No. 21-15430

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ACA CONNECTS – AMERICA'S COMMUNICATIONS ASSOCIATION,
CTIA – THE WIRELESS ASSOCIATION,
NCTA – THE INTERNET & TELEVISION ASSOCIATION, and
USTELECOM – THE BROADBAND ASSOCIATION,
Plaintiffs-Appellants,

v.

ROB BONTA, in his official capacity as Attorney General of California,
Defendant-Appellee.

On Appeal from the United States District Court for the
Eastern District of California, No. 2:18-cv-02684, Hon. John A. Mendez

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2015 Order	Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015)
2018 Order	Declaratory Ruling, Report and Order, and Order, *Restoring Internet Freedom*, 33 FCC Rcd. 311 (2018)
Access Now Br.	Brief of Access Now *et al.* as *Amici Curiae* in Support of Appellee
Chamber Br.	Brief of the Chamber of Commerce of the United States of America *et al.* as *Amici Curiae* in Support of Appellants
Chevron	*Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)
CLP Br.	Brief of Professors of Communications Law and Media Democracy Fund as *Amici Curiae* in Support of Appellee
EFF Br.	Brief of *Amici Curiae* Electronic Frontier Foundation *et al.* in Support of Appellee
FCC	Federal Communications Commission
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
FTC	Federal Trade Commission
Gov't Pet'r *Mozilla* Br.	Brief of Government Petitioners, *Mozilla Corp. v. FCC*, Nos. 18-1051 *et al.* (D.C. Cir. Nov. 27, 2018), https://bit.ly/3u3ofzZ
ICLE Br.	Brief of *Amicus Curiae* International Center for Law & Economics in Support of Appellants

ILP Br.	Brief of *Amici Curiae* Internet Law Professors in Support of Appellee
ISP	Internet service provider
Mozilla	*Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019)
NGA	Natural Gas Act
SB-822	California Internet Consumer Protection and Net Neutrality Act of 2018, Cal. Civ. Code § 3100 *et seq.*
States Br.	Brief for the State of New York *et al.* as *Amici Curiae* in Support of Appellee
TechFreedom Br.	Brief of TechFreedom as *Amicus Curiae* in Support of Appellants
Title I	Communications Act of 1934, tit. I, 47 U.S.C. § 151 *et seq.*
Title II	Communications Act of 1934, tit. II, 47 U.S.C. § 201 *et seq.*
Tr.	Transcript of Proceedings, *American Cable Ass'n v. Becerra*, No. 2:18-cv-02684 (E.D. Cal. Feb. 23, 2021) (ER-7–78)
Yoo Br.	Brief of *Amicus Curiae* Professor Christopher S. Yoo in Support of Appellants

INTRODUCTION AND SUMMARY

California defends SB-822 with a series of radical propositions. As California and its amici see it, all 50 states are free to impose potentially conflicting net neutrality requirements on interstate broadband Internet access service providers. And those states may enact the same (or more burdensome) requirements as those the FCC repealed in 2018 based on its determination (which California and other states unsuccessfully challenged) that federal objectives are best served by repealing its prior common-carrier rules, restoring the "information service" classification, and relying on a disclosure-based regime.

But California's theory is not the law. This Court long ago confirmed that conflict preemption applies when the FCC is "implement[ing] the more general goals of Title I." *California v. FCC*, 39 F.3d 919, 932 (9th Cir. 1994). And as *Mozilla* likewise recognized, any state law that "actually undermines the 2018 Order" is conflict preempted. 940 F.3d 1, 85 (D.C. Cir. 2019). Yet California and its amici claim the core rulings in the 2018 Order have no preemptive effect because the FCC's choice of the information-service classification purportedly means that it lacked statutory authority to impose the rules in SB-822. In fact, D.C. Circuit precedent gave the FCC three options: (1) full-fledged common-carrier mandates under Title II, (2) more modest conduct rules under § 706 of the 1996 Act, and (3) a transparency-based regime under Title I. In choosing option

three, the FCC exercised congressionally delegated authority, as *Mozilla* held, and its policy-based decision to fence off broadband from conduct rules gives rise to conflict preemption.

Conflict preemption arises independently under § 153(51) and § 332(c)(2), which prohibit imposing common-carrier duties on interstate information services and private mobile services. The history informing each provision refutes California's attempt to infer from the phrase "under this chapter" that Congress was indifferent to the prospect of any or every state doing what Congress forbade the FCC from doing.

SB-822 also regulates in a preempted field. California and its amici offer no plausible basis for distinguishing cases that interpret similar language in other contemporaneous statutes to occupy their interstate fields. Recognizing field preemption does not create a regulatory "vacuum" or displace any history of state regulation; California's assertion of authority to dictate how *interstate* communications services may be provided is unprecedented.

California and its amici fare no better on the other preliminary injunction factors. They ignore the presumption of irreparable harm for Supremacy Clause violations and fail to rebut clear evidence of harm in the record. And there is no evidence that broadband providers violated their commitments to Internet openness and every indication that Internet innovation, investment, and competition have

flourished absent heavy-handed, common-carrier regulation. A preliminary injunction is amply justified.

