EDITOR'S NOTE

Welcome to the first Issue of Volume 71 of the *Federal Communications Law Journal* ("*Journal*"), the official journal of the Federal Communications Bar Association (FCBA). Over the summer, the *Journal* added 30 talented editors to our membership ranks. FCLJ's incoming editorial board, associates, and members have worked diligently in their new roles to compose a topically diverse introduction to the new volume.

We are honored to publish two practitioner articles in this Issue. The first is written by Doctor Joel Timmer, a professor at Texas Christian University. In his article, Doctor Timmer explores whether the First Amendment is implicated by the previous net neutrality regulations imposed in the *2015 Open Internet Order*. Doctor Timmer asserts that although it is likely not implicated, reinstated net neutrality rules would not violate the First Amendment because they serve an important government interest in deterring Internet service providers from acting as content "gatekeepers".

The second practitioner article is penned by Lawrence J. Spiwak, President of the Phoenix Center for Advanced Legal and Economic Public Policy Studies and co-chair of the FCBA Editorial Advisory Board. While most of the net neutrality debate to date has focused on the statutory definitional question of whether broadband internet access should be classified as a "information" service under Title I or a common carrier" telecommunications" service under Title II, Mr. Spiwak's article focuses on the more substantive (yet notably neglected) legal problem: the FCC's actual implementation of Title II in its *2015 Open Internet Order*. As Mr. Spiwak argues, the FCC violated almost every standard of basic ratemaking in promulgating its *2015 Rules*, raising significant due process concerns under the Fifth Amendment. Yet, because the D.C. Circuit's broad extension of *Chevron* deference in *USTelecom* condoned this behavior, Mr. Spiwak contends that the D.C. Circuit has established a troubling precedent of administrative law that will likely haunt us for years to come.

Additionally, the *Journal* is excited to feature three timely student Notes. In the first Note, Katherine Krems examines the problem of the 22 million fraudulent comments filed in the FCC's *Restoring Internet Freedom* proceeding, and proposes that the FCC identify and remove such comments in order to preserve public faith in the FCC rulemaking process. The second Note is written by Laura Nowell, who argues that the Supreme Court should adopt the Fourth Amendment standard held by the Fourth and Ninth Circuits for digital searches at the border. The third Note is penned by John Roberts who discusses the prevalence of "fake news" on media platforms, and asserts that the Federal Trade Commission should use its authority under the Federal Trade Commission Act to regulate the circulation of such misinformation.

The editorial board is appreciative of the FCBA, GW Law, and the outgoing board for the continuous support that played a substantial role in the successful publication of this Issue. This fall, GW Law has generously added Michael Beder as an adjunct professor to guide our members in drafting their Notes.

We welcome your feedback or questions to fclj@law.gwu.edu, and please direct submissions for publication consideration to fcljarticles@law.gwu.edu. This Issue and our archive will be available at www.fclj.org.

Stephen Conley
Editor-in-Chief

FEDERAL COMMUNICATIONS LAW JOURNAL

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Federal Communications Law Journal

The *Federal Communications Law Journal* is published jointly by the Federal Communications Bar Association and The George Washington University Law School. The *Journal* publishes three issues per year and features articles, student notes, essays, and book reviews on issues in telecommunications, the First Amendment, broadcasting, telephony, computers, Internet, intellectual property, mass media, privacy, communications and information policymaking, and other related fields.

As the official journal of the Federal Communications Bar Association, the *Journal* is distributed to over 2,500 subscribers, including Association members as well as legal practitioners, industry experts, government officials and academics. The *Journal* is also distributed by Westlaw, Lexis, William S. Hein, and Bloomberg Law and is available on the Internet at http://www.fclj.org.

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ARTICLES

Net neutrality regulations were intended, in part, to promote free speech on the Internet. But do those regulations also infringe on the First Amendment rights of Internet service providers ("ISPs" or "broadband providers") subject to their restrictions? Examining the First Amendment issues with net neutrality regulation, this article first considers whether ISPs engage in speech when providing Internet access. While this is unlikely, there is support for the opposite conclusion. Thus, the First Amendment standard to which net neutrality would be subjected is considered. As net neutrality is a content-neutral regulation of online speech, intermediate scrutiny would be applied. Key to the regulation's survival of that standard is the FCC's 2015 determination that ISPs can act as gatekeepers, restricting or blocking the flow of online content to their subscribers. While the elimination of the rules also eliminates any First Amendment issues, the widespread interest in reinstating them means the First Amendment concerns remain relevant.

In 2015, the Federal Communications Commission made the controversial decision to reclassify broadband Internet access as a common carrier "telecommunications" service under Title II of the Communications Act. While much of the debate has focused on the legality of reclassification, little attention has been paid to actual implementation. As detailed in this article, a proper implementation of Title II precluded the Commission's approach in the *2015 Open Internet Order*, forcing the Commission to ignore the "vast majority of rules adopted under Title II" and "tailor[] [Title II] for the 21st Century." The D.C. Circuit found in *United States Telecom Association v. FCC* that the Commission had wide latitude to interpret the Communications Act and upheld not only the Commission's decision to reclassify but also, surprisingly and indirectly, its gross distortion of Title II. In so doing, the D.C. Circuit has extended *Chevron* deference beyond any reasonable limit, greatly expanding the Commission's authority well beyond its statutory mandate. This Article first presents several examples of how the *2015 Open Internet Order* ignores both the plain language of Title II and the extensive case law to achieve select political objectives and then discusses the D.C. Circuit's acceptance of such legal perversions. To provide an example of the troubling precedent set

by *USTelecom,* this Article then demonstrates how former FCC Chairman Tom Wheeler attempted (but, due to the clock running out by the Presidential election in 2016, ultimately did not succeed) to use the same theory of the case found in *USTelecom* to regulate the prices of Business Data Services. Conclusions and policy recommendations are at the end.

NOTES

Crowdsourcing, Kind Of

During the recent net neutrality notice-and-comment period, the Federal Communications Commission received nearly 22 million comments, but an astonishing number of these comments were fake. When fake comments flood agency dockets and remain on the record, it puts the democratic nature of the public comment process in jeopardy. Leaving these comments unaddressed skews the record and impedes agencies' abilities to comply with the Administrative Procedure Act's requirement that they consider relevant comments in rulemaking procedures. The FCC should act to investigate comments sent during the net neutrality notice-and-comment period and remove those that are clearly fake from the record, protecting the legitimacy of the process and setting a precedent for future proceedings. The contentious nature of the net neutrality debate has drawn widespread attention to probable fake comments on the record, and much has been written about the issue. But there has not yet been a comprehensive analysis of the record with suggestions for the removal of comments that were not submitted by real people under their own names, and the FCC has not acted to remove fake comments from the record.

This Note will analyze comments submitted to FCC through the net neutrality docket and argue that the Commission and other agencies in similar situations must, to adhere to their legal obligation to consider significant comments, remove illegitimate comments from the record. While agencies will have to invest time and resources to do this, the work will be well worth the investment; for leaving fake comments in the record will lessen what little faith the public has left in our government.

Privacy at the Border: Applying the Border Search Exception to Digital Searches at the United States Border

Should digital and physical searches be considered inherently different and therefore treated differently under the Fourth Amendment under all circumstances? This Note argues that despite the inherent differences between physical and digital searches, that the border search exception to the Fourth Amendment established by the Supreme Court should apply to digital searches at the border in the same manner applied for physical searches at the border. The Supreme Court should not apply its decision in *Riley v. California*, where the Court held that manual and digital searches require different standards of suspicion for a search incident to lawful arrest, to digital searches conducted under the border search exception because the Court's holding in *Riley* does not address border searches. Instead the Supreme Court should adopt the Ninth and Fourth Circuits' approach for determining the standard of suspicion

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

Dr. Joel Timmer *

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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).

USTelecom and its Aftermath

Lawrence J. Spiwak*

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I. BACKGROUND

For almost fifteen years, the thorny issue of net neutrality has loomed over the telecom debate. But what started with the simple notion that the FCC should stop broadband service providers ("BSPs") from engaging in strategic anticompetitive conduct ultimately morphed into the Obama Administration's rejection of nearly twenty years of bi-partisan consensus that the Internet should be subject to "light touch" regulation under Title I of the Communications Act in favor of applying a legacy common carrier regulation designed for the old Ma Bell telephone monopoly under Title II of the Communications Act.[1] While much of the debate to date has revolved around the threshold legal question of whether broadband Internet access should be appropriately classified as an "information" service under Title I or a common carrier "telecommunications" service under Title II, the purpose of this Article is to focus on perhaps the more substantive (yet notably neglected) legal problem: the FCC's actual *implementation* of Title II in the *2015 Open Internet Order*, specifically the ratemaking and tariffing provisions of Sections 201,[2] 202[3] and 203,[4] along with its forbearance authority in Section 10.[5]

As explained in detail below, a proper application of these statutory provisions should have prevented the FCC from doing what it wanted to do in its *2015 Open Internet Order*—in particular, the FCC wanted (1) to force BSPs to provide edge providers with terminating access without compensation (i.e., a regulated price of zero) in direct contradiction of Section 201; (2) to impose a blanket ban on reasonable discrimination in direct contradiction of Section 202; but yet (3) to give the patina of a "light touch" approach, to impose directly a regulated price of "zero" but use its forbearance authority contained in Section 10 to forbear from the formal tariffing requirements of Section 203—even while finding that BSPs were "terminating monopolists" and additional competitive entry was unlikely to ensure rates remained "just and reasonable." The FCC's solution to its legal pickle? To ignore the "vast majority of rules adopted under Title II"[6] by selectively picking and choosing whatever provisions of Title II it found convenient to achieve a results-driven outcome, so that it could, in the FCC's own words, "tailor[] [Title II] . . . for the 21st century."[7] In effect, since the statute prohibited the rules the FCC wished to impose, the FCC simply

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. 47 U.S.C. § 201.
3. 47 U.S.C. § 202.
4. 47 U.S.C. § 203.
5. 47 U.S.C. § 160.
6. *2015 Open Internet Order*, 30 FCC Rcd at 5616, para. 51.
7. *Id.* at 5603-04, para. 5.

rewrote the statute. Respect at the FCC for precedent and its governing statute, it seemed, was officially dead.[8]

As to be expected, the FCC's *2015 Open Internet Order* was appealed. For reasons known only to them, however, the appellants made the strategic decision to focus their legal challenge on the statutory reclassification question and deliberately not to challenge how the FCC actually implemented Title II via its rules. This strategy proved to be a costly miscalculation.

Citing the Supreme Court's seminal case in *NCTA v. Brand X,*[9] the D.C. Circuit found in *United States Telecom v. FCC* that the FCC had wide—nearly unbounded—latitude to interpret the Communications Act and not only upheld the FCC's decision to reclassify but—because no one squarely challenged the FCC's tortured implementation of Title II—also upheld the FCC's ability to "tailor" how it chose to implement Title II.[10] In so doing, the D.C. Circuit—rather by accident or by design—has taken the concept of administrative deference under the *Chevron Doctrine* to the extreme.[11] As demonstrated below, *USTelecom* may have greatly expanded the FCC's authority to set the rates, terms, and conditions of private actors well beyond its statutory mandate. Accordingly, the statutory construct of "Title II" now has no meaning; it is some bizarre legal hybrid that the FCC made up and the D.C. Circuit has, albeit indirectly, sanctioned.

This Article is organized as follows: In Section II, I present several examples of how the FCC in its *2015 Open Internet Order* ignored both the plain language of Title II and extensive case law to achieve select political objectives, followed by a discussion of the D.C. Circuit's review of such legal manipulations. To provide an example of the troubling precedent set by *USTelecom*, I demonstrate in Section III how former FCC Chairman Tom Wheeler attempted (but, due to the clock running out by the Presidential election in 2016, ultimately did not succeed) to use the same theory of the case found in *USTelecom* to regulate the prices of Business Data Services. Conclusions and policy recommendations are at the end.

II. *2015 OPEN INTERNET ORDER* AND THE D.C. CIRCUIT'S RESPONSE

When the FCC was contemplating its current *2015 Open Internet Rules*, it had a choice of two legal theories under which it could have proceeded. Under the first theory, the FCC could have followed the legal roadmap set

8. *C.f.*, T. Randolph Beard et al., *Eroding the Rule of Law: Regulation as Cooperative Bargaining at the FCC*, PHX. CTR. POL'Y PAPER NO. 49 (Oct. 2015), http://www.phoenix-center.org/pcpp/PCPP49Final.pdf [https://perma.cc/Q9ZH-SH4W] (published as *Regulating, Joint Bargaining, and the Demise of Precedent,* 39 MANAGERIAL AND DECISION ECONS. 638 (2018)).

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

10. United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016), *pet. for rehearing en banc denied*, 855 F.3d 381 (2017), *cert. denied,* No. 17-504 (Nov. 5, 2018) (2018 WL 5779073).

11. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

forth by the D.C. Circuit in *Verizon v. FCC*[12] and enacted its rules using the authority provided by Section 706 of the Telecommunications Act of 1996.[13] The advantage of this approach is that because this was a relatively "greenfield" area of the law, the FCC would have had a great deal of latitude to determine its own path under a "commercially reasonable" standard.[14] The other option (which the Wheeler FCC ultimately chose) was a reclassification of broadband Internet access as a Title II common carrier telecommunications service. Of course, the downside of a Title II approach is that when you choose to apply a law designed for the old Ma Bell monopoly in 1934 to the Internet, you presumably also get the nearly eighty years of established case law that goes along with it.

By its own admission, the FCC in its *2015 Open Internet Order* imposed a "no blocking" rule that was specifically designed to "prohibit[] broadband providers from charging edge providers a fee . . . "[15] As the D.C. Circuit expressly recognized in *Verizon v. FCC*, this rule was intended to "bar providers from charging edge providers for using their service, thus forcing them to sell this service to all who ask at a price of $0."[16] With intent, the FCC's rule establishes "a regulated price of zero."[17] Thus, despite the FCC's protestations to the contrary,[18] because net neutrality is unambiguously price regulation (albeit "zero-price" regulation), the reclassification dictated by the FCC's *2015 Open Internet Order* must satisfy the relevant rate-making provisions of Title II of the Communications Act.[19] These provisions include:

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

13. Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996) (codified at 47 U.S.C. § 1302); *see also* Lawrence J. Spiwak, *What Are the Bounds of the FCC's Authority over Broadband Service Providers?—A Review of the Recent Case Law*, 18 J. OF INTERNET L. 1, 20 (2015).

14. Spiwak, *supra* note 13; *see also* Protecting and Promoting the Open Internet, *Notice of Proposed Rulemaking*, 29 FCC Rcd 5561, 5564-65, para. 10 (2014) [hereinafter *2014 Open Internet NPRM*].

15. *See 2015 Open Internet Order,* 30 FCC Rcd at para. 113.

16. *Verizon*, 740 F.3d at 657.

17. *Id.* at 668 (Silberman, J., concurring in part and dissenting in part).

18. *See*, *e.g.*, *2015 Open Internet Order,* 30 FCC Rcd 5601 at para. 37 (our "light-touch approach for the use of Title II" means "no rate regulation"); *Id.* at para. 382 ("there will be no rate regulation"); *see also* Tom Wheeler, *This is How We Will Ensure Net Neutrality,* WIRED (Feb. 4, 2015), https://www.wired.com/2015/02/fcc-chairman-wheeler-net-neutrality [https://perma.cc/EYL2-3WUE] ("there will be no rate regulation"). To its credit, the FCC in its *Restoring Internet Freedom Order* finally admitted to this obvious fact, observing that the *2015 Open Internet Order* "imposed price regulation with its ban on paid prioritization arrangements, which mandated that ISPs charge edge providers a zero price." Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order*, FCC 17-166, para. 101 (2017) [hereinafter *Restoring Internet Freedom Order*].

19. *See generally*, George S. Ford & Lawrence J. Spiwak, *Tariffing Internet Termination: Pricing Implications of Classifying Broadband as a Title II Telecommunications Service,* 67 FED. COMM. L.J. 1 (2015).

- Section 201, which mandates that rates must be "just and reasonable;"[20]
- Section 202, which prohibits "unreasonable" discrimination;[21] and
- Section 203, which provides the enforcement mechanism for Sections 201 and 202—i.e., tariffs.[22]

If, however, the FCC wants to refrain from imposing direct price regulation and surrender the pricing function to the market, then Section 10 allows the FCC to forbear from the tariffing requirements of Section 203 under a delineated set of circumstances.[23]

What is important to understand is that the ratemaking and forbearance provisions of Title II are not solely designed to govern the conduct of the regulated firm (the FCC's rules serve that function), but to govern the conduct of the *regulator*. Indeed, whenever the government intervenes in the market—particularly when it seeks to set the price, terms, and conditions of service of private actors—a myriad of important due process concerns come to the fore that must be respected to avoid a "takings" under the Fifth Amendment of the U.S. Constitution.[24] For this reason, courts have provided detailed guidance on how the FCC is supposed to interpret these various statutory provisions. As explained in detail below, the FCC's problem in its *2015 Open Internet Order* was that both the plain terms of the statute and this extensive precedent prohibited them from doing what they wanted to do.[25] The FCC's solution? Ignore the plain language of the statute and the case law in order to make up new theories of both rate regulation and forbearance under Title II *de novo*. Let's look at a few examples.

A. "Just and Reasonable" Rates

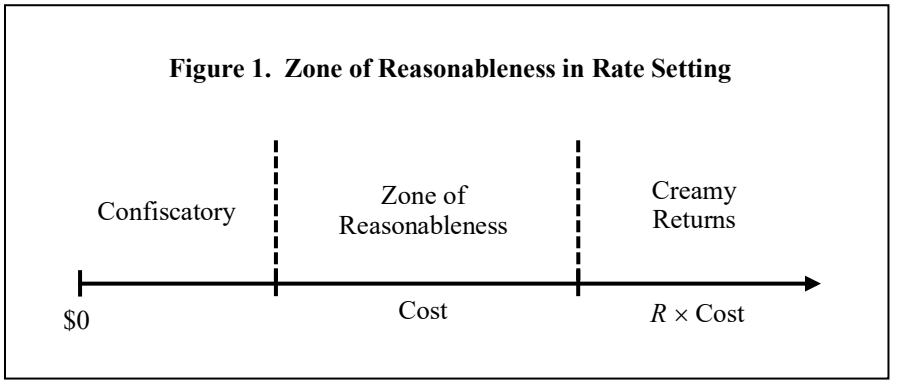
1. The FCC's Approach

Under Section 201 of the Communications Act, all rates must be "just and reasonable."[26] However, as the D.C. Circuit remarked over thirty years ago, the phrase "just and reasonable" is not "*a mere vessel into which meaning*

20. 47 U.S.C. § 201.
21. 47 U.S.C. § 202.
22. 47 U.S.C. § 203.
23. 47 U.S.C. § 160. Indeed, in cases where the FCC has opted to pursue this route in the past, it has relied upon the complaint process contained in Section 208 (47 U.S.C. § 208 (2012)) as a regulatory backstop. *See* Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Second Report and Order*, 11 FCC Rcd 20730 (1996).
24. The Fifth Amendment to the U.S. Constitution provides, in the relevant part, that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.
25. Ford & Spiwak, *supra* note 19.
26. 47 U.S.C. § 201(b).

must be poured."[27] The problem, of course, is that ratemaking is not "an exact science."[28] For this reason, courts simply require that in order to satisfy the "just and reasonable" standard the FCC must set a regulated rate that falls within the *zone of reasonableness*. As illustrated in Figure 1, this zone of reasonableness lies between rates that are *confiscatory* at the low end (that is, below cost and a "takings" under the Fifth Amendment) and rates that are *excessive* at the high end (that is, "creamy returns," the limit of which is defined by the markup *R*).[29] As the Supreme Court held in its seminal *Permian Area Rate Cases* ruling, the zone of reasonableness is such that the rate "may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interest, both existing and foreseeable."[30] So, in attempting to set a "just and reasonable" rate, the FCC must set a rate that exceeds cost, but not by too much.[31]

Figure 1. Zone of Reasonableness in Rate Setting



As noted above, in its *2015 Open Internet Order*, the FCC imposed a "no blocking" rule that was specifically designed to "prohibit broadband providers from charging edge providers a fee."[32] This rule is intended to "bar broadband providers from charging edge providers for using their service,

27. *See*, *e.g.*, Farmers Union Cent. Exch. v. FERC*,* 734 F.2d 1486, 1504 (D.C. Cir. 1984), *cert denied sub nom.*, 469 U.S. 1034 (1984) (emphasis added) (citation omitted) (internal quotation marks omitted). It is important to recognize that the "just and reasonable" standard is not exclusive to the Communications Act. This standard can also be found, for example, in the Federal Power Act and in the Natural Gas Act, all of which were enacted during the same time period.

28. *See*, *e.g.*, Fed. Power Comm'n. v. Conway Corp., 426 U.S. 271, 278 (1976*);* WorldCom v. FCC*,* 238 F.3d 449, 457 (D.C. Cir. 2001); Sw. Bell Tel. Co. v. FCC, 168 F.3d 1344, 1352 (D.C. Cir. 1999); Time Warner Entm't Co. v. FCC, 56 F.3d 151, 163 (D.C. Cir. 1995); United States v. FCC, 707 F.2d 610, 618 (D.C. Cir. 1983); *see also* Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered By Competitive Local Exchange Carriers; Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221, 14276, 14297-98, paras. 96, 144 (1999).

29. *See*, *e.g.*, *Farmers Union,* 734 F.2d at 1502-03 (citations omitted).

30. Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968).

31. I would like to thank Phoenix Center Chief Economist Dr. George S. Ford for his graphic rendering of the "zone of reasonableness."

32. *See 2015 Open Internet Order,* 30 FCC Rcd at 5647, 5648-49, paras. 107, 113.

thus forcing them to sell this service to all who ask at a price of $0."[33] Thus, the FCC's rule establishes "a regulated price of zero."[34] Accordingly, if edge providers are "customers" of BSPs as the D.C. Circuit found in *Verizon*, then the FCC's *2015 Open Internet Order* has the unambiguous effect of requiring BSPs to provide carriage to edge providers without any compensation.[35]

By directly setting a "zero-price," the FCC's actions violated many basic principles of ratemaking. For example, under the plain terms of the Communications Act, if edge providers are in fact customers of a BSP (as the D.C. Circuit found in *Verizon*) and Title II applies to this service as the *Order* plainly states, then a BSP must be allowed to charge a positive "fee" for this termination service because a common carrier is "for hire."[36] Indeed, the statute defines a service regulated under Title II as an "offering [] *for a fee* directly to the public."[37] Equally as important, this positive fee must also satisfy the "just and reasonable" ratemaking standard contained in Section 201. However, the FCC may not set a rate arbitrarily. Instead, the FCC must provide its whys and wherefores on how it derived the rate.[38] The FCC provided no such analysis in its *2015 Open Internet Order*.[39]

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33. *See* Verizon v. FCC*,* 740 F.3d 623, 657 (D.C. Cir. 2014) (citing Cellco P'ship v. FCC, 700 F.3d 534, 548 (2012)).

34. *Verizon*, 740 F.3d at 668 (Silberman J., concurring in part and dissenting in part).

35. *Id.* at 654 (Commission seeks to "compel[] an entity to continue furnishing service at no cost.").

36. 47 U.S.C. §§ 153(11), (53) (2012).

37. *Id*. at § 153(53) (emphasis added).

38. *See*, *e.g.*, Century Commc'ns Corp. v. FCC, 835 F.2d 292, 300–02 (D.C. Cir. 1987) (rejecting FCC's judgment where supported by "scant" evidence), *cert. denied,* 486 U.S. 1032 (1988); Cincinnati Bell Tel. Co. v. FCC, 69 F.3d 752, 760, (6th Cir. 1995) (overturning Commission's judgment when FCC "provide[d] to this Court nothing, no statistical data or even a general economic theory, to support its argument").

39. The exchange of voice traffic among carriers, a service also subject to Sections 201 and 202, is arguably priced at zero under the FCC's bill-and-keep regulations for terminating voice traffic. Thus, so the argument goes, the FCC may also impose a zero rate for the service offered to edge providers. This argument holds no water. Bill-and-keep is based on the FCC's authority over reciprocal compensation under Sections 251(b)(5) (47 U.S.C. § 251(b)(5)) and 252(d)(2) (47 U.S.C. § 252(d)(2)) of the Act. That is, the bill-and-keep regime only applies to parties seeking to impose rates by tariff or in the context of a Section 252 agreement between carriers. Parties are otherwise free to contract for different rates.

More importantly, carrier-to-carrier relationships, governed by Sections 251 and 252 of the Communications Act, are not "customer" relationships, and edge providers are not, today, carriers; they are customers. *See* Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform -- Mobility Fund, *Order*, 26 FCC Rcd 17,663 (2011). The FCC has not purported to classify edge providers as common carriers. As observed by the 10th Circuit Court of Appeals in FCC 11-161*,* 753 F.3d 1015 (10th Cir. 2014), when ruling on the FCC's *Connect America Fund Order,* carrier-to-carrier relationships involve the "recovery of costs through the offsetting of reciprocal obligations." 753 F.3d at 1128. Bill-and-keep is not per se "zero-price" regulation since there is consideration in the form of "reciprocal obligations," and the "recovery of costs" is a direct consideration. Besides, the FCC has expressly forborne from Sections 251 and 252 in the *2015 Open Internet Order* and thus must rely on its authority under Sections 201 and 202 when applying "Title II [] to the second side of the market." *See 2015 Open Internet Order*, 30 FCC Rcd at 5849-52, paras. 513-14.

Formulating termination rates is likely to be a complex and arduous task, but drudgery is no excuse for the FCC's avoidance of the requirements of its own choice to apply Title II. Unquestionably, the cost of a service is not zero—there are no free lunches. In fact, it could be argued that most of the costs of the broadband network are attributable to edge providers, since the bulk of traffic is downstream rather than upstream (a ratio of about 6:1).[40] Under a fully-distributed cost formula, it is feasible that much of the costs would be assigned to the edge providers.[41] As such, it may be that the revenues from edge providers could eventually make up a lion's share of BSP revenue from the sale of broadband service. In such a world, the consumer would benefit greatly. Economic theory predicts that as the edge provider's price rises, the end-user's price falls.[42] A more balanced rate structure across the two sides of the market may be beneficial to both network deployment and service adoption.

