No. 21-15430

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ACA CONNECTS – AMERICA'S COMMUNICATIONS ASSOCIATION,
CTIA – THE WIRELESS ASSOCIATION,
NCTA – THE INTERNET & TELEVISION ASSOCIATION, and
USTELECOM – THE BROADBAND ASSOCIATION,
Plaintiffs-Appellants,

v.

XAVIER BECERRA,* in his official capacity as Attorney General of California,
Defendant-Appellee.

On Appeal from the United States District Court for the
Eastern District of California, No. 2:18-cv-02684, Hon. John A. Mendez

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, ACA Connects – America's Communications Association ("ACA"), CTIA – The Wireless Association® ("CTIA"), NCTA – The Internet & Television Association ("NCTA"), and USTelecom – The Broadband Association ("USTelecom") respectfully submit the following corporate disclosure statements.

ACA: ACA is a nongovernment corporate party to the above-captioned action. ACA has no parent corporation, and no publicly held corporation owns 10% or more of its stock, pays 10% or more of its dues, or possesses or exercises 10% or more of the voting control of ACA.

CTIA: CTIA represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. CTIA's members include wireless carriers, device manufacturers, and suppliers, as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry, and co-produces the industry's leading wireless tradeshow. CTIA has no parent corporation and issues no stock.

NCTA: NCTA is the principal trade association of the U.S. cable television industry. Its members include owners and operators of cable television systems serving nearly 80 percent of the nation's cable television customers, as well as more than 200 video programming networks. The cable industry also is a leading provider of residential broadband service to U.S. households. NCTA is a nongovernment corporate party to the above-captioned action. NCTA has no parent companies, subsidiaries, or affiliates whose listing is required.

USTelecom: USTelecom is a non-profit association representing service providers and suppliers for the telecom industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks. Its diverse member base ranges from large publicly traded communications corporations to small companies and cooperatives – all providing advanced communications services to both urban and rural markets. USTelecom has no parent corporation and issues no stock.

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2018 Order	Declaratory Ruling, Report and Order, and Order, *Restoring Internet Freedom*, 33 FCC Rcd. 311 (2018)
BOCs	Bell Operating Companies
Chevron	*Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)
FCC	Federal Communications Commission
FERC	Federal Energy Regulatory Commission
FTC	Federal Trade Commission
ISP	Internet service provider
SB-822	California Internet Consumer Protection and Net Neutrality Act of 2018, Cal. Civ. Code § 3100 *et seq.*
Title I	Communications Act of 1934, tit. I, 47 U.S.C. § 151 *et seq.*
Title II	Communications Act of 1934, tit. II, 47 U.S.C. § 201 *et seq.*
Tr.	Transcript of Proceedings, *American Cable Ass'n v. Becerra*, No. 2:18-cv-02684 (E.D. Cal. Feb. 23, 2021) (ER-7–78)

INTRODUCTION

In 2018, the Federal Communications Commission ("FCC") concluded that the best way to preserve an open Internet is through a transparency rule mandating that broadband providers make enforceable public disclosures about their practices, together with competition among providers and existing federal and state antitrust and consumer protection laws. Appellants support an open Internet, as do their members. Appellants' members that provide broadband Internet access service comply with the FCC's transparency rule and have, either on their own or through Appellants, publicly committed to preserve core principles of Internet openness. Those commitments benefit their customers and, by extension, their broadband businesses.

California disagrees with the FCC about how best to preserve an open Internet and enacted SB-822 — the "California Internet Consumer Protection and Net Neutrality Act of 2018" — as a deliberate means of countermanding and undermining federal law. SB-822's sponsors made no secret of their purpose; they sought to reinstate "what was repealed by the FCC" in 2018.[1] And SB-822 reimposes the very common-carrier regulations on interstate broadband providers that the FCC rejected as harmful to the public interest.

[1] Press Release (July 5, 2018), https://bit.ly/2QoftbL.

Federal law preempts SB-822 in multiple respects. Appellants filed suit and sought a preliminary injunction. The district court denied that motion, concluding that Appellants were unlikely to succeed on their preemption claims. That erroneous decision opens the door — for the first time — to 50 states imposing their own, potentially conflicting rules on broadband providers.

First, SB-822 conflicts with the FCC's 2018 Order.[2] There, the FCC concluded, based on a comprehensive record, that "the costs . . . to innovation and investment" of the rules the FCC had adopted in 2015 "outweigh any benefits they may have." 2018 Order ¶ 4. The FCC took two statutorily authorized actions to replace the 2015 approach and re-establish the regulatory framework that had applied to broadband for all but three years of the Internet's existence: (1) it rejected the novel common-carrier "telecommunications service" and "commercial mobile service" classifications for broadband the FCC adopted in 2015 and restored the longstanding "information service" and "private mobile service" classifications under the Communications Act; and (2) in place of rules prohibiting broadband providers from taking specific actions, it imposed a transparency-based regime requiring those providers to disclose important terms of service to their

[2] Declaratory Ruling, Report and Order, and Order, *Restoring Internet Freedom*, 33 FCC Rcd. 311 (2018) ("2018 Order"), *petitions for review granted in part and denied in part*, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (per curiam).

customers, subject to oversight by the Federal Trade Commission ("FTC"), the Department of Justice, and state enforcement authorities. The FCC grounded both actions in its determination that a "light-touch framework" maximizes federal objectives in promoting broadband and ensuring an open Internet. *Id.* ¶ 1. California challenged those two FCC actions in the D.C. Circuit and lost. SB-822 represents a refusal to accept those losses by resuscitating the same rules and classifications the FCC lawfully rescinded. Under well-established conflict-preemption principles, California cannot do this.

Second, SB-822 conflicts with the Communications Act's prohibition on common-carrier regulation of interstate information services and private mobile services. Under that Act, only interstate telecommunications services and commercial mobile services may be subject to common-carrier treatment; interstate information services and private mobile services are immune. *See Verizon v. FCC*, 740 F.3d 623, 628, 654 (D.C. Cir. 2014); 47 U.S.C. §§ 153(51), 332(c)(2). It is undisputed in this case that SB-822 imposes common-carrier regulation on interstate information services and private mobile services. The district court erroneously concluded that the Communications Act bars only the *FCC* from regulating broadband providers as common carriers, while all 50 states may impose whatever common-carrier rules they like. That reading misinterprets the Communications Act, the Constitution's Supremacy Clause, and this Court's

precedent. For Congress's objectives to be given effect, the states — just like the FCC — must be prohibited from imposing this type of regulation.

Third, SB-822 regulates in a field — interstate communications services — that Congress occupied through the Communications Act and predecessor statutes. California does not dispute that SB-822 explicitly seeks to regulate *inter*state broadband and dictate the kinds of interstate services that broadband providers may offer. SB-822 makes no attempt to identify any purely *intra*state service, much less confine its scope to that service. Congress gave the FCC exclusive authority over interstate communications services, and an unbroken century of precedent holds that interstate communications services are exclusively subject to federal law.

In sum, this case is not about whether the Internet will remain open. It was and would remain so without SB-822. Instead, this case is about whether California — and, therefore, each of the 50 states — can impose its own preferred (and potentially incongruous) rules on an interstate communications service that Congress and the FCC have consistently determined must be subject to a single, uniform set of federal rules. This Court should reject the district court's conclusion that states can do so and reverse the district court's denial of Appellants' preliminary-injunction motion.

JURISDICTIONAL STATEMENT

The district court denied Appellants' preliminary-injunction motion on February 23, 2020. ER-5; ER-68–77. This Court has jurisdiction over this timely appeal of that denial under 28 U.S.C. § 1292(a)(1).

ISSUE PRESENTED

Whether the district court erred in concluding that Appellants were unlikely to succeed on the merits of their claims that federal law preempts California's law regulating broadband Internet access service providers' interstate service and in denying Appellants' preliminary-injunction motion.

STATEMENT REGARDING STATUTORY ADDENDUM

The addendum includes excerpts of relevant statutes.

STATEMENT OF THE CASE

A. Congress Exclusively Regulates Interstate Communications

Congress first regulated interstate communications in 1910, by amending the Interstate Commerce Act. *See* Mann-Elkins Act of 1910, ch. 309, § 7, 36 Stat. 539, 545 ("1910 Act"). Congress thereby brought "under federal control the interstate business of telegraph companies" and "excluded state action." *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27, 31 (1919). States tested the extent of this federal control. In 1917, the Indiana Supreme Court held that the state could require the delivery of interstate telegrams "with impartiality . . . and in

the order . . . in which they are received." *Western Union Tel. Co. v. Boegli*, 115 N.E. 773, 774 (Ind. 1917). The U.S. Supreme Court reversed, holding that the 1910 Act prohibited "the continuance of state power" over that interstate service. *Western Union Tel. Co. v. Boegli*, 251 U.S. 315, 316-17 (1920).

Regulatory authority over communications then was scattered across multiple federal agencies. In 1934, Congress "formulated a unified and comprehensive regulatory system" to reflect the new "national interest" in this industry. *FCC v. Pottsville Broad. Co*., 309 U.S. 134, 137 (1940). Congress enacted the Communications Act and created the FCC, "to which it entrusted authority previously exercised by" the Interstate Commerce Commission and other agencies. *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 6 (1942). Therefore, "cases decided . . . under the Interstate Commerce Act retain their importance for purposes of determining the scope of the Communications Act." *Ivy Broad. Co. v. AT&T Co.*, 391 F.2d 486, 490-91 (2d Cir. 1968) (following *Warren-Godwin* and *Boegli*).

The Communications Act "appl[ies] to all interstate . . . communication by wire or radio," while denying the FCC "jurisdiction with respect to . . . intrastate communication service by wire or radio." 47 U.S.C. § 152(a)-(b). Section 152 thus "divide[d] the world . . . into two hemispheres — one comprised of interstate service, over which the FCC would have plenary authority, and the other made up

of intrastate service, over which the States would retain exclusive jurisdiction" — though actions regulators take "within their respective domains" can affect "the other 'hemisphere.'" *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986).

B. The FCC Exempts Interstate Computer-Based Communications Services from Common-Carrier Regulation

In the Communications Act, Congress "gave the [FCC] a comprehensive mandate, with . . . expansive powers . . . over all interstate . . . communication by wire or radio." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 173 (1968) (third ellipsis in original). Title II of that Act imposes public-utility regulation only on common-carrier interstate communications services and gives the FCC broad powers to regulate those common carriers. *See* 47 U.S.C. § 201 *et seq.* But "[n]othing" in the Act "limits the [FCC's] authority to those activities" or providers "specifically described by the Act's other provisions." *Southwestern Cable*, 392 U.S. at 172. Congress "could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence," *Philadelphia Television Broad. Co. v. FCC*, 359 F.2d 282, 284 (D.C. Cir. 1966), and so it conferred substantial "flexibility" on the FCC to assert authority over all forms of interstate communications services that might one day emerge, *Southwestern Cable*, 392 U.S. at 172-73.

Over several decades, the FCC considered how to apply the Act to "the growing interdependence of computers and communications services,"[3] each time finding that public policy favored not imposing common-carrier regulation on interstate computer-based communications services.

In its first decision, the FCC made the policy decision to rely on the "existing competitive environment" — not Title II's common-carrier regulation — so that "data processing services" that "employ communications facilities" would "continue to burgeon and flourish."[4] The Second Circuit upheld that decision. *See GTE Serv. Corp. v. FCC*, 474 F.2d 724, 730-31 (2d Cir. 1973).

