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Chapter 976: The Battle for the Open Internet: Can California Salvage Net Neutrality?

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Chapter 976: The Battle for the Open Internet: Can California Salvage Net Neutrality?

*Camille Reid**

Code Section Affected

Civil Code § 3100 (new).

SB 822 (Wiener); 2018 STAT. CH. 976.

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* J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2020; B.A. English, Religion & Culture, William Jewell College, 2012. I would like to thank the law review editors, whose devotion to this publication and its contributors allowed this Article to take shape. My friend, Carlee Vellinga, for her constant support. Finally, thank you to my mother, Normagene Reid, for loving me unconditionally.

I. INTRODUCTION

In its purest form, the Internet is a virtual world for the “free exchange of ideas.”¹ In this world, all users have access to the same information at an equal cost.² Internet speed may vary, but everyone connects to the same Internet.³ A consistent, public Internet is not a farfetched idea.⁴ Taxpayers funded the creation of the Internet.⁵ Thus, the belief that the Internet is open to all is a mantra ingrained in the Internet’s beginnings.⁶ However, the Federal Communications Commission (“FCC”) demolished this mantra in 2017 with its Restoring Internet Freedom Order.⁷ In response to the FCC’s elimination of an open internet, California State Senator Scott Wiener stated that “[t]he FCC . . . abandoned democratic values. California must step in to protect a free and open [I]nternet.”⁸

Chapter 976 is California’s response to the FCC’s 2017 order.⁹ Chapter 976 prohibits Internet service providers “ISPs” and cable companies from interfering with consumer Internet access, including blocking content, slowing down traffic, and making consumers pay more to access content.¹⁰ This legislation could influence the broadband market and result in ISPs implementing the measure even in states without open Internet laws.¹¹ However, the Department of Justice served

1. Russell Brandom, *We Have Abandoned Every Principle of the Free and Open Internet*, THE VERGE (Dec. 19, 2017, 9:37 AM), <https://www.theverge.com/2017/12/19/16792306/fcc-net-neutrality-open-internet-history-free-speech-anonymity> (on file with *The University of the Pacific Law Review*).

2. *Id.*

3. *Id.*

4. Ben Tarnoff, *Time to Release the Internet From the Free Market – And Make It a Basic Right*, THE GUARDIAN (Nov. 29, 2017, 7:11 AM), <https://www.theguardian.com/technology/2017/nov/29/net-neutrality-internet-basic-right-america-trump-administration> (on file with *The University of the Pacific Law Review*).

5. Ben Tarnoff, *The Internet Should Be a Public Good*, JACOBIN (Aug. 31, 2016), <https://www.jacobinmag.com/2016/08/internet-public-dns-privatization-icann-netflix/> (on file with *The University of the Pacific Law Review*).

6. Peter Osnos, *The Enduring Myth of the ‘Free’ Internet*, THE ATLANTIC (Feb. 26, 2013), <https://www.theatlantic.com/technology/archive/2013/02/the-enduring-myth-of-the-free-internet/273515/> (on file with *The University of the Pacific Law Review*).

7. Press Release, Sen. Wiener’s Net Neutrality Bill Passes Senate Energy Committee with Major Protections Intact (Apr. 17, 2018), <http://sd11.senate.ca.gov/news/20180417-senator-wiener%E2%80%99s-net-neutrality-bill-passes-senate-energy-committee-major-protections> (on file with *The University of the Pacific Law Review*).

8. Press Release, Sen. Wiener’s Statement on California Net Neutrality Legislation (Jan. 11, 2018), <http://sd11.senate.ca.gov/news/20180111-senator-wiener%E2%80%99s-statement-california-net-neutrality-legislation> (on file with *The University of the Pacific Law Review*).

9. *Id.*

10. SENATE COMMITTEE ON ENERGY, UTILITIES, AND COMMUNICATIONS, COMMITTEE ANALYSIS OF SB 822, at 1 (Mar. 13, 2018).

11. Makena Kelly, *California’s Net Neutrality Bill Could Set a National Standard*, THE VERGE (June 4, 2018, 11:38 AM), <https://www.theverge.com/2018/6/4/17414384/california-net-neutrality-bill-washington-epa> (on file with *The University of the Pacific Law Review*).

California with a lawsuit under the 2017 order's federal preemption clause.¹²

At a time when one quarter of Americans use the Internet regularly, an open Internet becomes a crucial detail that has the power to control American work and personal life.¹³ Yet, misunderstandings surround open Internet, or more recently "net neutrality," which warrant America's attention.¹⁴ Net neutrality refers to the principle that the Internet should be "free," and not controlled by ISPs, like AT&T.¹⁵ Even large corporations know that Internet consumers expect net neutrality.¹⁶

The open Internet concerns the consumer and small startups relying on Internet traffic.¹⁷ Largely, speed matters to consumers, and if a startup is not performing at the rate the consumer requires, the startup may lose those consumers to other sites or apps.¹⁸ In fact, a recent Google study found consumers abandon their search if they have to wait longer than three seconds for a website to load.¹⁹ Consequently, with the loss of an open Internet, there will be less local news, quirky startups, and entrepreneurs, while larger platforms like Facebook and Google will be even more dominant.²⁰

Proponents of net neutrality are concerned with the adverse effects of not having an open Internet.²¹ Those consequences being that ISPs threaten to throttle many tasks of daily life, such as job applications, homework, or health care

12. Restoring Internet Freedom, 33 FCC Rcd. 311, 427–28 (2018), 2018 WL 305638; Press Release, Department of Justice (Sept. 30, 2018), <https://www.justice.gov/opa/pr/justice-department-files-net-neutrality-lawsuit-against-state-california-0> (on file with *The University of the Pacific Law Review*) (filing a lawsuit against California because Chapter 976 unlawfully burdens "the Federal Government's deregulatory approach to the Internet").

13. Andrew Perrin & Jingjing Jiang, *About a Quarter of U.S. Adults Say They Are 'Almost Constantly' Online*, PEW RES. CTR. (Mar. 14, 2018), <http://www.pewresearch.org/fact-tank/2018/03/14/about-a-quarter-of-americans-report-going-online-almost-constantly/> (on file with *The University of the Pacific Law Review*).

