

ORAL ARGUMENT NOT YET SCHEDULED  
No. 18-1051 (and consolidated cases)

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

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MOZILLA CORPORATION, ET AL.,

*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and  
UNITED STATES OF AMERICA,

*Respondents.*

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On Petitions for Review from an Order of  
the Federal Communications Commission

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BRIEF *AMICI CURIAE* OF  
MEMBERS OF CONGRESS

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## STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amici curiae* Members of Congress represents that all parties have consented to the filing of this brief.<sup>1</sup>

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amici curiae* certifies that a separate brief is necessary. *Amici* are members of Congress, some of whom were instrumental in the enactment of the Telecommunications Act of 1996, 110 Stat. 56 (the “1996 Act”), and all of whom have had experience with Congress’s role in legislative oversight of the FCC’s fulfillment of its statutory public interest mandate. Thus, *amici* are particularly well suited to provide the Court with background on the text, structure, and history of the statute and the manner in which it was intended to operate. Indeed, *amici* have unique knowledge on an issue at the core of this case: whether broadband access to the Internet is properly classified as a “telecommunications service” or as an “information service” as those terms are used in the 1996 Act.

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

### **I. PARTIES AND AMICI**

Except for *amici* Members of Congress and any other *amici* who have not yet entered an appearance in this Court, all parties and *amici* appearing before the district court are listed in the Brief for Petitioners.

### **II. RULINGS UNDER REVIEW**

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

### **III. RELATED CASES**

So far as counsel are aware, this case has not previously been filed with this Court or any other court, and counsel are aware of no other cases that meet this Court's definition of related.

Dated: August 27, 2018

By: /s/ Christopher Jon Sprigman  
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*\*Cases and other authorities principally relied upon are marked with asterisks.*

## GLOSSARY

The 1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56
<i>2015 Order</i>	<i>Protecting and Promoting the Open Internet</i> , 30 FCC Rcd 5601 (2015)
<i>2017 Order</i>	<i>Restoring Internet Freedom</i> , 33 FCC Rcd 311 (2017)
<i>Cable Modem Declaratory Ruling</i>	<i>Order Concerning High-Speed Access to the Internet Over Cable and Other Facilities</i> , 17 FCC Rcd 4798 (2002)
Caching	“[T]he storing of copies of content at locations in the network closer to subscribers than their original sources,” <i>2015 Order</i> at 5770 ¶ 372
Communications Act	Communications Act of 1934, 48 Stat. 1064, encoded as amended at 47 U.S.C. § 151 et seq.
DNS	Domain name service, a function that “matches the web site address the end user types into his browser...with the IP address of the web page’s host server,” <i>Nat’l Cable &amp; Telecomms. Ass’n v. Brand X Internet Servs.</i> , 545 U.S. 967 (2005)
Fixed broadband	Broadband service to a user’s fixed location
IP address	Internet Protocol address; a unique string of numbers used to identify each computer on a network
Mobile broadband	Broadband service to a user’s non-fixed location, often using radio waves
Title II	Title II of the Communications Act of 1934, codified as amended at 47 U.S.C. §§ 201-276



## INTEREST OF *AMICI CURIAE*

*Amici* are Members of Congress, some of whom were instrumental in the enactment of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (hereinafter the 1996 Act), and all of whom have participated in Congress's oversight of the FCC's fulfillment of its statutory public interest mandate. Thus, *amici* are particularly well placed to provide the Court with background on the text, structure, and history of the 1996 Act and the manner in which it was intended to operate. Indeed, *amici* have unique knowledge regarding an issue at the core of this case: whether broadband access to the Internet is properly classified as a "telecommunications service" or as an "information service," as those terms are employed in the 1996 Act.

*Amici* have an interest in ensuring that the 1996 Act is construed by the FCC and by the federal courts in accord with its text and purpose. *Amici* submit this brief to make clear that, in the view of a significant number of Members of Congress who have been active in telecommunications policymaking and are responsible for overseeing the actions of the FCC, broadband access to the Internet is properly classified as a "telecommunications service," and not as an "information service," under the plain language of the 1996 Act. Indeed, in view of how broadband Internet service is marketed to and used by consumers today, *amici* believe that the *only* classification of broadband supportable under the plain

terms of the 1996 Act is as a “telecommunications service.”

A full listing of congressional *amici* appears in Appendix A.

