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**Pro hac vice* motion to be filed

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

AMERICAN CABLE ASSOCIATION, CTIA – THE WIRELESS ASSOCIATION, NCTA – THE INTERNET & TELEVISION ASSOCIATION, and USTELECOM – THE BROADBAND ASSOCIATION, on behalf of their members,

Plaintiffs,

v.

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

Defendant.

Case No. _____

NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

Date: _____
Time: _____
Courtroom: _____
Judge: _____

PLEASE TAKE NOTICE that on Wednesday, November 14, 2018 at10:00 AM or as soon as shall be heard thereafter in Courtroom ____ of the United States District Court, Eastern District, Robert T. Matsui Federal Courthouse, at 501 I Street, Sacramento, California 95814, Plaintiffs American Cable Association, CTIA – The Wireless Association, NCTA – The Internet & Television Association, and USTelecom – The Broadband Association ("Plaintiffs") will move for an order preliminarily enjoining XAVIER BECERRA ("Defendant"), in his official capacity as Attorney General of California, from enforcing SB 822. Specifically, Plaintiffs ask the Court to enjoin Defendant from enforcement of:

a. California Civil Code §§ 3100 – 3104 or, in the alternative,

b. California Civil Code §§ 3101(a)(3), (5), (6), and (9).

Furthermore, pursuant to the Notice of Related Cases filed concurrently with this motion, Plaintiffs request that this hearing be coordinated with the United States Department of Justice's hearing on November 14, 2018, in the case entitled *United States v. California*, No. 2:18-cv-2660-JAM-DB, which involves the same or nearly identical issues presented in this matter.

Plaintiffs base their motion on this notice, the accompanying memorandum of points and authorities, the accompanying declarations of Ken Klaer and Joe Ruszkiewicz, the pleadings and papers on file in this action, any matters that may be subject to judicial notice, and such argument as may be heard on this motion by the Court.

Dated: October 3, 2018

/s/ *Marc R. Lewis*

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**Pro hac vice* motion to be filed

CERTIFICATE OF SERVICE

I hereby certify that, on October 3, 2018, I electronically submitted the attached document to the Clerk's Office using the U.S. District Court for the Eastern District of California's Electronic Document Filing System (ECF) and will include this motion with the Summons and Complaint to be served on Defendant in this case.

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

AMERICAN CABLE ASSOCIATION, CTIA – THE WIRELESS ASSOCIATION, NCTA – THE INTERNET & TELEVISION ASSOCIATION, and USTELECOM – THE BROADBAND ASSOCIATION, on behalf of their members,

Plaintiffs,

v.

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

Defendant.

Case No. _____

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Date: _____
Time: _____
Courtroom: _____
Judge: _____

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INTRODUCTION

On September 30, 2018, California enacted SB-822, the "California Internet Consumer Protection and Net Neutrality Act of 2018," which is scheduled to take effect on January 1, 2019. Through SB-822, California seeks to regulate Plaintiffs' members' provision of broadband Internet access service ("BIAS"), the interstate communications service that enables users to access and transmit information across the country and around the world. In doing so, the State purposefully acts to undermine federal law. SB-822 not only reimposes regulations that the Federal Communications Commission ("FCC") had adopted in 2015 but then *rescinded* in 2018, but also imposes regulations that the FCC considered and rejected in 2015. And it does so in conflict with both the FCC's 2018 Order[1] and the federal Communications Act.

Plaintiffs are trade associations whose members offer BIAS to customers in California and across the country. Plaintiffs and their members support an open Internet, which benefits their customers and, therefore, the broadband businesses in which they, collectively, have invested billions of dollars. Plaintiffs' members, either on their own or through the associations, have made public commitments to preserve core principles of Internet openness, and the FCC's 2018 Order ensures that those commitments are enforceable. This case, therefore, is not about whether the Internet will remain open. Instead, this case is about California's effort to nullify federal law by imposing state-specific rules on an interstate communications service that the FCC — under both Democratic and Republican administrations — has held must be subject to a single, uniform set of federal rules, rather than a patchwork of state-by-state regulation.

Plaintiffs are likely to prevail on the merits of their claim that SB-822 is unlawful. First, federal law preempts SB-822. The FCC expressly "preempt[ed] any state . . . measures that would effectively impose rules or requirements that [the agency] ha[d] repealed or decided to refrain from imposing . . . or that would impose more stringent requirements for any aspect of broadband service that we address in this order." 2018 Order ¶ 195. SB-822 is such a state measure. In addition, the FCC's conclusion that BIAS is an interstate service statutorily

[1] Declaratory Ruling, Report and Order, and Order, *Restoring Internet Freedom*, 33 FCC Rcd 311 (2018) ("2018 Order"), *petitions for review pending*, *Mozilla Corp. v. FCC*, No. 18-1051 *et al.* (D.C. Cir.).

immune from common carrier regulation — twice over in the case of mobile BIAS services — independently preempts SB-822, which seeks to impose common carrier obligations on those services. SB-822 also stands as a clear obstacle to the federal policy of ensuring a uniform, light-touch regulatory framework for BIAS, free from common carrier, utility-style regulation.

Second, SB-822 violates the dormant Commerce Clause. It is "impossible or impracticable for [BIAS providers] to distinguish between intrastate and interstate communications over the Internet" and, therefore, "not . . . possible for [one state] to regulate the use of a broadband Internet connection for *intrastate communications* without also affecting the use of that same connection for *interstate communications*." 2018 Order ¶ 200 & n.744. SB-822 thus regulates extraterritorially, controlling BIAS providers' activities outside California. SB-822 also unduly burdens interstate commerce. The FCC found that the regulations that SB-822 seeks to reimpose generate "approximately zero" benefits and impose significant "private and social costs," including "decreases in investment [that] are likely to result in less deployment of service to unserved areas and less upgrading of facilities in already served areas," harming consumers. *Id.* ¶¶ 308-312.

Because SB-822 is unconstitutional, Plaintiffs' members would be irreparably harmed if subjected to that unconstitutional law during the pendency of this litigation. In addition, specific provisions of SB-822 would cause further irreparable harm to Plaintiffs' members. First, SB-822 imposes ambiguous restrictions on interconnection arrangements between Plaintiffs' members and both Internet content providers ("edge providers") and other Internet network operators. It is not clear how these vague provisions will be interpreted and applied, but they create substantial marketplace uncertainty and incentives for the inefficient routing of Internet traffic that will harm Plaintiffs' members. SB-822 has already led to the breakdown of negotiations between a BIAS provider and two large edge providers. Second, SB-822 would outlaw some of Plaintiff CTIA's members' "zero rating" offerings, which benefit consumers by exempting certain Internet traffic from counting against their monthly data allowance. The invalidation of these service offerings would irreparably harm Plaintiffs' members, costing them customers and goodwill, as well as revenues that cannot be recovered from the State.

Finally, the balance of equities favors injunctive relief. A preliminary injunction would "preserv[e] the status quo and prevent[ ] the irreparable loss of rights before judgment." *Textile Unlimited, Inc. v. A..BMH & Co.*, 240 F.3d 781, 786 (9th Cir. 2001). The Internet will remain open under that status quo, as the 2018 Order protects the open Internet through a disclosure regime. *See* 2018 Order ¶¶ 240-245. As noted above, Plaintiffs' members have made public commitments to preserve core principles of Internet openness, which are fully enforceable by the Federal Trade Commission ("FTC") and state attorneys general, acting consistently with federal law. *See id.* ¶¶ 142, 196, 242, 244. A preliminary injunction will also ensure the primacy of federal law by preventing California's attempt to nullify the FCC's 2018 Order even as it appeals that decision in the D.C. Circuit, which has exclusive jurisdiction to hear challenges to the 2018 Order. *See* 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a).[2]

BACKGROUND

A. The Internet

The Internet is a network of computer networks delivering traffic between servers and end users located around the world. *See Reno v. ACLU*, 521 U.S. 844, 849 (1997). Among the companies that build and operate different parts of this network are Internet service providers ("ISPs"), including Plaintiffs' members. ISPs have invested billions of dollars to deploy not only the high-speed links that connect consumers' homes and smartphones to the ISPs' networks, but also the ISPs' servers and networks that give those consumers the capability of sending and receiving information to and from other parts of the Internet. *See Verizon v. FCC*, 740 F.3d 623, 629 (D.C. Cir. 2014).

The FCC and courts have long recognized that Internet access is an interstate (and international) communications service, because, among other reasons, "a substantial portion of Internet traffic involves accessing interstate or foreign websites." *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000); *see* 2018 Order ¶ 199 & nn.739-742; *see also USTelecom Ass'n v. FCC*, 825 F.3d 674, 730-31 (D.C. Cir. 2016) (affirming FCC's jurisdictional determination).

[2] Plaintiffs do not seek to present oral testimony at a hearing. *See* E.D. Cal. L.R. 231(d)(3).

Indeed, even when a person views a single web page, her browser will retrieve content from multiple servers located around the country or the world. *See* 2018 Order ¶ 200. Accordingly, it is "impossible or impracticable for ISPs to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance," and ISPs "could not comply with state or local rules for intrastate communications without applying the same rules to interstate communications." *Id.*

B. Federal Regulation and Deregulation of Broadband Internet Access Service

In 1996, Congress made clear that it is "the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(2), as well as to encourage the deployment of broadband Internet access capabilities by "remov[ing] barriers to infrastructure investment," *id.* § 1302(a). For nearly two decades, the FCC consistently implemented that federal policy through a "light-touch approach to the Internet" that rejected "sweeping regulation of Internet service providers." 2018 Order ¶ 9; *see id.* ¶¶ 10-16. That "successful light-touch bipartisan framework . . . promoted a free and open Internet and, for almost twenty years, saw it flourish." *Id.* ¶ 18.

1. The FCC's 2015 Order

In 2015, the FCC temporarily deviated from that longstanding approach when it reclassified BIAS as a "telecommunications service" and mobile BIAS as a "commercial mobile service" subject to common carrier regulation under Title II of the federal Communications Act. 2015 Order[3] ¶¶ 25, 189, 388. With that newly asserted authority, the FCC adopted a series of proscriptive rules against blocking, throttling, and paid prioritization of Internet traffic. 2015 Order ¶¶ 15, 16, 18. The FCC also adopted an "Internet Conduct Standard," prohibiting BIAS providers from "unreasonably disadvantag[ing]" or "unreasonably interfer[ing]" with end users' access to Internet content, and content providers' access to end users. *Id.* ¶ 21. The FCC acknowledged that these rules constituted common carrier regulation. *See id.* ¶¶ 288-296.

[3] *See* Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015) ("2015 Order").

In connection with the Internet Conduct Standard, the FCC considered a ban on "zero rating" — a service, analogous to toll-free telephone service, that allows a content provider to pay for its customers' data usage so that the usage does not count toward the customers' monthly data usage allowance. *See id.* ¶ 151. The FCC rejected claims that it should ban zero rating generally or any particular zero rating offering, observing that these offerings "could benefit consumers and competition." *Id.* ¶ 152. The FCC instead held that it would assess such offerings on a case-by-case basis. *See id.*

The FCC also rejected claims that it should affirmatively regulate the terms and conditions on which BIAS providers interconnect their networks with other network operators and edge providers, including by adopting specific rules governing interconnection or banning payments. In lieu of a proscriptive approach, the FCC opted for "case-by-case" review of such agreements for "reasonable[ness]." *Id.* ¶¶ 202-206. The FCC recognized that, in asserting authority to regulate these interconnection arrangements, it was imposing common carrier obligations on BIAS providers. *See id.* ¶ 204.

2. The FCC's 2018 Order

In the 2018 Order, the FCC "reinstate[d]" the "light-touch information service framework" that had applied before the 2015 Order. 2018 Order ¶ 2. The FCC again classified BIAS as an interstate "information service" and mobile BIAS as a "private mobile service," both statutorily immune from common carriage regulation. *See id.* ¶¶ 2, 18, 65. The FCC also eliminated the proscriptive rules and Internet Conduct Standard, finding that the "costs of these rules to innovation and investment outweigh any benefits they may have." *Id.* ¶ 4; *see also id.* ¶¶ 87-154, 239, 246-267. And the FCC rescinded the 2015 Order's case-by-case oversight of BIAS providers' interconnection arrangements, finding that "competitive pressures in the market for Internet traffic exchange . . . undermine the need for regulatory oversight." *Id.* ¶ 170.

