ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1051 (and consolidated cases)

MOZILLA CORPORATION, *et al.*
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

On Petitions for Review of an Order
of the Federal Communications Commission

BRIEF OF PROFESSORS OF COMMUNICATIONS LAW AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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August 27, 2018

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Except for the following, all parties, intervenors, and amici appearing in this Court are listed in the Brief for Government Petitioners and the Joint Brief for Petitioners Mozilla Corporation et al.

The following parties have filed a notice or motion for leave to participate as amici as of the date of this filing:

- American Council on Education, et al.
- City of New York, et al.
- Computer & Communications Industry Association, et al.
- Consumers Union
- eBay, Inc.
- Electronic Frontier Foundation
- Engine Advocacy
- Members of Congress
- National Association of State Utility Consumer Advocates, et al.
- Professors Scott Jordan and Jon Peha
- Twilio, Inc.

B. Rulings Under Review

The ruling under review is the FCC's *Restoring Internet Freedom, Declaratory Ruling, Report, and Order*, 33 FCC Rcd. 311 (2018) (the "*Order*").

C. Related Cases

The *Order* has not previously been the subject of a petition for review by this Court or any other court. All petitions for review of the *Order* have been consolidated in this Court. This Court has previously considered earlier, related commission decisions in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), and *United States Telecom Association v. FCC*, 825 F.3d 673 (D.C. Cir. 2016), *reh'g denied* 855 F.3d 381 (D.C. Cir. 2017). The latter decision is the subject of the following pending petitions for writs of certiorari in the Supreme Court of the United States: *Daniel Berninger v. FCC*, No. 17-498; *AT&T Inc. v. FCC*, No. 17-499; *American Cable Ass'n v. FCC*, No. 17-500; *CTIA-The Wireless Ass'n v. FCC*, No. 17-501; *NCTA-The Internet & TV Ass'n v. FCC*, No. 17-502; *TechFreedom v. FCC*, No. 17-503; *U.S. Telecom Ass'n v. FCC*, No. 17-504.

CERTIFICATE REGARDING AUTHORITY TO FILE AND SEPARATE BRIEFING

All Petitioners, Respondents, and Intervenors have consented to or represented that they do not oppose the filing of this brief. *Amici* filed a Notice of Intention to Participate as *Amici Curiae* on August 21, 2018.

Pursuant to D.C. Circuit Rule 29(d), *amici curiae* certify that they are submitting a separate brief from other *amici* because of the specialized nature of each *amicus*'s distinct interests and expertise. *Amici* are scholars and teachers of federal communications law. In submitting this brief, they draw upon their academic expertise to articulate and defend the position that the Federal Communications Commission's *Restoring Internet Freedom* order does not lawfully preempt state regulation of broadband internet access service. *Amici* anticipate an amicus brief on behalf of the City of New York and other municipalities that will in part address preemption issues. That brief will also address the impact of the FCC's preemption decision on public safety, a topic that *amici* do not address. As government entities, moreover, the municipalities have interests distinct from academic scholars of communications. Given those divergent interests, *amici* certify that filing a joint brief would not be practicable.

/s/ *Michael J. Burstein*
Michael J. Burstein

August 27, 2018

Counsel for Amici Curiae

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STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Government Petitioners and the Joint Brief for Petitioners Mozilla Corporation, et al.

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who write and teach about federal communications law.[2] *Amici* take no or varying positions about the merits of the Federal Communications Commission's *Restoring Internet Freedom Order*, but have a shared interest in ensuring the proper balance between federal and state communications regulation. *Amici* are deeply concerned that the Commission in this case has exceeded its authority to preempt state law, thereby disrupting the balance that Congress sought to secure in the Communications Act. *Amici* submit this brief to articulate their view, from a scholarly perspective, of the proper reach of Commission preemption authority.

[1] Pursuant to Fed. R. App. P. 29(4)(E), *amici curiae* state that no party's counsel authored this brief in whole or in part. No party or party's counsel, nor any other person other than *amici curia* or their counsel, made a monetary contribution to fund the preparation or submission of this brief.

