

**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 Petition for Review of an Order of the  
Federal Communications Commission

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***AMICUS CURIAE* BRIEF OF eBAY INC.  
IN SUPPORT OF PETITIONERS**

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August 27, 2018

**CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND  
RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* eBay Inc. hereby submits its Certificate as to Parties, Rulings, and Related Cases as follows:

**A. Parties and Amici.** All parties, intervenors, and amici appearing in this Court are listed in the Briefs for the Petitioners. Additional amici have filed notices of their intent to participate since those briefs were filed. In addition to eBay Inc., the new amici are City of New York, Electronic Frontier Foundation, Professors of Communications Law, Professors Scott Jordan and Jon Peha, Consumers Union, Engine Advocacy, Members of Congress, National Association of Regulatory Utility Commissioners, and Twilio, Inc.

**B. Rulings Under Review.** The ruling under review is the FCC's Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order*, 33 FCC Rcd. 311 (2018) (the "*RIF Order*").

**C. Related Cases.** Related cases are identified in the Brief for Non-Government Petitioners. We are aware of no other pending cases related to this one.

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the U.S. Court of Appeals for the District of Columbia Circuit, eBay Inc. certifies that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

/s/ Devendra T. Kumar

August 27, 2018

**CERTIFICATE OF COUNSEL REGARDING NECESSITY OF  
SEPARATE *AMICUS CURIAE* BRIEF**

Pursuant to D.C. Cir. R. 29(d), eBay Inc. hereby certifies that it is submitting a separate brief from other *amici* in this case due to the specialized nature of its interest in this proceeding. To eBay's knowledge, no other *amici* is focusing on the subjects discussed in this Brief that are unique to eBay's background and perspective, *i.e.*, the effect of the FCC's action in the underlying Order under review on small businesses who use online marketplaces such as eBay's. Accordingly, eBay Inc. certifies that filing a joint brief would not be practicable.

/s/ Devendra T. Kumar

August 27, 2018

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## GLOSSARY

<i>2005 Policy Statement</i>	Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, <i>Policy Statement</i> , 20 FCC Rcd. 14986 (2005)
<i>2015 Open Internet Order</i>	Protecting and Promoting the Open Internet, <i>Report and Order On Remand, Declaratory Ruling, and Order</i> , 30 FCC Rcd. 5601 (2015)
ISP	Internet Service Provider
MSME	Micro, small, and medium-sized enterprise
OTT	Over-the-top
<i>RIF Order</i>	Restoring Internet Freedom, <i>Declaratory Ruling, Report and Order, and Order</i> , 33 FCC Rcd. 311 (2018)



## INTEREST OF AMICUS CURIAE<sup>1</sup>

Founded in 1995 in San Jose, California, eBay Inc. (“eBay”) is one of the world’s largest and most vibrant marketplaces for discovering great value and unique selection. eBay empowers over 171 million buyers globally on its marketplaces and hosts approximately 1.1 billion listings at any given time. eBay’s marketplace also enables hundreds of thousands of U.S. entrepreneurs, small businesses, as well as mid-size and large businesses, to reach customers around the world. eBay is facilitating a new kind of commerce that is truly beneficial for Main Street businesses across the country.

The small businesses that thrive on eBay’s online platform rely on an open Internet to reach customers and suppliers around the country and world. These small businesses would also be hurt if they were made to pay extra for “fast lanes” or other forms of prioritized access that are no longer prohibited by the FCC following the *RIF Order*. Accordingly, eBay has a significant interest in the issues on appeal and believes its views on the impact on small businesses of the FCC Order under review will assist the Court.

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(c), *amicus* eBay Inc. states that no counsel for any party authored this brief in whole or part; no such party or counsel made a monetary contribution intended to fund its preparation or submission; and no person other than eBay and its counsel made such a contribution. Pursuant to D.C. Cir. R. 29(a), all petitioners, respondents, and intervenors in this appeal have consented to the filing of this brief.

