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HARLEM SHAKE MEETS THE *CHEVRON* TWO STEP: NET NEUTRALITY FOLLOWING *MOZILLA V. FCC*

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ABSTRACT

In October 2019, the D.C. Circuit handed down its much-anticipated decision in Mozilla v. FCC, relying heavily on Chevron *Deference and the Supreme Court's 2005* Brand X *decision. The* per curiam *opinion upheld large portions of the FCC's 2018 Restoring Internet Freedom Order, but also undermined the FCC's preemption of state law while also remanding issues related to public safety, pole attachments, and the Lifeline Program to the agency, assuring that the legal and policy battles over net neutrality will continue. This Article traces the history of the FCC's efforts on net neutrality as it has moved in and out of court since the FCC's 2005 Policy Statement before exploring the decision in Mozilla. The Article then argues that the continuing uncertainty over net neutrality regulation should be resolved by Congress.*

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INTRODUCTION

In December 2017, the FCC voted 3-2 along party lines to repeal its net neutrality rules.[1] The order repealed the Title II rules passed in 2015 that had prohibited ISPs from blocking and throttling lawful internet content and prohibited paid prioritization for internet content delivery.[2] This change would allow ISPs to favor some internet traffic over others.[3] The FCC's Restoring Internet Freedom order prompted immediate criticism from observers as well as lawsuits from several companies, states and organizations before the

[1] In the Matter of Restoring Internet Freedom, 33 FCC Rcd. 529–32, 533–41, 834-42, 843-45, 846-48 (2018) [hereinafter *Restoring Internet Freedom*]. Those who voted yes included: Commissioners O'Rielly and Carr, as well as Chairman Pai. Those who voted no included: Commissioners Clyburn and Rosenworcel. *Id*. The commissioners of the FCC were vocal about their opposition to or approval of the repeal. In dissenting vigorously, Commissioner Clyburn's stated that greater issues – not just procedural sufficiency – loomed, "There has been a darker side to all of this over the past few weeks. Threats and intimidation. . . Particularly damning is what today's repeal will mean for marginalized groups, like communities of color. . . . I close my eulogy of our 2015 net neutrality rules[.]" Commissioner O'Rielly's statement focused on explaining away accused procedural malfeasance, "Some would have us believe that the comment process has been irreparably tainted by the large number of fake comments," and itself was critical of the dissenting commissioners' knowledge of agency procedural requirements, "That view reflects a lack of understanding about the Administrative Procedure Act." *Id.* at 533-41, 834-42.

[2] 47 C.F.R. § 8 (2015); *see also Restoring Internet Freedom* at 312–13.

[3] 47 C.F.R. § 8 (2018); *see also* In the Matter of Protecting and Promoting the Open Internet (*Protecting and Promoting the Open Internet*), 30 FCC Rcd. 5601, 5607– 08 (2015).

D.C. Circuit.[4] After the FCC published the Restoring Internet Freedom order, Mozilla became the lead plaintiff as the first to formally re-file its complaint asserting that the FCC "depart[ed] from its prior reasoning and precedent" and, therefore, "violate[d] federal law," including the Communications Act of 1934, the Telecommunications Act of 1996, and FCC regulations promulgated thereunder.[5]

After oral arguments, but before a decision was released, in an August 20, 2019 declaration submitted to the U.S. Court of Appeals for the D.C. Circuit, Santa Clara County Fire Chief Anthony Bowden alleged that Verizon Wireless had throttled the internet services of the Santa Clara County Central Fire Protection District (County Fire).[6] According to the declaration, which was filed as an addendum to a brief filed by 22 state attorneys general to the D.C. Circuit, County Fire "relies on Internet-based systems to provide crucial and time-sensitive public safety services."[7] However, Bowden asserted that the department "experienced throttling by its ISP, Verizon,"[8] namely that its "data rates had been reduced to 1/200, or less, than the previous speeds."[9] Bowden contended that the reduced speeds "severely interfered with [County Fire's] ability to function effectively,"[10] including during wildfires that "resulted

[4] Christopher Terry, Scott Memmel, & Ashley Turacek, *Lost in a Novelty Mug: U.S. Telecom, the FCC, and Policy Resolution for Net Neutrality*, 41 HASTINGS COMM. & ENT. L.J. 1, 26 (2019).

[5] Protective Petition for Review at 2, Mozilla Corp. v. Fed. Commc'n Comm'n, 940 F.3d 1 (D.C. Cir. 2018) (No. 18-1051), (*available at* https://blog.mozilla.org/wp-content/uploads/2018/01/AS-FILED-Mozilla-Protective-Petition-16Jan2018-1.pdf).

[6] Brief for Government Petitioners at 23-24, Mozilla Corp. v. Fed. Commc'n Comm'n, 940 F.3d 1 (D.C. Cir. 2018) (No. 18-1051), 2018 WL 6242983 at 23-24; *see also* Jon Brodkin, *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/.

[7] *See* Brief for Government Petitioners at 10, Mozilla Corp. v. Fed. Commc'n Comm'n, 940 F.3d 1 (D.C. Cir. 2018) (No. 18-1051).

[8] Addendum to Brief for Government Petitioners at 5 Mozilla Corp. v. Fed. Commc'n Comm'n, 940 F.3d 1 (D.C. Cir. 2018) (No. 18-1051).

[9] *Id*. at 6.

[10] *Id*. at 5.

in over 726,000 acres burned and roughly 2,000 structures destroyed."[11]

The next day, Verizon sent a statement to *Ars Technica* acknowledging that it should not have throttled County Fire's data service, especially after the department had requested that Verizon lift the restrictions.[12] Verizon explained their side of what went wrong:

> Regardless of the plan emergency responders choose, we have a practice to remove data speed restrictions when contacted in emergency situations . . . . We have done that many times, including for emergency personnel responding to these tragic fires. In this situation, we should have lifted the speed restriction when our customer reached out to us. This was a customer support mistake. We are reviewing the situation and will fix any issues going forward.[13]

Verizon argued that the throttling was due to a customer service error and had "nothing to do with net neutrality."[14] However, in an August 22 statement, the Santa Clara County Counsel's Office contended that the throttling had "everything to do with net neutrality—it shows that the ISPs will act in their economic interests, even at the expense of public safety," adding, "[t]hat is

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[11] *Id*.

[12] Jon Brodkin, *Fire Dept. Rejects Verizon's "Customer Support Mistake" Excuse for Throttling*, ARS TECHNICA (Aug. 22, 2018), https://arstechnica.com/tech-policy/2018/08/fire-dept-rejects-verizons-customer-support-mistake-excuse-for-throttling/. Brodkin explained that previously, on June 29, 2019, Fire Captain Justin Stockman had written an email to Verizon, noting that "download speeds for an essential device used during large disasters had been throttled from 50Mbps to about 30kbps," leading to a series of emails between Verizon and the department.

[13] *Id.*

[14] *Id.*; *see also Net Neutrality*, ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/issues/net-neutrality (last visited July 15, 2019). EFF defines net neutrality as "the idea that Internet service providers (ISPs) should treat all data that travels over their networks fairly, without improper discrimination in favor of particular apps, sites or services." *Id.*

exactly what the Trump Administration's repeal of net neutrality allows and encourages."[15]

On October 1, 2019, the D.C. Circuit released a *per curiam* opinion which upheld the FCC's repeal of the net neutrality rules.[16] The court held that the FCC had the authority to repeal the agency's 2015 Title II provisions and had been reasonable in its approach to doing so.[17] However, the court also remanded several issues back to the FCC, including requirements that the agency assess the rollback's effect on public safety.[18] The court also prohibited the FCC from barring states from drafting their own net neutrality regulations.[19]

This Article argues that the D.C. Circuit ruling in *Mozilla*—which concluded that the FCC was due wide deference to repeal the rules despite remanding several issues back to the agency—will greatly extend the long running policy and legal debate over net neutrality. Absent an act of Congress to provide the FCC with guidance, the legal battles will continue both at the state and federal levels. Because the FCC's back and forth approach to structural internet regulation is likely to lead to more uncertainty, this Article argues that resolution of the issue is desirable. Furthermore, this Article contends that, ideally, net neutrality provisions should be restored because such rules can, and do, promote free expression on the internet.

To explore this argument, this Article first walks through the history of the net neutrality debate from the FCC's initial proposal

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[15] Jon Brodkin, *supra* note 12.

[16] Mozilla Corp. v. Fed. Commc'n Comm'n, 940 F.3d 1 (D.C. Cir. 2019) (*per curiam*).

[17] *Id.* at 57–59 (stating that, "We are, however, satisfied by the Commission's other reasons for believing competition exists in the broadband market. . . the Commission barely survives arbitrary and capricious review on this issue."); *see also* Marguerite Reardon, *Net Neutrality Court Ruling: States Can Set Own Rules*, CNET (Oct. 1, 2019), https://www.cnet.com/news/net-neutrality-court-ruling-states-can-set-own-rules/; *see also* Adi Robertson, *The FCC Can Repeal Net Neutrality, but it Can't Block State Laws, Says Court*, VERGE (Oct. 1, 2019), https://www.theverge.com/2019/10/1/20893342/fcc-net-neutrality-repeal-dc-appeals-court-ruling-state-law-preemption.

[18] *Mozilla*, 940 F.3d at 59.

