No. 21-15430

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ACA CONNECTS – AMERICA'S COMMUNICATIONS ASSOCIATION, CTIA – THE WIRELESS ASSOCATION, NCTA – THE INTERNET & TELEVISION ASSOCIATION, and USTELECOM –THE BROADBAND ASSOCIATION,

Plaintiffs-Appellants,

v.

ROB BONTA, in his official capacity as Attorney General of California

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of California
No. 2:18-cv-02684-JAM-DB
Hon. John A. Mendez, District Judge

BRIEF OF ACCESS NOW, MOZILLA CORP, PUBLIC KNOWLEDGE, NEW AMERICA'S OPEN TECHNOLOGY INSTITUTE, AND FREE PRESS AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. INTEREST OF AMICI CURIAE[1]

Amici curiae are non-profit advocacy organizations and online companies that have for many years supported strong net neutrality protections to ensure consumers can access an internet free from undue influence from their internet service provider. Amici curiae thus have an established interest in the outcome and potential ramifications of this proceeding, and believe that their perspective will provide a fuller view of the stakes of this case. Listed in alphabetical order, these groups are the following:

Access Now is an international civil society organization registered as a 501(c)(3) non-profit in the United States of America, and focuses on defending and extending the digital rights of users at risk around the world. Access Now filed comments in both the 2015 and 2017 net neutrality proceedings at the Federal Communications Commission supporting strong rules, and relies on an open internet to reach its audience.

Free Press is a 501(c)(3) non-profit organization focused on equitable access to technology, diverse and independent ownership of media, and journalism that serves local communities. Free Press also filed comments in the 2015 and

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[1] No party's counsel authored this brief in whole or in part, and no person other than amici, their members, and their counsel contributed money intended to fund the preparation or submission of this brief. The parties have consented to its filing.

2017 net neutrality proceedings (and earlier ones as well) at the Federal Communications Commission, supporting the strong rules adopted in 2015 and opposing their elimination in 2017.

Mozilla Corporation has been an advocate for the internet for over a decade. Its mission is guided by the Mozilla Manifesto, a set of principles recognizing that, among other things, the Internet must remain open and accessible. Today, hundreds of millions of people worldwide use Mozilla Firefox to discover and experience the web on computers, tablets, and mobile phones.

New America's Open Technology Institute ("OTI") is a 501(c)(3) non-profit organization in the United States. OTI is a program within New America, a foundation dedicated to the renewal of American politics and prosperity in the Digital Age. OTI strongly supports net neutrality and broadband deployment and strongly opposed the FCC's decision to eliminate net neutrality rules in 2017.

Public Knowledge ("PK") is a 501(c)(3) non-profit organization that advocates for technology policy that serves the public interest. PK advocates before Congress, the courts, the Federal Communications Commission, and other governmental entities. PK works to uphold and protect consumers' rights, including net neutrality.

II. ARGUMENT

A. The U.S. Chamber of Commerce misrepresents the level of broadband investment, falsely claiming that investment decreased due to the net neutrality rules.

Internet service providers ("ISPs") and their amici like the U.S. Chamber of Commerce ("Chamber") claim, falsely, that industry investment declined in 2015 and 2016, when the FCC's strong net neutrality rules were in place. They also claim, falsely, that investment rebounded in 2017 and 2018, when the Federal Communications Commission ("FCC") eliminated those rules. Yet it is evident from these ISPs' own SEC disclosures, and from deployment reports filed on FCC Form 477, that just the reverse is true: when the rules were in place, there was instead an overall increase in aggregate broadband capital expenditures and deployment (in urban and rural areas alike) by the publicly traded ISPs that report these numbers. Since the rules' elimination, aggregate broadband investment has decreased. That is not to say that the rules caused increased investment, or that their elimination caused a decrease; yet the numbers belie the Chamber's claims about the direction of any change in investment when these rules were operative.

To begin with, a comparison of aggregate investment totals from year to year is not as informative as the Chamber pretends. Aggregate investment is a blunt metric that obscures variations between individual firms. Yet the picture is clear, no matter how the Chamber's brief attempts to cloud it with incomplete data

derived solely from ISPs' lobbying arm. The Chamber claims, for example, that "[i]nvestment began to decline, however, in 2015, . . . [b]ut capital expenditures began to increase again with both the expectation and issuance of the 2018 [Restoring Internet Freedom] Order." Chamber Br. at 9-10. Yet each of the citations here, to a few different FCC record comments allegedly supporting this proposition, lead back to a single source: USTelecom, a plaintiff in this case.

Honest assessment of aggregate broadband investment before and after the elimination of the FCC's rules requires escaping the Chamber's hall of mirrors, where a single plaintiff's distorted claims about broadband investment are misleadingly made to look like several different commenters all supporting each other's analyses. And as looking below the surface at USTelecom's reports reveals, the lobbying association "collects capital expenditures data . . . in order to approximate an industry aggregate" but "does not adjust for inflation." *See* Patrick Brogan, *U.S. Broadband Investment Continued Upswing in 2018*, USTelecom (July 31, 2019), https://bit.ly/2G3ZOid at 3 (emphasis added).

