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## The Save the Internet Act: The Hero America Needs, But We Deserve Much Better, 53 UIC J. Marshall L. Rev. 607 (2021)

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# THE SAVE THE INTERNET ACT: THE HERO AMERICA NEEDS, BUT WE DESERVE MUCH BETTER

LEXI HUDSON \*

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## I. INTRODUCTION

The Internet is a network of roads.<sup>1</sup> The roads are the pathways to the places we want to go, and the destination is the content that we want to see, such as a news article, a video, or pictures of friends. We do not have much control over the route we must use to get there, so we rely on the assumption that the roads in place will be safe, efficient, and open.

This is the metaphor used by artist Michael Goodwin in his 2014 comic “Net Neutrality: What It Is, and Why You Should Care.”<sup>2</sup> While in reality, drivers do have some options as to how to

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\* JD, UIC John Marshall Law School 2021. I dedicate this Comment to my personal hero, Ruth Bader Ginsburg, whose life’s work made it possible for people like me to speak and be heard.

1. Michael Goodwin, *Net Neutrality: What It Is, and Why You Should Care*, ECONOMIX (2014), [economixcomix.com/home/net-neutrality](http://economixcomix.com/home/net-neutrality).

2. *Id.* This comic was created in 2014 in support of the FCC enacting net neutrality protections, such as the 2015 Order. *Id.* The illustration was published to help explain the concept of net neutrality and that not having those

travel from Point A to Point B, the path that a user on the Internet must take in order to reach their destination, a website, is determined by their Internet Service Provider, or ISP.<sup>3</sup> One's ISP not only determines the path taken, but also how quickly, efficiently, and safely the user reaches the destination.<sup>4</sup>

This type of power, uninhibited, can be dangerous.<sup>5</sup> ISPs want to provide users with quick and efficient Internet access, but more importantly, they are businesses which exist to make a profit.<sup>6</sup> When Internet usage starts costing an ISP more money than it is making and it wants to charge the customer more to make up the difference, then a controversial issue arises: Should Internet Service Providers be able to charge customers more money to access certain content but not others?

This question relates to the principle of net neutrality – the topic of this Comment. Net neutrality is the principle that Internet Service Providers (ISP) must treat all data that is transferred among the Internet the same and not discriminate based on a variety of factors.<sup>7</sup> In other words, ISPs, operating under the standard of net neutrality, would have to offer equal access to all Internet content to all users without charging for faster or higher-quality delivery or preferring certain websites over others.<sup>8</sup>

In Part II, this Comment provides a brief summary of the concept of net neutrality and its recent history in the United States, including the Federal Communications Commission's everchanging policies. In Part III, this Comment analyzes the potential consequences of repealing net neutrality and possible solutions to bring it back. Finally, in Part IV, this Comment evaluates Congress's "Save the Internet Act" and its sufficiency. The Comment concludes that although this congressional act is a step in the right direction, it is not a long-term solution and a more permanent solution should be in place in order to ensure that the Internet stays neutral.

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protections threatens the open and free Internet that the world has had all along. *Id.*

3. *Id.*

4. *Id.*

5. Karyn Smith, *What a World Without Net Neutrality Looks Like*, FORBES (Jan. 12, 2018), [www.forbes.com/sites/ciocentral/2018/01/12/what-a-world-without-net-neutrality-looks-like/#62b3149f6efe](http://www.forbes.com/sites/ciocentral/2018/01/12/what-a-world-without-net-neutrality-looks-like/#62b3149f6efe) (providing an illuminating example of the reality the United States may find itself in without the enforcement of net neutrality).

6. *Id.*

7. *Net Neutrality*, ELECTRONIC FRONTIER FOUND., [www.eff.org/issues/net-neutrality](http://www.eff.org/issues/net-neutrality) (last visited Sept. 22, 2020); *see also Internet Service Provider (ISP)*, TECHOPEDIA, [www.techopedia.com/definition/2510/internet-service-provider-isp](http://www.techopedia.com/definition/2510/internet-service-provider-isp) (last updated Aug. 6, 2020) (defining "Internet Service Provider").

8. *Id.*

## II. BACKGROUND

### A. Net Neutrality and the Federal Communications Commission

The Federal Communications Commission (FCC) is a federal agency that implements laws to regulate interstate and international communications in the U.S. and its territories by television, radio, cable, wire, and satellite.<sup>9</sup> Under the Communications Act of 1934 (Act), the FCC “is the United States’ primary authority for communications law, regulation and technological innovation.”<sup>10</sup> Historically, the FCC has determined whether or not ISPs are required to operate their services in a neutral way.<sup>11</sup> This determination is made by a five-person vote within the FCC and, as described below, has been an issue of contention not just within the FCC, but the entire United States.<sup>12</sup>

A major issue surrounding net neutrality is the classification of ISPs under the Act and whether they should be considered Title I “information services”<sup>13</sup> or Title II “common carrier services.”<sup>14</sup> Historically, the FCC has had the power to make that determination because the Act does not specify which category they fall under.<sup>15</sup> The classification affects the FCC’s authority to

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9. *About the FCC*, FED. COMM’N. COMM’N, [www.fcc.gov/about/overview](http://www.fcc.gov/about/overview) (last visited Sept. 22, 2020).

10. *What We Do*, FED. COMM’N. COMM’N, [www.fcc.gov/about-fcc/what-we-do](http://www.fcc.gov/about-fcc/what-we-do) (last visited Sept. 22, 2020); *see* 47 U.S.C. §154 (2018) (establishing the Federal Communications Commission as the primary regulatory authority for communications such as radio in the United States).

11. *See* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5757 paras. 355-56 (2015) (establishing Internet Service Providers as “common carriers” under the meaning of Title II of the Communications Act of 1934 and enforcing net neutrality protections against Internet service providers); *see also* Restoring Internet Freedom Order, 33 FCC Rcd. 311, 318 para. 20 (2018) (overruling the 2015 Order and reflects the FCC’s current regulations regarding ISPs).

12. *Rulemaking Process*, FEDERAL COMM’N. COMM’N, [www.fcc.gov/about-fcc/rulemaking-process](http://www.fcc.gov/about-fcc/rulemaking-process) (last visited Sept. 22, 2020) (explaining the procedural rules of the FCC). The Commission follows a process known as “notice and comment” in which it gives notice to the public, solicits comments, and drafts an order reflecting the disposition of the comments before subjecting the proposed order to a five-person vote of the Chairperson and the four Commissioners. *Id.*

13. 47 U.S.C. § 153 (20) (2010). “Information service” is defined as the “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing.” *Id.*

14. *Id.* A common carrier “means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy.” *Id.* at § 153 (10).

15. *See* Protecting and Promoting the Open Internet, 30 FCC Rcd at 5757,

regulate ISPs, as the FCC would have significant ability to regulate ISPs if classified as Title II common carriers, but much less if ISP's are classified as Title I information services.<sup>16</sup>

### *B. The Struggle to Find Jurisdiction and Proper Authority to Enforce Net Neutrality Protections*

In 2005, FCC Chairwoman Kathleen Abernathy issued the Internet Policy Statement adopting network neutrality principles to “preserve and promote the vibrant and open character of the Internet as the telecommunications marketplace enters the broadband age.”<sup>17</sup> The order was broad in essence and contained few specifics.<sup>18</sup> At the time, ISPs were not considered to be common carriers, therefore not subject to mandatory regulation under Title II.<sup>19</sup> However, the FCC asserted its “jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications.”<sup>20</sup> Therefore, the FCC had the authority to “ensure that providers of telecommunications for Internet Access or Internet Protocol-enabled (IP-enabled) services are operated in a neutral manner.”<sup>21</sup>

The policy statement prompted both support and pushback.<sup>22</sup> Beginning in 2005, Congress made many attempts to pass legislation that would codify net neutrality as a matter of law, but due to partisan divide, all failed to pass.<sup>23</sup> In contrast, several large

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paras. 355-56 (classifying ISPs as Title II common carriers), *and* Restoring Internet Freedom Order, 33 FCC Rcd. at 318, para. 20 (classifying ISPs as Title I information services).

16. *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014) (holding that, in order to regulate ISPs under principles of net neutrality, they must be classified as “common carriers” and thus subject to the regulatory power of the FCC under the Communications Act of 1934). The court held, as is still true today, that common carriers are subject to regulatory schemes set forth by the FCC, but information services are not. *Id.*

17. Marlene Dortch, *Policy Statement: FC 05-151*, FED. COMM'N. COMM'N (Sept. 23, 2005).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *See infra* text accompanying notes 23-24 (describing the support and pushback in response to the 2005 Internet Policy Statement).

