Public Safety, Preemption, and the Dormant Commerce Clause: A Narrow Solution for States Concerned with the 2018 Restoring Internet Freedom Order's Preemption Clause

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I. INTRODUCTION

As wildfires burned in California during July of 2018, fire department personnel in Santa Clara noticed that their Internet service was much slower than usual.[1] In the ensuing conversations with Verizon sales associates, Verizon confirmed that it was throttling the fire department's unlimited data access during this critical time of need.[2] Despite the obvious threat to public safety, the Verizon sales team subjected the fire department to days of negotiation.[3] Indeed, Verizon was able to extract money before finally agreeing to cease throttling the data.[4] The fire department was not watching Netflix or cat videos during this crisis; they were using the data to coordinate life and property saving operations with multiple first responders across the affected area.[5] Consistent and responsive Internet access was critical to track the location of resources across agencies and locations, as well as to communicate with the public.[6] Instead, the fire department spent days distracted by the Internet service provider's (ISP) pecuniary machinations and the citizens of California ultimately paid the price.[7] This episode is emblematic. It highlights the critical position of ISPs in our national and local public safety apparatus, and clearly shows that these companies are not above exploiting this position for monetary gain even when life is quite literally on the line.[8]

While Verizon publicly apologized for this unfortunate lapse in moral judgment and promised not to do such things in the future, the damage was already done, and many questions remain.[9] Specifically, in light of the FCC's 2018 *Restoring Internet Freedom Order* (*2018 Order*) and its stated policy of "light-touch" regulation, along with its broad claim of preemption, it is not clear what actions, short of litigation, states can take to ensure that their critical public health and safety infrastructure is not hampered by unreliable Internet service.[10] Further, while the episode above dealt specifically with data caps on the fire department acting as an end user, the problem could

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1. Petition for Review of an Order of the Federal Communications Commission, Declaration of Fire Chief Anthony Bowden at ¶ 9, Mozilla Corp., et al. v. FCC, 18-1051(L) (D.C. Cir. 2018) [hereinafter Fire Chief Anthony Bowden].
2. *Id.* at Ex. A.
3. *Id.*
4. *Id.*
5. *See id.*
6. Fire Chief Anthony Bowden, *supra* note 1, at ¶¶ 4-5.
7. *See id.* at ¶ 9-10.
8. Petition for Review of an Order of the Federal Communications Commission at 23, Mozilla Corp., et al. v. FCC, 18-1051(L) (D.C. Cir. 2018) [hereinafter *Petition*].
9. Hamza Shaban, *Verizon Says It Shouldn't Have Throttled California Fire Fighters during Wildfire Emergency*, WASH. POST (Aug. 22, 2018) https://www.washingtonpost.com/technology/2018/08/22/verizon-says-it-shouldnt-have-throttled-california-firefighters-during-wildfire-emergency/ [https://perma.cc/7XLJ-38EQ] (last visited Nov. 17, 2018).
10. Restoring Internet Freedom Order, *Declaratory Ruling and Order*, FCC 17-166, at para. 1 & para. 195 (2018) [hereinafter *2018 Order*].

become more acute when critical health and safety content is given a lower priority than Facebook's data because the state agency, public hospital, or municipal utility lacks the funds to pay for prioritization.[11] Again, the FCC essentially claims congressional authority, direct or indirect, to preempt the field, but this should not necessarily prevent states from regulating ISPs in a narrowly tailored way to ensure the safety and health of their citizens.[12] In short, what is the scope of the preemption as it exists today (after the *2018 Order*), and what steps can states take to ensure they are able to reliably provide critical services that rely on the Internet backbone?

As the above example indicates, ISPs play a key and unavoidable role in keeping citizens safe.[13] Unfortunately, if left unregulated by both state and federal governments, ISPs are incentivized to put corporate interests ahead of social interests and safety.[14] The FCC's *2018 Order* does not adequately take these safety interests into account.[15] In fact, the *2018 Order* does not explicitly mention public health and safety considerations at all, despite prior judicial determinations that the FCC is mandated to explicitly take public health and safety into account when issuing substantive rules.[16] Instead, the *2018 Order* almost exclusively focuses on consumer protection issues, and subsequent state net neutrality laws have focused on consumer protection as well.[17] However, this focus misses the point. The largest issue with the *2018 Order* is not that consumers will have less access to entertaining or otherwise stimulating content. Rather, it is that the *Order's* proactive preemption claim undermines states' abilities to ensure the reliability and quality of Internet service provided to the states' critical public health and safety infrastructure, and thus puts lives and health at risk.[18]

It is quite possible the FCC's policy of deregulation will lead to a more robust Internet ecosystem in the long run,[19] but in the short term ISPs' blocking, throttling, and prioritization of content will lead to avoidable public harm as first responders, public health and safety authorities, hospitals, and utilities have their incoming and outgoing data throttled or deprioritized.[20] Furthermore, unlike consumer harm, where monetary damages as contemplated by the *2018 Order* may adequately compensate victimized

11. *See* Petition, *supra* note 8, at 23-27.
12. *See 2018 Order*, *supra* note 10, at para. 195.
13. *Id.* at para. 195-98.
14. *See generally* Fire Chief Anthony Bowden, *supra* note 1.
15. *See* Petition, *supra* note 8, at 2.
16. Nuvio Corp. v. FCC, 473 F.3d 302, 307 (D.C. Cir. 2006) (explaining the FCC is required by its enabling statutes to consider public safety when regulating industries (such as ISPs) that it has repeatedly deemed important to public safety); *See also* Mozilla Corp., et al. v. FCC 18-1051(L) (D.C. Cir. 2018) (where the FCC conceded at oral argument that it did not explicitly consider public safety in the *2018 Order*).
17. *See generally 2018 Order*; California SB-822; New York Bill A08882.
18. *See* Petition, *supra* note 8, at 23-24.
19. Simone A. Friedlander, *Net Neutrality and the FCC's 2015 Open Internet Order*, 31 BERKELEY TECH. L.J. 905, 909 (2016).
20. *See* Petition, *supra* note 8, at 23-27.

consumers, there is no post hoc compensation that truly compensates for the loss of life or a family's home.[21]

This Note argues that state officials can mitigate this risk to public safety without frustrating the goals of the FCC's *2018 Order* by enacting laws that prohibit the blocking, throttling, or deprioritization of specific entities the state deems critical for public safety. State regulations of the nature just described would likely be able to survive preemption claims stemming from the *2018 Order* because of the proposal's limited scope, the proposed law's critical importance to state safety, and the fact that the *2018 Order* fails to adequately deal with public health and safety.[22]

This Note begins by examining the main substantive changes the FCC's *2018 Order* made to the regulatory framework governing ISPs with a focus on the FCC's claim to preempt contrary state regulation in the area. It concludes that, while the FCC may have authority, pursuant to the *2018 Order*, to preempt state consumer protection laws seeking to re-implement anti-blocking, throttling, and paid prioritization regulations on a broad scale, the *2018 Order* does not expressly preempt narrowly tailored state regulations designed to protect critical state Internet communications infrastructure necessary to ensure public health and safety. It also concludes that carefully crafted state laws will be able to survive any conflict preemption or Dormant Commerce Clause claims.

