



Initial Comments of the County of Santa Clara,
Santa Clara County Central Fire Protection District,
and the City of Los Angeles
in Response to the Commission's February 19, 2020
Public Notice, Restoring Internet Freedom,
WC Docket Nos. 17-108, 17-287, 11-42

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ELECTRONICALLY SUBMITTED (<https://www.fcc.gov/ecfs>)

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Re: Initial Comments of the County of Santa Clara, Santa Clara County Central Fire Protection District, and City of Los Angeles in Response to the Commission's February 19, 2020 Public Notice, DA 20-168
Restoring Internet Freedom, WC Docket Nos. 17-108, 17-287, 11-42

Dear Ms. Dortch:

We write on behalf of the County of Santa Clara (the "County"), the Santa Clara County Central Fire Protection District ("County Fire"), and the City of Los Angeles (the "City") to provide initial comments in response to the February 19, 2020 Public Notice through which the Federal Communications Commission (the "Commission" or "FCC") seeks to refresh the record in the Restoring Internet Freedom and Lifeline proceedings in light of *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019). *See* DA 20-168 (the "Public Notice").

While we require additional time to fully and completely respond to the Public Notice because of the COVID-19 public-health emergency, it is already clear that the Commission's *Restoring Internet Freedom Order* (the "*Order*") risks public health and safety because it repealed the mandatory open internet principles the Commission had set out in its 2015 Report and Order, *In the Matter of Protecting and Promoting the Open Internet*, WC Docket No. 14-28 (the "Net Neutrality Rules"). The Commission has misapprehended the fundamental and critical public-safety questions at stake in this proceeding, focusing instead on narrow technical questions that will generate an incomplete and misleading factual record regarding public safety. The *Order* necessarily increases risk to public safety because its repeal of the Net Neutrality Rules prevent the Commission from ensuring the robust and reliable transmission of public health and safety-related communications between and among local governments and their residents. Instead, the *Order* permits broadband providers to prioritize profit, even when it disrupts these vital and time-sensitive communications. Yet recent experience, including in the context of COVID-19, reflects that neither market forces nor unenforceable voluntary pledges constrain broadband providers in order to protect public safety; only thoughtful and thorough regulation can ensure that broadband internet facilitates local governments' efforts to protect the public. The ongoing COVID-19 emergency underscores and reflects these realities.

The pandemic prevents us from providing complete comments at this time. As we explained in our April 16, 2020 letter to the Commission, we note at the outset here that the novel coronavirus and COVID-19 pandemic—and associated emergency declarations and shelter-in-place orders governing the County, the City, and many other jurisdictions—make it impossible at this time for us to provide the Commission with a complete and up-to-date description of the ways in which the *Order* implicates public health and safety. Public safety and

emergency officials are currently occupied responding to the public health emergency caused by the COVID-19 pandemic and keeping our communities as safe and healthy as possible. The input of these officials is necessary to respond fully to the Public Notice. But we are unable at this time to divert these resources from the emergency response to COVID-19 to provide complete responses to the Public Notice.

Local governments are charged with significant and front-line responsibility to respond to public health and safety emergencies, and have embraced that responsibility in the current crisis. Accordingly, they have worked around the clock to control and respond to COVID-19 and the associated economic fallout. But we operate with limited resources, and the pandemic's impact on these resources cannot be overstated. From law enforcement, emergency operations staff, and emergency medical services to public health departments, local governments have been massively redirected from their day-to-day tasks and are working under exceptionally difficult circumstances. For example, local governments are working ceaselessly to understand and prevent disease spread, especially among vulnerable populations like seniors and unsheltered individuals. Many are providing care for patients and testing for the potentially infected. And all the while, we are planning for and responding to the ancillary impacts of the pandemic, including by ensuring that individuals and families maintain access to food and housing.¹ Many local health departments are facing the immense responsibility of tackling the pandemic while still suffering from budget and staff cuts dating from the 2008 recession.²

The ongoing and unfolding COVID-19 crisis was the basis for the City, County, and the City of New York's April 16, 2020 request that the Commission extend the deadlines to respond to the Public Notice. *See* Filing ID No. 1041663325142 (submitted Apr. 16, 2020).³ But the Commission denied our request to extend these deadlines to account for the ongoing and unprecedented COVID-19 pandemic, including the inability of public-safety officials knowledgeable about this proceeding to dedicate time to anything other than protecting public health and safety during the pandemic. DA 20-432. Incredibly, the Commission found that

