The U.S. Federal Communications Commission's Proposed Rulemaking in the Matter of Protecting and Promoting the Open Internet

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I. Summary and Key Recommendations

On May 15, 2014, the United States Federal Communications Commission (FCC) announced its latest effort to impose net neutrality regulations on broadband providers. This report reviews the recent history of the FCC's regulation of Internet service providers – including the two recent cases in which the courts struck down the FCC's efforts to impose net neutrality rules – and analyzes the implications of the current Proposed Rules for free speech on the Internet. This report concludes that the FCC's Proposed Rules threaten the free flow of information on the Internet and endanger freedom of expression and freedom of the media values.

Key Recommendations:

- The FCC should regulate the transmissions service provided by broadband providers under Title II of the Telecommunications Act and subject broadband providers to meaningful, enforceable common carriage/nondiscrimination requirements.
- The FCC should no longer immunize broadband providers from common carriage obligations, and should re-impose on broadband providers the nondiscrimination obligations historically imposed on all conduits for communication.
- The FCC should regulate broadband providers to ensure that they act as good stewards within this marketplace – free from discrimination, prioritization, degradation, blocking, or other censorship, and true to the free speech and freedom of the media values that are integral to democratic self-government.

II. International Standards and OSCE Commitments in the Field of Freedom of Expression and Freedom of the Media

This analysis is based on the commitment by OSCE Participating States to freedom of expression and freedom of the media as protected by international instruments like the Universal Declaration of Human Rights. Article 19 of the Universal Declaration states:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

This right is developed and made legally binding in Article 19 of the International Covenant on Civil and Political Rights.

The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE clearly expresses the adherence by Participating States to such international standards by reaffirming that "everyone has the right to freedom of expression including the right to communication. This right will include freedom to hold

opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards."

The Joint Declaration on Freedom of Expression and the Internet, adopted on 1 June 2011 by the OSCE Representative on Freedom of the Media, together with the United Nations Rapporteur on Freedom of Opinion and Expression, the Organization of American States Special Rapporteur on Freedom of Expression and the African Commission on Human and People's Rights Special Rapporteur on Freedom of Expression and Access to Information, refers directly to net neutrality issues, stating that "a. There should be no discrimination in the treatment of Internet data and traffic, based on the device, content, author, origin and/or destination of the content, service or application. b. Internet intermediaries should be required to be transparent about any traffic or information management practices they employ, and relevant information on such practices should be made available in a form that is accessible to all stakeholders."

Finally, the Mandate of the OSCE Representative on Freedom of the Media includes:

> "Based on OSCE principles and commitments, the OSCE Representative on Freedom of the Media will observe relevant media developments in all participating States and will, on this basis, advocate and promote full compliance with OSCE principles and commitments regarding free expression and free media. In this respect he or she will assume an early-warning function. He or she will address serious problems caused by, inter alia, obstruction of media activities and unfavourable working conditions for journalists."

III. Introduction: History of U.S. Regulation of Internet Service Providers

In the passage and subsequent interpretation of the Telecommunications Act of 1996, a central issue confronting policymakers and courts was how, if at all, access and transmission services by Internet service providers should be regulated. If regulated as "telecommunications services" under Title II of the Telecommunications Act, then such providers would be subject to common carriage regulation prohibiting them, among other things, from discriminating against any type of legal content, applications, or services. If regulated instead as "information services," then such providers would not be subject to common carriage obligations. Prior to 2002, Internet Service Providers (ISPs) were generally narrowband or dialup and were regulated as "telecommunications services" under Title II of the Telecommunications Act and subject to common carriage obligations prohibiting them from discriminating against content/services – just as telephone services historically have been regulated. In 2002, the FCC was called upon to determine whether to classify cable broadband providers as "telecommunications services" subject to common carriage/nondiscrimination obligations. The FCC decided to classify cable broadband providers as "information services" and hence exempt from common carriage/nondiscrimination requirements. This action was subsequently upheld by United

States Supreme Court in its Brand X decision in 2005.[1] Shortly after the Brand X decision, in 2005 the FCC removed common carriage/nondiscrimination obligations from all other types of broadband providers as well. At the time it did so, the FCC issued an "Internet Policy Statement" – of dubious legal effect and enforceability – that embodied certain net neutrality principles.

