ORAL ARGUMENT SCHEDULED FOR FEBRUARY 1, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 18-1051
(and consolidated cases)

MOZILLA CORPORATION, et al.

Petitioners,

- *v.* -

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

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

BRIEF OF *AMICI CURIAE* THE INTERNATIONAL CENTER FOR LAW AND ECONOMICS AND PARTICIPATING SCHOLARS IN SUPPORT OF RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *amici curiae* certify as follows:

Parties and Amici. Except for the following, all parties, intervenors, and amici are listed in Brief for Respondents.

Additional parties have filed a notice of intent to participate as *amici curiae* supporting Respondents, including: Phoenix Center for Advanced Legal and Economic Public Policy Studies; Roslyn Layton; Multicultural Media, Telecom and Internet Council; National Association of Manufacturers, the Chamber of Commerce of the United States of America, the Business Roundtable, and the Telecommunications Industry Association; Technology Policy Institute; Richard Bennett, John Day, Tom Evslin, Shane Tews, and Martin Geddes.

Rulings Under Review. Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018) (JA___) (*Order*).

Related Cases. This case has not previously been before this Court or any other court. In the *Order*, the Federal Communications Commission rescinded the service classifications and rules that this Court upheld in *United States Telecom Association v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (*USTA*), *pets. for reh'g en banc denied*, 855 F.3d 381 (D.C. Cir. 2017), *pets. for cert. pending*. Seven petitions for *certiorari* seeking review of the *USTA* decision are now pending before the Supreme Court. *See Berninger v. FCC*, No. 17-498; *AT&T v. FCC*, No. 17-499;

Am. Cable Ass'n v. FCC, No. 17-500; *CTIA—The Wireless Ass'n v. FCC*, No. 17-501; *NCTA—The Internet & TV Ass'n v. FCC*, 17-502; *TechFreedom v. FCC*, No. 17-503; and *United States Telecom Ass'n v. FCC*, No. 17-504. The United States has also filed suit in federal court seeking to enjoin a recently-enacted California Internet regulation law on the ground that it is preempted by the *Order*. *United States v. California*, No. 2:18-CV-02660 (E.D. Cal. filed Sept. 30, 2018).

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GLOSSARY

1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)
BIAS	Broadband Internet Access Service
CDN	Content Delivery Network
DOJ	Department of Justice
FTC	Federal Trade Commission
Gov't Pet'rs Br.	Brief for Government Petitioners
ISP	Internet Service Provider
Non-Gov't Pet'rs Br.	Joint Brief for Petitioners Mozilla Corporation, Vimeo, Inc., Public Knowledge, Open Technology Institute, National Hispanic Media Coalition, NTCH, Inc., Benton Foundation, Free Press, Coalition for Internet Openness, Etsy, Inc., Ad Hoc Telecom Users Committee, Center for Democracy and Technology, and INCOMPAS
Open Internet Order	*Protecting and Preserving the Open Internet*, Report and Order, 25 FCC Rcd. 17905 (2010)
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STATEMENT OF INTEREST

Amici curiae, the International Center for Law and Economics ("Center") promotes the use of evidence-based methodologies for developing economically grounded policies that enable businesses and innovation to flourish.[1] Participating scholars are scholars, researchers and teachers of antitrust and/or telecommunications law and economics. The Center and Participating Scholars have particular expertise in legal, economic, and policy issues involving the Internet. The Center and Participating Scholars have been involved in the ongoing net neutrality policy debate virtually throughout its existence, and collectively have filed comments and legal briefs at nearly every stage of the relevant proceedings. In the Restoring Internet Freedom Order (*Order*), the Federal Communications Commission (Commission) chose a competition-oriented approach to ensure that Internet Service Providers (ISPs) do not interfere with consumers' access to content over the Internet. *Amici* believe that this competition-oriented regulatory scheme is consistent with congressional intent and better tailored to protect against the potential competitive harms than the *ex ante*, prescriptive rules adopted in the 2015 Open Internet Order. *See Protecting and Promoting the Open Internet*,

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[1]No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to fund the preparation or submission of this brief. The parties have consented to the filing of this amici brief.

Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015) (*Title II Order*). Far from disavowing its regulatory responsibility, as Petitioners wrongly assert, the Commission has restored an effective method of regulation that is evidence-based, well-grounded in proven economic policy, and consistent with the Commission's historical approach to oversight of the Internet. *Amici*'s brief draws on the Center's expertise in highlighting why the *Order* will adequately protect access to the Internet in an efficient manner that allows for greater investment and innovation to the benefit of consumers.

PERTINENT STATUTES

All applicable statues are contained in the Statutory Addendum of Brief for Respondents Federal Communications Commission and United States of America.

I. INTRODUCTION

Contrary to the claims of Petitioners, the Commission acted well within its authority in adopting the *Order*. The Commission developed a comprehensive regulatory scheme for ISPs that includes both obligations imposed under the Communications Act, as well as complementary regulation and potential enforcement under antitrust law by the Commission's sister agencies. As we show below, this competition-oriented, light touch regulatory regime comports with the relevant provisions and stated goals of the Communications Act far better than the *ex ante* rules adopted in the *Title II Order*.

In adopting this competition-oriented regulatory regime, the Commission also acted within its authority to preempt contradictory state laws under well-established precedent. The Commission did so while properly allowing for states to continue to regulate under other laws of general applicability that do not conflict with or frustrate the federal policies underlying the *Order*.

Accordingly, the *Order* should be upheld and the petitions for review should be denied.

II. THE COMMISSION DID NOT ACT ARBITRARILY AND CAPRICIOUSLY IN ENACTING A COMPETITION-ORIENTED REGULATORY SCHEME

In challenging the *Order*'s determination to return to a competition-oriented regulatory scheme, and to rescind the prior Commission's heavy-handed approach, Petitioners wrongly assert that the Commission has "disavow[ed] any responsibility for guarding against . . . harms, repealing every open Internet conduct rule, eliminating the classification that made those rules possible, and disclaiming other potential sources of authority." Non-Gov't Pet'rs Br. at 51. In fact, the Commission did not abandon its responsibilities. The Commission reasonably concluded that ensuring ISPs do not interfere with consumers' access to content over the Internet is best effected by adopting a competition-oriented approach. Not only is this a permissible exercise of the agency's discretion, it is consistent with the Commission's historical deregulatory approach to information

services, including in the *Open Internet Order*. *See Preserving the Open Internet*, Report and Order, 25 FCC Rcd. 17905 (2010) (*Open Internet Order*).

The *Title II Order* departed from the Commission's historical approach, adopting instead prescriptive, *ex ante* rules to protect consumer access to the Internet. Notably, however, the *Title II Order* itself framed its analysis almost exclusively in competition-focused terminology and legal theories. The *Order* here applies many of the same competition and legal principles using an evidence-based approach that reasonably evaluates the risk of the same harms and reaches a different conclusion on how best to address them. Far from radically departing from these regulatory aims, the *Order* adopts an approach to them that aligns with congressional intent and will foster more competition and innovation, and by extension, greater availability of BIAS for consumers. Fundamentally, Petitioners simply disapprove of the Commission's regulatory and policy judgments.

A. A different assessment of risk is not a disavowal of the existence of all risk

To be sure, there is a fundamental difference between the approach taken by the *Title II Order* and that adopted in the *Order*. This difference lies in the current Commission's assessment of the risk of harmful conduct by ISPs, and not in a disavowal of such risk, as Petitioners wrongly suggest.

The *Title II Order* was premised on the theory that because ISPs have *any* incentive and ability to engage in problematic conduct, they thus *will* very likely

engage in that conduct. The Commission then used this assumption to justify strong *ex ante* regulation to curtail such expected conduct.

In the *Order* here, rather than simply presuming harm, the Commission undertook an extensive, thorough, and fact-based analysis to first assess the likely *risk* of harm. *Order* ¶¶ 109-139 (JA___-___). Based on this analysis, the Commission then concluded that the risk of harmful conduct is low, in terms of both the likelihood that ISPs will engage in such conduct and its potential adverse effects on consumers. Because this risk is low, the Commission reasonably determined that a "light-touch" (here meaning *ex post*, competition-oriented) regulatory approach is preferable to the *ex ante* prescriptive rules adopted in the *Title II Order*.

