

NO. 21-15430

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

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ACA CONNECTS - AMERICA'S COMMUNICATIONS ASSOCIATION, FKA  
American Cable Association, CTIA - THE WIRELESS ASSOCIATION, NCTA - THE  
INTERNET & TELEVISION ASSOCIATION, and USTELECOM - THE  
BROADBAND ASSOCIATION

PLAINTIFFS-APPELLANTS,

v.

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

DEFENDANT- APPELLEE.

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On Appeal from the United States District Court for Eastern California, Sacramento  
2:18-cv-02684-JAM-DB  
Hon. John Mendez, District Judge

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**BRIEF OF AMICI CURIAE ELECTRONIC FRONTIER  
FOUNDATION, ACLU FOUNDATION OF NORTHERN CALIFORNIA,  
ACLU FOUNDATION OF SOUTHERN CALIFORNIA, ACCESS  
HUMBOLDT, BENTON INSTITUTE FOR BROADBAND & SOCIETY,  
CLEAN MONEY CAMPAIGN, FIGHT FOR THE FUTURE, GREENLING  
INSTITUTE, IFIXIT, INC., MEDIA JUSTICE, NATIONAL HISPANIC  
MEDIA COALITION, OAKLAND PRIVACY, REDDIT, INC., TURN—THE  
UTILITY REFORM NETWORK, WRITERS GUILD OF AMERICA, WEST,  
INC. IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici* state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

Dated: May 11, 2021

By: /s/ Corynne McSherry  
Corynne McSherry

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## STATEMENT OF INTEREST OF AMICI<sup>1</sup>

*Amici* are public interest advocates, educators, and businesses, predominantly based in California. Listed alphabetically, we are:

Access Humboldt

ACLU Foundation of Northern California

ACLU Foundation of Southern California

Benton Institute for Broadband & Society

Clean Money Campaign

Electronic Frontier Foundation

Fight for the Future

Greenlining Institute

iFixit, Inc.

Media Justice

National Hispanic Media Coalition

Oakland Privacy

Reddit, Inc.

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure Rule 29(a)(4)(E), *amici* certify that no person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. The parties have consented to the filing of this brief.



TURN—The Utility Reform Network

Writers Guild of America, West, Inc.

*Amici* have deep experience working with a wide range of Californians, and both we and our communities depend on net neutrality protections to connect, learn, speak, and more. We have seen firsthand that stripping away legal protection for net neutrality would inflict serious harm on Californians and on California nonprofits, educators and businesses. We offer our experiences and perspectives to assist the Court’s consideration of this important issue.

## INTRODUCTION

Net neutrality is one of the most important free speech, equity, and innovation issues of the digital age. Internet connectivity is essential to access and share information, find work and resources, and engage in political, civic, and social discourse. But Internet users are at the mercy of their Internet Service Providers (“ISPs”) for effective access to online content and services.<sup>2</sup> Absent effective neutrality rules, ISPs can—and do—act as self-interested gatekeepers

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<sup>2</sup> For a survey of broadband availability in California, see Lisa Prigozen, CALIFORNIA PUBLIC UTILITIES COMMISSION, RETAIL COMMUNICATIONS SERVICES IN CALIFORNIA: REPORT OF THE COMMUNICATIONS DIVISION PURSUANT TO ORDERING PARAGRAPH 3 OF DECISION 16-12-025 ANALYZING THE CALIFORNIA TELECOMMUNICATIONS MARKET (Dec. 2018), [https://www.cpuc.ca.gov/uploadedFiles/CPUCWebsite/Content/UtilitiesIndustries/Communications/Reports\\_and\\_Presentations/CD\\_Mgmt/re/CompetitionReportFinal%20Jan2019.pdf](https://www.cpuc.ca.gov/uploadedFiles/CPUCWebsite/Content/UtilitiesIndustries/Communications/Reports_and_Presentations/CD_Mgmt/re/CompetitionReportFinal%20Jan2019.pdf).

rather than neutral conduits, to the detriment of the public interest. And because the Internet service market is dysfunctional, competition cannot deter or remedy such discriminatory practices.

For decades, the Federal Communications Commission (“FCC”) promoted net neutrality standards to help ensure that ISPs would not exploit their gatekeeping power. Under the shelter of these protections, the Internet became the extraordinary platform for speech and commerce that it is today. In 2018, however, the FCC largely abandoned its regulatory role, based on the misguided notion that “transparency,” i.e., the mere publication of ISPs’ network management policies regardless of how discriminatory they might be, would be enough to spur market competition and protect consumers.

The FCC’s predictions have been proven wrong. Americans pay “the highest average monthly prices” in North America, Europe and Asia.<sup>3</sup> Not coincidentally, competitive options are sharply limited.<sup>4</sup> Without legal or competitive restraints, ISPs can easily renew efforts to shape how customers use the Internet.

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<sup>3</sup> Becky Chau & Claire Park, *The Cost of Connectivity 2020*, OPEN TECHNOLOGY INSTITUTE (Jul. 15, 2020), <https://www.newamerica.org/oti/reports/cost-connectivity-2020>.