Meanwhile, in 2007, Comcast – one of the largest broadband providers in the U.S. – secretly degraded legal peer-to-peer file sharing traffic. Comcast's actions, once discovered, prompted the FCC to issue an order censuring Comcast for violating the FCC's 2005 Internet Policy Statement, which provided in part that "consumers are entitled to access the lawful Internet content of their choice... [and] to run applications and use services of their choice." The D.C. Circuit, in reviewing the FCC's censure of Comcast, held in 2010 that the FCC lacked authority to enforce its Internet Policy Statement.[2] In Comcast v. FCC, the court held that, since the FCC had classified cable Internet providers as "information services" instead of as "telecommunications services," the FCC had essentially waived its jurisdiction over matters involving net neutrality and net discrimination.

In response to the decision in Comcast v. FCC, the FCC sought to re-assert its authority to implement and enforce net neutrality regulations and issued its 2010 Open Internet Order. The FCC's 2010 Open Internet Order claimed authority to impose net neutrality regulations under Section 706 of the Telecommunications Act, which provides that the FCC "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by using "measures that promote competition in the local telecommunications market" and "other regulating methods that remove barriers to infrastructure investment" and that the FCC "shall take immediate action to accelerate deployment," if necessary. In its 2010 Open Internet Order, the FCC found that broadband providers potentially face a variety of incentives to reduce the openness of the Internet. The Commission observed that some broadband providers have an incentive to block or disadvantage edge providers to benefit their own or affiliated offerings at the expense of unaffiliated offerings. The FCC found that reducing such openness would constitute a "barrier to infrastructure investment," which the net neutrality safeguards in its 2010 Open Internet Order would remove. The FCC found further that market discipline alone could not effectively check such behavior, given the current market power of broadband providers (in which 70% of the U.S. population has only 2 choices, while 20% has one choice, of broadband providers).

Accordingly, in its 2010 Open Internet Order, the FCC set forth the following mandates for broadband providers: (1) **Fixed broadband providers** (cable, DSL) were subject to a **no blocking rule** and a **no unreasonable discrimination rule**, as well as a **rule of transparency** in network management. The no blocking rule prohibited fixed broadband providers from blocking any lawful content, applications, or services. The no unreasonable discrimination rule prohibited them from engaging in unreasonable

[1] Brand X v. Federal Communications Commission, 545 U.S. 967 (2005).
[2] Comcast v. Federal Communications Commission, 600 F.3d 642 (D.C. Cir. 2010).

discrimination in handling network traffic. The transparency rule required them to publicly disclose accurate information regarding their network management practices, performance, and commercial terms of service. (2) **Mobile broadband providers** were subject to a **narrower no blocking rule** and a **rule of transparency** in network management, and they were **not subject to a no unreasonable discrimination rule**. The no blocking rule for mobile broadband providers only prohibited them from blocking access to lawful websites or applications that compete with their own voice or video telephony services. The transparency rule required them (like fixed broadband providers) to publicly disclose accurate information regarding their network management practices, performance, and commercial terms of service.

Broadband provider Verizon challenged the FCC's 2010 Open Internet Order, claiming inter alia that the FCC was without authority to enact such rules, that the FCC's asserted jurisdiction under Section 706 of the Telecommunications Act was invalid, and that the FCC gave up its authority to enact such regulation when it classified broadband providers as "information services" back in 2002 instead of as "telecommunications services" subject to common carriage/nondiscrimination obligations. Verizon also claimed that the 2010 Open Internet Order violated broadband providers' First Amendment rights. It argued that the First Amendment protects those who transmit the speech of others and who exercise editorial discretion in selecting which speech to transmit. Verizon claimed that although broadband providers generally allow all content to be transmitted, they nonetheless possess the editorial discretion not to do so. Because the 2010 Open Internet Order stripped providers of control over which speech they transmit and how they transmit it, and compelled the carriage of others' speech on a nondiscriminatory basis, Verizon argued, the order violates providers' First Amendment rights.

