No. 21-15430

United States Court of Appeals
for the Ninth Circuit

ACA CONNECTS – AMERICA'S COMMUNICATIONS ASSOCIATION, FKA AMERICAN CABLE ASSOCIATION; CTIA – THE WIRELESS ASSOCIATION; NCTA – THE INTERNET & TELEVISION ASSOCIATION; USTELECOM – THE BROADBAND ASSOCIATION,
Plaintiffs-Appellants,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA,
Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of California, No. 2:18-cv-02684, Hon. John A. Mendez

BRIEF OF PROFESSORS OF COMMUNICATIONS LAW AND MEDIA DEMOCRACY FUND AS AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLEE

Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Avenue
Suite 850
Bethesda, MD 20814
(202) 362-0636
(866) 574-2033 (fax)
krussell@goldsteinrussell.com

Counsel for Amici Curiae

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

This brief is submitted on behalf of professors of communications law and the Media Democracy Fund, a project of New Venture Fund, a catalyst for an open, secure, and equitable Internet. Amici have an established interest in the outcome of this case and believe that their perspectives will assist the Court in resolving it. The professor amici include:[2]

Yochai Benkler, Berkman Professor of Entrepreneurial Legal Studies at Harvard Law School, and faculty co-director of the Berkman Klein Center for Internet and Society at Harvard University

John Blevins, John J. McAulay Distinguished Professor of Law, Loyola University New Orleans College of Law

Rob Frieden, Pioneers Chair and Professor of Telecommunications and Law at Penn State University

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[1] No party's counsel authored this brief in whole or in part, and no person other than amici, their members, and their counsel contributed money intended to fund the preparation or submission of this brief. The parties have consented to its filing.

[2] Affiliations listed for identification alone. Each professor is signing in his individual capacity.

Jerry Kang, Distinguished Professor of Law and Asian American Studies, UCLA

INTRODUCTION

In its *Restoring Internet Freedom* order, 33 FCC Rcd. 311 (2018), the Federal Communications Commission (FCC or Commission) declared that broadband information access service (BIAS) is an information service, akin to email, Twitter, eBay, or Netflix. The FCC generally lacks the power to regulate the provision of information services, including the aspects of BIAS governed by the California Internet Consumer Protection and Net Neutrality Act of 2018, Cal. Civ. Code §§ 3100-3104 (SB-822). That is why the Commission repealed its prior net neutrality rules.

Plaintiffs, a group of trade associations for BIAS providers, insist States have no power to enact neutrality rules either. They initially argued to the D.C. Circuit that the FCC validly issued a rule preempting all state regulation of how BIAS is provided, even though the Commission lacked the power to meaningfully regulate BIAS itself. The D.C. Circuit rejected that argument, explaining that the FCC's lack of authority over net neutrality questions means that it lacks the power to impose *or*

preempt net neutrality rules. *Mozilla Corp. v. FCC*, 940 F.3d 1, 75-80 (D.C. Cir. 2019) (per curiam).

Plaintiffs now argue that the FCC's attempted preemption order was unnecessary because the Commission had already accomplished indirectly what it lacked the power to do forthrightly. They say that by deciding that it *lacked* any authority to regulate net neutrality, the Commission also precluded States from regulating it because the Commission's classification decision was driven by a deregulatory preference. In the alternative, they argue that Congress itself forbade the States from imposing common-carriage-type regulations on BIAS providers, although the provisions they point to limit only the powers of the FCC. Finally, Plaintiffs argue that none of this matters, and that the whole debate in *Mozilla* was beside the point, because Congress already preempted the entire field of interstate communications by wire or radio, a fact they forgot to mention to the D.C. Circuit.

If any of this is right, it would make *Mozilla* a silly case, prohibiting the FCC from saying out loud ("States may not enact net neutrality rules") what preemption doctrine already declared to be the law. But none of Plaintiffs' arguments has any merit. California and others

explained why the field preemption claim is unfounded. We explain in this brief why California's net neutrality law is not conflict preempted either. Having persuaded the Commission to classify BIAS as an information service in order to preclude the FCC from regulating it, Plaintiffs are stuck with the legal consequences that flow from that decision. And one of those consequences is the Commission's now lacks the authority not only to impose, but also to prevent States from imposing, net neutrality rules. If Plaintiffs find this result intolerable, they can urge the Commission to revisit its classification decision or ask Congress to change the law.

