

ACA CONNECTS v BONTA: CALIFORNIA’S LEGAL BATTLE WITH NET NEUTRALITY, EXPLAINED

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On January 28, 2022, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit (“**Ninth Circuit**”), in the case of *ACA Connects v. Bonta*¹, affirmed the decision of the United States District Court for the Eastern District of California (“**District Court**”). The plaintiffs-appellants, a group of industry associations representing communications services providers under the moniker America’s Communication Association (“**Appellants**”), sought a preliminary injunction against Rob Bonta, California’s Attorney General, to prevent him from enforcing the California Internet Consumer Protection and Net Neutrality Act of 2018² (“**SB-822**”) as made applicable to the broadband internet services provided within California. The decisions of the District Court and Ninth Circuit turned on the fact that the SB-822 was not preempted by federal law as the Federal Communications Commission (“**FCC**”) lacked the requisite regulatory authority over broadband internet services, paving the way for state laws to govern the realm of net neutrality.

This case is of particular interest to IP Justice as it directly implicated one of our core values-free and open internet as a prerequisite for the promotion of growth of the people. In the digital age, the internet is an integral platform for myriad purposes including innovation, commerce, resource sharing, and community discourse on socio-political issues. Equal access to the internet becomes an indispensable tenet that ought to be shielded from the concerted effort by large, commercially motivated enterprises to gatekeep a vital public resource to increase their bottom line.³ If left unchecked, the internet service providers would have the ability to create a tiered system within the internet forcing people to pay expensive overage fees to visit certain websites that were earlier available at no additional costs. It could also lead to service providers acting as censors blocking certain online content which they do not consider favorable to their point of view or interest. For over two decades, we have advocated for the promotion of internet freedom, liberties, and digital rights and we believe that there is a real and palpable danger to its openness. Just as one percent of the world’s population controls about fifty percent of the world’s wealth, rescinding net neutrality will, in effect, lead to the creation of the ‘one percent’ of the internet where only the people with sufficient disposable income and those who support the viewpoints of the internet service providers will be able to take full advantage of the resource. The ramifications of this can be far-reaching as it will impact the notion of equality that has been entrenched in the design and development of the internet since its origin. Public interest groups such as ourselves have a civic duty to advocate for and create awareness about the importance of maintaining net neutrality to ensure that consumers and not service providers control how and what can be accessed online.

¹ 24 F.4th 1233.

² Cal. Stats. 2018, ch. 976.

³ Brief for Electronic Frontier Foundation et. al. as Amicus Curiae at 3, *ACA Connects v Bonta*, 24 F.4th 1233.

The purpose of this note is to generate awareness about the silent battle being waged against net neutrality by providing a brief overview of the concept of net neutrality, the legislative history and reason for enacting SB-822, the main arguments made in *ACA Connects*, and the potential impact of the case on the laws related to net neutrality within the US.

Net Neutrality: A Primer

Consider the fiber optic cables forming the internet as being analogous to a highway and the data transmitted through the fiber optic cable to the cars traveling on the said highway.⁴ Similarly, broadband internet service providers can be considered as toll booths that control access to the highway by allowing some to travel on fast lanes while directing other traffic to congested lanes or completely halting certain types of vehicles from operating on the highway. These service providers have the ability to exercise such control through a variety of ways which may include paid-prioritization schemes (preferential treatment given to traffic for certain online content in exchange for monetary compensation), zero-rating (imposing data caps for the user while exempting certain preferred content from such caps), throttling (intentional limitation of a connection's bandwidth), and distorting content (through censorship). '[Net Neutrality](#)' is a principle of equity that seeks to regulate such conduct of broadband internet service providers whereby all data that travels through the networks of internet service providers should be treated in a like manner without discriminating in favor of any particular website, service or application.

