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WC Docket No. 17-108 / FCC 17-60

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COMMENTS  
of  
**HAROLD FURCHTGOFF-ROTH**  
and  
**WASHINGTON LEGAL FOUNDATION**  
to the  
**FEDERAL COMMUNICATIONS COMMISSION**  
  
**IN THE MATTER OF**  
**RESTORING INTERNET FREEDOM**

IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED  
AT 82 FED. REG. 25,568 (June 2, 2017)

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July 17, 2017

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**Submitted Electronically** (<http://apps.fcc.gov/ecfs/>)

Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
WC Docket No. 17-108  
445 12th Street, SW  
Washington, DC 20554

**Re: Restoring Internet Freedom**  
WC Docket No. 17-108 / FCC 17-60  
**82 Fed. Reg. 25,568 (June 2, 2017)**

Harold Furchtgott-Roth (Furchtgott-Roth) and Washington Legal Foundation (WLF) submit these comments to the Federal Communications Commission (FCC or the Commission) in response to the agency's Notice of Proposed Rulemaking (NPRM), published at 82 Fed. Reg. 25,568 (June 2, 2017), which invites comments on whether the Commission should end its public-utility regulation of the Internet and modify or eliminate the Commission's 2015 *Title II Order*.

Although we agree with those who contend that the Commission's Order both exceeds the Commission's statutory grant of authority and conflicts with more explicit provisions in the Commission's governing statutes, our comments focus exclusively on the Order's constitutional deficiencies. In particular, the NPRM asks whether "the continued classification of broadband Internet access service as a common-carriage service itself raise[s] any constitutional concerns." 82 Fed. Reg. 25,581. In short, our answer to that question is yes; by forcing broadband Internet service providers (ISPs) to carry, transmit, and deliver *all* Internet content—even that with which the provider disagrees—the Order impermissibly compels speech and deprives ISPs of their editorial discretion under the First Amendment. Moreover, by singling out for burdensome regulation the dissemination of information by ISPs—without imposing similar restrictions on other Internet entities that also disseminate information—the Order constitutes a content- and speaker-based restriction that discriminates against ISPs in violation of the First Amendment.

## **I. Interests of Mr. Furchtgott-Roth and WLF**

Harold Furchtgott-Roth is a widely recognized authority on issues related to the economic impact of federal regulation in the communications sector. He served as an FCC Commissioner from 1997 through 2001. Before his appointment to FCC, Mr. Furchtgott-Roth was chief economist for the House Committee on Commerce and a principal staff member behind the Telecommunications Act of 1996. He is the author of several books, including *A Tough Act to Follow?: The Telecommunications Act of 1996 and the Separation of Powers Failure* (AEI Press 2005), which chronicles FCC's institutional failure to implement many of the reforms Congress mandated in the 1996 Act.

Founded in 1977, WLF is a nonprofit, public-interest law firm and policy center based in Washington, DC, with supporters throughout the United States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, limited government, and the rule of law. To that end, WLF regularly appears before federal administrative agencies, including FCC, to ensure adherence to the rule of law. *See, e.g., In re: Proposed FCC Rule on Protecting Privacy*, WC Docket No. 16-106 (May 27, 2016) (urging against FCC's adoption of its Proposed Rule on Protecting the Privacy of Customers of Broadband and other Telecommunications Services as exceeding the agency's statutory grant of authority); *In the Matter of Applications of Charter Communications Inc., et al.*, MB No. 15-149 (Oct. 15, 2015) (urging against FCC's proposed release of companies' proprietary information absent a "persuasive showing" that the information was a "necessary link" to resolving a proceeding). Likewise, WLF has participated as *amicus curiae* in litigation challenging FCC's regulatory authority. *See, e.g., Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016) (successfully challenging FCC's authority to order North Carolina and Tennessee to operate expanded ISPs); *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (challenging FCC's authority under § 706 of the Telecommunications Act to regulate the Internet).

