SHAPING THE FUTURE OF THE INTERNET: REGULATING THE WORLD'S MOST POWERFUL INFORMATION RESOURCE IN *U.S. TELECOM ASS'N V. FCC*

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I. INTRODUCTION

Every sixty seconds, the Internet processes more than two million Google searches, 150 million email exchanges, and $200,000 in Amazon sales.[1] For comparison, the U.S. Postal Service delivers nearly 352,000 mail pieces per minute—just 0.2% of the average email delivery rate.[2] Operating as an unrestricted, unregulated network, the Internet has led the "Information Age" in a way that has transformed ordinary life.[3] From accelerating the pace we communicate, to revolutionizing the way we learn, socialize, and do business, the Internet has provided unparalleled reliability and awakened a dependency on information resourcing like never before.

In response to the growing demand of the Internet, the

1. Kelly LeBoeuf, *2016 Update: What Happens in One Internet Minute?*, EXCELACOM (Feb. 29, 2016), http://www.excelacom.com/resources/blog/2016-update-what-happens-in-one-internet-minute (noting further that, in one minute, there are: (a) 2.78 million videos viewed on YouTube; (b) 69,444 hours of movies and television shows watched on Netflix; (c) 701,389 logins on Facebook; (d) 38,194 posts to Instagram; and (e) 347,222 new tweets on Twitter).

2. Sally French, *This Is What Happens on the Internet in 60 Seconds*, MARKETWATCH (May 2, 2016, 3:52 PM), http://www.marketwatch.com/story/one-chart-shows-everything-that-happens-on-the-internet-in-just-one-minute-2016-04-26; *see Just One Day in the Life of the U.S. Postal Service . . . by the Numbers*, U.S. POSTAL SERV., https://about.usps.com/who-we-are/postal-facts/one-day-by-the-numbers.htm (last visited Aug. 30, 2017) (providing that the U.S. Postal Service delivers about 506 million pieces of mail each day, which is about 21 million per hour or about 351,656 per minute).

3. *Information Age*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/Information%20Age (last visited Mar. 16, 2017) ("Definition of Information Age: the modern age regarded as a time in which information has become a commodity that is quickly and widely disseminated and easily available especially through the use of computer technology.").

Federal Communications Commission (FCC), which oversees the telecommunications industry, set out to develop a policy to "preserve and promote the vibrant and open character of the Internet."[4] This policy established four guiding principles designed "to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers."[5] These principles, collectively referred to as "net neutrality," seek to ensure unabated consumer access to lawful content, applications, and devices, while also promoting the FCC's mission to stimulate market competition within the broadband industry.[6]

Supporting these net neutrality principles, former President Barack Obama, in a statement written in November 2014, urged the FCC to promulgate rules to protect Internet openess and to require Internet Service Providers (ISPs) to treat all online traffic

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4. *See In re* Protecting & Promoting the Open Internet, 30 F.C.C. Rcd. 5601, 5625–26 ¶ 76 (2015) [hereinafter 2015 Open Internet Order] (citations omitted) ("[T]he Internet's openness promotes innovation, investment, competition, free expression, and other national broadband goals . . . . For example, in addition to broadband infrastructure investment, there has been substantial growth in the digital app economy, video over broadband, and VoIP, as well as a rise in mobile e-commerce. Overall Internet adoption has also increased since 2010. Both within the network and at its edges, investment and innovation have flourished while the open Internet rules were in force.").

5. *See In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 F.C.C. Rcd. 14986, 14988 ¶ 4 (2005) [hereinafter Internet Over Wireline Facilities] (establishing four principicles, including: (1)"access the lawful Internet content of their choice"; (2) "run applications and use services of their choice, subject to the needs of law enforcement"; (3) "connect their choice of legal devices that do not harm the network"; and (4) "competition among network providers, application and service providers, and content providers").

6. *See id.* at 14987 ¶ 2 & nn.6–7 (quoting 47 U.S.C. § 230(b)(1)–(2) (2014))("[I]t is the policy of the United States 'to preserve the vibrant and competitive free market that presently exists for the Internet,' and 'to promote the continued development of the Internet.'"); *see also* Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. ON TELECOMM. & HIGH TECH. L. 141, 145–46 (2005) ("It is best to understand network neutrality as an end, and open access and broadband discrimination as different means to that end . . . . The argument for network neutrality must be understood as a concrete expression of a system of belief about innovation, one that has gained significant popularity over [the] last two decades . . . . [G]enerally, adherents view the innovation process as a survival-of-the-fittest competition among developers of new technologies . . . . This account is simplistic; of interest is what the theory says for network design. A communications network like the Internet can be seen as a platform for a competition among application developers. Email, the web, and streaming applications are in a battle for the attention and interest of end-users. It is therefore important that the platform be neutral to ensure the competition remains meritocratic.").

equally.[7] Following the President's statement, the FCC released the "2015 Open Internet Order" (2015 Order), which described its decision to regulate broadband[8] in 300-pages worth of detail.[9] The 2015 Order purported to provide "carefully-tailored rules to protect Internet openness" designed to promote "investment and innovation."[10]

Most notably, the 2015 Order abandoned the FCC's longstanding statutory designation of broadband as an "information service" and reclassified it as a "telecommunications service," thereby placing broadband under antiquated utility-like regulatory schemes used to de-monopolize the telephone industry.[11] These rules, grounded in Title II of the Communications Act of 1934, impose heavy-handed regulations and broad federal government oversight on telecommunication service providers that operate as common carriers.[12]

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7. *See* Ezra Mechaber, *President Obama Urges FCC to Implement Stronger Net Neutrality Rules*, WHITE HOUSE: PRESIDENT BARACK OBAMA (Nov. 10, 2014, 9:15 AM), https://obamawhitehouse.archives.gov/blog/2014/11/10/president-obama-urges-fcc-implement-stronger-net-neutrality-rules ("President Obama's plan . . . would serve as a 'basic acknowledgement of the services ISPs provide to American homes and businesses, and the straightforward obligations necessary to ensure the network works for everyone – not just one or two companies.'").

8. *See In re* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, 30 F.C.C. Rcd. 1375, ¶ 3 (2015) (updating the definition of broadband as an Internet offering with speeds of 25 megabits per second (Mbps) for downloads and 3 Mbps for uploads).

9. *See generally* 2015 Open Internet Order, 30 F.C.C. Rcd. 5601 (2015).

10. *See id.* at 5603 ¶ 4 ("[T]oday we adopt carefully-tailored rules that would prevent specific practices we know are harmful to Internet openness—blocking, throttling, and paid prioritization—as well as a strong standard of conduct designed to prevent the deployment of new practices that would harm Internet openness. We also enhance our transparency rule to ensure that consumers are fully informed as to whether the services they purchase are delivering what they expect.").

11. *Compare In re* Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, 17 F.C.C. Rcd. 4798, 4824 ¶ 41 (2002) [hereinafter Cable Broadband Order] (concluding that broadband providers offer a "single, integrated *information service* . . . .") (emphasis added), *aff'd in part*, *vacated in part*, Brand X Internet Servs. v. FCC, 345 F.3d 1120 (9th Cir. 2003), *rev'd sub nom.* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005), *with* 2015 Open Internet Order, 30 F.C.C. Rcd. at 5610 ¶ 29 ("[W]e find that broadband Internet access service is a 'telecommunications service' . . . . As a result, commercial arrangements for the exchange of traffic with a broadband Internet access provider are within the scope of Title II . . . .").

12. *See, e.g.*, 47 U.S.C. § 201(a) (2012) ("It shall be the duty of every common

In a 3–2 party-line vote, the Democratic commissioners approved the 2015 Order in June 2015.[13] FCC Commissioners Michael O'Rielly and Ajit Pai voted against the 2015 Order, dissenting on the grounds that the FCC was inappropriately overstepping its regulatory authority to solve non-existent problems and speculative harms.[14] Commissioner O'Rielly, who opposed the FCC's decision to impose obsolete regulations on the modern Internet, wrote:

> Today a majority of the Commission attempts to usurp the authority of Congress by re-writing the Communications Act to suit its own "values" and political ends. The item claims to forbear from certain monopoly-era Title II regulations while

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carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes."); *see also* 47 U.S.C. § 153(11) (2012) (defining a "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy").

13. *See* 2015 Open Internet Order, 30 F.C.C. Rcd. 5601, 5601 (2015) (showing that Chairman Wheeler and Commissioners Clyburn and Rosenworcel voted in favor of the Order, issued separate statements, and further showing that Commissioners Pai and O'Rielly dissented and issued separate statements); *see also* Jeff Dunn, *Trump's FCC Boss Has Reportedly Laid Out His Plan to Undo Net-Neutrality Laws, and He May Reveal It Soon*, BUSINESS INSIDER (Apr. 7, 2017), http://www.businessinsider.com/ajit-pai-net-neutrality-laws-reverse-fcc-report-2017-4.

14. 2015 Open Internet Order, 30 F.C.C. Rcd. at 5921 (Ajit Pai, Comm'r, dissenting) ("So why is the FCC changing course? Why is the FCC turning its back on Internet freedom? Is it because we now have evidence that the Internet is not open? No. Is it because we have discovered some problem with our prior interpretation of the law? No. We are flip-flopping [because] President Obama told us to do so . . . . [T]his *Order* imposes intrusive government regulations that won't work to solve a problem that doesn't exist using legal authority the FCC doesn't have . . . . The [FCC's] decision to adopt President Obama's plan marks a monumental shift toward government control of the Internet. It gives the FCC the power to micromanage virtually every aspect of how the Internet works. It's an overreach that will let a Washington bureaucracy, and not the American people, decide the future of the online world."); *id.* at 5987 (Michael O'Rielly, Comm'r, dissenting) ("[I]t is hard for me to believe that the [FCC] is establishing an entire Title II/net neutrality regime to protect against hypothetical harms. There is not a shred of evidence that any aspect of this structure is necessary . . . . [A]lthough we received a record-breaking number of [public] comments, those comments did not reveal any additional instances of actual harm to consumers. [The comments are] sprinkled with references to what an ISP 'may,' 'could,' 'might,' or 'potentially' to [sic] do to block or degrade applications, services, or content, but no new tangible violations.").