<sup>4</sup> See Prigozen, *supra* note 2 (“All of the State’s largest metropolitan markets for fixed broadband Internet service are highly concentrated, with concentration in some markets increasing over the previous year.”); *see also* Jonathan Sallet, *Broadband for America Now*, BENTON INSTITUTE FOR BROADBAND AND SOCIETY, 25 (2020) (“At typical cable broadband speeds of 100/10 Mbps, nearly 80 percent

SB 822 protects Californians by filling the gap the FCC created. It preserves the ability of all Californians, including the most vulnerable, to fully participate—economically, socially, and politically—in everyday life. It ensures that ISPs cannot block, throttle, or distort Internet content, and prohibits zero-rating and other paid-prioritization schemes so that all Californians have full access to lawful Internet content and services—at lower prices.<sup>5</sup> And it guarantees Californians an open Internet as they face present and future crises.

The public has a strong and abiding interest in protecting fair and non-discriminatory access to the Internet and ensuring that the avarice of local monopolies does not result in systemic harm to Californians. That’s why an enormous and diverse coalition campaigned in favor of SB 822’s essential protections.<sup>6</sup>

*Amici* urge the Court to uphold the district court’s denial of injunctive relief.

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of Americans face either a monopoly (no choice) or a duopoly (only one choice) for fixed service”)

<sup>5</sup> See *The Net Neutrality Situation in the EU: Evaluation of the First Two Years of Enforcement* 30–32, EPICENTER .WORKS, (Jan. 29, 2019), [https://en.epicenter.works/sites/default/files/2019\\_netneutrality\\_in\\_eu-epicenter.works-r1.pdf](https://en.epicenter.works/sites/default/files/2019_netneutrality_in_eu-epicenter.works-r1.pdf) (showing that countries that prohibited zero rating under their network neutrality rules in the same way as SB 822 received lower priced wireless services).

<sup>6</sup> CALIFORNIA’S NET NEUTRALITY LAW, EFF, <https://www.eff.org/cases/californias-net-neutrality-law> (collecting letters of support and the full list of supporters).

## ARGUMENT

### I. **SB 822 PROVIDES ESSENTIAL PROTECTIONS FOR VULNERABLE AND MARGINALIZED CALIFORNIANS.**

All Californians benefit from the protections of SB 822—but those protections are especially necessary for California’s most vulnerable residents. By ensuring that ISPs cannot favor or disfavor content or applications of the same nature, SB 822 helps ensure that all Californians have full access to the social, economic, and political power of the Internet.

#### A. **Low-Income Communities Need Affordable Access to Online Content.**

Low-income Californians, like many others, rely on the open Internet to find jobs, obtain health care, get an education, and otherwise take advantage of public and social services.<sup>7</sup> But “low-cost” plans that prioritize access to selected online content do not address this need.<sup>8</sup> Instead, they “create a second-class experience online,” perpetuating structural inequality and increasing barriers to full online

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<sup>7</sup> See *On the Wrong Side of the Digital Divide*, GREENLINING (June 2, 2020), <https://greenlining.org/publications/online-resources/2020/on-the-wrong-side-of-the-digital-divide/> (examining the challenges faced by low-income Californians in Fresno and Oakland with no or limited Internet access).

<sup>8</sup> See, e.g., Barbara van Schewick, *T-Mobile’s Binge On Violates Key Net Neutrality Principles*, (Jan. 29, 2016), <https://cyberlaw.stanford.edu/downloads/van-Schewick-2016-Binge-On-Report.pdf> (examining T-Mobile’s lowest qualifying “Binge On” plan, which caps data usage outside of its selected video streaming services at 3 GB per month, or a mere 9 minutes of video per day).

participation.<sup>9</sup> As a result, the Western Center on Law and Poverty has concluded that preferential treatment of selected content or applications “harms lower-income Internet users the most.”<sup>10</sup>

The problem is especially acute for the many low-income Californians who rely primarily on mobile devices for Internet access.<sup>11</sup> One in five California households with an annual income under \$20,000 access the Internet only through

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<sup>9</sup> SER-164 Renderos Decl. ¶ 35.

<sup>10</sup> Letter from Western Center on Law and Poverty to The Honorable Ricardo Lara. (May 22, 2018), [https://www.eff.org/files/2018/06/12/sb822\\_wclp\\_letter\\_on\\_zero\\_5-23.pdf](https://www.eff.org/files/2018/06/12/sb822_wclp_letter_on_zero_5-23.pdf). These costs may include monetary costs, as ISP steer customers to products that financially benefit the ISP at the consumer’s expense. *See id.* (“For example, an ISP partners with a bank that charges a higher interest rate and so ISP customers are steered in that direction because their data usage is exempted. This can be the same for any predatory partnership that an ISP may choose to engage in.”). *See also* Luca Belli, *Zero Rating: From Generative Internet to Mobile Minitel*, in NET NEUTRALITY RELOADED: ZERO RATING, SPECIALISED SERVICE, AD BLOCKING AND TRAFFIC MANAGEMENT: ANNUAL REPORT OF THE UN IGF DYNAMIC COALITION ON NET NEUTRALITY 23, 42 (2016), [https://internet-governance.fgv.br/sites/internet-governance.fgv.br/files/publicacoes/net\\_neutrality\\_reloaded.pdf](https://internet-governance.fgv.br/sites/internet-governance.fgv.br/files/publicacoes/net_neutrality_reloaded.pdf) (ISPs “create artificial scarcity to direct new or existing users towards a subset of the Internet, so that their attention can be concentrated on zero-rated content and applications and subsequently monetized.”).

