

**No. 23-15490**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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ASSURANCE WIRELESS USA, L.P.; et al.,

*Plaintiffs-Appellants,*

v.

ALICE B. REYNOLDS, President of the California Public Utilities Commission,  
in her official capacity; et al.,

*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the Northern District of California  
No. 3:23-cv-00483-LB  
The Honorable Laurel Beeler  
United States District Court Judge

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**MOTION OF MULTICULTURAL MEDIA, TELECOM AND INTERNET  
COUNCIL *et al.* FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN  
SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL**

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## INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 29(a), Multicultural Media, Telecom and Internet Council, ALLvanza, the California Hawaii State Conference of the National Association for the Advancement of Colored People, and LatinoJustice PRLDEF respectfully move this Court for leave to file an *amicus curiae* brief in the above-captioned case in support of Plaintiffs-Appellants and reversal of the district court’s decision. Plaintiffs-Appellants consent to this filing from proposed *amici*. Defendants-Appellees do not consent but do not oppose this motion. A copy of the proposed amicus brief is attached as Exhibit A to this motion.

## STATEMENT OF IDENTITY, INTEREST AND USEFULNESS

Courts have “broad discretion” to allow third parties to participate in an action as *amici curiae*. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982) (*abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995)). Where *amici curiae* and their respective constituents have an interest in the issues presented, it is appropriate for courts to consider those views. *Funbus Sys., Inc. v. State of Cal. Pub. Utilities Comm’n.*, 801 F.2d 1120, 1125 (9th Cir. 1986). Courts frequently welcome amicus briefs from non-parties concerning legal issues “that have potential ramifications beyond the parties directly involved” or if the non-party has “unique information or perspective that can help the court beyond the

help that the lawyers for the parties are able to provide.” *Sonoma Falls Developers, LLC v. Nevada Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003) (quoting *Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.D.C. 2003)).

Each of the proposed *amici* are uniquely interested in this case and can provide information and perspectives representing constituencies not party to the case. The proposed *amici* and their interests and constituencies are described below.

**Multicultural Media, Telecom and Internet Council** (“MMTC”) was established in 1986 as a national non-profit organization dedicated to promoting and preserving equal opportunity and civil rights in the mass media, telecommunications, and broadcast industries. MMTC performs civil rights advocacy; conducts research and analysis, particularly in the area of broadband access and broadband adoption for people of color and other vulnerable populations; and regularly participates in Federal Communications Commission rulemaking proceedings affecting these issues. Consistent with its mission, MMTC supports efforts to close the digital divide and bring broadband access to more people of color and other vulnerable populations.

**ALLvanza** is a non-partisan, forward-thinking, policy and action non-profit organization that advocates for the success of Latinxs, and other underserved communities, in our innovation- and technology-based society. It advocates for

regulatory policies that promote equitable deployment of broadband to all communities, rural and urban alike, and works to make sure its constituent communities are part of the conversation at key policy discussions, industry gatherings, events and conferences.

The **California Hawaii State Conference of the NAACP** was founded in 1909 with the mission of promoting social justice. The National Association for the Advancement of Colored People (the “NAACP”) is the country’s oldest and largest civil rights organization. The California Hawaii State Conference of the NAACP is the NAACP’s affiliate covering the State of California. The NAACP has over two million supporters and members, including thousands of members in California. For more than a century, the NAACP has used collective action and the legal process to champion equality and justice. The California Hawaii State Conference of the NAACP endeavors to promote and enhance people of color’s full participation in the modern economy, including ensuring access to the internet and wireless internet services.

**LatinoJustice PRLDEF** (“LatinoJustice”) is a national civil rights legal defense fund that has defended the constitutional rights and equal protection of all Latinos under the law. Founded in 1972 as the Puerto Rican Legal Defense and Education Fund, LatinoJustice seeks to create a more just society by using and challenging the rule of law to secure transformative, equitable and accessible

justice by empowering the greater pan-Latino community in the United States and Puerto Rico, and by fostering leadership through advocacy and education. During its 50-year history, LatinoJustice has successfully advocated against and litigated numerous cases challenging multiple forms of economic justice discrimination in fair housing, education, employment, language rights, and telecommunications.

