

Amicus brief of Law & Economics Scholars, TechFreedom, ICLE & CEI, State of Tennessee,
et al. v. FCC, 6th Circuit

September 25, 2015

[Geoffrey A. Manne](#) and [Berin Szoka](#)

Summary

“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 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.”)...

[View Article](#)