

**ORAL ARGUMENT SCHEDULED FOR DECEMBER 4, 2015**

**No. 15-1063 (AND CONSOLIDATED CASES)**

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

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**UNITED STATES TELECOM ASSOCIATION, ET AL.,  
PETITIONERS,**

**v.**

**FEDERAL COMMUNICATIONS COMMISSION AND  
UNITED STATES OF AMERICA,  
RESPONDENTS.**

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**ON PETITION FOR REVIEW OF AN ORDER OF THE  
FEDERAL COMMUNICATIONS COMMISSION**

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***AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENTS ON BEHALF  
OF WRITERS GUILD OF AMERICA, WEST, INC.;  
FUTURE OF MUSIC COALITION; AND  
NATIONAL ALLIANCE FOR MEDIA ARTS AND CULTURE**

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Dated September 21, 2015

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Writers Guild of America, West (“WAGW”), Future of Music Coalition (“FMC”), and National Alliance for Media Arts and Culture (“NAMAC”) certify the following:

### **A. Parties**

Except for the following, all parties, intervenors, and amici appearing in this Court are listed in the brief for Petitioners United States Telecom Association, et al. and in the brief for Respondents the Federal Communications Commission and the United States. The following parties have filed a notice or motion for leave to participate as amici as of the date of this filing:

- Internet Association
- Harold Furchtgott-Roth
- Washington Legal Foundation
- Consumers Union
- Competitive Enterprise Institute
- American Library Association
- Richard Bennett
- Association of College and Research Libraries
- Business Roundtable
- Association of Research Libraries
- Center for Boundless Innovation in Technology
- Officers of State Library Agencies
- Chamber of Commerce of the United States of America
- Open Internet Civil Rights Coalition
- Georgetown Center for Business and Public Policy
- Electronic Frontier Foundation
- International Center for Law and Economics and Affiliated Scholars
- American Civil Liberties Union

- William J. Kirsch
- Computer & Communications Industry Association
- Mobile Future
- Mozilla
- Multicultural Media, Telecom and Internet Council
- Engine Advocacy
- National Association of Manufacturers
- Phoenix Center for Advanced Legal and Economic Public Policy Studies
- Dwolla, Inc.
- Telecommunications Industry Association
- Our Film Festival, Inc.
- Christopher Seung-gil Yoo
- Foursquare Labs, Inc.
- General Assembly Space, Inc.
- Github, Inc.
- Imgur, Inc.
- Keen Labs, Inc.
- Mapbox, Inc.
- Shapeways, Inc.
- Automattic, Inc.
- A Medium Corporation
- Reddit, Inc.
- Squarespace, Inc.
- Twitter, Inc.
- Yelp, Inc.
- Media Alliance
- Broadband Institute of California
- Broadband Regulatory Clinic
- Tim Wu
- Edward J. Markey
- Anna Eshoo
- Professors of Administrative Law
- Sascha Meinrath
- Zephyr Teachout
- Internet Users

**B. Ruling Under Review**

The ruling under review is the FCC's *Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601 (2015) ("*Order*").

**C. Related Cases**

The *Order* has not previously been the subject of a petition for review by this Court or any other court. All petitions for review of the *Order* have been consolidated in this Court, and Writers Guild of America, West, Inc., Future of Music Coalition, and National Alliance for Media Art and Culture are unaware of any other related cases pending before this Court or any other court.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, amicus Writers Guild of America, West, Inc. certifies that it is a California nonprofit corporation doing business as a labor organization; it does not offer stock and has no parent corporation.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, amicus Future of Music Coalition certifies that it is a Washington, D.C. nonprofit corporation; it does not have a parent company and no publicly held company owns 10% or more of stock therein.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, amicus The National Alliance of Media Arts Centers Inc., doing business as National Alliance for Media Art and Culture, certifies that it is a nonprofit corporation organized pursuant to Section 501(c)(3) of the Internal Revenue Code. No parent corporation or publicly held corporation owns 10% or more of stock therein.