## SUMMARY OF ARGUMENT

Lost in the discussions of open Internet protections that too often focus on disputes between large ISPs and large OTT content providers is the fact that the open Internet has served as a level playing field that allows online marketplaces like eBay to enable individual entrepreneurs and small businesses to thrive around the country, including in rural and other underserved areas. Online marketplaces such as eBay play a critical role in allowing small businesses to trade globally and in fostering small business growth that is more rapid, more balanced, and more inclusive than that of the traditional economy. Open Internet protections enforced by the FCC enabled these Internet-enabled small businesses to start and invest in their ventures with the confidence that they would be able to reach their users around the world and would be able to compete with larger corporations without needing to negotiate for carriage on networks or purchase prioritized access.

In the *Restoring Internet Freedom* Order, the FCC ignored the reliance of small businesses (and edge providers more generally) on open Internet protections and the potential harm in the removal of such protections. Small businesses such as those that rely on eBay's online marketplace are particularly vulnerable to the FCC's elimination of all open Internet rules except a transparency rule because they lack the resources to access and understand ISP disclosures and take meaningful action to address potential harmful ISP conduct. In particular,

eliminating the restrictions on paid prioritization will harm Internet-enabled small businesses as they would find themselves priced out of “fast lanes” and other forms of prioritized or preferential access.

The FCC’s failure to consider the impact of its decisions on the small businesses that have thrived using online marketplace platforms such as eBay is unreasonable, arbitrary, and capricious.

## ARGUMENT

### **I. THE FCC ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER BY FAILING TO ADEQUATELY CONSIDER THE IMPACT OF THE *RESTORING INTERNET FREEDOM ORDER* ON PARTIES, INCLUDING SMALL BUSINESSES, THAT RELY ON AN OPEN INTERNET**

eBay agrees with Petitioners’ arguments that the *RIF Order* is arbitrary and capricious because, among other reasons, the FCC focused almost exclusively on the purported impact of the *2015 Open Internet Order* on investment by ISPs and did not consider adequately the impact of open Internet protections on investment at the edge or the reliance by edge companies on the FCC’s longstanding commitment to open Internet principles. Non-Gov’t Pet’rs’ Br. at 68–71; Gov’t Pet’rs’ Br. at 29–32. An agency’s decision is arbitrary and capricious if it “entirely failed to consider an important aspect of the problem . . . .” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983). As Petitioners explain, the FCC’s cursory and dismissive consideration of edge

provider reliance on open Internet protections fails to consider an important aspect of the need for and impact of open Internet protections and therefore is unreasonable, arbitrary, and capricious. Non-Gov't Pet'rs' Br. at 70–71; Gov't Pet'rs' Br. at 29–32.

A further aspect of the FCC's arbitrary and capricious analysis of the effects of open Internet protections is its failure to consider fairly the impact of the *RIF Order* on small businesses and entrepreneurs that rely on an open Internet to trade and reach customers globally via online marketplaces such as eBay, and that would be harmed by a lack of enforceable open Internet rules. As explained below, unfettered access to the Internet has been a critical factor in the success of small businesses around the United States.

**A. An Open Internet Without Gatekeepers Has Enabled Small Businesses to Trade Globally and Has Fostered New, Inclusive Small Business Growth**

For almost a decade, eBay has conducted research on the growth of Internet-enabled small businesses, and has shared its findings in publicly-available reports on the formation and growth of small businesses that are enabled by eBay's online marketplace.<sup>2</sup> The findings of this research highlight the critical role that eBay's

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<sup>2</sup> See, e.g., eBay, *United States Small Online Business Growth Report*, Spring 2018, available at [https://www.ebaymainstreet.com/sites/default/files/united\\_states\\_small\\_online\\_business\\_growth\\_report\\_5-17-18.pdf](https://www.ebaymainstreet.com/sites/default/files/united_states_small_online_business_growth_report_5-17-18.pdf) (“eBay Small Business Growth Report”); eBay, *Platform-Enabled Small Business Formation as a Counterweight Against Forces*

online marketplace plays in allowing small businesses to trade globally and in fostering small business growth that is more rapid, more balanced, and more inclusive than that of the traditional economy.

