ORAL ARGUMENT SCHEDULED FOR FEBRUARY 1, 2019

No. 18-1051 (and consolidated cases)

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

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 *AMICI CURIAE* OF WASHINGTON LEGAL FOUNDATION AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

Thomas R. McCarthy
Bryan K. Weir
CONSOVOY MCCARTHY PARK PLLC
ANTONIN SCALIA LAW SCHOOL
ADMINISTRATIVE LAW CLINIC
3033 Wilson Blvd., Suite 700
Arlington, VA 22201
Tel: (703) 243-9423
Email: tom@consovoymccarthy.com

Dated: October 18, 2018 *Counsel for Amici Curiae*

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

Except for *amici curiae* Washington Legal Foundation and Southeastern Legal Foundation, and any other *amici* who have not yet entered an appearance in this Court, all parties and *amici* appearing are listed in the petitioners' and respondents' briefs.

B. Ruling Under Review

The ruling under review is Restoring Internet Freedom, 33 FCC Rcd. 311 (2018) (the "*Restoring Internet Freedom Order*").

C. Related Cases

This case has been consolidated with Case Nos. 18-1052, 18-1053, 18-1054, 18-1055, 18-1056, 18-1061, 18-1062, 18-1064, 18-1065, 18-1066, 18-1067, 18-1068, 18-1088, 18-1089, 18-1105.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), *amici curiae* Washington Legal Foundation and Southeastern Legal Foundation represent that all parties have consented to the filing of this brief.[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amici curiae* Washington Legal Foundation and Southeastern Legal Foundation certifies that a separate brief is necessary. *Amici curiae* have a strong interest in the proper construction of the 1996 Act to ensure that the FCC does not exceed its authority. Here, Congress intended that the FCC use only a light regulatory touch with the Internet and Internet-related services. In addition to the text of the Telecommunications Act of 1996, that intent is confirmed by the contemporaneous and post-enactment legislative history. The *Restoring Internet Freedom Order*'s decision to classify broadband Internet access as an "information service" instead of a "telecommunications service" is in line with that Congressional intent. And *amici curiae* are not aware of any other briefs outlining that intent in detail.

[1] Pursuant to Fed. R. App. P. 29(c), *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Cir. R. 29(b), Fed. R. App. P. 26.1, and D.C. Cir. R. 26.1, Washington Legal Foundation and Southeastern Legal Foundation are nonprofit organizations that have no parent companies and no publicly held company holds a 10% or greater ownership interest in either organization.

By: /s/ Thomas R. McCarthy
Thomas R. McCarthy
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard
Suite 700
Arlington, VA 22201
Tel: (703) 243-9423
tom@consovoymccarthy.com

Counsel for Amici Curiae

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GLOSSARY

Commission or FCC	Federal Communications Commission
The 1996 Act	Telecommunications Act of 1996, Pub. No. 104-104, 110 Stat. 56
Restoring Internet Freedom Order	Restoring Internet Freedom, 33 FCC Rcd. 311 (2018)
Title II Order	Report and Order on Remand, Declaratory Ruling, and Order, Protecting and Promoting the Open Internet, 30 FCC Rcd 5601 (2015)
Title II	Title II of the Communications Act of 1934, codified as amended at 47 U.S.C. §§ 201-276

INTEREST OF *AMICI CURIAE*

Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 States. WLF devotes substantial resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law. In particular, WLF routinely litigates to ensure that federal administrative agencies adhere to the rule of law and do not exceed their statutory authority. *See, e.g., Perez v. Mortgage Bankers Assoc.*, 135 S. Ct. 1199 (2015); *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014). WLF filed a brief in this Court in an earlier lawsuit involving the *Title II Order*. *U.S. Telecom Assoc. v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates in support of constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the rigorous enforcement of constitutional limitations on the activities of federal and state governments. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly.

