

1 L. Charles Keller (CA SBN 169573)
2 WILKINSON BARKER KNAUER LLP
3 1800 M Street, N.W., Suite 800N
4 Washington, D.C. 20036
5 (202) 783-4141
6 ckeller@wbklaw.com

7 *Attorneys for Amici Communications Law*
8 *Scholars*

9 Lawrence J. Spiwak (pro hac pending)
10 Phoenix Center for Advanced Legal &
11 Economic Public Policy Studies
12 5335 Wisconsin Avenue, NW
13 Suite 440
14 Washington, D.C. 20015
15 (202) 274-0235
16 lspiwak@phoenix-center.org

17 **IN THE UNITED STATES DISTRICT COURT**
18 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

19 THE UNITED STATES OF AMERICA,
20
21 Plaintiff,

22 v.

23 THE STATE OF CALIFORNIA, et al.,
24
25 Defendants.

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

28 **BRIEF AMICUS CURIAE OF**
COMMUNICATIONS LAW
SCHOLARS IN SUPPORT OF
PLAINTIFFS' MOTIONS FOR
PRELIMINARY INJUNCTION

Judge: Hon. John A. Mendez
Hearing Date: To be determined by the
Court per Order of July 30, 2020
Hearing Time: To be determined by the
Court per Order of July 30, 2020

29 AMERICAN CABLE ASSOCIATION,
30 CTIA – THE WIRELESS ASSOCIATION,
31 NCTA – THE INTERNET & TELEVISION
32 ASSOCIATION, and USTELECOM – THE
33 BROADBAND ASSOCIATION, on behalf of
34 their members,

35 Plaintiff,

36 v.

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

39 Defendant.

CORPORATE DISCLOSURE STATEMENT

1 The Communications Law Scholars (the “Scholars”) submit the following corporate
2 disclosure statements:

3 The Communications Law Scholars are all individuals with significant experience in
4 communications law. All of the Scholars joining this brief are signing in their individual
5 capacity rather than as authorized representatives of their respective places of employment.
6

7 Dated:

8
9 /s/ L. Charles Keller
10 L. Charles Keller (CA SBN 169573)
11 WILKINSON BARKER KNAUER LLP
12 1800 M Street, N.W., Suite 800N
13 Washington, D.C. 20036
14 (202) 783-4141
15 ckeller@wbklaw.com

16
17 Lawrence J. Spiwak (pro hac pending)
18 President and General Counsel
19 Phoenix Center for Advanced Legal &
20 Economic Public Policy Studies
21 5335 Wisconsin Avenue, NW
22 Suite 440
23 Washington, D.C. 20015
24 (202) 274-0235
25 lspiwak@phoenix-center.org

26
27 *Attorneys for Amici Communications Law*
28 *Scholars*

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1 **INTEREST OF AMICUS CURIAE**

2 The Communications Law Scholars are academics affiliated with law schools and think
3 tanks with extensive experience in communications law and policy.¹ Listed in alphabetical
4 order, these scholars include:

5 James E. Dunstan, General Counsel – TechFreedom
6 Justin (Gus) Hurwitz, Associate Professor of Law and Director, Nebraska Governance
and Technology Center – University of Nebraska
7 Sam Kazman, General Counsel – Competitive Enterprise Institute
8 Geoffrey A. Manne, President – International Center for Law & Economics
9 Randolph J. May, President – The Free State Foundation
10 Michael J. Santorelli, Director, Advanced Communications Law & Policy Institute –
New York Law School
11 Lawrence J. Spiwak, President – Phoenix Center for Advanced Legal & Economic
Public Policy Studies
Jeffrey Westling, Research Fellow – R Street Institute

12 The Communications Law Scholars, therefore, have an established interest in the outcome of
13 this proceeding and believe that their perspective on the issues at bar will assist the Court in
14 resolving this case.²

15 **INTRODUCTION**

16 As first dial-up and then broadband Internet access took off in the late 1990s, the Federal
17 Communications Commission (“FCC”) made the deliberate choice to reject the application of
18 the legacy common carrier regulations designed for the old Ma Bell telephone monopoly to
19 those services. Instead, the Commission opted for a “light” regulatory touch by classifying
20 those services as “information services” under Title I of the Communications Act. The hope
21 was that this “light touch” regulatory policy would, in the words of former FCC Chairman Bill
22 Kennard, ensure the “unregulation” of the Internet. *The Unregulation of the Internet: Laying a*
23 *Competitive Course for the Future*, Remarks by FCC Chairman William E. Kennard Before the
24

25 ¹ Affiliations listed for identification alone. Each Scholar is signing in their
26 individual capacity.

27 ² The Communications Law Scholars state that no counsel for a party authored this
28 brief in whole or in part, and no person other than their counsel made a monetary contribution
intended to fund the preparation or submission of this brief.

