
02-70518

and consolidated cases

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRAND X INTERNET SERVICES, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *et al.*,

Respondents.

**On Petition for Review of a Declaratory Ruling
of the Federal Communications Commission**

**BRIEF OF AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION & ACLU OF OREGON
IN SUPPORT OF PETITIONER-INTERVENORS
STATE OF VERMONT, VERMONT PUBLIC SERVICE BOARD,
DEPARTMENT OF PUBLIC SERVICE, AND WORLDCOM, INC.,
SUPPORTING REVERSAL**

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STATEMENT OF INTEREST OF AMICUS CURIAE

American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the Constitutional principles of liberty and equality. The ACLU has been at the forefront in numerous state and federal cases involving freedom of expression on the Internet.

The ACLU's interest in this action is that this case will decide whether cable Internet access is subject to common carriage requirements, affording open access. Such access would preserve the Internet as an open, content neutral forum for First Amendment activity.

The American Civil Liberties Union of Oregon and the ACLU Foundation of

Oregon (“ACLU of Oregon”) is the Oregon affiliate of the American Civil Liberties Union. The ACLU of Oregon has appeared in an amicus or direct representational capacity in numerous cases involving civil liberties and Constitutional rights before this Court. The ACLU of Oregon is a private non-profit organization.

Amicus ACLU of Oregon respectfully submits that the present case will have a direct impact on an ongoing controversy in the State of Oregon, i.e. whether broadband cable providers must afford open access to Internet service providers. See AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000).

PRELIMINARY STATEMENT

The Internet is without doubt the most vital and active forum where freedom of speech rights are exercised today -- a place where citizens can publish their views to be seen by a few close friends or spread around the world; where citizens can engage with others on thousands of bulletin boards and chat rooms on nearly any topic, create new communities of interest, or communicate anonymously about sensitive topics. It is one of our top entertainment mediums. It is the nation's most comprehensive, flexible and popular reference source. It is the closest thing ever invented to a true free marketplace of ideas. The reason the Internet is such a vital forum for speech is that the networks comprising it are content-neutral and that anyone with a telephone line can access it via any number of competing service providers, most of which are also content-neutral.

The Internet as we have known it is going to change, and at issue is how. At stake is nothing less than the Internet's potential as a medium for free expression, civic involvement and economic innovation. Driving the change is consumers' conversion, by necessity, from telephone dial-up Internet service to far faster "broadband" connections. Dial-up Internet

access is provided over a medium that provides open, equal access to all: the telephone system. But with the shift to cable, Internet access must be adapted to a medium that has been subject to far more centralized control. The danger is that the Internet will come under private control, resulting in loss of the qualities that serve the First Amendment.

The FCC would have averted this danger had it held, as this Court has, that the use of the physical pipeline for cable Internet access is a telecommunications service. A telecommunications service is subject to common carriage requirements. Common carriage prevents a network owner from leveraging its control over the pipeline for communication to gain control over the actual information, products and services transmitted through it. It therefore allows for a healthy and competitive marketplace, to the benefit of the public. Instead, however, the FCC improperly concatenated cable ISPs' two offerings—Internet *service* and cable Internet *access*—and held that cable Internet access is an "interstate information service." The FCC's technical redefinition means that cable broadband Internet access could be completely exempt from federal regulation and common carriage requirements. The resulting monopolies threaten more than consumers' ability to obtain broadband Internet access at a reasonable price. Because an Internet service provider ("ISP") can, and without

competition will, control where a customer can and cannot go on the Internet, and under what conditions, these cable Internet access monopolies threaten the First Amendment purposes the Internet now serves so well. This Court must address this threat by correcting the FCC's error and holding that cable modem Internet service is a telecommunications service and therefore subject to the Telecommunications Act's Title II common carrier provisions.

ARGUMENT

I. COURTS HAVE RECOGNIZED AND PROTECTED THE PUBLIC'S FIRST AMENDMENT RIGHT TO SPEAK AND RECEIVE SPEECH VIA THE INTERNET

The FCC's Ruling, by allowing cable companies to avoid common carriage requirements, threatens First Amendment interests, because cable ISPs are capable of editing, delaying or outright censoring Internet traffic and are highly motivated to do so. Using the Internet, "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). "The Internet presents low entry barriers to anyone who wishes to provide or distribute information. Unlike television, cable, radio, newspapers, magazines or books, the Internet provides an opportunity for those with

access to it to communicate with a worldwide audience at little cost."

American Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401, 416 (E.D. Pa. 2002). Speech flourishes in an environment where anyone with a computer and an Internet connection can reach the world. "The architecture of the Internet, as it is right now, is perhaps the most important model of free speech since the founding...the model for speech that the framers embraced was the model of the Internet—distributed, noncentralized, fully free and diverse." *Id.* at 470 (quoting Lawrence Lessig, *Code and Other Laws of Cyberspace* 167, 185 (1999)). The special factors recognized in some of the Supreme Court's cases as justifying regulation of some broadcast media, such as radio and television, are not present in cyberspace and do not bear on the level of First Amendment scrutiny that should be applied to the Internet. *Reno v. ACLU*, 521 U.S. at 868-870 (applying strict scrutiny to provisions of the Communications Decency Act and striking them as unconstitutionally overbroad). "[W]hen Congress purports to abridge the freedom of a new medium, we must be particularly attentive to its distinct attributes, for 'differences in the characteristics of new media justify differences in the First Amendment standards applied to them.'" *Ashcroft v. ACLU*, 122 S. Ct. 1700, 1718 (2002) (concurring opinion of Justice Kennedy). For this reason, Courts have been emphatic that the Internet is entitled to the highest level of

protection and that attempts to censor its content or silence its speakers are to be viewed with extreme disfavor. *See Reno v. ACLU*, 521 U.S. at 870; *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1192-93 (N.D. Cal. 2001); *American Library Ass'n*, 201 F. Supp. 2d at 467-470 (describing the extent to which Internet access promotes First Amendment values by facilitating speech in a ways other fora cannot because it is interactive and "renders the geography of speaker and listener irrelevant.")

Courts have also recognized that the public has a First Amendment interest in receiving the speech and expression of others. "[T]he right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences..." is one of the purposes served by the First Amendment. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 at 390 (1969). Indeed, the "widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Metro Broad. Inc. v. FCC*, 497 U.S. 547, 566-67 (1990) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

Internet access permits the public "to receive speech on a virtually unlimited number of topics, from a virtually unlimited number of speakers" without any editorial restriction. *American Library Ass'n*, 201 F. Supp. 2d at

462. Because the Internet is a powerful means for the public to have meaningful access to diverse sources of ideas and experiences, courts have protected the public's right to uncensored Internet access on First Amendment grounds. *See id.* at 466 (Internet access in public libraries, where "the right to receive information is vigorously enforced" promotes First Amendment values and "warrants application of strict scrutiny to any content-based restriction on speech.") This Court should continue to protect these values in deciding this case, and hold that cable Internet access is a telecommunications service subject to common carriage, so that consumers will be able to choose among competing cable ISPs.

II. THE INTERNET IS A POWERFUL ENGINE FOR FIRST AMENDMENT ACTIVITY BECAUSE IT WAS DESIGNED TO BE SPEAKER-NEUTRAL AND CONTENT-NEUTRAL AND BECAUSE IT HAS BEEN ACCESSIBLE OVER A SYSTEM REGULATED AS A COMMON CARRIER

The speech-enhancing quality of today's Internet is the result of its decentralized, nondiscriminatory design. The overall architecture of the Internet is remarkably simple.¹ It is an "end-to-end" network, where the network itself is nothing more than interconnected computers ("routers") that

¹ *See, e.g.,* Vinton Cerf, *How the Internet Works*, at http://www1.worldcom.com/global/resources/cerfs_up/prose/hownetworks.xml (last visited October 29, 2002). *See also* Rus Shuler, *How Does the Internet Work?*, at http://www.theshulers.com/whitepapers/internet_whitepaper.html (last visited October 29, 2002).

receive and transmit bits of information without regard for the content, and the intelligence of the network (where the information is created, interpreted, and used) occurs only at its edges, where the users are. See Mark A. Lemley & Lawrence Lessig, *The End of End-To-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. Rev. 925 (2001).² An Internet Service Provider ("ISP") provides its customers a connection to the Internet and mediates the user's interactions with this global computer network. Each ISP has its own network of routers. All ISPs are able to exchange digital information with other ISP networks to which they are connected. Traditionally, no one network has had any greater control of data transfer than any other network. The structure of the Internet is therefore completely decentralized.

