

Assessing the Current State of Net Neutrality and Exploring Solutions in Creating and Maintaining Open, Available, and Innovative Internet and Broadband Services

Robbie Troiano

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/jbtl>

Recommended Citation

Robbie Troiano, *Assessing the Current State of Net Neutrality and Exploring Solutions in Creating and Maintaining Open, Available, and Innovative Internet and Broadband Services*, 14 J. Bus. & Tech. L. 553 (2019)

Available at: <https://digitalcommons.law.umaryland.edu/jbtl/vol14/iss2/7>

This Notes & Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Journal of Business & Technology Law by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Assessing the Current State of Net Neutrality and Exploring Solutions in Creating and Maintaining Open, Available, and Innovative Internet and Broadband Services

ROBBIE TROIANO*©

ABSTRACT

This article examines the current state of net neutrality regulation in the United States. Debates surrounding net neutrality are varied and layered. They include legal questions regarding how the internet should be classified under existing statutes, and the level of authority for federal agencies when regulating internet service providers. The Article will provide an extensive background of net neutrality in the United States, discussing the pertinent case law and legislation that shaped the modern Internet regulatory landscape. It will conclude by discussing the current state of the law, focusing on the perspectives of proponents and opponents of the law as it currently stands under the Restoring Internet Freedom Order. Finally, it will analyze examples of measures that opponents of the Restoring Internet Freedom Order are taking to repeal it.

INTRODUCTION

There is little doubt that control over the Internet is concentrated in the hands of a few massive conglomerates.

Assessing the Current State of Net Neutrality

Many have argued that this concentration of power, which has only become more pronounced in the past decade, is either a problematic, monopolistic development that threatens larger democratic ideals or the natural progression of an industry which requires some, but not extensive, regulation.¹ The answer may lie somewhere in the middle, and addressing it may require unconventional approaches that lie outside mere regulatory considerations.² Regardless, issues surrounding net neutrality and the antitrust considerations that accompany them are here to stay.³ Most recently, the Federal Communications Commission (“FCC”) under the leadership of Ajit Pai, and by proxy, Donald Trump, successfully struck down the Open Internet Order of 2015, an Order which ushered in stronger regulations in favor of net neutrality.⁴ Striking down the Order will benefit massive media conglomerates such as Verizon and Comcast, and has led to intense criticism over the potential for

* J.D. Candidate, 2020, University of Maryland Francis King Carey School of Law.

© Robbie Troiano 2019.

¹ Elizabeth Kolbert, *Who Owns the Internet*, THE NEW YORKER (Aug. 28, 2017), <https://www.newyorker.com/magazine/2017/08/28/who-owns-the-internet>.

² Adam Sneed, *What Can Cities and States Do About Net Neutrality*, CITY LAB (Dec. 15, 2017), <https://www.citylab.com/solutions/2017/12/what-can-cities-and-states-do-about-net-neutrality/548546/>, (last visited Dec. 15, 2017) (discussing numerous methods being used at various levels of government to influence net neutrality); *see also* Douglas MacMillan, *Startups Seek Tech Solution to Net Neutrality Repeal*, THE WALL STREET JOURNAL (Jan. 2, 2018), <https://www.wsj.com/articles/startups-seek-tech-solution-to-net-neutrality-repeal-1514383200> (explaining one alternative solution that proponents of net neutrality are advocating).

³ Sneed, *supra* note 2.

⁴ Tony Romm, *The Trump Administration Just Voted to Repeal the U.S. Government’s Net Neutrality Rules*, RECODE (Dec. 14, 2017), <https://www.recode.net/2017/12/14/16771910/trump-fcc-ajit-pai-net-neutrality-repeal>.

regulatory and antitrust abuses.⁵ The net neutrality debate, which concerns the level of control that the government may exercise over Internet Service Providers (“ISPs”), involves issues both modern and decades old; our bipartisan system has taken sides accordingly.⁶ However, disparate positions regarding the legal limitations on ISP regulation and the precise role of the government in enforcing them involve considerations far beyond mere Internet usage, as issues concerning Americans’ First Amendment rights, antitrust laws, and the status of public utilities are embroiled within the net neutrality debate.⁷

I. WHAT IS NET NEUTRALITY AND WHO IS INVOLVED?

At its most basic level, net neutrality involves the level of control that ISPs can exercise over American citizens’

⁵ Alan Wolk, *The Repeal Of Net Neutrality Is A Bad Thing (But Not For The Reasons You Think)*, FORBES, (Nov. 30, 2017), <https://www.forbes.com/sites/alanwolk/2017/11/30/the-repeal-of-net-neutrality-is-a-bad-thing-but-not-for-the-reasons-you-think/#76fcf75365be> (“The reason Pai’s decision is the wrong one is . . . because we don’t have anything close to free market conditions in the U.S. when it comes to broadband.”); Romm, *supra* note 4; *See also* Comcast Corp. v. FCC, 381 U.S. App. D.C. 194, 526 F.3d 763 (2008) (debating the constitutionality of the FCC’s authority to adopt and enforce net neutrality rules).

⁶ Larry N. Zimmerman, *Net Neutrality: The Sequel*, 86 J. KAN. B.A. 14 (2017) (“As an extreme generality, proponents of net neutrality tend to align with consumer advocates, application providers (e.g. Amazon, Netflix, Twitter), and civil rights groups while opponents often hail from the service provider side (e.g. Verizon, Comcast, AT&T) and deregulation interest groups.”).

⁷ *See Id.*; *See generally* Comcast Corp. v. FCC, 381 U.S. App. D.C. 194, 526 F.3d 763 (2008); *See generally* Babette E.L. Boliek, *FCC Regulation versus Antitrust: How Net Neutrality is Defining the Boundaries*, 52 B.C. L. REV. 1627 (2011).

Internet usage.⁸ A commonly cited example of a net neutrality violation would involve an ISP deliberately slowing down Internet speeds for certain websites, thereby steering traffic to another website.⁹ The ISP would theoretically profit by doing so, and federal regulators would work to regulate and restrict this type of control.¹⁰ This type of ISP control, referred to as “bandwidth throttling,” is among the most commonly cited examples of net neutrality concerns.¹¹ Aside from the concerns over the legality or illegality of certain practices, debates on how strictly ISPs should be regulated, the form and manner of regulation, whether Internet services should remain privatized, which entity should be responsible for regulation and creating and enforcing rules, and how such rules and regulations should be implemented are of critical importance.¹²

Regarding the various regulatory agencies involved, the Federal Trade Commission (“FTC”) and the FCC are the primary players, frequently jockeying for position and control over net neutrality regulation.¹³ Ajit Pai is perhaps the most

⁸ See Boliek, *supra* note 7 (“Roughly defined, net neutrality encompasses principles of commercial Internet access that include equal treatment and delivery of all Internet applications and content.”).