In *Amici*'s view, the *Order* reflects the kind of evidence-based, economically grounded approach to rulemaking that expert agencies should—and are best-suited to—make in adopting regulations. Petitioners wrongly disregard the careful assessments underlying the *Order* and instead attempt to portray the Commission as abandoning "any responsibility for guarding against" broadband providers' "incentive and capability to interfere with their customers' access to the Internet." Non-Gov't Pet'rs Br. at 51. Yet the existence of *some* "incentive and ability" to interfere is manifestly not the same thing as actual interference; thus, the Commission properly examined the *risk* of interference. Concluding that the *Title*

II Order was an excessive and costly mechanism for regulating risk is not a "disavow[al]" of risk nor of the "responsibility for guarding against it." It is merely a different, *fact-based assessment* of the risks and costs associated with potential ISP misconduct, as well as the concomitant best ways to address those risks and costs.

In short, the Commission acted within its discretion to revisit the assumptions underlying the *Title II Order* and to assess the likelihood of ISP interference with consumer access to the Internet actually occurring, the extent of harm it may cause, and the potential costs and effectiveness of different regulatory mechanisms for protecting against such risks. Having concluded based on the record that the *Title II Order* was an ineffective means to achieve these regulatory aims, the Commission fulfilled its regulatory responsibilities by adopting a different, competition-based approach that comports with the policies established by Congress in the 1996 Act.

B. The Commission properly implemented an antitrust-focused framework for regulation and enforcement designed to protect against harm to competition

More specifically, rather than using "*ex ante* rules and command-and-control government regulation," *Order* ¶ 149 (JA__), the Commission adopted an *ex post* regulatory approach that reflects well-established competition law principles and is commensurate with the *Order*'s assessment of the degree of risk and extent of

harm associated with ISP misconduct, while also mitigating against the risk that over-regulation like that adopted in the *Title II Order* would continue to harm consumers by curtailing pro-competitive ISP activity.

As the Commission observed, "[t]he Communications Act includes an antitrust savings clause, so the antitrust laws apply with equal vigor to entities regulated by the Commission." *Id.* ¶ 143 (JA__). Recognizing this, the Commission carefully structured the *Order* so that consumers would be protected under existing consumer protection and antitrust laws, while still leaving room for the historically applied light-touch regime for information services under Title I.

In so doing, the Commission struck the proper balance between indirect antitrust enforcement and direct regulation under the Communications Act, which incorporates competition policy as the generally applicable regulatory "default" in the absence of specific statutory mandates. As Justice Breyer has observed, "[r]egulation is viewed as a substitute for competition, to be used only as a weapon of last resort—as a heroic cure reserved for a serious disease." Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 Cal. L. Rev. 1005, 1007 (1987).

Of course, the Communications Act does not speak directly to "net neutrality" harms. But to the extent the Act permits the Commission to regulate in this area, it does so largely by requiring the agency to choose between Title I and

Title II classifications, reserving Title II for circumstances where the Commission determines that the risk of harm from providers is sufficiently great that *ex ante*, prescriptive regulation is appropriate—"as a heroic cure reserved for a serious disease." *Id.*

Within this statutory framework, the decision of how best to incorporate competition policy into its regulatory regime is within the purview of the Commission. As this Court has instructed:

> "[T]he basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same . . . ." *Northern Natural Gas Co. v. FCC*, 399 F.2d at 959 . . . . But the agencies are not "strictly bound by the dictates of (the antitrust) laws," *id.* at 961; rather, they are entrusted with the responsibility to determine when and to what extent the public interest would be served by competition in the industry. . . . As the Supreme Court has said, resolution of the sometimes-conflicting public interest considerations "is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the . . . industry. Congress left that task to the Commission . . . ." *McLean Trucking Co. v. United States*, 321 U.S. at 87.

United States v. FCC, 652 F.2d 72, 88 (1980).

