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**Day of Reckoning Approaches for California Net Neutrality Law**

by

**Daniel A. Lyons \***

**I. Introduction and Summary**

In 2017, the Federal Communications Commission adopted the *Restoring Internet Freedom Order* (*RIF Order*), which repealed the Commission’s two-year-old net neutrality restrictions.<sup>1</sup> This action spawned a flurry of activity in state legislatures that sought to re-impose those restrictions at the state level and subject the *RIF Order* to a death by a thousand paper cuts. Nowhere was this state activity more prominent than California, where Senate Bill 822 became a vehicle for net neutrality advocates not only to resurrect the requirements of the now-defunct 2015 *Open Internet Order*,<sup>2</sup> but also to impose additional regulations that even the Obama-era FCC had rejected.<sup>3</sup>

Unsurprisingly, the Justice Department challenged SB-822 in federal court in California, arguing that federal law preempted the state’s attempt to regulate the Internet from Sacramento.<sup>4</sup> In response, California agreed to voluntarily stay enforcement of the statute while the D.C. Circuit heard *Mozilla v. FCC*, which was considering the validity of the FCC’s *RIF Order*.<sup>5</sup> For almost two years, California’s bold net neutrality initiative has been in limbo, with supporters and critics alike waiting to see if the bill will ever amount to more than (in one commentator’s words) a “publicity stunt.”<sup>6</sup>

With the *Mozilla* litigation now complete, the day of reckoning is approaching – and the California court is likely to find that much, if not all, of SB-822 is preempted. At a minimum, the Communications Act expressly preempts most of the regulations that SB-822 places on wireless companies. More generally, the state law interferes with the carefully calibrated federal broadband policy determined in the *RIF Order*, and on that basis should face conflict preemption by the Supremacy Clause. These claims, which *Mozilla* left open,<sup>7</sup> are fatal to much, if not all, of California’s attempt to regulate broadband network management practices.

## II. California’s Net Neutrality Law Explained

California’s foray into broadband regulation began as an effort to undo the *RIF Order*. As noted above, the *RIF Order* repealed the 2015 *Open Internet Order* and restored the light-touch regulatory framework that governed much of the broadband industry since its inception. In response, California passed SB-822, the California Internet Consumer Protection and Net Neutrality Act of 2018. California Senate President or Tempore Kevin de Leon, a bill sponsor, was open about the fact that the bill’s purpose was to undo the effect of the *RIF Order*: “When Washington, D.C. abandons its obligation to protect American consumers...California must step up and do D.C.’s job.”<sup>8</sup> Similarly, the Senate Judiciary Committee’s bill analysis began by explaining that “This bill would codify portions of the recently-rescinded Federal Communications Commission rules protecting ‘net neutrality.’”<sup>9</sup>

SB-822 was part of a larger movement by activists to recreate at the state level various regulations that had been repealed by the federal government. In the communications realm, three other states (Washington, Oregon, and Vermont) adopted some form of a net neutrality statute in 2018,<sup>10</sup> while governors in six states issued executive orders purporting to compel broadband providers to abide by net neutrality requirements.<sup>11</sup> Though it is worth noting that only California and Washington put direct obligations on providers; the others merely placed conditions on state contracts. Maine also passed legislation adopting the FCC’s defunct ISP-specific privacy rules – which seems odd because the FCC’s focus on ISPs stemmed from its inability to regulate other Internet companies, a jurisdictional limitation that did not plague the Maine legislature.<sup>12</sup>

In some ways, the California statute mirrored (sometimes word-for-word) the repealed *Open Internet Order*. Like the *Open Internet Order*, SB-822 regulates the following activities:

- **Transparency:** broadband providers must accurately disclose information about their network management practices, performance, and commercial terms of their offerings sufficient for consumers to make an informed choice among providers and for edge providers to develop and maintain offerings;
- **Blocking:** broadband providers may not block lawful content, applications, services, or nonharmful devices, subject to reasonable network management;
- **Throttling:** broadband providers cannot impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a nonharmful device, subject to reasonable network management; and

- ***Paid Prioritization:*** providers cannot engage in paid prioritization, defined as management of an Internet service provider’s network to directly or indirectly favor some traffic over other traffic, either in exchange for consideration or to benefit an affiliated entity.