23. *See* Internet Freedom and Nondiscrimination Act, S. Rep. No. 2360 (2006) (proposing federal net neutrality regulations); Communications Opportunity, Promotion and Enhancement Bill, H.R. Rep. No. 5252 (2006) (proposing federal net neutrality regulations); Network Neutrality Act, H.R. Rep. No. 5273 (2006) (proposing federal net neutrality regulations); Communications Opportunity, Promotion and Enhancement Bill, S. Rep. No. 2686 (2006) (proposing federal net neutrality regulations); Internet Freedom and Nondiscrimination Act, H.R. Rep. No. 5417 (2006) (proposing federal net neutrality regulations); Internet Freedom Preservation Act, S. Rep. No. 215

ISPs challenged the FCC's stance.<sup>24</sup> In *Comcast Corp. v. FCC*, the D.C. Circuit of Appeals found that the FCC could not use its ancillary authority via Title I to take enforcement action against the ISP Comcast, but perhaps they could find more direct authority somewhere else in the Act.<sup>25</sup>

In response, the FCC adopted the more specific "2010 Open Internet Order" which codified the policy principles of the Internet Policy Statement of 2005.<sup>26</sup> This order specifically adopted three fundamental rules for ISPs: (1) no blocking content; (2) no unreasonable discrimination such as paid prioritization; and (3) to increase transparency with their customers.<sup>27</sup> Additionally, in order to avoid the issues from *Comcast*,<sup>28</sup> the FCC relied on Section 706 of the 1996 Telecommunications Act (which amended the Communications Act of 1934) to give itself adequate authority to make such rules.<sup>29</sup> The first two rules restricted ISPs from intentionally interfering with customers' access to lawful content.<sup>30</sup> The third rule requires ISPs to "disclose the network management practices, performance characteristics, and terms and conditions of their broadband services."<sup>31</sup> However, the rules were less imposing and more workable than the previous policy statement, as the restrictions were made subject to an exception for "reasonable network management."<sup>32</sup> This exception gave ISPs the ability to address the technical and economic realities of broadband Internet access, such as the management of network congestion or the regulation of harmful or illegal content.<sup>33</sup> Overall, the FCC's goal was to ensure that access to the Internet remain open while still

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(2007) (proposing federal net neutrality regulations); Internet Freedom Preservation Act, H.R. Rep. No. 5353 (2008) (proposing federal net neutrality regulations); *and* Internet Freedom Preservation Act, H.R. Rep. No. 3458 (2009) (proposing federal net neutrality regulations).

24. *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

25. *Id.* at 661. Litigation followed a consumer's complaint to the FCC that Comcast was interfering with their use of "peer-to-peer" networks. *Id.* at 644. The FCC, in its first attempt to enforce net neutrality principles, filed an order censuring Comcast and attempting to prevent them from using these practices in the future. *Id.* Comcast challenged this exercise of authority and the court found that the FCC failed to justify its use of ancillary power under Title I of the Communications Act of 1934 to regulate ISPs but hinted that the Commission would potentially be able to find this power elsewhere in the Act. *Id.*

26. *In re Preserving the Open Internet, Broadband Indus. Practices*, 25 FCC Rcd. 17905, 17907, para. 4 (Sept. 30, 2011).

27. *Id.* at 17906, para. 1.

28. *Comcast*, 600 F.3d at 642.

29. *In re Preserving the Open Internet, Broadband Indus. Practices*, 25 FCC Rcd. at 17968, para. 117; 47 U.S.C. § 1302 (2015).

30. *Id.* at 17906, para. 1.

31. *Id.*

32. *Id.* at 17928, para. 39.

33. *Id.*

allowing ISPs the freedom to conduct business with only limited intrusion.<sup>34</sup>

In 2014, Verizon challenged the Open Internet Order in the D.C. Court of Appeals.<sup>35</sup> There, the court validated the FCC's general authority to regulate ISPs under the Act, but struck down the order's rules against blocking and discrimination because it amounted to regulation of a common carrier in conflict with the FCC's previous classification of fixed Internet access as an "information service."<sup>36</sup> The ruling effectively meant that unless ISPs were reclassified as common carriers subject to Title II regulations, the FCC wasn't going to get any closer to achieving its goal of maintaining an open and uninhibited Internet.<sup>37</sup>

### *C. FCC Makes Major Strides Under the Verizon Decision*

Following *Verizon*, the FCC took steps to reclassify ISPs as common carriers subject to Title II regulation.<sup>38</sup> On May 15, 2014, the FCC issued a Notice of Proposed Rulemaking (NPRM) in order to receive comments from the public on net neutrality, policy reasons for maintaining an open Internet, and general comments.<sup>39</sup> It received a total of 3.7 million responses, with a substantial amount supporting reclassifying ISPs as common carriers.<sup>40</sup> Many commenters were concerned with the possibility of fast lanes, paid prioritization, and restricted access to legal content.<sup>41</sup>

The responses prompted the FCC to issue the groundbreaking

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34. *Id.*

35. *Verizon*, 740 F.3d at 628.

36. *Id.* at 650.

37. *Id.*

38. *See infra* text accompanying notes 39-45 (describing the steps that the FCC took in order to reclassify ISPs as common carriers).

39. Protecting and Promoting the Open Internet, 30 FCC Rcd at 5623, para. 72. *See generally Rulemaking at the FCC*, FED. COMM'N. COMM'N, [www.fcc.gov/general/rulemaking-fcc](http://www.fcc.gov/general/rulemaking-fcc) (last visited Oct. 10, 2019) (explaining the process of rulemaking at the FCC). The process by which the FCC enacts rules or policy begins with a Notice of Inquiry (NOI). *Id.* The Commission releases an NOI in order to research on a particular subject that it is considering regulating or altering current regulations. *Id.* Next, the Commission issues a Notice of Proposed Rulemaking (NPRM) which contains proposed rules and asks for public comments and seeks public approval or disapproval. *Id.* Additionally, if further comment is necessary, the Commission may issue a Further Notice of Proposed Rulemaking (FNPRM) regarding specific issues that are raised in comments. *Id.* Finally, the FCC issues a Report and Order (R&O) which contains the Commission's final decision, which could be to create a new rule, amend an existing one, or make the decision to not do anything and maintain the status quo. *Id.*

40. Protecting and Promoting the Open Internet, 30 FCC Rcd at 5624, para. 74.

41. *Id.*

2015 Open Internet Order (2015 Order) which reclassified ISPs as common carriers subject to FCC regulation under Title II of the Act, and it also revised open Internet requirements.<sup>42</sup> The FCC stated that the 2015 Order was “tailored for the 21st century, and consistent with the ‘light-touch’ regulatory framework that has facilitated the tremendous investment and innovation on the Internet.”<sup>43</sup> Tom Wheeler, FCC chairman, praised the order and stated, “These enforceable, bright-line rules assure the rights of Internet users to go where they want, when they want, and the rights of innovators to introduce new products without asking anyone’s permission.”<sup>44</sup> The 2015 Order was released on March 12, 2015, and went into effect on June 12 of the same year.<sup>45</sup>

However, even after what seemed like a major victory for proponents of an open Internet, the future of net neutrality was still precarious.<sup>46</sup> In 2015, the United States Telecom Association (Telecom), which represents large telecom companies, filed a lawsuit in the D.C. Circuit Court of Appeals challenging the enforcement of the 2015 Order.<sup>47</sup> Telecom argued, in part, that the FCC’s reclassification of broadband service as common carrier service was outside the scope of FCC administrative authority and incorrect due to the nature of broadband service.<sup>48</sup> After the court thoroughly analyzed of the history of ISP regulation and factual support submitted by the FCC, a divided panel ultimately upheld the 2015 Order and the FCC’s determination that broadband access is subject to Title II regulation.<sup>49</sup>

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42. *Id.* at paras. 14-18.

43. *Id.* at para. 5.

44. Statement of Chairman Tom Wheeler, *In re* Protecting and Promoting the Open Internet, GN Docket No. 14-28 (2015). Wheeler said of the order: “For over a decade, the Commission has endeavored to protect and promote the open Internet. FCC Chairs and Commissioners, Republican and Democrat alike, have embraced the importance of the open Internet, and the need to protect and promote that openness. Today is the culmination of that effort, as we adopt the strongest possible open Internet protections.” *Id.*

45. *FCC Releases Open Internet Order*, FED. COMM’N. COMM’N (Mar. 12, 2015), [www.fcc.gov/document/fcc-releases-open-internet-order](http://www.fcc.gov/document/fcc-releases-open-internet-order).

46. *See infra* text accompanying notes 47-49 (discussing the challenge that the 2015 Order faced in court).

47. *U.S. Telecom Association v. FCC*, 825 F.3d 674, 689 (D.C. Cir. 2016).

48. *Id.* at 701. U.S. Telecom also asserted two procedural arguments – that the FCC violated § 553 of the Administrative Procedure Act and that the Commission didn’t adequately provide a meaningful opportunity to submit comments on the 2015 Order. *Id.* The court rejected both of these arguments. *Id.* Additionally, and most relevant here, the court rejected all three of US Telecom’s arguments against the FCC’s reclassification of ISPs as common carriers. *Id.*

49. *Id.* at 739. Senior Circuit Judge Stephen Williams partially dissented in the courts decision to uphold the 2015 Order, stating that the “switch in classification of broadband from a Title I information service to a Title II telecommunications service fails for want of reasoned decisionmaking.” *Id.* at



### *D. Leadership Change: A Drastic Pivot Away from Net Neutrality Protections*

The beginning of the end for net neutrality was the appointment of Ajit Pai as Chairman of the FCC, an outspoken opponent of the 2015 Order.<sup>50</sup> Pai publicly stated, "When the FCC rammed through the Title II Order two years ago . . . I voiced my confidence that the Title II Order's days were already numbered."<sup>51</sup> Pai claimed that the reclassification of ISPs caused the country to lose billions of dollars in broadband capital investments and hundreds of thousands of jobs.<sup>52</sup> He argued that the idea of an open Internet is not the problem, but the heavy-handed regulatory scheme implemented by the 2015 Order hurt broadband companies and the United States economy overall.<sup>53</sup> He claimed the regulations "represented an unprecedented shift in favor of government control of the Internet."<sup>54</sup> Instead, he proposed a "light-touch" regulatory framework in order to better effectuate the goal of a free and open Internet while still allowing the free market economy to operate without government intervention.<sup>55</sup>

In order to effectuate Pai's goals, the FCC, after receiving comments from the public,<sup>56</sup> formulated a new official order entitled

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744.

