21-15430

United States Court of Appeals for the Ninth Circuit

ACA CONNECTS – AMERICA'S COMMUNICATIONS ASSOCIATION, et al.,

Plaintiffs-Appellants,

v.

ROB BONTA, 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

BRIEF FOR THE STATES OF NEW YORK, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON, AND WISCONSIN, AND THE DISTRICT OF COLUMBIA, AS AMICI CURIAE IN SUPPORT OF APPELLEE

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INTERESTS OF AMICI CURIAE

Amici States of New York, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin, and the District of Columbia file this brief in support of the district court's decision here to deny a preliminary injunction against enforcement of the California Internet Consumer Protection and Net Neutrality Act of 2018, Cal. Stat. 2018, ch. 976 ("SB 822"). Amici have a strong interest in defending the States' sovereign right to exercise their police powers against unwarranted assertions of federal preemption. A critical aspect of the States' sovereignty is the ability to pass laws aimed at "guard[ing] the lives and health of their citizens." *License Cases*, 46 U.S. (5 How.) 504, 582-83 (1847). Our federalist system is designed to "allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Gonzalez v. Oregon*, 546 U.S. 243, 270 (2006) (quotation marks omitted). The States' authority to protect their residents through robust consumer protection and public safety laws has long been considered a

critical exercise of such historic police powers. *See Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011).

In this case, several telecommunications industry groups assert that broadband internet providers are uniquely entitled to immunity from state regulatory authority, even when they engage in activities that harm consumers and undermine public safety. The district court correctly rejected this argument, recognizing that federal law does not excuse a broadband provider from complying with state laws when it chooses to offer goods or services in a State. Over the years, amici have exercised their sovereign authority to promulgate and enforce numerous laws and regulations applicable to broadband providers, including laws that, like SB 822, are aimed at protecting their residents from abusive business practices. The D.C. Circuit recently held that such laws could not be preempted by the Federal Communications Commission (FCC)'s regulatory decision to take a hands-off approach to net neutrality. *See Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019). Plaintiffs' attempts to find other sources of federal preemption likewise fail.

Amici have a strong interest in preserving their authority to exercise their police powers to protect their residents' health, safety, and

welfare by ensuring access to broadband internet without improper interference by broadband providers. Amici thus oppose plaintiffs' unjustified attempt to curtail the States' authority to enact and enforce state laws affecting broadband providers.

ARGUMENT

FEDERAL LAW DOES NOT CATEGORICALLY PREEMPT STATE REGULATION OF BROADBAND PROVIDERS

A. States Are Entitled to Regulate the Business Practices of Broadband Providers Offering Services to Their Residents.

"[B]ecause the States are independent sovereigns in our federal system," preemption analysis must begin "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quotation marks omitted). "[T]he purpose of Congress is the ultimate touchstone in every preemption case." *Id.* (quotation marks omitted).

Congress expressly acknowledged and sought to preserve the effect of state laws that, like SB 822, protect consumers and address unfair

business practices by broadband providers. In the Federal Communications Act of 1934 (the Communications Act) and the Telecommunications Act of 1996 (the 1996 Act), Congress endorsed active, affirmative, and meaningful state regulation of communications services, especially where such regulations fall within the States' traditional police powers. *See generally* Philip Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. Rev. 1692, 1694 (2001).

Among other things, the Communications Act preserves all state remedies available "at common law or by statute," 47 U.S.C. § 414, and embraces state authority in areas of traditional state concern—including state-law "requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers," *id.* § 253(b). *See also id.* § 332(c)(3), (7). Congress reiterated its intent to preserve state regulation over communications providers in section 601(c)(1) of the 1996 Act, stating explicitly that the 1996 Act should not be read to impair or modify state authority unless it so expressly provided. *See* Pub. L. No. 104-104, § 601(c)(1), 110 Stat. 56, 143 (1996) (codified at 47 U.S.C. § 152 note). None of plaintiffs' meritless theories of preemption

override these plain expressions of congressional intent to preserve rather than supplant state regulatory authority.

