SUMMARY OF ARGUMENT

In 2018, the FCC issued its *Restoring Internet Freedom Order*, 33 FCC Rcd. 311 (2018) [“2018 Order”], which returned broadband Internet access service (“broadband”) to a classification as a Title I information service. The FCC determined that a “light touch” regulatory regime was necessary to promote investment in broadband. *Id*. ¶¶ 1-2. While removing the “no-blocking” and “no-throttling” rules previously imposed under the 2015 Open Internet Order, *Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601 (2015) [“2015 Order”], the FCC also removed the “general conduct” standard—an open-ended regulatory catch-all that would permit the FCC to examine any conduct of broadband providers that it deemed potentially threatening to Internet openness. *Cf*. 2018 Order ¶¶ 239-245. Yet, notably, the FCC elected to keep a version of the 2015 Order’s transparency rule in place, which requires broadband providers to disclose any blocking, throttling, paid prioritization, or similar conduct. *Id*.

In retaining the transparency rule, the FCC noted that the FTC and state attorneys general are in a position to prevent anticompetitive consumer harm through the enforcement of consumer protection and antitrust laws. *See* 2018 Order ¶ 142. Thus, the overarching goal of the 2018 Order was to ensure business conduct which could be beneficial to consumers was not foreclosed by regulatory fiat, as would have been the case under the 2015 Order, while empowering the FCC, FTC, and state attorneys general to identify and address discrete consumer harms.

The *Mozilla* court noted that the FCC could invoke conflict preemption principles in order to prevent inconsistent state laws from interfering with the 2018 Order. *Mozilla Corp. v. FCC*, 940 F.3d 1, 85 (D.C. Cir. 2019) (per curiam). Without such preemption, a patchwork of inconsistent state laws would confuse compliance efforts and drive up broadband deployment costs. *Cf. Id*. Relying as it does on a common carriage approach to regulating the Internet, and fragmenting the regulation of broadband providers between the federal and state levels, SB-822 is at odds with the purpose of the 2018 Order.

The district court found the balance of the equities and the public interest both weighed in favor of California in enforcing SB-822, stating the law “provides crucial protections for California’s economy, democracy, and society as a whole,” Transcript of Proceedings, *American Cable Ass’n v. Becerra*, No. 2:18 cv-02684 (E.D. Cal. Feb. 23, 2021) (ER-7–78) [“Tr.”], and that a preliminary injunction would “negatively impact the State of California more than [it would benefit] the ISP companies.” *Id*. at 69. In denying the motion for a preliminary injunction, the court also found the Appellants failed to show a likelihood of success on the merits. *Id*. at 67.

The district court wrongly concluded the balance of equities tips in favor of Defendant-Appellee, the state of California, and incorrectly assumed that the Appellants’ members would not suffer irreparable harm. The economics underlying broadband deployment, combined with competition and consumer protection law, provide adequate protection to consumers and firms in the marketplace without enforcement of SB-822. And, because of the sovereign immunity provided to California under the Eleventh Amendment, the potential damages suffered by the Appellants' members are unable to be remedied. On the other hand, the enforcement of this law will significantly harm the Appellants' members as well as the public by allowing states to create a patchwork of inconsistent laws and bans on consumer welfare-enhancing conduct like zero-rating.

The district court made crucial errors in its analysis when balancing the equities.

First, when evaluating the likelihood of ISPs acting in ways that would reduce Internet openness, it failed to consider the economic incentives that militate against this outcome.

ISPs operate as multi-sided markets—their ability to draw consumers and edge providers on both sides of their platforms depends on behavior that comports with consumer expectations. Both broadband consumers and edge providers demand openness, and there is no reason to expect ISPs to systematically subvert those desires and risk losing revenue and suffering reputational harm. Contrary to the district court's characterization, the good behavior of ISPs is not attributable to scrutiny during the pendency of the current litigation: rather, it is a rational response to consumer demand and part of a course of conduct that has existed for decades.

Second, the district court discounted the legal backdrop that both would hold ISPs to their promises, as well as prevent them from committing competitive harms.

All of the major ISPs have made public promises to refrain from blocking, throttling, or engaging in paid prioritization. See *infra* Part I (A) at 17. Further, the FCC's 2018 Order creates a transparency regime that would prevent ISPs from covertly engaging in the practices SB-822 seeks to prevent. The FTC's Section 5 authority to prevent "unfair or deceptive acts or practices" empowers that agency to pursue ISPs that make such promises and break them while state attorneys general can also bring enforcement actions under state consumer protection laws. 2018 Order ¶¶ 140-41.

In addition to the consumer protection enforcement noted above, antitrust law provides a well-developed set of legal rules that would prevent ISP's from engaging in anticompetitive conduct. This would include preventing ISPs from entering into anticompetitive agreements with each other, or with edge providers, that harm competition, as well as prevent anticompetitive unilateral conduct.

In summary, the district court failed to properly balance the equities and, in so doing, sanctioned net harm to the public interest. Both the underlying economic incentives and existing laws ensure ISPs will continue to provide broadband service that meets consumer expectations. By contrast, SB-822, in going further than even the 2015 Order, actually permits a great deal of harm against the public interest by presumptively banning practices, like zero-rating, that increase consumer welfare without harming competition.