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FCC v. Prometheus Radio Project

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141 S. CT. 1150 (2021)

In *FCC v. Prometheus Radio Project*, the Supreme Court reversed the judgement of the Third Circuit, holding that the FCC's decision to repeal two of its media ownership rules and modify a third ownership rule was not arbitrary and capricious under the Administrative Procedure Act (APA).[1] Prometheus Radio Project (Prometheus) argued that, due to the FCC's reliance on flawed data, the FCC incorrectly concluded that the proposed rule changes would not have a negative impact on women and minority media ownership.[2] However, the FCC acknowledged that it was not working with a complete set of data, and that when the FCC requested additional data from outside parties to help fill the gaps, no data was provided.[3] Additionally, although Prometheus argued that the FCC ignored two studies regarding the negative impact of past rule changes on female and minority ownership, the Court found that the FCC had considered these studies but it had a different interpretation of the studies than what Prometheus had argued.[4] In light of the totality of the FCC's reasoning, the Supreme Court held that the FCC's decision to modify its media ownership rules was not arbitrary and capricious under the APA.[5]

I. BACKGROUND

The Communications Act of 1934 directs the FCC to regulate broadcast media "as public convenience, interest, or necessity requires."[6] In doing so, the 1934 Act grants the FCC power to promulgate rules related to broadcast media ownership that "limit the number of radio stations, television stations, and newspapers that a single entity may own in a given market."[7] Traditionally, the goal of these FCC media ownership rules has been to "promote competition, localism, and viewpoint diversity," including diversity with respect to women and minorities.[8] Pursuant to the Telecommunications Act of 1996, the FCC must conduct a review of its ownership rules every four

1. FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1154-55 (2021).
2. *Id.* at 1159.
3. *Id.*
4. *Id.*
5. *Id.* at 1155.
6. *Id.* (citing 47 U.S.C. §303).
7. *Id.*
8. *Id.*

years and abrogate or modify any rules that are "no longer in the public interest."[9]

In 2017, the FCC issued an order concluding that three of its media ownership rules "no longer served the public interest," and, therefore, needed to be abrogated or modified.[10] Two of the three rules, the Newspaper/Broadcast Cross-Ownership Rule and Radio/Television Cross-Ownership Rule, were repealed in their entirety.[11] The Newspaper/Broadcast Cross-Ownership Rule prohibited an entity from owning both a daily newspaper and either a radio or television broadcast company in the same market.[12] The Radio/Television Cross-Ownership Rule limited the amount of radio and television stations an entity can own in any given market.[13] The third rule implicated by the 2017 Order—the Local Television Ownership Rule, which limits the number of local television stations an entity can own in a single market—was amended rather than repealed.[14]

In coming to these decisions, the FCC "considered the effects of the rules on competition, localism, viewpoint diversity, and minority and female ownership of broadcast media outlets."[15] The FCC reasoned that, given the ever-evolving methods through which people consume information, including the rise of popular online alternatives to print, broadcast, and radio,[16] "the three rules were no longer necessary to promote competition, localism, and viewpoint diversity, and . . . changing the rules was not likely to harm minority and female ownership."[17]

Prometheus Radio Project, a non-profit advocacy organization, filed suit arguing that the FCC's decision to modify the ownership rules was arbitrary and capricious under the APA.[18] Prometheus took issue with the FCC's conclusion that the rule modifications would have only a "minimal effect" on minority and female media ownership.[19] Agreeing with Prometheus, the Third Circuit vacated the FCC's 2017 Order modifying its media ownership rules.[20] On petition from the FCC, the Supreme Court granted certiorari.[21]

II. ANALYSIS

In *Motor Vehicle Manufacturers Ass'n v. State Farm*, the Supreme Court held that, to pass muster under arbitrary and capricious review, the

9. *Id.* at 1155-56.
10. *Id.* at 1154.
11. *Id.* at 1157.
12. *Id.* at 1155.
13. *Id.*
14. *Id.* at 1155, 1157.
15. *Id.* at 1154.
16. *See id.* at 1157.
17. *Id.* at 1154.
18. *Id.* at 1155.
19. *See id.* at 1153, 1157 (quoting Prometheus Radio Project v. FCC, 939 F.3d 567, 584 (3d Cir. 2019), *rev'd*, 141 S. Ct. 1150 (2021)).
20. *Id.* at 1155.
21. *Id.* at 1157.

agency must examine the data presented to it, "reasonably consider[] the relevant issues, and reasonably explain[] the decision."[22] *State Farm* also made clear that arbitrary and capricious review is highly deferential to the agency, explaining that "the scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency."[23]

With respect to the potential impact that the rule modifications would have on women and minority ownership, the FCC noted that, despite inviting public comment on the matter, the only comments received were those suggesting that the rule modifications would have a *positive* effect on women and minority ownership—none that forecasted a negative effect.[24] Prometheus argued that the data relied upon by the FCC was "materially incomplete," thus rendering the FCC's decision arbitrary and capricious.[25] However, the Court reasoned that because no additional data was presented to the FCC upon request, the FCC acted reasonably in relying on the only data it had received.[26] As the Court noted, agencies are not required to supplement a sparse record with studies of their own.[27]

Additionally, Prometheus argued that two separate studies submitted to the FCC proved that past reforms to media ownership rules had harmed female and minority ownership, and the FCC acted arbitrarily and capriciously in ignoring this data.[28] However, the Court determined that the FCC did not actually ignore those two studies.[29] Rather, the FCC engaged with both studies and concluded that they actually suggested a "long-term *increase* in minority ownership after the Local Television Ownership and Local Radio Ownership Rules were relaxed."[30] In other words, Prometheus and the FCC simply interpreted the studies differently.[31] In offering its own reasonable interpretation of the studies, albeit a different interpretation from that of Prometheus, the Court found that the FCC's decision was not arbitrary and capricious.[32]

Accordingly, the Supreme Court reversed the judgment of the Third Circuit.[33]

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22. *Id.* at 1158 (citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)).
23. *State Farm*, 463 U.S. at 43.
24. *Prometheus*, 141 S. Ct. at 1158.
25. *Id.* at 1159.
26. *Id.*
27. *See id.* at 1160 (citing FCC v. Fox Television Stations, Inc., 556 U.S. 502, 518-20 (2009)).
28. *See id.* at 1159.
29. *Id.*
30. *Id.*
31. *Id.*
32. *See id.* at 1160.
33. *Id.* at 1161.

