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 *AMICI CURIAE* OF
MEMBERS OF CONGRESS

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amici curiae* Members of Congress represents 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* certifies that a separate brief is necessary. *Amici* are members of Congress, some of whom were instrumental in the enactment of the Telecommunications Act of 1996, 110 Stat. 56 (the "1996 Act"), and all of whom have had experience with Congress's role in legislative oversight of the FCC's fulfillment of its statutory public interest mandate. Thus, *amici* are particularly well suited to provide the Court with background on the text, structure, and history of the statute and the manner in which it was intended to operate. Indeed, *amici* have unique knowledge on an issue at the core of this case: whether broadband access to the Internet may be classified as a "telecommunications service" as that term is used in the 1996 Act.

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

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND AMICI

Except for *amici* Members of Congress and any other *amici* who have not yet entered an appearance in this Court, all parties and *amici* appearing before the district court are listed in the Brief for Petitioners.

II. RULINGS UNDER REVIEW

References to the rulings at issue appear in the Brief for Respondents.

III. RELATED CASES

So far as counsel are aware, this case has not previously been filed with this Court or any other court, and counsel are aware of no other cases that meet this Court's definition of related.

Dated: September 21, 2015

By: /s/ Christopher Jon Sprigman
Christopher Jon Sprigman
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**Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

The 1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56
Cable Modem Order	*Order Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002)
Caching	"the storing of copies of content at locations in the network closer to subscribers than their original sources," *Order* ¶ 372
CDN	Content delivery network; a network that delivers webpages and other Web content to a user based on the geographic locations of the user, the origin of a webpage and a content delivery server
Communications Act	Communications Act of 1934, 48 Stat. 1064, encoded as amended at 47 U.S.C. § 151 et seq.
DNS	Domain name service, a function that "matches the web site address the end user types into his browser...with the IP address of the web page's host server," *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967 (2005)
Fixed broadband	Broadband service to a user's fixed location
IP address	Internet Protocol address; a unique string of numbers used to identify each computer on a network
Mobile broadband	Broadband service to a user's non-fixed location, often using radio waves
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
VOIP	Voice Over Internet-Protocol; voice telephone service provided via the Internet

INTEREST OF *AMICI CURIAE*

Amici are Members of Congress, some of whom were instrumental in the enactment of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "1996 Act"), and all of whom have participated in Congress's oversight of the FCC's fulfillment of its statutory public interest mandate. Thus, *amici* are particularly well placed to provide the Court with background on the text, structure, and history of the statute and the manner in which it was intended to operate. Indeed, *amici* have unique knowledge regarding an issue at the core of this case: whether broadband access to the Internet may be classified as a "telecommunications service" as that term is employed in the 1996 Act.

Amici have an interest in ensuring that the 1996 Act is construed by the FCC and by the federal courts in accord with its text and purpose. *Amici* submit this brief to make clear that, in the view of a significant number of Members of Congress who have been active in telecommunications policymaking and are responsible for overseeing the actions of the FCC, the FCC's classification of broadband Internet access service as a "telecommunications service" is supported by the plain language of the 1996 Act. And that should not be a surprise: Congress crafted the definition of "telecommunications service" in the 1996 Act to make the term applicable to rapidly changing telecommunications technologies and markets on a technologically neutral and forward-looking basis. It was Congress's intent,

moreover, to preserve the FCC's authority to forestall threats to competition and innovation in basic telecommunications services, even as the technologies used to offer those services evolved over time. *See* President William J. Clinton, *Statement on Signing the Telecommunications Act of 1996* (Feb. 8, 1996), http://www.presidency.ucsb.edu/ws/?pid=52289 ("This landmark legislation fulfills my Administration's promise to reform our telecommunications laws in a manner that leads to competition and private investment, promotes universal service and open access to information networks, and provides for flexible government regulation."). Today, broadband Internet access is just such a basic telecommunications service – one which, in *amici's* view, lies at the heart of the FCC's Title II authority.