Unfortunately, the FCC failed to even consider such inquiry in its *2015 Open Internet Order*. In fact, it did nothing.[43] What cost standard was used to establish this zero price? Historical cost? Forward-looking cost? Marginal cost? Average cost? Total Element Long Run Incremental Cost? We cannot know, because the FCC arbitrarily set a price of zero without a shred of analysis.[44] Instead, the FCC bluntly told BSPs that they are prohibited from

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The bill-and-keep regime also includes two backstops unavailable to BSPs. First, the 10th Circuit recognized in *FCC 11-161* that to the extent costs are not recovered from such compensation, "[s]tates are free to set end-user rates, and the Order does not prevent states from raising end-user rates to allow a fair recovery of termination costs." *FCC 11-161*, 753 F.3d at 1130. Under the express terms of the *2015 Open Internet Order,* however, retail broadband prices were not regulated so there is no mechanism by which to ensure that costs are recovered. Second, if intercarrier compensation is insufficient to cover costs, the courts have noted that "the FCC reforms include funds for carriers that would otherwise lose revenues." *Id.*; *see also* Ace Tel. Ass'n v. Koppendrayer, 432 F.3d 876, 880 (8th Cir. 2005). The *2015 Open Internet Order* neither created nor even considered a subsidy scheme designed to broadly support BSPs impacted by the uniform zero-price rule. Cost recovery is not merely hypothetical. The FCC has observed elsewhere that the "financial incentives for private deployment of competitive networks are sometimes insufficient." City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160a-340 et seq., *Memorandum and Order*, 30 FCC Rcd 2408, para. 3 (2015); *rev'd,* Tennessee v. FCC, 832 F.3d 597 (6th Cir. 2016). Moreover, the economic theory of two-sided markets affirms that a regulated price cut on one side of a two-sided market will not be fully offset by price increases on other side of that market. *See* E. Glen Weyl, *The Price Theory of Two-sided Markets* 17-18 (2006).

At a minimum, if the carrier-to-carrier bill-and-keep type regime is created for edge provider termination service to BSPs, then edge providers must become telecommunications carriers, a formal classification that likewise will subject edge providers to Title II regulation. The *2015 Open Internet Order* does not classify edge providers as common carriers.

40. Sandvine, *Global Internet Phenomena Report*, 1H 2014, 1, 5 (2014).

41. *C.f.* STEPHEN J. BROWN & DAVID S. SIBLEY, THE THEORY OF PUBLIC UTILITY PRICING 44-49 (1986).

42. *See* Weyl, *supra* note 39; Jay Pil Choi & Byung-Cheol Kim, *Net Neutrality and Investment Incentives*, 41 RAND J. OF ECONS. 446-465, 453-57 (2010).

43. Despite having this wealth of case law brought to its attention, the FCC summarily proceeded to ignore it. *See 2015 Open Internet Order,* 30 FCC Rcd at 5843, n.1519.

44. Indeed, even in the case of TELRIC—a methodology many argued produced a confiscatory rate—the FCC demonstrated its why's and wherefores to the satisfaction of the courts. *See generally* AT&T v. Iowa Utilities Bd., 525 U.S. 366 (1999); Verizon Commc'ns Inc. v FCC, 535 U.S. 467 (2002) (finding FCC had provided sufficient detail in establishing TELRIC rate for unbundled network elements).

charging edge providers a fee for terminating access (despite the fact that edge providers impose a cost on the network). Absent some cost analysis indicating otherwise, therefore, the FCC—by definition—arbitrarily established a "confiscatory" (i.e., below cost) rate for the service BSPs offer to edge providers under Section 201.[45]

2. The D.C. Circuit's Response

As noted in the preceding section, when the FCC first attempted to impose a "no blocking" and "no paid prioritization" rule in 2010, the D.C. Circuit in *Verizon* repeatedly pointed out that the FCC was imposing zero-price regulation on BSPs under Title I.[46] (In fact, this *de facto* price regulation was the crux of the court's reversal of the FCC's *2010 Open Internet Rules* in *Verizon,* finding that the FCC was improperly attempting to regulate Title I information services as common carriers under Title II.[47]) Yet, when essentially the same rules came before the court again in *USTelecom*, the litigants failed to raise this argument on appeal. As a court will only respond to arguments made before it, the D.C. Circuit accepted this zero-price regulation at face value in the context of Title II. In fact, they made no mention of it at all in their opinion.

This lack of attention to the FCC's attempt to force BSPs to carry edge providers' traffic without any compensation was a serious omission by both the litigants and, by extension, the court. Indeed, throughout the *2015 Open Internet Order,* the FCC made great hay out of using the "just and reasonable" standard in Section 201 to justify its rules, yet the court never once stopped to consider whether the actual rate imposed by the FCC's rules—i.e., zero—passed muster under that standard. By giving the FCC a free pass to set a regulated rate without conducting an underlying cost analysis, the court has established a dangerous precedent. Under an expansive reading of *USTelecom*, the FCC now has wide latitude to set the rates, terms, and conditions of private firms with little regard for their guaranteed due process protections under the Fifth Amendment. Such a result is particularly curious given that the court has not hesitated to reprimand the FCC in the past for its

45. Ford & Spiwak, *supra* note 19.

46. *See* discussion *supra* in Section II.A.1.

47. *See*, *e.g.*, Verizon v. FCC, 740 F.3d 623, 655 (D.C. Cir. 2014) ("We have little hesitation in concluding that the anti-discrimination obligation imposed on fixed broad-band providers has 'relegated [those providers], *pro tanto,* to common carrier status.' In requiring broadband providers to serve all edge providers without 'unreasonable discrimination,' this rule by its very terms compels those providers to hold them-selves out 'to serve the public indiscriminately.'" (citation omitted)).

failure to engage in the requisite due diligence when reviewing rate cases.[48] Even though ratemaking is a complex problem, complexity is no excuse for the court to give the FCC a pass in this instance.[49]

B. Undue Discrimination

1. The FCC's Approach

Under the express terms of Section 202(a), carriers are allowed to engage in *reasonable* discrimination.[50] In fact, the FCC conceded this very point before the D.C. Circuit in *Orloff v. FCC*.[51] But how to define "unreasonable" discrimination? According to well-established case law, any charge that a carrier has unreasonably discriminated must satisfy a three-step inquiry (in sequence): (1) whether the services offered are "like"; (2) if they are "like," whether there is a price difference among the offered services; and (3) if there is a price difference, whether it is reasonable.[52] If the services are not "like," or not "functionally equivalent" in the legal parlance, then discrimination is not an issue and the investigation ends. There is no valid discrimination claim for *different* prices or price-cost ratios for *different* goods.[53]

Notably, a determination of whether services are "like" is based upon neither cost differences nor competitive necessity. Cost differentials are excluded from the likeness determination and introduced only to determine "whether the discrimination is unreasonable or unjust."[54] Likeness is based

48. As a classic case, take the example of payphone rates. While the FCC was charged with a simple task—setting a single rate—it took three separate attempts before the court finally found that the FCC acted correctly. *See* Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, *Report and Order*, 11 FCC Rcd 20541 (1996) [hereinafter *First Order*]; Ill. Pub. Telecomms. Ass'n v. FCC, 117 F.3d 555 (D.C. Cir. 1997) [hereinafter *Payphones I*]; Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, *Second Report and Order*, 13 FCC Rcd 1778 (1997); MCI Telecomms. Corp. v. FCC, 143 F.3d 606 (D.C. Cir. 1998) [hereinafter *Payphones II*]; Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Third Report and Order and Order on Reconsideration of the Second Report and Order*, 14 FCC Rcd 2545 (1999); Am. Pub. Commc'ns Council v. FCC*,* 215 F.3d 51 (D.C. Cir. 2000) [hereinafter *Payphones III*].

49. One potential explanation may lie with the author of the majority's opinion—Judge David Tatel—who has shown a reluctance in the past to focus on the FCC's violation of basic ratemaking principles. *See*, *e.g.*, Lawrence J. Spiwak, *From International Competitive Carrier to the WTO: A Survey of the FCC's International Telecommunications Policy Initiatives 1985-1997*, 51 FED. COMM. L. J. 111 (1998); *Addendum*, 51 FED. COMM. L.J. 519 (1999).

50. *See* 47 U.S.C. § 202(a) (2018).

51. Orloff v. FCC, 352 F.3d 415, 420 (D.C. Cir. 2003), *cert denied,* 542 U.S. 937 (2004) ("the [FCC] emphasizes that § 202 prohibits only *unjust* and *unreasonable* discrimination in charges and service") (emphasis in original).

52. *See*, *e.g.*, MCI Telecomms. Corp. v. FCC, 917 F.2d 30, 39 (D.C. Cir. 1990) and citations therein.

53. *Id.; see also* George S. Ford & Lawrence J. Spiwak, *Non-Discrimination or Just Non-Sense: A Law and Economics Review of the FCC's New Net Neutrality Principle*, PHX. CTR. PERSPECTIVE NO. 10-03 (Mar. 24, 2010), http://www.phoenix-center.org/perspectives/Perspective10-03Final.pdf [https://perma.cc/A8YH-56LT].

54. *Id.*

solely on functional equivalence.[55] If the services are determined to be "like" or "functionally equivalent," then "the carrier offering them has the burden of justifying the price disparity as reasonable," such as a difference in cost.[56] If a price difference is not justified, then the price difference is deemed unlawful. A price difference cannot be arbitrarily presumed unlawful, yet that is exactly what the FCC proceeded to do in its *2015 Open Internet Order*.

One usual measure to determine reasonableness is an inquiry as to whether the different rates are offered to "similarly situated" customers.[57] That is, are the customers roughly the same size and exchange similar levels of traffic, or, for example, is one customer a wholesale customer while the other only buys at retail? In the standard course of regulating telecommunications rates, such distinctions permit different rates. A prioritized termination service is not the functional equivalent of the typical termination service, so there is no claim of unreasonable discrimination under Section 202 across the two services. Nor does Netflix.com place the same demands on the network as does craigslist.org. To the extent the Open Internet is about slow and fast lanes and Title II is about "just and reasonable" and "not unreasonably discriminatory" rates, Title II offers no barrier to different services with different rates. In fact, it seems more likely that Title II facilitates rather than impedes the creation of prioritized termination.[58]

Clearly, a "no paid prioritization" rule violates both the letter and the spirit of Section 202. As was its expansive interpretation of Section 201, however, the FCC's response was to ignore the law. In this particular case, the FCC side-stepped the law by promulgating its "no paid prioritization" rule—not under Section 202(a), the provision in the Communications Act that is eponymously charged with regulating all issues of discrimination—but under the "public interest" catchall of Section 201(b) and Section 706.[59]

2. The D.C. Circuit's Response

Similar to its blessing of the FCC's tortured approach to the "just and reasonable" standard of Section 201, the court was just as accommodating to the FCC's disregard of the plain language of Section 202. Rather than the blind neglect the court adopted regarding the FCC's use of Section 201, however, this time the court decided to engage in a bit of legal gymnastics.

As noted in the previous section, rather than confront the plain language of Section 202(a) that expressly permits *reasonable* discrimination, the FCC adopted its "no paid prioritization" rule under the "public interest" catchall of

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55. *Id.*
56. *Id.*
57. *See*, *e.g.*, Competition in the Interstate Interexchange Marketplace, *Notice of Proposed Rulemaking*, 5 FCC Rcd 2627, 2642-43, paras. 131-139 (1990) (citing Associated Gas Distribs. v. FERC, 824 F. 2d 981, 1007-1013 (D.C. Cir. 1987); *but c.f.* Orloff v. FCC, 352 F.3d 415, 420 (2003) (allowing a mobile CMRS carrier to charge different promotional rates to similarly situated retail customers under *competitive* market conditions in the absence of tariffs)).
58. *See* Ford & Spiwak, *supra* note 19, at 13.
59. *See 2015 Open Internet Order,* 30 FCC Rcd at 5728, para. 292.

Section 201(b) and Section 706—an explicit recognition that the FCC was skirting the plain language of the statute.[60] In so doing, this use of Section 706 apparently provided a sufficient legal hook for the court. Citing its ruling in *Verizon,* the court held that not only does the FCC have independent rulemaking authority under Section 706 but that such authority "extends to rules 'governing broadband providers' treatment of internet traffic'—including the anti-paid-prioritization rule—in reliance of the virtuous cycle theory."[61] In other words, under the court's logic, once Section 706 is invoked, Section 202's express allowance of reasonable discrimination becomes irrelevant.

The majority's willingness to give the FCC a pass on basic ratemaking principles did not escape the dissent's watchful eye, however. As Judge Stephen Williams noted,

> . . . I can find no indication—and the [FCC] presents none—that any of the agencies regulating natural monopolies, such as the Interstate Commerce Commission, Federal Energy Regulatory Commission, or Federal Communications Commission—has ever attempted to use its mandate to assure that rates are "just and reasonable" to invalidate a rate distinction that was not unreasonably discriminatory. To uproot over a century of interpretation—and with so little explanation—is truly extraordinary.[62]

Yet, because Judge Williams was in the minority, the majority's blessing of the FCC's abject failure to adhere to basic principles of ratemaking remains the law of the land.

Worse, *USTelecom* represents a significant expansion of the D.C. Circuit's interpretation of Section 706. While the court had previously

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60. Section 706 is comprised of two relevant sections. Under Section 706(a),

> The [FCC] and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment. 47 U.S.C. § 1302(a).

Section 706(b), in turn, requires the FCC to conduct a regular inquiry "concerning the availability of advanced telecommunications capability . . . " 47 U.S.C. § 1302(b). It further provides that should the FCC find that if "advanced telecommunications capability is [not] being deployed to all Americans in a reasonable and timely fashion[,]" then it "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." *Id.* The statute defines "advanced telecommunications capability" to include "broadband telecommunications capability." 47 U.S.C. § 1302(d)(1).

61. United States Telecom Ass'n v. FCC, 825 F.3d 674, 734 (D.C. Cir. 2016) (citing Verizon v. FCC*,* 740 F.3d 623, 639-40, 644-49 (D.C. Cir. 2014)).

62. *USTelecom*, 825 F.3d at 759-760 (Williams, J., concurring in part and dissenting in part) (citations omitted).

recognized Section 706 as an independent source of authority in *Verizon*, prior to *USTelecom* the D.C. Circuit was quite adamant that the FCC's use of its Section 706 authority was not unfettered. As the court made plain in *Verizon,* "any regulatory action authorized by Section 706(a) [must] fall within the [FCC]'s subject matter jurisdiction over such communications—*a limitation whose importance this court has recognized in delineating the reach of the [FCC]'s ancillary jurisdiction.*"[63] Reading this case in conjunction with the court's earlier holding in *Comcast v. FCC*, this language means that any use of Section 706 must be tied directly to a specific delegation of authority in "Title II, III, or VI . . . "[64] In other words, prior to *USTelecom,* precedent dictated that one should read Section 706 as some sort of "enhanced" ancillary authority to the Communications Act—subject to appropriate constraints—which would provide sufficient legal jurisdiction for the FCC to oversee the activities of BSPs providing Title I "information" services.[65] Under the pre-*USTelecom* reading of Section 706, therefore, precedent would seem to dictate that if the FCC wants to control the rates, terms, and conditions of BSPs under Section 706, then the FCC needs to look exclusively at ratemaking portions of the Communications Act—namely, Sections 201 and 202.

Significantly, this reading of Section 706 was nothing new to the court. In fact, the D.C. Circuit's 2009 ruling in *Ad Hoc Telecommunications Users Committee v. FCC*—a case the FCC cited with approval several times in its *2015 Open Internet Order*—is directly on point.[66] In *Ad Hoc,* the court was asked to rule on the FCC's decision to use its Section 10 authority to forbear from dominant carrier price regulation for special access services. To support its decision to forbear, the FCC also argued that its actions would further Section 706's goals of promoting broadband deployment. After review, the court held that the "general and generous phrasing of Section 706 means that the FCC possesses significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband—a statutory reality that assumes great importance when parties implore courts to overrule FCC decisions on this topic."[67]

However, the court in *Ad Hoc* made it crystal clear that the FCC's forbearance authority did not lie in Section 706 itself, but exclusively in Section 10. As the court stated bluntly, "*As contemplated by [Section] 706 . . . [f]orbearance decisions are governed by the Communications Act's [Section] 10*."[68] Under this reasonable reading of the statute, therefore, even if the FCC un-reclassifies and returns broadband Internet access service to a Title I "information service" (as it did in the *Restoring Internet Freedom Order*), then the FCC—should it so chose—can implement adequate

63. *Verizon*, 740 F.3d at 639-40 (emphasis added). It is interesting to note that when the FCC cited to this exact passage from *Verizon* in its *Order,* the FCC specifically omitted the italicized language above. *See 2015 Open Internet Order*, 30 FCC Rcd at 5561, para. 138.

64. Comcast v. FCC, 600 F.3d 642, 654 (D.C. Cir. 2010).

65. *See* Spiwak, *supra* note 13.

66. Ad Hoc Telecom. Users Comm. v. FCC, 572 F. 3d 903, 907 (D.C. Cir. 2009).

67. *Id.* at 906-07.

68. *Id.* at 907 (emphasis added).

safeguards to protect an "Open Internet" under Section 706 so long as such actions are constrained by the relevant provisions of the Communications Act via the doctrine of ancillary jurisdiction.[69]

The problem with the D.C. Circuit's ruling in *USTelecom* is that this decision marks a significant expansion of the FCC's Section 706 authority not only from the court's 2009 ruling in *Ad Hoc,* but from its rulings in *Comcast* and *Verizon* as well. Indeed, the majority's ruling in *USTelecom* does not just elevate Section 706 to same level of 201 and 202; *USTelecom* essentially holds that Section 706 now *supersedes* Sections 201 and 202. The problem with such an expansive reading is that at least under Section 201 and 202, the FCC must comply with basic ratemaking principles to ensure, for example, that the FCC does not establish a confiscatory rate. Under *USTelecom,* however, the D.C. Circuit has told the FCC that if it wants to regulate directly BSP rates, terms, and conditions under Section 706, then it need not first determine that rates are "just and reasonable."[70] Instead, the FCC is now free to pick a rate out of thin air so long as it can claim that this rate will lead to increased broadband deployment.[71]

C. Forbearance of Tariffing Requirements

1. The FCC's Approach

Finally, we come to the FCC's forbearance decision. In its *2015 Open Internet Order*, the FCC used its authority under Section 10 to forbear from the tariffing requirements of Section 203 when it reclassified broadband Internet access as a Title II common carrier telecommunications service.[72] Prior to the *2015 Open Internet Order*, the FCC had never granted forbearance of tariffing requirements in the total absence of competition—either competition was present or at least imminent.[73] The reason is because under the plain language of Section 10 of the Communications Act, the FCC may only forbear when the enforcement of such regulation or provision is not

69. In the *Restoring Internet Freedom Order*, the FCC opted to pursue a very different course, however. FCC 17-166.

70. The preceding discussion raise an interesting academic question: what if FCC had adopted a "commercially reasonable" standard similar to one D.C. Circuit approved in *Cellco* as originally contemplated in the FCC's *2014 Open Internet NPRM*. *See 2014 Open Internet NPRM,* 29 FCC Rcd at 5564-65, para. 10. The FCC most likely would not have run into the problem of whether it violated the "just and reasonable" standard because the FCC would not be directly setting a rate. Instead, companies would have privately negotiated rate and then the FCC would have evaluated that rate under a defined set of parameters. *See* Spiwak, *supra* note 13.

71. In the *Restoring Internet Freedom Order,* the FCC held that going forward it would view Section 706 as hortatory rather than an independent source of authority. *See Restoring Internet Freedom Order,* FCC 17-166, at paras. 268-283. However, what one Commission can do, the next can undo, so the fact that the current Commission does not view Section 706 as independent authority does not mean that a future Commission will take the same view. *See*, *e.g.*, Verizon v. FCC*,* 740 F.3d 623, 636 (D.C. Cir. 2014) ("[T]he Commission need not remain forever bound by . . . [a] restrictive reading of section 706(a).").

72. *2015 Open Internet Order*, 30 FCC Rcd at 5841-42, para. 497.

73. For a detailed discussion of the FCC's forbearance authority, *see* George S. Ford & Lawrence J. Spiwak, *Section 10 Forbearance: Asking the Right Questions to Get the Right Answers*, 23 COMMLAW CONSPECTUS 126 (2014).

necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory.[74]

Stated another way, the FCC needs to ensure that the market will ensure that rates continue to fall under the "just and reasonable" standard before it can eliminate tariffs.[75] The problem for the FCC, however, was that its entire Open Internet paradigm up to 2015 rested on the proposition that each individual BSP is a "terminating monopoly" (subsequently changed to the more innocuous term "gatekeeper" in the *2015 Open Internet Order*), which, by the FCC's own terms, means that every BSP has the ability to raise price and restrict output.[76]

Yet in the *2015 Open Internet Order*, the FCC rejected the obvious logic of the statute, holding that it was free to surrender ratemaking to the market even in the presence of a "gatekeeper" because "nothing in the language of Section 10 precludes the [FCC] from proceeding in that basis where warranted."[77] The problem is that the FCC's legal logic for its new forbearance standard is circular. Let's walk though it step-by-step:

(1) Because all BSPs are "gatekeepers"/"terminating monopolists," the relevant market is each individual company; thus, each BSP is "dominant" over itself and, by definition, the potential for additional entry is zero.

(2) Under Title II, "dominant" firms (i.e., those firms with market power) have traditionally been subject to rate regulation under Section 201 and 202.[78]

(3) Rate regulation is enforced by the tariffing provisions of Section 203.

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74. 47 U.S.C. § 160(a)(1).

75. *See* Orloff v. FCC, 352 F.3d 415, 420 (D.C. Cir. 2003) (In the case of Section 203 forbearance, "[r]ates are determined by the market, not the [FCC], as are the level of profits.").

76. In its *2015 Open Internet Order,* in response to comments from the dissent in *Verizon* that "because terminating monopolies are not largely discussed outside of Commission jurisprudence, and '[t]he gatekeeper effect is a tool that facilitates the exercise of market power over sellers; it is not market power itself,'" the FCC elected to substitute the phrase "gatekeeper" for "terminating monopoly." For all intents and purposes, the FCC essentially uses these terms to mean the same thing. *See 2015 Open Internet Order*, 30 FCC Rcd at 5630, n.130 ("However, our reliance on these terms for our determinations today focuses on how this unique "gatekeeper" position of broadband providers in combination with other realities about broadband availability and access affects broadband providers' incentives and abilities to harm the open nature of the Internet. As explained further below, the FCC's discussion of these terms is especially important in combination with switching costs and limited retail broadband competition for fixed broadband. With respect to mobile, the presence of some additional retail competition is not enough to alter our conclusion here.").

77. *2015 Open Internet Order*, 30 FCC Rcd at 5807-08, para. 439 (citation omitted).

78. *See*, *e.g.*, Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier, *Order*, 11 FCC Rcd 3271 (1995).

(4) Under the plain terms of Section 10, the FCC may only forbear from the tariffing requirements of Section 203 when "enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are 'just and reasonable' and are not unjustly or unreasonably discriminatory."[79] In other words, if competitive forces can keep prices in check, then forbearance from the tariffing requirements of Section 203 is warranted. However, if a firm is "dominant" (i.e., it has the ability to raise price and restrict output), then forbearance is inappropriate.

(5) Yet, under plain terms of the *2015 Order*, the lack of competition due to the presence of a "gatekeeper" is immaterial to the FCC's Section 10 analysis. Under the FCC's logic, it can forbear from the tariffing requirements of Section 203 in this case because enforcement of the "no paid prioritization" and "no blocking" rules are sufficient to ensure that rates will remain "just and reasonable" as required by Section 10.[80]

The logical flaw in the FCC's argument is readily apparent: *The FCC is not surrendering ratemaking to the market because it does not trust the market to ensure that prices will remain "just and reasonable."* Indeed, on the one hand, the FCC claims that it is forbearing from the formal implementation of price regulation under Section 203, but on the other hand the FCC is nonetheless imposing a regulated price of zero without the due process protections of a tariff under Section 706. This it cannot do: Again, either the FCC may regulate prices via tariffs (subject to the due process contours of established law), or it may forbear from the tariff requirements and rely upon the market to ensure that rates remain "just and reasonable." The FCC cannot directly set a regulated price in a de-tariffed market, but that is precisely what it did in the *2015 Open Internet Order*.[81]

These legal shenanigans did not go un-noticed. As then-Commissioner Ajit Pai warned in his lengthy dissent to the *2015 Order*,

> What I cannot find—and what our precedent does not countenance—is any instance where the FCC eliminated economic regulations without first performing any market analysis or finding competition sufficient to constrain anticompetitive pricing and behavior. *** [T]he FCC has not and, under the statute, cannot forbear from *any* economic regulation on a whim or a lark. Instead, it must identify *something else* that will constrain pricing, and that something else has always been—and can only be—competition.

79. 47 U.S.C. § 160.
80. *2015 Open Internet Order*, 30 FCC Rcd at 5809-14, paras. 441-52.
81. *C.f.*, Orloff v. FCC, 352 F.3d 415, 420 (D.C. Cir. 2003).

> But in forbearing from economic regulations in today's *Order*, the [FCC] doesn't just fail to find sufficient competition. It goes so far as to find that competition is lacking in the market for broadband Internet access service: Competition "appears to be limited in key respects," with consumers facing "high switching costs . . . when seeking a new service," and "broadband providers hav[ing] significant bargaining power in negotiations with edge providers and end users." *** If that's truly how the FCC sees the market, it should go ahead and use the m-word—monopoly—and rely on the economic regulations of the Communications Act that Congress designed to prevent a monopolist (back in 1934, it was Ma Bell) from exercising market power to the detriment of consumers. I do not see how the [FCC] could possibly forbear from economic regulations while at the same time finding that competition is so limited or nonexistent. Yet the *Order* does just that.[82]

For these reasons, Commissioner Pai pointed out that the FCC essentially invented "out of whole cloth a new method of conducting a forbearance analysis that bears little resemblance to either the terms of the Act or the [FCC]'s precedents."[83] Instead, as Commissioner Pai explained, the "forbearance section of the *Order* most clearly reveals that the [FCC]'s decision today is driven neither by the law nor the facts but rather by the need to reach certain predetermined policy outcomes."[84] Commissioner Pai had a valid point: when it comes to the FCC's new forbearance standard, it is readily apparent that the FCC did not forbear from tariffing requirements to relieve constraints on the regulated. Quite to the contrary, the FCC acted to relieve constraints on itself as the regulator.

2. The D.C. Circuit's Response

Once again, the court upheld the FCC's tortured application of the plain terms of the Communications Act. As noted above, however, this result was not due to superior legal acumen by the FCC, but again the consequence of litigation tactics.

First, counsel for the appellants never directly challenged the FCC's new forbearance standard. Instead, Petitioners were more upset about the various provisions in the Communications Act from which the FCC did not

82. *See 2015 Open Internet Order,* 30 FCC Rcd at 5979 (Comm'r Pai, dissenting) (citations omitted) (emphasis in original).

83. *Id*. at 5976.

84. *Id.* at 5975

forbear.[85] Certainly, a regulated firm cannot be expected to challenge a relaxed standard for setting aside regulation (ignoring, unfortunately in this case, the fact that the relaxed standard was being used *to expand* regulation).

Second, the court found that for the one intervenor that did directly challenge the FCC's forbearance standard—Full Service Network—its counsel failed to make the requisite statutory arguments outlined above. As the court noted,

> Notably . . . Full Service Network has never claimed that the [FCC] misapplied any of the section 10(a) factors, failed to analyze competitive effect as required by section 10(b), or acted contrary to its forbearance precedent. Indeed, when pressed at oral argument, Full Service Network disclaimed any intent to make these arguments.[86]

Facing no meaningful opposition to the FCC's perversion of the plain language of Section 10, the court therefore upheld the FCC's new forbearance standard.

