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Not the Same Old Broken Record?: Why Judicial Review of the 2024 Net Neutrality Rules Could Be Different

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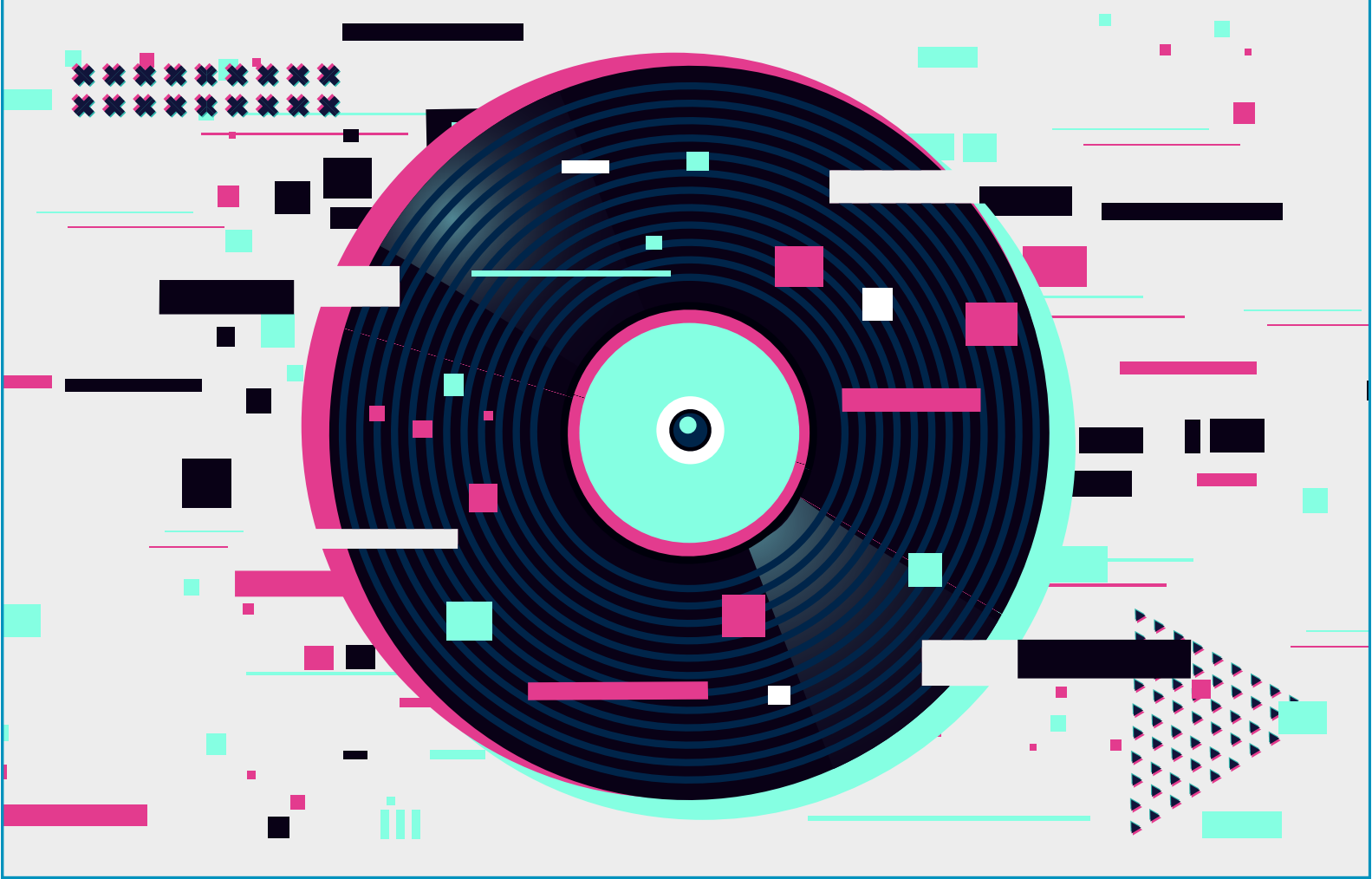
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NOT THE SAME OLD BROKEN
RECORD?:
**WHY JUDICIAL REVIEW OF THE
2024 NET NEUTRALITY RULES
COULD BE DIFFERENT**