In place of the 2015 Order's "utility-style regulation of the Internet," *id.* ¶ 2, the FCC relied on "transparency" to "protect Internet freedom . . . more effectively and at lower social cost," *id.* ¶ 208. The FCC expressly required BIAS providers to disclose, publicly and clearly, any practices that block, throttle, or prioritize traffic for payment or to benefit an affiliate,

among other things. *See id.* ¶¶ 218-223. These disclosures, the FCC found, would enable the FTC and states to "enforce any commitments made by ISPs," including the commitments that ISPs have made to manage their networks in line with open Internet principles. *Id.* ¶¶ 141-142. The FCC also rescinded additional disclosure obligations that the 2015 Order had imposed, finding that they imposed costs in excess of their benefits. *See id.* ¶¶ 214-215, 224-226.

The 2018 Order also confirmed the FCC's longstanding (and bipartisan) determination that BIAS is a "predominantly interstate" communications service that must be governed by "a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements." *Id.* ¶¶ 194, 199; *see also* 2015 Order ¶ 433 (announcing the FCC's "firm intention" to preempt state actions "that would conflict with the federal regulatory framework or otherwise frustrate federal broadband policies"). The FCC, therefore, expressly "preempt[ed] any state or local measures that would effectively impose rules or requirements that [the FCC has] repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service" addressed in that order. 2018 Order ¶ 195. Preemption is necessary, the FCC explained, because state efforts to regulate in this area "could pose an obstacle to or place an undue burden on the provision of broadband Internet access service and conflict with the deregulatory approach" adopted in the 2018 Order. *Id.*

C. SB-822 Adopts Rules That Conflict with the 2018 Order

On September 30, 2018, California enacted SB-822. The bill's sponsors made clear that their goal was to undo the 2018 Order. The author of SB-822 described it as "reflecting what was repealed by the FCC last year."[4] And he said further that SB-822 was designed to "step[ ] in" and regulate BIAS after the FCC "abandoned net neutrality protections."[5]

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[4] Press Release, *Senators Wiener and De Leon and Assemblymembers Santiago and Bonta Announce Agreement on California Bill with Strongest Net Neutrality Protections in the Country* (July 5, 2018), https://bit.ly/2QoftbL; *see also* Press Release, *Senator Wiener to Introduce Net Neutrality in California* (Dec. 14, 2017), https://bit.ly/2IwASwH (announcing "plans to introduce legislation to establish net neutrality protections in California after the Federal Communications Commission repealed national Net Neutrality regulations").

[5] Cal. Assembly Comm. on Communications & Conveyance, SB-822, at 6 (Aug. 22, 2018), https://bit.ly/2RfXJAw.

Reflecting those purposes, SB-822 resurrects 2015 Order rules the FCC had repealed, including the no-blocking, no-throttling, and no-paid-prioritization rules, as well as the Internet Conduct Standard. *Compare* Cal. Civ. Code § 3101(a)(1), (2), (4), (7), *with* 2015 Order ¶¶ 15-16, 18, 21; *see also id.* § 3101(b) (applying the rules in § 3101(a) to providers of mobile BIAS). SB-822 also adopts a disclosure rule that restores the repealed disclosure regulation from the 2015 Order, rather than the regulation adopted in the 2018 Order. *Compare* Cal. Civ. Code § 3101(a)(8), *with* 47 C.F.R. § 8.3 (2016) *and* 47 C.F.R. § 8.1(a) (2018).

In addition, SB-822 goes beyond the 2015 Order. First, SB-822 includes multiple provisions that, while ambiguous, directly regulate BIAS providers' agreements for the exchange of Internet traffic with edge providers and other Internet network operators. SB-822 restricts BIAS providers from "entering into ISP traffic exchange agreements that . . . evade the prohibitions contained" in §§ 3101 and 3102 and from "[r]equiring consideration, monetary or otherwise, from an edge provider" in exchange for, among other things, "[d]elivering Internet traffic to, and carrying Internet traffic from, the Internet service provider's end users." Cal. Civ. Code § 3101(a)(3), (9); *id.* § 3100(m) (defining ISP traffic exchange agreement).

Second, SB-822 adopts a bright-line rule that prohibits BIAS providers from "[e]ngaging in zero-rating in exchange for consideration, monetary or otherwise, from a third party." *Id.* § 3101(a)(5). And it also prohibits BIAS providers from "[z]ero-rating some Internet content, applications, services, or devices in a category of Internet content, applications, services, or devices, but not the entire category." *Id.* § 3101(a)(6).

SB-822 is scheduled to take effect on January 1, 2019. *See* Cal. Const. art. IV, § 8(c)(1).

ARGUMENT

SB-822 is unconstitutional in its entirety. It is preempted under the Supremacy Clause and violates the dormant Commerce Clause. Plaintiffs' members will suffer irreparable harm from being subjected to this unconstitutional state law during the pendency of this litigation. In addition, new Civil Code sections 3101(a)(3), (5), (6), and (9) threaten irreparable harm to Plaintiffs' members if they take effect on January 1, 2019. Preliminarily enjoining those sections during the pendency of this litigation will preserve the status quo and will not harm the

State or California consumers; the 2018 Order's transparency regime and Plaintiffs' members' commitments, which are enforceable by the FTC and state attorneys general, will continue to ensure an open Internet. A preliminary injunction will also respect Congress's allocation of judicial authority to review FCC decisions. Plaintiffs therefore satisfy all of the requirements for a preliminary injunction: they are likely to succeed on the merits, their members will suffer irreparable harm absent an injunction, the balance of the equities tips in Plaintiffs' favor, and the public interest favors an injunction. *See Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. Federal Law Preempts SB-822

1. The 2018 Order Expressly Preempts SB-822

a. The FCC declared that federal law preempts state regulation "that would effectively impose rules or requirements that [the FCC] repealed or decided to refrain from imposing" or that would "impose more stringent requirements." 2018 Order ¶ 195.[6] That is exactly what SB-822 does. It imposes regulations that the FCC repealed in the 2018 Order and regulations that the FCC declined to impose in both the 2018 Order and the 2015 Order.

The FCC's express preemption of state laws like SB-822 is sufficient to satisfy Plaintiffs' burden of showing a likelihood of success on the merits, because California cannot collaterally attack that determination here. In the Hobbs Act, Congress vested the federal courts of appeals with "exclusive jurisdiction . . . to determine the validity of all final orders of the Federal Communications Commission." 28 U.S.C. § 2342(1); *see* 47 U.S.C. § 402(a). As the Ninth Circuit has repeatedly explained, because § 2342(1) "requires that all challenges to the validity of final orders of the FCC be brought by original petition in a court of appeals," *US West Commc'ns, Inc. v. Jennings*, 304 F.3d 950, 958 n.2 (9th Cir. 2002), a court "must presume the validity of FCC regulations, rules, and orders that are currently in effect," *CallerID4u, Inc.*

[6] This express preemption also includes "any state laws that would require the disclosure of broadband Internet access service performance information, commercial terms, or network management practices in any way inconsistent with the transparency rule we adopt herein." 2018 Order ¶ 195 n.729.

v. MCI Commc'ns Servs. Inc., 880 F.3d 1048, 1062 (9th Cir. 2018). A district court, therefore, "lack[s] jurisdiction to pass on the validity of the FCC regulations." *Jennings*, 304 F.3d at 958. That is true even where a court "doubt[s] the soundness of the FCC's" decision; a court is "not at liberty to review that interpretation" and, instead, is "required by the Hobbs Act to apply [the FCC's decision] as it is written." *US West Commc'ns, Inc. v. Hamilton*, 224 F.3d 1049, 1055 (9th Cir. 2000), *as amended on reh'g* (Sept. 13, 2000). California has filed a Hobbs Act petition seeking direct review of the 2018 Order and has challenged the FCC's express preemption ruling.[7] That challenge is pending in the D.C. Circuit, which has exclusive jurisdiction to review the 2018 Order; in the meantime, this Court and all others must presume its validity and enforce it as written.

b. In any event, that preemption ruling is lawful. Agency regulations "have no less pre-emptive effect" than federal statutes, even without "express congressional authorization to displace state law." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *see City of New York v. FCC*, 486 U.S. 57, 63-64 (1988); *see also National Fed'n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 738-40 (9th Cir. 2016) (affirming preemptive force of Department of Transportation regulations). In addition, a "decision to forgo regulation" carries "as much pre-emptive force as a decision *to* regulate." *Arkansas Elec. Co-op. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983); *see also United States v. Locke*, 529 U.S. 89, 109-10 (2000) (holding that federal regulations preempt where the agency "has promulgated its own requirement on the subject or has decided that no such requirement should be imposed at all"); *New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58, 66 (2d Cir. 1982) (rejecting argument against preemption where FCC had not imposed regulation of its own).

The 2018 Order is a final agency order that has the "force and effect of federal law." *Reid v. Johnson & Johnson*, 780 F.3d 952, 964 (9th Cir. 2015). Congress granted the FCC — and denied to states — the authority "to regulate all aspects of interstate communication by wire." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984); *see* 47 U.S.C. § 152(a)-(b). That authority includes determining whether a service is a telecommunications service or an

[7] *See Mozilla Corp. v. FCC*, No. 18-1051 *et al.* (D.C. Cir.).

information service, and whether a mobile service is a commercial or private mobile service. *See, e.g.*, *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). Services within the latter categories are immune from common carrier regulation.[8] The FCC has authority to preempt states from interfering with the FCC's classification decisions and the substantive consequences that follow from them. And courts have upheld the preemption of state regulation of jurisdictionally interstate information services. *See Charter Advanced Servs. (MN), LLC v. Lange*, – F.3d –, 2018 WL 4260322, at *2, *4 (8th Cir. Sept. 7, 2018); *California v. FCC*, 39 F.3d 919, 932-33 (9th Cir. 1994).

c. Even apart from the 2018 Order's express preemption ruling, any state measure that contravenes federal broadband policy is independently invalid under the doctrine of conflict preemption. *See, e.g.*, *Geier v. American Honda Motor Co.*, 529 U.S. 861, 883-84 (2000) (federal determination that statutory objectives, including promoting innovation, were best achieved through less, rather than more, regulation had preemptive force under conflict preemption principles). SB-822 plainly "stand[s] as an 'obstacle' to the accomplishment" of the federal policy of ensuring a uniform, light-touch regulatory framework for BIAS. *Id.* at 885-86. Therefore, conflict preemption would provide a sufficient basis for finding SB-822 preempted even if the FCC had said *nothing at all* about preemption in the 2018 Order. *See id.* at 884 (explaining that courts have "never . . . required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists"); *BellSouth Telecomms., LLC v. Metropolitan Gov't of Nashville & Davidson Cty.*, 2017 WL 5641145, at *4-7 (M.D. Tenn. Nov. 21, 2017) (applying conflict preemption to find that FCC order preempted city ordinance that stood as an obstacle to the FCC's chosen approach to regulating pole attachments, even though FCC order did not include an express preemption ruling or otherwise address preemption).

2. SB-822 Conflicts with Congress's Prohibition on Common Carrier Regulation of Information Services and Private Mobile Services

The Communications Act independently preempts SB-822. Congress separated interstate communications services into distinct categories, permitting common carrier

[8] *See* 47 U.S.C. §§ 153(51), 332(c)(1)(A), (c)(2); *Verizon*, 740 F.3d at 650.

regulation of some (telecommunications services and commercial mobile services) and prohibiting common carrier regulation of the others (information services and private mobile services). In the 2018 Order, the FCC classified all BIAS as an information service and mobile BIAS as a private mobile service. *See* 2018 Order ¶ 2.[9] The FCC "would violate the Communications Act were it to regulate broadband providers as common carriers" while they are so classified. *Verizon*, 740 F.3d at 650.

Those statutory provisions equally preclude *state* common carrier regulation, because regulating providers of information services and private mobile services as common carriers "stands as an obstacle" to Congress's decision to immunize them from such regulation. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Nation v. City of Glendale*, 804 F.3d 1292, 1299-300 (9th Cir. 2015) (holding Arizona statute preempted because it sought to frustrate a Secretary of Interior decision and stood as an obstacle to Congress's purposes as reflected in a federal statute). SB-822 does just that: it expressly seeks to regulate BIAS providers as common carriers when providing the same *interstate* service that the FCC has classified in a manner that makes them "statutorily immune . . . from treatment as common carriers." *Cellco P'ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012); *compare* Cal. Civ. Code § 3100(b) (defining the BIAS service subject to regulation), *with* 47 C.F.R. § 8.1(b) (2018) (same).

Nor can there be any doubt that SB-822 imposes common carrier regulations. When the FCC imposed the proscriptive rules and the Internet Conduct Standard that SB-822 replicates, the FCC acknowledged they were common carrier regulations. *See* 2015 Order ¶¶ 288-296; *see also Verizon*, 740 F.3d at 650, 657-58 (striking down an earlier FCC attempt to impose such rules as common carrier obligations). And when the FCC in 2015 subjected BIAS providers' Internet traffic exchange arrangements to case-by-case scrutiny for reasonableness, the agency likewise recognized that it was imposing common carrier obligations. *See* 2015 Order ¶ 204.