> reserving the right to impose them using other provisions or at some point in the future. The Commission abdicates its role as an expert agency by defining and classifying services based on unsupported and unreasonable findings.[15]

Commissioner O'Rielly accused the FCC of devising a convoluted regulatory scheme that would permit certain acts it had expressly prohibited through guarantees granted by other regulatory provisions.[16] Using wordplay, he described the FCC's controversial decision to forbear from certain Title II regulatory provisions as "fauxbearance: all of Title II applied through the backdoor of sections 201 and 202 of the [Communications] Act, and section 706 of the 1996 [Telecommunications] Act."[17]

After its release in June 2015, multiple broadband providers, trade organizations, innovators, investors, and entrepreneurs appealed the 2015 Order in the U. S. Court of Appeals for the D.C. Circuit.[18] Consolidated in *U.S. Telecom Ass'n v. FCC*, the petitioners accused the FCC of grossly exceeding its authority to regulate broadband under Title II of the Communications Act.[19] In a 2–1 decision, the D.C. Circuit ultimately upheld the 2015 Order—a landmark victory for the FCC in the battle over net neutrality and one of the most significant policy changes to affect the broadband industry in recent history.[20]

This Casenote proceeds in five parts. Part II introduces the *U.S. Telecom* litigants and their claims, while Part III explains the historical context of telecommunications regulation, its role in the FCC's earlier efforts to regulate broadband, and federal court

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15. 2015 Open Internet Order, 30 F.C.C. Rcd. 5601, 5985 (2015) (Michael O'Rielly, Comm'r, dissenting).

16. *See id.* at 5996–97 (Michael O'Rielly, Comm'r, dissenting) (citations omitted) (listing examples of "fauxbearance," including tariffing, information collection and reporting, discontinuance approval, and duty to maintain adequate facilities, as items the FCC forbears from but still has the authority to enforce through other provisions).

17. *Id.* at 5985 (Michael O'Rielly, Comm'r, dissenting).

18. *See* U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 696 (D.C. Cir. 2016); *see also* FED. R. APP. P. 15(a)(1) ("Review of an agency order is commenced by filing . . . a petition for review with . . . a court of appeals authorized to review the agency order.").

19. *See U.S. Telecom*, 825 F.3d at 696.

20. *See id.* at 744; *see also* Brian Fung, *Cable and Telecom Companies Just Lost a Huge Court Battle on Net Neutrality*, WASH. POST (June 14, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/06/14/the-fcc-just-won-a-sweeping-victory-on-net-neutrality-in-federal-court/?utm_term=.622b20f48f8c.

precedent. Part IV continues with the D.C. Circuit's decision affirming the FCC's authority to enforce the 2015 Order and its accompanying rules. Part V then explores the potential impact of Title II regulation on the broadband industry. This Note concludes with a recommended approach to broadband regulation.

II. FACTS AND HOLDING

Since the early 2000s, ISPs have improved Internet infrastructure through technological innovation and significant investment, expanded service availability across the nation, and made access more affordable for consumers.[21] To meet growing consumer demand, cable providers like Comcast and Time Warner repurposed their cable lines to provide broadband service, or high-speed Internet, which is today considered one of the most valuable innovations to Internet technology.[22] Leveraging their immense cable-television customer base, cable companies quickly became the leading broadband service provider.[23] As a result, cable broadband service is now available to 93% of U.S. homes.[24]

To some, cable providers' market share of the broadband industry appeared monopolistic, causing certain lawmakers and administrative bodies, particularly the FCC, to fear that some cable companies "could act in ways that would ultimately inhibit the speed and extent of future broadband deployment."[25] The

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21. *See* 2015 Open Internet Order, 30 F.C.C. Rcd. 5601, 5603 ¶ 2 (2015) ("For example, according to US Telecom, broadband providers invested $212 billion in the three years following adoption of the rules—from 2011 to 2013—more than in any three year period since 2002."); *see also Broadband by the Numbers*, THE INTERNET & TELEVISION ASS'N, https://www.ncta.com/broadband-by-the-numbers (last visited Sept. 7, 2017).

22. Enrique De Argaez, *What You Should Know About Internet Broadband Access*, INTERNET WORLD STATS, http://www.internetworldstats.com/articles/art096.htm (last visited Mar. 17, 2017) ("The fibre networks that bring you cable TV at home can be more than an addition to your viewing options — it can also be your means to fast Internet access.").

23. John Brodkin, *Comcast, Time Warner Cable Get 71% of New Internet Subscribers*, ARSTECHNICA (Nov. 23, 2015, 12:09 PM), https://arstechnica.com/business/2015/11/comcast-time-warner-cable-get-71-of-new-internet-subscribers/ ("Comcast and Time Warner Cable are dominating the market for new wireline Internet subscribers in the US, with AT&T and Verizon lagging far behind. Cable already had a majority of the broadband market, even when you count slow DSL as 'broadband,' and that majority is growing.").

24. *Broadband by the Numbers*, *supra* note 21.

25. Verizon v. FCC, 740 F.3d 623, 645 (D.C. Cir. 2014); *see also* Richard

FCC also feared that cable providers threatened "Internet openness," meaning an Internet that is "open for commerce, innovation, and speech; open for consumers and for the innovation created by application developers and content companies; and open for expansion and investment by America's broadband providers."[26] For these reasons, the FCC has crafted rules and polices to protect Internet openness for more than a decade.[27]

Prior to the D.C. Circuit's ruling in *U.S. Telecom*, courts struck down the FCC's two earlier attempts to enforce open Internet rules under different regulatory frameworks.[28] The FCC eventually changed course in its 2015 Order, which overhauled its former regulatory policy by reclassifying broadband as a more heavily regulated telecommunications service. FCC Chairman Tom Wheeler branded the 2015 Order as a "light-touch regulatory framework" and "Title II for the 21st Century."[29] According to Chairman Wheeler, the 2015 Order was designed to enforce "carefully-tailored" open Internet rules to protect and promote broadband innovation and investment through the enforcement of three bright-line rules:

> (1) **No Blocking:** "A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management."
>
> (2) **No Throttling:** "A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management."
>
> (3) **No Paid Prioritization:** "A person engaged in the provision of broadband Internet access service, insofar

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Greenfield, *How the Cable Industry Became a Monopoly*, FORTUNE (May 19, 2015), http://fortune.com/2015/05/19/cable-industry-becomes-a-monopoly/.

26. 2015 Open Internet Order, 30 F.C.C. Rcd 5601, 5603 ¶ 1 (2015).

27. 2015 Open Internet Order, 30 F.C.C. Rcd. 5601.

28. *See* Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010); Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

29. 2015 Open Internet Order, 30 F.C.C. Rcd. at 5603 ¶ 5.

> as such person is so engaged, shall not engage in paid prioritization."[30]

These bright-line rules ban providers from blocking any form of legal online content, intentionally slowing Internet traffic, or selling content providers preferential broadband speeds at higher costs. In addition to these three bright-line rules, the FCC adopted a "catch-all" General Conduct Standard, which prohibits ISPs from unreasonably interfering with or unreasonably disadvantaging users or third-party content providers, like Netflix and Google, outside of what the FCC would consider reasonable network management.[31] Finally, the Enhanced Transparency Rule requires providers to publicly disclose certain network-management practices, performance characteristics, and commercial terms, such as price and promotional rates, data caps, and other fees.[32] While broadband providers have continuously supported these net neutrality principles, the *U.S. Telecom* petitioners centrally attacked the FCC's decision to reclassify broadband as a telecommunications service.[33]

A. THE PARTIES AND THEIR CLAIMS

The petitioner, the U.S. Telecom Association (U.S. Telecom), is a trade organization representing telecommunications-related businesses based in the United States.[34] Association members

30. 2015 Open Internet Order, 30 F.C.C. Rcd. 5601, 5603 ¶ 4, 5607 ¶¶ 15–16, 18 (2015).

31. *See id.* at 5609 ¶¶ 21–22 (citations omitted) ("Thus, the Order adopts the following standard: Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.").

32. *See* 2015 Open Internet Order, 30 F.C.C. Rcd. at 5609 ¶ 23 (citing 47 C.F.R. § 8.3) ("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.").

33. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 708 (D.C. Cir. 2016).

34. *See Who We Are*, U.S. TELECOM, https://www.ustelecom.org/who-we-are (last visited Mar. 17, 2017) ("US Telecom is the nation's leading trade association representing broadband service providers and suppliers."); *see also* 15 U.S.C. § 61 (2009) (defining an "association" as "any corporation or combination, by contract or

include publicly traded and privately held companies and cooperatives that connect urban and rural markets across the United States.[35] U.S. Telecom's mission is to "unite the broad base of [its] members that provide U.S. consumers with [broadband communications] services in advocating for pro-investment policies."[36] U.S. Telecom believed that regulating broadband as a public utility would harm Internet openness and "replace a consumer-driven Internet with a government-run Internet."[37]

The defendant in this case, the FCC, was established by the Communications Act of 1934 as a federal administrative agency authorized to regulate all interstate and international communications, including radio, television, wire, satellite, and cable within the United States.[38] The President of the United States appoints five FCC commissioners, and each are confirmed by the U.S. Senate for five-year terms.[39] Because the President appoints the commissioners and the Senate confirms them, the selection process is often political.[40] The FCC's mission is to "make available so far as possible, to all the people of the United States, without discrimination . . . rapid, efficient, Nationwide, and world-wide wire and radio communication services with adequate facilities at reasonable charges."[41] Among other initiatives, the FCC seeks to promote competitive telecommunications network expansion, protect public interest goals, and ensure that communication networks work for everyone.[42]

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otherwise, of two or more persons, partnerships, or corporations").