⁹ *Id.* (“The first concern is that ISPs will “exploit their dominant [market] position” to favor affiliated application providers or, conversely, to block, degrade, or raise the cost of access for rival application services.”); See also Molly McHugh, *The FCC Overturned Net Neutrality*, THE RINGER, (Dec. 14, 2017), <https://www.theringer.com/tech/2017/12/14/16777758/fcc-net-neutrality-overturn-ajit-pai> (explaining how the repeal will allow ISPs to restrict or alter internet speeds, “with the potential to fundamentally change how digital content is delivered.”).

¹⁰ *Id.*

¹¹ See Zimmerman, *supra* note 6, for an explanation of the breadth of net neutrality concerns ranging from “philosophical appeals to democratic ideals.”.

¹² *Id.*

¹³ See generally Jerry Brito & Jerry Ellig, *A Tale of Two Commissions: Net Neutrality and Regulatory Analysis*, 16 COMM. L. CONSPECTUS 1, (2007).

notable individual in the net neutrality debate as President Trump's appointed head of the FTC.¹⁴ Pai has led the charge against the "Open Internet" division, and was staunch in his desire to repeal the 2015 "Open Internet Order," an order supported by the Obama administration that fell under heavy criticism from opponents of net neutrality for lacking a legal basis.¹⁵ The courts face a difficult task in interpreting and applying relevant precedents and statutes, as many are outdated and contain legal language that is incompatible with modern day technological developments.¹⁶ The two most significant acts in the net neutrality debate are the Communications Act of 1934 and the Telecommunications Act of 1996; recent appellate decisions have struggled to apply language from a different era to the net neutrality concerns of today.¹⁷

Aside from the FCC and the FTC, various private sector entities play a critical role in net neutrality

¹⁴ Jacob Kastrenakes, *Read FCC Chairman Ajit Pai's Statement on Killing Net Neutrality*, THE VERGE (Dec. 14, 2017), <https://www.theverge.com/2017/12/14/16777626/ajit-pai-net-neutrality-speech>.

¹⁵ *Id.*; see also Larry Downes, *Why Treating the Internet as a Public Utility is Bad for Consumers*, THE WASHINGTON POST (July 7, 2016), https://www.washingtonpost.com/news/innovations/wp/2016/07/07/why-treating-the-internet-as-a-public-utility-is-bad-for-consumers/?utm_term=.ac18441ef78a.

¹⁶ See Rick Paulus, *Why American Internet Should be a Public Utility*, PACIFIC STANDARD (Feb. 16, 2017), <https://psmag.com/news/why-american-internet-should-be-a-public-utility> (describing how the rules governing the internet developed from outdated and difficult to apply legislation from the past century); See generally *Comcast Corp. v. FCC*, 381 U.S. App. D.C. 194, 526 F.3d 763 (2008) (applying the Communications Act of 1934 and the Telecommunications Act of 1996 to internet neutrality issues); see generally *Verizon v. FCC*, 408 U.S. App. D.C. 92, 740 F.3d 623 (2014) (applying the Communications Act of 1934 and the Telecommunications Act of 1996 to internet neutrality issues).

¹⁷ *Id.*

considerations.¹⁸ Within the private sector, the key players involved in the net neutrality debate include ISPs, or infrastructure providers, “edge” providers, as well as lobbying and advocacy groups.¹⁹ The infrastructure providers are made up primarily of the ISPs such as Comcast and Time Warner.²⁰ The “edge” providers include companies such as Google, Facebook, Amazon and Apple, collectively referred to by the acronym “GAFA” given their unique positions and unequivocal relevance.²¹ These companies are the “gatekeepers” that control the vast majority of what the average internet-user sees and experiences.²² Amazon has nearly cornered the market on Internet shopping, and is expanding rapidly into new ventures, while Facebook has a massive stake in social media, and Google has influence over what we see and search.²³ Many argue that the power that these companies wield constitutes an anticompetitive anti-trust violation.²⁴ Lobbying groups serve their basic purpose in supporting the interests of the companies that employ them, influencing political parties and politicians through campaign donations and other resources to conjure votes in their favor.²⁵

¹⁸ Paulus, *supra* note 16 (discussing the role and control that private enterprises should have over the internet).

¹⁹ *Verizon v. FCC*, 408 U.S. App. D.C. 92, 99, 740 F.3d 623, 630 (2014).

²⁰ *Id.*

²¹ Kolbert, *supra* note 1; *see also Verizon*, 408 U.S. App. D.C. at 99.

²² *Id.*

²³ *Id.*

²⁴ *Id.*; *see generally* Boliek, *supra* note 7 (examining the role of antitrust laws regarding the government’s regulatory authority).

²⁵ Aaron Mak, *Major Tech Lobbying Group Supporting Legal Push to Restore Net Neutrality*, SLATE (Jan. 5, 2018) http://www.slate.com/blogs/future_tense/2018/01/05/net_neutrality_lawsuits_will_have_support_from_lobbying_group_representing.html (discussing how major technology companies often rely on lobbying groups to act for them).

II. THE LEGAL AND LEGISLATIVE HISTORY OF NET NEUTRALITY

A. The Communications Act of 1934 and the Telecommunications Act of 1996

The Communications Act of 1934 is the earliest example of legislation that impacted the development of net neutrality today and the difficulty in applying outdated language and precedents to modern day problems.²⁶ The Act invoked one of the earliest debates at the core of net neutrality involving the distinction between “information services” and “telecommunications services.”²⁷ In 2002, the FCC, in determining how to classify the “then-emerging broadband Internet access services” under the Communications Act of 1934, decided to classify them as “information services.”²⁸ Under this classification, early ISPs were more lightly regulated than they would have been under the “telecommunication carrier” classification, which would have regulated ISPs as “common carriers” under Title II of the Communications Act.²⁹ The distinction between these two classifications and the debate over which was applicable is still raging today, and is among the most seminal arguments in the net neutrality debate.³⁰

²⁶ See Boliek, *supra* note 7.

²⁷ *Id.*

²⁸ Randolph J. May, *Chevron and Net Neutrality at the FCC*, THE REGULATORY REVIEW (Feb. 14, 2018), <https://www.theregreview.org/2018/02/14/may-chevron-net-neutrality-fcc/>.

²⁹ *Id.*

³⁰ The debate started immediately, as the 2005 Supreme Court case of *National Cable & Telecommunications Association v. Brand X Internet Services* affirmed the FCC’s ruling that broadband services could be classified as “information services.” 545 U.S. 967, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005).

