

*BERNINGER V. FEDERAL COMMUNICATIONS
COMMISSION: THE OUTER LIMITS OF
JUDICIAL DEFERENCE*

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I. INTRODUCTION

Broadband Internet is the most common Internet service used in the United States.¹ Broadband includes all services that provide high speed Internet, although not all Internet services are broadband.² Government regulation of broadband is highly controversial, in part due to broadband's rapid development and expansion. Congress has avoided drafting legislation governing broadband and instead granted regulatory authority to the Federal Communications Commission (FCC) under the theory that the FCC is in a better position to promulgate rules related to telecommunications³ and information services. In turn, the FCC has generally limited its regulation of broadband, with the goal of encouraging online innovation such as the development of video streaming, online commerce, and social networks.⁴

In pursuit of this goal, the FCC developed net neutrality principles in the 2010 and 2015 Open Internet Orders.⁵ Net neutrality is “the principle that [Internet Service Providers (ISPs)] treat all data on the

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¹ FED. COMM'NS COMM'N, *What is Broadband?*, BROADBAND.GOV, https://web.archive.org/web/20110713053907/http://www.broadband.gov/about_broadband.html [<https://perma.cc/7R83-798G>].

² *See id.*

³ 47 U.S.C. § 153 (Telecommunications is defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”).

⁴ THOMAS HAZLETT, *THE FALLACY OF NET NEUTRALITY* 27 (2011).

⁵ *See generally* 2010 Open Internet Order, 25 FCC Rcd. 17905 (2010); 2015 Open Internet Order, FCC 15–24 (2015).

Internet equally, and not discriminate or charge differently by user, content, website, platform, application, type of attached equipment, or method of communication.”⁶ The recent case of *Berninger v. FCC* addressed the issue of whether the FCC can promulgate net neutrality rules in the future without express congressional authorization.⁷ While the Supreme Court ultimately denied certiorari,⁸ the question presented by *Berninger* is still relevant given the continuing public debate on net neutrality and the possibility of a future administration sympathetic to stronger broadband regulation.

In *Berninger*, petitioner argued that the FCC should be denied judicial deference when implementing net neutrality rules without clear congressional authority because doing so would raise questions of deep political and economic significance.⁹ A federal agency that demonstrates that its rules are entitled to deference has much greater flexibility in creating and enforcing rules. Therefore, if the FCC created an order similar to the *Open Internet Order of 2015*, and the new order were challenged in court, the FCC would likely argue that it is entitled to judicial deference.¹⁰ Petitioner, in turn, asserted that regulations raising questions of deep political and economic significance, such as more robust regulation of broadband, should be exempt from ordinary *Chevron* deference analysis.¹¹

This case comment argues that the Court should not defer to the FCC’s interpretation of the Telecommunications Act of 1996 as to whether broadband is an information or telecommunications service because regulation of broadband raises a question of deep political and economic significance. In the last ten years, the FCC has on several occasions changed its classification of broadband providers, creating ambiguity as to the scope of authority with which the FCC may govern

⁶ ANGELE GILROY, CONG. RESEARCH SERV., ACCESS TO BROADBAND NETWORKS: THE NET NEUTRALITY DEBATE (Mar. 11, 2011), https://www.everycrsreport.com/files/20110311_R40616_81d4f1aa5388126152dec6b5a2959691d13f1145.pdf [<https://perma.cc/3L4J-HCES>].

⁷ Petition for Writ of Certiorari at 25, *Berninger v. FCC*, 139 S. Ct. 453 (2018).

⁸ Amy Howe, *Divided Court Denies Review in “Net Neutrality” Cases*, SCOTUSBLOG (Nov. 5, 2018), <https://www.scotusblog.com/2018/11/divided-court-denies-review-in-net-neutrality-cases/> [<https://perma.cc/E8HP-VDEP>].

⁹ Petition for Writ of Certiorari, *supra* note 7, at 22.

¹⁰ Brief of Respondent Free Press at 32, *Berninger v. FCC*, 139 S. Ct. 453 (2018) (arguing that the *Chevron* deference framework should apply in the present case).

