

# The Preemption Predicament Over Broadband Internet Access Services

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## Other Views:

- Tom Wheeler, *California Will Have an Open Internet. And So Will Lots Of Other States, Despite The FCC's Decision*, N.Y. TIMES, Oct. 2, 2019, <https://www.nytimes.com/2019/10/02/opinion/net-neutrality-fcc-wheeler.html>.
- Jon Brodtkin, *FCC's "illogical" claim that broadband isn't telecommunications faces appeal*, ARS TECHNICA, Dec. 13, 2019, <https://arstechnica.com/tech-policy/2019/12/fccs-illogical-claim-that-broadband-isnt-telecommunications-faces-appeal/>.
- Caitlin Chin, *In the net neutrality debate, what might follow Mozilla v. FCC?*, BROOKINGS TECHTANK, Oct. 7, 2019, <https://www.brookings.edu/blog/techtank/2019/10/07/in-the-net-neutrality-debate-what-might-follow-mozilla-v-fcc/>.

Throughout the history of modern telecommunications regulation, there has been an uneasy jurisdictional relationship between the Federal Communications Commission ("FCC") and the fifty states. As a result, complex issues of federalism routinely haunt the broadband debate.<sup>1</sup> A spate of recent court cases speaks 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.<sup>2</sup> Given the vertically-integrated nature of the Bell System, Congress drew the jurisdictional line between *intrastate* telecommunications services (regulated exclusively by the states)<sup>3</sup> and *interstate* telecommunications services (regulated exclusively by the FCC under Title II of the Act).<sup>4</sup> If there was a dispute between state and federal policy regimes, the Commission would invoke what has become known as the "impossibility exception."<sup>5</sup> Under this legal doctrine, the FCC is allowed to preempt state regulation of a service 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.<sup>6</sup> 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

1 See, e.g., L.J. Spiwak, *Federalist Implications of the FCC's Open Internet Order*, PHOENIX CENTER PERSPECTIVE NO. 11-01 (Feb. 8, 2011), <http://www.phoenix-center.org/perspectives/Perspective11-01Final.pdf>; T.R. Beard, G.S. Ford, L.J. Spiwak, & M. Stern, *A Legal and Economic Primer on Municipal Broadband: Causes and Consequences*, 72 FED. COMM. L.J. (forthcoming winter 2020); T.R. Beard, G.S. Ford, T.M. Koutsky, & L.J. Spiwak, *Developing A National Wireless Regulatory Framework: A Law and Economics Approach*, 16 COMM.LAW CONSPECTUS 391 (2008), available at <https://www.phoenix-center.org/papers/CommLawConspectusNationalWirelessFramework.pdf>.

2 See 47 U.S.C. § 153(11). In its most simplified form, "common carriage" means any firm that provides service to the public must take all traffic on a non-discriminatory basis.

3 See 47 U.S.C. § 153(48).

4 See 47 U.S.C. § 151; 47 U.S.C. § 153(28).

5 See *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368 (1986).

6 *Id.*

competition. These segments included “enhanced services” (e.g., voicemail), customer premises equipment (e.g., home telephones), terminal equipment (e.g., telephone switching 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.<sup>7</sup> Unfortunately for the Commission, it expressly lacked both clear forbearance and preemption authority under then-current law to meaningfully implement this policy.<sup>8</sup>

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.<sup>9</sup> And with the then-new Section 253, Congress provided the FCC with a clear mandate that it may preempt states laws and regulations that have “the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”<sup>10</sup> 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.*”<sup>11</sup>

While this new preemption and forbearance statutory authority was certainly welcome, the Commission was essentially limited to a case-by-case approach. As a result, particularly as IP-enabled services such as broadband and Voice over Internet Protocol (“VoIP”) took off in the late 1990s, the FCC came to recognize that a case-by-case approach was cumbersome and inadequate to fulfill Congress’s directive in Section 230(b)(1) to “promote the continued development of the Internet.”<sup>12</sup> 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”<sup>13</sup>—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<sup>14</sup> “subject to exclusive federal jurisdiction.”<sup>15</sup> 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.<sup>16</sup>

States were none too pleased. Despite the FCC’s efforts at preemption by nonregulation via Title I classification, over the years many states have nonetheless asserted jurisdiction over information services. But these efforts, for the most part, have been rebuffed by the courts. For example, the Eighth Circuit has twice ruled—in 2007 in *Minnesota Public Utilities Commission v. FCC*<sup>17</sup> and in 2018 in *Charter Advanced Services v. Lange*<sup>18</sup>—that state regulation of a Title I information service “conflicts with the federal policy of nonregulation” and is therefore preempted.

But for those who are interested in the federalism debate in telecom, two recent court opinions—released within three weeks of each other—have thrown a wrench into the FCC’s long-standing policy of preemption via nonregulation of Title I information services.

The first case came on October 1, 2019, when the D.C. Circuit released its decision in *Mozilla v. FCC*<sup>19</sup>—the latest case in the long-running net neutrality debate. At issue in *Mozilla* was the legality of the FCC’s 2018 *Restoring Internet Freedom Order* (hereinafter “*RIFO*”),<sup>20</sup> which reversed the Obama-era *2015 Open*

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

8 See, e.g., *Louisiana Public Service Commission*, 476 U.S. at 368-69; *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218 (1994).

9 47 U.S.C. § 160. For a discussion of the Commission’s exercise of that forbearance authority, see, e.g., G.S. Ford & L.J. Spiwak, *Section 10 Forbearance: Asking the Right Questions to Get the Right Answers*, 23 COMM.LAW CONSPICUOUS 126 (2014); L.J. Spiwak, *USTelecom and its Aftermath*, 71 FED. COMM. L.J. 39 (2019).

10 47 U.S.C. § 253(a).

11 47 U.S.C. § 230(b)(2) (emphasis supplied).

12 47 U.S.C. § 230(b)(1).

13 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).

14 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 . . .”).

15 See *infra* Section I.

16 *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, Federal Communications Commission (July 1999), available at [http://transition.fcc.gov/Bureaus/OPP/working\\_papers/oppwp31.pdf](http://transition.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf).