1 Federal Communications Bar Northern California Chapter, San Francisco, CA (July 20, 1999);
2 *see also* J. Oxman, *The FCC and the Unregulation of the Internet*, OPP WORKING PAPER NO.
3 31, Office of Plans and Policy, Federal Communications Commission (July 1999).

4 For the better part of the next two decades, regardless of whether the FCC was
5 controlled by Democrats or Republicans, the Commission held fast to this policy. *See, e.g.,*
6 *Federal-State Joint Board on Universal Service*, FCC 98-67, REPORT TO CONGRESS, 13 FCC
7 Rcd. 11501 (1998) (hereinafter “*Universal Service Report*”); *Inquiry Concerning High-Speed*
8 *Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798 (2002) (hereinafter
9 “*Cable Modem Classification Order*”), *aff’d Nat’l Cable & Telecomms. Association v. Brand X*
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18 Rcd. 13281 (2006) (hereinafter “*BPL Classification Order*”); *Preserving the Open Internet;*
19 *Broadband Industry Practices*, FCC 10-201, REPORT AND ORDER, 25 FCC Rcd. 17905 (2010)
20 (hereinafter “*2010 Order*”), *rev’d Verizon v. FCC*, 740 F.3d 623, 675 (D.C. Cir. 2014).

21 This bi-partisan tradition ended with the *2015 Order*, when the Commission rejected its
22 traditional light touch approach by choosing to apply the legacy common carrier regulatory
23 regime designed for the Old Ma Bell telephone monopoly to broadband Internet access services.
24 *Protecting and Promoting the Open Internet*, FCC 15-24, REPORT AND ORDER ON REMAND,
25 DECLARATORY RULING, AND ORDER, 30 FCC Rcd. 5601 (2015) at ¶ 431 (hereinafter *2015*
26 *Order*), *petitions for review denied*, *United States Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C.
27 Cir. 2016), *pet. for rehearing en banc denied*, 855 F.3d 381 (2017), *cert. denied*, 139 S.Ct. 454
28

1 (2018). But while the *2015 Order* may have survived legal scrutiny, it was bad policy. It is
2 well-established that regulation has both costs and benefits, but the *2015 Order* failed to conduct
3 even a basic cost/benefit analysis. (Indeed, the Commission’s own economist at the time
4 described the *2015 Order* as an “economics free zone.” T. Brennan, *Perspectives from FSF*
5 *Scholars: Is the Open Internet Order an “Economics-Free Zone”?* Free State Foundation (June
6 28, 2016).) Given such poorly designed and overzealous regulation, it came as no surprise that
7 broadband infrastructure investment suffered significantly after the *2015 Order*. G.S. Ford,
8 *Regulation and Investment in the U.S. Telecommunications Industry*, 56 APPLIED ECONOMICS
9 6073 (2018).

10 As the detrimental economic effects of the *2015 Order* continued to mount, in 2017 the
11 FCC recognized that it needed to switch gears and develop a different regulatory approach that
12 would still protect consumers but not stymie broadband investment. Accordingly, it opened a
13 new proceeding to investigate these issues. The end product of the Commission’s extensive
14 efforts was the *Restoring Internet Freedom Order*, FCC 17-166, DECLARATORY RULING,
15 REPORT, AND ORDER, 33 FCC Rcd. 311 (2018) (hereinafter “*2018 Order*”). The Commission’s
16 revised approach was straightforward and effective: The Commission returned broadband
17 Internet access back to a Title I service and continued its exclusive oversight through the
18 establishment of a transparency rule to be enforced by the Federal Trade Commission. The
19 Commission’s revised approach not only reflected sound economic reasoning that has since
20 been empirically confirmed, *see* G.S. Ford, *Net Neutrality and Investment in the US: A Review*
21 *of Evidence from the 2018 Restoring Internet Freedom Order*, 17 REVIEW OF NETWORK
22 ECONOMICS 175–205 (2019); J. Ellig, *Implications of Mozilla for Agency Economic Analysis*,
23 YALE JOURNAL ON REGULATION, NOTICE AND COMMENT (October 10, 2019), but also carefully
24 followed the law. As a result, the *2018 Order* was generally upheld by the D.C. Circuit in
25 *Mozilla v. FCC*, 940 F.3d 1 (D.C. Cir. 2019), *reh’g en banc denied*, (D.C. Cir. 18-1051) (Feb. 6,
26 2020).