ARGUMENT

I. SB-822 Is Not Conflict Preempted By The FCC's Deregulatory Preferences Or Reclassification Decision.

Plaintiffs argue that although the FCC lacks authority to expressly preempt state net neutrality rules, the agency had no need to do so because the deregulatory policy behind the Commission's reclassification of BIAS as an information services had the same effect. That is incorrect. The Supreme Court has held that "failure of . . . federal officials affirmatively to exercise their full authority" over a subject can preempt state regulation if the agency intended to leave the matter completely

unregulated. *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 178 (1978). But that is not what happened here. So long as BIAS is classified as an information service, Congress has withheld from the FCC any authority over the practices addressed by SB-822, including blocking, throttling, paid prioritization, etc. And because the Commission has no power to regulate those activities, it has no power to deregulate them either, whether through an express preemption provision of the sort invalidated in *Mozilla*, or by claiming that state law conflicts with a deregulatory preference it has no authority to enforce through a rule.

A. The FCC Lacks Regulatory Authority Over The BIAS Practices Addressed By SB-822 And Therefore Has No Power To Regulate Or Deregulate Them.

Plaintiffs claim that SB-822 conflicts with the Commission's goal of deregulating BIAS. Br. 28. And, they insist, a state law is preempted if it stands "'as an obstacle to the accomplishment and execution of the full purposes and objectives of' the federal regulatory framework." *Id.* 27 (quoting *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)). That is a fair summary of the law when the agency's objectives fall within its regulatory authority. But Plaintiffs cannot seriously claim that state law is preempted when it conflicts with objectives that lie

outside an agency's lawful power. If, for example, the FCC decided that it lacked authority to regulate the rules of televised Major League Baseball games because the matter falls outside the Commission's regulatory authority—or if the Nuclear Regulatory Commission, rather than the FCC, had decided not to regulate BIAS on the ground that it lacked regulatory authority over the service—no one would think that the agency had made a "deregulatory decision" that could preempt state law.

That is because preemption is an application of the Supremacy Clause, which makes supreme only "the Laws of the United States," not the bare objectives of federal officials. U.S. Const. art. VI, cl. 2; *see, e.g.*, *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1907 (2019) (opinion of Gorsuch, J.) (Supremacy Clause does not "elevate abstract and unenacted legislative desires above state law"). Moreover, the Constitution "gives 'supreme' status only to those [federal laws] that are '*made in Pursuance' of '[t]his Constitution*.'" *Wyeth v. Levine*, 555 U.S. 555, 585 (2009) (Thomas, J., concurring in the judgment) (quoting U.S. Const. art. VI, cl. 2) (emphasis added; second alteration in original). Accordingly, a federal statute that attempts to regulate a subject outside of Congress's

constitutional authority has no preemptive effect. *See ibid*. Likewise, agency regulations may preempt state law only if the agency has delegated authority over the subject matter. *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *Mozilla Corp. v. FCC*, 940 F.3d 1, 74-75 (D.C. Cir. 2019) (per curiam); *Nat'l Fed'n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 738 (9th Cir. 2016).

The same is true when Congress's or an agency's *failure* to regulate is alleged to preempt state law. It is only when the "'failure of . . . federal officials affirmatively to *exercise their full authority* takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' [that] States are not permitted to use their police power to enact such a regulation." *Ray*, 435 U.S. at 178 (emphasis added; citation omitted; ellipsis in original); *see also, e.g.*, *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714 (1985); *Nat'l Fed'n of the Blind*, 813 F.3d at 733, 738. An agency's failure to regulate a practice it lacks the authority to regulate simply shows that it is respecting the limits of its powers; it is not exercising delegated authority to decide whether the matter should be free from state regulation as well.

For example, in *Ray*, Congress authorized the Coast Guard to regulate the "vessel size and speed limitations" of certain tankers. 435 U.S. at 174 (citation omitted). The Coast Guard had not exercised this power to ban large tankers from Puget Sound, but state law did. The Supreme Court concluded that the Coast Guard's failure "affirmatively to exercise [its] full authority" to impose such a restriction was tantamount to a "ruling that no such regulation is appropriate." *Id*. at 178 (citation omitted). And because Congress had given the Coast Guard responsibility for deciding what size limitations were appropriate, the state law was preempted. *Ibid*.

Conversely, in *Virginia Uranium*, the Nuclear Regulatory Commission (NRC) refused to issue regulations concerning uranium mining on private land because it determined that the activity fell outside its regulatory authority. 139 S. Ct. at 1903 (opinion of Gorsuch, J.). A private mining company argued that "because the NRC's regulations say nothing about uranium mining . . . it remains free to mine as it will in Virginia or elsewhere" without regard to state law limitations. *Id*. at 1901. Importantly, in deciding whether the company was right, the Supreme Court did not apply the *Ray* line of cases or inquire whether

NRC decided it lacked authority over private mining because the agency thought the subject should be free from both federal and state regulation; it asked whether *Congress* intended to preempt state regulation of the matter. *See id*. at 1901-09; *id*. at 1910, 1915-16 (Ginsburg, J., concurring in the judgment).

