The Repeal of Net Neutrality: Does it Violate Title II of the Civil Rights Act of 1964?

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I. INTRODUCTION

On the evening of December 1, 1955, police forcibly removed a young woman from a local bus in Montgomery, Alabama, and arrested her when she refused to give up her seat for a White passenger.[1] At the time, Alabama law required African Americans to sit in the back of busses and relinquish their seats to White passengers if a bus became full.[2] Alabama's discriminatory state law denied Rosa Parks the *full and equal enjoyment* of Montgomery's local bus system.[3] Two years later, on September 4, 1957, law enforcement prohibited nine Black students from attending an all-White public high school in Little Rock, Arkansas.[4] Upon entering the school, Arkansas' National Guard blocked the nine Black students from entering the school, pursuant to Governor Orval Faubus' orders.[5] Arkansas' unwillingness to desegregate its public school system denied the Little Rock Nine the *full and equal enjoyment* of the state's public educational system.[6] Following this incident, on February 1, 1960, a diner denied four Black college students service at a local lunch counter in Greensboro, North Carolina.[7] The diner's lunch counter policy only permitted White customers to dine.[8] But fighting for equality, the young Black college students refused to leave despite the lunch counter's policy.[9] Stemming from intolerance and bigotry, North Carolina's diner denied the Greensboro Four the *full and equal enjoyment* of service at their local diner.[10] During the 1950s and early 1960s, discriminatory laws and practices continually denied the *full and equal enjoyment* of many public establishments to African Americans.[11] However, such discriminatory practices fueled the Civil Rights Movement, a movement that fought to ensure equality for African-Americans.[12]

On July 2, 1964, President Lyndon B. Johnson signed the Civil Rights Act of 1964 ("Civil Rights Act") into law, which aimed to eliminate discriminatory practices in places of public accommodation, such as hotels, restaurants, and local bus systems.[13] The Civil Rights Act protected an

1. *Today in History-December 1: Rosa Parks Arrested*, LIBR. OF CONG., https://www.loc.gov/item/today-in-history/december-01/ [https://perma.cc/ZP9C-CPBJ].
2. *Id.*
3. *See id.*; The Civil Rights Act, 42 U.S.C. § 2000(a) (1964).
4. *Civil Rights Movement*, HISTORY (Oct. 27, 2009), https://www.history.com/topics/black-history/civil-rights-movement#section_3 [https://perma.cc/4XDT-NPVS].
5. *Id.*
6. *See id.*; 42 U.S.C. § 2000(a).
7. *Civil Rights Movement*, *supra* note 4.
8. *See id.*
9. *Id.*
10. 42 U.S.C. § 2000(a); *Civil Rights Movement*, *supra* note 4.
11. *Civil Rights Movement*, *supra* note 4.
12. *Id.*
13. *Id.*

individual's right to fully and equally enjoy places of public establishments regardless of one's race or ethnicity.[14]

While discriminatory practices in places of public accommodation during the 1950s and 60s prompted the Civil Rights Act, there are similar issues today. [15] As America continues to progress socially, economically, and politically, places of public accommodation should not be confined to physical walls. In today's society, the Internet should be classified as a place of public accommodation. The Internet is an integral part of all of our lives and it will continue to revolutionize society for the better.[16] Thus, the law should guarantee all persons a right to fully and equally enjoy the Internet and its vast economic benefits.

Moreover, the Internet is one of the most common tools Americans use to receive information.[17] Due to rapid developments in social media and the sharing of digital news, 50% of all Internet users report that they receive breaking news via social media applications and Internet web browsers.[18] Over the years, Americans have become accustomed to freely receiving and imparting information and ideas via the Internet.[19] But this free exchange of material and knowledge is in jeopardy because, on October 1, 2019, the United States Circuit Court of Appeals for the District of Columbia ("D.C. Circuit") upheld the FCC's repeal of net neutrality.[20]

Net neutrality incorporates the idea that one's ability to access the Internet freely and equally is a human right.[21] Net neutrality is the principle that Internet service providers (ISPs), such as Comcast Xfinity, Verizon Fios, or AT&T, must treat all Internet content and Internet data equally, regardless of the source.[22] However, the D.C. Circuit affirmed the FCC's repeal of net neutrality.[23] ISPs may now engage in discriminatory practices including

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14. 109 CONG. REC. 22,839 (Dec. 30, 1963).

15. *Id.*

16. *See generally* Janna Anderson & Lee Rainie, *Stories from Experts About the Impact of Digital Life*, PEW RSCH. CTR. (July 3, 2018), https://www.pewresearch.org/internet/2018/07/03/stories-from-experts-about-the-impact-of-digital-life/ [https://perma.cc/2GN8-89VS]; *See generally* Kathleen Stansberry et al., *Experts Optimistic About the Next 50 Years of Digital Life*, PEW RSCH. CTR. (Oct. 28, 2019), https://www.pewresearch.org/internet/2019/10/28/experts-optimistic-about-the-next-50-years-of-digital-life/ [https://perma.cc/EX9J-CF96].

17. *See generally* Kristen Bialik & Katerina Eva Matsa, *Key trends in social and digital news media*, PEW. RSCH. CTR. (Oct. 4, 2017), https://www.pewresearch.org/fact-tank/2017/10/04/key-trends-in-social-and-digital-news-media/ [https://perma.cc/VQR6-VSQE].

18. *See generally* Nicole Martin, *How Social Media Has Changed How We Consume News*, FORBES (Nov. 30, 2018), https://www.forbes.com/sites/nicolemartin1/2018/11/30/how-social-media-has-changed-how-we-consume-news/#59a691573c3c) [https://perma.cc/EYR2-28HK].

19. *Id*.

20. *See* Mozilla Corporation v. FCC, 940 F.3d 1, 18 (D.C. Cir. 2019).

21. *Why Net Neutrality Should Be Considered a Human Right*, CITIZENS FOR GLOB. SOLS. (Aug. 3, 2017), https://globalsolutions.org/why-net-neutrality-should-be-considered-a-human-right/ [https://perma.cc/8WK7-LES2].

22. *Net Neutrality*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/net%20neutrality (last visited Nov. 11, 2020).

23. *Mozilla*, 940 F.3d at 18.

blocking, throttling, and paid prioritization.[24] Such discriminatory practices could result in an Internet that separates users by socioeconomic status or race.[25]

For example, individuals or private companies willing to pay ISPs at a higher rate may receive a faster, favored service, whereas individuals unwilling or unable to pay ISPs a competitive market price may find it much harder to compete and may receive slower Internet access.[26] Moreover, ISPs may begin to offer "bundled" Internet packages, similar to the market of television packages.[27] ISPs, like other private companies, are motivated by profits.[28] ISPs now have the market power as gatekeepers to impose "both technical and economic harms as part of a business negotiation, or favor their own higher-level services."[29] Not only can ISPs prevent a consumer's right to access lawful content, ISPs can degrade and slow down a consumer's network service.[30] The repeal of net neutrality and such harms associated with it could lead to a cable packaged Internet, jeopardizing the order of an open Internet. And because the Internet touches every facet of American lives, it should remain equally accessible to all.

The benefits of an open Internet are undisputed, including steady development in commerce, innovation, information, and free flowing speech.[31] But cable packaged Internet substantially harms such necessary benefits, which could severely and disproportionally impact African Americans and Hispanics.[32] African Americans and Hispanics, in comparison to Whites, rely substantially more on an open Internet to stay abreast of local and global news and are least likely to be able to afford an Internet package that offers a diverse set of unblocked, readily available content.[33] To prevent such a distorted outcome, the idea of Internet openness must be protected.

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24. *Id.* at 63.

25. *Id.*; *see* Keith Collins, *Net Neutrality Has Officially Been Repealed. Here's How That Could Affect You.*, N.Y. TIMES (June 11, 2018), https://www.nytimes.com/2018/06/11/technology/net-neutrality-repeal.html [https://perma.cc/3EQM-SFCT]; Michael J. Coren, *Without net neutrality in Portugal, mobile Internet is bundled like a cable package*, QUARTZ (Oct. 30, 2017), https://qz.com/1114690/why-is-net-neutrality-important-look-to-portugal-and-spain-to-understand/ [https://perma.cc/7SSU-JXK2].

26. *See* Collins, *supra* note 25.

27. *Id.*

28. *See generally* Tom Wheeler, Chairman, Fed. Commc'n Comm'n, Remarks at the Aspen Institute, *A Time to Look Forward: Protecting What Americans Now Enjoy* (Jan. 13, 2017), https://www.fcc.gov/document/remarks-chairman-wheeler-aspen-institute-washington-dc.

29. Protection and Promoting the Open Internet, *Report & Order on Remand, Declaratory Rule, and Order*, 30 FCC Rcd. 5601, 5629, para. 80, n.128 (2015) [hereinafter *2015 Order*].

30. *See id.* at 5892, para. 6.