### **RULE 29(C) DISCLOSURE**

Pursuant to Rule 29(c) of the Federal Rules of Appellate Procedure, amici Writers Guild of America, West, Inc., Future of Music Coalition, and National Alliance for Media Arts and Culture (jointly, “amici”) submit this disclosure of representation. Amici’s counsel, Anthony R. Segall of Rothner, Segall & Greenstone, authored the *amicus curiae* brief. Markham C. Erickson and Andrew W. Guhr of Steptoe & Johnson LLP, who also represent Intervenors Netflix, DISH, COMPTEL, and Level 3 in this proceeding, contributed to the preparation of the brief. No party or party’s counsel contributed money with the intention of funding the preparation or submission of the brief. No person other than amici and their members contributed money that was intended to fund the brief’s preparation or submission.

**CERTIFICATE OF COUNSEL REGARDING NECESSITY OF  
SEPARATE AMICUS CURIAE BRIEF**

Pursuant to D.C. Cir. R. 29(d), Writers Guild of America, West, Inc., Future of Music Coalition, and National Alliance for Media Arts and Culture (jointly, “amici”) hereby certify that they are submitting a separate brief from the other amici in this case to address points not addressed by the parties and unique to the content creators—writers and musicians—whose interests they represent. Specifically, amici will argue that the low entry barriers of the open Internet have produced unparalleled opportunities for content creators, including writers and musicians. Because of the ability of content creators to reach audiences directly, the Internet has created space for independent and diverse content often missing from traditional media. For these reasons, the brief amici propose to file would be of assistance to the Court and the matters to be argued in the brief are relevant to the disposition of this case. *See* Fed. R. App. 29(b)(1). Accordingly, Writers Guild of America, West, Inc., Future of Music Coalition, and National Alliance for Media Arts and Culture certify that filing a joint brief would not be practicable.

/s/ Anthony R. Segall  
Anthony R. Segall

Dated September 21, 2015

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<i>Annual Video Assessment</i>	<i>Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming</i> , MB Docket No. 07-269
DVD	Digital Video Disc
FCC	Federal Communications Commission
FMC	Future of Music Coalition
IP	Internet Protocol
ISP	Internet Service Provider
NAMAC	The National Alliance of Media Arts Centers Inc. d/b/a/ National Alliance for Media Arts and Culture
<i>Open Internet Order or Order</i>	<i>Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order</i> , 30 FCC Rcd. 5601 (2015)
WGA	Writers Guild of America (WGAE and WGAW jointly)
WGAE	Writers Guild of America, East, Inc.
WGAW	Writers Guild of America, West, Inc.

## STATEMENT OF INTEREST

Amici represent writers, musicians and producers of music, news, filmed entertainment, and documentaries distributed over the Internet. Amici support the FCC's *Open Internet Order*, which is vital to preserving the Internet as a platform for free speech, creativity, competition and diversity of content.

Amicus Writers Guild of America West, Inc. is a labor organization representing more than 8,000 professional writers working in film, television, and digital media, including news and documentaries. The original audiovisual programming available online on sites such as Netflix, Amazon, Hulu, and Crackle, all made possible by the open Internet, are written by WGAW members and the members of its affiliate, Writers Guild of America, East (jointly, "WGA"). As the creators of online video programming, WGA members are a key input for Internet content companies.

Amicus Future of Music Coalition is a national nonprofit organization that works to ensure a diverse musical culture where artists flourish and are compensated fairly for their work, and where fans can find the music they want. Founded by musicians, composers, and independent label owners, FMC works closely with musicians, music managers, and arts advocates to ensure that the interests of the independent music sector are considered in policy decisions.