35. U.S. TELECOM, *supra* note 34.

36. *Id.*

37. Walter McCormick, *Statement on Open Internet Court Ruling* (June 14, 2016), https://www.ustelecom.org/news/press-release/statement-open-internet-court-ruling.

38. *See* 47 U.S.C. § 151 (2012) (establishing the FCC and stating its purpose).

39. 47 U.S.C. § 154 (2012). The President also designates one of the commissioners to serve as chairperson. *Id.*

40. Edward Wyatt, *New Chief of the F.C.C. Is Confirmed*, N.Y. TIMES (Oct. 29, 2013), http://www.nytimes.com/2013/10/30/business/media/senate-approves-fcc-nominees.html?_r=0. For example, Republican Senator Ted Cruz attempted to block the nomination of Democratic Party member Tom Wheeler as chairman of the FCC because he feared Wheeler would expand disclosure requirements for televised political advertisements. *Id.*

41. *See* Communications Act of 1934 (codified as amended by the Telecommunications Act of 1996 (amendment to 47 U.S.C. § 151)).

42. *About the FCC Overview*, FCC, https://www.fcc.gov/about/overview (last visited Aug. 9, 2016) (outlining some of the FCC's goals: consumer protection,

U.S. Telecom, joined by broadband service companies and affiliates, such as AT&T and the National Cable and Telecommunications Association, petitioned the D.C. Circuit to vacate the 2015 Order.[43] U.S. Telecom alleged that the FCC did not have the statutory authority to reclassify broadband, the 2015 Order violated the Communications Act of 1934, and the categorical reclassification of broadband was arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act (APA).[44] U.S. Telecom specifically argued that Congress intended broadband to be treated as an information service, not a telecommunications service subject to utility-style common carrier treatment.[45] The FCC, on the other hand, claimed that reclassifying broadband as a telecommunications service was permissible under the Communications Act and consistent with Supreme Court precedent.[46]

This Note's analysis is limited to U.S. Telecom's most significant claims: (1) The FCC did not have the statutory authority to reclassify broadband as a telecommunications service and, even if it possessed such authority, it acted arbitrarily and capriciously in doing so; and (2) The FCC's decision to forbear from enforcing certain Title II provisions, as mandated in the 2015 Order, was unlawful.[47]

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competition, universal service, public safety, and national security).

43. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 696 (D.C. Cir. 2016). Full Service Network, National Cable & Telecomm. Association, CTIA-The Wireless Association, American Cable Association, Wireless Internet Service Providers Association, AT&T Inc., CenturyLink, Alamo Broadband Inc., and Daniel Berninger joined U.S. Telecom as petitioners. *Id.* TechFreedom entered as an intervenor. *Id.*

44. *See id.*

45. *See id.*

46. 47 U.S.C. § 153(53) (2012) (defining "telecommunications service" as "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used."); *U.S. Telecom*, 825 F.3d at 701–04; *see also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 989 (2005) (The FCC must conclude that broadband providers make an "offering" of telecommunications service in order to classify it as such.).

47. In addition to the two claims addressed in this Note, U.S. Telecom petitioned the following: (1) the FCC's regulation of interconnection arrangements was not reasonable; (2) the FCC lacked statutory authority to classify mobile broadband service as a "commercial mobile service" and that, in any event, its decision to do so was arbitrary and capricious; (3) the Open Internet rules violated due process and were impermissibly vague; and (4) some of the open Internet rules ran afoul of the First Amendment. *See U.S. Telecom*, 825 F.3d at 711–26, 734–44.

B. THE D.C. CIRCUIT'S HOLDING IN *U.S. TELECOM ASS'N V. FCC*

In a 2–1 decision, the D.C. Circuit Court fully upheld the FCC's net neutrality rules and the 2015 Order in its entirety.[48] In its 180-plus-page opinion, the majority rejected each of the petitioners' arguments, including their challenge to the reclassification of broadband.[49] The court specifically held that (1) the FCC acted reasonably by reclassifying broadband service as telecommunications service, (2) FCC provided valid reasons for changing its policy and promulgating rule reclassifying broadband service as telecommunications service, and (3) the FCC reasonably decided to forbear from applying mandatory network connection and facilities unbundling requirements.[50]

III. LEGAL BACKGROUND: THE LONG ROAD TO NET NEUTRALITY

Understanding the FCC's most recent attempt to regulate the Internet first requires a historical glimpse into the intricate chain of statutory law, FCC regulation, and federal court decisions that have influenced and developed modern telecommunications policy in the United States.

A. THE COMMUNICATIONS ACT OF 1934, COMPUTER II, AND THE TELECOMMUNICATIONS ACT OF 1996

A complex web of federal law and corresponding administrative agency rulemaking governs today's telecommunications industry. Regulation over electronic communications originated more than eighty years ago with the Communications Act of 1934, which delineated the FCC the

48. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 674 (D.C. Cir. 2016).

49. *See id.*

50. *See id.* (The court also held that the "FCC's notice of proposed rulemaking (NPRM) was adequate with respect to reclassification of broadband service as telecommunications service"; "NPRM provided adequate notice that FCC would regulate interconnection arrangements;" the "FCC reasonably reclassified mobile broadband service as commercial mobile service;" "NPRM provided adequate notice of rules from which FCC later decided to forbear;" "NPRM provided adequate notice that FCC would issue general conduct rule," and the "general conduct rule was not impermissibly vague, and thus did not violate Due Process Clause;" and the "new rules did not . . . force broadband providers to transmit speech with which they might disagree, in violation of First Amendment.").

authority to regulate the communications industry.[51] Today's telecommunication regulatory structure largely derives from the FCC's 1980 Computer II Order (Computer II), which distinguished certain communications services as "basic" or "enhanced" services.[52] Basic services, like telephone, were defined as services that *transmitted* communications but did not interact with customer-supplied information, while enhanced services, like voicemail, were services that *processed* customer-supplied information.[53]

Computer II only subjected basic services to common carrier treatment under Title II of the Communications Act, while enhanced services went unregulated.[54] Title II imposes utility-like regulations on telecommunications providers that operate as "common carriers,"[55] requiring them to "furnish such communication service[s] upon reasonable request" and charge "just and reasonable" rates.[56] Title II also prohibits "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services."[57]

Mirroring Computer II's categorical approach, the Telecommunications Act of 1996, which amended significant portions of the Communications Act, designated two new service categories—"telecommunications services" and "information services."[58] "Telecommunications services," the successor to Computer II's basic services, is the "offering of telecommunications for a fee directly to the public, or to such

51. *See* Communications Act of 1934 (codified as amended at 47 U.S.C. § 154 (2012)).

52. *In re* Amendment of Section 64.702 of the Commissioner's Rules and Regulations, 77 F.C.C.2d 384, 420 ¶ 97 (1980) [hereinafter Computer II].

53. *Id.* at 420 ¶¶ 96–97 (1980).

54. *See id.* at 387 ¶¶ 5–7 (1980).

55. 47 U.S.C. § 153(10) (2012) (defining a "common carrier" as "any person engaged as a common carrier for hire."); *see id.* at § 201(a) ("It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor."); *see also* Interstate Commerce Comm'n v. Baltimore & Ohio R.R. Co., 145 U.S. 263, 275 (1892) (The Supreme Court clarified, providing, "[T]he principles of the common law applicable to common carriers . . . demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable.").

56. 47 U.S.C. § 201(a)–(b) (2012).

57. 47 U.S.C. § 202(a) (2012).

58. 47 U.S.C. § 153(25), (50) (2012).

classes of users as to be effectively available directly to the public, regardless of the facilities used."[59] "Information services," the successor to Computer II's enhanced services, is an "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[60] The applicable regulatory treatment therefore depends on which services a provider offers to its consumers. Under the Telecommunications Act, only providers who offer telecommunications services are subject to Title II common carrier treatment.[61]

B. BROADBAND AS AN INFORMATION SERVICE

The first legal challenge against the regulatory classification of broadband was notably brought in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.[62] In 2002, the FCC classified cable modem service (or Internet delivered over cable lines) as an information service.[63] Brand X, a smaller ISP, opposed the FCC's classification of broadband service as an information service and appealed the agency's decision to the United States Court of Appeals for the Ninth Circuit.[64] Brand X specifically argued that cable modem service was an offering of both an information service *and* a telecommunications service; therefore, Internet, as a telecommunications service, was subject to Title II common carrier regulation.[65] This argument was influenced by smaller ISPs' belief that cable broadband providers should be required to allow other ISPs to use their cable lines to offer and sell Internet services.[66] Designation as a telecommunications service would have allowed smaller ISPs to accomplish this goal under the statutory provisions in Title II.[67]

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59. 47 U.S.C. § 153(53) (2012).

60. 47 U.S.C. § 153(24) (2012).

61. 47 U.S.C. § 153(51) (2012); *see* U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016).

62. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

63. Cable Broadband Order, 17 F.C.C. Rcd. 4798, 4823 ¶ 39–40 (2002).

64. *See Brand X*, 545 U.S. 967.

65. *See id.* at 971.

66. Saul Hansell, *Cable Wins Internet-Access Ruling*, N.Y. TIMES (June 28, 2005), http://www.nytimes.com/2005/06/28/technology/cable-wins-internetaccessruling.html?_r=0.

67. *See Brand X*, 545 U.S. at 971.

