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Legal Sidebar

No More Deference: Sixth Circuit Relies on *Loper Bright* to Strike Down Net Neutrality Rules

February 3, 2025

On January 2, 2025, the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) vacated the Federal Communications Commission's (FCC's) most recent net neutrality rules. The court held that, under the Communications Act of 1934, as amended (the Act), the FCC must treat broadband internet access service (BIAS) as a lightly regulated "information service" instead of a highly regulated "telecommunications service." The court similarly held that BIAS delivered via mobile phones (mobile BIAS) is a lightly regulated "private mobile service" under the Act instead of a highly regulated "commercial mobile service." Because the FCC's authority over BIAS and mobile BIAS is minimal, the court struck down the FCC's net neutrality rules.

The decision marks the first time that a court decided for itself—without deferring to the FCC—how BIAS should be treated under the Act. In prior cases, courts relied on the *Chevron* doctrine to defer to the FCC's reasonable interpretations when faced with ambiguous statutory language. The era of *Chevron* deference ended, however, with the U.S. Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, leaving to the courts the task of definitively interpreting the meaning of statutes enforced by a federal agency.

The Sixth Circuit's decision also addressed a lingering question: To what extent are lower courts bound by prior cases decided under the *Chevron* doctrine? In a 2005 decision, *NCTA v. Brand X Internet Services*, the Supreme Court had applied *Chevron* to uphold a prior FCC order classifying BIAS as an information service. As a result, litigants debated whether the Sixth Circuit was bound by this decision when interpreting the same statutory terms or whether it could approach the statutory interpretation question with a blank slate. The Sixth Circuit held it had a blank slate. It was not bound by *Brand X* because, while the interpretive question was the same, the particular agency order was new.

This Sidebar provides context for the Sixth Circuit's decision by briefly describing the history of net neutrality regulation and how that history intersects with the now-defunct *Chevron* doctrine. The Sidebar next highlights key aspects of the Sixth Circuit's decision, and it concludes with associated considerations for Congress.

Congressional Research Service
https://crsreports.congress.gov
LSB11264

Net Neutrality Regulation and *Chevron* Deference: Two Fates Intertwined

Net neutrality generally refers to the idea that BIAS providers should neither control how consumers use their networks nor discriminate among the content providers that use their networks. The FCC has sought to adopt net neutrality rules several times over the years: in 2010, 2015, and, most recently, in 2024 (2024 Order). While these rules varied in their precise formulation and scope, they generally prohibited BIAS providers from blocking or discriminating against lawful content, applications, services, or nonharmful devices.

As the FCC learned through the course of litigation, its ability to adopt net neutrality rules hinges on the legal classification of BIAS under the Act, which defines two mutually exclusive categories of services: telecommunications services and information services. Telecommunications service providers are treated as highly regulated common carriers under Title II of the Act. In contrast, the FCC has much more limited regulatory authority over information service providers. The Act also defines two similar categories specific to mobile communications—commercial mobile service and private mobile service. Per the Act, commercial service providers are treated as common carriers, while private mobile service providers are not. The U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) has held that the FCC may not adopt net neutrality rules *unless* BIAS and mobile BIAS are classified, respectively, as a telecommunications service and a commercial mobile service.

In the past, this classification issue did not prevent the FCC from successfully adopting net neutrality rules. Under the *Chevron* doctrine, courts gave the FCC significant discretion to classify and reclassify BIAS and mobile BIAS as it saw fit. The *Chevron* doctrine directed a reviewing court to defer to an agency's reasonable interpretation of an ambiguous statute, even if the court would not have adopted that interpretation on its own. In *Brand X*, the Supreme Court itself applied the *Chevron* doctrine to uphold the FCC's classification of BIAS. The Court held that the telecommunications service definition was ambiguous, and it deferred to the FCC's then-interpretation that BIAS provided by cable operators was an information service. The Court also held that the FCC was free to change position, as long as it stayed within the limits of a reasonable interpretation and adequately justified the change.

Chevron and *Brand X* laid the legal foundation for the FCC's oscillating BIAS policies. In 2015, the FCC reclassified BIAS as a telecommunications service (and mobile BIAS as a commercial mobile service) and adopted net neutrality requirements. When industry groups challenged the rules, the D.C Circuit applied the *Chevron* doctrine and upheld the FCC's action. In late 2017, the FCC reverted to classifying BIAS as an information service (and mobile BIAS as a private mobile service) and removed the 2015 rules. The D.C. Circuit again applied the *Chevron* doctrine and upheld the FCC's action. Finally, in April 2024, the FCC adopted the 2024 Order, which once more reclassified BIAS as a telecommunications service (and mobile BIAS as a commercial mobile service) and reimposed the 2015 net neutrality rules.

The Supreme Court's decision in *Loper Bright* broke the cycle of judicial deference. In June 2024—two months after the 2024 Order—*Loper Bright* overruled the *Chevron* framework, holding that it violated the Administrative Procedure Act (APA). In *Loper Bright*, the Supreme Court directed courts to exercise their independent judgement to determine the best meaning of statutes, instead of deferring to agency interpretations. As a result, the 2024 Order faced judicial review without the deference the FCC had long enjoyed.

