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

UNITED STATES TELECOM ASSOCIATION, et al. Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	Case No. 15-1063 (and consolidated cases)

MOTION OF SASCHA MEINRATH, ZEPHYR TEACHOUT, AND 45,707 USERS OF THE INTERNET FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENTS

Pursuant to Fed. R. Civ. P. 29(b), Sascha Meinrath, Zephyr Teachout, and numerous users of the Internet respectfully move for leave to file the accompanying amicus brief in support of Respondents in the above-captioned matter.

Movants sought consent to participate as amici from all parties and intervenors. All parties and intervenors consented to the participation except the Independent Telephone & Telecommunications Alliance, which stated that it "does

not oppose" the filing; Full Service Network et al.,[1] which advised that they "take no position for or against"; and U.S. Telecom et al.,[2] which refused to consent.

MOVANTS

Movant Sascha Meinrath is currently the Palmer Chair in Telecommunications at Pennsylvania State University and the Director of the X-Lab, a DC-based technology policy institute. He developed Network Neutrality policy for Free Press; founded the Open Technology Institute in 2008 and grew it into a leading authority on telecommunications policy; and co-founded M-Lab, now the world's largest broadband measurement data repository, in 2009.

Movant Zephyr Teachout is an Associate Law Professor at Fordham and activist who has written about the importance of network neutrality for democratic debate. She ran a political campaign with network neutrality as a core platform.

Movants Users of the Internet are citizens and lawful residents of the United States whose First Amendment interests are at stake in this litigation, and who have come together to join with Sascha Meinrath and Zephyr Teachout to provide

[1] It is movant's understanding that this includes Full Service Network, Sage Telecommunications LLC, Telescape Communications Inc. and Truconnect Mobile.

[2] These parties were identified by counsel as "the seven entities that joined the USTelecom et al. joint brief," which movants understand to mean United States Telecom Association, National Cable & Telecommunications Association, CTIA - The Wireless Association, AT&T, Inc., American Cable Association, CenturyLink, and Wireless Internet Service Providers Association.

information intended to assist the court in understanding the importance of an open, neutral Internet to democratic participation, activism, and political speech by the general public.[3]

INTEREST, DESIRABILITY, AND RELEVANCE

Movants, collectively, are Americans from many different walks of life, of all ages, and of all political affiliations. They are a large and diverse group of individuals who use the Internet to share ideas and views, engage in public debate, organize, advocate for political and other causes, petition the government and engage in an array of other important speech. Amici have been involved in the efforts to ensure an open Internet and Network Neutrality, through submitting comments to the FCC, through educating friends and family about the importance of the FCC decision, and through other means.

Movants therefore have a strong interest in ensuring that Court has before it relevant information about the ways in which the public relies on the high governmental interest in protecting an open Internet for organizing, advocacy,

[3] For each Internet user amicus, movants have collected the user's name, address, and email address, the user has attested that he or she read the draft brief, agrees with its arguments, wants be included among those on whose behalf the brief is submitted, and is a citizen or legal resident 18 years of age or older, and the user has confirmed his or her participation via an email link. *See* http://netneutralitybrief.com/. The complete list of signatory Internet user amici is attached to the accompanying brief, which also explains the method by which sign-ons were obtained and verified.

activism and the free exchange of critical ideas. The proposed brief is desirable because amici have a direct interest in and perspective for describing how the Internet has become a vital tool, if not the heart, of collective action: it is where organizing happens—where groups form and strategize to inform, advocate, protest, support each other, and challenge power.

Further, as advocates, activists and political actors engaged in the Network Neutrality debate, amici are particularly well suited to address how an open Internet and the FCC Net Neutrality rules at the core of this cases are critical to protecting these speech and organizing interests. These interests are unlikely to be fully represented by the parties or intervenors. Amici do not intend to repeat facts or legal arguments made in the principal briefs but will instead focus on the above points, which amici do not expect to be made or adequately elaborated upon otherwise.