The California statute also adopts the FCC’s broad ***general conduct*** standard contained in the *Open Internet Order*, which had prevented broadband providers from “[u]nreasonably 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.”

But in other ways, the California statute goes beyond even the restrictions that had been imposed by the Obama-era FCC. These include:

- ***Zero Rating:*** SB-822 prohibits broadband providers from “zero-rating” traffic (defined as exempting some traffic from a customer’s monthly data allowance) in exchange for any consideration, or zero-rating some content within a category but not all similarly-situated applications. In the 2015 *Open Internet Order*, the FCC explicitly declined commenters’ invitation to ban zero-rating. The order recognized that zero-rating can benefit consumers, and that any potentially anticompetitive practices would be addressed on a case-by-case basis under the general conduct standard.<sup>13</sup> During the two years that the *Open Internet Order* was in effect, the agency never took action to prohibit a zero-rating practice.
- ***Interconnection:*** SB-822 prohibits broadband providers from entering into traffic exchange agreements that have the purpose or effect of evading the statute’s restrictions. It also prohibits payment from an edge provider in exchange for delivery of traffic to end-users, effectively setting a rate of zero for direct interconnection agreements (such as the agreements that various broadband providers entered into with Netflix’s OpenConnect content delivery network). By comparison, the *Open Internet Order* explicitly declined to apply its rules to Internet traffic exchange agreements, choosing instead to review interconnection complaints against broadband providers under a just and reasonable standard.<sup>14</sup>
- ***Specialized Services:*** SB-822 prohibits broadband providers from offering other services (such as IP television, VoIP, heart monitors, or alarm services) over the same last-mile network as broadband service, if the service has the “purpose and effect of evading” the statute, or if they “negatively affect the performance of broadband...access.” This effectively requires providers to prioritize broadband over other services. The 2015 *Open Internet Order* explicitly found that such services were beyond the scope of the order unless they were the “functional equivalent” of broadband or are used to evade the rules.<sup>15</sup>

Importantly, the law explicitly subjects wireless broadband providers to the same restrictions that it places on fixed broadband providers.

California Governor Jerry Brown signed SB-822 into law on September 30, 2018. The same day, the federal government and industry trade groups filed suit alleging that the *RIF Order* preempted SB-822.<sup>16</sup> California could not defend on the ground that the *RIF Order* is invalid, as the Hobbs Act vests exclusive jurisdiction in the courts of appeal to determine the validity of FCC orders.<sup>17</sup> At the time, the *RIF Order* had been challenged by several parties – including California – in the D.C. Circuit case *Mozilla v. FCC*. Therefore, California agreed to voluntarily stay SB-822, and plaintiffs agreed to stay their challenges to SB-822, until the *Mozilla* case was completed.

### III. The *Mozilla* Decision

In *Mozilla*, a collection of plaintiffs, including California and several other states, argued the *RIF Order* was invalid. The complaint alleged that the FCC lacked statutory authority to classify broadband as a Title I information service and that the agency acted arbitrarily and capriciously by failing to justify its decision. The complaint also took aim at the *RIF Order*'s broad preemption clause, which purported to preempt “any state or local requirements that are inconsistent with the federal deregulatory approach we adopt today” (a clause that the *Mozilla* court deemed the “Preemption Directive”).<sup>18</sup>

The D.C. Circuit largely upheld the order. Unsurprisingly, it found the legal challenge was foreclosed by the Supreme Court's *Brand X* decision, which held that the FCC was free to choose whether to classify broadband as a Title I information service or Title II telecommunications service.<sup>19</sup> It also found that the agency's ultimate conclusions, that consumers are best protected by robust transparency requirements backstopped by consumer protection and antitrust law, and that the additional regulatory burden of the *Open Internet Order*'s regulations were harmful to consumers and competition, were reasonable.<sup>20</sup> The court did remand for additional explanation on three issues, but none of them were significant enough to warrant vacatur of the order.<sup>21</sup>