Amicus Free Press has conducted its own analysis of broadband investment before and after the FCC's elimination of its net neutrality rules; but unlike USTelecom, Free Press used only publicly-reported data, adjusted for inflation, and showed the numbers that make up the aggregate rather than obscuring them behind a series of poorly explained "approximat[ions]." As data through 2019

demonstrates, aggregate investment by publicly-traded broadband providers increased sharply in the two-year period 2015-2016 with the FCC's rules in place, when compared to the prior two-year period. *See, e.g.*, Free Press Broadband Deployment Comments, Dkt. No. 20-269 (Sept. 18, 2020), https://bit.ly/33ZVcSb at 50, Fig. 17 ("Free Press Comments"). On an inflation-adjusted basis, aggregate investment in 2017 by these firms did not even match their total in 2015, when the FCC's strong net neutrality rules went into effect. *Id*. And aggregate broadband investment has dropped every year since 2017, with the 2019 total more than $2 billion below 2016's total. *Id*.

Looking at individual ISP investment decisions and expenditures during these time periods is even more informative than looking at the aggregate figure, however, because the aggregate can be skewed by changes at a single large firm. The investment decisions, cycles, and strategies employed by individual firms likewise show an industry experiencing significant growth in 2015 and 2016, with the FCC's strong net neutrality rules in place: the majority of publicly traded broadband providers reported investment increases after the 2015 Open Internet Order issued (*Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601 (Mar. 12, 2015) ("2015 Open Internet Order")).

As the data in Free Press's latest report shows, there were declines reported by some individual providers in 2015 and 2016, such as AT&T; but these are clearly attributed to investment decisions made far in advance, in no way related to the FCC net neutrality rules' adoption or their elimination, and in accordance with the typically cyclical nature of capital investments in this industry. As AT&T itself told the FCC years before this particular proceeding, "there is no reason to expect capital expenditures to increase by the same amount year after year. Capital expenditures tend to be 'lumpy.'. . . Minor variations from year to year thus should not be surprising[.]" Comments of AT&T Inc., Dkt. 10-133 (July 30, 2010), https://bit.ly/2S3uG53 at 34.

Thus, the reason that AT&T spent less in 2015 than it did in 2014 had nothing to do with the FCC's net neutrality decisions: it had everything to do with the fact that AT&T finished a long-planned upgrade ahead of schedule in 2014. Comments of Randall Stephenson, Chairman & CEO, AT&T Inc., at UBS Global Media and Communications Conference (Dec. 8, 2015), https://bit.ly/2S7X2uH ("Stephenson Comments"). AT&T's rebound in 2016—with the net neutrality rules still in place—is attributable in large part to a merger condition imposed on its DIRECTV acquisition in 2015, in which AT&T promised to increase its fiber deployment in exchange for approval of that transaction. Yet AT&T's investment totals decreased every year under FCC Chairman Ajit Pai, and every year since the

elimination of the rules, with no promise to continue deploying fiber now that the company has met that merger obligation. Free Press Comments at 34-35.

The upward trajectory for broadband when strong net neutrality rules were in place is plainly reflected in data measuring broadband speeds and deployment as well. ISPs' own reports on FCC Form 477 data show a steady increase in the number of people in the U.S. reportedly served by fixed residential broadband from 2014-2017, seemingly unaffected by the phantasmal investment declines or spikes that these ISPs and their amici conjure for this Court. There were no such declines at all, let alone any traceable to FCC regulation decisions. In the two years while strong net neutrality rules were in place, the average maximum available downstream speed for terrestrial home broadband in areas where broadband is deployed, according to FCC data, increased by 150 percent. These and other performance metrics are far more informative than raw dollars of expenditures, because, as AT&T's Randall Stephenson bragged in 2015, deploying fiber and other upgrades "continues to get cheaper," allowing providers to spend less even as they offer significant increases in capacity and speeds. Stephenson Comments.

Furthermore, individual ISP capital expenditures have not skyrocketed since the FCC's elimination of these rules, even when that regulatory shift was coupled with massive corporate tax cuts. Both before and after the FCC's 2017 vote, improvements in wired broadband coverage, speeds, and choices continued on the

same trajectory seen from the end of 2014, just before the FCC adopted the 2015 Open Internet Order. However, many of the largest broadband providers actually reported decreased expenditures in 2018, after elimination of the rules.

Verizon reported a 6.4% inflation-adjusted investment decline for 2017-2018. *See* Free Press Comments at 50, Fig. 17. AT&T spending declined too, as it also announced worker layoffs instead of the tax-cut fueled job growth it had promised. Jon Brodkin, *AT&T Slashed Billions from Network Spending, Cut Tens of Thousands of Jobs*, Ars Technica (Jan. 30, 2020), https://bit.ly/3i40fpY. Comcast reported that capital expenditures for 2018 and 2019 likewise decreased, after reporting more than 23% growth in such investments when strong net neutrality rules were in place for 2015-2016. Jon Brodkin, *Ajit Pai Promised Faster Broadband Expansion—Comcast Cut Spending Instead*, Ars Technica (Jan. 28, 2020), https://bit.ly/3cvuUeB. That is why any claim that ISPs simply need more money at their disposal, and that if they get it then they will automatically reinvest it, are so laughably and demonstrably untrue.

