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## COMMENT IN THE MATTER OF RESTORING INTERNET FREEDOM

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Restoring Internet Freedom

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### INTRODUCTION

The Technology Policy Program of the Mercatus Center at George Mason University is dedicated to advancing knowledge about the effects of regulation on society. As part of its mission, the program conducts independent analyses to assess agency rulemakings and proposals from the perspective of consumers and the public. Therefore, this reply comment does not represent the views of any particular affected party but is designed to assist the agency as it explores these issues.<sup>1</sup>

It is welcome news that the FCC is considering the repeal of Internet regulations and revisiting the classification status of Internet access. Since at least the 1970s, the Federal Communications Commission and Congress have sought to reduce the reach of Title II burdens through forbearance and by narrowing the scope of “common carriage.”<sup>2</sup> The majority of commissioners in 2015, however, reversed years of precedent to regulate “broadband Internet access service” (BIAS) as a “telecommunications service,” thereby subjecting Internet services and content to vague Title II obligations and political pressures. A reversal is needed.

1. The author would like to thank Melody Calkins for research assistance and Nita Ghei for helpful comments.

2. Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor, 77 F.C.C.2d 308, 359–68 (1979) (Notice of Inquiry and Proposed Rulemaking).

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Ever since the 1920s, many US communications regulations that are nominally about technical issues<sup>3</sup> have been abused by political actors.<sup>4</sup> This was apparent when the Fairness Doctrine—a programming nondiscrimination requirement for broadcasters, derived from the existence of “spectrum scarcity”—was in effect. The FCC penalized radio stations for “throttling free speech.”<sup>5</sup> The FCC declined to give certainty about its vague rule: “No single or exact rule of thumb for providing time, on a nondiscriminatory basis, can be stated for application to all situations which may arise in the operation of all stations.”<sup>6</sup> Predictably, broadcasters used these nondiscrimination rules to punish political opponents and unwanted speech by, for instance, filing of tens of thousands of fairness complaints annually<sup>7</sup> in order to impose crushing regulatory costs on political opponents.<sup>8</sup>

The Open Internet Order (OIO) is a similar FCC regulatory scheme that is notionally about networks but will be abused by future regulators and activists to chill speech, shape culture, and hinder innovation. For this proceeding we need only consult the coiner of “net neutrality,” Professor Tim Wu, who told members of Congress that these Internet regulations were needed so that the FCC would have the ability to shape “media policy, social policy, oversight of the political process, [and] issues of free speech.”<sup>9</sup>

There was nothing “broken” about the Internet or American online innovation before 2015 requiring a drastic change in regulatory philosophy. The United States is a global leader in broadband subscriptions,<sup>10</sup> and—more importantly—its firms are the primary source of new Internet-based services and applications.<sup>11</sup> As Marvin Ammori wrote in 2014, before Title II regulation, “[T]he cost of running a basic Internet application fell from \$150,000 a month in 2000 to \$1,500

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3. HUGH RICHARD SLOTTEN, *RADIO'S HIDDEN VOICE: THE ORIGINS OF PUBLIC BROADCASTING IN THE UNITED STATES* 116 (2009) (“[The FRC commissioners] tried to treat radio regulation as primarily a technical problem to be solved through engineering analysis while, at the same time, often taking into account the fundamental social, economic, and political aspects of broadcasting.”).

4. *Id.* at 136 (“Despite publicly justifying decisions based on engineering factors or through the use of the neutral language of engineering evaluation, archival records indicate that commissioners—following the example of the engineers—took into account a number of different factors, including political lobbying by members of Congress.”).

5. United Broadcasting Co. (WHKG), 10 F.C.C. 515, 515 (1945).

6. *Id.* at 518.

7. In 1962, the FCC received about 400 fairness complaints. In 1970, it received over 60,000. *Responses to an FCC Cry for Help*, BROADCASTING 21 (Dec. 27, 1971).

8. FRED W. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT* 39 (1976) (“Our massive strategy was to use the Fairness Doctrine to challenge and harass right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue.”) (quoting Bill Ruder about Democratic National Committee, his client, fairness doctrine efforts).

9. *Net Neutrality: Is Antitrust Law More Effective Than Regulation in Protecting Consumers and Innovation?: Hearing Before the Subcomm. on Reg. Reform, Commercial & Antitrust L., H. Comm. on the Judiciary*, 113th Cong. 70 (June 20, 2014) (statement of Tim Wu, professor of law, Columbia Law School).

10. The United States exceeds the Organisation for Economic Co-operation and Development (OECD) average for fixed broadband subscription rates. *OECD Broadband Portal: 1.2.1. OECD Fixed Broadband Subscriptions per 100 Inhabitants, by Technology, June 2016*, OECD (Jun. 2016), <http://www.oecd.org/sti/broadband/oecdbroadbandportal.htm>.

The United States is fifth out of 35 OECD countries in terms of mobile broadband subscription rates. *Id.*

11. ADAM THIERER, *PERMISSIONLESS INNOVATION: THE CONTINUING CASE FOR COMPREHENSIVE TECHNOLOGICAL FREEDOM* 53–54 (2016) (“The world’s 15 most valuable Internet companies . . . have a combined market value of nearly \$2.5 trillion, but none of them are European while 11 of them are US firms.”).

a month in 2011. It continues to fall.”<sup>12</sup> The United States became the global leader in technology and Internet application development in the absence of common carrier regulations.

As was made clear after investigations by the *Wall Street Journal*<sup>13</sup> and a majority report from a Senate committee,<sup>14</sup> the FCC’s 2015 decision to ground rules in Title II of the Communications Act of 1934 was made hastily after pressure in November 2014 from the “ersatz FCC” of policy advisers within the White House to classify broadband access under “Title II of the Telecommunications Act [*sic*].”<sup>15</sup>

Given that about-face by the then chairman to use Title II of the Communications Act, the result was a legally deficient Open Internet Order. While the OIO’s legal and factual errors and omissions are too numerous to catalog here, some of the OIO’s most significant problems and its unforeseen negative effects are discussed below. This reply comment makes the following points:

1. Internet access is best classified as an information service.
2. Classifying Internet access as a telecommunications service renders other statutory provisions meaningless.
3. The Open Internet Order poses significant First Amendment issues.
4. The Open Internet Order gives Internet service providers an increased incentive to filter content and violate open Internet norms.
5. The Open Internet Order and Title II regulation chill innovation.

The deficiencies of the OIO cannot be remedied with mere tweaks, and the OIO and reclassification rules should be totally rescinded.

## INTERNET ACCESS IS BEST CLASSIFIED AS AN INFORMATION SERVICE

The 2015 decision to classify Internet access as a telecommunications service reversed years of FCC and bipartisan consensus, including the *de novo* review of the issue in 1998 by the Clinton FCC, that Internet access is an information service.<sup>16</sup> The “functions and services associated with Internet access,” the 1998 FCC said, “were classed as ‘information services’ under the MFJ. Under that decree, the provision of gateways (involving address translation, protocol conversion, billing management, and the provision of introductory information content) to information

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12. Marvin Ammori, *The Case for Net Neutrality: What’s Wrong with Obama’s Internet Policy*, 93 FOREIGN AFF. 62, 66 (2014).

13. Gautham Nagesh & Brody Mullins, *Net Neutrality: How White House Thwarted FCC Chief*, WALL ST. J., Feb. 4, 2015, <https://www.wsj.com/articles/how-white-house-thwarted-fcc-chief-on-internet-rules-1423097522>.

14. U.S. SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, REGULATING THE INTERNET: HOW THE WHITE HOUSE BOWLED OVER FCC INDEPENDENCE (Feb. 29, 2016).

15. President Barack Obama, *Net Neutrality: President Obama’s Plan for a Free and Open Internet*, THE WHITE HOUSE (Nov. 10, 2014), <https://obamawhitehouse.archives.gov/net-neutrality>. The White House statement urging reclassification cited to Title II of the wrong act.

16. Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd. 11501, 11536–37, paras. 74–75 (1998).

services fell squarely within the ‘information services’ definition.”<sup>17</sup> Until 2015, the FCC never classified Internet access as a telecommunications service. The FCC should restore the law to the interpretation that prevailed for 20 years while the United States became the global leader in technology development<sup>18</sup>—Internet access is a lightly regulated information service.