Assessing the Current State of Net Neutrality

In 1996, Congress passed the Telecommunications Act, which the FCC itself referred to as, “the first major overhaul of telecommunications law in almost 62 years,” referencing the Communications Act of 1934.³¹ The Telecommunications Act was a groundbreaking attempt to “provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced information technologies and services to all Americans by opening all telecommunications markets to competition.”³² The goal of deregulating the broadcasting and telecommunications markets resulted in a massive and unprecedented amount of investment in infrastructure.³³ Following the implementation of the Act, cable companies spent nearly \$65 billion nationwide installing cables for broadband networks that could provide Internet, video and cable services.³⁴ However, such a massive investment in infrastructure gave these companies almost total control over the industry, and thus many of the modern regulatory issues we face can be traced back to this Act.³⁵ The Telecommunications Act and the subsequent infrastructure developments resulted in the rise of the aforementioned “infrastructure providers,” the cable company giants such as Comcast and Time Warner that provide the vast majority of Americans with cable and Internet services.³⁶ Through it all, ISPs and edge providers acted under the lightly regulated

³¹ Telecommunications Act of 1996, <https://www.fcc.gov/general/telecommunications-act-1996> (last updated June 20, 2013); *see generally* Telecommunications Act of 1996, Pub. L. No. 104-104, 502, 110 Stat. 56 (codified in various sections of 47 U.S.C. §§ 151-612).

³² H.R. Rep., No. 104-458, at 1 (1996) (Conf. Rep.).

³³ *See* Paulus, *supra* note 16.

³⁴ *Id.* (“In the eight years following the Telecommunications Act of 1996, cable companies spent upwards of \$65 billion laying down additional broadband networks.”).

³⁵ *Id.* (“[B]ecause of this initial investment in infrastructure, the cable companies have had close to full control.”).

³⁶ *Verizon v. FCC*, 408 U.S. App. D.C. 92, 99, 740 F.3d 623, 630 (2014).

framework of the FCC.³⁷ The FCC practiced uncertain and tenuous authority over these companies until recent court decisions began to shape, and seemingly weaken, its power.³⁸

B. Comcast Corp. v. FCC: Ancillary Authority

Concern over Internet freedom became mainstream in the early twenty-first century, around the time when the FCC adopted four principles “to encourage broadband deployment and preserve and promote the open and interconnected nature of public Internet.”³⁹ These principles encouraged and supported ideals of a free and open internet, as well as competition among Internet providers.⁴⁰ However, the principles were not formal rules, and they were not intended to constitute an official FCC action.⁴¹ Public statements on the release by party affiliates on both sides foreshadowed the net neutrality debates soon to come, setting the stage for a power struggle between the FCC and the ISPs they sought to regulate.⁴² In 2007, the FCC investigated reports that

³⁷ Jonathan Spalter, *Forbearance: It's Not 1996 Anymore*, US TELECOM: THE BROADBAND ASSOCIATION (May 4, 2018), <https://www.ustelecom.org/forbearance-its-not-1996-anymore/> (describing the “light-touch regulatory structure” under the outdated 1996 rules).

³⁸ David Ingram & Alina Selyukh, *U.S. Appeals Court Strikes Down FCC Net Neutrality Rules*, REUTERS (Jan. 14, 2014), <https://www.reuters.com/article/us-usa-court-netneutrality/u-s-appeals-court-strikes-down-fcc-net-neutrality-rules-idUSBREA0D11420140114>. See *Verizon v. FCC*, 408 U.S. App. D.C. 92, 740 F.3d 623, (2014).

³⁹ Press Release, FCC Adopts Policy Statement, FCC, (Aug. 5, 2005).

⁴⁰ *Id.*

⁴¹ *Id.* The press release explicitly points out that although the release of a full Commission order constituted an official action, this was not the FCC's intent. *Id.*

⁴² Jim Puzzanghera, *A Brief, Strange History of Net Neutrality (Including a 'Series of Tubes,' a Dingo and James Harden)*, THE LOS ANGELES TIMES (May 3, 2017), <http://www.latimes.com/business/la-fi-net-neutrality-timeline-20170502-htmlstory.html>.

Assessing the Current State of Net Neutrality

Comcast was using bandwidth throttling practices to slow down some user's Internet speeds, in violation of the FCC's four principles.⁴³ The FCC found that the company was guilty of the alleged acts, and ordered Comcast to cease and desist. In response, Comcast sued in the seminal case of *Comcast Corporation v. FCC*.⁴⁴

In *Comcast Corporation v. FCC*, the District of Columbia Court of Appeals explicitly discussed these difficulties, stating that although “[i]t is true that Congress gave the [Commission] broad and adaptable jurisdiction so that it can keep pace with rapidly evolving communications technologies,” the Internet is “arguably the most important innovation in communications in a generation.”⁴⁵ The Court also acknowledged the “difficult regulatory problem of rapid technological change posed by the communications industry.”⁴⁶ Section 4(i) of the Communications Act of 1934 grants the FCC what is referred to as “ancillary” authority in matters concerning the extent of its power.⁴⁷ This authority authorizes the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”⁴⁸ The primary issue in *Comcast Corporation v. FCC* was whether the FCC had the authority to regulate an ISP's network management practices.⁴⁹ The

⁴³ *Id.*

⁴⁴ *Id.* (“By a 3-2 vote, the Republican-controlled agency found that the cable company had tried to cripple online video sites that competed with its on-demand service.”).

⁴⁵ *Id.* at 660.

⁴⁶ *Id.*

⁴⁷ *Comcast Corp. v. FCC*, 600 F.3d 642, 643, 390 U.S. App. D.C. 111, 112 (D.C. Cir. 2010) (referring to the FCC's power under the statute as its “ancillary” authority.”). *See* 47 U.S.C. § 154(i) (2018).

⁴⁸ *Id.* at 643.

⁴⁹ *See generally* *Comcast Corp.*, 600 F.3d at 642; *see also* Cecilia Kang, *Court Rules for Comcast Over FCC in 'Net Neutrality' Case*, THE WASHINGTON POST (Apr. 7, 2010) <http://www.washingtonpost.com/wp->

District of Columbia Court of Appeals held that the FCC had no *express* authority to regulate the net neutrality practices of ISPs.⁵⁰ The FCC argued that section 4(i) of the Communications Act was itself a statutory mandate.⁵¹ However, the appellate court held that despite the broad language of section 4(i), the “ancillary” authority of the FCC must come from a statutory mandate, as undefined ancillary authority would “virtually free the Commission from its congressional tether.”⁵² The *Comcast Corporation v. FCC* decision largely came down to the appellate court’s interpretation of various passages in the Communications Act and other legislative materials, leaving the court to choose the interpretation it decided was strongest.⁵³

C. Verizon v. FCC: How to Define Broadband

It should be noted that prior to both *Comcast v. FCC* and *Verizon v. FCC*, the Supreme Court set an important precedent in *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.* (“*Brand X*”).⁵⁴ Harkening back to the “Chevron Deference” precedent established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court in *Brand X* upheld the FCC’s decision to classify ISPs as “information services” over “tele-

[dyn/content/article/2010/04/06/AR2010040600742.html](http://www.washingtonpost.com/dyn/content/article/2010/04/06/AR2010040600742.html) (“A federal appeals court ruled Tuesday that the Federal Communications Commission lacks the authority to force Internet service providers to keep their networks open to all forms of content, throwing into doubt the agency’s status as watchdog of the Web.”).

