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

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**No. 18-1051 (and consolidated cases)**

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MOZILLA CORPORATION, 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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# PETITION FOR PANEL REHEARING AND REHEARING EN BANC FOR NEW AMERICA'S OPEN TECHNOLOGY INSTITUTE, FREE PRESS, PUBLIC KNOWLEDGE, CENTER FOR DEMOCRACY & TECHNOLOGY, THE BENTON INSTITUTE FOR BROADBAND & SOCIETY, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, AND NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

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| 2015 Order | *In re Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015) |
| 2018 Order | *In re Restoring Internet Freedom*, 33 FCC Rcd. 311 (2018) |
| Act | Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 |
| BIAS | Broadband Internet Access Service |
| DNS | Domain Name System |
| FCC or Commission | Federal Communications Commission |
| FCC Br. | Panel stage brief of Respondents Federal Communications Commission and United States |
| Intervenor Br. | Panel stage opening brief of Internet Association, Entertainment Software Association, Computer & Communications Industry Association, and Writers Guild of America, West, Inc. as Intervenors in support of Petitioners |
| Millet Concurrence | Judge Millet's concurrence to the panel opinion (attached in Addenda) |
| Mozilla Br. | Panel stage opening brief of Petitioners |
| NPRM | *In re Restoring Internet Freedom*, 32 FCC Rcd. 4434 (proposed May 23, 2017) |

| | |
|---|---|
| Opinion | The panel majority's opinion (attached in Addenda) |
| TME | Telecommunications management exception |
| USTA | *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016). |
| Wilkins Concurrence | Judge Wilkins's concurrence to the panel opinion (attached in Addenda) |

## INTRODUCTION AND RULE 35(b)(1) STATEMENT

For more than a decade, across administrations of both parties, the Federal Communications Commission (FCC or Commission) warned that providers of Broadband Internet Access Service (BIAS) had the financial incentive and technological means to interfere with their customers' free and open access to the internet. During that period, the Commission documented repeated instances of such abuses and vowed to use the powers it had to prevent further incidents, even as its interpretation of those powers shifted over time. Until two years ago. In 2017, the agency abandoned the project to prohibit BIAS interference with the open internet. It reclassified BIAS as an information service generally outside its authority to regulate and repealed its existing open internet rules.

In place of any substantive consumer protections, the Commission enacted a limited disclosure rule that, it said, was sufficient – but also necessary – to enable competitive forces in the internet ecosystem to prevent open internet abuses by BIAS providers. But having disavowed nearly every source of authority to regulate in this area, the Commission was left scrambling to support its lynchpin disclosure rule. It ultimately founded the rule on Section 257 of the Act, a provision it never mentioned

in its Notice of Proposed Rulemaking (NPRM) and which, in fact, the NPRM conveyed was not under consideration. *See In re Restoring Internet Freedom*, 32 FCC Rcd. 4434 (proposed May 23, 2017).

The panel in this case upheld the Commission's decision in relevant part, declaring its hands bound by *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). The panel acknowledged the dramatic changes in technology, markets, and internet usage in the nearly fifteen years since that decision. And it recognized that in light of those changes, the FCC's justification for its classification had changed from the one approved in *Brand X*. The panel's conclusion that *Brand X* nonetheless required it to uphold the FCC's revised rationale in a dramatically altered factual context conflicts with *Brand X* itself and merits en banc review. The panel's rejection of petitioners' notice challenge to the Commission's disclosure rule likewise warrants review because it conflicts with this Court's precedent in *National Tour Brokers Ass'n v. United States*, 591 F.2d 896 (1978), and fails to address the parties' principal arguments on the issue.

## BACKGROUND

1. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, makes some services subject to common carriage regulation under Title II of the Communications Act, while others are subject to typically more limited regulation under other provisions. Congress could have simply delegated to the Commission responsibility for deciding which regulatory scheme made the most sense in each context, as it did, for example, with respect to satellite service. *See* 47 U.S.C. § 153(51). But for all other services, Congress made the primary policy judgment itself, declaring that a "telecommunications carrier *shall* be treated as a common carrier" no matter the Commission's policy views. *See id.* (emphasis added). Congress further defined a telecommunications carrier as an entity "providing telecommunications services," *id.*, defined as "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used," *id.* § 153(53). "Telecommunications," in turn, is 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). In contrast, an "information service" is "the offering of a capability for

generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications*." *Id*. § 153(24) (emphasis added). In the "telecommunications management exception" (TME), however, Congress excepted from the information services definition "any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." *Id*.