1. Congress has not preempted the field.

First, plaintiffs argue that the entire field of interstate communications is preempted by federal law. *See* Br. for Pls.-Appellants at 49-58. Field preemption requires a showing that "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quotation marks omitted). But as explained *supra* (at 2-3), far from crowding States out of the field, Congress affirmatively embraced state authority over communications services in both the Communications Act and the 1996 Act. And the States, including amici, have routinely exercised their regulatory authority with respect to broadband providers and other internet-based communications services, as Congress intended. See *infra* at 8-12. This Court has expressly held that the extensive role played by States in the regulation of interstate communications "preclude[s] a finding that Congress intended to completely occupy the field." *Ting v. AT&T*, 319 F.3d 1126, 1137 (9th Cir. 2003); *see also In re NOS Commc'ns, MDL No.*

1357, 495 F.3d 1052, 1058 (9th Cir. 2007) (stating that the Communications Act "is fundamentally incompatible with complete field preemption"). Other courts of appeal have likewise rejected comparably sweeping claims of field preemption in this area. *See, e.g.*, *Johnson v. American Towers, LLC*, 781 F.3d 693, 703 (4th Cir. 2015); *In re Universal Serv. Fund Tel. Billing Practice Litig.*, 619 F.3d 1188, 1196 (10th Cir. 2010) ("[B]ecause state law expressly supplements federal law in the regulation of interstate telecommunications carriers, field preemption does not apply."). Notably, these cases rejected field preemption in the context of state regulation of interstate *telecommunications* services—services over which the FCC indisputably has more regulatory authority than the "information service" at issue here.[1]

Plaintiffs' field preemption argument finds no support in the text of the relevant statutes. For example, plaintiffs rely heavily (Br. at 51) on 47 U.S.C. § 152(a)-(b), which confers jurisdiction on the FCC over "all

[1] The FCC in 2018 classified broadband as an "information service" subject to Title I of the Communications Act, rather than as a "telecommunications service" subject to Title II. Unlike Title II, "Title I is not an independent source of regulatory authority." *California v. FCC*, 905 F.2d 1217, 1240-41 n.35 (9th Cir. 1990).

interstate . . . communication by wire or radio" and denies the FCC "jurisdiction with respect to . . . intrastate communication service by wire or radio." But statutory provisions defining the scope of a federal agency's jurisdiction do not, standing alone, displace state authority—and especially not with respect to exercises of the States' historic police powers. *See English v. General Elec. Co.*, 496 U.S. 72, 87 (1990) ("[T]he mere existence of a federal regulatory or enforcement scheme . . . does not by itself imply pre-emption of state remedies."). Accordingly, as this Court has held, the mere fact that there is federal authority to regulate communications "in general, does not completely preempt state law." *Metrophone Telecomms., Inc. v. Global Crossing Teles., Inc.*, 423 F.3d 1056, 1072-73 n.10 (9th Cir. 2005). It is particularly telling that section 152 focuses entirely on federal authority and says nothing about state authority. In sharp contrast, other portions of the Communications Act contain carefully cabined express preemption clauses pertaining to specific interstate communications services. *See, e.g.*, 47 U.S.C. § 253(a). Those more specific preemption clauses would be superfluous if the definitional provisions had already preempted all state regulation.

Plaintiffs are also wrong to suggest (Br. at 55-56) that their sweeping theory of field preemption was endorsed by the D.C. Circuit in *Mozilla*—a decision that *rejected* the FCC's attempt to preempt state regulatory authority. At issue in *Mozilla* was the legality of a 2018 FCC order which, among other things, withdrew certain federal net neutrality regulations and preempted "any state or local measures that would effectively impose rules or requirements that [the FCC] repealed or decided to refrain from imposing in th[e] order or that would impose more stringent requirements for any aspect of broadband service that [the FCC] address[ed] in this order." *See In re Restoring Internet Freedom*, 33 FCC Rcd. 311, 427 (2018) ("2018 Order"). While the D.C. Circuit upheld other aspects of the order, it vacated the FCC's preemption order in its entirety. *Mozilla*, 940 F.3d at 74-86. *Mozilla* did not hold, as plaintiffs contend (Br. at 55), that the preemption order was unlawful only because it touched upon *intrastate* communications. Rather, *Mozilla* found that the preemption order's intrusion on state regulation of intrastate communications was *especially* egregious because such "preemption treads into an area . . . over which Congress expressly denied the Commission regulatory authority." *Id.* at 78

