

ORAL ARGUMENT SCHEDULED FOR FEBRUARY 1, 2019

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

Case No. 18-1051 (and consolidated)

MOZILLA CORPORATION, *ET AL.*,
Petitioners,

v.

**FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,**
Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

**BRIEF OF AMICUS CURIAE
MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNCIL
IN SUPPORT OF RESPONDENTS**

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October 18, 2018

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

All parties, intervenors, and *amici* appearing in this Court are listed in the Brief for Respondents Federal Communications Commission and United States of America, except for the parties listed below.

The following additional parties have filed either notice or motion for leave to participate as an *amicus*, as of the date of this filing:

- International Center for Law and Economics and Participating Scholars
- Roslyn Layton
- The National Association of Manufacturers, The Chamber of Commerce of the United States of America, The Business Roundtable, and The Telecommunications Industry Association
- Technology Policy Institute
- Richard Bennett, John Day, Tom Evslin, Shane Tews, and Martin Geddes

B. Rulings Under Review

The ruling under review is a decision of the Federal Communications Commission, *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018) (“*Order*”) (JA____).

C. Related Cases

Related cases are listed in the Brief for Respondents.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 26.1 and 29(b), the Multicultural Media, Telecom and Internet Council (“MMTC”) hereby states that MMTC is a national nonprofit corporation that advocates for diversity and civil rights in the media, telecommunications, and broadband industries. MMTC has no parent corporation, and there is no publicly held corporation that has a 10% or greater ownership interest of MMTC.

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CERTIFICATE OF COUNSEL

Pursuant to Fed. R. App. P. 29(a)(4), MMTC affirms that no counsel for a party authored this brief in whole or in part, and no counsel, party, or person other than the Multicultural Media, Telecom and Internet Council made a monetary contribution intended to fund the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE* AND AUTHORITY TO FILE

In 1986, MMTC was established as a national nonprofit organization dedicated to promoting and preserving equal opportunity and civil rights in the media and telecommunications industries. MMTC performs civil rights advocacy, conducts research and analysis, particularly in the area of broadband internet access services and broadband adoption, and regularly participates in FCC rulemaking proceedings. MMTC supports efforts to close the digital divide and bring broadband access to more people of color and other vulnerable populations.

MMTC participated in the *Restoring Internet Freedom* proceeding below, in which the Commission restored the classification of broadband Internet access service to a Title I service under the Communications Act of 1934, as amended. MMTC has a demonstrated interest in the outcome of this case to protect the interests of historically disadvantaged groups, including some MMTC constituents and members who have limited or no access to broadband services. *See* Fed. R. App. 29(b)(1).

MMTC concurs in the Respondents' arguments in support of the *Order*. *See* Brief for Respondents at 57, 76. In filing this brief, however, MMTC addresses issues not developed by Respondents that are unique to MMTC's partners, constituents, and members, that may be of assistance to the Court and relevant to the disposition of this case. *See* Fed. R. App. P. 29(b)(2).

Pursuant to Federal Rule of Appellate Procedure 29(a)-(b) and D.C. Circuit Local Rule 29(b) and (d), all parties consented to MMTC's participation as an *amicus* in support of Respondents.

STATEMENT OF THE ISSUE

Whether the Commission appropriately considered the needs of our nation's most vulnerable, hard-to-reach populations, including communities of color, when it decided to return the classification of broadband internet access services to the light-touch regulation that resulted in the expansion of broadband deployment and access during the last two decades.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Respondents.

SUMMARY OF THE ARGUMENT

The preservation of an open internet has been, and remains, an issue of great importance to MMTC and its partners, constituents, and members. An open internet available to all encourages multicultural participation in creating and disseminating diverse content online; it provides innovative, affordable pricing that enables every citizen regardless of income, to be connected; and it ensures that consumers and their data are safe when they engage online. Every individual, regardless of race, color, or socioeconomic status, is entitled to the protections of an open internet and the opportunity to be connected. The proven way to achieve the shared goals of an open internet is to ensure internet access is affordable, offers innovative and low-cost services and plans popular with lower-income minorities,

and expands access to the millions of largely lower-income minorities who do not have broadband access at home because they cannot afford it or they feel it is irrelevant or unsafe due to privacy concerns.

MMTC encourages policymakers to focus on policies that facilitate the goal of ensuring affordable access to broadband for all, not just a fortunate few. However, heavily regulating broadband internet service has been shown to stifle innovation, such as innovative pricing plans, and increase costs on broadband providers. These costs are passed on to consumers, and lower-income consumers and small businesses are the least capable of absorbing the increased regulatory costs and most in need of nimble, innovative packaging and pricing plans that encourage them to adopt.

