Can the Federal Communications Commission Preempt State AI Laws? A Review of the Communications Act and Interpreting Caselaw

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I. INTRODUCTION

The age of Artificial Intelligence ("AI") is upon us. What should the policy response be?

The Biden Administration advocated for an "all of government" regulatory approach to AI in the hopes of somehow controlling the technology.[1] In contrast, the Trump Administration has embraced AI and wants to encourage its natural growth with a de-regulatory approach.[2] Regardless of which policy approach one may prefer, given the vast economic impact that AI will have on the U.S. economy, common sense nonetheless dictates that if AI is to be regulated then there should be a *single, cohesive national framework* rather than a patchwork of state laws that would subject AI to the proverbial "Death by Fifty State Cuts."[3]

But because common sense is scarce in policy debates these days, efforts to regulate AI at the state level are proliferating like mushrooms after it rains. According to the website Multistate.ai, in 2025 over 1200 AI-related bills were introduced in the states, with nearly 145 enacted into law.[4] By definition, this metastasizing patchwork of state AI laws raises compliance costs and slows innovation across the entire U.S. economy.[5]

Unfortunately, given the lack of a clear statement by Congress that the federal government can preempt such state AI laws, current legal options to stop the proliferation of state AI laws are shaky at best. Grasping for straws, the *Trump AI Action Plan* offers the following legal strategy to stop the legislative proliferation: the Federal Communications Commission ("FCC") should "evaluate whether state AI regulations interfere with the agency's ability to carry out its obligations and authorities under the Communications Act of 1934."[6] Presumably, the *Trump AI Action Plan* is implying that the FCC should use its limited authority contained in Section 253[7] and Section

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1. Exec. Order No. 14,141, Advancing United States Leadership in Artificial Intelligence Infrastructure, 90 Fed. Reg. 5469 (Jan. 17, 2025) (available at: https://bidenwhitehouse.archives.gov/briefing-room/presidential-actions/2025/01/14/executive-order-on-advancing-united-states-leadership-in-artificial-intelligence-infrastructure).

2. WINNING THE RACE: AMERICA'S AI ACTION PLAN (July 23, 2025) (available at: https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf) (hereinafter "*Trump AI Action Plan*").

3. *See* Dr. George.S. Ford, *An Economic Argument for Federal Preemption of State AI Laws,* PHOENIX CENTER POLICY BULLETIN NO. 25-05 (Nov. 6, 2025) (available at: http://www.phoenix-center.org/perspectives/Perspective25-05Final.pdf); *see also* Adam Thierer, Resident Senior Fellow, R Street Committee, AI At A Crossroads: A Nationwide Strategy or Californication?, Testimony Before the Subcommittee on Courts, Intellectual Property, Artificial Intelligence, And the Internet Committee on the Judiciary, U.S. House of Representatives (Sept. 18, 2025) (available at: https://www.rstreet.org/outreach/adam-thierer-testimony-hearing-on-ai-at-a-crossroads-a-nationwide-strategy-or-californication).

4. Multistate, *Artificial Intelligence (AI) Legislation Tracker 2026: All 50 States* (Updated 2026) (available at: https://www.multistate.ai/artificial-intelligence-ai-legislation).

5. *Cf.* T.Randolph Beard et al., *Developing a National Wireless Regulatory Framework: A Law and Economics Approach,* 16 COMMLAW CONSPECTUS 391 (2008).

6. *Trump AI Action Plan, supra* note 2, at 3.

7. 47 U.S.C. § 253 (2018).

332[8] of the Communications Act to preempt these assorted state AI laws. Yet given the plain language of the Communications Act as well as the present state of the caselaw, it is highly unlikely the FCC will succeed in these efforts. If anything, contorting the Communications Act to preempt state AI laws may open a Pandora's Box of unintended consequences, perversely leading to a vast expansion of the FCC's powers beyond its limited statutory constraints.[9] If preemption of state AI laws is indeed the ultimate policy goal, then political efforts must focus on developing and enacting specific federal legislation providing such authority.

To illustrate why relying on the FCC's limited preemption authority to stop the proliferation of state AI laws is a quixotic exercise, this paper is organized as follows: The paper begins by laying out the statutory text which confers the FCC with limited preemption authority. As explained below, because the FCC's proactive preemption authority is limited to removing barriers to entry for inter-or intra-state telecommunications services and yet AI is a general-purpose technology, significant legal gymnastics would be required to demonstrate that a state AI law "interfere[d] with the agency's ability to carry out its obligations and authorities under the Communications Act of 1934."[10] And if past is prologue, then the success of such gymnastics is highly unlikely.

To illustrate the problem, this paper next details the failed efforts to use the Commission's statutory authority to preempt state laws governing municipal broadband entry and operations.[11] After which, this paper then turns to the FCC's ultimately failed efforts of "preemption non-regulation" for broadband Internet access services. That is, because what one Commission can do the next Commission can undo, rather than make individual preemption determinations under Section 253, starting in the late the 1990s the FCC came to believe that a more permanent deregulatory solution would be to classify assorted broadband Internet access services as Title I information services rather than Title II common carrier telecommunications Services. This decision, in turn, lead to the nearly two-decade partisan net neutrality saga, where broadband was reclassified as a Title II service by the Obama Administration, then re-reclassified as a Title I information service during the first Trump Administration, then re-re-classified back to a Title II service during the Biden Administration, and then finally returned to a Title I service by the courts. But as explained below, in an unforeseen legal consequence of this net neutrality regulatory see-saw, several courts ruled that rather than protecting broadband from state regulation, the FCC's reclassification of broadband as Title I services severely curtailed (if not

8. 47 U.S.C. § 332(c)(3)(A) (2018).

9. *Cf.* George S. Ford, *Antitrust Reform and the Law of Unintended Consequences,* YALE J. ON REGUL.: Notice & Comment (Jan. 7, 2022) (available at: https://www.yalejreg.com/nc/antitrust-reform-and-the-law-of-unintended-consequences-by-george-s-ford-phd).

10. *Trump AI Action Plan, supra* note 2, at 3.

11. Much of this caselaw was previously discussed in T. Randolph Beard *et al.*, *The Law and Economics of Municipal Broadband,* 73 FED. COMM. L. J. 1 (2020).

outright eliminated) the FCC's authority to preempt states' efforts to regulate the provision of broadband.[12] Policy recommendations conclude the paper.

II. THE FCC'S LIMITED PREEMPTION AUTHORITY UNDER THE COMMUNICATIONS ACT

With the passage of the Telecommunications Act of 1996, Congress bestowed the FCC with express—albeit limited—preemption authority. This express preemption authority is centered in Section 253 of the Communications Act.[13]

Congress did not view preemption in a vacuum: Congress provided the FCC with the limited proactive power to preempt only state laws and regulations that act as barriers to entry. Under Section 253(a), no "State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[14] If the FCC determines that a "State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a)" then the "Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."[15] Using this authority, the FCC successfully preempted state laws and regulations that deterred entry for private-sector telecommunications network deployment.[16]

Significantly, while Section 253 gives the Commission proactive preemption authority, Section 332 takes the opposite approach. Under Section 332(c)(3), Congress (not the FCC) specifically preempted states from imposing rate regulation on both commercial and private mobile services. Under this title, "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service."[17] States may, however, petition the FCC for permission to regulate the states of commercial mobile services if certain conditions are met.[18] Thus, unlike Section 253—where the Commission has the *proactive* power to preempt—the Commission's job under Section 332 is *reactive*—that is, because Congress already took the steps to preempt rate regulation of wireless services, the FCC's only job under Section 332 is to adjudicate state petitions seeking to *restore* rate regulation. Such a view is supported by the text of Section 332(c)(3)(A), which specifically prohibits the

12. Much of this caselaw was previously discussed in Lawrence J. Spiwak, *The Preemption Predicament Over Broadband Internet Access Services,* 21 FEDERALIST SOC'Y REV. 32 (2020).

13. 47 U.S.C. § 253.

14. 47 U.S.C. § 253(a) (emphasis added).

15. 47 U.S.C. § 253(d).

16. *See, e.g.*, Public Utility Commission of Texas*, Memorandum Opinion and Order*, 13 FCC Rcd 3460 (2007).

17. 47 U.S.C. § 332(c)(3)(A).

18. *Id.*

FCC from preempting a "State from regulating the other terms and conditions of commercial mobile services."[19]

Finally, although the word "preemption" does not appear anywhere in the text of the statute, some have argued[20] that Section 706 of the Telecommunications Act[21] also provides the FCC with preemption authority. There are two primary provisions of Section 706: Under Section 706(a):

> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[22]

Section 706(b), in turn, requires the Commission to conduct an annual inquiry to "determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." If the Commission determination is negative, then "it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[23] As detailed more fully below, courts have ruled that these two provisions may be read separately.[24]

Whether Section 706 is an affirmative grant of regulatory authority (much less an affirmative source of preemption authority) or merely hortatory has been subject to great debate and litigation over the last three decades, particularly as Section 706 was the legal lynchpin for Democrat-controlled Commission's efforts to impose "net neutrality" regulation on the provision of "Broadband Internet Access Service" ("BIAS"). As of this writing, the current legal state of Section 706 is murky. The Obama Administration took the view that Section 706 is a definitive source of regulatory authority; the first Trump Administration took the view that Section 706 was hortatory—both decisions were upheld by the courts.[25] Although the Biden Administration restored Section 706 as an affirmative grant of authority in

19. 47 U.S.C. § 332(c)(3)(A).
20. *See* discussion Section III.B *infra.*
21. 47 U.S.C. § 1302 (2018).
22. *Id.*
23. *Id.*
24. *See* Lawrence J. Spiwak, *What Are the Bounds of the FCC's Authority over Broadband Service Providers?—A Review of the Recent Case Law,* 18 J. INTERNET LAW 1 (2015) and discussion therein.
25. *See, e.g.,* Lawrence J. Spiwak, *USTelecom and its Aftermath*, 71 FED. COMM. L. J. 39 (2019) and discussion therein.

their *2024 Open Internet Rules*,[26] these rules were struck down by the Sixth Circuit in *Ohio Telecom Ass'n v. FCC (In re MCP No. 185)* on the ground that the FCC's interpretation of the Communications Act was improper.[27] However, because the court limited its ruling to the Commission's interpretation of what constitutes an "information service," the Sixth Circuit never directly addressed the FCC's last determination that Section 706 is, again, an affirmative source of regulatory authority. As the Supreme Court's relatively recent decision in *Loper Bright Enters. v. Raimondo* gives the ultimate authority to the judiciary—and not to administrative agencies—to interpret statutes,[28] whether a reviewing court will make a definitive ruling that Section 706 is an independent source of authority remains an open question.[29] Regardless, even if Section 706 is ultimately ruled a separate affirmative source of authority, as explained below, because the terms of the statute do not include a clear statement that Congress wanted to include "preemption" among the Commission's powers, Section 706 may not be used for this purpose.