In January 2014, the D.C. Circuit struck down portions of the FCC's 2010 Open Internet Order.[3] It determined that the no blocking rule and the no unreasonable discrimination rules were invalid, while the transparency rules were valid. The court determined that the FCC did not have the authority to impose the no blocking or no unreasonable discrimination rules on broadband providers without classifying them as telecommunications services subject to common carriage obligations under Title II of the Telecommunications Act. Since the FCC had previously classified broadband providers as "information services" and not "telecommunications services," broadband providers could not be regulated in a manner that essentially subjected them to common carriage regulation. Therefore, the FCC's 2010 Open Internet Order's no blocking and nondiscrimination mandates, which could only be applied to common carriers, could not be applied to broadband providers. (The court, however, upheld the transparency rules, which it found were not contingent upon providers being classified as common carriers.) Additionally, the court recognized that Section 706 of the Telecommunications Act vests the FCC with affirmative authority to enact measures encouraging the deployment of broadband infrastructure. It further agreed with the FCC that broadband providers represent a threat to Internet openness and could hinder future Internet development

[3] Verizon v. Federal Communications Commission, 740 F.3d 623 (D.C. Cir. 2014).

without rules similar to those in the Open Internet Order. The court then suggested changes to the FCC's regulations that would render them more likely to be upheld.

IV. The FCC's Proposed Rulemaking in the Matter of Protecting and Promoting the Open Internet

On May 15, 2014, the FCC issued a Notice of Proposed Rulemaking in an effort to re-impose net neutrality obligations on broadband providers in a manner that would be upheld by the courts.[4] In doing so, the Commission sought to adhere closely to the guidance provided by the D.C. Circuit in its decisions striking down the FCC's earlier efforts. The Proposed Rules include: (1) A strengthened **Transparency Rule**, requiring broadband providers to publicly disclose accurate information regarding their network management practices, performance, and commercial terms of service. (2) A **No Blocking Rule** very similar to that in the 2010 Open Internet Order but with the benefit of a different legal rationale, prohibiting fixed broadband providers from blocking lawful content, applications, services, or non-harmful devices, subject to reasonable network management; and prohibiting mobile broadband providers from blocking access to lawful websites and from blocking applications that compete with the provider's voice or video telephony services, both subject to reasonable network management. The FCC proposed to combine the no blocking rule with a "minimum level or service" requirement for any legal website that end users seek to access. (3) A **No Commercially Unreasonable Practices Rule**, **which replaces the Open Internet Order's Nondiscrimination Rule.** This rule applies only to fixed broadband providers and prohibits fixed broadband providers – but not mobile broadband providers – from engaging in commercially unreasonable practices, with the proviso that reasonable network management shall not constitute a commercially unreasonable practice. Under this commercial reasonableness standard (which relies upon Section 706 as its jurisdictional authority), broadband providers would be prohibited from engaging in "commercially unreasonable" practices – as opposed to being prohibited from engaging in "unreasonable discrimination" as they were under the 2010 Open Internet Order. The FCC indicated that it would determine what constitutes a commercially unreasonable practice on a case-by-case basis, relying on a "totality of the circumstances" test.[5] The D.C. Circuit indicated in an earlier decision that the "commercial reasonableness" standard provides sufficient flexibility for providers to negotiate deals (such as pay-for-priority deals) on individualized terms and therefore was not equivalent to a common carriage regime.[6] The FCC hopes that the more flexible "commercial unreasonableness" rule will survive judicial scrutiny since it allows for individualized negotiations and does not impose strict common carriage/ nondiscrimination obligations on broadband providers. **The FCC, however, has asked**

[4] In the Matter of Protecting and Promoting the Open Internet, Notice of Proposed Rulemaking, May 15, 2014 (NPRM).
[5] See NPRM Par. 116.
[6] Cellco Partnership v. FCC, 700 F.3d 534 (D.C. Cir. 2012) (upholding data roaming order).

for comments on whether pay-for-priority deals are per se unreasonable and whether the FCC should impose an outright ban on pay-for-priority deals.[7]

In this Notice of Proposed Rulemaking, **the FCC also asks for comments as to whether it should classify broadband providers as Title II "telecommunications services" subject to common carriage obligations**,[8] instead of as "information services" as they are now classified – especially if reclassification is the only way that it can legally subject broadband providers to no blocking and nondiscrimination rules. In addition, **the FCC seeks comments on the First Amendment implications of the Proposed Rules, including whether net neutrality regulation violates broadband providers' First Amendment rights.**[9]