¹ Other local governments are responding in similar ways. *See, e.g.,* Charlotte Alter and Lissandra Villa, "You Must Act Now." *How States and Cities Have Responded to the Coronavirus Pandemic*, TIME (Mar. 14, 2020), <https://perma.cc/839B-UWHT>; Don Beyer, *State and Local Governments Fighting Coronavirus Need Our Help Now*, THE HILL (Apr. 9, 2020), <https://perma.cc/3R3Q-ZZA9>.

² *See, e.g.,* Julie Bosman and Richard Fausset, *The Coronavirus Swamps Local Health Departments, Already Crippled by Cuts*, N.Y. TIMES (Mar. 14, 2020), <https://perma.cc/S2TS-UDPX>.

³ The County and the City, along with several other commenters, initially requested a 30-day extension on March 11, 2020. The Commission waited two full weeks, until March 25, before granting just two-thirds of the requested extension. DA-20-331. By the time the Commission acted, President Trump had declared that a national emergency concerning COVID-19 had begun on March 1, and the Governor of California and the Health Officers with jurisdiction over the County, County Fire, and the City had all issued shelter-in-place orders. Proclamation No. 9994, 85 Fed. Reg. 15337 (signed by President Trump on Mar. 13, 2020); Executive Order No. N-33-20, <https://perma.cc/5FD6-ZHEW> (signed by Governor Newsom on Mar. 19, 2020); Order of the Health Officer of the County of Santa Clara, <https://perma.cc/MP92-STP3> (signed by Health Officer Sara Cody on Mar. 16, 2020); Order of the Health Officer of the County of Los Angeles, <https://perma.cc/3SM2-X8DR> (signed by Health Officer Muntu Davis on Mar. 21, 2020); *see also* Public Order under City of Los Angeles Emergency Authority, <https://perma.cc/2M79-P34Z> (Mar. 19, 2020).

adopting a schedule that would permit the Commission to make a decision on a complete record would *harm* the public interest, even though the persons most knowledgeable and able to explain the “public safety implications” of the *Order* to the Commission in light of COVID-19 are currently occupied responding to that emergency. *Id.* at 2.

Given the Commission’s total failure to consider public safety in the prior proceeding, if there was any possibility, in the current circumstances, of “prompt Commission resolution of the pending judicial remand,” *id.*, on a complete record, it might be true that such prompt consideration would serve the public interest. But that is not a possibility in the midst of a once-in-a-generation pandemic. So putting three of the local governments perhaps most affected by the current crisis to the choice of providing complete comments or responding to the current emergency is, to put it mildly, not faithful to the public interest. Faced now with the opportunity on remand to compile a thorough and complete record on the issue of public safety, the Commission has chosen instead to limit the ability of those most directly affected by the *Order*’s public safety implications to share their views with the Commission. In so doing, the Commission undermines the purpose and value of its notice-and-comment process despite hearing explicitly from public safety officials explanation from public-safety that the resulting record will be incomplete. The Commission effectively demands that emergency and public-safety personnel with knowledge of the issues raised in the Public Notice attend to this post-remand administrative proceeding *before* prioritizing public health and safety. That decision is truly baffling, and responsible and knowledgeable public officials are unable and unwilling to jeopardize their residents’ immediate public health and safety as the Commission would require.

In denying the extension request, the Commission is creating a record that only contains comments from the parties less affected by the public-safety emergency caused by coronavirus and that openly excludes comments from parties that need to fully devote their resources to handling the pandemic. This will inevitably create a lopsided record. In deciding to do so, the Commission is also explicitly rejecting the guidance of the parties best situated to tell it about the importance of network access during a public-safety emergency. It has denied requests for additional time from the largest two cities in the United States, the current U.S. epicenter of the pandemic, and the party whose comments were initially ignored by the FCC and whose lawsuit caused this proceeding.