27 The Commission’s policy of light touch regulation proved correct: broadband
28

1 infrastructure investment began to rebound, *see, e.g.*, G.S. Ford, *Infrastructure Investment After*
2 *Title II*, PHOENIX CENTER POLICY PERSPECTIVE NO. 18-09 (November 1, 2018); G.S. Ford,
3 *Comcast’s Capital Spending After Reclassification: A Check on Claims*, PHOENIX CENTER
4 POLICY PERSPECTIVE NO. 18-03 (April 25, 2018); G.S. Ford, *Net Neutrality and Investment in*
5 *the US* (2019), *supra*, and the most current raw data appear to confirm this trend. P. Brogan,
6 *U.S. Broadband Investment Continued Upswing In 2018*, USTELECOM RESEARCH BRIEF (July
7 31, 2019).³ Best of all, in these trying times of the current COVID pandemic, when reliable
8 broadband access is needed more than ever, the FCC’s *2018 Order* did not break the Internet as
9 some predicted. *See, e.g.*, M.H. McGill, *How the Loss of Net Neutrality Could Change the*
10 *Internet*, POLITICO (December 14, 2017). Quite to the contrary, U.S. networks performed
11 admirably and were resilient to the traffic surges. G.S. Ford, *COVID-19 and Broadband*
12 *Speeds: A Multi-Country Analysis*, PHOENIX CENTER POLICY BULLETIN NO. 49 (May 2020)
13 (finding no statistically-significant changes in fixed-line download speeds, while mobile
14 networks had a statistically-significant increase in download speeds).

15 The State of California disagreed with the *2018 Order*’s change in federal policy. Its
16 response was to enact SB-822, in which California seeks to supplant the exclusive federal
17 jurisdiction over interstate communications enshrined in statute by Congress with its own. As
18 explained below, under the long-standing legal doctrine of field preemption, this it may not do.
19 Whether it likes federal policy or not, California is not entitled to trample on the federal
20 government’s exclusive authority over interstate communications, including the broadband
21 Internet access services at issue here.

22
23
24 ³ As the FCC noted in its *2018 Order*, simple comparisons of changes in short-
25 term capital spending “can only be regarded as suggestive, since they fail to control for other
26 factors that may affect investment (such as technological change, the overall state of the
27 economy, and the fact that large capital investments often occur in discrete chunks rather than
28 being spaced evenly over time), and companies may take several years to adjust their investment
plans.” *Id.* at ¶ 92. Instead, “methodologies designed to estimate impacts *relative to a*
counterfactual tend to provide more convincing evidence of causal impacts of Title II
classification. *Id.* at ¶ 93 (emphasis supplied).

1 First, we discuss Congress’s long-standing determination that the federal government
2 has exclusive jurisdiction over interstate communications, leaving no authority to the states to
3 regulate such services. As we show below, throughout this history, and even in the *2015 Order*,
4 the FCC has consistently recognized and reaffirmed that broadband Internet access service is a
5 jurisdictionally *interstate* service. *See 2015 Order* ¶ 431 (reaffirming “the Commission’s
6 longstanding conclusion that broadband Internet access service is jurisdictionally interstate for
7 regulatory purposes”). The fact that Congress may have afforded states a limited cooperative
8 role in select, statutorily itemized areas does not mean that Congress has empowered the states
9 with the *concurrent* authority to regulate the rates, terms, and conditions of any interstate
10 communications service. Where, as here, a communications service is interstate, states are
11 forbidden from regulating that service directly, whether the FCC regulates the field extensively
12 or not at all. That principle applies all the more clearly given that the FCC has detailed at length
13 in its *2018 Order* how its continued oversight, enforced by its transparency rule, will preserve
14 Internet openness.

15 Second, we provide several examples how SB-822 unconstitutionally intrudes into the
16 FCC’s exclusive jurisdiction over interstate communications and is therefore subject to field
17 preemption. To begin, the plain terms of SB-822 unambiguously define broadband Internet
18 access as an interstate service, meaning that the law facially seeks to regulate interstate
19 communications. Similarly, SB-822’s improper intrusion into the FCC’s exclusive jurisdiction
20 over interstate communications services impedes the agency’s ability to carry out Congressional
21 instructions set forth under both Section 230 and Section 706 of the Communications Act.

22 ARGUMENT

23 I. Congress Gave the FCC Exclusive Jurisdiction Over Interstate Communications

24 A. The FCC’s Jurisdiction Over Interstate Communications Is Absolute

25 It is well established that when “Congress intends federal law to ‘occupy the field,’ state
26 law in that area is preempted.” *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372
27 (2000) (citations omitted). Importantly, field preemption need not be explicit. As the Supreme
28

1 Court noted in *Arizona v. United States*, the “intent to displace state law altogether can be
2 inferred ... where there is a ‘federal interest ... so dominant that the federal system will be
3 assumed to preclude enforcement of state laws on the same subject.’” 567 U.S. 387, 389 (2012)
4 (citations omitted). Here, field preemption is explicitly grounded in the Communications Act,
5 which confers jurisdiction on the FCC over interstate services and reserves authority for the
6 states over intrastate services. Field preemption is further supported by decades of regulatory
7 history and judicial precedent.

