ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2015
No. 15-1063 (and consolidated cases)

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

UNITED STATES TELECOM ASSOCIATION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

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

BRIEF OF *AMICUS CURIAE* COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PETITIONERS

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August 6, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae*, Competitive Enterprise Institute, certifies that:

(A) Parties and Amici

Except for the following, all parties, intervenors, and *amici* appearing in this court are listed in the Joint Brief for United States Telecom Association *et al.*:

Competitive Enterprise Institute

(B) Rulings under Review

References to the rulings at issue appear in the Joint Brief for United States Telecom Association *et al.*

(C) Related Cases

References to the related cases appear in the Joint Brief for United States Telecom Association *et al.*

CORPORATE DISCLOSURE STATEMENT

The Competitive Enterprise Institute ("CEI") is a nonprofit, non-stock corporation organized under the laws of the District of Columbia. CEI has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

CEI is a public interest organization dedicated to the principles of limited constitutional government and free enterprise. CEI engages in research, education, litigation, and advocacy on a broad range of regulatory and constitutional issues.

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GLOSSARY

CEI	Competitive Enterprise Institute
Commerce	United States Department of Commerce
FCC	Federal Communications Commission
USDA	United States Department of Agriculture

FED. R. APP. P. 29(C) STATEMENTS

Amicus curiae, the Competitive Enterprise Institute ("CEI"), is a section 501(c)(3) nonprofit, public interest organization dedicated to advancing free-market solutions to regulatory issues. Founded in 1984 and headquartered in Washington, D.C., CEI has grown into an effective advocate for freedom on a wide range of critical policy issues, particularly including Internet freedom.

CEI has conducted research and advocacy on the issue of government regulation of the Internet. It has filed comments with the FCC regarding its various proposals to regulate broadband Internet access services. And it was among the *amici curiae* that urged the Court to vacate the FCC's Open Internet rules in 2012. *See* Brief *Amici Curiae* of TechFreedom, the Competitive Enterprise Institute, the Free State Foundation, and the Cato Institute in Support of Appellant, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (No. 11-1355).

CEI participated in the FCC's rulemaking that produced its Open Internet rules and the order on review. *See Protecting and Promoting the Open Internet*, 30 F.C.C.R. 5601 (2015). CEI's interest in this case, as it

was in *Verizon*, is to prevent the FCC from imposing unauthorized regulation on the Internet.

On July 24, 2015, CEI notified the Court, pursuant to D.C. Circuit Rule 29(b), of its intention to file a brief as *amicus curiae* in support of the petitioners. It certified that all parties to this case consented to the filing of this brief. *See* Notice of Competitive Enterprise Institute of Intent to File Brief as *Amicus Curiae* in Support of Petitioners at 1, No. 15-1063 (July 24, 2015) (Doc. No. 1564370).

This brief was not authored in whole or in part by a counsel to a party in this case. Neither a party nor a party's counsel contributed money that was intended to fund the preparation or submission of this brief. No person, other than CEI, contributed money that was intended to fund the preparation or submission of this brief.

INTRODUCTION

The FCC has long wanted to be the federal agency that regulates access to the Internet. Lacking explicit statutory authority to regulate the Internet, the FCC has attempted to confer Internet regulatory authority upon itself under the guise of statutory construction. This case involves the FCC's latest attempt to construe § 706 of the Telecommunications Act of 1996 ("1996 Act")[1] as empowering it to promulgate so-called "net neutrality" or "Open Internet" rules that compel broadband service providers to treat all Internet traffic the same. *See Protecting and Promoting the Open Internet*, 30 F.C.C.R. 5601, 5721–24 (2015) ("*Open Internet Order*").

The FCC relied on *Verizon v. FCC*, 740 F.3d 623, 636–42 (D.C. Cir. 2014), which afforded *Chevron* deference[2] to the FCC's interpretation of § 706 of the 1996 Act as a grant of rulemaking authority. The *Verizon* Court's application of *Chevron* deference was clearly erroneous and must be revisited. *See Christianson v. Colt Industries Operating Co.*, 486 U.S.

1. Pub. L. No. 104-104, 110 Stat. 56 (1996).
2. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

800, 817 (1988) (a court may revisit a prior decision despite the law of the case doctrine where the initial decision was "clearly wrong").

