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Legal Sidebar

ACA Connects v. Bonta: Ninth Circuit Upholds California's Net Neutrality Law in Preemption Challenge

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On January 28, 2022, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit held in *ACA Connects v. Bonta* that California's net neutrality law, SB-822, is not preempted by federal law. This decision allows California to continue enforcing SB-822. The decision also has implications for other states' net neutrality laws. *ACA Connects* is binding precedent within the Ninth Circuit, which includes Washington and Oregon, states that have enacted their own net neutrality laws. The decision may also be persuasive precedent for courts outside of the Ninth Circuit.

This Legal Sidebar provides a brief overview of existing net neutrality law and the *ACA Connects* case. For context, the Sidebar starts by explaining the legal principles of federal preemption and by describing the FCC's past net neutrality actions. Next, it discusses California's net neutrality law, SB-822, and the Ninth Circuit's reasoning in *ACA Connects*. Finally, it discusses the decision's implications for the future of net neutrality in the United States and some potential considerations for Congress.

For further background on net neutrality, see CRS Report R46973, *Net Neutrality Law: An Overview*, by Chris D. Linebaugh and CRS Report R40616, *The Federal Net Neutrality Debate: Access to Broadband Networks*, by Patricia Moloney Figliola.

Preemption Principles

The preemption of state law by federal law derives from the U.S. Constitution's Supremacy Clause, which states that the "Constitution, and the Laws of the United States" shall be the "supreme Law of the Land." The U.S. Supreme Court has explained that the Supremacy Clause empowers Congress to displace state law when Congress is acting pursuant to its authority under the Constitution. The Supreme Court has also explained that regulations adopted by federal agencies have the same preemptive effect as statutes enacted by Congress, provided that the regulations are validly enacted and do not exceed the agency's statutory authority.

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The Supreme Court has said that federal law may preempt state law in three ways. First, federal law may *expressly* preempt state law by stating which state laws are preempted. Second, federal law preempts any *conflicting* state law. Such conflict preemption occurs when either (1) "compliance with both federal and state regulations is a physical impossibility" or (2) the "challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Third, federal law may preempt an entire *field* of state regulation by occupying that field "so comprehensively that it has left no room for supplementary state legislation."

In the communications law context, the Communications Act of 1934, as amended, primarily governs the extent to which state law is preempted. The Communications Act sets up a dual system of federal and state regulation. At the federal level, the Communications Act gives the Federal Communications Commission (FCC or Commission) broad authority to regulate wired and wireless telephony, radio transmissions, cable services, and matters that are reasonably ancillary to these areas. At the same time, the Act expressly preserves some state regulatory authority over these technologies. The FCC may generally preempt state law as long as it is acting pursuant to its regulatory authority and does not run afoul of any specific provisions in the Communications Act that define or limit is preemption authority. For further background about preemption issues in the communications law context, see CRS Report R46736, *Stepping In: The FCC's Authority to Preempt State Laws Under the Communications Act*, by Chris D. Linebaugh and Eric N. Holmes

FCC's Net Neutrality Actions

Net neutrality generally refers to the idea that internet service providers should neither control how consumers use their networks nor discriminate among the content providers that use their networks. The FCC's ability to adopt net neutrality rules is tied to whether it classifies broadband internet access service (BIAS) as a "telecommunications service" or an "information service" under the Communications Act. The FCC has broad authority to regulate telecommunications services as common carriers under Title II of the Communications Act. On the other hand, the FCC's regulatory authority over information services—which are not subject to Title II regulation—is limited. The Supreme Court has held that the FCC has discretion to choose which category is most appropriate for BIAS under the *Chevron* doctrine, under which courts generally defer to an agency's reasonable interpretation of an ambiguous statutory provision.

The FCC has alternated between classifying BIAS as a telecommunications service and an information service. For roughly the first 15 years of the 21st century, the FCC classified BIAS as an information service. The FCC attempted to regulate BIAS on several occasions while retaining its information service classification, but courts struck down these attempts. In 2010, in *Comcast v. FCC*, the U.S. Court of Appeals for the D.C. Circuit struck down the FCC's attempt to enforce net neutrality principles against a BIAS provider. After *Comcast*, the FCC attempted to adopt binding net neutrality rules in a 2010 order, but the D.C. Circuit struck it down in its 2014 decision in *Verizon v. FCC*. The D.C. Circuit held that the net neutrality rules were "*per se*" common carrier rules and that the Communications Act prohibited the FCC from imposing them as long as it classified BIAS as an information service.

