Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108
	)	

REPLY COMMENTS OF ALAMO BROADBAND INC.

Alamo Broadband Inc. ("Alamo") hereby submits its reply comments in response to the above-captioned Notice of Proposed Rulemaking. *Restoring Internet Freedom*, Notice of Proposed Rulemaking, FCC 17-60 (rel. May 23, 2017) ("*NPRM*"). The comments filed in the opening round of this proceeding establish that there is no basis to maintain the Title II classification of broadband Internet access service. If the Commission rightly corrects the error of the prior administration and, once again, classifies broadband Internet access service as a Title I information service, it will be unable to justify imposition of the no blocking, no throttling, and no paid prioritization rules. This is because such rules constitute *per se* common carriage regulation that cannot be imposed on providers of information services. *Verizon v. FCC*, 740 F.3d 623, 655-59 (D.C. Cir. 2014).

In addition, as Alamo has demonstrated in the past, Section 706 of the Telecommunications Act of 1996 does not provide the FCC with independent regulatory authority to adopt Internet conduct rules, as shown by its text, structure, history (including the agency's own repeated interpretations prior to 2010), and purpose. *See* Joint Brief of Alamo Broadband Inc. and Daniel Berninger, at 9-15, *United States Telecom Ass'n v. FCC*, Nos. 15-

1063, *et al.* (D.C. Cir. filed Oct. 13, 2015) ("Alamo Brief").[1] In fact, interpreting Section 706 to confer "virtually unlimited power to regulate the Internet," as the FCC had done in the past, would be unconstitutional. *See id.* at 15. The D.C. Circuit's decision in *Verizon* presents no obstacle to a decision by this Commission – now under new leadership – to correct the error of its predecessor by finding, once again, that Section 706 is merely a statement of policy referring to pre-existing regulatory power, rather than an independent grant of rulemaking authority. *See id.* at 15-16; *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-16 (2009).

Finally, maintenance of the no blocking, no throttling, and no paid prioritization rules would violate the First Amendment. *See* Alamo Brief at 4-9. Broadband providers engage in speech by exercising editorial discretion regarding which speech of others to transmit, and are therefore entitled to the protections of the First Amendment. *See id.* at 2, 4-6. The Internet conduct rules are subject to strict scrutiny because they require broadband Internet access providers like Alamo to carry all speech, even political or other speech with which they disagree, and because they single out broadband providers for regulation. *See id.* at 7-8. The prioritization rule further offends the First Amendment by prohibiting providers from elevating speech that they wish to promote over other speech. *See id.* And, even if the rules are only subject to intermediate First Amendment scrutiny, they fail to pass muster. *See id.* at 8-9.

For these reasons, the Commission should eliminate the no blocking, no throttling, and no paid prioritization rules.

[1] The Joint Brief, and the Joint Reply Brief filed by Alamo and Daniel Berninger in the same case ("Alamo Reply Brief") are attached to these comments, and Alamo fully incorporates them by reference herein.

Respectfully submitted,

/S/ Eve Klindera Reed
Eve Klindera Reed
Wiley Rein LLP
1776 K St NW
Washington, DC 20006

August 30, 2017

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JOINT BRIEF

FINAL VERSION

ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2015
No. 15-1063 (and consolidated cases)

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.

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

JOINT BRIEF FOR PETITIONERS ALAMO BROADBAND INC. AND DANIEL BERNINGER

RICHARD E. WILEY
BENNETT L. ROSS
BRETT A. SHUMATE
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Daniel Berninger

ANDREW G. MCBRIDE
BRETT A. SHUMATE
EVE KLINDERA REED
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Alamo Broadband Inc.

Dated: October 13, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The undersigned attorney of record, in accordance with D.C. Cir. R. 28(a)(1), hereby certifies as follows:

A. Parties and Amici

All parties, intervenors, and amici appearing before the FCC and this Court are listed in the Joint Brief for United States Telecom Association *et al.*

B. Ruling Under Review

Alamo Broadband Inc. and Daniel Berninger petition for review of the final order of the Federal Communications Commission captioned *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, FCC 15-24, 80 Fed. Reg. 19738 (rel. Mar. 12, 2015) ("*Order*")(JA3477-876).

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.

There are no other related cases.

/s/ *Brett A. Shumate*
BRETT A. SHUMATE
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of this Court, Alamo Broadband Inc. hereby submits the following corporate disclosure statement:

Alamo Broadband Inc. has no parent corporation, and no publicly held company owns 10 percent or more of Alamo Broadband's stock. Insofar as it is relevant to this litigation, Alamo Broadband's general nature and purpose is to provide broadband Internet access service.

STATEMENT REGARDING DEFERRED APPENDIX

The parties have conferred and intend to use a deferred joint appendix.

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STATUTES

LEGISLATIVE MATERIALS

ADMINISTRATIVE MATERIALS

MISCELLANEOUS

GLOSSARY

1996 Act	Telecommunications Act of 1996
Act	Communications Act of 1934
Advanced Services Order	FCC order released on August 7, 1998 declaring that Section 706 of the 1996 Act does not constitute an independent grant of statutory authority to the FCC
Comcast	2010 D.C. Circuit opinion holding that the FCC failed to justify the exercise of ancillary authority over Comcast's network management practices
FCC	Federal Communications Commission
JA	Joint Appendix
Pai Dissent	Dissenting statement of Commissioner Ajit Pai appearing at pages 321-84 of the *Order*(JA3797-860)
Open Internet Order	FCC order released on December 23, 2010 formally adopting "net neutrality" rules that regulated the broadband Internet access services offered by wireless and wireline providers
Turner	1994 Supreme Court opinion holding that the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992 are subject to intermediate scrutiny under the First Amendment
Verizon	2014 D.C. Circuit opinion holding that the FCC's anti-blocking and anti-discrimination rules unlawfully imposed common-carrier regulation on broadband Internet access service providers

Alamo Broadband and Daniel Berninger separately challenge each of the Open Internet rules.

JURISDICTIONAL STATEMENT

Jurisdiction is proper under 47 U.S.C. §402(a) and 28 U.S.C. §§2342-44.[1]

STATEMENT OF ISSUES

1. Whether the Open Internet rules violate the First Amendment.

2. Whether Section 706 of the Telecommunications Act of 1996 authorizes Open Internet rules.

3. Whether Sections 201(b) or 303(b) of the Communications Act authorize the paid prioritization rule.

PERTINENT STATUTES AND REGULATIONS

The addendum contains pertinent statutes and regulations.

STATEMENT OF THE CASE

In addition to reclassifying broadband under Title II, the Commission adopted four Open Internet "conduct rules": no blocking, no throttling, no paid

[1] Because Alamo Broadband filed a timely petition for review (No. 15-1164) after Federal Register publication, the Court need not decide whether Alamo's earlier-filed petition (No. 15-1078) was also timely.

prioritization, and a general "Internet conduct" rule. The Commission also enhanced its transparency rule.[2]

The FCC relied upon Section 706 as authority to promulgate all of the rules. *Order* ¶¶275-82(JA3597-600). As additional authority, the FCC cited Section 201(b) for the conduct and transparency rules, *id.* ¶¶290-92, 297(JA3602-04, 3606), and Section 303(b) only for the conduct rules, *id.* ¶¶286(JA3601). The Commission rejected First Amendment challenges to the conduct rules. *Id.* ¶¶544-58(JA3744-49).