This perversion of Section 10 by both the FCC and the majority in *USTelecom* proved to be a bridge too far for Judge Janice Brown. In her scathing dissent to the court's denial of a petition for rehearing *en banc*, Judge Brown argued that both the FCC and the majority in *USTelecom* "disregard[ed] the nature of forbearance."[87] As Judge Brown observed,

> Forbearance permits the FCC *to reduce* common carriage regulation over telecommunications, *not expand* common carriage regulation by reclassifying an information service and shaping common carriage regulations around it. The FCC has consistently understood this, invoking forbearance toward one of "Congress's primary aims in the 1996 Act:" "deregulate telecommunications markets to the extent possible."
>
> ***
>
> There is a sad irony here. Both this Court and the Supreme Court admonished the FCC for asserting forbearance authority without congressional authorization when the [FCC]'s aim was *deregulatory*. Now, when the [FCC]'s aim is to *increase regulation*, this Court is willing to bless the [FCC] using

85. *See*, *e.g.*, Joint Brief for Petitioners USTelecom, NCTA, CTIA, ACA, WISPA, AT&T, and Centurylink, *USTelecom v. FCC* at 20 ("Although the Order forbears under 47 U.S.C. § 160 from some Title II provisions, massive new regulation of broadband Internet access service remains."); Joint Reply Brief for Petitioners USTelecom, NCTA, CTIA, ACA, WISPA, AT&T, and Centurylink in *USTelecom v. FCC* at p.22 (the FCC "never addresses the immense costs imposed by the many Title II provisions from which the Order did not forbear).

86. *See* United States Telecom Ass'n v. FCC, 825 F.3d 674, 732 (D.C. Cir. 2016).

87. *USTelecom*, 855 F.3d at 408 (*pet. for rehearing en banc denied*, Brown J., dissenting) (emphasis in original) (citations omitted).

> forbearance without any satisfaction of the statutory requirements, and at odds with the nature of forbearance itself.[88]

In Judge's Brown's view, if "the FCC is to possess statutory forbearance authority, it should conform to forbearance's statutory conditions and the overall statutory scheme. Neither is the case here."[89] Given such a perversion of the plain terms of Section 10, therefore, Judge Brown concluded that the "FCC's abuse of forbearance amounts to rewriting the 1996 Act in the bowels of the administrative state, when it should petition Congress for these purportedly-necessary changes."[90]

Judge Brown's dissent certainly vindicates FCC Commissioner Michael O'Reilly's concerns about the [FCC]'s *2015 Open Internet Order*. As Commissioner O'Reilly presciently noted in his dissent to the *2015 Open Internet Order*,

> [T]he most surprising—and troubling—aspect of the item is that it promises forbearance from most of Title II but does not actually forbear from the substance of those provisions. Instead, the item intends to provide the same protections using a few of the "core" Title II provisions that are retained: chiefly, sections 201, 202, and 706. I call this maneuver *fauxbearance*.[91]

And that is precisely the point: either the FCC can directly impose price regulation (and follow the rules thereto) under Title II, or it can deregulate and surrender to the market. Due process mandates that it cannot do both (except—apparently according to the D.C. Circuit—it can do so now).[92]

III. *USTELECOM* AND ITS AFTERMATH: THE FCC ATTEMPTS TO REGULATE BUSINESS DATA SERVICES

The notion that an administrative agency should be able to set the rates, terms and conditions without the due process protections of a tariff held great appeal to former FCC Chairman Tom Wheeler. For example, in 2016, the FCC launched a *Further Notice of Proposed Rulemaking* ("*FNPRM*") to develop a new policy framework for "Business Data Services" or "BDS" (formally known as "Special Access" services).[93] Without belaboring the details, the FCC essentially sought to divide the BDS world into two segments

88. *Id.* at 409 (emphasis in original) (citations omitted).
89. *Id.*
90. *Id.*
91. *2015 Open Internet Order,* 30 FCC Rcd at 5996 (Comm'r O'Reilly, dissenting).
92. *C.f.*, Orloff v. FCC, 352 F.3d 415 (D.C. Cir. 2003).
93. Business Data Services in an Internet Protocol Environment, Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, Special Access for Price Cap Local Exchange Carriers, AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Service, *Tariff Investigation Order And Further Notice Of Proposed Rulemaking*, 31 FCC Rcd 4723 (2016) [hereinafter *BDS Further Notice*].

based upon a simple head-count: markets that are "competitive" and markets that are "not." According to the *FNPRM*, if a market is competitive, then the FCC would remove price regulation; but if the FCC finds that a market is not competitive, then the FCC would impose price cap regulation on "dominant" carriers. Significantly, however, the FCC did not seek to enforce this rate regulation via the process outlined in the Communications Act—i.e., a tariff. Instead, the FCC proposed to forbear from the tariffing requirements of Section 203 and instead exclusively rely upon the general catch-all provisions of Sections 201 and 202 of the Communications Act.[94]

If this legal theory sounds familiar, it should. It was the same flawed theory of ratemaking and forbearance that the FCC used in its *2015 Open Internet Order*, which was ultimately upheld by the D.C. Circuit in *USTelecom*. By the FCC's own admission, the detariffed BDS markets were *not competitive*—i.e., firms have market power and, therefore, have both the incentive and ability to raise price and restrict output. Thus, by definition, the FCC cannot surrender enforcement of the "just and reasonable" standard to the market, yet that is exactly what it purported to do in the BDS context. But, just as in the *2015 Open Internet Order*, despite this alleged forbearance, the FCC was fully prepared to impose a regulated rate on "detariffed" providers without any cost justification (other than the fact that the FCC believed them to be "too damn high").[95]

Given the case law outlined above, the problems with the FCC's proposed approach in the *BDS Further Notice* become apparent: if the government wants to set a regulated price (i.e., a rate), then tariffing provides an important constraint on the FCC's behavior. For example, tariffing forces the FCC to engage in a serious analysis to see if a rate is "just and reasonable"—a task the FCC never attempted to do.[96] Indeed, in the absence of a full-fledged review of a tariff in a rate case, how is a carrier protected from the FCC setting a confiscatory (i.e., below-cost) rate in violation of the "just and reasonable" standard contained in Section 201? Short answer: it's not. Similarly, under Section 202, firms are allowed to engage in *reasonable* discrimination so long as they provide the same product at the same price to a "similarly situated" customer.[97] In the absence of a formal tariff where price terms and conditions are public to all, litigation of alleged "unreasonable" price discrimination will run rampant. As with its *2015 Open Internet Rules*, the FCC was not attempting to use its forbearance authority to relieve constraints on the regulated; quite to the contrary, the FCC was seeking to relieve the constraints on itself as the regulator.

With the 2016 election, political pressure forced then-FCC Chairman Tom Wheeler to pull his final *BDS Order* on the eve of the FCC vote (something Mr. Wheeler was not particularly happy about).[98] Mr. Wheeler's

94. *Id.* at para. 263.

95. *See* George S. Ford, *How (and How Not) to Measure Market Power Over Business Data Services*, PHX. CTR. POLICY PAPER NO. 50 (Sept. 2016), http://www.phoenix-center.org/pcpp/PCPP50Final.pdf [https://perma.cc/S7L4-E9FM].

96. *Id.*

97. *See* discussion *supra* Section II.B.

98. Lawrence J. Spiwak, *A Political Temper Tantrum at the FCC*, THE HILL (Dec. 1, 2016, 7:28 AM), http://thehill.com/blogs/pundits-blog/technology/308187-a-political-temper-tantrum-at-the-fcc [https://perma.cc/77SA-7QUT].

successor—current FCC Chairman Ajit Pai—subsequently formally withdrew Mr. Wheeler's approach and replaced it with an approach more in line with the established Title II jurisprudence outlined above: namely, where there is sufficient competition, the FCC would forbear from regulation, and in markets still served by only one firm, it would impose price regulation via mandatory tariffs under Section 203.[99] As the Pai-led FCC correctly observed, "we conclude it is not practical to detariff carriers that are now subject to—and will remain subject to—price cap regulation, *where the tariff is the tool the [FCC] has used—and will continue to use—to enforce that regulation*."[100] Still, with *USTelecom* still on the books, despite the restraint shown by the Pai-led Commission, the risk that a future FCC with activist regulatory proclivities could again set a rate without the due process protections that tariffs afford remains a very legitimate possibility.

IV. CONCLUSION

USTelecom has established a troubling precedent. As noted above, the statutory construct of "Title II" now has no meaning; it is some bizarre legal hybrid that the FCC made up and the D.C. Circuit has sanctioned. The big question, therefore, is whether the precedential effect of *USTelecom* will be limited or significant. My guess is the latter.

For example, in January 2018, the Federal Communications Commission under Republican Chairman Ajit Pai reversed the Obama Administration's controversial *2015 Open Internet Rules*,[101] ironically relying, in no small part, on the deference accorded to the FCC by the D.C. Circuit in *USTelecom* to interpret the ambiguous language of the Communications Act. As such deference is a double-edged sword, however, it is not a stretch to presume that once the Democrats regain power they will try to reinstate all or part of the *2015 Open Internet Order*.[102] (Of course, we

99. Business Data Services in an Internet Protocol Environment; Technology Transitions; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, *Report & Order*, 32 FCC Rcd 3459 (2017); *aff'd,* Charter Advanced Serv. v. Lange, 903 F.3d 715 (8th Cir. 2018); *see also* George S. Ford, *Economics Makes a Welcome Return in the Forthcoming BDS Order,* @LAWANDECONOMICS BLOG (Apr. 18, 2017), http://www.phoenix-center.org/blog/archives/2223 [https://perma.cc/8HPW-GCRA].

100. AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, *Report & Order*, 32 FCC Rcd 3459, para. 165 (2017) (emphasis added).

101. Restoring Internet Freedom, *Declaratory Ruling, Report And Order, And Order*, 33 FCC Rcd 311 (1) (2018). Interestingly, the *Restoring Internet Freedom Order* did not discuss the Title II implementation problems of the *2015 Open Internet Order*.

102. Lawrence J. Spiwak, *Congress Needs to Stop the Net Neutrality Definitional Merry-Go-Round,* BLOOMBERG BNA (Nov. 6, 2017), https://www.bna.com/congress-needs-stop-n73014471706 [https://perma.cc/W4Q5-3LSC]. What is not clear, however, is assuming that the *2015 Open Internet Order* went into place and the FCC brought a specific enforcement action against a BSP that was ultimately appealed, whether a reviewing court would balk at the FCC's obvious torturing of the statute in a fact-specific adjudicative (as opposed to a generic rulemaking) context.

can always hope that Congress will end this merry-go-round with legislation. Yet if past is prologue, given the political rancor surrounding the Open Internet debate, having Congress do its job remains wishful thinking).

Moreover, in addition to a sound legal basis, the court's ruling provides excellent political cover for such efforts: Indeed, because the implementation of Title II was not specifically challenged in *USTelecom*, when one hears claims by net neutrality proponents that the rules contained in the FCC's *2015 Open Internet Order* were upheld by the courts, in a technical sense, these claims are true.[103]

Which brings us to the point of the pencil: properly viewed, the current iteration of the net neutrality debate is not really about an "Open Internet," "free speech," or even who has the biggest Reese's Peanut Butter mug; it's about *power*.[104] That is, should an administrative agency be permitted on its own initiative to expand its power beyond its statutory mandate at the expense of private actors' Fifth Amendment due process protections? Indeed, if an administrative agency, by its own admission, is free to interpret selectively its own enabling statute to fit the times, then what is the role of Congress? At stake, in other words, is whether an administrative agency should be permitted to re-write the law—especially when it does so simply to fit a political agenda.[105] So while this Article has focused on the actions of Federal Communications Commission, it is important to recognize that the D.C. Circuit's holding applies equally to other agencies with the power to regulate the price, terms, and conditions of private firms. As such, under the logic of *USTelecom*, what is to stop other agencies such as the Federal Energy Regulatory Commission or the Surface Transportation Board from doing the exact same thing? Absolutely nothing.

If anything, *USTelecom* proves the old adage that "bad facts make bad law." As noted above, the appellants made a deliberate, strategic decision to focus their legal challenge on the statutory interpretation question and not to challenge how the FCC actually implemented Title II via its rules. Still, while the FCC certainly has great latitude to interpret the Communications Act, it

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103. *See*, *e.g.*, *Debunking Chairman Pai's Claims about Net Neutrality,* Prepared by the Office of FCC Commissioner Clyburn (Nov. 30, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1130/DOC-348016A1.pdf [https://perma.cc/AS2P-EQ5W] ("The D.C. Circuit twice upheld the *2015 Order* and rejected all of the statutory interpretation arguments Chairman Pai raised in his dissent (which he raises again in the draft *Destroying Internet Freedom Order*.").

104. John Eggerton, *John Oliver Takes on FCC's Pai, Net Neutrality*, BROADCASTING & CABLE (May 8, 2017), http://www.broadcastingcable.com/news/washington/john-oliver-takes-fccs-pai-net-neutrality/165586 [https://perma.cc/U4HE-YRBT].

105. The Obama White House's interference in the FCC's deliberations regarding the *2015 Open Internet Order* is well-documented. *See*, *e.g.*, United States Telecom Ass'n v. FCC, 855 F.3d 381, 394 (D.C. Cir. 2017) (Brown, J. dissenting from *denial of petition for reh'g en banc*) ("When the FCC followed the *Verizon* 'roadmap' to implement 'net neutrality' principles without heavy-handed regulation of Internet access, the Obama administration intervened. Through covert and overt measures, FCC was pressured into rejecting this decades-long, light-touch consensus in favor of regulating the Internet like a public utility.") (citations omitted); *see also* Gautham Nagesh & Brody Mullins, *Net Neutrality: How White House Thwarted FCC Chief,* WALL ST. J. (Feb. 4, 2015), https://www.wsj.com/articles/how-white-house-thwarted-fcc-chief-on-internet-rules-1423097522 [https://perma.cc/5YEZ-9X7P]; Lawrence J. Spiwak, *The "Clicktivist" In Chief,* THE HILL (Nov. 12, 2014), http://thehill.com/blogs/pundits-blog/technology/223744-the-clicktivist-in-chief [https://perma.cc/LAB8-QU6C].

must nonetheless operate "within the bounds of reasonable interpretation,"[106] and it is not at liberty to pick and choose select provisions of the statute to govern for the sake of expediency. Or does it? Under a broad reading of the D.C. Circuit's decision in *USTelecom*, the FCC apparently now has *carte blanche* to tailor its enabling statute to fit a results-driven outcome and trample on key due process concerns so long as it can sprinkle some pixie dust about promoting broadband deployment. For those who care deeply about due process and the rule of law, therefore, the precedent set by the D.C. Circuit in *USTelecom* is deeply troubling, and we will likely have to deal with its aftermath for years to come.

And if that unbridled expansion of regulatory power doesn't scare you, then it damn well should.

106. *See*, *e.g.*, Utility Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2431 (2014) (citing City of Arlington v. FCC, 569 U.S. 290, 296 (2013)) (internal quotation marks omitted).

Crowdsourcing, Kind Of

Katherine Krems *

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I. INTRODUCTION

As public comment on rulemaking procedures increasingly occurs online[1] and more advanced technology becomes available to interested parties,[2] fake comments submitted during rulemaking procedures present a noteworthy problem for the FCC and other government agencies. Fake comments do not accurately reflect public sentiment and skew the facts on the record. Consideration of or even non-action around these comments is anti-democratic because leaving fake comments in the record drowns out the voices of real commenters.

Democracy is "[g]overnment by the people; that form of government in which the sovereign power resides in the people as a whole."[3] Comments submitted by bots and other parties under fake names take the power of the opportunity to comment on agency rulemakings from the people. At a time when public trust in the government and government institutions is near an all-time low,[4] the FCC and other agencies should act to remove fake comments from the record. If these comments remain in the record, the public's trust in these institutions will falter even more.

For public comments to remain relevant and for agencies to remain credible through rulemaking processes, agencies must revise the way they consider comments in the digital age, most significantly by discounting comments that are demonstrably fake and fraudulent. As prescribed by the Administrative Procedure Act ("APA"),[5] in notice-and-comment rulemaking[6] agencies must provide interested parties with opportunity to comment on proposed rules[7] and then consider "relevant matter presented."[8] The statute

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[1] *See*, *e.g.*, John M. de Figueiredo, *E-Rulemaking: Bringing Data to Theory at the Federal Communications Commission*, 55 DUKE L.J. 969, 992 (2006) (finding "a long-term trend from paper to electronic filings").

[2] *See*, *e.g.*, Issie Lapowsky, *How Bots Broke the FCC's Public Comment System*, WIRED (Nov. 28, 2017), https://www.wired.com/story/bots-broke-fcc-public-comment-system/ [hereinafter *System*] [https://perma.cc/N2BT-N455] ("When the Administrative Procedure Act became law in 1946, requiring government agencies to accept public comments, a world in which bots wreaked havoc on the rule of law was the stuff of science fiction. Today, it's a reality that the FCC can no longer ignore."); *Human-Like Bots Infiltrate U.S. Lawmaking Process*, FISCALNOTE (Nov. 13, 2017), https://fiscalnote.com/2017/11/13/human-like-bots-infilitrate-u-s-lawmaking-process/ [hereinafter *Human-Like Bots*] [https://perma.cc/A9YG-YJRR] (expounding artificial intelligence "is only continuing to advance and mature, as machines acquire enhanced understandings of human-generated content").

[3] *Democracy*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

[4] *See*, *e.g.*, *Pubic Trust in Government: 1958-2017*, PEW RES. CTR. (May 3, 2017), http://www.people-press.org/2017/05/03/public-trust-in-government-1958-2017/ [https://perma.cc/XWB7-SAG4]; *Confidence in Institutions*, GALLUP, http://news.gallup.com/poll/1597/confidence-institutions.aspx [https://perma.cc/SC7J-UK8A] (last visited Apr. 8, 2018).

[5] Administrative Procedure Act, 5 U.S.C. § 500 *et seq.* (2012).

[6] *See* Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015) (explaining that rulemaking applies to "formulating, amending, or repealing a rule" as defined as "statement [s] of general or particular applicability and future effect") (citing 5 U.S.C. §551(5) and (4) (2012), respectively).

[7] 5 U.S.C. § 553(c) (2012).

[8] *Id.*; *see also Perez*, 135 S. Ct. at 1203.

specifies that agencies must provide "interested persons"[9] with the opportunity to comment and then "consider and respond to significant comments received."[10] Agencies do not have to consider and respond to every comment,[11] but an accurate record is important for judicial review of agency action.[12]

As public comments on agency proceedings increasingly move online,[13] opportunities for fraudulent, fake, and mass-solicited comments are increasing. Fake and fraudulent comments submitted by people, bots, or other entities under fake names that look like real names; under words (or numbers) that do not look like real names; or under misused real names and information should not be included in the record. If the public believes an agency is considering fake comments in rulemaking processes or not acting to investigate, address, and remove these comments from the record, they may become wary of that agency and its actions, furthering distrust of the government that plagues our society today.[14] Additionally, if these comments remain in the record, their inclusion could affect agency rulemaking judgment, making it nearly impossible for agencies to gauge public sentiment. Finally, in judicial review of agency action, fake comments present a problem because they skew the record against which courts must judge agency decision-making.

This Note will argue that agencies have an obligation to remove fake and fraudulent comments from the record. It will argue that when agencies leave fake and fraudulent comments in the record, these comments overwhelm real, legitimate comments. It will use the recent comment period leading up to the FCC's December 2017 vote to repeal net neutrality rules to frame the argument, focusing on fake and fraudulent comments that include fake names, fake or short-term email addresses, and/or stolen personal information.

Section II will look at the background of the recent net neutrality public comment period. Section III will analyze the FCC and other agencies' obligations to the public and public comments under the APA. Section IV will examine difficulties agencies may face with finding and removing fraudulent comments from the record. Section V will address possible remedies for the problem. This Note will conclude by suggesting that for agencies to comply with the APA and for rulemaking to remain relevant to the public and to our democracy, agencies must take measures to limit the damage that fake and fraudulent comments can do.

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[9] 5 U.S.C. § 553(c); *see also* Animal Legal Def. Fund v. Vilsack, 237 F.Supp.3d 15, 22 (2017) (explaining that because agency decisions almost always affect the public at large, an "expansive interpretation of 'interested person' . . . is often necessary").

[10] *Perez*, 135 S. Ct. at 1203.

[11] *See*, *e.g.*, 5 U.S.C. § 553(c); Thompson v. Clark, 741 F.2d 401, 408 (1984) ("[5 U.S.C. § 553(c)] has never been interpreted to require the agency to respond to every comment, or to analyze every issue or alternative raised by the comments . . .").

[12] 5 U.S.C. § 706 (2012) (explaining a reviewing court "shall review the whole record").

[13] *See*, *e.g.*, de Figueiredo, *supra* note 1, at 992.

[14] *See Pubic Trust in Government*, *supra* note 4 (explaining public trust in government "remains near historic lows").

II. BACKGROUND

A. Definitions

Bots are "software developed to automatically do tasks online."[15] Bots (short for robots) appeared widely in the news as it became clear that bot-run Twitter pages were active leading up to the 2016 presidential election.[16] Based on the totality of available information about the comments submitted to the FCC during the net neutrality public comment period, it is highly likely that bots submitted fake and fraudulent comments to the FCC's Electronic Comment Filing System during this time.[17]

Fake and fraudulent comments, for the purposes of this Note, are comments submitted by people or bots with either completely made up identifying information[18] or real information belonging to a person who did not submit the comment. For the purposes of this Note, the words fake and fraudulent will be used interchangeably to describe this category. Fake comments may be submitted under a real person's name but not by that person, such as Ajit Pai, who is the current FCC Commissioner,[19] Donna Duthie, who died long before the first net neutrality regulations were passed,[20] or Sebastian Jakubowski, who discovered his name was used in a comment submission when a reporter from the *Wall Street Journal* sent him a survey to be used as research for an article.[21] Often, when fraudulent comments use real

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[15] Douglas Guilbeauly & Samuel Woolley, *How Twitter Bots Are Shaping the Election*, THE ATLANTIC (Nov. 1, 2016), https://www.theatlantic.com/technology/archive/2016/11/election-bots/506072/ [https://perma.cc/7BHN-32F4].

[16] *See id.* ("Marginal populations use bots to create an illusion of popularity around fringe issues or political candidates.").

[17] *See*, *e.g.*, Paul Hitlin et al., *Public Comments to the Federal Communications Commission About Net Neutrality Contain Many Inaccuracies and Duplicates*, PEW RES. CTR. (Nov. 29, 2017), http://www.pewinternet.org/2017/11/29/public-comments-to-the-federal-communications-commission-about-net-neutrality-contain-many-inaccuracies-and-duplicates/ [https://perma.cc/LJZ8-L9ZB] ("Some 57% of the comments utilized either duplicate email addresses or temporary email addresses created with the intention of being used for a short period of time and then discarded . . . many individual names appeared thousands of times in the submissions . . . it is often difficult to determine if any given comment came from a specific citizen or from an unknown person (or entity) submitting multiple comments using unverified names and email addresses.").

[18] *See*, *e.g.*, *id.* (listing top name submissions during the net neutrality debate as Net Neutrality and the Internet).

[19] *See* Jon Brodkin, *People Who Were Impersonated by Anti-Net Neutrality Spammers Blast FCC*, ARS TECHNICA (May 25, 2017, 4:30 PM), https://arstechnica.com/information-technology/2017/05/identity-theft-victims-ask-fcc-to-clean-up-fake-anti-net-neutrality-comments/ [https://perma.cc/54F8-4TEH] [hereinafter *Spammers*] (citing Commissioner Pai's statement that hundreds of comments were submitted under his name).

[20] James V. Grimaldi & Paul Overberg, *Millions of People Post Comments on Federal Regulations. Many Are Fake.*, WALL ST. J., https://www.wsj.com/articles/millions-of-people-post-comments-on-federal-regulations-many-are-fake-1513099188 [https://perma.cc/52R4-LS5D] (last updated Dec. 12, 2017, 2:13 PM).

[21] Interview with Sebastian Jakubowski in Alexandria, Va. (Nov. 7, 2017) (on file with author); *see also id.*

personal information, that real information was collected during data breaches.[22]

Mass-solicited comments are comments solicited on a large scale by a certain group or entity, such as when the television host John Oliver implored his audience to submit comments to the FCC on net neutrality,[23] or when an interest group encourages members to submit form emails to lobby a government agency or entity.[24] Mass-solicited comments are not fraudulent if, as often is the case, organizations submitting the comments have permission to use individuals' personal information.[25] Mass-solicited comments can and do encourage participation in the rulemaking process by making it easier for people to voice their views,[26] and these comments cannot be ignored or discarded.[27] Because mass-solicited comments are not inherently fraudulent, this Note will not focus on these comments and will instead focus on those that are clearly fake.

B. Public Comments and Net Neutrality

Agencies are required to consider and respond to what courts have described as "significant" comments.[28] While an agency is not expected to consider and respond to every single comment it receives,[29] failure to consider and respond to comments is meaningful when the failure "demonstrates that the agency's decision was not 'based on a consideration of the relevant factors.'"[30]

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[22] *See*, *e.g.,* Jon Brodkin, *Ajit Pai Not Concerned with Number of Pro-Net Neutrality Comments*, ARS TECHNICA (July 14, 2017), https://arstechnica.com/tech-policy/2017/07/ajit-pai-not-concerned-about-number-of-pro-net-neutrality-comments/ [https://perma.cc/DJ5U-S7AB] [hereinafter *Comments*] (explaining that many of the anti-net neutrality comments were submitted by bots using data collected during breaches); Grimaldi & Overberg, *supra* note 20 ("Hundreds of identities on fake comments were found listed in an online catalog of hacks and breaches.").

[23] *See*, *e.g.*, Ali Breland, *FCC Flooded with Net Neutrality Comments After John Oliver Plea*, THE HILL (May 9, 2017), http://thehill.com/policy/technology/332499-fcc-flooded-with-comments-on-net-neutrality-after-john-oliver-plea [https://perma.cc/9NVC-BXKY] ("Oliver called on viewers to visit gofccyourself.com, a website he and his staff created that sends users directly to the FCC page where they can file a comment.").

[24] *See* Grimaldi & Overberg, *supra* note 20 (explaining "Astroturf Lobbying" as "when an interest group gins up support from individuals and characterizes it as a grass-roots movement").

[25] *See id.*

[26] *See System*, *supra* note 2 (illustrating mass-solicited comment campaigns by legitimate organizations of legitimate commenters used similar techniques to those used by bot campaigns and bad actors).

[27] *See*, *e.g.*, Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation That Counts*, 2 MICH. J. ENVTL. & ADMIN. L . 123, 150 (2012) ("Agencies cannot refuse to docket and review the submissions produced by mass e-mail campaigns.").

