CASTING A BROAD NET: THE FEDERAL COMMUNICATION COMMISSION'S PREEMPTION OF STATE BROADBAND INTERNET REGULATION

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I. INTRODUCTION

As a comparatively modern innovation, the internet has become fundamental in our personal and professional lives. With increasing frequency we are introduced to new innovations in internet-based technologies that seek to make our lives easier socially, politically, and economically; changing how we consume our news, transact business, engage in communication, social connections and interactions, relax with entertainment, and even how we shop for our weekly groceries. As just one measure for the total pervasiveness of the internet today, digital ad spending in the United States is expected to finally overtake traditional ad spending (print, television, and radio, combined) in the

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United States in 2019 with estimated expenditures of $129.34 billion or approximately 54.2 percent of all U.S. ad spending.[1]

Yet for the vastness of the internet—in both its role in today's society and in the available content provided by a countless number of content providers (from big companies like Google, Facebook, Amazon, and Netflix, to individual bloggers and today's "social media influencers," and everything in between)—only a relatively few companies, known as internet service providers or "ISPs," provide access to the internet.[2] And, importantly, the ISPs themselves provide the critical infrastructure and the network connections necessary to link content providers to the millions of internet users or consumers.

As a small number of ISPs dominate the increasingly salient internet access services market, federal and state legislators, executives, and regulators throughout the United States have begun to take notice. Part of recognizing and accepting the role that the internet (and ISPs as providing access to the internet) plays in today's society is—as legislators, regulators, stakeholders, and others are beginning to do—confronting the issue of whether, how, and to what extent ISPs and the internet more broadly should be regulated.

In 2015, the Federal Communications Commission ("FCC"), for the first time of such magnitude, imposed rigorous regulations and rules on broadband ISPs. In doing so, the federal government had essentially decided as a policy matter that it was necessary to regulate how ISPs were ferrying or conveying the internet to consumers, ultimately connecting them to internet content producers; a regulatory scheme known as "net neutrality." In doing so, the FCC at least implicitly viewed broadband internet as a public (rather than private) good, subjecting it to the regulations more familiar to common carriers of television and telephone services within the modern communica-

1. *US Digital Ad Spending Will Surpass Traditional in 2019*, eMARKETER (Feb. 19, 2019), https://www.emarketer.com/content/us-digital-ad-spending-will-surpass-traditional-in-2019.

2. In 2017, two of the largest ISPs—Comcast and Charter—served as internet access service providers for an estimated 122 million people; by comparison, the next four telecommunications companies (AT&T, Verizon, CenturyLink, and Frontier Communications) provided internet access services for a combined 80.3 million people. HANNAH TROSTLE & CHRISTOPHER MITCHELL, PROFILES OF MONOPOLY: BIG CABLE AND TELECOM, 27 (2018), https://ilsr.org/monopoly-networks/. In a similar vein, another recent study found that the three largest broadband internet providers in the United States—Comcast, Charter, and AT&T—make up almost 60% of the broadband internet market just by themselves. Pete Bell, *Cable is the Main Form of Broadband Access in North America*, TELEGEOGRAPHY (Nov. 2018), https://blog.telegeography.com/cable-is-main-form-of-broadband-access-in-north-america. And this trend only continues. *See* Jon Brodkin, *Cable Expands Broadband Domination as AT&T and Verizon Lose Customers*, ARSTECHNICA (Aug. 16, 2016), https://arstechnica.com/information-technology/2016/08/cable-expands-broadband-domination-as-att-and-verizon-lose-customers/.

tions technology industry.[3] Just three years later, however, the FCC drastically altered course. Under a new administration focused on deregulation,[4] the FCC promulgated an order, the "Restoring Internet Freedom Order," ("2018 Order") that repealed its prior set of rules and regulations concerning broadband ISPs.[5]

Under this order, rather than regulating broadband internet as a public good to which the federal regulatory scheme for common carriers applies (as a practical effect, resulting in net neutrality regulations) the new regulatory scheme necessarily viewed broadband internet more like a private good, which is best regulated under a more market-based or laissez-faire approach. Most importantly, although not uniquely in agency rulemaking and regulation, the FCC reinforced its new regulatory scheme by expressly preempting states from imposing any net neutrality-style rules within their own jurisdiction (the same style or type of rules the previous FCC had made federal policy in its 2015 Order and which the FCC disavowed in 2018).[6]

Despite the agency's 2018 Order, state legislatures throughout the country maintained a view of the internet as necessarily a public good subject to appropriate regulation. In the 2018 legislative session, five states enacted legislation or adopted resolutions concerning net neutrality and thirty-four states introduced 120 bills or resolutions on the issue of internet regulation and net neutrality.[7] In 2019, twenty-nine states introduced legislation concerning net neutrality and four states enacted legislation concerning net neutrality.[8] In addition, in

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3. *See* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015). Largely, the common carrier regulations applied to cable and telephone providers and services.

4. *See President Trump's Historic Deregulation is Benefitting All Americans*, WHITEHOUSE.GOV (Oct. 21, 2019) (emphasizing the Administration's record of deregulation efforts generally).

5. Restoring Internet Freedom, 33 FCC Rcd. 311 (2018).

6. *See id.* at 426-28.

7. Heather Morton, *Net Neutrality Legislation in States*, NAT'L CONF. OF ST. LEGISLATURES (Jan. 23, 2019), http://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-legislation-in-states.aspx#2018Legis; *see also* OR. REV. STAT. § 276A.418 (2019) (prohibiting public contracts with broadband ISPs that violate net neutrality principles including paid prioritization, blocking lawful content, applications, or services, discriminating against or favoring content, etc.); WASH. REV. CODE § 19.385.020(2) (2018) (prohibiting broadband ISPs from blocking lawful content, impairing or degrading internet traffic on the basis of content, application, or service, or engaging in paid prioritization); VT. STAT. ANN. tit. 3, § 348(b) (LexisNexis 2018) (providing certification of ISP only if the provider does not block lawful content, applications, or services, impair or degrade lawful internet traffic based on content, application, or service, or engage in paid prioritization); CAL. CIV. CODE § 3101(a) (Deering 2019) (making it unlawful for broadband ISP to engage in anti-net neutrality principles as defined).

8. Heather Morton, *Net Neutrality Legislation in States*, NAT'L CONF. OF ST. LEGISLATURES (Jan. 21, 2019), https://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-2019-legislation.aspx.

2018, governors in six states signed executive orders that only permit state contracts with ISPs who follow or support net neutrality principles.[9] After California passed "one of the strongest net neutrality laws in the nation," the Department of Justice promptly filed suit seeking declaratory and injunctive relief, in large part seeking to invalidate the law under the preemption provision contained within the FCC's 2018 Order.[10]

Whether net neutrality regulation—as briefly described in Part II—is appropriate as a policy matter is not the focus of this article and is better left to policymakers and other experts in the field. Rather, this article explores how the FCC's 2018 Order with its express preemption provision fits within the context of well-established administrative law and preemption principles and what it reveals about the state of the delicate balance of federalism, particularly given the now developing federal-state divide as to whether broadband internet should be regulated as a public or private good.

In its 2018 Order, the FCC cast a broad net of preemption over state regulation of the internet, placing a heavy weight on the federal-state regulatory balance in favor of the federal government. While federalism and preemption are not mutually exclusive or contradictory, the ability to displace independent state regulation of the internet—a communications technology and industry in which the States have a vested and important interest[11]—should be nonetheless judiciously wielded, as should any exercise of the preemption power. And in a modern system that continues to experience the growth in the role and autonomy of administrative agencies, more opportunities will arise for agencies to be the federal actor that tips the scales in favor of the federal government under the preemption power. At the same time, congressional preemption and preemption by agencies—although both can be valid exercises of the preemption power—are two entirely different propositions.

Recently, in *Mozilla Corp. v. FCC*,[12] the United States Court of Appeals for the District of Columbia Circuit recognized this principle

9. Kathryn J. Kline, *State Responses to Net Netrality*, NAT'L REG. RSCH. INST., https://pubs.naruc.org/pub/45ACE3A2-AAEA-417D-2416-B6862C9D4435.

10. *See* Dina Kesbeh, *Justice Department Sues California Over Net Neutrality Law*, NPR (Oct. 1, 2018), https://www.npr.org/2018/10/01/653216821/u-s-justice-department-sues-california-over-net-neutrality-law; Complaint for Declaratory and Injunctive Relief at 9-10, United States v. California, 2018 U.S. Dist. Ct. Pleadings LEXIS 18799 (E.D. Cal. Sept. 30, 2018) (No. 2:18-at-01539).

11. Even industry insiders recognize the modern reality that "[l]ike electricity, broadband is essential to every American." Jonathan Spalter & Shirley Bloomfield, *Broadband Should be Reality for All*, TOPEKA CAPITAL-JOURNAL (Aug. 13, 2018), https://www.cjonline.com/opinion/20180813/jonathan-spalter-and-shirley-bloomfield-broadband-should-be-reality-for-all.

12. 940 F.3d 1 (D.C. Cir. 2019) (per curiam).

when it invalidated the FCC's exercise of the preemption power in its 2018 Order. In this vein, Part III outlines the principles of federal preemption of state law and also preemption of state law by administrative agencies. Part IV analyzes the FCC's 2018 Order in this context, as well as the D.C. Circuit Court's opinion in *Mozilla Corp.*, and concludes that the FCC's exercise of administrative preemption authority in this case raises important questions as to the seemingly unconstrained power administrative agencies like the FCC assert in the modern regulatory and governmental framework.

II. REGULATING THE INTERNET

To fully understand the implications and importance of potential federal preemption of state law here, it is important to have a basic understanding of the internet and the underlying principles of internet regulation colloquially referred to as "net neutrality." As a relatively modern technology, what we know as the "internet" is, in the most basic sense, a connection (or "network") of computers that are linked together to instantaneously and simultaneously send, release, and request "data packets" of information.[13] These packets are transmitted through the network and ultimately re-configured in the form of a webpage, document, or video on a user's computer.[14] Perhaps its most important and easily palpable process, the internet operates to connect a myriad of content providers to the end-of-the-line consumer: internet users.[15] Today, this connection is facilitated by a number of privately-owned ISPs that provide the final link in the internet chain that directs the packets of information from the network (the "internet") to the consumer's computer.[16] In one sense, ISPs provide consumers with the "on-ramp" to the internet.[17]

Today, internet consumers primarily rely on the technology of "broadband internet" as that on-ramp to access the internet.[18] Broadband internet is generally described as "high-speed internet access

13. Jennifer Wong, *Net Neutrality: Preparing for the Future*, 31 J. NAT'L ASS'N ADMIN. L. JUD. 669, 673 (2011).

14. *Id.*; *see also* 47 U.S.C. § 230(f)(1) (2019) (defining the internet as "the international computer network for both Federal and non-Federal interoperable packet switched data networks").

15. Wong, *supra* note 13, at 673.

16. Daniel Lyons, *Net Neutrality and Nondiscrimination Norms in Telecommunications*, 54 ARIZ. L. REV. 1029, 1034 (2012).

17. *Id.* at 1033 (quoting Julius Genachowski, Conversations with FCC Chairman Julius Genachowski: Thoughts on the October Commission Meeting & the Open Internet NPRM (Oct. 22, 2009)).

18. *See, e.g.*, *Internet/Broadband Fact Sheet*, PEW RSCH. CTR. (June 12, 2019), http://www.pewinternet.org/fact-sheet/internet-broadband/ (almost three-fourths of American adults have high-speed broadband service at home); *see also* Verizon v. FCC, 740 F.3d 623, 629 (D.C. Cir. 2014) (recognizing, "[t]oday, [internet] access is generally

that is always on and faster than the traditional dial-up access."[19] ISPs provide broadband internet service[20] in a number ways: copper telephone lines (known as digital subscriber lines or DSL), satellite, traditional cables and fiber optic cables, and mobile services.[21] Typically, consumers pay ISPs a monthly fee for the privilege of using the ISPs' broadband access service through one of these methods. Whatever the method for internet access, ISPs alone connect first-level content producers to last-level internet consumers.

A. The Basics of the Internet and Net Neutrality

As a function of a traditional "end-to-end" design that transmits data or information packets over the network without regard to their content, the internet provides a competitive and open platform for content providers to reach internet users.[22] It is competitive and open in the sense that the internet operates through a chain of "best efforts networks"—wherein the network delivers the digital packets of information based on a "best guess" of how to transmit the packet to its intended location rather than as any function of the packet's actual content; the internet does not operationally differentiate between data packets based on the content contained within them.[23] As a consequence of this traditional non-discriminatory model of the internet, as the United States Supreme Court has observed, "[n]o single organization controls any membership in the [internet], nor is there any single centralized point from which individual [internet] sites or services can be blocked[.]"[24]

But however objective the internet may be in its basic or classical functionality and design, the physical infrastructure necessary to access the network—telephone lines, cables, satellites, and mobile infrastructure—is built and maintained by the ISPs themselves.[25] As a

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furnished through 'broadband,' i.e., high-speed communications technologies, such as cable modem service," and no longer dial-up connections through phone lines).

19. *Types of Broadband Connections*, Fed. Comm. Comm'n (last updated June 23, 2014), https://www.fcc.gov/general/types-broadband-connections.

20. *See* Sam Cook, *Internet and Broadband Terms and Speeds Explained*, comparitech (Mar. 14, 2018), https://www.comparitech.com/internet-providers/internet-and-broadband-terms-explained/.

21. *Id.*; *Types of Broadband Connections*, *supra* note 19.

22. *See* Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. Telecomm. & High Tech. L. 141, 146 (2003); Reno v. Am. Civil Liberties Union, 521 U.S. 844, 853 (1997) ("From the publishers' [or content provider's] point of view, [the internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers.").

23. Lyons, *supra* note 16, at 1035.

24. *Reno*, 521 U.S. at 853 (citation omitted) (quotation omitted).

