Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	WC Docket No. 17-108
Restoring Internet Freedom	)	

REPLY COMMENTS OF THE COMPETITIVE ENTERPRISE INSTITUTE

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On behalf of the Competitive Enterprise Institute (CEI), we respectfully submit these reply comments regarding the FCC's proposed rule in the matter of restoring Internet freedom.[1] CEI is a nonprofit public interest organization dedicated to the principles of limited constitutional government and free enterprise. We have previously participated in the Commission's proceedings regarding how Internet service providers should be regulated,[2] and we filed amicus briefs with the U.S. Court of Appeals for the D.C. Circuit when it reviewed the Commission's previous efforts to regulate the Internet in *Verizon v. FCC*[3] and *US Telecom Association v. FCC*.[4] CEI also submitted comments to the Commission regarding this NPRM in July 2017.[5] In these comments, we discuss how the proposed rule would not only restore Internet freedom, but also restore the constitutional rights of broadband providers.

The 2015 Order denies Internet service providers the right to exercise editorial control over the content they transmit,[6] in violation of the First Amendment's securing the freedom of speech.[7] Although the 2015 Order allows a provider to block or degrade content that is "unlawful," and engage in "reasonable network management" for certain technical reasons, a broadband provider may *not* exercise "editorial discretion" by selectively blocking or degrading content with which it disagrees.[8] However, just as the First Amendment bars the government from requiring a newspaper to give equal space to political candidates,[9] it also protects the rights of companies—including Internet service providers—that transmit information on behalf of third

1. Restoring Internet Freedom, *Notice of Proposed Rulemaking*, 32 FCC Rcd 4434 (May 18, 2017) [NPRM], *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-60A1_Rcd.pdf.
2. *See, e.g.*, Comments of CEI, Framework for Broadband Internet Service, Protecting and Promoting the Open Internet, GN Docket Nos. 10-127, 14-28 (2016), *available at* http://cei.org/sites/default/files/CEI%20comments%202014%20Open%20Internet%20NPRM%20Crews.pdf.
3. Brief of TechFreedom, CEI, the Free State Foundation, and the Cato Institute as *amici curiae* supporting appellants, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), *available at* https://docs.google.com/file/d/0B2pNWHJ8ackuaWN5MVdkUTBfZXc/edit.
4. Brief of CEI as *amicus curiae* supporting petitioners, *US Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *available at* https://cei.org/sites/default/files/U.S.%20Telecom%20v.%20FCC%20-%20No.%2015-1063%20-%20CEI%20Amicus%20Brief%20FILED.pdf.
5. Comments of CEI, Restoring Internet Freedom, *Notice of Proposed Rulemaking*, 32 FCC Rcd 4434 (July 17, 2017), *available at* https://cei.org/sites/default/files/CEI%20Comments%20-%20Restoring%20Internet%20Freedom.pdf.
6. Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601, 5646, para. 105 (2015) [2015 Order].
7. U.S. Const. Amend. I.
8. 2015 Order, 30 FCC Rcd at 5869–70, para. 549.
9. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

parties over modern communications networks.[10] The 2015 Order infringes on this fundamental constitutional right.

Although a panel of the U.S. Court of Appeals for the D.C. Circuit held in *US Telecom* that the Commission's 2015 rules are permitted by the First Amendment, we believe the court misinterpreted the Supreme Court's First Amendment jurisprudence.[11] As Judge Kavanaugh explained in dissenting from the denial of rehearing that panel decision en banc, "the First Amendment bars the Government from restricting the editorial discretion of Internet service providers, absent a showing that an Internet service provider possesses market power in a relevant geographic market."[12] Judge Kavanaugh noted that under Supreme Court precedent, for the government to "impose content-neutral regulations on Internet service providers, [it] must satisfy the intermediate scrutiny test."[13] The 2015 Order, he concluded, fails this test.[14]

Recent events in the United States have underscored the importance of First Amendment rights to not only speakers, but also to providers who serve as conduits for the expression of information. In the wake of the deadly clash in Charlottesville, Virginia, on August 12, 2017, where a white supremacist allegedly killed one protester and injured many others, numerous Internet companies took prompt action to cut ties with neo-Nazi websites aimed at fomenting racism and hate.[15] Companies that stopped offering services to white-supremacist sites include domain name registrars such as GoDaddy and Google, the managed DNS provider Cloudflare, and several web hosting services. Despite the passive nature of these firms' services, their leadership nevertheless felt uncomfortable facilitating the transmission of racist, hateful speech.[16] Many Internet companies that had previously transmitted such

10. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997).