14. *The Daily: The History of Net Neutrality*, N.Y. TIMES (Dec. 14, 2017), <https://nyti.ms/2jTP8EN> (on file with *The University of the Pacific Law Review*).

15. *Id.*

16. Sarah Gray, *Netflix CEO Reed Hastings: Net Neutrality Is a 'Consumer Expectation'*, FORTUNE (Jul. 17, 2018), <http://fortune.com/2018/07/17/netflix-ceo-reed-hastings-net-neutrality-is-a-consumer-expectation/> (on file with *The University of the Pacific Law Review*) (finding a broad expectation despite some countries not having net neutrality laws because ISPs are delivering net neutrality).

17. Klint Finley, *Here's How the End of Net Neutrality Will Change the Internet*, WIRED (Nov. 22, 2017, 5:00 AM), <https://www.wired.com/story/heres-how-the-end-of-net-neutrality-will-change-the-internet/> (on file with *The University of the Pacific Law Review*).

18. Ryan Singel, *Expect Fewer Great Startups If The FCC Kills Net Neutrality*, WIRED (Dec. 12, 2017), <https://www.wired.com/story/expect-fewer-great-startups-if-the-fcc-kills-net-neutrality/> (on file with *The University of the Pacific Law Review*).

19. Alex Shellhammer, *The Need for Mobile Speed: How Mobile Latency Impacts Publisher Revenue*, DOUBLE CLICK (Sept. 2016), <https://www.doubleclickbygoogle.com/articles/mobile-speed-matters/> (on file with *The University of the Pacific Law Review*).

20. Singel, *supra* note 18.

21. Sarah Jones, *Who Loses in the War Against Net Neutrality?*, THE NEW REPUBLIC (Dec. 15, 2017), <https://newrepublic.com/article/146305/loses-war-net-neutrality> (on file with *The University of the Pacific Law Review*).

planning.²² A more precise example of what a world without net neutrality looks like is cellphone plans.²³ In 2013, cell phone companies advertised inexpensive plans that offered “unlimited high-speed access” to sites like Facebook, but limited access to other Internet sites.²⁴

However, the most significant threat to consumers is “zero-rating” plans, where big Internet providers favor their own content.²⁵ ISPs, like AT&T, engage in “zero-rating” activity when they exclude websites from a consumer’s usage allowances.²⁶ Cable TV is a model of what zero-rating can turn the Internet into.²⁷ Where consumers are only able to access those sites they pay for through their provider; otherwise, they pay extra for visiting sites not included in their package.²⁸ Chapter 976 eliminates this potentially disastrous future for Internet users the FCC’s net neutrality repeal created.²⁹

II. LEGAL BACKGROUND

The players in the net neutrality battle are networks, ISPs, edge providers, and end users.³⁰ Networks are “interconnected, long-haul fiber-optic links and high speed routers” that transmit data Internet users connect to through providers like Verizon.³¹ There are also edge providers like Amazon that provide content to end users.³² Section A explains how the FCC began to regulate the Internet.³³ Section B discusses the term, “net neutrality.”³⁴ Section C examines the FCC’s 2017 order.³⁵ Section D focuses on the FCC order’s preemption clause.³⁶ Section E highlights state lawmaker’s reactions to the FCC’s order.³⁷ Finally, Section F looks at how an agency’s order, including the FCC’s, has been determined unlawful.³⁸

22. *Id.*

23. John D. McKinnon & Ryan Knutson, *Want to See a World Without Net Neutrality? Look at These Old Cellphone Plans*, WALL ST. J. (Dec. 11, 2017, 5:30 AM), <https://www.wsj.com/articles/mobile-wireless-market-might-be-our-post-net-neutrality-world-1512988200> (on file with *The University of the Pacific Law Review*).

24. *Id.*

25. *Id.*

26. Restoring Internet Freedom, 33 FCC Rcd., *supra* note 12, at 454–55.

27. McKinnon & Knutson, *supra* note 23.

28. *Id.*

29. Press Release, Sen. Wiener’s Statement on California Net Neutrality Legislation, *supra* note 8.

30. *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014).

31. *Id.* at 628–29.

32. *Id.* at 629.

33. *Infra* Part II.A.

34. *Infra* Part II.B.

35. *Infra* Part II.C.

36. *Infra* Part II.D.

37. *Infra* Part II.E.

38. *Infra* Part II.F.

A. The FCC's First Regulation of the Internet

Congress granted the FCC the power to regulate communication by wire and radio,³⁹ which includes the Internet.⁴⁰ In 1980, the FCC adopted rules to differentiate basic services (e.g., telephone service) and enhanced services (encompassing services required for Internet connection).⁴¹ At first, enhanced services were not subject to the duties applicable to basic services.⁴² Specifically, enhanced services were not subject to FCC regulation as “common carriers” under Title II of the Communications Act of 1934,⁴³ but basic services were subject to such regulation.⁴⁴ Nonetheless, the FCC still imposed restrictions on enhanced services.⁴⁵

Congress passed the Telecommunications Act of 1996, which subjected telecommunications carriers—basic service providers—to Title II regulation but excluded ISPs.⁴⁶ In *National Cable & Telecommunications Association v. Brand X Internet Services*, the Supreme Court agreed with the FCC’s classification and held Title II did not regulate cable broadband providers because they were not telecommunications carriers.⁴⁷

B. The Term “Net Neutrality”

In 2005, the FCC first heard the word net neutrality.⁴⁸ Vonage, a voice over Internet protocol (“VoIP”) provider, filed a complaint with the FCC stating that a small digital subscriber line (“DSL”) provider was blocking ports used for VoIP applications.⁴⁹ The small DSL provider was attempting to foreclose competition by blocking ports so Internet users would have to go to it for their VoIP needs.⁵⁰ Showing support for an open Internet, the FCC fined the DSL provider \$15,000⁵¹ and explained that the industry needed to “adhere to certain consumer protection norms if the Internet is to remain an open platform for innovation.”⁵²

39. 47 U.S.C.A. § 151 (West 2018).