31. See *id*. at 5603, para. 1.

32. Collins, *supra* note 25; Coren, *supra* note 25.

33. *Local News in the Digital Age*, PEW RSCH. CTR. (Mar. 5, 2015), https://www.journalism.org/2015/03/05/race-and-ethnicity-in-the-local-news-ecosystem/ [https://perma.cc/Z86U-BNUM]; Rakesh Kochhar & Anthony Cilluffo, *How wealth inequality has changed in the U.S. since the Great Recession, by race, ethnicity, and income*, PEW RSCH. CTR. (Nov. 1, 2017), https://www.pewresearch.org/fact-tank/2017/11/01/how-wealth-inequality-has-changed-in-the-u-s-since-the-great-recession-by-race-ethnicity-and-income/ [https://perma.cc/5CGQ-EREC].

Similar to the way Rosa Parks, the Little Rock Nine, and the Greensboro Four were found to be entitled to *full and equal enjoyment* of the various places of public accommodations, African Americans, Hispanics, and more generally people of color should be entitled to the *full and equal enjoyment* of the Internet.

This Note will establish that the repeal of net neutrality will have disparate effects on people of color because ISPs can engage in blocking, throttling, and paid prioritization of an individual's Internet access, resulting in unlawful disparate impact prohibited by Title II of Civil Rights Act of 1964. Part II will establish the legal and factual background of the FCC and its net neutrality proceedings. Part III will illustrate how the FCC's repeal of net neutrality enables ISPs to engage in conduct that disparately impacts people of color. Part IV will explain what a place of public accommodation means under federal civil right law. Part V will establish why the Internet should be considered a place of public accommodation under Title II of the Civil Rights Act. And lastly, Part VI will demonstrate how Title II of the Civil Rights Act prohibits disparate impact resulting from the FCC's repeal of net neutrality.

II. BACKGROUND

A. Past Net Neutrality Principles

Net neutrality, a term first coined in 2003, has governed many of the FCC's policy positions and regulatory frameworks.[34] Even before the term's recognition, FCC Chairman William Kennard in 2000 identified the importance of an open Internet, stating: "Consumers—the people who actually drive a market—deserve and will demand an open platform. They are used to openness in the dial-up world, and they will not want to be denied it in the broadband environment."[35] Four years later, FCC Chairman Michael Powell established the "Four Internet Freedoms" ("The Freedoms"), which encouraged ISPs to follow and promote Internet openness.[36] The Freedoms included the freedom to access content, run applications, attach devices, and obtain service plan information.[37]

The Freedoms illustrate the FCC's long-standing efforts in encouraging ISPs to allow their customers to freely impart and receive information via the Internet. Moreover, in 2010, the FCC officially adopted an Open Internet Order ("2010 Order"), which incorporated principles of net neutrality.[38] In an effort to "preserve the Internet as an open platform for innovation, investment,

34. Tim Wu, *Network Neutrality, Broadband Discrimination* 2 J. TELECOMM. HIGH TECH. L. 141, 143–44 (2003)

35. William E. Kennard, Chairman, Fed. Commc'n Comm'n, Remarks before the Fed. Comm. Bar N. Cal. Ch., The Unregulation of the Internet: Laying a Competitive Course for the Future (July 20, 1999).

36. Michael K. Powell, Chairman, Fed. Commc'n Comm'n, Remarks at Silicon Flatirons Symp., Preserving Internet Freedom: Guiding Principles for the Industry (Feb. 8, 2004).

37. *Id.*

38. Preserving the Open Internet Broadband Industry Practices, *Action*, 25 FCC Rcd. 17905, 17906, para. 2 (2010) [hereinafter *2010 Order*].

job creation, economic growth, competition, and free expression," the FCC adopted three basic rules in the 2010 Order.[39] The rules required transparency by ISPs about their network practices and prohibited ISPs from blocking or unreasonably discriminating against lawful content in order to "empower and protect consumers and innovators while helping ensure that the Internet continues to flourish."[40]

The transparency rule required ISPs to disclose their network management practices and the conditions of all their services to their customers.[41] Secondly, the blocking ban prevented ISPs from preventing customers from viewing lawful websites.[42] And lastly, the FCC's no unreasonable discrimination rule prevented ISPs from unreasonably discriminating against lawful content, content an ISP would otherwise be obligated to transmit over the network.[43] Although the 2010 Order established restrictions on an ISP's behavior, ISPs still managed to circumvent and break such rules.[44] To further address the D.C. Circuit's expressed concerns in the 2010 Order, specifically that the FCC lacked authority to ban blocking and throttling without proper classification of broadband Internet under Title II of the Communications Act, the FCC promulgated the 2015 Open Internet Order ("2015 Order").[45]

The 2015 Order established three bright-line rules.[46] The FCC sought to develop these "clear, bright-line rules" to protect consumers from an ISP's discriminatory behavior.[47] The first bright-line rule issued was the *no blocking* rule.[48] The rule stated that, "[c]onsumers who subscribe to a retail broadband Internet access service must get what they have paid for—access to all (lawful) destinations on the Internet."[49] Verizon Fios and Comcast Xfinity are examples of retail broadband Internet access services, which the 2015 Order prohibited from blocking lawful content they did not wish to make available.[50] The rule of *no blocking* illustrated the FCC's long-standing commitment, as outlined above, to the protection of an individual's right to access any lawful content, application, or service.[51]

Furthermore, the 2015 Order prohibited an ISP from "impairing or degrading lawful Internet traffic on the basis of Internet content, application, [or] service," a practice known as "throttling."[52] In other words, the *no throttling* rule prevented an ISP from slowing down an individual's service—either in general or with respect to particular websites or services—whenever

39. *Id*. at 17.
40. *Id.*
41. *See id.* at 17937–88, para. 54–56.
42. *See id.* at 17907, para. 4.
43. *See id.* at 17944, para. 68.
44. *Infra* Part III – Section C will outline discriminatory conduct by various ISPs.
45. *See generally* Verizon v. F.C.C., 740 F.3d 623, 628 (D.C. Cir. 2014); *2015 Order*, *supra* note 29, at 5604, 5615 paras 7, 49.
46. *2015 Order*, *supra* note 29, at 5601.
47. *Id.* at 5607, para. 17.
48. *See id.*
49. *Id.*
50. *Id.* at 5607, para. 15.
51. *See id.*
52. *Id.* at 5646, para. 106.

the ISP saw fit.[53] The FCC explained that the *no throttling* rule prevented ISPs from circumventing the *no blocking* rule by effectively slowing down content, rendering it unusable but technically unblocked.[54] Working in tandem, the *no blocking* and *no throttling* rules ensured an ISP's equal treatment of all content and all customers who registered for a broadband service.

Lastly, the FCC established *no paid prioritization* as its third bright-line rule.[55] The agency explained that paid prioritization occurs "when a broadband provider accepts payment (monetary or otherwise) to manage its network in a way that benefits particular content, applications, or devices."[56] By prohibiting the implementation of paid prioritization, also known as "fast lanes," a broadband provider, under the 2015 Order, could not accept money in exchange for managing its network in a particular way.[57]

The 2015 Order, alongside past FCC's proceedings, demonstrate the FCC's commitment to protect America's most critical tool of information, the Internet. Moreover, under the 2015 Order, the FCC reclassified ISPs as "common carriers" providing a "telecommunications service" under Title II of the Communications Act of 1934.[58] Section C of this Note will further explain and outline these concepts, but it is important to recognize that this reclassification permitted the FCC to impose the three bright-line rules discussed above. Ultimately, the FCC wanted to establish rules that it could implement to ensure that an individual's Internet access was available without discriminatory practices. In finding that "broadband providers have the incentive and ability to discriminate in their handling of network traffic," the FCC felt compelled to develop rules that sufficiently protected against "broadband providers' incentives to disadvantage edge providers or classes of edge providers in ways that would harm Internet openness."[59] The 2015 Order represented a thoughtful approach in promoting technological advancement while protecting consumers from discriminatory practices.

B. Current Net Neutrality Rules

In 2017, the FCC promulgated the *Restoring Internet Freedom* order ("2017 Order"), which reversed the regulatory framework established by the 2015 Order and eliminated the three-bright line rules.[60] The 2017 Order highlighted the finding that the Internet thrived for decades before the

53. *See id.*
54. *See id*.
55. *Id.* at 5603, para. 4.
56. *Id.* at 5608, para. 18 ("Paid prioritization refers to the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through the use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.").
57. *See id.* at 5607, para. 18.
58. *Id.* at 5610, para. 29.
59. *Id.* at 5659, para. 133.
60. Restoring Internet Freedom, *Action*, 33 FCC Rcd 311, 312–13, paras. 1–5 (2018) [hereinafter *2017 Order*].

establishment of the three bright-line rules, and thus removed them.[61] In the 2017 Order, the FCC announced that it found such rules to be especially restrictive for an industry as dynamic and developing as the communications industry.[62] Thus, any benefit the three bright-line rules had were outweighed by the rules' costs on innovation and investment.[63] Moreover, the 2017 Order declared the 2015 Order's findings that ISPs would engage in harmful behavior as unpersuasive and sparse.[64] To the contrary, the 2017 Order found that problematic and harmful ISP behavior was quite rare and "inconsequential, and pale in comparison to the significant costs the three bright-line rules imposed."[65] Instead, the 2017 Order claimed to favor and prioritize regulatory principles which would increase technological innovation and investments while producing higher rates of economic growth.[66]

