ORAL ARGUMENT NOT YET SCHEDULED
IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1051 (and consolidated cases)

MOZILLA CORPORATION, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

JOINT BRIEF OF COMMON CAUSE, THE GREENLINING INSTITUTE, CENTER FOR MEDIA JUSTICE, COLOR OF CHANGE, 18 MILLION RISING, MEDIA ALLIANCE AND MEDIA MOBILIZING PROJECT AS AMICI CURIAE IN SUPPORT OF PETITIONERS AND VACATION OF THE ORDER

Respondents.

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August 27, 2018

STATEMENT REGARDING CONSENT TO FILE, SEPARATE BRIEFING, AUTHORSHIP, AND MONETARY CONTRIBUTIONS

All parties have consented to the filing of this brief.

Pursuant to Circuit Rule 29(d), counsel for amicus curiae certifies that no other amicus curiae brief of which he is aware relates to the subjects addressed herein. Given the nature of these cases and the large number of issues raised in the briefs of the Petitioners, there are a number of other parties with which counsel has been in contact which have different interests and are likely to file separate amicus curiae briefs. It is impracticable for all of these diverse parties to collaborate in a single brief. Moreover, in the circumstances of this case, the Court will benefit from the presentation of additional arguments on behalf of both Petitioners and Respondents.

Respectfully submitted,

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CERTIFICATE AS TO PARTIES, RULINGS, AND OTHER CASES

A. Parties

All parties, intervenors and amici appearing in this court are listed in the Brief for Petitioners.

B. Rulings Under Review

References to the ruling at issue appear in the Brief for Petitioners.

C. Related Cases

Amici curiae adopt the statement of related cases presented in the Brief for Respondents.

CORPORATE DISCLOSURE STATEMENTS

Center for Media Justice is a 501(c)(3) non-profit corporation and has not issued shares to the public. Center for Media Justice does not have any parent companies, subsidiaries or affiliates that have issued shares to the public.

Color of Change is a non-profit 501(c)(4) corporation and Color of Change Education Fund is a non-profit 501(c)(3) corporation. Neither Color of Change nor Color of Change Education Fund has a parent company and no publicly held corporation owns any part of Color of Change or Color of Change Education Fund.

Common Cause is a non-profit 501(c)(4) corporation and the Common Cause Education Fund is a non-profit 501(c)(3) corporation. Neither Common Cause nor Common Cause Education Fund has a parent company and no publicly held corporation owns any part of Common Cause or Common Cause Education Fund.

The Greenlining Institute is a 501(c)(3) non-profit corporation and has not issued shares to the public. The Greenlining Institute does not have any parent companies, subsidiaries or affiliates that have issued shares to the public.

18 Million Rising is a 501(c)(3) non-profit corporation and has not issued shares to the public. 18 Million Rising does not have any parent companies, subsidiaries or affiliates that have issued shares to the public.

Media Alliance is a 501(c)(3) non-profit corporation and has not issued shares to the public. Media Alliance does not have any parent companies, subsidiaries or affiliates that have issued shares to the public.

Media Mobilizing Project is a 501(c)(3) non-profit corporation and has not issued shares to the public. Media Mobilizing Project does not have any parent companies, subsidiaries or affiliates that have issued shares to the public.

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2015 Open Internet Order	In the Matter of Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015)
FCC or Commission	Federal Communications Commission
FTC	Federal Trade Commission
Greenlining	The Greenlining Institute
Broadband Privacy Order	Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, Report and Order, 31 FCC Rcd. 13911 (2016)
Order	Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018)
Wireline Framework Order	Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 9816 (2005)

STATUTES AND REGULATIONS

Except for the statutes and regulations reproduced in the Statutes and Regulations Addendum, Applicable statutes and regulations are set forth in Petitioners' Brief.

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

18 Million Rising brings many disparate Asian American communities together to build a more just and creative world where our experiences are affirmed, our leadership is valued, and all of us have the opportunity to thrive. 18 Million Rising has participated in the rulemaking process culminating in the Order on review in this litigation, as well as in prior FCC rulemakings related to net neutrality.

Center for Media Justice works to build a powerful movement for a more just and participatory media and digital world—with racial equity and human rights for all. Center for Media Justice has participated in the rulemaking process culminating in the Order on review in this litigation, as well as in prior FCC rulemakings related to net neutrality.

Color of Change is the nation's largest online racial justice organization that helps people respond effectively to injustice in the world around us. Color of Change has participated in the rulemaking process culminating in the Order on

review in this litigation, as well as in prior FCC rulemakings related to net neutrality.

