

TechFreedom  
110 Maryland Ave, Suite 409  
Washington DC, 20002



September 28, 2018

Governor Edmund G. Brown  
c/o State Capitol, Suite 1173  
Sacramento, CA 95814

**RE: Communications: broadband Internet access service (S.B. 822)**

Governor Brown,

Last month, the California Senate passed S.B. 822, which has been called the strongest net neutrality law in the country. Unfortunately, such state regulation of inherently interstate Internet services violates basic principles of federalism: (1) federal law preempted state regulation of broadband services and (2) state regulation of the Internet violates the Dormant Commerce Clause.<sup>1</sup>

Ultimately, when S.B. 822 is struck down in court, as it almost assuredly will be, California will have wasted valuable taxpayer resources fighting a lengthy, costly, and unwinnable legal battle. Thus, we urge you to veto this legislation. In the interim, California should focus on enforcing its generally applicable consumer protection and competition laws to address net neutrality concerns. Further, California's congressional delegation should do everything possible to ensure the passage of federal net neutrality legislation.

**Federal Preemption.** Any reviewing court will conclude that S.B. 822, and any other state net neutrality law, has been preempted by the FCC's Restoring Internet Freedom Order ("*RIFO*").<sup>2</sup> That Order returned broadband services to the FCC's pre-2015 determination that broadband is a Title I information service, rather than a Title II common carrier telecommunications service; as such, the FCC concluded that it lacked authority for most of the net neutrality rules it issued in the 2015 Open Internet Order ("*OIO*"), and thus rescinded those rules. While the *RIFO* has been challenged in the D.C.

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<sup>1</sup> See Graham Owens, *Federal Preemption, the Dormant Commerce Clause, and State Regulation of Broadband: Why State Attempts to Impose Net Neutrality Obligations on Internet Service Providers Will Likely Fail* (July 19, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3216665](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3216665).

<sup>2</sup> *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, FCC 17-166 (Jan. 4, 2018) [hereinafter *Restoring Internet Freedom Order*], <https://tinyurl.com/y9unslk8>.

Circuit, the Supreme Court has already upheld the FCC's discretion, under *Chevron*,<sup>3</sup> to classify broadband under Title I.<sup>4</sup> Thus, it is highly unlikely that the D.C. Circuit will strike down the *RIFO*. Regardless, the FCC's preemption authority is not limited to that Order and, as courts have made clear, the FCC is authorized to preempt such laws regardless of whether the *RIFO* survives judicial scrutiny, as we demonstrate below.

The Constitution makes the "laws of the United States ... the supreme law of the land."<sup>5</sup> Ingrained in the "Supremacy Clause" is the doctrine of federal preemption, by which the federal government may bar states and localities from regulating in certain contexts — *whether or not the state or local regulation conflicts with federal law*.<sup>6</sup> Although the "[p]urpose of Congress is the ultimate touchstone,"<sup>7</sup> it is "well-established" that "federal agencies acting pursuant to their congressionally delegated authority may preempt state regulation."<sup>8</sup> When a federal agency acts pursuant to this constitutional authority, "it is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes."<sup>9</sup>

While federal preemption is not a single, narrow doctrine, the federal government may generally preempt state laws in two ways, both of which apply here:

1. **Express preemption** occurs when a federal statute or regulation explicitly displaces state law and specifies the extent to which state law is preempted. The *RIFO* has both clearly and expressly preempted state law. While its preemption statement is in favor of a "deregulatory" national framework, that clear statement is nonetheless binding on the states under the Supremacy Clause for two reasons. First under binding Supreme Court precedent, "[f]ederal regulations have no less preemptive effect than federal statutes."<sup>10</sup> Second, "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un* regulated, and in that event would have as much pre-emptive force as a decision to regulate."<sup>11</sup> As you yourself are fond of saying, "Inaction may be the biggest form of action."

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<sup>3</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, 845 (1984)) ("*Chevron* established a familiar two-step procedure for evaluating whether an agency's interpretation of a statute is lawful.>").

<sup>4</sup> *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005).

<sup>5</sup> U.S. Const. art. VI, cl. 2.

<sup>6</sup> *City of New York v. FCC*, 486 U.S. 57, 63 (1988).

<sup>7</sup> *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted)).

<sup>8</sup> *Id.* (citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986)).

<sup>9</sup> *Id.*

<sup>10</sup> *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982); *see also City of New York*, 486 U.S. at 63-64 ("The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof.>").

<sup>11</sup> *Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983); *see also Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) (recognizing that "deregulation" is "a valid federal interest[] the FCC may protect through preemption of a state regulation").