III. THE MUNICIPAL BROADBAND EXPERIENCE

One of the largest fights involving Section 253 were attempts to have the FCC preempt state laws governing municipal broadband entry. These efforts are discussed in this section.

A. Nixon v. Missouri Municipal League

Seizing upon the language of Section 253(a), in 2001 proponents of municipal broadband argued that because municipal providers are an "entity," the FCC should preempt those state laws which either prohibit or restrict municipal broadband deployment.[30] While there was tremendous political pressure placed upon the Agency to preempt state legislatures at the time, a

26. In re Safeguarding and Securing the Open Internet*, Declaratory Ruling, Order, Report and Order, and Order on Reconsideration*, FCC 24-52, ___ FCC Rcd. __ (rel. May 7, 2024).

27. Ohio Telecom Ass'n v. FCC, 124 F.4th 993 (6th Cir. 2024).

28. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

29. It should be noted that D.C. Circuit in *United States Telecomms. Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *pet. for rehearing en banc denied,* 855 F.3d 381 (2017), *cert. denied,* 139 S. Ct. 453 (2018) accepted the FCC's argument that Section 706 was an independent source of authority, essentially holding that Section 706 trumps the other relevant provision of the Communications Act. *See* Lawrence J. Spiwak, *supra* note 24, at 50.

30. *In re* Missouri Municipal League, 16 FCC Rcd 1157 (2001).

Democratic-controlled FCC unanimously (albeit "reluctantly") ruled that the agency lacked any legal authority to preempt such laws.[31]

Undeterred, proponents of municipal broadband appealed the FCC's rejection all the way to the United States Supreme Court in the case of *Nixon v. Missouri Municipal League*.[32] The Court, however, agreed with the FCC, finding that Section 253 does not provide the agency with preemption authority in this instance.[33] According to the Court, the phrase "any entity" in Section 253 did not include "the State's own subdivisions, so as to affect the power of States and localities to restrict their own (or their political inferiors') delivery of [telecommunications] services."[34]

The Court's rationale for rejection was straightforward: "[F]ederal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power…"[35] Thus, reasoned the Court, permitting preemption in this circumstance "would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, 'are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.'"[36]

Significantly, the Court went out of its way to note that "it is well to put aside" the public policy arguments favoring municipal broadband to support any "generous conception of preemption." Why? Because the issue of preemption is one of Constitutional law and, as such, "the issue here does not turn on the merits of municipal telecommunications services."[37] This holding is critical and helpful in sniffing out weak arguments for preemption. In essence, the Court determined that it matters not how sweet municipal broadband can be made to sound, nor how bountiful its alleged benefits—as a matter of Constitutional law, the federal government—and by extension the FCC—has no legal authority to intervene into the relationship between states and their political subdivisions.

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31. *Id.*, concurring Statement of William E. Kennard ("We vote reluctantly to deny the preemption petition of the Missouri Municipals because we believe that HB 620 effectively eliminates municipally-owned utilities as a promising class of local telecommunications competitors in Missouri. Such a result, while legally required, is not the right result for consumers in Missouri. Unfortunately, the Commission is constrained in its authority to preempt HB 620 by the D.C. Circuit's *City of Abilene* decision and the U.S. Supreme Court's decision in *Gregory v. Ashcroft* that require Congress to state clearly in a federal statute that the statute is intended to address the sovereign power of a state to regulate the activities of its municipalities.").

32. Nixon v. Missouri Municipal League, 541 U.S. 125 (2004).

33. *See id.* at 131-32.

34. *Id*. at 128-29.

35. *Id.* at 141.

36. *Id.* at 140.

37. *Id.* at 131-32 (emphasis added).

B. The FCC's 2015 Preemption Order

Despite this defeat in *Nixon*, proponents of municipal broadband spent the next decade trying to find an alternative legal theory of preemption of state laws controlling how municipalities offer such services. With the D.C. Circuit's 2014 ruling in *Verizon v. FCC*,[38] many believed they had perhaps finally found one—namely, Section 706 of the Communications Act.[39] But as shown below, the use of Section 706 to preempt state laws could not pass Constitutional muster.

1. Background

As noted *supra*, under Section 706(a), the FCC may use, "[I]n a manner consistent with the public interest, convenience and necessity, … regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[40] Section 706(b), in turn, states that if the FCC determines that advanced telecommunications capability is not "being deployed to all Americans in a reasonable and timely fashion," then the FCC "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[41]

Whether Section 706 provides the FCC with an affirmative grant of authority has been hotly debated over the last several years. While the FCC had originally viewed Section 706 as hortatory, searching for a sustainable legal theory under which to justify its *2010 Open Internet Rules,* the FCC reversed course and held that Section 706 did provide an affirmative source of regulatory authority.[42] Viewing Section 706 in the context of the broader Communications Act, the D.C. Circuit ultimately held in *Verizon* that the FCC's interpretation of Section 706 as a grant of regulatory authority was "a reasonable interpretation of an ambiguous statute."[43]

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38. Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

39. 47 U.S.C. § 1302; George S. Ford & Lawrence J. Spiwak*, Justifying the Ends: Section 706 and the Regulation of Broadband,* PHOENIX CTR. POL'Y PERSP. No. 12-04 (2011) (available at: https://www.phoenix-center.org/perspectives/Perspective12-04Final.pdf).

40. 47 U.S.C. § 1302(a).

41. 47 U.S.C. § 1302(b).

42. *See Preserving the Open Internet*, 25 FCC Rcd. 17905 (2010), ¶ 117, *rev'd sub nom.,* Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

43. *Id.* at 637. There was some debate whether Section 706(a) is independent from Section 706(b), which states that if the Commission determines that advanced telecommunications capability is not "being deployed to all Americans in a reasonable and timely fashion", the FCC "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." While the agency once believed that Section 706(b) was required to trigger Section 706(a), the FCC ultimately read the D.C. Circuit's opinion in *Verizon* to mean that Sections 706(a) and 706(b) are independent grants of authority. For a full discussion, *see* Lawrence J. Spiwak, *What Are the Bounds of the FCC's Authority over Broadband Service Providers?, supra* note 24.

While a proper reading of the caselaw would have revealed that the FCC's new-found authority under Section 706 should be limited,[44] the exact opposite occurred: Section 706 became an overbroad tool that the agency believed conferred upon it almost unlimited power.[45] Accordingly, seizing upon this statutory language of Section 706, then-FCC Chairman Tom Wheeler, a vocal proponent of municipal broadband,[46] boldly stated after the *Verizon* decision came down that "I believe the FCC has the power—and I intend to exercise that power—to preempt state laws that ban competition from community broadband."[47]

Taking up Chairman Wheeler's invitation, the municipal provider in Chattanooga, Tennessee, filed a petition with the FCC asking the agency to use its authority under Section 706 to preempt a Tennessee state law which, the municipal entity claimed, prevents it from expanding beyond its existing franchise territory.[48] In addition, the City of Wilson, North Carolina, filed a similar petition for the FCC to preempt "level playing-field" requirements designed to prevent government-owned networks from "crowding out" private sector investment[49] (a risk, by the way, which the FCC specifically recognized in its *2010 National Broadband Plan*).[50] The White House, sensing political gold with its base, jumped on the bandwagon and sent a subtle signal of support for the Chattanooga and North Carolina petitions by having President Obama call for policies that promote broadband connectivity in his 2014 State of the Union speech.[51] Given such Presidential political cover, the FCC, although an independent agency, followed through on

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44. *Id.*

45. *See* Lawrence J. Spiwak, *supra* note 25.

46. Tom Wheeler, *Removing Barriers to Competitive Community Broadband,* FED. COM. COMM'N BLOG (June 10, 2014) (available at: http://www.fcc.gov/blog/removing-barriers-competitive-community-broadband.

47. Tom Wheeler, Chairman, FCC, Remarks before the National Cable & Telecommunications Association (Apr. 30, 2014) (available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0430/DOC-326852A1.pdf.

48. EPB, *EPB Petitions FCC to Enable Local Broadband Choice*, (July 24, 2014) (available at: https://www.epb.net/downloads/legal/EPB-FCCPetition.pdf). With a speed generally unheard of for the Commission four days later the agency established its pleading cycle. *See* Pleading Cycle Established for Comments on Electric Power Board and City of Wilson Petitions, Pursuant to Section 706 of the Telecommunications Act of 1996, Seeking Preemption of State Laws Restricting the Deployment of Certain Broadband Networks, *Public Notice*, 29 FCC Rcd 9239 (2014) (available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0728/DA-14-1072A1.pdf).

49. Petition of City of Wilson at 14, Petition for Preemption of North Carolina General Statutes § 160A-340 et seq., WC Docket No. 14-115 (July 28, 2014) (hereinafter City of Wilson Petition) (available at: https://www.fcc.gov/ecfs/document/6018240940/4).

50. Fed. Commc'ns Comm'n, *Connecting America: The National Broadband Plan* 153 (2010) (hereinafter "National Broadband Plan") (available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf) ("Municipal broadband has risks. Municipally financed service may discourage investment by private companies. Before embarking on any type of broadband buildout, whether wired or wireless, towns and cities should try to attract private sector broadband investment.").

51. Barack Obama, *State of the Union Address* (Jan. 28, 2014) (available at: https://obamawhitehouse.archives.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address).

