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Context, Courts and Commissions: The 6th Circuit Got Net Neutrality Wrong

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In issuing a temporary stay of the Federal Communications Commission 2024 Net

Í j e : X • Í e In re 3M CP No. 185, No. 24-7000, 2024 WL 3650468, at *3 (6th Cir. Aug. 1, 2024) (quotes cleaned up and internal quotations omitted). But, the court mistakenly è : 2 è + j î ô î à Ù 2 : • ô X ô Ù î : ô \ Ù : 2 X ô \ \ Ù è + ô Í X + … Ù X Í 2 e Ù e ô Ù : 1 1 \ \ è + Í \ \ … Ù æ X : Í î æ Í 2 î Ù U X : } î ô X \ Ù Íd. Ù è : 1 1 : 2 Ù è Í X X ô X \ ß Ù Ù

The Supreme Court has explained that a critical component of application of the major questions î : è e X 2 ô Ù \ Ù e ô Ù X ô W j X ô 1 ô 2 e Ù e Í e Ù e ô Ù • : X î \ Ù : Ù Í Ù \ e Í e è : 2 e ô „ e Ù Í 2 î Ù • e Ù Í Ù } ô • Ù e : Ù e ô X Ù U + Í è ô Ù 2 Ù e ô Ù : } ô X Í + + Ù e ô Ù particular focus is e ô Ù \ e : X … Ù Í 2 î Ù æ X ô Í î e Ù : Ù e ô Ù Í j e : X e … Ù e Í e Ù e ® å ß « X 2 Í ß } å ß (2 }, 597 U.S. 697, 721 (2022) …

technology, by determining, for example, that database services, like Dow Jones News, • ô X ô Ù ô 2 Í 2 ê ô 1 X ß Ù Brand X at 994.

This history of Commission action was expressly recognized by Congress in 1996. The : 2 ô X ô 2 è ô Ù ‡ ô U : X e Ù æ : e Ù X ô è : 2 • ô î Ù e ô Ù ô 2 ô \ \ Ù : Ù 2 : X 1 Í e 2 e ô 2 e Ù e Í e Ù e ô Ù : 1 1 \ \ : 2 Ù • : j + î Ù Í } ô Ù è : 2 definition and ô „ æ + e .. X j + ô \ Ù U ô X e Í 2 2 Ù e : Ù ô 2 Í 2 è ô î Ù \ ô X } è ô \ Ù Í \ Ù e ô è 104-458, at .. Ù è Í 2 ô \ 114-15 (1996) (Conf. Rep.).

Strikingly, the industry parties attacking the FCC action have taken the same position, telling the 6th X è j e Ù [t]he 1996 Act is best understood as codifying a pre-existing regulatory dichotomy between two types of services, Ù i U ô 2 2 Ù X ô Ù : Ù „ ô e e : 2 ô X \ Telecom Association, et al. at 39, MCP No. 185 Open Internet Rule (FCC 24-52), No. 24-7000 (6th Cir. August 12, 2024) and ô „ U + Í 2 2 Ù The Commission first created the dichotomy in 1980, in its Computer II regulation that was subsequently adopted in the AT&T break-up order. " j \ à Ù e ô Ù „ ô e e The 1996 Act . . . ¸ brought this : + î Ù \ : + Ù • e Ù e ß Id. at 41 (cleaned up and internal quotation omitted). Although the Petitioners use this history to debate the appropriate meaning of the statutory definitions, it really goes to : 2 X ô \ \ Ù j 2 î ô X \ e Í 2 anticipated and continuing role of the Commission in policing the line between telecommunications and information services.[3]

Congress understood that its new law would need to survive great change. The first web browser and the commercialization of the Internet were still recent events when Congress in Section 706 expressly encouraged the deployment of advanced telecommunications capability like those over which consumers can reach the Internet. Section 706.

And change the technologies did: In 1996, the dominant form of home internet access was over dial-up copper telephone lines and the common speed was 56,000 bits per second (56k). That is so quaint that it has become a catch-phrase for the old days of dial-up and VHS tapes in 1998. GENERATION 56K (Netflix 2021).

In 2015, the FCC upped the definition of broadband to reach 25 megabits per second (25 Mbps), and again to 100 Mbps in 2024. Today, speeds of 1 gigabit (a billion bits per second) are widely available. A file that would have taken around 3.5 days to download over 56k can today be downloaded in about 32 seconds.[4]

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[3] The petitioners rely on the political and economic significance of the application of Title II to argue that Congress could not have intended this exercise of regulatory authority, Opening Brief at 21-22, but Congress in 1996 clearly understood the social importance of the coming Internet, see legislative language at H.R. REP. No. 104-458, 38 (elementary schools); 86 (1996) (ô „ e X Í : X î 2 Í X … Ù Í î } Í 2 è ô Ù 2 Ù e ô Ù Í } Í + Í æ + e … Ù informational resources for our citizens) â Ù W V Ù ü î ô 2 2 Ù e ô political disputes since the 2 : Ù + e Ù : 2 Ù : 2 X ô \ \ Ù , and, in any event, the history and context demonstrate convincingly that Congress knew exactly what the FCC had done and what it wanted the FCC to keep doing.

[4] Mike Murphy, From dial-up to 5G: a complete guide to logging on to the internet, QUARTZ (October 29, 2019), https://qz.com/1705375/a-complete-guide-to-the-evolution-of-the-internet.