2. In *Brand X*, the Supreme Court reviewed the Commission's decision not to classify cable modem service (a form of BIAS) as a telecommunications service. The Commission had described cable modem service as bundling data transport (a telecommunications service) with a variety of information services, such as email, chat groups, file transfer services, Domain Name System (DNS), and caching. *See id*. at 987-88, 999. The challengers argued the statute compelled the FCC to classify the transmission component as a separate telecommunications service offering, subject to common carriage regulation.

The Supreme Court understood the parties' arguments to raise two questions. First, was it reasonable for the FCC to interpret the word "offering" as referring to an "integrated finished product," as opposed to

each component of a service? *See id*. at 989-90. The Court held that it was. *Id*. The second question was "whether the transmission component of cable modem service is sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering." *Id*. at 990. That question, the Court believed, turned on "the factual particulars of how Internet technology works and how it is provided." *Id*. at 991. It held that the Commission reasonably found, given the record before it, that the telecommunications and information services were integrated. *Id*. at 997. The challengers resisted that conclusion, insisting that cable modem service's various components were not fully integrated because a consumer "uses 'pure transmission'" to reach third-party websites. *Id*. at 998. But the Court accepted the FCC's factual determination that in 2002, web access also required using the information service capabilities of the provider's DNS and caching. *Id*. at 999-1000. And because the Court accepted that the overall service also integrated other information services like email, it had no need to decide whether DNS and caching fell within the TME. *Id*. at 999 n.3.

There remained a final legal question – how to classify an offering that integrated telecommunications with this particular array of

information services. But the FCC's decision on that question went "unchallenged" because the respondents did not dispute that if viewed in the aggregate, "cable modem service is an 'information service.'" *See id*. at 987. Given the facts at the time, that concession was unsurprising. Cable modem service then combined data transmission with a "comprehensive" range of information services that were, back then, found essential to the user experience. *Id.*

3. In 2015, the Commission reconsidered the proper classification of BIAS in light of the vast changes over the intervening decade. *See* 2015 Order. The Commission found that BIAS's add-on information services had faded into the background, as users increasingly bypassed BIAS providers' email, chat groups, web hosting, etc. in favor of services provided by third parties (such as Gmail, Facebook, and Dropbox). *See id.* ¶¶ 330, 347-50. It further held that DNS and caching fell within the TME. *See id.* ¶¶ 366-72. As a consequence, the Commission reclassified BIAS as a telecommunications service. *Id*. ¶¶ 361-87. It then used its Title II authority to enact regulations designed to prevent BIAS providers from interfering with users' access to the internet. *Id*. ¶¶ 14-24. This

Court subsequently upheld the reclassification and the rules. *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 689 (D.C. Cir. 2016) ("*USTA*").

4. After the 2016 presidential election, the Commission reversed course and reclassified BIAS as an integrated information service. *See* 2018 Order. Importantly, in so doing, the Commission did not rely on the rationale the Supreme Court had upheld in *Brand X*. In its Order, and on appeal, the FCC abandoned any claim that its decision was justified by the integration of data transport with email or any other of the add-on information services cited in the Cable Modem Order. *See* Opinion at 19-20. Instead, it argued that the bare transmission component, on its own, is an information service, not a telecommunications service, *id*. at 14, an argument the panel did not address, *see id*. at 19-21, and which Judge Millett convincingly rejected, *see* Millett Concurrence at 12-15. As a backup, the FCC also found that BIAS is not a telecommunications service because, despite its overwhelming focus on bare telecommunications, the transmission is facilitated by two auxiliary information services – DNS and caching. *See* Opinion at 14-15. It further held that neither service fell within the TME. *See id*. at 36, 41.

The Commission then concluded that given the reclassification, it lacked any power to retain the prior net neutrality rules. 2018 Order ¶ 239. It decided, however, that it still had authority under Section 257 to retain a pared-back version of its prior disclosure requirements. *Id*. ¶¶ 210, 232. Those disclosures, it declared, were adequate replacements for the prior conduct rules because they would enable consumers and markets to adequately police BIAS providers' compliance with open internet norms. *Id*. ¶¶ 240-45.

