

15-1063

United States Court of Appeals
for the District of Columbia
Circuit

US TELECOM ASSOCIATION, et al,
Petitioner,

v.

UNITED STATES FEDERAL COMMUNICATIONS COMMISSION,
Respondent

**BRIEF FOR WILLIAM MICHAEL CUNNINGHAM AS AMICUS CURIAE
IN SUPPORT OF THE PUBLIC INTEREST
AND FOR THE RESPONDENT**

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CORPORATE DISCLOSURE STATEMENT

William Michael Cunningham is filing as an individual, has no parent company,
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INTEREST OF THE AMICUS CURIAE

William Michael Cunningham registered with the U.S. Securities and Exchange Commission as an Investment Advisor on February 2, 1990. He registered with the D.C. Public Service Commission as an Investment Advisor on January 28, 1994. Mr. Cunningham manages an investment advisory and research firm, Creative Investment Research, Inc. Mr. Cunningham holds an MA in Economics and an MBA in Finance, both from the University of Chicago in Chicago, Illinois. Mr. Cunningham's understanding of capital markets is based on firsthand knowledge obtained in a number of positions at a diverse set of major financial institutions. He served as Senior Investment Analyst for an insurance company. Mr. Cunningham was an Institutional Sales Representative in the Fixed Income and Futures and Options Group for a leading Wall Street firm. Mr. Cunningham also served as Director of Investor Relations for a New York Stock Exchange-traded firm. On November 16, 1995, he launched one of the first investment advisor websites. In 2007, he invented and proposed the first investment crowdfunding initiative, the *Microcredit Stock Exchange*.

Mr. Cunningham has long been concerned with the integrity of the securities markets. He has worked to repair the damage caused by unethical institutions¹. From his testimony² on behalf of the public in Federal Court³, he understands that

¹ Property Flipping Remediation Yields Investment-grade Security.

<http://www.socialfunds.com/news/article.cgi?sfArticleId=682>

² See: Partial Revised Transcript from the Global Research Analyst Settlement Fairness Hearing. April 11, 2005. Before Judge William H. Pauley. In the U.S. District Court for the District of New York.

<http://www.creativeinvest.com/sri/fairness.html>

³ Supreme Court of the United States. No. 97-5066. William Michael Cunningham, Petitioner v. Board of Governors of the Federal Reserve System. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT. No. 97-1256 William Michael Cunningham, APPELLANT v. Board of Governors of the Federal Reserve System, Appellee. Decided April 30, 1997.

United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT. No. 98-1459

the widespread, generalized decline in ethical standards of business behavior over the past three decades requires constant consideration of the public interest.

Mr. Cunningham is as independent and objective as possible and comes to the Court with hands clean. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), William Michael Cunningham states that *no one* contributed money to fund preparing or submitting this brief.

Relationship to other Amici

Several organizations have filed “Friend of the Court” briefs in this matter. The majority are self interested, biased and ethically compromised.

Because they are *imitators* and not *originators*, most fail to understand that *the nature of the technology requires net neutrality*.

The Court will find little help in the Amicus briefs filed by the entities above (and perhaps none here, but at least this brief is submitted by a party with clean hands and a long history of correctly predicting the public interest impacts of financial market policy decisions⁴).

William Michael Cunningham, APPELLANT v. Board of Governors of the Federal Reserve System, Appellee. October, 1998.

US v. McGraw-Hill Companies Inc., et. al. Case No. CV 13-0779-DOC (JCGx).

⁴ See Supreme Court of the United States. No. 97–5066.

William Michael Cunningham, Petitioner v. Board of Governors of the Federal Reserve System. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, See United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT. No. 97-1256

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William Michael Cunningham, APPELLANT v. Board of Governors of the Federal Reserve System, Appellee. October 1998.

Also, see: This Week in Socially Responsible Investing, October 3, 2011.