Therefore, SB-822 is independently preempted because it imposes common carrier regulation on BIAS providers that are statutorily immune from such regulation by virtue of the

[9] The Hobbs Act immunizes the FCC's classification decisions from collateral attack in this proceeding. *See, e.g.*, *CallerID4u*, 880 F.3d at 1062; *Hamilton*, 224 F.3d at 1055.

FCC's classification decisions. That is true not only of the portions of SB-822 that replicate the common carrier regulations the FCC adopted in the 2015 Order, but also the portions of SB-822 that adopt common carrier rules the FCC considered and rejected in that order. *See Verizon*, 740 F.3d at 657-58 (finding invalid provisions that leave "no room at all for 'individualized bargaining' ").

B. SB-822 Violates the Dormant Commerce Clause

1. SB-822 Regulates Extraterritorially

The dormant Commerce Clause preempts state laws that regulate outside the state's borders. *See National Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 639 (9th Cir. 1993) (affirming invalidation of statute that would "force the [defendant]" to "regulate the integrity of its product in every state according to Nevada's . . . rules"); *Estate of Graham v. Sotheby's Inc.*, 860 F. Supp. 2d 1117, 1124 (C.D. Cal. 2012) (invalidating law regulating out-of-state transactions involving a California resident). A law is extraterritorial where "the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Miller*, 10 F.3d at 639. Such extraterritorial legislation is "*per se* invalid under the Commerce Clause." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).

SB-822 is invalid because it both directly regulates and has the practical effect of regulating commerce outside of California. As shown above, SB-822 regulates the transmission of data to and the receipt of data from "all or substantially all Internet endpoints" across the county and around the world. Cal. Civ. Code § 3100(b). The proscriptive rules and the Internet Conduct Standard apply with respect to Internet traffic sent to or originated by California customers, regardless of whether activities that allegedly violate those rules occur at BIAS provider equipment located inside or outside California. In addition, other prohibitions and obligations in SB-822 appear not to stop at the California border but to extend to a BIAS provider's operations nationwide. For example, SB-822's ambiguous restrictions on BIAS providers' agreements for Internet traffic exchange either reach the exchange of Internet traffic *outside* of California, since some of that traffic is delivered to or from California consumers, or

affect non-California consumers insofar as their Internet traffic is exchanged in California.[10] Likewise, SB-822's prohibitions on zero rating encompass Internet traffic delivered to customers in California from servers located outside of California. Those prohibitions may also prohibit BIAS providers from zero rating traffic either for their non-California customers while they vacation in California or for their California customers while they travel outside the state.

In addition, "it is impossible or impracticable for ISPs to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance." 2018 Order ¶ 200. Therefore, a BIAS provider "could not comply with state . . . rules for intrastate communications without applying the same rules to interstate communications." *Id.* Indeed, the FCC expressly "reject[ed] the view" that "some aspects of broadband Internet access service could theoretically be regulated differently in different states." *Id.* ¶ 200 n.744. The FCC found instead that "it would not be possible for [California] to regulate the use of a broadband Internet connection for *intrastate communications* without also affecting the use of that same connection for *interstate communications*." *Id.* Courts have likewise recognized that the "internet's geographic reach . . . makes state regulation impracticable." *American Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003). Therefore, it is "'difficult, if not impossible, for a state to regulate internet activities without projecting its legislation into other States.'" *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1024 (E.D. Cal. 2017) (quoting *Dean*, 342 F.3d at 103) (alteration omitted).

Courts have repeatedly invalidated state Internet regulations due to their extraterritorial reach. *See id.* at 1025 (granting preliminary injunction of statute with practical effect of governing out-of-state web content); *see also, e.g.*, *PSINet, Inc. v. Chapman*, 362 F.3d 227, 239 (4th Cir. 2004) (invalidating a Virginia law that criminalized the dissemination of material over the Internet because it necessarily regulates conduct occurring entirely out-of-state); *ACLU v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999) (similar); *cf. North Dakota v. Heydinger*, 825 F.3d 912, 921 (8th Cir. 2016) (statute regulating electricity imported to Minnesota regulates

[10] *See* Declaration of Ken Klaer ¶¶ 5, 15-16 ("Klaer Decl.") (Ex. A); Declaration of Joe Ruszkiewicz ¶¶ 5, 30-31 ("Ruszkiewicz Decl.") (Ex. B).

conduct "wholly outside" Minnesota because out-of-state power generators cannot identify and segregate Minnesota-bound electrons, and analogizing to the Internet).

One reason the dormant Commerce Clause forbids extraterritorial state regulation is that it creates an "impermissible risk of inconsistent regulation by different States." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987); *see Brown-Forman*, 476 U.S. at 583 (invalidating law where "proliferation" of similar state laws "greatly multiplied the likelihood that a seller will be subjected to inconsistent obligations in different States"); *Miller*, 10 F.3d 639-40 (affirming injunction of state statute inconsistent with similar state statutes). For example, in contrast to SB-822, which reinstates the FCC's repealed Internet Conduct Standard, New York's governor has issued an executive order that imposes an entirely different catch-all provision prohibiting ISPs from "requir[ing] that end users pay different or higher rates to access specific types of content or applications." N.Y. Exec. Order 175 (signed Jan. 24, 2018), https://on.ny.gov/2LBkRGY. Additional inconsistent state laws and executive orders also exist.[11] These inconsistent laws and the risk of additional ones further underscore that SB-822 violates the dormant Commerce Clause.

2. SB-822 Unduly Burdens Interstate Commerce

SB-822 independently violates the dormant Commerce Clause because it imposes burdens that are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). A regulation burdens commerce if it "regulate[s] activities that inherently require a uniform system of regulation" or "impairs the free flow of materials and products across state borders." *National Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1154-55 (9th Cir. 2012).

SB-822 significantly burdens interstate commerce. First, SB-822 regulates BIAS, which is a nationwide, interstate service that requires "a uniform set of federal regulations, rather than . . . a patchwork that includes separate state and local requirements." 2018 Order ¶ 194; *see also*

[11] As of today, eight other states — Hawaii, Montana, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington — have enacted laws or promulgated executive orders that seek to regulate BIAS providers. *See* National Conference of State Legislatures, Net Neutrality Legislation in States (Oct. 1, 2018), https://bit.ly/2y58AVb.

2015 Order ¶ 433 (adopting a "comprehensive regulatory framework governing [BIAS] nationwide" and stating its "firm intention" to preempt "inconsistent" state obligations). Courts striking down state efforts to regulate the Internet have recognized that "the structure of the Internet bears a striking resemblance to a railroad, highway, or other means of interstate transportation," which likewise must be subject to uniform regulations. *Johnson*, 194 F.3d at 1162; *see also Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 771 (1945) (invalidating state law governing train length because "national uniformity" in railroad regulations is "practically indispensable"); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 527 (1959) (invalidating state regulation of mudguards on semi-trailers). Like operators of interstate trains and commercial semi-trailers, "it is impossible or impracticable for ISPs to distinguish between intrastate and interstate" activities "or to apply different rules in each circumstance." 2018 Order ¶ 200.

Second, in the 2018 Order, the FCC found that common carrier regulation of BIAS providers "ha[d] resulted, and [would] result, in considerable social cost, in terms of foregone investment and innovation," with "no discernable incremental benefit relative to" the "pre-existing legal remedies, particularly antitrust and consumer protection laws." *Id.* ¶ 87; *see id.* ¶¶ 88-154 (canvassing the record evidence). The FCC reached the same conclusion with respect to the extension of common carrier obligations to Internet traffic exchange arrangements. *See id.* ¶¶ 167-173. In sum, the FCC found the "benefits of maintaining" common carrier regulation of BIAS "are approximately zero" and that doing so "would have net negative benefits" and "would decrease overall economic welfare." *Id.* ¶ 312.

The FCC also reviewed the Internet Conduct Standard and the proscriptive rules that the 2015 Order adopted, and which SB-822 revives, and found that the "costs of each rule outweigh its benefits." 2018 Order ¶ 239; *see also id.* ¶¶ 246-266 (canvassing record evidence). The FCC specifically found "little incremental benefit and significant cost to retaining the Internet Conduct Standard," which "created uncertainty and likely denied or delayed consumer access to innovative new services" and "different pricing plans that benefit consumers." *Id.* ¶¶ 246, 249. The FCC concluded that the "benefits of the Internet conduct standard are limited if not

approximately zero," while the "costs of the rule are considerable." *Id.* ¶¶ 317-318; *see id.* ¶¶ 319-323 (making similar findings regarding the proscriptive rules).

The FCC's findings on the costs and benefits of these rules, which are immune from collateral attack here,[12] demonstrate that SB-822's burdens on interstate commerce are "clearly excessive." *Pike*, 397 U.S. at 142; *Union Pac. R.R. Co. v. California Pub. Utils. Comm'n*, 346 F.3d 851, 871-72 (9th Cir. 2003) (invalidating state statute imposing performance-based requirements on railroads because burden on commerce outweighs benefits to state); *Pioneer Military Lending, Inc. v. Dufauchard*, 2006 WL 2053486, at *14 (E.D. Cal. July 21, 2006) (enjoining, under *Pike*, California law requiring non-California lenders to get a California business license because law imposed significant costs and benefits were insignificant).

II. SB-822 WILL SUBJECT PLAINTIFFS' MEMBERS TO IMMEDIATE AND IRREPARABLE HARM

Plaintiffs' members will suffer immediate and irreparable harm if SB-822 takes effect on January 1, 2019, before this litigation is complete. "[A]n alleged constitutional infringement will often alone constitute irreparable harm." *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997). That is because "the interest of preserving the Supremacy Clause is paramount." *California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 853 (9th Cir. 2009), *vacated and remanded on other grounds sub nom. Douglas v. Independent Living Ctr. of S. Cal., Inc.*, 565 U.S. 606 (2012). Thus, this Court recently "presume[d] that Plaintiff will suffer irreparable harm based on [a] constitutional violation[ ]," namely the likelihood of success "on [a] Supremacy Clause claim." *United States v. California*, 314 F. Supp. 3d 1077, 1096, 1098, 1112 (E.D. Cal. 2018); *see also Citicorp Servs. Inc. v. Gillespie*, 712 F. Supp. 749, 753-54 (N.D. Cal. 1989) (finding irreparable harm where plaintiff showed likelihood of success on its Commerce Clause claim because Ninth Circuit "cases suggest that the alleged constitutional violation alone should give rise to a presumption of irreparable harm"); *National Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2d 551, 578 (D.N.J.) (holding that enactment of a law

[12] *See, e.g.*, *CallerID4u*, 880 F.3d at 1062; *Hamilton*, 224 F.3d at 1055. California and other petitioners are challenging these findings before the D.C. Circuit.

"in violation of the Supremacy Clause, alone, likely constitutes an irreparable harm requiring the issuance of a permanent injunction"), *aff'd sub nom. National Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013). Plaintiffs' showing that they are likely to succeed on their Supremacy Clause and dormant Commerce Clause challenges to SB-822 in its entirety satisfies the irreparable harm prong of the test for preliminary injunctive relief.

In addition, specific provisions of SB-822 will independently cause irreparable harm to Plaintiffs' members if permitted to take effect during the pendency of this litigation. "[A] very real penalty [would] attach[ ] to [Plaintiffs' members] regardless of how they proceed" if these provisions took effect: either monetary losses, forgone business opportunities and investments, and loss of substantial customer goodwill if members discontinue these practices, or the possibility of enforcement actions and interference in ongoing commercial agreements and negotiations if the practices continue. *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1057-58 (9th Cir. 2009); *see also Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001) ("threatened loss of prospective customers or goodwill" can constitute irreparable harm); *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 784 (5th Cir. 1990) (enforcement of state laws regulating airlines "would violate the Supremacy Clause, causing irreparable injury to the airlines" by "depriving [them] of a federally created right to have only one regulator"). The fact that Plaintiffs cannot recover those losses from the State, which enjoys sovereign immunity from damages actions, underscores the irreparable nature of the harm. *See Pioneer Military*, 2006 WL 2053486, at *18; *see also Odebrecht Constr., Inc. v. Secretary, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) (collecting cases).

