Bryan K. Weir, CA Bar # 310964
Jeffrey M. Harris
Cameron T. Norris
CONSOVOY MCCARTHY PARK PLLC
3301 Wilson Boulevard, Suite 700
Arlington, VA 22201
(703) 243-9423
bryan@consovoymccarthy.com
Counsel for (Proposed) Amicus Chamber of Commerce

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF CALIFORNIA, et al.

Defendants.

AMERICAN CABLE ASSOCIATION, CTIA—THE WIRELESS ASSOCATION, NCTA—INTERNET & TELEVISION ASSOCIATION, and USTELECOM—THE BROADBAND ASSOCIATION

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Attorney General of California

Defendant.

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

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

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

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—just rejected approaches like California's in an exhaustive, 196-page order. *See* 33 FCC Rcd 311 (2018) (2018 Order). Never mind that internet traffic pays no heed to state borders and there is no meaningful way to limit internet regulations to a single State. And never mind that the vague and open-ended prohibitions in SB-822, which turn on words such as "reasonable" or "legitimate," are anathema to the development of a dynamic, constantly changing industry. California forged ahead anyway, 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).

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

The pervasive ambiguity and uncertainty about what practices SB-822 prohibits or allows also underscore the need for preliminary injunctive relief. SB-822 amplifies many of the uncertainties created by the FCC's repealed 2015 Title II classification—which the FCC explicitly found was chilling new investments in broadband services—and then

overlays another layer of uncertainty about the geographic scope of its new restrictions. The statute is also riddled with ambiguities about what practices are "reasonable," "legitimate," "harmful," "lawful," "primarily technical," or "application-agnostic"—going well beyond the FCC's now-repealed 2015 Order. And it leaves enforcement largely to the courts. Thus, an internet provider that invests to develop new services, features, traffic-management practices, or interconnection arrangements may face *ex post* penalties if a California court determines, years later, that it ran afoul of one of these vague words. And, although the statute purports to limit itself to services provided "in California," there is zero guidance about how (if at all) the State plans to limit its scope of the prohibitions to only in-state conduct.

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

ARGUMENT

I. California's SB-822 Is Unconstitutional.

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

A. SB-822 violates the Supremacy Clause because it is expressly preempted by the FCC's 2018 Order.

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

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

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

stand, statutes like SB-822 would generate a "patchwork" of requirements across the country, forcing providers to "comply with … potentially conflicting requirements" and sabotaging the "affirmative federal policy of *de*regulation." That is why the 2018 Order so broadly preempts state net-neutrality regulations.

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

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

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

The "practical effect" of SB-822 is to control out-of-state conduct. There is simply no way that the bill's effects can be contained within California's boundaries: that 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*, 491 U.S. at 334); *see also Am. Libraries 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 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.* 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. It would thus be impossible to apply California-specific rules regarding matters such as interconnection or zero-rating without completely changing the architecture of the network 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 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—and more than 100,000 people move out of California every year—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? Placing an "only in California" label on regulations that inherently apply to interstate and nationwide commerce cannot remedy the fatal flaws of SB-822 under the Dormant Commerce Clause.

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

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

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

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

II. SB-822 Should Be Preliminarily Enjoined.

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

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

Vague or unclear laws "invite arbitrary power." *Dimaya*, 138 S. Ct. at 1223 (Gorsuch, J., concurring). When a statute "leav[es] the people in the dark about what the law demands," it simply allows "prosecutors and courts to make it up," *id.* at 1223-24, or to use the law to "pursue their personal predilections," *Smith v. Goguen*, 415 U.S. 566, 575

(1974). California's net-neutrality statute flouts bedrock principles of fair notice and due process. SB-822 has all of the pervasive uncertainty and ambiguity of the FCC's repealed net-neutrality order from 2015 (and then some), and then overlays that uncertainty with an *additional* lack of clarity over its own territorial scope.

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

California has nonetheless forged ahead with its own general conduct standard. In addition to its specific prohibitions on practices such as blocking and throttling, SB-822 broadly prohibits any provider from "[u]nreasonably interfering with, or unreasonably disadvantaging, either an end user's ability to select, access, and use broadband Internet access service or lawful Internet content, applications, services, or devices of the end user's choice, or an edge provider's ability to make lawful content, applications, services, or devices available to end users." Cal. Civ. Code § 3101(a)(7)(A). But, as the FCC

concluded, a totality-of-the-circumstances "reasonableness" standard is anathema to the development and deployment of innovative new services. 2018 Order ¶¶ 246-49; *see also USAir, Inc. v. Dep't of Transp.*, 969 F.2d 1256, 1263 (D.C. Cir. 1992) (explaining that "totality-of-the-circumstances" tests are inherently indeterminate, "give little guidance to future litigants," and "impose limited restraint on agencies"). An internet provider that invests to develop new services as a competitive differentiator may face *ex post* penalties if a California court determines, years later, that the new service "unreasonably" disadvantaged end-users, other providers, or edge providers. Worse still, there will be no precedent to rely on for guidance since new services are, necessarily, unprecedented.

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

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

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

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

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

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

B. These inherent uncertainties in SB-822 tip the equities overwhelmingly in plaintiffs' favor.

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

Even more fundamentally, the complexity and uncertainty of the legal regime that California has created underscore why the equitable factors strongly favor the plaintiffs. 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 force internet providers to come into near-immediate compliance with an onerous and ambiguous series of rules that the FCC has just determined (in a 200-page order) to be excessively burdensome and unnecessary. And that is doubly

true when the challenged rules cannot in any meaningful way be limited to California. The most prudent way forward is to freeze the status quo and preliminarily enjoin SB-822 to ensure that, while this litigation proceeds, companies will not need to come into compliance with its standardless mandates.

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

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

Finally, preliminary injunctive relief is especially imperative because other States have also sought to impose *their own* net-neutrality regimes. *See 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"). As

of October 1, 2018, legislators in 30 States had introduced more than 70 bills requiring internet service providers to comply with various net-neutrality principles. National Conference of State Legislatures, *Net Neutrality Legislation in States* (Oct. 1, 2018), bit.ly/2y4v4sQ; *see also* ISPs Compl. ¶ 60 (identifying nine States that have already enacted net-neutrality regulations). 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. The FCC's 2018 Order has given the industry "a good deal to digest over a relatively short period," and this Court should "promptly remove from the menu the [California law], a smuggled-in dish that is indigestible." *Spears v. United States*, 555 U.S. 261, 267 (2009).

CONCLUSION

For all these reasons, the Court should grant the plaintiffs' motions for preliminary injunction.

Respectfully submitted,

/s/ *Bryan K. Weir*
Bryan K. Weir, CA Bar # 310964
Jeffrey M. Harris
Cameron T. Norris
CONSOVOY MCCARTHY PARK PLLC
3301 Wilson Boulevard, Suite 700
Arlington, VA 22201
(703) 243-9423
bryan@consovoymccarthy.com