EDITOR'S NOTE

Welcome to the first Issue of Volume 77 of the *Federal Communications Law Journal*, the nation's premier communications law journal and the official journal of the Federal Communications Bar Association (FCBA). Over the course of Volume 77's publication, we look forward to presenting articles and student Notes that showcase the diverse range of issues in the fields of technology and communications law.

This Issue begins with an article from Connor Haffey, Legal Fellow with For All Moonkind's Institute for Space Law and Ethics, which analyzes the American commercial space authorization framework and the debate regarding space mission regulation, arguing that the FCC is best equipped to centralize the regulation of commercial space activities.

Next, we have an article by Harvey Reiter, a partner in Stinson LLP's Washington D.C. office and adjunct professor of law at The George Washington University Law School, discussing the recent implications of *Loper Bright* on the FCC's authority to determine common carrier regulation and the breadth of the term "telecommunications service" under the Telecommunications Act of 1996.

This Issue also features three student Notes. First, Addison Spencer explores the potential for states to use the Children's Internet Protection Act (CIPA) as a backdoor to infringe upon students' First Amendment rights. To prevent this, Spencer proposes the implementation of an audit that heightens current E-Rate reporting requirements to safeguard access to constitutionally protected speech in schools and libraries.

Second, Andrew Ware discusses the reallocation of spectrum from federal to non-federal uses, arguing that the Commercial Spectrum Enhancement Act of 2004 requires a series of adjustments, if not an entirely new framework, to effectively address a congested spectrum environment and account for innovative developments in spectrum technology.

Third, Luke Posniewski analyzes how heightened privacy standards in the E.U. prevent the harmonious transfer of data to American companies. To solve this, Posniewski proposes the FTC promulgate rules mirroring the E.U.'s Data Privacy Principles to promote stronger consumer privacy standards at home, as well as the transfer of data abroad.

The Editorial Board of Volume 77 would like to thank the FCBA and The George Washington University Law School for their continued support of the Journal. We also appreciate the hard work of the authors and editors who contributed to this Issue.

The *Federal Communications Law Journal* is committed to providing its readers with in-depth coverage of relevant communication and technology law topics. We welcome your feedback and encourage the submission of articles for publication consideration. Please direct any questions or comments about this Issue to fclj@law.gwu.edu. Articles can be sent to fcljarticles@law.gwu.edu. This Issue and our archive are available at http://www.fclj.org.

Addison Spencer
Editor-in-Chief

FEDERAL COMMUNICATIONS LAW JOURNAL

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Federal Communications Law Journal

The *Federal Communications Law Journal* is published jointly by the Federal Communications Bar Association and The George Washington University Law School. The *Journal* publishes three issues per year and features articles, student Notes, essays, and book reviews on issues in telecommunications, First Amendment, broadcasting, telephony, computers, Internet, intellectual property, mass media, technology, privacy, communications and information policymaking, and other related fields.

As the official journal of the Federal Communications Bar Association, the *Journal* is distributed to over 2,000 subscribers, including Association members, as well as legal practitioners, industry experts, government officials and academics. The *Journal* is also distributed by Westlaw, Lexis, William S. Hein, and Bloomberg Law and is available on the Internet at https://www.fclj.org.

The *Journal* is managed by a student Editorial Board, in cooperation with the Editorial Advisory Board of the FCBA and two Faculty Advisors.

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The Federal Communications Bar Association (FCBA) is a volunteer organization of attorneys, engineers, consultants, economists, government officials, and law students involved in the study, development, interpretation, and practice of communications and information technology law and policy. From broadband deployment to broadcast content, from emerging wireless technologies to emergency communications, from spectrum allocations to satellite broadcasting, the FCBA has something to offer nearly everyone involved in the communications industry. That's why the FCBA, more than two thousand members strong, has been the leading organization for communications lawyers and other professionals since 1936.

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ARTICLES

The United States has a regulatory gap in their licensing and authorization of commercial space missions. Article VI of the Outer Space Treaty—the foundational international tool governing space law—mandates that each State Party to the Treaty must authorize and conduct continuing supervision of their country's governmental and nongovernmental entities. The United States has one of the world's most robust commercial space economies, yet its regulatory structure supporting that economy is mere patchwork. The three key regulators authorizing the traditional space activities of communications, launch, and remote sensing are the Federal Communications Commission, Department of Transportation, and Department of Commerce, respectively. As the space economy continues to grow, so does the technological complexity and sophistication of space missions. Since the mid 2010s, a debate has ensued asking how the U.S. regulatory scheme will continue to complete its international law obligations under Article VI while so-called "novel" space missions enter viability. Although the debate is ongoing, recent rulemakings and proposed legislation suggest regulators and policymakers alike recognize a need to fill the gap in the U.S. regulatory framework. This article begins with the background of the U.S.'s current commercial space authorization framework. It then addresses the debate over how to regulate novel space missions by analyzing two recently proposed bills, each vying for a different agency to have authorizing responsibility but ignoring the FCC completely. The crux of the article argues the FCC is already authorizing virtually every commercial space mission in some form and will continue to do so regardless of any legislation passed. Thus, with official responsibility given to the FCC, at least in the near to mid-term, it could centralize mission authorization without putting further burden on the commercial applicant.

On May 22, 2024, the FCC ruled that broadband access to the Internet provided by cable and telephone companies was a "telecommunications service" under the 1996 Telecommunications Act and thus subject to FCC common carrier

regulation. That decision marked the latest in a number of interpretive reversals by the FCC—all coinciding with changes in Presidential administrations. This time, however, the agency will not get the judicial benefit of the doubt previously given it under *Chevron*. About a month after the agency issued its new rule the Supreme Court overruled *Chevron* in *Loper Bright Enterprises*, declaring that agencies interpreting ambiguous statutory terms would have to convince the courts that their interpretations were not only reasonable, but the "best reading" of the statute. But before the FCC even gets a chance to defend its latest interpretation—one that has been challenged in court—it must get by an even bigger hurdle. Parties challenging the rule moved to enjoin it from taking effect and a Sixth Circuit motions panel granted their motion, finding that the rule likely exceeded the agency's authority under the "major questions doctrine."

This article addresses two principal issues.

First, it points out that while *Loper Bright* overruled *Chevron*, it nonetheless directed lower courts to give *stare decisis* effect to prior agency decisions affirmed on *Chevron* grounds. While the FCC no longer qualifies for *Chevron* deference to new interpretations of a statute, lower courts must still give *stare decisis* effect to the Supreme Court's determination in *Brand X* that the FCC had the authority to determine whether broadband access to the Internet was a telecommunications service. Thus, by definition, whether broadband access to the Internet is a telecommunications service cannot be a "major question" too big for the FCC to address—even if its determination no longer qualifies for deference.

Second, there is ample reason for the courts to conclude that the FCC's current interpretation *is* the best reading of the statute. The Ninth Circuit said as much in *AT&T v. City of Portland*, a private cause of action in which the Court stated that *Chevron* was inapplicable and that cable modem service was a "telecommunications service," making providers common carriers. No Justice in the *Brand X* case that had originally upheld the FCC's contrary interpretation on *Chevron* grounds had found the Ninth Circuit's earlier *City of Portland* decision incorrect. On the contrary, three Justices found the agency's interpretation unreasonable, one Justice in the majority (Breyer) found the agency's interpretation reasonable, but "just barely," and the author of *Brand X*, Justice Thomas, years later said he was mistaken.

NOTES

E-Rate Reporting Mechanisms: Closing CIPA's Backdoor for Unconstitutional Infringements on Students' First Amendment Rights

The First Amendment of the United States Constitution bestows upon American citizens protection and freedom of speech. Case law spanning decades has defined this right, including the forums, individuals, and types of speech that are protected. However, these definitions are not without debate in the political sphere, with one particular area at the epicenter: public schools and libraries. This Note will explore the resurgence of state legislation granting

companies adequately disclose their purposes and methods of collecting and using consumer data in their privacy policies, which are notorious for their difficulty to understand and ineffectiveness for consumers. This relatively lax approach to consumer privacy has created a tenuous relationship with the E.U., which tentatively does not consider U.S. privacy protections adequate to allow the transfer of personal data to the U.S. outside special arrangements. This circumstance risks losing the enormous economic benefits provided by the transatlantic data transfer.

Within the U.S. privacy landscape, the FTC reigns as the chief federal privacy regulator. It is also currently undergoing its uniquely onerous rulemaking procedure to promulgate new rules related to online commercial surveillance and data security. This Note contends that the FTC should base its new regulations on the E.U.-U.S. Data Privacy Principles, which currently allow the transfer of E.U. data to American companies who comply with its requirements. Further, the Note argues that these regulations will harmonize U.S. privacy practices with the E.U. such that E.U. regulators may move towards a favorable adequacy decision for the U.S. while promoting stronger consumer privacy standards for U.S. consumers.

Bridging the U.S. Regulatory Gap: Why the FCC Should Authorize Novel Commercial Space Activities

Connor Haffey*

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I. INTRODUCTION

Outer space is dark and seemingly unending. This makes it difficult to really "see" anything in the traditional sense of the word. Without telecommunications, we would be unable to locate or track objects in space, analyze and relay the data space objects gather, and operate many space objects. The role of the Federal Communications Commission ("FCC") to oversee and regulate communications of non-Federal entities within the United States ("U.S.")[1] is essential to the U.S. commercial space industry. The FCC's remit was extended to satellite communications once privatization allowed for private space objects to communicate in space and between Earth and space.[2] The FCC recently restructured itself by splitting the former International Bureau, which housed the Satellite Division, into two separate parts, the Space Bureau and the Office of International Affairs.[3] Because of the authority already granted to the FCC in the Communications Act, the Space Bureau currently authorizes U.S. commercial activities in space, including radio frequency ("RF") usage and orbital location. However, due to a gap in regulatory framework, the FCC is also either deliberating authorization or already authorizing other aspects of commercial space

1. *See The Communications Act of 1934*, DEP'T OF JUST., BUREAU OF JUST. ASSISTANCE, https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1288#:~:text=The%20Communications%20Act%20of%201934%20combined%20and%20organized%20federal%20regulation,oversee%20and%20regulate%20these%20industries [https://perma.cc/3FV9-66ES] (last visited Apr. 2, 2024); *see also* Memorandum of Understanding between the FCC and the Nat'l Telecomms. & Info. Admin. (Aug. 1, 2022) (on file with the FCC), https://www.ntia.gov/sites/default/files/publications/ntia-fcc-spectrum_mou-8.2022.pdf [https://perma.cc/Y42R-TQ7F]. *See generally* The Communications Act of 1934, 47 U.S.C. § 151.

2. *See* Communications Satellite Act of 1962, Pub. L. No. 87-624, 76 Stat. 419 (codified as amended at 47 U.S.C. §§ 701-69); *see also* Amendment of the Commission's Space Station Licensing Rules and Policies, *Notice of Proposed Rulemaking and First Report and Order*, 17 FCC Rcd 3847, n.3 (2002); *see also Satellite*, FCC, https://www.fcc.gov/general/satellite#:~:text=The%20Communications%20Act%20requires%20a,space%20stations%20and%20earth%20stations [https://perma.cc/L2YM-C93U] (last visited Apr. 2, 2024).

3. *See* Establishment of the Space Bureau and the Office of International Affairs and Reorganization of the Consumer and Governmental Affairs Bureau and the Office of the Managing Director, 88 Fed. Reg. 21424, 21424 (Apr. 10, 2023).

missions including lunar activities,[4] debris mitigation,[5] and other operations of in-space servicing, manufacturing, and assembly ("ISAM").[6]

Two separate draft statutory bills were proposed in late 2023 attempting to address this gap in the regulatory framework. The first, proposed by the White House (WH Draft Bill), splits mission authorization between the Department of Transportation ("DOT") for "in-space transportation" and the Department of Commerce ("DOC") for "uninhabited space missions."[7] The second bill, introduced by Representatives Babin (R-TX) and Lucas (R-OK) (Commercial Space Act of 2023 or "CSA"), grants the DOC power to authorize the operation of a space object via a certification process.[8]

While the need for an evolving authorization and supervision framework is necessary,[9] both proposed bills overlook the FCC. Why these two bills left out the FCC is likely only known within the political circles of the bills' respective drafters. But some, mostly Republican pundits and Congresspeople, believe the FCC may be overstepping its boundaries with its ancillary jurisdiction,[10] and maybe they believe ignoring the Commission is the best discipline they can muster. Additionally, the CSA is only currently supported by Republicans,[11] many of whom traditionally argue against regulation on the grounds it stifles investment and innovation. The CSA's

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4. *See, e.g.*, *Intuitive Machines*, ICFS File No. SAT-LOA-20210423-00055 (granted Oct. 6, 2023) [hereinafter *Intuitive Machines*]; *Lockheed Martin Corporation*, ICFS File. No. SAT-LOA-20220218-00020 [hereinafter *ParSec Application*]; *Lockheed Martin Corporation*, ICFS File. No. SAT-LOA-20230315-00060 [hereinafter *LM Lunar Space Stations Application*].

5. *See, e.g.*, *Denali 20020*, ICFS File No. SES-STA-20200113-00043 (granted Nov. 17, 2021) (granting special temporary authority to provide TT&C support for Astroscale's demonstration of rendezvous and proximity operations (RPO), capture, and deorbit of space debris) [hereinafter *Denali*].

6. *See, e.g.*, *Space Logistics LLC*, ICFS File No. SAT-LOA-20170224-00021 (granted in part Dec. 5, 2017) [hereinafter *MEV-1 License*]; *Space Logistics LLC*, ICFS File No. SAT-LOA-20191210-00144 (granted Mar. 20, 2020) [hereinafter *MEV-2 License*]; *SpaceIce*, ELS File. No. 0985-EX-CN-2019 (granted Oct. 8, 2020) [hereinafter *SpaceIce*]; *NanoRacks, LLC*, ELS File Nos. 0022-EX-ST-2021 (granted May 28, 2021), 1328-EX-ST-2021 (granted Nov. 15, 2021) [hereinafter *NanoRacks*]. All of these applications involve various types or applications of ISAM activity. *See MEV-1 License*; *MEV-2 License*; *SpaceIce*; *NanoRacks*.

7. *See* WHITE HOUSE, AUTHORIZATION AND SUPERVISION OF NOVEL PRIVATE SECTOR SPACE ACTIVITIES ACT, Sect. 1.12, (Nov. 2023) [hereinafter WH DRAFT BILL].

8. *See* Commercial Space Act of 2023, H.R. 6131, 118th Cong. (2023) [hereinafter CSA].

9. *See infra*, § II(A) (discussing Article VI and its significance in commercial space industry).

10. *See, e.g.*, Press Release, Rep. Earl L. "Buddy" Carter (R-GA), Carter, Clyde Challenge FCC's "Digital Discrimination" Rule (Jan. 30, 2024) (on file with author), https://buddycarter.house.gov/news/documentsingle.aspx?DocumentID=11631 [https://perma.cc/FGU8-FMZ3]; Letter from Rep. Eddie Bernice Johnson et al., Chairwoman, H. Comm. Sci., Space, & Tech., to Honorable Jessica Rosenworcel, Chairwoman, FCC (Sept. 27, 2022) (on file with the H. Comm. Sci., Space, & Tech.), https://republicans-science.house.gov/_cache/files/f/4/f4208cb4-ee5a-4f59-ab65-0cc7cc0b8209/6F2AFE4C757C5AC039876863E3DF3EBA.2022-09-27-sst-bipartisan-letter-to-fcc-on-orbital-debris-mitigation.pdf [https://perma.cc/W6PL-8KFD].

11. *See* Jeff Foust, *House Science Committee Advances Commercial Space Bill*, SPACENEWS (Nov. 29, 2023), https://spacenews.com/house-science-committee-advances-commercial-space-bill/ [https://perma.cc/5V7J-NWGY].

Findings and Policy section highlights this anti-regulation sentiment. It is also likely the reason the CSA calls its authorization a "certification" rather than a "license," rhetorically diverting from the phrase normally used for space mission authorization regulations.[12] Moreover, the FCC's recent rulemakings on ISAM and orbital debris mitigation (discussed further *infra* Sections II(b) and IV(c)) may be viewed by the CSA drafters as an overreach in regulatory power to which they have no reprisal due to the FCC's independent nature. The independent nature of the FCC also shields it from much of the executive branch's whim. Thus, the President's appointment of the Chairperson may influence the executive branch most over the agency. As such, the White House Draft Bill included the other two commercial space mission authorizing agencies, both of which must honor the White House's tenor. The FCC's independent nature is discussed further in Section IV(a). Regardless of why the FCC was left out of the proposals, it should not be overlooked.

Nearly every object launched into space requires communication with it, thus the FCC already analyzes nearly every space object launched into space by a U.S. commercial entity.[13] With this in mind, the FCC could also certify the mission—if taking the CSA's certification process into account—via a separate but simple form attached to each license. Although the CSA-style certification would come from the FCC, an applicant would still need to obtain a space situational awareness ("SSA") assessment for projected trajectories and risks either from the 18th Space Defense Squadron ("SDS") or, when it is finally operational, the Office of Space Commerce's ("OSC") Traffic Coordination System for Space ("TraCSS").[14] However, requiring the applicant to also gain authorization from the OSC is an unnecessary burden on the applicant, and it is unclear how the OSC would handle increased responsibility considering the OSC's slow development of TRaCSS.[15]

This paper discusses the importance of authorizing and supervising non-governmental space activities, lays out the scope of the current regulatory framework, evaluates the two recently proposed bills, and proposes that both bills overlook the FCC's preparedness and experience in authorizing and supervising commercial space activities. Ultimately, this paper advocates for the duties of mission authorization and certification to be given to the FCC because (a) it is already prepared to do so; (b) shifting the duty to the FCC would lessen regulatory burdens and costs for the applicant; and (c) the FCC's ISAM Notice of Proposed Rulemaking ("NPRM"), which is backed by many

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12. *See, e.g.*, 14 C.F.R. § 450 (2024) (FAA's vehicle operator license); 47 C.F.R. § 25 (2024) (FCC's space station license); 15 C.F.R. § 960 (2024) (NOAA's private remote sensing license).

13. *See* Payton Alexander, *The FCC: America's Other Space Agency*, REASON, Dec. 2022, https://reason.com/2022/11/15/americas-other-space-agency/ [https://perma.cc/Z3Z7-KYLQ].

14. *See Traffic Coordination System for Space (TraCSS)*, NOAA, https://www.space.commerce.gov/traffic-coordination-system-for-space-tracss/ [https://perma.cc/46NC-QPR3] (last visited Apr. 5, 2024); *see also Frequently Asked Questions on Conjunction Risk Assessment*, NASA, https://www.nasa.gov/cara/frequently-asked-questions/ [https://perma.cc/E37Y-6HXW] (last visited Apr. 28, 2024).

15. *See* Sandra Erwin, *Military-to-civilian space traffic transition nears critical juncture*, SPACENEWS (July 8, 2024), https://spacenews.com/military-to-civilian-space-traffic-transitionnears-critical-juncture/ [https://perma.cc/X3E2-HKRL].

in the industry,[16] creates a filler for the gap that can evolve alongside the industry.

II. BACKGROUND AND IMPORTANCE OF COMMERCIAL SPACE MISSION AUTHORIZATION

A. Outer Space Treaty Article VI Overview

The United States has one of the world's most robust regulatory frameworks regarding outer space activities. Even still, a debate has emerged as to whether this framework is sufficient to meet the obligations and responsibilities of the U.S. under Article VI of the Outer Space Treaty of 1967.[17] Article VI places responsibility on the state parties to the treaty for national activities in outer space, regardless of whether those activities are carried out by governmental or non-governmental activities.[18] Significantly, the Article goes on to say, "[t]he activities of non-governmental entities in outer space, including the moon and other celestial bodies, *shall require authorization and continuing supervision*."[19]

International conventions, or treaties, are among the most powerful sources of international law, as they create international obligations on the state parties that joined them.[20] Under the Articles on State Responsibility ("Articles"), a state is responsible for its internationally wrongful acts, which occur when a state breaches one of its international obligations and that breach is attributable to the state.[21] A breach may be an act or an omission of an act that violates an international obligation.[22] Although the Articles are not a

16. *See* Comments of CONFERS at 2, Facilitating Capabilities for In-space Servicing, Assembly, and Manufacturing, IB 22-271 (Apr. 29, 2024), https://satelliteconfers.org/wp-content/uploads/2024/04/CONFERS-FCC-ISAM-NPRM-Comment-FINAL_04252024.pdf [https://perma.cc/S2SU-QHDV]. CONFERS aims to "[d]evelop industry-led recommendations for standards and guide international policies for servicing that contribute to a sustainable, safe, and diverse space economy" through its global membership of industry and government experts in ISAM. *See* CONFERS, *About CONFERS*, https://satelliteconfers.org/wp-content/uploads/2024/09/About-CONFERS-Updated-091624-for-Web.pdf [https://perma.cc/B2KG-DZVQ] (last visited Nov. 2, 2024).

17. *See* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, art. VI, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter OST]; *see also* Laura Montgomery, *Treaty Enforcement Tensions in H.R. 6131*, GROUND BASED SPACE MATTERS (Nov. 14, 2023), https://groundbasedspacematters.com/index.php/2023/11/14/treaty-enforcement-tensions-in-h-r-6131/ [https://perma.cc/T29Z-3ANA]. *See generally* Mark J. Sundahl, *Regulating Non-Traditional Space Activities in the United States in the Wake of the Commercial Space Launch Competitiveness Act*, 42 AIR & SPACE L. 29 (2017).

18. *See* OST, *supra* note 17, at art. VI.

19. *Id.* (emphasis added).

20. *See* Statute of the International Court of Justice, art. 38(a), June 26, 1945, 33 U.N.T.S. 993 [hereinafter ICJ Statute]; *see also About Treaties*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/treaties.htm [https://perma.cc/E2UN-EA9K] (last visited Apr. 4, 2024).

21. *See* Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, *in* Rep. of the Int'l L. Comm'n (ILC) on its 53rd Sess., art. 2, ¶ 1, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (Nov. 2001) [hereinafter ASR Commentary].

22. *Id.* at art. 12, ¶ 2.

treaty, many of the Articles are considered customary international law,[23] which is also binding on states.[24]

Unlike in general international law, where the state is only responsible for its governmental activities, in the case of the Outer Space Treaty's Article VI, a state is responsible for the actions of its non-governmental and governmental entities.[25] Therefore, the U.S. could be breaching its obligations under the OST if its actions *or omissions* do not require authorization and continuing supervision of space activities.[26]

For example, most space missions are authorized by any or all of the following: the FCC, the Federal Aviation Administration ("FAA"), and the National Oceanic and Atmospheric Administration ("NOAA"). However, the U.S. does not have a lot of continuing supervision in its regulatory framework besides annual reporting of service and milestone updates.[27] Therefore, a commercial orbital habitat may be authorized to operate in Earth's orbit and manufacture new materials. Such a mission would likely be an FCC and FAA authorization. However, perhaps four years later it is discovered that the orbital habitat is manufacturing biological or chemical weapons, which may be considered weapons of mass destruction. In such a scenario, the U.S. would likely be internationally responsible for its omission to continue its supervision of the orbital habitat's manufacturing, or even for authorizing something that was in itself a breach of the OST (the placement of weapons of mass destruction in outer space is prohibited under Article IV of the OST).[28] Thus, the U.S., as a state party to the Outer Space Treaty, must have a regulatory framework in place to ensure it is sufficiently authorizing and continuing its supervision of U.S. non-governmental entities' activities.

B. Existing U.S. Commercial Space Authorization Regulatory Framework

The current commercial space authorization regulatory framework is split between the FCC, the FAA, and NOAA. These agencies were tasked to regulate what are known as "traditional" commercial space activities that

23. *See* JAMES R. CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 524 (9th ed. 2019).

24. *See id.*; *see also* ICJ Statute, *supra* note 20, at art. 38(b).

25. *See* OST, *supra* note 17, at art. VI; *see also* Sergio Marchisio, Sapienza Univ. of Rome, Inst. For Int'l Legal Stud. CNR, National Jurisdiction for Regulation Space Activities of Governmental and Non-governmental Entities at the U.N./Thailand Workshop on Space Law, at 3 (Nov. 16-19, 2010).

26. *See* OST, *supra* note 17, at art. VI; *see also* ASR Commentary, *supra* note 21, at art. 2, ¶ 6 & art. 12.

27. *See* 47 C.F.R. § 25.171 (2023).

28. *See* OST, *supra* note 17, at art IV, VI.

were feasible at that time.[29] Such traditional activities include spacecraft launch and re-entry (FAA), spectrum usage (FCC), and remote sensing (DOC). The U.S. likely did not consider technology innovations beyond these activities in assigning authority to regulate commercial space activities because of the well-documented risks of stifling innovation by attempting to regulate an activity *ex ante*.[30] The U.S. practices this philosophy in many instances, for example, in the moratorium, or "learning period," on regulating commercial human spaceflight.[31] Now, however, as technology is moving from conceptual to applicable, "non-traditional" or "novel" space activities must find their way into the regulatory framework. Thus, the next few subsections will consider the current scope of the three regulating agencies' space mission authorization authority.

1. FCC: Communications Act of 1934 (as amended)

The Communications Act of 1934 established the FCC "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio."[32] The Act also applies to any "interstate or foreign transmission of energy by radio, which originates and/or is received within the United States."[33] Essentially all commercial communications in space and between Earth and space are transmitted through the radio frequency spectrum.[34]

Through the Communications Act, the FCC also has the authority to determine whether a new technology or service is within the public interest and thus permitted under the Act.[35] If a person or entity opposes the proposal of a new technology or service to be permitted under the Act, that person or entity has the burden of demonstrating that such proposal is against the public

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29. *See* Kevin O'Connell et al., *Practical Applications of a Space Mission Authorization Framework*, SPACENEWS (Apr. 11, 2023), https://spacenews.com/op-ed-practical-applications-of-a-space-mission-authorization-framework/ [https://perma.cc/G2HN-5PGL]; Theresa Hitchens, *White House Nears Plan to Assign Regulatory Authorities for "New" Space Activities*, BREAKING DEF. (Feb. 23, 2023), https://breakingdefense.com/2023/02/white-house-nears-plan-to-assign-regulatory-authorities-for-new-space-activities/ [https://perma.cc/3MXD-JB4U]; Marcia Smith, *Companies Agree FAA Best Agency to Regulate Non-traditional Space Activities*, SPACEPOLICYONLINE.COM (Nov. 15, 2017), https://spacepolicyonline.com/news/companies-agree-faa-best-agency-to-regulate-non-traditional-space-activities/ [https://perma.cc/49Z9-YQ65].

30. *See generally Ex-Ante Regulation and Competition in Digital Markets*, ORG. ECON. COOP. & DEV. (Nov. 24, 2021), https://one.oecd.org/document/DAF/COMP/WD(2021)79/en/pdf [https://perma.cc/CV3B-69T4].

31. RACHEL LINDBERGH, CONG. RSCH. SERV., IF12508, COMMERCIAL HUMAN SPACEFLIGHT SAFETY REGULATIONS 1 (2024), https://crsreports.congress.gov/product/pdf/IF/IF12508#:~:text=For%20launch%20and%20re entry%20regulations,%C2%A7460 [https://perma.cc/4AKL-PA95].

32. 47 U.S.C. § 151.

33. 47 U.S.C. § 152.

34. *See* Brian Weeden, *Radio Frequency Spectrum, Interference and Satellites Fact Sheet*, SECURE WORLD FOUND. (June 25, 2013), https://swfound.org/media/108538/swf_rfi_fact_sheet_2013.pdf [https://perma.cc/92ST-CDRV].

35. 47 U.S.C. § 157.

interest.[36] These provisions in Title I of the Communications Act, namely 47 U.S.C. §§ 152(a) and 154(i),[37] allow the FCC to adopt regulations under what is called "ancillary jurisdiction."[38] The FCC must defend its exercise of ancillary jurisdiction on a case-by-case basis and, based on the two-part test in *American Library Association v. FCC*, the FCC may only exercise ancillary jurisdiction when "(1) the Commission's general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[39] An example of the FCC exercising its ancillary jurisdiction was with cable television, where the Commission had no express statutory mandate to regulate cable, and it eventually decided it could regulate cable because the exercise of that authority would be ancillary to its authority to regulate broadcasting.[40]

The scope of the FCC's ancillary jurisdiction has been challenged over the past decade,[41] which may play a role in the coming years regarding the Commission's express authority to regulate commercial space. Nonetheless, the FCC has express authority to license the use of commercial satellites via their radio frequency utilization and orbital location.[42]

The FCC has also regulated ancillary operations of satellite communications. Beginning in 2000, the FCC began orbital debris mitigation proceedings and ultimately released their first order in 2004, effective in 2005.[43] This rule, among other things, required a satellite in geostationary orbit ("GSO") to provide a statement disclosing the altitude selected for a disposal orbit and required satellites in non-geostationary orbit ("NGSO") to de-orbit via atmospheric reentry within 25 years of the completion of the satellite's mission.[44] In its proceedings for this rulemaking, the Commission sought comment on its statutory authority to regulate space debris, and only one commenter challenged the FCC's authority to do so but provided no legal analysis as to that challenge.[45] The Commission thus found it had the authority to regulate space debris because satellite communications are a critical component of radio communications infrastructure and debris is both a byproduct of and safety hazard to satellites, thus it is within the FCC's

36. *Id.*

37. 47 U.S.C. § 154(i) (stating "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.").

38. United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968); *see also* Christopher J. Wright, *The Scope of the FCC's Ancillary Jurisdiction After the D.C. Circuit's Net Neutrality Decisions*, 67 FED. COMM. L.J. 19 (2015).

39. Am. Libr. Ass'n v. FCC, 406 F.3d 689, 691-692 (D.C. Cir. 2005) [hereinafter *American Library*].

40. STUART MINOR BENJAMIN ET AL., INTERNET AND TELECOMMUNICATIONS REGULATION 325-26 (2d ed. 2023).

41. *See* Comcast Corp. v. FCC, 600 F.3d 642, 661 (D.C. Cir. 2010); *see also* Verizon v. FCC, 740 F.3d 623, 635-42 (D.C. Cir. 2014).

42. *See* 47 C.F.R. § 25.101 (2024); *see also* 47 U.S.C. § 303.

43. *See generally* Mitigation of Orbital Debris, *Second Report and Order*, 19 FCC Rcd 11567 (2004) [hereinafter 2004 FCC Order].

44. *Id.* at para. 61.

45. 2004 FCC Order, *supra* note 43, at paras. 8, 13.

ancillary purview.[46] The Commission defended its exercise of this ancillary jurisdiction by discussing the use of radio waves for satellite operations and the potential effect of increasing orbital debris on cost, asset and human safety, orbital accessibility, and other public interest considerations.[47]

In 2018, the FCC returned to the issue of orbital debris mitigation, noting technical and policy updates to orbital debris mitigation standards, policy, and guidance documents since 2004.[48] The Commission began new proceedings for various purposes, including shortening the 25-year de-orbit requirement, which was met with broad support from industry stakeholders.[49] The final Order regarding the de-orbit timeframe, issued in 2022, amended the de-orbit procedures by requiring satellites passing through low earth orbit ("LEO") in an uncontrolled re-entry to complete disposal "as soon as practicable, and no later than five years after the end of the mission."[50]

Although there was broad industry support for the initial notion of shortening the 25-year benchmark, this 2022 Order roused questions from members of Congress. Only a few days after the proposed Order's publication, the bipartisan leadership of the House Committee on Science, Space, and Technology and its Subcommittee on Space and Aeronautics sent a letter to the Commission's Chairwoman, Jessica Rosenworcel, asking the FCC to delay the vote by the Commissioners on the Order, citing concerns of insufficient statutory authority and potential confusion from conflicting guidance and threatening procedural measures by the Committee under the Congressional Review Act.[51]

While this letter may be a warning to the FCC that their ancillary jurisdiction to regulate orbital debris may overextend the test set out in *American Library*,[52] no action against this rule, from Congress or a private company, has taken place yet. This inaction may be because two signers of this letter, Representatives Babin and Lucas, have now introduced a bill for mission authorization (discussed in-depth *infra*), which denotes the requirement of an orbital debris mitigation plan that may—if the bill is passed—conflict with the FCC's Orders on time-limited deorbits, depending on the DOC's interpretation of the bill when drafting its rules.[53]

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46. The FCC worded this logic more abstractly by stating space debris was ancillary because it could affect the use of radio in the public interest and hinder the issuance of radio licenses that serve public convenience, interest, or necessity. *See id*. at para. 14 (citing to 47 U.S.C. §§ 301, 303(g), 307(a)).

47. *Id.*

48. Mitigation of Orbital Debris in the New Space Age, *Second Report and Order*, 37 FCC Rcd 11818, at para. 7 (2022) [hereinafter 2022 FCC Order].

49. *Id.* at para. 9.

50. *Id.* at para. 10.

51. *See* Letter from Rep. Eddie Bernice Johnson et al., Chairwoman, H. Comm. Sci., Space, & Tech., to Honorable Jessica Rosenworcel, Chairwoman, FCC (Sept. 27, 2022), https://republicans-science.house.gov/_cache/files/f/4/f4208cb4-ee5a-4f59-ab65-0cc7cc0b8209/6F2AFE4C757C5AC039876863E3DF3EBA.2022-09-27-sst-bipartisan-letter-to-fcc-on-orbital-debris-mitigation.pdf [https://perma.cc/52P6-8P24]; *see also* Jeff Foust, *House Committee Questions FCC Orbital Debris Rule*, SPACENEWS (Sept. 29, 2022), https://spacenews.com/house-committee-questions-fcc-orbital-debris-rule/ [https://perma.cc/4NQZ-ZNJT].

52. *See* Am. Libr. Ass'n, 406 F.3d at 692.

53. *See* CSA, *supra* note 8, at § 80104.

The most recent exercise of the FCC's ancillary jurisdiction, regarding commercial space operations, is the ongoing proceedings to establish a framework for licensing space stations engaged in ISAM.[54] While not officially an order set for codification yet, the proposed rule likely meets the two-part test from *American Library* considering the safety, efficiency, and technical issues that would emerge if a comprehensive framework were not adopted for licensing ISAM operators' varying spectrum use, changing orbital locations within the FCC's original jurisdiction, and related activities ancillary to the performance of that jurisdiction.[55] The ISAM NPRM will be discussed further *infra* when evaluating the draft bills. For the purposes of this paper, and without formal challenges to the contrary, it is assumed that the FCC is properly exercising ancillary jurisdiction to regulate orbital debris mitigation and ISAM operations.

2. DOT: Commercial Space Launch Activities Act

In 1984, the Commercial Space Launch Activities Act authorized the DOT to "oversee and coordinate the conduct of commercial launch and reentry operations" by issuing permits and commercial licenses to authorize those operations in a safe manner.[56] The DOT is also responsible for the development and regulation of space transportation infrastructure.[57] The DOT entrusted the Office of Commercial Space Transportation ("AST"), which was originally directly under the Office of the Secretary but moved to the FAA in 1995, to facilitate this role in the commercial space industry.[58]

As a brief aside, a noteworthy aspect of the history of the FAA's authority over launch and reentry is the debate that ensued over which agency should lead this oversight.[59] With the required approvals for the first commercial space launch in 1982 proving to be overly time-consuming, competing bills were introduced in Congress to ease the regulatory burden.[60] One in the House,[61] which proposed the DOC should be the lead agency, and one in the Senate,[62] which proposed the FAA be the lead agency. Although there are slight differences in circumstances, we are now seeing history repeat itself with dueling draft legislation representing the agencies' interests in

54. *See generally* Space Innovation; Facilitating Capabilities for In-Space Servicing, Assembly, and Manufacturing, 89 Fed. Reg. 18875 (Mar. 15, 2024) [hereinafter ISAM NPRM].

55. *See id.* at paras. 15, 18, 26, 34.

56. *See* 51 U.S.C. § 50901(b)(3); *see also* Space Launch Activities Act of 1984, Pub. L. No. 98-575, 98 Stat. 3055 (1984) (as amended and re-codified at 51 U.S.C. § 509).

57. *See* 51 U.S.C. § 511; *see also* 51 U.S.C. § 50901(b)(4).

58. *See Origins of the Commercial Space Industry*, FAA, https://www.faa.gov/sites/faa.gov/files/about/history/milestones/Commercial_Space_Industry.pdf [https://perma.cc/N8FR-R9YQ] (last visited Apr. 9, 2024). As an aside, the Office of Space Transportation's acronym was "OCST" when it was originally established under the Office of the Secretary of Transportation. *Id.* The acronym was changed to "AST" when the Office of Commercial Space Transportation was transferred to the FAA. *Id.* The author could not find the reason for the new, mismatching acronym.

59 *See id.*

60. *See id.*

61. *See* H.R. 1011, 98th Cong. (1983).

62. *See* S. 560, 98th Cong. (1983).

gaining mission authorization under their purview, as discussed *infra* at Section III.

Continuing with the FAA's commercial space regulatory authority, the AST, via the FAA, also conducts "payload reviews" on aspects of payloads not otherwise regulated by the FCC or DOC and payloads not owned or operated by the U.S. government.[63] A payload review consists of evaluating the payload to ensure its applicant, owner, or operator has obtained all required licenses and its launch or reentry will not jeopardize U.S. interests.[64] Upon a favorable determination of a payload review, the FAA issues a "payload determination."[65] Although the FAA does not have explicit Congressional authority to conduct payload reviews, the authority arguably comes from the definition of launch, which includes the preparation of a payload for launch,[66] and the compliance requirements set out in 51 U.S.C. § 50904(b).

The FAA's authority to regulate launch and reentry activities and conduct payload reviews is also relevant. This includes the FAA's authority to regulate human space flight.[67] While the FAA continues to promote "the continuous improvement of the safety of launch vehicles designed to carry humans,"[68] it has been prohibited from regulating the safety of humans while on board a space vehicle since 2004.[69] This moratorium was enacted to limit regulatory burdens on the nascent industry and was originally set to expire in 2012, however, after several extensions by Congress, the moratorium is now set to expire on January 1, 2025.[70] The Commercial Space Act of 2023, the bill introduced by Representatives Babin and Lucas directing the DOC as lead agency for mission authorization, also intends to extend the moratorium to October 1, 2031.[71] As human space flight develops, its plays a role in the discussion on which agency, or agencies, ought to lead the U.S.'s mission authorization for novel space activities, as discussed *infra* at Section III and IV.

63. 14 C.F.R. § 450.43(b) (2024).
64. 14 C.F.R. § 450.43(a) (2024).
65. *Id.*
66. *See* 51 U.S.C. § 50902(7).
67. 51 U.S.C. § 50901(b)(2)(C).
68. *Id.*
69. *See* LINDBERGH, *supra* note 31; *see also Human Space Flight*, FAA (Mar. 27, 2024), https://www.faa.gov/space/human_spaceflight#:~:text=The%20FAA%20also%20performs%20safety,safety%20of%20individuals%20on%20board [https://perma.cc/M23L-LF9S].
70. *See* LINDBERGH, *supra* note 31. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106184, FAA'S OVERSIGHT OF HUMAN SPACEFLIGHT (2024), https://www.gao.gov/assets/d24106184.pdf [https://perma.cc/L9L8-WCCF].
71. CSA, *supra* note 8, at Sec. 9(a)(3)(C)(vi); 51 U.S.C. § 50905(c)(9); LINDBERGH, *supra* note 31; Jeff Foust, *FAA Commercial Human Spaceflight Regulatory Learning Period Nears Expiration*, SPACENEWS (Feb. 24, 2024), https://spacenews.com/faa-commercial-human-spaceflight-regulatory-learning-period-nears-expiration/ [https://perma.cc/CQ8G-C7X6]. Another introduced bill, the Space Transformation and Reliability Act, seems to have been introduced solely to extend the moratorium until 2031. *See* H.R. 5617, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/house-bill/5617/text [https://perma.cc/5G7A-R8YY].

3. DOC: National and Commercial Space Programs Act

The DOC has been licensing private remote sensing satellites since the Landsat Act of 1984.[72] The Landsat Act was repealed and replaced by the Land Remote Sensing Act of 1992, which also directed the Commerce Department to create requirements and regulations for the licensing regime of commercial remote sensing satellites.[73] The DOC has created regulations for the licensing of private remote sensing satellites despite the Land Remote Sensing Act not being updated since 1992.[74] DOC delegated remote sensing licensing responsibilities to the National Oceanic and Atmospheric Association ("NOAA") within the DOC.[75] NOAA's National Environmental Satellite, Data, and Information Service ("NESDIS") was tasked with implementing the licensing regulations and created the Office of Commercial Remote Sensing Regulatory Affairs ("CRSRA") to do so.[76]

The Office of Space Commerce ("OSC") is the office within the DOC pushing to have regulatory authority over the U.S.'s authorization for novel space activities.[77] The history of the OSC over the past ten years has been a whirlwind of reorganizations and restructuring. The OSC had a budget of $500,000 and a staff of three people in 2016.[78] For years there was discussion that the OSC should be moved out from under NOAA to report directly to the Office of the Secretary.[79] In 2021, the Office of Commercial Remote Sensing Regulatory Affairs ("CRSRA"), the office tasked with implementing NOAA's licensing of private remote sensing satellites, and the OSC, were merged.[80] However, they both remained under NOAA's NESDIS.[81] Nonetheless, this merge gave the OSC *de facto* licensing authority and improved its regulatory influence by including the CRSRA's licensing implementation in its purview. In 2022, the OSC was moved out of NESDIS and into the Office of the Under Secretary, directly reporting to the Assistant Secretary for Earth Observation and Prediction.[82] For Fiscal Year ("FY")

72. *See* Land Remote Sensing Commercialization Act of 1984, Pub. L. No. 98-365, 98 Stat. 451 (1984) (repealed by the Land Remote Sensing Act of 1992) [hereinafter Landsat Act].

