No. 21-15430

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ACA CONNECTS, ET AL.,

Plaintiffs-Appellants,

v.

ROB BONTA,

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 *AMICI CURIAE* INTERNET LAW PROFESSORS IN SUPPORT OF APPELLEE

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INTEREST OF AMICI CURIAE[1]

Amici are law professors who write about and teach internet law. *Amici* have an interest in ensuring the proper balance between state and federal internet regulation that affects state access and consumer protection regulations. Amici submit this brief to articulate their scholarly view of the proper reach of federal preemption of interstate communications. *Amici* are:[2]

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[1] Amici certify that that no counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to its filing.

[2] Affiliations listed for identification purposes only.

SUMMARY OF ARGUMENT

Plaintiffs argue SB-822 is preempted because Congress occupied the entire field of either interstate communications or interstate information services, stripping the states of their preexisting police power.

This is a sweeping claim. If accepted, it would invalidate vital state laws regulating areas of traditional local concern—including consumer protection, public health, and public safety. In many cases, Plaintiffs' theory would leave both the FCC and the states without regulatory authority, leaving Americans wholly unprotected from harms by interstate communications and information service providers.

Neither the text and structure of the statute at issue nor the long history of judicial decisions interpreting the scope of federal preemption under the Communications Act of 1934 ("Communications Act" or "Act") supports this position. Plaintiffs' field preemption claim is also inconsistent with the Act's recognition of a role for states in regulating interstate communications, the long-standing practice of states doing so, and the case law upholding those regulations and practices.

Even if the Plaintiffs' claim were confined to "interstate information services," which it does not appear to be, the limited nature of the FCC's ancillary authority over these services is impossible to square with the essential requirement

for field preemption: "a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it.'" *Arizona v. United States*, 567 U.S. 387, 399 (2012) (alteration in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Instead, the text, structure, and history of the Telecommunications Act of 1996 (which introduced information services), coupled with its explicit prohibition on implied preemption, all demonstrate the contrary: Congress did not intend to create a regulatory void where neither the FCC nor the states could regulate many of the interstate information services that are now so central to modern life.

ARGUMENT

Field preemption occurs only in those "rare cases" in which "Congress has 'legislated so comprehensively' in a particular field that it 'left no room for supplementary state legislation.'" *Kansas v. Garcia*, 140 S. Ct. 791, 804 (2020) (quoting *R.J. Reynolds Tobacco Co. v. Durham Cnty.*, 479 U.S. 130, 140 (1986)). "The essential field preemption inquiry is whether the density and detail of federal regulation merits the inference that any state regulation within the same field will necessarily interfere with the federal regulatory scheme." *Nat'l Fed'n of the Blind v. United Airlines, Inc.*, 813 F.3d 718, 734 (9th Cir. 2016).

The Communications Act regulates neither the whole of "interstate communications services," (Plaintiffs' Br. 4, 25, 50), nor even the narrower field

of "information service[s]," 47 U.S.C. § 153(24), "so pervasive[ly] . . . that Congress left no room for the States to supplement it." *Arizona*, 567 U.S. at 399 (second alteration in original) (quoting *Rice*, 331 U.S. at 230). To the contrary, the Act leaves intact the states' preexisting police powers—their "broad authority to enact legislation for the public good." *Bond v. United States*, 572 U.S. 844, 854 (2014). SB-822 is an exercise of that police power. *See Durnford v. MusclePharm Corp.*, 907 F.3d 595, 601 (9th Cir. 2018) (holding that "traditional state police power" includes "[c]onsumer protection"). The preemption analysis in this case therefore proceeds from the assumption that a federal law has not displaced the state statute "unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).[3]

[3] *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003), is not to the contrary. There, this Court declined to "apply the presumption against preemption . . . because of the long history of federal presence in regulating long-distance telecommunications." *Id.* at 1136. But *Wyeth v. Levine* later made clear that the application of the presumption turns on "the historic presence of state law," rather than the historic "absence of federal regulation." 555 U.S. at 565 n.3. Since *Ting*, district courts in the Ninth Circuit have reversed course and applied the presumption. *See, e.g.*, *Rinky Dink Inc. v. Elec. Merchant Sys. Inc.*, No. C13-1347-JCC, 2013 WL 12074984, at *2 (W.D. Wash. Dec. 17, 2013); *Hovila v. Tween Brands, Inc.*, No. C09-0491RSL, 2010 WL 1433417, at *6-7 (W.D. Wash. Apr. 7, 2010); *New Cingular Wireless PCS LLC v. Picker*, 216 F. Supp. 3d 1060, 1070 n.7 (N.D. Cal. 2016). In any event, the *Ting* rule would not apply here given the absence of significant federal regulation of information services.

I. The Communications Act Does Not Preempt the Field of Interstate Communications.

A. The Communications Act's Grant of Federal Authority to Regulate Interstate Communications Does Not Divest the States of Their Concurrent Authority.