Amici curiae have a strong interest in the proper construction of the 1996 Act to ensure that the FCC does not exceed its authority. Federal agencies can wield only the power that Congress has granted them. Otherwise, *amici*'s goals of preserving

limited government and a robust separation of powers will be undermined. Here, Congress intended that the FCC use only a light regulatory touch with the Internet and Internet-related services. The FCC's *Title II Order* ignored that intent by imposing Title II-like regulations on broadband Internet access. The *Restoring Internet Freedom Order* fixed that mistake and returned the FCC to its Congressionally authorized role.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici curiae agree with the Respondents that the FCC's net neutrality rules imposed in the *Title II Order* were appropriately replaced with the light regulatory touch in the *Restoring Internet Freedom Order*. *Amici curiae* write separately to explain how the Telecommunications Act of 1996 and history of congressional enactments in this area demonstrate that Congress intended a light regulatory regime for the Internet and to further explain that the *Restoring Internet Freedom Order* is consistent with that congressional intent.

To that end, the 1996 Act was a deregulatory piece of legislation that specifically singled out the Internet as an area that should remain free from regulation. The 1996 Act expressly made it "the policy of the United States … to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). Congress's intent at the time likewise made clear that the Internet—and those ways in which it is accessed—were to be subject to only minimal regulation.

Legislative activity since 1996 confirms what the Act makes explicit. Congress has repeatedly considered and debated Internet regulation since then, and there have been countless proposals to authorize the FCC to enforce so-called "net neutrality." Yet, every proposal failed to pass. During this same time period,

however, Congress has granted the FCC narrow bands of authority over certain circumscribed aspects of the Internet. This extensive history of proposed legislation and congressional enactments following the 1996 Act demonstrates that the Commission lacks the broad authority over the Internet that it asserted in the *Title II Order*. The *Restoring Internet Freedom Order*, on the other hand, is consistent with both this history and the 1996 Act.

The FCC's decision to preempt states from imposing their own Title II-like laws is consistent with Congress's deregulatory intent. The Internet is not bound by geography like some industries. This makes it virtually impossible for broadband Internet access services to distinguish between intrastate and interstate communications over the Internet. If one State imposed "net neutrality" rules within its borders, there would be no way for providers to segregate that traffic to comply with those state-specific rules. Preempting such regulations is therefore necessary to preserve the federal policy against Title II obligations.

ARGUMENT

I. Congress Intended That The FCC Use A Light Regulatory Touch With The Internet.

This case addresses whether the FCC appropriately designated broadband Internet access as an "information service," as opposed to a "telecommunications service." *See, e.g.* FCC Br. 1-4. If broadband service were a "telecommunications service," as the *Title II Order* designated it, then the FCC could impose heavy-

handed Title II regulations similar to those imposed on common carriers (such as traditional telephone companies). *See id.* at 2. But if broadband Internet access is properly defined as an "information service," as the *Restoring Internet Freedom Order* designates it, then it is subject to only light regulation. *Id.* at 1. There can be no doubt that Congress intended that the Internet and broadband Internet access providers would be lightly regulated as "information services."

A. The 1996 Act's text and contemporaneous legislative history confirm that Congress intended broadband Internet access to be an "information service" subject to minimal regulation.

The text of the 1996 Act makes plain that the Internet and its access points should remain largely unregulated, as they had been before 1996. Congress found that "[t]he rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens." 47 U.S.C. § 230(a)(1). Congress also recognized that "[t]he Internet and other *interactive computer services* have flourished, to the benefit of all Americans, with *a minimum of government regulation*." *Id.* § 230(a)(4) (emphases added). For that reason, Congress stated that "it is the policy of the United States … to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." *Id.* § 230(b)(2). As a textual matter, then, Congress has expressed a federal policy of light Internet

regulation; regulating broadband Internet access as an "information service" squares with that express federal policy (whereas regulating broadband as a "telecommunications service" would not).

