



Net Neutrality: What to Expect From California's Net Neutrality Bill

Jesse King
DePaul University College of Law

Follow this and additional works at: <https://via.library.depaul.edu/jatip>



Part of the [Computer Law Commons](#), [Intellectual Property Law Commons](#), [Internet Law Commons](#), and the [Science and Technology Law Commons](#)

Recommended Citation

Jesse King, *Net Neutrality: What to Expect From California's Net Neutrality Bill*, 29 DePaul J. Art, Tech. & Intell. Prop. L. 37 (2019)

Available at: <https://via.library.depaul.edu/jatip/vol29/iss2/2>

This Legislative Updates is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Art, Technology & Intellectual Property Law by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

NET NEUTRALITY: WHAT TO EXPECT FROM CALIFORNIA'S NET NEUTRALITY BILL

I. INTRODUCTION

Imagine three scenarios. First, imagine you are an average internet user. You want to be able to visit any site you wish, but now you have noticed that your less popular sites take a much longer time to load or, at worst, never load. However, you also enjoy that your new deal with your Internet Service Provider (hereinafter ISP) provides you with an unlimited data cap, allowing you to use the internet more freely without worrying about added fees for your normal usage. You, in frustration with the slow loading, decide to call your ISP, and discover that these websites that are loading slowly are not preferred members of their network. If you wanted to spend more money, they may be able to increase your access, or maybe they couldn't help you personally and suggest you tell the websites directly to contact the ISP to arrange a deal. Either way, this seems frustrating because websites in the preferred network load quickly and seemingly have no discernable difference to you. However, you can likely sufficiently use the more popular sites and, besides occasionally being annoyed at a random site taking longer to load, you would likely be indifferent to Net Neutrality.

Second, imagine you are an ISP. You want to tailor your services to meet the demands of the most users possible at the smallest cost to yourself. You do a complex and complete survey of your users and determine what websites they use most often, and which websites are considered "very important." You may reach out to the host of such websites and inform them that they are in a preferred network, or you may simply add them without notification. You inform customers that you will be tailoring the way you provide the internet to ensure best cost to benefit. You

explain that if customers must have a website outside of the preferred network, they may purchase an addition to their plans, or convince the host of the website to reach out to you and you can arrange a way for them to be added to the network. This will easily satisfy the majority of users on your network and you will be able to spend the extra money that would have went to ensuring the quality to all sites on new infrastructure, further improving the quality of service being provided to your customer. You will likely not want Net Neutrality, as it would hurt this new business model.

Third, imagine you are a new company that wants to primarily operate on the internet. You find that many of your users are complaining that your website either takes too long to load or never loads at all. You talk to your ISP and are told that you could improve access to your website by paying an increased fee to be admitted to the preferred network, or you may be able to partner with an established internet company to accomplish the same aim. Neither of these options seem viable at this moment in time. This seems like some form of discrimination to you based on the fact that you cannot pay a fee that did not exist two years ago. You will likely have to close down the company as a result of this new policy by the ISP. You would want Net Neutrality to be reinstated, as otherwise your new business may fail.

California Senate Bill 822 (hereinafter “CA S.B. 822”) was drafted in March 2018 in response to the FCC attempting (and ultimately succeeding) to pass Restoring Internet Freedom Order, as a state law action to protect net neutrality.¹ Ultimately, CA S.B. 822 passed and has been chaptered for the state of California.² In this legislative update, I will explain why I believe that other states should enact similar bills to CA S.B. 822. Additionally, I will

¹ 2018 CA S.B. 822 (CA 2018); Restoring Internet Freedom, 83 FR 7852-01 (2018).

² 2018 CA S.B. 822.

explain what actions the FCC may attempt to bring to challenge such state laws. I will begin by explaining the history of the FCC's regulation surrounding net neutrality, and the approach that California is attempting to take.³ Then, I will present how the FCC is attempting to challenge this state law.⁴ Finally, I will explain the likely outcomes from these challenges based on prior case law, and also explain why it is beneficial for states to enact this type of legislation despite FCC challenges.⁵

II. BACKGROUND

A. Pre-FCC Listing ISPs as Title II Common Carriers

The term "Net Neutrality" itself was only coined in 2003 by Tim Wu.⁶ Thus, discussions around these kinds of regulations are a relatively new development.⁷ The Federal Communications Commission (FCC) first weighed in on the idea back in 2005.⁸ This regulation was to govern how broadband would function over telephone lines.⁹ Prior to this order, telephone-based Internet access

³ See *Infra* Section II.

⁴ See *Infra* Section III.

⁵ See *Infra* Section IV.

⁶ Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141, 141 (2003).

⁷ *Id.*

⁸ Daniel A. Lyons, *Net Neutrality and Nondiscrimination Norms in Telecommunications*, 54 ARIZ. L REV. 1029 (2012); See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14986, 14988 (2005) ("[T]o ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers, the Commission adopts the following principles") [hereinafter *Appropriate Framework for Broadband Access*].

⁹ *Id.*

was “open access”: if a telephone company offered Internet access, it had to make its infrastructure available to other Internet service providers.¹⁰ This practice began to burden the telephone companies as the fledgling broadband industry, classified as an information service, began creating its own infrastructure free from this open access restriction, allowing them to surpass the telephone companies.¹¹

This industrial regulatory imbalance caused the FCC to reclassify cable broadband as a Telecommunications Act (TCA) Title I “Information Service” provider instead of as a TCA Title II “telecommunications service” provider, thereby exempting cable and Internet services from FCC oversight and common carriage regulation.¹² This is known as *Brand X*.¹³ The FCC maintained jurisdiction to “impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign

¹⁰ Daniel A. Schuleman, *THE FCC RESTORING INTERNET FREEDOM ORDER AND ZERO RATING OR: HOW WE LEARNED TO STOP WORRYING AND LOVE THE MARKET*, 2018 U. Ill. J.L. Tech. & Pol’y 1492018 UILJLTP 149, 153 (Hereinafter LOVE the MARKET); See Second Computer Inquiry, 77 F.C.C.2d 384, 475 (“Computer II”), *aff’d sub nom.* Comput. & Comm’n Indus. Ass’n v. FCC, 693 F.2d 198 (D.C. Cir. 1982) (“[A]n essential thrust of this proceeding has been to provide a mechanism whereby non-discriminatory access can be had to basic transmission services by all enhanced service providers.”).

¹¹ *Id.*; See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities: Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, 17 FCC Rcd. 4798, 4825 (2002) (“As noted above, the Commission has applied these obligations only to traditional wireline services and facilities, and has never applied them to information services provided over cable facilities.”). FCC decision was affirmed in *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

¹² *Id.* at 154.

¹³ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

communications.”¹⁴ This granted the FCC jurisdiction over Internet providers to ensure that they operated in a neutral manner.¹⁵

The FCC issued a statement with this move stating that its Internet policy would follow these four principles: first, access to lawful Internet content of their choice; second, run applications and use services of their choice; third, connect their choice of legal devices that do not harm the network; and fourth, competition among network providers, application and service providers, and content providers.¹⁶ These principles contained in the policy statement were not binding, as acknowledged at the time by the FCC.¹⁷

B. Post-FCC Listing ISPs as Title II Common Carriers

What we conventionally think of as Net Neutrality was established in 2010 by the FCC Open Internet Order.¹⁸ This established the three general principals of net neutrality for the U.S. First, transparency: ISPs must disclose network management practices, performance characteristics and terms and conditions of their broadband services.¹⁹ Second, no blocking: there cannot be any blocking of lawful content, on either normal or mobile broadband.²⁰ Third, No Unreasonable Discrimination: ISPs cannot throttle or

¹⁴ *Id.*

¹⁵ Fed. Comm'n's Comm'n, In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd. 14986, 14988 (2005).

¹⁶ *Id.*

¹⁷ *Id.* at 14998 n.15 (“Accordingly, we are not adopting rules in this policy statement.”).

¹⁸ In the Matter of Preserving the Open Internet Broadband Indus. Practices, 25 FCC Rcd. 17905, 17905 (2010) [hereinafter Open Internet Order 2010].

¹⁹ *Id.* at 17906.

²⁰ *Id.*

otherwise interfere with the transmission of lawful content.²¹ They state that their adoption of these principles over the prior framework comes from an intense analysis of the economic patterns, as well as the reality that many internet users are limited in their choice of ISP.²² They found that without these types of restrictions, ISPs are to incentivized by the market to interfere with the openness that promotes a healthy innovation environment as well as allowing freer speech.²³

This move by the FCC would be challenged by Verizon, on the grounds that this type of regulation exceeds the authority of the FCC under the TCA.²⁴ The verdict was handed down in 2014, and the court decided that most of the provisions were enforceable.²⁵ However the provisions that would prevent the blocking of websites and “unreasonable discrimination” were beyond the scope of the TCA.²⁶ This effectively gutted the Open Internet Order, and started a political reaction that would begin to dominate the discussion around Net Neutrality.²⁷ This eventually culminated in November 2014 with President Obama speaking in favor of Net Neutrality. This acted as the tipping point in for the FCC.²⁸ In February of 2015,

²¹ *Id.*

²² *Id.* at 17908.

²³ *Id.* at 17919.

²⁴ *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014).

²⁵ *Verizon*, 740 F.3d at 623 (“For the forgoing reasons, although we reject Verizon's challenge to the Open Internet Order's disclosure rules, we vacate both the anti-discrimination and the anti-blocking rules.”).

²⁶ *Id.*

²⁷ Steve Lohr, *FCC is Deluged with Comments on Net Neutrality Rules*, N.Y. TIMES (July 15, 2014), <http://www.nytimes.com/2014/07/16/technology/a-deluge-of-comment-on-net-rules.html>.

²⁸ THE WHITE HOUSE, STATEMENT BY THE PRESIDENT ON NET NEUTRALITY (2014) (“So the time has come for the FCC to recognize that broadband service is of the same importance and must carry the same obligations as so many of the other vital services do. To do that, I believe the

the FCC unveiled its new plan to make the internet a public utility, which was passed in a 3-2 vote.²⁹ This would have had the effect of enshrining all of the same principles laid out in the Open Internet Order, but with enhanced transparency provisions and prohibited preferential fees.³⁰

C. FCC Introducing Restoring Internet Freedom

Plans to make the internet a public utility changed in 2017. The acting chair under the prior decision, Tom Wheeler, was set to leave in January, and Trump appointed former Verizon General Counsel Ajit Pai began acting as chairperson.³¹ Chairman Pai has

FCC should reclassify consumer broadband service under Title II of the Telecommunications Act — while at the same time forbearing from rate regulation and other provisions less relevant to broadband services. This is a basic acknowledgment of the services ISPs provide to American homes and businesses, and the straightforward obligations necessary to ensure the network works for everyone — not just one or two companies.”); See Edward Wyatt, *Obama Asks FCC To Adopt Tough Net Neutrality*, N.Y. TIMES (Nov. 10, 2014), http://www.nytimes.com/2014/11/11/technology/obama-net-neutrality-fcc.html?_r=0.

²⁹ Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,738, n. 7 para. 34 (Apr. 13, 2015) (codified at 47 C.F.R. pts. 1, 8, 20) [herein after referred to as Open Internet Order 2015]; See Rebecca Ruiz & Steve Lohr, *FCC Approves Net Neutrality Rules, Classifying Broadband Internet Service as a Utility*, N.Y. TIMES (Feb. 26, 2015), <http://www.nytimes.com/2015/02/27/technology/net-neutrality-fcc-vote-internet-utility.html>. (“The F.C.C. is taking this big regulatory step by reclassifying high-speed Internet service as a telecommunications service, instead of an information service, under Title II of the Telecommunications Act. The Title II classification comes from the phone company era, treating service as a public utility.”).

³⁰ *Id.*

³¹ Ajit Pai, FCC Chairman, FCC, <https://www.fcc.gov/about/leadership/ajit-pai>; See Jacob Kastrenakes, *Outgoing FCC Chief Tom Wheeler Offers Final Defense of Net Neutrality*, VERGE (Jan. 13, 2017, 2:24 PM EST),

openly opposed Net Neutrality, claiming that the regulations are burdensome for ISPs and stand to block innovation and maintenance of the infrastructures needed to ensure internet is accessible to everyone.³² He began acting immediately to undo many of the safeguards to the Open Internet principles established with the prior FCC, and set the tone that would begin to dominate the FCC under his chairmanship.³³

The FCC then filed notice for public comment on a new proceeding on “Restoring Internet Freedom” on April 27, 2017, and

<http://www.theverge.com/2017/1/13/14266168/tom-wheeler-final-speech-net-neutrality-defense>. (Wheeler says, “Those who build and operate networks have both the incentive and the ability to use the power of the network to benefit themselves even if doing so harms their own customers and the greater public interest.”)