50. Marguerite Reardon (Reardon I), *FCC Chairman Begins Assault on Net Neutrality Rules*, CNET (Apr. 26, 2017), [www.cnet.com/news/fcc-chairman-begins-assault-on-net-neutrality-rules](http://www.cnet.com/news/fcc-chairman-begins-assault-on-net-neutrality-rules).

51. *Id.*

52. Marguerite Reardon (Reardon II), *Net Neutrality Redux: The Battle for an Open Net Continues*, CNET (May 2, 2017), [www.cnet.com/news/net-neutrality-redux-the-battle-for-an-open-net-continues](http://www.cnet.com/news/net-neutrality-redux-the-battle-for-an-open-net-continues).

53. *Id.* Reardon writes that Pai's purported numbers are disputed, especially by some consumer advocacy groups. *Id.* Instead, these groups state that capital investment and profits are actually on the rise. *Id.*

54. Restoring Internet Freedom Notice of Proposed Rulemaking, 32 FCC Rcd. 4434, 4435, para. 3 (2018).

55. *Id.* at 4441, para. 24.

56. Brian Naylor, *As FCC Prepares Net-Neutrality Vote, Study Finds Millions of Fake Comments*, NPR (Dec. 14, 2017), [www.npr.org/2017/12/14/570262688/as-fcc-prepares-net-neutrality-vote-study-finds-millions-of-fake-comments](http://www.npr.org/2017/12/14/570262688/as-fcc-prepares-net-neutrality-vote-study-finds-millions-of-fake-comments). While not confirmed, there are allegations that of the 22 million comments received in response to the NPRM, millions of these could be fake comments, fabricated to create the appearance of public support for the 2017 Order. *Id.* A study by the Pew Research Center found that up to 94 percent of the comments were submitted more than once – up to many hundred times each. *Id.* Additionally, about 17,000 out of 22 million were submitted under the name "The Internet." *Id.* There were also thousands of comments under common names, such as John Smith or John Johnson, that call into question their validity. *Id.* In addition to this study, the office of New York Attorney General Eric Schneider did an investigation and came to the same conclusion: as many as two million of these comments were fake. *Id.* Democratic FCC

the Restoring Internet Freedom Order (2017 Order).<sup>57</sup> The 2017 Order, purportedly motivated by consumer protection, transparency, and removal of unneeded regulations, proposed to overturn the 2015 Order by stripping broadband of its Title II status, thus removing the FCC's authority to enforce net neutrality rules against ISPs.<sup>58</sup> On December 14, 2017, the FCC passed the 2017 Order by a 3-2 vote.<sup>59</sup> The vote, much like the one for the 2015 Order, was made along party lines – Democrats favoring net neutrality, and Republicans favoring deregulation.<sup>60</sup>

The official text for the 2017 Order was published on January 4, 2018.<sup>61</sup> Pursuant to the Congressional Review Act of 1996 (CRA), Congress had 60 legislative days from that date to vote to nullify the decision.<sup>62</sup> By January 15, the Senate had managed to get 50 Senators to endorse a legislative measure to override the FCC's decision to deregulate the broadband industry.<sup>63</sup> On May 16, the Senate passed the resolution with a 52-47 vote and sent it to the House of Representatives.<sup>64</sup> At the time, Republicans maintained a majority in the House, so it was speculated that the measure would

Commissioner Jessica Rosenworcel, who voted against the 2017 Order, stated that five hundred thousand fake comments were from Russian email addresses. *Id.*

57. Restoring Internet Freedom Order, 33 FCC Rcd. 311 (2018).

58. *Id.*; Reardon II, *supra* note 52. One other key aspect of the 2017 Order is the fact that, without Title II status, it will be up to the Federal Trade Commission to conduct investigations into privacy and anti-trust concerns. Reardon II, *supra* note 52. This is a problem for opponents of net neutrality, they argue, because the Federal Trade Commission acts only when companies violate its terms of service with customers and doesn't issue direct regulations. *Id.*

59. Brian Fung (Fung I), *The FCC Just Voted to Repeal its Net Neutrality Rules, in a Sweeping Act of Deregulation*, WASH. POST (Dec. 14, 2017), [www.washingtonpost.com/news/the-switch/wp/2017/12/14/the-fcc-is-expected-to-repeal-its-net-neutrality-rules-today-in-a-sweeping-act-of-deregulation](http://www.washingtonpost.com/news/the-switch/wp/2017/12/14/the-fcc-is-expected-to-repeal-its-net-neutrality-rules-today-in-a-sweeping-act-of-deregulation).

60. *Id.* Fung states that the “move by the Federal Communications Commission to deregulate the telecom and cable industries was a prominent example of the policy shifts taking place in Washington under President Trump and a major setback for consumer groups, tech companies and Democrats who had lobbied heavily against the decision.” *Id.*

61. *FCC Releases Restoring Internet Freedom Order*, FED. COMM'N. COMM'N (Jan. 4, 2018), [www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order](http://www.fcc.gov/document/fcc-releases-restoring-internet-freedom-order). The listed purposes of the order is “to Spur Investment, Innovation, and Competition . . . [and] Increase[] Transparency to Protect Consumers.” *Id.*

62. 5 U.S.C. § 802 (1996).

63. Brian Fung (Fung II), *The Senate's Push to Overrule the FCC on Net Neutrality Now Has 50 Votes, Democrats Say*, WASH. POST (Jan. 15, 2018), [www.washingtonpost.com/news/the-switch/wp/2018/01/15/the-senates-push-to-overrule-the-fcc-on-net-neutrality-now-has-50-votes-democrats-say](http://www.washingtonpost.com/news/the-switch/wp/2018/01/15/the-senates-push-to-overrule-the-fcc-on-net-neutrality-now-has-50-votes-democrats-say).

64. Ted Barret & Daniella Diaz, *Senate Passes Measure Repealing Changes to Net Neutrality Rules*, CNN, [www.cnn.com/2018/05/16/politics/net-neutrality-vote-senate-democrats/index.html](http://www.cnn.com/2018/05/16/politics/net-neutrality-vote-senate-democrats/index.html) (last updated May 16, 2018).

be stopped.<sup>65</sup>

The speculation held true: The 60-day period passed, and the House failed to act under the CRA to vote on the resolution.<sup>66</sup> On June 11, 2018, the 2017 Order took full effect and the historic 2015 Order was nullified.<sup>67</sup>

### *E. Where We Are Now and Looking to the Future*

As of the publication date of this Comment, there are no federal laws that require ISPs to provide broadband service in a fair, neutral, and nondiscriminatory way.<sup>68</sup> However, since the 2017 Order, thirty four states and the District of Columbia have introduced their own net neutrality bills.<sup>69</sup> California, New Jersey, Vermont, Washington, and Oregon are among the states that have enacted legislation in order to replace the policies in the 2015 Order.<sup>70</sup> However, these state legislative measures also faced challenges as the 2017 Order placed the regulation of ISPs under the sole jurisdiction of the Federal Trade Commission (FTC)<sup>71</sup> and preempted any state law that attempted to place net neutrality restrictions on ISPs.<sup>72</sup> In effect, it took the regulation of ISPs completely out of the realm of state power.<sup>73</sup>

States' authority to create their own rules in this area gained footing after a challenge to the 2017 Order in the D.C. Court of Appeals in *Mozilla v. FCC*.<sup>74</sup> In a *per curiam* opinion, the court

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65. *Id.*

66. Laurel Wamsley, *Net Neutrality Has Been Rolled Back – But It's Not Dead Yet*, NPR (June 11, 2018), [www.npr.org/2018/06/11/618928905/net-neutrality-has-been-rolled-back-but-its-not-dead-yet](http://www.npr.org/2018/06/11/618928905/net-neutrality-has-been-rolled-back-but-its-not-dead-yet).

67. *Id.*

68. Keith Collins, *Net Neutrality Has Been Officially Repealed. Here's How That Could Affect You*, N.Y. TIMES (June 11, 2018), [www.nytimes.com/2018/06/11/technology/net-neutrality-repeal.html](http://www.nytimes.com/2018/06/11/technology/net-neutrality-repeal.html).

