ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2015

No. 15-1063 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRCT OF COLUMBIA CIRCUIT

UNITED STATES TELECOM ASSOCATION, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents

ON PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

AMICUS BRIEF FOR AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF COLLEGE AND RESEARCH LIBRARIES, ASSOCIATION OF RESEARCH LIBRARIES AND CHIEF OFFICERS OF STATE LIBRARY AGENCIES IN SUPPORT OF RESPONDENTS

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September 21, 2015

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties

In Case No. 15-1063, the Petitioners are the United States Telecom Association, Alamo Broadband Inc., AT&T Inc., the American Cable Association, CTIA—The Wireless Association, the Wireless Internet Service Providers Association and Daniel Berninger. The Respondents are the Federal Communications Commission ("FCC") and the United States of America. The following parties have filed a notice or motion for leave to participate as *amici* as of the date of this filing:

Internet Association
Harold Furchtgott-Roth
Washington Legal Foundation
Consumers Union
Competitive Enterprise Institute
Richard Bennett
Business Roundtable
Center for Boundless Innovation in Technology
Chamber of Commerce of the United States of America
Open Internet Civil Rights Coalition
Georgetown Center for Business and Public Policy
Electronic Frontier Foundation
International Center for Law and Economics and Affiliated Scholars
American Civil Liberties Union
William J. Kirsch
Computer & Communications Industry Association
Mobile Future
Mozilla
Multicultural Media, Telecom and Internet Council
Engine Advocacy
National Association of Manufacturers
Phoenix Center for Advanced Legal and Economic Public Policy Studies
Dwolla, Inc.
Telecommunications Industry Association
Our Film Festival, Inc.
Christopher Seung-gil Yoo
Foursquare Labs, Inc.
General Assembly Space, Inc
Github, Inc.

Imgur, Inc.
Keen Labs, Inc.
Mapbox, Inc.
Shapeways, Inc.
Automattic, Inc.
A Medium Corporation
Reddit, Inc.
Squarespace, Inc.
Twitter, Inc.
Yelp, Inc.
Media Alliance
Broadband Institute of California
Broadband Regulatory Clinic
Tim Wu
Edward J. Markey
Anna Eshoo
Professors of Administrative Law
Sascha Meinrath
Zephyr Teachout
Internet Users

B. Ruling Under Review

The ruling under review is the FCC's *Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling and Order*, 30 FCC Rcd. 5601 (2015) ("*Order*")

C. Related Cases

The *Order* was issued in response to a remand from this Court in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014). The *Order* has not previously been subject of a petition for review by this Court or any other court. All petitions for review of the Order have been consolidated in this Court and *amici* are not aware of any other related pending cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the American Library Association ("ALA"), Association of College and Research Libraries ("ACRL"), Association of Research Libraries ("ARL") and Chief Officers of State Library Agencies ("COSLA") respectfully submit the following corporate disclosure statement.

ALA is the oldest and largest library association in the world, with approximately 57,000 members in academic, public, school, government and special libraries. ALA is a not-for-profit organization and has not issued shares or debt securities to the public. ALA does not have any parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

ACRL, a division of ALA, is a professional association of academic librarians and other interested individuals. ACRL is a not-for-profit organization and has not issued shares or debt securities to the public. ACRL does not have any parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

ARL is an organization of 124 research libraries in the US and Canada. ARL is a not-for-profit organization and has not issued shares or debt securities to the public. ARL does not have any parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

COSLA is an independent organization of the chief officers of state and territorial agencies designated as the state library administrative agency and responsible for statewide library development. COSLA is a not-for-profit organization and has not issued shares or debt securities to the public. COSLA does not have any parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

CERTIFICATE OF COUNSEL REGARDING NECESSITY OF SEPARATE AMICI CURIAE BRIEF

Pursuant to D.C. Cir. R. 29(d), the American Library Association ("ALA"), Association of College and Research Libraries ("ACRL"), Association of Research Libraries ("ARL") and Chief Officers of State Library Agencies ("COSLA") hereby certify that they are submitting a separate brief rom other *amici* in this case due to the specialized nature of its distinct interests in this proceeding. To their knowledge, ALA, ACRL, ARL and COSLA are the only *amici* parties focusing on the subjects herein. These library associations represent non-commercial entities that interact with the Internet as 1) Internet users, 2) providers of Internet service to library patrons, and 3) providers of applications and content, and these interests are significantly different from those of other entities appearing as *amici curiae.* Accordingly, ALA, ACRL, ARL, and COSLA certify that filing a joint brief would not be practicable.