Chevron applies only when an agency adopts a construction of a provision of a statute that it administers. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 (2013). That precondition to *Chevron* deference was not present in *Verizon*, and is not present here, because the FCC purported to reinterpret § 706 of the 1996 Act. Yet, as we show below, § 706 is simply not among the statutory provisions that comprise the Communications Act of 1934, as amended ("1934 Act")[3] — the statute that the FCC is authorized to administer.

SUMMARY OF ARGUMENT

Section 706 of the 1996 Act was a freestanding enactment that Congress deliberately chose not to insert into the 1934 Act. Section 706 was initially published as a note to § 157 of the 1934 Act and subsequently codified at 47 U.S.C. § 1302. Thus, the FCC correctly found that § 706 is not part of the 1934 Act. The *Verizon* Court erred by not deferring to the FCC's finding.

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3. Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–622).

Congress explicitly limited the FCC's rulemaking authority to prescribing rules to carry out the provisions of the 1934 Act. *See* 47 U.S.C. §§ 201(b), 303(r). Had Congress wished to empower the FCC to prescribe rules to carry out § 706, the 1996 Act would have placed § 706 in the 1934 Act. When Congress codified § 706 in 2008, it gave the FCC no authority to engage in rulemaking or adjudication to implement § 706. Consequently, the FCC exceeded the bounds of its statutory authority when it prescribed Open Internet rules pursuant to § 706. The promulgation of the 2015 Open Internet rules was *ultra vires*.

For *Chevron* deference to apply to an agency's statutory construction, Congress must have authorized the agency to administer the statute it interpreted, and expressly authorized the agency to engage in the process of rulemaking or adjudication that produced the statutory interpretation for which the agency seeks deference. The two pre-conditions to *Chevron* deference were not satisfied, however, when the FCC reinterpreted § 706. Congress neither vested the FCC with the authority to administer § 706 nor expressly authorized the FCC to engage in the rulemaking that produced its reinterpretation of § 706. Hence, the

FCC's reinterpretation of § 706 as a grant of rulemaking authority is ineligible for *Chevron* deference.

This Court should employ the traditional presumption that Congress would not authorize a transformative expansion of an agency's regulatory power in an ambiguous or ancillary statutory provision. It should presume that Congress did not authorize the FCC to prescribe rules to regulate the Internet when it enacted § 706 and placed it outside the scope of the FCC's rulemaking authority.

The 1996 Act added § 230 to the 1934 Act, which made it the policy of the United States to promote the continued development of broadband Internet access services with a minimum of government regulation. Congress later enacted three statutes that spoke directly to how it wanted federal agencies to encourage broadband deployment. Consistent with the deregulatory policy embraced by § 230, not one of these three broadband-specific statutes empowered the FCC to prescribe rules to encourage broadband deployment under § 706. These statutes evince Congress' consistent judgment to deny the FCC the power to adopt rules to regulate broadband Internet access services. That judgment — not the FCC's — deserves deference.

ARGUMENT

I. SECTION 706 IS NOT PART OF THE 1934 ACT

The 1934 Act is codified in Chapter 5 of Title 47 of the United States Code ("Code"). *See* 47 U.S.C. § 609 ("This chapter may be cited as the 'Communications Act of 1934'"). Chapter 5 of Title 47 of the Code ("Chapter 5") has seven subchapters or "titles." The FCC recognizes that "[t]he seven titles that comprise the … [1934] Act appear in Chapter 5." *Preserving the Open Internet*, 25 F.C.C.R. 17905, 17950 n.248 (2010).

Title I of the 1934 Act created the FCC "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio," and with the mandate to "execute and enforce the provisions of this [C]hapter [5]." 47 U.S.C. § 151. Title I empowers the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this [C]hapter [5], as may be necessary in the execution of its functions." *Id.* § 154(i).

Congress directed that most, but not all, of the provisions of the 1996 Act be inserted into Chapter 5.[4] Some of the provisions amended other

4. *See* 1996 Act, § 1(b) ("whenever … an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or

chapters of the Code;[5] others were "freestanding enactment[s]."[6] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 n.5 (1999). One freestanding enactment was § 706, which provided "incentives" for the deployment of "advanced telecommunications capability."[7]

The Office of the Law Revision Counsel[8] published § 706 of the 1996 Act as a note to § 157 of Chapter 5. *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 14 F.C.C.R.

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other provision, the reference shall be considered to be made to a section or other provision of the [1934] Act").

5. *See* 1996 Act §§ 103 (amending 15 U.S.C. § 79z-5c), 507 (amending 18 U.S.C. §§ 1462, 1465), 508 (amending 18 U.S.C. § 2422).