40. *Verizon v. FCC*, 740 F.3d 623, 629 (D.C. Cir. 2014).

41. *Id.* at 630.

42. *Id.*

43. *See* 47 U.S.C.A. § 151 (providing for the “regulation of interstate and foreign communication by wire or radio, and for other purposes”).

44. *Verizon*, 740 F.3d at 629.

45. *See id.* at 630 (demanding enhanced services offer additional enhanced services through a “completely separate corporate entity,” and that they offer their facilities to other enhanced service providers on a “common carrier basis”).

46. *Id.*

47. *Id.* at 631.

48. *The Daily: The History of Net Neutrality*, *supra* note 14.

49. *Id.*

50. *Verizon*, 740 F.3d at 631.

51. *Madison River Comm., L.L.C.*, 20 FCC Rcd. 4295, 4297 (2005), 2005 WL 516821.

52. Keith Regan, *FCC Fines Telecom that Blocked Vonage VoIP Calls*, E-COMMERCE TIMES (Mar. 4,

In 2009, the FCC determined appropriate actions to ensure continued industry investment of the Internet.⁵³ After receiving public comments, the FCC adopted three basic rules: transparency, no block, and no unreasonable discrimination.⁵⁴ The FCC took this stand after many enforcement proceedings tested the future of Internet freedom.⁵⁵ In 2014, a federal court of appeals struck down the regulations, specifically the anti-blocking and anti-discrimination rules.⁵⁶ Responding to the Court of Appeals decision, the FCC again reiterated the importance of an open Internet in its 2015 report and order.⁵⁷ The FCC stated that it “adopt[s] carefully tailored rules that would prevent specific practices we know are harmful to Internet openness—blocking, throttling, and paid prioritization. . . . [and] we also enhance our transparency rule.”⁵⁸

C. The FCC’s 2017 Order

In 2017, the FCC repealed the 2015 Obama-era net neutrality and purported to preempt any conflicting state laws.⁵⁹ The FCC’s 2017 order subjected the Internet to the Federal Trade Commission’s (“FTC”) control.⁶⁰ Therefore, the FTC would police “broadband privacy and data security” as it had before when the Internet was a common carrier.⁶¹ Believing that regulation “stifles innovation and deters investments,” the FCC reversed the 2015 regulations.⁶²

The FCC restored the classification of broadband Internet access as an “information service” and a “private mobile service.”⁶³ It reasoned that restoring the classification will encourage investment and further the idea of competition and invention that will benefit the consumer.⁶⁴

D. The Preemption Clause in the FCC 2017 Order

The FCC’s order included a preemption clause, wherein its new regulations

2005), <https://www.ecommercetimes.com/story/41101.html> (on file with *The University of the Pacific Law Review*).

53. Preserving the Open Internet Broadband Industry Practices, 25 FCC Rcd. 17905, 17906 (2010), 2010 WL 5281676.

54. *Id.*

55. *Id.*

56. *Verizon v. FCC*, 740 F.3d 623, 659 (D.C. Cir. 2014).

57. Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5603 (2015), 2015 WL 1120110.

58. *Id.*

59. Restoring Internet Freedom, 33 FCC Rcd., *supra* note 12, at 428–29.

60. *Id.* at 419–20.

61. *Id.* at 420.

62. *Id.* at 312.

63. Press Release, Fed. Comm. Comm’n, FCC Acts to Restore Internet Freedom (Dec. 14, 2017) (on file with *The University of the Pacific Law Review*).

64. *Id.*

trump all other state regulations that conflict with it.⁶⁵ In previous cases involving the FCC, including *Nixon v. Missouri*⁶⁶ and *Tennessee v. FCC*,⁶⁷ the courts found that Congress must explicitly state that it is providing an agency with the power to preempt; otherwise, the agency does not have such authority.⁶⁸

In *Nixon*, a Missouri state statute prohibited municipalities from providing telecommunications services.⁶⁹ Public utilities and municipalities petitioned the FCC to review and declare that the statute was unlawful.⁷⁰ The FCC denied the request because there was no clear statement from Congress to preempt the Missouri law.⁷¹ The Court agreed with the FCC and surmised that the clear statement rule was necessary; otherwise, federal preemption would threaten “to trench on the States’ arrangements for conducting their own governments.”⁷²

In *Tennessee v. FCC*, Tennessee and North Carolina legislatures passed laws placing restrictions or completely barring municipal telecommunications providers from expanding.⁷³ The FCC argued, based on the purposes of Section 706 of the Telecommunications Act of 1996, that preempting the Tennessee and North Carolina rules “would promote competition in the broadband marketplace.”⁷⁴ However, Tennessee and North Carolina argued there was no clear statement that Congress gave the FCC preemption power.⁷⁵ The court relied on the Supreme Court’s decision in *Nixon* in its holding,⁷⁶ stating “if Congress has the power to allocate decision making it must be clear that it is doing so.”⁷⁷

With that precedent, the court found there was no explicit statement from Congress allowing preemption.⁷⁸ Specifically, based on the language of Section 706, which gives the FCC rulemaking authority, the court determined “[n]owhere in the general charge [to the FCC] to ‘promote competition in the telecommunications market’ is a directive to do so by preempting a state’s allocation of powers.”⁷⁹ Congress did not allocate decision-making in that form to the FCC;⁸⁰ accordingly, the FCC lost in its action against Tennessee and North Carolina.⁸¹

65. Restoring Internet Freedom, 33 FCC Rcd., *supra* note 12, at 426–27.

66. 541 U.S. 125, 128 (2004).

67. 832 F.3d 597, 610 (6th Cir. 2016).

68. *Id.* at 610–11.

69. *Nixon*, 541 U.S. at 129.

70. *Id.* at 130.

71. *Id.*

72. *Id.* at 140.

73. 832 F.3d 597, 600 (6th Cir. 2016).

74. *Id.* at 603.

75. *Id.* at 610.