(quotation and alteration marks omitted). But *Mozilla* vacated the preemption order in its entirety, principally based on the conclusion that the FCC has no "authority to displace state laws" regulating information services because the FCC has no substantive regulatory authority over those services under Title I. *Id.* at 76. Moreover, *Mozilla* expressly noted "the Communications Act's vision of dual federal-state authority and cooperation in this area" including with respect to state laws governing business practices and commercial dealings, "categories to which broadband regulation is inextricably connected." *Id.* at 81. Thus, neither the relief nor the reasoning of *Mozilla* was limited to intrastate communications.

2. Conflict preemption does not apply.

Second, plaintiffs' conflict-preemption arguments are likewise meritless—whether they are based on the Communications Act or on the FCC's 2018 Order. Conflict preemption requires a showing that state law "actually conflicts with federal law." *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983). A party must demonstrate either that "it is impossible for a private party to comply with both state and federal requirements," *English*, 496 U.S.

at 79, or that the application of state law is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Wyeth v. Levine*, 555 U.S. 555, 577 (2009) (quotation marks omitted). Neither standard is met here.

Conflict "[p]re-emption is ordinarily not to be implied absent an '*actual* conflict.'" *English*, 496 U.S. at 90 (emphasis added). This principle "enjoins seeking out conflicts between state and federal regulation where none clearly exists." *Id.* (quotation and alteration marks omitted). Here, the FCC's 2018 Order cannot itself serve as the basis for conflict preemption because, as the district court correctly recognized (ER-71), that order declared the FCC's *lack* of regulatory authority to promulgate net neutrality conduct rules. The 2018 Order thus "is not an instance of affirmative deregulation, but rather a decision by the FCC that it lacked authority to regulate in the first place." *ACA Connects–Am.'s Commc'ns Ass'n v. Frey*, 471 F. Supp. 3d 318, 326 (D. Me. 2020). "[T]he FCC's abdication of authority" does not have preemptive effect and cannot be the basis of an impermissible conflict. *Id.*

It is immaterial that the 2018 Order was motivated by the FCC's policy objective of immunizing broadband providers from regulation

through a purported "light-touch" framework (Br. at 30). The Supreme Court has made clear that a federally mandated policy of deregulation cannot be enacted silently or by administrative fiat. The preemption of state laws represents "a serious intrusion into state sovereignty." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1904 (2019) (op. of Gorsuch, J.) (quotation marks omitted). "[A]ny [e]vidence of pre-emptive purpose, whether express or implied, must therefore be sought in the text and structure of the *statute* at issue." *Id.* at 1907 (op. of Gorsuch, J.) (emphasis added) (quotation marks omitted). "Without a [statutory] text that can . . . plausibly be interpreted as *prescribing* federal pre-emption it is impossible to find that a free market was mandated by federal law." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988).

Plaintiffs point to no such statutory text here. As an initial matter, the classification of broadband as an information rather than telecommunications service is not mandated by Congress. Indeed, the D.C. Circuit has previously found that the statutory definitions governing classification support the treatment of broadband as a telecommunications service subject to extensive regulation under Title II. *See United*

States Telecom Ass'n v. FCC, 825 F.3d 674, 701-06 (D.C. Cir. 2016). To be sure, the D.C. Circuit has also upheld the reclassification of broadband as an information service in light of the ambiguity in the relevant statutes. *Mozilla*, 940 F.3d at 23-35. But statutory ambiguity cannot evidence Congress's intent to preempt state law, and therefore cannot overcome the presumption against preemption. *See Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 693 (3d Cir. 2016). The FCC's own "unenacted approvals, beliefs, and desires" with respect to classification are insufficient to preempt. *See Isla Petroleum*, 485 U.S. at 501.