73. *See* Land Remote Sensing Policy Act of 1992, Pub. L. No. 102-555, 106 Stat. 4163 (1992) (as amended and re-codified at 51 U.S.C. § 601); *see also* 51 U.S.C. §§ 60121, 60124.

74. *See* 15 C.F.R. § 960 (2024).

75. Off. of Space Com., *Commercial Remote Sensing Regulatory Affairs*, NOAA, https://www.space.commerce.gov/regulations/commercial-remote-sensing-regulatory-affairs/ [https://perma.cc/6PUN-PZD8] (last visited Apr. 9, 2024).

76. *Id.*

77. *See* Brian Weeden, *Getting Serious About the Office of Space Commerce*, SPACENEWS (May 10, 2021), https://spacenews.com/op-ed-getting-serious-about-the-office-of-space-commerce/ [https://perma.cc/BM9S-VFX2].

78. *See id.*

79. *See id.*; *see also* Marcia Smith, *Office of Space Commerce Wins Bigger Budget in FY2021, But Will Remain in NOAA*, SPACEPOLICYONLINE.COM (Dec. 21, 2020, 4:16 pm ET), https://spacepolicyonline.com/news/office-of-space-commerce-wins-bigger-budget-in-fy2021-but-will-remain-in-noaa/ [https://perma.cc/SG3K-677W].

80. *See* Smith, *supra* note 79.

81. *Id.*

82. NOAA BUDGET SUMMARY 2024, 66-67 (2024) https://www.noaa.gov/sites/default/files/2023-05/NOAA_Blue_Book_2024.pdf [https://perma.cc/SUP8-9Z3G].

2024, the OSC was allocated $65 million, a noticeable change from $500,000 in 2016.

For FY 2025, the OSC is requesting $75.6 million, with $2 million going towards the "necessary staffing for OSC to implement Department of Commerce responsibilities under the U.S. Novel Space Activities Authorization and Supervision Framework" published in December 2023.[83] While the National Space Activities Authorization and Supervision Framework ("WH Authorization Framework") does not provide the DOC any leeway to create regulations beyond its current scope of authority, it directs the Department to co-lead a Private Sector Space Activities Interagency Steering Group with the DOT to:

> - Identify government organizations with expertise relevant to private sector space activities across the U.S. Government.
> - Discuss strategies to appropriately address issues pertaining to emerging private sector space capabilities that are nascent or in development.
> - Lead a process, in consultation with the U.S. private sector, to collate, develop, and promote standards, best practices, and information sharing protocols to address core U.S. Government interests common to novel space activities. These standards, best practices, and protocols will inform the guidance the Secretaries of Commerce and Transportation provide to industry.[84]

The Authorization Framework is not completely clear on its objectives for the OSC specifically, and likely this budget planning by the OSC to implement the Authorization Framework is simply because the Framework directs the DOC to consider the initiatives in the Framework and the Biden Administration's legislative proposal in their budget planning.[85]

Overarchingly, there are three relevant governmental bodies that regulate the commercial space sector. The FCC regulates satellite communications and the ancillary services necessary to safely and effectively perform their statutorily mandated authorities.[86] The FAA regulates space launch vehicles' launch and reentry operations and conducts payload reviews for aspects of payloads otherwise not regulated by the FCC or NOAA.[87]

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83. *See* Off. of Space Com., *FY25 Budget Proposes $75.6M for Office of Space Commerce*, NOAA (Mar. 12, 2024), https://www.space.commerce.gov/fy25-budget-proposes-75-6m-for-office-of-space-commerce/ [https://perma.cc/M887-55NP]. *See generally* WHITE HOUSE, NATIONAL SPACE ACTIVITIES AUTHORIZATION AND SUPERVISION FRAMEWORK (2023), https://www.whitehouse.gov/wp-content/uploads/2023/12/Novel-Space-Activities-Framework-2023.pdf [https://perma.cc/SZM6-6CUG] [hereinafter WH AUTHORIZATION FRAMEWORK].

84. *See* WH Authorization Framework, *supra* note 83, at 5.

85. *See id.* at 7.

86. *See, e.g.*, 47 C.F.R. Part 25 (2024); 47 U.S.C. § 303; *Am. Libr. Ass'n*, 406 F.3d at 692.

87. *See* 51 U.S.C. § 509; *see also* 14 C.F.R. § 450.43 (2024).

NOAA regulates the licensing of commercial remote sensing satellites.[88] However, new technologies are creating potential for novel missions that challenge the current regulatory framework's parameters, including: space mining; optical communication; ISAM; and orbital habitats. These new missions are inevitable but induce uncertainties about how to obtain authorization properly, thus shining a light on the gap in the U.S.'s regulatory regime for commercial space mission authorization.

III. A REGULATORY GAP IN MISSION AUTHORIZATION

A. The Debate: 2013-2023

As the so-called "new space race" ramps up, investment in the commercial space industry is causing a boom in innovation and leading the charge for the burgeoning value of the industry.[89] Some of these technologies are allowing for the conceptualization, experimentation, or even practicality of what are being deemed "novel" or "non-traditional" space activities.[90] These activities are considered novel or non-traditional and implicate Article VI of the OST "in ways not clearly addressed by the existing licensing frameworks."[91] In other words, there exists a regulatory gap for these novel activities that does not provide the U.S. "with a straightforward means to fulfill its treaty obligation" under Article VI.[92]

The Section 108 Report, issued in fulfillment of a reporting requirement in the Commercial Space Launch Competitive Act of 2015 ("SPACE Act"), was the first stab at addressing this regulatory gap,[93] which included examples of "unprecedented" space activities that may have aspects of their missions outside the bounds of the current "mission authorization" framework.[94] "Mission authorization" is the term used in the U.S. to describe the process of authorizing and supervising space activities in accordance with the U.S.'s obligations under Article VI of the OST.[95] The Section 108 Report laid out

88. *See* 51 U.S.C. § 601; *see also* 15 C.F.R. § 960 (2024).

89. *See, e.g.*, Saadia M. Pekkanen, *Governing the New Space Race*, 113 AM. J. INT'L L. UNBOUND 92, 93-94 (2019); Steven González & Loizos Heracleous, *The New Space Race Is Not What You Think*, CAL. MGMT. REV. INSIGHTS (Feb. 27, 2024), https://cmr.berkeley.edu/2024/02/the-new-space-race-is-not-what-you-think/ [https://perma.cc/BDM5-L5EH] (last visited Oct. 11, 2024); Akash Sriram, *Moon Landing Puts New Space Race Startups in Spotlight*, REUTERS (Feb. 26, 2024), https://www.reuters.com/technology/space/moon-landing-puts-new-space-race-startups-spotlight-2024-02-26/ [https://perma.cc/ZH3R-8CLX].

90. *See, e.g.*, Sundahl, *supra* note 17; WH Authorization Framework, *supra* note 83.

91. Letter from John P. Holdren, former Director and Assistant to the President, Off. Sci. & Tech. Pol'y, to John Thune, former Chairman, S. Comm. Com., Sci., & Transp. (Apr. 4, 2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/csla_report_4-4-16_final.pdf [https://perma.cc/ZSD5-Q4WX] [hereinafter Section 108 Report].

92. *Id.*; *see* Sundahl, *supra* note 17, at 30.

93. *See* Sundahl, *supra* note 17, at 32.

94. Section 108 Report, *supra* note 91.

95. *See id.*; Sundahl, *supra* note 17, at 33; Marcia Smith, *White House Wants DOT in Charge of Commercial Space Mission Authorization*, SPACEPOLICYONLINE.COM (May 2, 2016), https://spacepolicyonline.com/news/white-house-wants-dot-in-charge-of-commercial-space-mission-authorization/ [https://perma.cc/JJT9-JN2L].

some examples,[96] which still hold true today, of potential missions that may implicate Article VI concerns including private missions beyond Earth's orbit such as maneuvering payloads and lunar habitats on the Moon or Mars's surface,[97] ISAM and orbital habitat activities,[98] and space resource utilization.[99] As discussed below, some of these activities are closer in development than others. ISAM activities are likely the closest to being considered a market in themselves.

Bringing recognition of this regulatory gap to the forefront of commercial space policy began at the end of 2013 when Bigelow Aerospace sent a letter to the FAA asking if the FAA granted a license for Bigelow's experimental lunar habitat modules, would the FAA ensure non-interference with Bigelow's operations from other licensees?[100] The FAA ruminated on this correspondence for about a year and responded in the affirmative while recognizing there may be insufficiency in the licensing framework and the only true answer would lie with Congress.[101] Bigelow purportedly sent the request to see if the FAA would approve a launch of their lunar habitat and whether the FAA would issue future launch licenses that would interfere with their operations.[102] This answer ostensibly ruffled other regulatory agencies who felt this was a power grab or, at least, a lack of consultation.[103]

The SPACE Act of 2015 did not necessarily contemplate the implications of Article VI on mission authorization for novel space activities as a whole.[104] Rather, it intended to enhance private investment in new technology for novel activities, particularly space resource utilization.[105] However, the Section 108 Report, issued as a requirement of the SPACE Act of 2015, seems to have truly ignited the debate as to whether new legislation was needed to expand upon existing statutory authority or even create a new mission authorization framework.

The Section 108 Report had draft statutory language appended to it, proposing to have the FAA oversee and authorize novel space activities.[106] The recommended mission authorization framework would have been

96. Section 108 Report, *supra* note 91.

97. *See, e.g.*, LM Lunar Space Stations Application, *supra* note 4.

98. *See, e.g.*, *MEV-1 License*, *supra* note 6; *MEV-2 license*, *supra* note 6; *SpaceIce*, *supra* note 6; *Nanoracks*, *supra* note 6.

99. *See* Section 108 Report, *supra* note 91; Jonathan O'Callaghan, *The First Secret Asteroid Mission Won't be the Last*, N.Y. TIMES (Dec. 28, 2023), https://www.nytimes.com/2023/12/27/science/secret-asteroid-mission-astroforge.html [https://perma.cc/SSY9-3LQQ] (discussing the lack of licensing process for deep space mission).

100. Sundahl, *supra* note 17, at 40; Jeff Foust, *FAA Review a Small Step for Lunar Commercialization Efforts*, SPACENEWS (Feb. 6, 2015), https://spacenews.com/faa-review-a-small-step-for-lunar-commercialization-efforts/ [https://perma.cc/TG95-453M]; Leonard David, *Mining the Moon? Space Property Rights Still Unclear, Experts Say*, SPACE.COM (July 25, 2014), https://www.space.com/26644-moon-asteroids-resources-space-law.html [https://perma.cc/Z436-VNLY].

101. Sundahl, *supra* note 17, at 40; *see* Foust, *supra* note 100.

102. David, *supra* note 100.

103. Sundahl, *supra* note 17, at 40-41.

104. *See* SPACE Act of 2015, Pub. L. No. 114-90, 129 Stat. 704 (2015) (codified at 51 U.S.C. § 513).

105. *See id.* at § IV.

106. *See* Section 108 Report, *supra* note 91, at Appendix.

modelled on the payload review process of the FAA and have any activity not under any existing regulatory purview reviewed by the FAA on a case-by-case basis for compliance with international obligations.[107]

In 2017, Professor Sundahl believed that the majority opinion of space pundits and industry stakeholders was favorable towards the FAA being granted novel space activity authorization.[108] He supported this notion by stating three things the industry supported: (1) central authority to streamline the process; (2) modeling the new process on an already familiar process; and (3) adopting open-minded process that will accommodate any type of mission.[109] While these factors likely still represent the sentiment of industry in how they hope mission authorization framework pans out, there does not seem to be a preference as to which agency is responsible.

Around the same time as the Section 108 draft proposal, Representative Bridenstine, who later became the NASA Administrator, introduced the American Space Renaissance Act ("ASRA").[110] The ASRA generally followed the approach of the Section 108 Report Appendix, referring to the process as "enhanced payload review," but it went further by instructing the Secretary of Transportation to issue regulations relating to the specifics of how to authorize novel space missions.[111]

Neither of these proposals was incorporated into legislation or proceeded further in the legislative process. This may be due to other members of Congress, namely Representative Babin, who felt legislation instructing further regulations was premature and may compound already long interagency review processes.[112] In 2017, in hearings sparked mostly by Representative Babin, space law experts such as Laura Montgomery urged the U.S. not to create new regulations under the notions that Article VI does not forbid private actors from operating in space, and Article VI is not self-executing, meaning there is no "obligation or prohibition on the private sector unless Congress" says there is.[113] For the next six years, Professor Montgomery's perspective, to refrain from "regulatory drag,"[114] essentially won out.

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107. Sundahl, *supra* note 17, at 34.

108. *Id.* at 35.

109. *Id.*

110. *See* H.R. 4945, 114th Cong. (2016) [hereinafter ASRA].

111. *Id.* at § 309; *see* Sundahl, *supra* note 17, at 36.

112. *See* Sundahl, *supra* note 17, at 38.

113. *Reopening the American Frontier: Exploring How the Outer Space Treaty Will Impact American Commerce and Settlement in Space, Hearing Before the S. Comm. on Com., Sci. Tech.*, 115th Cong. 2 (2017) (statement of Laura Montgomery, Manager, Space Law Branch, AST), https://www.commerce.senate.gov/services/files/1a50ea32-d8f1-4ce8-9905-7740502bead3 [https://perma.cc/AM7Z-HHNX] [hereinafter *Montgomery Testimony*]. As an aside, a self-executing treaty or provision of a treaty means it is enforceable in domestic courts; the determination of a treaty's (or its provisions') self-executing nature has been the topic of U.S. Supreme Court jurisprudence. *See* U.S. Constitution Annotated, *Art. II, § 2, Cl. 2: Self-Executing and Non-Self-Executing Treaties*, U.S. CONG., https://constitution.congress.gov/browse/essay/artII-S2-C2-1-4/ALDE_00012955/ [https://perma.cc/V52B-WREK] (last visited Apr. 28, 2024).

114. *Montgomery Testimony*, *supra* note 113, at 2.

B. The Debate: 2023-?

After minimal movement in the legislature but prominent development in the industry, two new draft proposals have emerged since the Obama-era Section 108 proposal and the ASRA. Both draft bills came at the end of 2023, and one is another proposal borne out of White House Councils while the other is an introduced bill from members of a Congressional Committee. This time, however, the bills are not as parallel as with the Section 108 Appendix and the ASRA. Additionally, it appears the time of inaction has passed, as one of the bills' authors is none other than Representative Babin, who lauded restraint from regulation back in 2017.[115]

The first of these new proposals is the White House Draft Bill ("WH Draft Bill") Text, which is split into two titles and divides authority between the DOT and the DOC.[116] Title I of the WH Draft Bill seeks to amend the FAA's authority under 51 U.S.C. § 509 by adding an "in-space transportation license" process where the FAA would have authority to license and authorize the operation of a space transportation vehicle.[117] This bill creates new definitions that hinder the bill's efficacy because they seemingly overlap and constrain in ways unlikely to prove more helpful than not. For example, a "space transportation vehicle" is defined as "a vehicle operated to conduct in-space transportation."[118] Then "in-space transportation" is defined as "the conveyance of cargo or goods in outer space, including to or from celestial bodies, other than launch or reentry. In-space transportation does not include the repositioning of active satellites in orbit."[119] The definition's last sentence is what makes it difficult. What if a space object has a dual function of conveying fuel (a good, making it a space transportation vehicle), while shortly thereafter or simultaneously repositioning a satellite's orbit? The dual function space object would be conducting in-space transportation and not conducting in-space transportation. This would prove an issue when determining which agencies must grant approval, especially considering Title II of the WH Draft Bill.

Title II of the WH Draft Bill gives the DOC authority to regulate "uninhabited space missions,"[120] which would seemingly overlap with the proposed FAA authority over in-space transportation. However, the definition of uninhabited space mission includes all uncrewed activities conducted in space by non-governmental entities but excludes activities solely conducting remote sensing by NOAA, solely conducting communications with radiofrequency spectrum and licensed by the FCC, and activities licensed under Chapter 509 (FAA's authority).[121] In effect, this definition would not require an FAA and a DOC license, because all activities under § 509 are excluded, but would require an FCC and a DOC license because communications may not be the sole conduct.

115. *See* Sundahl, *supra* note 17, at 37-38.
116. *See* WH DRAFT BILL, *supra* note 7.
117. *Id.* at 5.
118. *Id.* at 8.
119. *Id.*
120. *Id.* at 13.
121. *See id.* at 12-13.

Regardless of the implications of the WH Draft Bill, it has been largely overshadowed by the comprehensive draft bill—introduced in the same month as the WH Draft Bill—by Representatives Babin and Lucas titled the Commercial Space Act of 2023.[122] The CSA would create Chapter 801 in Title 51 of the U.S.C. and require a commercial U.S. operator of a space object to hold a certificate issued by the DOC (would be from the OSC) before operating that space object.[123] The CSA grandfathers in any FAA, FCC, or NOAA licensees at the time of the CSA's enactment but requires every space object operator commencing operations after enactment to obtain a certificate, regardless of the operator's other license obligations.[124]

The CSA's purposes are important to note, as they are the crux of the reasoning behind the drafter's intent in the bill. These purposes include increasing transparency and efficiency by enhancing the existing framework, reducing the administrative burden, and ensuring the U.S. remains the world leader in commercial space activities.[125] These purposes can be summed up by stating the CSA aims to alleviate legal uncertainty, minimize regulatory burdens and costs, and not stifle innovation.[126]

Compared to the WH Draft Bill's 24 pages, the CSA's 68 pages are understandably a bit more comprehensive. Some important portions of the CSA are its consolidation of mission types to only require one certificate for multiple operations carried out by a single space object, or multiple space objects that carry out substantially similar operations, or multiple space objects carrying out a single operation.[127] Additionally, the CSA requires attestations from the applicant that the space object: (1) is not a nuclear weapon or weapon of mass destruction ("WMD"), (2) will not carry a nuclear weapon or WMD, (3) will not be operated as a weapon or used for testing of a weapon on any celestial body, and (4) all information in the application is true.[128] These attestations are presumed, absent clear and convincing evidence otherwise, to sufficiently address U.S. international obligations pertaining to non-governmental entities under the OST.[129] Notably, there is no cost for a certification,[130] and the commercial entity is required to participate in consultation if it is determined the interaction with a U.S. government space object presents a substantial risk.[131]

The CSA's certification process may conflict with the FCC's longstanding deorbiting regulations by merely requiring the applicant to provide a space debris mitigation plan "describing how the space object will

122. CSA, *supra* note 8; *see* Jeff Foust, *Why the White House and Congress Can't See Eye-to-eye on Regulating Commercial Space*, SPACENEWS (Apr. 14, 2024), https://spacenews.com/why-the-white-house-and-congress-cant-see-eye-to-eye-on-regulating-commercial-space/ [https://perma.cc/F36D-8484] (noting the industry has largely "gravitated towards" the CSA).

123. CSA, *supra* note 8, at § 80102.

124. *Id.*

125. *Id.* at Sec. 2.

126. *See id.*

127. *Id.* at § 80102(e).

128. *Id.* at § 80103(a)(3).

129. CSA, *supra* note 8, at § 80103(c)(3)(A).

130. *Id.* at § 80201(c).

131. *Id.* at § 80202.

be operated and disposed of in a manner to mitigate the generation of space debris."[132] Oddly, the CSA's provision does not mention the U.S.-sanctioned and multilateral Inter-Agency Space Debris Coordination Committee's Space Debris Mitigation Guidelines drafted in 2002 and last updated in 2021.[133] Additionally, while this provision, on its own, does not necessarily conflict with the FCC's space debris mitigation rulemaking, § 80204 prohibits any agency, other than the DOC from:

> impos[ing] a requirement with regard to an international obligation of the United States pertaining to a nongovernmental entity of the United States under the Outer Space Treaty relating to the following:
> (1) The operation of a space object certified under chapter 801.
> (2) The carrying out of a space debris mitigation plan of a space object for which a certification was issued under chapter 801.[134]

The CSA's § 80204 may be interpreted as a preemption to the FCC's space debris mitigation rules requiring a statement from an applicant outlining how a deorbit plan will be met within five years. Additionally, it may be argued that the FCC's ISAM NPRM conflicts with this provision considering one of the stated authorities for the creation of the ISAM NPRM is 47 U.S.C. § 303(r), which allows the FCC to make rules and regulations necessary to carry out its statutory authority of international obligations under any radio communications treaty.[135] Without a clear definition as to what a radio communication treaty is, the OST may be considered a radio communication treaty with its references to studying space communications and minimizing "harmful interference,"[136] which is a well-known term from the International Telecommunication Commission ("ITU") Constitution.[137]

Regarding the continuing supervision portion of Article VI, both the WH Draft Bill and the CSA seem to view the requirement as any type of "material change" in the operation of the space object.[138] The WH Draft Bill also expects updated information "provided on a periodic basis."[139]

As mentioned previously, these draft bills come at a time when there has been extensive debate over whether and how this regulatory gap should be addressed. It appears the White House has retained its position in granting most of the authorization powers to the FAA, though the Draft Bill does cede some outlying functions to the DOC. However, the structure and wording of

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132. *Id.* at § 80103(a)(2)(F).
133. IADC, IADC REPORT ON THE STATUS OF THE SPACE DEBRIS ENVIRONMENT 5 (2023).
134. CSA, *supra* note 8, at § 80204.
135. 47 U.S.C. § 303(r).
136. OST, *supra* note 17, at preamble, art. IX.
137. *See* Constitution of the International Telecommunication Union annex no. 1003, Dec. 22, 1992, S. Treaty Doc. No. 104-34, 1825 U.N.T.S. 331 [hereinafter ITU Constitution]; *see also Radio Interference*, ITU (Feb. 2021), https://www.itu.int/en/mediacentre/backgrounders/Pages/radio-interference.aspx [https://perma.cc/VEQ8-CE8N] (defining harmful interference and specifying a main objective of the ITU-R is ensuring interference-free operations of radiocommunications).
138. WH DRAFT BILL, *supra* note 7, at 7, 14; CSA, *supra* note 8, at § 80106.
139. WH DRAFT BILL, *supra* note 7, at 7.

the bill has come under fire by some in Congress who worry about the Draft Bill's convoluted new terms and numerous ambiguities.[140] According to the House Committee on Science, Space, and Technology website, it would appear there is an outpouring of support from industry stakeholders in favor of the CSA.[141]

Regarding the timing of the CSA, Representative Babin appears to have changed his tune from originally refraining from regulations to fill this gap. It may be that he does not see the DOC certification process as regulatory in nature but rather a blanket protection of industry by essentially presuming any activity to be authorized unless the DOC can provide evidence and justification contrarily.[142] Or it could be that Representative Babin worries a different approach than his may induce issues similar to those seen with NOAA's former remote sensing regulations that disincentivized operation in the U.S. relative to the rest of the world.[143]

Regardless of the reasons to reignite the simultaneous WH and Congressional Committee mission authorization draft bill debate, it is happening. Both proposed bills seek to supplement and transform the current regulatory regime to include novel space activities mission authorization. However, both proposals overlook or ignore the potential to further decrease regulatory burdens by centralizing mission authorization through the FCC's licensing process. Regardless of whether a certification process is beneficial or necessary, the Commission has already shown it is capable and prepared.

IV. USING THE FCC TO FILL THE REGULATORY GAP

The FCC has set itself up for success, with regards to streamlining a new mission authorization process, arguably better than the FAA or the DOC. Even without further legislation, the FCC, compared to the DOC and DOT, has the widest statutory authority because of its judicially-mandated and statutorily authorized ancillary jurisdiction; the most autonomy because of its status as an independent agency; and, with over 50 years of licensing satellites, the most regulatory and licensing experience, particularly of new technologies. This section discusses these comparative claims in depth to make the case for why the FCC should have authorizing authority. All of this should be considered while keeping in mind that the two proposed bills do not mention the FCC in their novel space activities mission authorization plans.

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140. *See* Jeff Foust, *Senators Question White House Mission Authorization Proposal*, SPACENEWS (Dec. 14, 2023), https://spacenews.com/senators-question-white-house-mission-authorization-proposal/ [https://perma.cc/VR9B-SLAF].

141. *See* The Commercial Space Act of 2023, H.R. 6131, 118th Cong. (2023) (as introduced in the H. Comm. on Sci., Space & Tech.), https://science.house.gov/2023/11/the-commercial-space-act-of-2023 [https://perma.cc/E7SB-YXYR].

142. *See* CSA, *supra* note 8, at § 80103(c)(3).

143. *See* Licensing of Private Remote Sensing Space Systems, 85 Fed. Reg. 30790, 30790-91 (May 20, 2020) (codified at 15 C.F.R. § 960 (2024)); Jeff Foust, *NOAA Lifts Many Commercial Remote Sensing License Conditions*, SPACENEWS (Aug. 8, 2023), https://spacenews.com/noaa-lifts-many-commercial-remote-sensing-license-conditions/ [https://perma.cc/3TWD-FHZ3].

This section proposes the FCC be granted authority to authorize—and already is authorizing—ISAM activities; the FAA, already having jurisdiction over human spaceflight once the Learning Period ends, should regulate private human physical presence in space; and a framework on space mining should be deliberated prior to fitting into any immediate framework ex ante. This section will consider how the FCC is well-suited for mission authorization, how mission authorization via the FCC is the path of least regulatory burden, and how the FCC's ISAM NPRM serves as a robust mission authorization framework. While both the CSA and the WH Draft Bill will be referenced, this section will mostly compare the FCC's readiness to the CSA's OSC certification process because it appears the CSA is gaining more traction than the WH Draft Bill.

A. The FCC is Well-Suited for Mission Authorization

With over 50 years of experience regulating and licensing commercial satellite systems, the FCC is better suited for this familiar mission authorization role.[144] The FAA, while an established regulator, has focused its efforts on launch and reentry and human safety. The OSC was not established with the intention of it being a regulator,[145] but was handed *de facto* regulatory purview when it merged with CSRSA only three years ago.

The DOC and the DOT were tasked in 2018 with streamlining their respective space regulatory responsibilities.[146] The Space Policy Directive-2 ("SPD-2") directed both agencies to release new rules within a year, but it took each of them at least two years.[147] While the FCC was not directly tasked with streamlining their regulations in the SPD-2, they were already working on doing so.[148] Moreover, the FCC has opened a rulemaking process on how it can further expedite satellite and earth station applications amid the influx of applications that include novel technologies.[149]

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144. *See* Establishment of Domestic Communication-Satellite Facilities by Non-Government Entities, *Report and Order*, 22 F.C.C. 2d 86 (1970); ISAM NPRM, *supra* note 54, at 18877.

145. *See* 51 U.S.C. § 50702(c)-(d).

146. *See* Space Policy Directive-2, Streamlining Regulations on Commercial Use of Space, 83 Fed. Reg. 24901, 24901-02 (May 30, 2018) [hereinafter SPD-2].

147. *Id.*; *see* Marcia Smith, *New Remote Sensing Regs Great Improvement, But Devil is in the Details*, SPACEPOLICYONLINE.COM (June, 25, 2020, 9:35 pm ET), https://spacepolicyonline.com/news/new-remote-sensing-regs-great-improvement-but-devil-is-in-the-details/ [https://perma.cc/WE5D-GUQX].

148. Streamlining Licensing Procedures for Small Satellites, 85 Fed. Reg. 43711, 43712 (July 20, 2020) (codified at 47 C.F.R. §§ 1, 25) (noting this rule's NPRM was released April 17, 2018, over a month before the SPD-2 was issued on May 24, 2018)*; see, e.g.*, Jeff Foust, *FAA to Establish Committee to Refine Launch Licensing Regulations*, SPACENEWS (Feb. 23, 2024), https://spacenews.com/faa-to-establish-committee-to-refine-launch-licensing-regulations/ [https://perma.cc/6EMX-ZV3L]; Foust, *supra* note 140; Theresa Hitchens, *Exclusive: Amid National Security Concerns, US Slaps Overhead Time Limits on Satellites*, BREAKING DEF. (Nov. 5, 2021), https://breakingdefense.com/2021/11/exclusive-amid-national-security-concerns-us-slaps-time-limits-on-overhead-satellites/ [https://perma.cc/5RJB-V8P2].

149. Expediting Initial Processing of Satellite and Earth Station Applications, 88 Fed. Reg. 85553, 85554 (Dec. 8, 2023).

The FCC already reviews nearly every commercial U.S. space object launched into space because nearly all space objects need to communicate either in space or between earth and space. Currently, the only commercial space objects it does not necessarily review are those sent without communicative abilities. An example of such was the controversial launch of human remains to the Moon, which would not need communication capabilities after launch.[150]

Furthering this notion that the FCC already reviews nearly all space objects' applications, it would continue to do so with the foreseeable novel technologies on the horizon. Lunar communications, optical communications, ISAM operations, and in-space resource utilization ("ISRU") operations will all require an FCC review. While optical communications (i.e., lasers operating outside the radio frequency on the electromagnetic spectrum) are the only technology presently capable of communicating outside the plain language of the Communications Act,[151] it would be surprising if the FCC did not extend its ancillary jurisdiction or if Congress did not amend the Communications Act to grant the FCC authority over communications along the whole of the electromagnetic spectrum. As such, the FCC will likely review all foreseeable novel commercial space activities in the U.S., thus it makes sense to also have the FCC "authorize" the operation via a form with some attestations.

Lastly, regarding the FCC's suitability, its status as an independent agency insulates it from partisan influences that may hinder mission authorization. Independent agencies are generally defined as agencies that only allow the President to remove the agencies' heads "for cause."[152] However, a variety of factors in these agencies' enabling statutes create varied forms of independent agencies.[153] Further, a consequence of self-funded independent agencies is greater autonomy because it takes away a major tool of Congress to reward or punish agencies and leaves the appointment of the Chair as the President's most influential tool.[154]

A self-funded budget, however, insulates the FCC from partisan influences. Currently, most outer space policy is bipartisan in nature. It is

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150. *See Legal and Ethical Framework*, CELESTIS, https://www.celestis.com/about/legal-and-ethical-framework/ [https://perma.cc/2KTF-NJD2] (last visited Apr. 12, 2024); *Celestial Services*, ELYSIUM SPACE, https://elysiumspace.com/#services [https://perma.cc/7ZGD-KF8S] (last visited Apr. 12, 2024); Jacob Knutson, *First U.S. Moon Lander in Decades Suffers "Critical" Fuel Loss Upon Launch*, AXIOS (Jan. 8, 2024), https://www.axios.com/2024/01/08/peregrine-moon-lander-launch-human-remains [https://perma.cc/223Y-FAM3].

151. *See* Joel Thayer, *Lasering in on the Federal Communications Commission: Can the FCC Regulate Laser Communications?*, 6 INTELL. PROP. BRIEF 99, 102 (2015). *See generally* Shane M. Walsh et al., *Demonstration of 100 Gbps Coherent Free-space Optical Communications at LEO Tracking Rates*, 12 SCI. REP. 18345 (2022) (showing the capabilities of optical communications and that they operate outside the radiofrequency portion of the electromagnetic spectrum).

152. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 772 (2013).

153. *Id.*

154. *See* Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822, 1831-36 (2012).

possible that a future space activity or policy may draw a barrier between party lines. If the OSC were granted authority, Congress could cut the office's budget or the President could cut off authorization for that activity or otherwise hinder the policy. The FCC's self-funded budget allows it to maintain autonomy in such an instance, insulating the space industry and economy from potential future partisan rifts.

This autonomy of the FCC may also be a reason they have been cast out of the draft proposals. Both the White House and Congress are vying for control over mission authorization, either directly (executive branch) or fiscally (legislative branch), and likely worry they have no recourse for future decisions should the FCC be granted authority.[155] Nonetheless, the FCC does not have free reign and other operations are in order to retain checks and balances, such as the Congressional Review Act, removing a Chair for cause, or even simply passing legislation.

All these factors, including the Commission's licensing experience, evaluation of nearly all space objects launched, and its insulation from partisan repercussions, makes the FCC well-suited to handle any novel mission authorization responsibilities. The FCC can already complete the certification process the CSA sets out. Moreover, tasking the FCC with the CSA's certification process would likely further reduce the regulatory burden the CSA intends to decrease—and may unintentionally increase.

B. Centralizing Mission Authorization with the FCC Minimizes Regulatory Burden

The CSA seeks to minimize regulatory burdens and costs,[156] but empowering the OSC with mission authorization may actually increase the regulatory burdens and costs on industry applicants. By forcing non-governmental entities to communicate with yet another federal agency, it adds more tasks to their already busy licensing journey and potentially creates more costs depending on how much communication is needed. Instead, centralizing mission authorization within the FCC would streamline the certification process and further minimize regulatory burdens and costs on industry applicants.

The only communication that must occur for non-remote sensing missions between the OSC and the applicant is for a request of SSA data via the OSC's TRaCSS system, once it is operational, to ensure there is no substantial risk of collision. This likely would have to be done prior to applying for an FCC license anyway, as any substantial risk would require an alteration of the technical standards specified in a license application.

Alternatively, to further streamline the process, the FCC and OSC could have an interagency cooperation specifically for the certification process where the OSC provides the SSA dataset to the FCC and the applicant uniformly based on the technical information in the FCC application. The applicant would then only need to communicate with the OSC if they sought

155. *See* Foust, *supra* note 122 (discussing the competing draft bills and the dislike of any further FCC authority).

156. *See* CSA, *supra* note 8, at Sec. 2(b)(4).

a different variety of data for a different reason. If there is a substantial risk of collision based on the information provided in the FCC application, the OSC can send the application back to the FCC with either conditions for the certificate or instructions for the applicant to alter their application. The FCC already has a similar interagency process with the National Telecommunications and Information Administration ("NTIA").[157] All interagency communication channels could be ongoing concurrently, thus adding no additional time to the FCC's rate of determination.

Centralizing mission authorization depletes the legal uncertainty of novel space activities and reduces the regulatory burdens and costs even more than dispersing mission authorization to the OSC. As such, centralization of mission authorization still fulfills the policy objectives stated in the CSA.[158]

C. The Framework Proposed in the ISAM NPRM Authorizes Novel ISAM Activities

Lastly, and most importantly, the FCC's recent ISAM NPRM can be used as a filler for novel space activities mission authorization, at least in the near-term, and potentially in the long-term. The rationale behind starting a rulemaking process for ISAM operators is similar to that of novel mission authorization. The ISAM Notice of Inquiry ("NOI"), and subsequent NPRM, sought to provide ISAM operators with support for innovation, a clear path to spectrum allocation, and guidance on how licensing of ISAM operations may best suit the industry.[159] The comments on the ISAM NOI indicated ISAM operators were eager for clear guidance towards novel ISAM operations, which the FCC took into account to create a new framework that can be built on as more complex ISAM operations develop.[160] The NPRM recognizes that, while some aspects of ISAM missions may be outside the scope of "communications," each aspect of a mission implicates communications and is necessary for the FCC to grant market access or license an operation in the public interest.[161]

The NPRM intends for the framework to apply to all ISAM operators but is based on a case-by-case analysis of each application and is subject to change as the industry develops.[162] The NPRM sets out a definition of ISAM space station as one with a "primary purpose of conducting in-space servicing, assembly, and/or manufacturing activities" and seeks further comment from stakeholders as to whether "primary purpose" should be further defined and how it could be further defined.[163] The NPRM seeks to create a new section in its Part 25 regulations (§ 25.126) that would aggregate the fulfillment

157. Press Release, FCC, NTIA Establish Spectrum Coordination Initiative (Feb. 15, 2022), https://docs.fcc.gov/public/attachments/DOC-380302A1.pdf [https://perma.cc/789N-V5K9].

158. *See* CSA, *supra* note 8, at Sec. 2(b)(1)-(4).

159. *See* Facilitating Capabilities for In-space Servicing, Assembly, and Manufacturing, *Notice of Inquiry*, 37 FCC Rcd 10022, paras. 1-3 (2022) [hereinafter ISAM NOI].

160. *See* ISAM NPRM, *supra* note 54, at 18878.

161. *See id.* at 1880, 18882.

162. *Id.* at 18877-18878.

163. *Id.* at 18878.

requirements and enumerate the exemptions applicable to ISAM operators. Two major exemptions proposed are from the traditional NGSO processing round requirements and GSO first-come-first-served requirements to streamline ISAM applications.[164]

Some commenters suggested an incentive program to bolster innovation via waived fees for enhanced debris mitigating companies and federally recognized small disadvantaged ISAM business.[165] However, the FCC is unable to accommodate such a program to bolster innovation because it is unable to waive fees for categories of payors and is required under the Communications Act to collect fees.[166] This is the type of scenario where Congress could exercise its legislative power to bolster innovation and space sustainability, both of which are cruxes of the CSA and WH Draft Bill. Rather than pushing the FCC away, Congress could work with them to figure out a way to federally incentivize industry innovation, especially among small, disadvantaged startups. Such legislation would still effectively meet the same policy goals set out in the CSA.

The comprehensiveness and foresight of the ISAM NPRM are important because ISAM likely encompasses a vast majority of the in-market or near-market novel commercial space activities. Of the novel activities listed on the Section 108 Report—lunar and Martian missions, ISAM, orbital habitats, and ISRU—ISAM is likely the closest to being considered a market, with orbital habitats next in line.

Lunar missions have already occurred with no regulatory issues, and any missions to the Moon or Mars that might be outside the current regulatory framework are at least ten years in the future. Similarly, ISRU is still in the extremely early stages of development, with proof of concepts still in the works and some U.S. "mining" companies stating unsubstantiated ambitions for missions that will likely take at least a decade to complete.[167] Orbital habitats, while still developing, are closer to full operation than the others. However, the operation of orbital habitats falls under the purview of ISAM because most orbital habitats proposed will be conducting research, manufacturing, or assembly. With that in mind, the only novel aspect would be the humans on board. As discussed above, regulating human safety in space is already delegated to the FAA, which will likely create a rulemaking process once the moratorium is lifted.

As such, the ISAM NPRM can serve as a foothold and template for novel space activities mission authorization. Once the ISAM rulemaking process is completed and codified, the FCC, or a different agency, could be instructed to start an ISRU rulemaking process or one of the other novel

164. *Id.* at 18879.

165. *See* ISAM NPRM, *supra* note 54, at 18883.

166. *Id.*

167. *See In-Situ Resource Utilisation (ISRU) Demonstration Mission*, ESA (Sept. 1, 2019), https://exploration.esa.int/web/moon/-/60127-in-situ-resource-utilisation-demonstration-mission [https://perma.cc/6QL7-B594] (a plan to demonstrate, by 2025, that water or oxygen production on the moon is feasible); *AstroForge*, ASTROFORGE, https://www.astroforge.io/ [https://perma.cc/F2WJ-YFVQ] (last visited Apr. 15, 2024) ("We mine asteroids to extract valuable minerals in space at a lower cost and smaller carbon footprint than the current terrestrial mining methods.").

activities. Although using the ISAM NPRM as a filler for the regulatory gap would continue the patchwork of U.S. commercial space regulations, it would allow the industry and the regulations to innovate and develop organically in unison rather than placing a blanket certification process over every activity, which may unintentionally increase regulatory burdens and costs and cut off the regulatory frameworks of other agencies.

The FCC has already begun authorizing novel space activities because it is the one U.S. commercial space regulator nearly all U.S. commercial companies need to obtain a license. For example, it provided a license to Intuitive Machines for its commercial lunar lander.[168] The FCC has licensed communications for operations of ISAM activities demonstrating rendezvous and proximity operations ("RPO"),[169] life-extension,[170] orbital repositioning,[171] manufacturing techniques in microgravity,[172] active debris removal,[173] and metal cutting.[174] The FCC is also currently deliberating applications for lunar space systems' services[175] and may see applications for optical communications soon.[176]

The FCC could simply implement the certification form described in the CSA and attach it to its license applications and determinations. This would shift the burden of more regulatory communication from the commercial entity to the FCC, which would have a system in place to run the data through the OSC's TRaCSS. There would be no need for more enforcement in the FCC because the onus would be on the entity to alert them of any material change and substantial fines could be enforced via the FCC's enforcement bureau. Having the entity alert the agency works because they know the dangers of space and not providing a notice of material change may harm their asset(s) in the long run, thus further enforcement would be unneeded for the FCC to implement the CSA certification process. Lastly, although tangential, the FCC would not need to change its name because its main licensing purpose is to oversee "communications," albeit with objects in outer space. The "certifications," if necessary, would be an ancillary task that would likely not be as onerous or laborious as spectrum management because most of the certification determination would be based on the OSC's SSA data and the FCC's review process already in place. All this to say, both the CSA and WH Draft Bill overlooked the preparedness and efficiency of the FCC in authorizing novel commercial space activities.