[28] *See*, *e.g.*, Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015).

[29] *See* Thompson v. Clark, 741 F.2d 401, 408 (D.C. Cir. 1984) (citing Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir.1968)).

[30] *Id.* (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)).

The recent debate over the repeal of the FCC's net neutrality rules, a particularly contentious issue,[31] has yielded the most comments in the history of the FCC public comment process,[32] but many of these comments likely originated from bots.[33] Agencies do not directly consider comments in the deliberative process that is rulemaking,[34] as rulemaking is not a process of direct democracy but of rational deliberation by rule writers.[35] Still, the opportunity to comment will become meaningless if agencies are unable to consider relevant information and distinguish real comments from those that are fake.[36]

Agencies should act when the record contains fake and fraudulent comments.[37] Agencies can take affirmative steps to avoid allowing fake comments to get through their electronic comment filing systems, and when those comments do get through, agencies should take steps to remove these comments from the record.

C. The FCC and Net Neutrality Public Comments

The FCC received a large number of fake and fraudulent comments during the four-month notice-and-comment period prior to the December 2017 vote on net neutrality rules.[38] The FCC received around 22 million comments, the most ever on a single action.[39] This large number of comments

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[31] *See*, *e.g.*, Larry Greenemeier, *Net Neutrality Prevails in Contentious FCC Vote*, SCIENTIFIC AM. (Feb. 26, 2015), https://www.scientificamerican.com/article/net-neutrality-prevails-in-contentious-fcc-vote/ [https://perma.cc/L5UV-9UQ7] (explaining "[t]he fundamental issue is whether the FCC should be putting itself in a position to regulate the Internet" and that it is a "very high-stakes matter") (internal quotation marks omitted).

[32] *See* FCC docket on proceeding 17-108 "Restoring Internet Freedom" yielding 22,158,902 results as of 11/15/17; Jacob Kastrenakes, *The FCC Just Killed Net Neutrality*, THE VERGE (Dec. 14, 2017, 1:12 PM), https://www.theverge.com/2017/12/14/16776154/fcc-net-neutrality-vote-results-rules-repealed [https://perma.cc/G957-3VRJ] ("Even if they don't include the spam, the net neutrality proceeding was still the most commented ever at the [FCC]."); *see also* Klint Finley, *FCC's Broken Comments System Could Help Doom Net Neutrality*, WIRED (Sept. 2, 2017), https://www.wired.com/story/fccs-broken-comments-system-could-help-doom-net-neutrality/ [https://perma.cc/KWG8-VEH5] ("By the time the online comment submission period ended . . . the agency had collected 21.9 million comments, an astounding level of participation . . . Even Janet Jackson's wardrobe malfunction at the 2004 Super Bowl garnered only about 1.4 million comments.").

[33] *See* discussion *infra*.

[34] *See* Farina et al., *supra* note 27, at 139 ("To the extent rulemaking is a 'democratic' process, we expect it to be a process of *deliberative*, rather than electoral, democracy" (emphasis in original) (citation omitted)).

[35] *See id.*

[36] *See* Home Box Office, Inc. v. FCC, 567 F.2d 9, 35-36 (D.C. Cir. 1977) (recognizing "a dialogue is a two-way street: the opportunity to comment is meaningless unless the agency responds to significant points") (citing Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393-94 (D.C. Cir. 1973)).

[37] *See*, *e.g.*, *FCC Sued for Ignoring FOIA Request Investigating Fraudulent Net Neutrality Comments*, ABOVE THE LAW (Sept. 22, 2017), https://abovethelaw.com/2017/09/fcc-sued-for-ignoring-foia-request-investigating-fraudulent-net-neutrality-comments/?rf=1 [hereinafter *FCC Sued*] [https://perma.cc/53FY-4NHT]; Finley, *supra* note 32.

[38] *See* Hitlin et al., *supra* note 17 and discussion *infra*.

[39] *See*, *e.g.*, Kastrenakes, *supra* note 32; Hitlin et al., *supra* note 17 (finding the FCC received a total of 21.7 million comments submitted electronically).

submitted signifies that this is a contentious issue about which the public is concerned.[40] But when many of the comments submitted on important policy issues arefake,[41] relevant matter is diluted and the people's right to be heard is minimized.

1. Net Neutrality Comment Data Studies

A study conducted by the Pew Research Center analyzed 21.7 million comments electronically submitted to the FCC from April 27 to August 30, 2017.[42] The study found that "[m]any submissions seemed to include false or misleading personal information," citing fifty-seven percent, or around eight million comments that used "duplicate email addresses or temporary email addresses created with the intention of being used for a short period of time and then discarded."[43] The study also found that "there is clear evidence of organized campaigns to flood the comments with repeated messages," and that only six percent of the comments were unique, with some comments being submitted hundreds of thousands of times.[44] Moreover, thousands of comments with the same or very similar wording were often submitted at the same second.[45]

The Pew analysis found thousands of duplicate names in the top fifteen most common names under which comments were submitted, including words listed as names that are not really names at all.[46] The most common name submitted with comments was "Net Neutrality," with 16,983 submissions, followed by "The Internet" with 7,470, "Pat M" with 5,910, and "net neutrality" with 5,153.[47] John Oliver, the host of the television show Last Week Tonight on HBO and an outspoken proponent of net neutrality rules,[48] appeared about 1,000 times.[49]

To determine whether bots were at work, a notable consideration is often how many comments were submitted at the exact same second, often with the exact same text.[50] Pew found "at least five separate occasions when the exact same text was submitted more than 24,000 times at precisely the same moment," and 25,000 or more comments were submitted at the same second more than 100 times.[51] Pew identifies "the fact that many comments

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[40] *See* Greenmeier, *supra* note 31; Hitlin et al., *supra* note 17.

[41] *See* Corey Thuen*, Discovering Truth Through Lies on the Internet: FCC Comments Analyzed*, GRAVWELL BLOG (Oct. 2, 2017), https://www.gravwell.io/blog/discovering-truth-through-lies-on-the-internet-fcc-comments-analyzed [https://perma.cc/SKR3-P9V8].

[42] *See* Hitlin et al., *supra* note 17. To analyze the data, the Pew Research Center downloaded all comments via the FCC's publicly available Application Programming Interface. *Id.*

[43] *Id*.

[44] *Id.*

[45] *See id.* ("On nine different occasions, more than 75,000 comments were submitted at the very same second – often including identical or highly similar comments.").

[46] *See id.*

[47] Hitlin et al., *supra* note 17.

[48] *See* Breland, *supra* note 23.

[49] *See* Hitlin et al., *supra* note 17.

[50] *Id.*

[51] *Id.*

were submitted at precisely the same instant" as support for other research that suggests "that some share of the FCC comments may have been submitted in bulk using automated processes, such as organized bot campaigns."[52] Although Pew does state in the study that the same-second filing is likely the work of bots and not just a coincidence, it recognizes that there is nothing "inherently wrong or sinister about bulk filing of comments" but also that "digital tools" are playing a significant part in the notice-and-comment process.[53] Bulk-filed comments could be the result of mass-solicited comment campaigns,[54] but based on a further analysis of the language in the comments, it is highly likely that bots submitted a large percentage of the net neutrality comments.[55]

Data scientist Jeff Kao conducted his own study of the language used in comments submitted to the FCC during the net neutrality debate.[56] After assessing the comments, Kao arrived at 2,955,182 unique comments, but after clustering categories and removing duplicates, he found that less than 800,000 comments could be considered "truly unique."[57] He found that a large number of the almost three million comments that seemed to be unique were actually duplicates that only differed by a few words or characters or had a different signature.[58] By analyzing supposedly unique comments, Kao found more clusters that had essentially the same language, with differences in syntax and organization of sentences but similarities in language that appeared throughout.[59] Similarities in these submissions included the words "Americans, as opposed to Washington Bureaucrats, deserve to enjoy the services they desire" or "[i]ndividual citizens, as opposed to Washington Bureaucrats, should be able to select whichever services they desire."[60] Kao concluded that there were 1.3 million comments with similar or the same syntax and language distributed in different places in each comment, making them hard to identify.[61]

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[52] *Id.*

[53] Hitlin et al., *supra* note 17.

[54] *See* Thuen, *supra* note 41 ("Just because a comment was part of a batch submission does not mean it is less legitimate.").

[55] *See* Jeff Kao, *More Than A Million Pro-Repeal Net Neutrality Comments Were Likely Faked*, HACKERNOON (Nov. 23, 1017), https://hackernoon.com/more-than-a-million-pro-repeal-net-neutrality-comments-were-likely-faked-e9f0e3ed36a6 [https://perma.cc/7S4Y-VUDB]; *see also* Thuen, *supra* note 41.

[56] *See* Kao study, *supra* note 55 (Mr. Kao analyzed comments submitted through October 27, 2017. Although the official comment period ended on August 30, 2017, the FCC Electronic Comment Filing System continued to accept comments after that date.).

[57] Kao defines "truly unique" comments as "[n]ot clustered as part of a comment submission campaign, not a duplicate comment." *Id.*

[58] *Id.*

[59] *See id.*; *see also* Brian Fung, *FCC Net Neutrality Process 'Corrupted' By Fake Comments and Vanishing Consumer Complaints, Officials Say*, WASH. POST: THE SWITCH (Nov. 24, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/11/24/fcc-net-neutrality-process-corrupted-by-fake-comments-and-vanishing-consumer-complaints-officials-say/?utm_term=.6c0bf1e5af17 [https://perma.cc/8T94-NQF4].

[60] *See* Kao, *supra* note 55 (explaining "[e]ach sentence in the faked comments looks like it was generated by a computer program . . . to generate unique-sounding comments" and "the combinations of comment configurations grows exponentially with each set of synonyms introduced"); *see also* Hitlin et al., *supra* note 17.

[61] *See* Kao, *supra* note 55.

Kao's study aligns with the Pew analysis and analyses performed by data analytics startup Gravwell[62] and data and media company FiscalNote[63] that concluded that many comments were submitted by bots configured to be indistinguishable from real humans.[64] As the FiscalNote study explains, Natural Language Generation technology makes bot-submitted comments difficult to identify, as the language varies from comment to comment.[65] Because of the nature of the Natural Language Generation technology and the number of submissions to the FCC during the net neutrality public comment period, analysts have struggled to pinpoint exactly how many comments were submitted by bots and how many were submitted with fake or stolen information.[66] But from looking at a totality of the evidence of comments submitted at exactly the same second, comments submitted with language generation software, and comments submitted with stolen or fake personal information, one can begin to understand the gravity of the situation and the necessity for the FCC to act.[67]

2. Action (and Inaction) In Response to Fake Comments

Then-New York Attorney General Eric Schneiderman released an open letter to the FCC a few weeks prior to the December 2017 vote to repeal net neutrality rules.[68] The letter was largely concerned with fraudulent comments that used stolen names and personal information and "attacked what is supposed to be an open public process by attempting to drown out and negate the views of the real people, businesses, and others who honestly commented on this important issue."[69] Schneiderman described the use of unwitting citizens' information in comments as "akin to identity theft,"[70] and he also wrote that his office contacted the FCC to request "logs and other records at least nine times over five months" without substantive response.[71]

Furthering confusion and contention around the net neutrality debate, Democratic Commissioner Jessica Rosenworcel identified that "half a million

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[62] *See* Thuen, *supra* note 41.

[63] *See Human-Like Bots*, *supra* note 2.

[64] *Id.*; Thuen, *supra* note 41; Hitlin et al., *supra* note 17.

[65] *Human-Like Bots*, *supra* note 2.

[66] *See* Kao, *supra* note 55 (finding "at least 1.3 million fake pro-repeal comments, with suspicions about many more"); *Human-Like Bots*, *supra* note 2 (finding "hundreds of thousands" of comments that fit a "specific NLG pattern").

[67] *See* discussion *supra*; *see Human-Like Bots*, *supra* note 2 ("The net neutrality debate thus serves as a prominent warning that, soon enough, the distinction between human-and computer-generated language may be nearly impossible to draw.").

[68] Letter from Eric T. Schneiderman, N.Y. Attorney Gen. to Ajit Pai, FCC Comm'r (Nov. 21, 2017) (on file with author).

[69] *Id.*

[70] *Id.*; *see also supra* note 21 and accompanying text (Sebastian Jakubowski's experience – he only became aware that a comment had been submitted under his name that did not align with his views when he received an email from a Wall Street Journal journalist investigating the issue).

[71] Schneiderman letter, *supra* note 68.

of the fake comments originated from Russian email addresses."[72] She said that these comments "call[] into question" the entire notice-and-comment process, explaining that "[a]gencies open up their doors, in effect ask the American people to tell them what they think about proposed rules, how their lives might be changed by them . . . It is essential that we come up with ways to manage the integrity of that process in the digital age."[73] At a news conference where she urged her colleagues at the FCC to delay the December 2017 vote, she said "[i]t is clear that our process for serving the public interest is broken."[74] When an FCC spokesman announced the agency would hold the net neutrality vote as scheduled, Commissioner Rosenworcel responded that the decision showed the FCC's "sheer contempt" for public input and the comment process.[75]

Meanwhile, at a November 2017 news conference, FCC Spokesman Brian Hart explained that the FCC does not have the resources to analyze every comment.[76] He further stated that 7.5 million comments filed in favor of net neutrality regulations that seemed to come from over 40,000 distinct email addresses were, in reality "all generated by a single fake email generator website."[77] Finally, Hart stated that 400,000 comments supporting net neutrality regulations originated from a Russian address.[78]

FCC Chairman Ajit Pai has said the agency would not consider comments submitted under obviously fake names, but the agency has not acted to remove or discount other fake and fraudulent comments,[79] likely because they do not have the staff or time to search and analyze the comments submitted.[80] At a press conference in May 2017, Pai addressed the issue of comments submitted fraudulently with real citizens' names but not by those

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[72] Brian Naylor, *As FCC Prepares Net-Neutrality Vote, Study Finds Millions of Fake Comments*, NPR: POLITICS (Dec. 14, 2017), https://www.npr.org/2017/12/14/570262688/as-fcc-prepares-net-neutrality-vote-study-finds-millions-of-fake-comments [https://perma.cc/N3E5-6QCJ].

[73] *Id.*

[74] Hamza Shaban, *FCC Commissioner, NY Attorney General Call for Delay of Net Neutrality Vote Over Fake Comments*, WASH. POST: THE SWITCH (Dec. 3, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/12/04/fcc-commissioner-new-york-attorney-general-call-for-delay-of-net-neutrality-vote-over-fake-comments/?utm_term=.95ce390501f5 [https://perma.cc/ZGG5-3UXL].

[75] Naylor, *supra* note 72.

[76] Shaban, *supra* note 74.

[77] *Id.*

[78] *Id.*.

[79] *See*, *e.g.*, *FCC Sued*, *supra* note 37; *Comments*, *supra* note 22 ("The FCC has not been removing fraudulent comments from the record"); *see also Victims Whose Stolen Names and Addresses Were Used to Submit Fake Anti-Net Neutrality Comments Send Letter to FCC Demanding Investigation*, FIGHT FOR THE FUTURE (May 25, 2017), https://www.fightforthefuture.org/news/2017-05-25-victims-whose-stolen-names-and-addresses-were-used/ [https://perma.cc/5VWG-8S3H] ("Although much evidence of this identity theft has been documented by concerned citizens, experts, media outlets, and organizations like Fight for the Future, Chairman Pai and the FCC have taken no steps to remove them from the docket, risking the safety and privacy of potentially hundreds of thousands of people.").

[80] *See* Harold Furchtgott-Roth, *How to Reduce Frivolous Comments in Federal Proceedings*, FORBES: OPINION – #BIGDATA (July 21, 2017), https://www.forbes.com/sites/haroldfurchtgottroth/2017/07/21/how-to-reduce-frivolous-comments-in-federal-proceedings/#7b40aff33e70 [https://perma.cc/6UTT-RMRP].

citizens and said, "This is an issue that's impacted me personally . . . Now there's obviously a tension between having an open process where it's easy to comment and preventing questionable comments from being filed, and, generally speaking, this agency has erred on the side of openness."[81]

Chairman Pai makes an important point about encouraging people to participate in the public comment process. But including fake comments in the record, especially those submitted under names like "Net Neutrality" and "the Internet" and comments submitted with stolen information[82] impacts the process's legitimacy, with illegitimate comments overwhelming those that are legitimate.

If the FCC and other agencies allow fake and fraudulent comments to remain in the record, they will be discouraging the public from commenting, rather than encouraging openness. Inaction will lead the public to believe that legitimate, individual comments do not matter. By ignoring the problem of fake and fraudulent comments submitted throughout the net neutrality notice-and-comment period, the FCC has created a dangerous precedent for future proceedings.

3. Chairman Pai's Proposal to Change the Comment System

In a July 6, 2018 letter to Senators Pat Tomey and Jeff Merkley, Chairman Pai said he would propose to "rebuild and reengineer" the FCC's Electronic Comment Filing System.[83] This letter was in response to a May 2018 letter from the senators that stated that both of their names had been used in fake comments posted through the FCC's Electronic Comment Filing System during the public comment period on the repeal of net neutrality rules.[84] Pai's response to the senators came seven months after the publication of a *Wall Street Journal* article asserting that the *Journal* had found thousands of fake comments submitted to agencies, including the FCC, through their electronic filing systems.[85] In his letter, Pai said he had asked Congress for permission to reallocate funds necessary to change the comment system "to institute appropriate safeguards against abusive conduct."[86] Mr. Pai also stated in his letter that those whose names were improperly used in fake comments could send the FCC a statement about the fake comment that would

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[81] Brodkin, *supra* note 19.

[82] *See*, *e.g.*, *id.* (citing a letter sent by people claiming they were impersonated to Chairman Pai that stated, "We are disturbed by reports that indicate you have no plans to remove these fraudulent comments from the public docket. Whoever is behind this stole our names and addresses, publicly exposed our private information without our permission, and used our identities to file a political statement we did not sign onto.").

[83] *See* James V. Grimaldi, *FCC Proposes Changing Comment System After WSJ Found Thousands of Fakes*, WALL ST. J. (July 11, 2018, 9:28 AM), https://www.wsj.com/articles/fcc-proposes-rebuilding-comment-system-after-thousands-revealed-as-fake-1531315654?ns=prod/accounts-wsj [https://perma.cc/6VMR-8V6R].

[84] *Id.*

[85] *Id.*; *see also* Grimaldi & Overberg, *supra* note 20.

[86] Grimaldi, *supra* note 83.

be made available in the public record.[87] The Chairman did not, however, propose to remove any demonstrably fake comments from the record, and he did not respond to Senator Merkley's request that the improper use of his name be referred for investigation to the Justice Department.[88]

III. THE ADMINISTRATIVE PROCEDURE ACT AND PUBLIC COMMENT

The FCC has an obligation under the Administrative Procedure Act ("APA") to encourage public participation in the rulemaking process and consider and respond to significant comments.[89] Under the APA, the FCC and other agencies do not have an obligation to consider all comments submitted, but they have an obligation to consider relevant matter[90] and act in a reasoned manner[91] subject to judicial review.[92] Fraudulent comments distorting the record could impede a court's ability to review agency decisions.

A. The APA

In notice-and-comment rulemaking[93] as applied to legislative rules,[94] agencies must provide the public with a "notice of proposed rulemaking" published in the Federal Register,[95] and provide "*interested persons* opportunity to participate in the rule making through submission of written data, views, or arguments."[96] Congress passed the APA to keep agencies accountable to the public.[97] One of the ways agencies remain accountable is that they must justify their decisions, as it "is the duty of agencies to find and formulate policies that can be justified by neutral principles and a reasoned explanation."[98] In judicial review, courts consider agency decisions to determine whether agencies contravened the APA's proscription on action

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[87] *Id.*

[88] *Id.*

[89] *See* 5 U.S.C. § 553(c) (2012); FBME Bank Ltd. v. Mnuchin, 249 F.Supp.3d 215, 222 (D.C. Cir. 2007); Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015).

[90] *See FBME Bank*, 249 F.Supp.3d 215 at 222 (quoting City of Portland v. EPA, 507 F.3d 706, 713 (D.C. Cir. 2007) (internal quotation marks omitted)).

[91] *See* FCC v. Fox TV Stations, 556 U.S. 502, 537 (2009).

[92] 5 U.S.C. § 706 (2012).

[93] *See Perez*, 135 S. Ct. at 1203 (citing 5 U.S.C. §§ 551(4), (5) (2012) (defining rulemaking as "formulating, amending, or repealing a rule" and rules as "statement[s] of general or particular applicability and future effect")).

[94] *See* Crystler Corp. v. Brown, 441 U.S. 281, 302-03 (1979) (quoting Batterton v. Francis, 432 U.S. 416, 425, n.9 (1977) (explaining "legislative, or substantive regulations . . . have the force and effect of law")).

[95] 5 U.S.C § 553(b) (2012).

[96] *Id*. at § 553(c) (2012) (emphasis added).

[97] *See*, *e.g.*, FCC v. Fox TV Stations, 556 U.S. 502, 537 (2009) ("Congress passed the Administrative Procedure Act (APA) to ensure that agencies follow constraints even as they exercise their powers.").

[98] *Id.* at 537.

that is "arbitrary, capricious, [or] an abuse of discretion, or otherwise not in accordance with law."[99] Courts often defer to agency judgment.[100]

For over 20 years, the federal government has "expressed a commitment to electronic rulemaking as a way to cut costs, enhance the deliberative process, and democratize the regulatory process with increased citizen participation."[101] Electronically-based rulemaking now predominates, and it is apparent that the process is flawed. The net neutrality public comment period exemplified these flaws.

B. Public Comment

During the period for public comment, "[a]n agency must consider and respond to significant comments received."[102] After consideration, in the final rule, the agency must include "a concise general statement of [the rule's] basis and purpose."[103]

Agency action must not be "arbitrary" and "capricious,"[104] and this requirement "includes a requirement that the agency . . . respond to relevant" comments.[105] To properly respond, agencies must address these comments "in a reasoned manner."[106] Agency response to comments "must show that its 'decision was . . . based on a consideration of the relevant factors.'"[107] Agencies must respond to comments in a way "that allows a court 'to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did.'"[108] Because of the deliberative nature of the rulemaking process, significant comments that an agency actually considers are often submitted by those who have informed and fact-based preferences.[109] While bot-submitted comments are often short and not fact-based,[110] having bot-submitted comments on the record makes it harder for agencies to find comments that contain informed and relevant preferences.

APA notice-and-comment provisions are meant "to serve the need for public participation in agency decision-making and to ensure the agency has

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[99] 5 U.S.C. § 706(2)(A) (2012).

[100] *See*, *e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citing Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962) ("The scope of review under 'arbitrary and capricious' is narrow and a court is not to substitute its judgement for that of the agency. Nevertheless, the agency must examine the data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'")).

[101] de Figueiredo, *supra* note 1 at 971.

[102] Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015).

[103] 5 U.S.C. § 553(c) (2012).

[104] *Id*. at § 706(2)(A).

[105] FBME Bank Ltd. v. Mnuchin, 249 F.Supp.3d 215, 222 (D.C. Cir. 2007) (quoting City of Portland v. EPA, 507 F.3d 706, 713 (D.C. Cir. 2007) (internal quotation marks omitted)).

[106] *Id.* (quoting Reytblatt v. Nuclear Regulatory Comm'n, 103 F.3d 715, 722 (D.C. Cir. 1997)).

[107] *Id.* (quoting Thompson v. Clark, 741 F.2d 401, 409 (D.C. Cir. 1984)).

[108] *Id.* (citing Pub. Citizen, Inc. v. FAA, 988 F.2d 186, 197 (D.C. Cir. 1993)).

[109] *See generally* Farina et al., *supra* note 27, at 136 (explaining "[t]hose holding informed and adaptive preferences are able to participate meaningfully" in the rulemaking process).

[110] *See* Kao study and discussion *supra* note 55.

all pertinent information before it when making a decision."[111] The APA is not clear on what it means for an agency to consider comments,[112] but various courts have contemplated the issue.[113] Notice-and-comment rulemaking and public comments collected through the process provide a record of general public sentiment, which is useful for a court assessing whether an agency acted arbitrarily and capriciously in making a rule.[114] As the D.C. Circuit has asserted, agencies must consider all relevant comments because "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public."[115]

When there is false information on the record, this information overshadows real public comments that reflect public sentiment and contravenes the APA's procedures meant to properly inform agencies of public opinion in decision-making processes.[116] Comments submitted with fake and/or stolen information skew the record and make it difficult for agencies and courts to properly assess the record.[117] Without a demarcation between comments that were submitted by real citizens and those that are fake, illegitimate comments minimize the impact of those that are legitimate.

Some parties may argue that as long as the FCC is aware of general public sentiment, its decision-making will not be affected and fake comments can remain in the record without affecting agency decisions.[118] Others may argue that the FCC need not consider the majority of comments in the record and instead need only consider significant comments such as those with a legal argument or those from experts in the field.[119] These arguments are faulty. First, the FCC will not be able to properly gauge public sentiment without a record that actually reflects public sentiment. Second, while the APA is not clear on what exactly constitutes "relevant matter,"[120] general public sentiment could and should be relevant, especially in a decision with a

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[111] Time Warner Cable v. FCC, 729 F.3d 137, 168 (3d Cir. 2013) (quoting Electronic Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d at 5–6).

[112] *See* 5 U.S.C. 553(c) (2012) (stating the necessity of "consideration of the relevant matter presented" before releasing rules).

[113] *See*, *e.g.*, FBME Bank Ltd. v. Mnuchin, 249 F.Supp.3d 215, 222 (D.C. Cir. 2007) (holding agencies need not respond in ways that satisfy commenters); Reytblatt v. Nuclear Regulatory Comm'n, 103 F.3d 715, 722 (D.C. Cir. 1997) (stating "[a]n agency need not address every comment, but it must respond in a reasoned manner to those that raise significant problems") (citing Action on Smoking and Health v. CAB, 699 F.2d 1209, 1216 (D.C. Cir. 1983)).

[114] *See*, *e.g.*, FCC v. Fox TV Stations, 556 U.S. 502, 561 (2009).

[115] Am. Civil Liberties Union v. FCC, 823 F.2d 1554, 1581 (D.C. Cir. 1987) (quoting Alabama Power Co. v. Costle, 636 F.2d 323, 384 (D.C. Cir. 1979)).

[116] *See Human-Like Bots*, *supra* note 2 (positing that when fake comments overwhelm the record, agencies are more likely to completely ignore comments that do not contain legal arguments or analysis).

[117] *See id.*

[118] *See*, *e.g.*, *Comments, supra* note 22 (quoting Chairman Pai as saying "the raw number is not as important as the substantive comments that are in the record").

[119] *See id.*; *see also Human-Like Bots*, *supra* note 2 (explaining an analysis of decades of comments that found "often, only comments that include a serious legal argument or are affiliated with some known entity like a big business or academic institution make their way in [to the final rule]").

[120] 5 U.S.C. § 553(c) (2012).

wide-ranging effect such as the repeal of net neutrality regulations. This is especially pertinent for judicial review of agency action.

