

No. 18-1051 (and consolidated cases)

IN THE
**United States Court of Appeals for
the District of Columbia Circuit**

MOZILLA CORPORATION, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
THE UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of an Order of the
Federal Communications Commission

**BRIEF OF LEONID GOLDSTEIN AS
AN INTERVENOR IN SUPPORT OF RESPONDENTS**

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CERTIFICATE AS TO PARTIES, ORDERS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the intervenor certifies as follows:

A. Parties and Amici.

The intervenor incorporates the lists of parties, intervenors, and amici appearing in this Court that were included in the brief for the respondent Federal Communication Commission. Additional amici have filed notices of their intent to participate since that brief was filed.

B. Order Under Review.

Petitioners seek review of the FCC order *Restoring Internet Freedom*, 33 FCC Rcd. 311 (2018) (adopted 2017) (“Order”) (JA____), reversing *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015), affirmed, *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

C. Related Cases.

Related cases appear listed in the brief for the FCC.

CORPORATE DISCLOSURE STATEMENTS

The intervenor is an individual.

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, ORDERS, AND RELATED CASES 2

CORPORATE DISCLOSURE STATEMENTS 3

TABLE OF CONTENTS..... 3

 Glossary..... 4

 Introduction 5

 Summary of the Argument..... 6

 Obamanet violation of the First Amendment rights of internet users 6

 Obamanet treated customers’ choices as BIAS’ choices..... 9

 The Obama era regulations stalled free press on the internet 9

 Alleged ISP monopolies don’t exist 10

 Obamanet was a power and money grab 11

 Safety, Security, and Privacy 11

 Argument..... 12

 Conclusion..... 12

CERTIFICATE OF COMPLIANCE 13

CERTIFICATE OF SERVICE 13

Glossary

RIF - Restoring Internet Freedom, Declaratory Ruling, Report and Order, 33 FCC Rcd 311 (2018)

Obamanet order – also, called *Title II Order* by FCC in the Brief of FCC, it refers to Protecting and Promoting the Open Internet, 30 FCC Rcd 5601 (2015). It is popularly called either Net Neutrality or Obamanet order, depending on the attitude of the speaker¹.

POI-2010 – Preserving the Open Internet, 25 FCC Rcd 17905 (2010). It was a milder predecessor of the Obamanet order, overturned by this Court in 2014, after much damage was already inflicted.

ISP – Internet Service Provider

BIAS – Broadband Internet Access Service, as defined in RIF and the Obamanet order in p. 25:

A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.

¹ Examples of the *Obamanet* usage:

<https://www.nationalreview.com/2015/02/obamacare-you-will-love-obamanet-deroy-murdock/>

<https://pjmedia.com/blog/yes-obamanet-is-here-meet-connecthome-the-free-internet-that-costs-taxpayers-much-more-than-a-private-sector-plan/>

https://www.realclearpolitics.com/2015/02/23/from_internet_to_obamanet_351750.html

<https://wattsupwiththat.com/2017/07/27/the-battle-for-the-net-a-little-twin-of-climate-alarmism/>

Petitioners' Allies – members of the Internet Association that benefited from Obamanet and are objecting to RIF. They include Google, Facebook, Twitter, Microsoft (“GFTM”), and other members of the Internet Association, which is among the Intervenors for the Petitioners. Petitioners' Allies might be some of the real parties of interest behind the Petitioners. The Internet Association is intervening on the side of the Petitioners.

Introduction

There is a story about 100 German professors in the early 1930s who published a joint article that *objected* Einstein's general theory of relativity. When Einstein learned of this, he commented that to *refute* his theory, one scientist would be enough. Similarly, if RIF, ordered by FCC of Ajit Pai, were against the law or public interest, or deserved to be invalidated for any other reason, a couple of petitioners and amici curiae would suffice.

Instead, opponents of RIF mobilized an army of Petitioners. This army is being headed by Democratic State Attorneys General and is brandishing all the powers their offices acquired over the last decade. It comprises of state and city governors that are all or nearly all Democrats. The Petitioners are supported by hordes of Intervenors and Amici Curiae, including Democratic Congresspersons, the Internet Association formed by humongous corporations, and leftist organizations of different degrees of radicalism.

The Petitioners filed their lawsuit after their Allies exhausted other options to which they availed themselves, including misuse of their platforms for Obamanet propaganda and squelching the voices of the opponents, and encouragement or

incitement of death threats against FCC Chairman Ajit Pai and his family.² The Government Petitioners tolerated this behavior.

Summary of the Argument

I have intervened in the case as an individual affected by RIF and Obamanet, but this brief is limited to arguing the interest that I share with 99.99% of U.S. internet users.

Obamanet violation of the First Amendment rights of internet users

The term BIAS provider, used by the FCC since POI-2010, is much broader than what is commonly understood as a *broadband internet service provider*, and the even more general *internet service provider*, or ISP.