[2] A complete list of *amici* can be found in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the Order under review, the Commission claims sweeping authority to preempt state and local regulation of broadband internet access service. See ¶¶ 194-204 (JA __ - __). But apart from those ten paragraphs, the rest of the Order is devoted to the argument that the Commission lacks any statutory authority to regulate that service. The Commission cannot have it both ways. It cannot on the one hand disclaim authority to regulate while on the other hand claim vast authority to preempt with respect to the same subject matter. The Commission's deregulation of broadband internet access service does not "establish[] a calibrated federal regulatory regime," id. ¶ 194, by the exercise of lawful authority. It instead leaves a regulatory vacuum because the Commission, on its own account, lacks authority to do otherwise. Nothing authorizes the Commission to preclude the states from stepping into the breach.

I. Federal agencies can only preempt state law when authorized to do so by Congress. The Commission must therefore demonstrate that it either has direct authority to preempt state broadband regulations or that it has authority to do so that is ancillary to its exercise of a direct authority. Because the Commission has reclassified broadband internet access service as an "information service," its direct authority to preempt under Title II is unavailable. Yet the Commission has also affirmatively disclaimed any potential source of ancillary authority over broadband

internet access service. As this Court's decision in Comcast Corp. v. FCC, 600 F.3d 642 (2010) makes clear, preemption no less than regulation requires ancillary authority. The Commission therefore does not have the statutory authority to enact its sweeping preemption here.

II. None of the Commission's proffered justifications for preemption in the absence of direct or ancillary authority withstand scrutiny.

First, the Commission's invocation of the "impossibility exception," Order ¶¶ 198-201, ignores the fact that that narrow exception to the jurisdictional bar on Commission regulation of intrastate services requires as a prerequisite the assertion of lawful authority over an interstate service. Because the Commission makes no such assertion here, the impossibility exception is beside the point.

Second, the Commission's argument (see id. ¶¶ 202-203) that Congress has approved a broad national policy of deregulation—even if true—does not support preemption of state law. It is well settled that preemption cannot be authorized through policy statements alone, and the Commission points to no statutory authority for its action.

Third, there is no "incongruity," id. ¶ 204, between Congress's decisions in section 160(e) to preempt state commissions from continuing to enforce provisions in Title II that the Commission has forborne from and not to do so when the Commission is not otherwise authorized to act under Title I.

ARGUMENT

I. THE COMMISSION HAS FAILED TO DEMONSTRATE ITS AUTHORITY TO PREEMPT STATE NET NEUTRALITY LAWS

It is well established that "a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority." *New York v. FERC,* 535 U.S. 1, 18 (2002) (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)). After all, "an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Louisiana PSC*, 476 U.S. at 374. Preemption, in other words, requires no less an act of congressional delegation than regulation. A court reviewing the lawfulness of an agency's preemption decision must therefore determine whether "Congress has conferred authority upon the agency" so to act, *New York*, 535 U.S. at 18, by "examin[ing] the nature and scope of authority granted by Congress to the agency," *Louisiana PSC*, 476 U.S. at 374.

In this case, the Commission claims sweeping authority to preempt "any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in [the *Order*] or that would impose more stringent requirements for any aspect of broadband service that we address in [the *Order*.]" *Order* ¶ 195 (JA __). Although the Commission is not clear about the scope of its preemption, is purports to prevent states from enacting

any "economic or public utility-type" regulations of broadband internet access. *Id.*; *see id.* ¶ 195 n.730 (defining "economic regulation"). At the very least, this includes the repealed Internet Conduct Standard, *see id.* ¶¶ 246-252 (JA __ - __), and the repealed rules prohibiting paid prioritization of content, *see id.* ¶¶ 253-262 (JA __ - __), and banning blocking and throttling of content, *see id.* ¶¶ 263-266 (JA __ - __).[3]

The Commission cites no direct authority to preempt such state regulation. Nor could it. The Commission's direct power to enact and preempt such rules is contained in Title II of the Communications Act of 1934. *See, e.g.*, *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 695-96 (D.C. Cir. 2016). But the *Order* reclassifies broadband internet access service as an information service rather than a telecommunications service, thereby taking it out of the regulatory ambit of Title II. *See Order* ¶¶ 26-64 (JA __ - __). The preemption authority in Title II therefore cannot support the Commission's action here.[4]

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[3] The Commission also purports to preempt state disclosure laws that go beyond the transparency rule adopted in the *Order*. *See Order* ¶ 195 n.729 (JA __). We address this preemption *infra* note 6.

