Network Neutrality and Broadband Service Providers' First Amendment Right to Free Speech

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I. INTRODUCTION

The emergence and continued pervasiveness of the Internet has sparked a controversy over whether there is a substantial social interest in maintaining open access to that Internet through network neutrality.[1] Put simply, network neutrality is "the principle that broadband networks should not discriminate between favored and disfavored Internet content, services, and applications."[2] The archetypical example of a non-neutral network is when broadband service providers ("BSPs"), such as Verizon or Comcast, treat one kind of Internet traffic differently from another.[3] For example, if Netflix—a website providing on-demand streaming of movies and television shows—forms a partnership with Comcast, Comcast may treat this traffic more favorably, allowing for faster streaming and ultimately a more enjoyable experience for Internet users. Further, if Netflix does not form a partnership with Verizon, Verizon might treat Netflix traffic less favorably, slowing the speed at which these videos stream. This slowing could lead Verizon users who wish to stream on-demand videos but hope to avoid the slow streaming rate on Netflix to select a competing video service—one that has partnered with Verizon and therefore offers faster streaming speeds.

To address concerns about such network discrimination, in December 2010, the Federal Communications Commission ("FCC") issued the Open Internet Order ("Order").[4] It contains three rules—a "Transparency" Rule, a "No Blocking" Rule, and a "No Unreasonable Discrimination" Rule—that act together to generally prohibit BSPs from prioritizing some Internet content over other content.[5] In January 2014, the U.S. Court of Appeals for the District of Columbia Circuit vacated the No Blocking and No Unreasonable Discrimination Rules in *Verizon v. Federal Communications Commission*, holding that these rules exceeded the FCC's authority under the Communications Act to regulate providers of "information services."[6]

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1. Moran Yemini, *Mandated Network Neutrality and the First Amendment: Lessons from* Turner *and a New Approach*, 13 VA. J. L. & TECH. 1, 3–4 (2008). Network neutrality "may be defined as 'the non-discriminatory interconnectedness among data communication networks that allows users to access the content, and run the services, applications, and devices of their choice.'" *Id.*

2. *Id.*

3. *See, e.g.*, *id.* at 4 n.15.

4. Preserving the Open Internet, *Report and Order*, FCC 10-201, 25 FCC Rcd. 17905, para. 1 (2010) [hereinafter *Order*]. This Note focuses on the No Blocking and No Unreasonable Discrimination Rules. BSPs affected by the Order immediately took issue with these new rules and brought action to oppose their implementation. *See* Brief for Appellant, Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014) (No. 11-1355) [hereinafter *Verizon Brief*]. The D.C. Circuit ultimately ruled in Verizon's favor, striking down the no blocking and nondiscrimination rules. *Verizon*, 740 F.3d at 659.

5. *Order*, *supra* note 4, paras. 62, 68, 97.

6. *Id.*; *see Verizon*, 740 F.3d at 659.

Although the court agreed with the FCC that section 706 of the Act[7] furnishes the agency with considerable authority to regulate BSPs,[8] the court nevertheless held that the FCC's rules impermissibly treated BSPs as common carriers.[9] Because the court resolved Verizon's claims on statutory grounds, it had no occasion to address Verizon's arguments that the Order violated the First and Fifth Amendments to the Constitution.[10]

Despite the FCC's loss in *Verizon*—and its earlier loss in *Comcast Corp. v. Federal Communications Commission*[11]—in the agency's efforts to require BSPs to abide by network neutrality, the FCC opened a new docket in February 2014 "to consider the court's decision and what actions the Commission should take, consistent with our authority under section 706 and all other available sources of Commission authority."[12] FCC Chairman Tom Wheeler pledged to "propos[e] rules that will meet the court's test for preventing improper blocking of and discrimination among Internet traffic."[13] If the FCC adheres to the "court's test," the agency will likely promulgate rules that *restrict* the circumstances in which BSPs may block or discriminate against Internet traffic, while also leaving "substantial room for individualized bargaining and discrimination in terms" among BSPs and content providers.[14] Even if the FCC promulgates new network neutrality rules that fall within the agency's statutory authority, however, it remains an open question whether regulation that limits the ability of BSPs to block or discriminate against Internet traffic violates the First Amendment.

This Note addresses this constitutional question, concluding that hypothetical FCC rules that limit BSPs' ability to block or discriminate against Internet traffic—referred to herein as "anti-blocking" and "anti-discrimination" rules—would not violate BSPs' First Amendment rights because BSPs' actions do not constitute speech and, therefore, are not constitutionally protected. Furthermore, even if BSPs' activities are

7. 47 U.S.C. § 1302 (2006).

8. *Verizon*, 740 F.3d at 635.

9. *Id.* at 650 (because the FCC's rules still classify BSPs as providers of "information services," BSPs are exempt from treatment as common carriers). Section 706 provides that "[t]he Commission and each State commission with regulartory jurisdiction over *telecommunications services* shall encourage the deployment on a reasonable and timely basis of advanced telecommnications capability to all Americans." 47 U.S.C. § 1302 (2006) (emphasis added).

10. *Verizon*, 740 F.3d at 634.

11. 600 F.3d 642, 644 (D.C. Cir. 2010).

12. New Docket Established to Address Open Internet Remand, *Public Notice*, DA 14-211, GN Docket No. 14-28 (rel. Feb. 19, 2014), *available at* http://www.fcc.gov/document/new-docket-established-address-open-internet-remand.

13. Statement by FCC Chairman Tom Wheeler on the FCC's Open Internet Rules (Feb. 19, 2014), *available at* http://www.fcc.gov/document/statement-fcc-chairman-tom-wheeler-fccs-open-internet-rules.

14. *Verizon*, 740 F.3d at 652 (citing Cellco P'ship v. FCC, 700 F.3d 534, 548 (D.C. Cir. 2012)).

considered speech, this Note argues that, under the intermediate scrutiny test set forth in *United States v. O'Brien*,[15] regulation of this speech is justified to further the legitimate government interest of maintaining an open Internet.