³² Cecilia Kang, *Trump's FCC Quickly Targets Net Neutrality Rules*, N.Y. TIMES (Feb. 5, 2017), <https://www.nytimes.com/2017/02/05/technology/trumps-fcc-quickly-targets-net-neutrality-rules.html> (Mr. Pai said he disagreed with the move two years ago to declare broadband a utility. The reclassification of broadband into a service akin to telephones and electricity provided the legal foundation for net neutrality rules. Mr. Pai said he disagreed with the move two years ago to declare broadband a utility. The reclassification of broadband into a service akin to telephones and electricity provided the legal foundation for net neutrality rules.).

³³ Public Notice, FCC, https://apps.fcc.gov/edocs_public/attachmatch/DOC-344623A1.pdf; See Notice of Proposed Rulemaking, FCC, https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-60A1_Rcd.pdf (“The Commission’s Title II Order has put at risk online investment and innovation, threatening the very open Internet it purported to preserve. Investment in broadband networks declined. Internet service providers have pulled back on plans to deploy new and upgraded infrastructure and services to consumers. This is particularly true of the smallest Internet service providers that serve consumers in rural, low-income, and other underserved communities. Many good-paying jobs were lost as the result of these pull backs. And the order has weakened Americans’ online privacy by stripping the Federal Trade Commission—the nation’s premier consumer protection agency—of its jurisdiction over ISPs’ privacy and data security practices.”).

in May a Notice of Proposed Rulemaking by Chairman Pai and Commissioner O'Rielly was made with two separate statements.³⁴ This notice was very critical of the 2015 Open Internet Order, claiming that the order was in favor of government control of the Internet.³⁵ Repealing the 2015 Order is a goal for Chairman Pai, because he sees it best to restore the market-based policies that preserve the future of Internet Freedom, and to reverse the decline in infrastructure investment, innovation, and options for consumers.³⁶ This Notice of Proposed Rulemaking was adopted on May 18, 2017, and released on May 23, 2017, followed by a comment date of July 17, 2017, and finished with a reply comment date of August 16, 2017.³⁷ In August 2017, many different special interest groups began to comment on the notice and Charmain Pai's new plan to remove the Open Internet Order of 2015, most of which criticized the repeal.³⁸ The FCC subsequently extended the deadline for filing reply comments until August 30, 2017.³⁹

This FCC notice provoked a lot of discussion in the public discourse.⁴⁰ Of particular note was July 17, 2017, named "Day of Action," wherein a large segment of the internet displayed notices or outright shut down in protest of the removal of Open Internet

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Public Knowledge et al., Motion for Extension of Time to File Reply Comments, WC Docket No. 17-108 (filed Aug. 1, 2017) (Joint Motion); *See also* Letter from Senator Edward J. Markey et al., to the Honorable Ajit Pai, Chairman, FCC (Aug. 3, 2017) (urging the Commission to "extend the reply comment period to allow sufficient time for the public to ensure their views are reflected in the record").

³⁹ FCC Order, WC Docket No. 17-108 (Aug. 11, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DA-17-761A1.pdf

⁴⁰ *See* Joint Motion, *supra* note 38.

Order of 2015.⁴¹ The point of this “Day of Action” was to increase public awareness.⁴² This was an attempt to get people motivated enough to reach out to the FCC to let them know that public opinion was against the repeal.⁴³ This created around twenty-two million comments to be sent to the FCC, but upon analysis, many of the comments were found to have been submitted with stolen identities.⁴⁴ Despite the controversy, pleas for a delay, and public outcry against a repeal, the FCC voted in a 3 to 2 decision to repeal the Open Internet Order on December 14, 2017, placing ISPs back under Title 1 “Information Service” providers.⁴⁵ Interestingly, the

⁴¹ July 12th: Internet-Wide Day of Action to Save Net Neutrality, BATTLEFORTHENET.COM, <https://www.battleforthenet.com/july12/> (The FCC wants to destroy net neutrality and give big cable companies control over what we see and do online. If they get their way, they’ll allow widespread throttling, blocking, censorship, and extra fees. On July 12th, the Internet will come together to stop them.”).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Jon Brodtkin, *2 Million People--and Some Dead Ones--Were Impersonated in Net Neutrality Comments*, ARS TECHNICA (Dec. 13, 2017), <https://arstechnica.com/tech-policy/2017/12/dead-people-among-millions-impersonated-in-fake-net-neutrality-comments/> (“The number of comments believed to be fake has grown as the A.G.’s investigation continues, and it isn’t done yet. Schneiderman’s office is still analyzing the public comments. We asked Schneiderman’s office how many of the fake comments supported net neutrality rules, and how many opposed them, but were told that the information was not available.”); see Lauren Gambino & Dominic Rushe, *FCC Flooded with Comments Before Critical Net Neutrality Vote*, GUARDIAN (Aug. 30, 2017), <https://www.theguardian.com/technology/2017/aug/30/fcc-net-neutrality-vote-open-internet>.

⁴⁵ Press Release, FCC, FCC Acts to Restore Internet Freedom (Dec. 14, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-348261A1.pdf; See Press Release, N.Y. State Office of the Attorney General, A.G. Schneiderman Releases New Details on Investigation into Fake Net Neutrality Comments (Dec. 13, 2017), <https://ag.ny.gov/press-release/ag-schneiderman-releases-new-details-investigation-fake-net-neutrality-comments>. (Attorney Schneiderman said,

FCC claims that in the Restoring Internet Freedom Order, they will pre-empt any state based legislation that attempts to re-instate any provisions of net neutrality.⁴⁶

D. States Begin to Reinstate Net Neutrality Provisions Without the Federal Government

Shortly after the FCC repealed the Open Internet Order of 2015 with the Restoring Internet Freedom Order, many states began looking at various options to reinstate similar provisions within their own borders.⁴⁷ It appears that most states fall into two primary

“[m]illions of fake comments have corrupted the FCC public process – including two million that stole the identities of real people, a crime under New York law. Yet the FCC is moving full steam ahead with a vote based on this corrupted process, while refusing to cooperate with an investigation. As we’ve told the FCC: moving forward with this vote would make a mockery of our public comment process and reward those who perpetrated this fraud to advance their own hidden agenda. The FCC must postpone this vote and work with us to get to the bottom of what happened.”)

⁴⁶ Restoring Internet Freedom, 83 FR 7852-01 (Feb. 22, 2018).

⁴⁷ Heather Morton, *NET NEUTRALITY LEGISLATION IN STATES*, NCSL (Jan. 23, 2019), <http://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-legislation-in-states.aspx> (Thirty-four states and the District of Columbia introduced 120 bills and resolutions regarding net neutrality in the 2018 legislative session. Five states—California, New Jersey, Oregon, Vermont and Washington—enacted legislation or adopted resolutions. California enacted the California Internet Consumer Protection and Net Neutrality Act of 2018. This act prohibits fixed and mobile internet service providers, as defined, that provide broadband internet access service, as defined, from engaging in specified actions concerning the treatment of internet traffic. In a deal with the U.S. Department of Justice, California agreed to not enforce its net neutrality law until the lawsuit challenging the Federal Communications Commission's repeal of the federal regulations is resolved. In addition, California adopted a resolution urging the FCC to reinstate the 2015 Open Internet Order and urging the U.S. Congress to intervene to protect net neutrality and codify its principles in statute.)

categories: actions on part of their legislatures, and actions on part of their governors.⁴⁸ The states where the legislature was the primary actor in reinstating net neutrality provisions found themselves to be slower acting, but found many supporters within their states and have had more robust plans than the governor option.⁴⁹ However, states where the governor is the primary actor have been able to implement regulations for ISPs much quicker, and they have even begun a novel way of forcing ISPs to comply.⁵⁰ Governors are the primary negotiators with private entities that provide services within a state, such as an ISP.⁵¹ As such, many governors are refusing to do business with any ISP that does not

⁴⁸ Alison Durkee, *States are now passing their own net neutrality laws to protect the internet from corporations*, MIC, (Jun. 13, 2018), <https://mic.com/articles/189800/how-states-are-now-passing-their-own-net-neutrality-laws-to-protect-the-internet-from-corporations#.5mgQwHjoU> (“Twenty-nine states have introduced legislation to address net neutrality thus far, according to the National Regulatory Research Institute. An additional nine states have introduced resolutions that support net neutrality principles.” ... “In addition to enacting legislation, other states are defending net neutrality through executive orders by their governors. Montana Gov. Steve Bullock led the charge in January with an executive order that requires ISPs to uphold net neutrality principles in order to receive a contract from the state.”).

⁴⁹ *Id.* (While many states’ legislation is still pending, there have already been some successes. Washington became the first state to pass its own net neutrality requirements in March, with legislation that prohibits ISPs from blocking content, impairing traffic or engaging in paid prioritization.)

⁵⁰ Brian Fung, *This crafty tactic may let states get around the FCC on net neutrality*, THE WASHINGTON POST, (https://www.washingtonpost.com/news/the-switch/wp/2018/02/09/states-and-the-fcc-are-on-a-collision-course-over-net-neutrality-and-nobodys-sure-how-itll-go/?utm_term=.9795b81fcc9c) (Rather than directly regulating the broadband industry, the executive order imposes procurement obligations on state agencies. Under the order, state officials contracting with ISPs for service may do so only if the providers agree not to block or slow websites, or to offer websites faster delivery to consumers in exchange for an extra fee.)

⁵¹ *Id.*

enforce Net Neutrality provisions as internal company policy.⁵² This predominately acts as a stop gap until more states begin to behave in a similar matter, as this can limit the amount of ISPs within a state which can hurt your constituents more than it helps.⁵³ However, many governors are actively encouraging other states to adopt such policies, and have gone so far as to send other governors their executive orders to act as a template for future policies.⁵⁴

E. *California Senate Bill 822*

With the FCC repealing federal regulations that would support net neutrality, California State Senator Scott Wiener proposed a new state bill that would ensure the same protections originally afforded under the Open Internet Order of 2015.⁵⁵ This bill was written in direct opposition to the new FCC, with many of the supporters and co-authors of the bill actively speaking out against the decision to repeal the Open Internet Order of 2015.⁵⁶

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Grace Lisa Scott, *Montana's Governor Just Released a Net Neutrality Template for All States*, INVERSE (Jan. 22, 2018) (<https://www.inverse.com/article/40429-montana-net-neutrality-steve-bullock-executive-order>) (Bullock also released a net neutrality template online so other legislators could follow in the footsteps of the Treasure State. “Any city or state can do this,” Bullock declared Monday afternoon, sharing a link to a downloadable executive order.).

⁵⁵ Press Release, Scott Weiner, *Senator Wiener Announces Strongest Net Neutrality Policy Proposal in the Country* (Mar. 14, 2018), <https://sd11.senate.ca.gov/news/20180314-senator-wiener-announces-strongest-net-neutrality-policy-proposal-country>.

⁵⁶ *Id.* (State Senator Weiner said, “Over the last two months, I have had many conversations with elected leaders across the country who share our goal of protecting net neutrality in the wake of the disastrous FCC decision. I will continue to engage with other states on this issue. I’m looking forward to working

Despite this, the bill has one provision that seems to give ISPs broader deference in achieving a technical goal than the prior order.⁵⁷ This provision allows ISPs to violate certain provisions of the order if their aim is narrowly tailored to promote technical growth and can show they are not violating merely for economic benefit.⁵⁸ The plan was also only going to target ISPs if they: (1) serve clients within the state of California;⁵⁹ (2) have a contract with the state of California, including any agency or office;⁶⁰ (3) apply for or hold a state franchise agreement to provide video service;⁶¹ and (4) serve state funds to build infrastructure for broadband communications.⁶² The implication here is that state law is not attempting to reach beyond the border of the state and is attempting

with my colleagues in the Legislature, including Senator Kevin de Leon, to pass this legislation here in California.”).

⁵⁷ Press Release, Scott Weiner, Senator Wiener Announces Strongest Net Neutrality Policy Proposal in the Country (Mar. 14, 2018), <https://sd11.senate.ca.gov/news/20180314-senator-wiener-announces-strongest-net-neutrality-policy-proposal-country> (“Internet service providers play a key role in allowing people to access the internet, but ISPs must not be allowed to decide who can access what websites or applications. Without net neutrality, ISPs have the power to manipulate which business, media, nonprofit, or political websites are accessible and by whom. SB 822 contains strong, comprehensive, and enforceable policies that will position California as a leader in the fight for net neutrality. Over the last two months, I have had many conversations with elected leaders across the country who share our goal of protecting net neutrality in the wake of the disastrous FCC decision. I will continue to engage with other states on this issue. I’m looking forward to working with my colleagues in the Legislature, including Senator Kevin de Leon, to pass this legislation here in California.”)