President Obama's promise and granted both petitions under Section 706 of the Communications Act.[52]

2. The FCC's Legal Argument

Recognizing that they were bound by the Supreme Court's holding in *Nixon*, the FCC did not seek to preempt the Tennessee and North Carolina laws outright. Instead, the FCC came up with a rather innovative legal argument: According to the FCC, once a state has made the decision to permit municipal broadband generally, then the FCC has the authority under Section 706 to preempt any state laws which impose restrictions on the ability of these municipalities to deploy broadband infrastructure—in the case of Tennessee, territorial restrictions, and in the case of North Carolina, "level playing field" restrictions to ensure that municipal broadband providers did not crowd out private investment. The argument was that such state laws were a "barrier to infrastructure investment" generally rather than an outright prohibition (the latter being the focus of the *Nixon* case).[53]

At the root of the FCC's argument was the following logic: (1) broadband Internet access is inherently an interstate service and thus subject exclusively to FCC jurisdiction; (2) Congress charged the FCC to promote the deployment of broadband "to all Americans" under Section 706; (3) under the Supremacy Clause of the Constitution federal laws trumps state laws[54]; and, therefore, (4) the FCC may use Section 706 to preempt state laws which restrict the deployment of municipal broadband overall. As the FCC explained, because in its view the state laws at issue were *not* enacted to protect taxpayers[55] but instead enacted "under pressure from national cable companies, telephone companies, and the American Legislative Exchange

52. City of Wilson, North Carolina, Petition for Preemption of North Carolina Gen. Statute Sections 160A-340 et seq., The Electric Power Bd. of Chattanooga, Tennessee, Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601*, Memorandum Opinion and Order*, 30 FCC Rcd 2408 (2015) (hereinafter *"2015 Preemption Order"*).

53. *See, e.g.*, *id.* at ¶ 147 ("To be sure, as explained below, a different question would be presented if we were asked to preempt under section 706 a law that goes to a state's power to withhold altogether the authority to provide broadband. But where a state has authorized municipalities to provide broadband, and then chooses to impose regulations on that municipal provider in order to effectuate the state's preferred communications policy objectives, we find that such laws fall within our authority to preempt.").

54. *See, e.g.*, City of New York v. FCC, 486 U.S. 57 (1988); Capital Cities Cable, Inc. v. Crisp*,* 467 U.S. 691 (1984).

55. Indeed, the Commission was quick to dismiss any argument that such laws were designed to protect taxpayers from the well-documented record of municipal broadband failures. Instead, employing a rather remarkable bit of circular logic, the Commission turned the taxpayer protection argument on its head, arguing that "even if we focus on taxpayer protection, as some request, the evidence before us suggests that the Tennessee and North Carolina laws before us actually increase the likelihood of failure because of the barriers that they erect to the successful deployment of broadband infrastructure by these entities." *2015 Preemption Order, supra* note 52, ¶ 62.

Council (ALEC),"[56] the "states here are deciding that incumbent broadband providers require protection from what they regard as unfair competition and regulating to restrict that competition."[57] Thus, according to the FCC, such laws "step[] into the federal role in regulating interstate communications. Where those laws conflict with federal communications policy and regulation, they may be preempted."[58]

3. Legal Problems with the FCC's *2015 Preemption Order*

While clever, the agency's legal argument was perhaps too clever by half. Indeed, despite its protestations to the contrary, the FCC still had multiple *Nixon* problems.

For example, while the FCC conceded that it lacked the authority to preempt state laws that prohibit municipal broadband outright, the FCC argued that it has the authority to preempt the state laws in question because "a state has permitted a political subdivision to enter the market as a broadband provider, but also seeks to impose regulations on the municipal provider in order to effect separate communications policy goals."[59] In this case, argued the FCC, "[T]he state has crossed from a 'decision of the most fundamental sort for a sovereign entity' into a matter in which conflicting federal law is presumed to preempt under the Commerce Clause."[60] However, while the FCC was correct that federal law generally trumps inconsistent state law when it comes to communications policy, the focus of the FCC's preemption efforts here—*i.e.,* territorial restrictions and "level playing field" rules—go directly to a state's control of its political subdivisions and, by extension, how it governs its citizens.

Moreover, the Court in *Nixon* appeared to reject specifically the FCC's argument that it was not preempting state laws that prohibit municipal broadband outright but only those laws which deter deployment after authority was provided. To illustrate the point, the Court offered the following hypothetical:

> [C]onsider the result if a State that previously authorized municipalities to operate a number of utilities including telecommunications changed its law by narrowing the range of authorization. Assume that a State once authorized municipalities to furnish water, electric, and communications services, but sometime after the passage of §253 narrowed the authorization so as to leave municipalities authorized to enter only the water business."[61]

56. *Id.* at ¶ 37.
57. *Id.* at ¶ 147.
58. *Id.*
59. *Id.* at ¶ 156.
60. *Id.* (citations omitted).
61. *Nixon*, 541 U.S. at 136.

In this circumstance, the Court noted that the:

> [R]epealing statute would have a prohibitory effect on the prior ability to deliver telecommunications service and would be subject to preemption. But that would mean that a State that once chose to provide broad municipal authority could not reverse course. A State next door, however, starting with a legal system devoid of any authorization for municipal utility operation, would at the least be free to change its own course by authorizing its municipalities to venture forth. *The result, in other words, would be the federal creation of a one-way ratchet. A State or municipality could give the power, but it could not take it away later.*[62]

In the Court's view, such as result made little legal sense and would interfere with the relationship between states and their political subdivisions:

> Private counterparts could come and go from the market at will, for after any federal preemption they would have a free choice to compete or not to compete in telecommunications; governmental providers could never leave (or, at least, could not leave by a forthright choice to change policy), for the law expressing the government's decision to get out would be preempted.[63]

Nixon also comes up in the agency's overall interpretation of Section 706. At bottom, it is important to recognize the simple fact that nowhere in Section 706 does any derivation of the word "preemption" appear—only the word "forbearance"—and there is a big legal difference between the two concepts.[64] To wit, Black's Law Dictionary defines the concept of forbearance simply as "refraining from action." In contrast, Black's defines preemption as the "doctrine adopted by the U.S. Supreme Court holding that certain matters are of such a national, as opposed to local character that federal laws preempt or take precedence over state laws." Given the Constitutional implications of preemption, therefore, there is a much higher legal standard to meet if an agency of the federal government would like to preempt a state law. Indeed, as the Supreme Court observed in *Wyeth v. Levine*, there are:

> two cornerstones of our pre-emption jurisprudence. First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." Second, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied,' ... we 'start with the assumption that the historic police powers of

62. *Id.* at 136-37 (emphasis added).
63. *Id.* at 137.
64. 47 U.S.C. § 1302.

> the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[65]

So, given that Congress deliberately chose to exclude the term "preemption" from Section 706(a), it is difficult to see how the FCC's use of Section 706 to preempt state laws would reflect a "clear and manifest purpose of Congress."

In its *2015 Preemption Order*, the FCC side-stepped this point by arguing that "Congress need not 'explicitly delegate' the authority to preempt"[66] because "Congress delegated the authority [to the FCC] to act in this sphere."[67] According to the FCC,

> Our preemption authority falls within the "measures to promote competition in the local telecommunications market" and "other regulating methods" of section 706(a) that Congress directed the [FCC] to use to remove barriers to infrastructure investment. It likewise falls within the available "action[s] to accelerate deployment" we may take in order to "remove barriers to infrastructure investment" and to "promote competition" described in section 706(b). As Congress would have been aware in passing the 1996 Act, the [FCC] has in the past used preemption as a regulatory tool where state regulation conflicts with federal communications policy. Given this history against which Congress legislated, the best reading of section 706 is therefore that Congress understood preemption to be among the regulatory tools that the [FCC] might use to act under section 706.[68]

The FCC's logic was a bit of a stretch for two fundamental reasons. First, the FCC's logic rested upon the notion that Section 706 provides an independent source of preemption authority. A simple reading of the caselaw reveals that it did not. According to the clear language of the D.C. Circuit's holding in *Verizon*, "[A]ny regulatory action authorized by Section 706(a) [must] fall within the [FCC]'s subject matter jurisdiction over such communications—a limitation whose importance this court has recognized in delineating the reach of the [FCC]'s ancillary jurisdiction."[69] According to the D.C. Circuit's holding in *Comcast v. FCC*, this means that any use of Section 706 must be tied directly to a specific delegation of authority in "Title

65. Wyeth v. Levine, 555 U.S. 555, 565 (2009) (citations omitted); *see also* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government," it must make its intention to do so 'unmistakably clear in the language of the statute.'") (citations omitted).

66. *2015 Preemption Order*, *supra* note 52 at ¶ 145.

67. *Id.* at ¶ 142.

68. *Id.* at ¶ 144.

69. *Verizon*, 740 F.3d at 639-40 (emphasis added). It is interesting to note that when the Commission cited this exact passage from *Verizon* in its *Order,* the agency specifically omitted the italicized language above. *See 2015 Preemption Order, supra* note 52 at ¶ 138.

II, Title III, or Title VI…."[70] So what does this language mean in practice? It means if the FCC wants to preempt under its Section 706 mandate, then it needs to look exclusively at Section 253. Section 706 does not provide an independent source of preemption authority.

This reading of Section 706 is nothing new to the courts. In fact, the D.C. Circuit's ruling in *Ad Hoc Telecommunications Users Committee v. FCC*—a case the FCC cited with approval several times in its *2015 Preemption Order*—is directly on point.[71] In *Ad Hoc*, the court was asked to rule on the FCC's decision to use its Section 10 authority to forbear from dominant carrier price regulation for special access services. To support its decision to forbear, the FCC also argued that its actions would further Section 706's goals of promoting broadband deployment. After review, the court held that the "general and generous phrasing of §706 means that the FCC possesses significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband—a statutory realty that assumes great importance when parties impose courts to overrule FCC decision on this topic."[72] However, the court made it crystal clear that the FCC's forbearance authority did not lie in Section 706 itself, but exclusively in Section 10. As the court stated bluntly, "As contemplated by §706 . . . [f]orbearance decisions are governed by the Communications Act's §10…."[73]

Given the court's ruling in *Ad Hoc*, the FCC's argument that Section 706 provides the agency with independent preemption authority falls apart. Section 706's explicit forbearance authority is governed by Section 10, which means that Section 706's implicit preemption authority (to the extent it exists) is governed by Section 253. And, if Section 706's preemption authority is, in fact, grounded in Section 253, then *Nixon* is directly on point and the FCC's actions were unconstitutional.

