

JOSEPH H. HUNT
Assistant Attorney General
Civil Division
MCGREGOR SCOTT
United States Attorney
BRINTON LUCAS
Counsel to the Assistant Attorney General
JAMES J. GILLIGAN
Acting Director, Federal Programs Branch
JACQUELINE COLEMAN SNEAD
Assistant Branch Director, Federal Programs Branch
DAVID SHELLEDY
Civil Chief, Assistant United States Attorney
JOSEPH BORSON (Va. Bar No. 85519)
KEVIN SNELL (NY Bar)
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L St. NW
Washington, DC 20530
Telephone: (202) 305-0924
Fax: (202) 616-8460
E-mail: Kevin.Snell@usdoj.gov

Attorneys for the United States

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF CALIFORNIA;
EDMUND GERALD BROWN JR.,
Governor of California, in his Official
Capacity, and XAVIER BECERRA,
Attorney General of California, in his
Official Capacity,

Defendants.

Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

1 Plaintiff, the United States of America, by its undersigned attorneys, brings this civil
2 action for declaratory and injunctive relief, and alleges as follows:

3 **NATURE OF THE ACTION**

4 1. In this action, the United States seeks a declaration invalidating and preliminarily and
5 permanently enjoining the California Internet Consumer Protection and Net Neutrality Act of
6 2018, enacted through Senate Bill 822 (“SB-822”). SB-822 is preempted by federal law and
7 therefore violates the Supremacy Clause of the United States Constitution.

8 2. The Communications Act, as amended by the Telecommunications Act of 1996, sets
9 forth “the policy of the United States” to “preserve the vibrant and competitive free market . . .
10 for the Internet and other interactive computer services, unfettered by Federal or State
11 regulation.” 47 U.S.C. § 230(b)(2). Consistent with that policy, in 2002, the Federal
12 Communications Commission (“FCC”) issued an order classifying broadband internet access
13 provided over cable modems as an “information service” statutorily exempt from common
14 carrier regulation under the Act. *Inquiry Concerning High-Speed Access to the Internet Over*
15 *Cable and Other Facilities*, 17 FCC Rcd 4798 (2002). The FCC’s decision was upheld by the
16 Supreme Court in *National Cable & Telecommunications Ass’n v. Brand X*, 545 U.S. 967
17 (2005). For the next decade, the Commission adhered to that classification, and the Internet
18 marketplace flourished.

19 3. In 2015, in a sharp (but brief) departure, the FCC reversed its longstanding determination
20 and classified broadband internet access service as a “telecommunications service” subject to the
21 Communication Act’s common carrier requirements. *Protecting and Promoting the Open*
22 *Internet*, 30 FCC Rcd 5601 (2015) (“2015 Order”). On the basis of that newly minted
23 classification, the agency adopted a set of rules governing the conduct of broadband providers.
24 Those rules prohibited providers from (1) “blocking” or “throttling” (degrading) lawful content,
25 applications, services, or non-harmful devices, (2) engaging in “paid prioritization” (giving
26 preferential treatment to certain Internet traffic either in exchange for consideration or to benefit
27 an affiliated entity), or (3) “unreasonably interfer[ing] with or unreasonably disadvantag[ing]”
28

1 the ability of producers of Internet content, applications, services or devices—known as “edge
2 providers”—to make their offerings available to users, or the ability of users to access the
3 content, applications, services, and devices offered by edge providers. 30 FCC Rcd at 5659-69
4 ¶¶ 133-53.

5 4. In January 2018, the FCC released *Restoring Internet Freedom*, 33 FCC Rcd 311 (2018)
6 (“2018 Order”), returning to its prior information service classification of broadband Internet
7 access and, concluding that the “costs . . . to innovation and investment outweigh[ed] any
8 benefits they may have,” repealed the 2015 Order’s rules governing the conduct of broadband
9 providers. *Id.* ¶ 4.