III. CONCURRENCE (J. THOMAS)

Justice Clarence Thomas wrote separately to note an alternative reason for reversal. Justice Thomas argued that by requiring the FCC to consider female and minority diversity in its consideration of media ownership rules, the Third Circuit imposed an impermissible procedural requirement onto the FCC.[34]

Justice Thomas noted that the Telecommunications Act of 1996 does not require the FCC to consider female and minority diversity with respect to media ownership; the 1996 Act only requires the FCC to determine whether its media ownership rules still further the public interest.[35] Therefore, given that "courts have no authority to impose 'judge-made procedure[s]' on agencies," the Third Circuit improperly required the FCC to take female and minority ownership into account—both in this case and in other challenges to the FCC's media ownership rules dating back to 2004.[36]

Prometheus argued that "because an agency cannot 'depart from a prior policy *sub silentio*,'" the fact that the FCC previously considered minority ownership required the FCC to either do so too in the present case, or alternatively, expressly depart from that prior policy.[37] Although Justice Thomas noted that the FCC has considered female and minority diversity in its past decisions, he noted that these considerations are not "policy goals in and of themselves, but . . . proxies for viewpoint diversity."[38] Therefore, Justice Thomas concluded that the Third Circuit erred in past cases by faulting the FCC for not considering female and minority diversity when modifying its ownership rules.[39]

IV. CONCLUSION

For the forgoing reasons, the Supreme Court reversed the judgement of the Third Circuit, holding that the FCC's actions were not arbitrary and capricious under the Administrative Procedure Act (APA).[40]

34. *Id.*
35. *Id.*
36. *Id.* (quoting Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 102 (2015)).
37. *Id.* (quoting *Fox Television Stations*, 556 U.S. at 515).
38. *Id.* at 1162.
39. *Id.* at 1163.
40. *Id.* at 1154-55.

NetChoice, LLC v. Paxton

Thompson J. Hangen

2021 WL 5755120 (W.D. TEX. 2021)

Plaintiffs NetChoice, LLC (NetChoice) and Computer & Communications Industry Association (CCIA) challenge Texas House Bill 20 (HB 20) on multiple grounds.[1] NetChoice and CCIA brought a motion for a preliminary injunction,[2] and the State of Texas, represented by the Attorney General of Texas, Ken Paxton, brought a motion to dismiss for lack of standing.[3] NetChoice and CCIA also brought a motion to strike an expert report attached to the state's opposition.[4] Judge Robert L. Pitman of the United States District Court for the Western District of Texas granted the plaintiffs' motion for preliminary injunction, dismissed the plaintiffs' motion to strike an expert report as moot, and dismissed the State's motion to dismiss.[5]

I. BACKGROUND

Texas House Bill 20, signed into law on September 9, 2021, is designed to prevent social media users from "censorship" by social media platforms.[6] Specifically, section 7 of HB 20 makes it unlawful for social media platforms to censor users and their speech based on: "(1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression; or (3) a user's geographic location in [Texas]."[7] Section 2 of HB 20 requires social media platforms to publish "acceptable use policies," establish an accessible complaints system, and produce a biannual "transparency report."[8] The bill applies to companies "(1) with more than fifty million active users in the United States in a calendar month, (2) that is open to the public, (3) allows users to create an account, and (4) enables users to communicate with each other for the primary purpose of posting information, comments, messages, or images."[9] HB 20 provides a right to private action under section 7 for users who have been improperly "censored," and also authorizes the Attorney General of Texas to bring an action "to enjoin a violation or potential

1. NetChoice, LLC v. Paxton, No. 1:21-CV-840-RP, 2021 WL 5755120, at *2 (W.D. Tex. Dec. 1, 2021).
2. *Id.*
3. *Id.* at *3.
4. *Id.*
5. *Id.* at *15.
6. *Id.* at *1.
7. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 143A.002 (West 2021)).
8. *Id.* at *2.
9. *See Id.* at *1 (internal quotation marks omitted).

violation" of HB 20 or for failure to comply with the requirements of section 2.[10]

Plaintiffs Netchoice, LLC (NetChoice) and Computer & Communication Industry Association (CCIA) are trade associations who have members who operate social media platforms that would be affected by HB 20.[11] NetChoice and CCIA challenged HB 20, alleging that it violates the First Amendment, Commerce Clause, Full Faith and Credit Clause, and the Fourteenth Amendment's Due Process and Equal Protection clauses.[12] NetChoice and CCIA also alleged that HB 20 is preempted under the Supremacy Clause because of the Communications Decency Act, and that HB 20 should be found void for vagueness.[13] NetChoice and CCIA moved for preliminary injunction to enjoin state enforcement of sections 2 and 7 of HB 20 against NetChoice, CCIA, and their members.[14] Shortly thereafter, Texas filed a motion to dismiss for lack of standing.[15] NetChoice and CCIA also filed a motion to strike an expert report attached to the State's opposition to the motion for a preliminary injunction.[16]

II. ANALYSIS

The court denied the State's motion to dismiss, rejecting the argument that NetChoice and CCIA lacked either associational or organizational standing.[17] The court described that an association may assert the standing of their own members when three elements are met: "(1) its members would otherwise have standing to sue in their own right, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[18] The court addressed each element in turn. In holding that the members of plaintiff organizations otherwise have standing to sue, the court was satisfied that the plaintiffs had alleged sufficient threat of prosecution and economic harms to members operating social media platforms, either of which would support standing.[19] The second element was undisputed by the State, and was therefore not addressed by the court in detail.[20] The court found that it could address the threshold question of whether a social media platform is a common carrier without the individual participation of association members, which fulfilled the third element needed to determine that the

10. *Id.* at *2.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at *3.
16. *Id.*
17. *Id.* at *3, *6, *15.
18. *Id.* at *4 (quoting Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n, 989 F.3d 368, 377 (5th Cir. 2021) (internal quotation marks omitted)).
19. *Id.* at *4-5.
20. *Id.* at *5.

plaintiffs have associational standing.[21] The court also addressed the issue of the plaintiffs' organizational standing on behalf of members.[22] The plaintiffs alleged in their complaint that they have already incurred costs to address compliance with and implications of HB 20, which was found to be sufficient for organizational standing.[23] Accordingly, the defendant's motion to dismiss was denied.[24]

The court granted the plaintiffs' motion for preliminary injunction, enjoining the Texas Attorney General from enforcing sections 2 and 7 of HB 20 until judgement in this case is entered.[25] Success on the motion for preliminary injunction rested on a determination that HB 20 "compels private social media platforms to disseminate third-party content and interferes with their editorial discretion over their platforms."[26] As a preliminary matter, the court addressed whether social media platforms have a First Amendment right to exercise editorial discretion.[27] In citing a number of cases, the court demonstrated that newspapers have the First Amendment right to moderate content, which extends to social media platforms moderating content disseminated on their platforms: "private companies that use editorial judgement to choose whether to publish content—and, if they do publish content, use editorial judgment to choose what they want to publish—cannot be compelled by the government to publish other content."[28] This editorial judgement is applicable to social media platforms because of the variety of content moderation that exists: screening, moderation, and curation of content, both by persons and algorithms employed by social media platforms.[29] The court found that this editorial discretion is explicitly considered in HB 20, which recognizes that social media platforms engage in curation of content, moderation of content and users, and search and ranking of content by algorithms or other procedures.[30]