The Court should exercise its discretion to permit proposed *amici*, the MMTC, ALLvanza, the California Hawaii State Conference of the NAACP, and LatinoJustice to file the attached amicus brief. *Amici* submit this brief by drawing upon their knowledge of the demographics and socioeconomic status of disadvantaged communities, and the brief describes the disproportionate impact that the California Public Utilities Commission's ("CPUC" or "Commission") new methodology for imposing surcharges will have on these communities unless the district court's decision is enjoined and the CPUC's decision enjoined. *Amici* will also draw from their experience seeking to bridge the digital divide to demonstrate to the Court how the CPUC's new methodology for imposing surcharges will impede access to broadband services by the less-affluent households who would have the most to gain from such access. Furthermore, counsel for *amici* are familiar with the scope of the arguments presented by the parties and will not unduly repeat those arguments.

## CONCLUSION

For these reasons, Multicultural Media, Telecom and Internet Council, ALLvanza, the California Hawaii State Conference of the NAACP, and LatinoJustice respectfully request that the Court grant it leave to file the amicus brief attached as Exhibit A.

Dated: May 8, 2023

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that:

1. This motion complies with the length requirement of Fed. R. App. P. 27(d)(2) because it contains 881 words, excluding the parts exempted by Fed. R. App. P. 32(f).
2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Microsoft Word and is written in a 14-point, proportionately spaced typeface Times New Roman font.

Dated: May 8, 2023

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# **Exhibit A**

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United States District Court Judge

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**BRIEF OF MULTICULTURAL MEDIA, TELECOM AND INTERNET  
COUNCIL, ALLVANZA, CALIFORNIA HAWAII STATE CONFERENCE  
OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF  
COLORED PEOPLE, AND LATINOJUSTICE PRLDEF IN SUPPORT OF  
PLAINTIFFS-APPELLANTS**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* Multicultural Media Telecom and the Internet Council, by and through its undersigned counsel, certifies that it is a non-profit organization and does not issue stock. ALLvanza, by and through its undersigned counsel, certifies that it is a non-profit organization and does not issue stock. California Hawaii State Conference of the National Association for the Advancement of Colored People, by and through its undersigned counsel, certifies that it is a non-profit organization and does not issue stock. LatinoJustice PRLDEF, by and through its undersigned counsel, certifies that it is a non-profit organization and does not issue stock.

Dated: May 8, 2023

Respectfully submitted,

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## I. STATEMENT OF INTEREST

**Multicultural Media, Telecom and Internet Council (“MMTC”)** was established in 1986 as a national nonprofit organization dedicated to promoting and preserving equal opportunity and civil rights in the mass media, telecommunications, and broadcast industries. MMTC performs civil rights advocacy; conducts research and analysis, particularly in the area of broadband access and broadband adoption for people of color and other vulnerable populations; and regularly participates in agency rulemaking proceedings affecting these issues. Consistent with its mission, MMTC supports efforts to close the digital divide and bring broadband access to more people of color and other vulnerable populations.

In the instant proceeding, MMTC believes that the California Public Utilities Commission’s (“CPUC” or “Commission”) decision is bad policy and violates well-established law. Decision Updating the Mechanism for Surcharges to Support Public Purpose Programs, *Order Instituting Rulemaking to Update Surcharge Mechanisms to Ensure Equity & Transparency of Fees, Taxes & Surcharges Assessed on Customers of Telecommc’ns Servs. in Cal.*, D. 22-10-021, 2022 WL 16782574 (Cal. P.U.C. Oct. 20, 2022) (the “Decision”). (2-ER-27–105.)

The Decision changes the way that the CPUC calculates surcharges for its Universal Service Surcharge from a revenue-based methodology to a connection or

“access lines” methodology. This change of methodology significantly increases the cost of the surcharge for most wireless customers. The change will substantially increase the portion of the total CPUC funding costs borne by lower-income, minority communities. Thus, the CPUC’s new methodology will harm the many Americans who remain on the wrong side of the digital divide. MMTC has a demonstrated interest in the outcome of this case to protect the interests of those citizens, mostly minorities and economically disadvantaged persons who have limited or no access to broadband services at home and therefore rely heavily on internet-enabled mobile devices.