The same is true on a more granular level. The Act defines "interactive computer services" to include "any *information service* … that provides or enables computer access by multiple users to a computer server, including specifically a service or system that *provides access to the Internet*." *Id.* § 230(f)(2) (emphases added). In other words, a "service … that provides access to the internet" is an "information service" that qualifies as an "interactive computer service." For that reason, the general deregulatory policy statements in Section 230 plainly apply to broadband Internet access because it falls neatly within the definition of "information service."

This result is no mistake; it aligns perfectly with Congress's understanding of the terms "information service" and "telecommunications service" when it passed the 1996 Act. Congress did not create those terms from scratch. They were conceived originally in the final Modification of Final Judgment ("MFJ") breaking up AT&T in 1982. *See United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982). In that case, the court explained that its definition of "information services," *id.* at 227-28, was intended to include "data processing" and other "*computer-related services*," *id.* at 178-79 (emphasis added). Moreover, the court prohibited the Bell

operating companies—which were allowed to hold monopolies in local telephone service—from providing "information services." *Id.* at 224, 227-28. The fear was that the Bell operating companies would use their monopoly position in local telephone services "to thwart the growth of their own competitors" in the newer markets for "information services." *Id.* at 224. The court thus expressly limited the Bell operating companies to providing only "telecommunications and exchange access service[s]," *i.e.*, their monopolies over local telephone service. *See id.* at 227-28 (limiting the Bell operating companies to "natural monopoly service[s] actually regulated by tariff."). Under the MFJ, the term "telecommunications service" included the more traditional, Title II-regulated telephone services while "information service" included the newer "computer-related services."

The legislative history of the 1996 Act confirms that Congress intended to adopt the MFJ definitions in the Act. In particular, the House Conference Report for the 1996 Act states that "'[i]nformation service' and 'telecommunications' are defined based on the definition used in the Modification of Final Judgment." *See* H.R. Conf. Rep. No. 104-458 at 126 (Jan. 31, 1996); *see also* Federal-State Joint Board on Universal Service, Report to Congress, 13 F.C.C.R. 11501 ¶¶ 28, 39, 42-43, 51 (1998) (explaining that Congress intended to adopt the MFJ's definition of "information service"). It is no surprise, then, that the 1996 Act's definition of "information service" is virtually identical to the one included in the MFJ. *Compare*

MFJ, 552 F. Supp. at 229, *with* 47 U.S.C. § 153(24) (differing substantively only to add the phrase "and includes electronic publishing."). As a result, broadband Internet access, which is plainly a "computer-related service," falls squarely within what Congress understood to be an "information service" not subject to Title II-like regulations.

Members of Congress confirmed this view of the 1996 Act shortly after it went into law. In 1998, a bipartisan group of Senators explained that "[n]othing in the 1996 Act or its legislative history suggests that Congress intended to alter the current classification of Internet and other information services or to expand traditional telephone regulation to new and advanced services." Letter from Five Senators to Honorable William E. Kennard, FCC Chairman, at 1 (Mar. 20, 1998), https://bit.ly/2C6AF27. Instead, those Senators explained, the Internet's "unparalleled success has emerged in the context of policies that favor market forces over government regulation." *Id.* Subjecting "information providers to telephone regulation seriously would chill the growth and development of advanced services to the detriment of our economic and educational well-being." *Id.* For that reason, "a critical goal of the 1996 Act was to diminish regulatory burdens as competition grew." *Id.*

Senator John McCain agreed. He explained that the FCC "should not interpret Congress's directive as an instruction to change its conclusions regarding the proper

classification of Internet services." Letter from Senator John McCain to Honorable William E. Kennard, FCC Chairman, at 1 (Mar. 16, 1998), https://bit.ly/2C6AF27. "It was certainly not Congress's intent in enacting the supposedly pro-competitive, deregulatory 1996 Act," he continued, "to *extend* the burdens of current Title II regulation to Internet services, which have historically been excluded from regulation." *Id.* at 2. Such an extension "would be incompatible with both the letter and intent of the 1996 Act." *Id.*

