Promoting and Infringing Free Speech? Net Neutrality and the First Amendment

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I. INTRODUCTION

The need for net neutrality rules has been hotly and highly debated in recent years. Put in place by the Obama-era FCC in 2015,[1] and eliminated by the Trump-era FCC two years later,[2] the rules generally prohibited ISPs from engaging in practices that favor some online content or services over others. Proponents of the rules say they are necessary to prevent service providers from stifling competition in the provision of online content and services, for example, by blocking or slowing consumer access to services that compete with those of the ISPs themselves, or by charging online content or service providers for faster connections to consumers over that of their rivals.[3] On the other hand, those opposed to the rules say they are unnecessary and that they hinder investment and innovation by ISPs.[4]

With the Internet being a primary place for the exchange of ideas and information in modern society, the rules necessarily implicate free speech principles. Without the rules, proponents say, service providers could skew the marketplace of ideas to benefit themselves or those willing to pay.[5] On the other hand, ISPs have argued that by mandating the manner in which they carry others' online speech, their own free speech rights are impaired.[6]

A potential issue with net neutrality regulation, then, is whether it infringes on the First Amendment speech rights of ISPs. There has been little case law on this point. In two cases, federal district courts have ruled that ISPs' free speech rights are infringed upon when the government regulates the manner in which they provide service.[7] The D.C. Circuit , however, in a challenge to the FCC's 2015 net neutrality rules, determined that the First Amendment was not implicated by net neutrality regulation.[8] Prior to

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1. Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601 (2015) [hereinafter *2015 Open Internet Order*].

2. Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order*, 33 FCC Rcd 311 (2018) [hereinafter *2018 Internet Order*].

3. *See*, *e.g.*, Klint Finley, *Why Net Neutrality Matters Even in the Age of Oligopoly*, WIRED (June 22, 2017, 3:52 PM), https://www.wired.com/story/why-net-neutrality-matters-even-in-the-age-of-oligopoly/ [https://perma.cc/HVR2-UJH7].

4. *See*, *e.g.*, Kieran McCarthy, *5 reasons why America's Ctrl-Z on net neutrality rules is a GOOD thing*, THE REGISTER (Dec. 14, 2017, 10:28 PM), https://www.theregister.co.uk/2017/12/14/net_neutrality_vote_great/ [https://perma.cc/B2DE-SARX]; Gene Marks, *3 Reasons Why You Should Support the FCC's New 'Net Neutrality' Proposal*, INC. (Nov. 29, 2017), https://www.inc.com/gene-marks/3-reasons-why-you-should-support-fccs-new-net-neutrality-proposaldraft-1511956090.html [https://perma.cc/CD84-QRH5].

5. *See*, *e.g.*, Stephanie Kan, Case Comment, *Split Net Neutrality: Applying Traditional First Amendment Protections to the Modern Interweb*, 53 HOUS. L. REV. 1149, 1174 (2016) ("In addition to economic innovation, it is imperative to keep the internet an open marketplace of ideas by maintaining its status as a medium of communication free of anticompetitive and harmful network management requirements. Because ISPs are the modern conduits of communication in our society, they have a basic duty not to discriminate or hinder the free flow of information.") (citations omitted).

6. *See 2015 Open Internet Order*, 30 FCC Rcd at 5868, 5872, paras. 546, 557.

7. *See infra* notes 148-67 and accompanying text.

8. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 391 (D.C. Cir. 2017) (Srivinvasan, J., concurring).

becoming a Supreme Court Justice,[9] Judge Kavanaugh, in a dissent to that opinion, came to the opposite conclusion: that net neutrality did infringe on the First Amendment rights of ISPs.[10]

This article examines the First Amendment issues that might be implicated by net neutrality regulation. Although the elimination of net neutrality requirements also eliminates the potential First Amendment concerns with the rule, there is great interest in reinstating the rules,[11] which would revive the First Amendment concerns. In analyzing those concerns, Part III addresses the question of whether ISPs even engage in speech when offering Internet access is considered. While the weight of authority leads to the conclusion that providing Internet access does not qualify as speech, Part IV considers the analysis courts would apply should the provision of Internet access be determined to constitute protected speech. Next considered is whether the particular medium being regulated affects the standards to which the speech restriction will be subject. Concluding that the fact that Internet speech is being regulated does not alter the test to be applied to the restriction, the article then observes that as a content-neutral regulation, it would be subject to intermediate scrutiny. In applying intermediate scrutiny, the importance of the government's identification of some "special characteristic" of the medium being regulated to help justify the intrusion on speech is discussed. With net neutrality, that characteristic has been identified as the ability of ISPs to act as "gatekeepers" who can restrict the access of online content providers to the service providers' users. By preventing ISPs from acting as gatekeepers who can restrict the flow of online speech, net neutrality would likely be found to advance an important government interest and survive intermediate scrutiny. Before reaching these First Amendment issues, however, the recent history of the FCC's actions on net neutrality is reviewed.

II. HISTORY OF NET NEUTRALITY

Although there were efforts to enforce analogous principles prior to 2005,[12] it was then that net neutrality regulation began to resemble its most recent form when the FCC released its *Internet Policy Statement*, laying out principles meant to protect and promote an open Internet.[13] These "principles were intended to ensure consumers had the right to (1) access the lawful Internet content of their choice; (2) run applications and use services of their choice; (3) connect their choice of legal devices that do not harm the network; and (4) enjoy competition among network providers, application and service

9. *See Current Members*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/4Q6Q-QM96].

10. *U.S. Telecom Ass'n*, 855 F.3d at 426 (Kavanaugh, J., dissenting).

11. *See infra* notes 83-88 and accompanying text.

12. For a detailed description of the history of open Internet regulation, *see 2015 Open Internet Order*, 30 FCC Rcd at 5618-25, paras. 60-74.

13. *Id.* at para. 64 (citations omitted).

providers, and content providers."[14] Through 2011, the FCC's primary mechanisms for enforcing these principles was to require compliance with the principles as a condition for the FCC's approval of several mergers involving ISPs subject to its review.[15] At the same time, the principles were "applied to particular enforcement proceedings aimed at addressing anti-competitive behavior by service providers."[16]

In 2010, the D.C. Circuit Court of Appeals found that the FCC had failed to properly identify a valid basis of legal authority to support these actions,[17] thereby invalidating the FCC's enforcement of those principles.[18] This led the FCC, in 2010, to adopt an *Open Internet Order* codifying the policy principles of the *Internet Policy Statement*.[19] The 2010 *Order* imposed three requirements on ISPs: (1) no blocking,[20] (2) no unreasonable discrimination,[21] and (3) transparency.[22] In *Verizon v. FCC*,[23] in a court challenge to these rules, the D.C. Circuit Court of Appeals determined that the FCC did have the authority to regulate broadband ISPs,[24] and that "the FCC had demonstrated a sound policy justification for the *Open Internet Order*."[25] Nevertheless, the *Verizon* court struck down the no-blocking and antidiscrimination rules on the grounds that these rules impermissibly

14. *Id.* at n.66 (citing Policy Statement, 20 FCC Rcd 14986, 14987-88, para. 4 (2005) [hereinafter *2005 Internet Policy Statement*]).

15. *2015 Open Internet Order*, 30 FCC Rcd at 5620, para. 65.

16. *Id.* (citation omitted).

17. Comcast Corp. v. FCC, 600 F.3d 642, 644 (D.C. Cir. 2010).

18. Framework for Broadband Internet Service, *Notice of Inquiry*, 25 FCC Rcd 7866, 7867, para. 1 (2010) [hereinafter *Broadband Framework NOI*] (citing *Comcast Corp.*, 600 F.3d at 642).

19. *See 2015 Open Internet Order*, 30 FCC Rcd at 5621, para. 67 (discussing Preserving the Open Internet, *Report and Order*, 25 FCC Rcd 17905 (2010) [hereinafter *2010 Open Internet Order*], *aff'd in part, vacated and remanded in part sub nom.* Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014)).

20. The no blocking rule prevented "[f]ixed broadband providers [from] block[ing] lawful content, applications, services, or non-harmful devices" and "mobile broadband providers [from] block[ing] lawful websites, or block[ing] applications that compete with their voice or video telephony services." *2010 Open Internet Order*, 25 FCC Rcd at 17906, para. 1.

21. The no unreasonable discrimination rules prohibited "[f]ixed broadband providers [from] unreasonably discriminat[ing] in transmitting lawful network traffic." *Id.*

22. The transparency rule required "[f]ixed and mobile broadband providers [to] disclose the network management practices, performance characteristics, and terms and conditions of their broadband services." *Id.*

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

24. *Id.* at 635-42.

25. *2015 Open Internet Order*, 30 FCC Rcd at 5622, para. 70 (citing *Verizon*, 740 F.3d at 645). "Specifically, the court sustained the [FCC]'s findings that 'absent rules such as those set forth in the *Open Internet Order*, broadband providers represent a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment.'" *2015 Open Internet Order*, 30 FCC Rcd at 5622, para. 70 (citing *Verizon*, 740 F.3d at 645).

imposed Title II common carrier obligations on broadband providers, when it had not classified the providers as such.[26]

A. 2015 Open Internet Rules

The FCC once again imposed net neutrality regulations in 2015.[27] This time, the FCC classified the provision of broadband Internet access as a telecommunications service, meaning that common carrier obligations could be imposed.[28] In its 2015 *Open Internet Order*, the FCC identified three practices that "invariably harm the open Internet—Blocking, Throttling, and Paid Prioritization" and banned each of these practices in the provision of "both fixed and mobile broadband Internet access service."[29] The "No Blocking" rule required that broadband Internet access providers provide their subscribers with "access to all (lawful) destinations on the Internet" by prohibiting the blocking of "lawful content, applications, services, or non-harmful devices."[30]

The "No Throttling" rule prohibited ISPs from impairing or degrading lawful Internet traffic.[31] This rule applied to conduct "that is not outright blocking," but that "impairs, degrades, slows down, or renders effectively unusable particular content, services, applications, or devices . . . ."[32] The FCC feared that ISPs might "avoid the no-blocking rule by, for example, rendering an application effectively, but not technically, unusable."[33] The FCC provided the example of a broadband provider providing its subscribers with slower access to a third-party over-the-top video service that competed with such a service of its own.[34]

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26. *Verizon*, 740 F.3d at 650. Common carriage classification provides the FCC with "'express and expansive authority' to ensure that the 'charges [and] practices . . . in connection with' telecommunications services are 'just and reasonable.'" *2010 Open Internet Order*, 25 FCC Rcd at 17972-73, para. 125 (citing 47 U.S.C. § 201(b)). The FCC can classify Internet services as either telecommunications services or information services, but may only impose common carrier obligations on those services classified as telecommunications. *See 2015 Open Internet Order*, 30 FCC Rcd at 5870-71, para. 551 (citing 47 U.S.C. § 153(44) (2010)). Telecommunications services generally involve "transmission . . . of information of the user's choosing . . . ." 47 U.S.C. §§ 153(50), 153(53). Information services provide users with content provided by the service provider or the ability to create or access online content, 47 U.S.C. § 153(24), such as a service provider home pages or subscriber email accounts. Service providers may offer both telecommunications and information services, in which case the FCC must determine whether to treat the services as a single, integrated offering, meaning it will be considered an information service and thus not be subject to common carrier treatment, or to treat them as separate services, with the telecommunications component subject to common carrier regulation. The FCC for many years generally classified such combined offerings as information services. *See 2015 Open Internet Order*, 30 FCC Rcd at 5740-41, paras. 320, 323-24.

27. *2015 Open Internet Order*, 30 FCC Rcd 5601.
28. *Id.* at para. 331.
29. *Id*. at para. 14.
30. *Id.* at para. 15.
31. *Id.* at para. 16.
32. *Id.* at para. 120 (citations omitted).
33. *Id*. at para. 17.
34. *Id.* at para. 123 (citations omitted).