[19] Margaret Harding McGill, *Court Mostly OKs FCC's Net Neutrality Repeal but Lets States Craft Their Own Rules*, POLITICO (Oct. 1, 2019), https://www.politico.com/news/2019/10/01/fcc-net-neutrality-014801.

in 2005 through the agency's 2017 Restoring Internet Freedom order. Second, this Article discusses the D.C. Circuit's decision, focusing especially on the court's application of *Chevron* deference as well as the three issues remanded to the FCC. Finally, this Article argues that Congress, or at the very least the states, need to act on this issue as net neutrality rules are an important mechanism that maximize opportunities for political participation by protecting free expression from private monopolization on the internet.

I. BACKGROUND

The following Part first provides background on the evolution of the net neutrality debate and key considerations regarding FCC decision-making between 2005 and the FCC's adoption of the 2017 Restoring Internet Freedom Order. Second, it provides important background information on the *Chevron* Doctrine and deference.

A. Net Neutrality

Net neutrality, a term coined by Tim Wu,[20] is a regulatory concept that can be traced back to the FCC's 2005 policy statement contending that anyone who can access the internet should be able to access any content on any device.[21] In support of this contention, the FCC cited § 230(b) of the amended Communications Act of 1934 which included Congress' policy to "preserve the vibrant and competitive free market that presently exists for the Internet" and "to promote the continued development of the Internet."[22]

Under the guidance of these Congressional directives and "to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers,"[23] the FCC adopted four principles:

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[20] Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 144 (2003) (discussing the "normative principle of network neutrality").

[21] In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 FCC Rcd. 14,986–88 (2005) [hereinafter *Framework*]; *see also* Terry, Memmel, & Turacek, *supra* note 4.

[22] 47 U.S.C. § 230(b) (2012).

[23] *Framework*, 20 FCC Rcd. at 14987; *supra* note 4, at 4.

- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of their choice.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network.
- To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to competition among network providers, application and service providers, and content providers.[24]

Five years later, a challenge was brought against the FCC's authority to enforce the four principles after several of Comcast's high-speed internet service subscribers discovered that the company had interfered with peer-to-peer networking applications.[25] In *Comcast Corp. v. FCC*, the court focused on whether the FCC had authority to regulate an ISP's network management practices.[26] The FCC argued they had the authority to classify ISPs as "information services" under Title I of the Communications Act of 1934.[27]

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[24] *Framework*, 20 FCC Rcd. at 14988, *supra* note 21 (emphasis omitted).

[25] *See* Peter Svensson, *Comcast Blocks Some Internet Traffic*, ASSOC. PRESS (Oct. 19, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/10/19/AR2007101900842.html; *see also* Terry, Memmel, & Turack, *supra* note 4.

[26] 600 F.3d 642, 645 (D.C. Cir. 2010).

[27] *Id.* at 649–50.

The case arose after several of Comcast's high-speed internet service subscribers alleged that the company was interfering with their use of peer-to-peer networking applications, which generally allow users to send files with each other without going through a central server.[28] Such programs present competition for cable providers because they allow users to view high-quality videos that they would otherwise have to pay for on cable television through networking protocols like BitTorrent.[29] In 2007, the Associated Press concluded that Comcast "actively interferes with attempts by some of its high-speed Internet subscribers to share files online."[30] The Electronic Frontier Foundation reached a similar conclusion, finding that Comcast was selectively targeting customers who uploaded files using BitTorrent and other peer-to-peer protocols.[31] Comcast later admitted to interfering with peer-to-peer traffic, contending that it interfered "only during periods of peak network congestion" and only "during periods of heavy network traffic."[32]

In November 2007, Free Press, an advocacy group focused on media reform, filed a complaint with the FCC requesting that the agency declare "that an Internet service provider violates the

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[28] *See* Svensson, *supra* note 25.

[29] *See id.; see also Framework*, 20 FCC Rcd. at 14988.

[30] Svensson, *supra* note 25. The AP continued: "Comcast's interference affects all types of content, meaning that, for instance, an independent movie producer who wanted to distribute his work using BitTorrent and his Comcast connection could find that difficult or impossible." *Id.* The AP further discovered that Comcast's conduct had a "drastic effect . . . on one type of traffic _ [sic] in some cases blocking it rather than slowing it down," concluding that the method used by Comcast was "difficult to circumvent and involves [Comcast] falsifying network traffic." *Id.*

[31] Peter Eckersley, Fred von Lohmann, & Seth Schoen, *Packet Forgery By ISPs: A Report On the Comcast Affair*, ELECTRONIC FRONTIER FOUND. (Nov. 28, 2017), https://www.eff.org/wp/packet-forgery-isps-report-comcast-affair. Electronic Frontier Foundation reached a similar conclusion, finding that Comcast was selectively targeting customers who uploaded files using BitTorrent and other peer-to-peer protocols.

[32] In the Matter of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications (*Comcast Complaint*), 23 FCC Rcd. 13028, 13032 (2007) (citing Letter from Mary McManus, Senior Director of FCC and Regulatory Policy, Comcast Corporation, to Kris A. Monteith, Chief, Enforcement Bureau, File No. EB-08-IH-1518, at 5 (Jan. 25, 2008) [hereinafter Comcast Response Letter]).

[Commission's] Internet Policy Statement when it intentionally degrades a targeted Internet application."[33] Free Press also filed a petition for declaratory ruling requesting the FTC to "clarify that an Internet service provider violates the FCC's Internet Policy Statement when it intentionally degrades a targeted Internet application."[34]

In a petition for rulemaking, Vuze, Inc. asked the FCC "to adopt reasonable rules that would prevent the network operators from engaging in practices that discriminate against particular Internet applications, content or technologies."[35] The FCC summarily issued an order which stated that the agency had jurisdiction over Comcast's network management practices, and that it could resolve the dispute through adjudication rather than through rulemaking.[36]

Comcast complied with the order, but raised three objections. First, Comcast argued that the FCC did not have jurisdiction over its network management practices.[37] Second, it argued that the FCC's adjudicatory action was procedurally flawed because it circumvented the rulemaking requirements of the Administrative Procedure Act and violated the notice requirements of the Due Process Clause of the U.S. Constitution.[38] Finally, Comcast asserted that parts of the order were poorly reasoned, and were, as a result, arbitrary and capricious.[39]

The D.C. Circuit discussed § 4(i) of the Communications Act of 1934, which authorizes the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."[40] In *Comcast*, the FCC did not claim that Congress had given it express authority to regulate Comcast's internet services.[41] In fact, in its 2002 Cable Modem order, the Commission ruled that cable internet service is neither a "telecommunications service"

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[33] *Id.*
[34] *Id.* at 13033.
[35] *Id.*
[36] *Id.*
[37] Comcast Corp. v. FCC, 600 F.3d 642, 645 (D.C. Cir. 2010).
[38] *Id.*
[39] *Id.*
[40] *Id.; see also* 47 U.S.C. § 154(i) (2018).
[41] *Comcast Corp.*, 600 F.3d at 645.

covered by Title II of the Communications Act nor a "cable service" covered by Title VI.[42] The Commission based its authority over Comcast's network management practices on the broad language of § 154(i) of the Act, which provides that the FCC can make rules and issue orders "as may be necessary in the execution of its functions."[43]

Courts refer to the Commission's § 154(i) power as its "ancillary" authority, a label derived from three Supreme Court decisions.[44] In *American Library Ass'n v. FCC*, the D.C. Circuit distilled the holdings of these three cases into a two-part test,[45] holding that the FCC "may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission's general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[46] Comcast conceded that the FCC's action satisfied the first requirement because the company's internet service qualified as "interstate and foreign communication by wire" within the meaning of Title I.[47] The court was then tasked with deciding whether the FCC's action satisfied the second prong of the *American Library* test.

The FCC argued that the order satisfied *American Library's* second requirement because it was "reasonably ancillary to the Commission's effective performance" of its responsibilities under

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[42] 67 Fed. Reg. 18,907 (Apr. 17, 2002); *see generally* In the Matter of Inquiry Concerning High–Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798, 4802 (2002), *aff'd*, National Cable and Telecomm. Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005) (giving further background on the reasoning behind this decision).

[43] 47 U.S.C. § 154(i) (2018); *Comcast Complaint*, 23 FCC Rcd. at 13035–36.

[44] *See*, United States v. Southwestern Cable Co., 392 U.S. 157 (1968); United States v. Midwest Video Corp. (*Midwest Video I*), 406 U.S. 649 (1972); FCC v. Midwest Video Corp. (*Midwest Video II*), 440 U.S. 689 (1979). All three of these cases dealt with Commission jurisdiction over early cable systems when, similar to 2009, the Communications Act gave the Commission no express authority to regulate such systems.

[45] *Comcast Corp.*, 600 F.3d at 646.

[46] American Library Ass'n v. FCC, 406 F.3d 689, 691-92 (D.C. Cir. 2005).

[47] *Comcast Corp.*, 600 F.3d at 646; *see also* 47 U.S.C. § 152(a) (2018).

the Communications Act.[48] However, the D.C. Circuit held that the FCC failed to adequately justify exercise of ancillary authority to regulate ISP's network management practices, and that the FCC could not use its ancillary authority to pursue a stand-alone policy objective, rather than to support its exercise of a specifically delegated power.[49] Furthermore, the court disagreed with the FCC that the Supreme Court's decision in *Brand X,* "already decided the jurisdictional question here."[50]

Following the D.C. Circuit's ruling in *Comcast*, the FCC released a 2010 order establishing disclosure and transparency requirements on ISPs.[51] In the order, the FCC adopted three basic rules "[t]o provide greater clarity and certainty regarding the continued freedom and openness of the Internet."[52] The first rule was "transparency," which required:

> A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.[53]

The second rule prohibited ISPs from "blocking" content or access.[54] The rule stated, "[a] person engaged in the provision of fixed broadband Internet access service, insofar as such person is so

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[48] *Comcast Corp.*, 600 F.3d at 646-47.