The *Mozilla* court did invalidate one key part of the *RIF Order*: the Preemption Directive. The court found that the agency failed to ground the clause in a lawful source of statutory authority.<sup>22</sup> The court correctly noted that the Commission may preempt state law “only when and if it is acting within the scope of its congressionally delegated authority.”<sup>23</sup> But the court found that the two grounds offered by the agency – the Impossibility Exception and the federal policy of nonregulation of information services – were insufficient to support a directive that preempted state law regulating “any aspect of broadband service...addressed in the Order.”<sup>24</sup>

But importantly, while the court invalidated the order's *express* preemption clause, it was careful to preserve the issue of *conflict* preemption. The court stressed that “the sweeping Preemption Directive...goes far beyond conflict preemption,” a defect that the court found was “fatal.”<sup>25</sup> But the court explicitly declined to decide whether state laws survive a conflict analysis, finding this question “wholly premature.”<sup>26</sup> The Court was correct here: to find that a state law conflicts with a federal order, one needs to, well, have a state law to compare it to. There were no state laws at issue in *Mozilla*, which solely considered the validity of the *RIF Order*.

Thus, while net neutrality advocates found a silver lining in *Mozilla*'s ruling on the Preemption Directive, their celebration is, at a minimum, premature. The court made clear that striking the Preemption Directive did not give states license to enact statutes that conflict with the *RIF Order*: *Mozilla* states clearly that the “suggestion that the court's decision leaves no room for implied preemption confuses (i) the scope of the Commission's authority to expressly preempt, with (ii) the (potential) implied preemptive effect of the regulatory choices the Commission makes that are within its authority.”<sup>27</sup>

The *Mozilla* plaintiffs elected not to seek Supreme Court review, announcing that the net neutrality “fight is best pursued” at “the state level...as well as other fronts including Congress or a future FCC.”<sup>28</sup> On July 6, 2020, the filing deadline passed for a writ of certiorari, thus ending the *Mozilla* case – and the stay in the SB-822 litigation. Pursuant to the district court's briefing schedule, the federal and industry plaintiffs filed renewed motions for a preliminary injunction on August 5, arguing again that the California statute is preempted by federal law. Free State Foundation President Randolph May joined an amicus brief filed on August 19. California's opposition is due on September 30, and any reply brief is due October 14.

#### **IV. The Case for Preemption**

It's important to note that, while the FCC has changed direction repeatedly over the proper regulatory treatment of broadband providers, a bipartisan consensus has consistently supported preemption of state broadband regulation. The 2010 *Open Internet Order* announced it would preempt state laws on a case-by-case basis that interfered with valid federal objectives.<sup>29</sup> The 2015 *Open Internet Order* was more explicit, explaining it would preempt “state regulations that would conflict with the federal regulatory framework or otherwise frustrate federal broadband policies.”<sup>30</sup> And, of course, the *RIF Order* expressed an intent to preempt state law as well, though the *Mozilla* court found its ambition outstripped its authority. More generally, the Commission has consistently supported a federal policy of nonregulation of information services, preempting state power grabs over services such as interconnected VoIP.<sup>31</sup>

Against that backdrop, and the *Mozilla* court's explicit reservation of conflict preemption issues, there remain several grounds upon which plaintiff challengers can argue that SB-822 is preempted in whole or in part by state law. This section assesses those arguments.

##### **A. Wireless Net Neutrality: Express Preemption by the Communications Act**

The strongest preemption argument is in the wireless context. Section 332 of the Communications Act expressly preempts state authority “to regulate the entry of or rates charged by any” commercial or private mobile service.<sup>32</sup> As the agency charged with interpreting Section 332, the FCC has read the term “rates charged” broadly to include state regulation of “rate levels and rate structures,” such as whether wireless phone providers can charge for calls in whole-minute increments and whether they can charge for both incoming and outgoing calls.<sup>33</sup> Under Section 332, states are prohibited from prescribing “the rate elements” of mobile service and “specifying which among the [mobile] services provided can be subject to charges by [mobile] providers.”<sup>34</sup> The Commission has also preempted state efforts to indirectly regulate rates, for

example by requiring state review and preapproval of a rate change, or a requirement that a carrier cannot change a rate without the affirmative consent of the subscriber.<sup>35</sup>