In the notice of proposed rulemaking, the FCC seeks comment on whether the plain language of Section 230 deems Internet access an information service.<sup>19</sup> It does. Section 230(b) announces that it is national policy that “interactive computer services,” including “specifically, *a service or system that provides access to the Internet,*” should be “unfettered from Federal or State regulation.”<sup>20</sup> The 2015 OIO’s “broadband Internet access service” unquestionably is a “service or system that provides access to the Internet,” and thus should be “unfettered” from regulation.

The linguistic gymnastics required to deem Internet access a telecommunications service reveals the underlying weakness of the OIO’s classification. The complex exegesis of Section 230 by INCOMPAS, for instance, is illustrative. INCOMPAS says that “Internet access services that constitute ‘telecommunications’ fall within the definition of the kinds of services considered to be interactive computer services” in Section 230.<sup>21</sup> But Congress said in Section 230 that “the Internet and other interactive computer services” should be “unfettered from Federal or State regulation.”<sup>22</sup> INCOMPAS’s position, then, is that Congress believed Internet access could be a highly regulated telecommunications service but, as an interactive computer service, should simultaneously be unfettered from federal or state regulation. That strained reasoning should be rejected.

If nothing else, the 230(b) policy statement rules out classifying Internet access service as a Title II “telecommunications service,” the FCC’s most intrusive regulatory regime. The only other classification option—supported by the deregulatory language of Section 230(b)—is that Internet access service is a lightly regulated “information service.” This grouping of Internet access with other information services in Section 230 clearly signals that Internet access should be understood as an information service. It was well understood by FCC officials for years that Section 230(b) policy “was created [to] promote[] economic and technological expansion” for then unregulated “enhanced [i.e., information] services.”<sup>23</sup>

Unsurprisingly, this commonsense interpretation was the same one the Supreme Court reached in *Brand X*, the 2005 decision upholding the FCC’s decision to classify cable modem service as an information service.<sup>24</sup> The *Brand X* decision states without caveat that Internet

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17. *Id.*

18. THIERER, PERMISSIONLESS INNOVATION 53–54 (“The world’s 15 most valuable Internet companies . . . have a combined market value of nearly \$2.5 trillion, but none of them are European while 11 of them are US firms.”).

19. FCC, “In the Matter of Restoring Internet Freedom,” WC Dkt. No. 17-108, Notice of Proposed Rulemaking, para. 31, released Apr. 27, 2017, [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-344614A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-344614A1.pdf).

20. 47 U.S.C. § 230(b)(2), (f)(2) (2012) (emphasis added).

21. Comments of INCOMPAS, “In the Matter of Restoring Internet Freedom” 66, WC Dkt. No. 17-108, Jul. 17, 2017.

22. 47 U.S.C. § 230(b)(2).

23. This was the assessment of Robert Cannon, then senior counsel for Internet issues at the FCC. Robert Cannon, *The Legacy of the Federal Communication Commission’s Computer Inquiries*, 55 FED. COMM. L.J. 167, 205 (2002).

24. *Nat’l Cable Telecom. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

access is an information service: “[C]ompanies in the broadband Internet service business ‘offe[r]’ consumers an *information service* in the form of *Internet access* and they do so ‘via telecommunications.’ . . .”<sup>25</sup>

Public Knowledge is wrong, then, that the FCC’s interpretation that Internet access is an information service is “shockingly incorrect” and would “overrule the Supreme Court’s holding in *NCTA v. Brand X* [*sic*].”<sup>26</sup>

Public Knowledge’s misreading of *Brand X* continues in its characterization of the holding. Public Knowledge says that in *Brand X* the Court “ruled that the Communications Act does not make explicit the correct classification of [broadband Internet access service].”<sup>27</sup> Public Knowledge cites to the *Brand X* holding in its comment but does not quote the actual holding. The actual words of the Court affirm that cable operators are information service providers when they offer Internet access:

[The Act] fails unambiguously to classify facilities-based *information-service providers* as telecommunications-service offerors. . . .<sup>28</sup>

The issue in *Brand X* was whether cable modem providers “offer” a single, integrated information service or an information service plus a telecommunications service. As the *Brand X* dissent put it, the majority holding was that “the word ‘offer’ is ambiguous”<sup>29</sup>—not, as Public Knowledge would have the FCC believe, that the classification of Internet access was ambiguous.

OIO supporters must distort Supreme Court holdings and statutes to maintain that Internet access is a Title II telecommunications service. “A word is known by the company it keeps,”<sup>30</sup> and a finding that interactive computer services like Internet access are information services preserves the intent of Congress and logical coherence. Internet access service, like all other interactive computer services covered in Section 230—like websites, apps, search engines, cloud storage, and email—is an information service.

## CLASSIFYING INTERNET ACCESS AS A TELECOMMUNICATIONS SERVICE RENDERS OTHER STATUTORY PROVISIONS MEANINGLESS

It is a basic principle of statutory interpretation that courts and agencies should avoid rendering superfluous any statutory language.<sup>31</sup> This “rule against surplusage” argues against classifying Internet access as a telecommunications service. For instance, in Section 231(b), Congress carves

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25. *Id.* at 989 (emphasis added). All information services are provided “via telecommunications.” 47 U.S.C. § 153(24) (definition of an “information service”).

26. Comments of Public Knowledge, “In the Matter of Restoring Internet Freedom” 32, WC Dkt. No. 17-108, Jul. 17, 2017.

27. *Id.* (citing *Brand X*, 545 U.S. at 996–97).

28. *Brand X*, 545 U.S. at 996–97 (emphasis added).

29. *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1006 (2005) (Scalia, J., dissenting).

30. “*Noscitur a sociis*” is a common statutory canon of interpretation.

31. See, e.g., *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . .”).

out a few protected parties, including “a telecommunications carrier engaged in the provision of a telecommunications service” and, immediately following, “a person engaged in the business of providing an Internet access service.”

Similarly, another provision in the Communications Act authorizes rules “for the distribution of specialized customer premises equipment designed to make *telecommunications service, Internet access service*, and advanced communications . . . accessible by low-income individuals who are deaf-blind.”<sup>32</sup> If Internet access service is a telecommunications service, portions of these statutes are superfluous.

Further, provisions of the Communications Decency Act (CDA) and Online Copyright Infringement Liability Limitation Act (OCILLA) are rendered meaningless by the Open Internet Order’s finding that Internet access is a common carrier telecommunications service. The CDA and OCILLA provide immunity to Internet access providers for defamatory content<sup>33</sup> and copyright infringement,<sup>34</sup> respectively. Common carriers, such as telephone and telegraph operators, however, do not need such statutory protections. Under common law, common carriers are not liable for the defamatory or infringing content of messages they transmit.<sup>35</sup> This statutory protection from defamation lawsuits and copyright infringement is nullified if Internet access service is a common carrier service.

Broadband Internet access service is an “interactive computer service.”<sup>36</sup> Classification of BIAS as a common carrier telecommunications service negates the effect of other federal laws.<sup>37</sup> Commenters’ assertions (and the prior FCC’s finding) that “Internet access service” is a Title II service should therefore be rejected to give effect to these laws.

## THE OPEN INTERNET ORDER POSES SIGNIFICANT FIRST AMENDMENT ISSUES

The continued classification of broadband Internet access service as a common carriage service poses several First Amendment problems. Title II proponents call net neutrality “the

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32. 47 U.S.C. § 620(a) (2012) (emphasis added).

33. 47 U.S.C. § 230(c) (2012).

34. 17 U.S.C. § 512 (2012).

35. Matt Jackson, *One Step Forward, Two Steps Back: An Historical Analysis of Copyright Liability*, 20 CARDOZO ARTS & ENT. L.J. 367, 378 (2002) (“The telegraph and telephone networks, primarily concerned with point-to-point, two-way communication (conversation), are largely considered to be immune from copyright liability. This immunity never posed a problem since these networks previously were ill-adapted to the distribution of copyrighted works.”). See Eli M. Noam, *Beyond Liberalization II: The Impending Doom of Common Carriage*, 18 TELECOMM. POL’Y 435, 440 (1994) (“In return for reduced discretion, a [common] carrier obtained certain benefits, including limited liability for the consequences of its own actions.”).