(Published October 2, 2011) <http://eepurl.com/gage9>

BRIEF BY WILLIAM MICHAEL CUNNINGHAM AS (Pro Se) AMICUS
CURIAE IN SUPPORT OF THE RESPONDENT

On June 7, 2007, Mr., Cunningham proposed the creation of the Microcredit Stock Exchange to the Government of the District of Columbia in a meeting with Mr. William Liggins (Director, DC Revenue Bond & Enterprise Zone Program, Office of the Deputy Mayor for Planning and Economic Development) and Robin Jasper (an aide to then City Council Chairman Vincent Gray). See documentation below:

Information on the Micro..., NMTCPProject1.pdf

This Week in Socially Responsible Investing (SRI)
to: John Simmons

William Michael Cunningham
6/11/2007

Attached is a discussion document and a budget for initial research on the concept.

Pls let me know what you think....

Information on the Micro...

Information on the Microcredit Stock Exchaghe
to: Liggins, William (EOM), robin.jasper@dc.gov

William Michael Cunningham
6/9/2007

As promised, I have attached an outline on the Microcredit Stock Exchange we discussed on Thursday.

William Michael Cunningham...

Information on the Micro...

The Microcredit Stock Exchange represents one of the earliest versions of crowdfunding. This solution was created by Mr. Cunningham in direct response to the decline in business ethics that limited capital access in low income, minority and women business communities. As noted in the proposal,

“Equity capital, or shares in micro businesses would be traded on a Micro Business Stock Exchange created and managed by a third party entity. The Exchange would provide the framework for the provision of small amounts of equity capital

(\$1,000 to \$250,000) to micro businesses in Washington. To make things easier and to enhance the probability of success, we suggest the initiative focus specifically on disadvantaged businesses operating in far Northeast and in Southeast.⁵”

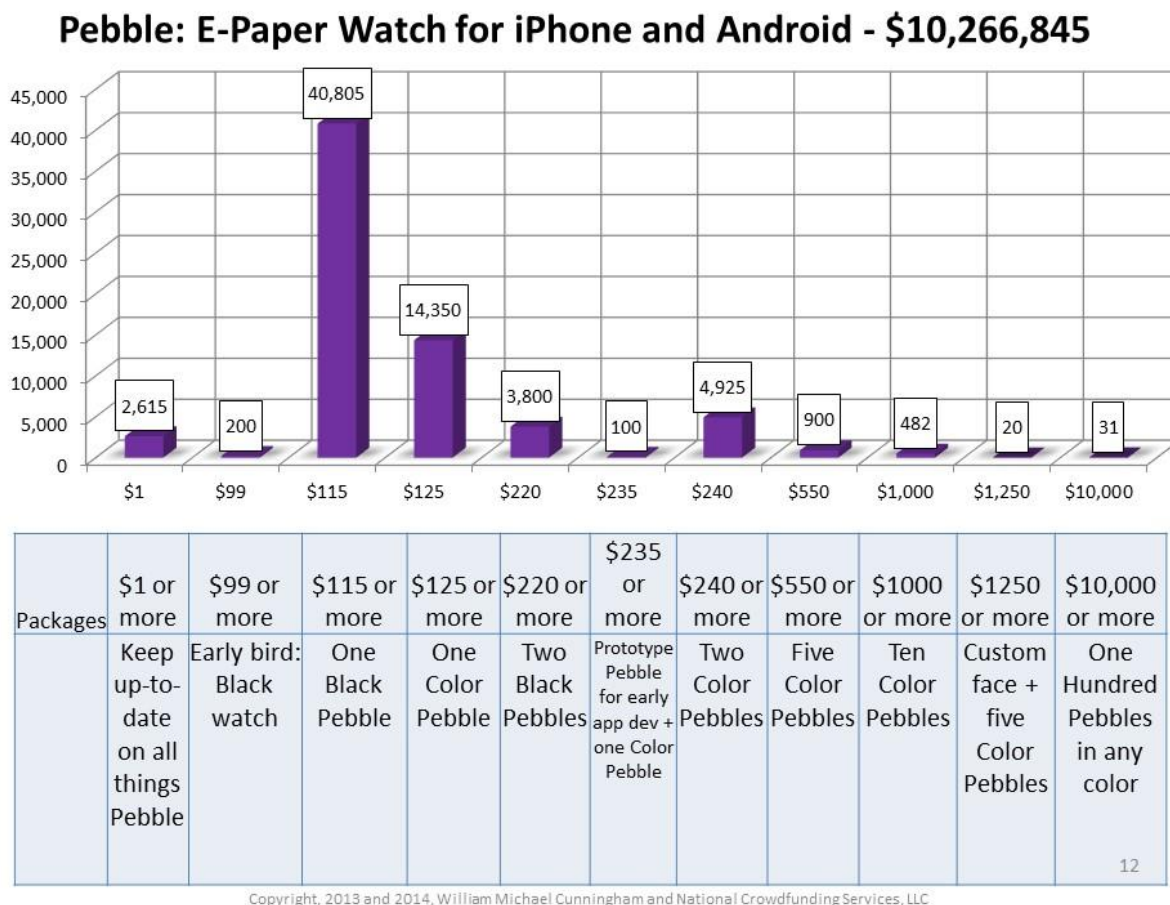
The equity crowdfunding concept Mr. Cunningham pioneered soon became the JOBS Act. As Mr. Cunningham noted in an article in the Washington Post,