The Vision Behind SB-822

To preserve the concept of net neutrality and avoid disadvantaging certain segments of society, certain states took the initiative to enact laws to regulate anti-competitive and discriminatory practices behavior of the service providers. The need to enact SB-822 sprouted from the recantation of the federal net neutrality rules ("**Open Internet Order**") that governed all internet service providers within the country.⁵ Prior to 2014, internet service providers were classified as "information services" under Title I of the Communication Act having limited regulatory oversight by the FCC.⁶ However, the federal government felt that they should subject them to stricter regulations, particularly those related to net neutrality, given the growing importance of the internet in modern society.⁷ Accordingly, in 2014, the FCC decided to classify broadband internet service providers as "telecommunications services" under Title II of the Communication Act⁸, enabling the FCC to impose comprehensive regulations on such service providers by way of the Open Internet Order. Unfortunately, after intense lobbying efforts by the industry, in 2018, the FCC decided to revert the classification of broadband

⁴ *ACA Connects*, 24 F.4th at 11.

⁵ 30 FCC Red 5601(7).

⁶ 47 U.S.C. § 151 et. sec.

⁷ *National Cable & Telecommunications Association v. Brand X Internet Services* (545 U.S. 967).

⁸ 47 U.S.C. §§ 151–646.

internet service to “information services” under Title I of the Communications Act, leading to the rescission of the federal net neutrality rules (“**2018 Order**”).⁹

Keeping a close watch on these developments, the state of California decided to keep the spirit of the Open Internet Order alive by codifying the broader federal net neutrality rules and applying them to the broadband internet services provided within the state. Following the enactment of the SB-822, the Appellants filed the case in the District Court arguing that the 2018 Order preempted California’s statute. The statute was also challenged by the U.S. Department of Justice, but they decided not to pursue the case further. The District Court stayed the case until the US Court of Appeals for the District of Columbia (“**DC Circuit**”) decided the validity of the 2018 Order in the case of *Mozilla Corp. v. F.C.C.*¹⁰ The DC Circuit held that by the reclassification of broadband services as “information services” under Title I of the Communications Act, the FCC had lost authority to regulate broadband services. Since the presence of federal regulatory authority is a prerequisite to pre-empt any state law, the FCC did not expressly pre-empt states from enacting their own laws on net neutrality.¹¹ Following the decision in *Mozilla*, the District Court resumed hearing *ACA Connects* and denied the request for a preliminary injunction. Shortly thereafter, the Appellants filed an appeal with the Ninth Circuit to review this decision of the District Court.

What Happened in the Appeal to the Ninth Circuit?

In their appeal to the Ninth Circuit, Appellants argued that the decision of the District Court was legally unsound and that a preliminary injunction against Sb-822 was warranted. In order to obtain a preliminary injunction, the party seeking the relief must demonstrate the following: (i) they are likely to succeed in the case on merits; (ii) they are likely to suffer irreparable harm in the absence of preliminary relief; (iii) balance of equities supports the motion for preliminary injunction; and (iv) an injunction is in the public interest.¹² The first prong is dispositive which is to say that if the party seeking the injunction is unable to demonstrate that they are likely to succeed on merits then the court *need not* consider the remaining factors.¹³ In *ACA Connects* the first hurdle for the Appellants was to prove that the SB-822 was preempted by the FCC’s reclassification of broadband services and by the Communications Act.

What is Preemption?

The doctrine of [preemption](#) is a rule of judicial interpretation that primacy to federal law over any conflicting state law. It is derived from the [Supremacy Clause](#) of the US Constitution establishing federal law as “the supreme Law of the Land” notwithstanding any state law to the contrary. State law may be preempted *expressly* (by including language that explicitly gives

⁹ In the Matter of Restoring Internet Freedom, 33 FCC Rcd. 311.

¹⁰ 940 F.3d 1 (D.C. Cir. 2019).

¹¹ *Id.* 74-76.

¹² *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (citing *Winter v. N.R.D.C., Inc.*, 555 U.S. 7, 20 (2008)).