[49] *Id.* at 659.

[50] *Id.* at 649.

[51] Matthew Lasar, *It's here: FCC adopts net neutrality (lite)*, ARS TECHNICA (Dec. 21, 2010), https://arstechnica.com/tech-policy/2010/12/its-here-fcc-adopts-net-neutrality-lite/.

[52] In the Matter of Preserving the Open Internet, 25 FCC Rcd. 17905, 17906 (2010) [hereinafter *Preserving the Open Internet*].

[53] 47 C.F.R. § 8.3 (2011); *see generally Preserving the Open Internet* at 17937 (explaining the reasoning behind the rule).

[54] *Preserving the Open Internet* 25 FCC Rcd. at 17906.

engaged, shall not block lawful content, applications, services, or nonharmful devices, subject to reasonable network management."[55]

The final rule prohibited "unreasonable discrimination" in "transmitting lawful network traffic,"[56] meaning that "[a] person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not unreasonably discriminate in transmitting lawful network traffic over a consumer's broadband Internet access service. Reasonable network management shall not constitute unreasonable discrimination."[57]

The order was summarily challenged by Verizon,[58] marking the second time in less than five years in which the D.C. Circuit was confronted with an FCC effort to compel broadband providers to treat all internet traffic the same regardless of source. The FCC claimed that § 706 of the Telecommunications Act of 1996 vested it with affirmative authority to enact measures encouraging the deployment of broadband infrastructure.[59] Verizon first claimed that neither subsection (a) nor (b) of § 706 provided the FCC with any regulatory authority.[60] Second, Verizon argued that even if § 706 granted the FCC with the necessary authority, the "scope of that grant" would not permit "the Commission to regulate broadband providers in the manner that the Open Internet rules did."[61] The court had stated that *Chevron* deference was "warranted even if the agency had interpreted a statutory provision that could be said to delineate the scope of the agency's jurisdiction."[62]

Verizon's first claim was rejected. The D.C. Circuit ruled that the FCC had "reasonably interpreted § 706 to empower" it to promulgate rules governing broadband providers' treatment of

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[55] 47 C.F.R. §8.5 (2011); *see generally Preserving the Open Internet* at 25 FCC Rcd. at 17942 (explaining the reasoning behind the rule).

[56] *Preserving the Open Internet* 25 FCC Rcd. at 17992.

[57] 27 C.F.R. § 8.7 (2011); *see also Preserving the Open Internet* 25 FCC Rcd. at 17992.

[58] Verizon Comm. Inc. v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

[59] *Id.* at 634; Terry, Memmel & Turacek, *supra* note 4.

[60] *Verizon*, 740 F.3d at 635.

[61] *Id.*

[62] *Id.*

internet traffic.[63] The court also concluded that the FCC's understanding of § 706(a) as a grant of regulatory authority represented a reasonable interpretation of an ambiguous statute.[64] Additionally, the court held that the Commission had authority under the Telecommunications Act to take steps to accelerate broadband deployment if and when it determined that existing efforts were not "reasonable and timely."[65] Furthermore, the court held that the FCC could compel fixed broadband providers under the Telecommunications Act to adhere to open network management practices that would meaningfully promote broadband deployment.[66]

However, regarding Verizon's second claim, the court found that the FCC had chosen to classify broadband providers in a way that exempts them from treatment as common carriers, and the Communications Act expressly prohibits the Commission from regulating them as such.[67] Therefore, the court held that the FCC had failed to establish that anti-blocking rules did not impose *per se* common carrier obligations, vacating those portions of the 2010 order.[68] The court went on to conclude that the anti-discrimination and anti-blocking obligation imposed on fixed broadband providers "relegated [those providers], *pro tanto*, to common carrier status,"[69] also in violation of the Communications Act. The court therefore vacated and remanded the anti-discrimination and the anti-blocking rules.[70]

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[63] *Id.* at 628.

[64] *Id.* at 637. The court further wrote that the Telecommunications Act of 1996 granted regulatory authority to the FCC and empowered it to promulgate rules governing broadband providers' treatment of Internet traffic, including preserving and facilitating "virtuous circle" of innovation that had driven explosive growth of Internet. However, the FCC was limited by its subject matter jurisdiction and the requirement that any regulation be tailored to specific statutory goal of accelerating broadband deployment. *Id.*

[65] *Id.*

[66] *Id.* at 643.

[67] *Id.* at 652.

[68] *Id.* at 628.

[69] *Id.* at 655 (quoting FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979) (internal quotations omitted)).

[70] *Id.* at 659.

In this case, the court held that the FCC could, and perhaps should, classify ISPs as Title II "common carriers" instead of under Title I of the Communications Act of 1934.[71] According to the court, if the FCC did so, the agency would then have authority to regulate ISPs by releasing orders like the one at issue in the case.[72] The majority held that the FCC's decision not to reclassify providers under Title II as part of the 2010 order was a choice and that the FCC should reconsider.[73]

In 2015, the FCC did just that in the Open Internet order, which classified ISPs as common carriers under Title II and § 706 of the Telecommunications Act of 1996.[74]

The Order enforced net neutrality through a variety of provisions, including three bright-line rules prohibiting ISPs from blocking and throttling lawful internet content, as well as prohibiting paid prioritization for internet content delivery, which would allow ISPs to favor some internet traffic over others.[75] Paid prioritization refers to:

> [T]he management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.[76]

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[71] *Id.* at 655.

[72] *Id.* at 632 (quoting American Library Ass'n v. FCC, 406 F.3d 689, 691-92 (D.C. Cir. 2005).

[73] *Id.* at 649.

[74] 47 C.F.R. § 8.2 (2015); *see also Protecting and Promoting the Open Internet*, 30 FCC Rcd. at 5614 ("Taking the *Verizon* decision's implicit invitation, we revisit the Commission's classification of the retail broadband Internet access service as an information service and clarify that this service encompasses the so-called 'edge service.'"); *see generally id.* at 5721–24 (explaining the FCC's use of § 706 as a basis for authority over the open internet and designating ISPs as common carriers).

[75] *Protecting and Promoting the Open Internet*, 30 FCC Rcd. at 5647.

[76] 47 C.F.R. § 8.9(b) (2015); *see generally Protecting and Promoting the*

In *U.S. Telecom v. FCC*, the D.C. Circuit upheld the 2015 Title II order, finding that the FCC had the authority to impose such an order, citing the suggestion made to the FCC by the majority in *Verizon*.[77] The case arose following the 2015 Title II Order when several ISPs and industry associations petitioned for review in the D.C. Circuit.

Conversely, U.S. Telecom argued that the Commission violated § 553 of the Administrative Procedure Act, which requires that a notice of proposed rulemaking (NPRM) "include . . . either the terms or substance of the proposed rule or a description of the subjects and issues involved."[78] In particular, U.S. Telecom argued that the FCC violated this requirement because the proposed NPRM relied on § 706, not Title II.[79]

The D.C. Circuit rejected U.S. Telecom's argument, finding that the NPRM had satisfied the test for validity of its final decision of reclassifying broadband service.[80] The court also held that an NPRM provided adequate notice when it "expressly ask[ed] for comments on a particular issue or otherwise ma[de] clear that the agency [was] contemplating a particular change."[81]

The D.C. Circuit held that the FCC had adequately addressed commenters' concerns about the agency's decision to forbear from applying mandatory network connection and facilities unbundling requirements as part of actions to promote open internet, or "net neutrality."[82] The court found that the FCC had authority to regulate network connections, broadband service fell within FCC's jurisdiction as interstate service, and that the Commission had no obligation to determine legal status of each underlying hypothetical

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Open Internet, 30 FCC Rcd. at 5653–59.

[77] U.S. Telecom Ass'n v. FCC (*Telecom I*), 825 F.3d 674, 740 (D.C. Cir. 2016).

[78] 5 U.S.C. § 553(b)(3) (1966).

[79] *Telecom I*, 825 F.3d at 700.

[80] *Id.*

[81] *Id.* (alterations ours) (quoting CSX Transp., Inc. Surface Transp. Bd., 584 F.3d 1076, 1081 (D.C. Cir. 2009)).

[82] *Id.* at 730.

regulatory obligation prior to undertaking forbearance analysis.[83] The court also held that the FCC was justified in reclassifying broadband internet service as telecommunications service subject to common carrier regulation under Title II of the Communications Act.[84] The court further found that "[c]ommon carriers have long been subject to nondiscrimination and equal access obligations akin to those imposed by the rules without raising any First Amendment question."[85]

The D.C. Circuit ultimately denied an *en banc* hearing, to which then-Judge Brett Kavanaugh wrote a dissenting opinion.[86] Kavanaugh argued that the FCC did not have the authority to reclassify ISPs under the Communications Act of 1934.[87] Kavanaugh further contended that the 2015 Title II order had violated ISPs' First Amendment rights by infringing on their editorial control and creating compelled speech.[88] He cited two Supreme Court cases[89] as evidence that "the First Amendment bars the Government from restricting the editorial discretion of Internet service providers, absent a showing that an Internet service provider possesses market power in a relevant geographic market."[90]

However, despite the D.C. Circuit's ruling, the FCC voted 3-2 along party lines in December of 2017 to repeal its net neutrality rules.[91] The order first "[r]estor[ed] the classification of broadband Internet access service as an 'information service'" as it had been classified prior to the 2015 Title II Order.[92] The FCC argued that this action would allow for "light-touch" regulation meant to promote "investment and innovation by removing regulatory

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[83] *Id.* at 730-31 (quoting AT & T Inc. v. FCC, 452 F.3d 830, 836-37 (D.C. Cir. 2006)).

