NO. 21-15430

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ACA CONNECTS – AMERICA'S COMMUNICATIONS ASSOCIATION, CTIA – THE WIRELESS ASSOCIATION, NCTA – THE INTERNET & TELEVISION ASSOCIATION, and USTELECOM – THE BROADBAND ASSOCIATION,

Plaintiffs-Appellants,

v.

ROB BONTA, in his official capacity as Attorney General of California,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of California
No. 2:18-cv-2684 (District Judge John A. Mendez)

BRIEF OF *AMICI CURIAE* WASHINGTON LEGAL FOUNDATION AND TECHFREEDOM SUPPORTING REHEARING *EN BANC*

Corbin K. Barthold
Berin Szóka
James Dunstan
TECHFREEDOM
110 Maryland Ave., NE
Suite 205
Washington, DC 20002

John M. Masslon II
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
jmasslon@wlf.org

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DISCLOSURE STATEMENT

Washington Legal Foundation has no parent company, issues no stock, and no publicly held company owns a ten percent or greater interest in it.

TechFreedom has no parent company, issues no stock, and no publicly held company owns a ten percent or greater interest in it.

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INTERESTS OF *AMICI CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* on the Federal Communications Commission's net neutrality rules. *See, e.g.*, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (*per curiam*); *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016). WLF believes that the FCC's 2018 Order, *In re Restoring Internet Freedom*, 33 FCC Rcd. 311 (2018), must be respected by States—even those States that don't agree with the FCC's decision.

TechFreedom is a nonprofit, nonpartisan think tank. It is dedicated to promoting technological progress that improves the human condition. TechFreedom seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible. It has been a prominent voice in all aspects of the net neutrality debate. In the 2018 Order, for instance, the FCC cited TechFreedom's comments twenty-nine

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[*] No party's counsel authored any part of this brief. No one, apart from *amici* and their counsel, contributed money intended to fund the brief's preparation or submission. All parties consented to the filing of this brief.

times. TechFreedom believes that if the net neutrality fight is allowed to drift into the States, it will lead to a mess of contradictory laws, understandings, and implementations of even the most basic net neutrality concepts. As TechFreedom explained in its panel-stage *amicus* brief, terms like "reasonable network management" and "zero rating" lack settled meanings. Even the definition of "broadband internet access service" is rife with ambiguity, leaving it unclear which internet services will be covered by the law. Even if States enact *identical* net neutrality laws, therefore, allowing those laws to take effect, in defiance of the 2018 Order, will produce intractable conflicts and patchwork regulation of the internet.

INTRODUCTION AND SUMMARY OF ARGUMENT

The debate about "net neutrality" has long since mutated from the core tenets on which everyone agrees, to the question of how those common goals can best be achieved. Can existing consumer protection and antitrust laws, combined with market forces, protect net neutrality? *See generally* Timothy B. Lee, *The Durable Internet: Preserving Network Neutrality without Regulation*, CATO POLICY ANALYSIS 626 (2008). Or should the FCC replace those laws with common carriage regulation? The

FCC has altered its approach over the past two decades as to the best approach to achieve net neutrality goals. But each time, the FCC has correctly presumed that those policy decisions must be made at the federal level because the internet, and access to it, constitute interstate commerce. This case is about whether federal law preempts California's net neutrality law. The panel, however, tripped over a preliminary issue: Could the FCC preempt California's net neutrality law under conflict-preemption principles? Splitting from the District of Columbia Circuit, the panel said no.

To ensure national consistency in communications regulation, the Communications Act of 1934 requires certain challenges of the FCC's actions to be filed in the District of Columbia Circuit. 47 U.S.C. § 402(b). This requirement ensures that judicial circuits do not differ on whether a challenged policy is lawful or whether it must be set aside. Other challenges may be filed in any circuit, *see id.* § 402(a), for which the multi-circuit lottery exists. *See* 28 U.S.C. § 2112. It likewise ensures a uniform national rule on issues of great importance.

Because this case is not a facial challenge to an FCC order, an original petition for review in a court of appeals was improper. Plaintiffs

properly sued in federal district court seeking an injunction barring enforcement of California's net neutrality statute. But that is not a license for this Court to create a circuit split. The issues involved in the case are important. Regulated entities deserve certainty about the preemptive effect of the 2018 Order.

