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Why inflexible

Major Internet service providers have seemingly given up on the argument that net neutrality rules violate their First Amendment rights. But one small ISP is continuing its fight against the Federal Communications Commission, claiming that it should be allowed to favor some Internet content over others because doing so qualifies for freedom of speech protection. "With prioritization, broadband providers convey a message by 'favor[ing]' certain speech—that prioritized content is superior—because it is delivered faster," Alamo Broadband argued in a **brief filed yesterday** as part of the broadband industry's lawsuit against the FCC.

Alamo Broadband uses fixed wireless technology to provide Internet access to about 1,000 customers outside San Antonio, Texas. Alamo filed the brief with Daniel Berninger, a communication architect who worked on the development of VoIP technology in the mid-1990s. Alamo **previously claimed** that net neutrality rules "eliminate Alamo's discretion to manage Internet traffic," while Berninger claimed the net neutrality ban on paid prioritization "precludes him from offering high-definition voice services that require prioritization."

The **FCC's net neutrality rules** prevent ISPs from blocking and throttling lawful Internet content and outlaw prioritization of Internet content in exchange for payment. "By foreclosing prioritization, the *Order* restricts broadband providers' editorial discretion to favor their own and unaffiliated Internet content," Alamo and Berninger wrote in their brief

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Philadelphia Daily News
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Pittsburgh Post-Gazette
Editorial: Second ask – Gov. Wolf's new plan still falls short for Pennsylvania

filed in the US Court of Appeals in Washington, DC. "It also infringes the speech of edge providers like Berninger who wish to distinguish their content and services by having them delivered faster."

An ISP favoring certain Internet content "is no different than a cable operator favoring popular channels by placing them on particular cable tiers," they wrote. ISPs already "exercise editorial discretion" by blocking content that is unlawful or harmful, such as child pornography and spam, they argued. "Broadband providers do not surrender their editorial discretion by electing to transmit all lawful content any more than an individual surrenders his free speech rights by not speaking," the Alamo/Berninger brief said.

The **FCC's net neutrality ruling** addressed some of these arguments before Alamo even made them, noting that the no-blocking rule applies only to lawful Internet traffic and thus doesn't prevent ISPs from refusing to transmit unlawful content including child pornography and copyright-infringing materials. The FCC's rules do not supersede any obligations broadband providers have to law enforcement agencies. The Commission's net neutrality ruling also said that spam protection is an "information service," separate from the core telecommunications service that is subject to common carrier and net neutrality rules.

The FCC also disputed Alamo's First Amendment argument in a **brief filed last month**. It argued that broadband providers are conduits for the speech of others, acting in the same role as telephone companies by delivering content requested by customers. Nobody reading *The New York Times* or *Wall Street Journal* editorial pages would mistake the newspapers' views for the broadband providers', the FCC said, further noting that "the Supreme Court has repeatedly cautioned that common carriers do not share the free speech rights of broadcasters, newspapers, or others engaged in First Amendment activity."

Alamo and Berninger countered yesterday that *New York Times* readers do not assume that the newspaper endorses the advertisements it publishes, "but the *Times* obviously has the right to select and print them." As for whether a VoIP provider's free speech rights are violated if it is unable to purchase prioritization from an ISP, the FCC **said** the fact that its rules "might govern certain business conduct has nothing to do with *speech*."

The First Amendment argument against net neutrality rules goes back a few years. **Verizon claimed in 2012** that the FCC's first attempt at net neutrality rules violated its First Amendment free speech rights and its Fifth Amendment property rights. The argument didn't stick, but Verizon ultimately **won its case on other grounds**.

ISPs raised the First Amendment argument again in May of this year when **challenging** the FCC's latest net neutrality rules. AT&T, CenturyLink, CTIA-The Wireless Association, and the United States Telecom Association all claimed the FCC's rules violate their First and Fifth Amendment rights. The American Cable Association challenged on Fifth Amendment grounds but not First Amendment grounds, while the National Cable & Telecommunications Association didn't mention any Constitutional amendments.

With the case moving forward, the major ISPs and trade groups have been filing joint briefs instead of separate ones. Perhaps because they don't agree on the Constitutional arguments, their latest briefs focus only on non-Constitutional claims. Their **brief filed yesterday** argues that Internet access is not a telecommunications service and thus ISPs cannot be regulated as common carriers. The broadband providers also argued that a new "Internet conduct standard" is unlawfully vague and that the FCC failed to provide sufficient public notice before enacting certain parts of the net neutrality order. ***– Ars Technica***

When the Supreme Court agreed to decide whether unhappy customers of DirecTV could band together in a class action, the court's purpose seemed clear: to reverse and rebuke

a California appeals court that had allowed the class action and refused to send the case to arbitration instead.