V. The FCC's Proposed Rules Threaten the Free Flow of Information on the Internet and Endanger Freedom of Expression and Freedom of the Media Values

The FCC's abandonment of the nondiscrimination rule for broadband providers threatens the free flow of information of the Internet. One key difference between the 2010 Open Internet Order and the Proposed Rules is the replacement of the Nondiscrimination Rule (which was struck down by the D.C. Circuit) with a No Commercially Unreasonable Practices Rule. As discussed above, the FCC apparently hopes that jettisoning the nondiscrimination rule will allow its regulations to survive judicial scrutiny and will be compatible with the non-common-carriage regime that it has imposed on broadband providers. Permitting "commercially reasonable" practices by broadband providers will allow – and indeed encourage – broadband providers to experiment with business models that include paid prioritization – and even *exclusive* paid prioritization – upon individualized negotiations with edge providers (providers of content, applications, and services).[10] Although exclusive prioritization deals with affiliates (a deal between Comcast and NBC.com, for example), would be presumptively illegal,[11] other kinds of exclusive prioritization deals – between nonaffiliates – would be presumed legal.

If broadband providers are permitted to negotiate exclusive pay-for-priority arrangements with individual edge providers, broadband providers would be able to anoint exclusive premium content providers and effectively become censors of other disfavored, poorly funded, or unpopular content, by choosing not to favor such content for transmission to subscribers. Under the Proposed Rules, a broadband provider like Comcast could enter into a deal with Foxnews.com to anoint it as the exclusive premium news provider for all Comcast subscribers, while comparatively disadvantaging all other news providers. Similarly, the Proposed Rules would allow a broadband provider like Verizon to enter into an arrangement with the Republican National Committee to anoint

[7] See NPRM Paragraph 138.
[8] See NPRM Paragraphs 148-55.
[9] See NPRM Paragraph 159.
[10] See NPRM Paragraph 111 (referring to "encouragement of individualized negotiation" by broadband providers.)
[11] See NPRM Paragraph 126.

it as the exclusive premium political site for all Verizon subscribers, while disadvantaging the Democratic National Committee's and other political sites. Otherwise protected speech – a blog critical of Verizon's latest broadband policies, a disfavored political party's website – could be disfavored by broadband providers and not provided to Internet users in a manner equal to other, favored Internet content – subject only to the Proposed Rules' vague prohibition against commercially unreasonable conduct. Such a regime would endanger the free flow of information on the Internet, would threaten freedom of expression and freedom of the media, and would herald the beginning of the end of the Internet as we know it. If, for example, in 2000, Verizon had been permitted to enter into a deal with AltaVista to prioritize its search engine application, then a startup like Google would not have enjoyed a fair and equal chance to compete on the merits. Because startups are not as well funded as dominant providers, they would not be able to afford paid prioritization. Of even greater concern from a First Amendment perspective, if Verizon had been permitted in 2000 to enter into a paid prioritization arrangement with FoxNews.com, then Verizon subscribers would have been deprived of meaningful access to a multiplicity of other news services. This would lead to entrenched market power by dominant content and applications providers, self-censorship by content providers who might alter their content to make it more palatable to broadband providers, and a reduction in the overall amount of speech that is meaningfully communicated as a result of content not being delivered effectively to its intended audience. In essence, such a regime would enable broadband providers to transition into a role analogous to that of cable television providers and to select which content is effectively made available to subscribers. This would signal the beginning of the transition of the Internet from "the most participatory marketplace of mass speech that this country – and indeed the world – has yet seen"[12] to a cable-television-like walled garden.

While some defenders of pay-for-priority arrangements have argued that this would simply allow broadband providers to provide the same types of tiers of service as FedEx or UPS, for example, the analogy is inapt. FedEx and UPS indeed offer increased speed of delivery upon customers' payment of higher rates, but these carriers make available the same pay-for-priority offerings *to all customers*. FedEx and UPS do not pick and choose which content providers are allowed take advantage of their priority overnight delivery service and which are relegated to slower two-day delivery. In contrast, the Proposed Rules allow broadband providers to enter into individualized negotiations with content providers to provide pay-for-priority and exclusive pay-for-priority deals only to select content providers – and to refuse such deals to other content providers – subject only to the vague and uncertain commercial reasonableness standard.