C. Judicial Review

Under the APA, "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review."[121] Reviewing courts may set aside agency action they find to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[122] Under the arbitrary and capricious standard, courts usually defer to agency judgment.[123] Where a court finds an agency decision was not based on reasonable consideration of the relevant factors or the record does not support the decision, the court may set aside the agency's decision.[124]

In *Petroleum Communications, Inc. v. FCC*, the D.C. Circuit held the FCC "arbitrarily and capriciously failed to justify its decision"[125] regarding radio licensees. The court partially based its decision on its view that the record did not support the agency's decision.[126] The court held that the FCC "utterly distort[ed] the record"[127] and that the FCC did not give sufficient weight to relevant factors in making its conclusion.[128] Therefore, the court reasoned, it was obligated to vacate the agency's decision.[129]

An individual or individuals affected by the FCC's repeal of net neutrality regulations could seek judicial review of the agency's decision, alleging that the agency acted arbitrarily and capriciously by disregarding a majority of comments in the record and/or by allowing fake comments to remain in the record. The FCC would likely allege that the agency did come to a reasoned decision based on relevant factors, such as its consideration of comments with legal or more advanced reasoning. But a petitioner could allege that the FCC did not and could not have based its decision on relevant factors because the record is a relevant factor, and the record has been distorted by fake comments. A petitioner may be able to win with this argument, if a court were to find that the record did not support the FCC's decision.

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[121] *Id*. at § 704 (2012).

[122] *Id*. at § 706(2)(A) (2012).

[123] See Petroleum Comm'ns, Inc. v. FCC, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (holding scope of arbitrary and capricious review "is narrow and a court is not to substitute its judgment for that of the agency) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

[124] *See*, *e.g.*, *id.*

[125] *Id.* at 1173.

[126] *Id*.

[127] *Id.*

[128] *Id*.

[129] *Id.*

IV. PROBLEMS WITH FINDING AND REMOVING FAKE AND FRAUDULENT COMMENTS

The majority of FCC rulemaking proceedings generate fewer than one hundred comments.[130] In the normal course of proceedings, when a notice-and-comment period results in a few dozen comments, each comment can be reviewed and considered by agency staff in a short period of time.[131] But with the recent net neutrality proceedings as the most extreme example, when agencies receive thousands or millions of comments on a single proceeding, it is impossible for staff to review all of the comments or even sort through them to determine which are real, which are fake, and which are significant enough to merit consideration.[132]

Agencies would face significant hurdles if, in instances when they receive thousands or millions of comments on a single proceeding, they were to try to sort through comments to determine which are real and which are fake or fraudulent. Just having a real address attached to a comment does not mean it is real, as some comments submitted to the FCC on net neutrality were attached to real information not submitted by the people to whom the information belongs.[133] Further, just because a comment has a fake email or address attached to it or has no email or address attached to it does not mean the comment is necessarily fake.[134]

Agencies do not have the resources to hire more staff to sort through comments and determine if they should be considered, left in the record but not considered, or removed from the record.[135] Computer algorithms designed to sort through comments would likely be flawed, possibly flagging as fake or fraudulent comments that are real.[136] Designing and implementing a system meant to sort through comments would be costly, and the public may have concerns with computer programs sorting through comments submitted to agency sites.

As government agencies and other entities use computer algorithms to perform increasingly more tasks, the public and artificial intelligence experts alike have pronounced concerns about the use of algorithms by government

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130 *See* Furchtgott-Roth, *supra* note 80.

131 *See id.*

132 *See id.* ("The FCC has approximately 1,600 staff working on literally thousands of different matters. Fewer than 50 will likely be assigned to review comments in the 'Restoring Internet Freedom' proceeding. A careful reading and filing of a comment might take an hour. Fifty staff members each working 2,000 hours per year full-time on reviewing comments would take more than 100 years to review all 10.5 million comments.").

133 *See* Finley, *supra* note 32 (arguing "just because someone didn't enter a valid address into the comment form doesn't mean their comment is illegitimate . . . just because a comment has a valid address doesn't mean it's a legitimate comment . . . ").

134 *See id.*

135 *See*, *e.g.*, Furchtgott-Roth, *supra* note 80.

136 *See supra* notes 137 & 138 *infra*.

entities and possible biases and errors that could arise from their use.[137] While artificial intelligence in the form of comment-submitting bots harms the notice-and-comment process by drowning out legitimate comments, an attempt to control the issue by using more artificial intelligence could result in an exasperated problem.[138]

In response to requests to remove fake comments, the FCC has responded that the agency need not consider all comments submitted and instead can just focus on comments that contain legal arguments.[139] FCC spokesperson Hart has said, "[t]he purpose of a rulemaking proceeding is not to see who can dump the most form letters into a docket. Rather, it is to gather facts and legal arguments so that the FCC can reach a well-supported decision."[140] While courts generally defer to agency rulemaking decisions,[141] and the Supreme Court has held that courts cannot impose on agencies their notions of what they think is "best,"[142] agencies have an obligation to the public under the APA to remain accountable for their decisions.[143] When fake, bot-submitted comments remain in the record, the public and courts cannot clearly assess the record, and the reasonableness of agency decisions becomes difficult to assess.

The problem of how to recognize and deal with fake and fraudulent comments submitted during rulemaking proceedings is a complicated one, but agencies must consider their options and act to avoid allowing fake comments to silence legitimate ones.

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[137] *See*, *e.g.*, Dave Gershgorn, *AI Experts Want Government Algorithmms to be Studied Like Environmental Hazards*, QUARTZ (Apr. 9, 2018), https://qz.com/1247033/ai-experts-want-government-algorithms-to-be-studied-like-environmental-hazards/ [https://perma.cc/FG7H-BLJH] (citing concerns that if government entities use algorithms without a focus on accountability, errors and biases in the systems would be difficult to find and correct); *see also* Ali Winston, *Palantir Has Secretly Been Using New Orleans to Test Its Predictive Policing Technology*, THE VERGE (Feb. 27, 2018), https://www.theverge.com/2018/2/27/17054740/palantir-predictive-policing-tool-new-orleans-nopd [https://perma.cc/7A6M-JJ72] (outlining problems with predictive policing technology in New Orleans).

[138] *See generally* Dillon Reisman et al., *Algorithmic Impact Assessments: A Practical Framework for Public Agency Accountability*, AI NOW (Apr. 2018), https://ainowinstitute.org/aiareport2018.pdf [https://perma.cc/CH8W-FE8B] ("Public agencies urgently need a practical framework to assess automated decision systems and to ensure public accountability.").

[139] *See*, *e.g.*, Issie Lapowsky, *It's Super Hard to Find Humans in the FCC's Net Neutrality Comments*, WIRED (Dec. 13, 2017), https://www.wired.com/story/bots-form-letters-humans-fcc-net-neutrality-comments/ [https://perma.cc/LG9R-MZZG].

[140] *Id.*

[141] *See*, *e.g.*, Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 233 (D.C. Cir. 2008); Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1207 (2015).

[142] *Perez*, 135 S. Ct. at 1207 (quoting Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 549 (1978).

[143] *See*, *e.g.*, FCC v. Fox TV Stations, 556 U.S. 502, 537 (2009).

V. SUGGESTED REMEDIES FOR ADDRESSING FAKE AND FRAUDULENT COMMENTS

After receiving various comments likely submitted by bots throughout the net neutrality public comment period, the FCC and other government agencies should update public comment filing systems to better protect against bots. 5 U.S.C. §553 establishes the minimum requirements to be imposed on agencies in rulemaking procedures.[144] Agencies have the leeway to allow other procedural rights if they think it necessary, but courts cannot impose on agencies any requirements other than those outlined in the statute.[145] Some possible remedies are outlined below.

A. CAPTCHAs

Adding CAPTCHAs,[146] which are tests commonly used to separate humans from bots online is one way agencies could address fake and fraudulent comments. But as technology rapidly changes and improves,[147] it will become increasingly difficult for agencies to keep up with the technology to properly protect against fake and fraudulent comments. Additionally, there are problems with traditional, text-based CAPTCHAs, as they are hard to read and disproportionately disadvantage people with disabilities.[148] Google has begun to move away from a text-based CAPTCHA model and instead uses a new "No CAPTCHA reCAPTCHA experience" where users only have to check a single box.[149]

Citizens could allege that CAPTCHAs make it more difficult to comment and participate in the rulemaking process, but a non-text-based CAPTCHA could be an effective and inexpensive first step in preventing bot-submitted comments. A CAPTCHA system would not place a large burden on agencies or citizens and could prevent some bot action preliminarily, but it would likely not be effective for stopping the majority of malicious comment activity. Chairman Pai has recently accepted a proposal to require

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[144] 5 U.S.C. § 553 (2012); *see also Vermont Yankee Nuclear Power Corp*, 435 U.S. at 520.

[145] *See id.*

[146] A CAPTCHA, or Completely Automated Public Turing Test To Tell Computers and Humans Apart traditionally asks a computer user to type difficult to read text into a box or complete another task to prove the user is not a robot nor computer before continuing to a page. Merrit Kennedy, *AI Model Fundamentally Cracks CAPTCHAs, Scientists Say*, NPR: THE TWO-WAY (Oct. 26, 2017), https://www.npr.org/sections/thetwo-way/2017/10/26/560082659/ai-model-fundamentally-cracks-captchas-scientists-say [https://perma.cc/5Y6F-LPME].

[147] *See id.* (explaining that in the course of recent research aimed at giving robots the ability to visually reason like humans, new Artificial Intelligence models were capable of cracking a majority of CAPTCHAs).

[148] *See* Derek Featherstone, *The Accessibility of Google's No CAPTCHA*, SIMPLY ACCESSIBLE (Dec, 4, 2014), https://simplyaccessible.com/article/googles-no-captcha/ [https://perma.cc/5D3Q-HPDN] ("Whether you are blind, deaf or hard of hearing, whether you have low-vision, some type of mobility or dexterity impairment, or even some type of cognitive difficulty, CAPTCHAs have been a thorn in the side of people with disabilities since the use of these techniques was popularized on the web.").

[149] *See Google reCAPTCHA*, https://www.google.com/recaptcha/intro/ [https://perma.cc/5W9H-N2E2] (last visited Oct. 21, 2018, 1:35 PM).

commenters to fill out CAPTCHAs before commenting, but Alex Howard, an advocate for stronger protections in electronic comment systems, has said "[a]dding a Captcha to try to prevent spam, unfortunately, sounds like a solution from the last millennium to a decidedly 21st century set of problems."[150]

B. Authentication

Another possibility would be for the FCC and other agencies to implement an authentication process. They could work to use technology that confirms comments are submitted by real people by requiring real email addresses to be submitted with each comment. Agencies could also require that each email address only be submitted one time during each public comment period. Another option would be that a confirmation email could be sent to each email address submitted with a comment to alert people if their email address has been used without their permission.[151] Agencies could also create a multi-step authentication process to confirm submitters are real people.[152]

However, there are legitimate reasons for citizens to not want their email addresses attached to comments, since all comments submitted to the FCC website are searchable in the public record.[153] Creating and/or implementing new authentication systems would be costly and take extra staff power, and agency staff are already overworked.[154] Agencies could require a valid email for submission but not include email addresses in public searches to encourage people to use real emails in their comment submissions. However, requiring a valid email address for submission could discourage some commenters from participating because they would not want their emails to be searchable on the electronic comment filing systems, or they may not have an email address, and this could contravene the goals of the APA by discouraging interested parties from participating.

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[150] Grimaldi, *supra* note 83.

[151] *See* Hitlin et al., *supra* note 17 for more on FCC valid email address requirement for comment submissions ("In theory, the process for submitting a comment to the FCC included a validation technique to ensure the email address submitted with each comment came from a legitimate account . . . However, the Center's analysis shows that the FCC site does not appear to have utilized this email verification process on a consistent basis . . . In the vast majority of cases, it is unclear whether any attempt was made to validate the email address provided.").

[152] *See Human-Like Bots*, *supra* note 2 (suggesting the FCC could implement "some kind of two-step authentication system").

[153] *See* Finley, *supra* note 32; *but see* Tiernoc, comment to *FCC Makes Net Neutrality Commenters' E-mail Addresses Public Through API*, ARS TECHNICA (June 15, 2017, 12:49 PM), https://arstechnica.com/information-technology/2017/06/psa-commenting-on-fcc-net-neutrality-plan-could-make-your-e-mail-public/ ("I am not thrilled that my email is easily accessible in an API viewable format, but . . . it's not like it's kept as some sort of secret.").

[154] *See* Furchtgott-Roth, *supra* note 80.

C. Administrative Fee

One commenter has suggested that agencies charge a 49-cent administrative fee for electronic submission of comments.[155] Harold Furchtgott-Roth, a senior fellow at the Hudson Institute and founder of the Center on the Economics of the Internet, argues that receipt of millions of comments on a single proceeding hinders agencies' abilities to consider and respond to significant comments because agencies cannot find significant comments amid so many mass-solicited, one-line, fake, and fraudulent comments.[156] He believes that while some believe mass commenting is a sign of a well-functioning democracy, "[m]ore accurately, millions of frivolous comments are an indication of anarchy," and agencies do not have the staff or resources to sort through and consider millions upon millions of comments on a single proceeding.[157] Mr. Furchtgott-Roth suggests that a 49-cent administrative fee, the same as the cost of sending a comment via the U.S. Postal Service would reduce frivolous comments, helping agencies function more smoothly because they would be able to more easily identify significant and meaningful comments and consider these comments as required under the APA.[158]

Adding a fee, even a 49-cent fee to submit a comment online, where people cherish their freedom, would put a price on what is now free. Although 49 cents is the price of a postage stamp, the need to pay a fee online could discourage some citizens from submitting comments, skewing the comment process away from encouraging broad public participation. All interested parties should be able to comment and participate in notice-and-comment rulemaking, but when fake comments dominate, legitimate comments may be overlooked.

VI. CONCLUSION

The significance of a public comment period is reduced when bots and illegitimate actors are able to easily submit comments to agencies on rulemaking proceedings. As Senator Jeff Merkley has recently said, "[t]he system of public comment is completely broken and manipulated to the point that it has basically lost any integrity or value."[159] Agencies cannot let bad actors control the conversation. While the APA does not clearly outline agency obligation to the public in the notice-and-comment process, the public should be able to comment on issues that they think are important, and the record must be accurate for judicial review. The public should be empowered to feel as though their comments on agency rulemaking proceedings matter in the United States, where we emphasize freedom of expression and the importance of democracy. Widespread awareness that fake and fraudulent comments remain in the record could lead the public to lose faith in the government and the rulemaking process, undermining the legitimacy of

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[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] Grimaldi, *supra* note 83.

federal agencies and the Administrative branch of our government. By not acting to remove fake comments submitted on net neutrality rules from the record, the FCC is inviting those with bad intentions to act again, and further, the agency is discouraging broad, legitimate public participation in the rulemaking process. The FCC must set a precedent of accountability and transparency, investigate the comments it received during the net neutrality notice-and-comment process, and, in the interest of preserving the public comment system, remove fake comments from the record.

Privacy at the Border: Applying the Border Search Exception to Digital Searches at the United States Border

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I. INTRODUCTION

In 2016 alone, eighty million people traveled outbound across the United States[1] and seventy-five million people traveled inbound through the United States.[2] As millions of people cross the United States border each year and the relevance of electronic devices for continuous everyday use increases, digital searches at the border become increasingly common. According to United States Customs and Border Protection ("CBP"), CBP Agents searched electronic devices belonging to 14,993 individuals entering or exiting through the United States border out of 189.6 million individuals traveling through the United States in 2017.[3] With the significant increase in the number of digital searches at the border, the need to determine the standard of suspicion required for conducting digital searches by Border Patrol and Transportation Security Administration officers at the border has also exponentially increased. With cases like *Alasaad v. Duke* in the District of Massachusetts being brought at the district court level against the Department of Homeland Security with the claim of Fourth Amendment violations for the search and seizure of electronic devices at the border without probable cause or a warrant, the discussion at hand in this Note remains at the forefront of current constitutional issues not yet decided by the Supreme Court.[4]

This Note addresses whether the border search exception to the Fourth Amendment should apply to both physical and digital searches at the border. First, Part II will provide a brief general background on the Fourth Amendment's balance between government protection and individual privacy rights and will discuss several exceptions to the Fourth Amendment. Part III will then discuss the standard for a digital search set by the Supreme Court in *Riley v. California* and will analyze why the Court set a different standard for digital searches than for searches of physical evidence in searches incident to lawful arrest.[5] Part IV will analyze why *Riley* is not applicable to border searches. Part V will discuss why the border search exception should be applied to both physical and digital searches at the United States border and proposes that the Supreme Court should adopt the Ninth and Fourth Circuit standard, which holds that an examination of the difference between forensic and manual digital searches at the border should be utilized as the factor to determine whether a digital search constitutes an especially intrusive search.

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1. *U.S. Resident Travel to International Destinations Increased Eight Percent in 2016*, INT'L TRADE ADMIN. (Dec. 4, 2017), https://travel.trade.gov/outreachpages/download_data_table/2016_Outbound_Analysis.pdf. [https://perma.cc/7NNL-JEHR].

2. *2016 Monthly Tourism Statistics*, NTTO, https://travel.trade.gov/view/m-2016-I-001/table1.asp.

[https://perma.cc/5SKV-MXAW] (last visited Oct. 26, 2018).

3. *CBP Releases Statistics on Electronic Device Statistics*, UNITED STATES CUSTOMS AND BORDER PROTECTION (Apr. 11, 2017), https://www.cbp.gov/newsroom/national-media-release/cbp-releases-statistics-electronic-device-searches-0 [https://perma.cc/N2KU-FJ3G] [hereinafter *CBP Releases Statistics on Electronic Device Statistics*].

4. *See* Amended Complaint at 1-2, Alasaad v. Duke, No. 1:17-cv-11730-DJC (D. Mass. Sept. 13, 2017), https://www.aclu.org/legal-document/alasaad-v-duke-complaint [https://perma.cc/NXX9-YDHE].

5. *See* Riley v. California, 134 S. Ct. 2473, 2493 (2014).

Part VI will conclude that by examining manual versus forensic digital searches, the Court will maintain the balance, which the Court first established in *Montoya de Hernandez*, between the government interest to provide national security, control of the borders, and the individual privacy interest.[6]

II. BACKGROUND

The Fourth Amendment provides the fundamental right to security and privacy from intrusion by the government by protecting an individual's security in their person and their belongings through prohibiting unreasonable searches and seizures.[7] Two separate clauses comprise the Fourth Amendment: the reasonableness clause and the warrant clause.[8] While the reasonableness clause requires that a search and seizure be reasonable, the warrant clause requires probable cause in order for a warrant to be granted.[9] The warrant must meet the particularity requirement by being supported with a particularized description of "the place to be searched" and the "people or things to be seized."[10]

Although a warrant is required to search a person or their property, the Supreme Court has upheld several exceptions that allow for a warrantless search and seizure under the Fourth Amendment.[11] The Court has established exceptions to the Fourth Amendment right because the Court has consistently held that the interest of the government must be balanced with the protection of an individual's privacy.[12] The Supreme Court established the Fourth Amendment balancing test known as the special needs doctrine in *Terry v. Ohio* and held that "a search is Constitutional where the government's interest in preventing crime outweighs the individual's interest in privacy."[13] The special needs doctrine is an exception to the Fourth Amendment, where the Court gives the government interest a "boost" in overcoming the interest of individual privacy rights in the balancing test.[14] In 2009, the Supreme Court continued to emphasize the importance of balancing these two interests by holding in *United States v. Villamonte-Marquez* that the search must be

6. *See* United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985).

7. U.S. CONST. amend. IV.

8. *See* William Clark, *Protecting the Privacies of Digital Life: Riley v. California, the Fourth Amendment's Particularity Requirement, and Search Protocols for Cell Phone Search Warrants*, 56 B.C. L. REV. 1981, 1986 (2015) (citations omitted).

9. *See id.* (citations omitted).

10. *See id.* (internal quotation marks omitted).

11. *See* Parker Jenkins, *OMG Not Something to LOL About: The Unintended Results of Disallowing Warrantless Searches of Cell Phones Incident to a Lawful Arrest*, 31 BYU J. PUB. L. 437, 441 (2017); *see also* Almeida-Sanchez v. United States, 413 U.S. 266, 274 (1973); Katz v. United States, 389 U.S. 347, 357 (1967).

12. *See* Alison M. Lucier, *You Can Judge a Container by Its Cover: The Single-purpose Exception and the Fourth Amendment*, 76 U. CHI. L. REV. 1809, 1809 (2009); *see also Almeida-Sanchez*, 413 U.S. at 274.

13. *See* Ari B. Fontecchio, *Suspicionless Laptop Searches Under the Border Search Doctrine: The Fourth Amendment Exception that Swallows Your Laptop*, 31 CARDOZO L. REV. 231, 233 (2009); Terry v. Ohio, 392 U.S. 1, 1 (1968).

14. *See* Fontecchio, *supra* note 14, at 233.

judged by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[15]

A. The Single Purpose Container Exception

The single purpose container exception, which allows a warrantless search of an item because the container's use is clear prior to search, is a key exception to the warrant requirement that falls within the larger category of the plain view exception.[16] Under the plain view exception, if the contents of the container are in plain view and known prior to search, there is a lowered expectation of privacy.[17] The warrantless search of the container is permissible if the container is so "distinctive that its contents are a foregone conclusion," and the contents are therefore considered to be in plain view.[18] A circuit split exists regarding how the determination of the single purpose container should be made.[19] While the Ninth and Tenth Circuits have consistently held that an objective viewpoint should be applied, the Fourth and Seventh Circuits have held that a subjective viewpoint should be applied.[20]

The Ninth and Tenth Circuits hold that the "objective viewpoint of a reasonable person" should be utilized to determine if the item subject to search constitutes a single purpose container.[21] In *United States v. Miller*, the Ninth Circuit held that neither the circumstances of the discovery of the evidence nor the expertise of the officer who discovered the evidence should be utilized to determine if the item constitutes a single purpose container.[22] In *Miller*, the Ninth Circuit held that the DEA agents, who conducted a warrantless search of a bag that was not transparent and lacked a distinctive shape and odor, conducted a search in violation of the defendant's Fourth Amendment right because the container was not so "distinctive that its contents" of a controlled substance were not a "foregone conclusion."[23] The Tenth Circuit, in *United States v. Bonitz*, declined to expand the single-purpose container exception to include "qualities independent of the container surrounding the search," because the court feared that extending the exception to these circumstances "would permit officers to conduct a 'warrantless search of any container found in the vicinity of a suspicious item.'"[24] However, the Fourth Circuit held that the officer's subjective viewpoint should be utilized, and the officer should account for the container's surrounding circumstances.[25] The Fourth Circuit in *United States v. Williams*

15. *See* United States v. Miller, 769 F.2d 554, 560 (9th Cir. 1985); United States v. Donnes, 947 F.2d 1430, 1438 (10th Cir. 1991).
16. *See* Lucier, *supra* note 13, at 1809.
17. See *id.*
18. *See id.* at 1817-18 (citation omitted).
19. *Id.* at 1809.
20. *See id.*
21. *See* United States v. Miller, 769 F.2d 554, 560 (9th Cir. 1985); United States v. Donnes, 947 F.2d 1430, 1438 (10th Cir. 1991); Lucier, *supra* note 13, at 1820-21.
22. *See Miller*, 769 F.2d at 560; *see also* Lucier, supra note 13, at 1820-21.
23. *See* Lucier, *supra* note 13, at 1809; *see also Miller*, 769 F.2d at 560.
24. *See* Lucier, *supra* note 13, at 1822 (citing Bonnitz v. United States, 826 F.2d 954, 956 (10th Cir. 1987)).
25. *See* Lucier, *supra* note 13, at 1826.

held that the subjective viewpoint should be applied because "the circumstances under which an officer finds the container may add to the apparent nature of its contents."[26]

B. The Exigent Circumstances Exception

In addition, there is an exigent circumstance exception to the Fourth Amendment, which allows a warrantless search and seizure to be conducted when both a time pressure exists and the evidence is at risk of being lost or destroyed.[27] In *Riley v. California*, the Supreme Court held that "police cannot search information on an arrestee's cell phone without a warrant, unless exigent circumstances exist at the time of the arrest" and that the "exigency must 'make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.'"[28] According to the Court, "exigency is both situational and environmentally influenced" based on "reasonableness, present needs, and existing facts."[29] The Supreme Court defined the standard required for exigent circumstances in *Brigham City v. Stuart* as requiring the officer to possess an objectively reasonable basis to believe that "someone was seriously injured or imminently threatened with such injury."[30]

C. The Search Incident to Lawful Arrest Exception

The search incident to lawful arrest creates a balancing test between the "reasonableness of a warrantless search, with the basic rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'"[31] The Supreme Court established the search incident to lawful arrest exception to the Fourth Amendment in the holding for *Mapp v. Ohio*.[32] The Court held later in *United States v. Robinson* that the primary purpose of the search incident to lawful arrest exception was to protect the government interest of providing for both the safety of officers and providing for the

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26. *See id.* at 1823.

27. *See* Di Jia et al., *An Analysis and Categorization of U.S. Supreme Court Cases Under the Exigent Circumstances Exception to the Warrant Requirement*, 27 GEO. MASON U. CIV. RTS. L.J. 37, 40-41 (2016) (citation omitted).

28. *Id.* at 41-42, (citing Mincey v. Arizona, 437 U.S. 385, 394 (1978)).

29. *See* Di Jia et al*., supra* note 28, at 42 (internal citations omitted) (internal quotation marks omitted); *see also* Graham v. Connor, 490 U.S. 128, 138 (1990) (finding that "[d]etermining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of 'the nature and quality of the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."); Kentucky v. King, 563 U.S. 452, 452 (2011) (holding that the need to prevent destruction of evidence invoked the exigent circumstances doctrine and justified the warrantless entry).

30. *See* Di Jia et al., *supra* note 28, at 42 (citing Brigham City v. Stuart, 547 U.S. 398, 400 (2006)).