<sup>11</sup> For a discussion of other ways that mobile Internet users are disadvantaged, *see generally* Philip M. Napoli & Jonathan A. Obar, *The Emerging Mobile Internet Underclass: A Critique of Mobile Internet Access*, 30 INFORMATION SOCIETY 323 (2014).

smartphones, twice the proportion of the general population.<sup>12</sup> For these families, mobile devices are the only way to access homework, employment, government services, and anything else that requires Internet connectivity. But low-cost mobile plans frequently include highly restrictive data caps<sup>13</sup> accompanied by zero-rating agreements with media companies whose content is exempted from the cap.<sup>14</sup> Thus, while wealthier Californians can access all online content without concern (either with an unlimited wireless data plan or a home wireline Internet

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<sup>12</sup> *Internet Connectivity and the “Digital Divide” in California - 2019*, Tables 3 & 4e, BERKELEY IGS POLL, CALIFORNIA EMERGING TECHNOLOGY FUND, (2019), [https://www.cetfund.org/wp-content/uploads/2019/08/005\\_003\\_002\\_CETF\\_2019\\_002\\_IGS\\_Poll\\_CA\\_Digital\\_Divide\\_ppt.pdf](https://www.cetfund.org/wp-content/uploads/2019/08/005_003_002_CETF_2019_002_IGS_Poll_CA_Digital_Divide_ppt.pdf). Another 12 percent of Californians lack both home and mobile Internet access. *Id.*

<sup>13</sup> For example, AT&T’s lowest-priced mobile plan includes only 4 GB of data per month and does not allow high-definition streaming. *Plans*, AT&T, <https://www.att.com/plans/wireless>. In contrast, “[m]ost of AT&T’s [fixed] plans” have a data cap of 1,024 GB.” Rachel Oaks, *Frustrated with Data Caps? Find Out Which Providers Limit Your Data and Why*, CABLETV (Mar. 18, 2020), <https://www.cabletv.com/blog/which-brands-have-data-caps#att>.

<sup>14</sup> For example, AT&T exempts HBO Max, owned by subsidiary WarnerMedia, from data caps, “essentially paying itself for the exemption [to] give its content an edge over the competition.” Jay Peters, *Senators Criticize AT&T for Not Counting HBO Max Toward Data Caps*, THE VERGE (June 4, 2020), <https://www.theverge.com/2020/6/4/21280914/sen-ed-markey-at-t-zero-rating-hbo-max-net-neutrality>.

connection), low-income Californians that rely on low-cost mobile plans are pushed away from the broader Internet and towards ISP-favored content.<sup>15</sup>

Finally, these discriminatory plans fail to provide cost savings for low-income Californians. Instead, paid prioritization and zero rating practices incentivize ISPs to make the *zero-rated* content more attractive by adopting artificially low caps for *other* content, thereby raising users' overall costs.<sup>16</sup> The end result is that users on zero-rated plans simply use the broader Internet far less than they would otherwise, especially low-income users.<sup>17</sup> As discussed, this is no

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<sup>15</sup> See, e.g., Harold Feld, *T-Mobile Data Roaming Petition Proves Wireless Data Caps Are About Market Power*, PUBLIC KNOWLEDGE (July 11, 2014), <https://www.publicknowledge.org/blog/t-mobile-data-roaming-petition-proves-wireless-data-caps-are-about-market-power/> (“T-Mobile has also said that 37% of subscribers don’t use streaming media because they fear going over their bandwidth caps.”).

<sup>16</sup> See Karl Bode, *Broadband “Zero Rating” Actually Costs Customers More, Study Finds*, VICE (Feb. 7, 2019), [https://www.vice.com/en\\_us/article/j575gg/broadband-zero-rating-actually-costs-customers-more-study-finds](https://www.vice.com/en_us/article/j575gg/broadband-zero-rating-actually-costs-customers-more-study-finds) (“[V]ertically integrated operators may have an incentive to keep data caps artificially low and gigabyte prices artificially high, in order to orient users’ preference towards the affiliated zero-rated applications.”); see also Letter from the Center for Media Justice to Senator Holly Mitchell (May 29, 2018), [https://www.eff.org/files/2018/06/12/cmj\\_support\\_sb822\\_to\\_mitchell.pdf](https://www.eff.org/files/2018/06/12/cmj_support_sb822_to_mitchell.pdf) (arguing that discriminatory zero-rating “incentivizes ISPs to keep customers’ data caps low in order to motivate deep-pocketed websites to pay to have their sites zero-rated”).

<sup>17</sup> *Id.* at 30; see also Feld, *supra* note 15 (“T-Mobile provides evidence that users with capped or throttled broadband use 20x–30x less broadband than users with uncapped broadband”).

coincidence: the zero-rating business model *relies* on deterring access to and participation in the broader Internet.

SB 822's prohibitions on such practices are beneficial to all Californians.

For low-income communities, however, those prohibitions are essential.