The Communications Act grants to the FCC *jurisdiction* over interstate communications and generally denies it jurisdiction over intrastate communications. *See* 47 U.S.C. § 152. There is nothing in the text or structure of the Act to suggest that the FCC's jurisdiction over interstate communications is exclusive of the states. Nor has Congress enacted a "comprehensive[]," *Garcia*, 140 S. Ct. at 804 (quoting *R.J. Reynolds*, 479 U.S. at 140), or "pervasive," *Arizona*, 567 U.S. at 399 (quoting *Rice*, 331 U.S. at 230), scheme of regulation for all interstate communications sufficient to infer preemption of that entire field.

1. Plaintiffs attempt to manufacture field preemption from the grant of jurisdiction to the FCC in section 152. But nothing in that section suggests a congressional intent to eliminate the states' police powers over interstate communications.[4] Section 152(a) defines the scope of the Communications Act, stating that its provisions "shall apply to all interstate and foreign communication

[4] Plaintiffs incorrectly suggest (Plaintiffs' Br. 56) that focusing on the statutory text "improperly conflates express and implied preemption." To the contrary, field preemption is an inference of congressional intent to exclude state regulation. That inference, "like all preemption arguments, must be grounded 'in the text and structure of the statute at issue.'" *Garcia*, 140 S. Ct. at 804 (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)).

by wire or radio." 47 U.S.C. § 152(a). This text by its terms addresses only the scope of the "provisions of this chapter," *id.*, and consequently, the scope of any regulatory authority they may confer on the FCC. It is silent about whether the FCC's jurisdiction over interstate communications is exclusive of or concurrent with state authority.

Section 152(b) does not help. That section merely limits the FCC's jurisdiction under the statute over intrastate communications, stating: "[N]othing in *this chapter* shall be construed to apply or to give the Commission jurisdiction with respect to" various aspects of intrastate communications, except in limited circumstances. *Id.* § 152(b) (emphasis added). The states' police powers exist independent of the Communications Act. It is implausible that Congress would indicate its desire to displace state powers that exist outside the purview of the statute by delimiting the scope of the FCC's jurisdiction under the Act. "Mere silence, in this context, cannot suffice to establish a 'clear and manifest purpose' to pre-empt local authority." *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607 (1991) (quoting *Rice*, 331 U.S. at 230).

The Supreme Court, moreover, has consistently held that authority to regulate does not, standing alone, give rise to field preemption. *See, e.g.*, *Hillsborough Cnty. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 714 (1985) (holding that FDA authority to regulate does not preempt the field); *see also*

Kurns v. R.R. Friction Prods. Corp., 565 U.S. 625, 638 (2012) (Kagan, J., concurring) (noting that "Congress must do much more to oust all of state law from a field" than "grant[] regulatory authority over that subject matter to a federal agency"). Indeed, the Court has specifically counseled against reading field preemption into "broad statements about the 'comprehensive' nature of federal regulation under the Federal Communications Act." *Head v. N.M. Bd. of Exam'rs in Optometry*, 374 U.S. 424, 429-30 (1963).

None of the cases Plaintiffs cite (Plaintiffs' Br. 45, 51) establish that courts have read section 152 to grant the FCC *exclusive* jurisdiction over or preempt the field of interstate communications. Most of Plaintiffs' cases do not address field preemption at all, much less field preemption of interstate communications. *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) (express and conflict preemption in Title II common carrier service); *Cap. Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984) (express and conflict preemption of cable service); *Nat'l Ass'n of Regul. Util. Commr's v. FCC*, 746 F.2d 1492, 1501 (D.C. Cir. 1984) (express preemption of interstate long-distance service). Shorthand references to the division of state and federal authority in those cases must be read in context: They note the breadth of the FCC's jurisdiction but address only the scope of the FCC's authority to preempt particular aspects of state law, not whether Congress has done so by occupying a field.

Neither does the language of other statutes offer compelling evidence about the scope of preemption under the Communications Act. *See* Plaintiffs' Br. 51-53. Although the Act's jurisdictional provisions use language that is superficially similar to jurisdictional provisions in the Federal Power Act (FPA) and Natural Gas Act (NGA), there is no case law suggesting that courts have interpreted these provisions interchangeably. Courts frequently rely on the NGA to interpret the FPA, and vice versa. But they do so explicitly, *see, e.g.*, *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1298 n.10 (2016), and because the statutes share a common historical origin, *see, e.g., Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 213-14 (1964). The same cannot be said for the Communications Act. The histories and structures of the telecommunications industry and the energy industry are different.

Even if the FPA and the NGA were persuasive authority for interpreting the Communications Act—and they are not—courts neither historically nor in modern cases rely on the jurisdictional provisions of those statutes to establish their preemptive scope. As noted, the early Supreme Court cases addressing the scope of preemption under the FPA and the NGA relied on the specific history of those statutes—a history that the Communications Act does not share. The FPA and NGA were passed to remedy Dormant Commerce Clause limitations on state power to regulate interstate energy markets that would otherwise leave the

industry unregulated. *See, e.g.*, *Interstate Nat. Gas Co. v. Fed. Power Comm'n*, 331 U.S. 682, 689 (1947). The preemptive scope of these statutes was "meticulous[ly]" tailored to remedy this deficiency while preserving the constitutional maximum of state power. *See Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 519 (1947).