31. Arizona v. Gant, 556 U.S. 332, 338 (2009) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

32. *See Gant*, 556 U.S. at 393; *see also* Mapp v. Ohio, 367 U.S. 643, 644 (1961); United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985).

preservation of evidence.[33] The Court later limited the search incident to arrest exception to only include "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."[34] The purpose for this restriction by the Court was to ensure that the government's interest to protect officers and to protect evidence susceptible to being destroyed following arrest would be maintained while also limiting the infringement that the exception causes on the Fourth Amendment rights of the individual.[35]

The Supreme Court also placed further restrictions on the search incident to lawful arrest exception by finding in *Preston v. United States* that "if there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply."[36] In *Riley v. California*, the Supreme Court further restricted the search incident to lawful arrest exception by holding that the exception did not apply to searches of electronic devices, specifically referring to cell phone data, and only applied to physical searches. [37] The Supreme Court made a crucial distinction between digital and physical searches when the Court held in *Riley* that a warrant is required for digital searches incident to lawful arrest unless an emergency exists, and that the search incident to lawful arrest exception does not apply to forensic or manual digital searches of cell phone data, although the purposes of protecting the officer and the evidence still apply in digital searches.[38]

D. The Border Search Exception

The Supreme Court has also consistently held that the Fourth Amendment's "balance of reasonableness is qualitatively different at the international border than in the interior."[39] The Court held in *Montoya de Hernandez* that "since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country."[40] In *United States v. Ramsey*, the Court held that the lower expectation of privacy at the borders exists because the state has a compelling interest to control "who and what may enter the country." [41] The Court also held in *Ramsey* that "a 'reasonable cause to suspect' a customs law violation . . . is 'a practical

33. United States v. Robinson, 414 U.S. 218, 230 (1973).
34. *Gant*, 556 U.S. at 335 (internal quotations omitted).
35. *See id.* at 335.
36. *See* Preston v. United States, 376 U.S. 364, 368; *see also Gant*, 556 U.S. at 335.
37. *See* Riley v. California, 134 S. Ct. 2473, 2493 (2014).
38. *See id.* at 2494.
39. *See* United States v. Montoya de Hernandez, 473 U.S. 531, 535 (1985).
40. *See id.* at 537 (citations omitted).
41. *See* United States v. Ramsey, 431 U.S. 606, 606 (1977); Victoria Wilson, *Laptops and the Border Search Exception to the Fourth Amendment: Protecting the United States Borders from Bombs, Drugs, and the Pictures from Your Vacation*, 65 U. MIAMI L. REV. 999, 1003 (2011).

test,' less stringent than the probable cause standard for the issuance of warrants imposed by the Fourth Amendment." [42]

The motivation for the state's interest in lowering the expectation of privacy at the United States borders has transformed over time from a purely financial interest to an interest in providing for the national security and to preventing the trafficking of illegal contraband across the border.[43] In 1985, the Supreme Court held in *United States v. Montoya de Hernandez* that "concern for the protection of the border is heightened by veritable national crisis in law enforcement caused by smuggling of illicit narcotics."[44] Additionally, the Court established the parameters of the border exception in *Montoya de Hernandez* by holding that a search at the border requires neither a warrant, probable cause, nor reasonable suspicion so that the search may uncover evidence or contraband.[45] If the search constitutes an especially intrusive search, the Court held that probable cause would be required.[46] For the purposes of the border search exception, the border is defined as an "international boundary," and the Court held in *Almeida-Sanchez v. United States* that "agents are acting within the Constitution when they stop and search automobiles without a warrant, without probable cause . . . to believe the cars have made a border crossing" when the individuals are within a reasonable distance from the border.[47]

Since *Ramsey*, the Court has significantly expanded the border exception from requiring the "reasonable cause to suspect" to a lower standard of permitting searches at the border based on suspicion at any level.[48] In 2004, a few years after the September 11th attacks, the Supreme Court continued to expand the border search exception by finding in *United States v. Flores Montano* that "the Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border."[49] The Supreme Court bolstered the importance of the weight of the government interest in searches at the border by holding that "searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border."[50]

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42. *See* Gretchen C. F. Shappert, *The Border Search Doctrine: Warrantless Searches of Electronic Devices after Riley v. California*, 62 U.S. ATT'YS BULL. 1, 2 (2014), https://www.justice.gov/sites/default/files/usao/legacy/2014/11/14/usab6206.pdf [https://perma.cc/C5CA-U8FN]; *see Ramsey*, 431 U.S. at 606.

43. Wilson, *supra* note 42, at 1004-05.

44. *See id.*

45. *See* United States v. Montoya de Hernandez, 473 U.S. 531, 535 (1985).

46. *See id.*

47. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 274 (1973) (holding that officers could search travelers in a car twenty miles from the border without violating their Fourth Amendment rights because "travelers may be stopped in crossing an international boundary because of national self-protection").

48. *See* Wilson, *supra* note 42, at 1004.

49. *See* United States v. Flores Montano, 541 U.S. 149, 152 (2004); *see also* Fontecchio, *supra* note 14, at 233.

50. *See Flores Montano*, 541 U.S. at 152; *see also* Wilson, *supra* note 42, at 233.

Within the border search exception, the Court has generally distinguished between routine and non-routine searches.[51] While a routine search constitutes a less intrusive search through methods such as pat downs, surveillance through metal detectors, and requiring the emptying of individuals' pockets, searches characterized in the category of routine require no level of suspicion of criminal activity.[52] If reasonable suspicion of an illegal activity such as smuggling contraband exists, a non-routine search may be conducted.[53] The courts have characterized searches including destruction of objects, use of prolonged detention, strip searches, body cavity searches, and x-ray searches as non-routine searches.[54]

E. Differences Between Forensic and Manual Digital Searches

When officers conduct searches of electronic data, there are five levels of digital evidence extraction techniques.[55] Manual extraction represents the most basic level of the techniques used to gain evidence from an electronic device and allows access only to information available by "point-and-click" operations.[56] This most basic level of extraction does not require any use of special tools and only allows the searcher to access information on the "standard interface" with no access to deleted items or clusters of deleted items available through this process.[57] The "point-and-click" method of searching is comparable to "sitting at a computer looking for a particular file by exploring file folders with a mouse and keyboard."[58] Beyond the basic manual search, the National Criminal Justice Reference Services established four levels of forensic search, all of which require specialized tools and knowledge to conduct.[59] These four levels of invasive data extraction include in order of increasing complexity: logical extraction, physical extraction, chip-off extraction, and micro read extraction.[60] The logical extraction process "incorporates external computer equipment to provide commands through code to the targeted device" and accesses information and data that would not be accessible through "simply point and click" methods.[61] The physical extraction process provides access to the flash memory, where a device stores the history of actions on the device, and provides access to deleted information that is not available through "point and click" or through logical extraction.[62] Both the chip-off extraction process and

51. *See* Stephen R. Vina et al., *Protecting our Perimeter: "Border Searches" Under the Fourth Amendment*, CRS (Aug. 15, 2006), http://trac.syr.edu/immigration/library/P1075.pdf [https://perma.cc/3BPW-9H3T].
52. *See id.*
53. *See id.*
54. *See id.* (citations omitted).
55. *See* Sean E. Goodison et al., *Digital Evidence and the U.S. Criminal Justice System*, NAT'L INST. OF JUSTICE (2014), https://www.ncjrs.gov/pdffiles1/nij/grants/248770.pdf [https://perma.cc/TGC4-Y77U].
56. *See id.*
57. *See id.*
58. *See id.*
59. *See id.*
60. *See id.*
61. *See id.*
62. *See id.*

the micro read process require highly technical knowledge and equipment to extract data directly from the memory chip and not through the device, so the search is similar to a microscopic search of the information.[63] Each level of digital extraction provides access to increasing amounts of evidence not accessible in a basic manual search including deleted file clusters.[64] Throughout each of the four levels of forensic extraction, the information from the device available significantly increases in quantity and increases in difficulty for the suspect to alter.[65] The chip-off and micro read extraction techniques constitute a "microscopic examination" of the contents of the digital device and is therefore by far the most invasive form of extraction.[66]

III. THE SUPREME COURT STANDARD SET IN RILEY V. CALIFORNIA: DIGITAL SEARCHES IN INCIDENT TO LAWFUL ARREST

In *Riley v. California*, the Supreme Court established that the standard for a digital search incident to arrest is categorically different than the standard for a physical search incident to arrest.[67] The Court rejected the government's argument that an electronic device containing digital information is analogous to a physical container that is subject to search in the same situation.[68] The Supreme Court held that the "search incident to arrest exception to the warrant requirement does not apply to cell phones" and that a constitutional search may occur without a warrant following an arrest under certain exceptions: to preserve evidence, to pursue a fleeing suspect, and to help those injured or in imminent danger.[69] The Court held that the search of the defendant's phone violated his Fourth Amendment right to be free from an unreasonable search because cell phones are distinguishable from other physical items that are subject to search on a person due to the quantity and quality of the information stored on the electronic device itself and the information that can be accessed on the phone but is stored on remote servers.[70] Due to the significant amount of private information stored on the phone and due to the information stored on remote servers through the "cloud" not being considered legally on the phone, the Court held that the phone therefore could not be subject to a warrantless search.[71] According to the Court, the warrantless searches of cell phones could be conducted in the instance of an emergency, if the search could be deemed reasonable based on the government's interest.[72] The Court explained a balancing test in *Riley* that

63. *See id.*
64. *See id.*
65. *See id.*
66. *See id.*
67. *See* Riley v. California, 134 S. Ct. 2473, 2493 (2014).
68. *See id.* at 2478.
69. *Id.* at 2494.
70. *See id.* at 2490-91.
71. *See id.*
72. *See id.* at 2494; *see also* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 663-65 (1995) (holding that a reasonable government interest to provide for the safety of minors who participate in high school athletics through random drug testing existed and outweighed the intrusion of the student athletes' Fourth Amendment rights); Shappert, *supra* note 43.

weighed the government's interest against the level of intrusion to the individual's privacy to determine what circumstances require deviation from the warrant requirement.[73] However, the Court left the appropriate level of suspicion required unclear and instead, chose to "expressly reserve the question."[74] The Court also held in *Riley* that digital searches constitute a non-routine search but did not address whether the traditional border search exception excludes digital searches at the border from this rule.[75]

The Supreme Court originally distinguished between routine and non-routine searches in *United States v. Montoya de Hernandez*.[76] In *Montoya de Hernandez*, the Court explained that under *Ramsey*, that "routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant."[77] The Court limited routine searches in *Montoya de Hernandez* to apply to border searches, which are "'reasonably related in scope to the circumstances which justified it initially.'"[78] Also, the Court in *Riley* did not address the level of suspicion for non-routine border searches, which the Court defined in *Montoya de Hernandez* as overly intrusive searches such as strip searches, body cavity searches, or involuntary x-ray searches.[79]

Although the Supreme Court held in *Riley* that digital searches are distinct from physical searches during searches incident to lawful arrest, the Court did not address whether the standard set in *Riley* applies to and places limitations on the border search exception for digital searches at the border.[80] The Court in *Riley* did not comment on whether digital and physical searches require different standards when applying the border exception.[81] In addition, although *Riley* provides a balancing test, the Court left the answers to several key questions unclear.[82] First, the Supreme Court has not discussed whether a heightened expectation of privacy exists for encrypted digital information or password protected information.[83] Second, the Court did not address whether manual searches and forensic searches, which provide access to significantly different qualities and quantities of evidence, should require a different level of suspicion by border patrol agents. or whether a heightened expectation of privacy therefore exists.[84] Because *Riley* addresses neither the border exception nor the substantial differences in quality and quantity of information accessible between manual and forensic digital searches, the Department of Homeland Security has not applied *Riley* to border search directives.[85] DHS does not instruct border patrol agents to treat electronic

73. *See* Riley v. California, 134 S. Ct. 2473, 2493 (2014).
74. Thomas M. Miller, *Digital Border Searches after Riley v. California*, 90 WASH. L. REV. 1943, 1995 (2015).
75. *See id.*
76. *See* United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985).
77. *See* Miller, *supra* note 75, at 1957 (citing United States v. Ramsey, 431 U.S. 606 (1977) (internal quotation)).
78. *See* Miller, *supra* note 75, at 1957.
79. *See id.* at 1958.
80. *See* Riley v. California, 134 S. Ct. 2473, 2493 (2014).
81. *See* Miller, *supra* note 75, at 1945.
82. *See generally Riley*, 134 S. Ct. at 2493; *see also* Miller, *supra* note 75, at 1945.
83. *See generally Riley*, 134 S. Ct. at 2493; *see also* Miller, *supra* note 75, at 1945.
84. *See generally Riley*, 134 S. Ct. at 2493; *see also* Miller, *supra* note 75, at 1945.
85. *See Riley*, 134 S. Ct. at 2493; *also see* Miller, *supra* note 75, at 1945.

devices as distinct from physical containers and therefore does not consider the standard required for suspicion to be any higher for a digital search than for a physical search at the border.[86]

IV. WHY *RILEY V. CALIFORNIA* SHOULD NOT BE APPLIED TO DIGITAL BORDER SEARCHES BROADLY

Although *Riley* provides no clarification on whether the same limitations placed on domestic digital searches subject to lawful arrest apply also to digital searches at the United States border, the Supreme Court has provided some clarification through consistently distinct holdings for searches incident to arrest and border exception searches. The Supreme Court has consistently held that searches incident to arrest are limited with respect to closed containers but also has consistently held that searches lacking any suspicion are permitted under the border search exception.[87] Lower courts seeking to answer the standard of suspicion necessary for digital searches at the border have varied in their approaches, which has led to a circuit split.[88] Although the majority of lower courts have required reasonable suspicion for a non-routine search, these courts have typically defined a non-routine search based on the level of intrusiveness of the search.[89] No lower courts have held that a digital border search that falls within the border search exception requires a warrant, and the United States Customs and Border Protection's authority to conduct such warrantless searches has been consistently upheld.[90]

A. The Ninth and Fourth Circuit Test for Digital Searches at the Border: Manual v. Forensic Digital Searches

Lower courts have divided in a split, with the Ninth Circuit and Fourth Circuits holding that the courts should apply the border exception to digital searches at the border by utilizing the balancing test between the government's interest and the of level intrusiveness based upon whether Border Patrol officers conducted a forensic or a manual digital search.[91] However, the United States District Court for the District of Columbia held that the court should instead treat all digital and physical searches at the border as inherently different and therefore not allow digital border searches without some heightened level of suspicion present under the border exception.[92] According to the Ninth and Fourth Circuits, border agents may conduct manual digital searches without a warrant, probable cause, or reasonable

86. *See* Miller, *supra* note 75, at 1950 (internal citations omitted).
87. *See id.* at 1945.
88. *Id.*
89. *See* United States v. Cotterman, 709 F.3d 952, 960 (9th Cir. 2013); *see also* United States v. Ickes, 393 F.3d 501, 505 (4th Cir. 2005); *see also* United States v. Arnold, 533 F.3d 1003, 1009 (9th Cir. 2008).
90. *See Cotterman*, 709 F.3d at 960; *Ickes*, 393 F.3d at 505; *Arnold*, 533 F.3d at 1009; *see also CBP Releases Statistics on Electronic Device Statistics*, *supra* note 4.
91. *See Cotterman*, 709 F.3d at 960; *see also Ickes*, 393 F.3d at 505; *see also Arnold*, 533 F.3d at 1009; *see also* United States v. Kim, No. 13-cr-00100-ABJ, 2015 BL 134375 (D.D.C. May 8, 2015).
92. *See also Kim*, No. 13-cr-00100-ABJ, 2015 BL 134375.

suspicion under the border exception, but agents are prohibited from conducting forensic searches, which always constitute an overly intrusive search, without reasonable suspicion of uncovering evidence or contraband.[93] The Ninth Circuit held in the *United States v. Cotterman* that Border Patrol Agents must possess "reasonable suspicion of criminal activity" to justify a forensic digital search of a laptop at the border but not for a manual search.[94]

CBP also directs officers that they may search, read, retain, copy, and share private data from a laptop searched under the border exception at the United States border.[95] These actions may be taken by border patrol on computer hard drives and external data storage units, and officers may retain the data for an "indeterminate amount of time."[96] CBP states that it adjusts its search procedures and directives to align with the current "threat information" while following constitutional and statutory authority.[97]

The Ninth and Fourth Circuits have not held that all digital searches at the border are non-routine nor constitute an overly intrusive search under the border search exception to the Fourth Amendment.[98] Instead, both circuits have applied the border exception established in *Montoya de Hernandez* to both physical and digital searches at the border and have analyzed the level of intrusiveness of the digital searches by distinguishing between manual and forensic digital searches.[99]

In *United States v. Cotternman*, the Ninth Circuit recognized the significant increase in quantity of information and deleted information that can be attained from remote servers during a forensic search, which cannot also be attained in a manual search.[100] The quantity and quality of the information attainable only through a forensic search constitutes an overly intrusive border search according to the Ninth Circuit.[101] In *United States v. Arnold***,** the Ninth Circuit held that a digital search of a laptop at the border does not require reasonable suspicion, and the court rejected the argument that the search of a laptop is analogous to the search of a home despite providing access to large quantities of evidence.[102] The court held that no distinction

93. *See Cotterman*, 709 F.3d at 956-957; *see also Ickes*, 393 F.3d at 504-05; *see also* Miller, *supra* note 75, at 1972-75.

94. *See* Miller, *supra* note 75, at 1946; *see also Ninth Circuit Holds Forensic Search of Laptop Seized at Border Requires Showing of Reasonable Suspicion*, 127 HARV. L. REV. 1041, 1041 (2014) (citing) (internal quotation marks omitted).

95. *See* Fontecchio, *supra* note 14, at 232 (citation omitted).

96. *See id.* (citation omitted).

97. *See CBP Releases Statistics on Electronic Device Searches, supra* note 4.

98. *See* United States v. Cotterman, 709 F.3d 952, 961 (9th Cir. 2013); *see also* United States v. Ickes, 393 F.3d 501, 505 (4th Cir. 2005); *see also* United States v. Arnold, 533 F.3d 1003, 1009 (9th Cir. 2008); *see also* United States v. Kim, No. 13-cr-00100-ABJ, 2015 BL 134375 (D.D.C. May 8, 2015).

99. *See Cotterman*, 709 F.3d at 956-957; *see also Ickes*, 393 F.3d at 504-05.

100. *See Cotterman*, 709 F.3d at 956-957.

101. *See id* at 982.

102. *See Arnold*, 533 F.3d at 1008-09.

exists between a warrantless and suspicion-less border search of luggage from a similar search of a laptop.[103]

The Fourth Circuit in *United States v. Ickes* also rejected limitations of electronic border searches and rejected the argument that searches of computers at the border should be limited based on the quality of information stored.[104] In *Ickes*, the court held that the presence of speech which might implicate First Amendment concerns does not implicate limitations on a border search.[105] The court in the Southern District of Maryland also distinguished between forensic and manual searches in *United States v. Saboonchi*, where the court held that reasonable suspicion was required for a forensic search when Border Patrol agents seized hard drives at the border to be subject to a forensic search at a later time.[106] The court held that such a forensic search would expose "intimate details" of the defendant's private affairs through the forensic extraction of some browsing histories and deleted files that would not be available through a manual digital search.[107] The Fourth Circuit then decided in 2018 in *United States v. Kolsuz* that border patrol agents must acquire a probable cause warrant before conducting a forensic digital search at the border.[108] The court stipulated that the holding did not apply to manual digital searches and found that "the distinction between manual and forensic searches is a perfectly manageable one."[109]

B. The District Court for the District of Columbia's Application of Riley v. California to Border Search Cases

The United States District Court for the District of Columbia, in *United States v. Kim*, applied *Riley* to the digital border search broadly and found that *Riley* applies to the search of electronic devices in all circumstances including both manual and forensic searches.[110] In *Kim*, TSA agents searched and seized the defendant's laptop and DHS subsequently searched the laptop's hard drive and extracted thousands of documents using specialized software but obtained a warrant for the extracted data only after the fact.[111] The District Court for the District of Columbia found in *Kim* that the *Riley* Court "made it clear that the breadth and volume of data stored on computers and other smart devices make today's technology different."[112] As a result, the burden is increasingly higher for the government to establish a compelling

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103. *See id.* at 1008-09 (holding that customs officers were permitted to search the contents of a passenger's laptop with no reasonable suspicion of the passenger being involved in a customs violation or criminal activity); *see also* Cooper Offenbecher, *Border Searches of Laptop Computers after United States v. Arnold: Implications for Traveling Professionals*, 5 SHIDLER J. L. COM. & TECH. 9 (2008).

104. *See Ickes*, 393 F.3d at 504-05 (holding that no level of suspicion was required to search a computer at the border in a manual digital search).

105. *See id.* at 506-507.

106. *See* United States v. Saboonchi, 990 F.Supp.2d 536, 548 (D. Md. 2014).

107. *See id* at 553.

108. United States v. Kolsuz, 890 F.3d 133, 146 (4th Cir. 2018).

109. *See id.*

110. *See* United States v. Kim, No. 13-cr-00100-ABJ, 2015 BL 134375, at *36-37 (D.D.C. May 8, 2015).

111. *Id.* at 1.

112. *Id.* at 34.

interest that outweighs the "degree to which the search intrudes upon an individual's privacy."[113]In *Kim*, the court chose not to address whether the Court's limitation in *Riley* on a digital search incident to lawful arrest should be distinguished from a limitation on a border search of an electronic device.[114] By not acknowledging this difference, the District Court for the District of Columbia failed to recognize the distinct purposes and parameters set for the border search exception in *Montoya de Hernandez* and the search incident to lawful arrest exception under *Arizona v. Gant*, where the Supreme Court held that "the exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations."[115] The two exceptions are inherently different, and the search subject to lawful arrest exception has been limited by the Court significantly more than the border search exception.[116] While the border search exception was created for significantly different and broad purposes by the Court to support the government's interest in protecting the borders and providing for the national security, the search subject to lawful arrest exception was created for the purpose of protecting the officer involved in the arrest and search and to protect the evidence that is tied to the arrest at hand from being destroyed.[117]

Therefore, the two exceptions should be treated differently by the Court in regard to searches of electronic devices just as the Supreme Court has treated the two exceptions differently in physical searches.[118] As a result, *Riley* should not be applied by the Court to digital searches at the border because in *Riley*, the Court intended to restrict the search incident to lawful arrest but did not address the border search exception.[119] Furthermore, the differentiation of digital and physical searches for searches subject to lawful arrest that *Riley* established does not necessarily apply to digital searches at the border.

V. THE BORDER SEARCH EXCEPTION SHOULD BE APPLIED TO BOTH PHYSICAL AND DIGITAL SEARCHES AT THE UNITED STATES BORDER

The Supreme Court established the border search exception to provide the government with an advantage because the government's interest in regulating what enters and exits the country outweighs the individual interest of privacy in a majority of instances.[120] The increasing presence of persons carrying digital devices that store electronic information across borders does not create a shift in the balance of the government's interest

113. *Id.* at 36; *see also* Miller, *supra* note 75, at 1975 (internal quotation marks omitted).

114. *See Kim*, No. 13-cr-00100-ABJ, 2015 BL 134375, at *29.

115. *See* Arizona v. Gant, 556 U.S. 332, 338 (2009); United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985).

116. *See* Mapp v. Ohio, 367 U.S. 643, 644 (1961); *see also Montoya de Hernandez*, 473 U.S. at 541.

117. *See Mapp*, 367 U.S. at 644; *see also Montoya de Hernandez*, 473 U.S. at 541; *see also* Miller, *supra* note 75, at 1946; *see also* Riley v. California, 134 S. Ct. 2473, 2493 (2014).

118. *See* Miller, *supra* note 75, at 1946; *see also Riley*, 134 S. Ct. at 2488-89, 2493.

119. *See Riley*, 134 S. Ct. at 2485.

120. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 274 (1973).

versus individual privacy interests. On the contrary, this increase in portable technology provides the opportunity to more efficiently, quickly, and more frequently commit crimes across the border, such as the trafficking of drugs, humans, and other illegal contraband.[121] The Supreme Court first established the border search exception in the interest of controlling trade and subsequently, in the interest of preventing the rapidly increasing flow of drugs into the United States.[122] Since the September 11th terrorist attacks, the government's interest in monitoring the border has increasingly stemmed from the need to provide for national security and to thwart growing threats of terrorism.[123]

A. Applying the Original Intent of the Border Search Exception v. the Original Intent of the Search Incident to Lawful Arrest

By recognizing the important difference between a forensic search of an electronic device and a manual search, the Court will not deviate from the border exception's original intent and standard set by the Supreme Court in *Montoya de Hernandez*.[124] The government interest will receive heightened protection while individuals' privacy interests will continue to receive the same level of protection guaranteed by the Court in *Montoya de Hernandez* because the Court will continue to require reasonable suspicion for overly intrusive searches.[125] The forensic digital search can reach significantly more information located on remote servers and in flash memory, which is not accessible through "point and click" methods.[126] Therefore, the amount of information available through forensic methods is more analogous to an overly intrusive search as defined by *Montoya de Hernandez* and less analogous to a routine physical search.[127] Searching an electronic device for large quantities of evidence in the flash memory, in deleted storage, and on remote servers is more analogous to the search of a home because the evidence constitutes a large quantity of potentially more sensitive information, and therefore a heightened expectation of privacy should be associated with both the search of a home and a forensic electronic search.[128] In *Montoya de Hernandez*, the Supreme Court held that the rectal search of an individual suspected of trafficking drugs into the United States by smuggling the contraband by hiding it in her alimentary canal did not constitute an overly intrusive search.[129] The Court found in *Montoya de Hernandez* that "the fact that protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, in itself, render the search unreasonable."[130] Under *Montoya de Hernandez*, the Court set a

121. *See* Richard Davis & Ken Pease, *Crime, Technology, and the Future*, 13 SECURITY J. 59, 61 (2009).
122. *See* Wilson, *supra* note 42, at 1003-04.
123. *See id.*
124. *See* United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985).
125. *See id.*
126. *See* Goodison, *supra* note 56.
127. *See Montoya de Hernandez*, 473 U.S. at 541.
128. *See* Miller, *supra* note 75, at 1946.
129. *See Montoya de Hernandez*, 473 U.S. at 541.
130. *See id.* (citations omitted).

high bar for proving that a search constitutes an overly intrusive search,[131] and under this standard, a forensic search is more analogous to this definition of an overly intrusive search than a manual "point and click" search.[132]

B. The Exigent Circumstances Exception as an Alternative Justification for Warrantless Digital Searches at the Border

In opposition to applying the border search exception to all searches at the border in the same manner, the dissent in *Montoya de Hernandez* argues for requiring reasonable suspicion for a search that "involves such severe intrusions on the values the Fourth Amendment protects that more stringent safeguards are required" because some "border detentions may involve the use of such highly intrusive investigative techniques as body-cavity searches, x-ray machines, and stomach-pumping."[133] The dissent here argues that there are many instances in which the border exceptions do not provide a heightened government interest for national security at the border that outweighs the Fourth Amendment rights of individuals.[134] As an alternative to the border protection exception, the exigent circumstances exception provides the justification for the warrantless search of electronic devices at the border.