Because of the central role they serve as conduits for expression, broadband providers should be regulated as common carriers, which would prohibit them from engaging in selective prioritization and from discriminating in favor of or against any legal content they are charged with transmitting. While the FCC's Proposed Rules would prohibit broadband providers from outright blocking legal content, the rules would allow

[12] 929 F. Supp. at 844.

providers to effectively discriminate against legal content by degrading the transmission of such content relative to the paid prioritization of other content. As critics of the Proposed Rules have observed, on the Internet it is impossible to prioritize some content without degrading other content. Allowing such paid prioritization of some content and relative degradation of other content is inconsistent with the United States', international and OSCE free speech values.

The FCC's Proposed Rules fail to protect one of the most important values in the free speech pantheon – meaningful protection for disfavored, poorly funded, and unpopular expression. Under the Proposed Rules, broadband providers have the incentive to pursue their own economic interests and to cater to market values and majoritarian interests. Broadband providers have the incentive to degrade or fail to prioritize disfavored, poorly funded, or unpopular content so as to advance the interests of the market. Allowing for paid prioritization subject only to nebulous commercial reasonability rules will not afford adequate protections for free speech on the Internet because such a regime results, at best, in protection for whatever speech wins out in "the market" and does not sufficiently protect disfavored, poorly funded, and unpopular speech from discrimination. Under the Proposed Rules, broadband providers enjoy the discretion to refuse to offer pay-for-priority deals to content providers that they disfavor for whatever reason. This sort of broadband discrimination poses the risk of enabling broadband providers to engage in precisely the sort of content-based and viewpoint-based regulations of speech that is antithetical to free speech values.

As an example of discrimination against unpopular speech in an analogous context, consider the actions of Verizon Wireless in restricting the ability of a pro-choice organization to transmit SMS messages. In 2007, Verizon Wireless refused to allow NARAL Pro-Choice America to transmit such messages *to NARAL's own members*. Asserting its authority to block messages from any group that seeks to "distribute content that, in [Verizon's] discretion, may be seen as *controversial or unsavory to any of our users*," Verizon initially refused to facilitate the transmission of such messages to certain Verizon customers – even when those users had expressly signed up to receive NARAL's messages. In that case, Verizon ultimately bowed to public pressure (after it was subject to criticism in a front page article in the New York Times) and reversed course, while maintaining that it enjoyed the discretion to determine which text messages to facilitate and which to prohibit.[13] Although the mainstream media in that case imposed a sufficient check on Verizon Wireless's discrimination against content, there will likely be other cases in which wireless or broadband providers will discriminate against content that is disfavored, poorly funded, or unpopular. T-Mobile's censorship of SMS messages connected to legal medical marijuana services provides a further example of discrimination against such controversial or unpopular content. In September 2010, T-Mobile blocked all messages going to or coming from EZ Texting, a marketing company

[13] See Adam Liptak, In Reversal, Verizon Says It Will Allow Group's Texts, N.Y. TIMES, September 28, 2007, at A20; In Re Petition of Public Knowledge et al. for a Declaratory Ruling Stating that Text Messages and Short Codes are Title II Services or are Title I Services Subject to Section 202 Nondiscrimination Rules, March 14, 2008.

that enables its clients to provide short code text messaging. T-Mobile did so because EZ Texting had contracted with the Legal Marijuana Dispensary, a web service that provides information regarding access to medical marijuana in states where it is legal. T-Mobile found Legal Marijuana Dispensary content to be "objectionable" and sought to block *all* text messages to or from EZ Texting – regardless of whether the messages involved the Legal Marijuana Dispensary – even after EZ Texting agreed to drop Legal Marijuana Dispensary as a client. In response to EZ Texting's lawsuit, T-Mobile asserted that it had the discretion to refuse to facilitate content of which it did not approve.[14]