69. Heather Morton, *Net Neutrality Legislation in States*, NAT'L CONF. OF ST. LEGISLATURES (Jan. 23, 2019), [www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-legislation-in-states.aspx](http://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-legislation-in-states.aspx). The

states that have not passed net neutrality legislation are Alabama, Arizona, Arkansas, Florida, Indiana, Louisiana, Maine, Mississippi, Montana, Nevada, New Hampshire, North Dakota, Ohio, Texas, Utah, and Wyoming. *Id.*

70. *Id.* While many states have adopted net neutrality measures, they are not all created equal: New Jersey adopted a resolution urging the President and Congress to restore net neutrality at the federal level. *Id.* Oregon, on the other hand, banned public institutions from contracting with ISPs whose practices don't align with net neutrality principles. *Id.* Similarly, Vermont instituted transparency standards by requiring ISPs that wish to win a government contract to certify that they do not violate net neutrality principles in their business practices. *Id.*

71. Reardon II, *supra* note 52.

72. Morton, *supra* note 69.

73. *Id.*

74. *Mozilla Corp. v. FCC*, 940 F.3d 1, 78 (D.C. Cir. 2019). Additionally, the

upheld the FCC's decision to deregulate ISPs and reclassify them under Title I.<sup>75</sup> However, the Court did not sustain the ability of the FCC to ban states from enacting their own legislation.<sup>76</sup> “[T]he Commission lacked the legal authority to categorically abolish all fifty States' statutorily conferred authority to regulate intrastate communications.”<sup>77</sup> Thus, while the 2017 Order was largely upheld, meaning that ISPs were not to be regulated under principles of net neutrality at the federal level, states were free to enact legislation to the same effect within their own jurisdiction.<sup>78</sup>

There have also been attempts at the federal level to chip away at the FCC's 2017 decision. In March 2019, Democratic Senators and Representatives introduced the Save the Internet Act (STIA).<sup>79</sup> The proposed legislation is relatively short and concise, with its stated purpose being “to restore the open Internet order of the Federal Communications.”<sup>80</sup> It was an attempt to rescind the 2017 Order.<sup>81</sup> If passed, the STIA would rescind the 2017 Order, codify the 2015 Order into law, bring back net neutrality protections, and prevent the FCC from making any future changes to eliminate those protections.<sup>82</sup>

On April 10, 2019, the Democrat-controlled House passed the Save the Internet Act by a vote of 232 – 190.<sup>83</sup> It was sent to the Senate the next day for consideration and to be placed on the Legislative Calendar, but many suspect that it won't go any further from there.<sup>84</sup> On the bill, Senate Republican Majority Leader Mitch McConnell said that net neutrality is “dead on arrival in the Senate.”<sup>85</sup> Partisan divide is expected to dictate the future of the bill.<sup>86</sup> Congressional Democrats support the bill, but Republicans,

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court remanded the Order because, among other things, it failed to examine the implications of the FCC's decisions for public safety. *Id.* at 69.

75. *Id.* at 35.

76. *Id.* at 78. “[T]he power to preempt the States' laws must be conferred by Congress. It cannot be a mere byproduct of self-made agency policy.” *Id.*

77. *Id.* at 86.

78. *Id.* Senior Circuit Judge Stephen Williams concurred in part and dissented in part, disagreeing with the court's decision that the 2017 Order would not preempt any state law. *Id.* at 95. “On my colleagues' view, state policy trumps federal; or, more precisely, the most draconian state policy trumps all else.” *Id.*

79. Save the Internet Act of 2019, H.R. Rep. No 1644 - 116th Congress (2019), [www.congress.gov/bill/116th-congress/house-bill/1644/all-actions](http://www.congress.gov/bill/116th-congress/house-bill/1644/all-actions).

80. *Id.*

81. *Id.*

82. Tali Arbel, *House Passes Save the Internet Act to Restore Obama-era 'Net Neutrality' Rules*, USA TODAY (Apr. 10, 2019), [www.usatoday.com/story/news/politics/2019/04/10/house-passes-save-internet-act-restore-net-neutrality-rules/3424273002](http://www.usatoday.com/story/news/politics/2019/04/10/house-passes-save-internet-act-restore-net-neutrality-rules/3424273002).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

including President Trump, have indicated that, one way or the other, they will stop the bill's passage.<sup>87</sup>

### III. ANALYSIS

This section addresses the arguments of those in favor of net neutrality protections included in the 2015 Order (“Proponents”) and those in favor of deregulation and the 2017 Order (“Opponents”). It also analyzes the implications of maintaining the current status quo, *i.e.* the state of the Internet in the United States without net neutrality and the resolutions currently being pursued to bring back these protections.

#### A. *The Pros, Cons, and Realities of America Following the Repeal of Net Neutrality*

Chairman Pai celebrated the 2017 Order as a victory over what he categorized as burdensome and heavy-handed regulations that hurt the U.S. economy.<sup>88</sup> In opposition, proponents argue that the elimination of these protections opens the door for ISPs to abuse their powers in order to maximize profits.<sup>89</sup> The next section will address both sides of the debate discussing whether widespread net neutrality regulation is beneficial or not by addressing a variety of factors including regulatory procedure, impact on the economy, and the effect on consumers.<sup>90</sup>

##### 1. *The FTC as the Regulating Body*

One major concern is the ability of the FTC to sufficiently regulate ISPs under Title I instead of the FCC. The role of the FTC is to prevent “anticompetitive, deceptive, and unfair business practices.”<sup>91</sup> Therefore, its role under the 2017 Order is to ensure

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87. Makena Kelly, *White House Threatens to Veto Democrat-led Net Neutrality Bill*, VERGE (Apr. 8, 2019), [www.theverge.com/2019/4/8/18301124/white-house-trump-net-neutrality-veto-bill-democrats-congress](http://www.theverge.com/2019/4/8/18301124/white-house-trump-net-neutrality-veto-bill-democrats-congress); see also Arbel, *supra* note 82 (reporting that Republicans in the Senate oppose the STIA).

88. Jacob Kastrenakes, *Read FCC Chairman Ajit Pai's Statement on Killing Net Neutrality*, VERGE (Dec. 14, 2017), [www.theverge.com/2017/12/14/16777626/ajit-pai-net-neutrality-speech](http://www.theverge.com/2017/12/14/16777626/ajit-pai-net-neutrality-speech). Pai reiterates his stance that net neutrality protections are not necessary because ISPs act fairly without regulation. *Id.*

89. Collins, *supra* note 68.

90. See generally Tim Wu & Christopher S. Yoo, *Keeping the Internet Neutral?: Tim Wu and Christopher Yoo Debate*, 59 FED. COMM. L.J. 575 (2007) (discussing both sides of the debate regarding net neutrality). Both experts argue that their respective ideas about net neutrality would be most beneficial for consumers, business, and the economy overall. *Id.*

91. *About the FTC: Our Mission*, FED. TRADE COMM'N., [www.ftc.gov/about-](http://www.ftc.gov/about-)

that ISPs do not engage in these types of practices that will harm consumers.<sup>92</sup> Proponents argue that this creates a simple loophole for ISPs to slip through: All ISPs have to do to evade FTC review is include language in their consumer contracts indicating their intention to exercise non-net neutral practices.<sup>93</sup> Essentially, the FTC cannot preclude ISPs from engaging in business practices that violate net neutrality – it can only require providers inform their customers of these practices.<sup>94</sup>

## 2. Effects on the Economy

Arguments made in opposition of net neutrality, for the most part, are based on maintaining a free market economy.<sup>95</sup> One argument is that the 2015 Order hurt the national economy by overly burdening ISPs with regulations.<sup>96</sup> Chairman Pai claimed that in the years following the 2015 Order, businesses in the U.S. lost an estimated 5.1 billion dollars in broadband capital investment and cost the country over 75,000 jobs.<sup>97</sup> Pai argued that the “heavy-handed” regulations caused businesses to cut back on capital investment and reduce developments in infrastructure.<sup>98</sup> The elimination of these regulations could allow ISPs to allocate resources that would otherwise be used for regulatory compliance to instead invest in growth and create more jobs.<sup>99</sup>

However, Chairman Pai’s promises that the 2017 Order would create more jobs due to ISP’s ability to expand is flawed.<sup>100</sup> For example, AT&T, the largest telecommunications company in the world,<sup>101</sup> laid off thousands of American workers in the two years

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ftc (last visited Oct. 31, 2019).

92. Reardon II, *supra* note 52.

93. Restoring Internet Freedom Order, 33 FCC Rcd. 846, 847 (2018) (Commissioner Jessica Rosenworcel dissenting opinion), [transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db1214/DOC-348259A1.pdf](https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1214/DOC-348259A1.pdf).

94. *Id.*

95. See generally Wu & Yoo, *supra* note 90 (analyzing the pros and cons of Net Neutrality regulation and its effect on the national economy).

96. Ajit Pai, *Remarks of FCC Chairman Ajit Pai at the Newseum – The Future of Internet Freedom*, FED. COMM’N. COMM’N (April 26, 2017), [transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0426/DOC-344590A1.pdf](https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0426/DOC-344590A1.pdf).

97. *Id.* at 3.

98. *Id.* at 2.

99. *Id.* at 4.

100. Dell Cameron, *Ajit Pai Promised New Jobs and ‘Better, Cheaper’ Internet. His ISP Pals Have a Different Plan*, GIZMODO (Mar. 14, 2019), [gizmodo.com/ajit-pai-promised-new-jobs-and-better-cheaper-internet-1833301242](https://gizmodo.com/ajit-pai-promised-new-jobs-and-better-cheaper-internet-1833301242).