Even removing from the equation the accounting complications introduced by the AT&T/DIRECTV merger and other changes affecting the accounting for Sprint's expenditures on leased handsets, the inflation-adjusted aggregate investment total for the remaining companies in this collection of publicly traded

broadband providers increased by 8% in 2015-2016, but dropped by 0.2% in the first two years of FCC Chairman Pai's tenure.

The overall declines, and declines in spending at individual companies, continued in 2019 and 2020, exposing the utter fallacy of claims that net neutrality rules depressed investment or that their elimination increased it. ISPs' investment decisions are driven by a multiplicity of factors, including the availability of new technologies, current interest rates, competitive pressures (if any), and the public demand for this increasingly essential communications service.

B. ISPs have a history of undermining net neutrality.

The Chamber argues "[c]ritics' predictions about the repeal of the [FCC's 2015 net neutrality rules] have failed to materialize," and claims that there is no evidence that ISPs have engaged in blocking, throttling, or paid prioritization, primarily because of competitive pressure. Chamber Br. at 15. These claims are not accurate or persuasive.

1. ISPs can and do violate net neutrality.

As an initial matter, ISPs have the economic incentive and technical ability to undermine net neutrality. Everything users do online goes through their ISP, and ISPs can control that traffic and "exploit this role by acting in ways that may harm the open Internet, such as preferring their own or affiliated content, demanding fees from edge providers, or placing technical barriers to reaching end users." 2015

Open Internet Order, 30 FCC Rcd at 5630 (¶80). This phenomenon is typically called the "terminating access monopoly" over users. The D.C. Circuit Court of Appeals upheld the FCC's logic in *Verizon Communications Inc. v. FCC*, stating the FCC "convincingly detailed how broadband providers' position in the market gives them the economic power to restrict edge-provider traffic and charge for the services they furnish edge providers" in part because of weak competition, high switching costs, and asymmetric information (detailed in part II.C of this brief). *Verizon Communications Inc. v. FCC*, 740 F.3d 623, 646 (D.C. Cir. 2014) ("*Verizon*").

For that reason, every FCC since 2005, until the Pai FCC, has adopted some variation of net neutrality conduct rules.[2] In 2005, the FCC under Chairman Powell

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[2] The Chamber claims that "between 2000 and 2014, broadband was classified . . . as an 'information service' . . . ." Chamber Br. at 9. That is not true. Digital Subscriber Line services were classified as Title II services until 2005, *see Deployment of Wireline Services Offering Advanced Telecommunications Capacity*, 13 FCC Rcd 24012 (1998) (classifying DSL as a telecommunications service) and *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853 (Sept. 23, 2005) (classifying wireline services as information services), and wireless services were classified as Title II services until 2007, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, Declaratory Ruling*, 22 FCC Rcd 5901 (Mar. 23, 2007). Moreover, many rural DSL providers continued to provide some broadband offerings as Title II services during that entire period. *See* Comments of the National Exchange Carrier Association, Dkt. No. 17-108 (July, 17, 2017), https://bit.ly/347jx8M at 5 ("These carriers typically serve rural, sparsely-

passed a Policy Statement based on four early net neutrality principles: consumers should be able to access the content of their choice, use applications of their choice, connect non-harmful devices to the network, and benefit from competition among network providers and online content and application providers. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Policy Statement*, 20 FCC Rcd 14986 (Sept. 23, 2005), https://bit.ly/2HyqWpY. After the D.C. Circuit held, in *Comcast Corp. v. FCC*, 600 F.3d 642 (2010), that the FCC lacked authority to enforce such requirements under Title I of the Communications Act, the FCC passed the 2010 Open Internet Order prohibiting blocking and unreasonable discrimination based in part on Section 706 and Title I authority. *Preserving the Open Internet, Report and Order*, 25 FCC Rcd 17905 (Dec. 23, 2010), https://bit.ly/3igaPdr. The D.C. Circuit struck down that decision too, in *Verizon*, because the court said the FCC is not allowed to attach common carrier obligations like nondiscrimination to a service that is classified as a Title I information service. *Verizon*, 740 F.3d 623 (D.C. Cir. 2014). Thereafter, the FCC passed its 2015 Open Internet Order, which reclassified broadband providers as Title II telecommunications services, forbore from a

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populated areas and obtain significant benefits from the provision of broadband transmission services on a common carriage basis[.]").

significant portion of Title II regulations, and imposed strong net neutrality requirements including no blocking, no throttling, no paid prioritization, a general conduct rule, and interconnection oversight. The D.C. Circuit upheld these rules in full in *United States Telecom Ass'n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017). They were the law of the land until the Pai FCC abdicated its authority over broadband, went against history, and eliminated all federal net neutrality conduct rules, retaining the bare minimum and insufficient transparency requirement. *Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order*, 33 FCC Rcd 311 (Jan. 4, 2018), https://bit.ly/3ibU4jG ("RIFO").

Thus, contrary to the Chamber's implications, net neutrality was not a new construct created in 2015, though only the strong rules from 2015 fully withstood judicial review. Yet, despite the continuous presence of such rules, and after their elimination as well, ISPs have engaged in behavior that violates and undermines net neutrality.