Common Cause is a nonpartisan, nationwide grassroots network of more than one million members and activists that has advocated for an open, honest, and accountable government for over 45 years. Common Cause has participated in the rulemaking process culminating in the Order on review in this litigation, as well as in prior FCC rulemakings related to net neutrality.

The Greenlining Institute is a nonprofit policy, research, organizing, and leadership institute working for racial and economic justice. Greenlining has participated in the rulemaking process culminating in the Order on review in this litigation, as well as in prior FCC rulemakings relating to net neutrality.

Media Alliance is a Northern-California based democratic communications advocate. Media Alliance dedicates itself to fostering a genuine diversity of media voices and perspectives, holding the media accountable for their impact on society, creating regulatory communications policies in the public interest and protecting freedom of expression. Media Alliance has participated in the rulemaking process culminating in the Order on review in this litigation, as well as in prior FCC rulemakings relating to net neutrality.

Media Mobilizing Project works with movements to communicate and organize to win, and to amplify the voices of communities fighting for justice,

equity and human rights. Media Mobilizing Project has participated in the rulemaking process culminating in the Order on review in this litigation, as well as in prior FCC rulemakings relating to net neutrality.

ARGUMENT

I. OPEN INTERNET RULES ARE CRITICAL FOR CIVIC ENGAGEMENT, CIVIL RIGHTS, AND DEMOCRACY, PARTICULARLY FOR COMMUNITIES OF COLOR.

Today, broadband has become the essential communications service of the 21st century – a virtual public square where the exchange of ideas and information occurs. Americans also rely on the Internet to pursue education, gain employment, receive health care, start a business, do homework, and a host of other services. *See e.g.,* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, *2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment*, 30 FCC Rcd. 1375, 1378 (2015) [JA __-__]. Therefore, net neutrality is essential to ensuring key democratic values such as innovation, competition, and consumer choice that users expect when going online.

Our communications networks were created with the concept of openness where anyone could access them. However, years of consolidation and gatekeeper power by incumbent carriers have made it difficult for new entrants to gain access to these networks. The value of an open Internet is that anyone can access the

network without first asking permission from the carrier. This has led to an explosion of innovation with the creation of digital apps, video over broadband offerings, e-commerce sites, and other online content. In the Matter of Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601, ¶ 3 (2015) (*hereafter*, *2015 Open Internet Order*) [JA __-__]. Without an open Internet, none of this content may have existed as broadband service providers could have easily adopted a "mother-may-I" approach choosing what content to carry and not carry over their networks. Studies show that online innovation has only increased since the Commission adopted its *2015 Open Internet Order* with massive growth in online video and over the top services. Free Press Comments at 170-176 [JA __-__]. Our democracy depends on the open Internet rules continuing to advance the "virtuous cycle of innovation" that drives consumer demand and leads to new investment, innovation, and deployment.

The Internet has grown into what it is today because an open Internet ensures broadband service providers treat all web traffic equally without picking winners or losers. This has allowed small businesses, startups, and entrepreneurs to compete on a level playing field. *See* Engine Comments at 4-6 [JA __-__]. Without an open Internet, broadband service providers could favor their own content or enter into pay-to-play agreements with websites to create fast lanes and

slow lanes. Indeed, the Commission has found that broadband service providers have the economic ability and incentive to limit Internet openness. *2015 Open Internet Order* at ¶¶ 78- 85 [JA __-__]. Broadband service providers have exerted their ability to degrade Internet traffic in the past. For example, Verizon once blocked many of its customers from using Google Wallet, which competed with its own payment solution. *2015 Open Internet Order* at ¶ 96 [JA __-__]. Another instance of blocking involved AT&T and Apple – this time, when AT&T used its control over certain carrier-specific settings on iPhones to prevent FaceTime from working on a mobile connection. *2015 Open Internet Order* at ¶ 79, note 123 [JA __-__]. Without the Commission's open Internet rules, broadband service providers would create a two-tiered system on the Internet where startups, small businesses, and other entrepreneurs are at competitive disadvantage while simultaneously limiting consumer choice.

While the elimination of rules protecting an open Internet would harm consumers and small businesses generally, it would cause a disproportionate of harm to consumers, business owners, and entrepreneurs of color. Eliminating an open Internet could potentially eliminate a critical means of engaging in social and political action. Additionally, opportunities for creators of color to create and distribute content through traditional media are extremely limited and eliminating the open Internet would further curtail the distribution of content by and for people

of color. Finally, tiered service or higher prices would disproportionately impact communities of color.