## SUMMARY OF ARGUMENT

The Telecommunications Act of 1996 is a landmark law dedicated to ensuring that all Americans have access, at competitive prices, to state-of-the-art telecommunications services. To help achieve that goal, Congress adopted a broad, technology-neutral definition of “telecommunications service” regulable under Title II of the Communications Act, as amended and updated by the 1996 Act, 110 Stat. 56. The 1996 Act defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public ... regardless of the facilities used.” 47 U.S.C. § 153(53). “Telecommunications” is in turn defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” *Id.* § 153(50).

As the FCC determined in its *2015 Order, Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015) (hereinafter *2015 Order*), broadband Internet access should be classified as a “telecommunications service.” First, broadband Internet access service fits squarely within the plain language of the 1996 Act’s definitions of “telecommunications” and “telecommunications service.” Second, even if one does not share this understanding of the plain text, consumer perceptions about the nature of broadband access point directly to the conclusion that the only reasonable interpretation of the 1996 Act is to classify broadband Internet service as

a “telecommunications service.”

Under the plain text of the 1996 Act, broadband Internet service providers are clearly providing “telecommunications.” Every broadband subscriber who sends an email, visits a website, or posts a photo to a social media site, uses his or her broadband Internet service to transmit information “between or among points specified by the user” – i.e., from the user’s computer or smartphone to the server that houses the email account of the email recipient the user has specified, or to a server associated with the website or social media platform that the user wishes to access. In all of these instances, the information is transmitted by the broadband Internet service provider “without change in [its] form or content.” Therefore, under the plain terms of the 1996 Act, broadband Internet access service providers – both fixed and mobile – are providing “telecommunications” to the public. And because broadband service qualifies as “telecommunications,” and broadband providers plainly “offe[r] ... telecommunications for a fee directly to the public,” broadband Internet access service is properly classed as a “telecommunications service” that is regulable by the FCC pursuant to its Title II authority. Indeed, the FCC’s determination in its *2015 Order* that broadband Internet access fits within the definition of “telecommunications service” is supported by a straightforward and unassailable interpretation of the statute’s plain text.

However, even if one does not share this understanding of the 1996 Act’s

plain meaning, classifying broadband Internet access as a “telecommunications service” is the *only* reasonable interpretation of the term. As this Court recognized, the Supreme Court has held that the proper “classification of broadband turns on consumer perception.” *U.S. States Telecomm. Ass’n v. FCC*, 825 F.3d 674, 708 (D.C. Cir. 2016) (hereinafter *FCC*) (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (hereinafter *Brand X*)). Finding that the FCC in 2015 had “extensive evidence” demonstrating how “consumers perceive broadband service both as a standalone offering and as providing telecommunications,” this Court upheld the FCC’s decision to classify broadband as a “telecommunications service.” *FCC*, 825 F.3d at 697-98, 704-05. Nothing has changed in the nature of broadband Internet service since 2015 to alter this consumer perception. In fact, in 2018, *it is now beyond reasonable dispute* that consumers overwhelmingly view broadband Internet access as a “telecommunications service.”

In sharp contrast to the 1996 Act’s plain text and established consumer perception, the FCC attempted in its *2017 Order, Restoring Internet Freedom*, 33 FCC Rcd 311 (2017) (hereinafter *2017 Order*), to reverse course and re-classify broadband Internet access service as an “information service.” This decision is based on a reading of the statute that distorts the meaning of certain of its plain terms, entirely ignores others, and runs counter to all consumer perceptions.

The 1996 Act defines an “information service” as “the offering of a capability

for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . .” 47 U.S.C. § 153(24).

The FCC argues in its *2017 Order* that broadband Internet access is properly classed as an “information service” because it offers a “capability” for “generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” Broadband Internet access is an “information service,” the FCC claims, because it “has the capacity or potential ability to be used to engage in the activities within the information service definition.” *2017 Order* at 322 ¶ 30.

The FCC’s “capabilities” argument can be boiled down to the following proposition: If a technology can be used to gain access to an information service, then that technology is itself an information service. But this construction of the 1996 Act would permit virtually any communications technology – even voice telephony – to be classed as an “information service.” Indeed, the FCC’s misconception of the statute would effectively merge the “telecommunications service” classification into a super-classification of “information service.” This is not what Congress intended when it included, and defined in the 1996 Act, separate categories for “telecommunications service” and “information service.”