“Crowdfunding works this way: An entrepreneur with an idea for a company or product posts the details of the idea or product on a Web site such as Kickstarter. The posting includes information on the amount of money needed, benefits to those who contribute to the project and information on the developers. The (Title III) crowdfunding provisions of the JOBS Act allow start-up and other companies to sell up to \$1 million in equity, or ownership shares, in their business.⁶” Title IV, the subject of this matter, allows firms to raise up to \$50 million. The two largest crowdfunding platforms, Indiegogo and Kickstarter are donations-based platforms (not equity); they are currently active and operational and have served as the model for many of the proposed rules and regulations, including certain aspects of Title IV of the JOBS Act.

⁵ *Information on the Microcredit Stock Exchange*. Proposal to William Liggins (Director, DC Revenue Bond & Enterprise Zone Program, Office of the Deputy Mayor for Planning and Economic Development) and Robin Jasper (aide to City Council Chairman Vincent Gray) representing the Government of the District of Columbia. June 7, 2007.

⁶ *Commentary: The quest for crowdfunding enters a complicated, but critical phase*. December 23, 2012. *Capital Business* The Washington Post. Online at: http://www.washingtonpost.com/business/capitalbusiness/commentary-the-quest-for-crowdfunding-enters-a-complicated-but-critical-phase/2012/12/23/d15ef280-4939-11e2-ad54-580638ede391_story.html

So that the Court can view the crowdfunding technique at work⁷, the chart below, from Mr. Cunningham's book, *Top 50 Crowdfunding Campaigns*⁸, shows activity for the Pebble Watch donation (or reward based) crowdfunding campaign on Kickstarter:



The horizontal axis shows the number of rewards. The vertical axis shows the various rewards and the dollar amount required for each. The boxes at the top of each bar represents the number of rewards taken. The Court can imagine the

⁷ Also see: Cunningham, William Michael, Four DC businesses use crowdfunding in support of innovative projects! November 23, 2014. and Cunningham, William Michael, Wanda's on 7th: How one small women owned firm seeks to use crowdfunding. November 18, 2014

⁸ Cunningham, William Michael, *Top 50 Crowdfunding Campaigns: Fifty Most Successful Crowdfunding Campaigns* [Kindle Edition]
<http://www.amazon.com/Top-50-Crowdfunding-Campaigns-Successful-ebook/dp/B00RKK4NL0>

Pebble Watch company granting equity ownership stakes in addition to selling crowdfunding campaign participants a watch.

RESPONDENT US FEDERAL COMMUNICATIONS COMMISSION IS
CLEARLY ACTING IN THE PUBLIC INTEREST

The Micro Credit Stock Exchange was invented by Mr. Cunningham and the resulting crowdfunding platforms emerged due to the ability of entrepreneurs to use the technology that is at issue here to address the lack of small business financing from large financial institutions. Large financial institutions, aided by financial institution regulators, caused the recent global financial crisis that cost US households \$17 trillion dollars.⁹ A loss of this magnitude suggests that financial regulators, charged with protecting the public, are incapable of doing so.

Unlike financial regulators, the FCC has not been captured by the industry they regulate. In response, industry participants have turned to this Court to accomplish by other means what they cannot: the capture of a regulator exercising its duties in clear support of the public interest.