A. For Communities of Color, An Open Internet Is A Powerful Tool For Social and Political Engagement.

The Commission's *2015 Open Internet Order* noted that open Internet protections promote free speech, civic participation, and democratic engagement. *2015 Open Internet Order* at ¶ 102 (citing Open Media and Information Companies Initiative (Open MIC) Comments at 3) [JA __-__]. For communities of color, net neutrality protections ensure that communities of color preserved "their constitutional right to speak, to assemble and to petition the government is dependent on an open Internet where providers cannot restrict access to ideas and speech by imposing additional costs or by blocking controversial viewpoints." *2015 Open Internet Order*, supra note 8, at ¶. 77, n. 118 [JA __-__]. "With lower barriers to entry, the Internet is a platform where [communities of color] can speak for ourselves and on behalf of our communities, to wider audiences." Voices for Internet Freedom Opening Comments at p. 4 [JA __-__]. This is particularly important for communities of color because traditional media outlets have not included enough voices of people of color. *Id* [JA __-__].

B. For Communities of Color, An Open Internet Protects Access to Diverse Sources, Viewpoints, and Content.

In its 2015 *Open Internet Order*, the Commission noted that Title II regulation protects access to diversity in content and applications because it allows the agency to prohibit practices that it determines unreasonably interfere with or unreasonably disadvantage the ability of consumers to access that content and applications. *2015 Open Internet Order* at ¶ 136 [JA __-__]. This is particularly important for communities of color because "traditional media outlets have not…provided enough relevant content to underrepresented groups." Voices for Internet Freedom Opening Comments at p. 4. An open Internet protects vital access for the creation and distribution of content and applications by and for creators of color.

C. For Communities of Color, An Open Internet Is Necessary to Access Economic Opportunity.

Communities of color spend a disproportionately larger amount of their income on communications services because of historic and pernicious racial wealth and income gaps. Greenlining Opening Comments at 3 [JA __-__]. Communities of color "are excluded from boardrooms and newsrooms, relegated to inferior classrooms, and face persistent challenges to obtaining the access to capital needed to amplify [their] voices, become creators, achieve ownership, and generate wealth." Voices for Internet Freedom Opening Comments at 3 [JA __-

__]. Accordingly, when ISPs are allowed to increase the costs of accessing content or content providers pass on the fees charged by ISPs, communities of color feel the impacts most.

II. THE RESTORING INTERNET FREEDOM *ORDER* IS ARBITRARY AND CAPRICIOUS BECAUSE IT FAILS TO CONSIDER THE IMPACTS ON COMMUNITIES OF COLOR.

A. The *Order* is Contrary to the Record Because It Ignores The Risk of Disparate Impacts on Communities of Color.

The *Order* (Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order*, 33 FCC Rcd. 311 (2018) (hereafter, *Order*)) attempts to whitewash substantial evidence in the record which demonstrates that the elimination of net neutrality protections promises to result in disparate impacts on communities of color. "An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate." *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502 (2009) (Kennedy, J., concurring).

The *Order* fails to consider the public benefit that a free and open Internet provides to communities of color, specifically their ability to make their voices heard. Greenlining Opening Comments at p. 16 [JA __-__]. The *Order* does not address the impact of the elimination of net neutrality rules on the ability of communities of color to make their voices heard. Similarly, the *Order* rejects concerns that bright-line net neutrality rules are necessary to ensure that media

firms continue to invest in a diverse array of content or that independent and diverse content producers will be harmed by eliminating those rules. *Order* at ¶ 258.

Instead, the *Order* focuses on alleged harms that so-called "heavy-handed utility-style regulation of broadband Internet access service" cause to investment and innovation to the practical exclusion of all other considerations (*Order* at ¶ 304 [JA __-__]) and sweeping conclusory statements that because the elimination of net neutrality rules could "lead to lower prices for consumers for broadband Internet access service, we find that our action benefits low-income communities and non-profits, and we reject arguments to the contrary." *Order* at ¶ 914 [JA __-__]. This tepid analysis does not reflect a careful consideration of the evidence. Rather, it reflects the dogmatic recitation of the claim that the "innovation and investment" created by deregulation is sufficient reason to reject claims of harms. Accordingly, the *Order* fails to provide a reasoned explanation for disregarding facts and circumstances addressed by the prior policy. *Encino Motorcars v. Navarro*, 579 U.S. ___, 136 S. Ct. 2117, 2125-26 (2016), citing *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502, 515-516 (2009).