The FCC’s misconception of “information service” also ignores the final – and crucial – two words of the statutory definition: “via telecommunications.” As

this Court recognized in 2016, those final two words in the statutory definition make clear that the functions provided by technologies properly classified as “information services” (i.e., “generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information”) are made available to the consumer via a telecommunications technology. *FCC*, 825 F.3d at 702. Thus, the definition of “information service” is written to maintain the separation between the “information service” and “telecommunications service” classifications. The FCC’s misconstruction of the 1996 Act’s plain language in its *2017 Order* would result in the merger of two categories that the statute defines separately.

Tellingly, the FCC fails to explain why its strained reading of “information service” is a proper construction of the statute in light of the conclusion it had reached less than three years prior that broadband Internet access is properly classed as a “telecommunications service” – a category into which broadband service fits without distorting the plain language of the 1996 Act.

The FCC cannot justify its argument that broadband access is an “information service” by ignoring broadband’s much more obvious fit with the statute’s language defining the category of “telecommunications service.” The agency itself admits that it does not have the discretion to ignore relevant portions of the statute. *See 2017 Order* at 321 ¶ 27 (“When interpreting a statute it

administers, the Commission, like all agencies, must operate within the bounds of reasonable interpretation. And reasonable statutory interpretation must account for both the specific context in which . . . language is used and the broader context of the statute as a whole.”) (citing *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014)) (internal quotations omitted). The FCC has plainly failed to “account for ... the broader context of the statute as a whole.” And as a result, the FCC’s interpretation of the statute is not reasonable. It is arbitrary, capricious, and unlawful. *Id.*

Moreover, as this Court has noted, a “reasoned explanation is needed for disregarding facts and circumstances that underlay . . . [a] prior policy,” and it is “arbitrary and capricious to ignore such matters.” *FCC*, 825 F.3d at 709 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009)). If the *2015 Order* was based upon “extensive evidence” that consumers perceived broadband to be a “telecommunications service,” *FCC*, 825 F.3d at 704-05, then the *2017 Order* can only be justified by a shift in the facts about consumer perception. Yet, the FCC in 2017 offered no evidence – *nor could it* – that in the short period since the *2015 Order*, either the nature of broadband Internet technology or consumer perceptions have shifted in any way. In short, the FCC has not exercised its authority under the 1996 Act. It has abdicated it. Broadband should remain classified as a “telecommunications service.”



Finally, none of the various attempts by the FCC to rescue its plainly incorrect interpretation of the meaning of “information services” succeeds. Neither the operation of the Internet’s Domain Name System (DNS) nor the existence of Internet caching change the fact that broadband Internet access is a “telecommunications service.” Nor do DNS or caching somehow transform broadband Internet access service into an “information service” that lies outside of the FCC’s Title II regulatory authority. The plain language of the “information service” definition in Section 153 of the 1996 Act excludes information processing capabilities used solely for the “management, control, or operation” of a telecom service. *See* 47 U.S.C. § 153(24). As the FCC determined in its *2015 Order*, *2015 Order* at 5765 ¶ 366, 5770 ¶ 372 – a determination this Court approved, *FCC*, 825 F.3d at 674 – both DNS and caching are network “management” technologies that are within the exclusion and thus are not properly classified as “information services.” Nothing has changed since the FCC’s *2015 Order* that supports the FCC’s decision to reverse course and assert in its *2017 Order* that DNS and caching turn broadband Internet access, which plainly is a “telecommunications service,” into an “information service.”

This Court should reverse the FCC’s *2017 Order*.

## ARGUMENT

### **I. Broadband Access to the Internet is a “Telecommunications Service,” and Not an “Information Service,” Under the Plain Language of the 1996 Act**

In the Telecommunications Act of 1996, 110 Stat. 56, Congress extended the FCC’s regulatory authority under Title II of the Communications Act of 1934 to a broad category of “telecommunications service.” The 1996 Act defines “telecommunications service” as “the offering of telecommunications for a fee directly to the public ... regardless of the facilities used.” 47 U.S.C. § 153(53). “Telecommunications” is in turn defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(50).

#### ***A. Broadband Service Fits Squarely Within the 1996 Act’s Definition of “Telecommunications Service”***

Broadband access to the Internet qualifies as a “telecommunications service,” as that term is defined in the 1996 Act. First, broadband Internet service is plainly “telecommunications.” Anyone who uses a broadband connection – whether fixed or mobile – to send an email, or to visit a website, or to log into his or her bank account, is transmitting “information of the user’s choosing;” the user is choosing what information to transmit over a broadband network from his or her

computer or smartphone.