Similarly, in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), the Supreme Court rejected a party's claim that state regulation of tractor-trailer brakes was preempted by the Department of Transportation's failure to issue regulations on that topic. The Court explained that "the lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes." *Id*. at 286. "Rather, the lack of a federal standard stemmed from the decision of a federal court that the agency had not compiled sufficient evidence to justify its regulations." *Id*. at 287. The agency's failure to issue regulations it had no authority to issue on the record it had compiled could not displace the States' authority to fill the void.

This case is more like *Virginia Uranium* and *Freightliner* than *Ray*. Rather than decline to exercise lawful authority over blocking and

throttling, the FCC determined that it lacked authority over those practices on the record it had compiled.

B. There Is No Conflict Preemption Arising From The FCC's Reclassification Decision.

Plaintiffs nonetheless argue that preemption arises from the Commission's decision to classify BIAS as an information service. Br. 36-38. They cite no case from this or any other court giving preemptive effect to such a jurisdictional classification decision. When the dissent in *Mozilla* raised essentially the same argument in defense of the Commission's preemption order, the majority correctly rejected it. *See Mozilla*, 940 F.3d at 82-85. This Court should do the same.

Classification decisions are different in kind from the sorts of regulatory decisions the Supreme Court gave preemptive effect in *Ray* and similar cases. A hypothetical may help illustrate why. Suppose that a federal statute required the Department of Transportation (DOT) to classify trucks as either "heavy" or "light," with the rules for operating heavy trucks subject to significant regulation under DOT's exclusive jurisdiction and the rules for light trucks left to the States. Suppose, then, that DOT classified RV's as "light" trucks because it wished to avoid intense regulation of those vehicles. A court would defer to that

classification decision so long as it was reasonable. But no one would think that this decision preempted States from regulating RV's. That is because under this hypothesized statutory regime, Congress already decided the scope of state and federal authority; the agency's only role is decide which regime governs a particular kind of vehicle by applying a statutory definition of "heavy" and "light." Congress *could* have asked the agency to decide which vehicles are subject to what regulation, by which regulators, based on the agency's policy judgments. But it didn't. It made the principal policy decision itself and assigned the agency a more modest role.

That is what happened here. Congress could have authorized the FCC to classify services as common carriage based on the agency's policy judgment. In fact, that's what it did for satellite communications. *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, *except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage*.") (emphasis added). But for all other services, Congress made the principal decisions itself, directing the

agency to regulate as common carriage any service that meets the definition of a "telecommunications service," whether the FCC thinks it wise or not. *Ibid*. The definition likewise depends not on the FCC's policy goals, but "on the factual particulars of how Internet technology works and how it is provided." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 991 (2005).

Such classification decisions have no preemptive effect, for two independent reasons.

First, the consequences of classification decisions are dictated by statute, not by agency policy preferences. If a statute provides that light vehicles or information services are subject to state regulation, an agency has no power to contradict that choice, either expressly or through the allegedly preemptive power of its reasons for choosing a particular classification. Of course, one consequence of a particular classification may be that the *statute* preempts the States' power over a subject. But that is not Plaintiffs' argument in this part of their brief. Nor do Plaintiffs argue that the statute gives the FCC discretion to preempt state regulation of information services—that is the argument they made and lost in *Mozilla*.

Thus, even if the FCC legitimately allowed its deregulatory agenda to play a role in its classification decision, it was still limited to choosing between the options Congress provided—it could classify BIAS as a telecommunications service, which would mean common carriage regulation and the power to preempt, or as an information service, which, as discussed, meant that the FCC could not enact net neutrality rules, but could not prevent States from doing so.

Plaintiffs plainly wish Congress had given the FCC a third choice to classify BIAS as something neither it nor the States could regulate. But Congress did not give the agency that option and neither can this Court.

Second, in making its classification decision, the FCC was not deciding what level of regulation is appropriate for a topic within its authority, as in cases like *Ray*. *See Mozilla*, 940 F.3d at 83. It was deciding whether it had the *power* to address that subject at all. And if an agency properly determines that a subject is outside its authority, then it has no authority to regulate *or* deregulate it. *See id.* at 75, 84.

It makes no difference that the agency could have made a different classification choice. *Contra* Pl. Br. 35-38. In *Arkansas Electric*

Cooperative Corp. v. Arkansas Public Service Commission, for example, the Federal Power Commission (FPC) determined "that it did not have jurisdiction under the Federal Power Act over wholesale rates charged by rural power cooperatives." 461 U.S. 375, 383 (1983). The question arose whether States could regulate those charges. As Plaintiffs note (Br. 28), the Court began with the proposition that "federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." 461 U.S. at 384. But the Court found that principle inapplicable to the case before it because the FPC decided to forgo regulation on the ground that "it did not have jurisdiction," not because it decided "that, as a matter of policy, rural power cooperatives . . . should be left unregulated." *Id*. at 383-84. Accordingly, to answer the preemption question, the Court did not ask about the policy reasons behind the FPC's jurisdictional decision. It asked whether *Congress* decided to preclude state authority over the subject. *Id*. at 384; *see also Va. Uranium*, 139 S. Ct. at 1903 (opinion of Gorsuch, J.) (same where NRC found no authority over private uranium mining).