In 2005, Madison River Communications, a DSL provider, blocked ports on its network that were used by competing VoIP services, which resulted in a consent decree and a fine. *Madison River Communications, LLC, Consent Decree*, 20 FCC Rcd 4295 (2005). Shortly thereafter, Comcast interfered with peer-to-peer file sharing over its network, resulting in another FCC investigation and enforcement order. *Formal Complaint of Free Press and Public Knowledge*

Against Comcast, *Memorandum Opinion and Order*, 23 FCC Rcd 13028 (2008), https://bit.ly/3kVuCk7.

From 2014-15, the nation's six largest wireline ISPs exploited a loophole in the 2010 Open Internet Order allowing them to force companies like Netflix and Riot Games to pay them fees. Kelsey Campbell-Dollaghan, *Netflix Agrees to Pay Comcast for Access to its Broadband Network*, Gizmodo (Feb. 23, 2014), https://bit.ly/2Q9bWDQ; Jake Swearingen, *How Time Warner Cable Broke Its Promise and Kept Your High-Speed Internet Slow*, N.Y. Mag. (Feb. 7, 2017), https://nym.ag/3bgasz3. To force such payments, the ISPs intentionally allowed the doors into their networks (known as interconnection points) to congest, causing slow internet access and failing applications for millions of people. ISPs relieved the congestion only when those online companies paid the ISPs a fee to deliver the traffic. SER-42, Schaeffer Decl. ¶80; Swearingen, *supra* ("[Netflix] refused to pay for access to [Time Warner Cable's] customers. In response, TWC didn't cut them off entirely. Instead, it allegedly just neglected to upgrade the port capacity between TWC and Netflix, causing slower connections."). ISPs finally stopped this behavior when the FCC decided in the 2015 Open Internet Order to scrutinize such agreements on a case-by-case basis to ensure they did not circumvent net neutrality protections. Swearingen, *supra* ("Cogent consistently remained the worst performing backbone provider on TWC right up until the FCC's ruling in 2015 that

ISPs were "common carriers," … at which point Cogent saw its port capacity increase again."). Cable company Charter later settled with the New York Attorney General for a record $174 million in fees and rebates for, in part, "guaranteeing that subscribers would enjoy seamless access to their chosen internet content while engaging in hardball tactics with Netflix and other popular third-party content providers that, at various times, ensured that subscribers would suffer through frozen screens, extended buffering, and reduced picture quality." Press Release, A.G. Underwood Announces Record $174.2 Million Consumer Fraud Settlement with charter for Defrauding Internet Subscribers, N.Y. Attorney General (Dec. 18, 2018), https://on.ny.gov/3uCgmSr.

Wireless providers engaged in harmful conduct between 2010 and 2015 when limited net neutrality rules applied to them, even during a time when the wireless market was more competitive than it is now. AT&T blocked, or attempted to block, voice services that competed with its voice service. Cecilia Kang, *AT&T Faces Complaint over iPhone Facetime Blocking*, Wash. Post (Sept. 18, 2012), http://wapo.st/S5kq7u. Verizon sought removal of tethering apps from the Android app store in 2011. Ryan Singel, *Verizon Ban on 4G Tethering Apps Violates Openness Rule, Complaint Alleges*, Wired (June 6, 2011), https://bit.ly/34bAi2v. Verizon similarly blocked Google Wallet, a competitor to the provider's own

mobile payment system, on its phones. David Goldman, *Verizon Blocks Google Wallet*, CNN Money (Dec. 6, 2011), https://cnn.it/3kPHf06.

Behavior of wireless providers internationally also shows harmful behavior, again illustrating that ISPs have the incentive and the ability to engage in the type of conduct that SB 822 addresses. In Canada in 2009, many wireless providers were throttling peer-to-peer traffic. Barbara van Schewick, *Network Neutrality and Quality of Service*, 67 Stanford L.Rev. 1, 96-97 (2015), https://stanford.io/2SapBbe. In Europe, one study found that from the mid-2000s to 2011, "application-specific traffic management became pervasive" in the British broadband landscape. Alissa Cooper, *How Competition Drives Discrimination: An Analysis of Broadband Traffic Management in the UK*, TPRC (Aug. 2013), https://bit.ly/2Q9E4GX at 4.

These kinds of issues have reappeared following the FCC's elimination of the net neutrality rules. For instance, an August 2019 report based on findings from the WeHe mobile application showed that all major U.S.-based wireless ISPs engaged in some kind of traffic differentiation between particular applications, even prior to the effective date of the RIFO. The report found all of the then-four major wireless carriers (Verizon, T-Mobile, Sprint, and AT&T) throttled Netflix and YouTube over the cellular network. Verizon, T-Mobile, and Sprint further throttled Amazon Prime. The services were typically throttled to 1.5 Megabits per

second (Mbps), even though the network could handle up to 20 Mbps throughput. Such throttling shows the continued harm that ISPs may wreak on their customers in a way that prevents users from streaming high-quality video to their devices. Fangfan Li, *et al.*, *A Large Scale Differential Analysis of Deployed Traffic Differentiation Practices*, Assoc. Computer Machinery (2019), https://bit.ly/3jffAFl at 137.