Moreover, there is no evidence that Congress intended to preempt *state* regulation of information services, even if it had intended to curtail *federal* regulation of such services. Congress is well aware of how to preempt state laws. For example, while the 1996 Act expressly authorizes preemption with respect to certain types of state regulation of telecommunications services, *see*, *e.g.*, 47 U.S.C. § 253(a), the Act includes no such provision regarding information services. And in section 601(c)(1) of the 1996 Act, Congress provided that there should be "no implied effect" from the provisions of the 1996 Act, and that the legislation should not be construed "to modify, impair, or supersede Federal, State, or local law

unless expressly so provided." Pub. L. No. 104-104, 110 Stat. at 143. As then–FCC Commissioner (and later Chairman) Ajit Pai noted in 2015, "section 601(c) counsels against any broad construction of the 1996 Act that would create an implicit conflict with state law." *In re City of Wilson*, 30 FCC Rcd. 2408, 2512 (2015) (dissenting statement) (quotation and alteration marks omitted), *order rev'd*, *Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016). Section 601(c)(1) thus precludes an inference that state regulation of "information services" is impliedly preempted.

Plaintiffs also erroneously argue that the Communications Act precludes the States from imposing "common carrier" regulations on information services. *See* Br. at 38. The Act provides that the FCC may impose common carrier regulations on such an entity "only to the extent that [a carrier] is engaged in providing telecommunications services." 47 U.S.C. § 153(51). In *Verizon v. FCC*, the D.C. Circuit interpreted this statute to bar the FCC from imposing regulations on information services that would prohibit blocking, throttling, and paid prioritization. 740 F.3d 623, 656 (D.C. Cir. 2014). But Congress's apparent decision to bar *the FCC* from promulgating certain types of regulations with respect to information services does not, standing alone, prohibit *the States* from so

acting. Because "the States entered the federal system with their sovereignty intact," *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991), they do not require Congress's authority or approval to exercise their historic police powers. *See Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1190 (11th Cir. 2017) ("Although federal agencies have only the authority granted to them by Congress, states are sovereign."). As sovereigns, States have their own inherent police powers to protect consumers, promote public health and safety, and regulate businesses operating within their borders. A "clear and manifest purpose" to preempt a state law that derives from the State's own sovereign authority cannot be derived solely from a congressional decision to strip a federal agency of jurisdiction. *Id.* at 1191.

B. Plaintiffs' Sweeping Theories of Field and Conflict Preemption Would Undermine the States' Ability to Protect Consumers.

Plaintiffs ask this Court to recognize a sweeping preemption of state regulation that would leave broadband almost completely un-regulated, notwithstanding Congress's recognition of "broadband as a critical public infrastructure, increasingly important to the nation's

economic development." Lennard G. Kruger et al., *The National Broadband Plan* 1 (Cong. Research Serv. July 2010). It is implausible that Congress would have silently blocked States from regulating broadband when it has described that very service as fundamental to, among other things, "consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth." *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2)(D), 123 Stat. 115, 516. And the stark consequences of precluding state regulation of broadband have been highlighted by the nation's experience over the past year with the COVID-19 pandemic, during which millions of Americans have been entirely dependent on broadband internet access to work, study, and obtain food and other essential goods.

Contrary to plaintiffs' representations, broadband providers are not entitled to special status among businesses offering goods or services in the States. States have ample authority to prohibit or regulate business practices by broadband providers that harm consumers or jeopardize public health and safety. Several States have appropriately relied on this

authority to promulgate net neutrality statutes, many of which plaintiffs have not challenged.[2] Maine, Nevada, and Minnesota have all enacted laws that require broadband providers to obtain permission from consumers before sharing data such as their web browsing history, application usage, or geographic location,[3] while other States have extended their data privacy laws to broadband providers.[4] These types of

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[2] *See, e.g.*, Ch. 210, 2019 Colo. Laws 2213; 5 Me. Rev. Stat. Ann. § 1541-B; Ch. 88, 2018 Or. Laws; No. 169, 2018 Vt. Acts & Resolves; Wash. Rev. Code ch. 19.385. More than twenty other States introduced net neutrality legislation in the 2020 legislative sessions alone. *See* Nat'l Conf. of State Legs., *Net Neutrality 2020 Legislation* (Jan. 19, 2021) (internet) (For authorities available on the internet, URLs are listed in the table of authorities. All sites were last visited May 11, 2021.)