ARGUMENT

I. THE 2018 ORDER PREEMPTS SB-822

A. The 2018 Order's Reclassification Decision Was a Lawful Exercise of Statutory Authority with Preemptive Effect

This Court has already rejected California's and its amici's claim that the FCC's classification of broadband as a Title I information service deprived it of authority and foreclosed conflict preemption. *See* California Br. 23; CLP Br. 5; States Br. 6 & n.1. Indeed, this Court stated that it "must . . . reject" the position — which California and its amici repeat — that "no preemption authority exists" where the FCC is "implement[ing] the more general goals of Title I." *California*, 39 F.3d at 932.[1]

California thus forecloses the argument that the FCC's Title I classification deprives the 2018 Order of preemptive effect. This Court there found conflict preemption where an interstate enhanced service provider "would be forced to comply with the state's more stringent [intrastate] requirements, or choose not to

[1] This area has a "history of significant federal presence," foreclosing any presumption against preemption. *United States v. Locke*, 529 U.S. 89, 108 (2000); *accord Ting v. AT&T Corp.*, 319 F.3d 1126, 1136 (9th Cir. 2003). Contrary to amici's suggestion (ILP Br. 4 & n.3), *Wyeth v. Levine* did not change the law; it involved an area with both a "historic presence of state law" and an "absence of federal regulation." 555 U.S. 555, 565-66 & n.3 (2009).

offer certain enhanced services, thereby defeating the FCC's more permissive [Title I] policy." *Id.* at 933. California claims (at 23 n.8) that this Court's recognition of the FCC's ancillary authority over interstate enhanced services distinguishes that case. But the same is true as to broadband, as the Supreme Court has confirmed: "the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction." *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 996 (2005).

Moreover, California's assertion (at 20-24) that the FCC's repeal of the 2015 Order's common-carrier regulations reflected a "lack of authority" mischaracterizes the 2018 Order. By 2018, the D.C. Circuit had twice held that the FCC *had statutory authority* to impose net neutrality requirements no matter how broadband is classified. First, in *Verizon v. FCC*, the court confirmed that, even when the agency classifies broadband as a Title I information service, it still has authority to impose non-common-carrier conduct rules under § 706 of the 1996 Act. 740 F.3d 623, 636-42 (D.C. Cir. 2014). Second, in *USTelecom v. FCC*, after the FCC made a policy decision favoring common-carrier rules and therefore classified broadband as a Title II telecommunications service, the court upheld the agency's authority to adopt that classification and those rules. 825 F.3d 674, 707 (D.C. Cir. 2016).

Based on this precedent, the FCC had *three* statutorily authorized options: common-carrier regulation under Title II; non-common-carrier conduct rules under § 706; or light-touch regulation under Title I. The FCC determined that the former two options imposed more costs than benefits, *see* 2018 Order ¶¶ 239, 246-266, 283, and therefore made the deliberate choice to fence off broadband from such regulation by choosing option three.

These options refute the efforts by California (at 23 n.8) and its amici (CLP Br. 7-8) to distinguish cases such as *Ray v. Atlantic Richfield Co*, 435 U.S. 151 (1978). As in *Ray*, the FCC here chose for policy reasons not to exercise its "full authority" under the statute, such that the 2018 Order "takes on the character of a ruling that no such regulation is appropriate or approved." *Id.* at 178. Given the FCC's decision to change the classification and repeal the conduct rules, based on carefully considered findings and policy conclusions, "States are not permitted to use their police power to enact . . . a regulation" that countermands that decision. *Id.*; *see* Yoo Br. 8-10 & n.1 (citing additional authorities).

California nonetheless attempts (at 26-33) to sever the FCC's *decision* to reclassify broadband from the *reasons* for that decision — contending that those reasons lack preemptive effect. California's amici similarly seek to diminish the classification decision as merely "jurisdictional." CLP Br. 10. But the FCC's policy objectives have *always* been part and parcel of its classification decisions

and cannot be surgically excised and set aside. *See* Appellants Br. 30-33, 35-38. And the Supreme Court has rejected the distinction California and its amici would draw. *See City of Arlington v. FCC*, 569 U.S. 290, 297-98 (2013) ("[T]here is no principled basis for carving out [from *Chevron*] some arbitrary subset of such claims as 'jurisdictional.'").

The FCC repeatedly made clear that its classification decision represented an affirmative act of deregulation — and that policy considerations were at the core of the decision to replace the 2015 Order's conduct rules with a disclosure-based regime. *See* Yoo Br. 17-18. The elimination of the conduct rules was not a mere byproduct of a legal determination that the FCC lacked authority to impose such mandates, as California claims (at 20-24):

> 2018 Order ¶ 1: "We eliminate burdensome regulation that stifles innovation and deters investment, and empower Americans to choose the broadband Internet access service that best fits their needs."
>
> ¶ 2: "We determine that this light-touch information service framework will promote investment and innovation better than applying costly and restrictive laws of a bygone era to broadband Internet access service."
>
> ¶ 4: "The record evidence, including our cost-benefit analysis, demonstrates that the costs of [conduct] rules to innovation and investment outweigh any benefits they may have."
>
> Part III.C.1 (¶¶ 88-108): "Title II regulation imposes substantial costs on the Internet ecosystem."
>
> ¶ 239: "We eliminate the conduct rules . . . . [because] the transparency rule we adopt, in combination with the state of broadband Internet access service competition and the antitrust and

> consumer protection laws, obviates the need for conduct rules . . . . [and] scrutinizing closely each prior conduct rule, we find that the costs of each rule outweigh its benefits."

