

D.C. Circuit Upholds Net Neutrality Repeal But Prevents the FCC from Preempting States' Rules, Remands Key Issues to the Agency

On Oct. 1, 2019, the U.S. Court of Appeals for the D.C. Circuit released a *per curiam* opinion upholding the Federal Communication Commission's (FCC) December 2017 repeal of the net neutrality rules, holding that the FCC had the authority to do so and that the agency had been reasonable in its approach. *Mozilla Corp. v. Federal Communications Commission*, 940 F.3d 1 (D.C. Cir. 2019). However, the court vacated the portion of the repeal that would have allowed the FCC to prohibit states from drafting their own net neutrality regulations. The D.C. Circuit also remanded several issues to the FCC, including requiring the agency to assess the rollback's effect on public safety.

Net neutrality is the principle that Internet Service Providers (ISPs) should treat all data on the internet the same, regardless of the source. In February 2015, the FCC adopted the 2015 Open Internet Order, which reclassified broadband internet access as a "telecommunications service" under Title II of the Communications Act. 80 Fed. Reg. 19,738 (Apr. 13, 2015) (codified at 47 C.F.R. 1). This action provided the FCC the authority to regulate ISPs, including through three "bright-line" rules, which prohibited ISPs from (1) blocking lawful internet content, (2) slowing down the speed of content delivery for specific applications or services, a practice known as throttling, and (3) paid prioritization, which would allow ISPs to favor some internet traffic over others.

On June 14, 2016, the D.C. Circuit upheld the Open Internet Order in a 2-1 decision, ruling that the FCC had the authority to implement the Order and that ISPs should provide equal access to all users. *U.S. Telecom Association v. Fed. Comm. Comm'n*, 825 F.3d 674 (D.C. Cir. 2016). However, on Dec. 14, 2017, the FCC voted 3-2 to repeal its net neutrality rules in an Order titled "Restoring Internet Freedom." 80 Fed. Reg. 19,738 (Apr. 13, 2015) (codified at 47 C.F.R. 1). The Order first "[r]estor[ed] the classification of broadband Internet access service as an 'information service'" as it had been classified prior to the 2015 Order. Second, the Order "[adopted] transparency requirements that ISPs disclose information about their practices to consumers, entrepreneurs, and the Commission." Finally, the FCC eliminated the rules preventing blocking, throttling, and paid prioritization. The rules were published in the Federal Register on Feb. 22, 2018, though they did not immediately take effect.

The repeal faced backlash through legal and legislative efforts, including lawsuits filed by twenty-two state attorneys general and the attorney general of Washington, D.C., as well as multiple technology and internet companies. The lawsuits were consolidated into one case on March 12, 2018. Meanwhile, on Nov. 5, 2018, the U.S. Supreme Court denied *certiorari* to review an earlier challenge to the FCC's authority to implement net neutrality rules. *U.S. Telecom Assoc. v. Fed. Comm. Comm'n*, 825 F.3d 674 (D.C. Cir. 2016) (cert. denied), 139 S. Ct. 454 (2018).

Additionally, several states took different actions related to net neutrality. For example, on Sept. 30, 2018, California Gov. Jerry Brown signed into law SB 822, the "California Internet Consumer Protection and Net Neutrality Act of 2018," which enacted net neutrality rules similar to those in the 2015 Order. However, on the same day, the U.S. Department of Justice (DOJ) filed a lawsuit in the U.S. District Court for the Eastern District of California to block the California law from going into effect on Jan. 1, 2019, arguing California lacked sufficient authority to regulate ISPs. On October 26, California Attorney General Xavier Becerra and the DOJ agreed to postpone litigation pending the *Mozilla* ruling. As the *Bulletin* went to press, it remained unclear whether the California law would take effect.

(For more information on the background of net neutrality, the lawsuits filed after the Restoring Internet Freedom Order, and additional legislative and legal efforts to implement net neutrality rules in different states, see "Repeal of Net Neutrality Rules Continues to Face Legal Uncertainty" in the Fall 2018 issue of the *Silha Bulletin*, "FCC Repeal of Net Neutrality Takes Effect, Faces Continued Legal and Legislative Opposition" in the Summer 2018 issue, "FCC Repeals Net Neutrality, Prompts Legal Action and Legislation" in the Winter/Spring 2018 issue, "D.C. Circuit Upholds 'Net Neutrality' Rules" in the Summer 2016 issue, "New FCC Rules Spur Heated Debate about Net Neutrality Regulation" in the Winter/Spring 2015 issue, "D.C. Circuit Strikes Down FCC 'Net Neutrality' Rules" in the Winter/Spring 2014 issue, and "Debates Continue Over Net Neutrality as FCC Nears Decision on 'Open Internet'" in the Fall 2014 issue.)

In its Oct. 1, 2019 *per curiam* decision, the D.C. Circuit grappled with whether the FCC had the authority in 2015 to reclassify fixed broadband from a telecommunication service, to an information service as it had done in the Restoring Internet Freedom Order. A corresponding reclassification applied to mobile broadband, now designated as a private mobile service.