**B. Marginalized and Faith Communities Need an Open Internet to Thrive.**

Full participation in modern society requires access to the communicative power of the Internet. Women, people of color and other less powerful communities, and those with currently unorthodox political and social opinions, rely on a fair and open Internet to make their voices heard, whether they seek to persuade, to entertain, to inform, or to call for justice. Workers need the Internet to organize to improve their conditions.<sup>18</sup> Many faith communities rely on the Internet to connect and worship. SB 822 helps ensure that these communities, and especially marginalized speakers and listeners, will not be drowned out or

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<sup>18</sup> When employees of the Canadian ISP Telus organized for better working conditions, the ISP blocked subscribers from accessing the union website (along with 766 unrelated sites that were hosted on the same server). *Telus Cuts Access to Pro-Union Website*, CBC NEWS (July 24, 2005), <https://www.cbc.ca/news/canada/telus-cuts-subscriber-access-to-pro-union-website-1.531166>; Tom Barrett, *To Censor Pro-Union Web Site, Telus Blocked 766 Others*, THE TYEE (Aug. 4, 2005), <https://thetyee.ca/News/2005/08/04/TelusCensor/>.



sidelined by traditional media and wealthy companies with the resources to dominate the public sphere.

In film and television production, minority and female participants “remained underrepresented on every front” as of 2015–16, frequently by a factor of two, three, or even more.<sup>19</sup> Disparities in ownership are even more stark: according to the FCC, male-owned commercial broadcast stations outnumber female-owned stations by almost 10 to 1, non-Hispanic/Latino-owned commercial broadcast stations outnumber Hispanic/Latino-owned stations by more than 14 to 1, and white-owned commercial broadcast stations outnumber minority-owned stations by more than 24 to 1.<sup>20</sup>

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<sup>19</sup> Darnel Hunt et al., *Hollywood Diversity Report 2020*, UCLA COLLEGE OF SOCIAL SCIENCES (2021), <https://socialsciences.ucla.edu/wp-content/uploads/2021/04/UCLA-Hollywood-Diversity-Report-2021-Film-4-22-2021.pdf> (“people of color remained underrepresented [as writers and directors] despite gaining ground on their White counterparts since the last report. . . Constituting slightly more than half of the population, women remained underrepresented among film directors and writers in 2020”); <https://socialsciences.ucla.edu/wp-content/uploads/2020/10/UCLA-Hollywood-Diversity-Report-2020-Television-10-22-2020.pdf> (“people of color remained underrepresented on every industry employment front . . . women remained underrepresented on every front but among digital scripted leads”).

<sup>20</sup> *Fourth Report on Ownership of Broadcast Stations* 4–5, MEDIA BUREAU INDUSTRY ANALYSIS DIVISION, FEDERAL COMMUNICATIONS COMMISSION, (Feb. 2020), <https://docs.fcc.gov/public/attachments/DA-20-161A1.pdf>.

In response, marginalized creators have turned to the Internet as a way to “write themselves into history,” bypassing traditional gatekeepers and connecting directly with their own communities as well as wider audiences.<sup>21</sup> To take just a few representative examples: Ruth Livier created *Ylse*, an award-winning web series, after she was rejected by media executives for proposing “a Latina-driven show written by someone with no track record.”<sup>22</sup> The podcast #GoodMuslimBadMuslim portrays Muslim feminism in a way that rarely appears in corporate media.<sup>23</sup> LGBTQ communities likewise “found places to thrive [on the Internet]” outside of traditional media hierarchies.<sup>24</sup>

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<sup>21</sup> Voices for Internet Freedom Coalition, Comment In the Matter of Restoring Internet Freedom at 4 (July 19, 2017), WC Docket No. WC-17-108, [https://www.freepress.net/sites/default/files/legacypolicy/voices\\_for\\_internet\\_freedom\\_coalition\\_comments.pdf](https://www.freepress.net/sites/default/files/legacypolicy/voices_for_internet_freedom_coalition_comments.pdf); see also Kayla Kumari Upadhyaya, *How Web Series Have Widened TV’s Talent Pool*, VICE (Dec. 13, 2016), [https://www.vice.com/en\\_us/article/wnd435/how-comedy-central-led-the-charge-in-developing-web-series-for-television](https://www.vice.com/en_us/article/wnd435/how-comedy-central-led-the-charge-in-developing-web-series-for-television) (“Women, people of color, and LGBTQ people underrepresented by mainstream media are writing themselves in by creating web shows.”).

<sup>22</sup> *Why Net Neutrality Matters: Protecting Consumers and Competition through Meaningful Open Internet Rules*: Hearing Before the S. Comm. on the Judiciary, 113th Cong. (Sept. 17, 2014) (statement of Ruth Livier), <https://www.govinfo.gov/content/pkg/CHRG-113shrg21221/html/CHRG-113shrg21221.htm>.

<sup>23</sup> #GOODMUSLIMBADMUSLIM, <http://www.goodmuslimbadmuslim.com/>.

<sup>24</sup> Julie Moreau, *Internet a ‘Lifeline for LGBTQ People’: Advocates Slam Net Neutrality Repeal*, NBC NEWS (Dec. 18, 2017),

Many women and people of color also rely on the open Internet—including distributed online platforms such as Etsy and Patreon—to survive and thrive economically. Without enforceable net neutrality requirements, ISPs could essentially demand protection money from those platforms, costs that would be passed on to users or prevent the entry of new competitors altogether.<sup>25</sup>

In addition, activists have been able to make their voices heard without fear that an ISP would discriminate against them for their own interests or in response to politicians or public pressure.<sup>26</sup> As FCC Commissioner Mignon Clyburn put it: “It was through social media that the world first heard about Ferguson, Missouri, because legacy news outlets did not consider it important until the hashtag started trending.”<sup>27</sup>

It is no surprise, then, that marginalized voices have been some of the most powerful supporters of the open Internet, and “some of the most vocal critics of the

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<https://www.nbcnews.com/feature/nbc-out/internet-lifeline-lgbtq-people-advocates-slam-net-neutrality-repeal-n830826>.