While the agency may employ "interpretive 'discretion' to classify broadband" by choosing among reasonable interpretations of the statutory definitions based on its policy views, Plaintiffs' "theory of *Chevron* . . . takes the discretion to decide which definition best fits a real-world communications service and attempts to turn that subsidiary judgment into a license to reorder the entire statutory scheme." *Mozilla*, 940 F.3d at 84.

C. Plaintiffs' Contrary Arguments Are Unpersuasive.

Plaintiffs' criticisms of the district court's decision are meritless.

1. Plaintiffs argue that the foregoing analysis "cannot be squared with *Mozilla*'s finding" that "'conflict preemption' *would* apply to 'a state practice [that] actually undermines the 2018 order.'" Br. 34 (quoting 940 F.3d at 85). But that statement simply held out the possibility that a state law could conflict with a rule the Commission actually and lawfully enacted—*e.g.*, a law forbidding BIAS providers from disclosing the information the FCC's transparency order requires be made public. *See Mozilla*, 940 F.3d at 85 (holding open conflict preemption based on "regulatory choices the Commission makes that are *within its authority*") (emphasis added). The court was not inviting Plaintiffs to repackage

their arguments defending the FCC's blanket preemption order as blanket conflict preemption claims. *See id*. at 81 (conflict preemption "'is an issue incapable of resolution in the abstract,' let alone in gross") (citation omitted).

2. Plaintiffs argue that even after reclassification the FCC "retained and affirmatively exercised statutory authority to advance" its deregulatory goals. Br. 28. But the only power the FCC had left was the ability to order limited disclosures arising from its obligation to produce certain reports to Congress under 47 U.S.C. § 257. *See Mozilla*, 940 F.3d at 47. But Plaintiffs do not claim that SB-822 interferes with the information-gathering purposes of the FCC's transparency rule. And Section 257 is not a source of authority for substantive net neutrality rules. *Comcast Corp. v. FCC*, 600 F.3d 642, 658-59 (2010).

The FCC's ability to regulate disclosures is irrelevant to its power to preempt California's regulation of other aspects of BIAS provision. The theory of preemption by inaction is founded in the idea that a State may not impose a *particular regulation* if an agency could have issued the same regulation but decided not to. Thus, in *Ray*, to determine whether specific state provisions were preempted, the Court asked

whether the Coast Guard had decided that the precise subject of the rule should be left unregulated. *See* 435 U.S. at 171-72 ("The relevant inquiry under Title I with respect to the State's power to impose a tug-escort rule is thus whether the Secretary has either promulgated his own tug requirement for Puget Sound tanker navigation or has decided that no such requirement should be imposed at all."); *id*. at 175 (finding preemption of state size limits because "federal authorities have indeed dealt with the issue of size and have determined whether and in what circumstances tanker size is to limit navigation in Puget Sound").

Here, California has regulated BIAS practices—*e.g.*, blocking, throttling, paid prioritization, etc.—the FCC has no authority to regulate under Section 257 or anything else.

2. Plaintiffs portray several decisions as holding state law preempted by a federal agency's "regulatory goal" without asking whether the agency had lawful authority to pursue that goal by enacting (or refusing to enact) its own rules on the subject. But in each instance, the agency indisputably *did* have regulatory authority over the matter, so the question presented here did not arise. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 874-75 (2000) (because DOT had authority to

require airbags, but elected not to, state tort claim based on lack of airbags preempted); *Cap. Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699-700, 708-09 (1984) (finding preemption where FCC had authority to regulate transmission of cable television signals); *McShannock v. JP Morgan Chase Bank NA*, 976 F.3d 881, 887-88 (9th Cir. 2020) (federal agency lawfully issued rule expressly preempting field of lending regulation for federal savings associations); *California v. FCC*, 39 F.3d 919, 931-32 (9th Cir. 1994) (upholding express preemption order as within FCC's ancillary authority to regulate telecommunications services) (citing *California v. FCC*, 905 F.2d 1217, 1240-41 & n.35 (9th Cir. 1990)).

Plaintiffs also quote (Br. 31) language in *Charter Advanced Services (MN), LLC v. Lange*, 903 F.3d 715, 719 (8th Cir. 2018), *cert. denied*, 140 S. Ct. 6 (2019), suggesting that the FCC's deregulatory purposes preclude States from regulating any information service. But the only question before the court was whether Minnesota could regulate certain fixed voice-over-internet-protocol (VoIP) calls as an intrastate telecommunications service. *Ibid.* The state agency did not raise the argument at the core of this case—*i.e.*, that the FCC cannot preempt state

regulations the FCC has no power to impose[3]—perhaps because the FCC likely *can* regulate VoIP through its ancillary authority over telecommunications (given that VoIP is a direct substitute for traditional telephony). Any broader dicta in *Charter* conflicts with settled Supreme Court and Ninth Circuit precedent.