¹³ *DISH Network Corp. v. F.C.C.*, 653 F.3d 771, 776–77 (9th Cir. 2011).

it preemptive power) or can be preempted *impliedly* (when the intent of Congress to preempt state law can be culled out from the structure and purpose of the particular federal law). Federal agencies, possessing delegated legislative powers bestowed by Congress, have the authority to enact regulations with similar preemptive powers provided that the regulations so enacted are valid and do not exceed their delegated authority.¹⁴ FCC, being a federal agency, has the power to issue regulations, including the net neutrality rules, that could have preemptive powers. The Appellants contended that SB-822 had been preempted by actions of the FCC. The Ninth Circuit considered these arguments in detail as set out below.

i. *Whether SB-822 conflicted with the FCC's Reclassification of Broadband Services under Title I of the Communications Act*

To fully flesh out this argument, the Ninth Circuit looked at seminal cases on preemption decided by the US Supreme Court. The court first considered the case of *Louisiana Pub. Serv. Comm'n v. F.C.C.*,¹⁵ in which the Supreme Court held that where federal regulations are absent, it may still preempt state law as long as the federal agency had the statutory authority to regulate that area of law. Similarly, the Ninth Circuit noted that in the case of *Ray v. Atlantic Richfield Co*¹⁶, Congress had granted the Secretary of Transportation broad authority to regulate “vessel size and speed limitation” of tankers traveling through Puget Sound, but the Secretary chose not to ban large tankers despite having the authority to do so. There the Supreme Court had opined that because the Secretary had the authority to ban large tankers, the decision not to impose a ban preempted states from banning such tankers.¹⁷

Applying these facts and principles to the case at hand, the Ninth Circuit reasoned that the decision to reclassify broadband services under Title I of the Communication Act resulted in the FCC giving up its authority to regulate common carriers. Accordingly, it no longer had the authority to adopt federal net neutrality laws. The facts of *ACA Connects* differed from those of *Ray* because, in the latter, the federal agency retained its regulatory authority and could preempt states from enacting laws as federal authority existed, whereas, in the former, the FCC had surrendered its authority to regulate broadband services concerning net neutrality through the 2018 Order.¹⁸ *ACA Connects* was more in line with facts in *Louisiana* where the Communications Act had explicitly denied the FCC the power to preempt state regulation of intrastate rates of telephone services. As it lacked the power to act, a federal agency could not preempt states from regulating the same area of law.¹⁹ Likewise, FCC in the present case could not preempt SB-822 as, by its own actions, it no longer had the authority to regulate laws on net neutrality. The Ninth Circuit looked at the prior attempts of the FCC to adopt net neutrality rules under Title I but was unable to do so until 2015 when the broadband services were classified as telecommunications services under Title II. The FCC was aware that by

¹⁴ *Fidelity Fed. S. & L. v. De la Cuesta*, 458 U.S. 141 (1982).

¹⁵ 476 U.S. 355, 374 (1986).

¹⁶ 435 U.S. 151, 178 (1978).

¹⁷ *Id.* at 178.

¹⁸ *ACA Connects*, 24 F.4th at 20.

¹⁹ *Louisiana*, 476 U.S. 355 at 374

reclassifying broadband services under the 2018 Order, it would strip itself from the authority to adopt net neutrality rules.²⁰

The Appellants then argued that the FCC’s policy objectives underlying the reclassification decision had a preemptive effect as it was based on the rationale that a “light-touch” regulatory framework would be more effective.²¹ The Ninth Circuit rejected this stating that a federal agency’s policy decision alone cannot give preemptive powers as it would amount to the agency conferring power upon itself and effectively overriding the powers of Congress.²² This reasoning would violate the basic Constitutional principle of [separation of power](#). Simply put, if the policy basis for agency decisions is given weight then they could, theoretically, make their powers all-encompassing, leaving no room for any state regulation to be enacted in those policy matters.