/s/ Krista L. Cox
Krista L. Cox

September 21, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ADMINISTRATIVE MATERIALS

OTHER AUTHORITIES

GLOSSARY

1934 Act	–	Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064
1996 Act	–	Telecommunications Act of 1996, Pub. L No. 104-104, 110 Stat. 56
ACRL	–	The Association of College and Research Libraries
ALA	–	The American Library Association
ARL	–	The Association of Research Libraries
BIAS	–	Broadband Internet Access Service
COSLA	–	The Chief Officers of State Library Agencies
FCC	–	The Federal Communications Commission
GCR	–	General Conduct Rule
NPRM	–	*Protecting and Promoting the Open Internet*, 29 FCC Rcd 5561 GN Docket No. 14-28, 79 FR 37448, (July 1, 2014)
Order	–	*Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, GN Docket No. 14-28, 80 FR 19738 (Mar. 12, 2015)

INTERESTS OF AMICI[1]

The American Library Association ("ALA"), the Association of College and Research Libraries ("ACRL"), the Association of Research Libraries ("ARL") and the Chief Officers of State Library Agencies ("COSLA") (collectively "*amici*") are library organizations whose members' public interest missions are highly dependent on an open Internet.

ALA is the oldest and largest library association in the world, with approximately 55,000 members in academic, public, school, government, and special libraries. ALA's mission is to provide leadership for the development, promotion, and improvement of library and information services and the profession of librarianship in order to enhance learning and ensure access to information for all.

ACRL, a division of ALA, is the higher education association for librarians dedicated to advancing learning, transforming scholarship, and meeting the information needs of the higher education community.

ARL is a nonprofit organization of 124 research libraries in the United States and Canada. ARL's mission is to influence the changing environment of

[1] Pursuant to Fed. R. App. P. 29(c), *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. *Amici* filed a Motion for Leave to File as *Amici Curiae* in Support of Respondent on September 1, 2015, granted September 9, 2015.

scholarly communication and the public policies that affect research libraries and the diverse communities they serve by providing leadership in public and information policy to the scholarly and higher education communities, fostering the exchange of ideas, and facilitating the emergence of new roles.

COSLA is an independent organization of the chief officers of state and territorial agencies designated as the state library administrative agency and responsible for statewide library development. Its purpose is to provide leadership on issues of common concern and national interest; to further state library agency relationships with federal government and national organizations; and to initiate cooperative action for the improvement of library services to the people of the United States.

Together, *amici* have long supported the democratic nature of the Internet as a neutral platform for sharing information and research. An open Internet is strongly aligned with the public interest missions of libraries and higher education as champions for intellectual freedom. Libraries rely upon an open Internet in three ways: as creators and providers of digital information; as users of Internet access for research, education and learning; and as providers of Internet access points that allow the general public to access and share such information. An increasing amount of content today is available solely or primarily online. Without

an open, neutral Internet, innovative content and services would be stifled, speech would be chilled, and equal access to information severely curtailed.

Amici also note the importance of an open Internet in protecting free speech. The Internet has operated as a "public square" where users can exercise their First Amendment right; without content-neutral rules governing the open Internet, some speech may be prioritized and therefore become more privileged than others. While *amici* are deeply interested in protecting freedom of speech, *amici* understand that the First Amendment issue will be covered in other briefs.

SUMMARY OF THE ARGUMENT

Amici represent non-commercial entities that interact with and are deeply affected by the character of the Internet. As broadband subscribers, providers of Internet access points to patrons, and providers of digital content and services, libraries rely on the open character of the Internet to achieve their missions of providing equitable access to information, enhancing education and promoting life-long learning, supporting democracy and informed citizenry, and protecting intellectual freedom. Libraries actively engaged in the FCC's rulemaking process because they are deeply invested in ensuring that an open Internet is preserved.

