NOT YET SCHEDULED FOR ORAL ARGUMENT

Nos. 11-1355, 11-1356, 11-1403 and 11-1404

In the

United States Court of Appeals

for the

District of Columbia Circuit

VERIZON, *et al.*

Appellants-Petitioners,

– v. –

FEDERAL COMMUNICATIONS COMMISSION, *et al.*

Appellees-Respondents.

APPEAL FROM THE FEDERAL COMMUNICATIONS COMMISSION,
NO. FCC-76FR59192

BRIEF OF *AMICI CURIAE* REED HUNDT, TYRONE BROWN, MICHAEL COPPS, NICHOLAS JOHNSON, SUSAN CRAWFORD AND THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS IN SUPPORT OF APPELLEE

SEAN H. DONAHUE
Counsel of Record
DONAHUE & GOLDBERG, LLP
2000 L Street, N.W., Suite 808
Washington, D.C. 20036
(202) 277-7085

DAVID T. GOLDBERG
DONAHUE & GOLDBERG, LLP
99 Hudson Street, 8th Floor
New York, New York 10013
(212) 334-8813

Attorneys for Amici Curiae Reed Hundt, Tyrone Brown, Michael Copps, Nicholas Johnson, Susan Crawford and The National Association of Telecommunications Officers and Advisors

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(A) Parties and Amici

The parties are listed in the Joint Brief for Verizon and MetroPCS, except that CTIA—The Wireless Association is no longer a party to this case.

The parties before the Federal Communications Commission are listed in the Joint Brief for Verizon and MetroPCS.

Amici in support of Appellant/Petitioners are Cato Institute, Competitive Enterprise Institute, Free State Foundation, TechFreedom; Commonwealth of Virginia; and the National Association of Manufacturers.

Amici in support of Appellee/Respondents are Scott Bradner, Douglas B. Comer, John Klensin, Jim Kurose, David Reed and Paul Vixie; Tim Wu; Center for Democracy & Technology, Marvin Ammori, Jack M. Balkin, Michael J. Burstein, Anjali S. Dalal, Rob Frieden, Ellen P. Goodman, David R. Johnson, Dawn C. Nunziato, David G. Post, Pamela Samuelson, Rebecca Tushnet, Barbara van Schewick, and Jonathan Weinberg; Reed Hundt, Tyrone Brown, Michael Copps, Nicholas Johnson, Susan Crawford, and the National Association of Telecommunications Officers and Advisors; Scott Bradner, Douglas B. Comer, John Klensin, Jim Kurose, David Reed and Paul Vixie.

(B) Rulings under Review

The FCC order challenged here is cited in the Joint Brief for Petitioners Verizon and MetroPCS at ii.

(C) Related Cases.

The positions of the parties concerning a potentially related case, *Cellco Partnership d/b/a Verizon Wireless v. FCC*, Nos. 11-1135, *et al*., are set out at Joint Brief of Verizon and MetroPCS at vii-viii, and Brief for Appellee/Respondents at ii.

Respectfully submitted,

Sean H. Donahue
Sean H. Donahue

January 16, 2013 (Final Brief)

RULE 26.1 STATEMENT

The National Association of Telecommunications Officers and Advisors ("NATOA") is a national trade association that promotes local government interests in communications and serves as a resource for local officials as they seek to promote communications infrastructure development. NATOA has no parent company and no publicly held company has a 10% or greater ownership interest in NATOA.

The other amici are individuals.

Respectfully submitted,

Sean H. Donahue
Sean H. Donahue

January 16, 2013 (Final Brief)

RULE 29 STATEMENTS

This brief is filed with the consent of all of the parties.

Pursuant to Fed. R. App. P. 29(c)(5), *amici* state that no party or party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person—other than the *amici* and their counsel—contributed money that was intended to fund preparing or submitting the brief.

Pursuant to D.C. Cir. Rule 29(d), amici state that a separate brief is necessary for the following reasons. Amici submit this brief based upon their extensive experience in the formulation and implementation of telecommunications policy – for four of the amici, as former FCC Commissioners; for another, as a former White House telecommunications policy advisor, and for the other amicus, as an association bringing together state and local officials and bodies with interests and expertise in telecommunications policy. As such, amici submit this brief from a different perspective from any other amicus (or party) and with a different objective – focusing less on the particular merits of the FCC regulations at issue, and instead on the distinctive harms to the policymaking process that would flow from adopting the rules of constitutional law advocated by petitioners in this case. Amici also wish to limit their participation to these

arguments, rather than a detailed discussion of the important policy issues this case presents.

Amici are aware of three other amicus briefs to be filed in support of the FCC in this case, one from a legal scholar addressing the relevant historical background; another, on behalf of a public interest organization and legal scholars concerned with internet freedom, that addresses certain First Amendment issues (though not the Takings issue); and another from a group of internet engineers and technologists. Amici understand the coverage of these briefs to be significantly different from ours, and that none of the other amicus briefs will address the institutional and separation of powers concerns that are central to our argument.

Respectfully submitted,

Sean H. Donahue
Sean H. Donahue

January 16, 2013 (Final Brief)

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GLOSSARY OF ABBREVIATIONS

DMCA	Digital Millennium Copyright Act
FCC	Federal Communications Commission
ISP	Internet Service Provider
NATOA	National Association of Telecommunications Officers and Advisors
Open Internet Rules	*In re Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 76 Fed. Reg. 59192 (Sept. 23, 2011)

Introduction and Statement of Interest

As described more fully in the Addendum, *Amici* include individuals and an organization whose members have long experience with the Nation's communications laws – administering, enforcing, and commenting upon legal frameworks that govern the mediums of information exchange and connectedness vital to modern economic, civic, and social life. *See* Add. A-1.

