

# ***Net Neutrality Protect Public Safety***



Catherine J.K. Sandoval

Associate Professor

Santa Clara University School of Law



SCU High Tech Law Institute,

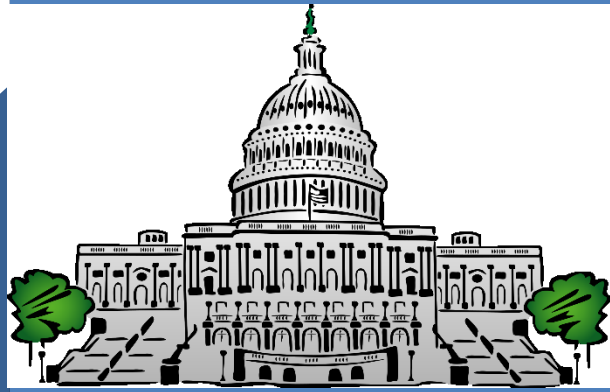
**Promoting Safety of Life and Property Through the  
Open Internet**

March 25, 2020

# The FCC's Net Neutrality Repeal Failed to Consider Public Safety

- **Mozilla v. FCC**, 940 F.3d 1 (D.C. Cir. 2019), appeal of the Federal Communications Commission (FCC) repeal of net neutrality rules adopted in 2018
- The D.C. Circuit determined that the FCC's disregard of its duty to analyze the impact of the 2018 Order on public safety renders its decision arbitrary and capricious in violation of the Administrative Procedures Act (APA)
- The FCC failed to analyze or consider public safety issues as required by its statutory duty under the Communications Act and other statutes to protect Safety of Life and Property
- The D.C. Circuit remanded the FCC's 2018 Net Neutrality Appeal Order to address the public safety issues the FCC ignored.



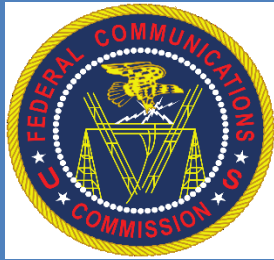


**Congress  
founded the FCC  
through the  
Communications  
Act of 1934 for  
National Defense  
and to Promote  
Safety of Life and  
Property**

- The FCC was founded:



“For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communication.”



**The FCC Ignored  
Record  
Comments that  
Raised Concerns  
about the Impact  
of Net Neutrality  
repeal on Public  
Safety**

- The D.C. Circuit in *Mozilla v. FCC*, 940 F.3d 1, 95, 97, 99-100 (2019) emphasized that public safety, government, and other officials and parties repeatedly raised public safety concerns about the FCC's proposal to repeal net neutrality rules.
- Public safety officials explained in the FCC record that allowing broadband providers to prioritize Internet traffic as they see fit, or to demand payment for top-rate speed, could imperil the ability of first responders, providers of critical infrastructure, and members of the public to communicate during a crisis.





**The FCC Ignored  
Record  
Comments that  
Raised Concerns  
about the Impact  
of Net Neutrality  
Repeal on Public  
Safety**



- Santa Clara County, California has a web-based public alert system” that “provides immediate contact with members of the public via email, text, or phone on matters such as evacuation or shelter-in-place orders, fires, unhealthy air quality, and excessive heat warnings”.



- **Public Access to these alerts and the ability of the public to communicate with the government, health care providers, employers, within and between Native American Tribes, to a variety of resources, and each other, is critical to protecting safety of life and property**



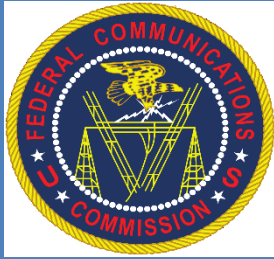
## The FCC Ignored Record Comments that Raised Concerns about the Impact of Net Neutrality Repeal on Public Safety



- The D.C. Circuit in *Mozilla v. FCC* cited Catherine Sandoval, former Commissioner of the California Public Utilities Commission, who noted that the Utility Commission authorized energy utility companies to expend ratepayer funds on Internet-based “demand response programs” that are “activated during times of high demand, or when fire or other emergencies make conservation urgent,” and “call on people and connected devices to save power.”