Part II of this Note reviews the background of this contemporary debate, demonstrating how the Order and subsequent *Verizon* lawsuit[16] brought the issue of whether government-mandated open Internet violates BSPs' First Amendment rights to a head. Part III argues that if a BSP were to challenge the constitutionality of future FCC anti-blocking and anti-discrimination rules, the Supreme Court should determine that BSPs do not enjoy First Amendment protection in their Internet transmissions, because they do not constitute protected speech. Part III also contends that even if the Court were to determine that BSPs are protected speakers because they exercise active editorial discretion, a regulation mandating network neutrality would not violate the First Amendment because the government has a substantial interest in maintaining an open Internet. Finally, Part IV outlines how the Court should examine the role that BSPs play and whether they function in the same way that a newspaper editor or cable television operator does in exercising editorial discretion.

II. NETWORK NEUTRALITY AND THE DEBATE OVER BSPS' FIRST AMENDMENT RIGHTS

When the FCC issued the Order, it rekindled a debate over whether the Commission had the authority to impose rules mandating an "open Internet" for broadband Internet consumers.[17] According to the FCC, the Order was "an important step to preserve the Internet as an open platform for innovation, investment, job creation, economic growth, competition, and free expression."[18] The FCC set forth three rules—two of which are directly relevant to this Note's discussion—to preserve Internet openness.[19] First, the Order's No Blocking Rule prevented fixed broadband providers from blocking "lawful content, applications, services, or non-harmful devices" and mobile broadband providers from blocking "lawful websites" or "applications that compete with their voice or video telephony services."[20] Second, the No Unreasonable Discrimination Rule prevented

15. 391 U.S. 367, 377 (1968).

16. *Verizon Brief*, *supra* note 4.

17. See Cecilia Kang, *FCC's Net Neutrality Rules to Trigger Legal, Hill Challenge*, WASH. POST (Sept. 13, 2011, 12:32 PM), http://www.washingtonpost.com/blogs/post-tech/post/fccs-net-neutrality-rules-to-trigger-legal-hill-challenge/2011/09/13/gIQALFzlPK_blog.html (discussing pending legal and statutory challenges to the Open Internet Order).

18. *Order*, *supra* note 4, at para. 1.

19. *Id.*

20. *Id.* at para. 1(ii).

fixed broadband providers from unreasonably discriminating in the transmission of "lawful network traffic."[21]

Although the D.C. Circuit vacated these two rules in *Verizon*, finding that the FCC lacked the statutory authority to promulgate them, this Note addresses a legal question the court has yet to examine: whether requiring BSPs such as Verizon and Comcast to provide open Internet violates the First Amendment.[22]

A. The Debate Over the Order

Among its various claims, Verizon argued that the Order abridged BSPs' First Amendment right to free speech.[23] Specifically, Verizon asserted that the Order stripped broadband network owners of "control over the transmission of speech on their networks."[24] Other critics of the open Internet regulations argued that although BSPs might not be direct speakers, they still maintain editorial discretion over the content they provide Internet users, just as a newspaper or cable television operator does.[25] Because the Supreme Court has extended First Amendment protections beyond direct speakers to include those who exercise editorial discretion through the selective transmission of the original speech of others,[26] Verizon contended that the rules infringed upon its right to select the messages transmitted by its network.[27]

According to Verizon, BSPs engage in speech not only when they create their own content, but also when they transmit the opinions and ideas of millions of individuals over the Internet.[28] Citing *Turner Broadcasting System, Inc. v. Federal Communications Commission* ("*Turner I*"),[29] Verizon argued that BSPs enjoy First Amendment protection because the Constitution protects those who transmit the speech of others when they select which speech to transmit and which to exclude.[30] Verizon further

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21. *Id.* at para. 1(iii).

22. *See Verizon*, 740 F.3d at 627; *cf.* Chloe Albanesius, *Verizon: FCC Net Neutrality Rules Violate First Amendment*, PC MAG. (July 3, 2012, 3:17 PM), http://www.pcmag.com/article2/0,2817,2406672,00.asp (discussing Verizon's First Amendment challenge to the Open Internet Order).

23. *Verizon Brief*, *supra* note 4, at 3.

24. *Id.*

25. Critics of network neutrality include BSPs as well as certain hardware providers and various commentators. FTC, BROADBAND CONNECTIVITY COMPETITION POLICY 60 (June 2007), *available at* http://www.ftc.gov/reports/broadband/ v070000report.pdf.

26. *See* Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 636 (1994) (holding that radio and cable television broadcasters possess First Amendment protection); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding that newspaper editors retain First Amendment protection through the exercise of editorial discretion).

27. *Verizon Brief*, *supra* note 4, at 42.

28. *Id.* at 43.

29. 512 U.S. 622 (1994).

30. *See Verizon Brief*, *supra* note 4, at 42–44. *See also Turner I*, 512 U.S at 636 ("Through 'original programming or by exercising editorial discretion over which stations

argued that BSPs may need the ability to prioritize some Internet traffic over other traffic in order to effectively maintain their service, and that the resulting increased efficiency benefits consumers.[31] Other opponents of the Order argued that "network operators should be allowed to innovate freely and differentiate their networks as a form of competition that will lead to enhanced service offerings for content and applications providers and other end users."[32]

The FCC countered that the Order was a permissible exercise of its authority because, among other things, it did not violate BSPs' First Amendment right to free speech.[33] This, the Commission reasoned, is due to the fact that BSPs do not engage in protected speech.[34] The FCC contended that the Order was consistent with the First Amendment because BSPs simply "transport the speech of others, as a messenger delivers documents containing speech."[35]

Furthermore, the FCC maintained that "unlike cable systems, newspapers, and other curated media, broadband providers do not exercise editorial discretion."[36] As the Order explained, "[w]hen the Supreme Court held in *Turner I* that cable operators were protected by the First Amendment, the critical factor that made cable operators 'speakers' was their production of programming and their exercise of 'editorial discretion over which programs and stations to include' (and thus which to exclude)."[37] Unlike these active participants in the transmission of communications, the Commission argued that BSPs are not speakers, but are mere conduits for speech.[38]

Finally, the FCC concluded that, because the First Amendment is not absolute, the government has the authority to regulate speech in certain circumstances.[39] The FCC argued that allowing BSPs to manipulate Internet traffic by permitting blockage and prioritization of content and applications could diminish Internet users' free expression.[40] Therefore, even if the actions of BSPs constitute speech, the rules satisfy intermediate

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or programs to include in its repertoire,' cable programmers and operators 'see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.'" (alteration in original) (quoting City of Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488, 494 (1986))).