Furthermore, the 2017 Order departs from the 2015 Order's classification of a broadband Internet access service ("BIAS") as a telecommunications service and reclassifies it as an information service.[67] However, the 2017 Order rejected the 2015 Order's classification because it found that "[w]ithin the communication industry . . . the most regulated sectors, such as basic telephone service, have experienced the least innovation," which the FCC believed could be damaging to the communications industry.[68] The 2017 Order significantly emphasized that "[t]he Internet as we know it developed and flourished under light-touch regulation."[69] Thus, the FCC felt justified to return to a regulatory framework already proven to work. The 2017 Order's reclassification adopts a market-based policy approach in order "to preserve the future of Internet freedom."[70] In conclusion, the 2017 Order asserted that a "light-touch information service framework will promote investment and innovation better than applying costly and restrictive laws. . . ."[71]

C. Title I versus Title II under the Communications Act of 1934

The Communications Act of 1934 ("Communications Act"), as amended by the Telecommunications Act of 1996 ("Telecommunications Act"), is divided into seven titles.[72] Under the Telecommunications Act, there are two possible classifications of a BIAS.[73] A BIAS can either be classified as an information service under Title I or a telecommunication service under

61. *See id.* at 317, 369, paras. 18, 100–02.
62. *See id.* at 368–69, paras. 99–102.
63. *Id.* at 313, para. 3.
64. *See id.* at 415–16, paras. 171–72.
65. *See id.* at 375, para. 109.
66. *See id.* at 318, para. 20.
67. *Id.* at 312, para. 2. These concepts will be identified and further discussed *infra* Subsection C.
68. *See id.* at 369, para. 100.
69. *Id.* at 375, para. 110.
70. *Id.* at 312, para. 2.
71. *Id.*
72. Communications Act of 1934, 47 U.S.C. § 151.
73. 47 U.S.C. § 153.

Title II of the Communications Act.[74] The difference between Title I and Title II is considerable, as each title "triggers an array of statutory restrictions and requirements."[75] But, before further explanation, this section will first provide necessary technical definitions.

BIAS is a "service that uses spectrum, wireless facilities, and wireless technologies to provide subscribers with high speed Internet access capabilities."[76] For example, companies like Verizon Wireless are considered BIAS because Verizon Wireless uses wireless technologies to provide customers with high speed Internet capabilities.[77] BIAS providers like Verizon Wireless can either be classified as a telecommunications service or an information service.[78]

A telecommunications service is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[79] A telecommunications service offers telecommunications, which is defined as "the transmission between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received."[80] And on the other hand, an information service is "the offering of a capability for generating, acquiring, sorting, transforming, processing, retrieving, utilizing, or making available information via telecommunications. . . ."[81] The "distinction between a telecommunications and an information service turns on the question of what service the provider, ISP, is offering."[82] Consequently, depending on which statutory classification—telecommunications service or an information service—the FCC finds the "offering" meets will determine subsequent regulatory restrictions and requirements.[83]

In the 2015 Order, the FCC classified BIAS as a telecommunications service.[84] In doing so, the FCC found that ISPs offering BIAS, like Comcast Xfinity and AT&T, are common carriers that provide a telecommunications service.[85] Following this classification, the FCC applied the sectional provisions found under Title II. Specifically, the FCC made use of Section

74. *See id.*

75. *Mozilla*, 940 F.3d at 17.

76. FCC Classifies Wireless Broadband Internet Access Services as an Information Service, WT Docket No. 07-53.

77. *Important Information About Verizon Wireless Broadband Internet Access Services*, VERIZON, https://www.verizonwireless.com/support/broadband-services/ (last visited Nov. 15, 2020) [https://perma.cc/EZT2-DWXE].

78. *See generally Mozilla*, 940 F.3d at 17.

79. 47 U.S.C. § 153(53).

80. *Id.* at (50).

81. *Id.* at (24).

82. *2017 Order*, *supra* note 60, at 704, para. 355.

83. *See id.*

84. *2015 Order*, *supra* note 29, at 5724, para. 283.

85. 47 U.S.C. § 153(11) (a common carrier is "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy."); *2015 Order*, *supra* note 29, at para. 355 ("[i]f the offering meets the statutory definition of telecommunications service, then the service is also necessarily a common carrier service.").

201–Services and Charges, Section 202–Discrimination and Preferences, and Section 208–Complaints to the Commission.[86] Such sectional provisions provided the FCC with the support and authority to adopt the *no blocking*, *no throttling*, and *no paid-prioritization* rules, in an effort to ensure an open Internet. However, motivated by different priorities and desired outcomes, such as an increase in investment and innovation, the FCC in the 2017 Order adopted a different regulatory framework. Under the 2017 Order, the FCC classified BIAS as an information service under Title I.[87] By reclassifying BIAS as an information service under Title I, the FCC removed the statutory restrictions under Title II, thereby removing ISPs from the sectional provisions outlined above.[88]

The difference in how the FCC classified BIAS in the 2015 Order and the 2017 Order is not an anomaly, but rather likely to occur again. Guided by different objectives, the 2015 and 2017 FCC administrations were able to classify BIAS in accordance with their stated goals.[89] Although the FCC is an independent agency, it is subject to politicization.[90] The FCC's five commissioners are appointed by the U.S. President and confirmed by the U.S. Senate, with the stipulation that only three out of the five commissioners can be from the same political party.[91] Furthermore, the President selects one commissioner to serve as the chairman, who acts as the chief executive officer of the commission.[92] Because each Presidential administration has different policy objectives, the FCC commissioners typically align with the Presidential administration and implement like orders.[93] In fact, past FCC chairmen have stepped down following a change in Presidential administrations.[94] Accordingly, with every change in Presidential administration comes a change in the FCC's policies and objectives, as seen by the reclassifications in the 2015 and 2017 Order.[95]

Nevertheless, the Internet, "a critical tool for America's citizens,"[96] should not be subject to the FCC's volatile changes. In accordance with Presidential administration policies and subsequent FCC orders, courts have upheld the FCC's classification of BIAS as either a telecommunication service or an information service, constantly altering how ISPs are required

86. *2015 Order*, *supra* note 29, at 5724, para. 283.
87. *2017 Order*, *supra* note 60, at 312, para. 2.
88. *See 2017 Order*, *supra* note 60, at 410, para. 166.
89. *Compare Mozilla*, 940 F.3d at 1, *with United States Telecom. Assoc'n*, 825 F.3d at 674.
90. *What We Do*, FCC, https://www.fcc.gov/about-fcc/what-we-do (last visited Nov. 15, 2020) [https://perma.cc/2PMU-69N4]; Brendan Sasso & The Nat'l J., *The Increasing Politicization of the FCC*, THE ATLANTIC (Feb. 26, 2015), https://www.theatlantic.com/politics/archive/2015/02/the-increasing-politicization-of-the-fcc/456579/ [https://perma.cc/D45X-8572].
91. *What We Do*, *supra* note 90.
92. *See id.*
93. Sasso, *supra* note 90.
94. Berkeley Lovelace Jr., *Net neutrality advocate Tom Wheeler stepping down as FCC Chairman*, CNBC (Dec. 15, 2016), https://www.cnbc.com/2016/12/15/fcc-chairman-tom-wheeler-says-he-plans-to-step-down-january-20.html [https://perma.cc/CKU8-4MN].
95. *Compare 2015 Order*, *supra* note 29, *with 2017 Order*, *supra* note 60.
96. *2015 Order*, *supra* note 29, at 5603, para. 1.

to treat a customer's Internet access.[97] Currently, ISPs are permitted to implement discriminatory practices and may slow down or block a customer's Internet access.[98] However, the Internet, which provides an individual access to information and services, should forever be protected from such discriminatory practices. Therefore, in an effort to prevent the likely and continual swing of the BIAS classification pendulum, the Internet should be defined as a place of public accommodation. As a place of public accommodation, the Internet would remain free of any discriminatory practices that would have disparate impacts on African Americans and Hispanics pursuant to Title II of the Civil Rights Act of 1964.

III. THE REPEAL OF NET NEUTRALITY AND ITS DISPROPORTIONATE IMPACTS

Part III will establish America's reliance on the Internet, specifically highlighting how Americans rely on the Internet to access the news. Next, Part III will show that people of color rely the most on the Internet when accessing the news and such findings will demonstrate that the repeal of net neutrality will likely have disparate impacts. Further, Part III will show that ISPs will likely engage in discriminatory behavior, which will establish the increasing likelihood that the repeal of net neutrality will have disparate impacts.

A. An Increase in Online News Consumption

Americans need the Internet to stay informed.[99] In 2017, over half of the U.S. population ages 18-29 and 30-49 accessed the news through online consumption.[100] With the tap of an app or the swipe of a finger, Americans can stay abreast of the latest issues. Consequently, traditional modes of accessing the news are becoming more uncommon, as only 18% of Americans rely on print newspapers.[101] Specifically, the growth and development in mobile technology has permitted Americans to access news with ease, such that among smartphone owners 78% percent reported using their mobile device to get the news when surveyed.[102] Moreover, social media has become

97. *Compare Mozilla*, 940 F.3d at 1, *with United States Telecom. Assoc'n*, 825 F.3d at 675.

98. *See 2017 Order*, *supra* note 60, at 450, para. 239.

