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12 IN THE UNITED STATES DISTRICT COURT
 13 FOR THE EASTERN DISTRICT OF CALIFORNIA
 14

15 **THE UNITED STATES OF AMERICA,**
 16
 Plaintiff,
 17
 v.
 18
 19 **THE STATE OF CALIFORNIA, et al.,**
 20
 Defendants.

2:18-cv-02660-JAM-DB
 2:18-cv-02684-JAM-DB

**STIPULATION REGARDING
 TEMPORARY STAY OF LITIGATION
 AND AGREEMENT NOT TO ENFORCE
 SENATE BILL 822**

Judge: The Hon. John A. Mendez
 Actions Filed: Sept. 30, 2018; Oct. 3, 2018

21 **AMERICAN CABLE ASSOCIATION, et al.,**
 22
 Plaintiffs,
 23
 v.
 24 **XAVIER BECERRA, in his official capacity**
as Attorney General of California,
 25
 Defendant.
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**Pro hac vice* motion to be filed

1 Plaintiffs the United States of America, American Cable Association, CTIA – The
2 Wireless Association, NCTA – The Internet & Television Association, and USTelecom – The
3 Broadband Association (collectively, “Plaintiffs”), and Defendants the State of California,
4 Governor Edmund G. Brown Jr., and Attorney General Xavier Becerra (“Defendants,” and
5 collectively with Plaintiffs, the “Parties”), by and through their respective counsel, hereby
6 stipulate and agree as follows:

7 **WHEREAS**, in January 2018 the Federal Communications Commission (“FCC”)
8 released an order governing the provision of broadband Internet access services. *Restoring*
9 *Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2018)
10 (“FCC Order”).

11 **WHEREAS**, the FCC took several actions, including: (1) reclassifying broadband
12 Internet access services as “information services” within the meaning of the Communications Act
13 of 1934, as amended by the Telecommunications Act of 1996, FCC Order ¶¶ 20-161; (2)
14 repealing certain of the FCC’s rules governing the conduct of Internet service providers, *id.*
15 ¶¶ 239-296; and (3) determining that “we should exercise our authority to preempt any state or
16 local requirements that are inconsistent with the federal deregulatory approach we adopt today,”
17 *id.* ¶ 195.

18 **WHEREAS**, with respect to preemption, the FCC Order states “[w]e conclude that
19 regulation of broadband Internet access service should be governed principally by a uniform set
20 of federal regulations, rather than by a patchwork that includes separate state and local
21 requirements.” *Id.* ¶ 194.

22 **WHEREAS**, the FCC determined to preempt “any state or local measures that would
23 effectively impose rules or requirements that we have repealed or decided to refrain from
24 imposing in this order or that would impose more stringent requirements for any aspect of
25 broadband service that we address in this order.” *Id.* ¶ 196.

26 **WHEREAS**, a coalition of 22 states, including the State of California, filed a petition for
27 review of the FCC Order in the United States Court of Appeals for the D.C. Circuit. *Mozilla*
28 *Corp. v. FCC*, Nos. 18-1051 *et al.* (D.C. Cir.).

1 **WHEREAS**, the State of California and other petitioners contend the FCC lacked
2 authority to preempt state and local measures as set forth in the FCC Order, and have urged the
3 D.C. Circuit to vacate that portion of the order, among others.

4 **WHEREAS**, proceedings in the D.C. Circuit are still pending, and oral argument has been
5 scheduled for February 1, 2019.

6 **WHEREAS**, on September 30, 2018, California enacted Senate Bill 822, the California
7 Internet Consumer Protection and Net Neutrality Act of 2018 (“Senate Bill 822”), which is
8 scheduled to take effect on January 1, 2019.

9 **WHEREAS**, Senate Bill 822 contains a legislative finding that “[a]lmost every sector of
10 California’s economy, democracy, and society is dependent on the open and neutral Internet.”
11 Cal. Stats. 2018, ch. 976, Sec. 1(a)(2).

12 **WHEREAS**, Senate Bill 822 states that, in order to promote “an open and neutral
13 Internet,” *id.*, Sec. 1(a)(1), Senate Bill 822 prohibits Internet service providers, as defined, from
14 engaging in certain activities, including blocking, throttling, zero rating, and paid prioritization,
15 *id.*, Sec. 2 (adding new Cal. Civ. Code §§ 3101, 3102).

16 **WHEREAS**, on September 30, 2018, the United States filed an action against the State of
17 California, Governor Edmund G. Brown Jr., and Attorney General Xavier Becerra in the United
18 States District Court for the Eastern District of California, alleging that Senate Bill 822 is
19 preempted by the FCC Order, and is therefore void under the Supremacy Clause of the United
20 States Constitution. *United States v. California*, No. 2:18-cv-02660-JAM-DB.

21 **WHEREAS**, on October 3, 2018, four industry associations representing the interests of
22 broadband Internet access service providers (“Association Plaintiffs”) filed a separate action
23 against Attorney General Xavier Becerra in the Eastern District of California, alleging that Senate
24 Bill 822 is preempted by the FCC Order, and that it also conflicts with the federal
25 Communications Act of 1934, as amended by the Telecommunications Act of 1996, and violates
26 the dormant Commerce Clause. *American Cable Association v. Becerra*, No. 2:18-cv-02684-
27 JAM-DB.

