UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
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AMERICAN CABLE ASSOCIATION, ET AL., Plaintiffs, v. XAVIER BECERRA, in his official capacity as the Attorney General of California, Defendant.	Docket No. 18-CV-2684 Sacramento, California February 23, 2021 1:39 p.m. Re: Preliminary injunction

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN A. MENDEZ
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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SACRAMENTO, CALIFORNIA, TUESDAY, FEBRUARY 23, 2021

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(In open court.)

THE CLERK: Please come to order. Court is now in session. The Honorable John A. Mendez, United States District Court Judge, presiding.

Calling case No. 18-2684, American Cable Association, et al. v. Xavier Becerra, et al.

THE COURT: Good afternoon. You can state your appearances starting with the plaintiffs, please.

MR. LEWIS: Good afternoon, Your Honor; Marc Lewis for the plaintiffs.

MR. ANGSTREICH: Good afternoon, Your Honor; Scott Angstreich also for the plaintiff.

MR. BRILL: And good afternoon; Matthew Brill for the plaintiffs.

THE COURT: For the State of California?

MS. LI: Good afternoon, Your Honor; Patty Li for defendant, Attorney General Becerra.

MS. KURTZ: And Sarah Kurtz also for defendant, Attorney General Becerra.

THE COURT: I'll allow any lawyer to jump in and answer questions, so I won't direct the questions to a specific lawyer. I'll direct questions simply to the parties. So feel free to jump in, add whatever you want for purposes of the

record.

The Court is here this afternoon on a motion for a preliminary injunction filed by the plaintiffs. Originally the United States was a party plaintiff in this case. The United States has dismissed its complaint against the State of California, and that leaves the current plaintiffs, the American Cable Association, et al., as the plaintiffs in this case.

Normally in a preliminary injunction hearing we'd start with a discussion of whether there is a likelihood of success on the merits. All parties agree and the law is clear that in order to grant a motion for preliminary injunction at this stage of the litigation, the plaintiffs would have to show a likelihood of success on the merits, that they're likely to suffer irreparable harm, that the balance of equities tips in their favor and that an injunction is in the public interest.

And I actually want to start with those last two criteria and focus on those final two requirements of injunctive relief. I do want to say this is a case -- we do have a number of amicus briefs that have been filed from both sides that were very helpful to the Court. The briefs are terrific. Thank you so much for the effort that went into preparing those briefs and assisting the Court in learning a lot more than I ever anticipated in my lifetime about net neutrality and ISPs and BIAS and end users and backbone

networks.

All the 20 and 30-year-olds that I deal with actually think that I understand what is going on in the world, and thanks to all of you for explaining it in a manner which I can understand and then focusing the legal issues, which is -- really this is a preemption case, a classic preemption case and preemption arguments, and that's what we'll focus on here today.

If you have not appeared in front of me before, my hearings are atypical in that I don't treat hearings on motions as you might be used to if you argue in appellate courts where you start your presentation, you're interrupted by questions. The hearing is basically just an opportunity for me to ask some follow-up questions that I wanted to give you an opportunity to answer to help me in terms of making a decision.

I would not read too much into the questions that I ask. They're simply designed to help me better understand the arguments that have been made.

And so I want to start, as I said, with the issue of whether a preliminary injunction would be in the public interest. And I use that term "public" broadly, as do, obviously, the defendant in this case, that the public doesn't necessarily include only end users, individuals who subscribe to ISPs rely on ISPs, but involves the entire public. And the defendant submitted -- I think the plaintiffs characterize it

as a baker's dozen worth of declarations.

And there weren't similar declarations, obviously I didn't see any, on the side of the plaintiffs. And so I want whatever counsel wants to jump in and take the question, I want you to explain to me how an injunction would be in the public interest defining that term "public" as broadly as possible, because I got declarations from fire chiefs, from the mayor of San Francisco, the founder of Reddit, you name it. There were some very interesting declarations in favor of openness and net neutrality. And so that's my first question for the plaintiffs is how is this injunction in the public interest?

MR. BRILL: Your Honor, Matthew Brill for the plaintiffs. I'll be happy to answer that question.

THE COURT: Go ahead.

MR. BRILL: There are two primary reasons why an injunction would serve the public interest here. One is tied to the merits in that we are asserting preemption claims, as Your Honor notes, which implicate the Supremacy Clause.

And the Ninth Circuit has held repeatedly that where there is a likely showing of a constitutional violation, it is always in the public interest to enjoin a state law that is unconstitutional.

So the first answer is just simply as a legal matter if Your Honor agrees with any of our preemption arguments under field preemption, conflict preemption, express preemption, it's

necessarily in the public interest to prevent enforcement of an unconstitutional state statute.

But second, in any event, while there is a lot of passion around this net neutrality issue, and undoubtedly the declarants supporting the State of California fervently believe that SB-822 is necessary to safeguard the open Internet, the fact is that the Internet is open and it will remain open.

Our clients are the principal providers of Internet service in the United States, and they've all made very public binding commitments to maintain Internet openness and net neutrality.

THE COURT: Let me stop you just -- or interrupt you. I'm sorry, but I did read that or I saw that and I wondered to myself what did you mean by that, that there are binding promises or interests? Where are those binding promises? Who can or can't enforce them? It seemed like a very broad general statement without much teeth to it. Can you give me specifics?

MR. BRILL: Certainly, Your Honor. Let me walk through the specific commitments, and then I'll explain why they're binding.

All of the Internet service providers have made clear in their terms of service and online pursuant to the FCC's transparency rule, and they've also taken out ads in publications like the Washington Post saying they will not block Internet traffic, they will not throttle Internet

traffic, they will not engage in what is called "paid prioritization," and they will remain transparent with respect to the terms of service, their performance and other attributes of the Internet service.

These are the core bright-line rules that have been at issue in these Internet policy debates for many years. And the reason they're binding is the Federal Trade Commission has made clear that when providers, like the parties in this case, the AT&Ts and Verizons and Comcasts and Charters, make these public commitments to adhere to these terms of service, a breach of that promise is a violation of the Federal Trade Commission Act, section 5. It's deceptive and unfair trade practice. And in addition, the FCC, itself, made clear in its 2018 order that the state attorneys general can enforce those promises because under mini-FTC acts under state law, including California's, providers cannot misrepresent how they're going to behave to their customers.

And this was at the foundation of the FCC's decision to impose a light touch regime that concluded that this transparency-based regime, built on these form of commitments, which providers must tell their customers what they're going to do -- if they're going to block, they have to say so -- paired with Federal Trade Commission, State AG enforcement and the antitrust laws was an appropriate and sufficient regime to protect --

[illegible] that we've been fine since

that that mobile carrier was imposing on the fire department. And in the remand proceedings, where public safety was one of the issues, which the DC Circuit told the FCC to revisit,

THE COURT: I'm sorry to interrupt, but I suddenly have a sixth lawyer up on the screen.

THE CLERK: That's Mr. Schwartzman. He's an amicus party.

THE COURT: Oh, okay. He should have his video off. Who is it, Mr. Who?

THE CLERK: Schwartzman.

THE COURT: Schwartz what?

THE CLERK: Schwartzman.

THE COURT: Okay. There he goes. Thanks. I'm sorry. I got distracted. Go ahead.

MR. BRILL: On top of these commitments which the FTC and the State AGs can enforce, it's notable and telling, Your Honor, that the State hasn't pointed to any purported violations, any purported harms that have arisen since SB-822 was enacted.

THE COURT: I'm going to stop you there only because I've read that argument and, honestly, I didn't find it persuasive at all. I wouldn't go down that path, and I don't want to have you argue something that really is going to fall on deaf ears. And I'll tell you why, and that is everybody's been on their best behavior since 2018 primarily because of the stay in this case and the decision to wait for whatever happened in the DC Circuit in *Mozilla*. So I don't place a whole lot of weight on the argument that we've been fine since

2018, there's no need to worry.

And then the flipside of that argument being, well, California hasn't suffered at all because we've been operating in this period of time without any enforcement of California's law.

Well, California can't enforce its law right now. Everybody's agreed to a stay. So I wouldn't go down that path and argue that that's proof that "You can trust us," in effect, that "What we've done since 2018 is what we're going to do in the future," because I know the plaintiffs strongly disagree with that view and have submitted a number of declarations contrary to that view.

So I will -- I mean, again, I know I cut you off, and I will cut you off to let you know that I wouldn't raise an argument that really isn't going to carry much weight. With that, go ahead.

MR. BRILL: Appreciate that, Your Honor. That's understood. And I think, you know, in short the likelihood of success that we believe we've shown on the merits does create a legal entitlement to an injunction because the Ninth Circuit has repeatedly held it's not in the public interest to enforce an unconstitutional statute.

But also, independently, we think the policy balance shows that there are sufficient protections in place and that there is no incentive, as the FCC found in its 2018 order, for

providers to breach their own promises and act in ways that are really contrary to our business interests, just as they would be contrary to the consumers' businesses.