The "No Paid Prioritization" rule prevented ISPs from providing preferential treatment to certain Internet traffic in exchange for money or other consideration, or to benefit an affiliated entity.[35] A concern behind the adoption of this rule was that allowing paid prioritization would create a "'fast' lane [on the Internet] for those willing and able to pay and a 'slow' lane for everyone else."[36] Here, the FCC provided the example of independent filmmakers and user-created videos being at a disadvantage against video provided by the major studios, who have the resources "to pay priority rates for dissemination of content."[37]

All but the no paid prioritization rule provided exceptions for practices that constituted "reasonable network management."[38] The FCC recognized that this was necessary for the optimal functioning of the ISPs' networks.[39] However, the FCC emphasized that any such practice "that would otherwise violate [a] rule must be used reasonably and primarily for network management purposes, and not for business purposes."[40] Furthermore, the FCC recognized that in addition to the three practices it had prohibited, there may be other practices, "current or future . . . that cause the type of harms [the] rules are intended to address."[41] As a result, the FCC also adopted a "no-unreasonable interference/disadvantage standard," which allowed the FCC, "on a case-by-case basis," to prohibit "practices that unreasonably interfere with or unreasonably disadvantage the ability of consumers to reach the Internet content, services, and applications of their choosing or of [online content and service] providers to access consumers using the Internet."[42]

The basis behind these rules was the FCC's belief that broadband Internet access providers had both the incentives and ability to threaten Internet openness.[43] As the FCC described it, an open Internet enables a "virtuous cycle of innovation" by allowing new uses of the Internet, "including new content, applications, services, and devices," to be developed without any hindrance from access providers.[44] The new content and services lead to increased subscriber demand for Internet service.[45] This in turn leads ISPs to further invest in network improvements, which leads to additional new uses of the Internet, and so on.[46] In the past then, edge providers—those that "provide content, services, and applications over the Internet," such as Netflix, Google, and Amazon[47]—developed new services, which increased

35. *Id.* at para. 125.
36. *Id.* at para. 126 (citations omitted).
37. *Id.* (citations omitted).
38. *Id.* at para. 112 (exception for no blocking rule), para. 119 (exception for no throttling rule), para. 136 (exception for no unreasonable advantage/disadvantage standard).
39. *Id*. at para. 124.
40. *Id.*
41. *Id.* at para. 135.
42. *Id.*
43. *See id.* at para. 75.
44. *Id.* at para. 77 (citing *2010 Open Internet Order*, 25 FCC Rcd at 17910-11, para. 14).
45. *2015 Open Internet Order*, 30 FCC Rcd at 5627, para. 77.
46. *See id.*
47. See U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 690 (D.C. Cir. 2016) (citing Verizon v. FCC 740 F.3d 623, 629 (D.C. Cir. 2014) (internal quotation marks omitted)). The FCC "use[s] 'edge provider' to refer to content, application, service, and device providers, because they generally operate at the edge rather than the core of the network." *2010 Open Internet Order*, 25 FCC Rcd 17907, para. 4, n.2.

subscriber demand for broadband Internet access, which led "to increased investment in broadband network infrastructure and technologies, which in turn leads to further innovation and development by edge providers."[48] The FCC's fear was, without Open Internet rules, service providers could "disrupt this 'virtuous circle' by '[r]estricting edge providers' ability to reach end users, and limiting end users' ability to choose which edge providers to patronize,'" which would "'reduce the rate of innovation at the edge and, in turn, the likely rate of improvements to network infrastructure.'"[49]

These concerns are amplified by the FCC's finding that broadband providers can act as "gatekeepers for both their end user customers who access the Internet, and for . . . edge providers attempting to reach the broadband provider's end-user subscribers."[50] Even in markets where there was competition for broadband Internet access, "once a consumer chooses a broadband provider, that provider has a monopoly on access to the subscriber."[51] This position "is strengthened by the high switching costs consumers face" when changing ISPs, which could include "high upfront device installation fees; long-term contracts and early termination fees; the activation fee when changing service providers; and compatibility costs of owned equipment not working with the new service."[52] Because of this, consumers may be unwilling or unable to switch providers, even when there is a choice of providers.[53]

The gatekeeper function is compounded by "an information problem, whereby consumers are unsure about the causes of problems or limitations with their services—for example, whether a slow speed on an application is caused by the broadband provider or the edge provider."[54] Because of this, consumers may not know whether switching providers would resolve any access issues they are encountering.[55] The FCC thus found that "broadband providers have both the incentive and the ability to act as gatekeepers standing between edge providers and consumers. As gatekeepers, they can block access altogether; they can target competitors, including competitors to their own video services; and they can extract unfair tolls."[56]

This gatekeeper position also provided ISPs with "significant bargaining power in negotiations with edge providers" because ISPs control

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48. *Verizon*, 740 F.3d at 634 (citing *2010 Open Internet Order*, 25 FCC Rcd at 17910-11, para. 14).

49. *Verizon*, 740 F.3d at 634 (citing *2010 Open Internet Order*, 25 FCC Rcd at 17911, para. 14).

50. *2015 Open Internet Order*, 30 FCC Rcd at 5628, para. 78 (internal citations omitted).

51. *Id.* at para. 80 (citations omitted).

52. *Id.* at para. 81 (citations omitted).

53. *Id.* (citations omitted).

54. *Id.* (citations omitted).

55. *Id.* (citations omitted).

56. *Id*. at para. 20. The *Verizon* court accepted this view: "Because all end users generally access the Internet through a single broadband provider, that provider functions as a 'terminating monopolist,' with power to act as a 'gatekeeper' with respect to edge providers that might seek to reach its end-user subscribers." Verizon v. FCC, 740 F.3d 623, 646 (D.C. Cir. 2014) (citations omitted).

the means of access to their subscribers.[57] As a result, broadband providers have "powerful incentives to accept fees from edge providers," either for providing prioritized access for a service or for degrading or blocking access to a service's competitors.[58] Broadband providers could likewise prioritize access for their own or affiliated services and degrade access to competitive services.[59] The FCC further observed that these incentives to favor paying edge providers and affiliated services "all increase when end users are less able to respond by switching to rival broadband providers."[60] The FCC thus concluded that "broadband providers (including mobile broadband providers) have the economic incentives and technical ability to engage in practices that pose a threat to Internet openness by harming other network providers, edge providers, and end users."[61]

B. Elimination of Net Neutrality

On December 14, 2017, the FCC voted to eliminate the net neutrality rules adopted only two years earlier.[62] Supporting this decision was the view that removing the regulatory burdens associated with Title II common-carrier style regulation[63] "is more likely to encourage broadband investment and innovation . . . ."[64] In fact, the FCC found that classifying and treating ISPs as common carriers had "reduced ISP investment in broadband networks, as well as hampered innovation, because of regulatory uncertainty."[65] In addition, the FCC pointed to the "flourishing innovation" that occurred under the "light-touch regulation" of ISPs in the two decades preceding the FCC's subjecting ISPs to Title II regulation with its 2015 rules:[66] "Edge providers have been able to disrupt a multitude of markets—finance, transportation, education,

57. *2015 Open Internet Order*, 30 FCC Rcd at 5629-31, para. 80.

58. *Id.* at para. 19 (citing *Verizon*, 740 F.3d at 645-46) (internal quotation marks omitted).

59. *Id.* at para. 82 (citations omitted).

60. *Id.* The *Verizon* court accepted the FCC's conclusions on these points, observing that "broadband providers might prevent their end-user subscribers from accessing certain edge providers altogether, or might degrade the quality of their end-user subscribers' access to certain edge providers, either as a means of favoring their own competing content or services or to enable them to collect fees from certain edge providers." *Verizon*, 740 F.3d at 629.

61. *2015 Open Internet Order*, 30 FCC Rcd at para. 78. For additional discussion of the values to be promoted by net neutrality rules, *see* Kan, *supra* note 5, at 1173-74; *see also* Alexander Owens, Comment, *Protecting Free Speech in the Digital Age: Does the FCC's Net Neutrality Order Violate the First Amendment?*, 23 TEMP. POL'Y & CIV. RTS. L. REV. 209, 251-58 (2013).

62. *2018 Internet Order,* 33 FCC Rcd at 5601. The FCC voted to eliminate the rules in 2017, but the Order itself was not released until 2018.

63. The FCC specifically cited "the well-recognized disadvantages of public utility regulation." *Id.* at para. 87.

64. *Id.* at para. 86. This is consistent with the Trump administration's focus on reducing regulatory burdens on business. *See*, *e.g.*, *Deregulating American business: An assessment of the White House's progress on deregulation*, THE ECONOMIST (Oct. 14, 2017), https://www.economist.com/news/business/21730170-donald-trump-has-blocked-new-regulations-ease-repealing-old-ones-will-be-harder [https://perma.cc/UJ5W-ECXN]; Phillip Bump, *What Trump Has Undone*, WASH. POST (Dec. 15, 2017), https://www.washingtonpost.com/news/politics/wp/2017/08/24/what-trump-has-undone/?utm_term=.d1ceb386d855 [https://perma.cc/NEX7-F87J].

65. *2018 Internet Order*, 33 FCC Rcd at 364, para. 88.

66. *Id.* at para. 110.

music, video distribution, social media, health and fitness, and many more—through innovation, all without subjecting the networks that carried them to onerous utility regulation."[67]

In addition, the FCC reversed its prior determination that ISPs could act as gatekeepers, finding that ISPs in fact "frequently face competitive pressures that mitigate their ability to exert market power,"[68] meaning that the primary justification for imposing net neutrality requirements was lacking.[69] Acting on the belief "that competition is the best way to protect consumers,"[70] the FCC asserted that these "competitive pressures" themselves protect "the openness of the Internet."[71] In addition, the FCC concluded "that ISPs have strong incentives to preserve Internet openness…."[72] The FCC observed that ISPs themselves benefit from an open Internet, as the "content and applications produced by edge providers often complement the broadband Internet access service sold by ISPs, and ISPs themselves recognize that their businesses depend on their customers' demand for edge content."[73] The FCC noted, in fact, "that many ISPs have committed to refrain from blocking or throttling lawful Internet conduct notwithstanding any Title II regulation."[74]

Thus, the FCC concluded that "the competition that exists in the broadband market, combined with the protections of our consumer protection and antitrust laws against anticompetitive behaviors, will constrain the actions of an ISP that attempts to undermine the openness of the Internet in ways that harm consumers, and to the extent they do not, any resulting harms are outweighed by the harms of Title II regulation."[75] Additionally, eliminating the 2015 net neutrality rules would "facilitate critical broadband investment and innovation by removing regulatory uncertainty and lowering compliance costs."[76] The FCC asserted its belief that this "light-touch framework" would "pave the way for additional innovation and investment that will facilitate greater consumer access to more content, services, and devices, and greater competition."[77]

The FCC did retain one aspect of the 2010 and 2015 *Open Internet* rules, with some modifications.[78] That rule is the transparency rule, which requires that:

67. *Id.*
68. *Id.* at para. 123.
69. *Id.*
70. *Id.* (citations omitted).
71. *2018 Internet Order*, 33 FCC Rcd at 382, para. 123.
72. *Id.* at para. 117 (citations omitted).
73. *Id.* (citations omitted).
74. *Id.* (citations omitted).
75. *Id.* at para. 123.
76. *Id.* at para. 20.
77. *2018 Internet Order*, 33 FCC Rcd at 434, para. 208.
78. *Id.* at para. 215.