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By Christopher S. Yoo

Judicial review of the Open Internet Order adopted by the Federal Communications Commission (“FCC”) in April 2024 has the chance to deviate substantially from the deferential scrutiny that resulted in upholding all three versions of the net neutrality rules adopted in prior years. With respect to administrative law, the Supreme Court’s pending reconsideration of the Chevron doctrine and its 2022 embrace of the major questions doctrine may open the door to more exacting judicial scrutiny of the FCC’s actions. In addition, Justice Kavanaugh’s elevation to the Supreme Court provides new salience to the First Amendment challenge to the 2015 version of the net neutrality rules that he endorsed in his dissent from the decision not to hear that case en banc. Lastly, the advent of 5G fixed home broadband and satellite home broadband have changed the economic and technological environment in ways that make the rationale for regulation and justifications for restricting ISPs’ editorial discretion more problematic. These key differences lead the reviewing court to take an approach that differs widely from those in the past.

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01

INTRODUCTION

One consequence of the transfer of control of the White House from one party to the other in 2021 is the seemingly inevitable change in net neutrality policy. Joe Biden's endorsement, both as a candidate and as president, of strong net neutrality rules based on the regime developed to regulate the telephone system made the Federal Communications Commission's ("FCC's") 2024 adoption of rules similar to those issued in 2015 something of an anticlimax.² The only surprise is perhaps how long it took the administration to seat the fifth FCC commissioner.

The FCC's return to the approach it took in 2015 means that the courts will review net neutrality's legality for a fourth time.³ The three previous cases all took place in the U.S. Court of Appeals for the D.C. Circuit.⁴ If litigants file their challenges to the rules in other circuits, as is expected, another court not bound by D.C. Circuit precedent may view the issues somewhat differently.

While the FCC's vacillations between regulation and deregulation have devolved into little more than performative political theater, more drama surrounds what the court reviewing these new rules may do this time around. Judicial review of the three previous versions of net neutrality rules took place in legal and technological contexts that led the reviewing courts to follow largely the same framework for analysis and to sound the same notes. Since that time, however, key members of the Supreme Court have signaled a willingness to exercise more exacting scrutiny over the actions of the administrative state.

The changing composition and sensibilities of the Court add a new dimension that was not present in challenges to prior net neutrality decisions. Moreover, critical changes to the economic and technological environment sur-

rounding broadband provide an additional reason that the review of the 2024 Open Internet Order may prove more interesting than the same old broken record that has characterized prior iterations with respect to earlier rules.

02

THE UNCERTAIN FATE OF THE CHEVRON DOCTRINE

The previous three times that courts reviewed the legality of net neutrality rules took place in the shadow of the Supreme Court's *Brand X* decision upholding the FCC's determination that last-mile broadband Internet access services fell into the category traditionally associated with lighter touch regulation known as *information services* and not the category used to govern traditional telephony known as *telecommunications services*. The *Brand X* Court based its decision on the well-known *Chevron* doctrine, which requires courts to defer to any reasonable interpretation advanced by the agency of a statute that it administers whenever Congress has not directly addressed the issue.⁵ *Brand X*'s conclusion that the statute at issue is ambiguous made it highly likely that reviewing courts applying *Chevron* would uphold the net neutrality rules under review regardless of whether they were regulatory or deregulatory.