THE COURT: What about the incident -- and I know it's only one incident, but it was raised in the firefighter's declaration about the throttling that occurred during an emergency. Why shouldn't even that one incident give a Court concern that maybe the ISPs really aren't following through on their promises or that you really can't trust the ISPs in living up to these promises? Is that just an isolated incident, something I shouldn't be concerned with or -- I want to give you a chance to address that, because obviously it was mentioned.

MR. BRILL: Thank you, Your Honor. The most fundamental reason that's not a concern is it wasn't a net neutrality issue at all, and it wouldn't have been affected by SB-822 at all.

The State of California, in its briefing before the DC Circuit in *Mozilla*, conceded that that was an issue that involved essentially the terms of service and the pricing plans that that mobile carrier was imposing on the fire department. And in the remand proceedings, where public safety was one of the issues, which the DC Circuit told the FCC to revisit, again, the State had conceded this was not a net neutrality issue.

So there's been a lot of heat and noise about that incident. And I think the provider has said it was an unfortunate incident and was isolated, but, fundamentally, it's not a net neutrality issue, and it wouldn't be affected at all by whether this state law or the prior federal regime is in effect.

THE COURT: And then what about the declarations from individuals who are concerned about access to the Internet by minority communities, low-income individuals, the areas geographically that -- there aren't a lot of providers that -- Internet access is difficult to obtain. How is allowing this what is, in effect, the 2018 order a deregulation of the industry, how is that, again, a benefit to those members of the public? I want to give you, again, an opportunity to respond to some of those declarations as well.

MR. BRILL: Your Honor, I think the FCC attempted to answer that question, and it was really at the heart of its decision in the 2018 order. The FCC found that a common carrier framework imposing some heavy-handed regulations would actually deter continued investment and deployment of broadband facilities.

One of the big challenges we face in this country is maximizing deployment so we have universal broadband, particularly in the face of a pandemic. We've seen everyone needs the Internet and we all depend on it.

And the FCC determined, based on its expert policy judgment, that the most efficacious way to get broadband out to the maximum number of people was to maintain the life touch regime that has been in place on a bipartisan basis for nearly 20 years with one brief exception from 2015 to 2017. And the DC Circuit found that that policy judgment was reasonable and that the regime that the FCC put in place was lawful.

Of course, there are continuing debates about what is the best policy to maximize deployment, but there's really no reason to think that enjoining of SB-822 would have any effect on access by low-income communities or others to broadband. And if there is an effect, we think that the life touch regime is one that maximizes the investment.

In fact, in the remand proceedings before the FCC parties, including amicus chamber of commerce in this case, have shown that investment has gone up in the wake of the FCC's order, speed has gone up and deployment has gone up.

So the Internet is thriving, it's open, it's being deployed more widely than ever. Of course challenges remain. We need to get more facilities out there as an industry and as a society, but maintaining a life touch regime is the best way to do that.

THE COURT: Ms. Li or Ms. Kurtz, I'll give you an opportunity to respond on this public interest issue.

MS. LI: Yes. Thank you, Your Honor.

In terms of the weight that a potential Supremacy Clause violation has, although it is true that the Ninth Circuit has recognized that enjoining a preempted law can serve the public interest, it certainly has not found that that is the determinative, dispositive factor in deciding whether to grant a preliminary injunction.

And as was made clear in the Ninth Circuit's opinion in *United States v. California*, in the sanctuary state case, the Ninth Circuit was very careful to explain that even a likelihood of success on a preemption claim was just one of multiple factors to be considered and really needed to be weighed in the context of all of the other equities, all of the other factors at issue here.

THE COURT: I'm familiar with that case for some reason.

Let me ask it this way: Is there a case where a court has found a likelihood of success on the merits on a preemption issue and no irreparable harm -- I mean or irreparable harm but still declined to grant injunctive relief because of simply the public interest or equities elements of the injunction motion?

MS. LI: I am not aware of that happening in a preemption case, although it certainly may be possible. I am aware of an example in the First Amendment context. It is the *Tracy Rifle* case, which was heard in the Eastern District. A preliminary injunction was denied even though a likelihood of

success on the merits was found, and the Ninth Circuit affirmed that denial, so it is possible.

THE COURT: And what case is that you're saying?

MS. LI: Tracy Rifle. I believe it may be in our briefs, but it is from within the last few years.

THE COURT: And that was in the First Amendment context?

MS. LI: Yes.

THE COURT: Okay.

MS. LI: And then I would like to, if I may, address the public interest questions.

THE COURT: Absolutely. Go ahead.

MS. LI: Sure. So the plaintiffs have said that the promises that they have properly made to not engage in blocking and throttling, for example, that that is good enough and that that is why we will not suffer any harm, why the public will not suffer any harm if SB-822 is enjoined.

So there are several problems with that argument. First, the promises that have been made are limited to blocking and throttling and perhaps some paid prioritization. Those promises were made by some Internet service providers. They certainly were not made by every internet service provider serving California consumers.

And as the Court has noted, those promises are totally voluntary and the ISPs can change their mind at any time. So

without SB-822 in effect, there is nothing to prevent any particular Internet service provider from deciding that it wants to engage in blocking and throttling, for example.

THE COURT: Well, but the plaintiff argues that there is. The attorney general can sue if the attorney general believes that, in effect, fraud is being committed. I think it's the Unruh Act, I believe, in California but that there is at least some mechanism for the attorney general to hold these ISPs to their what they call "enforceable commitments."

MS. LI: If they have --

THE COURT: Go ahead.

MS. LI: Yes. If there is a commitment on record, it may very well be enforceable, even under state law. However, it is a totally voluntary commitment, and they can change their minds at any time. And again, not every Internet service provider has made this commitment. And the quote/unquote commitments are not as broad as what is covered by SB-822. It really only goes to a subset of the conduct that SB-822 is concerned with.

I'd like to also address the example of the firefighter declaration. And so we don't agree that the firefighter -- the example of the throttling that occurred, you know, during the emergency response that Fire Chief Bowden described in his declaration, we do not agree that that is not relevant to net neutrality. It is very relevant.

Although it may not technically have been a violation of the 2015 FCC order, it certainly is relevant to the public safety concerns that are at issue with net neutrality, and that was very clearly recognized in the *Mozilla* opinion.

The *Mozilla* court, you know, found that that example, although perhaps, you know, not clearly within the schedule of the FCC rule-making, illustrated the very important public safety concerns at issue there. And you will see that the court, you know, recognized that irreparable harm is certainly possible if there is blocking and throttling during an emergency.

And so we think that that example shows the very real dangers that can occur if there are not clear, bright-line rules governing behavior on the front end.

If you need to negotiate with your ISP in order to get access to information or to get, you know, a high enough bandwidth during a public safety emergency, that really is just untenable. And it also goes to the broader concerns, as Your Honor alluded to. It's not simply the people subscribing to broadband service. It's anyone who really depends on access to information that goes out over the Internet and that these government entities serve.

THE COURT: Should I put any weight into what's gone on since 2018 as Mr. Lewis argues that, in effect, the ISPs have been on their best behavior and have, in fact, gone over

and above what we might expect, especially in light of the pandemic and how well they've responded to the demands placed on the Internet over the past year? How much weight should I put into that conduct?

MS. LI: The overall health of the Internet is certainly a matter of public concern, especially during the pandemic. I think what's relevant to the irreparable harm and the balance of equities analysis for the preemption claim is really, you know, what harm could result from a lack of enforcement of the net neutrality protections, and so the harms really are ongoing.

And I don't think it's disputed that there are examples of zero-rating going on right now, which disproportionately affect the disadvantaged or minority, you know, communities that tend to subscribe to these types of plans. You know, the harms from prioritization and throttling are ongoing and I don't think that it's true that there is no throttling going on. We have -- you know, we have references to that in some of the amicus briefs.

And so the particular harms that SB-822 is meant to address, those harms, you know, continue and happen every day that SB-822 is not in effect, particularly the lack of any, you know, requirement or, excuse me, any prohibitions on Internet service providers from engaging in even the most basic violations, such as blocking and throttling.

You know, we have seen examples of Internet service providers choosing to block access to certain websites because they disagree with particular actions taken by that website. And so you know, that is something that the FCC currently is not able to prohibit. That is something that the State of California would, in fact, prohibit under SB-822.

And just one point particularly on the deployment issue that counsel mentioned. Counsel said that the FCC found that overall deployment of broadband access would be much better served by a light touch regulatory regime. We don't agree that that is the case, and we think it's very much a contested issue about what the best approach to the deployment is, what -- even, in fact, the basic facts of, you know, the health of how competitive the market is and that sort of thing. But really the problem with that argument is that SB-822 is not deployment. It is about basic protections to access to the Internet, really at a very fundamental level. And so, you know, SB-822 is really meant to address this very, you know, important and basic service that everyone needs access to now.

THE COURT: Is it fair to characterize SB-822 as FCC 2015 order version 2.0? I mean, is there much of a difference between SB-822 and the FCC's 2015 order?

MS. LI: There is not a lot of difference.

THE COURT: Okay.

MS. LI: The conduct that would have been prohibited

under the 2015 order, I would say that much, if not all of it, would actually also be prohibited under SB-822.

