No. 21-15430

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ACA CONNECTS, ET AL.,

Plaintiffs-Appellants,

v.

ROB BONTA,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of California

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CALIFORNIA CHAMBER OF COMMERCE, SMALL BUSINESS & ENTREPRENEURSHIP COUNCIL, TELECOMMMUNICATIONS INDUSTRY ASSOCIATION, AND CALINNOVATES AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR REHEARING EN BANC

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STATEMENT OF INTEREST[1]

Chamber of Commerce of the United States of America. The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 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 several cases addressing net-neutrality issues, including filing two briefs before the district court and a brief before the panel in this case. *See, e.g.*, Amicus Brief, No. 21-15430 (9th Cir. Filed Apr. 13, 2021); Amicus Brief, Dkt. No. 55 (E.D. Cal. filed Aug. 19, 2020); Amicus Brief, Dkt. No. 31 (E.D. Cal. filed Oct. 19, 2018); *United States Telecom Ass'n v. FCC*, No. 15-1063 (D.C. Cir. 2015).

[1] No party's counsel authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel contributed money intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

The Chamber has a significant interest in, and can offer a unique perspective on, the issues here. American businesses are the beneficiaries of a nationally and globally deployed broadband infrastructure, which has transformed 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. At the same time, the Chamber opposes efforts to treat the Internet like a public utility and to create a disparate patchwork of state laws.

California Chamber of Commerce. The California Chamber of Commerce ("CalChamber") is a non-profit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues. CalChamber has members who support net

neutrality, but who are not supportive of SB-822 or state-by-state regulation of the Internet.

Small Business & Entrepreneurship Council. As an organization that has worked for more than 25 years to promote a policy environment that is conducive to entrepreneurship, innovation, and small business growth, the Small Business & Entrepreneurship Council is concerned about how SB-822 will negatively disrupt the activity of startups and entrepreneurs that have fueled and are fueling innovative technologies and uses of the Internet to the benefit of all consumers, including small businesses and the self-employed; the potential costs and burdens that a complex web of state rules governing the Internet may impose on small businesses and their ability to conduct business across state lines; and the overall impact of how the uncertain regulatory regime and its unintended consequences will impact investment and entrepreneurship generally, with significant potential to damage U.S. competitiveness and economic recovery.

Telecommunications Industry Association. TIA is an advocacy organization and a standard-setting body that represents hundreds of global manufacturers and vendors of information and communications technology ("ICT") equipment and services that are supplied to infrastructure owners and operators, enabling network operations across all segments of the economy. TIA's membership

responsible for providing the equipment that comprises the U.S.'s networks have nevertheless been affected by the California's decisions regulating the Internet. On their behalf, TIA seeks to maximize the deployment of broadband infrastructure nationwide and has been an active participant on dockets regarding net neutrality, as decisions on Internet openness have a direct and significant effect on such deployment. In order to ensure continued investment in ICT networks and broadband deployment, TIA has been vocal about the necessity for a federal framework setting the rules for the Internet, as opposed to a state-by-state patchwork of laws that force the ICT industry to conform to varying regulations.

CALinnovates. CALinnovates is a coalition comprised of technology leaders, startups, traditional telecommunications companies, entrepreneurs, and venture capitalists, all united around a shared desire to ensure that the Internet remains a vibrant and open space in which innovation continues to thrive.

INTRODUCTION

California has designated itself the nationwide regulator of the Internet. Never mind that the Federal Communications Commission ("FCC")—the expert agency tasked by Congress with adopting a uniform, national regulatory regime for interstate communications services, like broadband—has rejected approaches like California's in an exhaustive, 196-page order. *See* Declaratory Ruling, Report and

Order, and Order, *Restoring Internet Freedom*, 33 FCC Rcd 311 (2018) ("2018 Order"). Never mind that Internet traffic is indifferent to state borders, that there is no meaningful way to limit Internet regulations to a single state, and that SB-822 makes no effort to do so. And never mind that the vague prohibitions in SB-822 are anathema to the development of a dynamic, constantly changing industry. California forged ahead despite all these issues, announcing its intention to "position [itself] as a leader in the fight for net neutrality." Cal. S. Comm. on Energy, Utilities and Commn's, Analysis SB 822 1, 13 (2018) (Energy Analysis). And a panel of this Court allowed it to do so.

