



NET NEUTRALITY Washington, DC

A federal appeals court on June 14 upheld a White House-supported effort to make internet service providers treat all web traffic equally, delivering a major defeat to cable and telephone companies.

The US Court of Appeals for the District of Columbia Circuit, in a two-to-one vote, affirmed the FCC's latest net neutrality rules, which consumer groups and President Barack Obama have backed as essential to prevent broadband providers from blocking or degrading internet traffic. The telecom industry and Republicans have heavily criticized the rules as burdensome and unnecessary regulation, with Texas Sen. Ted Cruz once labeling it "Obamacare for the Internet."

AT&T immediately announced it would appeal the ruling, saying it's always expected the issue to be decided by the Supreme Court. Several industry trade groups are expected to join the effort.

The court decision marked a victory for FCC Chairman Tom Wheeler, who led the agency's Democratic majority in approving the rules in February 2015 over the objections of the agency's two GOP commissioners. The rules apply utility-style regulation originally written for telephone companies to both land-based and wireless internet services.

Wheeler celebrated the ruling, calling it a "victory for consumers and innovators who deserve unfettered access to the entire web."

"It ensures the Internet remains a platform for unparalleled innovation, free expression and economic growth," the FCC chair said in a statement. "After a decade of debate and legal battles, today's ruling affirms the Commission's ability to enforce the strongest possible internet

protections—both on fixed and mobile networks—that will ensure the internet remains open, now and in the future."

Big internet service providers, such as Verizon and Comcast, argued the rules will chill investment in network infrastructure. AT&T and CenturyLink, along with cable, wireless and telecom trade groups, filed the lawsuit to overturn the order.

During oral arguments in December, appeals court judges David Tatel, Sri Srinivasan and Stephen Williams had seemed receptive to the FCC's decision to ground its net neutrality rules in telephone-style regulation. In the majority opinion, written by Tatel and Srinivasan, the judges said the FCC's approach was bolstered by how people view the internet today.

"These conclusions about consumer perception find extensive support in the record and together justify the Commission's decision," they wrote.

The majority also let stand the FCC's decision to apply net neutrality rules to the wireless internet, citing the "rapidly growing and virtually universal use of mobile broadband service." That's a critical feature of the rules, since many people today access the web through smartphones.

Williams, the lone dissenter, said he agreed the FCC has the authority to change how it regulates broadband providers, but said the agency didn't provide enough reasons for doing so.

Sari Feldman, president of the American Library Association (ALA), released the following statement regarding the decision:

"The American Library Association hails the U.S. Court of Appeals decision today upholding the Federal Communications Commission's Open Internet Order. America's libraries collect, create and disseminate essential information to the public over the Internet. We also ensure our users are

able to access the Internet and create and distribute their own digital content and applications. Keeping an open Internet—often referred to as 'network neutrality'—is essential to meeting our mission in serving our communities.

"More than a year ago the FCC rightfully claimed its authority to protect against blocking or throttling of legal content, as well as to prevent paid prioritization of some Internet traffic over other traffic. We are pleased the Court has affirmed the FCC Order and sustained the strongest possible protections for equitable access to online information, applications and services for all."

Congressional Democrats cheered the court decision as a win for consumers and free speech, with Bernie Sanders tweeting that it "will help ensure we don't turn over our democracy to the highest bidder."

Republicans criticized the opinion, and some GOP lawmakers reiterated calls for legislation to undo the FCC's order and create rules that are less burdensome to industry.

"This is why we need to rewrite the Communications Act," Rep. John Shimkus (R-IL) said. "There's a better way to protect consumers from blocking and throttling without stifling innovation or delaying build-out. That way requires action by Congress."

But public interest groups involved in the net neutrality battle urged industry and Republicans to give up the fight.

"The people have spoken, the courts have spoken and this should be the last word on net neutrality," Free Press President and CEO Craig Aaron said in a statement.

Republican FCC Commissioner Ajit Pai—who voted against the net neutrality order—said big cable and telecom firms should keep pursuing the case in court. "I continue



to believe that these regulations are unlawful, and I hope that the parties challenging them will continue the legal fight,” Pai said.

The telecom sector has a successful track record in thwarting the FCC’s net neutrality efforts. A lawsuit by Verizon scuttled the agency’s previous 2010 Open Internet order. Reported in: politico.com, June 14.

PRIVACY Washington, DC

In an April court opinion, a federal court judge overseeing government surveillance programs said he was “extremely concerned” about a series of incidents in which the Federal Bureau of Investigation and National Security Agency deviated from court-approved limits on their snooping activities.