Modern cases focus on the scope of the *substantive* rather than *jurisdictional* provisions of the statutes to determine their preemptive effect. In *Hughes*, for example, the Court's preemption analysis focused on section 824d(a) of the FPA, which established the Act's rate-setting authority. 136 S. Ct. at 1292. The Court held that state law that interfered *with that authority* was preempted. *See id.* at 1297-98. To the extent the Court's decision was based on field preemption at all,[5] it is preemption not of the entirety of interstate power transmission, but only of interstate ratemaking. Indeed, the court emphasized the "limited" nature of its holding, declining to "address the permissibility of various other measures States might employ" related to the market. *Id.* at 1299.[6]

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[5] The Court articulated the legal standards for both conflict preemption and field preemption. *Hughes*, 136 S. Ct. at 1297*; see also id.* at 1300 (Sotomayor, J., concurring) (emphasizing that the Court's holding did not rest on any specific preemption theory).

[6] Plaintiffs also cite *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), for the proposition that the jurisdictional provision of the NGA preempts the field. But *Schneidewind* does not so hold and instead merely articulates in dicta that

2. This reading of the statutory text is supported by the Act's structure. The Act does not pervasively regulate *all* aspects of interstate communications. Plaintiffs therefore cannot show that "the mere volume and complexity of federal regulations demonstrate an implicit congressional intent to displace all state law" in the field. *Aguayo v. U.S. Bank*, 653 F.3d 912, 918 (9th Cir. 2011) (quoting *Bank of Am. v. City & Cnty. of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002)).

Some subfields of interstate communications are subject to little or no affirmative regulation. Outside of regulating telecommunications services (Title II of the Act), radio transmissions (Title III), or cable services (Title VI), the FCC has no "independent source of regulatory authority." *California v. FCC (California I)*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990). Instead, in areas of interstate communications not covered by those sections of the Act, the Commission has "only such power as is ancillary to the Commission's specific statutory responsibilities." *Id.* (citing *United States v. Sw. Cable Co.*, 392 U.S. 157, 178 (1968)). If—as with net neutrality conduct rules—the FCC is unable to link the desired regulatory action to some express statutory mandate, it has no regulatory authority at all, *see Comcast Corp. v. FCC*, 600 F.3d 642, 654-55, 659-61 (D.C. Cir. 2010); *Mozilla Corp. v. FCC*, 940 F.3d 1, 76 (D.C. Cir.

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where Congress has otherwise pervasively regulated and therefore preempted a field, deliberate and authoritative omission of a regulatory tool may imply that Congress intended to deny use of that tool to the states. *See id.* at 306.

2019), much less "pervasive" regulatory authority. The cases on field preemption under the Act reflect this diversity of authority in different subfields of "interstate communications."

Indeed, no court has held that the entire field of interstate communications is preempted by federal law. Instead, courts have only found field preemption in narrower subfields that are pervasively regulated. In *Ivy Broadcasting Co. v. AT&T Co.*, 391 F.2d 486 (2d Cir. 1968), for example, the court held that federal law preempted state regulation of the "duties, charges, and liabilities of telegraph or telephone companies with respect to interstate communications." *Id.* at 491. The "liability of communications carriers [i.e. of "common carriers," 47 U.S.C. § 153(11)] with respect to interstate services," *id.* at 492, is far narrower than "interstate communications." The court explicitly inferred a congressional intent to occupy this smaller field from the "broad scheme for the regulation" of interstate common carriers under Title II, which it described in detail. *Id.* at 490; *accord O'Brien v. W. Union Tel. Co.*, 113 F.2d 539 (1st Cir. 1940) (same for transmission of interstate telegraph messages); *Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651 (3d Cir. 2003) (same for common carrier two-way telex transmission service); *Postal-Tel. Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27 (1919) (field preemption of interstate telegraph service under Mann-Elkins Act of 1910); *W. Union Tel. Co. v. Boegli*, 251 U.S. 315 (1920) (same).

Similarly, courts have rejected field preemption claims in narrower subfields of interstate communications that are less pervasively regulated than common carriers. In *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S., the Supreme Court rejected field preemption of radio broadcast—a subset of interstate communications—despite the broad and comprehensive authority granted the FCC to issue broadcast licenses. *See id*. at 429-32. More recently, this Court has held that the field of online video closed captioning is not preempted, noting the "limited scope of the federal captioning scheme for online videos." *Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 433 (9th Cir. 2014) (*GLAAD*); *accord Metrophones Telecomms., Inc. v. Global Crossings Telecomms., Inc.*, 423 F.3d 1056, 1072 (9th Cir. 2005) (payphones); *Ting*, 319 F.3d at 1136-37 (9th Cir. 2003) (long-distance consumer contracts). If federal law does not preempt the narrower fields in those cases, then *a fortiori* it does not preempt the broader field of interstate communications.