Nonetheless, faced with the Commission’s denial of additional time, we provide at this time as much information as possible regarding the ways in which reclassification under the *Order* harms public safety. We intend to submit additional information as circumstances allow. The COVID-19 pandemic confirms many of the public-safety concerns the County and County Fire previously brought to the Commission’s attention in their December 6, 2017 *ex parte* submission in this matter, Filing ID No. 1207942320842 (the “12/6/17 Comment”), which we include and incorporate here.⁴

⁴ As explained in greater detail below, the current emergency *heightens* the risks to public safety created by the *Order*’s repeal of net neutrality protections. We requested an extension despite these heightened risks; our request does not indicate that the urgency of restoring the 2015 Open Internet rules is in any way diminished. This is

The Notice relies on faulty assumptions and asks the wrong questions. As the 12/6/17 Comment demonstrates, the Public Notice asks the wrong questions—and so is almost certain to result in a conclusion that is both wrong and arbitrary and capricious. The question before the Commission after *Mozilla* is how public safety is affected—and, vitally, whether and how the connections between public safety officials and the public are threatened—by the *Order*'s repeal of the Net Neutrality Rules. But the Commission sidesteps that question in favor of narrower and misdirected inquiries.

The Public Notice's questions start from the premises that (1) public-safety communications can be identified, isolated, and treated differently based on their endpoints, and (2) public-safety internet traffic travels primarily or exclusively on business- and enterprise-grade plans not subject to the *Order*. For instance, the Public Notice asks whether reclassification could “enabl[e] the more rapid, reliable transmission of public safety-related communications during emergencies” and if “broadband providers have policies in place that facilitate or prioritize public safety communications.” Underpinning these questions is the assumption that it is possible to know which communications relate to public safety and treat them differently from other communications. Likewise, the Public Notice asks whether “public safety officials . . . rely on mass-market retail broadband services . . . rather than dedicated networks with quality-of-service guarantees (i.e., enterprise or business data services) for public safety applications.” This question implies that local governments' reliance on the open internet extends no further than their own ISPs and broadband plans.

But as the 12/6/17 Comment explained, the Commission's starting premises are erroneous. A central point of the 12/6/17 Comment is that local governments rely on robust broadband internet access to communicate not only within their own offices, but also with members of the public who access the internet through mass-market broadband internet access service (BIAS) plans governed by the *Order*. The fundamental work of government, including public safety personnel, is outward facing: To protect our residents, we must be able to communicate with them, and they with us. Increasingly, as detailed in the 12/6/17 comment, that communication is over the internet. It is critical that our communications with our residents reach them, and theirs reach us, without regard to each user's internet service provider (ISP)—or how much that ISP is paid to transmit the communication. “Public safety,” by its nature, is not and should not depend on wealth.

Thus, the 12/6/17 Comment explained, local governments' “internet-based services depend, in many cases, on *community members*' access to broadband internet on nondiscriminatory terms”—not only access by government personnel through government connections. 12/6/17 Comment at 2 (emphasis added). This is true of local jurisdictions across the country, as the Government Petitioners' briefs and the Amicus Brief filed in the *Mozilla* litigation by the City of New York and others demonstrated. This comment includes and

particularly true because, as we also note below, violations of net neutrality principles are exceedingly difficult—if not impossible—for local governments to identify.

incorporates those briefs.⁵ Indeed, local governments around the country increasingly deliver data and services to their residents through systems that “rely heavily on real-time, low-latency data transmissions.” Cities’ Amicus Brief at 9; *see id.* at 9-17. For example, New York City’s Domain Awareness System collects and analyzes data from sources including thousands of public, private, and commercial surveillance cameras. Put simply, public safety-related communications cannot be identified and treated differently because 21st Century public safety systems rely on myriad connections between and among public officials, members of the public, and public and private systems and platforms.

Nor can transmissions from public safety officials reliably be isolated and identified as governmental communications. Increasingly, to reach residents, public safety officials use nongovernmental internet platforms. These uses include not only live-streaming on social media platforms of crucial updates on the COVID-19 pandemic by public health and emergency response officials, as we discuss below, but also posting video or photos of a suspect on Twitter or other social media platforms to engage the public in identifying and apprehending suspects.⁶

Moreover, the *Order* disclaims the Commission’s authority to require ISPs to segregate, and prioritize public-safety communications. So even if it were technologically possible to *identify* those communications ahead of time, it is impossible under the *Order* to leverage that technical possibility to protect public safety. Specifically, under the *Order* the Commission cannot regulate BIAS ISPs under Title II of the Telecommunications Act, under its ancillary authority, or under Section 706 of the Act. *See generally Mozilla*, 940 F.3d at 45-56, 74-76. And as we describe below, the Commission’s recent preference for simply requesting that carriers voluntarily prioritize public safety has proven ineffective.