<sup>25</sup> SER-163 Renderos Decl. ¶ 30.

<sup>26</sup> SER-160 Renderos Decl. ¶ 10.

<sup>27</sup> *In the Matter of Restoring Internet Freedom*, 33 FCC Rcd 311, 534 (2018) (dissenting statement of Commissioner Clyburn titled “Destroying Internet Freedom”), rev’d in part sub nom. *Mozilla Corp. v. FCC*, 940 F.3d 1 (2019).

repeal, and for good reason: we have more to lose.”<sup>28</sup> The Voices for Internet Freedom Coalition filed comments opposing the FCC’s repeal of its Open Internet Rule on behalf of 63 racial and social justice organizations, describing the open Internet as “digital oxygen” for minority communities.<sup>29</sup>

SB 822 provides precisely the protections that marginalized communities need to escape the constraints of traditional media and tell their own stories. As Ms. Livier put it:

For marginalized communities, our representation—or lack thereof—can be a matter of life or death. When we are dehumanized in the media, it makes it easier for immoral individuals and groups to justify their targeted aggressions against us. A neutral internet empowers us to

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<sup>28</sup> *Preserving an Open Internet for Consumers, Small Businesses, and Free Speech*: Hearing before the H. Comm. on Energy and Commerce, Subcomm. on Communications and Tech., 116th Cong. (Feb. 7, 2019) (Written Testimony of Jessica J. González), [https://www.freepress.net/sites/default/files/2019-02/gonzalez\\_free\\_press\\_written\\_testimony.pdf](https://www.freepress.net/sites/default/files/2019-02/gonzalez_free_press_written_testimony.pdf).

<sup>29</sup> Comments of Voices for Internet Freedom Coalition, *supra* note 21, at iii (“We have seen, first-hand, how the open Internet has empowered people of color with new opportunities for self-expression, entrepreneurship, political participation, education, employment, housing, healthcare, racial justice, and many other vital human needs.... [T]he vast majority of mainstream media owners and decision makers are white men, and on those platforms we are not able to control our own narratives, we are often absent or dehumanized, we are criminalized, we are habitually painted as threats and as the ‘others’. The open Internet is our digital oxygen in these debates, and the Commission’s proposal threatens to take it away.”); *see also* Joseph Torres, *The Voices for Internet Freedom Coalition Urges the Trump FCC to Keep the Net Neutrality Rules*, VOICES FOR INTERNET FREEDOM (Aug. 31, 2017), <http://www.internetvoices.org/blog/2017/08/31/voices-internet-freedom-coalition-urges-trump-fcc-keep-net-neutrality-rules> (discussing the coalition’s Reply Comments, signed by 73 groups, filed the following month).

virtually walk arm-in-arm—with the confidence of knowing that our voices matter and we are not alone, that we are not invisible, and that our experiences are not isolated.<sup>30</sup>

It is essential for these groups that SB 822, and the neutral Internet it promises, be preserved.

The Internet also provides digital oxygen for the many religious communities that depend on online tools to connect, worship, serve, and call others to action. As Valerie Kaur, co-founder of Faithful Internet, explains:

Today's moral leaders are using the Internet to meet the needs of new generations, speak truth to power, and minister to the underserved . . . They are using online tools to help us hear the call of wisdom traditions, not to violence and exclusion, but to love and service.<sup>31</sup>

That activity depends on a fast connection that can use large amounts of data, for which churches and parishioners are already paying. But they should not be forced to pay a new set of fees, particularly when budgets are already stretched to the brink by the recession.

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<sup>30</sup> *Preserving an Open Internet for Consumers, Small Businesses, and Free Speech*: Hearing before the H. Comm. on Energy and Commerce, Subcomm. on Communications and Tech., 116th Cong. (Feb. 7, 2019) (Testimony of Ruth Livier), <https://docs.house.gov/meetings/IF/IF16/20190207/108845/HHRG-116-IF16-Wstate-LivierR-20190207.pdf>.

<sup>31</sup> Carol Kuruville, *Why 12 Top Religious Leaders Are Proud To Support Net Neutrality*, HUFFPOST (June 12, 2015), [https://www.huffpost.com/entry/religious-leaders-on-net-neutrality\\_n\\_7562454?1434107326](https://www.huffpost.com/entry/religious-leaders-on-net-neutrality_n_7562454?1434107326).

Finally, ISP content selection for its zero-rated plans may be motivated by social and political as well as economic objectives. Such practices can have an adverse impact on speech, allowing ISPs to become gatekeepers controlling what content will be available to their lower-income customers, and restricting creators' ability to reach all sectors of society. Absent net neutrality rules, it is not unreasonable to imagine that ISPs may also take political considerations into account in designing their plans, allowing content that favors their own interests and candidates to be available without charge but restricting customers' access to opposing views.