6. *See id.* §§ 307 (mandating the FCC to promulgate regulations to prohibit restrictions on over-the-air reception devices), 552 (establishing a technology fund), 561 (providing for expedited judicial review for constitutional challenges to Title V), 601 (applicability of consent decrees and other law), 602 (preempting local taxation with respect to any direct-to-home satellite service), 706 (providing incentives to deploy of advanced communications capability), 708 (establishing the National Education Technology Funding Corporation), 709 (requiring a report on the use of advanced telecommunications services for medical purposes).

7. *Id.* § 706.

8. The Office of the Law Revision Counsel is a nonpartisan office of the House of Representatives tasked with, among other things, "classify[ing] newly enacted provisions of law to their proper positions in the Code where the titles involved have not yet been enacted into positive law." 2 U.S.C. § 285b(4).

2398, 2400 n.3 (1999) (§ 706 is "reproduced in the notes under … § 157"). It remained in the margin of the 1934 Act until 2008, when Congress enacted the Broadband Data Improvement Act ("Broadband Data Act").[9] That statute amended § 706 and enacted the broadband provisions of Chapter 12 of Title 47 of the Code ("Chapter 12").[10] Section 706 was codified in new Chapter 12. *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 24 F.C.C.R. 10505, 10506 n.1 (2009); 47 U.S.C. § 1302.

When it first adopted its Open Internet rules, the FCC recognized that § 706 was codified in Chapter 12, whereas the titles that comprise the 1934 Act appear in Chapter 5. *See Preserving the Open Internet*, 25 F.C.C.R. at 17950 n.248. Accordingly, the FCC found that § 706 "is not part of the … Act." *Id*. And in *Verizon*, the FCC argued that § 706 is not subject to the limitations imposed by §§ 153(51) and 332(c)(2) of the 1934 Act, because it "is not part of the … Act."[11]

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9. *See* Pub. L. 110-385, 122 Stat. 4096, 4096–97 (2008).
10. *See* Broadband Data Act, Title I, §§ 102–106.
11. Brief for Appellee/Respondents at 68, *Verizon* (No. 11-1355).

The *Verizon* Court rejected the FCC's "half-hearted argument" that § 706 was not part of the 1934 Act, 740 F.3d at 650, largely because it found that Congress "expressly directed" that the 1996 Act be inserted into the 1934 Act. *Id.* (quoting *AT&T*, 525 U.S. at 377). However, Congress directed that the "local-competition provisions" of the 1996 Act be inserted into Title II, *AT&T*, 525 U.S. at 377, but it neither referred to § 706 as an "amendment to, or repeal of, a section or other provision" of the 1934 Act nor directed that § 706 be inserted into the 1934 Act. Congress spoke clearly as to which parts of the 1996 Act it inserted into the 1934 Act; § 706 was not among them.

Yet the *Verizon* Court clearly erred when it did not defer to the FCC's finding that § 706 is not among the provisions of Chapter 5. That error was material because Congress expressly limited the FCC's rulemaking authority to prescribing rules to carry out the provisions of Chapter 5, as we show below. Based on the *Verizon* Court's erroneous conclusion, the FCC now asserts it has authority to prescribe rules under § 706, even though Congress never gave the Commission this authority.

II. THE FCC IS WITHOUT AUTHORITY TO PRESCRIBE RULES TO IMPLEMENT § 706

"Regardless of how serious the problem an administrative agency seeks to address, … it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." *Verizon*, 740 F.3d at 634 (quoting *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002)). The FCC departed from the administrative structure erected by Congress when it found that § 706 of the 1996 Act authorized it to adopt its Open Internet rules. *See Open Internet Order*, 30 F.C.C.R. at 5721. As constrained by Congress, the FCC's rulemaking authority is bound by Chapter 5, and does not reach § 706.

Congress explicitly limited the FCC's rulemaking authority to prescribing "such rules and regulations as may be necessary in the public interest to carry out the provisions of [Chapter 5]." 47 U.S.C. § 201(b); *see id.* § 303(r) (the FCC may make "such rules and regulations …, not inconsistent with law, as may be necessary to carry out the provisions of this [C]hapter [5]"). Thus, Congress plainly established the bounds of Chapter 5 as marking a "clear line" circumscribing the FCC's rulemaking authority. *Arlington*, 133 S. Ct. at 1874. The FCC crossed that line when

it claimed that § 706 authorized it prescribe its Open Internet rules. As the FCC found in 2010, § 706 is among the provisions of Chapter 12, not Chapter 5. *See Preserving the Open Internet*, 25 F.C.C.R. at 17950 n.248.