SUMMARY OF ARGUMENT

Regardless of how the Court resolves the challenges to the regulatory classification of broadband, the Open Internet rules should be vacated. *First*, the conduct rules violate the First Amendment. Broadband providers are speakers because they engage in speech, and they exercise the same editorial discretion as cable television operators in deciding which speech to transmit. The rules are subject to strict scrutiny because they compel providers to carry all speech, including political speech with which providers disagree, and because the rules

[2] After *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), the FCC invited comment on the transparency rule, Notice of Proposed Rulemaking ¶¶66-88(JA77-85), reconsidered it, *Order* ¶¶154-81(JA3545-57), and "reaffirm[ed]" it, *id.* ¶24(JA3485), under different authority, *id.* ¶297(JA3606). Although the enhancements require Office of Management and Budget approval, *id.* ¶585(JA 3757-58), the transparency rule is "in full effect," *id.* ¶23(JA3485).

discriminate among speakers on the Internet. The rules fail any level of scrutiny.

Second, the rules are unsustainable under Section 706, which instructs the FCC and State commissions to use preexisting authority to "encourage" the "deployment" of "advanced telecommunications capability." The text, structure, history, and purpose of Section 706 confirm that it delegates no independent authority to the FCC. The *Verizon* Court's deference to the FCC's interpretation of Section 706 is dicta that conflicts with more recent Supreme Court precedent.

Third, Section 201(b) unambiguously forecloses the ban on paid prioritization by expressly authorizing "just and reasonable" practices and "different charges" for "different classes" of Internet service. Nor does Section 303(b) authorize the FCC to invalidate licensees' prioritization arrangements with third parties.

STANDING

Alamo Broadband uses fixed wireless technology to provide broadband Internet access service to 1,000 customers outside San Antonio, Texas. The rules eliminate Alamo's discretion to manage Internet traffic and require extensive disclosures. Portman Declaration ¶5.

Daniel Berninger develops Internet communications services. The prioritization ban precludes him from offering high-definition voice services that require prioritization. Berninger Declaration ¶¶2-6.

STANDARD OF REVIEW

Chevron is inapplicable here. *First*, the Open Internet rules raise serious constitutional difficulties, *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1340-41 (D.C. Cir. 2002), which *Verizon* never addressed. *Second*, the more recent decisions in *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015), and *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014), compel de novo review because Internet regulation "involves decisions of great 'economic and political significance,'" *Verizon*, 740 F.3d at 639. *Third*, FCC "rulemaking authority" over the 1996 Act only "extends to" provisions "incorporated … into the Communications Act," *City of Arlington v. FCC*, 133 S. Ct. 1863, 1866 (2013); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 381 n.8 (1999) (same), but Section 706 "is not part of the Communications Act," *Open Internet Order*, 25 F.C.C.R. 17905, ¶79 n.248 (2010); Pai Dissent 372 & n.386(JA3848). "[W]hen an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is not entitled to deference." *U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1016 (D.C. Cir. 2002) (quotations omitted).

ARGUMENT

I. THE OPEN INTERNET RULES VIOLATE THE FIRST AMENDMENT.

1. Broadband providers are First Amendment speakers because they "engage in and transmit speech." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622,

636 (1994); *Ill. Bell Tel. Co. v. Village of Itasca*, 503 F. Supp. 2d 928, 948-49 (N.D. Ill. 2007); *Comcast Cablevision v. Broward Cnty.*, 124 F. Supp. 2d 685, 692 (S.D. Fla. 2000). They engage in commercial speech by developing their own "content or services" online, *e.g.*, a "news website," *Verizon*, 740 F.3d at 629, or streaming video service, *Order* ¶¶82, 123(JA3508-09, 3528). They engage in "political speech," FCC Stay Opp. 1, No. 15-1063, by refusing to carry content with which they disagree, ACLU Comments 5(JA343). And, like cable operators, they "carry the content of third parties." *Verizon*, 740 F.3d at 654-55. In performing these functions, broadband providers exercise editorial "discretion." *Id.* at 654.

The Open Internet conduct rules strip providers of control over which speech they transmit and how they transmit it. The rules also compel the carriage of others' speech, including speech with which broadband providers disagree. The prioritization rule prohibits broadband providers from elevating their speech over others' and selling the ability to prioritize some speech over other speech. Broadcast stations and cable operators sell longer commercials for more money. Newspapers and magazines vary the size and print of advertisements based on payment. The prioritization rule denies broadband providers the ability to make functionally and legally equivalent distinctions on the Internet. The ban also restricts Berninger's speech by preventing him from purchasing prioritization

services to promote his high-definition voice offerings over competing Internet services.

The FCC fails to distinguish broadband providers from the cable operators in *Turner*. *Order* ¶¶548-50(JA3745-46). Broadband providers transmit the same video content, *id.* ¶3(JA3479), and have the same "discretion" whether to "carry the content of third parties," *Verizon*, 740 F.3d at 654-55. The FCC's claim that "broadband providers exercise little control over the content which users access on the Internet," *Order* ¶548(JA3745), is belied by its finding that regulation is necessary to prevent broadband providers from disadvantaging certain content. It is not "at all relevant that" cable operators have "only a limited number of cable channels," whereas "the number of edge providers a broadband provider could serve is unlimited." *Verizon*, 740 F.3d at 655; *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) ("[B]asic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears."). Broadband providers face capacity constraints, CTIA Comments 14-27(JA1719-32), particularly given the demand for online video, *Broadband Progress Report*, 30 F.C.C.R. 1375, ¶¶30-32 (2015). The FCC's claim that broadband providers are only "conduits for the speech of others," *Order* ¶544(JA3744), is immaterial because cable operators enjoy First

Amendment protection even though they "function[]" as "conduit[s] for the speech of others," *Turner*, 512 U.S. at 629.

2. The rules are subject to strict scrutiny, "which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United v. FEC*, 558 U.S. 310, 339-40 (2010). *First*, 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. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 9 (1986); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974). "[W]hereas previously broadband providers could have blocked or discriminated against the content of certain edge providers, they must now carry the content those edge providers desire to transmit." *Verizon*, 740 F.3d at 655. Unlike the must-carry rules, there is no limit to the quantity of third-party speech—including political speech—a broadband provider must transmit. *Cf.* 47 U.S.C. §534(b)(1).

Second, the rules single out broadband providers without imposing similar restrictions on the speech of other Internet companies that have the incentive and the ability to act as gatekeepers. *Turner*, 512 U.S. at 659; *Citizens United*, 558 U.S. at 340, 353. Apple controls which applications iPhone users can access through the App Store; Facebook decides what content its users can access or post;

and Google decides which websites appear in searches and what content its users can access on YouTube. Tim Wu, THE MASTER SWITCH 304, 316 (2010). These companies can and do block consumers' ability to post to the Internet and access speech the companies deem offensive. National Religious Broadcasters Comments 9-11(JA249-51); Jeffery Rosen, *Free Speech on the Internet: Silicon Valley is Making the Rules*, New Republic (Apr. 29, 2015).