En banc review is warranted to prevent the significant harms that will result from a patchwork regime of state-level Internet regulations. The Internet is a fundamentally nationwide network that is uniquely ill-suited to overlapping and inconsistent state regulations. Both the economic and technical aspects of Internet traffic pay no heed to state boundaries. And if California may impose its own unique rules on the handling of Internet traffic traveling to and from its residents, then other states will surely try to do the same. Indeed, seven states have *already* adopted their own legislation or resolutions regarding net neutrality and nine others have introduced legislation regarding these issues. It is difficult to imagine a development more harmful to the effective functioning of a *national* broadband system. At

bottom, our critical broadband network is too important to the economy and interstate commerce to be left to a patchwork regulatory regime where the key details will be worked out on an ad hoc, state-by-state basis after years of litigation. The importance of these issues alone warrants rehearing en banc.

ARGUMENT

I. En banc review is warranted to prevent the significant harms that will result from a patchwork regime of state-level Internet regulations.

A. Because Internet traffic pays no heed to state boundaries, California's misguided law inevitably regulates interstate commerce.

The Internet is a "truly global medium of communication" that "isn't bound by any state or local boundaries." Pranjal Drall, *California's New Net-Neutrality Law Hurts Consumers*, Real Clear Policy (Oct. 8, 2018), bit.ly/3Jxv4kT. It thus makes no sense to regulate it on a state-by-state basis. Indeed, "[g]iven the boundless nature of the internet, an environment with many different regulatory regimes would place an undue burden on interstate commerce." *Id.* And a patchwork regulatory regime would harm businesses—major users of the Internet—too. Instead of having a uniform, nationwide set of rules, a state-by-state system would effectively allow the most restrictive state to dictate national broadband policy.

Importantly, SB-822 makes no attempt to limit its reach to California. Nor could it. There is simply no way that the bill's effects can be contained within

California's boundaries. That is not how California has defined the broadband service that it seeks to regulate, and it is not how the Internet works. "Because the internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate internet activities without 'project[ing] its legislation into other States.'" *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003) (quoting *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 334 (1989)); *see also Am. Librs. Ass'n v. Pataki*, 969 F. Supp. 160, 170-72 (S.D.N.Y. 1997) (explaining the many reasons why "no aspect of the Internet can feasibly be closed off to users from another state").

As the FCC has recognized, a provider cannot "comply with state or local rules for intrastate communications without applying the same rules to interstate communications." 2018 Order ¶200 & n. 744. "Because both interstate and intrastate communications can travel over the same Internet connection (and indeed may do so in response to a single query from a consumer), it is impossible or impracticable for ISPs … to apply different rules in each circumstance." *Id.*; *see also* Report and Order on Remand, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, ¶ 431 (2015) (reaffirming "the Commission's longstanding conclusion that broadband Internet access service is jurisdictionally interstate for regulatory purposes").

Content providers typically rely on a nationwide (or worldwide) network of servers to exchange traffic with internet service providers, and routing of information changes dynamically from moment to moment depending on network congestion and other factors. *See*, *e.g.*, ER-151-152 (declaration explaining that "[i]t would be impossible any time in the foreseeable future to identify—let alone segregate—the terabytes of Internet data exchanged at these interconnection facilities on the basis of the state jurisdictions where individual Internet packets originated or are headed"). It would thus be impossible to apply California-specific rules regarding matters such as interconnection or zero-rating only to Internet traffic heading to or from California without completely changing the architecture of the Internet in highly inefficient ways.