The court continued to find that HB 20 violates the First Amendment right to exercise editorial discretion by prohibiting content moderation based on "viewpoint."[31] Not only would HB 20 restrict platforms in expressing agreement or disagreement with content, but the threat of lawsuits under section 7 would "chill[] the social media platforms' speech rights."[32] "Burdensome" public disclosures mandated by section 2 would furthermore chill protected speech by platforms and "force elements of civil society to speak when they would otherwise have refrained."[33] Finally, the court held

21. *Id.* at *5.
22. *Id.* at *6.
23. *Id.*
24. *Id.* at *6, *15.
25. *Id.* at *15.
26. *Id.* at *6 (internal quotation marks omitted).
27. *Id.*
28. *Id.* at *7.
29. *Id.* at *7-8.
30. *Id.* at *8.
31. *Id.* at *9.
32. *Id.* at *9-10.
33. *Id.* at *11.

that HB 20 would discriminate based on content and speaker due to the limited exceptions found in section 7.[34] The record demonstrates that a legislative purpose in establishing a fifty million monthly user limit was to specifically target large social media companies viewed as "biased against conservative views," further supporting a conclusion that HB 20 would discriminate based on content.[35]

In addressing other reasons put forth by the plaintiffs to support a preliminary injunction, the court rejected arguments from the plaintiffs that HB 20 is unconstitutionally vague.[36] The court found that HB 20 fails on struct scrutiny and intermediate scrutiny, rejecting defendant's arguments that state interests in free and unobstructed use of public forums and providing individual citizens effective protection against discriminatory practices were sufficiently served by such a broad bill imposing serious consequences for privately owned platforms.[37]

The court dismissed the plaintiffs' motion to strike an expert report as moot, because it was not relied on by the court in reaching a decision on the motion for preliminary injunction or motion to dismiss.[38]

III. CONCLUSION

The District Court for the Western District of Texas denied the state's motion to dismiss and granted the plaintiffs' motion for preliminary injunction.[39] The court then dismissed as moot the plaintiffs' motion to strike without prejudice.[40] The decision has been appealed to the Fifth Circuit Court of Appeals as of December 7, 2021.[41]

34. *Id.*
35. *Id.*
36. *Id.* at *12-13.
37. *Id.* at *13-14.
38. *Id.* at *3.
39. *Id.* at *15.
40. *Id.*
41. *Id.*

AT&T Services, Inc., v. FCC

Courtland D. Ingraham

21 F.4TH 841 (D.C. CIR. 2021)

In *AT&T Services, Inc., v. FCC*, the D.C. Circuit denied the AT&T petition to review the FCC's 2020 Flexible Use Order (Order), which opened the 6 GHz band of spectrum to unlicensed users, and held that the petitioners did not overcome judicial deference to the FCC's conclusion that the Order would protect against a "significant risk of harmful interference."[1] The court dismissed all but one petition challenging the Order, finding that their petitions failed to bring into doubt the Order's thoroughness in preventing harmful interference,[2] and wholly mischaracterized the FCC's goals.[3] The court remanded the petition brought by the National Association of Broadcasters (NAB), and held that the FCC failed to reserve some of the 6GHz band exclusively for mobile licensees, as NAB had requested.[4]

I. BACKGROUND

Under the Communications Act of 1934, the FCC is mandated to encourage a more expansive and efficient use of spectrum.[5] The FCC has historically reserved the 6 GHz band "for licensed users that support a variety of critical services."[6] Many of these devices use spectrum to support critical functions ranging from public safety and transportation to energy, telecommunications, and broadcasting including 911 dispatch, railroad train movements, oil and gas pipelines, electric grid management, long distance telephone service, and connectivity to news vans and broadcast cameras.[7] The Order extended the 6 GHz band to unlicensed indoor low-power devices to meet a near sixfold increase in demand for broadband connectivity spurred by the rise in devices that use Wi-Fi and Bluetooth technology.[8] Further, in an effort to protect licensed users from potential interference, the Order required that routers must: (1) operate at power levels below 5 dbm/Mhz, (2) "use a 'contention-based' protocol," and (3) "remain indoors."[9] The Order also

1. AT&T Servs., Inc., v. FCC, 21 F.4th 841, 843 (D.C. Cir. 2021); Unlicensed Use of the 6 GHz Band: Expanding Flexible Use in Mid-Band Spectrum Between 3.7 and 24 GHz, *Report and Order and Further Notice of Proposed Rulemaking*, 35 FCC Rcd 3852, para. 5 (2020) [hereinafter *Order*].
2. *AT&T*, 21 F.4th at 843.
3. *Id.* at 846.
4. *Id.* at 843 (citing *Order*, *supra* note 1 at para. 7).
5. *Id.* at 844 (citing 47 U.S.C. §303(g)) (outlining the powers and duties of the Commission).
6. *AT&T*, 21 F.4th at 843.
7. *Id.*
8. *Id.* at 845; *see Order*, *supra* note 1, at para. 2.
9. *AT&T*, 21 F.4th at 845.

discouraged the use of outdoor routers to minimize the likelihood of interference with licensees by prohibiting outdoor routers from being made weather-resistant or battery-equipped and by requiring that they have integrated antennas.[10]

II. ANALYSIS

In response to the FCC's Order, several private sector parties filed a joint petition arguing that the Order was arbitrary and capricious and claimed that the FCC understated the harmful interference that may result from giving unlicensed users access to the 6 GHz band.[11] Further, the petitioners claimed that in doing so, the FCC overstepped its authority under both the Communications Act of 1934 and the Administrative Procedure Act (APA).[12] The court consolidated six challenges to the Order into one decision, addressing both jointly- and individually-petitioned causes.[13]

The court rejected most of the petitions and held that they did not meet the threshold to show that the Order was arbitrary and capricious under *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co*.[14] The court emphasized that the FCC was owed "the greatest deference by a reviewing court" and must only exhibit "a modicum of reasoned analysis" in its policymaking for a regulation to be upheld.[15] The court further justified giving the FCC heightened deference because it acted reasonably in areas within its discretion and expertise.[16]

A. Joint Petitions

The court dismissed the joint petitions because they mischaracterized the FCC's goals in claiming that the Order understated the risk of interference that unlicensed users may cause on the 6 GHz band.[17] Further, the court disagreed with the petitioners' claim that the FCC had violated the APA by failing to explain their decision to "not require low-power devices to use an AFC system."[18] The court also accepted the FCC's determination that if harmful interference ever occurred, that the FCC's Enforcement Bureau would investigate, issue enforcement actions if necessary, and if the

10. *Id.*; *Order*, *supra* note 1at para. 107.
11. *AT&T*, 21 F.4th at 846.
12. *Id.* at 843.
13. *Id.* at 841.
14. *Id.* at 845-46, 851, 852, 854 (citing Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)) (holding that in order for a challenger to demonstrate an agency regulation is arbitrary and capricious, they must show the "agency 'relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise'").
15. *Id.* at 846 (citing Mobile Relay Assocs. v. FCC, 457 F.3d 1, 8 (D.C. Cir. 2006)).
16. *Id.* at 851 (citing *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006)).
17. *Id.* at 846.
18. *Id.* at 847.