The FCC responded to *Verizon* by issuing a new order in 2015 (the 2015 Open Internet Order) that reclassified BIAS as a telecommunication service and adopted new net neutrality rules. The 2015 Open Internet Order, among other things, imposed three bright-line net neutrality rules on BIAS providers. These rules prohibited BIAS providers from: (1) blocking lawful internet traffic on the basis of content, applications, services, or non-harmful devices; (2) throttling (i.e., impairing or degrading) lawful internet traffic on the basis of content, applications, services, or non-harmful devices; and (3) engaging in paid prioritization, defined as favoring some internet traffic over other traffic in exchange for consideration. The order also imposed a more flexible "general conduct" rule that prohibited BIAS providers from

"unreasonably interfer[ing] or unreasonably disadvantag[ing]" users from accessing the content or services of their choice. The D.C. Circuit upheld the 2015 Open Internet Order in its entirety in a decision issued in 2016.

The Commission reversed course several years later, adopting a new order titled "Restoring Internet Freedom" (the RIF Order) in December 2017. The RIF Order reclassified broadband Internet as an information service and eliminated the bright-line rules and general conduct rule. The FCC posited that this new "light-touch" regulatory framework for BIAS would promote investment and innovation better than the "heavy-handed utility-style regulation" of Title II. The RIF Order also preempted any state or local laws "that would effectively impose rules or requirements that [the FCC] repealed or decided to refrain from imposing," or that would impose "more stringent requirements for any aspect of broadband service" addressed by the RIF Order.

The D.C. Circuit upheld the bulk of the RIF Order in its 2019 decision in *Mozilla Corp. v. FCC*, but vacated the RIF Order's "sweeping" preemption of state and local laws. The court held that the FCC's classification of BIAS as an information service deprived it of affirmative regulatory authority over BIAS and that the Commission could not preempt state law in an area over which it lacks regulatory authority, absent an express authorization from Congress. The court left open, however, the possibility that specific state laws might be preempted on a case-by-case basis under principles of conflict preemption. The D.C. Circuit's preemption analysis is discussed in detail in CRS Report R46736, *Stepping In: The FCC's Authority to Preempt State Laws Under the Communications Act*, by Chris D. Linebaugh and Eric N. Holmes.

California's Net Neutrality Law (SB-822)

California adopted its own net neutrality law, the California Internet Consumer Protection and Net Neutrality Act of 2018 (SB-822), in September 2018. As characterized by the Ninth Circuit, SB-822 "essentially codifies" the FCC's 2015 Open Internet Order, insofar as it contains bright-line rules against blocking, throttling, and paid prioritization, and establishes a general conduct rule. Unlike the 2015 Open Internet Order, SB-822 has additional rules regulating "zero-rating" (the practice of not counting the usage of a particular application or class of applications towards a data cap) and applies only to BIAS provided to customers in California.

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After the enactment of SB-822, BIAS providers commenced the *ACA Connects* litigation in federal district court, arguing that the FCC's RIF Order preempted California's statute. The U.S. Department of Justice also sued to block SB-822, although it later dropped its suit. The district court stayed the *ACA Connects* action pending the D.C. Circuit's decision on the challenge to the RIF Order in *Mozilla*. After considering arguments on what effect to give to the D.C. Circuit's decision, the district court rejected the plaintiffs' motion for a preliminary injunction blocking SB-822 and allowed the law to go into effect. The district court concluded that, given the FCC's reclassification of BIAS as an information service, it lacked the regulatory authority to preempt SB-822. The BIAS providers then appealed the district court's order denying a preliminary injunction to the Ninth Circuit.