[3] *See* 35-A Me. Rev. Stat. Ann. § 9301; Minn. Stat. § 325M.01 et seq.; Nev. Rev. Stat. § 205.498. More than a dozen States are considering comparable legislation. *See* Nat'l Conf. of State Legs., *2019-20 Privacy Legislation Related to Internet Service Providers* (Apr. 7, 2021) (internet).

[4] *See, e.g.*, 815 Ill. Comp. Stat. 530/1 et seq. (requiring data collector whose security system has been breached to notify Illinois Attorney General); 66 Pa. Cons. Stat. § 3019(d)(1) (prohibiting carriers from disclosing "information relating to any customer's patterns of use, equipment and network information and any accumulated records about customers" except name, address, and telephone number).

regulations are akin to many other types of industry-specific laws that States have enacted to protect the public.[5]

State enforcement actions have highlighted the ways in which state regulation is essential to policing unfair, deceptive, or otherwise harmful business practices by internet service providers. For example, in 2007, 48 States and the District of Columbia reached a $3 million settlement agreement with America Online (AOL) regarding the company's cancellation policies, which had made it extremely challenging for customers to cancel their service. As part of the agreement, AOL was required to reform its cancellation policies and issue refunds to consumers who continued to be charged fees after trying to cancel their services.[6]

Similarly, in 2018, New York reached a $174 million settlement agreement with Charter Communications in a lawsuit involving the

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[5] *See, e.g.,* Conn. Gen. Stat. § 21a-217 (health club contracts); Del. Code Ann. tit. 6, § 2401A et seq. (debt management services); Md. Code Ann., Com. Law § 14-3301 et seq. (immigration consultants); 940 Mass. Code Regs. § 19.01 et seq. (retail marketing and sale of electricity); Minn. Stat. § 325F.693 (prohibiting telephone companies from slamming); N.J. Stat. Ann. § 49:3-53 (investment advisers); Or. Rev. Stat. § 646A.800 (regulating late fees for cable service); 37 Pa. Code § 301.1 et seq. (automotive industry trade practices).

[6] Reuters, *AOL Settles with States on Cancellation Complaints* (July 11, 2007) (internet).

company's misrepresentations about the speed and reliability of their internet service.[7] Notably, Charter settled the case after unsuccessfully moving to dismiss the State's claims as preempted. *See People v. Charter Commc'ns, Inc.*, 162 A.D.3d 553 (N.Y. App. Div. 2018) (FCC regulation "does not preempt state laws that prevent fraud, deception and false advertising" (quotation marks omitted)).[8] Following the Charter settlement, New York reached agreements with four other broadband providers—Altice, Frontier Communications, RCN, and Verizon—to

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[7] Press Release, N.Y. Office of the Att'y Gen., *A.G. Underwood Announces Record $174.2 Million Consumer Fraud Settlement with Charter for Defrauding Internet Subscribers* (Dec. 18, 2018) (internet).

[8] Plaintiffs assert that New York's settlement with Charter and other broadband providers undercuts its filing to the FCC showing that "between 2013 and 2015, [providers] deliberately caused congestion at network interconnection points to extract payment from others." Br. at 62 n.34. There is no basis whatsoever for this assertion. New York did not enter the settlements because of the absence of wrongdoing, as plaintiffs misleadingly suggest. To the contrary, Charter and other providers agreed to provide substantial monetary relief and to make significant marketing and business reforms to address the conduct that New York had uncovered in its investigation. *See* Settlement Agreement, *People ex rel. Underwood v. Charter Commc'ns, Inc.* (Dec. 17, 2018) (internet).

reform their marketing and business practices regarding internet speed claims.[9]

Other States reached similar settlements. In March 2020, Pennsylvania reached a settlement agreement with Frontier also involving allegations of false and deceptive speed claims.[10] Washington State has likewise brought numerous enforcement actions against major broadband providers, including Charter, Comcast, Century Link, and Frontier, involving, among other things, claims of hidden or misleading fees.[11] In December 2019, Colorado and Oregon reached separate settlements with Century Link regarding the company's abusive marketing

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[9] Press Release, N.Y. Office of the Att'y Gen., *A.G. Underwood Announces Settlements Establishing Industry-Wide Standards for Marketing Internet Speeds* (Dec. 22, 2018) (internet).

