Nos. 15-3291 & 15-3555

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE STATE OF TENNESSEE, et al.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Respondents.

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

BRIEF OF *AMICI CURIAE* SCHOLARS OF LAW AND ECONOMICS, TECHFREEDOM, INTERNATIONAL CENTER FOR LAW AND ECONOMICS, AND COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PETITIONERS

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1999 706(b) Report	Report, In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 14 FCC Rcd 2398 (1999).
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2010 Open Internet Order	Report and Order, *In re Preserving the Open Internet*, 25 FCC Rcd 17905 (2010).
2015 Open Internet Order	Report and Order on Remand, Declaratory Ruling, and Order, *In re Protecting and Promoting the Open Internet*, 29 FCC Rcd 5561 (2015).

Advanced Services Order	Memorandum Opinion and Order, And Notice of Proposed Rulemaking, *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012 (1998).
Brown & Williamson	FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2001).
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Comcast Order	Memorandum Opinion and Order, In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd 13028 (2008).
FCC or *Commission*	Federal Communications Commission
Order	Memorandum Opinion and Order, In re City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq., The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601, 30 FCC Rcd 2408 (2015).

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IDENTITY AND INTEREST OF *AMICI CURIAE*

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TechFreedom is a non-profit, non-partisan 501(c)(3) think tank dedicated to educating policymakers, the media, and the public about Internet policy.

ICLE is a non-profit, non-partisan global research and policy center. ICLE works with scholars and research centers worldwide to develop sensible,

economically grounded policies that enable businesses and innovation to flourish.

CEI is a 501(c)(3) non-profit public interest organization dedicated to advancing free-market solutions to regulatory issues, including Internet freedom.

Amici's interest in this case is in ensuring proper constitutional balance of power between states and the federal government, and between Congress and regulatory agencies.

All three institutional *amici* regularly participate in FCC proceedings, including the Order on review and the FCC's 2015 Open Internet Order, which also rested on Section 706. *2015 Open Internet Order*, ¶¶ 275–82.[1]

INTRODUCTION

This case is not about broadband deployment or competition, nor local autonomy. It is about the FCC's claim of sweeping power and its essentially unchecked discretion to govern the Internet, including the supposed power to

[1] All parties have consented to the filing of this brief. This brief was not authored in whole or in part by a counsel to a party in this case. Neither a party nor a party's counsel contributed money intended to fund the preparation or submission of this brief. No person, other than amici, contributed money intended to fund the preparation or submission of this brief.

preempt decisions made by elected state lawmakers—*without* Congressional authorization.

To reject the FCC's reinterpretation of Section 706 as an independent grant of authority is not to say that nothing more need be done to promote broadband deployment and competition—but to affirm two facts about the Telecommunications Act of 1996 ("1996 Act"). First, Congress intended Section 706 as a command to the FCC to use the abundant authority granted to it elsewhere in the 1934 Communications Act ("1934 Act") to promote broadband deployment to all Americans. As the FCC said in 1998:

> After reviewing the language of section 706(a), its legislative history, the broader statutory scheme, and Congress' policy objectives, we agree with numerous commenters that section 706(a) does not constitute an independent grant of forbearance authority ***or of authority to employ other regulating methods***. Rather, we conclude that ***section 706(a) directs the Commission to use the authority granted in other provisions***, including the forbearance authority under section 10(a), to encourage the deployment of advanced services. *Advanced Services Order*, ¶ 69 (emphasis added).

Second, rejecting the FCC's reinterpretation means affirming that Congress intended "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," 47 U.S.C. § 230(b)(2); *see also* 47 U.S.C. § 230(a)(5) ("The Internet and other interactive computer services have flourished, . . . with a minimum of government regulation.").

The FCC has done much to promote broadband deployment and competition in the past, relying on Section 706 to justify its interpretation of *other* grants of authority. Notably, in 2003, the FCC declined to require telephone companies ("telcos") to unbundle new "Fiber-to-the-Home" networks to encourage telcos to invest in fiber upgrades for their traditional copper infrastructure. This decision was arguably essential to Verizon's deployment of its all-fiber FiOS network as a powerful alternative to cable broadband—precisely the progress Congress contemplated in Sections 230 and 706. *See 2003 Triennial Review Order*, ¶ 3.

In 2004, the D.C. Circuit upheld the FCC's decision on these grounds: "the FCC may weigh the 'costs of unbundling' (*e.g.*, investment disincentives) against the 'benefits of removing this barrier to competition.'" *Earthlink, Inc. v. FCC*, 462 F.3d 1, 6 (D.C. Cir. 2006) (citing *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 579 (D.C. Cir. 2004)). After the FCC extended this approach to other elements of telcos' networks, for the same reasons, the D.C. Circuit again upheld the FCC's reliance on Section 706 as a policy preference, referring to it as "set[ting] forth the following overarching direction," and simply quoting its text. *Id.* at 5–6.