We submit this brief to respond to – and urge that the Court reject – the startling constitutional arguments that Verizon raises in opposition to the FCC's action here. Verizon submits that because corporations like Verizon own some of the physical facilities that transmit the electromagnetic waves which in turn carry the digitized information that composes the experience of the Internet for all users, and because much of the data that passes over Verizon's property is itself constitutionally protected Speech, (1) these network operators enjoy a "First Amendment" right to decide what shall be communicated by means of the Internet akin to a newspaper publisher's control of its editorial page and (2) that Congress presumptively may make no law that inhibits Verizon's choices, whether made to disadvantage a competitor or to suppress views Verizon disapproves.

These arguments are startling on their own terms – *Verizon* recognized in a recent submission to the FCC that the regime it urges here would be "the beginning of the end of the Net." Their premises and implications contradict public

understandings and legal rules Verizon itself has encouraged (and benefitted from) before all three branches of government. And Verizon's arguments fail as a matter of constitutional principle: that transmission enables someone else's constitutionally-protected expression does not mean that it is *itself* Speech.

But the need for this Court to reject Verizon's claims of constitutional immunity from regulation goes beyond their doctrinal unsoundness. Were Verizon's theories credited, Congress's historic power to take and authorize measures to preserve openness of communication networks would be unsettled and dramatically narrowed. However the Court rules on the challenges to the FCC's action here, it should vindicate that authority and explicitly repudiate Verizon's effort to "constitutionalize" matters, involving adjustment of complex, competing private and public interests, that have long and properly been understood to be for legislative and administrative resolution.

ARGUMENT

I. The Court Should Reject Verizon's Constitutional Claims

> *The minute that anyone, whether from the government or the private sector, starts to control how people access and use the Internet would be the beginning of the end of the Net as we know it….When a person accesses the Internet, he or she should be able to connect with any other person that he or she wants to[.]*
>
> – Google and Verizon Joint Submission on the Open Internet, submitted in GN Docket No. 09-191 (Jan. 14, 2010) ("Joint Submission") (Add. A-20)

> *You can install a driveway and get a fair return from the consumer for installing that driveway, but that does not give you the right to dictate to the household where they go on the highway.*
>
> –Testimony of William Barr, General Counsel, GTE, *Hearing on H.R. 1686 and H.R. 1685 Before the H. Comm. on the Judiciary*, 106th Cong. 20 (June 30, 1999) (Add. A-3)

A. The FCC's Rules Do Not Implicate, Let Alone Abridge, Any "Free Speech" Right of Verizon's

What Verizon not long ago described as harkening "the end of the Net as we know it" – *i.e.*, "private … control [over] how people access and use the Internet," Joint Submission at 7, its brief now posits to be a *constitutional imperative.* According to Verizon, a rule prohibiting it and others who operate the "last mile" of the Internet from blocking their customers' access to lawful content of their choice violates its First Amendment right to "control …which speech they transmit and how they transmit it," Br. 44; is "compel[led] … speech," *id.*, akin to a law directing a newspaper what to publish, *id.* at 43.

These assertions – advanced by Verizon alone among the many broadband internet access providers who, on Verizon's theory, have suffered the same "injuries" – do not state any valid or even seriously plausible constitutional claim. On the contrary, they are at odds with common sense, with settled First Amendment law, and with legal and societal understandings that Verizon has encouraged and benefitted from.

1. Verizon Is Not Speaking When It Transmits Communications Between Edge Users and Its Internet Access Customers

Verizon's Free Speech arguments rest on an undefended and mistaken premise: that because much of the data that passes over the network Verizon operates is "speech" protected by the First Amendment, *see Reno v. ACLU*, 521 U.S. 844 (1997), Verizon's act of *transmitting* it in the course of providing its customers access to the Internet is *itself* within "the Freedom of Speech." The law is otherwise: precisely because the consequences of First Amendment protection are so significant, the Supreme Court has set a threshold to guard against clever "First Amendment" claims that "trivialize the freedom" it protects. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47, 62 (2006). "The Freedom of Speech," the Court has held, encompasses only conduct that is (1) "inherently expressive," *id.* at 64 or (2) evinces "[a]n intent to convey a particularized message' . . . that 'would be understood [as such]" by its audience. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418

U.S. 405, 410–411 (1974)). *See generally* Stuart M. Benjamin, *Transmitting, Editing, and Communicating: Determining What "The Freedom of Speech" Encompasses*, 60 Duke L.J. 1673 (2011).

Thus, in *FAIR*, the Court rejected a "Free Speech" challenge to a statute requiring law schools and other recipients of federal educational aid to host military recruiters, notwithstanding the schools' disapproval of the recruiters' views about gay and lesbian students' fitness for service. *See* 547 U.S. at 63–64. The Court held that the claim failed because the conduct "compelled" was not within "the Freedom of Speech": It was not enough that the *recruiters* were communicating a message, "because *the schools* [were] *not speaking* when they host[ed] interviews and recruiting receptions" at which the military expressed itself. *Id*. at 64 (emphasis added).