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

to enforce these net neutrality rules via their own commerce power.⁶³

However, in June 2018, the bill was gutted of many of the protections that Senator Weiner had hoped to achieve.⁶⁴ This prompted Senator Weiner to seek a compromise, and they were able to redraft the bill once more to include all of the major protections he originally sought.⁶⁵ They did this by two methods. First, they would allow certain “non-harmful zero ratings”. Second, they would place the provision that would enforce net neutrality via state contracts into a different senate bill, California Senate Bill 460.⁶⁶

⁶³ Barbara van Schewick, *SB 822 Would Secure Net Neutrality For California*, STANFORD LAW SCHOOL THE CENTER FOR INTERNET AND SOCIETY (March 14, 2018), <http://cyberlaw.stanford.edu/blog/2018/03/sb-822-would-secure-net-neutrality-california> (“Senator Scott Wiener’s bill SB 822 is the first state-level bill that would comprehensively secure all of the net neutrality protections that Americans currently enjoy. California is the largest state in the nation; its Internet companies and vibrant innovation ecosystem are the envy of the world. Protecting consumers and businesses in California is critical for California’s economy.”).

⁶⁴ Press Release, Scott Weiner, *Senator Wiener’s Gutted Net Neutrality Bill Moves Forward, Allowing Negotiations to Restore Protections to Continue* (June 26, 2018), <https://sd11.senate.ca.gov/news/20180626-senator-wiener%E2%80%99s-gutted-net-neutrality-bill-moves-forward-allowing-negotiations>. (State Senator Weiner said, “To be clear – I will not move SB 822 forward as currently drafted, as it isn’t currently a real net neutrality bill. But by keeping the bill alive today, we can continue negotiations to restore the protections that were gutted from the bill last week. Our broad coalition of supporters have been clear both before and after last week’s vote – California must lead in the fight for the future of the internet by passing a strong and enforceable net neutrality bill.”)

⁶⁵ *Id.*

⁶⁶ Press Release, Scott Weiner, *California Net Neutrality Proposal Moves Forward* (Aug. 8, 2018), <https://sd11.senate.ca.gov/news/20180808-california-net-neutrality-proposal-moves-forward>; See also Jon Brodtkin, *Net neutrality makes comeback in California; lawmakers agree to strict rules*, ARS TECHNICA (July 5, 2018), <https://arstechnica.com/tech-policy/2018/07/net-neutrality-makes-comeback-in-california-lawmakers-agree-to-strict-rules/>.

This compromise seems to swing back in favor of strong protections after it came to light that Verizon, an ISP, was found to have been throttling internet usage among firefighters working to combat dangerous forest fires.⁶⁷ Ultimately, the Senate Bill 460 would not pass the state assembly with 37 vote noes against 28 ayes.⁶⁸ However, Senate Bill 822 would pass the state assembly 61 votes to 18 votes and pass the senate 27 votes against 12 votes and be signed by the Governor of California, becoming state law.⁶⁹ It appears that Senator Weiner was ready to face challenges from both ISPs directly, and the FCC itself for this new law stating, “[w]e will vigorously defend this law...[a]nd the law is defensible.”⁷⁰

⁶⁷ Hannah Fry, *Verizon lifts data restrictions on first responders after criticism for slowing service to firefighters*, LOS ANGELES TIMES (Aug. 24, 2018), <http://www.latimes.com/local/lanow/la-me-ln-verizon-data-update-20180824-story.html> (“Verizon Wireless on Friday said it will immediately stop imposing data speed restrictions on first responders throughout the West Coast and Hawaii after facing intense criticism for reducing service to firefighters battling California’s largest-ever wildfire.” Verizon vice president of business and government Dave Hickey announced a plan for public safety personnel. “In supporting first responders in the Mendocino fire, we didn’t live up to our own promise of service and performance excellence when our process failed some first responders on the line, battling a massive California wildfire,” Mike Maiorana, Verizon senior vice president of public sector, said in a statement. “For that, we are truly sorry. And we’re making every effort to ensure that it never happens again.”).

⁶⁸ 2017 CA S.B. 460.

⁶⁹ 2017 CA S.B. 822; See Dell Cameron, *California Net Neutrality Bill Signed Into Law*, GIZMODO (Sep. 30, 2018), <https://gizmodo.com/california-net-neutrality-bill-signed-into-law-1829402679>. (“I’m very grateful to the governor for really taking a hard look at this and understanding that if the federal government refuses to protect net neutrality, that California has a responsibility to step in,” said Sen. Scott Wiener).

⁷⁰ *Id.*

F. FCC and ISP Challenges to State Law

It seems that before the governor's ink had even dried, the Department of Justice (DOJ) made moves to stop SB 822.⁷¹ Attorney General Jeff Sessions claimed net neutrality is the domain of the Federal Government, and that California does not have the authority to make legislation in that area of law.⁷² Chairman Pai stated, "Not only is California's Internet regulation law illegal, it also hurts consumers."⁷³ The law prohibits many free-data plans, which allow consumers to stream video, music, and the like exempt from any data limits.⁷⁴ They have proven enormously popular in the marketplace, especially among lower-income Americans.⁷⁵ But notwithstanding the consumer benefits, this state law bans them."⁷⁶ In Senator Weiner's response to the DOJ, he stated, "We've been down this road before: when Trump and Sessions sued Calif. and claimed we lacked the power to protect immigrants, California fought Trump and Sessions on their immigration lawsuit —

⁷¹ Tony Romm and Brian Fung, *The Trump administration is suing California to quash its new net neutrality law*, WASHINGTON POST (Sep. 30, 2018), https://www.washingtonpost.com/technology/2018/10/01/trump-administration-is-suing-california-quash-its-new-net-neutrality-law/?utm_term=.a26bf35ce381 ("Mere hours after California's proposal became law, however, senior Justice Department officials told The Washington Post they would take the state to court on grounds that the federal government, not state leaders, has the exclusive power to regulate net neutrality. DOJ officials stressed the FCC had been granted such authority from Congress to ensure that all 50 states don't seek to write their own, potentially conflicting, rules governing the web.")

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

California won — and California will fight this lawsuit as well.”⁷⁷ At this moment in time, it is unclear how this will turn out, but the DOJ has stated they are more than willing to take this issue before the Supreme Court, if needed.⁷⁸

To make matters worse for California SB 822, mere days over the DOJ announcement, ISP industry leaders sued to challenge its validity as well.⁷⁹ “We oppose California’s action to regulate internet access because it threatens to negatively affect services for millions of consumers and harm new investment and economic growth,” the industry groups said in a statement.⁸⁰ “Republican and Democratic administrations, time and again, have embraced the notion that actions like this are preempted by federal law.”⁸¹ Senator Weiner knew these lawsuits were a likely possibility.⁸² Furthermore, many different advocacy groups for net neutrality were anticipating such actions, and have promised to help California in defending the bill.⁸³ Fight for the Future, a net neutrality interest

⁷⁷ Dina Kesbeh, *Justice Department Sues California Over Net Neutrality Law*, NPR (Oct. 1, 2018), <https://www.npr.org/2018/10/01/653216821/u-s-justice-department-sues-california-over-net-neutrality-law>.

⁷⁸ *Id.*

⁷⁹ Makena Kelly, *Broadband industry groups sue California over net neutrality bill*, THE VERGE (Oct. 3, 2018), <https://www.theverge.com/2018/10/3/17933804/net-neutrality-california-bill-broadband-isp-sb822>.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Dell Cameron, *California Net Neutrality Bill Signed Into Law*, GIZMODO (Sep. 30, 2018). (“It’s very odd that Ajit Pai and the FCC apparently think that this unelected agency has the power to stop 50 states from acting to protect the internet,” said Wiener, conceding the industry has a right to ask the court to interpret the law. “We will vigorously defend this law,” he added. “And the law is defensible.”).

⁸³ Makena Kelly, *Broadband industry groups sue California over net neutrality bill*, THE VERGE (Oct. 3, 2018) (Fight for the Future released a statement condemning both of the lawsuits. “It’s no surprise that they’re suing, but it does make it even more blatant and clear that Jeff Sessions and Ajit Pai are working

group released the following statement, “[i]t’s no surprise that they’re suing, but it does make it even more blatant and clear that Jeff Sessions and Ajit Pai are working directly on behalf of Big Cable in trying to block basic consumer protection legislation that passed with overwhelming bipartisan support...Big telecom companies hate the California net neutrality bill because it prevents them from screwing over their customers more than they already do.”⁸⁴ California has agreed to halt the bill’s activation, pending determination on the DOJ’s case against the outcome, thus we will not be fully aware of how the effects of the bill will play out until we have the conclusion of the legal battle.⁸⁵

III. PROVISIONS OF CALIFORNIA SB 822

A. Transparency

California SB 822 adopts most of the original principles of net neutrality.⁸⁶ However, the Transparency requirements we

directly on behalf of Big Cable in trying to block basic consumer protection legislation that passed with overwhelming bipartisan support.” Evan Greer, Fight for the Future’s deputy director said, “Big telecom companies hate the California net neutrality bill because it prevents them from screwing over their customers more than they already do.”).

⁸⁴ *Id.*

⁸⁵ Susan McFarland, *California agrees to pause net neutrality law*, UPI (Oct. 27, 2018), <https://www.upi.com/California-agrees-to-pause-net-neutrality-law/5251540667088/>. (California Attorney General Xavier Becerra agreed Friday to put the state's net neutrality law on hold until a federal appeals court decides whether ending the regulation of Internet providers is lawful, something enacted by the Trump administration last year.).

⁸⁶ 2017 C.A. SB 822 (First, transparency: ISPs must disclose network management practices, performance characteristics and terms and conditions of their broadband services. Second, no blocking: there cannot be any blocking of lawful content, on either normal or mobile broadband. Third, No Unreasonable

associate with net neutrality are not as robust as what we saw in the Open Internet Order 2015.⁸⁷ The Open Internet Orders of 2010 and 2015 had the following provision: “A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet.”⁸⁸ The 2015 Order further expanded upon that rule by adopting provisions they laid out in a plan for stronger net neutrality in 2014.⁸⁹ These requirements had the effect of required disclosures for most metrics to users and content providers, with few exceptions and safe harbors for tailored disclosures.⁹⁰ However, the California

Discrimination: ISPs cannot throttle or otherwise interfere with the transmission of lawful content.).

⁸⁷ *Id.*; See Open Internet Order 2015, n. 9, para. 25. (“To do that, the Order builds on the strong foundation established in 2010 and enhances the transparency rule for both end users and edge providers, including by adopting a requirement that broadband providers always must disclose promotional rates, all fees and/or surcharges, and all data caps or data allowances; adding packet loss as a measure of network performance that must be disclosed; and requiring specific notification to consumers that a “network practice” is likely to significantly affect their use of the service”).

⁸⁸ Open Internet Order 2015, n. 69, para. 155; See Open Internet Order 2010 *supra* note 18; See also note 78.

⁸⁹ *Id.*; See In the Matter of Protecting and Promoting the Open Internet, 79 Fed. Reg. 37447, n. 24-33, para. 63-88. (Open Internet Order specifically says, “In the 2014 Open Internet NPRM, we tentatively concluded that we should enhance the existing transparency rule for end users, edge providers, the Internet community, and the Commission to have the information they need to understand the services they receive and to monitor practices that could undermine the open Internet.”).

⁹⁰ *Id.*

SB 822 forgoes any of these extended requirements.⁹¹ It instead adopts a policy that mirrors the language found only in the 2010 order.⁹² This does not necessarily mean that the policy will not have the same effect of the 2015 order.⁹³ The FCC took the approach that the explicit provisions laid out in the 2015 Order were the logical extension of the provisions laid out in the 2010 Order.⁹⁴ It will largely depend on how they intend to enforce the provision in the California bill, as the 2015 was merely laying out how an ISP will specifically follow the provision, whereas this bill only says that a violation of this provision is unlawful without careful detail as to how an ISP must comply with the provision.⁹⁵

Regardless of whether they choose to enforce the transparency provision as it was enforced in the 2015 or the 2010 order, it will likely not face much criticism from the court.⁹⁶ The *Verizon* case showed that the transparency provisions found in the 2010 provision were not unconstitutional, as it is merely policing commerce.⁹⁷ The 2015 Order was built from what was outlined in that case as acceptable.⁹⁸ Thus, the SB 822 bill adopts the specific

⁹¹ 2017 C.A. SB 822.

⁹² *Id.* (“Failing to publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of those services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.”); See Open Internet Order 2010 *supra* note 18.

⁹³ *Id.*; See *In the Matter of Protecting and Promoting the Open Internet*, 79 Fed. Reg. 37447, n. 24-33, para. 63-88.

⁹⁴ 2017 C.A. SB 822; Open Internet Order 2015, n. 9, para. 25.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014).