The *Order*'s failure to address the impacts of eliminating net neutrality issues on the ability of communities of color to be heard is particularly galling given the *Order*'s hyperbolic claims of objectivity. For example, the *Order* states

that its decision is based on "economic theory, empirical data, and even anecdotal evidence" (*Order* at ¶ 20 [JA __-__]), but then, as noted by then-Commissioner Clyburn, cites not one single consumer comment. Clyburn Dissent at p. 1 [JA __-__]. Similarly, the Federal Communications Commission decided to ignore thousands of informal complaints in its possession. *Order* at ¶ 342 [JA __-__]. Additionally, after carefully curating the evidence to acknowledge only materials which support its conclusion, the *Order* then accuses some commenters of using "highly selective quotations" to make their case. *Order* at ¶ 102 [JA __-__]. These actions demonstrate the *Order*'s complete disregard of the voices of consumers and, by extension, consumers of color. Accordingly, the *Order* fails to provide a "reasoned explanation…for disregarding facts and circumstances that underlay or were engendered by the prior policy," rendering the *Order* arbitrary and capricious. *Encino,* 136 S. Ct. 2117, 2125-26.

B. The *Order* Distorts and Misinterprets The Commission's Past Precedent On Protecting an Open Internet

The Commission has a longstanding history of protecting Internet openness. In 2005, the Commission adopted the *Internet Policy Statement* (Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Policy Statement*, 20 FCC Rcd. 9816 (2005) (hereafter, *2005 Internet Policy Statement*), which found that the agency's authority under Title I gave it the "jurisdiction necessary to ensure that providers of telecommunications for Internet access or

Internet Protocol-enabled (IP-enabled) services are operated in a neutral manner." *2005 Internet Policy Statement* at ¶ 4 [JA __-__]. The Commission outlined four principles "to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers." *Id.* [JA __-__]. The Commission reaffirmed these principles in its *2005 Wireline Framework Order* (Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd. 9816 (2005) (hereafter, *Wireline Framework Order*), where it stated its intention to incorporate these principles into its broadband. policymaking activities. *See Wireline Framework Order* at ¶ 96 [JA __-__]. In 2010 and 2015, the Commission adopted open internet rules and, in both instances, articulated that it was the agency's duty to preserve and protect an open internet. *2015 Open Internet Order* at ¶ 75 [JA __-__].

The *Order* takes a radical break from the Commission's history of protecting an open internet. Instead, it adopts a so-called transparency rule requiring broadband internet service providers to disclose their network management practices and terms of service while also relying on Federal Trade Commission ("FTC") authority and antitrust laws to protect an open internet. *Order* at ¶ 4 [JA __-__]. The *Order*'s reliance on FTC authority and antitrust law effectively ignores the Commission's longstanding policy goals regarding Internet openness that the

agency has articulated over the past fifteen years. General purpose and competition laws are insufficient to ensure that consumer protection needs are met by broadband service providers. Given that broadband is essential to participation in 21st century society, such an abandonment amounts to an abdication of the Commission's basic statutory mandate (47 U.S.C. § 151) and, as discussed above, promises to disproportionately harm communities of color.

III. THE *RESTORING INTERNET FREEDOM ORDER* DID NOT CONSIDER THE CONSEQUENCES OF TITLE I CLASSFICATION TO CONSUMER PROTECTION, UNIVERSAL SERVICE, AND COMPETITION

A. The *Order* Did Not Adequately Address How Consumer Privacy on Broadband Networks Will Be Protected.

The *Order* did not adequately address how consumer broadband privacy will be protected. In classifying broadband service providers as a Title I service, the *Order* returned broadband privacy to the FTC. *Order* at ¶¶ 181-182 [JA __-__]. The Commission specifically reasoned that returning jurisdiction to the FTC would establish a technologically-neutral approach to privacy regulation. Id. at ¶ 183 [JA __-__]. However, the *Order* failed to consider the unique nature broadband service providers hold in the internet ecosystem. The Commission has previously found that broadband networks have access to enormous quantities of Internet data that their subscribers transmit. *See* Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, *Report and Order*, 31 FCC Rcd. 13911 at

¶ 30 (2016) (hereafter, *Broadband Privacy Order*) [JA __-__]. While Internet traffic splinters among providers at the edge, all data – sensitive, non-sensitive, and everything in between – must pass through the hands of a broadband service provider. This type of access allows broadband service providers to paint a detailed picture of a user's life from basic header information such as IP addresses, ports and timing. *See Id.* at ¶ 28 [JA __-__]. The Commission has also found that broadband service providers hold a gatekeeper position in the internet ecosystem. *See Id.* at ¶ 75 [JA __-__]. Their role as gatekeepers not only enhances their ability to access consumer information but also makes their relationship with their customers unique. Consumers pay a fee to access broadband networks and in return do not expect that their personal information will be used as an additional revenue stream. The lack of competition in the broadband marketplace also means most consumers have limited choices between providers. Therefore, most consumers cannot change providers if they are unhappy with their current providers' privacy practices. For these reasons, the Commission has found the nature of broadband networks to be similar to other telecommunications services – they "have the ability to collect information from consumers who are merely using the networks as conduits to move information from one place to another without change in the form or content." *Id. at* ¶ 21 [JA __-__].