When Title II's common carrier classification is applied to a telecommunications provider, the Act substantially displaces the antitrust laws' fact-specific, *ex post* assessment of competitive effect and replaces it with an *ex ante* regime that prescribes (and proscribes) conduct. By contrast, when Title I's classification is applied to an information services provider, the Commission has greater latitude to design a regulatory regime. This may properly include

consideration of the antitrust laws and their enforcing agencies, among other approaches.

Here, the Commission has made the case for restoring the classification of broadband as an information service under Title I. Having done so, the Commission's reliance on its transparency rule, coupled with the antitrust laws and their enforcement by the FTC and DOJ, as well as state attorneys general, to deter ISP misconduct and to protect consumer access to the Internet is consistent with the Commission's statutory mandate under the Communications Act, the deregulatory policies established by Congress in the 1996 Act, and the agency's past practice.

C. The Commission's regulatory aims for net neutrality have always been focused on competitive harms

The Commission's prior efforts to promote net neutrality overlap substantially, if not entirely, with concerns over ISPs engaging in anticompetitive conduct. In the *Order*, the Commission specifically noted that this was a necessary logical justification for its previous order, observing that: "The premise of Title II and other public utility regulation is that ISPs can exercise market power sufficient to substantially distort economic efficiency and harm end users." *Order* ¶ 123 (JA__). *See also* Joshua D. Wright & Thomas W. Hazlett, *The Effect of Regulation on Broadband Markets: Evaluating the Empirical Evidence in the FCC's 2015 "Open Internet" Order*, 50 REV. INDUS. ORG. 487, 489 (2017)

(Network neutrality rules address conduct that "[i]f undertaken for anti-competitive purpose and achieving anti-competitive effect, [] would be deemed vertical foreclosure in economics (or under antitrust law)."). *See also Title II Order* ¶ 79 & n.123 (discussing past instances of alleged ISP misconduct that amounted to "limit[ations on] openness," all of which were cognizable under the antitrust laws) (citing *Open Internet Order* ¶¶ 20-37).

In the *Title II Order*, the Commission acknowledged that "[c]ommitment to robust competition and open networks defined Commission policy at the outset of the digital revolution," *id.* ¶ 63, and that "[t]he principles of open access, competition, and consumer choice embodied in *Carterfone* and the *Computer Inquires* have continued to guide Commission policy in the Internet era," *id.* ¶ 64. Likewise, the Commission explicitly acknowledged in the *Title II Order* that its asserted authority under Section 706 was based, at least in part, on a mandate to promote competition. *Id.* ¶ 275. Most telling, in a section titled "Competitive Effects" the Commission noted that

> As the Commission has found previously, broadband providers have incentives to interfere with and disadvantage the operation of third-party Internet-based services that compete with the providers' own services. Practices that have anti-competitive effects in the market for applications, services, content, or devices would likely unreasonably interfere with or unreasonably disadvantage edge providers' ability to reach consumers in ways that would have a dampening effect on innovation, interrupting the virtuous cycle. As such, these anticompetitive practices are likely to harm consumers' and edge

> providers' ability to use broadband Internet access service to reach one another . . . .

Id. ¶ 140.

Thus, as the Commission itself acknowledged in the *Title II Order*, competition and, by implication, anticompetitive behavior of ISPs, is a core concern that drove development of Internet policy at the Commission.

Yet, in just a single footnote of the *Title II Order*, and without any meaningful analysis, the Commission acknowledged, but then dismissed, the idea that antitrust or other existing competition laws had any role to play in policing what are largely textbook antitrust concerns. *See id.* ¶ 104 & n.237. By contrast, the *Order* here devotes over nine pages to a thorough examination of how existing consumer protection and antitrust laws would more appropriately address the protections sought by proponents of net neutrality laws, without harming consumers by disrupting investment and innovation in broadband services. *See Order* ¶¶ 140-154 (JA___-___).