[84] *Id.* at 698; Verizon v. FCC, 740 F.3d 623; Terry, Memmel & Turacek, *supra* note 4.

[85] *Telecom I*, 825 F.3d at 740.

[86] U.S. Telecom Ass'n v. FCC (*Telecom II*), 855 F.3d 381 (D.C. Cir. 2017).

[87] *Id.* at 417.

[88] *Id.* at 418.

[89] *Id.* (citing Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994); Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997)).

[90] *Telecom II*, 855 F.3d at 418.

[91] Restoring Internet Freedom, 83 Fed. Reg. 7852.

[92] *Id.*

uncertainty and lowering compliance costs."[93] Second, the order "[adopted] transparency requirements that ISPs disclose information about their practices to consumers, entrepreneurs, and the Commission."[94] The new rule required ISPs to disclose several network practices, including instances of "blocking," which the FCC defined as "[a]ny practice (other than reasonable network management elsewhere disclosed) that blocks or otherwise prevents end user access to lawful content, applications, service, or non-harmful devices, including a description of what is blocked."[95] ISPs, also needed to disclose instances of "throttling," which refers to "[a]ny practice (other than reasonable network management elsewhere disclosed) that degrades or impairs access to lawful Internet traffic on the basis of content, application, service, user, or use of a non-harmful device, including a description of what is throttled."[96] Finally, ISPs were required to disclose instances of "paid prioritization" and "affiliated prioritization," meaning "[a]ny practice that directly or indirectly favors some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, or resource reservation, to benefit an affiliate, including identification of the affiliate."[97] Additionally, the FCC eliminated its conduct rules for ISPs, including the bright-line rules preventing blocking, throttling, and paid prioritization.[98]

Meanwhile, the FCC delayed the petition for review of *Telecom II* seven times before the Court ultimately denied *certiorari* in the case.[99] Chief Justice John Roberts and Justice Kavanaugh recused themselves—Kavanaugh because he had already heard the case in

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[93] *Id.*

[94] *Id.* at 7891.

[95] *Id.* at 7983.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 7896.

[99] *Telecom II*, 855 F.3d 674, *appeal denied*, No. 17-504 (2017); *see also* Letter from Noel J. Francisco, U.S. Solicitor General, to Honorable Scott S. Harris, U.S. Supreme Court Clerk (May 30, 2018), https://www.supremecourt.gov/DocketPDF/17/17-504/48612/20180530110336121_Extension%20Letter%2017-498%20%20-%2017-504%208th.pdf.

the D.C. Circuit.[100] The FCC's 2017 repeal of net neutrality, as well as its delay in taking action on the petition for *certiorari* helped extend the messy legal landscape around net neutrality, requiring resolution that the D.C. Circuit has yet to provide and that the Supreme Court may decline to consider.[101]

B. Agency Decision-Making: Chevron *Doctrine and Deference*

A rationally based decision in a rulemaking inquiry is likely to withstand judicial review when it has a number of relevant characteristics. First, the U.S. Supreme Court stated that an agency's failure to provide any basis upon which its decisions were made rendered any such decisions invalid.[102] The court also reiterated that the record of a rulemaking proceeding must contain the information and other materials that the agency relied upon to ensure that the decision was not arbitrary.[103] Notably, the Supreme Court has expanded the review of agency decision-making to situations where an agency modifies existing rules; the agency is also required to provide a reasonable analysis in support of the decision.[104]

The Second Circuit ruled that effective judicial review of agency decision-making requires a complete record providing not only the agency's interpretation of the statute it is implementing, but also a full explanation of the agency's reasoning.[105] The D.C. Circuit held

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[100] Amy Howe, *Divided Court Denies Review in "Net Neutrality" Cases*, SCOTUSBLOG (Nov. 5, 2018), http://www.scotusblog.com/2018/11/divided-court-denies-review-in-net-neutrality-cases/.

[101] Terry, Memmel & Turacek, *supra* note 4.

[102] Sec. & Exch. Comm'n v. Chenery, 318 U.S. 80 (1943).

[103] HBO v. FCC, 434 U.S. 988 (1977).

[104] Motor Vehicles Mfr's Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983).

[105] United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 253 (2d Cir. 1977). In *Nova Scotia Foods* the court quoted Indus. Union Dept., AFL-CIO v. Hogson on this point, stating, "What we are entitled to at all events is a careful identification by the Secretary, when his proposed standards are challenged, of the reasons why he chooses to follow one course rather than another. Where that choice purports to be based on the existence of certain determinable facts, the Secretary must, in form as well as in substance, find those facts from evidence in the record. By the same token, when the Secretary is obliged to make policy

that to ensure a rational review of the agency decision-making required the court to examine the technical evidence, much of which was in dispute, to determine what information was used and what was discarded by the agency.[106] The failure of an agency to produce a full record, as well as allow comments on the interpretation of the statute and the data the agency relied on when promulgating a regulation undermined the rationality of the decision by an agency.[107]

The scope of review of agency action is specified in § 706 of the Administrative Procedure Act (APA), providing that "[a] reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning of applicability of the terms of an agency action."[108] Under § 706, a reviewing court will set aside agency actions it determines to be arbitrary and capricious.[109]

The *Chevron* decision, which set the modern standard for judicial deference to agency decision-making, was an effort to establish a standard to show deference to the agency's expertise.[110] *Chevron* provided parameters for the judiciary when reviewing agency decisions to help prevent courts from determining policy by overriding the agency's expertise, which, in turn, would result in the undermining of administrative agencies and their expertise in policy implementation.[111]

When reviewing agency action, a court applies the *Chevron* test to determine the legislative intent of a statute and what deference the court owes the agency and its expertise.[112] Under the first step of the test, the court examines the controlling statute: if the meaning is

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judgments where no factual certainties exist or where facts alone do not provide the answer, he should so state and go on to identify the considerations he found to be persuasive." 499 F.2d 467 (D.C. Cir. 1974).

[106] Ethel Corp v. Envtl. Prot. Agency, 51 F.3d 1053, 1054 (D.C. Cir. 1976).

[107] Weyerhaeuser Co. v. Castle, 590 F.2d 1011, 1055 (D.C. Cir. 1978).

[108] Administrative Procedure Act, 5 U.S.C. § 706 (1966).

[109] *Id.* § 706(2)(A).

[110] *See* Chevron, Inc. v. Nat'l Resources Defense Council, Inc., 467 U.S. 837, 838 (1984).

[111] *Id.* at 865.

[112] *Id.* at 843.

unambiguous, that meaning is determinative.[113] Under the second step of the *Chevron* test, if a statute's meaning is ambiguous, the court must uphold any reasonable interpretation of the statute by the agency, thus giving deference to the agency and its expertise.[114] Traditionally a reviewing court would give less deference to an agency's legal conclusions than to an agency's factual or discretionary determinations as a result of the agency's expertise. Recently, judicial review of agency action has focused primarily on whether the agency followed proper procedure and took a "hard look" examination of the agency's factual reasoning in the record.[115]

Judicial review of agency action in formal proceedings is conducted under APA § 706(2)(E), which codifies the substantial evidence test. Under the substantial evidence test, courts uphold the agency's decision where the evidence reasonably supports the agency's stated conclusions.[116] In so doing, the court is required to look at the whole record, including the evidence that supports and opposes the agency's decision, as well as any decision by the administrative law judge. In *Edison v. National Labor Relations Board*, the Supreme Court had held that the burden of substantial evidence has been met when an agency has relied on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[117]

II. MOZILLA CORPORATION V. FEDERAL COMMUNICATIONS COMMISSION (2019)

The D.C. Circuit held on October 1, 2019, that the FCC's reclassification of broadband internet under Title I of the Telecommunications Act was "reasonable under *Chevron*," finding

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[113] *Id.* at 842-43.

[114] *Id.* at 843-44.

[115] Ernest Gellhorn & Ronald Levin, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 99 (5th ed. 2006). In some cases, agencies have tried to limit the necessary factual basis for a decision by interpreting a statute in a way that makes the evidentiary requirements lower. *Id* at 183.

[116] 5 U.S.C. § 706(2)(F) (1966).

