EDITOR'S NOTE

Welcome to the second and final Issue of Volume 72 of the Federal Communications Law Journal, the nation's premier communications law journal and the official journal of the Federal Communications Bar Association.

This Issue showcases student-scholar writing spanning telehealth, intermediary liability, and political broadcast advertising to antitrust issues—criminal enforcement and merger review. This Issue also features our Annual Review, presenting case briefs from our incoming board members that focus on critical legal issues in the communications field during the past year.

In the first Note, Margaret McAlpin considers potential implications of the Federal Communications Commission's repeal of network neutrality rules on the delivery of telehealth services. In the second Note, Camille Bachrach advocates for a carve out for Section 230 to shield victims of online fraud and impersonation and proposes permitting injunctive relief in these situations. In the third Note, Kyle Gutierrez calls attention to the regulatory discrepancy that exists between cable programming and the broadcast and proposes an extension of Section 312(a)(7)'s reasonable access rules. In the fourth Note, Tawanna Lee offers an analysis of the 2010 High-Tech cases to suggest that the Justice Department's shift in its criminal enforcement strategy is premature and unlikely to deliver its intended aim. In the final Note, Audrey Greene proposes streamlining the merger review process related to the transfer of telecommunications licenses.

Finally, in March 2020, in light of the COVID-19 pandemic, the Journal postponed its 3rd Annual Spring Symposium, Untethered—Politics and Speech on the Internet. Certainly, few topics have proved more controversial or timely. The Journal is committed to continuing our conversation in print format. We are seeking articles for its Symposium issue to be published in the fall. We invite article submission exploring legislative and regulatory perspectives addressing industry self-regulation, consumer protection or election integrity issues, and existing state or proposed federal legislation. Manuscripts should be directed to fcljsymposium@law.gwu.edu.

The editorial board is appreciative of the George Washington University Law School and the Federal Communications Bar Association for their unwavering support throughout the year.

Volume 72 marks a pivotal point in scholarly writing for the Federal Communications Law Journal as the Federal Communications Bar Association transitions its subscription model to allow its members to opt-in to receiving a print issue. The Journal remains steadfast in providing its readership with substantive coverage of relevant topics in communications law, and we appreciate the continued support of contributors and readers alike. We encourage FCBA members to opt-in to print delivery. This Issue and our archive are available at http://www.fclj.org.

The Journal welcomes your feedback and submissions—any questions or comments about this Issue or future Issues may be directed to fclj@law.gwu.edu, and any submissions for publication consideration may be directed to fcljarticles@law.gwu.edu.

Tawanna Lee
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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Federal Communications Bar Association

The Federal Communications Bar Association (FCBA) is a volunteer organization of attorneys, engineers, consultants, economists, government officials and law students involved in the study, development, interpretation and practice of communications and information technology law and policy. From broadband deployment to broadcast content, from emerging wireless technologies to emergency communications, from spectrum allocations to satellite broadcasting, the FCBA has something to offer nearly everyone involved in the communications industry. That is why the FCBA, more than two thousand members strong, has been the leading organization for communications lawyers and other professionals since 1936.

Through its many professional, social, and educational activities, the FCBA offers its members unique opportunities to interact with their peers and decision-makers in the communications and information technology field, and to keep abreast of significant developments relating to legal, engineering, and policy issues. Through its work with other specialized associations, the FCBA also affords its members opportunities to associate with a broad and diverse cross-section of other professionals in related fields. Although the majority of FCBA members practice in the metropolitan Washington, D.C., area, the FCBA has ten active regional chapters: Atlanta, Carolina, Florida, Midwest, New England, New York, Northern California, Pacific Northwest, Rocky Mountain, and Texas. The FCBA has members from across the United States, its territories, and several other countries.

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NOTES

Section 230 of the Communications Decency Act has protected interactive computer services from certain kinds of civil liability since 1996. The Act provides immunity by shielding a provider from liability for third party content that is posted on their site. A wide variety of services have successfully used the Act to immunize themselves against various types of claims ranging from defamation and negligence to breach of contract. Recently, the Second Circuit ruled on a case that sheds light on the lengths the Act can go to immunize computer service providers—recognizing immunity even in the face of fraud and impersonation. The case, *Herrick v. Grindr*, dealt with Herrick's ex-boyfriend creating multiple fake profiles purporting to be Herrick on a popular gay dating app, Grindr. The app attracted thousands of men to show up, unannounced, to Herrick's house and workplace to have sex with Herrick. Herrick filed multiple complaints with Grindr to remove the profiles, but Grindr had successfully claimed immunity under the Act and as a result, was not being compelled to remove the fake profiles. Herrick was left with no available recourse, as the Act protects Grindr from any court order that would compel them to actively monitor and delete the fake profiles. This Note proposes an exception to the availability of the Act's immunity and argues that the immunity available under the Act should not apply in instances of fraud and impersonation once the plaintiff meets a certain burden. To meet this burden, a plaintiff must satisfy four elements under a reasonableness standard, and if successful, can prevent an interactive computer service, like Grindr, from claiming immunity, thus making injunctive relief a legal option. This Note will also cover the importance of allowing for injunctive relief in these situations, while providing a history of the Act and cases affected by it, as an important backdrop to the proposal.

In today's digital age, technology is part of virtually every American's life. Technology has also changed the understanding and delivery of health care

The Case for a Safe Harbor Provision of CDA 230 That Allows for Injunctive Relief for Victims of Fake Profiles*

Camille Bachrach*

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*This Note was written before President Trump's Executive Order issued on May 28, 2020—"Executive Order on Preventing Online Censorship"—and does not contemplate, analyze, or incorporate any suggestions or proposals made in the Executive Order. Additionally, this Note does not account for any regulations or clarifications promulgated by the Federal Communications Commission about Section 230 of the Communications Decency Act per the Exeuctive Order's directive.

*J.D., May 2020, The George Washington University Law School; B.S., Magazine Journalism, B.A., Political Science, Concentration: Law & Politics, May 2015, Syracuse University. Articles Editor, Federal Communications Law Journal, Vol. 72. Thank you to the Federal Communications Law Journal (FCLJ), FCLJ Adjunct Meredith Rose, and FCLJ Faculty Advisor Professor Dawn Nunziato for their invaluable help, advice, and assistance with transforming an idea into a Note. I would also like to thank my parents, Carlos and Deborah, and my brother, Kevin, for the unconditional love and support throughout the past three years—I couldn't have done law school without them.

I. INTRODUCTION

You join a dating app in hopes of meeting a new fling or love interest, or maybe in hopes of entering into a serious relationship. You swipe a lot. Then you swipe some more. You finally match with someone, and after a few months of talking and dating, you decide to be exclusive. So, you deactivate your dating profile, as it has successfully fulfilled its purpose. Unfortunately, some love stories are not destined to last forever, and your new relationship ends the following year. Right around that time, your ex begins impersonating you on the very app you met on. He creates profiles bearing your actual name with real photos—but lying about almost everything else.

Your new profile now says that you are "interested in 'serious kink and many fantasy scenes[]' [and] hardcore and unprotected group sex" among other things.[1] In the span of six months, about 1,100 people respond to this profile.[2] You try and report it to the dating app, but the only response you receive is an "automated, form response,"[3] lacking a recommended remedy—and, more importantly, lacking a promise to delete all the fake profiles. So, what can you do? After the Second Circuit Court of Appeals' ruling on March 27, 2019 in *Herrick v. Grindr*[4]—nothing.

This hypothetical situation reflects some of the facts from *Herrick v. Grindr*.[5] Last year, the Second Circuit Court of Appeals issued a decision in this case that created yet another way in which interactive computer services are broadly protected by the Communications Decency Act's Section 230

1. Herrick v. Grindr, LLC., 306 F. Supp. 3d 579, 585 (S.D.N.Y. 2018) (quoting Pl.'s Am. Compl. ¶ 50).

2. *Id.* (quoting Pl.'s Am. Compl. ¶ 49).

3. *Id.* (quoting Pl.'s Am. Compl. ¶ 71).

4. Herrick v. Grindr LLC., 765 F. App'x 586 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 221 (2019). The Second Circuit ruled that Grindr, as an interactive computer service, was not responsible for the content posted on its application by third parties. *Id.* Previously, the Southern District of New York also stated that Grindr was immunized from Herrick's claims under Section 230 of the Communications Decency Act, 47 U.S.C. § 230(c)(1) (2018), as that Section shields "Grindr from liability for content created by other users." *Herrick*, 306 F. Supp. 3d at 584. Additionally, the court denied Herrick's application to renew a temporary restraining order that was previously entered in New York State Supreme Court (before the case was moved to federal court). *See* Op. and Order at *1, Herrick v. Grindr, LLC., 17-CV-932, 2017 WL 744605 (S.D.N.Y. 2017).

5. *Herrick*, 306 F. Supp. 3d at 585.

(hereinafter CDA 230)[6] and leaves future defrauded individuals with almost no useful remedies.[7]

CDA 230 immunizes interactive computer services from liability by protecting them from being "treated as the publisher or speaker of any information provided by another information content provider."[8] While legislative history, as well as the additional effects of CDA 230, will be covered in more detail in Sections III, IV, and V of this Note, a brief overview will be useful before reading the facts of *Herrick v. Grindr* below.[9]

CDA 230 creates protections for providers of "interactive computer service[s]"[10] by not treating them as the original publisher or speaker of content posted by users on their platform.[11] The Act also imposes no liability if they chose not to monitor or restrict access to content considered to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable,"[12] or, alternatively, if they take any action that "enable[s] and make[s] available to information content providers[13] or others the technical means to restrict access to"[14] such content.

Most courts have interpreted the Act's requirement of "impos[ing] no liability" to mean that in claims against an interactive computer service,

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6. *Id.* (affirming No. 18-396, 2019 WL 1384092, at *5 (2d. Cir. March 27, 2019)).

7. *Herrick*, 765 F. App'x at 586; *see* 47 U.S.C. § 230(c)(1) (2018). Under CDA 230, courts have taken the phrase "no liability" to bar injured plaintiff's from seeking injunctive relief. *See* Medytox Solutions, Inc. v. Investorshub.com, Inc., 152 So. 3d 727, 731 (Fla. Dist. Ct. App. 2014) ("Thus, by the plain language of the statute, the immunity afforded by [S]ection 230 encompasses the claims for declaratory and injunctive relief sought in the case."); Smith v. Intercosmos Media Group, Inc., No. Civ. A.02-1964, 2002 WL 31844907 at *4 (E.D. La. 2002) ("This Court . . . concludes that any claim made by the plaintiffs for damages or injunctive relief with regard to either defamation and libel, or negligence and fault under Article 2315, are precluded by the immunity afforded by Section 230(c)(1), and subject to dismissal."). Thus, by not allowing injunctive relief for plaintiff's suing interactive computer services that are immune under CDA 230, when the claim relates to fake profiles, the plaintiff is currently left with no viable recourse, for if the interactive computer service does not voluntarily remove the profile, a court cannot require them to. *See* Hassell v. Bird, 420 P.3d 776, 779 (Cal. 2018) (stating that a lower court's order requiring Yelp to remove the contested reviews was "improperly treat[ing] Yelp as 'the publisher or speaker of [] information provided by another information content provider" and this is the exact thing that CDA 230 immunizes interactive computer providers from).

8. 47 U.S.C. § 230(c)(1) (2018).

9. *Herrick*, 306 F. Supp. 3d at 585.

10. 47 U.S.C. § 230(c)(1) (2018); § 230(f)(2).

11. 47 U.S.C. § 230(c)(1) (2018).

12. 47 U.S.C. § 230(c)(2)(A) (2018).

13. Typically, an information content provider is the individual or entity that creates or develops the content.

14. *Id.* § 230 (c)(2)(B). *See* Adi Kamdar, *EFF's Guide to CDA 230: The Most Important Law Protecting Online Speech*, Electronic Frontier Foundation (Dec. 6, 2012), https://www.eff.org/deeplinks/2012/12/effs-guide-cda-230-most-important-law-protecting-online-speech [https://perma.cc/TS8M-GXFF] ("Websites could edit, filter, and screen content if they wanted without being held liable for the content itself.").

injunctive relief cannot be sought.[15] However, this Note will argue that there should be an exception to this immunity for cases of fraud and impersonation. This exception would allow for CDA 230 immunity to be available in these circumstances only if certain requirements are met and a reasonableness requirement is satisfied. If the plaintiff is successful in this showing, then injunctive relief can be a viable option, as one factor that injunctive relief is dependent on is the likelihood of success on the merits of the case.[16] By amending CDA 230 to add this exception, Congress will be changing the requirements of CDA 230 immunity for cases of fraud and impersonation, thus altering the availability of CDA 230 immunity for these types of cases. This Note will advance this exception by using the facts of *Herrick v. Grindr*[17] as a framework for a situation where the proposed exception would have readily applied and could have been a helpful remedy for the plaintiff.

Section II will provide an overview of the facts of *Herrick v. Grindr.*[18] Section III will introduce CDA 230 and provide background information for the context of the statute's promulgation and its effects. Section IV will discuss cases concerning fake profiles, CDA 230 immunity, and how the courts have resolved those cases. Section V will provide an overview of the viability and inconsistency of grants of injunctive relief when CDA 230 is being used to immunize an interactive computer service. Additionally, it analyzes whether fraud and impersonation are covered by CDA 230 by looking at congressional intent, legislative history, and differentiating fraud and impersonation from defamation claims. Section VI will introduce the proposed exception for cases of false impersonation when CDA 230 should not apply and thus injunctive relief can be granted.

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15. *See* Medytox Solutions, Inc. v. Investorshub.com, Inc., 152 So. 3d 727, 731 (Fla. Dist. Ct. App. 2014) ("[T]he immunity afforded by [S]ection 230 encompasses the claims for declaratory and injunctive relief sought in the case."). *But see* Mainstream Loudoun v. Board of Trustees of Loudoun County Library, 2 F. Supp. 2d 783, 790 (E.D. Va. 1998) ("[D]efendants cite no authority to suggest that the 'tort-based' immunity to 'civil liability' described by § 230 would bar the instant action, which is for declaratory and injunctive relief.") (citing 47 U.S.C. § 230(a)(2) (2018); *Zeran*, 129 F.3d at 330.). The court explicitly held that Section 230 does not bar an action for injunctive relief. *Mainstream Loudoun*, 2 F. Supp. 2d at 790.

16. *See* Op. and Order at 3, Herrick v. Grindr, 17-CV-932 (VEC), 2017 WL 744605 (S.D.N.Y. Feb. 24, 2017) (*citing* MyWebGrocer, LLC v. Hometown Info., Inc., 375 F.3d 190, 192 (2d Cir. 2004)). This Note proposes that by altering the underlying requirements that a plaintiff has to satisfy in order to obtain CDA 230 immunity, the merits of the case also change—rendering a different outcome in courts when plaintiffs request for injunctive relief.

17. Herrick v. Grindr LLC., 765 F. App'x 586 (2d Cir. 2019).

18. *Id.*

II. FACTS OF *HERRICK V. GRINDR*

Around May 2011, Matthew Herrick[19] joined Grindr[20] and used the app for several years until he and a man named JC began talking and dating around June 2015.[21] In November 2015, Herrick removed his profile off Grindr, as he and JC were becoming more serious.[22] Soon after, JC began impersonating Herrick on Grindr—using a fake profile to talk with other users.[23] However, in June 2016, Herrick found out and successfully convinced JC to stop impersonating him.[24] In August 2016, Herrick began using his personal Grindr account again, and subsequently broke off his relationship with JC around October 2016 due to "JC's abuse and control."[25]

Once more, JC created a fake Grindr profile impersonating Herrick and this time scheduled "appointments for sexual encounters" between Herrick and other strangers.[26] JC would "manipulate the geo-physical settings"[27] to correspond with Herrick's home and work location and talk to men on the app in order to set up "sex dates" between them and Herrick.[28] JC would tell people that he (acting as Herrick) wanted to have sex and told them where to find him.[29] JC would also tell men on Grindr to "expect [Herrick's] resistance as part of an agreed upon rape fantasy or role play" which added even more danger to Herrick's life.[30] Herrick didn't feel safe inside his own home, had men bang on his window demanding to see him, and had some men refuse to leave "until they were physically escorted off the premises."[31]

Dozens of men have shown up at Herrick's work and apartment "expecting to have sex" with him and even refusing to leave when Herrick

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19. Matthew Herrick was around 26 years old. Pl.'s Compl. at 2, Herrick v. Grindr, No. 150903/2017 (N.Y. Sup. App. Div., Jan. 27. 2017).

20. Founded in 2009, Grindr is a popular dating app for gay men. *See* Katerina Ang, *Why Pioneering Dating App Grindr Hopes to Become a Big-Time Media Publisher*, MARKET WATCH (Dec. 30, 2017), https://www.marketwatch.com/story/why-pioneering-dating-app-grindr-hopes-to-become-a-big-time-media-publisher-2017-12-30 [https://perma.cc/U67F-DK9S].

21. Pl.'s Compl. at 9-10, *Herrick*, No. 150903/2017.

22. *Id.* at 10.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Normally, Grindr tracks a user's geolocation (a precise identification or a rough estimate of the location of the user), and based on that location, Grindr organizes matches on the App from "nearest to furthest." Pl.'s First Am. Compl. at 5, *Herrick*, No. 150903/2017. However, in this case, Herrick claims that JC would manipulate the automatic geolocation setting on the App to reflect Herrick's work and home address instead of JC's location. Pl.'s Compl. at 12, *Herrick*, No. 150903/2017.

28. Pl.'s Compl. at 12, *Herrick*, No. 150903/2017.

29. *See id.*

30. *Id.* at 14.

31. *Id.*

told them his profile is not him but merely an impersonation.[32] Once, when a stranger showed up at Herrick's apartment and was asked to leave by Herrick's roommate, the stranger refused and lunged and wrestled with the roommate.[33] On another occasion, a man showed up at Herrick's place of work expecting to have sex, and upon hearing that Herrick's profile was an impersonation, began screaming various vulgarities and obscenities at Herrick in front of "all the staff, management, and guests . . . ."[34]

Between November 2016 and January 2017, Herrick reported the fake accounts to Grindr around 50 times.[35] Between January 27, 2017 through March 2017, the fake accounts were reported another 50 times by Herrick, his counsel, or visitors on the site.[36] Grindr has not directly responded to Herrick's reports and have only sent automated replies that say "[t]hank you for your report."[37] Additionally, due to Grindr's silence on the matter, Herrick also filed "approximately 14 police reports and petitioned in Family Court for an order of protection [against JC] to stop the impersonation."[38] In November 2016, he received an Order of Protection against JC, which JC repeatedly violated.[39] Additionally, despite Herrick's multiple reports to the authorities, JC still did not stop.[40]

Herrick v. Grindr was originally filed in New York State Supreme Court,[41] where Justice Kathryn E. Freed issued an ex parte preliminary injunction and a temporary restraining order ("TRO") against Grindr, compelling them to "immediately disable all impersonating profiles created under [Herrick's] name or with identifying information related to [Herrick, Herrick's] photograph, address, phone number, email account or place of work, including but not limited to all impersonating accounts under the

32. *Id.* at 13. ("[B]etween January 13, 2017 and January 17, 2017, 4 to 13 men showed up as Plaintiff's place of employment every single day under the pretense that Plaintiff was going to have sex with them in the bathroom. . . . [And] 13 men visited Plaintiff's home and job expecting to have sex with him.").

33. *Id.*

34. *Id.*

35. Pl.'s First Am. Compl. at 18, *Herrick*, No. 150903/2017.

36. *Id.*

37. *Id.* at 19.

38. *Id.*

39. Brief for Sanctuary for Families, Inc. et al. as Amici Curiae Supporting Plaintiff-Appellant at 8, Herrick v. Grindr, 306 F. Supp. 3d 579 (S.D.N.Y. 2018) [hereinafter *Sanctuary for Families Amicus Brief*].

40. *Id.* Herrick was ultimately arrested on October 23, 2017 and charged with "stalking, criminal impersonation, making a false police report, and disobeying a court order." Tyler Kingkade & Davey Alba, *A Man Sent 1,000 Men Expecting Sex and Drugs to His Ex-Boyfriend Using Grindr, A Lawsuit Says*, BUZZFEED NEWS (Jan. 10, 2019), https://www.buzzfeednews.com/article/tylerkingkade/grindr-herrick-lawsuit-230-online-stalking [https://perma.cc/K33F-N48A].

41. *See Herrick*, No. 150903/2017.

control [of JC]."[42] This TRO expired as a matter of law on February 22, 2017, due to the case's removal to federal court.[43]

On that date, Judge Valerie E. Caproni, of the United States District Court for the Southern District of New York, heard arguments for extending the TRO but ultimately denied the extension.[44] Judge Caproni found that Herrick had not adequately shown that "'extreme or very serious damage' will flow from denial of [the] injunction."[45] Additionally, Judge Caproni's order stated that previous cases "suggest strongly" that Herrick's attempt to separate Grindr's actions from the protections of CDA 230 was a "losing proposition," and thus Herrick's likelihood of success on the merits was low.[46]

Specifically, the type of injunctive relief sought was a TRO to impose an affirmative duty on Grindr to monitor and delete the fake profiles bearing Herrick's name.[47] In the Second Circuit, the standard for granting a TRO resembles that of granting a preliminary injunction.[48] Those standards require that the party seeking a TRO "demonstrate '(1) irreparable harm in the absence of the [TRO] and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair grounds for litigation and a balance of hardships tipping decidedly in the movant's favor.'"[49]

In denying the extension of the TRO, the court stated that Herrick had not shown the presence of "sufficiently serious questions going to the merits to make the 'fair grounds' for litigation" and did not want to enter into a situation where the court would possibly be engaging in the "day-to-day supervision of Grindr's compliance."[50] Had the court not denied the extension of the TRO, Grindr would have been given a duty that currently does not exist

42. Order to Show Cause for Ex Parte Relief and Temporary Restraining Order, Complaint, Affirmation and Affidavit in Support of Order to Show Cause at 2, *Herrick*, No. 150903/2017.

43. Pl.'s First Am. Compl. at 19, *Herrick*, No. 150903/2017. Additionally, Herrick claims that Grindr violated the TRO, as "there was no change in the number of unwanted visitors" and men still visited him, expecting to have sex with him. *Id.* at 20.

44. First Mot. for Extension of Time, Herrick v. Grindr, 17-CV-932 (VEC), 2017 WL 744605 (S.D.N.Y. Feb. 24, 2017); *Herrick*, 17-CV-932 (VEC), 2017 WL 744605 at *6.

45. Op. and Order at 4, *Herrick*, 17-CV-932 (VEC), 2017 WL 744605 ((*citing* Somoza v. N.Y. City Dep't of Educ., No. 06-CV-5025 (VM), 2006 WL 1981758, at *4 (S.D.N.Y. July 10, 2006) (quoting Phillip v. Fairfield Univ., 118 F.3d 131, 133 (3d Cir. 1997)).

46. *Id.* at 5.

47. *Herrick*, 17-CV-932 (VEC), 2017 WL 744605 (declining to extend TRO that the New York State Supreme Court previously granted).

48. *Id.* at 2 (quoting Andino v. Fischer, 555 F. Supp. 2d 418, 419 (S.D.N.Y. 2008)).

49. *Id.* (quoting MyWebGrocer, LLC v. Hometown Info., Inc., 375 F.3d 190, 192 (2d Cir. 2004)).

50. *Id.* at 5.

under CDA 230.[51] This responsibility would take the form of an interactive computer service, specifically an edge provider[52] (in this case, Grindr) being legally required to affirmatively monitor content on their app—which is in direct opposition to the immunity that CDA 230 provides.[53] However, this Note will assert that although the granting of a TRO currently conflicts with CDA 230, introducing an exception that CDA 230 immunity is not available in matters of fake dating profiles would allow courts to issue TROs, as the underlying requirements of the claim would change and make it possible that a claimant could prevail. Under this new exception, Herrick would have been able to prevail at the hearing for an extension of the TRO, would have been granted injunctive relief against Grindr, and ultimately would most likely have won his entire case. Instead, the Second Circuit affirmed the ruling of the trial court and, in doing so, made clear that CDA 230's protections extend to cell phone applications ("apps"), thus leaving Herrick without any remedies available to him.[54]

III. HISTORICAL BACKGROUND OF THE COMMUNICATIONS DECENCY ACT

In 1996, Congress enacted CDA 230 to help foster the expansion of the Internet as a platform for diverse viewpoints and to expand the interconnectivity of news and information.[55] CDA 230 was promulgated in response to two cases that ruled in inconsistent manners with regard to interactive computer services hosting defamatory content on their site.[56] The

51. *See* 47 U.S.C. § 230 (2018). Currently, CDA 230 does not make providers of interactive computer services liable for "any action voluntarily taken in good faith to restrict access to or availability of material" on their platform. *Id.* Thus, the statute does not impose a responsibility or duty for interactive computer services to monitor the content on their site and similarly does not hold them liable if they chose to take part in any such monitoring. *Id.* An exception does exist in regard to websites that knowingly facilitate sex trafficking. *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (2018); *see also* 47 U.S.C. § 230 (5) (2018).

52. Edge providers "like Netflix, Google, and Amazon, 'provide content, services, and applications over the [I]nternet.'" United States Telecom Association v. Federal Communications Commission, 825 F. 3d 674, 690 (D.C. Cir. 2016) (quoting In re Preserving the Open Internet, 25 FCC Rcd. 17,905, 17, 910 ¶ 13 (2010)).

53. *See* 47 U.S.C. § 230 (c)(2) (2018) ("No provider or user of an interactive computer service shall be held liable on account of … any action voluntarily taken in good faith to restrict access to or availability of material … .).

54. *See generally* Herrick v. Grindr LLC, No. 18-396, 2019 WL 1384092 (2d. Cir. March 27, 2019).

55. *See* 47 U.S.C. § 230(b)(1) (2018); *see also* 47 U.S.C. § 230 (a)(3) (2018) ("The Congress finds . . . [t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.").

56. *CDA 230: Legislative History*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/cda230/legislative-history [https://perma.cc/2LE9-9SVY] (last visited Apr. 9, 2019) [hereinafter *CDA 230: Legislative History*]; *see* Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991); *see also* Stratton Oakmont, Inc. v. Prodigy Services Company, 1995 WL 323710 (Sup. Ct. Nassau County 1995).

first case, *Cubby, Inc. v. CompuServe, Inc.*, involved CompuServe, an "on-line general information service" that, for a membership fee, allowed users to access thousands of sources available on the platform or subscribe to "special interest 'forums'" that host "bulletin boards, interactive online conferences, and topical databases."[57] At issue in this case was the "Journalism Forum" ("Forum") which was an entity independent of CompuServe hired to "manage, review, create, delete, edit and otherwise control the contents" of the Forum.[58] Rumorville USA ("Rumorville") was a publication available as a part of the Forum, and plaintiffs claimed that Rumorville published defamatory content as related to their company.[59] CompuServe did not dispute that the statements were defamatory, but instead argued that, because they were only the distributor and not the original publisher of the content, they couldn't be held liable for the statements.[60]

In ruling that CompuServe was not liable for the defamatory statements, the court analogized CompuServe to a public library, bookstore, or newsstand and stated that, as such, they have "no more editorial control over such a publication" than those entities do over the material they distribute.[61] Further, the court emphasized that the same standard that applies to "more traditional news vendor[s]" needs to apply to a "computerized database" as well, as anything different would thwart the "free flow of information."[62] Finally, the court stated that CompuServe could not be held liable for the defamatory statements if it did not know or had no reason to know of the alleged defamatory statements that were being published.[63] As such, summary judgement in favor of CompuServe was granted.[64]

A few years later, a case with a similar factual background was decided in a different way. In *Stratton Oakmont, Inc. v. Prodigy Services Company*, the plaintiff successfully won their defamation case against Prodigy computer network.[65] Prodigy, an online computer service, provided online computer bulletin boards where users could post and leave comments.[66] At the time of the case, Prodigy's network had "at least two million subscribers" who used the bulletin boards to talk and communicate.[67] The bulletin board at issue in this case, "Money Talk," was "allegedly the leading and most widely read

57. *Cubby, Inc.*, 776 F. Supp. at 137 (S.D.N.Y. 1991).
58. *Id.*
59. *Id.* at 137-38.
60. *Id.* at 138.
61. *Id.* at 139-40. The court also drew on various First Amendment principles, stating that for a distributor to have a duty to "monitor each issue of every periodical it distributes" would pose an "impermissible burden on the First Amendment." *Id.* (citing Daniel v. Dow Jones & Co., 137 Misc. 2d 94, 102, 520 N.Y.S. 2d 334, 340 (N.Y. Civ. Ct. 1987)).
62. *Id.* at 140.
63. *Id.* at 140-41.
64. *Id.* at 141.
65. *See* Stratton Oakmont, Inc. v. Prodigy Services Company, 1995 WL 323710 at *7 (Sup. Ct. Nassau County 1995).
66. *Id.* at *1.
67. *Id.*

financial computer bulletin board in the United States."[68] Plaintiffs alleged that, on Money Talk, an "unidentified bulletin board user" posted defamatory statements about their securities investment banking firm, Stratton Oakmont, saying the firm committed "criminal and fraudulent acts" and that they were "a cult of brokers who either lie for a living or get fired."[69] Stratton Oakmont sued Prodigy for defamation based on the comments posted on the bulletin board, stating that Prodigy was a publisher of the statements and should be held liable.[70]

A significant divergence in the facts of these two cases was that Prodigy expressly held itself out as exercising editorial control over the content of the messages posted on the bulletin boards.[71] The plaintiffs used Prodigy's "software screening program,"[72] "emergency delete function,"[73] and promulgation of "content guidelines"[74] as evidence that Prodigy was in fact a publisher and could therefore be subject to liability in the defamation claim.[75]

The court distinguished a "distributor, or deliverer of defamatory material" from a newspaper, stating that the latter was "more than a passive receptacle or conduit for news, comment and advertising," and said the pertinent question was whether Prodigy "exercised sufficient editorial control over its computer bulletin boards to render it a publisher" that essentially made it more akin to a newspaper than merely a distributor.[76] The court ruled that because Prodigy made decisions as to the content posted on their boards, this constituted "editorial control" rendering them a publisher.[77] Stratton Oakmont won their case against Prodigy and the court's decision turned on Prodigy's active role in moderating the content on their boards—as that made

68. *Id.*
69. *Id.*
70. *Id.* at *2.
71. *Id.*
72. Prodigy's screening program "automatically prescreen[ed] all bulletin board postings for offensive language." *Id.*
73. A function allowing a Board Leader to "remove a note and send a previously prepared message of explanation," as to the reason of removal. *Id.* at *3. The options ranged from "solicitation, bad advice, insulting, wrong topic, off topic, bad taste" and more. *Id.*
74. These guidelines requested that users not post notes "that are 'insulting'" and advised users that "'notes that harass other members or are deemed to be in bad taste or grossly repugnant to community standards, or are deemed harmful to maintain a harmonious online community" will be removed. *Id.* at *2.
75. *Id.* at *5-7.
76. *Id.* at *3.
77. *Id.* at *4. The court also stated that through Prodigy's editorial staff "continually monitor[ing] incoming transmissions," censoring posts, and implementing certain policies and staffing decisions, the company opened itself up to more liability than CompuServe did in *Cubby, Inc. v. CompuServe Inc.* through "gain[ing] the benefits of editorial control." *Id.* at *5.

them a publisher.[78] These two conflicting cases became the impetus for the original passing of CDA 230 in 1996.[79]

When CDA 230 was passed, the courts interpreted the "no liability" component as creating a bar against claims for injunctive relief.[80] The court in *Medytox Solutions, Inc. v. Investorshub.com, Inc*. determined CDA 230 was clear about its constraints based on the text of the statute and that the immunity clearly includes "claims for declaratory and injunctive relief sought."[81] Recently, in *Hassell v. Bird,* the court reaffirmed this position, pointing out that for "almost two decades" courts have been using CDA 230 to preclude injunctive relief when plaintiffs are seeking to hold an interactive content provider as the original publisher of third party content.[82]

Most cases that are successfully dismissed by using CDA 230 as a defense are related to defamation claims.[83] For example, in *Craft Beer Stellar, LLC., v. Glassdoor, Inc.*, the court found that Glassdoor was not liable for the defamatory statements posted on their website, citing CDA 230 as barring Craft Beer Stellar's claim.[84] The court held that although Glassdoor monitored comments in accordance with their community guidelines standards, they didn't "create[] or develop[] the offending information" and thus could not be responsible for them, as they were held to be an interactive content provider.[85]

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78. *Id.* at *4.

79. *See* Alina Selyukh, *Section 230: A Key Legal Shield For Facebook, Google Is About To Change*, NPR (March 21, 2018), https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change [https://perma.cc/SNH9-67J4]. In 1995, Representative Chris Cox learned of the *Stratton Oakmont* ruling and thought it was "exactly the wrong result" that websites were going to be held liable for the content on their website if they've played an active role in monitoring their platform. *Id.* Cox, along with Senator Ron Wyden, drafted CDA 230, stating "[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." *Id.* (quoting 47 U.S.C. §230 (2018)). *See also* 141 Cong. Rec. H8460-01 Aug. 4, 1995.

80. *See Medytox Solutions, Inc. v. Investorshub.com, Inc.*, 152 So.3d 727, 729-31 (Fla. Dist. Ct. App. 2014). The court, in dismissing the plaintiffs' claim for injunctive relief, followed the reasoning of a Third District case stating "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.* (citing 47 U.S.C. § 230(e)(3) (2018)); *see also* Giordano v. Romeo, 76 So. 3d 1100 (Fla. 3d DCA 2011).

81. *Medytox Solutions, Inc.*, 152 So.3d at 731.

82. Hassell v. Bird, 430 P.3d 776, 793 (Cal. 2018).

83. David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 452 (2010) ("Defamation-type claims were far and away the most numerous claims in the section 230 case law, and the courts consistently held that these claims fell within [S]ection 230's protections.") (citations omitted); *see also* Barnes v. Yahoo!., 570 F. 3d 1096, 1101 (9th Cir. 2009) ("The cause of action more frequently associated with the cases on section 230 is defamation.").

84. Craft Beer Stellar, LLC., v. Glassdoor, Inc., No. 18-10510-FDS, 2018 WL 5505247 at *3 (D. Mass. Oct. 17, 2018).

85. *Id.*

Similarly, in *Igbonwa v. Facebook, Inc.*, Igbonwa filed a claim against Facebook for defamation based on comments posted on the social media platform.[86] The plaintiff was attempting to hold Facebook liable for information posted by an "information content provider," and the complaint argued that Facebook was liable as the "publisher or speaker" of that information—clearly falling within CDA 230's scope.[87] However, Facebook contended, and the court agreed, that they were immune from liability because they were an interactive computer service.[88]

IV. CDA 230'S APPLICATION IN CASES REGARDING FAKE PROFILES

CDA 230 protects interactive computer services against other claims, in addition to libel and defamation claims.[89] Specifically, interactive computer services have recently and successfully claimed immunity against plaintiffs seeking to hold them liable for fake profiles hosted on their sites[90]—for example, via a breach of contract for violations of terms of service theory.[91]

In *Barnes v. Yahoo!, Inc.*, Barnes' ex-boyfriend created profiles of her on a website run by Yahoo!.[92] Barnes got calls, emails, and personal visits by individuals expecting sex based on the profile posting.[93] Per Yahoo!'s policy, Barnes sent a copy of her photo ID and "a signed statement denying her involvement with the profiles and requesting their removal," but no response or action came of it.[94] During this time, a "local news program was preparing

86. Igbonwa v. Facebook, Inc., No. 18-cv-02027-JCS, 2018 WL 4907632 at *1 (N.D. Cal. Oct. 09, 2018).

87. *Id.* at *5 (quoting Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (citing 47 U.S.C. § 230(c)(1) (2018))).

88. *See id.*

89. *See generally* Ardia, *supra* note 83, at 427-29.

90. *See, e.g.*, Dehen v. DOES 1-100, No. 17-cv-198-LAB, 2018 WL 4502336 (S.D. Cal. Oct. 19, 2018) (regarding fake Twitter accounts); *see also* Carafano v. Metrosplash.com Inc., 339 F. 3d 1119 (9th Cir. 2003). In *Carafano,* the Ninth Circuit stated that Matchmaker.com was immunized under CDA 230 for a fake profile that was uploaded of actress Christianne Carafano. *See Carafano*, 339 F. 3d at 1121. The fact that some of the content uploaded was in response to the website's questionnaire did not alter the court's decision nor make the website an information content provider, as the court reasoned that "no profile has any content until a user actively creates it." *Id.* at 1124. The court did not discuss the possibility of injunctive relief as the suit was filed after Matchmaker.com removed the profile from their website. *See id.* at 1122.

91. *Dehen*, No. 17-cv-198-LAB, 2018 WL 4502336 at *4-5 (claiming that due to Twitter's failure to remove the fake profiles they were in violation of their terms of service and thus breaching the contract they entered with Dehen when she registered for their service).

92. Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1098 (9th Cir. 2009). The profiles were posted without Barnes' permission, contained indecent content and were "some kind of solicitation . . . to engage in sexual intercourse." *Id.* The online profiles also contained Barnes' personal information, such as her addresses, both physical and electronic, and her work phone number. *Id.*

93. *Id.*

94. *Id.* Barnes contacted Yahoo! two more times the following month. *Id.*

to broadcast a report on the incident[,]" and one day before this broadcast, Yahoo!'s Director of Communications told Barnes she would directly hand Barnes' statement to the correct division and that it would be handled.[95] However, when two months passed and nothing had changed, Barnes filed suit in Oregon state court, and shortly after, the profiles disappeared and never returned.[96] The court dismissed Barnes' claims, stating that CDA 230 immunized Yahoo!,[97] but allowed the promissory estoppel claims to move forward, as CDA 230 doesn't bar breach of contract suits.[98]

Similarly, in *Dehen v. DOES 1-100*, Dehen sued Twitter in response to fake accounts that were opened in her name in an effort to impersonate and defame her.[99] Twitter was successfully immunized under CDA 230 as they met the requirements to be classified as an interactive computer service; they were being treated as a "publisher" or "speaker" of the content and the content was in fact "provided by another information content provider."[100] Thus, Twitter was shielded from liability by the statute and immunized from the claims against them.[101]

With these cases, courts have been clear that CDA 230 covers interactive content providers against suits relating to fake profiles on their sites.[102] However, some courts have been less consistent when it comes to the possibility of obtaining injunctive relief when CDA 230 is invoked to immunize an interactive content provider.[103]

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95. *Id.* at 1099. Barnes, relying on this statement, took no further action on her own. *Id.*

96. *Id.*

97. *Id.* at 1105-06. The court did not discuss the availability of injunctive relief in this case. *See generally Barnes*, 570 F.3d 1096.

98. *Barnes*, 570 F.3d at 1109. The court explained that while CDA 230 has a "baseline" rule of no liability for information service providers, when the court concludes that a promise is legally enforceable under contract law, it has concluded that the "promisor has manifestly intended that the court enforce his promise." *Id.* This then removes it from CDA 230 protection and frames it into a breach of contract theory where the provider can be found liable, as they were here. *Id.*

99. Dehen v. DOES 1-100, No. 17-cv-198-LAB, 2018 WL 4502336 at *1 (S.D. Cal. Oct. 19, 2018).

100. *Id.* at *3. The requirements being: (1) the entity being sued provides an "interactive computer service" (2) plaintiff's claim treats the defendant as the "publisher" or "speaker" of the offending content, and (3) the content was "provided by another information content provider." *Id.* (quoting *Barnes*, 570 F. 3d at 1100-01).

101. *Id.* at *4.

102. *See generally Dehen*, No. 17-cv-198-LAB< 2018 WL 4502336; *see also Barnes*, 570 F. 3d at 1100-01.

103. *See* Smith v. Intercosmos Media Group, Inc., No. Civ. A.02-1964, 2002 WL 31844907 at *4 (E.D. La. 2002) ("[C]laims made by the plaintiffs for damages or injunctive relief . . . are precluded by the immunity afforded by Section 230(c)(1)."). *But see* Mainstream Loudoun v. Board of Trustees of Loudoun County Library, 24 F. Supp. 2d 552 (E.D. Va. 1998) (allowing for injunctive relief under CDA 230).

V. INCONSISTENCY IN THE AVAILABILITY OF INJUNCTIVE RELIEF UNDER CDA 230

Courts have differed on how to rule on the viability of injunctive relief when CDA 230 provides immunity to a defendant from damages.[104] In some instances, courts have ruled that CDA 230 does not immunize a defendant against a claim that is seeking declaratory and injunctive relief.[105] The courts in these cases reasoned that if Congress wanted the statute to immunize providers against "both liability and declaratory and injunctive relief," it would have written it into the statute.[106]

However, other courts have determined that CDA 230's immunity clearly encompasses injunctive relief, and that the statute's "no liability" provision bars other types of relief in addition to damages.[107] Courts have concluded that sometimes injunctive relief is "at least as burdensome" as damages and "typically more intrusive"—reasoning that if the stated purpose of CDA 230 is to immunize interactive computer services for statements made by third parties, then making them legally responsible for the content also defeats that purpose.[108]

The cases in which courts have explicitly expressed a view on the availability of injunctive relief—one way or another—have not been cases regarding fake profiles, fraud, or impersonation.[109] With courts split on the matter,[110] there is an opening in CDA 230 and injunctive relief jurisprudence to allow for an exception that would introduce a new standard of proof in order to be able to successfully claim CDA 230 immunity in cases of fraud

104. *See* Morrison v. American Online, Inc., 153 F. Supp. 2d 930, 934-35 (N.D. Ind. L.R. 2001) ("A review of the various cases addressing whether the statutory immunity of Section 230 applies to injunctive relief reveals a disagreement among various courts.").

105. *See Mainstream Loudoun*, 24 F. Supp. 2d at 561.

106. *See id.*; *see also* Does v. Franco Productions, No. 99 C 7885, 2000 WL 816779 (N.D. Ill. June 22, 2000) ("Plaintiffs' claims for injunctive relief, although not precluded by the CDA, fail to state a claim.").

107. *See* Kathleen R. v. City of Livermore, 87 Cal. App. Rptr. 2d 772, 781 (Ct. App. Cal. March 6, 2001). The court also found its interpretation consistent with a previous Tenth Circuit case which concluded injunctive relief was barred under CDA 230 immunity. *Id.* (citing Ben Ezra, Weinstein, & Co. v. America Online Inc., 206 F. 3d 980, 983-84 (10th Cir. 2000)).

108. *See* Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532, 540 (E.D. Va. 2003).

109. *See, e.g.*, Smith v. Intercosmos Media Group, Inc., No. Civ. A.02-1964, 2002 WL 31844907 (E.D. La. 2002); *Mainstream Loudoun*, 24 F. Supp. 2d at 561; *Morrison*, 153 F. Supp. 2d at 934-35.

110. *See Smith*, No. Civ. A.02-1964, 2002 WL 31844907 at *4-5 (stating that injunctive relief is precluded under CDA 230). *But see Mainstream Loudoun*, 24 F. Supp. 2d at 561 (allowing for injunctive relief under CDA 230).

and impersonation online.[111] This would likely increase the likelihood of a plaintiff's ability to succeed on the merits of their claim—thus increasing the likelihood of the availability of being granted injunctive relief. This proposal has some basis in modern legal decisions, seeing that in 2017 the New York State Supreme Court granted Herrick injunctive relief against Grindr, deeming that it was a viable option in the face of CDA 230 immunity.[112]

The availability of injunctive relief in cases pertaining to fake profiles and impersonation should be viewed inherently differently than when injunctive relief is sought in matters concerning defamatory comments and libelous statements. Impersonation and fake profiles are actions commonly done by abusive partners in an effort to "exploit, harass, threaten, and stalk their victims."[113] This type of abuse comes in the form of "nonconsensual disclosure" when images, videos, and personal information are published online for other users to use in order to "stalk, harass, or assault" the victim.[114] The abuse Herrick experienced "is among the most accessible forms of abuse available," as all that is needed to employ this harassment and abuse is the Internet.[115] This leaves victims helpless, and without the ability to receive relief from the courts against the platforms that are hosting these fake profiles, or the dating apps that are perpetuating their use, they are left suffering from this cyber harassment—just as Herrick is, years later.[116] This Note's proposal has two sources of justification that lend support to an exception within CDA 230: Congress' original intent is not at odds with this proposed exception and the underlying tenants of another exception, the Fight Online Sex Trafficking Act[117] and Stop Enabling Sex Traffickers Act,[118] would lend support.

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111. Some have proposed that actual liability be attached to interactive computer services, under a theory of distributor liability, akin to what was seen in FOSTA-SESTA. *See* Colleen M. Koch, *To Catch a Catfish: A Statutory Solution for Victims of Online Impersonation*, 88 U. COLO. L. REV. 233, 273 (2017). However, this proposal does not go as far, for it is not proposing that liability be attached if interactive computer services "know or should have known[,]" but would instead allow for an avenue for the courts to compel these services to delete the fake profiles when the victim brings a successful suit against them. *Id.*

112. Order to Show Cause for Ex Parte Relief and Temporary Restraining Order, Complaint, Affirmation and Affidavit in Support of Order to Show Cause at 1-2, Herrick v. Grindr, No. 150903/2017 (N.Y. Sup. App. Div., Jan. 27, 2017).

113. *Sanctuary for Families Amicus Brief*, *supra* note 39, at 9.

114. *Id.* at 10.

115. *Id.* at 15. *See also* Monica Anderson, *Key takeaways on how Americans view – and experience – online harassment,* PEW RESEARCH CENTER (July 11, 2017), http://www.pewresearch.org/fact-tank/2017/07/11/key-takeaways-online-harassment/ [https://perma.cc/8DZ6-X9JK] ("Nearly nine-in-ten Americans (89%) say the ability to post anonymously enables people to be cruel or harass one another.").