99. *See generally* Kristen Purcell & Lee Rainie, *Americans Feel Better Informed Thanks to the Internet*, PEW RSCH. CTR. (Dec. 8, 2014), https://www.pewresearch.org/internet/2014/12/08/better-informed/ [https://perma.cc/E4UW-FJQA].

100. Jeffrey Gottfried & Elisa Shearer, *Americans' Online News Use Is Closing in On TV News Use,* PEW RES. CTR., (Sept. 7, 2017), https://www.pewresearch.org/fact-tank/2017/09/07/americans-online-news-use-vs-tv-news-use/ [https://perma.cc/M3CC-7ZS6].

101. *See id*.

102. *The Personal News Cycle: How Americans choose to get their news*, AM. PRESS INST. (Mar. 17, 2014), https://www.americanpressinstitute.org/publications/reports/survey-research/personal-news-cycle/ [https://perma.cc/Z7CV-4XNB].

a critical means that permits individuals to discover the news and stay informed.[103] As the Internet allows for news customization, individuals visit different platforms to stay informed on varying subjects.[104] The Internet is now essential to everyday life.[105]

Today, the Internet provides an array of services, most notably access to global and domestic information. The U.S. Supreme Court has articulated the significance of "free speech, press, or assembly to the country's welfare."[106] Furthermore, Article 19 of the Universal Declarations of Human Rights declares that, "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[107] Therefore, Americans have a right to report and receive information without interference or barriers. However, under the 2017 Order, ISPs may now engage in discriminatory practices including "blocking, throttling, and paid prioritization" of information.[108] ISPs may now offer "bundled" Internet packages, similar to the way cable television is marketed.[109] If the Internet becomes cable packaged, the primary method by which Americans stay informed could dramatically change, resulting in disproportionate effects on African Americans and Hispanics.

B. African Americans & Hispanics' Use of the Internet

Compared to White people, African Americans and Hispanics depend substantially more on the Internet to stay informed. Like most Americans, African Americans and Hispanics have come to rely on an array of technologies and devices to receive news.[110] But the types of technological devices on which consumers rely substantially differ among races. In 2019, roughly 82% of White people reported owning a desktop or a laptop computer, compared with 58% of Black people and 57% of Hispanics. Thus, African Americans and Hispanics rely more heavily on their phone for Internet access.[111] Moreover, roughly 25% of Hispanics and 23% of African Americans, compared to 12% of Whites, are "smartphone only" Internet users

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103. *See id*.

104. *News consumption patterns among African Americans and Hispanics*, AM. PRESS INST. (Sept. 16, 2014) https://www.americanpressinstitute.org/publications/reports/survey-research/news-consumption-patterns-african-americans-hispanics/ [https://perma.cc/FM78-534L].

105. Emily A. Vogels et al., *53% of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak*, PEW RSCH. CTR. (Apr. 30, 2020), https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak/ [https://perma.cc/D2N3-563B].

106. Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

107. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 19 (Dec. 10, 1948).

108. *See 2017 Order*, *supra* note 60, at 450, para. 239.

109. *See* Collins, *supra* note 26.

110. *See* American Press Institute, *supra* note 104.

111. *See* Monica Anderson, *Racial and ethnic differences in how people use mobile* technology, PEW RES. CTR., (April 30, 2015) https://www.pewresearch.org/fact-tank/2015/04/30/racial-and-ethnic-differences-in-how-people-use-mobile-technology/ [https://perma.cc/RY9K-HM9X].

and lack traditional home broadband service.[112] Thus, African Americans and Hispanics continue to adapt to mobile technology at higher rates than non-Hispanic Whites.[113] In fact, when surveyed, roughly 75% of African Americans and 64% of Hispanics who own a cell phone reported that they use their cellphone to get the news, compared to 53% of White people.[114] Access to a cellphone that connects to the Internet allows African Americans and Hispanics to stay readily informed.

Moreover, while the digital divide – the difference between those who have ready access to computers and the Internet compared to those who don't – steadily persists, mobile technology and social media consumption among African Americans and Hispanics are substantially connected.[115] "African Americans smartphone owners are two times more likely to say they used social media to access news in the last week."[116] Roughly, 74% of non-whites report receiving their news via social media applications and sites compared to 64% of White people.[117] And, as social media applications and developments continue to increase, these percentages, and the divide, will likely steadily increase.[118] Because open Internet practices have afforded African Americans and Hispanics an ability to rely on the Internet to stay informed, they are least likely to be able to socially and economically adapt to a new cable packaged Internet.

A cable packaged Internet would economically hurt African Americans and Hispanic Americans, who are less likely to afford news subscriptions, because statistically, African American families and Hispanic American families have less wealth.[119] In fact, African Americans and Hispanics are twice as likely to cancel and turn off their cellular service because of its cost.[120] Moreover, African Americans and Hispanics are less likely than Whites to purchase news subscriptions.[121] Only 16% of African Americans and 11% of Hispanics report paying for news subscriptions, compared to 31% of Whites who pay for new subscriptions.[122] ISPs, like any other company, are motivated by profits.[123] Thus, ISPs are likely to implement market priced Internet packages that will be profitable for them. The repeal of net neutrality, which now permits ISPs to engage in discriminatory practices, will further

112. *See, e.g.*, Andrew Perrin & Erica Turner, *Smartphones Help Blacks, Hispanics Bridge Some – But Not All – Digital Gaps With Whites*, PEW RES. CTR., (Aug. 20, 2019) https://www.pewresearch.org/fact-tank/2019/08/20/smartphones-help-blacks-hispanics-bridge-some-but-not-all-digital-gaps-with-whites/ [https://perma.cc/F8V9-UF78].

113. *See* American Press Institute, *supra* note 104.

114. *See id*.

115. *See* Monica Anderson & Madhumitha Kumar, *Digital Divide Persists Even As Lower-Income Americans Make Gains in Tech Adoption*, PEW RES. CTR. (May 7, 2019), https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/ [https://perma.cc/9YLV-SR88].

116. *See* American Press Institute *supra* note 104.

117. *The Personal News Cycle*, *supra* note 102.

118. *See* Bialik, *supra* note 17.

119. *Id.*; Kochhar & Cilluffo, *supra* note 33.

120. *See* Perrin, *supra* note 112.

121. *See* American Press Institute, *supra* note 104.

122. *Id.*

123. Wheeler, *supra* note 28.

exacerbate what limited resources and access African Americans and Hispanics have to the Internet. Further, the repeal of net neutrality opens the door for a cable packaged Internet. African Americans and Hispanics are likely to be disproportionately affected due to economic inequality and their greater reliance on the Internet. To avoid such disparate impacts, the Internet needs to be considered a place of public accommodation under Title II of the Civil Rights Act.

C. The Likelihood of a Cable Packaged Internet

While some may contest the likelihood that ISPs will engage in threatening behavior, history reveals otherwise. As stated by former FCC Chairman Wheeler, "it is human nature to do things that benefit oneself, regardless of who it harms."[124] ISPs now more than ever have the power, ability, and more importantly the incentive to engage in harmful tactics, including "blocking, throttling, and paid prioritization."[125] And, starting as early as 2005, ISPs have utilized the methods of blocking, throttling, and paid prioritization.[126]

In 2005, a North Carolina ISP and telco, Madison River, blocked the voice-over-Internet protocol ("VOIP") service Vonage.[127] Vonage is a company that provides phone service over the Internet and Madison River imposed a block on VOIP providers like Vonage from working on its network.[128] Fortunately, due to the policies in place at the time, the FCC was able to issue sanctions against Madison River to ensure that further general blocking and specifically blocking of VOIPs, like Vonage, would not occur.[129] However, due to the recent repeal of net neutrality, the FCC could not sanction this type of behavior today.[130]

Just two years later, in 2007, Comcast, one of the nation's largest ISPs, began "secretly" blocking peer-to-peer technologies.[131] Peer-to-peer technologies allow for file sharing between systems without a central server.[132] Yet, Comcast blocked its customers from exchanging files on BitTorrent, a peer-to-peer technology, without disclosure to customers.[133] Moreover, around the same time, from 2007 to 2009, the wireless provider AT&T forced Apple to block Skype and other similarly situated VOIP phone services on the iPhone.[134] Motivated by different reasons, Comcast and AT&T felt it necessary to block such services, and now more than ever ISPs

124. *2015 Order*, *supra* note 29, at 5629, para. 80 n.128.
125. *Id.*
126. Timothy Karr, *Net Neutrality Violations: A Brief Histor*y, FREE PRESS (Jan. 24, 2018), https://www.freepress.net/our-response/expert-analysis/explainers/net-neutrality-violations-brief-history [https://perma.cc/PLY8-TYPQ].
127. *Id.* at 2.
128. *See* Lawrence Lessig, *Voice-Over-IP's Unlikely Hero*, WIRED (May 1, 2020), https://www.wired.com/2005/05/voice-over-ips-unlikely-hero/ [https://perma.cc/SZC9-J3LJ].
129. Karr, *supra* note 126, at 2.
130. *See generally Mozilla*, 940 F.3d at 18–19.
131. Karr, *supra* note 126.
132. *Id.*
133. *Id.*
134. *Id.*

may be inclined to engage in similar behavior following the elimination of the three bright-line rules.