V. CONCLUSION

The debate over whether to implement a new regulatory framework, expand on the existing one, or do nothing to address this regulatory gap has

168. *Intuitive Machines*, *supra* note 4.
169. *MEV-1 License*, *supra* note 6; *MEV-2 License*, *supra* note 6.
170. *MEV-1 License*, *supra* note 6; *MEV-2 License*, *supra* note 6.
171. *MEV-1 License*, *supra* note 6; *MEV-2 License*, *supra* note 6.
172. *See SpaceIce*, *supra* note 6.
173. *See Denali*, *supra* note 5.
174. *See NanoRacks*, *supra* note 6.
175. *See* LM Lunar Space Stations Application, *supra* note 4.
176. *See generally* Thayer, *supra* note 151.

been ongoing since the early 2010s. After the influential Section 108 Report and nearly concurrent legislative proposals and hearings, the current framework remains the same. The only differences have come from the FCC's rulemaking processes, which it has started on its own and has considered its statutory authority, industry input, and U.S. policy. We are now seeing two new proposals, one from the White House and one from a legislative Committee. Regardless of their intentions, these bills show a desire by both the White House and members of Congress to ensure non-governmental entities are complying with U.S. obligations under Article VI, and these entities are given legal certainty that they are complying. Whether these proposals gain traction is still to be seen.

The Section 108 Report laid out potential activities that may fall outside the current regulatory framework. But it did not insinuate that all these activities must be addressed immediately or must be addressed in the same manner. The way U.S. mission authorization has been traditionally approached is a piecemeal, patchwork mechanism of interagency cooperation. All four draft statutory proposals (the Section 108 Appendix, ASRA, WH Draft Bill, and CSA) have provided a blanket approach to covering the regulatory gap, without really considering the complexities of the space activities. Continuing in a patchwork approach, while seemingly counter-intuitive, might fit better so long as it is measured to the needs of the time.

The FCC has essentially already filled the most immediate patch needed to be filled via the ISAM NPRM, which will move into a Report and Order to be codified. ISAM operations encompass a large swath of the novel space activities that industry and scholars worry about. With this rulemaking, the FCC fills that gap. The other novel activities can be addressed, if necessary, once their development is closer to market viability.

Although too early to determine how it will pan out in Congress, the CSA seems to have more industry backing than the WH Draft Bill. However, considering the certification process set out in the CSA is not much more than a glorified form with attestations that the company is not—or does not intend to—violate the express provisions of the Outer Space Treaty, there is no need to burden entities with another agency to communicate with when it could just as easily be done by the FCC. If a blanket certification process is desired by the industry for legal certainty, have that certification go through the agency the industry applicants will likely need to apply with anyway: the FCC.

While the intentions of the White House and Representatives Babin and Lucas are commendable, they are complicating a process that already entails complicated technologies. Outer space is free for the exploration and use of all states, which the U.S. has extended to its citizens. The FCC has been a champion for public interest, space technology innovation, regulatory efficiency, and space sustainability for many years. Its suitability and preparedness for mission authorization, especially in light of the ISAM NPRM, makes it the best candidate for authorizing novel space missions, if not for every technology, at least for the most near-market ones.

The FCC's Terrible, Horrible, No Good, Very Bad Day[1]

Harvey Reiter*

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1. JUDITH VIORST, ALEXANDER AND THE TERRIBLE, HORRIBLE, NO GOOD, VERY BAD DAY (1987). For reasons that should become obvious upon reading, the article's original title was: Why Net Neutrality May Yet Survive *Loper-Bright*'s Repeal of *Chevron*: The (Nearly) Forgotten Story Behind *Brand X*.

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I. INTRODUCTION

On May 22, 2024, the FCC ruled that broadband access to the Internet provided by cable and telephone companies was a "telecommunications service" under the 1996 Telecommunications Act and thus subject to FCC common carrier regulation requiring "net neutrality," that is, barring broadband providers from "blocking, throttling, or engaging in paid or affiliated prioritization arrangements."[2] In *National Cable & Telecommunications Association v. Brand X Internet Services*,[3] now nearly twenty years ago, the Supreme Court had upheld the agency's right under the *Chevron* doctrine[4] to reach the opposite interpretation—and even to change it later, so long as its changed interpretation of the ambiguous term was reasonable.[5] The latest FCC rule was the fifth time the agency has changed its interpretation of "telecommunications service"[6] (the Supreme Court undercounts the number of flip flops at four[7])—all coinciding with changes in presidential administrations.[8] The second of the first four course changes was not challenged in court. And each of the other three reinterpretations survived judicial review under *Chevron*.[9] But little more than a month after the agency's latest 180º, the Supreme Court, moved by the example of these frequent policy reversals,[10] held in *Loper Bright Enterprises v. Raimondo* that

2. *Safeguarding and Securing the Open Internet*, 89 Fed. Reg. 45404, 45404 (May 22, 2024).

3. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980-82 (2005).

4. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842-44 (1984). *Chevron* established a two-part test for review of agency interpretations of statutes they were charged with administering. *Id.* First, using traditional tools of statutory interpretation, courts would ascertain whether or not a statute was ambiguous. *Id.* If not, that would end the inquiry. *Id.* If the court found the statute ambiguous, however, it would be required to defer to the agency's interpretation, if reasonable, irrespective of whether the court found the agency's reading the best one. *Id.* at 842-43. *Chevron* also permitted agencies to change their interpretations of ambiguous statutes. *Id.* at 863-64.

5. *Brand X*, 545 U.S. at 980-82.

6. Change one: Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facils., *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002) [hereinafter Cable Modem Rule] (reversing holding in Deployment of Wireline Servs. Offering Advanced Telecomm. Capability, *Memorandum Opinion and Order*, 13 FCC Rcd 24012, paras. 34-35 (1998) [hereinafter DSL Rule] that broadband internet access was a telecommunications service—at least as applied to cable companies), *aff'd*, *Brand X*, 545 U.S. 967. Change two: In re Appropriate Framework for Broadband Access to the Internet over Wireline Facils., 20 FCC Rcd 14853 (2005) [hereinafter 2005 Wireline Broadband Order]; In re Appropriate Regul. Treatment for Broadband Access to the Internet over Wireless Networks, 22 FCC Rcd 5901 (2007) [hereinafter Wireless Broadband Order] (reversing prior holding in DSL Rule and declaring that DSL was now an information service, too). Change three: In re Protecting and Promoting the Open Internet, 30 FCC Rcd 5601 (2015), *aff'd*, U.S. Telecomm. Ass'n v. FCC, 825 F.3d 674, 689-97 (D.C. Cir. 2016). Change four: In re Restoring Internet Freedom, 33 FCC Rcd 311 (2018), *aff'd in relevant part*, Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019). Change five: *Safeguarding and Securing the Open Internet*, *supra* note 2.

7. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2288 (2024) (Gorsuch, J., concurring).

8. *Id.*

9. *See* cases cited *supra* note 6.

10. *Loper Bright*, 144 S. Ct. at 2272.

Chevron created too much instability and, except for its *stare decisis* effect in settled cases, would apply no more.[11] Henceforth, the Court stated, agencies would have to convince courts that their new or revised interpretation of ambiguous statutes is not only a permissible, but the best reading of the law.[12] Not surprisingly, a flood of challenges to the agency's latest reversal on net neutrality were quickly brought in various circuit courts of appeal and ultimately consolidated in the Sixth Circuit.[13]

The only question I had originally planned to write about was this: Without *Chevron*'s safety net, can the FCC's latest about-face survive judicial review? I have a personal connection to *Brand X*, the first of the agency's flip flop cases, a Supreme Court case whose backstory gives us a strong reason to believe that the FCC's restoration of net neutrality can and should survive judicial review. And, because of my own sense of optimism, I still intend to explain why.

But the courts may never reach that question. Only a week after the Fifth Circuit had struck down the FCC's universal service funding program as an unconstitutional violation of the Taxing Clause[14]—and only days before the FCC's net neutrality rule was to go into effect—the agency took another direct blow to the chin. On August 1, 2024, a Sixth Circuit panel issued a per curiam order granting a stay of the rule pending litigation.[15] Its principal reason: there was a likelihood that the rule presented a question of "great economic and political significance" that Congress had not clearly authorized the FCC to decide and thus violated the Major Question Doctrine ("MQD")[16] a doctrine that, if applicable, strips agencies not only of *Chevron* deference to their statutory interpretations, but the authority to interpret.[17]

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11. *Id.* at 2272-73. While the net neutrality cases have been a poster child for the stability argument, others have observed that *Chevron* has made judicial review of agency decisions less ideological and more predictable. *Id.* at 2309 (Kagan, J., dissenting) (first citing Kent Barnett et. al, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1502 (2018); and then citing Cass R. Sunstein, *Chevron As Law*, 107 GEO. L.J. 1613, 1672 (2019)); *see also*, Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 625 (2021).

12. *Id.* at 2251.

13. In re MCP No. 185, No. 24-7000 (J.P.M.L. June 6, 2024) (ordering consolidation of cases and assigning to the Sixth Circuit).

14. Consumers' Rsch. Cause Based Commerce, Inc. v. FCC, 109 F.4th 743, 786 (5th Cir. 2024).

15. In re MCP No. 185, No. 24-7000, 2024 U.S. App. LEXIS 19815 at *13 (6th Cir. Aug. 1, 2024) [hereinafter Stay Order] (granting stay).

16. *Id.* The panel also held that the movants had demonstrated the "possibility of irreparable injury," an odd claim, given that the cable companies had not quantified their compliance costs, had previously operated under a net neutrality regime and, in any event, have long touted that they were neither blocking nor throttling websites or streaming services. *Id.* at *7, *9, *10. *See also Reaffirming Our Commitment to an Open Internet*, NCTA (May 17, 2017), https://x.com/NCTAitv/status/864829105837158401 [https://perma.cc/FB6G-K53S].

17. *See* Sunstein, *infra* note 25.

That was a "terrible, horrible, no good, very bad day" for the FCC. Still, a different panel will decide the merits.[18] And it will have two interrelated reasons to reverse course.

The court's stay order followed its request for supplemental briefing on the reach of *Loper Bright*, *not* on the applicability of the major questions doctrine. In finding a major question, the stay panel overreached, missing entirely the role *stare decisis* still plays under *Loper Bright*. Despite the FCC's flip flops on the meaning of "telecommunications service," its determination that it had the authority to decide that question—one way or the other—was upheld by the Supreme Court in *Brand X*. And because that determination has *stare decisis* status,[19] whether the FCC has authority to decide what is "telecommunications service" cannot logically be a "major question." No wonder the FCC did not brief the MQD issue.

As to the merits, before there was *Brand X*, there was the Ninth Circuit's decision in *AT&T v. City of Portland*.[20] Because it was a private cause of action and did not rest on *Chevron*,[21] the court's holding that broadband was a telecommunications service was, by definition, that court's best reading of the statute. Couple that with the fact that three Justices in *Brand X* thought the same thing[22] and the Sixth Circuit will have ample grounds to uphold the FCC's net neutrality rule as the best reading of the statute.

II. WHAT IS THE MAJOR QUESTIONS DOCTRINE AND WHY IS IT INAPPLICABLE TO THE FCC'S NET NEUTRALITY RULE?

"I know it when I see it," the late Justice Potter Stewart famously declared in trying to define hard core pornography.[23] But he might as well have been describing how lower court judges are to determine when an agency decision presents a major question. The major question doctrine posits, as readers may well know, that when in "extraordinary cases" an agency's interpretation of a statute's meaning poses a question of "vast economic and political significance"—a test that Berkeley law professor Dan Farber aptly observed is largely "in the eye of the beholder"[24]—an agency not merely gets no deference—it lacks authority altogether unless it can "point to

18. *See* Sunstein, *infra* note 25.

19. *Loper Bright*, 144 S. Ct. at *15-16 ("The Court does not call into question prior cases that relied on the *Chevron* framework.").

20. AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000).

21. *Id.* at 876.

22. *Brand X*, 545 U.S. at 1005 (Scalia, J., dissenting).

23. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

24. Dan Farber, *Another Worrisome Signal from the Supreme Court*, LEGAL PLANET (Aug. 30, 2021), https://legal-planet.org/2021/08/30/another-worrisome-signal-from-the-supreme-court/ [https://perma.cc/X8ZQ-VUW3].

'clear congressional authorization' for the power it claims."[25] In May 2022, I had written a law review article about the dangers to administrative agencies posed by the greatly expanded major questions doctrine the Supreme Court had articulated in two shadow docket cases—*Alabama Ass'n. of Realtors v. Department of Health and Human Services* and *National Federation of Independent Business v. OSHA*.[26] And I expressed hope that in the context of a full merits review it would take a step back from the precipice.[27] That didn't happen.

A month later, the Supreme Court found its third major question case in a year's span, declaring in *West Virginia v. EPA* that a dormant Obama era EPA regulation—one that "never went into effect"[28] and that the Biden Administration had disavowed any intention to resurrect[29]—nonetheless violated the major question doctrine because no direct delegation for it could be found in the Clean Air Act.[30] There was almost one more MQD case that same term. Four justices would also have invalidated HHS's COVID vaccine requirement for the staffs of hospitals receiving Medicare funding on MQD grounds as well.[31]

25. West Virginia v. EPA, 597 U.S. 697, 723 (2022). Professor Cass Sunstein worried about precisely this problem. Under what he called the "weak version" of the major questions doctrine, agencies would simply lose *Chevron* deference, but could still win, as was the case when the Supreme Court upheld the Affordable Care Act. Cass Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 477 (2021). Under the "strong version"—what is now the law of the land—he warned that "[t]he idea is not merely that courts will decide questions of statutory meaning on their own. *Id.* It is that such questions will be resolved unfavorably to the agency." *Id.*

26. *See* Harvey L. Reiter, *Would FERC's Landmark Decisions Have Survived Review Under the Supreme Court's Expanding "Major Questions Doctrine" And Could The Doctrine Stifle New Regulatory Initiatives?*, 3 ENERGY BAR ASS'N 1 (2022), https://www.eba-net.org/wp-content/uploads/2023/01/EBA_Brief_V3-1.pdf [https://perma.cc/2VDW-9L7F] (discussing Ala. Ass'n of Realtors v. HHS 594 U.S. 758 (2021) and Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 595 U.S. 109 (2022)).

27. *Id.* at 15.

28. West Virginia v. EPA, 597 U.S. at 715.

29. *Id.* at 717.

30. *Id.* at 732.

31. *See* Biden v. Missouri, 595 U.S. 87, 102 (2022).

What has followed has been a deluge of "extraordinary cases" flooding the lower courts.[32] A year after deciding *West Virginia v. EPA*, the Supreme Court again invalidated a federal rule under the major questions doctrine. Following an Eighth Circuit nationwide injunction, in *Biden v. Nebraska*, it overturned the federal government's student load debt relief plan.[33] Even the Supreme Court's *Loper Bright* case about requiring herring fisherman to pay the costs of federal monitors started as a major questions case.[34] And earlier this year, FERC Commissioner Christie invoked the MQD in his dissent from a new agency rule requiring public utilities to engage in coordinated long-range planning of electric transmission facilities.[35] The rule, Order No. 1920, built upon a 2011 rule, affirmed by the D.C. Circuit, that already required those utilities to participate in regional transmission planning and to devise benefits-based allocations of the costs of regionally planned projects.[36] Multiple petitions for review of Order No. 1920 have since been filed in

32. *See, e.g.*, Kentucky v. Biden, 23 F.4th 585, 607-08 (6th Cir. 2022) (denying stay of lower court order enjoining Property Act rule mandating that the employees of federal contractors in "covered contract[s]" with the federal government become fully vaccinated against COVID-19—injunction granted on grounds that rule was violative of MQD); Georgia v. President of the United States, 46 F.4th 1283, 1308 (11th Cir. 2022) (same—but narrowing the nationwide scope of the injunction); Brown v. U.S. Dep't of Educ., 640 F. Supp. 3d 644, 664-5 (N.D. Tex. 2022) (finding the debt relief plan violated MQD); Louisiana v. Biden, 585 F. Supp. 3d 840, 865 (W.D. La. 2022) (finding the social cost of carbon Executive order violated MQD) (reversed for lack of standing), *rev'd*, 64 F.4th 674, 677-78 (5th Cir. 2023); Oklahoma v. Biden, 577 F. Supp. 3d 1245, 1261-62 (W.D. Okla. 2021) (rejecting Oklahoma's challenge to vaccine mandate for National Guard members as not posing a "major question"); Kovac v. Wray, 660 F. Supp. 3d 555, 564-66 (N.D. Tex. 2023) (accepting claim that government's terrorist watchlist regulations presented a major question, but finding "clear" authorization for watchlist to be used in screening airline passengers); Ohio v. Yellen, 53 F.4th 983, 991 n.5 (6th Cir. 2022) (noting that MQD challenge to Treasury regulation clarifying conditions on state receipt of COVID-19 assistance "might have supported an attempt to seek vacatur of the Rule under 5 U.S.C. § 706, but Ohio has never asked for vacatur of the Rule"); Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1164 (M.D. Fla. 2022) (upholding challenge to CDC mask mandate on public transit as violative of MQD as alternative ground to finding *Chevron* deference inapplicable). *See also* Allison Larsen, *Becoming a Doctrine*, 76 FLA. L. REV. 1, 5 (2024) (noting that before 2017 only one federal judge had used the phrase major questions doctrine "and in only five federal decisions—at any level of court—before 2020"). Court filings using the term since 2016 (when it was used by then Judge Kavanaugh) jumped from 198 "to 450 filings in 2022." *Id.* at 7. For those seeking to challenge agency actions on MQD grounds, the Fifth Circuit appears to be the forum of choice. By the end of October, 2023, that court had decided twenty MQD cases, more than twice as many as the Eleventh Circuit, and had found a major question in more than half of those cases. Erin Webb, *Analysis: More Major Questions Doctrine Decisions Are Coming* (Bloomberg Law), Nov. 5, 2023, https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-more-major-questions-doctrine-decisions-are-coming [https://perma.cc/Y5LB-A5J3].

33. Biden v. Nebraska, 600 U.S. 477, 506 (2023) (holding that HEROES Act provided no "'clear congressional authorization' to justify [such a] program").

34. Loper Bright Enters., Inc. v. Raimondo, 45 F.4th 359, 364-65 (D.C. Cir. 2022), *vacated*, 144 S. Ct. 2244 (2024) (rejecting argument that rule presented a major question).

35. Building for the Future Through Electric Regional Transmission Planning and Cost Allocation, 89 Fed. Reg. 49565, 49574 (June 11, 2024) [hereinafter Order No. 1920].

36. *See* S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41, 48 (D.C. Cir. 2014).

several different circuit courts of appeal and consolidated for review in the Fourth Circuit.[37]

One of the strangest of the many post-*West Virginia v. EPA* citations to the doctrine appears in the Fourth Circuit's 2023 decision in *NCCFRG v. Capt. Gaston LLC*.[38] There, it agreed with the EPA that, contrary to the claim of the appellant, EPA (which was not a party to the case) had no authority—and had never claimed authority—under the Clean Water Act to prohibit commercial shrimpers from returning fish they had inadvertently snared in their nets (what the industry refers to as "bycatch") back into the ocean.[39] But it inexplicably went on to opine—at great length—that had EPA ruled otherwise, its interpretation would have run afoul of the MQD.[40]

On its face, the Sixth Circuit panel's stay, like the Fourth Circuit's dicta in *Captain Gaston*, is pretty remarkable.[41] It dismisses in only a few paragraphs the possibility that Congress contemplated "telecommunications services" might take place over broadband.[42] But the 1996 Act obligates "every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request."[43] And it defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities*

37. Madeline Lyskawa, *La., Miss. Utility Regulators Launch FERC Grid Policy Fight*, LAW360 (Jul. 15, 2024, 9:42 PM), https://www.law360.com/articles/1858295; *In re* MCP 190, Nos. 24-1650, (J.P.M.L. Aug. 8, 2024) (ordering consolidation of cases 24-1748, 24-1751, 24-1756 and 24-1650).

38. N.C. Coastal Fisheries Reform Grp. v. Captain Gaston, LLC, 76 F.4th 291, 296-304 (4th Cir. 2023).

39. *Id.* at 299 ("EPA has never sought the authority to regulate bycatch in the fifty years since the Clean Water Act was passed. Indeed, the EPA does not even seek it now.").

40. *Id.* at 295-304.

41. This author hopes that the panel's decision is an outlier and does not disprove Professor Richard Pierce's view that *Loper Bright*'s restriction on agency flip-flops "eliminates any justification for continued application of the powerful new version of the major questions doctrine that the Court created in 2021 and has now applied in four cases." Richard J. Pierce, Jr., *Two Neglected Effects of Loper Bright*, THE REGUL. REV. (Jul. 1, 2024), https://www.theregreview.org/2024/07/01/pierce-two-neglected-effects-of-loper-bright/ [https://perma.cc/TPW6-PYAX]. As Professor Pierce noted regarding the MQD, "[t]he Court has struggled to justify this radical new doctrine and has done a poor job of explaining it. The dangers created by the major questions doctrine become obvious when you look at the way that lower courts have applied it." *Id.* Justice Kavanaugh (who has endorsed the MQD), perhaps inadvertently, has pointed out how much havoc a broad reading of the MQD by lower courts might cause: "Justice Gorsuch," he noted, "would not allow … congressional delegations to agencies of authority to decide major policy questions—*even if Congress expressly and specifically delegates that authority*." Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (emphasis added). That view, if accepted by the lower courts, would amount to an endorsement of the non-delegation doctrine without the limiting, i.e., "intelligible principle" exception—that only Congress can legislate, so rulemaking on major questions, as a form of legislation, is unconstitutional. *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001).

42. *Stay Order*, *supra* note 15, at *6-7.

43. 47 U.S.C. § 201(a).

used."[44] From the very beginning, as the Ninth Circuit noted in *City of Portland*, the FCC was "regulat[ing] DSL service, a high-speed competitor to cable broadband, as an advanced telecommunications service subject to common carrier obligations."[45] Similarly, among the authorities the Act granted the FCC was the huge power to order incumbent owners of telephone networks to "unbundle" their individual components and make them available for sale or lease so that competing telecom providers *with no facilities of their own*, could assemble the components and compete.[46]

But letting the FCC decide what a telecom service is was too big for the agency to address? It makes little sense. Even under the Court's malleable test, it is not enough that a rule has "vast economic and political significance."[47] After all, nationwide rulemaking decisions by agencies regulating major industries will often have such significance. Rather, the rule must also be "extraordinary."[48] One of the few criteria the Court offered in *West Virginia v. EPA* that the EPA had gone too far was that it had relied on "vague language of an 'ancillary provision' of the Act [that] had rarely been used in the preceding decades."[49] By contrast, in declaring that DSL broadband was a "telecommunications service" in 1998, the FCC was relying on a *core* provision of a then only two-year old statute.

The FCC, of course, no longer gets the *Chevron* deference to determine the scope of its authority that the Supreme Court declared only a decade ago in *City of Arlington v. FCC*.[50] But whether its interpretation of its authority gets deference is far different from whether its view of what constitutes telecommunications service is a major question. Common sense ought to prevail here.

Under the Act, companies offering telecommunications services are common carriers "regardless of the facilities used." If the FCC hadn't been delegated the responsibility to ascertain who was a common carrier under the Act's definition, what purpose would the provision serve? Isn't identifying providers of telecommunications services the very type of question regulatory agencies regularly address and are expected to address?

In a case that predated *Chevron* by more than a decade, for example, the Supreme Court agreed with the Federal Power Commission that a transaction between two utilities located wholly within Florida nonetheless involved the interstate transmission of electricity and was thus subject to its jurisdiction.[51] A major question of "vast economic and political significance"? Well, overnight its impact was to bring virtually every transmission arrangement in the contiguous United States under the agency's oversight.[52] And the agency's direct authority? It came from the statute's until

44. 47 U.S.C. § 153(53) (emphasis added).
45. *City of Portland*, 216 F.3d at 879.
46. 47 U.S.C. § 251(c), (h).
47. *West Virginia v. EPA*, 597 U.S. at 716.
48. *Id.* at 723.
49. *Id.* at 724.
50. City of Arlington v. FCC, 569 U.S. 290, 307 (2013).
51, Fed. Power Comm'n v. Fla. Power & Light Co., 404 U.S. 453, 453 (1972).
52. Joel B. Eisen, *FERC's Expansive Authority to Transform the Electric Grid*, 49 U.C. DAVIS L. REV. 1783, 1789 n.21 (2016).

then lightly-used declaration that interstate transmission of electricity was subject to the Federal Power Act.

To be sure, the idea of invoking the MQD to block the FCC's latest net neutrality rule did not come out of nowhere. While still a circuit court judge, and before the Supreme Court ever used the term, then Judge Kavanaugh would have invalidated the FCC's 2015 net neutrality rule under what he termed the "major rules doctrine" (the Supreme Court would not label it the major questions doctrine for a few more years). In dissenting from the D.C. Circuit's denial of rehearing *en banc*, Kavanaugh argued that the question of what constitutes a telecommunications service was so big—and Congress's intent so ambiguous—that the FCC had no authority to adopt a rule on what constitutes a telecommunications service at all.[53]

This drew a rare response from Judge Kavanaugh's fellow judges Srinivasan and Tatel. How could the net neutrality rule trigger a major rule doctrine, they asked. After all, "we know Congress vested the agency with authority to impose obligations like the ones instituted by the Order because the Supreme Court has specifically told us so [in *Brand X*]." [54] The late Justice Scalia had made the same point a few years earlier, speaking for the Court in *City of Arlington v. FCC*.[55] Citing *Brand X*, he explained that a regulatory agency deciding who is a common carrier was the type of question that would be evaluated under *Chevron*.[56]

Lost in the headlines over the Sixth Circuit's stay decision is the fact that its ruling followed a request for supplemental briefing, *not on the major questions doctrine*, but on the application of *stare decisis* to *Brand X* following the Supreme Court's *Loper Bright* decision. The FCC's supplemental brief, unsurprisingly, made no mention of the MQD.[57] And the

53. U.S. Telecomm. Ass'n v. FCC, 855 F.3d 381, 419-21 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc) ("If a statute only ambiguously supplies authority for the major rule, the rule is unlawful . . . If an agency wants to exercise expansive regulatory authority over some major social or economic activity—regulating cigarettes, banning physician-assisted suicide, eliminating telecommunications rate-filing requirements, or regulating greenhouse gas emitters, for example—an ambiguous grant of statutory authority is not enough. Congress must clearly authorize an agency to take such a major regulatory action.").

54. *Id.* at 383-84 (Srinivasan, J., concurring in denial of reh'g en banc).

55. City of Arlington v. FCC, 569 U.S. 290, 297-301 (2013).

56. *Id.*

57. Brief for Respondent, In re MCP No. 185, No. 24-7000, 2024 U.S. App. LEXIS 19815 (6th Cir. Aug. 1, 2024), https://www.law360.com/articles/1860621/attachments/1, https://docs.fcc.gov/public/attachments/DOC-404244A1.txt [https://perma.cc/DS2P-23ZT] [hereinafter FCC Supplemental Brief] (opposing motion to stay).

broadband petitioners only made a brief mention of the MQD in the last paragraph of their nineteen-page brief.[58]

By invoking the MQD, the Sixth Circuit panel greatly overreached in its reading of *Loper Bright*. In overturning *Chevron*, *Loper Bright* clearly precluded the FCC from relying on *Chevron* to support *revisions* to its interpretation of "telecommunications services." But the Court also added that where agencies adhere to prior interpretations affirmed under *Chevron*, those prior interpretations would enjoy *stare decisis* status.[59] While the FCC has changed its interpretation of "telecommunications service," it has consistently maintained that it had the authority to determine whether broadband was a telecommunications service.

So how should courts honor *stare decisis* after *Loper Bright* where an agency has previously won *Chevron* deference from a reviewing court on two issues but clings to one aspect of its prior interpretation while reversing another? The short, but logical answer is that the agency is entitled to *stare decisis* protection for its unchanged interpretation, but no judicial deference to its changed interpretation. As Judges Srinivasan and Tatel observed, in *Brand X* "the Court made clear in its decision—over and over—that the Act left the matter to the agency's discretion. In other words, the FCC could elect to treat broadband ISPs as common carriers (as it had done with DSL providers), but the agency did not have to do so."[60]

In opposing the stay of its May 2024 net neutrality rule, the FCC made essentially that very argument. The one aspect of *Brand X* (and all the subsequent rules on net neutrality) that remained unchanged and thus entitled to *stare decisis* status under *Loper Bright*, it explained, was the Supreme Court's affirmance of the FCC's authority to determine who was a common carrier.[61]

In granting the stay, the per curiam panel never directly addresses that argument. While acknowledging that the FCC had invoked *stare decisis*, it erroneously characterizes the FCC's position, not as an interpretation of *Loper*, but as claiming that "*Brand X*'s silence about the major questions doctrine implies that it does not matter to today's dispute."[62] It then gives *that*

58. Supplemental Brief for Petitioner, In re MCP No. 185, No. 24-7000, 2024 U.S. App. LEXIS 19815 at *13 (6th Cir. Aug. 1, 2024) (filed July 19, 2024), https://www.law360.com/articles/1860621/attachments/0. The petitioners take the interesting position *both* that (1) the FCC's decision in *Brand X* to label broadband as an unregulated "information service" gets "vertical *stare decisis* effect" that not only deprives the agency's revised interpretation of *Chevron* deference, but bars courts from even entertaining "the Commission's new, contrary" interpretation, and (2) that the whole issue presents a major question. *Id.* at *8, 17. The petitioners do not explain how the FCC's since-disavowed interpretation of "telecommunications service" is binding on the courts *and* that the FCC has no "clear congressional authorization to exercise that kind of power." *Id.* at *8.

59. *Loper Bright*, 144 S. Ct. at 2273.

60. *U.S. Telecomm. Ass'n*, 855 F.3d at 384.

61. Supplemental Brief for Petitioner, *supra* note 58, at 1. "*Brand X* remains binding on this Court under established principles of *stare decisis* as to all issues the Supreme Court decided in that case. [Thus] *Brand X*'s holding that the Communications Act gives the FCC authority to classify and regulate broadband service [thus] forecloses petitioners' arguments that the major-questions doctrine deprives the agency of that authority." *Id.*

62. Stay Order, *supra* note 15, at *8.

argument short, and unilluminating, shrift. "[S]ilence," it says, is just that."[63] But as the courts have noted, a stay or preliminary injunction finding the movant's likelihood of success on the merits is not a decision on the merits.[64] And the Stay Order makes clear that the merits of the petitioners' claims are to be considered by "a randomly drawn merits panel."[65] With that in mind, and this author's expectation that with a more fully considered analysis of the issue by a merits panel, that panel may well reject the MQD label given the FCC's interpretation by the stay panel, this article addresses why *City of Portland* got it right and why that should matter in a post-*Loper Bright* world.

III. THE CABLE MODEM RULE—THE ORIGINAL ABOUT FACE

The Telecommunications Act of 1996 provides that, "regardless of the facilities used," companies offering a "telecommunications service" to the public are common carriers, obligated to offer their services on a non-discriminatory basis.[66] Applying that standard, by 1998 the FCC had required telephone companies offering digital subscriber line ("DSL") services—what was then considered a "high speed" broadband telecommunications service—to make their services available to independent internet service providers ("ISPs") otherwise dependent on slow telephone line "dial up" connections.[67] But a few years later, in what came to be known as the *Cable Modem Rule*,[68] the FCC declared that broadband services offered by cable companies (but

63. *Id.*

64. *See, e.g.*, Cook Cnty. v. Wolf, 962 F.3d 208, 234 (7th Cir. 2020) ("There would be no point in the merits stage if an issuance of a stay must be understood as a sub silentio disposition of the underlying dispute."). *See also* ACA Connects v. Bonta, 24 F.4th 1233, 1249 (9th Cir. 2022) (Wallace, J., concurring) ("[A] disposition of a preliminary injunction appeal is not an adjudication on the merits and . . . the parties should not 'read too much into' such holdings.") (internal citation omitted); Ctr. for Biological Diversity v. Salazar, 706 F.3d 1085, 1090 (9th Cir. 2013) ("We have repeatedly emphasized the preliminary nature of preliminary injunction appeals.").

65. Stay Order, *supra* note 15, at *9. After granting the stay, the panel established a very ambitious schedule, with petitioners' merits briefs to be filed a mere 10 days after its ruling and oral argument to take place between October 28th and November 1. *Id.*

66. 47 U.S.C. § 153(51), (53).

67. Deployment of Wireline Servs. Offering Advanced Telecomm. Capability, *Memorandum Opinion and Order*, 13 FCC Rcd. 24011, paras. 34-35 (1998). In granting a stay of the FCC's latest net neutrality rule, the Sixth Circuit inexplicably overlooked this ruling, erroneously stating that "[a]fter passage of the 1996 Act, the Commission for many years took the view that broadband internet access services were information services, not telecommunication services." Stay Order, *supra* note 15, at *3.

68. Cable Modem Rule, *supra* note 6.

not telephone companies) would be considered "information services" exempt under that same Act from FCC regulation.[69]

Although the FCC had previously conditioned the merger of Time Warner Cable with AOL on the merged entity's obligation to offer broadband access to competing independent ISPs,[70] and had similarly acknowledged in its *Cable Modem Rule* that cable companies "can lease their transmission facilities to independent ISPs that then use the facilities to provide consumers with Internet access,"[71] the FCC nonetheless reasoned that the cable companies' offerings of their cable broadband facilities bundled with their own Internet services were so tightly integrated that the whole bundled package should be considered an unregulated information service.[72]

This was understandably wonderful news for the cable companies, which, to that point, had been refusing to offer broadband access to independent ISPs anyway, forcing the latter to rely on increasingly uncompetitive dial up.[73] But it was terrible news for independent ISPs, including a small Los Angeles-based internet service provider I represented called Brand X. Still, we had what we believed was an ace up our sleeve.

Only a few years earlier, the Ninth Circuit had ruled in *AT&T v. City of Portland*[74]—a private cause of action in which, as noted earlier, *Chevron* was inapplicable[75]—that broadband service provided by cable companies *was* a "telecommunications service."[76] On appeal of the FCC's rule, Brand X argued

69. *Id.* at paras. 7, 34, 59, 60, 68. The Act defines "information services" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(24) (1996). Today, we think of information services as not only access to websites, but services from what the FCC calls "edge providers"—streaming video (think Netflix, Hulu, AppleTV+, etc) content providers and "those who, like Amazon or Google, provide content, services, and applications over the Internet." Verizon v. FCC, 740 F.3d 623, 629 (D.C. Cir. 2014).

70. Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 6547, paras. 93-100 (2001) (barring discrimination against unaffiliated ISPs, including content, first screens, and service standards); *see also* Harvey Reiter, *The Contrasting Policies of the FCC and FERC Regarding the Importance of Open Transmission Networks in Downstream Competitive Markets*, 57 FED. COMM. L.J. 246, 271-72 n.157 (2005), https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1405&context=fclj [https://perma.cc/N5K2-E3PQ] [hereinafter *Contrasting Policies*].

71. *Brand X*, 545 U.S. at 975 (citing Cable Modem Rule, *supra* note 6, at para. 6).

72. Cable Modem Rule, *supra* note 6, at para. 39 (finding that the "telecommunications component" of cable modem service was "not . . . separable from the data-processing capabilities of the service," but instead constituted one integrated information service).

73. *Contrasting Policies*, *supra* note 70 at 275.

74. *City of Portland*, 216 F.3d. at 880.

75. *Id.* at 876.

76. *Id.* at 878 ("Like other ISPs, @Home consists of two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet. To the extent @Home is a conventional ISP, its activities are that of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.").

to the Ninth Circuit that *Chevron* was wholly inapplicable because its earlier decision in *City of Portland* trumped the FCC's contrary interpretation.[77]

The panel agreed. Citing the Supreme Court's decision in *Neal v. United States*,[78] it held that where a court has previously decided the meaning of a statutory term, its ruling would override any subsequent and contrary ruling by the administrative agency.[79] And, because the panel was bound by the circuit's prior ruling in *City of Portland*, it ruled that the FCC, too, was bound by that earlier interpretation.[80] Brand X's success in invoking *City of Portland*, however, was unfortunately short-lived. Following denial of its en banc hearing request, the FCC sought and was granted certiorari by the Supreme Court. And, in the rarest of alignments, a 6-3 majority led by Justice Thomas rejected the strongly-worded dissent of Justice Scalia, holding that *Chevron* did apply, and that the FCC's interpretation that cable broadband was an unregulated "information service" was reasonable.[81]

Here again is the punchline, the details of which this article will shortly discuss more deeply: While the Supreme Court's decision in *Brand X* rendered *City of Portland* irrelevant for two decades, post-*Loper*, it is irrelevant no longer. Even without *Chevron*, the current FCC—whose position is now aligned with *City of Portland*—is not left simply to argue that the Court should buy its latest interpretation as the best reading of the statute. It has a well-reasoned, common sense-based and directly applicable judicial decision that was reached without *Chevron* deference. While judicial review of the FCC's latest decision will not take place in the Ninth Circuit, that decision should carry significant weight with other circuits. And so too should the dissenters' view in *Brand X* that, even under *Chevron*, the FCC's interpretation was unreasonable.

IV. WHAT *BRAND X* SAID AND DIDN'T SAY

To reach its decision to affirm the FCC's *Cable Modem Rule* under *Chevron*, the Court had to mount two hurdles. First, it had to square its decision in *Neal* with its conclusion that an agency's statutory interpretation

77. It bears mentioning the agency's acknowledgement in the Cable Modem Rule itself that its decision was at odds with *City of Portland*. But it dismissed the case's relevance on grounds that it had been decided "without the benefit of briefing by . . . the Commission." Cable Modem Rule, *supra* note 6, at paras 57-58. This was a remarkable display of regulatory chutzpah. After all, the agency had participated as amicus in the *City of Portland* proceeding, but then "declined, both in its regulatory capacity and as amicus curiae, to address the issue . . . " *City of Portland*, 216 F.3d at 876. That, in fact, was why the *City of Portland* court held *Chevron* inapplicable. *See id.*

78. Neal v. U.S., 516 U.S. 284, 295 (1996) ("Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of stare decisis, and we assess an agency's later interpretation of the statute against that settled law.").

79. Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1131-32 (9th Cir. 2003), *rev'd*, 545 U.S. 967 (2005).

80. *Id.* at 1130-32.

81. *Brand X*, 545 U.S. at 980, 997.

could trump an earlier judicial one. Second, because the FCC's decision involved a change in policy, the Court still had to find that the agency had acknowledged and explained its changed position.[82]

As to the first point, in a conclusion he would years later describe as a mistake,[83] Justice Thomas interpreted *Neal* to mean that a prior judicial interpretation would take precedence over a later agency one only if a court had previously found the statute to be unambiguous.[84] The Ninth Circuit, it bears noting, had never said that the statute was ambiguous.[85] *Brand X*'s interpretation of *Neal* also begged the question: if a court was not reviewing an agency's interpretation—the case in *City of Portland*—why would it need to declare whether or not a statute was unambiguous? Justice Scalia said as much in his dissent:

> The Court's unanimous holding in *Neal v. United States*, 516 U. S. 284 (1996), plainly rejected the notion that any form of deference could cause the Court to revisit a prior statutory-construction holding: "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of stare decisis, and we assess an agency's later interpretation of the statute against that settled law." The Court attempts to reinterpret this plain language by dissecting the cases *Neal* cited, noting that they referred to previous determinations of "'a statute's clear meaning.'" But those cases reveal that today's focus on the term "clear" is revisionist. The oldest case in the chain using that word, *Maislin Industries*, did not rely on a prior decision that held the statute to be clear, but on a run-of-the-mill statutory interpretation contained in a 1908 decision. When *Maislin Industries* referred to the Court's prior determination of "a statute's clear meaning," it was referring to the fact that the prior decision had made the statute clear, and was not conducting a retrospective inquiry into whether the prior decision had declared the statute itself to be clear on its own terms.[86]

As to the agency's departure from its treatment of DSL broadband as a telecommunications service, the majority found reasonable the FCC's

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82. *Id.* at 981-82.

83. Baldwin v. United States, 140 S. Ct. 690, 690-91 (2020) ("Although I authored Brand X, 'it is never too late to surrende[r] former views to a better considered position.'"). *Baldwin* involved a taxpayer's challenge to an agency's interpretation of a statutory refund deadline that the Ninth Circuit had upheld under *Chevron* even though it was at odds with that Court's contrary interpretation made years earlier. *Id.* In dissenting from the Court's decision denying certiorari, and presaging *Loper Bright Enterprises*, Thomas argued, *inter alia*, that deferring to an agency's interpretation violated the APA. *Id.* at 692.

84. *Brand X*, 545 U.S. at 982 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

85. *Brand X v. FCC*, 345 F.3d at 1131, *rev'd* 545 U.S. 967 (2005) ("[W]hile we never explicitly stated in *Portland* that our interpretation of the Act was the only one possible, we never said the relevant provisions of the Act were ambiguous.").

86. *Brand* X, 545 U.S. at 1016 n.11 (Scalia, J., dissenting) (citations omitted).

conclusion "that changed market conditions warrant different treatment of facilities-based cable companies providing Internet access," and that "there was nothing arbitrary about the Commission's providing a fresh analysis of the problem as applied to the cable industry, which it has never subjected to these rules."[87] Ironically, it was the Court's ruling in *Brand X* that the agency then used only months later to strip independent ISPs of their access to DSL.[88]

None of the foregoing convinced the three dissenting Justices.

So, to put *Brand X* in perspective: No justice in the majority indicated a belief that the FCC was right on the merits. The opinion's author, Justice Thomas, has since disavowed his own opinion. Concurring Justice Breyer had found the FCC's position reasonable, but "just barely."[89] And Justice Scalia, joined by Justices Ginsburg and Souter, had concluded that even under *Chevron* step II, the FCC's interpretation was unreasonable.[90] "Indeed, the Court majority went as far as to affirmatively 'leave[] untouched' the court of appeals's [sic] belief that the better reading of the statute—albeit not the one that had been adopted by the agency—called for treating broadband providers as telecommunications carriers."[91]

V. THE POST-*BRAND X* CASES THAT MAY HAVE BEEN THE TIPPING POINT LEADING TO *LOPER BRIGHT*

This article noted at the outset that an apparent impetus behind the Court's decision to end *Chevron* deference was the instability it had created, amplified by the FCC's oscillating between declaring broadband an unregulated "information service" and a regulated "telecommunications service." But why has the debate gone on for so long? After all, the independent ISPs who were the main opposition to the FCC's *Cable Modem Rule* have all but disappeared. The reasons seem to be twofold.