In *Brand X*, the primary issue concerned the ambiguous meaning of "offering" within the statutory definition of "telecommunications service" and whether a company's "offering" could refer to the "single, finished product" or the product's individual components.[68] According to the Supreme Court, the FCC had to determine whether the information service and the telecommunications components of broadband were "functionally integrated . . . or functionally separate."[69] The FCC concluded that, from the consumer's point of view, cable modem service was a functionally integrated whole, and thus "not a telecommunications offering."[70]

In a 6–3 decision led by Justice Clarence Thomas, the Supreme Court ultimately held that the FCC's ruling was a lawful construction of the Communications Act.[71] Under the *Chevron* deference standard, the Supreme Court deferred to the FCC's interpretation of "offering" and upheld the FCC's classification of broadband as solely an information service.[72]

C. STRIKE ONE: NET NEUTRALITY RULES FAIL IN *COMCAST CORP. V. FCC*

While *Brand X* left cable Internet unregulated, the FCC soon after issued a net neutrality policy statement.[73] The FCC's first attempt to legally enforce its net neutrality rules, however, was struck down after the agency issued an order compelling Comcast, the largest cable and Internet provider in the United States, to adhere to open network practices.[74] In 2007, the FCC sanctioned Comcast after customers accused the broadband provider of slowing their access to certain peer-to-peer networking applications like BitTorrent, an online file-sharing service.[75] The FCC found that, by interfering with peer-to-peer

68. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 991–92 (2005).

69. *See id.* at 991.

70. *See id.* at 997–98.

71. *See id.* at 982–86.

72. *Id.* at 997–98; *see* also Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (requiring a reviewing court to defer to an agency's construction of the statute—even if it is not what the court believes to be the best interpretation—when the statute is silent or ambiguous as to the specific issue and the agency's construction of the statute is reasonable).

73. Internet Over Wireline Facilities, 20 F.C.C. Rcd. 14,986 (2005).

74. *See* Comcast Corp. v. FCC, 600 F.3d 642, 644–45 (D.C. Cir. 2010).

75. *See id.* at 644.

network connections, Comcast limited customers' ability to access lawful Internet content and thereby violated its net neutrality policy.[76]

In response, Comcast addressed its customers' complaints by voluntarily adopting new practices that ensured it would not intentionally slow down any form of online traffic.[77] Despite Comcast's corrective measures, the FCC, in its "2008 Comcast Order," attempted to assert its authority to regulate Comcast by requiring the company to disclose its ongoing efforts to implement these new practices in detail.[78]

The FCC primarily relied on § 230 of the Telecommunications Act as statutory grounds for its ancillary authority to issue the 2008 Comcast Order.[79] In *Comcast Corp. v. FCC*, Comcast challenged the 2008 Comcast Order, arguing that the FCC did not legitimately have the authority to regulate its business practices.[80] The D.C. Circuit vacated the 2008 Comcast Order on the grounds that the FCC "failed to identify any grant of statutory authority to which the order was reasonably ancillary."[81] The court further explained that § 230 only provided policy statements and did not grant the FCC any apparent authority over Comcast's network management practices.[82]

D. STRIKE TWO: NET NEUTRALITY RULES FAIL AGAIN IN *VERIZON V. FCC*, BUT THE COURT PROVIDED A PATH FORWARD

Following *Comcast*, the FCC, in a 3–2 vote, passed the 2010

76. *See In re* Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp., 23 F.C.C. Rcd. 13028, 13052 (2008) [hereinafter 2008 Comcast Order].

77. *See* Comcast Corp. v. FCC, 600 F.3d 642, 645 (D.C. Cir. 2010).

78. *See* 2008 Comcast Order, 23 F.C.C. Rcd. at 13059–60 ¶ 54 (citing *Comcast*, 600 F.3d at 644). "The Commission may exercise this "ancillary" authority only if it demonstrates that its action—here barring Comcast from interfering with its customers' use of peer-to-peer networking applications—is 'reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities.'" *Comcast*, 600 F.3d at 644 (citations omitted).

79. 47 U.S.C. § 154(i) (2012) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [Chapter 5. Wire or Radio Communications], as may be necessary in the execution of its functions."); *see* 2008 Comcast Order, 23 F.C.C. Rcd. at 13034-36 ¶¶ 13–16; *see also Comcast*, 600 F.3d at 655.

80. *See Comcast*, 600 F.3d at 645.

81. *See id.* at 644.

82. *See id.* at 654.

Open Internet Order (2010 Order).[83] The FCC claimed the 2010 Order took an important step in making the Internet "an open platform for innovation, investment, job creation, economic growth, competition, and free expression" and would "empower and protect consumers and innovators while helping ensure that the Internet continues to flourish, with robust private investment and rapid innovation."[84] Yet the ruling endured criticism from both sides: net neutrality advocates claimed the rules were too weak, while opponents felt the decision was too radical.[85]

This time, the FCC relied on § 706 of the Telecommunications Act for its authority to enforce three bright-line net neutrality rules: (1) transparency, (2) anti-blocking, and (3) anti-discrimination.[86] Interestingly, Congress enacted § 706, which directs the FCC to "encourage the deployment" of "advanced telecommunications capability to all Americans," to *deregulate* the telephone industry.[87] Section 706 further enumerates the FCC's available methods to do so: "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[88]

In *Verizon v. FCC,* the D.C. Circuit reviewed the FCC's second attempt to enforce net neutrality rules as set forth in its 2010 Order.[89] Verizon challenged the 2010 Order on several grounds, including that the FCC "lacked affirmative statutory authority to promulgate the rules, that its decision to impose the rules was arbitrary and capricious, and that the rules [ran contrary to the] statutory provisions prohibiting the Commission

83. *In re* Preserving the Open Internet Broadband Indus. Practices, 25 F.C.C. Rcd. 17905, 17905 (2010) [2010 Open Internet Order].

84. *Id.* at 17906.

85. *See* Doug Gross, *FCC Approves Controversial 'Net Neutrality' Rules*, CNN (Dec. 22, 2010), http://www.cnn.com/2010/TECH/web/12/21/fcc.net.neutrality/index.html.

86. *See* 2010 Open Internet Order, 25 F.C.C. Rcd. at 17905–06, 17968–72 ¶¶ 117–23.

87. 47 U.S.C. § 1302(a) (2012); *see also* U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 745 (D.C. Cir. 2016) (Williams, J., dissenting) ("The [Communications Act of 1934] was designed for regulating the AT&T monopoly, the [Telecommunications Act of 1996] for guiding the telecommunications industry from that monopoly into a competitive future.").

88. 47 U.S.C. § 1302(a) (2012)

89. *See* Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014).

from treating broadband providers as common carriers."[90] Verizon specifically argued that the FCC's anti-discrimination and anti-blocking rules "subject[ed] broadband Internet access service . . . to common carriage regulation, a result expressly prohibited by the [Communications Act of 1934]."[91] Because the FCC had previously classified broadband as an information service and not as a telecommunications service, broadband providers were exempt from common carrier regulation.[92]

The court vacated the anti-blocking and anti-discrimination rules but partially agreed with Verizon.[93] The court concluded, however, that the FCC did in fact have the authority to enforce net neutrality rules—just not under the framework used in the 2010 Order.[94] Providing a path forward, the D.C. Circuit proposed that § 706 of the Telecommunications Act

> vest[ed] the FCC with affirmative authority to enact measures encouraging the deployment of broadband infrastructure . . . . [But] [g]iven that the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the Commission from nonetheless regulating them as such.[95]

Persuaded by the *Verizon* court's discussion, the FCC subsequently abandoned its 2010 regulatory ruling and launched a rulemaking proceeding to adopt net neutrality rules that conformed to the D.C. Circuit's guidance in *Verizon*.[96] The proposed rulemaking sparked one of the most commented issues in FCC history, collecting approximately 3.7 million public comments.[97] Following the comment period, the FCC passed the

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90. Verizon v. FCC, 740 F.3d 623, 634 (D.C. Cir. 2014).

91. *Id.* at 650.

92. *Id.* at 631.

93. *See id.* at 628, 650.

94. *See id.* at 628 ("The Commission, we further hold, has reasonably interpreted section 706 to empower it to promulgate rules governing broadband providers' treatment of Internet traffic, and its justification for the specific rules at issue here . . . .").

95. *Verizon*, 740 F.3d at 628.

96. *In re* Protecting and Promoting the Open Internet, 29 F.C.C. Rcd. 5561 (2014).

97. Jacob Kastrenakes, *FCC Received a Total of 3.7 Million Comments on Net Neutrality*, THE VERGE (Sept. 16, 2014), https://www.theverge.com/2014/9/16/6257887/fcc-net-neutrality-3-7-million-comments-made.

2015 Order.[98] Although the policy underlying the 2015 Order is generally an enhanced version of the 2010 Order's rules, the 2015 Order "marked a watershed in the regulation of broadband" and evidenced a significant depature from the FCC's prior policy position.[99]

IV. THE D.C. CIRCUIT'S DECISION TO UPHOLD THE 2015 OPEN INTERNET ORDER

Perhaps the most surprising aspect of the 2015 Order was the FCC's decision to reverse a decade's worth of industry policy by reclassifying broadband as a utility under Title II of the Communications Act.[100] Until the 2015 Order, the FCC practiced a "light-touch," hands-off regulatory approach to encourage broadband innovation and investment.[101] Never before had broadband been placed under such strict regulatory scrutiny, and many questioned whether the new designation would reverse the FCC's mission to keep the Internet open and free.[102] Even the *U.S. Telecom* dissent warned that the 2015 Order had the potential to produce exactly what it sought out to prevent: "the prevalence of an incurable monopoly."[103]

A. CHALLENGING THE RECLASSIFICATION OF BROADBAND AS A TELECOMMUNICATIONS SERVICE

While the petitioners challenged the 2015 Order on

98. *See* 2015 Open Internet Order, 30 F.C.C. Rcd. 5601 (2015).

99. Christopher Savage, *Open Internet Order Puts 'Edge Providers' in the Spotlight*, LAW 360 (June 11, 2015), http://www.law360.com/articles/659809/open-internet-order-puts-edge-providers-in-the-spotlight.

100. *See* 2015 Open Internet Order, 30 F.C.C. Rcd. at 5774 ¶ 381.

101. *In re* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities Universal Service Obligations of Broadband Providers, 17 F.C.C. Rcd. 3019, 3022 ¶ 5 (2002); *see, e.g.*, Cable Broadband Order, 17 F.C.C. Rcd. 4798, 4802 ¶ 5 (2002) (citations omitted) ("[W]e believe 'broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market.' In this regard, we seek to remove regulatory uncertainty that in itself may discourage investment and innovation. And we consider how best to limit unnecessary and unduly burdensome regulatory costs.").