Discrimination against disfavored, poorly funded, or unpopular speech by broadband providers is inconsistent with First Amendment and international freedom of expression values and principles, which require that speech not be subject to discriminatory treatment simply because "the overwhelming majority of people might find [it] distasteful or discomforting."[15] Rather, the unpopularity of the speech is the very reason "for according it constitutional protection."[16] As Justice Anthony Kennedy has explained, "the creation of standards and adherence to them, *even when it means affording protection to speech unpopular or distasteful*, is the central achievement of [U.S.] First Amendment jurisprudence."[17] Because of the importance of protecting disfavored, poorly funded, or unpopular content, allowing broadband providers to enter into paid prioritization deals with favored speakers and to correspondingly degrade the transmission of disfavored, poorly funded, or unpopular content will not adequately protect the full panoply of free speech values and will not serve as a meaningful check on providers' discrimination against such content. To accord meaningful protection for such fundamental free speech values, broadband providers should be subject to a nondiscrimination mandate that prohibits paid prioritization of content. As gatekeepers responsible for the free flow of information on "the most participatory marketplace of mass speech that this country – and indeed the world – has yet seen,"[18] broadband providers should be prohibited from engaging in bias and allowing preferred, favored, popular, or dominant content or applications providers to lock in their dominant positions.

VI. Regulation of Broadband Providers to Prevent Blocking of and Discrimination Against Legal Content Would Not Infringe Providers' First Amendment Rights

Broadband providers like Verizon have long clung to the argument that they enjoy

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14 See Edward Moyer, T-Mobile Sued for Allegedly Blocking Pot-Related Texting, September 18, 2010 CNET News, available at http://news.cnet.com/8301-13578_3-20016908-38.html.

15 Virginia v. Black, 538 U.S. 343, 358 (2003) (citations omitted).

16 Simon & Schuster, Inc. v. Members of N.Y. State Crimes Victims Bd., 502 U.S. 105, 118 (1991).

17 Denver Area Educ. Telecomm. Consortium, Inc. v. FCC**,** 518 U.S. 727, 784 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

18 929 F. Supp. at 844.

the First Amendment right to censor, favor, or disfavor the Internet content of their choosing and that no blocking rules and nondiscrimination rules would violate their free speech rights. Even while claiming that they do not actually discriminate against expression and that they in fact allow for the free flow of all types of information, they claim that their primary role for purposes of First Amendment analysis is similar to that of a newspaper editor – that of a selector or editor of the Internet's content and as a speaker in their own right, not as a conduit for the communications of others. They characterize their role as such to bolster their right to favor or disfavor the content of their choosing and to shore up their First Amendment rights under existing precedent. Verizon, for example, claims that its role for First Amendment purposes as a broadband Internet access provider is no different than a newspaper publisher's – that is, as an editor or selector of content.[19] The Supreme Court has held that government interference with newspaper publishers' discretion, such as by requiring newspapers to publish content not of their choosing, violates the newspapers' First Amendment rights.[20] Verizon argues that the imposition of no blocking and nondiscrimination rules on broadband providers presents the same speech concerns that regulation of newspapers has historically created.

Broadband providers' efforts to cast themselves primarily in the role of speakers or editors in opposing net neutrality regulations misconstrue the realities of broadband Internet access and misinterpret First Amendment case law and policy. In providing broadband Internet access, broadband providers predominantly function as conduits for the speech of others, not as speakers or editors in their own right. Broadband providers' primary function is to serve as conduit or pipeline for the speech of others. When we analyze where on the First Amendment spectrum – pure conduit versus pure editor – broadband providers fall with respect to their provision of broadband Internet access, it becomes clear that this function places them much closer to the conduit end than the editor end, and that regulation of such a function to protect the free flow of information does not implicate or violate providers' free speech rights.

Even assuming that broadband providers enjoy a minimal First Amendment interest in the transmission or conduit functions they perform, regulations prohibiting blocking of and discrimination against legal content would be analyzed and upheld by

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[19] See Joint Brief for Verizon and MetroPCS, Verizon v. FCC (arguing that "[j]ust as a newspaper is entitled to decide which content to publish and where, broadband providers may feature some content over others. Although broadband providers have generally exercised their discretion to allow all content in an undifferentiated manner, they nevertheless possess discretion that [net neutrality regulations] preclude them from exercising.")