17 483 F.3d 570 (8th Cir. 2007).

18 903 F.3d 715 (8th Cir. 2018), cert. denied sub nom., 589 U.S. \_\_\_, 140 S. Ct. 6 (2019).

19 *Mozilla v. FCC*, 940 F.3d 1 (D.C. Cir. 2019), reh’g en banc denied, (D.C. Cir. 18-1051) (February 6, 2020).

20 *Restoring Internet Freedom*, FCC 17-166, 33 FCC Rcd. 311 (rel. January 4, 2018) (Declaratory Ruling, Report, and Order). For more detail on the *Mozilla* case, see *infra* Section III.

Internet Order that imposed Title II on the internet.<sup>21</sup> While the court upheld the Agency’s decision to return classification of broadband internet access back to a Title I information service, the court also rejected the Commission’s attempt to prophylactically and expressly preempt state efforts to regulate information services in all cases. Although acknowledging that principles of conflict preemption still apply when state laws conflict with federal law, the D.C. Circuit reasoned that because Title I is not an affirmative source of independent regulatory authority (unlike the legacy common carrier ratemaking and conduct provisions of Title II), the Commission “lacked the legal authority to categorically abolish all fifty States’ statutorily conferred authority to regulate intrastate communications.”<sup>22</sup> In so doing, the court essentially invited states to enact laws and regulations that push the limits of what is a conflict, potentially resulting in a Death by Fifty State Regulatory Cuts for the internet.<sup>23</sup>

Members of the Supreme Court were apparently watching. On October 21, 2019—a mere three weeks after the D.C. Circuit released its decision in *Mozilla*—the Supreme Court denied certiorari in the aforementioned *Charter v. Lange* (the case name became *Lipschultz v. Charter* at the Supreme Court).<sup>24</sup> While most certiorari petitions are addressed per curiam without fanfare, Justice Clarence Thomas, with whom Justice Neil Gorsuch joined, issued a statement concurring in the denial of certiorari.<sup>25</sup> The concurring Justices stated that although they agreed that the Eighth Circuit’s decision in *Charter* did not satisfy the criteria for certiorari, they invited an “appropriate case” in which the Court “should consider whether a federal agency’s policy can preempt state law.”<sup>26</sup> In particular, the Justices were quite skeptical about “whether a federal policy—let alone a policy of nonregulation—is ‘Law’ for purposes of the Supremacy Clause.”<sup>27</sup>

At the time of this writing, parties are contemplating their appellate options for the D.C. Circuit’s decision in *Mozilla*. Could *Mozilla* be the case Justices Thomas and Gorsuch have invited? And if the Court does take the case, is the skepticism of Justices Thomas and Gorsuch toward FCC preemption the majority or minority view? It is hard to say. Accordingly, the purpose of this paper is not to prognosticate, but rather to provide a review of the legal history of the FCC’s policy of preemption via nonregulation to better understand the competing arguments.

This paper is therefore organized as follows: To provide context for the Commission’s approach in its *RIFO* and the D.C. Circuit’s ruling in *Mozilla*, Section I provides an abridged history of the FCC’s policy of preemption via nonregulation of

Title I information services, starting with a discussion of the FCC’s seminal 2004 *Pulver Order*. Given this context, Section II provides a brief description of the FCC’s approach to preemption by nonregulation in the *RIFO*. Section III summarizes the D.C. Circuit panel majority’s rejection of the Agency’s preemption efforts in *Mozilla*, as well as the dissent’s critiques of the majority’s reasoning. Some additional thoughts and observations about the majority’s preemption reasoning in *Mozilla* are set forth in Section IV. Section V then looks at the questions raised by Justices Thomas and Gorsuch’s separate statement in *Lipschultz v. Charter*. Conclusions are set forth in Section VI.

## I. A SIMPLIFIED HISTORY OF FCC “PREEMPTION BY NONREGULATION”

As noted above, in the 1980s, the Commission started to peel off those portions of the old Bell system that it believed were capable of sustaining competition. While the big enchilada was the long-distance market, the FCC also attempted to foster competition for what the FCC described as “enhanced services” such as voicemail via its *Computer Inquiries*, customer premises equipment, and terminal equipment. Regulation is the enemy of competition, so the Commission sought to promote competitive entry by reducing federal—and, where possible, state—regulatory burdens on new firms.

As also noted above, even though Congress granted the Commission the express authority both to forbear from applying certain provisions of the Communications Act and to preempt state laws and regulations under an assortment of legal parameters with the Telecommunications Act of 1996,<sup>28</sup> the FCC recognized that a case-by-case approach to preemption and forbearance was too cumbersome to fulfill the directive in Section 230(b)(1) to “promote the continued development of the Internet.”<sup>29</sup> So the Agency moved boldly: rather than adopt a case-by-case approach to preemption and forbearance, the Agency took IP-enabled services out of the ambit of Title II regulation altogether by classifying them as “information services” under Title I of the Communications Act “subject to exclusive federal jurisdiction.” The Agency’s efforts to preempt regulation of IP-enabled services by intentional nonregulation began in earnest with its seminal 2004 “*Pulver Order*”<sup>30</sup>—a template the Commission then proceeded to apply to an assortment of other IP-based services.<sup>31</sup>

### 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

21 See *infra* note 61.

22 *Mozilla*, 940 F.3d at 86.

23 *C.f.*, T. Wheeler, *California Will Have an Open Internet. And So Will Lots Of Other States, Despite The FCC’s Decision*, N.Y. TIMES, Oct. 2, 2019, available at <https://www.nytimes.com/2019/10/02/opinion/net-neutrality-fcc-wheeler.html>.

24 *Lipschultz v. Charter*, 589 U.S. \_\_\_, 140 S. Ct. 6 (2019).

25 *Id.*

26 *Id.* at 7.

27 *Id.*

28 See *supra* notes 9 and 10.

29 47 U.S.C. § 230(b)(1).