¹¹ See *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). In *Mozilla Corp. v. FCC*, No. 18-1051 (D.C. Cir. 2018), which had oral arguments on February 1st, petitioner challenged FCC’s repeal of the 2015 Open Internet Order. If the U.S. Court of Appeals for the D.C. Circuit overturns parts of the repeal, then FCC may have to implement further regulation of broadband.

ISPs. Fully removing the ambiguity would require Congressional legislation clarifying whether broadband is a telecommunications service and whether the FCC has the authority to implement net neutrality regulations such as restrictions on blocking, throttling, and paid prioritization.

Furthermore, the Supreme Court has previously declined to grant *Chevron* deference in circumstances where an agency's regulation raises questions of "economic and political significance," which the FCC would raise in implementing restrictions on blocking, throttling, and paid prioritization because these restrictions have the capacity to impact millions of Americans and involve billions of dollars.¹² Given that the Court has found that *Chevron* deference does not apply to an IRS interpretation of health insurance tax credits¹³ and the FDA's regulation of tobacco products,¹⁴ so too should the Court find that *Chevron* deference does not apply to regulation of broadband providers.

II. BACKGROUND

Congress passed the Telecommunications Act of 1996 (1996 Act)¹⁵ to amend the 1934 Act establishing the FCC.¹⁶ The 1996 Act expanded the FCC's regulatory jurisdiction¹⁷ to include Internet-based services—while Congress authorized the FCC to regulate information as well as telecommunication services, Congress did not explicitly pass legislation allowing the FCC to prohibit service providers from blocking or throttling lawful content or engaging in paid prioritization.¹⁸ In 2010, the FCC initially attempted to implement net neutrality principles under the *Open Internet Order of 2010* (2010 Order).¹⁹ The 2010 Order required ISPs to neither unreasonably discriminate in transferring network traffic

¹² See *King*, 135 S. Ct. at 2489.

¹³ See *id.*

¹⁴ See *FDA v. Brown & Williamson*, 529 U.S. 120, 125 (2000).

¹⁵ See generally Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

¹⁶ 47 U.S.C. § 609.

¹⁷ See 47 U.S.C. § 1302.

¹⁸ H.R. Rep. No. 104-458, at 120 (1996) (Conf. Rep.), <https://www.congress.gov/104/crpt/hrpt458/CRPT-104hrpt458.pdf> [<https://perma.cc/TE76-GJN6>]. Section 241 of § 101 of the House amendment restates the obligation contained in § 201(a) of the Communications Act on all common carriers to interconnect with the facilities and equipment of other providers of telecommunications services and information services.

¹⁹ See generally 2010 Open Internet Order, 25 FCC Rcd. 17905 (2010).

nor throttle or block legitimate websites, applications, services, or non-harmful devices.²⁰

The United States Court of Appeals for the District of Columbia (D.C. Circuit) held in 2014 that the FCC had limited authority under the 1996 Act to regulate ISPs because the 2010 Order classified ISPs as providers of information services rather than telecommunications services.²¹ Telecommunications services and information services are each regulated by their own statutory provisions, the former by Title II of the 1934 Act and the latter by § 706 of the 1996 Act.²² Title II grants the FCC authority to impose obligations on common carriers, which includes telecommunications services.²³ Under this authority, the FCC can, for example, require the prevention of “unjust and unreasonable discrimination” and require the “[interconnection] with other carriers and to establish through-routes.”²⁴ Additionally, under Title II, the FCC has the authority to impose obligations on common carriers to charge “just and reasonable” prices among all products and services connected to telecommunications services.²⁵

Conversely, because information services are not considered common carriers, the FCC exercises substantially less authority over providers of information services.²⁶ The FCC interpreted § 706 of the 1996 Act in a way that “grant[ed] the Commission affirmative authority to promulgate rules governing broadband providers”²⁷ in order to meet the “specific statutory goal of accelerating broadband deployment.”²⁸ In *Verizon v. FCC*, the D.C. Circuit held that because the FCC did not classify broadband as a telecommunications service under the 2010 Order, the FCC did not have authority to regulate ISPs as common carriers and therefore did not have the authority to promulgate the anti-blocking and anti-discrimination rules.²⁹

In response to *Verizon*, the FCC reclassified broadband as a telecommunications service in the *2015 Open Internet Order* (2015 Order).³⁰ The reclassification allowed the FCC to reintroduce rules

²⁰ *Id.*

²¹ *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014).