Repeatedly over the past thirty years, signal market participants, operating in the most materially advantaged country ever to exist, abandoned ethical principles in the pursuit of material wellbeing.¹⁰ By 2015, marketplace ethics reached a new.

⁹ “The housing downturn, financial market crisis, and job losses were major setbacks for U.S. households. On net, household wealth fell by about \$17 trillion, or 26 percent...” Statement for the Treasury Borrowing Advisory Committee of the Securities Industry and Financial Markets Association Alan B. Krueger Assistant Secretary for Economic Policy & Chief Economist. 5/3/2010. At <http://www.treasury.gov/press-center/press-releases/Pages/tg683.aspx>

¹⁰ The relationship between investment banks and the economy <http://twisri.blogspot.com/2009/03/why-market-failed.html>

Fully identifiable entities engaged in illegal activities.¹¹ They have, for the most part, evaded prosecution of any consequence.¹² We note that Goldman Sachs, fined \$659.3 million for various efforts to defraud investors, subsequently received \$75 million in Federal Government tax credits.¹³

Envy, hatred¹⁴, and greed¹⁵ have flourished in capital market institutions, propelling ethical standards of behavior downward. Without meaningful reform there remains a significant and growing risk that our economic system will simply cease functioning.¹⁶

As noted in testimony to the Department of Labor in August, 2015, markets cannot survive continuously elevated levels of fraud, since fraudulent practices mask an entity's true value and misallocates capital by moving investment dollars from deserving entities and companies to unworthy ones.¹⁷ The Microcredit Stock

¹¹ See: Racial Bias in Securitization and Community Lending <http://twisri.blogspot.com/2009/08/wells-fargo-sued-for-racially-biased.html>, Mortgage GSE's, Predatory Lending and Minority Banks (2007 Prediction: Bear Stearns Will Fail.) <http://twisri.blogspot.com/2007/08/morgage-gses-predatory-lending-and.html>

¹² See: Transaction Cost Theory of the Crisis <http://www.prlog.org/10746429-firm-releases-transaction-cost-theory-of-the-financial-crisis.html>

¹³ The tax credits were awarded under the U.S. Department of the Treasury New Markets Tax Credit (NMTC) Program. (See: <http://www.cdfifund.gov/programs/nmtc/>).

¹⁴ "Bank accused of predatory practices. Lawsuit alleges black neighborhood, churches targeted." Gazette.net. Online at: http://www.gazette.net/stories/06182009/collnew182411_32521.shtml

¹⁵ The relationship between investment banks and the economy. <http://twisri.blogspot.com/2009/03/why-market-failed.html>

¹⁶Proportional hazard models created by Mr. Cunningham and reflecting the probability of system wide market failure first spiked in September, 1998. The models spiked again in January and August, 2001. On December 22, 2005, we met with Ms. Elaine M. Hartmann and others from the Division of Market Regulation, U.S. Securities and Exchange Commission and specifically noted our model findings.

¹⁷ [Hearing on the Department of Labor's Fiduciary Rule](#), August 13, 2105.

Exchange and, by extension, crowdfunding, were designed to counter capital misallocation by helping insure that more capital goes, at the margin, to deserving small companies.

The use of on-line, Internet-based and enhanced capital access tools will significantly reduce costs and increase the flow of capital to all sectors in society. This increase in capital access will, in turn, result in significantly increased general economic activity.

We estimate, using proprietary economic models, this increased economic activity at \$22 trillion dollars over ten years. (This assumes an internet based capital access system that is gender and racially neutral, operating without significant falsification and fraud.) In order to realize this gain, however, neutrality is required.

