EDITOR'S NOTE

The Federal Communications Law Journal is proud to present the third and final issue of Volume 78. FCLJ is the nation's premier communications law journal and the official journal of the Federal Communications Bar Association (FCBA). Over the course of Volume 78's publication, we have had the opportunity to highlight articles and student Notes that showcase the diverse range of issues in the fields of technology and communications law.

This Issue begins with an Article from Lawrence J. Spiwak, Esq. The Article analyzes the Federal Communication Commission's (FCC) historic preemption authority and applies the existing framework to future efforts by the FCC to preempt state-level artificial intelligence (AI) regulation.

This Issue also features three student Notes. Each Note proposes novel solutions to emerging technology, communications and political speech issues.

First, Maya Lilly urges the Supreme Court to recognize a right for pre-trial detainees to receive voter information, arguing this right is rooted in the First Amendment similarly to a detainee's access to courts.

Second, Nako Caternor addresses explicit deepfake content and the current difficulties victims face when attempting to remove deepfake content from online platforms. The Note suggests that creating a federal right of publicity could remedy this problem without running afoul of Section 230 of the Communications Decency Act.

Third, Nina Mokhber Shahin examines undisclosed paid political advertisements by social media influencers, arguing that the Federal Trade Commission (FTC) is best situated to institute disclosure requirements for these presently underregulated advertisements.

Finally, this Issue concludes with our Annual Review of notable court decisions that have impacted the communications field in recent years. Each of these was authored by a member of our Journal, and we appreciate their thoughtful analyses of these important cases.

The Editorial Board of Volume 78 would like to thank the FCBA and The George Washington University Law School for their continued support of the Journal. We also appreciate the hard work of the authors and editors who contributed to this Issue.

The Federal Communications Law Journal is committed to providing its readers with in-depth coverage of relevant communication and technology law topics. We welcome your feedback and encourage the submission of articles for publication consideration. Please direct any questions or comments about this Issue to fclj@law.gwu.edu. Articles can be sent to fcljarticles@law.gwu.edu. This Issue and our archive are available at http://www.fclj.org.

Ella Hillier
Editor-in-Chief

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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, First Amendment, broadcasting, telephony, computers, Internet, intellectual property, mass media, technology, 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 2,000 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 https://www.fclj.org.

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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's why the FCBA, more than two thousand members strong, has been the leading organization for communications lawyers and other professionals since 1936.

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ARTICLE

Can The Federal Communications Commission Preempt State AI Laws? A Review of the Communications Act and Interpreting Caselaw

Efforts to regulate Artificial Intelligence ("AI") at the state level are proliferating like mushrooms after it rains. Unfortunately, given the lack of a clear statement by Congress that the federal government can preempt such state AI laws, current legal options to stop the proliferation of state AI regulation are shaky at best. Grasping for straws, the Trump AI Action Plan offers the following legal strategy to stop the legislative proliferation: the Federal Communications Commission ("FCC") should "evaluate whether state AI regulations interfere with the agency's ability to carry out its obligations and authorities under the Communications Act of 1934." As detailed below, given the plain language of the Communications Act as well as the present state of the caselaw, it is highly unlikely the FCC will succeed in these efforts. Thus, to prevent AI being subject to a patchwork of state laws, Congress should move expeditiously to enact a cohesive federal AI framework that can preempt such laws. This paper is organized as follows. First the paper details the statutory language in the Communications Act highlighted by the Trump AI Action plan. Next, the paper goes through efforts to use the FCC's efforts to preempt state laws governing municipal broadband. The next several sections proceed to go through the FCC's efforts of "preemption by nonregulation"—that is, rather than make case-specific preemption decisions, the FCC attempted to deregulate whole swaths of the industry by reclassifying those services as "information services" under Title I of the Communications Act. These reclassification battles, in turn, led to the two-decade Net Neutrality debate. Paradoxically, the FCC's reclassification of broadband as Title I services severely curtailed (if not outright eliminated) the FCC's authority to preempt states' efforts to regulate the provision of broadband. The paper concludes by noting that because the clock is ticking, trying to contort the Communications Act to preempt the growing patchwork of disparate state AI laws is a Quixotic exercise in futility. Worse, as courts are often a "black box" where outcomes can be unexpected, engaging in legal gymnastics with the Communications Act could perversely lead to a vast expansion of the FCC's authority beyond its statutory constraints. The cleanest legal solution, therefore, is for Congress to enact expeditiously some sort of preemption mechanism before the United States loses the AI race due to an unnecessary "Death by Fifty State Cuts."

NOTES

Can the Federal Communications Commission Preempt State AI Laws? A Review of the Communications Act and Interpreting Caselaw

Lawrence J. Spiwak, Esq.*

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* President, Phoenix Center for Advanced Legal & Economic Public Policy Studies. The views expressed in this paper are the author's alone and do not represent the views of the Phoenix Center or its staff.

I. INTRODUCTION

The age of Artificial Intelligence ("AI") is upon us. What should the policy response be?

The Biden Administration advocated for an "all of government" regulatory approach to AI in the hopes of somehow controlling the technology.[1] In contrast, the Trump Administration has embraced AI and wants to encourage its natural growth with a de-regulatory approach.[2] Regardless of which policy approach one may prefer, given the vast economic impact that AI will have on the U.S. economy, common sense nonetheless dictates that if AI is to be regulated then there should be a *single, cohesive national framework* rather than a patchwork of state laws that would subject AI to the proverbial "Death by Fifty State Cuts."[3]

But because common sense is scarce in policy debates these days, efforts to regulate AI at the state level are proliferating like mushrooms after it rains. According to the website Multistate.ai, in 2025 over 1200 AI-related bills were introduced in the states, with nearly 145 enacted into law.[4] By definition, this metastasizing patchwork of state AI laws raises compliance costs and slows innovation across the entire U.S. economy.[5]

Unfortunately, given the lack of a clear statement by Congress that the federal government can preempt such state AI laws, current legal options to stop the proliferation of state AI laws are shaky at best. Grasping for straws, the *Trump AI Action Plan* offers the following legal strategy to stop the legislative proliferation: the Federal Communications Commission ("FCC") should "evaluate whether state AI regulations interfere with the agency's ability to carry out its obligations and authorities under the Communications Act of 1934."[6] Presumably, the *Trump AI Action Plan* is implying that the FCC should use its limited authority contained in Section 253[7] and Section

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1. Exec. Order No. 14,141, Advancing United States Leadership in Artificial Intelligence Infrastructure, 90 Fed. Reg. 5469 (Jan. 17, 2025) (available at: https://bidenwhitehouse.archives.gov/briefing-room/presidential-actions/2025/01/14/executive-order-on-advancing-united-states-leadership-in-artificial-intelligence-infrastructure).

2. WINNING THE RACE: AMERICA'S AI ACTION PLAN (July 23, 2025) (available at: https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf) (hereinafter "*Trump AI Action Plan*").

3. *See* Dr. George.S. Ford, *An Economic Argument for Federal Preemption of State AI Laws,* PHOENIX CENTER POLICY BULLETIN NO. 25-05 (Nov. 6, 2025) (available at: http://www.phoenix-center.org/perspectives/Perspective25-05Final.pdf); *see also* Adam Thierer, Resident Senior Fellow, R Street Committee, AI At A Crossroads: A Nationwide Strategy or Californication?, Testimony Before the Subcommittee on Courts, Intellectual Property, Artificial Intelligence, And the Internet Committee on the Judiciary, U.S. House of Representatives (Sept. 18, 2025) (available at: https://www.rstreet.org/outreach/adam-thierer-testimony-hearing-on-ai-at-a-crossroads-a-nationwide-strategy-or-californication).

4. Multistate, *Artificial Intelligence (AI) Legislation Tracker 2026: All 50 States* (Updated 2026) (available at: https://www.multistate.ai/artificial-intelligence-ai-legislation).

5. *Cf.* T.Randolph Beard et al., *Developing a National Wireless Regulatory Framework: A Law and Economics Approach,* 16 COMMLAW CONSPECTUS 391 (2008).

6. *Trump AI Action Plan, supra* note 2, at 3.

7. 47 U.S.C. § 253 (2018).

332[8] of the Communications Act to preempt these assorted state AI laws. Yet given the plain language of the Communications Act as well as the present state of the caselaw, it is highly unlikely the FCC will succeed in these efforts. If anything, contorting the Communications Act to preempt state AI laws may open a Pandora's Box of unintended consequences, perversely leading to a vast expansion of the FCC's powers beyond its limited statutory constraints.[9] If preemption of state AI laws is indeed the ultimate policy goal, then political efforts must focus on developing and enacting specific federal legislation providing such authority.

To illustrate why relying on the FCC's limited preemption authority to stop the proliferation of state AI laws is a quixotic exercise, this paper is organized as follows: The paper begins by laying out the statutory text which confers the FCC with limited preemption authority. As explained below, because the FCC's proactive preemption authority is limited to removing barriers to entry for inter-or intra-state telecommunications services and yet AI is a general-purpose technology, significant legal gymnastics would be required to demonstrate that a state AI law "interfere[d] with the agency's ability to carry out its obligations and authorities under the Communications Act of 1934."[10] And if past is prologue, then the success of such gymnastics is highly unlikely.

To illustrate the problem, this paper next details the failed efforts to use the Commission's statutory authority to preempt state laws governing municipal broadband entry and operations.[11] After which, this paper then turns to the FCC's ultimately failed efforts of "preemption non-regulation" for broadband Internet access services. That is, because what one Commission can do the next Commission can undo, rather than make individual preemption determinations under Section 253, starting in the late the 1990s the FCC came to believe that a more permanent deregulatory solution would be to classify assorted broadband Internet access services as Title I information services rather than Title II common carrier telecommunications Services. This decision, in turn, lead to the nearly two-decade partisan net neutrality saga, where broadband was reclassified as a Title II service by the Obama Administration, then re-reclassified as a Title I information service during the first Trump Administration, then re-re-classified back to a Title II service during the Biden Administration, and then finally returned to a Title I service by the courts. But as explained below, in an unforeseen legal consequence of this net neutrality regulatory see-saw, several courts ruled that rather than protecting broadband from state regulation, the FCC's reclassification of broadband as Title I services severely curtailed (if not

8. 47 U.S.C. § 332(c)(3)(A) (2018).

9. *Cf.* George S. Ford, *Antitrust Reform and the Law of Unintended Consequences,* YALE J. ON REGUL.: Notice & Comment (Jan. 7, 2022) (available at: https://www.yalejreg.com/nc/antitrust-reform-and-the-law-of-unintended-consequences-by-george-s-ford-phd).

10. *Trump AI Action Plan, supra* note 2, at 3.

11. Much of this caselaw was previously discussed in T. Randolph Beard *et al.*, *The Law and Economics of Municipal Broadband,* 73 FED. COMM. L. J. 1 (2020).

outright eliminated) the FCC's authority to preempt states' efforts to regulate the provision of broadband.[12] Policy recommendations conclude the paper.

II. THE FCC'S LIMITED PREEMPTION AUTHORITY UNDER THE COMMUNICATIONS ACT

With the passage of the Telecommunications Act of 1996, Congress bestowed the FCC with express—albeit limited—preemption authority. This express preemption authority is centered in Section 253 of the Communications Act.[13]

Congress did not view preemption in a vacuum: Congress provided the FCC with the limited proactive power to preempt only state laws and regulations that act as barriers to entry. Under Section 253(a), no "State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[14] If the FCC determines that a "State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a)" then the "Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."[15] Using this authority, the FCC successfully preempted state laws and regulations that deterred entry for private-sector telecommunications network deployment.[16]

Significantly, while Section 253 gives the Commission proactive preemption authority, Section 332 takes the opposite approach. Under Section 332(c)(3), Congress (not the FCC) specifically preempted states from imposing rate regulation on both commercial and private mobile services. Under this title, "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service."[17] States may, however, petition the FCC for permission to regulate the states of commercial mobile services if certain conditions are met.[18] Thus, unlike Section 253—where the Commission has the *proactive* power to preempt—the Commission's job under Section 332 is *reactive*—that is, because Congress already took the steps to preempt rate regulation of wireless services, the FCC's only job under Section 332 is to adjudicate state petitions seeking to *restore* rate regulation. Such a view is supported by the text of Section 332(c)(3)(A), which specifically prohibits the

12. Much of this caselaw was previously discussed in Lawrence J. Spiwak, *The Preemption Predicament Over Broadband Internet Access Services,* 21 FEDERALIST SOC'Y REV. 32 (2020).

13. 47 U.S.C. § 253.

14. 47 U.S.C. § 253(a) (emphasis added).

15. 47 U.S.C. § 253(d).

16. *See, e.g.*, Public Utility Commission of Texas*, Memorandum Opinion and Order*, 13 FCC Rcd 3460 (2007).

17. 47 U.S.C. § 332(c)(3)(A).

18. *Id.*

FCC from preempting a "State from regulating the other terms and conditions of commercial mobile services."[19]

Finally, although the word "preemption" does not appear anywhere in the text of the statute, some have argued[20] that Section 706 of the Telecommunications Act[21] also provides the FCC with preemption authority. There are two primary provisions of Section 706: Under Section 706(a):

> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[22]

Section 706(b), in turn, requires the Commission to conduct an annual inquiry to "determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." If the Commission determination is negative, then "it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[23] As detailed more fully below, courts have ruled that these two provisions may be read separately.[24]

Whether Section 706 is an affirmative grant of regulatory authority (much less an affirmative source of preemption authority) or merely hortatory has been subject to great debate and litigation over the last three decades, particularly as Section 706 was the legal lynchpin for Democrat-controlled Commission's efforts to impose "net neutrality" regulation on the provision of "Broadband Internet Access Service" ("BIAS"). As of this writing, the current legal state of Section 706 is murky. The Obama Administration took the view that Section 706 is a definitive source of regulatory authority; the first Trump Administration took the view that Section 706 was hortatory—both decisions were upheld by the courts.[25] Although the Biden Administration restored Section 706 as an affirmative grant of authority in

19. 47 U.S.C. § 332(c)(3)(A).
20. *See* discussion Section III.B *infra.*
21. 47 U.S.C. § 1302 (2018).
22. *Id.*
23. *Id.*
24. *See* Lawrence J. Spiwak, *What Are the Bounds of the FCC's Authority over Broadband Service Providers?—A Review of the Recent Case Law,* 18 J. INTERNET LAW 1 (2015) and discussion therein.
25. *See, e.g.,* Lawrence J. Spiwak, *USTelecom and its Aftermath*, 71 FED. COMM. L. J. 39 (2019) and discussion therein.

their *2024 Open Internet Rules*,[26] these rules were struck down by the Sixth Circuit in *Ohio Telecom Ass'n v. FCC (In re MCP No. 185)* on the ground that the FCC's interpretation of the Communications Act was improper.[27] However, because the court limited its ruling to the Commission's interpretation of what constitutes an "information service," the Sixth Circuit never directly addressed the FCC's last determination that Section 706 is, again, an affirmative source of regulatory authority. As the Supreme Court's relatively recent decision in *Loper Bright Enters. v. Raimondo* gives the ultimate authority to the judiciary—and not to administrative agencies—to interpret statutes,[28] whether a reviewing court will make a definitive ruling that Section 706 is an independent source of authority remains an open question.[29] Regardless, even if Section 706 is ultimately ruled a separate affirmative source of authority, as explained below, because the terms of the statute do not include a clear statement that Congress wanted to include "preemption" among the Commission's powers, Section 706 may not be used for this purpose.

III. THE MUNICIPAL BROADBAND EXPERIENCE

One of the largest fights involving Section 253 were attempts to have the FCC preempt state laws governing municipal broadband entry. These efforts are discussed in this section.

A. Nixon v. Missouri Municipal League

Seizing upon the language of Section 253(a), in 2001 proponents of municipal broadband argued that because municipal providers are an "entity," the FCC should preempt those state laws which either prohibit or restrict municipal broadband deployment.[30] While there was tremendous political pressure placed upon the Agency to preempt state legislatures at the time, a

26. In re Safeguarding and Securing the Open Internet*, Declaratory Ruling, Order, Report and Order, and Order on Reconsideration*, FCC 24-52, ___ FCC Rcd. __ (rel. May 7, 2024).

27. Ohio Telecom Ass'n v. FCC, 124 F.4th 993 (6th Cir. 2024).

28. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

29. It should be noted that D.C. Circuit in *United States Telecomms. Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *pet. for rehearing en banc denied,* 855 F.3d 381 (2017), *cert. denied,* 139 S. Ct. 453 (2018) accepted the FCC's argument that Section 706 was an independent source of authority, essentially holding that Section 706 trumps the other relevant provision of the Communications Act. *See* Lawrence J. Spiwak, *supra* note 24, at 50.

30. *In re* Missouri Municipal League, 16 FCC Rcd 1157 (2001).

Democratic-controlled FCC unanimously (albeit "reluctantly") ruled that the agency lacked any legal authority to preempt such laws.[31]

Undeterred, proponents of municipal broadband appealed the FCC's rejection all the way to the United States Supreme Court in the case of *Nixon v. Missouri Municipal League*.[32] The Court, however, agreed with the FCC, finding that Section 253 does not provide the agency with preemption authority in this instance.[33] According to the Court, the phrase "any entity" in Section 253 did not include "the State's own subdivisions, so as to affect the power of States and localities to restrict their own (or their political inferiors') delivery of [telecommunications] services."[34]

The Court's rationale for rejection was straightforward: "[F]ederal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power…"[35] Thus, reasoned the Court, permitting preemption in this circumstance "would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, 'are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.'"[36]

Significantly, the Court went out of its way to note that "it is well to put aside" the public policy arguments favoring municipal broadband to support any "generous conception of preemption." Why? Because the issue of preemption is one of Constitutional law and, as such, "the issue here does not turn on the merits of municipal telecommunications services."[37] This holding is critical and helpful in sniffing out weak arguments for preemption. In essence, the Court determined that it matters not how sweet municipal broadband can be made to sound, nor how bountiful its alleged benefits—as a matter of Constitutional law, the federal government—and by extension the FCC—has no legal authority to intervene into the relationship between states and their political subdivisions.

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31. *Id.*, concurring Statement of William E. Kennard ("We vote reluctantly to deny the preemption petition of the Missouri Municipals because we believe that HB 620 effectively eliminates municipally-owned utilities as a promising class of local telecommunications competitors in Missouri. Such a result, while legally required, is not the right result for consumers in Missouri. Unfortunately, the Commission is constrained in its authority to preempt HB 620 by the D.C. Circuit's *City of Abilene* decision and the U.S. Supreme Court's decision in *Gregory v. Ashcroft* that require Congress to state clearly in a federal statute that the statute is intended to address the sovereign power of a state to regulate the activities of its municipalities.").

32. Nixon v. Missouri Municipal League, 541 U.S. 125 (2004).

33. *See id.* at 131-32.

34. *Id*. at 128-29.

35. *Id.* at 141.

36. *Id.* at 140.

37. *Id.* at 131-32 (emphasis added).

B. The FCC's 2015 Preemption Order

Despite this defeat in *Nixon*, proponents of municipal broadband spent the next decade trying to find an alternative legal theory of preemption of state laws controlling how municipalities offer such services. With the D.C. Circuit's 2014 ruling in *Verizon v. FCC*,[38] many believed they had perhaps finally found one—namely, Section 706 of the Communications Act.[39] But as shown below, the use of Section 706 to preempt state laws could not pass Constitutional muster.

1. Background

As noted *supra*, under Section 706(a), the FCC may use, "[I]n a manner consistent with the public interest, convenience and necessity, … regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[40] Section 706(b), in turn, states that if the FCC determines that advanced telecommunications capability is not "being deployed to all Americans in a reasonable and timely fashion," then the FCC "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[41]

Whether Section 706 provides the FCC with an affirmative grant of authority has been hotly debated over the last several years. While the FCC had originally viewed Section 706 as hortatory, searching for a sustainable legal theory under which to justify its *2010 Open Internet Rules,* the FCC reversed course and held that Section 706 did provide an affirmative source of regulatory authority.[42] Viewing Section 706 in the context of the broader Communications Act, the D.C. Circuit ultimately held in *Verizon* that the FCC's interpretation of Section 706 as a grant of regulatory authority was "a reasonable interpretation of an ambiguous statute."[43]

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

39. 47 U.S.C. § 1302; George S. Ford & Lawrence J. Spiwak*, Justifying the Ends: Section 706 and the Regulation of Broadband,* PHOENIX CTR. POL'Y PERSP. No. 12-04 (2011) (available at: https://www.phoenix-center.org/perspectives/Perspective12-04Final.pdf).

40. 47 U.S.C. § 1302(a).

41. 47 U.S.C. § 1302(b).

42. *See Preserving the Open Internet*, 25 FCC Rcd. 17905 (2010), ¶ 117, *rev'd sub nom.,* Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

43. *Id.* at 637. There was some debate whether Section 706(a) is independent from Section 706(b), which states that if the Commission determines that advanced telecommunications capability is not "being deployed to all Americans in a reasonable and timely fashion", the FCC "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." While the agency once believed that Section 706(b) was required to trigger Section 706(a), the FCC ultimately read the D.C. Circuit's opinion in *Verizon* to mean that Sections 706(a) and 706(b) are independent grants of authority. For a full discussion, *see* Lawrence J. Spiwak, *What Are the Bounds of the FCC's Authority over Broadband Service Providers?, supra* note 24.

While a proper reading of the caselaw would have revealed that the FCC's new-found authority under Section 706 should be limited,[44] the exact opposite occurred: Section 706 became an overbroad tool that the agency believed conferred upon it almost unlimited power.[45] Accordingly, seizing upon this statutory language of Section 706, then-FCC Chairman Tom Wheeler, a vocal proponent of municipal broadband,[46] boldly stated after the *Verizon* decision came down that "I believe the FCC has the power—and I intend to exercise that power—to preempt state laws that ban competition from community broadband."[47]

Taking up Chairman Wheeler's invitation, the municipal provider in Chattanooga, Tennessee, filed a petition with the FCC asking the agency to use its authority under Section 706 to preempt a Tennessee state law which, the municipal entity claimed, prevents it from expanding beyond its existing franchise territory.[48] In addition, the City of Wilson, North Carolina, filed a similar petition for the FCC to preempt "level playing-field" requirements designed to prevent government-owned networks from "crowding out" private sector investment[49] (a risk, by the way, which the FCC specifically recognized in its *2010 National Broadband Plan*).[50] The White House, sensing political gold with its base, jumped on the bandwagon and sent a subtle signal of support for the Chattanooga and North Carolina petitions by having President Obama call for policies that promote broadband connectivity in his 2014 State of the Union speech.[51] Given such Presidential political cover, the FCC, although an independent agency, followed through on

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44. *Id.*

45. *See* Lawrence J. Spiwak, *supra* note 25.

46. Tom Wheeler, *Removing Barriers to Competitive Community Broadband,* FED. COM. COMM'N BLOG (June 10, 2014) (available at: http://www.fcc.gov/blog/removing-barriers-competitive-community-broadband.

47. Tom Wheeler, Chairman, FCC, Remarks before the National Cable & Telecommunications Association (Apr. 30, 2014) (available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0430/DOC-326852A1.pdf.

48. EPB, *EPB Petitions FCC to Enable Local Broadband Choice*, (July 24, 2014) (available at: https://www.epb.net/downloads/legal/EPB-FCCPetition.pdf). With a speed generally unheard of for the Commission four days later the agency established its pleading cycle. *See* Pleading Cycle Established for Comments on Electric Power Board and City of Wilson Petitions, Pursuant to Section 706 of the Telecommunications Act of 1996, Seeking Preemption of State Laws Restricting the Deployment of Certain Broadband Networks, *Public Notice*, 29 FCC Rcd 9239 (2014) (available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0728/DA-14-1072A1.pdf).

49. Petition of City of Wilson at 14, Petition for Preemption of North Carolina General Statutes § 160A-340 et seq., WC Docket No. 14-115 (July 28, 2014) (hereinafter City of Wilson Petition) (available at: https://www.fcc.gov/ecfs/document/6018240940/4).

50. Fed. Commc'ns Comm'n, *Connecting America: The National Broadband Plan* 153 (2010) (hereinafter "National Broadband Plan") (available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf) ("Municipal broadband has risks. Municipally financed service may discourage investment by private companies. Before embarking on any type of broadband buildout, whether wired or wireless, towns and cities should try to attract private sector broadband investment.").

51. Barack Obama, *State of the Union Address* (Jan. 28, 2014) (available at: https://obamawhitehouse.archives.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address).

President Obama's promise and granted both petitions under Section 706 of the Communications Act.[52]

2. The FCC's Legal Argument

Recognizing that they were bound by the Supreme Court's holding in *Nixon*, the FCC did not seek to preempt the Tennessee and North Carolina laws outright. Instead, the FCC came up with a rather innovative legal argument: According to the FCC, once a state has made the decision to permit municipal broadband generally, then the FCC has the authority under Section 706 to preempt any state laws which impose restrictions on the ability of these municipalities to deploy broadband infrastructure—in the case of Tennessee, territorial restrictions, and in the case of North Carolina, "level playing field" restrictions to ensure that municipal broadband providers did not crowd out private investment. The argument was that such state laws were a "barrier to infrastructure investment" generally rather than an outright prohibition (the latter being the focus of the *Nixon* case).[53]

At the root of the FCC's argument was the following logic: (1) broadband Internet access is inherently an interstate service and thus subject exclusively to FCC jurisdiction; (2) Congress charged the FCC to promote the deployment of broadband "to all Americans" under Section 706; (3) under the Supremacy Clause of the Constitution federal laws trumps state laws[54]; and, therefore, (4) the FCC may use Section 706 to preempt state laws which restrict the deployment of municipal broadband overall. As the FCC explained, because in its view the state laws at issue were *not* enacted to protect taxpayers[55] but instead enacted "under pressure from national cable companies, telephone companies, and the American Legislative Exchange

52. City of Wilson, North Carolina, Petition for Preemption of North Carolina Gen. Statute Sections 160A-340 et seq., The Electric Power Bd. of Chattanooga, Tennessee, Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601*, Memorandum Opinion and Order*, 30 FCC Rcd 2408 (2015) (hereinafter *"2015 Preemption Order"*).

53. *See, e.g.*, *id.* at ¶ 147 ("To be sure, as explained below, a different question would be presented if we were asked to preempt under section 706 a law that goes to a state's power to withhold altogether the authority to provide broadband. But where a state has authorized municipalities to provide broadband, and then chooses to impose regulations on that municipal provider in order to effectuate the state's preferred communications policy objectives, we find that such laws fall within our authority to preempt.").

54. *See, e.g.*, City of New York v. FCC, 486 U.S. 57 (1988); Capital Cities Cable, Inc. v. Crisp*,* 467 U.S. 691 (1984).

55. Indeed, the Commission was quick to dismiss any argument that such laws were designed to protect taxpayers from the well-documented record of municipal broadband failures. Instead, employing a rather remarkable bit of circular logic, the Commission turned the taxpayer protection argument on its head, arguing that "even if we focus on taxpayer protection, as some request, the evidence before us suggests that the Tennessee and North Carolina laws before us actually increase the likelihood of failure because of the barriers that they erect to the successful deployment of broadband infrastructure by these entities." *2015 Preemption Order, supra* note 52, ¶ 62.

Council (ALEC),"[56] the "states here are deciding that incumbent broadband providers require protection from what they regard as unfair competition and regulating to restrict that competition."[57] Thus, according to the FCC, such laws "step[] into the federal role in regulating interstate communications. Where those laws conflict with federal communications policy and regulation, they may be preempted."[58]

3. Legal Problems with the FCC's *2015 Preemption Order*

While clever, the agency's legal argument was perhaps too clever by half. Indeed, despite its protestations to the contrary, the FCC still had multiple *Nixon* problems.

For example, while the FCC conceded that it lacked the authority to preempt state laws that prohibit municipal broadband outright, the FCC argued that it has the authority to preempt the state laws in question because "a state has permitted a political subdivision to enter the market as a broadband provider, but also seeks to impose regulations on the municipal provider in order to effect separate communications policy goals."[59] In this case, argued the FCC, "[T]he state has crossed from a 'decision of the most fundamental sort for a sovereign entity' into a matter in which conflicting federal law is presumed to preempt under the Commerce Clause."[60] However, while the FCC was correct that federal law generally trumps inconsistent state law when it comes to communications policy, the focus of the FCC's preemption efforts here—*i.e.,* territorial restrictions and "level playing field" rules—go directly to a state's control of its political subdivisions and, by extension, how it governs its citizens.

Moreover, the Court in *Nixon* appeared to reject specifically the FCC's argument that it was not preempting state laws that prohibit municipal broadband outright but only those laws which deter deployment after authority was provided. To illustrate the point, the Court offered the following hypothetical:

> [C]onsider the result if a State that previously authorized municipalities to operate a number of utilities including telecommunications changed its law by narrowing the range of authorization. Assume that a State once authorized municipalities to furnish water, electric, and communications services, but sometime after the passage of §253 narrowed the authorization so as to leave municipalities authorized to enter only the water business."[61]

56. *Id.* at ¶ 37.
57. *Id.* at ¶ 147.
58. *Id.*
59. *Id.* at ¶ 156.
60. *Id.* (citations omitted).
61. *Nixon*, 541 U.S. at 136.

In this circumstance, the Court noted that the:

> [R]epealing statute would have a prohibitory effect on the prior ability to deliver telecommunications service and would be subject to preemption. But that would mean that a State that once chose to provide broad municipal authority could not reverse course. A State next door, however, starting with a legal system devoid of any authorization for municipal utility operation, would at the least be free to change its own course by authorizing its municipalities to venture forth. *The result, in other words, would be the federal creation of a one-way ratchet. A State or municipality could give the power, but it could not take it away later.*[62]

In the Court's view, such as result made little legal sense and would interfere with the relationship between states and their political subdivisions:

> Private counterparts could come and go from the market at will, for after any federal preemption they would have a free choice to compete or not to compete in telecommunications; governmental providers could never leave (or, at least, could not leave by a forthright choice to change policy), for the law expressing the government's decision to get out would be preempted.[63]

Nixon also comes up in the agency's overall interpretation of Section 706. At bottom, it is important to recognize the simple fact that nowhere in Section 706 does any derivation of the word "preemption" appear—only the word "forbearance"—and there is a big legal difference between the two concepts.[64] To wit, Black's Law Dictionary defines the concept of forbearance simply as "refraining from action." In contrast, Black's defines preemption as the "doctrine adopted by the U.S. Supreme Court holding that certain matters are of such a national, as opposed to local character that federal laws preempt or take precedence over state laws." Given the Constitutional implications of preemption, therefore, there is a much higher legal standard to meet if an agency of the federal government would like to preempt a state law. Indeed, as the Supreme Court observed in *Wyeth v. Levine*, there are:

> two cornerstones of our pre-emption jurisprudence. First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." Second, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied,' ... we 'start with the assumption that the historic police powers of

62. *Id.* at 136-37 (emphasis added).
63. *Id.* at 137.
64. 47 U.S.C. § 1302.

> the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[65]

So, given that Congress deliberately chose to exclude the term "preemption" from Section 706(a), it is difficult to see how the FCC's use of Section 706 to preempt state laws would reflect a "clear and manifest purpose of Congress."

In its *2015 Preemption Order*, the FCC side-stepped this point by arguing that "Congress need not 'explicitly delegate' the authority to preempt"[66] because "Congress delegated the authority [to the FCC] to act in this sphere."[67] According to the FCC,

> Our preemption authority falls within the "measures to promote competition in the local telecommunications market" and "other regulating methods" of section 706(a) that Congress directed the [FCC] to use to remove barriers to infrastructure investment. It likewise falls within the available "action[s] to accelerate deployment" we may take in order to "remove barriers to infrastructure investment" and to "promote competition" described in section 706(b). As Congress would have been aware in passing the 1996 Act, the [FCC] has in the past used preemption as a regulatory tool where state regulation conflicts with federal communications policy. Given this history against which Congress legislated, the best reading of section 706 is therefore that Congress understood preemption to be among the regulatory tools that the [FCC] might use to act under section 706.[68]

The FCC's logic was a bit of a stretch for two fundamental reasons. First, the FCC's logic rested upon the notion that Section 706 provides an independent source of preemption authority. A simple reading of the caselaw reveals that it did not. According to the clear language of the D.C. Circuit's holding in *Verizon*, "[A]ny regulatory action authorized by Section 706(a) [must] fall within the [FCC]'s subject matter jurisdiction over such communications—a limitation whose importance this court has recognized in delineating the reach of the [FCC]'s ancillary jurisdiction."[69] According to the D.C. Circuit's holding in *Comcast v. FCC*, this means that any use of Section 706 must be tied directly to a specific delegation of authority in "Title

65. Wyeth v. Levine, 555 U.S. 555, 565 (2009) (citations omitted); *see also* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government," it must make its intention to do so 'unmistakably clear in the language of the statute.'") (citations omitted).

66. *2015 Preemption Order*, *supra* note 52 at ¶ 145.

67. *Id.* at ¶ 142.

68. *Id.* at ¶ 144.

69. *Verizon*, 740 F.3d at 639-40 (emphasis added). It is interesting to note that when the Commission cited this exact passage from *Verizon* in its *Order,* the agency specifically omitted the italicized language above. *See 2015 Preemption Order, supra* note 52 at ¶ 138.

II, Title III, or Title VI…."[70] So what does this language mean in practice? It means if the FCC wants to preempt under its Section 706 mandate, then it needs to look exclusively at Section 253. Section 706 does not provide an independent source of preemption authority.

This reading of Section 706 is nothing new to the courts. In fact, the D.C. Circuit's ruling in *Ad Hoc Telecommunications Users Committee v. FCC*—a case the FCC cited with approval several times in its *2015 Preemption Order*—is directly on point.[71] In *Ad Hoc*, the court was asked to rule on the FCC's decision to use its Section 10 authority to forbear from dominant carrier price regulation for special access services. To support its decision to forbear, the FCC also argued that its actions would further Section 706's goals of promoting broadband deployment. After review, the court held that the "general and generous phrasing of §706 means that the FCC possesses significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband—a statutory realty that assumes great importance when parties impose courts to overrule FCC decision on this topic."[72] However, the court made it crystal clear that the FCC's forbearance authority did not lie in Section 706 itself, but exclusively in Section 10. As the court stated bluntly, "As contemplated by §706 . . . [f]orbearance decisions are governed by the Communications Act's §10…."[73]

Given the court's ruling in *Ad Hoc*, the FCC's argument that Section 706 provides the agency with independent preemption authority falls apart. Section 706's explicit forbearance authority is governed by Section 10, which means that Section 706's implicit preemption authority (to the extent it exists) is governed by Section 253. And, if Section 706's preemption authority is, in fact, grounded in Section 253, then *Nixon* is directly on point and the FCC's actions were unconstitutional.

The FCC's argument that it need not have an express indication of Congressional intent to preempt using Section 706 was also belied by the plain language of *Nixon*. As the Court observed, while the FCC has ample authority to preempt state laws and regulations that create barriers to entry for private entities, the Court in *Nixon* specifically found that "neither statutory structure nor legislative history [of Telecommunications Act of 1996] points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms."[74] Thus, reasoned the Court, the "want of any 'unmistakably clear' statement to that effect is fatal" to any argument that Congress intended the FCC to have any authority to preempt state laws which restrict municipal broadband.[75]

70. Comcast v. FCC, 600 F.3d 642, 654 (D.C. Cir. 2010) (emphasis added).
71. Ad Hoc Telecoms. Users Comm. v. FCC, 572 F. 3d 903, 907 (D.C. Cir. 2009).
72. *Id.* at 906-07.
73. *Id.* at 907.
74. *Nixon*, 541 U.S. at 141.
75. *Id.*

4. Sixth Circuit Review

As to be expected, the FCC's *2015 Preemption Order* was appealed to the Sixth Circuit in *Tennessee v. Federal Communications Commission* and it did not go well for the Agency.[76] As the Sixth Circuit observed, the FCC's *2015 Preemption Order* "essentially serves to re-allocate decision-making power between the states and their municipalities."[77] To do so, the court held that this "preemption by the FCC of the allocation of power between a state and its subdivisions requires at least a clear statement in the authorizing federal legislation."[78] As Section 706 lacked such a clear statement, the Sixth Circuit reversed.

According to the Sixth Circuit,

> What the FCC seeks to accomplish through preemption is to decide *who*—the state or its political subdivisions—gets to make these choices. The FCC wants to pick the decision-maker for the discretionary issues of expansion, rate setting, and timeliness of rollout of services. It wants to provide the EPB and the City of Wilson with these options notwithstanding Tennessee's and North Carolina's statutes that have already made these choices.[79]

However, recognized the court, "[a]ny attempt by the federal government to reorder the decision-making structure of a state and its municipalities trenches on the core sovereignty of that state."[80] In the absence of a clear statement in Section 706 that Congress wanted to disrupt that relationship, therefore, the court ruled that the FCC had no authority to preempt the two state laws.[81]

The court also did not bite on the FCC's other two related arguments that (a) its ruling applied to circumstances where a state has already permitted a political subdivision to enter the market as a broadband provider and, ergo, (b) the FCC's authority trumps a state's authority due to the Commerce Clause. First, similar to the Supreme Court's reasoning in *Nixon*, the court recognized that the Agency's argument could produce an "anomalous" result due to the fact that a state could "flatly prohibit municipalities from engaging in telecommunications altogether, but they cannot do it in limited steps or with conditions based on the governmental nature of the municipalities."[82] In the court's view, such an outcome would be highly "intrusive on state-municipal relations…."[83] The court then tersely disposed of the FCC's Supremacy Clause argument: "[T]he statutes at issue here implicate core

76. Tennessee v. FCC, 832 F.3d 597 (6th Cir. 2016).
77. *Id.* at 600.
78. *Id.*
79. *Id.* at 610.
80. *Id.* at 611.
81. *Id.* at 613.
82. *Tennessee*, 832 F.3d at 611.
83. *Id*.

attributes of state sovereignty *and* regulate interstate communications services…. These effects are not mutually exclusive."[84]

Finally, the court went out of its way to note that its holding in *Tennessee* was limited. First, like the Supreme Court in *Nixon*, the Sixth Circuit made clear that it did not question the purported public benefits that the FCC identified in permitting municipalities to expand Gigabit Internet coverage.[85] The court also made clear that it would not address the following legal issues debated by the parties, including (1) whether Section 706 provides the FCC any preemptive power at all; (2) whether Congress, if it is clear enough, could give the FCC the power to preempt as it did in this case; (3) whether, if the FCC had such power, its exercise of it was arbitrary or capricious in this case; and (4) whether and to what extent the clear statement rule would apply to FCC preemption if a State required its municipality to act contrary to otherwise valid FCC regulations.[86]

IV. THE FCC'S ATTEMPTS AT "PREEMPTION BY NONREGULATION"

Throughout the history of modern telecommunications regulation, there has been an uneasy jurisdictional relationship between the Federal Communications Commission and the fifty states. As a result, complex issues of federalism routinely haunt the broadband debate.[87] A spate of court cases speak to such tensions, and we now find ourselves at another crucial legal juncture in this relationship.

When Congress enacted the Communications Act of 1934, it required the old Bell System monopoly to provide telecommunications services on a common carrier basis.[88] Given the vertically-integrated nature of the Bell System, Congress drew the jurisdictional line between *intra*-state telecommunications services (regulated exclusively by the states)[89] and *inter*-state telecommunications services (regulated exclusively by the Federal Communications Commission under Title II of the Act).[90] If there was a dispute between state and federal policy regimes, then the Commission would invoke what has become known as the "impossibility exception."[91] Under this legal doctrine, the FCC is allowed to preempt state regulation of a service

84. *Id.* at 611-12 (emphasis in original).
85. *Id.* at 613.
86. *Id.* at 613-14.
87. *See, e.g.,* Lawrence J. Spiwak, *Federalist Implications of the FCC's Open Internet Order*, PHOENIX CTR. PERSP. NO. 11-01 (Feb. 8, 2011) (available at: http://www.phoenix-center.org/perspectives/Perspective11-01Final.pdf); T.Ruldoph Beard et al*., supra* note 11; T. Rudolph et al., *Developing A National Wireless Regulatory Framework: A Law and Economics Approach,* 16 COMMLAW CONSPECTUS 391 (2008) (available at: https://www.phoenix-center.org/papers/CommLawConspectusNationalWirelessFramework.pdf).
88. *See* 47 U.S.C. § 153(11).
89. *See* 47 U.S.C. § 153(48).
90. *See* 47 U.S.C. § 151; 47 U.S.C. § 153(28).
91. *See* La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368 (1986).

which would otherwise be subject to dual federal and state regulation when (a) it is impossible or impractical to separate the service's intrastate and interstate components and (b) the state regulation interferes with valid federal rules or policies.[92] When the extent of Americans' telecommunications options were pretty much limited to "local" and "long distance" switched telephone service (and you could only get a landline phone from the phone company in basic black), this binary legal regime between interstate and intrastate telecommunications services functioned fairly well.

Starting in the 1980s, however, things began to get a bit more complicated. Enlightened minds at the FCC came to realize that it might be possible to carve out select pieces of the old vertically-integrated Bell System monopoly which could potentially sustain competition. These segments included "enhanced services" (*e.g.,* voicemail), customer premises equipment ("CPE"), terminal equipment, and, ultimately, long-distance service. To help facilitate these market transitions from monopoly to competition, the Commission embraced a simple and straightforward economic idea: encourage new entry by reducing federal—and, where possible, state—regulatory burdens on new firms.[93] Unfortunately for the Commission, it expressly lacked both clear forbearance and preemption authority under then-current law to implement meaningfully this policy.[94]

This statutory deficiency was remedied by the Telecommunications Act of 1996. Under the then-new Section 10 of the 1996 Act, Congress provided the Commission with a clear statement that it may forbear from enforcing certain statutory provisions of Title II under a delineated set of conditions.[95] And with the then-new Section 253, Congress provided the FCC with a clear mandate that it may preempt state laws and regulations that have "the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[96] Significantly, with the internet still in its nascency, Congress did not want the Commission to be timid with its new deregulatory powers: Congress made it clear in Section 230(b)(2) of the Telecommunications Act that it shall be "policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*."[97]

But as IP-enabled services such as broadband and Voice over Internet Protocol ("VoIP") took off in the late 1990's, the FCC recognized that a case-by-case approach to preemption and forbearance of legacy common carrier

92. *Id.*

93. For a more detailed description of this paradigm, *see* Lawrence J. Spiwak, *What Hath Congress Wrought? Reorienting Economic Analysis of Telecommunications Markets After The 1996 Act*, 11 ANTITRUST MAG. 32 (1997).