Also signing onto this brief is **Allvanza**, a non-partisan, forward-thinking, policy and action nonprofit organization that advocates for the success of Latinxs, and other underserved communities, in our innovation- and technology-based society. It advocates for regulatory policies that promote equitable deployment of broadband to all communities, rural and urban alike, and works to make sure its constituent communities are part of the conversation at key policy discussions, industry gatherings, events, and conferences.

Additionally, the **California Hawaii State Conference of the National Association for the Advancement of Colored People** joins as *amicus*. Founded in 1909 with the mission of promoting social justice, the National Association for the Advancement of Colored People (the “NAACP”) is the country’s oldest and largest

civil rights organization. The California Hawaii State Conference of the NAACP is the NAACP's affiliate covering the State of California. The NAACP has over two million supporters and members, including thousands of members in California. For more than a century, the NAACP has used collective action and the legal process to champion equality and justice.

The outcome of this case will have important civil rights implications for NAACP members and for the NAACP's institutional interest in redressing injustice and inequality. People of color are more likely to be disproportionately burdened by regressive taxes and regulatory fees, and ensuring that the CPUC's surcharges do not unfairly burden their ability to access to the internet (including wireless internet services) is a critical goal of the NAACP's in promoting and enhancing people of color's full participation in the modern economy.

**LatinoJustice PRLDEF** ("LatinoJustice") also joins as *amicus*.

LatinoJustice is a national civil rights legal defense fund that has defended the constitutional rights and equal protection of all Latinos under the law. Founded in 1972 as the Puerto Rican Legal Defense and Education Fund, LatinoJustice seeks to create a more just society by using and challenging the rule of law to secure transformative, equitable and accessible justice by empowering the greater pan-Latino community in the United States and Puerto Rico, and by fostering leadership through advocacy and education. During its 50-year history,

LatinoJustice has successfully advocated against and litigated numerous cases challenging multiple forms of economic justice discrimination in fair housing, education, employment, language rights, and telecommunications.

Each of the *amici* believe that if the District Court’s decision is not reversed and the Decision stays in effect, the CPUC’s new per access-line methodology for assessing surcharges will increase the cost of essential wireless services, a cost that will be borne disproportionately by lower-income, minority communities, harming the many Americans who remain on the wrong side of the digital divide.<sup>1</sup>

## II. SUMMARY OF ARGUMENT

Pursuant to the Decision, the CPUC seeks to change how it calculates its surcharge from a revenue-based approach to a flat-fee per access-line approach. The effect of this change will be to increase the cost of wireless service. Worse yet, flat-fee surcharges, like the CPUC’s proposed surcharge are regressive, and disproportionately burden low-income consumers. (*See* 2-ER-19.) With a flat-fee per access-line approach, the CPUC places the same burden on a low-income individual who buys the minimal option for connectivity as a business or a millionaire who purchases every possible service for connectivity. Ultimately, this

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<sup>1</sup> No party or party’s counsel authored this amicus brief in whole or in part, and no party or party’s counsel contributed money to fund preparing or submitting the brief.

disproportionate and unfair price change will force low-income individuals that rely on mobile wireless services to access broadband to lose that access.

Over the past several years, affordable and varying wireless options have helped bridge the digital divide that prevents low-income and communities of color from accessing broadband services in the same proportion as people in more affluent communities. The CPUC's shift to flat-fee access-line surcharges threatens that progress by increasing the price of wireless services and decreasing carriers' ability to offer reasonably priced options accessible to a variety of consumers. The flat-fee access-line approach has the effect of unlawfully discriminating against wireless services as compared to other services. This discrimination stifles competition, which will prevent carriers from offering new, flexible, and cost-effective wireless options necessary to further bridge the digital divide.