Foreign Intelligence Surveillance Court Judge Thomas Hogan sharply criticized the two agencies over the episodes, referred to by intelligence gatherers as “compliance incidents.” He also raised concerns that the government had taken years to bring the NSA-related issues to the court’s attention and he said that delay might have run afoul of the government’s duty of candor to the court.

“The court was extremely concerned about NSA’s failure to comply with its minimization procedures—and potentially” a provision in federal law, Hogan wrote. The NSA violations appeared to involve preserving surveillance data in its systems beyond the two or five years after which it was supposed to be deleted.

“Perhaps more disappointing than the NSA’s failure to purge this information for more than four years, was the Government’s failure to convey to the Court explicitly during that time that the NSA was continuing to retain this information,” the judge wrote in

the November 6, 2015, opinion made public in April.

In a statement, the Office of Director of National Intelligence said officials did not mean to be misleading. “The Government has informed the Court that there was no intent to leave the FISC with a misimpression or misunderstanding, and it has acknowledged that its prior representations could have been clearer,” the statement posted on ODNI’s Tumblr site said.

The NSA said in some cases it needed the data to prevent future incidents where data was accidentally collected without legal authority, like when a surveillance target enters the United States. (At that point, officials are supposed to seek a more specific court order to continue the surveillance.) However, that wasn’t the case with all of the old data NSA was hanging onto.

The FBI’s troubles involved failing to use the required procedures when conducting surveillance of suspects overseas who are facing criminal charges in US courts. In order to preserve attorney-client privilege, the FBI is supposed to have such surveillance reviewed by a “taint team” that can excise any legal communications, but that was not happening in all cases, the FBI reported.

Hogan said the FBI revealed some such incidents in 2014, but the number was redacted from the opinion made public. “The government generally attributed those instances to individual failures or confusion, rather than a ‘systematic issue,’” Hogan wrote. However, more incidents occurred from mid-2014 and through 2015, although again the precise number was not released. In some instances, FBI agents believed, incorrectly, that they didn’t need to set up a review team if the indictment was under seal or outside the United States.

“The Court was extremely concerned about these additional incidents of non-compliance,” wrote Hogan, who also serves as a federal district court judge in Washington. He was appointed by President Ronald Reagan.

At a closed hearing last October, the FBI detailed some procedures set up to remedy the problem, including additional training and a system to remind agents when such reviews are needed. Hogan said he was “satisfied” that the FBI was “taking appropriate measures” to address the issue. However, he said he “strongly encourages” the government to find any other such mistakes and he said he wanted a briefing on those efforts earlier this year. Reported in: politico.com, April 19.

SCHOOLS Chicago, Illinois

A federal appeals court has upheld the Chicago school system’s suspension of a sixth grade teacher for using for using a racial epithet in his classroom, ruling that even using the word in a lesson violated the school district’s policy against the use of racial epithets in front of students.

Lincoln Brown, a teacher at Murray Language Academy in the Chicago district, caught his students passing a note in class that included music lyrics featuring the word “nigger,” court papers say. He then attempted “a well-intentioned but poorly executed discussion of why such words are hurtful and must not be used,” said the US Court of Appeals for the Seventh Circuit, in Chicago.

Brown’s principal happened to be observing his class, and the principal suspended Brown, whose race isn’t noted in the opinion, for five days for violating the school board’s policy against the use of verbally abusive language. The Chicago school board upheld the suspension.



Brown sued, arguing that his First Amendment free speech rights and Fourteenth Amendment due process of law rights were infringed by the discipline.

He lost in both a federal district court and in the Seventh Circuit court. The three-judge appeals court panel ruled unanimously that his free speech rights were not violated because he used the word in the course of his employment.

The court noted that under US Supreme Court precedents such as the 2006 case of *Garcetti v. Ceballos*, speech by public employees pursuant to their official duties is not protected by the First Amendment.

“Here, Brown gave his impromptu lesson on racial epithets in the course of his regular grammar lesson to a sixth grade class,” said the June 2 opinion by Chief Judge Diane P. Wood in *Brown v. Chicago Board of Education*. “His speech was therefore pursuant to his official duties. That he deviated from the official curriculum does not change this fact.”

The court also rejected Brown’s arguments that the school district’s rule against using racial epithets in front of students was unconstitutionally vague. Brown argued that the school system permitted the teaching of Mark Twain’s *The Adventures of Huckleberry Finn*, which uses the word throughout, and had permitted the showing of movies such as *42*, about Jackie Robinson’s experiences as the first black player in Major League Baseball, which also uses the word.