[117] 305 U.S. 197, 229 (1938).

that the FCC "has compelling policy grounds to ensure consistent treatment of the two varieties of broadband Internet access, fixed and mobile, subjecting both, or neither, to Title II."[118]

The *per curiam* decision was built around whether or not the FCC had the right to reclassify fixed broadband from a telecommunication service, as it had done in 2015, to an information service in the 2017 net neutrality repeal.[119] A corresponding reclassification applied to mobile broadband, now designated as a private mobile service.[120] As part of the reclassification process, the FCC relied on § 257 of the Communications Act of 1934 to adopt transparency rules about Internet Service Providers' network practices.[121] To support this regulatory approach, the FCC applied a cost-benefit analysis, concluding that the regulatory burdens brought about by reclassifying ISPs under Title II and imposing net neutrality conduct rules exceeded their benefits.[122]

The majority opinion circled around this central point several times, granting a heavy deference to the FCC's decision-making. Relying on the reclassification authority provided to the FCC by the 2005 *Brand X* decision by the Supreme Court, as well as a liberal, wide-ranging application of the *Chevron* deference standard, the majority upheld the sections of the net neutrality repeal dealing with reclassification.[123]

The D.C. Circuit first held that the decision in *Brand X* gave the FCC a great deal of latitude in terms of decisions about how to classify broadband, and that *Chevron* deference was appropriate to the decision the agency made:[124]

> All this of course proceeds in the shadow of *Brand X*, which itself applied *Chevron* to a similar issue. Applying these principles here, we hold that classifying broadband Internet access as an "information service" based on the functionalities of

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[118] *Mozilla*, 940 F.3d at 35.
[119] *Id*. at 18.
[120] *Id.*
[121] 47 U.S.C. § 257 (2018).
[122] *Mozilla*, 940 F.3d at 70.
[123] *Id.* at 18.
[124] *Id.* at 20.

> DNS and caching is "a reasonable policy choice for the [Commission] to make' at *Chevron*'s second step.[125]

The majority declared that, in *Brand X*, the Supreme Court had already held that it was reasonable for the FCC to conclude that DNS and caching are information services integrated with the offering of internet service.[126] Likewise, *Chevron* authorized the FCC's conclusion that, "the vast majority of ordinary consumers . . . rely upon the DNS functionality provided by their ISP as 'part and parcel of the broadband Internet access service.'"[127] The majority held that the lack of a clear delegation from Congress left the FCC in a position to make some policy decisions, and that the lack of a conceptual framework to the FCC at the time of the net neutrality repeal or at the time of the 2015 Title II order had failed to provide any mandate on how the agency should handle the relationship between mobile broadband and VoIP.[128]

Although some of the petitioners had raised specific challenges to the FCC's repeal of net neutrality as arbitrary and capricious, the majority suggested that its review under the joint elements of *Brand X* and *Chevron* was "particularly deferential."[129] As such, the majority rejected arguments over the Restoring Internet Freedom order's transparency requirements, stating the FCC had clearly explained the changes through cost benefit analysis. The majority held, "The Commission explained that the "additional obligations [of the former transparency rule did] not benefit consumers, entrepreneurs, or the Commission sufficiently to outweigh the burdens imposed on [broadband providers]."[130]

Despite the particularly deferential standard being applied, the majority rejected the FCC's suggestion to uphold the entire rulemaking authority on the weight behind the FCC's statutory

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[125] *Id.* at 20.
[126] *Id.* at 21–22.
[127] *Id.* at 33 (citing *Restoring Internet Freedom*, *supra* note 1).
[128] *Id.* at 40–43.
[129] *Id.* at 49.
[130] *Id.*

interpretation alone.[131] The FCC had contended that the reasonableness of the agency's interpretation had insulated the Restoring Internet Freedom order from challenges that the order was arbitrary and capricious.[132] The majority stated that although there was overlap between *Chevron* at step two and an arbitrary and capricious review, the argument itself misunderstood the law, and that each test in judicial review of the agency's decision was independent.[133]

The disagreement in the review process was a significant part of the split between *Chevron* deference on most of the Restoring Internet Freedom order and the portions of the order remanded by the court.

The majority agreed that the FCC had advanced the reasonable interpretation purposes of *Chevron*, but also ruled that the FCC's failure to assess the impact of repealing net neutrality on public safety was still arbitrary and capricious under the Administrative Procedure Act.[134] In a similar line of reasoning, the majority applied the split standard to the FCC's considerations of the Restoring Internet Freedom's impact on pole-attachment regulation and the Lifeline Program, ruling the decision-making by the FCC to be inadequate on both issues.[135] In terms of pole attachment, the FCC's reclassification of broadband in the Restoring Internet Freedom order had created a statutory gap in FCC authority.[136]

Petitioners challenged the FCC's finding that reclassification of broadband as an information service was, "likely to increase ISP investment and output," by objecting specifically to the studies the agency had relied on and its failure to credit certain alternative data.[137] Again, by giving some credit to the FCC in terms of deference, the majority did a separate arbitrary and capricious review, and concluded that while some gaps may have existed, the

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[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.* at 59–63.
[135] *Id.* at 65–67.
[136] *Id.*
[137] *Id.* at 49.

agency had acted rationally.[138] The court wrote, "[w]e find that the agency's position as to the economic benefits of reclassification . . . which the Commission sees as 'particularly inapt for a dynamic industry built on technological development and disruption,' is supported by substantial evidence . . . and so reject Petitioners' objections."[139]

The majority also agreed with the FCC's cost benefit analysis conclusion that the harms the 2015 Title II order was designed to protect against could be achieved at a lower cost using transparency requirements, consumer protection, and antitrust enforcement measures.[140] But the majority was quite skeptical, or even "troubled," by the FCC's reliance on this analysis, pointing out that the FCC had failed to consider that in one way or another, some form of open internet conduct rules had been in effect for the majority of the past twenty years.[141] While chastising the FCC by pointing out that Title II rules covered DSL service from the late 1990s until the release of the FCC's 2005 Wireline Broadband Order, the majority did not believe this was grounds for a reversal:

> We are . . . troubled by the Commission's failure to grapple with the fact that, for much of the past two decades, broadband providers were subject to some degree of open Internet restrictions. . . . The Commission's failure to acknowledge this regulatory history, however, does not provide grounds for reversal on this record given its view that market forces combined with other enforcement mechanisms, rather than regulation, are enough to limit harmful behavior by broadband providers.[142]

Net neutrality has been seen as a mechanism that protects and fosters free expression online. The issue was a small element of the decision, but the opinion's heavy focus on deference reduced the expression concerns to a secondary consideration. The majority

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[138] *Id.* at 50.
[139] *Id.*
[140] *Id.* at 55–56.
[141] *Id.*
[142] *Id.*

suggested that, while petitioners had raised the issue, it was not an important element of the challenge brought against the FCC's repeal of net neutrality.[143] Calling the free expression challenge, "bare-boned," the majority ruled that the challenge did not represent enough of a challenge to pose an issue for review by the court.[144]

Beyond the limited nature of the petitioner's challenge, the majority also argued that the FCC had used a cost benefit analysis in a reasonable way to support the "light-touch" regulation as a mechanism to promote innovation and openness online.[145] As regulatory responsibilities would shift from the FCC to the Department of Justice and the FTC, incorporating controls designed to protect competitive behavior, the court stated that it was reasonable to "expect that competition would tend to multiply the voices in the public square."[146]

Relying on the FCC's suggestion that under the order's transparency provisions, ISP commitments, and the threat of FTC enforcement would act to protect free expression in a targeted way, the majority accepted the FCC's contention that anti-trust law would protect competition which in turn will protect free expression.[147] But the court also recognized the FCC was relying on a conceptual premise where some consumers would be willing to accept some infringement in trade for other benefits, holding that "[a]t the same time, the Commission frankly acknowledges that "[t]he competitive process and antitrust would not protect free expression in cases where consumers have decided that they are willing to tolerate some blocking or throttling in order to obtain other things of value."[148]

The court also rejected a challenge over evidence in the record brought by Petitioner National Hispanic Media Coalition, which had requested the FCC consider numerous informal consumer complaints filed under the previous rules obtained from the FCC through a Freedom of Information Act request.[149] The FCC denied

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[143] *Id.* at 71–72.
[144] *Id.*
[145] *Id.*
[146] *Id.* at 71.
[147] *Id.* at 72.
[148] *Id.*
[149] *Id.* at 73–74.

the motion to include the informal comments on the grounds that it was "exceedingly unlikely" that those complaints raised any issue that was not already identified in the large quantity of material in the record.[150]

The FCC's victory in *Mozilla* was one with narrow margins and required the agency to address three key issues: the agency's preemption directive, pole attachment authority, and the Lifeline program.[151]

> First, the Court concludes that the Commission has not shown legal authority to issue its Preemption Directive, which would have barred states from imposing any rule or requirement that the Commission "repealed or decided to refrain from imposing" in the Order or that is "more stringent" than the Order. The Court accordingly vacates that portion of the Order. Second, we remand the Order to the agency on three discrete issues: (1) The Order failed to examine the implications of its decisions for public safety; (2) the Order does not sufficiently explain what reclassification will mean for regulation of pole attachments; and (3) the agency did not adequately address Petitioners' concerns about the effects of broadband reclassification on the Lifeline Program.[152]

The court added that these "aspects of the Commission's decision are still arbitrary and capricious under the [APA] because of the [FCC's] failure to address [these] important and statutorily mandated consideration[s]."[153]

As several observers explained, the first issue meant that the FCC does not have the legal authority to prohibit state legislatures from passing their own net neutrality rules,[154] with some states already taking such actions prior to the D.C. Circuit ruling.[155] The

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[150] *Id.* at 73.
[151] *Id.* at 18.
[152] *Id.*
[153] *Id.* at 49.
[154] McGill, *supra* note 19; Neidig, *supra* note 17.
[155] *See infra* notes 198–200.

second issue meant that the FCC had other portions of its Restoring Internet Freedom order that needed to be addressed, including those related to ISPs throttling data services of public safety departments like in Santa Clara.