⁹⁸ *Id.*; See Open Internet Order 2015, n. 10, para. 27. (“In defining this service we make clear that we are responding to the Verizon court’s conclusion that broadband providers “furnish a service to edge providers” (and that this service

provisions that courts have said was an acceptable form of policing commerce.⁹⁹ As a result, this will likely be viewed as a legitimate form of California's commerce power provided that it does not conflict with the Federal Government's commerce power.¹⁰⁰

B. No Blocking

The SB 822 bill adopts a no blocking provision as its first provision, specifically stating, “[b]locking lawful content, applications, services, or nonharmful devices, subject to reasonable network management.”¹⁰¹ Furthermore, it adopts provisions that prevents degrading lawful content, or otherwise it prohibits throttling different websites dependent on outside force such as a contract with the content provider.¹⁰² This is very similar to provisions that were laid out in both the 2010 and 2015 Orders by the FCC.¹⁰³ California's application of these provisions will likely mirror the FCC's application if questions arise.¹⁰⁴ Thus, ISPs will not be able to block any content by any edge content provider so

was being treated as common carriage per se). As discussed further below, we make clear that broadband Internet access service encompasses this service to edge providers.”).

⁹⁹ *Id.*

¹⁰⁰ *Verizon*, 740 F.3d at 623.

¹⁰¹ C.A. SB 822 2017.

¹⁰² *Id.*

¹⁰³ Open Internet Order 2015 (No Blocking: A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or nonharmful devices, subject to reasonable network management. No Throttling: A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management.); *See* Open Internet Order 2010.

¹⁰⁴ *Id.*; *See* C.A. SB 822 2017.

long as they adhere to legal standard.¹⁰⁵ Interestingly, there is not much discussion around what is considered unlawful by the bill.¹⁰⁶ Illegal drug traffic and sex traffic are likely to be considered unlawful, as they were under the FCC. But, it possible we might see enhanced copyright protection surrounding this bill in the future, or perhaps even litigation.¹⁰⁷ However, all of this is unlikely, as these were not issues that arose under the 2015 order, and this law is merely trying to reinstate that order.¹⁰⁸

Courts seemingly have the biggest issue with anti-block and anti-throttling provisions.¹⁰⁹ The reason is that these two provisions almost force the ISPs to act as a common carrier, something not allowed under the Federal Communications Act.¹¹⁰ However, California will not be bound by the Federal Communications Act in the same way as the FCC, nor is it attempting to make ISPs common carriers.¹¹¹ This is noted in two primary ways.¹¹² First, the bill is attempting to replicate the provisions laid out in in the 2015 Order, not the 2010, despite the similarity in language.¹¹³ This means they want ISPs to act a public utility, something that has not been tested against the courts.¹¹⁴ Second, there are some methods of discrimination allowed under the new bill that may allow ISPs to

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Open Internet Order 2015.

¹⁰⁸ *Id.*

¹⁰⁹ *Verizon*, 740 F.3d at 623.

¹¹⁰ *Id.* at 656.

¹¹¹ C.A. SB 822 2017.

¹¹² *Id.*

¹¹³ *Id.*; See Richard Lawler, *CA governor signs net neutrality bill into law, Justice Department sues*, ENGADGET (Sept. 30, 2018) (“SB 822 is intended to restore the protections put in place by a (now-rescinded) 2015 FCC Order, as well as closing ‘loopholes’ that its backers said could have allowed anti-competitive forms of zero-rating.”).

¹¹⁴ *Verizon*, 740 F.3d at 623.

not act as what is typically considered a common carrier.¹¹⁵ This means that this aspect of the law is untested in the courts, but might survive a lawsuit from ISPs, but it is unclear how this will factor into the lawsuit from the FCC.¹¹⁶

C. No Unreasonable Discrimination and “Zero Rating”

The last major principle of net neutrality is present in the SB 822, in that it prevents content providers from paying to exclude or throttle content of their competitors from an ISP.¹¹⁷ However, a break with classic interpretations of the unreasonable discrimination occurs, in that the bill will allow “Zero Rating” by ISPs, provided that they do so in way that does not discriminate content providers of the same kind.¹¹⁸ In other words, two video content providers cannot be discriminated against one another based on a “Zero Rating” policy.¹¹⁹ This policy that allows certain kinds of “Zero

¹¹⁵ C.A. SB 822 2017 (“Zero-rating some Internet content, applications, services, or devices in a category of Internet content, applications, services, or devices, but not the entire category.” This provision will allow ISPs to discriminate based on category, such as video streaming, when it comes to how they rate their services, meaning they have a greater discriminatory power than a common carrier might.)

¹¹⁶ *Id.*; See *Verizon*, 740 F.3d at 623.

¹¹⁷ C.A. SB 822 2017 (“(7) (A) Unreasonably interfering with, or unreasonably disadvantaging, either an end user’s ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of the end user’s choice, or an edge provider’s ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be a violation of this paragraph.”)

¹¹⁸ *Id.* (“(7) (B) Zero-rating Internet traffic in application-agnostic ways shall not be a violation of subparagraph (A) provided that no consideration, monetary or otherwise, is provided by any third party in exchange for the Internet service provider’s decision whether to zero-rate traffic.”)

¹¹⁹ *Id.*

Ratings” seemingly came about as a compromise to allow the bill to pass.¹²⁰ This has not been tested by the 2015 Order, nor was this kind of provision addressed in prior court cases.¹²¹ However, this does adhere to the general idea of the discrimination principle of net neutrality, as it does not allow ISPs to hamper natural competition among content providers, ensuring a platform that strengthens competition rather than artificially allowing certain content providers to prevail.¹²² The law furthers this general principle by making it explicit that it will not tolerate any arrangement where ISPs are compensated for special treatment granted to certain content providers, only allowing agreements for traffic exchange.¹²³

¹²⁰ Press Release, Scott Weiner, *California Net Neutrality Proposal Moves Forward* (Aug. 8, 2018). (SB 822 contains strong net neutrality protections and prohibits blocking websites, speeding up or slowing down websites or whole classes of applications such as video, and charging websites for access to an ISP’s subscribers or for fast lanes to those subscribers. ISPs will also be prohibited from circumventing these protections at the point where data enters their networks and from charging access fees to reach ISP customers. SB 822 will also ban ISPs from violating net neutrality by not counting the content and websites they own against subscribers’ data caps. This kind of abusive and anti-competitive “zero rating”, which leads to lower data caps for everyone, would be prohibited, while “zero-rating” plans that don’t harm consumers are not banned.).

¹²¹ Jazmine Ulloa, *California pledged to protect net neutrality — the showdown is here*, LOS ANGELES TIMES (Aug. 27, 2018) (Neither issue was fully addressed in the 2015 federal net neutrality order, which allowed the FCC to further study zero-rated data plans and internet traffic exchange practices “without adopting prescriptive rules.”).

¹²² C.A. SB 822 2017. ((5) Engaging in zero-rating in exchange for consideration, monetary or otherwise, from a third party).

¹²³ *Id.* ((9) Engaging in practices, including, but not limited to, agreements, with respect to, related to, or in connection with, ISP traffic exchange that have the purpose or effect of evading the prohibitions contained in this section and Section 3102. Nothing in this paragraph shall be construed to prohibit Internet service providers from entering into ISP traffic exchange agreements that do not evade the prohibitions contained in this section and Section 3102.).

Whether these provisions can be challenged by ISPs as well as the FCC will prove interesting.¹²⁴ The provisions allowing ISPs to engage in “Zero Ratings,” despite the restrictions, show that California is not forcing a specific behavior, which was a big concern for the court in the *Verizon* case.¹²⁵ However, it is explicitly attempting to control what kind of agreements an ISP can make, something that the court was reluctant to allow.¹²⁶ In general, ISPs may have an argument that this infringes on their ability to negotiate with edge content providers. But, the court may not find this kind of argument compelling.¹²⁷ The more worrying concern is for the FCC challenge, as this kind of contract policing will affect an ISP's contract with all edge content provider may extend these rules beyond the borders of the state.¹²⁸ This creates concerns about pre-emption and jurisdiction, which are issues that do not have clear outcomes based on case law.¹²⁹

IV. ANALYSIS

This type of legislation should be passed in all fifty States as it can allow uniformity for ISPs while simultaneously giving state governments more authority over ISPs within the four corners of their state.¹³⁰ States should still move forward with this type of

¹²⁴ *Verizon*, 740 F.3d at 623.

¹²⁵ *Id.* at 656.

¹²⁶ *Id.* at 658. (“According to Verizon, they do because they deny “broadband providers discretion in deciding which traffic from ... edge providers to carry,” and deny them “discretion over carriage terms by setting a uniform price of zero.” Verizon's Br. 16–17. This argument has some appeal.”).

¹²⁷ *Id.*

¹²⁸ C.A. SB 822 2017.

¹²⁹ *Id.*; See *Verizon*, 740 F.3d at 623.

¹³⁰ Wilcox, James K., *California's Net Neutrality Law Could Lead to Protections Nationwide*, (Sept. 30, 2018) <https://www.consumerreports.org/internet->

legislation for two reasons. First it places demand for a federal solution. Second in the absence of a federal solution, SB 822 ensures the protection of consumers from anti-competitive business tactics.¹³¹ Pre-emption by the FCC seems unlikely in light of what we know about the authority of the FCC, its apparent abandonment of authority over these laws, and its recent losses to challenges to its authority over municipalities.¹³² We see in Senate Bill 460 is a novel theory that states act as purchasers of ISP's service, and as such can negotiate and dictate the terms of agreements to their state, which would allow them to stipulate net neutrality provisions within the contracts.¹³³ ISPs may also be successful in challenging these kinds of state legislation, considering they were moderately

providers/california-net-neutrality-law-could-lead-to-protections-nationwide/. ("California isn't alone in taking action. So far, at least 28 other states have introduced net neutrality bills, and three states—Oregon, Vermont, and Washington—have signed them into law. Washington's and Vermont's took effect earlier this summer, and Oregon's doesn't kick in until 2019.”).

¹³¹ *Id.* ("We simply cannot have 50 different state regulations governing our internet—consumers expect and demand a single, consistent, common-sense approach. Now, more than ever before, we need Congress to step forward and enact bipartisan legislation to make permanent and sustainable rules.”).

¹³² Harold Feld, *Can The States Really Pass Their Own Net Neutrality Laws? Here's Why I Think Yes.* (Feb. 6, 2018) <https://wetmachine.com/tales-of-the-sausage-factory/can-the-states-really-pass-their-own-net-neutrality-laws-heres-why-i-think-yes/>. ("I have a lot of reason to be skeptical that Congress delegated the FCC extremely narrow regulatory power over interstate communications generally, but virtually unlimited preemption power. Absent an express delegation of preemption authority (such as 47 U.S.C. § 253 preempting state laws that limit entry into the telecommunications market), the FCC's preemption power is tied directly to its regulatory power.”).

¹³³ *Id.* ("These powers extend to matters usually prohibited by the Commerce Clause. For example, states can explicitly favor local providers over out-of-state providers when they decide to purchase goods and services. This is because the courts have distinguished between the state's role as regulator and the state's role as purchaser.”).

successful in challenging the federal government's same assertions.¹³⁴ However, this is equally unfounded as many of the restrictions placed on the federal government draw from a different basis of authority than the basis of authority for many state governments.¹³⁵ Thus, it is likely that many state based approaches to regulating net neutrality can be successful, and more importantly, should be attempted to clarify the authority of the state in regards to federal authority.

A. *Bill Like SB 822 Will Bring Uniformity*

A federal law like this one would give the benefit of uniformity. But, this comes at the expense of individual states tailoring their laws to their constituents. Now that the FCC has removed the federal option, it may be possible that we can strike a unique balance between the tensions of federal and state law.¹³⁶ SB 822 takes a lot of the same language as well as text from the 2010 FCC order, but it has many new specific provisions around zero-ratings policies.¹³⁷ This was largely seen as a logical move as zero-ratings policies can be applied in a way that does not prejudice certain edge content providers.¹³⁸ This shows an interesting

¹³⁴ *Verizon*, 740 F.3d at 623.

¹³⁵ *Id.*

¹³⁶ Restoring Internet Freedom, 83 FR 7852-01 (2018).

¹³⁷ C.A. SB 822; See Open Internet Order 2015. (The difference between the texts shows that the zero-ratings provisions are largely a response to new methods used by ISPs. The concept of zero-rating is fairly old, but after the 2015 Order, many ISPs saw this as a loop-hole to work around the FCC Order. California saw this as ability to anticipate the work around and legislate in advance. It now allows zero-rating explicitly, but with special restrictions as to not allow prejudice against edge content providers, keeping in line with the general principles of net neutrality.)

¹³⁸ Brian Fung, *California's net neutrality bill is back and as tough as ever*, THE WASHINGTON POST (July 5, 2018),

relationship that might form as more and more states adopt net neutrality laws because general principles of net neutrality are rather consistent. However, unique provisions can be added to each state, thus allowing them to still tailor provisions as constituents.¹³⁹

This is beneficial in two primary ways. First, ISPs will be able to provide a relatively consistent experience across state lines.¹⁴⁰ Second, it will allow minor adjustments to laws to take place for the benefit of constituents via negotiation between the states or municipalities in the contracts they agree to with ISPs.¹⁴¹ Many ISPs would agree that the burden of having fifty different types of internet regulation would be far too cumbersome to reasonably do business, thus this seems initial false.¹⁴² However, to the first point, the principles of net neutrality are easily illustrated by three points: transparency, no blocking, and no

https://www.washingtonpost.com/technology/2018/07/05/californias-net-neutrality-bill-is-back-tough-ever/?noredirect=on&utm_term=.357b81158cb9. (“Not all zero-rating is anticompetitive, Wiener said. For example, he said, carrier programs that universally exempt whole classes of apps from data caps — rather than individual, specific services — could benefit consumers. Those types of zero-rating will not be banned under the California legislation.”).