Furthermore, in 2012 "AT&T blocked Apple's FaceTime application from running on its mobile network unless customers paid extra for the Mobile Shared Data plan."[135] AT&T forced its customers to pay for extra services if they wanted to legally use Apple's FaceTime service.[136] Under the 2017 Order, ISPs can engage in similar practices and force their customers to pay for extra services if they wish to have access to faster Internet and other carrier features. In 2013, another major ISP, Verizon, threatened to implement practices of paid prioritization.[137] During oral arguments in *Verizon v. FCC*, Verizon's counsel openly stated that if the Court overruled the FCC's open Internet rules, Verizon would be exploring the possibility of favoring some preferred services, content, and or sites over others.[138] Unfortunately, history illustrates the potential but real harms the public faces if the FCC's net neutrality protections are not restored and discriminatory practices, including blocking, throttling, and paid prioritization are banned.

From 2011 to 2013, AT&T, Sprint, and Verizon, three major ISPs, blocked a commonly known application, Google Wallet, "because all three companies had an economic stake in developing a similar service, Isis."[139] Currently, under the 2017 Order, nothing stops ISPs from eliminating competition by forming like alliances and blocking developing social media applications or Internet browsers. Furthermore, throughout 2013 and 2014, individuals across the U.S. generally experienced slower Internet speeds when trying to connect to various websites and applications.[140] After thorough investigation, analysts discovered that ISPs, such as Time Warner Cable and Verizon, limited their customer's capacity at interconnection points—points at which two different operators connect.[141] By limiting the capacity at customers' interconnection points, Time Warner Cable and Verizon were able to throttle the delivery of content to various U.S. businesses and residential customers across the country. Unfortunately, numerous ISPs' past conduct, even when open Internet rules were in place, illustrate the increasing likelihood that ISPs will now more than ever engage in harmful behavior following the recent repeal of net neutrality.[142] The Internet must be defined as a place of public accommodation in order to prevent and protect the invaluableness of the Internet.

135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*

IV. PLACES OF PUBLIC ACCOMMODATION UNDER FEDERAL CIVIL RIGHTS LAWS

Although the FCC has repealed its net neutrality rules, civil rights law provides another possible avenue for prohibiting the ISP abuses discussed above. Part IV will discuss how the text and legislative history of Title II of the Civil Rights Act of 1964 have been interpreted to define places of public accommodation in terms of traditional facilities like hotels and restaurants. Next, Part IV will explain how the definition of places of public accommodation under a similar civil rights law—the Americans Disability Act of 1990 ("ADA")—expanded to include websites. Finally, Part IV will explain why the expanded definition of public accommodation developed in ADA litigation should also apply under Title II of the Civil Rights Act.

A. The Civil Rights Act of 1964

The Civil Rights Act of 1964 ("The Civil Rights Act") prohibits the practice of discrimination "on the ground of race, color, religion, or national origin."[143] Specifically, Title II—Injunctive Relief Against Discrimination in Places of Public Accommodation—provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation."[144] Section 2000(b) establishes that a facility that serves the public is a place of public accommodation "if its operations affect commerce, or if discrimination or segregation by it is supported by State action. . . ."[145] Lodges, restaurants, and theaters are facilities that have traditionally fallen within the meaning of a place of public accommodation; however, what qualifies as a place of public accommodation should invariably expand to correspond with the Civil Rights Act's purpose.[146]

The Civil Rights Act aspired to move the U.S. forward by "eliminating every trace of discrimination and oppression."[147] Consequently, the definition of places of public accommodation should be broadly interpreted and applied.[148] Specifically, Section 202 provides that "[a]ll persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion or national origin…"[149] Section 202 advances the understanding that the nature of the facility is immaterial because Title II of the Civil Rights Act prohibits any facility that services the public from implementing discriminatory practices.[150] In accordance with legislative history, the Internet should be considered a place of public accommodation within the meaning of a "public

143. 42 U.S.C. § 2000(a).
144. *Id.*
145. 42 U.S.C. § 2000(b).
146. *See id*.
147. 109 CONG. REC. 22,839 (1963).
148. *See id.*
149. 42 U.S.C. § 2000(a).
150. *Id.; See also* Robert R. Bebermeyer, *Public Accommodations and the Civil Rights Act of 1964*, 19 U. MIAMI L. REV. 456, 472 (1965).

accommodation" under Title II of the Civil Rights Act of 1964. The Internet, a global and commonly used apparatus, which serves the public, may soon suffer from ISPs' discriminatory behavior. Pursuant to the 2017 Order, ISPs may now engage in blocking, throttling, and paid prioritization of network content.[151] Although the statute's drafters certainly did not foresee the Internet, the Civil Rights Act sought to ensure and protect an individual's right to equally enjoy all facilities which serve the public.[152] The Internet should be a place of public accommodation that can be equally enjoyed by all.[153]

B. The Americans with Disabilities Act

The Americans with Disabilities Act ("ADA") prohibits discrimination based on one's physical or mental disability.[154] Guided by the principles of the Civil Rights Act, the ADA sought to end discrimination against individuals with disabilities in all areas of life by creating an "equal opportunity law" for people with mental and physical disabilities.[155] Specifically, similar to Title II of the Civil Rights Act, Title III of the ADA prohibits discrimination on the basis of disability in places of public accommodations.[156] The statute does not define places of public accommodation, but rather presents a list of twelve categories, containing over fifty examples of facilities.[157] Pursuant to 28 C.F.R. § 36.204, "A public accommodation shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration that have the effect of discriminating on the basis of disability, or that perpetuate the discrimination of others who are subject to common administrative control."[158] Ultimately, like Title II of the Civil Rights Act, Title III of the ADA sought to prevent discrimination in places of public accommodation and aimed to ensure that individuals with disabilities have the same rights and opportunities.[159]

However, under Title III of the ADA, a place of public accommodation has significantly expanded to encompass technological advances like websites and mobile apps.[160] Across jurisdictions, courts have begun

151. *See 2017 Order*, *supra* note 60, at 450, para. 239.

152. 109 CONG. REC. 22,839 (1963).

153. *Internet Is a Modern Necessity, But Some Americans Don't Even Have Broadband*, WASH. POST (Aug. 11, 2019, 5:31 pm EDT), https://www.washingtonpost.com/opinions/all-americans-should-be-able-to-use-the-internet-how-do-we-get-there/2019/08/11/7d98a4d2-bad6-11e9-b3b4-2bb69e8c4e39_story.html [https://perma.cc/4369-EHWB].

154. The Public Health and Welfare, 42 U.S.C. § 12101 (2006).

155. *Id.*; *see also Introduction to the ADA*, ADA, https://www.ada.gov/ada_intro.htm (last visited Nov. 15, 2020) [https://perma.cc/F5Y5-Z5P4].

156. *Id.*; 42 U.S.C. § 2000.

157. 42 U.S.C. § 12181(7).

158. 28 C.F.R. § 36.204 (2010).

159. 42 U.S.C. § 12101.

160. *See* Jason P. Brown & Robert T. Quackenboss, *The Muddy Waters of ADA Website Compliance May Become Less Murky in 2019*, HUNTON ANDREW KURTH (Jan. 3, 2019), https://www.huntonlaborblog.com/2019/01/articles/public-accommodations/muddy-waters-ada-website-compliance-may-become-less-murky-2019/ [https://perma.cc/A2T5-3NUJ].

broadening the definition of a place of public accommodation.[161] No longer are places of public accommodations restricted to the four walls of hotels, restaurants, and stadiums.[162] Now, courts seek to ensure that persons are protected from discriminatory treatment in all places and have assessed whether a website should be considered a place of public accommodation under Title III of the ADA.[163] Similarly, Title II of the Civil Rights Act should broaden the definition of a place of public accommodation to include not only a website but the Internet as well.

The Civil Rights Act should rely on recent judicial developments regarding whether a website is a place of public accommodation under Title III of the ADA to properly label the Internet as a place of public accommodation. When assessing the merits of a claim violation under the ADA or the Civil Rights Act, courts have turned to the respective title's counterpart application and interpretation.[164] For example, in *A.R. ex. rel. Root v. Dudek*, the court relied on Title VI's interpretation under the Civil Rights Act, which "proscribes discrimination on the basis of race, color, or national origin by state and local government entities receiving federal funds,"[165] to permit the U.S. to bring enforcement litigation under Title II of the ADA, Title VI's parallel.[166] Furthermore, the ADA and the Civil Rights Act have similar remedial schemes and statutory application and interpretation.[167] Congress explicitly intended that the relief sought in Title III violations under the ADA and Title II violations under the Civil Rights Act were consistent to ensure equal pleading standards while protecting two different classes of people.[168] Because the ADA and the Civil Rights Act were founded on similar beliefs, and rely upon one another for proper statutory interpretations, Title II of the Civil Rights Act of 1964 should similarly be expanded to include a website and the Internet within its meaning of places of public accommodation.