As this Court has recognized, "Congress enacted [the 1996 Act] to ensure 'a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector development of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.'" *Cellco P'ship v. FCC*, 357 F.3d 88, 91 (D.C. Cir. 2004) (quoting S. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996)). The bipartisan view was that the Act meant to take "down the barriers" to telecommunications, Cong. Rec. H1151 (Feb. 1, 1996) (statement of Rep. Markey), and was "antiregulatory and antibureaucratic in philosophy," *Id*. H1161 (statement of Rep. Oxley). The 1996 Act's preamble makes clear that the Act was meant "to promote competition and reduce regulation" to, among other things, "encourage rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56 (1996). It would make no sense for

Congress to direct the FCC toward a more deregulatory approach while at the same time imposing antiquated regulations on burgeoning new technologies such as the Internet. In short, the text of the 1996 Act and contemporaneous legislative materials compel the conclusion that Congress intended Internet access to be an "information service," not a "telecommunication service" subject to Title II regulations.

B. Congress's repeated rejection of bills that would have authorized the FCC to enforce "net neutrality" rules confirms that the FCC lacks such authority.

The legislative activity that Congress has undertaken since passing the 1996 Act likewise demonstrates that it never intended the Title II-type "net neutrality" obligations the FCC imposed in the *Title II Order*. Since 1996, Congress considered and rejected numerous bills that would have conferred power upon the FCC to promulgate so-called "net neutrality" or "open Internet" regulations.

For more than a decade, the questions whether and how to regulate the Internet have attracted substantial attention and have been the subject of ongoing debate in Congress. Indeed, since the outset of the "net neutrality" policy debate, Congress has considered at least a dozen different bills that would have conferred upon the FCC the authority to enforce so-called "net neutrality" rules but not one passed. *See* H.R. 5252, 109th Cong. (2006); H.R. 5273, 109th Cong. (2006); H.R. 5417, 109th Cong. (2006); S. 2360, 109th Cong. (2006); S. 2686, 109th Cong. (2006); S. 2917, 109th Cong. (2006); S. 215, 110th Cong. (2007); H.R. 5353, 110th Cong. (2008);

H.R. 5994, 110th Cong. (2008); H.R. 3458, 111th Cong. (2009); S. 74, 112th Cong. (2011); S. 3703, 112th Cong. (2012).

In the Communications Opportunity, Promotion and Enhancement Act of 2006, H.R. 5252, 109th Cong. (2006), a bipartisan group of representatives sought to authorize the FCC "to enforce its Broadband Policy Statement," H.R. Rep. No. 109-470, at 2 (May 17, 2006); *see also id.* at 4, 26, 27, but only through adjudication, *see id.* at 47. The bill expressly declined to grant the FCC rulemaking authority, *see id.* at 5, 27, 29, 47, as its proponents sought to avoid subjecting broadband providers to Title II-type regulation, *see id.* at 5, 29. And an amendment proposed by Representatives Markey, Eshoo, Boucher, and Inslee to impose a nondiscrimination requirement on broadband providers never made it out of committee. *See id.* at 17, 29, 61.

At the same time H.R. 5252 was pending, House Democrats sponsored two competing bills that sought to impose more stringent rules on broadband providers. Representatives Markey, Boucher, Eshoo, and Inslee sponsored the Network Neutrality Act of 2006, H.R. 5273, 109th Cong. (2006), which would have imposed common-carriage requirements upon broadband providers, complete with bans on blocking or degrading access to all lawful content, applications, and devices and on paid prioritization, *see id.* at § 4. The Internet Freedom and Nondiscrimination Act of 2006, H.R. 5417, 109th Cong (2006), would have imposed essentially the same

obligations on broadband providers but through the Clayton Act subject to enforcement by the FTC, *see id.* at § 3. All of these House bills failed to pass.