The *Order* also misconstrues the roles of the FCC and the FTC in protecting in protecting consumer privacy. In returning broadband privacy jurisdiction to the FTC, the *Order* relies on the fact that the FTC has decades of successful experience as a consumer privacy agency. *Order* at ¶ 183 [JA __-__]. This explanation is flawed for several reasons. First, although the FTC does have experience and expertise protecting consumer privacy, it is not the expert agency on communications networks. The FCC, on the other hand, has decades of experience protecting the privacy of consumers on communications networks. The Commission has used its authority under Section 222 to protect customer proprietary network information ("CPNI") on telephone networks for the past twenty years. Further, the Commission has continuously updated its CPNI rules to reflect changes in communications technology which now apply to mobile phones and interconnected voice over IP. See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, Report and Order and Further Notice of Proposed Rulemaking*, 22 F.C.C. Rcd. 6927, 6956-57 n.170 (2007) [JA __-__]. In addition to Section 222, Congress gave the FCC other sources of authority to protect consumer privacy on communications networks. Under Section 631 of the Cable Communications Policy Act of 1984, the Commission has the authority to protect the privacy of cable subscribers. *See*

Cable Communications Policy Act of 1984 § 631, 47 U.S.C. § 551 [JA __-__]. Title III of the Communications Act gives the FCC broad authority to regulate wireless services, which can include the authority to protect the privacy of mobile subscribers. These authorities highlight the agencies decades of experience protecting consumer privacy.

Second, the *Order* misconstrued the FTC's structure and its role in protecting consumer privacy. The FTC protects consumer privacy pursuant to its general consumer protection authority under Section 5 of the Federal Trade Commission Act to bar unfair and deceptive acts or practices. Because the FTC lacks both effective rulemaking authority and specific power from Congress to develop standards to protect consumer privacy specifically, the agency is constrained by the limits of Section 5 to apply the same, general "unfair and deceptive" standard to only privacy issues. Consequently, the FTC's enforcement actions usually involve broken privacy promises (*See* FTC, Enforcing Privacy Promises, https://www.ftc.gov/news-events/media-resources/protecting-consumer-privacy/privacy-security-enforcement) [JA __-__] or determining whether companies' are adhering to general industry practices rather than what practices would best protect consumers. *See* Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Collum. L. Rev. 583, 627-43 (2014). [JA __-__] Consumers expect adequate privacy protections when

accessing broadband networks. Unfortunately, enforcement actions without the ability to adopt bright line rules are not enough to protect consumer broadband privacy.

The *Order* notes that its broadband privacy rules adopted under the *Broadband Privacy Order* were repealed under the Congressional Review Act, preventing the agency from adopting substantially similar rules in the future. Although this is the case, Title II still provides the Commission with the statutory framework to enforce broadband privacy protections. Consumers can file complaints before the FCC citing egregious behavior by their broadband service provider's use over their data in violation of section 222. Therefore, the Commission can bring enforcement actions against broadband service providers. The FCC has also issued general guidance informing broadband service providers that they should take reasonable good faith steps to protect consumer privacy. *See Enforcement Bureau Guidance: Broadband Providers Should Take reasonable Good Faith Steps To Protect Consumer Privacy*, Public Notice, 30 FCC Rcd. 4849 (2015). [JA __-__] Commissioner Clyburn has called for the FCC to issue more detailed guidance outlining what privacy practices broadband service providers should adhere to. *See Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Order, WC Docket No. 16-106, CC Docket No. 96-115, FCC 17-82, at 13 (Commissioner Clyburn notes the FCC "even

without rules could adopt enforcement guidance or a policy statement using the voluntary code of conduct which broadband providers seeking reconsideration were willing to agree.") [JA __-__]. Taken together, these regulatory tools equate to what the FTC would do if it were to retain broadband privacy jurisdiction. However, the FCC still has the authority to promulgate new broadband privacy rules in the future - an authority the FTC clearly lacks.