94. *See, e.g., La. Pub. Serv. Comm'n, supra* note 91, at 368-69; MCI Telecomms. Corp. v. American Tel. & Tel. Co.*,* 512 U.S. 218 (1994).

95. 47 U.S.C. § 160. For a discussion of the Commission's exercise of that forbearance authority, *see, e.g.,* G.S. Ford and Lawrence J. Spiwak, *Section 10 Forbearance: Asking the Right Questions to Get the Right Answers*, 23 COMMLAW CONSPECTUS 126 (2014); Lawrence J. Spiwak, *supra* note 25.

96. 47 U.S.C. § 253(a).

97. 47 U.S.C. § 230(b)(2) (emphasis supplied).

regulations under Title II using its new statutory authority was cumbersome and inadequate to fulfill Congress's directive in Section 230(b)(1) to "promote the continued development of the Internet."[98] To move the ball forward, the Agency adopted a bold, alternative legal strategy: rather than adopt a case-by-case approach to preemption and forbearance—building on the precedent set by its *Computer II Inquiries* for "enhanced services"[99]—the Agency removed IP-enabled services from the ambit of legacy common carrier regulations under Title II altogether by classifying them as "information services" under Title I of the Communications Act[100] "subject to exclusive federal jurisdiction."[101] The hope was that this "light touch" regulatory policy would, in the words of former FCC Chairman Bill Kennard, ensure the "unregulation" of the Internet.[102] The FCC's efforts in this regard are summarized below.

A. The "Pulver Order"

At issue in the *Pulver Order* was whether pulver.com's "Free World Dial-up" ("FWD")—a predecessor to online messaging services such as Skype, Facetime, and Facebook Messenger—was an "unregulated information service subject to the Commission's jurisdiction."[103] The Commission ruled that it was. In so doing, the Commission held that state regulation was therefore preempted because "any state regulations that seek to treat FWD as a telecommunications service or otherwise subject it to public-utility type regulation would almost certainly pose a conflict with our policy of nonregulation."[104]

According to the Commission, two separate lines of reasoning compelled its determination that Title I services are subject to exclusive federal jurisdiction. First, the Commission argued that federal authority is

98. 47 U.S.C. § 230(b)(1).

99. *See, e.g.*, Computer and Commc'ns Indus. Ass'n v. FCC, 693 F.2d 198, 214–18 (D.C. Cir. 1982) (concluding the FCC may preempt state regulation to promote a federal policy of fostering competition in the market for customer premises equipment).

100. When Congress passed the Telecommunications Act of 1996, it changed the nomenclature from "enhanced services" to "information services." *See* 47 U.S.C. § 153(24). By statute, Title I information services are not subject to common carrier regulation. *See* 47 U.S.C. § 153(51) ("A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services . . .").

101. *See infra* Section 5.

102. *The Unregulation of the Internet: Laying a Competitive Course for the Future,* Remarks by FCC Chairman William E. Kennard Before the Federal Communications Bar Northern California Chapter, San Francisco, CA (July 20, 1999) (available at: https://transition.fcc.gov/Speeches/Kennard/spwek924.html); *see also* J. Oxman, *The FCC and the Unregulation of the Internet,* OPP WORKING PAPER NO. 31, Office of Plans and Policy, FCC (July 1999) (available at: http://transition.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf).

103. *In the Matter of Petition for Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, 19 FCC Rcd. 3307, ¶ 1 (2004).

104. *Id.* at ¶ 15.

"preeminent in the area of information services, and particularly in the area of the Internet and other interactive computer services, which Congress has explicitly stated should remain free of regulation." And second, the Agency reasoned that "state-by-state regulation of a wholly Internet-based service is inconsistent with the controlling federal role over interstate commerce required by the Constitution."[105] Let's look briefly at both of the Commission's contentions.

As to the Agency's first argument, the Commission argued that in the Telecommunications Act of 1996 "Congress expressed its clear preference for a national policy 'to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services' unfettered by Federal or State regulation."[106] While the Commission recognized that at the time of this order most states had not "acted to produce an outright conflict between federal and state law that justifies Commission preemption," the Commission held that it "does have the authority to act in this area if states promulgate regulations applicable to FWD's service that are inconsistent with its current nonregulated status."[107]

As to the Commission's second rationale, the Commission pointed out it was quite a stretch to argue that that FWD was a "purely intrastate" information service, much less even "practically and economically possible" to separate FWD into interstate and intrastate components.[108] As it was impossible to separate interstate traffic from intrastate traffic in this case, the Commission held, consistent with its precedent, that the service should be considered an interstate service.[109] Accordingly, reasoned the Commission, because the Commerce Clause denies "the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce," an "attempt by a state to regulate any theoretical intrastate FWD component [is] an impermissible extraterritorial reach."[110]

The FCC also proffered several compelling policy reasons as to why state jurisdiction should be preempted in this case. For example, the Commission noted that absent preemption, it could not "envision how state economic regulation of the FWD service described in this proceeding could benefit the public." In contrast, argued the Commission, "the burdens upon interstate commerce would be significant." As the Commission observed, given the way the Internet works,

> Even if it were relevant and possible to track the geographic location of packets and isolate traffic for the purpose of ascertaining state jurisdiction over a theoretical intrastate

105. *Id.* at ¶ 16.
106. *Id.* at ¶ 18 (citations omitted).
107. *Id.*
108. *Id.* at ¶ 20.
109. *In the Matter of Petition for Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, 19 FCC Rcd. 3307, ¶ 22 (2004).
110. *Id.* at ¶ 23.

> component of an otherwise integrated bit stream, such efforts would be impractical. Tracking FWD's packets to determine their geographic location would involve the installation of systems that are unrelated to providing its service to end users. Rather, imposing such compliance costs on providers such as Pulver would be designed simply to comply with legacy distinctions between the federal and state jurisdictions."[111]

Furthermore, the Commission reiterated a familiar (and proven) refrain: in the absence of preemption, FWD "would have to satisfy the requirements of more than 50 state and other jurisdictions with more than 50 different certification, tariffing and other regulatory obligations." As such, the Agency pointed out that

> allowing the imposition of state regulation would eliminate any benefit of using the Internet to provide the service: the Internet enables individuals and small providers, such as Pulver, to reach a global market simply by attaching a server to the Internet; requiring Pulver to submit to more than 50 different regulatory regimes as soon as it did so would eliminate this fundamental advantage of IP-based communication.[112]

Thus, concluded the Commission, "it is this kind of impact Congress considered when it made clear statements about leaving the Internet and interactive computer services free of unnecessary federal and state regulation noted above."[113]

Finally, the Commission observed (albeit in a footnote) that even though they were declaring FWD to be a Title I information service, that decision did not *a fortiori* mean that they were abdicating their jurisdiction under the Communications Act altogether. As the Commission noted, even though "Congress has clearly indicated that information services are not subject to the economic and entry/exit regulation inherent in Title II," Congress has nonetheless provided "the Commission with ancillary authority under Title I to impose such regulations as may be necessary to carry out its other mandates under the Act."[114]

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111. *Id.* at ¶ 24.

112. *Id.* at ¶ 25.

113. In the Matter of Petition for Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, Memorandum Opinion and Order*, 19 FCC Rcd. 3307, ¶ 25 (2004).

114. *Id.* at ¶ 69.

B. "Preemption by Nonregulation" Goes Full Bore: The FCC Reclassifies An Assortment of Broadband Internet Access Services as "Information Services" Under Title I

With the precedent of preemption by nonregulation in the *Pulver Order* thus established, the FCC stuck to its guns and went full bore under its new legal template. Over the next several years, the Agency proceeded to declare a variety of IP-enabled services to be information services under Title I subject to exclusive federal jurisdiction, including cable modem service,[115] wireline broadband service,[116] wireless broadband service,[117] and even Broadband over Powerline Service.[118] Yet notwithstanding the clear interstate nature of the Internet and IP-enabled services, as highlighted below, state efforts to regulate broadband nonetheless continue to this day.

C. The Courts Weigh In on the FCC's Policy of "Preemption by Nonregulation" of Voice over Internet Protocol ("VoIP") Services

For purposes of this discussion, there are two related Eighth Circuit cases which dealt directly with the FCC's efforts to preempt by nonregulation state regulation of Voice over Internet Protocol ("VoIP") services—*Minnesota Public Utilities Commission v. FCC*[119] and *Charter v. Lange*.[120] Both cases are briefly discussed below.

1. Minnesota Public Utilities Commission v. FCC

The central issue in *Minnesota Public Utilities Commission* was whether state regulation was preempted for Voice over the Net services. Although the FCC refused (and continues to refuse) to make a definite ruling on whether VoIP is an information service under Title I or a telecommunications service under Title II, the FCC argued that under the "impossibility exception" set out by the Supreme Court in *Louisiana Public Service Commission*, it had the authority to preempt state regulation because

115. Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798, 4802-4803, ¶, 2002 WL 407567 (2002), *aff'd* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005).

116. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, FCC 05-150, 20 FCC Rcd. 14853, 14862 (2005), *aff'd* Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007).

117. Appropriate Reg. Treatment for Broadband Access to the Internet over Wireless Networks, FCC 07-30, 22 FCC Rcd. 5901 (2007).

118. United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, FCC 06-165, 21 FCC Rcd. 13281, 13281 (2006).

119. Minnesota Pub. Utils. Comm' n v. FCC, 483 F.3d 570 (8th Cir. 2007).

120. Charter Advanced Servs. v. Lange, 903 F.3d 715 (8th Cir. 2018), *cert. denied sub nom.,* 589 U.S. 1038 (2019).

it was impossible and impractical to separate the intrastate components of VoIP service from its interstate components. The Eighth Circuit agreed.

First, the court agreed with the Commission that given the nature of IP-enabled services, it was impossible to separate the interstate and intrastate components. Among other observations, the Agency noted that there was no "practical means … of directly or indirectly identifying the geographic location of a [VoIP] subscriber." Similarly, the court agreed with the Commission that communications over the internet are very different from traditional landline-to-landline telephone calls because of the multiple service features which might come into play during a VoIP call. Finally, the Court upheld the Commission's conclusion that the economic burden of forcing providers to identify the geographic endpoints of a VoIP service into their interstate and intrastate components far outweighed the benefits. As the court noted, "[s]ervice providers are not required to develop a mechanism for distinguishing between interstate and intrastate communications merely to provide state commissions with an intrastate communication they can then regulate," and the "Communications Act does not require 'construction of wholly independent intrastate and interstate networks.'"[121]

Second, the court agreed with the Commission's finding that state regulation of VoIP services would interfere with valid federal rules or policies. As the court observed,

> The FCC has promoted a market-oriented policy allowing providers of information services to "burgeon and flourish in an environment of free give-and-take of the marketplace without the need for and possible burden of rules, regulations and licensing requirements." Thus, any state regulation of an information service conflicts with the federal policy of nonregulation.[122]

But there was more. As the court further observed:

> The FCC's conclusions regarding the conflicts between state regulation and federal policy deserve "weight"—the agency has a "thorough understanding of its own [regulatory framework] and its objectives and is uniquely qualified to comprehend the likely impact of state requirements." Competition and deregulation are valid federal interests the FCC may protect through preemption of state regulation.[123]

While one could perhaps distinguish *Minnesota Public Utilities Commission* on the ground that the court only focused on the validity of the impossibility

121. *Minnesota Pub. Utils. Comm'n*, 483 F.3d at 578 (citations omitted).

122. *Id.* at 580 (citations omitted).

123. *Id.* (*citing* Geier v. Am. Honda Motor Co., 529 U.S. 861, 883, 120 S. Ct. 1913, 146 L.Ed.2d 914 (2000) (internal quotations and citations omitted)).

exception and never reached a definitive ruling that state regulation of a Title I information service is preempted under the FCC's policy of nonregulation, the Eighth Circuit took that next step in *Charter v. Lange*.

2. Charter Advanced Services v. Lange

A little over a decade after the Eighth Circuit ruled against the Minnesota Public Utility Commission, the state regulator was back at it in *Charter v. Lange*.[124] At issue, again, was whether VoIP should be considered a telecommunications service (and thus subject to potential regulation at the state level) or an information service (and thus state regulation would be preempted). Because the FCC had steadfastly refused to decide one way or the other, the Eighth Circuit stepped into the void and concluded that VoIP was an information service under Title I of the Communications Act. Citing its earlier decision in *Minnesota Public Utilities Commission*, the court concluded once again that "'any state regulation of an information service conflicts with the federal policy of nonregulation,' so that such regulation is preempted by federal law."[125]

3. Questions Raised by Justice Thomas in *Lipschultz v. Charter*

The parties sought *certiorari* of *Charter v. Lange*. Although the Court did not take up the case, Justice Thomas—with whom Justice Gorsuch joined—issued a very interesting separate statement in the Court's denial of *certiorari sub nom.* in the case of *Lipschultz v. Charter.*[126] In this statement, Justice Thomas invited an appropriate case in which the Court "should consider whether a federal agency's policy can preempt state law."[127]

Justice Thomas began his invitation by pointing out that under the Supremacy Clause of the Constitution, the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[128] In Justice Thomas' view, this Clause contains a non obstante provision—"a common device used by 18th-century legislatures to signal the implied repeal of conflicting statutes"—and, as such, "[a]t the time of the founding, this Clause would have been understood to pre-empt state law only if the law logically contradicted the

124. *Supra* note 119.
125. *Lange,* 903 F.3d at 718 (citations omitted).
126. *See* Lipschultz v. Charter Advanced Serve. (MN)*,* 589 U.S. 1038 (2019).
127. *Id.* at 1039.
128. *See* U.S. CONST., art. VI, cl. 2.

'Constitution' [or] the 'Laws of the United States.'"[129] However, argued Justice Thomas, it

> is doubtful whether a federal policy—let alone a policy of nonregulation—is "Law" for purposes of the Supremacy Clause. Under our precedent, such a policy likely is not final agency action because it does not mark "the consummation of the agency's decisionmaking process" or determine Charter's "rights or obligations."[130]

Moreover, Justice Thomas posited that even "if it were final agency action, the Supremacy Clause 'requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures.'"[131] Accordingly, reasoned Justice Thomas,

> Giving pre-emptive effect to a federal agency policy of nonregulation thus expands the power of both the Executive and the Judiciary. It authorizes the Executive to make "Law" by declining to act, and it authorizes the courts to conduct "a freewheeling judicial inquiry" into the facts of federal nonregulation, rather than the constitutionally proper "inquiry into whether the ordinary meanings of state and federal law conflict."[132]

As of this writing, the Court has yet to take up a case where Justice Thomas' views can be formally debated.

V. "PREEMPTION BY NONREGULATION" OF BROADBAND CONTINUES: THE FCC'S 2018 RESTORING INTERNET FREEDOM ORDER

As highlighted *supra*, for nearly two decades, the FCC on a bipartisan basis had classified broadband Internet access as a lightly regulated information service under Title I of the Communications Act of 1934 subject to exclusive federal jurisdiction. The big aberration in this policy came in 2015, when the FCC under the leadership of Chairman Tom Wheeler reclassified broadband Internet access back to a common carrier service under

129. *Lipschultz,* 589 U.S. at 1039 (citations omitted).
130. *Id.* (citations omitted).
131. *Id.* (citations omitted).
132. *Id.* at 1040 (citations omitted).

Title II of the Communications Act to provide legal justification for the imposition of net neutrality regulation.[133]

Although there were heated arguments over the legal merits and economic effects of reclassification in 2015, it is important to note that one policy remained constant: the Commission never wavered from its belief that the American consumer would not benefit from a hodgepodge of different regulatory regimes and that it was therefore better to establish a nationwide "comprehensive regulatory framework governing broadband Internet access services."[134] Understanding that returning broadband Internet access back under the umbrella of legacy common carrier regulations of Title II could open the door to aggressive state regulation (and taxation) of the internet,[135] the Commission in its *2015 Open Internet Order* announced its "firm intention to exercise our preemption authority to preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme we adopt in this Order."[136] However, the Commission said it would make such preemption decisions "on a case-by-case basis in light of the fact specific nature of particular preemption inquiries."[137]

The Obama administration's policy of applying legacy common carriage regulation to the internet did not last long. Finding that imposing rules designed for the old Bell monopoly on the internet had a negative effect on broadband investment, the current FCC reversed the *2015 Open Internet Order* with its *2018 Restoring Internet Freedom Order* ("*RIFO*") and returned broadband Internet access back to a "light touch" regulatory regime under Title I subject to exclusive federal jurisdiction.[138]

Given its long-standing policy of preemption by nonregulation of Title I information services, no doubt the Commission thought this question closed. It was wrong. Once again, the politics of net neutrality forced the Commission in its *RIFO* to tackle the thorny issue of potential aggressive state

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133. Protecting and Promoting the Open Internet, FCC 10-201, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601 (2015) [hereinafter "*2015 Open Internet Order*"], *aff'd* United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016), *pet. for rehearing en banc denied,* 855 F.3d 381 (2017), *cert. denied,* 139 S. Ct. 453 (2018). For a thorough critique of the legal gymnastics used in these decisions, *see* L.J. Spiwak, *USTelecom and its Aftermath, supra* note 25.

134. *2015 Open Internet Order id.* at ¶ 433.

135. *See, e.g., Federalist Implications of the FCC's Open Internet Order, supra* note 87; *see also* City of Eugene v. Comcast*,* 359 Or. 528 (2016) (finding that with the FCC's reclassification of broadband internet access as a telecommunications service in the 2010 *Open Internet Order,* the City of Eugene Oregon was entitled to impose a license fee on cable modem service on top of the cable franchise fee already paid by Comcast).

136. *2015 Open Internet Order, supra* note 134, ¶ 433.

137. *Id.* Interestingly, in the one paragraph in the *2015 Open Internet Order* where the Commission discusses preemption, the agency provided no citation showing that its preemption authority derives from Section 253. *See supra* note 134 and accompanying text.

138. In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, And Order*, 33 FCC Rcd. 311, ¶ 95-98 (2018) [hereinafter RIFO].

regulation of the internet. To address this question, the Commission returned to its time-tested argument on preemption by again recognizing that:

> Allowing state and local governments to adopt their own separate requirements, which could impose far greater burdens than the federal regulatory regime, could significantly disrupt the balance we strike here. Federal courts have uniformly held that an affirmative federal policy of deregulation is entitled to the same preemptive effect as a federal policy of regulation. In addition, allowing state or local regulation of broadband Internet access service could impair the provision of such service by requiring each ISP to comply with a patchwork of separate and potentially conflicting requirements across all of the different jurisdictions in which it operates.[139]

The Commission also reiterated its longstanding view that "regulation of broadband Internet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements."[140] It therefore concluded that it was exercising its "authority to preempt any state or local requirements that are inconsistent with the federal deregulatory approach we adopt today."[141] In particular, the Commission preempted "any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order."[142]

The Commission offered up two familiar legal arguments in support of its position: First, that it was entitled to invoke the "impossibility exception" as articulated by the Supreme Court in *Louisiana Public Service Commission v. FCC*,[143] and second, that the Commission has independent authority to displace state and local regulations in accordance with the longstanding federal policy of nonregulation for information services. Each argument is briefly summarized below.

A. The Impossibility Exception

As noted above, under the legal doctrine known as the "impossibility exception" to state jurisdiction, the FCC may preempt state law when (a) it is impossible or impracticable to regulate the intrastate aspects of a service without affecting interstate communications and (b) the Commission determines that such regulation would interfere with federal regulatory

139. *Id.* ¶ 194.
140. *Id.*
141. *Id.*
142. *Id.* at ¶ 195.
143. 476 U.S. 355, 375 n.4 (1986).

objectives.[144] According to the Commission, the facts of this case satisfied both conditions "because state and local regulation of the aspects of broadband Internet access service . . . would interfere with the balanced federal regulatory scheme" contained in the *RIFO*.[145]

The Commission concretely argued that because both interstate and intrastate communications can travel over the same internet connection (and indeed may do so in response to a single query from a consumer), "it is impossible or impracticable for Internet Service Providers ('ISPs') to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance."[146] As such, reasoned the Commission, ISPs "generally could not comply with state or local rules for intrastate communications without applying the same rules to interstate communications."[147] Accordingly, because the Commission found that any effort by states to regulate intrastate traffic would interfere with its treatment of interstate traffic, it considered the first condition for conflict preemption to be satisfied.[148] For similar reasons, the Commission found the second condition for the impossibility exception to be satisfied because "state and local regulation of the aspects of broadband Internet access service . . . would interfere with the balanced federal regulatory scheme" adopted in the *RIFO*.[149]

B. Federal Policy of Nonregulation

The Commission also reiterated its argument that it has independent authority to displace state and local regulations in accordance with the longstanding federal policy of nonregulation for information services.[150] According to the Commission, multiple provisions of the 1996 Act "confirm Congress's approval of our preemptive federal policy of nonregulation for information services."[151] For example, the Commission pointed to Section 230(b)(2) of the Act, as added by the Telecommunications Act of 1996, which declares it to be "the policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services"—including "any information service"—"unfettered by Federal or State regulation."[152] The Commission also pointed to Section 3(51) of the Act, which provides that a communications service provider "shall be treated as a common carrier under [this Act] only to the extent that it is engaged in providing telecommunications services."[153] As the

144. *See supra* note 90.
145. *RIFO, supra* note 138 at ¶ 198.
146. *Id.* at ¶ 200.
147. *Id.*
148. *Id.*
149. *Id.* at ¶ 201.
150. *Id.* at ¶ 202.
151. *RIFO, supra* note 138 at ¶ 203.
152. *Id.* (citing 47 U.S.C. § 253(b)(2)).
153. 47 U.S.C. § 153(51).

Commission highlighted, this statutory language "forbids any common-carriage regulation, whether federal or state, of information services."[154]

Finally, the Commission argued that its "preemption authority finds further support in the Act's forbearance provision[s]" contained in Section 10 of the Communications Act.[155] Under Section 10(e), "A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a) of this section."[156] In the Commission's view, it would be

> incongruous if state and local regulation were preempted when the Commission decides to forbear from a provision that would otherwise apply, or if the Commission adopts a regulation and then forbears from it, but not preempted when the Commission determines that a requirement does not apply in the first place.[157]

Indeed, argued the Commission, nothing "in the Act suggests that Congress intended for state or local governments to be able to countermand a federal policy of nonregulation or to possess any greater authority over broadband Internet access service than that exercised by the federal government."[158]

VI. THROWING A WRENCH INTO PRECEDENT: THE D.C. CIRCUIT'S RULING IN *MOZILLA V. FCC*

As with all other past net neutrality rulings from the FCC, the *RIFO* was appealed. Grounding its decision in the Supreme Court's ruling in *Brand X,*[159] the D.C. Circuit in *Mozilla Corp. v. FCC* affirmed the Agency's decision to re-reclassify broadband Internet access back to a Title I information service.[160] But, to the surprise of many, the court rejected the Commission's express preemption arguments, thereby opening the door for state and local governments to regulate where the FCC has purposely refrained from doing so. The latter ruling destroyed the FCC's nearly twenty-year belief that it had the authority to expressly and broadly preempt all state regulation by classifying something as a Title I information service subject to exclusive federal regulation. This section summarizes the majority's reasoning and the dissent's critiques in *Mozilla*.

At bottom, the D.C. Circuit in *Mozilla* struck down the FCC's efforts to preempt prospectively all state regulation of the internet via reclassification—or, as the court came to call it, the FCC's "Preemption

154. *RIFO, supra* note 138 at ¶ 203 (citations omitted).
155. *Id.* at ¶ 204 (citing 47 U.S.C. § 160(e)).
156. *Id.*
157. *Id.*
158. *Id.*
159. National Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980–81, 125 S.Ct. 2688, (2005).
160. Mozilla Corp. v. FCC*,* 940 F.3d 1 (D.C. Cir. 2019).

Directive"—because, in the court's view, the "Commission ignored binding precedent by failing to ground its sweeping Preemption Directive . . . in a lawful source of statutory authority."[161] This lack of statutory authority, reasoned the court, was "fatal" to Commission's effort to invoke express preemption.[162]

A. Statutory Abdication

The crux of the court's decision was its belief that when the FCC deliberately placed "broadband *outside* of its Title II jurisdiction" by reclassifying it as a Title I information service,[163] the Commission had essentially abdicated *all* legal authority (express or ancillary) under Title II.[164] In the court's words, the agency's efforts to preempt state regulation of broadband "could not possibly be an exercise of the Commission's express statutory authority" under the Communications Act.[165] Thus, for example, the court rejected the FCC's argument that it had express authority to preempt because Congress did not "statutorily grant the Commission freestanding preemption authority to displace state laws . . . in areas in which it does not otherwise have regulatory power."[166] Following the same reasoning, the court rejected the argument that the Commission's Preemption Directive was supported by ancillary jurisdiction because the Agency had specifically disavowed all of its authority under Title II by reclassifying broadband Internet access as a Title I information service; in other words, the Agency's abdication meant that there was no longer any specific statutory authority to which the Commission's preemption efforts could be ancillary.[167]

The court then went on to use this finding of statutory abdication to reject specifically the Agency's two asserted legal theories of preemption: the impossibility exception and a policy of federal nonregulation.

As to the former, the court reasoned that the FCC's use of the impossibility exception failed because "[a]ll the impossibility exception does is help police the line between those communications matters falling under the Commission's authority . . . and those remaining within the States' wheelhouse."[168] "In other words," reasoned the court, "the impossibility exception presupposes the existence of statutory authority to regulate; it does not serve as a substitute for that necessary delegation of power from Congress."[169]

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161. *Id.* at 74.
162. *Id.*
163. *Id*. at 76 (emphasis in original). The court also observed that the Commission similarly placed broadband outside of the definition of "radio transmission" under Title III and a "cable service" under Title VI. *Id.* at 75.
164. *Id*. at 75.
165. *Id.* at 74.
166. *Mozilla*, 940 F.3d at 75-76.
167. *Id.* at 76-77.
168. *Id.* at 76 (citations omitted).
169. *Id.* at 77-78.

As to the latter, the court also found that the Agency's lack of statutory authority could not sustain the Commission's argument that states were preempted due to a "federal policy of nonregulation for information services."[170] As noted above, the Agency in its *RIFO* argued that it would be

> incongruous if state and local regulation were preempted when the Commission decides to forbear from a provision that would otherwise apply, or if the Commission adopts a regulation and then forbears from it, but not preempted when the Commission determines that a requirement does not apply in the first place.[171]

But the court did not bite. According to the court, "because the [RIFO] took broadband out of Title II . . . the Commission is not 'forbear[ing] from applying any provision' of the Act to a Title II technology."[172] As the court observed, Congress

> chose to house affirmative regulatory authority in Titles II, III, and VI, and not in Title I. And it is Congress to which the Constitution assigns the power to set the metes and bounds of agency authority, especially when agency authority would otherwise tramp on the power of States to act within their own borders.[173]

Accordingly, the court ruled that because the FCC took broadband out from under the rubric of Title II, "[n]o matter how desirous of protecting their policy judgments, agency officials cannot invest themselves with power that Congress has not conferred."[174] Indeed, reasoned the court, if "Congress wanted Title I to vest the Commission with some form of Dormant Commerce-Clause-like power to negate States' statutory (and sovereign) authority just by washing its hands of its own regulatory authority, Congress could have said so."[175]

B. Leaving Open the Door to Conflict Preemption

Notwithstanding the above, the court seemed to leave the door open to a future claim of conflict preemption, under which those portions of the *RIFO* that the court did uphold (including the information service classification and the elimination of most net neutrality mandates) would preclude the application of inconsistent state laws. As an initial matter, the court found that "because a conflict preemption analysis 'involves fact-intensive inquiries,' it 'mandates deferral of review until an actual preemption of a

170. *Id.*
171. *RIFO, supra* note 138 at ¶ 204.
172. *Mozilla*, 940 F.3d at 79.
173. *Id.* at 83.
174. *Id.*
175. *Id.*

specific state regulation occurs.'"[176] Yet in this particular case, the court held that "[w]ithout the facts of any alleged conflict before us, we cannot begin to make a conflict-preemption assessment in this case, let alone a categorical determination that any and all forms of state regulation of intrastate broadband would inevitably conflict with the [*RIFO*]."[177] Still, the court ruled that if "the Commission can explain how a state practice actually undermines the [*RIFO*], then it can invoke conflict preemption."[178] As the court pointed out,

> What matters for present purposes is that, *on this record*, the Commission has made no showing that wiping out all "state or local requirements that are inconsistent with the [*RIFO*'s] federal deregulatory approach" is necessary to give its reclassification effect. And binding Supreme Court precedent says that mere worries that a policy will be "frustrate[d]" by "jurisdictional tensions" inherent in the Federal Communications Act's division of regulatory power between the federal government and the States does not create preemption authority.[179]

But until this case is brought before it (or another court), the court ruled that concurrent state and federal regulation of the internet "can co-exist as the Federal Communications Act envisions."[180]

C. Judge Williams' Dissent

In an extensive dissent, Judge Stephen Williams took great exception to the majority's reasoning vis-à-vis express preemption. At bottom, Judge Williams simply could not get his head around the majority's reasoning that the Commission lacked any authority to preempt state regulation once it decided to "step[] off the Title II escalator and choose[] Title I." As Judge Williams observed, the majority's statutory abdication logic puts "the Commission in paradoxical bind. The Commission could create an effective federal policy controlling communications brought under Title II, within a considerable range of intrusiveness, but if it finds the light-touch associated with Title I more apt, it then de facto yields authority over interstate communications to the states."[181]

While Judge Williams agreed with the majority that (1) congressional authority was an essential prerequisite to preemption; and that (2) Congress

176. *Id.* at 81-82 (*quoting* Alascom, Inc. v. FCC*,* 727 F.2d 1212, 1220 (D.C. Cir. 1984)).

177. *Id.* at 82. As noted *supra*, even though the Commission had a legally cleaner preemption argument under Section 253 in its *2015 Open Internet Order*, the agency did not attempt a sweeping preemption of all state regulation but instead opted for a case-by-case approach.

178. *Mozilla*, 940 F.3d at 85 (citations omitted).

179. *Id.* (emphasis supplied and citations omitted).

180. *Id.*

181. *Id.* at 98.

did not afford the Agency *express* authority to preempt, Judge Williams pointed out that under Supreme Court precedent "a federal agency's authority to preempt state law need not be expressly granted."[182] And in this particular case, Judge Williams argued that

> the statute, its history and its interpretation give ample reason to infer a congressional intent that the Commission be authorized to preempt state laws that would make it 'impossible or impracticable' for ISPs to exercise the freedom that the Commission meant to secure by classifying broadband under Title I.[183]

Indeed, argued Judge Williams, for the majority to assume "without explanation that in allowing the Commission a choice between full-throttled regulation under Title II and very light regulation under Title I Congress had *no interest* in making sure that the Commission could, if it exercised the latter choice, establish an effective *national* broadband policy" simply makes no sense.[184] Stating the matter bluntly, Judge Williams wrote that the majority believed that "for an intrusive regulatory regime an agency's preemptive power can be inferred, while a deregulatory regime is a Cinderella-like waif, and can be protected from state interference only if Congress expressly reaches out its protective hand."[185]

To bring clarity to his argument, Judge Williams posited a simple rhetorical question: do "we see preemption as serving to protect the federal *regulations* from state frustration or to protect federal choice of a *regulatory regime* from state frustration."[186] In Judge Williams' view, the "majority staunchly believes that preemption serves solely to protect *affirmative* federal *regulations*."[187] Judge Williams contended that the majority's view was in error because:

> [i]f an agency decides that a robust regulatory scheme is apt in a given sector (say, under Title II), the majority is ready to infer authority to preempt. But . . . if the agency determines that an industry will flourish best under competitive market norms and accordingly adopts a "light-touch" path, preemption is suddenly superfluous *because* the agency now has less "power to regulate services."[188]

In fact, argued Judge Williams, under the majority's view that "*only* an agency's possession of affirmative regulatory authority can support authority to preempt state regulation," then the practical effect of that reasoning is that

182. *Id.* at 96 (citations omitted).
183. *Id.* at 97 (citations omitted).
184. *Mozilla*, 940 F.3d at 101 (emphasis in original).
185. *Id.* at 104-05.
186. *Id.* at 99 (emphasis in original).
187. *Id.* (emphasis in original).
188. *Id.* at 99-100.

"because of the impossibility of separation," state regulation—which nominally applies only to intrastate communications—would "in practice engulf[] interstate communications."[189]

Judge Williams also had other issues with the Majority's statutory abdication logic. For example, Judge Williams argued that if one were to follow the majority's statutory abdication reasoning to its logical conclusion, it would—despite the majority's dicta that it would entertain a potential conflict preemption argument—"render any conflict unimaginable."[190] In the majority's view, argued Judge Williams, "preemption is utterly dependent on the Commission's affirmative regulatory authority and cannot depend on its authority to apply a deregulatory regime to broadband."[191] As such, "when the Commission adopts a deregulatory regime under Title I, there's no there there."[192] Indeed, argued the judge, "if the handwaving toward conflict preemption is to mean anything, it requires a vision of a Commission exercise of power with which some state regulation could actually conflict. This the majority denies absolutely."[193]

Along the same lines, Judge Williams argued that the majority's statutory abdication logic also took any possibility of using ancillary jurisdiction as a source of preemption authority off the table. As Judge Williams noted, for the Commission to exercise ancillary authority, the Commission's actions must be "'reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities,' which are *exclusively* its responsibilities under Title II, III, at VI of the Act."[194] But as Judge Williams observed, the problem is that under the majority's interpretation of the law:

> There is no room in this concept for authority to establish a regulatory regime for broadband as an information service—meaning, given the extreme paucity of affirmative regulatory authority under Title I, a highly deregulatory regime. For the majority, the observation that by "reclassifying broadband as an information service, the Commission placed broadband *outside* of its Title II jurisdiction," is pretty much the end of the game. The majority conspicuously never offers an explanation of how a state regulation could ever conflict with the federal white space to which its reasoning consigns broadband.[195]

189. *Id.* at 100.
190. *Mozilla*, 940 F.3d at 106.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* (citations omitted and emphasis in original).
195. *Id.* (citations omitted).

Finally, Judge Williams argued that the majority's statutory abdication logic was, in his words, "inapplicable."[196] As Judge Williams explained, given the D.C. Circuit's ruling in *USTelecom v. FCC*,[197] the Commission had authority to apply Title II to broadband. By returning broadband Internet access back to a Title I information service, all the Commission did was "forswore any *current* intention to use Title II vis-à-vis broadband."[198] However, as Judge Williams pointed out, even though the FCC returned broadband Internet access back to its original classification, "the authority to reclassify broadband back under Title II, and thus to subject it to all the authorities granted under Title II, remained."[199] Accordingly, argued Judge Williams, "*the Commission's choice not to exercise a power is not a permanent renunciation of that power.*"[200]

VII. *MOZILLA* AND ITS AFTERMATH

A. ACA Connects – America's Communications Association v. Bonta

As both nature and regulation abhor a vacuum, after the FCC issued its *Restoring Internet Freedom Order*, California stepped in with the California Internet Consumer Protection and Net Neutrality Act of 2018 ("SB-822"), Cal. Stats. 2018, Chapter 976, which essentially codified at the state level the FCC's original *2015 Open Internet Rules*. Internet Service Providers sued, arguing that SB-822 was illegal both on conflict and field preemption grounds. The Ninth Circuit disagreed.[201]

To begin, the Ninth Circuit, just as the D.C. Circuit did in *Mozilla*, accepted the jurisdictional abdication argument. According to the court, a "fundamental principle of preemption … is that an absence of federal regulation may preempt state law only if the federal agency has the statutory authority to regulate in the first place."[202] However, reasoned the court, by "reclassifying broadband as a Title I information service, the FCC stripped

196. *Mozilla*, 940 F.3d at 101.

197. *USTelecom v. FCC,* 825 F.3d 674 (2016).

198. *Mozilla*, 940 F.3d at 101.

199. *Id.*

200. *Id.* (emphasis supplied); *cf.,* Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 384 (1983) ("[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision to regulate.") (emphasis in original). Judge Williams' argument apparently touched a nerve with the majority, whose opinion disagreed with any suggestion by Judge Williams that its holding on express preemption would prevent the application of conflict preemption when "the Commission can explain how a state practice actually undermines" portions of the *RIFO* the court upheld (including the information service classification and the elimination of most net neutrality mandates).

201. ACA Connects – America's Communications Association v. Bonta, 24 F.4th 1233 (9th Cir.), *reh'g denied en banc*, 2022 U.S. App. LEXIS 10669 (9th Cir. Cal., Apr. 20, 2022).

202. 24 F.4th at 1241.

itself of the requisite regulatory authority and, accordingly, of the preemptive authority to displace state laws."[203]

Next, the Ninth Circuit considered arguments of broader conflict preemption with the Communications Act writ large. Again, the Ninth Circuit wasn't convinced. According to the Court's reading of the Communications Act, the statute focuses explicitly on "defining the extent of FCC regulation" of information services and does not "mention, let alone defend or displace, the regulatory authority of the states."[204] In the court's view, the Communications Act prevents "the FCC itself, and not the states, from imposing common carrier regulations on either information services or private mobile services."[205]

The Ninth Circuit also found no issues with field preemption. In the court's view, because the Communications Act establishes dual state and federal authority "in the field of interstate broadband services, states have taken advantage of the space left for state laws to supplement the federal scheme."[206] In fact, noted the court, the "Communications Act itself reflects a federal scheme that leaves room for state regulation that may touch on interstate services." As an example, the court argued that even Section 253—which gives the FCC preemption authority to remove barriers to entry to the interstate and intrastate telecommunications industry—"expressly preserves a role for states to protect consumer rights in this field." In the court's view, the "express preemption provisions located throughout the Communications Act are predicated on the assumption that states otherwise would have concurrent authority to regulate interstate services." Thus, reasoned the court, if "Congress had intended the Communications Act to preempt state regulation touching on any interstate communications, there would be no need for any express preemption provisions."[207]

B. New York State Telecoms Association v. James

In an effort to bridge the so-called "digital divide," in 2021 New York passed a statute entitled the "Affordable Broadband Act" to regulate retail broadband rates. Under this statute, broadband service providers operating in New York must "offer high-speed broadband service to low-income consumers" at statutorily fixed prices (25 Mbps for $15/month for or 200 Mbps for $20 month). Broadband providers challenged the New York law, arguing that state price regulation of broadband stood in direct conflict with federal law. The Second Circuit in *New York State Telecoms Association v. James* disagreed.[208]

The court began its analysis by looking at field preemption. The court first reasoned that although the Communications Act "broadly grants the FCC jurisdiction over 'all interstate and foreign communication,' nothing in the

203. *Id.* at 1239-40.
204. *Id.* at 1245.
205. *Id.*
206. *Id.* at 1248.
207. *Id.*
208. New York State Telecoms Association v. James, 101 F. 4th 135 (2d Cir.).

text suggests that the FCC has *exclusive* jurisdiction over interstate communication, which is the relevant question for implied field preemption."[209] And according to the Second Circuit, a "statute granting regulatory authority over [a] subject matter to a federal agency is not in and of itself sufficient to find field preemption. Congress must do much more to oust all of state law from a field."[210] Moreover, noted the court, the "Communications Act has *no* framework for rate regulation over Title I services like broadband, let alone one that is 'so pervasive … that Congress left no room for the States to supplement it.'"[211] Thus, reasoned the court, the "*absence* of regulation is the exact opposite of a federal 'framework . . . so pervasive' that it results in field preemption."[212] Finally, the court observed that while the Communications Act

> contains provisions expressly prohibiting states from regulating specific types of communications services, and none covers all rate regulations of interstate communications services. Instead, the Act identifies specific *types* of communications services, regulates them differently under different Titles, and preempts state regulation of some of them on a case-by-case basis."[213]

In short, ruled the court, there is "simply no indication that Congress intended to preempt a field as broad as 'rate regulation of interstate communications services.'"[214]

The Second Circuit next turned to conflict preemption. Adopting similar reasoning by the Ninth Circuit in *Bonta* and the D.C. Circuit in *Mozilla*, the Second Circuit ruled that by reclassifying broadband as a Title I information service, the FCC had essentially abdicated it authority to "enact (or preempt) common carrier—style regulations of broadband under Title I."[215] According to the Second Circuit,

> Title I grants the FCC no authority to impose rate regulations, nor does it contain a forbearance provision similar to Title II. Thus, because broadband is now regulated as a *Title I* service, the FCC has no congressionally delegated authority to impose *or* forebear rate regulations. Absent the "power to act," the FCC has no power to preempt broadband rate regulation.[216]

209. *James*, 101 F. 4th at 150 (emphasis in original).
210. *Id.* at 150-51 (citations omitted).
211. *Id.* at 151.
212. *Id.* (citations omitted and emphasis in original).
213. *Id.* at 152 (emphasis in original).
214. *Id.*
215. *James*, 101 F. 4th at 155.
216. *Id.* (emphasis in original).

It would seem, therefore, that if state efforts to impose rate regulation on broadband internet access services are not subject to either field or conflict preemption with the Communications Act, then the probability that state laws governing AI—again*, a general-purpose technology*—could be preempted by the Communications Act appear to be slim to none.

VIII. POLICY RECOMMENDATIONS

The purpose of this paper is not to argue that the federal government should not preempt state AI laws and regulations. Quite the opposite: the purpose of this paper is to demonstrate that because the clock is ticking, trying to contort the Communications Act to preempt the growing patchwork of disparate state AI laws is a Quixotic exercise in futility. Worse, as courts are often a "black box" where outcomes can be unexpected, engaging in legal gymnastics with the Communications Act could perversely lead to a vast expansion of the FCC's authority beyond its statutory constraints.[217] The cleanest legal solution, therefore, is for Congress to enact expeditiously some sort of preemption mechanism before the United States loses the AI race due to an unnecessary "Death by Fifty State Cuts."[218]

217. *C.f.* Lawrence J. Spiwak, *Regulatory Implications of Turning Internet Platforms into Common Carriers,* 76 FED. COMM. L. J. 1 (2023).

218. While Congress is at it, it should also provide the FCC with the express ability to preempt states from regulating the rates, terms and conditions of retail broadband Internet access service. That said, as noted *supra*, providing the FCC with authority to preempt state municipal broadband laws would probably not pass constitutional muster.