California Civil Code § 3101(a)(3) and (9). Plaintiffs' members have entered into agreements with edge providers — companies such as Netflix, Google, and Apple that "provide[ ] . . . content, application[s], or service[s] over the Internet," Cal. Civ. Code § 3100(e) — that allow those edge providers to connect directly with the BIAS providers' network, in exchange for compensation, and are in the midst of negotiating additional such agreements. *See* Klaer Decl. ¶ 7; Ruszkiewicz Decl. ¶ 37. These agreements benefit the edge providers, Internet users, and BIAS providers. An edge provider benefits because it can bypass the middlemen —

content distribution networks ("CDNs"), transit providers, and other Internet network operators — that it would otherwise pay to carry its content. That benefits both the edge provider and the users, as the content can be routed more quickly and efficiently than when traffic is routed through middlemen. The BIAS provider benefits because it can more effectively manage the often extremely large volumes of traffic that these edge providers route into its network. That traffic would otherwise be delivered over one or more of the many different available routes into the BIAS provider's network, all of which it must independently manage to avoid congestion or other disruptions to its customers' Internet experiences. *See* Klaer Decl. ¶¶ 14, 20, 25; Ruszkiewicz Decl. ¶¶ 19-22, 38.

SB-822 imposes ambiguous restrictions on BIAS providers' existing contracts for the exchange of Internet traffic with edge providers and others and exposes BIAS providers to the potential of immediate enforcement actions. *See* Klaer Decl. ¶¶ 22-23; Ruszkiewicz Decl. ¶ 37. Although it is unclear what existing or new agreements will be claimed to constitute evasions of the prohibitions in SB-822, *see* Cal. Civ. Code § 3101(a)(9), the potential for such litigation threatens Plaintiffs' members with irreparable harm. Such actions will impose significant financial costs on Plaintiffs' members and harm their reputations in the competitive marketplace for BIAS. *See American Trucking*, 559 F.3d at 1057-58 (reversing denial of preliminary injunction and finding threat of enforcement proceedings constituted irreparable harm). To the extent that Plaintiffs' members are forced to break off negotiations for new contracts, the result would be lost, unrecoverable business and revenue, harm to reputation and goodwill, and exposure to private suits for breach of contract. *See* Klaer Decl. ¶ 21; Ruszkiewicz Decl. ¶ 39. The loss of "goodwill and revenue" also constitutes irreparable harm. *Stuhlbarg*, 240 F.3d at 841; *see Dish Network L.L.C. v. Ramirez*, 2016 WL 3092184, at *6 (N.D. Cal. June 2, 2016).

The prospect that these provisions would become law has already delayed commercial negotiations over new direct interconnection agreements between a BIAS provider and at least two large edge providers. *See* Klaer Decl. ¶ 19. Those provisions will distort the outcomes of ongoing commercial negotiations with other edge providers and Internet network operators, some of which undoubtedly will claim that SB-822 entitles them to free interconnection with

ISPs. *See id.*; Ruszkiewicz Decl. ¶ 39. Making matters worse, SB-822 includes an ambiguous restriction on contractual waivers of these provisions. *See* Cal. Civ. Code § 3104.

If the State or other entities claim that SB-822 regulates the nationwide exchange of Internet traffic, so long as that traffic is sent to or from California users of BIAS services, ISPs face the risk of having to alter their traffic exchange agreements and potentially to reconfigure their physical networks nationwide. It is commercially impracticable to treat California Internet traffic differently from other Internet traffic. *See* Ruszkiewicz Decl. ¶ 33; Klaer Decl. ¶ 16. If the State or other entities instead claim that SB-822 regulates the exchange of all Internet traffic at points within California, some content-sending networks likely will seek to engage in arbitrage by routing traffic to interconnection points in California in an attempt to obtain increased interconnection capacity on ISPs' networks for free, thus causing significant additional congestion and disruption at ISPs' California facilities. This could lead to congestion at the California interconnection points and under-utilization of interconnection points outside California, stranding investment. *See* Klaer Decl. ¶¶ 24, 31-32, 34-35; Ruszkiewicz Decl. ¶¶ 34-35. All of these harms will result in financial losses that ISPs can never recoup from the State. *See, e.g.*, Klaer Decl. ¶¶ 23, 31, 36; Ruszkiewicz Decl. ¶¶ 34-35, 37-38.

California Civil Code § 3101(a)(5) and (6). Plaintiff CTIA's members have developed offerings that "zero rate" certain content by excluding that content when calculating whether a customer has exceeded her monthly data allowance for mobile BIAS service.[13] These offerings especially benefit consumers who purchase mobile BIAS plans that charge them a flat, monthly rate for a certain quantity of data, as those customers incur additional charges if they exceed that monthly data allowance. Zero rating thus provides customers more data for the same money, while also benefiting the edge providers who encourage the use of their content by bearing the costs of the associated data usage on behalf of their customers. Mobile BIAS providers also

[13] *See, e.g.*, AT&T, About Data Free TV, https://www.att.com/esupport/article.html#!/u-verse-tv/KM1131836; Sponsored Data from AT&T, https://www.att.com/att/sponsoreddata/en/index.html.

benefit, as the ability of customers to get more data for the same money makes their service more attractive in the highly competitive marketplace for mobile BIAS.

SB-822 expressly prohibits these zero rating offerings. *See* Cal. Civ. Code § 3101(a)(5), (6). A BIAS provider's continued compliance with its existing contracts with its customers — which enable those customers to receive zero-rated content — is thus made an unlawful act. Again, willing consumers, BIAS providers, and content providers could not all agree to continue those zero rating offerings, or enter into new contracts for them, because SB-822 makes "any waiver of the provisions of this title . . . unenforceable and void." Cal. Civ. Code § 3104.

Sections 3101(a)(5) and (6) thus threaten to cause irreparable harm to CTIA's members and to any other BIAS providers that introduce zero-rated offerings. If CTIA's members continue to perform under their existing contracts with their customers and providers of zero-rated content, they will face the risk of enforcement actions under SB-822. Such actions will impose significant financial costs on CTIA's members, including potential civil penalties, and harm their reputations in the competitive marketplace for mobile BIAS. *See American Trucking*, 559 F.3d at 1057-58. If CTIA's members instead terminate their zero rating offerings due to fear of imminent enforcement, the result would be lost, unrecoverable business and revenue, harm to reputation and goodwill, and exposure to private suits for breach of contract, all of which constitutes irreparable harm. *Stuhlbarg*, 240 F.3d at 841; *Dish Network*, 2016 WL 3092184, at *6.

III. THE EQUITIES AND THE PUBLIC INTEREST FAVOR AN INJUNCTION

The remaining factors also support entry of a preliminary injunction because "it would not be equitable or in the public's interest to allow the state to continue to violate the requirements of federal law." *California Pharmacists*, 563 F.3d at 852-53. The interest in enforcing the Supremacy Clause is so strong that establishing a likelihood of success "also establishe[s] that both the public interest and the balance of the equities favor a preliminary injunction." *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014).

In addition, the balance of equities tips sharply in Plaintiffs' favor because SB-822 has not yet taken effect, and enjoining the law will simply "preserv[e] the status quo and prevent[ ]

the irreparable loss of rights before judgment." *Textile Unlimited*, 240 F.3d at 786. That status quo is a well-functioning interstate marketplace for BIAS in which the 2018 Order, which protects Internet openness through a transparency regime, remains in effect. That "transparency promotes openness and empowers consumers." 2018 Order ¶ 244. Plaintiffs' members, either on their own or through their trade associations, have also made public commitments to preserve core principles of Internet openness. *See, e.g.*, *id.* ¶ 142 n.511. The FTC can enforce these commitments "if ISPs fail to live up to their word," as can state attorneys general under state and federal unfair and deceptive trade practices laws (provided they enforce such commitments in a manner consistent with federal law). *See id.* ¶¶ 142, 196, 244.

On the other hand, the State will suffer no harm because the inability to enforce a statute that is likely unconstitutional is not harmful. *See Planned Parenthood Ariz., Inc. v. Betlach*, 899 F. Supp. 2d 868, 887 (D. Ariz. 2012); *Odebrecht Constr.*, 715 F.3d at 1289 (reasoning that the "nebulous, not easily quantified harm of being prevented from enforcing one of its laws" is insubstantial); *Trans World Airlines*, 897 F.2d at 784. Likewise, a preliminary injunction serves the public interest, which is reflected in the FCC's "decision[s] to deregulate," as well as in "the Constitution's declaration that federal law is to be supreme." *American Trucking*, 559 F.3d at 1059-60. "Frustration of federal statutes and prerogatives are not in the public interest." *California*, 314 F. Supp. 3d at 1112 (quoting *United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012)). A preliminary injunction also serves the public interest in enforcing Congress's allocation to the courts of appeals of exclusive jurisdiction to review FCC orders. Just as this Court must presume the validity of the 2018 Order and apply it as written, the State also has no authority to enact statutes that presume that the FCC's action is invalid.

CONCLUSION

The Court should grant Plaintiffs' motion and preliminarily enjoin SB-822 in its entirety or, at a minimum, California Civil Code § 3101(a)(3), (5), (6), and (9).[14]

[14] The Court should not require Plaintiffs to post a bond. *See California Hosp. Ass'n v. Maxwell-Jolly*, 776 F. Supp. 2d 1129, 1160 (E.D. Cal. 2011). If the Court concludes that a bond is appropriate, the amount should be nominal because the State will suffer no damages from a preliminary injunction. *See Planned Parenthood*, 899 F. Supp. 2d at 887-88.

Dated: October 3, 2018

Respectfully submitted,

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**Pro hac vice* motion to be filed

CERTIFICATE OF SERVICE

I hereby certify that, on October 3, 2018, I electronically submitted the attached document to the Clerk's Office using the U.S. District Court for the Eastern District of California's Electronic Document Filing System (ECF) and will include this memorandum with the Summons and Complaint to be served on Defendant in this case.

/s/ Marc R. Lewis
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EXHIBIT A

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**Pro hac vice* motion to be filed

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

AMERICAN CABLE ASSOCIATION, CTIA – THE WIRELESS ASSOCIATION, NCTA – THE INTERNET & TELEVISION ASSOCIATION, and USTELECOM – THE BROADBAND ASSOCIATION, on behalf of their members,

Plaintiffs,

v.

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

Defendant.

Case No. _____

DECLARATION OF KEN KLAER OF COMCAST IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Date:
Time:
Courtroom:
Judge:

I, Ken Klaer, declare as follows.

1. My name is Ken Klaer. I am Senior Vice President of Comcast Technology Solutions, a division of Comcast Cable Communications ("Comcast"). In this role, I am responsible for overseeing Comcast's commercial Internet traffic exchange arrangements with hundreds of networks, edge providers, and other third parties. I am also very familiar with Comcast's network infrastructure and practices. I make this declaration in support of Plaintiffs' Motion for Preliminary Injunction.

Background on Interconnection and Comcast's Backbone Network

2. Comcast is an Internet service provider ("ISP") that offers broadband Internet access service to mass-market customers in 39 states, including California, and the District of Columbia. Comcast currently has more than 24 million residential Internet customers and more than 2 million business Internet customers. In addition, Comcast has nearly 800,000 mobile Internet lines from its recently launched Xfinity Mobile service. Millions of these residential customers and nearly two hundred thousand business customers are located in California. Comcast is also a member of Plaintiff NCTA – The Internet & Television Association.

3. Internet traffic exchange involves the flow of data among the interconnected "network of networks" that comprises the "public Internet," including Comcast's advanced broadband network. The exchange of Internet traffic between networks is a fundamental and necessary function that makes the Internet work. It is also a core component of managing Comcast's network.

4. Comcast first began interconnecting with other networks over two decades ago, giving our Comcast customers access to all of the content, applications, and services offered over the Internet from "edge providers," which today include websites and online services such as Google, Netflix, Twitter, and countless others. Initially, Comcast did not have its own backbone network facilities. In order to send our customers' traffic out onto the global Internet, and to allow others on the Internet to reach our customers, Comcast relied on purchasing

"transit" services from providers with existing large network infrastructures, known as "backbone" providers, that serve as Internet network middlemen.

5. Fifteen years ago, Comcast decided to invest billions of dollars to build its own backbone infrastructure to offer a more robust network. Over this period, Comcast has invested in more than 145,000 miles of fiber, 18 backbone interconnection points (four of which are located in California), as well as 26 regional interconnect facilities across 22 regional markets (two of which are located in California). These interconnection points and facilities are now home to thousands of interconnection ports, supporting over 100 Tbps of capacity into Comcast's network. Comcast continues to add new ports as Internet use grows.

6. Our extensive investments have allowed Comcast to connect directly to major network providers on the Internet, creating a host of direct routes between Comcast's network and other providers' networks. Those routes allow providers to send their own end users' traffic directly to Comcast without using Internet middlemen, and also to send traffic from *other* providers through to Comcast's network (i.e., transit traffic). Likewise, Comcast uses those routes to deliver its own customers' traffic, and to send "transit traffic" from other entities through its network off to other networks across the Internet.