THE COURT: Okay. I'll come back to that on the discussion of likelihood of success on the merits.

Let me just turn quickly to irreparable harm. I think it's pretty clear that if I do find a constitutional violation, then it follows in most cases that the irreparable harm finding would follow as well.

I will say that I thought the defendant's argument on that issue was creative in many ways, that in effect you're suggesting that this Court could still find that there was no irreparable harm even if there was a finding of likelihood of success that there's a constitutional violation.

And let me ask, though, the plaintiff. The main argument about irreparable harm is simply that you lived with the reclassification in 2015 by the FCC, and there's no proof of harm.

In fact, there's evidence in this record, again, it's at a very early stage, but evidence in this record that, in fact, the CEOs -- the ISPs have told their shareholders "2015 didn't change our practices at all. We're not going to do anything differently." In effect, "We're not worried about what the FCC did; it will not, in any way, change our business model."

So if I hear ISPs, ISP CEOs saying that, it obviously

raises the question, Mr. Lewis, where's the harm? I mean, if SB-822 is, in effect, the 2015 FCC order and your clients have already told me "Don't worry, Judge," or "Don't worry, shareholders, it's not going to affect us in any way, there's no problems," why, other than obviously the legal argument where most courts find irreparable harm, why, under those circumstances, would a court still find that there's immediate and irreparable harm here? I'm having problems with that concept. Go ahead.

MR. BRILL: Your Honor, it's Matthew Brill just for the record, not Mr. Lewis, but --

THE COURT: Mr. Brill. I'm sorry.

MR. BRILL: Of course. Two primary points, Your Honor, and then if I could, I'd like to briefly respond to a few of the points Ms. Li made.

THE COURT: You may. Sure.

MR. BRILL: On irreparable harm, I think the first response goes back to your question whether SB-822 is the FCC's 2015 order 2.0. There is certainly overlap, but there are some key differences. One of the differences is the treatment of zero-rating. The FCC looked at zero-rating in 2015 and said: We can't make a decision categorically whether it's good or bad. We can imagine practices that would be good for consumers. You're giving people more free data and in our position that's almost invariably -- it's a benefit, not a

harm, as Ms. Li suggested.

If you have a 5-gigabit-per-month plan and the provider is willing to not count certain traffic, such as video traffic against that cap, you get more for your money, which is a good thing.

And so critically, while the FCC did not prohibit zero-rating, it just agreed to look at it case-by-case, SB-822 does categorically ban zero rating that involves consideration or that involves differential treatment of different categories of traffic.

And one of the declarations we put in from Barbara Roden of AT&T illustrates a particular sort of irreparable harm here, and that is AT&T does have a sponsored data plan that involves payment. Their data-free TV plan would violate SB-822 and would have to be withdrawn.

This is the classic kind of Hobson's choice that the case law recognizes an irreparable harm. Either they would have to continue with that plan and risk significant enforcement penalties or withdraw it and have an array of harms, including breaching their promise to their customers, revamping their entire operational system, software, billing systems. It's a massive thing to engineer your wireless plan to not count certain data against a cap and then to have to redesign the entire system. So that's one example of irreparable harm.

THE COURT: That sounds like economic harm to me, not irreparable harm. That sounds like the type of harm where you could, if the State was wrong, recover monetary damages. That's not sort of a classic irreparable harm situation.

We all learned in law school irreparable harm is when the bulldozer is at the house and about to knock down the house. That doesn't sound like a bulldozer-at-the-house situation. That sounds like an incredibly inconvenient, perhaps costly change that AT&T would have to make but that they could make. Am I wrong?

MR. BRILL: Respectfully, you're wrong about that, Your Honor, where the losses are unrecoverable because of the 11th Amendment.

What the Ninth Circuit has held --

THE COURT: Okay.

MR. BRILL: -- is that those sorts of losses are irreparable. And the perfect case for this -- you were asking if there was a case earlier where the district court had found a likelihood of success on the merits and then declined to grant an injunction. There is such a case, and it's I think instructive here. *California Pharmacists v. Maxwell-Jolly*. So in that case it was hospitals suing about preemption based on MediCal reimbursement. They thought they were getting too little money from the State, in violation of federal law.

The district court agreed there was a likelihood of

success on the merits, but it concluded that the harms were economic and speculative and not irreparable.

Ninth Circuit reversed and said we agree there's a likelihood of success on the merits, but those unrecoverable losses, because of the 11th Amendment, absolutely constitute irreparable harm. So it reversed the denial of an injunction.

And similarly, *American* -- the *American Trucking* case, which is one of the leading cases here, involved a reversal of district court denial of an injunction based on the same kind of "Hobson's choice" arguments that we're making here. So I think those are the two leading cases on point that demonstrate that there's irreparable harm here.

One other example of irreparable harm is that one of our other declarations from Cox which pointed out that although the broadband networks have been performing extremely well, there are isolated areas where there's congestion that will degrade network performance, and consumers will suffer. If you're on a Zoom call, it will be lagging and it won't have good connectivity. So they have a program. It affects about 1 percent of their nodes where they limit the upstream speeds to effectively allocate resources more equitably for their customer base. And they have indicated in the declaration that they would likely suspend that program if SB-822 went into effect, again, because of these Hobson's Choice concerns; either a fear of significant penalties which would ensue --

would -- you know, that the penalties would occur if they continued with that plan, and otherwise they could have a loss of network performance and goodwill and so forth.

Tellingly, the State didn't address that declaration at all in its lengthy response. They just don't mention it. They could have said, well, that kind of conduct would have been reasonable network management and it's permissible, but they didn't say that. They didn't even address it.

So I think that, too, even without getting into the interconnection harms, which are hotly disputed between the parties, both the zero rating and the congestion management were very tangible examples of irreparable harm.

THE COURT: What do your clients do if -- and it's always dangerous to predict the future, but I think it's realistic to maybe assume that there will be serious consideration given to reinstating the 2015 order over the next two years or so, given the change in administrations. So why -- again, I think it comes back to this irreparable harm issue. Why, if there's such a fairly strong likelihood that we're going to go back to 2015, where again is the harm? You're going to have to -- your client's going to have to deal not only with SB-822, which you say goes a little beyond the 2015 order, but you're going to have to deal with the FCC reclassifying your clients again under Title II.

So again, where's the harm? I mean, your clients are

fighting battles all over the place right now, focusing today on the SB-822, but I assume there's a battle going on in Washington that's about to come to a head if not this year then next year at some point, so where's the harm if we're just going to go back --

MR. BRILL: Your Honor --

THE COURT: If we're just going to go back to 2015, where's the harm?

MR. BRILL: Well, I don't assume that the outcome of any new proceedings are preordained. We have arguments that we're going to make and -- but let's assume, for the sake of your question, we're going to lose those arguments at the FCC.

THE COURT: Purely hypothetical right now, Mr. Brill, so go ahead.

MR. BRILL: My colleague, Mr. Angstreich, is going to talk about the merits and field preemption. One of the principal reasons we think this case is quite consequential is given our view of field preemption, states like California can't regulate interstate broadband. And so even if the FCC changed the manner in which it regulates broadband, we don't think the states have the ability to reach interstate broadband. Beyond that, I mean, you were asking about the harms and one of the harms is the kind of patchwork problem with States imposing seemingly similar requirements in very different ways.

Ms. Li's statement that there's throttling and harm going on every day is illustrative of that problem.

In our view, there is no problem, period. It's never occurred. There's no credible allegation.

We've talked about the Santa Clara fire issue. That is not throttling, as the FCC defined that term. That is a commercial term of service where your speed is reduced after hitting a certain threshold. That is not what the FCC defined as throttling. The FCC defined throttling as discriminating against particular traffic and degrading it for that reason, but this is the essence of the problem.

If California decides one thing is throttling and Vermont decides something else isn't throttling, the purpose of national uniformity, which the FCC in 2015 and 2018 agreed upon would be undermined. So the part of the harm that you're asking about is it being subjected to state laws that interpret even consensus norms in very different ways.

THE COURT: And let me preface this question as stating that I understand it's an unfair question, but I also like lawyers to respond to questions that are on my mind. And it may be so far afield that it really doesn't have any application to this case, but assume that SB-822 is enjoined, that I do find that preemption applies here. So we're back into a regulatory scheme where, in effect, the 2018 order is still in effect and you've been -- clients have been

reclassified under Title I. There is no power by the FCC to regulate your clients. And it made me think -- again, this may seem unfair, but it made me think, obviously, of what happened in Texas, in effect, where the government decided to back off, to allow the energy companies to proceed in an arena of almost complete deregulation and they didn't -- no matter which way you slice it, they didn't serve the public well last week. I think that's clear from everyone. Why shouldn't -- and maybe this goes back to the public interest element, but why shouldn't a court be concerned about the possibility of that happening if, in effect, there is -- there's no regulation over ISPs right now? FCC's not regulating your clients in any way. They can't. They don't have the power to, given the 2018 order. So alleviate that concern of mine.

MR. BRILL: A couple points, Your Honor. First, I would like to just challenge the assertion that there's no regulation. I don't think that's an accurate characterization of the 2018 order. What the FCC said was that it wanted a transparency-based regime.