Similar Senate bills were proposed during the 109th Congress. Among them were the Internet Non-Discrimination Act of 2006, S. 2360, 109th Cong. (2006), and the Internet Freedom Preservation Act, S. 2917, 109th Cong. (2006), both of which sought to impose common-carriage obligations on broadband providers similar to the Network Neutrality Act of 2006 that was proposed in the House, *see* S. 2360, 109th Cong., at § 4; S. 2917, 109th Cong. at § 12. Neither made it through Congress. A less stringent Senate bill—the Communications, Consumer Choice and Broadband Deployment Act of 2006, S. 2686, 109th Cong. (2006)—would have conferred upon the FCC only the authority to study the provision of broadband service and report to Congress with "recommendations for appropriate enforcement mechanisms" to "ensure that consumers can access lawful content and run Internet applications and services over the public Internet subject to the bandwidth purchased and the needs of law enforcement agencies," *id.* at § 901. It too failed.

Subsequent Congresses considered numerous similar "net neutrality" bills and draft legislation that failed to pass. *See, e.g.*, Internet Freedom Preservation Act, S. 215, 110th Cong. (2007); Internet Freedom Preservation Act of 2008, H.R. 5353, 110th Cong. (2008); Internet Freedom and Nondiscrimination Act of 2008, H.R. 5994, 110th Cong. (2008); Internet Freedom Preservation Act of 2009, H.R. 3458,

111th Cong. (2009); Internet Freedom, Broadband Promotion, and Consumer Protection Act of 2011, S. 74, 112th Cong. (2011); Data Cap Integrity Act of 2012, S. 3703, 112th Cong. (2012); *see also* W. David Gardner, *FCC Focuses On Waxman 'Net Neutrality' Framework*, Information Week (Dec. 2, 2010), https://ubm.io/2IJ42sH. Congressional debate over "net neutrality" and proposed legislation on this subject continued until the Commission effectively short-circuited this policy debate by adopting the *Title II Order*. *See* Sarah Morris, *Proposed net neutrality bill is a 'solution in search of a problem*', The Hill (Jan. 21, 2015), https://bit.ly/2A0Smih (discussing Senate and House hearings on a draft bill authored by Senator Thune and Representative Upton that would have prohibited blocking, throttling, and paid prioritization).

That Congress spent nearly a decade struggling with whether and how to regulate the Internet in a manner similar to the *Title II Order* did not provide the justification for the FCC to bypass that process and "contraven[e] [its] statutory limits." *Coal. for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 WL 6621785, at *22 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting from the denial of rehearing en banc). On the contrary, while "the legislative process can be cumbersome and frustrating …, the Framers … designed it that way" to ensure careful deliberation over important policy matters. *Id.* What the numerous failed "net neutrality" bills do demonstrate, however, is that Congress understood that the FCC

did not have the authority it claimed in the *Title II Order*. The *Restoring Internet Freedom Order* fixes that mistake.[2]

C. Congress's grants of narrow authority over discrete aspects of the Internet further confirm that it did not intend for the FCC to impose Title II-like regulations.

While Congress consistently has rejected "net neutrality" bills, it has enacted other targeted statutes vesting the FCC and other entities with narrow, circumscribed authority with respect to the Internet—limited grants of power that would make no sense if the FCC already possessed generous authority to regulate broadband providers. Since 1996, Congress has enacted:

- the Children's Online Privacy Protection Act, Pub. L. No. 105-277, §§ 1301-08 (1998), which vested the FTC with authority to protect the privacy of children by promulgating and enforcing rules relating to the collection of personal information over the Internet, *see, e.g.*, 15 U.S.C. § 6502(b);
- the CAN-SPAM Act, Pub. L. No. 108-187 (2003), which *inter alia* authorized the FCC to promulgate rules to protect mobile subscribers from receiving unwanted email advertisements, including by requiring providers of commercial mobile services to enable their subscribers to opt out of receiving such advertisements, *see id.* § 14(b);

[2] Since the FCC issued the Notice of Proposed Rulemaking for the *Restoring Internet Freedom Order*, the current Congress has considered similar "net neutrality" bills; not one has passed. *See* Save Net Neutrality Act of 2017, H.R. 4585, 115th Cong. (2017); The 21st Century Internet Act, H.R. 6393, 115th Cong. (2018). And some in Congress have tried to roll back the *Restoring Internet Freedom Order* via the Congressional Review Act. *See* S.R.J. Res. 115th Congress (2018). That effort also failed.