The Appellants then argued that the Ninth Circuit should give weight to an agency’s interpretation of the statute under the doctrine of deference as laid down in the case of *Chevron U.S.A., Inc. v. N.R.D.C.*²³. Under what is now known as the [Chevron deference](#), if the courts find any ambiguity in the statute, it must presume that Congress intended to delegate the agency the power to resolve the ambiguity using its expert policy judgment. The role of the court is then to assess whether the interpretation chosen by the agency is reasonable.²⁴ It is a way of giving weight to the judgment of the agencies as they are best suited to make policy decisions. The Appellants attempted to present this line of reasoning to show that FCC’s reclassification to adopt a lighter regulatory approach towards broadband services was binding on the states as well. The Ninth Circuit, however, noted that the D.C. Circuit in *Mozilla* had categorically refused to adopt the doctrine of deference to decide whether there has been preemption based on policy choices as deference is not a source of statutory authority required to regulate or to preempt, but is a discretionary tool to decide which definition of communication services would best fit broadband services.²⁵ Preemptive powers can only be derived when Congress has explicitly provided them and a certain interpretation of the law made by the agency cannot provide them with such authority.

Finally, the Appellants pointed to the Ninth Circuit’s decision in *People of State of California v. F.C.C.*²⁶, where it was held that there was some limited preemptive authority under Title I of the Communications Act if state regulations that are inconsistent with lawful federal regulation would make it impossible for the FCC to implement its regulatory measures. The Ninth Court distinguished *ACA Connects* from *California* because, in the former, the FCC has not adopted any regulatory measure given that the reclassification decision pushed broadband services to a relatively unregulated category under the Communications Act.²⁷ State law cannot

²⁰ *ACA Connects*, 24 F.4th at 21.

²¹ *Id.*

²² *Louisiana*, 476 U.S. 355 at 374-75.

²³ 467 U.S. 837 (1984).

²⁴ *Chevron*, 467 U.S. at 842-44.

²⁵ *ACA Connects*, 24 F.4th at 22-23 (citing *Mozilla*, 940 F.3d 1 at 82-85).

²⁶ 39 F.3d 919, 931-32 (9th Cir. 1994)

²⁷ *ACA Connects*, 24 F.4th at 25.

interfere with the FCC's enforcement of its regulation when FCC no longer has the authority to make or implement such regulation.

Summarily, it was the Ninth Circuit's understanding that the legal effect of the 2018 Order was that the FCC had diminished its own federal regulatory authority to adopt net neutrality rules and could not preempt states from adopting such rules.

ii. Whether SB-822 conflicted with the Communications Act

The Appellants contended that Sections 153(51) and 322(c)(3) of the Communication Act define the powers of the FCC's regulatory authority and limit the authority of the states from subjecting information services and private mobile services to any type of regulation.²⁸ The Ninth Circuit disagreed as the provisions delineate the FCC's power under Chapter 5 of the Communications Act and do not mention nor displace the states' regulatory authority. Attention was drawn to the *Mozilla* judgment in which the D.C. Circuit looked at Section 153(51) of the Communications Act and adjudged that the section was not the source of the regulatory authority of the FCC, rather it was a limitation on its authority. According to the D.C. Circuit, had Congress provided FCC with such expansive regulatory and preemptive authority, the source of such authority would not be found buried deep within a list of fifty-nine definitions in a non-regulatory portion of the statute.²⁹ Ninth Circuit agreed with the D.C. Circuit's reasoning to hold that Sections 153(51) and 322(c)(2) limit FCC's own authority and they cannot be liberally interpreted to grant preemptive power over the state's authority to regulate net neutrality. Moreover, Section 601(c)(1) of the Telecommunications Act provides that "the [Telecommunications] Act and the amendments made by this [Telecommunication] Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in the Act or amendments" (emphasis added). This section is generally known as a '[savings clause](#)' which is meant to clarify that the federal law does not purport to preempt certain categories of state law. An amendment in 1996 to the Telecommunication Act added the impugned Section 153(51) to the Communications Act. Therefore, the direction under the Section 601(c)(1) savings clause that no state law would be preempted by Section 153(51) unless it is expressly provided is applicable. Given that Sections 153(51) and 322(c)(3) do not contain any express statement of preemption, the Ninth Circuit concluded that these Sections could not preclude state law on net neutrality.³⁰

iii. Whether SB-822 Impermissibly Touches upon on the Field on Intestate Communications