76. *Id.*

77. *Id.*

78. *Tennessee*, 832 F.3d at 600.

79. *Id.* at 613.

80. *Id.* at 610.

81. *Id.* at 614.

E. Reaction to the Repeal

Lawmaker leadership is widespread in combating the FCC's order.⁸² Twenty-one state attorneys generals, including Xavier Becerra of California, filed lawsuits alleging that the FCC's rollback was arbitrary and capricious.⁸³ Becerra stated, "the FCC ignored consumers' strong support for a free and open Internet."⁸⁴ A 2017 survey conducted by the University of Maryland's School of Public Policy found a sizeable bipartisan majority opposed the FCC's plan before the repeal.⁸⁵ After the repeal, nonprofits and public interest groups also filed lawsuits.⁸⁶ These lawsuits have the support of large private companies, including Google and Netflix.⁸⁷

Responding to the FCC's order, California⁸⁸ and twenty-nine other states⁸⁹ introduced legislation to salvage net neutrality. Oregon's governor already signed into law legislation that would require its state agencies to only work with those ISPs that "do not block or slow traffic or accept payment to prioritize" data.⁹⁰ Additionally, attorneys generals in twenty-one states and the District of Columbia filed protective petitions for review against the FCC.⁹¹

F. Agency Regulations, Including the FCC's that Did not Stand

While Congress gives the FCC authority to regulate the Internet, the Supreme

82. Austin McChord, *Reversing Net Neutrality is a Tax on Small Business*, THE HILL (Jul. 14, 2018, 4:00 PM), <http://thehill.com/opinion/technology/396939-reversing-net-neutrality-is-a-tax-on-small-businesses> (on file with *The University of the Pacific Law Review*).

83. Cecilia Kang, *Flurry of Lawsuits Filed to Fight Repeal of Net Neutrality*, N.Y. TIMES (Jan. 16, 2018), <https://www.nytimes.com/2018/01/16/technology/net-neutrality-lawsuit-attorneys-general.html> (on file with *The University of the Pacific Law Review*).

84. Press Release, Att'y Gen. Cal., Attorney General Becerra Sues FCC Over Repeal of Net Neutrality Rule (Jan. 16, 2018) (on file with *The University of the Pacific Law Review*).

85. *Overwhelming Bipartisan Majority Opposes Repealing Net Neutrality*, PROGRAM FOR PUB. CONSULTATION SCH. OF PUB. POL'Y, UNIV. OF MD. (Dec. 12, 2017), <http://www.publicconsultation.org/united-states/overwhelming-bipartisan-majority-opposes-repealing-net-neutrality/> (on file with *The University of the Pacific Law Review*).

86. Kang, *supra* note 83.

87. *Id.*

88. Jazmine Ulloa, *California State Senator Pledges to Bring Back Net Neutrality Rules Just as FCC Votes to Repeal Them*, L.A. TIMES (June 27, 2018, 8:13 PM), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-california-state-senator-pledges-to-1513279047-htmlstory.html> (on file with *The University of the Pacific Law Review*).

89. NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-legislation-in-states.aspx> (last visited June 27, 2018) (on file with *The University of the Pacific Law Review*).

90. Mike Snider, *Net-Neutrality Is Over. Now California and Oregon Are Stepping In*, USA TODAY (June 27, 2018, 8:32 PM), <https://www.usatoday.com/story/tech/news/2018/04/20/net-neutrality-repeal-prompts-calif-other-states-pursue-their-own-laws/529337002/> (on file with *The University of the Pacific Law Review*).

91. Protective Petition for Review at 1, *State of N.Y. v. FCC*, No. 18-1013 (D.C. Cir. Jan. 16, 2018).

Court in *Louisiana Public Service Commission v. FCC* determined the FCC could not overcome a state law on the sole basis that it does not conform with its policies.⁹² Thus, the court repealed the regulation.⁹³ Congress can also reverse an agency's order under the Congressional Review Act ("CRA").⁹⁴ To date, Congress has not repealed an FCC regulation and only before 2017, had it used the CRA once with an Occupational Safety and Health Administration ("OSHA") regulation.⁹⁵

Finally, it is possible to overturn a regulation that is found unlawful, which can happen if there are flaws in the notice and comment period required by the Administrative Procedure Act ("APA").⁹⁶ Courts have dealt with agencies not responding to comments in their final rules before,⁹⁷ and ultimately will not overturn a regulation on that basis alone.⁹⁸ However, as was the case in *Home Box Office, Inc. v. FCC*, the lack of response to substantive comments and other indicia may cause a court to strike down the regulation as arbitrary and capricious.⁹⁹

III. CHAPTER 976

Chapter 976 prohibits fixed and mobile ISPs "from engaging in specified actions concerning the treatment of Internet traffic."¹⁰⁰ Additionally, Chapter 976 forbids ISPs from interfering with end users' access to the Internet¹⁰¹ and requires ISPs to disclose their performance and management practices.¹⁰² Finally, Chapter 976 prohibits ISPs from "zero-rating," however, interference that receives "no consideration, monetary or otherwise" is not a violation.¹⁰³

IV. ANALYSIS

California acts on the FCC's repeal of Obama-era regulations of ensuring an

92. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374–75 (1986).

93. *Id.* at 379.

94. 5 U.S.C.A. §§ 801–08 (West 2018).

95. Stuart Shapiro, *The Congressional Review Act, Rarely Used and (Almost Always) Unsuccessful*, THE HILL (Apr. 17, 2015, 7:30 AM), <http://thehill.com/blogs/pundits-blog/lawmaker-news/239189-the-congressional-review-act-rarely-used-and-almost-always> (on file with *The University of the Pacific Law Review*); Stephen Dinan, *GOP Rolled Back 14 of 15 Obama Rules Using Congressional Review Act*, WASH. TIMES (May 15, 2017), <https://www.washingtontimes.com/news/2017/may/15/gop-rolled-back-14-of-15-obama-rules-using-congres/> (on file with *The University of the Pacific Law Review*).