25. *See* Kristina M. Lagasse, *Shaping the Future of the Internet: Regulating the World's Most Powerful Information Resources in* U.S. Telecom. Ass'n v. FCC, 63 Loy. L. Rev. 321, 327 (2017) (discussing how, initially, Comcast and Time Warner repurposed

function of their existence as private entities and because the ISPs must themselves first invest in this infrastructure to provide the service, ISPs are necessarily subjected to outside forces such as profit incentivization; in turn, creating inherent preferences towards (or against) certain packets of information—more broadly, the content transmitted across the network between the content providers and the internet consumer.[26] This incentive to view data un-objectively is even stronger given the practical and economic reality that consumers typically choose a single ISP to provide their entire access to the internet where only a small handful of ISPs exist in the first place.[27] As a result, ISPs are primed to "manipulate the flow of information in society" simply "[b]y regulating the terms upon which content providers use their [ISPs'] networks to reach consumers."[28] This is especially true for today's ISPs that simultaneously exist and continue to expand and compete both in terms of content *and* the content delivery market.[29]

The ambiguous set of regulatory principles collectively known as "net neutrality" recognize this as a systemic flaw of the internet: the profit incentives and gate-keeper-style role ISPs can play inherently conflict with the classical design and true nature of the internet. Net neutrality proponents seek to safeguard and uphold a truly neutral end-to-end network by prohibiting ISPs from discriminating against packets of information (that is, content) by selectively slowing down or blocking their transmission altogether and from engaging in other non-objective or non-neutral network practices.[30] In other words, proponents of net neutrality argue that regulation is required to reduce the perverse incentives that come with the modern reality that ISPs

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their cable lines to provide high-speed internet); Spalter & Bloomfield, *supra* note 11 (stating that in the last twenty years, ISPs "have invested more than $1.6 trillion . . . building out our nation's world-leading digital infrastructure").

26. *See* Rob Frieden, *What's New in the Network Neutrality Debate*, 2015 MICH. ST. L. REV. 739, 748-49 (2015) (recognizing that in its early development, due to plentiful government grants and subsidies, ISPs had no incentive to "favor certain types and sources of [network] traffic," but the commercialization of the internet where ISPs bear the financial burden of network infrastructure, ISPs are incentivized to "seek higher compensation from both downstream and upstream users").

27. *Id.* at 764-65.

28. Lyons, *supra* note 16, at 1034.

29. *See* Tejas N. Narechania, *Network Nepotism and the Market for Content Delivery*, 67 STAN. L. REV. ONLINE 27, 27 (2014).

30. Frieden, *supra* note 26, at 745 (characterizing the debate as addressing "whether and how ISPs have the incentive and ability to provide preferential access to some content sources while handicapping others by providing inferior service, demanding unaffordable surcharges, or blocking specific types and sources of traffic"); *see* Lyons, *supra* note 16, at 1038 (net neutrality is about ISP ability to regulate and make rules for the "flow of information from Internet-based content and application providers to consumers," rather than the rates an ISP can charge the end consumer for broadband internet access).

are privately-owned profit-seeking businesses providing a service which has become an integral necessity within today's society.[31] Net neutrality supporters believe that the profit-incentives for ISPs (even if merely a function of the modern reality that such companies bear the cost of building and improving network infrastructure) can easily lead to "pay to play" surcharges and prioritization of traffic delivery, threatening the internet's classical end-to-end framework.[32]

Proponents of net neutrality as a policy matter seek regulation of ISPs and the internet in a way that protects against "paid prioritization" practices (i.e., charging content providers a fee or higher cost for priority in the ISP's allocation of the network's limited shared resources) rather than relying on the neutral and detached best efforts network system.[33] Additionally, net neutrality regulations are also aimed to protect against ISPs blocking certain traffic altogether,[34] closing off their network based on specific content or a specific content provider, or requiring a content provider or class of content providers to pay a fee to avoid being blocked from the ISP's network.[35] At the most fundamental level, net neutrality proponents argue that content or content provider discrimination by ISPs in whatever form, whether paid prioritization, throttling,[36] or blocking, has the potential to disrupt and, at a minimum, to undermine the open, nondiscriminatory nature of the internet in its classical design and function.[37]

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31. *See* Lyons, *supra* note 16, at 1034 (recognizing that "the largest broadband providers are cable and telephone companies, which have incentives to prevent customers from using their broadband connections in ways that threaten their revenue streams").

32. *See* Frieden, *supra* note 26, at 751.

33. Narechania, *supra* note 29, at 29; *see* Lyons, *supra* note 16, at 1034.

34. *See, e.g.,* Peter Svensson, *Comcast Blocks Some Internet Traffic*, ASSOCIATED PRESS (Oct. 19, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007 /10/19/AR2007101900842.html (reporting Comcast Corp. blocked online peer-to-peer network sharing through services like BitTorrent); *see also* Comcast Corp. v. FCC, 600 F.3d 642, 644 (D.C. Cir. 2010) ("In 2007 several subscribers to Comcast's high-speed Internet service discovered that the company was interfering with their use of peer-to-peer networking applications.").

35. Lyons, *supra* note 16, at 1053.

36. *See id.* at 1056 (defining throttling as "the intentional delaying of targeted network traffic").

37. For a brief discussion net neutrality generally, see Alexis C. Madrigal & Adrienne Lafrance, *Net Neutrality: A Guide to (and History of) a Contested Idea*, THE ATLANTIC (Apr. 25, 2014), https://www.theatlantic.com/technology/archive/2014/04/the-best-writing-on-net-neutrality/361237/?gclid=CJwKCAjwq_D7BRADEiwAVMDdHi-OFnqh0_VoaRYi_sWtEmfvRZgTsW_SH8Ae3iEqdFcTTeq460CbyxoCf34QAvD_BwE.

B. Federal Regulation of the Internet

Through the Communications Act of 1934,[38] as amended by the Telecommunications Act of 1996,[39] Congress created the Federal Communications Commission ("FCC") to "regulat[e] interstate and foreign commerce in communication by wire and radio."[40] Until 1996, the Communications Act principally regulated entities that were classified as "common carriers"; those defined as "any person engaged as a common carrier for hire, in interstate . . . communication by wire or radio."[41] In 1996, the Telecommunications Act, in part, amended the Communications Act by creating two new categories or classifications of regulated entities under the FCC's domain: telecommunications service providers and information service providers.[42] The classification assigned to broadband internet—itself an exercise of agency expertise and authority to which *Chevron* deference applies[43]—is especially important in terms of the potential regulation to which it is subject under the statutory scheme as each classification brings with it a very different regulatory framework. For instance, when classified as a telecommunications service, ISPs providing broadband internet access services are considered common carriers,[44] for which federal telecommunications law imposes a mandatory and onerous regulatory scheme under Title II of the Telecommunications Act.[45] On the other hand, if classified as an information service, these ISPs

38. Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified at 47 U.S.C. §§ 153-614 (2018)).

39. Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151, et seq. 2018)).

40. 47 U.S.C. § 151 (2018).

41. Communications Act of 1934, ch. 652, sec. 3(h) (1934) (codified at 47 U.S.C. § 153(11) (2018)).

42. Telecommunications Act of 1996, Pub. L. 104-104, sec. 3(a)(2)(41), (51), 110 Stat. 56, 58-60 (1996) (codified at 47 U.S.C. § 153(41), (51) (2018)). Congress enacted this modern distinction grounded in the FCC's long-standing practice of distinguishing between "basic" services (e.g., a single-telephone line) and "enhanced" services (e.g., a "computer-processing service offered over telephone lines"). Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 975-76 (2005); *see* 47 U.S.C. § 153(24), (53) (2018); *see also* S. Rep. No. 104-230, at 114-15 (1996) (Conf. Rep.) (noting that the new definition of "information service" is defined "similar to the [FCC]'s definition of "enhanced services" and that, "[t]he Senate intends that the Commission would have the continued flexibility to modify its definition and rules pertaining to enhanced services as technology changes").

43. *Brand X*, 545 U.S. at 981 (applying *Chevron* deference to the FCC's "interpretation of the Communications Act" in the agency's classification of broadband cable internet service).

44. *See* 47 U.S.C. § 153(51) (explaining telecommunications carriers means "any provider of telecommunications services" and "shall be treated as a common carrier"); Telecommunications Act of 1996, § 101(b), 110 Stat. 56 (amending Title II of the Communications Act by inserting before 47 U.S.C. § 201 the title: "Part I—Common Carrier Regulation").

45. 47 U.S.C. § 153(51); 47 U.S.C. §§ 201-231 (2018).

would instead be wholly outside the mandatory Title II common carrier regulations and would fall under Title I—a less-defined, but by definition a lighter and more limited regulatory scheme.[46]

Accordingly, whether the FCC classifies broadband internet as a telecommunications or information service under the Telecommunications Act is an exercise of agency authority that, in turn, determines the statutory authority, extent, and type or style of regulations the agency can impose on the ISPs who provide those services. If the agency promulgates a Title II telecommunications classification, it must impose the common-carrier-style rules; rules that practically speaking constitute a net neutrality scheme, including rules against blocking, throttling, and paid prioritization, in addition to enhanced transparency and disclosure requirements.[47] When applied under this scenario, the net neutrality-style rules are squarely "grounded in . . . statutory authority"; that is, § 706 of the Telecommunications Act[48] and the mandatory common carrier regulations under Title II.[49] While the common carrier regulations under Title II are mandatory, Congress expressly delegates to the agency decision-making authority to forbear from imposing certain regulations.[50] More plainly, a Title II telecommunications service classification brings ISPs and the internet industry within the FCC's "direct authority."[51]

Alternatively, if the FCC classifies broadband internet service as an information service, the agency's regulatory authority and jurisdictional framework are much different. Most importantly, ISPs are no longer subject to any of the clearly defined (and mandatory) common carrier regulations found under Title II. In fact, the FCC would have

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46. 47 U.S.C. § 151; *see also* Internet Policy Statement, 20 FCC Rcd. 14986, at 14987-88 (2005); *Brand X*, 545 U.S. at 978 (indicating Title I classification means that such services and service providers are "not subject to mandatory Title II common-carrier regulation").

47. *See* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, at 5607-08 (2015).

48. Pub. L. No. 104-104, § 706, 110 Stat. 153 (1996) (codified at 47 U.S.C. § 1302).

49. Protecting and Promoting the Open Internet, 30 FCC Rcd. at 5720-25; 47 U.S.C. §§ 201-276 (2018).

50. 47 U.S.C. §§ 153(51) (telecommunications carrier treated as common carrier), 160(a) (forbearance authority); *see also* U.S. Telecomm. Ass'n v. FCC, 825 F.3d 674, 701-11 (D.C. Cir. 2016) (upholding the FCC's re-classification of broadband internet access service as a telecommunications service in an order that imposed rules against blocking, throttling, and paid prioritization).

51. Lyons, *supra* note 16, at 1041; *see also* Framework for Broadband Internet Service, 25 FCC Rcd. 7886, at 7889 (2010) ("Title II of the Communications Act provides the Commission express authority to implement, for telecommunications services, [common carrier] rules furthering universal service, privacy, access for persons with disabilities, and basic consumer protection, among other federal policies."); Frank W. Lloyd, *Cable Television's Emerging Two-Way Services: A Dilemma for Federal and State Regulators*, 36 VAND. L. REV. 1045, 1051-54 (1983) (recognizing that Title II gives the FCC "express authority" and "comprehensive authority" over common carriers); 47 U.S.C. §§ 201-231.

no regulatory authority to impose any common carrier-style rules (including net neutrality-style rules) on ISPs.[52] Instead, its authority to regulate ISPs when broadband internet is classified under the Telecommunications Act as an information service is the agency's "Title I ancillary jurisdiction to regulate interstate and foreign communications."[53] Indeed, the Supreme Court of the United States has recognized that "[i]nformation-service providers, by contrast, are not subject to mandatory common-carrier regulation under Title II, though the [FCC] has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications[.]"[54]

Rather than relying on an express statutory authority, FCC's jurisdiction to regulate information service providers under its ancillary authority is statutorily grounded in the broad grant of agency authority under § 4(i) of the Communications Act,[55] authorizing the FCC to "perform any and all acts, make such rules and regulations, and issue such orders not inconsistent with this chapter, as may be necessary in the execution of its functions."[56] Based on Supreme Court case law,[57] the Court of Appeals for the D.C. Circuit[58] has formulated a two-part test for the exercise of so-called ancillary jurisdiction pursuant to Title I: (1) the regulated subject is covered by the "general jurisdictional grant under Title I" (i.e., it consists of an interstate communication by wire), and (2) the regulations promulgated are "reasonably ancillary to the [FCC]'s effective performance of its statutorily mandated responsibilities."[59] More clearly, "to assert ancillary jurisdiction, the FCC must establish a statutory mandate to which its proposed action is

52. *See* Verizon v. FCC, 740 F.3d 623, 650 (D.C. Cir. 2014) (determining the FCC could not regulate broadband providers as common carriers—specifically anti-discrimination obligation and anti-blocking rules—under authority of § 706 of Telecommunications Act when the still-binding classification of broadband internet was as an "information service" rather than "telecommunications service").

53. Internet Policy Statement, 20 FCC Rcd. 14986, at 14987-88 (2005) (quoting *Brand X*, 545 U.S. at 976).

54. *Brand X*, 545 U.S. at 976.

55. Pub. L. No. 73-416, § 4(i), 48 Stat. 1064 (1934) (codified at 47 U.S.C. §§ 154(i) (2018)).

56. 47 U.S.C. § 154(i); *see also* Christopher Terry, Scott Memmel, & Ashley Turachek, *Lost in a Novelty Mug: U.S. Telecom, the FCC, and Policy Resolution for Net Neutrality*, 41 HASTINGS COMM. & ENT. L.J. 1, 28 (2019).

57. *See generally* United States v. Southwestern Cable Co., 392 U.S. 157 (1968); United States v. Midwest Video Corp., 406 U.S. 649 (1972); FCC v. Midwest Video Corp., 440 U.S. 689 (1979).

58. Under the Hobbs Act, the courts of appeals have exclusive jurisdiction in cases challenging FCC's orders. *See* FCC v. ITT World Comms., Inc., 466 U.S. 463, 468 (1984) (citing 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a)).