The Order Continues to Threaten Critical Public Safety Systems. Crucially, the COVID-19 pandemic and associated public health emergencies bring into stark relief many concerns about reclassification that the 12/6/17 Comment identifies. That submission details the numerous ways in which reclassification would undermine local governments’ ability to provide and obtain critical, time-sensitive information and services during a public health or patient emergency, as well as residents’ ability to access local government services and communications during such emergencies. While local and state governments’ responses to the COVID-19 pandemic have been unprecedented, it was entirely predictable—in fact, predicted by the 12/6/17 Comment—that during a public-health emergency, public safety would rely heavily on robust and unencumbered community access to broadband internet.

⁵ *See* Brief for Government Petitioners, *Mozilla Corp. v. FCC*, No. 18-1051 (D.C. Cir. filed Aug. 20, 2018); Reply Brief for Government Petitioners, *Mozilla Corp. v. FCC*, No. 18-1051 (D.C. Cir. filed Nov. 16, 2018); Brief for Amici the City of New York and 27 Other Local Governments, Mayors, and Municipal Organizations in Support of Petitioners, *Mozilla Corp. v. FCC*, No. 18-1051 (D.C. Cir. filed Aug. 27, 2018) (the “Cities’ Amicus Brief”).

⁶ *See, e.g.*, Los Angeles Police Dep’t, Twitter Post (Apr. 8, 2020 7:48 p.m. PT), <https://twitter.com/LAPDHQ/status/1248080420505145344>, archived at <https://perma.cc/D26L-JAFS>; Boston Police Dep’t, Twitter Post (Apr. 19, 2013 6:32 a.m. PT), <https://twitter.com/bostonpolice/status/325240385003732993>, archived at <https://perma.cc/7JRJ-5D62> (distributing photograph and information about Boston Marathon bombing suspect).

Virtual emergency operations center. For instance, in all sorts of emergency circumstances—including the current COVID-19 pandemic but also more localized emergencies like floods, fires, hospital outages, and mass shootings—the County and/or County Fire activates a virtual emergency operations center, called WebEOC,⁷ that centralizes and coordinates emergency response. *See* 12/6/17 Comment at 6-7. That WebEOC, like those of many other public safety agencies and first responders throughout the United States, relies on BIAS to aggregate information from a diverse range of sources and then distribute it to a wide range of recipients. WebEOC’s information sources and recipients may be located across the County; for it to be effective, users must be able to access it regardless of the ISP through which they may be connected to the internet at any given moment—including mass-market retail BIAS plans. *See id.* at 7. In many cases, effective and timely communication with the public is central to effective emergency response. Because local governments distribute emergency information to the public over the internet (including through applications like AlertSCC, *see id.*), reliable and unfettered internet access by members of the public—not just governmental personnel—is essential to effective emergency and public-safety management. Similarly, County emergency personnel in the field may need to access WebEOC through a mass-market BIAS ISP. Thus, the Commission relies on a false dichotomy when inquiring in the Public Notice whether “concerns or consequences of broadband providers’ possible actions [are] different for public-safety-to-public-safety communications, such as onsite incident response or Emergency Operations Center communications, versus public safety communications made to or from the public.” Put simply, “public safety communications made to or from the public” in fact often *are* “public-safety-to-public-safety communications,” and at any given moment during an unfolding crisis, one kind of communication may be the more time-sensitive and mission-critical.

Public Health operations. The County’s Public Health Department (“County Public Health”) is another critical case in point. Its ongoing work responding to the COVID-19 pandemic employs many of the systems described in the 12/6/17 Comment. Its response exemplifies the ways those systems can operate effectively only when community members’ mass-market retail BIAS plans provide access without blocking, throttling, paid prioritization, and other conduct regulated or prohibited by the Net Neutrality Rules.