When it adopted § 706, Congress was aware that the provisions of the 1996 Act that it enacted "as an amendment to, and hence a *part of*, [the 1934] Act," were subject to the FCC's authority under § 201(b) to prescribe rules to "carry out the provisions of [the] Act." *AT&T*, 525 U.S. at 378 n.5 (emphasis in original). It was also aware that the FCC's exercise of "the general grant of rulemaking authority contained within the [1934] Act" does not extend to a "freestanding enactment" such as § 706, which is not part of the 1934 Act. *Id*. In other words, Congress made a deliberate choice in 1996 when it did not insert § 706 into the 1934 Act: it denied the FCC the power to prescribe rules to carry out the provisions of § 706.

Congress has not disturbed the administrative structure it enacted in 1996, and it has never granted the FCC any authority to enact rules to implement the provisions of Chapter 12. *See* 47 U.S.C. §§ 1301–1305. Hence, the "statutory text forecloses the agency's assertion of authority"

under § 706 to prescribe its Open Internet rules. *Arlington*, 133 S. Ct. at 1870–71.

The *Verizon* Court was obliged to rigorously apply the statutory limit that Congress explicitly placed on the FCC's rulemaking authority. *See Arlington*, 133 S. Ct. at 1874 (courts are to prevent agency self-aggrandizement "by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority"). Had it done so, the court would have held that the FCC's adoption of its Open Internet rules was *ultra vires*, because it exceeded the FCC's rulemaking authority under §§ 201(b) and 303(r) of the 1934 Act. *See id.* at 1869 (when administrative agencies "act beyond their jurisdiction, what they do is *ultra vires*"). Instead of fulfilling its obligation to enforce the limitation that §§ 201(b) and 303(r) imposed on the FCC's rulemaking authority, the *Verizon* Court improperly deferred to the FCC's reinterpretation of § 706 as an affirmative grant of such authority.

III. THE FCC'S INTERPRETATION OF § 706 DOES NOT QUALIFY FOR CHEVRON DEFERENCE

For *Chevron* deference to apply to an agency's statutory interpretation, the agency "must have received congressional authority to determine the particular matter at issue in the particular manner

adopted." *Id.* at 1874. First, Congress must have authorized the agency to administer the statute it interpreted. *See Chevron*, 467 U.S. at 842 (*Chevron* applies only when "a court reviews an agency's construction of the statute it administers"). Second, there must be "express congressional authorization" for the agency "to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

Whenever the FCC interprets a provision of the 1934 Act, "the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the [1934] Act through rulemaking and adjudication, and the agency interpretation was promulgated in the exercise of that authority." *Arlington*, 133 S. Ct. at 1874. However, those preconditions were *not* present when the FCC reinterpreted § 706, since it was not construing a provision of the statute that it is authorized to administer — the 1934 Act.

The FCC has not, and could not, claim that Congress unambiguously authorized it to administer § 706 through rulemaking or adjudication. The fact is that Congress delegated Chapter 12 rulemaking authority

only to the Assistant Secretary of Commerce for Communications and Information ("Assistant Secretary"). *See* 47 U.S.C. § 1305(m) ("The Assistant Secretary shall have the authority to prescribe such rules as are necessary to carry out the purposes of this section"). No authority to administer § 706 by rulemaking was unambiguously granted to the FCC by any of the broadband provisions of Chapter 12. That being so, Congress could not have authorized the FCC to "speak with the force of law" when it construed § 706 to grant it rulemaking authority. *Mead*, 533 U.S. at 229.

Because the preconditions to *Chevron* deference were not satisfied, no such deference was due the FCC's reinterpretation of § 706 as a "reasonable interpretation of an ambiguous statute." *Verizon*, 740 F.3d at 637. Moreover, *Chevron* deference was precluded insofar as the adoption of the Open Internet rules exceeded the FCC's rulemaking authority and was *ultra vires*. *See Mead*, 533 U.S. at 227 n.6 (*Chevron* deference assumes that "the agency's exercise of authority … does not exceed its jurisdiction").