31. *See Verizon Brief*, *supra* note 4, at 43–45, 50.

32. *See id.* at 44. *See also* FTC, *supra* note 25, at 60.

33. *See* Brief for Appellee at 22, 68–75, *Verizon*, 740 F.3d 623 (No. 11-1355) [hereinafter *FCC Brief*].

34. *See id.*

35. *Id.* at 22.

36. *Id.*

37. *Order*, *supra* note 4, at para. 140.

38. *FCC Brief*, *supra* note 33, at 69 ("The Commission correctly determined that broadband providers are not 'speakers' at all, but only 'conduits for speech' of others . . . .").

39. *Id.* at 73–74.

40. *Order*, *supra* note 4, at para. 146.

scrutiny because the government has a legitimate interest in preserving open access to the Internet.[41] Leaving aside the question of the FCC's statutory authority post-*Verizon*, two questions must be answered in order to determine whether the FCC would violate the First Amendment should it promulgate rules similar to the No Blocking and No Unreasonable Discrimination Rules: First, do BSPs enjoy First Amendment protections insofar as they transmit the speech of others? Second, if so, does the FCC have a legitimate government interest in regulating BSPs' speech?

B. First Amendment Protections for Speech Transmitters

According to the First Amendment, "Congress shall make no law . . . abridging the freedom of speech."[42] "Speech" is not limited to spoken or written words, however. The Supreme Court has interpreted the First Amendment broadly to include an individual's right not to speak[43] and the right to engage in symbolic speech,[44] among other things. Furthermore, the Court has declined to extend First Amendment protection to several categories of speech, including that which is libelous or obscene.[45]

The emergence of mass communication and the creation of media such as newspaper, radio, cable television, and the Internet have opened the definition of speech to further interpretation beyond original content to include the transmissions of third-party original speech.[46] Accordingly, the Supreme Court has had to consider how the First Amendment protects these transmitters of original content.[47]

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41. *Id.*

42. U.S. CONST. amend. I.

43. *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.").

44. Texas v. Johnson, 491 U.S. 397, 414–15 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. . . . In short, nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it.").

45. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1941) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . ." (footnote omitted)).

46. *See Turner I*, 512 U.S. at 636 (asserting that cable television broadcasters possess some First Amendment protection); *Miami Herald*, 418 U.S. at 258 (holding that newspaper editors retain First Amendment protection through the exercise of editorial discretion).

47. *Turner I*, 512 U.S. at 626, 636; *Miami Herald*, 418 U.S. at 241, 258.

1. Free Speech Rights for Newspaper Editors, Radio Broadcasters, and Cable Television Operators

The evolution of technology and communications has expanded the definition of "speech" to include First Amendment protections for the transmitters of third-party original speech content through their exercise of editorial discretion. For example, as the Court notably held in *Turner I*, "cable programmers and cable operators engage in and transmit speech" by exercising "editorial discretion" over what programming content to include or exclude on their limited spectrum.[48] Therefore, entities engage in protected speech not only when they create original programming, but also when they actively exercise editorial discretion to determine the expressions to which the users of the medium are exposed.[49] Because BSPs do not create original programming when they transmit the original speech of other Internet users, the relevant inquiry becomes whether BSPs use editorial discretion when they transmit third-party original speech.[50] Although the Supreme Court has not specifically determined whether BSPs exercise editorial discretion in their transmission of content, it has addressed this issue in the context of other media. The Court has suggested that a medium's scarcity is crucial in determining the amount of editorial discretion the transmitter of third-party original content exercises.[51] Newspapers, for instance, are very limited when considering the amount of space an editor has available to fill.[52] Small town newspapers can be as short as fifteen pages, while larger national newspapers can be fifty pages or more. An editor therefore must carefully choose which articles, pictures, and advertisements to include and which to exclude given the limited free space available.[53]

For example, in *Miami Herald Publishing Co. v. Tornillo*,[54] the Supreme Court invalidated a Florida state law requiring newspapers to allot equal space to political candidates for editorials or endorsement.[55] The Court held that the statute failed "to clear the barriers of the First Amendment because of its intrusion into the function of editors."[56] In

48. *Turner I*, 512 U.S. at 636.
49. *Id.*
50. That is not to say, however, that BSPs are incapable of creating their own original content. For example, Comcast creates original content when it publishes and provides information on its own website. Accordingly, BSPs are entitled to First Amendment protection in the same way as other website creators. However, this type of speech is not relevant to the rules set out in the Order and is thus beyond the scope of this discussion.
51. *See Miami Herald*, 418 U.S. at 256–58.
52. *See id.*
53. *See id.*
54. 418 U.S. 241 (1974).
55. *Id.* at 258.
56. *Id.*

analyzing how newspaper editors engaged in speech activity, the Court considered factors such as the editor's choice regarding what material should be included and how the newspaper was limited in terms of the paper's size.[57] These factors, the Court reasoned, indicate that a "newspaper is more than a passive receptacle or conduit for news, comment, and advertising."[58] Accordingly, newspaper editors retain a high level of First Amendment protection based on their active engagement in editorial discretion.[59]

Moving beyond newspapers, the Supreme Court has also acknowledged that radio and television broadcasters exercise a measure of editorial discretion as well, though the meaning and scope of that discretion differs from that afforded to editors of print.[60] For example, as the Court acknowledged in *Turner I*, there are unique physical limitations with the radio broadcast medium because "there are more would-be broadcasters than frequencies available in the electromagnetic spectrum."[61] This is particularly problematic when two original content speakers attempt to use the same frequencies at the same time.[62] Although advances in technology have expanded the supply of useful spectrum, the demand for spectrum has also grown to encompass both human communication, such as cell phone use, and automated communications, such as weather radar and aircraft controls.[63] The Court acknowledged these physical limitations in *Turner I*, explaining that the distinct approach it has taken to broadcasting is due to the technical limitations of the broadcast medium.[64]

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57. *Id.* at 256–58 ("The choice of material to go into a newspaper and the decisions made as to limitations on the size and content of the paper . . . constitute the exercise of editorial control and judgment.").

58. *Id.*

59. *See id.*; *Turner I*, 512 U.S. at 653 ("*Tornillo* affirmed an essential proposition: the First Amendment protects the editorial independence of the press.").