8 Exclusive federal oversight of interstate communications can be traced back more than a
9 century. In 1910, Congress endowed the Interstate Commerce Commission (“ICC”) with the
10 authority to regulate the field of interstate communications with the passage of the Mann-Elkins
11 Act. *See generally*, F.H. Dixon, *The Mann-Elkins Act, Amending the Act to Regulate*
12 *Commerce*, 24 THE QUARTERLY JOURNAL OF ECONOMICS 563, 596 (1910). That legislation
13 amended the Interstate Commerce Act (“ICA”) to provide that the ICA’s provisions “shall apply
14 to ... telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending
15 messages from one State, Territory, or District of the United States, to any other State, Territory,
16 or District of the United States, or to any foreign country.” Mann-Elkins Act § 7. In 1919, the
17 Supreme Court found it “clear that the [Mann-Elkins Act] was designed to and did subject
18 [communications] companies as to their interstate business to the rule of equality and uniformity
19 of rates which it was manifestly the dominant purpose of the [ICA] to establish,” and that the
20 consistency that Congress sought to impose “would be wholly destroyed if ... [carriers’]
21 interstate commerce business continued to be subjected to the control of divergent and
22 [possibly] conflicting local laws.” *Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co.*, 251
23 U.S. 27, 30 (1919). In short, the Mann-Elkins Act “was an exertion by Congress of its authority
24 to bring under federal control the interstate business of telegraph companies and therefore was
25 an occupation of the field by Congress which excluded state action.” *Id.* at 31. Thus, when
26 Indiana attempted to penalize a telegraph company for failure to timely deliver a message sent
27 there from Illinois, the Court found that any such penalty was “foreclosed,” because the Mann-
28

1 Elkins Act “so clearly establish[ed] the purpose of Congress to subject [telegraph] companies to
2 a uniform national rule as to cause it to be certain that there was no room thereafter for the
3 exercise by the several States of power to regulate.” *Western Union Tel. Co. v. Boegli*, 251 U.S.
4 315, 316-17 (1920).

5 Exclusive federal jurisdiction over interstate communications was reinforced with the
6 enactment of the Communications Act of 1934, which transferred the ICC’s authority in this
7 sphere to the newly created FCC. The 1934 Act preserved the prior law’s assertion of federal
8 control over interstate communications traffic. In particular, Section 1 of the Communications
9 Act of 1934 clearly states that the federal government—acting through the FCC as a
10 “centralizing authority”—has jurisdiction over “interstate and foreign commerce in
11 communication by wire or radio.” (47 U.S.C. § 151), and Section 2 further states that the
12 Communications Act “shall apply to all interstate and foreign communication by wire or radio
13 and all interstate and foreign transmission of energy by radio, which originates and/or is
14 received within the United States....” (47 U.S.C. § 152). *See generally Capital Cities Cable,*
15 *Inc. v. Crisp*, 467 U.S. 691, 700 (1984) (Communications Act grants FCC authority “to regulate
16 all aspects of interstate communication by wire or radio”) (emphasis added); *Ivy Broadcasting*
17 *Co. v. AT&T Co.*, 391 F.2d 486, 490 (2d Cir. 1968) (Communications Act created “broad
18 scheme for the regulation of interstate service by communications carriers indicates an intent on
19 the part of Congress to occupy the field to the exclusion of state law”). Indeed, it does not
20 matter whether the Commission classifies the interstate communications as a common carrier
21 “telecommunications service” under Title II (*see* 47 U.S.C. § 153(11)) or as an “information
22 service” under Title I (*see* 47 U.S.C. § 153(24)); the Commission’s jurisdiction over interstate
23 communications is absolute. *See, e.g., Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 654 (3d
24 Cir. 2003) (“[T]he establishment of [a] broad scheme for the regulation of interstate service by
25 communications carriers indicates an intent on the part of Congress to occupy the field to the
26 exclusion of state law.”) (*citing Ivy Broadcasting Co., Inc. v. AT&T, supra*).