30 See, e.g., Petition for Declaratory Ruling that *Pulver.Com*’s Free World Dialup is Neither Telecommunications nor a Telecommunications Service, FCC 04-27, 19 FCC Rcd. 3307 (rel. February 19, 2004) (Memorandum Opinion and Order) (hereinafter “*Pulver Order*”).

31 See *infra* Section I.B.

jurisdiction.”<sup>32</sup> 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.”<sup>33</sup>

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 “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.”<sup>34</sup> 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.”<sup>35</sup> Let’s look briefly at both of the Commission’s contentions.

As to the first rationale, 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.”<sup>36</sup> 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.”<sup>37</sup>

As to the Commission’s second rationale, the Commission pointed out that it was quite a stretch to argue that FWD was a “purely intrastate” information service, or even that it was “practically and economically possible” to separate FWD into interstate and intrastate components.<sup>38</sup> 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.<sup>39</sup> 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.”<sup>40</sup>

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.”<sup>41</sup> In contrast, argued the Commission, “the burdens upon interstate commerce would be significant.”<sup>42</sup> 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 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.”<sup>43</sup>

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.”<sup>44</sup> 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.<sup>45</sup>

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.”<sup>46</sup>

Finally, the Commission observed (albeit in a footnote) that even though it was declaring FWD to be a Title I information service, that decision did not mean that it was abdicating its 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.”<sup>47</sup>

32 *Pulver Order*, *supra* note 30 at ¶ 1.

33 *Id.* at ¶ 15.

34 *Id.* at ¶ 16.

35 *Id.*

36 *Id.* at ¶ 18 (citations omitted).

37 *Id.*

38 *Id.* at ¶ 20.

39 *Id.* at ¶ 22.

40 *Id.* at ¶ 23.

41 *Id.* at ¶ 24.

42 *Id.*

43 *Id.*

44 *Id.* at ¶ 25.

45 *Id.*

46 *Id.*

47 *Id.* at ¶ 69.

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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,<sup>48</sup> wireline broadband service,<sup>49</sup> wireless broadband service,<sup>50</sup> and even Broadband over Powerline Service.<sup>51</sup> 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 IP Services

As noted above, there are two related Eighth Circuit cases which deal directly with the FCC’s efforts to preempt by nonregulation state regulation of Title I information services—*Minnesota Public Utilities Commission v. FCC*<sup>52</sup> and *Charter v. Lange*.<sup>53</sup> Both are briefly discussed below.

1. *Minnesota Public Utilities Commission v. FCC*

The central issue in *Minnesota Public Utilities Commission* was whether state regulation of VoIP services was preempted. 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 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.”<sup>54</sup> 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 and separate them 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.’”<sup>55</sup>

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.<sup>56</sup>

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.<sup>57</sup>

The court in *Minnesota Public Utilities Commission* only focused on the validity of the impossibility 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. But 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*.<sup>58</sup> 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 ruled that VoIP was an information service under Title I of the Communications

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48 Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798, 4802-4803, ¶ 9, 2002 WL 407567 (2002), *aff’d* Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Services, 545 U.S. 967 (2005).

49 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).

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

51 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).

52 *Minnesota Public Utilities Commission*, *supra* note 17.

53 *Lange*, *supra* note 18.

54 *Minnesota Public Utilities Commission*, 483 F.3d at 578 (citations omitted).

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55 *Id.*

56 *Id.* at 580 (citations omitted)

57 *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)).

58 *Supra* note 18.

Act.<sup>59</sup> 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.<sup>60</sup>

## II. “PREEMPTION BY NONREGULATION” CONTINUES: THE FCC’S 2018 *RESTORING INTERNET FREEDOM ORDER*

As highlighted above, 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 one 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 Title II of the Communications Act in order to provide legal justification for the imposition of federal net neutrality regulation.<sup>61</sup>

Although there were great arguments over the legal merits and economic effects of reclassification in 2015, it is notable 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.”<sup>62</sup> Understanding that putting 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,<sup>63</sup> 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.”<sup>64</sup> Unlike the *RIFO*, however, the *2015 Open Internet Order* said the Commission would make such preemption decisions “on a case-by-case basis in light of the fact specific nature of particular preemption inquiries.”<sup>65</sup>

The Obama administration’s policy of applying legacy common carrier 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, in 2018 the Trump administration’s FCC reversed the *2015 Open Internet Order* with its *RIFO* and returned broadband internet access back to a “light touch” regulatory regime under Title I subject to exclusive federal jurisdiction.<sup>66</sup>

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 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.<sup>67</sup>

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.”<sup>68</sup> 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.”<sup>69</sup> 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.”<sup>70</sup>

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*,<sup>71</sup> and second, that the Commission has independent authority to displace state and

59 *Lange*, 903 F.3d at 719.

60 *Id.* at 718 (citations omitted).

61 Protecting and Promoting the Open Internet, FCC 10-201, REPORT AND ORDER ON REMAND, DECLARATORY RULING, AND ORDER, 30 FCC Rcd 5601 (2015), *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) (hereinafter “*2015 Open Internet Order*”). For a thorough critique of the legal gymnastics used in these decisions, see L.J. Spiwak, *US Telecom and its Aftermath*, *supra* note 9.

62 *2015 Open Internet Order*, *supra* note 61 at ¶ 433.

63 See, e.g., *Federalist Implications of the FCC’s Open Internet Order*, *supra* note 1; 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 *2015 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).

64 *2015 Open Internet Order*, *supra* note 61 at ¶ 433.

65 *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. *Id.*

66 *RIFO*, *supra* note 20 at ¶¶ 95-98.

67 *Id.*

68 *Id.* at ¶ 194.

69 *Id.*

70 *Id.* at ¶ 195.

71 476 U.S. at 375 n.4.