Verizon's claim here – and its resumed entitlement to heightened "First Amendment" scrutiny, Br. 45-48 – likewise fails at the threshold. There is nothing inherently expressive about transmitting others' data packets, at a subscriber's direction, over the Internet. Nor does Verizon explain what particularized message (of Verizon's) such transmission would seek or likely be understood to convey.

Indeed, the law, and Verizon itself, have long recognized a sharp distinction between providing a facility whereby someone else's speech is transmitted and expression itself. The Communications Decency Act, which was enacted as part of

the same 1996 statute on which Verizon relies to attack the Open Internet Rules here, provides that "No provider … of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c). That provision, which Verizon and other internet access providers have often invoked, builds upon longstanding common law rules precluding liability for transmission of others' unlawful content. *See, e.g.*, *Doe v. GTE Corp.*, 347 F.3d 655, 656, 659, 661 (7th Cir. 2003) (affirming dismissal of case against "subsidiaries of Verizon" for hosting website that featured illegally-recorded videos, explaining that the company, "like a delivery service or phone company, is an intermediary and [not] … liable for the sponsor's deeds"); David S. Ardia, *Free Speech Savior or Shield For Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of The Communications Decency Act*, 43 Loy. L.A. L. Rev. 373, 390 (2010) (explaining historic protections for "conduit intermediaries").

This same understanding animates the "safe harbor" provisions of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512. That law, whose soundness and importance Verizon emphasized in FCC proceedings related to this one, precludes "service provider" liability "for infringement of copyright by reason of [its] transmitting, routing, or providing connections" when (among other things) "the transmission is initiated and directed by an internet user." *Id.* § 512(a); *see*

Joint Submission at 3 (urging that "any policy governing the role of online intermediaries should continue to be governed by the carefully crafted compromise in the [DMCA]").

In *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003) (*RIAA*), this Court, at Verizon's urging, overturned a DMCA subpoena seeking from Verizon – which it described as "acting as a mere conduit for the transmission of information sent by others," *id.* at 1234 – the names of customers suspected of infringing copyrights. Verizon argued there that:

> The DMCA … makes clear that Internet service providers, such as Verizon, enjoy the same immunities that have traditionally applied to other entities that provide pure "transmission" or "conduit" functions.

Br., No. 03-7015, at 23. Accord *In re Charter Communications, Inc.*, 393 F.3d 771, 777 (8th Cir. 2005) (quashing subpoena on cable internet access provider, because it was "acting as a conduit"); *cf. Cartoon Network v. CSC Holdings, Inc.*, 536 F.3d 121, 132 (2d Cir. 2008) (cable system operator did not "make" unauthorized copies of copyrighted broadcasts its equipment recorded at subscribers' direction).[1]

[1] The same logic prevails in the Fourth Amendment privacy context. *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010), rejected the government's argument that the defendant's contractual relationship with an ISP, which allowed the provider to access his email for "routine" system maintenance purposes, *id.* at 286, extinguished his privacy interests in its contents. *See id.* at 287 (describing ISP as "functional equivalent" of "post office or telephone company" and noting that right was upheld in *Katz v. United States*, 389 U.S. 347 (1967)).

As *RIAA* itself illustrates, this settled understanding does not mean that laws regulating providers cannot *implicate* Free Speech. There, Verizon sought to vindicate First Amendment rights – of its *subscribers* – to communicate anonymously. *See* Verizon *RIAA* Br. at 32-40. And other decisions have invalidated government efforts to suppress disfavored speech by imposing requirements on those who transmit it. *See, e.g.*, *Sable Communications v. FCC*, 492 U.S. 115 (1989). But the teaching of those cases is not that the act of transmitting is itself inherently expressive, but that government may not pursue constitutionally forbidden ends through indirect regulatory means. *Cf. RAV v. St. Paul*, 505 U.S. 377 (1992) (First Amendment prohibits viewpoint-based regulation of *unprotected* "fighting words").[2] Here, of course, there is no allegation of a suspect, let alone impermissible, governmental purpose. The Open Internet Rules simply forbid providers of general-purpose broadband service from using their physical control over a portion of the Internet to interfere with transmission of content their customers lawfully seek to access for themselves.

[2] Nor does it mean that Verizon is unprotected when it does speak, *e.g.*, by posting content on its website. *Cf. C&P Tel. Co. v. United States*, 42 F.3d 181, 196 (4th Cir. 1994) (holding that telephone companies "are not members of 'the press'" when transmitting telephone calls, but had speech rights in providing video programming), *vacated as moot*, 516 U.S. 415 (1996).

2. Non-Interference Is Not "Compelled Speech"

FAIR also forecloses any argument that – whether or not transmission of data at its customers' request constitutes *its* speech – a conduit's act of *refusing* transmission must be protected, because such interference might express disagreement with the content being transmitted. The Supreme Court made clear that the mandate that law schools "host" those whose speech they disapprove did not warrant any First Amendment scrutiny – because the conduct "compelled" was not itself speech.

Indeed, Verizon's claim suffers numerous additional embarrassments. Unlike the (unsuccessful) plaintiffs in *FAIR*, who sought to exclude the military from their facilities in order to express their opposition to its discriminatory policies, Verizon does not claim that it engages or intends to engage in prohibited blocking. Its legal and public policy arguments against the Rules insist that customers would rebel against such conduct. *See* Br. 51 ("broadband providers today generally provide subscribers access to all lawful [Internet] content … and have strong economic incentives to continue to do so").