Locked Out of Democracy: Addressing the Hidden Voter Suppression in Jails

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I. INTRODUCTION

Voting is one of the most fundamental ways American citizens communicate their satisfaction or dissatisfaction with the government, which the Constitution designed to serve "the people."[1] Voting also serves as the medium for "the people" to choose their representatives, whose job is to enact policies on behalf of the desires of their constituents.[2] In recognition of the importance of the political process and constitutional balance of powers, the Supreme Court has been careful in exercising judicial power over decisions reserved to the people through the political process.[3] The Court has also expressed that judicial interference may be necessary where the political process breaks down and to protect American citizens who experience problems forming political coalitions and exercising the political power reserved to them.[4]

Currently, over half a million legally eligible voters held in jails across the country are being effectively disenfranchised due to insufficient access to accurate information about their right to vote and how they can exercise it awaiting trial.[5] This Note proposes that the federal courts should protect pre-trial detainees' fundamental right to vote by recognizing that jail officials may not obstruct their ability to access accurate voting information and have affirmative obligations to provide them access to voting information. It proceeds by first showing how insufficient access to accurate voting information in jails is causing the de facto disenfranchisement of pre-trial detainees.[6] Part II-B will show that access to voting information is protected

1. *See* Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL'Y J. 471, 488 (2016) ("The expressive nature of the vote is present whether the vote is for a candidate in a … election or for a ballot proposition, recall, referendum, or anything else called a vote.").

2. *Id.*; *see also* U.S. CONST. art. I, § 2.

3. *See generally* United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938) (explaining that it may be appropriate for the Court to supply more exacting judicial scrutiny upon "legislation which restricts those political processes which can be ordinarily expected to bring about repeal of undesirable legislation").

4. *See id.* (expressing that more exacting scrutiny may be necessary in addressing instances where "prejudice against discrete and insular minorities," could constitute a "special condition which tends to seriously curtail the operation of those political processes ordinarily relied upon to protect minorities").

5. *See* NICOLE D. PORTER ET AL., OUT OF STEP: U.S. POLICY ON VOTING RIGHTS IN GLOBAL PERSPECTIVE 15 (2024) (explaining that lack of knowledge about the right to vote and insufficient or inaccurate information from jail staff contribute present a significant obstacle to people voting in jail), https://www.sentencingproject.org/app/uploads/2024/08/Out-of-Step-U.S.-Policy-on-Voting-Rights-in-Global-Perspective.pdf [https://perma.cc/3K9F-HMEQ]; *see also* Press Release, Ginger Jackson-Gleich & Rev. Dr. S. Todd Yeary, *Eligible, but excluded: A guide to removing the barriers to jail voting*, Prison Pol'y Initiative (Oct. 2020), https://www.prisonpolicy.org/reports/jail_voting.html [https://perma.cc/2LTA-D2T2]; Nicole D. Porter, *Voting in Jails*, THE SENTENCING PROJECT (May 7, 2020), https://www.sentencingproject.org/policy-brief/voting-in-jails/ [https://perma.cc/JR7R-7F2W].

6. *See infra* Part II.A.

under the First Amendment's broad right to access information.[7] Part II-B will also explain how protecting access to voting information is consistent with the First Amendment's underlying purpose to protect political expression and access to political information as a way to ensure that the people maintain their constitutionally reserved power to hold government officials accountable.[8]

Part II-C will address the First Amendment framework the Supreme Court uses to address claims raised by incarcerated people.[9] This section will highlight how this highly deferential standard may not be sufficient to protect pre-trial detainees' from jail practices that interfere with their ability to access information on voting and effectively cast their ballots.[10] Part II-C will also highlight critiques of the *Turner* standard, specifically, that some dissenting Justices have expressed concerns that under *Turner*'s overly deferential standard courts will be able to disregard incarcerated peoples' constitutional rights.[11]

Part III proposes that the federal courts should recognize that pre-trial detainees have a right to access voting information and find that the government has affirmative obligations to ensure that they maintain adequate access to voting information.[12] This right is modeled after the prisoners' fundamental right of access to the courts.[13] This part will proceed by showing: (1) how the prisoners' right of access to the courts is also rooted in the First Amendment;[14] (2) that creating a pre-trial detainees' right to access voting information will serve the same purpose as the prisoners' right of access to courts; (3) the reasons underlying the Supreme Court's decision to place affirmative obligations on the states to ensure incarcerated people maintain access to the courts, and show why similar obligations should be placed on states to provide pre-trial detainees access to voting information;[15] (4) how the *Turner* standard will pose a less substantial threat to courts being able to meaningfully ensure that pre-trial detainees maintain access to voting information.[16] Part III will conclude by highlighting what voter information necessarily requires protection, including: (1) information on registering to vote in a detainees' state and information about any state voter registration deadlines; (2) information on whether they live in a vote-by-mail state; (3) information on how to vote-by-mail; (4) if they live in a state that has a voter identification law, understanding how to meet its requirements; (5) information about candidates and ballot measures; (6) whether being convicted of the crime which they are accused of will disqualify them from

7. *See infra* Part II.B.
8. *Id.*
9. I attempt to use humanizing language for incarcerated people where possible. At times, this Note will refer to people held awaiting trial as pre-trial detainees.
10. *See infra* Part II.C.
11. *Id.*
12. *See infra* Part III.A.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*

voting while incarcerated; and (7) information on how to have their right to vote reinstated in the event they are convicted of a disqualifying crime.[17]

II. BACKGROUND

A. The Disenfranchisement of Pre-Trial Detainees

The United States remains an outlier nation in disenfranchising its citizens due to criminal convictions.[18] Currently, over 4.4 million people who would otherwise be legally eligible to vote are disenfranchised due to a felony conviction.[19] These numbers may not surprise those following criminal justice reform movements focused on mass incarceration. However, many may be surprised to find out that hundreds of thousands of people sitting in jails—detained awaiting trial—maintain the right to vote.[20] Individuals in jails fall into a range of classes,[21] however, many of them commonly share the trait that they are legally eligible to vote.[22]

One class of individuals who maintains the right to vote in all fifty states are people detained awaiting trial.[23] Individuals may be detained before trial for many reasons, which vary across jurisdictions. Pursuant to the Bail Reform Act of 1984, judges in the federal system consider: (1) the type of crime an individual is charged with, (2) whether an individual poses a flight risk, or (3) whether there is a serious risk the individual will obstruct justice or attempt to obstruct justice.[24] After a hearing, judges may detain someone only if they find "that no conditions or combination of conditions exist which will 'reasonably assure the appearance of the person'" and to ensure "the safety of any other person and the community."[25] However, these individuals are only part of the jail population. Approximately sixty percent of individuals detained awaiting trial remain incarcerated solely because they cannot afford

17. *See infra* Part III.B.
18. *See* PORTER ET AL., *supra* note 5, at 4.
19. *Id.*
20. *See* O'Brien v. Skinner, 414 U.S. 524, 530 (1974) (holding that New York's failure to extend an opportunity for New York citizens detained before trial or incarcerated in jail for a misdemeanor an opportunity to vote via absentee ballot to be unconstitutional disenfranchisement because these individuals are not legally disenfranchised due to conviction but are merely "physically disabled" from participating in elections due to being detained or incarcerated in jail); *see also* Porter, *supra* note 5; Press Release, Prison Pol'y Initiative, *supra* note 5; DEP'T OF JUST. C.R. DIV., GUIDE TO STATE VOTING RULES THAT APPLY AFTER A CRIMINAL CONVICTION (updated Sep. 2024), https://www.justice.gov/crt/media/1332106/dl?inline= [https://perma.cc/53FZ-FTR8].
21. *See* BUREAU OF JUST. STAT., *Correctional Institutions*, https://bjs.ojp.gov/topics/corrections/correctional-institutions#0-0 (last visited Apr. 7, 2025) [https://perma.cc/2NAY-ZLD5].
22. *See* DEP'T OF JUST. C.R. DIV., *supra* note 20 (providing state-by-state information on voting rules that apply to criminal convictions, including misdemeanor convictions).
23. *Id.*
24. 18 U.S.C. § 3142(f).
25. *Id.* § 3142(e)(1).

the cash bail amount required for their release.[26] Whatever the reason these individuals are detained in jail before trial, the Supreme Court has clearly recognized that pre-trial detainees maintain the right to vote.[27]

Despite retaining their right to vote, pre-trial detainees face significant obstacles which effectively disenfranchise them.[28] The risk of disenfranchisement arises because people in jails often do not know that they maintain their right to vote and do not receive accurate information from jail officials about their right to vote.[29] This leaves people in jail without knowledge about how to: (1) register to vote, (2) confirm their voter registration status during election cycles, and (3) effectively cast their ballots. Even where information is available, the Sentencing Project has identified additional hurdles, including a lack of in-person voting opportunities, being unable to keep their registration address up to date, and getting an ID where states require one to vote.[30] Moreover, laws in certain states criminalize ballot return by non-family members, which prevents willing jail staff from assisting detainees with returning their ballots.[31] Additionally, individuals held in pre-trial detention centers with previous felony convictions may be deterred from voting due to fear of legal repercussions, since some states impose criminal penalties for attempting to vote after a felony conviction.[32]

To illustrate the impact of these information gaps, logistical hurdles, and collateral consequences, consider the state of Delaware's jails in the November 2020 general election. In 2020, Delaware's Department of Corrections ("DDOC") instituted a new mail policy to prevent people in pretrial custody from receiving physical mail unless it was marked "official mail."[33] According to DDOC, its new mail policy was implemented to minimize the flow of contraband through corrections facilities.[34] Under the policy, DDOC redirected physical mail to a third-party company that photocopies the mail and that photocopy is delivered to people held in DDOC custody.[35] The policy exempts "official mail," but did not specify that

26. *See* Tara Watford, *Unlocking the Truth: A Closer Look at Cash Bail Data*, THE BAIL PROJECT (Sep. 25, 2023), https://bailproject.org/data/unlocking-the-truth/#:~:text=Of%20those%20in%20jail%20on,a%20year%2C%20awaiting%20their%20trials [https://perma.cc/Q5R2-V6K2].

27. *See O'Brien*, 414 U.S. at 530. While most states also do not disenfranchise people due to a misdemeanor conviction, the scope of this Note will focus on pre-trial detainees being held in jails before trial.

28. *See* PORTER ET AL., *supra* note 5, at 15–16.

29. *See id.* at 16.

30. *Id.*

31. *Id.*

32. *Id.*

33. *See* Paul Kiefer, *DOC clarifies rules for absentee ballots, considers offer of voter registration volunteers*, DEL. PUB. MEDIA (Aug. 21, 2022, 8:35 PM), https://www.delawarepublic.org/politics-government/2022-08-21/doc-clarifies-rules-for-absentee-ballots-considers-offer-of-voter-registration-volunteers [https://perma.cc/Q69S-7MKC];PORTER ET AL., *supra* note 5, at 16 ("[I]n Delaware, evidence shows that *not one single voter* living in a jail voted in the November 2020 election").

34. *Id.*

35. *Id.*

absentee ballots qualified for exemption.[36] As a result, pre-trial detainees that remained eligible to vote were universally disenfranchised in the 2020 general election.[37]

In response, the ACLU of Delaware and the Prisoners' Legal Advocacy Network met with the Delaware Department of Elections Commissioner, Delaware state legislators, and representatives from DDOC.[38] At the meeting, it became clear that many "startling" practices, in addition to the Department of Corrections' mail policy led to the universal disenfranchisement of individuals in pre-trial detention.[39] These practices included: (1) inaccuracies about voter registration deadlines posted in every facility, (2) that DDOC mailroom staff had not been trained on how to process absentee ballots and remained confused over whether absentee ballot envelopes constituted contraband based on DDOC's general mailroom policies, (3) no eligible voter in solitary confinement was provided with an opportunity to register to vote or request or return an absentee ballot, (4) DDOC characterized eligible voters' constitutional right to vote as a "privilege."[40] These deficiencies underscore the reality that pretrial detainees' ability to exercise their right to vote depends on correctional facilities actively informing them of their rights and providing them with a pathway to cast a ballot.

B. The First Amendment Protects a Right to Access Voting Information.

This section first examines the origins of the First Amendment right to access information despite the word "information" not being explicitly included in the text. It then shows that voting-related information is a form of political expression/information protected by the First Amendment. It will show that voting-related information receives First Amendment protection and that pre-trial detainees, by being legally eligible voters, maintain a right to access voting-related information.

1. The First Amendment Right to Access Information

The Supreme Court has long recognized that the First Amendment protects the freedom to speak and the right to receive information.[41] The right to access information is closely related to the freedom of the press and the role that the Framers imagined the press to play in America's democracy. In

36. *See* Kiefer, *supra* note 33.

37. *Id.*

38. Letter from Dwayne J. Bensing, Legal Director, ACLU to Commissioner Hudson, Del. Dep't of Corr. (Sep. 12, 2022), https://www.aclu.org/cases/prisoners-legal-advocacy-network-v-carney?document=Demand-Letter-to-Department-of-Corrections#legal-documents[https://perma.cc/3J2A-7FNY]; *see also* PORTER ET AL., *supra* note 5, at 16.

39. *Id.*

40. *Id.*

41. *See generally* Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972) (collecting cases outlining the scope of the right to receive information and ideas protected under the First Amendment).

Near v. Minnesota, the Court struck down a state statute that punished newspaper, magazine, and other periodical publishers who published literature found to be "malicious, scandalous, and defamatory."[42] In striking down the law, the Supreme Court cited to the Framers' intention to include a freedom of the press into the First Amendment:

> "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more [honorable] and just modes of conducting affairs."[43]

According to this quote by the members of the Continental Congress, preserving the Press' role to function would preserve the People's freedom.[44] With this in mind, the Court closely scrutinized the government's attempts to regulate the publication and distribution of information and ideas.[45] It has expanded the First Amendment's press protection to "every sort of publication which affords a vehicle of information and opinion."[46]

The Supreme Court subsequently realized that the First Amendment's protection to speech would be useless without protecting people's ability to receive information and opinions.[47] In *Martin v. Struthers*, the Court explained the necessity of protecting access to information.[48] There, a city ordinance that made it unlawful for any person to distribute "handbills, circulars, or other advertisements" by approaching someone's home and ringing their doorbell.[49] Ms. Martin, a Jehovah's witness, was convicted after knocking on people's doors to distribute leaflets that advertised a religious meeting.[50] In holding that the City ordinance violated the First Amendment, Court explained that the freedom of the press and speech "necessarily protects the right to receive … novel and unconventional ideas," because "the freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society."[51] According to the Court,

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42. *See generally* Near v. Minnesota, 283 U.S. 697 (1931).
43. *See id.* at 717 (citing J. of the Cont'l Cong. (1904 Ed.) vol. I, pp. 104-08).
44. *Id.*
45. *See* Martin v. Struthers, 319 U.S. 141, 144 (1943) ("In considering legislation which thus limits the dissemination of knowledge, we must be astute to examine the effect of the challenged legislation and must weigh the circumstances and appraise the substantiality of the reasons advanced in support of the regulation.").
46. *See* Lovell v. Griffin, 303 U.S. 444, 452 (1938).
47. *See Martin*, 319 U.S. at 143 (explaining that the First Amendment necessarily protects the right to receive information to ensure that Framers' goals in drafting the First Amendment are upheld).
48. *Id.*
49. *See id.* at 142.
50. *Id.*
51. *See id.* at 146.

any "naked restriction of the dissemination of ideas … can serve no purpose but that forbidden by the Constitution."[52] Therefore, the Court closely monitors the government's attempts to regulate individual's access to information.

Since *Martin*, the Supreme Court has also held that the First Amendment protects workers interested in hearing about labor unions because "discussion concerning the industry and the causes of labor disputes [is] indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society."[53] These conversations are protected under both the First Amendment's speech and assembly clauses.[54] In *Red Lion Broadcasting Co. v. FCC*, broadcasters challenged the FCC's fairness doctrine.[55] Specifically, broadcasters alleged that the First Amendment protected their "desire to use their allotted frequencies continuously to broadcast whatever they choose, and exclude whomever they choose from ever using that frequency."[56] According to the broadcasters, under the First Amendment "[N]o man may be prevented from saying or publishing what he thinks, or from refusing in his speech … to give equal weight to the views of his opponents."[57] The Supreme Court disagreed, stating that in the context of broadcast media, "[I]t is the right of the viewers and listeners, not the right of the broadcasters which is paramount … [a]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences that is crucial here."[58] According to the Court, this was so because "speech concerning public affairs is more than self-expression; it is the essence of self-government."[59] Although *Red Lion* was a First Amendment decision made in the context of broadcasting, its principle that the First Amendment protects "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences …" has been acknowledged by the Court outside of the broadcast medium.[60]

52. *See id.* at 147.
53. *See* Thomas v. Collins, 323 U.S. 516, 532 (1945).
54. *Id.*
55. *See* 395 U.S. 367, 373-74 (1969). The Fairness Doctrine required broadcasters to allot equal time for all qualified candidates for public office. *See* 47 CFR §§ 73.123, 73.300, 73.598, 73.679 (all identical). In 1967, the FCC codified regulations pursuant to the Telecommunications Act which required broadcast licensees to provide an opportunity for legally qualified political candidates to respond to personal attacks or political editorials. *See Red Lion*, 395 U.S. at 374-75 (explaining the FCC's regulations).
56. *See Red Lion*, 395 U.S. at 386.
57. *Id.*
58. *See id.* at 390.
59. *Id.* (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)).
60. *See Kleindienst*, 408 U.S. at 763 (citing *Red Lion* to highlight the general principle that the First Amendment protects the right to receive information and ideas).

2. Pre-Trial Detainees' Access to Voting Information is Protected Under the First Amendment.

As *Red Lion* makes clear, the Supreme Court has held that people have a right to access political information.[61] This is so because, according to the Court, free speech "is the essence of self-government."[62] Alexander Meiklejohn's self-government theory of the First Amendment helps explain why. Meiklejohn's interpretation of the First Amendment comes from looking at surrounding constitutional provisions: the Preamble, Article I, § 2, and the Tenth Amendment.[63]

The Preamble states, "We the People … establish this Constitution for the United States of America."[64] Through the Constitution, "We the People," grant limited powers to the federal government, which are carried out by representatives acting as agents of the people.[65] However, as demonstrated by the Tenth Amendment, the people did not delegate all of their power to the federal government, "any powers not given to the federal government are reserved to the states or to *the people*."[66] Article I, § 2 supports the notion that one of the sovereign powers reserved to the people is the power to choose their representatives.[67]

According to Meiklejohn, Article I, § 2's express acknowledgement of the people's voting power subordinates the federal government's power to interfere with the people's ability to participate in the electoral process.[68] Reading these provisions together, Meiklejohn declares that the First Amendment's speech clause "protects the freedom of those activities of thought and communication by which we 'govern.'"[69] Since voting is the ultimate activity by which we govern, it follows that if voting falls within one of the categories protected under the First Amendment—speech, peaceable assembly, or a form of petition to the government for redress of grievances—it should receive protection under the First Amendment.[70]

The Supreme Court, however, has never expressly recognized voting as protected expression under the First Amendment,[71] even though there is theoretical support for the conclusion that voting is a form of protected

61. *See Red Lion*, 395 U.S. at 390.
62. *See Garrison*, 379 U.S. at 74-75.
63. *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 253 (1961).
64. U.S. CONST. pmbl.
65. *See* Meiklejohn, *supra* note 63, at 254.
66. U.S. CONST. amen. X (emphasis added).
67. *See* Meiklejohn, *supra* note 63, at 254.
68. *Id.*; *see also* U.S. CONST. art. I, § 2.
69. *See* Meiklejohn, *supra* note 63, at 254.
70. *Cf.* U.S. CONST. amend. I.
71. *See* Armand Derfner & J. Gerald Hebert, *supra* note 1, at 486 ("Despite the Court's current jurisprudential confusion, the Supreme Court has never explicitly considered, much less rejected the argument that voting is speech fully protected by the First Amendment.").

expression under the First Amendment.[72] Regardless, even without recognizing voting as protected First Amendment expression, access to information on voting is still protected. It is the type of political information that the Court has already afforded broad protection to under the First Amendment.[73] Moreover, this will preserve the balance of power which the framers divided among the federal government, the states, and the people.[74] After the Court announced in *O'Brien v. Skinner* that pre-trial detainees maintain the right to vote so long as they meet a state's voter eligibility requirements, this First Amendment right to information on voting must extend to them too.[75]

C. The Unfortunate Reality of the First Amendment in Jail

The obstacle faced in this Note is not that people in jails do not maintain the right to vote, nor is it challenging to see how the First Amendment would protect people from governmental interference with their ability to access voting information.[76] Rather, the difficulty comes from the way that the Supreme Court balances the government's interests against those of incarcerated individuals when determining the scope of First Amendment protections inside of prisons and jails.[77] Although Meiklejohn argued that the First Amendment entirely "subordinates the power of the [Government]," the Supreme Court has held that the First Amendment is not absolute and, therefore, balances the government's interests against an individual's interest in protected speech to determine the constitutionality of government regulations on speech or affecting speech.[78] Under the First Amendment framework applied to claims made by incarcerated people, the Court applies far more deference to the government's interest than it would outside of the setting of a jail or prison.[79] This balancing of interests makes it extremely challenging for incarcerated people to succeed on First Amendment claims.

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72. *See id.* at 488–89 (discussing how the act of voting serves sufficient communicative functions for the Supreme Court to find that it is a form of protected expression under the First Amendment).

73. *Cf. Red Lion*, 395 U.S. at 389-90 (explaining that individuals have the right to receive access to political ideas consistent with the purpose of the First Amendment to preserve an "uninhibited marketplace of ideas."); *see also Garrison*, 379 U.S. at 74-75 ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.").

74. *See* Meiklejohn, *supra* note 63, at 253–54; *see also* U.S. CONST. pmbl.; *see also* U.S. CONST. amen. X; U.S. CONST. art . I, § 2.

75. *See O'Brien*, 414 U.S. at 530 (explicitly stating that appellants—a group of pre-trial detainees and people convicted of misdemeanors in the State of New York—maintain the right to register to vote and vote because they are not legally disabled from doing so).

76. *See supra* Part II.A.

77. *See* Turner v. Safley 482 U.S. 78, 89–91 (1987) (creating the legal standard of review for constitutional challenges in the area of incarcerated people's rights).

78. *See* Konigsberg v. State Bar, 366 U.S. 36, 49-50 ("At the outset we reject the view that freedom of speech and association …, as protected by the First … Amendment [is] absolute.").

79. *See Turner*, 482 U.S. at 84-85 ("Prison administration is … a task that has been committed to the responsibility of [the legislative and executive branches], and separation of powers concerns counsel a policy of judicial restraint.").

This Part will first discuss the *Turner* standard utilized by the Supreme Court to assess incarcerated people's constitutional claims. It gives an example of incarcerated people who prevailed under *Turner* because the government could not show that its regulation limiting access to a newsletter was rationally related to a legitimate penological interest, in violation of the First Amendment. That example, however, will be followed by a discussion on common critiques to *Turner*'s heavily deferential standard. Mainly that courts do not adequately balance incarcerated people's fundamental rights against the government's interest in prison administration. To these critics, *Turner* allows incarcerated people's constitutional rights to be disregarded rather than upheld. Finally, it will end with an illustration of how *Turner*'s standard makes it uncertain whether pre-trial detainees could successfully raise a First Amendment challenge to jail practices and policies, such as the Delaware jail's mail policy, which effectively disenfranchise them.

1. The *Turner* Standard

The Supreme Court's *Turner* standard governs whether prison and jail regulations violate incarcerated peoples' First Amendment rights.[80] *Turner* challenged Missouri Division of Corrections' regulations prohibiting correspondence between incarcerated people housed at different correctional institutions.[81] The first challenged regulation prohibited correspondence between inmates unless it concerned "legal matters," or where "the classification/treatment team of each inmate deems it in the best interest of the parties involved."[82] The trial court found that, in practice, these regulations prohibited incarcerated people from writing to "non-family inmates."[83] The district court applied the standard articulated by the Supreme Court in *Procunier v. Martinez*, an earlier case.[84] Under the *Martinez* standard, the district court found that the regulation was unconstitutional because it was "unnecessarily broad … [since] prison officials could effectively cope with security problems raised by inmate-to-inmate

80. *See id.* at 84-89 (discussing the proper standard of review when a prison regulation impinges an [incarcerated person's] constitutional rights).

81. *See id.* at 82.

82. *See id.* at 81.

83. *See id.* at 82.

84. In *Martinez*, the Supreme Court addressed California corrections regulations that censored certain categories of mail correspondence between incarcerated people and "any person that was not a licensed attorney or holder of public office." *See* Procunier v. Martinez, 416 U.S. 396, 398-99 (1974). The Court held that under these circumstances, the Court did not need to establish the proper standard of review for prison regulations that restrict the freedom of speech because California's regulations implicate "more than the right of prisoners." *See id.* at 408. It then fashioned a standard of review that balanced interests in a similar way that the Court balances interests where there is a restriction on First Amendment expression imposed in furtherance of legitimate governmental activities. *See id.* at 411-12. The Court held that the proper analysis considered whether (1) the regulation or practice furthers an important or substantial governmental interest unrelated to the suppression of expression and (2) the restriction must be narrowly tailored. *See id.* at 413-14. In this context, a regulation will be upheld if it furthers "a substantial interest of penal administration—security, order, and rehabilitation and does not "sweep unnecessarily broad." *Id.*

communication through less restrictive means."[85] The Eighth Circuit affirmed, finding that it was proper for the district court to apply the *Martinez* standard under these circumstances and that the "correspondence did not satisfy [*Martinez*] because it was not the least restrictive means of achieving the security goals of the regulation."[86]

The Supreme Court disagreed with the lower courts' application of *Martinez* to the Missouri regulation.[87] The Court pointed out that the *Martinez* Court fashioned its standard around the fact that the California regulation challenged in that case implicated the First Amendment rights of people that are not incarcerated.[88] Therefore, according to the Court, *Martinez* did not answer the question of what the proper standard of review is for analyzing cases "involving questions of prisoners' rights."[89] The Court went on to formulate a standard based on four cases following *Martinez*, that in the Court's eyes, addressed "questions of prisoners' rights."[90] After reviewing these cases, the Court concluded that, with respect to prisoners' rights, a regulation will be upheld so long as it is "reasonably related to legitimate penological interests."[91] According to the Court, a reasonableness standard was more appropriate to address constitutional claims raised by incarcerated people because "prison administrators … and not the courts, [are] to make the difficult judgments concerning institutional operations."[92] Applying anything stricter than this "would seriously hamper [prison officials'] ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."[93] It would also result in the courts rather than prison officials determining "the best solution to every [prison] administrative problem" and "unnecessarily perpetuate the involvement of the federal courts in affairs of prison administration."[94]

The Court determined that federal courts must undertake a four-factor balancing analysis in determining whether challenged prison regulations are "reasonably related to legitimate penological interests."[95] The first factor in the reasonableness analysis considers whether there is a "valid, rational connection between the prison regulation and the legitimate government interest" advanced to justify it.[96] To satisfy the first factor, the government must show that it has a neutral legitimate interest and a "logical connection between the regulation and the asserted goal."[97] Courts must strike down regulations where the "connection between the regulation and asserted goal

85. *See Turner*, 482 U.S. at 83.
86. *Id.*
87. *See id.* at 86.
88. *Id.*
89. *Id.*
90. *Id.*
91. *See Turner*, 482 U.S. at 89.
92. *Id.*
93. *Id.*
94. *Id.*
95. *See id.* at 89-91 (identifying several factors relevant to determining the reasonableness of a regulation).
96. *Id.*
97. *See Turner*, 482 U.S. at 89.

is so remote as to render the policy arbitrary or irrational."[98] This is the threshold inquiry under *Turner*.[99] The second factor considers "whether there are alternative means of exercising the right that remain open to prison inmates."[100] The third factor is "the impact of accommodation of the asserted constitutional right … on guards and other inmates, and on the allocation of prison resources generally."[101] Under this factor, where the "accommodation of an asserted right will have a significant ripple effect on fellow inmates or prison staff, courts should be particularly deferential to the informed discretion of corrections officials."[102] Fourth and finally, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation."[103]

a. An Example of Success Under *Turner*

Incarcerated people have been most successful under *Turner* when they can show that a prison regulation has no "valid, rational connection," to the prison's asserted interest. A good illustration of this is *Prison Legal News v. Cook*, where incarcerated people and Prison Legal News—the publisher of a non-profit newsletter—brought a civil rights action against corrections officials to challenge the Oregon Department of Corrections (Department) policy prohibiting receipt of standard rate mail, including subscriptions to the non-profit organization's mail.[104] Although many Department employees found that the non-profit organization's mail did not contain objectionable content, they rejected its newsletters because the Prison Legal News used a non-profit organization postage rate to circulate its publications.[105]

The Ninth Circuit began by rejecting the prison officials' argument that its policy did not implicate Prison Legal News and the incarcerated petitioners' First Amendment rights.[106] Instead, the court found that the policy's effect of prohibiting incarcerated subscribers access to Prison Legal News' newsletters affected "core protected speech."[107] Moreover, the Court noted that incarcerated people receiving "unobjectionable mail," does not interfere with penological interests.[108]

The Ninth Circuit then proceeded with its *Turner* analysis. It first addressed how it applies *Turner*, stating that where incarcerated challengers "present sufficient … evidence to refute a common-sense connection between a legitimate objective and a prison regulation … the state must present enough counter-evidence to show that the connection is not so remote as to render the policy arbitrary or irrational."[109] The court assessed each asserted penological

98. *See id.* at 89-90.
99. *Id.*
100. *See id.* at 90.
101. *Id.*
102. *Id.*
103. *Turner*, 482 U.S. at 90.
104. *See* Prison Legal News v. Cook, 238 F.3d 1145, 1146 (9th Cir. 2001).
105. *See id.* at 1148.
106. *See id.* at 1149.
107. *Id.*
108. *Id.*
109. *Id*. at 1150. (citing Frost v. Symington, 197 F.3d 348, 357 (9th Cir. 1999)).

interest in turn to determine whether a common-sense connection existed between its ban of standard rate mail and the Department's asserted interests.

First, the court found that no common sense connection existed between the Department's standard-rate mail ban and reducing contraband from entering its corrections facilities.[110] Under its current policies, incarcerated people would have been able to receive the Prison Legal News' newsletters if they sent them using first class postage.[111] According to the court, the Department provided "no evidence supporting a rational distinction between the risk of contraband in subscription non-profit organization standard mail and first class or periodicals mail."[112]

Second, the Department offered that the ban "helps reduce fire hazards by limiting the quantity of flammable material in inmates' cells."[113] However, the court noted that the Department already had property regulations that "limit the amount of material an inmate can possess," which refuted the "common sense connection between refusal to deliver subscription standard mail and the reduction of fire hazards."[114] Furthermore, it found it "irrational to believe that delivering the small amount of subscription non-profit organization standard mail that comes into Oregon prisons would significantly contribute to paper accumulation and increased fire hazards …."[115]

The court also was not convinced by the Department's third asserted interest, "that the regulation increases the efficiency with which random cell inspections can be conducted … the fewer materials in a cell, the better a correction officer can conduct a search."[116] The Ninth Circuit found that the property regulations outlined above sufficiently served these interests and therefore, found that it was not rationally related to "rendering efficient cell searches."[117]

Finally, the court rejected the Department's contention that the regulation enhanced prison security because it "allows mailroom staff to concentrate its efforts on timely processing acceptable mail and thoroughly inspecting mail for content and contraband."[118] Instead, it agreed with the petitioners' argument that processing Prison Legal News' subscription mail would not "substantially deplete prison resources and would not add significantly to the mailroom staff's workload."[119]

Since the Department failed to make the threshold showing that its regulation is rationally related to a legitimate penological objective, the court

110. *See Prison Legal News*, 238 F.3d at 1150.
111. *See id.* at 1148 ("the newsletter is rejected strictly because of the [non-profit organization] postage rate.").
112. *Id.* at 1150.
113. *Id.*
114. *Id.*
115. *Id.*
116. *See Prison Legal News*, 238 F.3d at 1150-1151.
117. *See id.* at 1151.
118. *Id.*
119. *Id.*

did not consider the other *Turner* factors and found itself required to reverse.[120]

2. *Turner*'s Critics Find the Standard to be Too Deferential

In *Turner*, Justice Stevens—joined by Justices Brennan, Marshall, and Blackmun—dissented as to the standard of review that the Court announced.[121] Justice Stevens expressed concern with the fact that a mere reasonableness standard will result in upholding regulations by "nothing more than logical connection."[122] According to Justice Stevens, this would result in courts restricting "prisoners' First Amendment rights on the basis of administrative concerns and speculation about *possible security risks* rather than on the basis of evidence that the restrictions are [necessary] to further an important governmental interest."[123] Ultimately, Justice Stevens saw this to mean that incarcerated people's constitutional rights would be disregarded by overly deferential courts.[124]

To demonstrate that his fears about the *Turner* standard were real, in a handful of dissents—including his separate opinion in *Turner*—Justice Stevens engaged in close evidentiary analyses of the records to show that the majority's application of *Turner*'s deferential standard contradicted incarcerated people's First Amendment interests.[125] In each analysis, Justice Stevens found that there was insufficient evidence provided by the government to show that a challenged regulation was reasonably related to legitimate penological interests.[126]

Justice Brennan also expressed policy concerns about the level of deference courts accord to prison officials under *Turner*.[127] In *O'Lone v. Estate of Shabazz*, decided eight days after *Turner*, Justice Brennan began his

120. *Id.*

121. *See Turner*, 482 U.S. at 100-116 (Stevens, J., concurring in part).

122. *See id.* at 100.

123. *See id.* at 101 n.1.

124. *See id.* at 100-101 (so long as "the imagination of the warden produces a plausible security concern, and a deferential trial court is able to discern a logical connection between that and the challenged regulation.").

125. *See, e.g.*, *Turner*, 482 U.S. at 105-12 (Stevens, J., concurring in part) (after reviewing the record before the trial court, finding that the blanket prohibition enforced at Renz to be "not only an 'excessive response' to any legitimate security concern; it is inconsistent with a consensus of expert opinion that is far more reliable than the speculation to which this Court accords deference."); *see also* Thornburgh v. Abbott, 490 U.S. 401, 429-31(1989) (Stevens, J., concurring in part) ("I am concerned that the Court today too readily substitutes the rhetoric of judicial deference for meaningful scrutiny of constitutional claims in the prison setting … the record convinces me that under either *Martinez* or the more deferential 'reasonableness' standard these regulations are an impermissibly exaggerated response to security concerns."); Beard v. Banks, 548 U.S. 521, 548 (2006) (Stevens, J., dissenting) ("As with regard to the current state of the record concerning the connection between the challenged regulation and its effect on prison security, the record is insufficient to conclude, as a matter of law, that petitioner has established a reasonable relationship between his valid interest in inmate rehabilitation and the prohibition on newspapers, magazines, and personal photographs . . .").

126. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 354-69 (1987) (Brennan, J., dissenting).

127. *See id.*

dissent by reminding us that, whether we like it or not, people that have committed crimes and are serving sentences of incarceration in prisons remain members of our society.[128] Although they are "banished from everyday sight," they do not exist in a "separate netherworld" governed by different demands and customs.[129] He emphasized that incarcerated people raise constitutional claims resting on the same set of principles and the same language of the Constitution "upon which all of us rely to hold official power accountable."[130]

Although Justice Brennan acknowledged that analyzing constitutional claims must account for the unique demands of prison administration, he made clear that it is not the Supreme Court's duty to construct a standard of review for incarcerated people's constitutional claims that instructs courts to defer to prison official's decisions.[131] Rather, the courts must construct a standard of review that honors the philosophy behind the Constitution as "a bulwark against infringements that might otherwise be justified as necessary expedients of governing."[132] Under the Constitution, it is the judiciary's duty to ensure that "fundamental restraints on [those in power] are enforced."[133] Therefore, Justice Brennan was skeptical about whether *Turner*'s standard aligned with the judiciary's duty to uphold the Constitution's commands. He also provided an important reminder in *O'Lone*: "Mere assertions of exigency have a way of providing a colorable defense to governmental deprivation, and we should be especially wary of expansive delegations of power to those who wield it on the margins of society."[134]

3. Can Pre-Trial Detainees Successfully Utilize *Turner* to Access Voting Information?

The ongoing de facto disenfranchisement of people awaiting trial represents the exact type of unconstitutional conditions that Justices Stevens and Brennan feared *Turner* would permit to exist.[135] Take the Delaware county jail example highlighted in Part II-A.[136] There, corrections officials cited the need to restrict drug contraband to justify its mail policy that resulted in the universal disenfranchisement of the Delaware corrections population.[137] If the pre-trial detainees in Delaware attempt to raise a constitutional challenge, under *Turner*, the Court would have to accord Delaware officials

128. *See id.* at 354-55.
129. *See id*.
130. *Id.* at 355.
131. *See id.* at 355–56 ("Our objective in selecting a standard of review is therefore *not*, as the Court declares, to ensure that courts afford appropriate deference to prison officials. The Constitution was not adopted as a means of enhancing the efficiency with which government officials conduct their affairs.") (internal quotations omitted).
132. *See O'Lone,* 482 U.S. at 355-56.
133. *See id.* at 356.
134. *See id.* at 358.
135. *See supra* Part II.C.
136. *See supra* Part I.A.
137. *See* Kiefer, *supra* note 33.

deference.[138] It is possible that this type of claim could end up before a court like the District Court in *Prison Legal News*, that is a part of a Circuit that requires corrections officials to show some evidence that their regulation is rationally related to legitimate penological interests and objectives.[139] But, it is just as likely that this sort of claim could go before a court that is willing to accord significantly more deference to corrections officials without any strong evidence that this mail regulation actually prevented drug contraband from entering Delaware correctional facilities.[140]

III. ANALYSIS

A. The Federal Courts Should Recognize that Pre-Trial Detainees Have the Right to Access Voting Information

As the previous section demonstrates, it will be incredibly challenging for eligible pre-trial detainee voters to bring a successful constitutional challenge to the current practices of jails that effectively disenfranchise them.[141] Instead, this Note proposes that the federal courts recognize a pre-trial detainee's right to access voting information. This right will look like the prisoner's right of access to the courts and would prohibit states from obstructing pre-trial detainees from accessing voter information and requiring states to affirmatively ensure that eligible pre-trial detainee voters have a reasonable opportunity to access voting information.

It is appropriate for the courts to adopt this right of access to voting information for many of the same reasons that the Supreme Court recognized the prisoners' right of access to the courts. First, both rights are supported by the First Amendment.[142] Second, both rights serve as a pathway to protect incarcerated people's ability to exercise other constitutionally guaranteed fundamental rights.[143] Third, the courts should feel comfortable placing obligations on states to ensure that pre-trial detainees have access to voting information because states already shoulder obligations to ensure that voting information is disseminated to its electorate.[144] Fourth, the *Turner* standard provides a less substantial threat in this context.[145]

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138. *See Turner*, 482 U.S. at 84-85, 89 (discussing the need for judicial restraint and deference to judgments of prison administrators when analyzing constitutional claims that arise concerning institutional operations of corrections facilities).

139. *See Prison Legal News*, 238 F.3d at 1149 (explaining the Ninth Circuit's application of *Turner*).

140. *See Turner*, 482 U.S. at 105-12 (Stevens, J., concurring in part) (criticizing the majority's failure to evaluate the evidentiary record closely and therefore rely on speculative evidence that the prison regulation had a logical connection to the interests it was purported to serve).

141. *See supra* Part II.C.

142. *See supra* Part II.B; *see also* infra Part III.A.1.a.

143. *See infra* Part III.A.2.

144. *See infra* Part III.A.3.

145. *See infra* Part III.A.4.

1. Prisoners' Right of Access to the Courts

There are three leading cases that created the prisoners' right to access the courts, *Ex parte Hull*,[146] *Johnson v. Avery*,[147] and *Bounds v. Smith*.[148] In *Ex parte Hull* and *Avery*, the Court held that prison officials may not obstruct incarcerated people from accessing the courts to challenge their convictions by filing for a writ of habeas corpus.[149] In *Bounds*, the Supreme Court found that states additionally have affirmative obligations to ensure that incarcerated people maintain access to the courts.[150] In *Bounds*, the Supreme Court encouraged "local experimentation," by states in creating a method for ensuring meaningful access to the courts but noted some acceptable methods include providing an adequate law library or offering access to assistance from people with legal training.[151] In *Lewis v. Casey*, the Supreme Court reaffirmed *Bounds* central holding that states have a duty to ensure incarcerated people maintain adequate access to the courts.[152] However, in *Lewis*, the Court explained that this does not mean that states must "enable the prisoner to discover grievances, and to litigate effectively once in court."[153]

a. The Link Between the Right of Access to the Courts and the First Amendment

The Supreme Court has never definitively said which part of the Constitution serves as the source for the prisoner's right to access the courts.[154] However, the Court has stated that an incarcerated individual's First Amendment right to petition the government for redress of grievances,

146. *See generally* 312 U.S. 546 (1941).
147. *See generally* 393 U.S. 483 (1969).
148. *See generally* Bounds v. Smith, 430 U.S. 817 (1977).
149. *See Ex parte Hull*, 312 U.S. at 549; *see also Avery*, 393 U.S. at 486-487.
150. *See Bounds*, 430 U.S. 817 at 824-25.
151. *See id.* at 830-31.
152. *See* 518 U.S. 343, 356 (1996).
153. *See id.* at 354.
154. The fact that the Court did not assert where in the Constitution the right of access to the courts comes from received sharp criticism from Justice Rehnquist in the *Bounds* dissent. *See Bounds*, 430 U.S. at 837 (Rehnquist, J., dissenting) ("There is nothing in the United States Constitution which requires that [an incarcerated person] serving a term of imprisonment in a state penal institution pursuant to a final judgment of a court of competent jurisdiction have a "right of access" to the federal courts in order to attack his sentence."). In *Borough of Duryea, Pa. v. Guarnieri*, Justice Scalia penned a dissent claiming that no Supreme Court decision has explicitly held that lawsuits fall within the word "Petition" in the Petition Clause. *See* 564 U.S. 379, 387, 403-04 (Scalia, J. dissenting). He also observed that historically laws regarding petitions in Colonial America did not discuss petitions directed to the judicial branch. *See id.* at 403; *but see* Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 648 (1999) (explaining that laws regarding petitions may not have been directed to petitions toward the judicial branch because "[t]he English Parliament and colonial legislative assemblies performed judicial roles and resolved individual grievances that today would constitute civil actions.").

includes their right to access the courts.[155] Moreover, the Supreme Court has protected court access for group and individual litigation outside of the prison context through the First Amendment.[156] Lower federal courts addressing prisoners' right of access to courts claims have also cited to the First Amendment as the source of the right.[157]

In *Cruz v. Beto*, the Supreme Court expressly acknowledged that an incarcerated person's right of access to the courts is included in their right to petition the government for redress of grievances.[158] Outside the context of prisons, the Supreme Court in *NAACP v. Button* held that the NAACP's litigation efforts to "vindicate the legal rights of the [African American] community," was a form of protected political expression and association under the First Amendment.[159] The NAACP's litigation efforts are similar to the litigation efforts that the Supreme Court was attempting to protect by creating their right of access to the courts. The courts created the right of access to the courts to prevent prisons from interfering with incarcerated people's ability to file petitions seeking a writ of habeas corpus.[160] In *Wolff v. McDonnell*, the Supreme Court extended the right to protect incarcerated people's ability to file civil rights actions under 42 U.S.C. § 1983.[161] A habeas corpus petition provides an incarcerated with an opportunity to challenge the legal basis for his confinement.[162] A civil rights action allows incarcerated people to raise claims challenging the constitutionality of their conditions of confinement.[163] Therefore, the nature of the allegations raised by incarcerated people in this context is nearly identical to the rights that the NAACP was seeking to vindicate in the litigation the Court protected in *Button*.