Dated: September 21, 2015

Respectfully submitted,

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ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2015
CASE NO. 16-1063 (AND CONSOLIDATED CASES)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES TELECOM ASSOCIATION, et al.
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of an Order of the
Federal Communications Commission

BRIEF AMICI CURIAE OF SASCHA MEINRATH, ZEPHYR TEACHOUT, AND 45,707 USERS OF THE INTERNET IN SUPPORT OF RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties

Parties appearing in this Court and before the FCC are listed in the Joint Brief for Petitioners USTelecom, the National Cable & Television Association, CTIA – The Wireless Association®, American Cable Association, Wireless Internet Service Providers Association, AT&T Inc., and CenturyLink. Amici curiae are aware of the following additional amici appearing or intending to appear before this Court:

American Library Association et al.
Automattic, Inc., et al.
Richard Bennett
Business Roundtable
Center for Boundless Innovation in Technology
Chamber of Commerce of the United States of America
Competitive Enterprise Institute
Computer & Communications Industry Association (CCIA) and Mozilla
Consumers Union
Electronic Frontier Foundation and the American Civil Liberties Union
Engine Advocacy et al.
Georgetown Center for Business and Public Policy
Harold Furchtgott-Roth
International Center for Law and Economics and Affiliated Scholars
Internet Association
William J. Kirsch
Media Alliance et al.
Members of Congress
Mobile Future
Multicultural Media, Telecom and Internet Council
National Alliance for Media Arts and Culture et al.
National Association of Manufacturers
Open Internet Civil Rights Coalition
Phoenix Center for Advanced Legal and Economic Public Policy Studies

Professors of Administrative Law
Professor Tim Wu
Reed Hundt, former FCC Commissioners
Telecommunications Industry Association
Washington Legal Foundation
Christopher S. Yoo

B. Rulings Under Review

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

C. Related Cases

This case has been consolidated with Case Nos. 15-1078, 15-1086, 15-1090, 15-1091, 15-1092, 15-1095, 15-1099, 15-1117, 15-1128, 15-1151, and 15-1164. Amici are not aware of any other related cases.

CERTIFICATE OF COUNSEL REGARDING NECESSITY OF SEPARATE AMICUS BRIEF

Pursuant to D.C. Circuit Rule 29(d), counsel for amici curiae Zephyr Teachout, Sascha Meinrath, and over 45,000 users of the Internet certify that they are submitting a separate brief from other amici curiae in this case due to the specialized nature of each amici's distinct interests. This is a brief of users of the Internet focused solely and directly on the critical dependence of citizens and government on an open, neutral Internet infrastructure and on the long history of public commitment to an open communications network.

Amici anticipate the following other amicus briefs: a lawmakers' brief focusing on the legislative history of Title II, a National Hispanic Media Coalition brief focusing on the importance of the rules for historically underserved communities, a Santa Clara Law brief focusing on access interests, a Consumers Union brief focusing on consumer interests, a Library Association brief focusing on the importance of an open Internet to research institutions, an Administrative Law Scholars brief focusing on administrative law issues, and a brief by Tim Wu focusing on the difference between basic and enhanced services. None of these other briefs focus on the central importance of neutrality for civic engagement and political or other advocacy and activism, or on the long history of common carriage principles in the communications sphere. Given these divergent purposes, counsel for amici certify that filing a joint brief would not be practicable.

Dated: September 21, 2015

Respectfully submitted,

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* Authorities chiefly relied upon are marked with asterisks.

GLOSSARY

FCC	Federal Communications Commission
IP	Internet Protocol
ISP	Internet Service Provider
Mbps	Megabits Per Second

IDENTITY AND INTEREST OF AMICI CUIAE AND SOURCE OF AUTHORITY TO FILE

Sascha Meinrath is currently the Palmer Chair in Telecommunications at Pennsylvania State University and the Director of the X-Lab, a DC-based technology policy institute. He developed Network Neutrality policy for Free Press; founded the Open Technology Institute in 2008 and grew it into a leading authority on telecommunications policy; and co-founded M-Lab, now the world's largest broadband measurement data repository, in 2009.

Zephyr Teachout is an Associate Law Professor at Fordham and activist who has written about the importance of network neutrality for democratic debate. She ran a political campaign with network neutrality as a core platform.

