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7 **UNITED STATES DISTRICT COURT**
8 **EASTERN DISTRICT OF CALIFORNIA**

9 THE UNITED STATES OF AMERICA,
10 Plaintiff,
11 v.
12 THE STATE OF CALIFORNIA, et al.
13 Defendants.

Case No.: 2:18-cv-02660-JAM-DB
Case No.: 2:18-cv-02684-JAM-DB

**UNOPPOSED MOTION OF THE
CHAMBER OF COMMERCE OF
THE UNITED STATES OF
AMERICA FOR LEAVE TO FILE
AMICUS BRIEF IN SUPPORT OF
PLAINTIFFS' MOTIONS FOR
PRELIMINARY INJUNCTION**

Judge: Hon. John A. Mendez
Hearing Date: November 28, 2018
Hearing Time: 10 A.M.

20 AMERICAN CABLE ASSOCIATION,
21 CTIA—THE WIRELESS
22 ASSOCIATION, NCTA—INTERNET &
23 TELEVISION ASSOCIATION, and
24 USTELECOM—THE BROADBAND
ASSOCIATION
25 Plaintiff,
26 v.
27 XAVIER BECERRA, in his official
28 capacity as Attorney General of California
Defendant.

1 The Chamber of Commerce of the United States of America respectfully moves this
2 Court for leave to file an amicus brief in support of the plaintiffs' motions for preliminary
3 injunction. The Chamber's motion is unopposed. This Court recently granted leave to file
4 many amicus briefs for and against a preliminary injunction in *United States v. California*,
5 No. 2:18-cv-490 (ECF No. 125), a case that involved similarly important questions of
6 preemption and federalism.

7 * * *

8 The Chamber is the world's largest business federation. It represents 300,000 direct
9 members and indirectly represents the interests of more than 3 million companies and
10 professional organizations of every size, in every economic sector, and from every region
11 of the country.

12 An important function of the Chamber is to represent the interests of its members in
13 matters before the courts, Congress, and the Executive Branch. To that end, the Chamber
14 regularly files amicus briefs in cases, like this one, that raise issues of concern to the
15 Nation's business community. The Chamber has previously participated as amicus curiae
16 in net-neutrality litigation. *See, e.g., United States Telecom Ass'n v. FCC*, No. 15-1063
17 (D.C. Cir. 2015). And it regularly participates in cases involving federal preemption. *See,*
18 *e.g., Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190 (2017); *Puerto Rico v.*
19 *Franklin Calif. Tax-Free Trust*, 136 S. Ct. 1938 (2016); *Gobeille v. Liberty Mut. Ins. Co.*,
20 136 S. Ct. 936 (2016); *Nw., Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014); *Nat'l Meat Ass'n v.*
21 *Harris*, 565 U.S. 452, 455 (2012); *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323
22 (2011); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011); *Wyeth v. Levine*, 555 U.S. 555
23 (2009); *Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008); *Riegel v. Medtronic, Inc.*, 552 U.S.
24 312 (2008).

25 The Chamber has a significant interest in, and can offer a unique perspective on, the
26 issues here. American businesses are the beneficiaries of a globally deployed broadband
27 infrastructure, which has transformed (and will continue to transform) the way that they
28

1 operate, providing numerous opportunities to create and market innovative products and
2 services. The Chamber is a proponent of a free and open internet, and it supports
3 congressional legislation to promote net-neutrality principles in a way that protects
4 consumers and provides regulatory certainty. California's Senate Bill 822 (SB-822) is the
5 opposite of that approach. If granted leave to file, the Chamber can lend its unique
6 perspective on the propriety of preliminary injunctive relief, including the immense
7 regulatory burdens that SB-822 will impose on the business community if this Court does
8 not preserve the regulatory status quo.

9 * * *

10 For these reasons, the Chamber asks this Court to grant its unopposed motion for
11 leave to file the attached amicus brief.

12
13 Respectfully submitted,

14 /s/ Bryan K. Weir

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CERTIFICATE OF SERVICE

I certify that I caused the foregoing motion, along with a proposed amicus brief and order, to be electronically filed with the Court’s CM/ECF filing system, which will send a notice of electronic filing to all parties of record who are registered with CM/ECF.