The Internet serves as a neutral, nondiscriminatory "pipe" that automatically carries data from origin to destination without prejudice or interference. No company, individual or institution has the power to decide what applications are allowed to run, what kinds of data can be moved through the network, or whose data moves faster. This neutrality promotes

² For a graphical depiction of the networks that comprise the Internet, see Hal Burch & Bill Cheswick, *Internet Mapping Project: Map gallery*, at <http://www.cs.bell-labs.com/who/ches/map/gallery/index.html> (last visited October 29, 2002). This data was current as of 1999; the image would be significantly more complex today.

open discourse. The Internet is open and easily accessible to the public, allowing it to freely communicate on a global scale. Consumers decide what sites to access, among millions of choices, and "pull" information from these sites, rather than having information chosen by others "pushed" out to them, as with television and other major media. The Internet's structure therefore currently facilitates both free speech and commercial innovation and competition. But the characteristics that "render it uniquely suited to promote First Amendment values may change as the Internet's architecture evolves." *American Library Ass'n*, 201 F. Supp. 2d at 469 n. 28.

Through the life of the Internet, most Americans have used dial-up services to access it, and they are accustomed to many choices in the ISP marketplace. Consumers' use of the dial-up system was well suited to a model of free-market competition, because every individual Internet user could choose which ISP to use, and connect directly to that company. If he did not like that ISP, he could drop it and connect to a new provider simply by dialing a different phone number. In fact, consumers readily change ISPs when dissatisfied, and as many as 5% to 6% of all Internet users switch ISPs each month. United States General Accounting Office, Pub. GAO-01-93, *Technological and Regulatory Factors Affecting Consumer Choice of Internet Providers*, 33 (2000) ("*Consumer Choice*") (citing Morgan Stanley

Dean Witter and Co., *The Internet Data Services Report* 24 (1999)). In the U.S. there were over 7,000 ISPs in the year 2000. *Id.* at 29; *see also The List of ISPs: United States*, at <http://thelist.internet.com/misc/usa/> (last visited October 29, 2002) (listing numerous domestic ISPs.) This degree of choice and competition is possible because the common carriage regulations that govern the telephone system were consciously designed to promote the principles of open access and nondiscrimination. It is very easy to go into business as a dial-up ISP. The same is not true in high speed Internet access.

III. THE FCC MUST REGULATE CABLE INTERNET ACCESS PROVIDERS BECAUSE THE CABLE BROADBAND MONOPOLY THREATENS THE PUBLIC'S FIRST AMENDMENT RIGHTS ONLINE

A. **Consumers Are Moving From Dial-Up Internet Connections To Faster Cable Broadband Connections**

Dial-up access over old-fashioned copper "twisted pair" telephone lines, while ubiquitous, is the slowest means of connecting to the Internet and uploading and downloading information. *Consumer Choice*, at 13-14. Increasingly, as richer, more data-intensive content is available on the Internet, the speed of one's Internet connection makes a large difference in one's experience online. Listening to streaming audio content, watching video clips, playing online games, viewing websites with elaborate graphics each require huge transfers of data in nearly real-time. Dial-up access is incredibly slow in comparison to DSL or cable and simply cannot handle the

large-bandwidth Internet applications commonly in use today without enormous frustration for the user. Downloading large files over dial-up connections can be frustrating and very time-consuming.

As this Court has recognized,

The allure of broadband technology is that it allows users to access the Internet at speeds fifty to several hundred times faster than those available through conventional computer modems connected to what is commonly referenced in the telecommunications industry as "plain old telephone service." Broadband allows transmission, or streaming of live video and audio communications, as well as video and audio data files.

AT&T Corp. v. City of Portland, 216

F.3d 871, 873-74 (9th Cir. 2000).

Consumers will increasingly adopt broadband Internet access to take full advantage of data intensive web-based content, just as consumers replaced their black and white television sets with color sets in the last century. And as broadband penetration increases, web sites will become more data-intensive on average, making dial-up service even

more intolerable. As consumers tire of the slow pace of the Internet delivered over phone lines, cable Internet will increasingly gain market share. But with this change, consumers have markedly less choice among Internet service providers. Today there are many more dial-up ISPs available than cable ISPs.³

In contrast to dial-up Internet access, cable Internet service operates over coaxial cables, which have significantly more capacity than standard copper telephone wires. *See Columbia Telecommunications Corp., Technological Analysis of Open Access and Cable Television Systems*, (2001) (“*Technological Analysis*”) (attached as an addendum for the Court’s convenience) at 11 n.13. Cable lines were developed to carry high-bandwidth content, because their original purpose was to deliver television