[20] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

courts as content-neutral regulations of speech that survive intermediate scrutiny. In *Turner Broadcasting Systems v. FCC*, cable network operators objected to "must carry" rules imposed by the FCC that required them to carry certain news and educational programming not of their choosing and that limited their editorial discretion over the content that could be provided over their cable channels. The Court specifically rejected the analogy the cable operators sought to draw between their First Amendment rights and those of newspaper publishers and held that the First Amendment editorial rights of the cable network operators were quite limited.[21] In *Turner*, the Court distinguished the amount and type of control that cable network operators exercise over the communications received by their subscribers from the editorial discretion exercised by newspapers. It noted that, in contrast to newspapers, cable operators enjoy "*bottleneck*, or *gatekeeper*, control over most ... programming that is channeled into the subscriber's home" and that "simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude."[22] The Court concluded that the FCC enjoyed the power to "ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."[23] While recognizing that the "must carry" rules interfered to some extent with the First Amendment rights of cable network operators, the Court ultimately held in *Turner II* that these regulations were justified in light of the control that cable operators exert over the free flow of information and ideas.[24] It held that the challenged regulations survived intermediate scrutiny because they were content-neutral and did not burden more of the cable operators' speech than necessary to further the government's important interests.[25] In his concurring opinion in *Turner II*, Justice Breyer explained that the must carry regulations served the purpose of advancing the national communications policy of protecting "the widest possible dissemination of information from diverse and antagonistic sources" and "facilitat[ing] the public discussion and informed deliberation [that] democratic government presupposes and the First Amendment seeks to achieve."[26] Justice Breyer concluded that although there were First Amendment interests "on both sides of the equation" – as in the current net neutrality debate – the must carry regulations struck a reasonable balance between potentially speech-restricting consequences for cable operators and speech-enhancing consequences for members of the public.[27]

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[21] *See* Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994).
[22] *Id.* at 656-57 (emphasis added).
[23] Id.
[24] Turner Broad. Sys. v. FCC (Turner II), 520 U.S. 180 (1997).
[25] *Id.* at 189-90.
[26] *Id.* at 226-27 (Breyer, J., concurring).
[27] *Id.* at 227.

As in *Turner II*, the imposition of no blocking and nondiscrimination rules on broadband providers would be scrutinized as content-neutral regulations that would survive intermediate scrutiny. The free speech interests of members of the public in having broadband providers serve as neutral conduits for our communications are even more pressing than in the *Turner II* context. Like the regulations at issue in *Turner II*, but to an even greater extent, net neutrality regulations advance the substantial government interest of protecting the public's access to the free flow of information and ideas – including access to disfavored, poorly funded, and unpopular expression. Even if broadband providers were able to convince a court that their First Amendment interests were implicated by such regulation – and they are implicated far less than cable operators' interests in *Turner II* – *Turner II* would counsel in favor of holding that such interests were outweighed by the countervailing free speech interests that promote broad information dissemination, public discussion, and deliberation. The predominant free speech interests implicated by no blocking and nondiscrimination rules are those of members of the public in nondiscriminatory transmission of the expression they seek to send and receive, not those of the broadband providers in providing broadband Internet access. The public's free speech interests outweigh whatever minimal editorial rights might be asserted by broadband providers and therefore no blocking and nondiscrimination rules imposed on broadband providers by the FCC would not violate the First Amendment rights of broadband providers.

VII. Conclusion

When the FCC first removed common carriage/nondiscrimination obligations from broadband providers in 2002, it abandoned the United States' long history of regulating telecommunications providers (like telephone and telegraph providers) so as to charge them with obligations not to discriminate against content. The FCC chose instead to entrust the protection of Internet users' free speech interests to the market – and to a highly imperfect market at that. Under the FCC's Proposed Rules, broadband providers would be free to prioritize whatever content or applications they choose, subject only to vague commercial reasonableness rules. Given the freedom to do so in the past, intermediaries for expression have indeed discriminated against content and applications in a variety of ways – including against social and political expression and other content that is highly valued within our constitutional scheme. It should come as no surprise that they would do so. As unregulated market actors, these speech intermediaries have various incentives to favor some and to discriminate against other expression – including expression that is disfavored, poorly funded, unpopular or otherwise conflicts with their own political, economic, or other interests. Doing so is inconsistent with the United States' First Amendment traditions as well as with binding international standards and media freedom commitments within the OSCE. As the Supreme Court explained in *Turner*, our nation's free speech values and traditions require "the widest possible

dissemination of information from diverse and antagonistic sources." Regulation of powerful speech intermediaries, pursuant to our national communications and free speech policy, is essential to "facilitate the public discussion and informed deliberation, which . . . democratic government presupposes and the First Amendment seeks to achieve. . . . [A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[28]