**C. Small Businesses Need Net Neutrality to Grow and Thrive.**

The open Internet has enabled an explosion of innovation over the past 25 years. Google, for instance, started as two students with a better search algorithm. If Google had been forced to negotiate deals with ISPs, it might never have overcome the search giants of the time: Excite and Alta Vista. The same holds true for many other innovators, including marketplaces like eBay, Craigslist, and Etsy, and online communication platforms like Facebook and Twitter. They have thrived in large part because neither service providers nor anyone else had an advance economic veto right on new applications, services, or content.

SB 822 is necessary to ensure that pattern continues. Internet "fast lanes" and pricing schemes enable ISPs to contract with now-entrenched incumbents not

only to give them prioritized transport but also to make sure that new entrants and nascent competitors will not be able to obtain such treatment even if they wish to pay a premium for such service. SB 822 insures that ISPs cannot stifle the emergence of the next generation of innovators. Etsy, Inc.—now a major e-commerce website with hundreds of millions of dollars per year in revenue—has said that it would likely have failed if it had to pay for priority access to users.<sup>32</sup> Other small businesses, their users, and Internet creators have echoed those concerns.<sup>33</sup>

As noted above, the loss of net neutrality protections would cause particular harm to traditionally marginalized entrepreneurs, but they will not be the only ones at risk. Writer and entrepreneur Ryan Singel has explained how fast lanes would

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<sup>32</sup> Etsy, Inc., Comments In the Matter of Open Internet Remand, Framework for Broadband Internet Service at 5 (July 8, 2014), GN Docket Nos. 14-28 & 10-127, <https://blog.etsy.com/news/files/2014/07/Etsy-Open-Internet-Comments-7.8.14.pdf>.

<sup>33</sup> See, e.g., Letter from Open Engine & The Open Tech. Inst. at the New Am. Found. to the FCC (May 7, 2014), *available at* <http://engine.is/wp-content/uploads/Company-Sign-On-Letter.pdf>; Mike Masnick, *Kickstarter, Etsy and Dwolla All Speak Out On Net Neutrality and Why the FCC's Plan Is Dangerous to Innovation*, TECHDIRT (July 11, 2014), <https://www.techdirt.com/articles/20140710/17450827845/kick-starter-etsy-dwolla-all-speak-out-net-neutrality-why-fccs-plan-is-dangerous-to-innovation.shtml>.; Geoff Weiss, *Hank Green, Fine Brothers, Meg DeAngelis Affirm Support For Net Neutrality In Letter To FCC*, TUBEFILTER (JULY 6, 2017), <https://www.tubefilter.com/2017/07/06/hank-green-fine-brothers-meg-deangelis-net-neutrality-internet-creators-guild/>.

force “every website, every startup, and every small merchant” to buy in if they want to succeed: “You have to be fast just to compete. Users bounce and customers don’t buy if sites or apps are slow to load or feel laggy.”<sup>34</sup> Startups would have an untenable choice: either burn through scarce resources to match deep-pocketed incumbents or watch their businesses fail to grow.<sup>35</sup> When they are inevitably forced to pass those costs on to customers, everyone loses.<sup>36</sup>

For similar reasons, SB 822 is essential to help new businesses find investors. Without net neutrality protections, entrepreneurs and investors will have to factor in the unpredictability of ISPs’ prioritization decisions. “[V]enture capitalists looking to invest in the next big thing now have to consider the possibility that the winners in the marketplace can now be determined by the ISPs that control Internet traffic to their subscribers, not by consumers themselves.”<sup>37</sup>

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<sup>34</sup> Ryan Singel, *Expect Fewer Great Startups if the FCC Kills Net Neutrality*, WIRED (Dec. 12, 2017), <https://www.wired.com/story/expect-fewer-great-startups-if-the-fcc-kills-net-neutrality/>.

<sup>35</sup> *Id.*

<sup>36</sup> SER-153 Ohanian Decl. ¶ 9 (“[I]f new startups are unable to get their companies off the ground and offer better products and services than those currently available, consumers . . . will have to be content with whichever products and services ISPs allow them hear about, purchase or download, and use”).

<sup>37</sup> SER-152-53 Ohanian Decl. ¶ 8.



These risks are not hypothetical. ISPs have a record of prioritizing their own financial interests and a continuing interest in doing so. For example, relying on the FCC’s own findings, the D.C. Circuit concluded that ISPs “have incentives to interfere with the operation of third-party Internet-based services that compete with the providers’ revenue generating telephone and/or pay-telephone services,” *Verizon v. FCC*, 740 F.3d 623, 645–46, (D.C. Cir. 2014) (citing *Preserving the Open Internet*, 25 F.C.C. Rcd. 17905 (2010) (“2010 Order”)); *see also id.* at 648 (“the threat that broadband providers would utilize their gatekeeper ability to restrict edge-provider traffic is not . . . ‘merely theoretical.’” (citing 2010 Order ¶ 35)). Indeed, in the early days of the Internet, telecom providers lobbied the FCC to impose access charges on Internet companies, as is done in some other countries.<sup>38</sup> Today’s ISPs would doubtless like to impose those charges themselves.

Clear, focused rules can help ward off these threats. By providing those rules, SB 822 helps support California businesses and their customers. Enjoining it helps no one but powerful ISPs.