Controlling precedent holds that the FCC's policy determinations provide a valid predicate for preemption. A state law that "stands as an obstacle to the accomplishment and execution of the full *purposes and objectives*" of federal law is preempted. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (emphasis added). And state law can neither "conflict[] with [agency] regulations *[n]or frustrate[] the purposes thereof*." *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (emphasis added). Given that the unmistakable purpose of the 2018 Order was to prevent the application of common-carriage mandates to broadband — including the very measures in SB-822 — California's attempt to veto the FCC's policy choice plainly "frustrates the purposes" of that Order.[2]

Ironically, California argued that the 2018 Order should be vacated *because* the FCC's policy justifications for the information-service classification were allegedly flawed. *See, e.g.*, Gov't Pet'r. *Mozilla* Br. 16-17 (arguing that the FCC's "deeply flawed" policy analysis "unreasonably disregarded" the States' concerns

[2] California's reliance (at 22) on *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), is unavailing. There the Court found no preemption where, unlike here, the regulator "informed [the Court] that the agency does not view [its] refusal to regulate . . . as having any pre-emptive effect." *Id.* at 67-68. *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894 (2019), is likewise inapposite, as there was no regulatory order in that case.

and evidence). California lost that argument, which is fatal under conflict preemption. *See Reid v. Johnson & Johnson*, 780 F.3d 952, 964 (9th Cir. 2015) ("In both *Chevron* and preemption contexts, a central inquiry is whether an agency has validly created federal law pursuant to the gap-filling power delegated to it by Congress."). No precedent supports the radical proposition that a state can challenge nationwide federal regulatory action, lose, and then veto that result by imposing the *same* regulations the agency repealed as a purported exercise of police power.[3]

B. The Transparency Rule Independently Preempts SB-822

Although California accepts (at 30) that the Transparency Rule is the type of statutorily authorized action that gives rise to conflict preemption, it mistakenly contends (at 25-26) that SB-822 does not conflict with it.

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[3] California asserts (at 32) that it would be "anomalous" to accord preemptive effect to an FCC classification issued at *Chevron* step two but not to a *Chevron* step one classification (i.e., for services that are "*unambiguously*" information services). But an agency's *Chevron* step one determination has no less preemptive effect; such a ruling would mean that the conflict preemption flows from the statute.

Contrary to the suggestion of California's amici (CLP Br. 11), Congress's decision in § 153(51) to allow the FCC to exclude from common-carrier regulation satellite services that *Congress* classified as telecommunications services does not diminish the conflict preemption that arises from the 2018 Order. *USTelecom* held that Congress permitted the FCC at *Chevron* step two to classify broadband as a telecommunications service for policy reasons, *see* 825 F.3d at 704, just as *Brand X* and *Mozilla* held that policy determinations provided sufficient reason to classify it as an information service, *see Brand X*, 545 U.S. at 997; *Mozilla*, 940 F.3d at 20.

The Transparency Rule is the cornerstone of the 2018 Order's competition-based regulatory regime. *See* 2018 Order ¶ 239 ("[T]he transparency rule we adopt, in combination with the . . . competition and the antitrust and consumer protection laws, obviates the need for conduct rules."); *Mozilla*, 940 F.3d at 46-47 (finding the Transparency Rule was an "essential component[]" of the FCC's rescission of the conduct rules). It is California's decision to impose conduct rules *in addition to* disclosure obligations meant to *replace* such rules that causes those conduct rules to conflict with the 2018 Order (not 47 U.S.C. § 257 itself). *See* Yoo Br. 11-13; *City of New York*, 486 U.S. at 64 (where "state law is claimed to be pre-empted by federal regulation, a narrow focus on Congress's intent to supersede state law is misdirected" (cleaned up)). The conflict between SB-822's conduct rules and the 2018 Order could not be clearer and is not eliminated by California's assertion (at 25) that SB-822's disclosure requirement is "nearly identical[]" and "does not prevent the FCC from collecting information."[4]

C. *Mozilla* Anticipated and Embraced Appellants' Conflict-Preemption Claim

California and its amici repeatedly mischaracterize *Mozilla*, which explicitly rejected their arguments. California concedes (at 30) that "*Mozilla* recognized that

[4] California erroneously relies (at 26) on § 1304, which provides no state authority to regulate broadband providers. Instead, it authorizes the Commerce Secretary to award grants to States to study and encourage broadband deployment.

any state practice that actually undermines the 2018 Order would be subject to conflict preemption." That concession is dispositive. California does not dispute that imposing on the same interstate broadband service the very requirements the FCC repealed directly undermines the FCC's decision to repeal those rules in favor of a disclosure-based regime.

California's only response is to claim (at 30) that *Mozilla* merely meant that conflict preemption would exist if "a state law . . . prohibit[ed] [broadband] providers from disclosing" information the Transparency Rule requires. That cramped reading of *Mozilla* does not pass the straight-face test. *Mozilla* recognized that conflict preemption applies to any state law that "actually undermines *the 2018 Order*," 940 F.3d at 85 (emphasis added), not merely the Transparency Rule. The court further emphasized that it was "premature" to decide the implied preemptive effect of "the remaining portions" — plural — "of the 2018 Order" because "no particular state law [was] at issue." *Id.* at 86. That explanation refutes California's assertion that *Mozilla* holds that those "remaining portions" — the FCC's reclassification and repeal of conduct rules — have no conflict-preemptive effect.