These two amici, together with the over 45,000 individuals listed in Appendix B, are Americans from all walks of life, of all ages, and of all political affiliations. Amici appear in their capacities as individuals who use the Internet to share their views, organize, and petition the government. Amici have been involved in the efforts to pass Network Neutrality, either through submitting comments to the FCC or otherwise educating friends and family about the importance of the FCC decision, and are well-suited to address the high governmental interest in protecting an open Internet for organizing.

Appendix B contains the names and states of residence of 45,707 Internet users who asked to have their names included to this brief. For each user, amici

collected the user's name, address, and email address. Each user has attested that he or she read the draft brief, agreed with its arguments, wanted be included among those on whose behalf the brief is submitted, and is a citizen or legal resident 18 years of age or older. After the user submitted the form, a confirmation email was sent to the user, and the user was required to click on a link in that email in order to complete the sign-on process. *See* http://netneutralitybrief.com/. Screenshots of the web form are attached to this brief in Appendix A.[4]

Pursuant to Fed. R. App. P. 29(c), amici state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, with the exception of the following: intervenor Demand Progress paid approximately $1,000 to host a web server that allowed users of the Internet to read a draft of this brief and, if they agreed and followed the procedures described above, to add their names to this brief.

Amici filed a Motion for Leave to file this brief on September 18, 2015; the Court has not yet ruled on this motion. Pursuant to Fed. R App. P. 29(b), this brief accompanies a substantialy identical Motion for Leave.

[4] Through an oversight, approximately 10,000 additional Internet users signed on to the brief on a pre-launch version of the website that did not include the disclaimer and attestation. Although no significant substantive changes have been made to this brief, to ensure that no users' views are misrepresented, these earlier names have not been included in the user count or in Appendix B.

SUMMARY OF ARGUMENT

The public interest in an open, neutral platform for the free exchange of ideas is a collective interest of the highest order. A neutral platform is particularly important for dissidents, those with unusual political ideas, groups who would challenge governmental choices, and activists who want to challenge concentrated private power. An open Internet is also critical for wide-open public discussion and debate where a broad range of clashing, complementary, and eccentric viewpoints can be spoken and heard. The Internet has become the beating heart of collective action, where organizing happens, where groups form and strategize to protest, support each other, and challenge power. The Internet is the single most important platform in America for organizing, speaking, learning, and protesting.

It would be a tragic irony if this Court struck down the Network Neutrality rules and allowed Internet service providers (ISPs) to shut down, slow down, or otherwise make difficult the kind of extraordinary activism that enabled the Network Neutrality rule in the first place. Over four million Internet users commented on the FCC's Network Neutrality proposal. Network Neutrality organizing was a high point of American civic activism, a moment of civic flourishing, where thousands of disconnected groups came together. Millions of people, young and old, educated themselves about an arcane topic and shared their unique viewpoints. Because of an open Internet, a great labyrinth of voices

representing Americans from many backgrounds commented on the proposed Net Neutrality rules.

Some petitioners argue that the Net Neutrality rules are incompatible with the First Amendment. It is our position that the First Amendment is not implicated in this case. However, if it is, the arrow points in the right direction: First Amendment values are served, not harmed, by Net Neutrality rules. The governmental interest in its citizens' speech, organizing, protest, and political freedom justify the regulations.

Finding otherwise would be a radical departure from two centuries of practice and jurisprudence. For over 200 years, this country has committed to providing neutral platforms for dissident political speech. Today's Net Neutrality rules continue that commitment; overturning them would greatly threaten it.

ARGUMENT

I. The FCC Net Neutrality Rules Serve Fundamental Democratic Interests

A. The Internet is an essential platform.

The Internet's vital role as a conduit between government and the people would be irrevocably damaged if this Court accepts some petitioners' argument that the Net Neutrality rules violate their First Amendment interest in exercising unfettered "editorial discretion" over the Internet content that their customers choose to send or receive. Joint Brief for Petitioners Alamo Broadband Inc. and Daniel Beringer at 7, United States Telecom Association v. Federal Communications Commission, No. 15-1063 (D.C. Cir. Jul. 30, 2015).