The FCC's argument that it need not have an express indication of Congressional intent to preempt using Section 706 was also belied by the plain language of *Nixon*. As the Court observed, while the FCC has ample authority to preempt state laws and regulations that create barriers to entry for private entities, the Court in *Nixon* specifically found that "neither statutory structure nor legislative history [of Telecommunications Act of 1996] points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms."[74] Thus, reasoned the Court, the "want of any 'unmistakably clear' statement to that effect is fatal" to any argument that Congress intended the FCC to have any authority to preempt state laws which restrict municipal broadband.[75]

70. Comcast v. FCC, 600 F.3d 642, 654 (D.C. Cir. 2010) (emphasis added).
71. Ad Hoc Telecoms. Users Comm. v. FCC, 572 F. 3d 903, 907 (D.C. Cir. 2009).
72. *Id.* at 906-07.
73. *Id.* at 907.
74. *Nixon*, 541 U.S. at 141.
75. *Id.*

4. Sixth Circuit Review

As to be expected, the FCC's *2015 Preemption Order* was appealed to the Sixth Circuit in *Tennessee v. Federal Communications Commission* and it did not go well for the Agency.[76] As the Sixth Circuit observed, the FCC's *2015 Preemption Order* "essentially serves to re-allocate decision-making power between the states and their municipalities."[77] To do so, the court held that this "preemption by the FCC of the allocation of power between a state and its subdivisions requires at least a clear statement in the authorizing federal legislation."[78] As Section 706 lacked such a clear statement, the Sixth Circuit reversed.

According to the Sixth Circuit,

> What the FCC seeks to accomplish through preemption is to decide *who*—the state or its political subdivisions—gets to make these choices. The FCC wants to pick the decision-maker for the discretionary issues of expansion, rate setting, and timeliness of rollout of services. It wants to provide the EPB and the City of Wilson with these options notwithstanding Tennessee's and North Carolina's statutes that have already made these choices.[79]

However, recognized the court, "[a]ny attempt by the federal government to reorder the decision-making structure of a state and its municipalities trenches on the core sovereignty of that state."[80] In the absence of a clear statement in Section 706 that Congress wanted to disrupt that relationship, therefore, the court ruled that the FCC had no authority to preempt the two state laws.[81]

The court also did not bite on the FCC's other two related arguments that (a) its ruling applied to circumstances where a state has already permitted a political subdivision to enter the market as a broadband provider and, ergo, (b) the FCC's authority trumps a state's authority due to the Commerce Clause. First, similar to the Supreme Court's reasoning in *Nixon*, the court recognized that the Agency's argument could produce an "anomalous" result due to the fact that a state could "flatly prohibit municipalities from engaging in telecommunications altogether, but they cannot do it in limited steps or with conditions based on the governmental nature of the municipalities."[82] In the court's view, such an outcome would be highly "intrusive on state-municipal relations…."[83] The court then tersely disposed of the FCC's Supremacy Clause argument: "[T]he statutes at issue here implicate core

76. Tennessee v. FCC, 832 F.3d 597 (6th Cir. 2016).
77. *Id.* at 600.
78. *Id.*
79. *Id.* at 610.
80. *Id.* at 611.
81. *Id.* at 613.
82. *Tennessee*, 832 F.3d at 611.
83. *Id*.

attributes of state sovereignty *and* regulate interstate communications services…. These effects are not mutually exclusive."[84]

Finally, the court went out of its way to note that its holding in *Tennessee* was limited. First, like the Supreme Court in *Nixon*, the Sixth Circuit made clear that it did not question the purported public benefits that the FCC identified in permitting municipalities to expand Gigabit Internet coverage.[85] The court also made clear that it would not address the following legal issues debated by the parties, including (1) whether Section 706 provides the FCC any preemptive power at all; (2) whether Congress, if it is clear enough, could give the FCC the power to preempt as it did in this case; (3) whether, if the FCC had such power, its exercise of it was arbitrary or capricious in this case; and (4) whether and to what extent the clear statement rule would apply to FCC preemption if a State required its municipality to act contrary to otherwise valid FCC regulations.[86]

IV. THE FCC'S ATTEMPTS AT "PREEMPTION BY NONREGULATION"

Throughout the history of modern telecommunications regulation, there has been an uneasy jurisdictional relationship between the Federal Communications Commission and the fifty states. As a result, complex issues of federalism routinely haunt the broadband debate.[87] A spate of court cases speak to such tensions, and we now find ourselves at another crucial legal juncture in this relationship.

When Congress enacted the Communications Act of 1934, it required the old Bell System monopoly to provide telecommunications services on a common carrier basis.[88] Given the vertically-integrated nature of the Bell System, Congress drew the jurisdictional line between *intra*-state telecommunications services (regulated exclusively by the states)[89] and *inter*-state telecommunications services (regulated exclusively by the Federal Communications Commission under Title II of the Act).[90] If there was a dispute between state and federal policy regimes, then the Commission would invoke what has become known as the "impossibility exception."[91] Under this legal doctrine, the FCC is allowed to preempt state regulation of a service

84. *Id.* at 611-12 (emphasis in original).
85. *Id.* at 613.
86. *Id.* at 613-14.
87. *See, e.g.,* Lawrence J. Spiwak, *Federalist Implications of the FCC's Open Internet Order*, PHOENIX CTR. PERSP. NO. 11-01 (Feb. 8, 2011) (available at: http://www.phoenix-center.org/perspectives/Perspective11-01Final.pdf); T.Ruldoph Beard et al*., supra* note 11; T. Rudolph et al., *Developing A National Wireless Regulatory Framework: A Law and Economics Approach,* 16 COMMLAW CONSPECTUS 391 (2008) (available at: https://www.phoenix-center.org/papers/CommLawConspectusNationalWirelessFramework.pdf).
88. *See* 47 U.S.C. § 153(11).
89. *See* 47 U.S.C. § 153(48).
90. *See* 47 U.S.C. § 151; 47 U.S.C. § 153(28).
91. *See* La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368 (1986).

which would otherwise be subject to dual federal and state regulation when (a) it is impossible or impractical to separate the service's intrastate and interstate components and (b) the state regulation interferes with valid federal rules or policies.[92] When the extent of Americans' telecommunications options were pretty much limited to "local" and "long distance" switched telephone service (and you could only get a landline phone from the phone company in basic black), this binary legal regime between interstate and intrastate telecommunications services functioned fairly well.

Starting in the 1980s, however, things began to get a bit more complicated. Enlightened minds at the FCC came to realize that it might be possible to carve out select pieces of the old vertically-integrated Bell System monopoly which could potentially sustain competition. These segments included "enhanced services" (*e.g.,* voicemail), customer premises equipment ("CPE"), terminal equipment, and, ultimately, long-distance service. To help facilitate these market transitions from monopoly to competition, the Commission embraced a simple and straightforward economic idea: encourage new entry by reducing federal—and, where possible, state—regulatory burdens on new firms.[93] Unfortunately for the Commission, it expressly lacked both clear forbearance and preemption authority under then-current law to implement meaningfully this policy.[94]

This statutory deficiency was remedied by the Telecommunications Act of 1996. Under the then-new Section 10 of the 1996 Act, Congress provided the Commission with a clear statement that it may forbear from enforcing certain statutory provisions of Title II under a delineated set of conditions.[95] And with the then-new Section 253, Congress provided the FCC with a clear mandate that it may preempt state laws and regulations that have "the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[96] Significantly, with the internet still in its nascency, Congress did not want the Commission to be timid with its new deregulatory powers: Congress made it clear in Section 230(b)(2) of the Telecommunications Act that it shall be "policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*."[97]

But as IP-enabled services such as broadband and Voice over Internet Protocol ("VoIP") took off in the late 1990's, the FCC recognized that a case-by-case approach to preemption and forbearance of legacy common carrier

92. *Id.*

93. For a more detailed description of this paradigm, *see* Lawrence J. Spiwak, *What Hath Congress Wrought? Reorienting Economic Analysis of Telecommunications Markets After The 1996 Act*, 11 ANTITRUST MAG. 32 (1997).

94. *See, e.g., La. Pub. Serv. Comm'n, supra* note 91, at 368-69; MCI Telecomms. Corp. v. American Tel. & Tel. Co.*,* 512 U.S. 218 (1994).

95. 47 U.S.C. § 160. For a discussion of the Commission's exercise of that forbearance authority, *see, e.g.,* G.S. Ford and Lawrence J. Spiwak, *Section 10 Forbearance: Asking the Right Questions to Get the Right Answers*, 23 COMMLAW CONSPECTUS 126 (2014); Lawrence J. Spiwak, *supra* note 25.

96. 47 U.S.C. § 253(a).

97. 47 U.S.C. § 230(b)(2) (emphasis supplied).

regulations under Title II using its new statutory authority was cumbersome and inadequate to fulfill Congress's directive in Section 230(b)(1) to "promote the continued development of the Internet."[98] To move the ball forward, the Agency adopted a bold, alternative legal strategy: rather than adopt a case-by-case approach to preemption and forbearance—building on the precedent set by its *Computer II Inquiries* for "enhanced services"[99]—the Agency removed IP-enabled services from the ambit of legacy common carrier regulations under Title II altogether by classifying them as "information services" under Title I of the Communications Act[100] "subject to exclusive federal jurisdiction."[101] The hope was that this "light touch" regulatory policy would, in the words of former FCC Chairman Bill Kennard, ensure the "unregulation" of the Internet.[102] The FCC's efforts in this regard are summarized below.

A. The "Pulver Order"

At issue in the *Pulver Order* was whether pulver.com's "Free World Dial-up" ("FWD")—a predecessor to online messaging services such as Skype, Facetime, and Facebook Messenger—was an "unregulated information service subject to the Commission's jurisdiction."[103] The Commission ruled that it was. In so doing, the Commission held that state regulation was therefore preempted because "any state regulations that seek to treat FWD as a telecommunications service or otherwise subject it to public-utility type regulation would almost certainly pose a conflict with our policy of nonregulation."[104]

According to the Commission, two separate lines of reasoning compelled its determination that Title I services are subject to exclusive federal jurisdiction. First, the Commission argued that federal authority is

98. 47 U.S.C. § 230(b)(1).