116. *See generally* Pl.'s Compl. 3-16, 23-25.

117. H.R. 1865, 115th Con. (2018). Hereinafter "FOSTA."

118. S. 1693, 115th Cong. (2018). Hereinafter "SESTA."

A. Congress Did Not Enact CDA 230 with Fraud or Impersonation in Mind

When Congress passed CDA 230, it was in response to two defamation cases,[119] and as such, was often viewed as providing protection for interactive computer services against libel claims.[120] In fact, from the statute's enactment in 1996 to 2009, 50.5% of the legal claims that utilized a CDA 230 defense were for "defamation, libel, slander, and disparagement . . . ."[121] Congress' stated intent with passing CDA 230 was to "promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material."[122] This intent, paired with the vast number of defamation claims in which CDA 230 immunity is invoked,[123] goes to show that this Note's proposed exception would likely not be at odds with the vast amount of the litigation pleadings—as it would be creating a carve out exception that doesn't affect defamation claims.

Fake news, profiles, and impersonation accounts online are not seen as aiding in the spread of valuable information in the marketplace of ideas, or even as a beneficial addition to the exchange of information online.[124] Thus, one could argue that allowing fake profiles and impersonation accounts to remain online, with no relief for victims, would be directly against Congress' intent and thus does not fit within CDA 230's rationale. The contours of the specific requirements will be covered further in Section VI, but it is important to note that the proposed exception contains a malicious intent requirement as well as an inducement requirement—thus harmless parody accounts would not be within its purview. These harmless parody accounts, as they are a protected type of speech under the First Amendment,[125] would be a category of speech that this proposed exception would work to avoid removing.

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119. *CDA 230: Legislative History, supra* note 56. *See also* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991); Stratton Oakmont, Inc. v. Prodigy Services Company, 1995 WL 323710 (Sup. Ct. Nassau County 1995).

120. As CDA 230 expressly overruled *Stratton Oakmont*, a case that imposed liability on an Internet provider for content on their website, it makes sense to view libel and defamation cases as the types of cases against which Congress wanted to protect Internet providers. *See* H.R. Conf. Rep. No. 104-458, at 194 (1996).

121. Ardia, *supra* note 83, at 429-30.

122. Joseph Monaghan, Comment, *Social Networking Websites' Liability for User Illegality*, 21 SETON HALL J. SPORTS ENT. L. 499, 504 (2011).

123. *See* Ardia, *supra* note 83, at 430.

124. *See generally* Renee Diresta, *Free Speech In The Age of Algorithmic Megaphones*, WIRED (Oct. 12, 2018, 4:19 PM), https://www.wired.com/story/facebook-domestic-disinformation-algorithmic-megaphones/ [https://perma.cc/HJT5-YJDM] ("When viewed holistically, these manipulative activities call into question the capacity of social media to serve as a true marketplace of ideas—and this is not a new concern."); *see also* Philip M. Napoli, *What If More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L.J 55, 88 (2018) ("The irony here is that fake news is a type of speech that is most directly and irrefutably damaging to the integrity of the democratic process.").

125. *See* Hustler v. Falwell, 485 U.S. 46, 46-47 (1988).

B. The Reasoning Behind the Exception Would Be Akin to the Reasons that FOSTA-SESTA Was Passed

When FOSTA-SESTA was signed into law by President Trump in 2018,[126] the bill created a significant exception to CDA 230 immunity by clarifying that the statute does not protect interactive computer services from laws relating to "sexual exploitation of children or sex trafficking."[127] These bills also hold these services liable and responsible if third parties are posting information relating to sex-trafficking or prostitution on their site.[128] Most notably, these bills place an affirmative duty on providers to monitor content on their website and completely place the "onus on website owners to self-police,"[129] as FOSTA can be used as the basis for civil action against a website found to be "knowingly assisting, supporting, or facilitating a sex trafficking violation"[130] or "advertisements for sex work."[131]

The bottom-line effect of FOSTA and SESTA—punishing and holding publishers liable for hosting information about sex trafficking and prostitution[132]—can be readily applied here. When passed, FOSTA-SESTA was said to "ensure that victims and survivors of sex trafficking can seek justice against websites that knowingly facilitated the crimes against them."[133] Senators in support of the bill recognized that it would strike a balance between holding sex traffickers accountable and "allowing free speech and innovation to continue to thrive."[134] Importantly, the bills are meant to protect vulnerable groups and communities from the bad actors that exploit them.[135] The bills give these groups the "legal tools needed to seek and receive justice from all those involved" by no longer allowing these providers to have the blanket protection that CDA 230 can provide.[136]

However, these bills have endured extreme criticism—perhaps rightfully so—about the detrimental effects they have in practice for sex

126. Tom Jackman, *Trump signs 'FOSTA' bill targeting online sex trafficking, enables states and victims to pursue websites*, WASH. POST (Apr. 11, 2018), https://www.washingtonpost.com/news/true-crime/wp/2018/04/11/trump-signs-fosta-bill-targeting-online-sex-trafficking-enables-states-and-victims-to-pursue-websites/?utm_term=.c419a71015dd [https://perma.cc/77FE-3FGT].

127. 164 Cong. Rec. H.R. 1731, 1865 (March 21, 2018).

128. *See* Aja Romano, *A new law intended to curb sex trafficking threatens the future of the internet as we know it*, VOX (July 2, 2018), https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom **[**https://perma.cc/JCS8-EJPB] (last visited Apr. 9, 2019) (explaining that FOSTA-SESTA meant to "curb sex trafficking on online personal sites").

129. *Id.*

130. H.R. 1865, 115th Con. § 5 (2018).

131. Romano, *supra* note 128.

132. *See* H.R. 1865, 115th Con. § 5 (2018).

133. 164 Cong. Rec. H.R. 1865 (March 21, 2018).

134. *Id.* (statement of Sen. Schumer).

135. *See* Romano, *supra* note 128.

136. 164 Cong. Rec. S.R. 1731, 1859 (March 21, 2018).

workers and prostitutes.[137] Opponents of the bill cite studies purporting to show that online communications make "sex work safer"—for example, a 2017 study showed a "17 percent decrease in homicide of female victims after Craigslist erotic services were introduced in various cities."[138] They also point to the direct impact these laws have had on sex workers' ability to research and screen clients, report dangerous situations to other workers, and share important and possibly dangerous health information about clients to the community at large.[139] Without access to these forums, sex workers are forced to go on the streets without being equipped with crucial information, and are more susceptible to "violence, STIs, and exploitation"—putting their health and safety directly at risk.[140]

FOSTA and SESTA hold providers accountable for "knowingly assisting, supporting or facilitating a violation,"[141] and do not take a provider's intent or motives into account. Further, it may not be evident if the content is for consensual sex work or sex trafficking—thus many websites take "action to censor or ban parts of their platforms" because discerning which ads are promoting consensual versus nonconsensual sex is too difficult.[142] This Note's proposed exception would require both a showing of malicious intent and a showing of inducement by the individual that created the fake profiles. These requirements, which FOSTA-SESTA lacks, will likely not overly burden speech by sweeping too broadly. For example, they won't affect parody accounts that aren't aimed to harm anyone. Further, these requirements would make sure the speech being removed from these platforms is not serving a justifiable purpose and would thus limit any unintended consequences that can occur from flat bans that stem from the strict liability seen in FOSTA-SESTA cases.[143] This distinction is important because currently in FOSTA-SESTA, advertisements can be taken down regardless of whether the intent or goal of the person who posted it is for illegal sex trafficking or consensual sex work.[144] In this Note's proposal, the intent requirement ensures that the motivations behind the fake accounts are taken into account.

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137. *See* Siouxsie Q, *Anti-Sex-Trafficking Advocates Say New Law Cripples Efforts to Save Victims*, ROLLING STONE (May 25, 2018, 7:01 PM), https://www.rollingstone.com/culture/culture-features/anti-sex-trafficking-advocates-say-new-law-cripples-efforts-to-save-victims-629081/ [https://perma.cc/P995-GPZQ].

138. Briana Hauser, *FOSTA/SESTA Becomes Law Despite Strong Opposition*, GEO. L. TECH. REV. (LEGAL NEWS) (2018), https://georgetownlawtechreview.org/fostasesta-becomes-law-despite-strong-opposition/GLTR-04-2018/ [https://perma.cc/B4ER-7RN9].

139. *Id.*

140. *Id.*

141. H.R. 1865, 115th Cong. § 5 (2018).

142. Romano, *supra* note 128.

143. *See* Tina Horn, *How a New Senate Bill Will Screw Over Sex Workers*, ROLLING STONE (Mar. 23, 2018), https://www.rollingstone.com/politics/politics-features/how-a-new-senate-bill-will-screw-over-sex-workers-205311/ [https://perma.cc/L9A4-JNX9] ("When platforms over-censor their users, marginalized communities are often silenced disproportionately.").

144. *Id.* ("The threat of prosecution has already led such forums to simply shut down rather than face potential legal liability.").

Comparable to the balance between accountability and free speech ideals that a majority of Congress found was met in FOSTA-SESTA, creating an exception by changing the underlying provisions of CDA 230 for fraud and impersonation cases and in effect allowing injunctive relief for victims of these cases could do the same thing. As will be discussed in Section VI, apps and interactive computer services (specifically, edge providers) can implement identity verification steps to make sure the profiles taken down are in fact fake ones.

Finally, cyber abuse and harassment is a troubling issue in American society, with about four-in-ten Americans personally experiencing a form of online harassment.[145] Even more troubling is that "certain groups are more likely than others" to experience trait-based harassment, creating vulnerable communities and groups of people that are in desperate need of recourses.[146] The availability of injunctive relief would hold these providers responsible for answering and addressing victim concerns and impose an affirmative duty (should a court issue the injunctive relief), that a majority of the population[147] believes they should be responsible for. These statistics reflect the pervasiveness of cyber harassment and abuse that justifies imposing liability on providers in the same way that a majority of Congress believed that passing FOSTA-SESTA was justified in order to hold providers responsible for hosting content facilitating sex trafficking.

VI. INTRODUCING AN EXCEPTION TO CDA 230

Introducing injunctive relief as an option in cases where a provider is no longer technically immune (after this Note's proposed congressional amendment to CDA 230 is passed), would still require the plaintiff to adhere to a specific process and a different standard of proof in order to get relief. The provider—be it a dating app or dating website—would still not have to actively monitor for fake profiles, as CDA 230 imposes no affirmative duty to monitor, and this proposal does not suggest that such a duty should be imposed. Specifically, this proposed exception is explicitly intended to address impersonation dating app accounts. The harms posed by such

145. Maeve Duggan, *Online Harassment 2017*, PEW RESEARCH CENTER 1 (July 11, 2017), http://www.pewinternet.org/2017/07/11/online-harassment-2017/ [https://perma.cc/86K6-35S4].

146. *Id.* at 3. According to a 2017 Pew Research Center survey on online harassment, one-in-four blacks and one-in-ten Hispanics have been targets of online harassment due to their race or ethnicity. *Id.*

147. *Id.* at 4 (stating 79% of Americans think that it is the responsibility of the online services to intervene and stop the "harassing behavior [that] occurs on their platform . . . ."); *see also* Jonathan Stempel, *Grindr defeats appeal over harassment on gay dating app*, REUTERS (March 27, 2019), https://www.reuters.com/article/us-grindr-app/grindr-defeats-appeal-over-harassment-on-gay-dating-app-idUSKCN1R81WD [https://perma.cc/Y9R7-M89B] ("What happened to [] [Herrick] is not an isolated incident, . . . [a]pps are being used to stalk, rape and murder. Under the court's reading of the CDA, big tech companies don't have responsibility to do anything about it, even if they know it is happening. Congress needs to amend this statute.").

accounts are uniquely pervasive, as seen in *Herrick v. Grindr,* and necessitate different requirements and their own exception to combat the problem.

Accordingly, a procedure similar to the one henceforth mentioned may be what is necessary to provide recourse for plaintiffs and victims affected by fraud and impersonation on dating apps and to enable them to re-establish the normalcy in their life that has been stripped away.

Successfully prevailing under this specific contort of CDA 230 pertaining to fake profiles and online impersonations would require the following: first, the plaintiff must follow all the adequate procedures set in place (if any exist) with the dating app or website to alert them to the presence of the fake profile.[148] Taking part in this process does not need to be successful or even yield a response from the provider[149]—the plaintiff would only be required to show their good faith attempt to alert the provider to the impersonation before legal recourse is available. Further, a set waiting period would be imposed in order to give the provider time to answer the complaint and possibly resolve the issue before it goes to the courts. One suggestion is a maximum period of two to three weeks.[150]

Second, after the requisite waiting period has passed, and if the fake profile is still live, the plaintiff needs to then satisfy a reasonableness requirement. For this, the burden is on the plaintiff to affirmatively show that their request is a reasonable one. This is a multi-factor test and no factor alone is dispositive—however, when taken into account and based on the totality of the circumstances, a combination of these various factors can help to prove reasonableness on the part of the plaintiff. A showing that the individual seeking recourse is a private figure and not a public one will factor in, as private figures have significantly less means of recourse to clarify and disseminate the truth about them in the face of lies.[151] Additionally, the content being posted can be of importance when looking at the take down request in its totality. For example, in *Herrick v. Grindr*, the content at issue would have been very clearly viewed under this new exception as low value

148. This may very well be the end of the fake profiles and impersonations for the plaintiff. For example, for Herrick, when another "lesser-known gay dating app, Scruff[,]" had Herrick's fake profiles on them, he filed a complaint with them and the company deleted and banned the account within 24 hours. Andy Greenberg, *Spoofed Grindr Accounts Turned One Man's Life Into A "Living Hell,"* WIRED (Jan. 31, 2017 02:57 PM), https://www.wired.com/2017/01/grinder-lawsuit-spoofed-accounts/ [https://perma.cc/E3WX-CLF6]. Scruff also "prevented the same device or IP address from creating any new accounts," taking Herrick's claims seriously and working to help him quickly. *See id.*; *see also* Carafano v. Metrosplash.com Inc., 339 F. 3d 1119 (9th Cir. 2003) (explaining that, after alerting Matchmaker to the fake profiles, the company, upon request, deleted the fake profile before a complaint was filed in California state court).

149. The plaintiff would, however, need to show evidence of successfully adhering to all the procedures that are in place.

150. While this is a relatively short waiting period, any longer might risk significant harm to the plaintiff at the hands of the fake profiles. Thus, to balance the plaintiff's interest in not prolonging cyber abuse and harassment with the provider's interest and realistic capabilities to respond to requests, a period of 2-3 weeks should be a fair middle ground for both parties.

151. *See generally* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

speech, as JC had spread lies about Herrick's very personal sexual life, published Herrick's address and in doing so, placed him in direct harm.[152]

The intent of the individual who is creating the content must also be analyzed and classified. The malicious intent prong would require the plaintiff to prove the individual impersonating him or her was doing it with an intent to harm the plaintiff and created the fake profile to cause that harm.[153] This requirement would ensure that parody accounts, for example, that are created with the goal of comedic relief are not swept up in this exception. The malicious intent in these cases could be aided by a showing of what the content actually is. For example, in Herrick's case, a reasonable person would most likely concur that JC's intent and motivations were malicious, based on the content of the lies he was spreading.[154]

Additionally, realistic intent can also work its way into this analysis. If the matter is between two private citizens and one is mocking the other, more likely than not the intent is malicious and not pure. What further supports this theory is that, if the mocking was lighthearted and with the consent of the one mocked, it most likely wouldn't have found its way into the court system at all.

Further, the plaintiff would be aided in their showing of reasonableness by proving that the fake profile spread false information and induced individuals by reaching out to them and engaging in conversations under the guise of being the plaintiff. Inducing individuals to believe the profile is real and holding the profile out as a real profile, is a very different situation than a fake profile that merely exists but neither seeks to convince others it is something it is not nor actively tries to spread misinformation about someone.

Because these factors are holistic and not determinative, there may be other factors that aid in the formulation of reasonableness. However, by weighing these factors in light of the totality of the circumstances, courts could be better equipped to determine when a dating app can claim that CDA 230 makes them immune and when a plaintiff has successfully shown that his situation should fall under the new exception to CDA 230.

As for the logistics of tangible proof that the profile is in fact fake, a plaintiff could submit copies of their driver's license or other verified forms of identification to prove their identity, as well as copies of the profiles that are impersonating them, a signed affidavit that these profiles were not created with their consent or approval, and, finally, the name of the profiles they want removed if they are successful in their plea for injunctive relief.

Third, if the reasonableness standard is met, and the court believes that the plaintiff is likely to succeed on the merits and thus grants injunctive relief, it would be the plaintiff's responsibility to show the provider exactly which profile(s) are fake and which ones they want taken down, and to give the

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152. *See generally* Herrick v. Grindr, LLC., 306 F. Supp. 3d 579, 585 (S.D.N.Y. 2018) (quoting Pl.'s Am. Compl. ¶¶ 49-50).

153. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) ("'[A]ctual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'").

154. *See Herrick*, 306 F. Supp. 3d at 585 (quoting Pl.'s Am. Compl. ¶¶ 49-50).

provider the plaintiff's accurate contact information so the provider can have it on file. This accurate contact information would include the plaintiff's email address, phone number, physical address, and a picture. This could help to streamline the process if other fake profiles continue to pop up with the plaintiff's photo, but with different contact information.

Fourth, a successful grant of injunctive relief would place the onus on the plaintiff, rather than the provider, to search the dating apps for any new or additional fake profiles, in order to request subsequent removals. This approach benefits both the plaintiffs and the providers. The plaintiffs, while undertaking the duty to find the fake profiles, can feel comfortable that the exact profiles they are concerned about are getting deleted. The providers can feel secure that their rights and lack of affirmative duty to monitor under CDA 230[155] are not being thwarted, and that little to no economic burden is being imposed on them as they do not have to hire individuals to take on an affirmative role to search and locate fake profiles.[156]

A. Pros, Cons, and Effects of the Proposed Exception

A clear benefit of this exception would be providing individuals with the autonomy to protect and control their online presence. As seen in *Herrick v. Grindr,* an individual currently has no legal recourse when fake dating profiles are created and used to spread false information about him or her and to induce others to believe and rely on those falsities.[157] This was apparent in Herrick's case, for example, as individuals that relied on their conversation with the fake profiles on Grindr showed up to his home and work and engaged in extremely harassing behavior.[158]

A disadvantage of this exception is that it would lead to a degree of judicial interference currently not seen anywhere besides matters falling under FOSTA-SESTA's umbrella. This could create opposition for the same reason those laws did, as the exception would also have the possibility of thwarting free speech rights while also taking away the autonomy that dating apps currently have in deciding how to address issues of impersonation. Additionally, it is unclear if this exception would be successful in limiting the access of individuals who impersonate others online. This limitation would most likely have to be addressed in a dating app company's internal policies and guidelines, giving them discretion as to whether an individual who has

155. *See* 47 U.S.C. § 230 (c)(2) (2018).

156. Herrick's lawyer also acknowledged this. Carrie Goldberg said that providers such as Grindr don't respond to complaints or actively do anything because "[i]t's cheaper for them not to staff a department that addressees complaints and abuses of the product." Greenberg, *supra* note 148. This proposal takes into account Goldberg's statement when it recommends placing the responsibility on the plaintiff to find and flag the fake profiles instead of the provider. *See id.*

157. *See* Herrick v. Grindr, No. 18-396, 2019 WL 1384092, at *2 (2d. Cir. Mar. 27, 2019).

158. Pl.'s Compl. at 12, Herrick v. Grindr, No. 150903/2017 (N.Y. Sup. App. Div., Jan. 27. 2017).

impersonated individuals in the past could legitimately create a profile for themselves on the app in the future.

However, the high bar that is required of the plaintiff works to ensure that only those accounts that are actually causing or will cause harm are being taken down, and thus will not likely result in the over removal of dating app profiles. As with all new proposals and changes of law, there is a possibility that this exception may affect some individuals outside of the intended group at the outset of its application. Because of this, the courts may rightfully modify the factors in the reasonableness test and perhaps place a higher burden on the plaintiff to ensure that no protected speech is being removed. Additionally, lawmakers may choose to embed additional safeguards to the exception in order to prevent it from becoming an overly vague and motive-independent law—to avoid the pitfalls in the way that FOSTA-SESTA was drafted.[159]

As for the punishment for the individuals that create fake dating profiles, courts would need to look at state fraud and impersonation laws to determine the correct civil remedy.[160] That being said, this exception does not encompass or pertain to a joint suit against the dating app and the individual responsible.

VII. CONCLUSION

Under this proposed amendment to CDA 230 allowing for an exception for matters of online fraud and impersonation, a plaintiff is more likely to obtain injunctive relief because they are more likely to be successful on the merits of their underlying claim. Under this proposal, Herrick's injuries and traumas could have ended almost as quickly as they began because he was already equipped with the knowledge that JC was responsible.[161] JC spread false information about Herrick, inducing individuals to show up at Herrick's home and work, which presumably proves JC's malicious intent.[162] With that information and evidence, Herrick would have successfully sought relief from a court adopting this Note's proposed exception and would have gotten the fake dating profiles removed. This would have ended Herrick's emotional and physical suffering at the hands of JC and prevented countless random men from showing up and taunting and harassing him. This exception could have allowed Herrick to get his life back and feel safe again.

This proposal would arm victims with the power they need to take control of fake online personas that paint an inaccurate picture of an

159. Romano, *supra* note 128. (*"*[N]umerous websites took action to censor or ban parts of their platforms in response — not because those parts of the sites actually *were* promoting ads for prostitutes, but because policing them against the outside possibility that they *might* was just too hard.").

160. *See, e.g.*, *Identity Theft*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/financial-services-and-commerce/identity-theft-state-statutes.aspx [https://perma.cc/S4SK-JEN] (last visited Apr. 9, 2019).

161. *See* Herrick v. Grindr, 306 F. Supp. 3d 579, 584 (S.D.N.Y. 2018).

162. *See id.*

individual, at best, and help to perpetuate sexual assault, harassment, and rape at worst. It would create a way for victims of fraud and impersonation via fake dating app profiles to finally seek help within the confines of established CDA 230 immunity and interactive computer services' current lack of affirmative duty to monitor.

What's the FCC Got to Do With It?: How the FCC's Repeal of Net Neutrality Affects Telehealth, Contributing to Inequities and Disparities

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I. INTRODUCTION

It is estimated that by the year 2035, the world will have a shortage of 12.9 million health care providers.[1] In the United States by 2032, there will be a shortage of roughly 21,100 to 55,200 physicians needed to provide primary care.[2] Other physician specialties will see a shortage of about 24,800 to 65,800 physicians.[3] In the face of this national and global health care provider shortage, telehealth is becoming increasingly important to ensure individuals have access to care.[4] Telehealth involves "the use of digital information and communication technologies, such as computers and mobile devices, to access health care services remotely."[5] As modern telehealth technology and policy is shaped, the telecommunications field should be monitored closely to determine which regulations and policies will have implications for the field.

Section II of this Note will discuss telehealth and telemedicine's history, why broadband technology is important to the field, and the various technologies telehealth employs. Section II will also discuss the history and background of net neutrality regulations and their subsequent repeal by the FCC. Section III will examine the FCC's *2017 Restoring Internet Freedom Order*[6] and its implications for telehealth. The section will also focus on the ability of telehealth technology innovators and health systems and providers to have their content prioritized.

Section IV will explore possible solutions to mitigate any harm that current telecommunications policies and regulations have on telehealth. Specifically, current FCC programs related to telehealth will be evaluated to determine if these programs provide adequate support to telehealth in light of the net neutrality repeal. Additionally, this Section will propose a health care exception to the FCC rules and the deployment of local or municipal-built networks for telehealth.

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1. World Health Organization, *Global Health Workforce Shortage to Reach 12.9 Million in Coming Decades*, (Nov. 11, 2013), NEWS RELEASES, https://www.who.int/mediacentre/news/releases/2013/health-workforce-shortage/en/ [perma.cc/B32T-CLW8].

2. ASSOCIATION OF AMERICAN MEDICAL COLLEGES, THE COMPLEXITIES OF PHYSICIAN SUPPLY AND DEMAND: PROJECTIONS FROM 2016 TO 2030 41 (Apr. 2019), https://aamc-black.global.ssl.fastly.net/production/media/filer_public/31/13/3113ee5c-a038-4c16-89af-294a69826650/2019_update_-_the_complexities_of_physician_supply_and_demand_-_projections_from_2017-2032.pdf [https://perma.cc/8C7V-5U7H].

3. *Id.*

4. Mackenzie Garrity, *Telehealth: A proactive, value-based solution to the US physician shortage*, BECKER'S HOSPITAL REV., https://www.beckershospitalreview.com/telehealth/telehealth-a-proactive-value-based-solution-to-the-us-physician-shortage.html (May 23, 2019) [https://perma.cc/P6WA-7JZE].

5. *Telehealth: Technology Meets Healthcare*, MAYO CLINIC (Aug. 16, 2017), https://www.mayoclinic.org/healthy-lifestyle/consumer-health/in-depth/telehealth/art-20044878 [perma.cc/G57B-3DZV] [hereinafter *Telehealth*, MAYO CLINIC].

6. Restoring Internet Freedom, *Declaratory Ruling, Report, and Order*, 33 FCC Rcd 311(1) (Jan. 4, 2018) [hereinafter *Restoring Internet Freedom Order*].

II. BACKGROUND

A. History and Development of Telehealth

Some believe that telehealth is a recent development due to technological advances, but if telehealth can be understood as "[t]he delivery of health care services at a distance"[7] then telehealth has existed for centuries. In times where infectious diseases were a leading cause of death in the western world, bells or flags were used to warn individuals and prevent the further spread of disease.[8] Telehealth, as it is understood in a modern sense, is the "use of telecommunications and virtual technology to deliver health care outside of traditional health-care facilities."[9] Thus, telehealth is a broad term that describes a wide variety of health care services that utilize telecommunications technology. Telemedicine is the delivery of clinical medical care by physicians using telecommunications technology,[10] while telehealth services include but are not limited to clinical patient care,[11] and can be delivered by a variety of health care professionals other than physicians.[12] For the purpose of this Note, the terms "telehealth" and "telemedicine" will *not* be used interchangeably. The term telehealth will be used in discussion and analysis of the field's interaction with telecommunications policy, although further discussion of the history of this field will focus on telemedicine.

Modern telemedicine began in the United States in the 1960s.[13] A well-known example of one of the first uses of telemedicine is the Nebraska Psychiatric Institute, established at the University of Nebraska's medical school.[14] Physicians at the institute used a closed circuit television to provide psychiatric consultation services to staff at Norfolk State Hospital.[15] Beginning in the 1970s and lasting for approximately two decades, interest in telemedicine diminished.[16] This was largely due to "high costs of the technology, the poor quality of images, a lack of uptake services, [and] an inability to interface telemedicine with mainstream health care provision."[17]

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7. ADAM WILLIAM DARKINS & MARGARET ANN CARY, TELEMEDICINE AND TELEHEALTH: PRINCIPLES, POLICIES, PERFORMANCE, AND PITFALLS 4 (Bill Tucker & Pamela Lankas eds., 2000).

8. *Id.* at 4-5.

9. World Health Organization, *Telehealth*, HEALTH SECTOR STRATEGIES, http://www.who.int/sustainable-development/health-sector/strategies/telehealth/en/ [perma.cc/GBV6-4JXA] (last visited Dec. 28, 2019).

10. TELEHEALTH, TELEMEDICINE AND TELECARE: WHAT'S WHAT?, https://www.fcc.gov/general/telehealth-telemedicine-and-telecare-whats-what [https://perma.cc/2SCR-AM37] (last visited Nov. 7, 2018).

11. *Id.*

12. *Id.*

13. DARKINS & CARY, *supra* note 7 at 6.

14. RASHID L. BASHSHUR & GARY W. SHANNON, HISTORY OF TELEMEDICINE: EVOLUTION, CONTEXT, AND TRANSFORMATION 158-59 (2009).

15. *Id.* at 162.

16. DARKINS & CARY, *supra* note 7 at 7.

17. *Id.*

Although telemedicine was not being used by the "general health care sector[,]"[18] other sectors continued to use telemedicine, including NASA and the U.S. military.[19]

By the mid-1990s, however, telemedicine was once again viewed as a relevant solution to address health care access and quality issues.[20] Telemedicine also gained the interest of the health care community because of its ability to reduce costs in health care delivery.[21] As telemedicine was further developed, physicians were able to treat a variety of illnesses remotely, such as providing stroke care,[22] radiology services,[23] and treating individuals with HIV/AIDS.[24]

Today, telehealth services have become increasingly important for delivery of healthcare, especially to individuals living in rural communities.[25] Individuals in rural communities face unique challenges compared to their urban and suburban peers; they often have to travel long distances to receive health care services and typically do not have access to sophisticated equipment or medical specialists.[26] Telehealth services have had a notable positive impact on other groups, such as the elderly and disabled.[27] Telehealth is useful for seniors and the disabled because they can receive care in their homes rather than having to seek care from nursing homes or caregivers.[28] Additionally, there are programs, such as the Oregon Center for Aging and Technology, that have "[studied] the use of in-home sensors as a way to track cognitive decline" among the elderly, which could lead to earlier diagnosis of cognitive diseases.[29]

B. Broadband's Importance to Telehealth Technology

The positive impact telehealth has is largely a result of the development of broadband technology. Broadband is "high-speed Internet access . . . faster than traditional dial-up access."[30] Although there are conflicting views on what speeds constitute broadband, the FCC's current benchmark for

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18. *Id.*

19. These fields continued to use telemedicine because of the ongoing challenge in providing health care to individuals who were in remote areas or who did not have access to the "usual health care services." *Id.* at 8-9.

20. *Id.* at 13.

21. *See id.*

22. BASHSHUR & SHANNON, *supra* note 14, at 252.

23. *Id.* at 283.

24. *Id.* at 254.

25. CHARLES M. DAVIDSON & MICHAEL J. SANTORELLI, THE IMPACT OF BROADBAND ON TELEMEDICINE, ADVANCED COMMC'NS LAW & POL'Y INST. 14 (Apr. 2009), https://telehealth.org/sites/default/files/BroadbandandTelemedicine.pdf [https://perma.cc/DJ9B-9AMD].

26. *Id.*

27. *Id.* at 18-19.

28. *Id.* at 18.

29. *Id.* at 29.

30. *Types of Broadband Connections* (June 23, 2014), https://www.fcc.gov/general/types-broadband-connections [perma.cc/6H7A-PWLB].

broadband is 25 Mbps download speed and 3 Mbps upload speed.[31] There are several different types of broadband connections that deliver telecommunication services, such as digital subscriber line (DSL), cable modem, fiber, wireless, and satellite.[32] DSL provides broadband access through copper telephone lines, whereas fiber connections transmit data by "convert[ing] electrical signals to light and send[ing] the light through transparent glass fibers."[33] Wireless broadband connections link customers to providers through mobile or fixed connections, by radio airwaves.[34] Satellite technology is a subset of wireless technology.[35] Both wireless and satellite broadband delivery are used in rural areas where other technologies such as DSL are not available.[36]

Broadband technologies have provided consumers with access to the Internet at higher speeds due to innovation in technologies used to deliver service.[37] Faster Internet service has increased the speed at which health data can be disseminated, thus facilitating the growth of telehealth services.[38] Broadband has also led to growth in telehealth due to the ability to cut costs by eliminating the need for travel and by creating efficiencies from greater access to medical specialists who can quickly detect and treat illnesses.[39]

C. The History of Net Neutrality and the Surrounding Debate

Telehealth's foundation and ultimate success is rooted in broadband technology, therefore telecommunication policies that govern broadband have serious implications for the successful delivery of care through telehealth. Net neutrality has been a hot topic, from its adoption by the FCC in 2015, [40] to its repeal, which took effect in 2018.[41] The concept of net neutrality is commonly understood to be that "owners of the networks that compose and provide access to the Internet should not control how consumers lawfully use that network, and . . . should not be able to discriminate against content provider access to that network."[42] It is helpful to explore the events and actions by the FCC that led to the adoption of net neutrality rules and their subsequent repeal.

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31. *2018 Broadband Deployment Report* (Feb. 2, 2018), https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2018-broadband-deployment-report [https://perma.cc/88TB-V92D].

32. *Types of Broadband Connections*, *supra* note 30.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. DAVIDSON & SANTORELLI, *supra* note 25, at 10.

38. *See id.*

39. *Id.* at 16.

40. Protecting and Promoting Internet Freedom, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC RCD 5601 (Feb. 26, 2015) [hereinafter *Protecting and Promoting Internet Freedom Order*].

41. *See Restoring Internet Freedom Order*, *supra* note 6.

42. CONG. RESEARCH SERV., R40616, *The Net Neutrality Debate: Access to Broadband Networks* 1 (July 19, 2018), https://crsreports.congress.gov/product/pdf/R/R40616 [https://perma.cc/H6NL-XX94] [hereinafter CONG. RESEARCH SERV., July 19, 2018 Report].

In 2005, the Supreme Court sustained an earlier decision by the FCC holding that cable companies who offer Internet access are an information service.[43] In the same year, the FCC classified Internet service provided by telephone companies as an information service.[44] Because the FCC ruled that cable and telephone companies offering Internet access were information services and fell under Title I of the Communications Act,[45] they were not subject to the more stringent standards of Title II, which are applied to common carriers that traditionally provide telecommunication services.[46] In 2010, the FCC issued an order aimed at regulating the practices of Internet service providers ("ISPs").[47] The FCC's *2010 Order* implemented net neutrality rules calling for "transparency, no blocking, no unreasonable discrimination, and reasonable network management."[48] The *2010 Order* also made clear that paid prioritization arrangements would not "satisfy the no unreasonable discrimination standard"[49]

The *2010 Order's* rules on blocking and discrimination were later vacated by the United States Court of Appeals for the District of Columbia Circuit in 2014.[50] Following the D.C. Circuit's decision, the FCC issued a new Open Internet Order in 2015.[51] In the *2015 Order*, broadband Internet access was classified as a telecommunications service.[52] The effect of this classification was to subject ISPs that provide wireless or landline connections to the stricter common carrier regulations under Title II of the Communications Act.[53] The *2015 Order* also established "bright line" rules prohibiting ISPs from blocking[54] or throttling content,[55] and explicitly banned paid prioritization.[56] Just two years after the net neutrality rules were passed,

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43. *See* Nat'l Cable & Telecomms' Ass'n v. Brand X Internet Servs', 545 U.S. 967, 997 (2005).

44. CONG. RESEARCH SERV., July 19, 2018 Report, *supra* note 42; Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 FCC Rcd 14986 (17) (2005).

45. Restoring Internet Freedom, 33 F.C.C. Rcd 311 (2017), https://www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order; *see also* The Communications Act of 1934, 47 U.S.C. §§ 151-162 (1982).

46. *Id.* at §§ 201-276.

47. *See* Preserving the Open Internet, Broadband Industry Practices*, Report and Order*, 25 FCC Rcd 17905 (Dec. 23, 2010) [hereinafter *Preserving the Open Internet Order*].

48. *Id.* at para. 43.

49. *Id.* at 137.

50. Verizon v. FCC, 740 F.3d 623, 656–58 (D.C. Cir. 2014).

51. CONG. RESEARCH SERV., R40616, The Net Neutrality Debate: Access to Broadband Networks 7-9 (April 15, 2019), https://crsreports.congress.gov/product/pdf/R/R40616 [https://perma.cc/YK3Z-WCVX] [hereinafter CONG. RESEARCH SERV., April 15, 2019 Report].

52. *Protecting and Promoting Internet Freedom Order*, *supra* note 40, at para. 363.

53. CONG. RESEARCH SERV., April 15, 2019, *supra* note 51.

54. *Id.* at para. 115 (The order prohibits "blocking access to lawful Internet content, applications, services, and non-harmful devices.").

55. *Id.* at para. 119 (Explaining that ISPs "shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, service or use of a non-harmful device, subject to reasonable network management.").

56. *Id.* at para. 125. ISPs are banned from "directly or indirectly favor[ing] some traffic over other traffic including through use of traffic shaping, prioritization, resource reservation, or other forms of preferential traffic treatment . . . ." *Id.*

they were repealed by the FCC under the new Chairman Ajit Pai.[57] The FCC behind the *2017 Order* believed that regulation of ISPs under the *2015 Order* had stifled growth and innovation,[58] with Chairman Pai stating that the FCC would take a "light-touch" approach in the future.[59] The repeal of net neutrality has left individuals in the health care industry concerned, with many noting that deregulation of the Internet could have a potential harmful impact on health care and telehealth.[60]

D. Technologies Employed in Telehealth

An understanding of the technologies used in telehealth is important to the discussion of how broadband access impacts these technologies. Cameras and computers allow health care providers to connect to their patients in "real time" through video conferencing,[61] which provides patients with "virtual appointments."[62] Video conferencing also enables health care providers to connect with other health professionals who provide consultation services.[63]

Remote patient monitoring ("RPM") technologies allow health care providers to monitor patients and provide care outside of the clinical setting.[64] RPM includes "wearable devices" that monitor and record an individual's health information.[65] The information gathered about the individual wearing the device is then transmitted to their health care provider.[66] Through RPM, health providers monitor different types of health information and related conditions, including but not limited to blood pressure, blood glucose levels, and heart rate.[67] One example of such technology is the CardioMessenger, which records and transmits patient data to a provider to remotely monitor the patient's heart condition rather than having the patient continually travel to

57. *Restoring Internet Freedom Order*, *supra* note 6.

58. *See* Press Release, Restoring Internet Freedom, FCC, https://www.fcc.gov/restoring-internet-freedom [http://perma.cc/3C5K-BGL7] (last visited Apr. 6, 2019).

59. Statement of Chairman Ajit Pai, Restoring Internet Freedom Order Taking Effect (May 10, 2018), https://www.
fcc.gov/document/chairman-pai-restoring-internet-freedom-order-taking-effect [http://perma.cc/39AM-QGGM].

60. *See* Gaynor et al., *Telecommunications Policy May Have Unintended Health Care Consequences*, HEALTH AFFAIRS (May 21, 2017), https://www.healthaffairs.org/do/10.1377/hblog20170531.060342/full/ [http://perma.cc/X67K-C8WG]; Mei Wa Kwong, *FCC's Net Neutrality Change May Have Big Implications for Telehealth*, CHCF BLOG (Dec. 13, 2017), https://www.chcf.org/blog/fccs-net-neutrality-change-may-big-implications-telehealth/ [http://perma.cc/VLH7-8AUA].

61. Center for Connected Health Policy, *Live video*, ABOUT TELEHEALTH, https://www.cchpca.org/about/about-telehealth/live-video-synchronous [http://perma.cc/6QRT-WSCJ] (last visited Apr. 6, 2019).

62. *Telehealth*, MAYO CLINIC, *supra* note 5.

63. Center for Connected Health Policy, *Live video*, *supra* note 61.

64. *See* Center for Connected Health Policy, *Remote Patient Monitoring (RPM)*, ABOUT TELEHEALTH, https://www.cchpca.org/about/about-telehealth/remote-patient-monitoring-rpm [https://perma.cc/WK2V-3APS] (last visited Oct. 30, 2019).

65. *Telehealth*, MAYO CLINIC, *supra* note 5.

66. *See id.*

67. *Id.*

the provider's office to monitor their condition.[68] RPM can also be accomplished through the use of applications on mobile devices.[69] Patients can enter data into an application that a health care provider then uses to monitor their health.[70] Additionally, health care providers can remotely monitor their patients through sensors in the patient's home that record activity through movement.[71]

Mobile devices, specifically smartphones and tablets, have enabled health care professionals to provide care through applications.[72] Examples include CareAware Connect, which allows for "[m]ultiple teams — from care teams to ancillary staff — [][to] collaborate and communicate for the purpose of improving care coordination."[73] Health care providers using the app can also access patient information.[74] Patients can use health apps to manage their health in a variety of ways, such as "stor[ing] personal health information, record[ing] vital signs, [and] schedul[ing] reminders for taking medicine."[75]

While the technologies previously discussed are not an exhaustive list of the available telehealth technologies, they illustrate the ways technology is used to deliver and manage health care. The ultimate success of these telehealth technologies, however, depends on access to broadband. Without access to broadband, patients and providers will not be able to effectively use the technologies that have been developed. For video conferencing, patients and providers need clear visual and audio capabilities because poor connections affect how they communicate concerns and discuss diagnoses and treatment. Providers also need broadband to receive information from their patient's wearable devices. Applications that support telehealth are reliant on broadband access to function correctly, with access to large amounts of data being especially critical. One industry analyst notes that data caps are problematic because patients could burn through their data limit "with a few doctor consults, sending pictures of a rash, and regular monitoring of a chronic condition."[76] Without reliable and robust access to broadband,

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68. Thomas Beaton, *Top 10 Remote Patient Monitoring Companies for Hospitals*, MHEALTH INTELLIGENCE (July 7, 2017), https://mhealthintelligence.com/news/top-10-remote-patient-monitoring-solutions-for-hospitals [https://perma.cc/54F5-STBA].

69. *See Telehealth*, MAYO CLINIC, *supra* note 5.

70. *Id.*

71. DAVIDSON & SANTORELLI, *supra* note 25, at 15.

72. C. Lee Ventola, *Mobile Devices and Apps for Health Care Professionals: Uses and Benefits*, 39 PHARMACY & THERAPEUTICS 356, 361 (2014).

73. Beaton, *supra* note 69.

74. *Id.*

75. *Telehealth*, MAYO CLINIC, *supra* note 5.

76. Craig Settles, *Telehealth & Broadband: In Sickness and in Health, Part 2* (July 2018) (section 08), http://cjspeaks.com/wp/wp-content/uploads/2018/07/snapshot-7-18.pdf [https://perma.cc/V745-ECTP]. Data caps have been raised as a net neutrality concern, with allegations that some ISPs have violated net neutrality rules when using data cap exemptions. ISPs use data cap exemptions to exempt certain content from being counted against a user's data allowance. ISPs use data cap exemptions for their own content but have also offered paid data cap exemptions to other providers, such as Netflix and HBO, giving these providers an edge. *See* Ray Sylvester, *The Concerned Citizen's Guide to Net Neutrality*, HYPERLINK MAGAZINE (Nov. 16, 2017), https://medium.com/hyperlink-mag/the-concerned-citizens-guide-to-net-neutrality-16901d212b15 [https://perma.cc/ZE3U-W3MJ].

telehealth technologies are rendered useless, and telehealth's goals cannot be achieved.

III. WHAT NET NEUTRALITY'S REPEAL MEANS FOR TELEHEALTH

A. How the Repeal will Affect Telehealth Growth and Innovation

The repeal of the *2015 Order's* net neutrality rules has left stakeholders in the health care industry concerned about the ability of ISPs to prioritize certain health care information or services over others.[77] Telehealth technologies need fast and reliable Internet, and prioritizing content could be one way to ensure health information is being transmitted at fast speeds. As one blog notes, whether ISPs will engage in paid prioritization remains unclear.[78]

Verizon's website tells customers that some plans' content may be prioritized behind others during times of high demand, but does not specify which plans could be affected.[79] Verizon does not have any specific statements regarding paid prioritization arrangements. However, Verizon's website does state that its "network management practices" will be disclosed to plan holders who may be impacted by prioritization mechanisms.[80] Comcast states that it does not block or slow down content but also does not mention if it will engage in paid prioritization.[81] Similarly, Cox is silent on whether the company plans to engage in paid prioritization arrangements, but says it will not block or throttle user content.[82] On the surface, it is reassuring that major ISPs have stated they will not engage in blocking or throttling content, but the creation of fast lanes through paid prioritization has the potential to harm several stakeholders in the telehealth community.

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77. Gaynor et al., *It's Hard to be Neutral About Network Neutrality for Health,* HEALTH AFFAIRS (Aug. 18, 2014), https://www.healthaffairs.org/do/10.1377/hblog20140818.040833/full/ [https://perma.cc/6ETN-D8WC].

78. Phillip Berenbroick, *House Commerce Takes on Paid Prioritization, an Essential Tenet to Open Internet*, PUBLIC KNOWLEDGE (Apr. 12, 2018), https://www.publicknowledge.org/news-blog/blogs/house-commerce-takes-on-paid-prioritization-an-essential-tenet-to-the-open [https://perma.cc/8B2M-6KK3].

79. VERIZON, *Important Information About Verizon Wireless Broadband Internet Access Services* (Sept. 18, 2018), https://www.verizonwireless.com/support/broadband-services/ [https://perma.cc/XG9C-TG6K].

80. *Id.*

81. COMCAST, *Net Neutrality*, https://corporate.comcast.com/openinternet/open-net-neutrality [https://perma.cc/X78D-ESB2] (last visited Dec. 28, 2019).

82. COX, *Net Neutrality*, https://www.cox.com/residential/support/net-neutrality.html [https://perma.cc/J9ME-FCSK] (last visited Dec. 28, 2019).