And such behavior would be less likely than that in *FAIR* to be understood to convey any intelligible message. Known instances of blocking and degrading were undertaken in ways that sought to elude detection rather than to announce the network operator's "point of view." *See In re Comcast Corp*., 23 FCC Rcd 13028,

13032 & nn.22-24 (2008) (noting that Comcast had denied purposefully degrading service and had accomplished its aim by injecting "forged RST packets," which told "both ends to stop communicating"); *id*. at 13065 (Statement of Chairman Kevin J. Martin) ("Comcast was delaying subscribers' downloads and blocking their uploads.…Even worse, Comcast was hiding that fact by making affected users think there was a problem with their Internet connection or the application.").

But in any event, as *FAIR* makes clear, conduct does not become constitutionally-protected Free Speech every time it has an expressive motive. Were that the law, many tax evaders and copyright and trademark violators could not be punished, and every business's decision to not deal with another would be immunized if it could claim to be expressing some idea. (Indeed, the immunity would not be limited to communications: A railroad owner might as easily express its disapproval for one side of the abortion debate by refusing to ship adherents' coal as their pamphlets). The breadth – and deficiency – of the theory becomes more apparent in light of what Verizon implies degrading or blocking might "express": its wish to disadvantage a competitor or "disapproval" of an application unwilling to pay Verizon to prioritize data packets. *See* Br. 44. If business decisions made for business reasons were constitutionally-protected Speech, every government regulation would be a presumptively unconstitutional abridgment.

3. Verizon Enjoys No Constitutionally Protected "Discretion" to Discriminate Against Internet Communications to and from its Customers

Verizon's efforts to liken its position to that of a newspaper publisher, *see Miami Herald Pub. Co. v. Tornillo,* 418 U.S. 241 (1974), or of the cable system operator in *Turner Broadcasting v. FCC*, 512 U.S. 622 (1994), *see* Br. 43, likewise blink reality. Even leaving aside salient market differences, newspaper publishers are treated as and understood to be speakers – and responsible for the content they publish. A reader of The Miami Herald – unlike one who signs up for broadband internet access – does not expect "to be able," as Verizon told the Commission, "to connect with any other person … he or she wants to," Joint Submission at 2, or be provided with unmediated *access* to "content …as diverse as human thought." *Reno*, 524 U.S. at 870 (citation omitted). Indeed, it is because newspapers "exercise … journalistic judgment as to what shall be printed." *Tornillo*, 418 U.S. at 259, that publishers are held responsible for their contents: Unlike a "provider … of an interactive computer service," 47 U.S.C. § 230(c), a "newspaper may not defend a libel suit on the ground that the falsely defamatory statements [it published] are not its own," *Pittsburgh Press Co. v. Pittsburgh Human Relations*

Comm'n, 413 U.S. 376, 386 (1973) (citing *New York Times v. Sullivan*¸ 379 U.S. 276, 279 (1964)).[3]

No more plausible is Verizon's claim to the mantle of the cable operators who challenged the "must carry" provisions in *Turner Broadcasting*. *Turner* did not hold that every "transmission" over a cable company's wires is protected Free Speech. Rather, the Court concluded that cable system operators can "communicate messages" either through their own "original programming or by exercising editorial discretion over which stations or programs to include in [their channel] repertoire." 512 U.S. at 636 (quotation marks omitted). *Compare Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 793 (1996) (Kennedy, J.) ("In providing public access channels under their franchise

[3] *Tornillo* implicated further fundamental First Amendment principles entirely absent here: the right-of-response law challenged there was triggered by the content and viewpoint of newspapers' editorials, and the measure's obligation was itself content-based: the newspaper was compelled to publish views about a particular subject with which it disagreed. As such, the "danger" was real that the statute would "'dampe[n] the vigor and limi[t] the variety of public debate' by deterring editors from publishing in the first place controversial political statements." *PruneYard Shopping Center v. Robbins*, 447 U.S. 74, 88 (1980) (quoting *Tornillo*, 418 U.S. at 256). By contrast, the Commission's Rules are unconcerned with the viewpoint of the transmission network owners might block or degrade.

agreements, cable operators … are not exercising their own First Amendment rights. They serve as conduits for the speech of others.").[4]

Cable systems selling pay-TV programming, unlike Verizon selling general purpose internet access, provide their subscribers with access to only a small subset of potentially available programming – and do so by means of contracts with content owners seeking audiences for their material. Thus, the rules in *Midwest Video II* could be said to have "transferred control of the content of … cable channels from cable operators to [programmers] who wish to communicate by the cable medium." *FCC v. Midwest Video Corp*., 440 U.S. 689, 700 (1979). Here, "control" resides with the provider's *customers*; the "wish" of any edge provider to communicate with a Verizon subscriber has no purchase, absent a directive *from the customer* to access their material. *Accord Cartoon Network*, 536 F.3d at 132 (for Copyright purposes, subscribers, not cable system implementing their directions, "made" unauthorized recordings).[5]

[4] Contrary to Verizon's suggestion (Br. 43 n.12), *Turner* did not suggest that the conduit "function[]" is itself Speech, but noted instead that cable operators' transmissions were protected "[o]nce the[y] … selected the programming sources," 512 U.S. at 628.