> Any person providing 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 to enable consumers to make informed choices regarding the purchase and use of such services and entrepreneurs and other small businesses to develop, market, and maintain Internet offerings.[79]

The transparency rule is intended to provide consumers with the ability to make informed choices regarding their choice and use of ISPs.[80] The FCC believes that such "disclosure increases the likelihood that ISPs will abide by open Internet principles by reducing the incentives and ability to violate those principles, [as] the Internet community will identify problematic conduct, and … those affected by such conduct will be in a position to make informed competitive choices or seek available remedies for anticompetitive, unfair, or deceptive practices."[81] As the FCC viewed it, "[t]ransparency thereby 'increases the likelihood that harmful practices will not occur in the first place and that, if they do, they will be quickly remedied.'"[82]

The FCC's 2017 elimination of the net neutrality rules resulted in a great deal of public uproar and opposition to the elimination.[83] The Internet Association, an industry group whose members include Google, Facebook, and Netflix, announced that it would join the legal fight to reinstate the net neutrality rules.[84] Over twenty state attorneys general sued to block the rules' repeal.[85] Bills were introduced in at least six states, including New York and California, that would prohibit ISPs from blocking or slowing access to websites or online services.[86] Democrats in the U.S. Senate "obtained enough support to force a floor vote on whether the FCC should reinstate" the rules.[87] Although the vote is seen as largely "symbolic" given the Trump administration's opposition to the rules, Democrats plan to make a campaign issue out of it in 2018, and "the vote would put lawmakers on the record on

79. *Id.*
80. *Id.* at para. 216.
81. *Id.* at para. 217 (citations omitted).
82. *Id.* (quoting *2010 Open Internet Order*, 25 FCC Rcd at 17936-37, para. 53).
83. *See* Ted Johnson, *Republican Sen. Susan Collins Joins Effort to Reverse FCC's Net Neutrality Repeal*, VARIETY (Jan. 9, 2018), https://variety.com/2018/politics/news/susan-collins-net-neutrality-fcc-1202658248/ [https://perma.cc/TEP8-2X66]; Ted Johnson, *Internet Association Will Join Legal Battle to Fight FCC's Net Neutrality Repeal*, VARIETY (Jan. 5, 2018), http://variety.com/2018/digital/news/net-neutrality-google-facebook-internet-association-1202654440/ [https://perma.cc/HY86-3JMV].
84. Cecilia Kang, *Big Tech to Join Legal Fight Against Net Neutrality Repeal*, N.Y. TIMES (Jan. 5, 2018), https://www.nytimes.com/2018/01/05/technology/net-neutrality-lawsuit.html [https://perma.cc/VY55-CMXT].
85. Associated Press, *Wave of Lawsuits Filed to Block Net-Neutrality Repeal*, AP NEWS (Jan. 16, 2018), https://www.apnews.com/13de8d0c79bf4c4baf8c4675de183f83/Wave-of-lawsuits-filed-to-block-net-neutrality-repeal [https://perma.cc/SH93-A5YY].
86. Cecilia Kang, *States Push Back After Net Neutrality Repeal*, N.Y. TIMES (Jan. 11, 2018), https://www.nytimes.com/2018/01/11/technology/net-neutrality-states.html https://perma.cc/RY48-5GF3].
87. Ted Johnson, *Senate Democrats Obtain Enough Support to Force Net Neutrality Vote*, VARIETY (Jan. 8, 2018), https://variety.com/2018/politics/news/fcc-net-neutrality-senate-1202657566/ [https://perma.cc/R2WV-TSAM].

such a contentious issue."[88] Thus, even though the rules have been eliminated by the FCC, along with any potential infringement they might have on the First Amendment rights of ISPs, many are working to reinstate the rules. The issue is therefore an ongoing one, meaning the First Amendment issues are still relevant. This article next turns to an examination of those issues.

III. DOES THE PROVISION OF INTERNET ACCESS CONSTITUTE SPEECH?

The First Amendment provides that the government shall "make no law… abridging the freedom of speech."[89] The First Amendment, then, is a restriction on the government's ability to regulate speech, whether that be restricting or prohibiting speech, or in the case of net neutrality, possibly compelling speech. Net neutrality can be seen as promoting free speech interests due to its requirement of "nondiscriminatory transmission of content,"[90] which prevents ISPs from blocking or hindering Internet users' access to speakers, or speakers' access to users.[91] But by mandating the manner in which ISPs carry and treat Internet content—which consists largely of speech—ISPs are compelled by net neutrality to carry speech they might otherwise choose not to carry.[92] Net neutrality, then, might be seen as compelling speech by ISPs. Compelled speech has been found to raise First Amendment issues in other contexts,[93] which thus presents the question of whether net neutrality requirements are an unconstitutional infringement of broadband Internet access providers' First Amendment rights.

This is not a question that has been given much considerations by the courts: "[e]ven after approximately two decades of enforcing net neutrality principles, there remains a lack of notable case law . . . pertaining to [net neutrality-related] free speech concerns . . . ."[94] Instead, court decisions addressing First Amendment interests on the Internet have primarily dealt with content-based regulation of specific categories of speech, such as

88. *Id.*

89. U.S. CONST. amend. I.

90. Kan, *supra* note 5, at 1151.

91. *Id*. at 1156; *see also 2015 Open Internet Order,* 30 FCC Rcd at 5628-31, paras. 78-80.

92. Kan, *supra* note 5, at 1151 (citing Dina R. Richman, *The Shot Heard Round the World Wide Web: Comcast Violates Net Neutrality*, 20 INTELL. PROP. & TECH. L.J. 17, 20 (2008) ("[C]ompelling a speaker to convey a message is just as much a First Amendment violation as forbidding the speaker from conveying a message.").

93. *See* Turner Broad. Sys. v. FCC (*Turner II*), 520 U.S. 180 (1997); Turner Broad. Sys. v. FCC (*Turner I*), 512 U.S. 622 (1994); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257-58 (1974); Red Lion Broad. Co. v. FCC (*Red Lion*), 395 U.S. 367 (1969); *see also infra* notes 271-308 and accompanying text.

94. Kan, *supra* note 5, at 1150-51 (citing Owens, *supra* note 61, at 211-12, 215 (stating that "there remains little precedent or even academic discourse pertaining to the free speech concerns engendered by net neutrality" and that "[c]ourts have thus far had little opportunity to tangle with the convergence of Internet regulation and the constitutional protections of free speech rights affected by net neutrality.")).

obscene and indecent speech.[95] These cases differ from net neutrality requirements, which are not aimed at particular categories of speech.[96] The few courts that have considered regulations on the provision of Internet access have come to opposite conclusions on whether those regulations infringe on the First Amendment rights of access providers.[97]

A. Tests for Speaker Status

A threshold question that must first be considered is whether the ISP services and activities regulated under net neutrality constitute speech protected by the First Amendment? There are two components to this question. First, does the provision of broadband Internet access constitute speech itself protected by the First Amendment? Second, does compelling ISPs to transmit the speech of others infringe on an ISP's First Amendment rights? In regard to the first of these questions—whether the provision of broadband access is itself speech—the FCC observed, "[c]laiming free speech protections under the First Amendment necessarily involves demonstrating status as a speaker—absent speech, such rights do not attach."[98] To answer the questions of "whether an actor's conduct possesses 'sufficient communicative elements to bring the First Amendment into play,' the Supreme Court has asked whether '[a]n intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who viewed it.'"[99]

The Supreme Court applied this test in *Spence v. Washington*, in which a college student hung an upside down U.S. flag in his window with removable tape affixed on the front and back in the shape of a peace symbol.[100] Prosecuted under a statute that, *inter alia*, prohibited the fixing of any figure on a U.S. flag,[101] the student "testified that he put a peace symbol on the flag and displayed it to public view as a protest against the invasion of Cambodia and the killings at Kent State University, events which occurred a few days prior to his arrest."[102] In doing so, the student sought "to associate the American flag with peace instead of war and violence."[103] In determining whether the student's act constituted speech falling within the First Amendment's protection,[104] the Court rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[105] In this case,

95. Owens, *supra* note 61, at 215 (citing Reno v. Am. Civil Liberties Union, 521 U.S. 844, 885 (1997) (finding that much of the Communications Decency Act violated the constitutional right to free speech)).

96. *See 2015 Open Internet Order*, 30 FCC Rcd at 5872, para. 553.

97. *See infra* notes 149-71 and accompanying text.

98. *2015 Open Internet Order*, 30 FCC Rcd at 5868-69, para. 547.

99. *Id.* (citing Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting Spence v. Washington, 418 U.S. 405, 410-11 (1974) (per curiam)).

100. *Spence*, 418 U.S. at 406.

101. *Id.* at 406-07 (discussing WASH. REV. CODE § 9.86.030).

102. *Spence*, 418 U.S. at 408.

103. *Id.*

104. *Id.* at 414-15.

105. *Id.* at 409 (citing United States v. O'Brien, 391 U.S. 367, 376 (1968)) (internal quotation marks omitted).

however, the requirements for conduct to be considered speech were present: The student's act was accompanied by an intent convey a message, which was likely to "be understood by those who viewed it."[106] The Court thus found this to be "the expression of an idea through activity"[107] meaning the student's conduct was protected by the First Amendment.[108]

The Court has found this test— (1) an "intent to convey a particularized message,"[109] and (2) a likelihood "that the message would be understood by those who viewed it"[110]—satisfied in multiple contexts. In *Texas v. Johnson*, the Supreme Court found that the burning of a United States flag at a political protest fulfilled these requirements and thus constituted protected speech.[111] The Court has also found these requirements to be met by "students' wearing . . . black armbands to protest American military involvement in Vietnam,"[112] blacks engaging in a sit-in "in a 'whites only' area to protest segregation,"[113] "the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam,"[114] and by "picketing about a wide variety of causes."[115]

It seems unlikely that the provision of broadband Internet access would satisfy this test, however. Broadband providers act in "a passive role when providing content to end users,"[116] "simply transmitting third-party original content."[117] This passive transmission of the speech of others "does not convey any identifiable message."[118] The D.C. Circuit Court of Appeals, in a denying a challenge to the 2015 net neutrality rules, concurred with this analysis. There, the court observed that,

106. *S*pence v. Washington, 418 U.S. 405, 410-11 (1974).
107. *Id.* at 411.
108. *Id.* at 415.
109. *Id.* at 410-11.
110. *Id.* at 411.
111. Texas v. Johnson, 491 U.S. 397, 405-06 (1989).
112. *Id.* at 404 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969)).
113. *Johnson*, 491 U.S. at 404 (citing Brown v. Louisiana, 383 U.S. 131, 141-142 (1966)).
114. *Johnson*, 491 U.S. at 404 (citing Schacht v. United States, 398 U.S. 58 (1970)).
115. *Johnson*, 491 U.S. at 404 (citing Food Emps. v. Logan Valley Plaza, Inc., 391 U.S. 308, 313-314 (1968); United States v. Grace, 461 U.S. 171, 176 (1983)).
116. Kan, *supra* note 5, at 1171 (citing Meredith Shell, Note, *Network Neutrality and Broadband Service Providers' First Amendment Right to Free Speech*, 66 FED. COMM. L.J. 303, 319 (2014)).
117. Kan, *supra* note 5, at 1171.
118. *Id.* (citing Brief for Tim Wu as Amicus Curiae Supporting Respondents at 7, Verizon, 740 F.3d 623 (D.C. Cir. 2012) (No. 11-1355) [hereinafter *Wu Amicus*]).

> when a subscriber uses her broadband service to access internet content of her own choosing, she does not understand the accessed content to reflect her broadband provider's editorial judgment or viewpoint. If it were otherwise—if the accessed content were somehow imputed to the broadband provider—the provider would have First Amendment interests more centrally at stake.[119]

However, "nothing about affording indiscriminate access to internet content suggests that the broadband provider agrees with the content an end user happens to access."[120] Thus, "a broadband provider does not—and is not understood by users to— 'speak' when providing neutral access to internet content . . . ."[121]

B. Compelled Speech Cases

As for whether being compelled to carry the speech of others infringes on the broadband access providers' First Amendment rights, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*)[122] provides some guidance. *FAIR* involved the Solomon Amendment, which denied federal funding to institutions of higher education that prevented military recruiters from recruiting on campuses or from gaining access to students "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer."[123] The Solomon Amendment was a response to some law schools that had restricted military recruiters' access to their schools and students due to the schools' "disagreement with the Government's policy on homosexuals in the military."[124] A number of law schools sued the government for violating the schools' First Amendment rights,[125] arguing that the law "was unconstitutional because it forced law schools to choose between exercising their First Amendment right to decide whether to disseminate or accommodate a military recruiter's message, and ensuring the availability of federal funding for their universities."[126]

In its analysis, the Court pointed to the "established . . . principle that freedom of speech prohibits the government from telling people what they must say,"[127] citing decisions striking down laws "requiring schoolchildren to recite the Pledge of Allegiance and to salute the flag"[128] and "requir[ing] New

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119. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 743 (D.C. Cir. 2016) (citing Rumsfeld v. Forum for Acad. & Inst. Rights, Inc., 547 U.S. 47, 63-65 (2006); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 86-88 (1980)).