5. A panel of this Court recently upheld the Commission's reclassification decision, stating that result was largely compelled by *Brand X*. Opinion at 19-20, 40-45; Millett Concurrence at 1; Wilkins Concurrence at 1. It also rejected the parties' argument that the NPRM failed to provide adequate notice of the Commission's intent to rely on Section 257 to support its disclosure rules. Opinion at 70-71.

Judge Millett wrote separately to express her "substantial reservation[s]." Millett Concurrence at 1. Among other things, she explained, "the Commission's exclusive reliance on DNS and caching blinkered itself off from modern broadband reality, and untethered the

service 'offer[ed]' from both the real-world marketplace and the most ordinary of linguistic conventions." *Id*. at 9 (alteration in original).

## ARGUMENT

### I. The Panel Decision Misconstrued *Brand X* As Precluding Any Judicial Review Of The Reasonableness Of Classifying A Service That Overwhelmingly Offers Telecommunications As An Information Service Simply Because It Includes DNS And Caching.

There are many problems with the Commission's Order and the panel's opinion. We focus here on one. For purposes of this argument, we accept almost every premise of the panel's decision, including that the FCC has discretion to characterize DNS and caching as information services that fall outside the TME, and that BIAS functionally integrates those services with data transport.[1] That still leaves the question of whether it was reasonable for the Commission to classify that integrated service as an information service given the auxiliary role DNS and caching play. The panel seemed to accept that this is a logical question to ask, noting that it would be "dubious" to call a sweater with a few

[1] To be clear, petitioners strongly dispute these premises and embrace the argument, raised in Mozilla's petition for rehearing, that the FCC did not reasonably conclude that DNS and caching are integrated with transmission.

golden threads a "golden garment." Opinion at 43. If, for example, a law required an agency to impose an import duty on sweaters, but excluded golden garments, a court would at least *ask* whether it was reasonable for the agency to exempt a sweater from the duty so long as it included a few golden threads. The panel nonetheless declined to ask the parallel question of the Commission's decision because it believed that *Brand X* precluded the inquiry. *See id*. at 44. That is simply wrong.

To be sure, *Brand X* did not ask whether cable modem service, when viewed as an integrated offering, was reasonably considered an information service. But Judge Millett explained why: the *Brand X* challengers "effectively concede[d] . . . that information services like email, newsgroups, caching, and DNS were sufficiently significant to define the overall 'offering' and, thus, to control the classification decision. The only question was whether those services were sufficiently integrated with transmission to constitute a single offering." Millett Concurrence at 7. That is, the Commission's conclusion "that cable modem service is an 'information service,'" when viewed as a single offering, went "unchallenged" in the Supreme Court. *Brand X*, 545 U.S. at 987.

Even if that conclusion *had* been challenged, it would have raised a materially different question than the one presented here. In *Brand X*, the Supreme Court determined that the FCC reasonably viewed cable modem service as offering a single, integrated service that combined transmission with a broad range of information services, from email and webhosting to DNS and caching. 545 U.S. at 990. Even if the Court had been asked to decide whether *that* bundle of services was reasonably called an information service, the question here is different. "With the Commission now having abandoned its reliance on any additional technologies provided by broadband, *see 2018 Order* ¶ 33 n.99, the question is whether the combination of transmission with DNS and caching *alone* can justify the information service classification." Millett Concurrence at 7.

The panel suggested that *Brand X* implicitly decided that question as well, reasoning that if "the Court thought along Petitioners' lines, it could have sided with the challengers in *Brand X* by saying that—when users wander beyond ISPs' proprietary services—the quantum of ISP-offered 'information services' shrinks so greatly in proportion to the transmission aspect that in that realm they are accepting an 'offering' of

standalone telecommunications service." Opinion at 44. But the Court wouldn't have sided with the challengers on that argument unless the challengers had actually *made* that argument, and they didn't.[2] They argued, instead, that accessing third-party websites involved no information services at all, only "pure transmission." 545 U.S. at 998. Having rejected the factual premise of that argument, the Court had no reason to go further.