Moreover, the broadband service provider just as plainly transmits that user-selected information “without change in [its] form or content.” A few simple examples will make this fact clear. If you visit Orbitz to purchase a plane ticket to Paris, your broadband provider transmits the Orbitz webpages to you without changing their form or content. If you send an email using Gmail to your friend telling him how excited you are that you’ve purchased the tickets to Paris, your broadband provider does not alter the form or content of the email message either. When you finish sending your email, you decide to watch a movie about Paris on Netflix. You use your broadband service to send a message to Netflix’s servers requesting the video stream (you choose “Before Sunset”, with Julie Delpy and Ethan Hawke), and Netflix transmits it back to you. Your broadband carrier does not alter the form or content of either your request to Netflix or the video that Netflix streams back to you. Now you’re in Paris, and you use your smartphone to take a vacation picture of the Eiffel Tower and post it to Facebook. Your mobile broadband carrier transmits that photo to Facebook without change in its form or content. In all of these cases, you use an information service – email, web browsing, video streaming, social networking – that is provided by a third party. Your broadband Internet access provider’s role is to transmit information between the user and the third party, without altering the information in any way.

Indeed, it could hardly be otherwise – if a broadband Internet access provider altered in any way the form or content of an email, or of information sent to a website or a social media platform, or a motion picture streamed from a video streaming service, the broadband service would immediately be suspect as a tool for communications.

And finally, when an Internet user accesses a website, her broadband Internet access provider is transmitting data (the request for the website, and the actual content of the website) “between or among points specified by the user;” here, the user’s computer or smartphone, and the computer, or “server”, that hosts the website. Similarly, a user who sends an email directs his Internet service provider to transmit the email to the server hosting the recipient’s email account. It is of no moment that the Internet’s routing protocols may make the precise path that the user’s content (the message requesting the website, or the email) takes to the server difficult or impossible to predict. The message is delivered to the server, and, from the perspective of the user, that is the relevant “point” that the user has specified. Nor does it matter that the user does not know where the server is geographically located.

In these essential respects, broadband Internet service is no different from traditional telephony service: When a person makes a telephone call, she dials a number that she associates with a person she wants to reach. The caller doesn’t know along which path the call is traveling through the telephone network. Nor

does she specify a particular telephone – and indeed, several telephones may ring when a particular number is called – and if that number is associated with a mobile phone then the caller likely does not know the precise geographic location of the recipient at the time the call is made. From the perspective of the caller, all that matters is that the telephone number is associated with a certain person or entity that the caller wishes to reach.

In sum, the FCC’s decision in its *2015 Order* to classify broadband Internet access as a “telecommunications service” is entirely consistent with the plain language defining that term in the 1996 Act. In contrast, the FCC’s attempt in its *2017 Order* to reclassify broadband Internet access as an “information service” is both contrary to the plain language of the 1996 Act and an abuse of the agency’s discretion.

***B. Broadband Internet Service Does Not Qualify as an “Information Service” Under the Plain Meaning of the Language of the 1996 Act that Defines That Category***

The 1996 Act defines an “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . .” 47 U.S.C. § 153(24). The FCC argues in its *2017 Order* that broadband Internet access is properly classed as an “information service” because it offers a “capability” for “generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making

available information via telecommunications.” Broadband Internet access is an “information service,” the FCC claims, because it “has the capacity or potential ability to be used to engage in the activities within the information service definition.” *2017 Order* at 322 ¶ 30.

The FCC’s “capabilities” argument can be boiled down to the following proposition: If a technology can be used to gain access to an information service, then that technology is itself an information service. To give a practical example, in the FCC’s view, because a consumer’s broadband Internet connection provides her with the “capability” to access Netflix (clearly itself an “information service” within the meaning of the 1996 Act) to stream a movie, then the consumer’s broadband Internet service is itself an “information service.” Because a consumer’s broadband Internet connection provides her with the “capability” to access Gmail (another information service) to send an email, then the consumer’s broadband service is itself an “information service.”

This is an unreasonable – indeed, an absurd – construction of the definition of “information service.” It is a misconstruction of the statute that would effectively erase the “telecommunications service” classification. Following the illogic of the FCC’s “capabilities” argument, even voice services, both fixed and mobile, would be classed as “information services.” Voice services can also offer a “capability” for accessing information services – consider, for example, a person using his telephone

to access the “Julie” automated reservation service that Amtrak offers as a means of purchasing tickets for its trains. *See* Ian Urbina, *Your Train Will be Late, She Says Cheerily*, N.Y. TIMES, (Nov. 24, 2004), <https://www.nytimes.com/2004/11/24/nyregion/your-train-will-be-late-she-says-cheerily.html>. “Julie” is an information service, and many users access the service using voice telephony. Accepting the FCC’s “capabilities” argument is tantamount to accepting that the FCC may reclassify voice telephony as an “information service.”