D. The potential net neutrality harms raised by Petitioners are competition concerns that are properly addressed by *ex post* competition laws and policy

The potential net neutrality harms that the prior Commission's open Internet orders, and the Petitioners, have identified are largely derived from vertical foreclosure theory. Namely, the classic antitrust concern that dominant firms in a vertical supply chain may foreclose competitors from access to consumers or

extract supracompetitive prices from input providers. *See* Patrick Rey & Jean Tirole, *A Primer on Foreclosure*, in III HANDBOOK OF INDUS. ORG. 2145 (Mark Armstrong & Rob Porter eds., 2007). The Non-Government Petitioners' Brief cites to the potential harms identified in the Commission's *Open Internet Order* as examples of the need for net neutrality regulation. Non-Gov't Pet'rs Br. at 61. Specifically, the *Open Internet Order* described "three types of incentives [for ISPs] to reduce the current openness of the Internet:" (1) "benefit[ing their] own or affiliated offerings at the expense of unaffiliated offerings," *Open Internet Order* ¶ 21; (2) "charging edge providers . . . for access or prioritized access to end users," *id.* ¶ 24; and (3) "degrad[ing] or declin[ing] to increase the quality of the service they provide to non-prioritized traffic," *id.* ¶ 29.

Each of these examples of potential ISP misconduct raises straightforward antitrust concerns with vertical conduct, squarely within the purview of antitrust law. *See* Rey & Tirole, *A Primer on Foreclosure*, *supra*. Importantly, antitrust enforcers and courts—following antitrust economists—assess these vertical restraints under the rule of reason, avoiding their presumptive condemnation because they only rarely result in actual anticompetitive harm. *See* Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629 (2007) (documenting the economic evidence

showing that such vertical relationships are more likely to be competitively beneficial or benign than to raise serious threats of foreclosure).

It is thus appropriate that the Commission does not specify in the *Order* precisely when such ISP conduct may be problematic. Petitioners assert that "one searches in vain for a straight answer to whether the FCC believes that all blocking or throttling should be prohibited by law and, if not, when blocking and throttling can be tolerated without unduly interfering with broadband deployment," Non-Gov't Pet'rs Br. at 53, and that "the FCC never asks whether the undesirable conduct would be reached by the hodge-podge of antitrust and consumer laws it contemplates," *id.* But this complaint is incoherent. By design, our antitrust and consumer protection laws nearly always operate *ex post*. The effects of potentially harmful conduct are typically evaluated and weighed against the various aims that competition law seeks to promote; only following that review is it determined whether particular conduct is harmful and, if so, whether there are procompetitive benefits that outweigh the harm.

In fact, only a few types of conduct are presumptively condemned, and then only when experience has demonstrated that they are more-often-than-not harmful. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886-87 (2007) (holding that the *per se* rule should be applied "only after courts have had considerable experience with the type of restraint at issue" and "only if courts can

predict with confidence that [the restraint] would be invalidated in all or almost all instances under the rule of reason" because it "'lack[s] . . . any redeeming virtue.'" (citation omitted)). Vertical restraints are never evaluated under this *per se* standard. *See* D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason, and Per Se Legality*, 79 ANTITRUST L.J. 1003, 1004 (2014) ("[T]he shift in the antitrust rules applied to [vertical restraints] has not been from per se illegality to the rule of reason, but has been a more dramatic shift from per se illegality to presumptive legality under the rule of reason."). Having properly adopted a competition framework for assessing conduct that might threaten "Internet openness," it is entirely appropriate for the Commission also to conclude that such conduct should not be presumptively condemned, as the *Title II Order* prescribed.

E. The Commission's *ex post* regime is an economically appropriate way to regulate conduct like paid prioritization

Indeed, the *Title II Order* proscribed *ex ante* ISP conduct that has been proven to provide consumer benefits. This reinforces the reasonableness of the Commission's determination to adopt a regulatory approach that provides for a case-by-case evaluation of such conduct under the rule of reason. In particular, the Commission determined that "eliminating the ban on paid prioritization will help spur innovation and experimentation, encourage network investment, and better allocate the costs of infrastructure, likely benefiting consumers and competition."

Order ¶ 253 (JA__). The Commission's defense of its conclusion is thorough and well-supported by the economic literature, *id.* ¶¶ 254-262 (JA___-___). By contrast, Petitioners' assertion that the Commission's "justifications do not withstand APA scrutiny," Non-Gov't Pet'rs Br at 51, is completely at odds with the economic reality of such conduct, *see* Policy Comments of the International Center for Law & Economics, WC Docket No. 17-108, at 38-66 (July 17, 2017) (discussing the relevant economic literature and applying it to paid prioritization).