A decade later, the FCC revisited these data-processing communications services, which the agency called "enhanced services." The FCC recognized its "regulatory power" over enhanced services but again made the policy decision to leave those services unregulated, finding that "the absence of traditional public utility regulation" of enhanced services "offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network."[5]

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[3] Tentative Decision, *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 28 F.C.C.2d 291, ¶ 1 (1970).

[4] *Id.* ¶ 22.

[5] Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 F.C.C.2d 384, ¶¶ 7, 124 (1980).

The D.C. Circuit upheld that decision. *See CCIA v. FCC*, 693 F.2d 198, 209-12 (D.C. Cir. 1982).

The FCC returned to these services a third time in the 1980s and 1990s, allowing the Bell Operating Companies ("BOCs") to provide interstate enhanced services through the same company that provided basic (*i.e.*, local telephone) services. *See California v. FCC*, 905 F.2d 1217, 1228-29 (9th Cir. 1990). The FCC also preempted states from "impos[ing] structural separation requirements on intrastate enhanced services"[6] or otherwise regulating those services. *See id.* at 1239. This Court vacated and remanded. The Court first found that "the authority to regulate intrastate communications services reserved to the states by [47 U.S.C. § 152(b)] does not turn on whether the services are provided on a common carrier or non-common carrier basis." *Id.* at 1239-42. It then found that the FCC's preemption swept too broadly because it was not "limited to [intrastate regulation] that would necessarily thwart or impede valid FCC goals." *Id.* at 1243.

On remand, the FCC issued a narrower preemption order, which this Court upheld. *See California v. FCC*, 39 F.3d 919 (9th Cir. 1994). The FCC, acting under Title I of the Communications Act, again eliminated requirements that the BOCs maintain structural separation — *i.e.*, separate facilities, personnel, and

[6] Report and Order, *Amendment of Sections 64.702 of the Commission's Rules and Regulations*, 104 F.C.C.2d 958, ¶ 347 (1986).

accounting — when providing interstate enhanced services and local telephone service. *See id.* at 923-24. The FCC also again preempted state requirements that BOCs structurally separate their provision of intrastate enhanced services, but limited its preemption to state requirements affecting enhanced services that include both interstate and intrastate communications. *See id.* at 922, 932. This Court "rejected" New York's argument that "the FCC may preempt state action only when it is acting pursuant to . . . Title II" and so even this narrower preemption was unlawful. *Id.* at 932. The flaw in the FCC's earlier order, this Court explained, was its "failure to justify the breadth of the preemption" — "not its jurisdiction to order any preemption" when "act[ing] pursuant to Title I." *Id.* The Court then rejected California's challenges, finding that the "FCC has met its burden of showing that its regulatory goals . . . would be negated by the state regulations it has preempted." *Id.* at 933.

C. Congress Codifies the FCC's Enhanced Services Regime

In the Telecommunications Act of 1996 ("1996 Act"), Congress "borrow[ed] heavily from" the regulatory regime described above when it enacted definitions of "telecommunications service" and "information service," which are "the successor[s] to" basic and enhanced services. *USTelecom v. FCC*, 825 F.3d

674, 691 (D.C. Cir. 2016).[7] Like basic services, telecommunications services are subject "to common carrier regulation under Title II," while information services (like enhanced services) are "not subject to Title II." *Id.*; *see* 47 U.S.C. § 153(51).

This Court recognized that the 1996 Act continued the FCC's prior enhanced-services regime and held that an Internet service provider ("ISP") was not a common carrier under either the FCC's enhanced-services regime or the 1996 Act. *See Howard v. America Online, Inc.*, 208 F.3d 741, 752-53 (9th Cir. 2000). To support that conclusion, this Court pointed to Congress's statement in the 1996 Act "that its aim is 'to preserve the vibrant and competitive free market that presently exists for the Internet . . . , unfettered by Federal or State regulation.'" *Id.* at 753 (quoting 47 U.S.C. § 230(b)(2)).[8]

D. The FCC's Decisions Classifying Broadband

1. In 2002, the FCC concluded that the high-speed Internet access service cable companies offer "is properly classified as an interstate information service."[9] The Supreme Court upheld that decision, finding that the

[7] *See AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000) ("information services" is "the codified term for . . . 'enhanced services'").

[8] The 1996 Act also "unquestionably" granted the FCC new jurisdiction over intrastate communications services. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999).

[9] Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798, ¶¶ 7, 33, 59 (2002).

Communications Act "fails unambiguously to classify" the service and, therefore, "the [FCC] has the discretion to fill the consequent statutory gap." *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 996-97 (2005). The Supreme Court noted that the FCC "remains free to impose special regulatory duties on [broadband providers] under its Title I ancillary jurisdiction." *Id.* at 996.

After *Brand X*, the FCC concluded that traditional telephone companies' broadband service also is an information service that "should not be subject to mandatory common carrier regulation under Title II." *Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205, 220 (3d Cir. 2007) (upholding FCC decision). And the FCC concluded that mobile providers' broadband service is an information service and a private mobile service, and for both reasons not subject to common-carrier regulation.[10]

2. In 2005, the FCC adopted a series of principles, grounded in its Title I authority, "to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers."[11] Those principles were intended to

[10] *See generally* Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd. 5901 (2007). In 1993, Congress had "creat[ed] two statutorily defined categories of mobile services": commercial mobile services (common-carrier services) and private mobile services (exempt from such regulation). *American Ass'n of Paging Carriers v. FCC*, 442 F.3d 751, 753 (D.C. Cir. 2006).

[11] Policy Statement, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14986, ¶ 4 (2005).

foster best practices and were not codified, which led the D.C. Circuit to vacate the FCC's subsequent effort to enforce those principles against a broadband provider. *See Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010).

The FCC then promulgated rules governing providers of "mass-market retail service . . . that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints."[12] The FCC adopted two rules, commonly referred to as "net neutrality" protections, which prohibited blocking and unreasonable discrimination in the transmission of Internet traffic.[13] The D.C. Circuit vacated these rules, finding that each "impose[d] *per se* common carrier obligations." *Verizon*, 740 F.3d at 628. Under the Communications Act, telecommunications carriers may be "treated as a common carrier under this chapter *only* to the extent that [they are] engaged in providing telecommunications services." 47 U.S.C. § 153(51); *see Brand X*, 545 U.S. at 975 ("The Act regulates telecommunications carriers, but not information-service providers, as common carriers."). Similarly, persons "engaged in the provision of a . . . private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter." 47 U.S.C. § 332(c)(2). Because the

[12] Report and Order, *Preserving the Open Internet*, 25 FCC Rcd. 17905, ¶ 44 (2010) ("2010 Order"). We use "broadband" to refer to this service.

[13] *See id.* ¶¶ 62-79.

FCC classified broadband as an information service and private mobile service (not as a telecommunications service or commercial mobile service), the court recognized that broadband providers were "statutorily exempt from common carrier treatment." *Verizon*, 740 F.3d at 628, 654.

3. In 2015, a 3-2 FCC concluded that the "right public policy solution" was to adopt various conduct rules for broadband providers.[14] But the FCC acknowledged, in light of the D.C. Circuit's *Verizon* decision, that the conduct rules it thought necessary as a public-policy matter were *per se* common-carrier regulations. *See* 2015 Order ¶¶ 204, 288-296. And the FCC recognized that, unless it "classifi[ed] . . . broadband providers as providing a 'telecommunications service,'" it would have to "steer clear of . . . common carriage *per se* regulation." *Id.* ¶ 307; *see id.* ¶ 328 (same). So in a sharp break from decades of prior decisions, the FCC for the first time classified broadband offered to end users as a telecommunications service and mobile broadband as a commercial mobile service. *See id.* ¶¶ 355-381, 388-408.

Relying on that unprecedented reclassification, the FCC prohibited broadband providers from blocking access to lawful content, "throttling" (*i.e.*, slowing down transmission of) lawful content, and accepting compensation to

[14] Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, ¶ 72 (2015) ("2015 Order").

prioritize the transmission of certain content (known as "paid prioritization"); it also subjected broadband providers to a broad "Internet Conduct Standard" prohibiting "unreasonable" practices. *See id.* ¶¶ 105-108. And the FCC expressed its intention to scrutinize, on a case-by-case basis, broadband providers' "interconnection" agreements (agreements between two network operators that govern the terms on which they will exchange Internet traffic). *See id.* ¶¶ 202-203.

The D.C. Circuit upheld the FCC's new classification. The court accepted, as "a perfectly good reason for the [FCC's] change," the agency's conclusion that it was "necessary to establish . . . rules . . . [that] impose per se common carrier obligations," which it "did not believe it could do" under broadband's historical classification. *USTelecom*, 825 F.3d at 707. And the court rejected arguments that the Communications Act unambiguously classifies broadband as an information service or telecommunications service and found the FCC adopted a permissible statutory construction under *Chevron* step two. *See id.* at 701-06.

4. In 2018, a 3-2 FCC reached the opposite public-policy conclusion. The FCC found "the costs of [the 2015 Order's] rules to innovation and investment outweigh any benefits they may have." 2018 Order ¶ 4; *see id.* ¶¶ 88-108, 246-266. The FCC therefore returned broadband to its historical and bipartisan classification as an information service and private mobile service and rescinded the 2015 Order's conduct rules. *See id.* ¶¶ 2, 18, 65. In place of those rules, the

FCC relied on its statutory authority to adopt a modified version of the 2015 Order's transparency rule. *See id.* ¶¶ 215, 232-234 (citing 47 U.S.C. § 257). So modified, the transparency rule requires all broadband providers to make a series of disclosures, including of any practices that block, throttle, or prioritize Internet traffic for payment or to benefit an affiliate. *See id.* ¶¶ 218-223. The FCC found that these disclosures enable the FTC and states "to enforce [providers'] commitments" not to engage in those behaviors. *Id.* ¶¶ 141-142. The FCC found further that this transparency-based regime, together with competition among providers and antitrust and consumer protection laws, was sufficient to ensure an open Internet. *See id.* ¶¶ 123-138, 140-154, 240-245.

The D.C. Circuit largely upheld this decision. The court rejected challenges to the FCC's "weighing [of] the costs and benefits of Title II regulation against those of a deregulatory strategy" and its preference for "the latter approach." *Mozilla*, 940 F.3d at 72-73. The court also upheld the FCC's classifications at *Chevron* step two, finding that the agency had "lawfully construed an ambiguous statutory phrase in a way that tallies with its policy judgment, as is its prerogative." *Id.* at 26; *see generally id.* at 18-45. And the court held that the FCC had statutory authority to impose its transparency rule and had reasonably determined that transparency, competition, and existing antitrust and consumer protection laws

"can adequately protect Internet openness." *Id.* at 47-49, 56 (citing 47 U.S.C. § 257).[15]

E. The FCC's History of Preempting Intrastate Broadband Regulation

Even as the FCC's policy views and classifications changed over time as described above, the FCC consistently concluded that, although broadband "may include an intrastate component," the service "is properly considered jurisdictionally interstate for regulatory purposes."[16] And the FCC repeatedly stated its "firm intention" to preempt states' intrastate broadband laws that are inconsistent with the agency's approach to interstate broadband. 2015 Order ¶ 433 & n.1286; *see* 2010 Order ¶ 121 n.374. In 2018, the FCC went further and issued a "Preemption Directive" that expressly "preempt[ed] any state or local measures that would effectively impose rules or requirements" the FCC had "repeal[ed] or . . . refrain[ed] from imposing." 2018 Order ¶ 195. As before, the FCC's concern was that states might "regulate the use of a broadband Internet connection

[15] The court remanded "three discrete issues" but did not vacate the 2018 Order. *Mozilla*, 940 F.3d at 18, 86. The FCC reviewed those issues on a further developed record and adhered to the 2018 Order. *See* Order on Remand, *Restoring Internet Freedom*, 35 FCC Rcd. 12328, ¶¶ 2, 18 (2020), *petition for review pending*, *California Pub. Utils. Comm'n v. FCC*, No. 21-1016 (D.C. Cir. Jan. 14, 2021).