Enforcement Bureau were unequipped to handle an issue that victims may then petition the FCC for relief.[19]

1. CableLabs and AT&T Studies

The court held the FCC acted within its authority under the APA because it adequately addressed the risk of harmful interference by substantiating the Order with intensive data analysis.[20] The court generally found that the FCC responded adequately to technical challenges brought forward by the petitioners because the Order was heavily justified by a study conducted by Cable Television Laboratories (CableLabs) that evaluated several scenarios where harmful interference could occur.[21] The CableLabs study simulated how towers in New York City could hypothetically be impacted by introducing 1.2 billion unlicensed routers to the 6 GHz band of spectrum and it found no scenarios resulting in harmful interference.[22] The D.C. Circuit rejected the petitioners' assertion that the FCC should have publicly released the CableLabs datasets owing to the court's longtime practice of giving "considerable deference" to the FCC's expertise in "highly technical questions."[23] To dispute the accuracy of the CableLabs report, AT&T submitted an independently prepared study during the Notice and Comment period which simulated six worst-case scenarios that all showed the possibility of harmful interference from clutter loss.[24] The court found that the AT&T study did not raise sufficient doubt concerning the FCC's judgement and expertise that would merit the court denying the FCC deference.[25] The FCC adequately addressed AT&T's concerns because they incorporated the AT&T study into the Order by modifying the study's methodology to fit more realistic circumstances and moved forward with the Order when they found only one in six scenarios resulting in harmful interference.[26]

2. Harmful Interference Concerns

Petitioners also challenged the Order's requirements that routers must: (1) operate below 5 dbm/Mhz, (2) "use a 'contention-based' protocol," and (3) "remain indoors."[27] Regarding the power limit requirement, the court decided that the FCC's conclusion was well-founded.[28] While petitioners

19. *Id.* at 851; *see Order*, *supra* note 1, at para. 149.
20. *AT&T*, 21 F.4th at 846-48, 851.
21. *Id.* at 847; *see Order*, *supra* note 1, at paras. 117-18.
22. *AT&T*, 21 F.4th at 847.
23. *Id.* at 848 (citing Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 233 (D.C. Cir. 2008)).
24. *Id.* at 849. The court defined "clutter loss" as "signal attenuation caused by terrain, trees, and other structures." *Id.*
25. *Id.*
26. *Id.*; *see Order*, *supra* note 1, at paras. 123-32.
27. *AT&T*, 21 F.4th at 845.
28. *Id.* at 850-51.

claimed that the Order's "contention-based" protocol offered licensees no protection against interference, the court rejected this assertion as a mischaracterization because the FCC never claimed that towers would be fully protected by such requirements.[29] The court also suggested that the FCC fully acknowledged petitioner's concerns about indoor devices causing interference when brought outside, and that by making outdoor router use impractical, the FCC promoted their goal to minimize the risk of harmful interference.[30] Lastly, the court dismissed petitioner's claim that the Order failed to offer a protocol for detecting and turning off harmfully interfering devices by again referring to the FCC's Enforcement Bureau as the proper venue for relief, should such a situation arise.[31]

B. Individual Petitions

The D.C. Circuit also heard and addressed individual petitions that challenged the Order brought by APCO International (APCO), electric utilities entities, and NAB.[32]

APCO's concerns, delivered on behalf of public safety operators, (1) claimed the Order did not acknowledge potential interference with 911 operators and AFC systems, (2) challenged the Order's regulation of unlicensed standard-power devices, and (3) characterized the FCC's enforcement authority as inadequate to address their concerns.[33] The court dismissed these challenges, noting that the FCC adequately considered APCO's concerns about harmful interference and that APCO failed to identify where the Order fell short in doing so.[34] The Order's requirement that unlicensed standard-power devices must consult a centralized AFC system before transmitting was found to be a sufficient demonstration of the FCC's predictive judgement to prevent harmful interference.[35] Lastly, the D.C. Circuit found APCO's concerns were inadequate for the court to question the FCC's Enforcement Bureau's competence to investigate interference issues, should they arise.[36]

Electric utility companies brought forward concerns that the FCC unreasonably dismissed Southern and Critical Infrastructure Industry studies submitted by Southern Company Services to contrast the CableLabs study.[37] Although the D.C. Circuit found that the FCC mischaracterized how the Southern and Critical Infrastructure Industry studies treated clutter loss, they ultimately held the FCC fulfilled its duty to respond to their comments in the Order.[38]

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29. *Id.* at 850.
30. *Id.*; *see Order*, *supra* note 1, at paras. 105-08.
31. *AT&T*, 21 F.4th at 851 (citing EarthLink, Inc. v. FCC, 462 F.3d 1, 12 (D.C. Cir. 2006)); *see Order*, *supra* note 1, at para. 149.
32. *AT&T*, 21 F.4th at 845.
33. *Id.* at 851-52.
34. *Id.* (citing Mozilla Corp. v. FCC, 940 F.3d 1, 59 (D.C. Cir. 2019).
35. *Id.* at 852.
36. *Id.*
37. *Id.* at 852-53.
38. *Id.* at 853 (citing *Order*, *supra* note 1, at para. 138 n.364).

Lastly, the court addressed NAB's petition to vacate the Order because the FCC failed to address its concerns that the Order's restrictions on indoor low-power routers offered insufficient protection to mobile licensees.[39] The court ruled in favor of this petition only with regard to complaints that NAB expressed about interference in the 2.4 GHz band, and it remanded the issue to the FCC for a response.[40] The court further held this was a remand without vacatur, both relying on factors established in *Allied-Signal, Inc. v. Nuclear Regulatory Commission* and under the rationale that vacating the Order would be much more disruptive than leaving it in place.[41]

III. CONCLUSION

Ultimately, the D.C. Circuit upheld the Order and dismissed most of the petitioners' challenges because they failed to meet *State Farm*'s high standards for holding an agency regulation to be arbitrary and capricious.[42] Only NAB's comments about interference in the 2.4 GHz were remanded to the FCC for further consideration.[43]

39. *Id.*

40. *Id.* at 853-54.

41. *Id.* (citing Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n, 988 F.2d 146, 150-51 (D.C. Cir. 1993)) (holding that "the decision whether to vacate depends on the seriousness of the order's deficiencies and the disruptive consequences of an interim change that may itself be changed." *Allied-Signal*, 988 F.2d 150-51).

42. *AT&T*, 21 F.4th at 854 (citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

43. *Id.*

Colon v. Twitter, Inc.