Finally, no court has found field preemption in subfields of interstate communications where, as here, the FCC only has limited ancillary authority. Instead, courts have carefully evaluated the scope of the Commission's ancillary authority to determine whether it can preempt state law. *See Mozilla*, 940 F.3d at 75 ("[I]n any area where the Commission lacks the authority to regulate, it equally lacks the power to preempt state law.") In *National Association of Regulatory*

Utility Commissioners v. FCC (NARUC II), 533 F.2d 601 (D.C. Cir. 1976) (*NARUC II*), for example, the court vacated the FCC's preemption of state regulation of two-way, nonvideo uses of cable systems, a forerunner of broadband, because the FCC lacked ancillary authority to regulate those services.[7] If the Act actually preempted the field of interstate communications, the court would have upheld the preemption—no careful examination of ancillary authority in these cases[8] would have been necessary.

Concurrent state authority over interstate communications also accords with the general principle that Congress does not strip states of authority when it decides to leave some aspects of a field unregulated. In *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894 (2019), for example, the Atomic Energy Act gave the Nuclear Regulatory Commission (NRC) broad authority to regulate many aspects of the nuclear power industry. The NRC nevertheless concluded, as the FCC did here, that it lacked authority over one part of the field—uranium mining on private

[7] The majority in *NARUC II* held that the entire preemption was invalid because it was not "reasonably ancillary" to the FCC's statutory responsibilities. *Id.* at 612-614, 621-622. Only one judge found that the FCC also lacked authority to preempt because it was preempting state regulation of intrastate services. *See id.* at 621-23 (Lumbard, J., concurring).

[8] For examples, *see Comcast*, 600 F.3d at 650-58 (discussing examination of ancillary authority in various cases); Brief of Professors of Communications Law as Amici Curiae in Support of Petitioners 6-10, 18-21, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (Nos. 18-1051 et al.) [Mozilla Professors' Br.] (same).

land. *See id*. at 1900. The Court declined to find that narrow field preempted, thinking it unlikely that Congress had intended to create a regulatory void. *Id.* at 1903; *see also id.* at 1912 (Ginsburg, J., concurring in the judgment). The Ninth Circuit reached a similar conclusion with respect to the Communications Act in *Ting*, holding that the FCC's decision to deregulate long distance carriers did not deprive the states of their authority to protect consumers. 319 F.3d at 1136-37. The court reasoned that state law always operates in the background of federal regulation. Rather than oust states from the field, the FCC's forbearance instead "created a much larger role" for state regulation. *Id.*

B. States' Long-Established Role Regulating Interstate Communications Belies Any Claim to Field Preemption.

The long-standing practice of state regulation of important aspects of interstate communications and the recognition of that practice in the Communications Act further supports the conclusion that the Act does not preempt the field. Indeed, the Communications Act has long incorporated a "vision of dual federal-state authority and cooperation" in interstate communications, *Mozilla*, 940 F.3d at 81, that precludes a finding of field preemption. "Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one." *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 421 (1973).

Numerous provisions of the Act specifically preserve a role for the states in interstate communications. *See, e.g.*, 47 U.S.C. §§ 253(b) (preserving state role in universal service, public safety, service quality, and consumer rights), 253(c) (public rights-of-way). Even with respect to broadband internet access service (BIAS), the FCC has recognized the states' role in "policing such matters as fraud, taxation, and general commercial dealings," *In re Restoring Internet Freedom*, 33 FCC Rcd. 311 ¶ 196 (2018), "remedying violations of a wide variety of general state laws," *id.* ¶ 196 n.732, and "enforcing fair business practices," *id.* ¶ 196 (citing *In re Vonage Holdings Corp.*, 19 FCC Rcd. 22404 ¶ 1 (2004)); *see also In re NOS Commc'ns, MDL No. 1357*, 495 F.3d 1052, 1058 (9th Cir. 2007) (47 U.S.C. § 414 indicates that Congress did not "intend[] to preempt the entire field of telecommunications regulation"); *Metrophones*, 423 F.3d at 1072 (relying on §414 in rejecting field preemption).

The Act also contains numerous express preemption provisions. *See, e.g.*, 47 U.S.C. §§ 223(f)(2), 230(e)(3), 253(a), 253(d), 276(c), 543(a)(1), 544(e), 556(c). "Congress's enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992). Some of these express preemption provisions, moreover, are predicated on the assumption that states generally have the concurrent authority to regulate interstate communications, even if the Act

displaces that authority in specific cases. For example, § 253(a) provides that no state or local law or regulation "may prohibit or have the effect of prohibiting the ability of any entity to provide any *interstate or intrastate* telecommunications service." 47 U.S.C. § 253(a) (emphasis added). The FCC has the authority to preempt such laws on a case-by-case basis. *See id.* § 253(d). These provisions, added as part of the Telecommunications Act of 1996 and intended to stimulate competition for *both* interstate and intrastate services, would be unnecessary if the states were already categorically precluded from regulating any interstate communications. Telecommunications Act of 1996 § 253, 47 U.S.C. § 253.