60. Although radio licensees and cable television operators also receive some First Amendment protection based on their active editorial discretion, the Supreme Court has held that this protection does not amount to the same amount of protection afforded to newspapers editors. *See generally Turner I*, 512 U.S. 622; Michael I. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the 'Speaker' Within the New Media*, 71 NOTRE DAME L. REV. 79, 90–91 (1995).

61. *Turner I*, 512 U.S. at 637.

62. *See id.* ("And if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all.").

63. *See* Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367, 396–97 (1969) ("Advances in technology, such as microwave transmission, have led to more efficient utilization of the frequency spectrum, but uses for that spectrum have also grown apace. Portions of the spectrum must be reserved for vital uses unconnected with human communication, such as radio-navigational aids used by aircraft and vessels.").

64. *Turner I*, 512 U.S. at 637 ("The justification for our distinct approach to broadcast regulation rest upon the unique physical limitations of the broadcast medium."). *See also* FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984); *Red Lion*, 395 U.S. at 394–95; NBC v. United States, 319 U.S. 190, 226 (1943).

Cable television is plagued with fewer constraints than the print and broadcast mediums, and there is no "danger of physical interference between two cable speakers attempting to share the same channel."[65] However, cable television is still limited in the amount of content it can convey, with only so many channels available for scheduled programming each hour.[66] This limitation is not as great as with print or broadcast media, and as the cases discussed above indicate, transmitters of third-party speech exercise less discretion over determining what content to provide as the size of the medium increases.[67]

Additionally, the Supreme Court has held that the First Amendment does not protect cable operators from a rule known as "must-carry"[68] that compels cable operators to distribute to their subscribers certain broadcast television networks.[69] In upholding must-carry, the Court departed from its traditional approach to the First Amendment, which strictly limits the circumstances in which government may force people to speak or communicate expressive messages against their wishes.[70] In *West Virginia Board of Education v. Barnette*, for instance, the Supreme Court held that the government abridged public school students' First Amendment rights by forcing them to salute the American flag and recite the Pledge of Allegiance.[71] The Court explained that sustaining a compulsory flag salute would necessitate the absurd conclusion that the framers of the "Bill of Rights[,] which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."[72]

Government-compelled speech is anathema to the print medium.[73] However, as the Court held in *Turner I*, the same hazards are not necessarily present when compelling cable providers to adhere to the must-

65. *Turner I*, 512 U.S. at 639.

66. *Id.* at 644.

67. *See generally Miami Herald*, 418 U.S. at 241–42 (1974); *Turner I*, 512 U.S. 622. Importanyl, however, although broadcasters need to exercise editorial discretion over the programming they air, the Court has still upheld regulation of broadcast speech because only a limited number of licensees are able to communicate over the airwaves at any given time. *See Red Lion*, 395 U.S. at 390 ("Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.").

68. 47 U.S.C. § 534 (2006).

69. *See* Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180 (1997).

70. *Barnette*, 319 U.S. at 642.

71. *Id*.

72. *Id.* at 634.

73. *Miami Herald*, 418 U.S. at 258 n.24 ("'[L]iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper. A journal does not merely print observed facts the way a cow is photographed through a plate-glass window. As soon as the facts are set in their context, you have interpretation and you have selection, and editorial selection opens the way to editorial suppression. Then how can the state force abstention from discrimination in the news without dictating selection?'" (alteration in original) (quoting 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 633 (1947))).

carry rule.[74] In a subsequent case also involving Turner Broadcasting, the Court reaffirmed its holding in *Turner I*, explaining that must carry serves several important government interests.[75] These interests include "preserving the benefits of free, over-the-air local broadcast television," the promotion of the widespread dissemination of information, and the promotion of fair competition among television programmers.[76] The Supreme Court has yet to determine the extent to which BSPs exercise editorial discretion in transmitting content to Internet users.

On the other hand, an entity that *could* exercise editorial discretion but generally declines to do so does not necessarily lose its First Amendment rights. For example, as the Supreme Court found in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, private speakers such as parade organizers do not forfeit their right to free speech "simply by combining multifarious voices."[77] However, because parade organizers have a far greater expressive interest in their selection of marchers than BSPs do in their selection of Internet traffic, a court would likely find a comparison between the two activities to be unavailing.

2. The First Amendment Is Not Absolute: Justifying Free Speech Restrictions

The First Amendment is not absolute.[78] In some cases, the government may justifiably abridge speech to further a legitimate government interest.[79] However, the validity of such an abridgement depends in large part on the type of speech that is being abridged, which in

74. Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 BUFF. L. REV. 847, 868 (2011) ("Involuntary transmission of broadcast programming would not 'force cable operators to alter their own messages' in response." (quoting *Turner I*, 512 U.S. at 655)).

75. *Id.* at 180–81.

76. *Id.*

77. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 570 (1995); *see also id.* at 576–77 ("Parades and demonstrations, in contrast [to the cable context], are not understood to be so neutrally presented or selectivelly viewed. Unlike the programming offered on various channels by a cable network, the parade does not consist of indivudal, unrelated segments that happen to be transmitted together for individual selection by members of the audience. Although each parade unit generally identifies itself, each is understood to contribute something to a common theme . . . the parade's overall message is distilled form the indicidual presentations along the way, and eachunit's expression is perceived by spectators as part of the whole."). The same is not true for BSP transmitted content.

78. *See Chaplinsky*, 315 U.S. at 571 ("Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances.").

79. United States v. O'Brien, 391 U.S. 367, 377 (1968).

turn depends on whether a particular regulation of speech is "content-based" or "content-neutral."[80]

A speech regulation is content-based if treats speech differently depending on the message or meaning conveyed by the speaker, while speech regulation is content-neutral if its application is irrespective of the speaker's message or the nature of the speech.[81] There are very few circumstances where the government can enforce a speech restriction based on its content.[82] While no single factor determines if a restriction is content-based, one aspect to consider is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[83] If it does, the regulation is likely content-based.[84] The right to free speech is nullified if the government can regulate the content of that speech. Because content-based restrictions severely abridge this fundamental right to free speech, courts subject them to strict scrutiny.[85] In order to pass the strict scrutiny test, the restriction or prohibition of speech must be justified by a compelling governmental interest, be narrowly tailored, and be the least restrictive means available for achieving that interest.[86]

In contrast, content-neutral restrictions on protected speech can impose reasonable time,[87] place,[88] and manner restrictions on speech.[89] Such restrictions are generally only acceptable because their all-inclusive

80. R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 333 (2006).

81. *See id.*

82. In upholding one content-based restriction on speech, the Supreme Court stated that the government may regulate speech that is libelous or obscene based on the actual content of that speech. *See Chaplinsky*, 315 U.S. at 571–72.