Rebecca Roberts

14 F.4TH 1213 (11TH CIR. 2021)

In *Colon v. Twitter, Inc.*,[1] the United States Court of Appeals for the Eleventh Circuit affirmed the district court's decision to dismiss the plaintiffs' claims for aiding and abetting under the Anti-Terrorism Act (ATA), and affirmed its decision to dismiss the plaintiffs' claims for negligent infliction of emotional distress and wrongful death under Florida state law.[2] The court determined that the plaintiffs were unable to show that the Pulse massacre was an act of "international terrorism" associated with ISIS as defined by the Anti-Terrorism Act.[3] The court also held that the plaintiffs failed to demonstrate "proximate cause," as was required by both state law claims.[4]

I. BACKGROUND

In 2004, ISIS was designated as a foreign terrorist organization (FTO), in accordance with 8 U.S.C. § 1189.[5] Its stated goal is to use social media sites —like Twitter, Facebook, and Google (YouTube)—to "assist in carrying out [its] terrorist attacks throughout the world."[6] These social media postings often include violent videos, propaganda, messages, and solicitations for donations.[7]

Omar Mateen was a security guard from Fort Pierce, Florida.[8] On June 12, 2016, Mr. Mateen armed himself with a semi-automatic pistol and rifle, and opened fire at Pulse, an LGBT nightclub in Orlando, Florida—killing forty-nine people and injuring fifty-three others.[9] During the attack, he made a 9-1-1 call where he pledged allegiance to ISIS and declared himself an "Islamic soldier."[10] Mr. Mateen was ultimately killed by police during a standoff.[11] After the Pulse shooting, ISIS claimed responsibility for it, issuing a statement identifying Mr. Mateen as an "Islamic State fighter" and a "soldier of the Caliphate."[12] Following a thorough investigation, the FBI concluded

1. *Colon v. Twitter, Inc.*, 14 F.4th 1213 (11th Cir. 2021).
2. *Id.* at 1228.
3. *Id.* at 1216.
4. *Id.*
5. *Id.* at 1218.
6. *Id.*
7. *Id.* at 1218-19.
8. *Id.* at 1219.
9. *Id.* at 1216.
10. *Id.* at 1219.
11. *Id.*
12. *Id.*

that, prior to his attack at Pulse, Mr. Mateen had been self-radicalized through ISIS's postings on Twitter, Facebook, and YouTube.[13]

Plaintiffs are a blend of some of the injured parties and the estates of some of the victims from the Pulse nightclub shooting.[14] Their three claims against Facebook, Twitter, and Google (YouTube) include an allegation that the social media companies aided and abetted Mr. Mateen in violation of the ATA, as well as allegations of negligent infliction of emotional distress and wrongful death under Florida state law.[15] This lawsuit was filed after an unsuccessful lawsuit in Michigan by the estates of other victims from the same shooting and against the same companies.[16] However, the present Florida lawsuit was also unsuccessful, as the ATA claim and the Florida state-law claims were dismissed with prejudice by the district court under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[17] The plaintiffs only appealed the dismissal of those three claims.[18]

II. ANALYSIS

The Eleventh Circuit performed a plenary review of the district court's dismissal order of: (1) the ATA aiding and abetting claim, (2) the Florida state law claim of negligent infliction of emotional distress, and (3) the Florida state law claim of wrongful death.[19]

Turning first to the ATA claim, the plaintiffs must first show that an act of "international terrorism" was "committed, planned, or authorized" by a foreign terrorist organization.[20] After showing that, a further analysis would be necessary to identify whether aiding and abetting liability under the ATA could be asserted.[21] However, the court found that the Pulse shooting was *not* an instance of "international terrorism," as defined by the ATA, nor was it "committed, planned, or authorized" by ISIS.[22] Therefore, a further analysis of aiding and abetting liability was not performed.[23]

The court acknowledged that the definition of international terrorism varies depending on context and situation.[24] However, because the ATA clearly defines the term "international terrorism," such an explicit definition should be followed closely.[25] The ATA definition of "international terrorism"

13. *Id.* at 1219.
14. *Id.* at 1216.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 1217.
19. *Id.*
20. *Id.* at 1219.
21. *Id.*
22. *Id.* at 1222.
23. *Id.* at 1218.
24. *Id.* at 1217.
25. *Id.* at 1218.

has three requirements that must be satisfied.[26] Focusing on the third element, requiring that the act in question either "occur primarily outside the territorial jurisdiction of the United States" or "transcend national boundaries," the court found that the Pulse shooting did neither, and, thus, did not meet the definitional requirements of "international terrorism."[27]

First, the shooting occurred in Orlando, Florida, which is within the territorial jurisdiction of the United States.[28] However, the plaintiffs alleged that the Pulse shooting was an activity that transcended national boundaries "in terms of the means by which [it was] accomplished, the persons [it] appear[ed] to be intended to intimidate or coerce, or the locale in which the[] perpetrators operate[d] or s[ought] asylum," as defined in the ATA.[29] As Mr. Mateen was radicalized via the Internet while living in Florida, and then committed mass murder while also in Florida, the means by which the Pulse shooting was accomplished did not transcend national boundaries.[30] While the plaintiffs argued that it was ISIS's social media use from outside of the United States that transcended national boundaries, it was Mr. Mateen's conduct, and not that of the Internet, which was the means by which he carried out his deadly acts.[31] Likewise, the court found that the "persons . . . intended to intimidate or coerce" did not transcend national boundaries, as an attack in the United States justifiably terrorized its citizens and residents.[32] And finally, as discussed previously, Mr. Mateen (the lone perpetrator) operated and acted within Florida and as such, did not "transcend national boundaries" since Florida is located within the national boundaries of the United States.[33]

While ISIS *did* take credit for the shooting after the fact, the court was not persuaded that this subsequent act transcended national boundaries "in terms of the means by which they [were] accomplished."[34] Nor did the court find that ISIS "committed, planned, or authorized" the shooting, as required by the ATA.[35] The court agreed with the Sixth Circuit's finding, during the previous Michigan lawsuit, that Mr. Mateen's self-radicalization did not indicate that ISIS "committed, planned, or authorized" the Pulse shooting, only that it approved of Mr. Mateen's actions after the shooting had already occurred.[36]

As for the two Florida state law claims, the court agreed with the district court's finding that the plaintiffs had not shown proximate cause to raise

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26. *Id.* at 1217. The first two elements of international terrorism require activities that "…(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State…" and "…(B) appear intended … (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping…" *Id.*
27. *Id.* at 1220.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 1220-21.
32. *Id.* at 1221.
33. *Id.* at 1220.
34. *Id.*
35. *Id.* at 1222.
36. *Id.*

either one.[37] The plaintiffs had mistakenly relied on establishing proximate cause under the ATA, failing to address how Florida state law should address instances of third-party proximate cause, as found in this case.[38] The court performed a cursory analysis, identifying the lack of precedence and clarity in instances of third-party proximate cause, especially within Florida state law.[39] However, the court chose not to perform a more thorough search into relevant case law without input from the parties involved, and held that by failing to cite critical and applicable case law, the plaintiffs failed to show proximate cause in this case.[40]

III. CONCLUSION

For the foregoing reasons, the court affirmed the district court's decision to dismiss plaintiffs' claims of aiding and abetting in violation of the ATA and negligent infliction of emotional distress and wrongful death claims under Florida state law.[41]

37. *Id.* at 1227.
38. *Id.* at 1224.
39. *Id.* at 1224-27.
40. *Id.* at 1227.
41. *Id.* at 1228.

Mahanoy Area School District v. B.L.