¹³⁹ Open Internet Order 2010; *See* Open Internet Order 2015; C.A. SB 822 2017.

¹⁴⁰ Wilcox, James K., *California's Net Neutrality Law Could Lead to Protections Nationwide*, (Sept. 30, 2018) (“We simply cannot have 50 different state regulations governing our internet—consumers expect and demand a single, consistent, common-sense approach. Now, more than ever before, we need Congress to step forward and enact bipartisan legislation to make permanent and sustainable rules.”).

¹⁴¹ *Id.* (“For example, AT&T zero-rates the DirecTV Now streaming service for its cellular customers, meaning consumers can watch programming on a mobile phone without it counting against their data caps. AT&T owns the streaming service along with its parent, the satellite TV provider DirecTV. Internet service providers say that zero-rating provides value to their customers and should be allowed.”).

¹⁴² *Id.*; *see supra* note 130.

discrimination.¹⁴³ These principles make up the backbone of any legislation passed hoping to institute net neutrality.¹⁴⁴ It can be rightly expected then that these general principles will apply in every state that adopts these measures.¹⁴⁵ Anything that adds to these general principles will either be a natural extension, such as the California “zero-ratings” policies, or quite rare.¹⁴⁶ Thus, it will allow ISPs to have a relatively uniform experience in supplying their services to different states, provided they already adhere to the general principles of net neutrality.¹⁴⁷ The alternative is sporadic states with and without net neutrality, which is a growing concern

¹⁴³ Open Internet Order 2010.

¹⁴⁴ *Id.*; See Open Internet Order 2015; C.A. S.B. 822 2017.

¹⁴⁵ Wilcox, James K., *Net Neutrality Battles Move to the States, Congress, and the Courts*, (Mar. 8, 2018) <https://www.consumerreports.org/net-neutrality/net-neutrality-battles-move-to-states-congress-courts/> (“In recent months, 26 states have introduced legislation and a number of governors have signed executive orders to enact their own net neutrality rules. In early March, for example, a net neutrality bill in the state of Washington passed both houses of the state legislature and was signed into law, making it the first state to enact net neutrality legislation.” ... “It’s not just state legislators who are getting involved in the issue. Governors of several states—including Hawaii, Montana, New Jersey, New York, and Vermont—have issued executive orders to impose net neutrality rules. The details vary, but in general the executive orders are using the power of government contracts to pressure ISPs to abide by net neutrality principles for the residents of their states.”).

¹⁴⁶ C.A. SB 822 2017; See Fung Brian, *California’s net neutrality bill is back and as tough as ever* (July 5, 2018) (The California proposal goes further than the defunct federal rules. The revised bill will contain tougher language that not only bans Internet service providers from blocking and slowing websites, but, for example, it will also ban “abusive” forms of a practice known as zero-rating, the lawmakers said. Zero-rating occurs when an ISP exempts its own apps and services from customer data caps but counts other app usage against those monthly limits.).

¹⁴⁷ Wilcox, James K., *California’s Net Neutrality Law Could Lead to Protections Nationwide*, (Sept. 30, 2018); See *supra* note 125.

under the current FCC ruling.¹⁴⁸ With that kind of arrangement, ISPs are put in an interesting situation of wanting to not have net neutrality in states that do not have those requirements, but being forced to in states that do.¹⁴⁹ This makes the kind of service being provided vary wildly based on which states have legislation, and will ultimately be much more costly for ISPs.¹⁵⁰ Thus, for the benefit of the consumer and ISPs alike, the uniformity of all states having net neutrality legislation is ideal.¹⁵¹

B. Bills Like SB 822 Gives States More Power

The SB 822 would give states more power by solidifying their power as market agents to determine which contracts that they can agree to, and thus if adopted across many states would give

¹⁴⁸ Brian Fung, *California's net neutrality bill is back and as tough as ever*, THE WASHINGTON POST (July 5, 2018) (USTelecom, a national trade association representing ISPs, said that it is committed to an open Internet. "Today's amendments to SB 822 in California is yet one more indicator that consumers and providers alike deserve a permanent, federal, legislative solution rather than confusing, conflicting and ever-changing state-by-state rules," said Jonathan Spalter, USTelecom's chief executive.).

¹⁴⁹ Wilcox, James K., *California's Net Neutrality Law Could Lead to Protections Nationwide*, (Sept. 30, 2018); *See supra* note 125.

¹⁵⁰ Karl Bode, *Why feds can't block California's net neutrality bill*, THE VERGE (Oct. 2, 2018) <https://www.theverge.com/2018/10/2/17927430/california-net-neutrality-law-preemption-state-lawsuit> ([C]onsumers still face an ocean of discordant state-level protections instead of comprehensive federal guidelines. As a result, some states might craft terrible laws or no laws at all, leaving consumers with not only no meaningful broadband competition, but little recourse when those regional monopolies and duopolies misbehave (which they do, often). Meanwhile, consumers in other states will enjoy comprehensive protections that go further than the original FCC rules they are intended to replace.).

¹⁵¹ *Id.*

states more power overall.¹⁵² Without any legislation, the internal policies of ISPs will determine how the consumer's, or constituent's for this example, internet will behave.¹⁵³ Individual consumers do not normally have the ability to negotiate how an ISP's handling of their framework will affect them as ISP coverage is not uniform across the nation.¹⁵⁴ This is assumed to be the role of the local government to ensure local competition amongst ISPs and is accomplished via states allowing ISPs to establish their own infrastructures in an area.¹⁵⁵ This creates a problem that consumers

¹⁵² Feld, Harold, *Can The States Really Pass Their Own Net Neutrality Laws? Here's Why I Think Yes.* (Feb. 6, 2018) (These powers extend to matters usually prohibited by the Commerce Clause. For example, states can explicitly favor local providers over out-of-state providers when they decide to purchase goods and services. This is because the courts have distinguished between the state's role as regulator and the state's role as purchaser. Decisions on whether and from whom to buy services are considered intrinsic to the independence of the state in our federalist system. Again, while no power is without limit, nothing stops a state from saying it will only purchase services from vendors that meet its standards or conditions. If you do not like the conditions, do not compete for the contract.).

¹⁵³ Commissioner Jessica Rosenworcel, STATEMENT OF COMMISSIONER JESSICA ROSENWORCEL ON FCC'S REPEAL OF NET NEUTRALITY TAKING EFFECT, Office of Commissioner Rosenworcel (Jun 11, 2018) (Internet service providers now have the power to block websites, throttle services, and censor online content. They will have the right to discriminate and favor the internet traffic of those companies with whom they have pay-for-play arrangements and the right to consign all others to a slow and bumpy road. Plain and simple, thanks to the FCC's roll back of net neutrality, internet providers have the legal green light, the technical ability, and business incentive to discriminate and manipulate what we see, read, and learn online.).

¹⁵⁴ *Internet Access Services as of 6/30/17*, FCC (Jun. 30, 2018) <https://docs.fcc.gov/public/attachments/DOC-355166A1.pdf>.

¹⁵⁵ *Id.*; Jeff Dunn, *America has an internet problem — but a radical change could solve it*, BUSINESS INSIDER, (April 23, 2017) <https://www.businessinsider.com/internet-isps-competition-net-neutrality-ajit-pai-fcc-2017-4> (One way to do this is a process known as "local loop unbundling." This involves regulating ISPs to lease or open up the "last mile" of their

often cannot exert much control over the kinds of services they can acquire from ISPs, and can almost never control high level concerns, such as “zero-ratings” policies.¹⁵⁶ We know that California originally wanted to enforce their net neutrality provisions via the state purchasing power from Senate Bill 460.¹⁵⁷

Despite that bill’s failure to become law, it gives an interesting insight into the benefit of allowing states to propose their own individual, slightly different but mostly similar net neutrality laws.¹⁵⁸ By moving the negotiation power to the state level instead of the federal level, this allows the direct consumers of ISPs to be closer to this negotiation power and can directly ask their state to further their wishes from ISPs.¹⁵⁹ This is because, with a more localized group, such as a state or municipality, the consumers are

infrastructure to other ISPs, who'd then sell internet service plans over the wires that are already in place. The immense barriers to entry for any would-be ISP would disappear. [sic] This would be a radical change, one that'd effectively tell Comcast and Charter and Verizon that the infrastructure they helped pay for no longer belongs to them alone. But it could result in a floodgate of competition, potentially bringing far more choice between price and speeds in all parts of the country.).

¹⁵⁶ *Id.* (On its face, asking Charter to build its network to areas without internet above all else is understandable. But when those customers get their internet, there is a good chance they'll be subject to whatever level of service Charter wants to provide, because there won't be any other competition.).

¹⁵⁷ C.A. SB 460 2017.

¹⁵⁸ *Id.*; See Brian Fung, *This crafty tactic may let states get around the FCC on net neutrality*, THE WASHINGTON POST (Feb. 9, 2018) https://www.washingtonpost.com/news/the-switch/wp/2018/02/09/states-and-the-fcc-are-on-a-collision-course-over-net-neutrality-and-nobodys-sure-how-itll-go/?utm_term=.d3c6093b7ab2 (Rather than directly regulating the broadband industry, the executive order imposes procurement obligations on state agencies. Under the order, state officials contracting with ISPs for service may do so only if the providers agree not to block or slow websites, or to offer websites faster delivery to consumers in exchange for an extra fee.).

¹⁵⁹ *Id.*

more likely to have specialized requests in common, and, thus, can more reasonably request these changes, unlike at the federal level where a change will affect the entire country.¹⁶⁰ For instance, the California Bill has a “zero-ratings” policy which was something the constituents actually wanted from ISPs, but would be better managed by the government.¹⁶¹ Thus, similar states, or even municipalities, with special concerns that affect only their constituents could use their legislation power as a type of negotiation power proxy for consumers of ISPs services.¹⁶²

¹⁶⁰ *Id.*

¹⁶¹ C.A SB 822 2017; See Falcon, Ernesto, *California's Net Neutrality Bill Has Strong Zero Rating Protections for Low-Income Internet Users, Yet Sacramento May Ditch Them to Appease AT&T* (Jun 12, 2019) <https://www.eff.org/deeplinks/2018/06/californias-net-neutrality-bill-has-strong-zero-rating-protections-low-income> (S.B. 822 bans the practice of self-dealing and discriminatory gatekeeping by ISPs outright, which is why those same ISPs will fight to take it out of the legislation before it becomes law. It is why they are actively attempting to mislead legislators in Sacramento with bogus superficial studies from groups that represent ISP interests like CAL innovates that ignore the fact that the data cap is an artificial construct that is designed to raise rates on wireless users and zero rating is how they exploit that structure. There is no benefit to Internet users by simply saying the ISP's selected services do not have additional fees associated with them and nothing about the current structure is “free” because we have all compensated companies like AT&T and Verizon to the tune of \$26 billion in profits in just 2016 alone.).

¹⁶² Brian Fung, *This crafty tactic may let states get around the FCC on net neutrality*, THE WASHINGTON POST (Feb. 9, 2018) (The initiatives have put states on a collision course with the FCC. But now a new tactic gaining momentum among governors threatens to complicate the debate further. Their novel approach, analysts say, is largely untested in court — and it could drive the fight over the Internet's future into hazy legal territory. [...] New Jersey Gov. Phil Murphy (D) this week became one of the latest to adopt the strategy, signing an executive order that effectively forces Internet service providers (ISPs) that do business with the state to abide by strong net neutrality rules.).