Moreover, had the Court undertaken to review the proper classification of web access alone, it would have been required to decide whether DNS and caching fell within the TME, as the panel was required to do in this case. *See* Opinion at 22-24. But the Supreme Court refused to decide the TME question precisely because it was *not* considering the status of web access as an independent service, having upheld the FCC's conclusion that cable modem service integrated web access, transmission, email, and other information services into a single offering. *See Brand X*, 545 U.S. at 999 n.3; Mozilla Br. 42-43. Given that holding,

[2] *See* Brief for Respondents Earthlink, Inc., et al., *available at* 2005 WL 435900; Brief for Respondent MCI, Inc., *available at* 2005 WL 435885.

there would have been no point in deciding whether web access could reasonably be classified as an information service if separately offered.

Beyond its reliance on *Brand X*, the panel offers nothing in law or logic that would immunize from reasonableness review the Commission's ultimate decision on how to label what the agency considers a mixed, integrated service. Indeed, one need only flip back a few pages in the opinion to find the panel engaged in precisely that kind of inquiry with respect to the TME. *See* Opinion at 23-25. There, the panel acknowledged that DNS and caching have a dual character, affording benefits both to providers (which suggests classification under the TME) and to users (which, according to the FCC, suggests the opposite). *Id*. at 24. The panel recognized that when a service has characteristics that support either classification, there is a judgment call to be made. *Id*. And, importantly, rather than throwing up its hands and proclaiming that the judgment call is insusceptible to judicial review, the panel proceeded to judge the reasonableness of the Commission's decision. *Id*. 25. It upheld the classification of DNS, for example, because the FCC decided that DNS's "benefits to the end user *predominate* over any management function DNS might serve." *Id*. (emphasis added).

Petitioners likewise have argued that the telecommunications aspect of BIAS predominates over any information service BIAS may include. Both the FCC and the panel wrongly failed to address that question.

This error was consequential. As Judge Millett convincingly explains, the Commission's decision to call BIAS an information service based on its inclusion of DNS and caching is patently unreasonable. Millett Concurrence at 6-10. None of the reasons that led Congress to require the Commission to regulate telecommunications services as common carriage are changed one iota by carriers' inclusion of DNS and caching as part of the package. "By putting singular and dispositive regulatory weight on broadband's incidental offering of DNS and caching, the Commission misses the technological forest for a twig." *Id.* at 16.

## II. The Panel's Telecommunications Management Exception Ruling Warrants En Banc Review.

Despite suggesting that *Brand X* required upholding the FCC's decision, the panel acknowledged that "*Brand X* did not directly confront whether DNS and caching may fall within the TME." Opinion at 22. The panel then accepted the FCC's vision of the TME as addressing "a continuum with two poles: a user-centered pole and network management-centered pole," with any given service being classified

"according to which pole it appears closest to." *Id.* at 24. It then held that the FCC reasonably found DNS and caching to be on the user-centered end of the spectrum. *Id.* at 24-25.

Again, there are many problems with the panel's decision in this regard, but we focus here on one. The panel did not dispute that the Commission continues to treat equally "user-centered" services, like speed-dialing, call-forwarding, and directory assistance, as falling within the TME in the telephone context. *See id.* at 38-40. In the face of this arbitrary inconsistency, the panel simply shrugged, noting what it viewed as some disarray in the Commission's prior regulatory treatment of such issues. *Id.* But even if the panel's view of the regulatory history were correct, prior arbitrariness is hardly a license for more. In *Brand X*, the Court allowed a *temporary* inconsistency in the treatment of cable modem and DSL services only because the Commission was undertaking a broader effort to reconsider its classification decisions. *See* 545 U.S. at 1002. But here, the FCC has given no indication that it plans to reconsider its classification of speed-dialing and similar services (which, under the logic of this Order, would render telephone service an information service).

This is no trivial matter. The APA's proscription against capricious inconsistency is the key protection against exactly what has happened in this case: the Commission adopted an interpretation of the statute that is good for this case only, in order to achieve a particular policy objective rather than to provide an interpretation that it is willing to live with in other contexts. The net result is to give the FCC free rein to simply choose its preferred policy outcome and gerrymander its subsidiary findings and interpretations to suit its predetermined outcome, free from even the modest constraint of logical consistency.

## III. The Panel's Section 257 Ruling Conflicts With Circuit Precedent And Disregards The Parties' Principal Notice Arguments.