Governmental petitioners challenged the repeal of net neutrality's preemption directive, arguing that the way the FCC was applying preemption exceeded the agency's statutory authority.[156] The majority ruled that the directive was far beyond simple conflict preemption, that the FCC had ignored binding precedent and "[t]hat failure is fatal."[157] Arguing that the FCC had given itself powers to invalidate all state and local laws that interfered with either federal regulatory objectives or any element of broadband service, the majority ruled that the preemption directive functionally represented a prejudged intent, in place from the moment it went into effect, for the FCC to preempt any state laws that would conflict with the Restoring Internet Freedom order.[158] The court further argued that:

> For the Preemption Directive to stand, then, the Commission must have had express or ancillary authority to issue it. It had neither. The Preemption Directive could not possibly be an exercise of the Commission's express statutory authority. By reclassifying broadband as an information service, the Commission placed broadband outside of its Title II jurisdiction.[159]

Although the FCC's decision to reclassify broadband under Title I was a valid policy choice, the FCC argued that it could not simply turn around and argue for preemption authority by analogy.[160] The majority proposed that the FCC go back to Congress with any complaints about this statutory gap.[161] According to the court,

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[156] *Mozilla*, 940 F.3d at 74.

[157] *Id.*

[158] *Id.*

[159] *Id.* at 75–76.

[160] *Id.* at 79 ("The best the Commission can do is try to argue by analogy. It claims that it would be 'incongruous' not to extend preemption authority under Title I, given that Section 160(e) prohibits States from regulating a service classified under Title II in instances of federal forbearance.").

[161] *Id.* at 80.

absent new Congressional action, the ability of the FCC to apply preemption to competing laws at the state or local level required the agency to identify an applicable statutory delegation of regulatory authority, an act the majority clearly stated the FCC had failed to do in the 2018 order.[162]

Lacking any legal authority, the FCC's action to preempt even potential laws in every state was a step too far. Vacating the FCC's preemption directive from the Restoring Internet Freedom Order, the court also ruled that because no state laws were at issue in the case, it was, "premature to pass on the preemptive effect, under conflict or other recognized preemption principles, of the remaining portions of the 2018 Order."[163]

Preemption was also a significant issue in the arguments raised in the concurring opinions by Judges Patricia Millett and Robert L. Wilkins, as well as Judge Stephen F. Williams's opinion concurring in part and dissenting in part. Judge Millet's concurring opinion came with "substantial reservations."[164] Agreeing that *Brand X* provided a clear precedent to uphold the FCC's reclassification of broadband as an information service as reasonable, Judge Millet stated a deep concern that the "result is unhinged from the realities of modern broadband service."[165]

Arguing that the FCC's analysis focused on the value added to consumers rather than tie that value to a convenient item that had promoted the FCC's policy preferences, Judge Millet suggested that the FCC's decision was divorced from market realities and was, "performing Hamlet without the Prince"[166] because the FCC's policy had wrongly declared the transmission element as an information service rather than the integrated component or pet and leash standard proposed by *Brand X*.[167]

Noting that the FCC's capricious view of what constituted an information service would risk one point that all sides had agreed on, that traditional telephone belonged within the common carrier

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[162] *Id.*
[163] *Id.* at 86.
[164] *Id.* (Millet, J., concurring) at 86.
[165] *Id.* at 87.
[166] *Id.* at 91.
[167] *Id.* at 92.

constraints of Title II, Judge Millet suggested that the FCC had made a concerning decision that had drifted beyond the boundaries of its statutory authority and discretion.[168] Despite the concern, Judge Millet also found that it was the Supreme Court's "prerogative" to reexamine *Brand X* in more contemporary terms and to require the FCC to bring the regulation in line with the realities of the contemporary broadband market.[169] Until either the Supreme Court or Congress forced the FCC into action, Judge Millet explained that she was bound to concur in sustaining the Commission's action.[170]

Judge Williams' lengthy opinion concurring in part and dissenting in part was largely focused on the preemption issue.[171] Judge Williams was extremely skeptical that the majority could agree to grant deference to the FCC over major portions of the Open Internet order, but undermine the preemption directive because the FCC's decision to move broadband regulation to Title I was predicated heavily on preemption authority.[172]

Arguing that since there were no examples of state laws that would be in conflict with the FCC's Title I authority that leaned heavily in favor of waiting until a specific challenge arose, Judge Williams also suggested that Congress had a significant role to play in resolving the boundaries of the FCC's preemption authority under Title I.[173] Agreeing with the majority decision that the 1996 Telecommunication Act provided the FCC the authority to apply either Title I or Title II, Judge Williams argued that not extending the same level of deference to the FCC on the preemption directive would undermine the 2018 order by exposing broadband to a patchwork of intrusive state regulations.[174]

III. DISCUSSION

This Part argues that the D.C. Circuit ruling not only failed to fully clarify the net neutrality debate, but also raised new questions,

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[168] *Id.* at 92–94.
[169] *Id.* at 94.
[170] *Id.* at 89.
[171] *Id.* (Williams, J., concurring in part and dissenting in part) at 95–107.
[172] *Id.* at 95.
[173] *Id.* at 96.
[174] *Id.* at 100.

including several for the FCC to address. In order to see the net neutrality debate resolved, the most logical solution would be an updated delegation of authority from Congress. Although at least four states, including California, had passed state level provisions before the *Mozilla* decision, state level provisions will likely confuse the issue even more as the FCC and states battle over preemption.

A. D.C. Circuit Left Net Neutrality Unresolved

Taken as a whole, the D.C. Circuit ruling left many questions unanswered (and likely created new ones), which are related to net neutrality in three ways. First, because the D.C. Circuit held that the FCC was within its authority to repeal the net neutrality rules and reclassify broadband internet under Title I of the Telecommunications Act, it seems the court would likely reach a similar ruling if the agency were to once again classify ISPs under Title II. Such an action remains a possibility, especially if a Democratic administration takes the White House and the FCC in 2020. The result is that the future of net neutrality remains in question when a different FCC has deference to reclassify broadband internet once again.

Second, the D.C. Circuit overturned the preemption doctrine, which functionally prohibits the FCC from attempting to bar state legislation and executive orders creating new net neutrality rules.[175] Although allowing the FCC to bar such laws would have helped resolve the net neutrality debate and aid implementation across the United States, the D.C. Circuit's ruling meant that state legislatures and governors will likely continue to take actions aimed at net neutrality. As discussed more below, several states prior to 2019 had already taken actions towards implementing net neutrality rules, with likely more states to follow.[176] The result would be varying net neutrality protections depending on which state an ISP and/or consumer is located, leading to a complicated and messy legal landscape. Furthermore, such efforts by states could become the subject of lawsuits, perhaps even by the FCC, further muddying net neutrality protections across the country.

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[175] *Id.* at 86.

[176] *See infra* notes 184–199.

Finally, the D.C. Circuit remanding three issues to the FCC meant that those questions remain unanswered and require new attention by the agency. As the situation with Verizon in Santa Clara demonstrated, ISPs and consumers have already disagreed about the cause and intent behind throttling even in public safety situations, suggesting that such disagreement and contentiousness will only continue moving forward as ISPs test the boundaries of blocking, throttling, and paid prioritization.

Although the D.C. Circuit ruling on the surface clarified key questions about net neutrality rules, it, in fact, only further complicated the legal picture. The ruling ultimately left the door open for the FCC to take actions under different administrations, meaning the net neutrality debate could continue to go back and forth for years to come.

B. Congress or the States Need to Provide Resolution to the Net Neutrality Debate

We argue that Congress needs to provide at least some resolution to the net neutrality debate by directing the FCC. On one hand, Congress could pass legislation preventing the FCC from enforcing net neutrality regulations, though such efforts currently face significant opposition.[177] Alternatively, Congress could make key and necessary changes to the Telecommunications Act of 1996, clarifying whether ISPs fall under Title I as information services or Title II as telecommunication services subject to common carrier regulation. Certainly, Congress could take addition actions to amend or otherwise change the law as well. Nevertheless, the result would be an end to the back-and-forth that has taken place between different FCC administrations about the classification of ISPs. This would potentially result in companies being classified one way or

[177] *See* Mallory Locklear, *Net neutrality still faces an uphill battle in Congress*, ENGADGET (May 16, 2018), https://www.engadget.com/2018/05/16/net-neutrality-faces-uphill-battle-in-congress/; Makena Kelly, *White House Threatens To Veto Democrat-Led Net Neutrality Bill*, VERGE (Apr. 8, 2019), https://www.theverge.com/2019/4/8/18301124/white-house-trump-net-neutrality-veto-bill-democrats-congress.

another, meaning under Title I or Title II, therefore either allowing or restricting rules around blocking, throttling, and paid prioritization.

Significantly, Congress has shown that it can take at least some actions related to net neutrality. On May 16, 2018, the U.S. Senate passed a resolution of disapproval aiming to block the FCC's repeal of net neutrality.[178] Senator Edward J. Markey (D-Mass.) had previously introduced the resolution of disapproval in February 2018[179] under the Congressional Review Act, which allows Congress 60 days to challenge new rules passed by an independent agency, such as the FCC.[180] The Senate voted 52-47 in favor of the resolution, with all 49 Democratic senators voting for the resolution, as well as three Republicans.[181]

On April 10, 2019, several media outlets reported that the U.S. House of Representatives had passed a bill by a 232-190 vote aiming to reinstate the net neutrality protections passed by the FCC in 2015.[182] However, *Vox* reported that President Trump said he would

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[178] *See generally* Brian Fung, *Senate Approves Bipartisan Resolution to Restore FCC Net Neutrality Rules*, WASH. POST (May 16, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/05/16/net-neutrality-is-getting-a-big-vote-in-the-senate-today-heres-what-to-expect/?noredirect=on&utm_term=.57a8dfcd9711; Andrew Wyrich, *As the Net Neutrality CRA Deadline in Congress Approaches, Support Continues to Grow*, DAILY DOT (Apr. 26, 2018), https://www.dailydot.com/layer8/net-neutrality-cra-fcc/; Scott Memmel, *FCC Repeal of Net Neutrality Takes Effect, Faces Continued Legal and Legislative Opposition*, 23 SILHA BULL. 43 (2018) (*available at* https://conservancy.umn.edu/handle/11299/203919).