Proponents within this school of thought who advocate for requiring a warrant for all electronic searches at the border and for extending *Riley*'s holding to border searches have filed suit in the United States District Court for the District of Massachusetts in *Alasaad v. Duke* on behalf of eleven plaintiffs who underwent searches of their laptops and cell phones by CBP officers and Immigration and Customs Enforcement Officers when crossing the United States border.[135]

The proponents who advocate for effectively eliminating the border search exception for all digital searches and who are in favor of requiring probable cause or a warrant to conduct all digital searches at the border fail to recognize that the exigent circumstances exception also applies at the border in many instances.[136] The exigent circumstances exception provides the justification for manual digital searches at the border without probable cause or a warrant because the government's interest to control the borders to provide for national security creates the necessary situational circumstances for the exigency exception to apply.[137] The exigent circumstances exception is applied based on "situational and environmentally influenced" circumstances based on "reasonableness, present needs, and existing facts."[138] The Supreme Court held in *Brigham City, Utah v. Stuart* that the exigent circumstances exception provides the justification for warrantless searches

131. *See id.*
132. *See* Goodison, *supra* note 56.
133. *See Montoya de Hernandez*, 473 U.S. at 551-52 (Brennan, J. dissenting).
134. *See id.*
135. *See* Amended Complaint, Alasaad v. Duke, No. 1:17-cv-11730-DJC at 1 (D. Mass. Sept. 13, 2017).
136. *See* Jia, *supra* note 28, at 38.
137. *See id.* at 41-42.
138. *Id.* at 42 (internal citations omitted) (internal quotation marks omitted).

when an objectively reasonable basis for the search exists to prevent someone from being seriously injured.[139]

When heightened levels of threats to national security persist at the border, CBP officers and TSA officers must adjust search procedures based on the current "threat information."[140] The knowledge of an imminent threat to public safety creates the circumstances necessary to invoke the exigent circumstances and justifies a search without a warrant, probable cause, or reasonable suspicion.[141] If the officer bases the search upon reasonableness and the present need for heightened security to provide for the safety of persons imminently in danger according to the existing facts, then manual digital searches are subject to the exigent circumstances exception to the Fourth Amendment.[142] In such circumstances, the interest of the national government outweighs the individual privacy interest.[143] Similarly, the Court held in *Riley*, when referring to a domestic digital search not at the border, that exigent circumstances must be "so compelling that [a] warrantless search is objectively reasonable," but when officers possess knowledge of heightened national security threats, the warrantless manual digital search is objectively reasonable.[144] However, the forensic search that requires an extensive period of time, expertise, and equipment to conduct as well as the ability to retain significantly more information[145] would likely not be held by the Court as being justified by the exigent circumstances exception.

C. Case Study: Alasaad v. Duke

In the pending district court case, *Alasaad v. Duke*, the plaintiffs echo the D.C. District Court's holding in *Kim*, in construing *Riley* to stand for the proposition that digital and physical searches are categorically different, and therefore, the exceptions to the Fourth Amendment should not be applied equally for each but rather should be extended and applied to the border exception as well.[146] The plaintiffs in *Alasaad* argue that the border search exception established in *Montoya de Hernandez* should be applied to only physical searches at the border and exclude digital border searches.[147] The plaintiffs do not distinguish between manual and forensic searches in their argument and do not claim that the officers conducted forensic searches on the electronic devices in question but only mention that many forensic searches are conducted by border patrol agents.[148] The plaintiffs in *Alasaad* claim that if the District Court for the District of Massachusetts applied *Riley*, all of the digital searches at the border in question would be violations of the

139. *See* Brigham City v. Stuart, 126 S. Ct. 1943, 1946 (2006); Jia, *supra* note 28, at 40.
140. *See CBP Releases Statistics on Electronic Device Statistics, supra* note 4.
141. *See id.*
142. *See Stuart*, 547 U.S. at 402-03; Jia, *supra* note 28, at 40.
143. *See Stuart*, 547 U.S. at 402-03; Jia, *supra* note 28, at 40.
144. *See* Riley v. California, 134 S. Ct. 2473, 2493 (2014) (internal citations omitted) (internal quotation marks omitted).
145. *See* Goodison, *supra* note 56.
146. *See* Amended Complaint at 38, Alasaad v. Duke, No. 1:17-cv-11730-DJC (D. Mass. Sept. 13, 2017); Goodison, *supra* note 56.
147*See* Amended Complaint at 38, Alasaad v. Duke, No. 1:17-cv-11730-DJC (D. Mass. Sept. 13, 2017).
148. *See id.*

Fourth Amendment because the officers conducting the searches lacked probable cause or a warrant.[149] However, if the district court applies *Riley* to *Alasaad*, the court would extend *Alasaad* beyond the scope of search incident to arrest and would fail to acknowledge the differences in the purposes of the search incident to arrest exception and the border search exception.

Instead of applying *Riley* and effectively eliminating the border search exception, which no Circuit Court has yet done, the United States District Court for the District of Massachusetts should apply the Ninth and Fourth Circuit standard to *Alasaad v. Duke*.[150] By applying the Ninth Circuit holding from *United States v. Cotterman* to *Alasaad*, the district court would recognize the significant increase in quantity of information and quality of information in a forensic search, which creates a heightened expectation of privacy that is not present in the evidence available in a "point and click" manual search.[151] Due to the heightened expectation of privacy from access to deleted information and information on remote servers through a forensic search, the District Court in *Alasaad* should hold that forensic searches and manual searches cannot be considered equally when examining whether the government overly intruded an individual's privacy rights.[152] The district court should hold as the Court did in *United States v. Arnold* that forensic searches require reasonable suspicion while manual digital searches at the border do not, which would balance the government's interest in providing for the national security with the personal privacy interest of the individuals traveling across the United States border.[153]

The plaintiffs in *Alasaad* argue that they possess a heightened expectation of privacy because some of their electronic devices, which were searched at the border without a warrant under the justification of the border exception to the Fourth Amendment, contained sensitive work-related material. [154] However, the Fourth Circuit held in *United States v. Ickes* that searches of computers at the border should not be limited based on the quality of information stored.[155] The District Court in *Alasaad* should apply the Fourth Circuit's holding in *Ickes* because Ickes' concern that the information stored on his electronic device that was searched by border patrol agents at the border implicated First Amendment concerns is analogous to the claims of the plaintiffs in *Alassad* that their digital information should be protected with a heightened expectation of privacy.[156] The district court in *Alassad* should, as the Fourth Circuit did in Ickes, "refuse to undermine" the "well-settled law by restrictively reading the statutory language in 19 U.S.C. §

149. *See id.* at 56.

150. *See* United States v. Cotterman, 709 F.3d 952, 955 (9th Cir. 2013); *see also* United States v. Arnold, 533 F.3d 1003, 1009 (9th Cir. 2008); *see also* United States v. Ickes, 393 F.3d 501, 505 (4th Cir. 2005).

151. *See Cotterman*, 709 F.3d at 955.

152. *See id.* at 967.

153. *See Arnold*, 533 F.3d at 1008.

154. *See* Amended Complaint at 38, Alasaad v. Duke, No. 1:17-cv-11730-DJC (D. Mass. Sept. 13, 2017).

155. *See Ickes*, 393 F.3d at 505-06.

156. *See id.*

1581(a) or by carving out a First Amendment exception to the border search doctrine."[157]

VI. CONCLUSION

As electronic devices continuously grow in their capacities to contain significant amounts of personal information and as travel across the United States border also continues to exponentially grow each year, the significance and relevance of the border search exception's application to digital searches remains at the forefront of Fourth Amendment issues. *Riley* should not be applied broadly to all digital searches because each search exception to the Fourth Amendment originated with a distinct intent, and extending *Riley* beyond its application to the search incident to lawful arrest exception sets the precedent of treating all exceptions to the Fourth Amendment exactly alike. Instead, the Supreme Court should instead adopt the holding of the Ninth and Fourth Circuits to provide for the most equal balance between the government's interest to control the borders and individuals' Fourth Amendment rights by broadly applying the border exception to manual searches but requiring a heightened level of suspicion for forensic digital searches at the border.

157. *See id.* at 502.

From Diet Pills to Truth Serum: How the FTC Could Be a Real Solution to Fake News

John Roberts*

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I. INTRODUCTION

> "Don't believe everything you read on the internet."-Abraham Lincoln[1]

While the thought of President Lincoln espousing the dangers of believing unverified stories on the internet may seem comical, for people like James Alefantis, the owner of Comet Ping Pong, a pizza restaurant in Washington, D.C., blind reliance on Internet rumors can have horrifying results.[2] On December 4th, 2016, at around 3 p.m., a man arrived, walked into the restaurant armed with an AR-15 assault rifle, and fired several rounds.[3] The shooter then proceeded to search the restaurant for underground vaults or hidden rooms, and finding none, surrendered to police after 45 minutes.[4] It was later revealed that the shooter, Edgar Maddison Welch, had acted in reliance on a story that he had read online, which claimed the restaurant had concealed a pedophilia ring run by then-Democratic presidential candidate Hillary Clinton and her campaign manager, Jon Podesta.[5] That story originated from a tweet alleging these rumors and rapidly spread across different social media platforms, with Infowars talk show host Alex Jones suggesting Clinton and Podesta's involvement in a child sex ring.[6] While these rumors had no factual basis, this incident, now known as "Pizzagate,"[7] provides just one example of the effects of the unchecked spread of misinformation, or "fake news" on multi-service media platforms (hereinafter "platforms") such as Facebook, Twitter, and Google. Despite the severity of the consequences of the rapid spread of patently false rumors, actually halting the dissemination of fake news has proven difficult for legislators and platforms alike, as the First Amendment fiercely protects free speech.[8] To reduce the dissemination of fake news while balancing First Amendment concerns, the Federal Trade Commission ("FTC") should regulate fake news by treating information shared by the media on platforms as "products." This would allow the FTC to pursue unfair trade practice actions while removing the monetary incentive for the media and others to share these stories.

Part II of this Note begins by defining "fake news," and then proceeds to identify the factors that make it so effective in reaching a large audience on

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1. *See Abraham Lincoln Quotes*, MEME GENERATOR, https://memegenerator.net/instance/67282698/abraham-lincoln-quotes-dont-believe-everything-you-read-on-the-internet-abe-lincoln [https://perma.cc/T8AS-G97H]] (last visited Nov. 9, 2017).
2. *See* Marc Fisher et al., *Pizzagate: From rumor, to hashtag, to gunfire in D.C.*, WASH. POST (Dec. 6, 2016), https://www.washingtonpost.com/local/pizzagate-from-rumor-to-hashtag-to-gunfire-in-dc/2016/12/06/4c7def50-bbd4-11e6-94ac-3d324840106c_story.html?utm_term=.1108ed20ba7b [https://perma.cc/7V8H-RCHB].
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. *See generally* U.S. CONST. amend. I. The First Amendment grants broad protection to speech, preventing Congress from creating laws that "abridge[e] the freedom of speech, or of the press." *Id.*

social media platforms. Next, Part II examines the financial and political incentives that motivate posters of fake news. Lastly, Part II explores the dangers that fake news pose to our society. These risks include perpetuating a misinformed citizenry, destroying trust and confidence in the mainstream media, widening the partisan divide, and potentially interfering with democratic functions.

Part III examines the approaches taken by other countries in dealing with the spread of fake news on social media platforms. These approaches include a bill in Germany that would compel social media platforms to rapidly remove fake news or face massive fines, as well as the designation of special units in the Czech Republic tasked with debunking fake news stories. Part III then discusses the incompatibility of these approaches with the First Amendment protections on speech that are unique to the United States and the narrow exceptions to these protections that have been carved out by other laws.

Part IV explores several existing avenues that are available to combat fake news, as well as the pitfalls of these approaches. First, Part IV discusses the efficacy of libel laws and the jurisdictional and financial issues that make this method infeasible. Part IV also discusses methods of self-regulation, such as the steps taken by Facebook and Google to filter out fake news from their platforms, as well as calls for increased media literacy for the public.

Part V advocates for the oversight of fake news by the FTC. In doing so, this Note will discuss how the Second Circuit handled a case involving a fake news advertiser. Importantly, Part V will discuss the implication of the court's findings regarding the interaction of the Federal Trade Commission Act ("FTCA") with Section 230 of the Communications Decency Act ("CDA"), and how treating news as a product would provide a loophole in the rigorous First Amendment protections that would otherwise apply to publishers of fake news.

II. DEFINING FAKE NEWS AND IDENTIFYING ITS CONSEQUENCES

A. What is "Fake News"?

While misinformation has always been present in public discourse to some extent, the phenomenon of "fake news" has become especially prevalent in recent years. The lack of a precise definition of "fake news" adds to the difficulty of developing a solution.[9] The President of the United States, Donald Trump, has frequently used the term to refer to news organizations and stories that reflect negatively on his administration and himself.[10] However, as journalism Professor Larry Atkins has explained, the fact that a

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9. *See* Claire Wardle, *Fake News: It's Complicated*, FIRST DRAFT (Feb. 16, 2017), https://firstdraftnews.com/fake-news-complicated/ [https://perma.cc/JYQ6-JZUA].

10. *See* Donald J. Trump, TWITTER (Feb. 6, 2017), https://twitter.com/realDonaldTrump/status/828574430800539648 [https://perma.cc/4N9P-YJUR] ("Any negative polls are fake news, just like the CNN, ABC, NBC polls in the election. Sorry, people want border security and extreme vetting."); *see also* Donald J. Trump, TWITTER (Feb. 15, 2017), https://twitter.com/realdonaldtrump/status/831830548565852160 [https://perma.cc/36JN-DY3J] ("The fake news media is going crazy with their conspiracy theories and blind hatred. @MSNBC & @CNN are unwatchable. @foxandfriends is great!").

news article is critical or even biased does not necessarily make it fake if the article does not lie or misrepresent the facts.[11] Even inaccurate stories are not fake, another journalism professor Barbara Friedman has explained, where the mistakes are unintentional and the providers "strive for accuracy and work to correct their errors."[12] For the purposes of this Note, fake news will be defined, borrowing from Tom Hagy's definition in his article, *A Little Truth About Fake News—and the Law*, as an article that is intentionally and verifiably false and distributed via social media with the purpose of:

> 1. Swaying opinion, sparking emotion, or even causing outrage among individuals who — believing the information to be true — click, comment, and/or spread the information and/or take some form of action that supports a particular cause or point of view
> 2. Getting the reader to click through the content, driving "click revenue," and view and even click on web ads, driving more revenue and, potentially, purchases[13]

As previously mentioned, misinformation and obviously false rumors are nothing new, which raises the question: Why is there currently so much concern about fake news? To answer this question, it is necessary to understand how fake news spreads and the incentives, both financial and political, that exist for creators of fake news. What makes today's fake news troubling is in large part the relative ease with which these stories can be created and spread to thousands of readers as a result of reduced barriers to sharing content.[14] With the resources available today, it is now easy to create websites and publish content, and with highly-populated userbases, online platforms such as Facebook and Twitter are prime markets for rapidly sharing sensational articles.[15] Fake news sites may even use domain names and logos that are very similar to those of reputable news organizations and in doing so fool readers into believing that the information that they are reading is from a well-known and credible source.[16]

In addition to being easily circulated, fake news can be extremely lucrative. Fake news content may easily be monetized through advertising platforms.[17] This format compensates publishers based on the number of

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11. *See* Steven Seidenburg, *Lies and Libel: Fake news lacks a straightforward cure*, ABA J. (July 2017), http://www.abajournal.com/magazine/article/fake_news_libel_law [https://perma.cc/M6SH-JT2V] ("They are cherry-picking quotes or facts to back up their position but think they are telling the truth. MSNBC will show a positive slant on Obamacare. Fox News will have a negative slant. Neither is fake news because both networks are just cherry picking facts, not making stuff up." (internal quotation marks omitted)).

12. *Id.* (internal quotation marks omitted).

13. Tom Hagy, *A Little Truth About Fake News—and the Law*, CORP. LAW ADVISORY, https://www.lexisnexis.com/communities/corporatecounselnewsletter/b/newsletter/archive/2017/09/08/a-little-truth-about-fake-news-and-the-law.aspx [https://perma.cc/78KA-7MM7].

14. *See* Hunt Alcottt & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. OF ECON. PERSP. 211, 211–36, 214–15 (2017).

15. *See id.* at 215 (explaining "[i]n 2016, active Facebook users per month reached 1.8 billion and Twitter's approached 400 million").

16. *See id.* at 217.

17. *See id.* at 214.

clicks on a given article, which incentivizes individuals to churn out as much sensational content as possible in order to reach more viewers.[18] For example, more than 100 sites posting right wing fake news articles were discovered to have been run by teenagers in a small town in Macedonia in order to earn tens of thousands of dollars in advertising revenues from the clicks on these fabricated stories.[19]

Some creators of fake news are motivated by ideology rather than financial gain. These posters post content designed to influence readers to either support or oppose candidates or causes consistent with the creator's own beliefs.[20] One right wing fake news provider stated that they actually identify as liberal and sought to use their article to embarrass conservatives who would share the content.[21] Fake news posts, especially political posts, draw an especially large amount of views, with the top twenty fake news stories on Facebook generating more interaction than the top twenty news stories from mainstream media during the last three months of the 2016 presidential election.[22] While fake news is disseminated by posters from all over the political spectrum, in the months leading up to the 2016 presidential election, nearly three times as many pro-Trump (or anti-Clinton) articles were shared on Facebook than pro-Clinton (or anti-Trump) articles, with totals of 30.3 million and 7.6 million shares, respectively.[23]

B. The Dangers of Fake News

It may be tempting to dismiss the recent uptick in fake news posts on platforms as merely the most recent iteration of an age-old problem, but the same characteristics that incentivize the creation of fake news and make it so easy to spread also pose a serious threat to democratic institutions by eroding the public's trust in established sources of reliable information. A survey by Pew Research Center found that sixty-two percent of US adults get at least some of their news from multi-service media platforms.[24] Of this sixty-two percent, eighteen percent get their news from social media "often," twenty-six percent got their news from social media "sometimes," and eighteen percent get it "hardly ever."[25] While established news organizations have reputational concerns that discourage the reporting of false or unverified information, fake news publishers do not share these concerns,[26] and as previously noted, the top fake news stories are often much more widely shared

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18. *See* Nabiha Syed, *Real Talk About Fake News: Towards a Better Theory for Platform Governance*, 127 YALE L.J. 337, 352 (2017); *see also* Alcott & Gentzkow, *supra* note 14, at 217; Seidenburg, *supra* note 11.

19. *See* Alcott & Gentkow, *supra* note 14, at 217 (citation omitted); Syed, *supra* note 18, at 352–53 (citation omitted); Seidenburg, *Lies and Libel*, *supra* note 11.

20. *See* Alcott & Gentkow, *supra* note 14, at 217.

21. *See id.*

22. Seidenburg, *supra* note 11 (citation omitted).

23. *See* Alcott & Gentkow, *supra* note 14, at 223.

24. Jeffrey Gottfried & Elisa Shearer, *News Across Social Media Platforms 2016*, PEW RES. CTR. (May 26, 2016), http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016 [https://perma.cc/F446-Z4FA].

25. *Id.*

26. *See* Alcott & Gentkow, *supra* note 14, at 214.

than the top actual news stories on social media.[27] As a result of this inundation of misinformation, fake news has the effect of creating confusion and fooling people into believing false information.[28] This uncertainty can erode even the most basic foundations and assumptions, and a Pew Research Center associate found that an estimated eighty-four percent of people reported that a disagreement existed over the basic facts underlying public issues prior to the 2016 election.[29]

In addition to flooding readers with false information, fake news also erodes trust in established sources of information. Trust in the mainstream media has dropped precipitously in recent years, with a Gallup poll reporting that just thirty-two percent of respondents claimed to have "a great deal" or "a fair amount" of trust for the established news outlets, the lowest reported level in Gallup polling history.[30] The evaporation of trust in the mainstream media has been more pronounced among Republicans than Democrats, dropping below twenty percent in 2016.[31] This growing distrust is not limited to the media, with the credibility of intelligence agencies and scientists increasingly being called into question.[32] This distrust creates a vicious cycle, as the uncertainty among Americans with regard to which sources they can trust creates a void that fake news is quick to fill.[33]

Fake news also serves to inflame tensions and deepen partisan divisions, causing people to "double down on opinions they already have."[34] In order to generate revenues from clicks, fake news articles tend to have sensationalist headlines that draw in viewers but can also create real animosity between sharers and commenters.[35] As Amanda Taub writes in her article, *The Real Story About Fake News Is Partisanship*, "[t]he very phrase [fake news] implies that the people who read and spread the kind of false political stories that swirled online during the election campaign must either be too dumb to realize they're being duped or too dishonest to care that they're

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27. *See generally* Seidenberg, *supra* note 11.

28. *See id.* (quoting Alcott & Gentzkow, *supra* note 14) ("We estimated that half of the people who saw fake news stories believed they were true.").

29. *See id.*

30. Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP NEWS (Sept. 14, 2016), http://news.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx [https://perma.cc/YDU2-XRHZ].

31. *See* Alcott & Gentzkow, *supra* note 14, at 215-16.

32. *See* Philip Rotner, *Trump Trashes Free Press And U.S. Intelligence In Poland*, HUFFINGTON POST (July 6, 2017), https://www.huffingtonpost.com/entry/trump-trashes-free-press-and-us-intelligence-in-poland_us_595ea645e4b08f5c97d0683f [https://perma.cc/D5YC-82L5]; Brian Kennedy & Cary Funk, *Many Americans are skeptical about scientific research on climate and GM foods*, PEW RES. CTR. (Dec. 5, 2016), http://www.pewresearch.org/fact-tank/2016/12/05/many-americans-are-skeptical-about-scientific-research-on-climate-and-gm-foods/ [https://perma.cc/MR9Z-B5BF].

33. *See generally* Alcott & Gentzkow, *supra* note 14, at 215.

34. *See* Seidenberg, *supra* note 11 (quoting Rachel Davis Mersey, an associate professor of journalism at Northwestern University's Medill school).

35. *See generally* Craig Silverman, *This Is How Your Hyperpartisan Political News Gets Made*, BUZZFEED NEWS (Feb. 27, 2017), https://www.buzzfeed.com/craigsilverman/how-the-hyperpartisan-sausage-is-made?utm_term=.hrWnJY8k3#.jsDdLbDjZ [https://perma.cc/9VFZ-4M9H]; Amanda Taub, *The Real Story About Fake News Is Partisanship*, N.Y. TIMES (Jan. 11, 2017), https://www.nytimes.com/2017/01/11/upshot/the-real-story-about-fake-news-is-partisanship.html [https://perma.cc/74YY-T56P].

spreading lies."[36] The contentiousness of these articles may result in individuals unfollowing or blocking other users, even friends or family, whose ideological views do not match up with their own.[37] As a result, many users end up in an insular echo chamber, with similarly-minded friends posting content that aligns with their own closely held beliefs, reaffirming what they were already disposed to believe, regardless of whether or not the content is reliable and accurate information.[38] These echo chambers are so pronounced that researchers can tell with high accuracy whether social media users skew liberal or conservative just by looking at their friends.[39] While it might be tempting to believe that this insularity will facilitate greater engagement with politics, without exposure to opposing viewpoints, the value of this discourse is significantly lessened.[40]

The above listed effects of fake news are not independent of one another, and their interaction can be readily seen, particularly regarding discussions of the Russian interference in the 2016 presidential election. In the aftermath of the election, Facebook and Twitter discovered that Russian entities had purchased significant amounts of advertising pushing divisive issues in the months leading up to the election.[41] Additionally, the platforms uncovered thousands of fake bot accounts traced to Russian users that pushed anti-Clinton comments in these online spaces.[42] The United States is not the only country that has experienced a plague of fake news as a means of targeted election interference. According to the recent "Freedom of the Net" report, at least 16 countries experienced attacks that were similar to the meddling efforts that took place during 2016 presidential election.[43]

Fake news, while not completely new, has a reach and influence unlike other iterations of miscommunication. Understanding the motives behind fake news and the effects it can have is crucial to developing an effective solution to combat the issue of rapidly spreading misinformation without unduly treading on rights of free expression.

III. A COMPARATIVE VIEW OF REGULATING FAKE NEWS

A. Actions Taken by Other Countries

As mentioned above, fake news is a global problem, with ramifications that extend well beyond the United States. The threat posed by fake news has

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36. Taub, *supra* note 35.

37. *See* Fillipo Menczer, *Fake Online News Spreads Through Social Echo Chambers*, SCI. AM. (Nov. 28, 2016), https://www.scientificamerican.com/article/fake-online-news-spreads-through-social-echo-chambers/ [https://perma.cc/W7V5-DDDK].

38. *See id.*

39. *See id.*

40. *See id.*

41. *See* Scott Shane, *The Fake Americans Russia Created to Influence the Election*, N.Y. TIMES (Sept. 7, 2017), https://www.nytimes.com/2017/09/07/us/politics/russia-facebook-twitter-election.html [https://perma.cc/M24Q-7T89].

42. *Id.*

43. Megan Trimble, *Fake News Found in 16 Countries' Elections*, U.S. NEWS (Nov. 14, 2017), https://www.usnews.com/news/best-countries/articles/2017-11-14/report-russia-like-election-meddling-discovered-in-16-countries [https://perma.cc/TA7W-R7LU].

prompted some countries to take aggressive action to counter and prevent the spread of deliberate misinformation. In Germany, for example, a fake news article falsely claimed that asylum seekers raped a German girl of Russian descent, a falsehood that was repeated by even high-ranking members of the Russian government, presumably to attack Chancellor Angela Merkel's open-door policy for refugees.[44] In response to such incidents, as well as the reports of the impact of fake news in the 2016 United States presidential election, Merkel's cabinet drafted a bill that would impose hefty fines on social media outlets that fail to remove blatantly false news articles that incite hate within twenty-four hours.[45] The law, called "Netzwerkdurchsetzungsgesetz" or "NetzDG," came into effect in October 2017 and would fine social media platforms as much as fifty million euros for failing to adequately police the content shared on their sites.[46] Networks would have up to a week to remove other content that is less blatantly in violation of the law.[47]

Critics of this law highlight the threat it poses to expressive speech. These critics raise concerns that in the government's effort to eradicate fake news articles, other permissible forms of expression will inevitably be limited by the law.[48] By enacting such harsh penalties, the government runs the risk of imposing burdensome restrictions on citizens who might unknowingly violate the law by merely sharing their opinions.[49]

France has also taken steps to introduce a law to prohibit fake news. The law proposed by President of France Emmanuel Macron and passed by the French parliament in June 2018 draws some of its inspiration from Germany's law addressing fake news.[50] The law will impose tougher rules on social media regarding sources of news content and would give judges emergency powers to remove or block content determined to be fake during election periods.[51]

The Czech Republic has taken a very different approach to addressing fake news, declining to adopt a law. Instead, the government created a task

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44. *See* Anthony Faiola & Stephanie Kirchner, *How do you stop fake news? In Germany, With a Law,* WASH. POST (Apr. 5, 2017), https://www.washingtonpost.com/world/europe/how-do-you-stop-fake-news-in-germany-with-a-law/2017/04/05/e6834ad6-1a08-11e7-bcc2-7d1a0973e7b2_story.html?utm_term=.1967bf0ed6b1 [https://perma.cc/S9HB-XVDS].

45. *See id.*

46. *See* Patrick Evans, *Will Germany's new law kill free speech online?*, BBC NEWS (Sept. 18, 2017), http://www.bbc.com/news/blogs-trending-41042266 [https://perma.cc/Y6JX-AN87]. The law does not substantively change what is considered illegal hate speech, but instead cites categories from the German Criminal Code.