C. A Website as a Place of Public Accommodation

Pursuant to Title III of the ADA, some courts have begun broadening the meaning of places of public accommodation beyond physical structures.[169] These courts determined that the ADA's legislative history and purpose supports applying disability protections to other mediums.[170] However, other courts seem to grapple with the question of whether a place of public accommodation requires a physical nexus, and thus have concluded that a website is not a place of public accommodation.[171] Specifically, courts

161. *See id.*
162. *See id.*
163. *See id.*
164. Williams v. City of New York, 121 F.Supp. 3d 354, 370 n.19 (S.D.N.Y. 2015).
165. A.R. ex rel. Root v. Dudek, 31 F.Supp. 1363, 1366 (S.D. Fla. 2014).
166. *See id.* at 1368.
167. *See Williams*, 121 F.Supp at 354 n.19 ("Title III of the ADA adopts the remedial scheme of the Title II of the Civil Rights Act of 1964.").
168. *See* Dudley v. Hannaford Bros. Co*.,* 333 F.3d 299, 306–07 (1st Cir. 2003).
169. *See* Brown, *supra* note 160*.*
170. *See id.*
171. *See id.*

within the Third, Sixth, Ninth, and Eleventh Circuit Courts of Appeals found that places of public accommodation must be physical places.[172] But, courts within the First, Second, and Seventh Circuits concluded that a website can be defined as place of a public accommodation under the ADA, independent of any connection to a physical place.[173] Title II of the Civil Rights Act of 1964 should be guided by the principles, standards, and interpretations of courts which hold that a website is a place of public accommodation for disability law purposes, to establish that websites, and Internet access generally, are places of public accommodation.

1. Circuits Recognizing ADA Protections Beyond Physical Places

The First, Second, and Seventh Circuits hold that a website can be a place of public accommodation under Title III of the ADA.[174] In the seminal 1994 *Carparts* decision, the First Circuit began its analysis by looking to the statute in question.[175] Under the plain meaning of the statute, the court found that the statute "does not require public accommodation to have physical structures."[176] The First Circuit rejected the district court's interpretation that a place of public accommodation must have "actual physical structures with definite physical boundaries which a person physically enters for the purpose of utilizing the facilities or obtain services therein."[177] The court reasoned that by including a 'travel service' among the list of places to be considered a place of public accommodations, Congress clearly contemplated that service establishments, like travel, which often lack physical structures due to the nature of business, are still public accommodations because of their substantial effect on commerce.[178] Following the plain reading of the statute, the court was further persuaded by the ADA's legislative history and purpose.[179] The court found that the statute's purpose, which is to "invoke the sweep of Congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities," consistent with its decision, and held that websites are places of public accommodation under Title III of the ADA.[180]

Moreover, within the First Circuit, in *National Ass'n of the Deaf v. Netflix, Inc.*, a federal district court in Massachusetts held that Netflix's Watch Instantly website is a place of public accommodation.[181] The court rejected Netflix's argument that because the statute's list of entities does not include

172. *See id.*
173. *See id.*
174. *See id.*
175. Carparts Distrib. Ctr. v. Auto. Wholesaler's Ass'n of New Eng., 37 F.3d 12, 19 (1st Cir. 1993).
176. *Id.*
177. *See id.* at 18.
178. *See id.* at 19.
179. *See id.*
180. *Id.*
181. *See* Nat'l Ass'n of the Deaf v. Netflix, 869 F. Supp. 2d 196, 202 (D. Mass. 2012).

websites or streaming video programming services, such services do not fall within the statute's definition of place of public accommodation.[182] Instead, the court reasoned that because such web-based services did not exist when the ADA was passed in 1990, they could not have been explicitly included in the statute.[183] The statute's history makes clear that Congress intended for the ADA to adapt to changes in technology.[184] The court relied on the findings of the Congressional Committee on Energy and Commerce, which stated that, "[T]he Committee intends that the types of accommodation and services provided to individuals with disabilities, under all of the titles of this bill, should keep pace with the rapidly changing technology of the times."[185] The court ultimately held that Congress intended for the statute to stretch broadly, as Congress stated in a House Report, "[A] person alleging discrimination does not have to prove that the entity being charged with discrimination is similar to the examples listed in the definition. Rather, the person must show that the entity falls within the overall category."[186] In addition to the ADA's legislative history, the court relied on the text of the statute as well.[187] The court concluded that the ADA covers the services "of" a public accommodation, not services "at" or "in" a public accommodation, and thus found a website to be a place of public accommodation.[188]

Similar to the First Circuit, the Second Circuit held that a place of public accommodation is not limited to physical structures.[189] In *Pallozzi v. Allstate Ins. Co*., the court reasoned that the ADA's language in Title III "suggests to us that the statute was meant to guarantee them more than mere physical access."[190] The court found that Title III "does regulate the sale of insurance policies in insurance offices," and held that a website is a place of public accommodation.[191] The court's interpretation of Title III comports with ADA legislative history. Following *Pallozzi*, subsequent decisions in this circuit adhered to the same broad interpretation of the statute, concluding that a website is a public accommodation.[192]

Likewise, the Seventh Circuit, in *Doe v. Mutual Omaha Ins. Co*., held that, "the owner or operator of a store, hotel, restaurant, dentist's office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space), that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do."[193] In reaching its decision, the court held that a

182. *Id.* at 200.
183. *See id.*
184. *See id.* at 200–01.
185. *Id.*
186. *Id.* at 201.
187. *See id.*
188. *Id.*
189. Pallozzi v. Allstate Life Ins., 198 F.3d 28, 32 (2nd Cir. 1999).
190. *Id.*
191. *Id.* at 33.
192. *See* Andrews v. Blick Art Materials, 268 F. Supp. 3d 381, 387–88 (E.D.N.Y 2017) (quoting Camarillo v. Carrols Corp., 518 F.3d 153, 156 (2d. Cir. 2008)).
193. Doe v. Mut. of Omaha Ins., 179 F.3d 557, 559 (7th. Cir. 1999) (internal citations omitted).

physical nexus is not required for a place to be considered a public accommodation.[194]

Courts which classify websites as places of public accommodation under Title III remain consistent with the ADA's purposes and legislative history. However, other courts hold that places of public accommodation under Title III require a physical nexus or locale.[195] Nonetheless, such interpretations are inconsistent with the spirit of the ADA, as all persons should be equally entitled to the same benefits and opportunities.

2. Circuits Requiring a Physical Connection

The Third, Sixth, Ninth, and Eleventh Circuits have asserted that a physical connection is required for a place to be considered a public accommodation under the ADA.[196] In *Ford v. Schering-Plough Corp.*, the court determined that while an insurance office may be a place of public accommodation, that does not mean that the insurance policies offered and sold at that location are places of public accommodations.[197] The court reasoned that because the plaintiff received her disabilities benefits through her employer, which had no physical nexus to MetLife's insurance office, she was not discriminated against with regards to being denied access to a public accommodation.[198] Moreover, the court reasoned that the statute's plain meaning controls because the statute is unambiguous, and thus looking to the ADA's legislative history was unnecessary.[199] In doing so, the court determined that the plain meaning of the term "public accommodation" under Title III of the ADA does not refer to non-physical access but a physical structure.[200]

Roughly 10 years later, in *Peoples v. Discover Financial Services, Inc.*, the Third Circuit reaffirmed its position that public accommodations are limited to physical places.[201] The court once again looked to the statute's text and held that the ADA supports the conclusion that a public accommodation is a physical place.[202] The court reasoned that the prohibitions of Title III are restricted to "places" of public accommodation and defined a place as a "facility, operated by a private entity, whose operations affect commerce and fall within at least one" of the twelve public accommodation categories.[203]

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194. *See id.* at 560.

195. *See* Brown & Quackenboss, *supra* note 160.

196. *See* Haynes v. Dunkin' Donuts, 741 Fed.Appx. 752, 753–54 (11th Cir. 2018); Peoples v. Discover Fin. Servs., 387 F. App'x 179, 183 (3d Cir. 2010); Weyer v. Twentieth Cent. Fox Film, 198 F.3d 1104, 1114 (9th Cir. 2000*);* Earll v. eBay, 599 F. App'x 695, 696 (9th Cir. 2015); Ford v. Schering-Plough Corp., 145 F.3d 601, 613 (3d Cir. 1998); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010 (6th Cir. 1997); Gil v. Winn-Dixie Stores*,* 257 F. Supp. 3d 1340, 1349 (S.D. Fla. 2017).

197. *See Ford*, 145 F.3d at 614.

198. *See id.*

199. *Id.* at 613.

200. *Id.* at 612–13.

201. *See Peoples,* 387 F. App'x. at 183–84.

202. *See id.*

203. *Id.*; *see also* C.F.R. § 36.104 (2020).