[179] Press Release, Sen. Edward J. Markey, Senator Markey Leads Resolution to Restore FCC's Net Neutrality Rules (Dec. 14, 2017), *available at* https://www.markey.senate.gov/news/press-releases/senator-markey-leads-resolution-to-restore-fccs-net-neutrality-rules.

[180] Dylan Scott, *The new Republican plan to deregulate America, explained*, VOX (Apr. 25, 2018), https://www.vox.com/policy-and-politics/2018/4/25/17275566/congressional-review-act-what-regulations-has-trump-cut.

[181] Fung, *supra* note 178.

[182] Save the Internet Act of 2019, H.R. 1644, 116th Cong. (2019); *see also* David Shepardson, *U.S. House Approves Net Neutrality Bill but Legislation Faces Long Odds*, REUTERS (Apr. 10, 2019), https://www.reuters.com/article/us-usa-internet/u-s-house-approves-net-neutrality-bill-but-legislation-faces-long-odds-idUSKCN1RM24X; Jason Abbruzzese, *House Passes Net Neutrality Bill — but*

veto the bill and that Senate Majority Leader Mitch McConnell called the bill "dead on arrival in the Senate."[183]

If Congress fails to act or provide sufficient resolution to the net neutrality debate, it would fall on the states to implement such rules. Although states may be able to provide some resolution, a patchwork of state laws will not provide lasting, consistent or coherent resolution to the already complicated legal and policy net neutrality landscape.

In 2018, California Governor Jerry Brown signed into law SB 822, the California Internet Consumer Protection and Net Neutrality Act of 2018.[184] The California law prohibits ISPs from "[b]locking lawful content, applications, services, or nonharmful devices, subject to reasonable network management."[185] The law also prohibits the "[i]mpairing or degrading [of] Internet traffic on the basis of Internet content, application, or service, or use of a nonharmful device," meaning ISPs cannot impair or degrade "(1) particular content, applications, or services; (2) particular classes of content, applications, or services; (3) lawful Internet traffic to particular nonharmful devices; or (4) lawful Internet traffic to particular classes of nonharmful devices."[186] Additionally, the law prohibits "paid prioritization," which the law defines as the "management of an Internet service provider's network to directly or indirectly favor some traffic over other traffic."[187]

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it Won't Have Much of a Chance in the Senate, NBC NEWS (Apr. 10, 2019), https://www.nbcnews.com/tech/tech-news/house-passes-net-neutrality-bill-it-won-t-have-much-n992991; Cecilia Kang, *Net Neutrality Vote Passes House, Fulfilling Promise by Democrats*, N.Y. TIMES (Apr. 10, 2019), https://www.nytimes.com/2019/04/10/technology/net-neutrality-vote.html.

[183] Ella Nilsen, *Why the Senate is Blocking a New Net Neutrality Bill, a Year After Trying to Save it*, VOX (Apr. 10, 2019), https://www.vox.com/2019/4/10/18302186/net-neutrality-house-bill-senate.

[184] S. 822, 2018 Leg., 2017–2018 Reg. Sess. (2017). – This needs to be double checked

[185] CAL. CIV. CODE § 3101(a)(1) (West 2019); *see also* Sarah Wiley, *Repeal of Net Neutrality Rules Continues to Face Legal Uncertainty*, 24 SILHA BULL. 34 (2018) (*available at* https://conservancy.umn.edu/handle/11299/203922).

[186] CAL. CIV. CODE § 3100(j)(1)-(4) (West 2019).

[187] §3100(r)(1)-(2).

However, approximately an hour after Governor Brown signed the California law, the U.S. DOJ filed a lawsuit in federal court in California to block the law from going into effect, arguing that California lacked sufficient authority to regulate ISPs.[188] On October 26, California Attorney General Xavier Becerra and the DOJ agreed to postpone litigation pending the D.C. Circuit's ruling in *Mozilla*.[189] As discussed above, because of the D.C. Circuit's ruling on the state's rights issue, the fight over net neutrality will likely continue in California.

California, however, is not the only state to consider net neutrality legislation. The National Conference of State Legislatures reported in January 2019 that net neutrality legislation had been introduced in 29 states, with over 65 bills introduced requiring internet service providers to ensure various net neutrality principles.[190] In 13 states and Washington, D.C., 23 resolutions have been introduced opposing the repeal of net neutrality rules, urging Congress to take action to restore the rules, or stating the state's support for net neutrality principles.[191]

In 2018, both Washington and Oregon passed legislation enforcing net neutrality requirements for government agencies working with ISPs.[192] On March 6, 2018, Washington Governor Jay Inslee signed House Bill 2282, which first requires "[a]ny person providing broadband internet access service in Washington state [to]

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[188] Complaint at 1, United States v. California, 413 F. Supp.3d 1077 (E.D. Cal. 2018) (No. 18-264).

[189] S*ee* Dawn C. Chmielewski, *California Postpones Net Neutrality Law Pending Outcome Of Federal Court Challenge*, DEADLINE (Oct. 26, 2018), https://deadline.com/2018/10/california-net-neutrality-delay-law-pending-outcome-court-challenge-1202490374/; Jon Brodkin, *Net Neutrality Delay: Calif. Agrees to Suspend Law Until After Court Case*, ARS TECHNICA (Oct. 26, 2018), https://arstechnica.com/tech-policy/2018/10/california-delays-net-neutrality-laws-enforcement-until-after-court-case/.

[190] Heather Morton, *Net Neutrality Legislation in States*, NAT'L CONF. OF STATE LEGIS. (Jan. 23, 2019), http://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-legislation-in-states.aspx.

[191] *Id.*

[192] *See* H.R. 2282, 65th Leg., 2018 Reg. Sess. (Wash. 2018); H.R. 4155, 79th Leg. Assemb., 2018 Reg. Sess. (Or. 2018); *see also* Terry, Memmel & Turacek, *supra* note 4.

publicly disclose accurate information regarding the network management practices, performance characteristics, and commercial terms of its broadband internet access services." [193] Second, the law prohibits any "person engaged in the provision of broadband internet access service in Washington state" from "(a) Block[ing] lawful content, applications, services, or nonharmful devices, subject to reasonable network management; (b) Impair[ing] or degrad[ing] lawful internet traffic on the basis of internet content, application, or service . . . or (c) Engag[ing] in paid prioritization."[194] The law therefore reflects the FCC's net neutrality rules passed in 2015.

Like the Washington statute, ORS § 276A.418 (2019) prohibits a public body from contracting "with a broadband Internet access service provider" that:

> (a) Engages in paid prioritization;
>
> (b) Blocks lawful content, applications or services or nonharmful devices;
>
> (c) Impairs or degrades lawful Internet traffic for the purpose of discriminating against or favoring certain Internet content, applications or services or the use of nonharmful devices;
>
> (d) Unreasonably interferes with or unreasonably disadvantages an end user's ability to select, access and use the broadband Internet access service or lawful Internet content, applications or services or devices of the end user's choice; or
>
> (e) Unreasonably interferes with or unreasonably disadvantages an edge provider's ability to make

[193] WASH. REV. CODE § 19.385.020(3) (2018).

[194] *Id.* § 19.385.020(2). The law also includes exceptions if ISPs have an obligation or authorization "to address the needs of emergency communications or law enforcement, public safety, or national security authorities" or in cases in which the ISP regulates unlawful content. *Id.* § 1(3)(a).

> devices or lawful content, applications or services available to end users.[195]

The law also requires that ISPs "publicly disclose information regarding the provider's network management practices and performance characteristics and the commercial terms of the provider's broadband Internet access service sufficient for end users to verify that the service is provided in compliance with subsections (3) and (4) of this section."[196]

Additionally, several state governors signed executive orders requiring public-sector businesses, organizations, and agencies in their states to only work with ISPs that uphold or practice net neutrality principles.[197] For example, in Hawaii, Governor David Ige's Executive Order No. 18-02 directed all state government agencies to only contract with ISPs "who demonstrate and contractually agree to support and practice net neutrality principles where all Internet traffic is treated equally."[198] Rhode Island, New Jersey, New York, Montana, and Vermont also required state entities award future contracts only to ISPs that adhere to these net neutrality principles, which generally prohibit blocking, throttling, and paid prioritization of lawful internet content by ISPs.[199]

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[195] OR. REV. STAT. § 276A.418(1) (2019).

[196] *Id.* § (5)(a). The law also contains some exceptions, including if the ISP is the "sole provider of fixed broadband Internet access service to the geographic location subject to the contract." *Id.* § 1(j)(4)(a).

[197] Daniel Lyons, *State Net Neutrality*, 80 U. OF PITT. L. REV. 905, 930, 948-950 (2019).; *see also* Terry, Memmel & Turacek, *supra* note 4.

[198] Haw. Exec. Order No. 18-02 (Feb. 5, 2018), https://governor.hawaii.gov/wp-content/uploads/2018/02/Executive-Order-No.-18-02-Net-Neutrality-Signed.pdf.