Section II.A discusses the major changes in the *2018 Order* and ultimately finds that the FCC reduced its ability to regulate ISPs and to preempt state laws in the field when it reclassified ISPs under Title I of the Telecommunications Act.[23] Sections II.A.1-3 explain the legal theories the FCC used to justify its preemption claim. Sections II.B.1-3 explain the current state of congressional and agency preemption case law, with an analysis of agency preemption in the FCC context. Taken together, these sections explain the distinction between congressional and agency preemption and clarify the different legal standards that apply. Section II.C explains the current state of Dormant Commerce Clause case law and discusses how and when to use the competing tests. Section II.D identifies state public health and safety entities covered by the proposed law and explains why state regulation is necessary to protect them. Section III is an analysis of the proposed state law in light of the FCC's preemption claim. It discusses how the changes in the *2018 Order* gave the states more room, in specific circumstances, to regulate ISPs despite the FCC's preemption claim, and concludes that the proposed state law is likely to survive any legal challenges.

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21. Mozilla Corp., et al. v. FCC 18-1051(L) (D.C. Cir. 2018) (oral argument Feb. 1, 2019).

22. *See* Petition, *supra* note 8, at 4 (quoting Metropolitan Life, Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985) ("[States] have traditionally had great latitude under their police powers to legislate as to the protection of lives, limbs, [and] health . . . of their residents.")).

23. Verizon v. FCC, 740 F.3d 623, 650 (D.C Cir. 2014); *see* Petition, *supra* note 8, at 47.

II. BACKGROUND

A. The 2018 Restoring Internet Freedom Order and the Authority to Preempt

The *2018 Order* aims to promote corporate investment in the Internet's physical infrastructure by significantly reducing regulations on Internet service providers.[24] Specifically, it repeals the (1) no blocking, (2) no throttling, and (3) no paid prioritization regulations put in place by the *2015 Open Internet Order*.[25] The rationale is that allowing service providers to monetize more aspects of their service will incentivize more robust investment in the Internet's underlying infrastructure; thus leading to wider coverage, faster speeds, and more consistent Internet connectivity nationwide.[26]

The *2018 Order* also reclassifies ISPs as information services, rather than telecommunication services.[27] The legal significance of this reclassification is that ISPs are now regulated under Title I, rather than Title II, of the 1996 Telecommunications Act; the FCC has much less regulatory authority under Title I of the Act than Title II.[28] This was made clear in *Verizon v. FCC*, where the D.C. Circuit held that the FCC could not impose anti-blocking, throttling, and paid prioritization regulations on entities subject to Title I regulation.[29]

The *2018 Order* goes further than repealing the no blocking, no throttling, and no paid prioritization regulations. The *2018 Order* also attempts to preempt states from enacting legislation that would be inconsistent with *the Order's* regulatory goals.[30] Obviously, a federal agency cannot just preempt state law because it would like to. It needs the requisite legal authority, and the FCC's *2018 Order* relies on three distinct theories in an attempt to gain this authority: (1) the impossibility exception, (2) a policy statement inserted into the Telecommunications Act of 1996, and (3) forbearance.[31]

1. The Impossibility Exception

The "impossibility exception to state jurisdiction" is an agency-specific (as opposed to congressional) preemption theory, which has been accepted by the Supreme Court.[32] It can be thought of as a subset of agency preemption

24. *See 2018 Order*, *supra* note 10, at para. 1.
25. *See id.* at paras. 4, 17. Colloquially these regulations have been referred to as net neutrality, but technically they are regulatory mechanisms designed to implement net neutrality.
26. *See id.* at paras. 1, 5.
27. *Id.* paras. 26-29.
28. *See* Verizon v. FCC, 740 F.3d 623, 650 (D.C Cir. 2014).
29. *Id.*
30. *See 2018 Order*, *supra* note 10, at para. 195.
31. *See id.* at para. 198.
32. *Id.*

specific to the FCC. Under this theory, FCC preemption is valid if "(1) it is impossible or impracticable to regulate the intrastate aspects of a service without affecting interstate communication; (2) the Commission determines that such regulation would interfere with federal regulatory objectives,"[33] [and] "(3) the state regulation in question would negate the FCC's exercise of its lawful authority."[34]

The "impossibility exception" closely resembles conflict preemption, which can occur "when a state action stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[35] The difference here is that the agency itself, rather than Congress or a court, has proactively determined that a state law would frustrate its attempts to implement the policy it has determined best fulfills its congressional mandate.[36] The agency in effect substitutes its own express preemption for the direct congressional intent that is usually necessary.[37] There is an ongoing debate, scholarly and judicial, about how much deference agencies should be given when they purport to explicitly preempt state laws absent explicit statutory authority.[38]

2. The Telecommunications Act of 1996: Policy Statement

The second legal justification the FCC gives for valid preemption is a policy statement in the Telecommunications Act of 1996.[39] The relevant section of the statute provides that it is "the policy of the United States to preserve the vibrant and free market that presently exists for the Internet and other interactive computer services including any other information service, unfettered by Federal or State regulation."[40] The *2018 Order* combines this policy statement with Section 3(51) of the 1996 Act, which provides a definition of telecommunication services, to assert that all federal and state

33. *Id.* at para. 198 (citing Vonage Order, 19 FCC Rcd at 22413-15, 22418-24, paras. 17-19, 23-32; Minn. PUC, 483 F.3d at 578-81).

34. Petition, *supra* note 8, at 45 (citing Public Serv. Comm'n of Maryland v. FCC, 909 F.2d 1510, 1515 (D.C. Cir. 1990).

35. *See* Shane Levesque, *Preemption and the Public Health: How Wyeth v. Levine Stands to Change the Ways in which we Implement Health Policy*, 3 ST. LOUIS U. J. HEALTH L. & POL'Y 307, 320 (2010) (quoting Pacific Gas & Electric v. Energ. Res. Comm., 461 U.S. 190, 204 (1983)).

36. *See* Karen A. Jordan, *Agency Preemption and the Shimer Analysis: Unmasking Strategic Characterization by Agencies and Giving Effect to the Presumption Against Preemption*, 2008 WIS. L. REV. 69, 91 (2008).

37. *See id.*

38. Nina Mendelson, *A Presumption Against Preemption*, 102 NW. U. L. REV. 695, 698-99 (2008).

39. *2018 Order*, *supra* note 10, at para. 203.