Additionally, after Comcast started once again employing tactics that slowed the network speeds of internet backbone operator Cogent, app developer Panic, a Cogent customer, reported that its Comcast users suffered slow connections when trying to access Panic's apps and upgrades. Jon Brodkin, *When Slow Downloads Hit an App Developer, only Comcast Customers Suffered*, Ars Technica (Mar. 9, 2018), https://bit.ly/3l0nbs6.

The elimination of net neutrality rules and any real oversight of ISP conduct at the federal level harms public safety as well. Verizon made headlines when it slowed the Santa Clara Fire Department's wireless service during the 2018 Mendocino Complex wildfire crisis. Colin Lecher, *Verizon Throttled California Fire Department During Wildfire Crisis*, Verge (Aug. 21, 2018), https://bit.ly/2S97G4z . Whatever the implications of this shameful episode under the provisions of SB 822, officials in California have rightly noted that any

impairment or degradation of outgoing emergency messages to members of the public would indeed be a net neutrality issue—and a public safety catastrophe.

2. ISPs, particularly mobile providers, further undermine net neutrality through harmful zero-rating practices.

Anticompetitive zero rating is another harmful practice ISPs engage in, which violates net neutrality laws under clearly delineated rules set forth in SB 822. Zero rating is the practice where an ISP imposes a data cap or threshold for its users, then exempts certain preferred content (usually from a source affiliated with the ISP, or from an entity that pays the ISP for the exemption) from that data cap.

If an ISP zero-rates services in these harmful ways,[3] it has an incentive to reduce its data cap or threshold, to nudge or force its users into using the affiliated content and avoiding the unaffiliated content. This is one reason why zero rating is banned in the Netherlands, and the Dutch Authority on Consumers and the Market has fined companies for violating the ban. The ban prevented another large Dutch ISP, KPN, from engaging in the same behavior as it was rolling out its video service that "allows its customers to watch anytime, anywhere TV on their smartphones or tablets." Research Note, Netherlands Zero-Rating, Rewheel (Feb. 6, 2015), https://bit.ly/3mZxle9 at 1. In recognition of the ban and the likelihood of

[3] SB 822 allows application-agnostic zero-rating so long as no consideration is provided by third parties in exchange. Cal. Civ. Code §§3101(a)(7)(B), 3101(b).

its video service being underutilized by customers, KPN doubled the allowance under its data caps to 10 GB per month at no additional charge to the customer. *Id.*

Without such regulations in place, zero rating also harms consumers by raising prices. A study of ISPs in the EU during 2015 and 2016 found that "in markets where zero-rating offers had existed in both years, prices increased by 2%, whereas in markets with no zero-rating offers in both years, prices dropped by 8%. . . . Countries in which zero-rating offers disappeared from the market, displayed a 10% decrease in prices." Thomas Lohninger, *et al*., *The Net Neutrality Situation in the EU*, Epicenter.works (Jan. 29, 2019), https://bit.ly/34bCbMD at 30.

Anticompetitive zero rating also has negative effects on competition, as people tend to prefer using services that will not count against their cap. An app or service that is exempted from the data cap will be favored by the consumer, and any competing apps or services will suffer especially when the service is a video-based service. Such practices make it difficult for voices not affiliated with large ISPs to be heard. *See* SER-164, Renderos Decl. ¶35 ("Choosing between accessing content created by people of color and watching Game of Thrones on HBO isn't a real choice if watching a couple hours of the former means you go over your data cap and have your connection slowed down for the rest of the month.").

ISPs have continually engaged in these kinds of harmful zero-rating practices, and did so before and after the elimination of the FCC's net neutrality

rules and its disavowal of investigations into such practices. AT&T exempted its own DIRECTV services from its customers' data caps, and provided other favorable treatment for customers who subscribe to its services. Similarly, Verizon once zero-rated its own go90 service (which has since been shut down). Wireless Telecommunications Bureau, *Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-rated Content and Services*, FCC (2017), https://bit.ly/3n0wFVZ at 9. The FCC then found that these zero-rating programs had negative competitive impacts. *Id*. at 14, 16-17. Yet in the wake of the elimination of the rules and the current FCC's withdrawal, AT&T recently doubled down and began favoring another of its own video services, HBO Max, by zero rating it. Tyler Hersko, *AT&T Ignores Net Neutrality: HBO Max Won't Hit Data Caps but Competing Streamers Will*, IndieWire (June 4, 2020), https://bit.ly/33duJBF. Verizon made a similar move in 2017 by zero-rating its own Fios app. Nick Statt, *Verizon Wireless Wades Right Back Into the Net Neutrality Debate with Fios Deal*, Verge (Mar. 9, 2017), https://bit.ly/3f5ahrn.