The FCC’s “capabilities” argument rests on another central flaw: it ignores the presence of the words “via telecommunications” at the end of the definition of “information service.” *See* 47 U.S.C. § 153(24). As this Court recognized, those final two words in the statutory definition make clear that the functions provided by technologies properly classified as “information services” (i.e., “generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information”) are made available to the consumer via a telecommunications technology. *FCC*, 825 F.3d at 702. As a result, the definition of “information service” itself is structured to maintain “information service” and “telecommunications service” as separate classifications.

In the case of an individual using a broadband Internet connection to access an information service, it is the individual’s broadband connection that serves as the “telecommunications” via which the functions provided by the information service

are made available. It is the broadband connection that transmits information “between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(50). So, for example, if a consumer uses her broadband Internet connection to access Netflix, and then selects a movie to watch and presses “play,” the “information” (i.e., the video content) that Netflix offers is “ma[de] available” to the consumer “via telecommunications.” The relevant “telecommunications” in this example *must* be the consumer’s broadband Internet connection. There is no other path via which Netflix could “ma[ke] available” the information it offers to subscribers.

Here is another example: Imagine a consumer using a smartphone on an airplane. The smartphone is on airplane mode; the consumer types out responses to a number of emails, and then presses “send.” The email client – an information service – has acquired information from the consumer (the content of the emails). But for the email client to make the emails available to their intended recipient, the consumer must connect his phone to a telecommunications service. The consumer’s plane lands, and she switches her phone off of airplane mode. The phone connects to the consumer’s cellular service. The email client then makes the emails available via the cellular connection – it has “ma[de] available information via telecommunications.” 47 U.S.C. § 153(24).



The FCC’s misconstruction removes any meaningful distinction between two categories of technology which Congress meant to define separately in the 1996 Act. Congress crafted the definitions of “telecommunications service” and “information service” in the 1996 Act in the expectation that the FCC would interpret the boundaries of those categories in a manner that would maintain their separate identity and not render surplusage the category of “telecommunications service.” This is not to say that Congress intended those categories to be rigid – rather, Congress expected the FCC to apply them to changing technologies and markets on a technologically neutral and forward-looking basis. In other words, the nature of a particular technology might change in a way that would lead the FCC to reclassify it. But such a decision must be undertaken according to an understanding of the statute’s meaning that respects the separate existence of both the “telecommunications service” and “information service” classifications. The FCC’s reclassification decision in its *2017 Order*, which, contrary to the plain language of the statute, merges the two classifications, is an abuse of discretion.

Tellingly, the FCC fails to explain why its strained reading of “information service” is a proper construction of the statute in light of the conclusion it had reached less than three years prior that broadband Internet access is properly classed as a “telecommunications service” – a category into which broadband service fits comfortably and without having to distort the plain language of the 1996 Act.

Indeed, in its *2017 Order* the FCC ignores the plain language of the “telecommunications service” definition, and says nothing to explain why broadband is not a much more obvious fit within “telecommunications service” classification – a conclusion that the plain language of that classification forces upon anyone engaged in a fair reading of the 1996 Act. This failure is fatal to the FCC’s reclassification decision in its *2017 Order*. The agency itself admits that it does not have the discretion to ignore relevant portions of the statute. *See 2017 Order* at 321 ¶ 27 (“When interpreting a statute it administers, the Commission, like all agencies, must operate within the bounds of reasonable interpretation. And reasonable statutory interpretation must account for both the specific context in which . . . language is used and the broader context of the statute as a whole.”) (citing *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014)) (internal quotations omitted). But this is precisely what the FCC has done. By ignoring the plain language of the statute that supports the inclusion of broadband within the “telecommunications service” classification, the FCC has failed to “account for ... the broader context of the statute as a whole.” And as a result, the FCC’s interpretation of the statute is arbitrary, capricious, and unlawful. *Id.*

## **II. Broadband Access to the Internet is a “Telecommunications Service,” and Not an “Information Service,” According to Congressional Intent and Consumer Perception**

### ***A. The FCC’s 2015 Order was Based on Extensive Evidence that Consumers Perceive Broadband as a “Telecommunications***