40. 47 U.S.C. § 230 (b)(2), (f)(2).

common carriage-type regulation[41] of information services is congressionally prohibited.[42] The FCC claims that through this policy statement and statutory definition, Congress itself meant to prevent and thus preempt states from regulating information services in specific yet somehow unnamed ways.[43] With this claim, the FCC is relying on implied congressional authority. The FCC does not seem to be arguing that the entire field is occupied, as the FCC concedes that the states can still regulate in the field as long as the regulations are not inconsistent with the 2018 Order.[44]

3. Forbearance

The third legal justification given for preemption is not especially relevant to this Note's proposed law. The FCC claims that they have forborne the implementation of common carriage regulation under Title II, and therefore the states cannot implement the specific regulations the FCC has affirmatively declined to impose.[45] However, the FCC has not actually forborne these regulations.[46] Instead, it redefined ISP so that providers would be regulated under Title I of the Act.[47] Under Title I of the Act, the FCC has no statutory authority to impose common carriage regulations.[48] It is not clear how one can affirmatively forebear from using a power one does not possess.[49]

B. The Current Preemption Landscape

Determining whether Congress intended to preempt state law in an area is not always straightforward.[50] It has become even murkier as the scope of federal agencies grows and our society becomes more economically and technologically integrated.[51] This section examines the current state of traditional congressional preemption, as well as claims of agency preemption, absent a direct congressional intent to preempt. This section also examines the Dormant Commerce Clause, as it can become important to the vitality of the proposed state law in certain circumstances.

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41. Typical common-carriage regulations include a duty to, "furnish . . . communication service upon reasonable request, engage in no unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilitities, or services, and charge just and reasonable rates." Verizon v. FCC, 740 F.3d 623, 630 (D.C Cir. 2014) (quoting 47 U.S.C. §§ 201(a)-(b) and 202(a)) (internal citations omitted).

42. *2018 Order*, *supra* note 10, at para. 203.

43. *Id.*

44. *Id.* at para. 196.

45. *Id.* at para. 204; *See also Verizon*, 740 F.3d at 650 (D.C Cir. 2014) (equating no blocking, no throttling, and no paid prioritization regulations to common carrier regulations).

46. *See* Petition, *supra* note 8, at 46.

47. *2018 Order*, *supra* note 10, at para. 20.

48. *Verizon*, 740 F.3d 623, 650 (D.C Cir. 2014).

49. *See* Petition, *supra* note 8, at 47.

50. Levesque, *supra* note 35, at 315-16.

51. *See generally id.* at 322-26.

1. Traditional Forms of Congressional Preemption

The Supremacy Clause in Article VI of the Constitution states, "[t]he Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land."[52] One of the primary goals of the Clause is straightforward—to ensure that constitutional laws important for national uniformity are not thwarted by inconsistent state laws or regulations.[53] The clause prevents states from protecting or promoting local interests, whether they be economic or social in nature, at the expense of national interests.[54] Another goal is to ensure that important national policies are not thwarted by a patchwork of different state laws.[55] Preemption stems directly from this Clause and can be either explicit or implicit.[56]

As the role of federal agencies grew in the twentieth century, courts also recognized a type of preemption stemming from the authority of federal agencies, under the well-established theory that federal regulations carry the same legal weight as congressionally passed statutes.[57] The ability of agencies to proactively preempt state law through regulation has further complicated preemption analysis, as it is not always clear what form of preemption is being asserted, and thus what kind of legal analysis is necessary to examine preemption claims.[58] This phenomenon is apparent in the *2018 Order*, where the FCC asserts both its own authority to preempt state laws in the given circumstances, as well as direct congressional authority.[59]

This section will examine (1) explicit preemption; (2) the two forms of implicit preemption; and (3) agency preemption, with a focus on the *2018 Order*.

Explicit preemption is exactly what it sounds like—Congress writes into a statute that all state legislation in the area is now superseded by the federal law at issue.[60] This means that supplemental, complimentary, or even identical state laws relating to a particular issue are no longer operative because Congress has decided that the consistency and advantages of having one standard federal law in the area furthers important national policy goals.[61] The key here is that Congress is acting pursuant to a constitutionally enumerated power and explicitly stated their preemptive intent in the statute.[62]

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52. U.S. CONST. art. VI, cl. 2.
53. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 412 (Wolters Kluwer 5th ed. 2015).
54. *Id.* at 414.
55. *See id.* at 414-15.
56. *Id.* at 414.
57. Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982).
58. Jordan, *supra* note 36, at 88.
59. *2018 Order*, *supra* note 10, at paras. 198, 203.
60. CHEMERINSKY, *supra* note 53, at 416.
61. *See id.* at 416. *But see id.* at 417 (explaining "even when an express preemption clause exists, it rarely provides guidance as to the scope of preemption.").
62. *Id.* at 412-13.

Implicit preemption is more abstract and is broken down into two categories: (1) field preemption[63] and (2) conflict preemption.[64] Field preemption is determined by performing a statutory analysis of the relevant federal law and determining if "the scheme of federal regulation is so pervasive as to make a reasonable inference that Congress left no room for the states to supplement it."[65] Conflict preemption also involves a detailed statutory analysis and occurs when it is impossible to conform with both the state and federal law at the same time, or when the state law stands in the way of accomplishing the "full purposes and objectives of Congress."[66] For this Note's purposes, it is important to understand that field preemption can also be implied from regulatory schemes drawn from the rules and regulations promulgated by federal agencies.[67] However, in these cases, as in all implied preemption cases, there is a "presumption against preemption of state police power regulations."[68] The Supreme Court is less likely to find field preemption in cases stemming solely from agency promulgated rules.[69]

Even if a statute expressly preempts all state legislative efforts, there is a question about the scope of the preemption.[70] The point is that in any preemption case, the courts must first determine if there is congressional intent to preempt state regulation in the area, and second, if that intent is clear, what the scope of that preemption is.[71] The analysis can be fact sensitive to the point of seeming purely subjective, but one guideline is that courts are less likely to find preemption in areas traditionally left to the police power of the states.[72] For example, in *Metropolitan Life v. Massachusetts*, the Supreme Court upheld a state law regulating insurance companies in the face of the Employment Retirement Income Security Act's (ERISA) notoriously broad preemption clause, noting that states typically have "great latitude" under their police powers to protect the health and safety of their citizens.[73] It is also important to note that implied preemption analyses, both field and conflict,