In their final argument, the Appellants sought to rely on the concept of field preemption which extends the jurisdiction of federal law to occupy an entire legislative field of law in a manner that demonstrates Congress' intention to exclude all state law in such a field.³¹ The Appellants

²⁸ *Id.* at 27.

²⁹ *Mozilla*, 940 F.3d 1 at 79.

³⁰ *ACA Connects*, 24 F.4th at 29.

³¹ *Arizona v. United States*, 567 U.S. 387, 399 (2012).

believed that the field of interstate communications services is under the exclusive domain of federal law thereby preempting SB-822.³² The Ninth Circuit observed that SB-822 is limited in its application to broadband internet services “provided to customers in California” and to internet service providers that “provide broadband Internet access service to an individual, corporation, government, or other customers in California.”³³ The Appellants countered by stating that Section 152 of the Communications Act prevents the state from legislating any law related to intrastate communication which touches upon interstate communications. The court dismissed this argument as the language of the section merely excludes FCC from regulating intrastate commerce and does not talk about field preemption when intrastate communication may touch upon interstate communication. This was further buttressed by the Supreme Court’s decision in *Louisiana* that had explicitly rejected interpreting the Communications Act in a manner that would neatly divide its domain between federal and state authority.³⁴ The Supreme Court in both *Louisiana* and *Mozilla* reasoned that as the same infrastructure may be used to provide intrastate as well as interstate telecommunication services, there is a dual authority over such services - state and federal.³⁵ Further, the FCC has acknowledged the role of the states in interstate broadband services which includes policing fraud, taxation, general commercial dealings, and enforcing fair business practices³⁶. Moreover, Communication Act has express preemption clauses within various sections indicating that states have concurrent authority to regulate interstate services unless explicitly excluded.³⁷ This implies that Congress did not intend Communications Act to occupy the entire field of broadband services for it would not have included such express preemption clauses within the Communication Act. The Ninth Circuit reaffirmed the decision of the district court on the ground that SB-822 is not field preempted by the Communications Act.

Final Ruling of the Ninth Circuit

Since the Ninth Circuit ruled against the Appellants on all three of their arguments, the Appellants had failed to meet the burden of proving that SB-822 was pre-empted by federal law. As this was the first prong required to be proved to obtain a preliminary injunction (i.e., they would be likely to succeed in the case on merits), the Ninth Circuit did not analyze the remaining prongs and the preliminary injunction against enforcement of SB-822 was not granted. This allowed California to keep the law in force. Moreover, the jurisdiction of the Ninth Circuit extends to the states of [Washington and Oregon](#) making their net neutrality law enforceable as well.

Impact of the Case and Future Considerations

³² *ACA Connects*, 24 F.4th at 30.

³³ Cal. Civ. Code § 3100(b), (k)

³⁴ *Louisiana*, 476 U.S. at 360.

³⁵ *Id* at 375; *Mozilla*, 940 F.3d at 81.

³⁶ 2018 Order §196.

³⁷ *E.g.* 47 U.S.C. § 253(a) (“[n]o State or local statute or regulation...may prohibit...the ability of any entity to provide any interstate or intrastate telecommunications service”).