120. *U.S. Telecom Ass'n*, 825 F.3d at 743.

121. *Id.*

122. Rumsfeld v. Forum for Acad. & Inst. Rights, Inc. (*FAIR*), 547 U.S. 47 (2006).

123. *Id.* at 54 (citing 10 U.S.C. § 983(b) (2000 ed., Supp. IV)) (internal quotation marks omitted).

124. *FAIR*, 547 U.S. at 51.

125. *Id*. at 51.

126. *Id.* at 53.

127. *Id.* at 61 (citing W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 643 (1943); Wooley v. Maynard, 430 U.S. 705, 717 (1977)).

128. *FAIR*, 547 U.S. at 61 (discussing *Barnette*, 319 U.S. at 624).

Hampshire motorists to display the state motto—'Live Free or Die'—on their license plates."[129] However, the Court distinguished those cases from the situation in *FAIR*, observing that the law in question did "not dictate the content of the speech at all," as it did not require schools to adopt or endorse any particular government message.[130] Instead, the Solomon Amendment regulated conduct.[131]

However, the Court observed that in addition to situations in which an individual was forced to speak the government's message,[132] its compelled speech cases also included situations in which the government attempted "to force one speaker to host or accommodate another speaker's message."[133] Violations in these cases "resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate."[134] For example, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the Court held that a state law cannot require a parade to include a group whose message the parade's organizer does not wish to send.[135] Finding that a parade was expressive in nature,[136] the *Hurley* Court found that every participant in the parade "affects the message conveyed by the [parade's] private organizers."[137] On the other hand, law schools being required to grant military recruiters access "does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions."[138] According to the Court, law schools do not attempt to express any message when they allow recruiters on campus; instead they do so to help their students get jobs.[139]

The law schools, however, argued that by complying with the Solomon Amendment's requirements, "they could be viewed as sending the message that they see nothing wrong with the military's policies, when they do."[140] Rejecting this argument, the Court pointed to *PruneYard Shopping Center v. Robins*, in which the Court "upheld a state law requiring a shopping center owner to allow certain expressive activities by others on its property."[141] In doing so, the Court found "little likelihood that the views of those engaging in the expressive activities would be identified with the owner, who remained free to disassociate himself from those views and who was 'not

129. *FAIR*, 547 U.S. at 61 (discussing *Wooley*, 430 U.S. at 717).
130. *FAIR*, 547 U.S. at 61.
131. *Id.* at 51.
132. *Id.* at 63.
133. *Id*. (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 566 (1995); Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1, 20-21, (1986) (plurality opinion); *Wooley*, 430 U.S. at 725 (Marshall, J., concurring in judgment) (state agency cannot require a utility company to include a third-party newsletter in its billing envelope); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (right-of-reply statute violates editors' right to determine the content of their newspapers)).
134. *FAIR*, 547 U.S. at 63.
135. *Hurley*, 515 U.S. at 566.
136. *FAIR*, 547 U.S. at 63 (citing *Hurley*, 515 U.S. at 568).
137. *Id.* at 63 (quoting *Hurley*, 515 U.S. at 572-73) (internal quotation marks omitted).
138. *FAIR*, 547 U.S. at 64.
139. *Id.*
140. *Id.* at 64-65.
141. *Id.* at 65 (discussing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980)).

. . . being compelled to affirm [a] belief in any governmentally prescribed position or view.'"[142] Finding no First Amendment issue raised by the Solomon Amendment's requirements,[143] the Court observed:

> The Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds . . . As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*.[144]

Applying the analysis in *FAIR* to net neutrality regulations leads to the conclusion that ISPs' provision of Internet access service should not constitute speech protected by the First Amendment. To prevail on this point, an ISP "would have to show that its own message was affected by the speech it was required to accommodate, or that the requirement interfered with its ability to communicate its own message."[145] Though ISPs are required by net neutrality to treat all content evenhandedly, they are not being compelled to carry any particular message. As net neutrality regulations do "not dictate the content of the speech at all,"[146] there is no government-mandated message that ISPs must provide because of the law. Nor is any message an ISP might wish to communicate interfered with by its being required "to host or accommodate another speaker's message."[147] What is regulated by net neutrality is ISP conduct, not speech.

C. Cases Finding First Amendment Protection for ISPs Providing Internet Access

Despite the foregoing analysis, "in two cases, federal district courts have concluded that the provision of broadband service is 'speech' protected by the First Amendment."[148] The first, *Comcast Cablevision of Broward County v. Broward County,*[149] involved a challenge to a Broward County, Florida ordinance that required cable operators offering "high-speed Internet service to allow competitors equal access to its system."[150] Cable operators, arguing that this infringed on their First Amendment rights, pointed out that they provided their own "first pages" that subscribers could access when

142. *FAIR*, 547 U.S. at 65 (discussing and quoting *PruneYard*, 447 U.S. at 88).
143. *Id*. at 65.
144. *Id.* at 60 (emphasis in original) (citations omitted).
145. Susan Crawford, Symposium, *Freedom of the Press: First Amendment Common Sense*, 127 HARV. L. REV. 2343, 2381 (2014) (citations omitted).
146. *FAIR*, 547 U.S. at 62.
147. *Id.* at 63 (citations omitted).
148. *2015 Open Internet Order*, 30 FCC Rcd at 5870, para. 550, n.1701.
149. Comcast Cablevision of Broward Cty. v. Broward Cty., 124 F. Supp. 2d 685 (S.D. Fla. 2000).
150. *Id.* at 686.

going online.[151] These "first pages" included news, information, and advertising that was either produced or acquired by the operators.[152]

Referring to this "first page" content, the court rejected the argument that "the conduit or transmission capability of speech can be separated from its content."[153] In fact, according to the court, the "content and technology are intertwined in ways which make analytical separability difficult and perhaps unwise."[154] As support for this conclusion, the court pointed to Marshall McLuhan's well-known quote, "'the medium is the message.'"[155] With little more analysis or cited authority than this, the court concluded that "[n]ot only the message, but also the messenger receives constitutional protection,"[156] thus upholding the cable operators' First Amendment challenge to the ordinance.

The second case, *Bell Telephone Company v. Village of Itasca*[157] involved a challenge to "a number of ordinances and actions taken by the municipalities allegedly depriving plaintiff [AT&T][158] of its rights to use the public rights-of-way for its telecommunications network."[159] The government argued that here, AT&T was only engaged in the transmission of content, not "offering a collection of content," and consequently did not qualify for First Amendment protection.[160] To support its rejection of that claim, the court relied on the holding in the *Comcast Cablevision* case just discussed, as well as the Seventh Circuit's holding in *Graff v. City of Chicago*,[161] a case in which the First Amendment implications of a restriction on the erection on newsstands on public land was at issue.[162] The court noted that *Graff* was an *en banc* decision in which "the complex First Amendment analysis produced a splintered court and four opinions."[163] The plurality opinion, consisting of five of the twelve judges hearing the case, suggested "that the erection of newsstands on public property was conduct that fell outside the protections of the First Amendment."[164] However, the *Itasca* court focused on the three opinions produced by the remaining seven judges, all of which "indicated that the erection of a newsstand was in fact protected conduct under the First Amendment."[165] The court then relied on *Graff*, *Comcast Cablevision*, and "the number of cases holding that cable and satellite companies are protected

151. *Id.* at 690.
152. *Id.*
153. *Id.* at 692.
154. *Id.*
155. *Id*. at 685, 692 (S.D. Fla. 2000) (citing MARSHALL MCLUAN, UNDERSTANDING MEDIA: THE EXTENSION OF MAN (1964)).
156. *Comcast Cablevision of Broward County*, 124 F. Supp. 2d at 693.
157. Bell Tel. Co. v. Vill. Of Itasca, 503 F. Supp. 2d 928 (N.D. Ill. 2007).
158. Illinois Bell Telephone Company had become AT&T Illinois by the time of the suit. *See id.* at 930.
159. *Id.*
160. *Id.* at 947.
161. Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993).
162. *Itasca*, 503 F. Supp. 2d at 948.
163. *Id.*
164. *Id.*
165. *Id.*

by the First Amendment"[166] as support for its conclusion that the restrictions on AT&T's access to public rights of way for purposes of upgrading its network violated its First Amendment rights.[167]

The FCC, in its 2015 *Open Internet Order* stated, without elaborating, that it disagreed with the courts' reasoning in both *Comcast Cablevision* and *Itasca*.[168] In a concurring opinion in *U.S. Telecom Association v. FCC*,[169] a decision on the FCC's 2015 *Open Internet Order*, Judge Srinivasan rejected the argument that the First Amendment is a barrier to net neutrality regulation.[170] In doing so, Srinivasan did not mention the *Comcast Cablevision* or *Itasca* cases. Even more significantly, neither did Judge Kavanaugh, who argued in a dissenting opinion that net neutrality regulations do violate the First Amendment.[171] Thus, given the lack of in-depth reasoning behind the conclusions in the *Comcast Cablevision* and *Itasca* decisions, and their lack of acceptance by other authorities, those decisions should be accorded little weight.

Nevertheless, the *Comcast Cablevision* court did point to ISPs engaging in the provision of content to subscribers that they themselves have selected, such as the content on the "first pages" in that case.[172] This is an example of ISPs engaging in activities, apart from providing Internet access, that would qualify for First Amendment protection, such as creating "web pages that contain content or offer links to content."[173] The FCC, however, in its net neutrality regulations, separated these "information services" from the "telecommunications services" encompassing the simple transmission of content, with net neutrality requirements only applicable to transmission services.[174] Thus, "neither the [*Open Internet*] *Order* nor any popular conception of net neutrality would infringe on an ISP's liberty to create a website, offer a streaming service, or engage in other content provision."[175] As the FCC made clear under its net neutrality rules, "[p]roviders remain free to engage in the full panoply of protected speech afforded to any other speaker."[176]

D. Editorial Discretion

ISPs have relied on another argument to try to bring their activities within the scope of the First Amendment: that they exercise "editorial discretion" in the provision of broadband Internet access and that this

166. *Id.* at 948 (citing Turner Broad. Sys. v. FCC, 512 U.S. 622, 636 (1994); Satellite Broad. & Comms. Ass'n v. FCC, 275 F.3d 337, 352-53 (4th Cir. 2001); Comcast Cablevision of Broward Cty. v. Broward Cty., 124 F. Supp. 2d 685, 690-91 (S.D. Fla. 2000) 690-91)).

167. *Itasca*, 503 F. Supp. 2d at 948 (citing *Comcast Cablevision*, 124 F. Supp. 2d at 692).

168. *2015 Open Internet Order*, 30 FCC Rcd at 5870, para. 550, n.1701.

169. U.S. Telecom Ass'n v. FCC, 855 F.3d 381 (D.C. Cir. 2017).

170. Id. at 382-83 (Srivinvasan, J., concurring).

171. *Id.* at 426-27 (Kavanaugh, J., dissenting).

172. *Comcast Cablevision*, 124 F. Supp. 2d at 690.

173. Owens, *supra* note 61, at 238 (citing Rob Frieden, *Invoking and Avoiding the First Amendment: How Internet Service Providers Leverage Their Status as Both Content Creators and Neutral Conduits*, 12 U. PA. J. CONST. L. 1279, 1317 (2010)).

174. *See 2015 Open Internet Order*, 30 FCC Rcd 5601.

175. Owens, *supra* note 61, at 238 (citing 47 C.F.R. § 8.1 (2011)).

176. *2015 Open Internet Order*, 30 FCC Rcd at 5872, para. 556.