1. Prioritization for Creators of Telehealth Technologies

Although it is not a foregone conclusion that ISPs will engage in paid prioritization, silence on the part of major ISPs[83] is extremely telling. The *2017 Order* requires ISPs to disclose their paid prioritization practices,[84] but compulsory transparency rules do nothing to *prevent* ISPs from engaging in prioritization, leading to potential adverse effects. In her dissent to the repeal of net neutrality rules, then-FCC Commissioner Mignon Clyburn stated,

> [w]hat we do know, is that broadband providers did not even wait for the ink to dry on this Order before making their moves. One broadband provider, who had in the past promised to not engage in paid prioritization, has now quietly dropped that promise from its list of commitments on its website.[85]

Without a ban on paid prioritization, ISPs are likely exploring ways they can pursue these arrangements, evidenced by the fact that several major ISPs provide no information on their websites discussing their stance on paid prioritization.[86]

The FCC seeks to justify its repeal of net neutrality through the belief that "public attention, not heavy-handed FCC regulation, has been most effective in deterring ISP threats to openness,"[87] but this explanation seems highly unlikely. Approximately one hundred and twenty-nine million people in the United States have only one provider for broadband Internet access, and fifty-two million of those people are receiving service from a provider who has violated network neutrality rules in the past.[88] One hundred and forty-six million people have the option of choosing between two different providers, but forty-eight million of those users still have to choose between two companies that have both violated network neutrality rules.[89] This information is not hidden, but it is not necessarily common knowledge among consumers. Broadband users can be outraged and object to ISP practices, but the reality is that millions of users' options are limited. Many users must choose between receiving service from an ISP that has violated net neutrality rules or forgo the Internet altogether. ISPs facing almost no competition in certain markets will hardly be worried that unhappy customers will take their business elsewhere. The FCC believes that public attention will help control

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83. COMCAST, *supra* note 84; COX, *supra* note 85.
84. *Restoring Internet Freedom Order*, *supra* note 6, at para. 220.
85. *Id.* at Comm'r Clyburn Dissenting Statement.
86. *See* COMCAST, *supra* note 84; COX, *supra* note 85.
87. *Restoring Internet Freedom Order*, *supra* note 6, at para. 241.
88. Lisa Gonzalez, *As the US Senate Considers Net Neutrality Today our Maps Show Millions at Risk*, INSTITUTE FOR LOCAL SELF-RELIANCE (May 16, 2018), https://ilsr.org/as-the-us-senate-considers-ne-neutrality-today-our-maps-show-millions-at-risk/ [https://perma.cc/U7TA-2CM2].
89. *Id.*

ISP behavior [90] but public attention is not an effective deterrent due to limited options for consumers.

Under the new net neutrality rules, ISPs have the incentive to engage in paid prioritization. Application creators, including those in the telehealth industry, may view the repeal of net neutrality rules as a way to advance their interests and promote business by paying for prioritized content. However, prioritization can lead to unfairness between competitors. Those with deeper pockets will be able to prioritize their content, regardless of the quality of their services as compared to their competitors. The ability for some telehealth technology creators to prioritize their services and content makes it more difficult for their competition to generate business around their product or service.

ISP engagement in paid prioritization may be "cloaked under nondisclosure agreements and wrapped up in mandatory arbitration clauses so that it will be a breach of contract to disclose these publicly or take the provider to court over any wrongdoing."[91] Thus, while the creator of a telehealth technology with a prioritization arrangement has full knowledge of how the arrangement affects their content, their competitors may not be able to effectively compete; they, in fact, may not realize the edge their competitor has. In other cases, a competitor may not be able to afford paid prioritization[92] even if they are aware they need prioritization to effectively compete. One start-up CEO comments that,

> [t]he rollback of net neutrality rules could have a negative impact on newer streaming services. If ISPs are allowed to charge more for certain content providers and paid-prioritization deals become common, this could present significant challenges. As a newer company in the streaming space, I could be at a disadvantage.[93]

Telehealth needs constant innovation to grow and provide quality service to users, and innovation is driven by healthy competition. In a sense, paid prioritization is a threat to innovation because it could be a barrier to new companies developing technology to support telehealth that often serve as market disrupters.[94] Without innovation in the market, many people, not just business owners themselves, will suffer.

One health blog notes that if ISPs prioritize some content and offer its provider better service, then users may grow to prefer that content because it

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90. *Restoring Internet Freedom Order*, *supra* note 6, at para. 241.

91. *Id.* at para. 363 (Comm'r Clyburn Dissenting Statement).

92. *See* Agam Shah, *Getting the Internet Out of Neutral*, 140 MECHANICAL ENGINEERING 21, 22 (last visited May 27, 2020), http://www.msaidi.ir/asme/201807.pdf [https://perma.cc/HPN2-P28B].

93. James K. Willcox, *How You'll Know Net Neutrality is Really Gone*, Consumer Reports (June 11, 2018), https://www.consumerreports.org/net-neutrality/end-of-net-neutrality-what-to-watch-for/ [https://perma.cc/MB5B-TX57] (quoting Colin Petrie-Norris, the CEO for advertising-based streaming start-up Xumo).

94 *See* Joshua Gans, *The Other Disruption*, Disruptive Innovation, Harvard Business Review, https://hbr.org/2016/03/the-other-disruption (March 2016) [https://perma.cc/BRV7-NDBS]

is prioritized rather than the content's actual "features and attributes."[95] Allowing prioritization of health care services or products to influence user choice is problematic because patients may not be using a service that provides them with the best quality, and instead may choose the service based on the reliability of the connection.[96] As each patient has unique health concerns and needs, it is essential they use telehealth services that provide the greatest health benefits. Prioritization for Large Health Care Providers, Hospital Systems, and Clinics Leaves Small and Rural Providers Disadvantaged

The ability for large health care systems and providers to use paid prioritization for their telehealth programs is also problematic due to the implications for rural or small health care providers. Rural health care providers, in particular, face many obstacles when implementing telehealth programs.

a. The Costs of Building Broadband in Rural Areas

One significant issue rural providers face is that they often do not have the necessary communications infrastructure to support a telehealth program.[97] Rural areas are behind in communications infrastructure compared to urban areas for a variety of reasons. One contributing factor is that ISPs are more likely to build new communication lines in urban areas that have "high population density."[98] ISPs look to urban areas to build communication lines because it is more cost effective; they balance the "cost of every mile laid against the expected profits from those lines."[99] There are "around 2,000 people per square mile in urban areas versus 10 in some rural areas."[100] Simply put, ISPs lack the incentive to build communications infrastructure in rural communities. Terrain is also cited as a reason why rural communities struggle with broadband deployment. For example, mountains and densely forested areas make it more expensive to build communications infrastructure.[101]

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95. Gaynor et al., *It's Hard to be Neutral About Network Neutrality for Health,* HEALTH AFFAIRS (Aug. 18, 2014), https://www.healthaffairs.org/do/10.1377/hblog20140818.040833/full/ [https://perma.cc/6ETN-D8WC].

96. *Id.*

97. *See* Dena S. Puskin, *Telecommunications in Rural America: Opportunities and Challenges for the Health Care System*, 670 ANNALS OF THE NEW YORK ACADEMY OF SCIENCES 67, 68 (1992).

98. Brian Whitacre, *Technology is Improving, So why is Rural Broadband Access Still a Problem?*, US NEWS: CIVIC (June 9, 2016), https://www.usnews.com/news/articles/2016-06-09/technology-is-improving-so-why-is-rural-broadband-access-still-a-problem [https://perma.cc/J8GR-2C8X].

99. *Id.*

100. *Id.*

101. CONG. RESEARCH SERV., RL30719, Broadband Internet Access and the Digital Divide: Federal Assistance Programs 7 (January 9, 2019), https://crsreports.congress.gov/product/pdf/RL/RL30719 [https://perma.cc/PT77-4RYJ].

A further impediment to rural providers is that rural communities may not have access to broadband at the minimum speeds set by the FCC, which requires download speeds of 25 Mbps and upload speeds of 3 Mbps.[102] Over 24% percent of Americans in rural areas do not have access to broadband speeds on par with the FCC's benchmarks.[103] Access to robust broadband services is essential to the efficient operation of telehealth programs, and thus a provider's inability to access fast broadband speeds impedes the use telehealth technologies.

Higher costs in building infrastructure in these communities translates to higher costs to the consumers, creating yet another obstacle rural health care providers face. In many instances, rural providers cannot afford to build the necessary infrastructure, such as backhaul connections[104] that provide broadband, without funding or support.[105] Without the infrastructure to provide reliable access to broadband, paid prioritization agreements would be impossible for rural health care providers to utilize or would be at such a high cost that it would be impractical.

b. Large Providers Do Not Face the Same Financial Hurdles as Rural and Small Providers

Health providers, such as solo practitioners or small physician groups, may experience many of the same disadvantages as their rural peers with respect to telehealth. Rural and small providers, particularly those who provide care to underserved communities, do not have the same financial resources that larger providers do. Additionally, it is unclear if the "economic benefit . . . [justifies] the equipment and communications investment costs incurred to install and maintain selected telemedicine purposes."[106] This would be especially true if paid prioritization arrangements became another cost that would be necessary to operate a successful telehealth program.

On the other hand, large health providers can pay to have content prioritized. Larger health systems also have the infrastructure to support the high capacity needs of telehealth. Infrastructure coupled with paid

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102. *2018 Broadband Deployment Report*, FCC (Feb. 2, 2018), https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2018-broadband-deployment-report [https://perma.cc/V7VX-VMDE].

103. CONG. RESEARCH SERV., RL30719, Broadband Internet Access and the Digital Divide: Federal Assistance Programs 6-7 (January 9, 2019), https://crsreports.congress.gov/product/pdf/RL/RL30719. The report also noted that "32% of Americans in Tribal lands lack coverage fixed terrestrial 25 Mbps/3 Mbps broadband." *Id.*

104. *Id.* at 7.

105. Additionally, individuals who want to build municipal broadband networks face other hurdles aside from cost. For a discussion on obstacles faced s*ee* Jon Brodkin, *One Big Reason We Lack Internet Competition: Starting an ISP is Really Hard*, ARSTECHNICA (Apr. 6, 2014) https://arstechnica.com/information-technology/2014/04/one-big-reason-we-lack-internet-competition-starting-an-isp-is-really-hard/ [https://perma.cc/L8AJ-CB8H].

106. Cynthia LeRouge & Monica J. Garfield, *Crossing the Telemedicine Chasm: Have the U.S. Barriers to Widespread Adoption of Telemedicine Been Significantly Reduced?*, 10 INT'L J. ENVTL. RES. & PUB. HEALTH 6472, 6477 (2013).

prioritization arrangements provides large health systems with the tools they need to ensure success for their programs and grow their programs into powerhouses.[107] Consequently, a large provider with a strong telehealth program will be able to exert power and influence within the telehealth community in ways a small or rural provider could not.

Larger providers who have well-developed telehealth programs are better positioned to identify the needs of their systems and adequately address them. They could address obstacles either internally or externally if they are presented with barriers to the growth of their programs. When interacting with external forces, such as lawmakers, large health care providers are in a better position to advocate for their own needs or interests, which may not necessarily benefit the needs of the telehealth community as a whole. We already recognize the ability of powerful corporations to successfully lobby for their interests and exert significant political influence.[108] The health care industry is no exception, spending millions of dollars each year on lobbying.[109] Health professionals spent over seventy-three million on lobbying in 2019.[110] This does not include the millions of dollars spent by other actors in the health care community, such as the insurance and pharmaceutical industries.[111]

For instance, imagine a situation where large providers heavily favor the continued ability to enter into paid prioritization arrangements. Smaller providers may advocate for an exception banning prioritization arrangements for telehealth. However, large providers have the financial resources to effectively lobby to prevent a possible exemption from being applied. They would likely do so, as allowing for paid prioritization would be beneficial to

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107. *See Health Systems Remain Slow to Adopt Telehealth Tools*, TELEHEALTH NEWS (Sept. 30, 2019), https://mhealthintelligence.com/news/health-systems-remain-slow-to-adopt-telehealth-tools [https://perma.cc/4BTE-QXFV].

108. *See* Olivia Solon & Sabrina Siddiqui, *Forget Wall Street- Silicon Valley is the New Political Power in Washington,* THE GUARDIAN (Sept. 3, 2017), https://www.theguardian.com/technology/2017/sep/03/silicon-valley-politics-lobbying-washington [https://perma.cc/P2WE-D8JC]; Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, THE ATLANTIC (Apr. 20, 2015), https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/ [https://perma.cc/85YD-P4BU].

109. In 2017 the health care industry spent the most out of any industry on lobbying spending $555 million**.** *See* Eric Oliver*, Healthcare-Related Lobbying Hits $555M in 2017 — 6 Statistics on Lobbying in Healthcare*, BECKER'S ASC REVIEW (Jan. 31, 2018), https://www.beckersasc.com/asc-coding-billing-and-collections/healthcare-related-lobbying-hits-555m-in-2017-6-statistics-on-lobbying-in-healthcare.html [https://perma.cc/6FVW-FSX5]; *see also* Tony Abraham, *Hospital lobbying in 2018 — by the numbers*, Healthcare Divided (Feb. 19, 2019), https://www.healthcaredive.com/news/hospital-lobbying-in-2018-by-the-numbers/548262/ [https://perma.cc/85DR-PN6Q].

110. *See Industry Profile Summary: Health Professionals*, CENTER FOR RESPONSIVE POLITICS (2019), https://www.opensecrets.org/federal-lobbying/industries/summary?cycle=2019&id=H01 [https://perma.cc/TGF6-QTKN].

111. Susan Scutti, *Big Pharma Spends Record Millions on Lobbying Amid Pressure to Lower Drug Prices*, CNN (Jan. 24, 2019), https://www.cnn.com/2019/01/23/health/phrma-lobbying-costs-bn/index.html [https://perma.cc/TP3D-N7BA]; America's Health Insurance Plans, Center for Responsive Politics (2019), https://www.opensecrets.org/federal-lobbying/clients/summary?cycle=2019&id=D000021819 [https://perma.cc/4QHD-PBJH].

their programs. The ability of large provider systems to prioritize their content would give them several advantages. One industry observer remarks that,

> [a]s telehealth provides greater access to care in more geographical markets, some physicians may feel financially threatened because patients will be able to access care from other sources, such as distant large health systems with sophisticated telehealth portals. And as medical care becomes more commoditized and more widely available, new financial risks to providers and organizations may emerge, including price competition from providers in other parts of the country or even other countries.[112]

The ability to access a greater number of patients by "poaching" them from other providers would translate into increased revenues for these large providers. Additionally, attracting more customers to a telehealth program will help large providers get the experience and insight they need to strengthen and fine-tune their programs. This will continue to feed the cycle of large systems being able to offer "superior" programs, leading more patients to seek medical care from these providers. Rural and small providers already struggle to initiate and develop telehealth programs. The continued influence and control large health systems and providers have, coupled with increasing numbers of patients seeking care from larger providers will likely serve to push other providers out of the telehealth market.

c. Paid Prioritization and Health Care Consolidation

Issues with paid prioritization are further compounded by the trend towards consolidation in the health care industry.[113] Consolidation has meant that larger hospitals and health systems wield increasing amounts of power as markets become less competitive.[114] Consolidation is problematic for rural communities. With roughly thirty hospitals closing a year, rural patients are left with fewer options for their care. [115] When hospitals close, rural patients are sometimes directed towards other health care options such as Teladoc or the CVS Minute Clinic.[116] Health care mergers and acquisitions can place

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112. Lee H. Schwamm, *Telehealth: Seven Strategies to Successfully Implement Disruptive Technology and Transform Health Care*, 33 HEALTH AFFAIRS 200, 202 (Feb. 2014), https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2013.1021 [https://perma.cc/U689-RCV7].

113. Herschman et al., *INSIGHT: The Health Care M & A Meter- Hot 2018 to Be Followed by Hotter 2019* BLOOMBERG LAW NEWS (Feb. 8, 2019), https://news.bloomberglaw.com/health-law-and-business/insight-the-health-care-m-a-meter-hot-2018-to-be-followed-by-hotter-2019 [https://perma.cc/CP9M-HPJL].

114. *Id.*

115. Cristin Flanagan, *U.S. Hospitals Shut See Down at 30-a-Year Pace With No End In Sight*, BLOOMBERG BUSINESS (Aug. 21, 2018), https://www.bloomberg.com/news/articles/2018-08-21/hospitals-are-getting-eaten-away-by-market-trends-analysts-say [https://perma.cc/QL3W-QPU].

116. *Id.*

rural patients at a disadvantage as they are given options that do not always offer care that is personalized or sensitive to their needs.[117]

Paid prioritization arrangements will allow large chains to continue to build their programs, and when these large chains realize efficiencies through their telehealth programs, they will continue to push patients to use these systems. A large system may seek to acquire rural hospitals and, rather than keep those facilities open, may close them and offer rural residents care through telehealth technologies. There are already instances where large chains have acquired rural health care providers, such as Apollo Global acquiring LifePoint Health, a chain of rural hospitals.[118] While telehealth has an enormous opportunity to transform care for rural communities, delegating rural patients to receive health care only through telehealth can be damaging.[119] These patients need and deserve to have their care actively managed by a physician with whom they can build a relationship,[120] and to have accessible facilities to manage their care in conjunction with telehealth. As the telehealth field continues to grow it is important that all voices, not just the most powerful, shape the field.

d. Prioritization Allows for Increased Investment in Larger Health and Hospital Systems

Large providers also have the power to attract companies and individuals who create telehealth technologies. Companies that market telehealth products may already be reluctant to work with a provider that does not have a network to accommodate transmitting large amounts of data.[121] Also, innovators may be attracted to larger providers because they have more developed programs in place to implement and experiment with new technology. If a large hospital or health system pays for a "fast lane" for their content, they are better able to attract innovators and investors, feeding further investment into their programs. Development of programs in rural

117. Although retail clinics can offer adequate care in certain situations, they may not be an appropriate source for patients to receive all of their care. For discussions on potential disadvantages of retail health clinics see John K. Iglehart, *The Expansion of Retail Clinics — Corporate Titans vs. Organized Medicine*, 373 N. ENGL. J. MED. 301, 302 (July 23, 2015); *Retail Health Clinics: The Pros and Cons*, HARVARD HEALTH BLOG (Jan. 15, 2016), https://www.health.harvard.edu/blog/retail-health-clinics-the-pros-and-cons-201601158979 [https://perma.cc/K8V9-KAJ8].

118. Flanagan, *supra* note 115.

119. *See* EDWARD ALAN MILLER, TELEMEDICINE AND THE PROVIDER-PATIENT RELATIONSHIP: WHAT WE KNOW SO FAR, NUFFIELD COUNCIL'S WORKING PARTY ON MEDICAL PROFILING AND ONLINE MEDICINE: THE ETHICS OF 'PERSONALISED' MEDICINE IN A CONSUMER AGE 1, 4-6 (2010).

120. Reed Abelson & Julie Creswell, *The Disappearing Doctor: How Mega Mergers Are Changing Health Care*, N.Y. TIMES (Apr. 7, 2018), https://www.nytimes.com/2018/04/07/health/health-care-mergers-doctors.html [https://perma.cc/7EVZ-AN7Q].

121. Settles, *supra* note 77, at 11 (quoting a telehealth company CEO who discussed her frustration over working with facilities that did not have strong and reliable connections).

communities and among small providers, on the other hand, may be underserved or ignored.

Some advocates champion the ability of health systems to grow their telehealth programs through paid prioritization.[122] The issue is not that health systems will be able to further develop their programs—innovation and growth in telehealth is beneficial. However, allowing paid prioritization has the ability to influence health disparities for rural patients and other underserved populations. If paid prioritization becomes a necessary condition to operate a telehealth program it will preclude some providers from implementing them. Arguably, rural communities are most in need of robust telehealth programs because of access to care issues,[123] and the fact that provider shortages affect rural communities the most.[124] Allowing for paid prioritization arrangements can undermine efforts to use telehealth to combat health care issues.

2. Antitrust Law May Be Insufficient to Remedy the Harm to Competition and Innovation Caused By Paid Prioritization Arrangements

With the potential for paid prioritization arrangements to negatively affect competition, it is important to take note of which laws could successfully combat harmful effects. A decrease in competition due to prioritization arrangements could raise antitrust concerns, and some believe antitrust enforcement mechanisms would remedy these issues.[125] However, there is a debate over whether antitrust could police potential situations arising due to the repeal. Former FTC Commissioner, Maureen Ohlhausen, argues,

122. Ajit Pai, Chairman, FCC, Remarks at Project GOAL's Conference on Aging and Technology: Creating Opportunities to Age Well with Innovation (Nov. 30, 2017); Hal Singer, *Three Ways the FCC's Open Internet Order Will Harm Innovation*, PROGRESSIVE POLICY INSTITUTE 1, 4-5 (May 2015).

123. *See* N. Douthit, et al., *Exposing Some Important Barriers to Health Care Access in the Rural USA*, 129 PUBLIC HEALTH 611, 614 (2015).

124. *See* BUREAU OF HEALTH WORKFORCE, HEALTH RESOURCES AND SERVICE ADMINISTRATION, DESIGNATED HEALTH PROFESSIONAL SHORTAGE AREAS STATISTICS (Sept. 30, 2019).

125. *See* Maureen K. Ohlhausen, *Antitrust Over Net Neutrality: Why We Should Take Competition in Broadband Seriously*, 15 COLO. TECH. L.J. 119, 133-38 (2017).

> [w]ere an ISP to degrade one form of desired content in favor of another without providing a concomitant benefit . . . other ISPs would have powerful incentives to satisfy unmet consumer demand. And if competition were insufficient to prevent or to neutralize unwanted discrimination that harms consumers, then antitrust liability would be around the corner.[126]

In contrast, economist Hal Singer argues that it would be difficult to frame issues with paid prioritization as an antitrust injury even if the preferential treatment offered by an ISP to a telemedicine service provider was not extended to rivals.[127] Singer notes that,

> [b]y offering preference to a single telemedicine supplier, while carrying the packets of rival suppliers, the ISP at most has diverted eyeballs from rival telemedicine sites to the preferred site, ensuring no output effect. . . . And the ISP would hardly be able to raise prices for Internet access to its customers as a result of giving preference to one telemedicine provider.[128]

Ohlhausen's argument relies on the hypothetical situation where an ISP "degrading" content is corrected by market forces.[129] But as Singer notes, situations where a creator's content is being prioritized over another's does not necessarily lead an ISP to degrade content. Rather, it could have the effect of guiding users to one telehealth technology creator rather than its competitor.[130]

Ohlhausen acknowledges that "start-ups and other less-well-financed competitors may not be able to afford to pay as much as dominant incumbents" affecting competition, but writes this off as a fact present in offline and online industries and notes there is a "fiction that today's Internet is currently a world of equals."[131] Although correct in her assessment, it could be damaging to accept Ohlhausen's view that industries are unfair, *particularly* in the context of telehealth. It may be too much to hope for a world where every individual's needs are adequately met, but in the context of health care, where there are already glaring disparities, there must be individuals and enforcement mechanisms to ensure disparities do not flourish. Provided there are competition issues for prioritization arrangements, it is

126. *Id.* at 119-120.

127. Hal J. Singer, *Paid Prioritization and Zero Rating: Why Antitrust Cannot Reach the Part of Net Neutrality Everyone Is Concerned About*, THE ANTITRUST SOURCE 1, 2 (Aug. 2017) https://www.americanbar.org/content /dam/aba/publishing/antitrust_source/aug17_singer_8_2f.authcheckdam.pdf [https://perma.cc/CJM7-DG34] [hereinafter Singer, *Paid Prioritization and Zero Rating*].

128. *Id.* at 5.

129. *See* Ohlhausen, *supra* note 125, at 119-120.

130. Singer, *Paid Prioritization and Zero Rating*, *supra* note 127, at 2.

131. Ohlhausen, *supra* note 125, at 138.

unclear if antitrust enforcement mechanisms would effectively police situations proposed in this Note.

IV. SOLUTIONS TO PREVENT THE STIFLING OF TELEHEALTH GROWTH AND INNOVATION

Health care plays an important role in our society and the advancement of telehealth can create efficiencies and address access to care issues. With the potential for the net neutrality repeal to negatively affect telehealth systems, solutions to combat the effects should be explored and discussed. The following section examines the FCC's current programs that support telehealth and possible solutions to mitigate any harmful effects the repeal of net neutrality has on telehealth.

A. Are Current FCC Programs Enough?

The FCC's commitment to supporting telehealth is commendable, but current programs may not be enough to offset the potential harms to telehealth in light of the repeal of net neutrality rules. The FCC's Rural Health Care Program ("RHCP") is comprised of two programs: the Health Care Connect Fund and the Telecommunications Program.[132]

The Health Care Connect Fund ("HCCF") provides funding opportunities for "high-capacity broadband connectivity to rural, as well as non-rural health care providers."[133] Non-rural providers can only participate if they are part of a consortium that consists of more than fifty percent of rural health providers.[134] A non-rural health care provider who wants to participate in the HCCF must also be a health care provider listed under the program.[135] Such providers are limited to "public or not-for-profit hospitals, rural health clinics, community health centers, health centers serving migrants, community mental health centers, local health departments or agencies, and post-secondary educational institutions/teaching hospitals/medical schools."[136] Individual providers or provider consortia in the program may receive a sixty-five percent discount on eligible equipment or services.[137] Non-rural providers who are eligible to participate in the program, however, will have funding capped.[138] Eligible expenses under the program are

132. Summary of the Rural Health Care Program, FCC https://www.fcc.gov/general/rural-health-care-program [https://perma.cc/NG8B-TV98].

133. Rural Health Care Support Mechanism, Report and Order, FCC 12-150, para. 12-14 (Dec. 21, 2012).

134. *Id.*

135. *Id.*

136. Summary of the Rural Health Care Program, FCC (May 29, 2020), https://www.fcc.gov/general/rural-health-care-program [https://perma.cc/NG8B-TV98].

137. *Funding Broadband-Enabled Health Care*, CONNECT2HEALTHFCC, https://www.fcc.gov/general/funding-broadband-enabled-health-care [https://perma.cc/GS47-JCZV] (last visited Jan. 21, 2019).

138. *Id.*

"broadband services, network equipment, and HCP-constructed and owned network facilities for consortium applicants."[139]

The Telecommunications Program provides that rural health care providers will not pay more for telecommunications services as compared to their urban peers.[140] Under the program rural providers pay for services that are "no higher than the highest tariffed or publicly available commercial rate for a similar service in the closest city in the state with a population of 50,000 or more people, taking distance charges into account."[141]

Although the FCC's programs for telehealth has supported rural providers, they are not sufficient to offset the effects of the repeal previously discussed. The programs aid rural health care providers, but the effects of the repeal could have implications for non-rural providers as well. The FCC's programs simply provide financial support so rural providers will have the necessary infrastructure and connectivity to support telehealth programs. Rural telehealth programs, however, are still likely to be behind in the development of their programs compared to large health care providers. The HCCF only provides a sixty-five percent discount on eligible products and services;[142] and the Telecommunications Program does not provide direct funding but rather controls the costs to rural providers.[143] These funding opportunities help with the associated costs of getting a telehealth program up and running but do not provide for one hundred percent of the costs.

Funding for infrastructure and equipment alone may not be enough for rural health care providers to successfully implement their telehealth programs. Paid prioritization arrangements may not be within the budgets of rural health care providers, even those who receive FCC funding. Non-rural health care providers, such as solo practitioners or small physician groups, will also face financial constraints and FCC programs provide limited funding or no funding at all.

B. State Health Regulation vs. Telecommunication Regulation

The FCC expressed its intent to preempt state laws relating to net neutrality in its *2017 Restoring Internet Freedom Order*,[144] rationalizing that "Internet access service should be governed principally by a uniform set of federal regulations."[145] The FCC advanced two arguments supporting its decision to preempt state law; the "impossibility exemption" allows FCC preemption of state laws when (1) "it is impossible or impractical to regulate the intrastate aspects of a service without affecting interstate communications" and (2) when "the [FCC] determines that such regulation

139. Rural Health Care Support Mechanism, Report and Order, FCC 12-150, para. 12 (Dec. 21, 2012) https://www.fcc.gov/document/fcc-releases-healthcare-connect-order.

140. *Id.*

141. *Id.*

142. *Summary of the Rural Health Care Program*, *supra* note 136.

143. *Id.*

144. *Restoring Internet Freedom Order, supra* note 6, at para. 194-204.

145. *Id.* at para. 194.

would interfere with federal regulatory objectives."[146] The FCC reasons that action taken by individual states not only disrupts federal efforts to have uniform regulation but also "undermine[s] Congress's goal of ensuring that the Internet remain free from 'Federal *or State* regulation.'"[147] The FCC also justified preemption of state legislation of net neutrality due to "longstanding federal policy of nonregulation for information services," of which Congress has implicitly approved.[148]

Despite the FCC's declaration that federal regulation of broadband Internet service preempts state action, several states have taken steps to implement their own net neutrality laws and have expressed concern over the repeal. The National Conference of State Legislatures has reported that "[t]hirty-four states and the District of Columbia introduced 120 bills and resolutions regarding net neutrality in the 2018 legislative session."[149]

States fighting to regulate net neutrality could frame their arguments as regulation of health, rather than a telecommunications regulation. States have the authority to regulate health through their police powers, enabling them to "protect the health, safety, and morals of the community."[150] States can exercise their police power by "[enacting] quarantine laws and health laws of every description . . . that relate to matters completely within its territory."[151] States could argue that regulation of net neutrality *specifically* for telehealth is in place to protect the health of their citizens and is thus a valid exercise of their police powers. As discussed above, paid prioritization could have harmful effects on providers which translate into adverse effects on citizens' health, especially in rural communities. Although beyond the scope of this Note, there is an interesting avenue for states to explore in their defense to enacting net neutrality laws. A successful regulation of net neutrality would need to be tailored narrowly, with only an exception for telehealth or other fields relating to health and safety.

C. A Health Care Exception?

One possible solution is to create a health care exception to FCC rules that would ensure the growth of telehealth does not erode. The FCC seems to be of the view that the repeal will be beneficial to health care. Chairman Pai has made statements regarding the repeal of the net neutrality rules and how

146. *Id.* at para. 198.

147. Brief of Respondent at 27, Mozilla v. FCC, 18-1051 (D.C. Cir. Oct. 11, 2018).

148. *Restoring Internet Freedom Order*, *supra* note 6, at para. 202; *see also* n. 749.

149. Heather Morton, *Net Neutrality Legislation in States*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 23, 2019), http://www.ncsl.org /research/telecommunications-and-information-technology/net-neutrality-legislation-in-states.aspx [https://perma.cc/9GTK-PY7U].

150. ELEANOR D. KINNEY, ADMINISTRATIVE LAW OF HEALTH CARE IN A NUTSHELL 14-15 (2017). The States' power to regulate health was recognized in the Supreme Court case *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824) (holding that the states have the power to regulate health laws).

151. Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).

it will promote telehealth services.[152] During a conference on aging and technology sponsored by Project GOAL, the Chairman remarked,

> [i]n two weeks, we'll vote on a plan to restore Internet freedom and bring back the same legal framework that was governing the Internet three years ago today . . . . This will result in increased investment in infrastructure and more digital opportunity for seniors, especially in rural and low-income urban areas. One aspect of this proposal I think is worth highlighting here is the flexibility it would give for prioritizing services that could make meaningful differences in the delivery of healthcare. By ending the outright ban on paid prioritization, we hope to make it easier for consumers to benefit from services that need prioritization—such as latency-sensitive telemedicine. Now, we can't predict exactly which innovations entrepreneurs will come up with. But by replacing an outright ban with a robust transparency requirement and FTC-led consumer protection, we will enable these services to come into being and help seniors.[153]

However, this view overlooks the fact that paid prioritization is only available for those who can *afford* to pay. Rural health providers and other small providers serving low-income communities do not have the financial resources to pay for prioritization. As one health care blog notes, "telehealth services could have secured an exemption under the old rules without implementing paid prioritization across the market."[154] The exemption of telehealth services under the old rules would have been put into effect provided that telehealth services were classified as "non-BIAS services."[155] Non-BIAS (broadband Internet access services) are classified by the FCC as having services that

> are not used to reach large parts of the Internet . . . [and] are not a generic platform–but rather a specific 'application level' service . . . us[ing] some form of network management to isolate the capacity used by these services from that used by broadband Internet access.[156]

In fact, the FCC, in their *2015 Order*, mentioned that telemedicine could be classified as a non-BIAS.[157] If current FCC leadership had serious concerns about how net neutrality rules would affect innovation in the

152. Ajit Pai, Chairman, FCC, *Remarks at Project GOAL's Conference on Aging and Technology: Creating Opportunities to Age Well with Innovation* (Nov. 30, 2017).

153. *Id.*

154. Kristi Kung, *Life in the Slow Lane? What Net Neutrality Repeal May Mean for Telehealth Services*, SHEPPARD MULLIN HEALTH CARE LAW BLOG (Jan 25, 2018,) https://www.sheppardhealthlaw.com/2018/01/articles/healthcare-information-technology/net-neutrality-telehealllth/ [https://perma.cc/9BY3-CHP8].

155. *Protecting and Promoting Internet Freedom Order*, *supra* note 40, at para. 207.

156. *Id.* at para. 209.

157. *Id.* at n. 315.

telehealth industry, they should have recognized that under the *2015 Order* telehealth could receive an exception. Chairman Pai's statements distort the reality concerning how paid prioritization arrangements interact with telehealth, both in the past and present.

Because paid prioritization presents a disadvantage for some health care providers, one possible solution is for the FCC to create a health care exception that would ban paid prioritization for telehealth services and products. An exception would be beneficial because it could ensure the harmful effects of prioritization would not impact telehealth content creators, small and rural providers, or consumers. The FCC should explore implementing an exception, especially due to the American Medical Informatics Association's letter asserting its belief that "access to broadband is, or will soon become, a social determinate of health."[158] There would likely be many advocates from the health community urging the FCC to take this approach because since the FCC announced its intention to repeal net neutrality, stakeholders in the health care community have advocated for a health care exception.[159]

D. Municipality/Community Built Networks

Another possible solution to diminish or prevent harm to telehealth is to build community broadband networks that are dedicated specifically to telehealth. Dedicated networks have already been used in other industries. For instance, FirstNet is a dedicated wireless network created by AT&T for police and firefighters to address problems with communication among first responders.[160] The concept of FirstNet could provide insight into how to create telehealth specific networks and implement them successfully.

A wireless network specifically for telehealth would enable telehealth users to have reliable connectivity and prevent the need for prioritization arrangements. Health care providers would not need to compete with every other service using the Internet, and thus may not need a prioritization to ensure their data is sent and received quickly. Networks built specifically for telehealth would also allow owners to ensure the network is customized for the sensitive needs of telehealth and could increase access to those who want to provide telehealth services.

Alternatively, telehealth providers could tap into community broadband networks that have already been built to provide telehealth services. Using

158. Letter from American Medical Informatics Association to Ajit Pai, Chairman, FCC (May 24, 2017).

159. Ebunola Aniyikaiye, *A Case for an Exception to the FCC Rule: Vulnerable Populations and Telemedicine*, EPSTEIN BECKER GREEN HEALTH LAW ADVISOR (Dec. 19, 2017), https://www.healthlawadvisor.com/2017/12/19/a-case-for-an-exception-to-the-fcc-rule-vulnerable-populations-and-telemedicine/ [https://perma.cc/M6T4-VK35]; Kung, *supra* note 154.

160. Tom Jackman, *FirstNet Launches, Giving Police and Firefighters a Dedicated Wireless Network and Infinite Possibilities*, WASH. POST (June 25, 2018), https://www.washingtonpost.com/news/true-crime/wp/2018/06/25/firstnet-launches-giving-police-and-firefighters-a-dedicated-wireless-network-and-infinite-possibilities/ [https://perma.cc/37CB-ZMJS].

existing networks would allow providers to lower costs, as they would not need to build a network from scratch. It could also provide providers with the assurance that they are dealing with a network that is well established, which would decrease the difficulties that arise when a network is in its early stages and could impact the provision of telehealth services.

Whether telehealth providers use locally built networks that are specifically for telehealth or not, these broadband networks may better provide for telehealth needs rather than large ISPs. In fact, community-owned networks are becoming increasingly popular because consumers are "frustrat[ed] with sub-par broadband speeds, high prices, and poor customer service."[161] A 2018 Harvard study evaluating community-owned fiber optic networks found that community networks offered lower prices compared to ISPs and also provided more transparency in terms of costs.[162] Lower costs for broadband services would be especially critical for rural and small health care providers.

Building community-owned networks would be no simple feat, as there are multiple actors involved and issues with funding.[163] Additionally, telehealth providers could face opposition from major ISPs.[164] As such, state or FCC support would be vital in the construction of community or telehealth specific networks. States could provide funding or offer other aid to facilitate the process of building a network to help providers get municipal networks up and running. The FCC could also help by expanding their current programs or creating new programs that offer more funding to rural providers and being more inclusive of small providers. Although the FCC has the Health Care Connect Fund that provides funding for HCP-constructed and owned networks, funding is limited and is only provided for eligible health care providers,[165] which precludes many non-rural providers who would benefit from supportive funding. Although telehealth providers will likely face obstacles in building these networks,[166] the resulting benefits would foster growth in telehealth.

V. CONCLUSION

The FCC believes that paid prioritization arrangements will "[close] the digital divide,"[167] reasoning that the ban on paid prioritization leads to "forcing the poor to support high-bandwidth subscription services skewed

161. Karl Bode, *More Than 750 American Communities Have Built Their Own Internet Networks*, MOTHERBOARD (Jan. 23, 2018), https://motherboard.vice.com/en_us/article/a3np4a/new-municipal-broadband-map [https://perma.cc/7AXX-JQAX].

162. Talbot et al., *Community Owned Fiber Networks: Value Leaders in America*, BERKMAN KLEIN CENTER FOR INTERNET & SOCIETY RESEARCH (Jan. 2018), http://nrs.harvard.edu/urn-3:HUL.InstRepos:34623859 [https://perma.cc/D2AS-AWF6].

163. *See* Brodkin, *supra* note 105.

164. *Id.*

165. *Summary of Rural Health Care Program*, *supra* note 136.

166. *See* Brodkin, *supra* note 105.

167. *Restoring Internet Freedom Order*, *supra* note 6, at para. 260.

towards the wealthier."[168] But the FCC overlooks the more subtle ways paid prioritization arrangements could lead to disparities in health care. The FCC's Restoring Internet Freedom Order may be beneficial for certain stakeholders in the telehealth field, but this benefit would not extend to all.

Allowing telehealth technology innovators to enter into paid prioritization arrangements with ISPs may threaten growth in telehealth due to lack of healthy competition. If paid prioritization becomes a prerequisite to successfully operating a telehealth business, it could preclude innovators from starting companies or developing new technologies for fear they will not be able to compete effectively. Paid prioritization arrangements could threaten the development of telehealth programs for rural communities and small health care providers. Providers who are not capable of paying for prioritization may not be able to operate an effective telehealth program, because without an arrangement, they may lack the necessary capabilities to support their telehealth activities. In sum, the effect of the repeal of net neutrality could prevent opportunities for new telehealth products and companies as well as harm rural communities and providers who cannot afford these arrangements, which further supports health disparities.

168. *Id.* at para. 260 (quoting the Cisco Comments at 11-12).

Too Much, Too Soon: The High-Tech Cases Reveal Criminal Antitrust Enforcement Inappropriate for No-Poach and Wage Fixing

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*J.D., May 2020, The George Washington University Law School; M.Ed, Lynn University; B.S., International Business, Florida Atlantic University. Editor-in-Chief, Federal Communications Law Journal, Vol. 72. First and foremost, I want to acknowledge the hard-working staff of the Federal Communications Law Journal for their dedication to the success of the FCLJ. Special thanks to Meredith Rose, Journal Adjunct, and Tess Macapinlac, Vol. 71 Notes Editor, for their steadfast encouragement, and to Professor William E. Kovacic for his guidance during the writing process.

I. INTRODUCTION

The use of agreements that restrict employee mobility has come under increasing scrutiny as economists, policy analysts, and legislators explore how these trends connect to rising income inequality.[1] In 2016, the Obama Administration turned its attention to non-compete and wage-fixing agreements as disruptors to the competitive nature of the labor market.[2] Both the White House and the Treasury Department issued reports asserting that these agreements may restrain employee movement and advancement, resulting in reduced job mobility and bargaining power, lower wages, and greater earnings inequality.[3] The Administration asserted that these agreements also likely stifle innovation by limiting the exchange of ideas and stymying employees' ability to launch new companies.[4] Though the 2016 reports did not focus on America's tech giants, disruption in how industries use non-compete and wage-fixing agreements would have a unique effect on big technology companies. Silicon Valley, arguably the seat of innovation in the digital economy, may prove instructive in a case against criminal enforcement.

In conjunction with the research findings outlined in the reports, President Obama directed executive agencies to use their authority, where applicable, to promote competition.[5] Against this political backdrop, in 2016, the Antitrust Division of the United States Department of Justice (DOJ) and the Federal Trade Commission (FTC), in a dramatic departure from antitrust jurisprudence, branded "naked" no-poach and wage-fixing agreements *per se*

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1. *See* Shepard Goldfein & Karen Hoffman Lent, *No-Poach and Non-Competes: Democrats' Proposed Legislation Places Employment Practices in Antitrust Crosshairs*, LAW.COM: N.Y.L.J. (June 11, 2018), https://www.law.com/newyorklawjournal/2018/06/11/no-poaches-and-non-competes-democrats-proposed-legislation-places-employment-practices-in-antitrust-crosshairs/ [https://perma.cc/VEB6-KZWH].

2. *See, e.g.*, The White House, Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses 3 (May 2016), https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf [https://perma.cc/VGC4-JG45] [hereinafter White House Report].

3. *Id.* at 5; OFFICE OF ECONOMIC POLICY, U.S. TREASURY DEP'T, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS (Mar. 2016), https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf [https://perma.cc/2GMN-7WV9].

4. White House Report, *supra* note 3, at 2.

5. *See* WHITE HOUSE, OFFICE OF THE PRESS SEC'Y, EXECUTIVE ORDER: STEPS TO INCREASE COMPETITION AND BETTER INFORM CONSUMERS AND WORKERS TO SUPPORT CONTINUED GROWTH OF THE AMERICAN ECONOMY (Apr. 15, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers [https://perma.cc/4332-LF98]; *see also* Exec. Order No. 13725, 3 C.F.R. § 13725 (2017), https://www.govinfo.gov/content/pkg/CFR-2017-title3-vol1/pdf/CFR-2017-title3-vol1-eo13725.pdf [https://perma.cc/8YKX-LM3M] (last visited Jan. 20, 2019).

illegal under antitrust laws and announced its intent to pursue such agreements criminally.[6]

No-poach agreements, also referred to as "anti-solicitation," "no-hire," "no-switching," or "no cold call" agreements, are arrangements whereby companies agree not to compete for each other's employees by not soliciting or hiring them.[7] Similarly, wage-fixing agreements are arrangements whereby companies agree to constrain "employees' salary or other terms of compensation, either at a specific level or within a range."[8] Historically, the DOJ and FTC[9] have investigated and prosecuted companies for engaging in "naked"[10] no-poach and wage-fixing agreements as civil antitrust violations where violators have been met with consent decrees.[11]

The term no-poach agreement perhaps first made its way into the American consciousness when several Silicon Valley technology companies came under fire for their use.[12] In 2010, the DOJ brought a series of lawsuits against six of the most prominent technology companies—Adobe Systems, Inc., Apple, Inc., Google, Inc., Intel Corp., Intuit Inc., and Pixar—challenging their use of no-poach and wage-fixing agreements.[13] These cases have been collectively referred to as the *High-Tech* cases. Although the DOJ pursued civil enforcement in each of these cases, it asserted that the agreements were

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6. DEP'T OF JUSTICE ANTITRUST DIVISION & FEDERAL TRADE COMMISSION, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 3, (Oct. 2016), https://www.justice.gov/atr/file/903511/download [https://perma.cc/4FAR-R764] [hereinafter Antitrust Guidance].

7. *See* Division Update Spring 2018, *No More No-Poach: The Antitrust Division Continues to Investigate and Prosecute "No-Poach" and Wage-Fixing Agreements*, Antitrust Division, U.S. Dep't of Justice, https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements [https://perma.cc/64M9-U5R6] [hereinafter DOJ, *"No-Poach" and Wage-Fixing Agreements*].

8. *Id.*

9. The DOJ has exclusive jurisdiction to criminally enforce Sherman Act Section 1. *See* FEDERAL TRADE COMMISSION, GUIDE TO ANTITRUST LAWS, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/X62V-T37U].

10. An agreement is "naked" if it involves no more than the trade restraint itself. Conversely, an "ancillary" agreement is one that is reasonably necessary as part of a larger, procompetitive agreement. Alison Jones and William E. Kovacic note that the court's analysis in Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899) distinguishes between "naked trade restraints, where direct rivals simply agreed to restrict output and raise price, and reasonable ancillary restraints, which encumbered the participants only as much as needed to expand output or introduce a product that no single participant could offer." (internal quotations omitted). *See* Alison Jones & William E. Kovacic, *Identifying Anticompetitive Agreements in the United States and the European Union: Developing a Coherent Antitrust Analytical Framework*, 62 THE ANTITRUST BULLETIN 2, 266-67 (2017).

11. *See* Press Release, Antitrust Division, U.S. Dep't of Justice, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010), https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee [hereinafter High Tech Press Release] [https://perma.cc/WH9H-8SZA].

12. *Id.*

13. *See* Complaint, United States v. Adobe Systems, Inc., 1:10-cv-01629, at 2 (D.D.C. Mar. 18, 2011), https://www.justice.gov/atr/case-document/file/483451/download [https://perma.cc/VY9L-PV7V].

per se unlawful under Section 1 of the Sherman Act, and thus gave rise to potential criminal liability.[14] In the *High-Tech* cases, the tech companies entered into consent decrees whereby they were enjoined from participating in these types of agreements in the future[15] and were required to institute training and compliance programs.[16] In the private lawsuits that followed against Apple, Google, Intel, and Adobe, 64,000 employees sought $3 billion in damages,[17] which would have trebled under antitrust law.[18] Nonetheless, the tech companies, which had initially proposed a settlement of $324.5 million—a number which the court rejected for "fall[ing] below the range of reasonableness"[19]—collectively paid $415 million in settlements.[20] The DOJ's shift in enforcement policy is significant as it implicates the economic and liberty interests of the actors and may have unintended ripple effects not only on the technology sector, but on the national economy.