³ In 1999, it was estimated that 96% of Americans could reach at least four dial-up ISPs by a local telephone call, and the remaining 4% were able to reach at least one dial-up ISP using either a local call or a toll-free number. *See Andrew Oram, ISPs and Internet Policy: New Agendas (1999)*, available at: http://www.oreilly.com/~andyo/ar/agenda_isp.html (last visited October 29, 2002).

data. But, of course, Internet service is fundamentally different from cable television service. Cable television has a limited number of channels, centrally controlled by the cable company, and pushing data one way-toward the viewer. Cable Internet access, in contrast, can be access to a limitless network of distributed information and entertainment sources with no centralized control -- the consumer chooses what packets she wants to receive. *See AT&T*, 216 F.3d at 876-77 ("Accessing web pages, navigating the Web's hypertext links, corresponding via e-mail, and participating in live chat groups involve two-way communication and information exchange unmatched by the act of electing to receive a one-way transmission of cable or pay-per-view television programming.") When cable companies provide Internet access through the cable pipeline, they are performing a telecommunications service exactly analogous to the phone company's role in dial-up service: providing a two-way pipe for information. *Id.* at 877-78. They should be regulated, accordingly, as telecommunications common carriers, to bring consumers the benefits of competition and content-neutral access to the Internet's offerings.

B. As Consumers Adopt Cable Internet Access, They Have No Choice of Providers Because, Absent Regulation of Cable Systems as Common Carriers, Nothing Prevents Cable ISP Monopolies

Cable companies are in the unusual position of having complete control over their wires, the essential facility for cable Internet access. *See Before the City of Los Angeles, UCAN Opening Comments: How Open Access Architecture for Cable Networks Benefit Consumers, Competition & Free Speech*, at http://www.ucan.org/law_policy/teledocs/openLA.html (last visited October 29, 2002) [*“UCAN Opening Comments”*]. The hard fact is that the top five cable companies in the U.S. control 75 percent of the cable market nationwide. National Cable & Telecommunications Association, *Top 25 MSOs*, at http://www.ncta.com/industry_overview/top50mso.cfm (last visited October 29, 2002). If the government does not require these companies to open access via their cable systems to other ISPs, these five cable companies will soon effectively control the Internet as well. In 2000 an estimated 97% of the 2 million people had no choice of cable ISP. James Mathewson, *Open Access Rises From The Ashes*, *Computer User* (Sept. 8, 2000), available at <http://www.computeruser.com/articles/daily/8,6,1,0908,00.html> (last visited October 29, 2002). Most cable systems offer only one ISP, which is either the cable system itself or an exclusive licensee that might as well be the cable company.

Under the FCC's ruling, cable companies can restrict access to a single ISP because neither competition nor regulation restrains them from doing so. The only way to ensure competition and choice in cable Internet access is for the FCC to regulate cable as a telecommunications common carrier. The history of the telephone systems is illustrative. The FCC has treated telephone systems as common carriers, forcing telephony to be open to competition. As a result, there are thousands of ISPs in the dial-up and DSL markets offering users a wide choice of different, competing ISPs. See UCAN opening comments. There is no reason that cable Internet access should be treated differently.

Indeed, this Court has held that, while some ISP functions are information services, the transmission of Internet packets through a cable broadband "pipeline" – the cable into consumers' homes and the cable system itself— is a "telecommunications service," as defined in the Communications Act. AT&T, 216 F.3d at 878. This Court appropriately distinguished between cable Internet access, and other Internet services offered in conjunction with that access. In its Declaratory Ruling, however, the FCC has held that cable Internet service is an "interstate information service," which is therefore outside of the scope of the 1996 Communications Act. This ruling is particularly absurd when AT&T, one

of the nation's largest cable companies, has begun offering digital phone services through its cable systems, in what seems to be "a deliberate end run around the Telecom Act." Mathewson, Open Access Rises From the Ashes. The Internet is shifting from the open phone system to the closed cable network. If the government remains passive, the shift will transform the Internet from an open forum into a place where not all thoughts, expressions, publications, and other content are treated equally. This Court should reverse the FCC ruling to prevent this loss.