[16] Memorandum Opinion and Order, *NARUC Petition for Clarification or Declaratory Ruling that No FCC Order or Rule Limits State Authority to Collect Broadband Data*, 25 FCC Rcd. 5051, ¶ 8 n.24 (2010) (citing pre-2010 Order precedent); *accord* 2010 Order ¶ 121 n.374; 2015 Order ¶ 431; 2018 Order ¶ 199.

for *intrastate communications*," which would "affect[] the use of that same connection for *interstate communications*." *Id.* ¶ 200 & n.744.

Although no party appealed the FCC's 2010 or 2015 preemptive statements, California and others challenged the 2018 Order's Preemption Directive. In *Mozilla*, a 2-1 majority vacated that directive, finding that the FCC lacked statutory authority to expressly preempt "any and all forms of state regulation of intrastate broadband" and thereby "wipe out a broader array of state and local laws than traditional conflict preemption principles would allow." 940 F.3d at 74, 81-82. The majority emphasized that the flaw in the FCC's "sweeping" Preemption Directive was its "categorical[] aboli[tion of] all fifty States' statutorily conferred authority [in § 152(b)] to regulate intrastate communications." *Id.* at 74, 86; *see id.* at 80-81 (finding the FCC lacked "authority . . . to kick the States out of intrastate broadband regulation"); *see id.* at 76-77, 80, 82 (citing § 152(b)).

At the same time, *Mozilla* recognized that the 2018 Order could preempt a state law that actually conflicted with the FCC's determinations that the D.C. Circuit upheld as lawful — noting that the FCC had explicitly disclaimed conflict preemption as the basis for the Preemption Directive. *See id.* at 82-86. Judge Williams, dissenting in part, would have upheld the Preemption Directive. *See id.* at 95-107. The majority, however, rejected his contention that vacating the Preemption Directive "le[ft] no room for implied [*e.g.*, conflict] preemption" in a

future case. *Id.* at 85. The majority explained that this "confuse[d] (i) the scope of the [FCC's] authority to expressly preempt, with (ii) the (potential) implied preemptive effect of the regulatory choices the [FCC] makes that are within its authority." *Id.* Because "no particular state law [was] at issue in" *Mozilla*, the majority could not "begin to make a conflict-preemption assessment" and found it "wholly premature to pass on the preemptive effect" of the portions of the 2018 Order it upheld. *Id.* at 82, 86; *see id.* at 85 (same). But the majority stressed that, if the FCC "can explain how a state practice actually undermines the 2018 Order, then it can invoke conflict preemption." *Id.* at 85.

F. California Enacts SB-822

On September 30, 2018, while its challenge to the 2018 Order was pending, California enacted SB-822. The bill's sponsors made clear that their goal was to undo the 2018 Order and its transparency-based regulation of interstate broadband services. SB-822's author described it as reinstating "what was repealed by the FCC" in the 2018 Order.[17] And he said further that SB-822 was designed to "step[] in" and regulate broadband after the FCC "abandoned net neutrality protections."[18]

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[17] Press Release (July 5, 2018), https://bit.ly/2QoftbL; *see also* Press Release (Dec. 14, 2017) (announcing "plans to introduce legislation to establish net neutrality protections in California after the [FCC] repealed national Net Neutrality regulations"), https://bit.ly/2IwASwH.

[18] Hearing on SB-822, at 6 (Aug. 22, 2018), https://bit.ly/2D2E4li.

Reflecting that intent, SB-822 defines broadband to include the same service as the FCC does: high-speed "mass-market retail" service that "provides the capability to transmit data to, and receive data from, all or substantially all Internet endpoints." *Compare* Cal. Civ. Code § 3100(b) *with* 2010 Order ¶ 44; 2015 Order ¶ 187; 2018 Order ¶ 21. SB-822 resurrects rules from the 2015 Order that the FCC repealed in 2018, including the no-blocking, no-throttling, and no-paid-prioritization rules, and the Internet Conduct Standard. *Compare* Cal. Civ. Code § 3101(a)(1)-(2), (4), (7) *with* 2015 Order ¶¶ 15-16, 18, 21. SB-822 also "restores" the 2015 Order's case-by-case rules that "governed [broadband] providers' interconnection practices."[19]

Finally, SB-822 goes beyond the 2015 Order by prohibiting certain forms of "zero-rating," which is when a broadband provider does not charge customers for certain data usage (such as for video streaming), including where a third party pays for the customer's data usage, which is analogous to toll-free calling. In the 2015 Order, the FCC recognized that zero-rating "could benefit consumers and

[19] Cal. Opp'n Br. 44 (ECF 57). Although SB-822's interconnection provisions appear to go beyond the 2015 Order, *compare* Cal. Civ. Code § 3101(a)(3), (9) *with* 2015 Order ¶¶ 202-206, California's Attorney General construed SB-822 to be coextensive with those 2015 rules. Because the Attorney General is "the chief law officer" charged with ensuring "the laws of the State are uniformly . . . enforced," Cal. Const. art. V, § 13; *see also* Cal. Gov't Code §§ 12510, 12511, 12550, this construction should govern in any future enforcement action.

competition" and decided to address zero-rating offerings "on the facts of each individual case." 2015 Order ¶ 152. The FCC subsequently conducted a "thirteen-month investigation" into zero-rating and found no "specific evidence of harm" related to zero-rating. 2018 Order ¶ 250. In contrast, SB-822 prohibits two types of zero-rating: when it is "in exchange for consideration . . . from a third party," Cal. Civ. Code § 3101(a)(5), or when the provider "[z]ero-rat[es] some Internet content . . . in a category of Internet content, . . . but not the entire category," *id.* § 3101(a)(6).

G. Procedural History

On September 30, 2018, the United States filed a complaint and preliminary-injunction motion, seeking to enjoin enforcement of SB-822. Appellants did the same soon after. Because of California's then-pending challenge to the 2018 Order, the United States and Appellants agreed to stay the litigation in exchange for California's agreement "not [to] take any action to enforce, or direct the enforcement of, Senate Bill 822 in any respect" until 30 days after the district court ruled on any renewed, post-*Mozilla* preliminary-injunction motions. *See* Order (ER-179–81).

After *Mozilla*, the United States and Appellants filed amended complaints and renewed preliminary-injunction motions. On January 15, 2021, the district court ordered the United States to inform the court whether, "upon review by the

Biden Administration, it will . . . dismiss this lawsuit."[20] On February 8, 2021, the United States voluntarily dismissed its complaint.

The district court then held oral argument on Appellants' preliminary-injunction motion, which it denied in a ruling from the bench. The court found Appellants had not shown a likelihood of success on their arguments that federal law preempts SB-822. Tr. 62:22-63:2 (ER-68–69). The court found that, while the FCC had "authority to decide whether [broadband] is an information service" — which the court stated "turns . . . on the factual particulars" of broadband — "the deregulatory purposes behind [the 2018 Order] do not have preemptive effect." Tr. 66:13-67:2 (ER-72–73). The court concluded further that, by classifying broadband as an information service, the agency "placed it outside the FCC's regulatory ambit," so the 2018 Order was "a decision by the FCC that it lacked authority to regulate in the first place." Tr. 65:16-23 (ER-71).

The court found further that, despite imposing common-carrier regulation on interstate information services and private mobile services, SB-822 did not conflict with the Communications Act. Tr. 63:24-65:7 (ER-69–71). The court found it dispositive that Congress used the phrase "under this chapter" in the statutory provisions exempting information services and private mobile services from

[20] Minute Order, *United States v. California*, No. 2:18-cv-2660-JAM-DB (E.D. Cal. Jan. 15, 2021) (ECF 43).

common-carrier regulation, leading it to conclude that Congress did not prevent states from imposing common-carrier regulation on those services. Tr. 64:2-10 (ER-70).

And the court found that SB-822 did not regulate in a field that Congress had occupied. Tr. 63:3-23 (ER-69). The court concluded that, while Congress granted the FCC "authority to regulate interstate communications [and] preclud[ed] it from regulating intrastate communications," this grant of authority "indicates nothing about the power of the States" to regulate interstate communications. Tr. 63:13-17 (ER-69).[21]

The court found it "need not make a detailed finding" on Appellants' evidence of irreparable harm given its other preliminary findings. Tr. 67:22-68:2 (ER-73–74). The court found the remaining preliminary-injunction factors "require[d] further development." Tr. 68:5-6 (ER-74). But, on the current record, the court found the balance of equities "weigh[ed] in favor of denying the injunction." Tr. 68:6-69:14 (ER-74–75).

[21] The court also found that 47 U.S.C. § 332(c)(3) did not expressly preempt SB-822. Tr. 67:3-21 (ER-73). Appellants do not raise that argument on this interlocutory appeal, but reserve all rights to continue relying on that provision before the district court.

STANDARD OF REVIEW

The Court reviews the denial of a preliminary injunction for abuse of discretion, but the "interpretation of the underlying legal principles is subject to de novo review and a district court abuses its discretion when it makes an error of law." *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 989 (9th Cir. 2006) (cleaned up). This Court "will therefore reverse a denial of a preliminary injunction if the district court based its decision on an erroneous legal standard." *United States v. California*, 921 F.3d 865, 878 (9th Cir. 2019) (cleaned up), *cert. denied*, 141 S. Ct. 124 (2020).

SUMMARY OF ARGUMENT

Appellants are likely to succeed on the merits of their claims that the 2018 Order and the Communications Act independently preempt SB-822. The district court erred in concluding otherwise and in denying Appellants' preliminary-injunction motion.

I. SB-822 conflicts with the portions of the 2018 Order the D.C. Circuit upheld in *Mozilla*, as California intended. *Mozilla* holds that the FCC acted within its statutory authority when it classified broadband as an information service and private mobile service. That decision was expressly based on the FCC's conclusion that broadband providers should not be subject to *ex ante* rules governing their conduct, but instead to a refined transparency approach that,

together with competition and existing laws, would preserve the open Internet. The district court attributed no preemptive effect to those decisions and concluded they could not give rise to conflict preemption. But, in doing so, it improperly adopted the same argument the *Mozilla* majority rejected as a "straw man." The district court likewise ignored the well-recognized authority under *Chevron* step two permitting agencies to adopt rules because of their policy consequences.

II. SB-822 also conflicts with the Communications Act. It imposes restrictions that the D.C. Circuit and the FCC have held are common-carrier regulations on services that Congress decided "shall" be exempt from such regulations. The district court concluded that, because Congress expressly prohibited only the FCC from imposing those regulations, states remain free to regulate broadband as a common-carrier service. That conclusion ignores the lengthy history of exclusively *non*-common-carrier regulation of broadband (and its predecessor services) and reads a savings clause in conflict with decisions of other courts of appeals.

III. More broadly, SB-822 is preempted because it expressly dictates the types of interstate communications services providers may offer and, thereby, regulates in a field Congress occupied with exclusive federal jurisdiction and oversight. The district court's contrary finding ignores not only a century of settled Communications Act precedent, but also Supreme Court and Ninth Circuit

precedent finding field preemption in similar provisions of contemporaneous statutes, as well as the Supreme Court's admonition against disturbing longstanding interpretations of complex regulatory statutes.