This Note considers the implications of the DOJ's newly announced criminal enforcement priorities. Section I will provide a historical exploration of *per se* illegality under Section 1 of the Sherman Act. Section II will then review federal enforcement action on no-poach agreements, which have primarily targeted the technology sector through an examination of the *High-Tech* cases. Thereafter, Section III will consider the DOJ's criminal enforcement agenda in view of antitrust jurisprudence. Finally, Section IV will examine the competitive implications of criminal enforcement and recommend legislative policy alternatives.

I. THE COURT-FORMULATED ANALYTICAL SHORTCUT TO SECTION 1 SHERMAN ACT CLAIMS

Section 1 of the Sherman Act, which declares "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" to be illegal,[21] reflects Congress' judgment that

14. *Id.* at 8.

15. *See* Final Judgment, United States v. Adobe Systems, Inc., 1:10-cv-01629, at 5 (D.D.C. Mar. 18, 2011), https://www.justice.gov/atr/case-document/file/483426/download [https://perma.cc/ZXU3-EFTB].

16. *Id.* at 7-9.

17. *Silicon Valley's No-poaching Case: The Growing Debate over Employee Mobility*, Knowledge@Wharton, UNIV. OF PENNSLYVANIA (Apr. 30, 2014), http://knowledge.wharton.upenn.edu/article/silicon-valleys-poaching-case-growing-debate-employee-mobility/ [https://perma.cc/W783-4XUT] [hereinafter Knowledge@Wharton].

18. 15 U.S.C. § 15(b) (2018). "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

19. Order Denying Plaintiffs' Mot. for Preliminary Approval of Settlements with Adobe, Apple, Google, and Intel, High-Tech Employee Antitrust Litig., No. 11-CV-02509 (N.D. Cal. Aug. 8, 2014).

20. *See* Dan Levine, *U.S. judge approves $415 million settlement in tech worker lawsuit*, REUTERS (Sept. 3, 2015 at 1:50 AM), https://www.reuters.com/article/us-apple-google-ruling/u-s-judge-approves-415-million-settlement-in-tech-worker-lawsuit-idUSKCN0R30D120150903 [https://perma.cc/U2UL-GFPT].

21. 5 U.S.C. § 1 (2012).

"competition is the best method of allocating resources in a free market."[22] On its face, the statutory language raises a threshold question of whether Congress intended that the term "every" be read literally. If so, Section 1 would raise tremendous concerns, given the myriad of procompetitive ways that companies cooperate and share information. In 1911, the Supreme Court in *Standard Oil of N.J. v. United States* examined the legislative history of the Sherman Act, which revealed that "[t]he statute . . . evidenced the intent . . . to protect [] commerce from . . . *undue* restraint."[23] In so doing, the Court presumed Congressional intent to apply a common law standard, which has come to be known as the Rule of Reason, under which only an "unreasonable" "contract, combination . . . or conspiracy" can violate Section 1.[24]

A. The Court Limits the Use of Per Se Condemnation for "Pernicious" and "Unredeemable" Conduct

As a judicial construct, the Rule of Reason framework provides a continuum upon which alleged conduct is evaluated to determine liability.[25] At its outer bound sits *per se* condemnation as an analytical shortcut, wherein conduct is so obviously a detrimental restraint that it is conclusively presumed unreasonable.[26] If a court applies the *per se* standard, only the action or restraint must be proven—foreclosing the opportunity to present any justifications or defenses.[27] In the development of antitrust law over the last 120 years, it has always been the case that the courts are the only actor to determine presumably unreasonable conduct.[28] Historically, the courts have treated horizontal price fixing, horizontal market allocations, and some concerted actions as *per se* unlawful conduct.[29]

The Supreme Court provides the rationale for having a *per se* rule to shortcut the Rule of Reason determination as follows:

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22. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978).

23. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60 (1911) (emphasis added).

24. *Id.*

25. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779 (1999) ("The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like '*per se*,' '[R]ule of [R]eason,' and 'quick look' tend to make them appear."); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104 n.26 (1984) ("[T]here is often no bright line separating *per se* from Rule of Reason analysis.").

26. *See, e.g.*, *Standard Oil*, 221 U.S. at 65 (ceasing analysis under the Rule of Reason when it discovered price-fixing because there is "a conclusive presumption" that price-fixing violates Section 1).

27. *See* Ariz. v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 343-44 (1982).

28. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 216 (1940) (addressing price fixing); *see, e.g.*, Fashion Originator's Guild v. FTC, 312 U.S. 457 (1941) (addressing concerted action); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899) (addressing market allocation).

29. *Id.*

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.[30]

Thus, in the interest of judicial economy, the Court has exclusively reserved *per se* condemnation for conduct where consumer harm is inevitable.

B. The Supreme Court Has Been Unsurprisingly Reluctant to Extend the Per Se Rule to New Areas

By contrast, restraints that are not *per se* illegal "can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed."[31] Under the Rule of Reason standard, each party has the opportunity to present evidence.[32] The plaintiff offers evidence of a "restraint's anticompetitive effects, and the defendant submits procompetitive justifications." [33] Thus "the fact-finder weighs all the circumstances to determine whether the restraint is one that suppresses competition or promotes it."[34]

Courts have been reluctant to condemn no-poach agreements as *per se* violations[35] notwithstanding the likely analogous economic effects, in some scenarios, on economic markets as market allocations and price fixing.[36] Thus, in shifting its enforcement priority to prosecute no-poach agreements as *per se* violations,[37] the DOJ has eschewed the historical antitrust analysis

30. N. Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

31. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978).

32. Competitive Impact Statement at 8, United States v. Knorr-Bremse AG (No. 18-CV-00747) (D.D.C. filed Apr. 3, 2018), https://www.justice.gov/opa/press-release/file/1048481/download [https://perma.cc/MJQ6-DSPP].

33. *Id.*

34. *Id.* (quoting *Bd. of Trade of City of Chi. v. United States*, 246 U.S. 231, 238 (1918)).

35. Eichorn v. AT&T Corp., 248 F.3d 131, 143-144 (3d Cir. 2001) (acknowledging "judicial hesitance to extend the *per se* rule to new categories of antitrust claims," the court applied Rule of Reason, rather than *per se* analysis).

36. *See* Rochella T. Davis, *Talent Can't Be Allocated: A Labor Economics Justification For No-Poaching Agreement Criminality In Antitrust Regulation*, 12 BROOK. J. CORP. FIN. & COM. L. 283 (2017), https://brooklynworks.brooklaw.edu/bjcfcl/vol12/iss2/2 [https://perma.cc/EQ4V-W9GD].

37. Antitrust Guidance, *supra* note 6, at 2.

of no-poach agreements under the Rule of Reason.[38] The presumption of *per se* illegality would permit the DOJ to prosecute these agreements without considering their justifications or competitive effects, raising issues of fundamental fairness.[39] Perhaps unsurprisingly, cases that the DOJ has brought to date have been settled before the courts have had an opportunity to weigh in on which standard—*per se* illegality or Rule of Reason—should apply.[40]

II. FEDERAL ENFORCEMENT OF NO-POACH CASES

A. The 2010 High-Tech Cases Illustrate the Immaturity of this Area of Law

In 2009, after an investigation into the relationship between the boards of Apple and Google, the FTC reported the existence of an alleged "gentleman's agreement" whereby the two companies agreed not to hire one another's employees.[41] In 2010, the Antitrust Division investigated what they alleged to be similar no-poach agreements between Adobe, Apple, Google, Intel, Intuit, and Pixar.[42] A similar complaint was filed against a seventh company, Lucasfilm, three months later.[43] Shortly thereafter, a federal class-action lawsuit alleged that the companies made pacts not to have recruiters "cold call" each other's employees.[44] The precise conduct at issue varied between the DOJ cases and the class action, but the enforcement target was the same: "naked" restraints of trade—those agreements between companies to not to recruit or compete for each other's employees that were not ancillary to any procompetitive collaboration. These investigations collectively became known as the *High-Tech* cases.

In the *High-Tech* cases, the DOJ determined that the companies reached facially anticompetitive or naked agreements that "eliminated a significant form of competition to attract highly skilled employees."[45] Moreover, those

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38. *See, e.g.*, Union Circulation Co. v. FTC, 241 F.2d 652, 657 (2d Cir. 1957) (applying the Rule of Reason to a no-poaching agreement); Cesnik v. Chrysler Corp., 490 F. Supp. 859, 867-88 (M.D. Tenn. 1980) (applying the Rule of Reason); *Eichorn*, 248 F.3d at 144 (applying Rule of Reason to no-poaching agreement and declining *per se* application).

39. Dina Hoffer & Elizabeth Prewitt, *To Hire or Not To Hire: U.S. Cartel Enforcement Targeting Employment Practices*, 3 CONCURRENCES COMPETITION L. REV. 78, 79 (Sept. 2018), https://www.concurrences.com/en/review/issues/no-3-2018/articles/to-hire-or-not-to-hire-u-s-cartel-enforcement-targeting-employment-practices-87317-en [https://perma.cc/4QKH-BE9N].

40. *See, e.g.*, United States v. eBay, Inc., 968 F. Supp. 2d 1030 (N.D. Cal. 2012).

41. *See* Damon Poeter, *Apple, Intel, Google, Others Allegedly Conspired to Stiff Workers*, PC Mag, (May 4, 2011 9:21 PM EST), https://www.pcmag.com/news/264056/apple-intel-google-others-allegedly-conspired-to-stiff-wo [https://perma.cc/ZTR3-7NLG].

42. *See* High Tech Press Release, *supra* note 11.

43. Complaint at 1, United States v. Lucasfilm, Ltd., 1:10- cv-02220 (D.D.C. filed Dec. 21, 2010), https://www.justice.gov/atr/case-document/file/501671/download [https://perma.cc/527R-5HPX]. The complaint along with a concurrent proposed final judgment and competitive impact statement was filed, leading to settlement.

44. *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103 (N.D. Cal. 2012).

45. High Tech Press Release, *supra* note 11.

agreements harmed employees by lowering salaries and benefits that they might otherwise have commanded and depriving them of access to "competitively important information about salary levels and better job opportunities."[46] According to the complaint, Apple, Google, Adobe, Pixar, Intel, and Intuit executives agreed not to cold call each other's employees.[47] Each company maintained internal Do Not Cold Call lists which instructed human resources staff not to directly solicit employees from companies that had no-poach agreements. [48] Specifically, the evidence, including extemporaneous internal emails, indicated that the tech companies agreed not to directly solicit employees from each other or extend employment offers if employees voluntarily applied.[49]

The DOJ investigation revealed that the agreements "were not ancillary to any legitimate collaboration,"[50] citing substantial documentary evidence, including evidence of direct communications between the tech executives.[51] While the companies argued that the bilateral agreements were separate, the DOJ noted that there was "strong evidence that the companies knew about the other express agreements, patterned their own agreements off of them, and operated them concurrently with the others to accomplish the same objective." [52] The agreements, created and enforced by senior company executives, were between Apple and Google, Apple and Adobe, Apple and Pixar, Google and Intel, and Google and Intuit.[53]

The DOJ asserted that the agreements, which were not limited by geography, job function, product group, or time period "eliminated a significant form of competition to attract high tech employees, and substantially diminished competition to the detriment of the affected employees who were likely deprived of competitively important information and access to better job opportunities."[54] Moreover, the DOJ found that the agreements generally covered all employees, and "were thus much broader than reasonably necessary for the formation or implementation of any

46. *Id.*

47. *See* Adobe Complaint, *supra* note 13, at 2.

48. *Id.* at 5-8.

49. Josh Constine, *Damning Evidence Emerges in Google-Apple "No Poach" Antitrust Law Suit*, TECHCRUNCH (Sept. 1, 2012), https://techcrunch.com/2012/01/19/damning-evidence-emerges-in-google-apple-no-poach-antitrust-lawsuit/ [https://perma.cc/2YCG-GBDW].

50. Competitive Impact Statement at 9, United States v. Adobe Sys., Inc., 1:10-cv-01629, 2011 U.S. Dist. LEXIS 83756 (D.D.C. Mar. 18, 2011), https://www.justice.gov/atr/case-document/file/483431/download [https://perma.cc/2HV3-7BBZ] [hereinafter Adobe Competitive Impact Statement].

51. *See* Jeff Elder, *Silicon Valley Tech Giants Discussed Hiring, Say Documents*, WALL ST. J. (Apr. 20, 2014) ("If you hire a single one of these people, that means war."), https://www.wsj.com/articles/case-reveals-silicon-valleys-clubby-ways-1398035419 [https://perma.cc/6Z5W-H4EN].

52. Constine, supra note 49.

53. Adobe Complaint, *supra* note 13, at 2.

54. *See* Adobe Competitive Impact Statement, *supra* note 50, at 10.

collaborative effort."[55] Employees were not informed of, and had not agreed to, this restriction.[56]

Significantly, in its complaint, the DOJ categorized these agreements as *per se* illegal.[57] Relying on precedent dealing with sales restraints outside of the employment context,[58] the DOJ argued that, if competing employers entered into market allocation agreements, then the alleged conduct would undoubtedly constitute a *per se* violation. The DOJ baldly asserted that "[t]here is no basis for distinguishing allocation agreements based on whether they involve input or output markets," because "[a]nticompetitive agreements in both input and output markets create allocative inefficiencies."[59] Mere allocative inefficiency, however, is analytically distinct from conduct "that would always or almost always tend to restrict competition and decrease output," the standard the court uses to determine whether conduct should be conclusively presumed unreasonable and thus subject to *per se* condemnation.[60]

In the *United States v. Lucasfilm* suit, it was alleged that in addition to "no cold call" arrangements, the companies agreed to additional stipulations.[61] The tech firms agreed to notify the current employers of any employees trying to switch between them, agreed not to enter into bidding wars, and agreed to limit the potential for employees to negotiate higher salaries.[62] The suit also alleged that the firms agreed to communicate about the timing of offers and set caps on pay packages to prospective employees.[63] The DOJ reiterated its arguments advanced in *Adobe,* specifically tying its arguments to employment markets, noting that "[a]ntitrust analysis of downstream customer-related restraints applies equally to upstream monopsony restraints on employment opportunities."[64] In other words, the DOJ made an unsupported assertion that customer allocation and price-fixing schemes whereby competitors enter into agreements to allocate customers or prices, which are subject to *per se* condemnation, are indistinguishable from no-poach agreements.

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55. *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d at 1109.

56. *See* Adobe Complaint, *supra* note 13, at 5-8.

57. High Tech Press Release, *supra* note 11, at 5.

58. *See* Adobe Competitive Impact Statement, *supra* note 50, at 7 (citing United States v. Coop. Theatres of Ohio, Inc., 845 F.2d 1367 (6th Cir. 1988) (finding the agreement between movie theater booking agents to refrain from soliciting each other's customers was *per se* illegal, even though booking agents remained free to accept unsolicited business); United States v. Brown, 936 F.2d 1042 (9th Cir. 1991) (affirming jury verdict on violation of Section 1 of the Sherman Act against two competing billboard companies who agreed to refrain from bidding on each other's former sites for a year).

59. Adobe Competitive Impact Statement, *supra* note 50, at 7-8; *see also* Competitive Impact Statement at 5-6, United States v. Lucasfilm Ltd. (No. 10-CV-02220) (D.D.C. filed Dec. 21, 2010), https://www.justice.gov/atr/case-document/file/501651/download [https://perma.cc/56C8-CXWA].

60. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20 (1979).

61. Complaint, United States v. Lucasfilm, Ltd., *supra* note 43, at 1.

62. *See* Lucasfilm Competitive Impact Statement, *supra* note 59, at 2-3.

63. *Id.*

64. *Id.* at 5-6.

The DOJ Antitrust Division concurrently filed a civil complaint, a proposed final judgment, and a competitive impact statement in the *Adobe* matter on September 24, 2010, in the United States District Court for the District of Columbia.[65] The companies involved did not admit any wrongdoing.[66] The settlement, which was in effect for five years, prohibited the companies from entering into no-poach agreements and required the implementation of compliance programs.[67] While the complaint alleged only that the companies agreed not to directly "cold-call" prospective employees, the settlement more broadly "prohibit[ed] the companies from entering, maintaining or enforcing any agreement that in any way prevents any person from soliciting, cold calling, recruiting, or otherwise competing for employees."[68]

In the *High Tech Employees* class action, the employees argued that, in the skilled high-tech labor market, where cold calling to lure employees away from competitors played an important role in determining salaries and labor mobility, their employers' conspiracy to restrain trade was a *per se* violation of the Sherman Act and a violation of Clayton Act.[69] The complaint asserted that the "labor market for skilled high-tech labor was national" and that employers "had succeeded in lowering the compensation and mobility of their employees below what would have prevailed in a lawful and properly functioning labor market."[70]

While the Court has historically established the boundaries of *per se* analysis, the DOJ itself has analyzed wage-fixing and no-poach agreements under the Rule of Reason, undermining its justification for precipitously recasting these agreements as *per se* illegal criminal offenses.[71] Both the DOJ and class action complaints in the *High-Tech* cases charge these "naked" no-poach agreements as *per se* violations of Section 1 of the Sherman Act.[72] Critically, no judicial determination was made as to whether the no-poach agreements constituted *per se* illegal conduct—the DOJ settled its case, and the parties and the court in the class action suit agreed that the court need not reach, and in fact did not reach, the issue of whether Rule of Reason or *per se* analysis applied.[73]

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65. *See* Adobe Complaint, *supra* note 12, at 2.

66. Proposed Final J. at 1, United States v. Adobe Sys., Inc., 1:10-cv-01629, 2011 U.S. Dist. LEXIS 83756 (D.D.C. Mar. 18, 2011), https://www.justice.gov/atr/case-document/file/483441/download [https://perma.cc/7T7N-ZCY7].

67. *Id.* at 4, 7-8.

68. *See* High Tech Press Release, *supra* note 11.

69. Order Granting in Part and Den. in Part Defs.' Joint Mot. to Dismiss; Den. Lucasfilm Ltd.'s Mot. to Dismiss; In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d at 1122.

70. In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d at 1122.

71. *eBay*, 968 F. Supp. 2d at 1037-40. The DOJ claimed that no-poach and wage fixing agreements were *per se* unlawful. However, the agency also argued in the alternative that the agreement was an "unreasonable restraint of trade . . . under an abbreviated or 'quick look' rule of reason analysis."

72. *See* Adobe Complaint, *supra* note 12, at 2; Adobe Competitive Impact Statement, *supra* note 50, at 3; In re High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d at 1109.

73. Order Granting in Part and Den. in Part Defs' Joint Mot. to Dismiss; Den. Lucasfilm Ltd.'s Mot. to Dismiss at 22-23; *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d at 1122-23.

On the heels of the *High-Tech* cases, the DOJ filed a similar no-poach agreement claim against eBay.[74] Defendants sought dismissal on the basis that the DOJ complaint failed to allege an unreasonable restraint of trade because the no-poach agreement should be analyzed under the Rule of Reason standard, and that the complaint failed to include any allegations sufficient to state a Rule of Reason claim.[75] Notably, the trial court found that the agreement constituted a "classic" horizontal market allocation agreement, which is generally a *per se* violation, because "[a]ntitrust law does not treat employment markets differently from other markets in this respect."[76] Nonetheless, in denying the motion to dismiss, the judge held that the court need not reach the question of the appropriate standard at the pleading stage.[77]

B. Criminal Enforcement of No-Poach Agreements Departs from Antitrust Jurisprudence

Having merely charged, without judicial review, that no-poach agreements are *per se* illegal in the *Adobe*, *Lucasfilm*, and *eBay* cases, on October 20, 2016, the DOJ and FTC announced in its release of "Antitrust Guidance for Human Resource Professionals" its plans to criminally prosecute naked no-poach agreements:

> Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements. These types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct. Accordingly, the DOJ will criminally investigate allegations that employers have agreed among themselves on employee compensation or not to solicit or hire each other's [sic] employees. And if that investigation uncovers a naked wage-fixing or no poaching agreement, the DOJ may, in the exercise of its prosecutorial discretion, bring criminal, felony charges against the culpable participants in the agreement, including both individuals and companies.[78]

The joint-agency guidance is a marked departure from earlier jurisprudence in equating the impact of no-poach agreements with that of price-fixing and market allocation agreements. The DOJ's apparent reclassification of no-poach and wage-fixing agreements from civil infractions to "hardcore" criminal conduct in and of itself is highly unusual. Yet the unconventional decision comes in the wake of the 2012 *eBay* enforcement action and without judicial precedent that is directly on point.

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74. *See generally* United States v. eBay, Inc., 968 F. Supp. 2d 1030 (N.D. Cal. 2012).
75. *Id.* at 1037.
76. *Id.* at 1039.
77. *Id.* at 1040.
78. Antitrust Guidance, *supra* note 6, at 4.

The substantive merits of the policy shift are vigorously debated in antitrust circles. Some commentators note that the guidance brings antitrust jurisprudence "full circle" to the precedent set forth a century prior in *Anderson v. Shipowners' Association of the Pacific Coast* [79] by extending the same level of antitrust protection to individuals and employees as to products in interstate commerce.[80] Conversely, the abrupt policy change has also received criticism that these agreements may offer some pro-competitive effects such that outright condemnation as *per se* anticompetitive is "precipitous and inappropriate." [81] The fatal flaw of the policy directive at this stage is one of procedure: the criminal enforcement strategy is inconsistent with legislative and judicial precedent.[82]

Early in the Trump Administration, the DOJ signaled that the Antitrust Division would continue to pursue criminal prosecutions of no-poach and wage-fixing agreements.[83] In January 2018, the newly-appointed head of the Antitrust Division, Assistant Attorney General Makan Delrahim, revealed that the Antitrust Division had several no-poach investigations underway and would soon be bringing enforcement actions in these investigations.[84] This policy change, which ignores antitrust jurisprudence and separation of powers considerations, was confirmed in public remarks by Principal Deputy Assistant Attorney General Andrew Finch.[85] The Antitrust Division's second-in-command reminded companies that they should be "on notice" that they could face criminal prosecution for participating in no-poach or wage-fixing agreements.[86]

The DOJ's Antitrust Manual currently permits criminal prosecution only against anticompetitive conduct between competitors that is *per se*

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79. 272 U.S. 359 (1926).

80. Jiamie Chen, *"No-Poach" Agreements as Sherman Act § 1 Violations: How We Got Here and Where We're Going*, 28 J. ANTITRUST & UNFAIR COMPETITION LAW SEC. CAL. LAW. ASS'N 81, 92 (2018).

81. *See* Hoffer & Prewitt, *supra* note 39, at n.26 *citing* J. M. Taladay and V. Mehta, Criminalization of Wage-fixing and No-poach Agreements, CPI, June 2017, https://www.competitionpolicyinternational.com/wp-content/uploads/2018/05/North-America-Column-June-Full-1.pdf [https://perma.cc/2QZM-QWLD].

82. At the Global Antitrust Symposium, then-Acting Assistant Attorney General Andrew Finch acknowledged that the appropriate course is for the DOJ to "advocate for a clear per se rule."

83. *See* Acting Asst. Att'y Gen. Andrew C. Finch, Antitrust Div., U.S. Dep't of Justice, Remarks at the Global Antitrust Enforcement Symposium (Sept. 12, 2017), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-andrew-finch-delivers-remarks-global-antitrust [https://perma.cc/B5GL-WF4B].

84. Matthew Perlman, *Delrahim Says Criminal No-Poach Cases Are in the Works*, LAW360 (Jan. 19, 2018) ("If the activity has not been stopped and continued from the time when the DOJ's policy was made," in October 2016, "we'll treat that as criminal.").

85. *See* Principal Deputy Asst. Att'y Gen. Andrew C. Finch, Antitrust Div., U.S. Dep't of Justice, "Trump Antitrust Policy After One Year," Remarks at the Heritage Foundation (Jan. 23, 2018), https://www.justice.gov/opa/speech/file/1028906/download [https://perma.cc/VAP5-2DJK].

86. *Id.*

illegal.[87] Nonetheless, without judicial review, Delrahim has brought the looming specter of criminal prosecution by the U.S. Department of Justice, Antitrust Division on a fairly commonplace element of corporate conduct thought to be legal and competitively harmless.[88] Corporations found guilty of participating in a no-poaching or wage-fixing agreements could be required to pay up to $100 million in fines, while individuals could be required to pay up to $1 million in fines.[89] Alternatively, prosecutors could seek a fine up to twice the gross financial loss or gain resulting from the violation. Moreover, individuals criminally prosecuted for participating in a no-poach or wage-fixing agreement could face up to ten years in prison.[90]

The prospect of criminal liability creates risk for companies and higher ex-ante penalties, including more substantial fines and longer jail sentences. In the last several years, there has been an uptick in both the quantity and magnitude of DOJ prosecutions. Over the last decade, the Antitrust Division has secured a staggering $9.7 billion in criminal fines over 537 criminal cases.[91] Since the 2000s, the average jail sentence has grown to an average of 19.5 months, which is more than double the average of jail sentences in the 1990s.[92]

Criminal liability notwithstanding, individuals and companies face collateral costs from an investigation, including the use of *prima facie* evidence of a violation in a parallel civil proceeding and potential investigation in other jurisdictions [93] The mere announcement of an investigation often spurs civil litigation—a forum in which plaintiffs enjoy a lower burden of proof, a preponderance of the evidence. Moreover, the resulting reputational harm, decreased shareholder value, distraction from operations, and the loss of senior executives all test a company's operational capacity. The high costs extracted from companies in a criminal investigation requires that any policy shift be subject to judicial review.

87. *See generally* ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION MANUAL III-12 (5th ed. Apr. 2015), https://www.justice.gov/atr/file/761166/download [https://perma.cc/3XL4-CR7C] [hereinafter ANTITRUST DIVISION MANUAL III-12].

88. Makan Delrahim, Asst. Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks following Knorr-Bremse Settlement (Apr. 3, 2018).

89. 15 U.S.C. § 1 (2018). ("Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.")

90. *Id.*

91. Criminal Enforcement Trends Chart Through Fiscal Year 2018, Antitrust Division, U.S. Dep't of Justice, https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts [https://perma.cc/2HQU-HS5E] (last updated May 6, 2020).

92. *Id.*

93. 15 U.S.C. § 16(a) (2018). Section 5 of the Clayton Act treats a finding of liability in a government action as prima facie evidence of a violation in a follow-on private suit.

C. Prosecutorial Discretion Signals DOJ's Uncertainty with Enforcement Strategy

On April 3, 2018, the DOJ Antitrust Division announced its first challenge to a "no-poaching" agreement since the release of the Antitrust Guidance.[94] Despite legal assertions of *per se* illegality in legal briefs and declarations from a number of high-ranking enforcement officials of impending criminal enforcement, the government elected to file a civil antitrust complaint alleging that Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation entered into unlawful agreements not to poach each other's employees in violation of Section 1 of the Sherman Act.[95]

In *United States v. Knorr-Bremse*, two rail equipment manufacturers who competed with one another to attract, hire, and retain skilled employees entered into a series of no-poach agreements between 2009 and 2016.[96] According to the complaint, the companies agreed not to solicit, recruit, hire without prior approval, or otherwise compete for employees.[97] Within the rail industry, the DOJ observed a "high demand for and limited supply of skilled employees."[98] Within that market, the agency found that the no-poach agreements restrained competition to attract workers, "denied employees access to better job opportunities, restricted their mobility, and deprived them of competitively significant information that they could have used to negotiate for better terms of employment."[99] In its Competitive Impact Statement, the DOJ echoed its position that no-poach agreements which unlawfully allocate employees between the companies are indistinguishable from market allocation agreements, and are thus *per se* unlawful restraints of trade that violate Section 1 of the Sherman Act.[100]

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94. *See* Press Release, Antitrust Division, U.S. Dep't of Justice, Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees (Apr. 2, 2018), https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete [https://perma.cc/P4JP-ULE4].

95. Complaint at 1, United States v. Knorr-Bremse AG (No. 18-CV-00747) (D.D.C. filed Apr. 3, 2018), https://www.justice.gov/opa/press-release/file/1048491/download [https://perma.cc/FVJ8-M6P9].

96. *Id.* at 2-3.

97. *Id.* at 2.

98. *Id.* at 5.

99. *Id.* at 10-11.

100. *See* Knorr-Bremse AG Competitive Impact Statement, *supra* note 32, at 9 ("Market allocation agreements cannot be distinguished from one another based solely on whether they involve input or output markets.").

> In the relevant labor markets, the agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, and they were not reasonably necessary for any collaboration between the firms. These no-poach agreements distorted competition to the detriment of employees by depriving them of the chance to bargain for better job opportunities and terms of employment.[101]

There are remarkable parallels to the *High-Tech* cases: (1) pervasive use of no-poach agreements over several years, which (2) impacts a highly-specialized skilled labor force in a high-demand market that (3) served no procompetitive benefit. Nonetheless, the DOJ explained that it reached a settlement as an exercise of prosecutorial discretion, rather than pursuing criminal prosecution.[102] Because the companies "formed and terminated [these agreements] before" the federal antitrust agencies issued their Antitrust Guidance for Human Resource Professionals, the DOJ declared that it would treat the no-poach agreements as civil violations.[103] The Antitrust Division made clear, however, "that it intends to bring criminal, felony charges against culpable companies and individuals who enter into naked no-poach agreements . . . where the underlying no-poach agreements began or continued after October 2016."[104] Thus, no-poach agreements (and presumably wage-fixing agreements) that either were entered into or continued after the agency guidance are likely to be prosecuted as criminal antitrust offenses, significantly increasing the liability exposure for companies and executives involved in no-poach agreements. An examination of prior agency practice in the *High-Tech*, *eBay, and Knorr* matters reveals continued uncertainty with respect to prosecuting wage-fixing and no-poaching agreements that undermine the *per se* criminal classification announced in the new guidance.

III. THE DOJ'S PROSECUTORIAL DISCRETION DOES NOT EXTEND TO REDEFINING OFFENSES ALTOGETHER

The DOJ's strategy to summarily condemn the use of no-poach agreements is merely an attempt to appear responsive to public outcry about fears of the outsized influence wielded by the technology industry. The Antitrust Division's enforcement policy is problematic on several fronts. First, this development disregards long-standing antitrust jurisprudence. Courts have historically analyzed no-poach agreements under the Rule of

101. *See* DOJ, *"No-Poach" and Wage-Fixing Agreements*, *supra* note 7.

102. *See* Knorr-Bremse AG Competitive Impact Statement, *supra* note 32, at 9.

103. *See id.* at 12.

104. *See* Hoffer & Prewitt, *supra* note 39, at 78 n.35 ("In October 2016, the Division issued guidance reminding the business community that no-poach agreements can be prosecuted as criminal violations. For agreements that began after the date of that announcement, or that began before but continued after that announcement, the Division expects to pursue criminal charges.").

Reason standard of liability.[105] *Per se* analysis, which forecloses any inquiry into competitive efficiencies, has been strictly limited to conduct that is so "pernicious" that they can be condemned without detailed economic analysis.[106] As a result, the Supreme Court has narrowly cabined the types of conduct subject to categorical *per se* condemnation[107] in favor of the more comprehensive Rule of Reason framework, which allows defendants to offer procompetitive justifications for alleged anticompetitive conduct. [108] Moreover, the Court has signaled a shift away from *per se* analysis[109] and demonstrated a reluctance to extend *per se* condemnation to new areas.[110]

Second, the DOJ has traditionally pursued criminal prosecution only for conduct that *the courts* have characterized as *per se* illegal. Questions of fundamental fairness are implicated when an executive branch enforcement agency expands its criminal enforcement program without judicial review of its classification of no-poach and wage-fixing agreements as *per se* offenses under the Sherman Act.[111] Criminal investigation and prosecution have been reserved for narrow classes of conduct where the legality of the challenged conduct is unquestioned, in part due to the heightened exposure to defendants.[112] Criminal prosecution of no-poach and wage-fixing agreements threatens both economic and liberty interests,[113] exposing corporate officials

105. *See* Richard A. Posner, *The Rule of Reason and Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 14 (1977).

106. *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) ("Some types of restraints, however, have such predictable and anticompetitive benefit that they are deemed unlawful *per se*."); FTC v. Superior Court Trial Lawyers' Ass'n, 493 U.S. 411, 434 n.16 (1990) ("[P]rice-fixing cartels are condemned *per se* because the conduct is tempting to businessmen but very dangerous to society. The conceivable social benefits are few in principle, small in magnitude, speculative in occurrence, and always premised on the existence of price-fixing power which is likely to be exercised adversely to the public."); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988) ("*per se* rules are appropriate only for conduct that would always or almost always tend to restrict competition and decrease output"(citations omitted)); NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 103-04 (1984) ("*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."); N. Pac. Ry. v. United States, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.").

107. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889-99 (2007) (finding minimum resale price maintenance no longer *per se* unlawful); *State Oil Co.*, 522 U.S. at 15 (finding maximum resale price maintenance not subject to *per se* condemnation); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57-58 (1977) (finding non-price vertical restraints should be adjudged under a Rule of Reason analysis).

108. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 759 (1999) (finding where "any anticompetitive effects of given restraints are far from intuitively obvious, the [R]ule of [R]eason demands a thorough enquiry into the consequences of those restraints.").

109. *See Sharp Elecs. Corp.*, 485 U.S. at 726 (finding any departure from the Rule of Reason standard "must be justified by demonstrable economic effect.").

110. United States v. Topco Assocs., Inc., 405 U.S. 596, 607-08 (1972) ("It is only after considerable experience with certain business relationships that courts classify them as *per se* violations . . . .").

111. Hoffer & Prewitt, *supra* note 39, at 78.

112. ANTITRUST DIVISION MANUAL III-12, *supra* note 87.

113. 15 U.S.C. § 1 (2018).

to higher risk of fines and jail terms for conduct that has previously been subject to only consent decrees.[114] Unlike in a civil antitrust investigation wherein market and economic analyses are relied upon to determine liability,[115] the bright-line categorization of no-poach agreements as *per se* illegal requires only that the Justice Department prove the prohibited conduct.[116] Moreover, the Antitrust Division's impromptu shift in its enforcement strategy stands as a clear appropriation of the authority consigned to the judicial and legislative branches.[117] If the Antitrust Division brings indictments, it will be asking courts to criminalize conduct when there is no precedent establishing *per se* treatment even as a civil violation. It has long been established that it is the Court—and not the antitrust enforcement agencies—that classifies conduct as *per se* illegal.[118] Meanwhile, the Court has clearly delineated the role of Congress's vested authority, determining that such "delicate judgment on the relative values to society of competing areas of the economy" is best left to the legislature.[119]

Lastly, with respect to the skilled labor market in the technology sector, there is uncertainty whether the criminal enforcement priority is the appropriate antitrust tool. While a politically popular target, it is unclear whether the antitrust harm of no-poach and wage-fixing agreements "would always or almost always tend to restrict competition and decrease output"[120] supporting a *per se* condemnation. To justify a *per se* prohibition, a restraint must have "manifestly anticompetitive" effects[121] and "lack . . . any redeeming virtue."[122] "As a consequence, the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the [R]ule of [R]eason."[123] In 2007, the Supreme Court indicated that it should be unsurprising that the Court would be reluctant "to adopt *per se* rules with regard to restraints

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114. Hoffer & Prewitt, *supra* note 39, at 78.

115. *See* Thomas O. Barnett, Criminal Enforcement of Antitrust Laws: The U.S. Model, Remarks before the Fordham Competition Law Institute (Sept. 14, 2006), https://www.justice.gov/atr/speech/criminal-enforcement-antitrust-laws-us-model [https://perma.cc/3K7H-VPP9].

116. N. Pac. Ry. v. United States, 356 U.S. 1, 2 (1958) (discussing agreements or practices that are conclusively presumed "illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.").

117. Hoffer & Prewitt, *supra* note 39, at 79.

118. *See* Maricopa Cnty. Med. Soc'y, 457 U.S. at 350 n.19 (1982) (discussing the "established position that a new *per se* rule is not justified until the *judiciary* obtains considerable rule-of-reason experience with the particular type of restraint challenged.") (emphasis added).

119. United States v. Topco Assocs., Inc., 405 U.S. 596, 611-12 (1972) ("To analyze, interpret, and evaluate the myriad of competing interests and endless data" that would surely be brought to bear on such decisions [weighing competitive efficiency in one portion of the market against another] . . . the judgment of the elected representatives of the people is required.").

120. Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988).

121. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977).

122. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289 (1985).

123. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886-87 (2007).

imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious."[124] Furthermore, as the Court has stated, a "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."[125]

A. Federal Antitrust Agency Eschews Nearly a Century of Antitrust Jurisprudence

Read generously, the DOJ's shift in enforcement policy is a push back against the argument advanced by Judge Richard Posner that "the [antitrust] enforcement agencies and the courts do not have adequate technical resources, and do not move fast enough to cope effectively" with a dynamic technology industry.[126] Nonetheless, the precipitous decision to seek criminal enforcement flies in the face of well-established antitrust jurisprudence.

In 1926, the Supreme Court first addressed unreasonable restraints of trade in the employment context in *Anderson v. Shipowners' Association of the Pacific Coast*.[127] The case stood for the proposition that prohibitions against unreasonable restraint of trade apply to instrumentalities of commerce, with no distinction between employees and products.[128] The line of cases that follow, while grappling with the viability of an antitrust claim, and the appropriate focus of antitrust protection, has nevertheless upheld the principle that the uncertainty of alleged harm arising from the use of no-poach agreements warrants a fact-specific inquiry into the anticompetitive effects under the Rule of Reason.

The 1957 Second Circuit ruling in *Union Circulation Company v. Federal Trade Commission*[129] retreated from the *Anderson* decision, holding that no-poach agreements do not constitute *per se* antitrust violations.[130] The court reasoned that "[b]ecause a harmful effect upon competition is not clearly apparent from the terms of these agreements, we believe them to be distinguishable from those boycotts that have been held illegal *per se*."[131] Nonetheless, the court found the agreement *at issue* constituted unreasonable

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124. *Id.* at 887.

125. *GTE Sylvania*, 433 U.S. at 58-59.

126. *See* Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925 (2001) (laying out the "new economy" as three interrelated industries: (1) the manufacture of computer software; (2) Internet-based businesses e.g., AOL and Amazon; and (3) the communications services and equipment designed to support the first two markets).

127. 272 U.S. 359 (1926). More than 69 years later, the 10th Circuit's decision in Roman v. Cessna Aircraft Co., 55 F.3d 542 (10th Cir. 1995), is regarded as a paradigm shift, focusing antitrust protections on employees, rather than the industry.

128. *See* Chen, *supra* note 81, at 82. The court in effect invited employees to bring antitrust no-poach lawsuits as class actions by framing the antitrust harm in no-poach cases as largely shouldered by employees.

129. Union Circulation Co. v. FTC, 241 F.2d 652 (2d Cir. 1957).

130. *Id.* at 656-57.

131. *Id.*

restraints of trade.[132] The fact-specific analysis undertaken by the Second Circuit makes clear that the Rule of Reason is the appropriate analysis of competitive harm for no-poach agreements.

The 2001 *Eichorn v. AT&T Corp*. decision marked the beginning of the modern era of no-poach cases.[133] There, the court determined based on the clear weight of judicial precedent and an acknowledgment of "judicial hesitance to extend the *per se* rule to new categories of antitrust claims" that the Rule of Reason analysis applied in considering the use of no-hire clauses for particular employees in a series of business acquisitions and reorganizations.[134]

B. Courts, Not Agencies, Have the Authority to Classify Offenses

The Antitrust Division's position that wage-fixing and no-poaching agreements are *per se* offenses subject to criminal prosecution appropriates authority consigned to the legislative and judicial branches.[135] As Justice Marshall declared in *Topco*, the *per se* rule is a judicial construct, crafted in recognition that the "courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason *we have formulated per se* rules."[136] Seminal cases like *Northern Pacific Railway*, *Broadcast Music*, and *Business Electronics* reveal the role the court has played in delineating the bounds of the *per se* rule,[137] resulting in a robust body of case law that has so far reserved *per se* condemnation for price-fixing, bid rigging, and customer or territory allocation.

Over time, the Court has constrained the types of offenses subject to a presumption of *per se* illegality;[138] however, there is *judicial* precedent for

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132. *Id.* at 657-58 (2d Cir. 1957). The petitioners, two door-to-door magazine sales companies, allegedly agreed with one another not to hire any salespersons who had been employed by another agency within the preceding year. The court, in examining the competitive harm to the industry, rather than to employees, distinguished the "no-switching agreement" from per se violations. The court reasoned that the agreements served an organizational "housekeeping" function directing employee conduct rather than a means "to control manufacturing or merchandising practices."

133. *See generally* Eichorn v. AT&T Corp., 248 F.3d 131, 143-44 (3d Cir. 2001).

134. *Eichorn*, 248 F.3d at 143-44.

135. *See* John Taladay & Vishal Mehta, Criminalization of Wage- Fixing and No-poach Agreements, 2 CPI, (June 2017), https://www.competitionpolicyinternational.com/wp-content/uploads/2018/05/North-America-Column-June-Full-1.pdf [https://perma.cc/X8J8-KG7A].

136. United States v. Topco Assocs., Inc., 405 U.S. 596, 609-10 (1972) (emphasis added).

137. *Compare N. Pac. Ry. Co.*, 356 U.S. at 4 ("[T]his principle of *per se* unreasonableness . . . avoids the necessity for complicated and prolonged economic investigation . . . .") *with Columbia Broad. Sys.*, 441 U.S. at 4 ("In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade. . . certain agreements . . . are conclusively presumed illegal without further examination under the [R]ule of [R]eason . . . .") *and Sharp Elecs. Corp.*, 485 U.S. at 719 ("[T]he factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.").

138. *See* Jones & Kovacic, *supra* note 10, at 259-60.

expanding *per se* condemnation to include conduct resembling price-fixing "which theory and experience show to have, or almost always have, harmful effects."[139]

As previously discussed, "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations."[140] Nonetheless, in recent years, the Court has stressed a presumption in favor of the Rule of Reason in Sherman Act Section 1 cases. "[The] Court presumptively applies the Rule of Reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful."[141]

C. It Is Not Immediately Obvious that No-Poach and Wage-Fixing Agreements Always or Almost Always Pose Undue Restraint in the Technology Sector

It is uncertain whether the criminal enforcement priority is the appropriate tool in this area of developing antitrust jurisprudence. The Court has consistently resorted to *per se* rules only in instances whereby restraints on trade "would always or almost always tend to restrict competition and decrease output."[142] Moreover, lower courts have been reluctant to extend a *per se* analysis to conduct that is unlikely to be intuitively viewed as criminal and where there is no contemporaneous consciousness of guilt expressed by the defendants (albeit not required under the Sherman Act).[143] As discussed above, these decisions make clear that the authority to classify these offenses is vested in the courts, rather than executive branch agencies.

The DOJ asserts that it is "the horizontal nature of the [no-poach] agreement—the elimination of competition between employers—that justifies [*per se*] treatment for these types of agreements."[144] However, scholars warn against drawing parallels between customer or product allocation and labor allocation.[145] There are several considerations, such as investments in professional training and development, that do not have a

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139. *Id.*

140. *Topco Assocs.*, 405 U.S. at 607-08; *see also, e.g.*, *Maricopa Cnty. Med. Soc'y*, 457 U.S. at 349, n.19 (1982) (discussing the "established position that a new *per se* rule is not justified until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged."); *Superior Court Trial Lawyers' Ass'n*, 493 U.S. at 432-33 (noting that the *per se* rule "reflect[s] a longstanding judgment that the prohibited practices by their nature have a substantial potential for impact on competition.") (quotations omitted).

141. Texaco, Inc. v. Dagher, 547 U.S. 1, 5 (2006).

142. *Sharp Elecs. Corp.*, 485 U.S. at 723.

143. *See* Bryan Koenig, *Partial 10th Circ. Win Puts DOJ In Bind on Antitrust Charges*, LAW360 (Oct. 31, 2018, 7:44 PM EDT), https://www.law360.com/articles/1097554?scroll=1&related=1 [https://perma.cc/24M6-MBS4].

144. *See* Andrew C. Finch, *supra* note 83.

145. Knowledge@Wharton, *supra* note 17. Joseph Harrington, Wharton professor of business economics and public policy, discusses benefits to consumers and shareholders of a return on employee investments in training and development that is facilitated by no-poach agreements.

corollary in the product market. While unlikely to be a compelling justification on its own, courts may consider the use of no-poach agreements in incentivizing investments in employee development, which may "provide some offsetting benefits for a 'no poaching' policy."[146] Joseph Harrington, Wharton professor of business economics and public policy, analogizes the use of no-poach agreements in the *High-Tech* cases to resale price management schemes, which the Court has determined to not be subject to *per se* condemnation because of potential procompetitive benefits.[147] As a result, Harrington argues that the balancing of the harm to employees and shareholders resulting from the departure of a highly-skilled worker after significant investment in training and development against the impact on the mobility of the individual employee more appropriately calls for the Rule of Reason standard in order to determine whether there is "undue" restraint.[148]

Since *Socony*, the courts have expanded the field of horizontal restraints to include other forms of conduct "which *theory and experience* show to have or almost always have harmful effects."[149] The Supreme Court has indicated that an expansion would be predicated in part upon the extent of "experience" that courts have had with the practice.[150] Even if the Court were to recognize no-poach and wage fixing agreements as *per se* illegal, as the Antitrust Division manual explains, criminal prosecution of even *per se* illegal matters may not be appropriate where truly novel issues of law or fact—certain to emerge in the evolving digital economy—are present.[151]

IV. LEGISLATIVE & POLICY ALTERNATIVES TO ADDRESS MOBILITY OF TECH LABOR

The "high-stakes war" for skilled talent in Silicon Valley, where non-compete agreements are unenforceable, served to create a breeding ground where companies resorted to an arsenal of tactics, including "non-disclosure agreements, patent infringement lawsuits[,]" and no-poach agreements to retain top engineers.[152] Legal commentators have long attributed Silicon Valley's entrepreneurial success to its unique legal environment, hailing California's lack of enforcement of non-compete agreements as the linchpin of the innovation, entrepreneurship, and mobility that has exploded in the tech sector over the last 25 years.[153] Distinct from no-poach agreements, non-compete agreements, or covenants not to compete, are agreements whereby

146. *Id.*

147. *Id.*; *see also* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 886-87 (2007).