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63. *Id.* at 422.
64. *Id.* at 431.
65. *Id.* at 427.
66. *Id.* at 435.
67. *Id.* at 429.
68. Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005); Medtronic v. Lohr, 518 U.S. 470, 485 (1996).
69. CHEMERINSKY, *supra* note 53, at 429-30; Rice v. Santa Fe Elevator Co., 331 U.S. 218, 230 (1947).
70. *Compare* Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983) (holding that a state law that forbade insurance plans from discriminating against pregnant women was preempted by federal law because the law "related to" employee benefit plans) *with* N.Y. Conf. of Blue Cross Blue Shield Plans v. Travelers, 514 U.S. 645 (1995) (holding that a state law charging surcharges on commercial insurance plans was not preempted because the purpose of the act was to have national uniformity of employee benefit plans and the surcharge did not thwart this purpose); CHEMERINSKY, *supra* note 53, at 417.
71. CHEMERINSKY, *supra* note 53, at 421 (explaining express preemption clauses rarely define the scope of federal preemption at issue, and thus courts are left to determine their scope and effect).
72. *Id.* at 414.
73. *Metropolitan Life Ins., Co. v. Massachusetts*, 105 S. Ct. 2380, 2398 (1985); Petition, *supra* note 8, at 4.

do not occur in the abstract. They occur in the face of actual state laws that are being challenged in court.[74] This is distinct from both express and agency preemption which may occur proactively before a state law is actually enacted.[75]

2. Agency Preemption

Beyond the traditional categories of congressional preemption discussed above, the Court has also accepted a form of agency express preemption.[76] That is, when an agency passes a substantive rule, such as the *2018 Order*, courts may accept the agency's determination that any contrary state law will frustrate the federal regulatory scheme promulgated by the agency if that scheme itself is within the agencys' congressional mandate and properly promulgated.[77] The Court has accepted agency rules declaring its regulation preempts the field and agency claims that certain state laws would frustrate the regulatory goal, i.e. a type of proactive conflict preemption.[78]

The distinction between traditional congressional preemption and agency preemption is that in traditional preemption, Congress implicitly or explicitly decides that the relevant federal statute preempts state law, while with agency preemption, Congress did not directly make the preemption decision.[79] Instead, Congress gave the agency the authority to promulgate rules, and then the agency determined that the governing statute could only be put into effect if relevant state laws were preempted.[80]

The key legal significance between congressional preemption and agency preemption is the standard of review and tests courts use to review the respective preemption claims.[81] When courts find that the agency is claiming direct congressional authority to preempt, they engage in the types of analysis discussed in section II.B.1. However, when courts determine that the agency is claiming its own express intent to preempt based on its opinion that preemption is necessary to fulfill its congressional mandate, the court engages in something called Shimer analysis.[82]

Shimer analysis is used more rarely than the traditional analysis because courts generally only recognize express agency preemption when the

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74. *Alascom, Inc. v. FCC*, 727 F.2d 1212, 1220 (D.C. Cir. 1984); Petition, *supra* note 8, at 4.

75. *See* Jordan, *supra* note 36, at 91-92 ("After notice and comment on the issue, and consideration of arguments on both sides, the FCC announced, we now find that there is a necessity to rationalize, interrelate, and bring into uniformity the myriad standards now being developed by numerous jurisdictions. We, therefore, are preempting the field of technical standards…") (quoting *In the Matter of Part 76*, 49 FCC 2d. at 480) (internal quotation marks removed)); *see also* CHEMERINSKY, *supra* note 53, at 416 (explaining that ERISA preempted futute state laws in the field).

76. *Id.* at 75.

77. City of New York v. FCC, 486 U.S. 51, 63-64 (1988).

78. Jordan, *supra* note 26, at 83.

79. *See id.* at 75.

80. *Id.*

81. *Id.* at 76.

82. *Id.* at 92-93.

agency openly acknowledges, in the relevant rule, that it is relying on its own preemption determination.[83] Agencies more often than not will attempt to veil their preemption behind a claim of direct congressional intent.[84] Usually, courts accept this characterization and proceed to engage in the traditional preemption analysis.[85] However, Shimer analysis is well represented in FCC preemption cases, and the Court in *City of New York v. FCC* explained that the analysis involves two steps: (1) identifying the scope of the agency's legal authority, and (2) determining whether the "decision to preempt represents a reasonable accommodation of conflicting policies committed to the agency's care by statute." [86] If both of these conditions are met the agency preemption will be upheld.

Preemption in the FCC context is made more complicated by the dual state and federal regulation envisioned by Congress in the two governing Acts—the Communications Act of 1934, as amended by The Telecommunications Act of 1996.[87] Neither act contemplates the dominant role the Internet has come to play in society today, and both acts force a distinction between inter and intrastate jurisdictions that does not lend itself well to modern communications technology.[88] That being said, over time it has become clear that if any aspect of the technology at issue has an interstate component the FCC regulation will supplant a contradictory state law.[89]

The Acts specifically regulate telecommunications and broadcast services by name.[90] In order to gain jurisdiction over new technologies that do not fit neatly under one of these categories, the FCC must either determine that the technology meets the statutory requirements to fall into one of the two categories, or it must rely on ancillary jurisdiction provided by Title I of the Act.[91] The *2018 Order* defines ISPs as information services, i.e. not telecommunications or broadcast services, and thus it is regulating pursuant to its Title I authority.[92]

The FCC's ancillary jurisdiction under Title I of the Telecommunications Act is a broad catch-all that allows the FCC to regulate technologies in ways not specifically contemplated in the Act when two conditions are met: (1) the communication technology uses interstate wire or radio facilities and (2) "the subject of the regulation [is] reasonably ancillary to performance of the [FCC's] various responsibilities."[93] When the FCC regulates under this ancillary authority, its powers to impose rules on regulated parties, and indeed to preempt state laws, are more limited than

83. *Id.* at 94.
84. *See id.* at 94.
85. *See id.* at 94-95.
86. *Id.* at 113.
87. *See* Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986).
88. HARVEY L. ZUCKERMAN, ET AL., MODERN COMMUNICATIONS LAW 757 (West Group 1999).
89. *Id.* at 759.
90. *See* Comcast Corp. v. FCC, 600 F.3d 642, 645 (D.C. Cir. 2010).
91. *See* ZUCKERMAN ET AL., *supra* note 88, at 757.
92. *2018 Order*, *supra* note 10, at para. 2.
93. Library Association v. FCC, 406 F.3d 689, 689 (D.C. Cir. 2005) (quoting United States v. Southwestern Cable Co., 392 U.S. 157, 167 (1968).

under one of the enumerated classifications.[94] Further, in *Louisiana Public Service Commission v. FCC*, the Court essentially limited preemption under this ancillary authority to instances where (1) the preemption is necessary to achieve a statutorily acceptable goal,[95] and (2) the inter and intra components cannot be separated.[96]

C. The Dormant Commerce Clause

The Dormant Commerce Clause stems from the Commerce Clause,[97] and it is much more controversial than preemption.[98] Its basic premise is that if the federal government has the power to regulate in a specific field, but has *not* chosen to exercise that power, then state laws can still be held invalid if they discriminate against out of state interests or "if they place an undue burden on interstate commerce."[99]