96. 5 U.S.C.A. §§ 553(b), 706 (West 2018).

97. *See ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987) (finding the FCC did not have to respond to all comments); *see also Home Box Office, Inc. v. FCC*, 567 F.2d 9, 40 (D.C. Cir. 1977) (determining based on the comment period that the FCC's regulations did not support its purpose).

98. *ACLU*, 823 F.2d at 1581.

99. *Home Box Office*, 567 F.2d at 40.

100. CAL. CIV. CODE § 3100 (enacted by Chapter 976).

101. *Id.* § 3101(a)(7)(A).

102. *Id.* § 3100(a)(8).

103. *Id.* § 3100(a)(7)(B).

open Internet with Chapter 976.¹⁰⁴ Senator Wiener stated that California is capable of implementing Internet regulations that protect Internet users and consumers.¹⁰⁵ Chapter 976's primary focus is to ensure that there are no winners or losers in Internet access.¹⁰⁶ However, opposition to Chapter 976 indicates that regulations attached to Chapter 976 will only stifle invention and cause compliance costs that consumers would bear.¹⁰⁷ Additionally, opposers point to the preemption provision made by the FCC in its 2017 order.¹⁰⁸ They claim it will snuff out whatever good intentions Senator Wiener and his co-authors created in Chapter 976.¹⁰⁹

Section A discusses Chapter 976's path in both the Assembly and Senate.¹¹⁰ Section B examines the obstacles standing in Chapter 976's way.¹¹¹ Section C focuses on various methods Chapter 976 can survive if a court overrules the FCC's 2017.¹¹²

A. *Setbacks of Chapter 976*

Chapter 976's bright future for protecting California Internet users dimmed for a moment on June 20, 2018, when the Assembly made numerous amendments to it.¹¹³ The California Communications and Conveyance Committee gutted this legislation and destroyed its status as the "gold standard for state-level net neutrality."¹¹⁴ The Committee removed the zero-rating prohibition, along with the speeding up and slowing down prohibitions.¹¹⁵ Concerns arose that the original language of Chapter 967 was "too extreme" and would "drive up the cost of [I]nternet service" for consumers.¹¹⁶ As a result of the amendments, support for Chapter 976 dropped.¹¹⁷ Senator Wiener described the amended Chapter 976 as no

104. Press Release, Sen. Wiener's Net Neutrality Bill Passes Senate Energy Committee with Major Protections Intact, *supra* note 7.

105. *Id.*

106. *Id.*

107. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 822, at 29 (Apr. 24, 2018).

108. *Id.* at 25.

109. *Id.*

110. *Infra* Part IV.A.

111. *Infra* Part IV.B.

112. *Infra* Part IV.C.

113. Dell Cameron, *California Lawmakers Accused of 'Corruption' After Gutting Net Neutrality Bill*, GIZMODO (June 20, 2018, 5:25 PM), <https://gizmodo.com/california-lawmakers-accused-of-corruption-after-guttin-1826997552> (on file with *The University of the Pacific Law Review*).

114. *Id.*

115. *Id.*

116. Levi Sumagaysay, *California Net Neutrality Bill Gutted at Tense Assembly Hearing*, MERCURY NEWS (June 20, 2018, 8:05 AM) <https://www.mercurynews.com/2018/06/20/california-net-neutrality-bill-faces-crucial-hearing-as-democrat-seeks-to-water-it-down/> (on file with *The University of the Pacific Law Review*).

117. ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION, COMMITTEE ANALYSIS OF SB 822, at 14 (June 26, 2018).

longer representing “a real net neutrality bill.”¹¹⁸

However, Senator Wiener did not give up on Chapter 976 and reaffirmed his commitment to providing Californians with net neutrality.¹¹⁹ “[B]y keeping the bill alive today, we can continue negotiations to restore the protections that were gutted from the bill.”¹²⁰ With that commitment came limited support from organizations that would only endorse Chapter 976 if it reverted to its original state.¹²¹ Nevertheless, because of the August 8 amendment restoring Chapter 976, substantial support remained.¹²²

B. What is Standing in Chapter 976’s Way?

While Chapter 976’s status is in a constant state of flux, its central disturbance is its potential preemption.¹²³ The Supremacy Clause of Article VI of the U.S. Constitution mandates that courts give federal law superiority when state law and federal law conflict.¹²⁴ There are two types of federal preemption under the Supremacy Clause: express and implied.¹²⁵ Express preemption is “when a federal statute explicitly confirms Congress’s intention to preclude state law.”¹²⁶ Implied preemption is where federal law is so ubiquitous that Congress planned to occupy the field in that part of the law; or where federal and state law irreconcilably conflict; or that state law is an obstacle to Congress’ purpose.¹²⁷

The FCC’s 2017 Order, expressly stated its authority to preempt any state or local regulations seeking to impose stricter requirements for broadband providers.¹²⁸ As a result of the FCC’s language, challengers of Chapter 976 argue it is incompatible with the recent order.¹²⁹ Challengers also argue that the previous version of Chapter 976 is “bad policy and contrary to federal law” because it “violates the Interstate Commerce Clause by proposing to impose state specific

118. Press Release, Sen. Wiener’s Gutted Net Neutrality Bill Moves Forward, Allowing Negotiations to Restore Protections to Continue (June 26, 2018), <http://sd11.senate.ca.gov/news/20180626-senator-wiener%E2%80%99s-gutted-net-neutrality-bill-moves-forward-allowing-negotiations> (on file with *The University of the Pacific Law Review*).

119. *Id.*

120. *Id.*

121. ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION, *supra* note 117.

122. Press Release, California Net Neutrality Proposal Moves Forward (Aug. 8, 2018), <http://sd11.senate.ca.gov/news/20180808-california-net-neutrality-proposal-moves-forward> (on file with *The University of the Pacific Law Review*).

123. Sean Captain, *Snubbing FCC, States Are Writing Their Own Net Neutrality Laws*, FAST CO. (Jan. 2, 2018), <https://www.fastcompany.com/40510095/snubbing-fcc-states-are-writing-their-own-net-neutrality-laws> (on file with *The University of the Pacific Law Review*).