[4] The Commission similarly reclassified mobile broadband internet access service as an information service rather than a "commercial mobile service" subject to Title III of the Communications Act. *See Order* ¶¶ 65-85 (JA __ - __), thereby disclaiming that source of authority to enact or preempt net neutrality rules. The Commission also disclaims authority under Title VI of the Act. *See id.* ¶¶ 289-292 (JA __ - __).

Instead, the Commission must rely on its ancillary authority under Title I of the Act, 47 U.S.C. § 154(i). This Court has consistently held that the exercise of such authority is "constrained." *American Library Ass'n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005). "In order for the Commission to regulate under its ancillary jurisdiction, two conditions must be met. First, the subject of the regulation must be covered by the Commission's general grant of jurisdiction under Title I of the Communications Act. . . . Second, the subject of the regulation must be 'reasonably ancillary to the effective performance of the Commission's various responsibilities.'" *Id.* (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968)); *see also Comcast Corp. v. FCC*, 600 F.3d 642, 646-47 (D.C. Cir. 2010). These constraints apply to Commission preemption actions just as they apply to the Commission's affirmative regulations. In *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) ("*NARUC II*"), for example, this Court held that the Commission could not preempt state common carrier regulation of point-to-point two-way communication over cable lines (an early forerunner of voice over IP technology) because, although the Commission had *some* ancillary authority to regulate cable systems, the *specific* preemption action it sought to take was not "independently justified," *id.* at 612, by a sufficiently close relation to the Commission's express statutory authority over broadcasting. *See id.* at 615-17; *see also California v. FCC*, 905

F.2d 1217, 1240 n.35 (9th Cir. 1990) (holding ancillary authority to preempt must be tied to specific statutory authorization to regulate).

But just as with its direct authority, the Commission has affirmatively disclaimed *any* ancillary authority to regulate and preempt with respect to the internet conduct rules. *See Order* ¶¶ __ - __ (JA __ - __). To some extent, the Commission merely acted consistently with this Court's decision in *Comcast*. In that case, the Court rejected the Commission's previous attempt to require an internet service provider to adhere to neutral network management practices as ancillary to several different provisions in the Communications Act. In particular, the Court held first that section 230(b) of the Act was a mere policy statement, which could not support ancillary authority absent a connection to an express statutory delegation of regulatory responsibility. *See Comcast*, 600 F.3d at 654-55; *accord Order* ¶ 284 (JA __). The Court then went on to consider several potential delegations to which the power to enforce net neutrality could be ancillary and rejected each, concluding that the connection between the regulations and the delegated authority was too attenuated. *See Comcast*, 600 F.3d at 659-661 (citing 47 U.S.C. §§ 256, 257, 201, 623); *accord Order* ¶¶ 285-292 (JA __ - __).

In the *Order* here, however, the Commission went even further to limit its own power to regulate or preempt in this space. In *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), this court held that § 706 of the Telecommunications Act of

1996, which provides that "[t]he Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the telecommunications market, or other regulating methods that remove barriers to infrastructure investment," 47 U.S.C. § 1302(a), could reasonably be interpreted as a grant of regulatory authority sufficient to support the Commission's ancillary power to enact net neutrality rules. *See Verizon*, 740 F.3d at 636-37.[5] Yet here, the Commission has reversed the interpretation of § 706 that it put forth in *Verizon*, concluding that the provision is merely "hortatory" rather than a "grant[] of regulatory authority." *Order* ¶ 268 (JA __ - __).

The Commission here has therefore stripped itself of regulatory authority to enact economic regulation that furthers net neutrality. But in so doing, the Commission has not identified any statutory provision to which the act of preempting similar state laws would be reasonably ancillary.[6] In short, the

[5] The *Verizon* court nevertheless held that although "section 706 grants the Commission authority to . . . regulate how broadband providers treat edge providers," 740 F.3d at 649, the Commission could not regulate broadband internet access providers as common carriers without classifying them as telecommunications services subject to Title II. *See id.* at 656-69.