[5] Nor do these user-selected applications obtain anything like a "dedicated channel" that would preclude Verizon's connecting that or any other customer to other lawful content of their choosing. The First Amendment concern that most troubled the dissenters in *Turner* was that the law specified particular speakers, local broadcasters whose programming it required be carried, notwithstanding the views and preferences of the cable systems and their customers. (Indeed, the

Indeed, briefs *Verizon* submitted to this Court and to the Supreme Court refute its central assertions here. In *NCTA v. Gulf Power*, 534 U.S. 327 (2002), Verizon explained that the statutory definitions of "cable service," *see* 47 U.S.C. §§ 522(6); 153(7), "plainly cannot encompass" "broadband internet access" – which Verizon described as a "transport service" and a "transparent conduit for content … selected by an end user and []originated by a third party." Verizon *Gulf Power* Amicus Br. at 19, 22 (Add. A-8, A-10). Congress, Verizon maintained, had ratified this Court's conclusion in *NCTA v. FCC*, 33 F.3d 66 (D.C. Cir. 1994) that "'*transmitting*' a video signal ['obviously'] implies at least choosing the signal, or originating it," *id.* at 72; Verizon explained that "once the cable operator connects customers to their ISPs, the cable operator does no selection of the information transported … Customers are in complete control of the information sent and received." Verizon *Gulf Power* Br. at 17, 21. This Court's decision, in turn, had agreed with the brief filed by Verizon's predecessor, which emphasized the fundamental distinction between "a cable television operator['s] … 'send[ing] out' programming to its subscribers, and "provid[ing[a] … platform" that merely "transport[s] (or 'carr[ies]') signals chosen and sent by multiple programmers on a

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dissenters indicated that their Free Speech objections would be obviated had the law instead treated the plaintiffs as "common carriers," giving the government no role in directing which broadcasters would benefit, *see* 512 U.S. at 684 (O'Connor, J.).

nondiscriminatory, common carriage basis," explaining that in the latter situation,"[i]t is the programmer, not the [network operator] that 'transmits' programming." Verizon *NCTA* Br. at 15 (Add. A-14-15).

Indeed, Verizon's claims here to be speaking – or exercising editorial judgment – whenever content travels without interference over its wires is fundamentally at odds with what the company is publicly understood to be doing (and what it *says* it is doing) in providing internet access. In its early 2010 FCC submission, Verizon explicitly endorsed the Commission's "existing … principles," which prohibited blocking, describing "the minute that anyone, whether from the government or the private sector, starts to control how people access and use the Internet," as "the beginning of the end of the Net as we know it," Joint Submission at 7. Indeed, if interfering with content of which network operators disapprove (or disapprove of transmitting, unless given additional revenues) were part of providing internet access, these would be the subject of promotion and competition between providers – and there would be no reason for objecting to the FCC's requirement, *see* 47 C.F.R. § 8.3, that "network management" practices be disclosed. But Verizon and others do not compete over the quality of their content-blocking policies.

Nor, finally, does the potential that Verizon might earn greater revenues if left unregulated, *see* Br. 44, state a First Amendment concern: "One liable for a

civil damages award has less money to spend on paid political announcements…, yet no one would suggest that such liability gives rise to a valid First Amendment claim.…we have not traditionally subjected every criminal and civil sanction [to scrutiny] simply because [it] …will have some effect on the First Amendment activities of those subject to sanction." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 (1986).

Accordingly, as in *FAIR*, there is simply no lawful basis here for the heightened judicial scrutiny applicable to genuine First Amendment claims – nor for resorting to canons that suspend ordinary interpretive deference in order to avoid confronting "serious" constitutional problems.

* * *

What Verizon invites is no mere "trivialization," but an *inversion* of the relevant principles. The claimed "Free Speech" right to interfere with users' internet activities, by virtue of Verizon's position operating the "last mile" of the Internet (operational contracts themselves acquired through valuable government licenses and benefits), is in derogation of "the policy of the United States" to "maximize user control over what information is received" over the Internet, 47 U.S.C. § 230(b)(2) & (3), and of the principle "[a]t the heart of the First Amendment…that each person should decide for himself or herself the ideas and

beliefs deserving of expression, consideration, and adherence." *Turner*, 512 U.S. at 641.

The "constitutional immunity" sought by Verizon here is no less misconceived than the similarly "strange" one the Supreme Court rebuffed decades ago:

> It would be strange indeed however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the [regulations], here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

Associated Press v. United States, 326 U.S. 1, 20 (1945) (footnote omitted).

B. Verizon's "Takings" Claim Is Also Meritless

Verizon's efforts to enlist the Takings Clause likewise fail. Citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), Verizon insists (Br. 49) that the Open Internet Rules be adjudged a "per se" violation, on the ground that by forbidding network operators like Verizon from blocking transmissions,

they effect a "permanent physical occupation" of their property or a deprivation of their "right to exclude."

That contention is also plainly wrong. It ignores Supreme Court precedent squarely rejecting claims that laws providing for nondiscriminatory access to business premises are Takings. *See Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 261 (1964); *PruneYard*, 447 U.S. at 84 (explaining that 'the fact that [petition solicitors] may have 'physically invaded''[the owners'] property cannot be viewed as determinative," because "the owner had not exhibited an interest in excluding all persons from his property").

For reasons explained by the Second Circuit, in refusing to extend *Loretto* to a cable system owner's "must carry" transmission of a local broadcast signal, *Cablevision Sys. Corp. v. FCC*, 570 F.3d 83, 98 (2d Cir. 2009), it is doubtful there is any physical occupation here, *see id.*, and surely not the "permanent" kind to which *Loretto*'s avowedly "very narrow," 458 U.S. at 441, rule applies. *Cf.* 17 U.S.C § 512(a) (shielding those who enable "Transitory Digital Network Communications"). Unlike even in that case, where the unwelcome local broadcaster could be described as taking up "a channel" the cable system preferred to put to different use, the supposed "occupation" of Verizon's wires is neither "absolute [nor] exclusive," 570 F.3d at 98 (quoting in *Southview Associates, Ltd. v. Bongartz,* 980 F.2d 84, 94-95 (2d Cir. 1992)). *See Loretto,* 458 U.S. at 434

(distinguishing *PruneYard* on the ground that "the invasion was temporary and limited in nature").