Some preemption provisions also assume, *contra* Pls.' Br. 54, that states have the preexisting authority to "dictat[e] the kind of interstate communications services that broadband providers may offer." For example, cable service is a type of interstate communication. *See Southwestern Cable*, 392 U.S. at 168-69. Section 544(e), which empowers the FCC to promulgate "minimum technical standards relating to cable systems' technical operation and signal quality," also retracts the states' authority to do so: "No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology." 47 U.S.C. § 544(e).

The evolution of cable regulation also shows that Plaintiffs' assertion that "there is no history in the last century of states attempting to dictate which

interstate communications services providers may offer," Pls.' Br. 55, is incorrect. Not only does such history exist, but it also demonstrates that the states are empowered to regulate interstate communications. Prior to the enactment of Title VI of the Communications Act in 1984, the FCC had no express authority to regulate cable, only ancillary authority under Title I. *See Sw. Cable*, 392 U.S. at 178. As described *supra* at 10-11, that ancillary authority is limited. And the courts vacated FCC preemption of state cable regulations that was unsupported by ancillary authority. *See, e.g.*, *NARUC II*, 533 F.2d at 612-14, 621-22.

In *TV Pix, Inc. v. Taylor*, 396 U.S. 556 (1970), *aff'g* 305 F. Supp. 459, 465-66 (D. Nev. 1968), the Supreme Court summarily affirmed a lower court judgment that the Communications Act did not preempt state regulation of interstate cable services as public utilities. The Nevada statute at issue in that case imposed traditional duties of public utilities on cable providers—regulating their rates, services, and facilities. *TV Pix*, 304 F. Supp. at 460. The district court held that "Congress, in enacting the Federal Communications Act of 1934, did not intend absolute preemption of the field to the exclusion of all state regulation." *Id.* Instead, the court observed that the FCC had narrowly regulated only three areas of cable service that would give rise to conflict preemption. *Id.* at 466.

By 1978, eleven states had adopted comprehensive regulations governing this interstate service, including regulating it as a public utility (eight states) and

creating separate cable regulatory agencies (three states). Although the specifics of each state's regulations differed, many states regulated cable television rates and operations, or imposed access and nondiscrimination requirements. *See* Philip R. Hochberg, *The States Regulate Cable: A Legislative Analysis of Substantive Provisions* 23, 29-30, 59-64, 91-97 (1978), https://perma.cc/Z89E-JTHQ.

Against this backdrop of state action, Congress enacted the Cable Communications Policy Act of 1984 ("Cable Act"), Pub. L. No. 98-549, 98 Stat. 2779, which added Title VI to the Communications Act and gave the FCC express authority over cable services. It included several targeted express preemption provisions, *see, e.g.*, 47 U.S.C. § 543(a) (rate regulation), but also expressly preserved states' ability to regulate consistent with the Act, *see id.* § 556.

This history demonstrates that even though the Communications Act asserts federal jurisdiction over interstate communications, that jurisdiction is not *exclusive*. Contrary to Plaintiffs' claims (Pls.' Br. 45, 51), there is a long history of states regulating interstate communications, including in ways that mirror how California has chosen to regulate BIAS. The Communications Act does not preempt the field.[9]

[9] In the district court, Plaintiffs argued that since the intrastate aspects of BIAS are inseparable from its interstate aspects, field preemption of interstate communications or information services meant that California could not enforce SB-822 even as applied to purely intrastate broadband. Plaintiffs do not renew

II. The Communications Act Does Not Preempt the Field of Interstate Information Services.

Even if Plaintiffs' field preemption claim were limited to a narrower field—and it is not—the claim still fails. There is no evidence that the Act preempts the

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that argument on appeal. It therefore is forfeited. *See Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977-78 (9th Cir. 1994). Were this Court nevertheless to entertain the argument, it would still fail, for several reasons.

First, as described above, the Communications Act does not impliedly preempt the fields of interstate communications or interstate information services. It therefore is irrelevant whether it would be impossible for California to regulate only the intrastate aspects of BIAS.

Second, Congress has expressly reserved to the states the ability to regulate intrastate communications, *see* 47 U.S.C. § 152(b), subject only to the "impossibility exception." To the extent Plaintiffs appear to invoke this doctrine, *see* Plaintiffs' Br. 50 n.29, it is inapposite. The impossibility exception speaks only to the FCC's authority, which is not at issue in this case. Plaintiffs cannot bootstrap a reservation of authority to the FCC into an argument that the Communications Act itself preempts SB-822. Courts applying the impossibility exception have consistently held that the agency must have lawful authority to act in order to invoke it. *See La. Pub. Serv. Comm'n*, 476 U.S. at 375 n.4; *Mozilla*, 940 F.3d at 76-78; *California v. FCC (California III)*, 39 F.3d 919, 931-32 (9th Cir. 1994); *California I*, 905 F.2d at 1239-41, 1240 n.35; Mozilla Professors Br. 11-18. There is no question in this case that the FCC lacks such authority. *See Mozilla*, 940 F.3d at 77-78.