101. Sarah Hansen, *The World’s Largest Telecom Companies 2019: AT&T, Verizon Hold on To Top Spots Amid 5G Buzz*, FORBES (May 15, 2019), [www.forbes.com/sites/sarahhansen/2019/05/15/worlds-largest-telecom-companies-2019/#364e21a16d4e](https://www.forbes.com/sites/sarahhansen/2019/05/15/worlds-largest-telecom-companies-2019/#364e21a16d4e).

following the 2017 Order.<sup>102</sup> Comcast lowered its capital spending by three percent in 2018 as compared to 2017.<sup>103</sup> Pai's assertions are not supported by reality, only hopeful platitudes devoid of any actual comprehension of the real world.<sup>104</sup>

Proponents counter that the 2017 Order will hurt the national economy by disproportionately impairing small businesses.<sup>105</sup> Evan Greer of the open Internet advocacy group, Fight for the Future, argues that eliminating net neutrality protections "amounts to a tax on small businesses that they just can't afford."<sup>106</sup> Small businesses have increasingly relied on the Internet to market and sell their products and services, even though many barriers exist to the establishment of a successful Internet presence.<sup>107</sup> The ability of small businesses to market, sell, and communicate with consumers online is crucial to their existence.<sup>108</sup> Charging more money to engage in these activities harms small businesses who have less money to spend and fewer resources to combat the imposition of such fees.<sup>109</sup>

Opponents argue that fewer regulations will promote

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102. See Karl Bode, *AT&T Preps for New Layoffs Despite Billions in Tax Breaks and Regulatory Favors*, VICE (Jan. 8, 2019), [www.vice.com/en\\_us/article/nexpeg/atandt-preps-for-new-layoffs-despite-billions-in-tax-breaks-and-regulatory-favors](http://www.vice.com/en_us/article/nexpeg/atandt-preps-for-new-layoffs-despite-billions-in-tax-breaks-and-regulatory-favors) (describing AT&T's plans to conduct layoffs in 2019 following the 2017 Order); Jon Brodtkin, *AT&T Cuts Another 1,800 Jobs as it Finishes Fiber-Internet Buildout*, ARSTECHNICA (June 17, 2019), [arstechnica.com/tech-policy/2019/06/att-cuts-another-1800-jobs-as-it-finishes-fiber-internet-buildout](http://arstechnica.com/tech-policy/2019/06/att-cuts-another-1800-jobs-as-it-finishes-fiber-internet-buildout) (reporting AT&T's layoffs in 2019); and Daniel Golightly, *AT&T Job Cuts Have Continued As It Abandons Midwest Communities*, ANDROID HEADLINES (June 14, 2019), [www.androidheadlines.com/2019/06/att-job-cuts-layoffs-continue.html](http://www.androidheadlines.com/2019/06/att-job-cuts-layoffs-continue.html) (describing AT&T's actions following its previous promise to create more jobs in the United States).

103. Jon Brodtkin, *Sorry, Ajit: Comcast Lowered Cable Investment Despite Net Neutrality Repeal*, ARSTECHNICA (Jan. 23, 2019), [arstechnica.com/information-technology/2019/01/sorry-ajit-comcast-lowered-cable-investment-despite-net-neutrality-repeal](http://arstechnica.com/information-technology/2019/01/sorry-ajit-comcast-lowered-cable-investment-despite-net-neutrality-repeal).

104. *Infra* text accompanying notes 100-103.

105. Rhonda Abrams, *Losing Net Neutrality is a Loss for Small Businesses*, USA TODAY (May 30, 2018), [www.usatoday.com/story/money/columnist/abrams/2018/05/30/small-business-lose-if-net-neutrality-goes-away/653679002](http://www.usatoday.com/story/money/columnist/abrams/2018/05/30/small-business-lose-if-net-neutrality-goes-away/653679002) (last updated June 1, 2018); see also, Jessica Rosenworcel, *What Small Businesses Stand to Lose in a Net Neutrality Rollback*, HARV. BUS. REV. (Dec. 12, 2017), [hbr.org/2017/12/what-small-businesses-stand-to-lose-in-a-net-neutrality-rollback](http://hbr.org/2017/12/what-small-businesses-stand-to-lose-in-a-net-neutrality-rollback) (describing the plight of American small businesses without Net Neutrality protections).

106. Abrams, *supra* note 105.

107. See Ajeet Khurana, *Barriers to Entry in the Ecommerce Business*, THE BALANCE|SMALL BUS., [www.thebalancesmb.com/barriers-to-entry-in-the-ecommerce-business-1141565](http://www.thebalancesmb.com/barriers-to-entry-in-the-ecommerce-business-1141565) (last updated Dec. 9, 2018) (explaining that smaller companies face barriers in setting up a true Ecommerce business that are more than negligible).

108. See Abrams, *supra* note 105 (explaining the plight of small businesses without Net Neutrality protections).

109. *Id.*

competition, which will benefit consumers.<sup>110</sup> They argue that without the burden of regulatory compliance, more businesses will be able to enter the market, thus promoting competition and leading to better prices for consumers.<sup>111</sup> Also, Title II regulation served as a barrier to entering the market, as it required ISPs to retain “armies of lawyers and compliance officers” to ensure that the regulations were being met.<sup>112</sup> Therefore, without these barriers, customers seeking an ISP will have more options and better service.<sup>113</sup>

However, the concern that Title II regulations serve as a “barrier” to entering the market was addressed by the regulatory scheme adopted in the 2015 Order.<sup>114</sup> There, the FCC specifically acknowledged the unique challenges that small ISPs face compared to large conglomerate corporations and offered temporary exemption status (subject to further consideration) to small providers with less than 100,000 broadband subscribers.<sup>115</sup> This argument is greatly dampened by the reality that 129 million Americans do not have a choice as to what ISP they may use to provide Internet to their households.<sup>116</sup> Of those 129 million, 52 million are being serviced by providers who have violated net neutrality principles in the past.<sup>117</sup> Where there is some competition available, 146 million Americans have the choice of two ISPs,

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110. See Pai, *supra* note 96, at 4 (explaining the underlying justification for the passage of the 2017 Order). In these remarks, Pai stands firm in his stance that “[t]he more heavily you regulate something, the less of it you’ll get.” *Id.* at 2. He details the disposition of several small ISPs after the passage of the 2015 Order and asserted that the “Title II regulatory onslaught” harmed their business and caused them to cut back on planned growth and expansion. *Id.* He argues that this threatens service in underprivileged communities, like low-income rural and urban neighborhoods, therefore widening the “digital divide” and accentuating the practice of “digital red-lining.” *Id.* at 3.

111. *Id.* at 4.

112. *Id.*

113. *Id.*

114. Protecting and Promoting the Open Internet, 30 FCC Rcd at 5677, para. 172.

115. *Id.* This exemption is largely in part to the numerous concerns expressed during the NPRM process that small ISPs would face greater challenges in complying with the Title II regulations than larger conglomerate corporations. *Id.* This exemption sought to accommodate such concerns while presumably allowing consideration to determine whether or not it was necessary. *Id.*

116. Christopher Mitchell, *Repealing Net Neutrality Puts 177 Million Americans at Risk*, CMTY. NETWORKS (Dec. 11, 2017), [munetworks.org/content/177-million-americans-harmed-net-neutrality](http://munetworks.org/content/177-million-americans-harmed-net-neutrality). This study used FCC data to determine the actual plight of American consumers in the wake of the 2017 Order. *Id.* It also noted that these numbers may actually understate the scale of the problem because the FCC collected data at the census block level, so it may not be reflective of the status of all persons within that block. *Id.*

117. *Id.*



usually both with records of violating net neutrality.<sup>118</sup> This leaves 177 million Americans deprived of true free market competition.<sup>119</sup> Should any of these consumers decide that they are unhappy with their ISP, they do not have the option of seeking out a different one that better suits their preferences and needs.<sup>120</sup> As far as the assertion that more ISPs will enter the market and improve this competition, there is no evidence of that happening nor is it likely to happen.<sup>121</sup> Pai's rosy predictions of a utopia where the economy ebbs and flows catering to the will of consumers without any kind of supervision are naïve and blind to reality.<sup>122</sup>

### 3. *Effect on Consumers*

Proponents also assert three major concerns that are most relevant to consumers.<sup>123</sup> The first is that ISPs can block certain (legal) content at will.<sup>124</sup> This means that ISPs can prevent users from accessing certain websites unless they agree to pay more or subscribe to subscription plans, much like modern cable packages.<sup>125</sup> The second is that ISPs will throttle certain content at will.<sup>126</sup> This is similar to blocking, except that ISPs will “degrade” or “impair” traffic in such a way that renders websites virtually

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118. *Id.*

119. *Id.*

120. *Id.*

121. Gigi Sohn, *One Year After the Net Neutrality Repeal: The FCC Has Abdicated Its Role Protecting Consumers and Competition*, PROMARKET|STIGLER CTR. AT U. OF CHI. BOOTH SCH. OF BUS. (Dec. 14, 2018), [www.promarket.org/net-neutrality-repeal-fcc-competition/](http://www.promarket.org/net-neutrality-repeal-fcc-competition/) (asserting that the FCC has failed to follow through on any promise made about the impacts of the 2017 Order). The author also predicts that while the FCC has failed in this regard, “[t]here will be net neutrality in this country within the next several years” whether at the state or federal level. *Id.* Sohn is confident that the policy reasons in favor of reinstating net neutrality outweigh the potential negative consequences and that, given enough time, these consequences will be made apparent and action will be taken. *Id.*

122. *See supra* discussion accompanying notes 114-21.