99. *See, e.g.*, Computer and Commc'ns Indus. Ass'n v. FCC, 693 F.2d 198, 214–18 (D.C. Cir. 1982) (concluding the FCC may preempt state regulation to promote a federal policy of fostering competition in the market for customer premises equipment).

100. When Congress passed the Telecommunications Act of 1996, it changed the nomenclature from "enhanced services" to "information services." *See* 47 U.S.C. § 153(24). By statute, Title I information services are not subject to common carrier regulation. *See* 47 U.S.C. § 153(51) ("A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services . . .").

101. *See infra* Section 5.

102. *The Unregulation of the Internet: Laying a Competitive Course for the Future,* Remarks by FCC Chairman William E. Kennard Before the Federal Communications Bar Northern California Chapter, San Francisco, CA (July 20, 1999) (available at: https://transition.fcc.gov/Speeches/Kennard/spwek924.html); *see also* J. Oxman, *The FCC and the Unregulation of the Internet,* OPP WORKING PAPER NO. 31, Office of Plans and Policy, FCC (July 1999) (available at: http://transition.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf).

103. *In the Matter of Petition for Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, 19 FCC Rcd. 3307, ¶ 1 (2004).

104. *Id.* at ¶ 15.

"preeminent in the area of information services, and particularly in the area of the Internet and other interactive computer services, which Congress has explicitly stated should remain free of regulation." And second, the Agency reasoned that "state-by-state regulation of a wholly Internet-based service is inconsistent with the controlling federal role over interstate commerce required by the Constitution."[105] Let's look briefly at both of the Commission's contentions.

As to the Agency's first argument, the Commission argued that in the Telecommunications Act of 1996 "Congress expressed its clear preference for a national policy 'to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services' unfettered by Federal or State regulation."[106] While the Commission recognized that at the time of this order most states had not "acted to produce an outright conflict between federal and state law that justifies Commission preemption," the Commission held that it "does have the authority to act in this area if states promulgate regulations applicable to FWD's service that are inconsistent with its current nonregulated status."[107]

As to the Commission's second rationale, the Commission pointed out it was quite a stretch to argue that that FWD was a "purely intrastate" information service, much less even "practically and economically possible" to separate FWD into interstate and intrastate components.[108] As it was impossible to separate interstate traffic from intrastate traffic in this case, the Commission held, consistent with its precedent, that the service should be considered an interstate service.[109] Accordingly, reasoned the Commission, because the Commerce Clause denies "the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce," an "attempt by a state to regulate any theoretical intrastate FWD component [is] an impermissible extraterritorial reach."[110]

The FCC also proffered several compelling policy reasons as to why state jurisdiction should be preempted in this case. For example, the Commission noted that absent preemption, it could not "envision how state economic regulation of the FWD service described in this proceeding could benefit the public." In contrast, argued the Commission, "the burdens upon interstate commerce would be significant." As the Commission observed, given the way the Internet works,

> Even if it were relevant and possible to track the geographic location of packets and isolate traffic for the purpose of ascertaining state jurisdiction over a theoretical intrastate

105. *Id.* at ¶ 16.
106. *Id.* at ¶ 18 (citations omitted).
107. *Id.*
108. *Id.* at ¶ 20.
109. *In the Matter of Petition for Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, 19 FCC Rcd. 3307, ¶ 22 (2004).
110. *Id.* at ¶ 23.

> component of an otherwise integrated bit stream, such efforts would be impractical. Tracking FWD's packets to determine their geographic location would involve the installation of systems that are unrelated to providing its service to end users. Rather, imposing such compliance costs on providers such as Pulver would be designed simply to comply with legacy distinctions between the federal and state jurisdictions."[111]

Furthermore, the Commission reiterated a familiar (and proven) refrain: in the absence of preemption, FWD "would have to satisfy the requirements of more than 50 state and other jurisdictions with more than 50 different certification, tariffing and other regulatory obligations." As such, the Agency pointed out that

> allowing the imposition of state regulation would eliminate any benefit of using the Internet to provide the service: the Internet enables individuals and small providers, such as Pulver, to reach a global market simply by attaching a server to the Internet; requiring Pulver to submit to more than 50 different regulatory regimes as soon as it did so would eliminate this fundamental advantage of IP-based communication.[112]

Thus, concluded the Commission, "it is this kind of impact Congress considered when it made clear statements about leaving the Internet and interactive computer services free of unnecessary federal and state regulation noted above."[113]

Finally, the Commission observed (albeit in a footnote) that even though they were declaring FWD to be a Title I information service, that decision did not *a fortiori* mean that they were abdicating their jurisdiction under the Communications Act altogether. As the Commission noted, even though "Congress has clearly indicated that information services are not subject to the economic and entry/exit regulation inherent in Title II," Congress has nonetheless provided "the Commission with ancillary authority under Title I to impose such regulations as may be necessary to carry out its other mandates under the Act."[114]

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111. *Id.* at ¶ 24.

112. *Id.* at ¶ 25.

113. In the Matter of Petition for Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, Memorandum Opinion and Order*, 19 FCC Rcd. 3307, ¶ 25 (2004).

114. *Id.* at ¶ 69.

B. "Preemption by Nonregulation" Goes Full Bore: The FCC Reclassifies An Assortment of Broadband Internet Access Services as "Information Services" Under Title I

With the precedent of preemption by nonregulation in the *Pulver Order* thus established, the FCC stuck to its guns and went full bore under its new legal template. Over the next several years, the Agency proceeded to declare a variety of IP-enabled services to be information services under Title I subject to exclusive federal jurisdiction, including cable modem service,[115] wireline broadband service,[116] wireless broadband service,[117] and even Broadband over Powerline Service.[118] Yet notwithstanding the clear interstate nature of the Internet and IP-enabled services, as highlighted below, state efforts to regulate broadband nonetheless continue to this day.

C. The Courts Weigh In on the FCC's Policy of "Preemption by Nonregulation" of Voice over Internet Protocol ("VoIP") Services

For purposes of this discussion, there are two related Eighth Circuit cases which dealt directly with the FCC's efforts to preempt by nonregulation state regulation of Voice over Internet Protocol ("VoIP") services—*Minnesota Public Utilities Commission v. FCC*[119] and *Charter v. Lange*.[120] Both cases are briefly discussed below.

1. Minnesota Public Utilities Commission v. FCC

The central issue in *Minnesota Public Utilities Commission* was whether state regulation was preempted for Voice over the Net services. Although the FCC refused (and continues to refuse) to make a definite ruling on whether VoIP is an information service under Title I or a telecommunications service under Title II, the FCC argued that under the "impossibility exception" set out by the Supreme Court in *Louisiana Public Service Commission*, it had the authority to preempt state regulation because

115. Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798, 4802-4803, ¶, 2002 WL 407567 (2002), *aff'd* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005).

116. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, FCC 05-150, 20 FCC Rcd. 14853, 14862 (2005), *aff'd* Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007).

117. Appropriate Reg. Treatment for Broadband Access to the Internet over Wireless Networks, FCC 07-30, 22 FCC Rcd. 5901 (2007).

118. United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, FCC 06-165, 21 FCC Rcd. 13281, 13281 (2006).

119. Minnesota Pub. Utils. Comm' n v. FCC, 483 F.3d 570 (8th Cir. 2007).

120. Charter Advanced Servs. v. Lange, 903 F.3d 715 (8th Cir. 2018), *cert. denied sub nom.,* 589 U.S. 1038 (2019).

it was impossible and impractical to separate the intrastate components of VoIP service from its interstate components. The Eighth Circuit agreed.

First, the court agreed with the Commission that given the nature of IP-enabled services, it was impossible to separate the interstate and intrastate components. Among other observations, the Agency noted that there was no "practical means … of directly or indirectly identifying the geographic location of a [VoIP] subscriber." Similarly, the court agreed with the Commission that communications over the internet are very different from traditional landline-to-landline telephone calls because of the multiple service features which might come into play during a VoIP call. Finally, the Court upheld the Commission's conclusion that the economic burden of forcing providers to identify the geographic endpoints of a VoIP service into their interstate and intrastate components far outweighed the benefits. As the court noted, "[s]ervice providers are not required to develop a mechanism for distinguishing between interstate and intrastate communications merely to provide state commissions with an intrastate communication they can then regulate," and the "Communications Act does not require 'construction of wholly independent intrastate and interstate networks.'"[121]

Second, the court agreed with the Commission's finding that state regulation of VoIP services would interfere with valid federal rules or policies. As the court observed,

> The FCC has promoted a market-oriented policy allowing providers of information services to "burgeon and flourish in an environment of free give-and-take of the marketplace without the need for and possible burden of rules, regulations and licensing requirements." Thus, any state regulation of an information service conflicts with the federal policy of nonregulation.[122]

But there was more. As the court further observed:

> The FCC's conclusions regarding the conflicts between state regulation and federal policy deserve "weight"—the agency has a "thorough understanding of its own [regulatory framework] and its objectives and is uniquely qualified to comprehend the likely impact of state requirements." Competition and deregulation are valid federal interests the FCC may protect through preemption of state regulation.[123]

While one could perhaps distinguish *Minnesota Public Utilities Commission* on the ground that the court only focused on the validity of the impossibility

121. *Minnesota Pub. Utils. Comm'n*, 483 F.3d at 578 (citations omitted).

122. *Id.* at 580 (citations omitted).

123. *Id.* (*citing* Geier v. Am. Honda Motor Co., 529 U.S. 861, 883, 120 S. Ct. 1913, 146 L.Ed.2d 914 (2000) (internal quotations and citations omitted)).

exception and never reached a definitive ruling that state regulation of a Title I information service is preempted under the FCC's policy of nonregulation, the Eighth Circuit took that next step in *Charter v. Lange*.