²² *Id.*; see also 2010 Open Internet Order, 25 FCC Rcd. 17905 (2010).

²³ 47 U.S.C. § 201(b).

²⁴ G. Hamilton Loeb, *The Communications Act Policy Toward Competition: A Failure to Communicate*, 1978 DUKE L.J. 1, 20 (paraphrasing 47 U.S.C. § 201(a)).

²⁵ 47 U.S.C. § 201(b).

²⁶ *Verizon*, 740 F.3d at 655.

²⁷ *Id.* at 642.

²⁸ *Id.* at 641.

²⁹ *Id.*

³⁰ 2015 Open Internet Order, FCC 15–24, ¶ 363 (2015).

vacated in *Verizon*, including rules prohibiting providers from blocking or throttling lawful content. Additionally, the FCC crafted a new rule prohibiting paid prioritization. As mentioned, the FCC has broader authority to regulate telecommunications services under Title II,³¹ thereby permitting the FCC to regulate ISPs as common carriers and subject them to more extensive regulation. The 2015 Order therefore allows the FCC to circumvent the barrier to regulation set up by the D.C. Circuit in *Verizon*.³²

As mentioned, the 2015 Order implements net neutrality principles by banning paid prioritization for Internet access.³³ It also significantly restricts ISPs from blocking or interfering with access provided to specific parties, subject to “reasonable network management practices.”³⁴ The FCC’s restrictions prevent ISPs from controlling a user’s bandwidth and prevent “edge providers”³⁵ from receiving exemptions to net neutrality rules that are denied to startups and new market participants.³⁶ While the FCC explicitly stated that it retains the right to waive the restrictions on paid prioritization at any time, requests for waivers are subject to a notice-and-comment procedure,³⁷ which sets a high bar for applicants to demonstrate that a waiver (1) would not undermine open Internet access and (2) would provide a significant benefit to the public.³⁸ Hence, the FCC’s right to waive restrictions grants the agency significant authority over online activity.

In response to the 2015 Order,³⁹ the U.S. Telecom Association brought suit on the grounds that the order was “arbitrary, capricious, and an abuse of discretion.”⁴⁰ The D.C. Circuit in *U.S. Telecom Association v. FCC* deferred to the FCC’s interpretation of the 1996 Act, rather than

³¹ *Verizon*, 740 F.3d at 629; see also Amendment of Section 64.702 of the Comm’n’s Rules & Regulations, 77 F.C.C.2d 384, 387 ¶¶ 5–7 (1980).

³² *U.S. Telecom Ass’n v. FCC (U.S. Telecom II)*, 855 F.3d 381, 401 (D.C. Cir. 2017).

³³ 2015 Open Internet Order, FCC 15–24, ¶ 218.

³⁴ *Id.* § II.A.1.

³⁵ An edge provider is an established company that provides online content and services.

³⁶ 2015 Open Internet Order, FCC 15–24, ¶ 20.

³⁷ *Id.* at 58 ¶ 130; see also 47 C.F.R. § 1.3 (the Commission may waive any rule “in whole or in part, for good cause shown”).

³⁸ 2015 Open Internet Order, FCC 15–24, ¶ 130; An “open Internet” here means one where all functions of the Internet and means to operate on it are easily accessible to all individuals, companies, and organizations. Tom Wheeler, *What Is the Open Internet Rule*, BROOKINGS INSTIT. (Sept. 15, 2017), <https://www.brookings.edu/blog/unpacked/2017/09/15/what-is-the-open-internet-rule/> [<https://perma.cc/4JZ5-SY4S>].