And contrary to Ms. Li's assertion that these commitments we've made are entirely voluntary, the transparency rule is mandatory. And part of the transparency rule is you must indicate whether you block, whether you throttle, whether you engage in paid prioritization. And to my knowledge, no ISP in the country has said it will do that.

So back to Your Honor's point that the state AG can sue for fraud. I mean, that is absolutely available, and this is a mandatory rule that the FCC enforces and the Federal Trade Commission enforces. There's an MOU between the FTC and the FCC on enforcement of that transparency rule.

Beyond that, we simply haven't seen in this record or in the public domain or anywhere any credible threat that, you know, we're going to have a Texas-like situation where the Internet is going to go down, where we're going to suffer from, you know, widespread outages. Whatever happened in the energy deregulation arena in Texas, there is nothing of the sort that's been alleged here, much less shown here, and quite the contrary. I mean, we put in evidence and our amici put in evidence that during the pandemic, a significant challenge that's kind of akin to a polar vortex, you know --

THE COURT: Right.

MR. BRILL: -- we had a huge spike in usage. The Internet is performing beautifully.

Contrast that with Europe. There have been academic studies. They've had to throttle Netflix, they've had to throttle video streaming because the public utility regulated Internet connections in Europe haven't kept pace.

So in the factual record the public domain shows that far from there being some threat of the Internet outage, the Internet is doing great. And this record certainly doesn't

show that Your Honor should be concerned about outages or anything of the sort.

THE COURT: I didn't mean to use the term "no regulation." I meant to uses the term "light touch," as one of the parties tends to like to call.

Ms. Li, anything further on these two issues?

MS. LI: Yes. Let's see. In terms of -- to clarify or address the assertions about the 2015 order and zero-rating, so although there is not a flatout rule in the 2015 order prohibiting zero-rating, the FCC did indicate in the order that it would be taking a good look at zero-rating practices and could potentially prohibit them under the no-unreasonable-interference rule that is part of the 2015 order. And the FCC did, in fact, undertake proceedings to do that and would have if there had not then been a change in leadership at the FCC and then withdrawal of the 2015 order. So zero-rating is certainly fairly within the scope of the 2015 order.

And in terms of the, you know, the harms that result from zero-rating, it is simply not true that free data is just good for everybody. This is a practice that really is misleading in terms of, you know, hiding the true costs of the data, the true costs of the plan. It is why I think we all realize that buy one/get one free is not -- doesn't actually mean that the second one is free. And similarly with

zero-rating. Although certain data does not count towards your data cap, your data caps are artificially lower because of the economic practices that the ISPs are engaging in.

And so we certainly dispute that there is no harm from zero-rating and we also dispute the idea that it would be incredibly difficult to transition customers from a zero-rated plan to a nonzero-rated plan. I can't quite understand, you know, why that would be so difficult.

In terms of, you know, congestion management and the Cox declaration, threatening that perhaps they won't engage in congestion management anymore because of the specter of this law, but the law imposes a reasonableness standard, which is very much similar to what was already in place under the old FCC regime. And reasonableness is certainly a very familiar concept under the law. It is not a new concept here, and we don't think that there is any, you know, reason that ISPs couldn't continue to engage in reasonable network management practices.

I'm not sure if Your Honor would like an answer to the question about a light touch regulatory regime and where that would leave the public.

THE COURT: Go ahead.

MS. LI: Sure. So as I have alluded to, what's at issue here is, you know, with SB-822 is the protections that are necessary to ensure nondiscriminatory access to the

Internet. This is not about the entire Internet, the performance of the entire Internet, you know, how widely broadband is deployed; although, those are obviously very important issues that certainly, you know, may be related.

What's regulated by SB-822 is just the very, you know, basic terms of accessing the Internet, and you will have a regulatory vacuum if SB-822 is enjoined for California residents. There will be no law in effect that prevents ISPs from engaging in these practices.

And I would like to push back on the idea that this quote/unquote transparency-based regime is good enough to protect California consumers because although it's true that certain practices must be disclosed, there's no prior requirement that, you know, simply prevents the practices from happening in the first place. So there is a real harm just from the lack of this fundamental requirement from basic fair access.

THE COURT: Okay. Let me turn -- I want to turn to the likelihood-of-success-on-the-merits arguments. I don't have a lot of questions here. As I said, the briefs were excellent.

Ms. Li, I want to start with you and the reply brief, give you an opportunity to respond to the arguments raised in the reply brief on the preemption issues. And the main question I have for you is whether or not you think that your

position in this case, your client's position, can be reconciled with the *Mozilla* court statement where the *Mozilla* court writes, quote, "If the FCC can explain how a state practice actually undermines the 2018 order, then it can invoke conflict preemption." Tell me how your position can be reconciled with that statement in the *Mozilla* opinion.

MS. LI: Yes. So in *Mozilla*, the argument for the express preemption directive that was at issue there was essentially that there is a policy of nonregulation that the FCC is adopting. And *Mozilla* rejected that argument for lack of statutory authority, finding that the FCC doesn't have the power to set that type of policy with respect to information services, and so that is directly relevant to the arguments being made here.

So although *Mozilla* says we're not deciding conflict preemption, we don't have a specific law in front of us, which makes sense, *Mozilla* is still extremely relevant because the same arguments are being made here. We have the same argument about -- instead of a policy of nonregulation, it's called a deregulatory policy, but it's the same thing. So the reasoning in Mozilla we think is quite instructive.

And so what's going on here is that the same, you know, policy, deregulatory policy, it also fails for lack of statutory authority. There is nothing in the Act that authorizes the FCC to go out and set a national uniform policy

for broadband, for information services. That simply is not there.

What is in the Act is, you know, really broad powers over very specific things. If they're classified in a certain way, for example, as a common carrier, the FCC has extremely broad powers. If it does not fall into one of the categories over which the FCC has these broad powers, the FCC has very limited powers. And so once it is in that second bucket, there's no authority for the FCC to unilaterally set a nationwide deregulatory policy.

THE COURT: Mr. Brill or Mr. Angstreich, you want to respond?

MR. ANGSTREICH: Yeah. Thank you, Your Honor. This is Scott Angstreich. I'll respond to this question. And there are two differences between what's going on here and what was going on in *Mozilla*. And I do mean you can't square the State's position with that statement on page 85. One thing that's different is the DC Circuit and before at the FCC were considering what if the State tries to regulate intrastate communication, can they do that consistent with our treatment of interstate communication? That's not this case. SB-822, in section 3100(b), defines the service that it's regulating as the very same interstate service that, you know, the FCC was talking about. So we're not even dealing with the specific impossibility intrastate preemption question that, you know,

Mozilla was confronted with.

But second, you know, and I think when you go down the page what you heard from Ms. Li, with all respect, reflects the same confusion that the DC Circuit called out between the FCC's authority to expressly preempt and the implied preemptive effect of the regulatory choices the Commission makes that are within its authority.

And what the rest of the *Mozilla* decision upholds is that the classification and transparency rule choices that the FCC made are within its authority. And the FCC there was making those choices, as *Chevron* says it can, based on its best judgment about public policy. That's what drove the decision to classify broadband the way the FCC did in 2018, just as it drove the 2015 FCC's decision to classify broadband the way it did. Those choices that are within its authority have implied preemptive effect.

So even as we're talking about merely intrastate traffic, this is the very question that *Mozilla* left open, but of course we're not talking about merely intrastate traffic because California isn't limiting itself in that way.

THE COURT: Okay. Back to the defendant. The plaintiff writes in its reply brief at the very end "At bottom, California's brief is a transparent attempt to relitigate policy determinations the FCC made in the 2018 order, which the DC Circuit upheld on appeal rejecting arguments California and

others made against them."

I assume you disagree with that, Ms. Li; and if so, why?

MS. LI: Yes, we do disagree. The analysis for determining whether SB-822 is conflict preempted, you know, we need to look at what the agency action is that allegedly preempts. And here we have -- you know, all that remains really, in terms of an affirmative regulation, is the transparency rule, which does not conflict in any way with the transparency rule that is part of SB-822.

The transparency rule itself, you know, it doesn't have any broader effect beyond requiring ISPs to disclose certain information. It's authorized as part of a, you know, statutory provision that directs the FCC to provide a report to Congress. So that we don't think is -- it's not fair to read that as somehow establishing or justifying a policy on the part of the agency to deregulate an entire industry.

So, you know, I think the problem with the argument that the FCC, you know, did have the power to reclassify, and so everything that went into that decision to reclassify, you know, must be taken as a purpose, an objective of the law that has the power to preempt is that classification -- the decision about, you know, whether to classify broadband as a Title II service or as a Title I service, that is just a decision on what type of -- what category the service that's in question

falls into, whether it meets a statutory definition, you know, sufficiently. And there's nowhere in the Act to indicate that in making that decision, the agency must, you know, decide what is the right national uniform approach to regulating a service. There is no free-standing, you know, power given by the Communications Act authorizing the FCC to do that.