Amicus National Alliance for Media Arts and Culture consists of 225 organizations that serve over 300,000 artists and media professionals nationwide. Members include community-based media production centers and facilities, university-based programs, museums, media presenters and exhibitors, film festivals, distributors, film archives, youth media programs, community access television, and digital arts and online groups. NAMAC's mission is to foster and fortify the culture and business of the independent media arts. NAMAC believes that all Americans deserve access to create, participate in and experience art.

## ARGUMENT

### I. INTRODUCTION AND SUMMARY

The Internet has created a transformative platform for free speech and creative expression. As the WGAW wrote in its comments in the FCC's Open Internet proceeding: "Not since the printing press has a technological development had such an impact on free speech."<sup>1</sup> The *Open Internet Order* serves an important governmental interest by protecting the public's ability to express opinions and hear from a diverse range of speakers online without discrimination or censorship by ISPs.

For writers, musicians, producers and other creative professionals, the low entry barriers of the open Internet have produced unparalleled opportunities for free expression. Artists use the Internet to collaborate with partners, experiment with new forms of storytelling, find new audiences, and distribute their creative works. The ability to innovate without permission and to offer new content and services directly to consumers is possible only because the Internet is a conduit for the free speech of the customers of ISPs. The results are compellingly made clear by the popularity of Netflix, YouTube, and other video and music streaming sites. Internet distribution of content stands in contrast to more traditional forms of

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<sup>1</sup> Writers Guild of America, West, Inc., Comments, *2015 Open Internet Proceeding*, at 3 (July 15, 2014).

content distribution, where the creative community's options have increasingly narrowed due to the limited bandwidth of broadcast and cable television, coupled with industry consolidation. The result is that a handful of companies decide what content reaches the public, and programming from independent sources has dwindled.

The *Open Internet Order* is necessary to protect the unique nature of content distribution online because it prevents ISPs from interfering with the free speech of their users. To grant ISPs the authority to act as gatekeepers of content from the Internet would stifle opportunities for creative expression and restrict the availability of content from diverse sources. By limiting the ISPs' ability to control access to such content, the *Open Internet Order* "protects free expression, thus fulfilling the congressional policy that 'the Internet offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.'"<sup>2</sup>

## **II. SPEECH INTERESTS ON THE INTERNET RESIDE WITH CONTENT CREATORS AND ISP SUBSCRIBERS, NOT WITH THE ISPS**

Free speech and fair competition, quintessential American values, flourish on the open Internet. At stake in this case is whether the Internet will remain an

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<sup>2</sup> *Open Internet Order* ¶ 22 (quoting 47 U.S.C. § 230(a)(3)).



open and accessible platform. Down the path advocated by Petitioners, an ISP would have the right to censor speech for which it is not being paid. The other path—the one protected by the FCC’s *Open Internet Order*—will preserve the Internet as a uniquely democratic forum for the dissemination of speech and creative content. Without protection, the openness that fosters democratic discourse and innovation will give way to oligopoly and corporate control of speech, which are the hallmarks of traditional media platforms.

Given the critical role the Internet has played in fostering free expression, there is some irony in the fact that Petitioners have based their challenge, in part, on the First Amendment. In effect, Petitioners ask this Court to recognize, for the first time, a constitutional right of ISPs to *edit* the Internet. *See* Alamo Br. at 4-5 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994)). Petitioners’ theory is based upon the unprecedented notion that an ISP is constantly “exercis[ing] editorial discretion over which” content “to include in [the] repertoire” of websites it makes available to consumers like newspapers, broadcast stations, and cable television operators. *Id.* Petitioners’ description, however, bears no resemblance to what consumers recognize as Internet access.<sup>3</sup>

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<sup>3</sup> To be clear, nothing in the *Open Internet Order* prevents Petitioners from offering consumers a pay television-like walled garden of content. But such a service would not be “Internet” access as understood by the FCC or the public. And the FCC would necessarily retain its authority under Section 706 of the

In fact, ISPs are the computer-aided, faster versions of Federal Express, UPS, or Union Pacific. When a consumer orders a movie written by a WGAW member, she expects the ISP simply to deliver the movie. The movement of that content from point to point is the ISP's core function. The function is not speech. The ISP's conduct "is in no respect inevitably or necessarily expressive." *United States v. O'Brien*, 391 U.S. 367, 385 (1968); *see also Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 66 (2006) ("[W]e have extended First Amendment protection only to conduct that is inherently expressive.").