“A handful of instances of past non-enforcement . . . is insufficient to render the policy so vague that an ordinary person would not know what it prohibits,” Wood said.

“Brown is indignant that he was suspended for using a racial slur while attempting to teach his students why such language is inappropriate,” Wood

added. “His frustration is understandable, but it is not legally actionable.” Reported in: *Education Week*, June 3.

STUDENT PRESS Phoenix, Arizona

Student media outlets stripped of financial support because of unflattering content have some additional legal ammunition, thanks to a federal appeals court decision.

The US Court of Appeals for the Ninth Circuit has overturned a district court’s ruling dismissing the claims of an Arizona student organization that was penalized with the loss of an automatic \$1-per-student fee subsidy after opposing the governor’s position on a statewide referendum.

The court’s ruling reinstates the First Amendment claims brought on behalf of Arizona Students Association, which advocates for the interests of students at the state’s three public universities.

In a 3-0 ruling issued June 1 the California-based court held that the ASA’s complaint adequately set forth the essential ingredients of a First Amendment claim by alleging that the state Board of Regents adversely altered the association’s funding formula as punishment for political speech—specifically, campaigning for an education-funding ballot initiative that the governor opposed.

A US district court dismissed ASA’s claims in 2013, finding that the loss of student activity fees wasn’t actionable under the First Amendment. Essentially, Judge John D. Sedwick accepted the state’s argument that allocating student fees is a purely discretionary, year-to-year decision and that the receipt of fees in a prior year in no way creates an entitlement or expectation of continued funding.

Even worse, the district judge declined even to consider evidence of retaliatory bias expressed by Regents

members: “The allegedly illicit motivation of some members of [the board] is not relevant to the First Amendment analysis in the circumstances here.”

Had that ruling held up, student media organizations facing the removal of university financial support would have had an essentially impossible burden to challenge even the most blatant cause-and-effect cases of retaliation.

But it didn’t. In an opinion by Judge Richard A. Paez, the court overruled Sedwick and sent the case back with instructions to allow the student association to re-plead its First Amendment claims:

“A state, division of the state, or state official may not retaliate against a person by depriving him of a valuable government benefit that that person previously enjoyed, conditioning receipt of a government benefit on a promise to limit speech, or refusing to grant a benefit on the basis of speech. Those limitations apply even if the aggrieved party has no independent or affirmative right to that government benefit,” the court ruled.

That’s an enormously important point that, while logical, hasn’t always been obvious to college lawyers or judges. There’s a tendency to argue that, when something is a “privilege” rather than an “entitlement,” taking it away cannot be actionable under the First Amendment, because there’s “no right to receive student activity fees.”

But, as Judge Paez understood and explained, that’s the wrong way to think about a First Amendment retaliation claim. The ASA wasn’t claiming a “right to receive money”—they were claiming a right to be free from punishment for speech.

This principle would be well-understood outside of the campus setting. Everyone knows that the governor cannot send the highway patrol



door-to-door to confiscate the driver licenses of people who give speeches opposing the governor just because “driving is a privilege, not a right.” Government can’t take rights or privileges away as a means of punishing or deterring constitutionally protected speech—and advocating for the passage of a referendum is at the pinnacle of protected political speech.

The Ninth Circuit stated it unequivocally: “the collection and remittance of funds is a valuable government benefit, and a change in policy undertaken for retaliatory purposes that results in the deprivation of those funds implicates the First Amendment.”

The court’s ruling resonates at least as far away as Kansas, where right now the *University Daily Kansan* newspaper is (just as the ASA was) defending against a motion to dismiss its First Amendment lawsuit challenging the retaliatory withdrawal of student activity fees. And just as in the Arizona Students Association case, the university is defending itself by insisting that a vote to allocate or not allocate fees is a matter of legislative discretion, its motivation beyond the authority of courts to review. Reported in: splc.org, June 6.

UNIVERSITY Raleigh, North Carolina

On June 4, a federal district court ruled that a student organization, Grace Christian Life, was likely to be successful in its First Amendment lawsuit against North Carolina State University, ordering the university to immediately cease enforcing a policy requiring permission to distribute literature on campus. While the court could later vacate the preliminary injunction following trial, it’s likely that the case will either settle before trial or a trial will vindicate the student organization’s claims, making this order

a welcome addition to the growing heap of speech codes struck down by courts on First Amendment grounds.

The policy at issue is NC State’s “Non-Commercial Solicitation” policy, which prohibited “any distribution of leaflets, brochures or other written material, or oral speech to a passerby [*sic*]” without written permission in advance from NC State administrators.