The 12/6/17 Comment explained that County Public Health uses “a web- and internet-based system” to alert and mobilize “the 8,000 medical and public health providers in Santa Clara County” during unfolding public health situations. County Public Health’s system distributes these alerts and mobilization requests through a cloud-based system, “including to individuals accessing the internet through home and small-business internet service plans” governed by the *Order*. 12/6/17 Comment at 8-9. Thus, “[c]ommunity access to an open internet is critical to the County’s implementation of this alert system.” *Id.* Indeed, even the Public Health side of the communications rely on private-sector platforms such as MailChimp to distribute to the public. *Id.* During the current crisis, County Public Health has used MailChimp

⁷ *See* SCCPublicHealth, *Inside the Emergency Operations Center | LIVE with the County of Santa Clara | 2020-04-13*, https://youtu.be/8CL8pC4cd_0 (Apr. 13, 2020).

to distribute guidance and directives to healthcare providers surrounding COVID-19. Hospitals, community providers, and County partners receive the MailChimp disseminations.

Likewise, the 12/6/17 Comment explained, “[i]n the event of a public health emergency, the public relies heavily on the Public Health website for emergency information, including what action to take, during the crisis.” *Id.* at 9. While this point is critical in a wide variety of emergencies, the COVID-19 pandemic is a case in point that reflects that the public has come to rely ever more on information distributed by local government public health departments via the internet since submission of the 12/6/17 Comment.

From the time the County Health Officer issued the first-in-the-nation shelter-in-place order on March 16, 2020, for instance, the County Public Health website has provided members of the public important information about COVID-19. Among other things, County Public Health frequently updates its online COVID-19 Data Dashboard, which provides information about COVID-19 testing, hospital resource usage, and other items.⁸ The Health Officer has also ordered residents and businesses to report to the County the personal protective equipment, like gowns and masks, they possess;⁹ County Public Health uses its website and another domain, research.net, to receive those reports.¹⁰ County Public Health has also used email and text messages to notify the public about the Health Officer’s orders and information regarding testing for COVID-19. And the County’s Health Officer also provides daily briefings through Facebook Live and YouTube, and the County also distributes other critical and time-sensitive public-health information through these channels; although these are critical public-safety communications, none of the endpoints are identifiably governmental.¹¹ Local governments across the nation are taking similar steps using nongovernmental platforms.¹²

⁸ See County of Santa Clara Public Health Department, *Coronavirus (COVID-19) Data Dashboard*, <https://www.sccgov.org/sites/covid19/Pages/dashboard.aspx> (last accessed Apr. 20, 2020).

⁹ Order of the Health Officer of the County of Santa Clara regarding Personal Protective Equipment, <https://perma.cc/8BT5-5BF6> (Apr. 8, 2020).

¹⁰ See Santa Clara County Health Officer Order to Gather Information on Local Supplies of Personal Equipment and Ventilators, <https://perma.cc/99LE-UFN4> (last accessed Apr. 20, 2020); Santa Clara County Public Health One-Time PPE Inventory Survey, <https://perma.cc/4UH9-Z7JD> (last accessed Apr. 20, 2020). Other public health departments around the country are using their websites similarly.

¹¹ See County of Santa Clara Public Health Department Facebook Page, <https://www.facebook.com/sccpublichealth> (last accessed Apr. 20, 2020); County of Santa Clara Public Health Department YouTube Channel, <https://www.youtube.com/user/SCCPublicHealth> (last accessed Apr. 20, 2020); see, e.g., County of Santa Clara Public Health Department, “County of Santa Clara Public Health Issues Guidance on Face Covering | 2020-04-17,” <https://www.facebook.com/sccpublichealth/videos/281155356211105> (last accessed Apr. 20, 2020).

¹² See, e.g., County of Los Angeles, Facebook Live Event (April 17, 2020), <https://www.facebook.com/countyofla/videos/540375753340786>; New York City Mayor’s Office, Facebook Live Event (April 17, 2020), <https://www.facebook.com/NYCMayor/videos/235114534230087>; Chicago Mayor’s Office, Facebook Live Event (April 17, 2020), <https://www.facebook.com/ChicagoMayorsOffice/videos/229441834942987>; Shawnee County COVID-19 Updates, (April 17, 2020), <https://www.facebook.com/sncocovidupdate/videos/733947403807560>.

All of this critical and time-sensitive public health content is directed primarily at members of the public, most of whom access the internet through mass-market BIAS plans. This is especially true now, when most Americans are staying home.