Additionally, the circumstances which drove the Supreme Court in *Button* to recognize the NAACP's litigation efforts on behalf of the African American community as protected political expression and association are present here. As the Court observed in *Button*, the NAACP's efforts to litigate

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155. *See* Cruz v. Beto, 405 U.S. 319, 321 (1972) ("[P]ersons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes 'access of prisoners to the courts for the purpose of presenting their complaints.'") (citing *Avery*, 393 U.S. at 485); *Ex parte Hull*, 312 U.S. at 549).

156. *See* Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415 (1963); *see also* California Motor Transp. v. Trucking Unlimited, 404 U.S. 508 (1972); Bill Johnson's Rests, Inc. v. NLRB, 461 U.S. 731 (1983); *see also* Andrews, *infra* note 168 (arguing that all individuals have a narrow right to access the courts grounded in the Petition Clause of the First Amendment).

157. *See, e.g.*, Thomas v. Evans, 880 F.2d 1235, 1241-42 (11th Cir. 1989) (stating that the source of the right of access to courts is the First Amendment); Adams v. James, 784 F.2d 1077, 1081 (11th Cir. 1986) ("Litigation undertaken in good faith by a prisoner motivated to bring about social change and protect constitutional rights in prison is a "'form of political expression' and 'political association.'") (citing *Button*, 371 U.S. at 419, 431; *In re Primus*, 436 U.S. 412, 428 (1978)).

158. *See* 405 U.S. at 321 ("[P]ersons in prison, like other individuals, have the right to petition the Government for redress of grievances, which of course, includes access of prisoners to the courts.").

159. *See* 371 U.S. at 431.

160. *See Ex parte Hull*, 312 U.S. at 549; *see also Avery*, 393 U.S. at 486-87.

161. *See* 418 U.S. 539, 579-80 (1974).

162. *See* 28 U.S.C. § 2241; *see also* 28 U.S.C. §§ 2254, 2255.

163. *See* 42 U.S.C. § 1983.

on behalf of the African American community may well have been "the sole practicable avenue open to a minority to petition for redress of grievance."[164] Additionally, litigation was the way that the NAACP "makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society."[165] This is equally true for incarcerated people who are, as Justice Brennan noted, "banished from everyday sight."[166] Since incarcerated people are shut off from the rest of society while held in confinement, their right of access to courts provides them with "the sole practicable avenue" to seek redress for constitutional violations.[167] Their litigation efforts also bring public awareness to unconstitutional circumstances. Therefore, the litigation efforts by incarcerated people similarly make possible their distinctive contribution to the ideas and beliefs of our society.

The purpose of the prisoners' right of access to the courts is also consistent with the purpose of the Petition Clause. The Petition Clause's purpose is to protect people's targeted speech to the government to seek redress of their grievances.[168] The Petition Clause also gives the people "a chance at a peaceful and lawful alternative to self-help and force [and] a feeling of justice and order in their government."[169] By providing incarcerated people with access to the courts, it ensures them to access to the government and offers the opportunity to resolve disputes peacefully. This access to courts is essential for people incarcerated in prisons who are likely convicted of felony offenses and therefore who the state can legally disqualify from voting.

These reasons demonstrate that the prisoners' fundamental right of access to the courts is protected under the First Amendment, just like this Note's proposed pre-trial detainees' right to access voting information.

2. The Pre-Trial Detainees' Right to Access Voting Information Serves as a Pathway to Protect Their Constitutional Right to Vote

The Supreme Court decided that people incarcerated in prison have a right of access to the courts to ensure that they can bring legal claims that allow them to vindicate other federal constitutional and statutory rights.[170] In *Avery*, the Supreme Court emphasized that incarcerated people must maintain access to the writ of habeas corpus because its purpose is to protect unlawfully incarcerated people from wrongful convictions or illegal sentences.[171] In *Wolff*, the Supreme Court reasoned that the Court's guarantee to incarcerated

164. *See Button*, 371 U.S. at 429-30.
165. *See id.* at 431.
166. *See O'Lone*, 482 U.S. at 354 (Brennan, J., dissenting).
167. *See Button*, 371 U.S. at 429-30.
168. *See* Andrews, *supra* note 154, at 624 ("Madison, and likely most of his contemporaries, understood the right to petition as part of the system by which the First Amendment would guard the people's right to communicate their will to their government.").
169. *See id.* at 624.
170. *See Avery,* 393 U.S. at 485; *see also Wolff*, 418 U.S. at 479.
171. *See id.* at 485.

people that they do maintain constitutional rights would be "diluted" if the Court did not permit them to present constitutional claims to the judiciary.[172]

By recognizing that pre-trial detainees maintain a right to access voting information, the courts can create a pathway to ensure they can exercise their fundamental right to vote. In *O'Brien v. Skinner*, the Supreme Court recognized that the Equal Protection Clause protects pre-trial detainees' right to vote.[173] In *O'Brien*, the Court explicitly recognized that pre-trial detainees are "under no legal disability impeding their legal right to register or to vote … they are legally qualified to vote."[174] Yet, it is well-documented that current jail practices are not amenable to pre-trial detainees exercising their right to vote.[175] Therefore, by recognizing that pre-trial detainees have a right to access voting information it will serve as a pathway, in the same way the prisoners right of access to the courts does, to ensure that pre-trial detainees can exercise a fundamental right.

3. Placing Obligations on States is Appropriate

The courts should also require that states must ensure pre-trial detainees maintain access to necessary voter information, in the same way it has held that states have obligations under the prisoners' right of access to the courts. In *Bounds*, the Supreme Court reaffirmed that states have an affirmative obligation to provide incarcerated people with law libraries or adequate legal assistance under the prisoners' right of access to courts.[176] However, as noted by the Court, prior to *Bounds*, in a *per curium* opinion, the Court affirmed the holding of a California district court opinion which ruled that under *Avery*, "some provision must be made to ensure that prisoners have the assistance necessary to file petitions and complaints," to be considered by the courts.[177] The Court also noted that in prior cases it had previously required that states take remedial measures to ensure that incarcerated people's access to the courts was "adequate, effective, and meaningful," after finding that incarcerated people's right of access to courts was violated.[178] Therefore, *Bounds*' holding was not a far departure from the Court's other prisoners right of access to the courts cases.

As further support for its holding, the Court highlighted that states already have obligations to provide resources that protect criminal

172. *See Wolff*, 418 U.S. at 579.

173. *See O'Brien*, 414 U.S. at 531.

174. *See id.* at 530-31.

175. *See* Porter, et al., *supra* note 5, at 15-16; Press Release, Prison Pol'y Initiative, *supra* note 6.

176. *See Bounds*, 430 U.S. at 829 (reaffirming *Younger v. Gilmore*'s principle that "state[s] have an affirmative federal constitutional duty to furnish prison inmates with extensive law libraries, or, alternatively, to provide inmates with [legal assistance]").

177. *See* Gilmore v. Lynch, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd*, Younger v. Gilmore, 404 U.S. 15 (1971).

178. *See Bounds*, 430 U.S. at 822-25 (highlighting previous decisions where states were required to institute remedial measures after incarcerated people raised meritorious access to courts claims).

defendants' rights and indigent incarcerated people's rights.[179] These existing financial obligations rebutted the State of North Carolina's contention in *Bounds* that under *Avery*, states had no further obligation to provide funding to implement incarcerated people's right of access to courts.[180] The Court also pointed out that the federal government and states which had been successful in implementing prison legal services programs were able to receive funding from the federal government and non-profit organizations.[181]

Like in *Bounds*, states already shoulder affirmative obligations when administering elections and ensuring that eligible voters receive information to help them participate in elections. Although states remain free to come up with procedures for administering their elections, in 1993, Congress passed the National Voter Registration Act (NVRA), which required states to meet minimum federal standards for establishing voting registration requirements for federal elections.[182] Additionally, Congress and others provide funding to states and local jurisdictions so they can put on national federal elections.[183] In 2002, Congress passed the Help America Vote Act (HAVA) providing states with about three billion dollars to improve voting systems, voter access, and maintain compliance with the NVRA.[184] The law also created the Election Assistance Commission (EAC) to administer HAVA grant programs.[185] According to the EAC, it "has administered more than $4.35 billion in HAVA formula funding to states and [U.S.] territories."[186] Between 2018-2024 alone, EAC administered $1.4 billion in funding.[187]

Therefore, placing obligations on states in this context is like placing obligations on states to ensure people incarcerated in prison maintain adequate access to courts in two main ways: (1) states are already legally required to provide eligible voters with information to assist them with voting, and (2) there is funding available for states for them to provide these resources.

4. *Turner*'s Deferential Standard Does Not Pose a Threat to a Pre-Trial-Detainee's Right to Access Voting Information

As discussed in Part II-C, the highly deferential *Turner* standard stands in the way of pre-trial detainees who may want to raise a constitutional claim

179. *Id.*
180. *Id.*
181. *See id.* at 830.
182. *See* Pub. L. No. 103-31, 107 Stat. 77 (1993).
183. *See* Election Administration at State and Local Levels, NCSL, https://www.ncsl.org/elections-and-campaigns/election-administration-at-state-and-local-levels (last updated Jan. 13, 2026).
184. *See* Pub. L. No. 107-252.
185. Hava Grant Programs, U.S. ELECTION ASSISTANCE COMM'N (Feb. 23, 2026) https://www.eac.gov/grants/hava-grant-programs#:~:text=The%20Election%20Assistance%20Commission%20(EAC)%20administers%20HAVA,based%20on%20predetermined%20formulas%20and%20eligibility%20requirements [https://perma.cc/2S9Y-RCDK].
186. *Id.*
187. *Id.*

challenging the current way that jails regulate information, which is adversely affecting pre-trial detainees' ability to access constitutionally protected voting information.[188] The Supreme Court addressed the interplay between *Bounds* and *Turner* when it decided *Lewis*.[189] In *Lewis* the Supreme Court expressed that in reading *Bounds* and *Turner* together, that the lower court had not accorded "adequate deference" to the prison authorities decisions.[190] Yet when the Court provided a model of deference for courts to follow, it pointed back to the remedial procedures ordered by the lower court in *Bounds*, which placed the Department of Correction with the responsibility of devising a constitutionally sound access to courts program.[191]

After *Bounds*, the state of North Carolina came up with a plan to establish law libraries in its prisons, develop procedures for use of the law libraries, and would train people incarcerated in the prisons to serve as paralegals.[192] The plan was litigated for 13 years and ultimately led to the Fourth Circuit affirming the district court's decision to order the implementation of a legal assistance plan after North Carolina had failed to present evidence that the state's law libraries were constitutionally sufficient under *Bounds*.[193] The Fourth Circuit highlighted that district courts enjoy "wide discretionary authority in formulating remedies for constitutional violations," and where a court finds "systemic constitutional violations," it may "order necessary changes in the structures or procedures of a state institution to alleviate those violations."[194] Based on the district court's findings, the court found that its remedy was "a reasonable choice among its alternatives to deal with the constitutional violation that it found."[195]

If the aftermath from *Bounds* is the model, it teaches that although states are accorded deference under *Turner* in creating the methods they will use to satisfy their duties under the right of access to courts, those plans are still subject to review by courts for constitutional compliance. Where states engage in patterns of behavior that rise to systemic constitutional violations of the right of access to courts, district courts are empowered to use their broad discretion to afford appropriate relief.

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188. *See supra* Part II.C; *see also* Part II.A.

189. *See Lewis*, 518 U.S. at 361-62.

190. *Id.*

191. *See id.* at 362 ("For an illustration of the proper procedure in a case such as this, we need look no further than *Bounds* itself. There, after granting summary judgment for the [incarcerated plaintiffs], the District Court refrained from 'dictating precisely what course the States should follow.'"); *see also Bounds*, 430 U.S. at 818.

192. *See* Smith v. Bounds, 610 F. Supp. 597, 601-02 (E.D. N.C. 1985) (finding (1) that the state's regulation was constitutionally sufficient to ensure that people confined in disciplinary segregation will have the same access to law libraries as the rest of its incarcerated population; (2) that the state's provisions covering copying did not meet the state's obligations because it did not allow indigent incarcerated people free copies of all required filings).

193. *See id.* at 606 (directing the state to require some form of assistance of counsel to ensure its incarcerated population receive meaningful access to the courts); *see also* Smith v. Bounds, 813 F.2d 1299, 1300-01 (4th Cir. 1987), *aff'd*, 841 F.2d 77 (4th Cir. 1988) (finding that the district court did not abuse its discretion when it ordered North Carolina to implement a legal assistance plan to provide incarcerated people with attorney assistance).

194. *See Smith*, 813 F.2d at 1301.

195. *Id.* at 1302.

Therefore, under *Turner*, jails will be given deference in creating plans to ensure that pre-trial detainees have access to voting information. However, the plans would still be subject to review for compliance with their constitutional obligations. Like under *Bounds*, states must ensure that pre-trial detainees have meaningful and adequate access to voting information.

B. Voter Information that Must be Accessible to Pre-trial Detainees

As detailed in Part I.A, the risk of disenfranchisement arises because people in jails often do not know that they maintain their right to vote and do not receive accurate information from jail officials about their right to vote.[196] People in jails are left without knowledge about how to: (1) register to vote, (2) confirm their voter registration status during election cycles, and (3) effectively cast their ballots.[197] Therefore, shaping a right to access voting information like the prisoners' right of access to courts, the states may not unlawfully obstruct a pre-trial detainee from accessing voting information[198] and would have a duty to ensure that pre-trial detainees maintain adequate access.[199] However, as explained by the Supreme Court in *Lewis*, states will be given deference to come up with methods that will provide pre-trial detainees to access this information.[200]

There are several key informational elements to the act of voting. Vote.gov's webpage informing people who are 18 and under is provides most of the necessary information Americans must have to exercise their right to vote.[201] First, individuals must register to vote.[202] To register to vote, people need access to information on registering to vote in their state and information about any state voter registration deadlines.[203] Most pre-trial detainees will have a special interest in a state's vote-by-mail requirements, therefore eligibility and identification requirements should be made available.[204] Individuals also need to learn about their ballot, including information about candidates and ballot measures.[205] Pre-trial detainees should also be made aware of whether the state will legally disqualify them if they are convicted for the offense which they are accused of and how to reinstate their right to vote after a conviction.[206] Since each of these criteria must be met for someone to exercise their right to vote, information on these subjects must remain accessible to pre-trial detainees.

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196. *See supra* Part II.A.
197. *Id.*
198. *See supra* Part III.A.
199. *Id.*
200. *See supra* Part III.A.4.
201. *See Preparing to vote: age 18 and under*, VOTE.GOV, https://vote.gov/guide-to-voting/preparing-age-18-and-under (last visited Mar. 2, 2025).
202. *Id.*
203. *Id.*
204. *Id.*; *see also* Press Release, Prison Pol'y Initative, *supra* note 5 (providing suggestions for remedying disenfranchisement in jails).
205. *Id.*
206. *See* DEP'T OF JUST. CIV. RIGHTS DIV., *supra* note 20.

Although states will have the discretion to choose methods to adequately provide voting information, there are some current examples to guide them. In the federal system, people incarcerated in federal custody who are residents of the District of Columbia, Maine, and Vermont all maintain the right to vote even after felony convictions.[207] A current example of how jails can implement this right of access to information is based on the way that the federal Bureau of Prisons (BOP) had updated its policies, under President Biden's Executive Order to promote access to voting to inform, eligible voters in federal detention of their right to vote.[208] The Inmate Admission & Orientation Handbook contains a section dedicated to voting rights.[209] It contains information for pre-trial detainees, people convicted of misdemeanors, and people convicted of felonies.[210] According to the manual, additional voting materials are available through TRULINCS,[211] the reentry resource library, or people can discuss voting rights with their reentry affairs coordinator (RAC).[212] Under the BOP's policy, election mail is also put through a less vigorous review process than ordinary mail.[213] A mail policy like the BOP's will also still allow jails to prevent contraband from entering without resulting in universal disenfranchisement, therefore, it would serve as a reasonable alternative to jails that have policies like the Delaware Department of Corrections.[214]

Using the former BOP manual as a model, jails could (1) include voting information in admission materials, (2) provide access to physical materials in a resource library, (3) place election mail through a less restrictive review process, (4) train people, like the BOP's RACs, to assist pre-trial detainees access voting information and materials, and (5) for jails that have the ability to provide a limited computer-type of system like TRULINCS, it could provide pre-trial detainees to the myriad of online PDF materials outlining the

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207. *Id.*

208. *See* Voting Resources, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/voting_resources.jsp [https://web.archive.org/web/20250306085902/https://www.bop.gov/inmates/custody_and_care/voting_resources.jsp]. This resource was removed once President Donald Trump rescinded President Joe Biden's Executive Order No. 14019 which specifically ordered the Attorney General to take appropriate steps to ensure "Access to Voter Registration for Eligible Individuals in Federal Custody." *See* Exec. Order No. 14019, 86 Fed Reg. 13623 (Mar. 7, 2021); *see also Initial Rescissions of Harmful Executive Orders*, THE WHITE HOUSE, https://www.whitehouse.gov/presidential-actions/2025/01/initial-rescissions-of-harmful-executive-orders-and-actions/ [https://perma.cc/3EE6-UL3Q] (last visited Mar 2. 2025).

209. *See* U.S. DEP'T OF JUST., Inmate Admission & Orientation Handbook, Voting Rights for Incarcerated Individuals 58-61 (Jan. 20, 2023), https://www.bop.gov/locations/institutions/bry/bry_ao_handbook.pdf?v=1.0.0 [https://web.archive.org/web/20250204002723/https://www.bop.gov/locations/institutions/bry/bry_ao_handbook.pdf?v=1.0.0] [https://perma.cc/Q666-98N6]. This resource was also removed from the BOP's website after President Trump's Executive Order.

210. *Id.* at 58.

211. *Id.* at 60. TRULINCS is the "Trust Fund Limited Computer System," a computer network for incarcerated people; however, there is no access to the Internet. *Id.* at 12.

212. *Id.*

213. *See id.* at 60 (explaining that mail labeled "Official Election Mail," "Official Election Ballot," "Ballot Enclosed," will be treated like legal mail).

214. *See supra* Part II.A.

voting process. There are also many organizations that have made suggestions available to local governments.[215]

IV. CONCLUSION

There is an ongoing voter suppression crisis happening across our nation's jails. Although pre-trial detainees maintain the right to vote and although access to voting information should be available to them through the First Amendment. The reality is that it would be challenging to predict with certainty that pre-trial detainees can vindicate these First Amendment rights under *Turner*'s highly deferential framework. This situation is reminiscent of *Button* and the other prisoners right of access to courts cases, where litigation and legal court remedies may be the only practicable avenue available to protect the fundamental constitutional rights of another minority population with little political will. By recognizing that states have an obligation to ensure that pre-trial detainees maintain adequate access to voting information appears to be a plausible way for the courts to create a pathway and protect pre-trial detainees' fundamental right to vote. Creating this pathway to voting can create a lasting impact. Take the words of one woman who regained her right to vote after Minnesota restored voting rights for people with felony convictions, "Voting helps cast the divide between rich and poor, Black and white. The moment we cast our ballot, we are taking part in something much bigger than ourselves … It's especially important for people who have been incarcerated … Voting makes us feel like we belong."[216]

215. *See, e.g.*, Press Release, Prison Pol'y Initiative, *supra* note 5.

216. Jennifer Schroeder, *My Conviction Meant 40 More Years Without A Vote. Not Anymore*, ACLU (Mar. 21, 2023), https://www.aclu.org/news/voting-rights/my-conviction-meant-40-years-without-a-vote-not-anymore [https://perma.cc/796V-C7D7].

Deepfakes, Deeper Issues: Moderating Explicit Deepfake Content Through a Federal Right of Publicity Exception

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TABLE OF CONTENTS

* J.D., May 2026, The George Washington University Law School; B.S. 2020 American Politics, The United States Military Academy-West Point. Praise God for what He has done! I am incredibly thankful to Professor Dawn Carla Nunziato whose encouraging mentorship during the topic selection and writing process was vital in bringing this Note into fruition (and advancing my curiosity for First Amendment jurisprudence). I also thank the Federal Communications Law Journal Editorial Board for their dedication and diligence to prepare this piece for publication. A special shout out to my amazing friends, especially the gals who love a cute brunch or a chill time spent together. Last but certainly not least, to my family—your abundant love, jokes, mom's delicious cooking, and encouragement have supported me through these years!

I. INTRODUCTION

In late January 2024, the social media platform X was flooded with sexually explicit images of Grammy-award winning singer and songwriter Taylor Swift.[1] These graphic images were later identified as sexually explicit images generated by artificial intelligence (AI).[2] Although disturbing, one such image shared by an X account garnered 47 million views before the account was suspended.[3] Fans of Taylor Swift quickly mobilized and flooded X with positive images and videos of Swift under the hashtag #ProtectTaylorSwift in an ardent effort to make the disturbing images harder to find.[4] This disturbing use of AI is unfortunately not new; rather it is a more recent example of digital sexual exploitation that has affected many people, including actress Scarlett Johansson six years prior in 2018.[5] But make no mistake, this abusive use of technology does not exclusively affect celebrities; it can and has been used to create false sexual images of even non-celebrities using just their face.[6]

This Note argues for a federal right of publicity automatically granted upon birth that allows a person to control the use of their image or likeness, exclusively in the context of explicit deepfake content. Incorporating this right into the Digital Millennium Copyright Act would give victims a mechanism to remove this content online. As an intellectual property right, the right of publicity falls out of the safe harbor provision of Section 230 of the Communications Decency Act, allowing victims an avenue to hold platforms liable for this content if they refuse to remove it.[7] This Note will examine a brief history about deepfakes and how they have been disproportionately used to create sexual content that impacts women more significantly than men. This Note also explores the damaging effects of explicit deepfake content and the current legal remedies for victims. This Note will then discuss the lack of mechanisms to force content takedown on platforms and the significant barrier Section 230 of the Communications Decency Act poses for content moderation. This Note finally discusses how

1. *See* Jess Weatherbed, *Trolls have flooded X with graphic Taylor Swift AI fakes*, THE VERGE (Jan. 25, 2015, at 11:04 EST, https://www.theverge.com/2024/1/25/24050334/x-twitter-taylor-swift-ai-fake-images-trending [https://perma.cc/62EH-4RMM].

2. *See* Katie Conger & John Yoon, *Explicit Deepfake Images of Taylor Swift Elude Safeguards and Swamp Social Media*, N.Y. TIMES (Jan. 25, 2024), https://www.nytimes.com/2024/01/26/arts/music/taylor-swift-ai-fake-images.html.

3. *See id.*

4. *See id.*; s*ee also Taylor Swift deepfakes spread online, sparking outrage*, CBS NEWS (Jan. 26, 2024, at 21:32 EST), https://www.cbsnews.com/news/taylor-swift-deepfakes-online-outrage-artificial-intelligence [https://perma.cc/B3SV-GQQH].

5. *See* Ben Beaumont-Thomas, *Taylor Swift deepfake pornography sparks renewed calls for US legislation*, THE GUARDIAN (Jan. 26, 2024, at 08:44 EST), https://www.theguardian.com/music/2024/jan/26/taylor-swift-deepfake-pornography-sparks-renewed-calls-for-us-legislation [https://perma.cc/66KT-5DPE].

6. *See* Jake Sturmer & Allison Bradley, *Noelle Martin fights to have harmless selfie removed from 'parasite' porn sites*, ABC NEWS (Oct. 12, 2016, at 07:45 EST), https://www.abc.net.au/news/2016-10-12/womans-fight-to-have-harmless-selfie-removed-from-porn-site/7924948 [https://perma.cc/RDR3-A62Q].

7. *See* discussion *infra* Section V.A.2.

the proposed solution solves the issue of content moderation that existing remedies are unable to address and potential challenges that may be brought up against the solution.

II. BACKGROUND

A. Deepfakes

A deepfake is a type of fabricated media "where a person in an image or video is swapped with another person's likeness."[8] This term originated from a Reddit user called "deepfakes" in 2017.[9] The term deepfake is a portmanteau of deep learning, which is the type of AI used to create this content, and fake.[10] Deep learning is the underlying process in which technology uses large sets of data to solve problems and is often used to manipulate and create false content using images of real people.[11] From this, a computer will generate content from existing images that the computer has been trained on.[12] Deep learning uses artificial neural networks to mimic the complex decision-making of the human brain.[13] The network model takes in data for processing to recognize, classify, and describe content within the data and over time becomes more accurate.[14]

One common type of framework is a generative adversarial network (GAN).[15] Within a GAN, there are two networks that compete against the other: the generator tries to produce synthetic data that looks real and the discriminator tries to classify the data as either real or synthetic.[16] The generator uses feedback from the discriminator after each round to adjust its parameters and increase the accuracy of the synthetic data.[17] This competition

8. *See* Meredith Somers, *Deepfakes, explained*, MIT SLOAN (July 21, 2020), https://mitsloan.mit.edu/ideas-made-to-matter/deepfakes-explained [https://perma.cc/J2S5-384F].

9. *See id.*

10. *See* James Vincent, *Why we need a better definition of 'deepfake'*, THE VERGE (May 22, 2018, at 14:53 EDT), https://www.theverge.com/2018/5/22/17380306/deepfake-definition-ai-manipulation-fake-news [https://perma.cc/A3N5-GLQA].

11. *See* Dave Johnson & Alexander Johnson, *What are deepfakes? How fake AI-powered audio and video warps our perception of reality*, BUS. INSIDER (June 15, 2023, at 10:58 EDT), https://www.businessinsider.com/guides/tech/what-is-deepfake [https://perma.cc/TC3K-BHWE].

12. *Id.*

13. *See What is deep learning?*, IBM (June 17, 2024), https://www.ibm.com/topics/deep-learning [https://perma.cc/5D87-GBBP].

14. *Id.*

15. *See* Scott Robinson, Kinza Yasar & Sarah Lewis, *What is a generative adversarial network (GAN)?*, TECHTARGET (Oct. 18, 2024), https://www.techtarget.com/searchenterpriseai/definition/generative-adversarial-network-GAN [https://perma.cc/AEY5-HKRV].

16. *Id.*

17. *Id. See also* Shipra Garg, *What is a GAN? – Generative Adversarial Networks Guide*, SOLULAB (Oct. 17, 2024), https://www.solulab.com/generative-adversarial-network/ [https://perma.cc/M3NC-K742].

continues until the discriminator is unable to distinguish the synthetic data from the generator and real samples.[18]

Because the goal of this framework is to generate synthetic data that is almost impossible to distinguish as fake, explicit deepfake content will only become harder to separate from authentic images.[19] One early example of how effective deepfake technology is in creating highly realistic content was a video of President Obama appearing to call President Trump derogatory words.[20] This video went viral and brought attention to the potential misuse of deepfake technology to mislead people.[21] Deepfake content has significantly increased over the past several years, with a 550% increase in deepfake videos from 2019 to 2023.[22] Deepfake content will likely continue to increase at an exponential rate as the technology becomes more accessible.[23]

B. The Dark Side: Exploitation to Create Explicit Content

The Reddit user "deepfake" came into prominence in 2017 because he had created a space on the website to share explicit deepfake videos that used technology to swap faces on the videos.[24] Deepfake pornography makes up 98% of all deepfake videos.[25] The unfortunate reality is that deepfake pornography disproportionately affects women more than men.[26] In 2023, 99% of the individuals whose image was used for deepfake pornography were women.[27] Entire computer applications have been developed solely for the purpose to artificially "undress" and expose the nude body of women's images.[28] These applications take images of innocent women and artificially generate nude images of the women without their consent.[29] One such website called DeepNude was launched June 23, 2019 and allowed users to generate images of an "undressed" woman in 30 seconds for free but required a $50

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18. *See*, *What is a GAN?*, AWS, https://aws.amazon.com/what-is/gan/ [https://perma.cc/G5FP-8HUX].

19. *See* Don Philmlee, *Practice Innovations: Seeing is no longer believing — the rise of deepfakes*, THOMSON REUTERS (July 18, 2023), https://www.thomsonreuters.com/en-us/posts/technology/practice-innovations-deepfakes/ [https://perma.cc/DF3A-62PW].

20. *See* Kaylee Fagan, *A viral video that appeared to show Obama calling Trump a 'dips--' shows a disturbing new trend called 'deepfakes'*, BUS. INSIDER (Apr. 17, 2018, at 16:48 EDT), https://www.businessinsider.com/obama-deepfake-video-insulting-trump-2018-4 [https://perma.cc/BUD8-8SPT].

21. *See id.*

22. *See 2023 State of Deepfakes*, SEC. HERO, https://www.securityhero.io/state-of-deepfakes/#deepfake-porn-survey [https://perma.cc/N8GS-EEVY].

23. *See* Rick Hutchinson, *Deepfakes Are the New Frontier Of Cyberattacks: 5 Steps to Fight Back*, FORBES (Jan. 6, 2025, at 08:45 EST), https://www.forbes.com/councils/forbestechcouncil/2025/01/06/deepfakes-are-the-new-frontier-of-cyberattacks-5-steps-to-fight-back/ [https://perma.cc/5XEE-4ZJK].

24. *See* Somers, *supra* note 8.

25. *See id.*

26. *See 2023 State of Deepfakes*, *supra* note 22.

27. *Id.*

28. *See* Henry Ajder et al., *The State of Deepfakes: Landscape, Threats, and Impact*, DEEPTRACE, 8 (2019) [https://perma.cc/EC3B-JDL7].

29. *See id.*

fee to remove the watermark.[30] Of significance is that this application could only "undress" women; there was no similar algorithm to "undress" men.[31] Additionally, this website received over 545,000 visits and over 95,000 active users within seven days of launching; a majority of these visits likely occurred within 24 hours of launching which caused the website to go offline.[32] On Telegram, the messaging application, there are at least 50 different bots that create similar explicit images and videos.[33] These bots combined have over 4 million monthly users using this technology to generate explicit content.[34] All a user needs to do is upload a photo of a woman and they will receive a fake nude image or video within minutes.[35] These applications reveal how easy it is now to create explicit deepfake content and how high the appetite is to create this type of content.

C. A New Nightmare: False Explicit Images

1. Use for Sextortion

The FBI released a public service announcement in 2023 highlighting concerns and the dangerous uses of deepfake content.[36] One of the harmful uses that they had observed an increase in was sextortion.[37] These victims reported that they were blackmailed with explicit deepfake images or videos created from their photos posted online or on social media.[38] The offenders would then demand either payment or for victims to send real sexual content, threatening to share the deepfake content with family or friends if the demand was not met.[39] Lauren Book, a Florida state senator, experienced this when she was sent explicit images of herself that included distorted and fake images.[40] The offender threatened to release the photos to the public and ruin her political career if she did not pay them $5000.[41] She began to cooperate with law enforcement, who were able to locate the offender under the pretext

30. *Id.*
31. *Id.*
32. *Id.*
33. Sammi Caramela, *'Nudify' Deepfake Bots on Telegram Are Up to 4 Million Monthly Users*, VICE (Oct. 16, 2024, at 09:38 EDT), https://www.vice.com/en/article/nudify-deepfake-bots-telegram/ [https://perma.cc/B36Q-P8BT].
34. *See id.*
35. *See id.*
36. *Malicious Actors Manipulating Photos and Videos to Create Explicit Content and Sextortion Schemes*, FBI (June 5, 2023), https://www.ic3.gov/PSA/2023/PSA230605 [https://perma.cc/9QZ2-X8GV].
37. *See id.*
38. *See id.*
39. *See id.*
40. *Man enters no contest plea in Florida Sen. Lauren Book extortion case,* ASSOCIATED PRESS (June 16, 2022), https://www.wtsp.com/article/news/regional/florida/no-contest-plea-lauren-book-extortion/67-a7f993c9-bf33-4b86-af6c-4e2f96d6b7d5 [https://perma.cc/VF4X-HS6E].
41. *Id.*

of paying the ransom.[42] As a brave politician with the resources to hire an attorney and trust to seek help, Lauren Book was able to successfully bring her extorter to justice; this unfortunately may not be the case for many others with similar threats.[43]

2. Use for Revenge, Humiliation, & Degradation of Reputation

Explicit deepfake content can also be utilized to create false non-consensual intimate images of former partners.[44] No longer do former partners need actual nude images to ruin a person's reputation: they can simply create it themselves. Explicit deepfake content has also been used as a tool to humiliate and degrade the reputation of women.[45] Investigative journalist Rana Ayyub became a victim of a barrage of explicit deepfake content after speaking out against a political party in India protecting a child sex abuser.[46] A video was generated placing her face on a pornographic video and circulated on messaging platform Whatsapp.[47] Ayyub experienced a large volume of harassment on Facebook, Twitter, and Instagram and later her phone after her number was released alongside the content.[48] Her video was additionally shared over 40,000 times from a fan page of the political party leader she had spoken out against.[49] This attack came as a way to discredit and attack Ayyub's character by humiliating her and ruining her reputation on a national scale.[50]

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42. *See id.*; *see For-Profit Companies Charging Sextortion Victims for Assistance and Using Deceptive Tactics to Elicit Payments*, FBI (Apr. 7, 2023), https://www.ic3.gov/PSA/2023/PSA230407 [https://perma.cc/LSP8-QQKS] (some sextortion victims have sought services from companies that advertise providing "assistance." Victims are charged high fees and some reporting shows that some of these companies are involved in the sextortion activity).

43. *See Florida senator extorted over nude photos is taking legislative action to protect others*, ASSOCIATED PRESS (Jan. 25, 2022, at 08:42 EST), https://www.foxnews.com/us/florida-senator-extorted-nude-photos-protect-others [https://perma.cc/S6U5-AYLV] [hereinafter *Florida senator extorted*].

44. *See* Tim Mak & Dina Temple-Raston, *Where Are The Deepfakes In This Presidential Election?*, NPR (Oct. 1, 2020, at 05:05 EDT), https://www.npr.org/2020/10/01/918223033/where-are-the-deepfakes-in-this-presidential-election [https://perma.cc/K2VY-JVY6].

45. *See* Shona Moreau & Chloe Rourke, *Fake porn causes real harm to women*, POL'Y OPTIONS (Feb. 8, 2024), https://policyoptions.irpp.org/magazines/february-2024/fake-porn-harm/ [https://perma.cc/9XPT-TYTH].

46. *See* Rana Ayyub, *I Was The Victim Of A Deepfake Porn Plot Intended To Silence Me*, HUFFINGTON POST UK, (Nov. 21, 2018, at 08:11 GMT), https://www.huffingtonpost.co.uk/entry/deepfake-porn_uk_5bf2c126e4b0f32bd58ba316 [https://perma.cc/ZK3F-FXDL].

47. *Id.*

48. *Id.*

49. *Id.*

50. *See id.*

3. Effects on Employment, Mental Health, and Personal Dignity

Employers will often make hiring decisions based on what they may find online about a potential candidate.[51] A study of over 2,300 hiring managers and human resources professionals found almost 70% of employers use search engines to conduct research on a potential candidate.[52] More than 50% of employers found content on a candidate's social media that caused them to not hire them.[53] Of the employers who passed on a hire, 39% did not hire because they had found inappropriate or provocative content of the candidate.[54] An explicit deepfake image or video could potentially ruin a person's chance of securing employment.[55] An employer may have concern or hesitation about a candidate's character or abilities.[56] And for people who are already employed, explicit deepfake content can cost them their job.[57] Although a worker or candidate's personal sexual life should not impact their eligibility for hire, many employers still will hesitate based on the concern that their reputation would be risky for their business.[58]

Explicit deepfake content can have damaging effects to women "by causing psychological trauma and feelings of humiliation, fear, embarrassment, and shame."[59] Explicit deepfake content can also have devastating psychological effects on victims.[60] Some victims have reported suffering from anxiety and panic attacks from the false intimate exposure of their body.[61] One young girl experienced a fake nude image of herself

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51. *See Number of Employers Using Social Media to Screen Candidates at All-Time High, Finds Latest CareerBuilder Study*, PR NEWSWIRE (June 15, 2017, at 03:02 EDT), https://www.prnewswire.com/news-releases/number-of-employers-using-social-media-to-screen-candidates-at-all-time-high-finds-latest-careerbuilder-study-300474228.html [https://perma.cc/PM42-EM9J] [Hereinafter *Number of Employers*].

52. *Id.*

53. *Id.*

54. *Id.*

55. *See* Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1927-28 (2019); *see generally* Coralie Kraft, *Trolls Used Her Face to Make Fake Porn. There Was Nothing She Could Do.*, N.Y. TIMES MAG. (July 31, 2024), https://www.nytimes.com/2024/07/31/magazine/sabrina-javellana-florida-politics-ai-porn.html (After explicit deepfake images of her were shared online, Sabrina Javellana decided against taking the state teaching-certification exam knowing the risk of damaging a future school's reputation).

56. *See id.*

57. *See* Victoria Rousay, Sexual Deepfakes and Image-Based Sexual Abuse: Victim-Survivor Experiences and Embodied Harm 107 (May 2023) (M.A. thesis, Harvard University), https://www.researchgate.net/publication/370324689_Sexual_Deepfakes_and_Image-Based_Sexual_Abuse_Victim-Survivor_Experiences_and_Embodied_Harms [https://perma.cc/69R4-6GM5].

58. *See* Citron, *supra* note 55, at 1927.

59. *See* Caramela, *supra* note 33.

60. *See* Sophie Compton & Reuben Hamlyn, *Opinion: The rise of deepfake pornography is devastating for women*, CNN (Oct. 29, 2023, at 12:07 EDT), https://www.cnn.com/2023/10/29/opinions/deepfake-pornography-thriving-business-compton-hamlyn/index.html [https://perma.cc/J8V4-DE4B].

61. *Id.*

circulating amongst her peers at school.[62] This image exacerbated the bullying she was already experiencing at school until she tragically took her life; she was only 15 years old.[63] Although a victim's sexual privacy is not technically violated per se, explicit deepfake content intrudes upon and violates a person's sexual identity.[64] Explicit deepfake images exercise power over a person's sexuality, create a sexual identity not of that person's curation, and exhibit this false identity without that person's consent.[65]

III. CURRENT LEGAL LANDSCAPE

Currently, there is no federal legislation enacted that prohibits or regulates deepfake content.[66] Traditional torts and efforts by states to create legislation may provide avenues for victims to hold the content creator liable.[67] However they do not provide a way to remove the content online or to hold platforms liable for refusing to remove the content. Federal legislation concerning deepfakes has been discussed, but multiple attempts at bills have so far failed.[68] One of the first attempts was the DEEP FAKES Accountability Act of 2019 which would require watermarks on all deepfake content and impose criminal penalties for creation of content that was sexual, intended to incite or cause physical harm, or used in the criminal conduct related to fraud.[69] This bill did not receive a vote and was never enacted.[70] In the summer of 2024, the Disrupt Explicit Forged Images and Non-Consensual Edits Act of 2024 (DEFIANCE Act) passed the Senate.[71] This pending legislation would provide a civil remedy for victims against offenders who create or possess with intent to distribute or offenders who distribute if they knew or disregarded the lack of consent from the victim.[72] In the absence of federal legislation, victims may turn to traditional torts or state legislation to pursue legal remedies.

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62. *See* Isabella Ross, *Social Media Summit unpacks impact of explicit deepfake image abuse on young girls*, ABC NEWS (Oct. 12, 2024, at 17:13 EDT), https://www.abc.net.au/news/2024-10-13/social-media-deepfake-abuse-impact-on-kids/104457222 [https://perma.cc/6KSQ-XT4R].

63. *Id.*

64. *See* Citron, *supra* note 55, at 1921.

65. *See id.*

66. *See* Michelle M. Graham, *Deepfakes: Federal and state regulation aims to curb a growing threat*, THOMSON REUTERS (June 26, 2024), https://www.thomsonreuters.com/en-us/posts/government/deepfakes-federal-state-regulation/ [https://perma.cc/RGU8-AHJQ].

67. *See infra* note 102 and Section III.A.

68. *See* Andrew R. Chow*, Congress May Finally Take on AI in 2025. Here's What to Expect*, TIME (Dec. 23, 2024, at 07:00 EST), https://time.com/7203040/congress-ai-preview-2025/ [https://perma.cc/Z6KT-RWCM].

69. *See* DEEP FAKES Accountability Act, H.R. 3230, 116th Cong. (2019).

70. *See id.*

71. *See* Kat Tenbarge, *The Defiance Act passes in the Senate, potentially allowing deepfake victims to sue over nonconsensual images*, NBC NEWS (July 24, 2024, at 15:28 EDT), https://www.nbcnews.com/tech/tech-news/defiance-act-passes-senate-allow-deepfake-victims-sue-rcna163464 [https://perma.cc/9653-PN7N].

72. *See id.*

A. Traditional Torts

Victims of explicit deepfake content may turn to traditional torts to pursue remedies against their offenders. Through the tort of Intentional Infliction of Emotional Distress (IIED) a victim can hold an offender liable for emotional distress caused by their extreme and outrageous conduct.[73] The Restatement poses a closely analogous illustration where someone is held liable for the shame, embarrassment, and humiliation that a woman feels after they caused her to appear nude in public amongst people she was not familiar with.[74] In a similar manner a creator of explicit deepfake content that posts online causes a person to be "naked" amongst strangers and may cause them similar humiliation and embarrassment. One issue a victim may face in bringing up this claim is whether posting such content will constitute extreme and outrageous behavior.[75] IIED has been successfully used in the context of non-consensual pornography.[76]One potential gap for victims filing such a claim is whether their state considers explicit deepfake content as outrageous and proving their emotional distress in connection to the content.