As a rule of reason-like competition regime requires, any potential harm from paid prioritization must be weighed against the benefits to consumers, infrastructure investment, and competition from allowing discrimination. Tim Wu, progenitor of the concept of net neutrality, understood that neutrality entails a tradeoff in terms of consumer welfare. Among other things, prohibiting discrimination also precludes prohibiting subsidies, which invariably raises consumer prices:

> Of course, for a given price level, subsidizing content comes at the expense of not subsidizing users, and subsidizing users could also lead to greater consumer adoption of broadband. It is an open question whether, in subsidizing content, the welfare gains from the invention of the next "killer app" or the addition of new content offset the price reductions consumers might otherwise enjoy or the benefit of expanding service to new users.

Robin S. Lee & Tim Wu, *Subsidizing Creativity through Network Design: Zero-Pricing and Net Neutrality*, 23 J. ECON. PERSP. 61, 67 (2009).

This economic reality results from the "two-sidedness" of ISP information services, which connect and mediate the relationship between users and content providers. Critics of the Commission's approach in the *Order* assert that any *active* mediation of this relationship by ISPs is harmful. But, as Wu notes, there is a tradeoff, and some effort at balancing could increase welfare overall. *See, e.g.*, Justin (Gus) Hurwitz, *Net Neutrality: Something Old; Something New*, 2015 MICH. ST. L. REV. 665, 706-07 & n.180 (discussing and summarizing the robust literature on net neutrality in two-sided markets, which consistently finds that such rules can have negative or positive welfare effects).

Rather than facilitating anticompetitive conduct or enabling greater exploitation of users or content providers, two-sided markets facilitate otherwise-difficult, efficient economic exchange. And virtually all two-sided markets incorporate subsidies from one side of the market to the other, not excessive profiteering through charging both sides of the platform. *See generally* Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 990 (2003). *See also* Larry F. Darby & Joseph P. Fuhr, Jr., *Consumer Welfare, Capital Formation and Net Neutrality: Paying for Next Generation Broadband Networks*, 16 MEDIA L. & POL'Y 122, 123 (2007) (noting that "rules that prevent voluntarily negotiated multisided prices will never achieve optimal market results, and . . . can only lead to a reduction in consumer welfare").

In fact, the restraints imposed upon paid prioritization and differential pricing by the *Title II Order* thwarted various pro-consumer business models on the Internet. Even during the run-up to the *Title II Order*, the Commission's own Open Internet Advisory Committee recognized that different pricing models, even ones incorporating paid prioritization, embody a tradeoff that could have decidedly pro-consumer benefits, while imposing, or risking imposition of, some costs. Jonathan Zittrain & David Clark, *Open Internet Advisory Committee 2013 Annual Report*, at 58, http://transition.fcc.gov/cgb/oiac/oiac-2013-annual-report.pdf.

While differential pricing schemes like paid prioritization could be used by ISPs in ways that are, in theory, harmful to consumers, this alone is insufficient to support an outright ban on the practice. Such a ban can harm consumers directly, whereas allowing paid prioritization can benefit consumers. The *Order*'s competition- and consumer-protection-oriented approaches to addressing concerns about paid prioritization provide a framework that is flexible and tailored to the fact-based analysis required to determine whether any given instance of paid prioritization harms or benefits consumers. This is the antithesis of an approach that is arbitrary or capricious. Instead, an outright ban on paid prioritization, as the *Title II Order* imposed, should be considered arbitrary and capricious because it precludes any weighing of the associated costs, benefits, and risks of such conduct.

See Hurwitz, *Net Neutrality: Something Old; Something New*, 2015 MICH. ST. L. REV. at 695-98.

Consider two ways paid prioritization is well understood to promote the objectives of an open Internet. First, paid prioritization can facilitate new entry by edge providers into the market, allowing new entrants to compete with established incumbents where they otherwise would struggle to do so. While paying for priority entails costs for start-ups and innovators, it is often far less costly than trying to gain a foothold in an established market without it. Indeed, the baseline state of affairs is that entrants are naturally at a disadvantage relative to incumbents. Blanket bans on prioritization, exclusivity, or other forms of beneficial discrimination can operate to lock in the status quo.