7. As Comcast built out its backbone capabilities, it also became possible to offer direct backbone connections to "one-way" networks, such as content delivery networks ("CDNs") and cloud services providers that are used to deliver online services to ISP networks, and eventually to very large edge providers that have their own facilities. These commercial arrangements allow for more efficient interconnection and exchange of Internet traffic with Comcast's expanding network. Today, these direct interconnection arrangements include other backbone providers (e.g., Level 3 and Zayo); CDNs (e.g., Akamai); major edge providers (e.g., Netflix, YouTube, and Yahoo); and other ISP networks (e.g., Charter, Cox, and AT&T). Some providers are hybrids of these categories (e.g., edge providers that also offer CDN or cloud services).

8. The various backbone connections that Comcast and all other major players on the Internet have established are typically documented in so-called "interconnection agreements" (and sometimes also rely on interconnection policies published on providers' network websites). Generally speaking, these interconnection agreements include specific terms for adding capacity to existing interconnection points (on Comcast's or the other provider's facilities) and/or require capacity reviews at pre-set intervals to discuss and evaluate the needs of each interconnecting party, consider traffic growth projections and geographic routing needs, and the like. Interconnection agreements enable both parties to plan for Internet traffic growth and to ensure that there is sufficient capacity at both parties' interconnection points to accommodate the traffic volumes of each interconnection partner. This helps to avoid system "congestion," which can delay and disrupt the delivery of traffic to both partners' customers and impair their Internet experience. Because Comcast and its interconnection partners also offer transit across their networks onto *other* providers' networks, the effects of such congestion can be far-reaching.

9. While Comcast's backbone investments allow it to offer direct interconnection arrangements to edge providers, these arrangements are entirely optional for edge providers. The majority of edge providers do not engage in direct arrangements with Comcast. Typically, only large edge providers that have their own network facilities opt for a direct connection arrangement with Comcast, because they have the capacity to reach various backbone (or regional) interconnection points. Other edge providers rely on the dozens of third-party transit providers, CDNs, and other intermediary networks that act as middlemen and offer alternative routes for the delivery of traffic to Comcast or other ISPs' networks.

10. That said, many edge providers and other interconnecting parties prefer – for economic, technical, and other reasons – to enter into interconnection agreements with Comcast so that they can route their traffic directly to Comcast's network (and on to its end user customers) and bypass intermediary, third-party networks. These direct interconnection arrangements can provide more reliable and consistent delivery of content (due in part to fewer

hops over which the traffic must travel), thereby improving the experiences of our customers. Providers can also work out customized arrangements that meet their geographic needs or address specific routing requirements they may have.

11. Comcast's interconnection agreements reflect the particular needs and attributes of each interconnecting partner. For example, consistent with well-established market practices, Comcast provides "settlement-free" interconnection, primarily to other large backbone and transit providers that offer a generally balanced exchange of traffic with Comcast. "Settlement-free" simply means that no monetary payment is made in either direction; the exchange of traffic is the sum total of the parties' mutual consideration.[1] Comcast has dozens of such agreements.

12. In other cases, where the exchange of traffic and value is significantly out of balance, it is common for the interconnection arrangement to involve payment (in one direction or the other), at least for the portion of traffic that is out of balance. As of the end of 2017, Comcast had approximately 100 commercial Internet interconnection contracts that involve payment in some form, including with many large edge providers and with CDNs such as Akamai, Limelight, and Cloudflare.

13. Moreover, interconnecting partners often agree to share the costs of upgrading capacity at interconnection points caused by shifts in traffic volumes or flows. Several of Comcast's more significant interconnection agreements also involve other terms – including payment terms for various additional or related services – that reflect the parties' broader commercial relationship.

14. Each of these different interconnection agreements reflects a mutually beneficial arrangement between Comcast and the interconnecting partner. Because the Internet is an inherently two-sided marketplace – where end-user customers and network and content

[1] Settlement-free arrangements may also be appropriate where the parties have other ways to provide each other with mutual value in connection with the interconnection investment, other than monetary payment, such as with providers of Root DNS services (e.g., Internet Systems Consortium), that are a critical part of the Internet infrastructure.

providers all use and benefit from the overall network – interconnection agreements provide a means to ensure that the costs are spread fairly and not borne solely by end-user customers through broadband Internet subscription rates. Our paid interconnection agreements, in particular, help to ensure that no provider and its customers are saddled with funding the network costs imposed disproportionately by another, and provide market-driven incentives for interconnecting parties to exchange Internet traffic in an efficient and predictable manner that best serves the end-user customers.

15. Further, as I noted above, Comcast exchanges Internet traffic at the dozens of network facilities it has built around the country, including the four backbone interconnection points and two regional interconnection points within California. The geographic diversity of these facilities is another key feature of Comcast's network that enables Comcast to manage Internet traffic efficiently and effectively. Under its interconnection agreements, Comcast and its interconnecting partners typically seek to ensure that these geographically diverse interconnection points are put to their most efficient use. Comcast's settlement-free interconnection agreements, for example, require interconnection at a minimum of four such geographically diverse interconnection points to help maintain a balanced flow of traffic across interconnection points. Commercial interconnection arrangements may cover a substantial number, if not all, of these interconnection points, or may provide for more selective interconnection deeper into the network at our regional hubs.

16. There is no requirement for Internet traffic originating with or delivered to an end-user customer located in California to be exchanged at a traffic exchange point located within California. Depending on Internet traffic volumes at any particular moment, traffic from or to California may be routed over any part of Comcast's backbone infrastructure or the Internet more broadly to provide the most efficient delivery. For similar reasons, is it not technically feasible for Comcast to treat Internet traffic both to and from California separately from all other Comcast Internet traffic.

Harms Caused by SB 822's Prohibition on Consideration from Edge Providers

17. I understand that SB 822 prohibits ISPs like Comcast from "requiring consideration, monetary or otherwise, from an edge provider" for "delivering Internet traffic to, and carrying Internet traffic from, the Internet service provider's end users" and for "avoiding having the edge provider's content . . . impaired or degraded." The legislation also prohibits ISPs from "engaging in practices that have the purpose or effect of evading" various net neutrality prohibitions through "ISP traffic exchange" arrangements made with, among others, "an edge provider, content delivery network, or other network operator." And it decrees that "any waiver of [these] provisions is contrary to public policy and shall be unenforceable and void." Due to the broad and ambiguous wording of these paid interconnection provisions in SB 822, Comcast fully expects that some edge providers and even intermediary networks, such as CDNs and transit providers, will assert that the law prohibits Comcast from receiving consideration for interconnecting and exchanging Internet traffic.

18. Although Comcast believes that the paid interconnection provisions in SB 822 can and should be read more narrowly, these provisions will nonetheless impose irreparable harms to Comcast if allowed to take effect. These harms will occur immediately, as different parties assert divergent and conflicting commercial expectations for Internet traffic exchange and seek to take advantage of the law to avoid sharing the costs of interconnection that they traditionally have paid. And these harms will also be long-term if the broad restrictive view of the paid interconnection provisions advocated by some entities are adopted by the California Attorney General or a California state court.

Loss of Interconnection Partners, Revenues, and Goodwill

19. The paid interconnection provisions will harm Comcast's ability to enter into new, mutually beneficial interconnection agreements with edge providers that involve consideration, leading to a loss of existing and prospective interconnection partners and significant lost revenues. In fact, Comcast has been engaged in discussions with at least two large edge providers about entering into new interconnection agreements that would involve

monetary consideration. The prospect of SB 822's enactment and its ambiguous "prohibition" on paid interconnection have already delayed these commercial negotiations. If the law becomes effective, it will likely be the death-knell of these commercial discussions, as it would put Comcast in the untenable position of risking an enforcement action or litigation by entering into interconnection agreements that could be claimed – and ultimately deemed by the California Attorney General or a California state court – to violate SB 822's paid interconnection provisions. Our ability to negotiate new paid interconnection agreements with other edge providers will likewise be harmed.

20. Notably, reading SB 822 to ban paid interconnection, as some entities will no doubt do, is unlikely to save most edge providers any money. Rather than connecting directly to Comcast, they will now likely pay a third-party transit provider, such as Cogent, to reach Comcast's network. So while middlemen such as Cogent will make money by routing additional traffic onto Comcast's network, Comcast and other ISPs will not be able to offer these edge providers competing paid interconnection services, which could be more efficiently and economically desirable for both parties. At the same time, Comcast's costs of supporting the network will also rise since we will be deprived of a source of contribution to our Internet network costs. In other words, one portion of the two-sided Internet marketplace will be significantly interrupted, which will shift the costs onto Comcast's end users. In addition, larger edge providers will not be able to enjoy the benefits of direct interconnection with Comcast on mutually beneficial terms, which include joint capacity planning to handle growth, service level agreements, outage escalations, and so on.

21. Together, these effects of SB 822 will harm our customers, resulting in a loss of good will and damage to our reputation as an ISP. The loss in revenues and other monetary damages that the law will cause to Comcast will also be significant and are difficult to calculate. In any event, I understand that money damages would not be recoverable from California due to sovereign immunity principles.

Harms Under Existing Commercial Interconnection Agreements

22. Comcast's existing paid interconnection agreements with edge providers and others will be under a similar legal cloud, leaving Comcast vulnerable to the risk of immediate enforcement action or other litigation, disruption to its business operations, and further loss of customers, revenues, and good will. For example, the California Attorney General, or one (or more) of our direct-interconnection edge provider partners, could contend that the compensation provisions in our existing interconnection agreements are void or unenforceable under SB 822. Edge providers could seek to legally compel us to provision additional network capacity without any reciprocal consideration, or refuse to pay invoices for interconnection and force us to sue for non-payment. Similarly, as existing interconnection agreements come up for renewal, or require additional network capacity, edge providers may expect Comcast to continue these arrangements but now without cost to them (i.e., for free) and at Comcast's sole expense.

23. This will put Comcast to an untenable "Hobson's Choice": either (a) forgo the revenues that it would otherwise be entitled to, and absorb all of the costs for direct interconnection, to avoid harmful disruption of our Internet service and potential enforcement actions by the State for noncompliance with SB 822, (b) terminate its direct interconnection arrangements with these edge provider partners, resulting in lost revenues and likely causing increased traffic and congestion on third-party routes, which would degrade the customer experience and harm Comcast's good will and reputation (among other things, our customers may wrongly conclude that Comcast is "throttling" content along these routes), or (c) engage in protracted and disruptive litigation with its interconnection partners to have each agreement declared lawful. Under any of these options, monetary damages would not adequately compensate Comcast for these harms, even if we could somehow recover them from the State.

Harms to Comcast from a Broader Disruption of the Network Ecosystem

24. In addition, some entities are likely to read the paid interconnection provisions in SB 822 to include intermediary networks, like CDNs and transit providers, rather than applying

only to edge providers. This potential application of the law would upend the backbone ecosystem.

25. For example, I understand that Cogent, a transit provider, was among the interested stakeholders that actively lobbied for the paid interconnection provisions. The broad and ambiguous prohibition on paid interconnection, coupled with the non-"evasion" and non-waiver provisions of SB 822, provide ample fodder for Cogent (and possibly even the California Attorney General) to claim that the ban on paid interconnection extends to transit providers like Cogent directly or as potential agents of or "proxies" for edge providers. As a consequence, the third-party routes onto which edge provider Internet traffic is re-directed will themselves be in turmoil under SB 822.

26. As background, both edge providers and the intermediary networks that carry edge providers' traffic for a fee (e.g., CDNs and transit providers like Cogent) dictate the path that their traffic will travel to reach Comcast's network. Based on incidents of Internet congestion that occurred in 2013-2014, an authoritative independent study confirmed that most of these congestion incidents were attributed to "decisions by content providers as to how to route content" as part of "recognized business issues" (i.e., commercial disputes or arbitrage).[2] As a later version of the study concluded, Internet "congestion can more or less instantly shift (in a day or so) from one path to another . . . . [A] content provider can shift a huge fraction of traffic from that [one] link to another link overnight."[3] Direct interconnection agreements alleviate these tactics by removing intermediary networks as middlemen. As these same researchers recently concluded, the incidence of "persistently congested transit links . . . –

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[2] MIT Information Policy Project, *Measuring Internet Congestion: A Preliminary Report* 2 (2014), http://laweconcenter.org/images/articles/appa_clark-measuring_internet_congestion.pdf.pdf.