A panel of three Ninth Circuit judges affirmed the district court's denial of a preliminary injunction against SB-822. The plaintiffs argued that the RIF Order preempted SB-822 because: (1) SB-822 conflicts with the policy underlying the FCC's reclassification decision in the RIF Order; (2) SB-822 conflicts with the Communications Act; and (3) the FCC occupies the entire field of interstate communications, precluding the states from regulating in any manner that touches interstate communications. The Ninth Circuit panel rejected each of these arguments.

The court characterized the plaintiffs' argument that SB-822 conflicts with the RIF Order as "essentially contend[ing]" that SB-822 conflicts with the "absence of federal regulation." The court recognized that an agency's decision *not* to regulate may have preemptive effect in some circumstances, but such preemption occurs only when the agency has regulatory authority that it has chosen not to exercise. An agency may not, however, preempt state regulation when it does not have regulatory authority. The court held that, in the RIF Order, the FCC had "surrendered its authority to regulate" net neutrality, thereby surrendering as well its power to preempt state regulations.

The Ninth Circuit also rejected what it called the plaintiffs' "novel" interpretation of the *Chevron* doctrine. The plaintiffs argued that, under *Chevron*, Congress delegated to agencies the authority to interpret ambiguous statutory language because it intended to rely on agencies' expert policy judgment. Thus, according to the plaintiffs, the policy judgments animating agencies' statutory interpretations under *Chevron*—in this case, the FCC's policy judgment regarding how best to regulate BIAS—should be binding on the states. The Ninth Circuit rejected this contention, concluding that policy preferences motivating *Chevron* interpretations are "not a source of the statutory authority required to regulate or to preempt."

The Ninth Circuit next rejected the plaintiffs' argument that the Communications Act preempts SB-822 because the provisions in the Act that prohibit the FCC from imposing common carrier requirements on information services apply equally to states. The court observed that these provisions expressly apply to the FCC and say nothing about the regulatory authority of states. The court reasoned that if Congress wanted to limit state authority with these provisions it would have done so explicitly, as it had done elsewhere in the Communications Act.

Lastly, the court rejected the plaintiff's argument that, through the Communications Act, Congress had occupied the entire field of interstate communications and that SB-822 was preempted because it "touches" on interstate communications. The court explained that the Communications Act does not "neatly divide" regulatory authority between the federal government and the states in the way the plaintiffs contended; rather it reflects a regulatory scheme that "leaves room" for state regulation that touches on interstate services.

Next Steps and Considerations for Congress

It is possible that the plaintiffs in *ACA Connects* will seek to have the panel's decision reviewed *en banc* (meaning, by the Chief Judge and ten other judges of the Ninth Circuit) or will petition the Supreme Court for review. Assuming there are no further judicial proceedings, California will be able to continue enforcing the provisions of SB-822. *ACA Connects* also has ramifications beyond California. Other states—including Colorado, Maine, New Jersey, Oregon, Vermont, and Washington—have adopted some form of net neutrality requirements, and *ACA Connects* could spur additional states to do the same. While *ACA Connects* dealt specifically with SB-822, its reasoning could be applied to other state net neutrality laws. The decision is binding within the Ninth Circuit (which includes Oregon and Washington), and it may be persuasive to courts outside of the Ninth Circuit weighing the legality of state net neutrality laws.

It also remains possible that state net neutrality laws could be preempted by future federal action, either by the FCC or Congress. Were the FCC to reclassify BIAS as a telecommunications service, it then would have Title II regulatory authority over BIAS and thus remove the barrier to preempting state net neutrality laws on which the Ninth Circuit grounded its decision in *ACA Connects*. While the FCC has not initiated any new net neutrality proceedings, President Biden has issued an executive order urging the FCC to adopt rules similar to those in the 2015 Open Internet Order. Congress might also adopt a federal net neutrality law. For instance, in the 116th Congress, the U.S. House of Representatives passed the Save the Internet Act, which would have repealed the RIF Order and restored the 2015 Open Internet Order. Other bills introduced in the 116th Congress, such as H.R. 1101, H.R. 1006, H.R. 2136, and H.R. 1096, would

have amended Title I to include net neutrality requirements, such as prohibitions on blocking or throttling, and would have given the FCC limited regulatory and enforcement authority to implement the requirements. Similar bills have not been reintroduced in the 117th Congress.

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