For the overwhelming majority of Americans, using the Internet has become indispensable. As President Obama recently stated, "The Internet is not a luxury, it is a necessity." Drew Olanoff, President Obama: The Internet Is Not A Luxury. It Is A Necessity, (July 15, 2015), http://techcrunch.com/2015/07/15/ Internet-for-everyone. The Internet is essential for finding and applying to jobs, doing work, going to school and participating in online classrooms, learning outside of school and completing online homework, meeting and building friendships, finding love and maintaining relationships, creating art, publishing writing, purchasing goods online, listening and creating music, watching movies and TV, creating and sharing videos, and much, much more.

The Internet also is at the heart of civic and political life. The Internet has become the primary vehicle through which Americans go about paying taxes, learning about government benefits, researching governmental activity, communicating with their representatives, objecting to governmental behavior, following up on claims made by elected representatives, proposing new ideas, finding others with shared political interests, discussing politics, investigating news stories, creating and maintaining political communities and registering support and protest in collective community.

In the 1990s, when the Internet was not yet as integrated into daily life as it is today, the Supreme Court approvingly cited a District Court's conclusion that "it is no exaggeration to conclude that the content on the Internet is as diverse as human thought." *Reno v. ACLU*, 521 U.S. 844 (1997), citing *ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996). Nearly 20 years later, the Internet has become a crucial tool for civic engagement. Between 2000 and 2015, the percentage of Americans who use the Internet increased from 52% to 84%. Andrew Perrin, Maeve Duggan, Americans' Internet Access: 2000-2015, Pew Research Center (June 26, 2015). During that same time, American citizens have come to rely on the premise that every kind of political idea can be found and debated without ISP interference, and that they can organize and advocate without their ISPs exercising "editorial discretion" over their speech.

The Internet continues to thrive at the center of modern politics and civic engagement, because groups and individuals know their voices can be heard. By contrast, groups and individuals that are barred from speaking and organizing online, or whose speech and organizing is disfavored or slowed down, cannot have their voices effectively heard. Rashad Robinson, Executive Director of the online advocacy organization Color of Change, explains that, "Our ability to be heard, counted, and visible in this democracy now depends on an open Internet . . . because it allows voices and ideas to spread based on their quality—not the amount of money behind them." Rashad Robinson, Civil Rights Groups Applauds FCC, Calls New Rules Major Civil Rights Victory, (Feb. 26, 2015), http://colorofchange.org/press/releases/ 2015/2/26/fcc-new-rules-net-neutrality.

The Internet is also at the center of political organizing directed at governmental action. A 2013 Pew Research study concluded that 34% of Americans contacted a public official or spoke out in a public forum online. Aaron Smith, *Civic Engagement in the Digital Age*, Pew Research Center (Apr. 25, 2013), http://pewinternet.org/Reports/2013/Civic-Engagement.aspx.

In addition, the Internet is increasingly the government's tool of choice to communicate with Americans, and to hear from Americans. For example, Regulations.gov is a website serving more than 35 federal regulatory agencies, where citizens can view and comment on proposed regulations. In 2011, the White

House launched an online platform called *We The People* to enable citizens to submit online petitions to the government. Since then, the government has grown *We The People* so that online petitions distributed by non-governmental advocacy organizations can be incorporated into the *We The People* platform. In doing so, the government has recognized the important role that advocacy organizations play in encouraging citizens to engage in civics, particularly by petitioning and engaging with government online. *See*, Jason Goldman, *How We're Changing the Way We Respond to Petitions* (July 28, 2015), https://www.whitehouse.gov/blog/2015/07/28/how-we-are-changing-way-we-respond-petitions.

In sum, the U.S. government has created an infrastructure that requires an online component for meaningful political organizing. The government has developed an application programming interface (API) for use by groups such as the Sierra Club, Planned Parenthood, the ACLU, and the Christian Coalition of America, among others, explicitly naming and elevating the importance of activism organizations. That infrastructure relies on Net Neutrality for its legitimacy. If ISPs can pick and choose which viewpoints and ideas are favored (e.g., which petitions users can and cannot access and sign), these governmental websites used to solicit citizen feedback lose credibility, since they would risk

becoming not a sample of public wants, but a censored or filtered sample of which issues ISPs are willing to let through.