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 impossibility exception to state jurisdiction, the FCC may preempt state law when (a) it is impossible or impractical 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 objectives.<sup>72</sup> 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*.<sup>73</sup>

The Commission 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.”<sup>74</sup> 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.”<sup>75</sup> 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 under the impossibility exception to be satisfied.<sup>76</sup> 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*.<sup>77</sup>

### 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.<sup>78</sup> According to the Commission, multiple provisions of the 1996 Act “confirm Congress’s approval of our preemptive federal policy of nonregulation for information services.”<sup>79</sup> 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.”<sup>80</sup> 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.”<sup>81</sup> As the Commission highlighted, this statutory language “forbids any common-carriage regulation, whether federal or state, of information services.”<sup>82</sup>

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.<sup>83</sup> 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.”<sup>84</sup> 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.<sup>85</sup>

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.”<sup>86</sup>

### C. *The States Respond to the RIFO*

Needless to say, advocates for aggressive regulation of the internet were not thrilled with the FCC’s *RIFO*. They launched a two-pronged counterattack. First, seeking more politically friendly forums, these advocates shifted their attention to state legislatures.<sup>87</sup> Some of these efforts proved successful. For example, New Jersey, Oregon, Vermont, and Washington have all enacted legislation or adopted resolutions supporting the regulation of the internet.<sup>88</sup> Most notably, in 2018 California

<sup>72</sup> See *supra* note 6.

<sup>73</sup> *RIFO*, *supra* note 20 at ¶ 198.

<sup>74</sup> *Id.* at ¶ 200.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at ¶ 201.

<sup>78</sup> *Id.* at ¶ 202.

<sup>79</sup> *Id.* at ¶ 203.

<sup>80</sup> *Id.* (citing 47 U.S.C. § 253(b)(2)).

<sup>81</sup> 47 U.S.C. § 153(51).

<sup>82</sup> *RIFO*, *supra* note 20 at ¶ 203 (citations omitted).

<sup>83</sup> *Id.* at ¶ 204 (citing 47 U.S.C. § 160(e)).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See, e.g., Fight for the Future, *These States Are Fighting for Net Neutrality. Is Yours One of Them?* (visited Jan. 28, 2020), <https://actionnetwork.org/petitions/these-states-are-fighting-for-net-neutrality-is-yours-one-of-them>.

<sup>88</sup> H. Morton, *Net Neutrality Legislation in States*, National Conference of State Legislatures (Jan. 23, 2019), available at <https://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-legislation-in-states.aspx>.

passed a sweeping net neutrality law which, by some accounts, went well-beyond the FCC's 2015 *Open Internet Order* by, among other things, banning "zero rating" of broadband services.<sup>89</sup> As of this writing, the Vermont and California laws are both in litigation, and both states have agreed to suspend enforcement until the appeals process for the D.C. Circuit's ruling in *Mozilla* is ultimately resolved.<sup>90</sup> The second prong of the counterattack, as detailed in the next section, involved the *Mozilla v. FCC* lawsuit, in which several states successfully challenged the Commission's preemption efforts.

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

As with all other net neutrality rulings from the FCC, the *RIFO* was appealed. Grounding its decision in the Supreme Court's ruling in *Brand X*,<sup>91</sup> the D.C. Circuit in *Mozilla* affirmed the Agency's decision to re-reclassify broadband internet access back to a Title I information service.<sup>92</sup> But, to the surprise of many, the court also rejected the Commission's statutory 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*.

#### A. *Per Curiam* Majority Opinion

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 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."<sup>93</sup> This lack of statutory authority, reasoned the court, was "fatal" to the Commission's effort to invoke express preemption.<sup>94</sup>

#### 1. Statutory Abdication

The crux of the court's decision was its determination that when the FCC deliberately placed "broadband *outside* of its Title II jurisdiction" by reclassifying it as a Title I information service,<sup>95</sup> the Commission had essentially abdicated *all* legal authority (express or ancillary) under Title II.<sup>96</sup> 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.<sup>97</sup> 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."<sup>98</sup> 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.<sup>99</sup>

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 the 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

89 See, e.g., Remarks of FCC Chairman Ajit Pai at the Maine Heritage Policy Center, Portland, Me (Sept. 14, 2018), available at <https://docs.fcc.gov/public/attachments/DOC-354099A1.pdf>. For those unfamiliar with the term, a common example of "zero rating" would be when a carrier exempted particular data from counting against a user's data cap.

90 See, e.g., H. Kelly, *California Just Passed Its Net Neutrality Law. The DOJ Is Already Suing*, CNN BUSINESS (Oct. 1, 2018), available at <https://www.cnn.com/2018/10/01/tech/california-net-neutrality-law/index.html>; K. Finley, *California Will Pause Net Neutrality Law for Federal Suit*, WIRED, Oct. 26, 2018, available at <https://www.wired.com/story/california-will-pause-net-neutrality-law-for-federal-suit>. J. Eggerton, *ISPs, Vermont Agree to Delay Net Neutrality Preemption Fight, Court Agrees to Stay Case Until Net Neutrality Decision*, BROADCASTING AND CABLE (March 18, 2019), available at <https://www.broadcastingcable.com/news/isps-vermont-agree-to-delay-net-neutrality-preemption-fight>.

91 *Brand X*, 545 U.S. at 980–81.

92 *Mozilla*, *supra* note 19. As this article was going to press, Justice Thomas—the author of *Brand X*—dropped another bombshell in his dissent in *Baldwin v. United States*, 140 S. Ct. 690 (2020). The Justice asked the Court to revisit *Brand X* because he has come to believe that his earlier reasoning "appears to be inconsistent with the Constitution, the Administrative Procedure Act (APA), and traditional tools of statutory interpretation." *Id.* at 690. Needless to say, any revision of *Brand X* would have direct and significant consequences for the first portion of the majority's reasoning in *Mozilla*. Discussion of this question is mercifully beyond the scope of this paper.

93 *Mozilla*, 940 F.3d at 74.

94 *Id.*

95 *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.

96 *Id.*

97 *Id.*

98 *Id.* at 76.

