Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Safeguarding and Securing the	)	WC Docket No. 23-320
Open Internet	)	
	)	
RIF Remand Order	)	WC Docket Nos. 17-108,
	)	17-287, 11-42

Comments of TechFreedom

Berin Szóka and James Dunstan

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Summary

Net neutrality is alive and well—even without the FCC's net neutrality regulations. Consumers demand unrestricted access to lawful content, services, and applications. Broadband providers promise to meet that demand, and existing consumer protection law ensures that consumers get what they're promised. Exceptions have been vanishingly rare and fleeting.

The Notice of Proposed Rulemaking (NPRM) claims openness, free expression, public safety, and national security are at risk unless the FCC reclassifies broadband Internet access service as telecommunications service subject to common carriage regulation under Title II of the Communications Act. The NPRM cites just two examples of non-neutrality. One of them, supposedly a threat to free expression and openness, was never actually implemented. Moreover, even with Title II, the FCC would find itself powerless to do anything about non-neutral practices unless they were not properly disclosed because such services would not qualify as broadband Internet access service (BIAS). The other example, a purported risk to public safety, did not involve a BIAS service because it was sold to government users, so it could not have been covered by Title II or the FCC's rules. More generally, the FCC could not police non-neutral BIAS practices that implicated public safety unless those practices were inadequately disclosed.

In that sense, the FCC would end up policing truth-in-advertising, much as the Federal Trade Commission does today. But because the FTC cannot regulate common carriers, Title II reclassification would strip the FTC of its powers through agency fiat—itself a clear sign that major questions are involved. What the FCC would gain, however, and the whole reason

for this exercise, are vast powers to dictate every aspect of how broadband networks operate.

The NPRM claims the FCC will use these powers only to protect net neutrality, and that it will "forbear" from all other powers. In fact, it will not forbear from the core powers conferred by Title II, and it will forbear from significantly less of Title II than it did in 2015. Notably, the NPRM proposes to retain the power to make ex ante rules in the name of public safety—which, apparently, means anything. It also proposes, in the name of national security, the power to govern every aspect of broadband deployment under Section 214.

With these powers, the FCC could decide major questions of "vast economic and political significance." The Supreme Court will not allow the FCC to decide such questions without a clear statement of authority to do so from Congress, but the Telecommunications Act provides no such statement. The Court has already decided that the definition of "telecommunications service" is ambiguous. The FCC implicitly acknowledges that its interpretation of the statute is not what Congress intended by pretending to "tailor" Title II into a more workable form—without meaningfully constraining the power it could exercise. Reclassification would also potentially implicate the nondelegation doctrine, and to avoid implicating the Constitution's separation of powers, the Court will not accept the FCC's interpretation. In short, the FCC is doomed to lose the coming legal battle over reclassification. It should instead focus its efforts on helping Congress to finally enact legislation to provide a clear regulatory framework to address net neutrality concerns, however hypothetical they may be.

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Pursuant to Section 1.415 and 1.419 of the Commission's rules,[1] TechFreedom hereby files these comments in response to the Notice of Proposed Rulemaking ("Notice") released by the Commission on September 28, 2023.[2]

I. Introduction

"Here we are again." That's what Judge Ambro of the Third Circuit said when faced for a fourth time with appeals from FCC rules related to broadcast ownership.[3] He also lamented that he wanted to "avoid sounding like a broken record."[4] Judge Ambro is lucky that he hasn't been forced into this debate, which is supposedly about net neutrality—but is really about the FCC's authority. For the rest of us, it's "here we are again" "sounding like a

[1] 47 C.F.R. §§ 1.415 & 1.419.

[2] Safeguarding and Securing the Open Internet, WC Docket No. 23-320, 88 Fed. Reg. 75048 (proposed Nov. 3, 2023) (to be codified at 47 C.F.R. pts. 8 and 30), https://docs.fcc.gov/public/attachments/FCC-23-83A1.pdf (hereinafter NPRM). The NPRM set the comment date as December 14, 2023, and the reply comment date as January 17, 2024. These comments are timely filed.

[3] Prometheus Radio Project v. Fed. Commc'ns Comm'n, 939 F.3d 567, 572 (3d Cir. 2019).

[4] *Id.* at 572-73.

broken record." For the fourth time in just over a decade, the FCC wants input on how to regulate broadband, and for at least the second time, seems poised to ignore Congress's clear statutory directive in the 1996 Telecommunications Act "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."[5]

Somehow, the "vibrant and competitive free market" of the Internet has survived, thus far, from the meddling hands of overreactive bureaucrats and the cottage industry that has made millions advocating for their vision of how the Internet should be run. Industry has spent more than $2.1 trillion since 1996 deploying faster and faster broadband.[6] The government has dedicated unprecedented taxpayer dollars to drive deployment deeper into the most rural and underserved areas of the country.[7]

What Congress hasn't done, unfortunately, is enact into law the basic principles of net neutrality. There is no real debate over these principles; everyone has agreed that blocking and throttling is such a bad idea that the marketplace has rejected it. A net neutrality legislative framework sits on the shelf, ready to be enacted—drafted by the Internet Society, the world's largest advocacy group on behalf of Internet users, with the participation of many stakeholders, including TechFreedom.[8]

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[5] 47 U.S.C. § 230(b)(2) (emphasis added).

[6] USTELECOM, 2021 BROADBAND CAPEX REPORT (2022), https://ustelecom.org/wp-content/uploads/2022/07/2021-Broadband-Capex-Report.pdf.

[7] The Bipartisan Infrastructure Act alone will provide $42.45 billion in new broadband funding. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021) (codified in scattered sections of 23 U.S.C).

[8] *See Net Neutrality Legislation: A Framework for Consensus*, INTERNET SOCIETY (May 29, 2019), https://www.internetsociety.org/resources/doc/2019/net-neutrality-legislation-a-framework-for-consensus/.

The U.S. Internet survived COVID far better than Europe's highly regulated networks.[9] Broadband networks kept up with unprecedented demands while children were locked down at home and forced to learn over video, and adults worked from home.[10] The broadband industry survived this monumental stress test with flying colors, all without the FCC micromanaging—or having the power to micromanage—every aspect of broadband deployment, operations, and marketing.

Yet here we are again. What's different this time? The legal landscape has shifted. The Supreme Court has held repeatedly that agencies may no longer rely on vague language or silence within a statute to decide major questions of "vast economic and political significance."[11] TechFreedom has raised the major questions doctrine repeatedly.[12] A majority of the Court has also indicated that it stands ready to revive the nondelegation

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[9] Chiara Albanese, Thomas Seal, & Rodrigo Orihuela, *Pandemic Exposes Europe's Creaking Internet for All to See*, BLOOMBERG (Oct. 9, 2020), https://www.bloomberg.com/news/articles/2020-10-09/europe-s-bad-internet-risks-missing-out-on-133-billion-a-year.

[10] Anne-Maria Kovacs, *U.S. broadband networks rise to the challenge of surging traffic during the pandemic* 6 (Geo. Ctr. for Bus. & Pub. Pol'y), https://georgetown.app.box.com/s/8e76udzd1ic0pyg42fqsc96r1yzkz1jf ("EU Commissioner Thierry Breton was concerned that European networks would not be able to handle the rapid traffic increases during the pandemic. Via Twitter, on March 18th, he asked European consumers to shift their video streaming from high-definition (HD) to standard-definition (SD). He also asked the video-streaming companies directly.").

[11] West Virginia v. Envtl. Prot. Agency, 142 S. Ct. 2587, 2605 (2022).

[12] *See, e.g.*, Petitioners Petition for Writ Certiorari., TechFreedom v. Fed. Commc'ns Comm'n, 139 S. Ct. 455 (2018) (No. 17-___) http://docs.techfreedom.org/TF-OIO-Cert-Petition.pdf; Brief For Tech Freedom As Amicus Curiae Supporting Respondents, Mozilla Corp. Pet'rs Pet. Writ Cert., TechFreedom v. Fed. Commc'ns Comm'n, 139 S. Ct. 455 (2018) http://docs.techfreedom.org/TF-OIO-Cert-Petition.pdf; Br. *Amicus Curiae* TechFreedom Supp. Resp't, Mozilla Corp. v. Fed. Commc'ns Comm'n, 940 F.3d 1 (D.C. Cir. 2019) (No. 18-1051), https://techfreedom.org/wp-content/uploads/2018/10/TechFreedom-Amicus-Brief-Restoring-Internet-Freedom-Order.pdf; Brief for Intervenors for Rehearing en banc, U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381 (D.C. Cir. 2017) (Nos. 15-1063), http://docs.techfreedom.org/TF_Petition_for_Rehearing_En_Banc.pdf.

doctrine, which bars Congress from handing legislative power to executive agencies, however clearly it does so.[13] Both doctrines "serve to prevent "government by bureaucracy supplanting government by the people."[14]

The FCC's response? The NPRM barely asks about these constitutional constraints.[15] Instead, it reverts to the kind of Chicken-Little claims made in 2015—an Internet being delivered one word at a time—plus new speculation about public safety and national security being at risk. The NPRM relies on statutory authority that doesn't exist, and policy goals that have never been within the FCC's purview, to propose Title II rules that go far beyond even the 2015 rules, which a previous FCC concluded had stifled investment in broadband deployment.[16]

Indeed, here we are again. Heaven help us.

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[13] Gundy v. United States, 139 S. Ct. 116 (2019), is the Supreme Court's most recent statement on how much authority Congress may delegate to executive agencies. *Gundy* upholds an "intelligible principle" test, under which Congress's power to delegate authority is broad indeed. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989). Only eight justices heard the case, however, and only four justices endorsed the regnant standard. In a brief concurrence, Justice Alito expressed his "support" for "reconsider[ing] th[at] approach," if and when a majority of the Court wishes to do so. 139 S. Ct. at 2131 (concurring opinion). Justice Kavanaugh, who did not participate in *Gundy*, has expressed just such a willingness. Paul v. United States, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J., respecting denial of certiorari). And Justice Ginsburg, one of the four justices to stand by the "intelligible principle" standard in *Gundy*, has been replaced by Justice Barrett, who has called the "intelligible principle" standard "notoriously lax." Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 318 (2014). Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, urged the Court to end its "intelligible principle misadventure." *See Gundy*, 139 S. Ct. at 2141.

[14] Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 142 S. Ct. 661, slip op. at *6 (2022) (Gorsuch, J., concurring) (quoting Antonin Scalia, *A Note on the Benzene Case*, AMERICAN ENTER. INST. J. ON GOVT. & SOC. 27 (1980)).

[15] NPRM ¶¶ 81-83 (major questions), n. 334 (only mention of nondelegation).

[16] Restoring Internet Freedom, WC Docket No. 17-108, FCC 17-166, ¶ 88 (Jan. 4, 2018), https://docs.fcc.gov/public/attachments/FCC-17-166A1.pdf (hereinafter RIF Order).

II. Net Neutrality Is Alive and Well—without FCC Rules

The Federal Communications Commission says it's "restoring" net neutrality. It's been more than five years since the Republican FCC repealed the short-lived 2015 rules against blocking, throttling, and discriminating against lawful content, yet the Internet is no less open, innovative, or free than it ever was. Net neutrality has never really been in jeopardy.

Title II reclassification wouldn't fundamentally change how net neutrality is protected. Net neutrality has survived without FCC rules because consumers *demand* unrestricted access to the Internet, ISPs promise to meet that demand, and the FTC already ensures that consumers get what they're promised. Why? Broadband companies have long committed not to interfere with Internet traffic. Comcast, the top U.S. ISP, proclaims: "We do not block, slow down or discriminate against lawful content."[17] Charter, the second-largest ISP, adds: "We don't . . . otherwise interfere with the online activity of our customers."[18] All other large ISPs have equivalently explicit—and easily enforceable—"open Internet" policies.

Standard consumer protection laws make these commitments legally enforceable.[19] The FCC worries that, if companies abandoned those voluntary commitments, consumers would be left unprotected. But the real question has always been whether to make

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[17] OPEN INTERNET, https://corporate.comcast.com/openinternet (last visited Dec. 13, 2023).

[18] *See* Steve Lohr, *Net Neutrality Repeal: What Could Happen and How It Could Affect You*, N.Y. TIMES (Nov. 21, 2017), https://www.nytimes.com/2017/11/21/technology/net-neutrality-repeal-questions.html.

[19] *See infra* Section IV.A.3.

broadband providers common carriers under Title II of the Communications Act. That would allow the FCC to second-guess every aspect of the broadband market, including prices.

Unfortunately, net neutrality and Title II have been hopelessly conflated. That conflation has made it difficult to translate a clear national consensus on the basic principles of net neutrality into legislation. Title II is far broader than net neutrality, and net neutrality does not require Title II. Indeed, net neutrality is not really in danger at all. The NPRM provides just two examples of non-neutrality since repeal of the 2015 Open Internet Order—one supposedly a threat to free expression and the other supposedly a threat to public safety.[20] Neither example holds water, as we explain below.[21]

III. The FCC Lacks Clear Authority to Decide Such a Major Question

If the Supreme Court sees Title II reclassification as a "major question" of "vast economic and political significance," the FCC will lose. As the Court has held repeatedly, only a clear statement from Congress can authorize agencies to decide major questions. But the Court has already decided that the Communications Act is ambiguous with respect to the proper classification of broadband.[22]

In litigation over the 2015 Order,[23] we at TechFreedom were the only party to raise the major questions doctrine.[24] Then-Judge Brett Kavanaugh embraced our arguments in

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[20] NPRM ¶ 117 et seq.

[21] *See infra* Section IV.

[22] National Cable Telecom. Assn. v. Brand X Internet S, 545 U.S. 967, 992 (2005).

[23] Protecting and Promoting the Open Internet, Report and Order, GN Docket No. 14-28, FCC 15-24 (Feb. 26, 2015), https://docs.fcc.gov/public/attachments/FCC-15-24A1.pdf [hereinafter 2015 Order].

[24] *See supra* note 12.

U.S. Telecom (D.C. Cir. 2017).[25] The appeals court majority deferred to the FCC because the Supreme Court had yet to clearly articulate a coherent doctrine regarding major questions. The case never made it to the Supreme Court because the Republican FCC repealed the 2015 Order through its 2018 Restoring Internet Freedom Order.[26]

Now, we have a clear idea of how the Supreme Court will decide this case. In 2000, the Court rejected the Food and Drug Administration's claims of authority to regulate—even ban—tobacco in the name of "safety."[27] The Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[28] Nine major question cases have followed. In eight, agencies lost.[29]

The FCC's new NPRM devotes just four of 231 paragraphs to the major questions doctrine.[30] The NPRM doesn't bother asking about the significance of Title II reclassification. Yet to Judge Janice Rogers Brown, the other *U.S. Telecom* dissenter, "turning Internet access

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[25] U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381, 417-18 (D.C. Cir. 2017).

[26] RIF Order.

[27] Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000).

[28] *Id.*

[29] *See* KATE R. BOWERS, CONG. RESEARCH SERV., IF12077, THE MAJOR QUESTIONS DOCTRINE (Nov. 2, 2022), https://crsreports.congress.gov/product/pdf/IF/IF12077 (citing Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457 (2001); Gonzalez v. Oregon, 546 U.S. 243 (2006); Util. Air Regul. Grp. V. Envtl. Prot. Agency, 573 U.S. 302 (2014); King v. Burwell, 576 U.S. 473 (2015); Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485 (2021) (per curiam); Nat'l Fed'n of Ind. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 142 S. Ct. 661 (2022) (per curiam); West Virginia v. Envtl. Prot. Agency, 142 S. Ct. 2587 (2022); Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497 (2007)).

[30] NPRM ¶¶ 81-84.

into a public utility is obviously a 'major question' of deep economic and political significance—any other conclusion would fail the straight-face test."[31] Why, exactly?