First, for reasons that escaped me twenty years ago[92] and that escape me still, the concept of open access to network transmission/transportation facilities as a means to facilitate competition has long been a bipartisan policy embraced by FERC commissioners and members of Congress of both major parties—a policy that has transformed the natural gas pipeline and electric

87. *Id.* at 1001-1002.

88. *See* 2005 Wireline Broadband Order, *supra* note 6, at n.2. Not surprisingly, the thousands of independent ISPs that had existing before *Brand X* have now all but vanished.

89. *Brand X*, 545 U.S. at 1003 (Breyer, J., concurring).

90. *See U.S. Telecomm. Ass'n*, 855 F.3d at 385 (D.C. Cir. 2017) (Srinivasan J., concurring in denial of reh'g en banc) ("All nine Justices [in *Brand X*] recognized the agency's statutory authority to institute 'common-carrier regulation of all ISPs,' with some Justices even concluding that the Act left the agency with no other choice.").

91. *Id.* at 384 (Srinivasan, J., concurring) (quoting *Brand X*, 545 U.S. at 985-86).

92. *Contrasting Policies*, *supra* note 70.

utility industries.[93] But open access to the broadband facilities owned by the nation's cable systems has been an intensely, if irrationally partisan issue. This is evident from the purely partisan divide among the FCC commissioners on this issue for now a quarter century. That is, each of the agency's interpretation reversals have been adopted in straight party-line votes.[94]

Second, following on the heels of the demise of competition from independent ISPs to those operated by cable companies,[95] broadband proved to be a godsend for "edge providers" now able to stream high quality video, exchange mountains of data and offer gaming services online.[96] The cable companies' control over broadband, however, gave them the economic power—which edge providers feared the cable operators would use—to favor their own content, to throttle the speeds with which customers could access certain websites or online apps, to extract extra fees to prioritize access, or to block some competing edge services altogether.[97] As the D.C. Circuit explained in upholding the FCC's 2015 Open Internet Order[98]:

93. *See, e.g.*, Philip M. Marston, *Pipeline Restructuring: The Future of Open-Access Transportation*, 12 ENERGY L.J. 53 (1991); Christopher Flavin, Nicholas Lenssen, *Reshaping the Electric Power Industry*, 22 ENERGY POL'Y 1029 (1994), https://www.sciencedirect.com/science/article/abs/pii/0301421594900175 [https://perma.cc/HCB3-97FA].

94. *See, e.g.*, Barbara Ortutay & Tali Arbel, *FCC votes along party lines to end 'net neutrality,'* AP (Dec. 14, 2017), https://apnews.com/article/e1eabbdf1525477dbaacf1a482b57ed4 [https://perma.cc/HF9N-E6T5]; Julia Shapero, *FCC votes to Restore Net Neutrality Rules*, THE HILL (April 25, 2024), https://thehill.com/policy/technology/4620907-fcc-votes-to-restore-net-neutrality-rules/ [https://perma.cc/KVR2-K2UF] ("agency voted 3-2 along partisan lines"); Christopher W. Savage et al., *Landmark Open Internet Order Released by FCC*, DAVIS WRIGHT TREMAINE LLP (Aug. 2015), https://www.dwt.com/blogs/media-law-monitor/2015/06/landmark-open-internet-order-released-by-fcc [https://perma.cc/H8MT-6U5L**]** (noting issuance "on a 3-2 party line vote"); *What's Not To Like About Open Internet Rules?*, BENTON INSTITUTE FOR BROADBAND AND SOCIETY (Mar. 1, 2015), https://www.benton.org/blog/whats-not-about-open-internet-rules [https://perma.cc/LES3-5P6W] (noting "[The Cable Modem Rule] was not a bipartisan decision. Commissioner Michael Copps, then the only Democrat on the Commission, dissented.").

95. Telecom providers also offer fiber-based broadband. But their presence is largely confined to a handful of densely populated metropolitan centers and the largest—FIOS—has added no new territories for almost fifteen years. Peter Svensson, *Verizon winds down expensive Fios expansion*, USA TODAY (Mar. 26, 2010), https://web.archive.org/web/20120111040823/https://www.usatoday.com/money/industries/telecom/2010-03-26-verizon-fios_N.htm/ [https://perma.cc/R8BK-ZW56].

96. *See, e.g.*, Lisa Iscrupe & Hannah Whatley, *Best Internet speeds for streaming without buffering*, USA TODAY (May 3, 2024), https://www.usatoday.com/tech/internet/what-internet-speed-do-you-need-for-streaming/ [https://perma.cc/3FMN-L3VL].

97. *U.S. Telecomm.*, 825 F.3d at 694.

98. *Id.*

> "[B]roadband providers represent[ed] a threat to Internet openness and could act in ways that would ultimately inhibit the speed and extent of future broadband deployment." For example, the [FCC] noted that "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 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." Importantly, moreover, the [FCC] found that "broadband providers have the technical . . . ability to impose such restrictions," noting that there was "little dispute that broadband providers have the technological ability to distinguish between and discriminate against certain types of Internet traffic." The [FCC] also "convincingly detailed how broadband providers' [gatekeeper] position in the market gives them the economic power to restrict edge-provider traffic and charge for the services they furnish edge providers." Although the providers' gatekeeper position would have brought them little benefit if end users could have easily switched providers, "we [saw] no basis for questioning the [FCC]'s conclusion that end users [were] unlikely to react in this fashion." The [FCC] "detailed . . . thoroughly . . . the costs of switching," and found that "many end users may have no option to switch, or at least face very limited options."[99]

But prohibition of throttling, paid prioritization, and blocking, the Court had previously held, was beyond the agency's powers so long as it continued to classify broadband as an unregulated information service.[100] With the demise of the independent ISPs after *Brand X* and the limits placed on the FCC's authority to address these acknowledged concerns as long as broadband providers remained unregulated information service providers, these concerns had remained largely unaddressed. "Edge providers" thus offered a new reason for the FCC in 2015 to adopt a telecommunications service definition that would ensure open access to broadband facilities, renamed a push for "net neutrality." And it is those same concerns that undergirded the FCC's 2024 decision to reassert its authority over broadband as a telecommunications service.

99. *Id.* at 694 (citations omitted).

100. *Id.* at 689, citing *Verizon*, 740 F.3d 623 (D.C. Cir. 2014). *See also U.S. Telecomm.*, 825 F.3d at 707.

VI. THE SIMPLE LOGIC OF *CITY OF PORTLAND* AND JUSTICE SCALIA'S DISSENT IN *BRAND X*

Having received no input from the FCC on the specific issue of broadband over cable (as opposed to FCC-regulated DSL broadband), the court in *City of Portland* did what *Loper Bright* says the courts would do *pre-Chevron*.

First, it gave respect to the agency's interpretation "issued roughly contemporaneously with the enactment of the statute."[101] The court noted that shortly after its enactment, the FCC interpreted telecommunications services to include "DSL service, a high speed competitor to cable broadband, as an advanced telecommunications service subject to common carrier obligations."[102]

Second, it looked at how the term fit within the overall statutory scheme of the Act, i.e., it began by "reviewing text in context."[103] "[T]he definition of cable broadband as a telecommunications service," it reasoned, "coheres with the overall structure of the Communications Act as amended by the Telecommunications Act of 1996, and the FCC's existing regulatory regime."[104] That structure, it pointed out, included "broad reforms" that were "embodied by the dual duties of nondiscrimination and interconnection," and noted that "[e]lsewhere, the Communications Act contemplates the provision of telecommunications services by cable operators over cable systems."[105]

Finally, like any court, it applied common sense to its interpretation.[106] It noted that cable companies, like telephone companies offering DSL to competing ISPs, were offering two distinct services:

101. *Loper Bright*, 144 S. Ct. at 2257.

102. *City of Portland*, 216 F.3d at 879.

103. *Loper Bright*, 144 S. Ct. at 2262 n.4.

104. *City of Portland*, 216 F.3d at 879.

105. *Id.* On this point, the Court noted that the Act expressly contemplated that cable companies might offer telecommunications services and that they would need no franchise authority to do so. *Id.* (citing 47 U.S.C.§ 541(b)(3)(A)).

106. United States v. Castleman, 572 U.S. 157, 183 (2014).

> Like other ISPs, @Home consists of two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet. To the extent @Home is a conventional ISP, its activities are that of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.[107]

The dissenting Justices in *Brand X* doubled down on this point. Not only were information services and telecommunications services distinct, but adopting the FCC's position would give the cable companies the unilateral power to skirt regulation:

> The merger of the physical connection and Internet functions in cable's offerings has nothing to do with the "inextricably intertwined" . . . nature of the two . . . , but *is an artificial product of the cable company's marketing decision not to offer the two separately, so that the [FCC] could . . . exempt it from common-carrier status*.[108]

This reasoning tracked closely the reasoning of two court decisions under the analogous structure of the Natural Gas Act ("NGA"). Just as the Telecommunications Act regulates providers of telecommunications services, the NGA similarly regulates natural gas pipelines providing interstate transportation services. And just as the Telecommunications Act leaves "information services" unregulated, so too does the NGA exempt direct sales of natural gas to consumers from agency rate regulation.[109] The notion that a regulated provider of transportation services can avoid the reach of federal regulation by the artifice of bundling that service with an unregulated service

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107. *Id.* This is not to say that two or more distinct elements cannot be combined into a single product. No one would argue sensibly that a baker selling a cake is really selling eggs, flour, sugar and water or that "a car dealer is in the business of selling steel or carpets because the cars he sells include both steel frames and carpeting." *Brand X*, 545 U.S. at 1007 (Scalia, J., dissenting). But in other instances the seller may instead be combining two distinct products or services in order to force the unwilling purchase of one of them, as in an unlawful tying agreement under the antitrust laws. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605 (1953). In such cases the question of whether the combined elements are one product or two is ascertained "*from the buyer's perspective.*" Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 20 (1984) (emphasis added). On this score, as *City of Portland* and the dissent in *Brand X* observed, both independent ISPs and the cable companies were seen as offering internet access, but the cable companies uniquely offered service over a separate high speed transmission pipe as a means of access. *City of Portland*, 216 F.3d at 874; *Brand X*, 545 U.S. at 1008 (Scalia, J., dissenting).

108. *Brand X*, 545 U.S. at 1009-10 n.4 (Scalia, J., dissenting) (emphasis added).

109. 15 U.S.C. § 717(b).

—in the NGA context by offering a bundled direct sale of natural gas using the pipeline's facilities to transport the gas—was first rejected by the Supreme Court in *Federal Power Commission v. Louisiana Power & Light Company*.[110]

And some years later when another pipeline tried to advance a similar argument, the D.C. Circuit rejected the attempt in language offering the same warning about manipulation that concerned the dissenters in *Brand X*. "FERC," it stated, "is not barred from regulating a pipeline's interstate transportation of natural gas merely because the sale of gas being transported is not itself subject to federal regulation. FERC's authority over such transactions is beyond dispute."[111] Any other rule, the court observed, would invite manipulation by the utility, which could avoid regulation by offering bundled pricing of the same services:

> As far as the statute is concerned, there would have been no doubt of FERC's Section l(b) authority if MRT, instead of charging a bundled price, had charged separately for transporting the gas and for the gas itself. *To accept MRT's position would therefore be tantamount to conferring on private parties the power whether FERC could set the rate for interstate transportation. Private parties would have this power because it would be entirely up to them whether to structure a direct sale and interstate-transportation transaction in terms of a bundled price or separate charges*.[112]

110. Fed. Power Comm'n v. La. Power & Light Co., 406 U.S. 621 (1972). There, the pipeline and its customer, an electric utility, argued that because direct sales of natural gas were not subject to Federal Power Commission regulation the agency had no power to limit the pipeline's transportation of the gas (the agency had asserted authority to curtail gas deliveries for electric generation to ensure that sufficient natural gas, which was in short supply, would be available for higher priority uses, like hospitals, schools and homes). *Id.* The Supreme Court disagreed. *Id.* It had no authority to regulate the rates charged for direct sales of natural gas, but retained the separate authority to regulate the interstate transportation of that gas. *Id.* at 640-42.

111. Mississippi River Transmission Corp. v. FERC, 969 F.2d 1215, 1217-18 (D.C. Cir. 1992). There, the FERC exercised authority over the transportation component of a bundled contract for the direct sale of natural gas, but not over the natural gas component of the bundled rate. *Id.* The pipeline argued that the bundled contract comprised a single service for the direct sale of natural gas and thus pricing for the entire transaction was outside FERC's jurisdiction entirely. *Id.*

112. *Id.* at 1218 (emphasis added). The court technically affirmed FERC's decision on *Chevron* grounds. *Id.* at 1219-20 ("We need not go so far as to say that FERC's reading of section 1(b) is compelled."). It left little room to conclude that any other interpretation could be justified, noting that FERC had "adopted a straightforward reading of section 1(b) amply supported by forty years of Supreme Court decisions," and that it doubted whether the pipeline's alternative reading was even "plausible." *Id.* at 1219.

VII. *LOPER-BRIGHT* DOES NOT EVISCERATE, BUT PRESERVES DELEGATED AGENCY DISCRETION, PARTICULARLY AS TO REMEDIES

More than three quarters of a century ago, the Supreme Court spoke about the "expansive powers" Congress had granted to the FCC under the 1934 Communications Act. "Congress," it observed, "was acting in a field of regulation which was both new and dynamic."[113] The Court acknowledged that the Act did "not explicitly say that the [FCC] shall have power to deal with network practices found inimical to the public interest."[114] But "[i]n the context of the developing problems to which it was directed, the Act gave the [FCC] . . . expansive powers."[115] "[T]his kind of flexibility and adaptability to changing needs and patterns of transportation,"—it similarly emphasized a quarter century later in affirming an Interstate Commerce Commission rule in *American Trucking Ass'ns v. Atchison, Topeka & Santa Fe Railway Co*.—"is an essential part of the office of a regulatory agency."[116] "Regulatory agencies," it famously said, "do not establish rules of conduct to last forever; they are supposed to, within the limits of the law and of fair and prudent administration, adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday."[117]

In overruling *Chevron*, *Loper Bright* makes clear that it does not seek to cabin in this legislatively-granted flexibility:

113. Nat'l Broad. Co. v. United States, 319 U.S. 190, 218-19 (1943).
114. *Id.*
115. *Id.* at 219.
116. Am. Trucking Ass'ns v. Atchison, Topeka & Santa Fe Ry. Co., 387 U.S. 397, 416 (1967).
117. *Id.*

> In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes "expressly delegate[]" to an agency the authority to give meaning to a particular statutory term. Others empower an agency to prescribe rules to "fill up the details" of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," *such as "appropriate" or "reasonable."*
>
> When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, "fix[ing] the boundaries of [the] delegated authority, and ensuring the agency has engaged in 'reasoned decision making'" within those boundaries. By doing so, a court upholds the traditional conception of the judicial function that the APA adopts.[118]

It is hard to imagine that in passing the sweeping Telecommunications Act of 1996, Congress sought to narrow the FCC's ability to deal with developing technologies Congress had given to it ninety years ago, much less that it thought the classification of broadband was too big a question for the agency to tackle.

Nor would there logically be reason to challenge the scope of the remedies (bans on throttling, paid prioritization, blocking) the FCC has sought to ensure that broadband provides do not discriminate. Section 4(i) of the Communications Act of 1934 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."[119] This is the very type of term found in regulatory statutes that denotes Congress's intention to delegate "flexibility to the agency." Indeed, "[i]t is well understood that "[a]gency discretion is often at its 'zenith' when the challenged action relates to the fashioning of remedies."[120] Perhaps the clearest manifestation of congressional intent to give the FCC the authority to determine who is providing a telecommunications service comes from the immense forbearance authority it extended to the agency under the 1996 Act. Section 160 of the Act[121] requires the FCC to forbear from applying to "telecommunications carriers or telecommunications services" any provision of the Act or FCC regulation it determines (1) "is not necessary" to ensure that telecommunications services remain "just and reasonable and not unjustly or unreasonably discriminatory," (2) "not necessary for the

118. *Loper Bright*, 144 S. Ct. at 2263.
119. 47 U.S.C. § 154(i).
120. NTCH, Inc. v. FCC, 841 F.3d 497, 508 (D.C. Cir. 2016).
121. 47 U.S.C. § 160.

protection of consumers" and (3) "is consistent with the public interest."[122] In directing the FCC to consider whether forbearance would "enhance competition among providers of telecommunications services[,]"[123] Congress could not have been unaware of the development of high speed telecommunications.[124] What would be the purpose of forbearance if it would not apply to all types of potential telecommunications services?

I cannot close this article without mentioning the somewhat contradictory arguments of the net neutrality rule's opponents on this point.

Two think tanks have argued that the agency's degree of forbearance was so extensive that it proved the FCC had no authority to regulate broadband in the first place: "If broadband were clearly a Title II service," they argued, "the FCC would not need (as it does) to abuse its forbearance power, ignoring so many core Title II requirements to practically write a new statute."[125] The notion that too much forbearance denotes lack of any authority is an odd one. The 1996 Act gives the FCC authority to forbear from regulating *entirely* if the public interest so requires.

Petitioners, by contrast, have objected that even with its forbearance provisions, the rule still exposes them to heavy-handed "public utility-style regulation" not intended by Congress.[126] But the key feature of utility regulation—agency control over pricing to ensure "just and reasonable rates"[127] – is missing from the Rule.

Thus, if anything, the remedies are too small—the FCC chose (as it did in its 2015 net neutrality order) to forebear from regulating the rates charged

122. 47 U.S.C. § 160(a)(1)-(3).

123. 47 U.S.C. § 160(b).

124. Cable residential broadband was first offered to consumers in 1996, the year the Telecommunications Act became law. *See Cable's Story*, Nat'l Cable & Telecomms. Ass'n, https://www.ncta.com/cables-story [https://perma.cc/5AAB-SCP2] (last visited Nov. 17, 2024).

125. Brief for TechFreedom and Washington Legal Foundation as Amici Curiae Supporting Petitioner at 25, In re MCP No. 185, No. 24-7000, 2024 U.S. App. LEXIS 19815 (6th Cir. Aug. 1, 2024) (filed Aug. 15, 2024).

126. Brief for Petitioner at 10, 25, In re MCP No. 185, No. 24-7000, 2024 U.S. App. LEXIS 19815 (6th Cir. Aug. 1, 2024) (filed Aug. 12, 2024).

127. Farmers Union Cent. Exch., Inc. v. FERC, 734 F.2d 1486, 1508 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1034 (1984) ("It is of course elementary that market failure and the control of monopoly power are central rationales for the imposition of rate regulation." (citing S. BREYER, REGULATION AND ITS REFORM 1, 5-16 (1982)).

by broadband providers.[128] So, broadband providers might well be acting in a non-discriminatory fashion—by charging *all* users exorbitant rates.[129]

VIII. CONCLUSION

Both *Loper Bright* and the MQD reflect sea changes in administrative law jurisprudence. But the intensely political nature of the net neutrality debate should not distract reviewing courts from either (1) the stare decisis import of *Brand X* in confirming that the FCC has jurisdiction to determine whether cable broadband is a telecommunications service or (2) the fact that the well-reasoned *City of Portland* and the equally persuasive rationale of the dissent in *Brand X* provide ample grounds to conclude that the best reading of the Telecommunications Act is that cable broadband is a telecommunications service the FCC has the authority to regulate. Alexander's very bad day turned out okay. Here's hoping the FCC's does as well.

128. *Safeguarding and Securing the Open Internet*, 89 Fed. Reg. 45404, 45459, 45484 (May 22, 2024).

129. *See, e.g.*, Lee L. Selwyn & Helen E. Golding, *Revisiting the Regulatory Status of Broadband Internet Access: A Policy Framework for Net Neutrality and an Open Competitive Internet*, 63 FED. COM. L.J. 91, 136, 138 (2010) ((1) pointing out the FCC's inconsistency in determining that a retail access duopoly is "ineffective in disciplining rates, terms and conditions" for conventional wireline services, but sanctioning the absence of price regulation for broadband and (2) urging "access to incumbents' unbundled broadband access facilities, at forward-looking, cost-based rates.").

E-Rate Reporting Mechanisms: Closing CIPA's Backdoor for Unconstitutional Infringements on Students' First Amendment Rights

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I. INTRODUCTION

Content restriction is perhaps best understood as an effort to control a narrative under the guise of protection. However, those in power have historically abused their authority to project interests ranging in extremity, purpose, and impact. Going back as far as the dominance of Ancient Greece and Rome, ideologies conflicting with the political and religious regimes were censored from the general public.[1] In 1933, Nazi-affiliated student groups infamously burned 25,000 pieces of literature found to be "un-German"—practically anything directing animosity toward Nazi ideologies or advocating for socialism, communism, or social justice.[2] Clearly, this conflicts with the modern American liberty of free speech and expression. However, this inherent constitutional right,[3] and broader human right,[4] is a mere privilege in some parts of the world. For example, the Communist Party of China strictly regulates Internet content, "ensuring that only information matching the government's desired narrative is shared."[5] Additionally, following Russia's invasion of Ukraine in 2022, the Kremlin[6] restricted platforms including Facebook and the BBC, and "enact[ed] a law to punish anyone spreading 'false information' about its Ukraine invasion with up to 15 years in prison."[7]

The above instances may seem more critical compared to the availability of a book in a school classroom or library. Especially as they tend to address the rights of adults compared to children, whose rights, in the First Amendment context, are more perplexing. This Note explores this debate further, first providing a background on literature censorship in the United States, focusing on the intersection between First Amendment speech restriction and the public education system. This section details infamous Supreme Court precedent and the path it paved in defining the scope of

1. *See History of Censorship*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/censorship/Medieval-Christendom [https://perma.cc/4EFU-PS6C] (last visited Jan. 23, 2024).

2. *See Book Burning*, THE HOLOCAUST ENCYCLOPEDIA, https://encyclopedia.ushmm.org/content/en/article/book-burning [https://perma.cc/9VGF-MATT] (last visited Jan. 23, 2024).

3. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

4. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) ("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.").

5. *China's Disregard for Human Rights*, U.S. DEP'T OF STATE, https://2017-2021.state.gov/chinas-disregard-for-human-rights/ [https://perma.cc/UA7J-2H4F] (last visited Jan. 23, 2024).

6. *See The Kremlin of Moscow*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/place/Moscow/The-Kremlin [https://perma.cc/P3NH-YE65] (last visited Jan. 23, 2024) (stating the Kremlin "has served as the official residence of the president and Russian Federation since 1991").

7. Anton Troianovski & Valeriya Safronova, *Russia Takes Censorship to New Extremes, Stifling War Coverage*, N.Y. TIMES (May 18, 2022) https://www.nytimes.com/2022/03/04/world/europe/russia-censorship-media-crackdown.html [https://perma.cc/5KXB-49VB].

student rights to freely access materials in schools and libraries, alongside parental and state interests. Next, this Note explores the notable surge of content restrictive legislation over the past ten years, specifically in conservative states. This section focuses explicitly on the state of Florida and H.B. 1069's expansion of school authority to ban politically controversial subjects, including but not limited to, lessons against racial discrimination, LGBTQ+ fiction, and the proposition of a non-binary gender system.[8] This Note then details unprecedented, pending litigation in the U.S. District Court for the Northern District of Florida, where plaintiffs have been granted standing to sue a school district in federal court for the removal of books from library shelves.[9] This section then transitions into a discussion of the Children's Internet Protection Act (CIPA) and its implementation through the E-Rate federal discount program. Specifically, the discussion evaluates the controversy and former case law debating CIPA's potential to excessively restrict content that is relatively unharmful to minors, and therefore an unjust exercise of state power.

This Note does not take issue with CIPA's intention, nor does it disqualify the legitimacy of a state's interest in shielding young children from objectively inappropriate or obscene Internet materials, such as explicit sexual content or child pornography.[10] Rather, this Note argues that, in a modern America driven by political polarization and culture wars, states may try to push their interests too far, twisting the legitimacy of their role as regulators to advance a desired social agenda. Therefore, this Note proposes that CIPA, as it is presently written, creates a backdoor for states to restrict materials in public schools that qualify as constitutionally protected speech, thereby infringing upon students' First Amendment rights. The analysis argues how such a possibility is a logical outgrowth from banning physical literature, as modern education is increasingly relying on the Internet for classroom materials and instructional learning. It concludes with a proposed framework of a heightened reporting mechanism via the E-Rate program, requiring schools and libraries applying for E-Rate discounts to show that they are not exceeding the limits and intentions of CIPA to push an unconstitutional infringement on speech. This solution will help balance the uneven scales, upholding the protection of minors online and their constitutional right to access free speech.

8. *See generally* H.B. 1069, 2023 Leg. Sess. (Fla. 2023).

9. *See In Win for Free Expression, Judge Rules Lawsuit Challenging Escambia County, FL Book Bans Can Move Forward*, PEN AM. (Jan. 10, 2024), https://pen.org/press-release/in-win-for-free-expression-judge-rules-lawsuit-challenging-escambia-county-fl-book-bans-can-move-forward/ [https://perma.cc/9XVK-WZP9].

10. *See Children's Internet Protection Act (CIPA),* FCC, https://www.fcc.gov/consumers/guides/childrens-internet-protection-act [https://perma.cc/3JGT-RLLU] (last updated July 5, 2024).

II. BACKGROUND

A. The Intersection of First Amendment Rights and the American Education System

Despite the vast array of rights the United States Constitution affords American citizens, a right to education is not expressly provided.[11] In fact, it was only in 1954, following the groundbreaking decision of *Brown v. Board of Education*, that the status of public education evolved from a privilege to a fundamental right.[12] Even now, the right to equal access merely extends to the quality of education offered, not the fact that it's offered in the first place.[13] This then begs the question of whether access to accurate, impartial information should be a protected element of quality education. Nonetheless, it is widely accepted that students have constitutional rights associated with education,[14] and more generally, the dissemination of information.[15] In the 1969 case of *Tinker v. Des Moines Independent Community School District*, the Supreme Court addressed whether students wearing black armbands in protest of the Vietnam War was protected speech under the First Amendment.[16] The majority opinion, written by Justice Fortas, held that it is, emphasizing "it can hardly be argued that students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[17]

Notwithstanding *Tinker's* precedent, whether students relinquish their First Amendment rights when the school bell rings remains at issue. There has been a recent wave of state legislation dictating the content accessible to

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11. Stephen Lurie, *Why Doesn't the Constitution Guarantee the Right to Education?*, THE ATLANTIC (October 16, 2023), https://www.theatlantic.com/education/archive/2013/10/why-doesnt-the-constitution-guarantee-the-right-to-education/280583/ [https://perma.cc/N5QH-32ZL].

12. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (explaining that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education" and that "such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms")*; see also* Patricia Wright Morrison, *The Right to Education: A Constitutional Analysis*, 44 U. CIN. L. REV. 796, 801 (1975).

13. *See generally Brown*, 347 U.S. 483.

14. *See* Trish Brennan-Gac, *Educational Rights in the States*, AM. BAR ASS'N (Apr. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_2_civil_rights/educational_rights_states/ [https://perma.cc/HU4T-Y9KL]. While the Constitution itself does not grant educational rights, "[a] limited number of state constitutions explicitly recognize education to be a fundamental right, entitling all students to the same quality of education[.]" *Id.*

15. *See* Adam Horowitz, *The Constitutionality of the Children's Internet Protection Act*, 13 ST. THOMAS L. REV. 425, 426 (2000) (citing First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978) (noting the First Amendment plays a role in "affording the public access to discussion, debate, and the dissemination of information and ideas")).

16. *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

17. *Id.* at 506-08 (noting that the students' actions did not equate to "aggressive, disruptive action or even group demonstrations" but "direct, primary First Amendment rights akin to 'pure speech'").

students in classrooms and school libraries.[18] Such legislation has led to a resurgence of book bans and conversations concerning the possible infringements on students' First Amendment rights.[19]

Book bans are by no means breaking news. Going back as far as the 17th century, states have restricted access to materials conflicting with religious, political, or community values.[20] As tensions rose in the 19th century, before the peak of the Civil War, censorship distinctly differed based on geography.[21] For example, states in the South strictly forbade expression of "anti-slavery sentiments" while Northern states belonging to the Union banned books promoting "pro-Southern" ideologies.[22] In 1873, the federal government made an effort to curb immorality and "a culture of sexual impurity" by passing the Comstock Act, "prohibiting the mailing of 'obscene, lewd, or lascivious' materials . . . intended for the prevention of conception or the procuring of abortion."[23] However, by the 20th century, America's stance on immorality had evolved, leaving the Comstock Act to become somewhat of a "relic," interpreted to prevent the mailing of illegal materials

18. *See* Jonathan Friedman & James Tager, *Educational Gag Orders*, PEN AM. (Nov. 8, 2021), https://pen.org/report/educational-gag-orders/ [https://perma.cc/VX8N-C3GP] ("Between January and September 2021, 24 legislatures across the United States introduced 54 separate bills intended to restrict teaching and training in K-12 schools, higher education, and state agencies and institutions."). *See also* H.B. 1069, 2023 Leg. Sess. at 11-12 (Fla. 2023); H.B. 1084, 156th Gen Assemb., Reg. Sess. (Ga. 2022); S.B. 150, 2023 Gen. Assemb. Reg. Sess. (Ky. 2023); S.B. 2114, 2022 Reg. Sess. (Miss. 2022); H.B. 1508, 67th Leg. Assemb. Spec. Sess. (N.D. 2021); H.B. 5150(1B), 124th Gen. Assemb. Reg. Sess. (S.C. 2022); H.B. 4300(1B), 125th Gen. Assemb. Reg. Sess. (S.C. 2023); S.B. 623, 112th Gen. Assemb. Reg. Sess. (Tenn. 2021); H.B. 3979, 87th Leg. (Tex. 2021); H.B. 427, 2023 Gen. Sess. (Utah 2023).

19. *See* Friedman & Tager, *supra* note 18 ("The bills' vague and sweeping language means that they will be applied broadly and arbitrarily, threatening to effectively ban a wide swath of literature, curriculum, historical materials, and other media, and casting a chilling effect over how educators and educational institutions discharge their primary obligations.").

20. *See* Erin Blakemore, *The history of book bans–and their changing targets–in the U.S.*, NATIONAL GEOGRAPHIC (Apr. 24, 2023), https://www.nationalgeographic.com/culture/article/history-of-book-bans-in-the-united-states [https://perma.cc/MW85-QN3F]. In 1650, Massachusetts Puritan colonists who believed that "only a special few were predestined for God's favor" banned *The Meritorious Price of Our Redemption*, "a pamphlet that argued that anyone who was obedient to God and followed Christian teachings on Earth could get into heaven." *Id.*

21. *See id.*

22. *See id.* Published in 1851, Harriet Beecher Stowe's *Uncle Tom's Cabin* was widely banned and burned by Southern slaveholders for its exposition of "the evils of slavery." *Id.*

23. Luke Vander Ploeg & Pam Belluck, *What to Know About the Comstock Act*, N.Y. TIMES (May 16, 2023), https://www.nytimes.com/2023/05/16/us/comstock-act-1978-abortion-pill.html [https://perma.cc/63HF-KQA3]. The Comstock Act gained its name from Anthony Comstock, who successfully imparted his religious ideals, persuading Congress that the restriction of materials via mail was necessary to prevent the moral corruption of the American public. *Id.*

instead of immoral materials.[24] Still, efforts to restrict books deemed obscene, indecent, or objectionable remained.[25]

The educational sphere is also no stranger to book bans. However, it wasn't until 1982 that the highest court addressed the blurry line between protecting minors from harmful content and infringing upon their First Amendment rights.[26] In *Board of Education v. Pico*, the principal question was "whether the First Amendment imposes limitations upon the exercise by a local school board of its discretion to remove library books from high school and junior high school libraries."[27] In 1975, following a conference hosted by conservative parents concerned about the state of education in New York, the school board for the Island Trees School District (the "Board") motioned to review twelve library books categorized as "objectionable" and of an "anti-American, anti-Christian, anti-[Semitic], and plain filthy" nature.[28] The Board instated a committee (the "Committee"), consisting of parents and staff, to read the books in question and determine their value, evaluating factors including "educational suitability," "good taste," "relevance," and "appropriateness to age and grade level."[29] Through this evaluation, the Committee concluded that two of the twelve books should be removed from library shelves: *The Naked Ape* and *Down These Mean Streets*.[30] Despite the Committee's conclusion, the Board, without explanation, chose to retain only one title, *The Laughing Boy*, and motioned to remove *The Naked Ape*, *Down These Mean Streets*, as well as seven other titles.[31] Following this decision, five students filed suit against the Board claiming their First Amendment rights had been violated.[32] Further, the students alleged the Board "ordered

24. *See id.* American society no longer embraced "the rigidity of the Comstock Act" as women were bestowed the right to vote and the Great Depression prompted acceptance, or at least acknowledgment, of the benefits of contraception. *Id.*

25. *See* Dan Sheehan & Lisa Tonlin, *Manuscripts Don't Burn: A Timeline of Literary Censorship, Destruction, and Liberation*, PEN AM. (July 13, 2023), https://pen.org/censorship-history-book-bans [https://perma.cc/N8Z4-7D5B]. In 1921, a trial was held to determine whether James Joyce's *Ulysses* should be banned in the United States. *Id.* The court held that the text was "obscene," banning the book throughout the country and sanctioning burnings by the U.S. Postal Service throughout the decade. *Id. See also* Blakemore, *supra* note 20. Boston's New England Watch and Ward Society "petitioned against printed materials they found objectionable, sued booksellers, pressured law enforcement and courts to bring obscenity charges against authors, and spurred the Boston Public Library to lock copies of the most controversial books[.]" *Id.*

26. *See generally* Bd. of Educ. v. Pico, 457 U.S. 853 (1982).

27. *See id.* at 855-56.

28. *Id.* at 855-57.

29. *Id.* at 857.

30. *See id.* at 858 n.6; *see also* Robin Dunbar et al., *The Naked Ape at 50: Its central claim has surely stood the test of time*, THE GUARDIAN (Sept. 24, 2017), https://www.theguardian.com/science/2017/sep/24/the-naked-ape-at-50-desmond-morris-four-experts-assess-impact [https://perma.cc/T52L-FQG7] (detailing how Desmond Morris' *The Naked Ape* showcased the intersection of human behavior, animal behavior and evolution.). *See generally* Felice Blake, *What Does It Mean To Be Black?: Gendered Redefinitions of Interethnic Solidarity in Piri Thomas's Down These Mean Streets*, 51 AFR. AM. REV. 95 (2018). Piri Thomas's *Down These Mean Streets* "engages with the struggles against antiblack racism and for civil rights" through the lens of a Puerto Rican man living in New York. *Id.*

31. *See Pico*, 457 U.S. at 858 n.10.

32. *See id.* at 859.

the removal of the books from school libraries and proscribed their use in the curriculum because particular passages in the books offended their social, political and moral tastes and not because the books, taken as a whole, were lacking in educational value."[33] In its plurality opinion, the Supreme Court noted the unique environment a library fosters, expressing that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding."[34] Further, while recognizing that entities like the Board "possess significant discretion to determine the content of their school libraries," such "discretion may not be exercised in a narrowly partisan or political manner."[35] The Court held that the Board's action of removing nine books from school library shelves was motivated by their desire to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion[,]" thereby violating the students' First Amendment right to access constitutionally protected speech.[36]

B. Pushing the Limits of Constitutional Content Restriction in the Name of Safety?

1. Local Efforts to Fight State Legislation that Broadens Discretion to Restrict Content in Schools

Although educational book bans are not geographically limited, they tend to manifest more frequently and more restrictively in historically conservative states, and by extension, conservative legislation.[37] However, a comparative analysis of book bans nationwide is not relevant for purposes of this Note—which will instead focus exclusively on Florida statutes and legislation. In 2023, the Florida State Legislature enacted Florida Statute § 1006.28, which outlines the duties and powers of school districts, boards, and persons working for them.[38] Specifically, the statute conveys broad authority to school districts to control curriculums presented in classrooms and materials available in school libraries.[39] It also requires school boards to implement a detailed process for parents or community members to raise

33. *Id.* at 858-59.
34. *Id.* at 868 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).
35. *Id.* at 870.
36. *Id.* at 872 (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).
37. *See* Alexandra E. Petri, *Book bans are on the rise in U.S. schools, fueled by new laws in Republican-led states*, L.A. TIMES (Apr. 22, 2023), https://www.latimes.com/world-nation/story/2023-04-22/book-bans-soaring-schools-new-laws-republican-states [https://perma.cc/BU4B-6JTL] (noting that "state legislatures and courthouses in Republican-controlled states have largely led the charge" in removing material from classrooms and library shelves).
38. *See generally* FLA. STAT. § 1006.28 (2023).
39. *See id.* at § 1006.28(2)(a)(1) ("Each district school board is responsible for the content of all instructional materials and any other materials used in a classroom, made available in a school or classroom library, or included on a reading list, whether adopted and purchased from the state-adopted instructional materials list, adopted and purchased through a district instructional materials program under s. 1006.283, or otherwise purchased or made available.").

objections to certain materials.[40] Any material objected to will be inaccessible to students until resolution, and if the material is found to be unsuitable, the school district will permanently discontinue its availability for relevant grades.[41] Such extensive discretion has perpetuated a rising cycle of book bans in Florida public schools, with approximately 300 bans occurring in the 2022-2023 academic year.[42]

Many of these bans have sparked lawsuits based on concerns for students' First Amendment rights, but one in particular garnered national attention as the first claim filed in federal court.[43] Pen America Center, along with Penguin Random House[44] and two Escambia County public school parents, (together, "Petitioners"), filed suit against the Escambia County School District and School Board, challenging the removal and restriction of books from public school libraries.[45] Pen America Center is a non-profit organization that advocates on behalf of students and schools nationwide fighting for equitable and protected access to diverse educational materials.[46] Lindsay Durtschi, one of the parents suing Escambia County, expressed her inability to stay silent once she realized that Florida law would prevent children from accessing "a healthy, comprehensive collection of – whether it be reading material, knowledge, or history – the good, the bad and the ugly of our country and our state."[47] Banding together and relying on precedent from *Tinker* and *Pico*, Petitioners assert that the "restrictions and removals have disproportionately targeted books by or about people of color and/or LGBTQ people, and have prescribed an orthodoxy of opinion that violates the First and Fourteenth Amendments."[48]

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40. *See id.* at § 1006.28(2)(a)(2) (requiring such objections to be supported by evidence exhibiting that the material at issue does not meet statutory standards and is either (1) "pornographic or prohibited under § 847.012"; (2) "[d]epicts or describes sexual conduct"; (3) "[i]s not suited to student needs and their ability to comprehend the material presented"; or (4) "[i]s inappropriate for the grade level and age group for which the material is used").

41. *See id.* at § 1006.28(2)(a)(2)(b).

42. Matt Lavietes, *Florida school districts removed roughly 300 books last school year*, NBC NEWS (Sept. 12, 2023), https://www.nbcnews.com/nbc-out/out-news/florida-school-districts-removed-roughly-300-books-last-school-year-rcna104367 [https://perma.cc/SSN5-FLQU]. *See also 2022-2023 School District Reporting Pursuant to Section 1006.28(2)*, FLA. DEP'T OF EDUC. (2023), https://www.fldoe.org/core/fileparse.php/5574/urlt/2223ObjectionList.pdf [https://perma.cc/XD7M-JV3G].

43. *See generally* Brief for Petitioner & Demand for Jury Trial, Pen Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd., No. 3:23-cv-10385 (N.D. Fla. filed May 17, 2023).

44. *Our Story*, PENGUIN RANDOM HOUSE, https://www.penguinrandomhouse.com/about-us/our-story/ [https://perma.cc/MA7S-SMHD] (last visited Jan. 19, 2024). Penguin Random House is an international publishing company and "champion of expression, ensuring that [authors'] voices carry beyond the page and into the folds of communities and societies around the globe." *Id.*

45. *See* Brief for Petitioner & Demand for Jury Trial, *supra* note 43 at 1.

46. *See About PEN America*, PEN AM., https://pen.org/about-us/ [https://perma.cc/SR3Y-AP9P] (last visited Jan. 19, 2024).

47. Brittany Misencik, *Why this Escambia County mom is suing her daughters' school district*, PENSACOLA NEWS J. (May 31, 2023), https://www.pnj.com/story/news/education/2023/05/31/why-this-escambia-county-mom-is-suing-her-daughters-school-district/70260161007/ [https://perma.cc/35GJ-KEQF].