Yet the panel here created a sharp circuit split on whether the 2018 Order can preempt state laws. The plain language of the panel's decision, compared to that of the District of Columbia Circuit's decision, manifests the split. Although the D.C. Circuit vacated the 2018 Order's provision preempting all state net neutrality laws, it did so because of the breadth of the 2018 Order's express preemption provision. The D.C. Circuit acknowledged that, under the conflict preemption doctrine, the 2018 Order could preempt some state net neutrality laws. It just refused to offer an advisory opinion about which laws could be preempted. In other words, the D.C. Circuit held that courts would have to consider the preemptive effect of the 2018 Order case-by-case.

If any uncertainty remained, the Congressional Research Service's report ended it. The panel, however, twisted itself into a pretzel trying to explain how its decision follows the D.C. Circuit's decision. In other

words, the panel refused to acknowledge that it was creating a circuit split. It therefore caused massive uncertainty for regulated parties. If this Court does not provide certainty, then the Supreme Court will most likely grant certiorari and reverse.

In addition, one panel member believes that parties should *never* exercise their right to appeal from an order granting or denying a preliminary injunction. In a concurring opinion, Judge Wallace speculated that parties often appeal solely to get more information about how the case will likely conclude. This simply makes no sense. The real reason that parties appeal from preliminary injunction orders is that the preliminary injunction is often more important than the final injunction. The Court should grant rehearing to repudiate the concurrence's insistence that parties not appeal preliminary injunction orders. This is particularly critical in a case of national importance. Insisting that a single district court judge should, no matter the issue, be able to bind parties for months or years is wrong. Yet that is what the concurrence insists. The only way to reject these musings from a senior circuit judge is for the Court to grant rehearing *en banc*.

ARGUMENT

I. THE COURT SHOULD NOT PERMIT A PANEL TO CREATE A CIRCUIT SPLIT WITHOUT ACKNOWLEDGING THE SPLIT.

A. The Panel's Decision Conflicts With The D.C. Circuit's *Mozilla* Decision.

The panel's decision claims to follow the D.C. Circuit's *Mozilla* decision. Slip Op. 20 ("This is in accord with the D.C. Circuit's decision."). But the two decisions are irreconcilable. The panel held that the 2018 Order lacks any preemptive effect on state net neutrality laws. *Id.* at 17-26. The D.C. Circuit, on the other hand, held that the 2018 Order preempts a state statute where an actual conflict exists. *See Mozilla*, 940 F.3d at 85.

The FCC has "'express and expansive authority' . . . to regulate certain technologies." *Mozilla*, 940 F.3d at 75 (quoting *Comcast Corp. v. FCC*, 600 F.3d 642, 645 (D.C. Cir. 2010)). "By reclassifying broadband as an information service, the Commission placed broadband outside of its Title II jurisdiction." *Id.* at 75-76. Congress has not given the FCC broad authority over Title I information services (as, under the 2018 Order, internet service providers are). The D.C. Circuit held that the 2018 Order thus stripped the FCC of authority to expressly preempt all state laws.

That however, was not the end of the D.C. Circuit's preemption analysis. The FCC also has authority allowing it to regulate matters "reasonably ancillary to the effective performance" of its express authority. *Mozilla*, 940 F.3d at 75 (quoting *Am. Libr. Ass'n. v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005) (cleaned up)). The D.C. Circuit held that the FCC lacked ancillary authority to preempt all state net neutrality laws regulating intrastate broadband because it was unrelated to the "effective performance" of its "statutorily mandated responsibilities." *See id.* at 76 (quotation omitted); *see also id.* (noting that the FCC relied only on its express authority for preemption (citation omitted)).

Because it found that the FCC could not rely on either its express or ancillary authority, the D.C. Circuit vacated the 2018 Order's "sweeping" preemption of "any state or local requirements that are inconsistent with [its] deregulatory approach." *Mozilla*, 940 F.3d at 74 (cleaned up). But the scope of the D.C. Circuit's decision was limited.

The D.C. Circuit explained that the 2018 Order may preempt some state net neutrality laws. *Mozilla*, 940 F.3d at 85. This is because, along with express preemption, a state law can face implied preemption, including conflict preemption. Under this doctrine, a state law that is

irreconcilable with federal law is preempted. *See CDK Glob. LLC v. Brnovich*, 16 F.4th 1266, 1274 (9th Cir. 2021) (citing *United States v. California*, 921 F.3d 865, 882 (9th Cir. 2019)).

Yet the panel did not undertake the proper conflict-preemption analysis. Rather, it conflated express preemption with conflict preemption. When discussing whether the California law is conflict preempted by the 2018 Order, the panel focused on the reclassification of ISPs. As discussed above, this was central to the D.C. Circuit's decision to throw out the 2018 Order's broad express preemption provision. It was not part of the D.C. Circuit's conflict preemption analysis.