A. Despite Forbearance, Title II Reclassification Would Give the FCC Exceptionally Vast Powers & Sweeping Discretion

In assessing whether an issue presents a "major question," the Supreme Court weighs not only an agency's current action but what it *could* do with the powers it claims.[32] During the recent pandemic, the Centers for Disease Control imposed a moratorium on evictions of renters who claimed financial distress and lived in counties hit hard by COVID, claiming this was "necessary" to slow the disease. "It is hard to see what measures this interpretation would place outside the CDC's reach," warned the Court.[33] "Could the CDC . . . [o]rder telecommunications companies to provide free high-speed Internet service to facilitate remote work?" Indeed, the FCC could do something very close to this under Title II: while setting a price of zero might not be "reasonable," the FCC certainly could require BIAS providers to provide such service at regulated rates.[34]

Through "extensive forbearance" from most provisions of Title II, the 2015 Order claimed to create a "tailored Title II regulatory framework" for broadband Internet access service. But ever since the FCC first floated the "Title II Lite" in 2010,[35] this has always been

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[31] U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381, 402 (D.C. Cir. 2017) (Brown, J., dissenting).

[32] *See generally* KATE BOWERS & DANIEL SHEFFNER, CONG. RESEARCH SERV., LSB10745, THE SUPREME COURT'S "MAJOR QUESTIONS" DOCTRINE: BACKGROUND AND RECENT DEVELOPMENTS (May 17, 2022).

[33] Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485, 2489 (2021).

[34] At most, ISPs could, like any regulated utility, quibble over recovering "reasonable" costs—perhaps by charging *other* users.

[35] *See* Julius Genachowski, Fed. Commc'ns Comm'n, *The Third Way: A Narrowly Tailored Broadband Framework* (May 6, 2010), https://docs.fcc.gov/public/attachments/DOC-297944A1.pdf .

a hollow promise: the FCC could wield the core powers of Title II. The NPRM again promises forbearance, including forbearing "from . . . *ex ante* rate regulations" in order to deflect investment concerns.[36] Yet the NPRM also seeks comment on retaining the FCC's "ability to adopt *ex ante* regulations" to protect public safety. Since, Title II advocates claim, essentially any aspect of broadband service *might* affect public safety, there's no telling how the FCC might invoke this seemingly limited exception.[37]

"They say this is a stalking horse for rate regulation," Chair Jessica Rosenworcel remarked when she announced the NPRM. "Nope. No how, no way."[38] The FCC has been playing this same semantic game since 2015. Yes, the Supreme Court has called "rate filings"—the way the railroads and the old Ma Bell monopoly sought prior approval for price schedules—"the essential characteristic of a rate-regulated industry."[39] But such "tariffing" is far from the only way the FCC could meddle with broadband prices.

The NPRM proposes to retain the most essential powers claimed by Title II.[40] Section 201(b) confers the power to decide whether all "charges" and "practices" of common carriers are "just and reasonable," while Section 202(a) says the same about "discrimination" in their business. These two sections constitute "the heart of [Title II]," as the 2015 Order

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[36] But as we discuss below related to the issue of national security, *see infra* Section IV.C, the NPRM fails to forebear from Section 214 as did the 2015 Order, which may result in thousands of broadband providers being required to seek, for the first time, authority to operate under Section 214, and allowing the Commission to review each such new application to determine whether authorization would be consistent with U.S. national security policy.

[37] *See infra* Section IV.B.

[38] Jessica Rosenworcel, Chairwoman, Fed. Commc'ns Comm'n, Remarks at the National Press Club 5 (Sept. 26, 2023), https://docs.fcc.gov/public/attachments/DOC-397257A1.pdf.

[39] MCI Telecomms. Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 231 (1994).

[40] NPRM ¶¶ 98-99.

recognized.[41] The FCC could use these powers to require ISPs to offer higher speeds or larger allowances of data, for example. Either would have the same effect as rate regulation: customers would get more for less—at the expense of providers. As Commissioner Ajit Pai noted in his 2015 dissent: "if the FCC decides that it does not like how broadband is being priced, Internet service providers may soon face admonishments, citations, notices of violation, notices of apparent liability, monetary forfeitures and refunds, cease and desist orders, revocations, and even referrals for criminal prosecution."[42]

The NPRM proposes to revive[43] the "general conduct" or "catch-all" standard, which the 2015 Order said was a distillation of Sections 201 and 202.[44] Through this standard, the FCC could restrict any practice that might "*unreasonably* interfere with or *unreasonably* disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users." The 2015 Order promised that this standard would be "applied to carefully balance the benefits of innovation against harm to end users and edge providers"[45] and the NPRM expects that "this . . . standard would accomplish these same goals going forward."[46] In fact, this standard would give the FCC "almost unfettered discretion to decide what

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[41] 2015 Order ¶ 441.

[42] *Id.* at 5922.

[43] NPRM ¶¶ 148-49.

[44] *Id.* ¶ 137 ("the standard we adopt today represents our interpretation of these 201 and 202 obligations in the open Internet context").

[45] *Id.*

[46] NPRM ¶ 165.

business practices clear the bureaucratic bar," as Republican Commissioner Ajit Pai warned in his dissent.[47] While this standard excluded "reasonable network management," providers would bear the burden of proving that they qualified for this exception.[48] The 2015 Order conceded very little: Even practices that were neutral ("application-agnostic") "likely would not" violate this standard, while clearly disclosed features chosen by users would be "less likely" to violate it.[49] Ultimately, everything would be a judgment call for the FCC, based on a "non-exhaustive list" of seven factors.[50] Even the Electronic Frontier Foundation, a leading supporter of net neutrality regulation and Title II, warned that the standard would be "anything but clear."[51]

Under Title II, as then-Commissioner Pai warned in 2015, the FCC could "decide where the Internet should be built and how it should be interconnected."[52] Specifically, Section 201(a) allows the FCC to order the construction of "physical connections" and "through routes."[53] Section 214 goes even further: common carriers also need the FCC's permission to construct, extend, or acquire "lines" (networks), or to "discontinue, reduce, or

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[47] *Id.* at 5923.

[48] *See infra* Section IV.A.3.

[49] 2015 Order ¶¶ 139, 144.

[50] *Id.* ¶¶ 138-45.

[51] Corynne McSherry, *Dear FCC: Rethink The Vague "General Conduct" Rule*, EFF (Feb. 24, 2015), https://www.eff.org/deeplinks/2015/02/dear-fcc-rethink-those-vague-general-conduct-rules.

[52] 2015 Order ¶ 5924.

[53] 47 U.S.C. § 201(a).

impair service"—enforceable by injunctions and penalties.[54] The 2015 Order forbore from these aspects of Section 214,[55] but the NPRM proposes to retain them.[56]

The stakes here are high. AT&T wastes $6 billion a year maintaining outdated copper-wire telephone lines—the classic common carrier service—because the FCC won't let the company replace them with fiber, even though doing so would enable faster broadband service.[57] Broadband providers spent $86 billion on deployment last year—and, together, Sections 201(a) and 214 would empower the FCC to control every aspect of that investment.[58]

Despite the FCC's promise of forbearance, the core powers of Title II will loom over the broadband industry like Chekhov's proverbial gun: "If you say in the first act that there is a rifle hanging on the wall, in the second or third act it absolutely must go off. If it's not going to be fired, it shouldn't be hanging there."[59]

B. Reclassification Would Obviously Have Vast Economic Significance

The NPRM declares, in its second sentence, that "the COVID-19 pandemic and the rapid shift of work, education, and health care online demonstrated how essential broadband Internet connections are for consumers' participation in our society and

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[54] 47 U.S.C. § 214.

[55] 2015 Order ¶¶ 509-510.

[56] NPRM ¶ 27.

[57] *See* Jeff Baumgartner, *AT&T's aggressive copper network retirement could be a mistake*, LIGHTREADING (Mar. 14, 2022), https://www.lightreading.com/optical-networking/at-t-s-aggressive-copper-network-retirement-could-be-a-mistake-analyst-says.

[58] USTELECOM, 2021 BROADBAND CAPEX REPORT (2022), https://ustelecom.org/wp-content/uploads/2022/07/2021-Broadband-Capex-Report.pdf.

[59] Carlos Loaeza, *Crafting a Story Finale: The Chekhov's Gun Principle*, ARCADIA (Apr. 29, 2021), https://www.byarcadia.org/post/crafting-a-story-finale-the-chekhov-s-gun-principle.

economy."[60] That's exactly the kind of thing the Court has considered to raise a major question.

Both arguments for, and objections to, Title II reclassification have long focused on broadband investment.[61] While reclassification "might in some cases reduce providers' investment incentives," the 2015 Order concluded, "any such effects are far outweighed by positive effects on innovation and investment in other areas of the ecosystem that our core broadband policies will promote."[62] But as the Court said both in *Biden v. Nebraska* (2023)[63] (about unprecedented loan forgiveness) and *West Virginia v. EPA* (2022)[64] (about shifting away from coal generation of electricity), "[t]he basic and consequential tradeoffs inherent" in deciding major questions "are ones that Congress would likely have intended for itself."[65]

The NPRM repeats the 2015 Order's conclusion: "no party [could] quantify with any reasonable degree of accuracy how either a Title I or a Title II approach may affect future investment."[66] But the Court's analysis in major question cases turns on the overall magnitude of economic significance, not precise quantification. Moreover, while Courts might defer to such conclusions under their normal "arbitrary and capricious" standard of review, the Supreme Court has never applied that standard on any question it determined to be major.

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[60] NPRM ¶ 1.

[61] *See infra* Section VI.B.

[62] 2015 Order ¶ 410.

[63] Biden v. Nebraska, 143 S. Ct. 2355, 2365 (2023).

[64] West Virginia v. Envtl. Prot. Agency, 142 S. Ct. 2587, 2613 (2022).

[65] *Biden*, 143 S. Ct. at 2375; *West Virginia*, 142 S. Ct. at 2613.

[66] 2015 Order ¶ 410; NPRM ¶ 57.

U.S. broadband providers invested $86 billion in 2021—and $2.1 trillion since 1996.[67] That's on par with, say, the $1.18 trillion invested by oil and gas companies in the last decade.[68] Most broadband investment occurred under Title I classification. Even a slight dip could, over a few years, be comparable to the tens of billions the Court recently found "significant."[69]

The ripple effects could be even bigger. Lost broadband investment means slower networks and less coverage, especially in harder-to-serve areas. Investing at twice the per capita average of other developed countries really paid off during the COVID pandemic:[70] as everyone suddenly did everything online from home, American networks managed unimaginable surges in demand "remarkably well."[71] European broadband operators had invested less than a third as much per capita in their networks.[72] With slower networks,[73] the European Commission resorted to throttling the quality of streaming services.[74]

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[67] USTELECOM, 2021 BROADBAND CAPEX REPORT (2022), https://ustelecom.org/wp-content/uploads/2022/07/2021-Broadband-Capex-Report.pdf.

[68] *See* Collin Earon & Rebecca Elliott, *Coronavirus Threatens to Hobble the U.S. Shale-Oil Boom for Years*, WALL STREET J. (May 24, 2020), https://www.wsj.com/articles/coronavirus-threatens-to-hobble-the-u-s-shale-oil-boom-for-years-11590312601?stream=top.

[69] Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2485, 2489 (2021).

[70] ROGER ENTNER, RECON ANALYTICS LLC, US BROADBAND NETWORK PERFORMANCE DURING COVID-19 AND BEYOND 10 (2021), https://reconanalytics.com/wp-content/uploads/2021/11/ReconAnalytics-Networks-in-the-Pandemic.pdf ("American operators spent twice as much per person as what is spent in the economies of other OECD countries.").

[71] *Id.* at 1.

[72] *See* USTELECOM, US VS. EU BROADBAND TRENDS 2012-2020 11 (2022), https://www.ustelecom.org/wp-content/uploads/2022/04/USTelecom-US-EU-Broadband-Trends-2012-2020.pdf.

[73] *Id.* at 2-3.

[74] *See* Hadas Gold, *Netflix and YouTube are slowing down in Europe to keep the internet from breaking*, CNN BUSINESS (Mar. 20, 2020, 10 :57 AM), https://edition.cnn.com/2020/03/19/tech/netflix-

C. Reclassification Would Have Vast "Political Significance" and Involves an Issue of "Earnest and Profound Debate Across the Country"

In *West Virginia*, the Supreme Court found that "the oblique form of the claimed delegation" was "all the more suspect" not only because of the "'importance of the issue'" (phasing out coal power generation) but also "the fact that the same basic scheme EPA adopted 'has been the subject of an earnest and profound debate across the country . . . .'"[75] There may be consensus on the core of net neutrality, but the Title II debate has been at least as "profound" as any the Court has found to involve a major question.

The FCC first considered reclassification in 2009, after an appeals court said its 2005 Open Internet Policy Statement wasn't enforceable.[76] The 2010 Order relied on Section 706.[77] But in 2014, the same appeals court voided that order for exceeding the authority supposedly conferred by Section 706.[78] The largest websites rallied in protest to demand Title II.[79] President Barack Obama urged reclassification.[80] In 2015, the FCC obliged,[81]

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internet-overload-eu/index.html#:~:text=Netflix%20and%20YouTube%20will%20reduce,video%20streams%20for%2030%20days .

[75] West Virginia v. Envtl. Prot. Agency, 142 S. Ct. 2587, 2614 (2022) (quoting Gonzalez v. Oregon, 546 U.S. 243, 267-268 (2006)).

[76] *See* Comcast Corp. v. Fed. Commc'ns Comm'n, 600 F.3d 642 (D.C. Cir. 2010).

[77] Preserving the Open Internet, Report and Order, GN Docket No. 09-191, FCC 10-201 (Dec. 21, 2010), https://docs.fcc.gov/public/attachments/FCC-10-201A1.pdf [hereinafter 2010 Order].

[78] *See* Verizon v. Fed. Commc'ns Comm'n, 740 F.3d 623 (D.C. Cir. 2014).

[79] *See, e.g.*, Vauhini Vara, *The Speed of Internet Slowdown Day*, NEW YORKER (Sept. 11, 2014), https://www.newyorker.com/business/currency/speed-internet-slowdown-day; *Sept. 10th is the Internet Slowdown*, BATTLE FOR THE NET (last visited Dec. 13, 2023), https://www.battleforthenet.com/sept10th/.

[80] *Net Neutrality*, THE WHITE HOUSE (last visited Dec. 13, 2023), https://obamawhitehouse.archives.gov/net-neutrality.

[81] 2015 Order ¶ 74.

touting the "unprecedented" number of comments filed: 4.7 million in all.[82] In 2017, the Republican FCC moved to repeal the 2015 Order and return net neutrality to the FTC—drawing nearly 22 million comments.[83] A bomb threat disrupted the FCC's vote.[84] A deranged activist was later convicted for threatening to murder FCC Chair Pai and his family.[85]

A Democratic-controlled Senate passed a resolution[86] disapproving the return to the deregulatory Title I—just one of more than fifty party-line bills taking one side or the other of the debate since 2009.[87] As in *West Virginia*, Congress has "considered and rejected" imposing Title II "multiple times."[88] What the *Nebraska* Court said about the Biden administration's unprecedented loan forgiveness program applies no less to Title II reclassification:[89] the "sharp debates generated by" the agency's "extraordinary" use of

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[82] Dave Keating, *EU and US in tune on net neutrality*, POLITICO (Apr. 1, 2015), https://www.politico.eu/article/eu%E2%80%88and-us-in-tune-on-net-neutrality/.

[83] Lauren Gambino & Dominic Rushe, *FCC flooded with comments before critical net neutrality vote*, THE GUARDIAN (Aug. 30, 2017, 7:00 AM), https://www.theguardian.com/technology/2017/aug/30/fcc-net-neutrality-vote-open-internet.