***Service,” while the FCC’s 2017 Order is Not Supported by  
Consumer Perception***

The FCC’s *2015 Order*, in which the agency reclassified broadband Internet service as a “telecommunications service,” is not only consistent with the plain language of the 1996 Act, but also with Congress’s intent regarding how the FCC should undertake the task of classifying telecommunications and information technologies. Congress crafted the definition of “telecommunications service” in the 1996 Act to make the term applicable to changing telecommunications technologies and markets on a technologically neutral and forward-looking basis. In its *2015 Order*, the FCC re-affirmed that the proper classification of broadband Internet access services depended on the nature of the service offered to consumers, and, crucially, how consumers perceived that service. *2015 Order* at 5750 ¶ 342. This approach was accepted and implemented by the Supreme Court in *Brand X*, as well as recognized by this Court in 2016. *Brand X*, 545 U.S. at 990, 998; *FCC*, 825 F.3d at 708. Therefore, even if one disagrees with the plain text arguments above, the FCC’s decisions can be reviewed under this “consumer perception” standard.

In its previous classification decision in the 2002 *Cable Modem Declaratory Ruling*, 17 FCC Rcd 4798 (2002), the FCC focused on the consumer perception that broadband Internet access was essentially about the use of *applications*. The Commission found that broadband Internet access service “typically includes many and sometimes all of the functions made available through dial-up Internet access

service, including content, email accounts, access to news groups, the ability to create a personal Web page, and the ability to retrieve information from the Internet, including access to the World Wide Web.” *Id.* at 4804. In addition, the Commission in 2002 noted that “[n]etwork monitoring, capacity engineering and management, fault management, and troubleshooting are Internet access service functions that . . . serve to provide a steady and accurate flow of information between the cable system to which the subscriber is connected and the Internet.” *Id.* at 4811-12. All of these, the Commission held, “are *applications* that are commonly associated with Internet access service,” and that “[t]aken together, [ ] constitute an information service.” *Id.* at 4822.

In 2005 and 2007, the FCC re-stated its view that broadband access should be classified as an integrated “information service.” *2015 Order* at 5751 ¶¶ 344-45. But in the intervening years, much changed. In particular, many consumers spurned the applications, such as email, news groups, “walled garden” content, and home pages, offered by their broadband Internet access provider, in favor of services and applications offered by third parties, such as email on Google’s Gmail or Yahoo’s Yahoo Mail; news and related content on nytimes.com or washingtonpost.com or Google News; home pages on Microsoft’s MSN or Yahoo!’s “my.yahoo”; video content on Netflix or YouTube or Hulu; streaming music on Spotify or Pandora or Apple Music; and on-line shopping on Amazon.com or Target.com, as well as

many others in each category. Further, millions of consumers spend an increasing share of their time online interacting with social networks, such as Twitter, Facebook, Instagram, Snapchat and Pinterest, that are offered by third parties and not by the firms that provide broadband Internet access service. *2015 Order* at 5753-55 ¶¶ 348-50. Although each of these applications and services is properly classed as an “information service,” all of them are offered by third parties, and are not part of the “offering” that broadband Internet access providers make to the public. Indeed, the marketing efforts of the broadband Internet access providers reflect consumers’ shift toward third-party applications, in that they tend no longer to focus on the applications offered by the broadband access provider, but rather on the *speed and reliability with which the service allows consumers to reach third-party applications. Id.*

In light of these substantial changes in the way consumers use and perceive broadband Internet access service, as well as the corresponding changes in the way broadband service is marketed, the FCC held in its *2015 Order* that “it is more reasonable to assert that the ‘indispensable function’ of broadband Internet access service is the connection link that in turn enables access to the essentially unlimited range of Internet-based services.” *2015 Order* at 5743 ¶ 330. It found that from the consumer’s perspective, “broadband Internet access service is today sufficiently independent of these information services that it is a separate offering.” *2015 Order*

at 5757–58 ¶ 356. In support of these conclusions, the FCC pointed to evidence in the record demonstrating that consumers use broadband principally to access third-party content. “As more American households have gained access to broadband Internet access service,” the FCC explained, “the market for Internet-based services provided by parties other than broadband Internet access providers has flourished.” *Id.* at 5753 ¶ 347. The FCC also pointed to evidence in the record establishing that, from the user’s point of view, the standalone offering of broadband service provides telecommunications. “Users rely on broadband Internet access service,” the FCC explained, “to transmit ‘information of the user’s choosing,’ ‘between or among points specified by the user,’” without changing the form or content of that information. *Id.* at 5761 ¶ 361 (quoting 47 U.S.C. § 153(50)); see also *id.* at 5762–63 ¶ 362.