Dated: October 19, 2018

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world’s largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every economic sector, and from every region of the country.

An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus briefs in cases that raise issues of concern to the Nation’s business community. The Chamber has previously participated as amicus curiae in net-neutrality litigation. *See, e.g., United States Telecom Ass’n v. FCC*, No. 15-1063 (D.C. Cir. 2015). And it regularly participates in cases involving federal preemption. *See, e.g., Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190 (2017); *Puerto Rico v. Franklin Calif. Tax-Free Trust*, 136 S. Ct. 1938 (2016); *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936 (2016); *Nw., Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014); *Nat’l Meat Ass’n v. Harris*, 565 U.S. 452, 455 (2012); *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323 (2011); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011); *Wyeth v. Levine*, 555 U.S. 555 (2009); *Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008).

The Chamber has a significant interest in, and can offer a unique perspective on, the issues here. American businesses are the beneficiaries of a globally deployed broadband infrastructure, which has transformed (and will continue to transform) the way that they operate, providing numerous opportunities to create and market innovative products and services. The Chamber is a proponent of a free and open internet, and it supports congressional legislation to promote net-neutrality principles in a way that protects consumers and provides regulatory certainty. California’s Senate Bill 822 (SB-822) is contrary to that approach.

INTRODUCTION

1
2 California has designated itself the nationwide regulator of the internet. Never mind
3 that the Federal Communications Commission (FCC)—the expert agency tasked by
4 Congress with adopting a uniform, national regulatory regime for interstate
5 communications—just rejected approaches like California’s in an exhaustive, 196-page
6 order. *See* 33 FCC Rcd 311 (2018) (2018 Order). Never mind that internet traffic pays no
7 heed to state borders and there is no meaningful way to limit internet regulations to a single
8 State. And never mind that the vague and open-ended prohibitions in SB-822, which turn
9 on words such as “reasonable” or “legitimate,” are anathema to the development of a
10 dynamic, constantly changing industry. California forged ahead anyway, announcing its
11 intention to “position [itself] as a leader in the fight for net neutrality.” Cal. S. Comm. on
12 Energy, Utilities and Comm’n’s, Analysis SB 822 1, 13 (2018) (Energy Analysis).

13 SB-822 is unconstitutional under both the Supremacy Clause and the Commerce
14 Clause. The FCC unequivocally preempted state laws that are more stringent than the rules
15 in the 2018 Order, and California’s disregard of that instruction is little more than an
16 attempt at nullification. The bill’s drafters admit as much. Moreover, because there is no
17 principled way to limit regulation of the internet to a single State, California’s new
18 regulatory regime will inevitably dictate conduct beyond California’s borders and become
19 the de facto national standard. For the legislators who enacted SB-822, that is a *feature*,
20 not a bug. But under the Dormant Commerce Clause, it is fatal to the statute’s
21 constitutionality. The “critical inquiry” is whether the “practical effect” of the law is “to
22 control conduct beyond the boundaries of the State,” *NCAA v. Miller*, 10 F.3d 633, 639
23 (9th Cir. 1993), something that SB-822 unquestionably does.

24 The pervasive ambiguity and uncertainty about what practices SB-822 prohibits or
25 allows also underscore the need for preliminary injunctive relief. SB-822 amplifies many
26 of the uncertainties created by the FCC’s repealed 2015 Title II classification—which the
27 FCC explicitly found was chilling new investments in broadband services—and then
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1 overlays another layer of uncertainty about the geographic scope of its new restrictions.
2 The statute is also riddled with ambiguities about what practices are “reasonable,”
3 “legitimate,” “harmful,” “lawful,” “primarily technical,” or “application-agnostic”—going
4 well beyond the FCC’s now-repealed 2015 Order. And it leaves enforcement largely to the
5 courts. Thus, an internet provider that invests to develop new services, features, traffic-
6 management practices, or interconnection arrangements may face *ex post* penalties if a
7 California court determines, years later, that it ran afoul of one of these vague words. And,
8 although the statute purports to limit itself to services provided “in California,” there is
9 zero guidance about how (if at all) the State plans to limit its scope of the prohibitions to
10 only in-state conduct.