124. U.S. CONST. art. VI, cl. 2.

125. ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION, *supra* note 117, at 12.

126. *Id.*

127. *Id.*

128. Restoring Internet Freedom, 33 FCC Rcd., *supra* note 12, at 427–28.

129. ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION, *supra* note 117, at 12.

restrictions on an inherently interstate service.”¹³⁰

Nevertheless, there is one facet within the FCC’s 2017 order that is inconsistent with the FCC’s claim of preemption.¹³¹ That is, the FCC discarded its authority to regulate broadband.¹³² In the order, the FCC cites Section 230 of the Telecommunications Act of 1996, which establishes the Internet as “an unregulated information service.”¹³³ However, the FCC stated it could stop state and local governments from creating net neutrality laws which are inconsistent with the 2017 order.¹³⁴ As a result, it is inconsistent for the FCC not to have authority to regulate but be able to prevent states from controlling broadband.¹³⁵

Furthermore, *Tennessee v. FCC* indicates the FCC cannot preempt without express language from Congress.¹³⁶ Since there has been no clear statement from Congress indicating that the FCC can preempt inconsistent state law, nor that the FCC itself has the power to regulate the Internet, the belief that the FCC can preempt is unfounded.¹³⁷ While a lawsuit was filed against this legislation on October 1, 2018, there is still the argument that the FCC cannot preempt because it has no power to regulate.¹³⁸

C. Can Chapter 976 Survive Despite the FCC’s Current Order?

If a court finds the FCC’s 2017 order ineffective, there are various ways Chapter 976 can survive.¹³⁹ Subsection 1 discusses the FCC’s inability to regulate the Internet within California.¹⁴⁰ Subsection 2 reviews how Congress can override the FCC’s 2017 order, thus allowing the Obama-era legislation to endure.¹⁴¹ Finally, subsection 3 evaluates how the compromised notice and comment period

130. *Id.*

131. Jon Brodtkin, *Why the First State with a Net Neutrality Law Isn’t Scared of Lawsuits*, ARS TECHNICA (Mar. 16, 2018, 7:45 AM), <https://arstechnica.com/tech-policy/2018/03/net-neutrality-supporting-lawmaker-tells-isps-were-ready-for-lawsuits/> (on file with *The University of the Pacific Law Review*).

132. *Id.*

133. Restoring Internet Freedom, 33 FCC Rcd., *supra* note 12, at 350.

134. *Id.* at 427–28.

135. Brodtkin, *supra* note 131.

136. 832 F.3d 597, 600 (6th Cir. 2016).

137. Barbara van Schewick, *SB 822 Would Secure Net Neutrality for California*, CTR. FOR INTERNET AND SOC’Y BLOG (Mar. 14, 2018, 6:00 AM), <https://cyberlaw.stanford.edu/blog/2018/03/sb-822-would-secure-net-neutrality-california> (on file with *The University of the Pacific Law Review*).

138. Karl Bode, *Why Feds Can’t Block California’s Net Neutrality Bill*, THE VERGE (Oct. 2, 2018, 8:29 AM), <https://www.theverge.com/2018/10/2/17927430/california-net-neutrality-law-preemption-state-lawsuit> (on file with *The University of the Pacific Law Review*).

139. Jon Brodtkin, *Why States Might Win the Net Neutrality War Against the FCC*, ARS TECHNICA (Feb. 22, 2018, 7:37 AM), <https://arstechnica.com/tech-policy/2018/02/why-ajit-pai-might-fail-in-quest-to-block-state-net-neutrality-laws/> (on file with *The University of the Pacific Law Review*).

140. *Infra* Part IV.C.1.

141. *Infra* Part IV.C.2.

can guarantee Chapter 976's existence.¹⁴²

1. The FCC's Limitation in California

Congress gave the FCC power to regulate communication by wire and radio,¹⁴³ but Congress did not provide the FCC with jurisdiction over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service."¹⁴⁴ Since the FCC's purpose is to regulate only communication that is interstate, including the Internet, its ability to control Internet use that originates in California and ends with a user in California is unsupported.¹⁴⁵

2. CRA

Additionally, the CRA gives Chapter 976 another avenue to withstand the FCC's order.¹⁴⁶ This law gives Congress the right to review a government agency's regulations.¹⁴⁷ Ultimately, it is a powerful deregulatory tool.¹⁴⁸ Here, if Congress repeals the FCC order, it may not be reissued in the same form, unless Congress authorizes it.¹⁴⁹ To repeal a regulation, the CRA requires a joint resolution from Congress,¹⁵⁰ which the President must sign.¹⁵¹

It is unlikely that the President will sign such a resolution if his appointee to the agency voted in favor of the regulation.¹⁵² However, if the President vetoes the resolution, Congress may still vote to override the veto.¹⁵³ Based on the required steps of the CRA, it is easier to reverse an agency order if the agency rule comes at the end of the previous administration, thus allowing the new administration to strike down the regulation.¹⁵⁴

Since its inception, the CRA successfully overturned one rule promulgated by

142. *Infra* Part IV.C.3.

143. See 47 U.S.C.A. § 151 (West 2018) (providing for the "regulation of interstate and foreign communication by wire or radio, and for other purposes").

144. 47 U.S.C.A. § 152(b) (West 2018).

145. SENATE JUDICIARY COMMITTEE, *supra* note 107, at 13.

146. 5 U.S.C.A. §§ 801–08 (West 2018).

147. *Id.* § 801.

148. Phillip A. Wallach & Nicholas W. Zeppos, *Is the Congressional Review Act About to Supercharge Deregulation?*, BROOKINGS INST. (Apr. 4, 2017), <https://www.brookings.edu/blog/fixgov/2017/04/04/will-congressional-review-act-supercharge-deregulation/> (on file with *The University of the Pacific Law Review*).

149. 5 U.S.C.A. § 801(b)(2) (West 2018).

150. *Id.* § 802(b)(1).