The Supreme Court did not apply strict scrutiny in *Turner* because of "the bottleneck monopoly power exercised by cable operators." 512 U.S. at 661. The FCC did not find that broadband providers have monopoly power, *Order* ¶84(JA3509), nor could the FCC make such a finding given the multiple options that exist for Internet access service, CTIA Comments 6-11(JA1711-16). The FCC's "terminating monopoly" and "gatekeeper" concepts are "largely invented." *Verizon*, 740 F.3d at 663 (Silberman, J., dissenting). At a minimum, the rules are subject to intermediate scrutiny. *Turner*, 512 U.S. at 662.

3. The rules fail any level of scrutiny. *First*, the rules are directly "related to the 'suppression of free expression,'" *id.*, because they forbid the exercise of editorial discretion by requiring providers to carry *all* Internet content.

Second, the FCC claims the rules "ensur[e] a level playing field for a wide variety of speakers," *Order* ¶555(JA3748), but the First Amendment "reject[s] the premise that the Government has an interest in equalizing the relative ability of"

speakers to have their voices heard, *Citizens United*, 558 U.S. at 349; *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) ("First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end.").

Third, the rules are insufficiently tailored. They are "underinclusive" because they apply to a single subset of speakers but not to other Internet companies with similar incentives and abilities. *Brown*, 131 S. Ct. at 2740. They are "overbroad" because they require carriage of *all* Internet content and thus prohibit broadband providers from even engaging in political speech by compelling the carriage of traffic with which they disagree. *United States v. Stevens*, 559 U.S. 460, 473 (2010); *Citizens United*, 558 U.S. at 349. Assuming authority for them, "disclosure requirements are among the least intrusive and most effective regulatory measures at [the FCC's] disposal." *Order* ¶154(JA3545); *Citizens United*, 558 U.S. at 319.

II. SECTION 706 DOES NOT AUTHORIZE OPEN INTERNET RULES.

1. No court has ever closely analyzed the text, structure, history, and purpose of Section 706. The only permissible construction of Section 706 is that it does not delegate independent authority to the FCC. Pai Dissent 370-75(JA3846-51).

Text. Whatever Section 706(a) delegates to "the Commission," it would

also delegate to "each State commission." 47 U.S.C. §1302(a). Yet "nowhere does the Communications Act contemplate state action coterminous with, or even at cross-purposes with, the FCC." Pai Dissent 373(JA3849). *Verizon* noted that "Congress has granted regulatory authority to state telecommunications commissions on other occasions," citing 47 U.S.C. §§251(f) and 252(e), 740 F.3d at 638, but those provisions do not grant coterminous *rulemaking* authority to the States. Under the 1996 Act, state authority is limited to implementing rules adopted by the FCC. *Iowa Utils. Bd.*, 525 U.S. at 378 n.6.

The supposed delegations in Section 706(a) and (b)—"shall encourage" and "shall take immediate action"—do not resemble grants of rulemaking authority. Pai Dissent 371(JA3847). They do not mention adopting "rules and regulations," 47 U.S.C. §201(b), even though Congress plainly knows how to confer such authority, *e.g.*, *id.* §§251(d)(1), 251(h)(2), 254(g), 227(b)(2), 325(b)(3), 615c(g). Indeed, when Congress wants an agency to adopt *rules* to "encourage" activity, it provides express authority to adopt "regulations." 49 U.S.C. §11122(a); 47 U.S.C. §§303(g), 303(r). Thus, the Supreme Court had no difficulty recognizing Section 706 as a "congressional policy" statement containing only a "general instruction to the FCC." *NCTA v. Gulf Power Co.*, 534 U.S. 327, 339 (2002).

Section 706(a) describes what the FCC must "encourage": "advanced telecommunications capability." 47 U.S.C. §1302(d)(1). The 1996 Act elsewhere

instructs the FCC to leave "interactive computer service," which "provides access to the Internet," "unfettered by Federal or State regulation." 47 U.S.C. §230(b)(2), (e)(2). The fact that Internet access service is "never mentioned in" Section 706(a) is compelling evidence that Congress did not delegate authority to regulate this service. *ABA v. FTC*, 430 F.3d 457, 469 (D.C. Cir. 2005). If Congress had wanted the FCC to "establish rules" for "Internet access service," it would have said so expressly. 47 U.S.C. §620(a).

Section 706(a) describes how to "encourage" this capability—"by utilizing" four particular regulatory methods—consistent with the preexisting "public interest" standard. The first three methods plainly refer to the Commission's preexisting authority: "price cap regulation" under Section 201(b), "regulatory forbearance" under Section 10, and "measures that promote competition in the local telecommunications market" under Sections 251-61. Pai Dissent 372(JA3848). Under the *ejusdem generis* canon, *Yates v. United States*, 135 S. Ct. 1074, 1086 (2015), which *Verizon* did not apply, the catchall—"other regulating methods that remove barriers to infrastructure investment"—must also refer to preexisting authority, 47 U.S.C. §§253, 257. The reference to "each State commission with regulatory jurisdiction over telecommunications services" also refers to preexisting authority. If States are limited to preexisting authority, then the Commission must be too. Thus, Section 706(a) does not contain "conferrals of

authority, but ... references to the exercise of authority conferred elsewhere." *Iowa Utils. Bd.*, 525 U.S. at 381 n.8.

Verizon failed to recognize that other provisions, such as Section 10, would be superfluous if Section 706 delegates independent authority. *Advanced Services Order*, 13 F.C.C.R. 24012, 24047, ¶63 (1998). It would be nonsensical for Congress to restrict the Commission's forbearance authority in Section 10 of the Communications Act only "to largely eliminate" such restrictions in Section 706. Pai Dissent 373 n.391(JA3849).

Structure. Neither did *Verizon* address Section 706's place in the statutory scheme. Congress gave the FCC express authority over telecommunications in Title II, radio in Title III, and cable in Title VI. *Comcast Corp. v. FCC*, 600 F.3d 642, 645 (D.C. Cir. 2010). One would expect that, for "the most important innovation in communications in a generation," *id.* at 661, Congress would have similarly given the FCC express authority. Yet "[t]he major components of the [1996 Act] have nothing to do with the Internet." *Reno v. ACLU*, 521 U.S. 844, 857-58 (1997). It would have been highly unusual for Congress to grant authority over the Internet in a "Miscellaneous Provision[]"of the 1996 Act. Pub. L. 104-104, Title VII, 110 Stat. 56.

Section 706 was not even inserted into the Communications Act. Pai

Dissent 372 & n.386(JA3848).[3] It was originally codified as a note to the policy statement in 47 U.S.C. §157. Today, Section 706 is codified with the Broadband Data Improvement Act in Chapter 12 of Title 47. Inserting regulatory authority over the Internet as a note to a policy statement or alongside provisions to improve data collection is like hiding "a rather large elephant in a rather obscure mousehole." *ABA*, 430 F.3d at 469.