11 In sum, “this isn’t your everyday ambiguous statute.” *Sessions v. Dimaya*, 138 S. Ct.
12 1204, 1232 (2018) (Gorsuch, J., concurring). It “leaves the people to guess about what the
13 law demands—and leaves judges to make it up.” *Id.* Our national broadband network is
14 too important to the economy and interstate commerce to be left to an amorphous
15 regulatory regime where the key details will be worked out on an ad hoc and patchwork
16 basis after years of litigation. It would be profoundly damaging and inequitable to force an
17 entire industry to come into compliance with this new and poorly defined regulatory
18 regime, only to revert back to the old practices when plaintiffs inevitably prevail on the
19 merits. The far better—and legally required—course is to preserve the regulatory status
20 quo by enjoining the operation of SB-822 pending a final resolution of this case. The
21 motions for preliminary injunction should be granted.

22 ARGUMENT

23 I. California’s SB-822 Is Unconstitutional.

24 The plaintiffs thoroughly explain in their briefs why SB-822 violates both the
25 Supremacy Clause and Commerce Clause. The Chamber agrees, and will highlight just a
26 few of the reasons why that is true.
27
28

1 **A. SB-822 violates the Supremacy Clause because it is expressly preempted**
2 **by the FCC’s 2018 Order.**

3 Because the Supremacy Clause confirms that “federal laws are the supreme law of
4 the land, notwithstanding state laws to the contrary,” any “state law that conflicts with
5 federal law is without effect.” *In re City of Vallejo, CA*, 432 B.R. 262, 268 (E.D. Cal. 2010)
6 (Mendez, J.). “Federal regulations” have this preemptive effect “no less ... than federal
7 statutes.” *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984). Although the
8 federal government can preempt state law in a variety of ways, the simplest way is to
9 include provisions that “speak expressly to the question of pre-emption.” *Shaw v. Delta Air*
10 *Lines, Inc.*, 463 U.S. 85, 96 (1983). When a federal law includes such a provision, the court
11 asks whether the state law comes within the provision’s “plain wording,” without “any
12 presumption against pre-emption.” *Franklin Calif.*, 136 S. Ct. at 1946.

13 The FCC’s 2018 Order contains an express preemption provision that broadly
14 preempts state law. In a section titled “Preemption of Inconsistent State and Local
15 Regulations,” the 2018 Order rejects a “patchwork” system of “separate state and local
16 requirements” in favor of “a calibrated federal regulatory regime.” ¶ 194. Specifically, the
17 Order preempts “any” state law that would “effectively impose rules or requirements that
18 [the Order has] repealed or decided to refrain from imposing.” ¶ 195. It also preempts “any”
19 state law that would “impose more stringent requirements for any aspect of broadband
20 service.” *Id.* Such laws, the Order explains, would require providers “to comply with ...
21 potentially conflicting requirements across ... jurisdictions” and impede the “affirmative
22 federal policy of deregulation.” ¶ 194.

23 This preemption provision plainly covers SB-822. Several parts of SB-822
24 “effectively impose rules or requirements that [the 2018 Order has] repealed.” *See, e.g.*,
25 Cal. Civ. Code §§ 3101(a)(1)-(2), (a)(3)(B)-(C), (a)(4), & (a)(7). Several other parts
26 “impose more stringent requirements” that the 2018 Order “refrain[ed] from imposing.”
27 *See, e.g.*, §§ 3100(t), 3101(a)(3)(A), (a)(5)-(6), (a)(9), (b), 3102(a)(2), (b). If allowed to
28

1 stand, statutes like SB-822 would generate a “patchwork” of requirements across the
2 country, forcing providers to “comply with ... potentially conflicting requirements” and
3 sabotaging the “affirmative federal policy of deregulation.” That is why the 2018 Order so
4 broadly preempts state net-neutrality regulations.