MMTC has consistently opposed Title II regulation of the internet. Instead, MMTC supports a moderate regulatory regime that avoids adding burdensome costs on providers, thus encouraging experimentation with pricing plans and therefore ultimately lowering costs for consumers. This approach is essential for increasing broadband availability and adoption in communities of color that have too often been left behind.

For the twenty years of moderate regulation of broadband internet access service – 1995 to 2015 – broadband deployment and adoption flourished, and with it came innovative and expanded service offerings for all Americans, including

mobile broadband access that people of color disproportionately rely on for online access. A Pew Research study found that only 11 percent of Americans are not online, and that over time, the offline population has been steadily shrinking.¹ However, racial minorities are among those who are least likely to have internet service at home. According to Pew, 72 percent of white adults are home broadband users, whereas only 57 percent of African Americans and 47 percent of Hispanics use broadband at their home.² These groups, however, are much more likely to use their smartphones to get online.³ The Commission's 2015 decision to classify broadband internet service as a Title II service under the Communications Act of 1934, as amended (the Act), threatened to curtail the growth in access to broadband and the ongoing development of new and innovative wireless and wireline broadband offerings that are more likely to benefit lower income minorities.

MMTC would have preferred that the Commission adopt enforceable “rules of the road” for broadband internet access service under Section 706 of the Telecommunications Act of 1996. Now, it appears that regulatory uncertainty will

¹ See Monica Anderson, Andrew Perrin, and JingJang Jiang, *11% of Americans Don't Use the Internet. Who Are They?*, Pew Research Center (March 18, 2018), available at <http://www.pewresearch.org/fact-tank/2018/03/05/some-americans-dont-use-the-internet-who-are-they/> (last visited October 17, 2018).

² See *Internet Broadband Fact Sheet*, Pew Research Center (February 5, 2018), available at <http://www.pewinternet.org/fact-sheet/internet-broadband/> (last visited October 17, 2018).

³ *Id.*

continue as the Commission's rules surrounding the open internet change with each change in administration; MMTC, therefore, believes that a legislative solution is the best way to bring long-term certainty. Nonetheless, MMTC supports the Commission's decision in the *Order* to return broadband internet access service to its proper classification as an information service under Title I of the Act, not Title II. This decision will facilitate broadband deployment, spur investment, and encourage innovation for the benefit of all Americans, including those with limited or no access to broadband services.

ARGUMENT

I. THE REGULATORY CERTAINTY OF RECLASSIFICATION OF BROADBAND INTERNET ACCESS SERVICE AS A TITLE I SERVICE HELPS BRIDGE THE DIGITAL DIVIDE.

The digital divide persists; there are profound disparities in broadband adoption based on race, location, and wealth. Broadband adoption is the essential gateway to educational attainment, employment opportunity, and an enhanced quality of life. Without broadband access, low-income populations, people of color, and other historically disadvantaged populations have limited opportunities to gain new skills, secure quality and high-wage jobs, obtain a valuable education, participate in civic dialogue, and benefit from advanced telemedicine and other technologies.

The Commission’s decision to reclassify broadband internet access service as a Title I information service makes it more likely that the benefits of an open internet will be shared by all Americans. For the two decades that preceded the Commission’s Title II Order, Title I provided a clear and consistent framework that led to the successful expansion of broadband deployment, benefitting in particular disadvantaged communities with limited access to broadband. As the Commission correctly observed, “[t]he Internet thrived for decades under the light-touch regulatory regime in place before the *Title II Order*.”⁴ That moderate framework under Title I “pave[d] the way for additional innovation and investment that will facilitate greater consumer access to more content, services, and devices, and greater competition.”⁵

In contrast, the Commission’s 2015 decision to change the classification of broadband internet service to a Title II service introduced significant legal and regulatory uncertainty into the digital ecosystem. As the Wireless Internet Service Providers Association (WISPA) argued, “[t]he Title II Order has discouraged small broadband providers from making network investments that would accelerate

⁴ See *Restoring Internet Freedom Declaratory Ruling, Report, and Order* (“*Order*”), WC Docket 17-108 (Released Jan. 4, 2018) at 109 (JA ____).

⁵ *Id.* at 208 (JA ____).

broadband deployment,”⁶ thus discouraging these providers from expanding “into areas that currently do not have access to service.”⁷ The restricted opportunities for innovation and increased costs imposed on broadband providers are ultimately passed on to consumers in the form of higher prices, and these effects are more acutely felt in rural and economically-challenged urban communities.⁸ This adversely impacts all consumers, but particularly those who are already on the wrong side of the digital divide, notably including minority populations. As WISPA argued, “jamming the square peg of Title II regulation into the round hole of the broadband marketplace has created harmful uncertainty that undermines both regulatory consistency and investor confidence, thereby impeding salutary innovation and competition.”⁹

MMTC consistently has expressed concerns over the negative impact on broadband adoption from the increased costs of utility-style regulation. MMTC also is concerned about the potential for blocking content or throttling networks on minorities that produce and provide access to unique content, but there is little

⁶ See Comments of the Wireless Internet Service Providers Association In the Matter of Restoring Internet Freedom, WC Docket 17-108 (filed July 17, 2017) at 11 (JA____).