1 While states have occasionally tried to encroach on the Commission’s exclusive
2 jurisdiction over interstate communications, the FCC has consistently rejected these attempted
3 incursions. For example, when Tennessee enacted a statute regulating interstate operator
4 services, the FCC found the law preempted: “[T]he Communications Act precludes the
5 Tennessee statute’s efforts to regulate interstate and foreign communications. The Tennessee
6 statute seeks broadly to establish the terms and conditions under which interstate operator
7 services may be offered in the states—establishing specific requirements for [providers of
8 operator services] before they complete interstate calls. The Tennessee statute thus seeks to
9 exercise one of the fundamental functions *exclusively assigned to this Commission* under the
10 Communications Act, namely to assure the reasonableness of the rates, terms, and conditions of
11 interstate communications services.” *In the Matter of Operator Services Providers of America,*
12 *Petition for Expedited Declaratory Ruling*, FCC 91–185, MEMORANDUM OPINION AND ORDER,
13 6 FCC Rcd. 4475, 4477 (1991) (emphasis supplied). And the Commission has never deviated
14 from this view, regardless of which political party was in control. *See e.g., Vonage Holdings*
15 *Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public*
16 *Utilities Commission*, 19 FCC Rcd. 22404 (2004) (“*Vonage Order*”) (preempting Minnesota’s
17 regulation of interstate voice over IP traffic); *In the Matter of Applications of Cellco*
18 *Partnership D/B/A Verizon Wireless and SpectrumCo LLC And Cox TMI, LLC For Consent to*
19 *Assign AWS-1 Licenses*, FCC 12-95, MEMORANDUM OPINION AND ORDER AND DECLARATORY
20 RULING, 27 FCC Rcd. 10698 (rel. August 23, 2012) at n. 349, *aff’d NTCH, INC. v. Federal*
21 *Communications Commission*, 841 F.3d 497 (D.C. Cir. 2016), *cert. denied* 137 S.Ct. 2277 (June
22 19, 2017) (Section 2 of the Communications Act provides “the Commission with jurisdiction
23 over all interstate communications by wire or radio”); *In the Matter of Telephone Company–*
24 *Cable Television Cross–Ownership Rules, Sections 63.54–63.58*, FCC 92-327, SECOND REPORT
25 AND ORDER, RECOMMENDATION TO CONGRESS, AND SECOND FURTHER NOTICE OF PROPOSED
26 RULEMAKING, 7 FCC Rcd. 5781 (rel. August 14, 1992) at ¶ 72, *dismissed as moot, Mankato*
27 *Citizens Telephone Company, et al., v. Federal Communications Commission*, No. 92-1404
28

1 (D.C. Circuit 1996) (1996 WL 393512) (hereinafter “*Video Dialtone Order*”) (“The
2 Commission has exclusive jurisdiction [over video dialtone services] because the local
3 telephone company facility is an ‘integral component in an indivisible dissemination system
4 which forms an interstate channel of communication.’ Consistent with this approach, the basic
5 video dialtone platform is presumptively an interstate service over which the FCC has exclusive
6 jurisdiction.”).

7 **B. The Fact that Congress Gave States Discrete and Limited Cooperative Roles**
8 **Does Not Diminish the FCC’s Exclusive Jurisdiction over Interstate**
9 **Communications**

10 While it is true that Congress in more recently enacted statutes envisioned “dual federal-
11 state authority and cooperation,” *Mozilla*, 940 F.3d at 80-81, Congress did not alter the federal
12 government’s exclusive jurisdiction over interstate communications.⁴ Rather, Congress has
13 been careful to give the states narrowly tailored roles to play—and in one very prominent
14 instance has even supplanted states’ authority over a critical class of *intrastate* traffic. In each
15 of the instances of cooperative federalism the *Mozilla* panel cited, Congress afforded states only
16 discrete, purpose-specific authority. In none of those instances did Congress open the field of
17 interstate communications to concurrent regulation.

18 For example, 47 U.S.C. § 1301 et seq., provides a role for the states to help the FCC
19 oversee the broadband mapping and affiliated grant program under the 2008 Broadband Data
20 Improvement Act. Similarly, Section 706 of the Telecommunications Act of 1996, 47 U.S.C.
21 § 1302, encourages both the federal government (with exclusive jurisdiction over interstate
22 communications services) and states (with jurisdiction over *intra*-state communications
23 services) to promote advanced telecommunications services to all Americans (but affords
24 *neither* independent authority to take action). 47 U.S.C. § 1302; *Mozilla*, 940 F.3d at 45-46
(upholding FCC determination that Section 706 is not a grant of authority). Section 254 of the

25 ⁴ As the association plaintiffs and United States note, *Mozilla* did not suggest that
26 states have authority to regulate interstate broadband and did not address any claims of field
27 preemption under the Communications Act. *See* Association Br. at 2, 10, 13, 19-20; U.S. Br. at
28 9, 17 n.2. *See also* Lawrence J. Spiwak, *The Preemption Predicament Over Broadband Internet*
Access Services, 21 FEDERALIST SOCIETY REVIEW 32 (2020).