This Court agreed. “That consumers focus on transmission to the exclusion of add-on applications,” this Court held, “is hardly controversial.” *FCC*, 825 F.3d at 698. “Even the most limited examination of contemporary broadband usage,” this Court added, “reveals that consumers rely on the service primarily to access third party content.” *Id.* Therefore, after finding that the FCC in 2015 had “extensive evidence” demonstrating how “consumers perceive broadband service both as a standalone offering and as providing telecommunications,” this Court upheld the FCC’s decision to classify broadband as a “telecommunications

service.” *Id.* at 697-98, 704-05.

In sum, whatever the situation may have been in 2002, or 2005, or even 2007, it was clear in 2015 – *and it is even clearer now in 2018* – that broadband access to the Internet is a “telecommunications service.” Indeed, it is surprising to *amici* that today this could even be a serious question. In its current form, the only proper classification of broadband Internet access is as a “telecommunications service.” Fixed voice service has been classified as a Title II telecommunications service since 1934, when the Communications Act was passed, and mobile voice service has been classified under Title II since 1994. Today, broadband access to the Internet is at least as important as either fixed or mobile voice service in the lives of millions of Americans. Indeed, in *amici*’s view, broadband Internet access has emerged as *the single most important* service that Americans use to transmit information to one another.

The FCC’s determination was clearly correct in 2015, and this Court affirmed it. Moreover, this Court has noted that a “reasoned explanation is needed for disregarding facts and circumstances that underlay . . . [a] prior policy,” and it is “arbitrary and capricious to ignore such matters.” *FCC*, 825 F.3d at 709 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009)). Therefore, if the *2015 Order* was based upon “extensive evidence” demonstrating how “consumers perceive broadband service both as a standalone offering and as

providing telecommunications,” *FCC*, 825 F.3d at 697-98, 704-05, the 2017 *Order* can only be justified by a shift in the facts about consumer perception. Yet, the FCC in 2017 offered no evidence – *nor could it* – that in the short period since the 2015 *Order*, either the nature of broadband Internet technology or consumer perceptions have shifted in any way. Indeed, nothing has changed in the past three years – other than the political composition of the FCC – that supports the agency’s attempt in its 2017 *Order* to turn back the clock. Even if it were true that in 2002, and 2005, and perhaps even in 2007, consumers viewed broadband Internet access as “indispensably” about access to applications – i.e., “information services” – offered by their broadband access service providers, by 2015 it was clear – *and it is beyond reasonable dispute now* – that consumers overwhelmingly view broadband Internet access as a data transport service that they use mostly for the purpose of interacting with applications offered by firms other than their broadband Internet access provider.

Congress gave the FCC authority in the 1996 Act to reasonably reclassify communications technologies in light of changed facts. But the FCC has not exercised that authority in its 2017 *Order*. It has abdicated it. Broadband should therefore remain classified as a “telecommunications service.”

For these reasons, and in contrast to its 2015 *Order*, the FCC’s 2017 *Order* is inconsistent with the letter of the 1996 Act, Congress’s intent, and established



consumer perception. Indeed, what the FCC offers in its *2017 Order* is not a reassessment of the nature of broadband technology, of the marketplace, or of consumer perceptions, but rather, as described above (see pages 17-18 of this brief), a misconstruction of the plain language of the statute that debauches the meaning of the word “capability”, and that ignores the words in the statute (“via telecommunications”) that make clear that telecommunications services are, in the ordinary instance, separate from information services, and that telecommunications services are not to be merged with information services simply because they are used to access them.

In sum, the FCC’s reclassification decision in its *2017 Order* is based entirely in the misuse of language. It is divorced from the practical realities that supported the FCC’s 2015 classification decision. And it leads immediately to absurd results. It is an abuse of discretion which this Court should overturn.

***B. None of the FCC’s Other Arguments Support its Decision to Reclassify Broadband Internet Access as an Information Service***

Finally, in a bid to resist the plain language of the statute and established consumer perception, the FCC offers a clutch of makeweight arguments – which this Court has previously rejected, *FCC*, 825 F.3d at 705-06, – asserting that broadband access contains the sort of information processing capabilities that characterize an “information service.” In particular, the FCC asserts that the Internet’s Domain Name System (DNS) and Internet “caching” technologies

render broadband Internet access an “information service” that is not properly within the scope of the FCC’s Title II regulatory authority. This argument is incorrect.