Victims may also seek recourse through defamation. A communication is considered defamatory if it detrimentally harms their reputation or causes others to avoid association.[77] Due to the sensitive nature that a person's sexual reputation or perception affects how other people or society view them, explicit deepfake content would meet this classification.[78] A victim may also seek legal remedies through the tort of false light.[79] An offender can be held liable for giving publicity that places another in a false light if (1) the false light would be "highly offensive to a reasonable person" and (2) the offender knew or "acted in reckless disregard" about the falsity of the publicity and false light that the other person would be placed in.[80] The first requirement would likely be satisfied because serious offense is reasonably expected by a reasonable person when there is a "major misrepresentation of [their] character,... activities or beliefs."[81] Explicit deepfake content can create a false representation of a person's personal beliefs concerning sexual activity and portray victims engaging in activities they did not actually partake in.[82] The second requirement would also be satisfied because an offender would have knowledge that they were purposely creating a false sexual image of the

73. RESTATEMENT (SECOND) OF TORTS § 46 (AM. L. INST. 1965).
74. RESTATEMENT (SECOND) OF TORTS § 46, illus. 3 (AM. L. INST. 1965).
75. RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (AM. L. INST. 1965).
76. *See* K.I. v. Tyagi, No. 1:23-2383-JRR, 2024 U.S. Dist. LEXIS 203666, at *30–31 (D. Md. Nov. 8, 2024) (explaining that New York courts have found public disclosures or threats of publicly disclosing sexually explicit content of a person without their consent constitutes extreme and outrageous conduct). *See* Taylor v. Franko, No. 09-00002 JMS/RLP, 2011 U.S. Dist. LEXIS 75128, at *13–14 (D. Haw. July 11, 2011) (awarding plaintiff $425,000 for her claims of IIED, NIED, defamation, and public disclosure of private facts against defendant who posted nude photos of her online).
77. RESTATEMENT (SECOND) OF TORTS § 559 (AM. L. INST. 1977).
78. *See* Rousay, *supra* note 57.
79. *See* RESTATEMENT (SECOND) OF TORTS § 652E (AM. L. INST. 1977).
80. *See* RESTATEMENT (SECOND) OF TORTS § 652E(a)–(b) (AM. L. INST. 1977).
81. *See id.* at cmt. c.
82. *See* Citron, *supra* note 55, at 1921-22.

victim by incorporating nude body parts that are not of the victim.[83] A potential issue and barrier for filing a claim is proving the element of publicity.[84] The Restatement defines publicity as a matter that is communicated to "the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."[85]As a result, it is not an invasion of a victim's privacy if explicit deepfake content is communicated to a small group of people.[86]A victim may then have to prove that enough people had viewed this explicit deepfake content to overcome this barrier. However, a "publication in a newspaper or a magazine, even of small circulation," is sufficient to meet this publicity requirement.[87] If a court determines that posting explicit deepfake content on a website, even with limited viewership, is a fitting analogue, a victim may not have to prove actual viewership.

B. State Legislation

Current legislative proposals concerning deepfake content are all at the state level and some of them address deepfake content used to spread disinformation about a candidate during an election.[88] Several states have also taken initiative to enact legislation to grant victims a remedy against offenders who generate explicit deepfake content using their image.[89] California's explicit deepfake content statute allows a victim to hold a person liable if they create or intentionally distribute explicit deepfake content of them without consent.[90] This statute also increases the maximum level of damages awarded if the victim can prove the creation or distribution was conducted with malice.[91] Virginia updated its non-consensual pornography statute to prosecute persons who disseminate explicit deepfake content of another person.[92] This amendment specifies "another person" includes "a person whose image was used in creating, adapting or modifying a videographic or still image with the intent to depict an actual person and who is recognizable as an actual person by the person's face, likeness or other distinguishing characteristic. [93]

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83. *See* Caramela, *supra* note 33. *See generally* Ajder, *supra* note 28.
84. *See* RESTATEMENT (SECOND) OF TORTS § 652E(a)–(b) (AM. L. INST. 1977).
85. RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a (AM. L. INST. 1977).
86. *See* RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a (AM. L. INST. 1977).
87. RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a (AM. L. INST. 1977).
88. *See Tracker: State Legislation on Deepfakes in Elections*, PUBLIC CITIZEN, https://www.citizen.org/article/tracker-legislation-on-deepfakes-in-elections/ [https://perma.cc/4E3R-S5CL] (As of January 22, 2025, 23 states have enacted legislation regulating the use of deepfake content in elections).
89. Vittoria Elliot, *The US Needs Deepfake Porn Laws. These States Are Leading the Way*, WIRED (Sep. 5, 2024, at 06:00 EDT), https://www.wired.com/story/deepfake-ai-porn-laws/ [https://perma.cc/YW5Q-FWBX].
90. *See* CAL. CIV. CODE § 1708.86 (2025).
91. *See id.*
92. *See* Michael Grothaus, *Virginia Updates Its Revenge Porn Laws to Include Deepfakes,* FAST CO. (July 2, 2019), https://www.fastcompany.com/90372079/virginia-updates-its-revenge-porn-laws-to-include-deepfakes. *See* VA CODE § 18.2-386.2 (2019).
93. VA CODE § 18.2-386.2 (2019).

New York also amended its non-consensual pornography statute to prosecute producers of explicit deepfake content.[94] However, their statute still requires showing an intent to harm the victim emotionally, financially, or physically.[95] A defendant could possibly argue they never intended for the victim to view it and therefore there was no intent to cause that type of harm.

Kentucky incorporated deepfake provisions into a statute concerning sexual crimes against minors, making it a felony to produce explicit deepfake content of a minor.[96]

Although many states have enacted some type of legislation concerning explicit deepfake content, there is great variety in what each statute requires for a claim and allows for remedies.[97] Some only apply to minors,[98] some allow a civil remedy,[99] and others only address prosecution.[100] Depending on where a victim lives, they may not have access to a civil remedy in state laws.[101]

C. Shortcomings of Available Legal Remedies

All these current remedies address holding persons who create the images accountable.[102] This comes with the difficulties of having to identify and track down perpetrators online, which can be difficult, expensive, and potentially dangerous for victims.[103] Although victims with money and resources may find success in holding their offenders responsible,[104] the average victim does not and may be left without redress.[105]

Current legislation also does not address how a victim may force the takedown of images from the sites. Even if a victim is able to hold the offender accountable for creating the content, the continual existence of the content

94. *See* S. B. S1042, 2023 Leg. Sess. (NY. 2023).

95. *See* N.Y. PENAL LAW §245.15 (2023).

96. *See* H.B. 207 2024 Gen. Assemb., Reg. Sess. (KY. 2024).

97. *See e.g.*, N.Y. PENAL LAW §245.15 (2023); VA CODE § 18.2-386.2 (2019); H.B. 207 2024 Gen. Assemb., Reg. Sess. (KY. 2024); CAL. CIV. CODE § 1708.86.

98. *See* H.B. 207 2024 Gen. Assemb., Reg. Sess. (KY. 2024).

99. *See* CAL. CIV. CODE § 1708.86.

100. *See e.g.*, N.Y. PENAL LAW §245.15 (2023); VA CODE § 18.2-386.2 (2019).

101. *See* Julia Scammahorn, *Missouri lawmakers consider 'Taylor Swift Act' to criminalize deepfake images of minors*, KCTV (Feb. 24, 2026, at 14:26 EST), https://www.kctv5.com/2026/02/24/missouri-lawmakers-advance-taylor-swift-act-criminalize-deepfake-images-minors/ [https://perma.cc/QG2F-A88T] (Missouri is one of three states that do not have any legislation concerning the abuse of artificial intelligence such as deepfakes).

102. *See e.g.*, N.Y. PENAL LAW §245.15 (2023); VA CODE § 18.2-386.2 (2019); H.B. 207 2024 Gen. Assemb., Reg. Sess. (KY. 2024); CAL. CIV. CODE § 1708.86.

103. *See* Laurie Segall, *Opinion: The Taylor Swift AI photos offer a terrifying warning*, CNN (Jan. 31, 2024, at 20:06 EST), https://www.cnn.com/2024/01/31/opinions/taylor-swift-deepfakes-ai-segall/index.html [https://perma.cc/M45U-X57E].

104. *See Florida senator extorted*, *supra* note 43.

105. *See* Segall, *supra* note 103.

online may cause the victim to repeatedly suffer mental harm and anguish.[106] As long as it exists online, anyone has the ability to see it.[107] One young woman attempted to have an explicit deepfake image removed from a website by contacting the website master and was instead blackmailed to send nude photos in exchange for the removal.[108]

In short, a victim is at the mercy of a platform's goodwill to remove this content.[109] Some platforms have taken initiative to help fight against this.[110] In 2023, Facebook and Instagram became founding members of the platform Take it Down, in collaboration with the National Center for Missing and Exploited Children.[111] This platform allows people under 18, or people whose images were taken when they were under 18, to "submit a case that will proactively search for their intimate images" on participating platforms.[112] This great initiative is limited in scope as only participating companies such as TikTok, YouTube, and PornHub are moderating this content.[113] Additionally, this tool is unavailable for persons whose image was taken at 18 or older.[114] Attempts to moderate content on the Internet can be difficult and met with resistance.[115]

IV. ISSUES WITH CONTENT MODERATION

A. Communications Decency Act

Content moderation has been a hot topic since the growing popularity of the Internet in the 1990s.[116] Early attempts to broadly regulate inappropriate content were struck down,[117] but one safe harbor section withstood legal review and has protected platform hosts from liability for third-party

106. *See* Becky Freeth, *Jennifer Lawrence says 'trauma' of having her nude photos leaked will last 'forever'*, COSMOPOLITAN (Nov. 24, 2021), https://www.cosmopolitan.com/uk/body/a38328843/jennifer-lawrence-trauma-nude-photo-leak/ [https://perma.cc/P2XY-JHK2] (Actress Jennifer Lawrence describes how she will experience trauma for the rest of her life because anyone can look up her nude photos at any time).

107. *See id.*

108. *See* Sturmer & Bradley, *supra* note 6.

109. *See id.*

110. *See* Antigone Davis, *New Updates to Help Prevent the Spread of Young People's Intimate Images Online*, META (Feb. 27, 2023), https://about.fb.com/news/2023/02/helping-prevent-the-spread-of-young-peoples-intimate-images-online/ [https://perma.cc/6MUU-H4FE].

111. *See id.*

112. *See id.*

113. *See Participating Online Platforms*, TAKEITDOWN, https://takeitdown.ncmec.org/participants/ [https://perma.cc/KQE9-E2JT].

114. *See* Davis, *supra* note 110.

115. *See generally* Ashcroft v. ACLU, 542 U.S. 656, 661, 670 (2004) (Congress attempted to prohibit knowingly posting content that is harmful to minors on the Internet, but the Supreme Court struck the legislation down because it was not narrowly tailored and the government failed to prove alternatives were less effective).

116. Romain Badouard & Anne Bellon, *Introduction to the special issue on content moderation on digital platforms*, INTERNET POL'Y REV., Mar. 23, 2025, at 2, 4.

117. *See* Reno v. ACLU, 521 U.S. 844, 877–879 (1997).

content.[118] However, this broad interpretation of immunity from liability has left victims of harmful content like non-consensual pornography unable to force content removal or to hold platforms liable.[119]

In response to the growing access and use of the Internet, Congress enacted the Communications Decency Act (CDA) as part of the Telecommunications Act of 1996.[120] Modernization and easy access to the Internet created an issue of people abusing the Internet and making it less safe for other users, especially minors, to use.[121] The Senate Conference report noted that there was an increase in reports that the Internet was being used to send explicit content, engage minors in inappropriate contact with adults, and steal personal information.[122] In part, provisions of the CDA were intended to "modernize the existing protections against obscene, lewd, indecent, or harassing uses of a telephone."[123] Decency provisions were supposed to increase penalties for abusive uses of the Internet, protect privacy, and protect families from unwanted programming on television that they deem inappropriate for their children.[124] This bill would subject a person to a fine or prison if they used the Internet to display sexual content in a manner available to persons under the age of 18.[125]

The Supreme Court struck down the portions of this act regulating indecency as unconstitutional due to its overbreadth.[126] The Court reasoned that the indecency provisions would prohibit nonpornographic material with serious educational value such as information about birth control.[127] The Court acknowledged the government interest in protecting minors from harmful content, but this interest would not justify suppression of a broad content of speech addressed to adults.[128] Ironically, the original intent of the CDA to attempt regulation of pornography and indecent material on the Internet did not come into fruition.[129]

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118. *See* Chris Cox, *Policing the Internet: A Bad Idea in 1996 -- and Today*, REALCLEARPOLITICS (June 25, 2020), https://www.realclearpolitics.com/articles/2020/06/25/policing_the_internet_a_bad_idea_in_1996_--_and_today.html.

119. *See* GoDaddy.com, LLC v. Hollie Toups, 429 S.W.3d 752, 762 (Tex. App. 2014).

120. *See* Telecommunications Act of 1996, Pub. L. No. 104-104 § 501 (1996).

121. *See* S. REP. NO. 104-23, at 59 (1995).

122. *See id.*

123. *Id.*

124. *See id.*

125. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 502, 110 STAT. 134 (1996).

126. *See* Reno v. ACLU, 521 U.S. 844, 877–879 (1997).

127. *See id.* at 877–878.

128. *See id.* at 875.

129. *See* S. REP. NO. 104-23, at 59 (1995); *see* Telecommunications Act of 1996 at §§ 501–509.

B. Safe Harbor Provision

Following the Supreme Court's decision to strike down provisions of the CDA, Section 230 became the sole part of the Act to survive.[130] The safe harbor provision ensures that a platform host will not be "treated as the publisher or speaker of any information provided by" a third party.[131] This section of the CDA originated in a bill called the Internet Freedom and Family Empowerment Act sponsored by two representatives; Republican Christopher Cox and Democrat Ron Wyden.[132] Part of the driving force behind this bill was to promote development of the Internet and allow the free market to flourish without excessive limitations from government regulation.[133] An additional reason why this bill was created was in response to two New York court cases that discussed platform liability for third-party content.[134] In 1991 CompuServe, an electronic library service that hosts forums, was sued for libel by Cubby Inc. for allegedly defamatory statements posted on its journalism forum.[135] The district court compared CompuServe to a newspaper vendor and ruled that because they did not know or have reason to know of the statements, they could not be held liable; they were simply a distributor.[136]

In contrast, a few years later another New York court held that Prodigy, another Internet service provider, was liable for the content posted by third parties.[137] The court distinguished *Cubby, Inc. v. Compuserve, Inc* from *Stratton Oakmont v. Prodigy Servs. Co.* because they had implemented moderation controls and held itself out to the public as controlling the content on its bulletin boards.[138]Prodigy was considered a publisher rather than a distributor.[139]

Following these court cases, platforms now began to face a new dilemma: they could either attempt to moderate content but risk liability for remaining content posted by third parties, or they could choose not to moderate and risk offensive, damaging, or obscene content proliferating

130. *See* Ambika Kumar & Tom Wyrwich, *The Test of Time: Section 230 of the Communications Decency Act Turns 20*, DAVIS WRIGHT TREMAINE LLP, (Sep. 2016), https://www.dwt.com/blogs/media-law-monitor/2016/08/the-test-of-time-section-230-of-the-communications [https://perma.cc/SAS8-3B99].

131. 47 U.S.C. § 230(c)(1).

132. *See* Chris Cox, *Policing the Internet: A Bad Idea in 1996 -- and Today*, REALCLEARPOLITICS, (June 25, 2020), https://www.realclearpolitics.com/articles/2020/06/25/policing_the_internet_a_bad_idea_in_1996_--_and_today.html.

133. *See* 47 U.S.C. § 230(b)(1) – (2).

134. *See* Cox, *supra* note 132.

135. *See* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 137–38 (S.D.N.Y. 1991).

136. *See id.* at 140–41.

137. *See* Stratton Oakmont v. Prodigy Servs. Co., No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *12–13 (Sup. Ct. May 24, 1995).

138. *See id.* at *10.

139. *See id.* at *1.

instead.[140]As described by then-Representative Cox, the jurisprudence of *Prodigy* and *CompuServe* would have "created a powerful and perverse incentive for platforms to abandon any attempt to maintain civility on their sites."[141] Representative Cox argued that platforms should instead be encouraged to filter and moderate content as much as they can.[142] To encourage self-moderation, this bill would allow platforms to act as "Good Samaritans" and moderate the content that they host if they want to in the manner they choose.[143]

The "Good Samaritan" provision of the bill would protect computer providers from liability on the basis that they will make a good faith effort to restrict access to material that is obscene, excessively violent, or otherwise objectionable.[144] A year following enactment of Section 230, the Fourth Circuit became the first federal court of appeals to interpret the law and its scope.[145] Mr. Zeran sued AOL Online for its delay in removing defamatory messages and refusal to post retractions and screen for similar subsequent postings.[146] In *Zeran v. Am. Online, Inc.*, the Fourth Circuit held that Section 230 immunized AOL Online from liability.[147] The court explained that even if a user provides notice to the platform of damaging or offensive content, the platform is not liable for its decision to moderate or retain the content because it would go against the purpose of enacting the statute.[148]

C. Broad Interpretation of Section 230

Following this decision, many courts followed suit in broadly interpreting Section 230(c)(1) and solidifying a very broad definition of immunity for platforms under Section 230.[149]

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140. *See Department of Justice's Review of Section 230 of The Communications Decency Act Of 1996*, DEP'T OF JUST., https://www.justice.gov/archives/ag/department-justice-s-review-section-230-communications-decency-act-1996 [https://perma.cc/M24L-SW64] [hereinafter *Review of Section 230*].

141. *See* Cox, *supra* note 132.

142. *See* 141 CONG. REC. 22044, 22045 (1995) (statement of Rep. Christopher Cox).

143. *See* Cox, *supra* note 132; s*ee generally* 47 U.S.C. § 230(c)(2) (this bill later becomes codified).

144. *See* Cox, *supra* note 132.

145. *See* Valerie Brannon & Eric Holmes, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW 9-10 (2024).

146. *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

147. *See id.* at 332.

148. *See id.* at 333.

149. *See* Valerie Brannon & Eric Holmes, CONG. RSCH SERV., R46751, SECTION 230: AN OVERVIEW 10 (2024); *see also* Universal Commc'n Sys. v. Lycos, Inc., 478 F.3d 413, 418-19 (1st Cir. 2007) (joining the Fourth, Ninth, and Tenth Circuits in their broad interpretation of Section 230 immunity).

As a result, many courts will find preemption under Section 230 for lawsuits that would impose liability based on third-party content.[150] When courts have not found preemption, it has primarily been because the claim at issue was dismissed on other grounds or the court found the defendant was the actual source or responsible for the content at issue.[151] The currently broad interpretation of Section 230 means that platforms have little incentive or reason to closely monitor their content or to even remove illicit content once identified.[152]

In more recent years Section 230 has come under fire for the broad immunity grant for platforms.[153] Some argue that Section 230 has been taken advantage of and often used as a 'get out of jail free card' and its current use to escape liability was not aligned with the original intent of passing the Safe Harbor provision.[154] Victims of non-consensual pornography have found no relief in holding platforms liable for hosting such illicit images on their websites.[155] Due to the broad definition of immunity under Section 230, courts have immunized platforms who knew or should have known that their platforms were being used to host violations of privacy, civil rights, and defamation.[156] Even worse, some individuals have used Section 230 as a shield to assert that their conduct, which would horrify some people, is protected by the CDA.[157]

Although the original purpose of the CDA was to help moderate content on the Internet, it is now weaponized to help facilitate harmful and negative

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150. *See*, *e.g.*, 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, 435, 438–40 (2010) (reporting courts found preemption under section 230 for at least one claim in almost 60% of decisions. Additionally, nearly 70% of unreversed federal court decisions found preemption when addressing the application of section 230 in summary judgement motions).

151. *See id.* at 442.

152. *See* Danielle Keats Citron, *Section 230's Challenge to Civil Rights and Civil Liberties*, KNIGHT FIRST AMEND. INST. (Apr. 6, 2018), https://knightcolumbia.org/content/section-230s-challenge-civil-rights-and-civil-liberties [https://perma.cc/V54Q-D3Z9] [hereinafter Citron, *Section 230's Challenge*].

153. *See* Rebecca Kern, *White House renews call to 'remove' Section 230 liability shield*, POLITICO, (Sep. 9, 2022, at 12:39 EDT), https://www.politico.com/news/2022/09/08/white-house-renews-call-to-remove-section-230-liability-shield-00055771 [https://perma.cc/4VWQ-YVYB].

154. *See* Citron, *Section 230's Challenge supra* note 152.

155. *See* GoDaddy.com, LLC v. Hollie Toups, 429 S.W.3d 752, 762 (Tex. App. 2014) (reversing lower court's refusal to grant summary judgement because plaintiffs were seeking to hold GoDaddy liable as publisher for the nude content on their website, which is barred by Section 230).

156. *See* DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 171 (2014) [hereinafter CITRON, HATE CRIMES].

157. *See* Kashmir Hill, *Hunter Moore Will Post Your Nude Photos but Will Only Include Your Home Addresses If He Thinks You're a Horrible Person*, FORBES, (Dec. 5, 2012, at 17:16 EST), https://www.forbes.com/sites/kashmirhill/2012/12/05/hunter-moore-is-going-to-start-posting-your-nude-photos-again-but-will-only-post-your-home-address-if-he-thinks-youre-a-horrible-person/ [https://perma.cc/9TZH-D8CF].

actions on the Internet.[158] Calls for amending Section 230 have increased over the years but to no avail.[159] The CDA has only been amended twice since its enactment in 1996, with the most recent amendment in 2018 creating an exception for certain cases that involve sex trafficking.[160] As explicit deepfake content proliferates on the Internet, there will be more victims who are unable to force the takedown of that content or hold platforms liable; it is solely the platform's decision.[161] In the case of celebrities, there may not be a desire to remove explicit deepfake content due to their popularity and interest.[162]

It's clear that Section 230 is both a saving grace to platforms and a weapon for bad actors to avoid liability.[163] To some, it feels like a nearly impossible task to get a website to remove this explicit, harmful content.[164] However, there are a few exceptions to Section 230 immunity.[165] One such exception is the immunity from liability does not apply to intellectual property laws.[166] Through this exception there is a potential avenue to ensure that platforms either remove explicit deepfake content or face liability for their actions.

V. ANALYSIS

A. Right of Publicity Law

The Right of Publicity is commonly known as a property right over the use of one's name, image, or likeness. [167] This right exists only in state common law and statutes as there is no federal right of publicity.[168] This right may provide a person injunctive relief or damages if their name, image, or

158. *See* Alina Selyukh, *Section 230: A Key Legal Shield For Facebook, Google Is About To Change,* NPR, (Mar. 21, 2018, at 05:11 EST), 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/SN52-QAAH], (quoting Cox). *See generally* CITRON, HATE Crimes, *supra* note 156, at 168 (discussing how a revenge porn site operator told a woman that she could pay him $75 to take down her photo and that he is untouchable for liability because of federal law).

159. *See Review of Section 230*, *supra* note 140; *see also* CITRON, HATE CRIMES, *supra* note 156, at 177 (proposing amending Section 230's Safe Harbor provision to exclude bad actors like platforms that exclusively host cyber stalking or non-consensual pornography).

160. *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), Pub. L. No. 115-164, § 4, 132 Stat. 1253 (2018); *see also* 47 U.S.C. §§ 230(b)(5), (e)(5).

161. *See* Sturmer & Bradley, *supra* note 6.

162. *See* Conger & Yoon, *supra* note 2.

163. *See generally* CITRON, HATE CRIMES, *supra* note 156, at 168.

164. *See* Sturmer & Bradley, *supra* note 6.

165. *See* 47 U.S.C. § 230(e).

166. *See id.* at § 230(e)(2).

167. *See* Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185, 187 (2012).

168. *See id.*; *see also* Mark Roesler & Joey Roesler, *Patchwork Protections: The Growing Need for a Federal Right of Publicity Law*, ABA (July 10, 2024), https://www.americanbar.org/groups/intellectual_property_law/resources/landslide/2024-summer/patchwork-protections-growing-need-federal-right-publicity-law/ [https://perma.cc/UD2D-MHWD] (describing need for a Federal Right of Publicity to harmonize and provide consistency for the current patchwork landscape of differing state laws).

likeness is used without their permission.[169] Because the right of publicity varies based on the state, some laws only encompass commercial use, while others only require that the use was made for any type of advantage.[170] With the rise of AI creating more realistic images and videos, recent federal legislation has attempted to create rights of publicity.[171] The NO FAKES Act of 2024 would create a civil action for a person whose image, voice, or likeness was used to create computer-generated content or the publishing of such content without their consent.[172] This legislation would require actual knowledge and would exclude common copyright fair uses such as scholarship, satire, and parody.[173] The No AI Fraud Act would create a civil action for conduct that makes available to the public a digital voice replica without someone's consent or a personalized cloning service.[174]

1. Circuit Split on CDA Section 230

There is currently a circuit split concerning whether right of publicity laws fall within the intellectual property exception of CDA Section 230's safe harbor provision.[175] The Ninth Circuit rejected the right of publicity as falling within intellectual property under Section 230.[176] This court held that including the right of publicity would undermine the broad grant of immunity provided by Section 230.[177]As a result, the Ninth Circuit construed intellectual property in Section 230 to mean federal intellectual property statutes which primarily encompass copyright or trademark.[178] The Ninth Circuit further narrowly construed the meaning of intellectual property to mean those that are specifically established such as trademark, patent, and copyright.[179] One argument against including the right of publicity under intellectual property is that because the goal of Section 230 is to help "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or

169. *See id.*

170. *See id.* at 211.

171. *See* NO FAKES Act of 2024, H.R. 9551, 118th Cong. (2024); *see* No AI FRAUD Act, H.R. 6943, 118th Cong. § 3(b)(1) – (2) (2024).

172. *See* H.R. 9551 §§ 2(a)(1), (c).

173. *See id.* at §2(c).

174. *See* H.R. 6943 § 2(c).

175. *See* Ned T. Himmelrich, *Right of Publicity May (or May Not) Be Intellectual Property Under Section 230*, GORDON FEINBLATT LLC (Feb. 22, 2024), https://www.gfrlaw.com/what-we-do/insights/right-publicity-may-or-may-not-be-intellectual-property-under-section-230 [https://perma.cc/778M-F2T9].

176. *See* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1118-19 (9th Cir. 2007).

177. *See id.* at 1119 n.5.

178. *See id*. at 1119. *See generally* 15 U.S.C. §§ 1051-1127 (federal trademark statutes); 17 U.S.C. §§ 101-122 (federal copyright statutes).

179. *See generally* Enigma Software Grp. USA, LLC v. Malwarebytes, Inc., 946 F.3d 1040, 1053 (9th Cir. 2019) (establishing that the intellectual property "exception does not apply to false advertising claims brought under § 1125(a) of the Lanham Act, unless the claim itself involves intellectual property").

State regulation" inclusion of this right that varies state to state would stifle the market.[180]

Although the First Circuit did not directly discuss if the right of publicity would fall within intellectual property, this circuit found that a state trademark dilution claim was not barred by Section 230 because it was a claim based on intellectual property.[181] The Third Circuit found that the right of publicity fell within intellectual property exception of Section 230(e)(2).[182] Within its analysis, the court highlighted that two legal dictionaries, including Black's, define the right of publicity as an intellectual property and that it has been described as analogous to copyright, trademark, and patent.[183]

2. Right of Publicity is an Intellectual Property

This circuit split must be resolved in favor of the right of publicity falling out of Section 230 immunity under the intellectual property exception. First, the plain text of statute reads to include state intellectual property statutes as opposed to just federal, which includes right of publicity.[184] Section 230 specifically states that the immunity will not have any effect on federal criminal statutes, intellectual property law, or state law.[185] If Congress intended that only intellectual property included in federal statutes applied, they would have said so.[186] Because the meaning of this statute is plain, there is no further need to ascertain other potential interpretations.[187]

Another reason is the property and economic interests in one's personal image and reputation. In *Hepp*, the court highlights that the plaintiff had "dedicated considerable time, effort and money into building her brand."[188] Additionally some state courts have recognized that individuals have property interests in their personas.[189] This interest need not be exclusive to public figures because of significant interests that private persons also have in their personas.[190] As mentioned earlier, employers may make or alter hiring decisions based on perceptions of a person's image and reputation.[191] Even if the effects of a tarnished reputation are not immediate, they may affect a

180. *See* 47 U.S.C. § 230(b)(2); *see also* Hepp v. Facebook, 14 F.4th 204, 211 (3d Cir. 2021).

181. *See Universal Commc'n Systems, Inc.*, 478 F.3d at 422–23 (citing 47 U.S.C. § 230(e)(2)).

182. *See Hepp*, 14 F.4th at 214.

183. *See id.* at 213.

184. *See* 47 U.S.C. § 230(e)(2).

185. *See* 47 U.S.C. § 230(e)(1) – (3).

186. *See Hepp*, 14 F.4th at 211 (explaining that when Congress wanted to limit the interpretation about state law within CDA §230, it knew how to do so and did so explicitly).

187. *See* Bostock v. Clayton Cty., 590 U.S. 644, 673–74 (2020) (explaining when the meaning of the text is plain, the Court's job of interpretation is done).

188. *See Hepp*, 14 F.4th at 212.

189. *See id.*

190. *See Number of Employers*, *supra* note 51.

191. *See id.*

person in the future.[192] Additionally, a private person today may become a public figure in the future.[193] One such example was Vanessa Williams who was the first Black woman to be crowned Miss America.[194] Only two months before the end of her reign, she was forced to relinquish her title because the magazine *Penthouse* announced they would publish scandalous photos she had posed for two years prior.[195] These photos were taken when she was still a private figure; she was working as an assistant to a photographer.[196] She had also been assured at the time the photos were taken that they were merely silhouettes, that she would not be identifiable, and that the photos would not leave the studio.[197] Despite this, these photos that were supposed to be private became public and burned Vanessa Williams' reputation.[198] In this era of social media and the world wide web, anything posted on the Internet can exist into perpetuity.[199]

Lastly, there have been past and present references to the right of publicity as an intellectual property right within the federal government.[200] In *Zacchini v. Scripps-Howard Broad*, the Supreme Court considered the right of publicity as "closely analogous to… patent and copyright" because it focuses "on the right of the individual to reap the reward of his endeavors."[201] In the introduced bill NO FAKES Act of 2024, the bill's purpose is stated as "[t]o protect intellectual property rights in the voice and visual likeness of individuals, and for other purposes" describing the right of publicity as a type of intellectual property.[202] The right of publicity should accordingly be considered an intellectual property that falls out of Section 230 immunity.

B. A (Narrow) Federal Right of Publicity

The enactment of a narrow federal right of publicity through an amendment to the Digital Millennium Copyright Act would clearly answer

192. *See generally* Jennifer Latson, *The Scandal That Cost a Miss America Her Crown*, TIME, (July 23, 2015, at 10:30 EDT), https://time.com/3961120/miss-america-scandal-vanessa-williams/ [https://perma.cc/KS7T-68YT].

193. *See id*.

194. *See id.*

195. *See id.*; *see* Lester Fabian Brathwaite, *How Vanessa Williams lost the Miss America crown but won over Hollywood*, ENT. WKLY. (July 23, 2024, at 23:57 EDT), https://ew.com/how-vanessa-williams-lost-miss-america-crown-but-won-over-hollywood-8682640.

196. *See* Latson, *supra* note 192.

197. *See id.*

198. *See* Janine Rubenstein, *How Vanessa Williams Went from Being 'Canceled' amid Miss America Scandal to Proving Her Haters Wrong (Exclusive)*, PEOPLE, (July 27, 2024, at 09:20 EDT), https://people.com/how-vanessa-williams-proved-haters-wrong-after-miss-america-scandal-exclusive-8684148 [https://perma.cc/5E9C-Q4SW].

199. *See generally* Freeth, *supra* note 106.

200. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 573 (1977); *see* NO FAKES Act of 2024, H.R. 9551, 118th Cong. (2024).

201. *Zacchini*, 433 U.S. at 573.

202. NO FAKES Act of 2024, H.R. 9551, 118th Cong. (2024); *see also* No AI FRAUD Act, H.R. 6943, 118th Cong. § 3(b)(1) – (2) (2024) (asserting that every person has a property right in their own likeness and that it constitutes an intellectual property right).

the circuit split question on whether a right of publicity is an intellectual property right.[203] The right of publicity would be automatically granted upon one's birth and exist until 10 years past one's death. This right would allow a person to control the use of their image or likeness and would only apply to explicit deepfake content. Because only several states recognize a right of publicity and they differ from state to state, some individuals either do not have a right of publicity or have a limited right that would not allow them to bring a claim for non-commercial use.[204] Providing a narrow federal right of publicity will ensure that every individual, regardless of jurisdiction, is able to prevent their image from being used to create explicit deepfake content and to hold others liable for this offense. People may still create deepfake content to create parodies or other related content in the absence of further legislation.[205] However, explicit deepfake content using someone's image or likeness cannot be created without the permission of the right-holder.

This federal right of publicity would create a "floor" of minimum protections.[206] A very narrow federal right of publicity will also ensure that existing state laws concerning right of publicity are not affected.[207] States would be free to increase their individual right of publicity privileges as they see fit. This proposal will not establish that all state right of publicity laws are exempt from Section 230 immunity due to the potential issues with individual First Amendment rights.[208] However, this proposal will exempt such laws from Section 230 immunity as applied to explicit deepfake content.

Because this right of publicity places a significant restriction on the creation of explicit deepfake content, it may face a First Amendment challenge because content-based speech restrictions are subject to strict scrutiny.[209] This restriction would successfully overcome such a challenge because (1) there is a compelling government interest and (2) this right is narrowly tailored to achieve this interest.[210] Here the compelling government interest is protecting citizens from the harms associated with non-consensual explicit deepfake content. One's sexual reputation or perception can have

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203. *Compare* Hepp v. Facebook, 14 F.4th 204, 214 (3d Cir. 2021), *with* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1119 (9th Cir. 2007).

204. *See* Roesler & Roesler, *supra* note 168 (explaining that "37 states recognize the right of publicity, with 25 of these states recognizing the right via statute and 12 by common law" and some states only recognize a right of publicity for public figures); *see* LA. STAT. ANN. §470.3 (2022) (Louisiana statute provides that "every individual has a property right in connection with the use of that individual's identity for commercial purposes"); *see also Right of Publicity Statutes & Interactive Map*, RIGHT OF PUBLICITY, https://rightofpublicity.com/statutes [https://perma.cc/YBG8-B7DK].

205. *See generally* Graham, *supra* note 66 (explaining there is no federal legislation regulating the creation of deepfake content).

206. *See* AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES, UNITED STATES COPYRIGHT OFFICE 118 (Apr. 2019).

207. *See id.*

208. *See generally* Reed v. Town of Gilbert, 576 U.S. 155, 163–164 (2015); *see generally* Rothman, *supra* note 167, at 2223 (explaining a common defense to a right of publicity is the First Amendment).

209. *See Reed*, 576 U.S. at 163–164.

210. *See id.* at 155 (asserting that content-based speech restrictions can only be justified if the law is narrowly tailored to achieve a compelling government interest).

particularly detrimental consequences.[211] As highlighted earlier, sexual content of a person can ruin their reputation,[212] sabotage employment opportunities,[213] and harm their mental health to the point of death.[214] This government interest significantly outweighs a person's individual interest in creating explicit deepfake content using another person's image and likeness.

This parallels with non-consensual pornography, where several state supreme courts have found preventing intrusions on individual privacy and protecting individuals from the harms of non-consensual pornography to be compelling government interests.[215]In these cases, the courts found that the statutes prohibiting the dissemination of non-consensual pornography survived strict scrutiny because they were narrowly tailored to achieve the compelling interest.[216] This right of publicity is similarly narrowly tailored to only affect the use of one's image and likeness in the context of explicit deepfake content; this would achieve the government's interest without broadly affecting other uses such as creating parody or satire content.[217] This right of publicity would not completely bar an individual from creating the explicit deepfake content outright; they would still be able to use their own image and likeness and that of another person who gives them consent. Establishing a narrow federal right of publicity would be the first step towards content moderation of explicit deepfake content; the next and more critical step would be to incorporate it into a process to ensure identified images are removed upon identification.

C. Digital Millennium Copyright Act

The Digital Millennium Copyright Act (DMCA) is a copyright law that implemented two 1996 treaties of the World Intellectual Property Organization.[218] Passed in 1998, the DMCA amended Title 17 of the United States Code and created a limitation on the liability of platforms for copyright infringement committed by their users.[219] This limited liability, however, is contingent on a platform responding expeditiously to remove or disable access to material that has been identified by a copyright owner as infringement.[220] A platform must take down content that constitutes copyright

211. *See* Rubenstein, *supra* note 198.

212. *See* Moreau & Rourke, *supra* note 45.

213. *See Number of Employers*, *supra* note 51.

214. *See* Ross, *supra* note 62.

215. *Accord* People v. Austin, 155 N.E.3d 439, 462 (Ill. 2019); State v. Katz, 179 N.E.3d 431, 455–56 (Ind. 2022);

State v. Casillas, 952 N.W.2d 629, 642–43 (Minn. 2020); State v. VanBuren, 214 A.3d 791, 811 (Vt. 2018).

216. *Accord* Austin, 155 N.E.3d at 466; Katz, 179 N.E.3d at 460; Casillas, 952 N.W.2d at 644; VanBuren, 214 A.3d at 814.

217. *See generally* Austin, 155 N.E.3d at 466, 474.

218. Digital Millennium Copyright Act, Pub. L. No. 105-304 (1998).

219. *See Digital Millennium Copyright Act*, U.S. GEN. SERVICES AGENCY, https://digital.gov/resources/digital-millennium-copyright-act [https://perma.cc/K8DH-7NNN].

220. Digital Millennium Copyright Act Pub. L. No. 105-304 § 202 (1998); *see* 17 U.S.C. § 512(b)(2)(E).

infringement once notice has been given or else can be held liable for the copyright infringement.[221] A person who physically takes a photo is the copyright owner.[222] As the owner, only they can sue for copyright violations, not the person(s) featured in the photo.[223] This could prove especially difficult when the person who has taken the photo was a stranger. As currently written, the DMCA would not provide a person the ability to hold a platform to the notice and takedown measures of the DMCA for explicit deepfake content of themselves on the platform.[224] But amending the DMCA to include a federal right of publicity would provide a victim with this powerful tool to get this content removed or to hold the platform responsible for noncompliance.[225]

1. Incorporating the Right of Publicity into DMCA Through Amendment

The DMCA must be amended to include a narrow federal right of publicity for explicit deepfake content. Rather than create new legislation, Congress can amend this statute that already contains a notice and takedown mechanism; this would provide victims with an avenue to remove explicit deepfake content from platforms.[226] This amendment would allow a person whose image or likeness is used to create explicit deepfake content to contact a platform and request the removal of the content.[227] This would also bypass the issue of needing an actual copyright owner to file the notification.[228] The ability to utilize the notice and takedown mechanism in the DMCA would be limited to intellectual property that is specifically identified in this Act: copyright and (the proposed) right of publicity. This would ensure that this form of content moderation would only occur where Congress has specifically spoken and alleviate concerns that the various state regulations would stifle content in the free market.[229] There would also be a requirement to utilize notice and takedown and (1) wait 30 days or (2) receive a denial from the platform host (whichever is earlier) before pursuing legal liability against the platform host for explicit deepfake content.

This framework would solve legal problems that existing remedies are unable to address. Current remedies only provide victims with a way to hold the actual content creator liable for making the explicit deepfake content.[230] They do not provide a way to remove the content, throwing victims at the

221. *See* 17 U.S.C. § 512(c)(1)(C).
222. *See* CITRON, HATE CRIMES, *supra* note 156, at 121–122.
223. *See id*.
224. *See generally* 17 U.S.C. § 512(c)(1)(C) (only identified copyright infringement is eligible for the notice and takedown process).
225. *See id.* at § 512(c)(1)(C).
226. *See id*.
227. *See id*.
228. *See* CITRON, HATE CRIMES, *supra* note 156, at 121–122.
229. *See generally* Hepp v. Facebook, 14 F.4th 204, 211 (3d Cir. 2021).
230. *See e.g.*, N.Y. PENAL LAW §245.15 (2023); VA CODE § 18.2-386.2 (2019); H.R. 207 2024 Gen. Assemb., Reg. Sess. (KY. 2024); CAL. CIV. CODE § 1708.86; *see* discussion *supra* Sections III.A, III.C.

mercy of the platform to remove it of their goodwill.[231] Section 230 stands as a nearly impenetrable barrier against forcing the removal of explicit deepfake content because of its safe harbor provision, allowing platforms to escape liability.[232] However, as an intellectual property right, the right of publicity falls out of the Section 230 safe harbor provisions.[233] Incorporating this right into the DMCA gives victims a mechanism to force the takedown of explicit deepfake content and prevent further harm.[234] In the scenario where a platform refuses to comply with this request, victims can seek legal recourse against the platform without Section 230's usual bar against civil liability.[235] The ability to hold platforms liable will prevent bad faith actors from using Section 230 as a shield to further harm victims.[236]

2. Challenges to Right of Publicity Framework

A possible challenge against this federal right of publicity framework within the DMCA is that an offender may assert their First Amendment right as a defense. A platform may then argue that since the content creator may escape liability from existing state right of publicity remedies through this defense, they too should escape liability from this framework. Courts have applied several tests to analyze a first amendment defense against a right of publicity claim.[237] In the "relatedness test", the use of a person's name, image, or likeness is not barred unless it is "wholly unrelated" to the underlying work.[238] In *Rogers v. Grimaldi*, the court held that the use of Ginger Rogers' name in a movie title was permitted because it was clearly related to the content of the movie.[239] Within the context of explicit deepfake content, this claim should fail because the nature of such content is creating a false sexual identity for the actual person, unrelated to their actual identity.[240] A defendant may argue that the use of a person's face is enough of a hook to be related to the person's image or likeness. Even if a court were to determine that the use of one's face is sufficient to meet the threshold of relatedness, there is also a strong argument that this test would not even be appropriate in this context.[241] The Third Circuit rejected the use of the relatedness test, considering it better suited for trademark-like claims.[242] The Ninth Circuit agreed with this view, asserting that the relatedness test is used to protect the consumer from

231. *See* Sturmer & Bradley, *supra* note 6.
232. *See* 47 U.S.C. § 230(c)(2); *see also Zeran*, 129 F.3d at 332.
233. *See e.g.*, 47 U.S.C. § 230(e)(2); Hepp v. Facebook, 14 F.4th 204, 214 (3d Cir. 2021).
234. *See* 17 U.S.C. § 512(b)(2)(E).
235. *See* 47 U.S.C. § 230(c)(2).
236. *See* Hill, *supra* note 157.
237. *See* Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE L.J. 86, 129–130 (2020).
238. *See id*. at 130.
239. *See* Rogers v. Grimaldi, 875 F.2d 994, 1005 (2d Cir. 1989).
240. *See* Citron, *supra* note 55, at 1921.
241. *See* Hart v. Elec. Arts, Inc., 717 F.3d 141, 157 (3d Cir. 2013).
242. *See id*.

confusion not the right of publicity holder.[243] A defense that attempts to utilize this test should fail.