5 Of course, California knows this already. Its own Senate Judiciary Committee
6 confessed that the 2018 Order “explicitly preempt[s] state attempts to restore net neutrality,
7 such as [SB-822].” Cal. S. Comm. on Judiciary, SB 822 Analysis 1, 23 (2018). The
8 Committee was correct. But the State’s assumption that it could still somehow override the
9 federal government’s policy of deregulation flies in the face of the Supremacy Clause.
10 “[W]hen federal officials determine, as the FCC has here, that restrictive regulation of a
11 particular area is not in the public interest, ‘States are not permitted to use their police
12 power to enact such a regulation.’” *Capital Cities*, 467 U.S. at 708.

13 **B. SB-822 violates the Dormant Commerce Clause because it has the**
14 **practical effect of regulating out-of-state conduct.**

15 Because the Constitution gives *Congress* the power to regulate interstate commerce,
16 a State cannot enact economic “policy for the entire Nation” or “impose its own policy
17 choice on neighboring States.” *BMW of N.A., Inc. v. Gore*, 517 U.S. 559, 571 (1996). The
18 Dormant Commerce Clause “precludes the application of a state statute to commerce that
19 takes place wholly outside of the State’s borders.” *Sam Francis Found. v. Christies, Inc.*,
20 784 F.3d 1320, 1323 (9th Cir. 2015) (quoting *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336
21 (1989)). This rule against extraterritoriality applies “whether or not the commerce has
22 effects within the State.” *Id.* It applies “regardless of whether the statute’s extraterritorial
23 reach was intended by the legislature.” *Healy*, 491 U.S. at 336. And it applies even if the
24 statute “is addressed only to [transactions] in [that State].” *Brown-Forman Distillers Corp.*
25 *v. N.Y. State Liquor Auth.*, 476 U.S. 573, 583 (1986). The “critical inquiry” is whether the
26 “practical effect” of the law is “to control conduct beyond the boundaries of the State.”
27 *NCAA*, 10 F.3d at 639 (quoting *Healy*, 491 U.S. at 336).

1 The “practical effect” of SB-822 is to control out-of-state conduct. There is simply
2 no way that the bill’s effects can be contained within California’s boundaries: that is not
3 how the internet works. “Because the internet does not recognize geographic boundaries,
4 it is difficult, if not impossible, for a state to regulate internet activities without
5 ‘project[ing] its legislation into other States.’” *Am. Booksellers Found. v. Dean*, 342 F.3d
6 96, 103 (2d Cir. 2003) (quoting *Healy*, 491 U.S. at 334); *see also Am. Libraries Ass’n v.*
7 *Pataki*, 969 F. Supp. 160, 170-72 (S.D.N.Y. 1997) (explaining the many reasons why “no
8 aspect of the Internet can feasibly be closed off to users from another state”). As the FCC
9 recognized, a provider cannot “comply with state or local rules for intrastate
10 communications without applying the same rules to interstate communications.” 2018
11 Order ¶ 200 & n. 744. “Because both interstate and intrastate communications can travel
12 over the same Internet connection (and indeed may do so in response to a single query from
13 a consumer), it is impossible or impracticable for ISPs ... to apply different rules in each
14 circumstance.” *Id.* Content providers typically rely on a nationwide (or worldwide)
15 network of servers to exchange traffic with internet service providers, and routing of
16 information changes dynamically from moment to moment depending on network
17 congestion and other factors. It would thus be impossible to apply California-specific rules
18 regarding matters such as interconnection or zero-rating without completely changing the
19 architecture of the network in highly inefficient ways.

20 Consider, moreover, SB-822’s application to mobile broadband services, which
21 are—by definition—*mobile*. If a Californian travels to Texas and brings her wireless
22 phone, do California’s net-neutrality regulations travel with her? Conversely, if a wireless
23 customer in Florida travels to California for a one-week vacation, must the provider now
24 comply with the full panoply of regulations that apply to service in California? What if a
25 California resident near the state border connects to a cell tower in Nevada or Oregon? Or
26 what if a college student has a wireless account registered at his parents’ address in San
27 Diego but spends most of the year at school in North Carolina? Number porting introduces
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1 yet another complexity: because customers can now keep their phone numbers no matter
2 where they live—and more than 100,000 people move out of California every year—there
3 may be more than a million California phone numbers that are no longer used primarily in
4 the State. When consumers use devices associated with those numbers to access mobile
5 broadband offerings, are those consumers still deemed to be “in California” for purposes
6 of the net-neutrality regulations? Placing an “only in California” label on regulations that
7 inherently apply to interstate and nationwide commerce cannot remedy the fatal flaws of
8 SB-822 under the Dormant Commerce Clause.

