

CDT, Scholars, Technologists and More Agree: ISPs Shouldn't Have Right to Edit the Net

by [Andrew McDiarmid](#) [1]
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Is MetroPCS the publisher of your tweets? Is Verizon's FiOS Internet service a newspaper? They seem to think so. In their pending challenge to the [FCC's Open Internet Rules](#) [2], [Verizon and MetroPCS](#) [3] argued that the Rules violate their purported First Amendment right to exercise "editorial discretion" over their customers' Internet access. Yesterday, CDT and other friends of the court (not to mention friends of the Internet) filed briefs rebutting this dangerous assertion.

[CDT's brief](#) [4] – filed in collaboration with the [Yale Information Society Project](#) [5] on behalf of over a dozen First Amendment, telecom, and Internet law professors – starts by explaining how valuable the Internet is for free expression and describes how the courts, when considering how the First Amendment applies to the Internet, have put the rights of Internet *users* first. The Internet became the engine of free expression and innovation it is by allowing everyone connected to it to send and receive information on relatively equal terms without seeking permission from any central gatekeeper. Yet the ISPs' argument that they have a right to interfere – to treat the Internet more like cable, where they select and package content for your consumption – would utterly transform the Internet as we know it.

The ISPs are also wrong on the law. Far from regulating any expressive conduct by ISPs, the Rules are better understood as governing ISPs' conduct of transmitting information at users' request. Our brief goes on to illustrate how that conduct – providing a general-purpose communications link over which users decide for themselves what to access – does not meet various Supreme Court tests for "expressiveness" such that the Rules merit First Amendment scrutiny. But even if the court disagrees and goes through a First Amendment analysis, a final section argues that non-discrimination rules for ISPs are a straightforward case that pass muster far more easily than controversial "must-carry" rules upheld for cable providers.

Law professor and net neutrality advocate [Tim Wu also filed a brief](#) [6] largely aligned with our analysis. Wu's brief points out how accepting the ISPs' argument would imperil not only the Rules, but also decades of communications law and policy going back to the telegraph, the constitutionality of which has long been assumed and unquestioned.

A brief from former [FCC Commissioners and other public officials](#) [7] picks up that thread, dismantling both the Fifth and First Amendment claims the ISPs make and arguing that any finding of unconstitutionality would hamstring the executive branch in all sorts of vital areas of policy for years to come.

A group of prominent technologists, including several elder statesmen of Internet technology, joined the fray to argue the virtues of Internet openness the FCC seeks to preserve. [Their brief](#) [8] lays out the [basics of layering](#) [9] and [end-to-end design](#) [10] and explores the implications of these early design choices for the information revolution, underscoring CDT's arguments about user-control and the value of openness. And [one more brief, from tech investors](#), [11] further highlights the value of an open Internet by focusing on how the Rules will help insure a thriving and competitive information economy.

This impressive list of amicus briefs shows just how much is at stake in this case. It's possible that the Court will choose to focus on the FCC's statutory authority to issue the Rules (well covered by the [FCC's brief](#) [12] and the [brief of Intervenors on their side](#), [13] including Public Knowledge and the Open Internet Coalition). However, if the Court does reach the First Amendment issue, it will find a raft of strong arguments in the broad range of amicus briefs arrayed against Verizon and MetroPCS's claims, and we're proud to be a part of that number. Because with the future of the Internet is at stake, the more voices the better.

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- [Internet Neutrality](#)
- [Free Expression](#)

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