Julia Dacy

141 S. CT. 2038 (2021)

I. INTRODUCTION

Mahanoy Area School District v. B.L. deals with the First Amendment right to free speech as it applies to public school students.[1] This issue was most notably addressed in the Supreme Court case, *Tinker v. Des Moines* in which the Court found that schools have an interest in regulating student speech that "materially disrupts classwork."[2] In *Mahanoy*, the Supreme Court granted certiorari to decide whether the school district's decision to punish a student for comments posted on Snapchat outside of school hours and off of school grounds violated her First Amendment right to free speech.[3]

II. BACKGROUND

B.L.—then a minor—was a freshman student at Mahanoy Area High School.[4] At the end of the school year, B.L. tried out for the school's cheerleading squad and a private softball team.[5] She failed to make the varsity squad but was instead offered a spot on the junior varsity team.[6] Additionally, B.L. was not given the softball position for which she had hoped.[7] That weekend, B.L. expressed her frustration with the situation.[8] While visiting a local convenience store, B.L. posted two Snapchat images criticizing the coaches' decisions.[9] The first image showed B.L. and her friend raising their middle fingers, and the caption read "F**k school f**k softball f**k cheer f**k everything."[10] The second image's caption read, "[l]ove how me and [another student] get told we need a year of [junior varsity] before we make varsity but tha[t] doesn't matter to anyone else?"[11]

The images were posted to B.L.'s Snapchat story which was viewable by about 250 people for twenty-four hours.[12] During that time, at least one other student at the school took photos of B.L.'s posts and shared them with

1. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038 (2021).
2. *Id.* at 2044 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).
3. Mahanoy, 141 S. Ct. at 2044.
4. *See id.* at 2043.
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*

the cheerleading squad.[13] One of the students showed the images to her mother who was a cheerleading coach at the school.[14] The situation garnered some attention and two coaches reported having to take several minutes during an algebra class they taught to address the issue.[15] Eventually, the coaches consulted school administrators who determined that "the posts used profanity in connection with a school-sponsored activity" which warranted a suspension from the cheerleading squad.[16]

At issue in this case is the applicability of the *Tinker* standard to off-campus speech.[17] In *Tinker*, the Supreme Court held that student speech that "materially disrupts" the school day is not fully protected by the constitutional right to free speech.[18] Here, B.L.'s speech occurred off-campus and on a weekend when school was not in session.[19]

B.L. challenged the suspension in Federal District Court, claiming that the school had no constitutional authority to punish her for off-campus speech.[20] The district court agreed and granted a temporary restraining order and a preliminary injunction ordering the school to allow B.L. to rejoin the cheerleading team.[21] The district court found that the Snapchats had not caused a substantial disruption to the school day that would have justified the district's actions under *Tinker*.[22] The Third Circuit affirmed this decision but concluded that the *Tinker* standard did not apply here to B.L.'s off-campus speech.[23]

III. ANALYSIS

The Supreme Court granted certiorari to address *Tinker's* applicability to off-campus speech.[24] The Court rejected the Third Circuit's argument that schools have no regulatory interest in or authority to punish off-campus speech—acknowledging instead that schools have a regulatory interest in certain off-campus speech such as that which constitutes bullying or is expressed using school computers.[25] The Court identified three factors that should be considered when evaluating a school's regulation of student speech.[26] The first factor asks whether the school is standing *in loco parentis*, meaning in place of the student's parents.[27] The second factor considers whether regulating the student's off-campus speech would amount to regulation of "all the speech a student utters during a full twenty-four-hour

13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.*
17. *See id.* at 2044.
18. *See id.* at 2040.
19. *See id. at* 2043.
20. *See id.* at 2043-44.
21. *See id.* at 2044
22. *See id.* at 2044.
23. *See id.* at 2044.
24. *See id.* at 2044.
25. *See id.* at 2045.
26. *See id.* at 2046.
27. *See id.*

day," thus completely preventing a student from ever engaging in that type of speech.[28] This means that courts must be hesitant to permit regulations of off-campus speech—particularly when the speech is political or religious in nature—that could entirely restrict a student's ability to engage in that form of expression.[29] The third factor emphasizes that public schools are meant to be "nurseries of democracy" and have an interest in fostering even unpopular speech.[30]

In applying these factors to this case, the Court found that Mahanoy Area High School did not stand *in loco parentis* when B.L. posted the Snapchat messages from an off-campus location on a weekend.[31] As such, while the school claimed an interest in promoting good manners, this cannot overcome B.L.'s right to freedom of expression since the administration had no authority over her behavior at the time.[32] Additionally, the Supreme Court, agreeing with the district court, decided that the alleged class distraction lasted only a few minutes and did not cause a significant enough decline in school morale to constitute a substantial disruption.[33] This does not meet *Tinker's* high standard for regulation of student speech, which requires that such a prohibition be based on more than a fear of discomfort with a particular view.[34] Finally, the Court warned against dismissing the seriousness of this case simply because of the frivolous nature of the facts, noting that, "sometimes it is necessary to protect the superfluous in order to preserve the necessary."[35]

IV. CONCLUSION

In sum, the Supreme Court affirmed the judgment of the Third Circuit, yet it disagreed with the lower court's reasoning that the *Tinker* standard did not apply to this off-campus speech.[36] Instead, the Supreme Court considered several factors—including whether the school stood *in loco* parentis, if the school would be regulating all of a student's speech in a day, and whether the school has an interest in protecting unpopular opinions—to determine if *Tinker* applies in off-campus settings.[37] While the Court declined to state exact principles for regulating off-campus speech, it acknowledged that the leeway given to public schools to punish student speech is "diminished" in these situations.[38] Ultimately, the Court decided that Mahanoy Area School District violated B.L.'s First Amendment rights.[39]

28. *Id.* at 2046.
29. *See id.*
30. *See id.*
31. *See id.* at 2047.
32. *See id.*
33. *See id.* at 2047-48.
34. *See id.* at 2048.
35. *Id.*
36. *See id.*
37. *See id.* at 2046.
38. *See id.*
39. *Id.* at 2048.

V. CONCURRENCE (J. ALITO)

Justice Samuel Alito authored a concurring opinion agreeing with the majority's decision that the *Tinker* standard can apply to some instances of off-campus student speech.[40] However, he placed greater emphasis on the role of parents in making choices for their children and the distinction between private and public schools.[41] Alito noted that, while parents implicitly delegate *some* control over their child to a public school, they do not give the school complete authority to regulate what a student says at all times.[42]

VI. DISSENT (J. THOMAS)

Justice Clarence Thomas argued that courts have historically given schools leeway to discipline students for a variety of off-campus speech.[43] Thomas explained that the Court failed to address its reasons for departing from this rule, and, as a result, he dissented.[44]

40. *Id.* (Alito J., concurring).
41. *See id.* at 2050-51.
42. *See id.* at 2052.
43. *See id.* at 2059 (Thomas, J., dissenting).
44. *See id.* at 2061.