While the long-standing revenue-based surcharge imposes fees on only intrastate voice services proportionate to their use, the flat-fee access-line surcharge is the same regardless of use. Without proportionality of use, multi-line wireless families or small businesses who rely on their smartphones as their only means of broadband access will bear the bulk of the burden of funding the public purpose programs. Thus, the low-income individuals who are the intended beneficiaries of the surcharge-funded program will be hardest hit.

Under the CPUC’s new per-line approach, the average monthly surcharge a California wireless subscriber pays jumps from \$0.27 to \$1.11. (2-ER-121 (*Comments of the Utility Reform Network on the Proposed Decision Updating the Mechanism for Surcharges to Support Public Purpose Programs* (Sept. 22, 2022))). That means a typical family of four will bear an additional, new and unexpected, expense of \$3.36 per month or \$40.32 per year. The shock of such a new expense will hit communities of color and other marginalized groups the hardest and endanger their ability to access wireless and broadband service. Therefore, *Amici* request that this Court reverse the district court’s decision and prevent the Decision’s harmful effects.

### III. ARGUMENT

#### A. Accessible and Affordable Wireless Services Are Essential to Bridging the Digital Divide

The CPUC’s new per access-line surcharge will make wireless service more expensive and therefore, less affordable and accessible to those who need it most. Since the 1990s, a gap in ownership and adoption of digital technology between the “haves” and “have nots” has been coined the “digital divide.” Due to a mix of factors, communities of color have historically and disproportionately fallen on the wrong side of this divide. In 2020, the Federal Communications Commission (“FCC”) reported that over 18 million Americans still lack fixed high-speed terrestrial broadband. *In re Inquiry Concerning Deployment of ATC to All*

*Americans*, 35 FCC Rcd. 8986, 9034 (2020). However, as wireless broadband has become more affordable and accessible, it has served as a major factor in bridging the digital divide.

According to the National Center for Health Statistics, low-income consumers are significantly more likely to rely on mobile wireless as their sole connection to broadband and other communications services. Stephen J. Blumberg, Ph.D. & Julian V. Luke, Nat'l Center for Health Statistics, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2022* (Dec. 2022).<sup>2</sup> About 74% of all low-income adults lived in wireless-only households, compared to 69% of all adults. *Id.* While only 15% of adults solely use their smartphones for broadband internet access, this number increases to 25% for Latinx adults and 17% for African American adults. Andrew Perrin, Pew Research Center, *Mobile Technology and Home Broadband 2021* (June 3, 2021).<sup>3</sup> Today, wireless internet connects more previously unserved and underserved groups than ever before—91% of adults in the U.S. are now connected to broadband, and 85% own a smartphone. *Id.*

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<sup>2</sup> <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless202212.pdf>.

<sup>3</sup> <https://www.pewresearch.org/internet/2021/06/03/mobile-technology-and-home-broadband-2021/>.

This increase in connectivity has largely been driven by affordable mobile broadband offerings. Wireless service addresses some of the greatest barriers to broadband adoption: providing both widespread access and affordable pricing structures that attract people of color, low-income households, rural populations, and other unserved and underserved groups. Over time, the price of wireless has decreased as compared with inflation. As wireless technology has continued to evolve, it has both increased access to these connections and enhanced the ways lives can be transformed. Major wireless companies, including Plaintiffs-Appellants, offer low-cost and flexible offerings that are highly attractive to communities of color and low-income households.

For communities of color in particular, which have historically faced inequities in access to resources for advancement, a connection to the internet means a connection to opportunity. Connecting families to high-speed internet connects them to a vastly improved quality of life, including economic empowerment, improved healthcare outcomes for chronic illnesses, broader opportunities for advanced education, safer workplaces, and much more.