Consider, moreover, SB-822's application to mobile broadband services, which are—by definition—*mobile*. If a Californian travels to Texas and brings her wireless phone, do California's net-neutrality regulations travel with her? Conversely, if a wireless customer in Florida travels to California for a one-week vacation, must the provider now comply with the full panoply of regulations that apply to service in California? What if a California resident near the state border connects to a cell tower in Nevada or Oregon, or vice versa? Or what if a college student has a wireless account registered at his parents' address in San Diego but

spends most of the year at school in North Carolina? Number porting introduces yet another complexity: because customers can now keep their phone numbers no matter where they live, there may be more than a million California phone numbers that are no longer used primarily in the state. When consumers use devices associated with those numbers to access mobile broadband offerings, are those consumers still deemed to be "in California" for purposes of the net-neutrality regulations?

Given these obvious problems with states regulating the Internet, SB-822 purports to limit its reach to fixed and mobile broadband services provided "in California." *See* §3100(b), (i), (p). But placing an "only in California" label on regulations that inherently apply to *interstate* and *nationwide* commerce does not fix the problem. As Petitioners note (at 16), California does not suggest that SB-822 is indifferent to the treatment of Californians' Internet traffic once it leaves the state. Rather, the prohibitions appear to apply even as the packets travel over the broadband provider's network in other states as well.

B. If California succeeds in adopting state-specific net-neutrality rules, other states will inevitably follow suit, resulting in confusion, complexity, and the chilling of investment in critical broadband infrastructure.

If California succeeds in regulating the Internet at the state level, other states will surely seek to impose their own unique rules. *See*, *e.g.*, *Healy*, 491 U.S. at 336 (explaining that the practical effects of a challenged law "must be evaluated … by

considering … what effect would arise if … every[] State adopted similar legislation"). In fact, some have already done so. Six additional states—Colorado, Maine, New Jersey, Oregon, Vermont, and Washington—have *already* adopted their own legislation or resolutions regarding net neutrality. *See* Nat'l Conf. of State Legislatures, *Net Neutrality 2021 Legislation* (Jan. 20, 2021), bit.ly/31XC6LT; *see also* ISPs' First Amended Compl. ¶75 (discussing states that have already enacted state-level net-neutrality regulations). And, in 2021 alone, nine other states introduced legislation regarding these issues. *See Net Neutrality 2021 Legislation, supra*. It is difficult to imagine a development more harmful to the effective functioning of a *national* broadband system that pays no heed to state boundaries.

Allowing each state to make its own rules would result in confusion, complexity, and the chilling of investment in critical broadband infrastructure. Since the FCC repealed its heavy-handed, utility-style federal net-neutrality regulations in 2018, the Internet has flourished, with massive increases in investment, faster speeds, and wider deployment and access. In recent years, broadband investment reached $80 billion—the highest amount since 2001. *See* Telecommunications Industry Association, Comments on Restoring Internet Freedom ("TIA Comments"), at 4 (Apr. 20, 2020), bit.ly/31AsCWD; *see also* Patrick Brogan,

USTelecom, *U.S. Broadband Investment Continued Upswing in 2018*, at 1-2 (July 31, 2019), bit.ly/31n3xOt.

These increases in broadband investment are not merely numbers on a page; they have directly contributed to real-world improvements in broadband deployment and quality. Since the repeal of the heavy-handed federal regulations in 2018, the number of Americans living in areas without access to the FCC's benchmark internet speeds dropped from 18.1 million to 14.5 million—a decrease of more than 20%. *See* Fourteenth Broadband Deployment Report, FCC, at ¶2 (Jan. 19, 2021), bit.ly/3cYNqhh. And more than three-fourths of those newly served Americans live in rural areas. *Id.* Households with even faster *fiber* broadband access mirrored that trend, *see* U.S. Chamber of Commerce Technology Engagement Center, Comments on Restoring Internet Freedom, at 3-4 (Mar. 20, 2020), bit.ly/2PtwFOw, with 2018 having the largest expansion of fiber broadband in U.S. history, *see* Statement of Chairman Pai on Increased Broadband Investment for Second Year in a Row (June 10, 2019), bit.ly/3ketyIp. Those investments are especially critical to national economic growth as more Americans work and learn from home, requiring reliable access to Internet applications and video platforms—a trend that has rapidly accelerated during the COVID-19 pandemic.

