

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

COUNTY OF SANTA CLARA, ET AL,

Petitioners,

v.

FEDERAL COMMUNICATIONS
COMMISSION and UNITED STATES
OF AMERICA,

Respondents.

No. 18-70506 (Lead)

Consolidated with Nos. 18-70510, 18-70679, 18-70680, 18-70686, 18-70691, 18-70692, 18-70695, 18-70697, 18-70698, 18-70699, 18-70700, 18-70701, 18-70702, 18-70703

**THE INTERNET ASSOCIATION’S MOTION FOR LEAVE TO
INTERVENE IN SUPPORT OF PETITIONERS**

Pursuant to 28 U.S.C. § 2348, 47 U.S.C. § 402(e), and Federal Rule of Appellate Procedure 15(d), the Internet Association, a trade association representing leading global internet companies on matters of public policy, moves for leave to intervene as a matter of right in support of Petitioners in the above-captioned proceeding. All parties have stated that they do not oppose this motion.¹

¹ Pursuant to Circuit Rule 27-1, the Internet Association conferred with all Petitioners, Respondents, and Intervenors admitted to the consolidated cases as of March 21, 2018: Mozilla Corp.; Vimeo, Inc.; Public Knowledge; the Open Technology Institute; the State of New York, et al.; County of Santa Clara, et al.; California Public Utilities Commission; National Hispanic Media Coalition; NTCH, Inc.; Benton Foundation; Free Press; Coalition for Internet Openness; Etsy, Inc.; Ad Hoc Telecom Users Committee; Center for Democracy and Technology; the City of San Francisco; the Federal Communications Commission; and the United States.

Petitioners seek review of the Federal Communications Commission's Order, which eliminates judicially approved rules the Commission adopted in 2015 to protect and promote net neutrality. *See Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, Order, FCC 17-166 (Dec. 14, 2017) ("Order"). Petitioners seek review of the Order on the grounds that it is "arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act, 5 U.S.C. § 701 et seq.," "violates federal law, including ... the Communications Act of 1934, as amended, and FCC regulations promulgated thereunder," "conflicts with the notice-and-comment rulemaking requirements of 5 U.S.C. § 553," and is "otherwise not in accordance with law."

The Internet Association was an active participant in the agency proceeding and its interests, along with the interests of its members, will be substantially affected by this Court's review of the Order. *See Comments of the Internet Association, Restoring Internet Freedom*, WC Docket No. 17-108 (filed July 17, 2017). The Internet Association is making this motion within 30 days of the filing of petitions for review of that agency proceeding, *See* Dkt. No. 1 (filed Feb. 22, 2018), and the Internet Association should be granted leave to intervene. Fed. R. App. P. 15(d).

First, the Commission's Order eliminates the rules that prevent both fixed and mobile broadband providers from blocking, throttling, charging for prioritized

delivery, and otherwise interfering with consumers' access to lawful online content—including the content offered by the Internet Association's members. The Order also eliminates Commission oversight over anticompetitive broadband provider practices at the point where online content interconnects with networks serving local broadband consumers. Without these legal protections, internet companies and consumers will have no effective legal recourse against broadband providers that distort competition and impede communication by preventing or discouraging consumers from reaching the online content of their choice. This is particularly problematic given that nearly half of Americans have no choice of wireline provider for high-speed broadband service. *See* Order ¶ 125. The risk of harm is even worse in rural areas where 87 percent of consumers have no choice of wireline provider for high-speed broadband service. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 2016 Broadband Progress Report, FCC 16-16, GN Docket No. 15-191, ¶ 86, Table 6 (Jan. 29, 2016). Absent effective net neutrality rules, both online consumers and companies are left to the mercy of broadband provider gatekeepers.

Second, by eliminating the established, judicially approved rules of the road protecting the open internet, the Order removes the legal certainty on which the Internet Association's members have relied. To attract investment and growth, online content providers (such as many of the Internet Association's members)

need assurance of a baseline level of nondiscriminatory treatment by all internet service providers, so they can develop, market, and offer content and services across the country regardless of a potential customer's choice of broadband provider. The Commission's Order has eliminated the clear and predictable ex ante rules that supported such investment and innovation.

Moreover, eliminating clear, ex ante rules that apply equally to all broadband technologies risks consumer confusion and market distortions. Today's consumers rely heavily on both wired and wireless broadband subscriptions and expect to be able to access the same content and services no matter how they connect. Even with the disclosures required by the Order, it may not be apparent to consumers that broadband providers slow or degrade access to certain services. Consumers may be understandably frustrated when their video, gaming or other service provider cannot solve the problem.

Finally, the Commission's Order disrupts the virtuous cycle of innovation and investment created by strong, enforceable net neutrality rules. The Commission's open internet rules codified longstanding net neutrality principles that fostered vibrant innovation in online content and services, fueling consumer demand for faster and better broadband connections and, in turn, broadband network investment and the internet's dynamic growth. Today, the internet contributes more than 6 percent of U.S. GDP, over 3 million direct American jobs,

and nearly 24 million additional online income opportunities in every state. By eliminating the net neutrality protections against harmful broadband provider conduct, the Commission's Order breaks the cycle of innovation and investment that has allowed the Internet Association's members to bring innovation and choice to consumers.

For the foregoing reasons, the Court should grant the Internet Association's motion to intervene.

Respectfully submitted,

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Dated: March 22, 2018

Counsel for the Internet Association

PROPOSED INTERVENOR'S CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Internet Association hereby submits this Corporate Disclosure Statement. The Internet Association does not have any parent corporations and does not issue stock.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 22, 2018, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users. Users not registered with CM/ECF will be served by U.S. Mail.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Motion complies with the type-volume limitation of Fed. R. App. 27 because it contains 879 words. This Motion complies with the typeface and type style requirements of Fed. R. App. P. 27 because this Motion has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

Respectfully submitted,

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