151. Maeve P. Carey et al., *The Congressional Review Act: Frequently Asked Questions*, CONG. RES. SERV. (Nov. 17, 2016), <https://fas.org/sgp/crs/misc/R43992.pdf> (on file with *The University of the Pacific Law Review*).

152. *Id.*

153. *Id.*

154. *Id.*

OSHA¹⁵⁵ and fourteen rules made by the Obama administration.¹⁵⁶ On May 16, 2018, the U.S. Senate approved a resolution to restore FCC net neutrality rules from 2015.¹⁵⁷ To effectuate the resolution, it needs to pass the House and President Trump must sign it.¹⁵⁸ Despite over a hundred votes supporting it in the House, it still has not passed.¹⁵⁹ As a result, House Majority Leader Kevin McCarthy, Republican from California, and his chamber are focused on creating net neutrality legislation to respond to the FCC.¹⁶⁰

Furthermore, it is doubtful President Trump will sign the resolution reversing the FCC's net neutrality repeal, because the White House endorsed the repeal in the first place.¹⁶¹ In fact, President Trump approved a Republican-backed CRA that invalidated other FCC rules developed by the Obama Administration.¹⁶² If the President signs the CRA joint resolution, the 2015 net neutrality rules will be reinstated, thus averting an otherwise likely showdown between Chapter 976 and the FCC's 2017 Order.¹⁶³

3. *Inadequate Notice and Compromised Public Comment.*

In addition, several state lawsuits claim the notice and comment period in the FCC's order was flawed and thus unlawful.¹⁶⁴ Pursuant to the APA, an agency must give notice to the public of its plan to alter regulations.¹⁶⁵ During this notice and comment period, the public can make comments about the proposed regulation.¹⁶⁶ This period allows the agency to see what the public thinks about the

155. Shapiro, *supra* note 95.

156. Dinan, *supra* note 95.

157. Brian Fung, *Senate Approves Bipartisan Resolution to Restore FCC Net Neutrality Rules*, WASH. POST (May 16, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/05/16/net-neutrality-is-getting-a-big-vote-in-the-senate-today-heres-what-to-expect/?utm_term=.d0bfeb7026c7 (on file with *The University of the Pacific Law Review*).

158. *Id.*

159. *Id.*; Andrew Wyrich, *What is the Congressional Review Act, and How Is It Being Used to Try and Save Net Neutrality?*, THE DAILY DOT (Oct 1, 2018, 1:30 PM), <https://www.dailydot.com/layer8/net-neutrality-congressional-review-act/> (on file with *The University of the Pacific Law Review*) (stating the CRA is at 177 votes in the House, which is shy of the 41 votes required to force a vote).

160. Brian Fung, *Why the Internet Is Suddenly Protesting on Net Neutrality All Over Again*, WASH. POST (May 9, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/05/08/senate-democrats-have-been-pushing-a-big-vote-on-net-neutrality-all-year-its-here/?utm_term=.c29c15d97989 (on file with *The University of the Pacific Law Review*).

161. *Senate Approves Bipartisan Resolution to Restore FCC Net Neutrality Rules*, *supra* note 157.

162. *Id.*

163. *Id.*

164. Jon Brodtkin, *State Attorneys General Line Up to Sue FCC Over Net Neutrality Repeal*, ARS TECHNICA (Dec. 14, 2017, 2:40 PM), <https://arstechnica.com/tech-policy/2017/12/state-attorneys-general-line-up-to-sue-fcc-over-net-neutrality-repeal/> (on file with *The University of the Pacific Law Review*).

165. 5 U.S.C.A. § 553(b) (West 2018).

166. *Id.*

proposed regulation and adjust the proposed rule if necessary.¹⁶⁷

Thus, the FCC's failure to follow proper notice and comment procedures may result in suspension of its order.¹⁶⁸ Failure to follow the rules for the notice and comment period may result in the court setting aside agency action which is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."¹⁶⁹ If an agency does not respond to comments raised by the public, "the opportunity to comment is [rendered] meaningless."¹⁷⁰ However, an agency's failure to respond to comments will not result in automatic reversal of a regulation.¹⁷¹

Surprisingly, the notice and comment period for the repeal of net neutrality received more feedback than most other proposed regulations.¹⁷² Yet, mass comment campaigns, like the one that occurred before the FCC's rollback, rarely determine rulemaking outcomes.¹⁷³ FCC Chairman Ajit Pai repeatedly stated that the agency favors quality comments over the quantity.¹⁷⁴ Furthermore, duplicate statements like those made in this comment period, do not add to the "legal, economic, scientific and technical information that agencies are looking for in public comments."¹⁷⁵ Nonetheless, if a judge finds these comments represented substantive, yet unacknowledged concern by the public, it may raise issues regarding the FCC's decision.¹⁷⁶

What is more, during the notice and comment period for the repeal of the net

167. *Id.*

168. *See* Home Box Office, Inc. v. FCC, 567 F.2d 9, 40 (D.C. Cir. 1977) (finding the FCC's regulations were arbitrary because there was no record or evidence to support the regulation's purpose based on the comments).

169. 5 U.S.C.A. § 706(2)(A) (West 2018).

170. *ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987).

171. CAL. CIV. CODE § 3100 (enacted by Chapter 976).

172. Jacob Kastrenakes, *The Net Neutrality Comment Period Was a Complete Mess*, THE VERGE (Aug. 31, 2017), <https://www.theverge.com/2017/8/31/16228220/net-neutrality-comments-22-million-reply-record> (on file with *The University of the Pacific Law Review*) (explaining the comment period closed out with almost 22 million replies in contrast with the FCC's comment period in 2015 which stopped at 3.7 million); *see also* Melissa Locker, *John Oliver Wants You to Flood the FCC Website to Save Net Neutrality, Again*, TIME (May 8, 2017), <http://time.com/4770205/john-oliver-fcc-net-neutrality/> (on file with *The University of the Pacific Law Review*) (stating the television host encouraged people from celebrities to average people to save net neutrality by posting a link to the FCC's public comment area on his show's website).