Thus, when a consumer orders a DVD of *Apocalypse Now* from Amazon, Federal Express merely ships the DVD. In so doing, Federal Express is not making a statement about the depravity of war or the human cost of the United States' intervention in Vietnam. Federal Express merely delivers the content created by someone else. The same is true for delivery of content on the Internet. Petitioners' First Amendment theory, if accepted, would create a legal anomaly: it would transform conduct into speech merely because the fixation of the content has changed from code on a DVD to code on an IP packet transmitted over the Internet.

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Telecommunications Act and Title II of the Communications Act to encourage or require, respectively, the provision of actual Internet access services to consumers.

Take the following excerpt from Amazon's entry on the movie *Lost in*

*Translation*:

## Lost in Translation [Blu-ray]

Bill Murray (Actor), Scarlett Johansson (Actor), Sofia Coppola (Director, Writer) |

★★★★☆ ▾ 2,136 customer reviews

Amazon Instant Video \$2.99 — \$12.99	<b>Blu-ray</b> <b>\$8.71</b>	DVD \$6.99	Other from \$5.60
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Under Petitioners' theory, if a consumer chooses the button on the left, then the act of delivery implicates a speech interest, and the ISP has the First Amendment right to stop or inhibit the consumer from receiving the content she wants delivered. If the consumer chooses any other button, then the act of delivery (by UPS, Federal Express, or the United States Postal Service) implicates no speech interest, and the delivery service has no editorial right over the consumer's choice. Such a legal rule defies common sense and lacks any basis in First Amendment jurisprudence.

### III. AN OPEN INTERNET BENEFITS CONTENT CREATORS

#### A. The Vertiginous Growth of Online Content Distribution

By virtue of its low participation barriers, the open Internet has facilitated the growth of numerous video and music services. The rise of new digital platforms has enhanced opportunities for creative expression, expanded consumer choice, and increased competition in programming markets. The first video was uploaded to YouTube in 2005. Now, according to the company, 300 hours of

video are uploaded to the site every minute.<sup>4</sup> Netflix first introduced its streaming service in 2007 and now has nearly 40 million subscribers in the United States.<sup>5</sup> Music streaming services Spotify and Pandora now count over 75 and 79 million users respectively.<sup>6</sup> The popularity of these services has spawned numerous new competitors, creating robust choice for content creators and consumers.

The online video market is one of the open Internet's biggest success stories. In addition to an abundance of user-generated content, the distribution of professionally produced audiovisual programming is now one of the most popular services on the Internet. According to industry analyst SNL Kagan, subscription video on-demand services in the United States, such as Amazon Prime and Netflix, have about 89 million subscribers, generate \$6.4 billion in revenue and are expected to grow to 114 million subscribers in 2020.<sup>7</sup> Further, the Interactive Advertising Bureau reports that the U.S. digital video advertising market, "totaled

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<sup>4</sup> *Press: Statistics*, YOUTUBE, <https://www.youtube.com/yt/press/statistics.html> (last visited Sept. 20, 2015).

<sup>5</sup> Netflix, Inc. Quarterly Report, Form 10-Q, at 17, 19 (July 17, 2015), <http://files.shareholder.com/downloads/NFLX/744136923x0xS1065280-15-31/1065280/filing.pdf>.

<sup>6</sup> *Information*, SPOTIFY, <https://press.spotify.com/us/information/> (last visited Sept. 20, 2015); Pandora, Historical Detailed Financials - Calendar, Q2 2015, at 9 (June 30, 2015), <http://investor.pandora.com/phoenix.zhtml?c=227956&p=irol-irhome>.