In the "transformative test", the court uses analysis similar to the transformative factor of the fair-use doctrine test in copyright law.[244] The court considers whether the work adds significant creative elements so that it is transformed beyond an imitation or likeness.[245] Within this test, explicit deepfake content should also fail. A defendant may argue that the images they use to create the content transform the victim into having a body that they do not have in reality, therefore meeting this threshold. However, the goal of the underlying network that creates deepfakes is to create content that is indistinguishable from reality.[246] As a result, the content created will look very realistic. The Third Circuit asserted that when the use is "entertainment that is merely a copy or imitation, even if skillfully and accurately carried out" there is no creative component and therefore no transformational purpose.[247] In a similar manner, creating explicit deepfake content is attempting to create an indistinguishable image of a person with sexual content. With this consideration, explicit deepfake content should be considered closer to an imitation or likeness and fail this test.

VI. CONCLUSION

Explicit deepfake content is unfortunately an issue that will continue to grow with more advances in technology. While there have been recent movements to create state legislation and closer attempts to create federal legislation, there is still significant work to be done to protect victims and minimize harm. Legal remedies to either prosecute the offender or create a civil action to seek damages may face barriers if the offender is unable to be identified or found. More significantly, the continual presence of this content online may be a reminder of this deeply invasive violation. Some attempts to have websites remove analogous non-consensual pornography have been thwarted due to the broad definition of immunity under Section 230 of the CDA.[248] Although broad, this immunity is not absolute.

Creating a narrow federal right of publicity helps to utilize the intellectual property exception that exists under Section 230. Many legal sources have defined the right of publicity as intellectual property or an analogue to trademark, patent, and copyright. By narrowing the scope of this right to the context of explicit deepfake content, we can ensure that the compelling government interest in protecting citizens from the harm of non-consensual explicit deepfake content is achieved in the least restrictive manner. Incorporating this right of publicity into the DMCA will provide

243. *See* Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.), 724 F.3d 1268, 1280 (9th Cir. 2013).

244. *See* Post & Rothman, *supra* note 237, at 129. *See* 17 U.S.C. § 107.

245. *See* Post & Rothman, *supra* note 237, at 129.

246. *See* discussion *supra* Section II.A.

247. Hart v. Elec. Arts, Inc., 717 F.3d 141, 164 (3d Cir. 2013).

248. *See* CITRON, HATE CRIMES, *supra* note 156, at 168. *See generally* 47 U.S.C. § 230(c)(2).

victims with an avenue to force the takedown of this content and the ability to hold platforms liable if they refuse. Platforms will not be able to hide behind Section 230 or use it as a weapon against victims.

Elections Affect Commerce: Why the FTC Should Regulate Political Endorsements by Social Media Influencers

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* J.D., May 2026, The George Washington University Law School; B.A., 2021, University of California, Santa Barbara. My utmost thanks to Rizwan Chowdhry, Christina Hitchcock, and Michael Zschokke for their discerning and constructive feedback. Thank you to the editorial board of the Federal Communications Law Journal for their efforts to bring this volume to print. A final note of thanks to my parents, whose sacrifices made my higher education possible. All errors are my own.

I. INTRODUCTION

> What you don't know won't hurt you. A dubious maxim: sometimes what you don't know can hurt you very much.[1]

Suppose you see an influencer[2] on Instagram or TikTok raving about a popular soft drink.[3] Then you notice the caption, which reveals that they are a paid partner of the brand.[4] The influencer may genuinely want you to know the post is an advertisement—but they also have no choice.[5] In the realm of product placement, that disclosure is mandated by law.[6] You can thank the Federal Trade Commission ("FTC") for the transparency.[7] The independent federal agency enforces existing antitrust and consumer protection laws, and promulgates new regulations under them.[8] Now suppose that the influencer was not promoting a soft drink, handbag, or hotel stay.[9] Suppose, instead, the promotion was for Kamala Harris's 2024 presidential campaign.[10] Or Mike Johnson's next bid for the House of Representatives.[11] Or Cory Booker's

1. MARGARET ATWOOD, THE BLIND ASSASSIN 137 (2000).

2. "Influencers," as referred to in this Note, are individuals who cultivate an audience by publishing curated content to online social media platforms. A large following gives these individuals opportunities to earn money through promotional content partnerships. This subset of the marketing industry sees huge investments, which in 2020 alone totaled $9.7 billion. Stasia Skalbania, *Advising 101 for the Growing Field of Social Media Influencers*, 97 WASH. L. REV. 667, 669–674 (2022).

3. Gillian Follett, *Behind Poppi's Influencer Marketing Strategy: Neon Sweatsuits*, AD AGE (Apr. 24, 2024), https://adage.com/article/digital-marketing-ad-tech-news/behind-poppis-influencer-marketing-strategy-neon-sweatsuits/2554746 [https://perma.cc/VWP4-6KW5].

4. Alix Earle (@alix_earle), INSTAGRAM (Apr. 12, 2024), https://www.instagram.com/p/C5rg_AlPb6_/?img_index=1 [https://perma.cc/J3LG-A4JK].

5. *FTC's Endorsement Guides: What People Are Asking*, FED. TRADE COMM'N, https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking [https://perma.cc/B97S-RHUR] [hereinafter *FTC Endorsement Guidance*]; Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. §§ 255.0–255.6 (2023).

6. 16 C.F.R. §§ 255.0–255.6.

7. The FTC shares this responsibility. For example, the Department of Justice's Antitrust Division has enforcement authority for federal antitrust laws, and the Consumer Financial Protection Bureau has rulemaking authority for certain consumer protection issues. *The Enforcers*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers [perma.cc/3MTN-9NYZ]; *The CFPB*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/about-us/the-bureau/ [perma.cc/P9H7-KU89].

8. 16 C.F.R. §§ 255.0–255.6; *Enforcement*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement [perma.cc/5TWG-JE8L].

9. Each of those promotions would be subject to the FTC's endorsement regulations. 16 C.F.R. §§ 255.0–255.6.

10. Malachi Barrett, *Harris Campaign Enlists Detroit Social Media Stars to Reach Young Voters*, BRIDGEDETROIT (Aug. 30, 2024), https://www.bridgedetroit.com/harris-campaign-enlists-detroit-social-media-stars-to-reach-young-voters/ [perma.cc/5PEJ-HL2J].

11. Cami Mondeaux, *Mike Johnson Looks Ahead to 2026 Fundraising with House Majority on the Line*, WASH. EXAM'R (Jan. 13, 2025), https://www.washingtonexaminer.com/news/campaigns/congressional/3284589/mike-johnson-2026-early-efforts-expand-house-gop-majority/ [perma.cc/F54Q-P5MD].

2026 Senate run.[12] If the influencer was paid for the endorsement, surely the law would require similar transparency? Surely not.

There is a troubling loophole in social media regulation. This loophole enables influencers to be paid for covert political promotions.[13] And it was exploited and reported on extensively with respect to the 2024 presidential election.[14] Why does the loophole persist? The FTC reasons that its authority to regulate endorsements, online and elsewhere, does not extend to extend to political advertising.[15] Perhaps regulatory responsibility lies with the Federal Communications Commission ("FCC")?[16] Perhaps not. While "communications" is in its name, the FCC does not regulate online content.[17] Surely, then, the Federal Election Commission ("FEC"), the agency directly responsible for the administration of campaign finance laws?[18] Yes, the FEC *could* act.[19] But when the opportunity arose, the FEC declined to close the

12. David Wildstein, *Booker Has Almost $10.5 Million Banked for 2026*, NEW JERSEY GLOBE (Oct. 15, 2023, 3:30 PM), https://newjerseyglobe.com/congress/booker-has-almost-10-5-million-banked-for-2026/ [perma.cc/G3ZZ-3DUD].

13. Unless otherwise stipulated, this Note implicates the federal level when referencing elections, campaigns, candidates, political committees, endorsements, and related endeavors.

14. Rebecca Kern, *Seeing a Viral Pro-Biden TikTok? A PAC Might Have Paid for It*, POLITICO (Jan. 23, 2024, 10:00 AM EST), https://www.politico.com/news/2024/01/23/biden-campaign-social-media-influencers-00136389 [perma.cc/P827-UTQK]; Clare Duffy & Brian Fung, *Influencers Are Playing a Big Role in This Year's Election. There's No Way to Tell Who's Getting Paid for Their Endorsements*, CNN (Oct. 29, 2024, 6:00 AM EDT), https://www.cnn.com/2024/10/29/tech/influencers-presidential-campaign-paid-disclosure/index.html [perma.cc/2SMS-FMTW]; Geoff Harris, *TikTok Influencers Play Pivotal Role in 2024 Election, Reshaping Political Engagement*, CBS AUSTIN (Jan. 20, 2025, 9:33 PM), https://cbsaustin.com/news/nation-world/power-reach-of-younger-influencers-felt-during-presidential-election-president-donald-trump-re-election-campaign-content-creator-tiktok-bytedance-millions-of-followers-gen-z [perma.cc/V9DH-6U6W]; Makena Kelly, *A Visual Guide to the Influencers Shaping the 2024 Election*, WIRED (Aug. 15, 2024, 7:15 AM), https://www.wired.com/story/visual-guide-to-influencers-shaping-2024-election/ [perma.cc/6CRW-GYQM]; Annika Pillai, *How Online Influencers Are Shaping the 2024 Election*, TUFTS DAILY (Nov. 5, 2024), https://www.tuftsdaily.com/article/2024/11/how-online-influencers-are-shaping-the-2024-election [perma.cc/L35B-UF6L]; Laura Barrón-López, Saher Khan & Shrai Popat, *How Social Media Influencers Are Playing a Role in the Presidential Election*, PBS NEWSHOUR (Mar. 19, 2024, 6:40 PM EST), https://www.pbs.org/newshour/show/how-social-media-influencers-are-playing-a-role-in-the-presidential-election [perma.cc/HJM8-97JU].

15. "The FTC doesn't have jurisdiction over political advertisements." *FTC Endorsement Guidance*, *supra* note 5.

16. *See* Allegra D'Virgilio, *The U.S. Government's Role in Regulating Social Media Disinformation*, N.U. POL. REV. (May 19, 2022), https://nupoliticalreview.org/2022/05/19/the-us-governments-role-in-regulating-social-media-disinformation/ [perma.cc/228L-7SM2] (misrepresenting social media regulation the FCC's jurisdiction and directing readers to the FCC's "Social Media" webpage, which merely presents links to the FCC's various social media accounts).

17. *The FCC and Speech*, FED. COMMC'NS COMM'N, https://www.fcc.gov/consumers/guides/fcc-and-speech [perma.cc/9QLL-Z7KX] (last updated Aug. 31, 2022).

18. *Mission and History*, FED. ELECTION COMM'N, https://www.fec.gov/about/mission-and-history/ [perma.cc/PH8K-B744].

19. *See id.*

loop.[20] So for now, your favorite influencer often has no legal obligation to disclose when they are paid to promote a politician.[21] And worse, where payments from campaigns and Super PACs are distilled through influencer management agencies, even disclosed disbursements may be impossible to trace to individual influencers.[22] This Note details the historic regulatory authority of relevant federal agencies, identifies potential barriers to their on-point rulemaking, and argues that one agency—the FTC—is best suited to mandate transparency in political advertising by influencers.

II. THE PAST AND PRESENT SCOPE OF SOCIAL MEDIA REGULATION BY THE FCC, FEC, AND FTC

Political campaigns have long used popular technology to influence voters, necessitating regulatory oversight to preserve transparency. Take the telephone, for instance. From 1945 to 1970, the number of American households with a telephone jumped from more than 50% to more than 90%.[23] Concurrently, phone banking became a high-profile campaign staple.[24] When social media platforms arrived on scene, politicians moved faster. A mere 5% of American adults used social media platforms in 2005, the year before Facebook hosted its first political advertisements.[25] By 2021, when surveys showed more than 70% of adults used social media, its political use had exploded, and federal campaign strategy began to include the engagement of paid influencers.[26] Political use of older technology was by then largely regulated. In the telephone's case, Congress had enacted the Telephone Consumer Protection Act, empowering the FCC to administer restrictions on

20. Shana M. Broussard & Ellen L. Weintraub, *Statement of Commissioners Ellen L. Weintraub and Shana M. Broussard Regarding the Commission's Adoption of Final Rules in REG 2013-01 (Technological Modernization)*, FED. ELECTION COMM'N (Dec. 14, 2023), https://www.fec.gov/resources/cms-content/documents/Reg-2013-01-TechMod-Final-Statement-ELW-and-SMB.pdf [perma.cc/VA8N-N5QH].

21. Duffy & Fung, *supra* note 14.

22. "It is impossible to discern how much of that [FEC data] has gone directly to influencers because PACs and campaigns typically pay firms that then contract work to influencers." Stephanie Lai, *Campaigns Pay Influencers to Carry Their Messages, Skirting Political Ad Rules*, N.Y. TIMES (Nov. 2, 2022), https://www.nytimes.com/2022/11/02/us/elections/influencers-political-ads-tiktok-instagram.html.

23. Mark Landler, *Multiple-Family Phone Lines: A Post-Postwar U.S. Trend*, N.Y. TIMES (Dec. 26, 1995), https://www.nytimes.com/1995/12/26/us/multiple-family-phone-lines-a-post-postwar-us-trend.html.

24. All Things Considered, *Phone Banks: A Staple of Campaigning Since 1968,* NPR (July 31, 2012, 3:00 PM ET), https://www.npr.org/2012/07/31/157678602/phone-banks-a-staple-of-campaigning-since-1968 [perma.cc/ZC22-S85Q].

25. University student candidates, early Facebook users, were the first to buy campaign ads on the platform. Merill Weber, *Reform for Online Political Advertising: Add on to the Honest Ads Act*, Note, 74 FED. COMM. L.J. 81, 83 (2022); Katie Harbath & Collier Fernekes, *A Brief History of Tech and Elections: A 26-Year Journey*, BIPARTISAN POL'Y CTR. (Sept. 28, 2022), https://bipartisanpolicy.org/wp-content/uploads/2022/09/A-Brief-History-of-Tech-and-Elections_-A-26-Year-Journey.pdf [perma.cc/3YWX-CVPY].

26. Harbath & Fernekes, *supra* note 25.

phone banking and adjacent practices.[27] The convergence of social media and elections implicates new transparency issues,[28] obscured political promotion being one, but federal oversight is not yet as robust as for earlier inventions.

For federal agencies, statutory authority and the First Amendment pose substantive roadblocks to increased social media regulation. The First Amendment prohibits the federal government from enacting laws that unduly abridge the right of free speech, and expressive conduct—like hosting or posting content online—falls under the speech umbrella.[29] These protections apply regardless of the degree to which individuals, organizations, and social media platforms fall within the regulatory jurisdiction of independent federal agencies.[30] The judiciary scrutinizes laws regulating protected speech for their validity.[31] Content-based speech restrictions are typically subject to strict scrutiny, while content-neutral restrictions (like those that regulate the time or place of expression) are subject to lesser, intermediate forms of scrutiny.[32] To withstand strict scrutiny, the government must demonstrate that a legal constraint is the least restrictive means of achieving its crucial interest, a standard oft-called "'strict' in theory and fatal in fact."[33] With respect to jurisdiction, because an agency derives power by Congressional delegation, it may only regulate within the scope of its statutory authority.[34] So an agency may not regulate social media if its authorizing legislation cannot be read to include that oversight.[35] First Amendment and jurisdictional challenges are consequently a frequent obstacle to the FCC, FEC, and FTC's diverse rulemaking efforts.[36]

The structure of an agency may create procedural hurdles for rulemaking. Organizational structure varies between independent federal regulatory agencies.[37] Legislation establishing an agency often defines its

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27. 47 U.S.C. § 227; *FCC Actions on Robocalls, Telemarketing*, FED. COMMC'NS COMM'N, https://www.fcc.gov/general/telemarketing-and-robocalls [https://perma.cc/3U7R-DGFA] (last updated July 23, 2018).

28. Harbath & Fernekes, *supra* note 25.

29. *See, e.g.*, 303 Creative LLC v. Elenis, 600 U.S. 570, 600 (2023) (reiterating that "the First Amendment extends to all persons engaged in expressive conduct" in holding that website design was protected speech). It should be noted that not all conduct is speech under the meaning of the First Amendment. United States v. O'Brien, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

30. *See* U.S. CONST. amend. I ("Congress shall make no law...abridging the freedom of speech").

31. VICTORIA L. KILLION, CONG. RSCH. SERV., R47986, FREEDOM OF SPEECH: AN OVERVIEW (2024).

32. *Id.*

33. *Id.*; Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

34. TODD GARVEY & SEAN M. STIFF, CONG. RSCH. SERV., R45442, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES (2025).

35. *Id.*

36. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310 (2010); FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411 (1990); Reno v. ACLU, 521 U.S. 844 (1997).

37. *See* 47 U.S.C § 154; 15 U.S.C. § 41; 52 U.S.C. § 30106.

structure.[38] This is true of the FCC, FTC, and FEC's collegial body compositions, or commissions.[39] Because an agency quorum (the number of commissioners who must be present for decisions to be made) is defined by statute, it is inflexible.[40] This can limit these agencies' ability to promulgate regulations.

While the FCC, FEC, and FTC each enforce some social media-adjacent directives, news outlets, scholars, and elected officials alike advocate for increased regulation.[41] Examination of each agency's statutory authority and relevant administrative efforts illustrates how federal regulation can advance transparency—and, in the FEC's case, how it sometimes fails to do enough.

A. The Federal Communications Commission

The Communications Act of 1934 ("the Communications Act") streamlined federal management of public interstate communications by creating the FCC to oversee the phone, radio, and telegraph industry.[42] As technology expanded interstate communication, Congress amended its legislation to clarify whether new services, like cable television, were subject to FCC regulation.[43] Though updates to the Communications Act expanded FCC jurisdiction, the agency lacks discretion to freely regulate all methods of interstate communication, including internet content.[44]

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38. *Id.*
39. *Id.*
40. *Id*.
41. *See* 47 U.S. Code § 230; 11 CFR 100.26, as amended at 89 FR 210–212, 214, Jan. 2, 2024; 88 FR 48092; *see generally* Lai, *supra* note 22; Marshall Auerback, *Don't Leave Social Media Regulation to the Platforms, Bring in the FCC*, AM. COMPASS (July 22, 2021), https://americancompass.org/dont-leave-social-media-regulation-to-the-platforms-bring-in-the-fcc/ [perma.cc/3DN7-NNA7] (arguing that the FCC should regulate social media platforms, rather than permitting self-regulation to continue); Luke J. Matthews, Heather J. Williams & Alexandra T. Evans, *Protecting Free Speech Compels Some Form of Social Media Regulation*, RAND CORPORATION (Oct. 20, 2023), https://www.rand.org/pubs/commentary/2023/10/protecting-free-speech-compels-some-form-of-social.html [perma.cc/885Y-HT6W] (calling government intervention over social media platforms overdue); Pichaya P. Winichakul, THE MISSING STRUCTURAL DEBATE: REFORMING DISCLOSURE OF ONLINE POLITICAL COMMUNICATIONS, 93 N.Y.U. L. REV. 1387 (2018) (advocating administrative reform to competently address foreign interference of social media platforms); Elizabeth A. Casale, *Influencing the FTC to Update Disclosure Rules For the Social Media Era*, 40 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 1 (2019) (declaring that the FTC should incorporate influencers into its disclosure regulations, which it had not done at the time and still does not with respect to political endorsements).
42. Title 47 of the United States Code codifies the Communications Act and additional legislation granting the FCC its subject matter jurisdiction and rulemaking authority. *The Communications Act of 1934*, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1288#background [perma.cc/F5PZ-Y5ZT]; *see generally* 47 U.S.C. § 151 et seq. (containing the provisions of the Telecommunications Act of 1934 as amended).
43. *See, e.g.*, 47 U.S.C. § 325.
44. *See, e.g.*, 47 U.S.C. § 221(b) (limiting the FCC's authority to regulate where exchange services are the jurisdiction of local government).

Under the Communications Act, the FCC broadly regulates where "common carriers" and where "broadcasting" are concerned.[45] The FCC's jurisdiction relies on how a technology or entity is classified—and not all services qualify.[46] Telecommunications services are regulated as common carriers.[47] Telecommunications services, "regardless of the facilities used," are those which offer "telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public."[48] If a technology merely offers "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, [including] electronic publishing," it is an information service.[49] Information services are not regulated as common carriers.[50] "Broadcasters," entities to whom the FCC grants broadcasting licenses, are regulated separately (also not as common carriers).[51]

The primary difference between common-carrier and broadcasting regulation is that the FCC regulates broadcasters with respect to their content and its allotted frequencies and common carriers with respect to their service distribution methods.[52] Title II of the Communications Act subjects qualified common carriers to mandatory access regulations set by the FCC.[53] Case in point, the FCC prohibits common carriers from engaging in unreasonable business practices.[54] Public telephone companies are one example of undisputed common carriers under the Communications Act.[55] The FCC regulates broadcasters under Title III of the Communications Act.[56] Public television channels and radio stations are examples of broadcasters under the Communications Act.[57] Because they transmit information through a limited medium—a public television station, for instance, can only broadcast for as many hours as there are in a day—broadcasters licensed by the FCC are subject to content regulations.[58] The Supreme Court has held that that oversight faces diminished First Amendment scrutiny because the unique nature of broadcast media heightens the government's regulation interests.[59]

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45. 47 U.S.C. § 151 et seq.
46. *See id*.
47. 47 U.S.C. §§ 201–276.
48. 47 U.S.C. § 153.
49. *Id*.
50. 47 U.S.C. §§ 201–276.
51. While FCC broadcasters are not common carriers for purposes of the Communications Act, Supreme Court analyses of broadcasters' speech protections are "[rooted] in the common law doctrines related to [historic] common carriers." VALERIE C. BRANNON, CONG. RSCH. SERV., R45650, FREE SPEECH AND THE REGULATION OF SOCIAL MEDIA CONTENT 27, 30 (2019); 47 U.S.C. §§ 201-276.
52. Sindhu Zagoren, *Common Carriers, Broadcasters, and the Fight Over the Internet: Toward a Material Model of Mediation*, 24 DEMOCRATIC COMMUNIQUÉ 28, 31 (2011).
53. 47 U.S.C. §§ 201-276.
54. 47 U.S.C. §§ 201(b).
55. 47 U.S.C. § 153.
56. 47 U.S.C. §§ 301-399.
57. 47 U.S.C. § 396.
58. *See* BRANNON, *supra* note 51, at 28.
59. *Id*.

The FCC does not regulate internet content.[60] The Telecommunications Act of 1996 ("the 1996 Act") was a notable amendment to the Communications Act, in part because it was the first to contemplate the Internet.[61] Congress attempted to bring internet content regulation under FCC jurisdiction through Title V, the Communications Decency Act.[62] The FCC by then already moderated broadcast content for offensive speech (e.g., obscenity).[63] The provisions of the new title imposed criminal sanctions internet users whose indecent or obscene speech might reach minors—provisions the Supreme Court found violated the First Amendment.[64] In *Reno v. ACLU*, the Court determined the unique considerations which permitted "qualifying the level of First Amendment scrutiny that should be applied" to traditional broadcasters were not relevant to the Internet.[65] The only internet-related provision of Title V that remains good law is Section 230, where (c)(1) provides that "no 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."[66] So Section 230 shields a social media platform from criminal liability for posts by its platform users, but does not expand the FCC's regulatory jurisdiction to either users or platforms.[67]

B. The Federal Election Commission—and the Problem

Established by the Federal Election Campaign Act ("FECA"), the FEC's mission is "to protect the integrity of the federal campaign finance process by providing transparency and fairly enforcing and administering federal campaign finance laws."[68] The FEC has faced significant First Amendment challenges to statutory limits it enforced on political spending and broadcasting by corporations and unions.[69] The Bipartisan Campaign Reform Act of 2002 ("BCRA") amended FECA to limit issue advocacy advertisements leading up to elections and to limit campaigns' abilities to accept soft money (funds beyond the scope of FEC regulation).[70] But the Supreme Court in *Citizens United v. Federal Election Commission* held that political speech made by "associations of citizens," whether via spending or broadcasting, was protected by the First Amendment; in doing so, the Court

60. *The FCC and Speech*, *supra* note 17.
61. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.
62. *Id*.
63. *The History of the Federal Communications Commission (FCC)*, MITEL, https://www.mitel.com/articles/history-federal-communications-commission-fcc# [perma.cc/588G-RDFZ]. Independent of the broadcast media context, obscene material is not protected speech under the First Amendment. Miller v. California, 413 U.S. 15 (1973).
64. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56; *Reno*, 521 U.S. at 844.
65. *Reno*, 521 U.S. at 870.
66. 47 U.S.C. § 230.
67. *Id*.
68. 52 U.S.C. § 30106; *Mission & History*, *supra* note 18.
69. *See generally* 52 U.S.C. § 30104; *see, e.g.*, *Citizens United*, 558 U.S. at 318.
70. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified at 52 U.S.C. § 30101 et seq.).

found unconstitutional BCRA provisions restricting corporate independent expenditures and advertising.[71] Disclosure mandates, which do not "prevent anyone from speaking," and "help citizens 'make informed choices in the political marketplace,'" endured.[72] Because disclosure mandates are constitutional, the FEC continues to impose them not only with respect to political spending, but also with respect to political advertising.[73]

The FEC mandates disclosure of qualified political advertisements, or "public communications."[74] A "public communication" must be marked with a clear disclaimer.[75] While the FEC has updated its definition of "public communication" for technological relevance, the latest definition remains insufficient, creating a transparency loophole for individual influencers.[76] The current definition and accompanying disclosure guidelines fail to account for how influencer marketing is utilized to advance political campaigns.[77]

That what constitutes a "public communication" is inadequate reflects the FEC's unwillingness to issue comprehensive social media regulations. The FEC has historically avoided regulating the Internet.[78] When BRCA was ratified, the agency refused to apply the statute's disclaimer requirements to internet-hosted advertisements that would otherwise compel disclosure.[79] When federal courts held that the FEC's exemptive administration of those statutory provisions was legally deficient, the FEC incorporated disclosure requirements to some advertisements placed on websites.[80] But the commission delayed the issue of more robust internet regulations for over a decade thereafter.[81] Finally, in November 2022, it issued draft rules to update the definition of "public communication."[82] "Draft A" would apply disclaimers to almost all online advertisements—but the FEC passed "Draft B" for proposed rulemaking.[83] That proposed rule would designate as a "public communication" only internet content "placed" for a fee—but not

71. *Citizens United*, 558 U.S. at 372.

72. *Id*. at 366–67 (quoting McConnell v. FEC, 540 U.S. 93, at 197, 201).

73. *Advertising and Disclaimers*, FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/advertising-and-disclaimers/ [perma.cc/P8ZB-33WL].

74. *Id*.

75. *Id.*

76. Internet Communication Disclaimers and Definition of "Public Communication," 11 C.F.R. § 100.26 (2022), as amended by Technological Modernization, Notice 2023-20, 89 Fed. Reg. 196, 210–211, 214 (Jan. 2, 2024); *Advertising and Disclaimers*, *supra* note 73.

77. Daniel I. Weiner & Harry Isaiah Black, *Comment to the FEC: Adopt Updated Rules Requiring Transparency for Paid Influencers*, BRENNAN CTR. FOR JUST. (Jan. 23, 2023), https://www.brennancenter.org/our-work/research-reports/comment-fec-adopt-updated-rules-requiring-transparency-paid-influencers [https://perma.cc/YS7X-CLYG].

78. *Internet Communication Disclaimers and Definition of Public Communication*, Comment, 136 HARV. L. REV. 2201 (2023), https://harvardlawreview.org/print/vol-136/internet-communication-disclaimers-and-definition-of-public-communication/ [https://perma.cc/5CVG-ZKR8] [hereinafter *Public Communication Comment*].

79. *Id.*

80. *Id*.

81. *Id*.

82. *Id*.

83. *Id*. at 2202–2203.

content "promoted" for a fee.[84] Legal scholars and nonprofits identified myriad problems with the update as proposed.[85] The Brennan Center For Justice, a nonprofit law and public policy institute, highlighted the implications of omitting "promotional" content from mandatory disclosure requirements.[86] The organization published its public comment in response to the FEC's rulemaking notice.[87]

> The current rules, while a significant improvement, do not provide the regulated community or the wider public with clear guidance as to how the disclaimers will apply to newer methods of online campaign communication, including those in which an advertiser might not literally be paying a fee to place content on a website, digital device, application, or advertising platform. There is no principled distinction between these newer methods of paid communication and typical online ads where the Commission's disclaimer rules unambiguously apply. In all cases, an advertiser is paying to disseminate a covered political message. If anything, the need for clear disclaimers is even greater for nontraditional advertising that resembles organic content. […] Other methods, like paying an influencer to share a campaign's organic content or paying an online platform to boost that content in search results, might also be harder to recognize as paid communications than a typical online ad.[88]

While the final rule redefining "public communication" *is* inclusive of promotional content, it wholly fails to address these consequences.[89] Under the final rule, promulgated in 2024, online messages are public communications "promoted for a fee" *only if* "payment is made to a website, digital device, application, or advertising platform."[90] These parameters profoundly dilute the impact of incorporating promotional language to the rule because they omit payments made to individuals.[91]

84. Internet Communication Disclaimers and Definition of "Public Communication," 87 Fed. Reg. at 77467, 77470–71.
85. Weiner & Black, *supra* note 77; *Public Communication Comment*, *supra* note 78.
86. Weiner & Black, *supra* note 77.
87. *Id*.
88. *Id*.
89. 11 C.F.R. § 100.26, as amended by 89 Fed. Reg. 214, Jan. 2, 2024.
90. *Id.*
91. *Id.*

Individuals are required to disclose their political advertising on social media only if it displays "express advocacy."[92] The same disclaimer mandate applies to independent expenditures, which occur when individuals or organizations spend to procure campaign advertisements containing "express advocacy" without campaign input.[93] "Express advocacy" is itself communication that "unmistakably urges election or defeat of one or more clearly identified [candidates]."[94] Express advocacy may be established in one of two ways.[95] The first is through "explicit words of advocacy of election or defeat."[96] The second is an "only reasonable interpretation" test.[97]

> In the absence of such "explicit words of advocacy of election or defeat," a communication expressly advocates when, taken as a whole and with limited reference to external events, such as the proximity to the election, it can only be interpreted by a "reasonable person" as advocating the election or defeat of one or more clearly identified [candidates].[98]

"If reasonable minds could not differ as to the unambiguous electoral advocacy of the communication, it is express advocacy regardless of what the author intended."[99] Individual influencers who avoid express advocacy under these standards are not required to disclose if they were paid to promote a candidate, even when paid by an entity other than a campaign.[100] This avoidance obscures the source of political content consumed by social media users and erodes election transparency.[101]

Omitting individuals from promotional public communication disclosures obfuscates other disclosures mandated for election transparency. While the FEC requires public disclosure of many disbursements made by campaigns, PACs, and Super PACs, disbursement tracking offers less

92. Disclaimers are also required for any individual's "electioneering communication" containing express advocacy; because electioneering communications are definitionally confined to broadcast, cable, and satellite communications, this requirement is irrelevant to individual influencers' social media messaging. *Public Communications*, FED. ELECTION COMM'N, https://www.fec.gov/press/resources-journalists/public-communications/ [perma.cc/VK8G-L3LP]; *Making Electioneering Communications*, FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/other-filers/making-electioneering-communications/ [perma.cc/DKH8-MUXU].

93. *Making Independent Expenditures*, FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/making-independent-expenditures/ [perma.cc/GQ2Z-RY7Q].

94. *Id*.

95. *Id*.

96. *Id*.

97. *Id*.

98. *Id*.

99. *Making Independent Expenditures*, *supra* note 93.

100. *Public Communications*, *supra* note 92.

101. *See* Broussard & Weintraub, *supra* note 20.

transparency than clear disclaimers.[102] The latter is more accessible. Disbursement tracking requires an individual consumer to seek out the expenditures made by a particular campaign or political action committee. Disclaimers require nothing from consumers because they append material already being consumed. When they are examined, disbursements are less granular than disclaimers. In 2024, for example, the Super PAC Priorities USA spent $7,163,532 on "Media."[103] Under that umbrella, $3,743,790 went to "web ads," $2,810,604 to "unspecified media buys," $471,793 to "media production," and $47,723 to "miscellaneous media."[104] Expenditure details reflect neither what "web ads" were placed nor with whom.[105] If new regulation were to compel more granular disbursement reports, the high-volume spending of large campaigns and Super PACs would produce an unnavigable quantity of records. That requirement would still fail to account for the fact that disbursements made in this context may not be made to individual influencers.[106] Many influencers belong to management groups that contract with campaigns on their behalf, such that any disbursement record would reflect payment to the relevant management company.[107] And entities that are not campaigns are wholly shielded from reporting disbursements of this nature.[108] Because organizational funds spent on advertisements that do not contain express advocacy are definitionally not "independent expenditures," they are not subject to the FEC's reporting requirements.[109] Finally, disbursement tracking necessitates some foundational knowledge. Even if a social media user suspects that content is political promotion, they may not be aware of or be able to determine which expenditure records to consult for more clarity. Without knowing certain disclosures are mandated by law, they may not even be aware that relevant records exist.

C. The Federal Trade Commission

The Federal Trade Commission Act of 1914 ("FTC Act") established the FTC and authorized the agency to regulate "unfair or deceptive acts or

102. *Making Independent Expenditures*, *supra* note 93; L. PAIGE WHITAKER, CONG. RSCH. SERV., IF12691, PACS AND SUPER PACS IN FEDERAL ELECTION CAMPAIGNS: LEGAL FRAMEWORK (2024).

103. Ctr. for Responsive Pol., *Priorities USA Action PAC Expenditures*, OPENSECRETS, https://www.opensecrets.org/political-action-committees-pacs/priorities-usa-action/C00495861/expenditures/2024 [perma.cc/N3QN-F4Z4].

104. *Id.*

105. *Id.*

106. Lai, *supra* note 22.

107. *Id.*; Laura Barrón-López & Matt Loffman, *A Look at the Massive Donations to Campaigns and Super PACs This Election Season,* PBS NEWSHOUR (June 21, 2024), https://www.pbs.org/newshour/show/a-look-at-the-massive-donations-to-campaigns-and-super-pacs-this-election-season [perma.cc/A53Q-X5NR].

108. Ctr. for Responsive Pol., *Priorities USA Action Independent Expenditures*, OPENSECRETS, https://www.opensecrets.org/political-action-committees-pacs/priorities-usa-action/C00495861/independent-expenditures/2024 [perma.cc/8UYA-SJ6H].

109. *Id.; Making Independent Expenditures*, *supra* note 93.

practices in or affecting commerce."[110] Signed into law later the same year, the Clayton Antitrust Act ("Clayton Act") empowered the FTC to exercise jurisdiction over additional antitrust and consumer protection issues.[111] The predecessor to the FTC and Clayton Acts was the Sherman Antitrust Act ("Sherman Act"), codified in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[112] Although the FTC does not directly enforce violations of the Sherman Act, all Sherman Act offenses constitute enforceable per se violations of the FTC Act.[113] These policy mandates give the agency broad latitude to promulgate diverse rules and institute expansive enforcement actions.[114]

FTC regulation of commercial activity typically faces diminished First Amendment scrutiny. Before the advent of modern internet, the Supreme Court held that commercial speech, or "expression related solely to the economic interests of the speaker and its audience," is entitled less First Amendment protection than other forms of speech.[115] Although commercial transactions are "content-based," because they fall within "an area traditionally subject to government regulation," government interference with related speech is subject to intermediate scrutiny.[116] But there is an important exception: the intermediate-scrutiny standard applies only if commercial speech is "neither misleading nor related to unlawful activity," because protection for commercial speech is premised on its informational function.[117] "The government may ban forms of communication more likely to deceive the public than to inform it" with "no constitutional objection."[118]

Over time, the FTC has adapted its regulation of deceptive commercial speech for emerging technologies, including social media.[119] As the Internet became a consumer-facing marketplace, the FTC regulated accordingly.[120] Merchandise rules that govern conditions of receipt and refund, for example, were updated to incorporate internet orders.[121] Today, the FTC primarily regulates influencers through its Guides Concerning the Use of Endorsements

110. Federal Trade Commission Act, 15 U.S.C. §§ 41–58.

111. Clayton Act, 15 U.S.C. §§ 12–27.

112. N. Pac. Ry. Co. v. U.S., 356 U.S. 1, 4 (1958); 15 U.S.C. §§ 1–7.

113. FTC v. Cement Inst., 333 U.S. 683, 694–695 (1948).

114. 15 U.S.C. § 45(a)(2).

115. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561–566 (1980).

116. *Id*.

117. *Id*.

118. *Id*. at 564.

119. *Disclosures 101 for Social Media Influencers*, FED. TRADE COMM'N, https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf [https://perma.cc/F7XQ-4QAN].

120. *See, e.g.*, Mail, Internet, or Telephone Order Merchandise, 16 C.F.R. § 435 (2025); *FTC Issues Final Amendments to Mail or Telephone Order Merchandise Rule*, FED. TRADE COMM'N, (Sept. 11, 2014), https://www.ftc.gov/news-events/news/press-releases/2014/09/ftc-issues-final-amendments-mail-or-telephone-order-merchandise-rule [perma.cc/PW9M-FYAQ].

121. 16 C.F.R. § 435.

and Testimonials in Advertising.[122] In connection with agency's consumer-protection mission, the rules seek to ensure that Americans are not misled by covert product placement.[123] On social media platforms, that means the FTC requires influencers to clearly disclose any material connection to products they endorse.[124] The scope of material connections is expansive:

> Material connections can include a business, family, or personal relationship. They can include monetary payment or the provision of free or discounted products (including products unrelated to the endorsed product) to an endorser, regardless of whether the advertiser requires an endorsement in return. Material connections can also include other benefits to the endorser, such as early access to a product or the possibility of being paid, of winning a prize, or of appearing on television or in other media promotions.[125]

These guidelines ensure maximum transparency by requiring that even an unpaid connection which might otherwise mislead viewers be disclosed.[126] While the rule makes copious reference to "product," the term is inclusive of physical goods, services, and other forms of product.[127]

III. WHY THE FTC IS BEST SITUATED TO ACT NOW

An individual disclosure mandate for influencers paid to publish political endorsements is needed to further existing federal policy aims—namely, that transparency makes Americans safer. FCC regulations that guarantee transparent pricing by common carriers ensure Americans can rely on the stability of those communication services' contracts.[128] Existing FEC disclosure mandates improve Americans' political awareness ahead of elections.[129] And current FTC endorsement regulations for influencers make Americans better informed about the nature of internet content they consume.[130] Rulemaking is the answer, not only because it would complement these agencies' underlying policy goals, but also because it would complement existing regulation—which requires disclosure for other express and indirect commercial endorsements. Ambiguous political endorsements remain unchecked, degrading election transparency by blurring the line between entertainment and political advertising for a burgeoning number of

122. 16 C.F.R. §§ 255.0–255.6
123. *Id*.
124. *Id*.
125. *Id*.
126. *Id*.
127. "The Commission is also deleting 'or service' from 'product or service,' because the term 'product' includes a 'service.'" 88 Fed. Reg. 48092, 48093 (codified at 16 C.F.R. § 255.0).
128. 47 U.S.C. § 201(b).
129. *See, e.g.*, *McConnell*, 540 U.S. at 201 (noting the public interest in pre-election transparency afforded by legislation presently codified at 52 U.S.C. §30104).
130. 16 C.F.R. §§ 255.0–255.6.

American social media users. For substantive and structural reasons,[131] the FTC is the right agency to close the gap—and should do so by updating its endorsement regulations to include political promotion.

A. *The FCC is a Nonstarter*[132]

The FCC is poorly suited to close this gap because social media regulation would likely fall outside the agency's jurisdiction. Courts have been unwilling to classify new technologies as telecommunications services subject to FCC regulation as common carriers.[133] In addition, Congress withdrew the FCC's authority over election-related matters.[134]

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131. This Note offers a structural rationale for its prescription, premised on current Supreme Court jurisprudence interpreting the Executive Removal Power under Article II. The landmark case for removal doctrine is *Humphrey's Executor v. United States*. The *Humphrey's* decision upheld statutory limits on the President's power to remove commissioners of independent agencies. The Supreme Court found that where the FTC was a multimember body exercising legislative and judicial functions, its commissioners could only be removed for cause. In the second Trump administration, the Justice Department declared that it would seek to have *Humphrey's Executor* overturned and President Trump fired two Democratic FTC commissioners without cause. The commissioners challenged their firings, and the U.S. District Court for the District of Columbia held that the removal attempts were illegal and issued a reinstatement order for former commissioner Rebecca Slaughter. The U.S. Court of Appeals for the D.C. Circuit denied the Justice Department's bid for a stay of the D.D.C. order, but the Supreme Court issued certiorari before judgment and granted the stay request. The Court heard oral argument on December 8, 2025. The Court's decision in that case, *Trump v. Slaughter* (expected summer 2026) is likely to restrict or overturn *Humphrey's Executor*; as of May 2026, *Humphrey's Executor* remains good law. Ann E. Marimow, *Highlights of the Supreme Court Argument on Firing Independent Agency Heads*, N.Y. TIMES (Feb. 20, 2026), https://www.nytimes.com/live/2025/12/08/us/trump-supreme-court-presidential-power; *Fighting the Consolidation of Power and Illegal FTC Purges*, PROTECT DEMOCRACY UNITED (Mar. 27, 2025), https://protectdemocracy.org/work/fighting-the-consolidation-of-power-and-illegal-ftc-purges/ [perma.cc/9EDH-Y24F]; Carrie Campbell Severino, *Humphrey's Executor's Days Are Likely Numbered as Cases Regarding the President's Power to Remove Rev Up*, NAT'L REV. (Apr. 4, 2025, 2:35 PM), https://www.nationalreview.com/bench-memos/humphreys-executors-days-are-likely-numbered-as-cases-regarding-the-presidents-power-to-remove-rev-up/ [perma.cc/E9DL-JWF6]; Lydia Wheeler & Jess Bravin, *Supreme Court to Reconsider Limits on President's Power to Fire Top Officials*, WALL ST. J. (Sept. 22, 2025, 5:38 PM ET), https://www.wsj.com/us-news/law/supreme-court-trump-ftc-rebecca-kelly-slaughter-cb69e8f3; Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

132. While FCC regulation would likely fail judicial review, interagency support may give the FCC new purpose. Under 47 U.S.C. § 162, the FCC may "promote the carrying out of…or otherwise to arrange for such research and development [in connection with any matter in relation to which the Commission has jurisdiction] to be carried out by others." The FCC has oversight of political advertising by broadcasters, so it could reasonably identify political advertising by influencers as "in relation" to their jurisdiction. Interagency support has been leveraged this way before—the Do-Not-Call registry, an FCC rule, was established in coordination with the FTC. 47 U.S.C. § 162; *Political Programming*, FED. COMMC'NS COMM'N, https://www.fcc.gov/media/policy/political-programming [perma.cc/G7Y4-MDSG]; *FCC Actions on Robocalls, Telemarketing*, *supra* note 27.