It really only has the power to decide what kind of service broadband is. If it had made a different decision -- you know, under the 2015 order, it was classified as a Title II service -- there certainly is very broad federal authority in that area, and it certainly is possible to preempt more extensively there.

But, actually, I would like to point out, just kind of to get back to Your Honor's previous question about, you know, what happens if there is a change in the federal regime, even if there were a reclassification back to Title II for broadband, even if there were a movement to reenact federal net neutrality rules in a very similar way to 2015, that does not mean that SB-822 would be preempted.

Again, the analysis would be is there an actual conflict with anything the agency has done, and there would not necessarily be a conflict in that instance. And we don't believe there's a conflict here where the agency has no, you know -- expressly said multiple times it has no power to require net neutrality rules. And it just cannot be that an

agency that has no power to do that somehow has the power to prevent States from exercising their traditional police powers.

THE COURT: In the reply brief, the plaintiff argues that, in effect, California is trying to turn BIAS or ISPs back into common carriers. But the FCC order only limits FCC power, it does not explicitly limit -- I'm sorry. You argue that the FCC order only limits the FCC's power, it doesn't explicitly limit the States' ability to legislate in this area. But I want to focus on the plaintiff's argument, and then I'll come back to the plaintiffs, that you're doing what the FCC says that you can't do, and that is, you're reclassifying the plaintiffs as a Title II rather than a Title I provider. And where's the authority for California to do what the FCC says shouldn't be done or can't be done; that no one should be regulating these companies because they're not that type of carrier? They're, to use the language, they're not telecommunications service or commercial mobile service providers, they are, as the 2018 order found, information service providers. In effect, SB-822 says we're doing a reclassification without calling it a reclassification. Where's your authority -- where's the State's authority to do that?

MS. LI: So the State has plenary authority to legislate. It has the power to regulate, protect public health and safety, and it does not need prior federal authorization in

order to enact laws that protect its own consumers.

So the question really should be, where is the federal authority to prevent the States from exercising their traditional police powers?

And we don't believe that the provision in the Communications Act that limits what the FCC can do, that that prevents the FCC from applying common carrier regulations unless a service is classified as a telecommunications service. We don't believe that that provision has any effect on what the States can do.

There really needs to be a much more clear indication that Congress, you know, intended to preempt the States, prevent them from exercising their historic police powers. And reading a definitional provision in the Communications Act to do that when there are many other, you know, provisions in the Communications Act that are very specific about preempting the States in certain contexts, that -- we don't think that would be an appropriate reading of 15351. And the same is true of the provision about mobile services and not regulating private mobile services as common carriers. We also don't believe that that is -- can be fairly read to lock the States out of their -- out of exercising their historic police powers.

And, in fact, later in that same subsection there is an express preemption provision that says States shall not, you know, regulate the rates for entry of private mobile providers.

So it really -- it stretches the imagination to see those provisions as, you know, as a clear indication of congressional intent to prevent the States from acting in a field in which they are entitled to act, you know, until there is actual preemption.

THE COURT: That's a good segue. I want the plaintiffs to respond to that. I think the guts of this argument, the difficult issue is that issue, that -- where's the clear indication from Congress that the FCC's policy practices in this case are sufficient to preempt state law, that once the FCC passed that 2018 order, that now precludes all 50 states from, in any way, regulating the ISPs?

And the amicus briefs from the law professors really hammer this point home, and I want to give the plaintiffs an opportunity to respond to those amicus arguments as well, but the argument very simply is that the FCC's policy preferences, without more, are insufficient to preempt state law. A litigant must point specifically to a constitutional text or federal statute that does the displacing or conflicts with state law. You need more here than the argument that it should be implied here. That makes a court nervous if preemption is based on implication.

And again, I've read the briefs. I want you to be as specific as possible, but I don't see anything, any specific congressional intent that says the States can't act in this

area when the FCC has refused to act. In effect, the FCC says: We don't have jurisdiction. Our role is to classify the ISPs, and we did that. Once we do that, we lose the power to preempt any state law that States are precluded from getting involved here. And let -- this is just one part of one of the amicus briefs. It's at Doc 64. It's the brief of the communication law scholars. They say "Plaintiffs' arguments are foreclosed by settled preemption law. The Supreme Court has previously recognized that where failure of federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute, States are not permitted to use their police power to enact such a regulation." They cite to the *Ray v. Atlantic Richfield Company* case, but that is not what happened here.

Given BIAS's -- that's capital B, capital I, capital A capital S, given BIAS's status as an information service, Congress has withheld from the FCC virtually all authority over the practices addressed by SB-822, including blocking, throttling, paid prioritization, et cetera. And because the Commission has no power to regulate those activities, it has no power to deregulate them either, whether through an express preemption provision of the sort invalidated in *Mozilla* or by arguing that state law conflicts with a deregulatory preference it has no authority to enforce through a rule."

Go ahead.

MR. ANGSTREICH: Thank you, Your Honor. Scott Angstreich, for the plaintiff.

So I'd like to start from sort of the center and work outward because we obviously have arguments that aren't based on the 2018 order at all. But with due respect to the amicus brief that you just read from, that is exactly what happened here. The FCC wasn't deciding information service, telecommunications service, commercial mobile service, private mobile service as some kind of dry technocratic determination. Rather, as the DC Circuit recognized -- this is page 72 of *Mozilla* -- it was weighing the costs and benefits of Title II regulations against those of a deregulatory strategy. And it found that on almost every point the latter approach is the preferable one.

It was -- as *Chevron* says, it is allowed to choose among reasonable statutory interpretations based on its judgment of the best public policy outcomes. And when it does that, the decision that these services belong in the noncommon carrier box, because that's the best for the public -- California disagrees with that to be sure, but that's the kind of judgment that an agency dealing with an ambiguous statute is authorized to make.

And as cases like *Ray* hold, when the agency makes that determination that States aren't allowed to countermand it.

And that's what the State of California is doing here. California really is trying to refight the very arguments that the DC Circuit said were wrong, that they weren't arbitrary and capricious reasons for the FCC to prefer information service and private mobile service rather than commercial mobile service and telecommunications service.

THE COURT: My question isn't clear. I'm not getting through to you. Let me try it this way. Let's step away from the 2018 order. Let's just look at the Act itself. Where in that Act is there -- just call it "preemption language." Where has Congress said that when we're in a situation like we're in now where there is a void that the federal agency has decided we don't have regulatory authority over these ISPs, given our factual finding that they're information service providers. Now there's a void, at least in view of one state. Where is the language in these Acts that say the States can't act in that situation? That's what I'm looking for. And there's obviously -- we're all aware of the findings by courts that we assume that Congress knows how to write laws, that if Congress truly intended there to be preemption here, they could have included a very clear statement in the Act. And in some instances, both sides provide examples, there is language in this Act where either they have allowed preemption or they haven't allowed preemption. That tells me that Congress knows what they're doing.

But where's the language that you can point me to that says, "Sorry, State of California, in this situation the Act itself has made it clear that you can't act here, that you're preempted"?

And I know you point to the section 151, 152. I wasn't convinced by that argument. I'm digging through this -- these Acts and looking for something that tells me that, "Judge, you can put your finger on this and tell the State of California you can't do what you're trying to do here."

Again, you start with the premise that -- it's a big hurdle for plaintiff to argue preemption, especially against a State, a State that's passed a law through the process that it goes through. And I'm looking for what are you putting your finger on here, because that's sort of the Achilles' heel that the law professors argue over and over. It's not here. Congress knew when they wanted to include language to preempt, but they didn't -- they didn't put that type of language in here.

Go ahead.

MR. ANGSTREICH: Sure. Thank you, Your Honor. And they did put that type of language in here, but we have to remember that we're dealing with a 1930s era statute, which has also analyzed the National Gas Act, the Federal Power Act. All of them used a comparable method that we can find in 152(a) of dividing up the field. But you don't take my word for it.

right?

In 1919, the State of Indiana passed a law, so a statute on the books that said that interstate telegraphs, they have to be sent by the telegraph company with impartiality and in the order of time in which they are received. So telegraph neutrality, essentially, right? You can't favor your preferred customer, you can't send them out of order, you have to treat everybody impartially and do it in order.

And the Supreme Court says no. That law is preempted because the Mann-Elkins Act of 1910 took possession of the field of the interstate business of telephone -- telegraph companies at the time leaving no room for the exercise by the several states of power to regulate. So telegraph neutrality is preempted. Deals with interstate telegraph transmissions, which is what this statute deals with, although the Internet.

The 1934 Act, section 151 says and the *Scripps-Howard* case, *Scripps-Howard Radio* case recognizes that all Congress is doing is taking authority from various three-letter agencies and consolidating them in the FCC to be the central authority.

And in 152(a) and (b) it says the Act is going to deal with all interstate communications, and intrastate communications are going to stay with the States.

They did the same thing in the Natural Gas Act at sections 15 U.S.C. 717(b) and (c), recognized by the U.S. Supreme Court in the *Schneidewind* case to be field preemptive.

That's what they did in the Federal Power Act as well, which the Ninth Circuit still recognizes to be field preemptive even after FERC, a last power utility, engaged in market-based rates rather than common carrier public utility style rates.