⁵⁰ *Id.*

⁵¹ *Comcast Corp.*, 381 U.S. App. D.C. at 655.

⁵² *Id.*

⁵³ *Comcast Corp. v. FCC*, 600 F.3d 642, 643, 390 U.S. App. D.C. 111, 112 (D.C. Cir. 2010).

⁵⁴ 545 U.S. 967, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005).

communications services.”⁵⁵ In *Chevron*, the Supreme Court had held that courts must defer to an agency’s actions so long as they are reasonable.⁵⁶ This deference was applied in *Brand X*, among the earliest cases addressing the Communications Act classification debate.⁵⁷ While the *Verizon* decision implicated this debate, the Open Internet Order of 2015 utilized the *Chevron* Deference and *Brand X*’s precedents to its advantage.

Following the decision in *Comcast Corporation v. FCC*, the FCC attempted to adopt formal regulations governing net neutrality.⁵⁸ These regulations would prohibit the actions that Comcast had taken, actions that the D.C. Circuit declared unconstitutional barring a statutory basis in *Comcast Corporation v. FCC*.⁵⁹ These regulations were enacted in the Open Internet Order of 2010, which resulted in a case remarkably similar to *Comcast Corporation v. FCC*.⁶⁰ This time around, it was Verizon Communications that brought suit against the FCC for violating its statutory authority.⁶¹

The D.C. Circuit Court of Appeals addressed the relationship between the cases immediately, opening the opinion by acknowledging that, “[f]or the second time in four years, we are confronted with a Federal Communications Commission effort to compel broadband providers to treat all Internet traffic the same regardless of source—or to require,

⁵⁵ *Id.* at 969; see *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 2779, 81 L. Ed. 2d 694 (1984).

⁵⁶ *Id.* at 845.

⁵⁷ *Brand X*, 545 U.S. at 982.

⁵⁸ Puzzanghera, *supra* note 42.

⁵⁹ *Id.*

⁶⁰ *Id.*; see FCC, In the Matter of Preserving the Open Internet, 25 F.C.C.R. § 17905, *vacated and remanded by Verizon v. FCC*, 408 U.S. App. D.C. 92, 740 F.3d 623 (2014).

⁶¹ *Verizon v. F.C.C.*, 740 F.3d 623408 U.S. App. D.C. 92 (D.C. Cir. 2014).

as it is popularly known, ‘net neutrality.’”⁶² The appellate court vacated both the “anti-discrimination and the anti-blocking rules” of the Open Internet Order of 2010, wisely noting that their decision was neither a rebuke or an affirmance of the Open Internet Orders themselves, but rather an analysis of the FCC’s statutory power.⁶³ Reviewing the plethora of statutory provisions that the FCC proffered to affirm its Open Internet Order, including most notably section 706 of the Telecommunications Act of 1996, the appellate court found that the FCC lacked the authority to implement the Order.⁶⁴ The appellate court reasoned that although section 706 grants the FCC the authority “to promote broadband deployment by regulating how broadband providers treat edge providers,” the FCC may not “utilize that power in a manner that contravenes any specific prohibition contained in the Communications Act.”⁶⁵ Verizon argued that the Open Internet Order did just that through its anti-discrimination and anti-blocking rules, which enforced common carrier regulations against broadband ISPs, a result specifically prohibited by the Communications Act.⁶⁶ The D.C. Circuit Court of Appeals agreed, reasoning that the anti-discrimination and anti-blocking rules relegated ISPs to common carriers and vacated the 2010 Open Internet Order.⁶⁷

⁶² *Id.* at 97.

⁶³ *Id.* at 97. (“Because the Commission has failed to establish that the anti-discrimination and anti-blocking rules do not impose per se common carrier obligations, we vacate those portions of the Open Internet Order.”). *Id.*

⁶⁴ *Id.* at 118-19; see 5 U.S.C.A. § 706 (allowing a reviewing court to hold unlawful and set aside agency action found to be “arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law”). *Id.* The FCC also argued that section 706 granted it authority to regulate broadband providers in *Comcast*.

⁶⁵ *Verizon*, 408 U.S. App. D.C. at 118-19.

⁶⁶ *Id.* at 119.

⁶⁷ *Id.* at 128.

D. The 2015 Open Internet Order

Former FCC Chairman Tom Wheeler viewed the *Verizon* defeat as a sort of legal “roadmap” in determining the authority of the FCC, using this “roadmap” to craft the 2015 Open Internet Order.⁶⁸ *Verizon* limited the FCC’s ability to regulate ISPs so long as they were classified as providers of “information services” under Title II of the Communications Act of 1934.⁶⁹ As such, the 2015 Open Internet Order reclassified broadband as “telecommunications,” subject to regulation as “common carriers” under Title II of the Communications Act of 1934.⁷⁰ The authority to do this arose initially out of *Chevron*, which created the standard for agency deference.⁷¹ *Brand X* would apply this standard to telecommunications.⁷² Telecommunications, as defined in the Communications Act, is the “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁷³ This definition seems straightforward, and would grant the FCC the ability to regulate ISPs as common carriers, something that the U.S. Court of Appeals for the D.C. Circuit denied the FCC in

⁶⁸ Statement of Chairman Tom Wheeler regarding Protecting and Promoting the Open Internet, GN Docket No. 14-28 (Feb. 26, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-327104A2.pdf.

⁶⁹ *Verizon*, 408 U.S. App. D.C. at 118-19; see Fran Berkman & Andrew Couts, *Title II is the Key to Net Neutrality – So What is It?*, THE DAILY DOT (May 20, 2014), <https://www.dailydot.com/layer8/what-is-title-ii-net-neutrality-fcc/>.

⁷⁰ Berkman, *supra* note 69. (“The 2015 Open Internet Order reclassified broadband internet service under Title II (it was previously classified under Title I as an “information service), which provided the legal basis for the FCC to enforce net neutrality rules.”). *Id.* See Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (2018).

⁷¹ See *supra* note 54-57.

⁷² See *supra* note 53.

⁷³ 47 U.S.C.A. § 153.