II. There Is No Conflict Between SB-822 And The Communications Act's Limits On The FCC's Power To Issue Common Carriage Regulations.

Plaintiffs argue that the FCC's policy judgments ultimately make no difference anyway because Congress itself preempted SB-822 through provisions of the Communications Act that, they say, forbid the FCC *and* the States from imposing common carriage requirements on information service providers. Br. 38-42. Notably, the United States has never made this argument even when it was vigorously challenging SB-822 in the district court. The claim has no merit.

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[3] *See Charter* Appellant Br. 17; *Charter* Appellee Br. 19 (noting that "MPUC expressly conceded" below that state regulation of information services was preempted).

A. The Act Restricts Only The FCC's Powers Over Information Services, Not The States'.

Plaintiffs do not claim that the Act expressly preempts state common carriage requirements. Instead, they say such state regulation is impliedly preempted by one of the definitional provisions of the statute, which defines the term "telecommunications carrier." Pl. Br. 38. That provision states that 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." 47 U.S.C. § 153(51) (emphasis added); *see* Pl. Br. 38. Plaintiffs also cite a similar provision regarding mobile services that states that a "person engaged in the provision of a service that is [not a commercial mobile service] shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose *under this chapter*." Br. 38-39 (quoting 47 U.S.C. § 332(c)(2)) (emphasis added).

Both provisions unambiguously address only the scope of the FCC's authority under the federal statute (*i.e.*, "under this chapter"), not States' authority under state law. Plaintiffs nonetheless insist Congress meant

these limitations to apply to States as well. But nothing supports that counter-textual assertion.[4]

1. Sections 153(51) And 332(c)(2) Address Only The Powers Of The FCC.

The Supreme Court rejected a similar argument in *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011). There, Congress required the Secretary of Homeland Security to establish an electronic system for verifying an employee's work authorization status, but had forbidden the Secretary from requiring employers to use it. *Id.* at 590-91. Arizona, however, enacted a law compelling its employers to use the system. *Id.* at 593. Like Plaintiffs here, the plaintiffs in *Whiting* claimed that by prohibiting the federal agency from imposing a certain regulatory requirement, Congress impliedly preempted any state law that would impose the same obligation. *Id*. at 608. The Supreme Court rejected that assertion out of hand. The federal statute, it observed, "contains no

[4] Because the district court rightly determined that the Act does not preempt state common carriage regulation of BIAS, it did not decide whether SB-822 imposes common carriage regulations. *See* ER-69–71. *Contra* Pl. Br. 22. Amici likewise do not address (or concede) the issue at this stage of the litigation.

language circumscribing state action." *Ibid*. And the provision "constrain[ing] federal action" simply "limits what the Secretary of Homeland Security may do—nothing more." *Ibid*.

So too here. As the district court noted, if Congress had intended to preclude both state and federal regulation, it presumably would have said so clearly, as it did elsewhere in the statute. ER-70; Calif. Br. 38 n.14 (collecting cites). For example, the provision immediately following Section 332(c)(2) expressly addresses preemption, but restricts state authority over mobile services only with respect to rules regarding "entry of or the rates charged." 47 U.S.C. § 332(c)(3)(A).

The district court did not "conflate[] implied and express preemption" or treat the existence of express preemption provisions as a "'bar [on] the ordinary working of conflict pre-emption principles.'" Pl. Br. 42, 43 (quoting *Geier*, 529 U.S. at 869). Ordinary implied conflict preemption principles require "[e]vidence of pre-emptive purpose . . . in the text and structure of the statute at issue." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). A court examining that text and structure may consider it relevant (if not dispositive) that the statute repeatedly addresses preemption in plain and direct terms, while the

provision Plaintiffs rely upon speaks only of limits on federal power. *See, e.g.*, *Wyeth*, 555 U.S. at 573-74; *Mozilla*, 940 F.3d at 83.

2. There Is No General Rule Extending Restrictions On Federal Agencies' Power To States.

Unable to base their argument on the text as written, Plaintiffs suggest the Supreme Court has adopted a general rule that when Congress has forbidden a federal agency from imposing certain regulations, "States are not permitted to use their police power to enact such a regulation" either. Br. 40 (quoting *Cap. Cities Cable*, 467 U.S. at 708). That position, however, cannot be squared with the decisions of the Supreme Court, this Court, or other circuits.

Start with *Whiting*, discussed above. On Plaintiffs' theory, the Court should have concluded that in forbidding DHS from requiring employers to use the e-Verify system, Congress impliedly forbade States from requiring it either. But the Court reached the opposite conclusion.