- the Broadband Data Improvement Act, Pub. L. No. 110-385, at §§ 101-06 (2008), which directed the FCC and other governmental entities to take steps to improve data collection regarding broadband deployment, the impact of broadband speeds on small businesses, and online safety, *see, e.g.*, *id.* § 106 (codified at 47 U.S.C. § 1304);

- the New and Emerging Technologies 911 Improvement Act, Pub. L. No. 110-283 (2008), which amended Title 47 to require VOIP providers to provide 9-1-1 and E-9-1-1 services to their subscribers and authorized the FCC to promulgate regulations to ensure that VOIP providers have the ability to connect to entities with ownership or control of such capabilities, *see* Pub. L. No. 110-283, § 101 (codified at 47 U.S.C. § 615a-1);

- Title VI of the American Recovery and Reinvestment Act, Pub. L. No. 111-5, §§ 6000-01 (2009), which allocated approximately $8 billion in stimulus funding for broadband deployment and related activities, and directed the Department of Commerce and the FCC to establish a "non-discrimination" obligation as contractual preconditions for grants, *id.* § 6001 (codified at 47 U.S.C. § 1305); and

- the Twenty-First Century Communications and Video Accessibility Act, Pub. L. No. 111-260 (2010), which imposed accessibility requirements with respect to mobile Internet browsers, VOIP, and Internet-delivered video content, and authorized the FCC to implement those requirements via rulemaking, *see generally id.*

The "plain implication" of these repeated narrow grants, of course, is that Congress is of the view that the 1996 Act does not confer authority on the FCC to subject the Internet to common-carrier regulations under Title II. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000). On top of that, Congress made the point expressly in the Broadband Data Improvement Act, explaining that that statute "should not be construed as giving" the FCC (or any other affected entity) "any regulatory jurisdiction or oversight authority over providers of broadband

services or information technology." Pub. L. No. 110-385, at § 106(j) (codified at 47 U.S.C. § 1304(j)). Unlike the *Title II Order*, then, the *Restoring Internet Freedom Order* is in line with Congressional intent.

II. Preempting State-Based Title II Laws Is Consistent with Congressional Intent.

Federal preemption of state "net neutrality" laws is consistent with Congress's intended deregulatory approach. Such laws would conflict directly with the express federal policy of light regulation, as embodied in the *Restoring Internet Freedom Order*, because Internet and broadband Internet access would become heavily regulated state-by-state absent preemption. To the point, California has already passed its own "net neutrality" law *despite* the preemption provision included in the *Restoring Internet Freedom Order*. Jazmine Ulloa, *California enacts strongest net neutrality protections in the nation—and the Trump administration sues*, L.A. Times (Sept. 30, 2018), https://lat.ms/2RdFnA3. Oregon, Vermont, and Washington also have enacted net neutrality legislation, and many other States are endeavoring to do the same. *See* National Conference of State Legislatures, Net Neutrality Legislation in States (Oct. 1, 2018), https://bit.ly/2y4v4sQ ("Legislators in 30 states have introduced over 72 bills requiring internet service providers to ensure various net neutrality principles.").