In 2008, the FCC began to tack a new course: claiming Section 706 as one of several statutory policy statements that conferred on the agency ancil-

lary authority to enforce the FCC's 2005 Internet Policy Statement. *Comcast Order*, ¶ 18. In 2010, the D.C. Circuit struck down this order, holding the FCC to its 1998 decision that Section 706(a) was not a grant of authority. *Comcast Corp. v. FCC*, 600 F.3d 642, 658–59 (D.C. Cir. 2010). The court warned that the FCC's reliance on statements of Congressional policy as bases for ancillary jurisdiction would, "if accepted[,] . . . virtually free the Commission from its congressional tether." *Id*. at 656. Because the FCC had not officially reinterpreted Section 706, the court did not opine on the meaning of that provision. *See id*. at 659.

In the 2010 Open Internet Order, the FCC reinterpreted Section 706 as a grant of authority, reversing its 1998 interpretation—instead of seeking clear legislative authority from Congress to enact its "net neutrality" rules. *2010 Open Internet Order*, ¶ 118. The FCC claimed that reading the provision as a source of authority was "consistent with" its 1998 statement that Section 706 "'gives this Commission an affirmative obligation to encourage the deployment of advanced services' using its existing rulemaking, forbearance and adjudicatory powers, and stressed that 'this obligation has substance.'" *Id*. ¶ 119 (quoting *Advanced Services Order*, ¶ 74). The FCC asserted that "Congress necessarily invested the Commission with the statutory authority to carry out" the tasks enumerated in Section 706(a). *Id*.

SUMMARY OF ARGUMENT

The FCC's reinterpretation of Section 706 as an independent grant of authority is part of the Commission's decade-long regulatory "voyage of discovery." *Cf. Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) ["*UARG*"]. That voyage led to the present case, in which the FCC attempts to substitute its judgment about government-owned networks for that of elected state legislatures. Throughout, the FCC has sought to maximize its discretion to make decisions about how to govern the Internet.

(§ I) The court must confront the FCC's reinterpretation as a matter of first impression because the other two appellate decisions on point are dicta.

(§ II) The FCC's reinterpretation contradicts three fundamental principles of statutory construction:

(§ II.A) The FCC's reinterpretation would essentially allow it to craft a new Communications Act out of thin air—claiming *carte blanche* to govern the Internet. The FCC thus presumes that Congress delegated to the FCC power to decide a question of utmost "economic and political significance"—despite the lack of clearly expressed statutory authorization and the consistent history of Congressional action and, importantly, inaction, indicating that Congress did *not* intend to do so. *See Brown & Williamson*, at 133.

(§ II.B) Read in context of the "whole act" (the 1996 Act), the meaning of Section 706 is plain: the FCC "shall" use its many *other* sources of authority to promote deployment and competition in the broadband ("advanced telecommunications") market. This commandment does not *empower* the FCC to do anything it otherwise could not; indeed, it *constrains* the FCC by allowing other parties to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

(§ III) Even if Section 706 were ambiguous as to whether it is an independent grant of authority, this Court should still interpret the statute *de novo*. *Chevron*'s deferential framework is inapplicable, for three reasons:

(§ III.A) This Court should not presume that Congress delegated interpretive authority, regarding a matter of such "economic and political significance," to the FCC instead of the courts. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

(§ III.B) In drafting the 1996 Act, Congress deliberately declined to place Section 706 in the 1934 Act. Therefore, Congress denied the FCC the power to administer Section 706, a prerequisite to *Chevron* review.

(§ III.C) By claiming immense regulatory authority without an intelligible limiting principle, the FCC imputes to the statute a "sweeping delegation of legislative power"—a statutory construction the Supreme Court instructs

courts and agencies to avoid. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) ["*Benzene*"]. Because the FCC's reinterpretation of Section 706 raises significant nondelegation questions, the Court must interpret the statute *de novo*. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 473 (2001).

ARGUMENT

"In our federal system, the National Government possesses only limited powers[.]" *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014). Federal agencies are even *more* limited, constrained to exercise only those powers that Congress has chosen to further delegate to them. Thus the FCC, like any other agency, has "literally . . . no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

Although courts respect agencies' discretion as to the "formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress," *Chevron,* at 843, courts also must preserve Congress's constitutional power and duty to define the scope of agency discretion, by "taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority," *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874 (2013).