2. Charter Advanced Services v. Lange

A little over a decade after the Eighth Circuit ruled against the Minnesota Public Utility Commission, the state regulator was back at it in *Charter v. Lange*.[124] At issue, again, was whether VoIP should be considered a telecommunications service (and thus subject to potential regulation at the state level) or an information service (and thus state regulation would be preempted). Because the FCC had steadfastly refused to decide one way or the other, the Eighth Circuit stepped into the void and concluded that VoIP was an information service under Title I of the Communications Act. Citing its earlier decision in *Minnesota Public Utilities Commission*, the court concluded once again that "'any state regulation of an information service conflicts with the federal policy of nonregulation,' so that such regulation is preempted by federal law."[125]

3. Questions Raised by Justice Thomas in *Lipschultz v. Charter*

The parties sought *certiorari* of *Charter v. Lange*. Although the Court did not take up the case, Justice Thomas—with whom Justice Gorsuch joined—issued a very interesting separate statement in the Court's denial of *certiorari sub nom.* in the case of *Lipschultz v. Charter.*[126] In this statement, Justice Thomas invited an appropriate case in which the Court "should consider whether a federal agency's policy can preempt state law."[127]

Justice Thomas began his invitation by pointing out that under the Supremacy Clause of the Constitution, the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[128] In Justice Thomas' view, this Clause contains a non obstante provision—"a common device used by 18th-century legislatures to signal the implied repeal of conflicting statutes"—and, as such, "[a]t the time of the founding, this Clause would have been understood to pre-empt state law only if the law logically contradicted the

124. *Supra* note 119.
125. *Lange,* 903 F.3d at 718 (citations omitted).
126. *See* Lipschultz v. Charter Advanced Serve. (MN)*,* 589 U.S. 1038 (2019).
127. *Id.* at 1039.
128. *See* U.S. CONST., art. VI, cl. 2.

'Constitution' [or] the 'Laws of the United States.'"[129] However, argued Justice Thomas, it

> is doubtful whether a federal policy—let alone a policy of nonregulation—is "Law" for purposes of the Supremacy Clause. Under our precedent, such a policy likely is not final agency action because it does not mark "the consummation of the agency's decisionmaking process" or determine Charter's "rights or obligations."[130]

Moreover, Justice Thomas posited that even "if it were final agency action, the Supremacy Clause 'requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures.'"[131] Accordingly, reasoned Justice Thomas,

> Giving pre-emptive effect to a federal agency policy of nonregulation thus expands the power of both the Executive and the Judiciary. It authorizes the Executive to make "Law" by declining to act, and it authorizes the courts to conduct "a freewheeling judicial inquiry" into the facts of federal nonregulation, rather than the constitutionally proper "inquiry into whether the ordinary meanings of state and federal law conflict."[132]

As of this writing, the Court has yet to take up a case where Justice Thomas' views can be formally debated.

V. "PREEMPTION BY NONREGULATION" OF BROADBAND CONTINUES: THE FCC'S 2018 RESTORING INTERNET FREEDOM ORDER

As highlighted *supra*, for nearly two decades, the FCC on a bipartisan basis had classified broadband Internet access as a lightly regulated information service under Title I of the Communications Act of 1934 subject to exclusive federal jurisdiction. The big aberration in this policy came in 2015, when the FCC under the leadership of Chairman Tom Wheeler reclassified broadband Internet access back to a common carrier service under

129. *Lipschultz,* 589 U.S. at 1039 (citations omitted).
130. *Id.* (citations omitted).
131. *Id.* (citations omitted).
132. *Id.* at 1040 (citations omitted).

Title II of the Communications Act to provide legal justification for the imposition of net neutrality regulation.[133]

Although there were heated arguments over the legal merits and economic effects of reclassification in 2015, it is important to note that one policy remained constant: the Commission never wavered from its belief that the American consumer would not benefit from a hodgepodge of different regulatory regimes and that it was therefore better to establish a nationwide "comprehensive regulatory framework governing broadband Internet access services."[134] Understanding that returning broadband Internet access back under the umbrella of legacy common carrier regulations of Title II could open the door to aggressive state regulation (and taxation) of the internet,[135] the Commission in its *2015 Open Internet Order* announced its "firm intention to exercise our preemption authority to preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme we adopt in this Order."[136] However, the Commission said it would make such preemption decisions "on a case-by-case basis in light of the fact specific nature of particular preemption inquiries."[137]

The Obama administration's policy of applying legacy common carriage regulation to the internet did not last long. Finding that imposing rules designed for the old Bell monopoly on the internet had a negative effect on broadband investment, the current FCC reversed the *2015 Open Internet Order* with its *2018 Restoring Internet Freedom Order* ("*RIFO*") and returned broadband Internet access back to a "light touch" regulatory regime under Title I subject to exclusive federal jurisdiction.[138]

Given its long-standing policy of preemption by nonregulation of Title I information services, no doubt the Commission thought this question closed. It was wrong. Once again, the politics of net neutrality forced the Commission in its *RIFO* to tackle the thorny issue of potential aggressive state

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133. Protecting and Promoting the Open Internet, FCC 10-201, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601 (2015) [hereinafter "*2015 Open Internet Order*"], *aff'd* United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016), *pet. for rehearing en banc denied,* 855 F.3d 381 (2017), *cert. denied,* 139 S. Ct. 453 (2018). For a thorough critique of the legal gymnastics used in these decisions, *see* L.J. Spiwak, *USTelecom and its Aftermath, supra* note 25.

134. *2015 Open Internet Order id.* at ¶ 433.

135. *See, e.g., Federalist Implications of the FCC's Open Internet Order, supra* note 87; *see also* City of Eugene v. Comcast*,* 359 Or. 528 (2016) (finding that with the FCC's reclassification of broadband internet access as a telecommunications service in the 2010 *Open Internet Order,* the City of Eugene Oregon was entitled to impose a license fee on cable modem service on top of the cable franchise fee already paid by Comcast).

136. *2015 Open Internet Order, supra* note 134, ¶ 433.

137. *Id.* Interestingly, in the one paragraph in the *2015 Open Internet Order* where the Commission discusses preemption, the agency provided no citation showing that its preemption authority derives from Section 253. *See supra* note 134 and accompanying text.

138. In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, And Order*, 33 FCC Rcd. 311, ¶ 95-98 (2018) [hereinafter RIFO].

regulation of the internet. To address this question, the Commission returned to its time-tested argument on preemption by again recognizing that:

> Allowing state and local governments to adopt their own separate requirements, which could impose far greater burdens than the federal regulatory regime, could significantly disrupt the balance we strike here. Federal courts have uniformly held that an affirmative federal policy of deregulation is entitled to the same preemptive effect as a federal policy of regulation. In addition, allowing state or local regulation of broadband Internet access service could impair the provision of such service by requiring each ISP to comply with a patchwork of separate and potentially conflicting requirements across all of the different jurisdictions in which it operates.[139]

The Commission also reiterated its longstanding view that "regulation of broadband Internet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements."[140] It therefore concluded that it was exercising its "authority to preempt any state or local requirements that are inconsistent with the federal deregulatory approach we adopt today."[141] In particular, the Commission preempted "any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order."[142]

The Commission offered up two familiar legal arguments in support of its position: First, that it was entitled to invoke the "impossibility exception" as articulated by the Supreme Court in *Louisiana Public Service Commission v. FCC*,[143] and second, that the Commission has independent authority to displace state and local regulations in accordance with the longstanding federal policy of nonregulation for information services. Each argument is briefly summarized below.

A. The Impossibility Exception

As noted above, under the legal doctrine known as the "impossibility exception" to state jurisdiction, the FCC may preempt state law when (a) it is impossible or impracticable to regulate the intrastate aspects of a service without affecting interstate communications and (b) the Commission determines that such regulation would interfere with federal regulatory

139. *Id.* ¶ 194.
140. *Id.*
141. *Id.*
142. *Id.* at ¶ 195.
143. 476 U.S. 355, 375 n.4 (1986).

objectives.[144] According to the Commission, the facts of this case satisfied both conditions "because state and local regulation of the aspects of broadband Internet access service . . . would interfere with the balanced federal regulatory scheme" contained in the *RIFO*.[145]

The Commission concretely argued that because both interstate and intrastate communications can travel over the same internet connection (and indeed may do so in response to a single query from a consumer), "it is impossible or impracticable for Internet Service Providers ('ISPs') to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance."[146] As such, reasoned the Commission, ISPs "generally could not comply with state or local rules for intrastate communications without applying the same rules to interstate communications."[147] Accordingly, because the Commission found that any effort by states to regulate intrastate traffic would interfere with its treatment of interstate traffic, it considered the first condition for conflict preemption to be satisfied.[148] For similar reasons, the Commission found the second condition for the impossibility exception to be satisfied because "state and local regulation of the aspects of broadband Internet access service . . . would interfere with the balanced federal regulatory scheme" adopted in the *RIFO*.[149]

B. Federal Policy of Nonregulation

The Commission also reiterated its argument that it has independent authority to displace state and local regulations in accordance with the longstanding federal policy of nonregulation for information services.[150] According to the Commission, multiple provisions of the 1996 Act "confirm Congress's approval of our preemptive federal policy of nonregulation for information services."[151] For example, the Commission pointed to Section 230(b)(2) of the Act, as added by the Telecommunications Act of 1996, which declares it to be "the policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services"—including "any information service"—"unfettered by Federal or State regulation."[152] The Commission also pointed to Section 3(51) of the Act, which provides that a communications service provider "shall be treated as a common carrier under [this Act] only to the extent that it is engaged in providing telecommunications services."[153] As the

144. *See supra* note 90.
145. *RIFO, supra* note 138 at ¶ 198.
146. *Id.* at ¶ 200.
147. *Id.*
148. *Id.*
149. *Id.* at ¶ 201.
150. *Id.* at ¶ 202.
151. *RIFO, supra* note 138 at ¶ 203.
152. *Id.* (citing 47 U.S.C. § 253(b)(2)).
153. 47 U.S.C. § 153(51).