9 Even if its effects could somehow be contained to California, the “practical effect”
10 of SB-822 “must be evaluated ... by considering ... what effect would arise if ... every[]
11 State adopted similar legislation.” *Healy*, 491 U.S. at 336. The FCC determined that a
12 regime of 50 different net-neutrality rules would be prohibitively expensive and totally
13 unworkable. *See* 2018 Order ¶ 194 n. 727. Indeed, “[t]he unique nature of the Internet”
14 supercharges “the likelihood that a single actor might be subject to haphazard,
15 uncoordinated, and even out-right inconsistent regulation by states that the actor never
16 intended to reach and possibly was unaware were being accessed.” *PSINet, Inc. v.*
17 *Chapman*, 362 F.3d 227, 240 (4th Cir. 2004); *accord ACLU v. Johnson*, 194 F.3d 1149,
18 1162 (10th Cir. 1999). That likelihood is precisely what the Dormant Commerce Clause
19 seeks to avoid.

20 The practical effects of SB-822 are magnified by the fact that California is the State
21 enacting it. California is the most populous State in the country; it contains “over 12 million
22 wireline and fixed wireless subscribers and over 35 million wireless subscribers.” Makena
23 Kelly, *California’s Net Neutrality Bill Could Set a National Standard*, The Verge (June 4,
24 2018 11:38 A.M.), [bit.ly/2JcXs0X](https://www.theverge.com/2018/6/4/20181138/california-net-neutrality-bill). Because no provider can afford to miss out on the
25 California market, providers would have no choice but to attempt to comply with SB-822
26 if it is permitted to take effect. *See id.* And because it is not remotely feasible to create
27 different net-neutrality policies for different States, SB-822 would become “the new
28

1 broadband standard nationwide.” *Id.*; see *NCAA*, 10 F.3d at 639 (invalidating a Nevada law
2 that would, in practice, require the NCAA to change its procedures everywhere if it wanted
3 to maintain uniformity).

4 Again, none of this was lost on California. According to the author of SB-822, the
5 bill’s “strong, comprehensive, and enforceable policies” would “put[] California at the
6 national forefront of ensuring an open internet” and would “position California as a leader
7 in the fight for net neutrality.” Energy Analysis 13. Or, as another coauthor stated while
8 presenting the bill, “The Trump administration destroyed the internet as we know it, plain
9 and simple.... We have an opportunity in California to lead this nation by voting yes for
10 this bill.” Jacob Kastrenakes, *California Is Close to Approving the Strongest Net Neutrality*
11 *Law in the US*, The Verge (Aug. 30, 2018 6:14 P.M.), bit.ly/2N1YiPn. Yet the Commerce
12 Clause does not permit California to effectively regulate the internet for the entire Nation.
13 It assigns that role to the federal government alone.

14 **II. SB-822 Should Be Preliminarily Enjoined.**

15 SB-822’s provisions appear to prohibit a number of existing business practices and
16 arrangements, including “zero rating” plans and certain paid interconnection agreements.
17 At a minimum, they are vague, ambiguous, and uncertain—leaving internet users and
18 providers in the dark about what the law actually requires. Rather than force an entire,
19 economically critical industry to disrupt existing business plans in an effort to comply with
20 these mandates—and face severe penalties and enforcement actions for noncompliance—
21 the Court should preliminarily enjoin SB-822 until it can reach a final decision on the
22 merits.

23 **A. SB-822 has a highly vague and uncertain scope.**

24 Vague or unclear laws “invite arbitrary power.” *Dimaya*, 138 S. Ct. at 1223
25 (Gorsuch, J., concurring). When a statute “leav[es] the people in the dark about what the
26 law demands,” it simply allows “prosecutors and courts to make it up,” *id.* at 1223-24, or
27 to use the law to “pursue their personal predilections,” *Smith v. Goguen*, 415 U.S. 566, 575
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1 (1974). California’s net-neutrality statute flouts bedrock principles of fair notice and due
2 process. SB-822 has all of the pervasive uncertainty and ambiguity of the FCC’s repealed
3 net-neutrality order from 2015 (and then some), and then overlays that uncertainty with an
4 *additional* lack of clarity over its own territorial scope.