In addition, WLF's Legal Studies Division, the publishing arm of WLF, frequently produces and distributes articles on a wide array of legal issues related to FCC regulation. *See, e.g., Arielle Roth, A Communications Reform Priority: Curtailing FCC's Ancillary Jurisdiction under Telecom Act Section 706*, WLF WORKING PAPER (February 2017); Thomas R. Julin, *Confronting Online Privacy Regulation: Time to Defend the First Amendment*, WLF LEGAL BACKGROUNDER (May 27, 2016); Jay B. Stephens,

Commissioner Ajit Pai, & David Parkhurst, *Federal Preemption vs. State Authority over Municipal Broadband*, WLF CONVERSATIONS WITH (Autumn 2015).

## **II. The Title II Order**

The *Title II Order*, “In re Protecting and Promoting the Open Internet,” 30 FCC Rcd. 5601 (Feb. 26, 2015) (“the Order”), drastically expands FCC’s authority over broadband Internet access services by classifying ISPs as Title II “telecommunications” services subject to common-carrier regulation. Among other things, the Order empowers FCC to determine whether—in the Commission’s sole judgment—any ISP’s activities “unreasonably interfere with or unreasonably disadvantage the ability of consumers to reach the Internet content, services, and applications of their choosing.” Order ¶ 135. FCC is further authorized to assess the “reasonableness” of all rates, terms, and practices of ISPs. *Id.* at ¶¶ 441-52, 512, 522.

The Order adopts three bright-line rules prohibiting all blocking, throttling, and paid prioritization by broadband Internet service providers. Claiming that ISPs have an economic incentive to grant edge providers better access to end users for a fee, FCC prohibits the creation of Internet “fast lanes” and “slow lanes.” *Id.* at ¶ 126. The “no-blocking” rule prohibits broadband providers from blocking access to any and all lawful Internet content, applications, services, and non-harmful devices. *Id.* at ¶ 115. The “no-throttling” rule reinforces the blocking ban by prohibiting providers from inhibiting the delivery of particular (and particular classes of) Internet content, applications, services, or lawful traffic to non-harmful devices. *Id.* at ¶ 120. The “no-paid-prioritization” rule forbids broadband providers from accepting payment to manage their networks in a way that prioritizes any particular traffic over other traffic. *Id.* at ¶ 125. For conduct not covered by these three rules, the Order adopts a standard that prohibits ISPs from “unreasonably interfering” with or “disadvantaging” end users’ ability to access the Internet. *Id.* at ¶¶ 135-37. The same standard also prohibits interfering with or disadvantaging edge providers’ ability to supply Internet content, applications, services, and devices to end users. *Id.*

## **III. The Order Violates the First Amendment**

The Order imposes speaker- and content-based burdens that violate ISPs’ First Amendment rights, both by compelling their speech when they would otherwise prefer not to speak and by restricting or otherwise burdening truthful and non-misleading

commercial speech. Such restrictions are subject to heightened scrutiny—a burden FCC cannot meet. In any event, as explained below, the Order cannot withstand *any* level of First Amendment scrutiny.

#### **A. ISPs Enjoy First Amendment Rights**

The “basic freedom of speech and the press, like the First Amendment’s command, do not vary when a new and different medium for communication appears.” *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011). FCC’s contention that ISPs are undeserving of First Amendment protection because they are mere “conduits for the speech of others,” *see* Order ¶ 544, is without legal precedent. More than a century ago, the Supreme Court recognized that the decision to act as a mere conduit for the dissemination of information by delivering newspapers in the mail triggers the First Amendment because the “[l]iberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.” *Ex parte Jackson*, 96 U.S. 727, 733 (1877). This “liberty of circulating” is “not confined to newspapers and periodicals, pamphlets and leaflets, but also to delivery of information by means of fiber optics, microprocessors, and cable.” *Comcast Cablevision of Broward Cnty. v. Broward Cnty.*, 124 F. Supp. 2d 685, 692 (S.D. Fla. 2000). Indeed, the Supreme Court has squarely held that cable operators enjoy First Amendment protection even though they “function[] as “conduit[s] for the speech of others.” *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 628-29 (1994) (“*Turner I*”).