THE COURT: So I shouldn't be concerned that Congress didn't add one sentence to 151 that, in effect, says, "And by the way, this would preempt the States from acting in the area of interstate communications" in any way? I shouldn't be concerned by that?

MR. ANGSTREICH: I think if this was a 2021 statute, I think you would be right to be concerned, but it's a 1934 statute, and this -- the 152(a) and (b), that's how Congress wrote field preemption back then.

You have the *Ivy Broadcasting* case, which recognizes that those old cases, like *Western Union*, and I'm quoting here from pages 490 to 491, "Retain their importance for determining the scope of the Communications Act."

And applying those -- again, 1934 is not quite as modern, obviously, as today, but it's more modern than 1910, but recognizes that with respect to interstate communications they're to be governed solely by federal law, and the States are precluded.

The *NARUC* case from the DC Circuit in 1984 recognizes the same thing slightly further closer in time. The 1934 Act creates a dual regulatory structure, and interstate

communications are totally entrusted to the FCC and State authority over intrastate is on the other side of the dividing line.

So yes, a modern statute would have done it very differently, but we're not dealing with a modern statute here. We're dealing with a 1930s era, three-letter agency, where Congress and all the other three-letter agencies it was creating around that time divided the field of interstate and intrastate and gas and power and communications and said, "States, you get to do the intrastate. Federal, we're going to keep the interstate."

And as the *Transcontinental Gas Pipeline* case recognizes, and there FERC had had common carrier authority over all sorts of gas sales and Congress took away some of it and the Supreme Court concludes, well, that when Congress moves those things out of that public utility regime into a more market-based regime, that's not Congress saying the federal government no longer cares and is now indifferent about how these services or these sales are going to be regulated. We, Congress, have made a decision that they shouldn't be regulated in the public utility way. And that's what you see in section 332 and in the definitional sections, which merely continue preexisting law that had existed for 35 years, that there are certain services that can be regulated as common carriage and there are certain services that shall not be so regulated.

And California disagrees, I do get it, they do, but when it comes to interstate communication services, Congress gets to make those decisions. And Congress made those decisions and the States don't get to come in and say "We think better and different; and therefore, we are going to do it our way." That's what the Supremacy Clause exists to prevent.

THE COURT: Let me read these arguments to you as well. I want you to respond to them. Again, from the amicus briefs. It's argued that --

MR. ANGSTREICH: Your Honor, could you tell us which brief and page you're reading from so I could read along with you?

THE COURT: I am reading from -- I'm paraphrasing, but it's the -- this is from the professors of Internet law at ECF No. 70. I'm going to paraphrase, but they argue that "The Act does not persuasively regulate all aspects of interstate communications. Plaintiffs cannot show that the mere volume and complexity of federal regulations demonstrate an implicit congressional intent to displace all state law in the field," quoting *Aguayo v. U.S. Bank*. It's a Ninth Circuit 2011 case. "Some aspects of interstate communications are subject to little or no affirmative regulation.

"The fact that Congress chose pervasively to regulate only some but not all aspects of interstate communications suggests that Congress did not intend federal law to occupy the

field. Quite the opposite. It suggests that Congress knew how to engage in pervasive regulation and affirmatively chose not to do so with respect to the entire field for interstate communications.

"It's not for courts to adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed. Matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law."

The professors also argued that "The State's long-established role in regulating interstate communications belies any claim to field preemption. The Act has long incorporated a vision of dual federal/state authority in cooperation in interstate communications that precludes a finding of field preemption." It's quoting from *Mozilla* at page 81.

"Where coordinate state and federal efforts exist within a complimentary administrative framework in the pursuit of common purposes, the case for federal preemption becomes a less persuasive one.

"For one thing, numerous provisions of the Act specifically preserve a role for the State in interstate communications. For example, section 253(b) states that nothing in this section shall affect the ability of a State to impose requirements necessary to preserve and advance universal

service, protect the public safety and welfare, ensure the continued quality of telecommunication services and safeguard the rights of consumers.

"The Act also contains numerous express preemption provisions. Congress's enactment of a provision defining the preemptive reach of a statute find that matters beyond that reach are not preempted. Some of these express preemption provisions, moreover, are predicated on the assumption that States generally have the concurrent authority to regulate interstate communications even if the Act displaces that authority in specific cases. For example, the Act prohibits state laws that prohibit or have the effect of prohibiting the ability of any entity to provide any interstate telecommunications services in 47 U.S.C. section 253(a) and grants authority to the FCC to preempt such laws on a case-by-case basis.

"These provisions would be unnecessary if the States were already categorically precluded from regulating any interstate communications, which includes interstate telecommunication services."

The professors also argue that "Even if plaintiffs' field preemption claim were limited to a narrower field, it would still fail. Information services are subject to regulation only under Title I of the Act. The FCC's regulatory authority under that title is limited to that which is

reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities. That limited authority is hardly the kind of comprehensive or pervasive regulation that ordinarily gives rise to an inference that Congress intended to wholly occupy the field.

"To believe that Congress preempted the field of interstate information services then, one must believe that Congress intended neither the federal government nor the States to have authority to regulate them, although congressional creation of such a regime may be possible, to say that it can be created is not to say that it can be created subtly. Courts will not lightly infer congressional intent to mandate that a field be unregulated by anyone.

"Nothing in the text or legislative history of the 1996 Act says anything about preemption with respect to information services. This silence speaks volumes compared to the range of express preemption provisions elsewhere in the 1996 Act. Indeed, the 1996 Act went even farther, specifically forbidding courts and agencies from applying preemption by anything in the 1996 Act other than its express preemption provisions."

I know there's a lot there, but the general thrust of that is, there's got to be more there for the Court to buy into the argument that the FCC and the federal government and Congress intended to preoccupy or to occupy this field

completely. I can't -- I don't see it. But go ahead.

MR. ANGSTREICH: Sure, Your Honor. There is a lot in that, and I'm going to try to get to all of it.

I think there are, though, two broad problems. One, it takes an anachronistic and blank-slate view of the issues. We aren't dealing in a blank-slate world. We have the Supreme Court, which has already told us more than a century ago that when Congress moved into the field of interstate communications, that was an occupation of the field. And so I think it is incumbent on the other side to identify a place where Congress subsequently decided, well, actually, we're going to leave some of that away as opposed to what cases like *Transcontinental* made clear, that Congress sometimes decides some services, interstate services, should be regulated by public utilities and some shouldn't. And when Congress makes that decision, that isn't abandoning the field, right?

The FCC, as *Brand X* from the U.S. Supreme Court holds, still has authority under Title I over noncommon carrier services, which has existed since services existed and, yet, there is no state history of any kind regulating interstate communications services. So the notion that there's some history that had to be displaced, you know, the Indiana law is about as history as you get, and that's from the 1910s.

The second problem is we're not relying on the Telecommunications Act of 1996 as the basis for our conclusion

of field preemption. We're relying on the Mann-Elkins Act and the continuation in the 1934 Communications Act for field preemption.

And, you know, all of the various provisions that are pointed to, they virtually -- I'm happy just to walk through each of them, but they virtually all deal with the fact -- well, first of all, none of them presumes that States are going to be directly regulating interstate communication services, not one of them. At most they recognize what we have pointed out. Lots of services, including the Internet, are jurisdictionally mixed. They have some intrastate components, they have some interstate components.

The States can regulate intrastate components except where there are spillover effects with the federal regime. That is not this case. California is saying we can regulate not only, you know, local calls within Sacramento or calls from Sacramento to Los Angeles, we can also regulate calls from Sacramento to New York and Texas. There is no history of any State doing anything like that, again, short of the telegraph neutrality case from the 1910s.

THE COURT: Just because there's no history -- that doesn't go to the preemption argument. Just because there's no history -- this case is making history. It's a case of first impression. So, again, I didn't find the no history to be very persuasive.

Technology changes every day. The courts are trying to keep up with it and Congress is trying to keep up with it. So whether there's a history or not, I, again, I don't find necessarily very persuasive.

I'm trying to find where it says, as simply as I can put it in plain English, where does it say the State can't do this? Because if Congress doesn't want a State to do something, they can say that in the law. They've done it over and over again. They did it within these laws. And the very simple argument is that Congress knows what it's doing. It didn't do here what you said is implied.

And I'm still trying to come back to what do I hang my hat on in finding that this field wasn't going to be occupied solely by the federal government?

MR. ANGSTREICH: And I know I said this before, Your Honor, but I need to come back to 152(a) --

THE COURT: Okay.

MR. ANGSTREICH: -- and 152(b). That is how the 1930s Congress did field preemption. And how do we know that? Because, again, if you look at 15 U.S.C. 717(b) and (c), you will you see the exact same division there in the context of gas. There is no jurisdiction over intrastate sales; the Natural Gas Act will regulate interstate sales. I'm going to botch the pronunciation -- the *Schneidewind* case, 485 U.S. 293 specifically at 300 to 301 recognizes that that was field

preemptive.