Telemedicine. Community members' access to open internet through mass-market retail BIAS is also essential to ensure that individuals can access healthcare without risks the health and safety of the community at large. But telehealth can be a high-bandwidth application, and it relies on individual patients' access to an open internet through their mass-market BIAS plans.

The COVID-19 pandemic response is again a case in point. The 12/6/17 Comment explained that the County's hospital system has increasingly invested in telemedicine and electronic medical records systems, including to provide healthcare over high-definition video connection with patients. Even without the overlay of a public health crisis that demands that residents stay home, telehealth is not simply a matter of convenience. As the County and County Fire explained, telehealth permits "clinicians to connect with, diagnose, and treat patients through a broadband connection"; "to triage the most critical situations and improve outcomes, including in time-sensitive situations (such as strokes or vehicular accidents) where immediate diagnosis can literally mean life or death"; and "to avoid high-risk situations such as in-person treatment of jail inmates." 12/6/17 Comment at 10. These benefits predate and will outlast COVID-19, but the current pandemic emergency underscores telehealth's value to public health and safety: it permits individuals to be seen by medical providers without leaving their home, thereby avoiding the risk of contracting or further spreading COVID-19.

Indeed, the U.S. Department of Health and Human Services has encouraged increased use of telemedicine during the COVID-19 crisis. It announced on March 17, 2020 that, "effective immediately," it would "waive potential penalties for HIPAA violations against health care providers that serve patients through everyday communications technologies during the COVID-19 nationwide public health emergency"—including through "widely available communications apps" "that allow for video chats, including Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, Zoom, or Skype." Its Office of Civil Rights explained that the purpose of encouraging telemedicine during the crisis was to "empower[] medical providers to serve patients *wherever they are*," and to "reach[] those most at risk, including older persons and persons with disabilities."¹³ Consistent with this guidance, the Los Angeles City Fire Department launched a new telemedicine program to serve those with non-life-threatening medical issues,¹⁴ and the Valley Health Plan—a health insurer covering employees, Medicaid and Medicare recipients, and individuals in Santa Clara County—likewise

¹³ Dep't of Health & Human Servs., Office of Civil Rights, "Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency," <https://perma.cc/QES3-9WTK> (last accessed Apr. 20, 2020); HHS, "OCR Announces Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID-19 Nationwide Public Health Emergency," <https://perma.cc/UJ45-TVSM> (last accessed Apr. 20, 2020) (emphasis added).

¹⁴ Los Angeles Fire Department, "LAFD Launces Telemedicine Pilot Program," <https://perma.cc/ED83-WVZF> (Apr. 10, 2020).

now recommends and encourages its members to use telemedicine to “get care faster and reduce the spread of the Coronavirus.”¹⁵

Telecommuting. Telecommuting pursuant to shelter-in-place orders in effect across the country further belies the Commission’s assumption that public safety-related communications can be identified *ex ante* and prioritized in emergencies. Local government public-health and public-safety officials conduct meetings using many of the same services that their non-emergency colleagues also use. In both the City and the County, many workers deeply involved in public-health emergency response connect with one another from their homes over Zoom, Skype, FaceTime, and other video-chat applications. Yet they and others in their homes may use the same services for non-emergency work as well as social engagements. There is no meaningful technological way to determine before the fact whether a Zoom meeting involves collaboration on emergency response, non-emergency work product, or a purely social call—particularly because the very same households may well engage in all three interactions over the course of a day with one another. There is, therefore, no meaningful way for a broadband provider to commit to “policies in place that facilitate or prioritize public safety communications,” as the Commission’s Public Notice suggests they might.

Neither voluntary commitments nor market forces reduce the risk or ameliorate the harm. In the face of its refusal to regulate BIAS ISPs, the Commission turned to the “tools” of market behavior to claim that the *Order* would not harm consumers, edge content providers, or public safety. In particular, the Commission claimed the public would be protected by morally responsible market behavior, public and market pressure, and after-the-fact antitrust and consumer-protection enforcement. *See Mozilla*, 940 F.3d at 55-59.