148. Knowledge@Wharton, *supra* note 17.

149. Jones & Kovacic, *supra* note 10, at 269 (emphasis added).

150. *Maricopa Cnty. Med. Soc'y*, 457 U.S. at 344 ("Once experience with a particular kind of restraint enables the Court to predict with confidence that the [R]ule of [R]eason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable.").

151. ANTITRUST DIVISION MANUAL III-12, *supra* note 87.

152. Roberts, *supra* note 20.

153. *See* John Dodge, *The War for Tech Talent Escalates*, BOSTON GLOBE (Feb. 19, 2016), https://www.bostonglobe.com/business/2016/02/19/the-war-for-tech-talent-escalates/ejUSbuPCjPLCMRYlRZIKoJ/story.html [https://perma.cc/Y52G-N8A5].

an employee, as a condition of their employment, agrees not to work for a competing employer, generally within a specified geographic area for a specified time period.[154] In Silicon Valley, this opened the door for the circulation of ideas and employee mobility, resulting in "technology spillover"[155] that has become central to the innovative start-up ecosystem.

Legislators have begun to examine how the enforcement of these agreements have shaped local economies and sectoral development.[156] Any legislation of no-poach and wage-fixing agreements will need to balance on the one hand providing an incentive for employers to invest in employees. When employers make a capital investment, they do so with the full certainty that the property, plant, or equipment is going to stay. On the other hand, employers fear that employees will use the training and development that a company provides to boost their earning potential elsewhere, and any legislation pertaining to no-poach and wage-fixing agreements must balance this as well.

A. Policy Alternatives

Where employees have high-level access to proprietary trade secrets, there is heightened concern that companies will lose competitive advantages if their talent simply walks out the door. In many states, non-compete agreements, where an employee has the (theoretical) ability to negotiate additional considerations in exchange for agreeing to not seek employment with a competitor, serve as a backstop.

Tax policy may provide an avenue for employers to reduce reliance on no-poach agreements. For example, employers are permitted to take tax deductions for employee training as a business investment. The current model presents unworkable limitations; employers are only eligible for a tax deduction for providing education that is legally required or improves or maintains skills that are required of their current position.[157] Providing tax incentives to employers for the development of new skills allows employers to reap additional immediate short-term benefits on their investment, increase employee loyalty, and (potentially) reduce reliance on no-poach agreements. Similarly, training repayment contracts, which stipulate that an employee is required to pay a portion of training costs, on a decreasing scale, based on the length of time in a position, may provide employers with a vehicle to protect investments in training.[158]

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154. *See* White House Report, *supra* note 2, at 2.

155. *See* Stephen Mihm, *Send Noncompete Agreements Back to the Middle Ages*, BLOOMBERG (Dec. 5, 2018, 10:58 AM EST), https://www.bloomberg.com/opinion/articles/2018-12-05/noncompete-agreements-are-bad-for-employees-and-the-economy [https://perma.cc/73A4-XACK].

156. *See* Roy Maur, *Democrats Propose Bans on Noncompete, No-Poach Agreements*, SOC'Y FOR HUMAN RES. MGMT. (May 10, 2018), https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/democrats-propose-bans-noncompete-no-poach-agreements.aspx [https://perma.cc/8GNU-X6XY].

157. 26 U.S.C. § 127 (2012).

158. Knowledge@Wharton, *supra* note 17.

In 2018, as a part of a broader legislative package aimed at competition in the labor market, House Democrats put forward identical bills, HR5632 and S2480, The End Employer Collusion Act. The Act would codify the antitrust enforcement agencies' stance that no-poach and wage fixing agreements are unreasonable restraints of trade under the Sherman Antitrust Act and therefore unlawful.[159] The legislation would ban no-poach agreements, categorizing such agreements as *per se* illegal. Legislation appears to be the most straightforward path to provide authorization to the DOJ to pursue its criminal enforcement priority.

V. CONCLUSION

Notwithstanding the likely harms that no-poach and wage fixing agreements present to competition, labor markets, and, ultimately, consumers, criminal prosecution may not be the best tool to address this issue. The body of law surrounding no-poach and wage-fixing agreements is not mature enough to support a presumption of unreasonableness to justify *per se* condemnation. The DOJ should continue to bring forward no-poach cases for investigation and prosecution to develop substantial experience with judicial review to determine whether these cases warrant an expansion of the boundaries of *per se* analysis.

The Supreme Court's steadfast posture in applying *per se* analysis suggests a likelihood that the Court will maintain its position absent Congressional action. The Court has signaled that the "delicate judgment on the relative values to society of competing areas of the economy" are best left not to the enforcement agencies, but the legislature.[160] Moreover, policy considerations for the impact of criminal prosecution on innovation and U.S. trade interests fall squarely within the purview of the legislature. Meanwhile, a more expedient approach to stem anticompetitive conduct with respect to no-poach and wage-fixing agreements may be derived from Congress. To that end, there are several legislative developments aimed at addressing competition in the labor market, and I would recommend taking that avenue.

159. End Employer Collusion Act, H.R. 5632, 115th Cong. (2018); End Employer Collusion Act, S. 2480, 115th Cong. (2018); *see also* Press Release, Rep. David Cicilline, House Democrats Unveil Legislation to Protect American Workers Against Anti-Competitive Employment Practices (Apr. 26, 2018), https://cicilline.house.gov/press-release/house-democrats-unveil-legislation-protect-american-workers-against-anti-competitive [https://perma.cc/PT4L-T8F9].

160. United States v. Topco Assocs., Inc., 405 U.S. 596, 612 (1972).

Reasonable Access, Made More Reasonable: An Argument for Extending the Reasonable Access Rule to Cable Programming

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* J.D., May 2020, The George Washington University Law School; B.A., English, May 2016, Tulane University. Senior Articles Editor, Federal Communications Law Journal, Vol. 72. This Note is dedicated to my parents, Ann Stevens and Tom Gutierrez, for giving me the opportunity to attend law school, and to my sister, Lacey Gutierrez, for making sure that I survived it. Without them, none of this would have been possible. Thank you to Professor Michael Beder, Notes Editor Ali Kingston, and the staff of the Federal Communications Law Journal for all of their guidance and hard work throughout this process, and to Bobby Baker for introducing me to this topic. Finally, I would like to thank everyone who has helped me get to where I am today: my family, my friends, my professors and teachers, my coaches, my colleagues and supervisors, and, most importantly, my loved ones who, although no longer with us, surely would have been proud to see my words in print—Julie, Grandma, Pop Pop, and Uncle John.

I. INTRODUCTION

For many Americans, the first Friday of February can be a particularly long one. The nine-to-five nation anxiously watches the clock as it ticks, seemingly slower than ever, towards quitting time, knowing that what awaits them that weekend is the most glorious day of the American sporting year: Super Bowl Sunday.

Super Bowl XLVI, the culmination of the 2011-2012 National Football League season, gave football fans a much-anticipated rematch between the New England Patriots and the New York Giants.[1] Yet on that first Friday of February 2012, while millions of Americans wondered whether quarterback Tom Brady and the Patriots would get back at the Giants for denying the Patriots a perfect season in Super Bowl XLII,[2] whether quarterback Eli Manning and the Giants would finally put the nail in the coffin of the Patriots' Dynasty,[3] or whether they had ordered enough chicken wings to feed all the guests coming to watch the game, Randall Terry had something very different on his mind.

In early 2011, Terry announced his intention to challenge President Obama in the Democratic primaries before the 2012 presidential election.[4] A prominent figure within the pro-life movement, Terry was well aware that he stood no chance of unseating Obama.[5] In reality, the goal of Terry's candidacy, at least in part, was to gain the right to air graphic anti-abortion advertisements during Super Bowl XLVI.[6] In the days leading up to the Super Bowl, Terry submitted a request to Chicago's WMAQ-TV to purchase ad time for his campaign during the game.[7] Fortunately, WMAQ-TV rejected Terry's request, and, on that Friday before the big game, the FCC denied the complaint Terry filed against the station, saving millions of unsuspecting

1. *See* Mark Maske, *Super Bowl 2012: Giants, Patriots Prepare for Rematch of Memorable Championship Game*, WASH. POST (Jan. 23, 2012), https://www.washingtonpost.com/sports/redskins/super-bowl-2012-giants-patriots-prepare-for-rematch-of-memorable-championship-game/2012/01/23/gIQA7i8FMQ_story.html?utm_term=.e9f1de63efc2 [https://perma.cc/C84X-HRY9].

2. *See* Judy Battista, *Giants Stun Patriots in Super Bowl XLII*, N.Y. TIMES (Feb. 4, 2008), https://www.nytimes.com/2008/02/04/sports/football/04game.html [https://perma.cc/W9Y4-RW72].

3. As we now know, neither of these outcomes came to fruition.

4. *See* Devin Dwyer, *Activist Vows Graphic Anti-Abortion Ads During Super Bowl*, ABC NEWS (Jan. 18, 2011), https://abcnews.go.com/Politics/anti-abortion-activist-randall-terry-eyes-presidency-graphic/story?id=12639702 [https://perma.cc/AWF8-E36E].

5. *See id.*

6. *See id.*

7. *See* Complaint of Randall Terry Against WMAQ-TV, Chicago, Illinois, *Memorandum Opinion and Order*, 27 FCC Rcd 598, para. 1 (2012).

viewers from being subjected to unsettling material during the ad breaks normally reserved for the likes of the Budweiser Clydesdales.[8]

Naturally, all of this begs the question of how running a 30-second spot during the most coveted advertisement opportunity of the year would even be in the realm of possibilities for someone like Randall Terry. The answer is something called the reasonable access rule. In essence, Section 312(a)(7) of the Communications Act of 1934[9] ("Communications Act") requires commercial broadcast stations to grant legally qualified candidates for federal office "reasonable access" to their station—meaning that, upon request, commercial broadcasters must make reasonable amounts of air time available for purchase to these candidates.[10]

In reality, Congress did not intend to give the Randall Terrys of the world a platform to push their agenda in such a manner, and by no means is a situation like this the norm. Rather, it was the interests of the American voting public that were the driving force behind the reasonable access rule, as the provision sprang from Congress's desire to "give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters."[11] In theory, the reasonable access rule is a good thing, as it aims to further the democratic process we as Americans hold so dear. However, in practice and in execution, the reasonable access rule would seem to have its flaws.

As the law currently stands, the reasonable access rule applies to broadcast television, as well as direct broadcast satellite (DBS) television.[12] Yet, when it comes to cable programming, the rule's presence is nowhere to be found. In fact, FCC regulations specifically provide that cable operators are under no obligation to permit legally qualified candidates to use their facilities.[13] Thus, while the eyes of the nation look ahead to the 2020 presidential election this November, and to all of the political advertising that will come with it, the reasonable access rule finds itself residing all too comfortably in the past.

What can be done to address this discrepancy and bring the reasonable access rule at least a little bit closer to the present? Well, the solution that this

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8. *See id.* (finding WMAQ-TV reasonably concluded that Terry "did not make a substantial showing that he is a legally qualified candidate entitled to reasonable access to broadcast stations in Illinois[,]" and "even if Terry were a legally qualified candidate, . . . WMAQ's refusal to sell time to him specifically during the Super Bowl broadcast [was not] unreasonable.").

9. 47 U.S.C. § 151 *et seq.* (2018).

10. *See* 47 U.S.C. § 312(a)(7); *see also* 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 2.03(2) (2018). To avoid confusion, it should be noted here, as it also will be later in this Note, that Section 312(a)(7) was not part of the original 1934 Communications Act, but rather was enacted in 1972.

11. CBS v. FCC, 453 U.S. 367, 379 (1981) (quoting S. Rep. No. 92-96, at 20 (1971)) (emphasis omitted).

12. *See* 47 C.F.R. § 25.701 (2019) (directing DBS providers to also comply with 47 U.S.C. § 312(a)(7)).

13. *See* 47 C.F.R. § 76.205 (2019). Cable operators are free to sell advertising time to candidates if they so choose, but they also must "afford equal opportunities to all other candidates for that office to use such facilities." 47 C.F.R. § 76.205(a) (2019).

Note puts forth is a simple one: Congress could, within the bounds of its constitutional authority, amend the Communications Act to establish a cable equivalent to the reasonable access rule, and provide the FCC with a statutory directive to create a regulatory scheme that mirrors the one currently in place for broadcasters. It should be noted that the resolution that this Note lays out is statutory, as opposed to purely administrative, in large part because this exertion of regulatory force over cable operators would appear to exceed the FCC's current rulemaking authority under the Communications Act.

Whether Congress should or should not actually amend the Communications Act in this regard is not for this Note to say. Rather, this Note merely intends to demonstrate that if individuals were to advocate for such a change, they would have a valid argument in support of doing so. Specifically, given the current make-up of the television landscape, the failure to amend the Act could arguably amount to an abandonment of the goals Congress sought to achieve with the reasonable access rule in the first place. On top of that, because it would advance the government's compelling interest in contributing to the freedom of expression that the First Amendment guarantees, and because it would be narrowly tailored to achieve this goal by creating an even more limited access right than the one that already exists in the broadcast scheme, Section 312(a)(7)'s cable twin would likely survive the strict scrutiny that a reviewing court would be inclined to apply. Ultimately, in an era in which the differences between broadcast and cable television—at least in the eyes of the average viewer—are virtually invisible, there is certainly a viable argument that requiring broadcasters, but not cable operators, to comply with Section 312(a)(7) not only makes little to no sense at all, but also goes against basic notions of fairness.

Although the reasonable access rule extends to candidate requests for all types, lengths, and classes of programming time,[14] this Note will focus on the rule specifically within the context of political advertising in the form of traditional, short-form commercials, as opposed to program-length commercials, like infomercials.[15] Section I will provide a brief look at the dynamics of today's television landscape, in order to demonstrate how one might argue that the current regulatory regime makes little sense, while Section II will provide an introduction to the political programming scheme as a whole and explain the statutory and regulatory provisions relevant to how the reasonable access rule functions with regards to broadcast. Next, Section III will address *CBS v. FCC*,[16] the case in which the Supreme Court upheld the constitutionality of the broadcast reasonable access rule, and will examine the logic the Court applied in coming to its decision. From there, Section IV will discuss what level of scrutiny a reviewing court might apply to a potential statute expanding reasonable access requirements to cable operators, looking at standards that have been applied in similar cases and concluding that such

14. *See* 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 2.03(2) (2018).

15. Program-length commercials are defined as "any commercial or other advertisement fifteen (15) minutes in length or longer or intended to fill a television or radio broadcasting or cablecasting time slot of fifteen (15) minutes in length or longer." 16 C.F.R. § 308.2(f) (2019).

16. 453 U.S. 367 (1981).

a court would likely apply strict scrutiny. Finally, Section V will perform a strict scrutiny analysis on the would-be cable reasonable access rule, concluding that the bases that the *CBS* Court relied on could similarly serve as the compelling government interest and sufficiently narrow tailoring necessary for such a statute to be upheld.

II. THE TELEVISION LANDSCAPE TODAY

It seems that the biggest television-related buzz phrase of the last few years has been "cord cutting," which makes sense considering how much easier the Internet has made it to view your favorite television content when you want it, where you want it, and how you want it.[17] So of course, more and more viewers are, in fact, cutting the cord, electing to rely on over-the-top video providers like Netflix and Hulu, as well as virtual multichannel video providers (vMVPDs) like Sling or YouTube TV.[18] While there are arguments to be made for applying the reasonable access rule to these platforms as well, such a stance is beyond the scope of this Note, especially considering the relative nascence of the streaming industry as compared to cable.

Despite the rise of cord cutting, there is no reason to believe that the sun has set on cable quite yet, as a whopping 72.9% of American households still have traditional cable service.[19] Compare this to the mere 13.3% of homes that are using over-the-air TV antennas,[20] the traditional form of receiving broadcast television signals, and the discrepancy in the application of the reasonable access rule starts to become a head scratcher. Although local broadcast channels[21] are generally included as part of a cable subscription, there are still scores of for-pay channels that potential voters devote their time to whose commercial breaks are currently unavailable to legally qualified federal candidates by way of the reasonable access rule.[22]

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17. *See* Gregory Go, *7 Ways to Get the Most Out of Cutting the Cord*, U.S. NEWS WORLD REP. (Aug. 16, 2017), https://money.usnews.com/money/personal-finance/spending/articles/2017-08-16/7-ways-to-get-the-most-out-of-cutting-the-cord [https://perma.cc/X3WP-6REV].

18. *See* Mike Snider, *Television is Still the Most Dominant Media, but More Young Adults are Connecting Via Internet*, USA TODAY (Dec. 12, 2018, 12:01 AM), https://www.usatoday.com/story/money/media/2018/12/12/cutting-cord-2018-tv-dominates-but-younger-users-connect-via-web/2276207002/ [https://perma.cc/4NC8-CVL5] (citing Nielsen's Q2 2018 Total Audience Report) (stating that "[t]wo thirds of U.S. homes (66 percent) have subscription video services" and that "[b]roadband-delivered live TV services . . . are in 3.4 percent of homes . . . .").

19. *See Nielsen Total Audience Report Q1*, NIELSEN (2019), https://www.rbr.com/wp-content/uploads/Q1-2019-Nielsen-Total-Audience-Report-FINAL.pdf [https://perma.cc/5TAF-STLR].

20. *See id.*

21. The major broadcast networks are NBC, CBS, ABC, FOX, and, in some markets, CW. *See Broadcast, cable... What's the difference?*, NCTA (Nov. 12, 2008), https://www.ncta.com/whats-new/broadcast-cable-whats-the-difference [https://perma.cc/LL6M-2GRG].

22. For reference, examples of subscription cable channels include Animal Planet, Comedy Central, Turner Classic Movies, etc. *See id.*

In addition to cable's sizeable share of the television market, it is also important to note that broadcast and cable television are no longer so distinguishable as to justify an unequal regulation like the reasonable access rule. For instance, seeing as 72.9% of television-viewing households receive their cable and broadcasting content in the same way, it seems likely that the average consumer would tend to lump all of the content that they watch together under the general umbrella of "TV," rather than correctly perceiving it as coming from two distinct sources.

Further, the dynamics of the broadcast and cable industries mirror one another in certain key ways. Broadly speaking, just as the broadcast networks do with their local station affiliates, cable networks grant local cable operators permission, one way or another, to transmit the networks' content. Similarly, cable networks make a certain amount of time per hour of programming available for cable operators to sell to advertisers themselves,[23] and the same is true for broadcast networks and their local station affiliates.[24] When we combine this amorphous relationship between broadcast and cable television with cable's prevalence, the decision to apply Section 312(a)(7) to broadcast without also applying it to cable seems to not make all that much sense—adding fuel to the fire for a demand that Congress extend the reasonable access rule to cable.

III. INTRODUCTION TO THE REASONABLE ACCESS REGIME IN THE BROADCASTING CONTEXT

In essence, the Communications Act and the regulations that it instructed the FCC to adopt require broadcasters transmitting political programming to satisfy a series of obligations, while also granting certain rights to political candidates that wish to reach the broadcasters' audience.[25] Before proceeding any further, it will be necessary to explain to whom the Communications Act grants these rights, and to introduce the right that is the focus of this Note: the right of reasonable access.

A. Legally Qualified Candidates

Generally speaking, the rights granted by the FCC's political programming rules may only be enjoyed by "legally qualified" candidates.[26] These regulations establish a three-pronged test that provides that, in order to be legally qualified, a candidate must: (i) "publicly announce[] his or her intention to run for nomination or office;" (ii) be "qualified under the

23. *See* Hiawatha Bray, *With New Tech, TV Election Ads Get Personal*, BOS. GLOBE (Nov. 5, 2018), https://www.bostonglobe.com/business/2018/11/05/with-new-tech-election-ads-get-personal/NuPUy32veySgi4PC3ZN0pI/story.html [https://perma.cc/9EPQ-34AC].

24. *See* Janet Stilson, *Fox, NBC Affils Wary of Nets' Ad Reduction Plans*, TVNEWSCHECK (Jul. 25, 2018, 8:58 AM), https://tvnewscheck.com/article/219485/fox-abc-affiliates-wary-nets-reduced-ad-plan/ [https://perma.cc/S6CF-FLUX].

25. *See* 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 2.01 (2018).

26. *See id.* at § 2.02.

applicable local, State or Federal law to hold the office for which he or she is a candidate;" and (iii) be a "bona fide candidate for nomination or office."[27]

A candidate can publicly announce his or her candidacy by making a public statement of their intention to run, or by simply "filing the necessary papers to qualify for a place on the ballot."[28] This requirement extends to incumbent candidates as well, as his or her intention to run is not assumed.[29] To satisfy the second prong of the test, a candidate must satisfy "the age, residency, and other requirements" imposed by the law applicable to the office sought, as well as any "eligibility requirements imposed by the political party."[30] Finally, in order to be a bona fide candidate, "[t]he candidate must make a substantial showing that his or her candidacy is genuine."[31] This can be accomplished by qualifying for a spot on the ballot,[32] or by showing that he or she is otherwise qualified for the office in question and "[h]as publicly committed . . . to seeking election" as a write-in candidate,[33] which usually necessitates "engag[ing] to a substantial degree in activities commonly associated with political campaigning."[34]

B. Reasonable Access

One of the most significant rights that the Communications Act grants to legally qualified candidates for federal office is the right to reasonable access to broadcast facilities. Enacted in 1972 as part of the Federal Election Campaign Act of 1971,[35] Section 312(a)(7) amended the Communications Act to provide that all legally qualified candidates for federal office are to be granted "reasonable access" to commercial broadcast facilities.[36] In essence, the reasonable access rule grants legally qualified federal candidates the "statutory right to purchase a 'reasonable' amount of time on broadcast stations, regardless of whether the station has previously provided such time to another candidate."[37] In terms of sanctions for broadcasters that do not comply with Section 312(a)(7)'s directive, the Act allows the FCC to revoke a station's license for the "willful or repeated failure to allow reasonable

27. *See* 47 C.F.R. § 73.1940(a)(1)-(2), (b)(2) (2019).
28. *See* 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 2.02 (2018).
29. *See id.*
30. *Id.*
31. *Id.*
32. *See* 47 C.F.R. § 73.1940(b)(1) (2019).
33. *See* 47 C.F.R. § 73.1940(b)(2) (2019).
34. *See* 47 C.F.R. § 73.1940(f) (2019).
35. 2 U.S.C. § 431 *et seq*. (2018).
36. *See* 47 U.S.C. § 312(a)(7).
37. Kerry L. Monroe, *Unreasonable Access: Disguised Issue Advocacy and the First Amendment Status of Broadcasters*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 117, 136 (2014).

access or to permit purchase of reasonable amounts of time for the use[38] of a broadcasting station" by such a legally qualified federal candidate.[39]

Broadcasters must provide candidates reasonable access to their stations "at least during the 45 days before a primary and the 60 days before a general or special election."[40] Within these windows, "a broadcaster faces a steep burden to justify refusing an access request."[41] Otherwise, the FCC "rel[ies] upon the reasonable, good faith judgements of licensees[,]" and will determine whether a candidate's request for access was reasonable on a case-by-case basis, looking at the "circumstances surrounding a particular candidate's request for time and the station's response to that request."[42]

In deciding whether to grant a candidate's request, broadcasters may consider "their broader programming and business commitments, including the multiplicity of candidates in a particular race, the program disruption that will be caused by" the candidate's use, and "the amount of time already sold to a candidate in a particular race."[43] However, while broadcasters are kept on a fairly long leash, the FCC does impose some important limitations on their ability to decline candidate requests to purchase time. For instance, broadcasters may neither consider the candidate's chance of winning,[44] nor the content of the candidate's use[45] in making their decision. Additionally, broadcasters are prohibited from establishing policies "that flatly ban[] federal candidates from access to the types, lengths, and classes of time which they sell to commercial advertisers."[46] Finally, broadcasters may not impose restrictions on the exercise of a candidate's reasonable access right if that restriction would require the candidate to forfeit some other legal right.[47]

For an example of these standards in action, we need look no further than the previously-mentioned Randall Terry case. There, the FCC concluded

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38. While not as relevant for purposes of the reasonable access rule as it is for other parts of the political programming regulatory scheme, for clarity's sake it should still be noted that, generally speaking, "any broadcast . . . of a [legally qualified] candidate's voice or picture" constitutes a "use" for purposes of the FCC's political programming rules, provided that the candidate's appearance is identifiable and non-fleeting. *See* Political Primer 1984, 100 F.C.C. 2d 1476, 1489-92 (1984).

39. 47 U.S.C. § 312(a)(7).

40. Codification of the Comm'n's Political Programming Policies, *Report and Order*, 7 FCC Rcd 678, 681 para. 9(b) (1991).

41. 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 2.03(2) (2018).

42. Codification of the Comm'n's Political Programming Policies, *Report and Order*, 7 FCC Rcd 678, 681 para. 8 (1991).

43. *Id.* at 682 para. 9(i).

44. *See* Political Primer 1984, 100 F.C.C. 2d 1476, 1486 (1984).

45. *See* Codification of the Comm'n's Political Programming Policies, *Report and Order*, 7 FCC Rcd 678, 681 para. 9(g) (1991).

46. *Id.* at para. 9(h).

47. *See* American Family Life Assur. Co. v. FCC, 129 F.3d 625, 627 (D.C. Cir. 1997) (citing to Complaint of Dole Kemp '96 Campaign Against Aflac Broadcast Partners, Licensee of Station KWWL (TV), Waterloo, Iowa, and Station WAFB (TV), Baton Rouge, Louisiana, *Memorandum Opinion and Order*, 11 FCC Rcd 13036, para. 6 (1996)) (noting the FCC found unreasonable a broadcaster's refusal to sell time to a candidate unless the candidate agreed to a forum selection clause making the FCC the sole and exclusive forum for resolving disputes over charges for advertising time).

that the broadcast station's refusal to sell Terry his desired advertising time during the Super Bowl was reasonable for two primary reasons.[48] First, because Terry requested time on what is "typically the highest rated program of the year," the station likely would have had a limited amount of advertising time left to sell.[49] As such, it could have been impossible for the station "to provide reasonable access to all eligible federal candidates who request[ed] time during that broadcast."[50] Second, because there are really no other broadcasts equivalent to the Super Bowl, the station reasonably concluded "that it would be impossible to provide equal opportunities after the fact to opponents of candidates whose spots aired during the program."[51]

IV. THE BASES FOR UPHOLDING THE CONSTITUTIONALITY OF THE REASONABLE ACCESS RULE ON BROADCAST

Considering that the reasonable access rule not only requires broadcasters to do business with candidates who they may have never chosen to do business with otherwise, but also compels the broadcasting of ads from candidates with whom broadcasters may disagree on a political level, it should be of little surprise that the constitutionality of the rule has been challenged. The first such challenge to the rule, and the only one to reach the Supreme Court, came in 1981 in *CBS v. FCC*.[52]

Roughly a year before the 1980 presidential election, the Carter-Mondale Presidential Committee ("Committee") requested that NBC, CBS, and ABC each make a 30-minute prime time program available for the Committee's purchase.[53] Each of the networks declined the Committee's request, claiming either that granting such access would lead to a disruption of regular programming, or that they were not yet prepared to sell programming time to candidates this early in the election season.[54] After the FCC resolved the Committee's complaint against the networks in favor of the

48. *See generally* In re Complaint of Randall Terry Against WMAQ-TV, Chicago, Illinois, *Memorandum Opinion and Order*, 27 FCC Rcd 598, para. 9 (2012).

49. *Id.* at 602.

50. *Id.*

51. *Id.* Another piece of the political programming regulatory scheme, the Communications Act further provides that "[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station . . . ." 47 U.S.C. § 315(a) (2018). Essentially, this equal opportunity requirement "means that a licensee must treat all legally qualified candidates for the same office alike." 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 2.07(1) (2018). In practice, a station will be able to satisfy this requirement if it offers time that is "reasonably comparable in terms of audience reach and demographics." *Id.* However, few broadcast events, if any, are truly comparable to the Super Bowl in this regard.

52. 453 U.S. 367 (1981).

53. *See id.* at 371. The Committee's intention was to present a documentary that outlined the record of President Carter's administration, along with the formal announcement of his candidacy. *See id.* at 371-72.

54. *See id.* at 372-73.

Committee,[55] the broadcasters decided to take their case to federal court to challenge the constitutionality of Section 312(a)(7). However, the Supreme Court ultimately held that the reasonable access rule passed constitutional muster, as it "properly balance[d] the First Amendment rights of federal candidates, the public, and broadcasters."[56]

Although it never explicitly articulated what degree of scrutiny was applied to Section 312(a)(7), the Court, in coming to its conclusion, rested on two key bases. First, the Court emphasized that the reasonable access rule implicates the First Amendment interests of candidates and voters as well, not just those of the broadcasters.[57] Noting that "it is of particular importance that candidates have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues"[58] before making a decision, the Court concluded that the reasonable access rule "makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process."[59] Second, the Court asserted that its holding was not an approval of a "*general* right of access to the media" and was impliedly thus allowing a permissible intrusion into the broadcasters' First Amendment rights because of the limited nature of the reasonable access right.[60] In the Court's words:

> Section 312(a)(7) creates a *limited* right to 'reasonable access' that pertains only to legally qualified federal candidates and may be invoked by them only for the purpose of advancing their candidacies once a campaign has commenced. The Commission has stated that, in enforcing the statute, it will 'provide leeway to broadcasters and not merely attempt *de novo* to determine the reasonableness of their judgements. . . .' If broadcasters have considered the relevant factors in good faith, the Commission will uphold their decisions.[61]

However, underlying these two bases was another element that factored into the Court's decision: the nature of the broadcast medium. The Court noted that licensed broadcasters are "granted the free and exclusive use of a

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55. The FCC found that the networks' explanations for their conduct were "deficient when subjected to [the Commission's] test of reasonableness[,]" largely because the networks had failed to consider President Carter's individual needs as a candidate. Complaint of Carter-Mondale Presidential Committee, Inc. Against the ABC, CBS, and NBC Television Networks, *Memorandum Opinion and Order*, 74 F.C.C. 2d 631, para. 45 (1979).

56. *CBS, Inc.*, 453 U.S. at 397.

57. *See id*. at 396-97.

58. *Id.* at 396 (quoting Buckley v. Valeo, 424 U.S. 1, 52-53 (1976)).

59. *Id.*

60. *Id.*

61. *Id.* (quoting Complaint of Carter-Mondale Presidential Committee, Inc. Against the ABC, CBS & NBC Television Networks, *Memorandum Opinion and Order*, 74 F.C.C.2d 657, para. 44 (1979)) (emphasis in original).

limited and valuable part of the public domain"[62]—the electromagnetic spectrum. However, in exchange for this benefit, broadcasters are "burdened by [certain] enforceable public obligations."[63] This is, in essence, an articulation of what is often referred to as the scarcity theory, a "cornerstone of broadcast regulation."[64] It was this theory that guided the Court's decision in the seminal *Red Lion Broadcasting Co. v. FCC* to uphold an earlier version of the political programming regulatory regime, concluding that "[t]here is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others . . . ."[65] Subsequently, the *Red Lion* decision has come to stand for the principle that the government has "greater freedom to place restraints on broadcast speech" than it does with regards to other mediums,[66] and that precedent surely played a role in the Court's decision.

V. WHAT LEVEL OF SCRUTINY SHOULD APPLY TO A CABLE REASONABLE ACCESS RULE?

Like Section 312(a)(7) before it, a cable reasonable access rule would likely be met with staunch opposition, as cable operators would surely attempt to challenge the constitutionality of the rule under the First Amendment. As is the case with any First Amendment inquiry, the first question that must be asked is what degree of scrutiny a reviewing court should apply to a potential statute expanding the reasonable access requirement to cable, especially considering that "not every interference with speech triggers the same degree of scrutiny under the First Amendment . . . ."[67] Although the proper First Amendment treatment of cable speech has been debated as cable has grown into what it is today, "[t]he Supreme Court has never fully articulated the extent of First Amendment protections applicable to cable operators."[68] On one end of the spectrum, there is *Red Lion*'s model for broadcast, allowing for more extensive federal regulation, relatively speaking.[69] On the other is

62. *Id.* at 395 (quoting *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (1966)).

63. *Id.* (quoting *Office of Communication of the United Church of Christ*, 359 F.2d at 1003). As a technical matter, "broadcasters cannot, in the same location, share a single frequency." 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 1.04(2)(O.a) (2018).

64. 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 1.04(2)(O.a) (2018).

65. 395 U.S. 367, 389. The regulation in question was something called the "fairness doctrine," which "imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage." *Id.* at 369.

66. 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 7.15(16)(b) (2018); *see also* 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 13.11(1) (2018).

67. Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 637 (1994).

68. 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 5.07(2) (2018).

69. *See id.* at § 13.11(1) (2018).

the Court's approach to print media, largely embodied in the Court's decision in *Miami Herald Publishing Co. v. Tornillo*,[70] which ensures that publishers "are unburdened by any governmentally imposed access or content requirements."[71]

Cable, it would seem, falls somewhere in the middle. While some courts and the FCC applied the broadcast model to cable in its early days, several decisions in the 1980s expressed dissatisfaction with this approach.[72] After all, cable does not use the airwaves to the same extent that broadcast does, rendering "the rationale of physical interference in the broadcast spectrum requiring an 'umpiring role' for government . . . absent, or at least substantially lessened."[73] However, the Supreme Court has not exactly embraced the print model either. In *Turner Broadcasting System, Inc. v. FCC*, for example, the Court concluded that analogizing cable operators to newspapers is inappropriate because "the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home."[74] Therefore, due to the nature of the technology, "a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude" and, "unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch."[75]

One potential approach a reviewing court could take would be the approach adopted by the Court in *Turner I*. At issue there was one of the amendments that the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")[76] made to the Communications Act.[77] Congress stated that its intention with the 1992 Cable Act was to, among other things, "ensure cable operators continue to expand their capacity and program offerings, to ensure cable operators do not have undue market power, and to ensure consumer interests are protected in the receipt of cable service."[78] The provision in question required cable operators to carry "the signals of local commercial television stations and qualified low power stations[,]"[79] thus allowing broadcast stations to "require a cable operator that serves the same

70. 418 U.S. 241 (1974).

71. 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 5.07(2) (2018).

72. *See* 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 13.11(1) (2018) (citing to Century Communications Corp. v. FCC, 835 F.2d 292, 294-95 (D.C. Cir. 1987) and Preferred Communications v. City of Los Angeles, 754 F.2d 1396, 1403 (9th Cir. 1985) among others).

73. 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 8.03 (2018).

74. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 656 (1994) (*Turner I*).

75. *Id.*

76. 47 U.S.C. § 521 *et seq.* (2018).

77. *See Turner I*, 512 U.S. at 630.

78. *Cable Television*, FCC (Dec. 15, 2015), https://www.fcc.gov/media/engineering/cable-television [https://perma.cc/3AUF-G769].

79. 47 U.S.C. § 534(a) (2018).

market . . . to carry its signal."[80] This program carriage regime is commonly referred to as "must-carry."[81]

Soon after the 1992 Cable Act went into effect, Turner Broadcasting System—a cable operator, despite the name—along with a series of other cable programmers and operators, filed suit to challenge the constitutionality of the provisions.[82] Ultimately, the Court held that the must-carry provisions were content-neutral restrictions subject to intermediate First Amendment scrutiny,[83] which required the provisions to be narrowly tailored to further important governmental interests.[84] Subsequently, the Court proceeded to remand for further fact finding.[85]

When the case ultimately made its way back up, the Court, in applying intermediate scrutiny, concluded that the record supported "Congress' predictive judgment that the must-carry provisions further important governmental interests"[86] in "preserving the benefits of free, over-the-air local broadcast television," as well as "promoting the widespread dissemination of information from a multiplicity of sources" and "fair competition in the market for television programming."[87] Additionally, the Court found that "the provisions do not burden substantially more speech than necessary to further those interests."[88] As such, the Court concluded that the provisions were "consistent with the First Amendment."[89] Vital to the decision were the interests of non-cable viewers, as the Court emphasized that the purpose of the provisions was "to prevent any significant reduction in the multiplicity of broadcast programming sources available to noncable households."[90]

The First Amendment concerns posed by the must-carry provisions and the reasonable access rule are one and the same species, as they both constrain the editorial discretion of cable operators and broadcasters, respectively. However, the reasonable access rule cannot truthfully be called a content-neutral restriction in the same way that the must-carry provisions are. While a cable reasonable access rule would be neutral with respect to its treatment of various political standpoints, in that cable operators would generally have to grant access requests to legally qualified federal candidates regardless of their platform, "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that

80. *See Cable Carriage of Broadcast Stations*, FCC (Dec. 9, 2015), https://www.fcc.gov/media/cable-carriage-broadcast-stations [https://perma.cc/Y7M4-VNXK].
81. *See id.*
82. *See Turner I*, 512 U.S. at 634.
83. *See id.* at 662.
84. *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 185 (*Turner II*) (citing to *Turner I*).
85. *See Turner I*, 512 U.S. at 668.
86. *Turner II*, 520 U.S. at 185.
87. *Id.* at 189.
88. *Id.* at 185.
89. *Id.*
90. *Id.* at 193.

subject matter."[91] As such, a court reviewing the constitutionality of a cable reasonable access rule would likely apply strict scrutiny in doing so, which would require "the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"[92]

VI. APPLYING STRICT SCRUTINY TO A CABLE REASONABLE ACCESS RULE

Although the *CBS* Court never expressly articulated what degree of scrutiny it was applying, we can assume that, although Section 312(a)(7) is plainly a content-based speech regulation, the more lenient *Red Lion* approach to regulations of broadcast speech would have led the Court to apply something less than traditional strict scrutiny. At the same time, we also know that the degree of scrutiny that Section 312(a)(7) satisfied must have been stricter than the intermediate scrutiny that the Court applied to the content-neutral must-carry provisions at issue in *Turner II*. Therefore, at the very least, it must have been the case that the broadcast reasonable access rule's contribution to freedom of expression constituted an important government interest, and the limited nature of the right the rule conferred made it such that the rule was narrowly tailored to achieve that important interest. However, a statute that satisfies intermediate scrutiny very well may have the potential to satisfy strict scrutiny as well, and that could be the case with a cable reasonable access rule.

A. Compelling Government Interest—Contribution to Freedom of Expression

If allowing more candidates to disseminate their messages to more broadcast viewers is an important government interest, then perhaps allowing candidates to reach even more viewers on cable, who might not have been reachable otherwise, is an even more important government interest—perhaps so important as to verge into compelling territory. For the *CBS* Court, the degree to which the reasonable access rule furthered the First Amendment rights of audience members nationwide carried the day when it came to concluding that the government's interest in the rule was constitutionally sufficient.[93] This logic should doubly support the application of the reasonable access rule to cable, as cable television provides candidates and the public with even more opportunities to present and receive, respectively, that

91. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2230 (2015). Appropriate for the context of this Note, the example the Court gave to illustrate this principle was "a law banning the use of sound trucks for political speech – and only political speech . . . even if it imposed no limits on the political viewpoints that could be expressed." *Id.*

92. Citizens United v. FEC, 558 U.S. 310, 340 (2010) (quoting *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007)) (internal quotations omitted).

93. *See* CBS v. FCC, 453 U.S. 367, 395-96 (1981) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)) ("It is the right of the viewers and listeners . . . which is paramount.").

"information necessary for the effective operation of the democratic process."[94]

At the outset, it should be noted that there is an argument to be made that, because some cable operators already elect to make advertising time available to candidates on their own terms, the government's interest in expanding the reasonable access rule to cable is somewhat less than compelling. However, at least up to this point, simply relying on cable operators voluntarily selling time slots to candidates in order to effectuate the goals Congress set out to achieve with the reasonable access rule in the first place has been insufficient. For instance, in the lead up to the 2018 midterm elections, candidates collectively spent over two-and-a-half times as much money on local broadcast advertising as they did on local cable advertising, with totals reaching $3.1 billion and $1.2 billion, respectively.[95] As this data indicates, there certainly appears to be a barrier to access to cable advertising in place, and a cable reasonable access rule could be the government's best shot at overcoming it. Whereas the current regime only allows candidates to assert their reasonable access right to have their advertisements played on a few channels, expanding the right to cable would grant candidates access to hundreds of new channels, and with them new viewers that may have otherwise been unreachable by virtue of the reasonable access rule.

Admittedly, it seems at times as if, like Mark Twain, the reports of broadcast's death are greatly exaggerated.[96] In fact, of the top five most-watched networks of 2019, by total viewers, only one was a cable network—Fox News, which came in at number five.[97] On the other hand, the big four broadcast networks—CBS, NBC, ABC, and Fox—finished first through fourth, in that order.[98] In this sense, it could certainly be argued that the reasonable access rule, as it currently stands, already sufficiently contributes to freedom of expression, and any further increase of the already-large audience available to legally qualified federal candidates would not be enough to justify the burdens that such an expansion would impose on cable operators. If candidates can seemingly get the job done as it is, then is subjecting cable operators to the same obligations as broadcasters really necessary?

On a base level, the answer to that question is: yes. Congress would never have enacted the reasonable access rule in the first place had its purpose not been deemed necessary. There is no reason that that purpose should lose

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94. *Id.* at 396.

95. *See* Jason Lynch, *Advertisers Spent $5.25 Billion on the Midterm Election, 17% More Than in 2016*, ADWEEK (Nov. 15, 2018), https://www.adweek.com/tv-video/advertisers-spent-5-25-billion-on-the-midterm-election-17-more-than-in-2016/ [https://perma.cc/7KB8-K9F3].

96. Contrary to popular belief and common misquoting, this is, in fact, how Mark Twain phrased his famous line. *See* DICTIONARY.COM, *The reports of my death are greatly exaggerated*, https://www.dictionary.com/browse/the-reports-of-my-death-are-greatly-exaggerated [https://perma.cc/34ZS-NMK3] (last visited Jan. 27, 2019).

97. Michael Schneider, *Most-Watched Television Networks: Ranking 2019's Winners and Losers*, VARIETY (Dec. 26, 2019, 7:45 AM PST), https://variety.com/2019/tv/news/network-ratings-top-channels-fox-news-espn-cnn-cbs-nbc-abc-1203440870/ [https://perma.cc/KHN7-T2BR] (citing Nielsen's 2019 viewership report).

98. *Id.*

any importance simply because of the medium in question. Further, although the broadcast networks' spots atop the viewership rankings are by no means an aberration,[99] their numbers may still be somewhat inflated. Nine of the year's top ten most-watched television events came from one of the big four broadcast networks, which surely helped boost them in the rankings.[100] The fact remains that there are still millions of viewers, spread out over more than 100 different cable channels, who are inaccessible by means of the reasonable access rule while watching those channels. Working off the 2019 network viewership rankings, expanding the reasonable access rule to cable would almost double the number of viewers that candidates can already reach on the big four broadcast networks.[101] Surely this would be an even more significant contribution to freedom of expression.

Audience size aside, extending the reasonable access rule to cable would allow candidates to do something that they simply cannot do as effectively with broadcast programming alone: target their advertisements with hyper-specificity. Part of cable's appeal is the presence of so many channels that cater to so many different niche interests. There is the Food Network for the gourmands, the Travel Channel for the wanderlust crowd, and even the Tennis Network for the Serena Williams devotees—and the list goes on.

We are living in the era of Big Data, where various organizations have "the ability to make sense of [the] huge amounts of data" we leave behind as part of our consumer footprint,[102] and have been for quite some time.[103] Unsurprisingly, politicians use this wealth of information to their benefit as part of a practice referred to as "addressable advertising," which dates back to President Obama's 2012 campaign.[104] Based off of information like voting

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99. For instance, the top five most-watched networks in 2018 were, similarly, NBC, CBS, ABC, Fox, and Fox News. *See* Michael Schneider, *Most-Watched Television Networks: Ranking 2018's Winners and Losers*, INDIE WIRE (Dec. 27, 2018, 3:30 PM), https://www.indiewire.com/2018/12/network-ratings-top-channels-espn-cnn-fox-news-cbs-nbc-abc-1202030597/ [https://perma.cc/9YRA-3DZD] (citing Nielsen's 2018 viewership report).

100. The 2019 College Football Playoff Championship game was the lone cable event to break the top ten. *See* Michael Schneider, *Top Rated Shows of 2019: Super Bowl LIII, 'The Big Bang Theory,''Game of Thrones' Dominate*, VARIETY (Dec. 27, 2019, 12:00 PM PST), https://variety.com/2019/tv/news/top-rated-shows-2019-game-of-thrones-big-bang-theory-oscars-super-bowl-1203451363/ [https://perma.cc/3LUM-QZC4] (citing Nielsen's 2019 viewership report).

101. Michael Schneider, *Most-Watched Television Networks: Ranking 2019's Winners and Losers*, VARIETY (Dec. 26, 2019, 7:45 AM PST), https://variety.com/2019/tv/news/network-ratings-top-channels-fox-news-espn-cnn-cbs-nbc-abc-1203440870/ [https://perma.cc/KHN7-T2BR] (citing Nielsen's 2019 viewership report).