The rules and policies adopted in the FCC's *Order* are necessary to protect the mission and values of libraries and the rights of library patrons to fully access and use online content, particularly with respect to rules prohibiting paid

prioritization. Without these rules, libraries would be significantly hampered in efforts to provide their patrons, including the most vulnerable populations, with access to content and services on the Internet.

In addition, *amici* submit that the General Conduct Rule ("GCR") is an important tool for ensuring that the open character of the Internet is preserved, allowing the Internet to continue to operate as it has since its inception—as a democratic platform for research, learning and the sharing of information. This standard is consistent with the Communications Act and necessary to ensure that the FCC has the authority to protect the openness of the Internet against future harms that cannot yet be defined.

ARGUMENT

I. *Amici* Actively Participated in the FCC's Rulemaking Process to Convey the Critical Importance of an Open Internet to Libraries, Demonstrating that the FCC Provided Sufficient Notice of the Proposed Rules.

Amici, together with other organizations, participated in the FCC's rulemaking process. As broadband subscribers, providers of Internet access points, and providers of content and services, libraries rely on an open Internet to ensure that their patrons can freely seek and receive information, as well as develop and share content used for research and education, entrepreneurship, social connection and free expression. Libraries and higher education filed a letter when the FCC first announced in February 2014, then filed comments on July 18, 2014, and reply

comments on September 15, 2014, in response to the FCC's Notice of Proposed Rulemaking ("NPRM"). A representative of libraries and higher education also participated on the FCC's Roundtable on this issue on October 7, 2014.

Contrary to Petitioners' claims that the FCC failed to provide adequate notice, the NPRM provided *amici* and others with ample opportunity to address the proper regulatory regime for maintaining an open Internet, including Title II reclassification and the proper standard for future behavior. During the rulemaking process, *amici* highlighted the importance of an open Internet; expressed deep concerns that broadband providers have the opportunity and financial incentive to block, degrade or discriminate against certain content, services and applications; and noted that the proposed "commercially reasonable" standard was insufficient to adequately protect an open Internet. *See* Open Internet Comments by AASCU, ACE, ALA, AAU, ACRL, APLU, ARL, COSLA, CIC, EDUCAUSE and MLA, GN Docket No. 14-28 (July 18, 2014*)* ("Comments of Libraries and Higher Education"). *Amici's* comments suggested several ways to strengthen the FCC's proposed rules, including prohibiting paid prioritization, blocking and discrimination, as well as proposing a standard to govern future behavior based on the unique character of the Internet as an open platform. *Amici's* reply comments suggested that a clearly articulated standard was necessary, but should "avoid hard and fast rules that might be too rigid for a rapidly changing broadband ecosystem."

Open Internet Reply Comments by AASCU, ACE, ALA, AAU, ACRL, APLU, ARL, COSLA, CIC, EDUCAUSE and MLA, GN Docket No. 14-28, 10-11 (Sept. 15, 2014)("Reply Comments of Libraries and Higher Education").

In these comments, amici noted that Title II reclassification under the Communications Act was an available legal option that would provide valuable certainty in the market. *Amici's* comments also noted that, in the alternative, enforceable rules could be created relying on the FCC's authority under Section 706 of the Telecommunications Act of 1996 ("1996 Act"). This participation demonstrates that there was ample notice to express views and concerns regarding the FCC's proposed rules, and Petitioners' claim that the FCC failed to provide sufficient notice should be rejected.

II. Without Strong Rules Protecting the Open Internet, Libraries Cannot Fulfill Their Missions and Serve Their Patrons.

Ensuring public access to the Internet and digital content are essential modern library services, as confirmed by a 2013 Pew Research Center survey that found that 77% of adult Americans say free access to computers and the Internet is a "very important" service of libraries. Kathryn Zickuhr, Lee Rainie & Kristen Purcell, *Library Services in the Digital Age*, Pew Internet Project, Pew Research Ctr. (Jan. 22, 2013), *available at* http://libraries.pewinternet.org/2013/01/22/library-services/. Public libraries specialize in providing Internet access to all people, including the roughly one-

third of the population without broadband access at home. One national survey found that local public libraries offer the only no-fee public Internet access in over 60% of all communities. *Public Libraries and the Internet: Community Access and Public Libraries*, Info. Policy and Access Ctr., http://www.plinternetsurvey.org/analysis/public-libraries-and-community-access. Community residents depend on the availability of open Internet access from their local libraries for a variety of activities: to complete homework assignments, use e-government services, research and develop business opportunities, find health information, pursue online distance education and job training, download a range of media, upload and share content, and more. John B. Horrigan, *Libraries at the Crossroads*, Pew Research Ctr. (Sept. 15, 2015), *available at* http://www.pewinternet.org/2015/09/15/libraries-at-the-crossroads/.