Moreover, in the event that this Court finds some ambiguity in the 1996 Act, *amici* note the Supreme Court's clear direction in *Nat'l Cable & Telecomms. Assn. v. Brand X Internet Svcs.,* 545 U.S. 967 (2005) (*Brand X*) that the FCC should be given substantial discretion to interpret ambiguous language in the 1996 Act. In *amici's* view, this Court has every reason to respect the expert agency's judgment on this point. Whatever the FCC's view of the matter may have been in the past, it is clear in 2015 that broadband Internet access is a "telecommunications service" and that the FCC's decision to classify it as such is reasonable. Indeed, it is surprising to *amici* that there could be serious dispute

about the fact that broadband Internet access is properly classed as a "telecommunications service" – not least because today, broadband access to the Internet has emerged as *the single most important* service that Americans use to transmit information to one another. Today, both fixed and mobile broadband Internet access are as central, or perhaps even more central, to the lives of millions of Americans than telephone service was when the 1996 Act was passed into law. Fixed voice service has been classified as a Title II telecommunications service since 1934, when the Communications Act was passed, and mobile voice service has been classified under Title II since 1994. It clearly is within the FCC's discretion to extend that classification to broadband Internet access, even should this Court find that the plain meaning of the statute does not command such a classification.

A full listing of congressional *amici* appears in Appendix A.

SUMMARY OF ARGUMENT

The Telecommunications Act of 1996 is a landmark law dedicated to ensuring that all Americans have access, at competitive prices, to state-of-the-art telecommunications services. To help achieve that goal, Congress adopted a broad, technology-neutral definition of "telecommunications service" regulable under Title II of the Communications Act, as amended and updated by the 1996 Act, 110 Stat. 56. The 1996 Act defines "telecommunications service" as "the offering of

telecommunications for a fee directly to the public … regardless of the facilities used." 47 U.S.C. § 153(53). "Telecommunications" is in turn defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(50).

Broadband Internet access service fits within these definitions. First, broadband Internet service providers are providing "telecommunications." Every broadband subscriber who sends an email, visits a website, or posts a photo to a social media site, uses his or her broadband Internet service to transmit information "between or among points specified by the user" – i.e., from the user's computer to the server that houses the email account of the email recipient, or to a server associated with the website or social media platform. In all the instances just noted, the information is transmitted by the broadband Internet service provider "without change in [its] form or content."[1]

When one sets aside the obfuscating argot of telecommunications lawyers and engages with the plain language of the statute in the way that Congress intended for the FCC and the courts to read it, it is patent that broadband Internet access service providers – both fixed and mobile – provide "telecommunications" under the terms of the 1996 Act. And because broadband service qualifies as "telecommunications",

[1] Broadband subscribers also expect to be able to access the content and applications of their choosing without being subject to Internet slow lanes or paid prioritization schemes that restrict consumer choice.

and broadband providers plainly "offe[r] … telecommunications for a fee directly to the public," *Protecting & Promoting the Open Internet*, 30 FCC Rcd 5601, ¶ 363 (2015) (*Order*), broadband Internet access service is properly classed as a "telecommunications service" that is regulable by the FCC pursuant to its Title II authority.

None of the various attempts by Petitioners and certain of their *amici* to escape that fact succeeds. Neither the operation of the Internet's Domain Name System (DNS) nor the existence of Internet caching change the fact that broadband Internet access is a "telecommunications service." Nor do DNS or caching somehow transform broadband Internet access service into an "information service" that lies outside of the FCC's Title II regulatory authority. The plain language of the "information service" definition in Section 153 of the 1996 Act excludes information processing capabilities used solely for the "management, control, or operation" of a telecom service. *See* 47 U.S.C. § 153(24). Both DNS and caching are network "management" technologies that are within the exclusion and thus are not properly classified as "information service." But even if, contrary to the 1996 Act's plain language, this Court were to find that DNS and caching are "information services," this Court must nonetheless uphold as reasonable the FCC's determination that DNS and caching are in fact separable from transmission service, are not "inextricably intertwined" with the provision of broadband Internet access, and thus do not alter

the proper classification of broadband access as a "telecommunications service." *See Brand X*, 545 U.S. at 978-79.

This Court should affirm the FCC's *Order*.

ARGUMENT

In the *Order* under review, the FCC determined that companies that sell broadband Internet access provide "telecommunications service" as the 1996 Act defines that term, and hence are subject to common carrier regulation under Title II of the Communications Act of 1934. *Order* ¶¶ 283-84. The FCC's determination is correct: as discussed in Part I below, companies that sell broadband Internet access are plainly providing "telecommunications service." But even if the meaning of the statute were not plain, the FCC's determination is at minimum a reasonable construction of the 1996 Act and is therefore entitled to deference under *Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc.,* 467 U.S. 837 (1984). *See also Nat'l Cable & Telecomms. Assn. v. Brand X Internet Svcs.,* 545 U.S. 967, 1000 (2005) (*Chevron* mandates that courts defer to the FCC's reasonable interpretation of its authority under the statutes that the agency administers, even where a current FCC interpretation is inconsistent with past practice); *Home Care Assn. of Amer. v. Weil,* 2015 WL 4978980 (D.C. Cir. Aug. 21, 2015) (Department of Labor's reasonable interpretation of provision of Fair Labor Standards Act entitled to deference under

Chevron, even where it contravenes previous reasonable interpretation of same provision).

