Does First Amendment let ISPs sell Web-browsing data? Judge is skeptical

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The broadband industry has lost a key initial ruling in its bid to kill a privacy law imposed by the state of Maine.

The top lobby groups representing cable companies, mobile carriers, and telecoms sued Maine in February, claiming the privacy law violates their First Amendment protections on free speech and that the state law is preempted by deregulatory actions taken by Congress and the Federal Communications Commission. Maine's Web-browsing privacy law is similar to the one killed by Congress and President Donald Trump in 2017, as it prohibits ISPs from using, disclosing, or selling browsing history and other personal information without customers' opt-in consent. The law took effect on July 1, 2020.

The case is not over, but the ruling today by Judge Lance Walker in US District Court for the District of Maine dealt a major blow to the broadband industry's lawsuit. The plaintiffs representing the broadband industry are America's Communications Association, CTIA, NCTA, and USTelecom. Walker denied the plaintiffs' motion for judgment on the pleadings, criticized the industry's First Amendment argument, and granted Maine's motion to dismiss claims that the state law is

preempted by federal law.

The judge agreed with the broadband industry that “plaintiffs’ marketing of customer data… is sheltered by the First Amendment,” but he added that “not all speech deserves the same level of protection.” Commercial speech “is ordinarily accorded less First Amendment protection than are other forms of constitutionally guaranteed expression,” he noted. The judge agreed with the Pine Tree State that its privacy law should be “subject to intermediate scrutiny” under a First Amendment analysis, instead of the “strict scrutiny” standard proposed by the broadband industry.

The judge also found that “Plaintiffs’ Motion simply fails to clarify how an ill-defined opt-in and opt-out regime would inhibit any protected First Amendment activity; for example, how it might chill them from preparing particular marketing materials for sale to customers. And, they have not begun to bear their burden to show the statute would be unconstitutional in ‘all of its applications,’ as they must for a facial challenge.” These findings will make it harder for ISPs to prove Maine’s law violates the First Amendment.

“While Judge Walker allowed the broadband industry’s argument that the Maine law violates the First Amendment to proceed, he ruled that the law is not unconstitutional on its face and clearly expressed skepticism that the industry would succeed at trial,” Gigi Sohn, a consumer advocate and former Obama-era FCC official, said today. “Judge Walker refused to apply a strict scrutiny standard to the law, instead applying an intermediate First Amendment scrutiny that applies to commercial speech. He also firmly rejected broadband providers’ overwrought allegations of harm.”

Judge calls FCC preemption

“dubious”

The judge ruled against ISPs’ claims that the Maine law is preempted by actions taken by Congress and the FCC. Contrary to the industry’s claim, the judge found that Congress’s decision to eliminate Obama-era FCC privacy rules “creates no overarching federal policy, and enacts no scheme with which the Maine Privacy Statute can conflict.”

The judge also said Maine’s law does not conflict with the Trump-era FCC’s decision to deregulate the broadband industry as part of its net neutrality repeal. Walker wrote:

> *Not only is the FCC’s abdication of authority in favor of the FTC of dubious preemptive effect, but Plaintiffs also have failed to identify any conflict between the FCC’s proclamation that the FTC [Federal Trade Commission] is the proper federal regulator of ISPs [in the net neutrality repeal order] and Maine’s decision to impose privacy protections at the state level. The idea that the FCC’s relinquishment of authority over ISPs creates a federal scheme prohibiting state privacy regulation of ISPs blinks reality.*

Walker granted Maine’s motion for judgment against the industry’s claims that the Maine law conflicts with the congressional and FCC orders. The judge also denied an industry motion “to invalidate the Privacy Statute as unconstitutionally vague due to its geographic scope.”

FCC Chairman Ajit Pai tried to wipe out all current and future state net neutrality rules in his net neutrality repeal order, but Walker isn’t the first judge to find that the FCC repeal doesn’t automatically invalidate state laws. The US Court of Appeals for the District of Columbia Circuit last year upheld the repeal itself, but it simultaneously vacated the FCC’s attempt at a blanket, nationwide preemption.

“ISPs welcomed the Pai FCC’s decision to abdicate authority over broadband with open arms,” said Legal Director John Bergmayer of consumer-advocacy group Public Knowledge. “This opened the door to states regulating broadband practices, as Maine has done. The argument that somehow states lack this authority was rejected by the DC Circuit in the Mozilla [vs. FCC] case, and here as well. This bodes well for other state efforts to protect the privacy of broadband users and open Internet principles.”

Sohn said that if ISPs “prevail at trial and beyond, the future of national and state privacy laws will be at risk, as will nearly any attempt to protect consumers and competition in the broadband market.” But she called today’s ruling “a good first step towards deflating the providers’ ‘shoot-the-moon’ attempt to use the First Amendment as a deregulatory tool.”

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