In addition to providing patrons with access to broadband Internet service, libraries also serve as creators and providers of rich content and information. The diversity of such content is best highlighted through several concrete examples. The National Library of Medicine (NLM), for example, is the world's largest medical library and provides a vast amount of information-based services, ranging from video tutorials to large genomic datasets. NLM provides valuable information and data to the public amounting to trillions of bytes each day disseminated to millions of users. Without open Internet protections, NLM would

likely fight a losing battle for speed and bandwidth, to the detriment of researchers and users who wish to access this content.

New York Public Library's ("NYPL") collection of the New York World's Fair of 1939 and 1940 provides another example. After receiving over 2,500 boxes of records and documents and 12,000 promotional photographs, NYPL digitized the content and makes it available online. It provides the material in a free app that was named one of Apple's "Top Education Apps" of 2011 and is used in New York K-12 public schools.

The Ann Arbor Public Library has produced and shared close to 150 podcasts featuring online interviews as varied as a local historian discussing the Underground Railroad to a fifth grader talking about library programs for kids her age. The library also hosts the Ann Arbor Film Festival Archive, among dozens of other local history digital collections. The Iowa City Public Library encourages interest and awareness of local musicians with a digital collection of more than 100 albums by artists playing everything from electronica to children's music. The online collection includes out-of-print music and live shows.

State libraries also play an important role in digitizing and sharing unique and significant collections. The Florida Memory Project provides free online access to select archival resources from the collections of the State Library and Archives of Florida. Florida Memory chooses materials for digitization that

illuminate significant events and individuals in the state's history, and help educate Floridians and millions of other people around the world about Florida history and culture. It contains nearly 200,000 images dating back to 16th century maps, 196 full-length films, 2,931 audio recordings, more than 310,000 digitized documents, and an online classroom with materials tailored to state standards.

Library patrons also use public Internet access in libraries to produce and share their own original digital content. Teens at the Albany (New York) Public Library, for instance, create original songs using digital recording equipment, editing software and instruments provided by the library. They write lyrics, build original rhythms, record vocals, then upload and share their work through YouTube. More libraries are democratizing self-publishing and entrepreneurship opportunities by leveraging high-capacity broadband connections as a means for people to create, connect and share. The rich content created or provided by these public libraries and their patrons is available through an open Internet that does not favor commercial over non-profit and/or educational content.

The Digital Public Library of America (DPLA) has developed a portal that delivers millions of materials found in American archives, libraries, museums, and cultural heritage institutions to students, teachers, scholars, and the public. The portal provides innovative ways to search and scan through its unified collection of distributed resources including a dynamic map, a timeline that allows users to

browse by year or decade, and an online library that provides access to applications and tools created by external developers using DPLA's open data.

All of these examples—which range from medical information, historical documents, cultural materials including video and audio works, and educational resources—demonstrate a clear need for an open Internet. Without bright-line rules and more general policies to preserve the open character of the Internet, access to these services and content provided by libraries may be slowed and impeded, resulting in reduced access to information and frustration for users.

III. The Rules Adopted by the FCC's *Order* Are Critical to Preserving the Open Internet and Allowing Libraries to Achieve Their Missions.

A. Libraries would be seriously disadvantaged without rules banning paid prioritization.

Without rules banning paid prioritization, broadband providers have the opportunity and incentive to provide favorable Internet service to certain edge providers, thereby disadvantaging non-profit or public interest entities. Broadband providers could, for instance, sell faster or prioritized transmissions to some entities,[2] while institutions that serve the public interest may not be able to pay

[2] This is not just a theoretical concern. A senior BellSouth executive said that his company (prior to its acquisition by AT&T) should be allowed to offer a "pay-for-performance" service that would give certain websites priority over others. *See* Jonathan Krim, *Executive Wants to Charge for Web Speed*, Washington Post, Dec. 1, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/11/30/AR2005113002109.html.

extra fees for enhanced transmission of their content. Research, public and school libraries are almost always not-for-profit institutions supported by limited funds.