⁷ *Id.* at 16 (JA____).

⁸ See Letter from David Honig, President Emeritus and Senior Advisor, Multicultural Media, Telecom and Internet Council, and James Winston, President, National Association of Black Owned Broadcasters, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket 17-108 (Dec. 4, 2017) at 2 (JA____).

⁹ See *supra* n.6, at 12 (JA____).

evidence that such concerns materialized under the previous two decades of moderate regulation. Title II is a regulatory scheme created for telephone monopolies in the early 20th century; it is clearly inappropriate as applied to a fast-moving, competitive, and innovative internet ecosystem. MMTC agrees with the argument that Title II reclassification is a “solution in search of a problem,” as “there have been relatively few formally adjudicated instances of blocking, throttling, and unreasonable discrimination....”¹⁰ Furthermore, such concerns are of no relevance to people who are unable or cannot afford to access broadband, problems that are exacerbated by Title II utility regulation. As the Commission notes, “[t]here is no evidence that the remaining nearly one-fifth of the population [who don’t use broadband at home] are all waiting for the development of applications that would make internet access useful to them. Rather, the cost of broadband internet service is a central reason for non-adoption. ISP innovation that lowers the relative cost of internet service is as likely as edge innovation, if not more so, to positively impact consumer adoption rates.”¹¹

Ideally, MMTC would like to see Congress intervene to provide a permanent legislative solution and an unambiguous set of rules for all internet players. The constant threat of new and changing regulations creates uncertainty that chills investment and innovation, disproportionately impacting small businesses, which

¹⁰ See *supra* n.8 at 3 (JA____).

¹¹ See *Order* ¶ 120 (JA____).

drive innovation. Regulatory certainty benefits all participants in the internet ecosystem, especially the unserved and the underserved, by creating an environment that encourages broadband deployment and expanded opportunities for innovation. Such certainty prevailed until the misguided decision in 2015 to change the classification of broadband Internet access service to a Title II service. For small businesses, particularly minority-owned, public utility-type regulations are costly, disconcerting, and disorienting to deal with changing requirements depending on who is in charge of the FCC.

Absent a legislative solution, however, MMTC supports the Commission’s classification of broadband Internet access service as an information service under Title I, returning to the framework that made possible the thriving internet-driven economy we have today, and expanding America’s networks to reach more disadvantaged communities than would be the case under Title II.

II. TITLE II PUBLIC UTILITY-STYLE REGULATION IMPOSES A BURDEN ON INNOVATION AND AFFORDABILITY.

As the Commission recognized, lifting the burdens of utility-style regulation “will allow new innovative business arrangements to emerge as part of the ever-evolving Internet ecosystem.”¹² The Commission found that the regulatory burdens created by the classification of broadband internet access service as a Title

¹² *See Order* ¶ 148 (JA____).

II service prevented broadband providers from experimenting and developing new, innovative services.¹³

The rigid rules contemplated by the Commission's Title II Order foreclosed the permission-less innovation that historically has characterized the internet ecosystem. Such new and innovative products, packages, and pricing models help disadvantaged individuals whose barrier to online access too often is affordability.

As a result of the Commission's Title II Order, internet service providers faced massive regulatory uncertainty and the potential for intrusive regulatory action at any time. Consequently, innovative services that benefitted disadvantaged communities in particular were threatened. WISPA, representing a group of small broadband providers, made this clear to the Commission, reporting that "because the Commission's reach under the [Title II] rules appears to be virtually unlimited, each of us has slowed, if not halted, the development and deployment of innovative new offerings which would benefit our customers."¹⁴ As

¹³ See Order ¶¶ 86-108 (JA____). In addition, Title II regulation imposes regulatory burdens that constrain affordability and innovation, but fails to address the biggest concern about the internet, which is the widespread and pervasive use of consumer online data without proper protections being in place. See Rafi Goldberg, *Most Americans Continue to Have Privacy and Security Concerns, NTIA Survey Finds* (August 20, 2018), available at <https://www.ntia.doc.gov/blog/2018/most-americans-continue-have-privacy-and-security-concerns-ntia-survey-finds> (last visited October 17, 2018).