A patchwork scheme would also undermine the competition and innovation that has helped low-income consumers by reducing prices. The United States "consistently ranks ... as one of the most affordable nations for entry-level broadband," and repeatedly ranked "first in the world for broadband affordability." Doug Brake, *Lessons From the Pandemic: Broadband Policy After COVID-19*, Info. Tech. & Innovation Found., at 11 (July 13, 2020), bit.ly/2PobvRY. Internet speeds, too, have vastly improved in recent years. In 2018 alone, U.S. internet speeds increased by 40%. Jeff Jacoby, *A Year After Net-Neutrality's Repeal, the Internet Is Alive and Well — And Faster Than Ever*, Bos. Globe (Dec. 28, 2018), bit.ly/2C20eUv.

Patchwork state-level regulations would undermine this critical progress. In the face of SB-822's amorphous and open-ended prohibitions in the Nation's most populous state, many providers will likely err on the side of caution before launching new services, thereby undermining the FCC's goals of promoting innovative new services and technologies. And, as explained, the statute makes no effort to limit its reach to internet traffic that purportedly starts and ends "in California."

At bottom, the complexity and uncertainty of the legal regime that California has created underscores why this case warrants en banc review. The Internet is an indispensable component of the stream of commerce, and the constant innovation

occurring in this sector has been a boon to consumers and businesses alike. It would be profoundly inequitable to subject providers to an onerous and ambiguous series of state-level rules that the FCC itself has determined to be excessively burdensome and unnecessary. And that is doubly true when the challenged rules cannot in any meaningful way be limited to California. Indeed, SB-822 already has spurred the withdrawal of beneficial service offerings from the marketplace. *See* Appellants' Br. 60-61 & nn.31-32 (discussing elimination of zero-rating offerings and certain network management tools).

II. En banc review is also warranted because the panel failed to fully grapple with important preemption precedents.

This Court should also grant en banc review because the panel failed to adequately grapple with this Court's directly relevant preemption precedents.

The panel erroneously concluded that SB-822 "does not impermissibly touch on the field of interstate communications." Slip Op. at 29 (cleaned up). It did so because, in its view, "SB-822 limits its application … to broadband internet access services 'provided to customers in California' and to internet service providers that 'provide[] broadband Internet access service to an individual, corporation, government, or other customer in California.'" *Id.* at 30. As explained above, however, there is simply no way that SB-822's effects can be contained within California's boundaries.

The panel's decision is also based in significant part on a misreading of *Greater Los Angeles Agency on Deafness, Inc. v. CNN, Inc.*, 742 F.3d 414 (9th Cir. 2014). The panel suggested that *Greater Los Angeles Agency on Deafness* considered an "analogous California statute that regulated online content only when it was accessed by California viewers" and held that "such state regulation of internet services does not have the practical effect of regulating wholly interstate conduct." Slip Op. 30. But, as Petitioners explain, "that law regulated users of the Internet (companies placing videos online)—not the underlying interstate communications service itself." Rhrg. Pet. at 16 n.12.

The panel also missed the mark in its discussion of *People of State of California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) ("*California I*") and *People of State of California v. FCC*, 39 F.3d 919 (9th Cir. 1994) ("*California*"). Those decisions involved services that were precursors to the modern Internet, allowing the "provision of enhanced or data processing services over the telecommunications network" and "convey[ing] information from remote computers to customers' terminals." *California I*, 905 F.2d at 1223 & n.3. When telephone companies sold those services to Californians, they enabled the purchasers to connect to remote computers both *inside* and *outside* California. *See, e.g.*, *id.* at 1239-40.

In 1990, this Court reviewed an FCC order in which the agency tried to preempt *all* state regulation of services allowing Californians to send information to remote computers *within* California. This Court invalidated that order, holding that:

> The FCC may not justify a preemption order merely by showing that *some* of the preempted state regulation would, if not preempted, frustrate FCC regulatory goals. Rather, the FCC bears the burden of justifying its *entire* preemption order by demonstrating that the order is narrowly tailored to preempt *only* such state regulations as would negate valid FCC regulatory goals. … We are therefore faced with the task of deciding whether the FCC's regulation of interstate enhanced services would necessarily be frustrated by all possible forms of state-imposed [regulations] that are inconsistent with [federal] requirements.