C. Why State Legislatures Should Attempt Their Own Net Neutrality Regulations

The novelty of seeking to use a state's purchasing power as a way to dictate regulations to service providers within their state is alone a worthwhile endeavor.¹⁶³ It can help establish or clarify the authority that states have over companies operating within their borders.¹⁶⁴ It also illustrates why new legislation of this variety should be attempted in all 50 states.¹⁶⁵ The first point of these state based legislations is that challenging the FCC's order with both basic state legislation, as well as novel ways such as the purchasing power argument, will help clear the air moving forward and make explicit whose authority reigns over the area of broadband communications.¹⁶⁶ The second, and equally important of state based legislation, is the exploration of alternatives to conventional wisdom on how to best legislate this realm of

¹⁶³ Jon Brodtkin, *Why states might win the net neutrality war against the FCC*, ARS TECHNICA, (Feb. 2, 2018) <https://arstechnica.com/tech-policy/2018/02/why-ajit-pai-might-fail-in-quest-to-block-state-net-neutrality-laws/> (The FCC says it can preempt state net neutrality laws because broadband is an interstate service (in that Internet transmissions cross state lines) and because state net neutrality rules would subvert the federal policy of non-regulation. But the FCC's preemption powers are limited, and not everyone is convinced the FCC can actually stop states from protecting net neutrality. Even among legal experts who support net neutrality, there is no consensus. State laws that forbid all ISPs from blocking or throttling Internet traffic are "vulnerable to legal attack," Electronic Frontier Foundation (EFF) Legislative Counsel Ernesto Falcon argued recently.).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (This could all be moot because nearly half of US states are suing the FCC to overturn the net neutrality repeal. But if that lawsuit does not succeed, states that want to protect net neutrality will face some difficult legal questions about the limits of their regulatory authority).

telecommunications.¹⁶⁷ The third and final point of state based legislation will help make clear to both ISPs and the federal government what the wishes of the constituents want to see done with net neutrality, and act as a call to action to prevent decisions from being made without careful input from the general public, unlike the FCC's current actions.¹⁶⁸ Thus, there are three primary reasons why state based legislation regarding net neutrality need to continue, as this is an ever evolving discussion and is one of the strongest methods for achieving these three aims.

The solidification of the authority and the states and the FCC over broadband internet is very important, as these are not clear matters.¹⁶⁹ The state governments seeking to challenge the FCC in

¹⁶⁷ Jeff Dunn, *America has an internet problem — but a radical change could solve it*, BUSINESS INSIDER, (April 23, 2017) (This would be a radical change, one that'd effectively tell Comcast and Charter and Verizon that the infrastructure they helped pay for no longer belongs to them alone. But it could result in a floodgate of competition, potentially bringing far more choice between price and speeds in all parts of the country.)

¹⁶⁸ Jacob Kastrenakes, *The net neutrality comment period was a complete mess*, THE VERGE (Aug. 31, 2017) (All the while, the FCC's chairman has been trying to explain that comments don't really matter anyway, despite the commission's requirement to act in the public interest and take public feedback. From the very beginning of the proceeding, FCC leadership laid out that it would be the quality, not the quantity, of the comments that made a difference. On the surface, that's a reasonable argument, but it's being set out as an excuse to ignore the overwhelming millions of comments in support of net neutrality in favor of few well-written filings by Comcast and the like. (Comcast is an investor in Vox Media: The Verge's parent company.) Even the telecom-funded study found that 60 percent of comments were in favor of keeping net neutrality in place.)

¹⁶⁹ Jon Brodtkin, *Why states might win the net neutrality war against the FCC*, ARS TECHNICA, (Feb. 2, 2018) ("I wholeheartedly agree with Harold's assessment that the FCC appears to have no preemption power under Title I of the Communications Act," Falcon told Ars this week. Falcon said he was previously certain that state net neutrality laws would not survive if they directly regulate all ISPs. Now he thinks states have about a 10 percent chance of making

these ways will most certainly help clear up these matters.¹⁷⁰ This is good for the consumers, as they will become more aware of who has the authority to make changes in the regulatory scheme.¹⁷¹ This will encourage more public involvement with the government on these issues, as they will now be certain where they should focus their efforts to effectuate certain change.¹⁷² For example, if it turns out that the states lack any authority to regulate ISPs at all, it will become clear to the voting public that Congress is the only way to change current regulations.¹⁷³ This is equally good for ISPs as well, as it makes clear to them how certain power dynamics will play

such net neutrality laws hold up in court. The reason for his continued pessimism is the "dormant commerce clause," which concerns "whether states can constitutionally reach beyond their borders for economic regulation when Congress is silent in its lawmaking role," Falcon told Ars. "When Congress has nothing really written in law, then it's a dormant commerce clause question where states are restricted in two ways," Falcon said. "1) They can't discriminate against out-of-state economic actors in favor of in-state actors and 2) They can't unduly burden interstate commercial activity and must have a strong state interest." Falcon and Feld "agree that Title I grants virtually no authority to the FCC over ISPs," but they "part ways on how much direct regulation of ISPs would violate the dormant commerce clause's prong of undue burden on interstate commercial activity," Falcon said.).

¹⁷⁰ *Id.*

¹⁷¹ Katherine Trendacosta, *Even Though Net Neutrality Protections Are Ending, Congress Can Still Bring Them Back*, ELECTRONIC FRONTIER FOUNDATION, (Jun. 11, 2018) <https://www.eff.org/deeplinks/2018/06/even-though-net-neutrality-protection-end-today-congress-can-still-act-save-them> (While the FCC ignored the will of the vast majority of Americans and voted not to enforce bans on blocking, throttling, and paid prioritization, it doesn't get the final say. Congress, states, and the courts can all work to restore these protections. As we have seen, net neutrality needs and deserves as many strong protections as possible, be they state or federal. ISPs who control your access to the Internet shouldn't get to decide how you use it once you get online.).

¹⁷² *Id.*

¹⁷³ *Id.*

out.¹⁷⁴ The same is true for them that when it is clear who has the authority to make changes, ISPs can appeal to them.¹⁷⁵ However, it is of even more importance to ISPs, as they have vested interest in reducing complicated regimes of regulations.¹⁷⁶ If states each make their own varying and restrictive rules for broadband internet, ISPs will be incentivized to make an appeal to congress to change the landscape to ensure uniformity.¹⁷⁷

¹⁷⁴ Falcon, Ernesto, *California's Net Neutrality Bill Has Strong Zero Rating Protections for Low-Income Internet Users, Yet Sacramento May Ditch Them to Appease AT&T* (Jun 12, 2019) (S.B. 822 bans the practice of self-dealing and discriminatory gatekeeping by ISPs outright, which is why those same ISPs will fight to take it out of the legislation before it becomes law. It is why they are actively attempting to mislead legislators in Sacramento with bogus superficial studies from groups that represent ISP interests like CALinnovates that ignore the fact that the data cap is an artificial construct that is designed to raise rates on wireless users and zero rating is how they exploit that structure. There is no benefit to Internet users by simply saying the ISP's selected services do not have additional fees associated with them and nothing about the current structure is "free" because we have all compensated companies like AT&T and Verizon to the tune of \$26 billion in profits in just 2016 alone.).

¹⁷⁵ Wilcox, James K., *California's Net Neutrality Law Could Lead to Protections Nationwide*, (Sept. 30, 2018) (Trade groups representing ISPs that oppose both the California measure and FCC rules say they would prefer for Congress to pass a national law. "Broadband providers support an open internet with bright line net neutrality rules. This is not—and never has been—an issue," a spokesperson for US Telecom, a trade association representing mainly smaller broadband providers, wrote in an email to Consumer Reports before the measure was signed by Gov. Brown.).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* ("We simply cannot have 50 different state regulations governing our internet—consumers expect and demand a single, consistent, common-sense approach. Now, more than ever before, we need Congress to step forward and enact bipartisan legislation to make permanent and sustainable rules." [Said a representative from ISPS] California isn't alone in taking action. So far, at least 28 other states have introduced net neutrality bills, and three states—Oregon, Vermont, and Washington—have signed them into law. Washington's and

The exploration of alternative methods of legislation of the internet is equally important, as our current model for internet regulation may not prove to be the most effective.¹⁷⁸ As states begin to make, hopefully minor, adjustments we may discover new methods of regulating broadband internet that are more effective.¹⁷⁹ One such method being tossed around that will solve the concerns of Ajit Pai, in hoping that ISPs will expand their coverage to all citizens, as well as the concerns of many net neutrality advocates is the idea of "local loop unbundling,"¹⁸⁰ which would force ISPs to rent out their infrastructure to other ISPs, allowing ISPs to compete directly.¹⁸¹ This would make it so that any ISP could provide their

Vermont's took effect earlier this summer, and Oregon's doesn't kick in until 2019.).

¹⁷⁸ Jeff Dunn, *America has an internet problem — but a radical change could solve it*, BUSINESS INSIDER, (April 23, 2017) (The process would make the net-neutrality debate look like peanuts, and it'd probably mean a new tax when it comes time to upgrading the networks. But if you really think the internet is a public utility, it's a more wholesale solution).

¹⁷⁹ *Id.* (We know that because the US has technically introduced this sort of leasing and unbundling technique before, and it was either never truly enforced, or it led to private companies not being incentivized to invest in upgrading the underlying infrastructure.).

¹⁸⁰ Tyler Cooper, *What is Local Loop Unbundling?* (Jan. 31, 2018) (Essentially, it is the section of network infrastructure that spans from the demarcation point of a home or business to the network edge. It's quite literally "the last mile." This particular piece of the internet puzzle directly impacts the experience of users, and in America, that's a real issue. Why? Because the pipes are owned by the same few companies providing the internet service itself, who have no incentive to lease those lines to other providers, who would simply use them to compete for the same customers.).

¹⁸¹ *Id.* (Crucially, unbundling the local loop is also a proven solution — various European countries, including the UK, and some Asian nations already take a similar approach today. A number of them get faster and/or cheaper broadband as a result. If it wasn't already obvious, this is all a pipe dream under the current regime. Pai's plans are just about the exact opposite. But this change in thinking wasn't close to occurring under the Obama administration, either. America gets

services where any other ISP has placed their lines.¹⁸² This direct competition would likely solve many of the concerns that net neutrality advocates are concerned about, if any ISP started an internal policy of net neutrality provisions, consumers would find it in their interest to use that ISP.¹⁸³ The testing of new regulatory schemes in this manner could lead to other, better, ideas that other governments have yet to implement.¹⁸⁴

State based legislation is becoming a call to action for an adjustment of the FCC or generally a federal solution.¹⁸⁵ It was relatively apparent that people were generally displeased with the FCC's order to remove the Open Internet Orders.¹⁸⁶ By states

cold feet whenever it thinks of even mildly socializing a part of life it considers a universal good.).

¹⁸² *Id.* (That "last mile" infrastructure would probably have to be nationalized to an extent, but again, this is what you do with a public utility. Yet very few in Washington seem to want to entertain the idea for consumer service.).

¹⁸³ *Id.* (Theoretically, it'd also make any need for net-neutrality (or internet-privacy) laws irrelevant — if your ISP wants to throttle YouTube and sell your browsing history without telling you first, you can just take your business to one that doesn't. The market would likely erase such behavior out of existence, or at least force ISPs to deploy it in a way that isn't terrible.).

¹⁸⁴ *Id.*

¹⁸⁵ Wilcox, James K., *California's Net Neutrality Law Could Lead to Protections Nationwide* (Sept. 30, 2018) (In addition, governors in six states have signed executive orders that reinstate some form of net neutrality, which prevent ISPs from getting or renewing state contracts unless they agree to abide by net neutrality principles.

Around two dozen states and the District of Columbia have filed lawsuits to overturn the FCC's repeal of the earlier rules. A number of companies, including Mozilla and Vimeo, and public-interest groups such as the Free Press and Public Knowledge, also filed lawsuits following the FCC's net neutrality rollback.).

¹⁸⁶ Jacob Kastrenakes, *The net neutrality comment period was a complete mess*, THE VERGE (Aug. 31, 2017) (Even with the outpouring of support for net neutrality, it's always seemed likely that the internet protections introduced in 2015 were going down. The new proposal would undo the classification of internet providers as "common carriers" under Title II of the Communications

continuing to try to implement their own forms of net neutrality, this places a large burden on the FCC, and may incentivize them to reconsider their position.¹⁸⁷ Furthermore, this greatly incentivizes congress members to come up with their own plan for federal regulations.¹⁸⁸ This is because ISPs will continue to find even minor variances amongst states to be untenable, and will seek to return to federal regulations, even if they are more strict.¹⁸⁹ Furthermore, Congress taking a look at this overturning the FCC will impart many of the same benefits of state governments making decisions on behalf of their constituents, as congress represents the will of the people at the federal level, but with even more uniformity across state lines.¹⁹⁰ This will also provide an opportunity for Congress to give more authority to the FCC, giving it the ability to implement things like “local loop unbundling” or even making ISPs a public utility overseen by the FCC.¹⁹¹ This is why state based legislation being used as a call to action for Congress is good for the general public.¹⁹²

Act, and in doing so, strip the FCC of the authority needed to enforce true net neutrality — that is, no blocking, throttling, or prioritization of content.).

¹⁸⁷ Wilcox, James K., *California's Net Neutrality Law Could Lead to Protections Nationwide* (Sept. 30, 2018).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Jeff Dunn, *America has an internet problem — but a radical change could solve it*, BUSINESS INSIDER, (April 23, 2017).