36. Interactive computer service includes, “specifically, a service or system that provides access to the Internet.” 47 U.S.C. § 230(f)(2) (2012).

37. The OIO renders redundant a criminal statute about “knowingly us[ing] any express company or other common carrier or interactive computer service. . . .” 18 U.S.C. § 1462 (2012). It also renders redundant another statute saying that “any interactive computer service or telecommunications service, may be liable under this subchapter. . . .” 31 U.S.C. § 5367 (2012).

first amendment of the internet.”<sup>38</sup> That would be news to the Supreme Court, which held that the First Amendment is the First Amendment of the Internet.<sup>39</sup> The First Amendment as applied to the Internet is clear. In the 1997 *Reno v. ACLU* decision, the Supreme Court held that the Internet receives full First Amendment protection and Internet regulations must satisfy strict scrutiny.<sup>40</sup>

Tim Wu in 1999 wrote hopefully that “[s]ooner or later . . . *Reno*’s one rule for the entire Internet may begin to lose its luster and perhaps feel ridiculous.”<sup>41</sup> The Open Internet Order can be seen as a culmination of Wu’s and other media access advocates’ attempts to evade the *Reno* decision and inject their idiosyncratic view that the First Amendment requires the government to regulate private censorship and media.<sup>42</sup>

### Congress and the Courts Recognize the First Amendment Rights of ISPs to Edit Internet Content

The DC Circuit’s ambivalent language<sup>43</sup> in *US Telecom v. FCC* about the speaker status of Internet service providers conceals certitude of Congress and other courts: Internet service providers (ISPs) are speakers and distributors whose editorial judgment is protected by the First Amendment. The ACLU says in its comments that “there is no congressional endorsement of any sort for the proposition that large ISPs should have the power to determine who gets to view what online content. . . .”<sup>44</sup> This is simply wrong. That Congress recognizes that ISPs can and should exercise editorial control is, on the basis of the text of the law and legislative history,<sup>45</sup> “undeniable.”<sup>46</sup>

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38. Comments of the World Wide Web Foundation, “In the Matter of Restoring Internet Freedom” 7, WC Dkt. No. 17-108, Jul. 17, 2017.

39. *Reno v. ACLU*, 521 U.S. 844 (1997) (striking down Internet content regulation on First Amendment grounds).

40. *Id.* at 870 (finding that there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium [the Internet]”).

41. See Timothy Wu, *Application-Centered Internet Analysis*, 85 VA. L. REV. 1163, 1167 (1999).

42. Wu dubs this the “second free speech tradition.” See *Net Neutrality, the Internet and the First Amendment*, CONSTITUTION DAILY (Jan. 30, 2014), <https://constitutioncenter.org/blog/podcast-net-neutrality-the-internet-and-the-first-amendment/>. Wu notes that “it is important . . . for the federal government . . . to make sure there’s not too much censorship happening by private parties” like ISPs (podcast audio at 19:10). See generally Jack Balkin, *Media Access: A Question of Design*, 76 GEO. WASH. L. REV. 933, 942 (2008) (stating that “network neutrality policies prevent certain forms of content censorship by conduits”); Marvin Ammori, *Another Worthy Tradition: How the Free Speech Curriculum Ignores Electronic Media and Distorts Free Speech Doctrine*, 70 MO. L. REV. 59 (2005); David L. Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C. L. REV. 1, 9 (1973) (“[T]he owners and managers of the media have become the real sources of suppression and censorship in America, with perhaps an even greater capacity to suppress thought than the government itself.”).

43. *U.S. Telecom Ass’n v. FCC*, Dkt. No. 15-1063, slip op. at 114 (D.C. Cir. 2016).

44. Comments of ACLU, “In the Matter of Restoring Internet Freedom” 8, WC Dkt. No. 17-108, Jul. 17, 2017.

45. See, e.g., “We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer . . . what comes in and what our children see.” 141 CONG. REC. H8469–H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). See also H.R. REP. NO. 107-449, at 13 (2002) (“The Committee notes that ISPs have successfully defended many lawsuits using section 230(c).”) (statement of Rep. Tauzen).

46. Raymond Shih Ray Ku, *Irreconcilable: Congressional Treatment of Internet Service Providers as Speakers*, 3 VAND. J. ENT. L. & PRAC. 70, 80 (2001).

Congress recognized the speaker status of Internet access providers with Section 230 of the Communications Decency Act, which protected Internet access providers<sup>47</sup> (and websites) from a traditional *speaker* liability—liability for publishing defamatory statements.<sup>48</sup> Common carriers and nonspeakers, of course, do not need statutory protection from speaker liability.

Specifically, Congress passed Section 230 of the Communications Decency Act to encourage ISPs and websites to use their editorial control to clean up the Internet.<sup>49</sup> As the Fourth Circuit Court of Appeals said in *Zeran v. America Online*, an “important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services.”<sup>50</sup>

As Professor Ku has said,

The CDA does not simply recognize the private editorial rights of ISPs, it encourages private censorship of speech by immunizing ISPs from all liability with respect to their editorial decisions. . . .<sup>51</sup>

Similarly, media scholars like Dawn Nunziato and Jack Balkin have noted that Congress, via Section 230, encourages ISPs to “censor” online content.<sup>52</sup>

It’s never been the case that ISPs, as commenters claim, “provid[e] a pathway to the Internet and nothing more”<sup>53</sup> and are “mere conduits.”<sup>54</sup> In a 2005 law journal article, for instance, Professor Dawn Nunziato noted that “[e]ach of the major ISPs establishes and enforces Terms of Service by which it prohibits the expression of certain types of speech that fall within the protection of the First Amendment.”<sup>55</sup> Despite government attempts to penalize these editorial functions

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47. A protected party includes “specifically” one that is “a service or system that provides access to the Internet.” 47 U.S.C. § 230(f)(2) (2012).

48. 47 U.S.C. § 230(c) (2012). See also Raymond Shih Ray Ku, *Irreconcilable: Congressional Treatment of Internet Service Providers as Speakers*, 3 VAND. J. ENT. L. & PRAC. 70, 72 (2001).

49. Felix T. Wu, *Collateral Censorship*, 87 NOTRE DAME L. REV. 293, 302 (2011) (“[Section] 230 was premised in part on a desire to encourage, rather than discourage, the filtering of content, by removing legal disincentives to filter.”).

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

51. Raymond Shih Ray Ku, *Irreconcilable: Congressional Treatment of Internet Service Providers as Speakers*, 3 VAND. J. ENT. L. & PRAC. 70, 77 (2001).

52. Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1129 (2005) (“ . . . Congress sought to encourage ISPs and other owners of Internet speech forums to restrict expression, and access to expression, that the providers found undesirable.”). Balkin notes that “§ 230(c)(2) immunizes conduits when they censor the speech of others.” Jack Balkin, *Media Access: A Question of Design*, 76 GEO. WASH. L. REV. 933, 944 (2008).