Depending on the state activity in question, courts apply different levels of review to determine if the state law or regulation violates the Dormant Commerce Clause.[100] If the state law is discriminatory against out of state interests, courts apply strict scrutiny and are much more likely to find a violation.[101] In non-discriminatory Dormant Commerce Clause challenges, courts compare the local interest involved with the burden on interstate commerce.[102]

The first step of Dormant Commerce Clause analysis is to determine if the relevant state law discriminates against out-of-state interests—either on its face or through its effects.[103]

This is a fact-specific inquiry, and two seemingly identical laws can lead to different results.[104] This can be seen by comparing *C & A Carbone, Inc. v. Town of Clarkstown* and *United Haulers Association. v. Oneida-Herkimer Solid Waste Management Authority*.[105] Both of the state laws in question required nonhazardous waste to be sent to specific disposal transfer stations, and both required the haulers to pay a fee.[106] Both laws applied equally to in-state and out-of-state parties.[107] The key difference was that in *C & A Carbone* the transfer station was privately owned, while in *United*

94. Verizon v. FCC, 740 F.3d 623, 632 (D.C. Cir. 2014).
95. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 373-74 (1986).
96. *See id.* at 371, 374.
97. CHEMERINSKY, *supra* note 53, at 443-44.
98. *Id.* at 445, 447.
99. *Id.* at 443.
100. *See id.* at 455, 461.
101. *Id.* at 468.
102. *Id.* at 461.
103. Pharmaceutical Research and Mfrs. v. Thompson, 259 F. Supp. 2d 39, 43 (D.D.C. 2003).
104. *See generally* CHEMERINSKY, *supra* note 53, at 459.
105. C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 114 S. Ct. 1677 (1994); United Haulers Assn. v. Oneida-Herkimer Solid Waste Mngt. Authority, 127 S. Ct. 1789 (2007).
106. CHEMERINSKY, *supra* note 53, at 458-59.
107. *Id.*

Haulers the transfer station was owned by the state.[108] The Court found this ownership distinction dispositive; it held that the law mandating deposit at the privately owned facility discriminated against out-of-state interest, but that the law mandating delivery to the state-owned facility did not.[109] The Court's point was that the law requiring delivery to a privately owned facility discriminated against out-of-state business interests.[110]

On the other hand, courts apply the *Pike* balancing test when the law at issue (1) only has an "incidental effect" on interstate commerce, (2) regulates in-state and out-of-state interests "even-handedly[,]" and (3) attempts to "effectuate a legitimate state interest."[111] If a court finds a legitimate public interest, it balances the importance of the public interest against the effect on interstate commerce.[112] Courts also consider if the public interest could be served by a less restrictive alternative.[113] The *Pike* test is much more permissive of state interests, and any proposed state law anticipating challenges under the Dormant Commerce Clause should be designed to ensure that courts will apply the *Pike* balancing test rather than strict scrutiny.

There are two defenses to otherwise violative state actions. First, if Congress sanctions the state activity, the court will not find a violation.[114] Second, if the state is acting as a market participant as opposed to a regulator, then the courts will also not find a violation.[115] For example, a state purchasing Internet service may claim that it is acting as a market participant rather than a regulator, and can therefore purchase service based on whatever criteria it chooses, e.g. only from ISPs that do not block, throttle, or engage in paid prioritization. However, states cannot condition their Internet service contracts on the future behavior of the ISP; that is, states cannot insert a contractual term to the effect of "if the ISP engages in blocking, throttling, or paid prioritization in the future, it will be deemed to have violated this contract," because that would be construed as a form of regulation.[116] On the other hand, states could choose to only contract with ISPs who have a history of not engaging in the activity stated above. That being said, the market participant exception only applies to the Dormant Commerce Clause, not preemption.[117] In *Wisconsin v. Gould*, the Supreme Court made clear that if a federal statute preempts state law, attempts to regulate through the spending power, as in the above example, are just regulation by another name.[118]

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108. *Id.*
109. *See id.*
110. *See id.*
111. Pike v. Bruce Church, 397 U.S. 137, 142 (1970).
112. *Id.*
113. *Id.*
114. CHEMERINSKY, *supra* note 53, at 473.
115. *Id.*
116. South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 97 (1984).
117. *See* Wisconsin Dept. of Indus. v. Gould, Inc., 475 U.S. 282, 290-91 (1986).
118. *Id.* at 1062.

D. Critical State Health and Safety Entities That Rely Upon the Internet

Multiple state and municipal entities integral to public health and safety rely on un-degraded Internet content delivery and transmission in order to keep the public safe.[119] These entities' missions are put at risk when ISPs are allowed to monetize all aspects of their service without due regard for their role in protecting public safety.[120] This Note's proposed law would seek to protect (1) designated municipal utilities, (2) designated public health and safety agencies, and (3) designated public hospitals.

1. The Power Grid

Utility companies and consumers have come to rely on a consistent, responsive Internet to manage the power grid.[121] The so-called "smart grid" allows consumers, energy wholesalers, and buyers to efficiently and safely manage the energy supply by allowing for instantaneous communication between its requisite parts.[122] The smart grid is critical to the safety of local communities because it allows utility companies to get electricity where it needs to be during emergencies and reduce energy loads during times of congestion.[123] This prevents power surges and allows utility companies to comply with federal reliability regulations.[124] Utility companies are integral to public safety, and therefore net neutrality should be preserved for municipal utility companies.[125]

2. Public Health and Safety Agencies

State and local governments use the Internet to manage emergency communications during times of natural disasters, weather events, active shooters, communicable disease outbreaks, and evacuations, and to distribute and receive general public health information.[126] Rapid response is necessary both to communicate with other agencies and with the public at large.[127] These entities are unlikely to have the budget to pay for the prioritization of their data, as are the agencies and entities that they must continuously communicate with to monitor public health and react efficiently in the face of emergencies.[128] As with other front line first responders, state laws should be

119. *See* Petition, *supra* note 10, at 23-28; FRANCESCA SPIDALIERI, STATE OF THE STATES CYBERSECURITY, PELL CENTER FOR INTERNATIONAL RELATIONS AND PUBLIC POLICY 3 (2015).
120. *See* Petition, *supra* note 10, at 23-28.
121. *See id.* at 24.
122. *Id.*
123. *Id.*
124. *Id.*
125. *See id.* at 24-25.
126. *See id.* at 26.
127. *Id.*
128. *Id.* at 28.

crafted to prevent the FCC's deregulation from frustrating their mandate to keep the public safe.