³⁹ Protecting & Promoting the Open Internet, 30 FCC Rcd. 5601, 5891 (2015).

⁴⁰ *U.S. Telecom Ass’n v. FCC (U.S. Telecom I)*, 825 F.3d 674, 689 (D.C. Cir. 2016).

independently interpreting the statute.⁴¹ The court based its decision on *Chevron v. NRDC*, which established the judicial practice of granting administrative agencies deference when interpreting a body of law that grants a federal agency legal authority.⁴² The D.C. Circuit held that it must defer to the FCC's interpretation of the statute because the 1996 Act was ambiguous with respect to the classification of broadband and because the FCC's interpretation of the Act was reasonable. In other words, because the FCC argued that the 2015 Order was necessary to ensure net neutrality, the court determined that the agency's decision to reclassify broadband as a telecommunications service was reasonable and deferred to the agency's judgment as a standard judicial practice.⁴³ *U.S. Telecom* was consolidated with other pending net neutrality cases challenging the FTC's authority into *Berninger v. FCC*.

III. SUMMARY OF ARGUMENTS

In *Berninger v. FCC*, the petitioner argues that federal courts should not grant *Chevron* deference to the FCC when it attempts to vastly expand its authority to regulate broadband providers by reinterpreting the FCC's enabling statute (the 1996 Act).⁴⁴ In the petitioner's view, the FCC's restrictions on paid prioritization are an interpretation that contradicts prior agency interpretations: this treats the statute as a mere blank slate on which the agency would be empowered to issue law.⁴⁵ Thus, the petitioner asserts that granting *Chevron* deference would violate the nondelegation doctrine by vesting the agency with the power to "make law" unmoored from any congressionally enacted policy or law.⁴⁶ Since only Congress can exercise legislative power, the petitioner argues that the Court should exercise judicial review to determine whether the 1996 Act granted the FCC the authority to adopt the 2015 Order.⁴⁷

⁴¹ *Id.* at 711.

⁴² *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984).

⁴³ *U.S. Telecom I*, 825 F.3d. at 689.

⁴⁴ Petition for Writ of Certiorari, *supra* note 7, at 22.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 22–24.

IV. ANALYSIS

Although the Supreme Court denied certiorari to *Berninger*, the issue of whether the FCC is entitled to judicial deference for classifying broadband providers as an information or telecommunications service is still relevant. For example, in *Mozilla v. FCC*, which held oral arguments on February 1, 2019, the petitioner challenged the FCC's *repeal* of the 2015 Order—as opposed to *U.S. Telecom*, which challenged the FCC's *creation* of the 2015 Order.⁴⁸ According to the petitioner, the broadband regulation is ambiguous, and the FCC's interpretation of the 1996 Act is reasonable, thus passing the two-step *Chevron* deference standard. However, *King v. Burwell* crafted an exception to *Chevron* deference for questions of deep political and economic significance.⁴⁹ This exception should also apply to broadband regulation because imposing net neutrality rules on ISPs implicates a substantial level of online economic activity and constitutes an issue of political and national importance. Therefore, the FCC should not be entitled to judicial deference, and Congress must resolve the ambiguity as to whether broadband is an information or telecommunications service via legislation.

A. The Application of Chevron Deference

Chevron deference applies when an agency acts under a congressional delegation of lawmaking authority.⁵⁰ Such delegation may be made by Congress explicitly or implicitly. Implicit delegations of authority arise in cases where the statute in question grants broad authority to an agency or when the wording of the statute is ambiguous.⁵¹

Chevron deference requires an agency to first demonstrate that (1) Congress has either not addressed the issue directly or addressed the issue ambiguously and that (2) the agency's decisions are a reasonable interpretation of the statute.⁵² If Congress has directly spoken to the

⁴⁸ Brief for Petitioner Mozilla at 6, *Mozilla Corp. v. FCC*, No. 18-1051 (D.C. Cir. Apr. 23, 2018).