However, after the U.S. District Court for the Eastern District of California denied the ISPs' motion for a preliminary injunction, allowing California to enforce SB 822, both AT&T and Verizon stopped their anti-competitive zero-rating of their own video services. Jon Brodkin, *AT&T Lies about Calif. Net Neutrality Law, Claiming It Bans "Free Data,"* Ars Technica (Mar. 18, 2021),

https://bit.ly/3vXwNJE; Fios TV App, Verizon, https://vz.to/2RbKCFg (Verizon stopped the practice only in California). Stopping that practice is a win for Californians and ended an ongoing harm to competitive applications and to underrepresented voices.

3. Competition among ISPs is bleak at best.

The Chamber argues that competition among ISPs prevents behavior that undermines net neutrality, Chamber Br. at 13-14, but that assertion flies in the face of reality. In truth, the ISP market in the U.S. is a deeply anticompetitive oligopoly, dominated by just a handful of companies. Recent FCC data, which overcounts broadband deployment and competition, *see* Jonathan Sallet, *Broadband for America's Future*, Benton Fdn. (Oct. 2019), https://bit.ly/3kWVikr at 27-28, shows weak competition for 100 Mbps download connection (the speeds at which about half of Americans subscribe, SER-100-101, Kronenberg Decl. ¶9). FCC data for 2018 suggests that 9.5% of the population has zero options at this speed, with 39% having one option, and 41% having two options. That data means approximately 292 million people in the U.S. had at most a duopoly at that speed, with 31 million of those having no options, and 127 million under a monopoly. *Fixed Coverage Updates as of YE2018*, FCC, https://bit.ly/33fLcW1 at 2. Even at the bare minimum "broadband" speed of 25 Mbps download, 2018 FCC data suggested that

at least 18 million Americans (5.6%) still lacked even one provider, and 87 million Americans (26.6%) are under a monopoly. *Id.*

Recent studies conducted in California show that competition in the state is likewise poor. In 2016, California regulators found that "[t]he residential high speed broadband market is highly concentrated throughout California," and "[d]espite advancement in technologies and services, the so-called 'digital divide' between geographic and economic sub-groups of the State's population has widened. Those Californians who lack reliable and affordable access to that network are unable to participate fully in the economy and society of the 21st century." *Decision Analyzing the California Telecommunications Market and Directing Staff to Continue Data Gathering, Monitoring and Reporting on the Market*, CPUC (Dec. 8, 2016), https://bit.ly/3jfDpwK at 3-4. Worse, that report found that "[i]n the Oakland and San Francisco markets, all . . . competitive carriers together provide less than 8% of total fixed broadband lines," meaning giant incumbent ISPs like AT&T and Comcast controlled the other 92% of the broadband market. *Id.* at 94. Further, in 2019, California regulators found that the investment focus of California telecom companies has been primarily in higher-income communities and urban areas, while they leave low-income communities behind with old, decaying infrastructure that is less resilient and more likely to have outages. *Examination of the Local Telecommunications Networks and*

Related Policies and Practices of AT&T California and Frontier California, CPUC (April 2019), https://bit.ly/3kVAQjZ at 2-3.

Even if there were competition, several aspects of the ISP market make such competition less effective at disciplining behavior. First, consumers often lack information about the true cause of a low-quality internet connection. There could be many reasons for a poor user experience online, and interference by that user's ISP is merely one potential culprit. While disclosure is intended to fix this problem, some consumers may not understand such disclosures especially when they are poorly drafted and purposefully buried by the ISP; and, once again, disclosure only helps if there is competition, such that a customer could switch to a provider that does not have the same limitation. Barbara van Schewick, *supra*, 67 Stanford L.Rev. at 86-88. Second, switching providers can often be difficult and costly for customers. The high switching costs incurred by customers who switch between providers make it less likely that those customers will actually make the switch. These costs include paying early termination fees, paying for equipment or installation, and time spent waiting for installation and new equipment or returning old equipment. Significant effort goes into switching as well—customers need to compare new plans and coordinate installation, potentially missing work. *Id*. at 92-96.

The Chamber also argues that many of the largest ISPs have committed not to block or throttle content and claims that promise is enforceable by the Federal Trade Commission. Chamber Br. at 17. These commitments provide cold comfort because they are narrow and are subject to change.

Take, for instance, AT&T's pledge: "We don't block websites. We don't censor online content. And we don't throttle, discriminate or degrade network performance based on content. Period." Tony Romm, *AT&T Says It Supports Net Neutrality – But It's Staying Quiet on Whether It Could Charge More for Faster Access*, Vox Recode (Jan. 24, 2018), https://bit.ly/3fbmGtR. That is the entire commitment; it lacks specificity especially regarding paid prioritization or speeding up certain services, both of which are banned under SB 822 in §3101(a)(2)-(3). Similarly, Verizon claims not to block or throttle any traffic. While it claims it does not allow for paid priority, it states "nor will we deliver our affiliates' internet traffic faster or sooner than third parties' [and] will not prioritize traffic in a way that harms competition or consumers." Our Commitment to Broadband Consumers, Verizon, https://vz.to/2SwMMja. The language is vague and narrow enough to allow Verizon to determine whether its own practices are harmful or zero-rate its own services like go90 and the Fios TV app, as discussed above.