Congress's decision not to insert Section 706 into the Communications Act means the FCC cannot use the Act's delegations of rulemaking authority to implement Section 706. Pai Dissent 372(JA3848). If Congress had intended for the FCC to enforce this statute outside the Communications Act, it would have said so expressly. 47 U.S.C. §§229(a), 1403(a). Although the FCC claims that, even if Section 706 is not part of the Communications Act, it can still rely upon its ancillary authority, *Order* ¶280(JA3599), this begs the question whether Section 706 is an "anchor" sufficient to support the exercise of ancillary authority, *Comcast*, 600 F.3d at 652.

History. The FCC's "past approach to this statute" is "rather telling" because, until 2010, the FCC had "never interpreted the statute to give it authority to regulate" in this area. *Loving v. IRS*, 742 F.3d 1013, 1021 (D.C. Cir. 2014). For

[3] *Verizon* erroneously "suggested that section 706 was part of the Communications Act," *Order* ¶298(JA3607), albeit in addressing a different question, 740 F.3d at 650.

a dozen years, the FCC held a contrary view. *Advanced Services Order* ¶¶69, 77. *Verizon* approved the FCC's changed interpretation, 740 F.3d at 636-37, but overlooked "congressional reliance" on the FCC's disclaimer of authority, *id.* at 638. Congress was plainly aware of the FCC's longstanding interpretation when it *twice* amended Section 706 without disturbing the agency's interpretation. Pub. L. 107-110, 115 Stat. 1425, Title X, §1076(gg), Jan. 8, 2002; Pub. L. 110-385, 122 Stat. 4096, Title I, §103(a), Oct. 10, 2008; S. Rep. No. 110-204, at 3 n.3 (2007). The "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827-28 (2013) (quotations omitted).

The circumstances surrounding Section 706's adoption also belie the Commission's changed interpretation. Pai Dissent 375(JA3851). The language describing "section 706 as a 'necessary fail-safe,'" *Verizon*, 740 F.3d at 639 (citing S. Rep. No. 104-23, at 50-51 (1995)), was stricken from the Conference Report, as was the provision that would have delegated authority to preempt State commissions that "fail to act," S. Conf. Rep. No. 104-230, at 210 (1996). *Verizon*'s reliance upon Congress's failure to disapprove the FCC's new interpretation of Section 706, 740 F.3d at 639, was inappropriate, 5 U.S.C. §801(g).

Purpose. Nor did *Verizon* consider whether the FCC's interpretation of Section 706 is consistent with "the Telecommunications Act's purpose—'reduc[ing] regulation in order to ... encourage the rapid deployment of new telecommunication technologies.'" *AT&T v. FCC*, 452 F.3d 830, 836 (D.C. Cir. 2006). Section 706 is designed to encourage deregulation through, *e.g.*, price cap regulation (deregulatory compared to rate-of-return regulation) and forbearance (from common-carrier regulation). Even if Section 706 delegated independent authority to the FCC, the purpose of Section 706 is to move away from exactly the kind of common-carrier duties imposed by this *Order*. Thus, even under *Chevron* step two, the rules frustrate the purpose of the statute and are therefore unlawful.

2. The FCC's interpretation renders Section 706 unconstitutional, even with the FCC's purported limitations. *Verizon*, 740 F.3d at 639-40. If Section 706 delegates independent regulatory authority unmoored to the statute's deregulatory purpose, the FCC "has virtually unlimited power to regulate the Internet" and "carte blanche to issue any regulation that the Commission might believe to be in the public interest." *Id.* at 662 (Silberman, J., dissenting). The FCC proves the point, claiming authority to prohibit even "unknown practices" that might impede the Internet's "virtuous cycle." *Order* ¶294(JA3604-05). The fact that the FCC must "decline to apply the open Internet rules" to edge providers and a host of other industries—"coffee shops, bookstores, airlines," *id.* ¶191(JA3561)—

establishes that there is no "intelligible principle" guiding its exercise of authority, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001).

3. This Court is free to construe Section 706 because *Verizon*'s interpretation is dicta. The discussion of Section 706 was unnecessary to the holding that the anti-blocking and anti-discrimination rules unlawfully imposed common-carrier regulation. Nor was the Section 706 discussion necessary to sustain the transparency rule because the Commission did not rely upon Section 706 for that rule,[4] and the Court could not have "sustain[ed] the Commission's action on a ground upon which the agency itself never relied." *Verizon*, 740 F.3d at 658-59.

[4] Taking this Court's suggestion, *Comcast*, 600 F.3d at 659, the FCC relied upon authority ancillary to its obligations to issue reports to Congress for the transparency rule, *Open Internet Order* ¶¶136-37 (citing §§4(k), 218, and 257), and Verizon challenged the rule on that basis alone, Verizon Br. 42, No. 11-1355. The Court "reject[ed] Verizon's challenge to the *Open Internet Order*'s disclosure rules," *Verizon*, 740 F.3d at 659, but "did not expressly opine on the legal authority for the Commission's prior transparency rule," *Order* ¶297(JA3606). Judge Silberman agreed that it was "reasonably ancillary" to Section 257, *Verizon*, 740 F.3d at 668 n.9 (dissenting), a theory the FCC abandoned here, *Order* ¶297(JA3606) (citing §§706 and 201(b)).

III. NEITHER SECTION 201(b) NOR SECTION 303(b) AUTHORIZES THE PAID PRIORITIZATION RULE.

1. Even if the FCC could lawfully rely upon Title II,[5] the Commission's conclusion that paid prioritization is inherently "unjust or unreasonable," *Order* ¶¶290-92(JA3602-04) (quoting 47 U.S.C. §201(b)), fails any level of scrutiny.[6] As the FCC Chairman acknowledged before Congress, "[t]here is nothing in Title II that prohibits paid prioritization," Pai Dissent 343 n.148(JA3819), because common carriers have always been permitted to offer "certain types of priority treatment," *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 609 (D.C. Cir. 1976).

Section 201(b) expressly authorizes "different charges…for...different classes of communications." 47 U.S.C. §201(b). Internet access involves a two-sided market implicating two classes of communications: service to (1) consumers and (2) edge providers. *Verizon*, 740 F.3d at 653; *Order* ¶338(JA3623-24). The FCC authorized broadband providers to charge one class (consumers), but not the other (edge providers). *Order* ¶125(JA3529). A "price of $0" is no charge at all,

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[5] The Commission unlawfully failed to give notice that it would adopt rules under Section 201(b). 5 U.S.C. §553(b)(2); Pai Dissent 337-38(JA3813-14); *Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 899-900 (D.C. Cir. 1978). The Commission "propose[d] to adopt rules … under section 706." Notice of Proposed Rulemaking ¶142(JA102).

[6] As noted in Part I, because the paid prioritization rule impinges on editorial discretion, it raises at least a substantial constitutional question, requiring the Court to decide the issue without any deference.