IV. Because Appellants are likely to succeed on the merits, the other factors all favor entry of a preliminary injunction. As this Court has held, where a state statute is likely preempted, that gives rise to a presumption of irreparable harm and establishes that both the public interest and the balance of equities support preliminary injunctive relief. Appellants also demonstrated specific, unrebutted irreparable harms — some of which have already occurred. And Appellants showed that California was unable to identify a single genuine harm occurring since the FCC's 2018 Order took effect that SB-822 would have prevented or remedied.

ARGUMENT

SB-822 is preempted in multiple respects. "There are three classes of preemption: express preemption, field preemption and conflict preemption." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1022 (9th Cir. 2013). This appeal presents conflict and field preemption issues; it does not concern express preemption. And only express preemption turns on "explicit[]" statutory text "manifest[ing] Congress's intent to displace state law." *Id.* Conflict preemption and field preemption exist independent of express preemption. Conflict preemption operates

on a case-by-case basis and, as relevant here, turns on whether a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of" federal law. *Id.* at 1023. And field preemption "can be inferred" where, as here, "there is a federal interest so dominant that the federal system will be assumed to preclude" state law. *Id.* at 1022-23 (cleaned up).

I. THE 2018 ORDER PREEMPTS SB-822

A. SB-822 Conflicts with the 2018 Order's Statutorily Authorized Methods for Creating a Light-Touch Regulatory Regime for Broadband

A "state law stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of" the federal regulatory framework is preempted. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). And "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Id.*; *accord McShannock v. JP Morgan Chase Bank NA*, 976 F.3d 881, 888 (9th Cir. 2020); *see also PLIVA, Inc. v. Mensing*, 564 U.S. 604, 613-17, 626 (2011) (finding preemption based on agency interpretation of its regulations). Likewise, a federal regulator's decision to reduce or eliminate regulation on policy grounds preempts contrary state regulatory efforts to the same degree as a federal decision to expand regulation. *See*, *e.g.*, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) ("[W]here failure of federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is

appropriate or approved pursuant to the policy of the statute, States are not permitted to use their police power to enact such a regulation.") (cleaned up); *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) ("[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate.").

Here, SB-822 conflicts with both the FCC's affirmative regulation of broadband and its decision to reduce regulation in other respects.

1. The FCC's 2018 Order concluded that a transparency-based regime represents the optimal approach to regulating broadband, striking a balance between the need for disclosures that protect consumer choice and competition, and the interest in avoiding more onerous rules that threaten to stifle investment and innovation. Even though it reclassified broadband in a manner that prevented regulation under Title II of the Communications Act, the FCC retained and affirmatively exercised statutory authority to advance this goal. Relying on 47 U.S.C. § 257, the FCC refined its "transparency rule," which requires broadband providers to publicly disclose information regarding performance, prices, and network management practices — including any that entail blocking, throttling, or prioritizing traffic for payment or to benefit an affiliate. *See* 2018 Order ¶¶ 218-222. The FCC explained that the transparency rule, along with "preexisting federal

protections" (*i.e.*, consumer protection and antitrust laws), were not only "sufficient to protect Internet freedom," but demonstrably could do so more "effectively and at lower social cost than" heavy-handed conduct rules. *Id.* ¶ 208; *see id.* ¶ 239.

The D.C. Circuit upheld this exercise of statutory authority, along with the FCC's determination that a disclosure-based regime — without intrusive conduct regulations — was sufficient to protect consumers. *See Mozilla*, 940 F.3d at 46-49, 56-57. Therefore, the FCC's transparency-based regime creates both a floor and a ceiling for broadband regulation, and it provides a valid predicate for conflict preemption. *See McShannock*, 976 F.3d at 888. This Court previously found preemption where, as here, a provider of interstate enhanced services "would be forced to comply with the state's more stringent requirements, or choose not to offer certain enhanced services, thereby defeating the FCC's more permissive [Title I] policy." *California*, 39 F.3d at 933.

2. Based on its determination that a transparency-based regime is optimal, the FCC also exercised its statutory authority under 47 U.S.C. § 153 and § 332 to restore the longstanding classification of broadband as an information service and a private mobile service under the Communications Act. In doing so, the FCC overturned its own 2015 classification of broadband as a telecommunications service and commercial mobile service, thereby also ending

the imposition of common-carrier regulation. It made this decision based on its "expert policy judgment," as it was entitled to do under the Supreme Court's decision in *Brand X*. 545 U.S. at 1003. There, the Court held that the FCC's interpretation of the relevant statutory definitions warrants *Chevron* deference. And the Court made clear that, at *Chevron*'s second step, the FCC may rely on policy objectives as part of its classification determination. *See id.* at 1001 (upholding FCC determination that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market").

The FCC relied on that policy judgment in the 2018 Order. It explained that reclassification was driven in large measure by its policy view that the light-touch, Title I regulatory framework "is more likely to encourage broadband investment and innovation, furthering [the agency's] goal of making broadband available to all Americans and benefitting the entire Internet ecosystem." 2018 Order ¶ 86. The FCC concluded further that the 2015 Order's common-carrier regime "ha[d] resulted . . . in considerable social cost, in terms of foregone investment and innovation," while having "no discernable incremental benefit." *Id*. ¶ 87. The D.C. Circuit upheld these policy-based grounds for the FCC's reclassification, *see Mozilla*, 940 F.3d at 49-55, and so they likewise form a valid predicate for conflict preemption, *see*, *e.g.*, *Geier v. American Honda Motor Co.*, 529 U.S. 861, 874-75,

878 (2000) (state law preempted because it raised an obstacle to achieving the agency's judgment as to the optimal mix of regulatory measures); *Charter Advanced Servs. (MN), LLC v. Lange*, 903 F.3d 715, 719 (8th Cir. 2018) ("[A]ny state regulation of an information service conflicts with the federal policy of nonregulation."), *cert. denied*, 140 S. Ct. 6 (2019).

3. SB-822 conflicts with both the transparency-based regime and the reclassification because it presents an unmistakable obstacle to the objectives underlying both: a lightly regulated, market-based framework for broadband. The stated intent behind SB-822 was to reinstate "what was repealed by the FCC," *see supra* n.1, and SB-822 does this by reimposing *every* mandate from the 2015 Order that the 2018 Order explicitly rejected as contrary to the public interest.[22] Specifically:

- The FCC concluded that the 2015 Order's no-blocking and no-throttling rules were not necessary "to prevent the harms that they were intended to thwart." 2018 Order ¶ 263. There had been "scant evidence that end users, under different legal frameworks, have been prevented by blocking or throttling from accessing the content of their choosing." *Id.* ¶ 265. And

[22] When asked whether SB-822 was the 2015 Order "2.0," California acknowledged that "[t]here is not a lot of difference" between the two and that "much, if not all," of the conduct "that would have been prohibited under the 2015 [O]rder . . . would actually also be prohibited under SB-822." Tr. 18:20-19:2 (ER-24–25).

there are other ways to ensure that blocking and throttling do not occur, and are detected and remedied in the unlikely event they do. *See id.* ¶ 264. So the FCC eliminated these rules. *See id.* ¶¶ 263-265. Nevertheless, SB-822 reinstates those bans. *See* Cal. Civ. Code § 3101(a)(1)-(2).

- The FCC concluded that lifting the 2015 Order's categorical ban on paid prioritization would "increase network innovation," encourage entry of new edge providers, reduce economic inefficiency, and "lead to lower prices for consumers." 2018 Order ¶¶ 254-256, 259. "[T]o the extent" paid prioritization could lead to any harms, they were "outweighed by the distortions that banning [the practice] would impose." *Id.* ¶ 261. Again, SB-822 reinstates the blanket ban on paid prioritization. *See* Cal. Civ. Code § 3101(a)(4).
- The FCC concluded that the 2015 Order's "Internet Conduct Standard" had "created uncertainty and likely denied or delayed consumer access to innovative new services" and that its "net benefit" was "negative." 2018 Order ¶ 246. It therefore eliminated that rule, finding such action likely would "benefit consumers, increase competition, and eliminate regulatory uncertainty that has a corresponding chilling effect on broadband investment and innovation." *Id.* ¶ 249. Yet SB-822 reinstates that mandate. *See* Cal. Civ. Code § 3101(a)(7)(A).

- The FCC concluded that its "thirteen-month investigation" into "zero-rating" uncovered *no* "specific evidence of harm" and that the 2015 Order had prevented providers from making "innovative offerings" to consumers. 2018 Order ¶ 250. The FCC accordingly found that zero-rating was permissible. *See id.* SB-822 contradicts this conclusion and bans many zero-rating arrangements outright (also in contrast with the 2015 Order, which had rejected a ban on zero-rating and subjected such arrangements only to case-by-case review). *See* Cal. Civ. Code § 3101(a)(5)-(6); 2015 Order ¶ 152.
- The FCC concluded that imposing common-carrier regulation on broadband providers' interconnection arrangements "was unnecessary and is likely to unduly inhibit competition and innovation." 2018 Order ¶ 167. Freeing these "arrangements from burdensome government regulation, and allowing market forces to discipline this emerging and competitive market[,] is the better course." *Id.* ¶ 168. Again, SB-822 revives the 2015 Order's rules. *See* Cal. Civ. Code §§ 3101(a)(9), 3102; *supra* n.19.

SB-822 thus poses a clear "obstacle to the accomplishment and execution of the full purposes and objectives of" federal law. *Fidelity Fed.*, 458 U.S. at 153. Indeed, it is difficult to imagine a clearer obstacle to a federal regulatory framework than a state law whose express purpose and effect is to reimpose

mandates identical to those the federal regulator purposefully and expressly revoked after an extensive rulemaking proceeding. State law must yield based on so stark a conflict. *See*, *e.g.*, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984) (state law preempted where it created "a result [that] is wholly at odds with the regulatory goals contemplated by the FCC"); *California*, 39 F.3d at 933 (finding preemption where "state rules . . . would negate the FCC's goal of allowing [providers] to develop efficiently a mass market for enhanced services for small customers").

B. The District Court Erred in Finding No Likelihood of Success on the Merits of This Preemption Argument

1. According to the district court, the 2018 Order "is not an instance of affirmative deregulation but, rather, a decision by the FCC that it lacked authority to regulate in the first place." Tr. 65:21-23 (ER-71). That determination misconstrues both *Mozilla* and the FCC's order.

First, the district court's analysis cannot be squared with *Mozilla*'s finding — which is binding authority here[23] — that "conflict preemption" *would* apply to "a state practice [that] actually undermines the 2018 Order." 940 F.3d at 85. That statement would have no meaning if, as the district court concluded, a state could

[23] The D.C. Circuit was the exclusive forum for adjudicating the validity of the 2018 Order, and its determinations are binding on all other Circuits. *See*, *e.g.*, *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008).

reimpose each rule the FCC rescinded and effectively countermand the FCC's regulatory classifications by imposing common-carrier regulation. Because *Mozilla* upheld the FCC's classifications and adoption of a light-touch, transparency-based regime as proper exercises of congressionally delegated authority, those regulatory choices preempt conflicting state law. In short, the district court relied on the very "straw man" argument that *Mozilla* rejected, by "confus[ing] (i) the scope of the [FCC's] authority to expressly preempt, with (ii) the (potential) implied preemptive effect of the regulatory choices the [FCC] makes that are within its authority." *Id.*

Second, the district court misread the 2018 Order. To be sure, the FCC concluded that, once it returned broadband to its classification as an information service and private mobile service, it no longer had authority to impose heavy-handed conduct rules on broadband providers. *See* 2018 Order ¶ 267. But the reclassification *itself* was lawfully predicated on the FCC's policy-based determination that those heavy-handed conduct rules were unwarranted and harmful. *That* decision was not an abdication of authority; it was a clear *exercise* of statutory authority under the Communications Act.[24] In addition, the FCC

[24] Although the D.C. Circuit concluded that the Act's definitions did not confer power on the FCC to issue its express Preemption Directive and categorically abolish all state authority to regulate any *intrastate* broadband service, *see Mozilla*, 940 F.3d at 79, the court also recognized that the FCC's

acknowledged its Title I authority to impose additional, non-common-carrier requirements on broadband providers, but found such requirements unwarranted. *See id.* ¶ 172 & n.642. And there is no dispute that the FCC exercised statutory authority by establishing the transparency-based regime pursuant to § 257. *See id.* ¶¶ 209-238. The D.C. Circuit agreed, holding that the FCC acted within its statutory authority in both respects. *See Mozilla*, 940 F.3d at 18-44, 46-49. The district court thus was doubly wrong in finding that the 2018 Order reflected a decision by the FCC that it lacked statutory authority.