10 5. The 2018 Order recognized that “regulation of broadband Internet access service should
11 be governed principally by a uniform set of federal regulations, rather than by a patchwork that
12 includes separate state and local requirements,” and that such requirements “could impose far
13 greater burdens” than the FCC’s “calibrated federal regulatory regime,” and threaten to
14 “significantly disrupt the balance” the agency struck. *Id.* ¶ 194; *see id.* ¶¶ 197-204.
15 Accordingly, the 2018 Order preempts “any state or local measures that would effectively
16 impose rules or requirements that [the FCC] ha[d] repealed or decided to refrain from imposing
17 in this order or that would impose more stringent requirements for any aspect of broadband
18 service that [it] address[ed] in this order.” *Id.* ¶ 195.

19 6. California, however, seeks to second-guess the Federal Government’s regulatory
20 approach by enacting SB-822. As the state acknowledges, SB-822 “codif[ies] portions of the
21 recently-rescinded” 2015 Order and imposes “additional bright-line rules” that not even “the
22 FCC opted” to embrace in 2015. Cal. S. Comm. on Judiciary, SB 822 Analysis 1, 19 (2018).
23 As such, SB-822 squarely falls within the preemption provision of the 2018 Order and is
24 unlawful.
25

26 7. Plaintiff therefore seeks a declaratory judgment that SB-822 is invalid under the
27 Supremacy Clause and is preempted by federal law. Plaintiff also seeks an order preliminarily
28 and permanently enjoining enforcement of the preempted provisions of SB-822.

JURISDICTION AND VENUE

8. The Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1345.

9. Venue is proper in this jurisdiction under 28 U.S.C. § 1391(b) because Defendants reside within the Eastern District of California and because a substantial part of the acts or omissions giving rise to this Complaint arose from events occurring within this judicial district.

10. The Court has authority to provide the relief requested under the Supremacy Clause, U.S. Const. art. VI, cl. 2, as well as 28 U.S.C. §§ 1651, 2201, 2202, and its inherent equitable powers.

THE PARTIES

11. Plaintiff is the United States of America.

12. Defendant, the State of California, is a state of the United States.

13. Defendant, Edmund G. Brown Jr., is the Governor of the State of California, and is being sued in his official capacity.

14. Defendant, Xavier Becerra, is the Attorney General for the State of California, and is being sued in his official capacity.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

15. The Supremacy Clause of the Constitution mandates that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const., art. VI, cl. 2.

16. The Communications Act of 1934 (the “Act”), as amended by the Telecommunications Act of 1996 (the “1996 Act”) and other laws, establishes “the policy of the United States” to “preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(2). In the preamble to the 1996 Act, Congress set forth its goal of “promot[ing] competition and reduc[ing] regulation” to “secure lower prices and higher quality services for American telecommunications consumers” and to “encourage the rapid deployment of new telecommunications technologies.” Pub. L. No. 104-104 pmb., 110 Stat. at 56.

1 17. Section 2 of the Act, 47 U.S.C. § 152, addresses the division of federal and state authority
 2 over communications services. Section 2(b) of the Act expressly preserves state jurisdiction over
 3 *intrastate* communications, subject to any federal rules authorized under certain other provisions
 4 of the Act. *Id.* § 152(b) (“[C]harges, classifications, practices, services, facilities, or regulations
 5 for or in connection with intrastate communication service” fall under state jurisdiction,
 6 “[e]xcept as provided” under certain other provisions). By contrast, Congress did not reserve
 7 any state authority over *interstate* communications, which instead are governed by federal law.
 8 *See id.* § 152(a) (granting the FCC jurisdiction over “all interstate and foreign communication”
 9 and “all persons engaged . . . in such communication”). The FCC thus is authorized to preempt
 10 inconsistent state and local regulation, including on the basis of the “impossibility exception to
 11 state jurisdiction” “[b]ecause both interstate and intrastate communications can travel over the
 12 same Internet connection . . . in response to a single query,” 2018 Order ¶ 200, and the agency’s
 13 “independent authority to displace state and local regulations in accordance with the
 14 longstanding federal policy of nonregulation for information services,” *id.* ¶ 202.