Any suggestion that the transmission of speech can be separated from its content ignores the symbiotic relationship that exists between the two. As Marshall McLuhan famously observed more than half a century ago, “the medium is the message.” *See generally* MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSION OF MAN (1964). That observation has never been truer than in the case of broadband Internet technology, which allows for instantaneous two-way communication via video, audio, and textual transmissions. “The Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted.” *Citizens United v. FEC*, 558 U.S. 310, 353-54 (2010).

Not only is the Internet the modern-day equivalent of the printing press, but ISPs are speakers in their own right who create and transmit their own content. Because they both “engage in and transmit speech,” *Turner I*, 512 U.S. at 636, broadband providers clearly qualify as “speakers” for purposes of the First Amendment. *See Sorrell v. IMS*

*Health Inc.*, 564 U.S. 552, 570 (2011) (holding that the “creation and dissemination of information are speech within the meaning of the First Amendment”); *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (“[I]f the acts of ‘disclosing’ and ‘publishing’ information do not constitute speech, it is hard to imagine what does fall in that category.”) (internal quotations omitted); *Turner I*, 512 U.S. at 639 (“There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.”). Nor is this right “restricted to the press,” but rather is “enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 574 (1995).

At the same time, the First Amendment also protects ISPs’ editorial discretion to decide what to transmit, how quickly to transmit it, and on whose terms. In *Ex parte Jackson*, for example, the Court held that the routine dissemination of newspapers while delivering the mail “necessarily involves the right to determine what shall be excluded” from such carriage. 96 U.S. at 732. “‘Since *all* speech inherently involves choices of what to say and what to leave unsaid,’ one important manifestation of the principle of free speech is that one who chooses to speak may also decide ‘what not to say.’” *Hurley*, 515 U.S. at 573 (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 11 (1986)). Indeed, “[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression.” *Turner I*, 512 U.S. at 641.

FCC has implicitly acknowledged that ISPs enjoy editorial discretion to prioritize content and to otherwise discriminate against certain content they transmit over the Internet. After all, the Order itself is premised on the very notion that ISPs might exercise their editorial discretion to block, throttle, prioritize, or otherwise “disadvantage” certain content. If ISPs lacked the ability to exercise editorial discretion, then the Order’s diktat prohibiting them from engaging in such editorial practices would be superfluous. Indeed, the Order’s curious claim that “broadband providers exercise little control over the content which users access on the Internet,” Order ¶ 548, is belied entirely by the Commission’s own findings elsewhere in the Order. *See, e.g., id.* at ¶ 82 (“Broadband providers may seek to gain economic advantages by favoring their own or affiliated content over other third-party sources.”). As one federal appeals court has held in striking down nearly identical anti-discrimination and anti-blocking rules, “the Commission’s

regulations require[] the regulated entities to carry the content of third parties to these customers—content the entities otherwise could have blocked at their discretion.” *Verizon v. FCC*, 740 F.3d 623, 654 (D.C. Cir. 2014).

## **B. The Open Internet Rules Abridge Core First Amendment Freedoms**

By forcing ISPs to carry, transmit, and allow *all* Internet content—even that with which they disagree—the Order impermissibly compels speech and deprives ISPs of their editorial discretion. At the same time, by singling out ISPs without imposing similar requirements on the speech of other Internet entities that have the ability to disseminate information, the Order discriminates among speakers in violation of the First Amendment.

### **1. The Order Unconstitutionally Compels Speech**

The First Amendment guarantees “both the right to speak freely and the right to refrain from speaking at all.” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Indeed, no value is more central to First Amendment doctrine than the freedom of private speakers to disassociate themselves from messages with which they disagree. For that reason, the Supreme Court has repeatedly struck down laws that seek to compel speakers to convey messages against their will. *See, e.g., Pac. Gas & Elec. Co.*, 475 U.S. at 9 (holding that an electric utility could not be compelled to include in its billing envelope an advocacy group’s flyer with which it disagreed); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that a newspaper could not be compelled to publish candidate’s reply to a critical editorial).