2. The district court also incorrectly found that the "deregulatory purposes behind [the reclassification] decision do not have preemptive effect," because classification "ultimately turns not on the [FCC's] regulatory or deregulatory preference but on the factual particulars of how Internet technology works and how it is provided." Tr. 66:14-67:2 (ER-72–73).

That finding ignores the reality that the FCC has always approached broadband classification as a matter of public policy and not as a technocratic exercise limited to the factual particulars of the service. As shown above, the FCC's regulatory preferences are a critical feature of classification at *Chevron* step two. *See supra* pp. 11-12, 14-16; *see also Brand X*, 545 U.S. at 997 ("conclud[ing]

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statutory authority under those definitions "includes classifying various services into the appropriate statutory categories," *id.* at 17.

that the [FCC's] construction was a reasonable *policy choice* for the [FCC] to make at *Chevron's* second step") (cleaned up; emphasis added); *USTelecom*, 825 F.3d at 707 (affirming FCC determination that reclassification of broadband was "necessary" to advance agency policy objectives). As a result, the FCC's return to the information service and private mobile service classifications based on the light-touch regulatory framework they enable has preemptive effect.

Indeed, the core premise of *Chevron* is that Congress has delegated to agencies the authority to settle the meaning of ambiguous statutory language by applying their reasoned policy judgment to the interpretive question at hand. *See Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1150 (9th Cir. 2013) (explaining that "[t]he essence of *Chevron* deference" is to allow agency "resolution of difficult policy choices that agencies are better equipped to make than courts"). An agency "exercising its *Chevron* step two/*Brand X* powers" "avowedly and self-consciously . . . exercises its delegated policy-making authority to write a new rule of general applicability according to its vision of the law as it should be." *De Niz Robles v. Lynch*, 803 F.3d 1165, 1173 (10th Cir. 2015) (Gorsuch, J.). And "courts defer to the agency's new view because the agency has been authorized to fill gaps in statutory law with its own policy judgments." *Id.*

In short, the FCC acted within its statutory authority when it applied its policy judgment and eliminated the conduct rules California has reimposed. In

addition, and contrary to the district court's conclusion, the FCC's policy objectives underlying those exercises of authority are a core foundation for the 2018 Order and have preemptive force. California is no freer to disregard the FCC's policy objectives when the agency acts within its statutory authority — as *Mozilla* held it did here — than it may ignore congressional intent. *See City of New York v. FCC*, 486 U.S. 57, 64 (1988) (holding state law can neither "conflict[] with [agency] regulation[s] [n]or *frustrate[] the purposes thereof*") (emphasis added); *California*, 39 F.3d at 933 (same).

II. SB-822 CONFLICTS WITH THE COMMUNICATIONS ACT

A. SB-822 Imposes Common-Carrier Regulations on Services That Congress Decided Should Be Exempt from Such Regulations

1. As explained above, Congress limits common-carrier regulation to interstate telecommunications services and commercial mobile services, while precluding common-carrier regulation of interstate information services and private mobile services. Congress's limitation of common-carrier regulation to interstate telecommunications services is in 47 U.S.C. § 153(51):

> A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services . . . .

Congress's similar decision to exempt private mobile services from common-carrier regulation is in 47 U.S.C. § 332(c)(2):

> A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter.[25]

As shown above, in the 2018 Order, the FCC returned broadband to its longstanding classifications as an interstate information service and private mobile service, and the D.C. Circuit upheld those classifications. Both the D.C. Circuit and the FCC have long recognized that, so classified, broadband is immune from common-carrier regulation. *See*, *e.g.*, *Verizon*, 740 F.3d at 650; *Cellco P'ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012); 2015 Order ¶¶ 307, 328. Because SB-822 imposes common-carrier regulations, it therefore conflicts with — and at a bare minimum "stands as an obstacle to" — Congress's design. *Fidelity Fed.*, 458 U.S. at 153.

2. Both the D.C. Circuit and the FCC have found that the FCC's former prohibitions on blocking, throttling, and paid prioritization — which SB-822 replicates — are common-carrier regulations. *See Verizon*, 740 F.3d at 655-56; *USTelecom*, 825 F.3d at 695; 2015 Order ¶¶ 288-296. The FCC reached the same conclusion about its Internet Conduct Standard (which SB-822 reprises) and

[25] As this Court has noted, "under this chapter" in these provisions means that a company's status as a "common carrier" under the Communications Act is activity-based, not status-based, which is relevant to the scope of other federal laws. *See FTC v. AT&T Mobility LLC*, 883 F.3d 848, 861-64 (9th Cir. 2018) (en banc) (interpreting these provisions in determining the scope of the common-carrier exception to the FTC's § 5 jurisdiction).

regulating broadband providers' interconnection arrangements (which, according to California, SB-822 reinstates). *See* 2015 Order ¶¶ 137, 195. And, while the FCC did not ban zero-rating in the 2015 Order, it concluded that any such ban — like the ones SB-822 adopts — would be a common-carrier regulation. *See id.* ¶¶ 151, 153. Before the district court, California did not argue that SB-822's prohibitions stop short of imposing common-carrier regulation. In denying Appellants' motion, the district court did not find otherwise. Tr. 63:24-65:7 (ER-69–71).

3. SB-822 thus conflicts with Congress's determination that interstate information services and private mobile services may not be subject to common-carrier regulation. The Supreme Court has made clear that "when federal officials determine . . . that restrictive regulation of a particular area is not in the public interest" — as Congress did here — "States are not permitted to use their police power to enact such a regulation." *Capital Cities*, 467 U.S. at 708.

For example, in *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi*, 474 U.S. 409, 422-23 (1986), the Supreme Court held that Congress's decision to exempt certain gas sales from the Federal Energy Regulatory Commission's ("FERC") public-utility regulation preempted states from reimposing such regulation on those same sales. The Court rejected the argument that Congress's revision of the Natural Gas Act "to give market forces a

more significant role" reflected Congress's "inten[t] to give the States the power it had denied FERC." *Id.* at 422; *see also Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 507 n.8 (1989) ("Congress' intent . . . that the supply, the demand, and the price of deregulated gas be determined by market forces requires that the States still may not regulate purchasers so as to affect their cost structures.").[26]

In *Public Utility District No. 1 of Grays Harbor County Washington v. IDACORP Inc.*, this Court similarly held that "conflict preemption applies" to prevent "a state rule . . . that would interfere with the method by which the [Federal Power Act] was designed to reach it[s] goals." 379 F.3d 641, 650 (9th Cir. 2004). This Court rejected the argument "that no actual conflict exists" between the decision *not* to engage in public-utility rate-setting for interstate electricity sales — instead permitting the market to set those rates — and using state law to "set a fair price" for those same interstate sales. *Id.* State law conflicted because the "result would make state law stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.*

[26] The district court concluded that *Transcontinental Gas* was inapposite, because it involved a "comprehensive scheme" of federal regulation. Tr. 65:2-5 (ER-71). But, as discussed below and in Part III, both the Communications Act and the Natural Gas Act created exclusive federal regimes using similar statutory language. It is that federal exclusivity — not public-utility regulation — that gives rise to conflict preemption and forecloses state action.

So too here: SB-822 regulates broadband — an interstate information service and private mobile service under federal law — as a common-carrier service, which federal law prohibits. *See Verizon*, 740 F.3d at 651; *Cellco*, 700 F.3d at 547. Accordingly, the "result" of SB-822 is as much of an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" under the Communications Act as state law was to market-based rates under the Federal Power Act. *Grays Harbor*, 379 F.3d at 650.

B. The District Court Erred in Finding No Likelihood of Success on the Merits of This Preemption Argument

1. The district court concluded that SB-822 did not conflict with the Communications Act because Congress exempted interstate information services and private mobile services from common-carrier regulation only "under this chapter." Tr. 64:2-10 (ER-70) (quoting 47 U.S.C. §§ 153(51), 332(c)(2)). The court reasoned that, if Congress "had intended to preclude both state and federal regulation, it presumably would have said so clearly." Tr. 64:8-10 (ER-70).

a. That reasoning conflates implied and express preemption: only the latter requires "explicit[]" statutory language. *Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199, 1203 (9th Cir. 2002). "[T]he absence of express pre-emption is not a reason to find no *conflict* pre-emption." *PLIVA*, 564 U.S. at 618 n.5. For example, as the Third Circuit held in finding that state law conflicted with the FCC's regulation of radiofrequency emission exposure, "the lack of an express

preemption provision" regarding such exposure "does not necessarily mean Congress intended to preserve conflicting state law." *Farina v. Nokia Inc.*, 625 F.3d 97, 130 (3d Cir. 2010). The district court's refusal to find conflict preemption absent express preemptive language improperly "subsum[es] conflict preemption into express preemption analysis." *Id.*

b. The district court also erred by relying on the presence of express preemption clauses "elsewhere in th[e] statute" to support its conclusion that SB-822 does not conflict with the Communications Act. Tr. 64:10 (ER-70). An "express pre-emption provision[] does *not* bar the ordinary working of conflict pre-emption principles." *Geier*, 529 U.S. at 869; *see National Fed'n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 731 (9th Cir. 2016) ("[T]he inclusion of either a saving clause or an express preemption clause within a statutory scheme does not foreclose the application of ordinary implied preemption principles.").

And none of those express preemption provisions supports an inference that Congress included "under this chapter" in § 153(51) and § 332(c)(2) to permit state common-carrier requirements for interstate information services and private mobile services. Instead, many of the provisions expressly preempt states from regulating *intrastate* communications services. For example, Congress expressly preempted state regulation of mobile services, which can be used to make intrastate calls, "[n]otwithstanding" the states' otherwise-reserved authority over intrastate

services. 47 U.S.C. § 332(c)(3)(A); *see also*, *e.g.*, *id.* §§ 276(c) (intrastate payphone service), 543(a)(1) (intrastate cable rates). Other provisions expressly preempt regulation of rights of way, *see id.* § 253, or zoning, *see id.* § 332(c)(7), because states can use (and have used) their traditional state authority in those non-communications areas to interfere with interstate communications services.

c. The history of § 153(51) and § 332(c)(2) also confirms that Congress did not intend to allow states to enact laws conflicting with its decisions to exempt those services from common-carrier regulation.

i. Section 153(51) codified decades of FCC decisions that enhanced (now, information) services are exempt from common carriage. *See supra* pp. 8-11. And while states argued that the FCC could not preempt states from regulating *intrastate* enhanced services — an argument this Court largely rejected, *see California*, 39 F.3d at 933 — no state suggested it could contradict the FCC's regime for *interstate* enhanced services.