Further, it is likely that third parties who are able to pay for preferential treatment will pass along their costs to their consumers and/or subscribers, including libraries and other public institutions. Public libraries, for instance, subscribe to digital media services such as Hoopla, OverDrive, and Zinio, to provide access to video, audiobooks, e-books, and e-magazine titles, and these content providers would have incentives to pass these costs on to their library subscribers.

Finally, prioritizing some traffic over others would conflict with one of the Internet's fundamental underlying principles—that network operators use "best efforts" to deliver information to the end user without manipulating content based on its content, source or destination. From a broader perspective, traffic prioritization creates artificial motivations and constraints on the use of the Internet for both end users and edge providers.

Paid prioritization is fundamentally inconsistent with the public services provided by institutions such as libraries. Paid prioritization would undermine the libraries' abilities to reach end users with network applications, such as the one on the New York World's Fair offered by NYPL, on equal grounds as other content unless libraries are willing to pay for prioritization. Further, paid prioritization

over the public Internet would disrupt the efforts of institutions to provide to their communities—including the most vulnerable populations such as older adults, non-English speakers, low-literacy and low-income individuals, and those with disabilities—access to the essential tools they need to participate fully in the 21st century economy.

Without rules prohibiting paid prioritization, there is a great risk that network operators will give priority to entertainment—which may be willing to pay tolls for prioritization—over education, civic engagement, access to information and other important non-commercial services. Indeed, this Court has acknowledged that broadband providers have "powerful incentives to accept fees from edge providers, either in return for excluding their competitors or for granting them prioritized access to end users." *Verizon v. FCC*, 740 F.3d 623, 645-46 (D.C. Cir. 2014).

Petitioners argue that the ban against paid prioritization is not permitted because the FCC rule essentially declares *all* prioritization inherently unjust or unreasonable, even if the prioritization would (in Petitioners' view) provide a consumer benefit. However, even if a particular consumer or set of consumers might theoretically benefit from prioritized services, the practice of paid prioritization may not benefit consumers as a whole. If prioritization is generally permitted, then broadband providers will compete to offer such prioritization for

some services, resulting in a degraded level of service for all others. Internet users expect and should be entitled to access the content, services and applications of their choice, rather than be subject to network operators' deal-making to give preference to entities able to pay the highest toll.

Furthermore, Petitioners' argument against the bright-line rule ignores the option for broadband providers to obtain a waiver. *Order*, 30 FCC Rcd. 5601, ¶107, 129. The FCC's *Order* recognizes that paid prioritization is a harmful practice that may be difficult to detect and therefore should generally be prohibited. *Id*. at ¶129. However, the rule also acknowledges there may be limited circumstances where paid prioritization could benefit the public and therefore allows the FCC to waive the ban. Thus, the bright-line rule against paid prioritization satisfies the "just and reasonable" test in the statute by setting forth a principle, while allowing the FCC some flexibility to consider individual waiver applications. *Id*. at ¶130.

B. The General Conduct Rule is an important tool in ensuring that the Internet remains open, is consistent with the Act, and is not unlawfully vague.

The General Conduct Rule ("GCR") ensures that the Internet remains open and protects against future harms, including those that will be made possible by

technological innovations and advances.[3] While the GCR is broader than the three bright-line rules, it is not unbounded; the GCR specifically ensures that ISPs do not unreasonably interfere with the ability of consumers and edge providers to reach each other, which is the essential characteristic that makes the Internet a democratic platform for the free flow of information for all. Petitioners' arguments for overturning the GCR are severely flawed and should be rejected.

1. The GCR rests on solid legal ground under both Title II and Section 706.

First, petitioners argue that the GCR should be overturned because it is based upon the decision to re-classify Broadband Internet Access Service ("BIAS") as a telecommunications service, and the 1996 Act bars such re-classification. *See* Pet'rs' Br., 72. However, no provision of the 1996 Act dictates a finding that BIAS is only an information service. Instead, the 1996 Act left the regulatory classification decision to the FCC.