48. Brief for Petitioner & Demand for Jury Trial, *supra* note 43 at 2.

Shortly after Petitioners filed this brief, the Florida Legislature enacted H.B. 1069, setting out a series of provisions "designed to protect children in schools."[49] The bill expanded upon § 1006.28, affording all school boards, in each school district, complete control over the content presented to its students.[50] Specifically, H.B. 1069 aims to restrict educational instruction to reflect a binary sex and gender system associating gender and pronouns with biological sex assigned at birth.[51] Additionally, in conformance with Florida Statute 1006.29(6),[52] it requires school libraries and those in charge of shelving them to attend trainings to determine what materials are appropriate.[53] H.B. 1069's effectiveness, beginning July 1, 2023, yielded debates over mootness for the pending Escambia County lawsuit, with a federal judge issuing a temporary stay to consider a motion to dismiss in August 2023.[54] However, in January 2024, a U.S. District Judge ruled that the petitioners had standing to proceed with their claims under the First Amendment as they adequately alleged that Escambia County's decisions could be based on their own personal disagreement to the content contained within the banned materials.[55] The Court noted its skepticism toward the likelihood of successful relief because the banned books in question are under objection, and therefore permitted, under state law, to "remain unavailable . . . until the objection is resolved."[56] Further, the court dismissed the petitioners' equal protection claim, concluding the removal and restrictions were of "disparate impact" and "require[] far too many inferences to conclude that the

49. *2023 Summary of Legislation Passed: CS/CS/HB 1069 – Education*, THE FLORIDA SENATE 1 (2023), https://www.flsenate.gov/PublishedContent/Session/2023/BillSummary/Education_ED1069ed_01069.pdf [https://perma.cc/G46G-MBJ9].

50. *See* H.B. 1069, 2023 Leg. Sess. at 11-12 (Fla. 2023) ("Each district school board is responsible for the content of all instructional materials and any other materials used in a classroom, made available in a school or classroom library, included on a reading list"); *see also* Andrew Albanese, *Judge Stays Escambia County Book Banning Lawsuit to Consider Dismissal*, PUBLISHER'S WEEKLY (Aug. 25, 2023), https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/93043-judge-stays-escambia-county-book-banning-lawsuit-to-consider-dismissal.html [https://perma.cc/4RPB-X4YD].

51. *See* H.B. 1069 at 4 ("It shall be the policy of every public K-12 educational institution that is provided or authorized by the Constitution and laws of Florida that a person's sex is an immutable biological trait and that it is false to ascribe to a person a pronoun that does not correspond to such person's sex.").

52. FLA. STAT. § 1006.29(6) (2023).

53. *See* H.B. 1069 at 16 ("[S]chool librarians, media specialists, and other personnel involved in the selection of school district library materials must complete the training program developed pursuant to s. 1006.29(6) before reviewing and selecting age-appropriate materials and library resources.").

54. Albanese, *supra* note 50.

55. Pen Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd., No. 3.23cv10385-TKW-ZCB, 2024 U.S. Dist. LEXIS 7314, at *6-10 (N.D. Fla. Jan. 12, 2024) (denying motion to dismiss). *See also In Win for Free Expression, Judge Rules Lawsuit Challenging Escambia County, FL Book Bans Can Move Forward*, PEN AM. (Jan. 10, 2024), https://pen.org/press-release/in-win-for-free-expression-judge-rules-lawsuit-challenging-escambia-county-fl-book-bans-can-move-forward/ [https://perma.cc/3P44-78VX].

56. *Pen Am.*, 2024 U.S. Dist. LEXIS 7314, at *10 n.12 (citing FLA. STAT. §1006.28(2)(a)).

removal or restriction of a book about a particular subject constitutes intentional discrimination against an individual in a protected class."[57]

C. The History of CIPA and E-Rate Funding

Current laws such as § 1006.28 and H.B. 1069 only begin to pierce the veil of possibility concerning the extent to which states may attempt to restrict students' First Amendment rights. As society becomes increasingly reliant on digital technology, and education supplements curriculums with online resources, states may further perpetuate content restriction under the guise of Internet protection for minors.[58]

Intentions to regulate the growing variety of digital content accessible to minors first sprouted in 2000 when Congress enacted the Children's Internet Protection Act (CIPA).[59] Due to the basic principles of federalism and the federal government's limited ability to regulate state-based public education, CIPA exclusively applies to schools and libraries receiving discounts through the E-Rate program.[60] E-Rate, a program regulated by the Federal Communications Commission (FCC), is designed to make telecommunication services, including "[I]nternet access, internal connections, managed internal broadband services, and basic maintenance of internal connections" more affordable to eligible schools and libraries through discounts funded by the Universal Service Fund (USF).[61] By putting the FCC (a federal entity) in charge of the E-Rate budget, CIPA created a funding loophole to the Tenth Amendment, thereby allowing the federal government

57. *Id.* at 9 (citing FLA. STAT. §1006.28(2)(a)).

58. *See* Lucinda Gray & Laurie Lewis, *Use of Educational Technology for Instruction in Public Schools: 2019–20*, INST. OF EDUC. SCIS. (Nov. 2021), https://nces.ed.gov/pubs2021/2021017Summary.pdf [https://perma.cc/D9HP-73JX].

59. *See Children's Internet Protection Act (CIPA),* FCC, https://www.fcc.gov/consumers/guides/childrens-internet-protection-act [https://perma.cc/3JGT-RLLU] (last updated July 5, 2024).

60. *See id.*; *see also* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Brendan Pelsue, *When it Comes to Education, the Federal Government is in Charge of…Um, What?*, HARVARD ED. MAG. (Aug. 29, 2017), https://www.gse.harvard.edu/ideas/ed-magazine/17/08/when-it-comes-education-federal-government-charge-um-what [https://perma.cc/48N4-37BE]]. The language of the Tenth Amendment implies a "preclu[sion of] any federal oversight of education" except to the extent the Fourteenth Amendment requires "equal protection of the laws." *Id.*

61. *E-Rate: Universal Service Program for Schools and Libraries*, FCC, https://www.fcc.gov/consumers/guides/universal-service-program-schools-and-libraries-e-rate [https://perma.cc/UG6B-5RGX] (last updated Feb. 27, 2024). *See also E-Rate Program - Discounted Telecommunications Services*, DEP'T OF EDUC., https://www2.ed.gov/about/inits/ed/non-public-education/other-federal-programs/fcc.html [https://perma.cc/D23K-4W78] (last modified Sept. 3, 2019). The Universal Service Fund is administered by the Universal Service Administrative Company (USAC), "an independent, not-for-profit corporation created in 1997 to collect universal service contributions from telecommunications carriers and administer universal support mechanisms (programs) designed to help communities across the country secure access to affordable telecommunications services." *Id.*

to regulate certain aspects of public education.[62] To meet the USF's E-Rate eligibility requirements, schools must operate at the elementary or secondary level, while libraries must fall under the categories excerpted in the 1996 Library Services and Technology Act.[63] Once deemed eligible, schools and libraries submit requests for their desired goods and services,[64] which prospective vendors[65] bid on.[66] With price as the primary consideration, schools and libraries select the most cost-effective goods and services and submit their desired selections to the Universal Service Administrative Company (USAC)[67] for approval.[68] The E-Rate program is in great demand, with the FCC capping the 2021 budget at $4.276 billion.[69] In 2019, over 30,000 public schools across the United States participated and received funds from the E-Rate program, totaling over $700 million.[70]

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62. *See generally* VICTORIA L. KILLION, CONG. RSCH. SERV., R46827, FUNDING CONDITIONS: CONSTITUTIONAL LIMITS ON CONGRESS'S SPENDING POWER (2021), https://crsreports.congress.gov/product/pdf/R/R46827 [https://perma.cc/Q5R7-ACRN]]. *See also* U.S. CONST. art. I, § 8, cl. 8, 18.

63. *See E-Rate Program - Discounted Telecommunications Services*, *supra* note 61; *see also* 20 U.S.C. § 7801(19) (defining elementary school as "a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law"); 20 U.S.C. § 7801(45) (defining secondary school as "a nonprofit institutional day or residential school, including a public secondary charter school, that provides secondary education, as determined under State law, except that the term does not include any education beyond grade 12"); 20 U.S.C. § 9122(1) (defining library as "(A) a public library; (B) a public elementary or secondary school library; (C) a tribal library; (D) an academic library; (E) a research library . . . (F) a private library or other special library, but only if the State . . . determines that the library should be considered a library"); 20 U.S.C. § 9122(2) (defining a library consortium as "any local, statewide, regional, interstate, or international cooperative association of library entities which provides for the systematic and effective coordination of the resources of school, public, academic, and special libraries and information centers, for improved services for the clientele of such library entities").

64. Goods and services offered under the E-Rate program are divided into two categories: (1) Category 1, consisting of "the services needed to support broadband connectivity to schools and libraries" (i.e., cable modems, ethernet, satellite, wireless); and (2) Category 2, consisting of "internal connections needed for broadband connectivity within schools and libraries" (i.e., antennas, cabling, routers). *Order In the Matter of Modernizing the E-Rate Program for Schools and Libraries*, FCC (Dec. 15, 2023), https://docs.fcc.gov/public/attachments/DA-23-1171A1.pdf [https://perma.cc/4AES-R5DN].

65. Although the FCC does not provide qualifications or guidelines for defining an E-Rate Vendor, the New York Department of Education has defined an E-Rate Vendor as "an entity that is providing, or seeking to provide, to the NYC [Department of Education], products or services related to technology or telecommunications" (i.e., AT&T Corp., T-Mobile USA, Inc., Dell Marketing L.P.). Memorandum from the Office of Federal and State Regulatory Compliance Junaid Qaiser, E-rate Compliance Officer on E-Rate Vendor Gifts, Donations, and Grant Procedures (Mar. 2018) (on file with the New York Department of Education), https://infohub.nyced.org/docs/default-source/default-document-library/e-rate-vendors.pdf [https://perma.cc/L8CQ-QQKK].

66. *See E-Rate: Universal Service Program for Schools and Libraries*, *supra* note 61.

67. *About USAC*, UNIVERSAL SERV. ADMIN. CO., https://www.usac.org/about/ [https://perma.cc/HYH9-777N] (last visited Mar. 3, 2024) (the USAC is "an independent not-for-profit designated by the FCC" which is responsible for administering the USF, including the E-Rate program).

68. *See E-Rate: Universal Service Program for Schools and Libraries*, *supra* note 61.

69. *See id.*

70. Center for Public Education, *E-rate Schools*, NAT'L SCH. BD. ASS'N 7 (2020), https://www.nsba.org/-/media/NSBA/File/cpe-e-rate-schools-report-march-2020.pdf [https://perma.cc/66BU-MXHT].

CIPA requires E-Rate participants to implement a program that ensures minors are unable to access, via school or library computers, "visual depictions that are (i) obscene; (ii) child pornography; or (iii) harmful to minors."[71] Schools and libraries must enforce "the operation of such technology protection measure[s] during any use of such computers by minors" and "educate minors about appropriate online behavior."[72] In short, CIPA blocks and filters information individuals can access, creating yet another gray area between protection from harm and the infringement of First Amendment rights. This blurriness became a point of contention in *American Library Association v. United States*, where a group of libraries, associations, and website publishers (libraries) filed suit against the United States alleging that CIPA was unconstitutional on First Amendment grounds.[73] They specifically alleged that CIPA forced public libraries to violate their patrons' First Amendment rights and to renounce their own as a necessary means to obtain federal funding.[74]

The Eastern District Court for Pennsylvania held that CIPA was an unconstitutional use of the Spending Clause because it promoted the suppression of First Amendment rights by permitting the filtering of protected speech on library computers.[75] Applying strict scrutiny,[76] the court determined that current technology lacked the ability to fulfill Congress' intent in enacting CIPA and would instead promote a culture of overblocking content "that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions, such as 'pornography' or 'sex.'"[77] However, the Supreme Court later reversed in a plurality opinion written by Chief Justice Rehnquist, holding that CIPA was not infringing upon libraries' or their patrons' First Amendment rights.[78] The Court found that libraries were not public forums,[79] but entities designed to "facilitate research, learning, and recreational pursuits

71. 47 U.S.C. § 254(h)(5)(B).

72. *Id.*

73. *See* Am. Libr. Ass'n v. United States, 201 F. Supp. 2d 401, 407 (E.D. Pa. 2002).

74. *See id.*

75. *See id.* at 476.

76. *See id.* at 454 (citing United States v. Playboy Ent. Grp., 529 U.S. 803, 813 (2000) (finding "software filters [that] block access to speech on the basis of its content, and content-based restrictions on speech are generally subject to strict scrutiny"); *see also* Richard H. Fallon Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1269 (2007) (explaining strict scrutiny as "the baseline rule under the First Amendment for assessing laws that regulate speech on the basis of content, as well as for scrutinizing content-based exclusions of speakers from public fora").

77. *See Am. Libr. Ass'n*, 201 F. Supp. 2d at 449 (concluding "the number of pages of constitutionally protected speech blocked by filtering products far exceeds the many thousands of pages that are overblocked by reference to the filtering products category definitions"); *see also* Katherine A. Miltner, *Discriminatory Filtering: CIPA's Effect on Our Nation's Youth and Why the Supreme Court Erred in Upholding the Constitutionality of the Children's Internet Protection Act*, 57 FED. COMM. L.J. 555, 567 (2005).

78. *See* United States v. Am. Libr. Ass'n, 539 U.S. 194, 206 (2003).

79. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985) (citing Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983) ("Traditional public fora are those places which 'by long tradition or by government fiat have been devoted to assembly and debate.'"); *id.* at 802 (citing Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)) (qualifying public streets and parks as public forums).

by furnishing materials of requisite and appropriate quality."[80] Consequently, the case did not qualify for strict scrutiny, with the Court instead applying the rational basis standard of review.[81] Justice Breyer's concurrence emphasized that the federal government, through CIPA, has a "legitimate" and "compelling" interest in restricting children's access to "obscenity, child pornography . . . and material that is comparably harmful."[82] Also concurring, Justice Kennedy explained that the supposed issue nearly becomes moot as an adult patron may simply request a librarian to unblock restricted Internet content.[83] So long as that request is met "without significant delay, there is little to this case."[84] Dissenting, Justice Stevens agreed with the plurality that a public library's decision to filter sexually explicit content available to children on the premises is "neither inappropriate nor unconstitutional."[85] However, he did raise concern for the impracticability of individual librarians being able to review every piece of restricted content an adult may request to view.[86] And because "most of that information is constitutionally protected speech . . . th[e] restraint is unconstitutional."[87] Justice Stevens also expressed how CIPA's reliance on E-Rate perpetually furthers the infringement of First Amendment rights and is entirely "unnecessary to accomplish Congress' stated goal."[88]

In balancing the states' interests and CIPA's purpose alongside constitutionally protected speech, perhaps one of the biggest debates concerns the question of "obscene" Internet materials[89] and precisely what material falls within the given parameters.[90] The Supreme Court defined the term via a three-pronged test in *Miller v. California*:[91]

80. *Am. Libr. Ass'n*, 539 U.S. at 206.

81. *See id.* at 207 n.3 ("We require the Government to employ the least restrictive means only when the forum is a public one and strict scrutiny applies . . . In deciding not to collect pornographic material from the Internet, a public library need not satisfy a court that it has pursued the least restrictive means of implementing that decision.").

82. *See id.* at 218 (Breyer, J. concurring).

83. *See id.* at 214 (Kennedy, J. concurring).

84. *Id.*

85. *See id.* at 220 (Stevens, J. dissenting).

86. *See Am. Libr. Ass'n*, 539 U.S. at 220 (Stevens, J. dissenting) ("[T]he Children's Internet Protection Act (CIPA) operates as a blunt nationwide restraint on adult access to 'an enormous amount of valuable information' that individual librarians cannot possibly review.").

87. *Id.*

88. *See id.* at 231 (Stevens, J. dissenting) ("[A] library in an elementary school might choose to put filters on every single one of its 10 computers. But under this statute, if a library attempts to provide Internet service for even *one* computer through an E-rate discount, that library must put filtering software on *all* of its computers with Internet access, not just the one computer with E-rate discount.").

89. *See* 47 U.S.C. § 254(h)(5)(B).

90. *See id.*

91. Miller v. California, 413 U.S. 15, 39 (1973).

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; [92]
(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[93]

In *Miller*, the Court held that the Defendant's act of mailing pornographic materials to individuals without request or consent was obscene and therefore within the realm of state regulation because it had no "serious literary, artistic, political, or scientific value."[94] Although this provides some guidance to defining "obscene," the *Miller* decision still affords broad discretion and an opportunity for restriction influenced by disagreement, discomfort, or distaste.[95] Petitioners in the Escambia County lawsuit assert that this is no happenstance, but rather a "clear agenda . . . to categorically remove all discussion of racial discrimination or LGBTQ issues from public school libraries."[96]

III. THE USAC SHOULD HEIGHTEN E-RATE REPORTING MECHANISM REQUIREMENTS TO PREVENT AN UNCONSTITUTIONAL APPLICATION OF CIPA

A. Unconstitutional Content Restriction via CIPA is a Logical Outgrowth of Current State Legislation

Considering the decision in *Miller v. California* came nearly twenty years before the inception of the World Wide Web,[97] the Court failed to contemplate obscenity in the digital context and the difficulties associated

92. *See Miller*, 413 U.S. at 16 n.1 (defining prurient interest as "a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation . . . and is . . . utterly without redeeming social importance").

93. *See id.* at 24.

94. *See id.* at 17-24.

95. *See* Hanna Natanson, *Objection to sexual, LGBTQ content propels spike in book challenges*, WASH. POST (June 9, 2023), https://www.washingtonpost.com/education/2023/05/23/lgbtq-book-ban-challengers/ [https://perma.cc/CJF3-6NVK] (finding that "sixteen percent of all objections claimed that school books violated wither state obscenity laws or legislation . . . restricting education on race, racism, sexuality, and gender identity").

96. Brief for Petitioner & Demand for Jury Trial, *supra* note 43, at 4.

97. *See* Evan Andrews, *Who Invented the Internet?*, HISTORY.COM (Oct. 28, 2019), https://www.history.com/news/who-invented-the-internet [https://perma.cc/HK56-9P98]. Computer scientist Tim Berners-Lee invented the World Wide Web in 1990, thereby "populariz[ing] the [I]nternet among the public, and serv[ing] as a crucial step in developing the vast trove of information that most of us now access on a daily basis." *Id.*

with regulating the vast wealth of information now available on the Internet.[98] Even *United States v. American Library Association*, which was decided in 2003, lacked exposure to the Internet we know today.[99] This then begs the question of whether CIPA can be reconciled in a world with rapidly developing technology, in recovery from a global pandemic, and heavily transitioning to a dependence on online learning.[100] Although digital technology had risen by the time of CIPA's enactment, Congress certainly could not have foreseen the extent to which education and the Internet would intertwine. Nor could they have predicted states' eagerness and dedication to restrict student access to previously accepted materials suddenly deemed improper for school classrooms and libraries. And since its enactment in 2000, CIPA has not been amended.[101] As states continue to seek out opportunities to restrict content available to students in schools, the next logical step is to do so online. Hence, CIPA could very easily become a backdoor for conservative agenda-pushing and First Amendment speech violations.

B. How to Improve Current Reporting Mechanisms

Although this problem remains hypothetical for the time being, easily implementable solutions exist to curb the likelihood of this possibility and ensure CIPA is being used as it was intended. Currently, when public schools and libraries apply for discounts via the E-Rate program, "they must certify they are in compliance with CIPA before they can receive E-Rate funding."[102] This is done through a written pledge[103] and documentations of proof, including but not limited to, "a memorandum or report to an administrative authority of a school or library from a staff member that discusses and analyzes Internet safety policies in effect at other schools and libraries."[104]

98. *See generally Miller*, 413 U.S. 15 (1973) (failing to mention anything concerning the Internet, online material, or the obscenity in the digital context).

99. *See generally Am. Libr. Ass'n*, 539 U.S. 194 (2002).

100. *See* Natasha Singer, *Online Schools are Here to Stay, Even After the Pandemic*, N.Y. TIMES (Apr. 11, 2021), https://www.nytimes.com/2021/04/11/technology/remote-learning-online-school.html [https://perma.cc/FY6Y-FBNK].

101. *See Children's Internet Protection Act (CIPA),* FCC, https://www.fcc.gov/consumers/guides/childrens-internet-protection-act [https://perma.cc/3JGT-RLLU] (last updated July 5, 2024) (lacking reference to any modifications or amendments made to CIPA since its enactment in 2000).

102. *Id.*

103. *See CIPA*, UNIVERSAL SERV. ADMIN. CO., https://www.usac.org/e-rate/applicant-process/starting-services/cipa/ [https://perma.cc/9A9V-D948]. The required certification language is as follows: "Pursuant to the Children's Internet Protection Act, as codified at 47 U.S.C. Section 254(h) and (l), the recipient(s) of service represented in the Funding Request Number(s) on this FCC Form 486, for whom this is the first funding year in the federal universal service support mechanism for schools and libraries, is (are) undertaking such actions, including any necessary procurement procedures, to comply with the requirements of CIPA for the next funding year, but has (have) not completed all requirements of CIPA for this funding year." *Id.*

104. *Id.* (noting that other examples of acceptable documentation include "a published or circulated school or library board agenda with CIPA compliance cited as a topic[,]" "a circulated staff meeting agenda with CIPA compliance cited as a topic[,]" or "an agenda or minutes from a meeting open to the public at which an [I]nternet safety policy was discussed").

However, these documents fail to investigate whether schools are over-regulating or over-restricting content available online.[105] This provides an opportunity for school boards to ban digital content that may not necessarily fail CIPA's guidelines, but rather contradicts community standards or values. And while state and local entities have the authority to dictate curriculums and materials available to students on school grounds,[106] abuse of this authority and the infringement of constitutionally protected speech is entirely plausible. Therefore, this Note proposes a required data report consisting of every website a school chooses to restrict, the types of content the website contains, and a detailed explanation of why it meets the criteria of "visual depictions that are (i) obscene; (ii) child pornography; or (iii) harmful to minors."[107] This way, CIPA would operate in a more practical manner, prioritizing Congress' focus on restricting materials that are genuinely harmful to minors.[108] After all, some schools are responsible for the education of children varying in age, and "there is a substantial difference in what society considers appropriate for a five-year-old as opposed to a sixteen-year-old."[109] Additionally, Justice Kennedy's concurrence in *United States v. American Library Association*, where the Supreme Court upheld CIPA's constitutionality, centered on an adult's option to request disabling the restricting filter—an option that minors don't have.[110] Therefore, a required data report certifying CIPA compliance would ensure that objectively age appropriate, educational, and constitutionally protected materials are accessible to students seeking them.

This data report would be most effective as an audit.[111] Reporting mechanisms alone provide school boards with too much discretion to misrepresent material restrictions. Conversely, "compliance auditing is the

105. *See id.* (notice how none of the provided examples of documentation require disclosing specific sources restricted under CIPA).

106. *See The Federal Role in Education*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/overview/fed/role.html [https://perma.cc/D4CV-JEKT] (last updated May 23, 2024) ("Education is primarily a State and local responsibility in the United States. It is States and communities . . . that establish schools and colleges, develop curricula, and determine requirements for enrollment and graduation."); *see also Responsibility for Selection*, AM. LIBR. ASS'N (Dec. 19, 2017) https://www.ala.org/tools/challengesupport/selectionpolicytoolkit/responsibility [https://perma.cc/VX43-A73C] ("[T]he school board is legally responsible for the resources in school libraries[.]").

107. 47 U.S.C. § 254(h)(5)(B).

108. *Id.*; *see also* S. REP. NO. 106-141, at 1 (1999) ("The purpose of the bill is to protect America's children from exposure to obscene material, child pornography, or other material deemed inappropriate for minors while accessing the Internet from a school or library receiving Federal Universal Service assistance for provisions of Internet access, Internet service, or internal connection.").

109. Miltner, *supra* note 77, at 576.

110. *See Am. Libr. Ass'n*, 539 U.S. at 214 (Kennedy, J. concurring); *see also* Miltner, *supra* note 77, at 576-77 (noting that "a high school student attempting to access information on sexual health for a school paper cannot ask a librarian to disable the filter" without first obtaining parental consent).

111. An audit is "an official examination and verification of accounts and records, especially of financial accounts." *Audit*, DICTIONARY.COM, https://www.dictionary.com/browse/audit [https://perma.cc/4KUN-M5YL] (last visited Apr. 6, 2024).

independent assessment of whether a given subject matter is in compliance with applicable authorities," including "activities, financial transactions, [and] information."[112] The USAC already employs audits to ensure accurate documentation of program contributions and payments to comply with FCC rules.[113] Should the audits uncover non-compliance, auditees will have the opportunity to respond before a subsequent USAC review potentially notes necessary corrective actions.[114] The USAC provides separate audit guidelines and required documentation for different programs, including E-Rate.[115] Specifically, for CIPA, audits evaluate proof of compliance, such as documentation supporting public notice, the use of filtering programs, and service provider verification of operational filters and blocked sites.[116] However, as they currently stand, these audits merely inquire whether CIPA is effectively blocking content, not the type of content or the reasons for the blocking.[117] Therefore, the USAC should strengthen the precision of these audits by requiring schools, libraries, and service providers to examine the blocked materials and ensure that they genuinely contain "visual depictions that are (i) obscene; (ii) child pornography; or (iii) harmful to minors."[118] As a removed entity, service providers can conduct their own objective evaluations without pressure from school boards who may attempt to restrict content based on personal disagreement rather than obscenity or potential to cause harm. Service providers can then submit their findings to the USAC, who can compare them to the schools' findings and inform the schools of any discrepancies or non-compliance. Similar to the current auditing process, schools will have the opportunity to respond in defense of their actions.[119] The USAC will then determine the validity of the defense and whether the content should be accessible to students under CIPA.[120]

Nevertheless, this mechanism may be the subject of challenges, as the First Amendment protects against compelled disclosures, especially when

112. INT'L ORG. OF SUPREME AUDIT INSTS., ISSAI 400 COMPLIANCE AUDIT PRINCIPLES 8 (2019), https://www.intosai.org/fileadmin/downloads/documents/open_access/ISSAI_100_to_400/issai_400/ISSAI_400_en_2019.pdf [https://perma.cc/CC7X-Q3KA].

113. *See Beneficiary and Contributor Audit Program (BCAP)*, UNIVERSAL SERV. ADMIN. CO., https://www.usac.org/about/appeals-audits/beneficiary-and-contributor-audit-program-bcap/ [https://perma.cc/LEZ5-3DGT] (last visited Mar. 2, 2024).

114. *See id.*

115. *See id.*; *see also E-Rate Program List of Documents to Retain for Audits and to Show Compliance with Program Rules*, UNIVERSAL SERV. ADMIN. CO., https://www.usac.org/wp-content/uploads/e-rate/documents/resources/e-rate-program-list-of-documents-to-retain.pdf [https://perma.cc/WJ5L-J2J8] (last visited Mar. 2, 2024) ("A copy of a report (if applicable) or other documentation on the use of the Technology Protection Measure for the funding year(s) subject to audit (i.e., reports from the service provider of Internet sites blocked, bills from the service provider verifying that the filter was operational, etc.).").

116. *See E-Rate Program List of Documents to Retain for Audits and to Show Compliance with Program Rules*, *supra* note 115.

117. *Id.*

118. 47 U.S.C. § 254(h)(5)(B).

119. *See Beneficiary and Contributor Audit Program (BCAP)*, *supra* note 113.

120. *Id.*

"they require a person to communicate an unwanted message."[121] For example, in *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, the Supreme Court held that disclosure requirements that are "unjustified or unduly burdensome" and fail to "reasonably" reflect the interests of the states "might offend the First Amendment by chilling protected commercial speech."[122] That being said, strengthening an already existing reporting mechanism to an elective program is far different from cases, like *Zauderer*, where the Supreme Court stepped in to oversee compelled speech.[123] Here, the enhanced precision and heightened requirements are neither "unjustified"[124] nor "unduly burdensome"[125] because states seeking discounts from the E-Rate program already have to collect resources to offer as proof of compliance with CIPA. This solution proposes one extra step: while offering compliance assurance, schools and libraries detail which CIPA policies are restricting which materials. Additionally, those involved in the implementation of the program—the USAC, FCC, and Department of Education—have a legitimate interest in doing so: maintaining the integrity of students' First Amendment rights. Furthermore, because the E-Rate program operates on an entirely opt-in basis,[126] entities that do not wish to comply with the reporting mechanism simply do not have to and face no fear of repercussions—they just can't participate in the voluntary program.

The legality of the proposed solution can be analogized alongside *United States v. Phillip Morris*, where the D.C. Circuit Court of Appeals reviewed the language of a proposed disclosure in which the government was requiring cigarette manufacturers to publish "corrective statements" concerning the potential risks of smoking in their advertisements.[127] Relying on *Zauderer*, the court looked at whether the disclosures were "unjustified or unduly burdensome" and "reasonably related to the State's interest."[128] The court held that the government had a legitimate interest in compelling cigarette manufacturers to disclose "purely factual and uncontroversial information" regarding their products in order to "preven[t the] deception of consumers."[129] Further, the court found that such a required disclosure was

121. *See* VALERIE C. BRANNON ET AL., CONG. RSCH. SERV., IF12388, FIRST AMENDMENT LIMITATIONS ON DISCLOSURE REQUIREMENTS (2023) https://crsreports.congress.gov/product/pdf/IF/IF12388 [https://perma.cc/NG8G-7H7D]; *see also* U.S. CONST. amend. I.

122. Zauderer v. Off. of Disciplinary Couns. of Sup. Ct., 471 U.S. 626, 651 (1985).

123. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that a school board's act "in compelling the flag salute and pledge transcended constitutional limitations on their power and invaded the sphere of intellect and spirit which was the purpose of the First Amendment to reserve from all official control"); *see also* BRANNON ET AL., *supra* note 121.

124. *Zauderer*, 471 U.S. at 651.

125. *Id.*

126. *See E-Rate*, UNIVERSAL SERV. ADMIN. CO., https://www.usac.org/e-rate/ [https://perma.cc/GR77-L4SC] (last visited Sept. 17, 2024) ("Public or private schools (K-12), libraries, and groups of schools and libraries (e.g., consortia, districts, systems) *can* apply for discounts on eligible services.") (emphasis added).

127. *See* United States v. Phillip Morris, 855 F.3d 321, 323 (D.C. Cir. 2017).

128. *Zauderer*, 471 U.S. at 651.

129. *Phillip Morris*, 855 F.3d at 327.

not unduly burdensome to the manufacturers.[130] And while the above cases deal exclusively with the analysis of commercial disclosures, the D.C. Circuit held in *American Meat Institute v. United States Department of Agriculture* that *Zauderer* "applies 'to disclosure mandates aimed at addressing problems other than consumer deception.'"[131]

If challenged in a court of law, this proposed solution could be subject to a variety of scrutiny levels. For example, a state or school board challenging the mechanism would likely argue for strict scrutiny, where the government is required "to show its regulatory approach is narrowly tailored to achieve a compelling interest."[132] Cases where this is typically applied reflect "content-based" regulations, where the government "compel[s] individuals to speak a particular message . . . [thereby] 'alter[ing] the content of their speech.'"[133] Often, "such laws 'are presumptively unconstitutional[.]'"[134] However, the proposed reporting mechanism would consist of objective data reports and therefore reflects more of a "content-neutral" regulation, which "imposes only an incidental burden on speech [and] 'will be sustained if it furthers an important or substantial governmental interest . . . unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" [135] The USAC and FCC would therefore likely argue for intermediate scrutiny because the mechanism "pose[s] a less substantial risk of excising certain ideas or viewpoints from the public dialogue."[136] Under this standard, it is likely a court would uphold the mechanism just as was done in *Turner Broadcasting System, Inc. v. FCC*.[137] There, the Supreme Court held that intermediate scrutiny was the appropriate level of scrutiny to determine the constitutionality of content-neutral "must-carry" provisions in the Cable Television Consumer Protection and Competition Act of 1992, which require "cable operators to carry the signals of a specified number of local broadcast television stations."[138] On remand to the District of Columbia District Court, it was found that the must-carry provisions were constitutional, "surviv[ing] the 'intermediate level of scrutiny applicable to content-neutral restrictions that impose only an incidental burden on speech.'"[139]

130. *Id.* at 328.

131. *Id.* (citing Am. Meat Inst. v. U.S. Dep't of Agric, 760 F.3d 18, 20 (D.C. Cir. 2014)).

132. BRANNON ET AL., *supra* note 121.

133. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 766 (2018) (quoting Riley v. Nat'l Fed'n of Blind, 487 U.S. 781, 795 (1988)).

134. *Id.* (citing Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)).

135. *See Amdt1.7.3.7 Content-Neutral Laws Burdening Speech*, LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/amendment-1/content-neutral-laws-burdening-speech [https://perma.cc/2QJL-D4FG] (last visited Jan. 28, 2024) (citing Turner Broad. Sys. v. FCC, 512 U.S. 622, 662 (1994)).

136. Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994) (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

137. *See* Turner Broad. Sys. v. FCC, 910 F.Supp. 734, 751 (D.D.C. 1995).

138. *See Turner*, 512 U.S. at 630.

139. *See Turner Broad. Sys.*, 910 F.Supp. at 751.

C. *Pending Threats to the USF's Future and Viability of Proposed Reporting Mechanisms*

Since writing this Note, cases questioning the USF's constitutionality were brought before the Fifth, Sixth, and Eleventh Circuits.[140] In 2023, both the Sixth and Eleventh Circuits affirmed the program's constitutionality as a proper delegation of congressional power.[141] However, in July 2024, the Fifth Circuit diverged in an en banc decision, holding the USF's funding mechanism unconstitutional under the Taxing Clause.[142] As the USF is responsible for collecting funds to "subsidize communications services to . . . schools and libraries"—including the E-Rate program—the longevity of this Note's proposed solution may now be called into question.[143]

The Supreme Court previously denied certiorari for the Sixth and Eleventh Circuit decisions.[144] However, there are two new petitions pending before the Court: *FCC v. Consumers' Research* (filed September 30, 2024)[145] and *Schools, Health & Libraries Broadband Coalition (SHLB Coalition) v. Consumers' Research* (filed October 11, 2024).[146] Both petitions ask the Court to review the Fifth Circuit's ruling and uphold the USF's constitutionality as a proper delegation of congressional power.[147] Although it remains unclear whether the Supreme Court will grant certiorari in either of these cases, let alone side with the Fifth Circuit's unprecedented decision, "it

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[140] *See generally* Consumers' Rsch. Cause Based Com., Inc v. FCC, 109 F.4th 743 (5th Cir. 2024); Consumers' Rsch. v. FCC, 67 F.4th 773 (6th Cir. 2023); Consumers' Rsch. v. FCC, 88 F.4th 917 (11th Cir. 2023).

[141] *See* Consumers' Rsch. v. FCC, 67 F.4th at 797 ("Congress provided the FCC with a detailed statutory framework regarding universal service. That framework contains an intelligible principle because it offers nuanced guidance and delimited discretion to the FCC. Section 254 therefore does not violate the nondelegation doctrine . . . Accordingly, we DENY the Petition for Review."); Consumers' Rsch. v. FCC, 88 F.4th at 921 ("Because § 254 provides an intelligible principle and the FCC maintains control and oversight of all actions by the private entity, we hold that there are no unconstitutional delegations and therefore DENY the petition."); *see also* Marc S. Martin et al., *Fifth Circuit Shocks Telecom Industry by Overturning the FCC's Universal Service Fund*, PERKINS COIE (July 31, 2024) https://perkinscoie.com/insights/update/fifth-circuit-shocks-telecom-industry-overturning-fccs-universal-service-fund [https://perma.cc/7QG3-UHNP].

[142] *See generally* Consumers' Rsch. Cause Based Com., Inc v. FCC, 109 F.4th 743 (5th Cir, 2024); *see also* Martin et al., *supra* note 141.

[143] Martin et al., *supra* note 141.

[144] *See* Consumers' Rsch. v. FCC, 144 S.Ct. 2628 (2024) (mem.); Consumers' Rsch. v. FCC, 144 S. Ct. 2629 (2024) (mem.).

[145] Petition for Writ of Certiorari at I, FCC v. Consumers' Rsch., No. 24-354 (U.S. Sept. 30, 2024) ("The questions presented are: 1. Whether Congress violated the nondelegation doctrine by authorizing the Commission to determine, within the limits set forth in Section 254, the amount that providers must contribute to the Fund. 2. Whether the Commission violated the nondelegation doctrine by using USAC's financial projections in computing universal service contribution rates. 3. Whether the combination of Congress's conferral of authority on the Commission and the Commission's delegation of administrative responsibilities to USAC violates the nondelegation doctrine.").

[146] Petition for Writ of Certiorari at i, SHLB Coal. v. Consumers' Rsch., No. 24-422 (U.S. Oct. 11, 2024) (presenting the same three issues addressed in the FCC's petition).

[147] Kalvis Golde, *FCC asks court to uphold constitutionality of nationwide rural phone and interest subsidies*, SCOTUSBLOG (Nov. 12, 2024, 12:07 PM), https://www.scotusblog.com/2024/11/fcc-asks-court-to-uphold-constitutionality-of-nationwide-rural-phone-and-internet-subsidies/ [https://perma.cc/B7TC-LBTT].

has long been known that the existence of a circuit split is the best predictor of Supreme Court review."[148]

Before the Fifth Circuit, the FCC argued that the USF operates as a fee rather than a tax in that it "confers special benefits on contributing carriers by (among other things) expanding the network such carriers can serve."[149] However, nine judges disagreed, finding that USF contributions lacked three defining qualities of a fee that is *not* a tax: (1) USF contributions "are not incident to a voluntary act but rather a condition of doing business in the telecommunications industry"; (2) "the cost of [USF] contributions is not borne by parties [the] FCC regulates"; and (3) "the benefits associated with [USF] contributions 'inure to the benefit of the public' . . . rather than to the benefit of the persons who pay them."[150] Determining that USF contributions operate as taxes—a power that Congress must constitutionally delegate via an intelligible principle[151]—the Fifth Circuit further held that the USF's "double-layered contribution mechanism"—in which Congress delegates authority to the FCC and the FCC subsequently delegates to the USAC—violates the nondelegation doctrine.[152]

The seven dissenting judges, however, found the majority's serious break from precedent unconvincing.[153] Judge Stewart concluded that the USF is constitutional under the nondelegation doctrine and that its contributions do in fact possess the three defining qualities of a fee.[154] First, USF contributions are indeed "incident to a voluntary act" in that they reflect "telecommunications providers' willing choice to engage in the industry."[155] Second, Section 254 of the Telecommunications Act fails to mention any scenario in which the costs of USF contributions are passed on from telecommunications providers—whom which the FCC regulates—to the general public.[156] Third, while service providers are the primary beneficiaries

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[148] Deborah Beim & Kelly Rader, Evolution of Conflict in the Federal Circuit Courts 1 (Mar. 19, 2015) (on file with Yale Law School). *See also* SUP. CT. R. 10. According to Supreme Court Rule 10, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion" and "will be granted only for compelling reasons." *Id.* Such compelling reasons include a split of consensus among federal courts of appeals regarding "an important federal question." *Id.*; *see also* Joseph A. Grundfest, *Quantifying the Significance of Circuit Splits in Petitions for Certiorari: The Case of Securities Fraud Litigation* 11 (Stanford L. Sch. and The Rock Ctr. for Corp. Governance, Working Paper No. 254, 2024).

[149] *Consumers' Rsch.*, 109 F.4th at 756-57 (quoting en banc Brief for Respondents at 51, Consumers' Rsch. v. FCC, 109 F.4th 743 (5th Cir. 2024) (No. 22-60008).

[150] *Id.* at 757; Martin et al., *supra* note 141.

[151] *See Artl.S1.5.2 Origin of the Intelligble Principle Standard*, LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/article-1/section-1/origin-of-the-intelligible-principle-standard [https://perma.cc/KG3Y-L7Y3] (last visited Nov. 17, 2024) (citing Panama Refin. Co. v. Ryan, 293 U.S. 388, 421 (1935)). With regard to the nondelegation doctrine, the 'intelligible principle' standard requires that Congress delineate a legal framework to constrain the authority of the delegee, such as an administrative agency." *Id.*

[152] *See* Martin et al., *supra* note 141 (noting that the Fifth Circuit declined to rule on whether the Telecommunications Act of 1994 includes an intelligble principle); *see also Consumers' Rsch.*, 109 F.4th at 782, 786.

[153] *Consumers' Rsch.*, 109 F.4th at 788-805.

[154] *Id.* at 788.

[155] *Id.* at 800.

[156] *See id.* (noting that "costs incurred by entities and passed down to consumers through the entites' independent business judgment are not taxes"); *see also* 47 U.S.C. § 254.

of USF contributions, "the general public . . . receives an ancillary benefit in the form of more affordable, standardized service."[157] Also dissenting, Judge Higginson noted that the majority not only "ignores statutory criteria" and upends years of collaboration that bridged "the technology divide[,]" but also fails to find "an unconstitutional delegation of legislative power nor an unconstitutional exercise of government power by a private entity."[158]

Thus, while the USF's fate may soon be decided by the highest court, this Note's proposal remains plausible. Should the Supreme Court decide to grant certiorari and side with the Fifth Circuit's break from precedent, the FCC will likely be granted the opportunity to restructure the USF and its funding of the E-Rate program, thereby maintaining its integrity and mission of providing access to affordable telecommunications services.[159]

IV. CONCLUSION

Congress enacted CIPA in 2000 with one goal in mind: the protection of minor children and students.[160] However, protection can remain effective without being excessively defensive. While shielding students from harmful and obscene content is of the utmost importance, equally important are students' First Amendment rights. In an alarmingly polarized America, these rights must remain at the forefront of the content restriction debate and not blinded by social or political disagreement. By pursuing the solution explored above and expanding current CIPA audit requirements, the USAC and FCC can objectively and wholistically review filters and blocking mechanisms, thereby closing CIPA's backdoor for content restriction and preventing infringements on students' First Amendment rights.