Verizon.⁷⁴ By adhering to the precedent set by *Verizon*, the FCC restored its authority to regulate and ban blocking, throttling and paid prioritization.⁷⁵ The measure was a direct response to the *Verizon* ruling, as “without broadband providers being classified as common carriers under Title II, the FCC would lack the legal authority to enforce net neutrality rules against blocking, throttling, and paid prioritization.”⁷⁶ Opponents of the Order, such as Verizon, argued that it constituted excessive government regulation, while some proponents of net neutrality thought it did not go far enough.⁷⁷

President Obama was an open and adamant supporter of Wheeler’s revised Order, taking public actions to support the Order and push the FCC to enact stringent regulations.⁷⁸ Although the Open Internet Order of 2015 was eventually enacted, and suits by AT&T and other telecom companies attacking the Order dismissed, President Trump’s election in 2016 changed the trajectory of the net neutrality regulations.⁷⁹ The case of *United States Telecom Association v. FCC* upheld the FCC’s Open Internet Order of 2015, with the court holding that changes in technology, broadband use, consumer perceptions and internet services supported

⁷⁴ See *supra* note 58.

⁷⁵ Jon Brodtkin, *To Kill Net Neutrality Rules, FCC Says Broadband Isn’t “Telecommunications”*, ARS TECHNICA (June 1, 2017), <https://arstechnica.com/information-technology/2017/06/to-kill-net-neutrality-rules-fcc-says-broadband-isnt-telecommunications/>.

⁷⁶ Berkman, *supra* note 69.

⁷⁷ Puzzanghera, *supra* note 42. (“Republicans complained that it was too much government interference . . . net neutrality supporters . . . wanted Wheeler to ban paid prioritization and pass rules that they hoped would withstand industry lawsuits.”). *Id.*

⁷⁸ Puzzanghera, *supra* note 42. (“In a two-page statement and an online video, Obama pushed the FCC to enact the toughest possible regulations by reclassifying broadband providers for utility-like oversight.”). *Id.*

⁷⁹ *Id.*

reclassification of broadband services as “telecommunications services.”⁸⁰

When Donald Trump was elected President in 2016, he immediately set out to create a new mandate on net neutrality, appointing Ajit Pai as the Commissioner of the FCC and immediately prompting fears that deregulation was imminent.⁸¹ In a 2017 *Wall Street Journal* op-ed, Pai famously articulated his position on net neutrality, praising the Telecommunications Act of 1996 as “the greatest free-market success story in history” for prompting nearly \$1.5 trillion in infrastructure investment.⁸² Pai attacked the shift to “telecommunications carrier” classification, arguing that it “was designed in the 1930s to tame the Ma Bell telephone monopoly.”⁸³ Pai cited declining investment, overly burdensome regulations for smaller ISPs, and declining innovation as by-products of the Open Internet Order of 2015.⁸⁴ Pai proposed a new plan, one in which regulatory measures were considerably mitigated, opening up ISPs to act freely, with the FCC ensuring only that the ISPs act transparently for the consumer’s benefit.⁸⁵ The FTC would become the “cop on the beat,” policing ISPs to promote fair competition.⁸⁶ In legal terms, Pai’s proposals would amount to a reversion back to the pre-2016 “information services” classification, a development that net neutrality opponents feared due to uncertainty over how ISPs would react to the

⁸⁰ *United States Telecom Ass’n v. FCC*, 825 F.3d 674, 423 U.S. App. D.C. 183 (D.C. Cir. 2016).

⁸¹ McHugh, *supra* note 9 (“Pai and the Republican-majority commission saw net neutrality as an overreaching government measure, one that stifled competition.”). *See also* Puzzanghera, *supra* note 42.

⁸² Ajit Pai, *How the FCC Can Save the Open Internet*, THE WALL STREET JOURNAL (Nov. 21, 2017), <https://www.wsj.com/articles/how-the-fcc-can-save-the-open-internet-1511281099>.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

newfound lack of regulation.⁸⁷ The FCC's mandate to do so arose out of *Chevron* and *Brand X*, reversing Tom Wheeler's 2015 reclassification which claimed authority on the same grounds.⁸⁸

Numerous problems with Pai's proposed changes to ISP oversight have been identified.⁸⁹ Although Pai referenced "voluntary commitments" he had received from ISPs to adhere to net neutrality rules on their own accord, many interpreted this as an admission that Pai and the Trump administration had no real plans to regulate the actions of ISPs.⁹⁰ *Above the Law* also noted that just as the FCC's authority to regulate ISPs was limited by their statutory authority, the FTC's authority over broadband providers was similarly limited absent the passage of a new law.⁹¹ *Above the Law* also cited concerns that the FTC does not have the infrastructure to take on the massive challenge of regulating ISPs, a concern which FTC Commissioner Terrell McSweeney also conveyed.⁹² Despite these concerns, the FCC voted to repeal the 2015 Open Internet Order on

⁸⁷ Berkman, *supra* note 69.

⁸⁸ See *supra* notes 54-57.

⁸⁹ Techdirt, *FTC Commissioner: If The FCC Kills Net Neutrality, Don't Expect Our Help*, ABOVE THE LAW (Apr. 14, 2017), <https://abovethelaw.com/2017/04/ftc-commissioner-if-the-fcc-kills-net-neutrality-dont-expect-our-help/?rf=1> (explaining many of the problems that Pai's leadership may present from the perspective of net neutrality supporters).

⁹⁰ *Id.*

⁹¹ *Id.* (proposing that the lobbying interests will ensure the FTC's authority is not similarly limited).

⁹² *Id.* McSweeney stated that the FTC is "... a very hard-working agency but [] not a very big agency The FTC doesn't have a lot of expertise in network engineering. We're not the FCC in that regard." *Id.*; see Jon Brodtkin, "*Unenforceable*": *How Voluntary Net Neutrality Lets ISPs Call the Shots*, ARS Technica (Apr. 11, 2017) <https://arstechnica.com/tech-policy/2017/04/unenforceable-how-voluntary-net-neutrality-lets-isps-call-the-shots/> ("FTC Commissioner Terrell McSweeney believes net neutrality enforcement should be left to the FCC."). *Id.*

December 14, 2017, and ISP regulatory measures reverted to the loose, undefined rules which permit actions such as blocking, throttling and paid prioritization.⁹³

E. Where Net Neutrality Stands Today

The repeal of the net neutrality regulations, formally known as the Restoring Internet Freedom Order (“RIFO”), brought with it a flurry of activity. RIFO effectively reversed the prior “telecommunications service” classification and disclaimed any FCC responsibility for enforcing an open internet, leading to a number of lawsuits filed in an attempt to block the repeal and significant legislation.⁹⁴ Since the repeal of the Open Internet Order and the institution of RIFO, the Democrats have won the House of Representatives, putting themselves in an improved position to support stronger net neutrality rules.⁹⁵

In the courts, the attorneys general of over twenty states have filed suit against the FCC.⁹⁶ The states involved fall along a wide range of the political spectrum, and include California, Kentucky, Maine, New York, and North Carolina.⁹⁷ The case is currently being heard in the United

⁹³ Ryan Whitwam, *FCC Votes to Overturn Net Neutrality Rules – Not What?*, EXTREME TECH (Dec. 14, 2017), <https://www.extremetech.com/internet/260568-fcc-votes-overturn-net-neutrality-rules>.