Third, Plaintiffs have not met their burden of persuasion by a clear showing that their factual premise—that intrastate and interstate aspects of BIAS are inseparable—is correct. *See Towery v. Brewer*, 672 F.3d 650, 657 (9th Cir. 2012). Evidence in the record contradicts the premise. *See* SER-80-95, Jordan Decl. ¶¶ 11-60; SER-37-40, Schaeffer Decl. ¶¶ 66-74.

Plaintiffs also claim that SB-822 is not limited to regulating intrastate services. Plaintiffs' Br. 49 n.28. Even if true, that leaves open the question whether the statute would be susceptible of a saving construction in the unlikely event that the Court were to determine that California is entitled to regulate only the intrastate aspects of BIAS.

fields of interstate information services or interstate BIAS, and significant evidence to the contrary.

Information services, "offering[s] of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," 47 U.S.C. § 153(24), are subject to regulation only under Title I. *See Comcast*, 600 F.3d at 645-46. This category includes online content, and many applications and services, such as email, websites, social media, online gaming, various online video services, and, since 2018, BIAS. For many information services, including BIAS, the FCC's authority under Title I is sharply limited because their regulation is not reasonably ancillary to the FCC's statutorily mandated responsibilities. *See id* at 645-46, 649-51. The FCC's limited ancillary authority under Title I is hardly the kind of "comprehensive[]," *Garcia*, 140 S. Ct. at 804 (quoting *R.J. Reynolds*, 479 U.S. at 140), or "pervasive," *Arizona*, 567 U.S. at 399 (quoting *Rice*, 331 U.S. at 230), regulation that ordinarily gives rise to an inference that Congress has intended wholly to occupy the field. It is, in fact, the opposite—a congressional abdication of regulatory authority.

To believe that Congress preempted the field of interstate information services, then, one must believe that Congress intended *neither* the federal government *nor* the states to have authority to regulate them. Although

"congressional creation of such a regime" may be possible, "to say that it can be created is not to say that it can be created subtly." *Puerto Rico Dep't of Consumer Aff. v. Isla Petroleum Corp.*, 485 U.S. 495, 500 (1988). Courts will not lightly infer congressional intent to leave a field unregulated by anyone. *See id.* at 503-04 (concluding that congressional repeal of federal regulation did not preclude states from filling regulatory void); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 68-70 (2002) (finding no field preemption in federally unregulated field absent "clear and manifest" evidence of congressional purpose). As in any case, "[e]vidence of pre-emptive purpose is sought in the text and structure of the statute at issue," *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993), not in hypothesized "abstract and unenacted legislative desires" that cannot be found in the statute itself. *Virginia Uranium*, 139 S. Ct. at 1907. Plaintiffs can point to no convincing evidence—subtle or otherwise—that Congress intended to leave interstate information services completely free from state or federal regulation, leaving behind "a pre-emptive grin without a statutory cat." *Isla Petroleum*, 485 U.S. at 504.

The text, structure, and history of the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56, do not support field preemption. The 1996 Act defined "information services" for the first time in federal law, *see* 47 U.S.C. § 153(24), but does not directly regulate them or give the FCC any

direct authority over them. Nothing in the text or legislative history of the 1996 Act says anything about preemption with respect to information services.

This statutory silence speaks volumes when compared to the range of express preemption provisions elsewhere in the 1996 Act, which carefully calibrate federal-state responsibilities, often striking different balances. Some provisions give the FCC "exclusive jurisdiction," *e.g.*, 47 U.S.C. § 303(v). Others couple an express preemption provision with multiple savings clauses, *e.g.*, *id.* §§ 223(f)(2), 253(a)-(d). Some directly preempt state law, *e.g.*, *id.* § 303(v), while others authorize the FCC to do so case by case after notice and comment, *e.g.*, *id.* § 253(d). Legislative history suggests that these provisions were extensively negotiated. *See, e.g.*, H.R. Rep. No. 104-458, at 201, 210 (1996). Against this statutory backdrop, Congress's silence on preemption of state regulation of information services forecloses any inference that Congress meant to preclude the states from exercising their preexisting police powers to regulate them.

Indeed, the 1996 Act went even further, specifically forbidding courts and agencies from implying preemption by anything in the 1996 Act other than express preemption provisions. A section entitled "No implied effect" states: "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." Pub. L. No. 104-104 § 601(c)(1), 110 Stat. 56, 143

(codified at 47 U.S.C. § 152 note) (emphasis added). As the conference report explains, § 601(c)(1) "prevents affected parties from asserting that the bill impliedly preempts other laws." H.R. Rep. No. 104-458, at 201.