ACA Connects v. Bonta

Alexa Pappas

24 F.4TH 1233 (9TH CIR. 2022)

In *ACA Connects v. Bonta*, the Ninth Circuit affirmed a California district court's refusal to enjoin the enforcement of the California Internet Consumer Protection and Net Neutrality Act of 2018 (SB-822), which created net neutrality rules for broadband Internet services provided to customers in California.[1] California passed SB-822 in the wake of the FCC's reclassification of broadband services from Title II's highly regulated "telecommunications services" to Title I's much less regulated "information services" (Reclassification Order).[2] Appellant service providers claimed that this reclassification preempted California from enacting SB-822.[3] The Ninth Circuit found that the service providers were unlikely to prevail on their argument that the FCC's reclassification preempts states from enacting their own net neutrality protections since the FCC no longer has the authority to regulate in that field.[4]

I. BACKGROUND

In 2018, the FCC ordered a decrease in federal regulation of broadband services by changing the classification of "broadband [I]nternet access services" from "telecommunications services" in Title II of the Communications Act, to "information services" in Title I.[5] Under Title II, broadband services were subject to a "multitude of statutory restrictions and requirements."[6] However, after the decision to reclassify under Title I, the FCC may only "impose regulations ancillary or necessary to the effective performance of the FCC's specific statutory responsibilities."[7] Thus, this reclassification abandoned extensive federal regulations that safeguarded equal access to the Internet, in favor of a "light-touch information service framework" in order to encourage innovation and investment.[8]

Within the FCC's Reclassification Order was a statement of preemption, which asserted federal preemption over any state or local laws "inconsistent with the federal deregulatory approach" (Preemption

1. ACA Connects v. Bonta, 24 F.4th 1233, 1248 (9th Cir. 2022); 2018 Cal. Stat. ch. 976.
2. *Bonta*, 24 F.4th at 1236; *see* Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order*, 33 FCC Rcd 311 (2018) [hereinafter *Reclassification Order*].
3. *Bonta*, 24 F.4th at 1237.
4. *Id.* at 1248.
5. *Id.* at 1236; *Reclassification Order*, *supra* note 2, at para. 2.
6. *Bonta*, 24 F.4th at 1238 (citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 975-76 (2005)).
7. *Id.*
8. *See id.* at 1236; *Reclassification Order*, *supra* note 2, at para. 2.

Directive).[9] Through this Preemption Directive, the FCC sought to ensure that costs associated with state and local compliance requirements would not keep broadband services from innovating and investing as intended with the FCC's "free market" approach.[10]

Considering this federal policy change and California's interest in preserving net neutrality for its citizens, California joined a group of plaintiffs challenging both the Reclassification Order and Preemptive Directive in *Mozilla Corp. v. FCC*, and, shortly thereafter, passed SB-822, which provided net neutrality regulations on broadband services for California customers.[11] The instant case arose when, while the *Mozilla* decision was pending, a group of industry trade associations representing communications service providers (service providers) petitioned for a preliminary injunction in the District Court for the Eastern District of California in order to prevent SB-822's enforcement.[12] With the consent of the parties, this action was stayed in anticipation of the *Mozilla* decision.[13]

In 2019, the D.C. Circuit in *Mozilla* ruled to uphold the Reclassification Order but vacate its Preemptive Directive.[14] In striking down the Preemptive Directive, *Mozilla* relied on the basic premise that a federal agency must have Congressional regulatory authority to be able to permissibly preempt state and local regulations.[15] Thus, the *Mozilla* court held that because the FCC terminated its ability to enact net neutrality regulations on broadband services through the reclassification, it simultaneously terminated its ability to preempt such state laws.[16]

After hearing both parties' takes on *Mozilla*'s effect on the instant case, the district court, in a ruling from the bench, denied the service providers' request for a preliminary injunction using the *Mozilla* rationale.[17] *Bonta* was the service providers' appeal to the Ninth Circuit.[18] Throughout the *Bonta* opinion, the Ninth Circuit stressed that *Mozilla*'s preemption rationale formed the basis of its decisions, especially since both parties agreed to stay the case until the *Mozilla* decision, and neither party challenged the validity of *Mozilla*'s holding.[19]

II. ANALYSIS

Appellant service providers proffered three arguments in defense of preemption.[20] First, they claimed that SB-822 is preempted because it conflicts with the purpose underlying the Reclassification Order.[21] Next, they

9. *Bonta*, 24 F.4th at 1239 (quoting *Reclassification Order*, *supra* note 2 at para. 194).
10. *Id.* at 1239.
11. *Id.* at 1240.
12. *Id.*
13. *Id.*
14. *Id.* at 1239 (citing Mozilla Corp. v. FCC, 940 F.3d 1, 74 (D.C. Cir. 2019)).
15. *Id.* (citing *Mozilla*, 940 F.3d at 74-75).
16. *Id.* (citing *Mozilla*, 940 F.3d at 74-76).
17. *Id.* at 1240.
18. *Id.*
19. *Id.* at 1241; *see also id.* at 1236, 1237, 1239-42, 1244-46.
20. *See Bonta*, 24 F.4th at 1237.
21. *Id.*

argued that SB-822 conflicts with the purpose underlying the Communications Act itself: specifically, section 153(51) and section 332(c)(2).[22] Appellants grounded these first two arguments in conflict preemption.[23] Third, they claimed that SB-822 impermissibly touches on the FCC-occupied field of interstate communications services.[24] This final argument was based in the theory of field preemption.[25]

A. Conflict Preemption

1. Reclassification Order's Purpose

First, the service providers claimed that SB-822 is preempted because it conflicts with the purpose underlying the Reclassification Order.[26] This argument implied that the elimination of federal net neutrality regulation is what preempts state net neutrality regulation; that is, "the state regulation conflicts with the absence of federal regulation."[27] The Ninth Circuit found this argument to be flawed, however, because "an absence of federal regulation may preempt state law only if the federal agency has the statutory authority to regulate in the first place."[28]

The service providers urged the Ninth Circuit to rely on *Ray v. Atlantic Richfield Co.*, in which the Secretary of Transportation had broad Congressional authority to regulate the size and speed of vessels in Puget Sound.[29] When the Secretary allowed large tankers, the Supreme Court found that decision to have preemptive power since the Secretary had the authority to ban large tankers, but, simply chose not to.[30] The Ninth Circuit distinguished *Ray* from the present case, because in the present case, the FCC does not possess the regulatory authority held by the Secretary in *Ray* since the FCC terminated its regulatory authority over broadband services by issuing the Reclassification Order.[31] The service providers urged that the reclassification was merely "an exercise of discretion under the statute as to the appropriate classification of communications services," and not a termination of regulatory authority.[32] However, the Ninth Circuit pointed to language in the Reclassification Order that suggested the FCC intended for the reclassification to strip it of its regulatory authority: "[A]fter reclassification[, there is] no 'source[] of statutory authority that individually or in the aggregate' supports net neutrality conduct rules."[33]

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22. *Id.* (citing 47 U.S.C. §§ 153(51), 332(c)(2)).
23. *Id.*
24. *Id.* at 1246-47.
25. *Id.* at 1237.
26. *Id.*
27. *Id.* at 1241.
28. *Id.* (citing Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986); citing Ray v. Atl. Richfield Co., 435 U.S. 151, 178 (1978)).
29. *Id.* (citing *Ray*, 435 U.S. at 174).
30. *Id.* (citing *Ray*, 435 U.S. at 178).
31. *Id.*
32. *Id.* at 1242
33. *Id.* (quoting *Reclassification Order*, *supra* note 2, at para. 267).