In short, the Internet today is the dominant platform for all speech in our society. Modern pamphleteers include website links on their pamphlets; television advertisers link to websites; radio advertisers refer people to their websites; and candidates for office include website links on all lawn signs. Almost all organizing is now done with some reliance on the Internet. The governmental interest in preserving the legitimacy of public comment and the space for speech, including dissident speech, is an interest of the highest order.

B. The idea that ISPs would suppress speech and organizing is not speculative.

In the United States, long-standing Net Neutrality rules and traditions have meant that, to date, we have been relatively free of experiencing ISPs using their power to slow or censor political speech and organizing. However, the threat that ISPs could suppress political speech and organizing is not merely speculative.

In fact, petitioners' brief explicitly asks for the right to conduct viewpoint-based data discrimination: "The rules deprive broadband providers of their editorial discretion by compelling them to transmit all lawful content, including Nazi hate speech, Islamic State videos, pornography, and political speech with which they disagree." Alamo Broadband Inc. and Daniel Beringer at 7. In reality, an ISP need not even ban a service or message entirely--simply slowing down

disfavored websites and favoring others could have enough of an effect on user behavior to chill discourse. For example, Microsoft found that "both abandonment rate and the time to click increased significantly from the fastest page load times to the slowest page load times." *See* Slow Search: Information Retrieval without Time Constraints, Microsoft Research, available at http://research.microsoft.com/en-us/um/people/ sdumais/hcir13-SlowSearch.pdf. In addition, Google and Amazon research found that increasing page load time "by as little as 100 milliseconds decreased the number of searches per person" *See*, Eric Schurman, Jake Brutlag, The User and Business Impact of Server Delays, Additional Bytes, and HTTP Chunking in Web Search, O'Reilly Velocity Conference (June. 23, 2009), *available at* http://velocityconf.com/velocity2009/public/schedule/detail/8523. As these researchers concluded, "'Speed matters' is not just lip service." *Id.* at 13.

Comcast, currently serving more US customers than any other ISP, is a major media owner of NBC and MSNBC. *See*, Amy Chozick, Brian Stelter, *Comcast Buys Rest of NBC in Early Sale*, N.Y. Times (Feb. 12, 2013), http://mediadecoder.blogs.nytimes.com/2013/02/12/comcast-buying-g-e-s-stake-in-nbcuniversal-for-16-7-billion/. In its role as a media owner, Comcast has every right to discriminate on the basis of content or viewpoint, but in its role as an ISP the public has an interest of the highest order in its neutrality. If Net Neutrality is

overturned, and ISPs are given free reign to use their infrastructure to discriminate against lawful political web traffic with which they disagree, as petitioners ask, we risk loss of the free flow and exchange of ideas central to our democracy. If ISPs can favor user access (by speeding, throttling or blocking web traffic) to their own news agencies over others, they can favor user access to some news topics or points or view over others, too.

Net Neutrality has been the de facto rule since the beginning of the Internet, based on a changing series of legal regimes, maintaining throughout that period the same principles of nondiscrimination by those who carry our speech. When *Reno* was decided, customers took non-discriminatory treatment of Internet content for granted. This is because most people accessed the Internet through their phone companies, using dial-up service. If a dial-up ISP discriminated on the basis of content or viewpoint, people could easily switch to a competitor who did not. But in today's Internet environment, 97% percent of households have 2 or fewer options for high-speed Internet access (as defined by the FCC, high speed Internet access is at least 25 Mbps download/3 Mbps upload) *See*, NTIA Broadband Initiative Data (Dec. 2013) Broadband Statistics Report, http://www2.ntia.doc.gov/files/broadband-data/Provider_by_Speed_Tier_Dec2013.pdf; *see also*, Jon Brodkin, *Most of the US has no broadband competition at 25Mbps, FCC chair says*, Ars Technica, Sep. 4,

2014, available at http://arstechnica.com/business/2014/09/most-of-the-us-has-no-broadband-competition-at-25mbps-fcc-chair-says/), which means vast majority of citizens can no longer switch in the face of politically-non-neutral treatment of content.