Ohio Telecom Ass'n v. FCC

In *Ohio Telecom Ass'n v. FCC*, the Sixth Circuit held that BIAS is an "information service" and mobile BIAS is a "private mobile service" under the Act and struck down the 2024 Order. The court wrote that "[a]pplying *Loper Bright* means we can end the FCC's vacillations." Using traditional tools of statutory construction, the court determined that the statutory text, structure of the Act, and historical context all support the conclusion that BIAS falls within the definition of information services. The court, in particular, focused on the Act's definition of information service, which says:

> The term "information service" means the offering a capability for generating, acquiring, storing transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . .

For the court, "offering a capability" is the key phrase in this definition. The court explained that BIAS providers meet this definition because they "plainly" offer users the capability to engage with third-party content by connecting them to content providers, such as social media and commercial marketplaces. The court also engaged in a similar exercise of statutory construction to hold that mobile BIAS does not meet the Act's commercial mobile service definition and is consequently a private mobile service.

The Sixth Circuit arrived at its conclusion independently and did not believe it was bound by the Supreme Court's *Brand X* decision. The petitioners argued that the 2024 Order was barred by *Brand X* and that the Sixth Circuit had no choice but to strike it down. The lynchpin of petitioners' argument was a passage from *Loper Bright*, in which the Supreme Court wrote: "we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful . . . are still subject to statutory *stare decisis* despite our change in interpretive methodology." To the petitioners, this meant that the FCC's interpretation upheld in *Brand X* had precedential authority, binding lower courts. For the Sixth Circuit, however, *Loper Bright*'s reference to "specific agency actions" was a critical nuance: because *Brand X* dealt with a different FCC order (and therefore a different "agency action"), the Sixth Circuit was not bound by its holding.

The Sixth Circuit also declined to consider whether the "major questions doctrine" barred the FCC's action. Under the major questions doctrine, the Supreme Court has rejected claims of regulatory authority involving issues of "vast economic and political significance" when there is no clear statutory language establishing that authority. Earlier in the litigation, the Sixth Circuit had postponed implementation of the 2024 Order, reasoning that the court would likely invalidate it on the grounds that net neutrality is a major question requiring clear congressional authorization. In the final opinion, however, the court saw "no need" to address this issue because the FCC's order contradicted the "plain language" of the Act.

Considerations for Congress

The Sixth Circuit may not have the last word on the validity of the 2024 Order. The FCC or other aggrieved parties have until April 2, 2025, to file a petition asking the Supreme Court to review the decision. The new chairman of the FCC, Brendan Carr, has welcomed the Sixth Circuit's decision, and it is unlikely the FCC will ask the Supreme Court to step in. Other interest groups, however, may file for Supreme Court review.

Congress could also intervene by amending the Act to squarely address BIAS and to impose or foreclose net neutrality rules. Bills introduced in prior Congresses could provide a reference point for possible action in the 119th Congress. A number of bills introduced in the 116th Congress, such as H.R. 1101, H.R. 1006, H.R. 2136, and H.R. 1096, would have amended Title I of the Act to include baseline net neutrality requirements. These bills would have given the FCC limited regulatory and enforcement authority over these requirements, but not the authority to treat BIAS as a telecommunications service. On the other

hand, bills introduced in both the 116th and 117th Congresses would have empowered the FCC to regulate BIAS as a telecommunications service under Title II of the Act. The Net Neutrality and Broadband Justice Act of 2022 (S. 4676; H.R. 8573), for example, would have amended the definition of a telecommunications service to explicitly include BIAS. Regardless of the regulatory approach Congress might choose, it could decide to preempt state net neutrality laws or leave them intact to the extent they are consistent with federal law.

Assuming neither the Supreme Court nor Congress intervenes, net neutrality regulation will revert to the states. A number of states, including California, Washington, and New York, have already adopted their own net neutrality laws through legislation or executive orders. The absence of federal rules may prompt others to follow. It is unlikely the FCC could preempt these laws. Federal appeals courts have said that the FCC may not preempt state broadband regulations if BIAS is classified as an information service. As these courts have explained, the FCC may not preempt state regulation in an area where it has no regulatory authority.

Beyond broadband and net neutrality regulation, the Sixth Circuit's decision has important lessons for agency authority in a post-*Chevron* world. The lines of agency jurisdiction may be increasingly redrawn not only through statutory amendments but through legal challenges. The FCC is not the only agency that has relied on *Chevron* deference to establish its jurisdictional boundaries. As described in another CRS report, for four decades *Chevron* has been the primary framework used by courts to decide questions of agency authority. As a result, there is an extensive body of case law where courts have deferred to agencies' interpretations of their own authority in settings where the statute is ambiguous. The Sixth Circuit's decision previews how at least one federal appellate court will deal with this body of *Chevron* precedent: specific agency orders upheld under the *Chevron* doctrine may be safe from legal challenges, but new orders will not be, even if they rely on legal theories that courts previously upheld as reasonable under *Chevron*. As a result, agencies issuing new rules might be subject to jurisdictional challenges and may see their ambit of authority narrowed. Congress, however, may always adjust an agency's jurisdiction by amending its governing statute, and Congress may also codify some form of judicial deference to agencies' legal interpretations.

Additional CRS products

CRS Report R48320, *Loper Bright Enterprises v. Raimondo and the Future of Agency Interpretations of Law*, by Benjamin M. Barczewski

CRS Report R40616, *The Federal Net Neutrality Debate: Access to Broadband Networks*, by Patricia Moloney Figliola

CRS Report R46973, *Net Neutrality Law: An Overview*, by Chris D. Linebaugh

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