**B. The CPUC's Access Line Surcharge Will Undermine the Progress from Affordable Wireless Service**

The CPUC's per access-line surcharge undermines the progress in bridging the digital divide, by imposing a significantly higher and disproportionate fee on

those least able to afford it. Increasing the cost of wireless service through the surcharge could prevent people on the wrong side of the digital divide from initiating or continuing to access wireless services. For example, in 2015, the high cost of home internet was the primary reason households did not subscribe to home internet. In California, communities of color were more likely to not be connected to the internet or were connected only via a smartphone. Mark DiCamillo, Institute of Governmental Studies, University of California, Berkeley, *Internet Connectivity and the “Digital Divide” in California – 2019*, Table 4a, <https://escholarship.org/uc/item/7rj7p5vw>. Nearly 50% of the most vulnerable smartphone-dependent populations have had to allow their phones to lapse based on financial hardship. *Id.* Since the flat access-line surcharge, which will disproportionately be collected from wireless customers, it will disproportionately impact communities of color.

The CPUC’s access-line surcharge also operates as a tax on broadband access for disproportionately low-income and minority individuals, who rely on wireless services as their sole means of broadband access. This new tax burden is not only illegal, but will prevent more and continued access to wireless broadband by people on the wrong side of the digital divide. The FCC preempts states from subjecting broadband to charges such as the CPUC surcharge. *In re FCC Releases Open Internet R&O, Declaratory Ruling, & Order*, 30 FCC Rcd. 5601, 5803, 5837

[¶¶ 431-32, 490 & n.1477] (2015); *In re Restoring Internet Freedom*, 33 FCC Rcd. 311, 429 [¶ 196 & n.736, ¶¶ 199-200] (2018). While the CPUC purports to avoid directly imposing a tax on broadband, the practical effect of the increased surcharge will be to impose an additional tax on individuals who rely on their wireless phone primarily, if not exclusively, for non-taxable broadband access. Meanwhile, higher-income individuals that can afford to purchase a home broadband subscription do not pay the surcharge on that service. The result is not a fee proportionate with use, but instead an effective higher tax rate on individuals least able to afford it. The access-line surcharge results in an end run around the preemption on taxing broadband services, but only for those often lower-income and people in communities of color, that do not have stand-alone broadband.

**C. The Access Line Surcharge Disproportionately Hurts Low-Income Individual and Communities of Color**

The change in surcharge calculation exacerbates the digital divide problem by disproportionately shifting the burden of the CPUC surcharges to residential consumers, particularly those who rely on wireless services as their sole means of broadband access. With the flat access-line surcharge method, wireless customers pay a surcharge disproportionate to their use of taxable telecommunications service. By eliminating the proportionality of the fees to the services, the bulk of the burden of funding the public purpose programs is borne by the multi-line

wireless customers who rely on their smartphones as their only means of broadband access.

The CPUC staff's report shows under the new approach, it "will dramatically increase the recovery of surcharge revenues from non-business customers." (2-ER-121.) Business customers, unlike low-income wireless customers, rely on broadband access from their business accounts. As The Utility Reform Network ("TURN") noted, wireless mobility customers' contribution will increase by nearly \$455 million, an especially large increase compared to traditional telecommunications service: VoIP customers will experience a surcharge assessment increase of \$21 million, and Plain Old Telephone Service ("POTS") customers will experience a decrease of \$77 million. (2-ER-121.) Thus, the CPUC's new methodology for assessing the surcharge shifts the burden to wireless customers without regard to the services they are using.

Imposing the bulk of the burden on wireless customers operates as a regressive tax. All customers will pay the same fee per-line regardless of income, so the per-line impact on lower income earners will be proportionally higher than for higher-income earners. Rather than seeking to transfer wealth from better-off, higher-income individuals' service plans, the regressive surcharge transfers the burden for the public benefit programs to the economically disadvantaged individuals those programs seek to support. (2-ER-19.)

The CPUC’s flat-fee per-line surcharge of \$1.11 per-line will adversely impact low-income consumers, especially communities of color, who are still financially struggling after the Covid-19 pandemic and record-high levels of inflation. The average monthly surcharge a California wireless subscriber pays jumps from \$0.27 to \$1.11. (2-ER-121.) With the flat-rate surcharge, a typical family of four will bear an additional, new, and unexpected expense of \$3.36 per month or \$40.32 per year.<sup>4</sup> This is a dramatic increase. Although \$40.32 may not seem like much to some, the reality is that low-income consumers “frequently have to choose between broadband service and basic necessities such as food.” FCC, *Report on the State of the Lifeline Marketplace* at 30 (June 2021) (citing the Benton Institute’s comments).<sup>5</sup> For struggling families, this price charge will be acutely felt: the decision between a week of groceries and a year of broadband is an easy one. The shock of this new expense will cause struggling families to cut back on multiple lines for families if not all their lines. Not only will the additional \$40.32 expense deter low-income individuals from obtaining broadband, but the CPUC reserves the right to increase the surcharge amount from \$1.11, making it