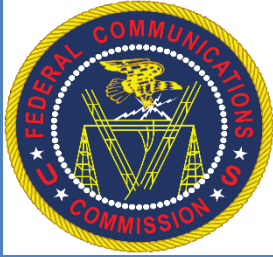
- The California Public Utilities Commission warned that the 2018 Net Neutrality Repeal Order could “profoundly impair[]” the ability of state and local governments “to provide comprehensive, timely information to the public in a crisis



On Remand from  
the D.C. Circuit,  
the FCC Requests  
Comments on  
Net Neutrality  
and Public Safety



- In Response to the D.C. Circuit’s Remand Order, the FCC Seeks to Refresh the Record on How the Changes Adopted in the *Restoring Internet Freedom Order* that repealed net neutrality rules “might affect public safety”
- **The FCC requests comments by April 20, Reply Comments by May 20**
- The FCC Extended the Comment Deadlines to these Dates In Response to Requests from Several Parties to Extend the previous March 30 Comment Deadlines in light of the Coronavirus State of Emergency declared by several Native American tribes, states, counties, and localities.
- **States like California may still be under a mandatory shelter in place in May.**
- **Persistence of a Widespread State of Emergency and Shelter in Place Orders to Protect Safety of Life Merit additional Extensions of Time to Respond to this Important Topic**



The FCC's Net Neutrality Repeal Allows Internet Service Providers to Engage in Paid Prioritization of Some Internet Traffic Without Safeguards for Other Data or Users, a Decision Adopted Without Considering Public Safety



- In the 2018 *Restoring Internet Freedom Order*, the FCC predicted:
- Permitting paid prioritization arrangements would “increase network innovation,” “lead[] to higher investment in broadband capacity as well as greater innovation on the edge provider side of the market,” and “likely . . . be used to deliver enhanced service for applications that need QoS [i.e., quality of service] guarantees





The FCC on Remand Unduly Focuses on a Narrow and Undefined Category of “Public Safety-Related Communications,” that Fails to Address the FCC’s Duty to Protect Safety of Life and Property through Interstate Wireless and Wireline Communications



- The FCC’s Public Notice requesting comments in response to the D.C. Circuit remand asks:
- “Could the network improvements made possible by prioritization arrangements benefit public safety applications—for example, by enabling the more rapid, reliable transmission of public safety-related communications during emergencies?”



Congress founded the FCC through the Communications Act of 1934 for National Defense and to Promote Safety of Life and Property



- ***The FCC's Statutory Duty to Protect Safety of Life and Property Puts the Public at the Center of Public Safety***
- Public Safety is Broader than the ability of First Responders or the Government to communicate with each other or with the public
- The Public's ability to communicate to other members of the public, to health care providers, to employers, schools, sources in the supply chain, to conduct research, to influence and reach government officials and first responders, to access and produce news and public affairs information, and to communicate about issues using the Internet all affect safety of life and property

# Dangers of Paid Priority: Videogame vs. the Energy Star



- ISP argued in 2017 FCC comment that it would like to be able to make paid prioritization arrangement with *video game distributors* for “isolated arrangements,” without defining what that is or being subject to regulation.

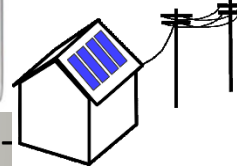
- Video Game Pays ISP for Priority



Internet Service Provider



Vs.



Internet-enabled energy

- Need to Assess Risks to Critical Infrastructure, Energy Reliability, Safety & the Environment from ISP Paid Priority Deals.
- ISP Priority Deals May Degrade Communication to the Energy Ecosystem including Energy Customers and Internet-Enabled Things
- FCC places no limits on who, Foreign or Domestic, can buy Paid priority
- *Who controls the video game?* Interest in Priority or Delay



# Videogame vs. Public Safety



- If the ISP invokes paid priority while a user in the household or business is playing the video game, or even if the video game's priority is running in the background such as through a sidebar ad, it could delay other signals and messages trying to reach the subscriber or Internet-enabled devices.