Much of SB-822 does precisely what Section 332 forbids: it regulates the rates that a wireless broadband provider may charge for service.<sup>36</sup> Most obviously, it prohibits wireless providers from zero-rating (exempting some data from a customer's monthly data allowance), which directly regulates "the rate levels and rate structures" of mobile broadband by marking a certain rate structure off-limits to mobile providers. The prohibition on paid prioritization effectively sets a rate – of zero – for priority delivery of congestion-sensitive traffic over the last-mile network. Similarly, the interconnection requirement prohibits wireless providers from charging to accept traffic onto the broadband network, which also effectively sets a rate of zero for network peering.

California may argue that the prohibitions on blocking and throttling fall within Section 332's savings clause. While preempting state regulation of wireless entry and rates, the act clarifies that "this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."<sup>37</sup> Setting aside the fact that the *RIF Order* classifies mobile broadband as a "private" rather than a "commercial" mobile service, the savings clause is unavailing. The blocking and throttling prohibitions affect wireless rates by preventing wireless companies from charging for delivery of content to an end-user. Depending on how California courts interpret the definition of "broadband provider," these restrictions could also prohibit providers from offering low-price plans that include only selected Internet content (such as the unlimited talk, text, and social media plan for teenagers that Sprint once piloted, but withdrew in the face of criticism that such a plan "blocked" non-social-media sites).<sup>38</sup> Courts have held that the savings clause permits states to impose consumer protection requirements on wireless providers, if they reflect the "neutral application of state contractual or fraud laws" to the wireless industry.<sup>39</sup> But the blocking and throttling prohibitions are industry-specific prohibitions that affect wireless rates, and therefore are unlikely to fall within the savings clause.

### **B. Conflict Preemption: Frustration of Federal Purpose**

More generally, plaintiffs can – and do – argue that SB-822 is preempted by the Supremacy Clause. As noted above, the *Mozilla* court reserved this issue, which was not properly before it: "Because a conflict-preemption analysis involves fact-intensive inquiries, it mandates deferral of review until an actual preemption of a specific state regulation occurs. Without the facts of any alleged conflict before us, we cannot begin to make a conflict-preemption assessment in this case."<sup>40</sup> In a properly presented case, *Mozilla* states, "[i]f the Commission can explain how a state practice actually undermines the 2018 Order, then it can invoke conflict preemption."<sup>41</sup> In this case, plaintiffs argue that conflict preemption is appropriate because SB-822 frustrates the accomplishment of a federal objective.

Although the boundaries of this branch of conflict preemption are not clearly defined, the Supreme Court's decision in *Geier v. American Honda Motor Co.* is instructive.<sup>42</sup> The *Geier* Court evaluated whether a state law requiring all cars to be equipped with airbags conflicted with a Department of Transportation standard that required airbags on only some automobiles. The federal agency had considered an all-airbag standard, but ultimately rejected it because of

concerns that public backlash would render the standard ineffective.<sup>43</sup> The plaintiff argued that while the federal standard set a minimum airbag standard nationally, states were free to set more stringent requirements above that federal minimum.<sup>44</sup> But the court found otherwise: the majority explained that the agency “deliberately provided the manufacturer with a range of choices among different passive restraint devices” designed to “bring about a mix of different devices introduced gradually over time.”<sup>45</sup> Although the agency could have mandated an all-airbag standard, it consciously adopted a less stringent rule and explained its reasons for doing so. The court found that the state all-airbag rule “frustrated the accomplishment of a federal objective” because it “presented an obstacle to the variety and mix of devices that the federal regulation sought and to the phase-in that the federal regulation deliberately imposed.”<sup>46</sup>