⁴⁹ *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

⁵⁰ See *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

⁵¹ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984).

⁵² In determining whether a particular construction of a statute by the agency is a “reasonable interpretation,” the Court will look to whether the interpretation is “rationally related to the goals of the statute.” See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999).

precise question at issue, then its direction is controlling over the agency's interpretation.⁵³

For the two-step analysis under *Chevron* to be applicable, the court must first determine whether Congress intended to delegate administrative authority for interpretations by agencies to carry the force of law.⁵⁴ The analysis must look for evidence of implicit congressional delegation.⁵⁵ A good indicator of implicit delegation is the use of formal procedures.⁵⁶ When Congress provides “for a relatively formal administrative procedure,” which encourages “fairness and deliberation,” this indicates that “Congress contemplates administrative action with the [force] of law.”⁵⁷ By contrast, agency interpretations that are not the result of formal adjudication or notice-and-comment rulemaking—e.g., interpretations stated in opinion letters, technical releases, policy statements, agency manuals, and enforcement guidelines—are less likely to receive *Chevron* deference.⁵⁸

Turning to *Berninger*, the question of whether the FCC should receive *Chevron* deference depends to a large extent on whether a decision to classify broadband as a telecommunications service was the result of a formal administrative procedure. This condition is met; the FCC used the notice-and-comment rulemaking process, which, as laid out by the Administrative Procedure Act, is required for “legislative rules,”⁵⁹ which have the “force and effect of law.”⁶⁰ In the 2015 Order, the FCC used the notice-and-comment rulemaking procedure to form the rule in question, receiving over four million comments.⁶¹

B. The Major Questions Doctrine

When a question of deep “economic and political significance”⁶² arises, the delegation of authority to an agency must be more than an implied authorization from the underlying statute; instead, it must be explicit. In these cases, courts should interpret the statute *de novo* rather

⁵³ *Id.* at 377–78.

⁵⁴ *Mead Corp.*, 533 U.S. at 229.

⁵⁵ *Id.* at 237.

⁵⁶ *Id.* at 243.

⁵⁷ *Id.* at 230; *see also* *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984).

⁵⁸ *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000).

⁵⁹ *See* 5 U.S.C. § 553(b)–(c).

⁶⁰ *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979).

⁶¹ 2015 Open Internet Order, FCC 15–24, ¶ 6.

⁶² *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *see also* *Petition for Writ of Certiorari*, *supra* note 7, at 20.

than defer to the agency's interpretation.⁶³ While the 2015 Order carries the force of law, Congress did not delegate authority to the FCC under the 1996 Act to resolve the significant questions related to net neutrality. Ordinarily, an agency claiming to discover in a "long-extant statute an unheralded power to regulate a significant portion of the economy" meets a great deal of judicial skepticism.⁶⁴ The Supreme Court followed such skepticism in carving out an exception to *Chevron* deference in *King v. Burwell* for questions of economic and political significance, holding that the IRS's enforcement of tax credits under the Affordable Care Act was exempt from *Chevron* analysis. For such a question of deep political and economic significance, the Court reasoned, Congress would have expressly delegated enforcement authority to the IRS if Congress intended the IRS to have such authority.⁶⁵

Requiring explicit delegations from Congress to justify regulations that significantly impact the economy, though a rare occurrence, has precedent. The Court has held that it will closely scrutinize agency actions when the agency is attempting to use existing law to exercise new authority. In other words, courts should, in "extraordinary cases," hesitate before concluding that Congress intended an implicit delegation that would allow for *Chevron* deference.⁶⁶ In *FDA v. Brown & Williamson*, the Supreme Court held that although agencies are ordinarily entitled to deference in the interpretation of statutes they administer, both the courts and the agency in question "must give effect to the unambiguously expressed intent of Congress."⁶⁷ The Court found Congress had not delegated authority to the Food and Drug Administration (FDA) to regulate tobacco products. In particular, the Court pointed out that in the six separate statutes passed by Congress since 1965 regarding tobacco regulation, the FDA was not granted jurisdiction to regulate tobacco products.⁶⁸ Therefore, the Court concluded that Congress did not intend to delegate regulation of tobacco products to the FDA.