The logic of these circuit courts fails to analyze the underlying purposes of the ADA. Limiting what constitutes a place of public accommodation only hinders equal participation by people with disabilities. Leading disability advocacy groups, such as the National Federation of the Blind ("NFB") advocate for website accessibility in efforts to ensure that disabled individuals are treated fairly.[204] Recently, in 2018, the NFB advocated for Greyhound's websites and mobile applications to become more user friendly for blind passengers.[205] Recognizing the prevalence and convenience of websites and mobile applications, the NFB wanted to ensure that companies' websites and mobile apps "allow blind users to gain the same information and engage in the same transactions with an ease of use substantially equivalent to that of a sighted person using the same browser or operating system. . . ."[206] The First, Second, and Seventh Circuits correctly apply the ADA's malleable text to determine that websites are places of public accommodation. Furthermore, these circuits align with the positions and policies of some of the Nation's leading disability advocacy groups, whose sole focus is to ensure equality for the disabled.[207]

V. EXPANDING THE DEFINITION OF A PLACE OF PUBLIC ACCOMMODATION

Under Title II of the Civil Rights Act, the Internet should be considered a place of public accommodation. Proper statutory interpretation begins with a plain textual analysis.[208] However, when a statute's text is facially unclear, the Supreme Court is guided by the statute's legislative history.[209] Like Title III of the ADA, Title II states "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation."[210] Nonetheless, illustrated by the circuit split discussed above, courts have grappled with the meaning of the word "place."[211] But guided by the Court's principles of proper statutory analysis, the First, Second, and Seventh Circuits have looked to Title III's legislative text under the ADA to properly determine that websites are places of public accommodation.[212] Because websites are merely components of the Internet, it would be unsound to limit the civil rights

204. *See, e.g.*, Press Release, Nat'l Fed'n of the Blind, Greyhound Website and Mobile App to Become More Accessible to Blind Users (July 17, 2018) (on file with author), https://www.nfb.org/about-us/press-room/greyhound-website-and-mobile-app-become-more-accessible-blind-users.

205. *See id.*

206. *Id.*

207. *See id.*

208. *See* Carter v. United States, 530 U.S. 255, 271 (2000).

209. *See* Garcia v. United States, 469 U.S. 70, 76 n.3 (1984).

210. *See* 42 U.S.C. § 2000(a).

211. *See infra* Part VI; *see also* Tara Thompson, Comment, *Locating Discrimination: Interactive Website as Public Accommodations under Title II of the Civil Rights Act The Scope of Equal Protection*, U. CHI. LEGAL F. 409, 431 (2002).

212. Carparts Distrib. Ctr., 37 F.3d at 20 (1st Cir. 1994).

protections afforded to websites.[213] Due to the repeal of net neutrality and the increasingly likelihood that ISPs will engage in non-neutral practices like blocking, throttling, and paid prioritization, the Internet must be labeled a place of public accommodation to prevent subsequent disparate effects on African Americans, Hispanics, and other people of color. The same way society regards restaurants as places of public accommodations and does not allow discriminatory restrictions on roads and highways which are needed to get to restaurants the FCC should not allow ISPs to use discriminatory methods for providing access to websites.

Moreover, Title II's legislative history demonstrates that the statue's legislators intended for the Civil Rights Act to have sweeping coverage of the meaning of places of public accommodation.[214] Legislators were not merely concerned with implementing restrictions on when and where an individual could be free of racial discrimination, but wanted to eliminate "every trace of discrimination and oppression that is based upon race or color."[215] So, legislators included Section 202, which prohibited discrimination based on race, color, religion, or national origin.[216] Section 202 advances the understanding that the nature of the facility is immaterial because any facility that serves the public and also implements discriminatory practices will be in violation.[217]

Furthermore, the Supreme Court adopted an open and all-encompassing view of the statute.[218] The Court asserted that the scope of the Civil Rights Act should not be restricted to the primary facilities Congress considered when adopting the Civil Rights Act, "when a natural reading of the statute's language would call for broader coverage."[219] Therefore, courts should rely on the Supreme Court's reading of the statute and determine that the Internet is a place of public accommodation under a Title II disparate impact claim. Title II's legislative history establishes that expanding the meaning of a place of public accommodation to include the Internet would not only be appropriate but necessary when eliminating racial discrimination.[220]

Additionally, the Civil Rights Act provides that establishments which affect interstate commerce are considered places of public accommodation.[221] Commerce is defined as "travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State. . . ."[222] In *American Libraries Ass'n v. Pataki*, the Southern District of New York held that "the Internet fits easily within the parameters

213. *Differences and Similarities between the Internet and Web*, GOOGLE, https://sites.google.com/site/Internetandwebinfo/ (last visited Nov. 15 2020) [https://perma.cc/AR4Y-A9BV].

214. 109 CONG. REC. 22,839 (1963).

215. *Id.*

216. 42 U.S.C. § 2000.

217. *Id.*; *See also* Robert R. Bebermeyer, *Public Accommodations and the Civil Rights Act of 1964*, 19 U. MIAMI L. REV. 456, 472 (1965).

218. Daniel v. Paul, 395 U.S. 298, 307–08 (1969).

219. *Id.* at 307.

220. 109 CONG. REC. 22,839 (1963).

221. 42 U.S.C. § 2000(b).

222. 42 U.S.C. § 2000(c).

of interests traditionally protected by the Commerce Clause," and further recognized the general impact the Internet could have on interstate commerce.[223] Moreover, many courts have determined that the Internet falls within the purview of the Commerce Clause.[224] Thus, in addition to the justifications advanced above, the Internet should be considered a place of public accommodation because it is an establishment which affects interstate commerce.

Similar to the logic announced by the First, Second, and Seventh Circuits, the court should include the Internet as a place of public accommodation when evaluating subsequent Title II disparate impact claims following the repeal of net neutrality.

VI. ISPS ENABLED DISCRIMINATORY PRACTICES VIOLATE TITLE II OF THE CIVIL RIGHTS ACT

Part VI will first discuss and explain why disparate impact claims are available under Title II of the Civil Rights Act. Following that discussion, Part VI will analyze ISPs' discriminatory practices as disparate impact claims under Title II.

A. Title II Disparate Impact Claims

While the Supreme Court has not explicitly decided whether disparate impact claims are cognizable under Title II of the Civil Rights Act, and other courts have held that "[w]e have never endorsed or rejected disparate-impact liability under Title II," some courts have applied a disparate impact analysis and have been willing to assume that the Civil Rights Act encompasses such a claim.[225] In *Olzman v. Lake Hills Swim Club*, the court permitted plaintiff's disparate impact claim if they could sufficiently plead that the facially neutral definition of "guest" disproportionately affected minority groups.[226] In *Jefferson v. City of Fremont*, the court did not permit plaintiff to bring a

223. 969 F. Supp. 160, 167 (S.D.N.Y. 1997).

224. *See* United States. v. Pearson, 714 F. App'x 547, 551 (6th Cir. 2017) ("The government proved the commerce element in this case by showing that Person's crimes involved the Internet, which is a channel of interstate commerce."); *see also* United States v. Liton, 311 F. App'x 300, 301 (11th Cir. 2009) ("We have held that the Internet is an instrumentality of interstate commerce and. . . ."); United States v. MacEwan, 445 F.3d 237, 245 (3rd Cir. 2006) ("Having concluded that the internet is an instrumentality and channel of interstate commerce. . . .").

225. *See* Hardie v. Nat'l Collegiate Athletic Ass'n, 97 F. Supp. 3d 1163, 1165 (S.D. Cal. 2015); Hardie v. Nat'l Collegiate Athletic Ass'n, 876 F.3d 312, 315 (9th Cir. 2017); Akiyama v. U.S. Judo Inc., 181 F. Supp. 2d 1179, 1184 (W.D. Wash. 2002) (citing Arguello v. Conoco, Inc., 207 F.3d 803, 813 (5th Cir. 2000) ("If facially neutral definition of "guest" disproportionately affects minority group, burden of justifying the definition shifts to defendant."); Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (1974) ("Here it might be shown that the rule change had the effect of discriminating against blacks, because apparently none of the relatives and few of the friends of members were black."); Robinson v. Power Pizza, Inc., 933 F. Supp. 1462, 1464–65 (M.D. Fl. 1998) ("A disparate impact claim . . .charges that a facially neutral practice or test of the employer led to a discriminatory impact on a particular group and that the test or practice cannot be justified as a business necessity.").

226. *Olzman*, 495 F.2d. at 1341.

disparate impact claim solely because the plaintiff failed to sufficiently show the discriminatory impact on the protected class.[227] Thus, upon sufficient pleading, courts may allow parties to assert a disparate impact claim under Title II of the Civil Rights Act.

Moreover, under the analogous Title III of the ADA, the Supreme Court has expressly held that disparate impact claims are cognizable.[228] Pursuant to Title III, when practices or policies disproportionately affect a group of individuals while appearing facially neutral, persons are permitted to bring suit.[229] Although the ADA and the Civil Rights Act differ in their protections, their structures and purposes are one of the same.[230] Not only do the Civil Rights Act and the ADA aim to ensure equal access and opportunities, "Title III under the ADA incorporates the remedies and procedures of Title II of the Civil Rights Act of 1964."[231] Moreover when determining a Title III violation, courts have relied on leading Title II Civil Rights cases to reach a decision.[232] Specifically, in *Ganden v. NCCA*, the court relied on Title II's legislative history and further cited *Welsh v. Boy Scouts of America*—a leading Title II Civil Rights case which presented a similar question of whether membership organization was a place of public accommodation.[233]

Because the ADA and the Civil Rights Act have similar policy aims and the text of the ADA derives from the text of the Civil Rights Act, disparate impact claims should be expressly cognizable under Title II of the Civil Rights Act.[234]

B. A Title II Violation under the Civil Rights Act of 1964

In order to assert a prima facie disparate impact claim under Title II of the Civil Rights Act, a plaintiff must first identify a specific neutral policy or practice and establish that such policy or practice has discriminatory effects on a particularized group.[235] Further, a party must demonstrate, through statistics or other qualified evidence, that the challenged policy has disparate impacts based on race.[236] A plaintiff must assert with particularity that the specific policy has a widespread, rather than a minimal, adverse effect on the

227. Jefferson v. City of Freemont, 73 F. Supp. 3d 1133, 1146 (N.D. Cal. 2014).

228. Raytheon Co v. Hernandez, 540 U.S. 44, 53 (2003).

229. *See id.* at 52.