83. Ward v. Rock Against Racism, 481 U.S. 781, 791 (1989).

84. *Id.*

85. *Turner I*, 512 U.S. at 641–42 (1994) (finding that the First Amendment "does not countenance governmental control over the content of messages expressed by private individuals. Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." (citation omitted)).

86. *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000). Further, under strict scrutiny if a "less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Id.*

87. Time restrictions regulate the time of day at which speech can be made. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 554–55 (1965) (stating that a person cannot "insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement.").

88. Place restrictions regulate where speech can occur. *See id.* at 555 (stating that demonstrators may not block or deny access to public or private building entrances).

89. Manner restrictions regulate the way in which the speech can occur. *See* Clark v. Cmty for Creative Non-Violence, 468 U.S. 288, 297 (1984) (holding that the Government has a legitimate interest in protecting the National Parks, and thus can enforce a reasonable regulation of the manner in which a demonstration in the park is carried out).

nature prevents them from being unduly burdensome.[90] Because content-neutral regulations restrict a person's First Amendment right in a non-discriminatory manner, they are subject to a lesser, intermediate level of scrutiny.[91] The Supreme Court has noted that content-neutral restrictions are valid provided "they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of information."[92]

Finally, content-neutral, protected speech may be incidentally regulated by generally applicable restraints that primarily target conduct, not speech. For example, in *United States v. O'Brien*, the Supreme Court held that a person's First Amendment right to free speech did not extend to the burning of a draft card because the act of burning the draft card was, in itself and excluding any personal expression, illegal.[93] The governmental restraint was justified because it prevented O'Brien from engaging in illegal conduct—burning the draft card—even though O'Brien did so for the purpose of conveying an anti-war message.[94] According to the intermediate scrutiny test set out in *O'Brien*, the Supreme Court will uphold a regulation that incidentally affects speech if it "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[95]

III. ANTI-BLOCKING AND ANTI-DISCRIMINATION RULES WOULD SURVIVE FIRST AMENDMENT SCRUTINY

Although the D.C. Circuit held in *Verizon* that the FCC lacks the authority to impose open Internet rules on providers of information services, the debate discussed in Part II of this Note demonstrates the importance of whether BSPs are speakers and whether their transmissions are considered speech. Just as the Supreme Court has clarified the First Amendment rights of the operators of traditional media—radio, cable-television and newspapers—the Court should also clarify the scope of First Amendment rights for the operators of the Internet.

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90. *See Turner I*, 512 U.S. at 676 ("Laws that treat all speakers equally are relatively poor tools for controlling public debate, and their very generality creates a substantial political check that prevents them from being unduly burdensome.").

91. *See O'Brien*, 391 U.S. at 376–77 (1968); *see also Clark*, 468 U.S. at 312–13 (Marshall, J., dissenting).

92. *Clark*, 468 U.S. at 293.

93. *O'Brien*, 391 U.S. at 377.

94. *Id.* at 370 ("The indictment upon which he was tried charged that he 'willfully and knowingly did mutilate, destroy, and change by burning [his] Registration Certificate . . . in violation of Section 462(b)[,]' part of the Universal Military Training and Service Act of 1948.").

95. *Id.* at 377.

This section assesses the constitutionality of anti-blocking and anti-discrimination rules, concluding that only limited First Amendment protections are available to BSPs. Due to the expansive size of the Internet and the function of BSPs in relation to Internet users, BSPs do not engage in active editorial discretion over the content they provide to Internet users. Accordingly, BSPs' transmission of Internet content should not be protected speech. However, even if BSPs do engage in active editorial discretion, the imposed rules promulgated in the Order further a legitimate government interest. Because the First Amendment right to free speech is not absolute, these government interests justify the minor abridgment of a BSP's First Amendment free speech rights under anti-blocking and anti-discrimination.

In order to hold that anti-blocking and anti-discrimination rules infringe upon BSPs' right to free speech, a court must determine that (1) BSPs' transmission of Internet content is protected speech[96] and (2) an imposed regulation mandating no blocking and nondiscrimination does not further a legitimate government interest.[97] Accordingly, for a court to vacate future FCC anti-blocking and anti-discrimination rules on First Amendment grounds, the court would need to find that the rules (1) infringe on protected speech activity and (2) that the Commission's reasoning for imposing these rules is not a legitimate government interest.

A. BSPs' Transmission of Internet Content Does Not Constitute Protected Speech

Anti-blocking and anti-discrimination rules would not violate the First Amendment because BSPs do not exercise editorial discretion over the transmission of others' speech in the same way that a cable television provider does in selecting which networks to transmit to its video subscribers.[98] As the Court held in *Turner I*, protected acts of speech include not only the creation of original programming, but also when they actively engage in editorial discretion.[99] The No Blocking and No Unreasonable Discrimination Rules, for example, did not regulate instances in which BSPs create their own original content, but instead restricted how

96. If the transmission of third-party original speech content is not considered *protected* speech, then the benefits of the First Amendment will not apply and the inquiry must end here.

97. *O'Brien*, 391 U.S. at 377

98. *See Order*, *supra* note 4, at para. 141 ("The broadband Internet access service at issue here does not involve an exercise of editorial discretion that is comparable to cable companies' choice of which stations or programs to include in their service. In this proceeding broadband providers have not, for instance, shown that they market their services as benefitting from an editorial presence. To the contrary, Internet end users expect that they can obtain access to all or substantially all content that is available on the Internet, without the editorial intervention of their broadband provider.").

99. *Turner I*, 512 U.S. at 636.

BSPs may transmit the speech of third-party Internet end users.[100] Because anti-blocking and anti-discrimination rules would not be concerned with BSP-created content, they can only violate the First Amendment right of BSPs if BSPs actively engage in editorial discretion when transmitting the original speech content of third-party Internet users.[101]

In determining whether a content provider engages in active editorial discretion, the Supreme Court has held that it is important to consider the time and space limitations of the medium.[102] Additionally, the Court has suggested that the content provider's transmission must involve some identifiable message.[103] This section considers each of these facets in turn.