[6] The Commission claims ancillary authority to enact its transparency rule based on 47 U.S.C. § 257, which imposes on the Commission certain reporting obligations to Congress. *See Order* ¶¶ 232-234 (JA __ - __). Even if that provision supports

Commission cannot simultaneously claim that it is powerless to enact net neutrality rules *and* that it is nevertheless empowered to preempt state and local authority from doing so. In this case, regulation and preemption are two sides of the same ancillary authority coin.

As *Comcast*—which arose in the same regulatory setting as this case—explains, none of this Court's cases upholding the Commission's ancillary authority to preempt are to the contrary. In *Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), the Court sustained the Commission's preemption of state tariff regulation of customer premise equipment because that action was directly linked to the Commission's exercise of its common carrier ratemaking powers in Title II. *See id.* at 214-18; *Comcast*, 600 F.3d at 655-56. Similarly, in *National Association of Regulatory Utility Commissioners v. FCC*, 880 F.2d 422 (D.C. Cir. 1989) ("*NARUC III*"), the Commission validly preempted state regulation of "inside wiring" because that

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the transparency rule, *but see* Non-Gov't Pet. Br. 54-55, it does not support ancillary authority to *preempt* state disclosure obligations. In *Comcast*, this Court narrowly construed the scope of ancillary authority linked to section 257: "We readily accept that certain assertions of Commission authority could be reasonably ancillary to the Commission's statutory responsibility to issue a report to Congress. For example, the Commission might impose disclosure requirements on regulated entities in order to gather data needed for such a report." 600 F.3d at 659. It strains credulity to believe that *eliminating* state-based sources of information about the behavior of broadband internet providers is reasonably linked to the goal of informing a report to Congress.

action "was ancillary to its regulation of interstate phone service" under Title II. *See id.* at 429-30; *Comacst*, 600 F.3d at 657-58. Finally, the exercise of preemption authority over early forms of satellite television in *New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984), was not challenged on the ground that it exceeded the Commission's ancillary authority. *See id.* at 808. But even so, the Court in *Comcast* explained that the Commission's preemption there was linked to its Title III power to regulate broadcast television. *See* 600 F.3d at 656-57.

In each of these cases, the Court "sustained the exercise of ancillary authority" to preempt because "the Commission had linked the cited policies to express delegations of regulatory authority." *Id.* at 655. The Commission in this case has not even attempted to do so. To the contrary, it has expressly disclaimed such authority. The Commission therefore has not established that it has the statutory authority to override state net neutrality laws.

II. NONE OF THE COMMISSION'S ASSERTED GROUNDS FOR PREEMPTION SUPPORT THE *ORDER'S* ACTION

In the absence of clear statutory authority for its preemption order, the Commission relies on three alternative sources of legal authority. In a petition for review of agency action, of course, the action "must be measured by what the [agency] did, not by what it might have done." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). "It is not the role of the courts to speculate on reasons that *might have*

supported an agency's decision." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016). In this case, the agency itself styles three sources of "Legal Authority" in the *Order*. *See* ¶¶ 197-204 (JA __ - __).[7] None are persuasive.

A. The "Impossibility" Exception to Section 152(b) of the Communications Act is Not an Independent Source of Commission Authority to Preempt State Laws

The Commission's first argument for its authority to preempt state net neutrality laws relies on a judicially created doctrine known as the "impossibility exception." Contrary to the Commission's assertion, however, the impossibility exception is not, and has never been, a freestanding grant of authority that empowers the Commission to preempt state laws based on *nothing more* than a showing that "it is impossible or impracticable to regulate the intrastate aspects of a service without affecting interstate communications" and that the Commission believes such laws to "interfere with federal regulatory objectives." *Order* ¶ 198 (JA __). In fact, the impossibility exception only applies if the FCC has valid statutory authority to act with respect to the interstate aspects of the service at

[7] The Commission's offhand reference to "conflict preemption," *see Order* ¶ 200 (JA __), without further development, is therefore not one of its three arguments in favor of preemption. *See* Gov't Pet. Br. 48 & n.26. In all events, the Supreme Court has held that conflict preemption is inapposite in this circumstance. "Since the Commission has explicitly stated its intent to exercise exclusive authority in this area and to pre-empt state and local regulation, this case does not turn on whether there is an actual conflict between federal and state law." *City of New York*, 486 U.S. at 65-66. Instead, "the inquiry is whether the Commission is legally authorized to pre-empt state and local regulation." *Id.* at 66.

issue. As discussed in Part I, *supra*, the Commission here lacks ancillary authority over interstate broadband; it therefore cannot invoke the impossibility exception.