- Video Game Pays ISP for Priority



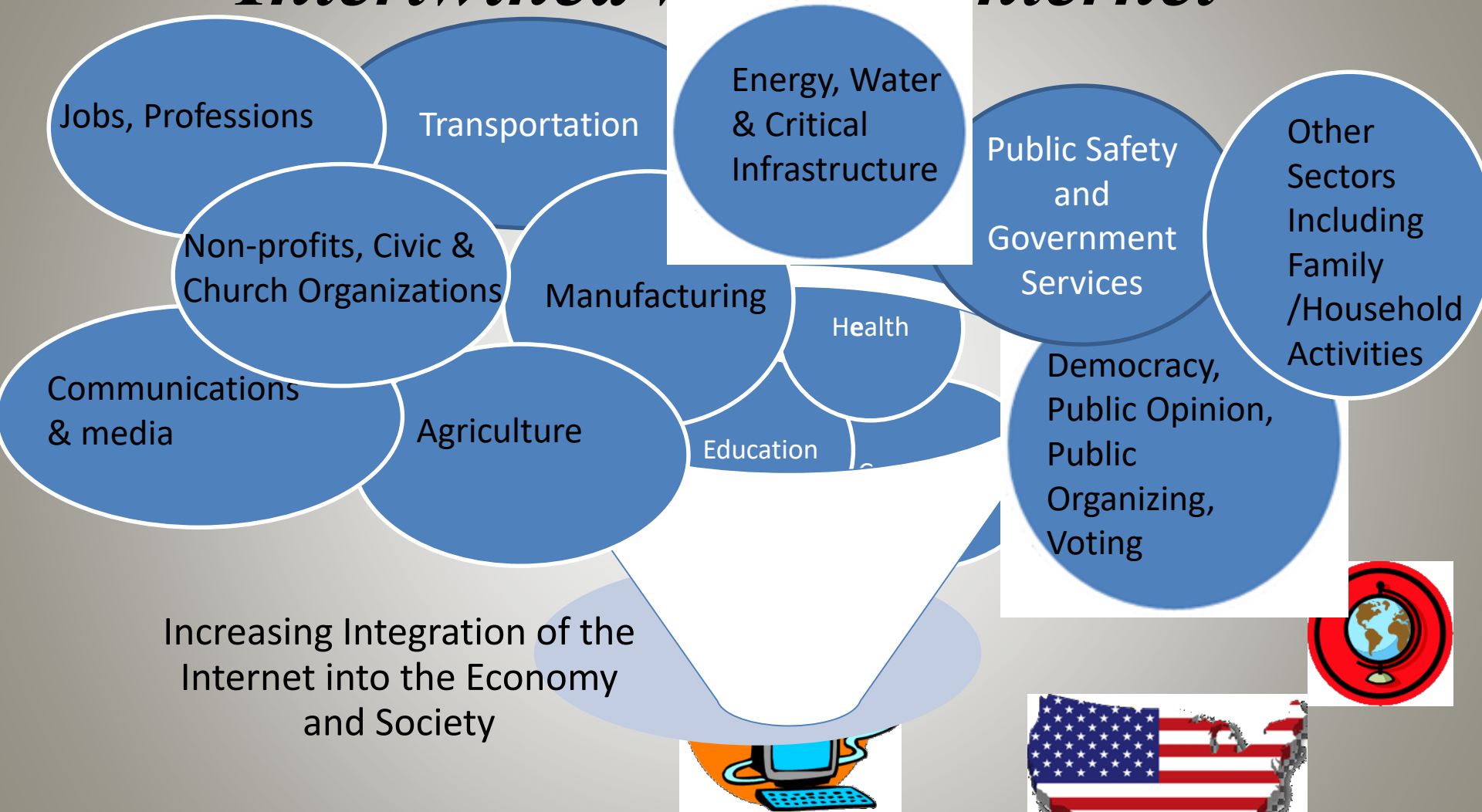
- Public Safety Uses of the Internet are *Not* Limited to Communications with the Government or Public Safety Agencies.

- Access to News Protects Public Safety
- News is Increasingly Shared by Users, e.g. Evacuation Routes and Situations During Fires or Emergencies
- Access to Shopping, Supply Chains, and a Wide Range of Family, Community, Business, and Non-Profits Protects Public Safety, Particularly during Emergencies and for People With Health and Mobility Issues