This contention was doubtful even as to consumers and edge content providers in daily life, and “[t]he Commission barely survive[d] arbitrary and capricious review.” *Id.* at 59. But it is flatly incorrect that marketplace pressures and antitrust and consumer-protection enforcement can protect public health and safety. *See id.* at 59-63. In these circumstances, time is of the essence, harms are irreparable, after-the-fact corrections are inadequate, and ISP practices previously barred by the Net Neutrality Rules are impossible for local governments to identify, let alone correct for.

The COVID-19 emergency reflects and exemplifies how the *Order*’s disclaimer of authority to regulate ISPs increases risks to public health and safety. It brings into particularly stark relief the myriad ways Americans rely on the internet to connect to civic, cultural, economic, and political life. Over the course of just a few weeks, local and state governments across the country have ordered millions, and then tens of millions, and ultimately hundreds of millions of people to shelter in place. Without the internet, even more Americans would be cut off from their workplaces, schools, friends, places of worship, and governments. Recognizing that the COVID-19 crisis would cause Americans to rely even more heavily on the internet, several FCC commissioners, and ultimately its chairman, requested that ISPs volunteer to adhere to a set of practices to keep residents connected to the internet even when customers are unable

¹⁵ Valley Health Plan, “Novel Coronavirus (COVID-19) Remote Doctor Visits,” <https://perma.cc/Y25W-7W65> (Mar. 24, 2020).

to pay monthly access charges. The Commission has touted that many companies have signed the chairman’s so-called “Keep Americans Connected Pledge” and made other promises “to maintain connectivity for Americans experiencing disruptions caused by the coronavirus epidemic.”¹⁶

Whatever voluntary offers ISPs may have made in the course of the COVID-19 emergency, however, in reality they continue to prioritize profit over public safety. Indeed, NBC reported just last week that Keep Americans Connected signatories continue to disconnect users for failure to pay—precisely what they represented that they would not do by signing the pledge.¹⁷ In light of the reality of ISPs’ unregulated market behavior, some governors managing the COVID-19 emergency have recognized what the FCC ignores: that mandatory regulation protects public health and safety in ways that ISP voluntarism does not. Thus, they have ordered what the FCC simply requests—that ISPs not disconnect households during the emergency.¹⁸

It bears noting that although the COVID-19 emergency underscores that the *Order* fails to protect public safety in myriad circumstances, the crisis’s unprecedented scale and reach makes it an outlier in a crucial respect: it has produced political and public pressures that caused the Commission to propose, and ISPs to sign, the Keep Americans Connected pledge. The Commission’s current reliance on ISP voluntarism lays bare the *Order*’s threat to public safety in more localized emergencies, which generate far less political and public pressure but may nonetheless result in loss of life or property.¹⁹

¹⁶ FCC, *Keep Americans Connected*, <https://perma.cc/4ET2-YJAY> (last accessed Apr. 20, 2020); FCC, *Companies Pledging to Keep Americans Connected During Pandemic Go Above and Beyond the Call*, <https://perma.cc/5WZT-G2GX> (last accessed Apr. 20, 2020).

¹⁷ Claire Atkinson, *Americans are losing service despite FCC pledge not to disconnect*, NBC News, <https://perma.cc/E9C5-7YXL> (last accessed Apr. 20, 2020).

¹⁸ See, e.g., Office of the Governor of New Jersey, Exec. Order No. 126 (Apr. 13, 2020), <https://perma.cc/KMA9-A3Y6> (last accessed Apr. 20, 2020) (determining that “during this Public Health Emergency, consistent access to residential internet and voice services are essential services,” finding that the FCC’s Keep Americans Together pledge “is being implemented inconsistently among companies and causing uncertainty regarding the provision of residential internet and voice services,” and ordering ISPs not to disconnect users for nonpayment during COVID-19 emergency).