At oral argument before the D.C. Circuit, the FCC conceded that the 2018 Order's express preemption provision was broader than conflict preemption. *Mozilla*, 940 F.3d at 74 (citation omitted). So the FCC was relying on its express authority to preempt state laws—even when they did not conflict with the federal policy enshrined in the 2018 Order. It was not relying on conflict-preemption principles.

That helps explain why the D.C. Circuit's holding in *Mozilla* was so narrow. The challenge to the 2018 Order was a facial challenge to the express preemption provision that went further than conflict preemption.

The D.C. Circuit decided that narrow challenge while clarifying that it was not deciding whether a specific state net neutrality law was conflict preempted by the 2018 Order. *See Mozilla*, 940 F.3d at 85.

The question of conflict preemption depends on the details of each State's net neutrality law. In other words, there must be a case-by-case analysis of the issue. *See Mozilla*, 940 F.3d at 81-82 (citations omitted); *id.* at 86. The panel, however, did not engage in this required case-by-case analysis. The conflict-preemption part of the panel's decision does not mention the details of California's net neutrality statute. *See* Slip Op. 17-26. Rather, that analysis would fit with any decision by this Court challenging a net neutrality law.

The rest of the panel's analysis assumes that the arguments Plaintiffs make are identical to those the partial dissent in *Mozilla* made in arguing that the FCC could issue the express preemption directive. This was a straw-man. The arguments that Plaintiffs make are the same arguments that the *Mozilla* majority adopted: The 2018 Order may preempt State net neutrality laws.

Mozilla's plain language shows that it cannot be reconciled with the panel's decision here. Even the Congressional Research Service's recent

report acknowledges the reality. It recognizes that *Mozilla* "left open [] the possibility that specific state laws might be preempted on a case-by-case basis under principles of conflict preemption." Chris D. Linebaugh & Eric N. Holmes, Cong. Rsch. Serv., R46736, *Stepping In: The FCC's Authority to Preempt State Laws Under the Communications Act* 13 (2021) (citing *Mozilla*, 940 F.3d at 85); *see id.* at 16.

The Congressional Research Service does not make definitive pronouncements when the law is ambiguous. Because it is charged with saying what the law is, if there is any dispute about a law's meaning, the Congressional Research Service presents all sides of an argument and sometimes states what it thinks courts will ultimately decide. But here it made unequivocal statements that *Mozilla* held that the 2018 Order may preempt some state laws.

The panel's failure to acknowledge that the Congressional Research Service rejects its reading of *Mozilla* is telling. It confirms the panel's failure to confront authorities showing the opinion's flaws. This Court should not be so cavalier when splitting from the D.C. Circuit on the preemptive effect of the 2018 Order. The only way to properly analyze the issue is by granting rehearing *en banc*.

B. The D.C. Circuit Correctly Held That The 2018 Order May Preempt State New Neutrality Laws.

If the panel's opinion is seen as rejecting *Mozilla*, that too is reason to grant rehearing. Federal preemption of state net neutrality laws reflects Congress's intended approach. *See* 47 U.S.C. § 230(b)(2). Such laws conflict directly with the express federal policy of light regulation, as embodied in the 2018 Order. Without preemption, broadband services would become heavily regulated state-by-state.

State net neutrality laws create severe practical problems. Often, "'it is not possible to separate the interstate and the intrastate components of the FCC regulation' involved." *Ill. Bell Tel. Co. v. FCC*, 883 F.2d 104, 114 (D.C. Cir. 1989) (quoting *La. Pub. Servs. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986)). That is why preemption is common in communications law. *See, e.g.*, *id.* at 115-16. This case proves the point.

The parties have spilled much ink in this Court and below on whether California's law merely "regulat[es] . . . intrastate communications that touches on interstate communications." Slip Op. 30. As the petition for rehearing explains, the panel reached the wrong conclusion on that issue. But even if the panel reached the right result,

the dispute highlights the difficulty separating regulations of intrastate communications and interstate communications.

The FCC has preempted other Title II-like state regulations in favor of lighter federal regulation. *See Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198, 217 (D.C. Cir. 1982) (rejecting argument that the FCC's preemption was unlawful because it "creat[ed] a vacuum of deregulation"). Such preemption recognizes that "state regulation which impedes a federal regulatory goal must yield to the federal scheme." *Id.* at 215. The 2018 Order aligns the FCC with Congress's regime. *See Minn. Pub. Utils. Comm'n. v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) (less regulation is a "valid federal interest[] the FCC may protect through preemption of state regulation" (citation omitted)).