REMOVAL OF THE RISK OF RACIAL AND GENDER DISCRIMINATION JUSTIFIES THE RESPONDENTS APPROACH

In the current environment, market institutions have been shown to allocate capital in a racially and gender biased manner.¹⁸ Crowdfunding has the potential to allocate capital in a more objective manner.¹⁹

A regulatory structure that allows internet startups founded by African Americans or women to pay more for access due to perceived biases as to the quality of the internet traffic coming from these demographic groups is likely without neutrality. The FCC's net neutrality regulation clearly prohibits price discrimination, and, by

¹⁸ "Bank accused of predatory practices. Lawsuit alleges black neighborhood, churches targeted." Gazette.net. Online at:

http://www.gazette.net/stories/06182009/collnew182411_32521.shtml

¹⁹ *Commentary: Crowdfunding can provide new financing option for minority firms*. June 3, 2012. Capital Business The Washington Post. Online at:

http://www.washingtonpost.com/business/capitalbusiness/commentary-crowdfunding-can-provide-new-financing-option-for-minority-firms/2012/06/01/gJQAThq7BV_story.html

extension, makes racial and economic discrimination far less likely. This is in the country's long term interest, given a rapidly diversifying population.

**RECENT FINANCIAL INSTITUTION BEHAVIOUR FURTHER
JUSTIFIES THE RESPONDENTS APPROACH**

Of more relevance is the risk that successful internet startups will suddenly pay more for internet access. This risk clearly follows from the demonstrated history of financial service provider greed and fraud. This is the far more reasonable and significant concern.

This might work as follows. To curry favor with or to simply have access to capital markets, under a non-neutral regulatory framework, it will be possible for an ISP to charge a disruptive financial services startup more in order to prevent the adoption of a new financial service. The nature of internet technology is such that, to be successful, new products and services must experience broad and rapid adoption. It will be easy for ISPs to delay this rapid adoption by engaging in internet bandwidth price discrimination.

**THE NATURE OF INTERNET TECHNOLOGY AND WHERE WE ARE
IN THE INDUSTRY LIFECYCLE REQUIRE NET NEUTRALITY**

With open internet standards, we expect internet file formats to become more efficient, leading to smaller download sizes and faster access. Further, we expect that funding for format research and development will increase if standards remain open, that is, as long as there is maximum economic incentive to lower file sizes. A bifurcated internet eliminates this incentive, and will result in a reduction in R&D that would otherwise lead to more efficient, more robust internet file methodologies.

The current industry lifecycle justifies classifying broadband providers as telecommunication, as opposed to information, services. The social return from internet service provider functions combined with the growing importance, scale and scope of ISP firms themselves justifies classifying them as telecommunications service businesses. When internet utilization was lower and

less impactful, such a classification may not have made sense. Now, given the clear value added provided by these services, given their critical role in supporting future economic growth, more regulation in the public interest is required. In this way, we stand a better chance of avoiding a loss like the \$17 trillion in damage that resulted from a lack of effective financial institution oversight.

The internet is a powerful tool. We understand both the potential benefits and the potentially disruptive nature of this technology better than most.²⁰ Capital market regulators in other regions of the world have begun to enhance their ability to access capital using internet-based tools.²¹ Thus, competitive advantage with respect to capital access is now available to any country with significant economic potential and a modest communications infrastructure.

We do not know which countries will be winners over the long term. We know with certainty, however, that without the full set of open internet standards and enhanced capital access tools, it is unlikely that the United States will long maintain and enjoy its current advantage.²²

CONCLUSION

For the foregoing reasons, the Court should DENY Petitioner's request.

Dated: December 7, 2015

²⁰ Mr. Cunningham launched his first website in 1995.

²¹ See: [Current Trends in Crowdfunding](#), Lecture at the Embassy of Italy, Washington, DC. September 16, 2015. We have designed an Italian "Food and Fashion" equity crowdfunding facility that focuses on equity investing in those two industries specifically for Italian companies while collecting small scale investments from investors all over the world. Note that "Food and Fashion" allows us to focus on two industries in which Italy has a relative competitive advantage. Also see: State Council of China, Measures to support entrepreneurship and innovation.
http://english.gov.cn/policies/latest_releases/2015/09/26/content_281475198633538.htm

²² Cunningham, William Michael, Comments to the SEC on Title IV. March 27, 2015. Online at: <http://www.sec.gov/comments/jobs-title-iv/jobstitleiv-38.pdf>

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), the typeface requirement of Fed. R. App. P. 32(a)(5), and the typestyle requirements of Fed. R. App. P. 32(a)(6). This brief contains 3,583 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and is prepared in a proportionally spaced typeface (14- point Times New Roman).

/s/ William Michael Cunningham