5 The California law suffers from all of the ambiguities and uncertainties of the FCC’s
6 now-repealed 2015 Order, which SB-822 expressly incorporates. The FCC made specific
7 findings in the 2018 Order that the repealed rules “depressed broadband investment,” and
8 that “the uncertainty regarding what is allowed and what is not allowed under the new ...
9 broadband regime has caused [providers] to shelve projects that were in development,
10 pursue fewer innovative business models and arrangements, or delay rolling out new
11 features or services.” ¶ 99. It is the Chamber’s view that uncertainty associated with the
12 Title II classification, including the “general conduct” standard, caused a decline in
13 investment. Other commenters insisted that the FCC needed to retain a “general conduct”
14 standard to police an expansive array of so-called “unreasonable” practices involving
15 encryption, cookies, inserting code into third-party website, sending search data to third
16 parties, and numerous other acts. *See* ¶ 115. But the 2018 Order concluded that it was “not
17 in the public interest” to retain a general conduct “reasonableness” standard because that
18 rule “has created regulatory uncertainty in the marketplace,” thereby “hindering investment
19 and innovation” by internet providers, app developers, and equipment manufacturers alike.
20 *See* ¶¶ 246-49.

21 California has nonetheless forged ahead with its own general conduct standard. In
22 addition to its specific prohibitions on practices such as blocking and throttling, SB-822
23 broadly prohibits any provider from “[u]nreasonably interfering with, or unreasonably
24 disadvantaging, either an end user’s ability to select, access, and use broadband Internet
25 access service or lawful Internet content, applications, services, or devices of the end user’s
26 choice, or an edge provider’s ability to make lawful content, applications, services, or
27 devices available to end users.” Cal. Civ. Code § 3101(a)(7)(A). But, as the FCC
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1 concluded, a totality-of-the-circumstances “reasonableness” standard is anathema to the
2 development and deployment of innovative new services. 2018 Order ¶¶ 246-49; *see also*
3 *USAir, Inc. v. Dep’t of Transp.*, 969 F.2d 1256, 1263 (D.C. Cir. 1992) (explaining that
4 “totality-of-the-circumstances” tests are inherently indeterminate, “give little guidance to
5 future litigants,” and “impose limited restraint on agencies”). An internet provider that
6 invests to develop new services as a competitive differentiator may face *ex post* penalties
7 if a California court determines, years later, that the new service “unreasonably”
8 disadvantaged end-users, other providers, or edge providers. Worse still, there will be no
9 precedent to rely on for guidance since new services are, necessarily, unprecedented.

10 In addition to the general conduct standard, SB-822 is riddled with open-ended
11 requirements that offer no meaningful guidance to regulated entities about the line between
12 prohibited and permissible conduct. Most notably, some (but not all) provisions of the act
13 purport to exempt “reasonable network management” practices. *See, e.g.*, Cal. Civ. Code
14 § 3101(a)(2) (exempting reasonable network management practices from ban on
15 “impairing or degrading” internet traffic); § 3107(a)(7)(A) (exempting reasonable network
16 management practices from general conduct standard). Although this exemption might
17 appear to be a helpful limitation on the scope of the Act, the definition of “reasonable
18 network management” is little more than a word salad of meaningless and open-ended
19 phrases:

20 “Reasonable network management” means a network management practice that is
21 reasonable. A network management practice is a practice that has a primarily
22 technical network management justification, but does not include other business
23 practices. A network management practice is reasonable if it is primarily used for,
24 and tailored to, achieving a legitimate network management purpose, taking into
25 account the particular network architecture and technology of the broadband Internet
26 access service, and is as application-agnostic as possible.

1 § 3100(s). To recap: sometimes (but not always) a carrier’s “reasonable” (*i.e.*, “legitimate”)
2 business practice may—depending on the “network architecture and technology”—justify
3 engaging in otherwise-prohibited conduct, so long as such conduct is “primarily technical,”
4 does not involve “other business practices,” and is “as application-agnostic as possible.”
5 What this all means is anyone’s guess, and it will be left to the state courts to interpret these
6 critical terms in post hoc litigation that will take years to resolve.