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<sup>4</sup> As TURN explained, the surcharge burden jumps to \$1.11 per month (or \$4.44 for a family of four). (2-ER-121–123.)

<sup>5</sup> <https://www.fcc.gov/document/bureau-releases-report-state-lifeline-marketplace>.

difficult for consumers to budget how much a new connection will cost them annually. (2-ER-90, -104.)

Undoubtedly, this unpredictable price increase will hit communities of color and other marginalized groups the hardest. In comments from the public to the CPUC prior to its decision, members of the public noted their opposition to the negative impact that the CPUC's change will have on them. Specifically, commenters stated that cell phone owners with fixed incomes will be directly and severely impacted by this substantial increase and will make wireless unaffordable and they depend on wireless communications for essential services such as communicating with doctors or international family. (2-ER-263-268.) Furthermore, the public comments demonstrated that elderly individuals would be disproportionately harmed by the new access-line surcharge. Several commenters noted that they rely on their phones for essential communications but are on fixed incomes from Social Security or retirement income and cannot afford to pay any new or increased charges.

The CPUC's revenue-based surcharge was calculated based on revenues from intrastate voice service rather than from information services. Under the revenue-based methodology, wireless customers pay a surcharge on the portion of their service from intrastate voice services, but not the interstate and broadband services, which are prohibited from being taxed. With the revenue approach, all

types of customers—wireless and wireline are paying the same percentage fees on their intrastate telecommunications usage. (2-ER-168-201.) The progressive revenue-based surcharge would allow a consumer that needs to reduce expenses to make spending changes to decrease the surcharge.

In contrast, a flat-fee per access-line surcharge will stay the same such that the low-income consumer’s only option to avoid the newly quadrupled surcharge would be to cancel a phone line. That effect will be multiplied when a family has multiple lines for multiple users, some of whom may not use the line for anything other than broadband.

#### **D. Unfairly Burdening Wireless Services Harms Consumers**

California’s Universal Service programs may not be “inconsistent with” the FCC’s Universal Service rules and the rules require that contributions be made on an “equitable and nondiscriminatory basis.” 47 U.S.C. § 254(f). Federal law therefore recognizes that the CPUC may not implement rules which unfairly favor or disfavor one type of technology in unfair ways. The FCC explained that this technological neutrality principle is consistent with the congressional intent to promote a pro-competitive framework and “will allow the marketplace to direct the advancement of technology and all citizens to benefit from such development.” *In re Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776, 8801-02 [¶¶ 48–49] (1997) (“1997 FCC Order”). Moreover the FCC wanted to avoid

limiting providers' service offering, when more cost-effective and relevant services were available. *Id.* Thus, the technological neutrality principle benefits consumers by fostering a marketplace where consumers can choose affordable communications options that are best for them, without being penalized by state policies for that choice.

To assess whether something is competitively neutral, the appropriate inquiry is whether the fee has the “practical effect” of burdening something Congress intended to prevent. *See Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 373 (1991) (quoting *Mobil Oil Corp. v. Comm'r of Taxes of Vt.*, 445 U.S. 425, 443 (1980)) (discussing a preemption of taxes). As explained above, the CPUC's flat-fee access-line surcharge disproportionately burdens wireless customers who rely on that service for broadband access. Meanwhile, individuals who can afford stand-alone terrestrial internet service do not pay the fee for the same service.<sup>6</sup> The CPUC's access-line method of calculation puts its thumbs on the scale in favor of one identical service over another, penalizing those individuals whose only affordable means of accessing the internet is wireless.

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<sup>6</sup> The CPUC's definition of “access line” applies only to a “telephone line” and associated with a telephone number, and therefore does not include stand-alone internet service. Decision at 40.