Consistent with the statutory text and legislative history, courts have held that § 601(c)(1) prohibits implied preemption, of which field preemption is one variety. In *GLAAD*, for example, the Ninth Circuit held that although the 1996 Act enacted several requirements related to closed captioning of video, § 601(c)(1) "signifies that Congress did not intend to occupy the entire legislative field of closed captioning." 742 F.3d at 428. Other courts are in accord. *See, e.g.*, *Farina v. Nokia, Inc.*, 625 F.3d 97, 121 (3d Cir. 2010); *Pinney v. Nokia, Inc.*, 402 F.3d 430, 458-59 (4th Cir. 2005); *AT&T Commc'ns of Ill. v. Ill. Bell Tel. Co.*, 349 F.3d 402, 410 (7th Cir. 2003); *City of Dallas v. FCC*, 165 F.3d 341, 348 (5th Cir. 1999); *cf. Abrams v. City of Rancho Palos Verdes*, 354 F.3d 1094, 1099 (9th Cir. 2004) (holding that § 601(c)(1) precludes finding that 1996 Act forecloses remedies under 42 U.S.C. § 1983), *rev'd on other grounds*, 544 U.S. 113 (2005). In this case, any preemption of information services must arise solely from the 1996 Act that added the term and accompanying regulatory scheme. But as this Court has held, that statute precludes implied field preemption.

To the extent Plaintiffs suggest that an indication of Congress's preemptive intent in the 1996 Act can be found in policy statements that are unmoored from

specific authority, *see* Plaintiffs' Br. 45, 58 (citing 47 U.S.C. § 230(b)(2)), § 601(c)(1) applies *a fortiori* to bar such preemption. But even on their own terms, those policy statements do not give rise to any inference of preemption. Section 230(b)(2) states 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). That statement of policy says nothing about preemption. It is found, moreover, in the Communications Decency Act, a portion of the 1996 Act, in a provision focused on blocking and screening of offensive material by providers of "interactive computer services," *id.* § 230(f)(2). It is implausible that Congress chose a provision about regulations on blocking and screening of offensive material by providers of one service—interactive computer services—to express an intent categorically to preempt any state regulation of a different service—information services. *See U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 702-03 (D.C. Cir. 2016) (noting that Congress would not have used an ancillary provision like § 230 to "oblique[ly]" and "indirect[ly]" resolve important policy questions about the "regulatory status of broadband Internet access services").[10]

[10] Plaintiffs argue that this Court in *Howard v. America Online, Inc.*, 208 F.3d 741, 753 (9th Cir. 2000), read § 230(b) as an expression of congressional intent to keep broadband unregulated. Plaintiffs' Br. 58. But that case invoked § 230(b) only as evidence that the FCC reasonably concluded that non-facilities-based

Moreover, as the D.C. Circuit has held, net neutrality rules are entirely consistent with the policies announced in § 230(b), which also include "promot[ing] the continued development of the Internet and other interactive computer services" and "encourag[ing] the development of technologies which maximize user control." 47 U.S.C. § 230(b); *see U.S. Telecom*, 825 F.3d at 707-08.

Finally, field preemption of interstate information services is inconsistent with the long line of cases limiting the scope of the FCC's preemption authority for both "information services" and "enhanced services" (the non-statutory forerunner to "information services") to instances in which the FCC had ancillary authority to regulate these services. *See, e.g.*, *NARUC II*, 533 F.2d at 615-17; *Mozilla*, 940 F.3d at 75-86; *see also* Mozilla Professors' Br. 6-10, 18-21.[11] If the

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internet services providers were not "common carriers" under the statute. The Court's passing mention of § 230 in affirming the reasonableness of an agency's construction of an ambiguous statute pursuant to *Chevron* cannot bear the weight Plaintiffs put on it. In particular, it cannot support Plaintiffs' argument that Congress intended a different type of service—facilities-based BIAS—to be completely free of regulation. Indeed, this Court itself distinguished *Howard* in *AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000), when it held that facilities-based broadband internet was a "telecommunications service" under the 1996 Act.

[11] The Eighth Circuit cases upholding preemption of interconnected voice-over-IP (VoIP), which the FCC has declined to classify, are not to the contrary. Unlike with most information services, the FCC has broad statutory authority (under Title II) or ancillary authority (under Title I) over the service, since interconnected VoIP competes with traditional telephony. The FCC has used that authority to impose extensive regulations. *See, e.g., Voice over Internet Protocol (VoIP)*, FCC,

1996 Act had impliedly preempted the field of interstate information services, the FCC would not have needed ancillary authority to preempt state regulation of the interstate aspects of BIAS.[12]

Similarly unpersuasive is any claim that Congress could not have intended to subject information services—or even BIAS, specifically—to a patchwork of state regulations. That argument can be made in nearly every field of interstate