- C. **Cable Companies Use Their Cable Access Monopoly Through Their ISPs to Censor, Regulate and Control Customers' Access to the Internet**

CABLE NETWORKS LACK THE OPEN AND NONDISCRIMINATORY DESIGN OF THE INTERNET, DESCRIBED ABOVE. AS A RESULT OF CABLE SYSTEMS' HISTORICAL USE TO DISTRIBUTE PAID AND UNPAID TELEVISION CONTENT, CABLE CUSTOMERS ARE WIRED DIRECTLY INTO THE CABLE PROVIDER'S SYSTEM AS PART OF ONE BIG LOCAL AREA NETWORK, ALL UNDER THE CONTROL OF A CENTRALIZED ADMINISTRATOR, THE CABLE PROVIDER. CABLE COMPANY ISPS WIELD ALMOST COMPLETE CONTROL OVER THE CONTENT THEIR CUSTOMERS ARE ABLE TO SEE AND DISSEMINATE ON THE INTERNET. A CABLE COMPANY HAS MANY OPPORTUNITIES FOR INTERFERING WITH ONLINE ACTIVITIES, OFTEN IN WAYS THAT ARE INVISIBLE TO ITS CUSTOMERS.

1. BASIC CONTROL OVER THE SERVICE AND WEB-BASED APPLICATIONS

THE CABLE ISP MAY LIMIT THE NUMBER OF COMPUTERS A CUSTOMER CAN CONNECT TO HIS OR HER MODEM. IT CAN CONTROL THE OVERALL SPEED AND RELIABILITY OF THE CUSTOMER'S SERVICE. IT CAN SET PRICES FOR VARIOUS LEVELS OF HIGH-SPEED INTERNET

ACCESS. *SEE TECHNOLOGICAL ANALYSIS* AT 19-20. ISPS HAVE THE ABILITY TO DISCRIMINATE AT A VERY FINE LEVEL, BY THE KIND OF PACKET BEING SENT (E.G., STREAMING VIDEO), BY THE ADDRESSEE OR ADDRESSOR, OR BY THE KIND OF USER (E.G., PRIVATE INDIVIDUAL VERSUS A CORPORATION).

ID.* AT 7. THE CABLE ISP CAN THUS EASILY BLOCK CUSTOMERS FROM USING SPECIFIC INTERNET APPLICATIONS, INCLUDING THOSE THAT COMPETE WITH THE CABLE COMPANY. *ID.* FOR EXAMPLE, AT&T COULD CHOOSE TO PREVENT ITS CABLE ISP CUSTOMERS FROM USING INTERNET TELEPHONY OR VIDEO CONFERENCING, BECAUSE THESE SERVICES COMPETE WITH AT&T'S LONG-DISTANCE TELEPHONE AND VIDEO CONFERENCE SERVICES. *ID.

2. CONTROL OVER ACCESS TO CONTENT

MOREOVER, ISPS CAN CONTROL WHAT THE CUSTOMER CAN AND CANNOT VIEW ONLINE. WHILE THE INTERNET WAS CREATED TO BE A CONTENT-NEUTRAL ENVIRONMENT, THIS NEUTRALITY IS IN JEOPARDY. ECONOMIC PRESSURES OR THE DESIRE TO MAXIMIZE PROFITS FOR SHAREHOLDERS

ARE DRIVING CABLE ISPS TO BIAS THE CONTENT TRAVELING OVER THEIR WIRES TO CONSUMERS. THESE ISPS CAN ACCOMPLISH THIS GOAL IN SEVERAL WAYS. A CABLE ISP MAY REDIRECT USERS AWAY FROM COMPETITOR CONTENT (OR OTHER CONTENT THAT THE ISP DOES NOT WANT A USER TO SEE) WITH AGGREGATION PAGES, OUTRIGHT BLOCKING OF CONTENT, AND REDIRECTION. A MORE SERIOUS CENSORSHIP OCCURS WHEN AN ISP INTENTIONALLY BLOCKS CERTAIN CONTENT, EITHER FOR BUSINESS OR IDEOLOGICAL REASONS. EVEN MORE EGREGIOUS IS REDIRECTION, IN WHICH THE ISP NOT ONLY PREVENTS ITS CUSTOMER FROM ACCESSING THE INFORMATION SHE REQUESTS BUT INSTEAD PROVIDES HER WITH COMPETING INFORMATION FROM THE ISP OR ONE OF ITS AFFILIATES. *SEE, E.G., COMMENTS OF AMAZON.COM, CS DOCKETS 02-52, 02-77 (FILED JUNE 17, 2002) 6-8; TECHNOLOGICAL ANALYSIS AT 3, 20.*