53. Comments of Vimeo, “In the Matter of Restoring Internet Freedom” 31, WC Dkt. No. 17-108, Jul. 17, 2017.

54. Comments of ACLU, “In the Matter of Restoring Internet Freedom” 20, WC Dkt. No. 17-108, Jul. 17, 2017.

55. Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1121 (2005). Arguments that curation opens ISPs up to copyright, defamation, and other lawsuits are speculative and likely wrong. Major ISPs for years have offered curated Internet aimed at children, and OIO repeal would only restore that status quo. Further, courts are skeptical of laws and legal interpretations that potentially chill the publication and distribution of speech. See *New York Times v. Sullivan*, 376 U.S. 254 (1965); *Miami Herald v. Tornillo*, 418 U.S. 241 (1972). See also Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429, 435–37 (2007) (describing the ways in which the Supreme Court “has significantly modified substantive and procedural legal doctrines . . . to expressly carve out breathing space to protect First Amendment interests”).



since at least 2005,<sup>56</sup> it's common for ISPs, especially smaller operators, to assert the right to block objectionable content on their networks.<sup>57</sup>

### The Open Internet Rules Are Unconstitutionally Vague

The OIO rules, particularly the Internet conduct standard, represent an impermissible infringement on speech and are subject to facial challenge on First Amendment grounds. The Supreme Court said in *Goguen*<sup>58</sup> that where a governmental restriction's "literal scope, unaided by a narrowing . . . court interpretation, is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts." The Supreme Court noted in *Gentile v. State Bar of Nevada* that "[t]he prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement. . . ."<sup>59</sup> "The question is not," the Court said, "whether discriminatory enforcement occurred . . . but whether the Rule is so imprecise that discriminatory enforcement is a real possibility."<sup>60</sup> The Internet conduct standard resembles the open-ended discretion that the Supreme Court struck down in other contexts.<sup>61</sup>

Public Knowledge claims that the "General Conduct Rule reflects a core non-discriminatory principle that are [*sic*] well understood and has a long history in communication law. . . ."<sup>62</sup> But other commenters disagree. As one commenter noted, "Generations of case law tell us what [unreasonable] means. In the net neutrality context, though, we simply don't know what ISP actions are impermissible."<sup>63</sup> There is considerable uncertainty about which applications and curated offerings are permitted.<sup>64</sup> Even supporters of Title II classification of Internet access agree the general conduct standard is too vague.<sup>65</sup>

Recognizing that the OIO's nonexhaustive, contradictory factors leave parties unaware of what practices are permissible, Public Knowledge's remedy is that ISPs and app developers "obtain an advisory opinion from the Enforcement Bureau before . . . engaging in conduct it is

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56. Appropriate Framework for Broadband Access to the Internet over Wireless Facilities et al., 20 FCC Rcd. 14986 (2005).

57. See, e.g., *Internet Agreement and Acceptable Use Policy*, CHESAPEAKE BAY COMMUNICATIONS (last visited Jul. 11, 2017), <http://www.baycrk.com/internet-agreement-and-acceptable-use-policy/> ("Chesapeake Bay Communications and its agents reserve the right at their sole discretion to remove any content that, in Chesapeake Bay Communications' judgment, does not comply with the AUP or is otherwise harmful, objectionable, or inaccurate."); *Acceptable Use Policy*, K2 COMMUNICATIONS (last visited Jul. 11, 2017), <http://k2cable.com/acceptable-use-policy.html>; *Acceptable Use Policy*, HORIZON CABLE (last visited Jul. 11, 2017), [http://www.horizoncable.com/horizon\\_2016\\_011.htm](http://www.horizoncable.com/horizon_2016_011.htm).

58. *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

59. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991).

60. *Id.*

61. The Court struck down a newsrack permit standard that included "other terms and conditions deemed necessary and reasonable by the Mayor." See *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 754 (1988).

62. Comments of Public Knowledge, "In the Matter of Restoring Internet Freedom" 124, WC Dkt. No. 17-108, Jul. 17, 2017.

63. Comments of Mitchell Lazarus, "In the Matter of Restoring Internet Freedom" 16-17, WC Dkt. No. 17-108, Jul. 17, 2017.

64. Comments of Daniel Lyons, "In the Matter of Restoring Internet Freedom" 4, WC Dkt. No. 17-108, Jul. 17, 2017.

65. Comments of Jon Peha, "In the Matter of Restoring Internet Freedom" 2, WC Dkt. No. 17-108, Jul. 17, 2017 ("Some portions of the existing rules create too much regulatory uncertainty, such as the 'Internet conduct standard.'").

unsure about.”<sup>66</sup> The advisory opinion process is an inadequate and unconstitutional restriction on providers that are engaged in distribution of media content.

### The Open Internet Regulations Are Content- and Speaker-Based Restrictions on Speech

On its face, the Open Internet Order imposes content- and speaker-based restrictions on speech. The Supreme Court decision *Reed v. Town of Gilbert*<sup>67</sup> was published in June 2015, a few months after the adoption of the Open Internet Order. That case made it clear that regulations like the open Internet rules impermissibly engage in content-based distinctions. The OIO is therefore subject to facial First Amendment challenge and heightened judicial scrutiny.<sup>68</sup> Even before *Town of Gilbert*, the Supreme Court held in *City of Lakewood*,

Therefore, a facial [First Amendment] challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers.<sup>69</sup>

Internet access service providers are FCC-licensed purveyors of speech, and the OIO satisfies the “nexus to expression” test set out in *City of Lakewood*.<sup>70</sup>

The OIO and its supporters are clear that “reasonable network management” captures content-based determinations by the FCC. As the Supreme Court said in *Town of Gilbert*, the “commonsense meaning of the phrase ‘content based’ requires a court to consider whether a regulation of speech ‘on its face’ draws distinctions based on the message a speaker conveys.”<sup>71</sup>

The OIO on its face draws distinctions based on the content conveyed by ISPs. In footnote 575 of the order, the FCC says that offering “family friendly” curated Internet to users is a form of “beneficial,” permitted network management.<sup>72</sup> That carve-out may make the OIO politically palatable because it allows operators to continue to offer filtered access to families and children, but it exposes the OIO to a First Amendment facial challenge. Blocking pornography and neo-Nazi sites is permitted by the OIO, but blocking, say, Washington Nationals fan sites and John F. Kennedy speeches is not permitted. The Supreme Court has said, “Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.”<sup>73</sup> As

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66. Comments of Public Knowledge, “In the Matter of Restoring Internet Freedom” 125, WC Dkt. No. 17-108, Jul. 17, 2017.

67. *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

68. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011).

69. *City of Lakewood*, 486 U.S. at 759.

70. “This is not to say that the press or a speaker may challenge as censorship any law involving discretion to which it is subject. The law must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks.” *Id.*

71. *Town of Gilbert*, 135 S. Ct. at 2227.

72. FCC, Protecting and Promoting the Open Internet, GN Dkt. No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order 102-3 n.375 (rel. Mar. 12, 2015). Regulation of only commercial speech would complicate the analysis, but family-friendly filtering is clearly noncommercial speech.

73. *United States v. Playboy Entertainment Group Inc.*, 529 U.S. 803, 812 (2000).

the Court stated in *Town of Gilbert*, facially content-based regulations like the OIO’s “reasonable network management” exception are automatically “subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.”<sup>74</sup>

Rather than deny the content-based nature of the rules, OIO supporters expressly anticipate that the FCC will engage in content-based regulation in enforcing the order. In other words, “this wolf comes as a wolf.”<sup>75</sup> Former FCC chief technologist Jon Peha comments that an ISP blocking “the streaming of political speeches against mergers in the telecom industry” would be prohibited as “unreasonable discrimination” under the rules.<sup>76</sup> Professor Tim Wu says the rules give the FCC authority to penalize ISPs for disfavoring “political speakers on one or another side of the spectrum,” local news services, a particular sports team,<sup>77</sup> or a particular news publication.<sup>78</sup> Senator Franken likewise states that the FCC needs the rules “to ensure that broadband providers couldn’t pick and choose which voices and ideas would actually reach consumers.”<sup>79</sup>

The notion that the FCC can compel ISPs to transmit content that they do not wish to disseminate runs afoul of First Amendment principles. As the Supreme Court stated in *Riley*,

There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees “freedom of speech,” a term necessarily comprising the decision of both what to say and what *not* to say.<sup>80</sup>

An ISP favoring news coverage of the New York Rangers, in Tim Wu’s hypothetical,<sup>81</sup> may be “irrational,” but the FCC cannot penalize that expression. Just as Google’s favoring its services in search results or blocking indecent images from search results is protected expression,<sup>82</sup> ISPs may favor certain services and content. The FCC’s attempt to limit ISP curation to family-friendly content is unconstitutional.

These restrictions are also prone to court challenge because they are speaker-based restrictions. The OIO is aimed squarely at regulating the editorial discretion of broadband Internet access service providers, colloquially known as ISPs or cable operators, alone. As the Supreme Court said in *Buckley v. Valeo*, “[T]he concept that government may restrict the speech of some

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74. *Town of Gilbert*, 135 S. Ct. at 2228 (2015) (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

75. *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

76. Comments of Jon Peha, “In the Matter of Restoring Internet Freedom” 10, WC Dkt. No. 17-108, Jul. 17, 2017.

77. *Net Neutrality: Is Antitrust Law More Effective Than Regulation in Protecting Consumers and Innovation?: Hearing Before the Subcomm. on Reg. Reform, Commercial & Antitrust L., H. Comm. on the Judiciary*, 113th Cong. 70 (Jun. 20, 2014) (statement of Tim Wu, professor of law, Columbia Law School).