As I discussed at greater length in an earlier *FSF Perspectives* article,<sup>47</sup> the conflict between SB-822 and the *RIF Order* parallels the conflict in *Geier*. Like the Transportation Department, the FCC had a wide range of options to regulate broadband network management practices. At one pole, it could have found broadband was a Title I information service and applied no regulation whatsoever. At the other pole, it could have found broadband was a Title II service and imposed a full suite of common carriage obligations, including rate regulation and tariffing, reminiscent of the regime that governed the Bell telephone monopoly. And given the flexibility of Title I ancillary authority and Title II forbearance, the FCC had many options between these poles. Like the Transportation Department, the FCC deliberately chose a middle ground: stringent transparency requirements, coupled with general consumer protection and antitrust law to protect consumers against abuse. And like the Transportation Department, the FCC considered and deliberately rejected the more stringent regulation pressed by the states: the FCC explained that it found the *Open Internet Order*'s common carriage-like regulations were likely to cause harm to consumers and to innovation – a conclusion that the *Mozilla* court found was reasonable.

Like the state airbag rule in *Geier*, SB-822 frustrates the accomplishment of a federal objective by erecting an obstacle to the regulatory scheme that the federal agency deliberately imposed. Like *Geier*, California could argue that the federal order merely set a regulatory minimum that states are free to exceed. But like the Transportation Department, the FCC styled its order as a deliberate policy choice to regulate this far and no further. It elucidated clear reasons why additional regulation would harm the broadband ecosystem, rejecting in particular the very blocking, throttling, and prioritization regulations that California sought to impose. In this context, a faithful application of *Geier* would suggest that SB-822 interferes with the carefully crafted regulatory scheme reflected in the *RIF Order*, and therefore is preempted by the Supremacy Clause.

## V. Conclusion

Ultimately, SB-822 and similar efforts in other states are driven largely by policy disagreements with the Trump Administration. There are multiple avenues for opponents, even within state government, to influence federal policy. California could, and did, file comments in the *RIF Order* proceeding, and it participated actively in the *Mozilla* litigation testing the validity of the final order. Moreover, states generally may flex their regulatory muscle in many areas that the federal government cannot or will not regulate; indeed, the idea of states as “laboratories” for policies is a key component of “Our Federalism.”<sup>48</sup>



But SB-822 is not limited to intrastate communications that the Communications Act places in the state's wheelhouse, but instead regulates interstate communications in ways that the FCC has determined would be harmful to federal efforts. Preemption doctrines can, and should, cabin state power where experimentation becomes balkanization and interferes with an overarching federal objective.

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<sup>1</sup> Restoring Internet Freedom, 33 FCC Rcd. 311 (2018).

<sup>2</sup> Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015) ("*Open Internet Order*").

<sup>3</sup> S.B. 822, Sen. Reg. Sess. (Ca. 2018).

<sup>4</sup> U.S. v. California, No. 2:18-cv-02660 (E.D. Cal., filed Sept. 30, 2018); see also Am. Cable Assn. v. California, No. 2:18-cv-02684 (E.D. Cal., filed Oct. 3, 2018).

<sup>5</sup> See *Mozilla v. Federal Communications Commission*, 940 F.3d 1 (D.C. Cir. 2019).

<sup>6</sup> See Larry Downes, *California's Net Neutrality Publicity Stunt Comes to an End*, FORBES, Oct. 29, 2018.

<sup>7</sup> *Mozilla*, 940 F.3d at 85 ("In vacating the Preemption Directive, we do not consider whether the remaining portions of the [RIF] Order have preemptive effect under principles of conflict preemption or any other implied-preemption doctrine.").

<sup>8</sup> See *Senator Wiener's Net Neutrality Bill Passes Out of its Final Committee and Advances to the Assembly Floor*, Aug 22, 2019, available at <https://sd11.senate.ca.gov/news/20180822-senator-wiener%E2%80%99s-net-neutrality-bill-passes-out-of-its-final-committee-and-advances>.

<sup>9</sup> Cal. S. Comm. on Judiciary, SB 822 Analysis (2018).

<sup>10</sup> H.B. 4155, 79th Leg. Assemb., Reg. Sess. (Or. 2018); S. 289, Gen. Assemb., Reg. Sess. (Vt. 2018); H.B. 2282, 65th Leg. Sess. (Wa. 2018).