Id. at 1243.

The Court determined that the FCC had "failed to carry its burden of demonstrating that *all* state-imposed separation requirements would negate its policy of permitting the structural integration of basic and enhanced services offered on an interstate basis." *Id.* Because the FCC "neglect[ed] to address the possibility that enhanced services may be offered on a purely intrastate basis," this Court invalidated the FCC's categorical preemption of such regulation. *Id.* at 1244.[2] Importantly, however, the lack of authority to preempt *every* conceivable regulation of intrastate

[2] That reasoning is similar to the D.C. Circuit's decision in *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019). There, the court similarly found unlawful a sweeping express preemption provision that exceeded what the FCC could justify under conflict preemption principles. *See id.* at 74, 81.

enhanced services did not answer the question whether conflict preemption prevented *some* such regulation.

In 1994, this Court considered a revised and narrowed FCC preemption order. *See California*, 39 F.3d 919. One state argued that, where the "FCC's action is intended to implement the more general goals of Title I … no preemption authority exists." *Id.* at 932. This Court rejected that position. *Id.* It then found that the FCC had "presented adequate record support" for its decision to "preempt[] state regulations requiring separate facilities and personnel for the *intrastate* portion of enhanced services that are offered both interstate and intrastate." *Id*. (emphasis added).

That decision is important and relevant here. *California* holds that the mere fact that the FCC is operating under Title I rather than Title II cannot defeat a finding of conflict preemption. Moreover, this Court expressly recognized that enhanced services sold to customers in an individual state could result in "both interstate and intrastate communications." *California*, 39 F.3d at 932-33. California was attempting to continue regulating those services only when they were used for *intrastate* communications. But this Court held in *California* that even when a state purports to limit itself to regulating the intrastate uses of a service, its actions can still be preempted under ordinary conflict preemption principles.

Contrary to the panel's decision, *California* supports preemption here. Unlike in the 1990s, where California limited its regulatory efforts to intrastate communications, in SB-822, California is attempting to regulate broadband service, which both in practice and as defined in the statute has both interstate and intrastate uses. Indeed, as discussed above the uses are overwhelmingly interstate—the servers Californians are communicating with are located across the U.S. (and the world) and normally not in California. *See supra* Section I.A.

The panel's opinion badly misreads the *California* case. *See* Slip Op. at 23-25. The only dispute there was whether the states could regulate the use of enhanced services that enabled both intrastate and interstate communications when the customers used those services solely for intrastate communications. No state argued that it could override the FCC's policy judgments about how to regulate the enhanced services when used for *interstate* communications. Yet that is exactly what California seeks to do here given that SB-822 defines the broadband service it regulates to include *all* Internet traffic, including communications that are necessarily interstate, and is not confined to in-state locations or nodes on the network. *See* Reh'g Petn. 15-16; *supra* Section I.A.

Finally, SB-822 also 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 explained that "States are not permitted to use their police power to enact [] a regulation" when, as here, "federal officials determine … that restrictive regulation of a particular area is not in the public interest." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984). And this Court has held that "conflict preemption applies" to prevent "a state rule … that would interfere with the method by which the federal statute was designed to reach it[s] goals." *Pub. Util. Dist. No. 1 of Grays Harbor Cty. Wash. v. IDACORP Inc.*, 379 F.3d 641, 650 (9th Cir. 2004). Yet the panel failed to grapple with that decision at all.

In *Grays Harbor*, this Court rejected the plaintiff's argument "that no actual conflict exists" between employing state law to "set a fair price" for interstate electricity sales and the decision by a federal agency *not* to engage in public-utility rate-setting for those sales (instead allowing the market rates to prevail). *Id.* The Court explained that the state law "would create a conflict with FERC's authority over wholesale rates" and that the "result would make state law stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* SB-822 poses a similar obstacle here to the "accomplishment and execution of the full proposes and objectives" of the Communications Act by regulating broadband as a common-carrier service, which federal law prohibits.

CONCLUSION

The Court should grant en banc review and reverse the decision below.

Respectfully submitted,

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