1. The Physical Qualities of the Internet Eliminate the Need for an "Editor"

Anti-blocking and anti-discrimination rules would not violate BSPs' right to free speech because the Internet is an unrestrained medium of communication that does not suffer the same technological limitations as newspapers, radios, and cable television. This eliminates the need for an editor to strategically pick which content to transmit. As the Supreme Court explained in *Reno v. American Civil Liberties Union*,[104] "the Internet can hardly be considered a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds."[105] Specifically, the physical qualities of the Internet—including the virtually unlimited availability of space and time of access—eliminate the need for a gatekeeper to determine what content is worthy of filling the available space.[106] Given the absence of these limitations, the Internet is therefore inherently different from the other media that the Supreme Court has already specifically granted First Amendment protections.

As discussed in Part II above, the Supreme Court has found that the editorial discretion inherent in a medium is linked in part to its physical scarcity.[107] Unlike newspapers, radios, or cable television, the Internet is infinitely expandable.[108] As such, BSPs need not perform any editorial role

100. *See Order*, *supra* note 4, at para. 1.

101. *See Turner I*, 512 U.S. at 636.

102. *See Miami Herald*, 418 U.S. at 258.

103. *See Turner I*, 512 U.S. at 636 (citing *Preferred Commc'ns*, 476 U.S. at 494).

104. Reno v. ACLU, 521 U.S. 844, 870 (1997).

105. *Id.* Furthermore, the Internet is expansive in terms of the available content. *See id.* ("This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue.").

106. *See id.* at 850–51.

107. *See* discussion *supra* Part II.B.1; *Miami Herald*, 418 U.S. at 256–58; *but see Red Lion*, 395 U.S. at 390 ("Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.").

108. *Reno*, 521 U.S. at 870.

when serving content to their end users, nor are they forced to block content or impede Internet traffic out of necessity driven by the medium's scarcity. Although a particular website may be able to offer only so much content, the Internet is virtually unlimited in this capacity; thus, there is no use for an editor to act as a gatekeeper by selecting what to include and what to exclude.

Furthermore, unlike periodical media like newspapers and television programs, the Internet connects publishers and audiences instantaneously at any time.[109] Barring technological difficulties, this medium is available twenty-four hours a day, seven days a week. Accordingly, because the Internet is not subject to the same time and space constraints as other media, there is no need for a BSP to make space- and time-sensitive decisions about what content to provide the public.[110]

In sum, BSPs do not perform an analogous function to the other media to which the Supreme Court has already afforded First Amendment protection because of their use of editorial discretion. As discussed above, the physical qualities of print, radio, and cable television media require the respective speech providers to actively engage in editorial discretion.[111] Given the limited space available in these media, newspaper editors, radio frequency licensees, and cable television providers must, to varying degrees, make determinations as to which content to include and which content to exclude.[112] The Internet's characteristics eliminate the need for an editor to pick and choose which content to transmit, which weighs against a finding that BSPs engage in active editorial discretion.

2. BSPs Do Not Engage in Active Editorial Discretion, but Instead Merely Act as Conduits of Speech Because Their Transmission of Third-Party Original Content Does Not Involve Any Identifiable Message

Anti-blocking and anti-discrimination rules would not violate BSPs' right to free speech because BSPs do not actively exercise editorial discretion over the content that is transmitted through their customers' Internet connections. As this subsection discusses, BSPs play a passive role in providing content to end users. As such, a BSP's role is much different from the way in which newspaper editors, radio broadcasters, and cable companies actively curate content for their end users. To understand the function BSPs perform, consider the following analogy:

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109. *See id.*

110. *Compare Miami Herald*, 418 U.S. at 258, *with Reno*, 521 U.S. at 870 (newspapers are limited in size, but the Internet is not).

111. *See* discussion *supra* Part II.B.1.

112. *Id.*

> Imagine that FedEx decided to speed up the delivery of documents addressed to companies with which it had a financial relationship; that is, FedEx would give preferential treatment in its delivery schedule to documents sent to companies that paid it for the privilege . . . . FedEx would be moving First Amendment-protected materials—documents—from one user to another, but it is hard to see how transporting documents turns a company into a speaker for First Amendment purposes.[113]

Some proponents of network neutrality regulation maintain that "in the absence of an identifiable message or editorial policy informed by usage restrictions, it is hard to see how imposing network restrictions would be seen as protected speech under the First Amendment."[114] When BSPs prioritize Internet traffic for their own commercial gain, this action does not necessarily promote a message.

Because of the varied and considerable amount of content on the Internet, and because BSPs remain mere passive conduits for speech, they do not deserve the same free speech protections that the Supreme Court has afforded to other speech providers. Accordingly, anti-blocking and anti-discrimination rules would not violate the First Amendment.

B. Even if BSPs' Transmissions Are Speech, Network Neutrality Rules Do Not Violate the First Amendment Because They Serve a Substantial Government Interest

Even if a court were to determine that BSPs engage in active editorial discretion when they prioritize or block certain Internet traffic, anti-blocking and anti-discrimination rules still would not violate the First Amendment because the government has a substantial interest in maintaining open access to the Internet. As discussed in Part II.B.2, the First Amendment right to free speech is not absolute, and is sometimes subject to government regulation.[115] The first step to analyzing whether government intervention is appropriate is to determine what the government is actually attempting to regulate—that is, whether the regulation is content-based or content-neutral.[116] This inquiry will

113. Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What "The Freedom of Speech" Encompasses*, 60 DUKE L. J. 1673, 1685 (2011).

114. *Ex Parte* Submission in CS Docket No. 02-52 from Tim Wu, Assoc. Professor, Univ. of Va. Law School, and Lawrence Lessig, Professor of Law, Stanford Law School, to Marlene H. Dortch, Secretary, FCC (Aug. 22, 2003), *available at* http://apps.fcc.gov/ecfs/document/view?id=6514683885; *see also* Yemini, *supra* note 1, at 21.

115. *See* discussion *supra* pages 12–14.