If Net Neutrality rules are overturned on First Amendment grounds, we would expect ISPs to gradually shape the viewpoints that are favored online. ISPs might, for instance, provide faster service to particular political viewpoints that align with their own, or where a politically-oriented, well-funded group or media organization paid them to do so. A content provider could ask or pay for special treatment, or ask for the opposing views to get worse treatment (either blocking, slowing or redirecting traffic). Because many ISPs are publicly-traded corporations with obligations to maximize shareholder return, Net Neutrality rules have helped to ensure fair treatment of information. If those rules are lifted and ISPs are constrained only by market forces, we would expect ISPs to tamper with the free flow of speech, which would carry with it profound political consequences.

One example of political speech in the United States that might have been blocked or hampered without Net Neutrality protections is speech in opposition to Internet-related legislation, such as the voices of Internet users and websites that rose up against the Stop Online Piracy Act (SOPA) and Protect IP Act (PIPA) in 2012. Because some ISPs (such as Comcast) had spent hundreds of thousands of

dollars lobbying for these bills, they might have a strong incentive to block or throttle anti-SOPA/PIPA voices that could threaten their investment. *See* Andrew Feinberg, *Comcast spent heavily in support of anti-online piracy bills*, The Hill, (Apr. 8, 2012), available at http://thehill.com/policy/technology/220467-comcast-spent- heavily-in-support-of-anti-online-piracy-bills. Net Neutrality protections ensured that ISPs had to treat voices that opposed SOPA/PIPA the same as voices that supported the bills. As a result, 75,000 websites took part in SOPA/PIPA protest; Internet users added 4.5 million signatures to Google's SOPA/PIPA protest petition, sent over 2.4 million SOPA/PIPA-related tweets on one day alone, and sent their representatives over 350,000 e-mails. *See* Chenda Ngak, *SOPA and PIPA Internet blackout aftermath, staggering numbers*, CBS News, (Dec. 19, 2012), http://www.cbsnews.com/news/sopa-and-pipa-internet-blackout- aftermath-staggering-numbers/. Together, this effort helped lead to the bill's defeat.

Without Net Neutrality protections, ISPs might have had a strong incentive to block or throttle anti-SOPA/PIPA voices, and this bipartisan bill might have sailed through Congress without organized opposition. Because of Net Neutrality, citizens were able to raise their political voices online, contact their representatives, and protect their interests. But whether web users will continue to be a potent lobbying force is by no means certain. If ISPs are permitted to decide

what information users can access on the basis of viewpoint alone, their political power will surely be curtailed.

Again, this is not speculative--in other countries, we have seen firsthand what a non-neutral Internet can become. In other countries without Network Neutrality and non-discrimination, a non-neutral Internet has repeatedly curtailed and shut down political speech and organizing. Dissenting ideas are shut out of public discourse, buried behind firewalls and sources more favorable to governments in power. Citizens operating on non-neutral platforms are less likely to be able to discover new ideas, organize with one another, and ultimately create political change.[5]

[5] The non-neutral Internet in China, for instance, means that citizens who search for "Tiananmen Square" have to search hard to find evidence of a protest that happened in 1989. When Chinese citizens started posting Instagram pictures of a student protest in Hong Kong in September 2014, the Chinese government shut down access to the Instagram service entirely – while continuing to allow access to the heavily-censored Weibo platform. As Xiao Qiang, an adjunct professor for the School of Information at the University of California at Berkeley, put it to CNN: "Chinese authorities … can shut down 'autonomous communication space' where public discussions can take place." When Hong Kong police unleashed tear gas on demonstrators, there was no mention of it that night on China's state-run TV news; citizens who sought information on China's top search engines Baidu and Sogou found that sympathetic coverage was removed from their search results. For social media and search engines hoping to operate in China, access to that market means actively working with the Chinese government to censor and block content. *See* Madison Park, *China's Internet Firewall Censors Hong Kong Protest News*, CNN (Sept. 30, 2014), http://www.cnn.com/2014/09/29/world/asia/china-censorship-hong-kong/.

The next time millions of Internet users come together to demand something similar to Net Neutrality rules, ISPs could slow their speech, de-prioritize it, or even block messages related to organizing. Only neutral platforms allow citizens to communicate with each other, organize, and advocate, crucial precursors for creating democratic change.