173. Steven Balla, *Fake Comments Flooded in When the FCC Repealed Net Neutrality. They May Count Less Than You Think*, WASH. POST (Dec. 14, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/12/14/there-was-a-flood-of-fake-comments-on-the-fccs-repeal-of-net-neutrality-they-may-count-less-than-you-think/?utm_term=.0b5d5319e0a4 (on file with *The University of the Pacific Law Review*).

174. Brian Fung, *FCC Net Neutrality Process 'Corrupted' by Fake Comments and Vanishing Consumer Complaints, Officials Say*, WASH. POST (Nov. 24, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/11/24/fcc-net-neutrality-process-corrupted-by-fake-comments-and-vanishing-consumer-complaints-officials-say/?utm_term=.ac881b004dad (on file with *The University of the Pacific Law Review*).

175. Balla, *supra* note 173.

176. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 40 (D.C. Cir. 1977) (reviewing whether the FCC's regulations regarding the siphoning of paid programming disturbs the quality of free television). *But see* *ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987) (holding that the FCC was not lawfully obligated "to respond to significant comments").

neutrality rules, numerous comments were made on the FCC website by fake accounts.¹⁷⁷ There were “[t]housands of bots [that] submitted comments,” and other comments “made under stolen identities.”¹⁷⁸ Comments that supported the FCC’s new Internet regulations were the most suspicious because of their consistent, and sometimes duplicative, syntax.¹⁷⁹

Many organizations and politicians from both party sides requested that the FCC delay its vote to allow time to investigate the public comment process.¹⁸⁰ Commissioner Jessica Rosenworcel of the FCC even requested that the Commission delay voting on the proposal until the investigation gathered more information.¹⁸¹ Despite this, the FCC did not pause its net neutrality repeal.¹⁸²

Regardless of the public comment period’s effectiveness, the FCC did not present the preemption clause in its proposed repeal.¹⁸³ Instead, the FCC asked for public comment on the repeal, not on whether it could preempt state regulations.¹⁸⁴ In the FCC’s Notice of Proposed Rulemaking, there is only one reference to the preemption clause.¹⁸⁵ That reference cites to an FCC proposal that relates to removing barriers to infrastructure investment.¹⁸⁶ Thus, the FCC’s failure to include this provision in its notice and comment period may also be an APA violation.¹⁸⁷

The suspicious submissions during the comment period will no doubt take center stage of any litigation regarding Chapter 976.¹⁸⁸ Regardless of how a court handles the fake comments, any challenge that does come up against Chapter 976 will likely not stand if Ajit Pai’s Restoring Internet Freedom Order is struck

177. Balla, *supra* note 173.

178. April Glaser, *Net Neutrality Is Over. Now What?*, SLATE (Dec. 14, 2017, 1:13 PM), http://www.slate.com/blogs/future_tense/2017/12/14/the_fcc_has_officially_voted_to_kill_net_neutrality_now_what.html (on file with *The University of the Pacific Law Review*).

179. *FCC Net Neutrality Process ‘Corrupted’ by Fake Comments and Vanishing Consumer Complaints*, *Officials Say*, *supra* note 174.

180. Jon Brodtkin, *2 Million People—And Some Dead Ones—Were Impersonated in Net Neutrality Comments*, ARS TECHNICA (Dec. 13, 2017, 3:00 PM), <https://arstechnica.com/tech-policy/2017/12/dead-people-among-millions-impersonated-in-fake-net-neutrality-comments/> (on file with *The University of the Pacific Law Review*).

181. *Id.*

182. Jon Brodtkin, *Goodbye, Net Neutrality—Ajit Pai’s FCC Votes to Allow Blocking and Throttling*, ARS TECHNICA (Dec. 14, 2017, 10:12 AM), <https://arstechnica.com/tech-policy/2017/12/goodbye-net-neutrality-ajit-pais-fcc-votes-to-allow-blocking-and-throttling/> (on file with *The University of the Pacific Law Review*).

183. *State Attorneys General Line Up to Sue FCC Over Net Neutrality Repeal*, *supra* note 164.

184. *Id.*

185. *Restoring Internet Freedom Comments (WC Docket No. 17-108)*, FCC (Apr. 27, 2017), <https://www.fcc.gov/restoring-internet-freedom-comments-wc-docket-no-17-108> (on file with *University of the Pacific Law Review*).

186. *Id.*

187. *State Attorneys General Line Up to Sue FCC Over Net Neutrality Repeal*, *supra* note 164.

188. *FCC Net Neutrality Process ‘Corrupted’ by Fake Comments and Vanishing Consumer Complaints*, *Officials Say*, *supra* note 174.

down.¹⁸⁹

V. CONCLUSION

Chapter 967's ride to becoming law was bumpy,¹⁹⁰ and will likely continue with the lawsuit that has been filed against it.¹⁹¹ Senator Wiener describes it as a dogfight¹⁹² against "[I]nternet service providers, telecoms, and cable companies" that will battle, but that he looks forward to successful litigation.¹⁹³ Nevertheless, popularity and support from public interest groups remain high for net neutrality.¹⁹⁴ The freedom of the Internet is at stake, so supporters will not relent from the fight.¹⁹⁵

189. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 822, *supra* note 107.

190. Dell Cameron, *California's Strong Net Neutrality Bill is Back*, GIZMODO (Jul. 5, 2018, 3:00 PM), <https://gizmodo.com/californias-strong-net-neutrality-bill-is-back-1827368616> (on file with *The University of the Pacific Law Review*).

191. Press Release, Department of Justice, *supra* note 12.

192. Cameron, *supra* note 190.

193. Brian Fung, *California Agrees Not to Enforce Its Net Neutrality Law as Justice Dept. Puts Lawsuit On Hold*, WASH. POST (Oct. 26, 2018), https://www.washingtonpost.com/technology/2018/10/26/california-agrees-not-enforce-its-net-neutrality-law-trumps-doj-puts-its-lawsuit-hold/?utm_term=.14a7ed0a1e63 (on file with *The University of the Pacific Law Review*).

194. Cameron, *supra* note 190.

195. *Id.*

* * *