This Court reached a similar result in *Greater Los Angeles Agency on Deafness, Inc. v. CNN, Inc.*, 742 F.3d 414 (9th Cir. 2014). There, Congress had directed the FCC to "require closed captioning of certain online video programming" but not others, without addressing state authority. *Id*. at 420. Consistent with Plaintiffs' position here, CNN

argued that Congress's limitation on the FCC's captioning authority impliedly preempted California from imposing captioning requirements the FCC could not mandate. But this Court "decline[d] CNN's invitation to interpret the limited scope of the federal captioning scheme for online videos as indicative of Congress's intent to preclude broader regulation of online closed captioning under state law." *Id*. at 429; *see also City of Dallas v. FCC*, 165 F.3d 341, 347 (5th Cir. 1999) (elimination of federal franchising requirement did not preclude State from adopting franchising requirements).

As the district court explained, *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi*, 474 U.S. 409 (1986), does not provide otherwise. ER-70–71. *Contra* Pl. Br. 40-41. In that case, States were forbidden from imposing rate regulations on certain natural gas sales because Congress had preempted the field, leaving no room for the States even after Congress precluded the Federal Energy Regulatory Commission (FERC) from setting prices. *See P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp*., 485 U.S. 495, 503 (1988) (*Transcontinental* did not establish that "deliberate federal inaction [will] always imply pre-emption" of state law, a rule that "cannot be"); *ibid*.

(explaining instead that preemption arose from the "comprehensive federal scheme intentionally leav[ing] a portion of the regulated field without controls"); *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 514 (1989) (explaining that *Transcontinental* was a field preemption decision).

Nor did any of the other cases Plaintiffs cite create the rule *Isla Petroleum* said "cannot be." *See* Br. 40-41. The relevant preemption in *Capital Cities Cable* was not based on any statutory limitation of the FCC's authority, impliedly extended to the States, but on a state law's conflict "with specific federal regulations." 467 U.S. at 705. In *Public Utility District No. 1 of Grays Harbor County Washington v. IDACORP Inc.*, 379 F.3d 641 (9th Cir. 2004), this Court simply applied ordinary conflict preemption principles to preclude the plaintiff from asking a court "to set a fair price" for its electricity purchases when a federal statute gave the power to FERC. *Id*. at 650.

3. The History Of Sections 151(53) And 332 Do Not Support Plaintiffs' Position.

Plaintiffs also argue that it was unnecessary for Congress to restrict anyone's authority but the FCC's because it was always understood that States had no authority to impose common carriage requirements (or,

indeed, any regulation at all) on the precursors to information services. Br. 44-46. To the extent this is just a preview of Plaintiffs' field-preemption argument, *see id*. 45, it is beside the point (if the field is preempted, conflict preemption doesn't matter) and unfounded (for the reasons California and others give). To the extent Plaintiffs argue that the Congress ratified some prior consensus that state common carriage rules were conflict preempted, *id*. 44-45, the argument lacks merit.

First, although the FCC may have decided that *it* would not impose common carriage regulation on enhanced services, Plaintiffs fail to establish any clear and settled FCC policy of preempting *state* common carriage regulation of the service prior to 1996, much less a judicial consensus that the Commission had the power to do so. *See* Pl. Br. 7-10, 44-46.

The only pre-1996 example Plaintiffs cite is a single order, eventually upheld by this Court in *California v. FCC*, 39 F.3d 919. *See* Br. 9-10, 44. But this Court addressed only the portion of the order preempting certain state structural separation requirements and nonstructural safeguards. *See ibid*; 39 F.3d at 922. It did not address common carriage or enhanced services at all. And the Court upheld the

limited preemption it considered only because the FCC had ancillary authority to regulate (and, therefore, deregulate) the matters at issue, given their effects on common carriers subject to pervasive FCC regulation under Title II. *See* 39 F.3d at 931-32.

Conversely, in *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C. Cir. 1976), the D.C. Circuit held States were free to impose common carriage requirements on a precursor to modern broadband because, as here, the FCC was *not* able to show that preempting state law was reasonably ancillary to regulating common carriers or any of its other statutory duties. *Id*. at 611-19 (invalidating FCC order preempting state common carriage regulation of two-way, point-to-point, nonvideo cable service).

Accordingly, if the 1996 Act codified any background principle, it was the one applied in *Mozilla*, precluding the FCC from preempting state regulation of information services except through a valid exercise of ancillary authority, which is missing here.

Second, even if the FCC's or the courts' position on state authority were clear and settled in 1996, there is no basis to assume Congress codified it. Plaintiffs acknowledge, after all, that the Act ratified existing

law in some respects and modified it in others. *See* Br. 11 n.8 (noting that 1996 amendments modified FCC's prior jurisdiction over intrastate communications services).