II. American History Shows Two Centuries of Commitment to Open Communications Platforms

"The best test of truth," Oliver Wendell Holmes wrote in 1919, "is the power of the thought to get itself accepted in the competition of the market." What Americans seek, Holmes said, is "free trade in ideas." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). An open Internet enables a free trade of ideas. A politically-biased Internet would stifle that trade, and undermine a foundational principle our government has upheld and promoted for centuries.

Petitioner's argument that the First Amendment is designed to enable ISP speech censorship turns the history of our country on its head.

From the beginning of our nation, Americans have understood the importance of keeping certain essential platforms open and neutral. Congress, the Executive, and the Supreme Court have repeatedly acknowledged that safeguarding the American ideals of liberty and democracy requires that the powers controlling these key platforms and networks not be allowed to control the debate. This anti-discrimination principle formed the basis of "common carriage"

laws, which required central facilities like ferries and railroads to treat all citizens equally. *See, e.g.*, Interstate Commerce Act, Pub.L. 49-104, 24 Stat. 379 (1887).

Nowhere is this principle more vital than in communications industries, where sweeping control by a handful of actors empowers them to serve as bottlenecks, manipulating not just commerce, but speech. Recognizing that freedom of expression and the unfettered flow of ideas are key to sustaining a vibrant democracy, the government has repeatedly intervened to forestall the dangers posed by concentrated control over our communications channels. The jurisprudential history of the First Amendment, too, has generally been animated by principles seeking to ensure universal access to spaces and media for speech. Marvin Ammori, *First Amendment Architecture*, Wis. L. Rev., Vol. 2012, No. 1, at 29-53 (2012).

America confronted the hazards of concentrated control over communications platforms early, under the British Crown. Leading up to 1776, the Crown postmaster would neglect to deliver newspapers sympathetic to the revolutionary cause. As a result, publishers struggled to disseminate newspapers and media at a critical national moment—an experience that proved foundational. When designing a postal system some years later through the Post Office Act, the United States held firmly that the mail network should enable anyone to send messages without constraint or discrimination. Post Office Act of February 20,

1792, 1 Stat. 232; see also, Ammori at 39 ("After Constitutional ratification, the first Congress fired the postmaster, who had previously engaged in discrimination, and passed the first major Post Office Act, removing postmasters' discretion over admitting or denying newspapers.").

As Congress debated whether to issue a flat or graduated rate for the delivery of newspapers, one recurring concern was how the decision would implicate the First Amendment. Newspapers "ought to come to the subscribers in all parts of the Union on the same terms," declared Massachusetts Congressman Shearjashub Bourne. Senator Elbridge Gerry, also from Massachusetts, identified the stakes, noting, "However firmly liberty may be established in any country, it cannot long subsist if the channels of information be stopped." Annals of Congress, 2d Cong., 1st sess., 284-286.

Wading into the debate, President George Washington echoed these concerns. In his Fourth Annual Address of November 6, 1792, he urged Congress to reconsider newspaper postage, stressing the "importance of facilitating the circulation of political intelligence" around the country. Protesting postage rates that they considered unduly high, newspaper editors argued that the "tax" on information would "curtail newspaper circulation among all but the wealthy" and "have the effect of permitting only the 'rich and better sort' to monitor and criticize the affairs of government." Richard B. Kielbowicz, *The Press, Post Office, and*

Flow of News, 3 Journal of the Early Republic, Vol. 3, No. 3 (Autumn, 1983), at 263 (citations omitted). Keeping the postal network open and ensuring that it did not discriminate among producers of news was a democratic duty--and one that paid off. In his survey of American society, Alexis de Tocqueville credited newspapers and other media delivered through the postal system as vital to the country's vibrant culture of democracy. *See* Alexis de Tocqueville, Democracy in America, 1835.