The pledges are subject to change and have changed. Under the current regime, ISPs need only provide notice of their practices, which are dictated entirely by the ISPs themselves. Comcast showed the fallibility of such transparency alone when it changed its net neutrality commitments after former FCC Chair Pai announced his plans to repeal the 2015 Open Internet Order. Jon Brodkin, *Comcast Deleted Net Neutrality Pledge the Same Day FCC Announced Repeal*, Ars Technica (Nov. 29, 2017), https://bit.ly/3f0u8aU. Comcast's prior pledge had an explicit statement saying "Comcast doesn't prioritize Internet traffic or create paid fast lanes." *Id*. Its new, vague statement does not include such a promise. Net Neutrality, Comcast, https://comca.st/2SB2Hgp.

Even if the pledges were meaningful, they do not protect people from all the behaviors and harms covered in SB 822, such as the ban on access fees (§3101(a)(3)(A)), paid prioritization (§3101(a)(4)), harmful zero-rating practices (§3101(a)(5)-(6)) such as paid zero rating or exempting only some applications in a class of similar apps (including zero-rating HBO Max but not YouTube), and harmful interconnection practices (§3101(a)(9)).

It is vitally important that SB 822 remain in effect and not be enjoined. Without any regulation, ISPs will continue to cause harm to their customers, preventing them from accessing the online content providers of their choice, and harming the open internet writ large by artificially constricting internet usage to

pad ISPs' own pockets. These kinds of harms would be further exacerbated by the fact that everyone now relies on the internet daily during the COVID-19 pandemic.

C. ISP networks have not been as "resilient" during the pandemic as industry claims.

The Chamber argues that "[t]he COVID-19 global pandemic highlights the resilience of the U.S. broadband infrastructure—a product of 'light touch' regulation and years of investment." Chamber Br. at 18. The Chamber also cites the prior administration's FCC in support of this conclusion. *Id*. at 19-20. Network performance in the U.S. in response to COVID-19, however, has not held up as industry as claimed. Much industry analysis cited by the Chamber focuses on national average or median speeds, but a national focus ignores the effects on individuals and communities that already had poor internet connections, such as communities of color or rural communities.[4]

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[4] There is also a history of lack of network resiliency, particularly of wireless networks, in California. During the recent wildfires between 2017 and 2019, wireless networks failed or proved highly unreliable, with network outages disrupting both traditional 911 calls and broadband emergency information services. California Public Utilities Commission Decision 20-07-011, *Decision Adopting Wireless Provider Resiliency Strategies,* at 45, 123, https://bit.ly/3biY0OZ ("widespread communications outages occurred across all sectors: in the facilities used to provide wireless telephone service, traditional landline telephone service, cable video service, VoIP service, and broadband Internet access service"; "during declared states of emergencies, such as in the 2017, 2018, and 2019 wildfires and 2019 [power shutoffs], California's facilities-based wireless providers' networks failed, endangering the lives of customers and first responders.").

Some reports suggest that additional usage during the COVID-19 crisis did indeed affect network speeds in the U.S. This research rebutting ISPs' self-serving claims uses Measurement Lab data, which is similar to the Ookla data on which industry relies, but more comprehensively measures the user experience by testing potential slowdowns in different parts of the connection including on and off ISP networks. This independent research showed more than a 10 percent increase between February and late March in the number of counties in which median network speeds did not meet the 25 Mbps download and 3 Mbps upload threshold that the FCC treats as "broadband" service. Additionally, 38 states experienced slower median speeds, with five experiencing a reduction in median speeds of more than 20 percent. Sascha Meinrath, *The Coronavirus Pandemic Is Breaking the Internet*, The Hill (May 2, 2020), https://bit.ly/30jljm3. And in 29.4 percent of counties, "most customers [were] not getting the government-required upload speed" to meet this FCC threshold. Amanda Hulpoch, *US's Digital Divide 'Is Going to Kill People' as COVID-19 Exposes Inequalities*, Guardian (Apr. 13, 2020), https://bit.ly/2HHKZm4.

Other studies suggest that many major cities encountered severe performance impacts during March, April, and even May 2020. In California, for one week in mid-March 2020 compared to the prior ten weeks, cities like San Jose saw a 38 percent decrease in median internet speeds, Oxnard saw a 42 percent

decrease, and Irvine saw a 20 percent decrease. Tyler Cooper, *Internet Speed Analysis: Top 200 Cities, March 15th – 21st*, BroadbandNow (Mar. 25, 2020), https://bit.ly/2Sgh8Tz. Over time, networks improved slowly and inconsistently. But even by early May, problems persisted. In an update to that study, 32 cities continued to show download speeds at 10% or greater below range. During the same week, 42 cities showed upload speeds at 10% or greater below range, and three cities showed a 40% or greater below range: Baltimore, MD, New Orleans, LA, and Oxnard, CA. Tyler Cooper, *Internet Speed Analysis: Rural, Top 200 Cities April 26th- May 2nd*, BroadbandNow (Dec. 16, 2020), https://bit.ly/3trdgQ9.