Today, the internet is a medium for speech and other forms of expression. The internet to the speech is like paper and bookstores to newspapers and books. The federal government may regulate the manufacturing or distribution of paper, but it is prohibited from regulating books on the pretext that they are printed on paper and are essential for public good. The pulp and paper industry regulators that would claim regulatory authority over books by expanding their mandate to include “anybody providing paper goods” or “anybody providing access to paper goods” would be laughed at. However, this is exactly what the Obamanet order did in its definition and regulation of BIAS, except that the *paper* was substituted for the *internet*. The Obamanet order affected everyone in the U.S. because in the

² Examples:

<https://legalinsurrection.com/2018/06/suspect-arrested-for-threatening-to-kill-fcc-chairman-ajit-pais-children/>

<https://dailycaller.com/2017/12/01/ajit-pai-is-right-on-big-techs-threat-to-an-open-internet/>

<https://www.dailywire.com/news/24009/net-neutrality-protesters-target-fcc-chairmans-hank-berrien>

<https://www.dailysignal.com/2017/11/28/dumping-net-neutrality-is-opposite-of-authoritarianism-fcc-chief-says-amid-physical-threats/>

<https://dailycaller.com/2017/11/25/activists-tell-fcc-chairmans-kids-their-father-is-an-evil-murderer/>

moment he or she hires the services of an internet access provider, he or she becomes a subject of the that regulation.

The Obamanet order has not only vested in the FCC's capacity to control speech via the internet, but heavily restricted speech of every U.S. internet user. The beneficiaries, other than the Democratic Party, are Petitioners' Allies and hostile foreign political parties and governments, aided by the Petitioners' Allies in the U.S. election interference and other meddling.

The Obamanet order has levied three heavy duties on internet users:

- 1) Prior to reading or viewing the content of their choice, the user must pay the ISP for delivering content to other individuals and corporations, including content that violates his or her religious convictions. The costs of subsidizing such objectionable content might exceed the costs of delivering the content of the user's choice ten or even one hundred times.
- 2) Obamanet has created a media market that is unprecedented in its absurdity. A median U.S. fixed internet subscriber pays about \$80 per month³, which buys him or her *no content*. Using the book store analogy, a potential buyer is required to pay hefty monthly fees just to enter the bookstore. When inside, the buyer has the broad choice of free advertising materials and fake news, can purchase some books paying with his or her valuable personal information, and can purchase even more for cash. But many buyers feel that \$80 per month satisfy their informational needs and are not aware of the value of their personal information and the extent of which its being collected and used by the Petitioners' Allies.

³ <https://www.telecompetitor.com/report-u-s-median-broadband-price-is-80-monthly/>

There is nothing similar in other media markets, even those requiring large capital investment on the distribution side, such as cinema or cable TV.

- 3) Internet users are prohibited from exercising their moral and religious choices regarding content that enters their homes via the internet. The especially egregious part of the Obamanet is a ban on family-friendly internet access. The effect of this ban is the absence of family-friendly internet access offers in the U.S.

The Obamanet order insinuates in that parental controls, which parents use to protect their children from pornography, drugs, gang recruitment, predators, and other online dangers are “*separable information services that are offered by providers other than providers of broadband Internet access service*” (p. 373). Such services do exist but are not sufficiently effective. Most frequently, parents use software, such as Net Nanny or Symantec Norton Family, which they install on home computers. Kids can bypass these “controls” easily by bringing their own tablets and connecting them to a Wi-Fi router, which is usually part of the modem-router, connecting the home to the internet. There are Wi-Fi routers with built-in filtering software, but they are hard to use for most people, and children are often more computer savvy than their parents and are capable to disable any in-home filtering. The only reliable option is network side filtering. Notice that the POI-2010 order had an exception for this and some other customer choices: “*Legitimate network management purposes include: ensuring network security and integrity, including by addressing traffic that is harmful to the network; addressing traffic that is unwanted by end users (including by premise operators), such as by providing services or capabilities consistent with an end user’s choices regarding parental controls or security capabilities ...*” (p. 82), “*Broadband providers also may implement reasonable practices to address traffic that a particular end user chooses not to*

receive. Thus, for example, a broadband provider could provide services or capabilities consistent with an end user's choices regarding parental controls" (p. 89). The Obamanet order has dropped this exception.

This said, even if effective home internet filtering solutions existed, the federal government has no power to limit people to using only home filtering. Such restriction is equivalent of the government banning churches, synagogues, and temples on the rationale that people can pray at their homes.

Obamanet treated customers' choices as BIAS' choices

Note that neither the Obamanet Order nor Petitioners' arguments distinguish between BIAS actions (blocking, throttling, prioritization, etc.) requested by their users from unrequested ones. The Obamanet authors and the Petitioners seem to think that we are incapable of making our own choices about internet access and content, or that we are *deplorables* who shouldn't be allowed choices. The Petitioners base their arguments on the interests and imaginary rights of the edge or content provider, which are 3rd parties to the BIAS provider – subscriber relations. Only occasionally they pay lip service to the subscriber's interests, although BIAS subscribers pay for delivery of all content from and to all content providers.