230. *Introduction to the ADA*, *supra* note 155.

231. *Id.; See also* Schlesinger v. Belle of Orleans LLC, 2015 WL 5944452, *4 (W.D. La. 2008) (citing 42 U.S.C. § 12188(a)(1)).”

232. *See* Ganden v. Nat'l Collegiate Athletic Ass'n, 1996 WL 680000, *9, (N.D. Ill.1996).

233. *See* Welsh v. Boy Scouts of America, 993 F.2d 1267, 1268 (7th Cir. 1993).

234. Williams v. City of New York, 121 F.Supp. 3d 354, 370, n.19 (S.D.N.Y. 2015) ("Title III of the ADA adopts the remedial scheme of the Title II of the Civil Rights Act of 1964"); Dudle v. Hannaford Bros. Co*.,* 333 F.3d 299, 306–07 (1st Cir. 2003). *See* discussion *infra* in Part III.B.

235. *See, e.g.*, Griggs v. Duke Power Company, 401 U.S. 424, 429–30 (1971).

236. *See* O'Neill v. Gourmet Systems of Minn., Inc., 213 F.Supp. 2d 1012, 1022 (W.D. Wis. 2002).

particularized group.[237] Moreover, a court must find that the disproportionate adverse effects are "unjustified by a legitimate business rationale."[238]

Moreover, in pleading a Title II violation, a plaintiff does not need to present evidence illustrative of a defendant's subjective intent to discriminate but merely must show adverse and disproportionate effects.[239] Under the same theory in resolving a Title VII Civil Rights Act violation, the Supreme Court has stated that, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze'" out a particular group.[240] A court must look to see whether there is facially a neutral device that screens out disproportionate numbers of a particular race.[241]

If the Internet becomes cable packaged, African Americans and Hispanics would be disproportionately screened out due to the FCC's allowance of discriminatory practices. In order to sufficiently prove a disparate impacts claim under Title II of the Civil Rights Act, a moving party would have to identify that an ISP's practices, including blocking, throttling, or paid prioritization, although racially neutral on their face, have disparate impacts on African Americans and Hispanics. Unlike *Arguello v. Conoco*, where the plaintiffs failed "to allege that there was a specific Conoco policy which had negative disparate effects on minority customers," here, complainants would allege with specificity that their ISP's practice of either blocking, throttling, or paid prioritization is disproportionally affecting their minority racial group.[242] Unlike in *Akiyama v. U.S. Judo Inc.,* where the court held plaintiffs did not sufficiently plead a Title II disparate impact claim because the court could not identify Plaintiff's religious following as a protected class.[243] Here, that is simply not the case. When surveyed, roughly 75% of African Americans and 64% of Hispanics who own a cell phone reported that they used their cellphone to get the news, compared to 53% of White people.[244] And roughly 25% of Hispanics and 23% of African Americans, compared to 12% of Whites, are "smartphone only" Internet users, and lack traditional home broadband service. African American and Hispanics more substantially rely on access to their cellphones that connect to the Internet to stay readily informed. Moreover, while such numbers on their face may appear minor compared to successful disparate impact claims, the connectedness of the Internet is unprecedented. Because the Internet is fundamental to everyday life, a court should consider this disparate impact seriously concerning. Thus, plaintiffs could establish the widespread disproportionate effects the repeal of net neutrality will have African Americans and Hispanics.

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237. *See id.*

238. Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519, 524 (2015).

239. *See Raytheon*, 540 U.S. at 52.

240. *See Griggs*, 401 U.S. at 430–31.

241. *See Raytheon*, 540 U.S. at 55.

242. *Arguello*, 207 F.3d at 813.

243. *Akiyama*, 181 F.Supp.2d at 1186 (finding that because hundreds of similarly situated religious followers would not be adversely affected by defendant's policy, the court did not recognize plaintiff's religious following as a protect class).

244. *The Personal News Cycle*, *supra* note 102.

Next, a court is likely to assess whether the repeal of net neutrality is justified by a legitimate rationale.[245] This is likely to be a difficult burden for complainants to overcome, given the fact that the FCC has articulated a number of reasons why the repeal of net neutrality was necessary, including increased innovation, investment, and growth of the U.S. economy. Moreover, ISPs who will likely be the defendant of such claims, can assert that the cable-style pricing is economically efficient because it places more cost on people who use the Internet more, that paid prioritization draws investment, or that throttling helps manage networks in a way that maximizes user-friendliness. ISPs likely will be able to assert a legitimate business reason for engaging in such practices.[246] Moreover, the D.C. Circuit has already found the FCC's articulated reasons for repealing net neutrality legitimate in *Mozilla Corporation v. Federal Communications Commission*.[247] However, complainants can argue that while ISPs may have legitimate reasons for repealing net neutrality, there is a less discriminatory alternative that ISPs can take in order to achieve its articulated goals.[248] Like in *Grano v. Dep't of Dev. of City of Columbus*, where the employee could show that there existed other selection devices which did not screen out disproportionate numbers of minorities, here, complainants could illustrate that ISPs' behavior under the FCC's 2015 Order likely has less discriminatory effects on African Americans and Hispanics than the 2017 Order.[249]

Furthermore, complainants can rely on compelling evidence, which is advanced above to support its prima facie disparate impact case.[250] Unlike in *O'Neill v. Gourmet Sys. Of Minn. Inc.*, where plaintiff provided no evidence in which a reasonable jury could infer that American Indians were disproportionally affected by defendant's policy, plaintiffs here will be able to present to the jury the aforementioned statistical evidence illustrating the disproportionate affects.[251] Furthermore, in *Robinson v. Power Pizza, Inc.*, where plaintiffs presented a verified affidavit which illustrated that the defendant specifically chose "to expand its home delivery service to the predominantly Caucasian community of Amelia Island Plantation and not to the predominantly African-American community of American Beach," a prima facie case was established because "the protected class of African-Americans [was] denied a service rendered to those falling outside of the class."[252] Similarly here, complainants need only show that a more diversified, expanded Internet package is available to those outside the protected class, White customers, under the 2017 Order.

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245. *See* Hardie v. National Collegiate Athletic Association, 876 F.3d 312, 317 (9th Cir. 2017).

246. *See generally 2017 Order*, *supra* note 60.

247. *Mozilla*, 940 F.3d at 55 (D.C. Cir. 2019).

248. *See* Grano v. Dep't of Dev. of City of Columbus, 637 F.2d 1073, 1081 (6th Cir. 1980).

249. *See id.*

250. *See O'Neill*, 213 F.Supp. 2d at 1022.

251. *See id*.

252. *Power Pizza*, 993 F. Supp. at 1465.

If the Internet becomes cable packaged, African Americans and Hispanics can demonstrate their economic limitations in paying for a diverse Internet package and Internet access service, as African Americans and Hispanics are twice as likely to cancel and turn off their cellular service because of its costs.[253] And African Americans and Hispanics are less likely than Whites to purchase news subscriptions.[254] Thus, African Americans and Hispanics would be able to sufficiently establish they would be denied a rendered service available to White families. Because the repeal of net neutrality opens the door for a cable packaged Internet, African Americans and Hispanics will be disproportionately affected due to various economic constraints, the stark digital divide, and their greater reliance on the Internet to stay readily informed.

VII. CONCLUSION

Today, the significance of the Internet and one's ability to freely access the Internet is without question. Americans' reliance on the Internet for news consumption has been increasing, with no signs of slowing down.[255] However, following the recent repeal of net neutrality, the undisputed value of an open Internet is at risk.[256] Under the 2017 Order, ISPs can now engage in discriminatory behavior, including blocking, throttling, and paid prioritization of one's Internet access.[257] And although such policies are facially neutral, they may have substantial adverse effects on African Americans and Hispanics. In particular, if the Internet becomes cable packaged, African Americans and Hispanics will be disproportionately affected due to various economic constraints and their greater reliance on the Internet. Therefore, in efforts to prevent such disparate impacts, the Internet must be made a place of public accommodation under Title II of the Civil Rights Act.[258] Guided by the judicial developments of Title III of the ADA, the meaning of a place of public accommodation must too be expanded to include the Internet.[259] Similar to the ADA, the Civil Rights Act sought to ensure racial and ethnic equality in all facets of life, which should not exclude the Internet.[260] The FCC's polices and rules concerning net neutrality will continue to change as political administrations fluctuate, but the "critical tool for American citizens"—the Internet— must forever be free of discriminatory effects.[261]

253. *See, e.g.*, Perrin, *supra* note 112.
254. *News Consumption*, *supra* note 104.
255. Bialik, *supra* note 17, at 1–2.
256. *See 2017 Order*, *supra* note 60.
257. *Id.*
258. *See supra*, Part V.
259. *See supra*, Part IV.
260. 109 CONG. REC. 22,839 (1963).
261. *See* 2015 Order, *supra* note 29, at 5603.