Petitioners maintain that BIAS must be an information service because it meets all eight prongs of the information services definition in the 1996 Act. *See* Pet'rs' Br., 30. But Petitioners' overly narrow reading of the definition would mean that dial-up Internet access (which no one disputes is a "telecommunications service") is also an information service. The definition of "information service"

[3] The GCR is similar to the "Internet reasonable" standard recommended by *amici's* comments and reply comments in this proceeding.

(which includes an "offer" of a "capability") must be read in context with the definition of "telecommunications service," which also includes an "offer" of "transmission" (a type of "capability"). In other words, the language in the two definitions overlaps. Applying these definitions to the changes in the marketplace is as much art as science, and the FCC deserves deference to make this distinction.

Petitioners further claim that Congress enacted the 1996 Act against a background of FCC findings that Internet access was not a telecommunications service, and that Congress confirmed that background by adopting the same definitions as the Commission in the *Computer Inquiry* decisions. In fact, the regulatory background regarding the treatment of broadband access to the Internet cuts the other way. Broadband access had barely emerged in 1996, and the FCC treated the first broadband offering—DSL service—as a telecommunications service. Furthermore, the FCC had wrestled with the distinction between these services in over 50 decisions prior to the 1996 Act. *Computer III Reference*, Cyber Telecom, http://www.cybertelecom.org/ci/ciiref.htm. Rather than wade into this difficult terrain and create brand new definitions, Congress wisely chose to incorporate definitions based on the FCC's *Computer Inquiry* decisions, and in doing so demonstrated that it trusted the expert agency to draw the line between telecommunications and information services. *See*, Federal-State Joint Board on Universal Service, 13 FCC Rcd. 11501 (1998) ("Stevens Report").

Petitioners also allege that the passing reference to "access to the Internet" in Section 230 of the 1996 Act—which addresses the very different topic of Internet indecency—establishes Congress' intent not to regulate Internet access. However, this argument is undercut by the fact that many other provisions of 1996 Act explicitly *regulated* the services and facilities that provide Internet *access*, especially Section 251 (regulating local exchange and exchange access services used to provide Internet access). *See, e.g.,* Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order and Notice of Proposed Rulemaking, CC Docket No. 98-147, (Aug. 7, 1998). These statutory provisions demonstrate that Congress actually *intended* to regulate Internet access, despite Section 230.

Further, Petitioners allege that Title II cannot apply because the Commission did not find that BIAS providers have market power. *See* Pet'rs' Br., 73. In fact, a market power finding is not required by either the statutory definitions or prior court rulings. *Order*, ¶¶363-364. In fact, several legal scholars have demonstrated that "market power" is not tied to common carriage. Barbara Cherry, *The Rise of Shadow Common Carriers* (Dec. 2012) ("Common carriers bear these obligations merely based on their economic relationship with customers (i.e. status), independent of any requirement or finding of monopoly or market power."). Petitioners' improper attempt to import a market power test into the

common carriage definition is itself evidence that the Commission's decision otherwise satisfies the Title II/common carriage requirements.

Even if the court overturns the FCC's reclassification decision and finds that Title II does not apply, the GCR is still supported by Section 706. *Verizon* provided the FCC with a roadmap for the regulation of BIAS providers, and the GCR is a general guideline that does not impose common carriage and is consistent with the test set forth in *Cellco* and *Verizon*. *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); *Cellco P'ship v. FCC*, 700 F.3d 534 (D.C. Cir. 2012).

Petitioners allege without any specificity that the GCR imposes *per se* common-carrier obligations that can apply only to telecommunications services, and are thus not supportable under Section 706. *See* Pet'rs' Br., 72. But the GCR intentionally does not use the "unjust and unreasonable discrimination" language of Section 202(a) that the *Verizon* court found objectionable. Rather, the GCR uses the terms "unreasonably interfere with or unreasonably disadvantage," which is a completely different standard. The GCR focuses on harm that could be imposed on certain traffic; the non-discrimination standard, by contrast, is broader and prevents giving favorable treatment or causing harm.

Thus, the 1996 Act does not provide any basis for overturning either the reclassification of BIAS as a telecommunications service or the GCR.