Such "speed degradations appear to be especially acute in rural areas and areas that already have poor broadband service," Meinrath, *supra*, in part because "many rural Internet networks were barely functional before the pandemic." Doug Dawson, *Will COVID-19 Traffic Kill the Internet?*, POTs and PANs Blog (Mar. 31, 2020), https://bit.ly/3n4HohW. Rural areas are often served by older and less resilient DSL or low-quality fixed wireless service, which are more likely to suffer under the increased traffic. One broadband consultant worked with a rural county to test speeds right before the pandemic, and found that it had almost no download speed tests above 5 Mbps. "A 30% increase in usage won't cut speeds by just 30%, the extra usage is likely to crash the networks. A large portion of rural America already has dreadful broadband. There are terrible ramifications if a network that is

only delivering 3 Mbps broadband today gets further stressed." *Id*. Data from BroadbandNow confirms this analysis. Rural speeds took a severe dip in mid-March, and still had not recovered by the end of April. Tyler Cooper, *Internet Speed Analysis: Rural, Top 200 Cities April 26th- May 2nd*, BroadbandNow (Dec. 16, 2020), https://bit.ly/3trdgQ9.

The Chamber contrasts the supposedly-resilient U.S. network by comparing it to the EU, which the Chamber states "had to request bandwidth intensive services such as Netflix reduce video quality in order to ease stress on its network infrastructure." Chamber Br. at 19 (citing prior administration's FCC). As an initial matter, network investment is dictated by far more than regulatory regimes (if indeed the regulatory choices made by the FCC over the past decade had any impact at all), as discussed above. Even if it were true that the internet in the U.S. held up better, the Chamber's claim as to the cause for that performance would be unpersuasive. However, the Chamber completely ignores the context of the reports about the EU's request. First, as contemporaneous reporting shows, a decision to ask video providers to reduce their bandwidth needs was made, apparently unilaterally, by Thierry Breton, the European Commissioner for the Internal Market, in conversation with Reed Hastings, the CEO of Netflix. *See* Tweet by Thierry Breton, Twitter (Mar. 18, 2020), https://bit.ly/3n1bvXJ. If there were a real concern, the telecom agency (known as the Body of European Regulators for

Electronic Communications, or BEREC) would have been involved. Second, and most importantly, this decision was a preventative measure, and was not based on evidence that EU networks were actually degrading. *Id*. (stating "infrastructures *might* be in strain") (emphasis added). In fact, when BEREC weighed in with its own statement, it provided an account for the EU inconsistent with the Chamber here: while "overall traffic … has increased during the COVID-19 crisis, … no major congestion issues have occurred." Further, "network operators have been able to cope well with this additional traffic load. Some local and temporary difficulties with the internet access have been observed and mitigated but has not been considered to be out of the ordinary." Press Release, BEREC Report on the Status of Internet Connectivity in Light of COVID-19 Crisis, BEREC (Mar. 30, 2020), https://bit.ly/3b1dhDH.

Looking at other countries more broadly also counters the Chamber's claim that domestic regulation is the cause of any supposed superiority of U.S. networks. Another study looked at speeds after the COVID-19 lockdowns in the U.S., EU, the European Free Trade Area (EFTA), and Canada. That study showed that ping times between peak traffic and low traffic showed a lower congestion rate in the EFTA and Canada than in the U.S., and also showed the speeds improved at a greater rate the following week in the EU, EFTA, and Canada than in the U.S. *Coronavirus Impact on Internet Use*, Tech4i2 (Apr. 2020), https://bit.ly/2QF2qZb.

The EFTA and Canada both have strong net neutrality protections in place, which means net neutrality regulations likely had little impact on network resilience after COVID-19. *See* Regulation (EU) 2015/2120 incorporated into EEA agreement, EFTA https://bit.ly/3o3ZS3g; Telecommunications Act (Canada), 1993, c. 38, s 27(2), https://bit.ly/2R1QFwn.

Even using average Ookla/speedtest.net data that industry relies on, looking more specifically within the EU calls the Chamber's arguments into question. Austria, for instance, experienced a slight 3.5% drop from 56 Mbps to 54 Mbps average performance between March 30 and April 13, 2020, but then shot up to almost 59 Mbps by April 27, and by July 13, speeds were at 65 Mbps. Austria Speed Performance, Speedtest.net (July 20, 2020), https://bit.ly/3vJaVBE. Switzerland experienced a 5% drop from 156 Mbps to 148 Mbps between March 2 and 23, then went up to almost 160 Mbps by April 27, and was at 168 Mbps by July 13. Switzerland Speed Performance, Speedtest.net (July 20, 2020), https://bit.ly/3b1QBDg. These drops in performance were actually less profound than the drop in performance in the United States, which saw a 6.4% drop from 141 Mbps on March 2 to 132 Mbps on March 23. United States Speed Performance, Speedtest.net (July 20, 2020), https://bit.ly/3eTlGu7.

All of this is not to say that any particular region performed objectively better or worse in response to the COVID-19 pandemic. The answer to that

question is entirely unclear. But what is clear is that the connection between so-called "light-touch" regulation in the U.S. and the internet's response to the COVID-19 pandemic is not as simple as the Chamber claims it to be. As a result, this court should not view its arguments as persuasive.

III. CONCLUSION

For these reasons, amici curiae urge the Court to affirm the District Court's denial of the motion for preliminary injunction.

Date: May 11, 2021

Pryor Cashman

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