B. The *Order* Did Not Adequately Address The Consequences of Title I Classification to the Digital Divide

1. The Commission Ignored Relevant Data Regarding the Impact on the Digital Divide for Communities of Color.

In its rush to eliminate net neutrality protections, the *Order* brushes aside the 2015 *Open Internet Order*'s conclusion that "In minority communities where many individuals' only Internet connection may be through a mobile device, robust open Internet rules help make sure these communities are not negatively impacted by harmful broadband provider conduct." *2015 Open Internet Order at ¶ 102* [JA __-__]. The *Order* waves away concerns that without strong net neutrality protections, providers will not build out or upgrade broadband infrastructure in unserved or underserved areas by once again invoking the mantra of "deregulation will lead to increased investment." *Order* at ¶ 260 [JA __-__]. Similarly, the *Order* dismisses arguments that potential anticompetitive cost increases would disproportionately impact households of color that, because of the racial wealth

and income gaps, are more likely to be in a position where they cannot afford additional financial burdens. Greenlining Opening Comments at 10. The *Order* dismisses these arguments by concluding that as long as some members of the public see the benefit of increased investment and lower prices, the Commission need not concern itself with the impacts on low-income or other unrepresented or underrepresented communities. *See Order* at ¶ 253, note 914 [JA __-__].

This reasoning is a slap in the face to communities of color, who have long had to deal with pernicious effects of "digital redlining"—decisions by ISPs to avoid serving lower-income neighborhoods because, in the words of FCC Chairman Ajit Pai, "It's not worth [ISPs'] time and money to deploy there." National Multicultural Organizations Opening Comments at p. 25 [JA __-__]. The *Order* waves away concerns about digital redlining even though net neutrality **opponents** argued that eliminating Title II jurisdiction would be insufficient to ensure broadband buildout to unserved and underserved communities and would require additional anti-redlining protections. *Id*. at p. 27 [JA __-__].

The *Order* fails to even **consider** how its elimination of net neutrality rules will impact communities of color, even though the Commission itself has raised that concern in the past. While the *Order* may view those impacts as unimportant or improbable, this court has not, stating that assertions regarding those impacts "are, at the very least, speculation based firmly in common sense and economic

reality." *Verizon v. FCC*, 740 F.3d 623, 646 (D.C. Cir. 2014). The *Order*'s dismissal of potential disparate impacts on communities of color is arbitrary and capricious.

2. The *Order* Did Not Address How Broadband-Only Providers Can Receive Universal Service Lifeline Support Without Title II

The *Order* did not address how broadband-only providers can receive universal service Lifeline support. 47 U.S.C. § 254 grants the Commission with legal authority to provide universal service support ("USF") for broadband-only networks. The Commission has historically interpreted its authority under section 254 to provide USF support to both voice telephony services and the facilities over which they are offered. Connect America Fund *et al, Report and Order and Further Notice of Proposed Rulemaking,* WC Docket No. 10-90 et al, 26 FCC Rcd. 17663, 17685 ¶ 64 (2011) [JA __-__]. This interpretation has allowed the agency to include USF support for broadband services. However, even with this interpretation, a carrier must be designated by the FCC or a state as an "eligible telecommunications carrier" to receive support. *See* 47 U.S.C. § 254(e) ("only an eligible telecommunications carrier designated under Section 214(e) shall be eligible to receive Federal universal service support"). Further, only common carriers under Title II can be designated as eligible telecommunications carriers. *See* 47 U.S.C. § 214(e)(1) ("A common carrier designated as an eligible

telecommunications carrier … shall be eligible to receive universal service support in accordance with section 254….”). As the Tenth Circuit found prior to Title classification of broadband, the Commission’s statutory framework made it impossible for broadband-only providers to receive USF support. *In Re: FCC 11-161*, No. 11-99000 at 51 (10th Cir. 2014) [JA __-__].

When classifying broadband as a Title I service, the *Order* failed to consider how broadband-only providers would be able to receive universal service support. In its *2015 Open Internet Order*, the Commission made a conscious decision to apply Section 254 in order to provide more legal certainty and strengthen its ability to support broadband. *2015 Open Internet Order* at ¶ 57 [JA __-__]. Indeed, it is only with Title II classification that the Commission was able to modernize its Lifeline program and allow broadband-only providers to participate. *See* Lifeline and Link Up Reform and Modernization *et al*, *Third Report and Order, Further Report and Order, and Order on Reconsideration*, WC Docket Nos. 11- 42, 09-197, 10-90, 31 FCC Rcd. 3962, ¶ 8 [JA __-__]. However, the *Order* ignores the Commission’s prior action and reasoned that a separate proceeding is considering the elimination of broadband-only providers from the Lifeline program. *Order* at ¶ 193 [JA __-__]. As broadband-only services become increasingly popular, the Commission is essentially ignoring it statutory mission of providing ubiquitous and affordable connectivity to all Americans. Commissioner Clyburn noted that “as our

communications networks continue to transition away from legacy voice service and towards services which the Commission refuses to recognize as common carriers, our universal service construct will become weaker." Dissenting Statement of Commissioner Mignon Clyburn, WC Docket No. 17-108, at 8-9 (Jan. 4, 2018) [JA __-__].