"[A] substantial portion of Internet traffic involves accessing interstate or foreign websites." *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000) (quotation omitted). That is why "geography . . . is a virtually meaningless construct on the Internet." *ACLU v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999) (quotation omitted). Thus, "it is impossible or impracticable for ISPs to distinguish between intrastate and interstate communication over the Internet." 2018 Order, 33 FCC

Rcd. at 430. This crucial finding remained "uncontested" by the *Mozilla* plaintiffs and undisturbed by the *Mozilla* majority, even as it vacated the 2018 Order's express preemption provision. *Mozilla*, 940 F.3d at 95 (Williams, J. concurring and dissenting). It is therefore hard for ISPs to comply with differing States' laws without incurring substantial costs. In fact, it might be impossible. *See id.* ("[A]n ISP generally could not comply with state or local rules for intrastate communications without applying the same rules to interstate communications." (citations omitted)).

Preempting States from imposing Title II-like regulations avoids that problem and ensures a less regulated environment, but not lawless environment: Only if the FCC declares broadband internet access service to not be a common carrier service may the Federal Trade Commission enforce generally applicable consumer protection and competition laws. 15 U.S.C. § 45(a)(1). That is why Congress's opposition to federal Title II regulations of information services is not an invitation for States to step in, as California argues. Congress wanted less regulation—both generally and as to the internet and broadband access in particular. *See* 47 U.S.C. § 230(b)(2). That "federal decision to forgo regulation" shows "an authoritative federal determination that the area is best left

unregulated" by the States too. *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (citations omitted); *see also Transcon. Gas Pipe Line Corp. v. State Oil & Gas Bd. of Miss.*, 474 U.S. 409, 423 (1986).

A contrary reading would render the FCC's decision "meaningless in a world where substantially similar state [regulations] were readily available." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151 (1989). Because the 2018 Order's conflict preempting of state net neutrality laws reflects Congress's intent, the D.C. Circuit's *Mozilla* decision was correct and the panel's decision is wrong.

II. THE COURT SHOULD GRANT REHEARING AND REJECT ANY SUGGESTION THAT PARTIES SHOULD NOT APPEAL PRELIMINARY INJUNCTION ORDERS.

This case shows why having only one active circuit judge decide a case is unwise. After meeting age and service requirements, Article III judges may retire from active service while continuing to receive their full salaries. 28 U.S.C. § 371(b)(1). Senior judges then have the option to continue performing duties that they are willing to undertake. *See id.* § 294(c). For some appellate jurists, that means maintaining a full caseload. For others, it means deciding only cases submitted on the

briefs. Most senior circuit judges, however, choose to hear a reduced number of the same cases. But again this is a choice made by the senior circuit judge and the chief judge or judicial council of his or her circuit. *See id.*

Sections 294 and 371 do not permit senior circuit judges to keep hearing the same types of cases while restricting parties' rights. Yet that is what Judge Wallace's concurrence suggests. His concurring opinion suggests that parties should not appeal these decisions because they require this Court to do extra work.

Only one judge in regular active service sat on the panel here. The Court should grant rehearing *en banc* to soundly reject the concurring judge's musings about the propriety of appealing preliminary injunctions. Parties should not be worried about angering circuit judges by filing nonfrivolous appeals of orders granting or denying preliminary injunctions. Rather, they should be assured that if they exercise their rights under federal law, they will receive a fair adjudication of their claims on appeal.

Congress has given parties the right to appeal orders granting or denying preliminary injunctions. 28 U.S.C. § 1292(a)(1); *see Abbott v.*

Perez, 138 S. Ct. 2305, 2320 (2018) (citing *Sampson v. Murray*, 415 U.S. 61, 86-88 (1974)). This rule makes sense. Many times, the decision to grant or deny a preliminary injunction is as important as the final judgment. Two examples prove the point. First, in the noncompete arena, the preliminary injunction decision is usually more important than the final injunction. There is a short period when a former employee is barred from working for a competitor. If a party could not appeal the grant or denial of a preliminary injunction, a single judge would effectively be the first and last person to resolve the party's claims. The time during which the employee cannot work for the competitor will lapse before final judgment—much less an appeal. So the final decision really doesn't matter.