I. Broadband Access to the Internet is a "Telecommunications Service" Under the Plain Language of the 1996 Act

In the Telecommunications Act of 1996, 110 Stat. 56, Congress extended the FCC's regulatory authority under Title II of the Communications Act of 1934 to a broad category of "telecommunications service." The 1996 Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public … regardless of the facilities used." 47 U.S.C. § 153(53). "Telecommunications" is in turn defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(50).

There is no doubt that broadband access to the Internet qualifies as a "telecommunications service," as that term is defined in the 1996 Act. First, broadband Internet service is plainly "telecommunications." Anyone who uses a broadband connection – whether fixed or mobile – to send an email, or to visit a website, or to log into his or her bank account, is transmitting "information of the user's choosing;" the user is choosing what information to transmit over a broadband network from his or her computer.

Moreover, the broadband service provider just as plainly transmits that user-selected information "without change in [its] form or content." A few simple examples will make this fact clear. If you visit Orbitz to purchase a plane ticket to Paris, your broadband provider transmits the Orbitz webpages to you without changing their form or content. If you send an email using Gmail to your friend telling him how excited you are that you've purchased the tickets to Paris, your broadband provider does not alter the form or content of the email message either. When you finish sending your email, you decide to watch a movie about Paris on Netflix. You use your broadband service to send a message to Netflix's servers requesting the video stream (you choose "Before Sunset", with Julie Delpy and Ethan Hawke), and Netflix transmits it back to you. Your broadband carrier does not alter the form or content of either your request to Netflix or the video that Netflix streams back to you. Now you're in Paris, and you use your smartphone to take a vacation picture of the Eiffel Tower and post it to Facebook. Your mobile broadband carrier transmits that photo to Facebook without change in its form or content. In all of these cases, you use an information service – email, web browsing, video streaming, social networking – that is provided by a third party. Your broadband Internet access provider's role is to transmit information between the user and the third party, without altering the information in any way.

Indeed, it could hardly be otherwise – if a broadband Internet access provider

altered in any way the form or content of an email, or of information sent to a website or a social medial platform, the broadband service would immediately be suspect as a tool for communications.

And finally, when an Internet user accesses a website, her broadband Internet access provider is transmitting data (the request for the website, and the actual content of the website) "between or among points specified by the user;" here, the user's computer, and the computer, or "server", that hosts the website. Similarly, a user who sends an email directs his Internet service provider to transmit the email to the server hosting the recipient's email account. It is of no moment that the Internet's routing protocols may make the precise path that the user's content (the message requesting the website, or the email) takes to the server difficult or impossible to predict. The message is delivered to the server, and, from the perspective of the user, that is the relevant "point" that the user has specified. Nor does it matter that the user does not know where the server is geographically located.

This is no different from traditional telephony service: When a person makes a telephone call, she dials a number that she associates with a person she wants to reach. The caller doesn't know along which path the call is traveling through the telephone network. Nor does she specify a particular telephone – and indeed, several telephones may ring when a particular number is called – and if that number is associated with a mobile phone then the caller likely does not know the

precise geographic location of the recipient at the time the call is made. From the perspective of the caller, all that matters is that the telephone number is associated with a certain person or entity that the caller wishes to reach.

In short, broadband Internet access plainly fits the 1996 Act's definition of a "telecommunications service." In a bid to resist the plain language of the statute, petitioners and their *amici* offer a clutch of arguments that broadband access is not a "telecommunications service," but rather must be classed as an "information service" under the 1996 Act – a category not subject to common carrier obligations. In particular, petitioners and their *amici* assert that the Internet's Domain Name System (DNS) and Internet "caching" technologies render broadband Internet access an "information service" that is not properly within the scope of the FCC's Title II regulatory authority. They argue (a) that DNS and Internet caching are information services provided by the broadband Internet service provider, and (b) that because these information services are "inextricably intertwined" with the "telecommunications" provided by the ISP, the "telecommunications" component is not independently "offered" to the broadband customer. Both of these arguments are incorrect. [2]