The Obama era regulations stalled free press on the internet

Public access to the internet became available only in the 1990s. For some time, the internet had remained a communication tool for nerds. 2003 was the best year ever for printed newspapers. By 2008, the internet as *the medium* for all kinds of speech and expression eclipsed the news media. The free press business model, in which the reader or viewer pays the publisher for the whole media product, could not develop for the internet in such short period of time. Then Obama administration mandated (first by POI-2010, then by the Obamanet order) separation of all internet media products into the medium part, regulated under

taxation without representation principle (the beneficiaries of the taxation being private parties), and the content part, heavily influenced by foreign regulations.

Alleged ISP monopolies don't exist

Proponents and defenders of Obamanet sometimes claim that heavy-handed regulatory approach is necessary because BIAS providers tend to be monopolies. That's not true. In fact, almost every internet user can become a BIAS provider using his or her internet connection and a Wifi router. Even POI-2010 clumsily admitted it (footnote 164): "*We also do not include within the rules free access to individuals' wireless networks, even if those networks are intentionally made available to others.*" The Obamanet order dropped this exception.

In some of the previous proceedings on the Obama administration regulation of the internet access, proponents of the Obamanet concocted putative empirical evidence BIAS monopolies by a trick. They studied ISP offerings, providing a very high download speed (possibly 25 Mbps), and reported scarcity of BIAS meeting such speed requirements. But BIAS definition covers all providers and potential providers at any speed, despite the word *broadband* in the definition.

The concern that half a dozen huge corporations (e.g., Comcast) having both large content assets and many internet subscribers would engage in monopolistic behavior is a valid one. Not surprisingly, this concern was not addressed by the Obamanet order. Other way around, Obamanet decreased the competition. Even worse, it benefitted ISPs with the technical capacity to provide most raw bandwidth – the large cable companies, most of which own or have agreements for large amounts of content assets, and held government granted monopolies. The Obama administration⁴ might have used this arrangement to reward its friends and push to the left news and other content, distributed by conglomerates

⁴ <https://www.foxnews.com/politics/obamas-netflix-deal-inked-with-help-from-bundler-buddy>

comprising ISPs. RIF allows the FTC to rein in such unsuitably integrated conglomerates.

Obamanet was a power and money grab

The Obamanet order vested into the Petitioners' Allies, especially GFTM and Apple, enormous power. Unlike BIAS providers, almost all members of the Internet Association are global corporations, some of them derive more revenues from abroad than from the U.S. GFTM and Apple tend to accommodate foreign governments and political parties at our expense, and to obstruct, resist, and contest in courts the rights of Americans.

Safety, Security, and Privacy

The internet is global and transnational, and not everybody uses the internet for good. Hostile governments, non-government organizations, and terrorists have internet access. There are also gangs, criminal hackers, spies, etc. Some of them seek to harm Americans in various ways, like by collecting sensitive personal information, encouraging riots, hacking, etc. The Obamanet order unilaterally disarmed Americans by banning us from ordering security measures in the internet access, even to defend against threats from foreign nations or terrorist organizations. The Obamanet order stressed that we are not allowed to protect ourselves on the internet; p. 301 reiterates the intent to ensure "*that broadband providers do not use the safety and security provision without the imprimatur of a law enforcement authority, as a loophole to the rules.*" The law enforcement authority is accommodated, but subscribers are prohibited from having any safety and security features with the internet access. The Obamanet order didn't allow exceptions even for the families of the military personnel fighting abroad,

although terrorist organization Daesh (ISIS) had threatened U.S. military wives over the internet before⁵.

Argument

The 2,000-word limit leaves no space for the argument.

Conclusion

The Obamanet order was un-Constitutional. RIF repealed the un-Constitutional Obamanet provisions. All challenges raised by the Petitioners and the Intervenors for the Petitioners either directly object to repeal of these provisions or arise such objections. The FCC could do no wrong by repealing those provisions and bringing its regulatory framework in agreement with the Constitution. For this and other reasons, the petitions for review should be denied.

Respectfully submitted,

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⁵ *ISIS hacker targets military spouses*, <https://thehill.com/policy/defense/232286-isis-hacker-targets-military-spouses>

CERTIFICATE OF COMPLIANCE

I, Leonid Goldstein, hereby certify that the foregoing brief contains 1941 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Leonid Goldstein
Leonid Goldstein

October 18, 2018

CERTIFICATE OF SERVICE

I, Leonid Goldstein, hereby certify that on this day, October 18 of 2018, I caused the foregoing brief to be filed via the Court's CM/ECF system, which caused that document to be served on all parties or their counsel.

/s/ Leonid Goldstein
Leonid Goldstein

October 18, 2018