Section 152(b) is a jurisdictional bar that precludes the Commission from acting with respect to intrastate "charges, classifications, practices, services, facilities, or regulations." 47 U.S.C. § 152(b). The "impossibility exception" is a narrow exception to this jurisdictional bar that allows the Commission to regulate *intrastate* communications only if "an exercise of [a state's] authority [over intrastate communications] negates the exercise by the FCC *of its own lawful authority over interstate communications*." *NARUC III*, 880 F.2d at 429 (emphasis added). The impossibility exception does not provide the Commission with authority over interstate communications that does not already exist.[8]

This principle has its genesis in a footnote in the Supreme Court's decision in *Louisiana PSC*. *See* 476 U.S. at 375 n.4. In *Louisiana PSC*, the Supreme Court

[8] Although the terms are sometimes used interchangeably, the Commission's interstate *jurisdiction* is not the same as the Commission's *authority* to impose a particular regulation on interstate communications. Even when a service falls within the Commission's interstate jurisdiction—as broadband internet access likely does, at least to some extent, *see In re Promoting and Protecting the Open Internet*, 30 F.C.C. Rcd. 5601, 5803 n.1275 (2015) (citing precedents)—the Commission must still demonstrate that it has statutory authority to preempt state regulation of that service. *See Comcast*, 600 F.3d at 648 (distinguishing between the Commission's subject matter jurisdiction over broadband and its ancillary authority to impose regulations on broadband); *Global NAPs, Inc. v. Verizon New Eng. Inc.*, 444 F.3d 59, 71 (1st Cir. 2006) ("A matter may be subject to FCC jurisdiction, without the FCC having exercised that jurisdiction and preempted state regulation.").

rejected—as a violation of the section 152(b) jurisdictional bar—a Commission order that preempted state regulations concerning deprecation rates for intrastate ratemaking that were inconsistent with interstate rates prescribed by the Commission. *See id.* at 373. The parties agreed that the Commission's authority to adopt deprecation rates for *interstate* services was based on an express delegation of statutory authority in section 220 of the Communications Act. *See id.* at 366-368, 376-378. But the Court held there was no reason why state regulation of depreciation for the purpose of *intrastate* rates could not proceed. *See id.* at 373-76. In a footnote, the Court distinguished that situation from cases in which it was "not possible to separate the interstate and the intrastate components of the asserted FCC regulation," *id.* at 375 n.4, noting as well that in those cases, the "FCC acted within its authority." *Id.*

Subsequent cases interpreting the Supreme Court's brief footnote have consistently reiterated that lawful Commission authority to act at the interstate level is a prerequisite to applying the impossibility exception in order to overcome Section 152(b)'s jurisdictional bar. In *NARUC III*, this Court confronted an attempt by the Commission to preempt state regulation of the installation and maintenance of wiring inside customers' homes and businesses that was used for both interstate and intrastate communication. *See* 880 F.2d at 425. The Court explained that "the *only* limit that the Supreme Court has recognized on a state's authority over

intrastate telephone service occurs when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication." *Id.* at 429. Only once it established that the FCC had ancillary authority to implement its desired policy for inside wiring "with respect to interstate communications" did the Court to analyze the the applicability of the impossibility exception. *See id.* at 429-430; *see also Comcast,* 600 F.3d at 657, 658 (explaining that ancillary authority was critical to the preemption holding of *NARUC III*).