DNS and Internet caching offered by the broadband Internet service provider are not information services. The 1996 Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing,

[2] The first argument will be dealt with here, the second, in Part II, below.

retrieving, utilizing, or making available information via telecommunications . . . ." 47 U.S.C. § 153(24). The 1996 Act makes clear, however, that the category of "information service" does not include "any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." *Id.*

DNS and Internet caching are precisely the sort of capabilities "for the management, control, or operation of a telecommunications system or the management of a telecommunications service" that the 1996 Act excludes from the definition of "information service." The DNS is a system that associates domain names, such as "house.gov" (the domain name for the U.S. House of Representatives), which can easily be remembered, with numerical IP addresses, such as 143.228.126.60 (the IP address that corresponds to "house.gov"), which are not easily remembered but which are needed for the purpose of connecting to websites and performing a range of other functions on the Internet. Without DNS, a user would have to type the series of four numbers separated by periods into his or her browser to retrieve a website – an operation which, although entirely possible, would be inconvenient. *See Definition of "DNS"*, PC Magazine Encyclopedia, http://www.pcmag.com/encyclopedia/term/41620/dns.

DNS lookup is an important technology, but it is also clearly a technology that is employed in the "management, control, or operation of a telecommunications

system or the management of a telecommunications service." DNS is a tool that firms that operate telecommunication systems employ to make Internet usage convenient for customers using their system. It is the Internet version of automated telephone directory service – a service that established FCC precedent has consistently classified as a function that falls within the telecommunications management exception (*Order* ¶ 367) – or, as Justice Scalia correctly noted in his dissent in *Brand X*, "scarcely more than routing information, which is expressly excluded from the definition of 'information service.'" *Brand X*, 545 U.S. at 1012-13 (Scalia, J., dissenting).

Internet caching is, for similar reasons, also not an "information service." That technology involves the temporary storage of web content for the purpose of speeding its delivery to users. *See Definition of "Web Cache",* PC Magazine Encyclopedia, http://www.pcmag.com/encyclopedia/term/54281/web-cache. When this functionality is used by a broadband service provider, it is clearly a technology that is employed in the "management, control, or operation of a telecommunications system or the management of a telecommunications service." Internet caching when so employed by the broadband service provider is not a technology that anyone would consume other than adjunct to the use of Internet access service. The technology exists for the sole purpose of improving the performance of the telecommunications service offered by companies providing broadband Internet

access. The technology is within the scope of the exception for "management" of a telecommunications system, and is for that reason excluded from the definition of "information service."

In short, under the plain language of the 1996 Act, broadband Internet access is a "telecommunications service," the provision of which is properly subject to the FCC's Title II regulatory authority. This Court should affirm the FCC's *Order* as entirely consistent with the authority delegated to the Commission by Congress in the 1996 Act.

II. The FCC's Determination that Broadband Internet Access is a "Telecommunications Service" that is Separable From Any Associated "Information Service" is Reasonable and this Court Should Defer to it

The FCC's classification of broadband Internet access as a "telecommunications service" is consistent with the plain language of the 1996 Act. Even if, however, this Court finds the 1996 Act's language to be ambiguous with respect to the proper classification of broadband Internet access, the FCC's interpretation of the language of the statute it is charged with administering is reasonable and therefore entitled to deference from this Court. *Brand X*, 545 U.S. at 986. When it passed the 1996 Act, Congress expressly delegated interpretive authority to the Commission, and "[t]he Commission is in a far better position . . . to address this "'technical, complex, and dynamic'" subject. *Id*. at 1002-03 (quoting

Nat'l Cable & Telecomms. Assn. v. Gulf Power Co., 534 U.S. 327, 339 (2002)). There are, of course, limits to what the FCC properly may classify as a "telecommunications service." For example, applications offered by third parties that fall within the definition of "information service" cannot properly be considered "telecommunciations services." But in this instance, the FCC's classification decision reaches services that are well within the ambit of the 1996 Act's definition of "telecommunications service."