⁹⁴ Cecilia Kang, *Flurry of Lawsuits Filed to Fight Repeal of Net Neutrality*, THE NEW YORK TIMES (Jan. 16, 2018), <https://www.nytimes.com/2018/01/16/technology/net-neutrality-lawsuit-attorneys-general.html>; See *In re Restoring Internet Freedom*, 2018 FCC LEXIS 44 (F.C.C. Jan. 4, 2018).

⁹⁵ Jason Abbruzzese & Brandi Vincent, *Net Neutrality Could Get a Reprieve Once Democrats Take Control of the House*, NBC NEWS (Dec. 8, 2018), <https://www.nbcnews.com/tech/tech-news/net-neutrality-could-get-reprieve-once-democrats-take-control-house-n945501>.

⁹⁶ Seth Fiegerman, *More than 20 States Sue to Stop FCC’s Net Neutrality Repeal*, CNN TECH (Jan. 16, 2018), <http://money.cnn.com/2018/01/16/technology/net-neutrality-lawsuit/index.html>.

⁹⁷ *Id.*

States Court of Appeals for the District of Columbia Circuit, and the states have been joined by a number of prominent tech companies including Reddit, Mozilla, Vimeo and Etsy.⁹⁸

Discussions in the case echo common themes of the net neutrality debate, exploring the distinction between an “information service” and a “telecommunications service,” and attacking the *Brand X* decision as inapplicable in the modern ISP landscape.⁹⁹ The outcome is especially important given the Supreme Court’s decision not to review *U.S. Telecom Ass’n v. FCC*, which upheld the Open Internet Order of 2015.¹⁰⁰

Regardless of how the case progresses, various parties are also exploring a number of legislative and regulatory options.¹⁰¹ In the legislature, numerous senators support a resolution that would overrule the FCC decision and restore the net neutrality rules.¹⁰² Such a resolution would need

⁹⁸ Ben Lovejoy, *Reddit, Mozilla, Vimeo and 22 State Attorneys General Fight to Save Net Neutrality Today*, 9TO5MAC (Feb. 1, 2019), <https://9to5mac.com/2019/02/01/save-net-neutrality/>.

⁹⁹ Jon Brodtkin, *Net Neutrality Court Case Preview: Did FCC Mess Up By Redefining Broadband*, ARS Technica (Jan. 31, 2019), <https://arstechnica.com/tech-policy/2019/01/net-neutrality-advocates-confident-about-beating-fcc-as-case-heads-to-court/> (discussing FCC opponent arguments that “the business model used by ISPs at the time of *Brand X* is now ‘largely extinct,’ and how ISPs today are utilized primarily as a “pathway to third-party services.”)

¹⁰⁰ Bill Chappell, *Supreme Court Won't Review Decision That OK'd Obama-Era Net Neutrality Rules*, NPR (Nov. 5, 2018), <https://www.npr.org/2018/11/05/664451451/supreme-court-wont-review-decision-that-ok-d-obama-era-net-neutrality-rules>; see *United States Telecom Ass'n v. Fed. Commc'ns Comm'n*, 825 F.3d 674 (D.C. Cir. 2016), *cert. denied*, 139 S. Ct. 475, 202 L. Ed. 2d 361 (2018).

¹⁰¹ See *infra* notes 102-107.

¹⁰² Brian Fung, *Democrats Say 50 Senators Endorse Resolution to Restore FCC Net Neutrality Regulations*, CHICAGO TRIBUNE (Jan. 15, 2018), <https://www.chicagotribune.com/news/nationworld/politics/ct-net-neutrality-regulations-20180115-story.html> (“Fifty Senate lawmakers

Assessing the Current State of Net Neutrality

approval by the House of Representatives, which is likely given the Democrats' recent victory; however, the chances of a resolution surviving a veto by President Trump are incredibly unlikely.¹⁰³ Many states are pursuing their own net neutrality rules, and will likely be forced to defend these regulations in court by arguing that the FCC has no valid authority to prevent states from making their own net neutrality laws.¹⁰⁴ The California legislature recently approved a bill that is being called "the strongest net neutrality law in the US," that would prevent ISPs providing broadband Internet service from engaging in a number of actions that prohibit net neutrality principles.¹⁰⁵ Essentially, the California Internet Consumer Protection and Net Neutrality Act of 2018 serves to restore the protections of the Open Internet Order.¹⁰⁶ It sets an important and encouraging precedent for state legislators who may seek to follow suit, despite the apparent threat of litigation by ISPs to combat this state legislation.¹⁰⁷

have endorsed a legislative measure to override the Commission's recent decision to deregulate the broadband industry.").

¹⁰³ *Id.*

¹⁰⁴ Jacob Kastrenakes, *California Passes Strongest Net Neutrality Law in the Country*, THE VERGE (Aug. 31, 2018), <https://www.theverge.com/2018/8/31/17805892/california-sb822-net-neutrality-law-vote>. Chelsea Hilliard & Peter Vogel, *Will Congress Override State Net Neutrality Laws?*, NAT'L L. REV. (Feb. 22, 2019), <https://www.natlawreview.com/article/will-congress-override-state-net-neutrality-laws> ("The position of the state attorneys general is that the FCC's actions constitute an unconstitutional preemption of state authority to introduce their own Net neutrality laws.").

¹⁰⁵ Kastrenakes, *supra* note 104.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

III. LEGAL APPROACHES TO ENFORCING NET NEUTRALITY

The Restoring Internet Freedom Order specifically states that in lieu of the Open Internet Order regulations, “antitrust law and the Federal Trade Commission’s authority under Section 5 of the FTC Act to prohibit unfair and deceptive practices” are now the primary law protecting consumers in the net neutrality realm.¹⁰⁸ RIFO specifically rescinds “utility-style regulation” under Title II “in favor of the market-based policies necessary to preserve the future of internet freedom.”¹⁰⁹ The policing structure of the FTC and attorneys general under RIFO is one of “transparency,” a word that appears over 300 times in the Order itself.¹¹⁰ RIFO discusses how ISPs will be required to “disclose any practices that block websites; throttle delivery speeds; prioritize delivery, either through ‘free’ data usage where downloads do not count against a plan or through ‘fast lane’ delivery where an ISP provides data faster because of a fee-based arrangement; or deal with congestion management.”¹¹¹

Thus, rather than regulation, “the onus will shift to enforcers to ensure that ISPs deliver what they promise.”¹¹² As it currently stands, the legal remedies at the disposal of the FTC include traditional consumer protection statutes that would allow the FTC to go after ISPs for deceptive statements or unfair practices, as well as Section 5 of the FTC Act which would also challenge unfair competition practices.¹¹³ These would include an ISP’s

¹⁰⁸ In the Matter of Restoring Internet Freedom, 32 F.C.C. Rcd. 4434, para. 140 (2018).