59. Comcast Corp. v. FCC, 600 F.3d 642, 647 (D.C. Cir. 2010) (citing Am. Library Ass'n v. FCC, 406 F.3d 689, 691-92 (D.C. Cir. 2005)).

securely tethered."[60] Thus, to properly exercise ancillary authority under Title I, the FCC must tie the regulation to some duty or responsibility specifically assigned or delegated by Congress. In 1980, when initially outlining its authority to regulate enhanced services—an order that was the precursor to and model for the Telecommunications Act's "information services" classification—the FCC recognized that the "principle limitation" on its Title I authority is that the "regulation must be directed at protecting or promoting a statutory purpose."[61]

In a 2010 decision, the D.C. Circuit Court further delineated the importance in the distinction between internet service as a telecommunications service or information service.[62] In *Comcast Corp. v. FCC*, despite FCC's classification of cable internet as *not* a Title II telecommunications service, it issued an order asserting jurisdiction over Comcast's network management practices and requiring the ISP to stop discriminating against peer-to-peer network applications and to adopt a new system to manage its network ("Comcast Order").[63] In effect, the FCC attempted in its Comcast Order to impose regulations sounding in the Title II common-carrier realm of its jurisdiction while employing a different, non-Title II classification to cable internet service.

But as noted above, to properly exercise ancillary jurisdiction under Title I, the FCC must ground any regulation imposed under its ancillary authority in some statutory obligation (such that FCC's regulation is "ancillary" to that statutory obligation or mandate). In promulgating its Comcast Order, the agency relied on 47 U.S.C. § 230(b), arguing that Comcast's network management practices frustrated stated congressional policy "to promote the continued development of the internet and other interactive computer services" and "to encourage the development of technologies which maximize user control over what information is received."[64] The Court of Appeals recognized, however, that by the very nature of ancillary—rather than direct—authority, the FCC cannot provide the necessary statutory link simply by relying on congressional statements of policy.[65] In

60. Babette E.L. Boliek, *FCC Regulation versus Antitrust: How Net Neutrality Is Defining the Boundaries*, 52 B.C. L. REV. 1627, 1636-37 (2011).

61. Second Computer Inquiry, 77 F.C.C.2d 384, ¶ 126 (1980).

62. As an initial note, while the FCC order that precipitated this case did not classify cable internet as an information service, the FCC nevertheless relied only on § 4(i) of the Communications Act (its Title I ancillary authority) where a then-binding 2002 FCC order had classified cable internet services as "neither 'a telecommunications service' covered by Title II . . . nor a 'cable service' covered by Title IV." *Comcast Corp.*, 600 F.3d at 645.

63. *Comcast Corp.*, 600 F.3d at 644-45.

64. *Id.* at 651 (quoting 47 U.S.C. § 230(b)(1), (3)).

65. *See id.* at 651-55 (determining the FCC could not rely on policy statements contained within 47 U.S.C. § 230(b) and § 151 to justify ancillary authority or jurisdic-

other words, the court at least implicitly confirmed that, at the core, the FCC's exercise of its ancillary authority must be tied to some express delegation of regulatory authority or other statutory responsibility. The appeals court vacated the FCC's order finding it had not properly exercised its Title I ancillary authority where it relied only on congressional policy statements and failed to tie those policy statements to any "express delegation[ ] of regulatory authority," rejecting the agency's attempt "to use its ancillary authority to pursue standalone policy objective, rather than to support its exercise of a specifically delegated power."[66] In *Comcast*, then, while the circuit court found that cable internet clearly falls within the scope of potential FCC regulation as a non-Title II service, FCC could not rely only on congressional policy statements setting forth federal policies and purposes regarding the internet, to properly exercise its ancillary jurisdiction.[67]

Prior to its 2015 Order, the FCC classified broadband internet access service as an information service.[68] In doing so, the FCC principally relied on its interpretation of § 706 of the Telecommunications Act and Title II. First, in accordance with the D.C. Circuit Court's earlier decision in *Verizon v. FCC*[69] (upholding the FCC's prior interpretation of § 706(a) as an affirmative grant of authority), the FCC expressly interpreted § 706 as its "affirmative authority."[70] Second, in light of its administrative determination that broadband internet access service should be classified as a telecommunications service, the FCC found statutory authority to implement net neutrality rules under Title II.[71]

In 2018, however, the FCC reversed course again to re-classify broadband internet access service as an information service under the Telecommunications Act.[72] As a function of this re-classification, the agency expressly eliminated the "conduct rules" of the prior order, in-

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tion because they are not delegations of regulatory authority and FCC "cites neither . . . to shed light on any express statutory delegation of authority found in Title II, III, VI, or for that matter, anywhere else").

66. *Id.* at 655, 659; *see also* Terry et al., *supra* note 56, at 9.

67. *Comcast Corp.*, 600 F.3d at 655, 661 (citing *Am. Library Ass'n*, 406 F.3d at 692) (vacating FCC's order because FCC "failed to tie its assertion of ancillary authority . . . to any 'statutorily mandated responsibility'"); *see* Terry et al., *supra* note 56, at 9.

68. *See* Protecting and Promoting the Open Internet, 30 FCC Rcd. at 5743-44 n.865 (citing FCC's prior decisions classifying broadband internet access service as information services and re-classifying broadband internet access service as a "telecommunications service subject to our regulatory authority under Title II of the Communications Act").

69. 740 F.3d 623 (D.C. Cir. 2014).

70. Protecting and Promoting the Open Internet, 30 FCC Rcd. at 5722.

71. *Id.* at 5724 (citing 47 U.S.C. §§ 201, 202, 208 and "related enforcement authorities").

72. *See* Restoring Internet Freedom, 33 FCC Rcd. 311, at 320 (2018).

cluding bans on paid prioritization, blocking, and throttling.[73] In rationalizing its retreat and 180-degree turn from the net neutrality rules, the FCC now reasoned that the agency has no legal authority to adopt such conduct rules for all ISPs in the first instance,[74] reinterpreting § 706 of Telecommunications Act and § 509 of the Communications Act as "hortatory" and *not* grants of regulatory authority that would support a legal basis to impose net neutrality conduct rules.[75]

Notwithstanding the removal of net neutrality rules on broadband ISP's conduct, the FCC imposed an affirmative transparency rule requiring ISPs to disclose certain network management practices, performance, and commercial terms underlying its broadband internet access service.[76] Consistent with the Title I ancillary jurisdiction framework set out above, to affirmatively regulate the broadband ISPs it now classified as information-service providers (effectively in the form of the new transparency rule and pulling away from net neutrality-style rules), the agency relied on § 101(a) of the Telecommunications Act[77], imposing a reporting requirement on the FCC, as a substantive grant of authority to which it anchored its Title I ancillary jurisdiction.[78]

III. FEDERAL PREEMPTION OF STATE LAW

As the Supreme Court has consistently recognized, "central to the constitutional design"[79] are the principles of federalism that guide our dual sovereignty system; promoting (and at times straining) the successful coexistence of the federal and state spheres of government. Simultaneously aware that a dual sovereignty-system of governance will result in conflicts and also (on the heels of the earlier failed attempt at organization under the Articles of Confederation that created only a weak federal government) that, at times, federal law must take precedence in the delicate balance, the Framers included Article VI in the Constitution.[80] The Supremacy Clause provides:

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73. *Id.* at 450.
74. *Id.*
75. *Id.* at 470.
76. *Id.* at 437-44 (noting that the new rule requires ISPs to disclose, among others, practices like blocking, throttling, and paid prioritization, although it does not prohibit such practices).
77. Pub. L. 104-104, § 101(a), 110 Stat. 56, 152 (1996) (codified at 47 U.S.C. § 257(a) (2018)).
78. Restoring Internet Freedom, 33 FCC Rcd. 311, at 445 n.846 (2018) (quoting 47 U.S.C. § 257(a)) (citing 29 FCC Rcd. 1433, 1460, para. 77 & n.30 (2014)).
79. Arizona v. United States, 567 U.S. 387, 398 (2012).
80. *See* Susan Bartlett Foote, *Administrative Preemption: An Experiment In Regulatory Federalism*, 70 VA. L. REV. 1429, 1432 (1984) ("The Framers of the Constitution understood that supreme federal power was essential to coherent national government.").

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[81]

It preserves federal law at the top, ensuring that where state law conflicts or contradicts otherwise valid federal law, any conflict is necessarily resolved in favor of the federal law.[82] But only where state law contradicts federal law (or vice versa and regardless whether the state law at issue precedes, coincides, or comes after the federal law) is the Supremacy Clause activated.[83] Thus, the Supremacy Clause forms the foundation for the constitutional preemption doctrine—that is, when federal law preempts (displaces) state laws that "interfere with, or are contrary to, federal law."[84]

A. Congressional (Statutory) Preemption

With the Supremacy Clause the Founders conferred on Congress—as the very embodiment of the federal law-making power under the separation of powers framework established by the same Constitution—a broad and expansive authority to enact legislation that preempts state law.[85] Because the statutes Congress enacts are, beyond dispute, "Laws of the United States," statutes preempt any conflicting state laws under operation of the Supremacy Clause. Although in nearly all cases it is not an active issue, the Supremacy Clause is clear that Congress may exercise this power of preemption only when acting within the confines of the authority granted it by the Constitution (it must be a valid enactment of Congress's constitutional lawmaking power).[86] Writing for a plurality, Justice Gorsuch recently

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81. U.S. Const. art. VI, cl. 2.

82. Rose v. Ark. State Police, 479 U.S. 1, 3 (1986) (citations omitted) (recognizing, "[t]here can be no dispute that the Supremacy Clause invalidates all state laws that conflict or interfere with an Act of Congress"); Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 250-51 (2000) (quoting 2 Samuel Johnson, A Dictionary of the English Language (London, J.F. & C. Rivington 6th ed. 1785) (the Clause ensures that federal law is "supreme," that is, "highest in authority")).

83. Nelson, *supra* note 82 at 260 (stating courts must "disregard state law if, but only if, it contradicts a rule validly established by federal law").

84. Hillsborough Cnty., Fla. v. Automated Med. Labs, Inc., 471 U.S. 707, 713 (1985) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 211, 6 L.Ed. 23 (1824) (Marshall, C.J.)). *But see* Stephen A. Gardbaum, *Nature of Preemption*, 79 Cornell L. Rev. 767, 769-74 (1994) (stating, "[c]ontrary to the prevailing view . . . supremacy and preemption are quite distinct legal concepts," and arguing that the federal power to preempt state law does not emanate from the Supremacy Clause).

85. Arizona v. United States, 567 U.S. 387, 399 (2012) (explaining that "Congress has the power to preempt state law" under the Supremacy Clause).

86. City of New York v. FCC, 486 U.S. 57, 63 (1988) ("When the Federal Government acts within the authority it possesses under the Constitution, it is empowered to

noted: "to win preemption of a state law[,] a litigant must point specifically to a constitutional text or a federal statute that does the displacing or conflicts with state law."[87]

In light of the dual-sovereignty system of state and federal government, the power of preemption becomes a significant tool for the federal government to exercise regulatory power and authority vis-à-vis the states; a tool that can be wielded either broadly or very precisely. Not only does it effectively give the makers of federal law (Congress and, as explored below, federal administrative agencies) the ability to unilaterally displace state law over an issue, topic, or regulatory arena, it also operates to allow federal law-makers to act offensively to foreclose any future state law on a given topic, even where no conflict yet exists.[88]

Because the power of preemption places a heavy weight on the delicate balance of federalism in favor of federal law and effectively removes from the states any authority to regulate a particular subject or issue, regardless of any interests the state may have, if it is to wield the power of preemption, Congress must do so intentionally. As the Supreme Court has recognized, "the ultimate touchstone in every preemption case" is "the *purpose* of Congress."[89] In other words, preemption jurisprudence requires Congress to have acted with the "objective, goal, or end" of preempting state law.[90] Nonetheless, courts have rec-

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preempt state laws."). The Federal Government, by ultimately deriving its authority and power from the people, is a government of limited enumerated powers. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people."). Implicit in every action is the requirement that it must act within its constitutionally-delegated authority (i.e., the laws must be valid).

87. Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1901 (2019) (citation and internal quotation marks omitted).

88. *See* David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1136-37 (2012); *Arizona*, 567 U.S. at 399 ("There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express pre-emption provision."). Although the exercise of the federal preemption power, even when used expressly and proactively, does not itself act to restrict states from passing certain laws or enacting certain regulations on a given topic, it does mean these state laws are susceptible to an easily foreseeable legal challenge on preemption grounds and, if the preemption act is within the framework detailed below, one that is likely to prevail. Thus, acting to preempt state laws in a proactive manner may chill state legislation; an outcome that is not hard to imagine could motivate the use of the federal preemption power in this manner.

89. Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)) (emphasis added); *see* Gardbaum, *supra* note 84, at 767-68.

90. *Purpose*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see* English v. General Elec. Co., 496 U.S. 72, 78-79 (1990) (citation omitted) ("Preemption fundamentally is a question of congressional intent.").

ognized that Congress may demonstrate its intent to preempt state law in an express or implicit manner.[91]

There are several ways, then, in which Congress wields the preemption power. First, Congress may pass a statute that simply displaces state law by its express terms with a specific provision that clearly states a congressional intent to preempt state law.[92] When Congress does so, congressional intent to preempt is clear. But Congress is not confined in its power to remove a given topic or subject from state regulation or jurisdiction (the practical effect of federal preemption) only when expressly stating as much.[93] The Supreme Court frequently finds an implied congressional intent to preempt state law where a federal regulatory scheme is "so pervasive" that "Congress has left no room for the States to supplement it" or that the "federal interest . . . [is] so dominant" that the federal law "precludes enforcement of state laws on the same subject"; a kind of preemption known as "field preemption."[94]

Similarly, the Court finds implied congressional intent to preempt state law where federal and state law otherwise "actually conflict[ ]."[95] Conflict preemption, in turn, is implied where it would be physically impossible to comply with both state and federal law ("impossibility preemption"), or the state law "stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress" ("obstacle preemption").[96] Importantly, "[i]n all pre-emption cases," and especially when Congress reaches into areas traditionally occupied and regulated by the States, the Supreme Court applies a "presumption against . . . preemption,"[97] in which any claimed pre-

91. *See, e.g.*, FMC Corp. v. Holliday, 498 U.S. 52, 56-57 (1990) (recognizing both express and implied preemption principles).

92. Rubenstein, *supra* note 88, at 1137; *see, e.g.*, Coventry Health Care of Missouri, Inc. v. Nevils, 137 S. Ct. 1190 (2017) (analyzing express preemption provision within the Federal Employees Health Benefits Act); *Arizona*, 567 U.S. at 399.