[3] David Clark et al., *Measurement and Analysis of Internet Interconnection and Congestion* 9-10 (2014), https://groups.csail.mit.edu/ana/Measurement-and-Analysis-of-Internet-Interconnection-and-Congestion-September2014.pdf.

regardless of cause – implies clear motivation for large players to engage in direct peering negotiations" (i.e., direct interconnection agreements).[4]

27. To be sure, Comcast has experienced incidents where both settlement-free peers and CDNs have manipulated their traffic to congest certain Comcast interconnection points, thereby degrading Internet service for our customers, in an attempt to extract perceived benefits from us. For example, in 2013-2014, Cogent sold transit service to Netflix and other content providers at a significant discount, who then began rerouting large amounts of traffic over Cogent's interconnection ports with Comcast. Cogent's traffic into Comcast's network grew by nearly *500 percent* over a very short time period, overwhelming Cogent's existing spare capacity and additional capacity that Comcast supplied on a complimentary basis in the hopes of encouraging a commercial solution with Cogent. This congestion not only affected popular content, but also disrupted traffic from other business customers of Comcast and Cogent. Cogent later admitted that it had created "at least two priority levels (a 'fast lane' and 'slow lane')" in 2014 that resulted in the de-prioritization of Netflix traffic.[5]

28. Throughout this period, Cogent refused to discuss any kind of commercial arrangement with Comcast.[6] The congestion at the Cogent links only disappeared after Netflix

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[4] Amogh Dhamdhere et al., *Inferring Persistent Domain Congestion* 13 (2018), http://www.caida.org/publications/papers/2018/inferring_persistent_interdomain_congestion/inferring_persistent_interdomain_congestion.pdf.

[5] Dan Rayburn, *Cogent Now Admits They Slowed Down Netflix's Traffic, Creating a Fast Lane & Slow Lane*, STREAMINGMEDIABLOG.COM (Nov. 5, 2014), https://www.streamingmediablog.com/2014/11/cogent-now-admits-slowed-netflixs-traffic-creating-fastlane-slow-lane.html.

[6] Since 2002, Cogent has been involved in at least 10 similar peering disputes with AOL, Verizon, Level 3, Sprint, France Telecom, ESNet, Telia, China Telecom, and others. *See* Cybertelecom, *Industry: Cogent*, http://www.cybertelecom.org/industry/cogent.htm (detailing Cogent's peering disputes) (last visited Sept. 20, 2018); *see also* Press Release, CenturyLink-Level 3, *Level 3 Issues Statement Concerning Internet Peering and Cogent Communications* (2005), http://news.centurylink.com/news?item=125153 ("Cogent was sending far more traffic to the Level 3 network than Level 3 was sending to Cogent's network. It is important to keep in mind that traffic received by Level 3 in a peering relationship must be moved across Level 3's network at considerable expense. Simply put, this means that, without paying, Cogent was using far more of Level 3's network, far more of the time, than the reverse. Following our

and Comcast entered into a contract addressing multiple aspects of their business relationship, including all interconnection needs and direct connections into Comcast's network. This commercial arrangement effectively removed Cogent as an intermediary for Netflix, eliminating Cogent's ability to engage in such traffic exchange arbitrage (at least with respect to Netflix's substantial traffic).[7]

29. In similar incidents, other intermediary networks, in addition to Cogent, have intentionally routed traffic over certain interconnection links that were already congested, despite the availability of other non-congested links into Comcast's network, in further attempts to subsidize their operations by shifting unfair costs onto Comcast and its customers.

30. In each incident, and regardless of the actual underlying facts, Comcast has borne the brunt of criticism from affected customers for any degraded experience due to traffic congestion caused by the transit provider or CDN. Because Comcast has the direct relationship with the end-user customer, its customer service call centers were flooded with complaints, requiring additional staffing and related costs. We suffered a loss of good will, harm to our reputation as an ISP, and even loss of Internet customers to other broadband providers.

31. The same harms will occur if the paid interconnection provisions in SB 822 are read to extend to intermediary networks, *and, in fact, will be even worse* because SB 822 would restrict the option Comcast and other ISPs currently have to alleviate these harms through direct commercial interconnection agreements with edge providers, which some intermediary networks will claim are now prohibited. For example, intermediary networks will contend that Comcast and other ISPs must provide unlimited free capacity to them for their delivery of *other* parties' (i.e., edge providers') traffic onto Comcast's networks. Conceding to these demands and providing this interconnection capacity for free to intermediary networks will again increase our network support costs, and give intermediary networks an unfair market advantage to

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review, we decided that it was *unfair for us to be subsidizing Cogent's business*.") (emphasis added).

[7] David Clark et al., *Measurement and Analysis of Internet Interconnection and Congestion* at 9-10.

generate revenues by selling delivery to Comcast's network to edge providers at high margins. It will also significantly disrupt and harm our Internet services.

32. And even if Comcast rejects such demands by intermediary networks, the legal uncertainties created by SB 822 will likely result in a commercial stalemate and have to be resolved through protracted litigation. All the while, it will cause significant disruption to Internet traffic exchange and impose substantial interconnection costs on Comcast and its customers. These harms will only worsen during the impasse, since these intermediary networks will be operating a highly profitable, essentially cost-free "highway" into the Comcast network and thus be incentivized to constantly increase the amount of transit they sell to our network and attempt to force Comcast to increase capacity for free to avert having our customers' experience degraded.

Additional Risks of Harm to Comcast From the Paid Interconnection Provisions

33. As noted above, this problem would not be unique to California because traffic is routed to California from throughout the country and vice versa. But even if the State disavows any intention for the paid interconnection provisions to apply outside of California, and instead claims that the law only regulates the exchange of Internet traffic in the State, SB 822 will still harm Comcast and its broadband Internet customers in numerous ways.

34. Under this view of the law, the ambiguous prohibition on paid interconnection and non-"evasion" and non-waiver provisions in SB 822 will still be seen by intermediary networks as an invitation to the same kind of interconnection arbitrage described above. Only this time, intermediary networks will be incentivized to route substantial amounts of their Internet traffic, destined both for California and non-California end users, to Comcast's interconnection points in the State. Such artificial re-routing of traffic will cause significant congestion and disruption at our California facilities, degrading and slowing Comcast's ability to deliver Internet content to its customers in the State. And even though this network congestion will be caused solely by edge providers and/or intermediary networks rerouting Internet traffic to flood our interconnection links in California, a large percentage of our

customers (and many in the media) will again blame Comcast for such service disruptions. Meanwhile, intermediary networks will contend that they are entitled to obtain increased interconnection capacity on Comcast's network for free to relieve this congestion, which they will then resell at high margins to their edge provider customers.

35. The vast amount of data and the variability in the timing of traffic flows across the Internet will also make it infeasible for Comcast or other ISPs to effectively plan for or manage such abuses of its California facilities. For starters, Comcast would need to install new network infrastructure or, in some cases, even arrange for more space and power to accommodate new interconnection demands from intermediary networks, all while leaving significant existing interconnection capacity with edge providers and other networks lying fallow and stranded. Depending on how much work is required, this process can take six to eight weeks, on average, for each upgrade, during which time Comcast end user customers and commercial partners, as well as other networks interconnected with Comcast's networks – both within and outside of California – would continue to experience congestion and degraded service.

36. Nor would it be feasible for Comcast to avoid these harms by relocating its interconnection exchange points outside of California. These facilities are located to help optimize our network infrastructure for the exchange of Internet traffic in California, where some of the heaviest usage of our network occurs, as well as in surrounding states. Moving these facilities out of the State would increase the latency (i.e., delays in content delivery) that our customers in California experience, degrading their broadband Internet service. It would also cost millions of dollars in unrecoverable expense and be highly disruptive to our business operations.

Harms Caused by Conflicting State Net Neutrality Laws

37. Although California has been at the forefront of enacting legislation to reinstate the net neutrality rules rescinded by the Federal Communications Commission ("FCC"), to date at least three other states (Washington, Oregon, and Vermont) have enacted state-specific net

neutrality legislation. And six states (Hawaii, Montana, New Jersey, New York, Rhode Island, and Vermont) have issued executive orders establishing state-specific net neutrality obligations. There is significant variation among these state measures. For example, while SB 822 reinstates the FCC's repealed Internet Conduct Standard, the New York executive order imposes an entirely different catch-all provision prohibiting ISPs from "requir[ing] that end users pay different or higher rates to access specific types of content or applications." *See* New York EO-175 (signed Jan. 24, 2018), *available at* https://on.ny.gov/2LBkRGY. Because Comcast's Internet services are inherently interstate, it will be impossible or impracticable for Comcast to apply California's requirements to Internet packets as they move through California, and then to apply New York's requirements when those packets travel through New York.

38. Allowing SB 822 to take effect will expose Comcast to a patchwork of inconsistent and burdensome regulation and immediately impair our ability to provide Internet services in California and other parts of the country. These harms will only multiply as other states enact net neutrality legislation, and different agencies and courts in different states interpret and enforce each state's requirements differently as applied to Comcast's Internet services.

The Requested Injunction Will Not Harm Others

39. In contrast to the irreparable and imminent harms that SB 822 will cause to Comcast, its broadband Internet customers, and numerous commercial interconnection partners, the requested injunction will not harm edge providers. Comcast has no incentive or ability to block or degrade content from edge providers under its existing interconnection agreements. Such tactics would not only cause significant disruption of our customers' enjoyment of their broadband service (and result in some of them switching Internet providers), but would also violate our contractual obligations to our interconnection partners. The requested injunction would not harm transit providers, CDNs, or other intermediary networks that interconnect with Comcast, either, because it would simply maintain the status quo. Based on my industry experience, and as the FCC has noted repeatedly, the interconnection marketplace has been

functioning effectively for many years *without* SB 822, and will continue to do so if the requested injunction is granted.[8]

[8] *See, e.g.*, *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 ¶ 18 (2018) (observing that the Internet has flourished "for almost twenty years" under a "light-touch bipartisan framework").

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 27th day of September 2018 in Denver, Colorado.

Ken Klaer
SVP, Comcast Technology Solutions
Comcast Cable Communications

EXHIBIT B

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**Pro hac vice* motion to be filed

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

AMERICAN CABLE ASSOCIATION, CTIA – THE WIRELESS ASSOCIATION, NCTA – THE INTERNET & TELEVISION ASSOCIATION, and USTELECOM – THE BROADBAND ASSOCIATION, on behalf of their members,

Plaintiffs,

v.

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

Defendant.

Case No. _____

DECLARATION OF JOE RUSZKIEWICZ OF AT&T IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, Joe Ruszkiewicz, declare as follows.

1. I, Joe Ruszkiewicz, am Assistant Vice President–Product Marketing Management at AT&T, a member of plaintiffs USTelecom and CTIA. I have worked in this position since 2005 and for AT&T since 1986. I have been personally involved in the negotiation and administration of interconnection agreements. I submit this declaration in support of Plaintiffs' Motion for Preliminary Injunction.

2. AT&T believes in and is committed to an open Internet. It has clearly and unequivocally stated, including in enforceable commitments, that it does not block consumers from accessing lawful content or engage in discriminatory throttling of content. Central to the proper functioning of an open Internet are efficient and commercially reasonable interconnection arrangements. As I explain below, the interconnection provisions of SB 822 will not further an open Internet. Instead, they will threaten the efficient and commercially reasonable interconnection arrangements on which the Internet depends.

Summary

3. AT&T provides broadband Internet access to mass-market customers nationwide, including in California. To bring those customers the content and connectivity they demand, AT&T has negotiated numerous commercial "interconnection" agreements for the exchange of Internet traffic with other networks on the Internet.

4. AT&T and the entities with which it interconnects route traffic along many paths connecting millions of Internet users. The terms of AT&T's interconnection agreements are carefully negotiated to specify the types and locations of traffic-exchange facilities as well as the financial responsibilities undertaken by each network to augment capacity amid rapidly escalating Internet usage. These interconnection arrangements, along with those between third

parties, support the modern Internet and enable it to function properly in this highly dynamic environment.

5. These private agreements have long been free of prescriptive regulation by any governmental authority. I understand, however, that SB 822 purports to regulate such agreements and may be construed to prohibit payment for direct interconnection in many circumstances. *See* § 3101(a)(9) (regulating "ISP traffic exchange" agreements deemed by California authorities to "evad[e]" state net neutrality requirements); *see also* § 3101(a)(3) (prohibiting a broadband Internet access provider from "[r]equiring consideration" from "edge provider[s]" in exchange for "[d]elivering Internet traffic" to its end users). Enforcement of this new legislation threatens to involve regulators in the minute details of carefully reticulated interconnection agreements—deciding, for example, when particular networks are entitled to "free interconnection," at what physical locations, and at what levels of capacity. Such unprecedented regulatory intervention would threaten the interconnection arrangements supporting the modern Internet and impair network performance to the detriment of network operators and their customers. That outcome would not only disserve the public interest, but cause AT&T substantial irreparable harm.