In recent years, however, attitudes toward *Chevron* have undergone something of a sea change, as members of the Court's current conservative majority have mounted a sustained attack on that precedent. Four current justices have criticized *Chevron* in their published opinions⁶ and scholarly writings,⁷ a fifth has called for a narrowing of

2 See Exec. Order No. 14,036, 86 Fed. Reg. 36,987, 36,994 (July 9, 2021) (calling for the adoption of net neutrality rules similar to those adopted in 2015); Biden-Sanders Unity Task Force Recommendations 13 (July 8, 2020), <https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMENDATIONS.pdf> (endorsing a restoration of net neutrality rules).

3 Safeguarding and Securing the Open Internet, Declaratory Ruling, Order, Report and Order, and Order on Reconsideration, FCC 24-52 (May 7, 2024), available at <https://docs.fcc.gov/public/attachments/FCC-24-52A1.pdf> [hereinafter 2024 Open Internet Order].

4 *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019); *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016); *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

5 *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

6 See, e.g., *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 908-09 (2019) (Gorsuch, J., joined by Thomas, J., dissenting); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-52 (10th Cir. 2016) (Gorsuch, J., concurring).

7 See, e.g., Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150-54 (2016) (book review); Samuel Alito, Remarks at the Claremont Institute (Feb. 11, 2017), <https://www.scotusmap.com/posts/2>.

the doctrine,⁸ and Justice Barrett joined other justices in openly questioning the doctrine during oral argument.⁹ In fact, the Court is currently deliberating on a case in which the question presented specifically asks whether *Chevron* should be overruled, with a decision expected before the end of June.¹⁰

Overruling *Chevron* has the potential to change the tenor of the impending judicial challenge to the new net neutrality rules dramatically. Revocation of a doctrine requiring courts to defer to agency interpretations of a statute would open the door for courts to engage in their own assessments of the best construction of the legislative text. Elimination of *Chevron* as the governing framework for analysis would open the door to a broader range of outcomes than was possible during the judicial review of previous versions of the net neutrality rules.

03

THE EMERGENCE OF THE MAJOR QUESTIONS DOCTRINE

A second major administrative development has the potential to alter the way that a reviewing court would evaluate the 2024 Open Internet Order: The Supreme Court's embrace of the *major questions* doctrine. Interestingly, some of the most important early articulations of this doctrine appeared in dissents from the D.C. Circuit's decision to deny the petition to rehear the challenge to the 2015 Open Internet Order *en banc*. In that case, then-Judge Kavanaugh synthesized from Supreme Court precedent the principle that agencies

may not issue major rules of "great economic and political significance" without clear congressional authorization, particularly when "Congress and the public have paid close attention to the issue."¹¹ In support of this conclusion, Kavanaugh quoted the Supreme Court's recognition, that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"¹² Judge Brown also issued a dissenting opinion embracing the major questions doctrine and agreeing that reclassifying broadband Internet access services to bring them within the regulatory regime that governs traditional telephone service violated it.¹³

The Supreme Court subsequently gave its endorsement to the major questions doctrine in its landmark decision in *West Virginia v. EPA*, in which the Court held that "our precedent teaches that there are 'extraordinary cases' . . . in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."¹⁴ This is particularly the case when an agency interpretation "effected a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind."¹⁵ In such cases, "[t]he agency instead must point to 'clear congressional authorization' for the power it claims."¹⁶

The Supreme Court's explicit recognition of the major questions doctrine greatly increases the likelihood that a court reviewing the 2024 Open Internet Order will give greater weight to it than was the case during judicial evaluations of the legality of prior net neutrality rules. Justice Kavanaugh's dissenting opinion suggests the presence of at least one strong advocate for invoking the doctrine to invalidate the 2024 Order when the case eventually reaches the Supreme Court.

8 *City of Arlington v. FCC*, 569 U.S. 290, 314-28 (2013) (Roberts, C.J., dissenting) (arguing in favor of a narrower approach to *Chevron*); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Roberts, C.J., concurring in part and in the judgment) (noting that his support for deference to agency interpretations of agency rules does not extend to *Chevron* deference).

9 Oral Argument at 27:00; 59:44; 1:01:51; 1:04:18, *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022) (No. 20-1114), <https://www.oyez.org/cases/2021/20-1114>.