93. *See* Nelson, *supra* note 82, at 226; David S. Rubenstein, *The Paradox of Administrative Preemption*, 38 HARV. J.L. & PUB. POL'Y 267, 275 (2015) [hereinafter "Rubenstein, Paradox"].

94. Nelson, *supra* note 82, at 226-27 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); Rubenstein, Paradox, *supra* note 93, at 275; Arizona v. United States, 567 U.S. 387 (2012) (finding state law imposing a penalty for failing to complete or carry an alien registration document, a requirement under federal law, is preempted under the principle of field preemption); United States v. Locke, 529 U.S. 89 (2000) (applying this principle to find that Washington state regulations governing certain aspects of tanker vessels and crew is preempted under the Ports and Waterways Safety Act as a matter of field preemption).

95. Nelson, *supra* note 82, at 227-28 (quoting *English*, 496 U.S. at 79).

96. *Id.* at 228; *see also* Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982); *Wyeth*, 555 U.S. at 589 (explaining the two types of conflict preemption—physical impossibility and obstacle preemption).

97. Damien J. Marshall, *The Application of Chevron Deference in Regulatory Preemption Cases*, 87 GEO. L.J. 263, 264 (1998) (citing Cipollone v. Liggett Group, Inc., 505

emption is effective only if Congress also demonstrates a "clear and manifest purpose" to preempt state law in that area.[98] Whatever the case, the "touchstone" is congressional intent to preempt and must, somehow, "whether express or implied . . . be sought in the text and structure of the statute at issue."[99] Thus, although the Supremacy Clause and preemption doctrine function to ensure federal law prevails over state law in certain circumstances (i.e., conflict arises), the exercise of that awesome power by Congress is tempered and framed by federalism concerns, as demonstrated by the requirement of some conflict between state and federal law and, additionally, the requirement that preemption must be the intended consequence and is not a presumed "default" effect of federal law.

B. Administrative Agency Preemption

Under Article I of the U.S. Constitution, all legislative power (the power to make the "Laws of the United States") expressly rests with the Legislative Branch—that is, Congress.[100] Narrowly construed, then, only Congress can enact or "make" the Laws of the United States that can expressly or impliedly preempt state law under operation of the Supremacy Clause and preemption doctrine. Yet as much as the Constitution does not define what exactly constitutes "Laws of the United States," it certainly does not expressly limit it to statutes passed by Congress and neither does it provide for nor prohibit that Congress may delegate the very legislative power it holds under the Constitution.[101]

U.S. 504, 518 (1992)); *see also* New York State Conference of Blue Cross & Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654-55 (1995) (stating, "we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law"); Riegel v. Medtronic, Inc., 552 U.S. 312, 334 (2008) (Ginsburg, J., dissenting) (recognizing the principle of a presumption against preemption, especially when state police powers are implicated).

98. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (quoting *Rice*, 331 U.S. at 230) (citations omitted); *see also* Howard P. Walthall, Jr., *Chevron v. Federalism: A Reassessment of Deference to Administrative Preemption*, 28 Cumb. L. Rev. 715, 719, 721 (1997) (noting that Congress must demonstrate preemption is its "clear and manifest purpose" although preemption may be based on either the express or implied doctrines of preemption).

99. *Va. Uranium, Inc.*, 139 S. Ct. at 1907 (citation and internal quotation omitted).

100. U.S. Const. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States.").

101. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 Colum. L. Rev. 2097, 2127 (2004); Rubenstein, *supra* note 88, at 1143 (stating, "nothing in the constitutional text expressly forecloses congressional delegation of policymaking power to agencies").

Although the early "non-delegation doctrine" limited the exercise of legislative or law-making authority to Congress alone,[102] there can be no serious question today that the non-delegation doctrine as strictly applied no longer governs.[103] As a result of the complex realities of today's modern world, administrative agencies—existing under the executive branch of government—are bastions of congressionally-delegated authority, both administering the law and creating or "making" law by promulgating regulations.[104] Indeed, the Supreme Court has recognized that notwithstanding the non-delegation doctrine it was "established long ago that Congress must be permitted to delegate to others at least some authority that it could exercise itself."[105] Under this framework and the expansive understanding of Congress's ability to delegate its authority to administrative agencies, the Supremacy Clause applies with equal weight to a myriad of actions undertaken by federal administrative agencies as to Congress itself.[106]

But just like the preemption power exercised by Congress, administrative agencies can preempt state law only when acting under valid law-making authority. Here, that means the agency action must be consistent with not only the Constitution (the sole limit on congressional action) but it also must be within the authority delegated to it by Congress.[107] Consequently, although preemption by an adminis-

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102. Loving v. United States, 517 U.S. 748, 758 (1996) (explaining the non-delegation doctrine: "the lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity").

103. *See* Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 472 (2001) (recognizing the general framework under which Congress can validly delegate authority, and although it still exists in theory, the limitations of the non-delegation doctrine as applied today).

104. *Loving*, 517 U.S. at 758 ("To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government."); *see also* Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1464 (2000) (noting that "few today question [administrative agencies'] legitimacy or centrality as legal institutions"); *see generally* PETER J. WALLISON, JUDICIAL FORTITUDE (2018) (recognizing the hugely prevalent role administrative agencies play in the modern system).

105. *Loving*, 517 U.S. at 758.

106. *See* Joshua Hawkes & Mark Seidenfeld, *A Positive Defense of Administrative Preemption*, 22 GEO. MASON L. REV. 63, 64, 93-94 (2014) (concluding that "as a matter of constitutional law, agencies with substantive rulemaking authority should be viewed as having the power to preempt state law"); Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes."); City of New York v. FCC, 486 U.S. 57, 63 (1988) ("The phrase 'Laws of the United States' [of the Supremacy Clause] encompasses both federal statutes themselves and federal regulations.").

107. La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1986) (indicating agency must be acting "within the scope of its congressionally delegated authority"); *City of New York*, 486 U.S. at 64 (framing the issue in an administrative context as, "whether the federal agency has properly exercised its own delegated authority rather than sim-

trative agency rests in part on the same constitutional foundation as congressional preemption, administrative agency preemption requires a revised analytical framework.

This difference necessarily arises as a function of the role and authority of administrative agencies. While Congress makes legislative decisions as a first-order exercise of its constitutional authority, administrative agencies can engage in legislative decision-making only under authority delegated by Congress—a second-order exercise of such authority. In this way, administrative agencies "literally ha[ve] no power to act" in a legislative decision-making manner "unless and until Congress confers power on it."[108] Moreover, administrative agencies, whether delegated authority by Congress or not, exist under the executive branch of government and not the legislative branch. Accordingly, without any natural (constitutional) legislative authority, agencies can create "Laws of the United States" only when acting under some authority delegated it by Congress. Thus, administrative agencies are fundamentally constrained in their exercise of (delegated) legislative authority or decision-making in two ways: (1) agencies are constrained by the scope of their enabling or authorizing legislation (by which Congress delegates the necessary authority to an agency), and (2) administrative agencies must engage in evidence-based decision-making and must avoid arbitrary and capricious decision-making by following certain procedures (like notice and comment, timeliness, etc.).[109] These are constraints, of course, that Congress need not consider in its first-order exercise of legislative decision-mak-

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ply whether Congress has properly exercised the legislative power"); *see* Matthew Dunne, *Let My People Go (Online): The Power of the FCC to Preempt State Laws that Prohibit Municipal Broadband*, 107 COLUM. L. REV. 1126, 1140-41 (2007) (explaining the key question in the administrative preemption context is whether (1) "Congress has delegated the power to preempt" and (2) the agency's action falls within the scope of that power).

108. *La. Pub. Serv. Comm'n*, 476 U.S. at 374 ; *see also* Paul E. McGreal, *Some Rice with your Chevron?: Presumption and Deference in Regulatory Preemption*, 45 CASE W. RES. L. REV. 823, 859 (1995) ("When Congress grants an agency broad discretion within which to act, Congress presumably intends that all agency actions within such discretion have the full force and effect of federal law."); Rubenstein, *supra* note 88, at 1141 ("Nothing in the Constitution itself vests authority in administrative agencies per se; rather, such authority is born of congressional grace.").

109. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 513, 515 (2009) (noting that under the Administrative Procedure Act, 5 U.S.C. § 551 et seq., agency decisions can be set aside if they are arbitrary and capricious and without a "reasoned explanation"—that is, "the agency must show that there are good reasons for the new policy"); Ridgway v. Ridgway, 454 U.S. 46, 57 (1981) (regulations must not be "unreasonable, unauthorized, or inconsistent" with the enabling statute); *see also* WALLISON, *supra* note 104, at 109-10 (recognizing that as a function of its non-legislature status, agencies must act (1) on the basis of evidence [i.e., unlike legislative decision-making, agency decision-making must not be arbitrary or capricious] and (2) within the confines of the authorizing/enabling legislation).

ing. For our purposes, this means that agency preemption authority must rest more or less on the same foundation as statutory or congressional preemption: congressional intent in conjunction with these other limitations.

When an agency preempts state law through regulatory action, it does so under one of two processes. First, in promulgating the rule, regulation, or order that is intended to have preemptive effect, an agency may simply be engaged in the practice of interpreting a statute or statutory scheme that itself preempts state law.[110] In other words, administrative agencies can validly preempt state law by interpreting the preemptive nature or effect of statutes they are charged with administering.[111] Of course, when an agency exercises its authority to interpret its statutes (and specifically, interpreting any preemptive effect or outcome), the *Chevron* doctrine of judicial review applies; courts defer to an agency's interpretation of a statute if the "statute is ambiguous and the agency's interpretation" is not unreasonable.[112] While the addition of the *Chevron* doctrine to the preemption power seems to give agencies a large amount of discretion in preempting state law, the reality is that any preemptive effect here wholly rests on that which must be found in the statute created and passed by Congress. In other words, any regulation that preempts state law is the result of a clear and manifest congressional design, thereby lessening any potential federalism-based concerns that could arise from an unelected bureaucratic agency (rather than an elected Congress that at least in political theory represents the people) ostensibly preempting state law in a regulation interpreting a statute. The key is that in this first context, even if the current reality of *Chevron* affords great discretion on judicial review to an agency interpretation of a given statute and its preemptory effect, any preemption at its core is ultimately an exercise of first-order legislative authority by Congress and emanates directly from Congress itself.

Second, administrative agencies may preempt state law in the course of substantively exercising its congressionally-delegated au-

110. Ernest A. Young, *Executive Preemption*, 102 NW. U.L. REV. 869, 881-900 (2008); Walthall, *supra* note 98, at 726-27 ("Agencies can seek to effect preemption analysis in two key ways. First, they can offer their interpretation of the preemptive effect of a federal statute . . . . Second, the agency may promulgate regulations which have preemptive effect.").

111. *See* Young, *supra* note 110, at 881.

112. *Id.* at 883-84 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-44 (1984)). The Chevron doctrine only applies, as the Supreme Court clarified in Smiley v. Citibank, 517 U.S. 735 (1996), where the agency's interpretation has to do with the substantive meaning of a statute (that is, what a statute "means, does, or requires") even if the agency's decision has a preemptive effect. *Id.* at 884-85 (citing *Smiley*, 517 U.S. at 744-45); *see Smiley*, 517 U.S. at 744 (deferring to agency's interpretation of a statute that, by its own express terms, preempts state law).

thority.[113] In other words, the agency—as an independent action pursuant to its congressionally-delegated authority—promulgates a rule, regulation, or order that purports to preempt state law. Such an action may be based on an express delegation of discretion to the agency to make preemptory determinations within its realm of regulatory authority or the agency's general authority under the statutory scheme.[114] Substantive preemption by an administrative agency is valid where the agency intended to preempt state law and in doing so the agency is acting within the scope of its delegated authority.[115]

Under this framework, the same general preemption principles apply. Agencies acting in an independent substantive capacity may preempt state law with an "express pre-emption clause" in a promulgated regulation or order or through the operation of the implied preemption principles.[116] Administrative agencies may preempt state law that conflicts with federal law when it is physically impossible to comply with both federal and state laws and when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[117] Again, however, administrative preemption is (at least in theory) naturally more constrained vis-à-vis congressional preemption inasmuch as whether the agency purports to preempt state law expressly or impliedly, it must be acting pursuant to authority granted or delegated it by Congress.[118] Generally, congressional preemption in whatever way must be an intentional exercise of the preemption power. Thus, to preempt state law by express provision, the agency may rely on authority delegated by Congress only so much as that delegated authority includes the au-

113. *See, e.g.,* Walthall, *supra* note 98, at 726-27.

114. *City of New York* , 486 U.S. at 64 (noting that the key inquiry is "whether the federal agency has properly exercised its own delegated authority" and on the "proper bounds of its lawful authority to undertake such action"); Young, *supra* note 110, at 881-900; Walthall, supra note 98, at 726-27 ("Agencies can seek to effect preemption analysis in two key ways. First, they can offer their interpretation of the preemptive effect of a federal statute . . . . Second, the agency may promulgate regulations which have preemptive effect."); *see* Rubenstein, *supra* note 88, at 1148-49 (determining under this method, agencies may independently preempt state law based on (1) Congress's delegation of the power to preempt state law and to make the decision to preempt state law, or (2) Congress's grant of "general rulemaking authority").

115. *See de la Cuesta*, 458 U.S. at 154; *City of New York*, 486 U.S. at 66 (the agency must be "legally authorized" to substantively preempt state law); Rubenstein, *supra* note 88, at 1150.

116. Rubenstein, *supra* note 88, at 1150 n.146 (collecting cases); Sprietsma v. Mercury Marine, 537 U.S. 51, 65 (2002) (quoting Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 869 (2000) ("Congress' inclusion of an express pre-emption clause 'does not bar the ordinary working of conflict pre-emption principles.'").

117. *de la Cuesta*, 458 U.S. at 153 (citations omitted); *see also Geier*, 529 U.S. at 873-74.