California and its amici compound their error by conflating conflict preemption with express preemption and arguing that *Mozilla*'s ruling on the latter controls this Court's consideration of the former. *See, e.g.*, California Br. 23-24;

States Br. 2; ILP Br. 13, 15-16. *Mozilla* explicitly warned against such conflation. That court vacated the FCC's express preemption ruling because it concluded that the agency could not "wipe out a broader array of state and local laws than traditional conflict preemption principles would allow." 940 F.3d at 74. But *Mozilla* did not foreclose — and indeed contemplated — a finding of conflict preemption in individual cases. Notably, the dissenting judge argued that *Mozilla* would allow "each of the 50 states . . . to impose" the "heavy hand of Title II for the Internet," and *cited SB-822* as such a law. 940 F.3d at 95 (Williams, J., concurring in part and dissenting in part). The majority pointed to the continued availability of conflict preemption as the reason he was wrong, characterizing his argument as a "straw man." *Id.* at 85. California cannot resurrect that strawman here.[5]

II. SB-822 CONFLICTS WITH THE COMMUNICATIONS ACT

A. SB-822 conflicts with the Communications Act because it imposes common-carrier regulations on interstate information services and private mobile

[5] California's reliance (at 24 n.9 & 33) on individual, non-precedential opinions of two Justices highlights its disregard for the Supreme Court's holdings on conflict preemption. In any event, other opinions by those Justices indicate that they do not share California's view of the law. *See, e.g.*, *De Niz Robles v. Lynch*, 803 F.3d 1165, 1173 (10th Cir. 2015) (Gorsuch, J.) (an agency "exercising its *Chevron* step two/*Brand X* powers" "avowedly and self-consciously . . . exercises its delegated policy-making authority to write a new rule of general applicability"); *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 613-17, 626 (2011) (Thomas, J.) (finding conflict preemption based on agency interpretation of federal law).

services, which Congress exempted from such regulations. California first responds (at 34 n.12) with an argument it waived below: that SB-822 might not impose common-carrier regulations. Appellants argued at length to the district court that SB-822, like the 2015 Order, imposes common-carrier regulations. *See* Pls. Br. 16-18 (ECF 53-1). California's response was a short footnote stating only that it did "not concede" the point, but offering no argument. Cal. Br. 28 n.25 (ECF 57). That footnote did not preserve the argument for appeal. *See Int'l Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985). California's similarly half-hearted suggestion (at 56 n.24) that SB-822 might not regulate jurisdictionally interstate communications services was also not argued below and, therefore, waived. And California does not dispute that SB-822's definition of the service it regulates is the same as the FCC's definition of the interstate broadband service that was the subject of its 2015 and 2018 Orders. *See* Appellants Br. 49-50.

The question here is therefore whether § 153(51) and § 332(c)(2) reflect congressional indifference to the prospect of any or all of the 50 states doing what Congress forbade the FCC from doing: regulating providers of interstate information services and private mobile services as common carriers. The history informing those provisions forecloses California's answer, which would enable

states to erect clear "obstacle[s]" to Congress's manifest "purposes and objectives." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1023 (9th Cir. 2013).

Section 153(51) codified decades of FCC decisions that *interstate* enhanced services should be immune from common-carrier regulations. *See* Appellants Br. 8-11, 44-46. Over those decades, no state ever attempted to countermand that mandate. Rather, in the cases California cites (at 43-44), states attempted to continue common-carrier regulation of *intrastate* enhanced services, despite the FCC's Title I regulation of their interstate counterparts. *See California*, 39 F.3d at 932-33; *California v. FCC*, 905 F.2d 1217, 1228-29 (9th Cir. 1990); *CCIA v. FCC*, 693 F.2d 198, 209-12 (D.C. Cir. 1982).[6] If California were correct that states could impose common-carrier regulation on Title I *interstate* services, these cases would have been argued and decided differently. And it would have been a sea change if Congress, in codifying the FCC's decisions so the agency could not reverse course, had opened interstate information services for the first time to state common-carrier regulation. On the contrary, as Appellants showed (at 54) and neither California nor its amici dispute, the 1996 Act extended federal law into areas of historical state authority; it did not create a "surpassing strange" regime of state

[6] California (at 43-44) also cites *NARUC v. FCC*, which addressed preemption of state regulation of "intrastate . . . communications" services. 533 F.2d 601, 606 (D.C. Cir. 1976).

control of interstate communications services. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999).

California also ignores Congress's contemporaneous statement of its intent that the Internet should be "preserve[d]" as it "presently exists . . . , unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). This Court correctly read § 230(b)(2) to state a "policy goal" of excluding information service providers from common-carrier regulation, implicitly rejecting amici's view that § 230(b)(2) is only about facilitating parental filtering controls of harmful Internet content. *Compare Howard v. Am. Online Inc.*, 208 F.3d 741, 752-53 (9th Cir. 2000) *with* CLP Br. 29-30.[7]

The history of § 332(c)(2) similarly refutes California's assertion that Congress was unconcerned if states regulated private mobile services in ways denied to the FCC. Congress enacted § 332(c)(2) to *eliminate* the FCC's prior

[7] The limited examples of telecommunications service classifications California and its amici cite are not to the contrary. *See* California Br. 8 n.3; ILP Br. 24 n.10. The "DSL telephone lines" California references were "pure transmission services" that provided no "Internet access" without a separately purchased "information service." Memorandum Opinion & Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd. 24012, ¶¶ 35-36 (1998). Similarly, *AT&T Corp. v. City of Portland*, held that, "[t]o the extent" a cable company "is a conventional ISP, its activities are that of an information service," but that the cable company's last-mile "pipeline" — which it used "instead of telephone lines" when selling broadband — was a telecommunications service. 216 F.3d 871, 878 (9th Cir. 2000). *Brand X* upheld the FCC's rejection of that latter holding.

inconsistent patchwork mobile service regulation, *see* Appellants Br. 46-47, by bringing "all mobile service providers under a comprehensive, consistent regulatory framework."[8] Again, it is implausible that Congress was simultaneously unconcerned that states might create 50 different regulatory schemes governing private mobile service providers.