[84] Jon Brodkin, *Bomb threat temporarily disrupts FCC vote to kill net neutrality rules*, ARS TECHNICA (Dec. 14, 2017, 12:58 PM), https://arstechnica.com/tech-policy/2017/12/security-problem-disrupts-fcc-vote-to-kill-net-neutrality-rules/.

[85] Chris Sanders, *Net neutrality supporter sentenced for death threats to FCC Chairman Pai*, REUTERS (May 17, 2019, 1:43 PM), https://www.reuters.com/article/us-usa-internet-pai-idUSKCN1SN2AN/.

[86] S.J. Res. 52, 115th Cong. (2018), https://www.congress.gov/115/bills/sjres52/BILLS-115sjres52es.pdf.

[87] PATRICIA MOLONEY FIGLIOLA, CONG. RESEARCH SERV., R40616, THE FEDERAL NET NEUTRALITY DEBATE: ACCESS TO BROADBAND NETWORKS 20 (Feb. 24, 2021), https://sgp.fas.org/crs/misc/R40616.pdf.

[88] West Virginia v. Envtl. Prot. Agency, 142 S. Ct. 2587, 2614 (2022) ("Finally, we cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions 'had become well known, Congress considered and rejected' multiple times." (citations omitted)).

[89] Biden v. Nebraska, 143 S. Ct. 2355, 2374 (2023).

ambiguous legislation "stand in stark contrast to the unanimity with which Congress passed" that legislation.

In 1995, the Telecommunications Act passed the House without objection and by a vote of 81-18 in the Senate.[90] Congress declared it "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, unfettered by Federal or State regulation."[91] "The term 'interactive computer service,'" Congress specified, "means any information service . . . ,"[92] and information services generally would be immune from Title II regulation,[93] but the 1996 Telecommunications Act didn't explicitly specify whether broadband interactive access service would be an information service or a telecommunications service. This ambiguity probably helped Congress achieve near-unanimity. In 1997, Congress required the FCC to submit a report on the meaning of the terms "telecommunications" and "telecommunications service" in the Telecommunications Act. The 1998 "Stevens Report" concluded that the "proper interpretation of [these terms] raises difficult issues that are the subject of heated debate."[94] As we'll see, what started as a very technical debate over how to regulate remote data processing in the 1960s gradually became today's very public debate over the Internet.[95]

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[90] *Roll Call Vote 104th Congress*, UNITED STATES SENATE (June 15, 1995), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1041/vote_104_1_00268.htm (on S. 652).

[91] 47 U.S.C. § 230(b)(2).

[92] 47 U.S.C. § 230(e)(2).

[93] *See* Nat'l Cable & Telecomms. Assn. v. Brand X Internet Serv., 545 U.S. 967, 975 (2005).

[94] FED. COMMC'NS COMM'N, FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE, REPORT TO CONGRESS 17 (Apr. 10, 1998), https://transition.fcc.gov/Bureaus/Common_Carrier/Reports/fcc98067.pdf.

[95] *See infra* Section III.E.

D. Agency Expertise Is Not Sufficient to Decide a Major Question

The NPRM asks about "the extent to which this matter falls within the Commission's recognized expertise and authority."[96] A lack of agency expertise has, in some cases, been noted by the Court in applying the major questions doctrine.[97] But the "Court has never taken [the] view" "that a mismatch between an agency's expertise and its challenged action . . . is necessary to the [major question] doctrine's application," as Justices Neil Gorsuch and Samuel Alito explained in their *West Virginia* concurrence.[98] At most, the Court considers "regulat[ing] outside [an agency's] wheelhouse" to be just one possible "telltale sign that an agency may have transgressed its statutory authority."[99]

E. Congress Uses Clear Statements to Establish Common Carriage, but the Telecommunications Act Lacks Them

To decide major questions, an agency "must point to 'clear congressional authorization' for the power it claims."[100] So said the *West Virginia* Court, quoting its 2014 decision in *Utility Air Regulatory Group v. EPA*.[101] TechFreedom alone raised the *UARG* case

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[96] NPRM ¶ 82.

[97] *See, e.g.,* King v. Burwell, 576 U.S. 473, 486 (2015) ("It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort."); Gonzales v. Oregon, 546 U.S. 243, 267 (2006) ("The Government contends the Attorney General's decision here is a legal, not a medical, one. This generality, however, does not suffice. The Attorney General's Interpretive Rule, and the Office of Legal Counsel memo it incorporates, place extensive reliance on medical judgments and the views of the medical community in concluding that assisted suicide is not a 'legitimate medical purpose.' . . . This confirms that the authority claimed by the Attorney General is both beyond his expertise and incongruous with the statutory purposes and design.").

[98] West Virginia v. Envtl. Prot. Agency, 142 S. Ct. 2587, 2624, n. 5 (2022) (Gorsuch & Alito, JJ., concurring).

[99] Biden v. Nebraska, 143 S. Ct. 2355, 2383 (2023).

[100] *West Virginia v. EPA*, 142 S. Ct. at 2609 (Gorsuch & Alito, JJ., concurring).

[101] *Id.* (citing Util. Air Regulatory Grp. v. Envtl. Prot. Agency, 573 U.S. 302, 324 (2014)).

in *U.S. Telecom*. Judges Srinivasan and Tatel responded by noting the Supreme Court's 2005 *Brand X* decision, which upheld the FCC's classification of broadband under Title I: the "Court expressly recognized that Congress, by leaving a statutory ambiguity, had delegated to the Commission the power to regulate broadband service."[102] Under *Chevron*, this meant deference to the FCC in both cases. But since 2017, the Court has repeatedly held that, on major questions, ambiguity means the agency loses.

The "starting point" for applying *Chevron* is whether "the statute gives an agency broad power to enforce all provisions of the statute."[103] Some have suggested that the major questions doctrine could be satisfied with "clear congressional authorization" to make rules.[104] If so, there would be no such doctrine at all; agencies would continue to win easily under *Chevron*. Instead, the doctrine holds that agencies cannot decide major questions by interpreting ambiguous terms—here, the definition of "telecommunications"—even when their authority to make rules is clear.

What might a clear statement look like? The Interstate Commerce Act of 1887 (railroads), the Mann-Elkins Act of 1910 (telegraph and telephone networks), and the Motor Carrier Act of 1935 (trucking) all stated clearly which industries would be common carriers.[105] The Communications Act of 1934 took the same approach to "every common

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[102] U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 825 F.3d 674, 704 (D.C. Cir. 2016).

[103] Gonzales v. Oregon, 546 U.S. 243, 258 (2006).

[104] Harold Feld, *Does SCOTUS EPA Case Impact Net Neutrality? Here's Why I Say No*, WETMACHINE (July 1, 2022, 3:58 PM), https://wetmachine.com/tales-of-the-sausage-factory/does-scotus-epa-case-impact-net-neutrality-heres-why-i-say-no/.

[105] Interstate Commerce Act of 1887, ch. 104, Pub. L. No. 49-104, 24 Stat. 379 ("the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers

carrier engaged in interstate or foreign communication by wire or radio"—except, it clarified, broadcasters.[106]

The Telecommunications Act of 1996 took a different approach.[107] Since the 1960s, the FCC had struggled with how to apply the 1934 Act to new technologies. Eventually, its 1980 *Computer II* Order distinguished between "basic" (common carrier) and "enhanced" (non-common carrier) services[108] "functionally, based on how the consumer interacts with the provided information."[109] In 1996, Congress drew on this order to craft an arcane, highly technical definition that does not clearly decide anything: "telecommunications" is the "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[110]

In *Brand X,* the Supreme Court found the term "telecommunications service" ambiguous.[111] Thus, it allowed the FCC *not* to apply Title II to broadband. But the Court did

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or property . . . by railroad"); Railway Rate Act of 1910 (the "Mann-Elkins Act"), ch. 309, Pub. L. No. 61-218, 36 Stat. 539, 545 ("All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, . . . shall be just and reasonable;"); Motor Carrier Act of 1935, ch. 498, Pub. L. No. 74-255, 49 Stat. 543, 544-45 ("The term 'motor carrier' includes . . . a common carrier by motor vehicle" and "The term 'motor vehicle' means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails").

[106] Communications Act of 1934, § 201(a), Pub. L. No. 73-416, 48 Stat. 1064, 1070 (codified as amended at 47 U.S.C. § 153).

[107] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 *et seq.*).

[108] *In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980) [hereinafter Computer II Order].

[109] Nat'l Cable & Telecomms. Assn. v. Brand X Internet Serv., 545 U.S. 967, 970 (2005).

[110] 47 U.S.C. § 153(50).

[111] *Brand X*, 545 U.S. at 970.

not decide whether applying Title II would be a major question. Increasingly, it is clear that the Court will block such reclassification.

F. Radical "Tailoring" Can Indicate That an Agency Has Misread Its Statute

Congress gave the FCC explicit authority to "forbear" from specific requirements of Title II.[112] The 2015 Order granted "extensive forbearance" from the vast bulk of Title II's provisions,[113] "tailoring" the law down to what the FCC had previously dubbed "Title II Lite."[114]

Meanwhile, even as the FCC sought comment on Title II in 2014, the Supreme Court decided *Utility Air Regulatory Group*.[115] The Environmental Protection Agency had "tailored" its rule governing greenhouse gas emissions to cover only "a relatively small number of large industrial sources."[116] Without tailoring, the agency said, the rule would have required permits for every motor vehicle, which would have rendered the statute "unrecognizable to the Congress that designed it."[117] The Court struck down the tailoring rule as an "extravagant statutory power over the national economy."[118]

When broadband providers challenged the 2015 Order's Title II reclassification, they didn't mention *UARG*, despite obvious parallels to their own situation. Fearing full-blown

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[112] Telecommunications Act of 1996, § 401, Pub. L. No. 104-104, 110 Stat. 56, 128 (codified at 47 U.S.C. 160).

[113] 2015 Order ¶ 51.

[114] *See supra* note 35.

[115] Util. Air Regulatory Grp. v. Envtl. Prot. Agency, 573 U.S. 302 (2014).

[116] *Id.* at 312.

[117] *Id.*

[118] *Id.* at 324.

Title II regulation, they were loath to criticize forbearance. TechFreedom alone invoked the case. The D.C. Circuit distinguished *UARG* because the FCC, unlike the EPA, had "express" forbearance authority.[119]

The NPRM relies heavily on this distinction, but it misses entirely the point of *UARG*: the EPA had "essentially admitted that its interpretation would be unreasonable without 'tailoring.'"[120] Forbearance itself isn't inappropriate, but the need to forbear so "extensively"—to craft what the 2015 Order called a "Title II tailored for the 21st century"[121]—"should have," as the *UARG* Court said, "alerted [the agency] that it had taken a wrong interpretive turn."[122] The same applies here, especially because the FCC isn't actually forbearing from the core provisions of the statute anyway.[123] In effect, the agency admits that applying Title II would be unworkable, claims it isn't really applying Title II because it has forborne from so much of it, but then applies exactly the parts of Title II that really matter.

G. The Lurking Nondelegation Problem

Even in its current, loose (but endangered[124]) form, the nondelegation doctrine requires Congress to set forth an "intelligible principle" by which an agency is to act. If an agency may comprehensively rewrite a statute, as a means of applying the statute as the agency sees fit, this is—or certainly should be—a giveaway that the agency is acting without

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[119] U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 825 F.3d 674, 706 (D.C. Cir. 2016).

[120] *UARG*, 573 U.S. at 325.

[121] 2015 Order ¶ 38.

[122] *UARG*, 573 U.S. at 328.

[123] *See supra* Section III.A.

[124] *See* discussion *supra* note 13.

the required "intelligible principle." That is exactly what is occurring when the FCC attempts to jam broadband into Title II.

The utility-style rules in Title II pre-existed the Telecommunications Act of 1996. They were the rules that governed AT&T's telephone monopoly in the mid-twentieth century. Many of them—especially the tariff rules, which required AT&T to file its rates with the FCC for approval—are wildly obsolete. In line with its goal of *de*regulation, the Telecommunications Act permits the FCC to "forbear" from imposing every provision of Title II on a telecommunications service. "Logically, forbearance is a tool for lessening common carrier regulation, not expanding it."[125]

That didn't stop the 2015 Order from trying to use forbearance to hike up broadband's regulatory status. The Order forbore from imposing 27 Title II provisions. It called this "Title II tailored for the 21st century"—"tailored," here, being a euphemism for "rewritten."[126] The FCC is trying to pull the same move this time around, imposing burdensome common-carrier rules while also adopting "broad forbearance" for things like tariffs. Granted, the forbearance power appears in the statute. But the way the FCC wants to use it—as, in effect, a giant statutory red Sharpie—amounts to an exercise not in regulating but *in legislating*. The agency is trying to pick and choose from a buffet of legislative options, without an intelligible principle in the statute itself to guide the agency's choices. This is exactly what the nondelegation rule is meant to prevent.

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[125] U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381, 396 (D.C. Cir. 2017) (Brown, J., dissenting from denial of rehearing en banc).

[126] 2015 Order ¶ 5.

There is, in addition, a nondelegation problem residing in the notion that the FCC can define something as intricate as broadband as a "telecommunications service." Of course, that term is a descendent of the "basic" services identified in this agency's *Computer Inquiries*.[127] The *Computer Inquires* spotted, defined, and analyzed a distinction between "basic" and "enhanced" services. A "basic" service simply carries data along, the *Inquiries* explained, while an "enhanced" service processes data in some way during data transport. This basic/enhanced distinction was then codified into the Telecommunications Act of 1996. "Basic" services became "telecommunications," which the 1996 Act defines as the "transmission" of information "without change in the form or content of the information as sent and received."[128] "Enhanced" services, meanwhile, became "information services," which the 1996 Act defines as a service that has the "capability" to "generat[e]," "acquir[e]," "stor[e]," "transform[]," "process[]," "retriev[e]," "utiliz[e]," or "mak[e] available" information "via telecommunications."[129]

Since its earliest days—as a government-funded research project—the Internet has been a system built on routers that break data into packets, disperse the packets piecemeal across a network, and then receive, store, and recombine the packets into messages. The original router—called an Interface Message Processor—was a "sophisticated store-and-forward device" that had to "disassemble messages, store packets, check for errors, route the packets, . . . send acknowledgements for packets arriving error-free," and "reassemble

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[127] *See generally* Tom Struble, *The FCC's Computer Inquiries: The Origin Story Behind Net Neutrality*, MORNING CONSULT (May 23, 2017), https://bit.ly/3spHuED.

[128] 47 U.S.C. § 153(50).

[129] *Id.* § 153(24).

incoming packets into messages and send them up to the host machines."[130] If broadband, an exponentially more complex version of this process, is a "telecommunications service"—a *basic* service—then the distinction between "information services" and "telecommunications services" is empty, illusory. In such a world, the FCC could define any service however it wants, without any intelligible principle to get in its way. This is a second and distinct nondelegation problem.

H. Title II Reclassification Imposes Huge Costs for Speculative & Minimal Benefits

Title II reclassification, as the NPRM proposes, would not only impose immense costs and burdens; it would do so without the FCC demonstrating any actual, significant risks of harm. Such an interpretation of Title II, TechFreedom warned in *U.S. Telecom*, calls to mind the Supreme Court's 1980 *Benzene* decision, which undergirds more recent major questions jurisprudence: allowing an agency "to impose enormous costs that might produce little, if any discernible benefit . . . would make such a sweeping delegation of legislative power that it might be unconstitutional."[131] The *Benzene* Court said it would favor an alternative "construction of the statute that avoids this kind of open-ended grant." More recently, as Justice Neil Gorsuch recently noted in his concurrence *West Virginia v. EPA*, "the Court routinely enforced 'the nondelegation doctrine' through 'the interpretation of statutory

[130] KATIE HAFNER & MATTHEW LYON, WHERE WIZARDS STAY UP LATE: THE ORIGINS OF THE INTERNET 123 (1996).