The FCC argues that Congress—despite no legislative history other than a passing reference in a Senate committee report—embedded, in a scant 182 words, a grant of authority that allows the FCC to do *anything* regarding "communications" that is not specifically prohibited by the other 46,290 words of the 1996 Act or the 16,900 words of the 1934 Act (or the Constitution). The FCC neglects to mention that this committee report language was dropped from the final Conference Report. H.R. Rep. No. 104-458, at 210 (1996). The FCC's claim grows even more incredible still, considering that the 1996 Act did not initially place Section 706 in the 1934 Act, instead leaving Section 706 to be appended as a mere note to a preexisting Communications Act section—and that, when Congress finally codified Section 706 in 2008, it placed it *outside* the Communications Act.

Among the endless imaginable ways the FCC could, under its interpretation, use Section 706, it would be difficult to find a policy objective less consistent with 47 U.S.C. § 230 than the one here: Congress declared its intention "to preserve the vibrant and competitive free market for [broadband]," yet the FCC has attempted to promote the expansion of *government-owned* broadband networks—the very antithesis of a "free market." One can debate the merits of this free-market policy; one *cannot* debate that it is the approach Congress explicitly adopted. That the FCC has reached the contrary conclusion, turning

explicit Congressional policy on its head, "should have alerted [the FCC] that it had taken a wrong interpretive turn." *UARG*, 134 S. Ct. at 2446.

I. PREVIOUS DECISIONS REGARDING SECTION 706 ARE MERE DICTA

In 2014, the D.C. Circuit upheld the FCC's re-interpretation of Section 706. *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014). The Tenth Circuit recently reached the same conclusion. *In re FCC 11-161*, 753 F.3d 1015, 1054 (10th Cir. 2014). Both decisions are mere dicta: The D.C. Circuit had no need to expound upon the meaning of Section 706 in order to uphold the Open Internet Order's transparency rule because Verizon did not challenge that rule and, as the dissent noted, the court could have upheld that rule on much clearer statutory grounds. *Verizon*, 740 F.3d at 668, n.9 (Silberman, J. dissenting). The Tenth Circuit discussed Section 706 only as an *alternative* basis for applying Universal Service Fund subsidies to broadband. *In re FCC 11-161*, 753 F.3d at 1054.

II. THE FCC'S REINTERPRETATION OF SECTION 706 VIOLATES FUNDAMENTAL PRINCIPLES OF STATUTORY CONSTRUCTION

The FCC's reinterpretation of Section 706 violates the basic rules laid down by courts to give effect to Congress's intent.

A. The FCC Claims Authority over a Matter of Utmost "Economic and Political Significance"

The D.C. Circuit in *Verizon* said that

> we might well hesitate to conclude that Congress intended to grant the Commission substantive authority in section 706(a) if that authority would have no limiting principle. . . . But we are satisfied that the scope of authority granted to the Commission by section 706(a) is not so boundless as to compel the conclusion that Congress could never have intended the provision to set forth anything other than a general statement of policy. [*Verizon*, 740 F.3d at 639–40.]

The court concluded: "To be sure, Congress does not . . . 'hide elephants in mouseholes.' But FCC regulation of broadband providers is no elephant, and section 706(a) is no mousehole." *Id.* at 639 (quoting *Whitman*, 531 U.S. at 468). The Order on review simply recites these claims. *Order*, ¶ 138.

1. The FCC Has Claimed *Carte Blanche* to Govern the Internet

The "limits" asserted by the *Verizon* court are not limits. First, that the Commission may regulate only "interstate and foreign communication by wire and radio," 47 U.S.C. § 152(a), is a tautology: it leaves the FCC free to regulate the entire Internet.

Second, another tautology: because "[a] specific provision . . . controls one[] of more general application," *2010 Open Internet Order*, ¶¶ 118–19 (quoting *Bloate v. United States*, 559 U.S. 196, 207 (2010)), the FCC may not use Section 706 to do something forbidden by another provision of law. The *Verizon* court held that the 2010 Order had violated a provision of the Communications Act, *Verizon*, 740 F.3d at 659, but nowhere did the court

explain how the Communications Act can limit the FCC's use of Section 706 since, as the FCC itself argued, Section 706 is not part of the Communications Act. *See infra* at 24–34.

Finally, the requirement that whatever the FCC does "must be designed to [encourage broadband deployment]," *Verizon*, 740 F.3d at 640, does little, if anything, to limit the FCC's discretion.

Despite claiming to perform "searching analysis," *id.* at 640, the D.C. Circuit simply deferred to the FCC's vague "triple-cushion shot" theory, *id.* at 643–44, by which regulating broadband providers would *increase* investment in broadband. This theory is not substantiated by economic analysis. *See* Brief of *Amici* ICLE, et al., *USTA v. FCC*, No. 15-1063, at 28–32 (D.C. Cir. 2015), *available at* http://goo.gl/LDyUdX.