B. The history against which Congress enacted § 153(51) and § 332(c)(2) belies the anti-conflict-preemption meaning California ascribes (at 34-37) to the phrase "under this chapter" in each provision. In addition, this Court has already recognized that "under this chapter" instead ensures that companies offering multiple services, including common-carrier telecommunications services, remain subject to FTC jurisdiction when they are offering information services. *See FTC v. AT&T Mobility LLC*, 883 F.3d 848, 861-64 (9th Cir. 2018). California's response (at 36 n.13) — that the Court did not *quote* the words "under this chapter" — ignores the Court's express identification of this aspect of both provisions as providing further support for its holding. *See id.* at 862.

California also misconstrues (at 42-43) cases holding that a prohibition on federal regulations also forecloses identical state regulation absent explicit congressional authorization. In *Public Utility District No. 1 of Grays Harbor*

[8] Second Report & Order, *Implementation of Sections 3(n) & 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd. 1411, ¶ 12 (1994).

County Washington v. IDACORP Inc., this Court held that *both* conflict *and* field preemption independently applied where "Congress withheld [from FERC] the authority to grant retroactive rate increases." 379 F.3d 641, 647-50 (9th Cir. 2004). In *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi*, the Supreme Court similarly identified conflict and field preemption as "two considerations" that each resulted in preemption: first, allowing state law "to regulate directly the prices" of gas would "directly undermine[]" Congress's denial to FERC of "the power to regulate" those prices; and, second, state action would "disturb[] the uniformity of the federal scheme." 474 U.S. 409, 422-23 (1986).[9]

In none of the cases California cites (at 35-36) did Congress *prohibit* certain regulation. The Supreme Court held in *Chamber of Commerce v. Whiting* that a statute *permitting* the Department of Homeland Security to compel employer participation in e-Verify as a sanction did not prevent Arizona from compelling broad employer participation in that program, which was compatible with the federal government's "consistent[] expan[sion]" of e-Verify. 563 U.S. 582, 608-09 (2011). Likewise, in *Greater L.A. Agency on Deafness, Inc. v. CNN, Inc.*,

[9] Contrary to the claims of California's amici (CLP Br. 24-25), *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.* held only that federal preemption does not persist after the "repeal" of an entire statute — there, emergency price controls responding to the 1970s oil crisis. 485 U.S. 495, 503-04 (1988). *Isla Petroleum* reaffirmed that where, as here, Congress "intentionally leaves a portion of the regulated field without controls," a "pre-emptive inference can be drawn." *Id.* at 503.

California permissibly extended federal law *mandating* closed captioning for a "subset" of online videos to a broader set that Congress had not exempted from such regulation. 742 F.3d 414, 429-31 (9th Cir. 2014) ("*GLAAD*"). In neither case did federal law expressly bar the very regulations a state sought to impose on the same exempted service.[10]

C. Section 601(c)(1) does not support California's argument. California does not dispute that § 153(51) codified decades of FCC orders, which themselves preempted state common-carrier regulation of interstate enhanced services. Therefore, SB-822 conflicts with federal law that pre-dates the "Act and the amendments" to which § 601(c)(1) applies. Amici's observation (CLP Br. 31) that those earlier decisions were a matter of agency discretion ignores that those decisions had preemptive effect. *See City of New York*, 486 U.S. at 64. The 1996 Act continued, but did not create, the conflict preemption.

By protesting that other circuits construing § 601(c)(1) erred, California confirms (at 41) that adopting *its* reading of § 601(c)(1) to allow actual conflicts with federal law would create a circuit split. Contrary to California's claim (at 40),

[10] *See also Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 383-85 (1983) (federal agency's decision that jurisdiction belongs to *another* federal agency, "purely as a jurisdictional matter," does not foreclose state regulation); *City of Dallas v. FCC*, 165 F.3d 341, 345, 347-48 (5th Cir. 1999) (construing traditional state authority over access to local rights of way).

this Court has not already adopted California's expansive reading of § 601(c)(1).[11] *Abrams v. City of Rancho Palos Verdes* was a federal § 1983 action and did not involve state law or conflict preemption. *See* 354 F.3d 1094, 1099-101 (9th Cir. 2004). The Supreme Court also reversed this Court's decision to allow the § 1983 claim to proceed, rejecting this Court's broad reading of § 601(c)(1). *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120-21, 125 (2005). In *GLAAD*, this Court cited § 601(c)(1) as support for the (inapposite) proposition that a 2010 law "deal[ing] with closed captioning of television programming" did not occupy the "field of closed captioning of videos on the Internet." 742 F.3d at 428.[12]

D. California's attempt to contrast (at 37-39) the absence of express preemptive language in § 153(51) and § 332(c)(2) — irrelevant to conflict preemption, *see* Appellants Br. 42-43 — with express preemption provisions elsewhere in the Communications Act fares no better. The provisions California cites (at 38 n.14) expressly preempt *intrastate* regulation. Section 332(c)(3), for

[11] Nor has any other circuit, again contrary to California's suggestion (at 40). *Compare City of Dallas*, 165 F.3d at 348 (federal law does not preempt states' *intrastate* franchising authority); *Pinney v. Nokia*, 402 F.3d 430, 458 (4th Cir. 2005) (federal preemption of *intrastate regulation* does not also preempt "state tort law"); *AT&T Commc'ns of Ill. v. Ill. Bell Tel. Co.*, 349 F.3d 402, 410 (7th Cir. 2003) ("Federal law [that] names the state public utilities commission as regulator" does not "oust[] the state legislature [from rate-setting] by implication.").