15 18. Pursuant to these authorities, the 2018 Order expressly “preempt[s] any state or local
 16 measure that would effectively impose rules or requirements that [it] ha[s] repealed or decided to
 17 refrain from imposing in this order or that would impose more stringent requirements for any
 18 aspect of broadband service that [it] address[es] in this order.” 2018 Order ¶ 195; *see also id.*
 19 ¶¶ 197-204. This includes “any so-called ‘economic’ or ‘public utility-type’ regulations,
 20 including common-carriage requirements akin to those found in Title II of the Act and its
 21 implementing rules, as well as any other rules or requirements that [the FCC] repeal[ed] or
 22 refrain[ed] from imposing” in the 2018 Order. *Id.* ¶ 195 (footnote omitted).

24 19. The 2018 Order repealed several measures imposed in the 2015 Order. In 2015, the FCC
 25 adopted three bright-line rules prohibiting Internet service providers (“ISPs”) from blocking
 26 access to lawful websites (“blocking”); impairing or degrading access to Internet conduct (often
 27 referred to as “throttling”); and prioritizing the transmission of content for compensation (“paid
 28 prioritization”). 2015 Order ¶¶ 15-19. The 2015 Order further adopted a general Internet

1 conduct standard and certain transparency provisions. *Id.* ¶¶ 20-24.

2 20. The FCC determined, after careful study, that “the costs of [these 2015 rules] to
3 innovation and investment outweigh any benefits they may have,” 2018 Order ¶ 4, and thus their
4 elimination “is more likely to encourage broadband investment and innovation, furthering [the]
5 goal of making broadband available to all Americans and benefitting the entire Internet
6 ecosystem,” *id.* ¶ 86; *see also id.* ¶ 245 (“the substantial costs [of the 2015 rules]—including the
7 costs to consumers in terms of lost innovation as well as monetary costs to ISPs—[are] not worth
8 the possible benefits”) (footnote omitted).

9 21. Accordingly, the FCC, among other things, repealed the blocking, throttling, and paid
10 prioritization rules. It also concluded that the 2015 Internet conduct standard was “vague and
11 had created regulatory uncertainty,” *id.* ¶ 247, and thus repealed that former requirement. *Id.*
12 ¶¶ 246-66.

13 22. The 2018 Order instead relies on modified transparency and disclosure requirements,
14 market forces, and enforcement of preexisting antitrust and consumer protection laws. *See, e.g.,*
15 *id.* ¶¶ 140-54, 240-45.

16 23. First, it retained, with some modifications, a “transparency rule” mandating that ISPs
17 accurately disclose network management practices, performance, and commercial terms of
18 services. *See id.* ¶¶ 215-31.

19 24. Second, the FCC recognized that “[o]ther legal regimes—particularly antitrust law and
20 the [Federal Trade Commission’s (“FTC”)] authority under Section 5 of the FTC Act to prohibit
21 unfair and deceptive practices—provide protection for consumers,” 2018 Order ¶ 140; *see id.*
22 ¶¶ 141-54, and that these protections are especially potent here because the transparency rule
23 “amplifies the power of antitrust law and the FTC Act to deter and where needed remedy
24 behavior that harms consumers,” *id.* ¶ 244. To that end, the FCC entered into a memorandum of
25 understanding with the FTC to share information and to assist that agency’s policing specific
26 unfair or deceptive acts. *See* Restoring Internet Freedom FCC-FTC Memorandum of
27 Understanding, https://www.ftc.gov/system/files/documents/cooperation_agreements/fcc_
28

1 fcc_mou_internet_freedom_order_1214_final_0.pdf.

2 25. The FCC further “conclude[d] that regulation of broadband Internet access should be
3 governed principally by a uniform set of federal regulations, rather than by a patchwork that
4 includes separate state and local requirements,” 2018 Order ¶ 194, and thus preempted
5 inconsistent state and local regulations, *id.* ¶¶ 194-204.

6 26. The 2018 Order was released in January 2018, and took effect on June 11, 2018.