78. Alan Joch, *Debating Net Neutrality*, 52 COMMUNICATIONS OF THE ACM 14, 14 (2009) (quoting Tim Wu).

79. Comments of Senator Al Franken, “In the Matter of Restoring Internet Freedom” 3, WC Dkt. No. 17-108, Jul. 17, 2017.

80. *Riley v. National Federation of the Blind*, 487 U.S. 781, 796–97 (1988) (emphasis in original).

81. *Net Neutrality: Is Antitrust Law More Effective Than Regulation in Protecting Consumers and Innovation?: Hearing Before the Subcomm. on Reg. Reform, Commercial & Antitrust L., H. Comm. on the Judiciary*, 113th Cong. 70 (June 20, 2014) (statement of Tim Wu, professor of law, Columbia Law School).

82. *Langdon v. Google*, 474 F. Supp. 2d 622, 629–30 (D. Del. 2007).

elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”<sup>83</sup>

This makes the expressed desire by OIO supporters to use the OIO to deprive ISPs of their speech rights even more alarming. The OIO’s unconstitutional aim was made clear by Jon Sallet, the FCC general counsel when the order was drafted, who has stated the rules can be used to prevent editorial decisions by ISPs:

But without [OIO] rules prohibiting blocking, throttling, and the like, broadband providers would gain the power to limit what unpopular content flows over their networks. . . .<sup>84</sup>

Other prominent OIO supporters likewise view the rules as a tool to engage in viewpoint-based regulation and to restrict the speech rights of ISPs and cable companies. EFF claims that “regulation of broadband Internet access is governed by *Turner Broadcasting System, Inc. v. FCC* and *Red Lion*,” cases holding that FCC regulation of cable and broadcast programming, respectively,<sup>85</sup> is subject to diminished scrutiny.<sup>86</sup> The Supreme Court repudiated both *Turner* and *Red Lion* in *Reno v. ACLU*, where it held that Internet regulation is subject to the highest scrutiny.<sup>87</sup>

Drafters of the OIO and advocates clearly believe the OIO gives the FCC authority to engage in speaker- and content-based regulation. As perhaps the most famous net neutrality supporter, web inventor Tim Berners-Lee, said in the *Wall Street Journal*, “Do we want a web where cable companies determine winners and losers online? Where they decide which opinions we read, which creative ideas succeed? That’s not the web I want.”<sup>88</sup> The OIO should be rescinded given these unconstitutional aims.

### The Open Internet Order Functions as an Unconstitutional Prior Restraint

These regulations function as an unconstitutional prior restraint on protected speech. A prior restraint is an official restriction imposed upon expression in advance of publication or dissemination.<sup>89</sup> Companies already feel compelled to approach regulators before disseminating curated Internet content. According to October 2016 *Washington Post* reporting,<sup>90</sup> Facebook

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83. *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976).

84. Terrell McSweeney & Jon Sallet, *Kill the Open Internet, and Wave Goodbye to Consumer Choice*, WIRED (Jul. 3, 2017), <https://www.wired.com/story/kill-the-open-internet-and-wave-goodbye-to-consumer-choice/>.

85. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389–90 (1969).

86. Comments of Electronic Frontier Foundation, “In the Matter of Restoring Internet Freedom” 24, WC Dkt. No. 17-108, Jul. 17, 2017.

87. *Reno v. ACLU*, 521 U.S. 844, 868–70 (1997) (“We agree . . . that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium [the Internet].”).

88. Tim Berners-Lee, *In Defense of Net Neutrality*, WALL ST. J. (Jun. 22, 2017), <https://www.wsj.com/articles/in-defense-of-net-neutrality-1498171158>.

89. See Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 L. & CONTEMP. PROBS. 648, 648 (1955).

90. Brian Fung, *Facebook Is Talking to the White House About Giving You ‘Free’ Internet. Here’s Why That May Be Controversial*, WASHINGTON POST (Oct. 6, 2016), <https://www.washingtonpost.com/news/the-switch/wp/2016/10/06/facebook-is-talking-to-the-white-house-about-giving-you-free-internet-heres-why-that-may-be-controversial>.

sought permission from the Obama White House to offer its curated-web app, Free Basics, to customers of small US wireless carriers. Free Basics provides free Internet access to white-listed websites and applications and is used by tens of millions of users in dozens of countries around the world.<sup>91</sup> Such web curation is First Amendment–protected conduct, akin to a cable company choosing which TV channels to offer to subscribers.<sup>92</sup> Apparently the talks with the previous administration were not fruitful—Facebook’s Free Basics plans have stalled in the United States.

If Facebook, which is not an ISP and whose Free Basics service likely falls outside the reach of the Open Internet Order,<sup>93</sup> feels compelled to seek government preapproval, covered BIAS providers will feel even more compulsion to seek preapproval in order to avoid regulatory penalties.

Suppose religious ISP operators, despite knowing they’ll lose subscribers, wish to block a handful of the most-visited pornography sites or neo-Nazi sites because they do not wish to be associated with the sites. This is clearly expressive behavior. Yet the ISPs are also clearly BIAS providers,<sup>94</sup> and it is unclear that such filtering by a BIAS provider is permitted.<sup>95</sup> The Open Internet Order instructs them to submit their expressive activity to the FCC Enforcement Bureau for an “advisory opinion” on whether it is reasonable.<sup>96</sup> This prior restraint on BIAS and app providers who wish to exercise their First Amendment rights is unconstitutional, and there is no practical remedy short of rescission of the rules.

## THE OPEN INTERNET ORDER GIVES INTERNET SERVICE PROVIDERS AN INCREASED INCENTIVE TO FILTER CONTENT AND VIOLATE OPEN INTERNET NORMS

The 2015 rules force ISPs to choose between two undesirable options: (1) continue offering largely uncurated Internet access and become subject to the Open Internet Order’s burdensome and unpredictable obligations or (2) curate the Internet and escape Title II for light-touch Title I and FTC oversight. That’s because the Open Internet Order regulates only conventional, relatively open Internet access under Title II. While the OIO is unclear about what falls outside

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91. See *Where We’ve Launched*, INTERNET.ORG, <https://info.internet.org/en/story/where-weve-launched/> (last visited Aug. 10, 2017).

92. *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) (finding that cable TV companies, “through original programming or by exercising editorial discretion over which stations or programs to include in [their] repertoire,” engage in protected speech).

93. *U.S. Telecomm. Ass’n v. FCC*, 855 F.3d 381, 389 (D.C. Cir. 2017) (denying rehearing en banc) (Tatel, J., concurring) (stating that the current rules “do[] not apply to an ISP . . . making sufficiently clear to potential customers that it provides a filtered service involving the ISP’s exercise of ‘editorial discretion.’”).

94. BIAS is a “mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints. . . . This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence. . . .” FCC, *Protecting and Promoting the Open Internet*, GN Dkt. No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order 10 (rel. Mar. 12, 2015).

95. The Open Internet Order is contradictory about what “reasonable network management” is. ISPs must “first show that the practice is primarily motivated by a technical network management justification.” *Id.* at 100.

