

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

FREE PRESS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and the UNITED STATES OF AMERICA,
Respondents.

Case No. _____

PROTECTIVE PETITION FOR REVIEW

Pursuant to 5 U.S.C. § 706, 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342(1) and 2344, and Federal Rule of Appellate Procedure 15(a), Free Press hereby petitions this Court for review of the order of the Federal Communications Commission (“FCC”) captioned *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, FCC 17-166 (released January 4, 2018) (“Order”) (attached).

Venue is proper in this Court pursuant to 28 U.S.C. § 2343 because Free Press’s principal place of business is located at 40 Main Street, Suite 301, Florence, Massachusetts, 01062.

The Order repeals a prior order enforcing internet neutrality, which was upheld by the D.C. Circuit in *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *petitions for cert. filed*, Nos. 17-498 – 17-504 (Oct. 3, 2017).

Free Press seeks review of the Order on the grounds that it is arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*; violates federal law, including, but not limited to, the Communications Act of 1934, as amended, and FCC regulations promulgated thereunder; conflicts with the notice-and-comment rulemaking requirements of 5 U.S.C. § 553; and is otherwise contrary to law.

Free Press is filing this protective petition for review out of an abundance of caution. In particular, it files the petition in case the FCC's Order (or the Declaratory Ruling part of that Order) is construed to be final on the date it was issued (as opposed to after Federal Register publication, which Free Press believes is the better view), and the ten-day period in which a party must file a petition for review to "avail itself of procedures established for selection of a court in the case of multiple petitions for review" – *i.e.*, the lottery procedures under 28 U.S.C. § 2112(a) – is likewise construed to begin on that date. 47 C.F.R. § 1.13(a)(1); *see also id.* § 1.13(a)(2). In a prior challenge to the previous net neutrality rules, the lottery was conducted on the basis of premature petitions filed before the order's publication in the Federal Register. *See In re: Federal Communications Commission, In the Matter*

of Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24 (Released March 12, 2015), Consolidation Order, Document #1544975, No. 15-1063, MCP No. 128 (March 30, 2015). Free Press files this protective petition in part to avoid being excluded from the lottery should that course of events be repeated.

Petitioner intends to file an additional petition after the Order is published in the Federal Register to ensure this Court's jurisdiction.

To the extent that this protective petition for review is timely filed, Free Press respectfully requests that this Court hold unlawful, vacate, enjoin, and set aside the Order; remand to the FCC for further proceedings; and provide such additional relief as may be appropriate.

Dated: January 16, 2018

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Free Press states that it is a national, nonpartisan, nonprofit organization with no parent corporation and no publicly held corporation owning 10% or more of its stock or other interest in the organization.

Dated: January 16, 2018

Respectfully submitted,

s/ Kevin K. Russell

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CERTIFICATE OF SERVICE

I hereby certify that, on January 16, 2018, I caused a copy of the foregoing Protective Petition for Review to be served upon the following counsel in the manner indicated:

*By First Class Mail and
Electronic Mail*

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