[10] Nicholas Malfitano, *AG's Office Settles Shoddy Service Claims with Internet Provider Frontier Communications for $200K*, Penn. Record (Mar. 20, 2020) (internet). In February 2020, several California district attorneys resolved similar claims against Time Warner Cable (now owned by Charter). *See Time Warner Cable to Pay $18.8m in California Internet Case*, U.S. News (Assoc. Press Feb. 20, 2020) (internet).

[11] *State v. Frontier Commc'ns Corp.*, No. 20-2-01731-34 (Thurston County Super. Ct. July 20, 2020); *State v. Charter Commc'ns*, No. 20-2-00460-04 (Chelan County Super. Ct. July 27, 2020); *State v. CenturyLink, Inc.*, No. 19-2-32452-0 SEA (King County Super. Ct. Dec. 9, 2019); *State v. Comcast Cable Commc'ns Mgmt.,* No. 16-2-18224-1 SEA (King County Super. Ct. June 6, 2019).

practices, including hidden fees and failure to provide promised discounts and refunds.[12]

Plaintiffs' preemption arguments—and, in particular, its sweeping view of conflict preemption—would threaten such traditional and reasonable regulation of internet-based businesses. The 1996 Act's definition of "information service" could include not only broadband providers but also entities such as email providers, text messaging systems, VoIP providers, video conferencing services, online gambling platforms, websites, and more.[13] Plaintiffs' arguments here—including their argument that conflict preemption follows from the FCC's decision to adopt a "light-touch approach" for information services (*see* Br. at 27-31)—threatens to preclude the States from regulating these businesses.

The potential consequences of plaintiffs' arguments could be substantial. States have passed numerous statutes and regulations

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[12] Press Release, Colo. Office of the Att'y Gen., *Attorney General Phil Weiser Announces CenturyLink Will Pay $8,476,000 for Charging Hidden Fees, Overbilling Colorado Customers* (Dec. 19, 2019) (internet); Press Release, Or. Office of the Att'y Gen., *AG Rosenblum Announces $4 Million Settlement with CenturyLink* (Dec. 31, 2019) (internet).

[13] *See, e.g.*, *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, 33 FCC Rcd. 12075 (2018) (classifying text messaging as information service).

directly regulating the business practices of internet-based companies that have been or could be deemed "information services" by the FCC, where those practices could potentially harm consumers or threaten public safety. For example, approximately twenty States have statutes or regulations governing daily fantasy sports games, which are provided over the internet or by smartphone application to customers in particular States.[14] Six States have legalized online casino gaming subject to affirmative state regulation, and several others are actively considering such legislation.[15]

Similarly, many States have laws aimed at other types of electronic practices and internet-based industries. For example, Massachusetts regulates public virtual schools "whose teachers primarily teach from a remote location using the internet or other computer-based methods."[16]

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[14] Jake Lestock, *Tackling Daily Fantasy Sports in the States*, 26 Legis Brief no. 1 (Nat'l Conf. of State Legs. Jan. 2018) (internet); *see also What Are the States Where You Can Play Daily Fantasy Sports*, Legal Sports Report (2020) (internet).

[15] iDevelopment & Econ. Ass'n, *Bill Trackers: Online Gaming and Sports Betting Bills by State, Including Mobile Provisions* (Apr. 2021) (internet).

[16] Mass. Gen. Laws, ch. 71, § 94.