As petitioners and intervenors argued to the panel, Section 257 provides no support for the FCC's disclosure rule because it does not authorize any substantive rules at all. *See* Mozilla Br. at 55-56; Intervenor Br. at 31-34. But more importantly for present purposes, those problems were not ventilated during the notice-and-comment process because the 2017 NPRM failed to identify Section 257 as a potential source of authority for any disclosure rule. Instead, that NPRM simply asked the public to propose sources of authority. NPRM ¶ 102.

And it cited to paragraphs "124-35, 137" of the 2010 Order, conspicuously bypassing paragraph 136, *which was the only paragraph that even mentioned Section 257*. *See* NPRM ¶ 102 & n.221; 2010 Order ¶¶ 124-37 & n.444. This notice suffered from two independent flaws, neither of which the panel addressed.

1. The APA requires that in addition to a "description of the subjects and issues involved," 5 U.S.C. § 553(b)(3), the "notice shall include . . . *reference to the legal authority* under which the rule is proposed," *id*. § 553(b)(2) (emphasis added). In *National Tour Brokers*, this Court construed this second provision to require the agency to actually specify the statutory sections providing authority for the proposed rule. 591 F.2d at 900; *see* Intervenor Br. at 36.

The panel did not dispute that the NPRM contained no "reference" to Section 257 as legal authority for the disclosure rules. *See* Opinion at 70-71. Instead, the panel simply held that "[t]his Court has previously recognized Section 257 as a possible source of authority for such rules," that the NPRM included a "solicitation of comment on its legal authority," and that "several commenters identified Section 257 as a possible source of authority." *Id*.

Those responses are non sequiturs. Unlike the APA requirements for providing *notice* of the substance of a regulation, Section 553(b)(2) requires an actual "reference" to proposed legal authority in the NPRM itself. It is not enough that the agency ask the public for suggestions on possible authority, that the public be on notice of possible authorities from other sources (such as this Court's decisions), or that a handful of commenters addressed the provision.

This Court has construed the APA to mean what it says since the late 1970s. In *National Tour Brokers*, as in this case, the NPRM included no reference to the authority upon which the final rule was founded. *See* 591 F.2d at 900. "Such a reference," the court explained, "would have included something along the lines of what the Commission *did* include when it promulgated its final rules" wherein "it stated, 'The rule is issued under the authority of 49 U.S.C. 302, 303, 304, 305, 311, and 320, and 5 U.S.C. 553 and 559.'" *Id.* (quoting 42 Fed. Reg. 21782 (1977)). That is consistent with the law in the Fifth circuit as well. *See Global Van Lines, Inc. v. I.C.C.*, 714 F.2d 1290, 1298 (5th Cir. 1983) (citing the "authoritative and virtually contemporaneous *Attorney General's Manual*" as requiring that "'[t]he reference [to legal authority] must be

sufficiently precise to apprise interested persons of the agency's legal authority to issue the proposed rule") (quoting U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 29 (1947)) (alterations in original).

The panel's decision thus conflicts with *National Tour Brokers* and effectively writes out of the statute Congress's careful, specific, and separate requirements for providing notice of legal authority.

2. Even setting aside the requirement of an actual "reference," the panel simply ignored the parties' argument that the NPRM conveyed that Section 257 was off the table by conspicuously skipping over the provision referring to Section 257 in the cross-reference to the 2010 Order. *See* Mozilla Br. at 55-56; Intervenor Br. at 36-38. The public would reasonably interpret the clearly intentional omission as indicating the Commission would not consider that authority in this proceeding, even if this Court's prior decisions suggested that it could. That a couple of commenters (out of millions) nonetheless addressed the provision shows, at most, that a vanishingly small minority of the public thought the Commission had made a mistake by refusing to consider Section 257.

3. These errors were prejudicial, not harmless. As the briefing and opinion illustrate, there were serious questions whether Section 257, standing in isolation, could support the disclosure rules. *See* Mozilla Br. at 55-56; Intervenor Br. at 30-34. Those issues went almost entirely unaddressed in the comments. Intervenor Br. 37-38.