118. William Funk, *Judicial Deference and Regulatory Preemption by Federal Agencies*, 84 TUL. L. REV. 1233, 1236 (2010); *see La. Pub. Serv. Comm'n*, 476 U.S. at 374.

thority of the agency to make and to promulgate that very preemption determination.[119]

IV. CASTING A BROAD NET: FCC'S PREEMPTION OF STATE NET NEUTRALITY LAW

In 2018, the Federal Communications Commission ("FCC") promulgated its Restoring Internet Freedom Order[120] in which the agency, for the second time, re-classified broadband internet access service as a Title I information service. In doing so, the agency (again) altered the regulatory landscape as it relates to broadband internet ISPs by wholly removing broadband internet from the possible reach of the mandatory Title II common carrier regulations applicable to telecommunications services and, thus, from any possibility of a net neutrality-style regulatory regime. To be sure, when the courts exercise their power of judicial review over the FCC's 2018 Restoring Internet Freedom Order ("2018 Order"), the agency's classification decision is subject to the well-known deferential review under the *Chevron* framework as a question of statutory interpretation.[121] Indeed, in its review of the 2018 Order, the D.C. Circuit upheld the FCC's classification of broadband internet as an information service under *Chevron*, finding that the FCC's classification is a "reasonable policy choice" under Step Two of *Chevron*.[122] But establishing the FCC's proper jurisdiction via its reasonable classification of broadband internet does not *automatically* lead to the validity of the rest of the FCC's order, and especially its preemption of state law. The classification of broadband internet (even if, effectively, the classification means a net neutrality regulatory regime will not be applied) and preempting state net neutrality laws necessarily requires a separate analysis under judicial review, especially given the implications for the delicate balance of federalism for the latter. In other words, where, as here, the preemption of state law by an agency involves something more than statutory interpretation and, instead, is a sub-

119. *Id.*

120. 33 FCC Rcd. 311 (2018).

121. *See generally* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

122. Mozilla Corp. v. FCC, 940 F.3d 1, 20 (D.C. Cir. 2019). The Court of Appeals also noted that the United States Supreme Court previously upheld the FCC's classification of cable modem internet service as an information service (and not a telecommunications service) under Step Two of *Chevron*. *Id.* at 21 (citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 989-92 (2005)); *see also* Restoring Internet Freedom Order, 33 FCC Rcd. 311, at 320-21 (2018) (indicating FCC's classification decision was based on its interpretation of § 3 of the Telecommunications Act).

stantive exercise of agency authority, a more searching inquiry is required.

Not surprisingly, in its 2018 Order, the FCC itself renounced the notion that any statutory authority permits the agency to impose the net neutrality-style rules imposed in the agency's former 2015 Order.[123] Additionally, the FCC—entirely consistent with the D.C. Circuit's decision in *Verizon v. FCC*[124]—now argued that it has no legal authority under which to impose the net neutrality conduct rules imposed by the previous 2015 Order.[125] In fact, the 2018 Order expressly "eliminate[d] the conduct rules adopted in the [2015] Order—including the general conduct rules and prohibitions on paid prioritization, blocking, and throttling."[126] Effectively, the agency argued it had no statutory authority to impose net neutrality rules because under the appropriate classification (as determined by the agency),

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123. Restoring Internet Freedom, 33 FCC Rcd. at 470. Specifically, the agency announced its new interpretation of § 706 of the Telecommunications Act (codified at 47 U.S.C. § 1302) as "hortatory" and instead of granting the agency regulatory authority, only directed the FCC to "exercise market-based or deregulatory authority granted under other statutory provisions, particularly the Communications Act." *Id.* at 470-71. Section 706 instructed the FCC "with regulatory jurisdiction over telecommunications services," to:

> encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

Telecommunications Act of 1996, Pub. L. 104-104, sec. 706(a), 110 Stat. 56, 152 (1996) (codified at 47 U.S.C. § 1302(a) (2018)). Under the deferential *Chevron* framework, the D.C. Circuit held that the FCC's new interpretation of § 706 of the Telecommunications Act was reasonable. *Mozilla Corp.*, 940 F.3d at 46. Similarly, the FCC refused to rely on the policy statement contained within § 509 of the Telecommunications Act (adding 47 U.S.C. § 230) as granting any substantive authority to impose net neutrality regulations for the same reason: interpreting this statute as merely "hortatory" and, additionally, recognizing that a statement of policy standing alone is not a delegation of authority to the agency from Congress. Restoring Internet Freedom, 33 FCC Rcd. at 480-81 (citing, in part, Comcast Corp. v. FCC, 600 F.3d 642, 652 (D.C. Cir. 2010)). Section 230(b)(2) established that "[i]t is the policy of the United States: (1) to promote the continued development of the Internet . . . ; [and] (2) 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 (2018). Notably, however, although the agency argued the policy statement contained within § 230 was wholly insufficient for the agency to impose substantive net neutrality rules, at the same time it relies on the statute as demonstrating "Congress's approval of our preemptive federal policy of nonregulation for information services." 2018 Order, 33 FCC Rcd. at 480-81, 432.

124. Verizon v. FCC, 740 F.3d 623, 631-33, 655-59 (D.C. Cir. 2014) (noting that the FCC could not impose anti-discrimination and anti-blocking rules (common carrier rules) on broadband internet providers where it did so while continuing to classify broadband internet as an information service—and not a Title II telecommunications service).

125. Restoring Internet Freedom, 33 FCC Rcd. at 470.

126. *Id.* at 450.

broadband internet is not under the auspice of Title II, and therefore, no net neutrality rules can be applied. As discussed below, however, after finding it has no authority to regulate the internet in this manner, the agency asserted, at the same time, that it had authority to preempt state laws from regulating even intrastate broadband internet with net neutrality-style rules and regulations. Stated differently, the agency purported to affirmatively (and indeed prospectively) preempt state laws in a way in which the agency soundly determined it had no federal authority to regulate in the first instance.

To be sure, another way to characterize what the agency did in its 2018 Order by finding no authority to impose net neutrality regulations with a Title I classification is that the agency enacted, on the federal level, a "light-touch, market-based" regulatory framework over broadband internet.[127] At the same time, the agency did not leave ISPs wholly un-regulated. Rather, the agency imposed substantive regulations requiring ISPs to disclose their "network management practices, performance, and commercial terms" of the ISPs' broadband internet access services.[128] The transparency rule specifically requires ISPs to, in part, disclose any blocking, throttling, and paid prioritization practices in which it engages; even if the order did not outright prohibit these practices (as it would have done under a net neutrality regulatory regime).[129] As explained above, to exercise its Title I ancillary authority the FCC now asserted over broadband ISPs (as a function of its "information service classification") it must ground any regulation, including the transparency regulation, in some other existing statutory duty or responsibility. In its Order the FCC found the necessary authority for its transparency regulation in § 101(a) of the Telecommunications Act,[130] directing the agency to identify and

127. *Id.* at 434.

128. *Id.* at 437-41.

129. *Id.* at 440. Interestingly, this transparency rule targets the same practices of ISPs that net neutrality targets; the difference lies in the perceived role of government—whether an active role by the government is necessary to curb such harmful practices or whether the free-market will act to dissuade these practices. At least arguably implicit in the imposition of the transparency requirement is that blocking, throttling, and paid prioritization, to some extent are harmful or at least undesirable practices from the standpoint of the internet market and as to internet consumers.

130. Pub. L. 104-104, § 101(a), 110 Stat. 56, 152 (1996) (codified at 47 U.S.C. § 257(a) (2018)). Section 257(a) commands that the FCC:

> Shall complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this chapter (other than this section), market entry barriers for entrepreneurs and other small businesses in the provisions and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services.

47 U.S.C. § 257 (2018).

address market entry barriers into broadband internet as an information service.[131] The D.C. Circuit, under the deferential guiding hand of *Chevron*, ultimately upheld as reasonable the agency's interpretation of § 257 as delegating the agency direct authority "to collect evidence to prove that such barriers [to the information services market] exist."[132]

In addition to renouncing any statutory basis for any affirmative net neutrality regulation and promulgating the transparency rule, however, the FCC's 2018 Order also expressly preempted state laws from imposing any net neutrality-style regulations on broadband internet access services. The agency reasoned (1) broadband internet access service, as an information service, "should be governed . . . by a uniform set of federal regulations" and (2) the Order "establishes a calibrated federal regulatory regime based on the pro-competitive, deregulatory goals" of the Telecommunications Act of 1996, and therefore preemption was appropriate.[133] Specifically, the 2018 Order preempted state law conflicting with this federal scheme of light-touch regulation; state laws that would "impose more stringent requirements" on broadband internet access services and ISPs.[134] In its Order, the agency relied on conflict (impossibility) preemption,[135] an "independent authority" to preempt state law based upon "longstanding federal policy of no regulation of information services" and, finally, that § 401 of the Telecommunications Act embraces "regulatory flexibility" and grants the agency authority to "forbear from applying any regulation or any provision."[136]

A. FCC's Express Preemption Provision

Within its 2018 Order, the agency expressly preempted state law that would "effectively impose rules or requirements that we have repealed . . . or that would impose more stringent requirements for any

131. Telecommunications Act of 1996, § 101(a) (codified at 47 U.S.C. § 257(a)); Restoring Internet Freedom, 33 FCC Rcd. at 446.

132. *Mozilla*, 940 F.3d at 47 (quoting Restoring Internet Freedom Order, 33 FCC Rcd. at 446 n.847).

133. Restoring Internet Freedom, 33 FCC Rcd. at 426.

134. *Id.* at 427-28.

135. *Id.* at 429. Generally, conflict preemption analysis is case-specific. In other words, conflict preemption is piecemeal judicial inquiry as to whether a specific state law (fully and properly enacted) conflicts with the federal law. *See, e.g.*, Arizona v. United States, 567 U.S. 387, 399-414 (2012) (analyzing whether provisions of "Unlawfully Present Aliens," S.B. 1070 (2010) are preempted in light of federal law, particularly 8 U.S.C. § 1304(e)); Nat'l Meat Ass'n v. Harris, 565 U.S. 452 (2012) (deciding whether Cal. Penal Code Ann. § 599f (2010) was preempted by the Federal Meat Inspection Act, 21 U.S.C. §§ 601-695).

136. 47 U.S.C. § 160(a), (e) (2018).

aspect of broadband service."[137] In doing so, the agency did not purport to rely on some express delegation of preemptory authority because, simply, Congress did not expressly delegate such authority within the agency's Title I information services regulatory authority. To be sure, the Supreme Court has held that administrative agencies can lawfully preempt state law without express statutory authority to do so.[138] But as the D.C. Circuit recognized in *Mozilla Corp. v. FCC*,[139] because administrative agencies, by operation of the separation of powers constitutional design, rely on Congress for *any authority* they exercise, having an authority to regulate necessarily goes hand in hand with authority to preempt state law.[140] Thus, even if express statutory authority to preempt state law is not the end-all of a preemption analysis, an agency action preempting state law must still itself be a valid agency action, which requires some statutory authority to regulate. In this instance, the statutory scheme, when strictly construed—as I argue is necessary in this context and consistent with the constitutional framework—supports the conclusion that the agency simply has no authority to preempt state law in the manner for which it has no authority to regulate and when the agency's regulatory authority is only an ancillary and limited authority in itself.

Although the statutory scheme does not expressly delegate to the agency preemption authority in Title I, this is not simply indicative of the agency's delegated authority as a whole. Rather in the realm of Title II telecommunication services, Congress explicitly delegated preemption authority to the FCC.[141] Especially when considering preemption of state law by an executive-branch administrative agency in light of the separation of powers and the natural federalism concerns inherent with agency preemption, Congress's decision not to delegate the agency any preemption authority in one of its two realms of authority should be, and is, significant. As to telecommunications ser-

137. Restoring Internet Freedom, 33 FCC Rcd. 311, at 427 (2018).

138. *See* Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 154 (1982).

139. 940 F.3d 1 (D.C. Cir. 2019).

140. Mozilla Corp. v. FCC, 940 F.3d 1, 75 (D.C. Cir. 2019). After laying out the basic administrative law framework—that agencies can act only under authority delegated it by Congress, including the power to preempt state law—the Court of Appeals recognized: "By the same token, in any area where the Commission lacks the authority to regulate, it equally lacks the power to preempt state law." *Mozilla Corp.*, 940 F.3d at 75.

141. *See* 47 U.S.C. § 253(a), (d) (2018) (noting express congressionally-delegated preemption authority where FCC determines a local "statute, regulation, or legal requirement" "prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service"); 47 U.S.C. § 276(c) (2018) (noting express congressionally-delegated preemption authority for FCC's regulations concerning payphone service).

vices under Title II, Congress, in its constitutional Article I first-order legislative decision-making authority, recognized a need for the FCC to preempt state law to effectively regulate under the Title II common carrier regulatory scheme and, accordingly, it delegated such authority to the agency in its enabling statutes. While the modern trend in administrative law jurisprudence is to broadly construe agency authority under its enabling statutes[142] when considering an agency's exercise of the federal preemption power, an express delegation of preemption authority in one of only two potential regulatory schemes for the subject area should be significant. Indeed, even if not determinative, in the federal administrative agency preemption framework, at a minimum, the lack of a similar express preemption provision in the regulatory realm the agency has adopted should be an indication of the agency's authority delegated by Congress within that regulatory scheme.[143] And even more, the Communications Act, in creating the FCC, expressly fashioned and acknowledged a dual-governing structure where the states retained authority over "intrastate communication service by wire and radio."[144] More succinctly, given the constitutional concerns underlying any exercise of the preemption power, an agency should be able to point to some basis of clear congressional intent for the agency to preempt state law; and of course, while not the only way, express congressional intent is the clearest indication. And the lack thereof—in contrast to the alternative regulatory regime—makes congressional intent for the agency to preempt state law that much more opaque.

This is especially so when considering the basic framework under which administrative agencies act—solely within the authority delegated to it by Congress. When Congress engages in a first-order exer-

142. Interestingly, this sometimes works against the agency itself. For example, in *Massachusetts v. EPA*, the Supreme Court broadly construed § 202(a)(1) of the Clean Air Act, in conjunction with § 7602(g) defining "air pollutant" as "*any* air pollution agent or combination of such agents, including *any* physical, chemical substance or matter which is emitted into or otherwise enters the ambient air," to hold that the Environmental Protection Agency does have authority under the statutory scheme to regulate greenhouse gas emissions (carbon dioxide) and must do so. Massachusetts v. EPA, 549 U.S. 497, 528-32 (2007) (internal quotations omitted) (ellipses omitted). In another related context, the Supreme Court has applied *Chevron* deference directly to an agency's interpretation of its jurisdiction and the scope of its statutory authority. *See* City of Arlington, Tex. v. FCC, 569 U.S. 290, 296 (2013) (explaining how *Chevron* deference applies to agency construction or interpretation of its enabling statutes).