By enacting § 153(51), Congress prevented the FCC from reversing course and subjecting information services to common-carrier regulation. Congress did not thereby alter the structure of the Communications Act and invite states to regulate interstate information services as common-carrier services and thereby countermand Congress's decision to freeze in place the prior FCC decisions. Such an understanding of Congress's intent would also be inconsistent with the

simultaneously enacted 47 U.S.C. § 230(b)(2), which states that federal "policy [is] . . . to preserve the vibrant and competitive free market that presently exists for the Internet . . . , unfettered by Federal or State regulation." This Court previously and correctly read § 230(b)(2) as evidence that Congress meant to continue the FCC's pre-1996 treatment of interstate enhanced services as minimally regulated, non-common-carrier services. *See Howard*, 208 F.3d at 753.

More generally, there is no history of direct state regulation of *any* interstate communications service (enhanced, information, or otherwise). The Supreme Court and the courts of appeals have routinely recognized that the federal government has exclusive jurisdiction over interstate communications. *See*, *e.g.*, *Louisiana*, 476 U.S. at 360 (Communications Act gave the FCC "plenary authority" over "interstate service"); *Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 654 (3d Cir. 2003) ("interstate communications service[s] are to be governed solely by federal law"); *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (Congress "totally entrusted" the FCC with interstate communications). Therefore, Congress's prohibition of common-carrier regulation of interstate information services "under this chapter" prevented the only actor with such authority from so regulating those interstate communications services. Congress did not *sub silentio* open the door for 50 states to impose common-carrier regulations on interstate information services.

ii. It is equally implausible that, when Congress included "under this chapter" in § 332(c)(2), it was opening the door for states to impose common-carrier regulations on private mobile services. Before 1993, the FCC had allowed certain "mobile service operators to interconnect with the public telephone network and thereby provide the same service traditionally offered by common carriers only." *Paging Carriers*, 442 F.3d at 753. That "created the troubling prospect of direct competition between largely unregulated private carriers and heavily regulated common carriers." *Connecticut Dep't of Pub. Util. Control v. FCC*, 78 F.3d 842, 845 (2d Cir. 1996).

Congress amended the Communications Act to eliminate these "inconsistent regulatory schemes," H.R. Rep. No. 103-111, at 260 (1993), in favor of a "comprehensive, consistent regulatory framework" for all mobile services.[27] Congress created "two statutorily defined categories of mobile services": commercial mobile services and private mobile services. *Paging Carriers*, 442 F.3d at 753. Congress then required that any provider of commercial mobile services "shall . . . be treated as a common carrier," while a provider of private mobile services "shall not . . . be treated as a common carrier for any purpose under this chapter." 47 U.S.C. § 332(c)(2). Where Congress intended to permit states to

[27] Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd. 2156, ¶ 12 (1994).

exercise authority over mobile services, it was explicit, preserving state authority to regulate certain "other terms and conditions of commercial mobile services." *Id.* § 332(c)(3)(A). Congress did not preserve *any* state authority over private mobile services. *See id*.

The 1993 amendments were carefully crafted to eliminate "uncertainty" in favor of consistency. *Connecticut*, 78 F.3d at 845. The district court therefore erred in concluding that, by using "under this chapter," Congress opened the door to state-by-state decisions whether to mandate common-carrier regulation of private mobile services. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes.").

2. The district court also suggested that a savings clause in the 1996 Act counsels against finding implied conflict preemption from § 332(c)(2) and § 153(51), Tr. 64:11-15 (ER-70): "This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." 1996 Act, § 601(c)(1), *reprinted in* 47 U.S.C. § 152 note. This too was error.

By its terms, § 601(c)(1) is irrelevant to whether § 332(c)(2) gives rise to implied conflict preemption. Section 601(c)(1) applies only to "[t]his Act" (the

1996 Act) "and the amendments made by this Act." *Id.* Because Congress enacted § 332(c)(2) three years earlier, in 1993, § 601(c)(1) does not apply.

Nor does § 601(c)(1) preclude finding that § 153(51) gives rise to implied conflict preemption. Although § 153(51) was part of the 1996 Act, Congress there codified decades' worth of preexisting FCC precedent regarding enhanced services. *See USTelecom*, 825 F.3d at 691; *City of Portland*, 216 F.3d at 877-78. It was therefore federal law before 1996 that interstate information services are not subject to common-carrier regulation at the federal level. *See Howard*, 208 F.3d at 752-53. The implied conflict preemptive effect from that preexisting law does not arise from the 1996 Act or its amendments, so § 601(c)(1) also does not apply.

Finally, no court of appeals has read § 601(c)(1) to mandate acceptance of a state law, like SB-822, that actually conflicts with federal law. For example, the Third Circuit cautioned that § 601(c)(1) should "not be given broad effect," lest the Communications Act be interpreted to "destroy itself." *Farina*, 625 F.3d at 131 (holding that state law actually conflicted with and was preempted by FCC safety regulations issued under 1996 Act). And the Tenth Circuit similarly rejected the argument that § 601(c)(1) "require[s] the FCC to narrowly interpret" 47 U.S.C. § 251(b)(5) "to avoid interference with state regulation of intrastate" telephone calls, as that "would upset the regulatory scheme envisioned in the 1996 Act." *In re FCC 11-161*, 753 F.3d 1015, 1120 (10th Cir. 2014); *see also Qwest Corp. v.*

Minnesota Pub. Utils. Comm'n, 684 F.3d 721, 731 (8th Cir. 2012) ("[N]othing in the language of [§ 601(c)(1)] suggests an intent to save state-law regulatory actions that conflict with federal regulations.") (cleaned up). This Court should not create a circuit split by reading § 601(c)(1) to authorize actual conflicts with federal law.

III. SB-822 REGULATES IN A PREEMPTED FIELD

A. SB-822 Regulates in a Field Subject to Exclusive Federal Jurisdiction

1. SB-822 defines the service it regulates as "a mass-market retail service by wire or radio provided to customers in California that provides the capability to transmit data to, and receive data from, all or substantially all Internet endpoints." Cal. Civ. Code § 3100(b). This is essentially verbatim the FCC's definition of the interstate broadband service that it has decided how best to regulate. *See* 2018 Order ¶ 21 ("continu[ing] to define" broadband as "a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints") (footnote omitted); *accord* 2015 Order ¶ 187; 2010 Order ¶ 44.[28]

It is well-settled that a communications service is "jurisdictionally interstate" when its end points are in different states. *See*, *e.g.*, *Pacific Bell v. Pac-West*

[28] California has not argued that SB-822 regulates only intrastate services. Nor could it in light of how the statute defines the service it regulates. *See* Cal. Civ. Code § 3100(b).

Telecomm, Inc., 325 F.3d 1114, 1126 (9th Cir. 2003). SB-822's limitation to broadband sold to customers in California does not make the service intrastate, because the service itself enables communications outside of California's borders. That is why the FCC has consistently held on a bipartisan basis that broadband is an interstate communications service. *See* 2018 Order ¶ 199 (citing precedent); 2015 Order ¶ 431 ("reaffirm[ing] the [FCC's] longstanding conclusion that broadband . . . is jurisdictionally interstate").[29]

2. SB-822's regulation of interstate communications intrudes upon a field that Congress occupied long ago with exclusive federal jurisdiction and oversight. Congress first did so in 1910, when it brought "under federal control the interstate business of telegraph companies" and thereby "excluded state action" — including a state effort to enact a telegraph neutrality statute. *Warren-Godwin*, 251 U.S. at 31; *see Boegli*, 251 U.S. at 316-17. The Communications Act carried forward that "intent . . . to occupy the field to the exclusion of state law." *Ivy*

[29] While some Internet communications are intrastate on an end-to-end basis, providers do not sell separate "local" and "long-distance" broadband services or have the ability to treat "intrastate" Internet packets differently from "interstate" packets. *See* 2018 Order ¶ 200 & n.744. Providers are "not required to develop a mechanism for distinguishing between interstate and intrastate [broadband] communications merely to provide [states] with an intrastate communication they can then regulate." *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 578 (8th Cir. 2007).

Broad., 391 F.2d at 490-91; *see O'Brien v. Western Union Tel. Co.*, 113 F.2d 539, 541 (1st Cir. 1940) (same).

Congress's intent to occupy the field is reflected in § 152, which in subsection (a) grants the FCC "comprehensive authority" to "regulate all aspects of interstate communication by wire or radio." *Capital Cities*, 467 U.S. at 700; *see Louisiana*, 476 U.S. at 360 (describing § 152(a) as giving the FCC "plenary authority" over interstate service). Subsection (b) denies the FCC authority over intrastate communications services. *See*, *e.g.*, *California*, 905 F.2d at 1239. California has described § 152 as a "fence" and "jurisdictional wall" that divides federal and state authority. *See* California Br. 10, 14, *California v. FCC*, Nos. 92-70083 *et al.*, 1993 WL 13098729 (9th Cir. Nov. 10, 1993); *see also id.* at 2 ("Under the Communications Act, Congress divided authority between the FCC and states over communications services.").

Language similar to § 152 is found in other 1930s regulatory statutes, which the Supreme Court and courts of appeals have recognized also occupy their respective interstate fields. For example, the 1935 Federal Water Power Act (now known as the Federal Power Act) "shall apply to the transmission of electric energy in interstate commerce," but not to "the transmission of electric energy in intrastate commerce." 16 U.S.C. § 824(b)(1). The Supreme Court read this provision, which mirrors § 152, "to occupy an entire field of regulation" and give

FERC "exclusive authority to regulate 'the sale of electric energy at wholesale in interstate commerce.'" *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292, 1297 (2016). And this Court has held that the Federal Power Act continues to preempt the field even after public-utility regulation gave way to market-based regulation of interstate electricity sales. *See Grays Harbor*, 379 F.3d at 649.

Similarly, the 1938 Natural Gas Act states that it "shall apply to the transportation of natural gas in interstate commerce," but "shall not apply" to natural gas sales occurring within a state and "ultimately consumed within such State." 15 U.S.C. § 717(b)-(c). The Supreme Court has held that this provision, which also mirrors § 152, confers on FERC "exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988) (collecting cases).

The Court explained further that it is the *exclusivity* of federal authority — not any particular statutorily mandated regulation — that gives the Natural Gas Act "full pre-emptive force." *Id.* at 306. As the Court noted, where Congress denied "FERC access to a particular regulatory tool, it would not necessarily follow that Congress intended to allow the States the use of that tool. Congress may have determined that this particular form of regulation simply should not be employed." *Id.* In *Transcontinental Gas*, the Court faced one such denial and found that it did "not constitute a federal retreat from a comprehensive gas policy." 474 U.S.

at 421. As the Court explained, even though "FERC can no longer step in to regulate directly the prices at which pipelines purchase high-cost gas," state regulation of those prices still "impermissibly intrude[s] upon federal concerns." *Id.* at 422.

These decisions finding field preemption in the Federal Power Act and the Natural Gas Act confirm that § 152 is how Congress in the 1930s indicated its intent to occupy the field and preclude state regulation of interstate services.