Verizon, 740 F.3d at 657, and the statute unambiguously forecloses the FCC from prohibiting *any* "charge[]" for one of the classes of Internet service.

Sections 201(b) and 202(a) also expressly authorize different charges to customers within the same class (here, among edge providers), which the FCC concedes. *Order* ¶292(JA3604). "The prohibitions in sections 201(b) and 202(a) are not absolute, and bar only unreasonable" actions. FCC Br. 22, *Orloff v. FCC*, No. 02-1189. Indeed, Section 202(a) bars "'*unjust or unreasonable*' discrimination, not *all* discrimination," *Verizon*, 740 F.3d at 657, and permits charging "some customers more for better, faster, or more service," *Order* ¶292(JA3604). If some priority arrangements would be "just and reasonable under §202," then some arrangements "must also be just and reasonable under §201." *Orloff v. FCC*, 352 F.3d 415, 418 (D.C. Cir. 2003).

A ban on prioritization is also "patently unreasonable" because it "reads the key modifier—'unreasonable'—out of the statute." FCC *Orloff* Br. 23. The FCC declared *all* prioritization inherently "unjust or unreasonable," and even rejected a "'reasonable network management' exception." *Order* ¶18 n.18(JA3484). Although certain arrangements might be unjust or unreasonable, *id.* ¶126(JA3529-31), "some forms of paid prioritization could be beneficial," *id.* ¶19(JA3484), because they further "competition, innovation, consumer demand, or investment" without "harm[ing] the nature of the open Internet," *id.* ¶131(JA3534). These

include arrangements to "improve the provision of telemedicine services," *id.* ¶132 n.315(JA3534), high-quality voice services, Berninger Declaration ¶¶3-4, and "user-driven" prioritization, *Order* ¶19 n.22(JA3484). Because the statute expressly *authorizes* paid prioritization, it affirmatively *forecloses* the rule banning prioritization arrangements.

2. The FCC does not seriously contend that Section 303(b) authorizes the prioritization rule. *Id.* ¶¶286, 293(JA3601, 3604). The prioritization rule exceeds the FCC's authority by "invalidat[ing] licensees' contracts with third parties" for prioritization. *Cellco P'ship v. FCC*, 700 F.3d 534, 543 (D.C. Cir. 2012).

CONCLUSION

The Open Internet rules should be vacated.

Respectfully submitted,

/s/ *Brett A. Shumate*

RICHARD E. WILEY
BENNETT L. ROSS
BRETT A. SHUMATE
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Daniel Berninger

ANDREW G. MCBRIDE
BRETT A. SHUMATE
EVE KLINDERA REED
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
bshumate@wileyrein.com

Counsel for Alamo Broadband Inc.

Dated: October 13, 2015

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), as modified by the Court's June 29, 2015 briefing order, I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 32(a)(3)(B) because this brief contains 3,966 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(2).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2010 version of Microsoft Word in 14 point Times New Roman.

/s/ *Brett A. Shumate*

STATUTORY AND REGULATORY ADDENDUM

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Section 706

47 U.S.C. §1302

(a) In general

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) Inquiry

The Commission shall, within 30 months after February 8, 1996, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) Demographic information for unserved areas

As part of the inquiry required by subsection (b), the Commission shall compile a list of geographical areas that are not served by any provider of advanced telecommunications capability (as defined by subsection (d)(1) of this section) and to the extent that data from the Census Bureau is available, determine, for each such unserved area--

(1) the population;

(2) the population density; and

(3) the average per capita income.

(d) Definitions

For purposes of this subsection:

(1) Advanced telecommunications capability

The term "advanced telecommunications capability" is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) Elementary and secondary schools

The term "elementary and secondary schools" means elementary and secondary schools, as defined in section 7801 of Title 20.

Telecommunications Act of 1996, Pub. L. 104-104, §706, 110 Stat. 56

SEC. 706. ADVANCED TELECOMMUNICATIONS INCENTIVES.

(a) IN GENERAL.—The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) INQUIRY.—The Commission shall, within 30 months after the date of enactment of this Act, and regularly thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers

to infrastructure investment and by promoting competition in the telecommunications market.

(c) DEFINITIONS.—For purposes of this subsection:

(1) ADVANCED TELECOMMUNICATIONS CAPABILITY.—The term "advanced telecommunications capability" is defined, without regard to any transmission media or technology, as highspeed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) ELEMENTARY AND SECONDARY SCHOOLS.—The term "elementary and secondary schools" means elementary and secondary schools, as defined in paragraphs (14) and (25), respectively, of section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801).

No Child Left Behind Act of 2001, Pub. L. 107-110, §1076(gg), 115 Stat. 1425

TELECOMMUNICATIONS ACT OF 1996.—Section 706(c)(2) of the Telecommunications Act of 1996 (47 U.S.C. 157 note) is amended—

(1) by striking "paragraphs (14) and (25), respectively, of section 14101" and inserting "section 9101"; and

(2) by striking "(20 U.S.C. 8801)".

Broadband Data Improvement Act, Pub. L. 110-385, §103(a), 122 Stat. 4096

(a) IMPROVING SECTION 706 INQUIRY.—Section 706 of the Telecommunications Act of 1996 (47 U.S.C. 157 note) is amended—

(1) by striking "regularly" in subsection (b) and inserting "annually";

(2) by redesignating subsection (c) as subsection (d); and

(3) by inserting after subsection (b) the following:

"(c) DEMOGRAPHIC INFORMATION FOR UNSERVED AREAS.—As part of the inquiry required by subsection (b), the Commission shall compile a list of geographical areas that are not served by any provider of advanced

telecommunications capability (as defined by section 706(c)(1) of the Telecommunications Act of 1996 (47 U.S.C. 157 note)) and to the extent that data from the Census Bureau is available, determine, for each such unserved area—

"(1) the population;

"(2) the population density; and

"(3) the average per capita income.".

Title II

47 U.S.C. §201

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: Provided, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: Provided further, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: Provided further, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules

and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C. §202

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included

Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Penalty

Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

47 U.S.C. §230

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States--

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

***

(f) Definitions

As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

***

Title III

47 U.S.C. §303

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall--

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: Provided, however, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(l)(1) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to persons who are found to be qualified by the Commission and who otherwise are legally eligible for employment in the United States, except that such requirement relating to eligibility for employment in the United States shall not apply in the case of licenses issued by the Commission to (A) persons holding United States pilot certificates; or (B) persons holding foreign aircraft pilot certificates which are valid in the United States, if the foreign government involved has entered into a reciprocal agreement under which such foreign government does not impose any similar requirement relating to eligibility for employment upon citizens of the United States;

(2) Notwithstanding paragraph (1) of this subsection, an individual to whom a radio station is licensed under the provisions of this chapter may be issued an operator's license to operate that station.