The Ninth Circuit reached the same conclusion in *People of the State of California v. FCC* (*California I*), 905 F.2d 1217 (9th Cir. 1990). In that case, the Commission sought to preempt various state regulations of "enhanced services"—the forerunner of modern information services—that differed from the regulations the Commission had adopted for interstate enhanced services. *See* 905 F.2d at 1239. The Ninth Circuit endorsed this Court's holding that the Commission was required to demonstrate "its own lawful authority over interstate communications" before the impossibility exception could apply. *Id.* (quoting *NARUC III*, 905 F.2d at 429). The court specifically determined that the Commission was relying on Title I ancillary authority for its regulation of enhanced services—not simply the impossibility exception—and satisfied itself that the Commission's assertion of ancillary authority was legitimate. *See id.* at 1240 n.35.

Finally, in *Public Services Commission of Maryland v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990) (*Maryland PSC*), this Court articulated a three-part test for the impossibility exception. It applies only if: "(1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would 'negate[] the exercise by the FCC of its own lawful authority' because regulation of the interstate aspects of the matter cannot be unbundled from regulation of the intrastate aspects." *Id.* at 1515 (quoting *NARUC III*, 880 F.2d at 429; other internal quotations omitted). As part three of this Court's test and the reference to the relevant section of *NARUC III* makes clear, if the Commission is not exercising "its own lawful authority" to "regulat[e] the interstate aspects of the matter," the impossibility exception is not even implicated. *Id.* The Commission does not explain why it deviates from this longstanding case law. It simply omits the requirement that it act with authority from its description of the impossibility exception. *Compare id.* with *Order* ¶ 198 (JA __).

As described in Part I, supra, the Commission in this case has not established its authority to act. Nevertheless, the Commission cites two cases it claims are "analogous" to this one to justify its invocation of the impossibility exception—*Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570 (8th Cir. 2007) ("*Minnesota PUC*"), and *California III*, 39 F.3d 919 (9th Cir. 1994).. *See Order* ¶

198 n.738. Neither is analogous. In each of those cases, the Commission affirmatively asserted ancillary authority over the service at issue; here, the Commission disclaims any such *interstate* authority, much less the authority to preempt intrastate regulation.

In *Minnesota PUC*, the Eighth Circuit upheld a Commission order preempting state regulation of voice-over-IP calling ("VoIP")—a service that allows users to make calls to traditional telephones using the internet. The Commission supported its order on multiple alternative grounds, claiming that it could preempt state regulation under its Title II authority if VoIP were classified as a telecommunications service, and that it could preempt state regulation using its ancillary authority under Title I combined with the impossibility exception if VoIP were classified as an information service. *See Minnesota PUC*, 483 F.3d at 578. The Eighth Circuit grounded its preemption holding on the uncontested assumption that the Commission had ancillary authority to regulate VoIP. *See id*. at 577. *Minnesota PUC* therefore has no bearing on whether the Commission can preempt state regulation of an information service even when it vociferously disclaims any ancillary authority over that service.

The Ninth Circuit's decision in *California III* likewise does not suggest that the impossibility exception would allow the Commission to preempt state laws in the absence of any preexisting lawful statutory authority to act. *California III* was a

follow-up to *California I* in which the Commission narrowed the scope of some of its preemption of state regulations of enhanced services. *California III* reiterated the holdings of *California I* and this Court's *NARUC III*, "that the only limitation on a state's authority over intrastate telephone service is when the state's exercise of that authority negates the exercise by the Commission of its own lawful authority over interstate communication" *California III*, 39 F.3d at 931 (quoting *California I*, 905 F.2d at 1244 and *NARUC III*, 880 F.2d at 429). The Ninth Circuit pointed out that in *California I* it had already "noted specifically that the Commission acted pursuant to Title I of the Act." *California III*, 39 F.3d at 932 (citing *California I*, 905 F.2d at 1240 n.35). *California III* therefore does not suggest that the Commission could, in the absence of lawful statutory authority over a service's interstate component, nonetheless preempt state laws under the impossibility exception.

Simply put, the impossibility exception to Section 152(b) does not enable the Commission to overcome its fundamental lack of authority to act where it lacks either direct or ancillary authority. Adopting the Commission's interpretation of this exception in the current Order would place no limit on the Commission's ability to confer preemption authority on itself, without any reference to the actual terms on which authority was granted to the agency by Congress. No court has ever recognized that power.