And this Court's decision in *Building Owners & Mgrs. Ass'n Int'l v. FCC*, 254 F.3d 89 (D.C. Cir. 2001) (*BOMA*), gives further ground for rejecting Verizon's effort to stretch *Loretto*. Considering residential landlords' challenge to FCC rules requiring them to accede to tenant requests for permission to mount satellite television receiving equipment, *BOMA* reasoned that while the *cable companies* in *Loretto* (and presumably satellite providers) were uninvited "strangers," subject to the historic right to exclude, the *tenant*-subscribers were lawful occupants, whose property interests qualified the landlords'. *See* 254 F.3d at 98; a*ccord Loretto*, 458 U.S. at 439 (observing that the law before the Court did "not purport to give the *tenant* any enforceable property rights with respect to CATV installation") (emphasis original).

That reasoning controls here: having invited its *subscribers* to use its facilities to connect to the Internet (on financial and other terms Verizon proposes), Verizon does not maintain a broad property right to refuse passage to data those subscribers choose to obtain from edge providers. Indeed, the Takings claim here is far weaker than the one *BOMA* rejected: the federal regulation upheld there overrode terms in *residential leases*, whereas these Rules implicate the FCC's core jurisdiction over "all interstate and foreign communication by wire or radio," 47

U.S.C. § 152(a); they require transmission practices Verizon says it is *already* following; they involve no physical attachment; and (unlike in *Loretto* or *BOMA*) the alleged "beneficiary" is no one particular third party.[6]

Nor can Verizon satisfy the test that does govern – for the subset of "regulatory actions" claimed to be so burdensome as to be "functionally equivalent to … oust[ing] the owner from his domain," *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 539 (2005). On Verizon's own account, the FCC's action *deprives* it (and other broadband providers) of nothing: Verizon maintains that it has *not* been engaging in the kind of conduct the Open Internet Rules prohibit, and the evidence shows a significant *upswing* in infrastructure investment by those affected since their promulgation, *see* FCC Br. at 40.

Although Verizon highlights its extensive investments, it cannot show these were induced by a constitutionally-protected "expectation" that it would enjoy untrammeled power to exclude. Unlike in *Kaiser Aetna v. United States*, 444 U.S.

[6] The decision *BOMA* principally relied on, *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987), also resonates here. The plaintiff utility owners there brought a Takings challenge to the Pole Attachments Act, 47 U.S.C. § 224, maintaining that the attachments were a "physical occupation" and that the statute deprived them of their "right to exclude" cable companies unwilling to pay their full rate, however high that rate might exceed the owners' costs. (The challengers did not have the temerity to advance a "First Amendment" claim). The Supreme Court saw the implications of accepting that argument: almost any land use regulation (and many other economic regulations) could be described as "requiring" the regulated party to forfeit a right to "exclude" those willing to do business on reasonable terms – but not the terms the business prefers. *See* 480 U.S. at 252.

164, 176 (1979), where the consequence of the property owner's investments was a radical alteration of its rights vis-à-vis the general public, Verizon's actions (including its investments) in the wireless spectrum occur with the explicit understanding that *the United States* "maintain[s]… control … over all the channels of radio transmission," 47 U.S.C. § 301, and that the FCC has power, *inter alia*, to impose new conditions on existing licenses, *id*. § 316.

Any "expectation" by *wireline* internet access providers that they would be free to block could only date to 2005, when the Supreme Court decided *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, and the FCC issued its deregulatory *Wireline Broadband Order*, 20 FCC Rcd 14853 (2005). But *Brand X* highlighted the Commission's power to reverse course in the future, 545 U.S. at 981 (as well as its "freed[om]" to regulate under its "Title I" jurisdiction, *id*. at 996) and the Order was issued the same day as the *Internet Policy Statement*, 20 FCC Rcd 14986 (2005), which confirmed consumers' right to "access the lawful Internet content of their choice" and to "run applications and use services of their choice," *Id*. at 14987-14988. *See* Joint Submission at 7 (endorsing these "existing … principles"). Verizon's only real claim is that it is being "deprived" of hoped-for future revenues. But "[n]o person has a vested interest in any rule of law, entitling

him to insist that it shall remain unchanged for his benefit." *New York Cent. R.R. v. White*, 243 U.S. 188, 198 (1917).[7]

Finally, if there were any "Taking" here – itself a radical and unserious proposition – it would not be an *uncompensated* one. Verizon can and does collect revenues from its internet access subscribers, who cause any less-welcome applications or content to travel over Verizon's wires. Indeed, the Rules make explicit that providers may charge fees based on the *amount* of bandwidth they use, Order ¶72, and impose no limit on those fees.