"editorial discretion" should bring them within the protections of the First Amendment.[177] For support on this point, ISPs point to the Supreme Court's holding in the *Turner Broadcasting System v. FCC* cases (*Turner I*[178] and *Turner II*[179]). At issue in the *Turner* cases was the constitutionality of the must-carry obligations imposed on cable operators under the Cable Television Consumer Protection and Competition Act of 1992.[180] Must-carry requires cable operators to carry the primary signals of all local, full-power broadcast television ("TV") stations, subject to certain limited exceptions.[181] Cable operators objected to the mandated carriage of the speech of third parties—in this case, broadcast TV stations—saying that it required them to include channels in their lineups that they might otherwise choose not to include, and that—given the limited capacity of cable systems at the time—the capacity needed to carry those stations might have otherwise been used to carry different programming services.[182]

In its review of the First Amendment challenge to the rule, the Supreme Court observed that there was "no disagreement" that "[c]able programmers and cable operators engage in and transmit speech," and were entitled to First Amendment protection:[183] "Through 'original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and operators 'seek to communicate messages on a wide variety of topics and in a wide variety of formats.'"[184] Thus, whether they were providing their own programming or selecting programming from independent programmers to offer subscribers, cable operators were engaging in protected speech.[185] As a result, by "compelling" cable operators "to offer carriage to a certain minimum number of broadcast stations," must-carry "interfere[s] with cable operators' editorial discretion."[186] This editorial discretion is similar to that exercised by newspaper publishers when they pick which articles and editorials to print, both with respect to original content and material produced by others.[187] With "must-carry," then, "cable operators' editorial discretion in creating programming packages" is infringed by the laws' "'reducing the number of channels over which [they] exercise unfettered control.'"[188]

177. *Id.* at para. 548.

178. Turner Broad. Sys. v. FCC (*Turner I*), 512 U.S. 622 (1994).

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

180. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified at 47 U.S.C. § 521 et seq.).

181. 47 U.S.C. §§ 534, 535 (2014); 47 C.F.R. §§ 76.56-64 (2002).

182. *Turner I*, 512 U.S. at 636-37.

183. *Id.* at 636 (citing Leathers v. Medlock, 499 U.S. 439, 444 (1991)).

184. *Turner I*, 512 U.S. at 636 (citing Los Angeles v. Preferred Comms., Inc., 476 U.S. 488, 494 (1986)).

185. *2015 Open Internet Order*, 30 FCC Rcd at 5869, para. 548.

186. *Turner I*, 512 U.S. at 643-44.

187. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257-58 (1974). This too has been granted First Amendment protection. *Id.*

188. Turner Broad. Sys. v. FCC (*Turner II*), 520 U.S. 180, 214 (1997).

Similarly, ISPs have argued that net neutrality requirements interfere with their editorial control over their networks.[189] The FCC, in rejecting this argument, noted "that broadband providers exercise little control over the content which users access on the Internet."[190] Providers do not edit or control the speech that Internet users access, and users access that speech directly.[191] The FCC did recognize that "broadband providers engage in some reasonable network management designed to protect their networks from malicious content and to relieve congestion, but these practices bear little resemblance to the editorial discretion exercised by cable operators in choosing programming for their systems."[192] Broadband providers, then, in providing broadband access "serve as mere conduits for the messages of others, not as agents exercising editorial discretion subject to First Amendment protections."[193]

The FCC further distinguished the situation in *Turner*, noting that the must-carry rules "regulated cable speech by "reduc[ing] the number of channels over which cable operators exercise unfettered control" and "render[ing] it more difficult for cable programmers to compete for carriage on the limited channels remaining."[194] The FCC observed that neither of these concerns was present on the Internet, where the "arrival of one speaker to the network does not reduce access to competing speakers."[195] As a result, "broadband is not subject to the same limited carriage decisions that characterize cable systems."[196] The D.C. Circuit Court of Appeals agreed with the FCC's reasoning on this point:

189. *2015 Open Internet Order*, 30 FCC Rcd at 5869, para. 548 (citations omitted).

190. *Id.* at 549.

191. *Id.*

192. *Id.* at n.1698.

193. *Id.* at para. 549 (citing Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What "The Freedom of Speech" Encompasses*, 60 DUKE L.J. 1673, 1685 (2011)).

194. *2015 Open Internet Order*, 30 FCC Rcd at 5870, para. 550 (citing Turner Broad. Sys. v. FCC (*Turner I*), 512 U.S. 622, 637 (1994).

195. *2015 Open Internet Order*, 30 FCC Rcd at 5870, para. 550.

196. *Id.*

> [B]roadband providers face no such constraints limiting the range of potential content they can make available to subscribers. Broadband providers thus are not required to make, nor have they traditionally made, editorial decisions about which speech to transmit. In that regard, the role of broadband providers is analogous to that of telephone companies: they act as neutral, indiscriminate platforms for transmission of speech of any and all users.[197]

In his dissenting opinion in a decision on the FCC's 2015 rules, Judge Kavanaugh argued that ISPs do "exercise editorial discretion and choose what content to carry and not to carry," and thus do qualify for First Amendment protection.[198] To Judge Kavanaugh,

> Just like cable operators, ISPs deliver content to consumers. ISPs may not necessarily generate much content of their own, but they may decide what content they will transmit, just as cable operators decide what content they will transmit. Deciding whether and how to transmit ESPN and deciding whether and how to transmit ESPN.com are not meaningfully different for First Amendment purposes.[199]

Despite Judge Kavanaugh's assertion on this point, these things are different. Cable operators affirmatively choose what programming services—like ESPN—to provide to subscribers. That is not the end of the matter though. A cable operator would then need to enter into an agreement with ESPN under which the terms of its carriage by the operator would be specified. Issues that would be included in such an agreement would include the license fee the cable operator would provide to ESPN and potentially specifications on the placement of ESPN in the cable operator's lineup.[200] There is no similar process an ISP needs to go through to make ESPN.com available to its subscribers. If the site is publicly available on the Internet, the ISP need do no more to make the site available to subscribers—It's simply

197. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 743 (D.C. Cir. 2016) (citing *2015 Open Internet Order*, 30 FCC Rcd at 5753, para. 347, 5756, para. 352, 5869-70, para. 549). It is possible that broadband Internet access providers might "opt to exercise editorial discretion—for instance, by offering access only to a limited segment of websites specifically catered to certain content." *U.S. Telecom Ass'n*, 825 F.3d at 743. In such a case, the provider would not be providing a "standardized services that can reach 'substantially all end points,'" and thus fall outside the scope of the net neutrality rules. *See U.S. Telecom Ass'n*, 825 F.3d at 743.

198. *U.S. Telecom Ass'n*, 855 F.3d at 426-27 (Kavanaugh, J., dissenting).

199. *Id.* at 428 (Kavanaugh, J., dissenting).

200. *See*, *e.g.*, *How Do Programming Costs Work?*, RCN, https://www.rcn.com/hub/about-rcn/programming-costs/ [https://perma.cc/7QSF-8EDT]; John Ourand, *Takeaways from the surprise Altice-ESPN carriage agreement*, N.Y. BUS. J. (Oct 11, 2017, 8:02 PM), https://www.bizjournals.com/newyork/news/2017/10/11/takeaways-from-the-surprise-altice-espn-deal.html [https://perma.cc/N6P9-S4YT].

there for subscribers to access if they so choose.[201] Kavanaugh also observed that some of the same entities that provide cable TV service—colloquially known as cable companies—provide Internet access over the very same wires. If those entities receive First Amendment protection when they transmit TV stations and networks, they likewise receive First Amendment protection when they transmit Internet content. It would be entirely illogical to conclude otherwise.[202] This assertion ignores the fact that the cable operator has selected the programming services—TV stations and networks—it will make available to its customers and packaged them so as to appeal to potential subscribers. The cable operator providing Internet access has not done this with regard to online content. In such a case, the cable operator is only providing the means by which a consumer can reach Internet content, such as that provided by Netflix. It's the role of selecting and packaging the content consumers can access that results in cable operators providing cable service being considered editors. Cable operators acting as ISPs do none of this selecting and packaging of Internet content; they simply provide the connection whereby the subscriber is able to access the content of his or her choosing.

As the foregoing analysis indicates, it does not appear that ISPs engage in speech when providing Internet access to subscribers, and if they do not engage in speech, no First Amendment issues are implicated by net neutrality regulation. However, there are those who argue that ISPs do engage in speech and thus do have First Amendment rights that are burdened by net neutrality requirements.[203] And, as has been discussed previously, there are precedents that support this position.[204] Thus, it is possible that other courts might agree that net neutrality rules do infringe on ISP speech. This Article next turns to an analysis of the First Amendment scrutiny that net neutrality rules would be subjected to were that to be the case.

IV. LEVEL OF SCRUTINY

If the courts were to be persuaded that ISPs do engage in speech and that net neutrality requirements do infringe on ISPs' First Amendment rights, it would then be necessary to determine whether that infringement is constitutional. To do that, the courts would first determine the appropriate test or level of scrutiny to be applied to the regulation. Strict scrutiny is generally applied to content-based regulations,[205] while intermediate scrutiny is generally applied to content-neutral regulations.[206] However, the level of

201. *See*, *e.g.,* William S. Vincent, *What Happens When You Type in a URL?*, WILLIAM S. VINCENT (Nov. 29, 2017), https://wsvincent.com/what-happens-when-url/ [https://perma.cc/QL89-RX4R]; Pankaj Pal, *What happens when you type a URL in browser*, EDUSUGAR (May 30, 2014), http://edusagar.com/articles/view/70/What-happens-when-you-type-a-URL-in-browser [https://perma.cc/B8JP-D5XL]; *see also supra* note 197 and accompanying text.

202. *U.S. Telecom Ass'n*, 855 F.3d at 428 (Kavanaugh, J., dissenting).

203. *See id.* at 426-27 (Kavanaugh, J., dissenting).

204. *See supra* notes 148-70 and accompanying text.

205. *See* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

206. *See* Turner Broad. Sys. v. FCC (*Turner I*), 512 U.S. 622, 662 (1994) (citing Ward v. Rock Against Racism, 491 U.S. 781 (1989); United States v. O'Brien, 391 U.S. 367 (1968)).

scrutiny to be applied might be altered by the form of media to which the regulation is applicable, as different levels of First Amendment protection, and thus different levels of scrutiny, have been applied to different forms of media.[207]

A. Medium-Specific Considerations

Regulation of speech in the broadcast media (broadcast TV and radio) has been subject to a less demanding standard than restrictions on speech in other forms of media; as the Supreme Court has noted, "our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media."[208] The justification for this is based upon the "scarcity of broadcast frequencies," meaning there is only a limited number of licenses for broadcasting available for use by the public.[209] Not all who wish to have a broadcast license can have one. This scarcity of frequencies has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees. As we said in *Red Lion*, "where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[210]

However, these factors do "not readily translate into a justification for regulation of other means of communication."[211] Cable TV, for example, "does not suffer from the inherent limitations that characterize the broadcast medium,"[212] resulting in regulations of speech in the cable TV context being subject to a more stringent level of review than in broadcasting.[213] In addition, this scarcity has been found to be lacking with regard to the Internet, which "provides relatively unlimited, low-cost capacity for communication of all kinds."[214] As a result, there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]."[215] The level of scrutiny to be applied to net neutrality regulation—should the provision of

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207. As the Supreme Court has observed, "each medium of expression . . . may present its own problems." Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975).

208. *Turner I*, 512 U.S. at 637 (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (TV)); Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943) (radio); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (print); Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781 (1988) (personal solicitation)).

209. *Turner I*, 512 U.S. at 637-38 (citing FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984); *Red Lion*, 395 U.S. at 388-89, 396-99; *Nat'l Broad. Co.*, 319 U.S. at 226).

210. *Turner I*, 512 U.S. at 637-38 (citations omitted).

211. Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 74 (1983).

212. *Turner I*, 512 U.S. 622, 639 (1994).

213. *See id.* (citing *Bolger*, 463 U.S. at 74) ("In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny [applied in] broadcast cases is inapt when determining the First Amendment validity of cable regulation.").

214. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 (1997).

215. *Id.*

Internet access be considered speech in this context—turns on whether the law is content-based or content-neutral.