3. Hospitals

Hospitals are integral to public safety. They currently rely on the Internet to save lives and many are in the process of expanding their telemedicine practices, which would allow them to reach more patients and save more lives.[129] Telemedicine typically involves video conferencing and the transfer of large swaths of data.[130] It is not effective if the Internet is inconsistent or prohibitively expensive.[131] Even in the absence of a telemedicine expansion hospitals currently rely on fast and consistent Internet service to save lives in emergency situations.[132]

III. ANALYSIS

Relying on three separate legal theories, the *2018 Order* attempts to preempt "all state laws inconsistent with [the] Order."[133] In practice, this means that states cannot enact anti-blocking, anti-throttling, or anti-paid prioritization regulations.[134] However, the *2018 Order's* preemption claim is focused on state regulations designed to promote consumer protection.[135] It does not consider state laws designed to ensure consistent access to, and delivery of, the Internet content of critical public health and safety entities.[136] In fact, the *2018 Order* does not explicitly mention public health and safety one time.[137] This Note's proposed state law solely focuses on preventing ISPs from blocking, throttling, or deprioritizing data originating from or being sent to: (1) designated municipal utilities, (2) designated public health and safety agencies, and (3) designated public hospitals. Given the vital role ISPs play in modern public health and safety, the states' massive interest in protecting the health of their citizens, and the fact that the *2018 Order* does not consider how its deregulatory initiative will impact these critical state entities' ability to consistently send and receive vital Internet content, it is likely that narrowly tailored state regulations designed to protect these critical entities fall outside of the scope of the *2018 Order's* express preemption claim.[138] Such a law

129. *Id.* at 27.
130. *Id.*
131. *See id.* at 28.
132. *See id.* at 27.
133. *See 2018 Order*, *supra* note 10, at paras. 194-96.
134. *Id.*
135. *See generally id.*
136. *Id.*
137. *See generally id.* This point was conceded by the FCC during oral argument (Feb. 1, 2019). *See also* Mozilla Corp. v. FCC, No. 18-1051, 2019 WL 4777860 *1, *61 (D.C. Cir. 2019) ("nor does [the FCC] claim that it specifically addressed public safety in its 2018 Order").
138. *Supra* Section II.D.; *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996) ("[W]e used a presumption against the pre-emption of state police power regulations to support a narrow interpretation of such an express command in Cipollone.")(internal quaotaion marks removed).

would also be immune from a conflict preemption challenge because the law is sufficiently narrow, such that it will not frustrate the FCC's regulatory scheme.

The proposed state law would not broadly reintroduce the regulations rolled back by the *2018 Order*. It would simply ensure that limited critical aspects of the state health and safety apparatus are able to receive fast and reliable Internet connection at market rates without worrying that the data is being unnecessarily degraded. In effect, the proposed law would put the designated critical entities on par with those able to pay for prioritization—just as they were before the *2018 Order*.

A. The 2018 Order Does Not Expressly Preempt the Proposed Law Because It Failed to Show It was Necessary to Preempt Such Laws

The FCC greatly reduced its ability to regulate ISPs, and to preempt states from doing so when it reclassified Internet service providers as Title I services.[139] Recall that when the FCC makes an express preemption claim under Title I, it is in effect regulating through its ancillary jurisdiction because the governing statutes do not give the FCC the explicit power to preempt.[140] In *Louisiana Public Service Commission*, the Supreme Court said that, to preempt under its ancillary authority, the FCC must show that preemption is *necessary* to achieve statutorily acceptable goals.[141] The *2018 Order* does not meet this high bar in regard to the proposed state law. The *2018 Order* went to great lengths to show that individual states instituting net neutrality regulations on a state-by-state basis would frustrate the purpose of the federal regulation, but it failed to address how a very limited and necessary statewide regime to protect critical safety entities would frustrate its policy.[142] It failed to take these limited regulations into account despite public comments and concrete evidence that these critical state entities would be greatly affected by the deregulation.[143] This indicates that the proposed law is outside of the scope of the FCC's express preemption claim because the FCC did not address, much less show, that preemption of the contemplated law is necessary to achieve the goals laid out in the *2018 Order*.[144]

B. The FCC's Asserted Legal Authority to Preempt State Laws Does Not Apply to the Proposed Law

The FCC asserted three distinct legal theories to justify their preemption authority: (1) the impossibility exception, (2) the policy

139. *See* Verizon v. FCC, 740 F.3d 623, 632 (D.C. Cir. 2014).
140. *See id.*; *Supra* note 80.
141. *See* ZUCKERMAN ET AL., *supra* note 88, at 764.
142. *See 2018 Order*, *supra* note 10, at paras. 194-96.
143. *See* Petition, *supra* note 8, at 22.
144. *Id.* at para. 196 (explaining that the *2018 Order* will not displace any state laws that do not interfere with federal regulatory objectives).

statement, and (3) forbearance.[145] The first two of these theories are applicable to this Note's proposed law. Each of these justifications is distinct and must be analyzed under different frameworks. The impossibility exception is a form of agency preemption and therefore should be analyzed under Shimer analysis and relevant case law involving the FCC.[146] The policy statement argument is an attempt to claim direct congressional authority to preempt, and forbearance is a theory based on judicial precedent, which was previously considered in Section II.A.3.

1. The Impossibility Exception Does Not Apply to the Proposed State Law

The impossibility exception applies when the FCC determines that an intrastate regulation (1) affects interstate communication, (2) would frustrate federal regulatory objectives, and (3) would negate the FCC's lawful authority.[147] The exception can be seen as a subset of agency preemption and therefore must also satisfy both prongs of Shimer analysis.[148] An FCC assertion that the proposed law is expressly preempted by the *2018 Order* would fail Shimer analysis at step two. It would also fail both the second and third prongs of the impossibility exception itself.

This exception is analyzed under Shimer because the FCC made the express preemption claim "pursuant to its [congressionally] delegated authority" to ensure the development of a robust Internet infrastructure.[149] However, Congress did not explicitly or implicitly revoke the states' ability to regulate in this field.[150] Thus, there is no direct congressional preemption. Instead, Congress gave the FCC authority to regulate, and the FCC decided that, to do so in line with its congressional mandate, it had to expressly preempt certain state laws.[151]

In order to satisfy the second prong of Shimer the agency must show that "[the] decision to preempt represents a reasonable accommodation of conflicting policies committed to the agency's care by statute."[152] In the present case, the FCC failed to address public safety concerns in the *2018 Order*, despite judicial precedent saying that such concerns must be addressed when issuing substantive rules.[153] This failure shows that the FCC did not reasonably consider or accommodate states' public safety concerns before attempting to preempt their authority to regulate in a field traditionally left to their control. This failure removes the proposed law from the scope of the *2018 Order's* express preemption claim.

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145. *Supra* Section II.A; *see also* 2018 Order, *supra* note 10, at para. 197-204.
146. *Supra* Section II.A.1.
147. *2018 Order*, *supra* note 10, at para. 198; Petition, *supra* note 8, at 46.
148. *Supra* note 81.
149. Jordan, *supra* note 36, at 75.
150. *Mozilla Corp. v. FCC*, No. 18-1051, 2019 WL 4777860 *1, *52-53 (D.C. Cir. 2019).
151. *2018 Order*, *supra* note 10, at para. 198.
152. *See supra* Section II.B.2.
153. *Supra* note 20.