To illustrate, most established firms make significant use of content delivery networks (CDNs), private fiber-optic networks, and bespoke servers co-located in ISP data centers to achieve better performance for their users than if their data were sent entirely over the public Internet. That is, they achieve the equivalent of prioritized delivery over the public Internet by paying significant amounts of money to private networks that bypass the public Internet. But entrants often lack the resources to bypass the public Internet in this way. Paid prioritization can level this playing field, offering entrants a lower-cost way to ensure the network performance that their services may need in order to compete against established

firms. Similarly, other forms of paid prioritization, like zero-rating, enable not just technological prioritization, but preferential marketing and pricing that can help a new entrant overcome the inherent disadvantages of newness, such as a lack of brand recognition.

Second, and by corollary, a ban on paid prioritization is a regressive policy that may undermine the goals of increasing investment in and access to broadband networks, resulting instead in increased costs and decreased access for those who most need Internet access. Prioritization is most likely needed for services that make particularly heavy demands on ISPs' networks. Whether or not they are able to charge a premium to edge providers offering these services, ISPs will nonetheless need to build networks capable of supporting them. Unable to recover these capital costs from the companies actually driving the usage that necessitates incurring them, ISPs will, instead, recover these costs by amortizing them across their entire user base. *See* Michelle Connolly et al., *The Digital Divide and Other Economic Considerations for Network Neutrality*, 50 REV. INDUS. ORG. 537, 544 (2017).

Thus, in the absence of paid prioritization, ISPs must raise prices for *all users* in order to accommodate the intensive usage of a small fraction of users. Critically, this means higher priced Internet service for consumers who make more modest use of the Internet to access basic services like news and information, e-

mail, government services, and educational opportunities. That is a plainly regressive result simply to ensure that companies and consumers making intensive use of these networks pay less to offer or access, for example, multiple HD video streams simultaneously, video games that require low latency performance, or specialized services.

Absent an assessment of the actual or likely welfare effects, it is impossible to say *ex ante* that consumer welfare in general, and for the most needy consumers in particular, is best advanced by policies that encourage innovation and investment in *content* over *networks*. Indeed, an *ex ante* ban on paid prioritization not only deprioritizes network investment overall, but it may have distributive effects, as well. The net effect may be a shift in investment to more remunerative areas, like urban centers or higher-income suburbs, at the expense of more costly and risky investment in rural and low-income communities. These effects can directly impair the Commission's directive to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to *all* Americans." 47 U.S.C. § 1302(a) (emphasis added).

The *Order*'s approach, at the very minimum, acknowledges these realities, and focuses more broadly on competitive effects, choosing to regulate with the understanding that the likelihood of positive benefits from non-neutrality—even acknowledging the possibility of some costs—means that simply mandating

neutrality *ex ante* is unlikely to promote the Commission's objectives and can harm consumers. The careful balancing struck by the Commission should be afforded deference.

III. THE COMMISSION'S ORDER APPROPRIATELY PREEMPTS STATE REGULATION

The Commission has fully defended its authority to preempt state net neutrality laws and the legal and policy reasons for doing so. In *Amici*'s view, such preemption is essential to preserve the competition-oriented, light touch regulatory approach adopted in the *Order*.

The Commission's decision to rescind the prior rules from the *Title II Order* was based on an express determination that BIAS is an inherently interstate service that is best governed by "a uniform set of federal regulations, rather than a patchwork that includes separate state and local requirements." *Order* ¶ 194 (JA__). This constitutes an affirmative federal determination about regulatory policy that, though deregulatory, carries "as much pre-emptive force as a decision *to* regulate." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 383-84 (1983) (emphasis in original). *See also Charter Advanced Servs. (MN), LLC v. Lange*, 903 F.3d 715, 717 (8th Cir. 2018) (holding that "'any state regulation of an information service conflicts with the federal policy of nonregulation,' so that such regulation is preempted by federal law") (citation omitted). Allowing state net neutrality legislation to invade this regulatory space

would quickly disrupt and frustrate the careful balancing of regulatory and economic policy objectives struck by the Commission in the *Order*.