The right *not* to speak extends to statements of fact as well as statements of opinion, *see Riley v. Nat’l Fed. Of the Blind*, 487 U.S. 781, 797-98 (1988) (“[F]or First Amendment purposes, a distinction cannot be drawn between compelled statements of opinion and, as here, compelled statements of ‘fact.’”), and extends to corporations as well as to individuals, *see Pac. Gas & Elec. Co.*, 475 U.S. at 12 (“For corporations as for individuals, the choice to speak includes the choice of what not to say.”). These well-established restrictions on the government’s ability to compel speech apply with equal force to FCC. *See, e.g., Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 154 (2d Cir. 2013) (“Nor is there any dispute that the program carriage regime regulates [Petitioners’] protected speech by restraining their editorial discretion over which programming networks to carry and on what terms.”).

The Order deprives ISPs of their editorial discretion by forcing them to convey *all* lawful content, including content with which they may disagree. The Order further

forbids broadband providers from elevating their own speech above that of others. And, even though ISPs face significant capacity constraints, the Order prohibits them from selling to edge providers the ability to prioritize their speech to end users. By forcing ISPs to allow virtually all speech, at all times, the Order eliminates *any* editorial control that ISPs exercise over the speech they transmit and how they transmit it.

## **2. The Order Impermissibly Discriminates Among Speakers**

In addition to compelling speech, the Order impermissibly singles out ISPs without imposing similar requirements on the speech of other Internet entities that also disseminate information, including those that may be characterized as gatekeepers.<sup>1</sup> By imposing the no-blocking and Internet conduct rules on ISPs but not “edge providers” (*i.e.*, those who provide content or applications over the Internet), the Commission picks and chooses among speakers. Such differential treatment cannot be squared with the First Amendment. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). “Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns.” *Turner I*, 512 U.S. at 659.

Although an ISP may wish to prioritize its own affiliated content over the content of an edge provider, the Order flatly prohibits it from doing so. Under the guise of regulating practices “that threaten the use of the Internet as a platform for free expression,” Order ¶¶ 137, 143, the Order effectively elevates the speech rights of edge providers over those of ISPs. This it may not do. Indeed, “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). As the Supreme Court has cautioned, “[s]ubstantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. And in all events, those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux.” *Citizens United*, 558 at U.S. at 326.

Effectively conceding that it elevates the free speech rights of edge providers over those of ISPs, the Order flatly states that “the free speech interests we advance today do

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<sup>1</sup> The Order’s attempt to justify its discrimination on the basis that ISPs alone exercise “gatekeeper status” rests on a false premise. In fact, “[t]he ability to exercise gatekeeper control is a common feature of most mass communications systems. Cable operators, broadcasters, and newspapers all have the ability to exercise gatekeeper control over their audiences, yet the Supreme Court has repeatedly affirmed that these media have a constitutional right to discriminate against the speech of others.” Fred B. Campbell, Jr., Center for Boundless Innovation in Technology, *How Net Neutrality Invites the Feds to Ignore the First Amendment & Censor the Internet*, at 5 (June 4, 2015).



not inhere in broadband providers.” Order ¶ 545. But that simply is not true. The Supreme Court has consistently refused “to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate ... speech from a particular speaker.” *Citizens United*, 558 at U.S. 326-27. “Speech restrictions based on the identity of the speaker are all too often simply a means to control content.” *Id.* at 341. For that reason, “the mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from First Amendment standards.” *Turner I*, 512 U.S. at 640.