Delaware's "Safe Internet Pharmacy Act" regulates internet sites that dispense prescription drugs to patients within the State.[17] Illinois requires internet-based dating, child care, senior care, and home care services to disclose whether they perform criminal background checks on candidates listed on their sites and, if so, what types of background checks.[18] Multiple states including California, Connecticut, Delaware, Nevada, and Oregon have statutes governing the privacy policies and practices for websites or other online services.[19] California and Delaware also have specific statutes governing children's online privacy.[20] Courts have upheld such statutes against preemption challenges like plaintiffs' here, and this Court should do the same for SB 822. *See, e.g.*, *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 428-30 (9th Cir. 2014) (upholding state law requiring online video captioning);

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[17] Del. Code Ann. tit. 16, § 4741 et seq.

[18] 815 Ill. Comp. Stat. 518/1 et seq.

[19] *See* Cal. Bus. & Prof. Code §§ 22575-22578; Cal. Civ. Code §§ 1798.130(a)(5), 1798.135(a)(2)(A); Conn. Gen. Stat. § 42-471; Del. Code Ann. tit. 6, § 1201C et seq.; Nev. Rev. Stat. § 603A.340; Or. Rev. Stat. § 646.607.

[20] *See* Cal. Bus. & Prof. Code §§ 22580-22582; Del. Code Ann. tit. 6, § 1201C et seq.

cf. Quik Payday, Inc. v. Stork, 549 F.3d 1302, 1309-13 (10th Cir. 2008) (rejecting dormant Commerce Clause challenge to state regulation of online payday lending).

States also routinely use their authority to enforce general consumer protection statutes to regulate harmful business practices engaged in by internet-based companies. In 2006, Florida, Illinois, Massachusetts, Michigan, North Carolina, and Texas entered into a settlement agreement with Vonage regarding the company's failures to adequately disclose limitations in its 9-1-1 service provided through VoIP.[21] In 2009, 32 States reached a $3 million settlement with Vonage that required the company to change its marketing and cancellation policies with respect to VoIP service.[22] In 2013, 37 States and the District of Columbia reached settlements with Google regarding data and privacy abuses.[23] In 2016,

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[21] Press Release, Ill. Office of the Att'y Gen., *Madigan Announces Settlement with VoIP Provider Requiring Improved 911 Disclosures* (Dec. 14, 2006) (internet).

[22] Chris Rizo, *VONAGE Agrees to $3 Million Multistate Settlement*, Legal Newsline (Nov. 16, 2009) (internet).

[23] *See* Claire Cain Miller, *Google to Pay $17 Million to Settle Privacy Case*, N.Y. Times (Nov. 18, 2013) (internet); Adi Robertson, *Google Settles Street View Privacy Case with 38 States for $7 Million*, The Verge (Mar. 12, 2013) (internet).

Massachusetts obtained a preliminary injunction against an online auto title lender who had been making and collecting on illegal short-term loans in violation of state usury laws.[24] In May 2020, New York reached an agreement with Zoom Video Communications to provide security protections for users of its video conference platform.[25] In September 2020, Michigan reached a settlement with All Access Telecom, Inc., requiring that the VoIP provider substantially alter its practices with respect to robocalls.[26]

These are only a few examples of the critical state regulation and enforcement that could be jeopardized by plaintiffs' sweeping preemption theories. What these examples confirm is that the internet and internet-based services are integral to how people live, work, study, and entertain themselves. State regulation of broadband is an example of the States'

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[24] Press Release, Mass. Office of the Att'y Gen., *AG Stops Online Auto Title Lender from Collection on Illegal Loans Made to Massachusetts Consumers* (Mar. 18, 2016) (internet).

[25] Press Release, N.Y. Office of the Att'y Gen., *Attorney General James Secures New Protections, Security Safeguards for All Zoom Users* (May 7, 2020) (internet).

[26] Press Release, Mich. Office of the Att'y Gen., *AG Nessel Announces Significant Settlement with Telecom Carrier Focused on Innovative Robocall Mitigation Measures* (Sept. 11, 2020) (internet).

routine exercise of their historic police powers to protect consumers and ensure public safety. And contrary to plaintiffs' claims here, those powers have not been preempted by federal law.

CONCLUSION

The district court's denial of a preliminary injunction should be affirmed.

Dated: New York, New York
May 11, 2021

Respectfully submitted,

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By: */s/ Steven C. Wu*
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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