10 *Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429 (2023) (mem.).

11 *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419-24 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing *en banc*).

12 *Id.* at 423 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000))).

13 *Id.* at 402-08 (Brown, J., dissenting from the denial of rehearing *en banc*).

14 597 U.S. 697, 721 (2022) (quoting *Brown & Williamson*, 529 U.S. at 159-60).

15 *Id.* at 728 (quoting *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994)).

16 *Id.* at 723 (quoting *Util. Air*, 573 U.S. at 324).

04

UNDERAPPRECIATED FIRST AMENDMENT CONSIDERATIONS

Another basis for challenging the 2024 Open Internet Order that may play a greater role than in past proceedings is the First Amendment. Although the rejection of the First Amendment arguments by the panel of the D.C. Circuit evaluating the 2015 Open Internet Order failed to draw comment by the dissenting judge,¹⁷ then-Judge Kavanaugh took up the issue in his dissent from the D.C. Circuit's decision not to rehear the case *en banc*. Kavanaugh emphasized that the Supreme Court has long recognized that a platform's editorial discretion over what speech to carry falls within the ambit of the First Amendment.¹⁸ Moreover, ISPs lack the monopoly power necessary to give them the gatekeeper control necessary to justify infringement of that discretion.¹⁹

The two judges constituting the panel majority, both in their initial decision and in their opinion concurring in the denial of rehearing *en banc*, rejected the First Amendment argument on the basis that the 2015 Open Internet Order applied only to ISPs that hold themselves out as serving all websites on a nondiscriminatory basis.²⁰ As I have noted elsewhere, lower-court precedents, such as those invalidating the cable-telco crossownership rule as unconstitutional, recognize that companies offering services over which providers do not exercise editorial discretion retain the First Amendment right to offer other services over which they pick and choose what content to carry.²¹

The closest the 2024 Open Internet Order came to accommodating these concerns came in its readoption of a regulatory regime to govern a category of services (called *non-BIAS data services* and previously called *specialized services*) that “require isolated capacity for a specific functionality or level of quality of service that cannot be met over the open Internet.”²² Specific examples include “facilities-based VoIP and Internet Protocol-video offerings, connectivity bundled with e-readers, heart monitors, energy consumption sensors, limited-purpose devices such as automobile telematics, and services that provide schools with curriculum-approved applications and content.”²³

While somewhat helpful, the 2024 Open Internet Order defines this class of services too narrowly to accommodate the full range of services protected by the First Amendment. Specifically, the rules limit non-BIAS data services to those that “are only used to reach one or a limited number of Internet endpoints” and “are not a generic platform, but rather a specific ‘application level’ service.”²⁴ The First Amendment protects the rights of providers that offer service to a large number of endpoints and applications to refuse to carry content with which they do not want to be associated.²⁵

Equally problematic is the requirement that non-BIAS data services not unduly impinge on the capacity of the best-efforts Internet.²⁶ The clear effect of this mandate is to prevent providers from deciding to reallocate significant amounts of their capacity away from unmanaged Internet services to non-BIAS data services or, in the limit, from ceasing to offer unmanaged Internet services altogether and allocate all of their capacity to non-BIAS data services. Forcing such providers to continue to carry content that they no longer wish to carry is constitutionally problematic. As then-Judge Kavanaugh noted, the decision to carry all comers is “itself an exercise of editorial discretion” that, under the First Amendment, speakers may revoke at any time.²⁷ In other

¹⁷ *U.S. Telecom Ass’n*, 825 F.3d at 740-44.

¹⁸ *U.S. Telecom Ass’n*, 855 F.3d at 427-28 (Kavanaugh, J., dissenting from the denial of rehearing *en banc*).

¹⁹ *Id.* at 433-35.

²⁰ *Id.* at 388-89 (Srinivasan, J., joined by Tatel, J., concurring in the denial of rehearing *en banc*). 389-90.