IV. SECTION 706 IS NOT A DELEGATION OF AUTHORITY

When an agency examines a long-extant statute and claims to find the power to regulate a significant portion of the economy or fundamentally alter a regulatory scheme, the Supreme Court applies the presumption that Congress does not "hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). That is to say, the Court assumes that Congress would not have authorized a transformative expansion of an agency's regulatory power in an ambiguous or ancillary statutory provision. *See Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("*UARG*") (Congress is expected to "speak clearly" if it wishes to assign to an agency decisions of vast economic and political significance); *Whitman*, 531 U.S. at 468 (Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions"). Lying outside the FCC's enabling statute, the provisions of § 706 are *less* than ancillary to the agency's jurisdiction.

If Congress had intended § 706(b) to operate as a delegation of authority to the FCC, it would have inserted § 706 into the 1934 Act in 1996. By instead leaving § 706 as a freestanding enactment, Congress

provided a "general instruction to the FCC to 'encourage the deployment' of broadband capability and, if necessary, 'to accelerate deployment of such capability by removing barriers to infrastructure investment.'" *National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (quoting 47 U.S.C. § 157 note).

Section 706 was published initially as a note to § 157 of the 1934 Act, which made it "the policy of the United States to encourage the provision of new technologies and services to the public." 47 U.S.C. § 157(a). By relegating § 706 to the margin of § 157, Congress indicated that § 706 was subsumed by the policy statement codified in § 157. And to the extent that the 1934 Act contains policy statements, they "are not delegations of regulatory authority." *Comcast Corp. v. FCC*, 600 F.3d 642, 654 (D.C. Cir. 2010).

The Broadband Data Act, by which Chapter 12 was enacted — and by which § 706 was codified — was based in part on the congressional finding that the continued deployment of broadband technology was "vital" to the Nation's economy. 47 U.S.C. § 1301(2). If Congress had wanted the FCC to regulate broadband Internet access service, or to bestow additional authority on the FCC to accelerate broadband

deployment, the Broadband Data Act would have expressly authorized the FCC to prescribe rules to implement the new § 1302. Congress declined to do so.

The *Verizon* court distinguished *Whitman* by pronouncing that § 706 is "no mousehole." 740 F.3d at 639. If this characterization is correct, it is accurate only in the sense that a mousehole is usually found *indoors*; § 706, being *outside* the FCC's enabling statute, is really a molehill. If Congress wished to make a mountain out of this molehill in enacting § 706 — thus empowering the FCC to regulate the Internet — then "it surely would have done so expressly," especially given the "deep 'economic and political significance'" of the question here. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *UARG*, 134 S. Ct. at 2444). Just as the Court held in *King* that determining the availability of health insurance tax credits was "not a case for the IRS," *id.*, so too the scope of § 706 authority is not a case for the FCC to decide. Congress simply could not have authorized the FCC to regulate the Internet when it enacted § 706 and placed it outside the scope of the FCC's rulemaking authority.

V. CONGRESS HAS WITHHELD BROADBAND RULEMAKING AUTHORITY FROM THE FCC

Where it is clear, based on the overall regulatory scheme and subsequent legislation, that Congress "has directly spoken to the question at issue and precluded the [agency] from regulating," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160–61 (2000), an appellate court is "obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the [agency] this power." *Id.* at 160. Such should be the case here.

Since the advent of the Internet, Congress has enacted four statutes — the 1996 Act, the Food, Conservation, and Energy Act of 2008 ("Farm Bill"),[12] the Broadband Data Act, and the American Recovery and Reinvestment Act of 2009 ("Recovery Act")[13] — that speak directly to how Congress wanted federal agencies to encourage broadband deployment. Together, they represent a "consistent history of legislation" in which Congress withheld broadband rulemaking authority from the FCC. *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 233 (1994).

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12. Pub. L. No. 110-234, 122 Stat. 923 (2008).
13. Pub. L. No. 111-5, 123 Stat. 115 (2009).

The "major components" of the 1996 Act had "nothing to do with the Internet." *See Reno v. ACLU*, 521 U.S. 844, 857 (1997). The statute did add § 230 to the 1934 Act, thereby codifying Congress' findings as to the political and social importance of Internet access services. *See* 47 U.S.C. § 230(a). Finding that Internet access services had "flourished, to the benefit of all Americans, with a minimum of governmental regulation," *id.* § 230(a)(4), Congress made it the policy of the United States to promote the continued development of those services unfettered by regulation. *See id.* § 230(b)(2).