1 Communications Act provides a cooperative role between the federal government and the states
2 in dealing with the multi-billion-dollar universal service program (which also involves both
3 inter-and intra-state communications), 47 U.S.C. § 254, but that state role is narrowly tailored
4 and limited to areas of subsidy collection and distribution, *see id.* § 254(f) (providing that state
5 regulations may not be “inconsistent with the Commission’s rules” or “burden the Federal
6 universal service support mechanisms”).

7 Congress has *never* permitted the individual states to regulate as they please the rates,
8 terms, and conditions of interstate communications services, much less interstate *information*
9 services. To the contrary, Congress has made it abundantly clear that states have no concurrent
10 jurisdiction over those interstate communications services; that authority continues to reside
11 *exclusively* with the FCC. Indeed, if anything, Congress has demonstrated a clear preference for
12 federal control even regarding certain purely intrastate communications—namely, local
13 telephone service. *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 (1999). (“[T]he
14 question ... is not whether the Federal Government has taken the regulation of local
15 telecommunications competition away from the States. With regard to the matters addressed by
16 the 1996 Act, it unquestionably has.”).

17 **C. The FCC Has Steadfastly Retained its Exclusive Jurisdiction Over Title I**
18 **Information Services**

19 While the Communications Act gives the FCC exclusive jurisdiction over *all* interstate
20 communications, including *both* “telecommunications services” under Title II (47 U.S.C. §
21 153(53) and “information services” (*id.* § 153(24)), the case for field preemption is especially
22 clear with regard to information services. The Commission has repeatedly and unambiguously
23 confirmed that it retains exclusive jurisdiction over interstate information services.

24 In 2004, for example, the FCC found that a voice over IP product offering only
25 computer-to-computer service was an information service. *Petition for Declaratory Ruling that*
26 *Pulver.Com’s Free World Dialup is Neither Telecommunications nor a Telecommunications*
27 *Service*, FCC 04-27, MEMORANDUM OPINION AND ORDER, 19 FCC Rcd. 3307 (2004)
28 (hereinafter “*Pulver Order*”). As such, it was subject to federal, not state, control: “[F]ederal

1 authority has already been recognized as preeminent in the area of information services, and
2 particularly in the area of the Internet and other interactive computer services, which Congress
3 has explicitly stated should remain free of regulation.” *Id.* at 3317.

4 The FCC made similar statements each time it classified any form of broadband Internet
5 access as an information service. *See Cable Modem Classification Order* at ¶ 59 (“cable
6 modem service is an interstate information service”); *Wireline Classification Order* at ¶ 110
7 (“we find that we have subject matter jurisdiction over providers of broadband Internet access
8 services); *Wireless Classification Order* at ¶ 28 (“Having concluded that wireless broadband
9 Internet access service is an information service, we also find that the service is jurisdictionally
10 interstate.”); *BPL Classification Order* at ¶ 11) (“Having concluded that BPL-enabled Internet
11 access service is an information service, we also find that the service is an interstate service to
12 the same extent as cable modem service and wireline broadband Internet access service”); *2018*
13 *Order* at ¶ 199 (explaining that “it is well-settled that Internet access is a jurisdictionally
14 interstate service”). To this day, the FCC has never viewed the matter otherwise. In the realm
15 of interstate information services, there simply is no tradition of cooperative federalism. Claims
16 that the FCC has somehow ceded authority to the states are baseless—even assuming that that
17 agency were free to hand over its powers allocated by Congress, which it is not.

18 **D. The 2018 Order’s Transparency Rule Demonstrates the FCC’s Continued**
19 **Exercise of Exclusive Authority over Interstate Communications**

20 As noted above, Congress’s assertion of exclusive federal jurisdiction over interstate
21 communications governs whether the federal government (via the FCC or otherwise) regulates
22 such communications aggressively, modestly, or not at all. Here, though, the fact that the FCC
23 imposed (and continues to maintain) a transparency rule in the *2018 Order* further demonstrates
24 that the federal government continues to exercise its exclusive authority over these interstate
25 communications services. *See 2018 Order* at ¶¶ 209 *et seq.* Indeed, a transparency rule is
26 clearly an act of affirmative regulatory oversight, not abdication. The FCC’s transparency rule
27 requires every broadband provider to publicly disclose, either on an easily accessible website or
28 by transmittal to the FCC, “accurate information regarding the network management practices,

1 performance, and commercial terms of its broadband Internet access services sufficient to
 2 enable consumers to make informed choices regarding the purchase and use of such services
 3 and entrepreneurs and other small businesses to develop, market, and maintain Internet
 4 offerings.” *2018 Order* at ¶ 215.