102. Marrian Zhou, *Midterm Elections: How Politicians Know Exactly How You're Going to Vote*, CNET (Nov. 5, 2018, 7:49 AM PST), https://www.cnet.com/news/how-your-personal-data-is-used-to-create-a-perfect-midterm-election-ad/ [https://perma.cc/Y72F-TDL8].

103. *See generally* Steve Lohr, *The Age of Big Data*, N.Y. TIMES (Feb. 11, 2012), https://www.nytimes.com/2012/02/12/sunday-review/big-datas-impact-in-the-world.html [https://perma.cc/98A4-PQQN].

104. *See* Alex Byers and Emily Schultheis, *Political Ads' New Target: Individuals*, POLITICO (Feb. 12, 2014, 01:01 PM), https://www.politico.com/story/2014/02/political-ads-latest-target-individuals-103443?o=0 [https://perma.cc/YHZ6-EDX9].

records, home ownership, job history, and cable box addresses, these advertisements are custom-tailored for, and sent directly to, the households where the candidate believes the advertisement "will do the most good" for his or her campaign.[105]

While addressable advertisements can serve multiple purposes,[106] few are as beneficial to the candidate as targeting persuadable voters.[107] By analyzing all of the available data, a candidate's campaign staff could conclude that a significant portion of the 35 to 54-year-old female demographic in a particular town may be undecided and could be persuaded into casting their vote in the candidate's favor, and thus campaign funds should be used to buy advertising time on channels like HGTV or TLC from the local cable operator.[108] However, what is the candidate to do if the cable operator decides not to do business?

With no legal obligation to grant reasonable access to the candidate, there is nothing to stop a cable operator from simply declining to do business with a candidate because the cable operator takes issue with the candidate's political party or stances on certain issues. Thus, for example, a candidate who has been outspoken about a cable operator's business practices in the candidate's district could be prevented from reaching the voters that could be the difference between victory and defeat. Although it is worth noting that this cable operator would not be allowed to sell advertising time to this candidate's opponent without also selling time to the disfavored candidate,[109] all that the current regulatory regime would be doing in this situation is dissuading the cable operator from selling any advertising time to candidates running for that particular office. As such, and just as importantly, those voters could be deprived a means of receiving the disfavored candidate's message, or potentially the message of any other candidate for that office, thus hindering their ability to effectively participate in the democratic process. While no one can really say what the likelihood of all of this transpiring is, by extending the reasonable access rule to cable, such a situation could be entirely avoided, and one would be hard pressed to deem such an end result anything less than a contribution to freedom of expression.

Ultimately, the *CBS* Court made clear that "[t]he First Amendment has its fullest and most urgent application precisely to the conduct of campaigns

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105. *See* Hiawatha Bray, *With New Tech, TV Election Ads Get Personal*, BOS. GLOBE (Nov. 5, 2018), https://www.bostonglobe.com/business/2018/11/05/with-new-tech-election-ads-get-personal/NuPUy32veySgi4PC3ZN0pI/story.html [https://perma.cc/4N88-P7CH].

106. For example, a candidate could use an addressable advertisement to target supporters in order to motivate them to actually go to the polls. *See id.*

107. *See* Alex Byers & Emily Schultheis, *Political Ads' New Target: Individuals*, POLITICO (Feb. 12, 2014, 01:01 PM), https://www.politico.com/story/2014/02/political-ads-latest-target-individuals-103443?o=0 [https://perma.cc/WC2W-ALTF].

108. According to marketing profiles compiled for HGTV and TLC, viewers in this demographic account for a considerable portion of each of these channels' viewership. *See* NAT'L MEDIA SPOTS (last visited Jan. 31, 2020), http://www.nationalmediaspots.com/network-demographics/HGTV.pdf [https://perma.cc/F9WE-2RJY] *and* NAT'L MEDIA SPOTS (last visited Jan. 31, 2020), http://www.nationalmediaspots.com/network-demographics/TLC.pdf [https://perma.cc/JR86-LBGK].

109. *See* 47 C.F.R. § 76.205(a) (2019).

for political office[,]"[110] and the fact that a different medium is now in question should not make this sentiment any less true. Extending Section 312(a)(7) and its requirements to cable operators would allow candidates to present their platforms to even more potential viewers than under the current regulatory regime. This further contribution to the freedom of expression that the First Amendment guarantees should constitute a government interest that is sufficiently compelling to satisfy the first prong of the strict scrutiny analysis. Now, the only question remaining is whether a cable reasonable access rule would be narrowly tailored to achieve this compelling interest.

B. Narrow Tailoring—The Limited Nature of the Reasonable Access Right

In order to satisfy strict scrutiny, a cable reasonable access rule would also have to be narrowly tailored to achieve the compelling government interest in question. In order for a content-based statute to be deemed narrowly tailored, it must be no more restrictive than necessary to achieve the interest it was intended for, as, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."[111] Although the *CBS* Court did not use specific scrutiny language when performing its analysis, its emphasis on the limited nature of the broadcast reasonable access right as one of its bases for upholding Section 312(a)(7)'s constitutionality would appear to answer the narrow tailoring question in the affirmative.

Applying the reasonable access rule to cable by no means requires that the operations or interpretations of the rule itself be altered. Thus, if Section 312(a)(7)'s requirements were to be applied to cable operators in the same manner that they are applied to broadcasters, there is no reason to believe that the resulting right of reasonable access would be any less limited than the one that already exists. This is to say that Section 312(a)(7)'s cable equivalent also would not be unnecessarily restrictive. For instance, reasonable access requests would still be reserved solely for campaigns promoting legally qualified federal candidates. Further, in evaluating a cable operator's decision to decline a request for reasonable access, the FCC would still apply the same reasonableness standard that it applies in the broadcast context, with the cable operator receiving the same degree of deference as the broadcaster. Ultimately, "Section 312(a)(7) does not impair the discretion of broadcasters to present their views on any issue or to carry any particular type of programming[,]"[112] and neither would its cable twin.

In fact, a cable reasonable access right would arguably be even more limited than the right candidates currently enjoy with regard to broadcast, thus making the new statute even less restrictive than its broadcast predecessor and

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110. CBS, Inc. v. FCC, 453 U.S. 367, 396 (1981) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)) (internal quotations omitted).

111. U.S. v. Playboy Entm't Group, 529 U.S. 803, 813 (2000) (quoting Reno v. American Civil Liberties Union, 521 U.S. 844, 847 (1997)).

112. *CBS, Inc.*, 453 U.S. at 397.

sufficiently narrowly tailored for purposes of a strict scrutiny analysis. Generally speaking, the Communications Act directs the FCC to regulate broadcast television in the "public interest, convenience and necessity."[113] This public interest standard, as it is more commonly known, places a good deal of weight upon broadcasters' shoulders. Perhaps most importantly, the receipt[114] and renewal[115] of a license to operate a broadcast station is conditioned upon the degree to which the FCC believes the owner of the station would broadcast or has been broadcasting, respectively, in service of the public interest.

While not dealing with a purported violation of Section 312(a)(7) specifically, the Supreme Court spoke to the role that the public interest standard plays within the political programming context in *Arkansas Educational Television Commission v. Forbes*.[116] Ralph Forbes, an independent Congressional candidate with little support, claimed that the denial of his request to be included in a debate held by a public television station violated his First Amendment rights.[117] In rejecting Forbes' claim, the court implied that, because broadcasters, by virtue of their "duty to schedule programming that serves the 'public interest, convenience, and necessity[,]'"[118] are already obligated "to exercise substantial editorial discretion in the selection and presentation of their programming[,]"[119] access claims like the one made by this candidate could be what pushes interference with the broadcaster's free speech rights into impermissible territory.[120]

Cable operators, on the other hand, do not bear the same burden that the public interest standard imposes and, as such, are not required to exercise the same degree of editorial discretion that the *Forbes* Court notes. For instance, while a broadcaster runs the risk of having its license revoked for broadcasting indecent content, as doing so runs counter to the public interest,[121] cable operators generally need not be so concerned, as they, by virtue of operating a subscription service, are not subject to these same requirements.[122] Yet, as

113. *See* 1 Charles D. Ferris & Frank W. Lloyd, *Telecommunications & Cable Regulation* § 1.04(5)(a) (2018) (quoting 47 U.S.C. §§ 302(a), 307(d), 309(a) and 316(a) (2018)). Other formulations of this public interest standard are scattered throughout the Communications Act, but the substance of the standard remains the same across the various statutes. *See id.* at n.43.

114. *See* 47 U.S.C. § 309(a) (2018).

115. *See* 47 U.S.C. § 309(k)(1)(A) (2018).

116. *See* 523 U.S. 666, 674 (1996).

117. *See id.* at 669-71.

118. *Id.* at 674 (quoting 47 U.S.C. § 309(a)).

119. *Id.*

120. *See id.* at 673-74 ("When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity.").

121. *See, e.g.*, Citizens Complaint Against Pacifica Foundation Station WBAI (FM), New York, New York, *Declaratory Order*, 56 F.C.C. 2d 94, 99 (1975) (basing statutory authority to grant citizen complaint and deem broadcasted language "indecent" on 18 U.S.C. § 1464 and 47 U.S.C. § 303(g)'s mandate to "encourage the larger and more effective use of the radio in the public interest . . . ."). This Order was upheld in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

122. *See Obscene, Indecent and Profane Broadcasts*, FCC (last visited Jan. 27, 2019), https://www.fcc.gov/consumers/guides/obscene-indecent-and-profane-broadcasts [https://perma.cc/EU75-7SDC].

we saw in *CBS*, the broadcast reasonable access right is so limited that, even with the public interest standard and the editorial discretion that it requires broadcasters to exercise in play, it does not add so much to broadcasters' plates as to impermissibly intrude upon their First Amendment rights.[123] Therefore, because cable operators are not already burdened by the public interest standard, the risk of the reasonable access rule impermissibly interfering with their First Amendment rights is even lower than it is with broadcasters, thus preventing cable reasonable access from being impermissibly restrictive. Consequently, it is somewhat of a stretch to say that extending Section 312(a)(7)'s requirements to cable operators would be any more problematic than it was when the same was done to broadcasters.

However, with all this being said, if the determination of whether a statute is narrowly tailored depends on a lack of less restrictive alternatives, it would be a half-hearted effort to complete this analysis without looking at any such alternatives. In *United States v. Playboy Entertainment Group*, the Court made clear that "[w]hen a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals."[124] Undoubtedly, a challenger to the cable reasonable access rule would likely have some less restrictive alternatives in mind as well.

At issue in the *Playboy* case was a statute that required cable operators "who provide channels 'primarily dedicated to sexually-oriented programming' either to 'fully scramble or otherwise fully block' those channels or to limit their transmission" to the late evening and early morning, "when children are unlikely to be viewing . . . ."[125] Essentially, the purpose of the statute was to prevent children from inadvertently being exposed to such material.[126] However, its end result was that "for two-thirds of the day no household in [these] service areas could receive [this] programming, whether or not the household or the viewer wanted to do so."[127] Unsurprisingly, the plaintiff, an adult entertainment company whose programming consisted almost entirely of sexually explicit material, challenged the statute on First Amendment grounds.[128]

Because the statute in question was a content-based speech restriction, the Court applied strict scrutiny[129] and ultimately found that, because the government failed to show that the statute was "the least restrictive means for addressing" this issue, it was "violative of the First Amendment."[130] Upholding the decision made below, the Court concluded that if an alternative statute "requir[ing] cable operators to block undesired channels at individual

123. *See CBS, Inc.*, 453 U.S.

124. 529 U.S. 803, 816 (2000).

125. *Id.* at 806 (quoting 47 U.S.C. § 561(a) (1994)).

126. *See id.* As the Court explained, although "signal scrambling was already in use" before the statute was enacted, as a means to ensure "that only paying customers had access to certain programs[,]" the practice was imprecise and could at times still allow the material from the scrambled channels to be seen or heard, "a phenomenon known as 'signal bleed.'" *Id.*

127. *Id.* at 807.

128. *See id.*

129. *See id.* at 815.

130. *Id.* at 827.

households upon request" were to be "publicized in an adequate manner," said statute would be an effective, less restrictive means of achieving the government's goal,[131] and the government failed to explain why this approach would be "insufficient to secure its objective . . . ."[132]

It does not appear that a cable reasonable access rule would encounter the same difficulties as the statute from *Playboy*. There is not really another similar yet less restrictive statute in play that could be easily adapted and be just as effective as the reasonable access rule in achieving the government's interest in contributing to freedom of expression. If the goal is to truly maximize the degree to which candidates can disseminate their messages, and maximize the degree to which potential voters are able to become fully informed before exercising their right to vote, then it would seem that the reasonable access rule would really be the least restrictive means of achieving that goal.

With this being said, perhaps there are ways that the cable reasonable access rule could be altered so as to further minimize its restrictiveness. For instance, maybe the new statute could direct the FCC to establish an even more deferential standard to be applied when determining whether a cable operator's decision to reject a candidate's access request was reasonable, particularly outside of the pre-election window. Further, maybe an additional requirement of the cable reasonable access rule could be that, as part of his or her access request, the candidate must also submit a statement of purpose of sorts, detailing why the candidate believes that advertising on a certain channel in a certain area will contribute to freedom of expression. Specifically, this could include an explanation as to why the candidate believes that the voters he or she intends to reach would be otherwise unable to receive the candidate's message as effectively. The contents of this statement could then become part of the record to be reviewed by the FCC in determining the reasonableness of the candidate's request.

As appealing as these alternatives sound, the government would still have a strong argument against them. A regime that provided cable operators with a higher degree of deference than broadcasters, who enjoy a fairly substantial degree of deference as it is, would not really be as effective as applying the reasonable access rule to cable just as it is to broadcast. Additionally, imposing a burden on candidates to explain why they feel the need to advertise on certain channels or in certain locations would really only make the reasonable access rule more restrictive, as making candidates' lives more difficult would likely do nothing to make cable operators' lives easier.[133]

Ultimately, applying Section 312(a)(7)'s requirements to cable just as they are applied to broadcast would be the least restrictive means of achieving

131. *Id.* at 816. The statute that the Court was referring to was 47 U.S.C. § 560 (1994).

132. *Id.* at 826.

133. There is an argument to be made that imposing such a burden on candidates would diminish the number of candidates who seek to take advantage of the rule, thus reducing the burden the rule would place on cable operators. However, it seems unlikely that enough candidates would be dissuaded from invoking their reasonable access rights to make this a reality. Further, even if this were to be the result, all that it would mean is that this alternative version of the rule is less effective than the original.

the government's compelling interest in furthering freedom of expression by virtue of allowing more candidates to reach more voters with their messages. As such, it would appear that, were Congress to amend the Communications Act and enact a statute creating a cable reasonable access rule, that statute would survive strict scrutiny and be upheld as constitutional under the First Amendment.

VII. CONCLUSION

Generally speaking, the law struggles to keep pace in sectors and industries where change happens quickly. Such is the nature of the legislative process. Thus, it is understandable that the Communications Act does not fully reflect the realities of today's television landscape. However, not all of the changes that the television viewing experience has seen from 1972, when Congress enacted Section 312(a)(7), to now are exactly recent. Specifically, the differences between cable and broadcast media are now virtually indistinguishable to the average viewer, and cable is no longer the nascent younger sibling to broadcast that it once was—and it has been this way for quite some time. What this Note hopefully succeeded in demonstrating is that Congress could, within the bounds of its constitutional authority, bring the law in line with these realities by amending the Communications Act to create a cable equivalent to the reasonable access rule.

By allowing candidates to maximize the audience they can reach with their platform, and allowing viewers to become knowledgeable voters, the reasonable access rule strives to make the fundamental interest that we have in voting feel more tangible. After all, what good would a right to vote be if we could only exercise it with blinders on? Yet, because the reasonable access rule remains inapplicable to cable programming, same as the day it was born, one could very well say that Congress is not only failing to effectuate the very goals it set out to achieve in enacting Section 312(a)(7) in the first place, but is also imposing regulatory burdens on broadcasters that they alone should not have to bear.

As this Note detailed, the degree to which a cable reasonable access rule would contribute to the freedom of expression that the First Amendment guarantees could constitute a compelling government interest. Additionally, the limited nature of the right it would create could make it such that the statute would be narrowly tailored to achieve that interest. As such, although the court reviewing such an amendment to the Communications Act would likely subject it to strict scrutiny, Section 312(a)(7)'s cable equivalent would stand a significant chance of being upheld.

Of course, with the 2020 presidential election fast approaching, the chances that Congress would make such a change in time to make a difference are non-existent. And even if Congress did, there is admittedly a question of whether it would really make all that much of a difference. Given the rate at which the television landscape is evolving, it is unclear how people will be consuming their video content in the next few years. These concerns are both understandable and valid. However, they should not take away from anything

that this Note has put forth. Where there is room for change there are always those willing to push for it. And as this Note illustrates, if and when the time comes for a push to establish a cable reasonable access rule, the advocates for such a change will have a strong argument in favor of their cause. That is something that academics, regulators, and legislators alike must keep in mind.

Merger Review at the North Pole: The Problems of Dual Review in Telecommunications Mergers and a Proposal for FCC Leadership

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I. INTRODUCTION

At Christmastime, Santa is the decision-maker. Every year, children write him notes, explaining their good behavior and why they deserve a toy truck rather than a lump of coal.[1] To increase their chances, they might even leave out milk and cookies on Christmas Eve.

Imagine, for a moment, that children had to obtain approval from both Santa *and* Mrs. Claus for that truck. A child would have several questions. Why do I have to write two letters instead of one? Do Mr. and Mrs. Claus have different definitions of "good" and "bad"? Why don't the Clauses divide up this task?

Whether or not one believes in Santa Claus, this anecdote may be familiar to readers in the telecommunications world. Both the FCC and the Department of Justice (DOJ) have authority to review telecommunications mergers, leading to a protracted and unpredictable review process. Many have advocated for a simpler review process, but few agree on what changes are best. A majority of scholars suggest that the DOJ should obtain primary authority over telecommunications mergers, while a minority would give it to the FCC.

The minority's view is correct for four reasons. First, the FCC's merger review process is more comprehensive than that of the DOJ. Second, the FCC has more expertise regarding telecommunications. Third, the FCC's merger review process is more transparent than that of the DOJ. Fourth, as an independent agency, the FCC is a more neutral decisionmaker than the DOJ, which is part of the executive branch. The FCC is not perfect, but its weaknesses can be addressed through simple reforms relating to time limits and voluntary commitments. In summary, this Note calls for Congress to pass a law granting the FCC sole authority over mergers involving transfers of telecommunications licenses.

Part II of this Note summarizes the current dual review system and identifies its weaknesses. The leading criticisms of the status quo are, first, that it is inefficient, and, second, that the FCC's use of voluntary commitments is problematic. Part II also provides a survey of suggested reforms, several of which call for the FCC to take on a smaller role than this Note proposes. Part III explains why a larger role for the FCC—paired with reforms to the FCC's own process—is the optimal solution. Part IV concludes that, with common sense reforms that focus on processing time and voluntary commitments, the FCC is well positioned to lead the review of telecommunications mergers.

1. In 2013, CNN reported that more than 1 million American children sent letters to Santa. *See* Eoghan Macguire & Inez Torre, *Dear Santa: How many letters do you get every year?*, CNN (Dec. 23, 2013), http://edition.cnn.com/2013/12/23/business/dear-santa-christmas-letters/index.html [https://perma.cc/VU9K-9WKS].

II. BACKGROUND

This section summarizes the dual review system. Sub-Parts A and B explain the FCC's and DOJ's authority to review mergers, focusing on their respective organic statutes, as well as their standards of review. In Sub-Part C, this Note discusses the interaction between the two agencies, which is characterized by inconsistency and a lack of transparency. Finally, Sub-Part D identifies the weaknesses of the status quo, which include a protracted review process, uncertainty stemming from voluntary commitments, and a waste of government resources.

A. FCC Process and Standard of Review

Under Sections 214(a) and 310(d) of the Communications Act of 1934,[2] the FCC reviews mergers that involve transfers of telecommunications licenses.[3] While small mergers are "granted quickly," large mergers take longer.[4] The FCC aims to review mergers within 180 days, but, as discussed below, it often pauses this "shot clock" due to internal or external delays.[5] The merger review process unfolds in four steps. First, the process begins when the parties file applications with the FCC and the FCC issues a notice permitting the public to submit comments on a transaction-specific webpage.[6] Second, merger applicants respond to public comments, and commenters respond in turn.[7] Third, the FCC requests additional information related to the merger.[8] Fourth, the FCC makes a determination.[9]

The FCC may decide that a merger would violate a statute or rule, and therefore deny the transaction.[10] The FCC may instead decide that the transaction would serve the public interest if the parties agree to specific

2. To be approved, license transfers must be "in the present or future public convenience and necessity." 47 U.S.C. § 214(a). Additionally, 47 U.S.C. § 310(d) references the "public interest, convenience and necessity" of a potential transfer. *See generally Merger Review Authority of the Federal Communications Commission*, CONG. RESEARCH SERV. (2009), https://www.everycrsreport.com/files/20091208_RS22940_15cb7faac8005895457c47c6d7928ced7778ca1d.pdf [https://perma.cc/Y4YV-XBV2].

3. *See* Jon Sallet, *FCC Transaction Review: Competition and the Public Interest*, FCC (Aug. 12, 2014), https://www.fcc.gov/news-events/blog/2014/08/12/fcc-transaction-review-competition-and-public-interest#fn3 [https://perma.cc/R8T7-HWQ3].

4. *Overview of the FCC's Review of Significant Transactions*, FCC (July 10, 2014), https://www.fcc.gov/reports-research/guides/review-of-significant-transactions [https://perma.cc/US9B-B5HM].

5. *Frequently Asked Questions About Transactions*, FCC (July 10, 2014), https://perma.cc/3VWX-SM6C.

6. *See Overview of the FCC's Review of Significant Transactions*, *supra* note 4.

7. *Id.*

8. *See id.*

9. *See id.*

10. *See Frequently Asked Questions About Transactions*, *supra* note 5.

conditions,"[11] the content of which vary widely.[12] These conditions are frequently referred to as "voluntary commitments."[13] Alternatively, the FCC may decide that the transaction would not serve the public interest—even with voluntary commitments.[14] In this scenario, the FCC "designates" the case to an Administrative Law Judge (ALJ).[15] Most merger applicants withdraw before the hearing, fearing a long and costly battle before the ALJ.[16]

The FCC's organic statute requires it to decide whether the proposed merger will serve the "public interest, convenience, and necessity."[17] In *FCC v. RCA Communications*, the Supreme Court grappled with the definition of public interest, admitting that it "no doubt leaves wide discretion and calls for imaginative interpretation."[18] The public interest standard requires the FCC to consider traditional competition concerns, an inquiry consistent with DOJ methods.[19] However, the FCC's review goes beyond competition concerns.[20] In its decision regarding the merger between satellite radio companies Sirius and XM, the Commission summarized its approach to the public interest standard as follows:

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11. *See id.*

12. For example, the FCC's 2011 approval of the Comcast and NBC Universal merger was conditioned on a long list of commitments, including the establishment of partnerships with non-profit news organizations and an increase in local news programs. These and other conditions were unrelated to competition concerns. *See* Michael Farr, *Brace Yourself, Voluntary Commitments Are Coming: An Analysis of the FCC's Transaction Review*, 70 FED. COMM. L.J. 237, 249 (2018).

13. *See id.*

14. *See Frequently Asked Questions About Transactions*, *supra* note 5.

15. *Id.*

16. Alexander (Alexi) Maltas, Tony Lin, & Robert F. Baldwin III, *A Comparison of the DOJ and FCC Merger Review Processes: A Practitioner's Perspective*, THE ANTITRUST SOURCE (Aug. 2016), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug16_maltas_8_5f.authcheckdam.pdf [https://perma.cc/Y6PK-ZHKV].

17. *See* Sallet, *supra* note 3.

18. Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. LEGAL F. 29, 42 (2000) (citing *FCC v. RCA Communications*, 346 U.S. 86, 90 (1953)).

19. *See, e.g.*, *In the Matter of Applications of AT&T Inc. and DirecTV For Consent to Assign or Transfer Control of License and Authorizations*, 30 F.C.C. Rcd. 9131, para. 20 (2015) [hereinafter *AT&T / DirecTV Order*], https://www.fcc.gov/transaction/att-directv [https://perma.cc/RUY7-SH5H] ("The Commission, like the DOJ, considers how a transaction would affect competition by defining a relevant market, looking at the market power of incumbent competitors, and analyzing barriers to entry, potential competition, and the efficiencies, if any, that may result from the transaction.").

20. Christopher S. Yoo, *Merger Review by the Federal Communications Commission: Comcast-NBC Universal*, FACULTY SCHOLARSHIP, Paper 1543 (2014), http://scholarship.law.upenn.edu/faculty_scholarship/1543 [https://perma.cc/66J4-PHNP] ("At the same time, the FCC has made clear that its public interest mandate includes considerations that fall outside the scope of traditional competition policy, such as diversity of content, universal service, localism, spectrum efficiency, national security, and the agency's continued ability to regulate in other areas.").

> [W]e evaluate whether the proposed transaction complies with the specific provisions of the [Communications Act of 1934, as amended], other applicable statutes, and the Commission's rules. We also consider whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes. We employ a balancing process, weighing any potential public interest harms of the proposed transaction against any potential public interest benefits. Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest. [21]

In summary, the FCC employs a holistic approach that extends beyond competition concerns.

B. DOJ Process and Standard of Review

Under the Clayton Act, the DOJ and FTC have authority to review and prevent a merger if its effect "may be substantially to lessen competition, or to tend to create a monopoly."[22] Telecommunications mergers are reviewed by the DOJ, not the FTC.[23] The process begins when the parties submit a notice of the proposed merger.[24] Shortly thereafter, the applicants may avoid further review by divesting themselves of any problematic assets.[25] If the applicants choose not to do this, and the DOJ needs additional information to evaluate the proposed merger, it will issue a request for additional information, also known as a "Second Request."[26] Following the parties' compliance with a Second Request, the DOJ has thirty days to make a decision regarding the transaction.[27] The DOJ may permit the transaction to proceed or negotiate conditions that lessen competition concerns.[28] Alternatively, the DOJ may decide to litigate the issue and seek an injunction

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21. *In the Matter of Applications for Consent to the Transfer of Control of Licenses Xm Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, 23 F.C.C. Rcd. 12348, 12363–64 ¶ 30 (2008) (citations omitted).

22. *See* Barkow, *supra* note 18, at 34 n. 20 (citing 15 USC §§ 18, 21(a) (1994 & Supp 1998)).

23. The DOJ and the FTC divide merger review responsibility according to their respective areas of expertise. The DOJ takes the lead on telecommunications mergers. *See generally* Kathleen Anne Ruane, *Pre-Merger Review and Challenges Under the Clayton Act and the Federal Trade Commission Act*, CONG. RESEARCH SERV. (Sept. 27, 2017), https://fas.org/sgp/crs/misc/R44971.pdf [https://perma.cc/SW5S-JS53] (citing 15 U.S.C. § 21).

24. *Practical Law Department of Justice (DOJ) Consent Order Process Flowchart*, Practical Law Antitrust, Thompson Reuters (2017).

25. *See id.*

26. *See id.*

27. Michael G. Egge & Jason D. Cruise, *Practical guide to the U.S. merger review process*, 1 CONCURRENCES, COMPETITION L.J. 1, 4 (2014), https://www.lw.com/thoughtleadership/practical-guide-us-merger-review-process-012014 [https://perma.cc/W2VS-YQNX] (last accessed Jan. 19, 2020).

28. *See id.*

from a federal court.[29] The thirty day waiting period can be extended by agreement of the parties.[30]

The Clayton Act requires the DOJ to apply for an injunction in court if, during the course of merger review, it wishes to prevent the closing of a deal.[31] In practice, however, the DOJ need not always apply for an injunction, as the parties cannot finalize a merger until FCC review is complete.[32] When reviewing potential telecommunications mergers, the DOJ follows Horizontal Merger Guidelines, which are maintained jointly by the DOJ and FTC.[33] The guide states that the agencies should seek to prevent mergers that would "enhance[e] market power."[34] Further, "[a] merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives."[35] However, this thirty-four-page guide is only the starting point for defense lawyers, as merger review is a "fact-specific process."[36]

C. Coordination Between the DOJ and FCC During Merger Reviews

Public-facing DOJ and FCC materials say little about collaboration during merger review. The DOJ's website states that the Telecommunications and Broadband Section "works closely with the [FCC], coordinating merger reviews and filing comments in appropriate FCC proceedings."[37] Language on the FCC's website is similarly vague:

29. *See id.*

30. *See id.*

31. Laura Kaplan, *One Merger, Two Agencies: Dual Review in the Breakdown of the AT&T/T-Mobile Merger and A Proposal for Reform*, 53 B.C. L. REV. 1571,1588-90 (2012).

32. *Id.* at 1590.

33. U.S. Dep't of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* 1 (Aug. 19, 2010), https://www.justice.gov/atr/file/810276/download, p. 2. [https://perma.cc/K7JZ-7U3X] (last visited Mar. 2, 2019).

34. *Id.* at 2.

35. *Id.*

36. *See* Sallet, *supra* note 3 (explaining that the public interest standard " . . . necessarily encompasses . . . a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private-sector deployment of advanced services, ensuring a diversity of information sources and services to the public, and generally managing spectrum in the public interest. [The] public interest analysis may also entail assessing whether the transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers.").

37. *Telecommunications and Broadband Section*, U.S. DEP'T OF JUSTICE, https://perma.cc/MCC8-VQCE (last visited Apr. 6, 2019).

> Looking at past transactions, the Department of Justice and the FCC have worked very successfully together to further their understanding of the issues, sharing their respective expertise. We coordinate with DOJ informally at both the top levels and the staff levels. We try to ensure that we do not create duplicate work or place excessive burdens on any of the parties. We work together to avoid conflict between the necessary remedies.[38]

Evidence of collaboration is sometimes evident in FCC orders approving mergers. For example, in the FCC's order approving the CenturyLink/Level 3 merger, the FCC referenced the DOJ's Consent Decree, in which Level 3 had agreed to divest itself of certain fiber assets.[39] Similarly, in the order approving the merger between Charter, Time Warner Cable, and Bright House, the FCC stated that it had worked closely with the DOJ on their Consent Decree.[40]

D. Weaknesses of the Current Merger Review System

The current dual review system contains at least three critical flaws. First, the dual review system is unduly time-consuming for both the government and the merging parties. Second, FCC-imposed voluntary commitments allow the FCC to skirt the rulemaking process and create uncertainty for parties. Third, the dual review process leads to a waste of government resources. This section addresses these problems in turn.

1. Merger Reviews Often Take More Than 180 Days

First, the protracted duration of merger reviews constitutes an unfair burden on merger applicants. The FCC aims for a maximum of 180 days between the date of the application's acceptance and the completion of their review.[41] However, the FCC frequently exceeds the 180-day limit.[42] The

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38. *Frequently Asked Questions About Transactions*, *supra* note 5.

39. *Applications of Level 3 Communications, Inc. and CenturyLink, Inc. for Consent to Transfer Control of Licenses and Authorizations*, *Memorandum Opinion and Order*, 32 FCC Rcd. 958 n. 68 (2017) [hereinafter *Level 3/CenturyLink Order*] [https://perma.cc/BK45-LXV7].

40. *See Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order*, 31 FCC Rcd 6327 n. 762 (2016), https://perma.cc/7CKF-N2FA ("Because the Applicants have agreed to an anti-retaliation provision as part of the consent decree resolving the action filed by the United States, we find it unnecessary to adopt an anti-retaliation remedy as suggested by Herring Networks.")

41. *See Informal Timeline for Consideration of Applications for Transfers or Assignments of Licenses or Authorizations Relating to Complex Mergers*, FCC, https://perma.cc/P5DA-STMR ("The timeline represents the Commission's goal of completing action on assignment and transfer of control applications (i.e., granting, designating for hearing, or denying) within 180 days of the public notice accepting the applications.").

42. *See id.*

following chart identifies the timelines for the FCC's "Current and Recent Transactions,"[43] according to information on their website:

Merger	Start Date[44]	End Date[45]	Duration, including days when the FCC shot clock was paused
AT&T/DirecTV[46]	August 7, 2014	July 28, 2015	355 days
CenturyLink/Level 3[47]	December 21, 2016	October 30, 2017	327 days
Charter/Time Warner Cable/Bright House[48]	September 11, 2015	May 10, 2016	242 days
Gannett/Belo[49]	June 24, 2013	December 20, 2013	179 days
Nexstar/Media General[50]	February 17, 2016	January 11, 2017	329 days
Sinclair/Tribune[51]	July 6, 2017	Not approved; referred to ALJ in July 2018; parties ended merger efforts and sued one another[52]	N/A
T-Mobile/Sprint[53]	July 18, 2018	Not yet approved	N/A
Verizon/XO[54]	April 12, 2016	November 16, 2016	218

43. *See Archive of Major Transactions*, FCC, https://www.fcc.gov/proceedings-actions/mergers-transactions/major-transactions-archive [https://perma.cc/4JBJ-32LA] (last visited May 15, 2020).

44. This indicates the date on which the FCC released a Public Notice "accepting the application for filing and establishing a pleading cycle." In recent years, the FCC has used this exact language in its memorandum opinion and orders. In earlier orders, it has used a variant of the phrase to signify the date when it accepted the parties' applications. *See, e.g.*, *Gannett Co. and Belo Corp., MB Docket 13-189*, FCC, https://www.fcc.gov/transaction/gannett-belo [https://perma.cc/S7X6-WUHP].

45. This indicates the date on which the FCC released a Memorandum Opinion and Order approving the deal.

46. *AT&T and DirecTV, MB Docket 14-90*, FCC, https://perma.cc/H74L-BQWX.

47. *CenturyLink and Level 3, WC Docket 16-403*, FCC, https://perma.cc/C94S-MKT3.

48. *Charter - Time Warner Cable - Bright House Networks, MB Docket 15-149*, FCC, https://perma.cc/Y8HQ-52LM.

49. *Gannett Co. and Belo Corp.*, *supra* note 44.

50. *Nexstar and Media General*, *MB Docket No.16-57*, FCC, https://www.fcc.gov/transaction/nexstar-media-general#block-menu-block-4 [https://perma.cc/89P8-ERD6].

51. *Sinclair and Tribune, MB Docket 17-179*, FCC, https://www.fcc.gov/transaction/sinclair-tribune [https://perma.cc/5M5T-AD8J].

52. Brian Fund & Tony Romm, *Tribune withdraws from Sinclair merger, sues for $1 billion in damages over 'breach' of contract*, WASH. POST (Aug. 9, 2018), https://www.washingtonpost.com/technology/2018/08/09/tribune-withdraws-sinclair-merger-saying-it-will-sue-breach-contract/ [https://perma.cc/RD2C-9X25].

53. *T-Mobile and Sprint, WT Docket 18-197*, FCC, https://www.fcc.gov/transaction/t-mobile-sprint [https://perma.cc/RF4Z-3QPX].

54. *Verizon and XO, WC Docket 16-70*, FCC, https://www.fcc.gov/transaction/verizon-xo#block-menu-block-4 [https://perma.cc/L6RN-5RN7].

The FCC took an average of 275 days to review each of these deals. Both the agencies and the merging parties are responsible for these delays. Merging parties prolong the process when they provide supplemental information in the middle of the review process. For example, during the merger between CenturyLink and Level 3 Communications, CenturyLink notified the FCC on day 170 that it planned to submit additional information.[55] In response, the FCC paused the shot clock for nearly three months.[56] In other contexts, FCC may pause the clock for its own reasons. For example, during the Sinclair/Tribune merger, the FCC paused its clock from October 18, 2017 until November 2, 2017, to allow for additional public comments.[57]

In 2017, the Senate responded with the introduction of S.2847, a bill that would require the FCC to abide by the 180-day limit.[58] The bill would permit the FCC to apply to the United States District Court for the District of Columbia for a 30-day extension, but the court would only be able to grant the extension in one of three special scenarios. [59] Further, the FCC would bear the burden of proof in such cases.[60] The bill did not advance beyond the Judiciary Committee, leaving the status quo intact.[61]

The DOJ is also a source of undue delay. In 2017, the Deputy Assistant Attorney General for the DOJ's Antitrust Division delivered a speech on this topic to the American Bar Association's Antitrust Section.[62] He acknowledged that the average length of a significant merger review had grown from 7 to 11.6 months between 2011 and 2016,[63] and proposed five

55. *See CenturyLink and Level 3*, *supra* note 47.

56. *Id.*

57. *Media Bureau Pauses 180- Day Transaction Shot Clock in Sinclair Merger*, FCC (Oct. 18, 2017), https://www.fcc.gov/document/media-bureau-pauses-180-day-transaction-shot-clock-sinclair-merger [https://perma.cc/S5C5-7VLK].

58. Standard Merger and Acquisition Reviews Through Equal Rules Act of 2018, S.2857, 115th Cong. (2018).

59. S.2847 would have permitted the United States District Court for the District of Columbia to grant a 30-day extension if:

"(I) the court finds that the applicants for the transfer of control or assignment have not substantially complied, in a timely manner, with a reasonable request by the Commission for information;

(II) the Commission shows, by clear and convincing evidence, that the Commission is unable to complete review within the 180-day review period; or

(III) an Executive agency (as defined in section 105 of title 5, United States Code) has requested in writing that the Commission delay a determination pending the Executive agency's national security review of the transfer of control or assignment." *Id.*

60. *See id.* ("Notwithstanding any other provision of law, including section 706 of title 5, United States Code, in a judicial appeal of a Commission decision to deny a covered application, the Commission shall bear the burden of persuasion to demonstrate that the decision is—(1) permitted under applicable statutes and regulations; and (2) supported by the required amount of factual evidence").

61. *Id.*

62. Donald G. Kempf, Jr., Deputy Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, Address at American Bar Association Antitrust Section Fall Forum (Nov. 17, 2017), https://www.justice.gov/opa/speech/file/1012156/download [https://perma.cc/JQP2-372H].

63. *Id.* at 3-4.

strategies to ameliorate this trend.[64] Four of these strategies require the merging parties to make changes, such as meeting with the DOJ earlier in the process.[65] Only the fifth strategy—reducing the number of custodians involved in document requests—would be led by the DOJ.[66]

The FCC and DOJ have no incentive to chastise one another for these delays. The slower agency provides cover for the faster one. This protracted dual review process, coupled with international and state merger reviews, arguably creates an onerous barrier to merger activity.[67] As discussed below in Part III(B), the problem of delay will lessen with 1) elimination of the DOJ's authority over telecommunications mergers, and 2) a new law that requires the FCC to abide by its 180-day time limit, save for a judicial extension.

2. Some Voluntary Commitments Are Unrelated to the Merger Under Review

Another important criticism of the status quo is the FCC's practice of soliciting voluntary commitments as part of the merger review. Because the FCC's approval is often contingent upon parties' adherence to voluntary commitments, they become binding in nature, and the FCC may fine violating parties.[68] Critics express three main concerns. First, voluntary commitments often bear little relevance to the specific merger at hand. Second, their inconsistency introduces a high level of uncertainty into the merger process. Third, voluntary commitments enable the FCC to evade the rulemaking process. This Note will address each of these concerns in turn.

The FCC often uses voluntary commitments to exert influence over parties in ways that are unrelated to the merger.[69] For example, during the review of the merger between Bell Atlantic and NYNEX, the FCC required the parties to adopt a pricing model based on the Total Element Long-Run Incremental Cost, even though this condition was unrelated to the transaction under review.[70] In the merger between Comcast and NBC-Universal, the FCC required the parties to create a new Spanish-language channel.[71] This was part

64. *Id.*
65. *Id.* at 3.
66. *Id.*
67. Often, merging telecommunications companies must also pass the muster of foreign regulatory bodies and states. At the state level, both attorneys general and public utility commissions have legislative authority to challenge mergers. Between 2010 and 2017, public utility commissions reviewed nearly half of the mergers reviewed by the FCC. *See* Jeffrey Eisenach and Robert Kulick, *Do State Reviews of Communications Mergers Serve the Public Interest*?, NERA Economic Consulting (Oct. 2017), at 7, http://www.nera.com/content/dam/nera/publications/2017/Eisenach%20Kulick%20State%20Mergers%20Final%20101617.pdf [https://perma.cc/R8GK-LGJM].
68. *See* Farr, *supra* note 14, at 245.
69. *Infra* note 80.
70. *See* Yoo, *supra* note 21, at 29.
71. *See* Scott Jordan & Gwen L. Shaffer, *Classic conditioning: the FCC's use of merger conditions to advance policy goals*, 35 MEDIA, CULTURE & SOC'Y 392, 399-400 (2013).

of the FCC's effort to improve television offerings for Spanish speakers, and separate from the FCC's merger-related competition concerns.[72]

Critics point out that voluntary commitments introduce a high level of uncertainty into the merger process.[73] A comparison between the Echostar/DirectTV and Sirius/XM mergers, in which all parties were the sole satellite providers in the TV and radio industries, respectively,[74] demonstrates this point.[75] The FCC denied a potential merger between Echostar and DirectTV, finding that the deal would not be in the public interest.[76] By contrast, the FCC approved a similar merger between Sirius and XM.[77] In its order granting approval to Sirius and XM, the FCC acknowledged the similarity but brushed it aside for two reasons.[78] First, the FCC stated that a hearing would be futile because "it is not possible to use the normal tools of econometrics to define the relevant market or determine likely impacts on price."[79] Second, the FCC was confident that voluntary commitments would eliminate any harms to competition, despite the parties' previous disregard for FCC regulations.[80] In his dissent, Commissioner Michael Copps criticized the FCC for its inconsistency:

> The majority's argument is that it can stack up enough 'conditions' on the merged entity—spectrum set-asides, price controls, manufacturing mandates, etc.—to tip the scale in favor of approval. In essence, the majority asserts that satellite radio consumers will be better served by a regulated monopoly than by marketplace competition. I thought that debate was settled—as did a unanimous Commission in 2002 when it declined to approve the proposed merger between DirecTV and Echostar.[81]

The result of this inconsistency is that parties do not know what to expect when approaching a deal. As a result, parties argue about the best path

72. *Id.* at 400.

73. *See* Farr, *supra* note 14, at 240.

74. *Id.*

75. Bradley Dugan, *The FCC's New Formula for Mergers*, 29 LOY. L.A. ENT. L. REV. 435, 461-65 (2009).

76. *Id.* at 450-52.

77. *Id.* at 463-65.

78. *In the Matter of Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, *Memorandum Opinion and Order*, FCC 08-178, para. 58 (2008).

79. *Id.* at para. 58.

80. Dugan, *supra* note 78, at 457.

81. Statement of Commissioner Michael J. Copps, dissenting, *Re: In the Matter of Applications for Consent to the Transfer of Control of Licenses Xm Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, https://www.fcc.gov/document/application-consent-transfer-control-licenses-xm-0 [https://perma.cc/SG2R-4P4H].

to FCC approval.[82] During the Sinclair/Tribune merger, Tribune was adamant that Sinclair divest itself of certain television stations, fearing that the FCC would require this.[83] Sinclair had different expectations, and engaged in what Tribune has alleged was "belligerent and unnecessarily protracted negotiations" with the FCC and DOJ.[84] Differing expectations led to a failed merger and breach-of-contract litigation between the two parties.[85]

Third, critics point out that voluntary commitments permit the FCC to evade the rulemaking process mandated by the Administrative Procedure Act (APA).[86] For example, before the Ameritech/SBC merger review, the FCC was pursuing a rule regarding the deployment of wireline services.[87] Instead of continuing with the rulemaking process, the FCC converted the proposed rule into a voluntary commitment that applied only to Ameritech/SBC.[88]

Under the APA, the informal rulemaking process requires a notice-and-comment period.[89] Additionally, informal rules that constitute agency action are usually subject to judicial review.[90] Presently, the FCC extracts voluntary commitments that would routinely be subject to the informal rulemaking process.[91] This raises questions about the FCC's compliance with the APA, as well as whether the voluntary commitments are judicially reviewable.[92] If not, then parties have no means of redress when they believe that the FCC's requirements were arbitrary and capricious within the meaning of the APA.[93]

3. The Dual Review System Wastes Government Resources

A third criticism of the dual review system is that it wastes government resources. Although the DOJ and FCC do their best to coordinate merger reviews, their respective analyses have duplicative elements, leading to what Kaplan has called "redundancy."[94] This is unavoidable in the status quo, because the agencies' review standards overlap in substance. The FCC's public interest standard includes an evaluation of a potential merger's impact on competition, while the DOJ focuses on competition alone.[95] A quantitative study of government waste in dual review systems is beyond the scope of this

82. *See generally* Compl., *Tribune Media Company v. Sinclair Broadcast Group*, Aug. 9, 2018, at 4, available at http://www.tribunemedia.com/wp-content/uploads/2018/08/Complaint-for-Damages-Tribune-v-Sinclair_accepted.pdf [https://perma.cc/4BXC-NPCF].
83. *Id.* at 3.
84. *Id.* at 4.
85. *Id.* at 5.
86. Farr, *supra* note 14, at 240.
87. *Id.* at 247.
88. *Id.*
89. *Id.* at 243.
90. *Id.* at 245.
91. *Id.* at 249.
92. For an in-depth critique of voluntary commitments, *see id.* at 244.
93. *Id.* at 254.
94. *See* Kaplan, *supra* note 31, at 1572.
95. *Id.* at n. 21.

Note, but would be a valuable contribution to the discussion. The solution proposed in this Note provides a remedy for the problem of government waste.