116. *See generally* Wright, *supra* note 80.

determine whether courts apply strict scrutiny or intermediate scrutiny to the regulation.[117]

In the Order, for instance, the FCC did not seek to regulate the content of the message that the BSPs were providing, but instead intended only to regulate the way in which they transmitted third-party original content.[118] Because the strict scrutiny test applies only to those restrictions that are content-based,[119] the rules set forth in the Order are subject to the lesser, intermediate scrutiny test set forth in *O'Brien*.

According to the Supreme Court in *O'Brien*, "[a] government regulation is sufficiently justified if it is [1] within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[120]

1. The FCC Has the Statutory Authority to Impose No Blocking and Nondiscrimination Rules on BSPs

To meet the first prong of the *O'Brien* intermediate scrutiny test, the FCC must have the requisite authority to issue the rules preserving a free and open Internet. The D.C. Circuit cast some doubt on this authority in *Verizon v. Federal Communications Commission*,[121] holding that the FCC could not regulate BSPs as common carriers because it had previously classified them as providers of information services rather than telecommunications service.[122] The Order's rules effectively subjected BSPs to common carriage regulation, yet the Communications Act expressly renounces the FCC's authority to treat information services as common carriers.[123] Nevertheless, despite the classification problems with the Order's No Blocking and No Unreasonable Discrimination Rules, the *Verizon* decision acknowledged that section 706 of the Communications

117. *See Turner I*, 512 U.S. at 641–42.

118. *See Order*, *supra* note 4, at para. 1.

119. Glendale Assocs., Ltd. v. NLRB, 347 F.3d 1145, 1155 (9th Cir. 2003) ("Content-based regulations receive strict scrutiny because 'content-based restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate.'" (quoting City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring))).

120. *O'Brien*, 391 U.S. at 377.

121. The court did not address the issue of whether the *Order* violates BSPs' First Amendment rights. *Verizon*, 740 F.3d at 634 ("Given our disposition of the latter issue, we have no need to address Verizon's additional contentions that the *Order* violates the First Amendment.").

122. *Id.* at 630–32, 655–59.

123. *Id.* at 650.

Act is a substantive grant of authority empowering the Commission to broadly regulate BSPs.[124] Although *Verizon* held that the FCC cannot proscribe *all* forms of network discrimination and blocking by BSPs, the court preserved the FCC's "authority to promote broadband deployment by regulating how broadband providers treat edge providers . . . ."[125] To examine the First Amendment implications of network neutrality regulation, therefore, this Note assumes that the FCC has jurisdiction to promulgate anti-blocking and anti-discrimination rules similar to those presented in the Order, under either section 706 or Title II of the Act.

According to section 706, "[t]he Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[126] As the *Verizon* court held, this language affords the Commission relatively broad regulatory authority over BSPs, subjecting it only to two limitations: First, section 706 must be read in conjunction with all other provisions found in the Telecommunications Act.[127] Second, FCC regulations under section 706 must be designed to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[128]

Accordingly, if the FCC were to issue new anti-blocking and anti-discrimination rules, a court would find that these regulations were promulgated to encourage reasonable and timely telecommunications capability to all Americans. In aiming to prevent BSPs from blocking or slowing certain types of Internet traffic, anti-blocking and anti-discrimination rules would meet the second prong of section 706 by providing an "open Internet" for all Americans. As such, these rules would satisfy the first requirement of the *O'Brien* test. Alternatively, the FCC could reclassify BSPs as "telecommunications services"—which are common carriers—under Title II of the Communications Act.[129] If BSPs were so reclassified, pursuant to FCC's rulemaking procedure, the court's rationale for vacating much of the Order in *Verizon* would no longer apply, so a court would almost certainly find that anti-blocking and anti-discrimination rules fell well within the Commission's statutory authority.

124. *Id.* at 640.
125. *Id.* at 649.
126. 47 U.S.C. § 1302(a) (2006).
127. *Verizon*, 740 F.3d at 640 ("Any regulatory action authorized by Section 706 would thus have to fall within the Commission's subject matter jurisdiction over such communications.").
128. *Id.; see also* 47 U.S.C. § 1302(a) (2006).
129. 47 U.S.C. §§ 201–231 (2006).

2. Anti-Blocking and Anti-Discrimination Rules Further Important Government Interests

Anti-blocking and anti-discrimination rules would meet the second prong of the *O'Brien* intermediate scrutiny test because the government has several important and substantial interests in preserving an open Internet. Here, the terms "substantial" and "important" require that the government's interests have some genuine weight and authenticity, but these interests need not rise to the level of "compelling" that the strict scrutiny standard requires.[130] Although the intermediate scrutiny test only requires one important government interest,[131] the FCC's Order articulated several substantial interests as justification for restricting BSPs' speech. This rationale is not unique to the specific Rules in the Order; they also apply to other, similar regulations that limit the ability of BSPs to block and discriminate against Internet traffic.

First, as the FCC argued in its appellate brief in *Verizon*, the government has a profound interest in maintaining an infrastructure for investment and competition, which ultimately has numerous benefits for the public.[132] Specifically, the preservation of an open Internet provides a "platform for innovation, investment, job creation, [and] economic growth."[133] By preventing BSPs from blocking content or prioritizing certain types of Internet traffic, the rules promulgated in the Order seek to "protect competition both among edge providers and between edge providers and access providers."[134] Similar to the Court's holding in *Turner I*, by requiring BSPs to "carry" lawful content and reasonable traffic, the Order explained that its rules would have promoted fair competition to the benefit of BSPs and Internet users alike.[135] Additionally, the Commission asserted that it has an important interest in preserving an open Internet in order to protect the freedom of expression that all Internet users possess.[136] The Internet is a dynamic medium in which a multitude of people of all different viewpoints are able to exercise their right to free speech by contributing to the available content of this medium. As the Court emphasized in *Turner I*, "the First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict

130. 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 9:10 (2013).

131. *O'Brien*, 391 U.S. at 376.

132. *FCC Brief*, *supra* note 33, at 73–74 ("Openness drives infrastructure investment, which fulfills numerous policies that benefit the public.").

133. *Order*, *supra* note 4, at para. 1.

134. *FCC Brief*, *supra* note 33, at 74.

135. *See Turner I*, 512 U.S. at 662.