¹⁹² *Id.*

D. FCC Pre-Emption Will Likely Be Unsuccessful

From the moment that Senate Bill 822 was made law, it was being challenged by the DOJ on behalf of the FCC.¹⁹³ The primary argument that the law will not be enforceable is that the Restoring Internet Freedom order pre-empts any state legislation.¹⁹⁴ This is a complicated argument, as the jurisdictional power of the FCC is not clear.¹⁹⁵ This can go either way, as Section 152(b) outlines that states can control communications within their states, but the FCC has authority over any interstate communications by wire or radio,

¹⁹³ Tony Romm and Brian Fung, *The Trump administration is suing California to quash its new net neutrality law*, Washington Post (Sep. 30, 2018) (Mere hours after California's proposal became law, however, senior Justice Department officials told The Washington Post they would take the state to court on grounds that the federal government, not state leaders, has the exclusive power to regulate net neutrality. DOJ officials stressed the FCC had been granted such authority from Congress to ensure that all 50 states don't seek to write their own, potentially conflicting, rules governing the web. The move by Attorney General Jeff Sessions opens another legal battlefield between the federal government and California, which the DOJ has taken to court already for trying to bypass the Trump administration's policies around immigration and climate change. "The Justice Department should not have to spend valuable time and resources to file this suit today, but we have a duty to defend the prerogatives of the federal government and protect our Constitutional order," Sessions said in a statement.).

¹⁹⁴ *Id.* (Many governors and legislatures also set about trying to craft policies preserving net neutrality within their borders, even though the FCC's repeal order explicitly prohibited states from writing their own open-internet laws. That prompted the DOJ to file its lawsuit in a federal court in Sacramento, which seeks a preliminary injunction that will stop California's net neutrality rules from taking effect on January 1. "Not only is California's Internet regulation law illegal, it also hurts consumers," Pai said in a statement. "The law prohibits many free-data plans, which allow consumers to stream video, music, and the like exempt from any data limits. They have proven enormously popular in the marketplace, especially among lower-income Americans. But notwithstanding the consumer benefits, this state law bans them.").

¹⁹⁵ 47 U.S.C § 152(b) (2012).

such as broadband internet.¹⁹⁶ However, there are cases, such as *NARUC II*, that show the FCC's control over interstate communication does not always pre-empt state law.¹⁹⁷ There are cases, such as *Computer II*, which show that the FCC can pre-empt state law in instances where it has express authority to do so.¹⁹⁸ None of these cases explicitly address instances where the state acts a purchaser, such as the method attempted by the Senate Bill 460.¹⁹⁹ Thus, even if it is possible that state laws are found to be pre-empted

¹⁹⁶ *Id.*

¹⁹⁷ Nat'l Ass'n of Regulatory Util. Com'rs v. F.C.C., 533 F.2d 601 (D.C. Cir. 1976) (herein after referred to as "*NARUC I*") (The Commission's asserted pre-emption of state and local regulation of two-way, intrastate, non-video cable transmissions is set aside. Insofar as most of those activities partake of a common carrier character, the order violates the clear bar to Commission jurisdiction of 47 U.S.C. § 152(b). It thus cannot fall within the s 152(a) delegation of powers reasonably ancillary to broadcasting.).

¹⁹⁸ *Computer & Commc'ns Indus. Ass'n v. F.C.C.*, 693 F.2d 198 (D.C. Cir. 1982) (herein after referred to as "*Computer II*") (The Commission asserts that preemption of state regulation is justified in this case because the objectives of the Computer II scheme would be frustrated by state tariffing of CPE. We agree. Courts have consistently held that when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme.).

¹⁹⁹ Fung, Brian, *This crafty tactic may let states get around the FCC on net neutrality* (Feb. 9, 2018) ("I really don't know how the state spending case would turn out," said Berin Szoka, president of the right-leaning think tank TechFreedom. "We've been looking into it. There isn't much case law to look to as precedent. It will be a fascinating case." At the heart of a legal fight over the executive orders will be familiar constitutional questions — and some novel ones. Since the country's founding, legal experts have clashed over where the federal government's authority ends and state authority begins. From a basic perspective, the FCC enjoys the upper hand: Part of its reason for existence is to smooth over differences in state laws, said Jonathan Turley, a constitutional law professor at George Washington University.).

by the FCC, it is completely untested on whether a state acting as purchaser can be stopped by the FCC.²⁰⁰

The jurisdiction of broadband internet is often considered to be mixed jurisdictional service.²⁰¹ The FCA gave the FCC the authority to make decisions regarding any communications that cross state lines. This means that generally the FCC is considered to have the pre-eminent authority over broadband internet.²⁰² The internet is inherently an interstate service, with devices being connected across state line in the U.S. and to users globally, so it makes sense for the federal government to have pre-eminent authority.²⁰³ However, this does not change the fact that states have the authority to regulate commerce within their borders.²⁰⁴ This is illustrated in 47 USC §152(b), in which a state government can control the types of offerings of communications within its own borders.²⁰⁵ The state governments can certainly require any service offered by ISPs to adhere to certain provisions, like the general

²⁰⁰ *Id.*

²⁰¹ 47 U.S.C. § 152 (2012).

²⁰² Feld, Harold, *Can The States Really Pass Their Own Net Neutrality Laws? Here's Why I Think Yes.* (Feb. 6, 2018) (Moving from the general to the specific, we now turn to broadband and the regulation of communications services in the United States. Congress has created a federal agency, the FCC, that has general jurisdiction over “communication by wire and radio.” So broadband falls in the general jurisdiction of the FCC.)

²⁰³ *Id.*

²⁰⁴ *Id.* (But Section 152(b) explicitly recognizes the role of the states in regulating communications and expressly prohibits the FCC from regulating “intrastate communications.” Additionally, we have well over 80 years of history of states regulating how local telephone companies and local cable companies do business within their state. So this isn’t a case where Congress has “preempted the field” as against any state regulation. To the contrary, states traditionally have lots of authority over how they regulate any offering of local service, including an ability to impose non-discrimination requirements.)

²⁰⁵ *Id.*

principles of net neutrality.²⁰⁶ Thus, it is unlikely that the argument that the entire field of telecommunications is pre-empted, as there are explicit provisions that give state governments the right to make and pass law regarding intrastate telecommunications.²⁰⁷

Pre-emption cases regarding the FCC do not paint a clear picture of the authority of the FCC over state regulations.²⁰⁸ *NARUC II* looks like a useful case for those arguing against the authority of the FCC to pre-empt the state governments.²⁰⁹ The court

²⁰⁶ *Id.* (In particular, states get to dictate how businesses operate in their state — even if these businesses offer items “in the stream of interstate commerce.” Nothing stops a state from regulating supermarkets, even though these sell lots of out of state items. Nothing stops a state from regulating car dealerships. Nothing stops a state from regulating how properties get rented — even if it involves Airbnb. But the Commerce Clause does impose some limits. If it wants to, the federal government can preempt state law that is inconsistent with federal regulation of interstate commerce (that is the combination of the Interstate Commerce Clause and the Supremacy Clause).)

²⁰⁷ *Id.* (In telecom terms, we call something like broadband a “mixed jurisdictional service.” It has interstate elements and intrastate elements. So, unless Congress has either expressly limited state authority, or delegated authority to the FCC to create federal policy in a way that preempts the states, the states can do whatever they want — subject to the usual limitations of the Commerce Clause.)

²⁰⁸ *NARUC II*, 533 F.2d at 601; *But also, Computer II*, 693 F.2d at 198.

²⁰⁹ *NARUC II*, 533 F.2d at 610 (It is uncontroverted that the two-way communications at issue will be intrastate insofar as they are carried on by a cable network entirely encompassed within a single state. Properly, we think, no contention has been made that all communications within a given cable network take on an interstate character, due to the interstate, broadcast source of many transmissions. The relationship between return transmissions over an entirely intrastate cable network, and receipt of interstate broadcast signals at the headend of the cable network is too remote to justify such a conclusion. In many instances the only relationship will be that both activities are carried on by a single operator. We therefore conclude that, for purposes of determining § 152(b) applicability, the intrastate requirement demands nothing more than a single determination of which cable networks are entirely within a single state's boundaries. We leave

there determined that the FCC does not have the authority to preempt just because there are communications that are interstate if the receiver of a service and the provider of that service are within the same state lines.²¹⁰ The providing of internet service from ISPs to consumer are generally within the same state lines. Thus, the logic of *NARUC II* would appear to apply to the present case and states should be able to regulate it under the same theory that this service is in fact intrastate, rather than interstate.²¹¹ However, the FCC argues that the current case is more akin to the *Computer II*, and, in that case, it was deemed that the FCC does have the authority to preempt state regulations where the service being provided was predominately intrastate.²¹² However, an important distinction there was the fact the FCC was granted explicitly held authority over the equipment in that case.²¹³ This distinction is important, as there was not the mixed jurisdictional service like there is with broadband

that to be resolved by the Commission and appropriate state authorities, by their respective assertions of jurisdiction.).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Computer II*, 693 F.2d at 216 (“We fail to see any distinction in this case between preemption principles applicable to state ratemaking authority and those applicable to other state powers. The operative principle in this case is precisely the principle that demanded state preemption in the NCUC cases. There, the preemption of state regulations that restricted interconnection was justified because those regulations impeded the validly adopted federal policy of unrestricted interconnection. Similarly, in *Computer II* preemption of state tariffs on CPE is justified because state tariffs would interfere with the consumer's right to purchase CPE separately from transmission service and would thus frustrate the validly adopted federal policy. In *Computer II* the federal-state conflict would stem, as it did in the NCUC cases, from the practice of using CPE jointly for interstate and intrastate communication. The conflicting state policy, meant to affect only intrastate use, would unavoidably affect the federal policy adversely. Therefore, here, as in NCUC I and II, the state regulatory power must yield to the federal.”).

²¹³ *Id.*

internet.²¹⁴ This means that *Computer II* is not a perfect parallel with the current situation regarding state based net neutrality provisions.²¹⁵ If a court does determine that 47 USC §152(b) does not retain authority for the states over broadband internet, then the FCC has explicit authority over broadband.²¹⁶ However, this is not a clear conclusion from the statutes or the case law.²¹⁷

Purchasing power is a theory that the states can force net neutrality provisions by only agreeing to contracts with ISPs that adhere to the net neutrality provisions, as seen in the Senate Bill 460.²¹⁸ This would make the practices squarely intrastate, as this is just whether a state wants to purchase the services of an ISP for the residents of their state.²¹⁹ Whether the ISPs complies or not with

²¹⁴ *Id.* at 216. (In the NCUC cases, the Fourth Circuit also found that section 221(b) of the Act did not constitute a bar to federal control of dual use CPE. That section provides that the Commission has no jurisdiction over state-regulated charges, facilities, or other matters “for or in connection with ... telephone exchange service ... even though a portion of such exchange service constitutes interstate or foreign communication.” The Fourth Circuit found on the basis of the legislative history that this provision was merely intended to preserve state regulation of local exchanges that happened to overlap state lines.)

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *NARUC II*, 533 F.2d at 601; *But also, Computer II*, 693 F.2d at 198.

²¹⁸ C.A. SB 460 2017 (An Internet service provider that submits a bid or proposal to, or that otherwise proposes to enter into or renew a contract with, a state agency with respect to any contract in the amount of one hundred thousand dollars (\$100,000) or more for the provision of broadband Internet access service shall certify in writing that both of the following conditions are met [...]); See Fung, Brian, *This crafty tactic may let states get around the FCC on net neutrality* (Feb. 9, 2018) (Rather than directly regulating the broadband industry, the executive order imposes procurement obligations on state agencies. Under the order, state officials contracting with ISPs for service may do so only if the providers agree not to block or slow websites, or to offer websites faster delivery to consumers in exchange for an extra fee.)

²¹⁹ *Id.*

their terms is irrelevant, as they are free to find someone offering a different plan.²²⁰ This hinges on the idea that ISPs will not want to back away from the expensive contracts that state governments provide. But, if every state goes this route, the ISPs will not truly have an option other than to comply with the contracts being offered.²²¹ However, despite this inherent forcing of ISPs to comply, it is hard to see how the FCC could prevent states from behaving in this way.²²² Thus, if this is the pre-dominate methodology of states hoping to enforce net neutrality, there is no case law to guide the way and is it not prohibited by any legislation.²²³ However, this is the less ideal outcome compared to normal legislation, as these

²²⁰ 47 USC §152(b) (2012).

²²¹ Fung, Brian, *This crafty tactic may let states get around the FCC on net neutrality* (Feb. 9, 2018) (At the heart of a legal fight over the executive orders will be familiar constitutional questions — and some novel ones. Since the country's founding, legal experts have clashed over where the federal government's authority ends, and state authority begins. From a basic perspective, the FCC enjoys the upper hand: Part of its reason for existence is to smooth over differences in state laws, said Jonathan Turley, a constitutional law professor at George Washington University. “The overall case law supports the FCC in maintaining a consistent and coherent national policy for an interstate industry,” Turley said. “The states have a considerable burden to overcome.”).

²²² *Id.* (But despite the supremacy of the federal government in most matters, states still have broad leeway within their borders, other experts say. “The states' power to buy goods and services has nothing to do with the federal government,” said Andrew Schwartzman, a public interest lawyer at Georgetown University. States are also allowed some regulatory flexibility even on certain matters that indirectly touch interstate commerce — a traditionally federal issue.)