(3) In addition to amateur operator licenses which the Commission may issue to aliens pursuant to paragraph (2) of this subsection, and notwithstanding section 301 of this title and paragraph (1) of this subsection, the Commission may issue authorizations, under such conditions and terms as it may prescribe, to permit an alien licensed by his government as an amateur radio operator to operate his amateur radio station licensed by his government in the United States, its possessions, and the Commonwealth of Puerto Rico provided there is in effect a multilateral or bilateral agreement, to which the United States and the alien's government are parties, for such operation on a reciprocal basis by United States amateur radio operators. Other provisions of this chapter and of subchapter II of chapter 5, and chapter 7, of Title 5 shall not be applicable to any request or application for or modification, suspension, or cancellation of any such authorization.

(m)(1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee--

(A) has violated, or caused, aided, or abetted the violation of, any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted--

(1) false or deceptive signals or communications, or

(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) has willfully or maliciously interfered with any other radio communications or signals; or

(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

(2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order. The notice to the operator licensee shall not be effective until actually received by him, and from that time he shall have fifteen days in which to mail the said application. In the event that physical conditions prevent mailing of the application at the expiration of the fifteen-day period, the application shall then be mailed as soon as possible thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of the hearing which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension.

(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act, or which the Commission by rule has authorized to operate without a license under section 307(e)(1) of this title, or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.

(o) Have authority to designate call letters of all stations;

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this chapter;

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation. The permittee or licensee, and the tower owner in any case in which the owner is not the permittee or licensee,

shall maintain the painting and/or illumination of the tower as prescribed by the Commission pursuant to this section. In the event that the tower ceases to be licensed by the Commission for the transmission of radio energy, the owner of the tower shall maintain the prescribed painting and/or illumination of such tower until it is dismantled, and the Commission may require the owner to dismantle and remove the tower when the Administrator of the Federal Aviation Agency determines that there is a reasonable possibility that it may constitute a menace to air navigation.

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

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Open Internet Rules

47 C.F.R. §8.3

A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.

47 C.F.R. §8.5

A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.

47 C.F.R. §8.7

A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.

47 C.F.R. §8.9

(a) A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization.

(b) "Paid prioritization" refers to the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either;

(1) In exchange for consideration (monetary or otherwise) from a third party, or

(2) To benefit an affiliated entity.

(c) The Commission may waive the ban on paid prioritization only if the petitioner demonstrates that the practice would provide some significant public interest benefit and would not harm the open nature of the Internet.

47 C.F.R. §8.11

Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.

DECLARATION OF JOSEPH PORTMAN

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 consolidates cases

DECLARATION OF JOSEPH PORTMAN

I, Joseph Portman, declare as follows:

1. My name is Joseph Portman. I am the President of Alamo Broadband Inc. I submit this declaration to demonstrate the standing of Alamo Broadband in the above-captioned cases, and in particular Case Nos. 15-1078 & 15-1164.

2. Alamo Broadband uses fixed wireless technology to provide broadband Internet access service in an area about 500 square miles just south of San Antonio, Texas. We currently serve over 1,000 customers, many of whom had very limited choices for Internet service before I started the company in 2011.

3. Like most wireless broadband Internet access service providers, Alamo Broadband uses unlicensed spectrum in the 2.4 and 5.8 Gigahertz bands as its last mile delivery vehicle. Alamo Broadband shares this spectrum with other unlicensed users.

4. Alamo Broadband also uses licensed spectrum in the 3.65 Gigahertz band to provide broadband Internet access service. The FCC has authorized spectrum in the 3.65 Gigahertz band to be used for terrestrial wireless broadband operations. In 2011, the FCC issued a license to Alamo Broadband to use this band in connection with its provision of broadband Internet access service.

5. Alamo Broadband is injured by the *Order* because it is a provider of broadband Internet access service that the FCC seeks to regulate. The Open Internet conduct rules eliminate Alamo's discretion to manage the Internet traffic on its network. The transparency rule requires Alamo to make burdensome disclosures.

6. I participated in the FCC proceeding in my capacity as President of Alamo Broadband. Letter from Joseph Portman, President, Alamo Broadband Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (Feb. 17, 2015); Testimony of Joe Portman, President and Founder, Alamo Broadband Inc., Elmendorf, Texas at the FCC's Texas Forum on Internet Regulation, Texas A&M

University, Bush School of Government & Public Service, College Station, Texas (Oct. 21, 2014).

I, Joseph Portman, hereby declare under penalty of perjury that the foregoing is true and correct.

Joseph Portman

Executed this 29 day of July 2015

DECLARATION OF DANIEL BERNINGER

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 consolidates cases

DECLARATION OF DANIEL BERNINGER

I, Daniel Berninger, declare as follows:

1. My name is Daniel Berninger. I am an entrepreneur, founder of the Voice Exchange Communication Committee, and an architect of new communications services since 1991. I have devoted my professional career to transforming the communications industry from traditional circuit switched services to the Internet Protocol ("IP") services upon which customers increasingly rely today. I submit this declaration to demonstrate my standing in the above-captioned cases, and in particular Case No. 15-1128.

2. By prohibiting fixed and mobile broadband providers from entering into paid prioritization arrangements, the FCC's *Order* prevents me from

implementing new high-definition voice offerings, which I have devoted time and resources to developing in order to take advantage of the economic opportunities created by the retirement of the public switched telephone network in favor of IP networks. Because latency, jitter, and packet loss in the transmission of a communication will threaten voice quality and destroy the value proposition of a high-definition service, it is imperative that network operators prioritize this traffic. And, for network operators exchanging high-definition voice traffic, they will reasonably expect and demand to receive compensation or some other benefit in consideration for providing such prioritization.

3. One high-definition offering threatened by the *Order*, which was announced as the HD Network on January 6, 2015, allows end users to elect and for network operators to provision high-definition voice functionality on an individual end-user by end-user basis. A number of operators support high-definition voice on their networks, but the HD Network, demonstrated through trials in 2013, provides a means to move high-definition calls between networks.

4. Another high-definition service I am developing involves a voice hosting offer giving website visitors the ability to communicate with each other through high-definition voice. This project establishes high-definition voice as a new means of conversation without the need for telephone numbers or traditional dialing. Visiting a web page provides the triggering mechanism to initiate a high-

definition voice conversation with others sharing interest in the web page topic. This business model features a subscription-based destination for customers as well as provides an affiliation model and new revenue stream encouraging website owners to promote high-definition voice conversations between members of their audience.

5. In order to compete with competitive alternatives in terms of reliability and consistency of performance, the implementation of high-definition voice requires IP interconnection agreements with network operators to support the type of paid prioritization options the *Order* prohibits. The best efforts model associated with existing IP interconnection agreements does not enable the relevant implementation requirements necessary to support high-definition voice.

6. Although options for high-definition voice exist in the over-the-top arena of proprietary services as in the example of Viber and Facebook Messenger, the new FCC rule 8.9 prevents broadband Internet access providers from prioritizing high-definition voice "in exchange for consideration (monetary or otherwise) from a third party." The benefits of high-definition voice resulting from my offerings will not be realized without prioritization. And, by prohibiting a broadband Internet access service provider from receiving any consideration or benefit for prioritizing high-definition voice traffic, the possible business models that would support my high-definition voice offerings shrink to zero.