B. Intermediate Scrutiny

Content-based laws are those "that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed…."[216] Such laws are subject to strict scrutiny, which requires the government to show that the law "is necessary to achieve a compelling governmental interest and be narrowly drawn to achieve that end."[217] Content-neutral laws are those "that confer benefits or impose burdens on speech without reference to the ideas or views expressed…."[218] As content-neutral laws "do not pose the same 'inherent dangers to free expression' that content-based regulations do," they "are subject to a less rigorous analysis . . . ."[219] Such laws are subject to intermediate scrutiny, which requires that the law advance important government interests and not burden substantially more speech than necessary to further those interests.[220]

In finding the must-carry rules to be content-neutral in *Turner I*, the Court made the following observations:

> The design and operation of the challenged provisions confirm that the purposes underlying [their] enactment…are unrelated to the content of speech. The rules . . . do not require or prohibit the carriage of particular ideas or points of view. They do not penalize cable operators or programmers because of the content of their programming. They do not compel cable operators to affirm points of view with which they disagree. They do not produce any net decrease in the amount of available speech. And they leave cable operators free to carry whatever programming they wish on all channels not subject to must-carry requirements.[221]

The same reasoning applies to the net neutrality rules, meaning they are content neutral. The rules make no distinctions based on the content of any

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216. *Turner I*, 512 U.S. at 643 (citing Burson v. Freeman, 504 U.S. 191, 197 (1992) ("Whether individuals may exercise their free-speech rights near polling places depends entirely on whether their speech is related to a political campaign."); Boos v. Barry, 485 U.S. 312, 318-319 (1988) (plurality opinion) (whether municipal ordinance permits individuals to "picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not.")).

217. *See* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

218. *Turner I*, 512 U.S. at 643 (citing City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (ordinance prohibiting the posting of signs on public property "is neutral—indeed it is silent—concerning any speaker's point of view"); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981) ([s]tate fair regulation requiring that sales and solicitations take place at designated locations "applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds.")).

219. Turner Broad. Sys. v. FCC (*Turner II*), 520 U.S. 180, 213 (1997) (citing *Turner I*, 512 U.S. at 661; Ward v. Rock Against Racism, 491 U.S. 781, 798-99, n.6 (1989)).

220. *Turner I*, 512 U.S. at 662 (citing *Ward*, 491 U.S. at 781; United States v. O'Brien, 391 U.S. 367 (1968)).

221. *Turner I*, 512 U.S. at 647.

speech.[222] In fact, their requirement is that ISPs treat all speech carried over their networks evenhandedly. As the FCC observed, the rules "apply independent of content or viewpoint. . . The rules are structured to operate in such a way that no speaker's message is either favored or disfavored, i.e. content neutral."[223] Accordingly, the rules would be subject to intermediate scrutiny.[224]

C. Government Interest

Intermediate scrutiny first requires that the government regulation of speech serve an important interest.[225] In a discussion of the First Amendment issues related to net neutrality in its 2015 *Order*, the FCC asserted that the net neutrality rules "serve First Amendment interests of the highest order, promoting 'the widest possible dissemination of information from diverse and antagonistic sources' and 'assuring that the public has access to a multiplicity of information sources' by preserving an open Internet."[226] The FCC further observed that "the interest in keeping the Internet open to a wide range of information sources is an important free speech interest in its own right."[227] As support for the importance of this interest, the FCC noted that *Turner I* "affirmed [that] 'assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.'"[228] In fact, the *Turner I* Court observed that "it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[229]

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222. The only distinction the law makes based on content is that ISPs are implicitly given the authority to block subscriber access to content that is not lawful. *2015 Open Internet Order*, 30 FCC Rcd at 5648-49, paras. 112-13 (citations omitted). Speech that is not lawful receives little or no First Amendment protection. *See* Miller v. California, 413 U.S. 15, 23 (1973) ("obscene material is unprotected by the First Amendment"); Osborne v. Ohio, 495 U.S. 103, 111 (1990) (child pornography not protected by First Amendment). All lawful content is subject to net neutrality requirements, and no distinctions in the law are made on the content of lawful speech.

223. *2015 Open Internet Order*, 30 FCC Rcd at 5872, para. 553.

224. *Id.* at para. 557 (2015) ("intermediate scrutiny under *Turner I* would be the controlling standard of review if broadband providers were found to be speakers.").

225. *Turner I*, 512 U.S. at 642 (quoting *O'Brien*, 391 U.S. at 377).

226. *2015 Open Internet Order*, 30 FCC Rcd at 5868, para. 545 (citing *Turner I*, 512 U.S. at 663).

227. *2010 Open Internet Order*, 25 FCC Rcd at 17984, para. 146.

228. *2015 Open Internet Order*, 30 FCC Rcd at 5872, para. 555 (quoting *Turner I*, 512 U.S. at 663).

229. *Turner I*, 512 U.S. at 663; *see also* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 795 (1978) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)). "After *Turner*, 'promoting the widespread dissemination of information from a multiplicity of sources' . . . must be treated as [an] important governmental objective[] unrelated to the suppression of speech." Time Warner Entm't Co. v. FCC, 93 F.3d 957, 969 (1996) (citing *Turner I*, 512 U.S. at 2469-70).

D. Advancement of Government Interest

Having established the importance of the government interest to be served by net neutrality regulation, it is then necessary to show that the rules "will in fact advance those interests."[230] This requires the government to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[231] Thus, the regulation must promote "a substantial governmental interest that would be achieved less effectively absent the regulation…"and must not "burden substantially more speech than is necessary to further the government's legitimate interests."[232] This does not require that the regulation "be the least speech-restrictive means of advancing the Government's interests."[233] Instead, it merely requires that the government show that the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[234]

In a challenge to the FCC's authority to enact its 2010 rules, the D.C. Circuit Court of Appeals in *Verizon v. FCC*[235] was tasked with determining whether the FCC's justification for those rules —"that they will preserve and facilitate the 'virtuous circle' of innovation that has driven the explosive growth of the Internet—is reasonable and supported by substantial evidence."[236] Although the court was not analyzing these issues in the context of intermediate scrutiny, the analysis is largely the same. In evaluating the FCC's conclusions, the *Verizon* court noted that its role in that regard was to "uphold the [FCC]'s factual determinations if on the record as a whole, there is such relevant evidence as a reasonable mind might accept as adequate to support [the] conclusion."[237] This required an evaluation of "the [FCC]'s reasoning to ensure that it has examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[238] The court noted that in doing this, it "must be careful not to simply substitute [its] judgment for that of the

230. *Turner I*, 512 U.S. at 664 (citing Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1455 (D.C. Cir. 1985)) ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'").

231. *Turner I*, 512 U.S. at 664 (citing Edenfield v. Fane, 507 U.S. 761 (1993); Los Angeles v. Preferred Comms., Inc., 476 U.S. 488, 496 (1986) ("This Court may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity.") (internal quotation marks omitted); Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir. 1977) ("[A] 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.'") (citation omitted)).

232. Turner I, 512 U.S. at 662 (citing Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (quotations omitted)).

233. *Id.* at 662.

234. *Id*. (citing *Ward*, 491 U.S. at 799 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)) (quotations omitted).

235. Verizon v. FCC, 740 F.3d 623 (2014).

236. *Id.* at 628.

237. *Id.* at 643 (citation omitted) (internal quotation marks omitted).

238. *Id.* at 643-44 (citation omitted) (internal quotation marks omitted).

agency, especially when the agency's predictive judgments about the likely economic effects of a rule" are at issue.[239]

Similarly, the Supreme Court in the *Turner* cases noted that in evaluating whether must-carry would advance important government interests, the Court was not to give its "best judgment as to the likely economic consequences of certain financial arrangements or business structures, or to assess competing economic theories and predictive judgements. . . ."[240] Rather, it was the Court's role to determine "whether, given conflicting views of the probable development of the [TV] industry, Congress had substantial evidence for making the judgment that it did. We need not put our imprimatur on Congress' economic theory in order to validate the reasonableness of its judgment."[241] This was so even though there was evidence in the record "to support a contrary conclusion."[242]

In assessing the reasonableness of the FCC's conclusions underlying its 2010 open Internet rules, the *Verizon* court explained the FCC's rationale behind the rules: the rules, by preserving an open Internet, "spur[] investment and development by edge providers, which leads to increased end-user demand for broadband access, which leads to increased investment in broadband network infrastructure and technologies, which in turn leads to further innovation and development by edge providers."[243] If broadband providers were to interfere with the ability of edge providers to reach Internet users, or users to reach edge providers, this could "'reduce the rate of innovation at the edge and, in turn, the likely rate of improvements to network infrastructure.'"[244] Such behavior by broadband providers, then, could "'stifle overall investment in Internet infrastructure,' and could 'limit competition in telecommunications markets.'"[245] The *Verizon* court concluded that "the [FCC]'s prediction that the *Open Internet Order* regulations will encourage broadband deployment is, in our view, both rational and supported by substantial evidence."[246]

The *Verizon* court also found no "reason to doubt the [FCC]'s determination that broadband providers may be motivated to discriminate against and among edge providers," citing the FCC's observation that broadband providers have incentives to interfere with online services that

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239. *Id.* at 644 (citing Nat'l Tel. Coop. Ass'n v. FCC, 563 F.3d 536, 541 (D.C. Cir. 2009) (internal quotation marks omitted)).

240. Turner Broad. Sys. v. FCC (*Turner II*), 520 U.S. 180, 207 (1997).

241. *Id.* at 208.

242. *Id.* at 210.

243. Verizon v. FCC, 740 F.3d 623, 634 (D.C. Cir. 2014) (citing *2010 Open Internet Order*, 25 FCC Rcd at 17910-11, para. 14). In other words, "new uses of the network—including new content, applications, services, and devices—lead to increased end-user demand for broadband, which drives network improvements, which in turn lead to further innovative network uses." *2015 Open Internet Order*, 30 FCC Rcd at 5627, para. 77 (citations omitted) (internal quotation marks omitted).

244. *Verizon*, 740 F.3d at 634 (citing *2010 Open Internet Order*, 25 FCC Rcd at 17910-11, para. 14).

245. *Verizon*, 740 F.3d at 642-43 (citing *2010 Open Internet Order*, 25 FCC Rcd at 17970, para. 120).

246. *Verizon*, 740 F.3d at 644.

compete with their own,[247] such as Netflix and Hulu competing with subscription video services offered by ISPs AT&T or Time Warner.[248] Furthermore, ISPs, even those that do not offer services in competition with third-party edge providers, "have powerful incentives to accept fees from edge providers, either in return for excluding their competitors or for granting them prioritized access to end users."[249] The *Verizon* court also accepted the FCC's determination that ISPs have the "power to act as a 'gatekeeper'"[250] controlling "access to the Internet for their subscribers and for anyone wishing to reach those subscribers."[251]

E. "Special Characteristic" of the Medium Being Regulated

In a dissenting opinion, Judge Kavanaugh argued that the FCC's failure to find that broadband providers possessed market power resulted in the open Internet regulations failing intermediate scrutiny. According to Kavanaugh, the *Turner* cases required the government to show not only the existence of market power, but that "the market power would actually be used to disadvantage certain content providers, thereby diminishing the diversity and amount of content available."[252]

While Kavanaugh was correct that the FCC did not find that ISPs had market power,[253] the FCC did find that ISPs had the ability and incentive to act as gatekeepers that could interfere with the free flow of speech on the Internet.[254] The *Verizon* majority agreed with the FCC on this point, stating that "Broadband providers' ability to impose restrictions on edge providers does not depend on their benefiting from the sort of market concentration that would enable them to impose substantial price increases on end users . . . ."[255] Instead, the court observed, this ability was the result of the fact that subscribers were generally unlikely to switch providers even if their provider restricted or disadvantaged access to certain edge providers.[256] This unlikeliness was due to the high cost and inconvenience of switching

247. *Id.* at 645 (citing *2010 Open Internet Order*, 25 FCC Rcd at 17916, para. 22).

248. *Verizon*, 740 F.3d at 645 (citation omitted).

249. *Id.* at 645-46 (citing *2010 Open Internet Order*, 25 FCC Rcd 19 at 17918-19, paras. 23-24). As evidence of this, the court noted that "at oral argument Verizon's counsel announced that 'but for [the Open Internet Order] rules we would be exploring those commercial arrangements.'" *Verizon*, 740 F.3d at 646 (citation omitted).

250. *Verizon*, 740 F.3d at 646 (citing *2010 Open Internet Order*, 25 FCC Rcd at 17919, para. 24; *2018 Internet Order*, 33 FCC Rcd at 364, para. 88).