In its *Order*, the FCC re-affirmed its longstanding approach, one accepted and implemented by the Supreme Court in *Brand X*, holding that the proper classification of broadband Internet access services depended on the nature of the service offered to consumers, and, crucially, how consumers perceived that service. *Order* ¶ 342; *Brand X*, 545 U.S. at 990, 998. In its previous classification decision in the 2002 *Cable Modem Declaratory Ruling*, 17 FCC Rcd 4798 (2002), the FCC focused on the consumer perception that broadband Internet access was essentially about the use of *applications.* The Commission found that broadband Internet access service "typically includes many and sometimes all of the functions made available through dial-up Internet access service, including content, email accounts, access to news groups, the ability to create a personal Web page, and the ability to retrieve information from the Internet, including access to the World Wide Web." *Id.* at 4804. In addition, the Commission in 2002 noted that "[n]etwork monitoring,

capacity engineering and management, fault management, and troubleshooting are Internet access service functions that . . . serve to provide a steady and accurate flow of information between the cable system to which the subscriber is connected and the Internet." *Id.* at 4811-12. All of these, the Commission held, "are *applications* that are commonly associated with Internet access service," and that "[t]aken together, [ ] constitute an information service." *Id.* at 4822.

In 2005 and 2007, the FCC re-stated its view that broadband access should be classified as an integrated "information service". *Order* ¶¶ 344-45. But in the intervening years, much has changed. In particular, many consumers have spurned the applications, such as email, news groups, "walled garden" content, and home pages, offered by their broadband Internet access provider, in favor of services and applications offered by third parties, such as email on Google's gmail or Yahoo's Yahoo Mail; news and related content on nytimes.com or washingtonpost.com or Google News; home pages on Microsoft's MSN or Yahoo!'s "my.yahoo"; video content on Netflix or YouTube or Hulu; streaming music on Spotify or Pandora or Apple Music; and on-line shopping on Amazon.com or Target.com, as well as many others in each category. Further, millions of consumers spend an increasing share of their time online interacting with social networks, such as Twitter, Facebook, Instagram, Snapchat and Pinterest, that are offered by third parties and not by the firms that provide broadband Internet access service. *Order* ¶¶ 348-50.

Although each of these applications and services is properly classed as an "information service," all of them are offered by third parties, and are not part of the "offering" that broadband Internet access providers make to the public. Indeed, the marketing efforts of the broadband Internet access providers reflect consumers' shift toward third-party applications, in that they tend no longer to focus on the applications offered by the broadband access provider, but rather on the *speed and reliability with which the service allows consumers to reach third-party applications*. *Id.*

In light of these substantial changes in the way consumers use broadband Internet access service, and the corresponding changes in the way broadband service is marketed, the FCC held in its 2015 *Order* that "it is more reasonable to assert that the 'indispensable function' of broadband Internet access service is the connection link that in turn enables access to the essentially unlimited range of Internet-based services." *Order* ¶ 330. In other words, whatever the situation may have been in 2002, or 2005, or even 2007, it is clear that in 2015, broadband access to the Internet is a "telecommunications service." And the associated information services that the Commission in the past determined to be "inextricably intertwined" with that transmission function are in fact now separable from the offering to consumers of that telecommunications service. *Brand X*, 545 U.S. at 991 (whether broadband Internet access service is inextricably intertwined with the

provision of an "information service" turns "on the factual particulars of how Internet technology works and how it is provided, questions *Chevron* leaves to the Commission to resolve in the first instance.").

The FCC's determination is clearly reasonable. Even if it were true that in 2002, and 2005, and perhaps even in 2007, consumers viewed broadband Internet access as "indispensably" about access to applications – i.e., "information services" – offered by their broadband access service providers, by 2015 it is clear that consumers overwhelmingly view broadband Internet access as a data transport service that they use mostly for the purpose of interacting with applications offered by firms other than their broadband Internet access provider. This change in the way consumers view the broadband Internet access "offering" supports the FCC's reclassification of broadband access as a "telecommunications service" that is separable from the information services – i.e., the huge variety of Internet applications including email, home pages, social networking, on-line shopping, and access to all forms of digital content – that consumers now source mostly from third parties.

Much the same is true of DNS, Internet caching, and other network management and troubleshooting technologies. These applications and services are not properly classed as "information services," for they are technologies that function in "the management, control, or operation of a telecommunications system

or the management of a telecommunications service" and are therefore excluded from the definition of "information services." 47 U.S.C. § 153(24). However, even if, contrary to the language of the 1996 Act, these technologies were to be classed as "information services," it is nonetheless the case that in the current technological environment and from the point of view of consumers, none of these services are viewed by consumers as what broadband Internet access service providers are "offering," or are otherwise "inextricably intertwined" with broadband Internet access services in a way that would render broadband access service itself an "information service." *Order* ¶ 330.