<sup>7</sup> Ali Choukeir, *State of US Online Video: SVOD*, SNL KAGAN (July 24, 2015).

\$3.3 billion in full year 2014, a 17 percent increase over revenues of \$2.8 billion in 2013.”<sup>8</sup>

The online video market emerged because the Internet’s non-discriminatory transmission of content allows content creators to reach audiences directly without having to negotiate distribution by pay television providers. The market has grown because of the quality of video programming offered online, first by distributors licensing television and film content, and more recently by services offering original programming that competes with traditional television series and feature films.

In 2013, Netflix premiered its first original series, *House of Cards*, which it reportedly licensed for \$100 million for the first two seasons.<sup>9</sup> The show’s critical and popular success has demonstrated the viability of the online video market for original high-budget programming. The growth of this segment has been robust. In 2013 there were 19 original television-length series released online. In 2014,

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<sup>8</sup> Press Release, U.S. Internet Ad Revenues Reach Record-Breaking \$49.5 Billion in 2014, a 16% Increase Over Landmark 2013 Numbers, Marking Fifth Year in a Row of Double-Digit Growth for the Industry, INTERACTIVE ADVERTISING BUREAU (Apr. 22, 2015), [http://www.iab.net/about\\_the\\_iab/recent\\_press\\_releases/press\\_release\\_archive/press\\_release/pr-042215](http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-042215).

<sup>9</sup> Rebecca Greenfield, *The Economics of Netflix’s \$100 Million New Show*, THE WIRE (Feb. 1, 2013), <http://www.thewire.com/technology/2013/02/economics-netflixs-100-million-new-show/61692/>.

with Amazon and Netflix reportedly spending close to \$1 billion on original programming,<sup>10</sup> the number grew to 27 and is projected to reach 43 by the end of 2015. Such rapid growth is possible only because online video services have direct access to consumers.

Internet distribution has not only expanded production of new content, it has also created new markets for previously produced works. Studios and record labels with extensive catalogs can find new audiences for older content, with negligible distribution costs. Varied business models have emerged to support online video and music consumption, including advertising-supported sites, subscription services, a la carte rentals and sales of electronic downloads. These new services expand viewing opportunities and serve as new revenue sources for television programs, films and music.

#### **B. The Benefits of Online Distribution for Writers as Content Creators**

The online video market has been an important development for television and film writers because it has created new outlets to sell to and the opportunity to distribute content directly to the public. The development of this market is

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<sup>10</sup> Samantha Bookman, *A Closer Look at the Billions of Dollars Netflix, Amazon and Hulu Are Spending on Original Content*, FIERCEONLINEVIDEO (June 4, 2014), <http://www.fierceonlinevideo.com/special-reports/closer-look-billions-dollars-netflix-amazon-and-hulu-are-spending-original>.

important because traditional entertainment distribution is consolidated and distributed on closed platforms, limiting diverse viewpoints and information sources. The online video market has produced content from increasingly diverse and independent sources featuring stories not often seen in traditional media.

Over the past decades, media consolidation has limited the diversity of programming available to Americans. According to a WGAW analysis, “independent programming declined from 76% of all broadcast primetime programming in 1989, to only 10% in 2013.”<sup>11</sup> These findings have been confirmed by the Government Accountability Office, which determined that the “major broadcast networks and their affiliated studios produced between 76 to 84 percent of prime time programming hours” in 2002, 2005, 2008 and 2009.”<sup>12</sup> The decline in independent programming occurred as a result of the repeal of the

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<sup>11</sup> For the purpose of its analysis, WGAW defined independent producers as studios or production companies that are not owned or affiliated with a major broadcast or cable network or a pay television provider. See David Robb, *WGA Makes Last FCC Pitch on Latest Net Neutrality Rules*, DEADLINE (July 16, 2014), <http://deadline.com/2014/07/wga-makes-last-fcc-pitch-on-latest-net-neutrality-rules-805390/>.