NC State chose to enforce its policy against Grace Christian Life, with administrators’ emails showing that merely handing someone a card was construed as improper “solicitation.” When repeatedly challenged on the policy by Grace Christian Life’s attorneys from the Alliance Defending Freedom (ADF), NC State chose to repeatedly defend the policy. When Grace Christian Life sued, NC State chose to defend the policy before a federal judge.

NC State’s argument consisted largely of repeating the refrain that the restriction was a reasonable “time, place, and manner” restriction having nothing to do with content or viewpoint of the would-be speaker. The government can, of course, impose reasonable restrictions on speech which regulate the time, place, or manner of the speech, without regard to its content or views, but continually reciting “time, place, or manner” as a mantra does not make a policy so. More to the point, a university cannot say “you can’t speak ever without permission.” Even if such a policy were reasonable in scope, it cannot then fail to say what the criteria are to be eligible for such a permit.

The First Amendment does not grant government officials “unfettered discretion” to use their own judgment about when to issue a permit. That would allow an administrator to come up with their own varying reasons for granting or denying a permit, thus

creating a risk that those requirements will be harder to meet if the administrator dislikes the speaker or her message. And if there are no requirements other than asking for permission, why require a permit at all?

A federal judge agreed, and NC State has been ordered not to enforce the policy—for now, at least. Reported in: thefire.org, June 8.

CHURCH AND STATE Lincoln, Nebraska

A Nebraska inmate who has professed his allegiance to the divine Flying Spaghetti Monster lost his bid demanding that prison officials accommodate his Pastafarianism faith.

A federal judge dismissed the suit brought by Stephen Cavanaugh, who is serving a 4- to 8-year term on assault and weapons charges at the Nebraska State Penitentiary. US District Judge John Gerrard ruled that “FSMism” isn’t a religion like the ones protected under the Constitution.

“The Court finds that FSMism is not a ‘religion’ within the meaning of the relevant federal statutes and constitutional jurisprudence. It is, rather, a parody, intended to advance an argument about science, the evolution of life, and the place of religion in public education. Those are important issues, and FSMism contains a serious argument—but that does not mean that the trappings of the satire used to make that argument are entitled to protection as a ‘religion,’” the judge ruled.

For the uninitiated, Judge Gerrard gives some explanatory background on Pastafarianism:

“FSMism is a riposte to intelligent design that began with a letter to the Kansas State Board of Education when it was considering intelligent design. The primary criticism of intelligent design—and the basis for excluding it from school science classes—is that



although it purports to be “scientific,” it is actually “an interesting theological argument” but “not science.” The conceit of FSMism is that, because intelligent design does not identify the designer, its “master intellect” could just as easily be a “Flying Spaghetti Monster” as any Judeo-Christian deity—and, in fact, that there is as much scientific evidence for a Flying Spaghetti Monster as any other creator. As the FSM Gospel explains, “we are entering into an exciting time, when no longer will science be limited to natural explanations. . . . Propelled by popular opinion and local government, science is quickly becoming receptive to all logical theories, natural and supernatural alike.”

In his lawsuit, the inmate sought \$5 million and claimed he has “several tattoos proclaiming his faith” and

demanding that prison officials afford his “faith” the “ability to order and wear religious clothing and pendants, the right to meet for weekly worship services and classes and the right to receive communion.” Corrections officials determined FSMism was a parody religion and rejected his requests. (The religious clothing at issue is “a pirate costume,” the judge notes.)

According to the ruling, “This is not a question of theology: it is a matter of basic reading comprehension. The FSM Gospel is plainly a work of satire, meant to entertain while making a pointed political statement. To read it as religious doctrine would be little different from grounding a ‘religious exercise’ on any other work of fiction. A prisoner could just as easily read the works of Vonnegut or Heinlein and claim it as his holy book, and

demand accommodation of Bokononism or the Church of All Worlds. Of course, there are those who contend—and Cavanaugh is probably among them—that the Bible or the Koran are just as fictional as those books. It is not always an easy line to draw. But there must be a line beyond which a practice is not ‘religious’ simply because a plaintiff labels it as such. The Court concludes that FSMism is on the far side of that line.”

Nebraska, in seeking to have the case dismissed, told the judge that there was no constitutional violation. “The essence of this action,” the state wrote, “is that prison officials believe the Plaintiff is not sincere in his religious beliefs about a flying lump of spaghetti that first created ‘a mountain, trees, and a midget.’” Reported in: arstechnica.com, April 14.