Likewise, in *Berninger*, regulation over broadband by the FCC was not explicitly intended in the 1996 Act⁶⁹ nor was authority to regulate broadband expressly delegated.⁷⁰ The 1996 Act created the distinction between telecommunications services and information services but did not address whether broadband was a telecommunications or an information

⁶³ Petition for Writ of Certiorari, *supra* note 7, at 20.

⁶⁴ *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

⁶⁵ *King*, 135 S. Ct. at 2489.

⁶⁶ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

⁶⁷ *Id.* at 125.

⁶⁸ *Id.* at 122.

⁶⁹ See 47 U.S.C. § 303 (leaving out regulation of ISPs in the general powers of FCC).

⁷⁰ See 47 U.S.C. § 1302.

service.⁷¹ By regulating broadband providers like providers of telecommunications services, the FCC's 2015 Order attempted to address this ambiguity in the 1996 Act.

1. *Economic Significance*

While the Supreme Court never developed a method to determine the “economic significance” of a regulation, the Court has held that an agency interpretation of its authorizing statute that authorizes the agency to regulate tobacco is economically significant.⁷² Additionally, the Court held that administering tax credits for the Patient Protection and Affordable Care Act (ACA) was similarly economically significant.⁷³ In both cases, the Court assessed the economic magnitude of the regulatory decision, which can be quantified as either the number of American citizens or the amount of dollars impacted by the agency's policy. In 2000, cigarette sales were valued at approximately \$62 billion, while other tobacco product sales were valued at approximately \$7.5 billion. Total cigarette consumption annually was approximately 435 billion packs, while other tobacco products were estimated at approximately 15.15 billion units during the same period.⁷⁴ These attempted tobacco regulations would have brought a multi-billion-dollar industry under the FDA's regulatory domain.⁷⁵

The ACA tax credits had a comparable economic impact. Under Section 36B of the ACA, the IRS allowed any household with an income between 100 percent and 400 percent of the poverty line to receive a subsidy in the form of a tax credit.⁷⁶ The intent of this subsidy was to assist low-income Americans with purchasing health care insurance.⁷⁷ After *King v. Burwell*, the government released data indicating that in 2015 approximately 6.4 million Americans were enrolled in a federal exchange and received a tax credit.⁷⁸ According to other estimates, 8.2

⁷¹ See 47 U.S.C. §§ 153 (24), (53) (providing definitions for “information service” and “telecommunications service”).

⁷² *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

⁷³ See *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

⁷⁴ *Morbidity and Mortality Report: Consumption of Cigarettes and Combustible Tobacco—United States, 2000–2001*, CTR. FOR DISEASE CONTROL & PREVENTION (Aug. 3, 2012), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6130a1.htm#tab2> [<https://perma.cc/H97L-FUKU>].

⁷⁵ *Id.*

⁷⁶ 25 U.S.C. § 36B.

⁷⁷ See *King*, 135 S. Ct. at 2495–96.

⁷⁸ Lena H. Sun, *6.4 Million Americans Could Lose Obamacare Subsidies*, *Federal Data Show*, WASH. POST (June 2, 2015), <https://www.washingtonpost.com/national/health-science/64-million-americans-could-lose-obamacare-subsidies-federal-data->

million Americans relied on these subsidies to pay for healthcare.⁷⁹ Therefore, the tax credits administered by the IRS had an economic impact that affected millions of Americans and a healthcare industry valued at \$3.5 trillion.⁸⁰ The Supreme Court held that this kind of impact was economically significant, and thus judicial deference should not be extended.⁸¹

The FCC's net neutrality rules have at least the same level of economic impact as the tax credits' impact on the healthcare industry in *King v. Burwell* and the FDA tobacco regulations' impact on consumers and the economy in *FDA v. Brown & Williamson*. In 2017, online retail sales totaled approximately \$450 billion, with roughly 230 million Americans making an online purchase during that year.⁸² On the business-to-business side of the online commerce industry, transactions in 2018 were about \$900 billion and are on track to be valued at around \$1.1 trillion by 2021.⁸³ Even economic activity that is not conducted entirely online is still supported by online infrastructure. The amount of online economic activity is thus comparable to the economic activity involved in the health insurance and tobacco industries.