Not only do State "net neutrality" laws run directly contrary to the FCC's *Restoring Internet Freedom Order*, but they create severe practical problems. Often,

"'it is *not* possible to separate the interstate and the intrastate components of the FCC regulation' involved." *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 114 (D.C. Cir. 1989) (quoting *Louisiana Public Servs. Comm'n v. FCC*, 476 U.S. 355, 375-76 n.4 (1986)). Preemption is common in communications law for that reason. *See, e.g.*, *id.* at 115. In fact, the FCC has previously preempted Title II-like state regulations in favor of lighter federal regulation. *See Computer & Commc'ns Indus. Ass'n v. F.C.C.*, 693 F.2d 198, 217 (D.C. Cir. 1982) (rejecting argument that the FCC's preemption of state tariffing was unlawful because it "creat[ed] a vacuum of deregulation."). Doing so simply recognizes that "state regulation which impedes a federal regulatory goal must yield to the federal scheme." *Id.* at 215.

Here, the *Restoring Internet Freedom Order* aligns the FCC with Congress's express deregulatory regime. *See Minnesota Pub. Utils. Comm'n. v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) (explaining that "deregulation" is a "valid federal interest[] the FCC may protect through preemption of state regulation"). It is an uncontroversial point that "a substantial portion of Internet traffic involves accessing interstate or foreign websites." *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000) (citation omitted). "[G]eography … is a virtually meaningless construct on the Internet." *ACLU v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999) (citation omitted). For that reason, "it is impossible or impracticable for ISPs to distinguish between intrastate and interstate communication over the Internet." *Restoring Internet*

Freedom Order ¶ 200. At best, then, it is difficult for ISPs to comply with differing States' laws on broadband Internet access without incurring substantial costs. At worst, it is impossible for them to do so. *See id.* ("[A]n ISP generally could not comply with state or local rules for intrastate communications without applying the same rules to interstate communications."). By preempting States from imposing Title II-like regulations, the FCC avoids that problem and ensures a deregulated environment.

It is for these reasons that Congress's opposition to *federal* Title II regulations should not be read as an invitation for *States* to step in, as the States have argued. *See* Government Pet'rs Br. 53-55. The 1996 Act was intended to be deregulatory in nature, both generally and as to the Internet and broadband Internet access in particular. *See supra* Section I. That "federal decision to forgo regulation" indicates "an authoritative federal determination that the area is best left *un*regulated" by the States too. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983); *see also Transcon. Gas Pipe Line Corp. v. State Oil & Gas Bd. of Mississippi*, 474 U.S. 409, 423 (1986) ("[Congress's] decision to remove jurisdiction from FERC cannot be interpreted as an invitation to the States to impose additional regulations."). Otherwise, the FCC's decision "would be rendered meaningless in a world where substantially similar state law [regulations] were readily available." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151 (1989).

In sum, the FCC's preemption of State-based Title II regulations for broadband Internet access is consistent with Congress's intent as expressed in the 1996 Act and confirmed by subsequent legislative activity.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court deny the petitions for review.

Respectfully submitted,

By: /s/ Thomas R. McCarthy
Thomas R. McCarthy
Bryan K. Weir
CONSOVOY MCCARTHY PARK PLLC
ANTONIN SCALIA LAW SCHOOL
ADMINISTRATIVE LAW CLINIC
3033 Wilson Boulevard
Suite 700
Arlington, VA 22201
Tel: (703) 243-9423
Email: tom@consovoymccarthy.com

Dated: October 18, 2018

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because it contains 4,212 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), which is one-half the maximum length authorized for a principal brief under Fed. R. App. P. 32(a)(7)(B).

I further certify that the brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

By: /s/ Thomas R. McCarthy

Thomas R. McCarthy
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard
Suite 700
Arlington, VA 22201
Tel: (703) 243-9423
tom@consovoymccarthy.com

Counsel for Amici Curiae

Dated: October 18, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2018, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

By: /s/ Thomas R. McCarthy
Thomas R. McCarthy
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard
Suite 700
Arlington, VA 22201
Tel: (703) 243-9423
Fax: (703) 243-9423
tom@consovoymccarthy.com

Counsel for Amicus Curiae