If you'll look at the *California Public Utilities Commission v. FERC* case, 495 U.S. 490, and that's the 1990 Supreme Court looking at 16 U.S.C. 821, which is just a provision that says -- you know, talks about state jurisdiction. And the Court there says, yeah, you know if we were writing on a blank slate, that is not how we would understand Congress in 1990 to do field preemption, but in 1946 when we looked at it, we said that's field preemption because that's how Congress was writing these statutes back then.

And I recognize that it is difficult, in modern times, to put ourselves back in the understanding of what Congress was doing in the 1930s when it was creating the administrative state and creating all of these agencies, but we have case after case that recognizes that what they were doing was preempting the field and that the language they used and the division of jurisdiction that they used in things like 152(a) and (b) is exactly how the 1934 Congress preempted the field.

And there's nothing in the subsequent -- first of all, the *Metrophones* case, which we cite in footnote 4 of our reply brief notes that the existence of express preemption provision doesn't negate the possibility of field preemption, but all of the express preemption provisions that, you know, the amicus and the State have pointed to, they're all about, you know, limiting State authority over intrastate communication.

So 253, there's not a worry that States are going to go out and regulate interstate communications directly. It's that States are going to do things with regard to rights of ways or intrastate communications that have the effect of prohibiting the ability to provide an interstate service.

You know, there's 276 which deals with the pay phones which make intrastate calls. There are -- you know, you have State authority and Congress actually is taking that away from the States.

So none of the provisions that they cite presume that States actually had a role to play in interstate communications and took that away. They're all provisions that address intrastate communications.

And California is not trying to regulate exclusively intrastate communications. They literally defined broadband the same way the FCC did, to encompass the interstate ones as well.

Your Honor, the reason there's no history is because until recently it was well accepted and understood that States didn't have this authority because the Supreme Court has said it more than a hundred years ago and every court since has acknowledged its existence. It hasn't had to be applied because States chose not to test the clear dividing line in the words of the NARUC case.

THE COURT: Ms. Li? All right. Anything you want to

add?

MS. LI: Yes. Thank you.

In terms of the history and -- the history of the Act and the many cases that have been cited, discussed, you know, as we pointed out in our briefing, those cases all arise in much narrower contexts where there is no question that the FCC has the authority to comprehensively regulate, for example, you know, common carrier services. What's really notable is that there is no case, by the Supreme Court or otherwise, finding total field preemption of all interstate communication services.

What's also notable is that the FCC didn't make that argument in defense of its 2018 order when trying to justify the express preemption directive and there really is nothing to support the argument that there is field preemption other than, you know, picking and choosing language from cases that don't really say that.

There are also -- you know, I think as you have alluded to and as the amici have alluded to, that there would be huge consequences to finding that States cannot do -- have anything to do with interstate communications. States regularly regulate activities that take place on the Internet, and there really is no indication that this actually has been field preempted for the entire time.

You know, we actually see Supreme Court cases and

other cases undertaking a very careful inquiry into, you know, whether an agency -- whether the FCC has the statutory authority to undertake the action that is alleged to preempt. And that really -- it shouldn't be necessary if there were field preemption.

I want to ask as well if my colleague, Ms. Kurtz, has anything to add in terms of field preemption.

THE COURT: All right. Ms. Kurtz?

MS. KURTZ: Yes. I would just sort of go back to the point that we're talking about information services here, and the test for field preemption is, is the federal regulations so pervasive that Congress left no room for the States to supplement it? And there's nothing here that suggests that. The text of the Act, 151, 152, they don't say that. 151 was just designed to set up the FCC as a single federal agency at the time in 1934. There were other -- there were multiple agencies before that. So that was the main purpose of 151.

And 152 just simply, you know, restricted the FCC's authority to the areas under its jurisdiction and not to other areas that were outside its jurisdiction. So it doesn't say anything about states or police powers, as Your Honor noticed. And you can't -- you can't infer a clear and manifest purpose from silence.

In the structure of the Act also, as others have noted, it persuasively regulates only some areas, and there's

no regulatory authority over others, and that's where we are.

And the case law is clear, as Your Honor noticed, that the gaps in the field prevent a finding of field preemption.

And it's express preemption provisions also. It's not correct that they say that they only apply to intrastate or -- I mean, we can go through them, but we dispute that. They do apply to both. 253 applies to both. 276 they say it doesn't, but it does. And they also -- they also apply to direct regulation, 544(e).

And the case law is also clear that direct -- the States directly regulate interstate services. The *CNN* case at the Ninth Circuit, the *Quik Payday* case, which is in the Internet professors' brief.

And as Ms. Li said, there is no case that says that the FCC has exclusive jurisdiction over all interstate. There is no case that has found field preemption in a Communications Act in an area that's not pervasively regulated.

And all of the cases that they cite are very limited to common carriers, which are pervasively regulated. And even in those areas the courts have found even narrower fields to be not preempted. So there's just absolutely no basis to infer any kind of field preemption here at all.

THE COURT: I want to clarify one thing. There's a dormant Commerce Clause claim in the complaint. Plaintiffs are not in any way relying on their dormant Commerce Clause claim

in this preliminary injunction motion, correct? It's clear you're relying on preemption. You're not relying on your dormant Commerce Clause, fair characterization? I didn't see the words "dormant Commerce Clause" anywhere in the briefs, which I was glad not to see, but is that fair?

MR. ANGSTREICH: Yes, Your Honor. Scott Angstreich.

THE COURT: Okay.

MR. ANGSTREICH: That is fair. We do have it in the case, but we did not rely on it because it was more fact bound.

THE COURT: Okay. We're going to take a break. I will come back -- let's come back in -- take ten minutes and then we'll continue.

I'm, much to your surprise, prepared to issue a decision today. I'll explain why, but take ten minutes and we'll come back, give the court reporter a break. See you in ten minutes.

(Recess at 3:15 p.m. to 3:32 p.m.)

THE CLERK: Please come to order. Court is back in session. The Honorable John A. Mendez presiding.

THE COURT: All right. All parties -- all counsel are back.

Let me begin with comments generally about what's going on in the Eastern District of California and my decision to -- surprising as it may seem -- to rule this afternoon from the bench.

Under better circumstances I would take this under submission and prepare a lengthy -- it would probably be a lengthy written opinion in a case such as this.

And one of the -- I'll tell you one of the great benefits of being a district court judge is being able to participate in arguments such as this. You're terrific attorneys. The briefs are outstanding. And when you have really good lawyers, it really makes the job such a pleasure.

And one of the most frustrating aspects of this job, and particularly working here in the Eastern District of California is that circumstances prevent us from, I think, doing our job as well as the litigants should expect, and that includes preparing written orders in cases such as this, but I can't. And I say that honestly and sincerely that given the burdensome caseload in this district, I have to issue a decision from the bench today rather than prepare what I would rather do, and that would be prepare a written order because the record's important here. I recognize that. I think everybody recognizes it. Cases like this go up on appeal. It helps the Ninth Circuit when the record is more complete. It helps the lawyers and it makes for the appellate arguments to be more focused and understood by the appellate court.

But Congress has tied our hands here in the Eastern District. I think you're all aware of the fact that we've only been authorized six judges. We haven't had a new judge for 30

years. We're down to four judges right now.

Our chief judge actually is testifying tomorrow and has presented testimony to Congress, a subcommittee of Congress on how bad things are here in the Eastern District.

A judge in Fresno is operating by himself. The other judge who was in Fresno retired. That judge in Fresno, if you include the cases from the retired judge, and I'm not making this number up, has over 2,000 cases pending right now in his court. He's issued a standing order which indicates that he won't hold any hearings in civil cases and he'll be lucky to get criminal cases done in a timely manner.

I've said this a lot the past four months that it's weighing on me, it's weighing on every judge, and for that I wish I could do what I think you, as lawyers, would expect us to do, and that is prepare a written order. I don't have the resources and I don't have the time.

I dedicated one law clerk to assist me on this case where we basically put all other cases aside and focused on this case for a significant period of time. I can't afford to do that when I have so many other cases pending. And the pandemic has created a situation where we've literally just continued most of the criminal cases, and that's going to come back to bear towards the latter part of this year.

So for that reason I am prepared to rule from the bench. And unfortunately, the decision will be more general,

not as detailed.

The transcript and the questions that you all so kindly answered will hopefully supplement the record. The briefs and the record in this case is more than sufficient in terms of fleshing out the issues.

So let's get into the motion itself. It's a motion for a preliminary injunction. Although this case has been around for a while, it's still at the very early stages of a case.

As the plaintiffs point out, the burden is on -- as the defendants point out, the burden is on the plaintiffs to demonstrate, as we've discussed, the likelihood of success on the merits, the likelihood that they will suffer irreparable harm if preliminary injunctive relief isn't granted and that the balance of equities tip in the plaintiff's favor and that the injunction is in the public interest.

The defendants quote two cases from the Ninth Circuit to argue that the burden is particularly heavy in cases seeking to enjoin a state statute because a State suffers irreparable injury whenever an enactment of its people or their representatives is enjoined.