136. *Order*, *supra* note 4, at para. 1.

through physical control of a critical pathway of communication, the free flow of information and ideas."[137]

If BSPs were able to block content or discriminate against some Internet traffic, Internet users would suffer burdens that an open Internet would avert. For example, as discussed earlier, suppose that an individual who subscribes to Verizon wishes to stream a movie on Netflix. If Verizon, which hypothetically has not partnered with Netflix, decides to discriminate against traffic associated with Netflix, the Internet consumer will have one of two options: she can either accept the slower streaming speeds through her Verizon service or subscribe to an additional BSP that has partnered with the site. This restriction of the pathway of communication for this hypothetical Internet consumer demonstrates how discriminatory BSP practices could hurt the millions of U.S. individuals who use the Internet each day.

3. The Government's Interests in Preserving an Open Internet Are Unrelated to the Suppression of Free Speech

Anti-blocking and anti-discrimination rules would meet the third prong of the *O'Brien* intermediate scrutiny test because the government's interests in an open Internet are unrelated to the suppression of BSPs' free speech rights. Under this prong, in order for intermediate scrutiny to apply, the speech to be regulated must be content neutral.[138] As argued above, anti-blocking and anti-discrimination rules would regulate the transmission of speech, not actual speech itself.[139] Therefore, the rules are unrelated to the suppression of free expression and are content neutral, as required under the *O'Brien* test.

4. The Incidental Restriction on Alleged First Amendment Freedoms Is No Greater Than Is Essential to the Furtherance of That Interest

Anti-blocking and anti-discrimination rules would meet the final prong of the *O'Brien* intermediate scrutiny test because the rules set forth in the Order provide no greater restrictions than are necessary to satisfy the

137. *Turner I*, 512 U.S. at 657; *see also FCC Brief*, *supra* note 33, at 73–74.

138. SMOLLA, *supra* note 130, at § 9:13 (2013) ("The proper interpretation of the phrase 'unrelated to the suppression of free expression' requires that the reasons advanced by the government to justify the law be grounded solely in the *non*communicative aspects of the conduct being regulated. When the dangers that allegedly flow from the activity have nothing to do with what is *communicated*, but only with what is *done*, the dangers are unrelated to free expression.").

139. *See supra* Part III.B.

interest of maintaining an open Internet. As discussed above, the government has several important and substantial interests in preserving free and open access to the Internet.[140] Although the FCC primarily focused on furthering these interests in creating the open Internet rules, the agency also built various safeguards into the Order to guarantee that this regulation did not extend beyond what was necessary to further those government interests.[141] For example, the No Blocking Rule sought to prohibit BSPs from blocking *lawful* content and websites.[142] Accordingly, this rule would have still provided BSPs with the right to exercise their discretion to block unlawful content, such as websites displaying child pornography.[143] Similarly, the No Unreasonable Discrimination Rule only mandated that BSPs "may not *unreasonably* discriminate in transmitting *lawful* network traffic."[144] This rule still afforded BSPs the ability to reasonably discriminate against certain types of Internet traffic, such as spam.[145] Finally, the Order also allowed BSPs to offer "edited" service, such as a package that is only limited to "family friendly" materials.[146] So long as future FCC anti-blocking and anti-discrimination rules contain similar safeguards, BSPs will retain enough control over their networks to protect the interests of their users without restricting the lawful information to which users wish to gain access.[147]

IV. MOVING FORWARD: CLARIFYING FIRST AMENDMENT RIGHTS IN THE INTERNET AGE

Given the prevalence and prominence of the Internet in modern society, the time has come for the Supreme Court to address whether BSPs constitute speakers under the First Amendment. As discussed above, the Court has clarified this question with respect to other prominent media outlets—print, radio, and television. Although the court in *Verizon* established that the FCC did not have the statutory authority to issue the No Blocking and Nondiscrimination Rules in the Order, the decision did not address the question whether the rules violated the First Amendment, or whether the Commission could impose similar regulation through other avenues. Because the FCC has already commenced the process of making new network neutrality rules consistent with the *Verizon* holding, it is likely that courts will soon consider the other objections to the Order—

140. *See supra* Part III.B.2.
141. *See Order*, *supra* note 4, at para. 1.
142. *Id.* (emphasis added).
143. *See id.* at para. 64.
144. *Id.* at para. 68 (emphasis added).
145. *See id.* at paras. 64, 88.
146. *Id.* at para. 143 (explaining that BSPs could still manage Internet traffic in these ways under the rules).
147. *See id.*

namely, whether network neutrality rules violate BSPs' First Amendment right to free speech. In light of the Supreme Court's First Amendment doctrine, it is likely that BSPs do not enjoy First Amendment editorial rights when providing Internet service to consumers. The Court has suggested that scarcity is relevant to determine the degree of editorial discretion that an operator can exercise.[148] Because the Internet is not plagued with size limitations, BSPs are not burdened with the task of excluding content out of necessity. As such, BSPs do not function in a way that constitutes active discretion, but instead act merely as conduits of speech. Because they do not issue a message in transmitting third-party original speech, BSPs do not engage in protected speech activity and thus do not deserve to benefit from First Amendment protections.

In this day and age, billions of people use the Internet to do everything from expressing opinions and ideas to researching political and cultural issues to downloading music and streaming a favorite television show on Netflix. Allowing BSPs to control what content these individuals are able to view and use restricts the public's access to the broadest range of information available. By affirming that the FCC is not barred by the First Amendment from promulgating rules that prevent BSPs from blocking lawful content or unreasonably discriminating against lawful network traffic, the Supreme Court can protect the rights and interests of all these individuals to have unfettered, open access to the Internet.

V. CONCLUSION

The rights of Internet users are paramount to the interests of large broadband providers. In taking up this issue in the likely event that the FCC successfully asserts the authority to promulgate anti-blocking and anti-discrimination rules, courts should find that network neutrality regulation does not violate the First Amendment because BSPs are not speakers and therefore do not enjoy the benefits of the First Amendment when transmitting Internet traffic. Even if they are considered speakers and Internet transmissions are considered speech, there are substantial governmental interests in maintaining network neutrality and open Internet. In order to continue fostering innovation, as we have since the advent of the Internet, we should not allow large companies to protect their interests in their partnerships and thus overshadow the right of the public to have free and open use of the World Wide Web.

148. *See supra* notes 51–59 and accompanying text.