2. The GCR provides sufficient guidance and is not unlawfully vague.

Petitioners also allege that the GCR is unlawfully vague, arguing that the GCR "must be invalidated because it 'is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" Pet'rs' Br., 79 (citing *FCC v. Fox Television Stations*, 132 S. Ct. 2307, 2317 (2012)). They also claim the factors fail to give "precision" and that "basic policy matters" will be decided in enforcement actions brought "on an ad hoc and subjective basis." Pet'rs' Br., 81 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)).

Petitioners misread the decisions upon which they rely. The *Fox* decision overturned the FCC because it adopted a brand new standard in the middle of a specific enforcement action without providing advance notice to the parties. Here, the FCC is properly giving advance notice of the GCR *before* taking enforcement action. Furthermore, the *Fox* case concerned a First Amendment challenge, which requires more clarity to avoid chilling free speech.

Additionally, *Grayned* actually supports the GCR. In *Grayned*, the Supreme Court upheld the "anti-noise" statute against a claim of vagueness. It found that "[d]esigned . . . 'for the protection of Schools,' the ordinance forbids deliberately noisy or diversionary activity that disrupts or is about to disrupt normal school activities." *Grayned*, 408 U.S. at 111 (internal citations omitted). The GCR is similarly intended to "protect" the "normal" operation of the Internet.

The GCR clearly states that its purpose is to ensure that end users and edge providers can "reach" one another, and protect the "open nature" of the Internet:

> Under the standard that we adopt today, the Commission can protect against harm to end users' or edge providers' ability to use broadband Internet access service to reach one another. Compared to the no unreasonable discrimination standard adopted by the Commission in 2010, the standard we adopt today is **specifically designed to protect against harms to the open nature of the Internet.** *Order* ¶137 (citations omitted) (emphasis added).

Furthermore, the FCC spells out several factors that it will use to enforce this standard. Collectively, the rule and the factors provide advance notice to BIAS providers while allowing the FCC the flexibility to adapt its decisions to the marketplace.

Contrary to Petitioners' claims, there is no obligation under the law for the FCC to provide "precision." Such an approach would be impossible, given the ever-changing nature of the Internet technologies. Congress established the FCC—and other regulatory agencies—out of a recognition that Congress itself was ill-equipped to handle the complex technical and legal issues in telecommunications policy and established an "expert agency" to handle these matters. The 1996 Act, which expanded the FCC's regulator authority,[4] reaffirmed Congress' support for the FCC's role as the expert body to resolve these questions.

[4] Contrary to the claims of Petitioners and several *amici*, the 1996 Act did not curtail the FCC's general authority under Sections 201 and 202, and in fact, confirmed and expanded the FCC's general public interest authority. For instance, Congress chose to remove authority from the

While petitioners complain that the GCR is vague, Congress itself has chosen terms ("unjust and unreasonable discrimination," "just and reasonable," and "public interest") that could be described by some as vague but are necessary to give the FCC the flexibility that it needs to adapt its regulations to the marketplace.

Furthermore, the FCC has also offered parties an opportunity to seek advisory opinions from the FCC's Enforcement Bureau in advance of offering a service or engaging in a specific practice. *Order* n.332. By setting out the general purpose of the GCR, identifying the "factors" in its enforcement, and providing the opportunity for advisory opinions, the FCC is providing *more* guidance than the statutory language.

CONCLUSION

For the foregoing reasons, *amici* respectfully requests that this Court uphold the FCC's *Order*.

Respectfully submitted,

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courts over three Consent Decrees, and vested the FCC with the authority to make decisions about when the Regional Bell Operating Companies should be allowed to enter the long distance market. See Section 601 of the 1996 Act and Section 271 of the 1934 Act.

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September 21, 2015

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)(5)-(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Cir. R. 32(e), I certify that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman. Exclusive of the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(e)(1), this brief contains 4,463 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief (Microsoft Word 2010).

/s/ Krista L. Cox
Krista L. Cox

September 21, 2015

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2015, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system. I further certify that on September 21, 2015, service of the foregoing will be made electronically via the CM/ECF system upon the participants in the case who are registered CM/ECF users. Participants who are not registered CM/ECF users will receive service by U.S. mail unless another attorney for the same party is receiving service through the CM/ECF system.

/s/ Krista L. Cox
Krista L. Cox

September 21, 2015