99 *Id.* Under well-established law, courts do not consider Title I to be an independent source of regulatory authority. As such, ancillary jurisdiction exists only when "(1) the Commission's general jurisdictional grant under Title I of the Communications Act covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." Courts generally take this to mean those "statutorily mandated responsibilities" dictated by Titles II, III, or VI of the Act. *Mozilla*, 940 F.3d at 76. For a full discussion of the Commission's ancillary jurisdiction, see L.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 those remaining within the States' wheelhouse."<sup>100</sup> "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."<sup>101</sup>

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."<sup>102</sup> As noted above, the Agency in its *RIFO* had 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.<sup>103</sup>

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."<sup>104</sup> 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.<sup>105</sup>

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."<sup>106</sup> 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."<sup>107</sup>

## 2. 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 specific state regulation occurs.'<sup>108</sup> 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*]."<sup>109</sup> Still, the court ruled that if "the Commission can explain how a state practice actually undermines the [*RIFO*], then it can invoke conflict preemption."<sup>110</sup> 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.<sup>111</sup>

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."<sup>112</sup>

## B. 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."<sup>113</sup>

While Judge Williams agreed with the majority that (1) congressional authority was an essential prerequisite to preemption, and that (2) Congress did not afford the Agency *express* authority to preempt, Judge Williams pointed out that, under Supreme Court precedent, "a federal agency's authority to

<sup>100</sup> *Mozilla*, 940 F.3d at 77 (citations omitted).

<sup>101</sup> *Id.* at 78.

<sup>102</sup> *Id.*

<sup>103</sup> *RIFO*, *supra* note 20 at ¶ 204.

<sup>104</sup> *Mozilla*, 940 F.3d at 79.

<sup>105</sup> *Id.* at 83

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 81-82 (quoting *Alascom, Inc. v. F.C.C.*, 727 F.2d 1212, 1220 (D.C. Cir. 1984)).

<sup>109</sup> *Id.* at 82. As noted above in Section II, 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.

<sup>110</sup> *Id.* at 85 (citations omitted).

<sup>111</sup> *Id.* (emphasis supplied and citations omitted).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 98.

preempt state law need not be expressly granted.”<sup>114</sup> 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.<sup>115</sup>

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.<sup>116</sup> 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.”<sup>117</sup>

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.”<sup>118</sup> In Judge Williams’ view, the “majority staunchly believes that preemption serves solely to protect *affirmative* federal *regulations*.”<sup>119</sup> Judge Williams contended that the majority’s view was in error because:

If 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.”<sup>120</sup>

In fact, argued Judge Williams, the practical effect of the majority’s view that “*only* an agency’s possession of affirmative regulatory authority can support authority to preempt state regulation” is that “because of the impossibility of separation,” state regulation—which nominally applies only to intrastate communications—would “in practice engulf[] interstate communications.”<sup>121</sup>

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.”<sup>122</sup> 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.”<sup>123</sup> As such, “when the Commission adopts a deregulatory regime under Title I, there’s no there there.”<sup>124</sup> 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.”<sup>125</sup>

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 [sic] VI of the Act.”<sup>126</sup> 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.<sup>127</sup>

Finally, Judge Williams argued that the majority’s statutory abdication logic was, in his words, “inapplicable.”<sup>128</sup> As Judge Williams explained, given the D.C. Circuit’s ruling in *USTelecom v. FCC*,<sup>129</sup> the Commission has authority to apply Title II to broadband. But by returning broadband internet access back to a Title I information service, the Commission simply “forsook any *current* intention to use Title II vis-à-vis broadband.”<sup>130</sup> In other words, 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

114 *Id.* at 96 (citations omitted).

115 *Id.* (citations omitted).

116 *Id.* at 100 (emphasis in original).

117 *Id.* at 104-05.

118 *Id.* at 99 (emphasis in original).

119 *Id.* (emphasis in original).

120 *Id.* at 99-100.

121 *Id.* at 100 (emphasis in original).

122 *Id.* at 106.

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.* (citations omitted and emphasis in original).

127 *Id.* (citations omitted).

128 *Id.* at 101.

129 825 F.3d 674.

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

authorities granted under Title II, remained.”<sup>131</sup> Accordingly, argued Judge Williams, “*the Commission’s choice not to exercise a power is not a permanent renunciation of that power.*”<sup>132</sup>

#### IV. SOME ADDITIONAL THOUGHTS AND OBSERVATIONS ON MOZILLA

In addition to Judge William’s critiques, there are a few other glaring oddities in the majority’s reasoning on preemption that bear highlighting.

##### A. Problem #1: The Majority in Mozilla Erroneously Believes There is an “Intrastate” Internet

After digesting the majority’s decision in *Mozilla*, it becomes clear that the majority’s entire reasoning rests upon a single factual predicate—i.e., that there is a viable and indispensable intrastate component to the operation of the internet that states are free to regulate. As the court wrote, the FCC’s efforts to “kick the States out of intrastate broadband regulation . . . overlooks the Communications Act’s vision of dual federal-state authority and cooperation in this area specifically.”<sup>133</sup> This factual predicate is simply wrong.

To begin, it is unclear exactly where in the Communications Act the court finds support for such a predicate—the statutes the majority points to for support offer no help. These provisions include 47 U.S.C. § 1301 et. seq., which basically sets up the broadband mapping and affiliated grant program under the 2008 Broadband Data Improvement Act; the now-hortatory Section 706 from the Telecommunications Act of 1996 (a reclassification, ironically, approved by the majority in *Mozilla*<sup>134</sup>); and Section 254 of the Communications Act, which deals with universal service.<sup>135</sup> While these assorted statutes do provide states with a role to work cooperatively with the FCC in areas of subsidy collection and distribution, the notion that these statutes provide a clear statement by Congress that each respective state should be able to regulate as it pleases the rates, terms and conditions—and, by extension, the network management practices of ISPs—over what is obviously an interstate service strains credulity.

131 *Id.*

132 *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 unregulated, 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). See *supra* note 110.

133 *Mozilla*, 940 F.3d at 80-81.

134 *Id.* at 45-46. Prior to the *RIFO*, the Commission ruled, and the D.C. Circuit affirmed, that Section 706 provided an independent and affirmative grant of regulatory authority. For the bounds, and ultimately the abuses, of that authority, see Spiwak, *What Are the Bounds of the FCC’s Authority over Broadband Service Providers?*, *supra* note 99; and Spiwak, *USTelecom and its Aftermath*, *supra* note 9.