7 SB-822 then adds another, California-specific complexity: how, if at all, to limit the
8 statute’s reach to California. Given the obvious Commerce Clause problems with States
9 regulating the internet—an inherently interstate service that pays no heed to state borders,
10 *see supra* I.B—SB-822 purports to limit its reach to fixed and mobile broadband services
11 provided “in California.” *See* § 3100(b), (i), (p). But the statute provides no further
12 guidance about that restriction, and thus raises far more questions than answers. The
13 problems with applying it to mobile broadband services alone are staggering given the ease
14 with which those services can be used across state lines. *See supra* I.B. A taxi driver who
15 works in Lake Tahoe—which straddles the California-Nevada border—may cross the state
16 line dozens of times per day. It is wholly unclear how that driver’s mobile internet service
17 would be regulated if Nevada declines to follow California’s heavy-handed regulatory
18 scheme.

19 Finally, the inherent ambiguities in SB-822 are exacerbated by its proposed
20 enforcement mechanism. Although the FCC’s repealed Title II regulations were vague,
21 overbroad, and unnecessary, they would have at least been administered on a nationwide
22 basis by an expert agency. *See* 30 FCC Rcd 5601 ¶ 36 (2015) (“The Commission may
23 enforce the open Internet rules through investigation and the processing of complaints
24 (both formal and informal).”). The FCC thus could have exercised enforcement discretion
25 in choosing whether to punish a specific practice, and could have considered the broader,
26 systemic implications of any individual enforcement action.

1 Not so in California. SB-822 would likely be enforced through California’s general
2 Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200-17209, which authorizes suits
3 for injunctive relief and civil penalties against any “person” who has engaged in “any
4 unlawful, unfair, or fraudulent business act or practice.” “By proscribing ‘any unlawful’
5 business practice, [the UCL] ‘borrows’ violations of other laws and treats them as unlawful
6 practices’ that the [UCL] makes independently actionable.” *Cel-Tech Comm’ns, Inc. v.*
7 *L.A. Cellular Telephone Co.*, 973 P.2d 527, 539-40 (Cal. 1999). Thus, unlike the FCC’s
8 repealed regulations, there will be no check of enforcement discretion, and private suits
9 will be constrained only by the number of allegations that can be shoehorned into a claim
10 of “unreasonableness.” That is a recipe for regulatory disaster.

11 **B. These inherent uncertainties in SB-822 tip the equities overwhelmingly**
12 **in plaintiffs’ favor.**

13 The hopeless ambiguities of California’s law, regarding both its substantive scope
14 and its territorial effect, only underscore that the plaintiffs satisfy each factor for obtaining
15 a preliminary injunction. In the face of amorphous and open-ended prohibitions in the
16 Nation’s largest State, many providers will err on the side of caution before launching new
17 services, directly undermining the FCC’s goals of promoting innovative new services and
18 maintaining a “light touch” nationwide. And, as explained, there is no principled or
19 workable way to cure the fatal Commerce Clause problems with SB-822 by limiting the
20 statute’s reach to internet traffic “in California.”

21 Even more fundamentally, the complexity and uncertainty of the legal regime that
22 California has created underscore why the equitable factors strongly favor the plaintiffs.
23 The internet is an indispensable component of the stream of commerce, and the constant
24 innovation occurring in this sector has been a boon to consumers and businesses alike. It
25 would be profoundly inequitable to force internet providers to come into near-immediate
26 compliance with an onerous and ambiguous series of rules that the FCC has just determined
27 (in a 200-page order) to be excessively burdensome and unnecessary. And that is doubly
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1 true when the challenged rules cannot in any meaningful way be limited to California. The
2 most prudent way forward is to freeze the status quo and preliminarily enjoin SB-822 to
3 ensure that, while this litigation proceeds, companies will not need to come into compliance
4 with its standardless mandates.