[199] *See* R.I. Exec. Order No. 18-02 (Apr. 24, 2018), http://www.governor.ri.gov/documents/orders/ExecOrder18-02.pdf; N. J. Exec. Order No. 9 (Feb. 5, 2018), https://nj.gov/infobank/eo/056murphy/pdf/EO-9.pdf; N. Y. Exec. Order No. 175 (Jan. 24, 2018), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/old-files//EO%20%23175.pdf; Mont. Exec. Order, No. 3-2018 (Jan. 22, 2018), https://governor.mt.gov/Portals/16/docs/2018EOs/EO-03-2018_Net%20Freedom.pdf?ver=2018-01-22-122048-023; Vt. Exec. Order No. 2-18 (Feb. 15, 2018), https://governor.vermont.gov/sites/scott/files/documents/EO%2002-18%20-%20Internet%20Neutrality%20in%20State%20Procurement%20-%20Final.pdf.

Lastly, mayors in hundreds of jurisdictions around the United States signed a petition ensuring that their local governments would only work with ISPs that uphold/practice net neutrality principles,[200] demonstrating that the debate around net neutrality, including after the D.C. Circuit ruling, can and will continue at the local level as well.

Taken as a whole, the actions by Congress and several states lead to two conclusions. First, they demonstrate the complexity of the net neutrality debate, which necessitates some resolution. Because the D.C. Circuit left the door wide open for Congressional and state actions, such complexity is unlikely to be resolved quickly or easily. Second, if Congress fails to act, states are likely to continue to try to provide resolution, though it will likely only further complicate the legal landscape.[201]

C. Congress or the States Should Uphold Net Neutrality Principles

Although this Article argues that Congress or the states need to provide resolution one way or another, it further contends that each would, ideally, implement complementary net neutrality rules. We argue that there are several reasons to do so, but perhaps one of the most important is that such rules promote free expression on the internet.

The internet promotes key values—free expression, access to information, and viewpoint diversity—that have been the focus of past media systems, including the Postal Service, telegraph, and radio.[202] At the same time, although refuted by some scholars, the

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[200] Dell Cameron, *100 US Mayors Sign Pledge to Defend Net Neutrality Against Crooked ISPs*, GIZMODO (Apr. 27, 2018), https://gizmodo.com/100-us-mayors-sign-pledge-to-defend-net-neutrality-agai-1825612839; *Cities Open Internet Pledge*, MAYORSFORNETNEUTRALITY.ORG, https://docs.google.com/forms/d/e/1FAIpQLSctOwOuAZajo8BgYGzM4l0WemNeyBFnURoNWPg44971caMcuQ/viewform (last visited July 23, 2018).

[201] Daniel Lyons, *State Net Neutrality*, 80 U. OF PITT. L. REV. 905, 930, 948-950 (2019).

[202] See Paul Starr, *The Creation of the Media: Political Origins of Modern Communication* 5 (2004), in which Starr suggests that constitutive choices related to mass media come in three areas. The first, are the laws and societal norms

internet does raise issues of scarcity along the same vein as radio. Scarcity is a concept traditionally associated with electromagnetic spectrum, but is analogous to bandwidth limitations as well as the availability of internet service. Regarding radio, scarcity arises in that broadcast spectrum is limited or scarce.[203] Jeremy Lipschultz argued that scarcity arises in relation to the internet because "the existing network has seen a considerable slowdown in data transfer; the system at times reached capacity, resulting in no service for the user." [204] In short, high traffic online can create slower speeds for users, limiting their ability to see certain content. Perhaps more significantly, there are many places in the United States where individuals not only do not have a choice of ISP, but, in some cases, have no ISP at all, meaning they cannot access the internet.[205] The FCC has been tasked with overseeing broadband deployment to these rural areas, but the ability to access the internet remains impossible for some and nearly impossible for others who have speeds of 25 Mbps or less.[206]

Because of the physical problems associated with internet access, net neutrality can be seen as a "technocratic solution,"[207] or,

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dealing with freedom of expression, access to information, privacy and intellectual property. The second area of constitutive choices deal with the design of a country's communication media and networks, as well as, its larger industrial organization. Finally, the third area of choices includes the decision-making, the support for and the acceptance of education, research, and innovation all of which play a role in how technology is deployed.

[203] *See* Audrey Perry, *Scarcity Rationale*, First Amendment Encyclopedia (last visited Feb. 3, 2020), https://www.mtsu.edu/first-amendment/article/1016/scarcity-rationale.

[204] Jeremy Lipschultz, *Free Expression in the Age of the Internet* 62 (1999).

[205] FEDERAL COMMC'NS. COMM'N, FIXED BROADBAND DEPLOYMENT (2019), https://broadbandmap.fcc.gov.

[206] Daniel Frankel, *Nearly 16% of Broadband 'Power Users' Have Connection Speeds of 75 Mbps or Less*, MULTICHANNEL NEWS (July 25, 2019), https://www.multichannel.com/news/16-percent-of-broadband-power-users-have-slow-connection-speeds.

[207] Hugh Slotten, *Radio and Television Regulation: Broadcast Technology in the United States, 1920-1960*, at xiv (2000) ("not only the belief that technical experts should make traditional political decisions in a society increasingly dependent on complex technologies and technological systems, but also to the tendency by decision makers to follow values of instrumental rationality, efficiency, and specialization.. . . A commitment to technocratic values has led

at the very least, part of a larger set of technocratic solutions to scarcity, such as the widespread market failures caused by a lack of broadband competition.[208] Net neutrality promotes free expression by ensuring that users have access to information and content online. It does so by preventing ISPs from blocking, throttling, or otherwise discriminating against content, which would limit the information some users would be able to see. This is significant because, in *Packingham v. North Carolina*, the Supreme Court recently ruled that access to social media, and the internet more generally, was a necessary function/ability of anyone in the United States, even those convicted of crimes.[209] In short, net neutrality is meant to ensure the free flow of information to any individual using the internet, providing them with information that allows them to be an informed voter, to be entertained, or to otherwise benefit from internet content. The FCC seems to understand that net neutrality comes with a free expression component, but argues that free expression is potentially a consumer's bargaining chip that can be traded for some form of undefined benefit in the "light-touch" regime.[210] Yet, without net neutrality rules, ISPs would, at a minimum, have the ability and authority to limit access to certain information, an action

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participants to argue that technological, rather than traditional political, solutions, are most appropriate for solving social problems resulting from technological developments.").

[208] Bill Snyder & Chris Witteman, *The Anti-Competitive Forces That Foil Speedy, Affordable Broadband*, FAST COMPANY (Mar. 29, 2019), https://www.fastcompany.com/90319916/the-anti-competitive-forces-that-foil-speedy-affordable-broadband; Christopher Terry, *3500 Days of The National Broadband Plan*, BENTON INST. FOR BROADBAND & SOC'Y (Oct. 15, 2019), https://www.benton.org/blog/3500-days-national-broadband-plan; FED. COMM'N COMM., EIGHTH MEASURING BROADBAND AMERICA FIXED BROADBAND REPORT (2018), https://www.fcc.gov/reports-research/reports/measuring-broadband-america/measuring-fixed-broadband-eighth-report.

[209] 137 S.Ct. 1730, 1732 (2017) ("A fundamental First Amendment principle is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. Today, one of the most important places to exchange views is cyberspace, particularly social media[.]").

[210] *See Mozilla*, 940 F.3d at 72 (citing *Restoring Internet Freedom*, *supra* note 1) ("At the same time, the Commission frankly acknowledges that "[t]he competitive process and antitrust would not protect free expression in cases where consumers have decided that they are willing to tolerate some blocking or throttling in order to obtain other things of value.").

that has already taken place[211] and that is antithetical to the core values of access to information and free expression.

CONCLUSION

In its October 1, 2019 ruling, the D.C. Circuit allowed for the repeal of the net neutrality rules passed during President Barack Obama's administration, finding that the FCC had the authority to reclassify broadband internet under Title I and, therefore, allowing ISPs to block, throttle, or otherwise discriminate against certain internet content. However, the court also remanded several issues back to the FCC for the agency to address. As this Article argued, the result of the court's ruling was that the net neutrality debate remained unresolved as future FCC administrations retain the ability to reclassify ISPs once more, among other questions raised by the D.C. Circuit ruling.

Therefore, it is necessary for Congress to step in and offer at least some guidance on net neutrality, providing at least some resolution to a debate that has lasted nearly 15 years. Although any form of resolution would be beneficial at this stage, Congress or states should allow for the implementation of net neutrality rules once again in order to protect the free flow of information, as well as users' ability to access content online; values at the heart of American media systems dating back to the 18th century.

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[211] *See* Timothy Karr, *Net Neutrality Violations: A Brief History*, FREE PRESS (Jan. 24, 2018), https://www.freepress.net/our-response/expert-analysis/explainers/net-neutrality-violations-brief-history; Jacob Kastrenakes, *ISPs Won't Promise to Treat All Traffic Equally After Net Neutrality*, VERGE (Dec. 15, 2017), https://www.theverge.com/2017/12/15/16768088/internet-providers-plans-without-net-neutrality-comcast-att-verizon; Aria Bracci & Lia Petronio, *New Research Shows That, Post Net Neutrality, Internet Providers are Slowing Down Your Streaming*, NEWS@NORTHEASTERN (Sept. 10, 2018), https://news.northeastern.edu/2018/09/10/new-research-shows-your-internet-provider-is-in-control/.