In this case, the Commission has failed to demonstrate that "state regulation would negate[] the exercise by the FCC of its own lawful authority," *Maryland PSC*, 909 F.2d at 1515 (internal quotation marks omitted), because it has failed to identify any exercise of lawful authority to regulate broadband internet access. Indeed, the *Order* disclaims any such authority. For this reason, the Commission has also failed to identify a "valid federal regulatory objective," *Maryland PSC*, 909 F.2d at 1515, that would be subverted by state regulation. The Commission claims that its preemption order is consistent with a "balanced federal regulatory scheme" of deregulation. *See Order* ¶ 201 (JA __). But the Commission's deregulation of broadband internet access service, by its own terms, is not an expression of lawful authority to act, but a reflection of the Commission's belief that it *lacks* the authority to act.

B. The Communications Act Does Not Implicitly Endow the Commission With Freestanding Authority to Preempt State Regulation of Information Services

The Commission's second argument for authority to preempt state net neutrality laws is concededly based on policy alone. The Commission asserts that it has "independent authority to displace state and local regulations in accordance with the longstanding federal policy of nonregulation for information services." *Order* ¶ 202 (JA __). As Part I explains, however, this Court's decision in *Comcast* forecloses the Commission's bald assertion of preemption authority without any

connection to direct or ancillary authority. *See* 600 F.3d at 654 ("[P]olicy statements alone cannot provide the basis for the Commission's exercise of ancillary authority.").

Nevertheless, the Commission claims that Congress implicitly approved this broad authority when it enacted the Telecommunications Act of 1996 against the backdrop of the Commission's "longstanding policy of preempting state laws that interfere with our federal policy of nonregulation," *Order* ¶ 202 (JA __) of "enhanced services," the regulatory forerunners of post-1996 Act "information services." *See id. at* ¶ 202 n.748 (JA __ - __).

This argument overstates both the extent of the Commission's authority to preempt state regulation of enhanced services prior to the 1996 Act and the effect of the adoption of that Act on that authority. Before 1996, the scope of the Commission's preemption authority was limited to cases where the Commission could demonstrate that preempting state laws was ancillary to the effective performance of some express statutory duty. If Congress "embraced" any regime for information services in enacting the 1996 Act, it is the regime that multiple federal courts of appeals held governed preemption of state enhanced services regulations: the Commission has "only such power as is ancillary to the Commission's specific statutory responsibilities." *California I*, 905 F.2d at 1240 n.35; *see also California III*, 39 F.3d at 931; *CCIA*, 693 F.2d at 214.

In essence, the Commission claims that because it had carefully cabined authority before 1996, Congress implicitly removed these limitations and delegated unlimited power to the Commission to preempt state regulation of any service it designates an information service, without any reference to the text of the Communications Act. This claim is directly contradicted by a long line of cases, explained and reaffirmed in *Comcast* after the enactment of the 1996 Act, that hold preemption of state laws—including laws regulating information services—requires "a link to express delegated authority." *Comcast*, 600 F.3d at 658.

The Commission does not point to any authority that suggests otherwise. Without addressing this case law, the Commission claims power to preempt state laws without any specific statutory warrant based on *Louisiana PSC* and *City of New York.* Indeed, as explained in Part II.A, *supra*, *Louisiana PSC* stands for the opposite proposition—that the Commission can preempt state laws only when it has valid statutory authority. *See* 476 U.S. at 374 ("The best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency."); *id.* at 375 n.4 (limiting the impossibility exception's scope to cases where the Commission had acted "within its authority")

Nor does *City of New York* does empower the commission to preempt state laws based on a congressional "embrace" of Commission policy alone, without a

connection to an express delegated authority. In that case, the Supreme Court upheld a Commission order preempting state and local technical standards for cable signals. *See* 486 U.S. at 62-63. The Court upheld the preemption because it "conclude[d] that the Commission [was] authorized under § 624(e) of the Cable Act [47 U.S.C. § 544(e)] to pre-empt technical standards imposed by state and local authorities." *Id.* at 70 n.6. In reaching that holding, the Court noted that the Cable Act was enacted "against a background of federal pre-emption on this particular issue," and that the Cable Act "sanctioned in relevant respects the regulatory scheme that the Commission had been following." *Id.* at 66-67. But the Court did not recognize the Commission's authority to preempt state cable regulations based on that regulatory history alone. Rather, the Supreme Court looked to the Act's legislative and regulatory history to interpret the scope of the express delegation statutory delegation of regulatory authority in Section 624(e).