[131] Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 645 (1980).

texts, and, more particularly, [by] giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.'"[132]

IV. Purported Rationales for Reclassification

The rationale for net neutrality regulation keeps changing. In 2010, the Federal Communications Commission claimed a "virtuous cycle" would promote broadband deployment.[133] In 2015, it was openness, innovation, and free expression. Yet somehow, without enforceable rules, the Internet is as open, innovative, and free as ever. Now that it faces a Supreme Court increasingly skeptical of agency power grabs, the FCC has seized on two new rationales: public safety and national security. Unless it "reclassifies" broadband as a common carrier service, like a railroad, under Title II of the Communications Act, people will literally die, or the Chinese will take over the Internet. Pick your favorite among the parade of horribles, says the NPRM.

A. "Openness" and "Free Expression"

"Reclassification," proclaims the NPRM, "is Necessary to Ensure Internet Openness…"[134] as it "would give the Commission a solid basis on which to take enforcement action against conduct that prevents consumers from fully accessing all of the critical services available through the Internet."[135] Predictably, the NPRM invokes[136] the incident

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[132] West Virginia v. Envtl. Prot. Agency, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J. concurring) (quoting Mistretta v. United States, 488 U.S. 361, 373, n. 7 (1989)).

[133] Preserving the Open Internet, WC Docket No. 07-52, FCC 10-201, ¶ 38 (Dec. 21, 2010), https://docs.fcc.gov/public/attachments/FCC-10-201A1.pdf.

[134] NPRM ¶ 21.

[135] *Id.* ¶ 23.

[136] *Id.* n. 432.

that first led the FCC to attempt to police a supposed net neutrality violation back in 2008: Comcast was accused of blocking BitTorrent traffic.[137] Then and since, Comcast struggled to explain what had really happened: intensive file-sharing traffic was causing such severe latency and jitter that it made Voice over Internet Protocol (VoIP) telephony unusable.[138] One 2007 study "found that just 15 active BitTorrent users on a cable link shared among 400 total users could cause VoIP call quality to fall below a usable performance threshold."[139] Comcast wanted to launch its VoIP offering with dedicated network capacity but feared accusations of making it impossible for rival VoIP services to compete.[140] Throttling BitTorrent was *pro*-competitive: it aimed to enable consumers to use the Internet in way that everyone today now takes for granted.

The 2010 and 2015 Orders claimed that not only "openness" and "innovation" but also "free expression" and "free speech" were in peril; these claims were central to the rationale for both orders.[141] Yet the NPRM provides just one example of non-neutrality threatening "openness" and "free expression." Days after January 6, 2021, Facebook and

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[137] *See generally* Formal Complaint of Free Press and Public Knowledge Against Comcast Cormporation for Secretly Degrading Peer-to-Peer Applications, WC Docket No. 07-52, FCC 08-183 (2008), https://docs.fcc.gov/public/attachments/FCC-08-183A1.pdf.

[138] *See generally* Tyler Webb, *VoIP Jitter and Latency*, GETVOIP (June 14, 2023), https://getvoip.com/blog/voip-jitter-and-latency/.

[139] Alissa Cooper, How Regulation and Competition Discrimination in Broadband Traffic Management 112 (Sept. 2013) (unpublished Ph.D. thesis, Univ. of Oxford), https://alissacooper-dotcom.files.wordpress.com/2017/12/chapter5-final.pdf.

[140] *See* Richard Woundy & Jason Livingood, Comcast, IETF P2P Infrastructure Workshop Presentation 4 (May 28, 2008), http://downloads.comcast.net/docs/Comcast-IETF-P2Pi-20080528.pdf.

[141] The 2015 Order used the term "free expression" 20 times. *See generally* 2015 Order.

Twitter banned former President Donald Trump for his role in the assault on the Capitol.[142] YourT1Wifi announced that it would block the social media sites to protest their "censorship."[143] After sharp criticism, the tiny rural Idaho ISP relented. Market forces worked.

But it turns out that those rules wouldn't have applied to any ISP that fully disclosed the non-neutral nature of its service. That bombshell was dropped in 2017, not by critics of the FCC, but by the appellate judges who upheld the FCC's 2015 Order.[144] The FCC could still police *surreptitious* blocking, throttling, or discrimination among content, services, and apps—but then, the Federal Trade Commission can already do that; it just hasn't needed to. The FCC also insists that neither the FTC nor standard consumer protection law are adequate, so it must reclassify BIAS as a common carriage under Title II.[145] That would displace the authority of the FTC, which can't police common carrier services. Yet whether Title II applied would turn on whether a service was marketed to, or understood by consumers as, neutral—just as in FTC cases about deceptive marketing. And the differences in the two agencies' approaches to net neutrality are far smaller than the FCC claims.

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[142] Kate Conger et al., *Twitter and Facebook Lock Trump's Accounts After Violence on Capitol Hill*, N.Y. TIMES (Jan. 6, 2021), https://www.nytimes.com/2021/01/06/technology/capitol-twitter-facebook-trump.html.

[143] *See* Associated Press, *Your T1 WIFI, Idaho internet provider, to block Facebook, Twitter over censorship*, THE WASHINGTON TIMES (Jan. 11, 2021), https://www.washington-times.com/news/2021/jan/11/your-t1-wifi-idaho-internet-provider-block-faceboo/.

[144] *See infra* note 150.

[145] NPRM n. 448 ("[W]e believe the FTC's new approach to competition oversight is still fundamentally geared towards protecting competition rather than consumers.").

1. The 2015 Order Survived a First Amendment Challenge Because It Excluded Transparently Non-Neutral Services

The 2015 Order said BIAS providers "represent that their services allow Internet end users to access all or substantially all content on the Internet, without alteration, blocking, or editorial intervention."[146] This caveat attracted scant attention, but it overcame the First Amendment challenge by Alamo Broadband, a small Texas ISP.[147] In *U.S. Telecom v. FCC*, a three-judge panel addressed that challenge as well as large ISPs' challenge to Title II reclassification, upholding the 2015 Order.[148] Judges Sri Srinivasan and David Tatel saw no "First Amendment concern" because common carriers "merely facilitate the transmission of the speech of others rather than engage in speech in their own right."[149] The full appeals court declined to rehear their decision.[150] Brett Kavanaugh dissented. Then a D.C. Circuit judge, he argued that imposing "must-carry" mandates (a key aspect of common carriage regulation) on ISPs violated their First Amendment rights.[151]

Judges Srinivasan and Tatel were much clearer in this round of litigation: under the 2015 Order, "an ISP remains free to offer 'edited' services without becoming subject to the rule's requirements."[152] While the rule "applies to those ISPs that hold themselves out as

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[146] 2015 Order ¶ 549.

[147] *See* Brief of Petitioners, U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, No. 15-1063 (D. C. Cir. Dec. 4, 2015), https://www.eff.org/files/2015/10/05/joint_petitioner_reply_brief_filed_by_al-amo_broadband.pdf.

[148] U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 825 F.3d 674 (D.C. Cir. 2016).

[149] *Id.* at 741.

[150] U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381 (D.C. Cir. 2017) (order, and accompanying opinions, denying petitions for rehearing en banc).

[151] *Id.* at 427 (Kavanaugh, J., dissenting).

[152] *Id.* at 389.

neutral, indiscriminate conduits to internet content . . . , the rule does not apply to an ISP holding itself out as providing something other than a neutral, indiscriminate pathway."[153] Thus "an ISP wishing to provide access solely to 'family friendly websites' . . . so long as it represents itself as engaging in editorial intervention of that kind, would fall outside the rule."[154] Its non-BIAS service would be private carriage, and thus fall under the FTC's jurisdiction. Such an ISP need only make "sufficiently clear to potential customers that it provides a filtered service involving the ISP's exercise of 'editorial intervention.'"[155]

Critically, Srinivasan and Tatel thought the same would apply to "an ISP that engages in other forms of editorial intervention, such as throttling of certain applications chosen by the ISP, or filtering of content into fast (and slow) lanes based on the ISP's commercial interests."[156] So the FCC's "clear, bright-line" rules did less than many had imagined. The 2015 Order, by its own admission, merely served "to 'fulfill the reasonable expectations of a customer who signs up for a broadband service that promises access to all of the lawful Internet' without editorial intervention."[157] Kavanaugh agreed that this narrow reading of the rule's applicability "would of course avoid any First Amendment problem."

This is obviously the crux of the issue, yet the current NPRM barely mentions it.[158] You can't expect the emperor to ask whether he's naked. Instead, the NPRM asks if there is

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[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.* at 390.

[157] *Id.* at 389; 2015 Order ¶ 17.

[158] Protecting and Promoting the Open Internet, Notice of Proposed Rulemaking, GN Docket No. 14-28, FCC 14-61, ¶ 218 (May 15, 2014), https://docs.fcc.gov/public/attachments/FCC-14-61A1.pdf.

"any reason to depart from" the longstanding definition of BIAS,[159] which lets the FCC quibble over whether a service "provides the capability to transmit data to and receive data *from all or substantially all Internet endpoints*" or whether a service is the "functional equivalent of [BIAS]."[160] But for Srinivasan and Tatel, the degree of non-neutrality was immaterial; what mattered was whether consumers understood the non-neutral nature of the offering.

Srinivasan and Tatel said nothing to suggest that a broader definition would pass First Amendment muster; certainly, it would fail now-Justice Kavanaugh's test. It would likely also exceed the Communications Act's definition of "telecommunications" (common carriage) as "the transmission, between or among points specified by the user, *of information of the user's choosing*"—in other words, uncurated service.[161] Expanding the definition of BIAS would make it even harder for the FCC to overcome the other half of Kavanaugh's *U.S. Telecom* dissent, about the major questions doctrine.[162] So the current definition is likely the outer boundary of what the FCC has any chance of persuading the Supreme Court to accept.[163]

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[159] NPRM ¶ 59.

[160] *Id.*

[161] 47 U.S.C. § 153(50).

[162] *See U.S. Telecom v. FCC*, 855 F.3d at 402-05 (Kavanaugh, J., dissenting).

[163] It's true that this is all rather preliminary: dueling opinions about the denial of rehearing of a panel decision on a complex constitutional issue that no party had really briefed with no dissent on that issue below. But until a court says otherwise, the FCC's ability to regulate a broadband service necessarily turns on that service's marketing claims.

2. Even with Title II, What Could the FCC Actually Do About Non-Neutrality?

Both the FCC's and FTC's approaches would turn on marketing claims, but note the difference. A single non-neutral practice, if adequately disclosed, would make a service non-BIAS. Title II wouldn't apply—even to other non-neutral aspects of that service that were not adequately disclosed. For the FTC, the fully disclosed non-neutral practice might not be deceptive, but other aspects of the service could still be subject to FTC deception suits. And even if fully disclosed, non-neutral practices could be subject to FTC suit as unfair or anticompetitive. So are the two agencies' approaches to neutrality really as different as the FCC claims?

a. Baseline Case: Clear Policies & Undisclosed Non-Neutrality

If ISPs failed to deliver neutrality as promised, the FTC could bring a deception claim just as easily as the FCC could enforce its Title II rules.[164] Even without evidence of consumer injury, any deviation from the very clear neutrality commitments made by nearly all ISPs—and all large ISPs—would constitute deception. Consider how clear those commitments are: "We do not block, slow down or discriminate against lawful content."[165] Or: "We don't . . . otherwise interfere with the online activity of our customers."[166] Such claims would be easily enforceable in a deception case.

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[164] *See infra* Section IV.2.b. *See also* Fed. Trade Comm'n, Policy Statement on Deception (appended to Cliffdale Associates, 103 F.T.C. 110, 174 (1984)), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf (hereinafter DPS).

[165] *Open Internet*, COMCAST, https://corporate.comcast.com/openinternet (last visited Dec. 13, 2023).

[166] *An Open Internet Framework for the Broadband of the Future*, CHARTER, https://policy.charter.com/blog/open-internet-framework-broadband-future (last visited Dec. 13, 2023).

b. Changed Policies & Disclosed Non-Neutrality

Srinivasan and Tatel thought "it would be no small matter" for an ISP to "render the FCC's Order inapplicable by advertising to consumers that it offers an edited service rather than an unfiltered pathway."[167] The FCC has long said it follows the FTC's 1983 Deception Policy Statement (DPS)[168] as the bedrock of American consumer protection law. The Commission would be wise to continue doing do because the FTC's approach has proven consistent with the First Amendment, and deviating from the FTC's approach would only make it harder for the FCC to avoid First Amendment challenge.

The DPS requires that "material" information be disclosed "to prevent the claim, practice, or sale from being misleading." Disclosure must be "clear and conspicuous,"[169] meaning that "consumers notice it, read it, and understand it."[170] Likewise, Srinivasan and Tatel said, quoting the 2015 Order: "It would not be enough . . . for 'consumer permission' to be 'buried in a service plan—the threats of consumer deception and confusion are simply too great.'"[171]

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[167] *U.S. Telecom v. FCC*, 855 F.3d at 390.

[168] "The FCC has found that unfair and deceptive marketing practices by common carriers constitute unjust and unreasonable practices under section 201(b). Principles of truth-in-advertising law developed by the FTC under Section 5 of the FTC Act provide helpful guidance to carriers regarding how to comply with section 201(b) of the Communications Act in this context." Fed. Commc'ns Comm'n, Joint FCC/FTC Policy Statement For the Advertising of Dial-Around And Other Long-Distance Services To Consumers, FCC 00-72 (Mar. 1, 2000), https://docs.fcc.gov/public/attachments/FCC-00-72A1.pdf.

[169] FED. TRADE COMM'N, .COM DISCLOSURES 5 (Mar. 2013), https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf.

[170] Lesley Fair, *Full Disclosure*, FED. TRADE COMM'N (Sept. 23, 2014), https://www.ftc.gov/business-guidance/blog/2014/09/full-disclosure.

[171] *U.S. Telecom v. FCC*, 855 F.3d at 390.

Materiality is key to deception claims. If, explains the DPS, a claim or practice "is likely to affect the consumer's conduct or decision with regard to a product or service . . . , the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception."[172] Express claims, like Comcast's and Charter's promises of neutrality, are *presumptively* material because sellers make marketing claims to influence buyers.

Likewise, "information pertaining to the central characteristics of the product or service will be presumed material"—"depending on the facts."[173] This turns on the "expectations and understandings of the typical buyer." The Center for Democracy & Technology, as quoted in the FTC's 2007 Broadband Connectivity Competition Policy report,[174] explained that "consumers traditionally expect 'that Internet access entails the ability of users to communicate with any and all other Internet users without interference from one's own ISP.'"[175] CDT is probably right, but as the FTC report noted: "Whether particular network management practices will be material to consumers (and therefore must be disclosed), cannot be determined in the abstract, but will require an examination of specific practices and consumer expectations."[176] Proving the materiality of net neutrality shouldn't be hard if it's really as vital as the FCC claims.

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[172] DPS at 1.

[173] *Id.* at 5.

[174] BROADBAND CONNECTIVITY COMPETITION POLICY STAFF REPORT, FED. TRADE COMM'N (2007), https://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf (hereinafter FTC BROADBAND REPORT).

[175] *Id.* at 132-133.

[176] *Id.*

c. Unclear or Silent Policies (e.g., YourT1Wifi)

YourT1Wifi has no open Internet policy comparable to large ISPs'. The FCC could assert jurisdiction over a similarly situated provider by invoking two principles well-established by the FTC in its deception cases, which the FCC can apply without the need for Title II regulation.[177] First, if non-neutrality is material, failing to mention it would be an actionable omission.