More specifically, eBay's research has found that:

- In the United States, 96 percent of eBay-enabled micro, small, and medium-sized enterprises (“MSMEs”) are exporters, compared to just one percent of traditional businesses that serve customers in foreign markets.<sup>3</sup> Similarly, eBay-enabled MSMEs in the U.S. export to an average of 17 different export markets, compared to an average of just 4 markets for traditional businesses, while 58 percent of eBay-enabled MSMEs export to 10 or more export markets compared to just 8 percent of all U.S. exporters.<sup>4</sup>
- From 2011 to 2015, net enterprise growth was five times more robust on eBay than in the overall economy. Over this time, the rate of growth in the net number of eBay-enabled MSMEs was 21.8 percent, compared to 4.1 percent for businesses in the overall economy.<sup>5</sup> Moreover, this growth in enterprise formation was more than five times more balanced (*i.e.*, more

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*of Economic Concentration*, June 2018, available at [https://www.ebaymainstreet.com/sites/default/files/ebay\\_policy-lab\\_geographic-inclusion\\_report\\_2018-05-30\\_vf\\_2.pdf](https://www.ebaymainstreet.com/sites/default/files/ebay_policy-lab_geographic-inclusion_report_2018-05-30_vf_2.pdf) (“eBay Small Business Formation Report”).

<sup>3</sup> eBay Small Business Growth Report at 7.

<sup>4</sup> *Id.* at 8–9.

<sup>5</sup> eBay Small Business Formation Report at 9–10.

evenly distributed amongst counties of varying economic well-being) and inclusive (*i.e.*, more growth in less prosperous counties) than when compared to the traditional economy.<sup>6</sup>

- Specifically, when U.S. counties are grouped into quintiles of well-being, the net rate of growth of businesses in the traditional economy was significantly higher in the more prosperous quintiles (6 and 4.8 percent respectively in the most and second-most prosperous quintiles) but dropped precipitously in the bottom three quintiles (1.6, 0.5, and minus-2.8, respectively). In contrast, the net rate of growth of eBay-enabled MSMEs was comparatively much more flat across the five quintiles — 21.2, 24.7, 20.6, 16.8, and 16.7 percent, respectively, in the most-to-least prosperous quintiles of counties.<sup>7</sup>
- Finally, in the bottom three quintiles of counties ranked by prosperity (accounting for approximately one-third of the total U.S. population), the net rate of enterprise growth on eBay was 19.3 percent compared to just 0.55 percent for small businesses in the overall economy. Looked at another way, on eBay, the bottom three quintiles accounted for 20 percent of total

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<sup>6</sup> *Id.* at 10–14.

<sup>7</sup> *Id.* at 9–11.

net enterprise growth, while the same quintiles accounted for less than 4 percent of the growth of traditional enterprises.<sup>8</sup>

This research demonstrates the benefits of online platforms like eBay, which help small businesses succeed by enabling much easier access to information than in the traditional economy and by simplifying and streamlining selling and purchasing both in the U.S and internationally. Lower costs of doing business over distance and access to global consumer markets for even very small enterprises appears to have resulted in a much more robust rate of enterprise creation than exhibited in the traditional economy. All of this assumes, of course, that these small business have access to consumers and suppliers without gatekeepers and without facing competitive disadvantages vis-à-vis larger entities paying for prioritized access. While the discussion of open Internet protections often focuses on disputes between large ISPs and large OTT content providers, eBay's research demonstrates that the open Internet has served as a level playing field that allows online marketplaces like eBay to enable individuals and small businesses to thrive around the country, including in rural and other underserved areas.

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<sup>8</sup> *Id.* at 12–14.

**B. The FCC's Analysis Failed to Consider the Reliance of Internet-Enabled Small Businesses on an Open Internet and the FCC's Historic Promises to Protect Internet Openness**

For well over a decade prior to the *RIF Order*, users of broadband networks could expect to plan and invest in Internet-enabled businesses with the knowledge that the FCC would protect an open and neutral Internet that would allow them to compete and grow. *See* Gov't Pet'rs' Br. at 30–31 (explaining reliance on FCC's open Internet policies since 2005). As far back as 2005, when retail broadband networks were still in their relative infancy, the FCC promised to preserve and protect an open Internet in which broadband users would have access to all lawful content and would be able to use any service or application subject to the needs of law enforcement. *2005 Policy Statement* at 3. Since then, the FCC has consistently acted to preserve its commitment to an open Internet. *See United States Telecom Ass'n v. FCC*, 825 F.3d 674, 693–96 (D.C. Cir. 2016); Non-Gov't Pet'rs' Br. at 71; Letter from Eric Null, Open Technology Institute, to Marlene H. Dortch, FCC, WC Docket No. 17-108, at 2–6 (Dec. 7, 2017). Internet-enabled businesses such as those that rely on eBay's online marketplace could start and invest in their ventures with the confidence that they would be able to reach their users around the world and would be able to compete with larger corporations without needing to negotiate for carriage on the network or purchase prioritized access.