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[157] *Consumers' Rsch.*, 109 F.4th at 799.

[158] *Id.* at 801.

[159] *See E-Rate: Universal Service Program for Schools and Libraries*, supra note 61; *see also* Martin et al., *supra* note 141.

160. *See* S. REP. NO. 106-141, at 1 (1999).

Invisible Infrastructure: Adapting the Commercial Spectrum Enhancement Act to Meet Current Needs

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I. INTRODUCTION

On a busy sidewalk in Washington, D.C., smartphones buzz in peoples' pockets. They are sharing photos, following turn-by-turn directions, streaming music, and talking on video calls. The cars passing by are connected and communicating, too—providing real-time traffic updates and improving safety, since many cars are driving themselves. The city's buildings and infrastructure are connected: Internet-linked sensors and cameras collect data that drive decision-making to enhance public safety, improve energy efficiency, and better manage the busy streets. These benefits aren't limited to cities, either. High-speed wireless broadband spans the country, connecting rural areas to the Internet and enabling impressive innovations.

This future is not yet a reality, and it might never be achieved if the radiofrequency (RF) spectrum is not carefully managed. The RF spectrum consists of the frequencies over which information can be transmitted, enabling wireless connectivity and communication.[1] Spectrum is a finite resource because the amount available is limited, but investments and advancements in technology can increase the amount of usable spectrum.[2] Spectrum is a form of invisible infrastructure that is increasingly strained by a wide range of uses—from everyday website and app visits to military communications that preserve national security. To maintain technology leadership and a healthy innovation ecosystem without compromising national security and public safety, the United States must balance varied interests and conflicting considerations.[3] In the context of RF spectrum utilization, this means ensuring frequency bands are appropriately allocated toward uses in the federal government, including for missile defense systems and government communications, as well as toward non-federal and commercial uses, including public safety communications, connected cars, and more reliable connectivity for our many personal electronic devices.[4]

Through its active engagement in spectrum policymaking and standards-setting for wireless equipment, China is recognizing the economic, leadership, and security gains that can be achieved by involvement and influence.[5] Failure to actively engage in standards-setting and failure to allocate spectrum appropriately in the United States has wide-

1. *See* STUART MINOR BENJAMIN & JAMES B. SPETA, INTERNET AND TELECOMMUNICATION REGULATION 48-49 (Carolina Academic Press 2019).

2. *See id.* at 57-58.

3. Austin Bonner, *Resolving Interference Conflicts Among "Highest and Best" Uses of the Radio Spectrum*, 21 COLO. TECH. L.J. 177, 185 (2023).

4. *See* Principles for Promoting Efficient Use of Spectrum and Opportunities for New Servs., *Policy Statement*, 38 FCC Rcd 3682, paras. 1-3 (2023), https://docs.fcc.gov/public/attachments/DOC-392197A1.pdf [https://perma.cc/73XC-GBH4].

5. *See* James Andrew Lewis & Clete Johnson, *Modernizing Spectrum Allocation to Ensure U.S. Security in the Twenty-First Century*, CTR. FOR STRATEGIC & INT'L STUD. (Sept. 26, 2023), https://www.csis.org/analysis/modernizing-spectrum-allocation-ensure-us-security-twenty-first-century [https://perma.cc/R37U-ABGQ].

ranging effects, from adverse national security implications to stagnating innovation and engineering progress.[6]

Historically, the United States has been a global leader in allocating spectrum for wireless communications services, facilitating innovation—including having moved "expeditiously to repurpose high- and low-band spectrum to support new advancements in technology, such as 5G."[7] In addition, "[n]early every modern weapons system—such as those used by airplanes, satellites, tanks, ships, and radios—depends on the spectrum to function."[8] Not only is spectrum an essential resource to enabling our increasingly connected lives, but it is critical to military applications including communications and situational awareness.[9] Advancements in technology bring new uses to existing spectrum, and demand for spectrum continues to grow; therefore, it is vital that priorities for spectrum use be carefully considered by the Federal Communications Commission (FCC) and National Telecommunications and Information Administration (NTIA), the government agencies primarily responsible for spectrum policy and management in the United States.[10]

An updated legal framework and systematic way of evaluating priorities—and making determinations regarding how spectrum will be allocated between federal and non-federal uses—is needed. Applications are wide-ranging, from telecommunications technologies such as Wi-Fi to environmental monitoring systems, and important uses can be in conflict.[11] Different uses of the same finite spectrum can lead to interference and other reliability issues. In balancing varied interests and evaluating competing priorities, the FCC, NTIA, and broader federal government must leverage existing law and pave new paths forward that enable more efficient spectrum allocation.[12]

This Note focuses on one aspect of spectrum management—the reallocation of federal spectrum for non-federal uses. The current legal framework for repurposing federal spectrum for non-federal and commercial uses, defined in part by the Commercial Spectrum Enhancement Act of 2004 (the CSEA), does not meet its purpose of promoting more efficient use of spectrum because it does not adequately

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6. *See generally* KELLEY SAYLER, CONG. RSCH. SERV., IF11251, NATIONAL SECURITY IMPLICATIONS OF FIFTH GENERATION (5G) MOBILE TECHNOLOGIES (2023).

7. U.S. DEP'T OF COM., NAT'L TELECOMMS. & INFO. ADMIN., ANNUAL REPORT ON THE STATUS OF SPECTRUM REPURPOSING AND OTHER INITIATIVES 1 (2023).

8. JOHN HOEHN, JILL GALLAGHER & KELLY SAYLER, CONG. RSCH. SERV., R46564, OVERVIEW OF DEPARTMENT OF DEFENSE USE OF THE ELECTROMAGNETIC SPECTRUM 4 (2021).

9. *See id.*

10. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-106170, SPECTRUM MANAGEMENT: IMPROVED PLANNING AND INTERAGENCY COLLABORATION COULD STRENGTHEN SPECTRUM REALLOCATION EFFORTS 1 (2022); *see also Who Regulates the Spectrum*, NAT'L TELECOMMS. & INFO. ADMIN., https://www.ntia.gov/book-page/who-regulates-spectrum [https://perma.cc/KU3S-PPJL] (last visited Sept. 30, 2024).

11. *See* THE WHITE HOUSE, NATIONAL SPECTRUM STRATEGY 1 (2023).

12. *See generally* LINDA K. MOORE, CONG. RSCH. SERV., R40674, SPECTRUM POLICY IN THE AGE OF BROADBAND: ISSUES FOR CONGRESS (2013).

incentivize federal incumbents to relinquish or share spectrum, nor does it adequately foster innovation in spectrum use.

Part II of this Note provides basic background information on spectrum and spectrum policy. Part II, Sections A and B include a brief discussion of some of the current uses of spectrum and explain aspects of spectrum policymaking in the United States. Part II, Section C provides information about the CSEA; Section D describes international efforts to harmonize spectrum policy and explains standards-setting in this context. This background is followed by analysis in Part III, which includes discussion of how the CSEA fails to meet its purpose in Section A, the need for a sound approach to spectrum repurposing in Section B, and the important role of standards-setting in maintaining United States leadership in spectrum policy in Section C. Part IV, Section A offers recommendations in the form of potential adjustments to the CSEA. This is followed by a suggestion for an entirely novel approach to spectrum allocation in Section B and discussion of additional considerations that could enable efficient and more innovative uses of finite spectrum in Section C. Part V concludes this Note.

II. BACKGROUND

This section introduces the concept of spectrum and explains how spectrum is used in the United States. This section also describes aspects of spectrum policy in the United States, explaining the roles of the FCC and NTIA in spectrum management and introducing the 2023 National Spectrum Strategy released by the Biden Administration. Then, this section describes the CSEA, including its purpose to benefit the public. The section further explains the legal framework the CSEA provides for spectrum reallocation and amendments since its adoption. Finally, this section discusses international harmonization of standards.

A. Introduction to Spectrum and Spectrum Usage in the United States

The RF spectrum is a range of electromagnetic frequencies used for wireless communication and broadcasting; it is commonly referred to as "spectrum" and this Note will refer to RF spectrum used for communications as such.[13] Different frequencies have different characteristics and therefore different applications.[14]

For purposes of deciding how to allocate spectrum for different uses, subsets of the broader spectrum are divided into "bands," or specific ranges

13. *Radio Spectrum Allocation*, FCC, https://www.fcc.gov/engineering-technology/policy-and-rules-division/general/radio-spectrum-allocation [https://perma.cc/Y6ES-3V6V] (last visitied Sept. 30, 2024).

14. *See* BENJAMIN & SPETA, *supra* note 1, at 47-50, 75-78.

of frequencies.[15] Lower frequency bands have longer wavelengths, allowing these waves to travel longer distances and work more effectively through obstacles, like buildings and walls.[16] Higher frequency bands, which have shorter wavelengths and generally are allocated in greater bandwidths, can allow for wider channels and therefore carry more data—but are more suitable for communications over relatively shorter distances.[17] Advancements in wireless technologies have demanded larger licensed bands.[18] These higher-frequency bands, often with larger bandwidths, can also be used for radio communications, as well as other applications as far-ranging as Wi-Fi and Bluetooth in personal electronic devices to television broadcasting.[19] It is necessary to allocate spectrum because different uses within the same band can lead to interference that is detrimental to each use, and allocation ensures that spectrum—a finite resource—is used efficiently.[20]

Spectrum is an "invisible" infrastructure that supports critical and ubiquitous technologies.[21] One of the most prominent applications of spectrum is mobile communication, where spectrum enables cellular and Wi-Fi networks that offer constant connectivity.[22] Additionally, spectrum allows radio and television broadcasting across the country.[23] Spectrum is integral to public safety communication, too, supporting first responders and emergency services.[24] There are also applications of spectrum in medical imaging, meteorology, and scientific research.[25]

As technology continues to advance and digital devices continue to proliferate, spectrum is increasingly important. Spectrum is critical to enabling the Internet of Things (IoT), autonomous vehicles, and connected cities—but these innovations must coexist with current and future uses related to communication systems, national security, navigation systems, and other applications.[26] Spectrum is critical to the United States'

15. *See Radio Spectrum Allocation*, *supra* note 13; *see also* Catherine G. Manning, *What are the spectrum band designators and bandwidths?*, NAT'L AERONAUTICS & SPACE ADMIN. (Sept. 2, 2018), https://www.nasa.gov/general/what-are-the-spectrum-band-designators-and-bandwidths/ [https://perma.cc/D7PN-5UVQ].

16. *See* BENJAMIN & SPETA, *supra* note 1, at 48-50.

17. *Id.*

18. LINDA K. MOORE, CONG. RSCH. SERV., R40674, SPECTRUM POLICY IN THE AGE OF BROADBAND: ISSUES FOR CONGRESS 1 (2013).

19. *See* BENJAMIN & SPETA, *supra* note 1, at 50, 54-56; John Herrman, *Giz Explains: Why Everything Wireless Is 2.4 GHz*, GIZMODO (Sept. 7, 2010), https://gizmodo.com/giz-explains-why-everything-wireless-is-2-4ghz-5629814 [https://perma.cc/AV2D-MR6G].

20. *See* BENJAMIN & SPETA, *supra* note 1, at 63-68.

21. THE WHITE HOUSE, *supra* note 11.

22. BENJAMIN & SPETA, *supra* note 1, at 54-56; *see also* John Herrman, *Giz Explains: Why Everything Wireless Is 2.4 GHz*, GIZMODO (Sept. 7, 2010), https://gizmodo.com/giz-explains-why-everything-wireless-is-2-4ghz-5629814 [https://perma.cc/AV2D-MR6G].

23. BENJAMIN & SPETA, *supra* note 1, at 49, 52-56.

24. *See* THE WHITE HOUSE, *supra* note 11.

25. *Id.*

26. *See id.* at 21.

telecommunications infrastructure, serving as the medium for wireless communication services and many other applications.[27]

B. United States Spectrum Policy

Spectrum policy is essentially how governments manage the use of spectrum—the allocation and use of spectrum are regulated by national and international organizations, which designate bands for specific applications.[28] In the United States, the FCC manages spectrum and oversees non-federal uses, while NTIA oversees use of spectrum by federal agencies.[29] The International Telecommunication Union (ITU) develops standards for global spectrum allocation.[30] Increasing demand for wireless communication, along with new and innovative uses of spectrum driven by advancements in technology, have led to an increasingly congested spectrum environment and therefore an increased need for government agencies and the ITU to carefully consider various uses of spectrum.[31] To this end, NTIA coordinates "with the FCC and other stakeholders to understand the value of repurposing choices to the nation when making these critical decisions, while still preserving federal capabilities."[32]

1. The Roles of the FCC and NTIA in Spectrum Management

The FCC plays a key role in overseeing and managing spectrum by issuing licenses to entities for the non-federal use of specific frequencies and designating certain bands for use by unlicensed operations.[33] Different services, including radio and television broadcasting, mobile communication, satellite services, and public safety communication, operate within allocated frequency ranges to prevent interference with other services.[34] Changes in technology over time require the FCC to reevaluate and adjust spectrum allocations periodically.[35]

The FCC works to encourage the "highest and best use" of spectrum—that is, to align spectrum allocations with the mandate of the Communications Act, which gives the FCC its authority to regulate

27. *Id.*

28. *See Who Regulates the Spectrum*, NAT'L TELECOMMS. & INFO. ADMIN., https://www.ntia.gov/book-page/who-regulates-spectrum [https://perma.cc/KU3S-PPJL] (last visited Sept. 30, 2024); *see also Radio Spectrum Allocation*, *supra* note 13.

29. *See Who Regulates the Spectrum*, *supra* note 28.

30. *See About International Telecommunication Union (ITU)*, INT'L TELECOMM. UNION, https://www.itu.int/en/about/Pages/default.aspx [https://perma.cc/H78S-4Z9C] (last visited Sept. 30, 2024).

31. THE WHITE HOUSE, *supra* note 11, at 11-12.

32. U.S. DEP'T OF COM., NAT'L TELECOMMS. & INFO. ADMIN., *supra* note 7, at 42.

33. *See Radio Spectrum Allocation*, *supra* note 13.

34. *See* BENJAMIN & SPETA, *supra* note 1, at 63-68.

35. *See Radio Spectrum Allocation*, *supra* note 13.

communications to promote the public interest.[36] The FCC must consider how decisions regarding spectrum allocation will serve the broader public interest, including promoting competition, innovation, and access to wireless services.[37] As part of this effort, the FCC has conducted spectrum auctions to assign licenses for specific frequency bands to non-federal entities.[38]

Further, the FCC monitors spectrum and enforces rules and regulations to prevent interference between different wireless services and users.[39] Related to its roles, the FCC has opened an inquiry related to improving its understanding of spectrum usage by employing more advanced technologies and methods.[40] The FCC's oversight ensures that different and diverse services can coexist.[41] The FCC also develops policy, establishing rules and regulations related to spectrum usage and management with consideration of technological advancements and the evolving needs of wireless services.[42] This includes efforts to engage with other nations and foster international harmonization of standards for spectrum policy.[43]

NTIA oversees the allocation of spectrum for federal government use.[44] It works to ensure that government agencies have the spectrum they need for their missions, coordinating among federal agencies to determine the most efficient uses of spectrum, weighing priorities, and preventing potential conflicts.[45] NTIA also engages in research and planning activities to identify spectrum bands for government use and to explore opportunities for spectrum sharing.[46] Further, as part of the Department of Commerce,

36. *See What We Do*, FCC, https://www.fcc.gov/about-fcc/what-we-do [https://perma.cc/T3TE-E65Q] (last visited Sept. 30, 2024); *see also* 47 U.S.C. § 151.

37. *What We Do*, FCC, https://www.fcc.gov/about-fcc/what-we-do [https://perma.cc/T3TE-E65Q] (last visited Sept. 30, 2024).

38. *See* Implementation of the Com. Spectrum Enhancement Act and Modernization of the Comm'n's Competitive Bidding Rules and Procs., *Further Notice of Proposed Rulemaking*, 20 FCC Rcd 11268, paras. 1-3, 6 (2006), https://docs.fcc.gov/public/attachments/FCC-06-8A1.pdf [https://perma.cc/J7Q7-YQXF].

39. *See, e.g.*, Advancing Understanding of Non-Federal Spectrum Usage, *Notice of Inquiry*, FCC 23-232, paras. 1, 4 (2023), https://docs.fcc.gov/public/attachments/FCC-23-63A1.pdf [https://perma.cc/QR5B-HG92].

40. *Id.* at paras. 1-3, 22, 25-27, 34, 39.

41. *See id.*

42. *See Radio Spectrum Allocation*, *supra* note 13.

43. *See International Affairs*, FCC, https://www.fcc.gov/international-affairs [https://perma.cc/8G2D-HYNB].

44. *See Spectrum Management*, NAT'L TELECOMMS. & INFO. ADMIN., https://www.ntia.gov/category/spectrum-management [https://perma.cc/2MLX-G3YE] (last visited Sept. 30, 2024).

45. *See id.*

46. *See NTIA At-A-Glance*, NAT'L TELECOMMS. & INFO. ADMIN. (Mar. 2021), https://www.ntia.gov/files/ntia/publications/ntia_at_a_glance_march_2022.pdf [https://perma.cc/795V-P3PD] (updated Mar. 2021).

NTIA contributes to efforts by the United States to engage in global spectrum harmonization alongside the FCC.[47]

NTIA focuses on coordinating and managing spectrum use for federal government agencies, but works closely with the FCC to ensure efficient and effective spectrum utilization in the United States.[48] The agencies have a formal agreement regarding coordination "to promote the efficient use of the radio spectrum in the public interest."[49]

2. The 2023 National Spectrum Strategy

In November 2023, the Biden Administration released a National Spectrum Strategy (the Strategy) that aims to improve spectrum management in an increasingly congested spectrum environment.[50] It involves conducting an in-depth study of five spectrum bands for potential repurposing, describes a "national testbed" for spectrum research, and emphasizes spectrum sharing.[51] This strategy was the result of the NTIA's engagement with a wide range of stakeholders.[52]

The goals of the Strategy are "[t]o promote innovation and U.S. leadership in wireless technologies" and to "make the most efficient use possible of [spectrum] to enhance the quality of life for all Americans."[53] The Strategy states that spectrum is an infrastructure that supports countless aspects our daily lives and articulates the importance of developing a "comprehensive strategy to modernize spectrum policy."[54] A presidential memorandum accompanying the Strategy document establishes the Interagency Spectrum Advisory Council, which will encourage coordination on spectrum policy matters across agencies.[55] An implementation plan for the Strategy was released in March 2024, and a related research and development plan was released in October 2024.[56]

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47. *See International*, NAT'L TELECOMMS. & INFO. ADMIN., https://www.ntia.gov/category/international [https://perma.cc/R4XK-ZKDH] (last visited Sept. 30, 2024).

48. Memorandum of Understanding Between the Federal Communications Commission and the National Telecommunications and Information Administration, at 1-2 (Aug. 1, 2022) (on file with the NTIA), https://www.ntia.gov/files/ntia/publications/ntia-fcc-spectrum_mou-8.2022.pdf [https://perma.cc/KE7N-4SXC].

49. *Id.*

50. Memorandum on Modernizing United States Spectrum Policy and Establishing a National Spectrum Strategy, 88 Fed. Reg. 80079, 80079 (Nov. 17, 2023).

51. THE WHITE HOUSE, *supra* note 11, at 1-3, 16.

52. *National Spectrum Strategy*, NAT'L TELECOMMS. & INFO. ADMIN., https://www.ntia.gov/issues/national-spectrum-strategy [https://perma.cc/M3VY-3HM2] (last visited Oct. 16, 2024).

53. THE WHITE HOUSE, *supra* note 11.

54. *Id.*

55. Memorandum on Modernizing United States Spectrum Policy and Establishing a National Spectrum Strategy, 88 Fed. Reg. 80079, 80080 (Nov. 17, 2023).

56. U.S. DEP'T OF COM., NAT'L TELECOMMS. & INFO. ADMIN., NATIONAL SPECTRUM STRATEGY IMPLEMENTATION PLAN (2024); NAT'L SCI. & TECH. COUNCIL, NATIONAL SPECTRUM RESEARCH AND DEVELOPMENT PLAN (2024).

C. The Commercial Spectrum Enhancement Act

This subsection outlines the legal framework for spectrum reallocation in the United States within the context of current spectrum usage and policy. The CSEA is a key part of this framework; it aims to promote more efficient use of spectrum by encouraging—and compensating—the transition of federal spectrum to non-federal uses.[57] This subsection discusses the purpose of the CSEA and subsequently explains how it functions as a mechanism for spectrum reallocation in more detail. The subsection concludes by describing amendments to the CSEA since its enactment.

1. The Purpose of the CSEA

The CSEA was a bipartisan legislative effort with the aim of "get[ting] new valuable spectrum into the hands of the commercial wireless carriers so they can bring new advanced wireless services to the consumer."[58] The sponsor of the bill noted that a framework for reallocating spectrum from federal to non-federal users "would be good for the wireless carriers, good for the equipment manufacturers, good for the consumer, and terrific for the economy."[59]

The CSEA was designed to provide increased certainty to the private sector regarding the availability of spectrum for innovative uses, creating an environment more conducive to investment compared to one in which the future availability of spectrum was unknown.[60] In addition to the goal of stimulating investment by providing certainty to corporate interests, the legislative history indicates that the CSEA aimed to provide benefits to consumers using wireless services.[61] Legislators noted that consumers would "praise the benefits" offered by innovative wireless services enabled by making more spectrum available for commercial uses.[62] In addition, drafters ensured the CSEA would benefit government agencies who were the incumbent users of spectrum bands by providing a compensation scheme to cover the costs of relocation to other bands.[63]

At the time, the focus was on freeing up spectrum to be used for 3G services—a major advancement in wireless communications that dramatically increased the viability and usefulness of the smartphones that would reshape society.[64] Prior to the CSEA, there was not a streamlined

57. The Commercial Spectrum Enhancement Act of 2004, 47 U.S.C. §§ 901, 923, 928.

58. *The Commercial Spectrum Enhancement Act: Hearing Before the Subcomm. on Telecomms. and the Internet of the Comm. on Energy and Com.*, 108th Cong. 1 (2003) (statement of Rep. Upton).

59. *Id.*

60. *Id.* at 2.

61. *Id.*

62. *Id.*

63. *Id.*

64. *The Commercial Spectrum Enhancement Act: Hearing on H.R. 1320 Before the Subcomm. on Telecomms. and the Internet of the Comm. on Energy and Com.*, 108th Cong. 5 (2003) (statement of Rep. Dingell).

process for reallocating spectrum: the FCC would conduct an auction to sell spectrum licenses to the highest bidders, and winners would be responsible for paying twice, "once at auction and then again to . . . facilitate the movement of Government spectrum users to new spectrum bands."[65]

Recognizing that "legislation must provide for full reimbursement of all reasonable expenses the incumbents incur in relocating to new spectrum," the CSEA was implemented to make this process more straightforward and efficient.[66] The legislation established a fund to collect auction proceeds and a mechanism to "ensure that the entities bidding for spectrum are not subject to additional relocation costs for the incumbents beyond the amount they pay for the spectrum at auction."[67]

During the development of the legislation, lawmakers were aware of the critical defense implications associated with reallocating spectrum from federal users to non-federal users.[68] In particular, Department of Defense (DOD) leadership explained to legislators that spectrum was essential for the communications and preparedness of the military, and noted its "commit[ment] to ensuring the right balance is maintained in accommodating the economic needs of our Nation while preserving critical military capabilities."[69] In agreeing to cooperate with proposed efforts to repurpose federal spectrum, the DOD required that the legislation account for the DOD's spectrum needs.[70] The DOD also requested reimbursement for relocation costs and the ability for it to set timelines to transition and vacate reallocated spectrum.[71]

In addition to addressing the needs of commercial entities, American consumers, and government interests, legislators recognized the need to "support making more spectrum available for unlicensed use" as a way to enable experimentation and "enhance economic growth and entrepreneurial activity."[72]

Ultimately, the CSEA aimed to enable new applications and services that use spectrum—primarily for the benefit of consumers, by way of providing increased certainty to commercial interests and reliable compensation to federal incumbents.[73] The CSEA created a mechanism that

65. *Id.*

66. *Id.* at 11 (statement of Nancy Victory, Assistant Secretary, National Telecommunications and Information Administration).

67. *Id.*

68. *Id.* at 17 (statement of Steven Price, Deputy Assistant Secretary for Spectrum, Space, Sensors, and C3 Policy, Department of Defense).

69. *Id.*

70. *The Commercial Spectrum Enhancement Act: Hearing on H.R. 1320 Before the Subcomm. on Telecomms. and the Internet of the Comm. on Energy and Com.*, 108th Cong. 17 (2003) (statement of Steven Price, Deputy Assistant Secretary for Spectrum, Space, Sensors, and C3 Policy, Department of Defense).

71. *Id.*

72. *Id.* at 3 (statement of Rep. Markey).

73. H.R. REP. NO. 108-137, at 5-6 (2003).

the FCC and NTIA could use to reallocate spectrum frequencies predictably and efficiently from federal to non-federal users.[74]

2. The CSEA as a Mechanism for Facilitating Spectrum Reallocation

The CSEA allows federal agencies operating services using spectrum to be reimbursed for the cost of reallocation of frequencies from federal to non-federal use.[75] Frequencies eligible for reallocation include those that are specifically identified by Congress and any other spectrum frequency assigned by the FCC to be repurposed through the competitive bidding process.[76] Costs of reallocation consist of "relocation costs," which refer to "the costs incurred by a Federal entity in connection with the auction . . . or the sharing of spectrum frequencies . . . in order to achieve comparable capability of systems as before the relocation or sharing arrangement."[77]

Under the CSEA, the FCC and NTIA conduct an assessment of the spectrum currently held by federal agencies, identify spectrum bands that can be repurposed for non-federal use, and determine transition costs—that is, the costs that the agency would incur if it were to relinquish or share spectrum to allow for commercial or other non-federal use.[78] In accordance with the CSEA, NTIA is responsible for publishing "an annual report on the status of existing efforts and planned near- to mid-term spectrum repurposing initiatives" through coordination with the FCC and the Office of Management and Budget (OMB).[79]

The FCC has historically conducted auctions for the frequencies determined eligible for reallocation, providing licenses to the highest bidders for use of the spectrum bands being relinquished by federal users.[80] The FCC is required to receive proceeds that are "at least 110 percent of the total estimated relocation costs."[81] The proceeds of auctions go to the Spectrum Relocation Fund (SRF), which compensates federal agencies for costs incurred in making requisite adjustments to their operations.[82] A timeline is set for federal agencies to vacate or otherwise make available auctioned spectrum available to non-federal users.[83]

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74. 149 CONG. REC. H5182 (daily ed. June 11, 2003) (statement of Rep. Markey).
75. 47 U.S.C. § 923(g)(1).
76. *See* KAREN GORDON ET AL., INST. FOR DEF. ANALYSES, A REVIEW OF APPROACHES TO SHARING OR RELINQUISHING AGENCY-ASSIGNED SPECTRUM 5 (2014), https://www.ida.org/-/media/feature/publications/a/ar/a-review-of-approaches-to-sharing-or-relinquishing-agency-assigned-spectrum/p5102final.ashx [https://perma.cc/GZL3-XG2M].
77. 47 U.S.C. § 923(g)(3)(a).
78. *See generally* 47 U.S.C. § 923.
79. U.S. DEP'T OF COM., NAT'L TELECOMMS. & INFO. ADMIN., *supra* note 7, at 11.
80. LINDA K. MOORE, CONG. RSCH. SERV., R40674, SPECTRUM POLICY IN THE AGE OF BROADBAND: ISSUES FOR CONGRESS 3-7, 10-11 (2013).
81. 47 C.F.R. § 1.2104 (2023).
82. *See generally* 47 U.S.C. § 928.
83. *See* 47 U.S.C. § 928(d)(2)(B).

Assessing costs associated with making spectrum available involves evaluating the spectrum's market value, technical characteristics (to determine potential utility and limits), and economic value (including, for example, innovative potential and associated contributions to GDP).[84] Repurposing spectrum is associated with opportunity costs, coordination costs, and investments in infrastructure and equipment.[85]

The CSEA requires NTIA to develop a relocation plan with incumbent federal agencies and to monitor progress against estimated costs and timelines of transitions.[86] To this end, NTIA issues a progress report on the CSEA annually based on data submitted by federal agencies.[87] The report also describes "the costs estimated, funds transferred, and costs paid from the SRF."[88]

Revenue from licensing spectrum to commercial users, primarily through auctions run by the FCC, funds the SRF, which can in turn support modernization and transition efforts of government users.[89] Essentially, the SRF created a mechanism for "federal agencies to recover relocation costs directly from auction proceeds when they are required to vacate spectrum slated for auction."[90] The SRF allows federal entities to recover costs associated with relocation "without additional congressional appropriations."[91]

By design, the CSEA favors exclusive use of spectrum—licenses are needed to raise funds for the SRF, and unlicensed spectrum by definition does not involve entities bidding and paying for licenses issued by the FCC.[92] Unlicensed spectrum bands, such as those used for Wi-Fi, are "instead accessible to anyone using wireless equipment certified by the FCC for those frequencies."[93] However, new technologies now can allow for more dynamic spectrum sharing—that is, non-exclusive use of spectrum that is either licensed or unlicensed. For example, algorithms can dynamically select frequencies within a spectrum band, such that

84. *See* U.S. DEP'T OF COM., NAT'L TELECOMMS. & INFO. ADMIN., *supra* note 7, at 11-17.

85. *See id.* at 15.

86. 47 U.S.C. § 923(h).

87. *See, e.g.*, U.S. DEP'T OF COM., NAT'L TELECOMMS. & INFO. ADMIN., COMMERCIAL SPECTRUM ENHANCEMENT ACT: ANNUAL PROGRESS REPORT FOR 2022 (2023).

88. *Id.* at iii.

89. *See Updating the Spectrum Relocation Fund to Enable Innovation, Flexibility in Spectrum Use*, NAT'L TELECOMMS. & INFO. ADMIN. (Dec. 17, 2015), https://www.ntia.gov/blog/updating-spectrum-relocation-fund-enable-innovation-flexibility-spectrum-use [https://perma.cc/3AFC-XHQH].

90. LINDA K. MOORE, CONG. RSCH. SERV., R44433, FRAMING SPECTRUM POLICY: LEGISLATIVE INITIATIVES 8 (2016).

91. KAREN GORDON ET AL., INST. FOR DEF. ANALYSES, A REVIEW OF APPROACHES TO SHARING OR RELINQUISHING AGENCY-ASSIGNED SPECTRUM 5 (2014), https://www.ida.org/-/media/feature/publications/a/ar/a-review-of-approaches-to-sharing-or-relinquishing-agency-assigned-spectrum/p5102final.ashx [https://perma.cc/GZL3-XG2M].

92. *Id.* at 7.

93. LINDA K. MOORE, CONG. RSCH. SERV., R44433, FRAMING SPECTRUM POLICY: LEGISLATIVE INITIATIVES 12 (2016).

interference is largely avoided.[94] It is important to note, though, that these approaches to spectrum management are not without challenges: "available airtime for each network [using the same band] is reduced because some of the airtime is occupied by the other networks" and the remaining potential for interference "can result in a severe performance degradation."[95]

3. Amendments to the CSEA Since Its Enactment

Subsequent legislation has amended the CSEA in minor ways, adapting the mechanism to changes in technology and otherwise improving the framework. The 2012 Spectrum Act introduced "provisions to increase the amount of spectrum licenses available for auction and to improve management of the [SRF]."[96] It also "establishe[d] a process for television broadcasters to release spectrum licensed to them to be auctioned as commercial licenses for mobile broadband."[97] In addition, it "include[d] provisions to apply spectrum-license auction revenues toward deficit reduction; to establish a planning and governance structure to deploy public safety broadband networks, using some auction proceeds for that purpose; and to assign additional spectrum resources for public safety communications."[98] The 2012 Spectrum Act permits the use of funds in the SRF to be used not only to reimburse costs of federal users, but also to support investment for the advancement of public safety infrastructure in the United States.[99]

The Middle Class Tax Relief and Job Creation Act of 2012 further amended the CSEA, implementing additional changes to the SRF that permitted funds to be used "to reimburse Federal entities for costs associated with the shared use of spectrum frequencies."[100] However, the amendment "requires NTIA to give priority to options involving reallocation of the band for exclusive non-Federal use," preferring exclusive use over sharing.[101] The only circumstances in which NTIA may permit spectrum sharing are when relocating the federal incumbent "is not feasible because of technical or cost constraints."[102]

The Middle Class Tax Relief and Job Creation Act of 2012 also added the explicit authorization for SRF funds to be used to acquire and implement

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94. ANDREAS KÖNSGEN, DESIGN AND SIMULATION OF SPECTRUM MANAGEMENT METHODS FOR WIRELESS LOCAL AREA NETWORKS 103-104 (Vieweg+Teubner Verlag 2010).

95. *Id.*

96. LINDA K. MOORE, CONG. RSCH. SERV., R44433, FRAMING SPECTRUM POLICY: LEGISLATIVE INITIATIVES Summary (2016).

97. *Id.*

98. *Id.*

99. *Id.* at 3.

100. KAREN GORDON ET AL., INST. FOR DEF. ANALYSES, A REVIEW OF APPROACHES TO SHARING OR RELINQUISHING AGENCY-ASSIGNED SPECTRUM 5-6 (2014), https://www.ida.org/-/media/feature/publications/a/ar/a-review-of-approaches-to-sharing-or-relinquishing-agency-assigned-spectrum/p5102final.ashx [https://perma.cc/GZL3-XG2M].

101. *Id.* at 7.

102. 47 U.S.C. § 923(j).

"state-of-the-art replacement systems intended to meet comparable operational scope."[103] This introduced an incentive for federal agencies to upgrade equipment, enabling more efficient use of spectrum. Finally, the revisions clarified that expenditures associated with estimating costs and planning for potential relocation or sharing would be reimbursed by the SRF.[104]

The Spectrum Pipeline Act of 2015 followed these earlier amendments and similarly aimed to make more spectrum available for auction, clarify the CSEA's reimbursement mechanism, and emphasize spectrum sharing; it also included a focus on "federal research to improve spectrum and network efficiency."[105] Ultimately, though, the changes presented by amendments to the CSEA have not been significant, but rather minor modifications, including some changes that have largely been concerned with "describing reimbursable costs and providing guidelines to the Office of Management and Budget," the federal agency responsible for approving transfers from the SRF.[106]

D. International Harmonization and Standards-Setting

International harmonization efforts are important to consider in the broader context of spectrum management and the goals of the CSEA. While the FCC and NTIA are responsible for spectrum policy in the United States, they also engage in international coordination and collaboration on standards, advising the Department of State in international spectrum policy discussions and supporting efforts that enable coordination.[107] Supply chains and markets for telecommunications equipment are global, and leadership in standards-setting is critical to maintaining interoperability, economic competitiveness, and national security.[108]

Consistent global standards enable seamless international roaming for customers using mobile phones across different countries, economies of scale for hardware equipment manufacturers to sell to a global market, and competitive advantages for countries that play a role in setting the

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103. KAREN GORDON ET AL., INST. FOR DEF. ANALYSES, A REVIEW OF APPROACHES TO SHARING OR RELINQUISHING AGENCY-ASSIGNED SPECTRUM 5-6 (2014), https://www.ida.org/-/media/feature/publications/a/ar/a-review-of-approaches-to-sharing-or-relinquishing-agency-assigned-spectrum/p5102final.ashx [https://perma.cc/GZL3-XG2M].

104. *Id.*

105. LINDA K. MOORE, CONG. RSCH. SERV., R44433, FRAMING SPECTRUM POLICY: LEGISLATIVE INITIATIVES (2016).

106. *Id.*

107. *See International Affairs*, FCC, https://www.fcc.gov/international-affairs [https://perma.cc/AG9D-AH7X] (last visited Sept. 30, 2024); *International*, NAT'L TELECOMMS. & INFO. ADMIN., https://www.ntia.gov/category/international [https://perma.cc/R4XK-ZKDH] (last visited Sept. 30, 2024).

108. *See International Affairs*, FCC, https://www.fcc.gov/international-affairs [https://perma.cc/AG9D-AH7X] (last visited Sept. 30, 2024); *International*, NAT'L TELECOMMS. & INFO. ADMIN., https://www.ntia.gov/category/international [https://perma.cc/R4XK-ZKDH] (last visited Sept. 30, 2024).

standards.[109] For example, 3GPP, an organization of standards bodies that set technical specifications for the mobile telecommunications industry, set standards for harmonized bands for LTE technology.[110] Technical standards are "sets of mutually agreed-upon engineering specifications" that "help facilitate international trade and can solidify . . . competitive advantages."[111] The harmonization of technical standards creates a global market for buyers and sellers—including government entities—that enables economies of scale, more affordable devices, and interoperability of devices and networks.[112]

In addition to the practical and economic implications of globally harmonized standards, leading the standards-setting process can allow the United States and its allies to favor their own manufacturers of equipment, involving these interests in the process of setting standards and technical specifications to build economies of scale for trusted equipment manufacturers.[113] Leadership also enables the United States to continue to drive research, development, and experimentation related to dynamic spectrum sharing that would allow for more efficient use of spectrum.[114] If instead China or other countries are responsible for driving global spectrum policymaking and standards-setting in opposition to the United States and its allies, equipment manufactures from these countries, such as China's Huawei, will benefit from economies of scale and cause the rest of the world to be reliant on their equipment.[115] Recently, China has been "moving aggressively to bolster Chinese companies' domestic and international advantages in 5G/6G and in advanced technologies more broadly, with significant implications for China's drive to dominate emerging tech, set norms and standards, and build influence in Global South countries currently investing in digital infrastructure."[116]

Similarly to efforts of the United States and its allies, "China seeks to align global spectrum bands with its own domestic allocations" to achieve the benefits of economies of scale and technology leadership.[117] This would "provide an opportunity for Chinese vendors to exploit first mover advantage in creating products for the globally harmonized 5G bands" and

109. *See Exploring China's Global Agenda on Spectrum Policy and 5G/6G*, ATLANTIC COUNCIL (Nov. 15, 2023), https://www.atlanticcouncil.org/event/exploring-chinas-global-agenda-on-spectrum-policy-and-5g-6g/ [https://perma.cc/A9LF-8BXW].

110. *See* Lorenzo Casaccia, *Understanding 3GPP – starting with the basics*, QUALCOMM (Aug. 1, 2017), https://www.qualcomm.com/news/onq/2017/08/understanding-3gpp-starting-basics [https://perma.cc/GF3E-D48Z].

111. OWEN DANIELS, GEO. CTR. FOR SEC. AND EMERGING TECH., CSET ANALYSES OF CHINA'S TECHNOLOGY POLICIES AND ECOSYSTEM: THE PRC'S EFFORTS ABROAD 7 (2023), https://cset.georgetown.edu/wp-content/uploads/20230036_The-PRCs-Efforts-Abroad_FINAL9.20.2023.pdf [https://perma.cc/53QY-8P73].

112. *See id.* at 6-8.

113. LEWIS & JOHNSON, *supra* note 5, at 1-3, 7, 9.

114. *Id.*

115. *See id.*

116. *Exploring China's Global Agenda on Spectrum Policy and 5G/6G*, *supra* note 109.

117. LEWIS & JOHNSON, *supra* note 5, at 6.

cause harmful effects to the economic leadership and national security of the United States and its allies.[118]

These issues are distinct from, but closely connected with, efforts to reallocate spectrum domestically, where repurposing spectrum currently used by radar systems for 5G and 6G services could adversely affect military readiness.[119] The DOD holds large amounts of spectrum that could be used for 5G and 6G development and deployment.[120] If other countries set standards for these wireless services that are not aligned with how the United States continues to use spectrum for military systems, the operation of these systems abroad could be compromised.[121] Further, since Chinese companies such as Huawei receive subsidies from the Chinese government for facilities, research and development, and other important inputs to developing and manufacturing equipment, they are "well-positioned as global 5G suppliers."[122] Despite efforts by the United States to prevent equipment manufactured by Chinese companies from being used in the network infrastructure of the U.S. and its allies, in large part due to concerns that "vulnerabilities in Chinese equipment could be used to conduct cyberattacks or military/industrial espionage," Chinese companies have continued to deploy equipment and services for 5G infrastructure in dozens of countries around the world, including Hungary, Iceland, Turkey, Saudi Arabia, and South Africa.[123] This presents serious potential national security issues.

III. ANALYSIS

The CSEA provides a framework for repurposing federal spectrum for non-federal uses based on the reimbursement of relocation costs, with an emphasis on having federal incumbents fully relinquish spectrum for exclusive licensed use.[124] While amendments have increased flexibility, the CSEA does not meet the needs of an increasingly congested spectrum environment with a growing number of new, innovative ways to use spectrum.[125] This section will explain how the current CSEA framework does not meet its purpose of promoting more efficient use of spectrum because it is limited in its abilities to promote efficient spectrum use.

118. *See id.*

119. *See* KELLEY SAYLER, CONG. RSCH. SERV., IF11251, NATIONAL SECURITY IMPLICATIONS OF FIFTH GENERATION (5G) MOBILE TECHNOLOGIES 1-2 (2023).

120. *See id.* at 1.

121. *See id.* at 1-2.

122. *Id.* at 1.