The second is even easier. If a publisher sells an abridged version of a book, it must clearly and conspicuously disclose that the book is abridged. Why? "The offering of a book for sale constitutes an implicit representation that the book contains the entire original text," argued the FTC (successfully) in the 1950s.[178] The same goes for YourT1Wifi's promise of "High Speed, Unlimited Data Low Latency Internet!!"[179]: it implies that consumers can access the entire—"unabridged"—Internet. In both cases, a less-than-complete offering "unquestionably has the capacity and tendency to deceive and mislead prospective purchasers."[180] More generally, "by the very act of offering goods for sale the seller impliedly represents that they are reasonably fit for their intended uses."[181]

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[177] The FCC has followed the FTC's approach to defining deception. *See supra* note 168 and associated text.

[178] New Am. Library of W.L. v. Fed. Trade Comm'n, 213 F.2d 143 (2d Cir. 1954).

[179] YOURT1WIFI.COM, https://yourt1wifi.com/Home.php (last visited Dec. 14, 2023).

[180] *New American Library*, 213 F.2d at 145.

[181] International Harvester Co., 104 F.T.C. 949, 1058 (1984), https://www.ftc.gov/sites/default/files/documents/commission_decision_volumes/volume-104/ftc_volume_decision_104__july_-_december_1984pages949_-_1088.pdf#page=110.

If the FCC had not insisted on bringing an enforcement action against Comcast for its undisclosed blocking of BitTorrent in 2008,[182] the FTC might well have done so based on these two concepts.

d. Notice of Discontinuation of Neutral Service

If, asked the FTC's 2007 report, "a provider begins to differentiate traffic among various content and applications providers in the midst of [a broadband] contract, how will it notify [subscribers]"?[183] It wasn't enough for AT&T to notify customers by email and text message that those "with unlimited data plans whose usage is in the top 5% of users can still use unlimited data but may see reduced data speeds for the rest of their monthly billing cycle."[184] AT&T recently paid $60 million to settle this case,[185] agreeing to provide clear and conspicuous disclosure of any restrictions on "unlimited" plans.[186] Reducing speeds, AT&T effectively conceded, was material to consumers. Why not blocking, throttling, or discrimination, too?

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[182] *See supra* Section IV.A.

[183] FTC BROADBAND REPORT at 134.

[184] Complaint, Fed. Trade Comm'n v. AT&T Mobility LLC, 14-CV-04785, ¶ 35 (Oct. 28, 2014), https://www.ftc.gov/system/files/documents/cases/141028attcmpt.pdf.

[185] Press Release, Fed. Trade Comm'n, Wireless Customers Who Were Subject to Data Throttling by AT&T Can Apply for a Payment from the FTC (Jan. 19, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/wireless-customers-who-were-subject-data-throttling-att-can-apply-payment-ftc.

[186] Proposed Stipulated Order for Permanent Injunction & Monetary Judgment, Fed. Trade Comm'n v. AT&T Mobility LLC, 14-CV-04785, at 5 (Dec. 4, 2019), https://www.ftc.gov/system/files/documents/cases/att_mobility_llc_doc_201_2019-12-04_permanent_injunction_monetary_judgment_003.pdf.

e. Regulating Disclosure

In each of these cases, clear FTC case law would require disclosure—as would the FCC's 2015 Order's transparency rule. That rule exempted ISPs with <100,000 subscribers.[187] Even as the 2018 Order returned BIAS to its lightly regulated Title I status, it maintained and tightened the transparency rule to require disclosure of all non-neutral practices[188] by *all* ISPs.[189] Yet this requirement has gone unenforced, even under a Democratic FCC Chair. Enforcement would help the FCC show that a service is BIAS and also aid FTC deception claims.

f. Beyond Disclosure: Mandating Neutral Service

The FTC couldn't compel an ISP to continue offering neutral service after the contracts that promise it end—but neither could the FCC. Yes, Section 214 of the Communications Act says common carriers can't "discontinue, reduce, or impair service" without FCC approval.[190] That may apply to, say, retiring copper wire networks,[191] but if the FCC tried to force an ISP to continue to provide BIAS, its rules would no longer be "voluntary"; it would force carriage of speech, exactly as then-Judge Kavanaugh argued.

g. Discontinuing Neutral Service

What if, asks the FTC's 2007 report, an ISP switches to offering non-neutral service and "a subscriber does not consent to such a change, but the provider implements it

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[187] 2015 Order ¶ 174.

[188] RIF Order ¶¶ 219-20.

[189] RIF Order ¶ 227.

[190] *See* 47 U.S.C. § 214.

[191] *See supra* note 57.

anyway?"[192] The FCC would be powerless: there would be no BIAS to regulate. The FTC might be able to hold ISPs to their contracts using its unfairness power. In the classic case noted by the 2007 report, it was unfair for an extermination company to change the terms of its customers' lifetime service contracts by charging annual renewal fees.[193]

Some Title II advocates doubt[194] the FTC could prove that net neutrality violations produced the "substantial injury to consumers" required by the FTC Act.[195] But why not, if the harms of non-neutrality are even half as dire as the FCC claims? The FTC's 1980 Unfairness Policy Statement recognizes more than financial injuries.[196] While injury must be more than "trivial or merely speculative . . . [a]n injury may be sufficiently substantial . . . if it does a small harm to a large number of people, or if it raises a significant risk of concrete harm." Through case-by-case enforcement, the FTC has gradually expanded its conception of harm for "informational injuries" in privacy cases.[197] Why wouldn't the same happen for net neutrality—assuming real problems actually started arising?

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[192] FTC BROADBAND REPORT at 134.

[193] Orkin Exterminating Co., Inc. v. Fed. Trade Comm'n, 849 F.2d 1354, 1367 (11th Cir. 1988).

[194] *See, e.g.*, Harold Feld, *Can the FTC Really Handle Net Neutrality? Let's Check Against the 4 Most Famous Violations*, WETMACHINE (Dec. 11, 2017, 4:05 PM), https://wetmachine.com/tales-of-the-sausage-factory/can-the-ftc-really-handle-net-neutrality-lets-check-against-the-4-most-famous-violations/.

[195] 15 U.S.C. § 45(n).

[196] Fed. Trade Comm'n, Policy Statement on Unfairness n. 12 (appended to International Harvester Co., 104 F.T.C. 949, 1070 (1984)), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness.

[197] Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm'n, Painting the Privacy Landscape: Informational Injury in FTC Privacy and Data Security Cases 2 (Sept. 19, 2017), https://www.ftc.gov/system/files/documents/public_statements/1255113/privacy_speech_mkohlhausen.pdf.

Injury must also not be "reasonably avoidable by consumers themselves."[198] If non-neutrality isn't clearly disclosed, there's no way consumers can avoid it. That may also be true if consumers can't readily switch to a neutral option, even if the non-neutrality *is* disclosed. Finally, injury cannot be "outweighed by countervailing benefits to consumers or to competition."[199] While some forms of non-neutrality might offer such benefits, the FTC would not have a difficult time in arguing that to forcing consumers to switch to non-neutral service during a contract for neutral service has no such benefits.

h. Self-Preferencing

The FTC has another tool the FCC lacks. Suppose a clearly disclosed non-neutral practice advantaged the ISP or its business partners over their rivals—say, if Comcast charged Netflix tolls but not Peacock, Comcast's sister company. The service wouldn't be BIAS, so the FCC would lack jurisdiction. While such conduct likely would not violate the Sherman or Clayton Acts absent a showing of market power,[200] the FTC could still sue under its increasingly broad conception of what constitutes an "unfair method of competition"[201] without showing the harm to consumer welfare that antitrust law would require.

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[198] 15 U.S.C. § 45(n).

[199] *Id*.

[200] *See* Herbert Hovenkamp, *Antitrust and Self-Preferencing*, 38 ANTITRUST 5 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4526022.

[201] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition, File No. P221202 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

3. The FCC's Supposed Advantages over the FTC

The NPRM doesn't parse such comparisons. Instead, it claims "reclassification . . . is necessary to unlock tools the Commission needs . . . to safeguard this vital service."[202] Three institutional aspects of the FCC's approach are supposedly essential.

a. The Complaint Process

The two agencies handle "informal" complaints the same way.[203] But the NPRM insists that "formal" complaints are what really matters. Formal complainants could, under the 2015 Order, "participate in an [FCC] adjudicatory proceeding."[204] But the same goes for the FTC: anyone can request to participate as an intervenor.[205] Neither process requires proof of standing, as would intervenors in federal court, so watchdog groups would qualify either way.[206] The FCC's process offers complainants one advantage: their complaint goes straight to an ISP without a Commission vote, forcing the ISP to respond within 20 days. But in either case, only each Commission can require more.

The downside to the FCC's approach is larger: reclassification would deprive the FTC of jurisdiction; only Title II would apply, and only the FCC can enforce Title II. So if the FCC didn't act—say, because Republicans controlled it—a complaint would stall. Consumer

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[202] NPRM ¶ 21.

[203] The 2015 Order said the FCC's informal complaint mechanism "provide[s] end users, edge providers, and others with a simple and efficient vehicle for bringing potential open Internet violations to the attention of the Commission." 2015 Order ¶ 226. The FTC's equivalent process is by far the leading way for consumers to complain about business conduct. *See* REPORTFRAUD, https://reportfraud.ftc.gov/#/ (last visited Dec. 14, 2023).

[204] 2015 Order, Appendix A. *See also* Preserving the Open Internet & Broadband Industry Practices, GN Docket No. 09-191 & WC Docket No. 07-52, FCC 10-201, Appendix B (Dec. 21, 2010), https://docs.fcc.gov/public/attachments/FCC-10-201A1.pdf.

[205] 16 C.F.R. § 3.14.

[206] *See* Fed. R. Civ. P. 24, https://www.law.cornell.edu/rules/frcp/rule_24.

protection and competition law, by contrast, can always be enforced by other parties, so the FTC can't block enforcement through inactivity. Forty-nine state "Baby FTC" acts allow private parties to sue.[207] The 25 top ISPs all operate in at least one of the 22 states with a Democratic state attorney general.[208] Surely one of them would not hesitate to bring an enforcement action if one had merit.

b. Rulemaking

The NPRM claims restoring Title II and the 2015 rules would provide "clarity." It says the FTC's approach isn't clear enough because "the FTC has generally proceeded through *ex post* enforcement actions and public guidance" while Title II would "allow the [FCC] to proceed by establishing *ex ante*, commonly applicable rules" against blocking, throttling, and discrimination.[209] This is a false dichotomy. As we've seen, whether the FCC's Title II applies depends on case-by-case analysis of marketing representations, just like the FTC's deception power. And even when Title II applies, the FCC's "rules" are neither as "clear" nor as "bright-line" as the FCC claims.

Both the blocking and throttling rules are "subject to reasonable network management." Here, too, the 2015 Order "maintain[ed] a case-by-case approach," lest this exception "circumvent the open Internet rules while still allowing broadband providers flexibility to experiment and innovate as they reasonably manage their networks." "To provide greater clarity and further inform the Commission's case-by-case analysis," the

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[207] *See generally Consumer Protection Laws: 50-State Survey*, JUSTIA, https://www.justia.com/consumer/consumer-protection-laws-50-state-survey/ (last visited Dec. 14, 2023).

[208] *See generally State Attorneys General Map*, CROWELL, https://www.crowell.com/en/resources/state-attorneys-general-map (last visited Dec. 14, 2023).

[209] NPRM ¶ 139.

Order offered five short paragraphs of "guidance regarding legitimate network management purposes."[210] This offers no real guidance at all, apart from vaguely noting the "additional challenges involved in mobile broadband network management" and the "specific network management needs" of "providers relying on unlicensed Wi-Fi networks."[211]

In no way is the FCC's approach "clearer" than the FTC's. The main difference is in burdens of proof: While the FCC would bear the burden of proving that Title II applies in the first place, and formal complainants would bear the burden of establishing a prima facie rule violation, the rules place the real burden on ISPs to prove their innocence—as common carriers under Title II generally must do.[212] This is a key aspect of the major question presented by Title II reclassification: shifting the burden from the government to ISPs.

c. Deterrence & Penalties

The NPRM claims the FTC under-deters abuse: unlike the FCC, the FTC can't generally impose civil penalties. But with just two examples of non-neutrality—YourT1Wifi backed down quickly, and Santa Clara's plan wasn't BIAS anyway—what is there to deter, really?

In any event, the FCC understates the FTC's capacity for deterrence. When the FTC wins or settles suits, it requires detailed compliance plans, which strongly deter bad future behavior by that company. Such plans could require neutrality—enforceable with stiff

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[210] 2015 Order ¶¶ 220-24.

[211] The FCC explicitly "decline[d] to adopt a more detailed definition of reasonable network management" because "[c]ase-by-case analysis will allow the Commission to use the conduct-based rules adopted today to take action against practices that are known to harm consumers without interfering with broadband providers' beneficial network management practices." *Id.* ¶ 222.

[212] *See, e.g.*, Nat'l Commc'ns Ass'n v. AT&T Corp., 238 F.3d 124, 127 (2d Cir. 2001).

penalties. They are generally onerous enough to deter other companies from engaging in similar conduct.

Moreover, the FTC has three potential ways to impose civil penalties, all of which it has begun using aggressively. First, it could try to make a rule barring non-neutral practices as unfair methods of competition. It's doubtful whether the courts will accept the FTC's claim to such authority,[213] but if the courts reject the FCC's net neutrality rule before they reject the FTC's UMC rulemaking claim, count on the FTC to launch a net neutrality rulemaking as soon as the FCC loses.

Second, the FTC has clear authority to make rules governing unfair or deceptive acts and practices.[214] It could make a Magnuson-Moss rule after concluding an administrative enforcement action or if it believes there is a "widespread pattern of unfair or deceptive acts or practices."[215] Third, after such an enforcement action, the FTC could notify other ISPs that it has determined that specific non-neutral practice to be unfair or deceptive. If, despite such notice, another ISP did something sufficiently similar, the Commission could argue that it had "actual knowledge" that such conduct was unlawful, and thus use its "penalty offense authority."[216]

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[213] Berin Szóka & Corbin Barthold, *The Constitutional Revolution That Wasn't: Why the FTC Isn't a Second National Legislature,* CONCURRENCES (June 2022), https://techfreedom.org/wp-content/uploads/2022/06/FTC-UMC-Rulemaking-Authority-TF-Version.pdf.

[214] 15 U.S.C. § 57(a).

[215] *Id.*

[216] *See generally* Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 170 PA. L. REV. 71 (2021), https://www.pennlawreview.com/wp-content/uploads/2022/02/Chopra_Final-2.5.22.pdf.

B. Protecting Public Safety

For this rationale, FCC Chair Jessica Rosenworcel relies heavily on a single incident. In 2018, the Republican-led FCC returned broadband to Title I, the lighter regulatory approach. Months later, "when firefighters in Santa Clara, California, were responding to wildfires they discovered the wireless connectivity on one of their command vehicles was being throttled," Rosenworcel claims.[217] "With Title II classification, the FCC would have the authority to intervene," she said separately.[218]

She is mistaken. Title II doesn't apply to data plans marketed to government users; both the 2015 Order and the NPRM define BIAS as a "mass-market retail service" offered "directly to the public."[219] Even if Title II had applied, the FCC's rules wouldn't have addressed the unique confusion that occurred in Santa Clara, which involved the fire department buying a plan that was obviously inadequate for its needs, Verizon recommending a better plan, and the department refusing. But that isn't really the point. The point is that the FCC needed to shift its speculation about the possible impacts of blocking, throttling, or discrimination to something that seemed more tangible than abstractions like

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[217] Jessica Rosenworcel, Chairwoman, Fed. Commc'ns Comm'n, Remarks at the National Press Club 4 (Sept. 26, 2023), https://docs.fcc.gov/public/attachments/DOC-397257A1.pdf. *See also* Jon Brodkin, *Fire dept. rejects Verizon's "customer support mistake" excuse for throttling*, ARS TECHNICA (Aug. 22, 2018, 12:15 PM), https://arstechnica.com/tech-policy/2018/08/fire-dept-rejects-verizons-customer-support-mistake-excuse-for-throttling/.