The *Order* fails to consider the impacts on the availability of Lifeline broadband for communities of color, concluding that the *Order* "need not address concerns in the record about the effect of our reclassification of broadband Internet access service as an information service on the Lifeline program at this time." *Order* at ¶ 193 [JA __-__]. This ignores the fact that as a result of existing racial wealth and income gaps, households of color are more likely to be low-income. *See* Greenlining Opening Comments at p. 3 [JA __-__]. Once again, the *Order* disregards facts and fails to provide a reasoned explanation for its policy.

C. The *Order* Did Not Consider The Effect of Competition in the Broadband Marketplace Without Title II

The *Order* effectively ignores what impact Title I reclassification will have on small broadband service providers' and new entrants' ability to compete with incumbent carriers. *Order* at ¶ 185-186 [JA __-__]. Under Title II, section 224 allows the Commission to regulate pole attachments. 47 U.S.C. § 224(b). Broadband service providers rely on utility-owned poles to attach a variety of

wired broadband technologies such as cable and fiber. As the Commission notes in its National Broadband Plan, obtaining leases and permits to attach infrastructure to poles can be expensive, particularly in rural areas where there are more poles per mile. See FCC, Connecting America: *The National Broadband Plan* (Mar. 17, 2010), https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf [JA __-__].

Without Section 224, the Commission's mandate to promote competition in the broadband marketplace is significantly weakened. For example, new entrants such as Google Fiber who offer standalone broadband services may no longer have access to utility infrastructure. *See* Letter from Austin Schlick, Director of Communications Law, to Marlene Dortch, Secretary, FCC, GN Docket No. 14-28 at 2-3 (filed Dec. 30, 2014) [JA __-__]. Incumbent carriers can refuse to provide nondiscriminatory access to utility poles making it harder for small broadband providers to compete. Consumers expect robust choices between broadband service providers and the Commission's authority to meet this mandate is much harder under Title I.

IV. CONCLUSION

The Court should vacate the *Order*.

Dated: August 27, 2018

Respectfully submitted,

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CIRCUIT RULE 32(a)(2) ATTESTATION

In accordance with D.C. Circuit Rule 32(a)(2), I, Paul Goodman, hereby attest that all other parties on whose behalf this joint brief is submitted concur in the brief's content.

/s/ Paul Goodman
Paul Goodman

CERTIFICATE OF COMPLIANCE

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(B)(i) and D.C. Cir. R. 32(e), the undersigned certifies that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman. Exclusive of the portions exempted by Fed. R. App. P. 32(f) and D.C. Cir. Rule 32(e)(1), this brief contains 4,770 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).

/s/ Paul Goodman
Paul Goodman

STATUTES AND REGULATIONS ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

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47 U.S.C.A. § 151

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S.C.A. § 224, subdivision (b)

(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of this title.

(2) The Commission shall prescribe by rule regulations to carry out the provisions of this section.

47 U.S.C.A. § 254 (excerpts)

(a) Procedures to review universal service requirements

(1) Federal-State Joint Board on universal service

Within one month after February 8, 1996, the Commission shall institute and refer to a Federal-State Joint Board under section 410(c) of this title a proceeding to recommend changes to any of its regulations in order to implement sections 214(e) of this title and this section, including the definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for completion of such recommendations. In addition to the members of the Joint Board required under section 410(c) of this title, one member of such Joint Board shall be a State-appointed utility consumer advocate nominated by a national organization of State utility consumer advocates. The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after February 8, 1996.

(2) Commission action

The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15 months after February 8, 1996. The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation. Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.

(b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

(1) Quality and rates

Quality services should be available at just, reasonable, and affordable rates.

(2) Access to advanced services

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) Specific and predictable support mechanisms

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).

(7) Additional principles

Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.

(c) Definition

(1) In general Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services—

(A) are essential to education, public health, or public safety;

(B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;

(C) are being deployed in public telecommunications networks by telecommunications carriers; and

(D) are consistent with the public interest, convenience, and necessity.

(2) Alterations and modifications

The Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.

(3) Special services

In addition to the services included in the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h).