Commission highlighted, this statutory language "forbids any common-carriage regulation, whether federal or state, of information services."[154]

Finally, the Commission argued that its "preemption authority finds further support in the Act's forbearance provision[s]" contained in Section 10 of the Communications Act.[155] Under Section 10(e), "A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a) of this section."[156] In the Commission's view, it would be

> incongruous if state and local regulation were preempted when the Commission decides to forbear from a provision that would otherwise apply, or if the Commission adopts a regulation and then forbears from it, but not preempted when the Commission determines that a requirement does not apply in the first place.[157]

Indeed, argued the Commission, nothing "in the Act suggests that Congress intended for state or local governments to be able to countermand a federal policy of nonregulation or to possess any greater authority over broadband Internet access service than that exercised by the federal government."[158]

VI. THROWING A WRENCH INTO PRECEDENT: THE D.C. CIRCUIT'S RULING IN *MOZILLA V. FCC*

As with all other past net neutrality rulings from the FCC, the *RIFO* was appealed. Grounding its decision in the Supreme Court's ruling in *Brand X,*[159] the D.C. Circuit in *Mozilla Corp. v. FCC* affirmed the Agency's decision to re-reclassify broadband Internet access back to a Title I information service.[160] But, to the surprise of many, the court rejected the Commission's express preemption arguments, thereby opening the door for state and local governments to regulate where the FCC has purposely refrained from doing so. The latter ruling destroyed the FCC's nearly twenty-year belief that it had the authority to expressly and broadly preempt all state regulation by classifying something as a Title I information service subject to exclusive federal regulation. This section summarizes the majority's reasoning and the dissent's critiques in *Mozilla*.

At bottom, the D.C. Circuit in *Mozilla* struck down the FCC's efforts to preempt prospectively all state regulation of the internet via reclassification—or, as the court came to call it, the FCC's "Preemption

154. *RIFO, supra* note 138 at ¶ 203 (citations omitted).
155. *Id.* at ¶ 204 (citing 47 U.S.C. § 160(e)).
156. *Id.*
157. *Id.*
158. *Id.*
159. National Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980–81, 125 S.Ct. 2688, (2005).
160. Mozilla Corp. v. FCC*,* 940 F.3d 1 (D.C. Cir. 2019).

Directive"—because, in the court's view, the "Commission ignored binding precedent by failing to ground its sweeping Preemption Directive . . . in a lawful source of statutory authority."[161] This lack of statutory authority, reasoned the court, was "fatal" to Commission's effort to invoke express preemption.[162]

A. Statutory Abdication

The crux of the court's decision was its belief that when the FCC deliberately placed "broadband *outside* of its Title II jurisdiction" by reclassifying it as a Title I information service,[163] the Commission had essentially abdicated *all* legal authority (express or ancillary) under Title II.[164] In the court's words, the agency's efforts to preempt state regulation of broadband "could not possibly be an exercise of the Commission's express statutory authority" under the Communications Act.[165] Thus, for example, the court rejected the FCC's argument that it had express authority to preempt because Congress did not "statutorily grant the Commission freestanding preemption authority to displace state laws . . . in areas in which it does not otherwise have regulatory power."[166] Following the same reasoning, the court rejected the argument that the Commission's Preemption Directive was supported by ancillary jurisdiction because the Agency had specifically disavowed all of its authority under Title II by reclassifying broadband Internet access as a Title I information service; in other words, the Agency's abdication meant that there was no longer any specific statutory authority to which the Commission's preemption efforts could be ancillary.[167]

The court then went on to use this finding of statutory abdication to reject specifically the Agency's two asserted legal theories of preemption: the impossibility exception and a policy of federal nonregulation.

As to the former, the court reasoned that the FCC's use of the impossibility exception failed because "[a]ll the impossibility exception does is help police the line between those communications matters falling under the Commission's authority . . . and those remaining within the States' wheelhouse."[168] "In other words," reasoned the court, "the impossibility exception presupposes the existence of statutory authority to regulate; it does not serve as a substitute for that necessary delegation of power from Congress."[169]

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161. *Id.* at 74.
162. *Id.*
163. *Id*. at 76 (emphasis in original). The court also observed that the Commission similarly placed broadband outside of the definition of "radio transmission" under Title III and a "cable service" under Title VI. *Id.* at 75.
164. *Id*. at 75.
165. *Id.* at 74.
166. *Mozilla*, 940 F.3d at 75-76.
167. *Id.* at 76-77.
168. *Id.* at 76 (citations omitted).
169. *Id.* at 77-78.

As to the latter, the court also found that the Agency's lack of statutory authority could not sustain the Commission's argument that states were preempted due to a "federal policy of nonregulation for information services."[170] As noted above, the Agency in its *RIFO* argued that it would be

> incongruous if state and local regulation were preempted when the Commission decides to forbear from a provision that would otherwise apply, or if the Commission adopts a regulation and then forbears from it, but not preempted when the Commission determines that a requirement does not apply in the first place.[171]

But the court did not bite. According to the court, "because the [RIFO] took broadband out of Title II . . . the Commission is not 'forbear[ing] from applying any provision' of the Act to a Title II technology."[172] As the court observed, Congress

> chose to house affirmative regulatory authority in Titles II, III, and VI, and not in Title I. And it is Congress to which the Constitution assigns the power to set the metes and bounds of agency authority, especially when agency authority would otherwise tramp on the power of States to act within their own borders.[173]

Accordingly, the court ruled that because the FCC took broadband out from under the rubric of Title II, "[n]o matter how desirous of protecting their policy judgments, agency officials cannot invest themselves with power that Congress has not conferred."[174] Indeed, reasoned the court, if "Congress wanted Title I to vest the Commission with some form of Dormant Commerce-Clause-like power to negate States' statutory (and sovereign) authority just by washing its hands of its own regulatory authority, Congress could have said so."[175]

B. Leaving Open the Door to Conflict Preemption

Notwithstanding the above, the court seemed to leave the door open to a future claim of conflict preemption, under which those portions of the *RIFO* that the court did uphold (including the information service classification and the elimination of most net neutrality mandates) would preclude the application of inconsistent state laws. As an initial matter, the court found that "because a conflict preemption analysis 'involves fact-intensive inquiries,' it 'mandates deferral of review until an actual preemption of a

170. *Id.*
171. *RIFO, supra* note 138 at ¶ 204.
172. *Mozilla*, 940 F.3d at 79.
173. *Id.* at 83.
174. *Id.*
175. *Id.*

specific state regulation occurs.'"[176] Yet in this particular case, the court held that "[w]ithout the facts of any alleged conflict before us, we cannot begin to make a conflict-preemption assessment in this case, let alone a categorical determination that any and all forms of state regulation of intrastate broadband would inevitably conflict with the [*RIFO*]."[177] Still, the court ruled that if "the Commission can explain how a state practice actually undermines the [*RIFO*], then it can invoke conflict preemption."[178] As the court pointed out,

> What matters for present purposes is that, *on this record*, the Commission has made no showing that wiping out all "state or local requirements that are inconsistent with the [*RIFO*'s] federal deregulatory approach" is necessary to give its reclassification effect. And binding Supreme Court precedent says that mere worries that a policy will be "frustrate[d]" by "jurisdictional tensions" inherent in the Federal Communications Act's division of regulatory power between the federal government and the States does not create preemption authority.[179]

But until this case is brought before it (or another court), the court ruled that concurrent state and federal regulation of the internet "can co-exist as the Federal Communications Act envisions."[180]

C. Judge Williams' Dissent

In an extensive dissent, Judge Stephen Williams took great exception to the majority's reasoning vis-à-vis express preemption. At bottom, Judge Williams simply could not get his head around the majority's reasoning that the Commission lacked any authority to preempt state regulation once it decided to "step[] off the Title II escalator and choose[] Title I." As Judge Williams observed, the majority's statutory abdication logic puts "the Commission in paradoxical bind. The Commission could create an effective federal policy controlling communications brought under Title II, within a considerable range of intrusiveness, but if it finds the light-touch associated with Title I more apt, it then de facto yields authority over interstate communications to the states."[181]

While Judge Williams agreed with the majority that (1) congressional authority was an essential prerequisite to preemption; and that (2) Congress

176. *Id.* at 81-82 (*quoting* Alascom, Inc. v. FCC*,* 727 F.2d 1212, 1220 (D.C. Cir. 1984)).

177. *Id.* at 82. As noted *supra*, even though the Commission had a legally cleaner preemption argument under Section 253 in its *2015 Open Internet Order*, the agency did not attempt a sweeping preemption of all state regulation but instead opted for a case-by-case approach.

178. *Mozilla*, 940 F.3d at 85 (citations omitted).

179. *Id.* (emphasis supplied and citations omitted).

180. *Id.*

181. *Id.* at 98.

did not afford the Agency *express* authority to preempt, Judge Williams pointed out that under Supreme Court precedent "a federal agency's authority to preempt state law need not be expressly granted."[182] And in this particular case, Judge Williams argued that

> the statute, its history and its interpretation give ample reason to infer a congressional intent that the Commission be authorized to preempt state laws that would make it 'impossible or impracticable' for ISPs to exercise the freedom that the Commission meant to secure by classifying broadband under Title I.[183]

Indeed, argued Judge Williams, for the majority to assume "without explanation that in allowing the Commission a choice between full-throttled regulation under Title II and very light regulation under Title I Congress had *no interest* in making sure that the Commission could, if it exercised the latter choice, establish an effective *national* broadband policy" simply makes no sense.[184] Stating the matter bluntly, Judge Williams wrote that the majority believed that "for an intrusive regulatory regime an agency's preemptive power can be inferred, while a deregulatory regime is a Cinderella-like waif, and can be protected from state interference only if Congress expressly reaches out its protective hand."[185]

To bring clarity to his argument, Judge Williams posited a simple rhetorical question: do "we see preemption as serving to protect the federal *regulations* from state frustration or to protect federal choice of a *regulatory regime* from state frustration."[186] In Judge Williams' view, the "majority staunchly believes that preemption serves solely to protect *affirmative* federal *regulations*."[187] Judge Williams contended that the majority's view was in error because:

> [i]f an agency decides that a robust regulatory scheme is apt in a given sector (say, under Title II), the majority is ready to infer authority to preempt. But . . . if the agency determines that an industry will flourish best under competitive market norms and accordingly adopts a "light-touch" path, preemption is suddenly superfluous *because* the agency now has less "power to regulate services."[188]

In fact, argued Judge Williams, under the majority's view that "*only* an agency's possession of affirmative regulatory authority can support authority to preempt state regulation," then the practical effect of that reasoning is that

182. *Id.* at 96 (citations omitted).
183. *Id.* at 97 (citations omitted).
184. *Mozilla*, 940 F.3d at 101 (emphasis in original).
185. *Id.* at 104-05.
186. *Id.* at 99 (emphasis in original).
187. *Id.* (emphasis in original).
188. *Id.* at 99-100.