The FCC's vague prediction that the 2015 Open Internet Order would generate at least $100 million in annual benefits, Congressional Review Act Abstract, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, FCC 15-24 (2015), has proven wildly inaccurate: wireline broadband investment declined by 12% in the second quarter of 2015—a staggering $3.3 billion. Hal Singer, *Does the Tumble in Broadband Investment Spell Doom for the FCC's Open Internet Order?*, FORBES (Aug. 25, 2015). The only other quarters since 1996 in

which broadband investment fell were in 2001 (Dot-Com bubble collapse) and 2009 (the Great Recession). *Id*.

If the vague, "triple-cushion shot" rationale justifies the FCC's Open Internet Order, such a theory can authorize essentially *any* regulation of the Internet. Indeed, the 2015 Open Internet Order includes not only "net neutrality" regulations, but also several open-ended provisions that extend far beyond Internet "openness," including a "general conduct standard" and privacy and data-security regulations. These provisions rest in part on the "triple-cushion shot" rationale and could impose a broad range of unspecified obligations upon the *entire* Internet.

2. Congress Never Granted the FCC Such Sweeping Powers over the Internet

Congress could not have been more clear: "It is the policy of the United States . . . 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*[.]" 47 U.S.C. § 230(b)(2) (emphasis added). Lawmakers took care to specify Internet "access" service as one of the unfettered "interactive computer services." *Id.* § 230(f)(2).

Congress based its policy on legislative findings highlighting the Internet's importance as "an extraordinary advance in the availability of educational and informational resources to our citizens." *Id.* § 230(a)(1). As

Congress stressed, the "Internet and other interactive computer services have flourished, to the benefit of all Americans, *with a minimum of government regulation*." *Id.* § 230(a)(4) (emphasis added); *see also Reno v. ACLU*, 521 U.S. 844, 868–69 (1997) ("Neither before nor after [1996] have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry.").

The Internet is exponentially more significant today. The FCC Chairman routinely describes the Internet as "[t]he most powerful and pervasive network in the history of the planet." *See, e.g.*, Remarks of FCC Chairman Tom Wheeler, The Brookings Institution (June 26, 2015), *available at* https://goo.gl/MwVPK5.

The Internet's immense significance does not *support* the FCC's regulatory program—it *undermines* it. The Internet is of "such economic and political magnitude" that courts must not lightly conclude that Congress conferred broad powers over the Internet without express authorization. *Brown & Williamson*, 529 U.S. at 133. Congress made no such authorization here.

The Supreme Court's analysis in *Brown & Williamson* demonstrates the skepticism with which courts should evaluate agencies' sudden discoveries of immense, dormant powers in longstanding statutes. In reviewing an agency's attempt to expand its powers under a 1938 statute, the Court began by

observing that "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of *such economic and political magnitude*." *Id.* (emphasis added). The Court analyzed the relevant statutory language in light of the "overall statutory scheme," *id.*, and in light of Congress's longstanding legislative approach to the matter at hand (namely, tobacco regulation), *id.* at 143, not in isolation.

Just as here, Congress had stressed that the challenged regulations' subject matter had an extraordinary place in our society and economy. "A provision of the United States Code currently in force states that '[t]he marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point . . .' *Id.* at 137 (quoting 7 U.S.C. § 1311(a)). Congress's appraisal of the tobacco industry's national importance, which illuminated legislative "inten[t] to exclude tobacco products from the FDA's jurisdiction," *id.* at 142, pales compared to Congressional policy in favor of an Internet "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

3. Congress's "Consistent History of Legislation" Suggests that It Did Not Intend Broad Internet Regulation

In *Brown & Williamson*, the Court also noted that Congress had "enacted six separate pieces of legislation since 1965 addressing the problem of tobacco use and human health," but never authorized the FDA to take such drastic

action. 529 U.S. at 143. Congress rejected several bills that would have given the FDA the authority the agency later claimed. *Id.* at 146–47.

Similarly, Congress has enacted significant Internet-related legislation from the 1996 Act onward. From 2007 on, Congress considered, but did not enact, legislation that would have authorized the FCC to preempt state laws governing broadband deployment, *see, e.g.,* Community Broadband Act of 2007, S. 1853, 110th Cong. (2007), and to regulate "net neutrality," *see, e.g.*, Communications Act of 2006, H.R. 5252, 109th Cong. (2006).

The 1996 Act was but the most prominent part of a "consistent history of legislation," *cf. MCI Telecommc'ns Corp. v. AT&T Co.*, 512 U.S. 218, 233 (1994), in which Congress withheld broad regulatory authority over Internet services from the FCC—preferring, instead, to craft narrow grants of authority to address specific issues. For instance, Congress passed child-protection laws (the Communications Decency Act of 1996, the Child Online Protection Act of 1998, and the Children's Online Privacy Protection Act of 1998), and prohibited broadband taxes and discriminatory Internet-specific taxes by repeatedly extending the Internet Tax Freedom Act of 1998.