E. Potential Reforms to the Merger Review System

In response to concerns about the dual review system, critics generally have advocated for one of two major reforms. Many would reduce the FCC's role, while a minority would reduce that of the DOJ. Those who would reduce the FCC's role differ on how to do so. Some would remove the FCC from the process entirely, while others would keep the dual review system but significantly reduce the FCC's authority with respect to mergers. Part i examines the literature calling for a reduction of the FCC's role, and Part ii examines the literature calling for the reduction of the DOJ's role.

1. Some Call for a Reduction of the FCC's Role

Several scholars have suggested that Congress reduce, or even eliminate, the role of the FCC in telecommunications mergers. These scholars tend to criticize the FCC for extracting voluntary commitments that are unrelated to the merger at hand. In *Reexamining the Legacy of Dual Regulation: Reforming Dual Merger Review by the DOJ and the FCC*, Philip Weiser suggested that the FCC defer to the antitrust bodies.[96] In *Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of the "Public Interest" Standard*, Thomas M. Koutsky and Lawrence J. Spiwak advocated for a narrowing of the FCC's public interest standard.[97] Specifically, they called for the FCC to focus on merger-related harms, rather than addressing general issues that are better suited to the traditional rulemaking process.[98] Finally, in *Brace Yourself, Voluntary Commitments Are Coming: An Analysis of the FCC's Transaction Review*, Michael Farr suggested that FCC-imposed voluntary commitments be subject to judicial review.[99]

In *One Merger, Two Agencies: Dual Review in the Breakdown of the AT&T/T-Mobile Merger and A Proposal for Reform*, Kaplan discussed the weaknesses of eliminating either the FCC or the DOJ's role.[100] Kaplan also criticized a potential "clearance system," akin to the FTC/DOJ system, whereby one of the agencies would have sole reviewing authority over a specific merger.[101] Instead, she proposed that the dual review system remain,

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96. *See* Philip J. Weiser, *Reexamining the Legacy of Dual Regulation: Reforming Dual Merger Review by the DOJ and the FCC*, 61 FED. COMM. L.J. 167 (2008).

97. Thomas M. Koutsky & Lawrence J. Spiwak, *Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of the Public Interest Standard*, 18 COMMLAW CONSPECTUS, 329 (2010).

98. *See generally id.* at 347.

99. *See* Farr, *supra* note 14.

100. Kaplan, *supra* note 31, at 1600-06.

101. *Id.* at 1606-08.

but with two important changes to the FCC portion of it:[102] first, Kaplan would impose enforceable time limits on FCC reviews;[103] second, she would limit the FCC's authority in merger review.[104] Thus, rather than considering whether the merger would benefit the public interest, it would only evaluate the effects of the license transfer itself.[105]

2. Some Call for a Reduction of the DOJ's Role

In *Rethinking Federal Review of Telecommunications Mergers*, David A. Curran called for the FCC to obtain sole review authority of telecommunications mergers.[106] Curran observed that the FCC's expertise in telecommunications is a critical component of merger review.[107] He noted that the DOJ's review is not necessary, as the FCC's public interest standard already contains a thorough review of competition concerns.[108] Despite his compelling arguments, Curran's proposal has not gained traction since its publication in 2002.[109] In recent years, voluntary commitments have become the focus of scholars' work,[110] precluding their serious consideration of a leadership role for the FCC. Scholars are correct to criticize the nature of voluntary commitments, but the FCC remains the ideal agency to conduct reviews of telecommunications mergers.

III. ANALYSIS

A. The Case for FCC Leadership in Telecommunications Mergers

Congress should revise federal law, granting the FCC sole authority to review mergers involving telecommunications licenses. A larger role for the FCC—paired with reforms to the FCC's own process—is the optimal way to address inefficiencies in the status quo.[111] The FCC is better suited than the DOJ to take the lead for four reasons. First, the scope of the FCC's merger review is more comprehensive than the DOJ's scope. Second, the FCC has more expertise regarding telecommunications than the DOJ. Third, the FCC's merger review process is more transparent than that of the DOJ. Fourth, as an independent rather than an executive agency, the FCC is more insulated from political processes, and is subject to both Congressional oversight and the independent Office of the Inspector General. However, as previously noted,

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102. *Id.* at 1608.
103. *Id.*
104. *Id.* at 1609.
105. *Id.*
106. David A. Curran, *Rethinking Federal Review of Telecommunications Mergers*, 28 OHIO N.U. L. REV. 747, 788 (2002).
107. *Id.*
108. *Id.*
109. This observation is based on my own survey of existing literature on this topic.
110. *See, e.g.*, Koutsky, *supra* note 102, at 345.
111. Telecommunications would not be the first industry to be subject to exclusive merger review authority by an expert agency. Railroad and airline alliance agreements also fall into this category. *See* Kaplan, *supra* note 31, at 1602 n. 281.

the FCC does have two weaknesses. First, the FCC frequently fails to complete mergers within 180 days. Second, the FCC has developed a practice of extracting voluntary commitments that are unrelated to the content of the merger at hand. Therefore, this Note proposes that Congress also reform the FCC by imposing stricter timelines and limiting the scope of voluntary commitments. This section discusses each of these points in turn.

1. The FCC's Merger Review Scope is More Comprehensive

The FCC is well-suited to lead review of telecommunications mergers because its public interest standard already incorporates the DOJ's antitrust concerns. The FCC and DOJ standards for competition issues are very similar. The DOJ's review places an emphasis on "unilateral effects (i.e., exercise of single-firm dominance) or coordinated effects (i.e., collusion)."[112] The DOJ also considers factors that would counteract these negative effects—for example, the chance of a new entry into the market in the near future—and potential positive effects stemming from the merger.[113] These general principles apply to both vertical and horizontal mergers.[114]

The FCC's competition review is similar. The FCC's Order approving the merger between AT&T and DirectTV stated these similarities as follows: "The Commission, like the DOJ, considers how a transaction would affect competition by defining a relevant market, looking at the market power of incumbent competitors, and analyzing barriers to entry, potential competition, and the efficiencies, if any, that may result from the transaction."[115]

Further, both agencies employ a predictive, forward-looking approach. The FCC's website explains the public interest standard in predictive terms:

112. *See* Maltas, *supra* note 16, at 2.
113. *Id.*
114. *Id.*
115. *AT&T / DirecTV Order*, *supra* note 20.

> Under [S]ection 310(d) of the Communications Act, we determine whether a proposed transaction *will serve* the public interest, convenience and necessity. First, we determine if the application complies with provisions of the Act and our Commission rules. If it does, then we consider whether granting the application *could result in public interest harms* by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes. Competition, diversity, localism, and encouraging the provision of advanced services to all Americans are among the principle objectives of the Act. We also consider *what potential public benefits might occur* because of the transaction . . . .[116]

The DOJ's horizontal merger guidelines are also forward-looking, noting that "[m]ost merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not."[117]

One potential difference is the FCC's stated interest in enhancing, not merely preserving, competition. In its order approving the AT&T/DirectTV merger, the FCC stated that its competition review is "broader" because it "considers whether a transaction would enhance, rather than merely preserve, existing competition, and often takes a more expansive view of potential and future competition in analyzing that issue."[118] However, this distinction has proven to be minor, and the FCC has never denied a merger on the grounds that it merely preserved but did not "enhance" competition.[119] In summary, the agencies employ similar methods with respect to competition review. Removing the DOJ from the process will not deprive it of thoughtful, market-oriented analysis. Both agencies are equally capable of upholding traditional antitrust principles.

However, taking non-competition concerns into account, the FCC's broad scope of review gives it a distinct advantage over the DOJ.[120] The DOJ and FTC's merger reviews "involve narrower issues than the public interest standard established by the Communications Act."[121] In addition to competition, the FCC considers other factors that fall within the scope of

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116. See *Frequently Asked Questions About Transactions*, *supra* note 5 (emphasis added).

117. Horizontal Merger Guidelines, *supra* note 34, at 1.

118. *AT&T / DirecTV Order*, *supra* note 20.

119. *See* Maltas, *supra* note 16, at 3.

120. In his proposal for FCC review, Curran makes a similar—but not identical—point. Curran explains that the FCC's non-merger work under the Telecommunications Act of 1996 already requires it to consider competition between industry actors. Therefore, he states that "economies of scale in information gathering" favor a leading role for the FCC. *See* Curran, *supra* note 108, at 775.

121. ISSUES MEMORANDUM FOR MARCH 1, 2000 TRANSACTIONS TEAM PUBLIC FORUM ON STREAMLINING FCC REVIEW OF APPLICATIONS RELATING TO MERGERS, https://www.fcc.gov/issues-memorandum-march-1-2000-transactions-team-public-forum-streamlining-fcc-review-applications [https://perma.cc/75PC-YKCB] (last visited Apr. 6, 2019).

"public interest."[122] These factors include "whether the transaction would protect service quality for consumers, accelerate private sector deployment of advanced telecommunications services, ensure diversity of information sources and viewpoints, [and] increase the availability of children's programming and Public, Educational, and Government programming."[123] For example, in the FCC's review of the potential merger between Comcast and NBC Universal, commenters worried that NBC News would "unduly influence" its journalistic independence.[124] The FCC's opinion granting the merger discussed this concern, and concluded "it is appropriate to condition our approval of this transaction on the Applicants' commitment to ensure the continued journalistic independence of the Applicants' news operations."[125] If the DOJ were to become the sole reviewer of telecommunications mergers, they would no longer be evaluated for these non-competition concerns.

2. The FCC Has More Expertise Regarding Telecommunications

As the Supreme Court stated in *Verizon v. Trinko*, "[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue."[126] For three reasons, the FCC has more expertise than the DOJ in telecommunications and related technology. First, as the body charged with regulating the telecommunications industry since 1934,[127] the FCC has been closely involved with the development of the industry's regulation. The FCC, then, is well-prepared to evaluate technical claims asserted by merging parties.[128] Second, the FCC is knowledgeable about the impact of telecommunications mergers on other FCC initiatives. For example, the FCC implements a universal service program.[129] As the program's regulator, the FCC is best equipped to understand how a merger will affect it, if at all.[130] Third, the FCC's structure lends itself to more specific areas of expertise. For example, it has subject matter experts on policy areas such as public safety and homeland security, wireless telecommunications, and wireline

122. Maltas, *supra* note 16, at 3.

123. *Id.*

124. Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, Memorandum Opinion and Order, 26 FCC Rcd 4238, para. 203 (2011).

125. *Id.* at para. 207.

126. Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP, 540 U.S. 398, 399 (2004).

127. National Telecommunications and Information Administration, *U.S. Spectrum Management Policy: Agenda for the Future* (Sept. 3, 1998), https://www.ntia.gov/report/1998/us-spectrum-management-policy-agenda-future [https://perma.cc/2TJH-QAV3].

128. For example, during the AT&T/T-Mobile merger, AT&T alleged that it needed T-Mobile's spectrum space. Kaplan, *supra* note 31, at 1605.

129. Curran, *supra* note 111, at 771.

130. *Id.*

competition, all of whom contribute to merger review when relevant.[131] By contrast, the DOJ has just one "Telecommunications and Broadband Section" in its Antitrust Division, which is responsible for the broad category of "telecommunications equipment manufacturers and landline, wireless, and satellite telecommunications service providers."[132]

3. The FCC's Merger Review Process is More Transparent

Unlike the antitrust agencies, the FCC's merger review process provides opportunities for the public to comment on proposed transactions. In 2000, FCC Chairman Kennard submitted testimony before the House Committee on Commerce, highlighting this feature of the process:

> With respect to public participation, the FCC process offers the only forum where the merger is considered in a public proceeding conducted under the APA. The DOJ and FTC investigations are exercises in prosecutorial discretion, conducted under the cover of confidentiality, with no requirement to explain action or inaction unless a lawsuit is initiated.[133]

Critics argue that the FCC's negotiations with merging parties are not made public, and that these negotiations are often the basis for voluntary commitments.[134] However, this is still an improvement over the DOJ's process, which is entirely confidential until the lawsuit stage.

4. As an Independent Agency, the FCC is Better Insulated from Political Pressure

The FCC is also better equipped to lead merger reviews because of its status as an independent agency. The FCC has five commissioners who are appointed by the President and approved by the Senate.[135] One of these commissioners is chosen by the President to serve as chair.[136] However, only

131. ORGANIZATIONAL CHART OF THE FCC, https://www.fcc.gov/sites/default/files/fccorg-01302019.pdf [https://perma.cc/AGK2-E9XY] (last visited Apr. 6, 2019).

132. U.S. Dep't of Justice, Antitrust Division Manual, Fifth Edition, Page I-7 (updated 2018), https://www.justice.gov/atr/file/761126/download [https://perma.cc/A6Q2-GYJ9].

133. Statement of William E. Kennard, Chairman, Federal Communications Commission, before the House Committee on Commerce, Subcommittee on telecommunications, Trade, and Consumer Protection, March 14, 2000, https://transition.fcc.gov/Speeches/Kennard/Statements/2000/stwek021.html [https://perma.cc/U3RX-8DBA].

134. Weiser, *supra* note 98, at 170.

135. *See* 47 U.S.C. § 154(a).

136. *Id.*

three commissioners may be from the same political party.[137] Additionally, the President cannot remove a commissioner for any reason.[138]

The President is also limited in his ability to influence the FCC because of oversight mechanisms in Congress and at the FCC.[139] For example, in 2013, President Obama issued a video statement urging the FCC to pass net neutrality.[140] Concerned about a potential lack of independence, the Senate held hearings on the topic and issued their own report alleging impropriety.[141] In response, the FCC's Inspector General conducted an independent investigation, reviewing 600,000 emails.[142] The Inspector General's report concluded: "[W]e found no evidence of secret deals, promises or threats from anyone outside the Commission, nor any evidence of any other improper use of power to influence the FCC decision-making process."[143] Further, the report noted that the President's public support for Title II regulation of broadband providers was appropriately entered into the record.[144] This episode illustrated the power of both Congress and the FCC's Inspector General to keep the agency accountable.

Unlike the FCC, the DOJ falls within the President's vested executive powers under Article II of the Constitution.[145] The head of the DOJ, the Attorney General, is appointed by the President and confirmed by the Senate. The President can fire the Attorney General for any reason, without Congressional consent.[146] Therefore, the President has more legal power over the Attorney General than over FCC Commissioners. He or she can explicitly order the Attorney General to do something, so long as it is legal, and the Attorney General would be obligated to take that action. By contrast, FCC

137. *See* 47 U.S.C. § 154(b)(5).

138. Federal Communications Commission, ABOUT THE FCC: WHAT WE DO, https://www.fcc.gov/about-fcc/what-we-do [https://perma.cc/2RH6-DBFW] (last visited Apr. 7, 2019).

139. *See generally* LEGAL SIDEBAR, SEPARATING POWER SERIES: PRESIDENTIAL INFLUENCE V. CONTROL OF INDEPENDENT AGENCIES, https://fas.org/sgp/crs/misc/presinf.pdf [https://perma.cc/F6QW-5LP9] (last visited Apr. 7, 2019).

140. The Obama White House, *President Obama's Statement on Keeping the Internet Open and Free*, YOUTUBE (Nov. 10, 2014), https://www.youtube.com/watch?time_continue=2&v=uKcjQPVwfDk [https://perma.cc/TF9X-YMDM].

141. MAJORITY STAFF OF S. COMM. ON HOMELAND SECURITY & GOVERNMENTAL AFFAIRS, REGULATING THE INTERNET: HOW THE WHITE HOUSE BOWLED OVER FCC INDEPENDENCE (Feb. 29, 2016), https://www.hsgac.senate.gov/imo/media/doc/FCC%20Report_FINAL.pdf [https://perma.cc/8SRF-WXGU].

142. John Brodkin, *Obama didn't force FCC to impose net neutrality, investigation found*, ARS TECHNICA (Dec. 19, 2017, 12:38 PM), https://arstechnica.com/tech-policy/2017/12/obama-didnt-force-fcc-to-impose-net-neutrality-investigation-found/ [https://perma.cc/E8AM-DWCT].

143. Memorandum from F.C.C. IG David L. Hunt to Assistant IG for Investigations and Counsel to the IG, Memorandum (Aug. 22, 2016), Page 5-6, https://www.documentcloud.org/documents/4332075-OIG-B-15-0022.html#document/p1 [https://perma.cc/L5VC-BABG].

144. *See id.*

145. U.S. Const. art. II, § 2.

146. *See* Myers v. United States, 272 U.S. 52 (1926).

Commissioners are not obligated to take their policy direction from the White House.

Some may argue that the practices of the White House and the DOJ generate some level of independence from the President. For example, the President's counsel routinely sets limits on the manner in which White House staff may communicate with the DOJ.[147] "However, these limits are carefully crafted to protect the President from the appearance of impropriety, not to limit the influence of White House staff."[148] The White House is also limited by the presence of an independent Inspector General at the DOJ,[149] but these practices pale in comparison to the President's removal power over the Attorney General.

B. Reforming the Dual Review System through Elevation of the FCC's Role and Reform of its Processes

As noted above, the current dual review system for telecommunications mergers is inefficient and unpredictable. The FCC is better suited than the DOJ to carry out the review process, because it has a more comprehensive scope of review, greater expertise in telecommunications, and is better insulated from political pressure. Therefore, Congress should reform the Clayton Act to grant the FCC sole review authority and to remove the DOJ from the process. Additionally, to respond to scholars' concerns, the FCC should effectuate two categories of internal reforms. First, voluntary commitments should be limited to concerns about the specific merger at hand. The FCC should lead an initiative to memorialize this policy. Second, the FCC should reduce review times. Congress should pass a bill holding the FCC to a 180-day shot clock, absent a judicial extension. This section examines the legislative changes and the internal changes to the FCC needed to actualize this proposal.

1. Congress Should Revise the Clayton Act to Exempt Mergers Involving Telecommunications Licenses from DOJ Review

In order to remove the DOJ's role in telecommunications mergers, Congress must modify the Clayton Act. Congress should add a clause to the Clayton Act, clarifying that mergers involving FCC licensees are exempt from traditional antitrust review by the DOJ/FTC. At present, several

147. Jack Goldsmith, *Independence and Accountability at the Department of Justice*, LAWFARE (Jan. 30, 2018, 2:16PM), https://www.lawfareblog.com/independence-and-accountability-department-justice [https://perma.cc/AM78-5PNV].

148. Memorandum from Donald F. McGahn II, Counsel to the President, to All White House Staff, POLITICO (Jan. 27, 2017), https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000 [https://perma.cc/LWW5-9AKJ].

149. *See* Goldsmith, *supra* note 150.

categories of commercial activity are exempt from the Clayton Act.[150] This includes professional baseball, union activity, farm cooperatives, and insurance.[151] To adopt this model, Congress should amend the Clayton Act by adding a Section to Chapter 1. After Section 17, which addresses the labor exemption,[152] a new Section 18 should state that telecommunications mergers are reviewed by the FCC instead of the DOJ/FTC. This would establish a clear division of labor and place the onus on the FCC to carry out its role.

2. The FCC Should Issue Guidelines Limiting the Nature of Voluntary Commitments

While Congress is preparing legislative changes, the FCC should take action to assuage scholars' concerns about its own merger review process. First, the FCC should reduce the scope of voluntary commitments. At the time of this Note's publication, the FCC Commissioners demonstrated support for such an initiative. In 2012, then Commissioner Ajit Pai testified that the FCC "could and should stop imposing conditions and insisting upon so-called 'voluntary commitments' by parties that are extraneous to the transaction and not designed to remedy a transaction-specific harm."[153] And in the CenturyLink/Level 3 Order in 2017, as Chairman, Pai called for "narrowly tailored, transaction specific conditions that address the potential harms of a transaction."[154] Under Chairman Pai's leadership, the FCC should issue guidelines explaining the FCC's substantive and procedural goals with respect to voluntary commitments.

3. Congress Should Pass Legislation Holding the FCC to the 180-Day Timeline Absent a Judicial Extension

Second, the FCC should take action to reduce merger review times. In the status quo, the FCC may stop and start the "shot clock" at any time, and mergers often take longer than 180 days.[155] Congress should consider passing

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150. *See* Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 364 n.11 (1953) ("Congress has expressly exempted certain specific activities from the Sherman Act, as in § 6 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 17 (labor organizations), in the Capper-Volstead Act, 42 Stat. 388-389, 7 U.S.C. §§ 291, 292 (farm cooperatives), and in the McCarran-Ferguson Act, 59 Stat. 34, 61 Stat. 448, 15 U.S.C. (Supp. V) § 1013 (insurance).").

151. *Id.*

152. 15 U.S.C. § 17.

153. Statement of Ajit Pai, Commissioner, Federal Communications Commission, Hearing Before The Subcommittee On Communications And Technology Of The United States House Of Representatives Committee On Energy And Commerce, *Oversight Of The Federal Communications Commission*, https://docs.fcc.gov/public/attachments/DOC-315058A1.pdf [https://perma.cc/J9DB-UELR].

154. Hogan Lovells, *FCC Commissioners Debate Adjustments to Merger Review Standard*, BLOG: FOCUS ON REGULATION (Nov. 7, 2017), https://www.hoganlovells.com/en/blogs/focus-on-regulation/fcc-commissioners-debate-adjustments-to-merger-review-standard [https://perma.cc/ZB29-47RT].

155. *See Frequently Asked Questions About Transactions*, *supra* note 5.

legislation similar to S.2847, which would have required that the FCC abide by the 180-day limit absent a judicial extension.[156] If 180 days is too short, then the FCC may impose a longer limit. The goal of such a reform should be to evaluate a practical limit, and then abide by it except in extenuating circumstances.[157]

C. Rebutting Potential Counter-Arguments

Critics of this proposal might raise one of several counter-arguments. First, they might argue that the FCC's merger review authority, which is conditioned upon the transfer of a telecommunications license, encompasses either too many or too few companies. Second, they might argue that the FCC does not have the requisite economic expertise to be the sole reviewer of telecommunications mergers. Third, they might argue that this proposal will have undesirable effects such as the approval of an anticompetitive merger or the denial of neutral and procompetitive mergers. Finally, some argue that this proposal would open a Pandora's Box by calling other dual review systems into question. These concerns are surmountable, either because they rest on invalid assumptions or because, while valid, the FCC can easily address them.

1. This Proposal is Neither Underinclusive nor Overinclusive

One potential concern regarding this proposal is that the FCC could have authority over a merger that involved only one minor license transfer. In this scenario, the FCC's expertise in telecommunications would be of little benefit, and the DOJ would be deprived of an opportunity to participate. To avoid this problem, the DOJ should retain review authority over mergers where FCC-regulated activity is below a specific threshold.[158] When a proposed merger fell beneath the threshold, both the FCC and the DOJ would conduct reviews. Congress should be responsible for creating an initial threshold, and should seek testimony from the FCC and the DOJ as part of the legislative process. Congress should permit the DOJ and FCC to revise this threshold, if they desire, through the issuance of a joint Memorandum of Understanding.

Critics may also fear that a telecommunications company will avoid FCC review by divesting itself of any assets that would require license transfers. For example, Time Warner sold its television station prior to its

156. Standard Merger and Acquisition Reviews Through Equal Rules Act of 2018, S. 2847, 115th Cong. (2018).

157. These internal reforms could be effectuated in the form of an amendment to the Telecommunications Act or an internal policy change. If Congress is unsatisfied with the FCC's commitment to this issue, it should pursue an amendment.

158. The threshold should be a specific percentage of market activity, rather than a percentage of the party's business. A large company may have a large impact on the telecommunications market as a whole, but telecommunications may constitute only a small share of that company's business.

merger with AT&T, successfully avoiding FCC review.[159] In these limited cases, the DOJ should retain review authority. Additionally, the FCC's expertise in telecommunications would not be needed in such a scenario.

2. The FCC Has the Economic Expertise Needed to Lead this Review Process

Critics have questioned whether the FCC has the economic expertise required to lead merger reviews.[160] As Chairman Pai acknowledged in 2017, "the state of the FCC's economic analysis and data collection is not where it needs to be."[161] In response to this, Chairman Pai announced the creation of a new Office of Economics and Analytics (OEA), whose role is to better integrate economic analysis into FCC decision-making.[162] The office will consist of four divisions: the Economic Analysis Division, Industry Analysis Division, Auctions Division, and Data Division.[163] If enacted according to plan, the Economic Analysis Division (EAD) will play a key role in merger reviews.[164]

Even under the status quo, the FCC hires economic experts for merger reviews. When the FCC reviews a major transaction, it announces a team of experts—several of whom have economic backgrounds.[165] For example, the review teams for the Comcast/Time Warner Cable and AT&T/DirecTV mergers included William Rogerson, the former chief economist of the FCC, and Shane Greenstein, a Northwestern University professor with a focus on "the business economics of computing, communications and Internet

159. David Shepardson, *FCC approves Time Warner sale of Atlanta TV station*, REUTERS (Apr. 17, 2017, 8:43 PM), https://www.reuters.com/article/us-timewarner-fcc-meredith-idUSKBN17J1N8 [https://perma.cc/KGN8-M434].

160. Interview with Dan Kirkpatrick, Attorney, Fletcher, Heald & Hildreth (Nov. 15, 2018).

161. Ajit Pai, Chairman, FCC, *The Importance Of Economic Analysis At The FCC* (Apr. 5, 2017), https://www.fcc.gov/document/chairman-pai-economic-analysis-communications-policy [https://perma.cc/N7C9-ZWP7].

162. *Id.*

163. *See* Memorandum from Wayne Leighten to Ajit Pai, FCC Chairman, 6 (Jan. 9, 2018), https://docs.fcc.gov/public/attachments/DOC-348640A1.pdf [https://perma.cc/4JG5-MCSQ].

164. According to the FCC's planning document, EAD will "work with the transaction team to develop data requests, review the merger application, meet with outside economics consultants representing stakeholders, review and summarize economic comments and relevant economic analysis, analyze submitted data and other relevant material for empirical support for claimed economic harms or benefits, and draft sections of orders addressing claims of economic harms and benefits." *Id.* at 9.

165. *See, e.g.*, Brian Fung, *These are the FCC merger hawks who'll decide your cable future*, WASH. POST: THE SWITCH (July 7, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/07/07/these-are-the-fcc-merger-hawks-wholl-decide-your-cable-future/?utm_term=.e2d6bfaac521 [https://perma.cc/DK9Q-AWBW].

infrastructure."[166] The FCC has also hired individuals with experience in the traditional antitrust agencies.[167]

3. This Proposal Would Not Lead to the Approval of Anticompetitive Mergers, Nor Would it Lead to the Denial of Procompetitive Mergers

Scholar Laura Kaplan has expressed concerns that, if the FCC obtains sole review authority, the FCC could approve an anticompetitive merger on the basis that it serves the public interest.[168] However, this hypothetical assumes the existence of a merger that passes the FCC's competition test, while failing the DOJ test. This scenario has never occurred and, given the similarity of the agencies' competition analyses, it seems highly unlikely.[169]

Kaplan also fears that the FCC would deny a neutral or pro-competitive merger on the basis that it doesn't satisfy the public interest.[170] However, this is only a concern if—like Kaplan—one dismisses the legitimacy of the public interest standard.[171] Kaplan notes that the public interest standard is "speculative" and "unbounded."[172] All merger review is necessarily speculative.[173] The "unbounded" nature of FCC review is, concededly, problematic. As discussed above in Part B(II), the FCC should only be able to impose voluntary commitments that are specific to competition concerns.[174]

4. This Proposal Would Not Open a Pandora's Box

Additionally, critics argue that granting the FCC review authority over telecommunications mergers could open a Pandora's box.[175] If the government accepts the premise that expert agencies should control merger review, does this mean that other dual review systems should be eliminated? For example, the banking industry utilizes dual review and could be analogized to telecommunications. [176] This Note does not rule out the possibility that other dual review systems should be reevaluated. However,

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166. *Id.*

167. Press Release, *Review Teams Announced for Proposed Comcast-Time Warner Cable-Charter And AT&T-DirecTV Transactions* (July 7, 2014), https://www.fcc.gov/document/comcast-time-warner-cable-charter-and-att-directv-transactions [https://perma.cc/TW6K-SXXY] (For example, the FCC hired Jamillia Ferris, a former Chief of Staff and Counsel to the Assistant Attorney General of the DOJ's Antitrust Division.)

168. *See* Kaplan, *supra* note 31, at 1602.

169. *See supra* note 169.

170. Kaplan, *supra* note 31, at 1602-03.

171. *Id.* at 1603.

172. *Id.*

173. *See supra* p. 14.

174. *See supra* p. 26.

175. *Id.*

176. J. Robert Kramer II, *Antitrust Review in Banking and Defense,* 11 GEO. MASON L. REV. 111, 115-17 (2002).

Congressional action is required in order to alter merger review processes, and it is unlikely that Congress would eliminate all dual reviews without a careful consideration of industry nuances.

IV. CONCLUSION

In the telecommunications industry, an overhaul of the merger review process is long overdue. In weighing whether the DOJ or FCC should lead the process, the FCC has four distinct advantages: its comprehensive public interest standard, subject matter expertise in telecommunications, a transparent review process, and independence from political pressure. Congress should follow the successful examples of the railroad and airline alliance agreements[177] and grant the FCC sole review authority of telecommunications mergers.

177. *See* Kaplan, *supra* note 31, at 1602 n. 281.

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Enigma Software Group USA, LLC v. Malwarebytes, Inc.

Allie Pisula

946 F.3D 1040 (9TH CIR. 2019)

In *Enigma Software Group USA, LLC v. Malwarebytes, Inc.,* the United States Court of Appeals for the Ninth Circuit reversed and remanded the district court's decision to grant the defendant's motion to dismiss all four claims brought by plaintiff.[1] The court held that the "otherwise objectionable" clause of 47 U.S.C. § 230(c)(2) does not include blocking content for anticompetitive reasons and that, since all four of Enigma's claims alleged anticompetitive behavior by Malwarebytes, the district court wrongly dismissed the claims.[2]

I. BACKGROUND

Section 230(c)(2) of the Communications Decency Act (CDA) contains an immunity provision, called the "Good Samaritan" provision, that allows internet-service providers to restrict access to "material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" without being subject to liability for offensive content.[3]

Congress enacted the Good Samaritan provision primarily in response to *Stratton Oakmont, Inc. v. Prodigy Services Co.*, which held that when a service provider chooses to filter some offensive content, that provider takes on the responsibility for any non-filtered offensive content, regardless of the provider's degree of knowledge of such content.[4] Some members of Congress, such as Representative Chris Cox, spoke up against this ruling, saying that it deterred creation of filtering software.[5] A driving force behind congressional desire for filtering software was to restrict the availability of online pornography to children.[6]

In early 1996, Congress adopted two different approaches to the issue raised by *Stratton Oakmont*: the Exon-Coats amendment and the Online Family Empowerment Act (OFEA).[7] The Exon-Coats amendment, which

1. Enigma Software Group USA, LLC v. Malwarebytes, Inc., 946 F.3d 1040, 1054 (9th Cir. 2019).
2. *See id.* at 1045.
3. *See id.* at 1045 (quoting 47 U.S.C. § 230(c)(2) (1996)).
4. *See id.* at 1046 (citing *Stratton Oakmont, Inc. v. Prodigy Services Co.,* 1995 WL 323710, *5 (N.Y. Sup. Ct. May 24, 1995)).
5. *See Enigma*, 946 F.3d at 1046.
6. *See id.*
7. *See id.*

attempted to stop pornography from dissemination, was invalidated by *Reno v. ACLU*.[8] OFEA, however, was enacted as § 230(c)(2) and successfully overruled the *Stratton Oakmont* decision by allowing internet-service providers to claim immunity for offensive content liability when filtering certain third-party content.[9]

Although filtering pornography was the main concern of Congress at the time, § 230 includes broad language that allows the filtration of more categories of offensive content.[10] Additionally, Congress included five policy goals at the start of the statute, presumably to help interpret the broad language.[11] The court pointed out that three of those policy goals are relevant to the case at hand: (i) "to encourage the development of technologies which maximize user control[;]" (ii) "to empower parents to restrict their children's access to objectionable or inappropriate online content[;]" and (iii) "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services."[12]

Since the enactment of § 230, the Ninth Circuit has only decided one other case relevant to the scope of the section: *Zango, Inc. v. Kaspersky Lab, Inc.*.[13] In that case, the court was called upon to determine whether or not computer security software providers could claim immunity under § 230.[14] The court answered that question in the affirmative, adding that providers also had discretion in determining what content falls under the "otherwise objectionable" clause of the statute.[15] Although the majority opinion in that case did not discuss the scope of that discretion any further, the concurring opinion by Judge Fisher warned that there would need to be limits on this discretion in the future.[16]

Enigma and Malwarebytes are direct competitors in the market for computer security software across the U.S.[17] Computer security software helps protect users from "malicious or threatening software" by alerting them of the presence of such malware and then blocking it from their computer.[18] When determining which content to block, Malwarebytes uses a program to look for Potentially Unwanted Programs (PUPs).[19] When a PUP is found, the program alerts the user to the PUP's presence via a pop-up alert and recommends that the user block that content.[20] In 2016, Malwarebytes began flagging Enigma's software, which Enigma claims is due to Malwarebytes changing their PUP program to include anticompetitive criteria when searching for programs to flag.[21]

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8. *See id.*
9. *See id.* at 1046-47.
10. *See id.* at 1047.
11. *See id.*
12. *See id.*
13. *See id.* (citing *Zango*, 568 F.3d 1169, 1175 (9th Cir. 2009)).
14. *See id.* (citing *Zango*, 568 F.3d at 1175).
15. *See id.*(citing *Zango*, 568 F.3d at 1175).
16. *See id.* at 1047 (citing *Zango*, 568 F.3d at 1175 (Fisher, J., concurring)).
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.* at 1048.

In Enigma's complaint, the company asserted three claims under New York state law and one claim under federal law, which alleged a violation of the Lanham Act.[22] Malwarebytes's motion to transfer venue was granted, and thus the case moved from New York to California.[23] The district court granted Malwarebytes' motion to dismiss for failure to state a claim based on their finding that Malwarebytes had immunity under § 230 for all three state law claims. The district court based its ruling on its understanding that *Zango* gave unlimited discretion to internet-service providers in determining which content was "otherwise objectionable."[24]

In regards to the federal law claim, the district court held that since Enigma's claim under the Lanham Act was related to false advertising and not intellectual property, the intellectual property exception to § 230 (found at 47 U.S.C. § 230(e)(2), and which states that § 230 immunity "shall not be construed to limit or expand any law pertaining to intellectual property") was inapplicable, even though the Lanham Act relates partially to intellectual property.[25] The district court therefore ruled in favor of Malwarebytes and dismissed all four claims.[26] Enigma's primary contention on appeal is that the district court interpreted *Zango* too broadly and that the Good Samaritan clause does not include anticompetitive conduct.[27]

II. ANALYSIS

The Ninth Circuit analyzed whether or not internet-service providers could block content for anticompetitive reasons and still fall under the immunity granted by § 230.[28] The court found that although there was a split among the district courts in applying the *Zango* ruling, the decisions holding *Zango* to not be overly expansive were the most persuasive because these decisions were most in line with the congressional history behind the CDA and with the stated policy goals of § 230.[29] Primarily, the court found that Congress's intention was to drive competition for filtering software, not hinder it, and that to hold that blocking content for anticompetitive reasons was valid under the "otherwise objectionable" clause would go against that intention.[30] The court concluded that since the immunity did not apply to content blocked for anticompetitive reasons, the three state law claims should not have been dismissed and therefore, the decision as to these three claims was reversed and remanded.[31]

In response to the Lanham Act claim, the court affirmed the finding of the district court that merely having a claim under the Act was not enough for the claim to fall under the intellectual property exception of § 230 if the claim

22. *See id.*
23. *See id.*
24. *See id.*
25. *See id.* at 1048-49.
26. *See id.* at 1049.
27. *See id.*
28. *See id.* at 1050.
29. *See id.* at 1050-51.
30. *See id.* at 1051.
31. *See id.* at 1052.

itself was not directly related to intellectual property.[32] Although the federal claim did not fall under the intellectual property exception, the federal claim was based on allegations of anticompetitive conduct like the state law claims and therefore the decision as to the federal claim was also reversed and remanded.[33]

Judge Rawlinson dissented, claiming that the arguments in favor of limiting the "otherwise objectionable" clause were unpersuasive and that the clause at issue allows for total discretion on behalf of the internet-service provider.[34]

III. CONCLUSION

The United States Court of Appeals for the Ninth Circuit held that 47 U.S.C. § 230(c)(2) does not provide immunity to internet-service providers who block content for anticompetitive reasons, because to hold that it does would violate the history and stated policy goals of the statute, and, therefore, the district court erred in dismissing the four claims brought by Enigma.[35]

32. *See id.* at 1053.
33. *See id.* at 1054.
34. *See id.* at 1054-55 (Rawlinson, J., dissenting).
35. *See id.* at 1044-54.

Frank v. Gaos

Joseph Kunnirickal

139 S. CT. 1041 (2019)

In *Frank v. Gaos*, the Supreme Court vacated the United States Court of Appeals for the Ninth Circuit's judgment affirming the district court's approval of a settlement agreement of a class-action claim, and remanded to the lower courts to determine whether or not the plaintiffs established Article III standing.[1] In a class-action suit, plaintiffs must establish standing in order for a court to approve the settlement and render it binding.[2] The underlying suit was brought against Google by a class of plaintiffs, including Paloma Gaos, who alleged that Google violated the Stored Communications Act ("SCA") by using referrer headers.[3] Gaos also asserted numerous state law claims.[4] The SCA has a provision creating a private right of action, so in concluding that the plaintiffs had standing, the trial court relied on *Edwards v. First American Corp.*, which held that when a statute creates a private right of action, the plaintiff only needs to allege that the defendant violated the statute to establish Article III standing.[5] However, in light of the Supreme Court's holding in *Spokeo, Inc. v. Robins*, which abrogated the ruling in *Edwards*, the Supreme Court reviewed whether or not the plaintiffs had established an injury sufficient to establish Article III standing.[6]

I. BACKGROUND

The SCA prohibits an internet service provider from knowingly divulging the contents of a communication stored by that service provider to any person or entity[7] and creates a private right of action for any person to recover from a person or entity that engaged in a violation of the Act.[8]

The complaints alleged that when an Internet user searched certain terms in Google and clicked on a hyperlink to open a webpage listed on the search results page, Google sent information, including the terms of the

1. Frank v. Gaos, 139 S. Ct. 1046, 1048 (2019).
2. *Id.* at 1046 (citing Fed. Rule Civ. Proc. 23(e)).
3. *Id.* at 1044.
4. *Id.* at 1044-45.
5. *Frank,* 139 S. Ct. 1044; Edwards v. First American Corp., 610 F.3d 514 (2010) (holding that injury exists wherever a statute gives an individual a statutory cause of action and the plaintiff claims the defendant violated the statute).
6. *Frank*, 139 S. Ct. 1045-46; Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) (holding that Article III standing requires a concrete injury even if there is a private right of action in the statute and the plaintiff alleges the defendant violated the statute).
7. Stored Communications Act, 18 U.S.C. §2702(a)(1).
8. *Id.* at §2707(a).

search, to the server that hosted the selected webpage.[9] This information is contained in a referrer header, and tells the server that the user arrived at the webpage by searching certain terms on Google.[10]

In the district court, Google motioned to dismiss the suit for lack of standing.[11] The district court denied Google's motion to dismiss the plaintiffs' SCA claims.[12] The district court, relying on *Edwards*, concluded that Gaos had alleged an injury sufficient to establish standing because the SCA created a private right of action and Gaos alleged a violation of the SCA that was specific to her, as the claim was based on a search that Gaos personally conducted.[13]

After the district court ruled on Google's motion to dismiss, the Supreme Court granted certiorari in *Edwards* to determine whether an alleged statutory violation alone can support standing.[14] Google continued to challenge the district court's ruling on its motion, until the Supreme Court dismissed *Edwards* as improvidently granted, at which point Google withdrew its argument that Gaos lacked standing for their SCA claims.[15]

Google then negotiated a class-wide settlement with the parties, with terms requiring Google to include certain disclosures about referrer headers on three of its webpages, but allowing Google to continue using referrer headers.[16] Google agreed to pay $8.5 million, with none of the funds going to absent class members, but distributed to six *cy pres* recipients instead.[17] *Cy pres* refers to the distribution of settlement funds "not amenable to individual claims or meaningful pro rata distribution to nonprofits whose work is determined to indirectly benefit class members."[18] The remainder of the funds would be used to pay administrative fees and attorney's fees.[19]

The district court granted preliminary certification of the class and preliminary approval of the settlement, but five class members objected to the settlement, complaining that settlements providing only *cy pres* relief do not comply with the requirements of Rule 23(e) of the Federal Rules of Civil Procedure, among other claims.[20] The district court granted final approval of the settlement.[21] Two of the objecting plaintiffs appealed, and while the case was pending in the Ninth Circuit, the Supreme Court issued its decision in *Spokeo*, which abrogated *Edwards*.[22] Notwithstanding the fact that Google

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9. *Id.* at 1044.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 1045-55 (citing *First Am. Fin. Corp. v. Edwards*, 564 U.S. 1018, 131 S.Ct. 3022 (2011)).
15. *Id.*
16. *Id.* at 1045.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* (citing Fed. Rule Civ. Proc. 23(e))
21. *Id.*
22. *Id.*

notified the Ninth Circuit of the *Spokeo* decision, the Ninth Circuit, without addressing *Spokeo*, affirmed the district court's ruling.[23]

II. ANALYSIS

The Supreme Court granted certiorari to decide whether a class action settlement that provides a *cy pres* award but not direct relief to class members satisfied the requirement under Rule 23(e) that class settlements be "fair, reasonable, and adequate."[24] However the Solicitor General filed an *amicus curiae* brief urging the Court to vacate and remand the case to the lower courts to address whether the plaintiffs had standing, in light of *Spokeo*.[25]

In non-class litigation, litigants can freely arrange settlement agreements on their own terms or voluntarily dismiss their claims without a court order.[26] However, in class-action suits, the "claims, issues, or defenses of a certified class – or a class proposed to be certified for purposes of settlement – may be settled, voluntarily dismissed, or compromised only with a court's approval."[27] A court cannot approve a class settlement if it lacks jurisdiction to settle the dispute, and a court lacks jurisdiction if no named plaintiff has standing.[28]

In light of the fact that, since the Supreme Court's holding in *Spokeo,* no court had an opportunity to analyze whether the complaints alleged SCA violations concrete and particularized enough to establish standing, the Supreme Court ordered supplemental briefing from the parties and the Solicitor General to address the issue.[29] In those briefs, there were numerous issues of law and fact raised that were not addressed before the Court or at oral arguments.[30] The Court concluded the standing question must be resolved in the lower courts, and therefore vacated and remanded the matter for further proceedings, expressly stating that it takes no position as to whether or not the plaintiffs have established standing.[31]

III. DISSENT (J. THOMAS)

Justice Clarence Thomas dissented, noting that he would reach the merits and find that the plaintiffs had established standing, but reverse the Ninth Circuit's judgment because the *cy pres*-only relief did not provide any meaningful form of relief to the absent class members.[32]

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23. *Id.*
24. *Id.* (citing Fed. Rule Civ. Proc 23(e)(2)).
25. *Id.* at 1045-46.
26. *Id.* at 1046 (citing Fed. Rule Civ. Proc. 41 (a)(1)(A)).
27. *Id.* (citing Fed. Rule Civ. Proc. 23(e)) (alterations in original).
28. *Id.* (citing *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, n.20 (1976)).
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 1047 (J. Thomas, dissenting).

On the issue of standing, Thomas reasoned that, because they alleged violations of the SCA and violations of state law, the plaintiffs alleged an injury sufficient to establish standing, even in light of *Spokeo*.[33] Although Thomas did not specifically state under which claims the plaintiffs had established standing, he concluded the plaintiffs either established standing under (i) their state law claims, because they were asserting that "private dut[ies]" owed to them "as individuals" had been violated, or (ii) their SCA claims, because the SCA created a private right of action.[34]

However, Thomas explained he would reverse the Ninth Circuit's judgment because the *cy pres*-only relief failed to meet numerous requirements of Rule 23 of the Federal Rules of Civil Procedure.[35] Namely, the fact that absent class members' interests were not represented and the fact that the class received no benefit under the settlement rendered the settlement unfair and unreasonable under Rule 23.[36]

33. *Id.*
34. *Id.* (quoting *Spokeo*, 136 S. Ct. 1540) (alterations in original).
35. *Id.*
36. *Id.* (citing Fed. Rule. Civ. Proc. 23(b)(3), (e)(2), (g)(4)).