The best evidence of what Congress intended to retain, and what it meant to change, is the text of the Act. And that text conspicuously restricts only the Commission's authority, not the States'. Plaintiffs moreover cite nothing in the legislative history or any other indication that Congress considered, and embraced, the FCC's position on state common carriage regulation of enhanced or information services. *Cf.* H.R. Rep. No. 104-458, at 114 (1996) (Conf. Rep.) (confirming that "a 'telecommunications carrier' shall be treated as a common carrier *for purposes of the Communications Act*") (emphasis added).

More fundamentally, Plaintiffs' reliance on mere background and statutory silence disregards that the Supremacy Clause gives preemptive effect to the "Laws of the United States," U.S. Const. art. VI, cl. 2, not in the "unenacted approvals, beliefs, [or] desires" of legislators, *Isla Petroleum*, 485 U.S. at 501. "Without a text that can, in light of [Plaintiffs' history], plausibly be interpreted as *prescribing* federal pre-

emption it is impossible to find that a free market was mandated by federal law." *Ibid*.

4. Section 230(b) Does Not Support Plaintiffs' Inferences.

Plaintiffs' reliance (Br. 44-45, 58) on 47 U.S.C. § 230(b)(2) is also misplaced. That provision identifies the purposes behind the Communications Decency Act, a part of the 1996 amendments that required providers of interactive computer services to offer customers parental controls to help shield minors from harmful online content. *See* 47 U.S.C. § 230(d); *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 702 (D.C. Cir. 2016). The statement of policy Plaintiffs cite explains that Congress chose to facilitate filtering, rather than regulate offensive content directly, in order "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).

Even if Section 230(b)(2) addressed the purposes behind the broader 1996 amendments, Plaintiffs do not contest the D.C. Circuit's holding that the Act permits the FCC to classify BIAS as a form of common carriage, Section 230(b)(2) notwithstanding. *See U.S. Telecom*, 825 F.3d at 707-10. Given that the provision makes no distinction

between state and federal regulation, the FCC's ability to regulate BIAS providers as common carriers conclusively disproves Plaintiffs' contention the same provision implicitly strips States of that power.[5]

B. Congress Has Expressly Forbidden Inferring Any Preemptive Intent From The 1996 Amendments.

Plaintiffs' reliance on Section 230(b) runs into another problem as well. *See* Br. 44-45. Both Section 230(b) and Section 153(51) were added by Section 3 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 60, 138. And Section 601(c)(1) of the 1996 Act provides:

> NO IMPLIED EFFECT.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

110 Stat. at 143 (codified at 47 U.S.C. § 152 note).

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[5] In *Howard v. America Online Inc.*, 208 F.3d 741, 753 (9th Cir. 2000), this Court cited Section 230(b)(2) as one of several factors supporting the reasonableness of the FCC's determination that America Online was not a common carrier. The Court did not hold that this classification was *compelled* by the statute and said nothing about BIAS or preemption. *Ibid*.

Conflict preemption is a form of implied preemption. *Geier*, 529 U.S. at 884. Accordingly, Section 601(c)(1) precludes any conflict preemption argument based on these provisions of the 1996 Act.

Plaintiffs offer two responses, neither persuasive.

1. Section 601 Applies To Section 153(51).

Plaintiffs argue that Section 153(51)'s restrictions on the FCC's common carriage authority simply codified pre-existing law. Br. 48. But Section 601 does not distinguish between aspects of the Act that codified or revised prior law. And, in any event, Plaintiffs elsewhere admit that before 1996, forbearance from common carriage regulation of enhanced services was a matter of FCC *discretion*, not the result of any congressional limit on agency authority. *Id.* 44. Plaintiffs' preemption argument, however, arises from the fact that the FCC is now *forbidden* from imposing common carriage regulations on information services, a prohibition Plaintiffs claim Congress impliedly extended to the States as well. *Id.* 39. That is an argument founded on the 1996 amendments' alteration of existing law.

2. Section 601 Means What It Says.

Despite Section 601(c)(1)'s "pellucid statutory directive," *City of Dallas*, 165 F.3d at 349, Plaintiffs insist that the provision still permits implied preemption of state law that "actually conflicts" with the purposes[6] of the 1996 amendments. Br. 48. That argument fails for several reasons.

First, it is axiomatic that "where, as here, the words of a statute are unambiguous, the judicial inquiry is complete." *Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020) (cleaned up). Plaintiffs offer no interpretation of the text, just a plea to ignore it.

Second, this Court and others have read Section 601(c)(1) to mean what it says. *See Greater L.A. Agency on Deafness*, 742 F.3d at 428 (Section 601 "signifies that Congress did not intend to occupy the entire legislative field of closed captioning or to prohibit all private rights of action under state law," including suits to require captioning the FCC could not mandate); *Abrams v. City of Rancho Palos Verdes*, 354 F.3d

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[6] This case does not present the question whether Section 601(c)(1) bars impossibility preemption claims.