When Congress *did* pass broadband-specific legislation, it was to fund broadband deployment in rural areas, *see* Pub. L. No. 110-234, 122 Stat. 923 (2008); to promote broadband deployment by enhancing access to relevant

federal data, *see* Pub. L. No. 110-385, 122 Stat. 4096 (2008); and to have the FCC prepare *recommendations* for policymakers at all levels of government in a National Broadband Plan, Pub. L. No. 111-5, 123 Stat. 115 (2009). Nowhere did Congress grant the FCC any new powers to *govern* the Internet.

Congress's overriding goal in the 1996 Act was not onerous regulation (which the FCC's reinterpretation of Section 706 enables) or the expansion of government-owned broadband networks (the specific use of Section 706 at issue here)—but "free market" competition. 47 U.S.C. § 230(b)(2). Congress has not deviated from that goal in any subsequent legislation.

4. Congress Could Not Have Intended Section 706 to Give the FCC Broad Authority to Govern the Internet

In *Brown & Williamson*, the agency was "assert[ing] jurisdiction to regulate an industry constituting a significant portion of the American economy," 529 U.S. at 159, but without anchoring its regulatory program in clear congressional authorization to do so. "[W]e are confident," the Court concluded, "that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 160.

Section 706 is equally cryptic and the FCC's reinterpretation of it deserves equal—if not greater—skepticism. Even if an agency's policy aims are sound, the agency's good intentions are no substitute for the constitutional

requirement that the agency's policy "must always be grounded in a valid grant of authority from Congress." *Id.* at 161.

In *American Bar Association v. FTC*, 430 F.3d 457 (D.C. Cir. 2005), the court rebuffed the FTC's "attempted turf expansion" over the legal industry, based on a broad statute empowering the agency to regulate institutions that "engag[ed] in financial activities." *Id.* at 467. Even if the statute were ambiguous, the Court explained,

> [w]hen we examine a scheme of the length, detail, and intricacy of the one before us, we find it difficult to believe that Congress, by any remaining ambiguity, intended to undertake the regulation of the profession of law—a profession never before regulated by "federal functional regulators"—and never mentioned in the statute. [*Id.* at 469.]

To accept the FTC's self-aggrandizing statutory interpretation would have required the conclusion that Congress "had hidden a rather large elephant in a rather obscure mousehole." *Id.* "Such a dramatic rewriting of the statute is not mere interpretation." *Id.* at 470.

The D.C. Circuit similarly rejected the IRS's assertion of authority over tax-preparers, characterizing it as a decision "of major economic or political significance," because the agency "would be empowered for the first time to regulate hundreds of thousands of individuals in the multi-billion-dollar tax preparation industry." *Loving v. United States*, 742 F.3d 1013, 1021 (D.C. Cir.

2014). "[W]e find it rather telling that the IRS had never before maintained that it possessed this authority." *Id.*; *see also UARG*, 134 S. Ct. at 2444 ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism.") (citation omitted).

The FCC's reinterpretation of Section 706 raises the same concerns. To say that the FCC's assertion of Section 706 authority over the Internet—indeed, all "communications"—directly implicates regulation of a "significant portion of the economy" is an immense understatement. 85% of Americans rely upon the Internet every day, Thom File & Camille Ryan, U.S. Census Bureau, *Computer and Internet Use in the United States: 2013*, at 2 (Nov. 2014), *available at* http://goo.gl/usqJAk. Between 1996 and 2013, private broadband providers invested a staggering $1.3 trillion in private capital in broadband infrastructure, Patrick Brogan, U.S. Telecom, *Latest Data Show Broadband Investment Surged In 2013* (Sept. 8, 2014), *available at* http://goo.gl/Cpo9hc, making them the largest source of private investment over that timeframe, Nat'l Economic Council, *Four Years of Broadband Growth*, 5 (2013), *available at* http://goo.gl/f72B2s. These numbers do not even include the ubiquitous Internet services that run on top of America's broadband infrastructure.

The FCC's reinterpretation of Section 706 would give it essentially unfettered power to govern every aspect of the communications sector of the U.S. economy, which comprises an unquantifiable and rapidly growing amount of economic value. And it would do so based on new found authority in a longstanding statute after many years of the agency disclaiming such powers. *See Advanced Services Order*, ¶ 69. The FCC's assertion of these powers squarely contravenes Congress's express policy statement in Section 230—both its warning against regulation and its preference for "preserv[ing] the . . . free market[.]" This Court should not conclude that Congress delegated a question of such economic and political magnitude to the FCC's discretion based solely on the agency's contorted reading of a mere 182 words that are not even codified in the Communications Act.