143. *But see* City of New York v. FCC, 486 U.S. 57, 64 (1988) (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)) (deferring to agency's preemption regulation under a statutory "broad grant of authority to reconcile conflicting policies" so long as the preemption decision is a "reasonable accommodation of conflicting policies that were committed to the agency's care by the statute . . . [and] the accommodation is not one that Congress would have sanctioned").

144. 47 U.S.C. §§ 151, 152(b) (2018).

cise of legislative decision-making to preempt state law, it must act in a clear and intentional manner. Allowing an agency like the FCC to preempt state law (a second-order exercise of legislative authority) to then find preemption authority, whether express or even implied for that matter, under a broad and general grant of authority disregards the combination of institutional and constitutional limitations at play when considering agency preemption. Not only is the federal power of preemption limited to some clear and intentional action by *Congress*, agencies are even more constrained in that they can act in a legislative manner only to the extent and in the manner which Congress has delegated to the agency its own legislative authority.

A major tenet of today's administrative law jurisprudence is the deference agencies enjoy in terms of any judicial review of their rulemaking under the auspices of *Chevron*. Under *Chevron*, courts will defer to an agency's reasonable interpretation or "construction of the statute which it administers."[145] Yet even *Chevron* deference, as Justice Scalia recognized in *City of Arlington, Texas v. FCC*,[146] is "rooted in a background presumption of congressional intent."[147] It is premised on the notion that "'Congress, when it left ambiguity in a statute' administered by an agency, 'understood that the ambiguity would be resolved . . . by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'"[148] Moreover, any application of *Chevron* deference necessarily requires and presumes, as a threshold matter, that the agency action in question is properly authorized and valid. In other words, there can be nothing to which the court can defer if the agency action at issue is not statutorily (i.e., congressionally) authorized.

Where agency preemption is concerned, courts should be loath to rely on anything less than clear congressional intent and this necessarily includes applying a strict construction of agency authority to preempt state law.[149] The basic foundations of our system depend on it.

145. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984); *see also* City of Arlington, Tex. v. FCC, 569 U.S. 290, 296 (2013) (explaining how *Chevron* deference applies to agency construction or interpretation of its enabling statutes).

146. 569 U.S. 290 (2013).

147. *City of Arlington*, 569 U.S. at 296.

148. *Id.* (quoting Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 740-41 (1996)).

149. *See generally City of Arlington*, 569 U.S. 290 (applying *Chevron* deference directly to an agency's interpretation of its jurisdiction and the scope of its statutory authority); *see id.* at 302 (noting that the Court has "even deferred to the FCC's assertion that its broad regulatory authority extends to preempting conflicting state rules"); Nat'l Cable and Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (citations omitted) (quoting §§ 151, 201(b)) (applying *Chevron* deference to FCC regulation based upon the Communication Act's broad delegation of authority to "execute and en-

Finding sufficient delegation of preemption authority in broad grants of regulatory authority that are all too common today, a kind of deference in the same vein as *Chevron* but without any clear foundation in congressional intent of any nature, contravenes the very notion that Congress itself—much less an administrative agency—must intentionally wield the federal power of preemption.[150] On judicial review of an agency's express preemption of state law, courts should require that the agency action be traced to a secure foundation in congressional intent for the agency to wield the power of preemption (i.e., to engage in preemption decision-making). The ability to alter the balance of power between the federal government and the state governments requires more of Congress and should thus require more of agencies, even if only as a function of the basic principle underlying the separation of powers—that agencies can act only under the authority delegated by Congress.[151]

Thus, for purposes of the FCC's 2018 Order, the ultimate inquiry must be whether the agency is acting under and within the scope of federal power or authority so delegated by Congress in promulgating its order preempting states from imposing net neutrality-style regulations on broadband internet. Certainly, no real question or dispute exists that Congress itself could validly preempt state broadband internet access regulation in whatever form, but it has not done so here.

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force the Communications Act" and to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Communications Act); Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 238 (2004) (citing 15 U.S.C. § 1604(a)) (indicating *Chevron* deference applies based upon Congress's "express[ ] delegat[ion] to the [Federal Reserve] Board the authority to prescribe regulations containing 'such classifications, differentiations, or other provisions'" as the Board deems "necessary or proper to effectuate the purposes of [the Truth in Lending Act]"); *cf.* Gonzales v. Oregon, 546 U.S. 243, 258-59 (2006) (declining to apply *Chevron* deference to an interpretive rule from the Attorney General concerning the Controlled Substances Act, because the enabling statute under which the Attorney General has its rulemaking power as to controlled substances is not a grant of broad regulatory authority, but instead delegates only "limited powers, to be exercised in specific ways"). *But see City of New York*, 486 U.S. at 64 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)) (deferring to agency's preemption regulation under a statutory "broad grant of authority to reconcile conflicting policies"; so long as the preemption decision is a "reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," it will "not be disturbed unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned").

150. *See* Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1901 (2019) (quoting Puerto Rico Dept. of Consumer Affairs v. ISLA Petroleum Corp., 485 U.S. 495, 503 (1988)) (recognizing the principle that "to win preemption of a state law[,] a litigant must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law"). Thus, preemption of state law by federal law necessarily begins and ends with Congress.

151. *But see de la Cuesta*, 458 U.S. at 162 (recognizing a principle that broad congressional delegation of authority to regulate is not cabined by express authority to preempt state law in particular areas).

And when it is an *agency* acting to preempt state law, the separation of powers and constitutional framework requires that it must have the power or authority to do so through a delegation by Congress to preempt state law, not just to regulate generally. This determination, on judicial review, should require more than *Chevron*-esque deference or reliance on a broad and general grant of regulatory authority to act within a particular regulatory sphere.

While Title II of the relevant FCC statutory scheme speaks directly to the agency's preemption of state law,[152] because the agency's classification decision brings broadband internet under its Title I jurisdiction, to validly preempt state law, then, the agency must find authority to do so under Title I. But under Title I, the agency has only a broad and general grant of regulatory authority to "perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions."[153] Moreover, the nature of Title I's ancillary authority requires that any regulatory action the FCC takes must find a concrete foundation in an existing statutory duty or mandate. To allow preemption on the broad grant of regulatory authority given Title I's limited ancillary authority otherwise would, as a course of the resulting circular reasoning, allow the agency to enact virtually any regulation. This would not be consistent with the agency's ancillary authority delegated it by Congress in Title I.

Under administrative law principles, when acting in a substantive rather than interpretive capacity, the FCC may lawfully preempt state law concerning intrastate broadband internet access if: (1) the agency intends to preempt state law, and (2) its preemption action is within the confines of its congressionally-delegated authority.[154] The FCC's 2018 Order is clear that the FCC *intends* to preempt state law that imposes in any form common carrier net neutrality-style rules or regulations on ISPs providing broadband internet access. While it is enough in congressional preemption (as a first-order exercise of legislative decision-making) to validly preempt state law by indicating Congress's intent to do so, because agencies are constrained by the scope of power delegated by Congress, the agency's intent to preempt is not itself sufficient. Such action must be within the scope of its congressionally-delegated authority. And in the preemption context, the question is whether the agency has "properly exercised its own dele-

152. *See, e.g.*, 47 U.S.C. § 253(d) (2018).
153. 47 U.S.C. § 154(i) (2018).
154. *City of New York*, 486 U.S. at 65-66.

gated authority," i.e., a "congressionally delegated authority . . . [to] pre-empt state regulation."[155]

Under its Title I authority, the FCC only has ancillary authority to regulate.[156] In other words, it has authority to impose regulations on Title I information services that rest on some pre-existing statutory duty. While the agency ties its substantive transparency regulation to a statutory responsibility,[157] it does not tie its express preemption provision to any equivalent statutory authority. Instead, the FCC only purports to rely upon (1) the broad grant of authority to "perform any and all acts, make such rules and regulations, and issue orders . . . as may be necessary in the execution of its functions,"[158] and (2) statements of the Act's policy: "preserve . . . unfettered by Federal or State regulation" a "vibrant and competitive free market . . . for the internet and other interactive computer services" (with the latter defined as "any information service . . . that provides or enables computer access by multiple users to a computer server").[159]

In exercising its Title I regulatory authority, however, courts have held that a mere statement of policy does not provide the necessary pre-existing statutory duty to support the exercise of regulatory authority.[160] Neither should it be enough for an agency to promulgate a regulation that broadly preempts state law. When properly exercised,

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155. *Id.* at 63-64.

156. 47 U.S.C. § 151.

157. There seems to me to be some argument concerning whether 47 U.S.C. § 257 can satisfy the independent-statutory-duty foundational requirement for the FCC to impose a transparency regulation. *See* 47 U.S.C. § 257(a) (2018) (directing the FCC to "complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this chapter (other than this section), market entry barriers . . . in the provision and ownership of . . . information services"); Restoring Internet Freedom, 33 FCC Rcd. 311, at 438 (2018); Comcast Corp. v. FCC, 600 F.3d 642, 659-60 (D.C. Cir. 2010) ("[T]he Commission's attempt to dictate the operation of an otherwise unregulated service based on nothing more than its obligation to issue a report defies any plausible notion of 'ancillariness.'"). Any failure to promulgate a valid affirmative regulation on broadband ISPs would certainly weaken the agency's assertion of preemptive authority because it would in that instance be even more clearly based upon general federal policy which is not sufficient to exercise Title I ancillary authority. Notably, in reviewing the 2018 Restoring Internet Freedom Order, the D.C. Circuit held that the agency could rely on § 257 to impose the substantive requirement it did under its Title I ancillary authority, finding under standard principles of reviewing an agency's decision making that it was a "permissible" interpretation under *Chevron* Step Two. *Mozilla*, 940 F.3d at 47. Nonetheless, the validity of the 2018 Order's substantive transparency requirement is outside the scope of this paper because the agency's preemption provision was not directed to preempt conflicting state law relating to this substantive requirement. Instead, the FCC sought to preempt state law after finding, in effect, that the federal agency itself did not have authority to regulate ISPs in the proscribed manner.

158. 47 U.S.C. § 151(i); *see also* 47 U.S.C. § 303(r) (2018).

159. 47 U.S.C. § 230(b)(2), (f)(2) (2018).

160. *See Comcast Corp.*, 600 F.3d at 651-58.

preemption has a very necessary function and role in our dual-sovereignty system. Here, for instance, it can ensure that any lawful exercise of the FCC's ancillary-jurisdiction to impose a "ceiling" of regulation that the agency,[161] within its regulatory ancillary authority, has deemed sufficient to regulate broadband internet access services, is not undermined by state-based net neutrality regulatory schemes.[162] It would be wholly inconsistent, though, if the agency could displace state law much less exercise its Title I jurisdictional authority by affirmatively regulating solely on the basis of a congressional policy statement of non-regulation, rather than an affirmative statutory mandate or responsibility.

By operation of the express preemption provision in its Order, the FCC sought to preempt any state regulation that would conflict with the "deregulatory approach" intended by the 2018 Order.[163] This approach was, in large part, the main function of the Order's classification of broadband internet access service as an information service: removing broadband internet from the realm of Title II telecommunications services for which common carrier regulations (the statutory justification of any net neutrality-style rules) would apply. Thus, the agency effectively promulgated and supported its 2018 Order on the basis that it had no congressionally delegated authority to impose net neutrality regulations. In other words, the agency effectively argued that the earlier net neutrality regulations (because the "correct" classification required by the statutory scheme was information services and *not* telecommunication services) were outside the scope of the agency's proper statutory authority. To regulate, though, it remains the agency must have the statutory authority to do so. Thus, agencies cannot preempt laws they have no (federal) authority to impose much less where Congress has not, in some manner, allowed the agency to preempt state laws in the regulatory arena in which the agency, by exercising its lawful administrative discretion, has itself entered.

Stated differently, the FCC exhibited a desire to exercise the weighty power of federal preemption in an area and under circumstances in which it expressly (first) found that Congress did not delegate to the agency its own power to affirmatively or substantively

161. *See* William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1568-69 (2007) (defining "preemptive ceilings" as where "the federal government sets a standard of performance or regulatory requirement reflecting a choice about the degree of required protection, but prohibits any additional or more stringent regulation by states").

162. *See, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861, 874-75 (2000) (addressing federal regulation that sets a "minimum airbag standard" that "deliberately provided the manufacturer with a range of choices among different passive restraint devices" preempted a common-law "no airbag" action under D.C. tort law);

163. Restoring Internet Freedom, 33 FCC Rcd. 311, at 428.

regulate in the manner proscribed. The agency purported to preempt states from exercising otherwise existing regulatory authority in a manner the agency found it had no authority to do either. This clear disconnect—although neither determinative nor ultimately relied on by the FCC in its justification of its preemption provision in the Order—emphasizes the need to carefully and critically analyze administrative agencies' use of preemption authority.

At the same time, however, the Supreme Court has carefully established the principle that a federal law-making body (Congress or agencies) can validly decide as a policy matter to forgo regulation in a certain area and that this decision may have as much preemptive force as a decision to affirmatively regulate a certain area.[164] It is equally clear that Congress intended the Telecommunications Act "[t]o promote competition and reduce regulation to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[165] Yet if the separation of powers is to mean anything, and if there is to be any end to the scope of federal authority (which, by our dual-sovereignty constitutional design, is by definition required at some level), it must mean that agencies can act only under the authority they are delegated. Preempting state law that the agency itself disclaims statutory authority to regulate violates this principle.

Federalism requires maintaining a delicate balance; one that requires diligent attention to the use of the federal preemption power, especially by administrative agencies as a second-order exercise of the preemption power. Where preemption is concerned, courts should hesitate to find, no matter how appealing it may be or how easily it advances perceived congressional or federal policy, that Congress has delegated the power of preemption under a broad and general grant of authority. Here, the relevant statutory scheme applicable to broadband ISPs and under which the FCC is bound to act offers only a broad delegation of authority to "make such rules and regulations . . . as may be necessary in the execution of its functions" or "as may be necessary to carry out the provisions of this chapter."[166] And this broad authority is only ancillary regulatory authority. Simply, in this context, where state net neutrality-style regulations ostensibly would interfere or conflict with the FCC's order only inasmuch as the agency has determined it has no authority to otherwise regulate ISPs in this

164. *See, e.g.*, Ark. Elec. Co-op. Corp., v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 384 (1983) (emphasis in original) ("[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate.").