¹⁰⁹ *Id.* at para. 1.

¹¹⁰ *See generally id.*

¹¹¹ Lisa J. Dunlop & Richard P. Lawson, *Net Neutrality: From Rules to Enforcement*, 23 NO. 1 CYBERSPACE LAWYER NL 6 (Jan. 2018).

¹¹² *Id.*

¹¹³ *Id.*

misrepresentations regarding paid prioritization or bandwidth throttling, as well as any acts that illegally take advantage of consumers.¹¹⁴ The FTC and the Department of Justice can also utilize the Sherman Antitrust Act, which could be enforced if an ISP was restricting consumers' ability to access Internet content, constituting an antitrust violation.¹¹⁵

Net neutrality proponents will, of course, continue to argue that by law ISPs should be classified as common carriers under Title I of the Communications Act of 1934.¹¹⁶ Proponents of net neutrality will argue that the new rules improperly categorize ISPs as "information services" or "content providers."¹¹⁷ Harold Feld, the senior vice president of *Public Knowledge*, told *Reuters* that he believes shifting ISPs from common carriers to a more lightly regulated "information services" categorization under Title II "will fail in court because the main role of ISPs is delivering content from Google, Netflix or other websites, not offering email or online storage."¹¹⁸ As the D.C. Circuit Court noted in *Verizon v. FCC*, "broadband providers like AT&T and Time Warner have acknowledged that online video aggregators such as Netflix and Hulu compete directly with their own core video subscription service," and that even absent such direct competition, "[b]roadband providers . . . have powerful incentives to accept fees from edge providers, either in return for excluding their competitors or for granting them prioritized access to end users."¹¹⁹

The Washington Post identified two broad categories of arguments that the opponents of RIFO are expected to

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Reuters Staff, *supra* note 31; *see also* 5 U.S.C.S. § 706 (2018).

¹¹⁷ *Id.*

¹¹⁸ Reuters Staff, *supra* note 31.

¹¹⁹ *Verizon v. FCC*, 408 U.S. App. D.C. 92, 114, 740 F.3d 623, 645-46 (2014).

make.¹²⁰ One of these arguments will attack the FCC's legal standing, or lack thereof, to repeal the Open Internet Order. The other will focus on the process that led to the vote to repeal the Open Internet Order, and the well-publicized issues that plagued the process, such as alleged fraudulent comments during the FCC's open comment period.¹²¹

A. The Arbitrary and Capricious Standard

One of the most noteworthy legal routes considered thus far is an argument that the repeal of the Open Internet Order was illegal under the “arbitrary and capricious” standard, which bars federal agencies from passing “arbitrary, capricious” regulations.¹²² The standard is found within the Administrative Procedures Act, and states in full that, “[a] reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹²³

The Supreme Court has discussed the types of factors it reviews when assessing the standard, many of which apply to the net neutrality debate, stating that an agency rule would typically be found arbitrary and capricious if it is irrational, not based on the consideration of relevant factors, or outside of the agency's statutory authority.¹²⁴ In addressing lawsuits attacking RIFO, courts will address this

¹²⁰ Brian Fung, *The Net Neutrality Lawsuits are Coming. Here's What They're Likely to Say*, THE WASHINGTON POST (Dec. 19, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/12/19/the-net-neutrality-lawsuits-are-coming-heres-what-theyre-likely-to-say/?utm_term=.842bcb39ea13.

¹²¹ *Id.*

¹²² Reuters Staff, *supra* note 31.

¹²³ 5 U.S.C.S. § 706 (2018).

¹²⁴ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856 (1983).

standard and the considerations involved.¹²⁵ Important decisions may be made based upon how strict an individual judge chooses to interpret this standard.¹²⁶ For example, a court will ask whether the FCC relied on impermissible factors in repealing the Open Internet Order, or whether they ignored an important aspect of the regulatory issue in making its decision.¹²⁷

A third case in the vein of *Comcast Corporation v. FCC* and *Verizon v. FCC* was decided in the D.C. Circuit Court in 2016, wherein, ironically, the opponents of the Open Internet Order of 2015 argued in support of the arbitrary and capricious standard to have the Order struck down.¹²⁸ In that case, US Telecom argued that the FCC's current position went against past factual data that the agency had promulgated in passing the 2002 Cable Broadband Order, and that this action meant that the 2015 Order was arbitrary and capricious.¹²⁹ However, the Circuit Court reasoned that the Commission gave a valid and reasonable explanation for doing so, elaborating upon how changed circumstances rendered the previous data obsolete.¹³⁰ US Telecom also argued in favor of the reliance factor, stating that broadband providers were reliant on the past construction of the Internet rules.¹³¹ The court rejected this argument, agreeing with the FCC that "the regulatory status of broadband Internet access service appears to have, at most, an indirect

¹²⁵ See generally Robert L. Haig, *Standards of Judicial Review—The Arbitrary and Capricious Standard*, 13 BUS. & COM. LITIG. FED. CTS. § 139:30 (4th ed.) (Nov. 2017).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See generally *United States Telecomms. Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

¹²⁹ *Id.* at 709.

¹³⁰ *Id.*

¹³¹ *Id.* at 708-09.

effect (along with many other factors) on investment.”¹³² Thus, the case provides some relevant considerations which would work in favor of the defense.

Although there are valid arguments on both sides of the debate that could support a claim under the standard, it does not appear that the arbitrary and capricious standard is sufficient to overrule the repeal.¹³³ Many have pointed to the short passage of time between the Open Internet Order and its repeal as proof of its arbitrary nature.¹³⁴ Although the Supreme Court has noted that an agency must be allowed to change its mind, a court will take note of the shift in position, stating that such a shift would require “a more detailed justification than would suffice for a new policy created on a blank slate.”¹³⁵ The Supreme Court is careful to note that this shift in position will not result in a stricter standard, only a “reasoned analysis for the change beyond that which may be required when an agency *does not act* in the first instance.”¹³⁶ The Supreme Court has also held that if an agency considers an inappropriate factor or fails to acknowledge comments that, if true, would require a change in its position, the action may be found arbitrary and capricious.¹³⁷

Advocates of net neutrality have pointed out the alleged corruption in the comment-process leading up to the repeal as valid supporting evidence in favor of the capricious

¹³² *Id.* at 709.

¹³³ See *infra*, notes 134-43.

¹³⁴ Klint Finley, *The FCC Just Killed Net Neutrality. Now What?*, WIRED (Dec. 14, 2017), <https://www.wired.com/story/after-fcc-vote-net-neutrality-fight-moves-to-courts-congress/>.