[218] Jessica Rosenworcel, Chairwoman, Fed. Commc'ns Comm'n, Statement on Safeguarding and Securing the Open Internet 1 (Oct. 19, 2023), https://docs.fcc.gov/public/attachments/FCC-23-83A2.pdf. *See also* Gigi Sohn, *Verizon couldn't have restricted Santa Clara County's internet service during the fires under net neutrality*, NBC NEWS (Aug. 24, 2018, 10:35 AM), https://www.nbcnews.com/think/opinion/verizon-couldn-t-have-restricted-santa-clara-county-s-phone-ncna903531.

[219] 2015 Order ¶¶ 25, 363.

"openness." Invoking the Santa Clara kerfuffle may make the stakes *seem* higher, but it won't change how courts apply the major question doctrine.

1. The NPRM Gets Its History Wrong

The 2015 Order recognized that non-neutrality—treating some apps, services, or content differently—was vital to protecting public safety. The FCC's 2014 NPRM that preceded it recognized[220] that the Internet is a "best efforts" system.[221] Unlike, say, the 911 system, the Internet may stop working during a power outage, so no one can reasonably expect it to serve as a comprehensive, faultless, guaranteed emergency system.[222] Thus, the 2015 Order explicitly blessed prioritization of applications, content, services, and users that might be needed to "address the needs of emergency communications or law enforcement, public safety, or national security authorities."[223]

Accordingly, when the 2018 Order returned broadband to Title I, it said little about public safety. The NPRM relies heavily on the *Mozilla* decision, which upheld returning broadband to Title I, but remanded some issues to the FCC for further consideration.[224] Santa Clara County filed a supplemental affidavit in the *Mozilla* case alleging that Verizon

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[220] Protecting and Promoting the Open Internet, Notice of Proposed Rulemaking, GN Docket No. 14-28, FCC 14-61, ¶ 102 (May 15, 2014), https://docs.fcc.gov/public/attachments/FCC-14-61A1.pdf.

[221] Comments of TechFreedom In the Matter of Amendment of Part 11 of the Commission's Rules Regarding the Emergency Alert System, PS Docket No. 15-94 & 15-91, at 4 (May 14, 2021), https://techfreedom.org/wp-content/uploads/2021/05/TF-Draft-Comments-WEA-NOI-5-14-21.pdf.

[222] Brief of TechFreedom as Amicus Curiae Supporting Appellants, ACA Connects v. Bonta, 24 F.4th 1233 (9th Cir. 2022) (No. 21-15430), https://techfreedom.org/wp-content/uploads/2021/04/File-Stamped-TechFreedom-Brief-21-15430-9th-Cir.pdf.

[223] 2015 Order ¶¶ 301-303.

[224] Mozilla Corp. v. Fed. Commc'ns Comm'n, 940 F.3d 1, 97 (D.C. Cir. 2019).

"throttled" the mobile data usage of Santa Clara's Fire Prevention District (FPD) while it fought the largest wildfire in California history.[225] The appeals court warned that, "unlike most harms to edge providers incurred because of discriminatory practices by broadband providers"—harms that remain as conjectural as ever—"the harms from blocking and throttling during a public safety emergency are irreparable. People could be injured or die."[226]

The NPRM leans heavily on this brief discussion. "The record before the court demonstrated," Chair Rosenworcel claims, "that as a result of Title II repeal, the FCC didn't have any authority to intervene to fix" the throttling of the Santa Clara Fire Protection District's data service.[227] But the court didn't scrutinize Santa Clara's claims—because they weren't properly briefed. All the *Mozilla* court really said was that the FCC must address the issue.[228]

2. Title II Wouldn't Have Applied Anyway

The Communications Act specifies that "public safety services" are those which are "not made commercially available to the public by the provider."[229] Accordingly, the 2015 Order explicitly "excluded [such services] from the definition of mobile [BIAS]."[230] Likewise,

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[225] Addendum to Brief for Government Petitioners, Mozilla Corp. v. Fed. Commc'ns Comm'n, No. 18-1051, at 3 (Aug. 20, 2018), https://cdn.arstechnica.net/wp-content/uploads/2018/08/fire-department-net-neutrality.pdf.

[226] *Mozilla*, 940 F.3d at 62.

[227] Jessica Rosenworcel, Chairwoman, Fed. Commc'ns Comm'n, Remarks at the National Press Club 4 (Sept. 26, 2023), https://docs.fcc.gov/public/attachments/DOC-397257A1.pdf.

[228] *Mozilla*, 940 F.3d at 63.

[229] 47 U.S.C. § 337.

[230] 2015 Order n. 461.

the Act defines a "telecommunications service" (the thing Title II covers) as "the offering of telecommunications for a fee *directly to the public*."[231] Accordingly, the 2015 Order applied Title II only to "broadband Internet access service" (BIAS), defined as a "mass-market retail service" offered "directly to the public."[232]

But, as Verizon explains, first responders rely on "sophisticated contracts similar to other large agreements that government entities use to buy most goods and services on favorable terms for a fair price."[233] Because these plans are offered only to government users, they *can't* be covered by Title II—or by net neutrality rules, which apply only to BIAS.

3. Indirect Effects on Public Safety

California's lawyers later conceded that the "throttling" they complained about "would not be redressed even were they to prevail" in restoring Title II.[234] In 2021, Santa Clara asked the FCC to reconsider its 2018 return to Title I, carefully shifting their focus to ways "mass-market BIAS plans" might, conceivably, affect public safety.[235]

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[231] 47 U.S.C. § 153(53).

[232] 2015 Order ¶¶ 25, 363.

[233] Letter from Kathleen M. Grillo, Verizon, to Senators Dianne Feinstein and Kamala Harris (Sept. 13, 2018), https://www.ustelecom.org/wp-content/uploads/2018/10/Mozilla-v.-FCC-Intervenor-Brief.pdf#page=63.

[234] Brief for Respondent at 95, Mozilla Corp. v. Fed. Commc'ns Comm'n, No. 18-1051 (D.C. Cir. Oct. 11, 2018), https://docs.fcc.gov/public/attachments/DOC-354525A1.pdf.

[235] Petition for Reconsideration of the County of Santa Clara and Santa Clara County Central Fire Protection District of the Order on Remand, DA FCC-20-151 5 (Feb. 8, 2021), https://counsel.scc-gov.org/sites/g/files/exjcpb426/files/%20County%20of%20Santa%20Clara/20210208_SantaClaraPetitionForReconsideration_NetNeutrality.pdf ("As the COVID-19 pandemic pushes ever more public safety officials . . . to work from home over mass-market BIAS connections . . . the public-safety risks . . . pile up.").

Now, the NPRM claims that public safety entities and first responders "often rely on [BIAS] to communicate during emergency situations," to "access various databases, share data with emergency responders, and stream video into 911 and emergency operations centers," to notify the public via social media about emergencies, "to gain valuable information from the public," and to "build on-the-ground situational awareness."[236]

Of course, the FCC could address surreptitious blocking, throttling, or discrimination, but then, the Federal Trade Commission can already do that, which explains why those things just haven't been problems.[237] So the FCC would end up applying Title II only where there isn't a problem anyway.[238] The main difference is that the FCC would have an easier time making new rules,[239] and the FTC couldn't make prophylactic public safety rules. But for what public safety issues, exactly?

The NPRM provides a few examples, notably "requiring ISPs to transmit emergency alerts to their subscribers" and to offer "prioritized routing for all IP-based services and prioritized restoration for all networks."[240] If these are, indeed, urgent matters of public safety, how did the FCC miss them completely in the 2015 Order? (The FCC had already recognized the beginning of the transition to all-IP telephony years earlier.[241]) If lives are really on the line without Title II, why did the Chair wait to act until she had a Democratic

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[236] NPRM ¶ 34.

[237] *See supra* Part II.

[238] *See supra* Part IV.

[239] *See supra* Section IV.A.3.

[240] NPRM ¶ 35.

[241] Fed. Commc'ns Comm'n Chairman Tom Wheeler, *The IP Transition: Starting Now*, FCC (Nov. 19, 2023), https://www.fcc.gov/news-events/blog/2013/11/19/ip-transition-starting-now.

majority for Title II—nearly three years after taking the helm at the FCC? Why did she not ask Congress for new public safety authority immediately? She didn't mention these issues when discussing public safety in Congressional testimony.[242] Surely even a deadlocked 2-2 Commission could have reached consensus on asking Congress for authority to resolve a genuine public safety crisis. Surely even a dysfunctional Congress could have addressed such a crisis with targeted authority in any number of must-pass bills, or in the 2021 Infrastructure Act, which included multiple provisions addressed at the FCC.

The NPRM uses "public safety" as an incantation, a way of summoning the vast powers of Title II. What the Santa Clara incident illustrates is just how easily Title II could be used, in the name of public safety, to regulate BIAS in ways that aren't really about net neutrality—or public safety.

4. The Santa Clara Kerfuffle: What Actually Happened

The Santa Clara incident is about confusion and, ultimately, rates. Things started to go wrong when FPD first chose the data plan for a critical device that streamed video and other data in its mobile command-and-control center. Such vehicles allow firefighting teams from multiple jurisdictions to communicate with each other when fighting large fires. The need for such interfaces became painfully clear after the 9/11 attacks, when various first responders, each on their own dedicated networks, couldn't communicate.

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[242] Jessica Rosenworcel, Chairwoman, Fed. Commc'ns Comm'n, Statement Before the Subcommittee on Communications & Technology Committee on Energy and Commerce, United States House Of Representatives (Mar. 31, 2022), https://docs.fcc.gov/public/attachments/DOC-381971A1.pdf.

When deployed, FPD's device consumed up to 300 GB/month—compared to just 4 GB/month for the average phone.[243] Verizon had an offering that would provide exactly what FPD needed: enterprise plans with unlimited data at 4G speeds. Here's the menu of such alternatives Verizon sent FPD in early July:[244]

Public Sector Mobile Broadband Share Plans: Government Subscribers Only			
The calling plans below reflect the monthly access fee discount. No additional discounts apply.			
Public Sector Mobile Broadband	**5 Gigabytes**	**10 Gigabytes**	**20 Gigabytes**
Monthly Access Fee	$39.99 (90239)	$59.99 (90240)	$99.99 (90241)
Shared Domestic Data Allowance	5GB	10GB	20GB
Overage Per Gigabyte	$8.00 Per Gigabyte		
Note: This plan is available for domestic data only devices, on the Verizon Wireless network only. **Data Sharing**: At the end of each bill cycle, any unused data allowances for lines sharing on the same account will be applied to the overages of the other lines on the same account beginning with the line with the lowest overage need. Plan changes may not take effect until the billing cycle following the change request. Current NationalAccess and Mobile Broadband coverage details can be found at www.verizonwireless.com. New activations on these service plans require 4G LTE devices. Existing customers transitioning to one of these service plans are able to utilize existing 3G devices. The 5GB, 10GB, and 20GB Public Sector Mobile Broadband Plans are able to share with each other.			

Clearly, FPD should have bought the $99.99/month plan—and paid $8/GB after the first 20 GB. Instead, FPD bought the cheapest plan: $37.99 for unlimited data, with 4G speeds only for the first 25 GB.

Even if such an unlimited-but-speed-restricted plan had been marketed to retail (rather than government) users, it wouldn't have violated the 2015 Order's throttling ban because Verizon didn't throttle particular applications:[245] after the basic data allowance, FPD's plan slowed to 3G across the board—that is, neutrally. The Order explicitly recognized that "application-agnostic" throttling isn't a neutrality problem by deeming it "reasonable

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[243] *Worldwide smartphone average monthly cellular data usage from 2016 to 2021*, STATISTA, https://www.statista.com/statistics/752731/worldwide-average-monthly-smartphone-cellular-data-usage/ (last visited Dec. 14, 2023).

[244] Addendum Br. Gov. Pet'rs at ADD6, Mozilla Corp. v. Fed. Commc'ns Comm'n, No. 18-1051 (Aug. 20, 2018), https://cdn.arstechnica.net/wp-content/uploads/2018/08/fire-department-net-neutrality.pdf#page=8.

[245] *See supra* Section IV.B.4.

network management" exempted from the Order's throttling rule—so long as the provider clearly disclosed what users would get.[246]

But Santa Clara's complaint was really about pricing, not neutrality. "While Verizon ultimately did lift the throttling," says FPD's *Mozilla* affidavit, this "was only after County Fire subscribed to a new, more expensive plan." The standard complaint about unlimited-but-speed-restricted plans is that they give customers less than they bargained for. Here, just the opposite happened: Verizon gave FPD much *more*. In emergencies, Verizon generously offered to waive the speed restriction for government users upon request. Verizon's policy effectively converted FPD's very basic plan into an ultra-premium plan with no speed restriction that should have cost many times more: 300 GB of peak use minus 20 GB for the basic allowance at $8/GB is $2240/month. Add that to the $99.99 base plan for a total cost of $2399/month. So *of course* FPD wanted to stay on its $37.99/month plan.

Verizon imposed just one condition: such suspensions would be only temporary; if an emergency persisted or recurred, the user must repeat its request. Verizon imposed this minimal burden because the company had no way of verifying emergencies. This policy aimed to deter, say, a fire department from claiming that a wireless router was needed for emergencies, when in fact it was simply used to stream Netflix all day in the break room, which could result in *terabytes* of monthly data usage.

But Verizon's generosity caused confusion. FPD first complained about the speed restriction in December 2017.[247] Verizon suspended it—*temporarily*. In late June 2018,

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[246] 2015 Order ¶ 169.

[247] Addendum Br. Gov. Pet'rs at ADD11, Mozilla Corp. v. Fed. Commc'ns Comm'n, No. 18-1051 (Aug. 20, 2018), https://cdn.arstechnica.net/wp-content/uploads/2018/08/fire-department-net-neutrality.pdf.

apparently the next time the unit was deployed, the same FPD captain complained again. Recalling that the speed restriction had been suspended back in December, he claimed the Verizon representative had "communicated that Verizon had properly re-categorized the device as truly 'unlimited.'"[248] In fact, the suspension was only temporary.

As Verizon later readily acknowledged, the customer service rep handling the issue in June should have immediately dropped the speed restriction, as in December.[249] The new customer service representative simply made a mistake. As a result, "throttling" happened again when the unit was deployed at the end of July.[250]

FPD's frustration is palpable from the emails included in Santa Clara's *Mozilla* brief. "Remove any data throttling on OES5262 effective immediately," an FPD technician wrote to Verizon on July 29.[251] "Please work with us. All we need is a plan that does not offer throttling or caps of any kind."[252] In fact, weeks earlier, Verizon's customer service representative had explained exactly how FPD could switch to one of the data plans shown above.[253] Yet FPD remained on its bargain-basement plan—insisting that its speed restriction had been waived permanently.

Santa Clara County's lawyers somehow failed to notice or resolve this confusion, despite having joined Mozilla's lawsuit against the Republican FCC's return to Title I—the

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[248] *Id.* at ADD10.

[249] Rich Young, *Verizon statement on California fire allegations*, VERIZON (Aug. 21, 2018), https://www.verizon.com/about/news/verizon-statement-california-fire-allegations.

[250] Addendum Br. Gov. Pet'rs at ADD9, Mozilla Corp. v. Fed. Commc'ns Comm'n, No. 18-1051 (Aug. 20, 2018).