96. The OIO instructs ISPs to “seek guidance on the propriety of certain open Internet practices before implementing them, enabling them to be proactive about compliance and avoid enforcement actions later.” *Id.* at 106.

the rules,<sup>97</sup> the FCC attorney at oral arguments stated, and the DC Circuit affirmed, that the OIO excludes filtered Internet access from the rules.<sup>98</sup>

In a clumsy attempt to defend against First Amendment challenges to the order, the OIO deregulates curated Internet access relative to conventional Internet access. As Judge Tatel explained in his concurrence to the denial of rehearing *en banc* in *US Telecom*, the current rules “do[] not apply to an ISP . . . making sufficiently clear to potential customers that it provides a filtered service involving the ISP’s exercise of ‘editorial discretion.’”<sup>99</sup> In the words of the FCC attorney when defending the OIO, such a service will “drop out of the definition of Broadband Internet Access Service and the rules don’t apply. . . .”<sup>100</sup>

AT&T officials,<sup>101</sup> scholars,<sup>102</sup> and others,<sup>103</sup> surprised at this conclusion of the DC Circuit and the FCC, noted that ISPs that filter the Internet have an incentive to avoid burdensome and costly Title II obligations. CTIA notes that the DC Circuit decision suggested that ISPs “have a choice as to whether the rules will apply to them in the first place.”<sup>104</sup> Former FCC chief technologist Jon Peha warned that the FCC “has not made sufficiently clear what a . . . non BIAS data service . . . is, nor have they made clear what rules apply to such services.”<sup>105</sup> He calls this nonregulation of non-BIAS data services the “specialized services loophole” that incentivizes ISP discrimination against competing services.<sup>106</sup>

As the DC Circuit judges who upheld the rules stated in their concurrence denying a rehearing: “[N]o party disputes that an ISP could [offer an edited service] if it wished. . . .”<sup>107</sup> The OIO therefore introduces an asymmetric regulatory regime that may induce ISPs to filter content more often, in part to reduce regulatory uncertainty<sup>108</sup> and compliance costs. This

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97. *Id.* at 99 (“We disagree with commenters who argue that the Commission should adopt a more detailed definition for non-BIAS data services. . . .”).

98. *U.S. Telecomm. Ass’n v. FCC*, No. 15-1063, slip op. at 115 (D.C. Cir. 2016) (“Providers that may opt to exercise editorial discretion—for instance, by offering access only to a limited segment of websites specifically catered to certain content—would not offer a standardized service that can reach ‘substantially all’ endpoints. The rules therefore would not apply to such providers, as the FCC has affirmed.”).

99. *U.S. Telecomm. Ass’n v. FCC*, 855 F.3d 381, 389 (D.C. Cir. 2017) (denying rehearing *en banc*) (Tatel, J., concurring).

100. Brent Skorup, *Why the FCC’s Net Neutrality Rules Could Unravel*, PLAIN TEXT (Mar. 1, 2016), <http://readplaintext.com/why-the-fcc-s-net-neutrality-rules-could-unravel-cc26c6b96418> (quoting audio from *U.S. Telecomm. Ass’n* oral arguments).

101. Hank Hultquist, *The Surprising (to Me) Narrowness of the D.C. Circuit’s Title II Decision*, AT&T PUB. POLICY BLOG (May 31, 2017), <https://www.attpublicpolicy.com/consumer-broadband/the-surprising-to-me-narrowness-of-the-d-c-circuits-title-ii-decision/>.

102. Dan Lyons, *Can ISPs Simply Opt Out of Net Neutrality?*, FORBES (May 15, 2017), <https://www.forbes.com/sites/washingtonbytes/2017/05/15/can-isps-simply-opt-out-of-net-neutrality/#6f8d7d363ced>.

103. Mark Lutkowitz, *Google Hoisted by Its Own Petard*, FIBER REALITY (Jun. 2016), <http://fibereality.com/blog/google-hoisted-by-its-own-petard/> (“Why would not some ISPs consider moving in this direction [curating online content] to avoid the FCC’s draconian rules as they would be precluded under this scenario from the Open Internet Order anyway?”).

104. Comments of the CTIA, “In the Matter of Restoring Internet Freedom” 43, WC Dkt. No. 17-108, Jul. 17, 2017.

105. Comments of Jon Peha, “In the Matter of Restoring Internet Freedom” 6, WC Dkt. No. 17-108, Jul. 17, 2017.

106. *Id.*

107. *U.S. Telecomm. Ass’n v. FCC*, 855 F.3d 381 (D.C. Cir. 2017) (denying rehearing *en banc*) (Tatel, J., concurring).

108. Derek Bambauer, *Still Not a Dump Truck: Net Neutrality and the First Amendment*, INFO/LAW (Jun. 15, 2016), <https://blogs.harvard.edu/infolaw/2016/06/15/still-not-a-dump-truck-net-neutrality-and-the-first-amendment/> (“It sounds like [an] ISP has to exercise the Goldilocks level of editorial discretion [to fall outside the Order].”).

new incentive to filter content runs directly counter to the purpose of net neutrality rules.<sup>109</sup> As NCTA notes, “Ironically, then, the burdens of Title II could lead to a less open Internet and thereby frustrate the Commission’s policy goals.”<sup>110</sup> This unintended circumstance, which only became clear during litigation, is a material change in circumstances that, alone, justifies repeal of the rules.

## THE OPEN INTERNET ORDER AND TITLE II REGULATION CHILL INNOVATION

The complexity and fast-changing nature of IP networks makes it easier—and more damaging—for advocates to throw sand in the gears of online innovation. Unlike the “single app” Title II phone network, IP networks transmit thousands of services and apps—voice-over-IP, gaming, conferencing, over-the-top video, IPTV, voice-over-LTE, messaging, web—that require varying technologies, changing topologies, and different quality-of-service requirements. BIAS providers can, do, and will favor their own IP services—like carrier-provided VoLTE, VoIP, IPTV, and video-on-demand. The OIO’s vague standards, particularly the Internet conduct standard and advisory opinion process, ensure that these and prospective IP services face the risk of interminable legal challenges at the FCC and in court.

Network engineers have already expressed confusion about what net neutrality rules will mean for existing and nascent technologies and topologies like 5G wireless,<sup>111</sup> IP Packet Exchange,<sup>112</sup> software-defined networks and network function virtualization,<sup>113</sup> proxy bypass and other mobile quality-of-experience improvements,<sup>114</sup> and IP multimedia subsystems (IMS).<sup>115</sup> Likewise, telehealth researchers raised concerns years ago that “ambiguous network mandates,” like those found in the Open Internet Order, would “disrupt the emerging tele-health market.”<sup>116</sup>

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109. Comments of Free Press, “In the Matter of Restoring Internet Freedom” 5, WC Dkt. No. 17-108, Jul. 17, 2017 (stating that the rules prevent giving “cable and phone companies the power to determine who may speak and be heard on the internet”).

110. Comments of NCTA, “In the Matter of Restoring Internet Freedom” 40, WC Dkt. No. 17-108, Jul. 17, 2017.

111. Stephen Lawson, *Suddenly, Net Neutrality Doesn’t Look So Great for 5G*, PC WORLD (Mar. 4, 2015), <http://www.pcworld.com/article/2893032/5g-net-neutrality-may-be-headed-for-a-showdown.html>.

112. IP Packet Exchange provides end-to-end quality-of-service and proxy facilities for interconnection and billing agreements. OLAFUR PALL BOUCADAIR ET AL., IP TELEPHONY INTERCONNECTION REFERENCE 103 (2011) (“Questions of net neutrality and . . . net freedom could be raised [about IPX transport of IMS traffic].”).

113. FUJITSU, TECHNICAL REPORT: CARRIER SOFTWARE DEFINED NETWORKING (SDN) 46-47 (Mar. 2014), [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0013/32143/sdn\\_report.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0013/32143/sdn_report.pdf) (“The use of SDN and NFV to support service chaining and to drop services and facilities into and out of a traffic path in a dynamic way may complicate net neutrality enforcement.”).

114. *How YouTube Performance Is Improved in T-Mobile Network*, YOUTUBE (Aug. 6, 2014), [https://www.youtube.com/watch?v=G\\_SMCYu7qSw](https://www.youtube.com/watch?v=G_SMCYu7qSw) (audio at 32:10).

115. Despite showing early promise, SIP and IMS have faltered, “and the net neutrality controversy surrounding IMS [has] not helped to make SIP any more popular.” John G. Waclawsky, *SIP’s Future: Complicated and Competitive*, 37 BUS. COMM. REV. 24 (2007).

116. Max E. Stachura & Elena V. Khasanshina, *The Community and Its Telemedicine Program: Mutual Sustainability Issues with a Focus on the United States and Russian Federation*, in HEALTH CAPITAL AND SUSTAINABLE SOCIOECONOMIC DEVELOPMENT 6.5.1 (Mitra M. Motlagh & Patricia A. Cholewka eds., 2008).