123. *See infra* discussion accompanying notes 124-30.

124. *See* Protecting and Promoting the Open Internet, 30 FCC Rcd at 5607, para. 15 (outlining the reason for instituting net neutrality protections due to concerns about ISPs blocking content).

125. *Id.* *See generally*, Aatif Sulleyman, *Net Neutrality Repeal Could Let Internet Providers Block You from Using Your Favourite Services Unless You Pay More*, INDEP. (Nov. 22, 2017), [www.independent.co.uk/life-style/gadgets-and-tech/news/net-neutrality-repeal-internet-service-providers-donald-trump-fcc-apps-websites-services-block-a8069171.html](http://www.independent.co.uk/life-style/gadgets-and-tech/news/net-neutrality-repeal-internet-service-providers-donald-trump-fcc-apps-websites-services-block-a8069171.html) (illustrating the fears of many proponents of net neutrality of what will happen to the Internet following the 2017 Order).

126. *See* Protecting and Promoting the Open Internet, 30 FCC Rcd. at 5607, paras. 16-18 (outlining the reason for instituting net neutrality protections due to concerns about ISPs throttling content).

inaccessible, but falls short of blocking it completely.<sup>127</sup> The third is the implementation of paid prioritization, or “fast lanes.”<sup>128</sup> Paid prioritization occurs when ISPs “directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management” in exchange for compensation or to benefit an affiliated entity.<sup>129</sup> This is especially concerning for large ISPs who have many affiliates that they wish to promote over their competition.<sup>130</sup>

Opponents, including Chairman Pai, argue that these concerns are merely hypothetical and the result of “hysterical prophecies of doom.”<sup>131</sup> However, they are anything but hypothetical; examples from other countries show that these practices are not completely out of the realm of possibility.<sup>132</sup> In Portugal, a country without net neutrality protections, consumers of some ISPs pay a basic fee for limited Internet service but must pay extra for subscription packages for more services, such as access to instant messaging or social media.<sup>133</sup> In Great Britain, the ISP Vodaphone has a similar structure, offering extra “passes” which allow video streaming, social media access, and more.<sup>134</sup> Without net neutrality protections, ISPs are free to determine what content consumers have access to based on how much they are willing to pay.<sup>135</sup> If

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127. *Id.* at para. 16.

128. *Id.* at para. 18.

129. *Id.*

130. *Id.* These concerns are due to the fact that ISPs have an economic incentive to promote their affiliates over their competition. *Id.*

131. See Pai, *supra* note 96, at 4 (stating again Pai’s argument that net neutrality is not necessary because ISPs do not and will not engage in blocking, throttling, paid prioritization, or other practices that federal net neutrality regulations would forbid).

132. Michael Hiltzik, *Portugal’s Internet Shows Us a World Without Net Neutrality, and it’s Ugly*, L.A. TIMES (Nov. 27, 2017), [www.latimes.com/business/hiltzik/la-fi-hiltzik-portugal-internet-20171127-story.html](http://www.latimes.com/business/hiltzik/la-fi-hiltzik-portugal-internet-20171127-story.html). This story gained mainstream attention in the United States via a post on Twitter by American Congressman Ro Khanna which circulated the Internet in October 2017. *Id.* Meant to spread awareness about how the future of the Internet in America could look without net neutrality, the post contained a screenshot of the numerous subscription packages that Portuguese consumers must purchase in order to gain access to certain content. *Id.* For example, the screenshot shows an “Email & Cloud” package that appears to show various Google services, such as Gmail and Google Drive. *Id.* This illustrates the concern that ISPs could group together content from their affiliates and offer lower prices for using their platforms; or, conversely, they can group their rivals into one subscription package and disincentivizing use of these services by charging more. *Id.* Without net neutrality, ISPs are free to create these subscription packages and discriminating against content at will. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* See also Restoring Internet Freedom Order, 33 FCC Rcd. at 847 (Commissioner Jessica Rosenworcel dissenting opinion) (describing the

consumers in Portugal, a well-developed, Western democracy,<sup>136</sup> can be subject to these types of Internet practices, it cannot be said that it is so beyond the realm of possibility to be a reality here in the United States.<sup>137</sup>

### *B. Attempts to Bring Back Net Neutrality: State and Federal Regulation*

There are currently two main types of measures being taken by various bodies of authority in the United States that seek to reinstate net neutrality – those passed by individual states and one in the U.S. Congress.<sup>138</sup>

#### *1. State-by-State Regulation*

The first measure is state-by-state regulation.<sup>139</sup> The most ambitious is legislation passed by California.<sup>140</sup> The state enacted the California Internet Consumer Protection and Net Neutrality Act of 2018, which virtually replicates the protections originally guaranteed by the 2015 Order and applies it to the entire state.<sup>141</sup> It is a major win for proponents, but opponents argue that it creates a patchwork of irregular regulation that frustrates federal policy.<sup>142</sup> Additionally, these types of state laws face challenges.<sup>143</sup> While the FCC cannot preclude states from enacting such legislation,<sup>144</sup> the

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concerns of consumers if ISPs are not required to treat all Internet traffic equally). Commissioner Rosenworcel heavily criticizes the assertion that ISPs will voluntarily refrain from blocking, throttling, and instituting paid prioritization. *Id.* “[ISPs] say just trust us. But know this: they have the technical ability and business incentive to discriminate and manipulate your Internet traffic. And now this agency gives them the legal green light to go ahead and do so.” *Id.*

136. *The World Fact Book: Portugal*, CENT. INTELLIGENCE AGENCY, [www.cia.gov/library/publications/the-world-factbook/geos/po.html](http://www.cia.gov/library/publications/the-world-factbook/geos/po.html) (last updated Sept. 11, 2020).

137. *See supra* text accompanying notes 116-120 (discussing the fact that millions of Americans do not have the benefit of the “free market” when it comes to choosing an ISP).

138. *See infra* discussion at sections B.1 – B.2 (discussing the various net neutrality measures being taken by states and one in the US Congress).

139. Morton, *supra* note 69.

140. *Id.*

141. California Internet Consumer Protection and Net Neutrality Act of 2018, 2017 Bill Text CA S.B. 822. Available at [www.leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180SB822](http://www.leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB822).

142. Emily Cadei, *California Can Bar Internet Providers From Slowing Service*, *Federal Court Rules*, SACRAMENTO BEE (Oct. 1, 2019), [www.sacbee.com/news/politics-government/capitol-alert/article235671767.html](http://www.sacbee.com/news/politics-government/capitol-alert/article235671767.html).

143. *See infra* note 145 (describing cases involving federal preemption of state law).

144. *Mozilla Corp. v. FCC*, 940 F.3d 1, 74 (D.C. Cir. 2019).

laws can still potentially be preempted by federal law.<sup>145</sup> These regulations could be beneficial for ensuring net neutrality in the respective states, but they still do not solve the issue on a nationwide scale.<sup>146</sup>

2. *The “Save the Internet Act” – a Reversion to Policy Under the 2015 Order*

The second measure is an attempt at the federal level to reinstate net neutrality: The Save the Internet Act (STIA).<sup>147</sup> STIA states that the 2017 Order “shall have no force or effect.”<sup>148</sup> The proposed law is basically a check on the FCC; if passed, it would overturn the 2017 Order and reinstate net neutrality protections as enumerated in the 2015 Order.<sup>149</sup> Similar to the 2015 Order, the Act reassigns ISPs to Title II common carrier status subject to FCC regulation and enacts specific rules against blocking, throttling, and instituting paid prioritization.<sup>150</sup>

Essentially, the STIA reverts federal net neutrality policy back to the way it was under the 2015 Order.<sup>151</sup> It would reinstate the temporary exemption for small ISPs (“small businesses”) contained in the 2015 Order.<sup>152</sup> According to the act, “small business” includes “any provider of broadband Internet access service that has not more than 100,000 subscribers aggregated over all the provider’s affiliates.”<sup>153</sup> If the act passes, the FCC would then have 180 days to submit a report recommending whether to make the exemption permanent.<sup>154</sup>

The STIA would also reclassify ISPs as common carriers, as they were under the 2015 Order, thus subject to Title II regulation

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145. *See* Gade v. National Solid Wastes Management Ass’n, 505 U.S. 88, 98-99 (1992) (holding that federal employment occupational safety law preempted state regulations); Jones v. Rath Packing Co., 430 U.S. 519, 526-32 (1977) (holding that a state food handling and safety regulation was preempted by federal law); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95-109 (1983) (describing the standard for federal preemption and its exceptions); *and* Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta, 458 U.S. 141, 152-53 (1982) (explaining the supremacy clause in US Const., Art. VI, cl. 2 and the standard for when federal law must preempt a state statute).

146. *See infra* text accompanying notes 147-150 (describing a solution to the net neutrality problem at the federal level).