<sup>12</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-369, MEDIA PROGRAMMING: FACTORS INFLUENCING THE AVAILABILITY OF INDEPENDENT PROGRAMMING IN TELEVISION AND PROGRAMMING DECISIONS IN RADIO 1, 37 (2010) (“2010 GAO Report”).

Financial Interest and Syndication Rules in 1995, which had prohibited broadcast networks from owning much of the content they aired.

The growth of basic cable networks was part of the justification for retiring the Financial Interest and Syndication Rules.<sup>13</sup> The regulators at the time, however, did not foresee how the broadcast networks would be able to use retransmission consent—a regime established by the 1992 Cable Television Consumer Protection and Competition Act—as a means of forcing pay-television providers to carry basic cable networks they owned.<sup>14</sup> Consequently, the same companies that own the broadcast networks also control much of cable television. The Government Accountability Office reported that in 2008, 8 of the 20 most widely distributed basic cable networks were affiliated with a broadcast network.<sup>15</sup> This number remained unchanged in 2014.<sup>16</sup> Collectively, Comcast, Disney, Time

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<sup>13</sup> John Lippman, *Networks Can Own TV Shows, Judge Rules*, THE LOS ANGELES TIMES (Nov. 14, 1993), [http://articles.latimes.com/1993-11-14/news/mn-56931\\_1\\_broadcast-network](http://articles.latimes.com/1993-11-14/news/mn-56931_1_broadcast-network).

<sup>14</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 13-576, REPORT TO THE ACTING CHAIRWOMAN OF THE FEDERAL COMMUNICATIONS COMMISSION, VIDEO MARKETPLACE: COMPETITION IS EVOLVING, AND GOVERNMENT REPORTING SHOULD BE REEVALUATED 5 (2013) (“2013 GAO Report”).

<sup>15</sup> 2010 GAO Report at 16-17.

<sup>16</sup> TV Network Summary, SNL KAGAN, [https://www.snl.com/interactivex/tv\\_NetworksSummary.aspx](https://www.snl.com/interactivex/tv_NetworksSummary.aspx) (subscription only).



Warner, and Fox have ownership stakes in 29 of the top 50 most widely distributed cable networks.<sup>17</sup>

In the decades following the repeal of Financial Interest and Syndication Rules, media consolidation occurred on an unprecedented scale, with studios and networks combining to create the vertically integrated companies that now control television production and exhibition. This began with Viacom's 1994 purchase of Paramount and the subsequent merger in 1999 with CBS, and continued with Disney's acquisition of Capital Cities/ABC in 1995, Time Warner's purchase of Turner Broadcasting in 1996, and NBC's combination with Universal in 2003 and acquisition by Comcast in 2010.<sup>18</sup> The practical effect of this consolidation for writers is profound. Independent production in television has dwindled and writers have fewer companies to work for. "In 1989, 89 percent of television writing jobs and 88 percent of television writing compensation" came from independent producers.<sup>19</sup> By 2013, those figures had declined to 25% and 14%, respectively.

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<sup>17</sup> *Id.*

<sup>18</sup> See 2013 GAO Report at 8 n.11 ("In 2005, the former Viacom split into two companies—CBS and Viacom," and "[t]he Executive Chairman of the Board for Viacom and CBS remains the same individual.").

<sup>19</sup> Writers Guild of America, West, Inc., Comments, *Annual Video Assessment*, at 7 (June 8, 2011) (providing internal WGAW analysis of employment and compensation of writer members working in television and online video).

For the first time in a generation, we have now seen signs of a reversal of this trend. In the face of consolidation among media, television and cable companies, the Internet provides an unlimited platform for content creators to reach new audiences directly. In 2014, 27% of jobs and 16% of compensation were attributable to independent companies, a development traceable to the fact that many of the original series debuting on Netflix have come from independent producers, including Media Rights Capital, Lionsgate, Gaumont International Television, and Sony. This trend illustrates the potential for the Internet to have a positive effect on supplier diversity if independent content is given the opportunity to compete for viewer acceptance.