¹³⁵ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S. Ct. 1800, 1811 (2009).

¹³⁶ *Encino Motorcars, LLC v. Navarro*, 463 U.S. 29, 42, 103 S. Ct. 2117, 2856 (2016) (holding as well that a shift in policy must be acknowledged by the administration).

¹³⁷ See *Louisiana Federal Land Bank Ass'n, FLCA v. Farm Credit Admin.*, 336 F.3d 1075, 1080 (D.C. Cir. 2003).

nature of RIFO.¹³⁸ Leading up to the FCC's vote to repeal the Open Internet Order, the FCC received hundreds of thousands of allegedly fake comments from American citizens, many impersonating actual living and deceased U.S. citizens.¹³⁹ The FCC itself acknowledged these comments, noting, however, that they came from opponents *and* supporters of the repeal.¹⁴⁰ The FCC declined to investigate these fraudulent comments further, and many proponents of net neutrality argued that the use of fraudulent comments and the lack of an investigation constituted a fatal flaw in the FCC's consideration to repeal the Open Internet Order.¹⁴¹ Using the allegedly fraudulent comment process as evidence to support an argument that the FCC violated administrative procedure under the arbitrary and capricious standard, however, is unlikely to succeed.¹⁴² Perhaps if there was evidence that the FCC somehow supported or even turned a blind eye towards these comments, or knowingly and "capriciously" used them to further its agenda, then net neutrality advocates may have an argument under the standard. However, Pai and the FCC seem to have anticipated just such an argument, as the agency was mindful enough to explicitly state that they only considered the highest-quality comments that contained substantive quality.¹⁴³

¹³⁸ Brian Fung, *FCC Net Neutrality Process 'Corrupted' By Fake Comments and Vanishing Consumer Complaints, Officials Say*, THE WASHINGTON POST (Nov. 24, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/11/24/fcc-net-neutrality-process-corrupted-by-fake-comments-and-vanishing-consumer-complaints-officials-say/?utm_term=.da9e7faa9ff2.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Finley, *supra* note 134.

¹⁴³ Reuters Staff, *supra* note 31; *see* 5 U.S.C.S. § 706 (2018).

There are interesting parallels between RIFO and a case decided in the Supreme Court in 1983 that invoked the arbitrary and capricious standard. In *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, the Court reversed Ronald Reagan's appointment of Andrew Lewis as Secretary of Transportation.¹⁴⁴ Prior to Reagan's election, certain car safety rules were passed as Modified Standard 208.¹⁴⁵ The National Highway Transportation Safety Administration confirmed that these rules, which essentially mandated the inclusion of seatbelts in all vehicles, prevented tens of thousands of deaths and injuries each year.¹⁴⁶ However, Mr. Lewis immediately set about rescinding the rule following an investigatory period during which the Department of Transportation solicited written comments and held public hearings, similar to the process under which the Open Internet Order was repealed.¹⁴⁷ The agency presented findings it claimed created "substantial uncertainty" regarding the effectiveness of Modified Standard 208.¹⁴⁸ The Supreme Court rejected this position outright, stating that the safety benefits of Modified Standard 208 were undeniable and that the agency's failure to rationally assess Modified Standard 208 was "arbitrary and capricious."¹⁴⁹ The Supreme Court held that "an agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis . . .",

¹⁴⁴ 463 U.S. 29, 34, 103 S. Ct. 2856, 2862, 77 L. Ed. 2d 443 (1983).

¹⁴⁵ *Id.* at 2859-60.

¹⁴⁶ *Id.* at 2862.

¹⁴⁷ *Id.* at 2864.

¹⁴⁸ *Id.* at 2871.

¹⁴⁹ *Id.* at 2873 ("By failing to analyze the continuous seatbelts in its own right, the agency has failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary and capricious standard."). *Id.*

overturning Mr. Lewis' decision and upholding Modified Standard 208.¹⁵⁰

The parallels between the case are clear, especially when considering the subtext of the Court's decision. Mr. Lewis attempted to rescind Modified Standard 208 as a political move, rather than basing decisions on studies regarding the effectiveness and safety benefits of the rule.¹⁵¹ The rescission was engineered by the Reagan administration to support his pro-business platform and save car companies money on manufacturing.¹⁵² Although the Trump Administration likely anticipates such an argument, the *State Farm* decision could be used by net neutrality proponents as ammunition in an attack on the FCC's investigatory process and swift rescission of the Open Internet Order.

The greatest hurdle with the standard may come after a hypothetically successful legal challenge to RIFO, as under the arbitrary and capricious standard, "the agency's loss may prove only temporary."¹⁵³ The Administrative Procedure Act allows agencies "broad authority to fashion equitable remedies tailored to the circumstances of a given case."¹⁵⁴ Although jurisdictions vary on whether or not they will vacate an order entirely or allow it to be refashioned, courts have stated that such a decision will often rest on how seriously the order's deficiencies were, and the impact that a

¹⁵⁰ *Id.* at 2874.

¹⁵¹ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59, 103 S. Ct. 2856, 2875, 77 L. Ed. 2d 443 (1983) (Rehnquist, J., concurring in part). Interestingly, Justice Rehnquist argues that the change in the administration itself is a reasonable basis for an agency to reassess certain regulations but concedes that the rescission was arbitrary and capricious. *Id.*

¹⁵² *Id.*

¹⁵³ Haig, *supra* note 125.

¹⁵⁴ 5 U.S.C.A. § 706(1)-(2).

ROBBIE TROIANO

change in the law would have.¹⁵⁵ There is certainly an opportunity for the net neutrality proponents to succeed under the arbitrary and capricious standard, but it appears unlikely, and even if they receive a favorable judgment, it may prove difficult to engineer any substantive change while President Trump remains in office and Ajit Pai remains in charge of the FCC.

CONCLUSION

The net neutrality debate is likely to continue as it has for decades, and it appears as though partisan shifts will continue to dictate its form, as most would expect an attempt to return to the rules under the 2015 Open Internet order should the Democrats retake the White House in 2020.¹⁵⁶ It will be interesting to monitor whether a regular shift in the law will eventually result in a court applying the arbitrary and capricious standard to eventually block an attempt at repealing the regulatory measures of a prior regime. As it currently stands, all manner of challenges are currently being presented by proponents of net neutrality, and the FCC under Ajit Pai will be forced to defend itself on every front.

¹⁵⁵ *Northern Air Cargo v. U.S. Postal Service*, 674 F.3d 852, 861 (D.C. Cir. 2012).

¹⁵⁶ Alyssa Newcomb, *What's Next for Net Neutrality, and When Will We See Change?*, NBC NEWS (Dec. 15, 2017), <https://www.nbcnews.com/tech/internet/what-s-next-net-neutrality-when-will-we-see-change-n830106>.