Shortly after the opinion was published, the Appellants filed a petition for an *en banc* review (a review by all the sitting judges of the court) by the Ninth Circuit of their decision to deny preliminarily injunction to the SB-822. On April 21, 2022, the *en banc* hearing was unanimously denied by all the judges of the Ninth Circuit. With this dismissal of this petition, the only other recourse left with the Appellants was to file an appeal with the Supreme Court of the United States. However, on May 4, 2022, the Appellants decided to withdraw their lawsuit without prejudice, implying that the case may be refiled in the future. While the withdrawal of the case is a decisive victory for the state of California and all proponents of net neutrality, the fact that the case may be filed again at a later point in time cautions us of an impending battle. [It is also possible that the Appellants may hedge their bets by challenging another state's net neutrality law to get a favorable ruling.](#)

We hope that the opinion and the dismissal of the suit would open doors for legislations like the SB-822, that have been or are in the process of being enacted by various other states across the country. Before the 2018 Order, FCC had effectively [regulated net neutrality](#) which allowed the internet to flourish in the US. However, the FCC's decision to let the internet service providers self-regulate and the free market dictate the nature, structure, and price of accessing the internet has proved detrimental to the American public. A light-touch regulatory approach has seen the emergence of numerous instances in the past where the internet service providers were found to have engaged in [violations of the principles of net neutrality](#). The COVID-19 pandemic forced the world to work and study remotely from home, bringing to the fore the importance of being connected online to fully integrate and function in society. Legislations such as the SB-822 are essential to protect people from discriminatory, profit-motivated practices of internet services providers, [particularly the low-income and marginalized communities](#), who cannot afford to pay a premium to access basic services, [due to a limited number of competitive choices that have driven up the prices for internet services](#). The chasm of digital equality has widened over the years as telecom companies have been making infrastructural investments in the urban areas and higher-income communities, leaving the low-income communities with old, unreliable, and ill-maintained facilities.³⁸

IP Justice, along with other public interest groups, believes that the SB-822 is only a ripple in the pond that is necessary to ensure open internet access free from anti-neutrality practices. Recalling the internet-highway analogy proposed earlier, internet service providers should not be able to decide which data should be allowed on “fast lanes” while pushing all other data to the congested lanes. Nor should certain websites be allowed free access to the highway when most others must pay an exorbitant toll fee to use the same highway. There is a possibility that if Gigi Sohn is confirmed as the Democratic nominee to the FCC, the FCC [may move towards re-establishing its authority over broadband providers and reinstate the federal net neutrality rules](#). Until then, we believe that state action is immediately warranted because if the market is allowed to dictate who can use the internet, what can be consumed, and how it should be accessed, then it would lose its essential characteristics that make a basic necessity. Realistically, internet service providers would harm open access to the internet by creating

³⁸ Brief for Access Now et. al. as Amicus Curiae at 20, *ACA Connects v Bonta*, 24 F.4th 1233.

artificial barriers forcing people to shell out more money, which many low-income communities cannot afford. It would only benefit the elite few who would be lining their pockets by providing terrible services at increasingly high prices. Contrary to the rhetoric offered by the opponents of net neutrality, innovation and competition would be gravely hampered as the oligopolistic internet service providers tend to favor the incumbents, blocking new technologies and companies from entering the market and having a fair chance to grow or offer competitive prices. Elimination of net neutrality would perpetuate the systemic problem of discrimination, exclusion, and suppression as those sections of the society who have historically been unrepresented or underrepresented would lose their most critical avenue of parity with the majority, affluent and privileged classes. Groups of racial, ethnic, sexual, political, and economic minorities have been side-lined from the public discourse and been subject to untoward social sanctions. The internet acted as an alternative platform to the mainstream media that has long ignored, misrepresented, or even harmed such sections, allowing them to vocalize their plight to the masses and draw attention to the historic discrimination that has long marginalized them. It has allowed such people to seek knowledge and opportunities that were out of reach. It has also provided a gateway for small business owners and entrepreneurs to compete online against the dominant multinational corporations. The agnostic transmission of data on the internet was a key in its exponential growth given that every type of data, big or small, regardless of content, used the same infrastructure to reach anyone seeking it. Erosion of net neutrality is the erosion of this level playing field which would set back by many years the developments made by the many marginalized communities.