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https://perma.cc/2UZX-P7FQ (last updated Dec. 30, 2019). In *Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570 (8th Cir. 2007), which upheld the FCC's express preemption of certain state VoIP regulations, no party contested the FCC's assertion of authority over the interstate aspects of the service. *See In re Vonage Holdings Corp.*, 19 F.C.C. Rcd. 22404, 22411 n.46, 22425 n.118 (2004). The holding itself addressed the other requirements of the impossibility exception, 47 U.S.C. § 152(b), with respect to that service. *See Minnesota Pub. Utils. Comm'n*, 483 F.3d at 577-581. Based on a misreading of this precedent, *Charter Advanced Servs. (MN), LLC v. Lange*, 903 F.3d 715 (8th Cir. 2018) concluded that state regulation of interconnected VoIP was preempted, and observed, without further analysis, that "state regulation of an information service conflicts with the federal policy of nonregulation." *Id.* at 719 (quoting *Minnesota Pub. Utils. Comm'n*, 483 F.3d at 580). Despite the sweep of that dictum, the holding of the case is specific to conflict preemption of interconnected voice-over-IP. Neither case suggests field preemption of *all* information services.

[12] Contrary to Plaintiffs' claims, neither *Mozilla*'s holding nor its reasoning was limited to intrastate services. *Mozilla* vacated the FCC's entire preemption order—including its preemption of "'any state or local requirements that are inconsistent with [its] deregulatory approach'"—because the FCC "fail[ed] to ground" the order "in a lawful source of statutory authority." 940 F.3d at 74 (alteration in original) (quoting *In re Restoring Internet Freedom*, 33 FCC Rcd. 311 (2018)). The lack of statutory authority was "fatal" to the order's express preemption of state regulations, whether those state laws applied to interstate or intrastate services. That the FCC also preempted state regulation of intrastate BIAS in violation of § 152(b) was an *additional* problem with its preemption order, not the only or dispositive problem.

commerce, and yet courts find field preemption only "rare[ly]." *Garcia*, 140 S. Ct. at 804. Courts routinely refuse to imply field preemption simply from the fact that some may perceive uniformity to be preferable. *See, e.g.*, *Virginia Uranium*, 139 S. Ct. at 1907; *NARUC II*, 533 F.2d at 619 ("It matters not whether we or the FCC believe that one national laboratory would be better than 50 separate schemes of regulation.").

States commonly regulate information services provided to customers in their state that are both interstate and intrastate in nature, and courts have consistently upheld those laws against various preemption challenges. In *GLAAD*, for instance, this Court rejected a preemption challenge to a California law that directly regulated information services by requiring websites to caption posted videos. 742 F.3d at 428. The state law applied to all websites accessed by customers in California, regardless of the website's location, thus regulating both interstate and intrastate information services. *See also, e.g.*, *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 961 (N.D. Cal. 2006) (rejecting preemption of state law accessibility requirement regardless of website's location).

These statutes often directly regulate technical aspects of interstate information services. Colorado, for example, sets technical standards for online fantasy sports leagues that serve in-state customers, regardless of the provider's

location. Colo. Rev. Stat. § 44-30-1607(1)(i), (h), (k). New York recently reached a settlement with Zoom, an online videoconferencing service, in which the company committed to complying with New York's encryption and routing standards even when some participants are not in New York. *See* Letter Agreement Between Zoom and the NYAG at 3, 4, 6 (May 7, 2020), https://perma.cc/7ZCN-XKD5. The statutes upheld in *GLAAD* and many others like those cited above—all interstate applications of important state consumer protection laws—would fall under Plaintiffs' field preemption theory.[13] And because the FCC often lacks ancillary authority to engage in such regulation, consumers would be wholly unprotected.

[13] To the extent these statutes raise constitutional questions about the extraterritorial application of state law, challenge remains available under the Dormant Commerce Clause. *See, e.g.*, *GLAAD*, 742 F.3d at 432-33; *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1308-09 (10th Cir. 2008) (upholding application of Kansas online payday lending protections against out-of-state providers). Appellants have included a Dormant Commerce Clause claim in their complaint that they have chosen not to press at this stage of the litigation. *See* First Amended Complaint at 1, 15-17, 63-70, 84-88, prayer 2, *Amer. Cable Ass'n v. Becerra*, No. 18-cv-02684-JAM-DB (E.D. Cal. Aug. 5, 2020).

CONCLUSION

Amici respectfully urge this Court to affirm the decision below.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. The foregoing **BRIEF OF *AMICI CURIAE* INTERNET LAW PROFESSORS IN SUPPORT OF APPELLEE** complies with the type-volume limitation contained in Fed. R. App. P. 29(a)(5) and Ninth Circuit Rule 32-1(a). The brief is printed in proportionally spaced 14-point type, and the brief has 6996 words according to the word count of the word-processing system used to prepare the brief (excluding the parts of the brief exempted by Fed. R. App. P. 32(f)).

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2021, I electronically filed the foregoing **BRIEF OF *AMICI CURIAE* INTERNET LAW PROFESSORS IN SUPPORT OF APPELLEE** with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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