The D.C. Circuit first held that the FCC's reclassification of broadband internet under Title I of the Telecommunications Act was "reasonable under *Chevron*," finding that the FCC "has compelling policy grounds to ensure

consistent treatment of the two varieties of broadband Internet access, fixed and mobile, subjecting both, or neither, to Title II.” In *Chevron, Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court created a two-part test for judicial deference to agency decision making, providing parameters for the federal courts reviewing agency decisions to prevent judges from overriding the agency’s expertise. Under the first step of the test, the court examines the controlling statute; if the meaning is unambiguous, that meaning is determinative. Under step two of the *Chevron* test, if a statute’s meaning is ambiguous, the court must uphold any reasonable interpretation of the statute by the agency, thus giving deference to the agency and its expertise.

Second, the *per curiam* decision deferred to the FCC by holding that the Supreme Court’s decision in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), gave the agency significant latitude to classify broadband, also stipulating that *Chevron* deference was appropriate to the decision the agency made.

Third, the court acknowledged that net neutrality protects and fosters free expression online, but called the free expression challenge, “bare-boned,” and did not justify review by the court.

Finally, the D.C. Circuit held that the agency did not have legal authority to prohibit state legislatures or governors from passing their own net neutrality rules. (For more information on actions already taken by states related to net neutrality, including laws passed by California, Washington, and Oregon, see “Repeal of Net Neutrality Rules Continues to Face Legal Uncertainty” in the Fall 2018 issue of the *Silha Bulletin*.)

The court also remanded three parts of the Restoring Internet Freedom Order to the FCC for the agency to address, including how revoking the rules would affect public safety, such as access of fire departments to internet and communication networks. As the *Bulletin* went to press, the FCC had not addressed these issues.

Judges Patricia Millett and Robert L. Wilkins filed concurring opinions focusing primarily on the issue of preemption of state laws and actions. Millett wrote that she agreed that under *Brand X*, there was clear precedent to uphold the FCC’s reclassification of broadband as an information service as reasonable, but also stated a “deep concern” that the “result is unhinged from the realities of modern broadband service.” She added that the FCC’s decision to repeal the net neutrality rules had “drifted” beyond the boundaries of its statutory authority and discretion.

In a lengthy opinion concurring in part and dissenting in part, Judge Stephen F. Williams also addressed the preemption issue. He suggested that Congress had a significant role to play in resolving the boundaries of the FCC's preemption authority under Title I. He argued that not extending the same level of deference to the FCC on the preemption directive would undermine the 2018 order by exposing broadband to a patchwork of state regulations, leading to numerous legal battles.

The full *per curiam* opinion, as well as the individual opinions, are available online at:
[https://www.cadc.uscourts.gov/internet/opinions.nsf/FA43C305E2B9A35485258486004F6D0F/\\$file/18-1051-1808766.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/FA43C305E2B9A35485258486004F6D0F/$file/18-1051-1808766.pdf).

In a statement following the ruling, FCC Chairman Ajit Pai praised the decision, calling it a “victory for consumers, broadband deployment, and the free and open Internet.” He continued, “We look forward to addressing on remand the narrow issues that the court identified.”

In an Oct. 1, 2019 statement, Gigi Sohn, an adviser to former FCC Chairman Tom Wheeler, praised the ruling for allowing states to implement their own net neutrality rules. “The DC Circuit Court has spoken very clearly — the states are now free to do what the FCC will not — assert authority over the broadband market and protect an open Internet,” she wrote. “Broadband providers will inevitably complain about having to comply with a so-called ‘patchwork’ of different state laws, but that is of their own making.”

In an October 1 “Deeplinks” blog post, EFF stated, “We’re disappointed. The FCC is supposed to be the expert agency on telecommunications, but in the case of the so-called ‘Save the Internet Order,’ it ignored expertise and issued an order based on a wrong interpretation of the technical realities of the Internet. But we’re very pleased that the court’s ruling gives states a chance to limit the damage.” EFF also argued that “Congress . . . has a responsibility to bring this debate to an end.” The October 1 post noted that in April 2019, in a 232-190 vote, the U.S. House of Representatives had passed the “Save the Internet Act,” H.R. 1644, which would restore the blocking, throttling, and paid prioritization rules instituted by the FCC in the 2015 Open Internet Order. However, EFF noted that the U.S. Senate intended to block a vote on the bill. As the *Bulletin* went to press, the Senate had not voted on the legislation. (For more information on additional actions taken by Congress related to net neutrality, see “FCC Repeal of Net Neutrality Takes Effect, Faces Continued Legal and Legislative Opposition” in the Summer 2018 issue of the *Silha Bulletin*.)

In an October 1 statement, Amy Keating, the chief legal officer for Mozilla, said that the company was “encouraged to see the Court free states to enact net neutrality rules that protect consumers.” She added that the company’s “fight to preserve net neutrality as a fundamental digital right is far from over.” As the *Bulletin* went to press, Mozilla had not appealed the case to the Supreme Court or requested an *en banc* hearing by the D.C. Circuit.

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Editor’s Note:

The preceding story was adapted from an academic journal article written by Hubbard School of Journalism and Mass Communication Assistant Professor Christopher Terry and *Silha Bulletin* Editor Scott Memmel. The article is in press at the *Washington Journal of Law, Technology & Arts* and is set to be published in the Winter 2020 issue.