165. Telecommunications Act, Pub. L. No. 104-104, 110 Stat. 56, 56 (1996).

166. 47 U.S.C. §§ 154(i), 303(r).

manner, a broad grant of regulaty authority should not be enough for the agency to preempt state law.

Certainly, Congress can without question clarify an intent to preempt state law (just the same as the de-regulatory intent the FCC cites in its express preemption provision) by enacting statutes containing express administrative preemption language, as it did in Title II of the Telecommunications Act. Yet it did not do so in Title I, instead relying only on a broad and general grant of regulatory authority. Admittedly, however, when an administrative agency pursuant to its delegated authority promulgates regulations that advance statutorily stated congressional policy, there is conceivably less concern that any resulting preemption of state law "is not one that Congress would have sanctioned."[167] But at the same time, it is equally clear in this case the FCC cannot substantively exercise its properly delegated Title I ancillary authority by simply recognizing congressional policy, and it should accordingly be much less able to exercise preemptory authority that acts to displace state law and regulations when otherwise constrained to an ancillary regulatory authority. Even where a state regulatory scheme ostensibly conflicts with a federal scheme, it is within Congress's wheelhouse—and not administrative agencies' wheelhouse—to ensure the federal scheme of de-regulation is not undermined, especially when it has not expressly delegated to the administrative agency the power to preempt state law in the "unregulated" information services arena. While this would require Congress to take the necessary steps as a first-order exercise of legislative decision-making or, as seems more likely, to simply (expressly) delegate to the agency the necessary preemption authority to utilize under its Title I authority, the constitutional and institutional structure demands as much.[168]

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167. United States v. Shimer, 367 U.S. 374, 383 (1961).

168. Importantly, the companion of conflict preemption, "field preemption," is not asserted to apply in this instance. In *Arizona v. United States*, the Supreme Court explained that field preemption is an exercise of the preemption power wherein "States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." Arizona v. United States, 567 U.S. 387, 399 (2012). There, the Court found that the federal statutes concerning alien registration was so "comprehensive," in effect, "the Federal Government ha[d] occupied the field of alien registration," and therefore a state law creating a state misdemeanor on the failure to abide by federal alien-registration requirements was preempted. *Arizona*, 567 U.S. at 400-02. In this case, however, Congress has both recognized and maintained, by statute, the federal-state regulatory spheres regarding wire and radio communications. *See* 47 U.S.C. § 152(a), (b) (1993) (stating that the statutes "apply to all interstate and foreign communication . . . [and] nothing in this Act shall be construed to apply or to give the [FCC] jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . .").

B. Narrowing the Breadth of FCC's Broad Preemption Net

In October 2019, the United States Court of Appeals for the D.C. Circuit decided *Mozilla Corp. v. FCC*,[169] brought as a comprehensive legal challenge to the entirety of the agency's 2018 Order.[170] The petitioners—consisting of online companies, business associations, and public interest organizations,[171] alongside twenty-two state attorneys general (in addition to the District of Columbia)[172]—challenged: the FCC's classification of broadband internet as an information service, its interpretation of § 706 as "hortatory," the agency's reliance on § 257 to impose transparency requirements, and finally, the validity of the preemption provision. In its decision, a unanimous panel upheld the FCC's classification decision,[173] and a two to one majority affirmed the agency's interpretation of § 706 as "reasonable" under the auspice of *Chevron*[174] along with the agency's reliance on § 257 to issue its substantive transparency rule under its Title I ancillary authority.[175] And most importantly for purposes of this article, the two to one majority vacated the 2018 Order's preemption provision in whole.[176]

Based on the foundational principle of administrative law that administrative agencies have the authority to act *only* under that which is granted them by Congress, the D.C. Circuit recognized that the FCC can "preempt state law only when and if it is acting within the scope of its congressionally delegated authority."[177] Much in the same way, the court recognized (as a matter of analytical consistency and necessity) that where the agency "lacks the authority to regulate, it equally lacks the power to preempt state law."[178] Notably, the FCC did not, before the D.C. Circuit, claim either an express statutory authority to preempt state net neutrality laws or that its Title I ancillary authority to regulate ISPs provides an avenue to which it may validly preempt

169. 940 F.3d 1 (D.C. Cir. 2019).

170. *See generally* Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019).

171. Joint Brief for Petitioners at i - v, Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019) (No. 18-1068) (Aug. 20, 2018) 2018 WL 5282022.

172. Proof Brief for Government Petitioners, Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019) (No. 18-1068) (Aug. 20, 2018) 2018 WL 5282010.

173. *See Mozilla*, 940 F.3d at 18-35, 97 (Williams, J., concurring in part and dissenting in part).

174. *Id.* at 20, 46.

175. *Id.* at 47-49.

176. *See id.* at 74 ("The Governmental Petitioners challenge Preemption Directive on the ground that it exceeds the Commission's statutory authority. They are right.").

177. *Id.* at 74-75 (quoting Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986)).

178. *Id.* at 75.

state net neutrality laws.[179] Rather, in its Order and before the D.C. Circuit, the agency relied on two theories of its legal authority to preempt state law in such a broad and conclusory fashion: (1) implied preemption authority under a derivative of the conflict preemption doctrine known as the "impossibility exception," and (2) that preemption is necessarily consistent with the "federal policy of nonregulation for information services" (or stated in the negative, that not preempting state law while altering the regulatory framework from Title II to Title I would be inconsistent with the federal policy set forth under the Title I regulatory scheme).[180]

Under the first theory, the FCC asserted in its Order that because "it is impossible or impracticable to regulate the intrastate aspects of a [broadband internet] service without affecting interstate communications," state laws imposing regulations inconsistent with the regulatory approach the FCC was adopting in its 2018 Order (net neutrality regulations) would "interfere with federal regulatory objectives," i.e., the balanced free-market, low-pressure regulatory system resulting from the FCC's information services classification.[181] But as noted above, simply because state regulation would conflict with a federal regulatory objective does not give an agency authority to, as a second-order exercise of legislative decision-making, categorically preempt all such state laws. Preemption (and, in this case because of its ancillary authority under Title I) requires something more.

As an extension of implied conflict preemption doctrine,[182] the impossibility exception, rooted in the Supreme Court's opinion in *Louisiana Public Service Commission v. FCC*,[183] essentially permits an administrative agency to act to preempt state regulation of intrastate matters "when it is '*not* possible to separate the interstate and intra-

179. *Id.* at 75-76 (citing Am. Lib. Ass'n v. FCC, 406 F.3d 689, 691-92 (D.C. Cir. 2005). The panel applied the two-step ancillary jurisdiction test it previously applied in *American Library*: "ancillary jurisdiction exists only when '(1) the Commission's general jurisdictional grant under Title I . . . covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.'" *Id.* at 76 (quoting *Am. Lib. Ass'n.*, 406 F.3d at 691-92).

180. Restoring Internet Freedom, 33 FCC Rcd. 311, at 429-31; *see Mozilla Corp.*, 940 F.3d at 76.

181. Restoring Internet Freedom, 33 FCC Rcd. at 429-31; *see Mozilla Corp.*, 940 F.3d at 74-76.

182. As the D.C. Circuit recognized in *Mozilla Corp.*, the doctrine of conflict preemption does not apply in this circumstance with regards to the FCC's 2018 Order inasmuch as the agency conceded at oral argument that the preemption provision is broader than conflict preemption and, in addition, conflict preemption is a "fact-intensive inquir[y]" involving whether a specific state regulation is an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Mozilla Corp.*, 940 F.3d at 81-82 (citations and internal quotation marks omitted).

183. 476 U.S. 355 (1986).

state components of the asserted FCC regulation.'"[184] In *Mozilla Corp.*, the D.C. Circuit recognized the three-part test the court of appeals had previously formulated in an earlier case for when the FCC may preempt state regulation under the impossibility exception: (1) "the matter to be regulated has both interstate and intrastate aspects," (2) "[FCC] preemption is necessary to protect a valid federal regulatory objective," and (3) "state regulation would *negate the exercise by the* [*FCC*] *of its own lawful authority* because regulation of the interstate aspects of the matter cannot be unbundled from regulation of the intrastate aspects."[185]

In this context, because the FCC classified broadband internet access service as an information service, any application of the conflict preemption doctrine necessarily rests on the validity of FCC's exercise of its Title I ancillary jurisdiction to regulate information services.[186] Stated differently, as the D.C. Circuit recognized in *Mozilla Corp.*, "the impossibility exception presupposes the existence of statutory authority to regulate; it does not serve as a substitute for that necessary delegation of power from Congress."[187] Because the agency's classification decision relegated its regulatory authority to its Title I ancillary authority and because the agency's express preemption provision is necessarily outside the sphere of this limited authority, it cannot rely on the impossibility exception to broadly preempt state law as a matter of first-order legislative decision-making.

Indeed, the D.C. Circuit agreed, recognizing that "contrary to the Commission's argument, the 'impossibility exception' does not create preemption authority out of thin air."[188] In a sense, the D.C. Circuit applied a *Chevron* Step Zero-style[189] requirement in which the agency

184. Public Serv. Comm'n of Md. v. FCC, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (quoting *La. Pub. Serv. Comm'n*, 476 U.S. at 375 n.4 (1986)) (emphasis in original); *La. Pub. Serv. Comm'n*, 476 U.S. at 368 (discussing preemption when "compliance with both federal and state law is in effect physically impossible").

185. *Mozilla Corp.*, 940 F.3d at 77 (quoting *Pub. Serv. Comm'n of Md.*, 909 F.2d at 1515) (emphasis added). Although FCC cites a two-part test, the third prong is necessarily implied within the ostensibly two-prong tests. *See* Minn. Pub. Utilities Comm'n v. FCC, 483 F.3d 570, 578 (8th Cir. 2007) (stating the impossibility exception permits FCC to preempt state regulation if (1) separation of interstate and intrastate aspects of the service is impossible and (2) "federal regulation is necessary to further a valid federal regulatory objective"); Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC, 880 F.2d 422, 429 (D.C. Cir. 1989) (quoting *La. Pub. Serv. Comm'n*, 476 U.S. at 375-76 n.4) (alteration in original) (stating "[w]here [the] FCC acted within its authority . . . , preemption of inconsistent state regulation . . . [will be] upheld since state regulation would negate the federal tariff" (i.e., the exercise of lawful authority)).

186. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 976 (2005).

187. *Mozilla Corp.*, 940 F.3d at 78.

188. *Id*.

189. *See generally* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

must, before any inquiry can proceed, have adequate and proper statutory authority to act in the manner it purports to act.[190] An agency has no power to act without authority granted to it by Congress, especially concerning any second-order legislative decision-making and even more so, when exercising the federal Supremacy Clause power to preempt state law in a broad and categorical manner.[191]

As explained above, because the agency failed to tie its express preemption provision to any congressionally-delegated authority (other than, arguably, a broad grant of authority in § 151) to properly exercise its ancillary authority, it cannot validly regulate in this manner even under the auspice of the impossibility exception to traditional preemption law.

But the FCC also relies on an "independent authority" to displace state regulations on the basis that Congress itself adopted the deregulatory framework of non-regulation concerning information services.[192] To be sure, the United States Supreme Court has established the basic principle that when Congress "fail[s] . . . affirmatively to exercise their full authority," the resulting scheme "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute."[193] Here, the stated policy of the Telecommunications Act as cited by the FCC in its 2018 Order is 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."[194] But as the D.C.

190. *See* City of Arlington, Tex. v. FCC, 569 U.S. 290, 306 (2013) (stating "for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular manner at issue in the particular matter adopted").

191. As an additional matter of note, the FCC's preemption action here was not the quintessential exercise of conflict preemption principles where it did not identify any specific state law or regulation that actively conflicts with a valid and lawful regulation from the agency. *See, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861, 874-75 (2000). The agency acted instead in this instance to categorically preempt (by regulation) state net neutrality laws to foreclose the then-impending possibility that the states would enact their own net neutrality laws and regulations. Even so, because the FCC in this instance as an exercise of its ancillary Title I authority must tie any affirmative regulation to some pre-existing statutory mandate or duty, it is not clear that even if such state law existed, the FCC could bring these conflict preemption principles to bear in a rulemaking or regulatory setting, regardless. Instead, the agency would pursue litigation and judicial avenues to preclude the state law from taking effect and to "enforce" the Supremacy Clause principles. This approach avoids bringing into the mix separations-of-powers issues alongside federalism concerns and principles, as is the case here.

192. Restoring Internet Freedom, 33 FCC Rcd. at 431.

193. Bethlehem Steel Co. v. N.Y. State Labor Relations Bd., 330 U.S. 767, 773-74 (1947); *see also* Ark. Elec. Coop. Corp., v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 384 (1983) ("[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate.").

194. Telecommunications Act, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 230(b)(2) (2018)).

Circuit re-affirmed in *Mozilla Corp.*, when dealing with an action by an administrative agency, the initial question must necessarily be whether the agency is acting within the confines of its congressionally-delegated authority, especially when considering preemptive actions. At the core of administrative law is the principle that agencies are first and foremost depositories of legislative decision-making authority. As the appellate court recognized: "First, as a matter of both basic agency law and federalism, the power to preempt the States' laws must be conferred by Congress. It cannot be a mere byproduct of self-made agency policy."[195] Thus, to exercise any independent authority—preemptive or not, although as I argue especially when the result is preemption of state law or regulatory authority—the agency must be acting within or under the authority delegated it by Congress.

To mean anything, then, this standard must apply even when the agency is ostensibly pursuing (and even when expressly stating as much) what is otherwise clear congressional or federal policy. There is no exception to this basic principle of administrative law. Any positive regulations or actions with the force of law, whether in pursuit of federal regulatory objectives or policies or not, are valid agency actions only where Congress has delegated the agency the power or authority to promulgate the rule or order in question. As explained above, because the FCC's Title I authority here is an exercise of ancillary authority, simply pursuing or promulgating a regulation that is *consistent with* such congressional or federal policy is not enough. Thus, it should not be sufficient for an agency to wield the federal power of preemption even in the face of a federal statutory scheme that suggests a de-regulation or laissez-faire approach which may be undermined by individual state regulation to the contrary, without statutory authority in which to otherwise ground such preemption.