5 The legal logic behind the FCC’s transparency rule was straightforward: By requiring
 6 Internet Service Providers (“ISPs”) to describe their business practices and service offerings
 7 forthrightly and honestly, the agency ensured that any ISP that engaged in anticompetitive,
 8 unfair, or deceptive conduct in violation of these stated terms would be subject to enforcement
 9 by (*inter alia*) the FTC and the Department of Justice. *See generally 2018 Order* at ¶ 244. And
 10 the Commission’s transparency rule was upheld by the D.C. Circuit in *Mozilla*, 940 F.3d at 47.
 11 Thus, far from abdicating its authority, the federal government—acting via two independent
 12 agencies and the DOJ—remains closely involved in overseeing the broadband marketplace. (In
 13 fact, by returning broadband Internet access services back to a Title I information service, the
 14 FCC was able to put the FTC “back on the beat,” as it was prohibited by law from overseeing
 15 the sector due to the common carrier exemption contained in the Federal Trade Commission
 16 Act. *See* 15 U.S.C. § 45(a)(2); *see also 2018 Order*, Statement of Chairman Ajit Pai (“Two
 17 years ago, the *Title II Order* stripped the FTC of its jurisdiction over broadband providers. But
 18 today, we are putting our nation’s premier consumer protection cop back on the beat.”)).

19 **E. Even SB-822’s Legislative Sponsor Concedes Federal Supremacy over**
 20 **Interstate Communications**

21 What is particularly interesting about this case is that even the legislative sponsor of SB-
 22 822—California State Senator Scott Wiener—never denies that California is intruding into a
 23 field Congress specifically assigned to the FCC. Indeed, at a press conference he held on the
 24 legislature’s steps in support of the passage of SB-822, Senator Wiener specifically stated that it
 25 is the Commission’s “job” to set Internet policy. *See* YouTube: *Senator Wiener: Net Neutrality*
 26 *Press Conference Streamed live on May 29, 2018* (video starting at 5:19). But Senator Wiener
 27 was dissatisfied with how the Commission did that job. In Senator Wiener’s view, “because
 28 Donald Trump [came] into office and his FCC” reversed the Obama-era *2015 Order* by

1 replacing it with the *2018 Order*, we now are left with “essentially no federal net neutrality
 2 protections.” (YouTube, *id*) Unfortunately for Senator Wiener, Congress’s clear assertion of
 3 exclusive federal authority over interstate communications services (and especially over
 4 interstate *information* services) is not dependent on his approval of the regime the federal
 5 government selects. SB-822 improperly intrudes into the exclusive jurisdiction Congress
 6 granted to the FCC over interstate communications and is therefore ripe for field preemption.

7 **II. SB-822 Unconstitutionally Intrudes into the FCC’s Exclusive Jurisdiction Over**
 8 **Interstate Communications Services**

9 **A. By its Own Terms, SB-822 Seeks to Assert Jurisdiction Over an Interstate**
 10 **Service**

11 Despite Congress’s decision to give the federal government exclusive jurisdiction over
 12 all interstate communications services, California seeks to extend its jurisdictional grasp into
 13 interstate commerce by defining “broadband Internet access services” as “a mass-market retail
 14 service by wire or radio provided to customers in California that provides the capability to
 15 transmit data to, and receive data *from, all or substantially all Internet endpoints.*” Cal. Civ.
 16 Code §3100(b) (emphasis supplied). SB-822 thus explicitly regulates California customers’
 17 interactions with websites and other content located outside of California—*i.e.*, their *interstate*
 18 traffic. *See, e.g., Vonage Order* at ¶ 6 (“When a service’s end points are in different states or
 19 between a state and a point outside the United States, the service is deemed a purely interstate
 20 service subject to the Commission’s exclusive jurisdiction.”). Given the FCC’s occupation of
 21 the entire field of interstate communications, California’s improper attempt to assert its police
 22 power over interstate communications (*see* SB-822 Section 1(a)(1) (“This act is adopted
 23 pursuant to the police power inherent in the State of California....”) is unconstitutional, *see*
 24 *Arizona v. United States, supra*. As such, SB-822 is preempted in its entirety, regardless of its
 25 savings clause (*see* Cal. Civ. Code Section 3).

26 **B. SB-822 Frustrates Other Congressional Mandates**

27 That SB-822 impermissibly regulates in a federal field is also demonstrated by the
 28 FCC’s other statutory responsibilities under the Communications Act. These responsibilities

1 include, *inter alia*, the Congressional mandate contained in Section 230 to “promote the
2 continued development of the Internet” (47 U.S.C. § 230(b)(1)) in a manner “unfettered by
3 Federal or State regulation” (47 U.S.C. § 230(b)(2)) and the Congressional command in Section
4 706 for the agency to “encourage the deployment on a reasonable and timely basis of advanced
5 telecommunications capability to all Americans.” 47 U.S.C. § 1302(a).