The notice question warrants rehearing. The disclosure rule was the lynchpin of the Commission's justification for reclassification and the repeal of all conduct rules. *See, e.g.*, Order ¶¶ 2-4, 116, 142, 150, 208-209, 234, 239-245, 253, 261, 263-64. Accordingly, the Commission does not dispute that the disclosure rule is inseverable from the rest of the Order, which must fall if the disclosure rule is invalid. *See* FCC Br. at 96-103; Intervenor Br. at 39-41.

## CONCLUSION

For the foregoing reasons, the Court should grant rehearing en banc or, in the alternative, panel rehearing.

Dated: December 13, 2019

Respectfully submitted,

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## 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 December 13, 2019. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Kevin K. Russell
Kevin K. Russell

# ADDENDA

## CIRCUIT RULE 32(a)(2) ATTESTATION

In accordance with D.C. Circuit Rule 32(a)(2), I, Kevin K. Russell, hereby attest that all other parties on whose behalf this petition is submitted concur in its content.

December 13, 2019

/s/ Kevin K. Russell
Kevin K. Russell

## CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,898 words.

2. This document 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 this document has been prepared in a proportionally spaced typeface, the 14-point New Century Schoolbook Std font, using Microsoft Word 2016.

December 13, 2019

/s/ Kevin K. Russell
Kevin K. Russell

## CIRCUIT RULE 28(a)(1)(A) CERTIFICATE OF PARTIES AND AMICUS CURIAE

Petitioners:

- Mozilla Corp.;
- Vimeo, Inc.;
- Public Knowledge;
- Open Technology Institute;
- The States of New York, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota, Mississippi, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, and Washington;
- The Commonwealths of Kentucky, Massachusetts, Pennsylvania, and Virginia;
- The District of Columbia;
- The National Hispanic Media Coalition;
- NTCH, Inc.;
- The Benton Foundation;
- Free Press;
- The Coalition for Internet Openness;
- Etsy, Inc.;
- The Ad Hoc Telecom Users Committee;
- The Center for Democracy and Technology;
- The County of Santa Clara and the Santa Clara County Central Fire Protection District;
- The California Public Utilities Commission; and
- INCOMPAS.

Respondents:

- The Federal Communications Commission; and
- The United States of America

Intervenors:

- The Internet Association;
- The Computer & Communications Industry Association;
- The Entertainment Software Association;
- Writers Guild of America, West, Inc.;
- The City and County of San Francisco;
- The National Association of Regulatory Utility Commissioners;
- The National Association of State Utility Consumer Advocates;
- CTIA—The Wireless Association;
- NCTA—The Internet & Television Association;
- USTelecom—The Broadband Association;
- The American Cable Association;
- The Wireless Internet Service Providers Association;
- Leonid Goldstein; and
- The Digital Justice Foundation.

*Amici*:

- American Council on Education;
- Accreditation Council for Pharmacy Education;
- American Association of Colleges for Teacher Education;
- American Association of Colleges of Nursing;
- American Association of Community Colleges;
- American Association of State Colleges and Universities;
- American Library Association;
- Association of American Universities;
- Association of College & Research Libraries;
- Association of Jesuit Colleges and Universities;
- Association of Public and Land-grant Universities;
- Association of Research Libraries;
- College and University Professional Association for Human Resources;
- Consortium of Universities of the Washington Metropolitan Area;
- EDUCAUSE;
- Middle States Commission on Higher Education;
- National Association for Equal Opportunity in Higher Education;