One can see this readily with DNS. Consumers do not view DNS as what broadband Internet access service providers are "offering". Consumers view the broadband Internet access "offering" to be *access to the Internet* – i.e., a telecommunications service that transports data. DNS operates in the background to make that telecommunications service more convenient. But, from the perspective of consumers – or, indeed, judging by how they describe their offerings, from the perspective of providers as well – DNS is not the "offering". Nor is DNS service provided by the broadband Internet service provider "inextricably intertwined" with the offering. Today, DNS is available from a number of third-party providers, including popular free services like GoogleDNS (*see* https://developers.google.com/speed/public-dns/) and Cisco's OpenDNS

(https://www.opendns.com/home-internet-security/). If a broadband subscriber wishes to use DNS from a third party instead of the DNS provided by his broadband Internet access provider, switching to third-party DNS is trivially easy, and many customers have done so. *See* How-To Geek, *7 Reasons to Use a Third-Party DNS Service*, http://www.howtogeek.com/167239/7-reasons-to-use-a-third-party-dns-service/. If DNS ever was "inextricably intertwined" with the provision of broadband Internet access, it is not now – it is a functionality that can be, and often is, provided separately.

The same is true of Internet caching. That function is now performed mostly by third party "content delivery networks," or "CDNs," such as Akamai, Amazon CloudFront, KeyCDN, HP Cloud Services, and many others. The firms that offer broadband Internet access service also typically offer caching to content providers, and employ caching in their own networks. But from the perspective of consumers, caching is not what broadband Internet service providers are "offering". If consumers are even aware of the existence of caching, they are indifferent regarding who provides it, and indeed, caching is provided by many firms. Accordingly, the FCC's conclusion that Internet caching is not "inextricably intertwined" with broadband Internet access service, even if the broadband provider employs caching, and that broadband Internet access is not transformed from a "telecommunications service" into an "information service" by the broadband

Internet access provider's use of caching, is a reasonable construction by the Commission of the statute that it is charged with administering.

In sum, the FCC has done precisely what Congress intended the Commission to do – classify broadband Internet access service according to its best understanding of the technology of the day, and how consumers use that technology. It is within the FCC's power – power that Congress has delegated to it – to reclassify broadband Internet access as a "telecommunications service" where, as here, changed circumstances support such reclassification. Indeed, the Supreme Court made clear in *Brand X* that the FCC has an obligation to reconsider the wisdom of its classification decision as conditions change. *See Brand X*, 545 U.S. at 981 ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency … must consider varying interpretations and the wisdom of its policy on a continuing basis."). In light of the FCC's findings – findings which are amply supported by evidence – this Court should uphold the FCC's reasonable reclassification order.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court affirm the FCC's *Order*.

Respectfully submitted,

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Dated: September 21, 2015

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,651 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached *amicus* 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 14-point Times New Roman font.

Executed this 21st day of September, 2015.

/s/ Christopher Jon Sprigman
Christopher Jon Sprigman

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on September 21, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 21st day of September, 2015.

/s/ Christopher Jon Sprigman
Christopher Jon Sprigman

Counsel for Amici Curiae

APPENDIX: LIST OF *AMICI*

Edward J. Markey
U.S. Senator

Tammy Baldwin
U.S. Senator

Al Franken
U.S. Senator

Angus S. King, Jr.
U.S. Senator

Richard Blumenthal
U.S. Senator

Bernard Sanders
U.S. Senator

Ron Wyden
U.S. Senator

Cory A. Booker
U.S. Senator

Barbara Boxer
U.S. Senator

Barbara Lee
Member of Congress

Zoe Lofgren
Member of Congress

Eleanor Holmes Norton
Member of Congress

Jared Polis
Member of Congress

Anna G. Eshoo
Member of Congress

Nancy Pelosi
Member of Congress

John Conyers, Jr.
Member of Congress

Mike Doyle
Member of Congress

Keith Ellison
Member of Congress

Sam Farr
Member of Congress

Raúl M. Grijalva
Member of Congress

Michael M. Honda
Member of Congress

Jared Huffman
Member of Congress

John Lewis
Member of Congress

Betty McCollum
Member of Congress

Chellie Pingree
Member of Congress

Jan Schakowsky
Member of Congress

José E. Serrano
Member of Congress

Mark Takano
Member of Congress

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