[251] *Id.* at ADD6.

[252] *Id.*

[253] *Id.* at ADD4.

only county to do so. Even earlier, in December 2017, James Williams, Santa Clara County Counsel, had filed 15 pages of arguments for using Title II to protect public safety, including for FPD specifically.[254] But Williams got exactly what he wanted: a sensational story that suddenly made his speculation about public safety risks seem vivid. Absent Title II, FPD's *Mozilla* affidavit claimed that "Verizon will continue to use the exigent nature of public safety emergencies and catastrophic events to coerce public agencies into higher cost plans ultimately paying significantly more for mission critical service—even if that means risking harm to public safety during negotiations."[255]

5. How the FCC Could Use Title II to Regulate Speed Restrictions

Because the 2015 Order excluded them from the throttling rule, unlimited-but-speed-restricted plans have remained standard. T-Mobile's unlimited prepaid plans feature slower speeds beyond 50 GB/month.[256] Because this is over twice the North American average, just 19 GB/month in 2022,[257] most users will not hit such restrictions. AT&T takes a different approach: its "Unlimited Premium" plan offers "high-speed data that can't slow down based

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[254] Letter from the Office of the County Counsel, County of Santa Clara, to Marlene H. Dortch, Secretary, Federal Communications Commission (Dec. 6, 2017), https://techfreedom.org/wp-content/uploads/2023/10/Santa-Clara-December-2017-Filing.pdf#page=6.

[255] Addendum Br. Gov. Pet'rs at ADD4, Mozilla Corp. v. Fed. Commc'ns Comm'n, No. 18-1051 (Aug. 20, 2018).

[256] *There's a prepaid phone plan for everyone*, T-MOBILE, https://prepaid.t-mobile.com/prepaid-plans (last visited Dec. 14, 2023).

[257] *Average mobile wireless data usage per smartphone worldwide from 2022 and 2028*, by region*, STATISTA, https://www.statista.com/statistics/489169/canada-united-states-average-data-usage-user-per-month/ (last visited Dec. 14, 2023).

on how much you use,"[258] but it warns users that it may slow all usage "to reduce network congestion."[259] Consumers have a variety of clear options. The market is working.

Yet under Title II, the FCC might decide otherwise. Although the 2015 Order said that such speed restrictions wouldn't violate the throttling ban as long as they were "application-agnostic," the next sentence added: "If the Commission were concerned about the particulars of a data plan, it could review it under the no-unreasonable interference/disadvantage standard." This "standard" is so amorphous as to be no standard at all.[260] The Commission could decide whatever it wants.

Moreover, anyone could file "formal complaints" alleging violations of this standardless standard; ISPs would have to respond within 20 days. Each complaint could be a replay of the Santa Clara kerfuffle, with credulous reporters unquestioningly repeating breathless claims about "net neutrality"—indeed, people's lives!—being in dire peril. Whatever ISPs said in response would hardly matter. Indeed, many companies might decide defending themselves wasn't worth the endless media demonization—just as Verizon never really set the record straight on the Santa Clara incident. The smallest misunderstandings or customer service mistakes could be blown up into an existential crisis. Even if the FCC never acted, the perception of a widespread "problem" could grow into another net neutrality technopanic.[261]

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[258] *Compare our unlimited data plans*, AT&T, https://www.att.com/plans/unlimited-data-plans/ (last visited Dec. 14, 2023).

[259] *AT&T Consumer Service Agreement*, AT&T, https://www.att.com/legal/terms.consumerServiceAgreement.html (last visited Dec. 14, 2023).

[260] *See supra* Section III.A.

[261] *See supra* Section IV.A.

The 2015 Order required formal complainants to frame their arguments in terms of the rules. But the FCC could go beyond even the broad scope of the general conduct standard. The Order candidly invoked Sections 201(b) and 202(a) not only as a basis for the rules it issued, but also for the "statutory backstop they provide regarding broadband provider practices more generally." The FCC could invoke these provisions directly[262] to declare "unjust or unreasonable" any aspect of BIAS, including prices, technical service quality, and customer service on grounds not even discussed in whatever order the FCC issues next. Forbearing from other provisions of Title II won't affect how the FCC could use those powers, which the 2015 Order recognized as "the heart of [Title II]."[263]

The 2015 Order forbore from making *ex ante* rules beyond those in the order itself.[264] Now, the NPRM "invite[s] comment on whether the Commission's ability to adopt *ex ante* regulations would provide better public safety protections than an *ex post* enforcement framework." But given the NPRM's arguments about how "essential" BIAS is for public safety, what aspect of BIAS might *not* be a candidate FCC rulemaking on public safety grounds?

C. National Security

The traditional rallying cry for Title II regulation—"No blocking, throttling or paid prioritization"—has gone out the window. Market forces have ensured that incidents of non-

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[262] Even in the absence of rules, the FCC has applied provisions of Title II directly, including Section 201(b). *See e.g.*, TerraCom, Inc. and YourTel America, Inc. Apparent Liability for Forfeiture, FCC 14-173 (released Oct. 24, 2014), https://docs.fcc.gov/public/attachments/FCC-14-173A1.pdf.

[263] 2015 Order ¶ 441.

[264] *Id.*

neutrality will be exceedingly short-lived if they occur at all.[265] The Internet is manifestly *not* being delivered "one word at a time."[266] Grasping at regulatory straws, the last rationale listed in the NPRM for Title II regulation is that is necessary in order to protect national security.[267] Unlike the 2015 Order, the NPRM proposes *not* to forbear from Section 214, which requires common carriers to receive FCC authorization prior to commencing service. The NPRM claims the FCC must assess whether carriers controlled by a foreign power could threaten national security by gaining access to critical points of presence (POPs).[268]

The NPRM cites just one example: in 2021, the FCC withdrew the Section 214 authority of a Chinese-owned U.S. telephone company that resold mobile service within the U.S. from facilities-based providers and provided international Internet connections to

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[265] *See, e.g.*, Alex Crescenti, *N. Idaho internet company sends mixed messages to customers about blocking Facebook, Twitter*, KXLY (Jan. 11, 2021), https://www.kxly.com/news/local-news/n-idaho-internet-company-sends-mixed-messages-to-customers-about-blocking-facebook-twitter/article_80d5d268-4eed-52a3-ad75-5a7b08be0087.html ("A North Idaho internet company is changing its tune, just hours after telling customers it would block them from accessing Twitter and Facebook. The owner of Your T1 Wifi now says the message was misinterpreted.").

[266] Senate Democrats (@SenateDems), TWITTER (Feb. 27, 2018), https://twitter.com/SenateDems/status/968525820410122240.

[267] NPRM ¶ 25 ("But developments in recent years have highlighted national security and public safety concerns arising in connection with the U.S. communications sector, ranging from the security risks posed by malicious cyber actors targeting network equipment and infrastructure to the loss of communications capability in emergencies through service outages.").

[268] *Id.* ¶ 27 (citing China Telecom (Americas) Corporation, GN Docket No. 20-109, File Nos. ITC-214-20010613-00346, ITC214-20020716-00371, ITC-T/C-20070725-00285, Order on Revocation and Termination, 36 FCC Rcd 15966 (2021) (China Telecom Americas Order on Revocation and Termination), aff'd, China Telecom (Americas) Corp. v. Fed. Commc'ns Comm'n, 57 F.4th 256 (D.C. Cir. 2022)).

Chinese government facilities. The NPRM argues that Title II is thus the only defense the U.S. has to foreign interference with the communications grid.[269]

But, as Commissioner Nathan Simington notes,[270] Congress has already provided two mechanisms to address such concerns. Any foreign person attempting to take control of a U.S. business must submit the transaction to the Committee on Foreign Investment in the United States for review.[271] The FCC doesn't participate in CFIUS because the statute is limited to "executive" agencies.[272] Congress could involve the FCC in CFIUS if it wanted to. Even where transactions involve common carriers holding FCC licenses, the FCC has not been included in the review process.[273]

President Biden's 2021 executive order on "Protecting Americans' Sensitive Data From Foreign Adversaries"[274] requires the Commerce Department to issue a rule on "Securing the Information and Communications Technology Supply Chain," which applies to

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[269] What the NPRM doesn't do, however, is quantify just how many ISPs would suddenly have to undergo Section 214 review for the first time, and how the Commission could possibly handle the influx of new applications, or what would happen in the interim while the Commission processes all those applications. One source indicates that there are 2,934 broadband providers in the U.S., many of whom are not common carriers and currently required to obtain Section 214 authority prior to beginning operations. *See The Complete List of Internet Companies in the US*, BROADBANDNOW, https://broadbandnow.com/All-Providers (last visited Dec. 14, 2023).

[270] Dissenting Statement of Commissioner Nathan Simington, Safeguarding and Securing the Open Internet, WC Docket No. 23-320, Notice of Proposed Rulemaking (Oct. 19, 2023), https://docs.fcc.gov/public/attachments/FCC-23-83A5.pdf.

[271] 50 U.S.C. § 4565.

[272] *Id.* § 4565(k)(2).

[273] Exec. Order No. 13913, 85 Fed. Reg. 19643 (2020), https://www.federalregister.gov/documents/2020/04/08/2020-07530/establishing-the-committee-for-the-assessment-of-foreign-participation-in-the-united-states.

[274] Exec. Order No. 14034, 86 Fed. Reg. 31423 (2021), https://www.federalregister.gov/documents/2021/06/11/2021-12506/protecting-americans-sensitive-data-from-foreign-adversaries.

any "connected software application"—a term that covers any "software, a software program, or a group of software programs, that is designed to be used on an end-point computing device and includes as an integral functionality, the ability to collect, process, or transmit data via the internet."[275] That's broad enough to cover all broadband networks. While CFIUS covers transactions, the ICTS rule requires review of any "installation, dealing in, or use of any" covered software.[276] If the FCC believes it needs a seat at the table so badly, it should ask Congress to include it in CFIUS.

And it's not as if Congress hasn't had the opportunity to provide more regulatory authority to the FCC to protect national security interests. In the Secure and Trusted Communications Networks Act, in 2020 Congress directed the Commission to establish the Secure and Trusted Communications Networks Reimbursement Program to advance national security by supporting the removal, replacement, and disposal of communications equipment and services produced or provided by Huawei Technologies Company or ZTE Corporation from our Nation's communications networks.[277] If Congress had intended the FCC to go further, and use national security as the basis of regulating the entire Internet under Title II, it would have done so in that Act.

Using the threat of foreign infiltration of the communications grid as the basis for Title II regulation is akin to Congress deciding, for safety reasons, that the maximum speed limit should be 65 mph, and then the Department of Transportation, also citing safety reasons,

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[275] Securing the Information and Communications Technology and Services Supply Chain, 15 C.F.R. § 7.2.

[276] *Id.* § 7.1(a)(1).

[277] Secure and Trusted Communications Networks Act of 2019, Pub. L. No. 116-124, 134 Stat. 158 (2020), https://www.congress.gov/116/plaws/publ124/PLAW-116publ124.pdf.

ordering that the maximum speed limit instead be 55 mph. The FCC has tried this technique before. In *NAB v. FCC* (D.C. Cir. 2022), the FCC attempted to bootstrap off the statutory language of Section 317 regarding foreign-government sponsored programming to require broadcast stations to "independently confirm the sponsor's status, at both the time of the lease and the time of any renewal, by checking the Department of Justice's Foreign Agents Registration Act website and the FCC's U.S.-based foreign media outlets reports."[278] The problem, the court found, was that this latter requirement was nowhere articulated in the statute. The FCC argued that the language of Section 317 was broad enough to encompass the layering on of this additional requirement. The court disagreed:

> [T]he FCC argues that even if § 317(c) does not affirmatively authorize it to require searches of the federal sources, it can require the searches as part of its general authority to "prescribe appropriate rules and regulations to carry out the provisions" of § 317. A generic grant of rulemaking authority to fill gaps, however, does not allow the FCC to alter the specific choices Congress made. Instead, the FCC must abide "not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes."[279]

Congress made "specific choices" about the FCC's role in protecting national security interests in the Secure and Trusted Communications Networks Act. Congress chose not to authorize Title II regulation of the communications network. The Commission cannot now invoke national security as the basis for regulating BIAS.

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[278] Nat'l Ass'n of Broads. v. Fed. Commc'ns Comm'n, No. 39 F.4th 817, 819 (D.C. Cir. 2022) (citing In the Matter of Sponsorship Identification Requirements for Foreign Government-Provided Programming, 36 FCC Rcd. 7702, ¶ 35 (2021)).

[279] *Id.* at 820 (citations omitted).

V. Social Media Aren't Common Carriage Services

Commissioner Nathan Simington, in his dissent, suggests that social media companies "could still be 'common carriers' under . . . Title II" and, if so, this "should be the first place we go to protect free speech and consumer choice." This is transparent nonsense. When Commissioners Simington and Carr complain about "censorship" by social media, what they are really complaining about is the essentially curated nature of social media service.

A. Social Media Are Obviously Information, Not Telecommunications, Services

Social media services are not "telecommunications services." What they provide is not "telecommunications," which the Communications Act defines as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[280] Rather than providing "transmission," social media involve data that is subject to "computer processing" and "storage" contemplated in the definitional distinction between a telecommunications service and an information service.[281] But even if social media did provide transmission, no major social media service offers to transmit all "information of the user's choosing"; every single one reserves the right to block content that violates its terms of service, or to edit content to avoid such violations, such as removing offensive words, which is obviously a

[280] 47 U.S.C. § 153(50).

[281] The Act's dichotomy between "information services" and "telecommunications services" originated in the *Computer II* rules, *see supra* note 108. "Those rules defined such service as a 'pure' or 'transparent' transmission capability over a communications path enabling the consumer to transmit an ordinary-language message to another point without computer processing or storage of the information . . . ." Nat'l Cable & Telecomms. Assn. v. Brand X Internet Serv., 545 U.S. 967, 968 (2005).

"change in the . . . content of the information as sent and received."[282] Moreover, social media platforms make significant changes in "the form of the information as sent and received." Even simple text messaging, which requires the carrier to undertake some information processing during transmission, is not considered "telecommunications" as defined by the Act.[283]

Social media are a quintessential examples of "information services," which the Act defines as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[284] The definition of "information service . . . includes electronic publishing."[285] Of course, the latter term excludes the "transmission of information as a common carrier," but it includes "the dissemination, provision, publication" of, among other things, "editorials, columns, or features."[286] Columns are, of course, the means by which newspapers have long published content created by others; here, Congress explicitly recognized that "publication" of such content would be an information service.

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[282] *See* Daphne Keller, *Carriage and Removal Requirements for Internet Platforms: What* Taamneh *Tells Us*, 4 J. FREE SPEECH L. 87, 107-08 (2023) (noting that this Court omitted, in *Taamneh v. Twitter*, No. 21-1496 (U.S., May 18, 2023), to mention how much editorial intervention (and, thus, information processing), in the form of content moderation and algorithmic ranking, goes into creating a useable social-media product).

[283] *In re Petitions for Decl'y Ruling on Reg'y Status of Wireless Messaging Serv.*, 33 FCC Rcd. 12075 (2018).

[284] 47 U.S.C. § 153(24).

[285] 47 U.S.C. § 153(24).

[286] 47 U.S.C. § 274(h)(1).