B. Under the Whole Act Rule, Section 706 Cannot Be Read as an Independent Grant of Authority

The *Verizon* court created—and rejected, based on *Chevron* deference—a straw man: "that Congress could never have intended [Section 706] to set forth anything other than a general statement of policy." *Verizon*, 740 F.3d at 639–40. But in the context of the "whole act," the meaning of Section 706 is plain: it is a commandment that the FCC "shall" use its many *other* sources of authority for the purposes of promoting broadband deployment and competition. As Commissioner Pai noted in his dissent from the Order on

review, each of the terms used in Section 706 correlates to a specific grant of authority elsewhere in the act. *Order* at 2516.

Section 706 does not *empower* the FCC to do anything it could not have done otherwise. Instead, it forces the FCC to give great weight to the goal of encouraging broadband deployment in all its decisionmaking and it *constrains* the FCC—by allowing other parties to obtain a writ of *mandamus* from a federal court to "compel agency action unlawfully withheld or unreasonably delayed" under the Administrative Procedure Act. 5 U.S.C. § 706(1). *That* is the "fail-safe" contemplated by the 1996 Senate Committee report, upon which the FCC places so much weight, *2010 Open Internet Order*, ¶ 119, and the "affirmative obligation . . . that has substance" cited by the FCC in 1998. *Advanced Services Order*, ¶ 74.

The FCC's alternative interpretation—that this brief section gives it the authority to do anything regarding any form of "communications" that is not expressly forbidden to the agency—is the epitome of unreasonable statutory interpretation.

III. THE COURT SHOULD NOT APPLY *CHEVRON* REVIEW TO THE FCC'S ASSERTION OF IMMENSE REGULATORY POWER

The substantive question of *how* to interpret the statute is accompanied by the procedural question of *who* should interpret the statute: The Court must

decide whether Congress delegated interpretative authority to the agency to "fill in the statutory gaps," triggering *Chevron* review, or whether the Court remains obligated to interpret the law *de novo*. *See King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015).

Chevron review is inappropriate here for three reasons. First, the Court must not presume that Congress delegated to the agency interpretive authority on a question implicating such profound economic and political significance. Second, Congress deliberately placed Section 706 outside the Communications Act, and later codified it in a chapter of Title 47 that the FCC is not empowered to administer. Finally, the agency's interpretation raises significant nondelegation problems. Thus, even if Section 706 were ambiguous, the Court still should interpret it *de novo*.

A. The Court Should Not Presume that Congress Delegated this Legal Question of Immense Economic and Political Question to the FCC's Interpretative Authority

As explained above, the FCC's reinterpretation of Section 706 concerns matters of "such economic and political magnitude" that the courts must not presume that Congress authorized the agency to make policy without an explicit statutory mandate. *Brown & Williamson*, 529 U.S. at 160. The Court should therefore question not only the agency's claim of substantive regulatory powers, but also the FCC's suggestion that Congress intended the agency to

interpret the statute, and to receive deferential *Chevron* review for that interpretation.

As the Supreme Court explained recently in *Burwell*, the deferential two-step framework of *Chevron* "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." 135 S. Ct. at 2488 (quoting *Brown & Williamson*, 529 U.S. at 159). But "[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation" of interpretative authority. *Id.* at 2488–89.

In *King*, the Court held that Congress could not have intended to delegate interpretive authority to the agency by means of such ambiguous language, because the statute at issue implicated "billions of dollars in spending each year" and affected "millions of people;" Congress would have *expressly* granted authority over such significant activity if it intended to grant authority at all. *Id.* at 2489. The Court determined that no delegation was intended, that deference to the agency was inappropriate, and that the Court must interpret the ambiguity. *Id.* at 2489, 2492.

Here, too, it strains credulity to presume that Congress intended to give the FCC a blank check to govern the Internet by means of Section 706's murky language. Congress clearly views the Internet as a matter of utmost public

importance, 47 U.S.C. § 230(b), and the FCC wholeheartedly agrees, *see 2015 Open Internet Order*, ¶ 1. Internet regulation, again, implicates "billions of dollars," *id.* ¶ 76, n.115, and "hundreds of millions of consumers across the country and around the world," *id.* ¶ 5. Congress would not—indeed it could not—have conferred authority by mere implication over something so essential to the modern economy and society as the Internet, in a provision it chose not even to place in the 1934 Act, and without more detail and guidance than Section 706(a) and (b) offer. In short, this is an "extraordinary case[]" that calls for the Court to interpret the provision without deferring to the agency. *King*, 135 S. Ct. at 2488–89.