6 Indeed, one does not have to be a communications-law specialist to understand that
7 allowing each state to regulate the rates, terms, and conditions of ISPs’ service offerings as they
8 deem fit will clearly have adverse extrajudicial effects on interstate commerce. As noted above,
9 the FCC recognized this problem almost twenty years ago in the *Pulver Order*, and the
10 fundamental economics of broadband deployment have not changed since then. *See, e.g.,*
11 *Pulver Order* at ¶ 25 (“[A]llowing the imposition of state regulation would eliminate any benefit
12 of using the Internet to provide the service: the Internet enables individuals and small providers,
13 such as Pulver, to reach a global market simply by attaching a server to the Internet; requiring
14 Pulver to submit to more than 50 different regulatory regimes as soon as it did so would
15 eliminate this fundamental advantage of IP-based communication.”).

16 An economic analysis focused on the communications sector illustrates the problem of
17 having providers of a national service comply with different state rules, some of which may
18 even go farther than the national rules. As the paper’s economic model details, when state law
19 applies to a product or service that is actually national in scope such as telecommunications or
20 the Internet, even if each state acts with the purest of intentions to protect their respective
21 constituents’ interests, there is the risk of harmful conflicts in the rules as the states will
22 inevitably vary in their legal regimes. As a result, there will be *extra-jurisdictional effects* of
23 state-by-state regulation on a national service, making society worse off. T.R. Beard, G.S. Ford,
24 *et al., Developing A National Wireless Regulatory Framework: A Law and Economics*
25 *Approach*, 16 COMMLAW CONSPECTUS 391 (2008). As former FCC Chief Economist Michael
26 Katz stated regarding state-level business rules, “policies that make entry difficult in one
27 geographic area may raise the overall cost of entering the industry and thus reduce the speed at
28

1 which entry occurs in other areas.” M.L. Katz, *Regulation: The Next 1000 Years*, in SIX
2 DEGREES OF COMPETITION: CORRELATING REGULATION WITH THE TELECOMMUNICATIONS
3 MARKETPLACE 27, 44 (2000). Accordingly, when state and local regulation can spill across
4 borders, as is the case with communications regulation, economics dictate that society is
5 typically better off with a single national regulatory framework. This is precisely why Congress
6 gave the FCC—and not the individual states—exclusive jurisdiction over interstate
7 communications.

8 Firms are also not passive recipients of regulation. If we have learned anything from the
9 FCC’s ill-conceived *2015 Order*, it is that firms will not invest aggressively in the massive sunk
10 costs necessary when economic profits are under attack. The *2018 Order* eliminated the federal
11 threat, reigniting investment. But a regulatory “Sword of Damocles” threatening “Death by
12 Fifty State Regulatory Cuts” would exert a similar (and perhaps greater) chilling effect on the
13 investment decision of ISPs. G.S. Ford, *Regulation and Investment in the U.S.*
14 *Telecommunications Industry*, 56 APPLIED ECONOMICS 6073 (2018). The potential for
15 aggressive and, more importantly, *inconsistent* regulation of the Internet from fifty different
16 states will in turn inhibit the FCC’s ability to fulfil the congressional directives contained in
17 Section 230 and Section 706. *See also* Preamble, Telecommunications Act of 1996, Pub. L. No.
18 104-104, 110 Stat. 56 (in passing the Telecommunications of Act of 1996, the goal of Congress
19 was to “promote competition and reduce regulation in order to secure lower prices and higher
20 quality services for American telecommunications consumers and encourage the rapid
21 deployment of new telecommunications technologies.”).

22 CONCLUSION

23 For the reasons set forth above, we join with the Plaintiffs and respectfully ask this Court
24 to grant their motion for preliminary injunction.

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3

4 /s/ L. Charles Keller

5 L. Charles Keller (CA SBN 169573)
6 WILKINSON BARKER KNAUER LLP
7 1800 M Street, N.W., Suite 800 N
8 Washington, D.C. 20036
9 (202) 783-4141
10 ckeller@wbklaw.com

11 Lawrence J. Spiwak (pro hac pending)
12 President and General Counsel
13 Phoenix Center for Advanced Legal &
14 Economic Public Policy Studies
15 5335 Wisconsin Avenue, NW
16 Suite 440
17 Washington, D.C. 20015
18 (202) 274-0235
19 lspiwak@phoenix-center.org

20 *Attorneys for Amici Communications Law*
21 *Scholars*
22
23
24
25
26
27
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CERTIFICATE OF SERVICE

I hereby certify that, on August 19, 2020, I electronically submitted the foregoing 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.

/s/ L. Charles Keller
L. Charles Keller (CA SBN 169573)
WILKINSON BARKER KNAUER LLP
1800 M Street, N.W., Suite 800 N
Washington, D.C. 20036
(202) 783-4141
ckeller@wbklaw.com