102. *See* 2015 Open Internet Order, 30 F.C.C. Rcd. at 5985 (Michael O'Rielly, Comm'r, dissenting) ("While I see no need for net neutrality rules, I am far more troubled by the dangerous course that the [FCC] is now charting on Title II and the consequences it will have for broadband investment, edge providers, and consumers.").

103. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 778 (D.C. Cir. 2016) (Williams, J., dissenting).

procedural and constitutional grounds, they raised three main substantive challenges to the statutory reclassification of broadband as a telecommunications service.[104] First, the petitioners claimed that the FCC lacked the statutory authority to reclassify broadband as a telecommunications service.[105] Second, the petitioners alleged that even if the FCC had such authority, it failed to adequately explain why it reclassified broadband from an information service to a telecommunications service.[106] Finally, the petitioners argued that to reclassify broadband, the FCC had to first determine that broadband service providers were common carriers.[107]

From the outset, the D.C. Circuit established that its "role in reviewing agency regulation . . . [wa]s a limited one."[108] The limited role of a reviewing court requires it to "ensure that an agency has acted 'within its limits of [Congress's] delegation' of authority[109] and that its action is not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[110] The court is forbidden from substituting its judgment for that of the agency; therefore, it must not "inquire as to whether the agency's decision is wise as a policy matter."[111] When an agency acts within the bounds of its "congressionally delegated authority," the court must defer to the agency's interpretation or judgment—even if the court disagrees with the agency's approach.[112]

In reviewing the FCC's reclassification decision, the D.C. Circuit applied the two-step *Chevron* analysis to determine whether the Communications Act was ambiguous with respect to the classification of broadband, and, if so, whether the FCC's

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104. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 711 (D.C. Cir. 2016) (Williams, J., dissenting).

105. *Id.* at 702–06.

106. *Id.* at 706–710.

107. *Id.* at 710–711.

108. *Id.* at 696–97 (quoting Ass'n of Am. R.Rs. v. Interstate Commerce Comm'n, 978 F.2d 737, 740 (D.C. Cir. 1992)).

109. *U.S. Telecom*, 825 F.3d at 697 (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 865 (1984)).

110. *Id.* at 697 (quoting 5 U.S.C § 706(2)(A) (2012)).

111. 5 U.S.C. § 706(2)(A) (2012); *U.S. Telecom*, 825 F.3d at 697 (citing Ass'n of Am. R.Rs. v. Interstate Commerce Comm'n, 978 F.2d 737, 740 (D.C. Cir. 1992)).

112. *U.S. Telecom*, 825 F.3d at 697 (quoting City of Los Angeles v. U.S. Dep't of Transp., 165 F.3d 972, 978 (D.C. Cir. 1999)).

decision to reclassify was reasonable.[113] The court was unable to resolve the dispute in step one of the *Chevron* analysis, so it proceeded to step two to make its final conclusion.[114] The court ultimately concluded that the FCC was within its authority to reclassify broadband under the deference granted to federal agencies in *Chevron* and that its reasons to reclassify were reasonable.[115]

1. *CHEVRON* STEP ONE: EVALUATING THE FCC'S AUTHORITY TO RECLASSIFY

The court first addressed the petitioners' argument that broadband did not meet the statutory definition of "telecommunications service" under the Communications Act: "the *offering* of telecommunications for a fee directly to the public."[116] U.S. Telecom specifically argued that the FCC could not reclassify broadband as a telecommunications service because it was "unambiguously an information service."[117] The FCC noted, however, that the Supreme Court explained in *Brand X* that the appropriate classification of a telecommunications service depended on whether the provider made an "offering" of telecommunications.[118] There, the Supreme Court further held that the term "offering" was ambiguous.[119]

To establish its authority to reclassify, the FCC argued, and the court agreed, that *Brand X* expressly recognized that the proper classification of broadband turns "on the factual particulars of how Internet technology works and how it is provided, questions *Chevron* leaves to the [FCC] to resolve in the first instance."[120] The D.C. Circuit concluded that the Supreme Court "expressly recognized that Congress, by leaving a statutory ambiguity, had delegated to the Commission the power to regulate broadband service."[121]

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113. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 701–04 (D.C. Cir. 2016).

114. *Id.*

115. *Id.*

116. *Id.* at 701 (quoting 47 U.S.C. § 153(53) (2012)) (emphasis added).

117. *Id.*

118. *U.S. Telecom*, 825 F.3d at 701 (citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 989 (2005)).

119. *Brand X*, 545 U.S. at 989.

120. *Id.* at 991.

121. *U.S. Telecom*, 825 F.3d at 704.

The petitioners also argued that Congress had "tried and failed to enact open internet legislation" multiple times, which signified the FCC's lack of authority to issue open Internet rules.[122] This argument also failed to persuade the court, as it determined that the Supreme Court previously spoke directly to this issue, stating that "courts do not regard Congress' 'attention' to a matter subsequently undertaken by an agency" authority as "legislative history demonstrating a congressional construction of the meaning of the statute."[123]

2. *CHEVRON* STEP TWO: TESTING THE REASONABILITY OF THE FCC'S DECISION TO RECLASSIFY

To test the reasonability of the FCC's decision to reclassify, the petitioners further alleged that reclassification was unreasonable because many broadband providers offered *information* services, such as email and cloud storage, along with Internet access.[124] The petitioners argued that because broadband providers offered such services, "consumers *must* perceive that those providers offer an information service."[125] "The [FCC] agreed that broadband providers offer email and other services" but classified modern broadband Internet access as a *separate offering*, given that it is "sufficiently independent" from the information services.[126] The court found the FCC's conclusion was reasonably based on extensive evidence showing that "consumers percieve a standalone offering of [Internet] transmission, separate from the offering of information services like email and cloud storage."[127]

The petitioners also argued that the FCC's reclassification of broadband was unreasonable because the Domain Name System (DNS) and caching, both integral parts of Internet processing, did not fall within the Telecommunications Act's telecommunications-

122. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 703 (D.C. Cir. 2016).

123. *Id.* (citing Am. Trucking Ass'ns. v. Atchison, Topeka, & Santa Fe Ry. Co., 387 U.S. 397, 416–17 (1967).

124. *Id.* at 704.

125. *Id.* (emphasis added).

126. *Id.*; *see* 2015 Open Internet Order, 30 F.C.C. Rcd. 5601, 5757–58 ¶ 356 (2015) (citations omitted) ("Although broadband providers in many cases provide broadband Internet access service along with information services, such as email and online storage, we find that broadband Internet access service is today sufficiently independent of these information services that it is a separate 'offering.'").

127. *See U.S. Telecom*, 825 F.3d at 704–05.

management exception (applied to those services that would have qualified as "adjunct-to-basic" under the Computer II regime).[128] Previously, the FCC originally considered DNS and caching to be integral parts of broadband services.[129] The DNS is a naming system used to translate domain names into numerical IP addresses that are used by computers and other technologies to locate online content.[130] "Caching" is the process of storing copies of content at locations closer to the user allowing for a more rapid retrieval of information.[131] The FCC changed its prior view and maintained that tools like DNS and caching are used to manage basic Internet-access service and should be treated as telecommunications service instead.[132]

The Computer II adjunct-to-basic-standard test provides that in order to qualify as an adjunct-to-basic service, the service must be "basic in purpose and use" and cannot "alter the fundamental character of the telecommunications service."[133] The FCC argued that DNS and caching met this standard because they do not alter the fundamental characteristics of a telecommunication service.[134] The FCC explained that DNS fulfilled the standard by "allow[ing] more efficient use of the telecommunications network by facilitating accurate and efficient routing from the end user to the receiving party."[135] The FCC further justified its position, stating that caching "enabl[es] the user to obtain 'more rapid

128. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 705 (D.C. Cir. 2016); *see* 2015 Open Internet Order, 30 F.C.C. Rcd. 5601, 5766–67 ¶ 367 (2015) (citations omitted).

129. *See* Cable Modem Order, 17 F.C.C. Rcd. 4798, 4822–23 ¶ 38 (2002); *see also* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 999 (2005).

130. *See* Cable Modem Order, 17 F.C.C. Rcd. at 4810 ¶ 17 n.76; *see also Brand X*, 545 U.S. at 999–1000.

131. *See* Cable Modem Order, 17 F.C.C. Rcd. at 4810 ¶ 17.

132. *See* 2015 Open Internet Order, 30 F.C.C. Rcd. at 5770 ¶¶ 371–72 (citations omitted) ("[W]e now reconsider our prior analysis and conclude for two reasons that the bundling of DNS by a provider of broadband Internet access service does not convert the broadband Internet access service offering into an integrated information service. This is both because DNS falls within the telecommunications systems management exception to the definition of information service and because, regardless of its classification, it does not affect the fundamental nature of broadband Internet access service as a distinct offering of telecommunications.").

133. *See* 2015 Open Internet Order, 30 F.C.C. Rcd. at 5767 ¶ 367 (citations omitted); *U.S. Telecom*, 825 F.3d at 705.

134. *See* 2015 Open Internet Order, 30 F.C.C. Rcd. at 5770 ¶¶ 371–72 (citations omitted).