B. Section 706 Is Ineligible for *Chevron* Review Because Congress Deliberately Placed It Outside the 1934 Act

Chevron applies only when "a court reviews an agency's construction of the statute it administers." *Chevron*, at 842. Further, the agency must have "express congressional authorization . . . to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

Whenever the FCC interprets a provision of the 1934 Act, "the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the [1934] Act through rulemaking and adjudication, and the agency interpretation was

promulgated in the exercise of that authority." *City of Arlington*, 133 S. Ct. at 1874. These preconditions were *not* present when the FCC reinterpreted Section 706 in the 2010 Open Internet Order, as it is not part of the 1934 Act.

The 1934 Act is codified in Chapter 5 of Title 47 of the United States Code. 47 U.S.C. § 609. Chapter 5 has seven subchapters, or "titles," that comprise the 1934 Act. *2010 Open Internet Order*, ¶ 79, n.248. Title I created the FCC and empowered it to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this [C]hapter [5], as may be necessary in the execution of its functions." 47 U.S.C. § 154(i).

Congress inserted many, but not all, of the provisions of the 1996 Act into Chapter 5. *See* 1996 Act, § 1(b) ("[W]henever . . . an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the [1934] Act"). Some provisions of the 1996 Act amended preexisting chapters of the U.S. Code, *e.g.*, *id.*, §§ 103, 508; others were "freestanding enactment[s];" *e.g.*, *id.* §§ 307, 552, 601, 602, 708; *see also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.5 (1999). One such freestanding enactment was Section 706.

The Office of the Law Revision Counsel initially published Section 706 as a note to Section 157 of Chapter 5. *See 1999 706(b) Report*, ¶ 1, n.1. In 2008,

after Congress enacted the Broadband Data Improvement Act, Section 706 was codified at 47 U.S.C. § 1302, alongside several new broadband provisions. *See* Notice of Inquiry, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 24 FCC Rcd 10505, ¶ 1, n.1 (2009).

Congress "expressly directed" that the "local-competition provisions" of the 1996 Act be inserted into Title II of the 1934 Act. *AT&T*, 525 U.S. at 377. But Congress did not refer to Section 706 as an "amendment to, or repeal of, a section or other provision" of the 1934 Act. Nor did Congress specifically direct that Section 706 be inserted into the 1934 Act. Consequently, the FCC's rulemaking authority does not encompass Section 706.

Congress explicitly limited the FCC's rulemaking authority to prescribing "such rules and regulations as may be necessary in the public interest to carry out the provisions of [Chapter 5]." 47 U.S.C. § 201(b); *id*. § 303(r) (the FCC may make "such rules and regulations . . . , not inconsistent with law, as may be necessary to carry out the provisions of this [C]hapter [5]"). Congress plainly established the bounds of Chapter 5—that is, the 1934 Act—as marking a "clear line" circumscribing the FCC's rulemaking authority. *City of Arlington*, 133 S. Ct. at 1874. The FCC crossed that line when it claimed that Section 706 authorized the 2010 Open Internet Order. As the FCC concluded in 1998,

Advanced Services Order, ¶¶ 73–77, and reiterated in 2010, Section 706 is not part of the 1934 Act. *See 2010 Open Internet Order*, ¶ 79, n.248.

When it crafted Section 706, Congress knew that the provisions of the 1996 Act it enacted "as an amendment to, and hence a *part of*, [the 1934] Act," were subject to the FCC's authority under Section 201(b) to prescribe rules to "carry out the provisions of [the] Act." *AT&T*, 525 U.S. at 378 n.5. It also knew that the FCC's exercise of "the general grant of rulemaking authority contained within the [1934] Act" does not extend to a "freestanding enactment" such as Section 706. *Id*. By not inserting Section 706 into the 1934 Act, Congress acted deliberately, declining to empower the FCC to prescribe rules to carry out the provisions of Section 706.

This Court should apply rigorously the statutory limits that Congress explicitly placed on the FCC's rulemaking authority. *See City of Arlington*, 133 S. Ct. at 1874. In deference to Congress's "consistent judgment" to deny the FCC the authority to regulate Internet services by rulemaking, *cf. Brown & Williamson*, 529 U.S. at 160, this Court should hold that the Order is *ultra vires*.

C. Only the Court Can Remedy the Significant Nondelegation Problems Inherent in the FCC's Reinterpretation

The FCC purports to find, in the plainly deregulatory and limited language of Section 706, plenary authority to govern every aspect of the Internet. Such an extension of authority is impermissible. *See, e.g.*, *Am. Library Ass'n v.*

FCC, 406 F.3d 689, 707 (D.C. Cir. 2005) ("The [Commission's] position in this case amounts to the bare suggestion that it possesses plenary authority to act within a given area simply because Congress has endowed it with some authority to act in that area. We categorically reject that suggestion. Agencies owe their capacity to act to the delegation of authority from Congress.") (internal citation omitted).