Mozilla Corp., et al. v. FCC and United States of America

Christopher Frascella

940 F.3D 1 (D.C. CIR. 2019)

In *Mozilla Corp. v. FCC*,[1] the United States Court of Appeals for the D.C. Circuit upheld the FCC's 2018 *Restoring Internet Freedom Order* in part, vacated it in part, and remanded it in part.[2] The court found that it was permissible for the FCC to reclassify cable broadband internet as an "information service" rather than as a "telecommunications service" and mobile broadband as a "private mobile service" rather than as a "commercial mobile service,"[3] meaning that broadband internet providers would not be subject to the more rigorous common carrier regulations of Title II of the Telecommunications Act of 1996.[4] The court also found that the FCC's revised transparency rule, reducing disclosure requirements it had instituted under a prior administration, was not arbitrary and capricious.[5] The D.C. Circuit vacated the FCC's Preemption Directive, which would have prevented states from implementing more rigorous regulations of their own on broadband providers, and remanded the issues of pole attachments, the Lifeline program, and public safety matters, as the court found that the FCC failed to adequately address those issues in its 2018 Order.[6]

I. BACKGROUND

Mozilla Corporation, among other Internet companies, non-profits, state and local governments, and other petitioners, brought this action in objection to the terms of the FCC's 2018 *Restoring Internet Freedom Order*, which reversed many of the terms implemented by the FCC's prior 2015 *Promoting and Protecting the Open Internet Order* ("*Open Internet Order*").[7] Petitioners urged the D.C. Circuit to find the 2018 *Order* to be a misinterpretation or a violation of the law.[8]

1. Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019).
2. *See id.* at 86.
3. *See id.* at 35.
4. *See id.* at 17.
5. *See id.* at 49.
6. *See id.* at 86.
7. *See* Joint Brief for Petitioners Mozilla Corporation, Vimeo, Inc., Public Knowledge, Open Technology Institute, National Hispanic Media Coalition, NTCH, Inc., Benton Foundation, Free Press, Coalition for Internet Openness, Etsy, Inc., Ad Hoc Telecom Users Committee, Center for Democracy and Technology, and Incompas, Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019) (No. 18-1051), 2018 WL 5282022 at *1-2.
8. *See id.*

To provide a very brief overview of the recent history of the "net neutrality" dispute within the FCC, in 2002 the FCC classified broadband providers as an information service.[9] The Supreme Court found this classification permissible in *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*.[10] In 2015, the FCC classified them as a telecommunications service, which the D.C. Circuit found permissible in *United States Telecom Ass'n v. FCC*.[11] In 2018, the FCC classified broadband providers as an information service, which the D.C. Circuit found permissible here in *Mozilla*.[12]The defense test articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, was referenced heavily in each of these opinions.[13]

Prior to the 2015 *Order*, in *Brand X*, the Supreme Court held that it was appropriate to apply *Chevron* deference to the agency's interpretation of the definition of "telecommunications service"[14] and that it was permissible for the FCC to classify broadband providers as an information service.[15] In a dissenting opinion, Justice Scalia observed that the Court recognized that DNS functionality,[16] one of the bases for the FCC's classification, is scarcely more than routing information, which is "expressly excluded from the definition of 'information service.'"[17]

In *Verizon v. FCC*, which was also decided prior to the FCC's 2015 *Order*, the D.C. Circuit determined that, having classified fixed broadband providers as information service providers and mobile broadband providers as private mobile service providers, the FCC exempted those providers from treatment as common carriers, even under the agency's Section 706 authority.[18] This classification meant the FCC could not apply anti-discrimination[19] and anti-blocking rules to broadband providers.[20]

In its 2015 *Open Internet Order*, the FCC observed that, not only do broadband providers have the tools necessary to deceive consumers and degrade or disfavor content,[21] but they also—as the *Verizon* court noted

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9. *See* In Re Inquiry Concerning High-Speed Access to Internet Over Cable & Other Facilities, 17 F.C.C. Rcd. 4798, 4802 (2002).

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

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

12. *See Mozilla* at 65.

13. *See e.g.*, *Mozilla* at 19-20, 84; *USTA* at 692, 701; *Brand X* at 974, 979-86.

14. *See Brand X* at 980 (citing to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

15. *See Brand X* at 998-1000.

16. The Internet Domain Name System (DNS) translates user-friendly names and numeric network addresses, making the Internet easier to navigate. "Domain Name System," National Telecommunications and Information Administration, https://www.ntia.doc.gov/category/domain-name-system (last accessed: April 8, 2020).

17. *Brand X* at 1012-13 (Scalia, J., dissenting).

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

19. *See id.* at 655.

20. *See id.* at 658.

21. *See* Protecting & Promoting the Open Internet, *Report and Order*, 30 F.C.C. Rcd. 5601, para. 8 (2015) [hereinafter *Open Internet Order*].

despite its ruling—have powerful incentives to do so.[22] Explicitly in response[23] to the then-recent *Verizon* ruling, the FCC concluded in its 2015 Order that retail broadband internet service is "best viewed as separately identifiable offers of (1) . . . telecommunications service and (2) various 'add-on' applications, content, and services that generally are information services."[24] The FCC similarly observed that mobile broadband is best viewed as a commercial mobile service, as services that use public IP addresses are interconnected with the public switched network.[25] By changing how it classified broadband providers in its 2015 *Order*—as "telecommunications services"[26] and "commercial mobile services,"[27] rather than as "information services"[28] and "private mobile services,"[29] respectively—the FCC was then able to regulate those broadband providers as common carriers.[30] This permitted the FCC to address its concerns about consumer deception and other unfair conduct by broadband providers by prohibiting blocking, throttling,[31] and/or paid prioritization,[32] citing its authority to do so under Section 706, Title II, and Title III of the Communications Act.[33]

Subsequent to the 2015 *Order*, the D.C. Circuit in *United States Telecom Ass'n v. FCC* found that it was reasonable for the FCC to categorize DNS and caching connected to a telecommunications service to fall under the telecommunications management exception (TME), meaning providers of that functionality should be classified as a telecommunications service rather than an information service, and thus subject to Title II regulation as common carriers.[34] The *USTA* court also noted that its role was to ensure the FCC acted within Congress' delegation of authority to the agency, per the *Chevron* doctrine,[35] which the court ultimately found the agency to have done.[36]

In its 2018 *Order*, the FCC sought to revert to its 2002 standards, upheld by the Court in *Brand X*, by classifying broadband providers as providers of

22. *See Open Internet Order*, at para. 19 (citing to *Verizon* at 645-46); *see also* Joint Brief for Petitioners at *1-2.

23. *See Open Internet Order* at para. 50.

24. *Id.* at para. 47.

25. *See id.* at para. 48. This paragraph also notes that "[u]nder the statutory definition, commercial mobile services must be 'interconnected with the public switched network (as such terms are defined by regulation by the Commission).'" *Id.*

26. *See Open Internet Order* at para. 29.

27. *Id.* at para 48.

28. *Id.* at para 47.

29. *Id.* at para 48.

30. *See id.* at para. 364, 403; *see also* Joint Brief for Petitioners, Mozilla Corp. v. FCC, at *1-2.

31. Throttling is the degradation of a service rather than the outright blocking of it. *See Open Internet Order* at para. 106.

32. *See id.* at para. 14.

33. *See id.* at Appendix B, para. 13.

34. *USTA*, 825 F.3d 674, 706 (D.C. Cir. 2016). To be clear, a provider of DNS and caching functionality that is not connected to a telecommunications service would still be classified as a provider of information services under the TME as outlined in *USTA*.

35. *See id.* at 696-97.

36. *See id.* at 697-98, 703-05.

an information service, not a telecommunication service.[37] The FCC additionally argued that its 2018 adjustments to the 2015 *Order*'s transparency rule was appropriate, given the increased burden the rule represented to providers without a proportionate benefit to consumers or to the FCC,[38] and that its deregulatory policy should preempt any future contrary state policy.[39]

II. ANALYSIS

A. Common Carriers

The court conducted the two-step *Chevron* deference test, citing the findings in *Brand X* as sufficient to show that Congress left the matter of classification[40] to the FCC, and that, with regards to fixed broadband providers specifically, DNS and caching functionality eschew claims of unreasonableness in the FCC's decision to classify those providers as information services.[41]

The petitioners put forward several arguments challenging the reasonableness of the FCC's classification. The court found petitioners' "walled gardens" argument[42] to be inconsistent with the holding in *Brand X*, which puts forward DNS and caching as reasons to classify providers as information services providers, beyond any arguments about information services classification based solely on add-on services.[43] Similarly, the court concluded that the petitioners' argument regarding the "highly ambiguous" TME[44] conflated permissive interpretations of the Title II Order with mandatory interpretations, and as a result failed to consider that the FCC can adopt a contrary view so long as that view is not unreasonable.[45] The court determined petitioners' analogy to the FCC's older adjunct-to-basic framework was inapplicable to such a fact-specific determination best made by agency experts.[46]

The *Mozilla* court also deemed the functional integration argument to be inapplicable, as it failed to establish that there was a clear standalone

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

38. *See Restoring Internet Freedom Order* at para. 215.

39. *See id.* at para. 195.

40. Classification of broadband service providers as providers of telecommunications services or information services. *See Mozilla* at 20.

41. *See id.*

42. This is the argument that access to add-on services that could be considered information services represented access to a "walled garden" and therefore the telecommunications functionality should still be classified and regulated as such. *See* Joint Brief for Petitioners, *Mozilla*, at *6.

43. *See Mozilla* at 23.

44. *See id.* at 32.

45. *See id.* at 24.

46. *See id.* at 30-32.

telecommunications offering.[47] The argument is in part based on the faulty premise that a quantitative balancing determines how a provider should be classified, and it fails to otherwise show that the FCC's stance is unreasonable.[48]

Turning to the classification of mobile providers, the court held that interpretations that avoided self-contradiction "have a leg up on reasonableness,"[49] that the FCC's revised definitions of "public switched network" and "interconnected service" were within its authority,[50] and that the FCC's substitutability test was appropriate for determining that mobile broadband is not the functional equivalent of mobile voice.[51] The court similarly held *Chevron* deference applied to the agency's re-interpretation of its authority under Section 706.[52]

Finding none of the petitioners' arguments persuasive, the court found that the 2018 *Order* did not violate the law in classifying fixed broadband internet service providers as information service providers and mobile broadband providers as private mobile providers.[53]

B. Transparency Rule, Preemption Directive, and Remanded Issues

After clarifying that petitioners Mozilla and Internet Association had standing, the court found that they had sufficient notice through the question and corresponding comments in the FCC's Notice of Proposed Rulemaking regarding legal authority for the transparency rule.[54] The court similarly found the argument by intervenor Digital Justice—that the FCC's modifications to the transparency rule were arbitrary and capricious as they failed to take into account the impact on entrepreneurs and other small businesses—to be unpersuasive, as the *Order* specifically addressed keeping entrepreneurs and small businesses informed about the transparency rule.[55]

The court concluded that the FCC failed to ground its Preemption Directive in any lawful source of statutory authority.[56] After demonstrating that the FCC had neither express nor ancillary authority to issue the directive,[57] the court observed the Communication Act's "vision of dual federal-state authority and cooperation,"[58] and pointed out that conflict-preemption can only apply where there is an existing state practice that

47. *See id.* at 34.
48. *See id.* at 34-35.
49. *See id.* at 37.
50. *See id.* at 38-40, 43.
51. *See id.* at 44-45.
52. *See id.* at 46.
53. *See id.* at 35, 45, 46, 47-48.
54. *See id.* at 48.
55. *See id.* at 48-49.
56. *See id.* at 74.
57. *See id.* at 75-76.
58. *Id.* at 81.

actually undermines a regulation—and even then it is a fact-specific inquiry.[59] As such, the *Mozilla* court vacated the Preemption Directive.[60]

Several governmental petitioners were able to persuade the court that the FCC failed to take public safety into account in its 2018 *Order*, despite the FCC's founding purpose, which includes the promotion of safety through wired and radio communications, thus making the *Order* arbitrary and capricious.[61] Additionally, the court found that the FCC failed to address the legal contradictions regarding pole attachments[62] and the Lifeline program[63] created as a result of its changes in classifications. The court remanded these three portions of the 2018 *Order* for the FCC to address.[64]

III. CONCLUSION

The court vacated the Preemption Directive, remanded the issues of public safety, pole attachments, and the Lifeline program, and left untouched provisions regarding changes to the transparency rule and the classification of broadband providers.[65] As a result, broadband providers are once again considered providers of information services, and their reporting requirements are reduced.[66] A request for rehearing en banc was denied on February 6, 2020.[67]

59. *See id.* at 85.
60. *See id.* at 74.
61. *See id.* at 59-60.
62. *See id.* at 65-66.
63. *See id.* at 69.
64. *See id.* at 86.
65. *See id.*
66. *See Restoring Internet Freedom Order* at para. 3.
67. *See* Per Curiam Order, denying petitioners' and intervenor's request for panel reh'g, Mozilla Corp. v. FCC, (No. 18-1051), Document #1827520 at *1.

Patel v. Facebook, Inc.

Shuyu Wang

932 F.3D 1264 (9TH CIR. 2019)

In *Patel v. Facebook, Inc.*,[1] the United States Court of Appeals for the Ninth Circuit affirmed the United States District Court for the Northern District of California's decision to grant Facebook users' (plaintiffs) motion for class certification and denied Facebook's (defendant) motion to dismiss on the basis of standing.[2]

I. BACKGROUND

Facebook is a social network platform that allows its users to connect with each other by sending friend requests.[3] When users become friends, they can share content such as text and photographs.[4] Users can also tag their Facebook friends in photos posted to Facebook, which identifies the friend in the photo by name and includes a link to that friend's Facebook profile.[5]

In 2010, Facebook launched a "Tag Suggestions" feature.[6] If the feature is enabled, Facebook may use facial recognition technology to analyze whether a user's friends are present in photos uploaded by that user.[7] This technology scans uploaded photos and detects whether they contain images of faces.[8] Then, it extracts facial geometric data points to create a face map.[9] The face map is then compared to face templates in Facebook's database, which contains data from users that have been tagged in more than one photo and have not opted out of the Tag Suggestions feature.[10] If there is a match, Facebook may suggest tagging the person in the photos.[11] These user face templates are stored on Facebook's servers, and neither the servers nor Facebook's headquarters are located in Illinois.[12]

Users living in Illinois brought a class action against Facebook, claiming that this face recognition technology violated sections 15(a) and 15(b) of the Illinois Biometric Information Privacy Act (BIPA).[13] The sections require a private entity collecting, using, and storing an individual's

1. Patel v. Facebook, Inc., 932 F.3d 1264 (9th Cir. 2019).
2. *Id.*
3. *Id.* at 1267.
4. *Id.*
5. *Id.*
6. *Id.* at 1268.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*; *see also id.* n.2.
11. *Id.*
12. *Id.*
13. *Id.*

biometric identifiers to notify the individual in writing and secure a written release prior to taking any action, which, according to the complaint, Facebook failed to do.[14] The users also moved to certify themselves as a class under Rule 23 of the Federal Rules of Civil Procedure.[15]

Facebook challenged the users' standing via a motion to dismiss, but the district court denied its motion and certified the class.[16] Facebook timely appealed this decision.[17]

II. ANALYSIS

The Ninth Circuit reviewed the district court's decision *de novo*.[18] The appeal involved two main issues: (1) whether the users have standing to sue Facebook, and (2) whether the district court abused its discretion by certifying the class action.[19]

As for the first issue, a plaintiff that has standing to sue must have suffered an "injury in fact," which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.[20] The Ninth Circuit considered both history and legislative judgement to determine whether the users have suffered a sufficiently concrete injury.[21]

The court adopted a two-step approach to decide whether the users' injury arose from Facebook's failure to comply with BIPA.[22] First, the court asked whether the statutory provisions at issue were established to protect concrete interests as opposed to purely procedural rights.[23] The disputed right in this case was the right to privacy, which has been long recognized as a common law basis for suit.[24] Moreover, the Supreme Court, in a recent decision, has recognized that advances in technology can increase the potential for unreasonable intrusions into personal privacy.[25] Following these precedents, the Ninth Circuit concluded that an invasion of an individual's biometric privacy rights is closely related to the traditional harm to the right to privacy because they both encompass an individual's control of his or her personal information.[26]

Applying this to the instant case, the court found that the facial biometric data collected by Facebook could be used to identify an individual.[27] Such development of a face template without user consent under

14. *Id.* at 1268-69; *see also id.* at 1268 n.3.
15. *Id.* at 1269.
16. *Id.* at 1269-70.
17. *Id.* at 1270.
18. *See id.* at 1270, 1275.
19. *See id.*
20. *Id.* at 1270.
21. *Id.*
22. *Id.* at 1270-71.
23. *Id.* at 1270.
24. *Id.* at 1271.
25. *Id.* at 1272 (citing *Carpenter v. U.S.*, 138 S.Ct. 2206, 2214-15 (2018)).
26. *Id.* at 1273.
27. *Id.*

BIPA's requirement invades an individual's private affairs.[28] Thus, BIPA protects an individual's concrete interest in privacy.[29]

The court then turned to the second inquiry: whether a violation of BIPA actually harms or presents a material risk of harm to the interests in privacy. To address this question, the court aligned with the Illinois Supreme Court on the position that the protections offered by BIPA are crucial in the digital world, because a private entity's failure to comply may result in the loss of an individual's biometric privacy.[30] In other words, Facebook's alleged collection, use, and storage of users' face templates was the very same substantive harm targeted by BIPA.[31] Subsequently, the Ninth Circuit concluded that the users' allegation satisfied the court's two-step inquiry and showed concrete and particularized harm that was sufficient to confer standing.[32]

The court then moved on to address the second main issue of this case and to review whether the district court abused its discretion by certifying the class action.

As for this issue, Facebook urged that a Rule 23(b)(3) motion should not be granted because there were no questions of law or fact common to class members predominating over any questions affecting only individual members,[33] and a class action would not be superior to other available methods in terms of fairness and efficiency.[34] Facebook contended that BIPA bears no expressive intent to provide a cause of action against conduct that occurred extraterritorially.[35] Since Facebook's collection and use of biometric data occurred outside Illinois, the question of whether the cause of action arises "primarily and substantially" from events within Illinois remained undecided for the district court.[36] In other words, the common questions did not predominate, thus the district court erred in certifying the class action.[37] Additionally, Facebook argued that a class action for this case might pose great difficulties for the court to manage, and that a possibly enormous award of statutory damages defeated superiority.[38]

The Ninth Circuit disagreed with Facebook's arguments. Recognizing that BIPA, on its face, does not clarify where a violation occurs in the matter of Facebook's collecting facial recognition data, the court described two potential scenarios. If violation of BIPA occurred when individuals used Facebook in Illinois, there was no need to show a "primary and substantial" event due to the domicile of the users. If violation occurred when Facebook created face templates on its servers, the district court could try the issue of

28. *Id.*
29. *Id.*
30. *Id.* at 1274.
31. *Id.* at 1275.
32. *Id.*
33. *Id.*
34. *Id.* at 1276.
35. *Id.* at 1275.
36. *Id.* at 1275-76.
37. *Id.*
38. *Id.* at 1276.

extraterritoriality.[39] Nevertheless, neither of the scenarios automatically defeated predominance, and the district court could have come up with a conclusion consistent with this existing decision.[40]

The court also turned down Facebook's argument as to superiority. It looked into the legislative intent of BIPA to determine whether the potential for enormous liability could justify a denial of class certification.[41] However, the court found nothing in the text or legislative history of BIPA intending a cap for statutory damages, and to deny class certification on these grounds would "subvert legislative intent."[42] Thus, the court held that the district court also did not abuse its discretion in determining that a class action is superior to individual actions.[43]

III. CONCLUSION

In sum, the Ninth Circuit concluded that the users sufficiently alleged concrete injury-in-fact and thus had standing,[44] and that the district court did not abuse its discretion in determining that the predominance superiority requirement for class certification was met.[45] Therefore, the court affirmed the district court's decision.[46]

39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 1276.
43. *Id.* at 1277.
44. *Id.* at 1275.
45. *Id.* at 1275-76.
46. *Id.* at 1277.

Prometheus Radio Project v. FCC (Prometheus IV)

Andrew Magloughlin

939 F.3D 567 (3D CIR. 2019)

In *Prometheus Radio Project v. FCC*[1], the United States Court of Appeals for the Third Circuit vacated and remanded the FCC's reconsideration order and incubator order relating to media ownership restrictions as arbitrary and capricious under 5 U.S.C. § 706(2)(A) because the FCC failed to address the orders' impact on station ownership by women and minorities.[2]

I. BACKGROUND

The FCC has always held authority to regulate broadcast media ownership under the Communications Act of 1934.[3] Ownership restrictions imposed under this authority intend to promote competition, diversity, and localism.[4] However, after decades of technological change in the communications field, Congress worried the FCC's broadcast ownership rules might harm competitiveness of entities burdened by them.[5] So, with Section 202(h) of the Telecommunications Act of 1996 as amended, Congress required the FCC to review each of its media ownership rules on a quadrennial[6] basis and repeal those that no longer serve the public interest in light of competitive developments.[7] One of the considerations for public interest review under Section 202(h) is impact on diversity, including broadcast station ownership by women and minorities.[8]

These quadrennial reviews have spawned litigation galore and the relevant history is complex.[9] The same Third Circuit panel in this case[10] partially vacated and remanded the FCC's 2002 Biennial Review reforms for loosening ownership restrictions as arbitrary and capricious in *Prometheus*

1. Prometheus Radio Project v. FCC, 939 F.3d 567 (3d Cir. 2019) [hereinafter *Prometheus IV*].
2. *Id.* at 573.
3. *Id.* at 573-74.
4. *Id.* at 573.
5. *Id.* at 574.
6. The Telecommunications Act of 1996 § 202(h) originally required biannual review but Congress later amended this to quadrennial review by a subsequent law passed in 2004. *Id.*
7. *Id.* at 573-74.
8. *Id.* at 574, 591.
9. *Id.* at 572-77 ("Here we are again.").
10. "This case" refers to Prometheus IV.

I.[11] Then, the same panel again in *Prometheus II* partially vacated and remanded the FCC's 2006 Quadrennial Review ownership reforms and its proposal for promoting broadcast ownership by women and minorities as arbitrary and capricious.[12] Next, in *Prometheus III*, the same panel found that the FCC's twelve-year long delay in defining "eligible entit[y]"[13] for purposes of promoting fledgling broadcast stations by women and minorities was unreasonable.[14]

This case, *Prometheus IV*, involves both the FCC's response to *Prometheus III* and its subsequent reversal of this response after the administration change following the 2016 presidential election.[15] In 2016, under then-Chairman Tom Wheeler, the FCC completed its delayed 2014 Quadrennial Review, retaining broadcaster ownership restrictions and declining to create a broadcast incubator program as suggested by commenters.[16] Industry groups petitioned the FCC for rehearing, and the FCC under Wheeler's successor, Chairman Ajit Pai, granted it, which led to the FCC's reconsideration order on ownership restrictions in 2017 and incubator order establishing a broadcast incubator program in 2018.[17]

The reconsideration order repealed bans on cross-ownership of television stations and newspapers, as well as television stations and radio stations.[18] It partially relaxed the FCC's local TV ownership rules by repealing the "eight voices" rule that banned mergers in markets that would have fewer than eight independently-owned TV stations following a proposed transaction.[19] The reconsideration order also preserved a blanket ban on mergers between two of the top four TV stations in a given market, but amended it to permit discretionary waivers.[20] The incubator order incentivized incumbent broadcasters to train, finance, and provide resources for new market entrants by waiving radio ownership rules for incumbents in "comparable markets," which are radio station markets with a similar number of stations as the market of the new entrant.[21] Eligible entities for this assistance must (1) qualify as small businesses under the Small Business Administration's criteria and (2) be "new entrants," defined as businesses that do not currently own any television stations or more than three radio stations.[22] The FCC believed these rules would boost ownership among women and minorities.[23]

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11. Prometheus IV, 933 F.3d at 574; Prometheus Radio Project v. FCC, 373 F.3d 372 (3d. Cir. 2004).
12. Prometheus IV, 933 F.3d at 574; Prometheus Radio Project v. FCC, 652 F.3d 431 (3d. Cir. 2011).
13. Prometheus Radio Project v. FCC, 939 F.3d 567, 575 (3d Cir. 2019).
14. Prometheus IV, 933 F.3d at 574; Prometheus Radio Project v. FCC, 842 F.3d 33 (3d. Cir. 2016).
15. Prometheus IV, 939 F.3d at 575-76.
16. *Id.* at 575.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 576.
22. *Id.*
23. *Id.*

Ten entities sought judicial review for a combination of provisions in the reconsideration order and incubator order.[24] The Independent Television Group argued that the FCC's decision to eliminate the eight voices rule but retain the prohibition on mergers of the top four television stations in a market was arbitrary and capricious under 5 U.S.C. § 706(2)(A).[25] Another group of petitioners, including the National Association of Black-Owned Broadcasters, argued that the FCC's definition of "comparable markets" was arbitrary and capricious under § 706(2)(A) and lacked notice under 5 U.S.C. §§ 553(b)-(c).[26] This group also argued that the FCC unreasonably delayed extending its cable procurement rules to broadcasters under 5 U.S.C. § 601(1).[27] A final group, including the Prometheus Radio Project, argued that the FCC failed to adequately consider the impact of its revisions to its ownership rules on minorities and women, making them arbitrary and capricious under § 706(2)(A).[28] The Third Circuit obtained jurisdiction over each of these challenges and consolidated them in this case.[29]

II. ANALYSIS

A. Standing

The court rejected arguments by intervenors that petitioners lacked standing to seek review of the FCC's orders.[30] Standing requires:

> (1) [A]n 'injury in fact,' meaning 'an invasion of a legally protected interest which is (a) concrete and particularized[,] and (b) actual or imminent, not conjectural or hypothetical,' that is (2) 'fairly traceable to the challenged action of the defendant,' and it must (3) be 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'[31]

Intervenors argued petitioners lacked standing because (1) they failed to file materials proving standing in their initiating briefs, (2) there was no sufficiently evident harm to the petitioners from repealing the broadcast ownership rules and (3) petitioners' legal arguments addressed diversity issues instead of their stated harm of industry consolidation.[32]

Each argument against standing failed. First, the court held that standing for administrative review may be proven at any time during litigation by supplemental submission.[33] All persuasive authority from federal circuit courts holds that standing for administrative reviews may always be proven

24. *Id.*
25. *Id.* at 576-77.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 576.
30. *Id.* at 578.
31. *Id.* (quoting Lujan v. Def. of Wildlife, 504 U.S. 555, 560-61 (1992)).
32. *Id.* at 578-80.
33. *Id.* at 579.

by supplement.[34] Contrary persuasive authority supporting the intervenors came solely from the D.C. Circuit, which has a local rule that requires filing evidence of standing in initiating briefs for administrative reviews.[35] The Third Circuit has no such rule.[36] Second, the court held that petitioners stated a sufficiently evident harm because the type of merger that would damage their market share can only happen but-for the reconsideration order, which has an explicit policy of boosting consolidation.[37] Finally, the court rejected intervenors' contention that petitioners' legal arguments must involve harm to competition to have standing because there is no such requirement for standing under the Administrative Procedure Act or Article III of the United States Constitution.[38]

B. Hard Look Review

Here, the court vacated and remanded the reconsideration order and the incubator order as arbitrary and capricious because both failed to consider their impact on broadcast ownership by women and minorities.[39] But the court affirmed on challenges to the "comparable market" definition, cable procurement extension, and maintenance of the four-station television merger rule.[40] Each of the issues considered in this case, except the cable procurement rule, involved hard look review.[41] To survive hard look review under § 706(2)(A), an agency's regulation must "examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made."[42] Congress required the FCC to consider impact on women and minority ownership under Section 202(h) by requiring public interest review of media ownership rules.[43]

First, the court ruled that the FCC provided adequate evidence for maintaining its prohibition on mergers among the largest four television stations in a market.[44] The record included facts such as a large "cushion" of ratings and viewership between the fourth and fifth largest stations in local and national markets.[45] It also showed that the top four stations in most marketplaces are affiliates of the four largest broadcasters—ABC, CBS, NBC, and Fox.[46] Lastly, mergers among the third and fourth most-viewed stations in the top ten markets would produce a new largest station in each market and substantially boost consolidation.[47] Together, these facts in the

34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 580-81.
39. *Id.* at 589.
40. *Id.* at 588-89.
41. *See id.* at 577.
42. *Id.* (quoting Motor Vehicles Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).
43. *Id.* at 574, 591.
44. *Id.* at 581.
45. *Id.*
46. *Id.*
47. *Id.*

record justified the FCC's decision to maintain its prohibition against mergers of top four stations.[48] While there may have been more effective or efficient ways to draw pro-competitive lines prohibiting mergers, the FCC's action was within its lawful discretion.[49]

Next, the court found that the FCC provided adequate notice and reasoned decisionmaking for its "comparable markets" definition.[50] Adequate notice under §§ 553(b)-(c) requires that a notice of proposed rulemaking "fairly apprise interested persons of the subjects and issues before the agency."[51] Courts consider relative shock of commenters in response to a publicly released order as a factor for evaluating notice.[52] The FCC defined "comparable markets" as markets that have a similar number of radio stations as the incumbent station providing support to a qualifying entity.[53] Petitioners believed comparable markets would be based on population.[54] However, the text of the relevant Notice of Proposed Rulemaking informed petitioners that the FCC intended to base this definition on the number of stations in a market.[55] The FCC's response to petitioners' concerns that defining "comparable markets" based on the number of stations would decrease diversity by permitting waivers in markets with dissimilar population size satisfied hard look review.[56] The court found that the FCC adequately explained its rejection of petitioners' proposed definition and diversity concerns by reasoning that a station-based definition would not harm diversity, since many sparsely-populated markets with lots of stations are ethnically diverse.[57]

But the court delivered a blow to the FCC's reconsideration order by ruling it did not adequately address the impact of removing broadcast ownership rules on station ownership by women and minorities.[58] The court lambasted the FCC for comparing its own data to an incomplete and methodologically faulty dataset.[59] Even if the FCC had used accurate comparison data, it engaged in poor statistical analysis by comparing *absolute* numbers of minority-owned stations before and after relaxing ownership rules.[60] Confounding variables such as the total number of broadcast stations in existence may mean that repealing ownership rules decreased *the proportion* of minority owned stations in the dataset despite an *absolute* rise.[61] Also, the FCC provided no data on station-ownership by women.[62] The FCC responded to the court's concerns in litigation by claiming diversity is one of

48. *Id.*
49. *Id.* at 582.
50. *Id.* at 583.
51. *Id.*
52. *Id.*
53. *Id.* at 583.
54. *Id.* at 582-83.
55. *Id.* at 583.
56. *Id.* at 584.
57. *Id.*
58. *Id.*
59. *See id.* at 584-87.
60. *Id.* at 586.
61. *Id.* at 586.
62. *Id.* at 585-86.

many considerations under its public interest review, that it received support from many minority-owned entities, and that no commenters submitted better data.[63] While the FCC is not required to produce empirical data under the Administrative Procedure Act, it must use adequate analysis to justify its conclusion that repealing broadcast ownership caps would have no impact on ownership by women and minorities.[64] The court agreed with the FCC that diversity is only one part of public interest analysis that might be usurped by other considerations, but it must first show reasoned analysis for potential diversity impact before offering countervailing reasons to prioritize other goals.[65]

Lastly, the court found no unreasonable delay by the FCC with respect to declining to extend its cable procurement rules to broadcasters.[66] The challenge to the delay of the cable procurement rules involved 5 U.S.C. § 706(1) review for reasonableness of agency delay, which balances (1) the length of time elapsed since the duty to act, (2) the context of the statute authorizing action, (3) the consequence of agency delay, and (4) error, inconvenience, practical difficulties, or limited agency resources.[67] The court agreed with the FCC that delay was not unreasonable because it received no support from commenters on the issue when originally considered as part of the order extending from the 2014 Quadrennial Review and because it sought comment on the issues again in its 2018 Quadrennial Review.[68]

III. CONCURRENCE IN PART

Judge Scirica partly dissented from the panel majority's finding because he believed the reconsideration order and incubator order were not arbitrary and capricious.[69] Instead of vacating the orders, Judge Scirica would have allowed them to go into effect and order the FCC to report findings on women and minority broadcaster ownership in its upcoming 2018 Quadrennial Review.[70]

In general, Judge Scirica believed the majority constrained the FCC's lawful discretion and should have deferred to its public interest findings that ownership restrictions hurt competition.[71] He based his decision in part on massive technological and competitive media industry upheaval wrought by the Internet.[72] Judge Scirica also found it relevant to the FCC's public interest analysis and hard look review under § 706(2)(A) that public commenters didn't rebut the FCC's statistical findings on competition or diversity.[73] The

63. *Id.* at 586-87.
64. *Id.* at 587.
65. *Id.* at 587-88.
66. *Id.* at 588.
67. *Id.* at 578.
68. *Id.* at 588.
69. *Id.* at 589-90.
70. *Id.* at 590.
71. *Id.* at 594.
72. *Id.* at 589 ("Studies in the record reinforce what most people old enough to recall the days before WiFi and iPads understand instinctively: the explosion of Internet sources has accompanied the decline of reliance on traditional media.").
73. *Id.* at 593.

FCC sought comment on the reconsideration order's impact on minorities and women and competition but received no empirical evidence contrary to its own statistical conclusions on both subjects.[74] He also noted that receiving accurate data for the impact of the reconsideration order on women and minorities is impossible because it involves hypothetical and subjective predictions about the future.[75] Thus, the record will probably never demonstrate clear impact to satisfy the majority's demands, and such a showing likewise isn't required by the Administrative Procedure Act.[76]

Scirica would have also deferred to the FCC's interpretation of Section 202(h) of the Telecommunications Act as to its statutory requirements to consider diversity under the *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, doctrine, since the statute's meaning is disputed.[77] Lastly, Scirica believed the FCC adequately explained its definition of "eligible entity" in its Incubator Order by choosing a definition that would allow minorities and women to benefit from it while avoiding Equal Protection Clause violations.[78]

IV. CONCLUSION

In sum, the court vacated and remanded the FCC's reconsideration order and incubator order for failure to consider the orders' impact on women and minorities.[79] *Prometheus Episode V*, "the FCC Strikes Back" could soon be around the corner if the FCC responds to its remand.[80]

74. *Id.*
75. *Id.* at 592.
76. *Id.*
77. *Id.* at 593.
78. *Id.* at 596-97.
79. *Id.* at 589.
80. *See id.* at 589 ("Because yet further litigation is, at this point, sadly foreseeable, this panel again retains jurisdiction over the remanded issues.").

Rosenbach v. Six Flags Entertainment Corp.

Julia Swafford

129 N.E.3D 1197 (ILL. 2019)

In *Rosenbach v. Six Flags Entertainment Corp.*, the Supreme Court of Illinois reversed the appellate court's holding and found that a technical violation of Illinois's Biometric Information Privacy Act ("BIPA"), without a showing of actual damages, can give rise to a cause of action.[1] The court relied on the Illinois statute's plain meaning to determine that a plaintiff's standing under this statute is not determined by actual harm, but rather by an invasion and infringement upon a statutory right, which gives rise to a cause of action.[2]

I. BACKGROUND

BIPA states that a private entity cannot obtain a person's biometric information unless it provides the person whose information is obtained or their representative with written notice of what biometric information is stored, informs said subject of the purpose and duration of information storage, and obtains a written release from the subject or representative.[3] The Act also gives aggrieved persons a right of action to recover liquidated or actual damages.[4]

Plaintiff Alexander Rosenbach, whose interests were represented by his mother Stacy Rosenbach, formed a class of similarly situated plaintiffs.[5] Alexander visited the amusement park Six Flags Great America on a field trip.[6] Prior to his visit, Alexander's mother, Stacy, purchased a season pass for Alexander online.[7] Alexander needed to complete two steps at the park in order to obtain his pass: go to a security checkpoint to scan his thumbprint into the park's database and proceed to another building to collect his season pass.[8] Six Flags stated they utilize this biometric data to "quickly verify customer identities" and to "make entry into the park faster and more seamless," which in turn aids in maximizing revenue.[9] Six Flags claimed the

1. Rosenbach v. Six Flags Entm't Corp., 129 N.E.3d 1997, 1200 (Ill. 2019).
2. *Id.* at 1206.
3. *Id.* at 1203.
4. *Id.* at 1999.
5. *Id.* at 1201.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

point of the biometric scan was to reduce season pass fraud and tie a unique identifier like a thumbprint to a season pass.[10]

After returning home, Alexander's mother asked him for a booklet of paperwork associated with the season pass, to which he responded "that no paperwork was provided."[11] Additionally, the complaint alleged that Six Flags retained Alexander's biometric information and that there was neither any publicly available information on "what was done with the information or how long it will be kept, nor . . . any 'written policy made available to the public that discloses [defendants'] retention schedule or guidelines for retaining and then permanently destroying biometric identifiers and biometric information.'"[12]

The plaintiff's complaint alleged violation of the Act, requested injunctive relief in the form of disclosures to those from whom the defendant collected biometric data, and asserted an action under the doctrine of unjust enrichment.[13] The first two counts survived defendant's motion to dismiss.[14] The defense then motioned for an interlocutory appeal under Illinois Supreme Court Rule 308, since the circuit court's ruling "involved a question of law as to which there is substantial ground for difference of opinion and an immediate appeal might materially advance the ultimate termination of litigation."[15]

The trial court proposed two questions of law: (i) whether an individual is an aggrieved person under the Act, and thus able to seek damages under the Act, when the only injury alleged is a violation of the portion of the Act that requires disclosures and written consent, and (ii) whether an individual is an aggrieved person under the Act, and thus able to seek injunctive relief under the Act, based on the same injury.[16] The appellate court answered both questions in the negative, finding that a violation of the Illinois statute was not enough to create a cause of action.[17] Additional injury had to be alleged.[18]

II. ANALYSIS

Since it was undisputed that Alexander's thumbprint constituted a biometric identifier under the meaning of the statute,[19] and violation of the statute was not contested,[20] the issue left for the court to decide was whether or not a plaintiff had standing under the Act and constituted an "aggrieved person" if they could not prove harm beyond the collection of their biometric information in a way that is inconsistent with the statute.[21] The court first

10. *Id.*
11. *Id.*
12. *Id.* at 1201.
13. *Id.*
14. *Id.* at 1202.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 1203.
20. *Id.* at 1204.
21. *Id.* at 1207.

looked to the language of the statute and then discussed its enforcement mechanisms in order to deduce whether a "violation, in itself, is sufficient to support . . . [the] statutory cause of action."[22]

The court began by disproving the defense's argument that actual harm is required by pointing to other Illinois General Assembly legislation where the legislature explicitly required actual harm.[23] Next, the court analyzed the plain meaning of the word "aggrieved," concluding that the statute does not require a person sustain "damages beyond a violation of his or her rights under the Act in order to bring an action under it."[24] The court began its plain meaning analysis by assuming the legislature intended the used, undefined word to have its "popularly understood meaning," being mindful of whether or not the term had an independent, legal meaning in mind.[25]

The court noted precedent defining aggrieved as " . . . denial of some personal or property right."[26] Further, the court stated this meaning accords with definitions in Meriam-Webster's and Black's Law dictionaries.[27] Based on this, a cause of action arises once a private entity fails to comply with the statue at issue.[28] This is especially important, as the court noted that once the right to biometric privacy is invaded, it cannot be restored.[29] Since private rights of action remain the only enforcement mechanism, the court believed the legislature meant for the statutory penalties to be serious.[30]

III. CONCLUSION

The Illinois Supreme Court held that, in order for a person to be aggrieved under Illinois' Biometric Information Privacy Act, their statutory rights simply need to be violated.[31] They do not have to prove harm beyond the violation of that right.[32] The court reversed the appellate court's contrary holding and remanded to the trial court for further proceedings.[33]

22. *Id.* at 1206.
23. *Id.* at 1204.
24. *Id.* at 1205.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 1206.
29. *Id.*
30. *Id.* at 1207.
31. *Id.*
32. *Id.* at 1206.
33. *Id.* at 1207.

In Re Zappos.com, Inc.

Katrina Jackson

IN RE ZAPPOS.COM, INC., 888 F.3D 1020 (9TH CIR. 2018)

In *In Re Zappos.com, Inc.*,[1] the United States Court of Appeals for the Ninth Circuit reversed and remanded the district court's judgement.[2] The court determined that its previous decision in *Krottner v. Starbucks Corp.*, and the court's most recent decision in *Clapper v. Amnesty International USA*, are not irreconcilable.[3] The Ninth Circuit held, pursuant to *Krottner,* that plaintiffs have Article III standing.[4]

I. BACKGROUND

In January 2012, hackers successfully breached the online retailer Zappos.com.[5] The hackers obtained personal identifying information (PII) for over 24 million Zappos customers, including individuals' names, account numbers, passwords, email addresses, billing and shipping addresses, telephone numbers, and credit and debit card information.[6] Following the breach, several Zappos customers filed putative class actions throughout the United States, claiming that Zappos.com did not sufficiently protect their personal information.[7] The law suits were consolidated for pretrial proceedings.[8] The district court granted in part and denied in part Zappos's motion to dismiss and granted Zappos's motion to strike the Complaint's class allegations.[9] The district court dismissed plaintiffs' claims for lack of Article III standing.[10] In doing so, the district court distinguished between the Plaintiffs, dividing them in two separate groups.[11] The district court ruled that the first group of plaintiffs, who had already suffered financial losses from the hacking incident, had Article III standing, while the plaintiffs who had not yet experienced any such loss lacked Article III standing.[12] The district court reasoned that only the first group of plaintiffs had Article III standing because those plaintiffs had experienced "actual fraud . . . as a direct result of the breach."[13] The district court found that, unlike the first group of plaintiffs, the

1. In Re Zappos.com, Inc., 888 F.3d 1020 (9th Cir. 2018).
2. *Id.*
3. *Id.*
4. *Id.* at 1023.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 1024.
10. *Id.* at 1023.
11. *Id.* at 1024.
12. *Id.*
13. *Id.*

second group lacked Article III standing because those plaintiffs "failed to allege instances of actual identity theft or fraud."[14] At issue on appeal was whether both groups of plaintiffs, solely focusing on the hacking incident itself and not any subsequent illegal activity, had Article III standing.[15]

II. ANALYSIS

"The court reviewed the district court's standing determination de novo."[16] The court began its analysis by establishing what a plaintiff must show to establish Article III standing.[17] To establish Article III standing, a plaintiff must show that he or she has suffered an "injury in fact[,]" "that is concrete and particularized, actual or imminent, not conjectural or hypothetical."[18] Moreover, a plaintiff must establish that the suffered injury is traceable to the challenged action and that the injury suffered is likely to be redressed by a favorable judicial decision.[19]

The court started by rejecting defendant's argument that the court's previous decision in *Krottner v. Starbucks Corp.* does not control this case.[20] Further, the court determined that its decision in *Krottner* is not inconsistent with the Supreme Court's judgement in *Clapper v. Amnesty International USA*.[21] First, the court looked at the Supreme Court's decision in *Clapper*.[22] The plaintiffs in *Clapper* brought suit arguing that the government's surveillance pursuant to the Foreign Intelligence Surveillance Act of 1978 would result in injury-in-fact to them as attorneys because the government could surveil privileged telephone and email communications between them and their clients abroad.[23] Plaintiffs argued that they had Article III standing "because there was an objectively reasonable likelihood that their communications would be acquired . . . at some point in the future."[24] However, the Court rejected plaintiffs' argument in that a reasonable likelihood of injury was insufficient, and that Article III standing requires an injury which is certainly impending.[25] The Court found that plaintiffs' injury was too attenuated, as it rested on a series of inferences.[26]

However, unlike like *Clapper*, in *Krottner* the Ninth Circuit held plaintiffs had established Article III standing.[27] In *Krottner*, a thief stole a laptop containing individuals' names, addresses, and social security numbers.[28] Following the incident, Starbucks sent out a letter to affected

14. *Id.*
15. *Id.* at 1023.
16. *Id.* at 1024.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 1025.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* (quoting *Clapper v. Amnesty International USA*, 568 U.S. 398, 401).
25. *Id.* at 1025.
26. *Id.* at 1026.
27. *Id.*
28. *Id.* at 1024.

employees informing them of the incident and telling them to monitor their financial accounts.[29] Subsequently, employees sued and were found to have Article III standing, alleging an "increased risk of future identify theft."[30] The court concluded that the plaintiffs had "alleged a credible threat of real and immediate harm" because a laptop with their personal information had been stolen.[31] The court distinguished itself from the Supreme Court's decision in *Clapper* because the standing analysis the Court applied there was "especially rigorous because the case arose in a sensitive national security context involving intelligence gathering and foreign affairs."[32] Moreover, the court determined that its decision in *Krottner*, unlike *Clapper*, did not involve a separation of powers issue.[33] The plaintiffs in *Krottner* did not rely on a series of interferences, rather the thief had stolen all the requisite information needed to open accounts and spend money in the plaintiffs' names.[34] Thus, the court rejected defendant's argument and found the Supreme Court's decision in *Clapper* was not inconsistent with the court's decision in *Krottner*.[35]

The Ninth Circuit asserted that its *Krottner* decision controls the result here.[36] The court found that, like *Krottner*, the type of information obtained from the Zappos breach placed the plaintiffs at a high risk for "phishing" and "pharming."[37] Specifically, plaintiffs alleged that their credit card number, information which Congress has treated as sensitive information, was seized.[38] According to the court, when Zappos urged its affected customers to change their passwords after the theft, Zappos conceded that the obtained information was highly sensitive.[39] As such, the court found that the plaintiffs sufficiently established the element of injury-in-fact.[40] Further, the court was not persuaded by Zappos's argument that the alleged injury-in-fact was not imminent.[41] The court reasoned that just because the plaintiffs may not experience the full extent of identity theft or fraud for years to come does not mean their injury is diminished.[42] Therefore, the court found that the plaintiffs had sufficiently pleaded an injury in fact based on the substantial risk the Zappos hackers posed.[43] The court concluded that the remaining Article III standing requirements were satisfied, holding that plaintiffs' risk of future harm was fairly traceable to the breach of Zappos and the risk of identity theft was redressable by relief.[44]

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29. *Id.* at 1025.
30. *Id.* (quoting *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1142 (9th Cir. 2010)).
31. *Id.* (quoting *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010)).
32. *Id.* at 1026.
33. *Id.*
34. *Id.*
35. *Id.* at 1023.
36. *Id.* at 1027.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 1028.
41. *Id.*
42. *Id.* at 1028-29.
43. *Id.*
44. *Id.* at 1029.

III. CONCLUSION

For the foregoing reasons, the court held plaintiffs have Article III standing and reversed and remanded the district court's judgement.[45] A petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit was denied on March 25, 2019.

45. *Id.* at 1030.