Finally, the FCC relied on § 401 of the Telecommunications Act, adding 47 U.S.C. § 160, to support the agency's preemption authority regarding broadband internet access services.[196] Specifically, § 160(e) provides: "A State commission may not continue to apply or enforce any provision of this Act . . . that the [FCC] has determined to forbear from applying" under § 160(a).[197] In turn § 160(a) provides FCC statutorily delegated authority to make forbearance determinations regarding "any regulation or any provision of this Act to a telecommunications carrier or telecommunications service" upon certain findings.[198] The agency argued:

195. *Mozilla Corp.*, 940 F.3d at 78.
196. Restoring Internet Freedom, 33 FCC Rcd. at 432.
197. 47 U.S.C. § 160(a), (e) (2018).
198. *Id*.

> It would be incongruous if state and local regulation were preempted when the Commission decides to forbear from a provision that would otherwise apply, or if the Commission adopts a regulation and then forbears from it, but not preempted when the Commission determines that a requirement does not apply in the first place.[199]

The preemptive authority within § 160(e) is clear had the agency retained the telecommunications service-classification of broadband internet access service. In the realm of Title II regulation, Congress expressly sets forth (1) FCC discretionary authority to make forbearance determinations and (2) the requisite preemption of state law. But as the D.C. Circuit recognized, the agency's classification determination taking broadband internet out of the Title II realm necessarily removes such forbearance authority.[200] The court of appeals also noted that § 160(e) itself is not a delegation of preemptive authority to the agency but rather it only grants the agency authority to forbear from particular regulations under Title II with Congress "preemptively" determining the preemptive effect of such decision.[201] In other words, even under § 160(e) and the Title II sphere of regulatory authority, it is not the FCC that is necessarily making preemptive determinations but instead it is Congress itself that has made a preemptive determination as an exercise of first-order legislative decision-making.

In vacating the preemption provision on the grounds that the agency lacked any "lawful source of statutory authority" to do so,[202] the majority re-emphasized a foundational tenant of administrative law: that agencies are empowered to act only under such authority as granted by Congress and no more, including in preempting state law. But as the reasoning in the 2018 Order illustrates, in practice (as is more often than not the case) this is not a simple black and white matter. Indeed, as the dissent in *Mozilla* argues, in part, the Supreme Court has made clear that express grants of agency authority to preempt state law is not always a necessary requirement.[203] Something less is allowed. For example, the Supreme Court has recognized that when Congress "fail[s] . . . affirmatively to exercise their full authority," the resulting scheme "takes on the character of a ruling that no

199. Restoring Internet Freedom, 33 FCC Rcd. at 432.

200. *Mozilla Corp.,* 940 F.3d at 80 (discussing that the Commission "just cannot completely disavow Title II with one hand while still clinging to Title II forbearance authority with the other").

201. *Id.* at 79; *see also Am. Lib. Ass'n*, 406 F.3d at 708 (rejecting the argument that the FCC "possesses plenary authority to act within a given area simply because Congress has endowed it with some authority to act in that area").

202. *Mozilla Corp.*, 940 F.3d at 74.

203. *Id*. at 96 (Williams, J., concurring in part, dissenting in part). In addition, the dissent argues as an initial matter that the three-part impossibility test formulated by the D.C. Circuit itself was satisfied in this instance. *Id.* at 95.

such regulation is appropriate or approved pursuant to the policy of the statute."[204] Additionally, in an earlier case concerning the FCC's assertion of preemption authority in its regulation of cable television, the Court also recognized that while the key inquiry is whether the agency "has properly exercised its own delegated authority," at the same time "a pre-emptive regulation's force does not depend on express congressional authorization to displace state law."[205]

In *City of New York v. FCC*,[206] the Supreme Court found that Congress had delegated the FCC statutory authority to preempt state law in regulating cable television signals based on the broad power to "make such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this chapter" and, importantly, where the FCC had preempted such state and local regulation for the ten years leading up to Congress's enacting the Communications Act.[207] Additionally, just five years prior to *City of New York*, the Supreme Court stated the broad principle that decisions *not to* regulate are just as effective as a decision *to* regulate: "because a federal decision to forgo regulation in a given area may imply an authoritative factual determination that the area is best left *un*regulated, . . . that event would have as much pre-emptive force as a decision *to* regulate."[208]

Similar to the Eighth Circuit's 2007 opinion in *Minnesota Public Utilities Commission v. FCC*,[209] the *Mozilla Corp.* dissent argued for a deferential review of the FCC's action to preempt state law.[210] Remarkably, in *Minnesota Public Utilities Commission*, the Eighth Circuit—in reviewing an FCC-promulgated order preempting state regulation of telecommunication services using Voice over Internet Protocol ("VoIP")—engaged in a simple arbitrary-and-capricious standard of review of the agency's preemption promulgation.[211] In review-

204. *Bethlehem Steel Co.,* 330 U.S. at 773-74 (1947); *see also Ark. Elec. Coop. Corp*., 461 U.S. at 384 ("[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate.").

205. City of New York v. FCC, 486 U.S. 57, 64 (1988) (quoting Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 154 (1982)).

206. 486 U.S. 57 (1988).

207. *City of New York*, 486 U.S. at 66-67.

208. *Ark. Elec. Coop. Corp.*, 461 U.S. at 384 (noting the statutory scheme at issue, the Federal Power Act, did not determine as a matter of policy that the rural power cooperatives at the heart of the agency's preemptive act should be left unregulated as a matter of federal policy); *see also Minn. Pub. Utilities Comm'n*, 483 F.3d at 580 (noting, generally, "[c]ompetition and deregulation are valid federal interests the FCC may protect through preemption of state regulation").

209. 483 F.3d 570 (8th Cir. 2007).

210. *Mozilla Corp.,* 940 F.3d at 97 (Williams, J., concurring in part, dissenting in part).

211. *Minn. Pub. Utilities Comm'n*, 483 F.3d at 577-82.

ing the agency's assertion of the impossibility exception under 47 U.S.C. § 152(b), the Eighth Circuit deferred to the agency's "informed decision[-making]" in both its determination that the intrastate and interstate aspects of the service cannot be separated *and* that state regulation would interfere with federal rules or policies.[212] There, the FCC argued that if classified as an information service, state regulation of the VoIP service would conflict with the "long-standing national policy of nonregulation of information services" and the agency's "market-oriented policy" for information service providers.[213] The Eighth Circuit concluded the agency did not arbitrarily or capriciously preempt state regulation of VoIP service on the basis that it would "interfere with valid federal rules or policies," largely deferring to the agency's "conclusions regarding the conflicts between state regulation and federal policy."[214] On this basis, the *Mozilla* dissent argues that the 2018 Order's adoption of a federal regulatory regime characterized by deregulation for Title I information services does not render preemption impossible (or, more accurately, statutorily unauthorized as an exercise of agency authority).[215]

The Eighth Circuit recently re-affirmed its reasoning in *Charter Advanced Services (MN) LLC v. Lange*,[216] holding that because the VoIP service in issue (Spectrum Voice) is an "information service" under the Telecommunications Act, state regulation of the service is preempted:

> How a service is classified affects a state's ability to regulate the service. Telecommunications services are generally subject to "dual state and federal regulation." By contrast, "any state regulation of an information service conflicts with the federal policy of nonregulation [of information services under the Telecommunications Act]," so that such regulation is preempted by federal law.[217]

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212. *Id.* at 579-80.

213. *Id.* at 580 (quoting Communications Reg., 19 FCC Rcd. 22404 (2004)).

214. *Id.* at 580-81 (quoting, in part, Geier v. Am. Honda Motor Co., 529 U.S. 861, 883 (2000)).

215. *Mozilla Corp.*, 940 F.3d at 104 (Williams, J., concurring in part, dissenting in part) (asserting the Eighth Circuit's *Minnesota Public Service Commission* decision upholding FCC preemption of VoIP regardless of the service's classification as an information service or telecommunications service "seems wholly incompatible with the majority's idea that there is no Commission preemptive authority vis-à-vis a service located under Title I").

216. 903 F.3d 715 (8th Cir. 2018).

217. Charter Advanced Servs. (MN), LLC v. Lange, 903 F.3d 715, 718 (8th Cir. 2018) (quoting La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 375 (1986); then quoting *Minn. Pub. Util. Comm.*, 483 F.3d at 580). In *Charter Advanced Services*, the Eighth Circuit relied on its earlier decision in *Minnesota Public Utilities Commission* for the preemptive effect of state regulation of information services. *Charter Advanced Servs.*, 903 F.3d at 719.

When dealing with preemption by an administrative agency—rather, and especially so, than Congress itself—the principles of federalism and the separation of powers require a close and careful examination of the validity of the preemption action, as the majority in *Mozilla* re-affirmed. When acting as an independent or substantive matter (not merely interpreting federal preemption statutes), agencies like the FCC are limited to exercising delegated authority; as required by the separation of powers framework of the Constitution. Because of the implications of preemption under the Supremacy Clause and the delicate federalism balance, courts should be hesitant to accept an agency's asserted authority to preempt under only a broad delegated authority to act in a certain realm or on a certain topic especially when Congress itself (entitled without question to make first-level preemption decisions under the Constitution as a function of its vested lawmaking authority and legislative decision-making powers) must, to preempt state law, indicate a clear and manifest purpose to displace state law.

The United States Supreme Court should emphasize that judicial review of agency preemption decision-making must—as with judicial review of any agency action—begin with a "step-zero" inquiry: whether the agency is acting under some authority delegated by Congress. And where preemption of state law is concerned, for the sake of federalism and the basic institutional framework under the separation of powers, such power and authority to do so must be clear from Congress; much as Congress is itself required to make such determinations clear in statutory preemption. The Court should also clarify that even if the agency was not acting under Title I authority—under which congressional policy is simply not enough for regulatory action but requires a regulation tied to an existing statutorily mandated duty—as a general matter it should not be enough for agencies to independently undertake to pursue federal policy in preempting state laws, either. Unless Congress has delegated to the agency the authority to regulate and to preempt state law, it cannot so act with the force of law. Under this statutory scheme applicable to the FCC, pursuing congressional policy is not enough to exercise Title I authority as the FCC has undertaken to do here.[218] Neither should it be sufficient to

218. In *City of New York v. FCC*, the Supreme Court held the FCC had authority under the broad delegation of authority under § 4(i) of the Communications Act to preempt state law on an issue for which Congress enacted the enabling statute "against a background of federal [agency] pre-emption on this particular issue"; the FCC had "[f]or the preceding 10 years . . . pre-empted such state and local . . . standards under its broad delegation of authority . . . ." *City of New York*, 486 U.S. at 66-67. As mentioned above, the distinction between the less regulated "information services" and the more regulated "telecommunications services" is grounded in historic FCC practice.

exercise the power of preemption, even if the general federal scheme of regulation would indicate or arguably provide support for, as a policy matter, a laissez-faire or market-based approach to regulating the internet as an information service.

In sum, the courts in judicial review should ensure that when agencies like the FCC invoke the foundational principles of federalism and act to influence the balance of regulatory authority between the dual sovereigns under the Supremacy Clause by the federal power of preemption, agencies must act under and within the inherently limited power delegated to it by Congress. Administrative agencies like the FCC should not be able to derive regulatory authority to preempt state law and foreclose any and all state laws regulating broadband internet—in which the States certainly have an intimate and important interest—in a net neutrality-style by simply reasoning that since it has no jurisdiction to regulate interstate broadband internet providers in this manner, states do not have jurisdiction to regulate intrastate broadband internet providers in that same way.[219] This would, simply, be inconsistent with the administrative law framework that exists within the broader institutional and constitutional design.

V. CONCLUSION

Because of its excessive pervasiveness, how the internet is regulated (or not) will continue to become a mobilizing and pressing political issue across the federal and state levels of government. While the worthwhile regulatory policy debate centered around broadband ISPs' gatekeeper role and influence continues, it is important to remember the role the states can play as "laborator[ies] . . . [to] try novel social and economic experiments without risk to the rest of the country."[220] But this notion must necessarily exist under the framework established by the Supremacy Clause which dictates that in conflict, state law must cede to federal law.[221] While a necessary federal power, the power of preemption under the Supremacy Clause must be wielded

219. Ultimately, the D.C. Circuit agreed and vacated FCC's preemption provision on much the same grounds. *See generally Mozilla Corp.*, 940 F.3d 1. Importantly, however, the preemption issue is far from settled, as the dissent makes clear. *See id.* at 69-79 (Williams, J., concurring in part and dissenting in part). If nothing else, the FCC's 2018 Order itself illustrates the need to clarify the limits to federal agency power in an era of increasing administrative agency reach at the outer limits of its realm of authority.

220. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also* FERC v. Mississippi, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring in part and dissenting in part) (stating, "[c]ourts . . . frequently have recognized that the 50 states serve as laboratories for the development of new social, economic, and political ideas").

221. U.S. CONST. art. VI, cl. 2.

with at least intentionality, and even more so when wielded by an administrative agency rather than Congress.

Under the current administration, the FCC has wielded this authority to impose a market-based framework on broadband internet access regulation on the whole of the United States and to foreclose States from an alternative net neutrality scheme. While in this instance the regulatory action failed after the D.C. Circuit vacated the Order's preemption provision, it remains instructive. With the hyper-partisanship and hyper-politicization of net neutrality and the regulation of the internet today, it is not hard to imagine how the FCC under a different administration may yet again change course and *re-re-re-classify* broadband internet as a telecommunications service in order to pave the way to impose affirmative net neutrality requirements. And it is not unlikely that the agency will again wield the power of preemption. When this occurs, to establish some sense of consistency within this regulatory arena, we must ensure that the agency is properly exercising a preemptive authority delegated to it, in some way, by Congress. Where this authority is unclear given the statutory scheme, agencies like the FCC continue to demonstrate a willingness and desire to expand their reach and preempt state law based only on general or broad grants of authority and in the interest of congressional policy. When asked, the courts should carefully review such agency action, rein in this trend, and re-affirm the most basic constitutional principles at the intersection with administrative law. If policy statements and broad grants of general and undefined regulatory authority is enough for an administrative agency to preempt state laws, there is no effective limit to both the affirmative regulations administrative agencies can promulgate, let alone the administrative preemption of state law.