As a more subtle way to influence customers' behavior than blocking and redirection tactics, a cable ISP can permit customers to see disfavored content only after a significant delay. The ISP can effectively time-

discriminate between its own content and that of its competitors in at least two ways, caching and policy-based routing. "Caching" means that the ISP stores a complete copy of the information (e.g., a web page) on its local computers. If an ISP caches a particular website, when a customer asks to "go to" that site, it receives the packets of information comprising the website from the ISP's local computer instead of from the server hosting the website, which might be far away. This results in faster accessibility for a select set of information – that set of information that the ISP wants the user to be able to see quickly. The net effect of this manipulation is subtle, so "consumers may not realize that they have come to prefer certain content as a result of its faster accessibility." *Consumer Choice* at 32.

Second, an ISP (unlike the routers of the Internet itself under the nondiscriminatory TCP/IP protocols) can apply protocols that discriminate among packets. Two such protocols are Quality of Service ("QoS") and Policy Based Routing ("PBR"). Using protocols like these an ISP can delay delivery of certain packets and preferentially speed that of others.

Technological Analysis at 26, 30-31. On average, Internet users will stop trying to access a particular website after a delay of only 8 seconds.

National Research Council Computer Science and Telecommunications Board, *Broadband: Bringing Home the Bits*, 84, n.1 (National Academy

Press 2002). *See* Opening Brief of Media Access Project at 21-25 and sources quoted therein. The customer will not be able to tell that the difference is the work of the cable ISP and not merely general Internet traffic congestion. *Technological Analysis* at 7. As described above, ISPs can discriminate among content in a number of ways invisible to the customer.

ISPs' ability to limit or delay their customers' access to specific websites has disturbing implications. For example, if AOL/TimeWarner, which owns many cable systems, supports a Republican candidate for President, its cable ISPs could easily (1) track the surfing activity of those of their customers who access information online about the Democratic candidate; (2) block customers' access to Democratic candidate's webpages; (3) cache the websites of the Republican candidate on their local servers so that users receive this information very quickly when requested; and (4) specifically delay transmissions from the Democrat's website so that customers have to wait longer to view the site. Given that Internet users have little patience for websites that load slowly, a cable ISP can discourage or outright prevent customers from learning more about any political candidate that the cable company does not endorse, without them realizing what ISP is doing. *Bringing Home the Bits* at 84 n. 1. Similarly, if a cable company is opposed to abortion, it can easily deny its customers access to

websites providing information about abortion providers and instead direct them to websites promoting adoption or to religious websites, or simply keep track of who is looking at abortion providers' websites and use that information as it sees fit, or sell it. Depending on the cable company's political and social values, it could prevent customers from accessing information about gun control, labor unions, gay rights groups, or particular religious faiths. Or, from a pure business standpoint, customers trying to identify alternatives to their cable ISP could be blocked entirely from competitors' websites and/or rerouted to the cable ISP's own portal.

3. ABILITY TO EXPOSE CUSTOMERS TO SPECIFIC CONTENT AS A CONDITION OF ACCESS

MANY ISPS EMPLOY AN "AGGREGATION PAGE" OR "PORTAL" – A WEBSITE WHERE THE CUSTOMER MUST GO TO ACCESS THE ISP'S SERVICES. SUCH PAGES INCLUDE LINKS TO NEWS, MERCHANTS, AND OTHER INTERNET CONTENT THE ISP CHOOSES. FOR EXAMPLE, AOL'S "WELCOME SCREEN" HAS BECOME A POWERFUL COMMUNICATIONS TOOL FOR THE COMPANY, ALLOWING IT TO PLUG ITS AFFILIATED COMPANIES AND READ ADVERTISING REVENUES THROUGH AN OFTEN BLURRY MIX OF NEWS STORIES AND PAID PROMOTION. SEE BRENDAN

KOERNER, *CLICK HERE FOR BRITNEY: AOL MUSCLES ITS WAY INTO ONLINE JOURNALISM. BE AFRAID*, WASHINGTON MONTHLY, JULY 13, 2001, AVAILABLE AT [HTTP://WWW.WASHINGTONMONTHLY.COM/FEATURES/2001/0107.KOERNER.HTML](http://www.washingtonmonthly.com/features/2001/0107.koerner.html) (LAST VISITED OCTOBER 29, 2002). BY REQUIRING CUSTOMERS TO START AT THIS SITE, THE ISP HAS A CAPTIVE AUDIENCE FOR THE SERVICES AND SITES IT WANTS TO PROMOTE, GIVING THESE SERVICES ADVANTAGES OVER THEIR COMPETITORS. ACCORDING TO ONE SURVEY, INFREQUENT INTERNET USERS SPEND 43% OF THEIR TIME ONLINE AT THEIR ISP'S HOME PAGE, AND EVEN MORE KNOWLEDGEABLE, FREQUENT USERS SPEND AN AVERAGE OF 26% OF THEIR TIME ONLINE AT THE ISP'S PORTAL. *CONSUMER CHOICE* AT 32.