133. Marc S. Martin, Dania Assas & Brandon R. Thompson, *Why the FCC's Net Neutrality Rules Were Struck Down*, PERKINS COIE (Jan. 7, 2025), https://perkinscoie.com/insights/update/why-fccs-net-neutrality-rules-were-struck-down [https://perma.cc/R3SY-XWUB].

134. 47 U.S.C. § 801 (repealed 1974 by Pub. L. No. 93–443, 88 Stat. 1263).

The FCC cannot regulate social media platforms as common carriers.[135] Courts have already blocked the FCC from classifying internet service providers ("ISPs") as "common carriers."[136] During the Obama administration, the FCC reclassified ISPs as Title II common carriers in support of promulgating net neutrality rules.[137] In 2025, the U.S. Court of Appeals for the Sixth Circuit struck down the FCC's new classification.[138] The court in *Ohio Telecom Association v. FCC* ruled that ISPs provide "only an 'information service,'" and the alternative conclusion was both "inconsistent with the plain language of the Communications Act" and one the FCC exceeded its authority to reach.[139] As others have recognized, the appellate court faithfully adhered to the modern standard of judicial review for agency interpretations of law.[140] While certain Supreme Court Justices may be sympathetic,[141] the FCC's failure to bring ISPs under common carrier rules in lower courts makes it highly unlikely they would succeed with ISP-hosted social media platforms. If courts are unconvinced that running internet servers offers "telecommunications for a fee directly to the public," social media platforms don't offer telecommunications either. Both ISPs and social media platforms offer users the capability to make information available via electronic publishing—so both broker an "information service."

Even with a jurisprudential shift in evaluating common carriers, the FCC would be unlikely to successfully regulate individual social media users. The agency presently derives its individual enforcement authority under specific statutory provisions.[142] The FCC enforces provisions prohibiting, for example, tampering with public radio transmissions, running unlicensed public radio operations, selling jamming devices to break up radio waves, and engaging in illegal telemarketing practices.[143] It would not be enough if FCC *could* regulate platforms as common carriers. That would only enable the agency to impose distribution restrictions.[144] To leverage platform distribution regulation to combat individuals' covert political advertisements

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135. The prospect of platforms as "common carriers" is increasingly raised in scholarly debates over First Amendment speech protections and viewpoint censorship. Joel Thayer, *The FCC's Legal Authority to Regulate Platforms as Common Carriers*, FED. SOC'Y BLOG (Mar. 29, 2021), https://fedsoc.org/commentary/fedsoc-blog/the-legal-authority-for-the-fcc-to-regulate-platforms-as-a-common-carrier [perma.cc/Q22U-SGC3]; Shaun B. Spencer, *The First Amendment and the Regulation of Speech Intermediaries*, 106 MARQ. L. REV. 27 (2022); Christopher S. Yoo, *What's in a Name? Common Carriage, Social Media, and the First Amendment*, 119 NW. U. L. REV. ONLINE 49 (2024); Martin et al., *supra* note 133.

136. Ohio Telecom Ass'n v. FCC (In re MCP No. 185), 124 F.4th 993 (6th Cir. 2025).

137. Martin et al., *supra* note 133.

138. The first Trump administration reversed the classification, and the Biden administration resuscitated it—at which time it faced new legal challenges. *Id.*

139. *Ohio Telecom Ass'n*, 124 F.4th at 1009. The FCC in the second Trump administration did not file a petition for writ of certiorari. Ohio Telecom Ass'n v. FCC (In re MCP No. 185), No. 24-7000, 2025 LX 271408 (6th Cir. Mar. 11, 2025).

140. Martin et al., *supra* note 133.

141. Lawrence J. Spiwak, *Regulatory Implications of Turning Internet Platforms into Common Carriers*, 76 FED. COMM. L.J. 1, 23–24 (2023).

142. 47 U.S.C. § 227; 47 U.S.C. § 302; 47 U.S.C. § 333; 47 U.S.C. § 301.

143. 47 U.S.C. § 227; 47 U.S.C. § 302; 47 U.S.C. § 333; 47 U.S.C. § 301.

144. Zagoren, *supra* note 52 at 31; 47 U.S.C. §§ 201–276.

is to put a square peg in a round hole. Effective regulation would require punishing platforms for user violations, which runs afoul of Section 230.[145] And, as noted, the Supreme Court has already rejected bids for the FCC to regulate internet content like broadcaster content.[146]

Further, on-point regulation by the FCC would contradict congressional intent. The congressional record makes this clear.[147] Congress had once granted the FCC explicit oversight in this area—with 47 U.S.C. §§ 801 to 805.[148] Those provisions first restricted campaign expenditures to various forms of communications media.[149] When FECA was passed, §§ 801 to 805 were repealed, transferring all relevant authority from the FCC to the new FEC.[150]

B. The FEC is Ill-Equipped

Although obscured political advertisements fall squarely within FEC jurisdiction, procedural obstacles and substantive challenges leave the agency ill-equipped to comprehensively address the issue.

The FEC's unique organizational structure begets regulatory inefficiency, worsened by the present political climate. Both the FCC and FTC are headed by a five-person commission, where no more than three commissioners can be of one political party.[151] For these two agencies, three commissioners are required for a quorum.[152] No more than three FEC commissioners can be of the same political party—but the FEC's governing body consists of six commissioners, and four are required for a quorum.[153] Bipartisan commissioner appointment and participation are thereby required to conduct FEC business.[154] This quorum structure has previously stalled and deadlocked agency action.[155] From August 2019 to December 2020, for

145. While mounting partisan concerns suggest this may change, Section 230 remains good law as of May 2026. Paolo Confino, *Trump's Pick for FCC Chair Wants to Eliminate the Law Shielding Social Media Companies from Legal Consequences for Posts on Their Platforms*, FORTUNE (Nov. 19, 2024, 12:07 AM EST), https://fortune.com/2024/11/19/trump-fcc-pick-repeal-section-230-meta-facebook-instagram-tiktok-x-youtube/ [perma.cc/WC2N-DC6R].

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

147. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972); Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93–443, 88 Stat. 1263 (1974).

148. Pub. L. No. 92-225, 86 Stat. 3; Pub. L. No. 93–443, 88 Stat. 1263.

149. Pub. L. No. 92-225, 86 Stat. 3; Pub. L. No. 93–443, 88 Stat. 1263.

150. Pub. L. No. 92-225, 86 Stat. 3; Pub. L. No. 93–443, 88 Stat. 1263.

151. 47 U.S.C. § 154; 15 U.S.C. § 41.

152. 47 U.S.C. § 154; 15 U.S.C. § 41.

153. 52 U.S.C. § 30106.

154. *See id.*

155. Shane Goldmacher, *Democrats' Improbable New F.E.C. Strategy: More Deadlock Than Ever*, N.Y. TIMES (June 8, 2021), https://www.nytimes.com/2021/06/08/us/politics/fec-democrats-republicans.html.

instance, the FEC had a quorum for only three months.[156] And, as of May 2026, the FEC has lacked a quorum since April 2025.[157] Ahead of the 2018 midterm elections, when the agency did have a quorum, commissioner deadlock left the FEC unable to promulgate a rule "expanding disclaimers to 'internet-enabled device[s] or application[s].'"[158] The current Republican administration has actively facilitated the absence of an FEC quorum.[159] Any internal opposition to omitting individuals from public communication guidelines came from current and former Democratic commissioners.[160] For these reasons, it is unlikely that the FEC could overcome structural challenges to issue updated regulation.

And the Supreme Court will likely be more critical of disclosure requirements and related First Amendment implications in future.[161] Although the Supreme Court has declared FECA and BRCA's disclosure requirements constitutional, recent jurisprudence suggests new requirements will be subject to heightened scrutiny.[162] Legal scholars have identified the federal judiciary at-large as "increasingly skeptical of disclosure."[163] For example:

> No case has directly threatened disclosures like [those mandated by the FEC's public communications rule]. Yet courts have indicated their approval is waning. In *Americans for Prosperity Foundation v. Bonta*, the Supreme Court found that a California law requiring charities to disclose their big donors' names failed exacting scrutiny, as it burdened donors' associational rights while being "dramatic[ally] mismatch[ed]" from the state's antifraud interest. And in *Washington Post v. McManus*, the Fourth Circuit found that a Maryland law requiring online platforms to disclose facts about the ads they publish was unconstitutional compelled speech.[164]

156. Zach Montellaro, *Federal Campaign Finance Watchdog Has Full Slate for First Time in Years*, POLITICO (Dec. 9, 2020, 1:04 PM EST), https://www.politico.com/news/2020/12/09/federal-elections-commission-quorum-443919 [perma.cc/Z7TB-TNGD].

157. Ashley Lopez, *The Federal Election Commission Is Down to 2 Members. So Its Work Is at a Standstill*, NPR (Oct. 4, 2025, 5:00 AM EST), https://www.npr.org/2025/10/04/nx-s1-5559763/fec-no-quorum-campaign-finance [perma.cc/JUL9-Y7AU]; Defendant's Notice to the Complaint for Declaratory and Injunctive Relief, Senate Majority PAC v. FEC, Civ. No. 26-336 (D.D.C. Apr. 6, 2026), https://www.fec.gov/resources/cms-content/documents/fec-notice-of-lack-of-quorum-26-336-04-06-2026.pdf [https://perma.cc/7R7W-QK6S].

158. *Public Communication Comment*, *supra* note 78.

159. Lopez, *supra* note 157.

160. Broussard & Weintraub, *supra* note 20.

161. *Public Communication Comment*, *supra* note 78.

162. *Id.*; *Citizens United*, 558 U.S. at 372.

163. *Public Communication Comment*, *supra* note 78.

164. *Id.* at 2206.

Courts are evaluating purported government interests more critically when ruling on First Amendment challenges to some mandated disclosures.[165]

C. Fewer Roadblocks Lie Ahead for FTC Regulation

The FTC is best situated to close the regulatory loophole for influencers paid to promote federal campaigns. Considering the FTC's jurisdiction over "unfair or deceptive acts or practices in or affecting commerce," the agency should reverse its outdated determination that it lacks authority to regulate political advertising.[166] FTC regulation has routinely and appropriately expanded to account for an evolving technological landscape. In the present one, influencers retained for political promotion affect commerce, and those promotions should be marked with a clear disclaimer.

The FTC's authorizing legislation does not delineate that which "affects commerce," and commerce is itself a broad concept. The FTC Act prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[167] But the statute does not shed additional light on qualifying "acts or practices," it merely stipulates that "'commerce' means commerce among the several States or with foreign nations."[168] The same is true for the Sherman and Clayton Acts.[169] That capacious definition suggests congressional intent for a similarly broad understanding of activities "affecting commerce." Other pieces of federal legislation define "commerce" with a bit more specificity. Under the Labor-Management Relations Act, for instance, commerce is "trade, traffic, commerce, transportation, or communication among the several States."[170] Black's Law Dictionary bases its definition for "affecting commerce" on this statute; it defines the phrase as "touching or concerning business, industry, or trade" when applied to "an industry, activity, etc."[171] These more detailed definitions are, from a policy perspective, nearly as broad. And each definition supports a reading of the FTC Act to include jurisdiction over political advertising as activity that "affects commerce."

Political advertising *is* a practice "affecting commerce." Political promotions create a direct commercial transaction between an influencer and the entity providing them payment—whether that entity is a candidate's campaign, a political action committee, or an influencer management group.[172] Moreover, while political endorsements may not induce *viewers* to engage a transaction in the way of product advertising, they still have great downstream potential to affect interstate traffic, transportation, and communication.[173] Elected officials control policy outcomes affecting

165. *See id.*
166. 15 U.S.C. § 45.
167. *Id.*
168. 15 U.S.C. § 45.
169. 15 U.S.C. §§ 1, 12.
170. 29 U.S.C. § 152.
171. *Affecting Commerce*, BLACK'S LAW DICTIONARY (12th ed. 2024).
172. Lai, *supra* note 22.
173. *See* Duffy & Fung, *supra* note 14.

individual and national economic wellbeing. Those officials are elected by voters who are susceptible to viewing undisclosed political advertisements posted by influencers.[174] On a national scale, for instance, President Trump won his 2024 bid for reelection on a campaign that included scores of economic promises.[175] Post-inauguration, he imposed significant tariffs on United States trading partners.[176] The widescale tariffs caused significant market downturn, and millions of American stockholders saw their portfolio values plumet.[177] Although the tariff policy was struck down on judicial review, the policy and related economic promises illustrate a causal connection between political campaigns and commercial effect.[178]

Critically, a reading of the FTC Act to cover deceptive political advertising would likely survive judicial review. An agency's interpretation of its authorizing statute receives no deference from courts.[179] But in addition and without any deference to the FTC's interpretation, the Supreme Court has broadly interpreted the FTC Act.[180] In *FTC v. Motion Picture Advertising Service Co.*, the Supreme Court held that "Congress advisedly left the concept [of 'unfair methods of competition'] flexible to be defined with particularity by the myriad of cases from the field of business" in finding exclusive contracts warranted a charge by the FTC.[181] The Court had previously held in *FTC v. Ruberoid Co*. that "the Commission is not limited to prohibiting [an] illegal practice in the precise form in which it is found to have existed in the past," suggesting that restrictions on political advertising as commercial activity might have greater weight in the information era.[182] Consistent with *FTC v. Ruberoid Co*., agency efforts to keep pace with digital advancement recently included discussion of artificial intelligence technology—notably more attenuated from obvious commercial activity than political advertisements are.[183] To that end, the Supreme Court found in *FTC v. Sperry & Hutchinson Co.* that "the Federal Trade Commission does not arrogate excessive power to itself" if it "considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[184] This empowers the FTC to justify regulation with public policy, even without support from statutory text or legislative history.[185] And with respect to the

174. *See* Cody Couture & Ann L. Owen, *Political Advertising and Consumer Sentiment: Evidence from U.S. Presidential Elections*, EUR. J. OF POL. ECON. 86 (2025).

175. *Trump's Economic Promises Timeline*, U.S. REP. LLOYD DOGGETT, https://doggett.house.gov/issues/trumps-economic-promises-timeline [perma.cc/BH5T-FF9P].

176. Alan Rappeport, *Trump Imposes Sweeping Tariffs, Escalating Trade War*, N.Y. TIMES (Apr. 8, 2025), https://www.nytimes.com/2025/04/08/us/politics/trump-tariffs-greer.html.

177. *Id.*

178. Learning Res., Inc. v. Trump, 146 S. Ct. 628 (2026).

179. Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

180. *Id*.; FTC v. Motion Picture Advertising Service Co., 344 U.S. 392, 394 (1953).

181. *Motion Picture Advertising Service Co.*, 344 U.S. at 394.

182. FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952).

183. Comment from the Fed. Trade Comm'n on Artificial Intelligence and Copyright, Fed. Trade Comm'n Advocacy Filing (Nov. 1, 2023) (transcribing Oct. 4, 2023 roundtable).

184. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1971).

185. *Id.*

Constitution itself, the Supreme Court has broadly interpreted the Commerce Clause and consequent congressional powers, recognizing activities that appear unrelated to commerce on their face may nonetheless impact the interstate economy.[186]

FTC regulation of political advertising would unlikely violate the First Amendment. The strongest evidence is that the FEC's administration of BRCA disclaimer requirements, which are substantially equivalent, has been declared constitutional.[187] Jurisdictional challenges thereby pose a greater threat to on-point FTC regulation. And because this Note prescribes revision of existing FTC regulation, the judiciary's skepticism of novel disclosure schemes is not implicated.

If these assertions fail to hold, it remains true that FTC rulemaking has survived First Amendment challenges even under standards of scrutiny necessitating narrow tailoring.[188] In *National Federation of the Blind v. FTC*, for example, the Fourth Circuit applied heightened scrutiny to an agency rule restricting the conduct of professional telemarketers who solicit charitable donations on behalf of non-profit organizations.[189] The court found that because the telemarking rule was "'narrowly drawn' to serve the 'strong subordinating interest' of protecting residential peace," it "[embodied] a proper compromise between the important speech interests of charities and the equally important need to protect the public from excessive intrusions into the home."[190] On appeal, the Supreme Court denied the petition for a writ of certiorari.[191] The denial without listed dissent might suggest no Justice believed a reversal would "have national significance," "harmonize conflicting decisions in the federal Circuit courts" or "have precedential value."[192]

Mandatory disclaimers for political endorsements by influencers should be subject to diminished scrutiny. When an influencer is paid to produce and post content, the material constitutes commercial speech. That the material is of a political character should not wholly vitiate its commercial attributes, for an influencer's failure to make required disclosures would nonetheless deceive social media users. Given that the First Amendment does

186. U.S. CONST. art. I, § 8, cl. 3; *see, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

187. *Citizens United*, 558 U.S. at 366–371.

188. Nat'l Fed'n of the Blind v. FTC, 420 F.3d 331, 334 (4th Cir. 2005).

189. Rather than apply traditional intermediate scrutiny, the court applied a standard specific to charitable solicitations, as established by *Village of Schaumburg v. Citizens for a Better Environment*. In that case, the Supreme Court determined that charitable solicitations were not purely commercial speech, but similar enough to other protected speech forms to compel heightened scrutiny. *Id.* at 338; Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980).

190. *Id.* at 351 (quoting Sec'y of Md. v. Joseph H. Munson Co., 467 U.S. 947, 960–961 (1984)).

191. Petition for Writ of Certiorari, Nat'l Fed'n of the Blind v. FTC, 547 U.S. 1128 (2006) (No. 05-927).

192. *Id.*; *Supreme Court Procedures*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-court-procedures [perma.cc/P7AV-N2AD].

not protect misleading commercial speech, on-point regulation should not compel heightened scrutiny.[193]

Even under a more demanding test, applicable FTC disclosure regulations should face no more than intermediate scrutiny resembling the standard for charitable solicitations and traditional commercial speech. Regulation of this kind represents the FTC's strong interest in circumventing consumer deception, one underlying swaths of agency rulemaking.[194] Moreover, because a relevant rulemaking would impose no greater burden on social media influencers than is already placed on them to disclose other material relationships, the regulation would be narrowly drawn.[195]

The FTC also faces fewer political hurdles in rulemaking. Unlike bodies requiring bipartisan quorums (e.g., the FEC), the FTC can conduct business with commissioners from a single political party, insulating it from equivalent gridlock concerns.[196] Thanks to this structure, the current FTC Chair, a Republican, recently secured a successful vote without the support of any Democratic commissioners.[197] Furthermore, amid increasing political divisions, FTC policies receive relatively bipartisan support, depressing the agency's regulatory risk.[198] While executive appointee votes have split along party lines in recent years, the FTC's previous chair, Lina Khan, was confirmed with support from both Democrats and Republicans.[199] Congressional representatives from both major parties have introduced bills to expand the FTC's consumer protection authority.[200] With respect to social media in particular, legislators and commentators across the political spectrum say the FTC should be the regulating agency.[201] The Social Media NUDGE Act, introduced by Democratic Senator Amy Klobuchar in 2022, would have directed the FTC to promulgate regulations addressing harms caused by social media platforms.[202] Libertarian First Amendment scholar Eugene Volokh has suggested antitrust jurisdiction as an alternative avenue

193. *Cent. Hudson*, 447 U.S. at 563.

194. *About the FTC: Mission*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/mission [perma.cc/CQM7-DDX2].

195. *See* 16 C.F.R. §§ 255.0–255.6.

196. 15 U.S.C. § 41.

197. Jody Godoy, *FTC Chair Ferguson Wins First Vote Over Trump's DEI Purge*, REUTERS (Jan. 24, 2025, 1:41 PM EST), https://www.reuters.com/world/us/ftc-chair-ferguson-wins-first-vote-over-trumps-dei-purge-2025-01-24/ [perma.cc/8X2U-QV3A].

198. Michael Liedtke & The Associated Press, *Big Tech Antitrust Push 'Still Has Legs to It' Despite Regime Change*, FORTUNE (Nov. 17, 2024, 10:58 AM EST), https://fortune.com/2024/11/17/big-tech-antitrust-ftc-lina-khan-biden-trump-mergers-acquisitions-deals/ [perma.cc/KWL6-WBFH].

199. Russell Brandom, *Amazon Says New FTC Chair Shouldn't Regulate It Because She's Too Mean*, THE VERGE (June 30, 2021, 3:06 PM EDT), https://www.theverge.com/2021/6/30/22557456/amazon-lina-khan-recusal-petition-federal-trade-commission-antitrust [perma.cc/FFJ7-RQBG].

200. *See, e.g.*, PBM Act of 2024, H.R. 10362, 118th Cong. (2024); Performance Life Disclosure Act of 2024, H.R.10031, 118th Cong. (2024).

201. *See, e.g.*, Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?* 1 J. FREE SPEECH L. 377 (2021); Social Media NUDGE Act, S. 3608, 117th Cong. § 6 (2022).

202. Social Media NUDGE Act, S. 3608, 117th Cong. § 6 (2022).

for regulating social media platforms.[203] Lately, and perhaps in recognition of the FFC's lackluster claim for jurisdiction over platforms, the FTC has initiated something of the latter approach itself.[204] In 2025, the agency initiated launched a public request for information regarding censorship actions taken by technology platforms.[205] The FTC's justification? That "FTC staff [was] interested in understanding how consumers have been harmed—including by potentially unfair or deceptive acts or practices, or potentially unfair methods of competition—by technology platforms that limit users' ability to share their ideas or affiliations freely and openly."[206] In short, the broad mandate of the FTC Act.[207] If the agency is empowered to apply the FTC Act to social media contexts this attenuated from traditional notions of deceptive commercial practices, it must be equally empowered to regulate covert political endorsements by influencers under the statute.

The best course of action for the FTC is to revise the agency's Guides Concerning the Use of Endorsements and Testimonials in Advertising. Section 255.0 currently defines a "product" requiring disclosure of material connection as "any product, service, brand, company, or industry."[208] The most straightforward amendment would revise the definition of "product" to include political products. An update could be as minor as "the term 'product' includes any product, service, brand, company, industry, or political campaign." If the FTC seeks to avoid promulgation of the term "campaign," the preamble to a revised rule might instead extrapolate that a preexisting category of "product," such as "brand," includes those of a political nature. In layman's terms, "brand" denotes not only products manufactured under a particular name, but "a particular type or kind of something" and "a person's image, persona, or manner of presentation, regarded as an asset."[209] To that end, campaigns and other entities that transmit payment to influencers are essentially political brands.[210] Not only do organizations like Super PACs represent a particular political or ideological affiliation, but candidates effectively sell an individual "brand" when their campaigns contract with influencers.[211] Administratively, it is more efficient to promulgate a revised rule than a new one. Because most existing regulations have already survived the notice-and-comment process, future rulemaking is unlikely to face

203. As opposed to classifying platforms as common carriers. Volokh, *supra* note 204, at 461.

204. *See Request for Public Comment Regarding Technology Platform Censorship*, FED. TRADE COMM'N, https://www.ftc.gov/system/files/ftc_gov/pdf/P251203CensorshipRFI.pdf [perma.cc/97H6-VZ9Z].

205. *Id.*

206. *Id.*

207. 15 U.S.C. § 45.

208. 16 C.F.R. § 255.0.

209. *Brand*, OXFORD ENGLISH DICTIONARY (online ed. 2025), https://www.oed.com/dictionary/brand_n [https://perma.cc/7LQJ-V6CQ].

210. *See* Ciara Torres-Spelliscy, *The Power of Branding in Politics*, BRENNAN CENTER FOR JUSTICE (October 16, 2019) https://www.brennancenter.org/our-work/analysis-opinion/power-branding-politics [https://perma.cc/U6M7-VBTF].

211. *Id.*

significant additional challenges.[212] And the longevity of an existing rule without legal challenge further entrenches the agency's authority. In this case, the relevant FTC rule was first promulgated in 1975.[213]

For consumers, the next step is to utilize the FTC's petition for rulemaking process.[214] The FTC permits private individuals to participate in its rulemaking efforts by submitting a proposal that includes a request for FTC action, an explanation of how the petitioner's interests are affected, and any bases for the request (facts and law, including supporting data).[215] When the FTC does not advance a private proposal, it dismisses the petition without prejudice, permitting the issue to be reraised at a later date.[216] In lieu of an original proposal, the subject could also be raised in response to an interim rule issued by the agency.[217] Given that the FTC's endorsement guides were last amended in 2023, the opportunity for comment may not soon arise.[218] But the potential for future notice-and-comment periods or a favorable response to a petition for rulemaking warrants optimism. Data exists to suggest that federal regulators do give heed to public entreaties.[219]

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212. And the FTC was able to promulgate rule updates considering influencers even faced with some resistance. *See generally* Craig C. Carpenter & Mark Bonin II, *To Win Friends and Influence People: Regulation and Enforcement of Influencer Marketing After Ten Years of the Endorsement Guides*, 23 VAND. J. ENT. & TECH. L. 253 (2021) (arguing that FTC enforcement actions should not be more punitive with respect to influencers who violate endorsement regulations); Megan K. Bannigan & Beth Shane, *Towards Truth in Influencing: Risks and Rewards of Disclosing Influencer Marketing in the Fashion Industry*, 64 N.Y.L. SCH. L. REV. 247 (2019-2020) (detailing the consequences of marketing nondisclosure by fashion influencers).

213. FTC Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. §§ 255.0, 255.3, 255.4 (1975).

214. *Section 18 Rulemaking Booklet*, FED. TRADE COMM'N, https://www.ftc.gov/system/files/ftc_gov/pdf/Section-18-Rulemaking-Booklet.pdf [perma.cc/S8EL-MEZC].

215. 16 C.F.R. § 1.31 (b), (c).

216. 16 C.F.R. § 1.31 (g).

217. *See* Weiner & Black, *supra* note 77.

218. Before the latest update, the Endorsement Guides were revised in 2009. *Federal Trade Commission Announces Updated Advertising Guides to Combat Deceptive Reviews and Endorsements*, FED. TRADE COMM'N (June 29, 2023) https://www.ftc.gov/news-events/news/press-releases/2023/06/federal-trade-commission-announces-updated-advertising-guides-combat-deceptive-reviews-endorsements [perma.cc/TY2C-4DJ6]; Helen O. Ogunyanwo, *FTC Issues Long-Awaited Updates to the Endorsement Guides*, CROWELL & MORING LLP (May 22, 2022), https://www.crowell.com/en/insights/client-alerts/ftc-issues-long-awaited-updates-to-the-endorsement-guides [perma.cc/Z4TQ-UJ5V].

219. Take, for instance, that the definition of "public communication" ultimately promulgated by the FEC in 2024 partially addressed comments the agency received regarding the proposed rule's lack of "promoted for" language. Weiner & Black, *supra* note 77; *Public Communication Comment*, *supra* note 78; *see also* Andrei A. Kirilenko, Shawn Mankad & George Michailidis, *Do U.S. Financial Regulators Listen to the Public? Testing the Regulatory Process with the RegRank Algorithm* (Robert H. Smith Sch., Research Paper, 2014), https://ssrn.com/abstract=2377826 (finding a positive incorporation rate for comments received during the notice-and-comment period to final CFTC regulations).

IV. CONCLUSION

The law currently prevents an influencer from secretly promoting even a pastry online—but it does not prohibit secret political promotion. Americans deserve to know when the political content they consume online is paid for by a campaign or a private organization, even when the content does not constitute express advocacy. The FTC must acknowledge that undisclosed political endorsements are commercially delusive. The agency ensures that an influencer may not hide when they promote a product for profit, even when the promotion is indirect. The FTC should seek to enjoin covert political advertisements by influencers in its Guides Concerning the Use of Endorsements and Testimonials in Advertising, under the agency's authority to regulate deceptive practices affecting commerce. This prescription recognizes the far-reaching commercial impact of the political process while sidestepping legal and procedural challenges other agencies would face rulemaking in this area. Relevant FTC rulemaking would increase election transparency for the millions of American social media users who consume influencer content.

Communications Law: Annual Review

Staff of the Federal Communications Law Journal

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AT&T, Inc. v. Federal Communications Commission

Sophia Winston-Mendoza

NO. 24-60223 (5TH CIR. 2025)

In AT&T, Inc. v. Federal Communications Commission, the Fifth Circuit vacated a $57 million forfeiture order for mishandling customer data, finding the FCC's forfeiture order and adjudicatory procedure violated AT&T's right to adjudication in an Article III court and Seventh Amendment right to a jury trial.[1] This decision heavily relies on the recent holding in United States v. Jarkesy, 603 U.S. 109 (2024), where the Supreme Court found the SEC violated the Seventh Amendment when it sought civil penalties from an entity for securities fraud violations without a jury trial.[2]

I. BACKGROUND

Under Section 222 of the Telecommunications Act[3], customer proprietary network information (CPNI) must be protected to maintain a customer's privacy and confidentiality.[4] Section 222 defines CPNI as "information that relates to7 … location … of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship."[5] Carriers must take reasonable data protection measures and may only share the data with third parties to provide telecommunication services with customers' "opt-in approval."[6]

When violations of Section 222 occur, the FCC has two pathways at its discretion for issuing forfeiture penalties: adjudication by an administrative law judge or through internal FCC processes.[7] When the FCC chooses to internally investigate and adjudicate violations, the process involves three key steps: first, after learning of a potential violation, the FCC's enforcement bureau investigates and issues letters of inquiry to the carrier to gather information.[8] Second, after reviewing their investigative finds, the FCC issues a Notice of Apparent Liability for Forfeiture (NAL) to the carrier, advising

1. See AT&T v. FCC, No. 24-60223, slip op. at 2 (5th Cir. Apr. 17, 2025).
2. See id. at 10. (citing SEC v. Jarkesy, 603 U.S. 109, 140 (2024)).
3. 47 U.S.C. § 222.
4. *See AT&T v. FCC*, slip op. at 2 (citing 47 U.S.C. § 222(a)).
5. *Id.* (citing 47 U.S.C § 222(h)(1)(A)).
6. *See id.* at 3 (citing 47 U.S.C. § 222(c)(1); 47 C.F.R. § 64.2010(a); 47 C.F.R. § 64.2007(b)).
7. *See id.* (citing 47 U.S.C. § 503(b)(3)(A)).
8. *See id.* at 3 (citing *Enforcement Primer*, FCC, https://perma.cc/FMQ2-ZH7C).

the carrier of the violation and proposed penalty.[9] The carrier has the opportunity to respond to the NAL and assert its opposition to the claim.[10] Third, the FCC reviews the carrier's response and has the option to affirm their NAL findings.[11] If affirmed, the FCC issues a forfeiture order.[12] To oppose the forfeiture order, the carrier has two paths: 1) forgo paying the penalty and wait until the Department of Justice opens a collection action to enforce the order, which entitles the carrier to a *de novo* trial under 47 USC § 504 ("Section 504 trial"),[13] or 2) the carrier can pay the penalty and then seek appellate review.[14]

When AT&T customers' phones regularly connect to signal towers, these connections create data that is used to provide location-based services.[15] To provide these services, AT&T contracts with third parties known as "location aggregators" who collect the location data and sell it to additional third parties that provide the location-based services to AT&T's customers.[16] AT&T required these third party providers to document and share "why it needed the location data and how it obtained customers' opt-in consent" for every request.[17]

The FCC was alerted to possible problems with AT&T's location-based services in May 2018, after news articles revealed instances of data mishandling and unauthorized data access by the third party providers.[18] In response to the news articles, the FCC issued a notice of inquiry and opened an investigation.[19] AT&T complied with the FCC's investigation and by March 2019, AT&T had terminated all location-based services programs.[20] In February 2020, the FCC issued an NAL to AT&T, detailing AT&T's "willful and repeated violations" of Section 222 and attached a proposed penalty of approximately $57 million.[21] AT&T responded in opposition, highlighting numerous issues with the FCC's forfeiture order and notably that the FCC's order violated Article III, the Seventh Amendment, and the non-delegation doctrine.[22] In April 2024, the FCC rejected AT&T's opposition and affirmed the $57 million penalty, noting the forfeiture order did not violate Article III and the Seventh Amendment because AT&T was offered a Section 504 trial if they chose to forgo timely payment of the order.[23] Given its two options,

9. *See id.* at 3-4 (citing 47 U.S.C. § 503(b)(4)(A)).
10. *See ATT v. FCC*, slip op. at 4 (citing 47 U.S.C. § 503(b)(4)(C)).
11. *See id.*
12. *See id.* at 4.
13. *See id.* (citing 47 U.S.C. § 504(a)).
14. *See id.* (citing AT&T Corp. v. FCC, 323 F.3d 1081, 1084 (D.C. Cir. 2003; 47 U.S.C. § 402(a)).
15. *See id.* at 5.
16. *See ATT v. FCC*, slip op. at 5.
17. *See id.*
18. *See id.* at 5.
19. *See id.*
20. *See id.*
21. *See ATT v. FCC*, slip op. at 5. The FCC determined the penalty of $57 million by asserting the maximum penalty allowed under the telecom act and multiplying by the 84 "continuing violations" of Section 222. *See id.* at 9 n.3.
22. See *id*. at 9.
23. *See id.* at 8.

AT&T opted to timely pay the penalty and sought appellate review in the Fifth Circuit.[24]

II. ANALYSIS

Reviewing *de novo*, the Fifth Circuit determined the case could be resolved on one issue: whether the FCC's enforcement regime violated Article III and the Seventh Amendment.[25] The Seventh Amendment provides that "in Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved[.]"[26] The court found the determinative question at hand was "whether the [FCC's] enforcement proceeding qualifie[d] as a 'suit at common law'[.]"[27] In finding the FCC case against AT&T was a suit at common law, the court heavily relied of the recent analysis of a similar issue in *United States v. Jarkesy*, 603 U.S. 109 (2024).[28] In *Jarkesy*, "the Supreme Court ruled that the Seventh Amendment prohibited the SEC from requiring respondents to defend themselves before an agency, rather than a jury, against civil penalties for alleged securities fraud" and "the case did not fall within the 'public rights exception,' which would let Congress assign certain matters to an agency instead of an Article III court."[29] Similarly here, the Fifth Circuit found that the FCC's enforcement of civil penalties required a jury trial pursuant to Article III and the Seventh Amendment and the case at hand did not fall under the public rights exception.[30] Following the *Jarkesy* analysis, a "common law suit is one that is 'legal in nature'" based on its cause of action and the remedy provided.[31] Upon review, the court determined both factors confirmed this action was a suit at common law.[32]

A. The FCC's action against AT&T is a suit at common law.

Under the first consideration, the remedy provided in this case was a $57 million penalty.[33] The court found this civil penalty, to be the "'prototypical common law remedy,'" only enforceable by a court of law.[34] The court drew this conclusion due to the FCC's consideration of "the nature, circumstances, extent, and gravity of the violation" and "degree of culpability" to set penalties, showing a clear intent to "punish or deter"

24. *See id.* at 9.
25. *See id.* at 8 (citing Loper Bright Enterprise v. Raimondo, 603 U.S. 369, 412–13 (2024)).
26. *Id.* at 10 (citing U.S. CONST. amend. VII).
27. *See ATT v. FCC*, slip op. at 9.
28. *See id.* at 8-9.
29. *See id.* at 8 (citing *Jarkesy*, 603 U.S. at 134).
30. *See id*. at 18-19.
31. *Id.* at 9 (citing *Jarkesy*, 603 U.S. at 122).
32. *See id.* at 9-13.
33. *See supra* at 3.
34. *See AT&T v. FCC*, slip op. at 9 (citing Granfinanciera, S. A. v. Nordberg, 492 U.S. 33, 53 (1989)).

Section 222 violators.[35] When considering the second factor, if the cause of action is "analogous" to a common law cause of action, the court found Section 222 actions were akin to common-law negligence.[36] Both common law negligence and the FCC's action against AT&T rely on a finding of unreasonableness in the actions taken by AT&T's handling of its customers' location-based data.[37] The FCC posed the argument that Section 222 does not use similar terminology as common law negligence such as "negligence" or "reasonable care," however the court reasoned that while this point is correct, the pivotal factor was if Section 222 targeted the "same basic conduct" as common law negligence.[38] The court reasoned the causes of action targeted the same basic conduct and had a sufficiently "close relationship."[39]

B. The FCC's Action against AT&T does not fall under the public rights exception.

In the FCC's briefing, it argued that the FCC's case against AT&T fell under the "public rights" exception, which would have allowed the FCC to adjudicate the case outside an Article III court because it would "implicate the 'public interest.'"[40] However, the court disagreed because AT&T's role as a common carrier does not implicate the public rights exception.[41] As stated in *Jarkesy*, while agencies do enjoy regulatory authority over common carriers, the public rights exception does not remove every regulatory action addressing a common carrier from Article III jurisdiction.[42] Common carriers are often subject to negligence claims, placing them firmly within the presumption of Article III jurisdiction.[43] The court additionally reasoned that if common carriers were always subject to the public rights exception, it would significantly expand Congress's power to "bypass Article III adjudication countless matters." [44]

C. The FCC's adjudicatory procedures did not satisfy Article III and the Seventh Amendment.

In reviewing, the two options afforded to AT&T after the FCC issued its forfeiture order, paying the fine and seeking appellate review or forgoing payment and waiting for a trial in a collections suit, the court found that the FCC's procedure did not satisfy Article III and the Seventh Amendment.[45]

35. *See id.* at 9 (citing 47 U.S.C. § 503(b)(2)(E)).
36. *See id.* at 10.
37. *See id.* at 10-11.
38. *Id.* at 12 (citing *Jarkesy*, 603 U.S. at 125).
39. *Id.* at 10.
40. *AT&T v. FCC*, slip op. at 14.
41. *See id.*
42. *See id.* at 16 (citing Virginian Ry. Co. v. United States, 272 U.S. 658 (1926); *Jarkesy*, 603 U.S. at 135)).
43. *See id.* at 15.
44. *See id.* at 15 (citing *Jarkesy*, 603 U.S. at 131).
45. *See id.* at 18.

Specifically, the FCC asserted that AT&T's opportunity to be heard in an Article III court comes in the form of the Section 504 trial that is potentially triggered by failing to pay the penalty if the DOJ chose to bring the suit.[46] The court was not convinced that this sufficiently satisfied Article III and the Seventh Amendment because the FCC would still have independently adjudicated the claims, found AT&T guilty, and created a ripple effect of harms. Some harms noted include reputational harm to the carrier, putting the carrier's opportunity to appeal at the will of the DOJ to bring or not bring the collections action, and if a carrier has been issued a forfeiture order, the FCC can consider the previous offense if faced with penalties in the future.[47]

III. CONCLUSION

The Supreme Court of the United States granted the FCC's petition for certiorari in this case on January 9, 2026.[48] On the same day, the Supreme Court also granted certiorari in *Verizon Communications, Inc. v. Federal Communications Commission*, regarding the same question on appeal.[49] These cases were consolidated, and briefing is set to start in late February 2026.[50]

46. *See AT&T v. FCC*, slip op. at 18 (47 U.S.C. § 504(a)).
47. *See id.* at 18-19.
48. *See FCC v. AT&T, Inc.*, Petition for Certiorari, No. 24-506 (U.S. Oct. 6, 2025).
49. *See* Docket, FCC v. AT&T, Inc., No. 24-506 (Oct. 9, 2025).
50. *See id.*

National Republican Senatorial Commission v. Federal Election Commission

Nitika Reddy

117 F.4TH 389 (6TH CIR. 2024)

I. BACKGROUND

This case arises from a First Amendment challenge to the Federal Election Campaign Act's (FECA) limits on coordination between national political parties and their candidates.[1] Section 315 of FECA, codified at 52 U.S.C. § 30116(d), caps how much a party committee may spend in coordination with a candidate's campaign, even though the statute permits unlimited independent expenditures so long as the candidate is not involved.[2] The Federal Election Commission (FEC) enforces FECA's coordination limits.[3]

The plaintiffs, the National Republican Senatorial Committee, the National Republican Congressional Committee, Vice President J.D. Vance, and former Representative Steve Chabot, challenged these restrictions both facially and as applied to "party coordinated communications," a regulatory category that largely encompasses campaign advertising.[4] They argued that the limits prevent parties and candidates from coordinating core campaign messaging, force inefficient and duplicative spending, and undermine the traditional role political parties play in supporting their nominees through unified campaign strategies.[5] Because FECA requires constitutional challenges to its provisions to be certified directly to the court of appeals sitting en banc, the district court did not resolve the merits of the dispute.[6] Instead, it certified the question to the Sixth Circuit. The court of appeals was asked whether FECA's limits on coordinated party expenditures violate the First Amendment, either on their face or as applied.[7] That inquiry was shaped largely by the Supreme Court's decision in *FEC v. Colorado Republican*

1. Nat'l Republican Senatorial Comm. v. FEC, 117 F.4th 389, 395–98 (6th Cir. 2024) (en banc).
2. 52 U.S.C. § 30116(d); *see also* Citizens United v. FEC, 558 U.S. 310, 357-61 (2010).
3. *See id.*; *see also* 11 C.F.R. § 110.17.
4. NRSC v. FEC, 117 F.4th at 391-92.
5. *See id.* at 392-93.
6. *See id.*; *see also* 52 U.S.C. § 30110.
7. *NRSC*, 117 F.4th at 393.