As discussed above, Internet-enabled businesses have thrived under a regulatory framework in which the FCC acted as a “cop on the beat” to protect an open Internet. The importance of open Internet protections to small businesses was made clear during the course of the underlying FCC proceeding.<sup>9</sup> However, by effectively relinquishing its willingness and ability to preserve small businesses’ unfettered and equal access to their customers, the FCC has jeopardized this engine of small business growth and entrepreneurship. The FCC’s failure to consider the potential costs to Internet-enabled small businesses in its cost-benefit analysis represents arbitrary and capricious decision-making.

**II. THE FCC’S DECISION TO ELIMINATE ALMOST ALL OPEN INTERNET RULES IS UNREASONABLE, ARBITRARY, AND CAPRICIOUS BECAUSE THE CURRENT RULES CANNOT ADDRESS THE POTENTIAL HARMS TO USERS AND TO THE SMALL BUSINESSES THAT RELY ON EBAY’S PLATFORM**

As discussed above, an open Internet has enabled Internet-enabled businesses to trade globally and thrive while being located anywhere in the country with a broadband connection. A neutral Internet has been a particular boon to small businesses, such as those that rely on eBay’s online marketplace, because it provides a fair shot at competing with larger competitors without having to pay for

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<sup>9</sup> See, e.g., Reply Comments of Internet Association, WC Docket 17-108, Aug. 30, 2017, at 4 n.14, 8–9; Comments of Etsy, Inc., WC Docket No. 17-108, July 17, 2017.

prioritized or other forms of preferential access, and allows small businesses to rapidly scale their operations.

In the *RIF Order*, the FCC acknowledged the importance of an open Internet and the potential for harmful practices by ISPs, *see, e.g., RIF Order* ¶¶ 208–09, 265, but nevertheless decided to eliminate rules that prohibited blocking, throttling, paid prioritization, and other unreasonable practices. As Petitioners correctly note:

Agencies often abolish a rule when the problem the rule was intended to solve has gone away. This is the unusual case where the agency recognizes the continuing existence of the problem targeted by the rule, and announces it will stop doing anything to address it.

Non-Gov't Pet'rs' Br. at 51. eBay concurs with Petitioners' arguments concerning the inadequacy of other statutes and the transparency rule to address the potential harms identified. *Id.* at 51–55. In addition, a transparency rule alone with no protections against blocking, throttling, paid prioritization, or other discriminatory conduct would particularly harm small businesses, who would be left with no meaningful recourse if ISPs engage in non-neutral, discriminatory conduct as long as that conduct is disclosed in advance. In particular, eliminating the restrictions on paid prioritization will harm Internet-enabled small businesses as they would find themselves priced out of “fast lanes” and other forms of prioritized or preferential access. Moreover, the vast majority of eBay-enabled small businesses would find it extremely difficult if not impossible to access and

understand ISP disclosures and then do anything meaningful to address potential harmful ISP conduct.

While small businesses will never have the resources of larger entities to resolve disputes, the FCC's informal complaint process along with the FCC acting as a "cop on the beat" enforcing meaningful open Internet rules is a far superior solution for small businesses than any of the alternatives that the *RIF Order* assumes will address harmful conduct by ISPs. The FCC's failure to consider the impact of its decisions on the small businesses that have thrived using online marketplace platforms such as eBay is unreasonable, arbitrary, and capricious.

### CONCLUSION

Accordingly, eBay urges the Court to vacate the *RIF Order*.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 2,359 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the types style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

/s/ Devendra T. Kumar

August 27, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that on August 27, 2018, I electronically filed the foregoing Brief *Amici Curiae* of eBay Inc. with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I further certify that on August 27, 2018, service of the foregoing will be made electronically via the CM/ECF system upon the participants in the case who are registered CM/ECF users. Participants who are not registered CM/ECF users will receive service via U.S. mail unless another attorney for the same party is receiving service through the CM/ECF system.

/s/ Devendra T. Kumar

August 27, 2018