4. ABILITY TO VIOLATE CUSTOMERS' PRIVACY

A CABLE PROVIDER'S ABSOLUTE CONTROL OVER ITS NETWORK GIVES IT THE TECHNICAL CAPACITY TO RECORD EVERYTHING ITS CUSTOMERS DO ONLINE, DOWN TO THE SMALLEST MOUSE CLICK. CABLE COMPANIES HAVE EVERY INCENTIVE TO DO SO. FOR EXAMPLE, IN FEBRUARY 2002,

COMCAST, THE NATION'S THIRD LARGEST CABLE COMPANY, IN FEBRUARY 2002, WITHOUT NOTIFYING ITS CUSTOMERS, BEGAN TO TRACK THEIR WEB BROWSING. STEFANIE OLSEN & RACHEL CONRAD, *COMCAST PRIVACY MOVE ITS LATEST WOE*, C|NET, FEBRUARY 13, 2002, AVAILABLE AT [HTTP://NEWS.COM.COM/2100-1023-836937.HTML](http://news.com.com/2100-1023-836937.html) (LAST VISITED OCTOBER 29, 2002). *SEE ALSO TECHNOLOGICAL ANALYSIS AT 20. TRACKING USERS OBVIOUSLY COULD HELP THE CABLE COMPANY, OR A COMPANY THAT BUYS CUSTOMER INFORMATION, TO TAILOR ADVERTISEMENTS TO EACH. ADDITIONALLY, MEDIA COMPANIES ARE INCREASINGLY PRESSURING ISPS TO MONITOR CUSTOMERS' ONLINE ACTIVITIES SO AS TO BE ABLE TO HELP COMPANIES DETECT UNAUTHORIZED COPYING AND SHARING OF INTELLECTUAL PROPERTY.*

In summary, any ISP could use the tactics described above to discriminate against disfavored content and to promote other content. Some customers may even want an ISP to edit the Internet for them, as part of their service. But as a practical matter, the wide selection of ISPs in the dial-up environment has provided consumers the opportunity to switch to a content-

neutral (or at least differently discriminatory) ISP. But because the means of control discussed above are largely undetectable or not easily recognized as the work of the ISP, their effects are insidious and consumers may not notice that their Internet experience is being interfered with. And because of the monopolistic nature of cable systems, consumers cannot simply choose another ISP if they want the speed and bandwidth of cable Internet access. Therefore, the effect of a cable access monopoly will be to undermine the qualities of today's Internet that have made it such a powerful tool in the service of First Amendment values.

**D. There Is No Technical Barrier To Cable Systems Allowing
Open Access to Competing Service Providers**

Despite the claims of some cable operators, there is virtually no technical bar to allowing competing ISPs to offer services over cable systems, so long as a cable operator is willing or forced to cooperate in providing access. *See Technological Analysis* at 40-41 (outlining a blueprint for transferring the Internet from dial-up to cable access without losing its free and open nature). The most common cable system architecture, hybrid-fiber coaxial, can be used to offer advanced, interactive services in an open access environment. Each of the former barriers to open access has been

overcome by equipment manufacturers or changes in regulations. *Id.* The cable company does not need to construct new infrastructure or upgrade that it already owns. At most, open access would require some additional maintenance and repairs. As the cable company performs routine upgrades and replaces equipment, it would simply install equipment selected to facilitate open access. *Id.* There is no doubt that nondiscriminatory open access leading to true consumer choice and the survival of the open Internet is completely technically feasible.