"because of the impossibility of separation," state regulation—which nominally applies only to intrastate communications—would "in practice engulf[] interstate communications."[189]

Judge Williams also had other issues with the Majority's statutory abdication logic. For example, Judge Williams argued that if one were to follow the majority's statutory abdication reasoning to its logical conclusion, it would—despite the majority's dicta that it would entertain a potential conflict preemption argument—"render any conflict unimaginable."[190] In the majority's view, argued Judge Williams, "preemption is utterly dependent on the Commission's affirmative regulatory authority and cannot depend on its authority to apply a deregulatory regime to broadband."[191] As such, "when the Commission adopts a deregulatory regime under Title I, there's no there there."[192] Indeed, argued the judge, "if the handwaving toward conflict preemption is to mean anything, it requires a vision of a Commission exercise of power with which some state regulation could actually conflict. This the majority denies absolutely."[193]

Along the same lines, Judge Williams argued that the majority's statutory abdication logic also took any possibility of using ancillary jurisdiction as a source of preemption authority off the table. As Judge Williams noted, for the Commission to exercise ancillary authority, the Commission's actions must be "'reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities,' which are *exclusively* its responsibilities under Title II, III, at VI of the Act."[194] But as Judge Williams observed, the problem is that under the majority's interpretation of the law:

> There is no room in this concept for authority to establish a regulatory regime for broadband as an information service—meaning, given the extreme paucity of affirmative regulatory authority under Title I, a highly deregulatory regime. For the majority, the observation that by "reclassifying broadband as an information service, the Commission placed broadband *outside* of its Title II jurisdiction," is pretty much the end of the game. The majority conspicuously never offers an explanation of how a state regulation could ever conflict with the federal white space to which its reasoning consigns broadband.[195]

189. *Id.* at 100.
190. *Mozilla*, 940 F.3d at 106.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* (citations omitted and emphasis in original).
195. *Id.* (citations omitted).

Finally, Judge Williams argued that the majority's statutory abdication logic was, in his words, "inapplicable."[196] As Judge Williams explained, given the D.C. Circuit's ruling in *USTelecom v. FCC*,[197] the Commission had authority to apply Title II to broadband. By returning broadband Internet access back to a Title I information service, all the Commission did was "forswore any *current* intention to use Title II vis-à-vis broadband."[198] However, as Judge Williams pointed out, even though the FCC returned broadband Internet access back to its original classification, "the authority to reclassify broadband back under Title II, and thus to subject it to all the authorities granted under Title II, remained."[199] Accordingly, argued Judge Williams, "*the Commission's choice not to exercise a power is not a permanent renunciation of that power.*"[200]

VII. *MOZILLA* AND ITS AFTERMATH

A. ACA Connects – America's Communications Association v. Bonta

As both nature and regulation abhor a vacuum, after the FCC issued its *Restoring Internet Freedom Order*, California stepped in with the California Internet Consumer Protection and Net Neutrality Act of 2018 ("SB-822"), Cal. Stats. 2018, Chapter 976, which essentially codified at the state level the FCC's original *2015 Open Internet Rules*. Internet Service Providers sued, arguing that SB-822 was illegal both on conflict and field preemption grounds. The Ninth Circuit disagreed.[201]

To begin, the Ninth Circuit, just as the D.C. Circuit did in *Mozilla*, accepted the jurisdictional abdication argument. According to the court, a "fundamental principle of preemption … is that an absence of federal regulation may preempt state law only if the federal agency has the statutory authority to regulate in the first place."[202] However, reasoned the court, by "reclassifying broadband as a Title I information service, the FCC stripped

196. *Mozilla*, 940 F.3d at 101.

197. *USTelecom v. FCC,* 825 F.3d 674 (2016).

198. *Mozilla*, 940 F.3d at 101.

199. *Id.*

200. *Id.* (emphasis supplied); *cf.,* Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 384 (1983) ("[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision to regulate.") (emphasis in original). Judge Williams' argument apparently touched a nerve with the majority, whose opinion disagreed with any suggestion by Judge Williams that its holding on express preemption would prevent the application of conflict preemption when "the Commission can explain how a state practice actually undermines" portions of the *RIFO* the court upheld (including the information service classification and the elimination of most net neutrality mandates).

201. ACA Connects – America's Communications Association v. Bonta, 24 F.4th 1233 (9th Cir.), *reh'g denied en banc*, 2022 U.S. App. LEXIS 10669 (9th Cir. Cal., Apr. 20, 2022).

202. 24 F.4th at 1241.

itself of the requisite regulatory authority and, accordingly, of the preemptive authority to displace state laws."[203]

Next, the Ninth Circuit considered arguments of broader conflict preemption with the Communications Act writ large. Again, the Ninth Circuit wasn't convinced. According to the Court's reading of the Communications Act, the statute focuses explicitly on "defining the extent of FCC regulation" of information services and does not "mention, let alone defend or displace, the regulatory authority of the states."[204] In the court's view, the Communications Act prevents "the FCC itself, and not the states, from imposing common carrier regulations on either information services or private mobile services."[205]

The Ninth Circuit also found no issues with field preemption. In the court's view, because the Communications Act establishes dual state and federal authority "in the field of interstate broadband services, states have taken advantage of the space left for state laws to supplement the federal scheme."[206] In fact, noted the court, the "Communications Act itself reflects a federal scheme that leaves room for state regulation that may touch on interstate services." As an example, the court argued that even Section 253—which gives the FCC preemption authority to remove barriers to entry to the interstate and intrastate telecommunications industry—"expressly preserves a role for states to protect consumer rights in this field." In the court's view, the "express preemption provisions located throughout the Communications Act are predicated on the assumption that states otherwise would have concurrent authority to regulate interstate services." Thus, reasoned the court, if "Congress had intended the Communications Act to preempt state regulation touching on any interstate communications, there would be no need for any express preemption provisions."[207]

B. New York State Telecoms Association v. James

In an effort to bridge the so-called "digital divide," in 2021 New York passed a statute entitled the "Affordable Broadband Act" to regulate retail broadband rates. Under this statute, broadband service providers operating in New York must "offer high-speed broadband service to low-income consumers" at statutorily fixed prices (25 Mbps for $15/month for or 200 Mbps for $20 month). Broadband providers challenged the New York law, arguing that state price regulation of broadband stood in direct conflict with federal law. The Second Circuit in *New York State Telecoms Association v. James* disagreed.[208]

The court began its analysis by looking at field preemption. The court first reasoned that although the Communications Act "broadly grants the FCC jurisdiction over 'all interstate and foreign communication,' nothing in the

203. *Id.* at 1239-40.
204. *Id.* at 1245.
205. *Id.*
206. *Id.* at 1248.
207. *Id.*
208. New York State Telecoms Association v. James, 101 F. 4th 135 (2d Cir.).

text suggests that the FCC has *exclusive* jurisdiction over interstate communication, which is the relevant question for implied field preemption."[209] And according to the Second Circuit, a "statute granting regulatory authority over [a] subject matter to a federal agency is not in and of itself sufficient to find field preemption. Congress must do much more to oust all of state law from a field."[210] Moreover, noted the court, the "Communications Act has *no* framework for rate regulation over Title I services like broadband, let alone one that is 'so pervasive … that Congress left no room for the States to supplement it.'"[211] Thus, reasoned the court, the "*absence* of regulation is the exact opposite of a federal 'framework . . . so pervasive' that it results in field preemption."[212] Finally, the court observed that while the Communications Act

> contains provisions expressly prohibiting states from regulating specific types of communications services, and none covers all rate regulations of interstate communications services. Instead, the Act identifies specific *types* of communications services, regulates them differently under different Titles, and preempts state regulation of some of them on a case-by-case basis."[213]

In short, ruled the court, there is "simply no indication that Congress intended to preempt a field as broad as 'rate regulation of interstate communications services.'"[214]

The Second Circuit next turned to conflict preemption. Adopting similar reasoning by the Ninth Circuit in *Bonta* and the D.C. Circuit in *Mozilla*, the Second Circuit ruled that by reclassifying broadband as a Title I information service, the FCC had essentially abdicated it authority to "enact (or preempt) common carrier—style regulations of broadband under Title I."[215] According to the Second Circuit,

> Title I grants the FCC no authority to impose rate regulations, nor does it contain a forbearance provision similar to Title II. Thus, because broadband is now regulated as a *Title I* service, the FCC has no congressionally delegated authority to impose *or* forebear rate regulations. Absent the "power to act," the FCC has no power to preempt broadband rate regulation.[216]

209. *James*, 101 F. 4th at 150 (emphasis in original).
210. *Id.* at 150-51 (citations omitted).
211. *Id.* at 151.
212. *Id.* (citations omitted and emphasis in original).
213. *Id.* at 152 (emphasis in original).
214. *Id.*
215. *James*, 101 F. 4th at 155.
216. *Id.* (emphasis in original).

It would seem, therefore, that if state efforts to impose rate regulation on broadband internet access services are not subject to either field or conflict preemption with the Communications Act, then the probability that state laws governing AI—again*, a general-purpose technology*—could be preempted by the Communications Act appear to be slim to none.

VIII. POLICY RECOMMENDATIONS

The purpose of this paper is not to argue that the federal government should not preempt state AI laws and regulations. Quite the opposite: the purpose of this paper is to demonstrate that because the clock is ticking, trying to contort the Communications Act to preempt the growing patchwork of disparate state AI laws is a Quixotic exercise in futility. Worse, as courts are often a "black box" where outcomes can be unexpected, engaging in legal gymnastics with the Communications Act could perversely lead to a vast expansion of the FCC's authority beyond its statutory constraints.[217] The cleanest legal solution, therefore, is for Congress to enact expeditiously some sort of preemption mechanism before the United States loses the AI race due to an unnecessary "Death by Fifty State Cuts."[218]

217. *C.f.* Lawrence J. Spiwak, *Regulatory Implications of Turning Internet Platforms into Common Carriers,* 76 FED. COMM. L. J. 1 (2023).

218. While Congress is at it, it should also provide the FCC with the express ability to preempt states from regulating the rates, terms and conditions of retail broadband Internet access service. That said, as noted *supra*, providing the FCC with authority to preempt state municipal broadband laws would probably not pass constitutional muster.