123. *See Secure and Trusted Communications Networks Reimbursement Program*, FCC, https://www.fcc.gov/supplychain/reimbursement [https://perma.cc/U5GU-B5CP] (last visited Sept. 30, 2024); *see also* KELLEY SAYLER, CONG. RSCH. SERV., IF11251, NATIONAL SECURITY IMPLICATIONS OF FIFTH GENERATION (5G) MOBILE TECHNOLOGIES 1-2 (2023); *see also* David Sacks, *China's Huawei Is Winning the 5G Race. Here's What the United States Should Do To Respond*, COUNCIL ON FOREIGN RELS. (Mar. 29, 2021), https://www.cfr.org/blog/china-huawei-5g [https://perma.cc/C3FK-6QWL].

124. *See supra* Section II.C.2.

125. *See supra* Section II.C.3.

Following discussion of how the CSEA fails to meet its purpose, this section describes the need for a more reliable and robust framework for repurposing spectrum. The section concludes by highlighting the importance of U.S. involvement in international standards-setting and harmonization efforts.

A. The Failure of the CSEA to Meet Its Purpose

The CSEA currently does not adequately meet its purpose because the framework and mechanisms it provides to repurpose spectrum are limited, especially in today's context of innovative applications and increased needs for spectrum. The CSEA must be adapted to better meet its purpose—that is, to ensure spectrum is being used effectively and efficiently by enabling the repurposing of federal spectrum for non-federal uses.[126] The CSEA should be revised to create stronger and varied incentives for federal users to relinquish and share spectrum. The purpose that the CSEA originally set out to achieve was to "bring new advanced wireless services to the consumer" by providing increased certainty to commercial entities considering investment—while recognizing and maintaining national security and other federal needs by providing compensation for modifications to operations.[127] Currently, the CSEA does not meet its purpose because it does not provide adequate incentives for federal users of spectrum to innovate, nor does it provide a framework that would encourage federal users to more readily relinquish or share spectrum. Commercial and other non-federal entities must have access to additional spectrum to have opportunities to put it to new uses that could greatly benefit the public interest. The CSEA must be updated to reflect changes in technology and the increasingly congested spectrum environment.

The requirement that the FCC raise proceeds that are "at least 110 percent of the total estimated relocation costs"—determined by the federal incumbents—means that certain potentially innovative and valuable projects go unexplored and underinvested due to commercial uncertainty and risk that the CSEA initially aimed to address.[128] The high costs and risks associated with research and development of new technologies essentially forces commercial entities to maximize profit in the short term, rather than innovating for long-term economic value and societal benefit. Therefore, the high costs dissuade companies from potential investment and ultimately from innovative efforts that could bring immense benefit to the economy and American society. Further, these high costs create a barrier to entry for innovative upstarts that lack the resources to invest heavily for the opportunity to use spectrum.

When the CSEA was written in 2003, with the immediate goal of freeing up spectrum to be used for 3G services, it would have been practically impossible to predict the iPhone's release in 2007 and that more

126. *The Commercial Spectrum Enhancement Act: Hearing on H.R. 1320 Before the Subcomm. on Telecomms. and the Internet of the Comm. on Energy and Com.*, *supra* note 58.

127. *Id.*

128. 47 C.F.R. § 1.2104 (2023).

than ninety-five percent of American adults under 50 years old would own a smartphone 20 years later.[129] In many instances, the potential public interest benefit of enabling such progress likely outweighs the costs of transition estimated by incumbent government users, but the uncertainty surrounding such potential benefit prevents it from being pursued. The current framework undervalues innovative commercial and consumer uses and overvalues federal uses.

Rather than requiring commercial users who are granted licenses to spectrum to more than fully compensate federal users that are relinquishing spectrum, potential economic and societal benefits should be considered alongside government interests. These broader benefits to the economy and society should essentially serve to "discount" the value of incumbent federal uses in spectrum reallocation analyses. If there is an immense potential benefit to providing commercial users access to a frequency band but some uncertainty regarding whether these benefits can be achieved, this should be taken into account. A best estimate of these potential benefits, considered in the context of the likelihood that the benefits will be achieved, should be weighed against similar estimates of the costs associated with transitioning government uses to other bands. The calculation of costs associated with government interests should include economic costs as well as the costs of sharing, like potential for interference. It is important to incentivize research and development that may not, but could, lead to commercially viable or otherwise productive uses to further the public interest.

In addition to the requirements of its reimbursement mechanism, the framework of the CSEA prefers relinquishment and reallocation over sharing.[130] This does not reflect the current state of technology and the ability for spectrum to be shared and used more dynamically by both federal and commercial users.[131] By design and by mandate, the FCC must raise proceeds from auctions of licenses to fully fund relocation and NTIA must prefer exclusive use when assessing how spectrum might be repurposed.[132] Shared spectrum is not as valuable at auction because it offers less certainty

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129. *See The Commercial Spectrum Enhancement Act: Hearing on H.R. 1320 Before the Subcomm. on Telecomms. and the Internet of the Comm. on Energy and Com.*, *supra* note 64; *see also* John Markoff, *Apple Introduces Innovative Cellphone*, N.Y. TIMES (Jan. 10, 2007), https://www.nytimes.com/2007/01/10/technology/10apple.html [https://perma.cc/XY8L-Y4GL]; *see also Share of Americans Owning a Smartphone in the U.S. as of June 2024, by Age*, STATISTA (Sept. 2024), https://www.statista.com/statistics/231612/number-of-cell-phone-users-usa/ [https://perma.cc/ULK7-MBW3].

130. *See* KAREN GORDON ET AL., INST. FOR DEF. ANALYSES, A REVIEW OF APPROACHES TO SHARING OR RELINQUISHING AGENCY-ASSIGNED SPECTRUM 7 (2014), https://www.ida.org/-/media/feature/publications/a/ar/a-review-of-approaches-to-sharing-or-relinquishing-agency-assigned-spectrum/p5102final.ashx [https://perma.cc/GZL3-XG2M].

131. *See* JONATHAN AGRE & KAREN GORDON, INST. FOR DEF. ANALYSES, A SUMMARY OF RECENT FEDERAL GOVERNMENT ACTIVITIES TO PROMOTE SPECTRUM SHARING 12-15, 47-49 (2015), https://www.ida.org/~/media/Corporate/Files/Publications/STPIPubs/2015/p5186final.pdf [https://perma.cc/VN9H-BLEY].

132. *See* 47 U.S.C. §§ 923(j), 928; *see also* 47 C.F.R. § 1.2104 (2003).

to licensees in terms of resources that will be reliably available for use by the licensee. In addition, sharing spectrum involves coordination with other users to avoid interference.

Government users can be reluctant to share spectrum, especially where the frequencies are used for critical national security applications. For example, the DOD "holds large portions of the usable spectrum" for military operations, including bands that could "facilitate the build-out of 5G networks and the development of 5G technologies."[133] While the Defense Innovation Board has encouraged the DOD to share spectrum to support these innovative efforts, the DOD contends "that sharing presents operational, interference, and security issues for DOD users."[134] While the DOD has been increasingly considering more opportunities for spectrum sharing, it has expressed these challenges alongside concerns related to high cost and long timelines for transitions associated with sharing or relinquishing spectrum for non-federal uses.[135] The public interest may favor—and technology can enable—a shared spectrum approach for some bands. However, the CSEA does not allow for more flexible spectrum management policies, as it relies on the SRF to cover all of the costs associated with repurposing spectrum.

Overall, the CSEA's structure that provides compensation for relocation does not appropriately reflect the opportunity costs and benefits associated with decisions to repurpose spectrum from federal uses to services that would be in the public's interest. Therefore, the CSEA does not achieve the goals it was established to meet. Spectrum usage is critical to innovation and the public interest, and therefore a revised approach is needed.

B. The Need for a More Reliable, Robust Spectrum Repurposing Framework

A more robust system for reallocating federal spectrum to non-federal uses would present opportunities for innovation across government, academia, and the private sector. Historically, the CSEA has enabled government users to update "legacy analog systems to new digital systems and IP-based technologies, improving communications efficiencies and capabilities" and delivered substantial benefits to the American people by making spectrum available for commercial wireless services.[136] Strengthening incentives for enhancing spectrum use can allow for the

133. KELLEY SAYLER, CONG. RSCH. SERV., IF11251, NATIONAL SECURITY IMPLICATIONS OF FIFTH GENERATION (5G) MOBILE TECHNOLOGIES 1 (2023).

134. *Id.*

135. *See id.* at 1-2.

136. CTIA, REPURPOSING GOVERNMENT SPECTRUM FOR LICENSED COMMERCIAL USE: A WIN-WIN FOR WIRELESS PROVIDERS AND FEDERAL AGENCIES 4 (2020), https://api.ctia.org/wp-content/uploads/2020/08/Win-win_8-06.pdf [https://perma.cc/XAW2-T9QK]; *see* Memorandum on Modernizing United States Spectrum Policy and Establishing a National Spectrum Strategy, 88 Fed. Reg. 80079, 80080 (Nov. 17, 2023).

CSEA to continue to contribute to economic and societal benefits in the broader context of spectrum policy in the United States.

Government agencies need a more reliable system for spectrum repurposing. In addition to challenges with the structure of financial incentives created by the CSEA—which can easily weigh in favor of incumbency and impede innovation that could emerge from a more balanced consideration of societal and economic costs and benefits—it relies primarily on the FCC's auction authority to repurpose spectrum from federal to non-federal uses. As such, the FCC does not have the reliable ability to meet its mandate to manage spectrum for the public interest because its auction authority is time-limited and subject to the political process.[137] For example, Congress failed to grant an extension to the FCC upon the lapse of the FCC's auction authority in March 2023.[138] A more stable basis of authority would promote better spectrum management. The FCC's ability as an expert agency to make important decisions regarding how to allocate spectrum to support national security, promote innovation and competition, and advance the public interest, among other priorities, should not be hindered by Congress's failure to act. Further, the FCC has raised significant revenue from spectrum auctions (outside of the context of repurposing federal spectrum) that could support federal agencies' transitions to other spectrum bands and fund other important efforts.[139]

In addition, "SRF funds can . . . be used only to reimburse expenses related to a spectrum band that is auctioned by the FCC, or is previously identified by statute"—limiting the spectrum frequencies for which reimbursement is available.[140] Expanding the scope of the SRF by making it more broadly available to cover transition costs "would encourage proactive agency efforts to identify sharing opportunities in reallocated bands that are not assigned through the FCC's competitive bidding process."[141] The FCC's decision-making processes are also influenced by the CSEA—even with auction authority, the FCC must make decisions regarding whether to auction spectrum for reallocation purposes within the constraint of having to raise 110% of relocation costs estimated by federal incumbents.

137. *See* Press Release, FCC, Chairwoman Rosenworcel's Statement on the Expiration of FCC Spectrum Auction Authority, (Mar. 10, 2023), https://docs.fcc.gov/public/attachments/DOC-391576A1.pdf [https://perma.cc/28LG-QJH5].

138. *Id.*

139. CTIA, *supra* note 136, at 5, 7.

140. KAREN GORDON ET AL., INST. FOR DEF. ANALYSES., A REVIEW OF APPROACHES TO SHARING OR RELINQUISHING AGENCY-ASSIGNED SPECTRUM 7 (2014), https://www.ida.org/-/media/feature/publications/a/ar/a-review-of-approaches-to-sharing-or-relinquishing-agency-assigned-spectrum/p5102final.ashx [https://perma.cc/GZL3-XG2M].

141. *Id.*

C. International Harmonization and U.S. Involvement in Standards-Setting

In considering how to repurpose spectrum, it is critical to consider the challenges and realities of international spectrum policy to ensure that a balance is struck between stimulating the U.S. innovation ecosystem and maintaining national security for the United States and its allies. International harmonization and active involvement in standards-setting is key in this respect. In the absence of an updated CSEA that enables more flexible spectrum management, the United States risks losing its global leadership.

An updated CSEA could align U.S. spectrum management policy more closely with international norms, enabling U.S. companies to continue to leverage economies of scale and allowing the United States to rely on trusted manufacturers of telecommunications equipment rather than on foreign hardware that could undermine U.S. infrastructure. For example, if 3GPP set technical specifications for an emerging technology without input from the United States and its interests, the U.S. market could suffer severely from being left of out the global market for the new technology. A version of the technology would need to be made exclusively for the U.S. market, but without the economies of scale and interoperability that a global market enables—making such equipment more expensive and potentially less useful.

In addition, Chinese equipment manufacturers continue to deploy equipment and services for 5G infrastructure around the world that may be vulnerable and used to conduct cyberattacks.[142] Therefore, it is essential that the CSEA serves to promote U.S. technology leadership and meet growing demand from commercial entities and consumers while carefully balancing these interests with defense and national security needs.

IV. RECOMMENDATIONS

This section extends the previous analysis to provide recommendations to adapt the CSEA to current needs. The section begins by discussing potential adjustments and alternatives to the CSEA, including allowing for more flexible access rights and emphasizing spectrum sharing. Then, the use of prize competitions is introduced as a novel approach to spectrum allocation and mixed use. This section concludes by describing additional considerations that could foster innovation in spectrum use, including a brief description of unlicensed spectrum's role.

A. Potential Adjustments to the CSEA

The CSEA should be revised to better reflect the high value of public interests and to more reliably allow government entities to repurpose

142. *See* KELLEY SAYLER, CONG. RSCH. SERV., IF11251, NATIONAL SECURITY IMPLICATIONS OF FIFTH GENERATION (5G) MOBILE TECHNOLOGIES 1-2 (2023).

spectrum for more efficient uses, all while preserving national security and other important federal government operations. Researchers have identified several approaches to spectrum repurposing that might provide incentives for federal agencies to relinquish or share spectrum beyond the CSEA framework, including offering "spectrum property rights" to license holders and creating licensing systems that offer "flexible access rights."[143] These mechanisms can be implemented into the current CSEA framework or form the basis of a new system for spectrum reallocation.

"Spectrum property rights" allow federal agencies full property ownership rights to the spectrum they hold, "giving them . . . the ability to aggregate, subdivide, sell, lease, or share their spectrum holdings."[144] Such property rights could also permit federal agencies to determine whether spectrum could be shared among different services (federal or non-federal) to achieve more efficient utilization, as long as uses adhere to FCC rules and other applicable law.[145] This would provide substantially more power to incumbent federal users and NTIA. It would enable new arrangements between government agencies and other entities, fostering a secondary market for spectrum and opening new opportunities for funding innovation. However, the FCC and NTIA would need to carefully manage this change in spectrum management policy to maintain international harmonization and avoid interference domestically. Providing federal agencies the opportunity to trade or transfer spectrum (and allowing them to keep proceeds from such agreements) could enable new uses and sharing arrangements, but there are also significant implementation challenges associated with this approach, and it would likely lead to spectrum fragmentation.[146] "Flexible access rights" are an alternative form of spectrum sharing in which non-exclusive licenses would be issued.[147] These market-based mechanisms can be made more prominent to increase incentives for federal users to vacate, or share, spectrum with non-federal users.

Removing the preference for reallocation over sharing would be a productive first step. The combination of a more robust legal framework with a preference for spectrum sharing, advanced technologies to support dynamic spectrum allocation, and innovative funding mechanisms could greatly improve the efficiency of spectrum use—serving to fulfill the purpose of the CSEA. Spectrum sharing, while not a new concept, is increasingly seen as an important aspect of effective spectrum

143. KAREN GORDON ET AL., INST. FOR DEF. ANALYSES, A REVIEW OF APPROACHES TO SHARING OR RELINQUISHING AGENCY-ASSIGNED SPECTRUM 25, 29-32, 36-40 (2014), https://www.ida.org/-/media/feature/publications/a/ar/a-review-of-approaches-to-sharing-or-relinquishing-agency-assigned-spectrum/p5102final.ashx [https://perma.cc/GZL3-XG2M].

144. *Id.* at 11.

145. *See id.* at 11, 25-28.

146. *Id.* at 29-32.

147. *Id.* at 36-40.

management.[148] For example, the FCC issued a Notice of Proposed Rulemaking (NPRM) in 2023 to seek comment on how "[i]nnovative, non-exclusive spectrum access models" could be deployed "to provide increased access to high-band spectrum," improving efficiency "to bring next generation services to consumers, support expanding access for 5G, and prepare for 6G and beyond."[149] In particular, the FCC noted in the NPRM that "[m]illimeter wave transmissions have a shorter propagation range than lower-frequency spectrum and are blocked by walls and other obstacles, making it easier to reuse the same band or channel within a smaller geographic area."[150] The FCC also expressed that advancements in technology have made spectrum sharing more viable, indicating that non-exclusive licenses could become increasingly valuable as technology continues to develop and new approaches to spectrum management are considered and implemented.[151]

The FCC has previously explored alternatives to exclusive spectrum use and has considered rules to facilitate spectrum transfers among current users.[152] Relying on property rights concepts discussed previously, the FCC's rules for "leasing" spectrum would be "designed to facilitate spectrum access and encourage secondary market transactions that will lead to efficient use of spectrum."[153] Prioritizing spectrum sharing and leveraging technology to enable more dynamic allocation arrangements could enable more efficient uses of spectrum without disrupting some government uses.[154] However, there are challenges associated with these mechanisms, including "tracking spectrum allocations, establishing interference rules, enforcement, and incorporation into auctioning schemes."[155]

Given this context, and as an alternative to spectrum sharing and the existing framework that prefers repurposing after federal users vacate spectrum, federal agencies could lease spectrum to commercial entities when practicable. This could provide a revenue stream to support modernization efforts over time and enable continued operations. In

148. *See* JONATHAN AGRE & KAREN GORDON, INST. FOR DEF. ANALYSES, A SUMMARY OF RECENT FEDERAL GOVERNMENT ACTIVITIES TO PROMOTE SPECTRUM SHARING, at x (2015), https://www.ida.org/~/media/Corporate/Files/Publications/STPIPubs/2015/p5186final.pdf [https://perma.cc/VN9H-BLEY].

149. Shared Use of the 42-42.5 Band, *Notice of Proposed Rulemaking*, 88 Fed. Reg. 49423, 49424-25 paras. 1-4 (2023), https://docs.fcc.gov/public/attachments/FCC-23-51A1.pdf [https://perma.cc/P47V-L3ET].

150. *Id.* at para. 7.

151. *Id.*

152. *See, e.g.*, Partitioning, Disaggregation, and Leasing of Spectrum, *Notice of Proposed Rulemaking*, 34 FCC Rcd 1758, paras. 6-8, 14 (2019), https://docs.fcc.gov/public/attachments/FCC-19-22A1.pdf [https://perma.cc/Z477-4HBX].

153. *Id.* at para. 14.

154. *See* Stephan Wirsing & Peter Reichl, *Dynamic Spectrum Access and the Current Spectrum Management Paradigm: On the Challenges of Dynamic Licensing*, 2015 13TH INT'L CONF. ON TELECOMMS. (CONTEL) 1, 2-3 (2015).

155. KAREN GORDON ET AL., INST. FOR DEF. ANALYSES, A REVIEW OF APPROACHES TO SHARING OR RELINQUISHING AGENCY-ASSIGNED SPECTRUM 40 (2014), https://www.ida.org/-/media/feature/publications/a/ar/a-review-of-approaches-to-sharing-or-relinquishing-agency-assigned-spectrum/p5102final.ashx [https://perma.cc/GZL3-XG2M].

addition, arrangements between federal and commercial users could enable new compensation structures and foster cooperation among federal and non-federal entities. For example, a commercial user could pay a federal user over time based on revenue generated by deployed services, providing funds to support federal modernization efforts. These arrangements would have the additional benefit of permitting continued repurposing or sharing as technologies develop.

Further, the CSEA is currently limited to the repurposing of federal uses, but it could also benefit from being more broadly inclusive, applicable to repurposing spectrum of any incumbent user. This could include non-federal users relinquishing spectrum for other non-federal users, as well as the opportunity for non-federal users to relinquish different bands to federal users, depending on specific circumstances and needs. Ultimately, this flexible approach to reallocating spectrum would be aligned with the overall purpose of the CSEA to use spectrum more effectively and efficiently, enhancing utilization to benefit the public interest.

B. A Novel Approach to Spectrum Allocation

Entirely novel approaches to spectrum allocation may be worth considering in the broader context of spectrum management and the specific area of repurposing federal spectrum for non-federal uses. For example, prize competitions and challenges could be run by the incumbent federal users. Prize competitions are increasingly used across a wide range of federal agencies to stimulate innovation and "as a means of finding creative solutions to challenging problems."[156] Government-run challenges and prize competitions have also been shown not only to generate innovative ideas, but also as a way to foster productive partnerships between federal government agencies and other entities.[157] Instead of compensation or awarding a government contract for winning ideas, successful participants in a "spectrum repurposing" challenge could be given the reward of relinquished spectrum or the opportunity to share spectrum, coexisting with the federal incumbent. Proposals for spectrum use, presented by entities participating in the competition or challenge, would include a detailed plan for how economic proceeds or gains from the new spectrum use would compensate for changes in federal operations required to execute the proposal. While not feasible for all bands currently used by federal incumbents, this could offer a novel means of incentivizing the repurposing of spectrum where practicable, leveraging new compensation mechanisms that could essentially involve revenue sharing among commercial entities and government agencies.

156. THE WHITE HOUSE, THE OFF. OF SCI. AND TECH. POL'Y, IMPLEMENTATION OF FEDERAL PRIZE AND CITIZEN SCIENCE AUTHORITY: FISCAL YEARS 2019-2020 2 (2022).

157. *Id.* at 14-17; NAT'L SCI. & TECH. COUNCIL, NATIONAL SPECTRUM RESEARCH AND DEVELOPMENT PLAN 35-37 (2024).

C. Considering Other Factors and Unlicensed Spectrum to Foster Innovation

When determining whether and how spectrum should be reallocated, the FCC, NTIA, and other stakeholders should consider other factors in addition to those already discussed, including transition costs and the potential societal and economic benefits of reallocation. For example, the degree of disruption and other challenges with relinquishment and transition should be weighed against the opportunity cost of preventing innovation and research driven by commercial and other entities. In addition, the broader objective of fostering innovation and competition as a part of national security—by strengthening the U.S. equipment manufacturing industry and U.S. global competitiveness—should be emphasized. It is important to recognize that the suggestions presented in this Note would very likely require congressional legislation or authorization to implement, which presents a separate but significant set of related challenges.

Further, unlicensed spectrum has unleashed incredible innovation in an increasingly connected world (e.g., Wi-Fi and Bluetooth in the 2.4 GHz bands).[158] Opening up unlicensed bands can foster competition and lead to services that improve the daily lives of Americans. When spectrum can be used by any innovator, rather than a small and discrete number of licensees, new products and services can emerge. However, the economic challenges of spectrum repurposing are particularly acute in the context of making spectrum available for unlicensed use—by definition, users do not pay for licenses to use unlicensed spectrum, and therefore there is no clear revenue to cover the costs of relocating incumbent services.

The immense potential benefit of unlicensed bands must be weighed against the current uses of spectrum for critical national security operations and other federal uses. The potential value of enabling innovation by opening spectrum up to unlicensed use is difficult to predict and practically impossible to measure. Paired with the fact that unlicensed use does not provide revenue from licensees, there is not a clear compensation structure that would provide federal users proceeds needed to modify their existing operations. Instead, compensation can potentially come from government agencies such as the National Science Foundation (NSF) or National Institute for Standards and Technology (NIST), which invest in research and development to advance science, support national defense, champion U.S.

158. LINDA K. MOORE, CONG. RSCH. SERV., R44433, FRAMING SPECTRUM POLICY: LEGISLATIVE INITIATIVES 12 (2016).

industry, and generally promote the public interest.[159] Rather than investing in projects directly, these government agencies could compensate incumbent federal users for relinquishing or sharing spectrum, creating the space and opportunity for others to innovate in newly-available unlicensed bands.

V. CONCLUSION

In summary, adjustments or alternatives to the current framework for spectrum repurposing in the United States can enable a more efficient use of spectrum. The everyday uses of spectrum on which we rely, from communicating with apps on our smartphones to accessing websites containing the world's information, depend on reliable connectivity enabled by spectrum. Innovative, emerging uses of spectrum, such as connected cars and cities that can enhance public safety, improve energy efficiency, and drive better decision-making, will require additional spectrum allocations. To avoid compromising military communications and other uses that preserve national security, the United States must thoughtfully and carefully manage spectrum.

Spectrum is a vital, finite resource, and failing to allocate it appropriately has wide-ranging effects, from adverse national security implications to stagnating innovation and engineering progress. An updated framework is needed, in particular, for the reallocation of federal spectrum for non-federal uses, largely defined by the CSEA. The CSEA does not currently meet its purpose of promoting more efficient use of spectrum because it does not adequately incentivize stakeholders to determine ways to better use spectrum to advance the public interest. Investment and innovation are driven by economic viability—this was the driving force behind the CSEA framework and continues to be a critical consideration in spectrum policy.

Ultimately, a robust, reliable, and flexible framework for spectrum reallocation—allowing for new incentives, emphasizing spectrum sharing, and incorporating novel mechanisms for funding repurposing efforts—will help to address increasing demand for spectrum, foster innovation, preserve national security, and promote U.S. technology leadership.

159. *See* U.S. DEP'T OF COM., NAT'L TELECOMMS. & INFO. ADMIN., *supra* note 7, at 38; *see also Research & Development Programs*, NAT'L INST. OF STANDARDS & TECH., https://www.nist.gov/chips/research-development-programs [https://perma.cc/WQZ4-3Q9R] (last visited Sept. 30, 2024); *see also About NSF*, NAT'L SCI. FOUND., https://new.nsf.gov/about [https://perma.cc/2GN7-6WG9]. NSF has actively engaged with NTIA and the FCC on spectrum management policy challenges since 2020 through the Spectrum Innovation Initiative, which "presents a suite of opportunities to address the pressing challenges arising from the growing demand for usage of the electromagnetic spectrum." *NSF's Spectrum Innovation Initiative*, NAT'L SCI. FOUND., https://www.nsf.gov/mps/osi/spectrum_innovation_initiative.jsp [https://perma.cc/QWG2-PHT4] (last visited Oct. 15, 2024).

Alone Together: How the FTC Can Develop a Transatlantic Approach to Consumer Privacy in the Age of Surveillance Capitalism

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I. INTRODUCTION

In 2010, David Fincher and Aaron Sorkin put an acclaimed spotlight on the origins of the social media empire Facebook (now Meta) with their film *The Social Network*.[1] The film depicted the drama and personalities involved in the creation but avoided a fundamental question: if the social media product is free for users, how does it earn its billions? That same year, on the other side of the Atlantic, Austrian student Max Schrems learned the answer to this question when he requested Facebook provide him with the data the company retained related to his account.[2] The result was a 1,200-page document detailing Schrems' activity on the site, as well as some information about him that he never originally supplied to Facebook.[3] Schrems' discovery helped illustrate how websites like Facebook collect vast troves of data on their users to develop detailed profiles through which they serve targeted advertisements to generate revenue.[4]

This example highlights the logic behind the metaphor of personal data as the "oil" that fuels the digital economy.[5] In fact, the desire for inferences about consumer behavior has driven so much demand that there is a lucrative market populated by "data brokers," which are companies that collect, aggregate, and share personal information about people as their primary business.[6] As online participation becomes more ubiquitous, data brokers and other companies seeking to monetize consumer data have developed sophisticated tools for tracking consumer behavior on the Internet and inferring details about individual consumers through analysis of personal and behavioral data.[7]

Some argue that these practices create an overall benefit for both consumers and businesses.[8] From this perspective, the free flow of data allows companies to assess consumer demand down to the individual.[9] The data industry can then provide this detailed information to companies selling products or services that meet the demands of particular consumers.[10]

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1. THE SOCIAL NETWORK (Columbia Pictures 2010).

2. Olivia Solon, *How Much Data Did Facebook Have on One Man? 1,200 Pages of Data in 57 Categories*, WIRED (Dec. 20, 2012), https://www.wired.co.uk/article/privacy-versus-facebook [https://perma.cc/59F8-8FPW].

3. *Id.*

4. Michelle Castillo, *Here's How Facebook Ad Tracking and Targeting Works*, CNBC (Mar. 19, 2018), https://www.cnbc.com/2018/03/19/how-facebook-ad-tracking-and-targeting-works.html [https://perma.cc/KX5U-L6RW].

5. Louise Matsakis, *The WIRED Guide to Your Personal Data (and Who Is Using It)*, WIRED (Feb. 15, 2019) https://www.wired.com/story/wired-guide-personal-data-collection/ [https://perma.cc/RF75-CQWM].

6. *See generally* FED. TRADE COMM'N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY (2014).

7. Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 51273-74 (Aug. 22, 2022) (to be codified at 16 C.F.R. Ch. 1).

8. Orly Lobel, *The Problem With Too Much Data Privacy*, TIME (Oct. 27, 2022), https://time.com/6224484/data-privacy-problem/ [https://perma.cc/2M2P-2PDX].

9. FED. TRADE COMM'N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY at ii-iii (2014).

10. *Id.* at iv-v.

Indeed, the demand for consumer data will only grow as companies will require more comprehensive datasets about individuals to infer consumer behavior.[11] However, advocates, scholars, and government regulators have noted that this comprehensive collection of consumer personal data poses substantial risks to those consumers.[12]

These risks can manifest into harm in a number of ways. For example, in an instance where a credit monitoring company incorrectly lists a consumer as a terrorist, they could face adverse credit decisions that harm them economically.[13] Less specifically, one entity's aggregation of information about a consumer creates a number of risks if that information is disclosed to a party seeking to exploit the information.[14] To that end, the aggregation of personal information facilitates identity theft of those individuals if the data brokers are subject to a data breach.[15] Finally, the widespread availability of personal information for purchase creates the risk of effective social engineering campaigns by entities who can use this data to exploit certain information about individuals to influence them into making certain decisions.[16]

In response to these risks, governments have attempted to pass laws that seek to characterize the consumer data collected by companies, define and limit the risks and harms that occur with the collection of that data by establishing certain obligations on entities that collect consumer data, and enforce penalties on entities that violate these laws. The foremost example has been the European Union (E.U.)'s enactment and enforcement of the General Data Protection Regulation (GDPR) in 2018.[17] This comprehensive privacy law governs the general rights people have to their data and sets out rules for entities that seek to collect and use that data.[18] Much of the world has followed the E.U.'s approach and enacted similar laws that comprehensively address information privacy in their jurisdiction.

The United States (U.S.) has developed an alternative approach. Rather than a general regulation, the U.S. takes what is known as a sectoral approach, where Congress has created regulations for certain areas of commerce (e.g., Fair Credit Reporting Act (FCRA) regulations on financial institutions).[19]

Recently, a number of U.S. states have passed their own privacy

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11. *See, e.g.*, *Using AI to Predict Consumer Behavior*, HIVO, https://hivo.co/blog/using-ai-to-predict-consumer-behavior [https://perma.cc/P7NM-L546] (last visited Oct. 16, 2024).

12. *See e.g.* Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 BOSTON UNIV. L. REV. 793 (2022).

13. *See generally* TransUnion LLC v. Ramirez, 594 U.S. 413 (2021).

14. Citron & Solove, *supra* note 9, at 816.

15. Erika Harrell, *Just the Stats Data Breach Notifications and Identity Theft, 2021*, DEP'T OF JUST. (Oct. 2, 2023), https://bjs.ojp.gov/data-breach-notifications-and-identity-theft-2021 [https://perma.cc/ZC6W-U95D].

16. Justin Sherman & Anastasios Arampatzis, *Social Engineering as a Threat to Societies: The Cambridge Analytica Case*, THE STRATEGY BRIDGE (July 18, 2018), https://thestrategybridge.org/the-bridge/2018/7/18/social-engineering-as-a-threat-to-societies-the-cambridge-analytica-case [https://perma.cc/J28E-T45J].

17. 2016 O.J. (L 119) 87.

18. Shannon Togawa Mercer, *The Limitations of European Data Protection as a Model for Global Privacy Regulation*, 114 AJIL UNBOUND 20, 20-21 (2020).

19. *See, e.g.*, 15 U.S.C. § 1681(a)-(x).

regulations, each with its own set of definitions and requirements, which generally apply to the information of their own citizens or the companies who collect their information.[20] Under this system, U.S. information privacy law for consumers operates as a patchwork where the requirements a data collector must follow are specific to their industry, location, and the source of the data.[21]

Such an arrangement of laws creates difficulties for companies who operate online and collect user data of Americans, as they are concurrently subject to many of these state regulations except for the parts of their business that may fall within the scope of one of the federal sectoral statutes. In addition, companies often collect data from users outside of the U.S., so they must also comply with foreign regulations for consumers subject to those jurisdictions.[22] While there have been efforts to codify a comprehensive federal privacy law, fundamental disagreements between stakeholders have made it unlikely for Congress to agree on a particular set of rules.[23] The closest thing resembling comprehensive consumer privacy protection in the U.S. is the Federal Trade Commission's (FTC) authority to protect consumers against unfair and deceptive trade practices. The agency has taken this authority to regulate the privacy practices of companies in the U.S. In addition, the FTC enforces the E.U.-U.S. Data Privacy Framework, which sets the standard for the transfer of personal data between the U.S. and E.U. member states.[24] In particular, this framework provides a pathway for U.S. companies to process the personal data of E.U. subjects.[25] The FTC's role in regulating consumer privacy has become so fundamental that the agency has initiated rulemaking procedures to develop regulations related to commercial surveillance and data security.[26]

This Note will argue that the FTC should use the E.U.-U.S. Data Privacy Framework to codify its current data privacy practices and harmonize data privacy law for commercial entities on both sides of the Atlantic in a way

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20. *See* CAL. CIV. CODE § 1798.100 (West 2024) (regulating businesses' collection and use of consumers' personal information and data).

21. Elizabeth R. Pike, *Defending Data: Toward Ethical Protections and Comprehensive Data Governance*, 69 EMORY L.J. 687, 711-12 (2020).

22. Joseph Duball, *EDPB Issues Binding Decision Banning Meta's Targeted Advertising Practices*, INT'L ASS'N OF PRIV. PROS. (Nov. 1, 2023), https://iapp.org/news/a/edpb-issues-binding-decisions-banning-metas-targeted-advertising-practices/ [https://perma.cc/3MSG-JKB6].

23. Lucas Ropek, *There's One Big Problem With the New Federal Data Privacy Bill*, GIZMODO (Apr. 9, 2024), https://www.cnbc.com/2018/03/19/how-facebook-ad-tracking-and-targeting-works.html [https://perma.cc/KX5U-L6RW] (explaining privacy advocates' concern over a federal privacy law that overrides state protections). *See also* Joe Duball, *Calif. Privacy Agency Takes Aim at Dismantling Federal Privacy Protection*, INT'L ASS'N OF PRIV. PROS. (July 29, 2022), https://iapp.org/news/a/cppa-takes-aim-at-dismantling-american-data-privacy-and-protection-acts-preemption/ [https://perma.cc/A75Y-PSSG] (explaining state regulator's concern that a federal law will override their preferred protections).

24. *Data Privacy Framework*, FED. TRADE COMM'N., https://www.ftc.gov/business-guidance/privacy-security/data-privacy-framework [https://perma.cc/A2FL-CWJN] (last visited Sept. 29, 2024).

25. Commission Implementing Decision EU 2023/1795, 2023 O.J. (L 231) 118, 119.

26. Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 51277 (Aug. 22, 2022).

that practically enhances consumer privacy while creating a standard, predictable regulatory environment for companies that engage in transatlantic data transfers. First, it will critique the inadequacy of the current American system in addressing the risks posed by online surveillance by private entities. Then, it will look to the FTC's role as the U.S.'s privacy regulator to argue that it is uniquely situated to address the issue of online consumer privacy. Finally, this Note will suggest that the FTC can adopt regulations derived from the E.U.-U.S. Data Privacy Framework to enforce privacy standards that enhance general privacy protections for U.S. consumers, create an official expectation of privacy standards for U.S. firms to observe, and facilitate a regulatory environment that promotes firms to comply with the data transfer standards under the GDPR.

II. BACKGROUND

A. U.S. Federal Consumer Privacy Protection

At a general level, the FTC protects consumer privacy as part of its mission to "[protect] consumers from unfair or deceptive business practices and from unfair methods of competition."[27] Under its statutory authority known as "Section 5," the agency enforces consumer protection by seeking injunctions for "unfair" and "deceptive" trade practices.[28] A deceptive practice is one that is a material "representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."[29] An unfair practice is one that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[30]

The FTC has taken a leading role in addressing online consumer privacy since 1995.[31] In this nascent stage of online marketplaces, the FTC employed a hands-off approach by advocating self-regulation based on a set of "fair information principles."[32] However, by the turn of the century, the FTC observed that industry self-regulation was not sufficient to address the standards stated in the principles.[33] As recounted by legal scholars Daniel Solove and Woodrow Hartzog, the FTC's enforcement role began as the "backstop" to the rules created by the companies themselves in the form of

27. *Mission*, FED. TRADE COMM'N., https://www.ftc.gov/about-ftc/mission [https://perma.cc/C5M9-VAMB] (last visited Sept. 29, 2024).

28. 15 U.S.C. § 45(a)(1).

29. Letter from James C. Miller III, Chairman, FTC, to Hon. John D. Dingell, Chairman, House Comm. on Energy & Com. (Oct. 14, 1983) (on file with the Federal Trade Commission).

30. 15 U.S.C. § 45(n).

31. *See* FED. TRADE COMM'N, SELF-REGULATION AND PRIVACY ONLINE: A REPORT TO CONGRESS 16 (1999).

32. *Id.* at 3.

33. *See* FED TRADE COMM'N, PRIVACY ONLINE: FAIR INFORMATION PRACTICES IN THE ELECTRONIC MARKETPLACE: A REPORT TO CONGRESS 35 (2000).

privacy policies.[34] In this form of enforcement, the FTC would hold that a company took part in a deceptive practice by violating its own privacy policy.[35] However, this was an inherently limited form of enforcement, as the FTC lacked the ability to enforce anything if the company did not have its own privacy policy.

The FTC gained status as a national privacy authority through its role in enforcing specific statutes that govern some of the consumer privacy practices for specific types of businesses.[36] In addition, the FTC has responsibility for enforcing the E.U.-U.S. Data Privacy Framework.[37] As Solove and Hartzog observe, the FTC's broad authority under Section 5 and other statutes has led to a number of settlements with alleged violators that serve as a form of FTC "common law," guiding companies in developing their own privacy and security standards.[38]

B. Recent U.S. Legislative Attempts

On the congressional stage, a close attempt to pass a comprehensive privacy bill took place in 2022 when the American Data Privacy and Protection Act (ADPPA) moved out of committee to the full House of Representatives.[39] However, the bill failed to move through the legislative process as it faced resistance on key issues, such as whether to enable a private right of action and whether to preempt state law.[40] Some states, like California, passed extensive consumer privacy legislation and feared that a weaker federal bill would remove their ability to enforce the protections they preferred.[41] Additionally, opponents resisted the bill's inclusion of a limited private right of action, claiming that allowing this narrow private litigation

34. Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 598-99 (2014).

35. *Id.*

36. *Id.* at 604 (noting that enforcement actions under statutes like COPPA and the Gram-Leach-Bliley Act followed the same model as enforcement actions under Section 5).

37. DEP'T OF COM., E.U.-U.S. DATA PRIVACY FRAMEWORK PRINCIPLES ISSUED BY THE U.S. DEPARTMENT OF COMMERCE 1 (2022), https://privacyshielddev.blob.core.windows.net/publicsiteassets/Full Text_EU-U.S. DPF.pdf. [https://perma.cc/6Q42-M765] (last visited Apr. 9, 2024).

38. Solove & Hartzog, *supra* note 34, at 583.

39. JONATHAN GAFFNEY ET AL., CONG. RSCH. SERV., LSB10776, OVERVIEW OF THE AMERICAN DATA PRIVACY AND PROTECTION ACT, H.R. 8152 1 (2022).

40. *See* Christiano Lima, *Top Senate Democrat casts doubt on prospect of major data privacy bill*, WASH. POST (June 22, 2022, 5:53 PM), https://www.washingtonpost.com/technology/2022/06/22/privacy-bill-maria-cantwell-congress/ [https://perma.cc/6LES-2JKQ]*; see also* Daniel Castro, *Review of the Proposed "American Data Privacy and Protection Act," Part 1: State Preemption and Private Right of Action*, INFO. TECH. & INNOVATION FOUND.: INNOVATION FILES (June 6, 2022), https://itif.org/publications/2022/06/06/american-data-privacy-and-protection-act-review-part-1-state-preemption-and-private-right-of-action/ [https://perma.cc/6UL5-6G2V].

41. Joe Duball, *Calif. Privacy Agency Takes Aim at Dismantling Federal Privacy Protection*, INT'L ASS'N OF PRIV. PROS. (July 29, 2022), https://iapp.org/news/a/cppa-takes-aim-at-dismantling-american-data-privacy-and-protection-acts-preemption/ [https://perma.cc/A75Y-PSSG].

would lead only to mostly meritless outcomes because individuals could only sue for claims that the FTC or a state Attorney General refused to enforce.[42]

Currently, nineteen states have enacted comprehensive privacy laws, and more state legislatures are considering their own privacy bills.[43] With the previous resistance of California to federal preemption, it seems unlikely that these other states would defer to another legislative push from Congress for comprehensive privacy legislation. However, this lack of general federal consumer protection means that there is no governing standard outside the FTC's general Section 5 enforcement for circumstances outside the specific scope of state consumer privacy statutes or federal sectoral privacy statutes.