6. First, because the Internet is agnostic as to state political boundaries, the state-specific nature of SB 822 creates enormous uncertainty about its practical application and would create incentives to engage in highly inefficient forms of "geographic arbitrage." The statute seems to ignore the commercial realities that (1) interconnection agreements involve traffic-exchange points both inside and outside of California, and (2) any given interconnection point (wherever located) is used to route enormous volumes of Internet traffic to many different fixed and mobile customers, some of whom are likely in California and most of whom are likely in other states besides California. It would be impossible any time in the foreseeable future to

segregate the terabytes of Internet data exchanged at these interconnection facilities on the basis of the state jurisdictions where individual Internet packets originated or are headed. Thus, if this statute applies to interconnection for any communication with an origination point or an endpoint located in California, no matter where the traffic is exchanged, it will effectively govern—and thus distort—all interconnection arrangements nationwide, even for Internet traffic that never touches California. Meanwhile, other states are considering their own versions of net neutrality legislation, and to the extent another state adopts a different interconnection regime, it would conflict with California's, leaving AT&T no way to comply with both.

7. Even if SB 822 applies to traffic exchange in California only, that will create incentives for major networks to drive more of their AT&T-bound traffic at California traffic-exchange locations not for any sound engineering reason, but simply to avail themselves of asserted state-law rights to "free interconnection." That outcome could cause significant congestion at interconnection points throughout California, harming the Internet experience of AT&T's customers. The networks that deliver this extra traffic into California traffic-exchange points could then blame AT&T for the congestion that they themselves have caused and the ensuing degradation of Internet performance. And they could cite those consequences as a reason for compelling AT&T to incur the costs of augmenting the facilities needed to accommodate all of this excessive traffic. This is precisely the strategy that certain companies undertook in 2014 in their unsuccessful effort to persuade the FCC to regulate their interconnection agreements with AT&T and others.

8. More broadly, even the threat of regulatory intervention in the highly interdependent terms of these agreements would destabilize commercial negotiations by undermining ordinary incentives to compromise on individual issues in order to reach a mutually agreeable solution. For example, in contexts where payment mechanisms are

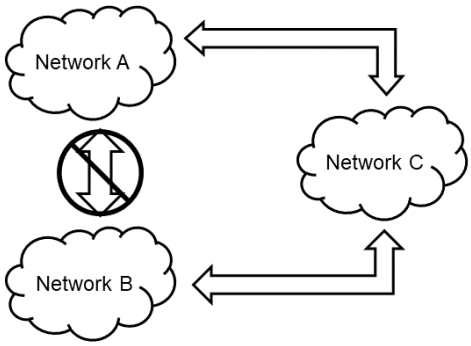
necessary to ensure efficient interconnection arrangements, one party could hold out in hopes of persuading a state regulator to excuse it from paying anything, thereby increasing the risk that no agreement will be reached and that efficient interconnection arrangements will be abandoned. Regulatory gamesmanship would replace sound economic and engineering considerations as the principal driver in negotiations about how traffic is managed, when facilities are augmented, who pays for what, and all other issues that arise in this complex area.

9. In sum, these and the other practical consequences of SB 822, discussed below, would irreparably harm AT&T and its customers in California and across the nation if the legislation takes effect.

Overview of Internet Interconnection Arrangements

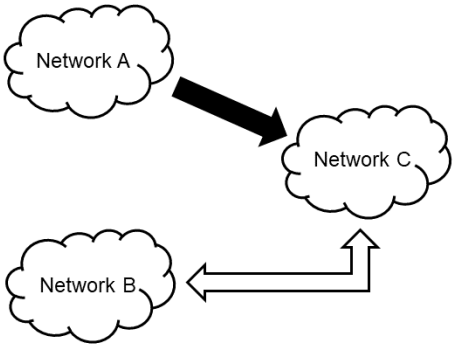
10. The Internet is a "network of networks" that uses a common addressing scheme to enable computers on one network to find computers on other networks and communicate with them. Before a user on one of the Internet's constituent networks can communicate with a user on another network, the two networks must connect with each other, either directly or indirectly. Networks have long achieved such interconnection through "peering" and "transit" agreements, which have been unregulated since the beginning of the commercial Internet in the mid-1990s.

11. Peering is a private commercial arrangement under which two "peer" Internet providers interconnect *directly* and exchange traffic. Each peer provides the other with access only to its own customers rather than to the entire Internet. For example, in the following diagram, Network C has a peering relationship with both Network A and Network B, but Network A does not have a peering relationship with Network B:



Because Networks A and B do not interconnect directly, they need to find an alternative, *indirect* means of connecting their respective customers.

12. Transit is a key means of achieving such indirect interconnection. When a network sells "transit," it ensures the delivery of its customers' traffic to virtually any Internet destination. For example, suppose that Network A serves a large content provider and Network B serves some of that content provider's customers. Network C can sell transit services to Network A (which becomes its transit customer) to enable the content provider's traffic to reach Network B's end users:



13. In this scenario, Network A pays Network C for the transit service that enables Network A's customers (including content providers) to reach the customers (including end users) of Network B and the other peers of Network C. Significantly, however, *many additional networks* besides Network C also peer with (or provide transport services to) Network B and thus stand ready to compete with Network C in selling transit services to Network A. As a

result, the marketplace for transit services is highly competitive, and the per-unit price of those services has been declining for many years. As the Federal Communications Commission ("FCC") found in 2016, "transit prices have fallen by more than 90% in the last five years alone."[1]

14. Whereas transit arrangements involve monetary payments, peering (direct-interconnection) arrangements may or may not. "Settlement-free peering," in which no money changes hands, is likely to make economic sense when (among other circumstances) the traffic flows between networks is roughly balanced and the arrangement presents each network with similar costs and benefits. Under longstanding industry practice, however, one network has traditionally compensated another for direct interconnection if the traffic flows between them are highly "asymmetric"—*i.e.*, if the first network consistently delivers far more traffic onto the second party's network than vice versa and thus imposes disproportionate network costs on the second network.

15. One well-known illustration of this phenomenon involved a dispute in 2005 between two large network peers, Level 3 and Cogent. Cogent had begun delivering much more traffic onto Level 3's network than vice versa, and Level 3 demanded compensation for the imbalance (with apparent success). As Level 3 explained at the time, "Cogent was using far more of Level 3's network, far more of the time, than the reverse. Following our review, we decided that it was unfair for us to be subsidizing Cogent's business."[2]

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[1] Mem. Op. and Order, *Applications of XO Holdings and Verizon Communications Inc. for Consent to Transfer Control of Licenses and Authorizations,* 31 FCC Rcd 12501, ¶ 44 n.156 (Nov. 16, 2016); *see also* William Norton, *What Are the Historical Transit Pricing Trends?*, DRPEERING, http://drpeering.net/FAQ/What-are-the-historical-transit-pricing-trends.php (last visited September 24, 2018).

[2] Level 3 Comm'ns, *Level 3 Issues Statement Concerning Internet Peering and Cogent Communications* (Oct. 7, 2005), http://news.centurylink.com/news?item=125153.

Interconnection Between Content Providers and ISPs

16. In the earliest years of the commercial Internet, most content providers did not operate Internet networks of their own. Instead, they relied solely on network providers such as AT&T, Level 3, Tata, Sprint, Cogent, and Verizon/MCI to convey their traffic across the Internet by means of transit agreements. These providers are known as "backbone" providers or (particularly if they also serve many end-user customers) "Internet service providers" ("ISPs"). Over the past two decades, interconnection arrangements between content providers and ISPs have grown both more complex and more efficient.

17. ***Third-party CDNs.*** Many content providers purchase specialized "content delivery network" ("CDN") services from third parties such as Akamai, Limelight, or Level 3. Either over its own network facilities or those of third-party contractors, a CDN arranges for (1) the transmission of a given content provider's content to many different "cache servers" across the Internet and (2) interconnection of those servers with ISP networks serving customers in particular geographic regions. That arrangement reduces the number of "hops" the content must take from its source (a server) to its destination (individual end users) and is typically more efficient than routing all of the same content from servers in a single geographical location to distant points throughout the Internet.

18. A CDN may interconnect with a given ISP's network either indirectly, by hiring a transit provider to intermediate between it and the ISP, or directly, by negotiating an arrangement with the ISP itself. When a CDN interconnects directly with an ISP, the traffic flows between the two networks are almost entirely unidirectional. For example, when a streaming-video provider hires Akamai to deliver its traffic to an ISP, Akamai delivers enormous quantities of data from its cache servers to the ISP at various points of interconnection, which the ISP must then transmit to its end users; those end users, in contrast,

typically transmit very little data back to the content providers or their CDNs. As in other contexts where traffic flows between two networks are highly asymmetric, a CDN typically compensates an ISP for the substantial costs of accommodating this extra traffic on the ISP's network.

19. ***CDN-equipped content providers.*** Although Akamai and other third-party CDNs are traditional providers of CDN functionality, some of the largest content providers—such as Netflix, Google, and Amazon—have now deployed global CDNs of their own. Through their proprietary CDNs, these content providers have entered into direct interconnection agreements with ISPs serving end-user customers. For example, through a direct-interconnection service known as "AT&T Dedicated Internet," AT&T enables content providers (as well as third-party CDNs) to choose the capacity of their connections and to deliver as much traffic to AT&T's network as those connections will permit. Such agreements benefit any CDN-equipped content provider because they reduce the costs of relying on third-party middlemen (third-party CDNs and transit providers) and ensure efficient delivery of their content to an ISP's customers with a minimum of network hops.

20. Of course, whether a content provider operates its own CDN or contracts CDN functionality out to a third party such as Akamai, the relevant traffic flows are all nearly one-directional and impose the same disproportionate costs on the ISP's network. As a result, just as third-party CDNs have long compensated ISPs for direct interconnection, compensation typically flows from a CDN-equipped content provider to any ISP that it directly interconnects with. But such direct interconnection does not impose new costs on the content provider that it otherwise would not bear. In the absence of direct interconnection with the ISP, the content provider would still pay a third party (either a third-party CDN or a transit provider) for the function of indirectly interconnecting with the ISP's network.

21. Compensation for direct-interconnection arrangements between ISPs and content providers (or their CDNs) serves critical efficiency objectives. Because the compensation owed depends in part on the volume of data traffic delivered onto the ISP's network, each content provider has appropriate incentives to keep that traffic volume efficient—for example, by using various forms of "digital compression" to convey essentially the same information with less data traffic. Requiring content providers to cover the costs their traffic imposes on the ISP's network also gives them appropriate incentives to agree to efficient points of interconnection so that the ISP does not incur the costs of transporting high-volume data traffic over unnecessary distances.

22. Finally, because ISPs must recover their network costs from one source or another, these paid-interconnection arrangements impose downward pressure on the retail prices that ISPs charge all other customers for broadband Internet access service. Thus, all else held equal, banning payment for direct interconnection services offered by AT&T in California would cause customers to pay higher retail rates than they otherwise would.

The Many Alternatives to Direct Interconnection

23. In AT&T's experience, content providers rarely rely *exclusively* on direct interconnection arrangements to reach any given ISP's customers. Instead, they typically supplement such arrangements by negotiating agreements with third-party CDNs and/or with one or more transit providers (*e.g.*, the ISP's peers). Those third-party arrangements provide multiple alternative paths into any ISP's network and enable each content provider to adjust its routing decisions among those providers on a moment-by-moment basis, depending on cost, measured performance, congestion, network outages, and other considerations. These third-party alternatives also constrain the price that any ISP can charge for direct interconnection.

24. As these alternatives reveal, no content provider *needs* to interconnect directly with any ISP—or deal directly with the ISP in any other respect—in order to ensure that its

content reaches the ISP's customers. Although some content providers have chosen to interconnect *directly* with ISPs, they typically do so to supplement third-party CDN services and/or transit services offered by one or more of the ISP's peers (and, for many ISPs, the ISP's own transit providers). Those more traditional forms of *indirect* interconnection will also enable the content providers' traffic to reach any ISP's end users.

25. Given this multiplicity of paths into an ISP network, no ISP can selectively degrade particular peering arrangements to harm particular content providers—especially because those content providers and their transit intermediaries, not the ISP, choose the interconnection path they will use for sending content to the ISP's customers.[3] As a result, AT&T could not subject a content provider to a "degradation by congestion" strategy without, among other things, limiting capacity across *all of its interconnection points* for extended periods. That strategy would be commercially self-destructive because it would degrade the ISP's entire service—not just the performance of any given content provider—and would thus threaten the ISP's status as a broadband provider to both consumers and businesses.

