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February 22, 2022

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WLF Urges Ninth Circuit To Recognize Preemptive Effect Of FCC's Net Neutrality Order

(ACA Connects v. Bonta)

“The panel’s refusal to acknowledge that it was creating a circuit split on an issue of national import warrants rehearing the case *en banc*.”

—John Masslon, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation (WLF) today urged the U.S. Court of Appeals for the Ninth Circuit to rehear an appeal from an order denying a preliminary injunction in an important preemption case. WLF was joined by TechFreedom in urging the court to reconsider its decision.

The case arises from California’s net neutrality law. Three industry groups sued arguing that the law is impliedly preempted by the FCC’s 2018 net neutrality order. The District Court denied the preliminary injunction motion. In affirming that decision, the panel held that the FCC’s net neutrality order could not preempt state net neutrality laws. A concurring panel member also said that parties should not appeal preliminary injunction orders.

In its *amicus* brief supporting the plaintiffs, WLF argues that the panel’s decision splits from the District of Columbia Circuit’s decision in *Mozilla v. FTC*. There, the D.C. Circuit struck down the FCC’s express preemption of state net neutrality laws. But it correctly held that those laws may be conflict preempted by the FCC’s order. The panel here, however, focused solely on express preemption. It did not conduct the necessary conflict preemption analysis. Yet the panel claimed that its decision was consistent with the D.C. Circuit’s *Mozilla* opinion. This circuit split will cause massive uncertainty for regulated parties.

WLF’s brief also explains why parties should not be discouraged from appealing preliminary injunction orders. Often, the preliminary injunction is more important than the final order. A single judge should not be able to make these important issues while evading meaningful judicial review. But parties will be worried about angering judges if they appeal preliminary injunction orders unless the Ninth Circuit grants rehearing *en banc* and repudiates the concurrence’s position.

Celebrating its 45th year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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