7. I participated in the FCC proceeding in my individual capacity and in my capacity as founder of the Voice Exchange Communication Committee. Letter from Daniel Berninger, founder, Voice Exchange Communication Committee, *et al.*, to Tom Wheeler, Chairman, FCC, GN Docket No. 14-28 (Jan. 23, 2015); Letter from Daniel Berninger, founder, Voice Exchange Communication Committee, *et al.*, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (July 10, 2014); Letter from Daniel Berninger, founder, Voice Exchange Communication Committee, *et al.*, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (July 28, 2014).

I, Daniel Berninger, hereby declare under penalty of perjury that the foregoing is true and correct.

Daniel Berninger

Executed this 27th day of July 2015

CERTIFICATE OF SERVICE

I hereby certify that, on October 13, 2015, I electronically filed the foregoing joint brief 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.

/s/ *Brett A. Shumate*

JOINT REPLY BRIEF

FINAL VERSION

ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2015
No. 15-1063 (and consolidated cases)

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.

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

JOINT REPLY BRIEF FOR PETITIONERS ALAMO BROADBAND INC. AND DANIEL BERNINGER

RICHARD E. WILEY
BENNETT L. ROSS
BRETT A. SHUMATE
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Daniel Berninger

ANDREW G. MCBRIDE
BRETT A. SHUMATE
EVE KLINDERA REED
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Alamo Broadband Inc.

Dated: October 13, 2015

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TABLE OF AUTHORITIES

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CASES

*Authorities upon which we chiefly rely are marked with asterisks.

STATUTES

ADMINISTRATIVE MATERIALS

MISCELLANEOUS

GLOSSARY

FCC	Federal Communications Commission
JA	Joint Appendix
Turner	1994 Supreme Court opinion holding that the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992 are subject to intermediate scrutiny under the First Amendment
Verizon	2014 D.C. Circuit opinion holding that the FCC's anti-blocking and anti-discrimination rules unlawfully imposed common-carrier regulation on broadband Internet access service providers

SUMMARY OF ARGUMENT

The FCC admits that broadband providers engage in and transmit speech, but contends the First Amendment does not protect these activities. That position is indefensible. The First Amendment protects broadband providers just as it does every other means of distributing mass communications, from cable systems to YouTube. The open Internet rules cannot survive any level of scrutiny because they foreclose the exercise of editorial discretion in the name of equalizing all speech. At a minimum, the rules present serious constitutional difficulties. The FCC also lacks authority to ban paid prioritization.

ARGUMENT

I. THE RULES VIOLATE THE FIRST AMENDMENT.

1. The FCC acknowledges (at 5, 149) that broadband providers "engage in First Amendment activity" when creating their own Internet content (Verizon's huffingtonpost.com), but argues that "these activities...are unaffected by the open Internet rules." This is incorrect.

With prioritization, broadband providers convey a message by "favor[ing]" certain speech—that prioritized content is superior—because it is delivered faster. *Order* ¶125(JA3529). This is no different than a cable operator favoring popular channels by placing them on particular cable tiers. By foreclosing prioritization, the *Order* restricts broadband providers' editorial discretion to favor their own and unaffiliated Internet content. It also infringes the speech of edge providers like

Berninger who wish to distinguish their content and services by having them delivered faster.

2. The FCC is also mistaken (at 143-44) that broadband providers do not engage in First Amendment activity when acting "as conduits for" others' speech. Distributing communications to mass audiences is no less entitled to First Amendment protection than the communications distributed. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 768 (1988).

Transmitting "communications of others" "plainly implicate[s] First Amendment interests," *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986), because it is a "communicative act[]," *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998). For example, cable operators engage in First Amendment activity by transmitting unaffiliated content, even though "cable system[s] function[]...as…conduit[s] for the speech of others." *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 629 (1994). When "provid[ing]...its subscribers news, information, and entertainment" on the Internet, a broadband provider "is engaged in 'speech' under the First Amendment, and...part of the 'press.'" *Leathers v. Medlock*, 499 U.S. 439, 444 (1991); Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO.WASH.L.REV. 697, 701-02, 717-57 (2010).

Disseminating content over the Internet is nothing like transmitting a telephone call over a copper wire. Broadband providers are not passive conduits; they "monitor and regulate the flow of traffic over their networks" to "optimize overall network performance and maintain a consistent quality experience for consumers." *Order* ¶¶85, 215(JA3510, 3576). Broadband providers communicate that they decide what may be transmitted over their networks. Time Warner Cable Internet Acceptable Use Policy, https://help.twcable.com/twc_misp_aup.html. They routinely exercise editorial discretion by deciding not to transmit content that is unlawful (child pornography) or harmful (spam). *Order* ¶¶113, 118 (JA3524-27). Congress recognized that the right of editorial discretion also includes the right to deny access to "objectionable" content. 47 U.S.C. §230(c)(2)(A); Yoo, at 756.

Broadband providers do not surrender their editorial discretion by electing to transmit all lawful content any more than an individual surrenders his free speech rights by not speaking. *Malik v. Brown*, 16 F.3d 330, 332 (9th Cir. 1994) ("A 'use it or lose it' approach…does not square with the Constitution."). Claiming that broadband providers are not speakers by prohibiting them from speaking is just as "flawed" as claiming that edge providers are not customers by forbidding customer relationships. *Verizon v. FCC*, 740 F.3d 623, 654 (D.C. Cir. 2014).

3. The FCC's view of the First Amendment is untenable in a time of Internet convergence. *Order* ¶¶3, 9(JA3479, 3481-82). The FCC's belief that companies engage in speech when they provide the ability to view content on television, but not an iPad, makes no sense. The way in which the user accesses content is irrelevant because First Amendment principles "'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).

No transmitter of mass communications would receive First Amendment protection under the FCC's approach. The FCC claims (at 144) that "[n]obody understands broadband providers to be sending a message or endorsing speech when transmitting the Internet content that a user has requested." But even though "there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator," *Turner*, 512 U.S. at 655, cable operators still exercise editorial discretion protected by the First Amendment. Likewise, no one would assume that the *New York Times* endorses the advertisements therein, but the *Times* obviously has the right to select and print them. "When a user" watches *Innocence of Muslims* on YouTube, "she has no reason to think that the views expressed there are those of" YouTube, FCC Br. 144, but the First Amendment protects YouTube, *Garcia v. Google, Inc.*, 786 F.3d 733, 747 (9th Cir. 2015) (en banc). All means to

distribute mass communications must be protected by the First Amendment or none will.

The FCC's approach opens the door to content regulation. If the FCC can "designate what shall be carried," it can also "determine what shall be excluded," *Ex Parte Jackson*, 96 U.S. 727, 732 (1877), because an order to carry all Internet traffic "operates as a command in the same sense as a statute or regulation forbidding" a carrier "to publish specified matter," *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974). If transmitting Internet content is not protected by the First Amendment, nothing would stop the government from requiring broadband providers to block content it deems objectionable.

4. Strict scrutiny should apply for the reasons already explained. Because all means of disseminating mass communications are converging on the Internet, the government could suppress the widespread dissemination of information by regulating Internet access.