251. *Verizon*, 740 F.3d at 646 (citing *2010 Open Internet Order*, 25 FCC Rcd at 17935, para. 50) (internal quotation marks omitted)).

252. U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 433, n.12 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (citing Turner Broad. Sys. v. FCC (*Turner I*), 512 U.S. 622, 664-68 (1994); Turner Broad. Sys. v. FCC (*Turner II*), 520 U.S. 180, 196-13 (1997) (controlling opinion of Kennedy, J.)).

253. Kavanaugh observed, "The FCC's Order states that 'these rules do not address, and are not designed to deal with, the acquisition or maintenance of market power or its abuse, real or potential.'" *U.S. Telecom Ass'n*, 855 F.3d at 432 (Kavanaugh, J., dissenting) (citing *2015 Open Internet Order*, 30 FCC Rcd at 5606, paras. 11, 60-74).

254. *See 2015 Open Internet Order*, 30 FCC Rcd at 5629-33, paras. 80-82.

255. *Verizon*, 740 F.3d 648 (citing *2010 Open Internet Order*, 25 FCC Rcd at 17923, para. 32; Johnson, *supra* note 87).

256. *Verizon*, 740 F.3d at 648 (citation omitted).

providers, as well subscribers potentially not even being aware that their provider was engaging in such activities.[257]

The *Verizon* majority rejected Kavanaugh's contention, which was also advanced by Verizon,[258] that the absence of a finding of market power was "fatal" to the FCC's open Internet regulations.[259] The court put it this way: "to say, as Verizon does, that an allegedly speech-infringing regulation violates the First Amendment because of the absence of a market condition that would increase the need for that regulation is hardly to say that the absence of this market condition renders the regulation wholly irrational."[260] Furthermore, the *Turner* opinions never explicitly stated that a finding of market power was required.[261] The *Turner I* Court considered the market power issue in the context of the question of whether "the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others."[262] Rejecting this contention, the Court observed that "such heightened scrutiny is unwarranted when the differential treatment is 'justified by some special characteristic of' the particular medium being regulated."[263] The "special characteristics of the cable medium" in the *Turner* cases were "the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast [TV]."[264] In the context of net neutrality, the FCC identified such "special characteristics justifying differential treatment"[265] as the gatekeeper position of ISPs and their "economic power to restrict edge-provider traffic and charge for the services they furnish edge providers."[266]

"Special characteristics" have been identified and used to justify mandated access requirements in other forms of media. Such requirements typically put the interest of the public in receiving speech from independent speakers above the interest of the media property owner to provide only the

257. *See 2015 Open Internet Order*, 30 FCC Rcd at 5629-32, paras. 80-81; *see also supra* notes 52-55 and accompanying text.

258. *Verizon*, 740 F.3d at 647 (citing Turner Broad. Sys. v. FCC (*Turner II*), 520 U.S. 180, 197(1997)).

259. *Verizon*, 740 F.3d at 647 (citing Dissenting Op. at 665).

260. *Id.*

261. Turner Broad. Sys. v. FCC (*Turner I*), 512 U.S. 622, 660-61 (1994).

262. *Id.* at 660.

263. *Id.* at 660-61 (citing Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228-29 (1987); Minneapolis Star & Tribune Co. v. Minneapolis Comm'r of Revenue, 460 U.S. 575, 585 (1983)).

264. *Turner I*, 512 U.S at 661. In Congress' view, it was this market power that provided cable operators with the ability and the incentive to engage in the anticompetitive behaviors that resulted in the need for must-carry regulation. The practices Congress was concerned about focused on cable operators' incentives to "drop local broadcast stations from their systems, or reposition them to a less-viewed channel." *Turner II*, 520 U.S. at 197. The reason cable operators would do this would be to "favor their affiliated programming services," *Turner II,* 520 U.S. at 198 (citations omitted), or "in favor of [other] programmers—even unaffiliated ones—less likely to compete with them for audience and advertisers." *Turner II*, 520 U.S. at 201-02. In addition, "Cable systems also have more systemic reasons for seeking to disadvantage broadcast stations: Simply stated, cable has little interest in assisting, through carriage, a competing medium of communication." *Turner II*, 520 U.S. at 201.

265. *2015 Open Internet Order*, 30 FCC Rcd at 5872, para. 557.

266. *Id.* at n.1722 (citing Verizon v. FCC, 740 F.3d 623, 646 (D.C. Cir. 2014)).

speech it chooses. For example, the government has, consistent with the First Amendment, required that broadcasters provide access to their facilities to individuals who were the subject of an on-air personal attack (the personal attack rule) or to candidates for political office whose opposing candidate had been endorsed on-air by the broadcaster (the political editorializing rule).[267] In essence, the rules provided a right of reply for those attacked or opposed on-air by the broadcaster.

In *Red Lion Broadcasting v. FCC*,[268] broadcasters challenged these rules as a violation of their First Amendment rights, alleging they interfered with their ability to use their frequencies as they chose, including the right to exclude speakers from their airwaves when they so desired.[269] The Supreme Court noted that the inherent scarcity of the broadcast medium—with only a limited number of frequencies available for TV and radio stations—required an adjustment of the First Amendment protections for broadcasters.[270] As the Court viewed it:

> A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.[271]

Finding that the public had a right to have the broadcast medium function so as to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail,"[272] the Court pronounced, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[273] In other words, the public's right to have access to a wide range of speech

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267. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 378 (1969) ("When a personal attack has been made on a figure involved in a public issue . . . the individual attacked [must] himself be offered an opportunity to respond. Likewise, where one candidate is endorsed in a political editorial, the other candidates must themselves be offered reply time to use personally or through a spokesman."). The requirement to allow access was only triggered by the broadcaster attacking a person on air or its on-air endorsement of or opposition to political candidates. The rules required "that under specified circumstances, a licensee must offer to make available a reasonable amount of broadcast time to those who have a view different from that which has already been expressed on his station. The expression of a political endorsement, or of a personal attack while dealing with a controversial public issue, simply triggers this time sharing." *Red Lion,* 395 U.S. at 391. The rules are no longer in effect. *See* Radio-TV News Directors Ass'n v. FCC, 229 F.3d 269 (D.C. Cir. 2000).

268. *Red Lion*, 395 U.S. 367.

269. *See id.* at 386.

270. *Id.* (citations omitted).

271. *Id.* at 389.

272. *Id.* at 390 (citing Associated Press v. United States, 326 U.S. 1, 20 (1945); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

273. *Red Lion*, 395 U.S. at 390 (citations omitted).

outweighed broadcasters' right to restrict or prohibit certain speech over their facilities.[274]

In the absence of the rules, the Court was concerned that "station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed."[275] The Court found that the First Amendment did not allow "for unlimited private censorship operating in a medium not open to all."[276] It was permissible under the First Amendment, then, to treat broadcasters "as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern."[277]

Scarcity was also found to exist in the context of satellite TV services, which justified a requirement that satellite TV providers grant access to outside speakers. The 1992 Cable Act[278] required satellite TV providers (also referred to as direct broadcast satellite (DBS) providers) to set aside 4-7% of their channel capacity "exclusively for noncommercial programming of an educational or informational nature."[279] DBS providers were to have "no editorial control" over this programming.[280] The government interest behind the DBS set-aside was to "assur[e] public access to diverse sources of information."[281]

The set-aside, as the reviewing court saw it, required "DBS providers to reserve a small portion of their channel capacity for [educational and informational] programs as a condition of their being allowed to use a scarce public commodity."[282] The court found that the same scarcity that applied to broadcast TV and radio applied to direct broadcast satellite as well, here stemming from the limited number of orbital slots for use by satellites providing DBS service.[283] As a result, the court applied "the same relaxed standard of scrutiny that the court has applied to the traditional broadcast media,"[284] noting that regulations of speech in broadcasting "have been upheld when they further [the] First Amendment goal" of promoting "the widest possible dissemination of information from diverse and antagonistic

274. *Id.*
275. *Id.* at 392.
276. *Id.*
277. *Id.* at 394.
278. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified at 47 U.S.C. § 521 et seq.).
279. Time Warner Entm't Co. v. FCC, 93 F.3d 957, 973 (D.C. Cir. 1996) (citing 47 U.S.C. § 335(b)(1)).
280. *Time Warner Entm't Co.*, 93 F.3d at 973.
281. *Id.* (citing 106 Stat. 1460).
282. *Id.* at 976.
283. *Id.* at 975.
284. *Id.*

sources."[285] The set-aside requirement achieved this, as its "purpose and effect" was "to promote speech, not to restrict it."[286] This led the court to conclude that the set-aside requirement was not a violation of DBS providers' First Amendment rights.[287]

Mandated access requirements, however, may violate the First Amendment when the medium being regulated lacks such special characteristics. For example, a government-mandated right of access in the newspaper context—one not unlike those at issue in *Red Lion*—was found to violate the First Amendment rights of newspaper publishers in *Miami Herald v. Tornillo*.[288] At issue in that case was a Florida "right of reply" statute that required that a candidate who was "assailed regarding his personal character or official record by any newspaper" be given a right to reply in the newspaper.[289] Those in favor of the right of reply requirement argued that the "government has an obligation to ensure that a wide variety of views reach the public."[290]

The Court acknowledged "that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster."[291] While the Court did not explicitly consider whether scarcity was present in the context of newspapers, there is no technological basis on which the number of newspapers needs to be limited, as is the case of broadcasters and DBS providers. Nevertheless, the Court noted that "as an economic reality, a newspaper can [not] proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available."[292] However, the Court observed that even if this were not the case, the statute violated "the First Amendment because of its intrusion into the function of editors."[293]

To the Court, the issue in the case was "[c]ompelling editors or publishers to publish that which reason tells them should not be published. . . ."[294] The Court described a newspaper's editorial function: "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues

285. *Id.* ("For example, in *NCCB*, the Supreme Court recognized that 'efforts to enhance the volume and quality of coverage of public issues through regulation of broadcasting may be permissible where similar efforts to regulate the print media would not be.'"); FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 799-800 (1978); CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981) ("preservation [of] an uninhibited marketplace of ideas" is proper consideration in imposing public interest obligations on broadcasters); FCC v. League of Women Voters, 468 U.S. 364, 377 (1984) (Congress may "seek to assure that the public receives through this medium a balanced presentation of information on issues of public importance. . . . ")).

286. *Time Warner Entm't Co.*, 93 F.3d at 977 (citing *NCCB*, 436 U.S. at 801-02).

287. *Time Warner Entm't Co.*, 93 F.3d at 976-77 (citing *NCCB*, 436 U.S. at 802).

288. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257-58 (1974).

289. *Id.* at 244 (discussing FLA. STAT. § 104.38 (1973)). The statute required that "the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges. The reply must appear in as conspicuous a place and in the same kind of type as the charges which prompted the reply, provided it does not take up more space than the charges. Failure to comply with the statute constitutes a first-degree misdemeanor." *Miami Herald*, 418 U.S. at 244.

290. *Miami Herald*, 418 U.S. at 248 (citation omitted).

291. *Id.* at 256-57.

292. *Id.* at 257 (citation omitted).

293. *Id.* at 258.

294. *Id.* at 256 (quotations and citations omitted).

and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment."[295] While a "responsible press is an undoubtedly desirable goal . . . press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[296] As a result, the Court found that this interference with a newspaper's editorial discretion constituted a violation of the First Amendment.[297]

Intrusion into the editorial function of cable operators was justified in the *Turner* cases because of a special characteristic of the cable medium, the bottleneck monopoly control exercised by a cable operator.[298] Such a special characteristic was lacking in *Miami Herald* with regard to newspapers, with that intrusion on the editorial function of newspaper editors being a First Amendment violation.[299] Nor was the intrusion on the editorial function justified by scarcity, which is not a characteristic of newspapers.[300] Scarcity does exist in broadcasting, which justified compelled access in that medium.[301] There, the Court found that the right of viewers and listeners to have access to a wide range of viewpoints and the free flow of information outweighed the right of broadcasters to air only that content which they wished.[302] The same scarcity rationale justified a set-aside for DBS providers, in that there were a limited number of orbital slots to use to provide satellite TV service.[303] Thus, there needs to be a "special characteristic" of a medium for the government to be able to mandate that the public be granted a right of access to that medium, even when that compelled access infringes on the medium owner's speech. Absent such a characteristic, as in the case of newspapers, such a right of access is unconstitutional.