3. The Supreme Court has also held that where, as here, the "pre-emptive effect" of a 1930s regulatory statute is "not [a] matter[] of first impression," courts should adhere to earlier preemption decisions and not "fundamentally . . . restructure a highly complex and long-enduring regulatory regime." *California v. FERC*, 495 U.S. 490, 497-500 (1990). In that case, the Court was considering Federal Power Act § 27, which states that "[n]othing . . . in this chapter shall be construed . . . to interfere with" certain state laws. In 1946, the Court had interpreted that provision's "reservation of limited powers to the States as part of the congressional scheme to divide state from federal jurisdiction," with federal law controlling in all "fields where rights are not thus 'saved' to the States." *Id.* at 498. Although the Court might have read § 27 differently in 1990 "[w]ere this a case of first impression," it refused "at this late date to revisit and

disturb" the earlier interpretation as there had been "no sufficient intervening change in the law" to "warrant[ ] [a] departure" from precedent. *Id.* at 497-99.

So too here. There has been no intervening change sufficient to justify departing from the historical understanding that § 152 excludes states from directly regulating interstate communications services. To the contrary, the intervening history is of expanded federal control. In 1993, Congress expressly preempted state regulation of mobile services — including purely intrastate aspects — "[n]otwithstanding" the reservation of state authority over intrastate services in § 152(b). 47 U.S.C. § 332(c)(3)(A). And, in the 1996 Act, Congress "unquestionably" took "the regulation of local telecommunications competition away from the States." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. Congress thus punched one-way holes in the § 152 "fence" that had been "hog tight, horse high, and bull strong." *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 (8th Cir. 1997) (subsequent history omitted). But Congress authorized no similar state intrusions on the FCC's *interstate* side of that fence, and it would be "surpassing strange" to think Congress intended for a "*federal* regime" to be "administered by 50 independent state[s]." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6.

4. By dictating the kind of interstate communications services that broadband providers may offer, California is impermissibly regulating in a preempted field. *See Grays Harbor*, 379 F.3d at 647 (when Congress "occupies a

given field," "the test of preemption is whether the matter on which the state asserts the right to act is in any way regulated by the federal government"). It is telling that there is no history in the last century of states attempting to dictate which interstate communications services providers may offer. States made no such effort when the FCC exempted interstate enhanced services from common-carrier regulation in the 1970s, when the FCC adhered to those decisions and preempted state regulation of intrastate enhanced services in the 1980s and 1990s, or when the FCC repeatedly classified broadband as an information service exempt from common-carrier regulation throughout the 2000s.

SB-822 thus differs meaningfully from the anticipated state actions that animated the 2018 Order's Preemption Directive. There, the FCC was concerned about a state attempting "to regulate the use of a broadband Internet connection for *intrastate communications*," because it would not "be feasible to allow separate state rules for intrastate communications while maintaining uniform federal rules for interstate communications." 2018 Order ¶ 200 n.744. For the same reason, *Mozilla*'s rationale for vacating the FCC's Preemption Directive does not suggest states are free to regulate interstate broadband as they see fit. Rather, the D.C. Circuit — like this Court decades earlier — found only that the FCC lacked authority "to categorically abolish all fifty States' statutorily conferred authority to regulate *intrastate* communications." 940 F.3d at 86 (emphasis added); *see*

California, 905 F.2d at 1243 (vacating FCC's similarly sweeping preemption of regulation of intrastate enhanced services).

The 2018 Order is thus nothing new. The FCC returned broadband to its decades-old regulatory classification: an interstate information service and private mobile service subject to the FCC's Title I authority. *See Brand X*, 545 U.S. at 996. All that is novel (and fundamentally incorrect) here is California's assertion — and the district court's conclusion — that states have always had the authority to dictate the kinds of interstate communications services providers can offer.

B. The District Court Erred in Finding No Likelihood of Success on the Merits of This Preemption Argument

The district court first determined that Congress has not preempted the field because § 152(a) "indicates nothing about the power of the States." Tr. 63:11-17 (ER-69). The court's search for explicit preemption language again improperly conflates express and implied preemption. Even when a statute says "[n]othing" that "expressly preempts state regulation," Congress can nonetheless "indicate[] its intent to occupy the field." *Montalvo v. Spirit Airlines*, 508 F.3d 464, 470 (9th Cir. 2007).

The court next found the absence of field preemption because Congress "specifically left out certain types of interstate communications from the FCC's jurisdiction, like information services." Tr. 63:18-23 (ER-69). Congress did no

such thing. The FCC has broad authority over "all interstate . . . communication by wire or radio." 47 U.S.C. § 152(a). The Supreme Court held long ago that "[n]othing" in the Act "limits the [FCC's] authority to those activities . . . specifically described by the Act's other provisions," like Title II. *Southwestern Cable*, 392 U.S. at 172. Prior to the 1996 Act, this Court and others held that the Communications Act gives the FCC authority over interstate enhanced services. *See California*, 39 F.3d at 932; *CCIA*, 693 F.2d at 209-12; *GTE Serv.*, 474 F.2d at 730-31. And, after Congress codified the parallel term "information service" in the 1996 Act, the Supreme Court confirmed that the FCC is "free to impose special regulatory duties" on interstate information services like broadband "under its Title I ancillary jurisdiction." *Brand X*, 545 U.S. at 996.

To the extent the district court meant instead that only common-carrier regulation constitutes the kind of "pervasive regulatory system" giving rise to field preemption, that too is wrong. Tr. 63:18-23 (ER-69). Field preemption arises for interstate communications services from § 152 — as it arises from comparable provisions in the Federal Power Act and the Natural Gas Act — not because Congress gave the FCC "access to a particular regulatory tool" such as common-carrier regulation, but because § 152 gives the agency "exclusive jurisdiction" over those services. *Schneidewind*, 485 U.S. at 306, 308. The Communications Act governs all interstate communications services, not only those subject to Title II.

See Southwestern Cable, 392 U.S. at 172. Nothing in the 1934 Act — or Congress's subsequent amendments — suggests that Congress opened the door for states to dictate providers' permissible interstate service offerings. In the particular context of broadband, as this Court has recognized, Congress expressed the opposite intent: that the Internet should remain "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2); *see Howard*, 208 F.3d at 753.

* * *

SB-822 represents a remarkable attempt to flip the Supremacy Clause on its head; it does not merely create minor tensions with federal law but instead seeks to reverse it entirely. Congress carefully constructed a regime under which federal and state regulators generally are confined, respectively, to interstate and intrastate services. And Congress further specified that the Internet should remain "unfettered" by "Federal or State regulation." 47 U.S.C. § 230(b)(2). The FCC, for its part, determined on the basis of a comprehensive record that conduct rules for broadband providers are unnecessary and counterproductive, and the D.C. Circuit affirmed that decision. SB-822 undercuts all of these federal determinations. It presents a paradigmatic example of a state law that cannot survive under the Supremacy Clause.

IV. THE OTHER FACTORS FAVOR A PRELIMINARY INJUNCTION

If this Court agrees that Appellants are likely to succeed on the merits of any of their preemption claims, it should conclude further that the balance of equities, public interest, and irreparable harm factors weigh in favor of a preliminary injunction as well. Importantly, the interest in enforcing the Supremacy Clause is sufficiently strong that showing a likelihood of success "also establishe[s] that both the public interest and the balance of the equities favor a preliminary injunction." *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014). And this Court has held that a "presum[ption] that [plaintiffs] will suffer irreparable harm based on . . . constitutional violations" is "consistent with [its] recognition that preventing a violation of the Supremacy Clause serves the public interest." *California*, 921 F.3d at 893 (citations omitted); *see American Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997).

Even absent the presumptive harms associated with a likely Supremacy Clause violation, reversing on likelihood of success would warrant reexamination of the other preliminary-injunction factors on remand. *See*, *e.g.*, *California*, 921 F.3d at 878, 893-94 (remanding for district court "to reexamine the equitable *Winter* factors" after reversing on likelihood of success). The district court's ruling was based on its assessment of the merits, and it declined to make conclusive

findings on the other factors. Tr. 67:23-68:2 (ER-73–74) (while the court "did have questions regarding irreparable harm," it "need not make a detailed finding given that . . . there is no constitutional violation"); Tr. 68:3-6 (ER-74) (balance of equities and public interest posed "an interesting question that, in all likelihood, requires further development"). Insofar as the court commented on those factors, its comments were premised on erroneous merits determinations.

The district court found that "[a]t this juncture . . . the balance of equities and the public interest weigh in favor of denying the injunction" because, "'[a]ny time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" Tr. 68:6-12 (ER-74) (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). But that in-chambers opinion is "not, of course, binding precedent." *United States v. Claiborne*, 870 F.2d 1463, 1467 (9th Cir. 1989). And this Court's precedent demonstrates that a state suffers no such harm when a court preliminarily enjoins a law (like SB-822) that likely is preempted. *See Brewer*, 757 F.3d at 1069 ("[I]t would not be equitable or in the public's interest to allow the state to violate the requirements of federal law.") (cleaned up).

The record in this case further supports a preliminary injunction. The "Hobson's choice" that Appellants' members face between "continually violat[ing]" SB-822 and "expos[ing] themselves to potentially huge liability;

or . . . suffer[ing] the injury of obeying the law during the pendency of the proceedings and any further review" constitutes irreparable harm. *American Trucking*, 559 F.3d at 1057-58.[30] Appellants submitted undisputed evidence that SB-822 likely would force changes to network congestion practices, retail "zero-rating" offerings, and interconnection negotiations, all of which threaten to cause substantial harm.[31] Indeed, as anticipated, mobile providers already have been forced to withdraw beneficial service offerings from the marketplace.[32] And the Department of Veterans Affairs has expressed concern that SB-822's ban on "zero-rating" could imperil its existing arrangements to zero-rate veterans' use of the VA's telehealth app.[33]

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[30] Though monetary, these losses are irreparable because California's sovereign immunity prevents recovery via traditional legal remedies. *See Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015).

[31] *See* McCormick Decl. ¶¶ 18-20 (ER-146–47) (explaining that legal risks associated with SB-822 will force Cox to suspend an existing congestion management practice); Roden Decl. ¶¶ 21-26 (ER-173–75) (explaining that AT&T's Data Free TV offering will need to be discontinued under SB-822, subjecting AT&T to immediate and substantial loss of customer goodwill and notification costs); Klaer Decl. ¶¶ 19-21 (ER-129–30) (explaining that SB-822 will harm Comcast's ability to negotiate new paid interconnection agreements with edge providers and subject Comcast to potential enforcement actions or litigation); Paradise Decl. ¶ 38 (ER-165) (similar, as to AT&T).

[32] *See* AT&T Public Policy Blog (Mar. 17, 2021), https://bit.ly/3twCRra.

[33] *See* John Hendel, *VA asking California if net neutrality law will snag veterans' health app*, Politico (Mar. 24, 2021), https://politi.co/31jiotW.

Appellants also showed that the balance of equities and public interest favored a preliminary injunction. Although the district court tentatively opined that it "appear[s] to be that issuing an injunction would . . . negatively impact the State of California more than the ISP companies," Tr. 69:9-11 (ER-75), the fact that California was unable to point to any genuine harm occurring between June 2018 and the hearing — a nearly three-year period when only the FCC's light-touch framework applied — belies that conclusion.[34] Appellants' members, either on their own or through their trade associations, have made public, enforceable commitments to preserve core principles of Internet openness. *See*, *e.g.*, 2018 Order ¶¶ 142 & n.511, 117, 244. The court should have preserved that status quo: a transparency-based regime that has resulted in today's well-functioning broadband marketplace.

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[34] In suggesting SB-822 would prevent more than "hypothetical concerns," the district court first cited a declaration from a Santa Clara, California Fire Chief. Tr. 68:23-69:2 (ER-74–75). But California has admitted that the events that declaration described did not violate the 2015 Order's rules (and thus would not have violated SB-822). *See* Tr. 16:1-4 (ER-22); Gov't Pet'rs Br. 24 n.13, *Mozilla Corp. v. FCC*, Nos. 18-1051 *et al.* (D.C. Cir. Nov. 27, 2018), https://bit.ly/3u3ofzZ.