Having designed the "pro-competitive, de-regulatory" policy framework of the 1996 Act specifically to accelerate "private sector deployment" of advanced technologies and services,[14] Congress did not bestow additional regulatory power on the FCC to provide the "advanced telecommunications incentives" called for by § 706. *Id.* § 1302. In particular, Congress did not authorize the FCC to adopt rules to "encourage the deployment on a reasonable and timely basis of advanced

14. H.R. Rep. No. 104-458, at 1 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 124.

telecommunications capability," *id.* § 1302(a), or to "accelerate deployment of such capability" of broadband "capability." *Id.* § 1302(b).

Congress' use of the terms "deployment" and "capability" in § 706 restricts the FCC to taking actions to encourage the private sector to put broadband-capable facilities in place.[15] By its own terms, § 706 does not apply *after* broadband facilities are deployed and put to public use. Hence, § 706 cannot be read reasonably to authorize the FCC to adopt Open Internet rules that regulate how broadband Internet access services are provided to the public.

According to the FCC, Congress "reaffirmed its strong interest in ubiquitous deployment of high speed broadband communications networks" by enacting the Farm Bill, the Broadband Data Act, and the Recovery Act. *Connect America Fund*, 26 F.C.C.R. 17663, 17684 (2011), *aff'd sub nom. In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 1015). But none of the three pieces of "broadband legislation" authorized the FCC to engage in rulemaking. *A National Broadband Plan for Our Future*, 24 F.C.C.R. 4342, 4384 (2009) ("*Broadband Inquiry*").

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15. The word "deploy" means "to arrange in a position of readiness." *Random House Webster's Unabridged Dictionary* 535 (2d ed. 2001).

The Farm Bill did not authorize the FCC to take any action. It merely required the FCC Chairman and the USDA Secretary to make recommendations to Congress to coordinate existing federal rural broadband "initiatives" and identify how federal agencies "can best respond to rural broadband requirements." *Bringing Broadband to Rural America: Report on a Rural Broadband Strategy*, 24 F.C.C.R. 12792, 12814 (2009) (quoting Farm Bill, § 6112(a)).

The Broadband Data Act amended § 706 and enacted Chapter 12. The statute tasked several federal agencies, including the FCC, with broadband data collection responsibilities. *See Broadband Inquiry*, 24 F.C.C.R. at 4387. And the Commerce Secretary was directed to establish a program to encourage statewide initiatives to improve broadband access. *See* 47 U.S.C. § 1304(b).

Finally, the Recovery Act required the FCC to submit to the House and Senate Commerce Committees a "report containing a national broadband plan," *id.* § 1305(k)(1), to "ensure that all people of the United States have access to broadband capability." *Id.* § 1305(k)(2). Once it sent its national broadband plan to Congress for its consideration, the FCC had no further role to play under the Recovery Act.

The broadband provisions of the Recovery Act are codified in Chapter 12. *See id.* § 1305. Those provisions included the *only* congressional delegation of broadband rulemaking authority. The Assistant Secretary was directed to establish and administer the Broadband Technology Opportunities Program, *see id.* § 1305(a), and was given the authority "to prescribe such rules as are necessary to carry out" that directive. 47 U.S.C. § 1305(m).

Congress has not enacted any other piece of broadband-specific legislation. It has left intact the deregulatory policy framework of the 1996 Act, under which the FCC was to encourage the deployment of broadband "unfettered … by regulation." *Id.* § 230(b)(2). By codifying its broadband legislation *outside* the reach of the FCC's Chapter 5 rulemaking authority, Congress denied the FCC any power to prescribe rules to carry out the broadband provisions of Chapter 12.

In deference to Congress' "consistent judgment" to deny the FCC the authority to regulate broadband by rulemaking, *Brown & Williamson*, 529 U.S. at 160, this Court should hold that Congress did not intend for § 706 to serve as an independent grant of authority to the FCC to prescribe its Open Internet rules.

CONCLUSION

This Court should grant the petitions for review, vacate the FCC's Open Internet rules, and remand this case to the FCC for further proceedings.

Dated: August 6, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(d) and D.C. Circuit Rule 32(e), I hereby certify that this *amicus curiae* brief complies with the applicable type-volume limitations. This brief was prepared with Microsoft Word 2013 using a proportionally spaced type (Century Schoolbook, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e)(1), this brief contains 4,290 words.

/s/ *Hans Bader*
Hans Bader

August 6, 2015

CERTIFICATE OF SERVICE

I hereby certify that, on August 6, 2015, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, which will send notification of this filing to all parties' counsel of record. Moreover, all participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ *Hans Bader*
Hans Bader

August 6, 2015