[12] California correctly does not claim that § 601(c)(1) applies to § 332(c)(2), which was enacted in 1993.

example, preempts state entry and rate regulation "[n]otwithstanding section 152(b) and 221(b) of this title" — two provisions that preserve state authority to regulate *intrastate* communications services. *See also* 47 U.S.C. §§ 276(c) (intrastate payphone service), 543(a)(1) (intrastate cable rates), 544(e) (cable television equipment and local franchising), 556(c) (same). Other provisions California cites preempt state laws regulating particular uses by third parties of communications services, *see id.* §§ 223(f)(2) (publishing obscene or offensive material), 230(e)(3) (same), or generally applicable rights of way and zoning laws when they have an effect on communications services, *see id.* §§ 253(a), (d), 332(c)(7).

In all events, Congress can employ "a belt and suspenders approach" for avoidance of doubt. *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1350 n.5 (2020). Doing so does not enable California's first-of-its-kind attempt to abrogate the Communications Act by imposing common-carrier regulations on interstate information services and private mobile services that are statutorily immune from that treatment.

III. FIELD PREEMPTION APPLIES BECAUSE SB-822 DIRECTLY REGULATES INTERSTATE COMMUNICATIONS SERVICES

A. SB-822's regulation of broadband — defined as an interstate service that enables communications between California customers and "all or substantially all Internet endpoints," Cal. Civ. Code § 3100(b) — occurs within a

field Congress has occupied for more than a century. *See* Appellants Br. 5-6, 49-58. The federal occupation of this field has always excluded state action that, like SB-822, dictates how *interstate* communications services may be provided, *see Western Union Tel. Co. v. Boegli*, 251 U.S. 315, 316-17 (1920), while generally preserving state authority to regulate *intrastate* communications services.

Congress used substantially similar language — providing that federal law "shall apply" to the "interstate," but not "intrastate," services — in several 1930s regulatory statutes. *See* 16 U.S.C. § 824(b)(1) (FPA); 15 U.S.C. § 717(b)-(c) (NGA); 47 U.S.C. § 152 (Communications Act). It is well established (and undisputed) that this language in the FPA and NGA occupies the interstate field. *See, e.g.*, *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292, 1297 (2016) (FPA); *Grays Harbor*, 379 F.3d at 649 (FPA); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300, 306 (1988) (NGA); *Transcon. Gas*, 474 U.S. at 421 (NGA).[13]

And the Supreme Court, this Court, and other federal courts have repeatedly described this same language in § 152 as granting the FCC exclusive jurisdiction over interstate communications services — or, in the Supreme Court's words (which California and its amici ignore), "plenary authority" over this "interstate

[13] Although Congress enacted the NGA to address industry-specific issues, *see* ILP Br. 9, its "basic purpose" was, like the Communications Act, "to occupy this field in which the Supreme Court has held that the States may not act." *Interstate Nat. Gas Co. v. FPC*, 331 U.S. 682, 690 (1947).

service." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986); *see California v. FCC*, 4 F.3d 1505, 1514 (9th Cir. 1993) (§ 152 "delineates a strict separation between interstate and intrastate jurisdiction"); *see also* Appellants Br. at 5-6, 51, 54 (collecting cases). California's ahistorical approach also ignores the Supreme Court's admonition in *California v. FERC* — a case Appellants discussed at length (at 53-54) and California and its amici never mention — not to "revisit" the field-preemptive effect of a 1930s statute establishing a "highly complex and long-enduring regulatory regime." 495 U.S. 490, 497-500 (1990).

California's contention (at 54-57) that the Supreme Court's and this Court's interpretation of the FPA's and NGA's substantially identical provisions are irrelevant here is contrary to the approach this Court and others have taken. As this Court held, where "no substantial difference" exists between applicable provisions of the NGA and the Communications Act, courts are "require[d] . . . to hold" that the two be interpreted the same. *Superior Oil Co. v. FPC*, 322 F.2d 601, 610, 612 (9th Cir. 1963); *see also New Orleans Pub. Serv., Inc. v. City of New Orleans*, 798 F.2d 858, 860 (5th Cir. 1986) (reasoning that Supreme Court's construction of Communications Act bolstered conclusion that FPA "created a 'bright line' between federal and state jurisdiction"). California's assertion (at 55)

that there is no "established practice" of commonly interpreting common provisions in the Communications Act, FPA, and NGA is incorrect.[14]

B. California contends (at 51-54) that reading § 152 to have field-preemptive effect would create a "regulatory vacuum." But a regulatory "vacuum" occurs only when Congress strips an agency of all regulatory options. *See*, *e.g.*, *Warren*, 139 S. Ct. at 1901, 1903 (federal statute creates a vacuum if it "affords [the federal agency] no authority to regulate" and "displac[es]" state law).[15] As shown above, there is no "vacuum" here. *See supra* pp. 4-5. Nor can the field-preemptive effect of § 152 be limited to some subset of interstate communications services, as California asserts (at 55-56), such as those subject to Title II. The Supreme Court long ago held that "[n]othing" in the Act "limits" the FCC's authority to services subject to Titles II and beyond; instead, § 152(a) gives the