135. *Id.* at 5768 ¶ 368 (citations omitted).

retrieval of information' through the network."[136]

The FCC's arguments went unrefuted, and the court concluded that when a broadband provider uses services like DNS or caching, which typically operates as an information service to manage a telecommunications service, those services no longer qualified as an information service under the Communications Act.[137]

The 2015 Order presented evidence that, from the consumers' perspective, "broadband Internet access service is today sufficiently independent of these information services that it is a separate offering."[138] The 2015 Order further reported that consumers perceive broadband as essentially a passive conduit for the transmission of online data.[139] Based on these findings, the court concluded that the FCC reasonably justified its reasons to reclassify broadband.[140]

Finding that none of the petitioners' substantive challenges to reclassification had any merit, the court was unpersuaded and ultimately upheld the FCC's reclassification of broadband as a telecommunications service.[141]

B. FINDING THE FCC ADEQUATELY EXPLAINED ITS REASONS TO RECLASSIFY

Next, the court evaluated the petitioners' argument that the FCC failed to adequately explain why, after having long classified broadband as an information service, it chose to reclassify it as a telecommunications service.[142] The petitioners argued that the 2015 Order and its rules were "arbitrary and capricious."[143] The Supreme Court previously held that "the APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious

136. 2015 Open Internet Order, 30 F.C.C. Rcd. 5601, 5770 ¶ 372 (2015) (citations omitted).

137. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 705 (D.C. Cir. 2016).

138. *Id.* at 698 (quoting 2015 Open Internet Order, 30 F.C.C. Rcd. 5601, 5757–58 ¶ 356 (2015)).

139. *Id.* at 699; *see* 2015 Open Internet Order, 30 F.C.C. Rcd. at 5757 ¶ 354.

140. *U.S. Telecom*, 825 F.3d at 697–98.

141. *See id.* at 700.

142. *Id.* at 706.

143. *Id.* at 708.

reliance interests that must be taken into account.'"[144] An agency must explain its reasons for a changed interpretation to meet the APA's reasoned decision-making requirement.[145] Further, "although the agency 'must show that there are good reasons for the new policy[,] . . . it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one.'"[146]

The petitioners emphasized that the FCC lacked good reasons for reclassifying broadband because "as *Verizon* made clear, and as the [FCC] originally recognized, it could have adopted appropriate Open Internet rules based upon § 706 *without* reclassifying broadband."[147] As the *Verizon* court explained, the FCC could rely on § 706 instead, which would have "steered clear of regulating broadband providers as common carriers *per se*."[148] Nevertheless, the court concluded that the FCC provided sufficient reasoning for its change in position.[149]

The petitioners further alleged that reclassification would significantly reduce broadband investment.[150] The FCC found, however, that "Internet traffic is expected to grow substantially in the coming years"[151] and "major [broadband] infrastructure providers have indicated that they will in fact continue to invest under [Title II] framework."[152] The court, in exercising deference to the FCC, found that the agency's explanation was adequate to support its decision.[153]

144. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 708 (D.C. Cir. 2016) (quoting Perez v. Mortgage Bankers Ass'n, 135 S.Ct. 1199, 1209 (2015)).

145. *Id.* at 706 (quoting Verizon v. FCC, 740 F.3d 623, 636 (D.C. Cir. 2010)).

146. *Id.* at 707 (quoting FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)).

147. *Id.* (internal citations omitted) (emphasis added).

148. *Id.* (citing 2015 Open Internet Order, 30 F.C.C. Rcd. 5601, 5614 ¶ 42 (2015)).

149. *U.S. Telecom*, 825 F.3d at 707.

150. *Id.*

151. *Id.* (citing 2015 Open Internet Order, 30 F.C.C. Rcd. at 5792 ¶ 412).

152. *Id.* (citing 2015 Open Internet Order, 30 F.C.C. Rcd. at 5795 ¶ 416).

153. "[A]n agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review, as long as they are reasonable." *See id.* (quoting EarthLink, Inc. v. FCC, 462 F.3d 1, 12 (D.C. Cir. 2006)).

C. BROADBAND PROVIDERS WERE NOT REQUIRED TO BE CATEGORIZED AS COMMON CARRIERS UNDER THE *NARUC* TEST

Next, the petitioners argued that the FCC failed to determine that broadband providers were common carriers under the D.C. Circuit's National Association of Regulatory Utility Commissioner (*NARUC*) test in order to reclassify.[154] Under this test, "a carrier has to be regulated as a common carrier if it will make capacity available to the public indifferently or if the public interest requires common carrier operation."[155] The court found that the petitioners' argument ignored that the Telecommunications Act provides that "[a] telecommunications carrier shall be treated as a common carrier . . . to the extent that it is engaged in providing telecommunications services" and that "[t]he [Telecommunications] Act . . . authorizes—indeed, requires—broadband providers to be treated as common carriers once they are found to offer telecommunications service."[156]

The court determined that if the FCC found broadband service as a telecommunications service under the statute, then the statutory interpretation would supersede the *NARUC* test.[157] The court also noted that the petitioners did not cite a case, nor were they aware of one, supporting the idea that the FCC must apply the *NARUC* test when applying the statutory test for common carriage.[158]

D. FORBEARANCE: REFRAINING FROM ENFORCING CERTAIN TITLE II PROVISIONS

After rejecting all of the petitioners' arguments against reclassification, the court turned to U.S. Telecom's challenge against the FCC's decision to forbear from applying certain provisions of Title II of the Telecommunications Act.[159] In 1996, the Telecommunications Act added a forbearance provision to

154. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 701 (D.C. Cir. 2016) (citing Nat'l Ass'n of Reg. Util. Comm'rs. v. FCC, 533 F.2d 601, 630 (D.C. Cir. 1976); Nat'l Ass'n of Reg. Util. Comm'rs. v. FCC, 525 F.2d 630 (D.C. Cir. 1976)).

155. *Id.* at 710 (quoting Virgin Is. Telephone Corp. v. FCC, 198 F.3d 921, 924 (D.C. Cir. 1999)).

156. 47 U.S.C. § 153(51) (2012); *U.S. Telecom,* 825 F.3d at 711.

157. *See U.S. Telecom*, 825 F.3d at 710–11.

158. *Id.*

159. *See id.* at 727; *see also* 2015 Open Internet Order, 30 F.C.C. Rcd. 5601, 5616 ¶ 51 (2015).

Title II, which required the FCC to opt out of provisions unnecessary to protect consumers or public interest.[160] Relying heavily on the 1996 forbearance provision, the FCC exercised its new authority by refraining from applying twenty-seven Title II provisions to its new broadband regulatory scheme.[161]

Furthermore, § 10 of the Telecommunications Act states that "the [FCC] shall consider whether forbearance . . . will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[162] The court explained that "section 10 imposes a mandatory obligation upon the FCC to forbear when it finds these conditions are met."[163] The court found, in light of substantial deference owed to the FCC, that there was a "rational connection between the facts found and the choice made."[164] Finally, the court determined that the FCC's interpretation of its regulations set forth in the 2015 Order "easily satisfie[d] [the APA] standard."[165]

E. JUDGE WILLIAMS'S DISSENT

On the other hand, Judge Stephen Williams, who dissented in part, concluded that the FCC failed to provide valid reasoning supporting its decision to reclassify broadband from an information service to a telecommunications service.[166] Judge Williams further found the FCC's position paradoxical on two accounts: (1) for using the Telecommunications Act to increase regulation, although it was intended to reduce regulation, and (2) for "coupling adoption of a dramatically new policy whose rationality seems heavily dependent on the existing state of

160. 47 U.S.C. § 160 (2012).

161. *See* 2015 Open Internet Order, 30 F.C.C. Rcd. at 5838–41 ¶¶ 493–96 (citations omitted) ("With respect to proposals to retain particular statutory provisions or requirements, we are not persuaded by the record here that forbearance is not justified for the reasons discussed below . . . . [A] tailored regulatory approach avoids disincentives for broadband deployment, which we weigh in considering what outcomes are just and reasonable—and whether the forborne-from provisions are necessary to ensure just and reasonable conduct . . . . Furthermore . . . particular conduct by a broadband Internet access service provider can have mixed consequences, rendering case-by-case evaluation superior to bright-line rules.").

162. 47 U.S.C. § 160(b) (2012).

163. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 727 (D.C. Cir. 2016).

164. *Id.* at 706.

165. *Id.* at 727.

166. *Id.* at 745 (Williams, J. dissenting).

competition in the broadband industry, under an Act intended to 'promote competition,' with a resolute refusal even to address the state of competition."[167]

The dissent also felt that the FCC's decision to forbear from enforcing a wide array of Title II's provisions was "based on premises inconsistent with its reclassification of broadband."[168] The 2015 Order's "combined reclassification-forbearance decision," he continued, "[wa]s arbitrary and capricious."[169] Judge Williams concluded, "The ultimate irony of the Commission's unreasoned patchwork is that . . . it shunts broadband service onto the legal track suited to natural monopolies."[170]

V. ANALYSIS

With the D.C. Circuit's full support of the 2015 Order, the FCC is now free to implement Title II regulation and enforce net neutrality rules on broadband providers. As explained below, these rules may detrimentally impact broadband providers and consumers. The resulting harms, ranging from bottom-line pitfalls to consumer-imposed fees, will burden the relationship not only between broadband providers and their consumers, but also between the consumer and the Internet itself.

A. A TORTUOUS APPROACH: IMPLICATIONS OF TITLE II REGULATION

Since the inception of broadband, ISPs have freely adopted net neutrality principles without government interference or mandate. Even in rare and isolated cases of misstep, providers adhered to the FCC's suggested recourse and self-imposed measures to better protect their consumers.[171] To an even greater extent, broadband investment has inevitably flourished—without regulation—and the United States is one of the most competitive

167. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 745 (D.C. Cir. 2016) (Williams, J., dissenting).

168. *Id.* at 744 (Williams, J., dissenting).

169. *Id.* at 778 (Williams, J., dissenting).

170. *Id.*

171. *Where We Stand on Net Neutrality*, NCTA (Aug. 21, 2014), https://www.ncta.com/platform/public-policy/where-we-stand-on-net-neutrality/ ("Cable broadband providers are unequivocally committed to building and maintaining an open Internet experience. That means [they] support the original principles of Net Neutrality . . . [and] the FCC's efforts to ensure consumers have basic protections.").

broadband markets in the world.[172] Judge Williams acknowledged ISPs' $343 billion broadband investment from 2006 to 2010, which equates to about $3,000 for every American household.[173] Through significant capital investment in network infrastructure, millions of industry jobs have also been generated in the United States.[174] The investment by ISPs toward building and maintaining an impenetrable Internet ecosystem has undoubtedly played a leading role in forging technical advancements, developing innovative application and devices, and expanding the network accessibility we know today. It would be difficult to dismiss the contributions broadband providers have made toward building a better, stronger Internet network.