The Post Office was only the beginning. Keeping the citizenry informed through open communications platforms--and forestalling the threats of concentrated private control--remained a central goal for our government throughout the next centuries. During the Civil War, Western Union amassed control over telegraph trunk lines across the country, eventually achieving near monopolistic dominance through buying up rivals. As its network expanded, Western Union prioritized "serving business clients" at the expense of "social obligations, such as universal service." Sascha Meinrath & Victor Pickard, *Transcending Net Neutrality: Ten Steps Towards An Open Internet*, Internet Law, Vol. 12, No. 6 (Dec. 2008). In response, Congress passed a series of public service protections into the telecommunications regulatory structure, to ensure that our nascent communications infrastructure aligned with the public interest. In 1866, for example, decades before the inception of antitrust law, Congress passed the

Telegraph Act, which blocked a private company from gaining monopoly control of the very first electronic medium of communication. 1866 National Telegraph Act, ch. 230, 14 Stat. 221; see generally, Richard R. John, Network Nation: Inventing American Telecommunications (2010); Paul Starr, The Creation of the Media: Political Origins of Modern Communications (2004).

Moreover, our government asserted that companies that command significant control over media platforms should not be able to use that power to control the debate in the political economy of speech and ideas. This basic principle animated the Supreme Court in its famous 1945 decision, *Associated Press v. United States*, 326 U.S. 1 (1945). The case grew out of a policy by the Associated Press that made its news available only to newspapers who became AP members. The news company further prohibited any of its members from selling news to non-members, and gave its members the power to block their competitors from membership--effectively locking out thousands of existing newspapers and discouraging new ventures from emerging.

The Court ruled that the AP's policy amounted to discrimination among newspapers, and that blocking the policy was not only within the government's power--but necessary to safeguard the First Amendment. As the court ruled, "[i]t would be strange indeed however if the grave concern for freedom of the press

which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom." *Id.* at 20.

The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." *Id.* The Court continued, "Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom." *Id.*

Nearly 50 years later, the Court further reasserted the government's right to demand open and nondiscriminatory communications networks in *Turner Broadcasting v. FCC*, 512 U.S. 622 (1994). Upholding the government's right to impose must-carry rules on cable television providers, Justice Kennedy, writing for the majority, held: "Assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." 512 U.S. at 663. Critically, "The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." *Id.* at 657.

Through key periods of history, our officials have viewed the concentrated control over our media platforms with appropriate alarm and caution. Following rapid consolidation throughout the media industry in the 1970s, Congress held a multi-session hearing to assess any potential threats. Opening the hearing, North Carolina Senator Robert Morgan stated, "We need to discuss and determine at what point concentration of ownership becomes a true threat to freedom of the press." United States Cong. Senate. Committee on Small Business. Economic Concentration in the Media--Newspapers. Hearings, May 24, 25, 1979. 96th Cong. 1st sess.

Around that time, the Federal Trade Commission, too, held a multi-day symposium to understand how concentration of control implicated our political and social values. “We must examine whether the right of free speech can be disassociated from the economic structure of the media which gives access to that speech,” said Michael Pertschuk, chairman of the Federal Trade Commission, at the hearing. “The first amendment protects us from the chilling shadow of government interference with the media. But are there comparable dangers if other powerful economic or political institutions assume control of the media?” Opening Address, Symposium on Media Concentration, Federal Trade Commission: Bureau of Competition, Dec. 14, 1978.

Long-standing practices are relevant to Constitutional adjudication. *See Eldred v. Reno*, 239 F.3d 372, 377 (D.C. Cir. 2001), *aff'd*, Eldred v. Ashcroft, 537 U.S. 186 (2003). This history shows two things: first, just how radical petitioners' position is. By challenging the capacity of the government to ensure a neutral political communications system, the logical implications of the brief threatens to undermine or overturn every common carriage rule of the last 230 years. But it also shows that a platform enabling a true multiplicity of views has been a central democratic value for the history of our country.

CONCLUSION

For all of the foregoing reasons, the FCC's Network Neutrality Rules should be upheld.

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Respectfully submitted,

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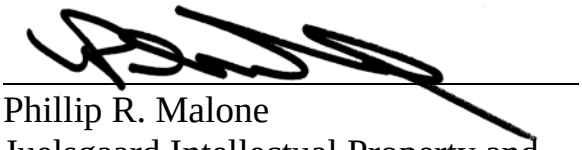
CERTIFICATE OF COMPLIANCE

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 for Windows 2013 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 4,795 words as reported by the Microsoft Word for Windows 2013 word count feature.



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CERTIFICATE OF SERVICE

I hereby certify that, on September 21, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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