[14] California asserts (at 56) that *Middle South Energy, Inc. v. FERC*, 747 F.2d 763 (D.C. Cir. 1984), is to the contrary. There, the D.C. Circuit found that *different* language in the statutes' comparable provisions meant that the Supreme Court's construction of the Interstate Commerce Act did not control the D.C. Circuit's interpretation of the FPA. *See id.* at 768-69 & n.2. No such difference exists here. *See Verizon Tel. Cos. v. FCC*, 453 F.3d 487, 498 (D.C. Cir. 2006) (construing similar language in the NGA and Communications Act similarly).

[15] The other "regulatory vacuum" cases California cites (at 52) also turned on the absence of any statutory authority to regulate. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207-08 (1983); *Knox v. Brnovich*, 907 F.3d 1167, 1178 (9th Cir. 2018).

FCC "expansive powers . . . over all interstate . . . communication" services. *United States v. Sw. Cable Co.*, 392 U.S. 157, 172-73 (1968).

California cites (at 47) two cases that it claims rejected Appellants' reading of § 152, but these cases only confirm that Congress occupied the field of *interstate* communications in the Communications Act. In the portion of *NARUC* that California quotes, the D.C. Circuit rejected the FCC's assertion that it could preempt state regulation of "two-way *intrastate*, non-video communications" because § 152(a) gave it authority "over *all* activities" in which cable systems engage. 533 F.2d at 606, 612 (emphases added). And in *United States v. Midwest Video Corp.*, the Supreme Court — in a sentence preceding the one California quotes — recognized that § 152(a) "is itself a grant of regulatory power"; the sentence California quotes notes only that § 152(a) does not identify the permissible uses of that power. 406 U.S. 649, 660-63 (1972).[16]

[16] Other cases California (at 48 n.18) and the State amici (at 5-6) cite also do not reject Appellants' reading of § 152. In one, this Court found that, in the 1996 Act, Congress had "substantially expand[ed] the [FCC's] jurisdiction" to "regulate both intrastate and interstate payphone calls," but that Congress had not intended to "occupy the entire field of payphone regulation," leaving states with no intrastate authority at all. *Metrophones Telecomms., Inc. v. Glob. Crossing Telecomms., Inc.*, 423 F.3d 1056, 1072 (9th Cir. 2005). In *GLAAD*, this Court addressed a 2010 statute governing video programmers — not interstate communications service providers — and held that Congress did not occupy the field of online video closed captioning. *See* 742 F.3d at 428-29. In *Ting*, this Court held only that the Communications Act did not preclude states from regulating the dispute resolution provisions in private contracts for long-distance telephone service. *See* 319 F.3d at

California also contends (at 53-54 & n.21) that there is a history of state regulation of interstate communications services that is inconsistent with field preemption. But the laws California identifies do not dictate how interstate communications services may be provided. Instead, these laws address conduct by users of an interstate communications service, such as "fraudulent or deceptive advertisements," "criminal activity," and "fantasy sports." California Br. 53-54 & n.21.[17] As the FCC explained, the states' role in "policing such matters as fraud" is distinct from regulating the substance of the interstate communications services themselves. 2018 Order ¶ 196.[18]

It is because this field has remained uninterrupted by state regulation for nearly 100 years — including the decades when the FCC regulated interstate

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1136; *see also In re Universal Serv. Fund Tel. Billing Practice Litig.*, 619 F.3d 1188, 1196 (10th Cir. 2010) (following *Ting*). *In re NOS Communications* involved complete preemption as a basis for removal jurisdiction, not field preemption. *See* 495 F.3d 1052, 1058 (9th Cir. 2007); *see also Johnson v. Am. Towers, LLC*, 781 F.3d 693, 703 (4th Cir. 2015) (following *NOS*).

[17] *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963), which California cites (at 48), is inapposite for the same reason: it addressed a state law regulating advertisements by users of an interstate communications service, not the radio service itself.

[18] That state attorneys general can enforce providers' Transparency Rule disclosures, *see* 2018 Order ¶ 142, is not inconsistent with field preemption, as California asserts (at 54). Using state law to hold providers to their promises is a far cry from SB-822, which dictates the content of those promises. And in *California ex rel. Lockyer v. Dynegy, Inc.*, this Court applied the filed-rate doctrine to prevent state law from varying the terms of a federal tariff, not from enforcing those terms. *See* 375 F.3d 831, 850-51 (9th Cir. 2004).

enhanced services only under Title I — that courts have not had to apply field preemption to find particular state laws preempted. *Compare* Appellants Br. 6 *with* California Br. 55-56. The single counter-example California says it found (at 53 n.22) — regarding television programming — involved state regulation of "an *appendage* to the primary interstate broadcasting facilities" for that programming, which the court viewed as "essentially a *local* business," not an interstate one. *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459, 463 (D. Nev. 1968) (emphases added).