(d) Telecommunications carrier contribution

Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's

contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

(e) Universal service support

After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

47 U.S.C.A. § 551

(a) Notice to subscriber regarding personally identifiable information; definitions

(1) At the time of entering into an agreement to provide any cable service or other service to a subscriber and at least once a year thereafter, a cable operator shall provide notice in the form of a separate, written statement to such subscriber which clearly and conspicuously informs the subscriber of—

(A) the nature of personally identifiable information collected or to be collected with respect to the subscriber and the nature of the use of such information;

(B) the nature, frequency, and purpose of any disclosure which may be made of such information, including an identification of the types of persons to whom the disclosure may be made;

(C) the period during which such information will be maintained by the cable operator;

(D) the times and place at which the subscriber may have access to such information in accordance with subsection (d); and

(E) the limitations provided by this section with respect to the collection and disclosure of information by a cable operator and the right of the subscriber under subsections (f) and (h) to enforce such limitations.

In the case of subscribers who have entered into such an agreement before the effective date of this section, such notice shall be provided within 180 days of such date and at least once a year thereafter.

(2) For purposes of this section, other than subsection (h)—

(A) the term "personally identifiable information" does not include any record of aggregate data which does not identify particular persons;

(B) the term "other service" includes any wire or radio communications service provided using any of the facilities of a cable operator that are used in the provision of cable service; and

(C) the term “cable operator” includes, in addition to persons within the definition of cable operator in section 522 of this title, any person who (i) is owned or controlled by, or under common ownership or control with, a cable operator, and (ii) provides any wire or radio communications service.

(b) Collection of personally identifiable information using cable system

(1) Except as provided in paragraph (2), a cable operator shall not use the cable system to collect personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned.

(2) A cable operator may use the cable system to collect such information in order to—

(A) obtain information necessary to render a cable service or other service provided by the cable operator to the subscriber; or

(B) detect unauthorized reception of cable communications.

(c) Disclosure of personally identifiable information

(1) Except as provided in paragraph (2), a cable operator shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned and shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or cable operator.

(2) A cable operator may disclose such information if the disclosure is—

(A) necessary to render, or conduct a legitimate business activity related to, a cable service or other service provided by the cable operator to the subscriber;

(B) subject to subsection (h), made pursuant to a court order authorizing such disclosure, if the subscriber is notified of such order by the person to whom the order is directed;

(C) a disclosure of the names and addresses of subscribers to any cable service or other service, if—

(i) the cable operator has provided the subscriber the opportunity to prohibit or limit such disclosure, and

(ii) the disclosure does not reveal, directly or indirectly, the—

(I) extent of any viewing or other use by the subscriber of a cable service or other service provided by the cable operator, or

(II) the nature of any transaction made by the subscriber over the cable system of the cable operator; or

(D) to a government entity as authorized under chapters 119, 121, or 206 of title 18, except that such disclosure shall not include records revealing cable subscriber selection of video programming from a cable operator.

(d) Subscriber access to information

A cable subscriber shall be provided access to all personally identifiable information regarding that subscriber which is collected and maintained by a cable operator. Such information shall be made available to the subscriber at reasonable times and at a convenient place designated by such cable operator. A cable subscriber shall be provided reasonable opportunity to correct any error in such information.

(e) Destruction of information

A cable operator shall destroy personally identifiable information if the information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information under subsection (d) or pursuant to a court order.

(f) Civil action in United States district court; damages; attorney’s fees and costs; nonexclusive nature of remedy

(1) Any person aggrieved by any act of a cable operator in violation of this section may bring a civil action in a United States district court.

(2) The court may award—

(A) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(B) punitive damages; and

(C) reasonable attorneys' fees and other litigation costs reasonably incurred.

(3) The remedy provided by this section shall be in addition to any other lawful remedy available to a cable subscriber.

(g) Regulation by States or franchising authorities

Nothing in this subchapter shall be construed to prohibit any State or any franchising authority from enacting or enforcing laws consistent with this section for the protection of subscriber privacy.

(h) Disclosure of information to governmental entity pursuant to court order

Except as provided in subsection (c)(2)(D), a governmental entity may obtain personally identifiable information concerning a cable subscriber pursuant to a court order only if, in the court proceeding relevant to such court order—

(1) such entity offers clear and convincing evidence that the subject of the information is reasonably suspected of engaging in criminal activity and that the information sought would be material evidence in the case; and

(2) the subject of the information is afforded the opportunity to appear and contest such entity's claim.

CERTIFICATE OF SERVICE

I, Paul Goodman, hereby certify that I have on this 27th day of August, 2018, electronically filed the foregoing Amicus Curiae Brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, which served a copy on all counsel of record in these cases.

/s/ Yosef Getachew
Yosef Getachew