To protect freedom of expression in the Internet age, the FCC should correct the mistakes it made in 2002 and should regulate the transmissions service provided by broadband providers under Title II of the Telecommunications Act and subject broadband providers to meaningful, enforceable common carriage/nondiscrimination requirements. The FCC should no longer immunize broadband providers from common carriage obligations, and should reimpose on broadband providers the nondiscrimination obligations historically imposed on all conduits for communication. In so doing, it should flatly prohibit paid prioritization of content by broadband providers.

To fulfill the Internet's promise of being "the most participatory marketplace of mass speech that this country – and indeed the world – has yet seen,"[29] those who serve as powerful gatekeepers for expression on the Internet should be regulated to ensure that they act as good stewards within this marketplace – free from discrimination, prioritization, degradation, blocking, or other censorship, and true to the free speech values that are necessary to facilitate the public discussion and informed deliberation that democratic government presupposes and the First Amendment and international standards and OSCE commitments require.

[28] 520 U.S. at 226-27 (Breyer, J., concurring).
[29] 929 F. Supp. at 844.

Appendix: The FCC's Proposed Rules

Proposed Rules

Part 8 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 8 – PROTECTING AND PROMOTING THE OPEN INTERNET

Sec.
8.1 Purpose.
8.3 Transparency.
8.5 No Blocking.
8.7 No Commercially Unreasonable Practices.
8.9 Other Laws and Considerations.
8.11 Definitions.

§ 8.1 Purpose.

The purpose of this Part is to protect and promote the Internet as an open platform enabling consumer choice, freedom of expression, end-user control, competition, and the freedom to innovate without permission, and thereby to encourage the deployment of advanced telecommunications capability and remove barriers to infrastructure investment.

§ 8.3 Transparency.

(a) A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services, in a manner tailored (i) for end users to make informed choices regarding use of such services, (ii) for edge providers to develop, market, and maintain Internet offerings, and (iii) for the Commission and members of the public to understand how such person complies with the requirements described in sections 8.5 and 8.7 of this chapter.

(b) In making the disclosures required by this section, a person engaged in the provision of broadband Internet access service shall include meaningful information regarding the source, timing, speed, packet loss, and duration of congestion.

(c) In making the disclosures required by this section, a person engaged in the provision of broadband Internet access service shall publicly disclose in a timely manner to end users, edge providers, and the Commission when they make changes to their network practices as well as any instances of blocking, throttling, and pay-for-priority arrangements, or the parameters of default or "best effort" service as distinct from any priority service.

§ 8.5 No Blocking.

A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.

A person engaged in the provision of mobile broadband Internet access service, insofar as such person is so engaged, shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider's voice or video telephony services, subject to reasonable network management.

§ 8.7 No Commercially Unreasonable Practices.

A person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not engage in commercially unreasonable practices. Reasonable network management shall not constitute a commercially unreasonable practice.

§ 8.9 Other Laws and Considerations.

Nothing in this part supersedes any obligation or authorization a provider of broadband Internet access service may have to address the needs of emergency communications or law enforcement, public safety, or national security authorities, consistent with or as permitted by applicable law, or limits the provider's ability to do so.

Nothing in this part prohibits reasonable efforts by a provider of broadband Internet access service to address copyright infringement or other unlawful activity.

§ 8.11 Definitions.

(a) Block. The failure of a broadband Internet access service to provide an edge provider with a minimum level of access that is sufficiently robust, fast, and dynamic for effective use by end users and edge providers.

(b) Broadband Internet access service. A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.

(c) Edge Provider. Any individual or entity that provides any content, application, or service over the Internet, and any individual or entity that provides a device used for accessing any content, application, or service over the Internet.

(d) End User. Any individual or entity that uses a broadband Internet access service.

(e) Fixed broadband Internet access service. A broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment. Fixed broadband Internet access service includes fixed wireless services (including fixed unlicensed wireless services), and fixed satellite services.

(f) Mobile broadband Internet access service. A broadband Internet access service that serves end users primarily using mobile stations.

(g) Reasonable network management. A network management practice is reasonable if it is appropriate and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service.