²¹ Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 *Geo. Wash. L. Rev.* 697, 751-57 (2010).

²² 2024 Open Internet Order, *supra* note 3, at 131 ¶ 197.

²³ *Id.* at 130 n. 208.

²⁴ *Id.* at 129 ¶ 195.

²⁵ Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 *J. Free Speech L.* 463, 494-97 (2021).

²⁶ 2024 Open Internet Order, *supra* note 3, at 130-32 ¶ 197.

²⁷ *U.S. Telecom Ass’n*, 855 F.3d at 429 (Kavanaugh, J., dissenting from the denial of rehearing *en banc*).

words, constitutional rights do not cease to exist just because an entity chooses not to exercise them. The fact that a speaker may have initially opted not to exclude or to favor any speech financially does not disable it from exercising the right at a later time.²⁸ Compelling providers to allocate any part of their bandwidth to unmanaged services violates these principles.

04

MAJOR CHANGES IN THE COMPETITIVE LANDSCAPE

Changes to the legal environment are not the only important factors that were not present during judicial review of previous versions of the net neutrality rules. The technical and business environments have undergone fundamental changes as well.

The most dramatic development is the emergence of 5G as a competitor in the market for home broadband services. In particular, the rollout of T-Mobile's 5G network is providing households whose only choice for decades was between offerings provided by fixed-line telephone and cable companies with a meaningful third option. The result is that fixed wireless broadband is taking subscribers from the cable industry,²⁹ with the most telltale sign of this dynamic being the commercials that cable companies are airing targeting 5G.³⁰ The emergence of satellite broadband by Starlink and the impending arrival of Amazon Kuiper further increase the number of home broadband options.

These new entrants may be providing the third connection to the home long regarded as the key threshold for making the broadband market effectively competitive.³¹ Although one could always hope for more intensive rivalry, economic studies indicate that it is entry by the third firm that provides most of the benefits to consumers.³² The key role that

²⁸ *Id.*

²⁹ Jeff Baumgartner, *US broadband subscriber pace slows across the board*, LIGHTREADING (May 20, 2024), <https://www.lightreading.com/broadband/us-broadband-subscriber-pace-slows-across-the-board>; Jan Huber, *5G is 'now' eating cables [sic] lunch*, OM (Feb. 20, 2024), <https://om.co/2024/02/20/5g-is-now-eating-cables-lunch/>.

³⁰ Jeff Baumgartner, *Comcast ad campaign takes aim at T-Mobile FWA*, LIGHTREADING (Oct. 17, 2022), <https://www.lightreading.com/broadband/comcast-ad-campaign-takes-aim-at-t-mobile-fwa>; Peter Kafka, *Suddenly, there's real competition for broadband internet*, BUS. INSIDER (Feb. 24, 2024, 5:10 PM EST), <https://www.businessinsider.com/broadband-internet-super-bowl-ad-spectrum-tmobile-fixed-wireless-cable-2024-2>.

³¹ Christopher S. Yoo, *Technological Determinism and Its Discontents*, 127 HARV. L. REV. 914, 927-28 (2014) (book review).

³² Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. POL. ECON. 977, 978 (1991); see also Howard A. Shelanski, *Adjusting Regulation to Competition: Toward a New Model for U.S. Telecommunications Policy*, 24 YALE J. ON REG. 55, 84-99 (2007) (concluding that the cost-benefit analysis tips in favor of deregulation upon entry by the third firm).

gatekeeper control plays in the rationale for regulation and in the First Amendment analysis may cause these technical and economic developments to tip the balance in the other direction.

05

CONCLUSION

Looming changes in administrative law, the interests expressed in the prior opinions of new members to the Supreme Court, and changes in the level of competition in the market for home broadband services thus provide a very different backdrop than was the case when courts reviewed the last three versions of the net neutrality rules. Only time will tell whether these differences are sufficiently important to lead to a different outcome. ■

“*The most dramatic development is the emergence of 5G as a competitor in the market for home broadband services*”

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