47. *Id.*

48. *See generally id.*

49. *Id.*

50. James McAuley, *France weighs a law to rein in 'fake news,' raising fears for freedom of speech*, WASH. POST (Jan. 10, 2017), https://www.washingtonpost.com/world/europe/france-weighs-a-law-to-rein-in-fake-news-raising-fears-for-freedom-of-speech/2018/01/10/78256962-f558-11e7-9af7-a50bc3300042_story.html?utm_term=.2fd3157331a8 [https://perma.cc/93RB-Q24F]; Zachary Young, *French Parliament passes law against 'fake news'*, POLITICO (July 4, 2018), https://www.politico.eu/article/french-parliament-passes-law-against-fake-news/ [https://perma.cc/UC26-YAB7].

51. *Emmanuel Macron: French president announces 'fake news' law*, BBC NEWS (Jan. 2, 2018), http://www.bbc.com/news/world-europe-42560688 [https://perma.cc/L26G-UGL4]; McAuley, *supra* note 50.

force to seek out and identify publishers of misinformation on social media and to alert the public to the falsity of fake news articles.[52] The agency does not engage in overt censorship of content, and instead merely flags posts as untrue.[53] While this method somewhat alleviates concerns over restraints on free speech, the task force has experienced only limited success since its inception.[54] The center's Twitter account, which it uses to notify the public of fake news stories, has fewer than 7,000 followers, and to date has only flagged a handful of news stories as fake news.[55]

B. First Amendment Limitations on Comparative Approaches

1. The First Amendment

While other countries have taken aggressive steps to halt the spread of fake news, the United States has been slower to adopt proactive regulatory measures to address the issue. In addition to public criticism of limitations on self-expression, lawmakers in the United States face a significant hurdle that is largely absent in the countries that have been able to pass aggressive laws or regulation: The First Amendment to the United States Constitution. The plain language of the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press," effectively curtailing the government's power to constrain the speech of its citizens.[56] While there are limits as to what constitutes protected speech, restrictions on speech that are based on the content are subject to strict scrutiny by courts.[57] Content-based laws are defined as "those that target speech based on its communicative content" or "appl[y] to particular speech because of the topic discussed or message expressed."[58] In order to survive strict scrutiny, the government must demonstrate that a content-based law "is necessary to serve

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52. *See* Faiola & Kirchner, s*upra* note 44; Rick Noack, *Czech elections show how difficult it is to fix the fake news problem*, WASH. POST (Oct. 20, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/10/20/czech-elections-show-how-difficult-it-is-to-fix-the-fake-news-problem/?utm_term=.86b39744faaf [https://perma.cc/MHB3-WWCY].

53. Noack, *supra* note 52.

54. Michael Colborne, *The Brief Life, and Looming Death, of Europe's 'SWAT Team for Truth'*, FOREIGN POL'Y (Sept. 20, 2017), http://foreignpolicy.com/2017/09/20/the-brief-life-and-looming-death-of-europes-swat-team-for-truth-fake-news/ [https://perma.cc/6GDC-9YPH].

55. *See id.*; Noack, *supra* note 52.

56. U.S. CONST. amend. I.

57. *See*, *e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015) (explaining "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed and [s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.") (internal citations omitted).

58. *See* Annie C. Hundley, *Fake News and the First Amendment: How False Political Speech Kills the Marketplace of Ideas*, 92 TUL. L. REV. 497, 504 (2017) (citing *Reed*, 135 S. Ct. at 2226–27) (internal quotation marks omitted).

a compelling state interest and is narrowly drawn to achieve that end."[59] Even where the government makes a compelling argument for the necessity of a content-based law, such cases rarely survive strict scrutiny.[60]

Commercial speech receives a lesser degree of protection under the First Amendment than other forms of speech.[61] Commercial speech is "speech that *proposes* a commercial transaction," such as an advertisement.[62] However, speech does not necessarily become commercial due to the fact that it is marketed, and in cases where the government seeks to impose a restriction on commercial speech, it must first demonstrate that the speech in question is commercial within the parameters set by the constitution.[63] Even where content is deemed to be commercial speech, it still retains the protections of the First Amendment where the speech is related to lawful activities.[64] However, the government may impose restrictions on commercial speech "when the particular content or method of advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse."[65] Advertising that is false or misleading receives no First Amendment protections whatsoever and "may be prohibited entirely."[66]

In determining whether a regulation of commercial speech is constitutional, the Supreme Court prescribed a four-prong test in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.*[67] Under the first prong, courts examine whether the commercial speech at question concerns lawful activity, the extent to which it is accurate and not misleading, and depending on these factors, whether it is protected by the First Amendment.[68] The second prong asks "whether the asserted governmental issue is substantial."[69] Where the answers to the first two prongs are affirmative, the inquiry shifts to the third and fourth prongs, which examine, respectively, "whether the regulation directly advances the government interests asserted" and "whether it is not more extensive than is necessary to serve that interest."[70] Even where there exists a compelling government interest that is served by a restriction on commercial speech, the restriction

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59. *See*, *e.g.*, *Reed*, 135 S. Ct. at 2236 (citing Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987) (internal quotation marks omitted)).

60. *See* Hundley, *supra* note 58, at 504 (citing *Reed*, 135 S. Ct. at 2226-27).

61. United States v. Edge Broadcasting Co., 509 U.S. 418, 426 (1993).

62. KATHLEEN ANN RUANE, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT, CONG. RES. SERV. No. 95-815, at 14 (2014) (citing Bd. of Trs. of the State University of New York v. Fox, 492 U.S. 469, 482 (1989)) (internal quotation marks omitted) (emphasis in original).

63. *Id.*

64. In re R. M. J., 455 U.S. 191, 203 (1982).

65. *Id.*

66. *Id.*

67. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of New York, 447 U.S. 557, 566 (1980); *see* RUANE, *supra* note 62, at 15.

68. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566. In *Central Hudson*, the Supreme Court rejected the New York Public Service Commission's argument that Central Hudson's possession of monopoly power meant that the Commission's order prohibiting promotional advertising did not constitute a meaningful restriction of commercial speech.

69. *Id.*

70. *Id.*

will be found unconstitutional where it is overly broad.[71] However, the fourth prong does not require that the state use the "least restrictive means" to advance the asserted governmental interest, but the fourth prong may be satisfied where there is "a reasonable 'fit' between the legislature's ends and the means chosen to accomplish these ends."[72]

2. Section 230 of the Communications Decency Act

Beyond the protections afforded to speech by the First Amendment, legislatures face another obstacle to implementing a solution to fake news, Section 230 of the Communications Decency Act ("CDA"). The CDA, which was passed as part of the Telecommunications Act of 1996, "subject to a few exceptions . . . forbids the imposition of damages or injunctions against search engines, social networks, online marketplaces, web-based sharing services and consumer review sites."[73] Section 230(c)(1) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[74] Section 230(c)(2) states,

> "No provider or user of an interactive computer service shall be held liable on account of-
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)."[75]

These provisions provide a high degree of protection to social media platforms and publishers of fake news alike.[76]

Recent developments suggest that the protections of Section 230 may not be as ironclad as they may seem. On March 21, 2018, the United States Senate passed the Stop Enabling Sex Traffickers Act ("SESTA") with the

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71. *See id.* at 570 (finding that the New York Public Service Commission's order prohibiting electric utilities from promoting the use of electricity was overly broad).

72. RUANE, *supra* note 62, at 15 (citing Bd. of Trs. of the State University of New York v. Fox, 492 U.S. 469, 482 (1989)).

73. Timothy Alger, *The Communications Decency Act: Making Sense of the Federal Immunity for Online Services*, ORANGE COUNTY LAW. (Jan. 2017), http://www.virtualonlineeditions.com/article/The_Communications_Decency_Act%3A_Making_Sense_Of_The_Federal_Immunity_For_Online_Services/2674709/371959/article.html [https://perma.cc/57NE-UUL2] ; *see generally* 47 U.S.C.A. § 230 (2018).

74. 47 U.S.C.A. § 230(c)(1).

75. *Id*. at § 230(c)(2).

76. *See generally* Alger, *supra* note 73*; Id*. at § 230.

Allow States and Victims to Fight Online Sex Trafficking Act ("FOSTA").[77] Under the acts, websites will be stripped of CDA Section 230 protections and will be liable for hosting content that "promote[s] and facilitate[s]" prostitution and sex trafficking.[78] While this development has limited applications that do not directly affect fake news, it reflects the willingness of Congress to place at least some restrictions on the scope of CDA Section 230.[79]

While FOSTA-SESTA seriously erodes the protections of CDA Section 230 with regard to sex trafficking, the statute's protections in most other areas remain a significant hurdle for those who might seek to target websites for content shared by third parties, such as fake news articles. With full CDA Section 230 protections in place, it would be impossible for Congress to adopt a law similar to those proposed in France and Germany, where the state places liability on platforms to police the content shared on their sites.[80]

IV. EXISTING REMEDIES

A. Libel Suits

Proponents of free speech may argue that no further action should be taken to stop fake news from spreading if the solutions would place further restraints on First Amendment protections, pointing instead to existing remedies as the preferred solution. Libel suits allow plaintiffs to sue defendants for defamation and have the potential for huge rewards, which might be enough to bankrupt some publishers of fake news while deterring creators from posting new fake news content.[81] However, identifying a defendant to sue for defamation can be difficult, as possibilities include the creator of the content as well as anyone who shares the content.[82] This uncertainty of who to sue can be especially problematic in cases where the publishers are outside the United States, as in the previously mentioned cases of the Macedonian teenagers who made thousands of dollars sharing fake news stories.[83] In such cases it may be difficult for courts to gain jurisdiction over defendants.[84] Additionally, litigation is slow and may cost more than can be recovered from a defendant, making it unappealing to pursue such claims

77. *See* Violet Blue, *Congress just legalized sex censorship: What to know*, ENGADGET (Mar. 30, 2018), https://www.engadget.com/2018/03/30/congress-just-legalized-sex-censorship-what-to-know/ [https://perma.cc/P6U6-WAM5]; Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat 1253 (Apr. 11, 2018).

78. *See id.* FOSTA-SESTA has drawn much criticism for its loose definition of sex trafficking, which critics say conflates sex trafficking with sex work. The immediate effect of the Act so far has been the elimination of online spaces for sex workers. The loss of these spaces means the loss of income for thousands of individuals employed in sex work.

79. *See id.*

80. *See generally* Alger, *supra* note 73; Faiola & Kirchner, *supra* note 44; McAuley, *supra* note 50.

81. *See* Seidenberg, *supra* note 11.

82. *See id.*

83. *See id.*; Alcott & Gentzkow, *supra* note 14, at 217.

84. *See* Seidenberg, *supra* note 11.

unless the defendant has substantial means.[85] The cost of litigation also has the effect of limiting who is able to bring these claims in the first place, and parties with insufficient resources to bear the cost of litigation are often left without recourse.[86] Additionally, as previously mentioned, Section 230 of the Communications Decency Act protects speech on the Internet, limiting the ability of harmed parties to hold social media platforms liable for information posted and spread on their sites by third parties.[87]

B. Self-Monitoring

Free speech proponents concerned with the prospect of government oversight of fake news have suggested that platforms should monitor themselves. Amidst reports of the pervasiveness of fake news on the Internet during the 2016 presidential election cycle, Facebook, Google, and Twitter have faced enormous pressure to recognize the role their platforms played in the spread of false and misleading articles and to take action to address the issue.[88] While reluctant to take responsibility for the prevalence of fake news and Russian "trolls," the platforms have taken some steps to address the rampant spread of fake news on their sites.[89] Facebook has partnered with multiple fact-checking agencies to vet articles and is implementing a feature that would notify users if the veracity of an article is in question, and then suggest other, more trustworthy sources.[90] While this is an encouraging step towards more responsible platform governance, this solution is problematic because it does not ultimately address the incentives that drive the spread of fake news.[91] Even while under scrutiny at two U.S. Congressional hearings, Facebook CEO Mark Zuckerberg declined to make any further promises about supporting legislation to regulate the platform or for Facebook to implement regulations itself.[92] Furthermore, by actively suggesting other alternatives to users, the platform could be subject to bias and influence the perceptions of viewers.[93]

Google has undergone efforts to change its algorithms to ensure that the search results that appear first tend to be verifiable and reliable sources of

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85. *See id.*
86. *See id*.
87. 47 U.S.C.A. § 230; Alger, *supra* note 73.
88. *See* Issie Lapwsky, *Eight Revealing Moments From The Second Day Of Russia Hearings,* WIRED MAG. (Nov. 1, 2017), https://www.wired.com/story/six-revealing-moments-from-the-second-day-of-russia-hearings/ [https://perma.cc/8CEP-K597].
89. *See* Lewis Long, *Fighting fake news: how Google, Facebook, and others are trying to stop it*, TECHRADAR (May 25, 2017), http://www.techradar.com/news/fighting-fake-news-how-google-facebook-and-more-are-working-to-stop-it [https://perma.cc/H4V6-QR8Y].
90. *Id.*
91. *Id.*
92. *See* Dustin Volz & David Ingram, *Zuckerberg resists effort by senators to commit him to regulation*, REUTERS (Apr. 10, 2018), https://www.reuters.com/article/us-facebook-privacy-zuckerberg/zuckerberg-resists-effort-by-senators-to-commit-him-to-regulation-idUSKBN1HH1CU [https://perma.cc/38R3-DA2V].
93. *Id*.; David Lumb, *Facebook and Twitter met with GOP leaders over tech's liberal bias,* ENGADGET (June 27, 2018), https://www.engadget.com/2018/06/27/facebook-twitter-meet--gop-leaders-tech-liberal-bias-censorship/ [https://perma.cc/FP5S-7VD6].

information, rather than results that are popular or trending.[94] This step will likely help those who seek to learn more about a news story to gain access to better information, but because many Americans get their news from other social media platforms, this safeguard would only be effective if, after seeing a story on a platform, people turned to Google to verify the information.[95]

C. Media Literacy

A third alternative method of addressing fake news is a push for increased media literacy. Media literacy is "the ability to identify different types of media and understand the messages they're sending."[96] Some communications experts have pointed to the lack of media literacy programs in high school curriculums as a major reason for the pervasiveness and effectiveness of fake news in the United States.[97] Whereas other proposed solutions place the burden on the government or private actors to make determinations for others as to what sources of information are credible, this approach would place the burden on citizens to make these decisions.[98] This approach has the obvious advantage avoiding First Amendment concerns, as it does not involve government action.[99]

Additionally, a recent study from the University of California, Riverside and Santa Clara University suggests that media literacy training improves judgements about accuracy, even more than having higher than average political knowledge.[100] However, this solution requires a high degree of civic engagement, which could be problematic, as there would be no guarantee that students would internalize the concepts from these programs once they enter the real world.[101] Additionally, and more problematically, people do not only share fake news as a result of an inability to critically analyze information, as people may choose to share stories they know are fake "to show what groups and ideas they agree with, to feel part of a movement, even for entertainment."[102] Lastly, the benefits of this approach could not be realized until it has been in place for some time and, standing alone, it would be unlikely to effectively address the issue of the extreme pace and volume of fake news.[103]

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94. *See* Long, *supra* note 89.
95. *See generally id.*
96. *What is media literacy, and why is it important?*, COMMON SENSE MEDIA, https://www.commonsensemedia.org/news-and-media-literacy/what-is-media-literacy-and-why-is-it-important [https://perma.cc/B2VD-2UJM].
97. *See* Seidenberg, *supra* note 11.
98. *See id.*
99. *See id.*
100. *See* Michael Rosenwald, *Making media literacy great again*, COLUM. JOURNALISM REV. (2017), https://www.cjr.org/special_report/media-literacy-trump-fake-news.php [https://perma.cc/GCK9-SMTQ].
101. *See id.*
102. *Id.*
103. Seidenberg, *supra* note 11.

D. Federal Trade Commission Enforcement

Regulation by the Federal Trade Commission ("FTC") provides an attractive alternative to previously mentioned solutions to limit the spread of fake news. The FTC, through Section 5 of the Federal Trade Commission Act ("FTCA"), is "empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."[104] To prove a deceptive act or unfair trade practice, the FTC must establish three elements: "[1] a representation, omission, or practice, that [2] is likely to mislead consumers acting reasonably under the circumstances, and [3], the representation, omission, or practice is material."[105] It is not required that the representation was made with the intent to deceive where the deception or practice was likely to mislead consumers acting reasonably.[106] The FTC defines "unfair" practices as those that "cause[] or [are] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[107] Deceptive practice suits have included suits against companies that publish fake scientific studies that support the efficacy of products such as fat loss pills.[108] These "studies" are designed to make consumers believe that the product being discussed is legitimate in order to induce a purchase.[109] Applied to fake news, the deception would be the marketing of fake news as legitimate information, targeting consumers for click revenue, and relying on consumers' false belief that the sites contain accurate information to attract web traffic.

V. THE FTC AS A REGULATOR OF FAKE NEWS

A. Analogizing Fake News to an Unfair Trade Practice

While the intricacies of the First Amendment make it unlikely that a blanket remedy to fake news will emerge, this inherent complexity does not mean that there are no mechanisms in place to serve as a bulwark against threats to democratic institutions. Rather than attempt to create a new law that would have to navigate the challenges of First Amendment protections and the insulation of Section 230 of the CDA, fake news should be policed

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104. 15 U.S.C.A. § 45 (2006).

105. FTC v. Verity Int'l, Ltd., 443 F.3d 48, 63 (2d Cir. 2006) (quoting Cliffdale Assocs., Inc, 103 FTC 110, 165 (1984)).

106. *See* FTC v. LeadClick Media, LLC, 838 F.3d 158, 168 (2d Cir. 2016) (citing *Verity Int'l, Ltd.*, 443 F. 3d at 63).

107. *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FCC, https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority [https://perma.cc/L23N-CAAS] (citing 5 U.S.C. § 45(n) (2006) (internal quotation marks omitted)).

108. *See* Callum Borchers, *How the Federal Trade Commission could (maybe) crack down on fake news*, WASH. POST (Jan. 30, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/30/how-the-federal-trade-commission-could-maybe-crack-down-on-fake-news/?utm_term=.6c0864b5bb37 [https://perma.cc/YN7D-Y2Q7].

109. *Id.*

through an existing agency that already possesses the resources and mechanisms to address the issue. Because the FTC is empowered to pursue claims for deceptive practices, the agency would be a suitable candidate to target financially-motivated fake news.

By extending its regulatory framework to fake news sites, the FTC could treat these sites as deceptive advertising inducing consumers to visit sites that "sell" fake news as a product.[110] By treating fake news sites that present blatantly false news stories similarly to websites that present fabricated articles purporting the efficacy of a product such as a fat loss pill, the FTC could bring this type of fake news under the umbrella of commercial speech and remove it from broad First Amendment protections.[111] In 2013, the FTC reached settlements in ten cases against online marketers who used fake news sites to market weight loss products.[112] In these cases, the marketers designed their websites to appear as if they were part of legitimate news organizations, with titles such as "News 6 News Alerts," "Health News Health Alerts," or "Health 5 Beat Health News."[113] These sites also falsely claimed that their reports had been carried on major networks, including ABC, Fox News, CBS, CNN, USA Today, and Consumer Reports.[114] These sites bear striking similarities to other, more recent fake news sites which, as previously discussed, also present themselves as legitimate sites, often borrowing logos or closely imitating the names of reputable networks.[115] With these similarities, the FTC could pursue unfair trade practice claims against fake news sites by viewing news as the product, although this approach would be limited to publishers of fake news who use the news to sell products or to generate click revenue.[116]

The FTC could apply its unfair trade practice criteria to fake news, which would limit liability for fake news to misleading representations made to the consumers, and within these cases, only when the deception or omission is material.[117] Because fake news is designed to look like real news, it is likely to mislead consumers and therefore could alleviate any need to demonstrate intent to deceive.[118] While not a perfect analogy, the FTC's treatment of fake websites created to promote the efficacy of weight loss products provides a clear example of how the FTC could engage in oversight of fake news.

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110. *See id.*

111. *See id.*

112. *See FTC Permanently Stops Fake News Website Operator that Allegedly Deceived Consumers about Acai Berry Weight-Loss Products*, FTC (Feb. 7, 2013), https://www.ftc.gov/news-events/press-releases/2013/02/ftc-permanently-stops-fake-news-website-operator-allegedly [https://perma.cc/DVD6-4S2E].

113. *See id.*

114. *See id.*

115. *See* Alcott & Gentzkow, *supra* note 14, at 217.

116. *See* Borchers, *supra* note 108.

117. *See* FTC v. Verity Int'l, Ltd., 443 F.3d 48, 63 (2d Cir. 2006) (quoting In re Cliffdale Assocs., Inc, 103 FTC 110, 165 (1984)).

118. *See generally id.*

B. Constitutional Hurdles

While it may be more difficult to demonstrate that fake news is likely to "cause substantial injury to consumers which is not reasonably avoidable by consumers themselves,"[119] in *FTC v. LeadClick Media, LLC*, the Court held online marketing company LeadClick liable for its participation in directing affiliates to create false news sites that misrepresented the effectiveness of weight loss products sold by its client and were made to appear as scientific studies.[120] Similarly, when fake news publishers market falsehoods as legitimate information by adopting logos and web layouts designed to deceive consumers as to the veracity of the content they are reading, the content should be treated as no longer expressive, but instead commercial and designed to sell a belief or generate click revenue. Additionally, the FTCA allows for the consideration of public policies alongside other evidence.[121] The similarities between political fake news and deceptive trade practices that rely on fake news reports about products, coupled with the compelling public policy concern of preventing the deliberate spread of misinformation that harms democratic institutions, makes a compelling case for FTC regulation for this category of fake news content.

By pursing this method of regulating fake news, the FTC could avoid constitutional hurdles that other remedies would be unable to avoid. If challenged, the FTC's regulation of fake news sites, limited to those who use the news to market products or generate click revenue, would be akin to product regulation and would therefore place restrictions on commercial speech, which is subject to a lesser degree of protection under the First Amendment, especially where advertising is false or misleading.[122] While false commercial speech is generally not protected by the First Amendment, even if the courts found fake news to have some protections, the FTC would only need to satisfy the intermediate scrutiny standard as opposed to strict scrutiny for content-based speech.[123] Fake news, as defined by this Note, is arguably not lawful activity, due the fraud inherent in its creation.[124] Even if courts were to adopt the view that fake news constitutes lawful activity, it is still inaccurate and misleading, which would cause it to fail to satisfy the first prong of the *Central Hudson* intermediate scrutiny test, eliminating any First Amendment Protections.[125]

Furthermore, even if the government were to find that fake news constitutes protected speech, the FTC could satisfy the second prong of the analysis, as preventing the spread of misinformation is a substantial governmental interest.[126] From here, the inquiry would shift to the third and

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119. 15 U.S.C.A. § 45(n).

120. *See generally,* FTC v. LeadClick Media, LLC, 838 F.3d 158, 158 (2d Cir. 2016).

121. *See* 15 U.S.C.A. § 45(n). In order to declare a practice unlawful as an unfair trade practice, the FTC must show that the practice is likely to cause injury to consumers that is not reasonably avoidable, relying on public policy and other evidence. *Id.*

122. *See* R. M. J., 455 U.S. 191, 203 (1982).

123. *See id.*

124. *See generally* Seidenberg, *supra* note 11.

125. *See* Ruane, *supra* note 62, at 15; *see generally* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 566 (1980).

126. *See Cent. Hudson*, 447 U.S. at 566.

fourth prongs, in which the FTC would be required to demonstrate that the regulation "directly advances the government interests asserted" and "is not more extensive than is necessary to serve that interest."[127] As previously stated, the fourth prong does not require that the FTC use the least restrictive means, as long as there is a "reasonable fit" between the legislature's goals and the mechanism used to achieve it.[128] Here, the regulation of sites deriving revenue from marketing false information would directly advance the government interest in halting the spread of fake news. Because this standard applies only to publishers who monetize their fake news content and whose content meets the criteria for an unfair trade practice, this regulatory scheme is tailored narrowly enough that it should survive a challenge under intermediate scrutiny.[129]

In addition to surviving constitutional challenges, the FTC regulation of fake news would also bypass the issues of immunity under Section 230 of the CDA.[130] In the recent action brought by the FTC against LeadClick Media, LLC, a manager of networks of online advertisers using fake news to sell products, the Court of Appeals for the Second Circuit found that LeadClick was not entitled to Section 230 immunity.[131] Even though LeadClick claimed to be an interactive computer service provider, the court found that it was an information content provider with respect to its deceptive and unfair trade practices.[132] Because the publishers of fake news that would be targeted by this solution actively market their sites and products with fake news, they would be found to be information content providers and would therefore receive no constitutional protections.[133]

C. Limits of FTC Oversight

The tradeoff for the permissibility of this method is its limited applicability. While this method works to remove the financial incentives to publish fake news content, it does not address the publishing of fake news that is purely designed to create confusion.[134]

However, eliminating profit incentives and empowering the FTC to pursue actions against creators of fake news, would reduce the overall level of fake news created. Individuals who churn out vast quantities of fake news to profit from click revenue would be less likely to produce content if they knew that they would be liable for sharing fake news. While this solution does not apply to other forms of fake news, such as articles meant to cause confusion and spread misinformation, the alternative non-regulatory methods discussed earlier in this Note could prove to be effective tools when paired with this regulatory mechanism.[135] FTC enforcement would provide

127. *Id.*
128. *See* RUANE, *supra* note 62, at 15 (citing Bd. of Trs. of the State Univ. of New York v. Fox, 492 U.S. 469, 492 (1989)).
129. *See generally Cent. Hudson*, 447 U.S. at 566.
130. *See* 47 U.S.C.A. § 230.
131. FTC v. LeadClick Media, LLC, 838 F.3d 158, 172 (2d Cir. 2016).
132. *See id.* at 175.
133. *See generally* Alger, *supra* note 73.
134. *See generally* Seidenberg, *supra* note 11.
135. *See generally* Long, *supra* note 89; discussion *supra* Part IV: Sections A-C.

objective criteria to target the financial incentives behind fake news, while self-policing by platforms and increased emphasis on media literacy by citizens could prove to be an effective remedy for fake news in areas that are less suitable for government regulation.

VI. CONCLUSION

In our daily lives, we are constantly bombarded with information that shapes the way we view issues and make decisions. Crucial to this process is an implicit reliance on the truthfulness of the information on which we base our decisions. With the emergence and increased prevalence of fake news, it is essential that our society develop mechanisms to better discern facts from misinformation and protect the institutions that form the basis for our democracy. Because fake news as we now know it is new and not totally understood, it is important to acknowledge the shortcomings of existing methods of regulating fake news and why a failure to effectively do so is a threat. In developing a solution to defend against attempts to weaken our democratic systems, it is important that the solutions we pursue do not inflict even greater harm to our personal liberties. By reading the Federal Trade Commission Act to encompass the regulation of fake news publishers, the Federal Trade Commission would be able to target and deter disseminators of blatantly false information while respecting First Amendment rights to free speech.