2. **Conflict preemption** occurs where state law conflicts with a federal law or regulatory framework, thereby frustrating the purposes and objectives of a federal regulatory regime.<sup>12</sup> Interpreting the Communications Act, the FCC's *RIFO* sets forth "a calibrated federal regulatory regime based on the pro-competitive, deregulatory goals of the 1996 [Telecommunications] Act," and makes clear that broadband service should be governed "by a uniform set of *federal* regulations, rather than by a patchwork that includes separate state and local requirements."<sup>13</sup> Accordingly, the *RIFO* "preempt[s] *any* state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspects of broadband service that we address in this order."<sup>14</sup>

**Commerce Clause.** S.B. 822 also violates the Dormant Commerce Clause, a second federalism doctrine that bars state regulation if the regulated activities "inherently require a uniform system of regulation" or if the regulations "impair the free flow of materials and products across state borders."<sup>15</sup> The Internet — described by the Supreme Court in 1997 as a "wholly new medium of *worldwide* human communication"<sup>16</sup> and defined by the 2015 *OIO* as "jurisdictionally interstate for regulatory purposes"<sup>17</sup> — naturally extends beyond the boundaries of any state. As such, the effects of any state regulation of the Internet inevitably extend beyond state borders, thus implicating the "Dormant Commerce Clause." This doctrine limits the states' ability to regulate in ways that serve as barriers to interstate commerce; it may even limit how the states may act within their traditional police powers to protect public health and safety, or to protect their citizens from unfair or deceptive trade practices.<sup>18</sup>

As the *RIFO* declares, "it is impossible or impracticable for ISPs to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance."<sup>19</sup> As such, state regulations of broadband service necessarily reach beyond state borders.

**Pandora's Box of Internet Regulation.** If state laws regulating Internet services *were* somehow upheld in court, no state would have as much to lose as California — the home of most of the world's

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<sup>12</sup> *De la Cuesta*, 458 U.S. at 144 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) ("state law is nullified to the extent it conflicts with federal law," such as when "state law 'stands as an obstacle to the accomplishment ... of the full purposes and objectives of Congress,' even if the issue being regulated is "of special concern to the States.").

<sup>13</sup> *Restoring Internet Freedom Order*, *supra* note 2, ¶ 194.

<sup>14</sup> *Id.*

<sup>15</sup> See *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1154-55 (9th Cir. 2012).

<sup>16</sup> *Reno v. ACLU*, 521 U.S. 844, 850 (1997).

<sup>17</sup> *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, ¶ 431 (Mar. 12, 2015) (2015 Order), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-15-24A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf).

<sup>18</sup> See Santiago Legarre, *The Historical Background of the Police Power*, 9 U. Pa. J. Const. L. 745 (2007).

<sup>19</sup> *Restoring Internet Freedom Order*, *supra* note 2, ¶ 200.

most successful Internet services. Does anyone in Sacramento really want state legislators in Alabama or Texas writing laws that govern California companies?

***What California Can Constitutionally Do.*** Rather than passing state laws of dubious constitutionality, California should focus on ensuring that the California Attorney General's office has the resources it needs, especially technical expertise, to enforce California's Unfair Competition Act<sup>20</sup> against most, if not all, of the potential anti-competitive, deceptive and unfair practices by broadband companies that could raise net neutrality concerns. Enforcement of such generally applicable laws, which are essentially consistent with the Federal Trade Commission Act, is unlikely to create the kind of federalism problems that S.B. 822 or any other broadband-specific legislation would.<sup>21</sup>

***Supporting Federal Legislation.*** Net neutrality legislation has stalled in Congress since 2006, when the Republican-controlled House first passed legislation to authorize the FCC to police net neutrality concerns. In 2010, Congressional Democrats, with the support of the Democratic FCC Chairman, attempted to move legislation, while Google and Verizon proposed their own joint legislative framework. Unfortunately, both these efforts ultimately stalled, leading the FCC to take action on its own. Since 2014, Congressional Republicans have proposed their own net neutrality legislation, while Congressional Democrats have yet to propose their own bills. Passage of S.B. 822, and the inevitable multi-year process of litigation, will simply provide further excuse for federal lawmakers not to put net neutrality on a firm legislative footing. California's congressional delegation should do everything possible to ensure the passage of federal net neutrality legislation.

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For all these reasons, we urge you to veto S.B. 822.

Sincerely,

TechFreedom

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<sup>20</sup> Cal. Bus. & Prof. Code § 17200 et seq. (West 1993).

<sup>21</sup> See Owens, *supra* note 1, at 86 ("This point is critical under the Pike balancing test, because state actions that burden interstate commerce will only be saved if the regulation imposing the burden could not be "promoted as well with a lesser impact on interstate activities." Clearly, if a state is already equipped to enjoin ISPs from engaging in the purportedly "deceptive" or "unfair" practices the proposed actions are attempting to proscribe, then the states' interests can be achieved by less burdensome means and the action would violate the Dormant Commerce Clause under Pike.") (internal citations omitted).