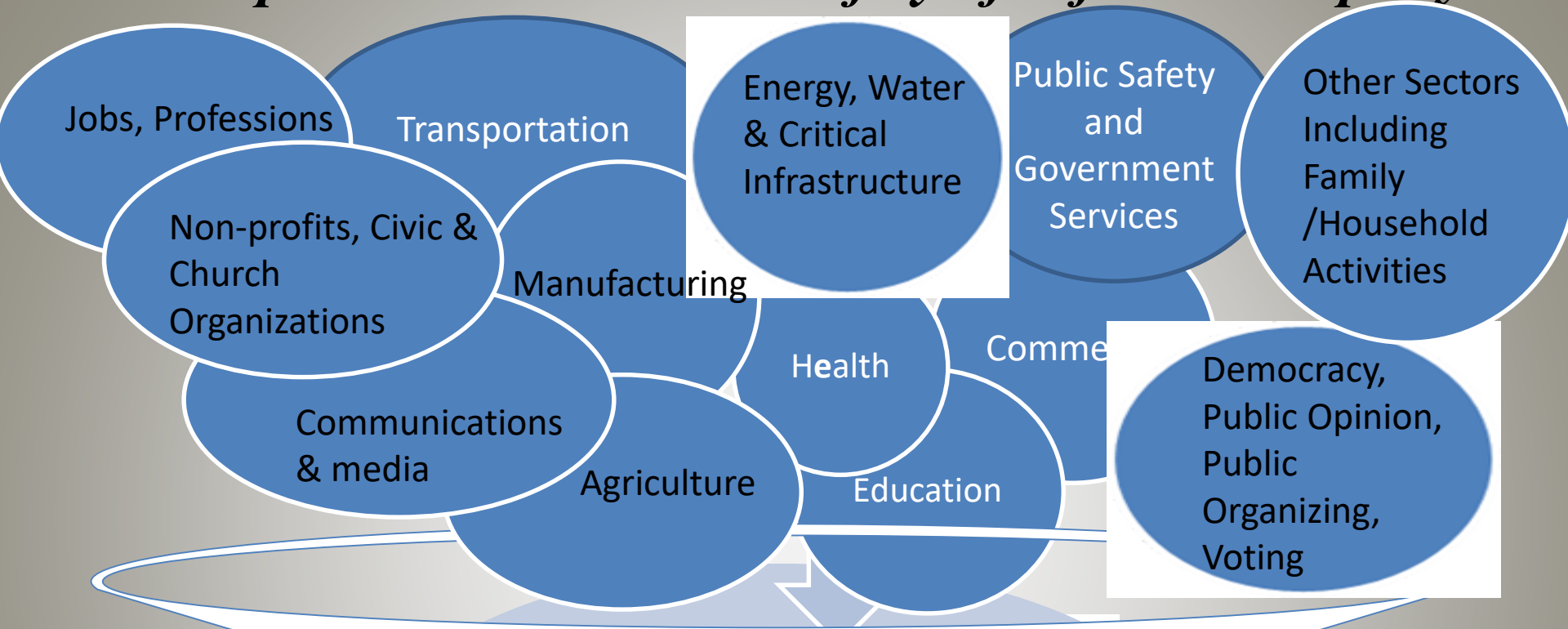
*Protection of Safety of Life and Property Involves a Wide Range of Internet Uses*

# *Sectors of the U.S. Economy and Society*

## *Intertwined with the Internet*



# *The Open Internet Fosters Safety of Life and Property*



Safety of Life and Property Promoted through Internet Communication and Access

# Net Neutrality Protects Public Safety

- **The Coronavirus State of Emergency Underscores the Importance of the Open Internet, Free of ISP Blocking, Throttling, and Paid Priority, to Protect Safety of Life and Property**
- **As of March 22, 2020, more than 1 in 4 Americans are under a Shelter in Place Order to Limit Coronavirus Spread, Protect Public Health and Safety, and Ensure that Medical Resources are Not Overwhelmed by Increasing Numbers of Very Sick People, Many at Risk of Dying**



# Net Neutrality Protects Public Safety

- **Open Internet protects public health and safety for communities sheltering in place during the Coronavirus pandemic, other emergencies, and during daily life**



- **Internet access enables access to emergency services, telemedicine, shopping services to obtain necessities, educational, government, and other services, communication to promote health and safety, and much more**



**The Internet enables one to many and many to many communication daily including during emergencies**



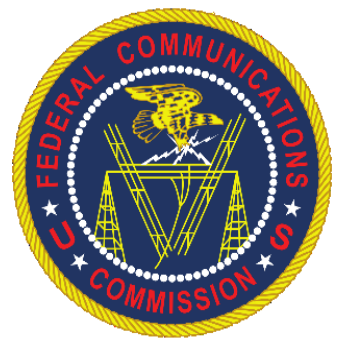




<https://www.cnbc.com/2020/02/26/zoom-has-added-more-users-so-far-this-year-than-in-2019-bernstein.html>

Communications providers reported to the FCC during the week of March 23 that congestion has not been a major issue during the Coronavirus Pandemic

- ***FCC's Keep Americans Connected Pledge.*** For 60 days, providers pledge to:
  1. Not terminate service to any residential or small business customers because of their inability to pay their bills due to the disruptions caused by the coronavirus pandemic;
  2. Waive any late fees that any residential or small business customers incur because of their economic circumstances related to the coronavirus pandemic; and
  3. Open its Wi-Fi hotspots to any American who needs them.
- FCC has recommended that providers make network performance information available



Millions of Americans Under Shelter in Place Orders Cannot Safely Use Public Wi-Fi hotspots