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<sup>38</sup> *See* Susan Crawford, *CAPTIVE AUDIENCE: THE TELECOM INDUSTRY AND MONOPOLY POWER IN THE NEW GILDED AGE* 90–91 (2014) (reviewing the regulatory history behind access charges in the early telecommunications market).

**D. Schools, Libraries and Students Need Neutral Access to Online Educational Resources.**

Like small businesses, libraries and schools are justifiably concerned that paid-prioritization schemes will degrade access to material on which students and the public depend. If ISPs favor commercial content, then educational, cultural, and political resources will be harder to reach, limiting the options available to educators and leading some students and other members of the public to abandon their efforts to learn and grow.

Even prior to the COVID-19 pandemic, countless Californians used bandwidth-intensive educational resources that depend on a neutral Internet. In 2019, over 300,000 Californians enrolled in online college programs.<sup>39</sup> Public libraries make large data collections available online, such as the San Francisco Public Library's collection of over 250,000 digitized historical photographs and over 10,000 popular songs from the Dorothy Starr Sheet Music Collection.<sup>40</sup> Non-profits such as the multilingual collaborative online encyclopedia Wikipedia and

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<sup>39</sup> Ashley A. Smith, *California finds solution to save distance learners' financial aid*, EDSOURCE (Jul. 28, 2019), <https://edsource.org/2019/california-finds-solution-to-save-distance-learners-financial-aid/615662>.

<sup>40</sup> *San Francisco Historical Photograph Collection*, SAN FRANCISCO PUBLIC LIBRARY, <https://sfpl.org/locations/main-library/historical-photographs>; *Dorothy Starr Collection*, SAN FRANCISCO PUBLIC LIBRARY, <https://sfpl.org/locations/main-library/art-music/searching-songs-sfpl/dorothy-starr-collection>.

the free educational site Khan Academy provide reference and learning materials that students, families, and teachers rely on daily.<sup>41</sup>

Some resources are particularly critical for learners from vulnerable communities. K-12 students across California, including students experiencing homelessness, access resources provided by California Virtual Academies.<sup>42</sup> The Sacramento County Office of Education maintains USA Learns, a free, multimedia system for those learning English that relies on high-quality streaming video so that learners can observe speakers' mouths and body language.<sup>43</sup> Public libraries offer targeted resources for elderly people, those seeking citizenship, and those seeking a high-school diploma.<sup>44</sup>

All of these resources will suffer if ISPs are permitted to force educational providers and students to pay a premium for high-quality data transmission.<sup>45</sup>

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<sup>41</sup> See WIKIPEDIA, <https://en.wikipedia.org/wiki/Wikipedia>; KHAN ACADEMY, <https://www.khanacademy.org/>.

<sup>42</sup> *Enrollment and Attendance FAQs*, CALIFORNIA VIRTUAL ACADEMIES, <https://cava.k12.com/general-faqs/enrollment-and-attendance-faqs.html>.

<sup>43</sup> *English Listening*, USA LEARNS, <https://www.usalearns.org/listening-to-language>.

<sup>44</sup> See, e.g., *Research and Learn*, SAN FRANCISCO PUBLIC LIBRARY, <https://sfpl.org/research-learn>.

<sup>45</sup> See, e.g., Andrea Peterson, *Why the Death of Net Neutrality Would Be a Disaster for Libraries*, WASH. POST: THE SWITCH (May 16, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/05/16/why-the-death->

Absent net neutrality protections, educators (and other not-for-profit enterprises) “be forced to compete directly with for-profits on the cost of messaging,”<sup>46</sup> Californians will find it harder to leverage the Internet for lifelong learning, and local institutions will find it harder to reach, educate and communicate with their constituents.

## **II. THE CONTINUING STATEWIDE EMERGENCY REINFORCES THE NEED FOR SB 822’S PROTECTIONS.**

ISPs have shown that they are willing to use emergencies to exploit their gatekeeper power for financial gain. California has faced multiple public-health crises, including climate change-induced wildfires and the COVID-19 pandemic, and, unfortunately, is likely to see similar crises in the future. SB 822’s foundational protections are critical to enabling California’s emergency response, because it ensures that the Internet remains a tool for both rescue workers and affected individuals to connect and seek help without interference.

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of-net-neutrality-would-be-a-disaster-for-libraries (discussing the importance of net neutrality for libraries and their users).

<sup>46</sup> Tom Watson, *Net Neutrality And Social Entrepreneurship: Why Freedom To Create And Share Matters*, FORBES (Jan. 15, 2014), <https://www.forbes.com/sites/tomwatson/2014/01/15/net-neutrality-and-social-entrepreneurship-why-freedom-to-create-and-share-matters/> (quoting Andrew Rasiej, founder of the Personal Democracy Forum).

**A. All Californians Rely on Online Communications in Emergencies.**

The threat of ISPs leveraging their ability to restrict the free flow of information in an emergency is not hypothetical. As discussed in Fire Chief Anthony Bowden’s Declaration,<sup>47</sup> Verizon throttled the Santa Clara Fire Department during one of the worst fires in the state’s history while attempting to upsell them to more expensive data plans.<sup>48</sup> Verizon understood that such throttling would render the fire department’s broadband access useless for any practical application, but the lack of legal protection at the time tied California’s hands in stopping unreasonable and harmful conduct.<sup>49</sup>

SB 822 ensures that all Californians retain access to the open Internet so that they can share and obtain essential information in times of crisis.<sup>50</sup> Last year’s even more devastating fire season, when firefighters and citizen alike are relying on Internet communications to respond to and share developments, only underscores

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<sup>47</sup> SER-6-7 Bowden Decl. ¶¶ 6–11.