The express preemption claim also fails two of the three elements of the impossibility exception itself—namely the second and third prong. In order to satisfy the second prong of the impossibility exception, the FCC must determine that "the regulation would interfere with federal regulatory objectives."[154] The FCC fails this because it did not discuss how limited regulation designed to protect critical state health and safety services would frustrate federal regulatory objectives.[155] It did not contend that such a limited regime was either technologically or economically infeasible.[156] The FCC simply failed to discuss this despite being on notice that this was an issue of great concern, and despite going into detail on how a patchwork of state consumer protection-oriented and net neutrality-focused laws would frustrate the *2018 Order's* purpose.[157] Much like the fatal Shimer flaw above, this failure indicates that state regulation targeting public health and safety Internet service is outside the scope of the *2018 Order*. The third prong of the impossibility exception requires the FCC to state how the law in question "would negate [its] exercise of its lawful authority."[158] Again, the *2018 Order* fails this prong because it failed to address the issue.

That being said, the fact that the proposed law is outside of the scope of the *2018 Order's* express preemption claim does not necessarily mean it is guaranteed to survive traditional preemption analysis. This is a distinct analysis and the FCC made it clear in the *2018 Order* that it will challenge state laws under these traditional theories as well.[159]

2. The Proposed State Law Does Not Conflict with the Federal Regulatory Scheme and is Not Preempted

The FCC argues that a policy statement in the Telecommunications Act of 1996, combined with the congressional definition of telecommunications services in the same Act, implies that Congress meant to prohibit all common carriage type regulation of information services on a state and federal level, and thus when the FCC redefined ISPs as information services, the states were preempted from enacting such regulation.[160]

On its face, this pronouncement is tenuous, as the Act leaves regulation of purely intrastate services up to the states, who are free to introduce common carrier regulation as they see fit on purely intrastate services.[161] However, given the interstate nature of the Internet, it is true that a federal prohibition

154. *2018 Order*, *supra* note 10, at para. 198.

155. *Supra* note 124.

156. *Id.*

157. Petition, *supra* note 8, at 22; *see also* Public Service Com'n of Maryland v. FCC, 909 F.2d 1509, 1515 (D.C. Cir. 1990).

158. *Public Service Com'n of Maryland*, 909 F.2d at 1515.

159. *Supra* Section II.A. (explaining that the FCC is asserting three distinct legal theories to preempt state regulations).

160. *See supra* Section II.A.2.

161. *See* Petition for Emergency Relief and Declaratory Ruling Filed by Bell South Corp., 7 FCC Rcd 1619, 1620 (1992) (upheld by the Court of Appeals for the 11th Cir.).

against the regulation of information services as common carriers could affect state laws.[162] This would depend on a reviewing court's determination of whether or not Congress implicitly preempted state laws in the area. That being said, just because the federal government lacks the statutory authority to regulate in a certain way does not mean that states also lack that authority.[163]

Even if the D.C. Circuit finds this purported authority valid, it would not affect the outcome of this Note's proposed state law. A reviewing court would likely proceed under an implied conflict preemption analysis because implied field preemption only happens when Congress has created or authorized the creation of a federal regulatory scheme that is so pervasive as to have occupied the entire field.[164] Further, Section 253(b) of the Communications Act endorses state regulation in areas such as "public safety and welfare," and Section 601(c) of the Telecommunications Act explicitly states that "[t]his Act shall not be construed to modify, impair, or supersede . . . State or local law unless expressly so provided in such Act or amendments."[165] In the instant case, Congress has left aspects of the regulation to the states, and the *2018 Order* acknowledges that the states do in fact play a role in the regulation.[166] These facts indicate that implied conflict preemption analysis is likely to be used.

In conflict analysis, a state law will be preempted if (1) it is impossible or impracticable to comply with both federal and state laws at the same time, or (2) the state law frustrates the purposes of the federal regulatory scheme.[167] It is worth noting that under the current theory being analyzed a reviewing court would not engage in Shimer analysis because the FCC directly pointed to and interpreted a specific statutory delegation of authority to preempt the state law. As said above, Shimer is only used when an agency claims it must preempt to effectuate a congressional command. In the instant case, the court will engage in traditional conflict analysis.[168]

The first part of the analysis is not applicable to the proposed law because there is no express law that an ISP must follow. They are free to follow the repealed net neutrality regulations or not. The *2018 Order* makes clear that the Federal Trade Commission or Department of Justice can bring consumer protection claims against ISPs who promise in advertising or terms of service to follow net neutrality principles but do not.[169] Therefore, there is no conflict here. However, there is still the second element of the test.

In order to evaluate the second element, the court must look at the congressional intent of the governing acts and determine if the specific state law frustrates those purposes to such an extent that preemption is

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162. *2018 Order*, *supra* note 10, at para. 194.
163. *See* Petition, *supra* note 8, at 46-47.
164. CHEMERINSKY, *supra* note 53, at 413.
165. 47 U.S.C. § 253(b); 47 U.S.C § 152; Petition, *supra* note 8, at 51-52.
166. *2018 Order*, *supra* note 10, at para. 196.
167. CHEMERINSKY, *supra* note 53, at 413.
168. Jordan, *supra* note 36, at 81.
169. *See 2018 Order*, *supra* note 10, at para. 2.

warranted.[170] Taking the FCC at its word, the purposes of the specific governing statute is to preserve "a vibrant free market unfettered by . . . regulation."[171] However, the *2018 Order* also imposes network management transparency rules on ISPs.[172] Therefore, the Telecommunications Act, and indeed the *2018 Order* itself, evidently anticipate that some type of regulation is necessary.[173]

The *2018 Order* itself only specifically seeks to preempt state laws that would broadly reintroduce the repealed net neutrality regulations.[174] Under the proposed state law, ISPs would still be able to offer prioritized service to non-critical edge providers, as well as block and throttle general content as they see fit. In this way, the law actually helps the FCC fulfill its mission of serving the public interest and the stated policy goal of supporting a vibrant Internet ecosystem because the ISPs will be able to make more money, which they can use to develop their networks without putting public safety at risk. Therefore, the proposed law does not frustrate the FCC's interpretation of congressional intent and a reviewing court would have no reason to find that the law conflicts with the federal regulatory scheme to such an extent that preemption is warranted.

C. State Regulations Can Be Designed to Avoid Violating the Dormant Commerce Clause

If the proposed state law survives a direct preemption challenge, it seems likely that it would also survive a challenge under the Dormant Commerce Clause, given that that kind of preemption is far less controversial within constitutional doctrine, and the fact that, to survive preemption, the law would have needed to show that it did not conflict with the federal regulations in place.[175] Still, they are two distinct challenges to the law's validity, and both should be analyzed. The Dormant Commerce Clause could become particularly relevant if the D.C. Circuit strikes down the FCC preemption clause.