Efforts to Manipulate the Regulatory System

26. Interconnection among IP networks has functioned efficiently for more than two decades without prescriptive regulation by the FCC or other regulatory authorities.[4] That was

[3] Although I can make these observations only in connection with my experience at AT&T, they appear to apply broadly to all ISPs. *See Applications of Global Crossing Limited and Level 3 Communications, Inc. for Consent to Transfer Control*, Mem. Opinion and Order and Declaratory Ruling, 26 FCC Rcd 14,068, ¶ 27 (2011) (finding foreclosure concerns unfounded because "if the combined entity were to engage in connection degradation or price increases," its interconnection customers "would be able to transition easily to another provider").

[4] *See generally* Stanley M. Besen & Mark A. Israel, *The Evolution of Internet Interconnection from Hierarchy to "Mesh": Implications for Government Regulation*, 25 Info. Econ. & Pol'y 235 (2013).

true even during the brief period (2015-16) in which the FCC imposed common carrier regulation on broadband ISPs to enforce "net neutrality" rules, which are fundamentally distinct from interconnection arrangements.[5]

27. In the months leading up to that decision, however, Netflix and certain network providers, including Cogent, tried to persuade the FCC to issue rules forbidding or restricting compensation for direct-interconnection arrangements. In arguing that such rules were necessary, these companies cited a series of interconnection disputes in 2014 in which they erroneously blamed AT&T and other ISPs for the poor performance of Netflix traffic on certain networks. As it turned out, however, the complaining companies themselves had allowed congestion to occur by driving their traffic to certain locations on ISP networks and then refusing to pay for the upgrades needed to accommodate the greater traffic load.[6]

28. After this was explained, the FCC rejected requests by Cogent and others to intervene by prohibiting paid-interconnection arrangements. It concluded that "prescriptive rules" governing interconnection arrangements were particularly unwarranted and opted instead

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[5] Report and Order on Remand, *Protecting and Promoting the Open Internet,* 30 FCC Rcd 5601 ¶ 31 (2015) (*"2015 Order"*).

[6] *See*, *e.g.*, Dan Rayburn, *Cogent Now Admits They Slowed Down Netflix's Traffic, Creating A Fast Lane & Slow Lane*, StreamingMediaBlog (Nov. 5, 2014) (*"Cogent Now Admits"*), https://www.streamingmediablog.com/2014/11/cogent-now-admits-slowed-netflixs-traffic-creating-fast-lane-slow-lane.html; Nick Feamster, *Why Your Netflix Traffic is Slow, and Why the Open Internet Order Won't (Necessarily) Make It Faster*, Freedom to Tinker (Mar. 25, 2015), https://freedom-to-tinker.com/2015/03/25/why-your-netflix-traffic-is-slow-and-why-the-open-internet-order-wont-necessarily-make-it-faster/ ("Much of the popular media has led consumers to believe that the reason that certain Internet traffic—specifically, Netflix video streams—were experiencing poor performance because Internet service providers are explicitly slowing down Internet traffic. … These caricatures are false, and they demonstrate a fundamental misunderstanding of how Internet connectivity works, what led to the congestion in the first place, and the economics of how the problems were ultimately resolved."); *see also* David Clark *et al.*, *Measurement and Analysis of Internet Interconnection and Congestion,* at 9-10 (Sept. 10, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2417573.

to continue "watch[ing]" and "learn[ing]" about the evolution of Internet interconnection.[7] Denied a ban on paid-interconnection arrangements, these network operators quickly entered into efficient, mutually agreeable agreements that resolved their congestion.

29. I believe that Cogent and others repeated their claims about the same 2014 interconnection disputes to induce the California legislature to enact SB 822's restrictions on paid-interconnection agreements. In my experience, however, efficient interconnection agreements can be more easily reached only if one side *cannot* credibly threaten to invoke regulatory intervention as a fallback in case it does not win all of the terms it seeks in negotiations. So long as a credible threat of regulatory intervention persists, it will chill commercial negotiations because one side will have incentives to hold out in hopes of a more favorable regulatory outcome. Similarly, that regulatory overhang will give networks that wish to interconnect directly with ISPs artificial incentives to route their traffic to ISPs in ways that *generate congestion*, at the expense of end users, in order to gain the attention of regulators and make their intervention more likely. As discussed below, that is one of the central threats posed by SB 822.

The Irreparable Harms Imposed By SB 822

30. If allowed to take effect on January 1, 2019, the interconnection provisions of SB 822 would irreparably harm AT&T and its customers in two broad types of ways. First, because the Internet is oblivious to state political boundaries, state-by-state regulation of Internet interconnection would create arbitrage incentives, impose unnecessary costs on ISPs, and ultimately impair Internet performance. Second, regulatory intervention in historically unregulated traffic-exchange arrangements would distort interconnection arrangements and

[7] *2015 Order* ¶ 31.

impose unprecedented and costly uncertainty on the entire Internet ecosystem. AT&T is particularly concerned that the prospect of regulatory intervention under SB 822 will disrupt ongoing and future negotiations and produce inefficient, regulation-driven interconnection arrangements that harm AT&T and its customers.

31. ***Costs of state-by-state regulation.*** AT&T and its direct-interconnection counterparties typically exchange Internet traffic at multiple designated points across the country. Some of these points are located in California, but most are not. Because state boundaries are irrelevant to efficient Internet traffic routing, traffic exchanged *outside* of California under these contracts may well be destined for AT&T's fixed and mobile broadband Internet access customers *within* California (as well as many customers outside of California). Likewise, traffic exchanged at points *within* California may well be destined for AT&T's fixed and mobile broadband Internet access customers *outside* of California.[8] These direct-interconnection agreements enable AT&T and its counterparties to route traffic in the manner that is most efficient at any particular time. The efficiencies of these agreements would be lost if individual states could impose substantively different rules on interconnection arrangements depending on the states in which interconnection points or end users are located.

32. That is what SB 822 purports to do, although the scope of its application is highly ambiguous. The law's regulation of traffic-exchange arrangements applies only "insofar as [a] provider is engaged in providing … broadband Internet access service," § 3101(a), (b),

[8] As a general rule, traffic is exchanged between Internet peers utilizing a "hot potato" routing model. The traffic is handed off by one peer to the other at the interconnection point closest to the origin of the traffic, regardless of where the traffic is ultimately destined, and the other peer is then obligated to carry that traffic on its own network to its destination. If there is return traffic, the other peer hands it off to the first peer at the nearest interconnection point and the first peer is then obligated to carry that traffic on its own network to its destination.

defined as a service "provided to customers in California," § 3100(b). It is unclear how this language will apply to real-world interconnection agreements: again, such agreements typically involve interconnection points both inside and outside of California, and any given interconnection point is used to route Internet traffic to many different fixed and mobile customers, some of whom are likely in California and many of whom are likely not.

33. Under one conceivable interpretation, SB 822 purports to regulate all interconnection arrangements anywhere in the country if *some* of the traffic exchanged under those arrangements is destined for customers physically located in California. Under that interpretation, SB 822 would have essentially *nationwide application* because some percentage of the traffic exchanged at any given interconnection point is likely to end up on computers or mobile devices of customers physically in California. AT&T lacks the ability today to "geofence" California to ensure that traffic subject to SB 822 is treated in a manner consistent with that statute's requirements, while keeping all other traffic from reaching customers in California. Moreover, if one state could adopt interconnection requirements with such *de facto* nationwide application, other states could do the same, threatening the industry with conflicting obligations imposed by disparate state-imposed interconnection rules with nationwide effect.

34. At a minimum, SB 822 could be read to apply only to interconnection arrangements physically located in California. That interpretation, however, would create incentives to engage in "geographic arbitrage": a strategy by content-sending networks to deliver more of their AT&T-bound traffic to California locations to avail themselves of asserted rights to "free interconnection" under state law, even if most of the traffic is destined for AT&T customers far away from California. In the short term, that arbitrage strategy would potentially expose AT&T's network to massive congestion both (1) at the interconnection points in California that become overloaded and (2) on AT&T's backbone network, as AT&T is forced to

deliver this extra traffic to its ultimate destination throughout the rest of the country. I expect that the content-sending networks causing that congestion would blame AT&T for the corresponding decline in the quality of end user experiences, just as Cogent and others did in the 2014 Netflix-related disputes discussed above. Because end users have no ready basis for validating such misinformation, many would in fact attribute their poor service to AT&T, causing lasting harm to AT&T's reputation.

35. Over the ensuing months, AT&T would then incur additional costs if it had to adapt to these geographic arbitrage schemes by increasing its interconnection capacity in California and transport capacity across the rest of the country so that it could then backhaul traffic from that State to the distant geographic points where the traffic would have been more efficiently handed off in the absence of SB 822. Those costs would then be magnified if, as is likely, other States in turn adopted state-specific rules governing interconnection arrangements within their borders, requiring AT&T to incur the additional costs of continuously adapting its network to an ever-changing patchwork quilt of state-by-state regulation.

36. ***Inherent costs of interconnection regulation.*** Even apart from these costs of complying with disparate state-by-state regulation, SB 822's restrictions on direct-interconnection arrangements would impose unrecoverable costs on AT&T, its customers, and the Internet ecosystem as a whole.

37. First, I understand that continued performance by AT&T under its existing Internet traffic exchange agreements with providers such as Facebook, Netflix, Google, Amazon, and Apple would likely expose AT&T to immediate claims by public and private entities that the compensation terms of those agreements violate SB 822. Such claims would cast doubt on whether AT&T should continue providing interconnection services under these contracts, which presuppose that AT&T will be compensated for the costs it incurs.

38. Moreover, insofar as SB 822 shields interconnecting networks from covering the costs their traffic imposes on AT&T's network, they would lose the financial incentives discussed above to manage their exchange of traffic with AT&T efficiently and predictably. For example, if freed from any obligation to cover those costs, content-sending networks would lack the incentives they have today to engage in efficient digital compression. As a result, they could deliver greater volumes of traffic onto AT&T's network and do so at inefficient points and in unpredictable ways. That outcome would impose additional costs on AT&T as it tries to keep up with these new network demands, and it could also impair network performance to the detriment of AT&T's end user customers, again harming AT&T's reputation in the competitive marketplace for broadband Internet access services. Similarly, as discussed above, shielding content-sending networks from covering their share of ISP network costs would not only increase those costs in an absolute sense (by removing the interconnecting networks' incentives to minimize them), but would shift the entire burden of recovering those costs to all other customers, including retail consumers.

39. SB 822 would also harmfully distort the outcomes of commercial negotiations regarding interconnection arrangements. AT&T is currently negotiating with content providers regarding direct interconnection. As discussed, content providers and their network agents have long (and unsuccessfully) urged federal regulators to conclude (1) that they are entitled to free interconnection and traffic-delivery at points of their choosing on an ISP's network and (2) that each ISP must build sufficient capacity at no cost to the content provider (but at substantial cost to itself) to avoid congestion at these interconnection points and backhaul its traffic to end users across the country. AT&T had to bargain against the shadow of that regulatory threat several years ago, when the FCC was actively considering (even though it ultimately rejected) proposals to ban interconnection compensation altogether. It appears inevitable that content providers will

similarly rely on SB 822 to demand free, dedicated interconnection capacity at locations of their choice—not only within California, but nationwide, on the ground that some traffic exchanged outside of California may be destined for some customers in California. As the FCC experience demonstrates, the threat of that outcome would distort the course of bargaining and result in substantial and irreparable harm to AT&T if SB 822 is allowed to take effect pending challenges to its validity.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 1st day of October 2018 in Dallas, Texas.

Joe Ruszkiewicz

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

AMERICAN CABLE ASSOCIATION, CTIA – THE WIRELESS ASSOCIATION, NCTA – THE INTERNET & TELEVISION ASSOCIATION, and USTELECOM – THE BROADBAND ASSOCIATION, on behalf of their members,

Plaintiffs,

v.

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

Defendant.

Case No. _____

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Having considered Plaintiffs' Motion for a Preliminary Injunction, the Court **GRANTS** the Motion. Defendant is hereby preliminarily enjoined from enforcing SB 822. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-35 (9th Cir. 2011).

Accordingly, it is hereby **ORDERED** that, pending a judgment on the merits, Defendant and all of Defendant's respective officers, agents, servants, employees, attorneys, and persons acting in concert of participation with Defendant are enjoined from enforcing the provisions of California law enacted through SB 822, codified at California Civil Code §§ 3100 – 3104.

This Court has exercised its discretion to determine that no bond shall be required, and this Order shall be effective immediately.

IT IS SO ORDERED.

DATED: _____

Hon. _____
UNITED STATES DISTRICT JUDGE