### **C. The Order Cannot Survive Strict Scrutiny**

By compelling speech and stripping ISPs of their vital editorial discretion, the Order imposes intolerable burdens on free speech and is therefore subject to strict scrutiny. *See Pac. Gas & Elec. Co.*, 475 U.S. at 12; *Wooley*, 430 U.S. at 715. That exacting standard requires the government not only to establish a compelling interest in the regulation, but it also must demonstrate that the regulation is the “least restrictive means” for achieving its goal. FCC cannot possibly satisfy either of those burdens here.<sup>2</sup>

The Order does not even attempt to show that “preserving and protecting” an “open Internet” is a compelling government interest. No evidence in the administrative record demonstrates a widespread discriminatory practice on the part of ISPs to justify the Order. FCC claims that the rules are necessary for the Internet to remain a “forum for a true diversity of political discourse” and to “ensur[e] a level playing field.” Order ¶¶ 22, 555. But the Internet persisted as such a forum for more than 20 years without the Order, and the Commission has never adequately explained how circumstances have changed to threaten or undermine “true diversity of political discourse.” In any event, the Supreme Court has squarely “rejected the premise that the Government has an interest ‘in equalizing the relative ability of individuals and groups’” to have their voices heard. *Citizens United*, 558 U.S. at 350 (internal citations omitted).

Moreover, the Order’s blanket rules mandating nearly unfettered carriage are far from being narrowly tailored. To the contrary, the Order prohibits any and all efforts by ISPs to control traffic over their networks—without regard to whether the practices in

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<sup>2</sup> The Supreme Court in *Turner I* elected not to apply strict scrutiny to the cable industry’s “must carry” rules because of the “special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators.” 512 U.S. at 661. But the Order expressly declines even to “consider whether market concentration gives broadband providers the ability to raise prices.” Order ¶ 84. Nor could FCC make such a monopoly finding, in light of the thousands of ISPs competing throughout the United States.

question expand end users' access to Internet content or serve some other legitimate market purpose. Indeed, any ISP that offered its customers a service that would ban ISIS training videos, racist propaganda, or pornographic images would run afoul of the Order. But the Supreme Court has "never approved a *general* right of access to the media." *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981). By requiring ISPs to carry *all* Internet content *all* the time, including even political speech with which they may disagree, the rules "burden substantially more speech than is necessary to further the government's legitimate interests." *Turner I*, 512 U.S. at 662.

#### **D. The Order Cannot Survive Heightened Scrutiny**

Much of Internet content is not commercial in nature. But even if all broadband content could be classified as commercial speech, that is, "speech that does no more than propose a commercial transaction," *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Hum. Rel. Comm'n*, 413 U.S. 376, 385 (1973)), "heightened judicial scrutiny" is nonetheless warranted in this case. See *Sorrell*, 564 S. Ct. at 565 (holding that speaker-based burdens on commercial speech warrant "heightened judicial scrutiny"). *Sorrell* conclusively established that heightened judicial scrutiny applies to regulations of commercial speech that discriminate on the basis of a particular speaker or content. *Id.* at 565-66. While the government generally may enact commercial-speech regulations so long as they satisfy *Central Hudson's* intermediate scrutiny, heightened scrutiny applies whenever the government fails to give a satisfactory neutral justification for a speaker- or content-based rule that bans or burdens the conveyance of certain information only in marketing or advertising, but not in, for example, "law enforcement operations." *Sorrell*, 564 U.S. at 560.

*Sorrell* struck down a Vermont restriction that prohibited the sale and disclosure of pharmacy records for marketing use by pharmaceutical manufacturers. The case nicely illustrates why the Order violates the First Amendment. Much like ISPs' selling of customer traffic data, many pharmacies sell prescriber-identifying information "to 'data miners,' firms that analyze prescriber-identifying information and produce reports on prescriber behavior." *Id.* at 558. In the name of "safeguard[ing] ... privacy" interests, the State of Vermont sought to prevent the sale of this consumer data without the explicit consent of the prescriber. *Id.* at 557, 559. Just as Vermont's stated interest was its concern that the pharmaceutical sales market favored drug manufacturers' interests rather than those of drug consumers, *id.* at 560-61, the Order manifests FCC's concern that the Internet-based advertising market is not in customers' best interests.