<sup>48</sup> Jon Brodtkin, *Verizon throttled fire department’s “unlimited” data during Calif, wildfire*. ARS TECHNICA (Aug. 21, 2018), <https://arstechnica.com/tech-policy/2018/08/verizon-throttled-fire-departments-unlimited-data-during-calif-wildfire>.

<sup>49</sup> SER-7 Bowden Decl. ¶ 10.

<sup>50</sup> AB 1699, enacted in 2020, prohibits throttling public safety officials’ communications, but does not extend to the general public. Cal. Pub. Util. Code § 2898 (West) (2020).

the importance of that power. Californians rely on the Internet to exchange public safety information with the government, but also to track down and connect with loved ones. Without SB 822, Californians could find themselves in the same situation as the Santa Clara Fire Department: unable, thanks to data caps or other restrictions, to access information they need or connect with others.

**B. Net Neutrality Protections Were Crucial During the COVID-19 Pandemic and Californians With Disabilities or Who Continue to Work Remotely Need Those Same Protections.**

The pandemic has given all Californians a taste of what it is like to depend on the Internet for nearly all work, social, educational, and commercial interactions. All of the risks SB 822 mitigates are exacerbated for Californians who rely on the Internet for everything from education to work to food delivery.<sup>51</sup>

During the pandemic, that has been nearly everyone. But seasonal wildfire smoke keeps millions of people indoors for days or weeks at a time,<sup>52</sup> and hundreds of thousands of Californians who are elderly or have disabilities are

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<sup>51</sup> See Rich Miller, *Internet Exchanges See Record Levels of Network Traffic*, DATA CENTER FRONTIER (Mar. 11, 2020), <https://datacenterfrontier.com/internet-exchanges-see-record-levels-of-network-traffic/> (discussing the record surge in Internet traffic at the start of the pandemic).

<sup>52</sup> Nathan Rott, *Study Finds Wildfire Smoke More Harmful To Humans Than Pollution From Cars*, NPR (Mar. 5, 2021), <https://www.npr.org/sections/health-shots/2021/03/05/973848360/study-finds-wildfire-smoke-more-harmful-to-humans-than-pollution-from-cars> (one-in-seven people on the West coast experienced at least a day of harmful wildfire smoke in 2020).

homebound, dependent on year-round on Internet access to the same extent as the typical Californian has been during the pandemic.<sup>53</sup>

SB 822 has helped ensure that they can keep that connection. As discussed above, ISPs artificially limit access to general Internet content to improve profits, not bandwidth.<sup>54</sup> Even during the pandemic, an ISP, outside of California, has even punished entire neighborhoods for using “too much” Internet by reducing caps (or, in other words, charging more to everyone who exceeds the new, lower cap).<sup>55</sup>

Workers’ livelihoods could be even further at risk if they cannot afford to pay for more expensive plans as they work from home or are hit with overage fees. And students could similarly risk losing access to education, simply by exceeding a data limit.

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<sup>53</sup> Katherina A. Ornstein et al., *The Epidemiology of the Homebound in the United States*, JAMA Intern. Med. (Jul. 2015), 175(7):1180-86, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4749137/> (5.6% of Medicare-eligible adults not in institutions are homebound).

<sup>54</sup> See *supra* Part I.A.

<sup>55</sup> Jon Brodtkin, *Cox slows Internet speeds in entire neighborhoods to punish any heavy users*, ARS TECHNICA (Jun. 8, 2020), <https://arstechnica.com/tech-policy/2020/06/cox-slows-internet-speeds-in-entire-neighborhoods-to-punish-any-heavy-users>.

SB 822 also ensures that large ISPs do not artificially congest their networks in order to squeeze exorbitant fees from content providers and other networks.<sup>56</sup> The New York Attorney General has documented how, prior to the FCC’s 2015 Open Internet Order, the largest ISPs made a “deliberate business decision to use congestion to strong-arm backbone providers and edge providers into paying for access” to their customers.<sup>57</sup> For the many Californians staying home, that artificial congestion could be catastrophic. The data-intensive apps and services people need to work and connect, such as video conferencing, online telephony, and secure VPN connections, must not be vulnerable to such tactics. SB 822 addresses those risks, preventing ISPs from exploiting the crisis to the detriment of millions of customers who cannot seek nor afford better options. Its protections must not be disturbed.

## CONCLUSION

For the foregoing reasons, *amici* urge the Court to affirm the district court’s order.

Dated: May 11, 2021

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<sup>56</sup> SER 19-28 Schaeffer Decl. ¶¶ 6–30.

<sup>57</sup> SER 28 Schaffer Decl. ¶ 32 (quoting State of New York, Comments in the Matter of Restoring Internet Freedom at 7 (May 23, 2017), FCC WC Docket No. 17-108, *available at* <https://www.fcc.gov/ecfs/filing/10717583023587>).



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

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Dated: May 11, 2021

By: /s/ Corynne McSherry  
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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 11, 2021.

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