By imposing a discriminatory surcharge that is not proportionate to the services used, the CPUC will also limit the competitive market's ability to offer new dynamic options to fit consumers' needs. Plaintiffs-Appellants note that they will have to absorb the financial impact of the new surcharge for their popular and consumer-friendly tax-inclusive wireless plans. (Plaintiffs-Appellants' Br. at 19-20.) Penalizing carriers making different kinds of plans available, like the tax-inclusive wireless plan, is anti-competitive and bad for consumers by limiting carriers' ability to innovate. If a carrier offering transparent and popular options is penalized, that will deter carriers from coming up with new cost-effective options. But these flexible and cost-effective options are exactly what is necessary to help bridge the digital divide.

**E. The CPUC Should Address Funding Issues through Less Harmful Means**

The CPUC surcharges are intended to help needy Californians access communications services—in other words, to help bridge the digital divide. The CPUC's change in surcharge calculation methods runs contrary to that very policy. The FCC has recognized the threat to competitive neutrality an access-line surcharge poses, since it has considered, but never authorized an access-line charge.

As discussed above, the change will make it less likely that new users subscribe to wireless services, more expensive for existing customers, and harder for carriers to offer flexible options to customers who need wireless service. The flat-fee surcharge will cause low-income wireless consumers to be a disproportionately large contributor to the fund, rather than a progressive model which is based on use and cost. The CPUC's exception to the surcharge for Lifeline recipients does not encompass all the low-income wireless customers, or potential wireless customers, who will be affected by the surcharge. In 2022, only 29% of Californians eligible for Lifeline participated. Universal Service Administrative Co, *Lifeline Program Data*, <https://www.usac.org/lifeline/resources/program-data/>.<sup>7</sup> The CPUC's efforts to increase funding for these programs should favor policies which are consistent with the mission on increasing access to essential communications services, rather than the route the CPUC has taken here. The CPUC's new surcharge methodology

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<sup>7</sup> Similarly, the California equivalent of the federal Lifeline program estimates about 40% participation by eligible households. Legislative Analyst's Office, *A Review of LifeLine Budget Estimates and Enrollment Process* (Apr. 3, 2019), <https://lao.ca.gov/Publications/Report/3995>.

is antithetical to this mission by making access to wireless broadband less affordable and accessible.

Although the CPUC exempts Lifeline providers from the surcharge, it does not similarly exempt subsidized service under the federal government’s newer Affordable Connectivity Program (“ACP”).<sup>8</sup> ACP-subsidized services also benefit low-income individuals that cannot afford additional fees: recipients must be at or below 200% of the federal poverty guidelines and/or meet other qualification requirements. ACP subsidizes services for not only cell phones, but also tablets and even tethered connections for computers. Thus, the CPUC’s access-line surcharge will apply to each connection for individuals receiving a government-subsidized service, effectively adding a tax to the ACP government assistance program. The decision to exempt one federal subsidy and not the other is arbitrary. Moreover, the increased surcharge on ACP-subsidized connections will be acutely felt by the intended beneficiaries of ACP subsidies—those low-income individuals who would benefit from affordable communications services. Imposing an access-line surcharge has the effect of a new tax and decreasing access to essential communications services.

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<sup>8</sup> Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 60502, 135 Stat. 429, 1239-1244 (2021).

#### IV. CONCLUSION

*Amici* respectfully urge the Court to reverse the District Court's decision with instructions to issue a preliminary injunction enjoining the CPUC's Decision and the new connections-based surcharge rule that will increase costs for low-income communities of color and prevent access to broadband.

Dated: May 8, 2023

Respectfully submitted,

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### CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that:

3. This amicus brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 3,789 words, excluding the parts exempted by Fed. R. App. P. 32(f).

4. This amicus brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Microsoft Word and is written in a 14-point, proportionately spaced typeface Times New Roman font.

Dated: May 8, 2023

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system and transmittal of a Notice of Electronic Filing to any ECF registrants for this case.

Dated: May 8, 2023

/s/ Alla Raykin

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