¹⁴ See *supra* n.6, at 14 (JA____); see also Comments of American Cable Association, WC Docket 17-108 (filed July 17, 2017) at 19 (reporting "a range of negative impacts" on members' ability and incentive to develop and deploy

the Commission recognized, the mere threat of *ex ante* regulation and other forms of “regulatory creep” were enough to stifle innovation under a Title II regime.¹⁵

An example of this was the uncertainty over the legal treatment of popular free data offerings under the Title II regime. These “zero-rating” services, such as T-Mobile’s Binge On, AT&T Sponsored Data, and Verizon FreeBee Data, allowed consumers to access certain internet content without that access counting against their data plans. Under prior leadership, the Commission was prepared to use its Title II authority to ban broadband service providers from offering some free data services. In January 2017, the Commission published a report determining that free data can “present significant risks to consumers and competition” and expressing “concern [...] that – absent effective oversight – these practices will become more widespread in the future.”¹⁶ While the report was rescinded less than

innovative new features and services, including “holding off or delaying moving to usage-based billing and data caps and allowances, changing or abandoning existing use of these models, and holding off or delaying launching ‘individualized’ arrangements with edge providers that would improve the end user experience”) (JA___); Comments of NTCA-The Rural Broadband Association, WC Docket 17-108 (filed July 17, 2017) at 11 (arguing that Title II regulation “denied consumers the benefits of innovative service offerings and deterred provider creativity in responding to consumer demand”) (JA___).

¹⁵ See *Order* ¶ 101 (JA___).

¹⁶ See FCC Wireless Telecommunications Bureau Report, *Policy Review of Mobile Broadband Operators’ Sponsored Data Offerings for Zero Rated Content and Services* (released Jan, 11, 2017). This report was subsequently rescinded by Chairman Pai in a statement, saying the FCC “will not focus on denying Americans free data.” See also Statement of Chairman Pai on Free Data Programs

one month later by the new Commission, the very public investigation and the threat of such regulatory intervention undoubtedly had a chilling effect on the development of innovative offerings, to the detriment of all consumers, particularly those in minority communities who stand to benefit most from lower-cost service plans.

The Commission’s decision to lift the burdens of heavy regulation also has a particularly compelling impact on mobile broadband services. Access to mobile broadband is of singular importance to MMTC and the consumers it represents, who disproportionately rely on mobile services as their primary means for going online. As many organizations pointed out, “[m]any traditionally disadvantaged communities rely on wireless as their only internet connection.”¹⁷ Research has shown that while today one-in-five American adults are “smartphone-only” internet users – meaning they own a smartphone, but do not have traditional home broadband service – that number increases for minorities with 24 percent of African American adults and 35 percent of Hispanics classified as “smartphone only” internet users.¹⁸ While mobile broadband is preferred overall in communities of color, African American and Latino smartphone owners are more

(released February 3, 2017), available at <https://www.fcc.gov/document/statement-chairman-pai-free-data-programs>.

¹⁷ See, e.g., Comments of Public Knowledge, Benton Foundation, and Access Sonoma Broadband, GN Docket 14-28 (July 17, 2017) at 27 (JA____).

¹⁸ See *supra* n.2.

likely to reach their maximum mobile data allowances in a billing period, receive monthly bills much higher than expected, and cancel or cut-off wireless service.¹⁹

The ability to access free data offerings from their broadband provider addresses many of these concerns, offering consumers additional choices at reduced costs. Innovative offerings, including sponsored data plans and zero rating services, can benefit lower-income consumers in particular by allowing them to access certain content without using their monthly data allowance. According to the U.S. Census Bureau, median income for Black and Hispanic households is significantly lower than other groups.²⁰ Thus, given the lower income levels for such households, these are the populations that are most harmed by increased costs from utility regulation. Closing the door on innovative service plans designed to lower costs made the adoption and use of mobile technology less cost-effective, needlessly thwarting the digital inclusion goals sought by communities of color.

III. CONCLUSION

Every American, not just the digitally proficient and fortunate, must have the benefit of broadband advancement and innovation if the United States is to have a

¹⁹ See Comments of The National Multicultural Organizations In the Matter of Restoring Internet Freedom, WC Docket No. 17-108 (July 17, 2017) at 12 (JA____).

²⁰ See Kayla Fontenot, Jessica Semega, and Melissa Kolar, *Income and Poverty in the United States: 2017*, U.S. Census Bureau Library (September 12, 2018), available at <https://www.census.gov/library/publications/2018/demo/p60-263.html> (last visited October 17, 2018)

strong digital economy. An open internet benefits all Americans, particularly those in disadvantaged communities, by expanding opportunity and access for all. Recognizing that the internet wasn't broken, in the *Order*, the Commission properly returned to the moderate regulatory regime that made possible a flourishing internet ecosystem that we have experienced for 20 years. Its decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1), this document contains 2977 words.

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/s/ David E. Honig
David E. Honig

October 18, 2018

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2018, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ *David E. Honig*
David E. Honig

October 18, 2018