Federal Campaign Committee ("*Colorado II*"), which had previously upheld the same statutory scheme.[8]

II. ANALYSIS

A. The Majority Opinion: Vertical Stare Decisis and the Limits of Lower-Court Authority

The en banc majority treated the case as one governed by judicial hierarchy.[9] The plaintiffs pressed the appeals court to reconsider the First Amendment doctrine in light of more recent cases, but the court declined to engage with them on the merits.[10] Instead, it held that the Supreme Court's decision in *Colorado II* directly controlled and foreclosed both the facial and as-applied challenges.[11] In *Colorado II*, the Supreme Court upheld FECA's coordinated party expenditure limits under the deferential "closely drawn" standard applicable to contribution limits, reasoning that coordinated expenditures functionally resemble direct contributions and may be restricted to prevent circumvention of base contribution limits.[12] The majority acknowledged that subsequent Supreme Court cases, most notably *Citizens United v. FEC*, *McCutcheon v. FEC*, and *FEC v. Ted Cruz for Senate*, have emphasized that only quid pro quo corruption or its appearance may justify restrictions on political speech.[13] Nevertheless, the court concluded that doctrinal tension alone does not permit lower courts to disregard binding precedent.[14]

The majority relied on vertical stare decisis to resolve the case.[15] Even where later cases appear to undermine an earlier decision's reasoning, lower courts must continue to apply controlling precedent until the Supreme Court expressly repudiates it.[16] Because *Colorado II* has not been overruled, the court treated it as binding precedent that foreclosed both the facial and as-applied challenges.[17] This approach allowed the court to resolve the facial challenge without reconsidering the constitutionality of coordinated expenditure limits in light of more recent First Amendment doctrine.[18] This also shaped the court's treatment of the as-applied challenge, which the

8. FEC v. Colo. Republican Fed. Campaign Comm. (Colorado II), 533 U.S. 431, 456-64 (2001).
9. *NRSC*, 117 F.4th at 394-96.
10. *See id.* at 395-97.
11. *See id.* at 396-97.
12. *Colorado II*, 533 U.S. at 456-65.
13. *See NRSC*, 117 F.4th at 395-96; *see also* Citizens United v. FEC, 558 U.S. 310, 359 (2010); McCutcheon v. FEC, 572 U.S. 185, 206-08 (2014); FEC v. Ted Cruz for Senate, 596 U.S. 289, 305-07 (2022).
14. *NRSC*, 117 F.4th at 394.
15. *See id.* at 394-97.
16. *See id.* at 396-97.
17. *See id.* at 391-92, 394.
18. *See id.* at 396-98.

majority rejected on the ground that it was too broad to fall within the narrow category of future challenges contemplated by *Colorado II*.[19]

B. The Concurrences: Competing Views on Constitutional Method and Campaign Finance

All of the concurring judges agreed that the plaintiffs could not prevail, but they did not agree on why the court should stop where it did.[20] Several of the concurrences reflect unease with *Colorado II*'s continued vitality, even as they ultimately adhered to it.[21] Judges Thapar and Bush both questioned whether *Colorado II* is still a comfortable fit with the Supreme Court's more recent campaign finance decisions.[22] Judge Thapar stressed that cases like *McCutcheon* and *Cruz* have narrowed the concept of corruption and weakened the anti-circumvention rationale that once supported limits on coordinated party spending.[23] In his view, those developments create real tension with *Colorado II*.[24] Even so, the concurring opinions emphasized that they were bound by *Colorado II*, even while expressing serious doubts about its consistency with modern First Amendment doctrine.[25] Since the Supreme Court has not overruled *Colorado II*, the concurring opinions likewise concluded that the court of appeals was not free to disregard it.[26]

Judge Bush wrote separately to raise greater concerns about the structure of First Amendment analysis itself.[27] His concurrence questioned the dependence on tiers of scrutiny that dominate modern campaign finance doctrine.[28] He suggested that coordinated party spending might look different if assessed under a more historically grounded approach, similar to the method the Supreme Court has adopted in other areas.[29] He did not apply that framework here. Instead, he emphasized that existing First Amendment doctrine continues to rely on scrutiny-based analysis and that lower courts remain bound by that framework unless and until the Supreme Court revisits it.[30]

Judges Stranch and Bloomekatz took the opposite view of the existing doctrine.[31] Their concurrences rejected the claim that *Colorado II* has been overtaken by later cases, while maintaining that existing doctrine still permits the coordination limits.[32] They also cautioned against importing post-*Bruen* historical analysis into the First Amendment context, warning that

19. *See id.* at 397-98.
20. *See* NRSC v. FEC, 117 F.4th at 398-443.
21. *See id.* at 398-421.
22. *NRSC*, 117 F.4th at 398-407 (Thapar, J., concurring); 409-15 (Bush, J., concurring dubitante).
23. *See id.* at 402 (Thapar, J., concurring).
24. *See id.* at 402-05 (Thapar, J., concurring); 409-15 (Bush, J., concurring dubitante).
25. *See id.* at 398-99 (Thapar, J., concurring).
26. *See id.*
27. *See id.* at 407-09 (Bush, J., concurring dubitante).
28. *See* NRSC v. FEC, 117 F.4th at 411 (Bush, J., concurring dubitante).
29. *See id.* at 400-02 (Bush, J., concurring dubitante).
30. *See id.* at 400-02 (Bush, J., concurring dubitante).
31. *NRSC*, 117 F.4th at 421-43 (Stranch & Bloomekatz, JJ., concurring).
32. *See id.* at 423-31 (Stranch, J., concurring); *id.* at 431-40 (Bloomekatz, J., concurring).

coordinated spending can function as a channel for donor influence.[33] From their perspective, abandoning *Colorado II* would risk destabilizing campaign finance doctrine rather than correcting it.[34]

C. *The Dissent: Doctrinal Obsolescence and a Merits-Based Rejection of Coordination Limits*

According to Judge Readler in his dissent, this case should have reached the merits and struck down FECA's coordinated party expenditure limits.[35] He criticized the majority for treating stare decisis as dispositive without contending with how much campaign finance doctrine has changed since *Colorado II* was decided.[36] The dissent focused on doctrine. Modern campaign finance cases, Judge Readler argued, recognize only the prevention of quid pro quo corruption, or its appearance, as a sufficiently important governmental interest.[37] *Colorado II*, by contrast, relied in part on a broader conception of corruption, including concerns about circumvention and forms of influence beyond quid pro quo arrangements.[38] In his view, the Supreme Court has since rejected that understanding in cases such as *Citizens United*, *McCutcheon*, and *Cruz*.[39] Under that narrower understanding of corruption, Judge Readler concluded that the coordination limits cannot be justified.[40]

Judge Readler also pointed to changes in both the statute and the political context.[41] Congress has amended FECA to allow unlimited coordinated spending for certain party activities, undercutting the claim that coordination is inherently corrupting.[42] At the same time, the rise of Super PACs and other outside spending groups has reduced the relative role of political parties in federal elections.[43] These developments, he argued, call into question *Colorado II*'s assumption that parties occupy a dominant position capable of facilitating corruption through coordination.[44]

Finally, the dissent rejected the government's effort to treat all coordinated activity as equivalent to direct contributions.[45] Coordination, Judge Readler emphasized, covers a wide range of conduct, much of which looks nothing like a party simply paying a candidates bills.[46] Applying *McCutcheon*, he concluded that the limits fail at both steps: (1) the government failed to identify a sufficiently important interest grounded in quid pro quo corruption, and (2) the limits were not closely drawn, given the

33. *See id.* at 426-29 (Stranch, J., concurring); *id.* at 436-40 (Bloomekatz, J., concurring).
34. *See id.* at 428-31 (Stranch, J., concurring); *id.* at 438-41 (Bloomekatz, J., concurring).
35. *See id.* at 443-45 (Readler, J., dissenting).
36. *See id.* at 445-47 (Readler, J., dissenting).
37. *See* NRSC v. FEC, 117 F.4th at 447-49 (Readler, J., dissenting).
38. *See Colorado II*, 533 U.S. at 456-57, 460-65; *see also NRSC*, 117 F.4th at 394-95 (Readler, J., dissenting).
39. *NRSC*, 117 F.4th at 448-50 (Readler, J., dissenting).
40. *See id.* at 450-52.
41. *See id.* at 452-54.
42. *See id.* at 452-53.
43. *See id.* at 452-54.
44. *See id.* at 454-55 (Readler, J., dissenting).
45. *See NRSC*, 117 F.4th. at 455-57 (Readler, J., dissenting).
46. *See id.* at 456-57.

availability of less restrictive alternatives such as disclosure requirements and contribution caps.[47]

D. Doctrinal Significance

The opinions do not resolve the underlying disagreement.[48] The majority treated the dispute as one governed by vertical stare decisis, insisting that *Colorado II* remains controlling unless the Supreme Court says otherwise.[49] The concurrences and dissent, however, revealed deep disagreement about whether *Colorado II* still fits within the Supreme Court's current campaign finance jurisprudence.[50] In that sense, the decision leaves the present framework in place and does not answer the harder questions raised.[51] As the Supreme Court has narrowed the concept of corruption to quid pro quo arrangements, the foundation of coordinated party expenditure limits appears increasingly uncertain.[52] Whether *Colorado II* remains consistent with modern First Amendment doctrine is a question the Sixth Circuit declined to resolve, instead treating itself as bound by existing precedent.[53]

III. CONCLUSION

The Sixth Circuit resolved the case on stare decisis grounds and not on First Amendment doctrine. Because the Supreme Court has not overruled *Colorado II*, here, the court concluded that it lacked authority to invalidate the coordinated party expenditure limits, even in light of subsequent decisions narrowing the permissible scope of campaign finance regulation.[54] The opinions in the case nonetheless expose growing strain in the Supreme Court's campaign finance framework. The majority's insistence on formal adherence to precedent contrasts markedly with the dissent's view that later cases have effectively displaced *Colorado II*'s understanding of corruption and coordination.[55] That disagreement indicates wider uncertainty about how lower courts should respond when Supreme Court doctrine evolves without express overruling. Although the decision leaves the coordinated expenditure limits intact, it does so on increasingly contested ground. Independent spending now plays a larger role in federal elections. Against that backdrop, *Colorado II* rests on uncertain footing.

47. *See id.* at 457-59.
48. *NRSC*, 117 F.4th at 394-459.
49. *See id.* at 395.
50. *See id.* at 398-459.
51. *See id.* at 397-98.
52. *See* e.g., *McCutcheon*, 572 U.S. at 206-08; *Ted Cruz*, 596 U.S. at 305-07.
53. *NRSC*, 117 F.4th at 394-95.
54. *See id.* at 396-97.
55. *See id.* at 396-98 (majority opinion); *see also id.* at 454 (Readler, J., dissenting).

Cox Communications, Inc. v. Sony Music Entertainment

Ella Holland

93 F. 4TH 222 (4TH CIR. 2024)

In Sony Music Entertainment v. Cox, the Fourth Circuit decided that because users of Cox Communication's internet and cable television services had infringed Sony's copyrights by downloading and distributing thousands of songs without permission, Cox was properly found liable for willful contributory infringement. However, the court reversed the vicarious liability verdict and remanded for a new trial on damages because, under the Safe Harbor Provision of the Digital Millenium Copyright Act, 17 U.S.C. § 512, Cox did not profit from its subscribers' acts of infringement.

I. BACKGROUND

Defendant Cox Communication sells internet, telephone, and cable television to six million homes and businesses across the United States.[1] Plaintiffs Sony Music Entertainment and other record companies and music publishers own extensive quantities of copyrighted musical works.[2] Between 2013 and 2014, users of Cox's internet service infringed copyright by downloading or distributing songs without permission from Sony.[3] Consequently, Sony sued Cox to hold it liable for its customers' infringement of their copyrights.[4]

Copyright owners have the exclusive right to reproduce, distribute, perform, display and prepare derivative works based upon their copyrighted works.[5] Whenever these exclusive rights are violated by copyright infringers, the copyright owner may institute an action and receive either statutory damages or actual damages plus the infringer's profits.[6] However, the Digital Millenium Copyright Act (DCMA), Safe Harbor Provision, protects internet service providers (ISPs), like Cox, from monetary liability only if those ISPs reasonably implement a policy to terminate repeat infringers.[7]

Here, the case proceeded to trial on two theories of secondary liability: vicarious and contributory liability.[8] Vicarious liability for a third party's

1. Sony Music Entertainment v. Cox Communications., Inc., 93 F.4th 222, 227 (4th Cir. 2024).
2. *Id.*
3. *Id.* at 228.
4. *Id.* at 227.
5. 17 U.S.C. § 106.
6. *Sony,* 93 F.4th at 227.
7. 17 U.S.C. § 512.
8. *Sony*, at 227 (4th Cir. 2024).

copyright infringement requires that the defendant 1) profits directly from the infringement and 2) has a right and ability to supervise the direct infringer.[9] Willful contributory infringement requires a defendant causes or materially contributes to infringing conduct.[10] The maximum statutory damages for contributory infringement is $150,000 per work.[11] At trial in the District Court for the Eastern District of Virginia, the jury found Cox liable for both willful contributory and vicarious infringement of 10,017 copyrighted works, awarding $99,830.29 per infringed work, for a total of $1 billion in statutory damages, to which Cox appealed.[12]

II. ANALYSIS

A. Although Cox Does Benefit Monetarily from Subscribers' Copyright Infringement, They Cannot be Held for Vicarious Liability

First, the court began its analysis by establishing whether Cox may be held vicariously liable for their users' copyright infringement.[13] The court stated a "defendant who 'has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities' is [vicariously] liable."[14] The court reasoned that because Sony failed, as a matter of law, to prove that Cox profits directly from its subscribers' copyright infringement, it would not reach the additional question of Cox's right and ability to supervise its subscribers.[15] In Cox's argument, it does not profit directly from its subscribers' infringement because subscribers pay a flat monthly fee for their internet access package, no matter what they do online.[16] The court reflected that vicarious liability for copyright infringement is "an outgrowth of the agency principles of respondeat superior."[17] In referencing a landmark case on vicarious liability, the court noted that when a department store was held accountable for infringing sales of "bootleg" records by a concessionaire operating in its stores, it was because the store retained the ultimate right to supervise the concessionaire and its employees, as well as receiving a percentage of record sale, whether bootleg or legitimate.[18]

Nonetheless, the court noted that other courts have recognized that a defendant may possess a financial interest in a third party's infringement of

9. *See,* e.g. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 1003 (2005); Sony Corp. v. Universal City Studios Inc., 464 U.S. 417, 439 (1984).

10. *See,* e.g. Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996).

11. *Sony,* 93 F.4th at 229 (citing 17 U.S.C. § 504(c)(1)-(2)).

12. Entertainment v. Cox Commc'ns., Inc., 93 F.4th 222, 229 (4th Cir. 2024).

13. *Id.* at 229-30 (citing Metro-Goldwyn-Mayer Studios Inc., 545 U.S. at 930).

14. *Id.* at 230 (quoting from Gershwin Publ'g. Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)).

15. *Id.*

16. *Id.* (quoting Opening Br. 27).

17. *Id.* (quoting Fonovisa, Inc., 76 F.3d at 262; see also A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1022 (9th Cir. 2001)).

18. *Sony*, 93 F.4th at 230 (referencing Shapiro, Bernstein & Co. v. H. L. Green Co., 316 F.2d 304, 307-08 (2d Cir. 1963)).

copyrighted music even without a strict correlation between each act of infringement and profits, such as where an operator at a swap meet collected admission fees, concession stand sales and parking fees from customers who wanted to buy counterfeit recordings.[19] Yet, applying these principles to copyright infringement in cyberspace, the court stated that courts and Congress agree that receiving a one-time set-up fee and flat periodic payments for service from both infringing and non-infringing users ordinarily would not constitute receiving a financial benefit directly attributable to the infringing activity, but where the value of the service lies in providing access to infringing material, those flat fees may constitute a direct financial benefit.[20] The court noted that the file-sharing service Napster, for example, had a direct financial interest in its users' exploitation of copyrighted music, as an increasing volume of pirated music available drew more users to register with Napster, and therefore revenue depended upon increases in its userbase.[21] Yet, it stated America Online (AOL) was not vicariously liable for copyright infringement when there was no evidence that AOL customers either subscribed because of the available infringing material or canceled subscriptions when the material was no longer available.[22] The court stated that the "crux of the financial benefit inquiry" is whether a causal relationship exists between the infringing activity and a financial benefit to the defendant.[23] Therefore, the court states that Sony had to show that Cox profited from its subscribers' infringing download and distribution of Plaintiffs' copyrighted songs, but it did not.[24]

The court disagreed with the trial court that there was enough evidence that Cox repeatedly declined to terminate infringing subscribers' internet service in order to continue collecting their monthly fees.[25] Instead, the court reasoned that the continued payment of monthly fees, even by repeat infringers, was not a financial benefit "flowing directly from *the copyright infringement itself*."[26] The court also reasoned that Cox would receive the same monthly fees even if all of its subscribers stopped infringing, and that retaining subscriptions did not give it a financial interest in its subscribers activities, whether that be copyright infringement or any other unlawful acts.[27] The court also wrote that vicarious liability "demands proof that the defendant profits directly from the *acts of infringement* for which it is being held accountable."[28] The court refuted all of Sony's alternative theories, deciding that none raised a reasonable inference that any Cox subscriber paid more for faster internet in order to engage in copyright infringement, and that ultimately Sony offered no adequate theory to establish the required causal

19. *Id.* at 231 (citing Fonovisa, 76 F.3d at 263).
20. *Id.* at 233 (citing Ellison v. Robertson, 357 F.3d 1072, 1079 (9th Cir. 2004) (quoting S. Rep. 105-190, at 44, 45 (1998)).
21. *Id.* (citing Napster, 239 F.3d at 1023).
22. *Id.* (citing Ellison, 357 F.3d at 1079).
23. *Id.* at 231.
24. *Sony*, 93 F.4th at 232.
25. *Id.* (referencing, J.A. 1499).
26. *Id.* (emphasis added).
27. *Id.*
28. *Id.* (emphasis added).

connection between subscribers' copyright infringement and increased revenue to Cox to establish vicarious liability.[29]

B. Allowing Users to Download or Distribute on Cox's Network Constitutes Contributory Liability

Next, the court analyzed whether Cox was liable for contributory infringement.[30] Under contributory liability, "one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, is liable for the infringement, too."[31] The court noted that it had recently clarified the intent necessary to prove contributory infringement by an internet service provider based on its subscribers' direct infringement in *BMG v. Cox Communications*, where it held that intent to cause infringement may be shown by "willful blindness" or "knowledge that infringement [was] substantially certain to result from the sale" of internet service to a customer.[32] Under this test, general knowledge of infringement occurring on the network is not enough, and in that case, Cox could not be contributorily liable absent "knowledge that infringement [was] substantially certain to result from Cox's continued provision of Internet access to particular subscribers."[33]

In this case, the court noted knowledge that particular subscribers are substantially certain to infringe is a "predictive question."[34] Here, the court stated that Cox did not argue to the district court, as it then appealed, that notices of past infringement failed to establish its "knowledge that the same subscriber was *substantially certain to infringe again.*"[35] Therefore, because Cox did not press this argument in the district court, it is forfeited in its appeal.[36] Consequently, the court declined to consider this new issue on appeal.[37]

Concerning the material contribution element of contributory liability, the court agreed with the district court, which declined to disturb the jury's contributory liability verdict because "sufficient evidence supported a finding that Cox materially contributed to its subscribers' direct infringement of Plaintiffs' copyrights."[38] It argued that a reasonable jury could have found that Cox provided service with "actual knowledge of infringement occurring on specific subscribers' accounts, yet failed to address that infringement on its network."[39] In the district court, all parties agreed that infringement notices

29. *Id.* at 233.
30. *Sony*, 93 F.4th at 233.
31. *Id.* (citing CoStar Grp., Inc. v. LoopNet, Inc., 373 F.3d 544, 550 (4th Cir. 2004) (quoting Gershwin Pub., 443 F.2d at 1162)).
32. *Id.* at 234. (referencing BMG Rights Mgmt. v. Cox Commc'ns, 881 F.3d 293, 307 (4th Cir. 2018)).
33. *Id.* at 234.
34. *Id.*
35. *Sony*, 93 F.4th at 234.
36. *Id.* at 235 (citing In re Under Seal, 749 F.3d 276, 287 (4th Cir. 2014)).
37. *Id.*
38. *Id.*
39. *Id.* (citing Sony Music Ent. v. Cox Commc'ns, Inc., 464 F. Supp. 3d 795, 816 (E.D. Va. 2020)).

to Cox of specific instances of infringement were sufficiently detailed to prove knowledge of subscribers' past infringement, and the Fourth Circuit agreed.[40]

III. CONCLUSION

For the foregoing reasons, the Fourth Circuit affirmed the District Court's decision on the willful contributory liability claim but reversed and remanded on the vicarious liability claim. Cox Communications petitioned the Supreme Court of the United States for a writ of certiorari, and the Court granted the petition on June 30, 2025.[41] Oral arguments in the case took place on December 1, 2025.[42]

40. *Id.* at 234.

41. *See* Docket, Cox Commc'ns, Inc. v. Sony Music Ent., No. 24-171 (U.S.), https://www.supremecourt.gov/docket/docketfiles/html/public/24-171.html [https://perma.cc/EMP8-5SWH].

42. *Id.*

Salazar v. Paramount Global

Alexa Nohavicka

133 F. 4TH 642 (6TH CIR. 2025)

In *Salazar v. Paramount Global*, the Sixth Circuit Court of Appeals affirmed the United States District Court for the Middle District of Tennessee's dismissal of Michael Salazar's complaint against Paramount Global under Rule 12(b)(6) because he failed to adequately allege that he is a "consumer" under the Video Protection Privacy Act.[1]

I. BACKGROUND

Congress passed the Video Privacy Protection Act (VPPA) to protect the personal privacy "in the records of the rental, purchase, or delivery of 'audio visual materials.'"[2] The VPPA imposes "stiff penalties" on any "video tape service provider who discloses personal information that identifies one of their 'consumers' as having requested specific 'audio visual materials.'"[3]

In September 2022, Appellant brought a class action lawsuit against Paramount Global, alleging a violation of the VPPA.[4] Appellant claimed that he qualified as a "consumer" under the VPAA because of his subscription to a 247Sports e-newsletter that reported on sports recruiting—that he became a VPAA-protected "subscriber" when he signed up for the newsletter.[5] However, because he did not subscribe to "audio visual materials," the lower court found that he did not qualify as a consumer and therefore dismissed Appellant's complaint.[6] The Sixth Circuit agreed and affirmed.[7]

The issues presented in this case surround whether the Appellant sufficiently alleged that he was a "consumer" under the VPPA—if "'subscriber' was 'cabined by the definition of 'video tape service provider,'"[8] and thus to qualify as a "consumer," a "plaintiff must be a subscriber of goods and services *in the nature of audio-video* content."[9]

1. *See* Salazar v. Paramount Global, 133 F.4th 642, 645 (6th Cir. 2025), *cert. granted*, ---S.Ct.----, 2026 WL 189831 (2026).
2. *Salazar*, 133 F.4th at 644.
3. *Id.* at 645.
4. *Id.*
5. *Id.* at 645-46
6. *Id.*
7. *Id.*
8. *Salazar*, 133 F.4th at 646 (quoting Carter v. Scripps Networks, LLC, 670 F.Supp.3d 90, 98-99 (S.D.N.Y. 2023)).
9. *Id.* (quoting 18. U.S.C. § 2710(a)(4)).

Salazar petitioned the Supreme Court for a writ of certiorari to address whether the Sixth Circuit properly determined that he did not qualify as a "consumer" under the VPPA.[10]

II. ANALYSIS

A. The Complaint Adequately Alleges a Concrete Injury to Establish Standing

Despite Appellee abandoning its challenge to Salazar's standing, the federal courts have an "independent obligation" to verify the plaintiff's standing prior to exercising jurisdiction.[11] Standing is reviewed de novo.[12] The Sixth Circuit found that the Appellant's allegations demonstrated that he suffered a "concrete injury by reference to well-established privacy harms," that "[his] complaint alleges that Appellee installed the tracking Pixel on 247Sports.com, the claimed harm is also traceable to Appellee's conduct," and that "an award of damages would redress [his] injury."[13] Thus, the district court correctly found that Appellant had standing.[14]

B. Online Newsletter Subscribers Do Not Qualify as "Consumers" Under the Video Privacy Protection Act.

Appellant's status as a subscriber to 247Sports.com's newsletter did not render him a "consumer" under the VPPA, and thus the district court properly dismissed his suit.[15]

1. The VPPA Defines Who May Sue and What Conduct it Prohibits

When analyzing whether the district court incorrectly granted Appellee's motion to dismiss under Rule 12(b)(6), the Sixth Circuit first analyzed the Act's structure.[16]

The VPPA establishes civil liability for any "video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider."[17] The Act defines "consumer" as "any renter, purchaser, or subscriber of goods or services from a 'video tape service provider,'"[18] which is "any person engaged in the business, in or affecting interstate or foreign commerce, of rental, sale, or

10. *Id.*
11. *See id.* at 646 (citing Kanuszewski v. Mich. Dep't of Health & Hum. Servs., 927 F.3d 396, 405 (6th Cir. 2019)).
12. *Id.* (citing Sullivan v. Benningfield, 920 F.3d 401, 497 (6th Cir. 2019)).
13. *Id.* at 647-48.
14. *Salazar*, 133 F.4th at 647-48.
15. *See id.* at 653.
16. *Id.* at 648.
17. *Id.* at 649 (quoting 18 U.S.C. § 2710(b)(1)).
18. *Id.* (quoting § 2710(a)(1)).

delivery of prerecorded video cassette tapes or similar audio visual materials."[19]

To adequately state a claim under the VPPA, Appellant had to allege that Appellee is a "regulated entity" ("video service provider"), that Appellant is a "protected party" (Appellee's "consumer"), and that "Appellee engaged in prohibited conduct (knowingly disclosing Appellant's 'personally identifiable information' to a third party)."[20]

2. "Goods or Services" That Create "Consumers" Must Be Interpreted in the Context of "Audio Visual Materials"

The district court dismissed Appellant's complaint because of his failure to "plausibly allege" that he was a "consumer" under the Act.[21] When determining whether Appellant plausibly pleaded that he was a "consumer," the Sixth Circuit asked whether he was "a subscriber of goods or services from a video tape service provider," because of his online newsletter subscription to 247Sports.com.[22]

The Sixth Circuit concluded that Appellant erred in reading "goods or services" "in isolation" which "yield[ed] a definition of 'consumer' based solely on the broadest imaginable definitions of the words."[23] It remains "a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[24] "Goods or services cannot be construed in a vacuum to wall it off from the meaning imputed by the rest of the statute's text."[25]

In the VPPA, there is an association between "goods or services" and "audio visual materials," and thus the definition of "consumer" is read to be a person who "subscribes to "goods or services" in the nature of "video cassette tapes or similar audio visual materials."[26] "Text and context point to the same place: goods or services is limited to audio visual ones."[27] This reading is reflective of the plain meaning to the VPPA when it was enacted.[28]

Thus, a "consumer" under the VPPA must consume *audio visual materials*.

19. *Id.* at 648-49 (quoting § 2710(a)(4)).
20. *Salazar*, 133 F.4th at 649.
21. *Id.*
22. *See id.* (quoting 18 U.S.C. § 2710(a)(1)).
23. *Id.* (citing Dubin v. United States, 599 U.S. 110, 143 (2023)).
24. *Id.* at 650 (citing West Virginia v. EPA, 597 U.S. 697 (2022) (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989)).
25. *Id.* (citing Home Depot U.S.A., Inc. v. Jackson, 587 U.S. 435 (2019)) (quoting Davis, 489 U.S. at 809).
26. *Salazar*, 133 F.4th at 650-51 (citing § 2710(a)(1), (a)(4)).
27. *Id.* at 651 (citing S.W. Airlines Co. v. Saxon, 596 U.S. 450 (2022)).
28. *Id.*

3. Mere Links to Videos in a Newsletter Do Not Qualify as "Audio Visual Materials"

Appellant's complaint failed to allege that he had accessed videos through the newsletter, and thus he did not plausibly allege that the newsletter was an "audio visual material."[29]

The complaint merely alleged that because the newsletter "contained links to videos, directed subscribers to video content, and otherwise enticed or encouraged them to watch Appellee's videos," and is a "video cassette tape or similar audio visual material" under the VPPA.[30]

Therefore, Appellant's claim that his subscription to 247Sports.com's newsletter made him a "consumer" under the VPPA fails, and the district court properly dismissed his suit.[31]

III. CONCURRING IN PART, DISSENTING IN PART (J. BLOOMEKATZ)

Circuit Judge Bloomekatz's opinion concurs in part, dissents in part, and dissents from the judgment.[32] The concurrence agrees that the court has jurisdiction, but dissents on the merits – the majority's interpretation of the VPPA.[33]

The dissent asserts that the majority's interpretation "contravenes" the plain language of the VPPA.[34] The dissent finds that Appellant is, in fact, a "consumer" under the plain text of the statute because he falls under "any renter, purchaser, or subscriber of goods or services from a video tape service provider;" that "subscriber" generally refers to a person who, by providing some sort of consideration, opts in advance to receive "goods or services" of a continuing or periodic nature from the provider."[35] Appellant is a "subscriber: under the VPPA because he provided his personal information in exchange for receiving a daily newsletter from 247Sports.com, the newsletter is a "good[] or service[] from [Appellee]," and Appellee is "a video tape service provider…as it engage[s] in the business of delivering video content."[36] Therefore, Appellant qualifies as a "consumer" under the VPPA.

Additionally, the dissent emphasizes that the majority places a nonexistent limitation on the definition of "goods or services," criticizing its narrow reading of who constitutes a *subscriber* of goods or services.[37] Reading "goods or services according to its plain language [does not] make the provision inconsistent with its accompanying words," nor does it "render

29. *Id.* at 652-53.
30. *Id.*
31. *Id.* at 653.
32. Salazar v. Paramount Global, 133 F.4th 642, 654 (6th Cir. 2025) (Bloomekatz, J., dissenting).
33. *Id.*
34. *Id.*
35. *Id.* at 654-55 (citing 18 U.S.C. § 2710(a)(1)).
36. *Id.* at 655.
37. *Id.* at 656.

meaningless other parts or the statute."[38] Therefore, the majority's definition is inconsistent with the plain meaning of the statute.[39]

Lastly, the dissent criticizes Appellee's "consequentialist argument against a plain language reading of the statute"—that it would "fundamentally transform the Internet."[40] When Congress enacted the VPPA, it recognized that the "'computer age' would bring 'technological innovations' with 'the ability to be more intrusive than ever before,'" and the VPPA was "meant to protect consumers privacy in the face of those advances, not become obsolete."[41] And Congress expressly amended the VPPA for consumers to give "informed, written consent for a video tape service provider to share their information."[42]

Therefore, the dissent asserts, the majority's interpretation of the VPPA is inconsistent with its text, structure, and purpose.

IV. CONCLUSION

Despite the dissent, the Sixth Circuit affirmed the district court's dismissal of Appellant's complaint, holding that he failed to "plausibly allege" that he was a "consumer" of "audio visual materials" under the VPPA.[43]

Appellant appealed this decision to the Supreme Court, which granted certiorari on January 26, 2026.[44]

38. *Salazar*, 133 F.4th at 659.
39. *See id.* at 654.
40. *Id.* at 660 (citing Brief of Amicus Curiae at 3, 13).
41. *See id.* (citing S. Rep. No. 100-599, at 6-7).
42. *Id.* (citing 18 U.S.C. § 2710(b)(2)(B)).
43. *See id.*
44. *Salazar v. Paramount Global,* ---S.Ct.-----, 2026 WL 189831 (2026).

Trump v. Slaughter

Jenna Thakkar

791 F. SUPP.3D 1 (D.C. CIR. 2025)

In *Trump v. Slaughter*, the U.S. District Court ordered an injunction effectively reinstating Rebecca Slaughter as a member of the Federal Trade Commission (FTC) after being removed by President Donald Trump. The D.C. Circuit left this injunction in place thus denying the government's motion for a stay pending appeal. In response, President Trump filed an emergency application with the U.S. Supreme Court seeking to reverse the D.C. Circuit's opinion. The petition for writ of certiorari was granted, and both parties were instructed to submit briefs on two key issues before the Court. For one, whether removal protections in place for FTC Commissioners violate separation of powers. Additionally, whether federal courts may prevent a public official's removal through equitable relief. The case was scheduled for oral argument before the Supreme Court in the December 2025 session.

I. BACKGROUND

The Federal Trade Commission (FTC) is an agency created by Congress to protect consumers and regulate economic competition. With this great power, the agency's structure is comprised of five commissioners, no more than three of whom could belong to a single political party.[1] This independent, multiple member arrangement is meant to diffuse power across several commissioners, and each commissioner must be appointed by the President and confirmed by the Senate.[2] Appointments are staggered, enabling future presidents to appoint members, and held in seven-year terms.[3] Most relevant in *Trump v. Slaughter*, these commissioners may be removed by the President on the grounds of "inefficiency, neglect of duty, or malfeasance in office."[4]

Ms. Rebecca Slaughter was nominated by President Donald Trump to be a commissioner of the FTC.[5] Ms. Slaughter's nomination was unanimously confirmed by the Senate, and in May 2018, she began serving in her term.[6] This appointment was further extended when former President Joe Biden renominated Commissioner Slaughter in 2023, which was again unanimously confirmed by the Senate.[7] The main issue arose in March 2025, when

1. Federal Trade Commission Act, 15 U.S.C. § 41 (2018).
2. *Id.*
3. *Id.*
4. *Id.*
5. Trump v. Slaughter, 791 F. Supp. 3d 1, 7 (D.C. Cir. 2025).
6. *Id.*
7. *Id.* at 8.

President Trump sent an email to Commissioner Slaughter removing her from office.[8] The message from President Trump stated: "I am writing to inform you that you have been removed from the Federal Trade Commission, effective immediately."[9] The justification for such removal was summarized as her service being inconsistent with the Trump Administration's priorities.[10] The message from President Trump did not suggest that Commissioner Slaughter was removed for "inefficiency, neglect of duty, or malfeasance in office" but rather stated this decision was made under the authority of Article II of the Constitution.[11] After receiving this email, Commissioner Slaughter lost digital access to systems essential to fulfilling her duties.[12] For this reason, Ms. Slaughter filed suit against Donald Trump asserting that her removal was unlawful.

In proceedings, the Defendants argue that, contrary to its original 1914 enactment, the FTC serves three primary roles.[13] For one, to investigate business entities on the grounds of potential federal law violations.[14] Second, to administratively adjudicate and conduct hearings on those claims.[15] Finally, to promulgate regulations to ensure proper business practices.[16] And because of these three functions, the Defendants claim that the FTC Commissioners wield significant executive power and thus the President may remove these officials at will.[17] On the contrary, the Plaintiffs find the role of the FTC Commissioners to be one of a "quasi-judicial and quasi-legislative" nature due to the exercise of investigatory, adjudicatory, and rulemaking power.[18] These include issuing subpoenas, conducting investigations, acquiring testimony, all of which have been part of the agency's authority since creation.[19]

II. ANALYSIS

A. Classifying the Functions of the FTC

The facts outlined in this case are nearly identical to the ninety-year standing precedent *Humphrey's Executor v. United States*.[20] In *Humphrey's Executor*, President Roosevelt removed FTC Commissioner William

8. *Id.*
9. Exhibit A to Complaint at 2, Slaughter v. Trump, 791 F. Supp. 3d 1 (D.D.C. 2025) (No. 25-909).
10. *Id.* (paraphrasing President Trump's reasoning for removal).
11. Trump v. Slaughter, 791 F.Supp.3d 1, 8 (D.C. Cir. 2025).
12. *Id.* at 8-9.
13. *Id.* at 18.
14. *Id.* at 19; 15 USC §§ 46(a).
15. *Trump*, 791 F.Supp.3d at 19; 15 USC § 45(b).
16. *Trump*, 791 F.Supp.3d at 19; 15 USC § 46(f).
17. *See Trump*, 791 F.Supp.3d at 18; *see also* Myers v. United States, 272 U.S. 52, 186 (1926).
18. *Trump*, 791 F.Supp.3d at 18 (citing Humphrey's Executor, 295 U.S. at 624, 628-629).
19. *Id.* at 19-21.
20. *Id.* at 14; *see generally* Humphrey's Executor v. United States, 295 U.S. 602 (1935).

Humphrey due to key disagreements on policy issues—not citing removal on the basis of inefficiency, neglect of duty, or malfeasance in office.[21] Further, in *Humphrey's Executor*, similarly, the Court analyzed whether cited powers granted in Article II would justify this firing on behalf of the President.[22] Essentially, counsel for the United States claimed restricting this removal would qualify as an "unconstitutional interference" on behalf of the courts.[23] This constitutional argument is largely derived from the holding of *Myers v. United States* where the Court found that the President has the broad authority to remove officials whose duties are purely executive.[24] Since all executive power is vested to the President, it is his responsibility to "take care that the laws be faithfully executed."[25] While the Court was compelled by this argument in *Myers*, firing within the FTC requires a much more complex separation of powers analysis.

Removal without cause is a narrowly tailored principle, applying only to those that are executive officers.[26] With the goal of being classified as officers performing purely executive functions, Petitioner asserts that the FTC serves three main functions. First, the FTC prosecutes federal law violations.[27] Second, the FTC has the power to administratively adjudicate claims.[28] And finally, the FTC may promulgate regulations to ensure businesses are not engaging in unfair practices.[29] The issue with this argument is that these functions existed far before the decision of *Humphrey's Executor*, and the Supreme Court has declined to overrule or revisit this issue since then.[30] On the contrary, the Court found that the FTC's role leans more toward quasi-legislative and quasi-judicial functions rather than purely executive ones.[31] While the duties of the FTC have grown, these are expansions of original powers and not inherently new abilities.[32] The executive nature of powers does not meet the threshold for removal without cause.[33] Therefore, the question before the Court is not whether *Humphrey's Executor* is good law but rather if the duties of the FTC are characterized properly.[34]

B. Ensuring the Proper Legal Relief

The issue of proper legal relief was rather simple given longstanding precedent and the Court's rejection of defendants' arguments.[35] Counsel for Defendants argues injunctive relief is not available and cannot be issued

21. *Id.* at 11.
22. *Id.* at 11.
23. *Id.*
24. *Myers*, 272 U.S. at 117.
25. *Trump*, 791 F.Supp.3d at 11; U.S. CONST. art. II, § 3.
26. *Trump*, 791 F.Supp.3d at 17.
27. 15 USC § 46(a).
28. 15 USC § 45(b).
29. 15 USC § 46(f).
30. *Trump*, 791 F.Supp.3d at 18.
31. *Humphrey's Executor*, 295 U.S. at 628.
32. *Trump*, 791 F.Supp.3d at 19.
33. *Id.* at 21.
34. *Id.* at 23.
35. *Id.* at 24.

against the President.[36] The Court has found even where a plaintiff presents a "strong claim for relief," injunctive relief may be withheld if it would be particularly intrusive or offensive, in which case declaratory relief may instead be appropriate.[37] Here, Commissioner Slaughter's firing rendered her unable to perform duties such as influencing federal decision making on unfair business practices and protecting American consumers from deceptive strategies.[38] However, executive officials who are wrongfully terminated *'de facto'* can be reinstated by the courts, even if there is no presidential reappointment.[39] Such injunctive relief may be granted if a plaintiff can show: (1) that an irreparable injury occurred, (2) that the "remedies available at law, such as money damages, are inadequate to compensate" for said injury, (3) the balance of hardship between the two parties warrants such, and (4) that "the public interest would not be disserved by a permanent injunction."[40]

Commissioner Slaughter was serving a high-ranking, public servant role in which she was nominated by the President and confirmed by the Senate, and she is being deprived of such employment.[41] This removal's harm is distinct from a typical termination suit because she is unable to serve the people, thereby suggesting a possibility of irreparable injury.[42] The Court notes that for ninety years, all three branches have respected the structure created by Congress and affirmed by the Court in *Humphrey's Executor*.[43] Although President Trump no longer perceived political alignment with Commissioner Slaughter, this framework still remains. Because this injury cannot be alleviated through monetary damages, the Court must weigh the desired remedy and public interest, specifically evaluated under the totality of circumstances rather than a single public policy.[44] When analyzing the President's Article II argument, the Court found that it rested on a misconstrued concept. Defendants assert that rehiring Commissioner Slaughter would cause constitutional harm by impeding on the President's duties under the Take Care Clause.[45] The Court explained, however, that this clause does not empower the President to enforce only his preferred laws but rather to faithfully execute all the laws of the United States.[46] The President must defend the Constitution in its entirety regardless of political affiliation and not view it as an obstacle.[47] Therefore, there is a public interest heavily in favor of enforcing the law which has already been clearly established.[48]

36. *Id.* at 24.
37. Samuels v. Mackell, 401 U.S. 66, 73 (1971).
38. *Trump*, 791 F.Supp.3d at 26.
39. Swan v. Clinton, 100 F.3d 973, 980 (D.C. Cir. 1996).
40. *Trump*, 791 F.Supp.3d at 25.
41. *Id. at 26.*
42. *See id.*
43. *See id.* at 27.
44. Fund for Animals v. Clark, 27 F.Supp. 2d 8, 15 (D.D.C. 1998).
45. *Trump*, 791 F.Supp.3d at 27.
46. *Id.*
47. *Id.*
48. *Id.* at 29.

III. CONCLUSION

For the foregoing reasons, the U.S. District Court granted Commissioner Slaughter's Motion for Summary Judgment and ordered injunctive relief restoring her to the functions of her position.[49] Further, given the substantial factual similarities with *Humphrey's Executor* and its continuing status as good law, the D.C. Circuit left the injunction in place.[50] Defendants continued to defy reinstatement on appeal, and the Supreme Court granted certiorari on September 22, 2025. Oral arguments were heard on December 5, 2025, for the Court to hear debate on whether to overturn *Humphrey's Executor*.

Several Justices expressed concerns about overruling such a longstanding case after nearly a hundred years without proper justification.[51] On the contrary, other justices expressed skepticism regarding the restrictions on presidential removal and suggest that the directly executive powers argument is too narrow.[52] The tension between administrative governance and separation of powers is indicative of the complex structure of the FTC. Based on the Court's discussion, it is likely that portions of the *Humphrey's Executor* holding will be narrowed, thus expanding presidential removal authority and limiting judicial remedies during an unlawful termination suit. Oral Arguments suggest that for-cause removal restrictions on FTC commissioners may be unconstitutional, and that courts lack the power to order formal reinstatement as injunctive relief.[53]

49. *Id.*

50. *See supra* notes 20–23.

51. *See generally* Transcript of Oral Argument at 10, *Trump v. Slaughter*, 146 S.Ct. 18, (2025) (No. 23-332), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2025/25-332_7lhn.pdf.

52. *See generally Id.* at 51.

53. *Id.* at 63-64; Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 201 (2020) (holding that the CFPB Director's for-cause removal protection was unconstitutional and severable from the remainder of the statute).