Indeed, the "patchwork" of state and local regulations foreseen by the Commission is already emerging. California's recently adopted SB-822 indicates how extensive and disruptive to federal policy these state regulations can be. *See* California Internet Consumer Protection and Net Neutrality Act of 2018, 2017 Bill Text CA S.B. 822. SB-822 re-imposes all of the *ex ante* proscriptions from the *Title II Order*, and then goes further in adopting more stringent requirements for ISPs. *Id.* These state legislative initiatives are expressly intended to countermand the Commission's regulatory approach and policy decisions in the *Order*, in disregard of the interstate nature of BIAS and the supremacy of federal law. Even ardent proponents of *ex ante* net neutrality regulation have acknowledged the need for federal preemption of state regulations such as California's. *Compare Everyone is suing everyone over net neutrality. Congress should step in*, WASH. POST, Oct. 2, 2018, *with* Katrina vanden Heuvel, *Net neutrality essential to our democracy*, WASH. POST, Dec. 2, 2014.

Moreover, the concerns animating the need for preemption go beyond the typical concerns of conflicting state requirements. Because Internet service is an inherently interstate service, it is inevitable that a state's net neutrality laws will impose burdens on services operating within its borders. These burdens will

disadvantage consumers and providers of services operating in other states, in contravention of the so-called "dormant" Commerce Clause of the United States Constitution.

While the Commission properly invoked its authority to preempt state regulation that conflicts with its chosen regulatory scheme, the *Order* does not preempt state consumer protection laws of general applicability, such as unfair or deceptive trade practices laws. This again demonstrates a careful and appropriate balancing of regulatory and policy objectives by the Commission.

Nevertheless, Petitioners wrongly claim that the "the agency . . . attempted to preempt state regulation of 'any aspect of broadband service' addressed in the *Order*." Gov't Pet'rs Br. at 21. That misstates the *Order*. The Commission did not seek to preempt *all* state laws, but rather only laws "that would effectively impose rules or requirements *that we have repealed or decided to refrain from imposing in this order* or that would impose more stringent requirements for any aspect of broadband service *that we address in this order*." *Order* ¶ 195 (JA__) (emphasis added). The Commission also noted that it has no authority to "repeal[] or decide[] to refrain from imposing" state consumer protection laws. *Id.* To the contrary, the Commission was careful to assert that compatible state laws of general applicability remain in force. *Id.* ¶ 196 (JA__). The Commission even went so far as to note that the "continued applicability of these general state laws is

one of the considerations that persuade us that ISP conduct regulation is unnecessary here," *id.*, and that states were likewise free to act to further the goals of Section 706, for instance "by promoting access to rights-of-way under state law, encouraging broadband investment and deployment through state tax policy, and administering other generally applicable state laws," *id.* ¶ 195 n.731 (JA___), so long as those laws did not conflict with the regulatory scheme established in the *Order*.

The *Order* is not a lack of regulation, but an *ex post* federal regulatory framework very much intentionally bolstered by enforcement of state antitrust and consumer protection laws of general applicability to the extent such enforcement does not conflict with or frustrate the federal policies underlying the *Order*. While Petitioners may disagree with the regulatory and policy choices of the Commission, the *Order* is entitled to the same preemptive effect of *other* state laws, and consumer protection and enforcement actions, that *do* conflict with the Order, as any other carefully "calibrated federal regulatory scheme." *Id.* ¶ 194 (JA__).

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Respectfully Submitted,

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APPENDIX

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Rules 29(a)(5) and 32(a)(7)(B) because it contains 5,423 words, excluding the parts of the brief exempted by Rule 32(f) and Circuit Rule 32(e)(1); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2013 and is set in Times New Roman font in a size equivalent to 14 points or larger.

Dated: October 18, 2018 *<u>/s/ David P. Murray</u>*

CERTIFICATE OF SERVICE

I hereby certify that all participants in this appeal are registered CM/ECF users and that service will be accomplished electronically through the Court's CM/ECF system today, October 18, 2018.

Dated: October 18, 2018 *\/s/ David P. Murray*