C. Europe's General Data Protection Regulation (GDPR)

In 2016, the European Parliament passed what is now known as the GDPR.[44] This comprehensive law established personal data protection as a fundamental right for individuals.[45] In short, the law designates and places regulations on parties that "control" and "process" data about individuals with "controllers" being those who determine the purpose and means of processing the data while the "processor" is the entity who processes the data on behalf of the controller.[46] To lawfully process personal data, a data controller must have a justification, such as an obligation to fulfill a contractual duty, a legitimate interest, or consent from the data subject.[47] The GDPR also creates a special category of data that controllers and processors may not process due to the sensitive information it reveals about the individual.[48] These restrictions, however, do not apply when the circumstances trigger statutory exceptions, such as the "explicit consent" of the individual.[49] Unlike the U.S., the E.U. has a data protection board (EDPB) that oversees the enforcement of the GDPR alongside data protection authorities (DPAs) of member states.[50]

European regulators have interpreted the provisions of the GDPR to find that large online platforms, like Meta, did not comply with the GDPR when processing user data for the purpose of delivering targeted advertisements.[51] In 2023, the Court of Justice of the European Union (CJEU) opined that consent is not a valid legal basis for processing personal data

42. *See* Castro, *supra* note 40 (arguing that the FTC and state attorney generals would likely only enforce claims with merit, so most private lawsuits would likely consist of meritless claims).

43. Andrew Folks, *US State Privacy Legislation Tracker*, INT'L ASS'N OF PRIV. PROS. (Jan. 28, 2024), https://iapp.org/resources/article/us-state-privacy-legislation-tracker/#enacted-laws [https://perma.cc/M2GR-2QB8].

44. 2016 O.J. (L 119) 1.

45. *Id.*

46. *Id.* at 33.

47. *Id.* at 36-37.

48. *Id.* at 38.

49. *Id.*

50. *The European Data Protection Board*, EUR. DATA PROT. BD., https://www.edpb.europa.eu/about-edpb/who-we-are/european-data-protection-board_en (last visited Oct. 7, 2024).

51. Duball, *supra* note 19.

where there is a "clear imbalance" between the parties.[52] Furthermore, the court elaborated that consent is not necessarily "freely given" within the meaning of the GDPR when "performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract."[53] In November 2023, the EDPB announced an E.U.-wide ban on Meta's use of user personal data for targeted advertising, reasoning that Meta lacked a "contract" legal basis for these purposes and had not demonstrated compliance with a consent legal basis.[54]

D. E.U.-U.S. Data Privacy Framework

Under the GDPR, data controllers may not freely transfer personal data to another country unless the European Commission has issued a decision stating that the other country possesses an "adequate" level of data protection.[55] As of this Note, the European Commission has not yet determined that the U.S. has adequate data protection under the GDPR. Consequently, commercial entities cannot freely transfer the personal data of those protected by the GDPR to the U.S. This means that large companies like Facebook or Amazon need to prevent data transfers across the Atlantic in the absence of a separate legal arrangement allowing that data transfer. For firms that derive value from the mass aggregation of consumer data, the regulatory situation limits the value of the data they possess because they cannot combine the data protected under the GDPR with other data to create a more global, comprehensive profile of consumer data.[56] In fact, this data flow has serious economic implications, as the U.S. Bureau of Economic Analysis valued E.U.-U.S. data flows in 2020 at $264 billion.[57] Naturally, some argue that restrictions on cross-border data flows pose a significant economic risk to the global economy.[58]

To enable this data flow, the U.S. Department of Commerce created a program known as the E.U.-U.S. Data Privacy Framework (DPF).[59] This program allows U.S. companies to receive data transfers from the E.U.

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52. Case C-252/21, Meta Platforms, Inc. v. Bundeskartellamt, ECLI:EU:C:2023:537, ¶ 43 (July 4, 2023).

53. *Id.*

54. *EDPB Urgent Binding Decision on Processing of Personal Data for Behavioural Advertising by Meta*, EUR. DATA PROT. BD. (Nov. 1, 2023), https://edpb.europa.eu/news/news/2023/edpb-urgent-binding-decision-processing-personal-data-behavioural-advertising-meta_en [https://perma.cc/AN6V-YUXY].

55. 2016 O.J. (L 119) 61.

56. *See* Dwyer v. Am. Express Co., 237 Ill. App. 3d 742, 749 (Ill. App. Ct. 1995) (holding that the defendants created a value in a list of consumers through the aggregation and categorization of the consumer data).

57. RACHEL F. FEFER & KRISTIN ARCHICK, CONG. RSCH. SERV., IF11613, U.S.-EU TRANS-ATLANTIC DATA PRIVACY FRAMEWORK 1 (2022).

58. Kimberley Bella & Supheakmungkol Sarin, *Free-flowing Data is Good for People and the Global Economy*, WORLD ECONOMIC FORUM (Jan. 16, 2023), https://www.weforum.org/agenda/2023/01/enabling-free-flows-of-data-a-user-centric-approach/ [https://perma.cc/M27E-WXED].

59. EU-U.S. DATA PRIVACY FRAMEWORK , *supra* note 37.

if they self-certify their compliance with specific principles detailed within the DPF.[60] Once firms self-certify and publicly declare their adherence to the DPF, the U.S. Department of Transportation (DOT) and the FTC have the authority to enforce compliance with the DPF.[61] Notably, the FTC's enforcement capability flows from its Section 5 authority, as a company's failure to abide by the DPF principles would constitute an unfair or deceptive trade practice due to its public declaration of compliance.[62]

III. ANALYSIS

A. The Inadequate State of Consumer Privacy Regulation

The current U.S. approach provides a regulatory landscape that limits the possibility of strong consumer privacy protections. While the FTC enforces certain federal statutes related to consumer privacy and pursues general consumer protection under Section 5, the law limits its authority to specific sectors of the economy and the strength of its Section 5 enforcement actions.[63] One might then look to empowering consumers to protect themselves through a federal consumer privacy law with a private right of action, allowing consumers to sue companies in federal court. However, Supreme Court precedent on standing in the privacy context has created an onerous standard for plaintiffs that weakens the deterrence effect of a private right of action. Finally, these regulatory responsibilities should not remain solely with the states, as this scenario would likely create inconsistent requirements for companies which would lead to burdensome compliance requirements for businesses that collect consumer data.[64]

1. Regulatory Gaps in Federal Privacy Law

Under what is known as a "sectoral" approach, the U.S. regulates consumer privacy through a series of statutes that regulate specific areas related to consumer privacy.[65] This method of regulation takes a "harms-based" approach to privacy where the law generally allows the collection and

60. *Id.* at 28.

61. RACHEL F. FEFER & KRISTIN ARCHICK, CONG. RSCH. SERV., IF11613, U.S.-EU TRANS-ATLANTIC DATA PRIVACY FRAMEWORK 2 (2022).

62. EU-U.S. DATA PRIVACY FRAMEWORK PRINCIPLES, *supra* note 37 at 2.

63. Elizabeth R. Pike, *Defending Data: Toward Ethical Protections and Comprehensive Data Governance*, 69 EMORY L.J. 687, 711-12 (2020); Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 51280 (Aug. 22, 2022) (recognizing that its Section 5 enforcement may be inadequate to deter companies since it cannot apply civil penalties for first-time violations).

64. Ev Kontsevoy, *New State-Wide Privacy Laws Could Have Unintended Consequences for Consumers and Businesses*, INFOSECURITY MAG. (Mar. 30, 2023), https://www.infosecurity-magazine.com/opinions/state-privacy-laws-consequences/ [https://perma.cc/3G4W-BNKH].

65. Frederic D. Bellamy, *U.S. Data Privacy Laws to Enter New Era in 2023*, REUTERS (Jan. 12, 2023, 10:21 AM), https://www.reuters.com/legal/legalindustry/us-data-privacy-laws-enter-new-era-2023-2023-01-12/ [https://perma.cc/L398-YZRH).].

use of consumer data but identifies specific sectors of the economy where these activities are restricted to protect consumers from a certain types of apparent harm.[66] For example, the Children's Online Privacy Protection Act (COPPA) identifies the online collection and use of data about children as a heightened privacy risk, and thus imposes more stringent standards on companies that know they are collecting data from children online.[67] As a result, consumer privacy regulation from the federal angle inherently limits itself to only protect consumer privacy from the risks and harms of data collection by companies where the activities of a given company fall within the scope of a given statute.

As such, consumer privacy protection takes the form of a statutory exception to the traditional American approach to encourage self-regulation by industry.[68] Regulators justified this method under the theory that self-regulation was the "least intrusive and most efficient" method to establish data protection principles.[69] However, this lens seems to view consumer privacy more as goodwill provided by the companies collecting and handling consumer data rather than a requirement for companies to refrain from harming consumers through the collection and use of their data. The FTC attempts to fill this gap by enforcing the prohibition of "unfair and deceptive" trade practices under Section 5. However, this amorphous language lacks clear privacy standards (indeed, it's not a privacy-focused regulation) and does not allow the FTC to apply strong enforcement actions.[70] As the economy becomes increasingly digitized, much of consumers' personal data will likely be collected and used outside the scope of federal statutes, which leaves regulators with a scant ability to deter the risk that entities create for consumers through aggregating their data.[71]

2. Weakness of Private Consumer Litigation in Federal Court

Under current jurisprudence, courts have found that most consumers fail to bring a proper cause of action for an alleged privacy violation because there is an inadequate theory of harm to the consumer.[72] While related to government surveillance as opposed to consumer privacy, the Supreme Court in *Clapper v. Amnesty International* interpreted a stringent standing requirement for all plaintiffs seeking to allege a privacy violation.[73] In this

66. *Id.*
67. Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501-6506.
68. FED. TRADE COMM'N, SELF-REGULATION AND PRIVACY ONLINE: A REPORT TO CONGRESS 16 (1999).
69. *Id.* at 6.
70. Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 51280 (Aug. 22, 2022).
71. Thorin Klosowski, *The State of Consumer Data Privacy Laws in the US (And Why It Matters)*, N.Y. TIMES (Sept. 6, 2021), https://www.nytimes.com/wirecutter/blog/state-of-privacy-laws-in-us/ [https://perma.cc/H3C9-BPGM].
72. *See, e.g.*, TransUnion LLC v. Ramirez, 594 U.S. 413, 433 (2021).
73. Clapper v. Amnesty Int'l, 568 U.S. 398, 414 (2013).

case, the plaintiffs alleged a constitutional violation due to the "objectively reasonable likelihood" of government surveillance of their communications.[74]

The Court ruled that the plaintiffs lacked standing because the alleged harm of unconstitutional government surveillance was speculative, since they did not have proof of actual surveillance.[75] In addition, the Court found that the plaintiffs did not have standing due to the costs incurred to avoid unconstitutional surveillance, since these costs arose from the same speculation of surveillance rather than concrete proof of surveillance.[76]

While not directly addressing consumer privacy, *Clapper* highlights the difficulty of alleging harm while litigating the collection and use of personal data. Courts have carried this scrutiny of privacy litigation to consumer privacy in cases such as *TransUnion v. Ramirez*.[77] There, a company aggregated consumer information and created erroneous data about certain consumers, including mislabeling one individual as a potential terrorist.[78] The plaintiffs brought a class action suit alleging a violation of the Fair Credit Reporting Act (FCRA).[79] The Court held that certain class members lacked standing, even though the company violated their statutory rights under FCRA, because there was no concrete harm associated with that violation.[80] However, the Court also found certain class members did allege adequate, concrete harm to confer standing because the company shared its erroneous data with third parties, and this caused the affected plaintiffs to suffer reputational harm with a "close relationship" to a defamation claim.[81]

These cases imply that courts will likely rule that a consumer-plaintiff lacks standing where they fail to allege the misuse of their data reflects a "close historical or common-law analogue."[82] Even where a statute confers consumer privacy protections and seeks to enforce them through a private right of action, courts will likely not view a violation of those protections as enforceable in itself. Consequently, consumer privacy regulation enforced through a private right of action likely does not confer enforceable protections under the Supreme Court's standing precedent.

3. Reliance on State Law Is Inadequate to Address Consumer Privacy

As of April 2024, nineteen states have enacted consumer privacy laws and numerous others are in the process of legislating their own.[83] One look at

74. *Id.* at 410.
75. *Id.* at 414.
76. *Id.* at 416.
77. *Ramirez*, 594 U.S. at 413.
78. *Id.* at 420.
79. *Id.* at 421.
80. *Id.* at 438.
81. *Id.* at 433.
82. *Id.* at 414.
83. Andrew Folks, *US State Privacy Legislation Tracker*, INT'L ASS'N OF PRIV. PROS. (Jan. 28, 2024) https://iapp.org/resources/article/us-state-privacy-legislation-tracker/#enacted-laws [https://perma.cc/M2GR-2QB8].

the International Association of Privacy Professional's U.S. State Privacy Legislation Tracker shows the diversity of the current and proposed laws, which differ in the privacy rights conferred to consumers and the obligations imposed on businesses.[84] Inevitably, each state law will likely also differ in its important definitions (e.g., personal data), as well as the statutory interpretation of seemingly similar provisions. The transitory nature of online data collection and gathering will likely exacerbate this incongruence, as information seamlessly crosses over state boundaries in a matter of seconds. As a result, a consumer privacy protection regime based solely on state statutes is likely inadequate because it would create an uneven regulatory environment that places a substantial burden of compliance on companies. In addition, this would create major regulatory complexities for data transfers with markets that have standards like the GDPR, as states with inadequate data protection standards would cause the markets to prohibit data transfer to the U.S.

For example, an online business that collects consumer data from all American users will theoretically have to comply with the privacy law of each state, assuming an American from each state uses it. Since the business falls within the scope of each statute, it must understand the definitions, interpretations, and applications of each law. This scenario creates a major burden because the companies must spend time and resources learning about each law and assessing how to comply with all of them. While it may be reasonable to subject businesses to high standards for the collection and use of personal data, these complexities might end up harming consumer protection in the end, as the consumer would have to interpret a given company's understanding of their own labyrinthine regulatory situation to understand exactly how that company collects and handles their data.

B. The FTC Should Assume the Role of Promulgating and Enforcing General Federal Consumer Privacy Regulations

Due to its history of developing and enforcing privacy standards under current law, the FTC stands in the best position to create and enforce general consumer privacy standards. First, the FTC has gained authority as a privacy regulator from Congress's grant of statutory authority to shape privacy regulation in certain sectors.[85] Furthermore, the agency has developed expertise and substantive principles regarding privacy through its enforcement efforts.[86] Finally, the FTC has recognized its role in this area by initiating its rulemaking procedure regarding online commercial surveillance and data security.[87] With this authority, experience, and opportunity, the FTC should promulgate privacy regulations to provide comprehensive protection to U.S. consumers.

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84. *Id.*
85. *See, e.g.*, 15 U.S.C.A. § 6804(a)(1)(C).
86. Solove & Hartzog, *supra* note 34, at 583.
87. Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 51280 (Aug. 22, 2022).

1. The FTC Serves as the De Facto Federal Privacy Regulator

E.U. member states enforce the GDPR through Data Protection Authorities.[88] In contrast and reflective of its sectoral approach, U.S. federal privacy regulation is dependent on the applicable statute.[89] As a result, there is no official administrative body solely responsible for enforcing federal privacy regulations. For example, the Health Insurance Portability and Accountability Act (HIPAA) creates a Privacy Rule that carries potential civil and criminal penalties.[90] The Department of Health and Human Services Office for Civil Rights carries out civil enforcement, while the Department of Justice manages criminal enforcement.[91]

While this may appear to imply there is no authoritative agency enforcing consumer privacy protections in the U.S., a comparison of the statutes and the history of FTC Section 5 enforcement actions shows that the FTC serves as the de facto federal privacy regulator.[92] First, a comparison of federal statutes that enforce consumer privacy standards reveals that the FTC is the most common regulator responsible for enforcement.[93] In addition, the FTC enforces consumer privacy as part of its broad mandate to prohibit unfair and deceptive trade practices under Section 5.[94] Consequently, the FTC sits in the best position to administer privacy regulations, as it has developed standards for regulating data privacy, possesses the ability to apply such standards under its Section 5 authority, and currently has the opportunity to promulgate its standards into express rules in its current rulemaking process.

As Solove and Hartzog explain, the FTC also received more legitimacy as the "lynchpin" of the enforcement mechanism that allows cross-border data transfer with the E.U.[95] At that time, E.U. regulators ruled that the U.S. did not have adequate levels of privacy protection, and E.U. law prohibited data transfers to such countries.[96] To protect the commercial benefits of the data transfers between these major markets, the U.S. and E.U. regulators entered into the Safe Harbor Agreement which allowed companies to transfer personal data from the E.U. if they agreed to comply with principles set out in the agreement.[97] With the FTC's pedigree as the regulator of a number of

88. *What Are Data Protection Authorities (DPAs)?*, EUR. COMM'N, https://commission.europa.eu/law/law-topic/data-protection/reform/what-are-data-protection-authorities-dpas_en [https://perma.cc/MMG5-F73W] (last visited Apr. 9, 2024).

89. STEPHEN P. MULLIGAN & CHRIS D. LINEBAUGH, CONG. RSCH. SERV., IF11207, DATA PROTECTION AND PRIVACY LAW: AN INTRODUCTION 1 (2022).

90. *See* 45 C.F.R. § 164 (2024); *see also* 42 U.S.C. § 1320d-5-1320d-6 (setting out potential civil and criminal penalties for violations).

91. *Id.*

92. Solove & Hartzog, *supra* note 34, at 583.

93. DANIEL J. SOLOVE & PAUL M. SCHWARTZ, PRIVACY LAW FUNDAMENTALS 166-67 (International Association of Privacy Professionals, 6th ed. 2022).

94. *See* FED. TRADE COMM'N, SELF-REGULATION AND PRIVACY ONLINE: A REPORT TO CONGRESS 16 (1999).

95. Solove & Hartzog, *supra* note 34, at 604.

96. *Id.* at 603.

97. *Id.* at 604.

federal privacy statutes, along with its companies' privacy policies for online companies, the Safe Harbor Agreement made the FTC the main regulator for U.S. compliance as the U.S. lacked a formal data protection authority.[98]

Although the CJEU invalidated the Safe Harbor Agreement, its successor, the E.U.-U.S. Data Privacy Framework, retains this enforcement mechanism with the FTC at the helm.[99]

2. The FTC Has Attained Privacy Expertise and Developed Substantive Privacy Standards

With its role as the central privacy regulator and its broad, somewhat vague mandate under Section 5, Hartzog and Solove conclude that the FTC has effectively produced a body of precedent through its enforcement actions and settlements.[100] In particular, the legal community uses the FTC's published settlement agreements and statements as guidance as to how the FTC will interpret and apply Section 5 to different privacy situations.[101]

Hartzog and Solove identify four trends in FTC enforcement actions that show the FTC has been able to interpret Section 5 to strengthen consumer privacy protections beyond ensuring a company's compliance with the language in its privacy policy.[102] First, the FTC has evolved its general standards into more specific ones.[103] Second, it has introduced "norms and best practices" into its assessment of privacy practices.[104] Third, it has created baseline standards that companies must meet.[105] Finally, the FTC has mirrored common law principles to recognize "indirect" unfair or deceptive practices similar to contributory liability.[106]

With respect to the first trend, the FTC has developed some specific requirements for companies to avoid the general moniker of "unfair" or "deceptive."[107] Hartzog and Solove highlight this evolution through a review of FTC settlement decrees that declare certain data security practices as inadequate and interpret the statement "clearly and conspicuously" to require "specific text with hyperlinks."[108] Although these settlement decrees do not have a legal effect on other parties, they reveal that the FTC can develop and implement heightened privacy requirements in its enforcement, and regulated companies will accept them.

Under the second trend, Hartzog and Solove find that the FTC has introduced qualitative judgments about certain practices such as the

98. *Id.*
99. DEP'T OF COM., *supra* note 37, at 52.
100. Solove & Hartzog, *supra* note 34, at 620-21.
101. *Id.* at 626.
102. *Id.* at 649.
103. *Id.*
104. *Id.*
105. *Id.*
106. Solove & Hartzog, *supra* note 34, at 649.
107. *Id.*
108. *Id.* at 657-58.

"inadequacy" of notices.[109] For instance, a vague disclosure from a company about how they track consumer activity when they download certain software may constitute a deceptive trade practice if the FTC considers the disclosure inadequate to inform a consumer.[110] Also in this thread of FTC "jurisprudence," the agency has effectively incorporated industry standards into its assessment of data security practices, pursuing enforcement actions against companies that employ inadequate security measures.[111] In *FTC v. Wyndham*, the Third Circuit confirmed the FTC's authority to pursue enforcement against a company's unfair practices under Section 5 because they failed to meet "commercially reasonable methods for protecting consumer information."[112] This decision affirmed the Third Circuit's view that the FTC is able to incorporate certain qualitative standards in its assessment of industry practices without explicit reference in the FTC Act.

This reasoning goes hand-in-hand with the "baseline standards" required by the FTC as identified by Hartzog and Solove.[113] Specifically, they state the FTC "require[s] baseline security practices for all companies that deal with personal information and prohibits certain kinds of invasive information collection…regardless of the existence of a privacy policy."[114] This ability to enforce specific requirements for privacy and data security reveals that the agency has discretion under the FTC Act to incorporate new principles into consumer protection enforcement actions.[115] Indeed, Hartzog and Solove conclude that the FTC can use their approach to enforce developing norms and customs of consumer privacy as substantive rules.[116]

As technology changes how consumers interact with businesses in the digital space, the FTC has continued developing substantive standards around practices that affect consumer privacy.[117] One such phenomenon is the FTC's recognition of and action against the use of "dark patterns" by companies to obtain consumer consent.[118] Rohit Chopra (then, an FTC Commissioner)

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109. *Id.* at 659.

110. *See* Complaint at para. 13, Sears Holdings Mgmt. Corp., F.T.C. No. C-4264 (Aug. 31, 2009) https://www.ftc.gov/sites/default/files/documents/cases/2009/09/090604searscmpt.pdf [https://perma.cc/2VYF-TD3K] (finding the download of tracking software unfair or deceptive because the license agreement did not adequately disclose the extent of the tracking).

111. *See* FTC v. Wyndham Worldwide Corp., 799 F.3d 236, 241 (3d Cir. 2015).

112. *Id.*

113. Solove & Hartzog, *supra* note 34, at 661.

114. *Id.*

115. *See e.g.*, FED. TRADE COMM'N, 2020 PRIVACY AND SECURITY UPDATE 3-5 (2020), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-2020-privacy-data-security-update/20210524_privacy_and_data_security_annual_update.pdf [https://perma.cc/U7KY-BBKM] (discussing the FTC's practice of requiring companies to implement comprehensive security program).

116. Solove & Hartzog, *supra* note 34, at 673.

117. *See, e.g.*, Final Complaint and Order at para. 1, Epic Games, Inc., F.T.C. No. C-4790 (Mar. 14, 2023) (alleging unfair practices due to company's use of "dark patterns" caused led consumers to incur charges without their express informaed consent).

118. Sean Kellogg, *How US, EU Approach Regulating 'Dark Patterns',* INT'L ASS'N OF PRIV. PROS. (Dec. 1, 2020), https://iapp.org/news/a/ongoing-dark-pattern-regulation/ [https://perma.cc/7FE7-FZP7] (last visited Apr. 9, 2024).

defined dark patterns as "design features used to deceive, steer, or manipulate users into behavior that is profitable for an online service, but often harmful to users or contrary to their intent."[119] While FTC actions have focused on the use of dark patterns to obtain customer consent to payment, scholars have shown that the same principle applies to consumer consent for privacy.[120] Even though these enforcement actions are not substantive regulations in themselves, the enforcement actions and subsequent Commissioner opinions reveal that the FTC has continued following the trends described by Hartzog and Solove by identifying certain substantive principles in its approach to consumer protection that implicate privacy.

3. FTC Rulemaking Authority and the Proposed Rule on Online Commercial Surveillance and Data Security

Outside of its ability to protect consumer privacy through prohibiting unfair and deceptive trade practices of specific companies under Section 5, the FTC also has the ability to use rulemaking to "address unfair or deceptive practices…that occur commonly."[121] This form of rulemaking is known as Magnusson-Moss Rulemaking Authority, and it establishes extra procedures such as a "reason to believe that the practices to be addressed by the rulemaking are 'prevalent.'"[122] Through this process, the FTC may create rules, known as trade regulation rules, which define specific practices that are unfair or deceptive and apply to an entire industry.[123] After rules are promulgated, they create civil penalties for anyone who violates the rule "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule."[124]

In August 2022, the FTC initiated its Magnusson-Moss Rulemaking Authority and published an advanced notice of proposed rulemaking to consider whether it should issue trade regulation rules relating to "commercial surveillance and lax data security practices" by companies.[125] According to

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119. Press Release, FTC, Statement of Commissioner Rohit Chopra Regarding Dark Patterns in the Matter of Age of Learning, Inc. 1 (Sept. 2, 2020) (on file with the Federal Trade Commission) https://www.ftc.gov/system/files/documents/public_statements/1579927/172_3086_abcmouse_-_rchopra_statement.pdf [https://perma.cc/W73C-H7LT].

120. Johanna Gunawan et al., Position Paper: Towards an Understanding of Dark Pattern Privacy Harms 1 (May 8, 2021), (on file with CHI Workshop) https://darkpatterns.ccs.neu.edu/pdf/gunawan-2021-chiworkshop.pdf [https://perma.cc/CF83-S6AB] (defining dark patterns as "interface designs that lead users towards outcomes that benefit the platform over users, or that steer users away from what they are intending to do).

121. *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/mission/enforcement-authority [https://perma.cc/D4TX-UCL2] (last visited Sept. 29, 2024).

122. *Id.*

123. *Id.*

124. *Id.*

125. Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 51277 (Aug. 22, 2022).

the FTC, the practice of commercial surveillance involves the "collection, retention, aggregation, analysis, and onward disclosure of consumer data" to target consumers for various commercial purposes.[126] As evidenced by its enforcement actions against companies for unfair or deceptive privacy practices, the FTC recognized that there may be prevalent practices that permit trade regulation rules.[127] Specifically, the FTC points to the limitations of its current Section 5 enforcement capabilities, as its enforcement actions do not allow for civil penalties until an individual company violates Section 5 a second time.[128] Since new trade regulation rules would permit the FTC to seek civil penalties for first-time violators, it posits that new trade regulation rules will bolster consumer privacy protections by incentivizing companies to invest in privacy compliance to proactively avoid these penalties rather than retroactively reacting to enforcement actions.[129]

Recent Supreme Court jurisprudence may undermine the FTC's ability to interpret its Section 5 authority to promulgate these regulations. In *Loper Bright*, the Court overruled the long-standing *Chevron* doctrine, which required courts to defer to "permissible" agency interpretations where statutory language is ambiguous.[130] Moreover, under the major questions doctrine, the Court looks for more express authorization from Congress when an agency asserts authority on a matter of major "economic and political significance."[131] With the ubiquity of online commerce and the use of consumer data in the economy, it is likely that the Court would take such an approach to this question.

However, these decisions are unlikely to bar the FTC's authority to regulate commercial surveillance and data security. Magnusson-Moss rulemaking, as opposed to Administrative Procedure Act, expressly authorizes the FTC to promulgate rules that "define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce."[132] The main question then is whether the FTC may interpret certain commercial surveillance and data security practices as unfair and/or deceptive. The FTC likely can interpret Section 5 this way, as suggested by the Third Circuit in *Wyndham*, since the standard is a "flexible concept" that Congress intentionally left for development by the FTC.[133] This suggests that a court reviewing an FTC rule need not address the question of deference, as Congress expressly granted the duty of interpretation to the FTC, not the Court. As a result, a court would likely find that Congress did grant the FTC

126. *Id.* at 51273-74.
127. *Id.* at 51280.
128. *Id.*
129. *Id.*
130. *See* Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2254 (2024)
131. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-160 (2000).
132. 15 U.S.C. § 57a(a)(1)(B).
133. *See* Wyndham, 799 F .3d at 243.

clear authority to implement them due to its broad discretion to regulate unfair and deceptive acts and practices in or affecting commerce.[134]

C. E.U.-U.S. Data Privacy Framework as a Standard for New Privacy Trade Regulation Rules

1. The E.U.-U.S. Data Privacy Framework

The E.U.-U.S. Data Privacy Framework is a mechanism to "facilitate transatlantic commerce by providing U.S. organizations with reliable mechanisms for personal data transfers to the United States from the European Union."[135] The E.U. and U.S. built the Data Privacy Framework to continue reaping the commercial benefits of the Safe Harbor Agreement after it was invalidated by cases in Europe known as *Schrems I* and *Schrems II*.[136]

After Edward Snowden, a government contractor for the National Security Agency, revealed U.S. intelligence agencies regularly accessed troves of personal data, litigation from Austrian privacy advocate Max Schrems lead to the suspension of the legal framework for data transfers to the U.S. from the E.U..[137] The resulting case led the CJEU to invalidate the European Commission's adequacy determination, allowing data transfers to the U.S., which led to the creation of a new framework known as the E.U.-U.S. Privacy Shield.[138] Schrems's amended complaint resulted in yet another CJEU invalidation of the European Commission's adequacy determination of the Privacy Shield.[139]

The E.U.-U.S. Data Privacy Framework allows American companies to transfer personal data protected by the GDPR if they agree to be bound by the principles detailed within the Data Privacy Framework.[140] The FTC acts as the enforcer of the Data Privacy Framework under the logic that the companies voluntarily entering into the Data Privacy Framework represent that they adhere to it. Therefore, a deviation from the Framework would constitute an unfair or deceptive trade practice.[141] As required by the GDPR, the European Commission issued a decision on July 10, 2023 declaring that the E.U.-U.S. Data Privacy Framework provided an "adequate level of protection for personal data transferred...to certified organizations in the United States."[142]

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134 *See* Douglas Ross, *How Loper Bright and the End to the Chevron Doctrine Impact the FTC*, PROMARKET. (Sept. 5, 2024), https://www.promarket.org/2024/09/05/how-loper-bright-and-the-end-to-the-chevron-doctrine-impact-the-ftc/ [https://perma.cc/6T7W-KPP5] (last visited Nov. 23, 2024).

135. DEP'T OF COM., *supra* note 37, at 1.

136. *Schrems I*, INT'L ASS'N OF PRIV. PROS., https://iapp.org/resources/article/schrems-i/ [https://perma.cc/2TTJ-VZNM] (last visited Sept. 29, 2024).

137. *Id*.

138. *Id.*

139. *Id.*

140. DEP'T OF COM., *supra* note 37.

141. *Id.* at 26.

142. Commission Implementing Decision EU 2023/1795, 2023 O.J. (L 231) 118, 119.

2. The Applicability of the E.U.-U.S. Data Privacy Framework Principles as Trade Regulation Rules

The Data Privacy Framework expresses seven Principles that participants must comply with to take advantage of the E.U.'s adequacy decision and receive personal data from E.U. data subjects.[143] These Principles are Notice; Choice; Accountability for Onward Transfer; Security; Data Integrity and Purpose Limitation; Access; Recourse, Enforcement, and Liability.[144]

Notice operates like a privacy policy requirement that directs participants as to what information the Data Privacy Framework requires them to communicate to consumers.[145] This reflects current standards of FTC enforcement that require adequate disclosure to consumers about their practices, but it specifies exactly what must be included at a minimum.[146]

Choice details the consent organizations must obtain from consumers for the use of their data.[147] However, the aspect of consent differs significantly from the FTC's domestic enforcement standards. While similar to their requirement of clear and conspicuous text detailing to consumers how to opt-out of consent, the Data Privacy Framework employs the GDPR's concept of sensitive data.[148] Under the Data Privacy Framework Standard, consumers must affirmatively consent to the collection and use of their sensitive data.[149]

Sensitive data is defined as "personal information specifying medical or health conditions, racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership or information specifying the sex life of the individual."[150] This approach to sensitive data is known as opt-in consent, which the FTC does not necessarily require as a matter of its Section 5 enforcement.[151]

Accountability for Onward Transfer essentially creates an obligation of stewardship for the data transferor such that it must require any transferee to adhere to the Principles and enter into a contract that limits the use of the controlled data.[152] These purposes must adhere to the scope of the consent

143. DEP'T OF COM., *supra* note 37, at 4-8.

144. *Id.*

145. *Id.* at 4-5.

146. *Id.*; *see also* Complaint at para. 13, Sears Holdings Mgmt. Corp., F.T.C. No. C-4264 (Aug. 31, 2009) (alleging that the full extent of the software's tracking of consumers' Internet behavior would be material to consumers' decision to install the software, so the failure to disclose this was deceptive under the FTC Act). https://www.ftc.gov/sites/default/files/documents/cases/2009/09/090604searscmpt.pdf [https://perma.cc/VTE7-LEZY].

147. DEP'T OF COM., *supra* note 37, at 5.

148. Solove & Hartzog, *supra* note 34, at 658; DEP'T OF COM., *supra* note 37, at 5.

149. DEP'T OF COM., *supra* note 37, at 5.

150. *Id.*

151. *The Difference Between Opt-In vs Opt-Out Principles In Data Privacy: What You Need To Know*, SECURE PRIV. (Feb. 1, 2024), https://secureprivacy.ai/blog/difference-beween-opt-in-and-opt-out [https://perma.cc/NG8Q-V2T9].

152. DEP'T OF COM., *supra* note 37, at 6.

provided by the consumer whose data is being processed.[153] These requirements generally exceed the standards enforced by the FTC in domestic Section 5 enforcement, as it generally allows the transfer of data without many limitations, as long as the entity does not misrepresent this use to consumers and gets adequate consent for the practice.[154]

The Security principle requires participants in the Data Privacy Framework to take "reasonable and appropriate" measures to mitigate the risks involved with processing personal data.[155] This approach runs parallel to the data security principles the FTC enforces under Section 5. The FTC has specifically required certain data security practices outside of any promise within a privacy policy.[156] This parallel suggests that the E.U. and FTC's approach to data security is parallel, as they agree a certain standard of data protection must exist for an organization to properly process consumer data regardless of what they promise that consumer.

Data Integrity and Purpose Limitation ensure participants in the Data Privacy Framework maintain accurate personal data and limit their use of the data to the purpose for which it is obtained.[157] It does not appear the FTC, in its domestic Section 5 enforcement, requires organizations to limit their use of data to such specific purposes. However, there is some congruence between the two regulatory frameworks where the FTC could take enforcement action against an organization for deceptive trade practices on the theory that the organization's privacy policy is too vague to properly notify a consumer of the purposes of their data use or any limits to their use of the data.[158] Moreover, the language in this Data Privacy Framework Principle to use "reasonable and appropriate measures" shows a similar method to FTC enforcement of creating baseline qualitative standards that incorporate and enforce industry norms without requiring any specific textual language detailing the requirements.[159]

Access requires members of the Data Privacy Framework to provide individuals with the right to access to the information about them and modify any information that is incorrect or improperly processed.[160] This consumer right likely is not part of the FTC "common law" of Section 5 enforcement outside of an organization's promise to provide that right in its privacy policy,

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153. *Id.*

154. *See, e.g.*, *FTC Order Will Ban Avast from Selling Browsing Data for Advertising Purposes, Require It to Pay $16.5 Million Over Charges the Firm Sold Browsing Data After Claiming Its Products Would Block Online Tracking*, FED. TRADE COMM'N (Feb. 22, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-order-will-ban-avast-selling-browsing-data-advertising-purposes-require-it-pay-165-million-over [https://perma.cc/NBE8-73NX] (alleging Avast's data practices were deceptive for promising its products would protect consumers from online tracking while selling consumer information to third parties).

155. DEP'T OF COM., *supra* note 37, at 6.

156. Solove & Hartzog, *supra* note 34, at 661.

157. DEP'T OF COM., *supra* note 37, at 6-7.

158. Solove & Hartzog, *supra* note 34, at 659. *See* Complaint at para. 13, F.T.C. No. C-4264 (finding the download of tracking software unfair or deceptive because the license agreement did not adequately disclose the extent of the tracking).

159. Solove & Hartzog, *supra* note 34, at 661-62.

160. DEP'T OF COM., *supra* note 37, at 7.

but other American consumer protection statutes may provide a similar right. For example, the Fair Credit Reporting Act (FCRA) provision at issue in *TransUnion v. Ramirez* required the regulated entity to take reasonable steps to ensure they held accurate data about the individual.[161] As the U.S. recognizes this right of access in specific statutes, the FTC has not tried to enforce it as part of its general privacy regulations, so it is unlikely that the FTC might regard refusal of this right as inherently unfair or deceptive for all commercial entities.

Recourse, Enforcement, and Liability entail the mechanisms available to those affected when a participant in the Data Privacy Framework deviates from the Principles.[162] These Principles are improper for analysis and comparison to FTC Section 5 enforcement, as U.S. law inherently limits the FTC's enforcement ability under Section 5, and FTC Act enforcement does not provide for a private right of action for individuals to enforce the statute through litigation.[163]

3. Addressing the Potential Limitations of the Data Privacy Framework and FTC Authority

While the Data Privacy Framework contains strong core principles that the FTC should incorporate in its efforts to strengthen consumer privacy, there are some clear limitations inherent in enforcement power fundamental to the Framework. First, the Data Privacy Framework exists as a voluntary organization, so any heightened standards applied to American companies within this framework are justified by the companies' assent to the regulation. If the FTC seeks to promulgate any trade regulation rules outside of the Data Privacy Framework Principles, it is likely the FTC will need to justify the Principle on the grounds that it coheres with industry standards, norms, and best practices outside of its mere presence in the Data Privacy Framework.[164]

The solution to this issue likely exists within the Data Privacy Framework itself, since the businesses involved have agreed to follow the Principles to do business with the E.U. As a result, the Principles themselves could constitute acceptable industry standards for data processing, so it follows that the Principles are an acceptable standard to apply to businesses processing consumer data in general.

Second, the Data Privacy Framework recognizes the constitutional right of private companies that limits the ability of U.S. regulators to regulate data transfers that implicate the First Amendment.[165] The Data Privacy Framework requires organizations to defer to the First Amendment when balancing free speech and privacy interests related to a "U.S. person or

161. *See Ramirez*, 594 U.S. at 413.

162. DEP'T OF COM., *supra* note 37, at 7.

163. Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 51280 (Aug. 22, 2022); 15 U.S.C. § 45(b)-(n).

164. Solove & Hartzog, *supra* note 34, at 673.

165. DEP'T OF COM., *supra* note 37, at 9.

organization."[166] Under the First Amendment, a regulation that prohibits speech due to its content is unconstitutional unless the regulation is narrowly tailored to achieve a compelling state interest.[167] Applied to the context of data transfers, the Supreme Court held in *Sorrell* v. *IMS Health Inc*. that regulations barring specific entities from transferring data for specific commercial purposes can constitute an impermissible "content- and speaker-based" restriction on speech.[168] In addition, the First Amendment establishes freedom of the press, which the Supreme Court has interpreted to protect access to information in the public record such as a court proceeding.[169] Consequently, it is not impossible for the FTC to promulgate trade regulation rules based on the Data Privacy Framework Principles due to the First Amendment, but a court would likely bar the FTC's attempts to enforce the Principles in situations where the information in question was collected or processed in a manner that receives First Amendment protection.

While the First Amendment may limit certain contexts of consumer privacy regulation, a general privacy regulation would apply equally to all commercial entities covered by Section 5 and regulate the collection and processing of data for all uses by covered entities. Thus, this regulation would not constitute a content-based restriction like the Vermont law in *Sorrell* where a prohibition of data transfers for marketing purposes constituted a content-based restriction, since it prohibited the transfers for the underlying marketing purposes of the data transfer. Since the FTC can likely apply these principles as content-neutral consumer protection standards, the Data Privacy Framework Principles serve as the basis of trade regulation rules in their commercial surveillance and data security rulemaking efforts.

IV. CONCLUSION

The FTC should use its current rulemaking process on Online Commercial Surveillance to promulgate trade regulation rules based on the E.U.-U.S. Data Privacy Principles. This approach to the rulemaking process will allow the FTC to strengthen consumer privacy protections by incorporating stronger, more definite standards into its Section 5 enforcement. The presence of the principles as trade regulation rules will also facilitate better compliance by entities not already subject to the current, voluntary privacy framework, since they would now be subject to a civil penalty for a first offense.[170] In addition, the new trade regulation rules based on the Data Privacy Framework Principles would create a simpler path to compliance than unique, new rules, since many companies already participating in the program would not need to implement new compliance regimes at all.

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166. *Id.*

167. *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

168. Sorrell v. IMS Health Inc., 564 U.S. 552, 571 (2011) (holding a Vermont law prohibiting pharmacists from selling certain prescription information for marketing purposes constituted content-based and viewpoint-based regulation of protected commercial speech).

169. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92 (1989).

170. Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51273, 51280 (Aug. 22, 2022).

While not all the Data Privacy Framework Principles may work through the rulemaking process, the FTC's past practice in its Section 5 enforcement suggests that it could incorporate certain practices into its new regulations. In particular, the FTC should promulgate a trade regulation rule based on a combination of the Notice, Accountability for Onward Transfer, and Purpose Limitation Principles. The FTC has shown that it can enforce a Section 5 violation for companies that insufficiently disclose their collection and use of personal data.[171] With this new standard, the FTC could make a rule that requires a notice of use in their privacy policy. Moreover, where the regulated entity's purpose or limitation of data use is not clear, the FTC could apply implied requirements of accountability for the transfer of the data and limits on the data use. Under such a theory, the FTC could find that the entity violated the trade regulation rule by unfairly or deceptively transferring personal data without accountability for its future use or using the data for an unreasonable purpose from the consumer's perspective.

171. Solove & Hartzog, *supra* note 34, at 661.