7 27. “[E]xclusive jurisdiction . . . to enjoin, set aside, suspend (in whole or part) or to
8 determine the validity . . . of all” final FCC orders lies in the federal courts of appeals on direct
9 review. *See* 28 U.S.C. § 2342(1); 47 U.S.C. § 402. Although the validity of the 2018 Order is
10 being challenged in the United States Court of Appeals for the D.C. Circuit, that Order remains
11 in effect and must be presumed valid unless and until the D.C. Circuit holds otherwise. *See id.*;
12 *see also Mozilla Corp. v. FCC*, Case Nos. 18-1052 et al. (D.C. Cir.).

13 **CALIFORNIA SB-822**

14 28. On August 31, 2018, and notwithstanding the 2018 Order’s effect, California’s state
15 legislature passed SB-822, which codifies the federal requirements that the 2018 Order
16 eliminated and imposes additional restrictions on ISPs. Governor Brown signed the bill into law
17 on September 30, 2018.

18 29. Specifically, SB-822 categorically bans blocking, throttling, and paid prioritization, SB-
19 822 §§ 3101(a)(1), (a)(2), (a)(3)(B)-(C), (a)(4); *see also id.* § 3100(j), (r), and also adopts an
20 Internet conduct standard that is nearly identical to the one repealed by the 2018 Order. *Id.*
21 § 3101(a)(7). And though the 2018 Order “return[ed] Internet traffic exchange to the
22 longstanding free market framework,” 2018 Order ¶¶ 163-73, SB-822 appears to regulate traffic
23 exchange, SB-822 §§ 3101(a)(3)(A), (a)(9). Additionally, California imposes more stringent
24 requirements than the FCC in that SB-822 broadly prohibits companies from offering “free data”
25 arrangements that exempt certain Internet traffic from data limitations, *id.* § 3101(a)(5), (a)(6),
26 (a)(7)(B); *see also id.* § 3100(t), and apparently prevents ISPs from offering or providing a range
27 of specialized services over the same last-mile connection, *id.* § 3102(a)(2).
28

1 30. **Blocking.** The 2018 Order repealed “the no-blocking . . . rule[]” because it “[was]
2 unnecessary to prevent the harms that they were intending to thwart,” 2018 Order ¶ 263, and
3 because the costs of *ex ante* conduct rules exceed their benefits, *see id.* ¶¶ 322-23. Yet SB-822
4 makes it “unlawful” to “[b]lock[] lawful content.” SB-822 §§ 3101(a)(1); *see also id.*
5 § 3101(a)(3)(B) (prohibiting charges to avoid blocking) [collectively referred to hereinafter as
6 “Blocking Provisions”].

7 31. **Throttling.** The 2018 Order similarly repealed the “unnecessary” “no-throttling rules.”
8 2018 Order ¶ 263. Yet SB-822 forbids the “[i]mpairing or degrading [of] lawful Internet traffic
9 on the basis of Internet content, application, or service, or use of a non-harmful device.” SB-822
10 § 3101(a)(2); *id.* § 3100(j); *see also id.* § 3101(a)(3)(C) (prohibiting charges to avoid throttling)
11 [collectively referred to hereinafter as “Throttling Provisions”].

12 32. **Paid Prioritization.** The 2018 Order “decline[d] to adopt a ban on paid prioritization.”
13 2018 Order ¶ 253. Yet SB-822 makes it unlawful to “[e]ngage in paid prioritization.” SB-822
14 § 3101(a)(4); *id.* § 3100(r) [collectively referred to hereinafter as “Paid Prioritization
15 Provisions”].

16 33. **Internet Conduct Standard.** The 2018 Order repealed the 2015 Order’s Internet
17 conduct standard that it found “not in the public interest,” 2018 Order ¶¶ 246-52; *see also* 2015
18 Order ¶ 136 (text of former Internet conduct standard). Yet SB-822 imposes a nearly identical
19 standard, prohibiting “unreasonably interfering with[] or disadvantaging, either an end user’s
20 ability to select, access, and use broadband Internet access service or the lawful Internet content,
21 applications, services, or devices of the end user’s choice, or an edge provider’s ability to make
22 lawful content, applications, services, or devised available to end users.” SB-822 § 3101(a)(7)
23 [hereinafter “Internet Conduct Standard”].
24