²²³ *Id.* (States are betting that most ISPs will fall in line rather than risk giving up a major customer. But it's a dangerous game that could end up with all of a market's ISPs essentially calling the state's bluff — leaving the government without any broadband provider, said Dan Lyons, a law professor at Boston College. And the move could even wind up costing state governments more money.)

contracts are only enforceable by the parties involved.²²⁴ They will need to be enforced more stringently by state as ISPs benefit by a failure of these contract.²²⁵ Potential customers could be harmed by their state governments letting the ISP skimp on those provisions.²²⁶ The ideal would be to approach with both only agreeing to contract with ISPs who comply to net neutrality as well as mandating all ISPs within your state complying outright by law, the way originally intended for senate bills 460 and 822.²²⁷

E. Internet Service Provider Unsuccessful Challenges to State Laws

The concern that state laws will conflict with the federal government is not the only concern, ISPs have rights that these laws may violate as well. As such the ISPs are hoping to sue the state of California directly, because this could be California overstepping its jurisdictional reach.²²⁸ In light of the *Verizon* case that happened in

²²⁴ Feld, Harold, Can The States Really Pass Their Own Net Neutrality Laws? Here's Why I Think Yes. (Feb. 6, 2018) (True, trying to enforce net neutrality via the state's purchasing power is not an effective substitute for actual net neutrality rules. An ISP can chose not to contract with the state, giving it the freedom to prioritize, throttle or block whatever it feels like. Additionally, if the state decides not to enforce the requirement, consumers are out of luck. Unlike a rule of general applicability, a contractual provision is generally only enforceable by the parties. I have not looked at the ability of third party beneficiaries to enforce contract terms since law school, but I don't want to pretend that state contract requirements can substitute for actual enforceable rules.).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ CA S.B. 460 2017; CA S.B. 822 2017.

²²⁸ Jon Brodtkin, *Entire broadband industry sues California to stop net neutrality law*, ARS TECHNICA (Oct. 3, 2018), <https://arstechnica.com/tech-policy/2018/10/entire-broadband-industry-sues-california-to-stop-net-neutrality-law/> (The lawsuit was filed in US District Court for the Eastern District of

2014, the way this plays out may be more surprising than the DOJ case.²²⁹ It is likely that if the DOJ case fails before the courts, then the ISP case will fail, as both will largely hinge on how the courts determine the jurisdiction of the FCC.²³⁰ However, another aspect of the discussion revolves around whether a state government is treating ISPs as a common carrier, and whether common carrier status is even a concern at the state level.²³¹ In the *Verizon* case, the court determined that the 2010 Open Internet Order was too intrusive and they lacked the authority to make the regulation prescribe unless broadband internet was a common carrier.²³² The reasoning present in that case will likely apply here, and as such we could see a similar outcome.²³³ Furthermore, however the courts determine the outcome of the states contracting only ISPs that adhere to Net Neutrality will likely be the same here, provided that this type of discrimination is not unreasonable.²³⁴ Thus, the ISP challenges to the California bill will not be substantially different

California by mobile industry lobby CTIA, cable industry lobby NCTA, telco lobby USTelecom, and the American Cable Association, which represents small and mid-size cable companies. Together, these four lobby groups represent all the biggest mobile and home Internet providers in the US and hundreds of smaller ISPs. Comcast, Charter, AT&T, Verizon, T-Mobile US, Sprint, Cox, Frontier, and CenturyLink are among the groups' members." This case presents a classic example of unconstitutional state regulation," the complaint said. The California net neutrality law "was purposefully intended to countermand and undermine federal law by imposing on [broadband] the very same regulations that the Federal Communications Commission expressly repealed in its 2018 Restoring Internet Freedom Order.").

²²⁹ *Verizon*, 740 F.3d at 623.

²³⁰ *Id.*

²³¹ *Id.* at 629.

²³² *Id.* at 658 (In requiring that all edge providers receive this minimum level of access for free, these rules would appear on their face to impose per se common carrier obligations with respect to that minimum level of service.).

²³³ *Id.*

²³⁴ *Id.*; See *supra* note 180.

from the FCC's direct challenge, but the variance in case law may change the way it plays out.²³⁵

The jurisdictional argument will not shift dramatically when being challenged by the ISPs.²³⁶ The predominate changes to the SB 822 from the law as it was under the 2015 Open Internet Order was in relation to the zero-ratings provisions.²³⁷ The *Verizon* case determined that the anti-discrimination provision of the order did overstep their authority in the 2010 Open Internet Order.²³⁸ The difference between the 2010 and 2015 order was that the 2015 Order was making ISPs common carriers.²³⁹ This language is not present in the California bill.²⁴⁰ Considering that fact that 47 U.S.C. § 152(b) grants state governments similar authority to telecommunications for intrastate activities, the apparent result would be that the bill will not survive challenges by ISPs.²⁴¹ There are still blocking requirements present in the bill, the language is not very different from what was blocked by the *Verizon* case, and

²³⁵ *Verizon*, 740 F.3d 623 (D.C. Cir. 2014).

²³⁶ 47 U.S.C. § 152 (2012).

²³⁷ CA S.B. 822 2017 ((B) Zero-rating Internet traffic in application-agnostic ways shall not be a violation of subparagraph (A) provided that no consideration, monetary or otherwise, is provided by any third party in exchange for the Internet service provider's decision whether to zero-rate traffic.); See Open internet Order 2015.

²³⁸ *Verizon*, 740 F.3d 623, 655 (D.C. Cir. 2014) (We have little hesitation in concluding that the anti-discrimination obligation imposed on fixed broadband providers has "relegated [those providers], pro tanto, to common carrier status." In requiring broadband providers to serve all edge providers without "unreasonable discrimination," this rule by its very terms compels those providers to hold themselves out "to serve the public indiscriminately.").

²³⁹ Open Internet Order 2010; Open Internet Order 2015.

²⁴⁰ *Id.*; See CA S.B. 822 2017.

²⁴¹ 47 U.S.C. § 152(b) (2012).

ISPs are not common carriers or public utilities.²⁴² State governments do not have a pervasive history of attempting to regulate broadband internet, which was a large point in favor of the FCC for the authority of the FCC in the *Verizon* case.²⁴³ Thus, it is not clear cut whether state governments do have the authority to pass such regulations. But, it is likely the FCC court case will guide courts through the ISP cases.

Another aspect of the *Verizon* case is that ISPs will attempt to argue that these regulations are attempting to treat ISPs as a common carrier within the states that enact bills like SB 822.²⁴⁴ This is likely to be deemed true, as during the *Verizon* case, the court assessed that, despite the overreach of the FCC, this did amount to making ISPs a common carrier.²⁴⁵ However, it is unclear if treating an ISP as a common carrier is an overstep of authority from the state perspective, as there is not the delegation of power from the federal government as there is from the FCA to the FCC.²⁴⁶ This means that,

²⁴² CA S.B. 822 2017 ((a) It shall be unlawful for a fixed Internet service provider, insofar as the provider is engaged in providing fixed broadband Internet access service, to engage in any of the following activities:

(1) Blocking lawful content, applications, services, or nonharmful devices, subject to reasonable network management.); *See* Open Internet Order 2010; *Verizon*, 740 F.3d 623, 658 (D.C. Cir. 2014) (The anti-blocking rules establish a minimum level of service that broadband providers must furnish to all edge providers: edge providers' "content, applications [and] services" must be "effectively []usable." The Order also expressly prohibits broadband providers from charging edge providers any fees for this minimum level of service. In requiring that all edge providers receive this minimum level of access for free, these rules would appear on their face to impose per se common carrier obligations with respect to that minimum level of service.).

²⁴³ *Id.*

²⁴⁴ *Verizon*, 740 F.3d 623 (D.C. Cir. 2014).

²⁴⁵ *Verizon*, 740 F.3d at 658.

²⁴⁶ 47 U.S.C. § 152 (2012); *See Id.* at 649. (Even though section 706 grants the Commission authority to promote broadband deployment by regulating how broadband providers treat edge providers, the Commission may not, as it

even if a court determines that states are treating ISPs as common carriers, this is not as an important question as whether the state has delegated authority under 47 U.S.C. § 152(b).²⁴⁷ However, if the authority of the state is determined to be the same as the FCC for the federal government, it is a much closer call and will largely depend on how the anti-discrimination as well as the anti-blocking provisions of the bill are interpreted by the court.²⁴⁸

Lastly, there is concern if the ISPs attempt to sue state governments for only offering contracts to ISPs that have adopted net neutrality provision themselves.²⁴⁹ Just like when the FCC challenges this same approach, there is very little case law that we can point to.²⁵⁰ However, it is obvious that this discrimination against certain ISPs would not be arbitrary, but instead be motivated from public concern of harmful business practices.²⁵¹ This means

recognizes, utilize that power in a manner that contravenes any specific prohibition contained in the Communications Act.)

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ Fred Campbell, *State Net Neutrality Regulations Are An Exercise In Futility*, FORBES (Aug. 13, 2018)

<https://www.forbes.com/sites/fredcampbell/2018/08/13/state-net-neutrality-regulations-are-an-exercise-in-futility/#485669684742> (Under the so-called “market-participant doctrine,” a state agency acting as a participant in the market is free to negotiate its own terms with an ISP. When a state governor establishes a state procurement policy requiring ISPs to extend net neutrality terms to all customers in a state, however, the state is no longer acting as an ordinary market participant. Such broad mandates are not “specifically tailored to one job” or a “legitimate response to state procurement constraints or local economic needs.” Their purpose is to defy federal law, as the nationwide advocacy campaign on this issue and the states’ themselves have made all too clear.).

²⁵⁰ *Id.*

²⁵¹ *Id.*; see also Jacob Kastrenakes, *The net neutrality comment period was a complete mess*, THE VERGE (Aug. 31, 2017)

<https://www.theverge.com/2017/8/31/16228220/net-neutrality-comments-22->

that ISPs cannot challenge states for being discriminatory in their selection.²⁵² The concerns with this approach that were present in the FCC case are still present, but are strengthened none the less.²⁵³ This is because if every state adopted this approach, ISPs will have a strong argument that states are working to undermine the federal rule that was attempting to deregulate.²⁵⁴ In that instance, it is very likely that a challenge to state based contracts of this nature would be deemed unconstitutional.²⁵⁵

million-reply-record (Even after millions of comments arguing that internet protections are needed, it's entirely possible that the commission will go ahead with its original, bare-bones plan to simply kill net neutrality and leave everything else up to internet providers to sort out.).

²⁵² *Id.*

²⁵³ Fred Campbell, *State Net Neutrality Regulations Are An Exercise In Futility*, FORBES (Aug. 13, 2018) (States efforts to defy federal law by conditioning state contracts on ISPs' state- and customer-wide compliance with net neutrality regulations will also fail in court. According to the Supreme Court, a state's decision to use its spending power rather than its police power (i.e., directly adopting state-level net neutrality regulations) is not enough to avoid federal preemption based on a conflict of law. It is the activity being regulated, not the chosen legal approach, that matters.).

²⁵⁴ *Id.* (This is not a close call. State efforts to defy Congress and the FCC on net neutrality won't withstand scrutiny in court. Such efforts will only serve to undermine investment in broadband networks, respect for the rule of law and state lawmakers' credibility.).

²⁵⁵ *Id.* (The nature of the conflict between state and federal law—e.g., that Congress decided to prohibit common carrier regulation of information service providers rather than impose such regulation on them—is likewise irrelevant. Deregulation is a “valid federal interest the FCC may protect through preemption of state regulation,” and federal deregulation has the same preemptive effect as affirmative regulation. For example, both the National Labor Relations Board and the states are prohibited from regulating conduct that Congress intended to leave to market forces; and there is no dispute that Congress intended to rely on market forces to protect consumers of information services.).

V. CONCLUSION

Net Neutrality is one of the most “hot button” issues of our generation. There are many proponents of net neutrality, with natural concerns over private companies having too much power over a vital service. Those who oppose net neutrality make a good point that, with deference to ISPs, we may see increased coverage of service across the US. Although these two points of view can have solutions that accomplish both aims, such as local loop unbundling, we are placed into this conflict as a result of how the authority is delegated from the federal government. Regardless of the politics of this situation, that is why states attempting to implement their own regime of regulations is one of the most interesting and potentially the most altering outcome available. This allows states to further solidify or lessen the authority states have in regard to the federal government. This means that states should move forward on this kind of legislation not merely in support of net neutrality provisions, but for the benefit of any of these kinds of issues down the road. Hopefully the states will be able to sort out the issue of net neutrality itself. But if not, this still answers the question of state authority versus federal authority, and that is worthwhile all on its own.

*Jesse King**

* Jesse King is a graduating 3L from DePaul College of Law with a certificate in Information Technology. He hopes to practice in copyright and trademark as they relate to the broader field of internet law. He has a B.A. in philosophy of the University of Tennessee. He is currently working for Ascent Regtech, focusing on regulations in the finance industry.