The open Internet has also created space for diverse viewpoints often missing from television programming. In television, networks and studios exercise editorial control by deciding what content reaches the public, which has historically limited the amount of diverse content available. In contrast, the Internet allows content creators to distribute their own content on a variety of open Internet platforms. The story of WGAW member Issa Rae, the creator of *The Misadventures of Awkward Black Girl*, a successful series airing on YouTube, illustrates the opportunity of the open Internet:

For years, I tried to break into the industry traditionally (writing spec scripts, meeting execs, going to networking events, pitching shows), and I was always told that my work and my voice didn't have an audience. Sometimes this was

shorthand for, “it’s too black,” or “we’re afraid to take a chance on this.” I created my third and most successful series, *The Misadventures of Awkward Black Girl* (ABG) based on what I was not seeing on television and writing for the series, producing it and distributing it for the 15-20 million viewers who tuned in was one of the most rewarding experiences of my life.<sup>20</sup>

Another WGAW member, Veena Sud, developed the television show *The Killing*, which first aired on the AMC network, but was only renewed for a third and fourth season because Netflix helped finance and distribute the series online. She explained the importance of the open Internet in remarks before the FCC in February of 2015:

We told some of our best stories, our toughest, most heartbreaking ones, in those last two seasons of the show. Stories that never would have been on the air had it not been for the open Internet—we talked about the death penalty and teenage homelessness and drug addiction—and I’m so grateful we had that opportunity. What the open Internet means for creativity, innovation, and diverse viewpoints is by no means limited to my own experience. Series like *Orange is the New Black* and *Transparent* are giving voice to worlds and people and experiences never before seen on the small screen.<sup>21</sup>

The quality of online video programming provides further evidence that the open Internet is an important platform for creative expression. Netflix received 34

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<sup>20</sup> Writers Guild of America, West, Inc., Reply Comments, *2015 Open Internet Proceeding*, at 9 (Sept. 15, 2014).

<sup>21</sup> February 2015 Open Commission Meeting, FCC (Feb. 26, 2015) (statement of Veena Sud), <https://www.youtube.com/watch?v=TCXEp9ZZfsQ>.

Emmy nominations in 2015, up from 31 in 2014.<sup>22</sup> Amazon Prime Instant Video received 12 nominations, including several for its hit show *Transparent*.<sup>23</sup> Yahoo also received a nomination for *Community*.<sup>24</sup> Online video programming not only contributes to our national culture, but it can also help advance important social dialogues. For instance, by creating story lines featuring transgender Americans, the writers of *Orange Is the New Black* and *Transparent* have portrayed experiences not often seen in traditional media. The *Open Internet Order* will ensure that these independent and diverse voices will continue to be heard.

### **C. The Open Internet Benefits Musicians**

The experience of musicians mirrors that of audiovisual content producers as deregulation has allowed consolidation in radio station ownership, limiting access to audiences. Since the 1930s, the federal government has limited the number of radio stations that one entity could own or control. However, in the 1980s and early 1990s, the FCC began gradually to relax these limits. Finally, in the Telecommunications Act of 1996, Congress eliminated the national cap on station

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<sup>22</sup> Cecilia Kang, *Netflix, Amazon Get Record Emmy Nods*, THE WASHINGTON POST (July 16, 2015), <https://www.washingtonpost.com/news/the-switch/wp/2015/07/16/netflix-amazon-get-record-emmy-nods/>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

ownership, allowing unlimited national consolidation and raising the caps on local station ownership.