The district court also cited a New York Attorney General filing with the FCC suggesting that, between 2013 and 2015, ISPs deliberately caused congestion at network interconnection points to extract payment from others. *See* Tr. 69:3-8 (ER-75); Li Decl. Ex. A (ER-105–21). But New York settled the civil actions it brought against ISPs without any finding of wrongdoing and terminated related investigations. *See*, *e.g.*, *People v. Charter Commc'ns, Inc.*, No. 450318/2017, Dkt. 253 (N.Y. Sup. Ct. July 18, 2019) (stipulating to dismissal with prejudice), https://bit.ly/3chqk5b.

CONCLUSION

For the foregoing reasons, this Court should vacate and remand the district court's ruling denying Appellants' preliminary-injunction motion.

Respectfully submitted,

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ADDENDUM

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U.S. Const. art. VI

Article VI. Debts Validated—Supreme Law of Land—Oath of Office

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

47 U.S.C. § 151

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S.C. § 152

§ 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A.

(b) Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

47 U.S.C. § 153

§ 153. Definitions

For the purposes of this chapter, unless the context otherwise requires—

* * * * *

(24) Information service

The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

* * * * *

(28) Interstate communication

The term "interstate communication" or "interstate transmission" means communication or transmission (A) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (B) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (C) between points within the United States but through a foreign country; but shall not, with respect to the provisions of subchapter II of this chapter (other than section 223 of this title), include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

* * * * *

(33) Mobile service

The term "mobile service" means a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations

communicating among themselves, and includes (A) both one-way and two-way radio communication services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding.

* * * * *

(51) Telecommunications carrier

The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

* * * * *

(53) Telecommunications service

The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

* * * * *

47 U.S.C. § 332

§ 332. Mobile services

* * * * *

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that—

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

* * * * *

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land

mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—

> **(i)** market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
>
> **(ii)** such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

* * * * *

(d) Definitions

For purposes of this section—

(1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B); and

(3) the term "private mobile service" means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

California Senate Bill No. 822

CHAPTER 976

An act to add Title 15 (commencing with Section 3100) to Part 4 of Division 3 of the Civil Code, relating to communications.

[Approved by Governor September 30, 2018. Filed with Secretary of State September 30, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

SB 822, Wiener. Communications: broadband Internet access service.

Existing law imposes certain obligations in the context of particular transactions, and provides mechanisms to enforce those obligations.

This bill would enact the California Internet Consumer Protection and Net Neutrality Act of 2018. This act would prohibit 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. The act would prohibit, among other things, blocking lawful content, applications, services, or nonharmful devices, impairing or degrading lawful Internet traffic on the basis of Internet content, application, or service, or use of a nonharmful device, and specified practices relating to zero-rating, as defined. It would also prohibit fixed and mobile Internet service providers from offering or providing services other than broadband Internet access service that are delivered over the same last-mile connection as the broadband Internet access service, if those services have the purpose or effect of evading the above-described prohibitions or negatively affect the performance of broadband Internet access service.

The people of the State of California do enact as follows:

SECTION 1. (a) The Legislature finds and declares all of the following:

(1) This act is adopted pursuant to the police power inherent in the State of California to protect and promote the safety, life, public health, public convenience, general prosperity, and well-being of society, and the welfare of the state's population and economy, that are increasingly dependent on an open and neutral Internet.

(2) Almost every sector of California's economy, democracy, and society is dependent on the open and neutral Internet that supports vital functions regulated under the police power of the state, including, but not limited to, each of the following:

(A) Police and emergency services.

(B) Health and safety services and infrastructure.

(C) Utility services and infrastructure.

(D) Transportation infrastructure and services, and the expansion of zero- and low-emission transportation options.

(E) Government services, voting, and democratic decisionmaking processes.

(F) Education.

(G) Business and economic activity.

(H) Environmental monitoring and protection, and achievement of state environmental goals.

(I) Land use regulation.

(b) This act shall be known, and may be cited, as the California Internet Consumer Protection and Net Neutrality Act of 2018.

SEC. 2. Title 15 (commencing with Section 3100) is added to Part 4 of Division 3 of the Civil Code, to read:

TITLE 15. INTERNET NEUTRALITY

3100. For purposes of this title, the following definitions apply:

(a) "Application-agnostic" means not differentiating on the basis of source, destination, Internet content, application, service, or device, or class of Internet content, application, service, or device.

(b) "Broadband Internet access service" means a mass-market retail service by wire or radio provided to customers in California that provides the capability to transmit data to, and receive data from, all or substantially all Internet endpoints, including, but not limited to, any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. "Broadband Internet access service" also encompasses any service provided to customers in California that provides a functional equivalent of that service or that is used to evade the protections set forth in this title.

(c) "Class of Internet content, application, service, or device" means Internet content, or a group of Internet applications, services, or devices, sharing a common characteristic, including, but not limited to, sharing the same source or destination, belonging to the same type of content, application, service, or device, using the same application- or transport-layer protocol, or having similar technical characteristics, including, but not limited to, the size, sequencing, or timing of packets, or sensitivity to delay.

(d) "Content, applications, or services" means all Internet traffic transmitted to or from end users of a broadband Internet access service, including, but not limited to, traffic that may not fit clearly into any of these categories.

(e) "Edge provider" means any individual or entity that provides any content, application, or service over the Internet, and any individual or entity that provides a device used for accessing any content, application, or service over the Internet.

(f) "End user" means any individual or entity that uses a broadband Internet access service.

(g) "Enterprise service offering" means an offering to larger organizations through customized or individually negotiated arrangements or special access services.

(h) "Fixed broadband Internet access service" means a broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment. Fixed broadband Internet access service includes, but is not limited to, fixed wireless services including, but not limited to, fixed unlicensed wireless services, and fixed satellite services.

(i) "Fixed Internet service provider" means a business that provides fixed broadband Internet access service to an individual, corporation, government, or other customer in California.

(j) "Impairing or degrading lawful Internet traffic on the basis of Internet content, application, or service, or use of a nonharmful device" means impairing or degrading any of the following: (1) particular content, applications, or services; (2) particular classes of content, applications, or services; (3) lawful Internet traffic to particular nonharmful devices; or (4) lawful Internet traffic to particular classes of nonharmful devices. The term includes, without limitation, differentiating, positively or negatively, between any of the following: (1) particular content, applications, or services; (2) particular classes of content, applications, or services; (3) lawful Internet traffic to particular nonharmful devices; or (4) lawful Internet traffic to particular classes of nonharmful devices.

(k) "Internet service provider" means a business that provides broadband Internet access service to an individual, corporation, government, or other customer in California.

(*l*) "ISP traffic exchange" means the exchange of Internet traffic destined for, or originating from, an Internet service provider's end users between the Internet service provider's network and another individual or entity, including, but not limited to, an edge provider, content delivery network, or other network operator.

(m) "ISP traffic exchange agreement" means an agreement between an Internet service provider and another individual or entity, including, but not limited to, an edge provider, content delivery network, or other network operator, to exchange Internet traffic destined for, or originating from, an Internet service provider's end users between the Internet service provider's network and the other individual or entity.

(n) "Mass market" service means a service marketed and sold on a standardized basis to residential customers, small businesses, and other customers, including, but not limited to, schools, institutions of higher learning, and libraries. "Mass market" services also include broadband Internet access services purchased with support of the E-rate and Rural Health Care programs and similar programs at the federal and state level, regardless of whether they are customized or individually negotiated, as well as any broadband Internet access service offered using networks supported by the Connect America Fund or similar programs at the federal and state level. "Mass market" service does not include enterprise service offerings.

(o) "Mobile broadband Internet access service" means a broadband Internet access service that serves end users primarily using mobile stations. Mobile broadband Internet access service includes, but is not limited to, broadband Internet access services that use smartphones or mobile-network-enabled tablets as the primary endpoints for connection to the Internet, as well as mobile satellite broadband services.

(p) "Mobile Internet service provider" means a business that provides mobile broadband Internet access service to an individual, corporation, government, or other customer in California.

(q) "Mobile station" means a radio communication station capable of being moved and which ordinarily does move.

(r) "Paid prioritization" means the management of an Internet service provider's network to directly or indirectly favor some traffic over other traffic, including, but not limited to, through the use of techniques such as traffic shaping, prioritization,

resource reservation, or other forms of preferential traffic management, either (1) in exchange for consideration, monetary or otherwise, from a third party, or (2) to benefit an affiliated entity.

(s) "Reasonable network management" means a network management practice that is reasonable. A network management practice is a practice that has a primarily technical network management justification, but does not include other business practices. A network management practice is reasonable if it is primarily used for, and tailored to, achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service, and is as application-agnostic as possible.

(t) "Zero-rating" means exempting some Internet traffic from a customer's data usage allowance.

3101. (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.

(2) Impairing or degrading lawful Internet traffic on the basis of Internet content, application, or service, or use of a nonharmful device, subject to reasonable network management.

(3) Requiring consideration, monetary or otherwise, from an edge provider, including, but not limited to, in exchange for any of the following:

(A) Delivering Internet traffic to, and carrying Internet traffic from, the Internet service provider's end users.

(B) Avoiding having the edge provider's content, application, service, or nonharmful device blocked from reaching the Internet service provider's end users.

(C) Avoiding having the edge provider's content, application, service, or nonharmful device impaired or degraded.

(4) Engaging in paid prioritization.

(5) Engaging in zero-rating in exchange for consideration, monetary or otherwise, from a third party.

(6) Zero-rating some Internet content, applications, services, or devices in a category of Internet content, applications, services, or devices, but not the entire category.

(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.

(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.

(8) 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.

(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.

(b) It shall be unlawful for a mobile Internet service provider, insofar as the provider is engaged in providing mobile broadband Internet access service, to engage in any of the activities described in paragraphs (1), (2), (3), (4), (5), (6), (7), (8), and (9) of subdivision (a).

3102. (a) It shall be unlawful for a fixed Internet service provider to offer or provide services other than broadband Internet access service that are delivered

over the same last-mile connection as the broadband Internet access service, if those services satisfy either of the following conditions:

(1) They have the purpose or effect of evading the prohibitions in Section 3101.

(2) They negatively affect the performance of broadband Internet access service.

(b) It shall be unlawful for a mobile Internet service provider to offer or provide services other than broadband Internet access service that are delivered over the same last-mile connection as the broadband Internet access service, if those services satisfy either of the conditions specified in paragraphs (1) and (2) of subdivision (a).

(c) Nothing in this section shall be construed to prohibit a fixed or mobile Internet service provider from offering or providing services other than broadband Internet access service that are delivered over the same last-mile connection as the broadband Internet access service and do not violate this section.

3103. (a) Nothing in this title supersedes any obligation or authorization a fixed or mobile Internet service provider may have to address the needs of emergency communications or law enforcement, public safety, or national security authorities, consistent with or as permitted by applicable law, or limits the provider's ability to do so.

(b) Nothing in this title prohibits reasonable efforts by a fixed or mobile Internet service provider to address copyright infringement or other unlawful activity.

3104. Notwithstanding Section 3268 or any other law, any waiver of the provisions of this title is contrary to public policy and shall be unenforceable and void.

SEC. 3. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s) 21-15430

I am the attorney or self-represented party.

This brief contains 13,975 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature */s/ Scott H. Angstreich* **Date:** April 6, 2021

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I hereby certify that, on April 6, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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