Regulatory experts across the political spectrum criticize the ex ante, permissioned approach like the one the OIO creates. Professor Richard Epstein notes<sup>117</sup> that

[t]he first choice on systems of social control is this: do you go ex ante or do you go ex post? . . . The least desirable permit system starts by imagining a thousand different things that could possibly go wrong. The law then requires the applicant to explain in detail how best to respond to each and every one of these remote possibilities in advance of their occurrence. Since talk is cheap, it is easy for multiple groups of objectors . . . to generate hundreds of reasons to prohibit some activity ex ante. The winning tactic, unfortunately, is to magnify extremely low probability events into make-it-or-break-it requirements for permit approval. Not good.

Professor Cass Sunstein similarly warned<sup>118</sup> about status quo bias in agencies:

For many permitting authorities, the incentive is to delay, to require more documentation, or to just say no. If a permitting agency maintains the status quo, it will avoid negative public attention, noisy complaints from interest groups and potentially serious risks. . . . It might even look like a hero. It won't bear the costs of refusing to allow a project to go forward, even if they turn out to be very high for the American people.

This is precisely the system of regulatory control the OIO creates. Title II allows advocates the ability to put a brake on new services, and the order advises companies to seek advisory guidance before launching new services. Companies that should be competing in the marketplace and for consumer loyalty compete instead for FCC waivers and favors.

#### Open Internet Order Supporters Have Pledged to Use the Vague Regulations Aggressively

No deviation from “neutrality” was too small for tech activists in the past. In 2010, MetroPCS developed an innovative service, years before the practice became common globally, that allowed unlimited (digitally compressed) YouTube videos for subscribers.<sup>119</sup> After publication of the 2010 OIO, and before the rules had taken legal effect, activists leapt into action and called for an FCC investigation for an evaluation of the technology used and the business model.<sup>120</sup> These legal challenges to an innovative business model certainly didn't help MetroPCS's competitive circumstances as a small mobile operator in the US, with 3 percent market share.<sup>121</sup> In 2012, MetroPCS and T-Mobile sought approval to merge their companies.

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117. Richard Epstein, *Property Rights in Water, Spectrum, and Minerals*, 86 U. COLO. L. REV. 389, 416–17 (2015).

118. Cass R. Sunstein, *Trump Did Something Good This Week*, BLOOMBERG (Aug. 17, 2017), <https://www.bloomberg.com/view/articles/2017-08-17/trump-did-something-good-this-week>.

119. Brent Skorup, *If You're Reliant on the Internet, You Loathe Net Neutrality*, REALCLEARMARKETS (Feb. 12, 2014), [https://www.mercatus.org/expert\\_commentary/if-youre-reliant-internet-you-loathe-net-neutrality](https://www.mercatus.org/expert_commentary/if-youre-reliant-internet-you-loathe-net-neutrality).

120. Free Press, Notice of Ex Parte 5, GN Dkt. No. 09-191, Jan. 10, 2011.

121. Brent Skorup, *If You're Reliant on the Internet, You Loathe Net Neutrality*, REALCLEARMARKETS (Feb. 12, 2014), [https://www.mercatus.org/expert\\_commentary/if-youre-reliant-internet-you-loathe-net-neutrality](https://www.mercatus.org/expert_commentary/if-youre-reliant-internet-you-loathe-net-neutrality).



Advocates are already preparing for constant legal proceedings over new and existing services. As Public Knowledge CEO Gene Kimmelman has said, these rules are about threatening the industry with vague but severe rules. “Legal risk and some ambiguity around what practices will be deemed ‘unreasonably discriminatory’ have been effective tools to instill fear for the last 20 years”<sup>122</sup> for the telecom industry, and, Kimmelman says, Title II functions as a “way[] to keep the shadow and the fear of ‘going too far’ hanging over the dominant ISPs.”<sup>123</sup> Internet regulation advocates, he said, “have to have fight after fight over every claim of discrimination, of new service or not.”<sup>124</sup>

### Recent History Shows That Gaining FCC Approval for New Services Means Reduced Innovation

Rigorous research on regulation and product innovation is scarce<sup>125</sup> but economist James Preiger took advantage of a natural experiment when, in the 1990s, an FCC decision deregulated telecommunications carriers for a brief time before regulation recommenced. Preiger’s findings suggest that the FCC’s permissioned approach for telecommunications carriers has a large negative effect on innovation.<sup>126</sup>

AT&T and Bell Operating companies were regulated as telecommunications carriers in the 1990s. Resembling the advisory opinion framework concerning “reasonable network management” in the Open Internet Order, those carriers had to offer competitors “comparably efficient interconnection” (CEI) and submit those CEI plans to the FCC for approval for reasonableness. As a result of an FCC decision and a subsequent court decision, for 18 to 30 months, depending on the firm, carriers were deregulated and did not have to submit CEI plans to the FCC.<sup>127</sup> After the court decision, the FCC required carriers to file retroactive CEI plans for services introduced after deregulation.<sup>128</sup>

This turn of events allowed Preiger to analyze and compare the rate of new services deployment in the regulated period and the brief deregulated period. Carriers disliked the permissioned approach because (1) there were substantial direct costs to prepare a plan; (2) the plans revealed prospective and innovative new services to competitors; and (3) the regulatory delays were substantial, averaging over 200 days in regulatory limbo.<sup>129</sup> The results are suggestive. Preiger found that “some otherwise profitable services are not financially viable under” the permissioned regime.<sup>130</sup> Critically, the number of services carriers deployed “during the [deregulated] interim is 60%–99% larger than the model predicts they would have created”

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122. Jennifer Holt, *Net Neutrality and the Public Interest: An Interview with Gene Kimmelman, President and CEO of Public Knowledge*, 10 *INTERNAT’L J. COMM.* 5795, 5802 (2016).

123. *Id.*

124. *Id.*

125. James E. Preiger, *Regulation, Innovation, and the Introduction of New Telecommunications Services*, 84 *REV. ECON. & STATISTICS* 704, 704 (2002).

126. *Id.*

127. *Id.* at 708.

128. *Id.* at 705.

129. *Id.* at 704.

130. James E. Preiger, *Regulation, Innovation, and the Introduction of New Telecommunications Services*, 84 *REV. ECON. & STATISTICS* 704, 705 (2002).

when CEI preapproval was required.<sup>131</sup> Finally, Preiger found that firms would have introduced 62 percent more services during the entire study period if there had been no permissioned regime.<sup>132</sup> The retarded rate of innovation is consistent with what Professors Epstein and Sunstein predict about the stifling effect of bureaucratic evaluation and approval.

Already, the permissioned approach from the OIO is burdening firms with uncertain and lengthy legal proceedings. T-Mobile's Binge On program is a textbook example of the uncertainty produced by the general conduct standard. The assessments from prominent OIO supporters ranged from "highly innovative"<sup>133</sup> to a "dangerous" practice that should be banned "immediately."<sup>134</sup> T-Mobile notes that it had to respond to multiple FCC inquiries during an investigation that, much like 1990s CEI approvals, lasted nearly a year.<sup>135</sup> T-Mobile notes that its new unlimited plan T-Mobile ONE "directly resulted from the Binge On" experiment, which showed executives not only that the T-Mobile network could handle an unlimited video offering if there were throughput limits, but also that such an offering was popular with consumers. Even after investigation, the FCC's assessment was ambivalent: "it is unlikely that the [Binge On] offering violates" the general conduct standard.<sup>136</sup>

This equivocal assessment for a transparent and oft-publicized practice that garnered praise from FCC Chairman Tom Wheeler<sup>137</sup> signals to all innovators to "lawyer up." Any ISP or app provider testing technical improvements and more controversial business models faces the prospect of multiyear delays and investigations before FCC approval. That possibility will chill the iteration, experimentation, and innovation that has improved US broadband technologies and applications.