147. Save the Internet Act of 2019, H.R. Rep. No 1644 - 116th Congress (2019), [www.congress.gov/bill/116th-congress/house-bill/1644/all-actions](http://www.congress.gov/bill/116th-congress/house-bill/1644/all-actions).

148. *Id.*

149. Arbel, *supra* note 82.

150. *Id.*

151. *Id.*

152. Save the Internet Act, H.R. Rep. No 1644 at § 2(b).

153. *Id.*

154. *Id.*

under the purview of the FCC.<sup>155</sup> The FCC is a specialized law-making agency with the authority to regulate interstate and international communications.<sup>156</sup> This delegation allows Congress to efficiently delegate purview of highly specialized subjects while still pursuing specific policy goals.<sup>157</sup> Proponents argue that the FCC is in the best position to make policy decisions regarding ISPs.<sup>158</sup> This is because (1) FCC is comprised of well-informed experts with extensive knowledge on the intricacies unique to this type of regulation, and (2) the procedure for which the FCC formulates rules inherently provides a robust, diverse discussion from the public via submitted comments.<sup>159</sup> This encourages precise, well thought out regulations while keeping the best interests of the public in mind.<sup>160</sup>

However, sometimes the procedural safeguards that seem to ensure public approval don't always appear to work. For instance, proponents criticize the FCC in the drafting and passage of the 2017 Order because they assert that public opinion was not adequately considered as many comments submitted were allegedly fraudulent.<sup>161</sup> Particularly, current FCC Commissioner Jessica Rosenworcel, a supporter of net neutrality, accuses the agency of deliberately ignoring the views of the public in passing the 2017 Order,<sup>162</sup> stating:

I worry that this decision and the process that brought us to this point is ugly. It's ugly in the cavalier disregard this agency has demonstrated to the public, the contempt it has shown for citizens who speak up, and the disdain it has for popular opinion. Unlike its predecessors this FCC has not held a single public hearing on net neutrality. There is no shortage of people who believe Washington is not listening to their concerns, their fears, and their desires. Add this agency to the list.<sup>163</sup>

The idea of public consensus is helpful in an agency's policy determinations, but it is not determinative of the choice that is ultimately made.<sup>164</sup>

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155. *Id.* See Protecting and Promoting the Open Internet, 30 FCC Rcd at 5610 (establishing ISPs as common carriers under Title II regulation).

156. *About the FCC*, supra note 9.

157. *Yakus v. US*, 321 U.S. 414, 423 (1944). The Court held that Congress may delegate its legislative authority so long as it is in pursuance of a defined policy objective and prescribes specific rules for administering the rules. *Id.*

158. Protecting and Promoting the Open Internet, 30 FCC Rcd at 5606, para. 13.

159. *Id.*

160. *Id.*

161. See Restoring Internet Freedom Order, 33 FCC Rcd. at 847 (Commissioner Jessica Rosenworcel dissenting opinion) (criticizing the FCC's procedure of soliciting comments for the 2017 Order).

162. *Id.*

163. *Id.*

164. *Rulemaking at the FCC*, supra note 39.

While it seems that the STIA will effectively bring back identical protections as the 2015 Order, due to the language of the act, there is one thing that remains unclear: What power the FCC would have in determining net neutrality policies following the passage of the STIA.<sup>165</sup> The act states that the FCC may not reissue the 2017 Order “in substantially the same form, and a new rule that is substantially the same as such [order] may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the enactment of this Act.”<sup>166</sup> The intent of the House, in proposing this statute, was to reinstate the net neutrality protections codified in the 2015 Order.<sup>167</sup> But the vague language of this particular provision makes it vulnerable to carefully crafted FCC orders that may undercut the STIA’s original purpose.<sup>168</sup>

#### IV. PROPOSAL

The STIA would successfully bring back net neutrality as it was before the 2017 Order,<sup>169</sup> but may not be enough to protect the Internet in the long term. The broad power of the FCC and its past of constant ideological shifts indicates that nonpartisan, comprehensive action by Congress is appropriate in order to create uniform, longstanding change that is not subject to the whims of the political party of the current Chairman or Chairwoman.<sup>170</sup> This could be done in one of two ways: Congress must pass either a standalone bill or an amendment to the Communications Act reclassifying once and for all, ISPs as “common carriers” under Title II. Additionally, the bill must codify net neutrality principles into law to prevent the FCC from declining to enforce net neutrality upon ISPs. Finally, Congress must tighten the reigns and establish closer and stricter supervision over the FCC to prevent policy changes that betray the democratic process.

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165. *See Rulemaking Process*, *supra* note 12 (describing the role of public opinion in the FCC’s rulemaking process).

166. Save the Internet Act of 2019, H.R. Rep. No 1644.

167. *Fact Sheet: Save the Internet Act*, House of Representatives Committee on Energy & Commerce (Mar. 2019), [www.energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Save%20the%20Internet%20Fact%20Sheet.pdf](http://www.energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Save%20the%20Internet%20Fact%20Sheet.pdf). It is clear that the intent of the House is to establish identical protection as under the 2015 Order and continue the investigations originally began by the FCC during that time regarding the effect of these regulations on communities lacking adequate broadband service. *Id.*

168. *See id.* (describing the intent of the STIA).

169. *Id.*

170. *See supra* discussion at section II (describing the many changes that ISP regulation has undergone since 2005).

### A. *Classify ISPs as Common Carriers.*

In order for net neutrality protections to stick around in the long term, Congress must classify ISPs as Title II common carriers.<sup>171</sup> As previously discussed, common carriers under the Act are subject to FCC regulation.<sup>172</sup> In the past, the FCC has had discretion to decide whether or not ISPs fall within its purview under Title II.<sup>173</sup> This discretion is precisely the reason for the unstable and tumultuous history of ISP regulation over the past several years.<sup>174</sup>

Reverting back to the regulations put in place by the 2015 Order won't permanently stop the FCC from eventually taking action to remove net neutrality protections in the future if it so chooses.<sup>175</sup> The STIA assigns no permanent status to ISPs, but vaguely prevents the FCC from taking any action substantially similar to the policies of the 2017 Order.<sup>176</sup> Essentially, it is a quick fix; the bill directly rejects the 2017 Order and reverts net neutrality protections to how they were under the 2015 Order.<sup>177</sup> But it does not completely take away the FCC's broad powers in determining ISP regulation; using the vague language to its advantage, the FCC could still institute policies that, on the surface, is "substantially in the same form"<sup>178</sup> as the 2017 Order, but ultimately undercut its intent by creating exemptions, loopholes, or other leniencies that render net neutrality protections effectively worthless. Policy-wise, this sets Congress back to square one.<sup>179</sup>

A bill that permanently reclassifies ISPs as Title II common carriers would prevent the FCC from undercutting the intent of the legislature that wrote the STIA.<sup>180</sup> Classifying ISPs as common carriers as a matter of United States law relieves the FCC of its discretion to change ISP status at will.<sup>181</sup> It forces the FCC to

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171. See *Verizon*, 740 F.3d at 650 (holding that ISPs must be classified as "common carriers" to be subject to the regulatory power of the FCC under the Communications Act of 1934).

172. *Id.*

173. See Protecting and Promoting the Open Internet, 30 FCC Rcd at 5757, paras. 355-56 (classifying ISPs as Title II common carriers); see also Restoring Internet Freedom Order, 33 FCC Rcd. at 318, para. 20 (overruling the 2015 Order and classifying ISPs as "information services").

174. See discussion *supra* Part II (describing the many changes that ISP regulation has undergone since 2005).

175. *Infra* text accompanying notes 176-79.

176. Save the Internet Act of 2019, H.R. Rep. No 1644.

177. *Id.*

178. *Id.*

179. *Infra* text accompanying notes 175-178.

180. See *Fact Sheet: Save the Internet Act*, *supra* note 167 (describing the House of Representative's legislative intent for passing the STIA).

181. Tyler Elliot Bettilyon, *Network Neutrality: A History of Common Carrier Laws 1884-2018*, MEDIUM (Dec. 12, 2017), [www.medium.com](http://www.medium.com)

regulate ISPs as common carriers, with all of the meaning that the classification carries under the Act.<sup>182</sup> An independent bill, or amendment to the Communications Act, would finally resolve the capricious history of ISP regulation.

In addition to this reclassification, Congress must also utilize the 2015 FCC's policy of "forbearance."<sup>183</sup> This policy, instituted by the 2015 Order, selectively chose which provisions of Title II that ISPs must adhere to and be exempted from by balancing consumer protection interests with the hardship that would be imposed on the ISPs.<sup>184</sup> These exemptions were a product of careful analysis and consideration by specialists within the FCC.<sup>185</sup> Any law or amendment written by Congress should equally be as careful working through these exemptions with help from specialists and experts in order to maximize consumer protections while still taking into consideration the unique problems that ISPs face when managing their respective services.

### *B. Establish Net Neutrality as Binding, Unwavering Law.*

Even if ISPs are common carriers subject to FCC regulation, it does not mean that net neutrality regulations would be in place: Along with the Title II status change, Congress must impose net neutrality protections via a bill or amendment in order to effectively bring back the regulations in place under the 2015 Order. If it is a matter of law, then the FCC cannot take these protections away.<sup>186</sup>

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/@TebbaVonMathenstien/network-neutrality-a-history-of-common-carrier-laws-1884-2018-2b592f22ed2e.