Before the 2015 Order, commentators referred to the Title II regulation route as the FCC's "nuclear option."[175] Considered politically controversial, many viewed Title II as a last resort that would only come into play if other methods of broadband regulation failed to pass.[176] As this Note has explained, the FCC's "nuclear option" was the only quick-remedy answer to the President's urgent call for net neutrality rules and deluge of media commentary.[177] What followed was the FCC's attempt to haphazardly string together a patchwork of existing law in a tortuous approach to regulation—that is, the FCC meticulously maneuvered through Title II to produce what it believed to be a consumer-driven broadband policy. In fact, it would be surprising if consumers have the patience or endurance to read the FCC's

172. *Broadband Investment*, U.S. TELECOM, https://www.ustelecom.org/broadband-industry/broadband-industry-stats/investment (last visited Aug. 9, 2016).

173. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 748 (D.C. Cir. 2016) (providing that broadband investment amounts to about $3,000 on average for every American household) (citing Quickfacts, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/table/PST045215/00.).

174. *Broadband Investment*, *supra* note 172.

175. Brian Fung, *The FCC Says It 'Won't Hesitate' to Use Its Nuclear Option on Net Neutrality*, WASH. POST (April 30, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/04/30/the-fcc-says-it-wont-hesitate-to-use-its-nuclear-option-on-net-neutrality/.

176. Grant Gross, *Net Neutrality: Reclassifying Broadband Would Be a Long Road*, PC WORLD (May 28, 2014), http://www.pcworld.com/article/2236980/net-neutrality-reclassifying-broadband-would-be-a-long-road.html.

177. *See* 2015 Open Internet Order, 30 F.C.C. Rcd. 5601, 5921 (2015) (Ajit Pai, Comm'r, dissenting) ("On November 10, President Obama asked the FCC to implement his plan for regulating the Internet, one that favors government regulation over marketplace competition. As has been widely reported in the press, the FCC has been scrambling ever since to figure out a way to do just that.").

policy in its entirety, considering the 300 pages of ambiguous rules and net neutrality buzzwords that can only be deciphered by a seasoned telecommunications attorney or Chairman Wheeler himself. In reality, the 2015 Order simply fails to provide significant consumer benefits.

Furthermore, as Commissioner O'Rielly pointed out, the 2015 Order claims to forbear from—or opt out of—certain Title II provisions but expressly opts in to protections granted in other provisions that "effectively gut the forbearance."[178] He went on to say, "[u]sing Title II combined with forbearance to cherry pick its preferred provisions is an egregious abuse of forbearance authority."[179] The *U.S. Telecom* dissent believed the FCC "attempt[ed] to have it both ways" when the FCC found a lack of competition in its reclassification decision but also simultaneously found adequate competition to justify forbearance.[180]

It is unusual for rulemakers to go to such great lengths to opt out of numerous core provisions in a manner that dilutes a statute's intended purpose but best fits the rulemakers' agenda. Verizon made this clear, explaining, "The very fact that the [FCC] feels the need to re-work so many provisions of Title II is proof that Congress never intended for Title II to apply to broadband providers."[181] This shoe-horn approach to broadband regulation is destined to fail the industry *and* its consumers.

B. HOW TITLE II REGULATION WILL HARM BROADBAND PROVIDERS AND CONSUMERS

The most disconcerting consequence of Title II regulation is the probable financial burden broadband providers and consumers could face. The National Communications Trade Association was adamant that the FCC's new regulatory authority would cascade harmful effects on the industry: "The enormous breadth and ambiguity of the FCC's new-found power will create uncertainty and conflict for years to come; depressing investment in new and better networks, and chilling development

178. *See* 2015 Open Internet Order, 30 F.C.C. Rcd. 5601, 5996 (2015) (Michael O'Rielly, Comm'r, dissenting).

179. *See id.* at 5998 (Michael O'Rielly, Comm'r, dissenting).

180. *See* U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 777 (D.C. Cir. 2016).

181. Verizon Feb. 19, 2015 Title II Ex Parte Letter at 7.

of new technologies, apps and services."[182] Then-FCC Commissioner Pai warned of what he believed to be the dismal consequences to follow Title II regulation: higher broadband prices, slower broadband speeds, less broadband deployment, less innovation, and fewer options for American consumers.[183] The exorbitant costs ISPs are expected to suffer came to life in June 2015 when the FCC sought to impose a $100 million fine against AT&T for alleged transparency rule violations.[184] This was the highest proposed fine by the FCC to date.[185]

Another harmful effect of Title II regulation is the dreaded "bill increase."[186] Consumers pay a "Universal Service Fee" on their telephone bills—about nine billion dollars total per year—and consumers may eventually see a similar line-item on their Internet bills.[187] Because broadband is now designated as a telecommunications service, it must adhere to Title II, except those provisions the FCC chose to forebear.[188] The FCC did not forbear from this Universal Service Fee requirement.[189] When asked to address this issue, former FCC Chairman Wheeler would not gurantee that consumers would not pay more to the Universal Service Fee fund due to Title II broadband regulation.[190]

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182. Michael Powell, *Why We Are Appealing the FCC's Title II Decision*, NCTA (April 14, 2015), https://www.ncta.com/platform/public-policy/why-we-are-appealing-the-fccs-title-ii-decision/.

183. *See* 2015 Open Internet Order, 30 F.C.C. Rcd. 5601, 5921 (2015) (Ajit Pai, Comm'r, dissenting) ("To quote Ronald Reagan, President Obama's plan to regulate the Internet isn't the solution to a problem. His plan is the problem.").

184. K.C. Halm, *FCC Proposes Record $100 Million Penalty for Alleged Violations of Open Internet Transparency Rule,* OPEN INTERNET LAW ADVISOR (June 18, 2016), http://www.openinternetlaw.com/2015/06/fcc-proposes-record-100-million-penalty-for-alleged-violations-of-open-internet-transparency-rule/.

185. *Id.*

186. *See* 2015 Open Internet Order, 30 F.C.C. Rcd. at 6000 (Michael O'Rielly, Comm'r, dissenting).

187. *See id.* at 5925 (Michael O'Rielly, Comm'r, dissenting); *see also id.* at 5835 ¶ 488 (citations omitted) ("[Title II] authorizes the [FCC] to impose universal service contributions requirements on telecommunications carriers – and, indeed, goes even further to require '[e]very telecommunications carrier that provides interstate telecommunications services' to contribute.").

188. *See* U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 689 (D.C. Cir. 2016).

189. *See* 2015 Open Internet Order, 30 F.C.C. Rcd. at 5926 (Ajit Pai, Comm'r, dissenting) ("[T]he *Order* repeatedly states that it is only deferring a decision on new broadband taxes—not prohibiting them. This is fig-leaf forbearance . . . .").

190. Jim Puzzanghera, *FCC's Net Neutrality Rules Open Door to New Fee on Internet Service*, L.A. TIMES (April 9, 2015), http://www.latimes.com/business/la-fi-

Consumers can also expect to share in other heavy net neutrality cost burdens. A net neutrality study revealed that the new rules could impose anywhere from a $10 to $55 monthly increase on top of an average broadband service charge of $30.[191] This study explained that broadband providers' expenses will increase due to net neutrality costs associated with increased litigation, operational costs, generic overhead, and broadband deployment.[192] These expenses could ultimately force broadband providers to decrease network investments and pass these costs on to consumers.[193] Equally concerning, a study conducted by an adjunct professor at Georgetown University's McDonough School of Business projected that broadband regulation could eliminate up to 43,560 jobs, cut economic output by $3.4 billion over a five-year period, and prevent 67,000 buildings from getting access to fiber-optic broadband.[194]

C. UNWINDING NET NEUTRALITY: POLITICAL DISCORD AFTER THE 2016 PRESIDENTIAL ELECTION

Despite the D.C. Circuit's *U.S. Telecom* ruling, the broadband battle may be far from over. Following the 2016 Presidential election, business-conscious Republicans—who tend to support a scaled-back government approach to regulation and generally oppose net neutrality[195]—gained control of the executive, legislative, and judicial branches, which caused many political analysts to anticipate a reversal of the 2015 Order's net neutrality rules.[196]

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broadband-fees-20150409-story.html (referring to FCC Chairman Tom Wheeler's statement that "even if broadband firms are required to contribute, there are no plans to increase the annual size of the fund. That means the cost simply would be spread among more customers, and in many cases a new broadband fee would be offset by a lower fee on a consumer's phone bill[,] . . . [but that] when pressed on the issue . . . [he] would not guarantee that consumers will not end up contributing more to the fund").

191. *Impact of Net Neutrality on Consumers and Economic Growth,* STRATECAST (2010), http://internetinnovation.org/files/special-reports/Impact_of_Net_Neutrality_on_Consumers_and_Economic_Growth.pdf.

192. *Id.*

193. *Id.*

194. *Assessing the Consequences of Additional FCC Regulation of Business Broadband: An Empirical Approach*, HAL SINGER (2016), http://innovatewithus.org/wp-content/uploads/2016/04/Hal-Singer-Report-FCC-Regulation-of-Business-Broadband.pdf.

195. Haley Sweetland Edwards, *Why 2016 Republicans Oppose Net Neutrality*, TIME (Mar. 13, 2015), http://time.com/3741085/net-neutrality-republicans-president/.