5 The Ninth Circuit’s decision in *American Trucking Associations, Inc. v. City of Los*
6 *Angeles*, 559 F.3d 1046 (9th Cir. 2009), is instructive. In that case, industry associations
7 sought to challenge state and local policies that imposed requirements on truck operators
8 at certain ports. The Ninth Circuit found that those requirements were likely preempted by
9 federal law. *Id.* at 1053-57. The court further found that the requirements for a preliminary
10 injunction were satisfied. As long as the challenged policies were in effect, the Ninth
11 Circuit reasoned, the associations’ members were forced to either discontinue doing
12 business at the ports or else “disrupt and change the whole nature of their business in ways
13 that most likely cannot be compensated with damages alone.” *Id.* at 1058. If the challenged
14 laws “were then held to be unconstitutional, [businesses] would be faced with either
15 continuing in that form, or, to the extent [they] could, unwinding that and returning to the
16 old form.” *Id.*

17 So too here. The telecommunications industry has already faced major changes at
18 the federal level with the enactment, and subsequent repeal, of the FCC’s nationwide net-
19 neutrality rules. It would be flatly contrary to the public interest to force that industry to
20 come into compliance with a sweeping yet vague state-level regulatory scheme while this
21 litigation proceeds to a final decision. The far better course is to enter a preliminary
22 injunction and freeze the regulatory status quo until this case can be litigated to completion
23 on the merits.

24 Finally, preliminary injunctive relief is especially imperative because other States
25 have also sought to impose *their own* net-neutrality regimes. *See Healy*, 491 U.S. at 336
26 (explaining that the practical effects of a challenged law “must be evaluated ... by
27 considering ... what effect would arise if ... every[] State adopted similar legislation”). As
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1 of October 1, 2018, legislators in 30 States had introduced more than 70 bills requiring
2 internet service providers to comply with various net-neutrality principles. National
3 Conference of State Legislatures, *Net Neutrality Legislation in States* (Oct. 1, 2018),
4 bit.ly/2y4v4sQ; *see also* ISPs Compl. ¶ 60 (identifying nine States that have already
5 enacted net-neutrality regulations). It is difficult to imagine a development more harmful
6 to the effective functioning of a *national* broadband system that pays no heed to state
7 boundaries. The FCC’s 2018 Order has given the industry “a good deal to digest over a
8 relatively short period,” and this Court should “promptly remove from the menu the
9 [California law], a smuggled-in dish that is indigestible.” *Spears v. United States*, 555 U.S.
10 261, 267 (2009).

11 CONCLUSION

12 For all these reasons, the Court should grant the plaintiffs’ motions for preliminary
13 injunction.

14 Respectfully submitted,

15 /s/ Bryan K. Weir

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7 **UNITED STATES DISTRICT COURT**
8 **EASTERN DISTRICT OF CALIFORNIA**

9 THE UNITED STATES OF AMERICA,
10 Plaintiff,
11 v.
12 THE STATE OF CALIFORNIA, et al.
13 Defendants.

Case No.: 2:18-cv-02660-JAM-DB
Case No.: 2:18-cv-02684-JAM-DB

**[PROPOSED] ORDER GRANTING
UNOPPOSED MOTION OF THE
CHAMBER OF COMMERCE OF
THE UNITED STATES OF
AMERICA FOR LEAVE TO FILE
AMICUS BRIEF IN SUPPORT OF
PLAINTIFFS' MOTIONS FOR
PRELIMINARY INJUNCTION**

Judge: Hon. John A. Mendez
Hearing Date: November 28, 2018
Hearing Time: 10 A.M.

20 AMERICAN CABLE ASSOCIATION,
21 CTIA—THE WIRELESS
22 ASSOCIATION, NCTA—INTERNET &
23 TELEVISION ASSOCIATION, and
24 USTELECOM—THE BROADBAND
25 ASSOCIATION
26 Plaintiff,
27 v.
28 XAVIER BECERRA, in his official
capacity as Attorney General of California
Defendant.

1 The Court has received and reviewed the timely filed motion of the Chamber of
2 Commerce of the United States of America for leave to file an amicus brief. The motion is
3 GRANTED, and the proposed brief attached to the motion is deemed filed.

4 SO ORDERED.

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6 Dated: _____

7 The Honorable John A. Mendez
8 United States District Judge
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