25 34. **Internet Traffic Exchange.** The 2018 Order eliminated the 2015 Order’s oversight of
26 Internet traffic exchange agreements and “return[ed] Internet traffic exchange to the
27 longstanding free market framework.” 2018 Order ¶¶ 163-73. But SB-822 appears to regulate
28 traffic exchange by prohibiting ISPs from charging edge providers for delivering traffic to end

1 users and by prohibiting any traffic-exchange agreements that could be construed as having the
 2 purpose or effect of evading other prohibitions. SB-822 §§ 3101(a)(3)(A), (a)(9) [hereinafter
 3 “Traffic-Exchange Provisions”].

4 35. **Zero-Rating.** SB-822 goes even beyond the 2015 Order by banning “[z]ero-rating,”
 5 defined as “exempting some Internet traffic from a customer’s data usage allowance,” SB-822 §
 6 3100(t), either (a) in exchange for consideration, *id.* § 3101(a)(5); *see also id.* § 3101(a)(7)(B), or
 7 (b) when doing so for only “some Internet content, applications, services, or devices in a
 8 category for Internet content, applications, services, or devices, but not the entire category,” *id.* §
 9 3101(a)(6) [hereinafter “Zero-Rating Provisions”]. Even in 2015, the FCC expressly declined to
 10 adopt that categorical approach, saying it would examine such practices only on a case-by-case
 11 basis. *See* 2015 Order ¶ 152. The 2018 Order not only declined to bar zero-rating programs, but
 12 expressly noted that, in the aftermath of the 2015 Order, the Wireless Telecommunications
 13 Bureau engaged in a “thirteen-month investigation” that “did not identify specific evidence of
 14 harms from particular zero-rating programs.” 2018 Order ¶ 250.

15 36. **Specialized Services Provisions.** SB-822 also goes beyond the 2015 Order by extending
 16 its prohibitions to separate non-Internet services that are delivered over an ISP’s last-mile
 17 transmission facilities. SB-822 § 3102(a) [hereinafter “Specialized Services Provisions”]. SB-
 18 822 does not define what services are prohibited by section 3102(a); it may be referring to what
 19 are sometimes known as “specialized services” (such as “facilities-based VoIP offerings, heart
 20 monitors, or energy consumption sensors,” 2015 Order ¶ 35), although the prohibition is so
 21 broad that it might even apply to a provider prioritizing its co-packaged pay-TV services. Even
 22 the 2015 Order expressly excluded specialized services from the rules it applied to broadband
 23 Internet access service, except for narrow circumstances where it could be subject to limited
 24 oversight under the Internet Conduct Standard. 2015 Order ¶¶ 35, 207-13. SB-822 appears to
 25 subject specialized services to all of “the prohibitions in Section 3101,” SB-822 § 3102(a)(1).
 26 Further, SB-822 prohibits any specialized services perceived to “negatively affect the
 27 performance of broadband Internet access service,” *id.* § 3102(a)(2), which is plainly
 28

inconsistent with the 2018 Order’s repeal of the Internet Conduct Standard.

37. **Disclosure Provision.** SB-822 further forbids “[f]ailing to disclose publicly accurate information regarding the network management practices, performance, and commercial terms . . . sufficient for consumers to make informed choices” SB-822 § 3101(a)(8) [hereinafter “Disclosure Provision”]. Although this language resembles a portion of the FCC’s transparency rule, 47 C.F.R. § 8.1(a), it omits the 2018 Order’s specific guidance addressing precisely what disclosures are and are not required, *see* 2018 Order ¶¶ 215-31. To the extent this provision imposes disclosure obligations “in any way inconsistent with” those imposed by the FCC, *id.* ¶ 195 n.729, which is a substantial possibility in light of the lack of guidance and uncertainty of future application, it is preempted by the 2018 Order. *See id.*