But as *Sorrell* makes clear, discriminatory speaker-based burdens on *truthful* commercial speech bear absolutely no relation to the underlying rationale for giving the government more leniency to regulate that kind of speech. The “typical” neutral justification for “why commercial speech can be subject to greater governmental regulation than noncommercial speech” is the concern for fraudulent or misleading statements in commercial transactions. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993). But where, as here, the government “nowhere contends that [the commercial speech] is false or misleading within the meaning of th[e] Court’s First Amendment precedents,” this allegedly neutral justification for avoiding strict scrutiny falls away. *Sorrell*, 564 U.S. at 579.

**E. The Order Cannot Withstand Intermediate Scrutiny Under *Central Hudson***

Aside from making clear that “heightened judicial scrutiny” applies to regulations (such as the Order) that impose content- and speaker-based burdens on free speech, *Sorrell* also demonstrates that the outcome here would be the same under the traditional “commercial speech inquiry” of *Central Hudson Gas & Elec. Corp.*, 447 U.S. 557, 566 (1980). Under *Central Hudson*, if the commercial speech concerns lawful activity and is not inherently misleading, then the challenged speech regulation violates the First Amendment unless: (1) the government demonstrates a substantial interest; (2) the regulation “directly advances” the asserted interest; and (3) the regulation “is no more extensive than is necessary to serve that interest.” *Id.* at 566.

FCC does not have a legitimate interest in banning truthful speech merely because, in its view, the content of that speech will influence behavior. *Sorrell*, 564 U.S. at 578 (“[T]he fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech.”) (internal quotation marks omitted). At their core, content- and speaker-based regulations are nothing more than paternalism, and courts are particularly skeptical of the government’s attempts to restrict speech based on its own perception of what is in people’s best interests. Consumers freely and knowingly convey certain information to ISPs, and once that information is completely de-identified and aggregated, FCC lacks any meaningful interest in regulating the way that ISPs use that proprietary information. The Order thus fails to demonstrate that it remedies any legitimate, cognizable harm.

Further, the Order does not advance FCC’s purported interest “in a direct and material way.” *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1985). This prong is “critical” because, without it, the Government “could with ease restrict commercial

speech in the service of other objectives that could not themselves justify a burden on commercial expression.” *Ibid* (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)). Indeed, it is not enough that a restriction “provides only ineffective or remote support for the government’s purposes,” or if the restriction has “little chance” of advancing the state’s goal. *Edenfield*, 507 U.S. at 770-71. While this prong requires much more than agency fact-finding devoid of empirical analysis, FCC simply relies on its own *ipse dixit* that consumers would be better off with this regulatory regime in place. FCC offers no proof that its burdensome regulatory regime will actually increase consumer privacy, even on the margins; and any effect the Order may have on ISPs will necessarily be immaterial because the discriminatory Order does not apply to major competitors in the same online market FCC purports to regulate.

Nor again is the Order narrowly tailored to support FCC’s claimed interest. It forces ISPs to allow nearly all speech all the time. If a blanket order mandating nearly unfettered carriage is “narrow,” it is difficult to imagine what “broad” compulsion of speech would look like. By contrast, even under the long-abandoned “fairness doctrine,” the Supreme Court permitted the government to compel speech only if it was limited in time and scope. *See, e.g., CBS, Inc.*, 453 U.S. at 396 (upholding “a limited right to ‘reasonable’ access that pertains only to legally qualified federal candidates and may be invoked by them only for the purpose of advancing their candidacies once a campaign has commenced”).

#### **D. Conclusion**

Because the Order violates ISPs’ First Amendment rights under any level of constitutional scrutiny, former Commissioner Furchtgott-Roth and WLF respectfully urge FCC to withdraw the Order in its entirety.

Respectfully submitted,

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