# How this week's net neutrality ruling can move the fight for an open internet forward

Earlier this week, a District of Columbia appeals court said the Federal Communications Commission could legally repeal net neutrality — removing rules that prevented internet service providers from throttling specific sites or services. The ruling was a blow to activists who have been fighting to preserve the internet's status as a telephone service-like "common carrier." But it handed them one major victory: the FCC can't preemptively stop states from adopting their own, stricter rules. And by doing so, it may be opening a new chapter in the fight for net neutrality.

The *Mozilla v. FCC* ruling slogs through a vast range of frequently convoluted arguments, sometimes hinging on strange questions like "Can a smart washing machine make phone calls?" But the section on state laws is comparatively straightforward. The FCC's 2018 "Restoring Internet Freedom Order" preemptively banned state or local rules that "impose more stringent requirements for any aspect of broadband service that we address in this order." The FCC argued that this fairly prevented a "patchwork" of inconsistent regulations. The court disagreed.

The ruling says that Congress hasn't given the FCC direct authority for such sweeping control over local law, and the FCC can't simply say the rule serves some indirect purpose like promoting competition. Finally, the court accuses the FCC

of trying to have its cake and eat it, too: the agency repealed net neutrality by reclassifying ISPs to reduce its authority over them, then granted itself power over states… using the old classification it had just rejected. (This is exactly what some legal experts predicted might happen.)

*The FCC will need to specifically explain how a state law undermines its rules*

Notably, the FCC can still object to individual state laws. But it can't declare that *any* stricter laws automatically violate its rules. "If the Commission can explain how a state practice actually undermines the 2018 order, then it can invoke conflict preemption," explains the ruling. "If it cannot make that showing, then presumably the two regulations can coexist."

That's good news for the 34 states that have already introduced or passed net neutrality rules. The most prominent of these is California, which passed what the Electronic Frontier Foundation dubbed a "gold standard" bill last year. The California rule not only bans blocking and throttling, but also stops ISPs from zero-rating specific apps like Netflix, which gives them a leg up by exempting them from data caps. But the Justice Department sued to stop its enforcement, and the rules have been on hold since last year — waiting for a resolution of their legal status.

The recent ruling doesn't put California in the clear yet. But a spokesperson for California Attorney General Xavier Becerra told the *Los Angeles Times* that it creates "solid ground" for a defense in court. And the bill's sponsor, California Senator Scott Wiener, wrote in a statement that he was "thrilled" about the ruling on state law. "As a result of this decision, California's net neutrality law … remains fully intact and the most impactful net neutrality law in the country," he said.

The FCC majority has maintained that this decision won't stop it from shutting down state rules — it will just have to make

more specific arguments about their contents. Conservative Commissioner Mike O'Rielly, who celebrated the overall decision, portrayed it as more of a headache than an existential threat, warning that the decision would lead to "case-by-case preemption efforts and more litigation."

*California is gearing up for a legal battle*

Opponents argue that the FCC has hamstrung itself by taking such a hands-off approach to internet regulation. "The court made it very difficult for the FCC to argue that a state law would conflict with federal regulations, because the FCC has repealed most of the substantive rules," said Eric Null, senior policy council at New America's Open Technology Institute, said in a Reddit Q&A.

If California and other states win their legal challenges, that doesn't just protect residents in those states; it makes maintaining a blanket throttling policy much more difficult. Conversely, though, it means having dozens of fights (in state congressional chambers *and* the courts) over net neutrality — and creating a potentially confusing spread of rules across the country.

So the ultimate solution, for net neutrality advocates, is still national legislation. Several US Congress members, including Rep. Anna Eshoo (D-CA) and Sen. Ed Markey (D-MA), used this decision to promote the Save the Internet Act — a bill that would reinstate the FCC's old net neutrality rules. The Save the Internet Act passed the House of Representatives earlier this year, but it's been stymied in the Senate.

This legal saga isn't over yet. Mozilla seems likely to appeal this week's decision, although a spokesperson said it was still considering its next steps. The FCC could also appeal over the state preemption section. But it suggests that we'll start seeing the fight for net neutrality heat up at a local level — whether or not it ultimately stays there.

https://www.theverge.com/2019/10/3/20895909/net-neutrality-mozilla-fcc-appeals-court-ruling-state-open-internet-law-legal-questions