The FCC, in its 2015 *Open Internet Order*, found such a special characteristic in the provision of broadband Internet access, that being the ability of ISPs to act as gatekeepers in terms of edge providers' access to an ISP's subscribers.[304] In the absence of that or another special characteristic, however, it appears that net neutrality would likely fail intermediate scrutiny's requirement that the restriction advances the government interest without burdening more speech than necessary. Indeed, if ISPs are not effectively able to exercise gatekeeper power, much of the rationale for the regulations disappears. The *Verizon* court observed,

295. *Id.*
296. *Id.*
297. *Id.* at 258 (citation omitted).
298. Turner Broad. Sys. v. FCC (*Turner I*), 512 U.S. 622, 656-57, 661 (1994).
299. *Miami Herald*, 418 U.S. at 258.
300. *See supra* notes 296-97 and accompanying text.
301. *See supra* notes 213-15, 273-75 and accompanying text.
302. *See supra* notes 276-83 and accompanying text.
303. *See supra* notes 284-92 and accompanying text.
304. *2015 Open Internet Order*, 30 FCC Rcd at 5629-33, paras. 80–81.

> To be sure, if end users could immediately respond to any given broadband provider's attempt to impose restrictions on edge providers by switching broadband providers, this gatekeeper power might well disappear. For example, a broadband provider like Comcast would be unable to threaten Netflix that it would slow Netflix traffic if all Comcast subscribers would then immediately switch to a competing broadband provider.[305]

Nevertheless, the court saw "no basis for questioning the [FCC]'s conclusion that end users are unlikely to react in this fashion."[306]

In eliminating the net neutrality rules in 2017, however, the FCC found "that the gatekeeper theory, the bedrock of the [2015] *Order*'s overall argument justifying its approach, is a poor fit for the broadband Internet access service market."[307] It thus found this special gatekeeper characteristic that had justified net neutrality regulation to be lacking, using that finding as a basis for the elimination of the rules.[308] Eliminating the rules also eliminated the potential First Amendment issues associated with net neutrality. Were the FCC to try to institute net neutrality requirements without a finding of such a special characteristic in the broadband Internet access market, those rules would likely fail intermediate scrutiny for the reasons just discussed.

F. Not Burdening Substantially More Speech Than Necessary

The final requirement of intermediate scrutiny is that the regulation "not 'burden substantially more speech than is necessary to further'" the government interest.[309] This is different from the analysis under strict scrutiny, which requires the regulation to be "narrowly drawn" to achieve its interest.[310] Part of that analysis can include a consideration of whether there are less restrictive alternatives for the government to achieve its interest. If there are, this can be fatal for the regulation under consideration.[311] This is not the case under intermediate scrutiny, which does not require that the

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305. Verizon v. FCC, 740 F.3d 623, 646 (D.C. Cir. 2014) (citing *2010 Open Internet Order*, 25 FCC Rcd at 17921, para. 51).

306. *Verizon*, 740 F.3d at 646 (citing *2010 Open Internet Order*, 25 FCC Rcd at 17921, para. 27).

306. *Verizon*, 740 F.3d at 647 (citing *2010 Open Internet Order*, 25 FCC Rcd at 17923, para. 32).

307. *2018 Internet Order*, 33 FCC Rcd at 363, para. 87.

308. *Id.* at paras. 117, 123.

309. Turner Broad. Sys. v. FCC (*Turner II*), 520 U.S. 180, 213-14 (1997) (citing Turner Broad. Sys. v. FCC (*Turner I*), 512 U.S. 622, 662 (1994) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

310. *See* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987) (citing Minneapolis Star & Tribune Co. v. Minneapolis Comm'r of Revenue, 460 U.S. 575, 591-92 (1983)).

311. *See*, *e.g.*, Am. Civil Liberties Union v. Mukasey, 534 F.3d 181, 198-04 (3d Cir. 2008), *aff'd sub nom*. Am. Civil Liberties Union v. Gonzalez, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *cert. denied*, 555 U.S. 1137 (2009) ("the Government has not shown that [the Child Online Protection Act (COPA)] is a more effective and less restrictive alternative to the use of filters and the Government's promotion of them in effectuating COPA's purposes . . . Accordingly, COPA fails the third prong of a strict scrutiny analysis and is unconstitutional.") *ACLU*, 534 F.3d at 204.

regulation "be the least speech-restrictive means of advancing the Government's interests."[312]

In *Turner II*, opponents of the must-carry regulation at issue offered a number of potentially less restrictive ways to achieve the government interests meant to be promoted by the rule.[313] The Court's response was that it would not strike down the must-carry law "simply because there is some imaginable alternative that might be less burdensome on speech."[314] In fact, the *Turner II* Court went as far as to state, "[i]t is well established a regulation's validity 'does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests.'"[315] Nevertheless, after considering the alternatives put forth by must-carry opponents, the Court was unable to conclude that any of them would be more effective in promoting the government's interests.[316] On this point, the Court stated that it could not "displace Congress' judgment respecting content-neutral regulations with [its] own, so long as its policy is grounded on reasonable factual findings supported by [substantial] evidence . . . . [I]n these circumstances the First Amendment requires nothing more."[317]

In conducting its analysis of potentially less restrictive alternatives, the Court found that the burden of must-carry on cable operators was "modest" and that "the vast majority of cable operators have not been affected in a significant manner by must-carry."[318] This would also seem to be the case with net neutrality regulations, as many providers were already acting in accordance with the law's requirements even when the law was not in effect.[319] Further, many providers have pledged to continue to act in accordance with those principles despite the rule's elimination.[320]

Net neutrality is also less of a burden than must-carry, in that ISPs do not face the capacity issues that were present in *Turner*. Being forced to carry a broadcast TV station meant that the cable operator was foreclosed from

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312. *Turner I*, 512 U.S. at 662 (citing *Ward*, 491 U.S. at 799 (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

313. *Turner II*, 520 U.S. at 217.

314. *Id.* (citing *Albertini*, 472 U.S. at 689; *Ward*, 491 U.S. at 797; Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 299 (1984)).

315. *Turner II*, 520 U.S. at 218 (citing *Albertini*, 472 U.S. at 689).

316. *Id*.

317. *Id.* at 224-25.

318. *Id.* at 214.

319. *2015 Open Internet Order*, 30 FCC Rcd at 5645-46, para. 104 ("[I]n the wake of the *Verizon* decision, there are no rules in place to prevent broadband providers from engaging in conduct harmful to Internet openness, such as blocking a consumer from accessing a requested website or degrading the performance of an innovative Internet application . . . . [M]any providers have indicated that, at this time, they do not intend to depart from the previous rules . . . .").

320. *See 2018 Internet Order*, 33 FCC Rcd at 378-79, at para. 117 ("many ISPs have committed to refrain from blocking or throttling lawful Internet conduct notwithstanding any Title II regulation"); *see also* Kerry Flynn, *The internet companies working to save net neutrality,* MASHABLE (Dec. 15, 2017), https://mashable.com/2017/12/15/tech-companies-saving-net-neutrality-internet-service-provider/#Ekem2XWwdOqi [https://perma.cc/H2VA-Y7N5].

using that capacity for other speakers.[321] It also made it more difficult for independent programmers to gain carriage on cable systems.[322] Neither of these issues are present in the context of the Internet, as transmitting the speech of one online speaker does not foreclose an ISP from carrying the speech of any other, nor does it make it more difficult for any user or edge provider to transmit its speech online.[323] Finally, ISPs are not foreclosed by net neutrality from engaging in speech by providing online content; they must simply carry and transmit that speech in the same manner as they do the speech of others.[324]

Net neutrality regulations, then, should they be determined to infringe on ISP speech, would likely satisfy intermediate scrutiny's requirement that they serve an important government interest: "promoting 'the widest possible dissemination of information from diverse and antagonistic sources' and 'assuring that the public has access to a multiplicity of information sources' by preserving an open Internet."[325] In identifying and detailing ISPs' abilities and incentives to act as gatekeepers, the FCC, as determined by the court in *Verizon*, also adequately supported the need for the rules and showed, to the court's satisfaction, that the rules would in fact advance these government interests.[326] Finally, net neutrality does not burden substantially more speech than necessary to achieve those interests, a point on which courts are likely to accept the FCC's conclusions, even if less restrictive alternatives are presented, so long as those conclusions are reasonable and supported by evidence.[327]

V. CONCLUSION

Free speech issues are intertwined with the net neutrality debate. Proponents argue the rules are necessary, in part, to ensure the free flow of ideas over the Internet.[328] However, the First Amendment may have little applicability here. The simple transmission of others' speech by ISPs is unlikely to be considered speech itself,[329] nor is any speech of ISPs themselves affected by net neutrality.[330] If that is the case, the First Amendment does not present a barrier to net neutrality regulation as enacted by the FCC in 2015. Should the provision of broadband Internet access be considered speech, however, net neutrality requirements would likely be upheld so long as they were found to be addressing some special characteristic of the medium that hindered the achievement of an important government interest.[331] With the 2015 rules, that characteristic was the ability of ISPs to

321. Turner Broad. Sys. v. FCC, (*Turner I*) 512 U.S. 622, 636-37 (1994).
322. *Id.*
323. *See 2015 Open Internet Order*, 30 FCC Rcd at 5872, para. 550.
324. *See supra* notes 172-76 and accompanying text.
325. *2015 Open Internet Order*, 30 FCC Rcd at 5868, para. 545 (citing *Turner I*, 512 U.S. at 663).
326. *See supra* notes 240-56 and accompanying text.
327. *See supra* notes 313-17 and accompanying text.
328. *See 2015 Open Internet Order*, 30 FCC Rcd at 5627, para. 77.
329. *See supra* notes 99-121 and accompanying text.
330. *See supra* notes 122-47 and accompanying text.
331. *See supra* notes 269-308 and accompanying text.

act as gatekeepers that could restrict or block users' access to online speech.[332] This would hinder the achievement of the government interests of "promoting 'the widest possible dissemination of information from diverse and antagonistic sources' and 'assuring that the public has access to a multiplicity of information sources' by preserving an open Internet."[333]

If ISPs are not gatekeepers, as determined by the FCC in 2017,[334] then net neutrality is not necessary, as competition will address the concerns that the regulations are intended to address in the absence of a special characteristic of the medium that hinders the achievement of the important government interest.[335] While it is not the purpose of this article to determine whether that is in fact the case, it should be noted that there appears to be sufficient evidence to support the conclusion that ISPs are gatekeepers as well as that they are not; both the FCC's 2015 and 2017 Orders spend much time providing support for their opposing conclusions on that issue.[336] When reviewing a governmental determination such as this, which can involve some degree of predictive judgment, the role of the courts is to determine if the decisionmaker's conclusion is reasonable and supported by evidence.[337] So long as that is the case, courts are unlikely to displace that conclusion.[338]

332. *2015 Open Internet Order*, 30 FCC Rcd at 5629-32, paras. 80-81.

333. *Id.* at para. 545 (citing Turner Broad. Sys. v. FCC (*Turner I*), 512 U.S. 622, 663 (1994); *see also supra* notes 248-56 and accompanying text).

334. *2018 Internet Order*, 33 FCC Rcd at 363, 378-79, 382, paras. 87, 117, 123.

335. *Id.* Antitrust and consumer protection laws also provide consumers with additional protections against anticompetitive or deceptive practices by ISPs. *Id.* at paras. 140-54.

336. *2015 Open Internet Order*, 30 FCC Rcd at 5628-45, paras. 78-103 (finding and justifying conclusion that ISPs have ability and incentive to act as gatekeepers); *2018 Internet Order*, 33 FCC Rcd at 363, 375-92, paras. 87, 109-38 (finding and supporting conclusion that sufficient competition exists in the market for broadband Internet access such that ISPs cannot effectively act as gatekeepers).

337. *See supra* notes 241-47 and accompanying text.

338. *See* Turner Broad. Sys. v. FCC (*Turner II*), 520 U.S. 180, 210 (1997).