California (at 49-51) and its amici (ILP Br. 15-16) contend that field preemption cannot be reconciled with Communications Act provisions preserving or expressly preempting state regulation. But because Congress occupied the field of interstate communications decades before the 1996 Act, the savings language in § 601(c)(1) does not apply. And because the express preemption provisions California cites (at 49-50 & n.20) *extend* the FCC's authority over some *intrastate* matters, they do not suggest any preexisting state authority over *interstate* communications. Section 253(a), for instance, expressly preempts any "State or local statute or regulation" — such as *intrastate* regulation regarding rights of way and zoning, not the regulation of the interstate service itself — that may "have the effect" of impinging on the entry of "any interstate or intrastate telecommunications service."

Finally, California (at 4 n.17) and its amici (ILP Br. 3-4) assert that, if the Communications Act preempted the field, *Mozilla* would have been argued and decided differently. But the FCC was defending *express* preemption in *Mozilla*. And because states had never attempted to regulate *interstate* communications services directly, the concern animating the FCC's express Preemption Directive was that states might seek to "regulate the use of a broadband Internet connection for *intrastate communications*." 2018 Order ¶ 200 & n.744. *Mozilla* also repeatedly cited § 152(b) and its "fencing off" of the FCC from "intrastate matters" as the reason the FCC needed express statutory authority to "kick the States out of intrastate broadband." 940 F.3d at 76-77, 80-81. The FCC's and D.C. Circuit's focus on potential state regulation of *intrastate* communications services is consistent with Congress having preempted the *interstate* field.

IV. THE OTHER FACTORS FAVOR A PRELIMINARY INJUNCTION

A. California and its amici have no response to precedent establishing that Supremacy Clause violations create a presumption of irreparable harm. *See* Appellants Br. 59. California also invents (at 58) an irreparable harm standard under which Appellants must show SB-822 "would . . . jeopardize the very existence of a[] company's business." No such standard exists. This Court's precedent recognizes that facing a "Hobson's choice," where "*a very real penalty* attaches to the [plaintiffs] regardless of how they proceed . . . [,] is an imminent

harm." *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1058 (9th Cir. 2009) (emphasis added).[19] And California has no meaningful response to Appellants' evidence that the changes SB-822 will force (and in some cases already has forced) to network congestion practices, "zero-rating" offerings, and interconnection agreements all pose an imminent threat of substantial harm. *See* Appellants Br. 61 & nn.31-33.[20]

B. On the balance of the equities, California's supposed harms (at 61-62) are illusory. California can point to no conduct occurring between June 2018 and the hearing — a 33-month period when only the FCC's 2018 Order applied — that SB-822 would have prevented. All it can muster is an isolated and inadvertent incident that California has *admitted* would not have violated the 2015 Order's rules or SB-822. *See* Appellants' Br. 62 n.34; California Br. 61 n.29. An incident that SB-822 would not have prevented cannot support a showing of harm. Nor do California or its amici defend the district court's speculation that the absence of

[19] California cites (at 58) *hiQ Labs, Inc. v. LinkedIn Corp.*, which is inapposite — in that case, any monetary injury was fully recoverable. *See* 938 F.3d 985, 993 (9th Cir. 2019). Here, California's sovereign immunity prevents monetary recovery. *See* Appellants Br. 61 n.30.

[20] California's contention (at 59) that broadband providers can treat Californians' interstate Internet traffic differently from other Americans' traffic is contradicted by record evidence it ignores. *See* Klaer Reply Decl. ¶ 16 (ER-89–90); Paradise Reply Decl. ¶¶ 15-20 (ER-100–03).

harms under the 2018 Order is because ISPs have "been on their best behavior . . . because of the stay in this case." Tr. 8:21-24 (ER-14). Instead, the lack of harms shows that the FCC's transparency-based regime and competition among providers ensure an open Internet. *See* Chamber Br. 15-17; ICLE Br. 8-15.

The rest of California's and its amici's arguments are pure speculation, unmoored from evidence about conduct in the marketplace.[21] Today's Internet speaks for itself — and conclusively rebuts their claims. As the FCC predicted, eliminating common-carrier regulation has spurred increased investment, and nearly all Americans now enjoy access to fast, reliable, open networks at prices that have declined sharply. *See* Chamber Br. 9-11, 13-14, 18-19.[22] Amici's attempts to blame broadband providers for problems ranging from "structural inequality" to underrepresentation in film and television, *see* EFF Br. 5, 10, are facially absurd and ignore ISPs' market incentives to provide an open Internet. The sad irony is that the *only* concrete indication of harm to a specific group — veterans — was the *result* of SB-822's prohibitions. *See* Appellants Br. 61;

[21] *See, e.g.*, EFF Br. 12, 15, 25 (making unsubstantiated claims about things that "could" or "may" happen, or that could be "imagin[ed] . . . may" happen).

[22] Amici claim the Chamber Brief is a "hall of mirrors," Access Now Br. 4, but recent FCC findings agree with the Chamber. *See, e.g.*, Order on Remand, *Restoring Internet Freedom*, 35 FCC Rcd. 12328, ¶ 36 (2020) (America's "robust and resilient broadband networks" owe "in significant part . . . [to] over two decades of almost continuous light-touch regulation").

TechFreedom Br. 17-19. And although California (at 60) continues to rely on a non-precedential, in-chambers opinion for the principle that states suffer harm when their laws are enjoined — a remedy no different from California's agreement not to enforce SB-822 for years — that principle has no application where (as here) the law at issue is preempted. *See Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014).

CONCLUSION

This Court should vacate and remand the district court's ruling denying Appellants' preliminary-injunction motion.

Respectfully submitted,

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9th Cir. Case Number(s) 21-15430

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