The 2015 Order had the potential to impact the level of prioritization in latency and bandwidth that sites can purchase, and hence, the FCC potentially could have impacts on all online economic activity—every Internet user, every industry operating through an online medium, and every product sold online. Therefore, the FCC's authority over net neutrality regulation implicates an interest at least as economically significant as the interests in *Burwell* and *Brown & Williamson*.

show/2015/06/02/fe0c87be-095a-11e5-95fd-d580f1c5d44e_story.html

[<https://perma.cc/37JR-7YNV>].

⁷⁹ LINDA J. BLUMBERG, MATTHEW BUETTGENS, & JOHN HOLAHAN, THE IMPLICATIONS OF A SUPREME COURT FINDING FOR THE PLAINTIFF IN KING VS. BURWELL: 8.2 MILLION MORE UNINSURED AND 35% HIGHER PREMIUMS, TIMELY ANALYSIS OF IMMEDIATE HEALTH POLICY ISSUES 4 (URBAN INSTIT. Jan. 2015), <https://www.urban.org/sites/default/files/publication/49246/2000062-The-Implications-King-vs-Burwell.pdf> [<https://perma.cc/9ZCX-Y58H>].

⁸⁰ See *NHE Fact Sheet*, U.S. DEP'T OF HEALTH & HUM. SERV., CTR. ON MEDICARE & MEDICAID SERV., <https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html> [<https://perma.cc/Y89Z-BKT3>].

⁸¹ See *King*, 135 S. Ct. at 2489.

⁸² Felix Richter, *The Rise of E-Commerce in the United States*, STATISTA (May 29, 2018), <https://www.statista.com/chart/14011/e-commerce-share-of-total-retail-sales/> [<https://perma.cc/5YLJ-YDVA>].

⁸³ Fareeha Ali, *Infographic: B2B E-Commerce by the Numbers*, DIG. COMMERCE 360 (June 30, 2018), <https://www.digitalcommerce360.com/2018/07/30/infographic-b2b-e-commerce-by-the-numbers/> [<https://perma.cc/DAQ8-AXPY>].

Consequently, the Court should exercise the same level of scrutiny in the present case.

Furthermore, the Court's deference to the FCC in *Brand X* should not apply to the 2015 Order. In *Brand X*, the FCC was granted deference in its decision not to classify broadband as a common carrier,⁸⁴ but the 2015 Order does not merely reverse a statutory interpretation. Instead, the 2015 Order imposes an even greater degree of regulation on broadband, resulting in a significant economic impact. The major questions doctrine concerns the 2015 Order's economic impact as opposed to the FCC's decision to change how it interprets an ambiguity in the statute.⁸⁵ The Court's application of the major questions doctrine is not affected by its grant of deference to the FCC in *Brand X*, where the possible economic impact was not a cited concern.⁸⁶ The argument against granting the FCC *Chevron* deference in the present case is therefore distinguished from *Brand X*, which was concerned with statutory construction.

2. Political Significance

The Supreme Court has not elaborated on what factors are relevant when assessing "political significance." Indeed, the Court discusses questions of "deep economic *and* political significance" together,⁸⁷ which suggests that the factors used to assess economic significance may be relevant to political significance as well. To the extent that political significance constitutes a separate category, the Court likely intended it to be utilized so that judicial deference would preclude agencies from deciding major questions even when the economic impacts of the agency's decisions are relatively minor.⁸⁸ The Court has emphasized the importance of preventing the delegation of congressional policymaking authority to an agency without providing an "intelligible principle" to guide and constrain the exercise of that authority.⁸⁹

⁸⁴ Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 973 (2005).