135 *Mozilla*, 940 F.3d at 81 (citations omitted).

More directly, the majority’s factual predicate bears no relationship to how the internet actually works. As highlighted in the cases discussed in this article, for almost twenty years the Commission has repeatedly demonstrated the absurdity of the court’s belief that there is a separate and distinct intrastate component to the internet.<sup>136</sup> Indeed, noted Judge Williams, if “Internet communications were tidily divided into federal markets and readily severable state markets, this might be no problem. But no modern user of the Internet can believe for a second in such tidy isolation . . .”<sup>137</sup> Given the D.C. Circuit’s past practice of according great deference to the Commission’s factual findings in other net neutrality litigation (deference often to the point of absurdity<sup>138</sup>), it is quite odd that the court petulantly rejected the Agency’s expert determination that broadband internet access is an interstate service—a view that the Agency has articulated consistently and repeatedly for nearly twenty years—in this particular case.<sup>139</sup> Either the D.C. Circuit wants to operate (as Judge Williams wrote) in the “real world” or it does not.<sup>140</sup>

##### B. Problem #2: The D.C. Circuit Takes An Analytically Inconsistent View of the FCC’s Alleged Statutory Abdication of its Title II Authority

As noted in Section II.A.1, the majority in *Mozilla* rejected the argument that the Commission’s Preemption Directive was supported by ancillary jurisdiction because the Agency had specifically disavowed its authority under Title II by reclassifying broadband Internet access as a Title I information service and that therefore there was no specific statutory authority to which the Commission’s preemption efforts were ancillary.<sup>141</sup> While this conclusion was perhaps made easier for the court because the Commission never claimed ancillary authority for its Preemption Directive in the *RIFO* or in its briefs,<sup>142</sup> it is hard to reconcile the court’s hostility to the use of ancillary jurisdiction for preemption purposes with its finding that it was perfectly acceptable for the Commission to adopt its transparency rule under Section 257 of the Communications Act.

By way of background, a central component of the *RIFO* was the Commission’s adoption of a transparency rule. Under this rule,

Any person providing broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient to enable consumers to make informed choices regarding the purchase

136 See, e.g., the discussions of the *Pulver Order*, *supra* Section I.A, and the *RIFO*, *supra* Section II.

137 *Mozilla*, 940 F.3d at 95.

138 See Spiwak, *USTelecom and its Aftermath*, *supra* note 9.

139 *C.f. id.*

140 *Mozilla*, 940 F.3d at 95.

141 *Id.*

142 *Id.* at 76. Why the Commission adopted this legal strategy is unclear, particularly as the agency made the specific point in the *Pulver Order* that it retained its ancillary jurisdiction authority over Title I services. See *supra* note 47 and accompanying text.

and use of such services and entrepreneurs and other small businesses to develop, market, and maintain Internet offerings. Such disclosure shall be made via a publicly available, easily accessible website or through transmittal to the Commission.<sup>143</sup>

The Commission's legal logic behind this transparency rule was straightforward: By requiring ISPs to outline their business practices and service offerings forthrightly and honestly, if ISPs nonetheless engaged in anticompetitive, unfair, or deceptive conduct in violation of these stated terms, then the Federal Trade Commission could take action under Section 5 of the FTC Act.<sup>144</sup>

To justify the imposition of the transparency rule, the Commission relied upon Section 257 of the Communications Act—a statutory provision which falls squarely under Title II.<sup>145</sup> Section 257(a) directs the Commission to “identify[] and eliminat[e] . . . market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services.” Section 257(a) set a deadline of 15 months from the enactment of the 1996 Act for the Commission's initial effort to fulfill its mandate, and Section 257(c) directs the Commission, triennially thereafter, to report to Congress on such marketplace barriers and how they have been addressed by regulation or could be addressed by recommended statutory changes.<sup>146</sup>

The Commission reasoned that Section 257(c) is properly understood as imposing a continuing obligation on the Agency to identify barriers described in section 257(a) that may emerge in the future, rather than limited to those identified in the original section 257(a) proceeding. In the Commission's view, “because Sections 257(a) and (c) clearly anticipate that the Commission and Congress would take steps to help eliminate previously-identified marketplace barriers, limiting the triennial reports only to those barriers identified in the original section 257(a) proceeding could make such reports of little to no ongoing value over time.”<sup>147</sup> Accordingly, the Commission found it

far more reasonable to interpret section 257(c) as contemplating that the Commission will perform an ongoing market review to identify any new barriers to entry, and that the statutory duty to “identify and eliminate” implicitly empowers the Commission to require disclosures from those third parties who possess the information necessary for the Commission and Congress to find and remedy market entry barriers.<sup>148</sup>

As such, argued the Commission, its use of Section 257 was justified because “[o]ur disclosure requirements will help us

both identify and address potential market entry barriers in the provision and ownership of information services and the provision of parts and services to information service providers.”<sup>149</sup>

Yet despite the majority's steadfast view that preemption of state regulation of the internet was inappropriate because the Commission had abdicated all authority under Title II, the majority nonetheless accepted the Commission's Section 257 argument and upheld the transparency rule. To do so, the court drew water from the *Chevron* deference well: finding that the relevant language in Section 257 is sufficiently ambiguous—in particular, that Congress did not prescribe the means of “identifying” market barriers—the majority found that the Commission permissibly read the clause to apply only to the elimination of market barriers.<sup>150</sup>

But the logical problem with the majority's decisions is readily apparent: On the one hand the court's entire preemption argument rests upon the finding that the Commission affirmatively abdicated *all* authority under Title II, yet at the same time the court found it perfectly acceptable for the Commission to base its transparency rule on Section 257—a section of the statute which is unambiguously housed in Title II. The majority should not be allowed to have its cake and eat it too.