1094, 1099-1100 (9th Cir. 2004) ("[T]he plain language of § 601(c)(1) demonstrates that Congress did not intend the [1996 Act] to alter the operation of any federal law unless the [Act] expressly provided for such change"), *rev'd on other grounds*, 544 U.S. 113, 125-27 (2005) (accepting that Section 601(c)(1) precludes implied impairment of existing law, but disagreeing about what existing law provided); *see also, e.g.*, *AT&T Commc'ns of Ill., Inc. v. Ill. Bell Tel. Co.*, 349 F.3d 402 (7th Cir. 2003); *City of Dallas*, 165 F.3d at 347-48.

The Supreme Court's construction of Section 601(c)(1)'s neighbor is also illuminating. In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), the Court interpreted Section 601(b)(1), which provides (with certain irrelevant exceptions) that "nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 110 Stat. at 143. The Court held that this provision "bars a finding of implied immunity" to antitrust claims (*i.e.*, a finding that the Act impliedly preempted or repealed antitrust law). 540 U.S. at 406. The Court acknowledged that the defendant had made a strong case for conflict preemption. *See ibid.* (noting that the "enforcement scheme set up by the 1996 Act is a good

candidate for implication of antitrust immunity"). But it held that Congress "precluded that interpretation." *Ibid*.

Third, Plaintiffs say other circuits allow implied preemption of state law that "actually conflicts" with the 1996 Act, Section 601(c)(1) notwithstanding. Br. 49. That argument is misplaced.

Each case is distinguishable. The Tenth Circuit held only that Section 601(c)(1) "does not limit Congress's actual delegation of authority to the FCC" and did not decide whether the Act itself impliedly preempted state law. *In re FCC 11-161*, 753 F.3d 1015, 1120 (10th Cir. 2014). *Farina v. Nokia Inc.*, 625 F.3d 97 (3d Cir. 2010), relied on additional statutory provisions, not applicable here, to find that Congress had overridden Section 601(c)(1)'s general rule in the specific context of the case before it. *See id.* at 132 (citing 47 U.S.C. § 332(c)(7)(B)(iv)). And *Qwest Corp. v. Minnesota Public Utilities Commission*, 684 F.3d 721 (8th Cir. 2012), ultimately concluded that there was "simply no preexisting state authority" over the relevant subject matter "for § 601(c) to preserve." *Id*. at 730-31.

To the extent the cases suggest in dicta that Section 601(c)(1) contains an implicit exception for cases involving an "actual conflict,"

they proceed on a misunderstanding of *Geier*, 529 U.S. at 869. *See, e.g.*, *Farina*, 625 F.3d at 131-32.

In *Geier*, the Supreme Court construed a provision stating that "[c]ompliance with" federal automotive safety standards "does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k) (1988), *quoted in Geier*, 529 U.S. at 868. The Court examined the precise language of this provision and determined that the words "'[c]ompliance' and 'does not exempt' sound as if they simply bar a special kind of defense, namely, a defense that compliance with a federal standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute requirement or only a minimum one." 529 U.S. at 869. In concluding that this specific language barred only a certain kind of preemption claim, the Court did not establish any general rule that courts may ignore *other* statutory provisions using *different* language to *unambiguously* preclude implied conflict preemption.

Section 601(c)(1) bears no resemblance to the provision in *Geier*. Rather than simply saying that a certain category of claims shall be preserved (as many ordinary savings clauses do), Section 601(c)(1)

addresses with unusual directness the details of preemption law doctrine. Congress directed that only one specific, identified mode of preemption analysis may be applied (express preemption) while using the title of the provision to make clear that another (implied preemption) was thereby excluded. Accordingly, unlike the provision considered in *Geier* and other general savings clause cases, there is no way to read Section 601(c)(1) to preserve implied preemption theories without reading words out of the text or simply ignoring its unambiguous command.

Finally, even if Section 601 somehow did not apply in cases of unavoidable "actual conflict" between state law and the purposes of the 1996 Act, for the reasons given above, Section 153(51) can easily read to avoid any such conflict by giving the Act its plain meaning as restricting only the FCC's authority and not the States'. *See Farina*, 625 F.3d at 131-32 (Section 601 at the very least counsels against easily finding conflict).

CONCLUSION

For the foregoing reasons, the district court's order should be affirmed.

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Respectfully submitted,

/s/ Kevin K. Russell
Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Avenue
Suite 850
Bethesda, MD 20814
(202) 362-0636
(866) 574-2033 (fax)
krussell@goldsteinrussell.com

Counsel for Amici Curiae

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/s/ Kevin K. Russell
Kevin K. Russell

Counsel for Amici Curiae

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 11, 2021. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Kevin K. Russell
Kevin K. Russell

Counsel for Amici Curiae