*These are Good Steps, but More is Needed to Protect Safety of Life during the Coronavirus. Pledge Does not address Public Safety Issues by Failure to Observe Net Neutrality*



# Net Neutrality Protects Public Health and Public Safety

*FCC's Keep Americans Connected Pledge.* For 60 days, providers pledge to:



1. Open their Wi-Fi hotspots to any American who needs them.
2. For the millions of Americans sheltering in place, we can't go to another location and sit there for hours at a time to use a hot spot to take a class, work, or take an exam
3. Many people are in self-quarantine as a precaution or are in quarantine because they or a household member are ill. Going out to a public hotspot is not allowed and can endanger public health and safety
4. Americans need access to the Open Internet protected by Net Neutrality Rules.



# Millions of Americans Rely Exclusively on Mobile Phones and Public Wi-Fi for Internet Access; *Public Wi-Fi Inaccessible for those Sheltering in Place*

- 27% of adults in 2019 do not have broadband Internet access at home except that provided by their mobile phone, according to Pew Research.
- <https://www.pewresearch.org/internet/2019/06/13/mobile-technology-and-home-broadband-2019/>
- African-Americans and Latinos are more than twice as likely as Whites to rely on mobile phones only to access the Internet, Pew reports.
- <https://www.pewresearch.org/fact-tank/2019/08/20/smartphones-help-blacks-hispanics-bridge-some-but-not-all-digital-gaps-with-whites/>
- Several ISPs Exempt Netflix from Data Caps but do not exempt Video Conferencing or let the user choose the type of data to exempt from data caps
- These practices undercut the ability to use other Internet resources for school, work, medical help, and safekeeping every day. Risks are magnified for those sheltering in place.



# Throttling Internet Users for Weeks based on Past Data Usage, *e.g.* Video Conferencing for Class or Work is Not Reasonable Network Management.

In response to the Coronavirus Pandemic, several ISPs raised data caps, a good step

- Yet many ISPs still throttle Internet users who consume 50 GB of mobile data to speeds that make video conferencing fail.
- ***One week of full-time work using Internet video conferencing and about two weeks of law school classes will use about 50 GB of data when accessed by a mobile phone.***
- FCC policies that allow ISPs to discriminate between Internet users and sites and tolerate weeks of throttling to twentieth century speeds undercuts equity, public health and safety.



## Some ISPs Throttle Internet Users for Weeks based on Past Data Usage

- The FCC issued a Notice of Apparent Liability Proposing to Fine AT&T \$100 million in 2014 for inadequate disclosure to “unlimited plan” customers that their Internet speeds would be dramatically slowed if they used more than an undisclosed amount of data
- The FCC found that AT&T reduced deprioritized customer speeds to “256 kbps or 512 kbps” [kilobits per second,” for an average of 12 days per billing cycle.”
- At those speeds subscribers could not use mapping applications, stream online video, or use video chat applications



## Some ISPs Now Throttle Users to Speeds Dramatically Slower than the Throttling Level in 2014

One Week of Full-time Work Using Video Conferencing or One to Two Weeks of School with Video Conferencing Triggers Throttling Thresholds

- In 2017 the FCC informed the Ninth Circuit that a Majority of the FCC's Current Commissioners Dissented from the decision to issue the Notice of Apparent Liability and that no further action has been taken on it.
- AT&T's 2020 Prepaid Plan states in small print that after the high-speed data allowance is used for its one gigabit and 8 gb plan, data speeds are slowed to a maximum of 128Kbps for the rest of the term.
- 128 kbps is half of the slowed speed the FCC found AT&T reduced users to in 2014
- At 128 kbps subscribers would not be able to use Telemedicine, to Participate in Work or School via Videoconferencing, and may not be able to use many applications important to daily life and essential during public health emergencies, disasters, and urgent situations that affect safety of life and property
- *It is urgent to public health and safety that ISPs stop throttling users in this fashion*





# Net Neutrality Protects Public Safety

## The Public is the Center of Public Safety!



— Users should be able to determine what content to send or access

- ISP policies that favor some Internet traffic over others and disfavor some users harm safety of life and property
- Several ISP practices disadvantage use of applications critical to public safety such as video conferencing
- Enforceable Net Neutrality Rules are Required to Protect Public Safety





# Thank you!

- Catherine Sandoval, Associate Professor  
Santa Clara University School of Law
- Co-Director, Broadband Institute of California
  - High Tech Law Institute, SCU Law
- Director, Santa Clara University Summer Law Program at Oxford University

[Csandoval@scu.edu](mailto:Csandoval@scu.edu)