The FCC's reinterpretation of Section 706 gives it power effectively unbounded by any "intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr., Co. v. United States*, 276 U.S. 394, 409 (1928). Accepting this reinterpretation would thus turn Section 706 into a constitutionally impermissible delegation by Congress. The "limits" cited by the D.C. Circuit in *Verizon* do not offer any "intelligible principle." *See supra* at 11–13. The "requirement" in Section 706(a) that the FCC assert a connection between its actions and broadband deployment is a vague concept that lacks the coherence necessary to constitute an "intelligible principle." The FCC makes this concept vaguer still by decoupling it from Section 706(b)'s requirement that the FCC make an official finding in an annual report as to the reasonableness or timeliness of broadband deployment. *See 2015 Open Internet Order*, ¶ 279.

Thus, to conjure the mighty powers it claims under Section 706, the FCC need only speak the talismanic words "broadband deployment"—in a rulemaking, declaratory order, or enforcement action. If ever a delegation of power were impermissible, it would be just such a delegation of plenary authority, which lacks an "intelligible principle" to provide meaningful constraint upon the agency's discretion, *see J.W. Hampton*, 276 U.S. at 409, to regulate what the Commission recognizes as the engine of the modern American economy.

Our claim is not that *Congress* impermissibly delegated legislative authority to the FCC; rather, it is that the FCC's reinterpretation of Section 706, if permitted to stand, would require such a reading of the Act, thus *turning it into* an impermissible delegation. In this sense, the nondelegation doctrine operates as a canon of avoidance. *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223 (2000). As the Supreme Court has held, the canon of avoidance requires that courts not accept such an impermissible delegation. *Clark v. Martinez*, 543 U.S. 371, 381–82 (2005) (The constitutional avoidance doctrine allows a court to "choos[e] between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.").

"When conferring decisionmaking authority upon agencies, Congress must 'lay down an intelligible principle to which the person or body authorized to act is directed to conform.'" *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton,* 276 U.S. at 409). That Congress laid down no such principle here is additional evidence that it did not intend Section 706 to be a delegation of authority.

Whether the FCC's analysis here was sufficient, whether it has articulated a sufficient methodology for weighing net effects on broadband deployment, whether it might do so in the future—are irrelevant to the constitutionality of the FCC's reinterpretation of the statute. In *Whitman v. American Trucking*, the Supreme Court stressed that proper application of the nondelegation canon "is a question for the courts, and an agency's voluntary self-denial has no bearing upon" the question of whether the statute unconstitutionally delegates legislative power to the agency by failing to sufficiently limit its discretion. 531 U.S. at 473; *see also id.* at 472 ("We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.").

Rather, as the D.C. Circuit has similarly explained, "[b]ecause the 'canon of constitutional avoidance trumps *Chevron* deference,'" the court "will not accept the Commission's interpretation of an ambiguous statutory phrase if

that interpretation raises a serious constitutional difficulty." *Rural Cellular Ass'n v. FCC*, 685 F.3d 1083, 1090 (D.C. Cir. 2012) (considering a nondelegation challenge). Deference in this case is thus inappropriate, and, confronted with the FCC's impermissible statutory interpretation, the Court must reject the FCC's construction and provide its own, constitutionally permissible one.

IV. EVEN IF SECTION 706 WERE A GRANT OF AUTHORITY, IT CANNOT BE AN ADEQUATE BASIS FOR PREEMPTION

The FCC's argument rests on a central contradiction: To claim *Chevron* deference, the FCC must assert that Section 706 is ambiguous as to whether it grants the FCC independent authority. Yet to defend the Order on federalism grounds, the FCC must argue that the statute provides a "plain statement" of Congressional intent: Specifically, even where the Constitution permits federal interference in a state's affairs, preemption is permissible only if Congress made its intention "unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). The two assertions cannot simultaneously coexist.

Before addressing this federalism question, however, the Court ought to resolve this case on the underlying question of statutory interpretation, under the doctrine of constitutional avoidance. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203–04 (2009).

CONCLUSION

In *UARG*, the Supreme Court refused "to stand on the dock and wave goodbye as EPA embark[ed] on its multiyear voyage of discovery." 134 S. Ct. at 2446. The FCC's reinterpretation of Section 706 would go still further: to explore strange new issues, to seek out new jurisdiction and new powers, to boldly go where no regulator has gone before. It disregards Congress's findings and expressly stated policy against Internet regulation—in favor of a "free market for [broadband]"—and the constrained, workable regulatory structure Congress enacted and maintained in furtherance of that legislative policy.

For the foregoing reasons, *amici* respectfully request that the Court vacate the FCC's Order.

Respectfully submitted,

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