### *C. Problem #3: Absent Preemption, What About Extra-Jurisdictional Effects From Inconsistent State Regulation?*

Another striking point about the majority's reasoning in *Mozilla* was a conspicuous absence of any discussion of Dormant Commerce Clause implications. Indeed, one does not have to be an expert to understand that allowing each state to regulate the rates, terms, and conditions of ISPs' service offerings as it deems fit will have adverse extra-jurisdictional effects on interstate commerce. The FCC recognized this problem nearly twenty years ago in the *Pulver Order*, and the economics of broadband deployment have not changed since then. When, as here, these extra-jurisdictional effects are significant, courts have not hesitated to hold that preemption is appropriate.<sup>151</sup>

A 2008 paper published in *CommLaw Spectus* explains clearly the problem of having providers of a national service comply with different state rules—some of which may even go farther than the national rules.<sup>152</sup> As the paper's economic model details, when state law applies to a product or service that is actually national in scope such as telecommunications or the internet, even if each state acts with the purest of intentions to protect their respective constituents' interests, there is the risk of harmful conflicts in the rules as the states will inevitably vary in their legal regimes. As a result, there will be extra-jurisdictional

143 *RIFO*, *supra* note 20 at ¶ 215.

144 *See generally id.* at ¶ 244.

145 47 U.S.C. § 257.

146 *Id.*

147 *RIFO*, *supra* note 20 at ¶ 232.

148 *Id.*

149 *Id.* at ¶ 233.

150 *Mozilla*, 940 F.3d at 47.

151 *See, e.g.,* Cotto Waxo Co. v. Williams, 46 F.3d 790, 793 (8th Cir. 1995) (“Under the Commerce Clause, a state regulation is *per se* invalid when it has an ‘extraterritorial reach,’ that is, when the statute has the practical effect of controlling conduct beyond the boundaries of the state. The Commerce Clause precludes application of a state statute to commerce that takes place wholly outside of the state's borders.”) (citation omitted).

152 *See Developing a National Wireless Regulatory Framework: A Law and Economics Approach*, *supra* note 1.

effects of state-by-state regulation on a national service, making society worse off. To quote former FCC Chief Economist Michael Katz on state-level business rules, “policies that make entry difficult in one geographic area may raise the overall cost of entering the industry and thus reduce the speed at which entry occurs in other areas.”<sup>153</sup> Accordingly, when state and local regulation can spill across borders, economic theory dictates that society is typically better off with a single national regulatory framework.

More to the point, firms are not passive recipients of regulation. If we have learned anything from the FCC’s 2015 efforts to impose legacy common carrier regulation on the internet at the federal level, it is that firms will not invest aggressively in the massive sunk costs necessary to widely deploy broadband when their economic profits are threatened.<sup>154</sup> Given this evidence, it is not unreasonable to expect that a potential Death by Fifty State Regulatory Cuts will send a similar chilling effect on the investment decision of ISPs. Accordingly, it strains credulity to argue that allowing the aggressive and, more importantly, *inconsistent* regulation of the internet from fifty different states will do anything to fulfill the congressional mandate in Section 230 for the FCC to “promote the continued development of the Internet”<sup>155</sup> and the now-hortatory command in Section 706 for the Agency to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”<sup>156</sup>

*D. Problem #4: Under the Majority’s Own Logic, the Communications Act Argues for “Categorical” Express Preemption*

As noted above in Section II.A, the majority in *Mozilla* rejected the Commission’s categorical express preemption of state internet regulation because the Agency “fail[ed] to ground its sweeping Preemption Directive . . . in a lawful source of statutory authority” in Title II.<sup>157</sup> However, while the majority would not condone the Agency’s efforts to categorically preempt state regulation in the *RIFO*, it seemed to hold open the door to entertaining future arguments about possible conflict preemption provided the Commission could make a specific showing of where state rules conflict with its federal policy of nonregulation by classifying broadband internet access as an information service

under Title I. But if the court is going to be a stickler for forcing the Commission to remain within the four corners of Title I, then the court cannot sweep Section 3(51) of the Act under the rug when trying to solve questions of conflict preemption. Indeed, if Section 3(51) is to have any meaning, then a conflict between state and federal policy regimes is right in front of our eyes and we need not to wait for future litigation.

Under the express terms of Section 3(51), 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.”<sup>158</sup> In other words, the Communications Act expressly prohibits an information service from being treated as a common carrier service.<sup>159</sup> As noted above, this is why for nearly twenty years the Commission made the affirmative decision to classify broadband internet access as a Title I information service: to ensure specifically that such offerings would not be subject to common carrier price regulation by either subsequent Commissions or state governments.<sup>160</sup>

But consider a scenario in which, despite the FCC’s classification of broadband internet access as a Title I information service, some states nonetheless decide to pass laws that would allow their respective public service commissions to regulate the price, terms, and conditions of ISPs. In so doing, these states are—by definition—attempting to treat information services as common carriers despite the FCC’s decision to impose the contrary result.<sup>161</sup> Such state efforts should be considered *prima facie* evidence of a categorical conflict between state and federal policy regimes, making individual showings of conflict preemption unnecessary and wasteful of the judiciary’s

158 47 U.S.C. § 153(51).

159 In fact, the agency’s attempt to effectively treat Title I services as common carriers was the central reason why the D.C. Circuit struck down the FCC’s 2010 net neutrality rules in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

160 See *supra* Section I. Contrary to popular belief, net neutrality regulation is unambiguously price regulation of the internet. As the D.C. Circuit in *Verizon v. FCC*—and ultimately the Commission in its *RIFO*—expressly recognized, the central pillars of the agency’s 2015 *Open Internet Order*—i.e., the “no paid prioritization” rule and the “no blocking” rule—amounted to nothing more than “zero price” rate regulation. See *Verizon*, 740 F.3d at 657 (such rules were intended to “bar providers from charging edge providers for using their service, thus forcing them to sell this service to all who ask at a price of \$0.”); *Id.* at 668 (Silberman, J., dissenting) (with intent, the Commission’s rules establish “a regulated price of zero”); *RIFO*, *supra* note 20 at ¶ 101 (The 2015 *Open Internet Order* “imposed price regulation with its ban on paid prioritization arrangements, which mandated that ISPs charge edge providers a zero price.”). For a full discussion, see G.S Ford and L.J. Spiwak, *Tariffing Internet Termination*, 67 FED. COMM. L.J. 1 (2015), available at <http://www.fclj.org/wp-content/uploads/2015/02/Tariffing-Internet-Termination.pdf>; Spiwak, *US Telecom and its Aftermath*, *supra* note 9. Accordingly, one could argue that the Commission’s decision not to impose price regulation on broadband internet access in the *RIFO* was not an act of regulatory abdication of its responsibilities under Title I; instead, the Commission’s decision was a laudable act of deregulatory precision. Cf., *Arkansas Electric*, *supra* note 132.