182. *Id.* Common carriers, like telephone companies, must be neutral in transporting data and they can't change their service based on the person requesting the data or the content requested. *Id.* Title II status also requires that common carriers report certain business practices to the FCC. *Id.* These are called "transparency requirements" and are not required under Title I status. *Id.*

183. Protecting and Promoting the Open Internet, 30 FCC Rcd at 5616, para. 51.

184. *Id.* This policy of applying some Title II regulations and not others was regarded as "Title II tailored for the 21st Century." *Id.* It sought to dispel concerns about regulating broadband service under a framework that some saw as outdated or inapplicable, such as telephone service. *Id.* It was considered a "careful approach" of Title II regulation that would protect consumers while still allowing for innovation and infrastructure investment. *Id.*

185. *Id.*

186. *See* *Mistretta v. U.S.*, 488 U.S. 361, 372 (1989) (explaining legislative authority). "So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" *Id.* (quoting *J.W. Hampton, Jr., & Co. v. U.S.*, 276 U.S. 394, 409 (1928)).



Enforcing net neutrality means prohibiting ISPs from engaging in three damaging practices – blocking, throttling, and paid prioritization.<sup>187</sup> All three were banned by the 2015 Order and are major concerns for consumers.<sup>188</sup> A statute or amendment that outlaws these practices is necessary as it would permanently prevent the FCC from making policy changes that allow ISPs to discriminate based on content, thereby ensuring that the principle of net neutrality is protected by law.

A federal law codifying net neutrality protections would also remedy what is lacking in the STIA. As previously discussed, the STIA leaves open opportunities for the FCC to undercut its intent because of its vagueness and limited nature.<sup>189</sup> While the FCC is prohibited from enforcing any policy change that substantially resembles the 2017 Order,<sup>190</sup> this language is subjective and prone to the creation of loopholes, exemptions, and other cutbacks.<sup>191</sup>

Additionally, a federal law would be ideal as it would preempt any state law that establishes net neutrality protections in the respective state.<sup>192</sup> This would be more efficient for ISPs and businesses who conduct commerce across several states.<sup>193</sup> A federal law would also relieve states of taking on the duty to regulate and enforce these protections. The FCC was created in order to regulate interstate and international communications,<sup>194</sup> and is best equipped to handle the national and international nature of the Internet.<sup>195</sup> State governments, without specialized agencies like the FCC, are not as qualified to manage the evolving Internet and the many challenges that interstate communications entails.<sup>196</sup>

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187. Protecting and Promoting the Open Internet, 30 FCC Red at 5607 paras. 15-18.

188. *Id.*

189. See text accompanying notes 175-79 (discussing the issues of the STIA).

190. Save the Internet Act of 2019, H.R. Rep. No 1644 - 116th Congress (2019), [www.congress.gov/bill/116th-congress/house-bill/1644/all-actions](http://www.congress.gov/bill/116th-congress/house-bill/1644/all-actions).

191. See *supra* text accompanying notes 175-79 (discussing the issues of the STIA).

192. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-109 (1983) (describing the standard for federal preemption and its exceptions).

193. See *AT&T Internet Coverage Map*, AT&T (Nov. 24, 2019) [www.broadbandnow.com/ATT](http://www.broadbandnow.com/ATT) (indicating that AT&T offers Internet services in 22 US states); *XFINITY from Comcast Availability*, XFINITY, providersby.zip.com/xfinity-availability (last visited Sept. 22, 2020) (indicating that XFINITY from Comcast offers Internet service in 40 US states); and *Areas We Serve*, SUDDENLINK, [www.suddenlink.com/our-company/areas-we-serve](http://www.suddenlink.com/our-company/areas-we-serve) (last visited Sept. 22, 2020) (indicating that SuddenLink by Altice offers Internet services in fourteen US states).

194. *About the FCC*, *supra* note 9.

195. See Kathryn J. Kline, *State Responses to Net Neutrality*, NAT. REGULATORY RESEARCH INST. (2018), [pubs.naruc.org/pub/45ACE3A2-AAEA-417D-2416-B6862C9D4435](https://pubs.naruc.org/pub/45ACE3A2-AAEA-417D-2416-B6862C9D4435) (discussing the various challenges that state legislatures face when regulating ISPs).

196. *Id.*

### C. *It Is Time to Tighten the Reigns on the FCC*

Any bill passed to codify net neutrality should also impose stricter limitations upon the FCC rule-making process. Due to the numerous, convincing allegations of fake comments received by the FCC in favor of the 2017 Order,<sup>197</sup> stricter regulations should be put in place in order to ensure that the FCC does not institute policies that do not align with public opinion.<sup>198</sup>

Despite the allegations of falsified comments, the FCC passed the 2017 Order without adequately investigating whether the comments were submitted in good faith.<sup>199</sup> This means that it is possible, if not likely, that the 2017 Order was not considered in light of public opinion.<sup>200</sup> It is contrary to democratic principles that unelected officers, not subject to the democratic process, can make such sweeping and disruptive policy choices without clear public support.<sup>201</sup>

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197. Naylor, *supra* note 56; *see also* Restoring Internet Freedom Order, 33 FCC Rcd. at 847 (Commissioner Jessica Rosenworcel dissenting opinion) (describing the fraudulent conduct in the 2017 comment process). “I think our record has been corrupted and our process for public participation lacks integrity.” *Id.* at 3.

198. *See* Naylor, *supra* note 56 (discussing the allegations of fraudulent comments and likelihood that public opinion was not properly assessed before issuing the 2017 Order).

199. *Id.* The allegations include the use of false identities, fake email addresses, foreign email addresses (primarily Russian) and hundreds or even thousands of duplicate comments from the same or similar names. *Id.* The allegations suggest that the FCC did not prevent these comments from being considered and ignored the indicators that they may have been fake. *Id.*

200. *See* Restoring Internet Freedom Order, 33 FCC Rcd. at 847 (Commissioner Jessica Rosenworcel dissenting opinion) (expressing concern over lack of public consensus in the FCC striking down net neutrality). “Everyone from the creator of the world wide web to religious leaders to governors and mayors of big cities and small towns to musicians to actors and actresses to entrepreneurs and academics and activists has registered their upset and anger.” *Id.* *See also* Sara Salinas, *FCC’s Net Neutrality Reversal is Denounced by Silicon Valley, Democrats*, CNBC NEWS (Updated Dec. 15, 2017) (describing negative backlash from entrepreneurs in Silicon Valley, prominent Democratic politicians, large entertainment companies including Netflix and Amazon, and others following the passage of the 2017 Order).

201. *See* Andrew Richard Albanese, *Tim Wu: Net Neutrality ‘As Important, If Not More Important, than the First Amendment*, PUBLISHERS WEEKLY (Mar. 30, 2018), [www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/76470-tim-wu-equates-net-neutrality-with-the-first-amendment.html](http://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/76470-tim-wu-equates-net-neutrality-with-the-first-amendment.html) (documenting Tim Wu’s keynote address at the 2018 Public Library Association Conference). Columbia law professor Tim Wu is one of the leading experts on net neutrality and is believed to have originally coined the term back in 2003. *Id.* He believes that the importance of communicating freely over the Internet cannot be overstated and heavily criticizes the U.S. in repealing these protections. *Id.* “It’s not surprising that the Russian government doesn’t respect net neutrality; that the Chinese government doesn’t respect net neutrality; that

If officers in the FCC are not serving the public, then to whom does their loyalty lie? That question goes beyond the scope of this Comment, but any bill that codifies net neutrality principles into law must also impose stricter rule-making requirements that ensure that the FCC's loyalty remains with the American people.<sup>202</sup> This could include mandatory investigations by an external agency into allegations of bad faith in the Notice of Proposed Rulemaking (NPRM) process; mandatory suspension of rulemaking until any investigation is concluded; and a more widespread marketing campaign informing the public of the NPRM. Additionally, in the event of a lack of public support, the FCC should be mandated by Congress to suspend rulemaking until further notice. Lastly, House committees should engage in more stringent oversight to ensure proper management of the agency.

## V. CONCLUSION

The Save the Internet Act, while a straight-forward and good faith attempt to return to the policies of the 2015 FCC, is not enough to save net neutrality. In order to establish a permanent place in United States law, Congress must cross the aisle, recognize the importance of a free and open Internet, and work together to create comprehensive legislation that protects consumers and reflects the reality of the modern Internet.

The net neutrality debate is not one that can be insulated from the democratic process any longer, left solely to the discretion of a group of unelected officials whose choices reflect the president who appointed them. Maintaining democracy, liberty, and protection from unfair business practices demand that it become a permanent fixture in American law. The Internet affects everyone in the United States every single day – whether you're checking emails, the news, or reading the President's latest Tweet – and fair, nondiscriminatory access to it should not be a privilege but a right.

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the most oppressive regimes are all opponents of net neutrality . . . there is a pattern, and it is sad that this country has joined those ranks." *Id.*

202. See Restoring Internet Freedom Order, 33 FCC Rcd. at 847 (Commissioner Jessica Rosenworcel dissenting opinion) (expressing concern over lack of public consensus in the FCC striking down net neutrality).