### The Paid Priority Ban Harms Innovative New Services

The paid priority ban disallows tech companies and ISPs from sharing joint costs and testing new services and business models. Paid priority is a common economic practice in many industries. There are "slotting fees" and other consideration payments, where producers pay downstream firms and retailers for access to consumers or special treatment, in many

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131. *Id.*

132. *Id.*

133. Todd Shields, *T-Mobile Offering Is 'Highly Innovative,' FCC Chief Wheeler Says*, BLOOMBERG TECH. (Nov. 19, 2015), <http://www.bloomberg.com/news/articles/2015-11-19/t-mobile-offering-is-highly-innovative-fcc-chief-wheeler-says>.

134. Susan Crawford, *Zero for Conduct*, BACKCHANNEL (Jan. 7, 2015), <https://medium.com/backchannel/less-than-zero-199bcb05a868>. T-Mobile's new unlimited plan was immediately criticized by Open Internet Order supporters as "run[ning] directly afoul of the principle of net neutrality." AJ Dellinger, *Net Neutrality Advocates Have Concerns About T-Mobile's New Unlimited Data Plan*, DAILY DOT (Aug. 18, 2016), <https://www.dailydot.com/debug/t-mobile-one-unlimited-data-net-neutrality-eff/>.

135. Comments of T-Mobile, "In the Matter of Restoring Internet Freedom" 10, WC Dkt. No. 17-108, Jul. 17, 2017.

136. FCC, Wireless Telecommunications Bureau Report, Policy Review of Mobile Broadband Operators' Sponsored Data Offerings for Zero-Rated Content and Services (rel. Jan. 11, 2017), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-342987A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-342987A1.pdf) (subsequently rescinded).

137. Todd Shields, *T-Mobile Offering Is 'Highly Innovative,' FCC Chief Wheeler Says*, BLOOMBERG TECH. (Nov. 19, 2015), <http://www.bloomberg.com/news/articles/2015-11-19/t-mobile-offering-is-highly-innovative-fcc-chief-wheeler-says>.

industries.<sup>138</sup> It is not the case that consideration payment—like a hypothetical paid prioritization agreement—occurs only or typically when an access provider is acting anticompetitively. Market participants in competitive industries, like grocery stores, home builders, bookstores, and department stores, charge consideration payments to upstream suppliers.<sup>139</sup> In the grocery industry or the music-streaming industry,<sup>140</sup> it is often smaller suppliers who are most willing to pay or forgo payment because they serve a niche demographic or need consumer exposure that big players already possess. Output can also increase in the face of consideration payments. The use of slotting fees in the grocery industry is illustrative. In the 15 years that slotting fees grew, the number of new products nearly tripled, from 11,000 per year to 31,000 per year.<sup>141</sup>

The notion that “only large companies will benefit” from allowing payments is contrary to economic theory and actual experience. As research published in an Institute of Electrical and Electronics Engineers journal concluded recently, “[P]aid prioritization provides incentives for ISPs to expand capacity and accommodate high traffic throughput in the long run.”<sup>142</sup> In most industries, and especially the Internet industry, good ideas from small and unknown innovators get funded.

The paid prioritization ban biases the evolution of the Internet in favor of cache-able services (like web browsing and streaming video) and against real-time or interactive services like teleconferencing, live TV, and gaming. Caching doesn’t work for these services because there’s nothing to cache beforehand.

In fact, real-time services are the next big challenge in the Internet’s evolution. Amazon<sup>143</sup> and Facebook,<sup>144</sup> for instance, are developing and launching video chat devices. As streaming media expert Dan Rayburn noted, “[T]raditional one-way live streaming is being disrupted by the demand for interactive engagement.”<sup>145</sup> Large and small edge companies are increasingly looking for low-latency video solutions. Today, a typical “live” event is broadcast online to viewers with a 15- to 45-second delay. This latency limits or kills the potential for interactive

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138. The most common consideration payment is called a slotting fee, but it goes by various names, depending on the industry and the structure of the commercial agreement, including presentation fee, display fee, failure fee, new product fee, and pay-to-stay fee. Marianne M. Jennings, Robert J. Aalberts & Stephen K. Happel, *The Economics, Ethics and Legalities of Slotting Fees and Other Allowances in Retail Markets*, 21 J.L. & COMMERCE 1, 5–6 (2001).

139. *Id.* at 5–9. For instance, “[s]upermarkets, bookstores, discounters and other retailers charge” slotting fees. John Greenwald & Viveca Novak, *Frito-Lay Under Snack Attack*, TIME, June 10, 1996.

140. Ben Fritz, *What Happens When Spotify and Netflix Promote Their Own Content First*, WALL ST. J. (Jul. 30, 2017), <https://www.wsj.com/articles/when-streaming-services-put-their-interests-first-1501412404>.

141. Marianne M. Jennings, Robert J. Aalberts & Stephen K. Happel, *The Economics, Ethics and Legalities of Slotting Fees and Other Allowances in Retail Markets*, 21 J.L. & COMMERCE 1, 37 n.134 (2001).

142. Richard TB Ma et al., *Paid Priority and Its Impact on Net Neutrality*, 35 IEEE J. SELECTED AREAS IN COMM. 367, 368 (2017).

143. Brian Heater, *The Echo Show Is a Small Step for Echo, a Big Leap for Amazon*, TECHCRUNCH (Jun. 26, 2017), <https://techcrunch.com/2017/06/26/the-echo-show-is-a-small-step-for-echo-a-big-leap-for-amazon/>.

144. Mark Gurman & Sarah Frier, *Facebook Is Working on a Video Chat Device*, BLOOMBERG (Aug. 1, 2017), <https://www.bloomberg.com/news/articles/2017-08-01/facebook-is-said-to-work-on-video-chat-device-in-hardware-push>.

145. Dan Rayburn, *More Content Owners Asking for Low Latency Streaming Option*, STREAMINGMEDIABLOG (Feb. 9, 2017), <http://blog.streamingmedia.com/2017/02/ow-latency-streaming.html>.

online streaming services like online talk shows, pet cams, online auctions, videogaming, and online classrooms.

In short, paid priority may make economic sense for a specialized service for dedicated users that requires end-to-end reliability. One such plausible service is telepresence service for deaf people. As Martin Geddes described,<sup>146</sup> a decade ago the government in Wales developed such a service. The service architects discovered that a well-functioning service had quality characteristics not supplied by ISPs. ISPs and video chat apps like Skype optimize their networks, video codecs, and services for nondeaf people (i.e., most customers) and prioritize consistent audio quality over video quality. While that's useful for most people, deaf people need basically the opposite optimization because they need to perceive subtle hand and finger motions. The typical app that prioritizes audio, not video, doesn't work for them.

But high-definition, real-time video quality requires upstream and downstream capacity reservation and end-to-end reliability. This is expensive to provide. An ISP has three options—charge the telepresence provider, charge deaf customers a premium, or spread the costs across all customers. The OIO's paid priority ban ordinarily means ISPs must charge customers for increased costs. This paid priority ban unnecessarily limits the potential for such services since there may be companies or nonprofits willing to subsidize such a service. The FCC should permit and encourage the development of real-time IP services that require idiosyncratic technical requirements. The OIO, however, bans or sharply limits their development. Paid prioritization should be allowed, provided it does not violate existing consumer protection or competition laws.<sup>147</sup>

## CONCLUSION

In 2015 the FCC reversed 20 years of bipartisan consensus established in the 1996 Telecommunications Act that Internet access should be “unfettered from Federal or State regulation.” This light-touch regime encouraged investment in broadband networks and Internet applications and made the United States the global leader in technology development. Many of the OIO's harms are still in the future,<sup>148</sup> but commenters have already noted that the order has slowed investment and chilled innovation. The FCC was wise to reevaluate the rules in this proceeding. The agency should end the brief experiment with intrusive Internet regulation and restore the free-market vision that Congress intended.

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146. Martin Geddes, *How Wales Got the First Internet “Fast Lane,”* GEDDES (Jul. 8, 2015), <http://www.martingeddes.com/how-wales-got-the-first-internet-fast-lane/>.

147. See, e.g., 15 U.S.C. § 1, 2 (2012).

148. As Philip Verveer acknowledged, Title II classification “could be employed as a . . . pretext for entertaining [policies by foreign governments] that we would disagree with profoundly.” *Verveer Urges Industry to Raise ISP Liability in Privacy Talks*, TELECOMM. REPORTS 37 (Apr. 1, 2010).