28 **WHEREAS**, the two actions challenging Senate Bill 822 have been related before the

1 Hon. Judge John. A. Mendez. *United States v. California*, No. 2:18-cv-02660, ECF No. 7;
2 *American Cable Association v. Becerra*, No. 2:18-cv-2684-JAM-DB, ECF No. 12.

3 **WHEREAS**, both sets of plaintiffs have filed a motion for a preliminary injunction,
4 further briefing on the motions is pending, and a hearing on the motions has been set for
5 November 28, 2018. *United States v. California*, No. 2:18-cv-02660, ECF No. 11; *American*
6 *Cable Association v. Becerra*, No. 2:18-cv-2684-JAM-DB, ECF No. 24.

7 **WHEREAS**, both sets of plaintiffs contend that, under the Hobbs Act, 47 U.S.C.
8 § 402(a), 28 U.S.C. § 2342(1), the district court must presume the validity of the FCC Order,
9 including but not limited to the FCC's determination to preempt state and local net neutrality
10 requirements, including but not limited to Senate Bill 822.

11 **WHEREAS**, the Association Plaintiffs contend that various findings and determinations
12 in the FCC Order establish that Senate Bill 822 is preempted by the Communications Act of
13 1934, as amended by the Telecommunications Act of 1996, and violates the dormant Commerce
14 Clause.

15 **WHEREAS**, although Defendants maintain that Senate Bill 822 is constitutional, and do
16 not concede any liability, the Hobbs Act has been construed by the United States Court of
17 Appeals for the Ninth Circuit to mean that: (1) a federal district court must presume the validity
18 of a final FCC order until its validity has been finally determined by a federal appeals court; (2)
19 the Hobbs Act precludes district courts from considering an affirmative defense to the extent such
20 defense is based on a challenge to the validity of a final FCC order. *Wilson v. A.H. Belo Corp.*,
21 83 F.3d 393 (9th Cir. 1996); *United States v. Dunifer*, 219 F.3d 1004 (9th Cir. 2004).

22 **WHEREAS**, under controlling authority in the Ninth Circuit, the Hobbs Act precludes the
23 district court in these related actions from determining the validity of the FCC's decision to
24 preempt state and local net neutrality requirements, including but not limited to Senate Bill 822.

25 **WHEREAS**, Plaintiffs rely extensively on the FCC Order—both in support of their
26 substantive claims and their motions for preliminary relief—and, as a result, the decision in
27 *Mozilla Corp. v. FCC*, Nos. 18-1051 *et al.* (D.C. Cir.), will significantly shape the scope and
28 conduct of these related actions depending on whether the FCC Order is ultimately upheld or

1 vacated in whole or in part.

2 **WHEREAS**, the Parties wish to avoid a waste of judicial and party resources, and believe
3 that these related actions should therefore be stayed pending resolution of proceedings in *Mozilla*
4 *Corp. v. FCC*, Nos. 18-1051 *et al.* (D.C. Cir.).

5 **WHEREAS**, this Court has authority under *Landis v. N. Am. Co.*, 299 U.S. 248 (1936), to
6 enter a stay of proceedings as part of its power to control its own docket, and is empowered to
7 enter a stay of proceedings based on the circumstances here.

8 **NOW THEREFORE**, in consideration of the foregoing, the Parties further stipulate and
9 agree as follows:

10 1. Further proceedings in both *United States v. California*, No. 2:18-cv-02660-JAM-DB,
11 and *American Cable Association v. Becerra*, No. 2:18-cv-2684-JAM-DB, shall be stayed until the
12 later of the following: (a) the D.C. Circuit issues its opinion in the petitions for review of the FCC
13 Order currently pending in *Mozilla Corp. v. FCC*, Nos. 18-1051 *et al.* (D.C. Cir.) and the period
14 for seeking further review from the D.C. Circuit and the U.S. Supreme Court has expired; or (b) a
15 final decision has been issued by the D.C. Circuit or the U.S. Supreme Court in response to any
16 petition for rehearing or certiorari, either denying such petition or issuing a final decision.

17 2. Unless all Parties agree to an alternative disposition, Defendants shall not take any
18 action to enforce, or direct the enforcement of, Senate Bill 822 in any respect, including through
19 participation in any private action seeking to enforce Senate Bill 822. This period of non-
20 enforcement shall run until 30 days after the later of: (1) the expiration of the stay, or (2) a
21 decision has been rendered on any renewed motion for preliminary injunctive relief that Plaintiffs
22 may file within 30 days after the expiration of the stay. Defendants shall not take any future
23 actions to enforce Senate Bill 822 based upon conduct occurring during the period in which
24 Defendants have agreed to not enforce Senate Bill 822.

25 3. Plaintiffs hereby withdraw their motions for a preliminary injunction without
26 prejudice to their refile at a future date (*United States v. California*, No. 2:18-cv-02660-JAM-
27 DB, ECF No. 2; *American Cable Association v. Becerra*, No. 2:18-cv-2684-JAM-DB, ECF
28 No. 3).

1 **IT IS SO STIPULATED AND AGREED.**

2 Dated: October 26, 2018

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1 Dated: October 26, 2018

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13 Dated: October 26, 2018

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