

Ninth Circuit Opens Door to State-Level Regulation of Internet Access

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On January 28, 2022, the US Court of Appeals for the Ninth Circuit issued a [decision upholding a California law that applies “network neutrality” requirements to internet service providers in the state](#), affirming a decision by a federal district court to deny a preliminary injunction requested by industry trade associations. Network neutrality is a form of regulation that prohibits internet service providers from adopting practices that could impede the flow of information on the internet. It typically includes obligations not to block traffic, not to discriminate in transmitting different types of traffic, and to provide customers with information about their services. This decision allows California to continue to enforce its law, increases the likelihood that similar state laws could be adopted and enforced, and potentially permits other forms of regulation for internet access services.

The central issue in the case was whether California’s legislation was preempted by federal law. The Ninth Circuit held that a 2018 decision from the Federal Communications Commission eliminating federal network neutrality regulation did not prevent states from adopting similar laws. In reaching this conclusion, the Ninth Circuit relied on a separate case in which the US Court of Appeals for the District of Columbia Circuit ruled that the FCC’s broad claim that it was preempting any state network neutrality laws could not be accepted because the FCC had disclaimed any general authority to regulate internet access. The court also dismissed arguments that the California law conflicts with the federal Communications Act and that the act precludes regulation of internet access because such access is an interstate service.

What’s next?

The industry parties to this case have sought further review from the full Ninth Circuit. If this request is denied, they can seek review from the Supreme Court or allow the case to go back to the district court.

This decision leaves California’s network neutrality requirements in place, but it also could have wider implications. In particular, the decision encourages other states to adopt their own network neutrality requirements. In addition, because the Ninth Circuit rejected broad preemption of state internet regulation, this decision could encourage efforts to adopt other types of regulation, such as requirements to serve sparsely populated areas, obligations to provide inexpensive service to low-income customers or mandatory service-quality standards. This decision also will add urgency to efforts by the FCC to reinstate its network neutrality rules, and could spur Congress to consider enacting a federal network neutrality law, although it does not appear that network neutrality is a legislative priority at this time.

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