Recall that the Dormant Commerce Clause is triggered when a state law poses an undue burden on interstate commerce, and Congress has the ability to legislate in the area but has not yet done so.[176] It is very important for the law not to discriminate, even unintentionally, against out of state business interests.

The distinction between *C & A Carbone, Inc. v. Town of Clarkstown* and *United Haulers Assn. v. Oneida-Herkimer Solid Waste Management Authority*,[177] discussed in Section II.C, is very important for the proposed law protecting critical state infrastructure because states, when crafting the law,

170. Levesque, *supra* note 35, at 317-18.
171. *2018 Order*, *supra* note 10, at para. 203 (quoting 47 U.S.C. § 230(b)(2), (f)(2)).
172. *Id.* at para. 209.
173. *Id.* at para. 3.
174. *Id.* at para. 195.
175. *See* CHEMERINSKY, *supra* note 53, at 445.
176. *Id.* at 443.
177. *Supra* note 108.

may be tempted to fold in any entity that they can make a colorable argument is critical to the state's health and safety. However, if the law includes privately owned businesses, such as hospitals and utility companies, then a court could easily find that the law has a discriminatory impact on interstate commerce. For example, it is easy to imagine that a private hospital or utility that is given a choice between two states—one that has laws mandating higher quality Internet service and another without a comparable law—will likely choose the state that has the protective law. It is also easy to imagine consumers preferring hospitals in states that prohibit ISPs from degrading critical data. If the court finds that there is a discriminatory impact, it would subject the law to strict scrutiny and the law is virtually guaranteed to be struck down.[178] On the other hand, if the state limits the proposed law to state or municipally owned entities, the court is more likely to apply the *Pike* balancing test, which is much more permissive of the state interest.[179]

The *Pike* test discussed in Section II.C is also a very fact sensitive balancing test, but the public interest served by critical communications infrastructure, especially that used by first responders, is likely to weigh heavy on a reviewing court.[180] The ISP challenging the statute would need to provide very persuasive evidence to outweigh the state's public interest. It could do this in three ways. First, it could attempt to show that the burden of blocking, throttling, and prioritization do not actually negatively affect the public interest at stake. This is a tall order considering the wildfire example already discussed. Second, the ISP may argue that the law burdens interstate commerce because it forces ISPs to shift costs to other non-regulated states and sectors. Third, the ISP could argue that the technology necessary to differentiate between critical public safety entities and non-entities either does not exist or is prohibitively expensive.[181]

The subjective nature of the test allows for biases and other considerations to creep into the court's analysis.[182] In the absence of a concrete claim by a litigant and specific facts, determining whether or not a statute will be upheld is especially difficult.[183] However, the state can make a solid argument that public health and safety are threatened by the absence of any substantive regulation of ISPs. The Supreme Court has been deferential to legitimate public safety concerns, even when those regulations incidentally propose seemingly substantial burdens on interstate commerce.[184] Thus, the key for states is to craft legislation so that it will be subject to the *Pike* test rather than strict scrutiny.

178. CHEMERINSKY, *supra* note 53, at 468.

179. *Supra* note 98.

180. *See* Metropolitan Life Ins., Co. v. Massachusetts, 105 S. Ct. 2380, 2398 (1985).

181. *See* Petition, *supra* note 8, at 23.

182. CHEMERINSKY, *supra* note 53, at 462.

183. Alascom, Inc. v. FCC, 727 F.2d 1212, 1220 (D.C. Cir. 1984) (discussing conflict preemption, but also applies to Dormant Commerce Clause).

184. CHEMERINSKY, *supra* note 53, at 431.

IV. CONCLUSION

Net neutrality is a divisive issue; there are good policy points and big money on both sides of the debate.[185] Net neutrality has mostly been discussed in a consumer protection context, but as the Internet came to dominate public life, it has become more than a way to entertain ourselves and connect with friends. The Internet is more than a way to efficiently run businesses. Indeed, it has become critical to public health and safety.[186] Removing all open Internet protections without any prohibitions against degrading critical public health and safety entities' data puts lives at risk and hampers the ability of states to efficiently respond to emergency situations.[187] It is important for safety that some form of regulatory protection is allowed to stay in place.[188] The FCC failed to take this into account when promulgating the *2018 Restoring Internet Freedom Order*,[189] and states can likely fashion regulations around any federal preemption or Dormant Commerce Clause claims.

Both preemption and the Dormant Commerce Clause are highly fact-specific and the analysis of proposed laws cannot receive the same level of scrutiny as they would in an actual case or controversy. This fact cuts against the FCC's presumptive claim to preempt "all state legislation inconsistent with [its] Order."[190] The waters surrounding agency preemption are muddier than most, and it can be hard to determine just what kind of preemption is being claimed.[191] The categories tend to bleed into each other. There is an ongoing legal debate about what kind of deference agency preemption claims should be given, and thus far the Supreme Court has failed to give any definitive guidance.[192]

Scholars arguing for little to no deference claim that agencies, especially independent agencies, are unaccountable to the voters and have an incentive to gather power for themselves.[193] People in favor of deferential treatment for agency preemption point to agency expertise and point out that agencies are indirectly accountable to voters.[194] The debate around agency preemption is made more complicated by the enormous discretion most statutes give to executive agencies.[195] It is quite easy for agencies to craft vast regulatory schemes within the confines of their governing statutes and then claim that any state law in the field would frustrate their purposes. Thus far

185. Anupam Chander, et al., *The Myth of Net Neutrality*, 2 GEO. L. TECH. REV. 400, 401 (2018).
186. *See* Petition, *supra* note 8, at 24; SPIDALIERI, *supra* note 116, at 3.
187. Petition, *supra* note 8, at 22-28.
188. *Id.*
189. *See* Petition, *supra* note 8, at 22.
190. *2018 Order*, *supra* note 10, at paras. 194-95.
191. Jordan, *supra* note 36, at 94.
192. Levesque, *supra* note 35, at 327-28.
193. *Id.*
194. *Id.*
195. *See id.* at 326.

courts have been somewhat deferential to these claims but, given the growth of the administrative state, perhaps courts should apply less deference.[196]

The state legislation that this Note proposes manages to stay out of the main thrust of the net neutrality policy debate by focusing on a relatively small amount of entities necessary to protect public health and safety. It respects the FCC's policy decision that "light touch regulation" will better serve the nation's communications infrastructure in the long run, but it also takes into account the states' need to ensure the safety of their citizens. As such, courts should uphold the proposed state legislation under both preemption and the Dormant Commerce Clause.

196. *Id.*