II. The Court Should Reject, Not Postpone Decision of, the Constitutional Claims and Affirm Congress's Authority to Enact Communications Law

A. Verizon's Arguments Would Create a Sweeping Immunity To Forms of Regulation Long Recognized as Constitutionally Unproblematic

Verizon's efforts to transmogrify qualified property interests into categorical "Free Speech" rights warrant rejection not only because they are doctrinally wrong, but also because they disregard and threaten to disrupt settled understandings of Congress's power to regulate (and authorize regulation) in this

[7] Basic features of the Internet medium make Verizon's claim especially untenable. Unlike with communication using earlier technologies, Verizon does not provide all the inputs or even the physical infrastructure used in an internet communication; other facilities and much open-source software are required, and Verizon's customers pay it for access to a broad realm of services, functions, and information that Verizon does not generate, own or control.

field. Verizon's claims – that a network operator's transmission of its customers' communication is its speech and therefore potentially "compelled" speech (or a "per se" Taking) and that simple nondiscrimination obligations are presumptively unconstitutional incursions on its "editorial discretion" – draw into question historic pillars of communications law, as well as more recent innovations, and they would place beyond legislative and administrative resolution complex matters that have been, and should be, addressed through study, the application of accumulated expertise, and open deliberation.

Because this sort of distortion is especially serious in a field whose "dominant characteristic" remains "the rapid pace of its unfolding," *National Broadcasting Co. v. United States,* 319 U.S. 190, 219 (1943), it is important that Verizon's errors here be explicitly rejected, and Congress's "constitutional authority and … institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by … new technology," *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984), vindicated.

Beginning with its first regulation of telephone and telegraph network operators as "common carriers," Congress has, in the interests of promoting competition, protecting the people who use networks to communicate, and safeguarding their access to a multiplicity of voices, exercised its jurisdiction under the Commerce Clause to impose (and authorize the FCC to impose) access and

nondiscrimination requirements much *more* far-reaching than the modest ones at issue here. There is nothing in the First Amendment theories Verizon presents here that would exclude these measures from invalidation. If transmission of data to which any network facility operator objects (or on terms the facility owner would prefer not to accept) is "compelled speech," then so too would be Congress's and the FCC's longstanding requirements that Verizon and other telephone companies route calls between those whose views Verizon disapproves (*e.g.*, between business competitors or unions organizing Verizon workers) or at "reasonable" rates lower than Verizon might otherwise charge.

To be sure, Congress and the FCC have, over time, moved away from imposing the all-encompassing regulation associated with the historic "common carrier" model, but such decisions have been rooted in judgments of policy, not dawning doubts as to constitutional *authority*, let alone "First Amendment" limitations of the sort Verizon proposes. *See* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 Colum. L. Rev. 1323 (1998). Indeed, measures and strategies that Congress and the Commission have increasingly adopted in place of full common carrier regulation would themselves be subject to the same "constitutional" objections.

The Telecommunications Act of 1996, for example, required incumbent local exchange carriers to provide access to elements of their local networks to

competitors at unbundled, regulated rates, *see* 47 U.S.C. § 251(c)(3). Although these complex provisions provoked ample litigation (including constitutional claims), no court perceived that obligations to permit another party's calls to pass over an incumbent phone company's lines as raising any plausible "compelled speech" concern.

As noted above, Congress enacted legislation requiring power companies to open their utility poles to cable companies on reasonable terms – a right later extended to wireless carriers like Verizon (and MetroPCS), *see Gulf Power*, 534 U.S. at 340. That law responded to utilities' history of using their control over facilities "essential" to cable and wireless service to extract artificially high rents. *Id.*at 330. *See also* Amicus Br., Wireless Communications Ass'n, Int'l, in No. 00-832 at 9 ("Just as with wireline carriers, … providers of wireless services … depend upon access to the utilities' poles, ducts, conduits, and rights-of-way to provide the congressionally-desired competition."). Although the utilities mounted and lost a Takings challenge, they did not claim that limiting their right to set prices impinged on "editorial discretion."

Congress also gave cable system operators (and later satellite ones) a statutory copyright license, *see* 17 U.S.C. §§ 111(c), 119, allowing them to transmit copyrighted programming (notwithstanding the originator's "constitutional" right not to speak, *cf. CBS Broad., Inc. v. EchoStar*

Communications Corp., 265 F.3d 1193, 1208 (11th Cir. 2001) (rejecting as "wholly without merit" satellite provider's claim that First Amendment entitled it to a *broader* license), and, as noted, satellite customers were given the right to install receiving equipment over their landlords' objections. *See BOMA*, 254 F.3d 89.

More recently, smaller wireless providers such as appellant Metro/PCS have persuaded the FCC to mandate interconnection through "roaming" requirements, so that first voice transmissions and, more recently, data ones, will be handled whenever a customer travels outside his provider's service area. *See* 22 FCC Rcd 15817 (2007); 26 FCC Rcd 5411 (2011). *See also* Verizon Br. 1 (noting MetroPCS's disavowal of Verizon's takings and common carriage arguments).