<sup>11</sup> See Daniel A. Lyons, *State Net Neutrality*, 80 U. PITT. L. REV. 905, 922 (2019) (collecting citations).

<sup>12</sup> Andrew Long analyzed the Maine ISP privacy law in an earlier FSF *Perspectives* essay. See Andrew Long, "Maine's ISP-Only Privacy Law Will Not Protect Consumers," *Perspectives from FSF Scholars*, Vol. 15, No. 17 (2020), available at <https://freestatefoundation.org/wp-content/uploads/2020/04/Maines-ISP-Only-Privacy-Law-Will-Not-Protect-Consumers-040920.pdf>.

<sup>13</sup> *Open Internet Order*, 30 FCC Rcd. at 5666-5668.

<sup>14</sup> *Id.* at 5686, 5692-5693.

<sup>15</sup> *Id.* at 5611.

<sup>16</sup> See *United States v. California*, No. 2:18-cv-02660 (E.D. Cal, filed Sept. 30, 2018); *Am. Cable Assn. v. California*, No. 2:18-cv-02684 (E.D. Cal filed Sept. 30, 2018).

<sup>17</sup> 28 U.S.C. § 2342(1).

<sup>18</sup> *RIF Order* at 427.

<sup>19</sup> *Mozilla*, 940 F.3d at 19; see *Nat'l Cable & Telecomm. Assn. v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

<sup>20</sup> *Mozilla*, 940 F.3d at 55-56.

<sup>21</sup> *Id.* at 59. 67. 69-70 (remanding for further consideration of order's effects on public safety, pole attachments, and Lifeline).

<sup>22</sup> *Id.* at 121.

<sup>23</sup> *Id.* at 122-123 (citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

<sup>24</sup> *Id.* at 74 (internal edits and citation omitted).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 86.

<sup>27</sup> *Id.* at 85.

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- <sup>28</sup> John Eggerton, *Mozilla Drops Appeal of FCC Net Neutrality Decision*, Multichannel News, July 7, 2020, available at <https://www.nexttv.com/news/mozilla-et-al-drop-appeal-of-fcc-net-neutrality-decision>.
- <sup>29</sup> Preserving the Open Internet, 25 FCC Rcd. 17905, 17970 n.374 (2010).
- <sup>30</sup> Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5804 (2015).
- <sup>31</sup> See, e.g., *Minnesota Pub. Utilities Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007).
- <sup>32</sup> 47 U.S.C. § 332(c)(3)(A).
- <sup>33</sup> *Southwestern Bell Mobile Sys., Inc.*, 14 F.C.C.R. 19898, 19907 (1999).
- <sup>34</sup> *Id.*
- <sup>35</sup> See *Cellco P'ship v. Hatch*, 431 F.3d 1077 (8<sup>th</sup> Cir. 2005).
- <sup>36</sup> It is undisputed that mobile broadband service falls under Section 332. See, e.g., *Mozilla*, 940 F.3d at 35.
- <sup>37</sup> 47 U.S.C. § 332.
- <sup>38</sup> See Daniel A. Lyons, *Innovations in Mobile Broadband Pricing*, 92 DENV. UNIV. L. REV. 453, 481-482 (2015).
- <sup>39</sup> See, e.g., *Hatch*, 431 F.3d at 1083.
- <sup>40</sup> *Mozilla*, 940 F.3d at 81-82.
- <sup>41</sup> *Id.* at 85.
- <sup>42</sup> *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000).
- <sup>43</sup> *Id.* at 879.
- <sup>44</sup> *Id.* at 874.
- <sup>45</sup> *Id.* at 874-875.
- <sup>46</sup> *Id.* at 863, 873.
- <sup>47</sup> See Daniel A. Lyons, "Conflict Preemption of State Net Neutrality Efforts After *Mozilla*," *Perspectives from FSF Scholars*, Vol. 14, No. 29 (2019), available at <https://freestatefoundation.org/wp-content/uploads/2019/10/Conflict-Preemption-of-State-Net-Neutrality-Efforts-After-Mozilla-100419.pdf>.
- <sup>48</sup> *Younger v. Harris*, 401 U.S. 37, 44 (1971).