⁸⁵ See *King*, 135 S. Ct. at 2488–89.

⁸⁶ See generally *Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 975.

⁸⁷ *King*, 135 S. Ct. at 2489.

⁸⁸ For example, the Fifth Circuit found that the Department of Homeland Security's (DHS) Deferred Action for Parents of Americans and Lawful Permanent Residents (DACA) program was likely unlawful, in part, because it "undoubtedly implicates question[s] of 'deep economic and political significance.'" *Texas v. United States*, 809 F.3d 134, 181 (5th Cir. 2015).

⁸⁹ The Supreme Court interprets "intelligible principles" quite broadly and refers to any standard set by Congress for the agency in question to base their regulations. See *Hampton v. United States*, 276 U.S. 394, 409 (1928).

Additionally, the Supreme Court has emphasized the importance of ensuring democratic legitimacy by presuming Congress is more likely to have focused upon major questions, while leaving the responsibility of the implementation to federal agencies.⁹⁰ Justice Breyer, for example, has argued that the Court should take the viewpoint of the “reasonable member of Congress” when determining the scope of the administrative discretion delegated to federal agencies.⁹¹ Breyer then goes on to assert that such a reasonable member would not have wanted courts to defer to agencies on questions of “national importance.”⁹²

Those questions that are deemed to be of national importance by the Court are usually questions that are the subject of substantial discussion and over which an agency asserts previously unclaimed regulatory authority.⁹³ Prior to 1996, tobacco products were controlled through a combination of state and congressional regulations, and the FDA played no role in the regulation of tobacco products.⁹⁴ When the FDA proposed its first rule to regulate tobacco products, it received over 700,000 submissions, more than “any other time in its history on any other subject.”⁹⁵ These factors suggest that regulation of tobacco products would have been a subject of national importance during the time that the FDA implemented its first regulation of the industry.

Similarly, Congress has not explicitly passed a law delegating authority to the FCC to regulate broadband to the same extent as common carriers. Also, the FCC had not regulated or banned paid prioritization of Internet bandwidth or latency prior to the 2015 Order.⁹⁶ The Internet has been called “one of the most significant technological advancements of the 20th century”⁹⁷ and is therefore arguably a topic of national importance. Additionally, net neutrality has been the topic of frequent political debate.⁹⁸ Thus, in asserting previously unclaimed regulatory authority over

⁹⁰ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (Breyer, J., dissenting) (explaining the justification for withholding judicial deference).

⁹¹ STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 103 (Alfred A. Knopf et al., 2005).

⁹² *Id.* at 107.

⁹³ *Id.* at 267.

⁹⁴ *Brown & Williamson Tobacco Corp.*, 529 U.S. at 125.

⁹⁵ *Id.* at 126–27; *see also* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44418 (1996).

⁹⁶ Protecting & Promoting the Open Internet, 30 FCC Rcd. 5601, 5629 (2015).

⁹⁷ Sen. Rep. No. 107–240, at 7 (2002).

⁹⁸ Wyatt Edward, *House Votes Against ‘Net Neutrality’*, N.Y. TIMES (Apr. 8, 2011), <https://www.nytimes.com/2011/04/09/business/media/09broadband.html> [<https://perma.cc/TTT2-M5J4>].

ISPs, the 2015 Order placed the FCC in the same position as the FDA in its initial attempts to regulate tobacco products.

V. CONCLUSION

The Court should not grant judicial deference to the FCC's interpretation of the 1996 Act because the 2015 Order raises questions of "deep economic and political significance." The Court has, in the past, declined to grant deference to agencies when they attempted to craft rules with the force of law that impact millions of Americans and involve billions of dollars.⁹⁹ Therefore, the FCC's 2015 Order, which impacts millions of Internet users and implicates billions of dollars in online economic activity, should not be granted deference. Even though the 2015 Order would ordinarily meet the two-part test for judicial deference under *Chevron*, this issue should be addressed by Congress prior to the FCC's intervention.

⁹⁹ See *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).