11. *US Telecom Ass'n v. FCC*, 825 F.3d 674, 743 (D.C. Cir. 2016).

12. *US Telecom Ass'n v. FCC*, 855 F.3d 381, 418 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)

13. *Id.* at 431.

14. *Id.*

15. Avi Selk, *A Running List of Companies That no Longer Want the Daily Stormer's Business*, WASH. POST (Aug. 16, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/08/16/how-the-alt-right-got-kicked-offline-after-charlottesville-from-uber-to-google/?utm_term=.21051875c039.

16. *See, e.g.*, Matthew Prince, *Why We Terminated The Daily Stormer*, CLOUDFLARE BLOG (Aug. 16, 2017), https://blog.cloudflare.com/why-we-terminated-daily-stormer/.

content were accused of complicity in the spread of racism and hate, simply because those companies maintained content-neutral policies.[17]

But not all Internet companies are allowed to decide whether to facilitate the transmission of white-supremacist content. Under the Commission's 2015 Order, an Internet service provider may not block, degrade, or impair "lawful Internet traffic"—no matter how repugnant or hateful it is. In general, hate speech is not unlawful in the United States.[18] The Supreme Court has held that the First Amendment generally protects offensive, hateful speech unless it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[19] Thus, although a domain name registrar or a hosting provider is free to evict neo-Nazi sites, an ISP is legally required to carry traffic between its users and white-supremacist websites. Forcing ISPs to transmit such content against their will is a violation of the First Amendment.

Several scholars have argued that the 2015 Order does not necessarily deprive broadband providers of the freedom to block content that they find objectionable, noting that the 2015 Order may allow a provider to "opt out" of the no-blocking rule by representing itself to consumers as providing an edited service.[20] As Judge Srinivasan wrote in his concurrence with the D.C. Circuit's decision to deny the rehearing of its panel decision in *US Telecom*, the 2015 Order prohibits a broadband provider from "hold[ing] itself out to potential customers as offering them an unfiltered pathway to any web content of their own choosing, but then … turn[ing] around and limit[ing] their access to certain web content based on the *ISP's* own commercial preferences."[21] On the other hand, according to Judge Srinivasan, the

17. *See, e.g.*, Ken Schwencke, *How One Major Internet Company Helps Serve Up Hate on the Web*, PROPUBLICA (May 4, 2017), https://www.propublica.org/article/how-cloudflare-helps-serve-up-hate-on-the-web.

18. *See* Eugene Volokh, *Supreme Court unanimously reaffirms: There is no 'hate speech' exception to the First Amendment*, WASH. POST (June 19, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/19/supreme-court-unanimously-reaffirms-there-is-no-hate-speech-exception-to-the-first-amendment/?utm_term=.f4ce1d21aff2.

19. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

20. *See, e.g.*, Brent Skorup, *Title II, Broadcast Regulation, and the First Amendment*, TECHLIBERATION.COM (Oct. 27, 2016), https://techliberation.com/2016/10/27/title-ii-broadcast-regulation-and-the-first-amendment/; Daniel Lyons, *Can ISPs Simply Opt Out Of Net Neutrality?*, FORBES (May 15, 2017, 9:53 AM), https://www.forbes.com/sites/washingtonbytes/2017/05/15/can-isps-simply-opt-out-of-net-neutrality/#67ea65243ced.

21. *US Telecom Ass'n v. FCC*, 855 F.3d 381, 382 (D.C. Cir. 2017) (Srinivasan, J., concurring with denial of rehearing en banc).

Order "does not apply to an ISP holding itself out as providing something *other than* a neutral, indiscriminate pathway."[22]

However, the Commission itself has yet to endorse this interpretation of the 2015 Order, and it is unclear whether Internet service providers believe they have the freedom to exercise editorial control over the communications they transmit over their networks. If a provider were to choose to exercise such discretion, would the FCC's rules even permit the firm to continue describing itself as offering "Internet access"? The answer is unclear. The Commission should abandon the no-blocking rule in its entirety, and allow other institutions to deter ISPs from misrepresenting the nature of the services they offer.

Respectfully submitted,

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22. *Id.* at 389 (emphasis added).