IV. THE FCC IGNORED ITS DUTY TO PROTECT THE PUBLIC'S FIRST AMENDMENT INTERESTS WHEN IT FAILED TO CLASSIFY CABLE MODEM INTERNET ACCESS AS TELECOMMUNICATIONS

In reviewing the FCC's decision, this Court should consider the agency's duty to the public interest. That public interest includes far more than just encouraging deployment of a technology. Rather, the FCC is required to consider the public's "paramount" First Amendment right to receive speech from a diversity of different sources. *See Red Lion Broad. Co. v. FCC*, 395 U.S. at 390; 47 U.S.C. § 257(b) (1996). In 1996, Congress passed the Telecommunications Act, charging the FCC with regulating

television and radio, stating that the policies and purposes of the Act were to favor "diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity." 47 U.S.C. § 257(b) (1996). Safeguarding the public's right to receive a diversity of views and information over the airwaves is an integral component of the FCC's mission. *Metro Broad.* 497 U.S. at 567 ("the 'public interest' standard necessarily invites reference to First Amendment principles"); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 122 (1973). The FCC must promote, therefore, the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press*, 326 U.S. at 20. *See Red Lion* at 385, 390. *See also United States v. Midwest Video Corp.*, 406 U.S. 649, 667-669, and n.27 (1972) (plurality opinion). The U.S. Supreme Court recognizes that the Commission may properly consider First Amendment and antitrust values underlying the Commission's policies in determining where the public interest lies. *See FCC v. National Citizens Comm. For Broad.*, 436 U.S. 775, 795 (1978).

Here, those values should have compelled the FCC to categorize cable Internet access so as to invoke the common carriage regulatory framework

that has allowed for healthy competition among many ISP's in the dial-up context. Cable companies' First Amendment interests are unharmed by an open access requirement because a cable company can still engage in expressive activity by offering its own cable ISP and its own web content. Mere ownership and control of the cable pipe does not render a cable company a speaker for First Amendment purposes. As shown above, however, if cable systems are not subject to common carriage regulations, limiting consumers' cable options to a single cable *access* provider means limiting their ISP options to a single ISP. Without competition, cable ISPs have no reason to follow the nondiscriminatory protocols that have kept the Internet as a whole open. Instead, they have significant business incentives to discriminate among content to maximize profits, and may have ideological reasons as well. Public Interest Petitioners brought these concerns to the FCC's attention repeatedly, as discussed in their opening brief at 5-8, but the FCC did not consider the impact of its decision on First Amendment interests. As shown above, the result of ruling that broadband Internet access delivered over cable lines is solely an information service and not a telecommunications service under the Communications Act is to leave consumers' First Amendment interests to the discretion of cable monopolists whose fiduciary duties are to their owners and shareholders, not

to the Public. The Ruling is an error of law that this Court should reverse, not only because it is plain legal error (as shown in the Brand X, Earthlink, Vermont and Worldcom briefs) but because the FCC breached its duty to safeguard the public's right to receive a diversity of views and information.

CONCLUSION

As detailed above, cable companies have the ability to easily influence the Internet content that cable ISP users are permitted to see and distribute, often so subtly that the user will not even realize that it is the ISP making it so difficult to see particular content. Cable will soon be the preferred means of reaching the Internet for most Americans, and the only practical way to use the Internet for applications requiring a high speed connection. A mere handful of companies control most cable systems in this country. If they are permitted to maintain their cable ISP monopoly, consumers will have no way to avoid the censorship and bias that the cable ISPs will without doubt employ. They will effectively be denied access to a diversity of views and information. Accordingly, this Court must reverse the FCC decision and hold, as it did in *Portland* that cable modem Internet service is a telecommunications service and therefore subject to the Telecommunications Act's Title II common carrier provisions. Only choice

among cable Internet service providers can keep the Internet the open public forum that it is today.

Dated: October 31, 2002

Respectfully submitted,

**AMERICAN CIVIL
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CERTIFICATE OF SERVICE

I, Joanne Newman, hereby certify:

I am employed in the County of Santa Clara, California. My business address is: 559 Nathan Abbott Way, Stanford, California 94305.

On October 31, 2002, I caused to be served the documents entitled:

LETTER TO CATHY CATTERSON, CLERK OF THE COURT;
MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE;
BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES
UNION & ACLU OR OREGON IN SUPPORT OF PETITIONER-
INTERVENORS STATE OF VERMONT, VERMONT PUBLIC SERVICE
BOARD, DEPARTMENT OF PUBLIC SERVICE, AND WORLDCOM,
INC., SUPPORTING REVERSAL

by placing two copies of said documents in a sealed envelope and with postage fully prepaid, in a mailbox routinely maintained by the U.S. Postal Service, properly addressed to each party on the attached service list.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 31st day of October 2002.

Joanne Newman

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