¹⁹ Even the Commission’s recent experiences, after issuing the *Order*, confirm the inefficacy of simply hoping—or even affirmatively requesting—that market actors prioritize and protect public health and safety in emergencies. When Hurricane Michael made landfall in Florida in October 2018, it damaged communications infrastructure. At first, the Commission’s chairman praised the planning and early response that carriers had undertaken on their own. But several days later, he complained that their efforts were “completely unacceptable” and that “their actions on the ground aren’t matching the urgency that we have conveyed” to them. Yet even after funding their conduct unacceptable, the chairman simply requested, rather than required, carriers to undertake additional efforts. When the Commission examined the matter more thoroughly, it concluded that “[t]he poor level of service several days after landfall by some wireless providers cannot simply be attributed to unforeseeable circumstances,” wireless carriers failed to coordinate and cooperate sufficiently, and “[s]ome providers appear not to have comported with the . . . voluntary commitment” that wireless carriers had made to request and offer one another mutual aid during emergencies. FCC, *October 2018 Hurricane Michael’s Impact on Communications: Preparation, Effect, and*

In fact, ISPs' responses to COVID-19 and the inconsistent response to the Commission's Keep Americans Connected pledge reflects a reality that the County and County Fire already brought to the Commission's attention: even in public-safety emergencies, ISPs will pursue maximum profits rather than opportunities to facilitate governments' responses to those emergencies. County Fire's experience with Verizon Wireless is another case in point.

County Fire Chief Anthony Bowden described this circumstance in an August 17, 2018 declaration (the "Bowden Decl.").²⁰ While County Fire was in the midst of fighting the Mendocino Complex Fire in the summer of 2018, Verizon severely throttled the internet access speed of County Fire OES Incident Support Unit 5262, which prevented that equipment from tracking, organizing, and prioritizing resources from around the state and country to where they are most urgently needed.

Verizon explained that it throttled the speed because the associated account had reached its monthly data cap. Even after County Fire made clear to Verizon "the importance of OES 5262 and its role in providing for public and first-responder safety," the ISP refused to stop throttling, and instead "indicated that County Fire would have to switch to a new data plan at more than twice the cost" before Verizon would remove the throttle. Bowden Decl. at ¶¶ 7-9 & Ex. A. Verizon Wireless's actions in connection with the Mendocino Complex Fire reflects ISP profit-seeking in the midst of a public-safety emergency—precisely what ISPs have done through inconsistent compliance with their voluntary pledges to Keep Americans Connected during the COVID-19 emergency.

It is difficult, if not impossible, for governments to identify harm caused by violations of net neutrality principles. Violations of net neutrality principles, particularly throttling or prioritizing some traffic in favor of other traffic, are virtually impossible for public safety officials to identify. Currently, thousands of public employees are performing the business of government over their home ISPs. Service disruptions can come from many sources, and local governments would be hard-pressed—and plainly do not currently have the resources—to investigate the source of these disruptions and trace them to violations of net neutrality principles. And even if they could, this information historically has proved virtually impossible to obtain.

* * *

The work that local governments have undertaken to protect residents' health and safety in the face of the COVID-19 pandemic underscores and exemplifies what has always been true of the internet: in the 21st Century, government's ability to protect the public health and the

Recovery, Filing ID No. 0509060401772, Proceeding No. PSHSB 18-339, <https://perma.cc/2QCS-487N> (May 9, 2019); FCC Office of the Chairman, *Statement of Chairman on Hurricane Michael Restoration Efforts*, <https://perma.cc/Y5H9-RDBV> (Oct. 16, 2018); see also FCC Office of the Chairman, *Statement of Chairman Pai on Hurricane Michael*, <https://perma.cc/TP9Z-LQ2L> (Oct. 11, 2018).

²⁰ Declaration of Fire Chief Anthony Bowden, *Mozilla Corp. v. FCC*, No. 18-1051 (D.C. Cir. filed Aug. 20, 2018).

public safety relies deeply on an open internet that provides unblocked, unthrottled, and nondiscriminatory broadband access by County personnel and residents alike. While the response by the County, the City, and other local governments to COVID-19 is dramatic and perhaps unprecedented, it relies on the very same systems and technologies that protect public health and public safety every day. To be effective, these systems and technologies demand that members of the public have open access to the internet. For the reasons set out above, in the 12/6/17 Comment, and elsewhere, nothing short of Net Neutrality Rules can prevent BIAS ISPs from risking public health and safety.²¹

As circumstances allow, we look forward to providing additional comments and facts regarding how the *Order* implicates and impairs public health and safety, and why protection of public safety demands a return to the Net Neutrality Rules imposed by the Commission's 2015 Report and Order under Title II of the Telecommunications Act of 1996.

Very truly yours,

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²¹ We include for the Commission's convenience and reference all documents cited herein that are amenable to submission in PDF format.