The Supreme Court is generally hostile to class actions and partial to arbitration, in which parties resolve disputes before private bodies. In 2011, in another case from California, it allowed companies to escape class actions by insisting on one-by-one arbitrations, even over trivial amounts of money, in standard-form contracts. It was something of a surprise, then, that the case, argued on Tuesday, seemed to strike many of the justices as difficult. While there appeared to be a consensus that the appeals court had gone astray, there was also a sense that the Supreme Court had bitten off both less and more than it wanted to chew.

On the one hand, some justices questioned why they had volunteered to answer a trivial and idiosyncratic question about early termination fees. The arbitration agreement at issue has been abandoned by DirecTV and is not used by any other major company. Simply deciding the meaning of that defunct contract did not warrant the court's attention, Justice Elena Kagan suggested. The appeals court "probably got the answer wrong," she said. "Strike the 'probably.' Got the answer wrong. But, you know, wrongness is just not what we do here." She meant that the Supreme Court is in the business of determining broad legal principles rather than correcting all manner of errors committed by lower courts.

If Justice Kagan was worried that the case was too small, other members of the court were concerned that it might be too big. Justice Stephen G. Breyer said the cost of reversing the appeals court would be to encourage countless other lawsuits. "Once we start with this case," he said, "even if this is not too difficult under state law, we've got every arbitration contract in the world where one lawyer or another will suddenly be saying, 'Oh, the interpretation of the contract here by the state court judge is not favorable enough to arbitration.' " "And suddenly," he said, "we have federalized, if not every area, a huge area of state contract law."

Christopher Landau, a lawyer for the company, agreed that contract interpretation is typically a matter of state law. But he added that Congress had enacted the Federal Arbitration Act to encourage arbitrations and to override interpretations of contracts animated by hostility to them. Justice Breyer was in dissent in the 2011 case, AT&T Mobility v. Concepcion, which favored arbitration. But he said he was worried that the lower courts were not complying with it, and he alluded to the difficulty of enforcing the court's 1954 decision in Brown v. Board of Education to underscore his point. "I think it's an extremely important thing," he said, "in a country which has only nine judges here and thousands of judges in other places who must follow our decisions — and think of the desegregation matters, et cetera — that we be pretty firm on saying you can't run around our decisions, even if they're decisions that I disagree with."

The contract the justices were considering barred mass arbitration, a form of class actions pursued before an arbitrator. But the contract added that the entire arbitration agreement — including provisions concerning one-by-one arbitrations — would be void if "the law of your state would find this agreement to dispense with class arbitrations unenforceable." Much of the argument was devoted to trying to puzzle out the meaning of that phrase and in particular its reference to state law.

Thomas C. Goldstein, a lawyer for the plaintiffs, said the provision was a "blowup clause," sending his clients to court if state law allowed mass arbitration. Mr. Landau countered that the 2011 decision had altered state law and that the appeals court ruling to the contrary was like "saying black means white." – ***New York Times***

ABC Family is finally changing its name. The cable network announced Monday that it will rebrand itself as Freeform, with the new name taking effect in January, 2016. The rebranding is part of the network's effort, announced at its upfront presentation in April, to focus on viewers ages 14-34 — a group that it has dubbed "Becomers." The network's

new logo and branding will be revealed prior to the January relaunch. ABC Family is the most recent television network to rebrand itself in the last two years, following Esquire network (formerly Style), Pop (formerly TV Guide Network) and FYI (formerly Bio). – ***The Wrap***

Thousands of Pennsylvanians went online to register to vote or changed their registrations in the first year of the new system. Monday was the deadline for registering to vote in the Nov.3 general election and Secretary of State Pedro Cortés said Tuesday that 32,428 people used the online system. More than 20,000 were new registrants and the rest were people who changed the information on their registration. On Aug. 27, Pennsylvania became the 23rd state to allow online registrations. Since then, two more states - Nebraska and West Virginia - have followed suit. – ***Associated Press***

BCAP
Broadband
Cable Association
of Pennsylvania
127 State Street, Harrisburg, PA 17101
717.214.2000 • bcapa.com

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