161 Indeed, the D.C. Circuit in *Verizon v. FCC*, specifically held that the FCC may not classify broadband internet access as a Title I service yet effectively attempt to regulate it as a common carrier service under Title II. 740 F.3d 623.

153 M.L. Katz, *Regulation: The Next 1000 Years*, in SIX DEGREES OF COMPETITION: CORRELATING REGULATION WITH THE TELECOMMUNICATIONS MARKETPLACE 27, 44 (2000).

154 G.S. Ford, *Regulation and investment in the U.S. telecommunications industry*, 56 APPLIED ECONOMICS 6073-6084 (2018), available at <https://www.tandfonline.com/doi/abs/10.1080/00036846.2018.1489115>.

155 47 U.S.C. § 230(b)(1).

156 47 U.S.C. § 1302(a). Whether the Court will view this investment problem through a Dormant Commerce Clause lens or as a policy dispute better left to Congress remains to be seen. Cf., *Louisiana Public Service Commission*, 476 U.S. at 359; *Nixon v. Missouri Municipal League*, 541 U.S. 124, 131-32 (2004) (“[I]t is well to put aside” the public policy arguments favoring municipal broadband to support any “generous conception of preemption” because the issue of preemption is one of constitutional law and, as such, “the issue does not turn on the merits of municipal telecommunications services.”).

157 *Mozilla*, 940 F.3d at 74.

resources.<sup>162</sup> The *Mozilla* majority recognized that the FCC’s information service classification might well establish a predicate for applying conflict preemption—e.g., in an individual case involving a state law that imposes common carrier obligations on broadband providers despite their federally recognized status as information service providers. But the court should have taken the next logical step of recognizing the categorical conflict that exists in such circumstances without requiring case-by-case adjudications.

#### V. QUESTIONS RAISED BY JUSTICE THOMAS IN *LIPSCHULTZ V. CHARTER*

As highlighted above in Section I, shortly after the D.C. Circuit released its ruling in *Mozilla*, Justice Thomas—with whom Justice Gorsuch joined—issued a very interesting separate statement concurring in the Court’s denial of certiorari in *Lipschultz v. Charter*. 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.”<sup>163</sup>

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.”<sup>164</sup> 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 ‘Constitution’ [or] the ‘Laws of the United States.’”<sup>165</sup> 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.”

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.’”<sup>166</sup> 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.”<sup>167</sup>

Given the remarkably coincidental timing with the D.C. Circuit’s ruling in *Mozilla* (along with the similar legal issues), is *Mozilla* the case Justice Thomas invited in *Lipschultz*? And if one of the *Mozilla* parties files for certiorari and the Supreme Court takes the case, are Justices Thomas and Gorsuch endorsing the majority’s view in *Mozilla* that by “stepping off the Title II escalator,” the FCC lacks any preemption authority because Title I is not an affirmative grant of authority “that was produced through the constitutionally required bicameral and presentment procedures”? It is impossible to know for sure and, given that *Mozilla* is still in litigation as of this writing, it would be inappropriate to comment further. But Justices Thomas and Gorsuch have given interested parties much to ponder as we wait to see what will happen as the *Mozilla* case proceeds.

#### VI. CONCLUSION

For nearly two decades, the notion that IP-enabled services should be treated as information services under Title I of the Communications Act subject to exclusive federal jurisdiction was a cornerstone of federal broadband policy. With the D.C. Circuit’s ruling in *Mozilla*, the legality of this policy is now in dispute. Adding to this legal uncertainty, shortly after the D.C. Circuit released its decision in *Mozilla*, two Supreme Court Justices invited an “appropriate case” in which the Court “should consider whether a federal agency’s policy can preempt state law.” Where this litigation ultimately ends up is anyone’s guess.

But as the courts wrangle through the complex issue of preemption in this case, one thing is for sure: these legal uncertainties regarding the appropriate jurisdictional roles of the states and the federal government vis-à-vis the internet do not benefit the American consumer. Unresolved questions over the appropriate respective jurisdictions of the federal government and the states over the internet—and, in particular, the FCC’s ability to preempt state regulatory efforts—will do nothing to increase broadband deployment or win the proverbial “race for 5G.” As noted above, firms are not passive recipients of regulation and the prospect of a potential Death by Fifty State Regulatory Cuts will chill investment of ISPs.<sup>168</sup>

Of course, the obvious option is for Congress to step in with bipartisan and comprehensive net neutrality legislation which includes clear federal preemption authority to end this dispute once and for all. It did so with Section 253 of the Telecommunications Act of 1996 for telecommunications services and could easily do the same for IP-enabled information services under Title I.

Unfortunately, given the vitriolic politics of broadband, the obvious path is rarely the one taken in Washington.

<sup>162</sup> The FCC alluded to this exact fact scenario in the *RIFO*. See *supra* at Section II.

<sup>163</sup> *Lipschultz*, 140 S. Ct. at 7.

<sup>164</sup> See U.S. CONST., art. VI, cl. 2.

<sup>165</sup> *Lipschultz*, 140 S. Ct. at 7 (citations omitted).

<sup>166</sup> *Id.* (citations omitted).

<sup>167</sup> *Id.* at 8 (citations omitted).

<sup>168</sup> Ford, *supra* note 154.