The service providers additionally claimed that because *Mozilla* upheld the FCC's policy judgment underpinning its reclassification decision, the FCC's policy in favor of less regulation was sufficient for conflict preemption.[34] However, the Supreme Court in *Louisiana Pub. Serv. Comm'n v. F.C.C.* expressly rejected this policy form of conflict preemption theory if the agency already has no regulatory authority; thus, the Ninth Circuit rejected this argument here.[35] The court also rejected service providers' "novel" reliance on *Chevron U.S.A., Inc. v. N.R.D.C.* to argue that because Congress delegates the power to interpret statutory ambiguities to agencies, the FCC's deregulation policy preference preempts the states.[36] Here, the court adopted *Mozilla*'s sentiment: "Nothing in *Chevron* goes that far."[37]

Thus, applying the *Louisiana* principle that "[w]ithout the power to act, a federal agency can not preempt," the Ninth Circuit found that because the FCC forfeited its power to impose net neutrality regulations on broadband services, the FCC could not preempt SB-822.[38]

2. Communications Act's Purpose

The service providers' second argument in defense of preemption was that SB-822 conflicts with the purpose underlying the Communications Act itself; specifically, section 153(51) and section 332(c)(2).[39] The service providers claimed that while these provisions clearly limit the FCC's regulatory authority, they also limit the states' authority to impose regulations on information services and private mobile services that could be imposed only on common carriers.[40] The Ninth Circuit dismissed this claim for three reasons.[41] First, because each provision makes clear that the extent to which they are relevant pertains only to "this chapter," they define and limit only the FCC's regulatory authority without touching the authority of the states.[42] Second, because of the other numerous express preemption provisions throughout the Communications Act, the court reasoned that Congress knows how to preempt state authority when it wants to and it did not implicitly do so in sections 153(51) or 332(c)(2).[43] Finally, the Ninth Circuit pointed to the Telecommunications Act's Savings Provision which makes clear that unless

34. *Id.*

35. *Id.* (citing Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374-75 (1986)).

36. *Id.* at 1243 (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842-44 (1984)).

37. *Id.* (quoting Mozilla Corp. v. FCC, 940 F.3d 1, 84 (D.C. Cir. 2019)).

38. *Id.* at 1242; *see also id.* at 1244 (discussing how *Mozilla*'s rationale is consistent with *Ray*, *Louisiana*, and the court's instant reasoning).

39. *Id.* at 1245 (citing 47 U.S.C. §§ 153(51), 332(c)(2)). Section 153(51) defines "telecommunications carrier" and states that they "shall be treated as a common carrier *under this chapter* only to the extent that it is engaged in providing telecommunications services." *Id.* (quoting 47 U.S.C. § 153(51) (emphasis in original)). Section 332 states that "[a] person engaged in the provision of a service that is a private mobile service shall not, insofar as that person is so engaged, be treated as a common carrier for any purpose *under this chapter*." *Id.* (quoting 47 U.S.C. § 332(c)(2) (emphasis in original)).

40. *Id.*

41. *Id.* at 1237.

42. *Id.* at 1245.

43. *Id.* at 1246.

"expressly" stated, the Act does not "modify, impair, or supersede Federal, State, or local law."[44] Therefore, because neither section 153(51) nor section 332(c)(2) expressly say as much, the court found them to have no effect on the states' regulatory power.[45]

B. Field Preemption

The service providers' third argument in defense of preemption was that SB-822 impermissibly touches on the FCC's occupied field of interstate communications services.[46] Here, the court noted that the *Louisiana* Court found it impossible to exclude the states from impeding on the FCC's interstate regulatory field because of "the realities of technology and economics."[47] *Louisiana* held that rather than neatly dividing interstate and intrastate regulatory power between the FCC and the states, respectively, the Communications Act establishes "dual state and federal regulatory authority" for interstate communications services.[48] To hold otherwise would "misrepresent[] the statutory scheme."[49]

To further its finding that the Communications Act left room for state regulation of intrastate communications, the Ninth Circuit pointed to the fact that Maine, Nevada, and Minnesota require broadband providers to obtain consumers' permission before sharing their data.[50] Even within the Reclassification Order itself, the FCC recognized that in the field of interstate broadband services, the states have a role in policing fraud, taxation, and general commercial dealings, as well as enforcing fair business practices.[51] In addition, if Congress had intended for the Communications Act to preempt all state regulation of interstate communications, Congress would not have added an express preemption provision in section 253.[52] Thus, the Ninth Circuit agreed with the district court that the Communications Act likely does not preempt SB-822.[53]

C. Concurrence

Judge Wallace wrote a separate concurrence emphasizing the "little guidance" the Ninth Circuit's opinion provides since it is merely a review of

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44. *Id.* (quoting Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(c)(1), 101 Stat. 56, 143 (1996), *reprinted in* 47 U.S.C. § 152 note).
45. *Id.*
46. *Id.*
47. *Id.* at 1247 (quoting Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 360 (1986)).
48. *Id.* (citing *Louisiana*, 476 U.S. at 360).
49. *Id.* at 1248 (quoting *Louisiana*, 476 U.S. at 373-74).
50. *Id.* (citing Me. Rev. Stat. Ann. § 9301 (2019); Minn. Stat. § 325M.01 (2021) et seq.; Nev. Rev. Stat. § 205.498 (2013)).
51. *Id.* at 32-33 (citing *Reclassification Order*, *supra* note 2, at para. 196).
52. *Id.* at 1248 (quoting 47 U.S.C. § 253(a) ("No State or local statute or regulation . . . may prohibit . . . the ability of any entity to provide any interstate or intrastate telecommunications service.") § 253(a).).
53. *Bonta*, 24 F.4th at 1248.

an order denying a preliminary injunction, not an adjudication on the merits.[54] Judge Wallace cautioned the parties not to "read too much into" the court's holding, as it merely found that the FCC is not *likely* to prevail on the merits and came to such a finding without the "fully developed factual record" that a full trial would elicit.[55]

III. CONCLUSION

The Ninth Circuit affirmed the District Court for the District of Eastern California's order denying a preliminary injunction that would bar enforcement of SB-822.[56]

54. *Id.* at 1248-49 (Wallace, J., concurring) (quoting Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 753 (9th Cir. 1982)).

55. *Id.* (Wallace, J., concurring) (quoting Gregorio T. v. Wilson, 59 F.3d 1002, 1005 (9th Cir. 1995) and *Sports Form*, 686 F.2d at 753).

56. *Id.* at 1248.