38. **Mobile Broadband Internet Access Service Provisions.** The 2018 Order makes clear that “broadband Internet access service, regardless of whether offered using fixed or mobile technologies, is an information service under the Act,” and that mobile broadband Internet access service “should not be classified as a commercial mobile service [i.e., requiring common carrier treatment] or its functional equivalent.” 2018 Order ¶ 65; *see also id.* ¶¶ 65-85. This conclusion, the Commission explained, “furtheres the Act’s overall intent to allow information services to develop free from common carrier regulations.” *Id.* ¶ 82. SB-822, by contrast, imposes the same common carrier rules described above on providers of mobile broadband Internet access services as it does on providers of fixed broadband Internet access services. SB-822 §§ 3101(b), 3102(b) [hereinafter “Mobile Broadband Internet Access Service Provisions”]. SB-822 conflicts with the 2018 Order in this respect as well and is likewise preempted.

COUNT ONE – PREEMPTION UNDER FEDERAL LAW

39. Plaintiff hereby incorporates paragraphs 1 through 38 of this Complaint as if fully stated herein.

40. The 2018 Order directly preempts SB-822’s Blocking Provisions, Throttling Provisions, Paid Prioritization Provisions, Internet Conduct Standard, Traffic Exchange Provisions, Zero-Rating Provisions, Specialized Services Provisions, and Mobile Broadband Internet Access

1 Service Provisions. To the extent SB-822’s Disclosure Provision imposes disclosure obligations
2 “in any way inconsistent with” those imposed by the FCC, 2018 Order ¶ 195 n.729, it is directly
3 preempted by the 2018 Order.

4 41. In addition, SB-822 conflicts with the 2018 Order’s affirmative federal “deregulatory
5 policy” and “deregulatory approach” to Internet regulation, *see* 2018 Order ¶¶ 39, 61, 194-96,
6 which the FCC adopted in furtherance of United States’ policy “to preserve the vibrant and
7 competitive free market that presently exists for the Internet . . . unfettered by Federal or State
8 regulation,” 47 U.S.C. § 230(b)(2). SB-822 “impose[s] far greater burdens” than the FCC’s
9 “calibrated federal regulatory regime,” and threatens to “significantly disrupt the balance” the
10 agency struck. *Id.* ¶ 194.

11 42. SB-822 contributes to a patchwork of separate and potentially conflicting requirements
12 from different state and local jurisdictions, and thereby impairs the effective provision of
13 broadband services, *see* 2018 Order ¶ 194, as ISPs generally cannot comply with state or local
14 rules for intrastate communications without applying the same rules to interstate
15 communications, *see id.* ¶ 200.

16 43. In short, SB-822 conflicts with and otherwise impedes the accomplishment and execution
17 of the full purposes and objectives of federal law.

18 **PRAYER FOR RELIEF**

19 WHEREFORE, the United States respectfully requests the following relief:

20 a. A declaratory judgment stating that the preempted provisions of SB-822 are
21 invalid, null, and void;

22 b. A preliminary and a permanent injunction against the State of California, and its
23 officers, agents, and employees, prohibiting the enforcement of the preempted provisions of SB-
24 822;

25 c. That this Court award the United States its costs in this action; and;

26 d. That this Court award any other relief that it deem just and proper.
27
28

1 Dated: September 30, 2018

Respectfully submitted,

2 JOSEPH H. HUNT
3 Assistant Attorney General
4 Civil Division

5 McGREGOR SCOTT
6 United States Attorney

7 BRINTON LUCAS
8 Counsel to the Assistant Attorney General

9 JAMES J. GILLIGAN
10 Acting Director, Federal Programs Branch

11 JACQUELINE COLEMAN SNEAD
12 Assistant Branch Director, Federal Programs Branch

13 DAVID SHELLDY
14 Civil Chief, Assistant United States Attorney

15 /s/ Kevin Snell
16 JOSEPH BORSON (Va. Bar No. 85519)
17 KEVIN SNELL (NY Bar)
18 Trial Attorneys
19 U.S. Department of Justice
20 Civil Division, Federal Programs Branch
21 1100 L St. NW
22 Washington, DC 20530
23 Telephone: (202) 305-0924
24 Fax: (202) 616-8460
25 E-mail: Kevin.Snell@usdoj.gov

26 *Attorneys for the United States*
27
28