And so the arguments focus on preemption. And I find, as you can tell from the questions that I had with respect to the likelihood of success on the merits that I don't find that the plaintiffs have demonstrated a likelihood of success on the

merits at this stage of the litigation. And let me go through very generally my findings.

First, the plaintiffs have asserted that the Communications Act gave the FCC the exclusive authority to regulate interstate communications, leaving the States only able to regulate purely intrastate communications. And that, in particular, was argued in the plaintiff's motion at page 10.

But the Court finds that the provisions of the Act that plaintiffs rely on do not support the arguments that have been raised.

The Court finds at section 151, which we've discussed, is just a statement of policy, and section 152 only deals with the FCC's authority. Section 152 grants the FCC the authority to regulate interstate communications while precluding it from regulating intrastate communications, but this grant of authority to the FCC indicates nothing about the power of the States.

And the fact that the Act specifically left out certain types of interstate communications from the FCC's jurisdiction, like information services, indicates to this Court that this is not the type of pervasive regulatory system that left no room for state law such that this Court can infer in this case a congressional intent to displace all state law.

The ISPs, the plaintiffs argue that the state common carrier regulations of information services would stand as an

obstacle to Congress's decision to immunize these services from such regulation, but the Act states that a telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing communication services. That's at 47 U.S.C. section 153(51).

The use of this language under this chapter makes clear to this Court that the provision only applies to the FCC's authority under the statute. If Congress had intended to preclude both state and federal regulation, it presumably would have said so clearly, as it did elsewhere in this statute.

This is supported by arguments in the briefs regarding section 601(c)(1) which states, quote, "This Act and the amendments made by this Act shall not be construed to modify, impair or supercede federal, state or local law unless expressly so provided in such Act or amendment," closed quote.

Plaintiffs have also argued that the Supreme Court has long held in analogous contexts that where Congress has prohibited federal regulators from imposing specific obligations, the States may not impose such regulation without running afoul of the Supremacy Clause. This, again, is an argument raised in the plaintiff's brief beginning at page 16.

But plaintiffs rely primarily in support of this argument on a case called *Transcontinental Gas Pipeline Corp v. State Oil and Gas Board of Mississippi*, a 1986 Supreme Court case, and the Court finds that that was not, in fact, the

holding in that case.

That case involved, in fact, a comprehensive scheme of federal regulation on all wholesales of natural gas in interstate commerce. The Supreme Court held that the statute occupied the field and precluded State regulation. The case was a straightforward application of field preemption that has no application here.

The Court also does not find persuasive the plaintiff's argument that SB-822 conflicts with the FCC's 2018 order. Those arguments are included in plaintiff's motion beginning at page 21.

The plaintiffs argue that SB-822 conflicts with the FCC's deregulatory policy for broadband internet access services as any State regulations of BIAS, again, capital B, capital I, capital A, capital S, is inconsistent with these objectives. However, the 2018 order reinterpreted broadband Internet as an information service covered by Title I of the Communications Act rather than as a telecommunications service covered by Title II and, thereby, placed it outside the FCC's regulatory ambit.

The upshot is that the order is not an instance of affirmative deregulation but, rather, a decision by the FCC that it lacked authority to regulate in the first place.

The Constitution gives supreme status only to those federal laws that are made in pursuance of the Constitution.

Accordingly, a federal statute that attempts to regulate a subject outside of Congress's constitutional authority has no preemptive effect. This is argued by the communication law scholars in their amicus brief at docket 64 beginning at page 8.

Likewise, agency regulations may preempt state law only if the agency has delegated authority over the subject matter. An agency's failure to regulate a practice it lacks the authority to regulate simply shows that it is respecting the limits of its powers, it's not exercising delegated authority to decide whether the matter should be free from State regulation as well.

While it is true that the FCC did have authority to decide whether BIAS is an information service, the Court finds that the deregulatory purposes behind that decision do not have preemptive effect.

Congress decided the appropriate level of regulation itself, that if a service satisfies the definition of a telecommunications service, it must be regulated as a common carrier under Title II; but if it qualifies as an information service, it is not.

The Commission's role is to determine whether a service meets the definition of a telecommunications or an information service. And that question ultimately turns not on the regulatory or deregulatory preference but on the factual

particulars of how Internet technology works and how it is provided.

Plaintiffs also argue that Congress, in 1993, expressly preempted States' attempts to regulate the entry of or the rates charged by any private mobile service under 47 U.S.C. section 332(c)(3)(A). Plaintiffs argue that SB-822 imposes conditions on the manner in which mobile service is provided and is, thus, preempted, but the prohibition on State regulation of entry of a mobile service appears to just mean that States cannot prevent mobile carriers from entering the market, which SB-822 does not do.

Plaintiffs also argue that SB-822's zero-rating provisions improperly regulate the rates charged. The zero-rating provision provides that as with paid prioritization, mobile broadband providers cannot manipulate their subscriber's Internet access experience to favor paid or affiliated content over other content on the Internet.

But as defendants point out, these provisions do not regulate how much providers can charge their customers because providers can charge the user as much or as little as they like for the service and, thus, there is no conflict with the Act.

Finding that there is no likelihood of success on the merits of the arguments raised, the Court similarly finds that there is, then, no irreparable harm. We did have -- the Court did have questions regarding irreparable harm, but the Court

need not make a detailed finding given that in this case there is no constitutional violation.

And in terms of the balance of equities in public interests weighing in favor of one party or the other, again, it's an interesting question that, in all likelihood, requires further development. At this juncture I do find that the balance of equities and the public interest weigh in favor of denying the injunction.

As California has stated in its opposition brief, quote, "Any time a State is enjoined by a Court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury," closed quoted, citing *Maryland v. King*, a 2012 Supreme Court case, this is especially true of SB-822, which provides crucial protections for California's economy, democracy and society as a whole, as reflected in the declarations submitted in support of the opposition.

California and their amici describe in great detail how the regulations are essential for fair access to the Internet, which essentially in the midst of the pandemic is essential to everyday functions, such as education, employment and even emergency response.

These are not hypothetical concerns. For example, the defendant submitted a declaration by Anthony Bowden, fire chief for Santa Clara County, that describes how Verizon allegedly

throttled the fire department's connection in the midst of their response to the Mendocino Complex fire.

Defendants also submitted comments from the New York Attorney General, who found that large ISPs made the deliberate business decision to let their network Internet connections become congested with traffic and used that congestion as leverage to extract payment from others. That can be found at ECF No. 5758.

It does appear to be that issuing an injunction would be would negatively impact the State of California more than the ISP companies and over the well-being the public. It is clearly not, the Court finds, in the public interest to issue the injunction and the balance of equities, the Court finds, weighs in California's favor.

I want to leave all the parties with this thought as well: This case reminds me a great deal of the *U.S. v. California* case that I had a few years ago given the significance of the issue and, frankly, the political implications of cases like this. I asked the parties -- I sent out a minute order asking whether the United States' decision to dismiss its complaint in this case in any way affects the case brought by the plaintiffs in this instance, the remaining plaintiffs, the ISP plaintiffs. And I think all parties agree and the Court agrees that from a legal perspective, as a matter of law, the United States' decision did not in any way affect

the issues raised in this case. But what it made clear to this Court is that there is an elephant in the room. There is clearly a political overtone to this case. And what I want to say to the parties is the same thing I said at the end of that decision in *U.S. v. California*, and that is that based on the law that this decision today is a legal decision and it should not be viewed through any type of political lens. I am expressing no view on the soundness of the policies or statutes involved in this lawsuit. Again, as I've said, it's obvious to all of us that this case raises issues that, quite frankly, might be better resolved by Congress rather than the federal courts.

My decision today was made without any concern for any possible political consequences, and I firmly believe here, as I did in *U.S. v. California*, that there's going to be some type of long-term solution to this issue of how we treat ISPs. Should they or shouldn't they be regulated? Should the States be allowed to regulate when the FCC decides not to regulate? All those types of decisions -- the answer to those questions are better -- and the parties are better stood when those answers come from the legislature and the executive branches. To have a number of piecemeal opinions issued by the judicial branch I don't think is going to, once and for all, help clear up or determine this issue.

And so as I did in *U.S. v. California*, I would urge

Congress to take up this issue, to take it up seriously. I clearly agree with the plaintiffs that the legislation -- when you have to deal with legislation drafted in 1934 in 2021, I don't think anybody is well served by trying to interpret, apply and analyze that type of legislation. And that's Congress's job. They've got to keep up with what's going on in the real world. They've got to give us five or six more judges, but besides that, they need to do that.

And I'm sure your clients are aware that -- plaintiffs' clients are aware of the fact that maybe the real remedy here and the real solution lies with Congress and not a federal district court.

Again, thank you all for responding so well to the Court's questions. The transcript will serve as the Court's order.

As I indicated, I do not intend to issue any final or subsequent supplemental written order. If the parties are looking to draft some type of order, I would also discourage that, because it just ends up with the parties arguing over what language should be included in that order. I've tried to be as clear as possible as to my findings and conclusions of law, and I assume it's on to the Ninth Circuit from here. So thank you all.

MR. ANGSTREICH: Thank you, Your Honor.

(Concluded at 3:54 p.m.)