B. The First Amendment Would Bar Regulating Social Media as Common Carriers

An edited product is, inherently, not common carriage. Despite the FCC's ping/pong match over BIAS providers are common carriers, for instance, what's clear is that if an ISP explicitly "hold[s] itself out as providing something other than a neutral, indiscriminate pathway," it is not a common carrier.[287] So long as it's up front about what it's doing, an ISP that wants to engage in "editorial intervention"—and, thus, not common carriage—is free to do so.[288] "That would be true of an ISP that offers subscribers a curated experience by blocking websites lying beyond a specified field of content (e.g., family friendly websites)."[289]

The common-carriage test for ISPs applies, a fortiori, to social media. Indeed, a higher level of the tech "stack" (the application layer—the one consumers interact with) should enjoy *at least* as much editorial control as a lower level (the Internet-service layer).[290] A contrary approach would be nonsensical. It would be like turning television networks (e.g., NBC, ESPN), but not cable companies (e.g., Xfinity), into common carriers.

No prominent social media site claims to provide an "indiscriminate pathway." Even X (formerly Twitter), which, as we discuss below, now engages in comparatively loose content moderation, still purports to bar "violence, harassment and other similar types of behavior [that] discourage" open conversation.[291] Not surprisingly, bans on things like

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[287] U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381, 389 (Srinivasan, J., concurring in denial of rehearing en banc).

[288] *Id*.

[289] *Id*.

[290] Blake Reid, *Uncommon Carriage*, 76 STAN. L. REV. ___, at 27-28 & n.178 (2024), https://tinyurl.com/4ajz7wye.

[291] *The X Rules*, X, https://bit.ly/3cpc75S (last visited Nov. 29, 2023).

harassment and hate speech are common among online platforms.[292] Such bans have always been common. "You agree not to use the Web site," Facebook's terms of service said in 2005, to post "any content that we deem to be harmful, threatening, abusive, harassing, vulgar, obscene, hateful, or racially, ethnically or otherwise objectionable."[293]

Without intermediaries, moreover, the Internet would be a bewildering flood of disordered information. By organizing that information, intermediaries enable users to "sift through the ever-growing avalanche of desired content that appears on the Internet every day."[294] It is only because websites engage in curation and editing that "social" media is navigable by—and a worthwhile experience for—the average user. "Very few users would want to spend time on YouTube or Facebook if it meant seeing the hate speech, extreme pornography, and scams that major platforms currently exclude . . . [but that] common carriage laws would unleash."[295]

Proponents of the common-carrier theory "gloss over the role of content moderation in the [social media] companies' product offerings."[296] "The essential truth of every social network is that the product is content moderation."[297] Distinct "content moderation

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[292] *See, e.g.*, *Bullying and Harassment Policy Details*, META, https://transparency.fb.com/policies/community-standards/bullying-harassment/ (last visited Dec. 14, 2023).

[293] *Facebook Terms of Use*, WAYBACK MACHINE (Nov. 26, 2005), https://bit.ly/3w1gYC5; *See also Stratton Oakmont, Inc. v. Prodigy Servs.*, 1995 WL 323710 at *3 (N.Y. Sup. Ct. May 24, 1995) (describing similar policies imposed by Prodigy, one of the first social networks, in 1990).

[294] Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 701 (2010)

[295] Daphne Keller, *Carriage and Removal Requirements for Internet Platforms: What* Taamneh *Tells Us*, 4 J. FREE SPEECH L. 87, 109-10 (2023).

[296] JEFF KOSSEFF, LIAR IN A CROWDED THEATER: FREEDOM OF SPEECH IN A WORLD OF MISINFORMATION 257 (2023).

[297] Nilay Patel, *Welcome to Hell, Elon*, THE VERGE (Oct. 28, 2022), https://tinyurl.com/46hrr7b4.

practices" are a major part of what "help[s] differentiate" social media products, in the eyes of users.[298] Companies, civil rights groups, news outlets, and other organizations, too, hold social media responsible for the content they spread.[299]

Since Texas and Florida enacted their legislation attempting to impose common carriage status on social media,[300] Elon Musk has conducted something of a natural experiment in content moderation—one that has wrecked those laws' underlying premise. Musk purchased Twitter, transformed it into X, and reduced content moderation on the service. The new approach "privileges . . . edgelords."[301] This, in turn, places "a larger burden on the user" to find quality content (and to tolerate being exposed to noxious content).[302] But users don't have to put up with this—*and they aren't*. "Since Musk bought Twitter in October 2022, it's lost approximately 13 percent of its app's daily active users."[303]

"It turns out that most people do not *want* to participate in horrible unmoderated internet spaces."[304] Imposing common carriage status on social media would not "open up" social-media websites; it would *destroy* them. This is perhaps the most obvious of the many

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[298] Kosseff, *supra* note 296, at 259.

[299] *See, e.g.*, Suzanne Vranica, et al., *Elon Musk's Campaign to Win Back Twitter Advertisers Isn't Going Well*, WALL ST. J. (Dec. 22, 2022), https://on.wsj.com/3IASicw (discussing companies' unwillingness to purchase social-media ads that get displayed next to hate speech); Peter Kafka, *Why Disney Didn't Buy Twitter*, VOX (Sept. 7, 2022), https://bit.ly/3VYI74w (discussing Disney's decision to back out of buying Twitter, after CEO Bob Iger realized that the "nastiness" on the platform would damage Disney's image as a "manufactur[er of] fun"); Analis Bailey, *Premier League, English Soccer Announce Social Media Boycott in Response to Racist Abuse*, USA TODAY (Apr. 24, 2021), https://bit.ly/3xIpfdT.

[300] *See* TEX. BUS. & COM. CODE ANN. § 2, subtitle C, title 5, chapter 120 (2021); 2021 Fla. Laws 32.

[301] Alex Kantrowitz, *The Elon Effect*, SLATE (Oct. 23, 2023), https://tinyurl.com/yrfz6b34.

[302] *Id*.

[303] *Id*.

[304] Nilay Patel, *Welcome to Hell, Elon*, THE VERGE (Oct. 28, 2022), https://tinyurl.com/46hrr7b4.

signs that these services are not, and cannot be treated as, common carriers. The First Amendment might not stop common carriage regulation from, for example, "'fulfill[ing] the reasonable expectations of a customer who signs up for a broadband service that promises access to all of the lawful Internet' without editorial intervention." But the First Amendment *does* apply to regulation that would compel a provider of a curated service to provide an *un*curated service.[305]

VI. Section 706 Is Not a Grant of Regulatory Authority

The NPRM proposes, as an alternative basis for Open Internet rules, the independent regulatory authority the 2010 and 2015 Open Internet Orders claimed to find in Section 706 of the Telecommunications Act.[306] The *RIF Order* found that "section 706(a) and (b) of the 1996 Act are better interpreted as hortatory, rather than as grants of regulatory authority."[307] Yet the NPRM proposes to reverse this finding[308] and seeks comment on its

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[305] U.S. Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381, 389 n.13 (D.C. Cir. 2017) (Srinivasan, J., concurring in denial of rehearing en banc).

[306] NPRM ¶ 194 ("we propose to return to our prior interpretation, upheld by the D.C. Circuit, that sections 706(a) and (b) of the 1996 Act are grants of regulatory authority and rely on that as a basis for our open Internet rules.").

[307] 2018 Order ¶ 280.

[308] *Id.* ¶ 195 ("In particular, although the RIF Order departed from the Commission's prior interpretation of section 706 and instead concluded that the provision was merely hortatory, we propose to return to the Commission's prior view and interpret sections 706(a) and (b) of the 1996 Act as grants of regulatory authority. We propose to do so in light of the considerations that persuaded the Commission to adopt such interpretations in the past, and that persuaded courts to affirm those interpretations. Consistent with that prior approach, we propose to rely on section 706(a) as part of our authority for open Internet rules. We also propose to rely on section 706(b), in the event that the Commission were to conclude under section 706(a) that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion." Footnotes omitted.).

proposal.[309] But as Commissioner Pai noted in his dissent from the 2015 Order on review, "claiming that Congress expressly delegated authority to the FCC through [Section 706] . . . is simply wrong. The text, statutory structure, and legislative history all make clear that Congress intended section 706 to be hortatory—not delegatory—in nature."[310]

A. A Plain Reading Shows Section 706(b) Is a Reporting Statute

A plain reading of Section 706(b) makes clear that it is a reporting statute only: Congress tasked the FCC in the Telecommunications Act with annually providing an update on the progress of broadband deployment.[311] Section 706 contains no additional grant of regulatory powers to the FCC. Indeed, current FCC precedent, upheld by the D.C. Circuit Court of Appeals,[312] concludes that Section 706 is hortatory in nature.[313] Moreover, as the *Mozilla* court affirmed, Section 706 lacks any specificity as to who, or even what, Congress intended the FCC to regulate under that section.[314]

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[309] *Id.* ¶ 200 ("We also seek comment on other theories discussed in the RIF Order as a basis for why section 706 of the 1996 Act not just permissibly could, but affirmatively should, be interpreted as merely hortatory, rather than a grant of regulatory authority to the Commission.").

[310] 2015 Order 5970.

[311] 47 U.S.C. § 1302(b).

[312] Mozilla Corp. v. Fed. Commc'ns Comm'n, 940 F.3d 1, 46 (D.C. Cir. 2019) ("The Commission interpreted these provisions as 'exhorting the Commission to exercise market-based or deregulatory authority granted under other statutory provisions, particularly the Communications Act' not as 'an independent grant of regulatory authority to give those provisions meaning.' Despite Petitioners' contentions, we find that this interpretation of Sections 706(a) and (b) is lawful." (citing RIF Order ¶ 270)). The court continued: "Thus, we proceed to Step Two of the analysis and ask whether the Commission's understanding of Section 706 as hortatory represents a reasonable interpretation of the statute. We find that it does." *Id.*

[313] RIF Order.

[314] *Mozilla*, 940 F.3d at 46.

B. Under the Whole Act Rule, Section 706 Cannot Be Read as an Independent Grant of Authority

Read in context of the "whole act" (the 1996 Act), the overall meaning of Section 706 is plain: it is a commandment that the FCC "shall" use its many *other* statutory sources of authority for the purposes of promoting broadband deployment and competition. This commandment does not empower the FCC to do anything it could not have done otherwise. Each of the "regulating methods" mentioned in Section 706(a) correlates to a specific grant of authority elsewhere in the act.[315] Far from empowering the FCC, Section 706 *constrains* the FCC—by allowing other parties to obtain a writ of mandamus from a federal court to "compel agency action unlawfully withheld or unreasonably delayed" under the Administrative Procedure Act.[316]

The FCC's alternative interpretation—that this brief section gives it the authority to do anything regarding any form of "communications" that is not expressly forbidden to the agency—is the epitome of unreasonable statutory interpretation. "Whether one looks at the statute's text, structure, or history, only one conclusion is possible: Congress did not delegate substantive authority to the FCC in section 706 of the Telecommunications Act. Instead, that statutory provision is a deregulatory admonition."[317]

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[315] Dissenting Statement of Commissioner Ajit Pai at 52-57, Protecting and Promoting the Open Internet, GN Docket No. 14-28 [hereinafter *2015 Pai Dissent*], https://docs.fcc.gov/public/attachments/FCC-15-24A5.pdf.

[316] 5 U.S.C. § 706(1).

[317] *2015 Pai Dissent* at 57.

C. If Section 706 Is Found to Convey Independent Regulatory Authority, It Will Only Reach So Far

The NPRM claims that Section 706(b) provides the FCC independent authority to adopt Open Internet rules in the event that it concludes that broadband is not being deployed in a timely fashion.[318] TechFreedom recently commented on the Commission's latest Section 706 Notice of Inquiry, noting that the Commission is ignoring both the plain text of the statute as well as its powers to regulate in the event that it concludes that there remain individuals who do not have a broadband connection.[319]

What the current NPRM ignores, however, is that Section 706(b), at most, only empowers the FCC to adopt rules that that "promote competition" and "remove barriers to infrastructure investment."[320] The term "remove barriers to infrastructure investment" is not used in the NPRM, and the term "promote competition" is used only once in the NPRM,

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[318] NPRM ¶ 198 ("We likewise believe that, in the event that the Commission concludes that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion under section 706(b), the open Internet rules we seek comment on here would be a reasonable exercise of authority under that provision as well.").

[319] In particular, we noted that Section 706 contains only 319 words. Not included in those words are "universal," "affordability," "adoption," or "equitable access." Section 706 refers only to "the availability of advanced telecommunications capability to all Americans." TechFreedom Comment on Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion at 5, GN Docket No. 22-270 (Dec. 1, 2023), https://techfreedom.org/wp-content/uploads/2023/12/TechFreedom-comment-FCC-NOI-Section-706-Report-Dec-1-2023.pdf. Yet the Commission's *NOI* concludes that if the broadband industry falls short on any of these metrics, the Commission is empowered to promulgate any rules it wants, including imposing Title II common carriage obligations on broadband providers. Fed. Commc'ns Comm'n, In the Matter of Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 22-270 (Nov. 1, 2023), https://docs.fcc.gov/public/attachments/FCC-23-89A1.pdf.

[320] 47 U.S.C. § 1302(a).

in reference to Multiple Tenant Environments (MTEs).[321] In other words, the Commission believes that Section 706(b) grants it substantive regulatory powers, yet utterly fails to articulate how the new proposed rules would "accelerate deployment . . . by removing barriers to infrastructure investment and by promoting competition in the telecommunications market" as required by the statute. The proposed reimposition of Open Internet rules, therefore, cannot be based on Section 706(b).

VII. What the FCC Should Do Instead of Reclassification

The FCC can play three useful roles. First, it should maintain and enforce its existing transparency rule. This requires neither Title II nor Section 706, as the RIF Order grounded the rule in Section 257 alone.[322] YourT1Wifi appears to be violating this rule—by failing to disclose an Open Internet policy.[323] Other small ISPs may be as well. The Commission should make clear that it intends to enforce the rule—and, after a reasonable period, begin doing so.

Second, the FCC should do for net neutrality, public safety, national security, and anything else it believes to be a real problem what it regularly does on many less significant issues: *ask Congress to enact legislation*. The Commission made this a priority back in 2010 and almost succeeded in getting Congressman Henry Waxman's bill over the finish line.[324]

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[321] NPRM ¶ 52 ("We seek comment whether reclassification of BIAS would provide additional authority for the Commission to further promote competition and consumer choice in communications services in MTEs.").

[322] 2018 Order ¶ 232.

[323] *See supra* note 143143143.

[324] Internet Freedom Preservation Act of 2009, H.R. 3458, 111th Cong. (2009).

There is simply no excuse for the Commission not to try again now. Again, the Internet Society's proposed legislative framework offers the obvious starting point.[325]

Finally, the Commission should forge a closer partnership with the FTC on these issues. Even if the courts were to uphold new Open Internet rules, it would necessarily be the FTC that would continue to police net neutrality for broadband services marketed as non-neutral—if such services ever arise. Whatever expertise the FCC has developed should be shared with the FTC. At the same time, the FCC would benefit from the FTC's expertise in parsing marketing claims, as this would be necessary to determine whether a broadband service is actually BIAS and therefore subject to the rules—if services marketed as neutral turn out not to be.

VIII. Conclusion

If control of the FCC changes again in 2025, the Republican-controlled FCC will reverse Title II reclassification, just as it did in 2018. Realistically, there likely will not be enough time for an appeals court to decide on the case before early 2025. Any pending legal challenge to reclassification will again be moot and dismissed accordingly. We may have to go through two more rounds of ping-pong just to get back to where we are right now. The next Democratic FCC will propose to return to Title II—maybe in 2029 or 2033. It'll be déjà vu all over again.

[325] *See supra* note 8 and associated text.

But if control of the FCC does not change, the inevitable will happen sooner: The Supreme Court will block Title II reclassification; likely, an appeals court will likely do so first. This outcome will be clear enough that reclassification will likely be stayed on appeal. This proceeding will prove to be a waste of everyone's time. At last, the FCC will have to admit that how to govern broadband is a question for the democratically elected representatives of the American people, not the unelected commissioners of the FCC.

Respectfully submitted,

_____/s/_____

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