196. Brian Fung, *The Future of Net Neutrality in Trump's America*, WASH. POST

The election of Republican President Donald Trump has elicited an uncertain destiny for net neutrality.[197] Soon after his election, President Trump began to vocalize his unwillingness to enforce the 2015 Order's rules and alluded to the possibility of overturning the 2015 Order altogether.[198] President Trump more formally addressed his intent to deregulate broadband companies in early 2017.[199] In March 2017, former White House Press Secretary Sean Spicer, speaking on behalf of President Trump, indicated that the President "pledged to reverse this overreach," and described Chairman Wheeler's neutrality rules as "[a]n example of 'bureaucrats in Washington' placing restrictions on one kind of company—internet service suppliers—and 'picking winners and losers.'"[200]

The 2016 presidential election also opened the floor for new federal government appointments that will inevitably impact the 2015 Order. In the wake of several vacancies, President Trump leveraged the opportunity to fill these open positions with Republican appointments.[201]

Following the *U.S. Telecom* decision, opponents to the 2015 Order attempted to seek a review of the D.C. Circuit's decision in front of the full nine-member court of appeals, when they moved for an en banc rehearing of the case.[202] This was a strategic move in hopes of extending the case's longevity in court, which ideally

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(Apr. 5, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/04/05/the-future-of-net-neutrality-in-trumps-america/?utm_term=.d8164a7a9d81; *see also* Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html.

197. Brian Fung, *FCC Chairman Tom Wheeler Is Stepping Down, Setting the Stage for a GOP Majority on Trump's First Day*, WASH. POST (Dec. 15, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/12/15/fcc-chairman-tom-wheeler-announces-hes-stepping-down/?utm_term=.cb01a2da0193.

198. Brian Fung, *How Donald Trump Could Dismantle Net Neutrality and the Rest of Obama's Internet Legacy*, WASH. POST (Nov. 10, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/11/10/how-donald-trump-will dismantle-obamas-internet-legacy/?utm_term=.0e7935bbf1ac.

199. Steve Lohr, *Net Neutrality Is Trump's Next Target, Administration Says*, N.Y. TIMES (Mar. 17, 2017), https://www.nytimes.com/2017/03/30/technology/net-neutrality.html.

200. *Id.* Secretary Spicer's comments came after a Congressional vote to overturn the Obama-era Internet privacy regulations. *Id.*

201. *See, e.g.,* Fung, *supra* note 197; Liptak & Flegenheimer, *supra* note 196.

202. *Open Internet En Banc Petition*, U.S. TELECOM (July 29, 2016), https://www.ustelecom.org/news/press-release/open-internet-en-banc-petition.

would have led to a Supreme Court hearing under the review of a new, conservative Supreme Court Justice.[203] President Trump appointed Neil Gorsuch to the Supreme Court,[204] but the conservative pick will never hear the case. The D.C. Circuit denied the petition to revisit *U.S. Telecom*, finding a rehearing "particularly unwarranted at this point in light of the uncertainty surrounding the fate of the FCC's Order."[205]

Furthermore, the FCC chairman customarily steps down when a new president comes into office, although there is no mandate requiring it.[206] Former FCC Chairman Wheeler, who spearheaded the 2015 Order, announced his plans to step down from the FCC in late December 2016.[207] Chairman Wheeler's vacant position left the agency with two Republican and one Democratic commissioner—reverting the political majority of the FCC to the Republicans.[208] Shortly thereafter, President Trump tapped Republican FCC Commissioner Ajit Pai to succeed Wheeler as Chairperson.[209]

Since his appointment, Chairman Pai has aimed to unwind the neutrality rules protected by the D.C. Circuit's decision in *U.S. Telecom*.[210] Pai, during a May 2017 FCC proceeding, described the net neutrality rules as a "bureaucratic straightjacket" and introduced "Restoring Internet Freedom"[211]—

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203. Lydia Beyoud, *Net Neutrality Opponents Weighing Next Move*, BLOOMBERG BNA (June 15, 2016), http://www.bna.com/net-neutrality-opponents-n57982074242/.

204. Liptak & Flegenheimer, *supra* note 196.

205. U.S. Telecom Ass'n v. FCC, No. 15-1063, slip op. at 3 (D.C. Cir. filed May 1, 2017) (The court denied the petition because "[t]he agency will soon consider adopting a Notice of Proposed Rulemaking that would replace the existing rule with a markedly different one."); Diana Goovaerts, *U.S. Appeals Court Denies Industry Petitions to Rehear Net Neutrality Case*, WIRELESS WEEK (May 1, 2017), https://www.wirelessweek.com/news/2017/05/us-appeals-court-denies-industry-petitions-rehear-net-neutrality-case.

206. Karl Bode, *FCC Boss Hints He May Not Resign Under New President*, DSL REPORTS (Mar. 2, 2016), http://www.dslreports.com/shownews/FCC-Boss-Hints-He-May-Not-Resign-Under-New-President-136416.

207. Fung, *supra* note 197.

208. *Id.*

209. Christine Wang, *President Trump Designates Ajit Pai as Next FCC Chairman*, CNBC (Jan. 23, 2017), http://www.cnbc.com/2017/01/23/president-trump-designates-ajit-pai-as-next-fcc-chairman.html.

210. Cecilia Kang, *Ajit Pai, F.C.C. Chairman, Moves to Roll Back Telecom Rules*, N.Y. TIMES, Apr. 20, 2017, at B9.

211. Alina Selyukh, *FCC Votes to Begin Rollback of Net Neutrality Regulations*, NAT'L PUB. RADIO (May 17, 2017), http://www.npr.org/sections/thetwo-way/

a proposed ruling set to "end the utility-style regulatory approach that gives government control of the Internet."[212] The repeal plan promises to "restore the market-based policies necessary to preserve the future of Internet Freedom, and to reverse the decline in infrastructure investment, innovation, and options for consumers put into motion by the FCC in 2015."[213] Following the release of Pai's plans to unwind Title II regulation, the FCC received more than 22 million public comments—far surpassing the 3.7 million comments filed before the 2015 Order's release.[214]

D. A RECOMMENDED APPROACH: REPLACE "TITLE II FOR THE 21ST CENTURY" WITH 21ST CENTURY LEGISLATION

As it now stands, the FCC forces the outdated telephone regulatory model on today's modern Internet. By design alone, the Internet simply does not comport to the mold of the telephone.[215] It is hardly surprising that the Supreme Court found the Communications Act ambiguous with respect to the classification of broadband when the Communications Act was enacted nearly fifty years before the birth of the Internet.[216] For this reason alone, Congress should exercise its legislative power to create a new statutory framework that more appropriately governs and protects the Internet and its consumers.

More specifically, Congress should pass new and separate broadband rules unattached to the Telecommunications Act and Title II. Several Congressional leaders have acknowledged that legislative action could enforce permanent guidelines without Title II.[217] For example, Congressional Republicans introduced a

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2017/05/18/528941897/fcc-votes-to-begin-rollback-of-net-neutrality-regulations.

212. *In re* Restoring Internet Freedom, No. 17-108 (adopted May 18, 2017), https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-60A1_Rcd.pdf.

213. *Id.* at 4435.

214. John Eggerton, *Net Neutrality Docket Pushes Past 22 Million Comments*, MULTICHANNEL NEWS (Sept. 3, 2017), http://www.multichannel.com/news/fcc/net-neutrality-docket-pushes-past-22-million-comments/414984.

215. Stephen Dubner, *Is the Internet Being Ruined*?, FREAKONOMICS (July 13, 2016), http://freakonomics.com/podcast/internet/.

216. Evan Andrews, *Who Invented the Internet?*, HISTORY (Dec. 18, 2013), http://www.history.com/news/ask-history/who-invented-the-internet ("ARPANET adopted TCP/IP on January 1, 1983, and from there researchers began to assemble the 'network of networks' that became the modern Internet.").

217. Michael Powell, *Why We Are Appealing the FCC's Title II Decision*, THE INTERNET AND TELEVISION ASS'N (Apr. 14, 2015), https://www.ncta.com/platform/public-policy/why-we-are-appealing-the-fccs-title-ii-decision/.

bill in late 2014 seeking to enact strong net neutrality rules.[218] The bill also clearly expressed that Congress never intended the FCC to have the discretion to transform broadband into a public utility.[219] While the proposal failed to gain enough support, Republicans appear to remain open to a potential bipartisan compromise on net neutrality.[220]

As one commentator summarized, the Republicans proposed 2014 bill would have most benefitted consumers because it granted clear and limited regulatory authority to FCC, put in place strong consumer protections, and "rescue[d] the agency from limbo, avoiding the need for any more costly and time-consuming legal gymnastics in federal court."[221] And argubably most importantly, a bipartisan passage of a net neutrality bill would "resolve a decade-long debate about the open Internet that has . . . engulfed the FCC and distracted the agency from more urgent business."[222]

Until new legislation passes, excessive argument, patchwork regulation, and inadequate attempts to preserve Internet openness will continue to burden America's consumers, the broadband industry, and even the FCC.

VI. CONCLUSION

Title II regulation resembles your Facebook newsfeed: irrelevant, exasperating, and probably wrong. If Title II regulation persists, the modern American broadband narrative will describe a world of regulatory friction, political conflict, and industry uncertainty. With unprecedented regulatory responsibility, ISPs are bound to operate as public utility providers under the strict standards set by the FCC. These standards, supported by the court's ruling in *U.S. Telecom*, expose broadband providers and their consumers to harmful consequences and probable financial burdens. This will

218. Larry Downes, *The Tangled Web of Net Neutrality and Regulation*, HARVARD BUS. REV. (March 31, 2017), https://hbr.org/2017/03/the-tangled-web-of-net-neutrality-and-regulation.

219. *Id.*

220. *Id.*

221. Larry Downes, *Eight Reasons to Support Congress's Net Neutrality Bill*, WASH. POST (Jan. 20, 2015), https://www.washingtonpost.com/news/innovations/wp/2015/01/20/eight-reasons-to-support-congresss-net-neutrality-bill/?utm_term=.d94cf14a4af7.

222. *Id.*

unquestionably stymie technological growth, shift the focus away from innovation, and significantly impair the world's most powerful information resource.

These consequences are avoidable. Title II is not the way.

Kristina M. Lagasse