The Commission points to two provisions of the Communications Act—section 230(b), 47 U.S.C. § 230(b), and section 3(51), 47 U.S.C. § 153(51)—that it claims "confirm Congress's approval of [its] preemptive federal policy of nonregulation for information services." *Order* ¶ 203 (JA __). For one thing, these sections do not unequivocally embody such a policy. For another, the Commission does not assert that either of these provisions is a delegation of regulatory authority. Elsewhere in the *Order*, the Commission expressly rejects section 230(b)

as anything more than "hortatory," ¶ 284 (JA __), and nowhere does it state or argue that section 153(51) constitutes a grant of authority.

Even if policy statements like that in section 230(b) could ground a delegation of authority—and they cannot, *see Comcast*, 600 F.3d at 651-58—section 230(b) on its own terms does not evidence any particular congressional policy choice in favor of deregulation. To be sure, Section 230(b)(2) provides that it is "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, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). But the very next subsection establishes another "policy of the United States" that cuts in precisely the opposite direction: "[T]o encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet." *Id.* § 230(b)(3). Maximizing user control over access to information on the internet is precisely the purpose of net neutrality regulations—so much so that the Commission has previously relied on section 230(b)(3) to argue that it had the authority to *impose* net neutrality regulations on broadband internet access services. *See Comcast*, 600 F.3d at 651.

Section 153(51) is the statutory definition of "telecommunications carrier." It does nothing except *restrict* Commission authority to "treat [a telecommunications carrier] as a common carrier under this chapter only to the

extent that it is engaged in providing telecommunications services." 47 U.S.C. § 153(51). As the phrase "under this chapter" suggests, Section 153(51) limits the ways in which the Commission can use its authority under Communications Act. *See Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014). Nothing in the text or in judicial precedent indicates that section 153(51) would apply to state laws. Nor is it likely that Congress would locate a mandate for the preemption of state laws in a definitional section restricting the Commission's authority. After all, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).

C. Section 160(e) Does Not Empower the Commission to Preempt State Regulation of Information Services

Finally, the Commission's complaint that "[i]t 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," under Title II, "but not preempted when the Commission determines that a requirement does not apply in the first place" under Title I, *Order* ¶ 204 (JA __ - __) provides no support for the Commission's authority to preempt state laws. Even if such an incongruity did exist in the statute, that would not justify preemption authority where the statute's terms do not provide it. The Commission's "own bruised sense of symmetry" does not invest it

with the authority to preempt state laws. *NARUC II*, 533 F.2d at 614.

But there is nothing incongruous about Congress's decision to explicitly prevent states from enforcing certain provisions of Title II that the Commission has forborne from applying, without granting the Commission boundless power to preempt state laws under Title I.

Indeed, when the Commission classifies a service as a telecommunications service, it acquires substantial authority over that service under Title II. *See Comcast*, 600 F.3d at 645. That is not the case with information services. Because the Commission lacks direct statutory authority over information services, each and every exercise of Commission authority involving information services must be "independently justified" as ancillary to some express statutory mandate. *NARUC II*, 533 F.2d at 612; *see also Comcast*, 600 F.3d at 651 ("The Commission must defend its exercise of ancillary authority on a case-by-case basis."). If the Commission cannot demonstrate that preempting state net neutrality laws is "really incidental to, and contingent upon, specifically delegated powers under the Act," *NARUC II*, 533 F.2d at 612, then the fact that a different portion of the Act governing a different service preempts state enforcement of different regulations is not relevant.

CONCLUSION

Because the Commission failed to ground its preemption of state laws in any valid source of express or ancillary authority, the Court should grant the petition for review and vacate the portion of the Order preempting state net neutrality regulations.

Respectfully submitted,

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APPENDIX

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and D.C. Circuit Rule 29(d), the undersigned certifies that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1), this brief contains 5895 words. This certificate was prepared in reliance upon the word-count function of the word-processing system (Microsoft Word for Mac version 16.16) used to prepare the brief.

/s/ *Michael J. Burstein*
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August 27, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on August 27, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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August 27, 2018