Second, the same was true for the Occupational Safety and Health Administration's emergency temporary standard case. The Sixth Circuit's lifting the stay would have allowed the ETS to remain in effect for the full six months. *See* Br. *Amicus Curiae*, Wash. Legal Found. at 12-13, *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022) (*per curiam*) (No. 21A244). The Supreme Court realized this and reinstated the stay. Now, a final merits

judgment will not issue. *See In re MCP No. 165, Occupational Safety & Health Admin. Rule on COVID-19 Vaccine and Testing*, 21-7000 (6th Cir. Feb. 18, 2022) (*per curiam*).

There is a related reason that Congress permits appeals of preliminary injunction orders. Rather than allow a single judge to decide important issues affecting the parties' rights, appeals allow for review of those decisions. But according to the concurrence, a single judge could issue a preliminary injunction preventing *The Los Angeles Times* from publishing materials of public interest. The *Times* then could not appeal that decision to this Court or otherwise seek review of that decision. The district court could wait years before issuing a final judgment—possibly when the materials are no longer of public interest. Congress did not want that result. In important cases, this Court should review the decision and the Supreme Court should be able to grant certiorari.

This case is important for at least two reasons. First, California's net neutrality law bars ISPs from letting consumers watch movies from a streaming platform without that data counting toward their plans' data allowances "in exchange for consideration, monetary or otherwise, from a third party." Cal. Civ. Code § 3101(a)(5). This provision reaches further

than it seems: Merely mentioning a streaming platform in an advertisement for a broadband service plan would likely be considered "consideration," and thus fall within the ban. If ISPs cannot tout such free streaming as an advantage to prospective customers, why would they ever bother to offer it? The law also bans exempting "some Internet content, applications, services, or devices in a category of Internet content, applications, services, or devices [from data caps], but not the entire category." *Id.* § 3101(a)(6). This seemingly an innocuous provision could, for example, "cut off veterans nationwide from a key telehealth app." John Hendel, *VA Asking California If Net Neutrality Law Will Snag Veterans' Health App*, Politico (Mar. 25, 2021), https://politi.co/39tMDCJ. This is because the Department of Veteran Affairs might have "to end agreements offering free, subsidized data to veterans participating in the telehealth app called VA Video Connect." *Id.*

Second, state net neutrality laws will cause massive uncertainty for ISPs and their customers. Both will have to guess what each State defines as broadband internet access services. The FCC's 2015 Order held that "[t]he term 'mass market' does not include enterprise service offerings, which are typically offered to larger organizations through

customized or individually negotiated arrangements, or special access services." *In re Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, 5683 (2015). State law could cover such broadband offerings, including those purchased by many government agencies. Both ISPs and their customers will have to guess what each state considers "reasonable network management." It may take years or decades of litigation to flesh out these issues in each State. In other words, California's law would create regulatory uncertainty.

If California enforces its statute, the regulatory uncertainty will lead to decreased investment and innovation in broadband *nationwide*. 2018 Order, 33 FCC Rcd. at 368; *see also Mozilla*, 940 F.3d at 56 (upholding the 2018 Order's factual findings about investment effects). Because "an ISP generally could not comply with state or local rules for intrastate communications without applying the same rules to interstate communications," 2018 Order, 33 FCC Rcd. at 430, ISPs nationwide will fear enforcement actions. Enforcement of the law will also deter investment in other internet services given that their providers fear being affected by expansive interpretations of what constitutes broadband internet access service.

A decision of nationwide import by a panel, which creates a circuit split, should not stand. Rather, a full complement of eleven active judges should consider the issues and decide whether the FCC's 2018 Order preempts California's net neutrality statute. Vacating the panel's decision will advance Congress's goal of uniform regulation.

* * *

The panel knew, or should have known, that it was splitting from the D.C. Circuit's *Mozilla* decision. Yet it chose not to acknowledge the split. Rather, it pretended that its decision followed the D.C. Circuit's decision. Not only does the panel's decision conflict with *Mozilla*'s plain language, it also conflicts with the Communication Act's language and purpose. This alone is reason to take the case *en banc*. But just as importantly, the *en banc* court should assure parties that they have the right to appeal the grant or denial of preliminary injunctive relief.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

/s/ John M. Masslon II

Corbin K. Barthold
Berin Szóka
James Dunstan
TECHFREEDOM
110 Maryland Ave., NE
Suite 205
Washington, DC 20002

John M. Masslon II
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
jmasslon@wlf.org

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limits of Ninth Circuit Rule 29-2(c)(2) because it contains 3,937 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

/s/ John M. Masslon II
JOHN M. MASSLON II

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