- National Association of Independent Colleges and Universities;
- Student Affairs Administrators in Higher Education;
- Thurgood Marshall College Fund;
- Center for Media Justice;
- Color of Change;
- Common Cause;
- Greenlining Institute;
- 18 Million Rising;
- Media Alliance;
- Media Mobilizing Project;
- Professors Michael Burstein, James Ming Chen, Rob Frieden, Barbara van Schewick, Catherine Sandoval, Allen Hammond, IV, Carolyn Byerly, Anthony Chase, Scott Jordan, and Jon Peha;
- Consumers Union;
- eBay Inc.;
- Electronic Frontier Foundation;
- Engine Advocacy;
- Twilio Inc.;
- William Cunningham;
- The Cities of New York, NY, Alexandria, VA, Baltimore, MD, Boston, MA, Buffalo, NY, Chicago, IL, Gary, IN, Houston, TX, Ithaca, NY, Los Angeles, CA, Lincoln, NE, Madison, WI, Newark, NJ, Oakland, CA, San Jose, CA, Schenectady, NY, Seattle, WA, Somerville, MA, Springfield, MA, Syracuse, NY, Tallahassee, FL, and Wilton Manors, FL; Cook County, IL;
- The Town of Princeton, NJ;
- The Mayor of Washington, DC;
- The Mayor and City Council of Portland, OR;
- International Municipal Lawyers Association;
- California State Association of Counties;
- United States Senators Edward Markey, Charles Schumer, Ron Wyden, Maria Cantwell, Tammy Baldwin, Brian Schatz, Richard Blumenthal, Tammy Duckworth, Cory Booker, Sheldon Whitehouse, Angus King, Kirsten Gillibrand, Benjamin Cardin, Dianne Feinstein, Jack Reed, Kamala Harris, Tina Smith, Patrick Leahy, Margaret Hassan, Jeanne Shaheen, Gary Peters, Jeffrey

Merkley, Patty Murray, Chris Van Hollen, Bernard Sanders, Sherrod Brown, and Elizabeth Warren;

- Members of the House of Representatives Anna Eshoo, Nancy Pelosi, Frank Pallone, Michael Doyle, Janice Schakowsky, Peter Welch, Zoe Lofgren, Mark Takano Eleanor Holmes Norton, Ro Khanna, Jose Serrano, Adam Smith, Jared Huffman, Peter DeFazio, Maxine Waters, Pramila Jayapal, Jerry McNerney, Jamie Raskin, Tulsi Gabbard, Hakeem Jeffries, Mike Thompson, John Lewis, Yvette Clarke, Charlie Crist, Adriano Espaillat, James McGovern, Mark Pocan, Jacki Speier, Keith Ellison, Joe Courtney, Daniel Kildee, Betty McCollum, Stephen Lynch, David Price, Marcy Kaptur, Jimmy Panetta, Barbara Lee, Donald Beyer, Jr., Nydia Velazquez, Chellie Pingree, Sean Maloney, Lloyd Doggett, Raul Grijalva, Joseph Crowley, Jacky Rosen, Earl Blumenauer, Alan Lowenthal, Andre Carson, Joseph Kennedy III, Steve Cohen, Lucille Roybal-Allard, Albio Sires, Mark DeSaulnier, Rosa DeLauro, Gregorio Sablan Bill Pascrell, Jr., Suzanne Bonamici, Diana DeGette, Kathy Castor, John Yarmuth, Jerrold Nadler, Grace Meng, Doris Matsui, John Larson, Carolyn Maloney, Sheila Jackson Lee, Danny Davis, John Sarbanes, Richard Nolan, Seth Moulton, Michelle Grisham, Colleen Hanabusa, Carol Shea-Porter, Katherine Clark, William Keating, and David Cicilline;
- Phoenix Center for Advanced Legal and Economic Policy Studies;
- International Center for Law and Economics;
- Geoffrey A. Manne;
- Gus Hurwitz;
- Roslyn Layton;
- Multicultural Media, Telecom and Internet Council;
- National Association of Manufacturers;
- Chamber of Commerce of the United States of America;
- Business Roundtable
- Telecommunications Industry Association;
- Technology Policy Institute;
- Richard Bennett;
- John Day;
- Tom Evslin;

- Shane Tews;
- Martin Geddes;
- Information Technology and Innovation Foundation;
- Washington Legal Foundation;
- Southeastern Legal Foundation, Inc.;
- States of Arkansas, Nebraska, Texas;
- TechFreedom;
- Georgetown Center for Business and Public Policy;
- Kevin Caves
- Gerald R. Faulhaber;
- Harold Furchtgott-Roth;
- Robert Hahn;
- Jeffrey T. Macher;
- Michael Mandel;
- John Mayo;
- James E. Prieger;
- Hal J. Singer; and
- Tech Knowledge.

December 13, 2019

/s/ Kevin K. Russell
Kevin K. Russell

## CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rules 26.1 and 27(a)(4), the required disclosure statements for all parties joining this petition were submitted as part of the opening briefs and have not changed since that time.

December 13, 2019

/s/ Kevin K. Russell
Kevin K. Russell

**PANEL OPINION**