The FCC offers no persuasive justification for discriminating among "different speakers within a single medium." *Turner*, 512 U.S. at 659. It concedes multiple competitive options exist to access the Internet and that other Internet companies exercise gatekeeper control over their users' ability to access content. "As gatekeepers," YouTube, Apple, Netflix, Facebook, and Twitter "can block access altogether; they can target competitors, including competitors to their own

video services; and they can extract unfair tolls." *Order* ¶20(JA3484). Those companies remain free to prefer their own content and block other content they deem offensive.

That the rules foreclose editorial discretion based on the agency's view of what is "harmful" and "legitimate" suggests that they are content based. *Id.* ¶69(JA3498). They are also directly related to the suppression of speech because they bar the exercise of editorial discretion. The FCC banned prioritization because it objects to the message it conveys.

5. The rules also fail intermediate scrutiny, which is "tough scrutiny." *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1323 (D.C. Cir. 2010). Any threat to the open Internet falls short of the evidence in *Turner* that, without must-carry, cable's bottleneck monopoly power would destroy broadcasters. Although *Verizon* deferred to the "virtuous cycle" rationale, intermediate scrutiny is "more demanding," *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1041 (D.C. Cir. 2002), and the Court cannot "rely on…deference," *Cablevision*, 597 F.3d at 1311.

The only interest the prioritization rule remotely advances is "ensuring a level playing field" for speakers, *Order* ¶555(JA3748), but "equalizing" the ability to speak is not a legitimate interest, *Citizens United v. FEC*, 558 U.S. 310, 350 (2010), or an appropriate means to "foster[] the growth of the Internet," *Reno v. ACLU*, 521 U.S. 844, 885 (1997).

Because the FCC mistakenly viewed the rules as not burdening "*any* identifiable speech," FCC Br. 152, it made no attempt to tailor them. Instead of banning prioritization, for example, the FCC could have permitted "beneficial" arrangements, *Order* ¶19(JA3484), adopted a reasonableness exception, *e.g.*, 47 U.S.C. §536(a)(3), or reserved judgment, *Order* ¶¶246-47(JA3487-88). The FCC also fails to explain why disclosure rules, which "are among the least intrusive and most effective regulatory measures," could not preserve Internet openness. *Id.* ¶¶154, 169(JA3545, 3552-53) (requiring disclosure of "network practices"). Transparency "curb[s]…incentives" to impose "discriminatory restrictions on access and priority," *id.* ¶563(JA3750), because providers will only disclose "reasonable" practices, *Comcast Order*, 23 F.C.C.R. 13028, ¶53 (2008).

The blocking, throttling, and Internet conduct rules are overbroad because "the compelled carriage obligation applies in all circumstances and with respect to all edge providers." *Verizon*, 740 F.3d at 656. No court has ever "approved a general right of access to the media." *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981). The FCC does not explain how compelled carriage of offensive content advances the "virtuous cycle." That a broadband provider is "not prevented…from saying anything it wishe[s]," *Tornillo*, 418 U.S. at 256, because it may speak "in some other place," *Reno*, 521 U.S. at 880, "begs the core question" whether broadband providers can be compelled to carry speech at all, *Tornillo*, 418 U.S. at 256; FCC

Br. 154. Because concern about degrading "competitors' content" animates each of the rules, *Order* ¶111, 123, 140(JA3523-24, 3528, 3538), the FCC could have limited the impact on speech—while still preserving Internet openness—by barring impairment of competitors' content, like the 2010 mobile blocking rule, *id.* ¶¶116-18(JA3526-27).

Finally, the Internet conduct rule is so vague that it chills speech. USTelecom Br. 79-81; ACLU Amicus Br. 28-29. The advisory opinion process, *Order* ¶¶229-39(JA3582-85), exacerbates the chill because the only way to avoid scrutiny is to "ask a governmental agency for prior permission to speak," *Citizens United*, 558 U.S. at 335-36.[1]

II. THE FCC LACKS AUTHORITY TO BAN PRIORITIZATION.

1. The FCC relies (at 130) primarily upon Section 706 to ban prioritization, but Section 706 does not authorize *any* rules. *Verizon* suggested that "Section 706 would affirmatively authorize" some rules, *id.*, but that suggestion was unnecessary to the result.

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[1] Intervenors' passing challenge to Petitioners' standing is meritless. Alamo's standing is self-evident; it is the object of the *Order*. None of the Petitioners must state that they "will in fact violate" the rules, *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2345 (2014), or "show injury to themselves" to bring a facial challenge, *Edwards v. DC*, 755 F.3d 996, 1001 (D.C. Cir. 2014). "The issue presented is a relatively pure legal one that subsequent enforcement proceedings will not elucidate." *Chamber of Commerce v. FEC*, 69 F.3d 600, 604 (D.C. Cir. 1995). Berninger has standing because the *Order* forecloses "the opportunity to purchase" prioritization. *Chamber of Commerce v. SEC*, 412 F.3d 133, 138 (D.C. Cir. 2005).

2. The Commission's reliance on Section 201(b) is unavailing because it concedes all prioritization cannot be banned under Section 202(a). FCC Br. 130-33. The specific ban on "unreasonable discrimination" in Section 202(a) controls over the general ban on "unreasonable practices" in Section 201(b) because prioritization is "discriminat[ion]." *Order* ¶¶103, 127(JA3521, 3531-32). If the FCC could prohibit all discrimination as unreasonable under Section 201(b), the specific ban in Section 202(a) would be superfluous. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S.Ct. 2065, 2070-71 (2012). The FCC also ignores that a ban on prioritization arrangements, even beneficial ones, reads the "reasonableness" modifier out of Section 201(b); offers no basis for interpreting "reasonable" differently in adjacent statutes; and fails to provide a reasoned explanation for disavowing previous decisions interpreting Sections 201-202 in parallel. While claiming (at 132) to disavow rate regulation, the FCC sets "a price of $0" for transmitting edge provider traffic, the other half of a two-sided market the FCC again ignores. *Verizon*, 740 F.3d at 653-54, 657-58.

3. Regarding Title III, the FCC concedes (at 133 n.47) that the prioritization rule "determine[s] the validity of contracts between licensees and others." *Cellco P'ship v. FCC*, 700 F.3d 534, 543 (D.C. Cir. 2012). The agency cannot escape this "limit on [its] regulatory authority," *id.*, by acting prospectively instead of retroactively.

Respectfully submitted,

/s/ *Brett A. Shumate*

ANDREW G. MCBRIDE
BRETT A. SHUMATE
EVE KLINDERA REED
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
bshumate@wileyrein.com

Counsel for Alamo Broadband Inc.

RICHARD E. WILEY
BENNETT L. ROSS
BRETT A. SHUMATE
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Daniel Berninger

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), as modified by the Court's June 29, 2015 briefing order, I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 32(a)(3)(B) because this brief contains 1,994 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(2).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2010 version of Microsoft Word in 14 point Times New Roman.

/s/ *Brett A. Shumate*

CERTIFICATE OF SERVICE

I hereby certify that, on October 13, 2015, I electronically filed the foregoing joint brief 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.

/s/ *Brett A. Shumate*