Decisions whether to impose these and other access and nondiscrimination obligations – up to and including common carrier ones – have reflected difficult predictive judgments about the extent of competition and the magnitude and imminence of threats; competing economic interests and expectations of regulated parties; and disagreement over the importance of particular public values and how these should be advanced. And incumbents have, unsurprisingly, maintained that regulatory measures were not needed or counterproductive. So, too here: some commentators, members of the Commission, and legislators have argued that even the modest Open Internet requirements are unwise or premature; others, including

some *Amici*, have favored applying some – or all – of the "common carrier" duties to broadband internet access providers, highlighting both similarities to industries and technologies historically so regulated as well as characteristics specific to the Internet that make openness especially important. *See, e.g.*, Susan P. Crawford, *Transporting Communications*, 89 B.U. L. Rev. 871, 877–886 (2009),

But debates about the wisdom of particular policies for particular communications media have properly been conducted on their merits, free of Verizon's distorting premise here: that the *First Amendment* imposes stringent limits on Congress's power to authorize access, nondiscrimination, or even full common carrier duties – or that "common carrier" regulation is, as a *constitutional* matter, limited to the monopolies or, even more narrowly, to the historic Bell System monopoly.[8]

Indeed, the costs of constitutionalizing policy questions like those here would be far-reaching: The "strict scrutiny" Verizon briefly advocates (Br. 45 & n.13) entails reviewing every enactment with a presumption of unconstitutionality, and the ostensibly "modest" "avoidance" canon, Br. 41, authorizes courts to reject legislatively-intended constructions of statutes in favor of minimally plausible

[8] While mature threats to competition can be important reasons for imposing antidiscrimination or equal access obligations, they are not constitutionally-required prerequisites. *See, e.g.*, *Heart of Atlanta Motel*, 379 U.S. at 257-58.

ones, and strips administrative bodies of the deference to which they are normally entitled by virtue of expertise and their place in the Constitution's lawmaking process.

B. Verizon's Position Here Contradicts Its Own Repeated Arguments Before Congress, the Courts and the FCC.

The extent of the departure from long-accepted understandings Verizon invites can be seen by contrasting the contentions in Verizon's brief here with specific ones it (and corporate predecessors) advanced – in a many-year effort to persuade courts that Congress *had* imposed common carrier obligations on cable internet access providers, and to persuade Congress to enact legislation imposing those duties unequivocally, denying the FCC any authority to forbear.

Far from seeing any constitutional limitation on Congress's power, William Barr, General Counsel of Verizon's predecessor, GTE, emphasized in congressional testimony that the "choice" to impose common carrier duties was one that could (and should *"be made"*) by Congress. *See* Add. A-2. While recognizing that "[h]igh-speed Internet access will become the most important communications medium in the country," his testimony emphasized that "the fundamental issue" facing Congress was the same as "for all telecommunications[:] how to allow the consumer to communicate with and obtain information from anyone anywhere in the world," and that the threats to that objective likewise were familiar. Summoning "bitter experience over the twentieth

century," when "large corporations came to leverage [their control over] …a large percentage of the local pipelines into the home" to "forc[e] the consumer to do business only with companies affiliated with the owner of the pipeline," he described cable companies' practices of providing "a lower-quality connection" and "limit[ing] video streaming over the Internet" as "discrimination pure and simple" and impermissibly "insulat[ing] their own television product from competition." Add.. A-2-4.

The necessary response, Verizon told Congress, was to apply "central tenet of ... telecommunications [regulation]" and impose "a simple legal mandate that cable operators deliver traffic on an open and nondiscriminatory basis to other ISPs." Add., A-3. This "open access" common carrier treatment, his testimony continued (*id*.):

> is not regulation of the Internet, as some opponents suggest, but simply ensures access to the Internet and Internet interconnection to guarantee competition on the Internet and freedom of choice for the consumer…
>
> The right to install a driveway and get a fair return from the consumer for installing that driveway, but that does not give you the right to dictate to the household where they go on the highway.[9]

[9] Mr. Barr's successor, Thomas J. Tauke, testified in favor of the same measures the following year, announcing that the need for "congressional action [had become] even more urgent." H. Jud. Comm. Hearing (June 28, 2000). Add. A-5.

During that same time period, Verizon sought, repeatedly, to persuade the Commission and the courts that Congress had *already* required common carrier treatment. Its Supreme Court amicus brief in *Gulf Power* explained that:

These reversals call to mind a recent submission in which Verizon, urging the Commission not to reverse course on its classification of broadband internet service, warned the FCC of courts' antipathy to instances "'[w]here a party assumes a certain position in a legal proceeding, . . . succeeds in maintaining that position, . . . [and then,] simply because his interests have changed, assume[s] a contrary position." Comments, Dkt. GN 10-127 at 39 (citations omitted) (Add. A-23-24). But we do not invoke such reversals (as Verizon did) in service of a plea for judicial estoppel. On the contrary, we believe it would be far preferable that the Court consider – and reject – Verizon's claims on their merits and find it unsurprising (and not necessarily unsavory) that an enterprise that aggressively sought access and nondiscrimination obligations when a market outsider would, having become a dominant insider, take a different stance. But this record of dramatic reversals *does* reinforce the need to guard against – and actively

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> cable modem service "consists of two elements: a 'pipeline' … and the Internet service transmitted through that pipeline." To the extent that a cable operator makes available the service of an affiliated or exclusive ISP, its activities are that of an information service. However, to the extent that a cable operator provides its "subscribers Internet transmission over [a] cable broadband facility," it is "providing a telecommunications service as defined in the Communications Act."

Br. at 22-23 (quoting *AT&T v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000)). (Add. A-7).

discourage – efforts to cloak matters of policy and economic interest in "constitutional" garb.

CONCLUSION

The Court should expressly repudiate Verizon's baseless constitutional claims.

Respectfully submitted,

/s/ Sean H. Donahue

David T. Goldberg
Donahue & Goldberg, LLP
99 Hudson St., 8th Floor
New York, NY 10013
(212) 334-8813

Sean H. Donahue
Donahue & Goldberg, LLP
2000 L St., N.W., Suite 808
Washington, D.C. 20036
(202) 277-7085
sean@donahuegoldberg.com

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