DNS and Internet caching offered by the broadband Internet service provider are not information services. The 1996 Act defines an “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . .” 47 U.S.C. § 153(24). The 1996 Act makes clear, however, that the category of “information service” does not include “any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” *Id.*

As the FCC determined in its *2015 Order*, *2015 Order* at 5765 ¶ 366, 5770 ¶ 372, a determination which this Court upheld, *FCC*, 825 F.3d at 699-701, DNS and Internet caching are precisely the sort of capabilities “for the management, control, or operation of a telecommunications system or the management of a telecommunications service” that the 1996 Act excludes from the definition of “information service.” The DNS is a system that associates domain names, such as “house.gov” (the domain name for the U.S. House of Representatives), which can easily be remembered, with numerical IP addresses, such as 143.228.126.60 (the IP address that corresponds to “house.gov”), which are not easily remembered but

which are needed for the purpose of connecting to websites and performing a range of other functions on the Internet. Without DNS, a user would have to type the series of four numbers separated by periods into his or her browser to retrieve a website – an operation which, although entirely possible, would be inconvenient.

*See Definition of “DNS”, PC MAGAZINE ENCYCLOPEDIA,*

<http://www.pcmag.com/encyclopedia/term/41620/dns>.

DNS lookup is an important technology, but it is also clearly a technology that is employed in the “management, control, or operation of a telecommunications system or the management of a telecommunications service.” DNS is a tool that firms that operate telecommunication systems employ to make Internet usage convenient for customers using their system. It is the Internet version of automated telephone directory service – a service that established FCC precedent has consistently classified as a function that falls within the telecommunications management exception, *2015 Order* at 5766 ¶ 367, – or, as Justice Scalia correctly noted in his dissent in *Brand X*, “scarcely more than routing information, which is expressly excluded from the definition of ‘information service.’” *Brand X*, 545 U.S. at 1012-13 (Scalia, J., dissenting).

Internet caching is, for similar reasons, also not an “information service.” That technology involves the temporary storage of web content for the purpose of speeding its delivery to users. *See Definition of “Web Cache”, PC MAGAZINE*

ENCYCLOPEDIA, <http://www.pcmag.com/encyclopedia/term/54281/web-cache>.

When this functionality is used by a broadband service provider, it is clearly a technology that is employed in the “management, control, or operation of a telecommunications system or the management of a telecommunications service.”

Internet caching when so employed by the broadband service provider is not a technology that anyone would consume other than adjunct to the use of Internet access service. The technology exists for the sole purpose of improving the performance of the telecommunications service offered by companies providing broadband Internet access. The technology is within the scope of the exception for “management” of a telecommunications system, and is for that reason excluded from the definition of “information service.”

In short, under the plain language of the 1996 Act, both DNS and Internet caching are excluded from the definition of “information service” because they are employed in the “management, control, or operation of a telecommunications system or the management of a telecommunications service.” The FCC’s makeweight arguments cannot change the fact that broadband Internet access is a “telecommunications service” under the plain language of the 1996 Act, the provision of which is properly subject to the FCC’s Title II regulatory authority.

This Court should reverse the FCC’s *2017 Order* as inconsistent with the plain language of the 1996 Act, and as an abuse of agency discretion.

## CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse the FCC's *Order*.

Respectfully submitted,

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Dated: August 27, 2018

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the length limitations of Fed. R. App. P. 29(a)(5) because it contains 6,322 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), which is less than one-half the maximum length authorized for a principal brief under Fed. R. App. P. 32(a)(7)(B).

I further certify that the attached *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 has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14-point Times New Roman font.

Executed this 27<sup>th</sup> day of August, 2018.

/s/ Christopher Jon Sprigman  
Christopher Jon Sprigman  
*Counsel for Amici Curiae*

## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on August 27, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 27<sup>th</sup> day of August, 2018.

/s/ Christopher Jon Sprigman  
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*Counsel for Amici Curiae*

## APPENDIX: LIST OF *AMICI*

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U.S. Senator

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U.S. Senator

Tammy Baldwin  
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Brian Schatz  
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Richard Blumenthal  
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Tammy Duckworth  
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Cory A. Booker  
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Mark Takano  
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Eleanor Holmes Norton  
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José E. Serrano  
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Adam Smith  
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Jared Huffman  
Member of Congress



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U.S. Senator

Jack Reed  
U.S. Senator

Kamala D. Harris  
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Tina Smith  
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Patrick Leahy  
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Margaret Wood Hassan  
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Jeanne Shaheen  
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Gary C. Peters  
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