As a result, “ownership of radio stations consolidated intensively over the next five years with some ownership groups acquiring dozens, if not hundreds, of radio stations across the country.”<sup>25</sup> Research published by FMC quantified the effects of consolidation. FMC found that “national concentration of radio advertising revenue increased from 12 percent market share for the top four companies in 1993 to 50 percent market share for the top four companies in 2004.”<sup>26</sup> The study also found that the “top four firms accounted for 48 percent of [radio] listeners, and the top ten firms have [controlled] almost two-thirds of listeners.”<sup>27</sup> FMC’s research revealed that this consolidation can lead to homogenized programming, and “playlists for commonly owned stations in the same format [genre of programming, *e.g.*, country, adult contemporary, smooth jazz] can overlap up to 97%.”<sup>28</sup>

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<sup>25</sup> Peter DiCola, *False Premises, False Promises: A Quantitative History of Ownership Consolidation in the Radio Industry*, FUTURE OF MUSIC COALITION, at 10 (Dec. 2006), <https://futureofmusic.org/sites/default/files/FMCradiostudy06.pdf>.

<sup>26</sup> *Id.* at 5.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 83.

Online services that offer music to consumers have been a crucial development for musical artists. Musicians and composers rely on an open Internet for everything from creating and selling music and merchandise, to booking tours, to staying in touch with fans. The open Internet allows independent artists and labels to compete alongside large corporations, participate in an array of legitimate platforms, and partner with emerging services. Independent artists have been some of the strongest supporters of the open Internet. A letter to the FCC signed by a group of critically acclaimed artists<sup>29</sup> stated:

The Internet has enabled artists to connect directly with each other and with audiences. It has eliminated the barriers of geography and taken collaborations to new levels. And it has allowed people—not corporations—to seek out the film, music and art that moves them.<sup>30</sup>

Any musician can upload her performance to YouTube and reach audiences directly. Apple offers a process for independent musicians to sell their music

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<sup>29</sup> Eddie Vedder, Neko Case, Roger Waters, Michael Stipe, Erin McKeown, Joe Perry, Tom Morello, OK Go, Fugazi, Ozomatli, David Lowery of Cracker/Camper Van Beethoven, Jeff Mangum & Astra Taylor of Neutral Milk Hotel, Fred Armisen, Mark Ruffalo, Evangeline Lilly, and Oliver Stone, among others. *See* Press Release, Artists to FCC: We Want Real Net Neutrality, FUTURE OF MUSIC COALITION (May 13, 2014), <https://futureofmusic.org/press/press-releases/artists-fcc-we-want-real-net-neutrality>.

<sup>30</sup> *See* Letter from Anti-Flag et al., FMC, to Chairman Tom Wheeler, FCC (May 13, 2014), <http://futureofmusic.org/net-neutrality-letter-may-13-2014>.

through iTunes.<sup>31</sup> While YouTube and iTunes are the top music sites, the open Internet has allowed numerous other competitors to emerge, ensuring that both artists and consumers will have a variety of choice.

#### IV. CONCLUSION

The benefits of an open Internet for writers, musicians and content creators of all kinds are real, measurable, and revolutionary. The FCC's *Open Internet Order* is essential to preserving those benefits. The consolidated petitions for review should be denied.

Respectfully Submitted,

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<sup>31</sup> *Music Provider: Frequently Asked Questions*, APPLE, <http://www.apple.com/itunes/working-itunes/sell-content/music-faq.html> (last visited Sept. 20, 2015).

**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF  
APPELLATE PROCEDURE 32(A)(5)-(7)**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(e), I certify that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman. Exclusive of the portions exempted by Federal Rule of Federal Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e)(1), this brief contains 3,814 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief (Microsoft Word 2010).

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### CERTIFICATE OF SERVICE

I hereby certify that on this 21st of September 2015, I caused true and correct copies of the foregoing Joint Brief for Intervenors to be filed electronically with the Clerk of the Court using the Case Management and Electronic Case Files (“CM/ECF”) system for the D.C. Circuit. Participants in the case will be served by the CM/ECF system or by U.S. Mail.

Sincerely

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