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October 25, 2017

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Restoring Internet Freedom, WC Docket No. 17-108

Dear Ms. Dortch:

Enclosed for filing please find the attached white paper explaining the importance of ensuring a uniform, national framework for broadband regulation as the Commission considers the issues in this proceeding. As this white paper concludes, the Commission has ample authority to do just that.

This letter is being filed electronically in accordance with Section 1.1206 of the Commission's rules. Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "William H. Johnson".

FCC AUTHORITY TO PREEMPT STATE BROADBAND LAWS

October 25, 2017

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SUMMARY

Congress and the Federal Communications Commission (“FCC” or “Commission”) have recently made great strides toward restoring the light-touch regulatory approach that had successfully applied to Internet Service Providers (“ISPs”) for most of the last two decades. Unfortunately, even as Verizon and other providers seek to develop a reasonable and sustainable federal framework to protect the open Internet, some supporters of stringent regulation of ISPs are now looking to States and localities to frustrate these achievements. State and local laws governing broadband Internet access service (“state broadband laws”) pose a real and significant threat to restoring a light-touch, uniform regulatory framework for broadband service.

This white paper explains why the Commission can and should preempt these problematic state broadband laws and identifies several potential sources of authority for the Commission to do so. Specifically, it describes the problems these state broadband laws create and provides an overview of the history of the Commission’s and courts’ recognition of the Commission’s power to preempt state laws that stand as obstacles to federal policies.

This paper then enumerates three separate sources of statutory authority that would enable the Commission to expressly preempt these laws. First, Section 706(a) of the Telecommunications Act¹ expressly directs the Commission to promote the deployment of broadband. If Section 706(a) can reasonably be interpreted to provide an independent source of rulemaking authority, as the D.C. Circuit has found, then it would clearly allow for the preemption of state broadband laws. But even if Section 706(a) does not confer such rulemaking authority, it certainly imposes a mandatory legal obligation upon the Commission to advance the cause of broadband deployment, and thus allows the Commission to preempt state broadband laws that undermine its efforts to achieve that goal. Second, Section 153 of the Communications Act codifies the original regime of light-touch regulation for “information services,” including broadband Internet access service, and thus further buttresses the Commission’s authority to preempt state laws—like state broadband laws—that interfere with the Act’s rule of light regulation for information services. Third, with respect to *mobile* broadband operators, Section 303 of the Communications Act authorizes the Commission to “[p]rescribe the nature of the service” provided; this provision, whatever its ultimate scope, enables preemption of state broadband laws that affect “the nature of the service” that mobile broadband providers in ways that run counter to federal policy.

There is separate statutory support reaffirming that all of these statutory provisions, together with the Commission’s general implementing powers under the Communications Act, grant regulatory authority sufficient to allow FCC preemption of state broadband laws, including state laws seeking to regulate net neutrality and broadband privacy. Section 230(b)(2) of the Communications Act makes clear Congress’ intention that the Commission should “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services [“including specifically a service or system that provides access to the

¹ This white paper generally refers to provisions of the Communications Act of 1934—including provisions added to the Communications Act by the Telecommunications Act of 1996—as the “Communications Act.” The term “Telecommunications Act” refers to provisions of the Telecommunications Act of 1996 that were not characterized as amendments to the Communications Act, such as Section 706.

Internet”] *unfettered* by Federal or State regulation.” 47 U.S.C. § 230(b)(2), (f)(2) (emphasis added). At the very least, Section 230(b)(2) confirms that it is reasonable to read these statutory provisions to facilitate FCC preemption of state broadband laws that contravene that unambiguous federal objective. Finally, these statutory provisions apply with equal force to state ISP privacy laws in particular, and Congress’s recent revocation of the prior Commission’s Internet privacy regulations provides additional evidence of congressional intent to secure a uniform, nationwide framework for Internet privacy.

The Commission thus has legal authority to preempt state laws that threaten to impede the creation of a uniform, deregulatory framework for broadband. Importantly, the Commission’s expert policy determination that certain state laws indeed pose such a danger and thus *should* be preempted is entitled to judicial deference. For all these reasons, the Commission can and should exercise its lawful authority to protect the integrity of a restored light-touch framework for broadband regulation.

I. State Laws Pose A Direct Threat To The Commission And Congress’s Recent Progress In Restoring A Light-Touch Regulatory Framework For Broadband Internet.

In recent months, the Commission and Congress have made significant progress toward restoring the longstanding, and successful, light-touch framework for regulating broadband. First, in May 2017, the Commission initiated its *Restoring Internet Freedom* proceeding, which proposes to undo the common-carrier regulations that the prior Administration erroneously imposed on fixed and mobile broadband service, and to return to the proven, light-touch, and uniform regulatory framework for broadband Internet access service that historically preceded it. *See Restoring Internet Freedom*, Notice of Proposed Rulemaking, 32 F.C.C. Rcd. 4434, 4444 (2017) (“*Restoring Internet Freedom NPRM*”) (proposing to undo the regulatory-classification decisions made by *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015)). Second, earlier that spring, Congress disapproved the Commission’s 2016 privacy rules under the Congressional Review Act, 5 U.S.C. §§ 801–808 (“CRA”). *See* Act of Apr. 3, 2017, Pub. L. No. 115–22, 131 Stat. 88 (2017) (disapproving *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, 31 FCC Rcd. 13,911 (2016) (“*ISP Privacy Order*”).

These achievements are significant, and they are critical to the future growth of broadband services. As the *Restoring Internet Freedom NPRM* explains, the Internet flourished under the light-touch regulatory approach that governed for decades before these two FCC decisions. *Restoring Internet Freedom NPRM*, 32 F.C.C. Rcd. 4434, 4458. Congress has recognized the importance of light-touch regulation and has expressly made it the policy of the United States to “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(2). “Interactive computer services” specifically include “a service or system that provides access to the Internet.” 47 U.S.C. § 230(f)(2).

Limiting governmental interference with the Internet is good for consumers and good for providers. Investments in broadband Internet access infrastructure entail large initial

expenditures with benefits coming only over the long-term; this makes investment highly sensitive to increased risks, including regulatory uncertainty. *See* Andres V. Lerner and Janusz A. Ordover, *An Economic Analysis of Title II Regulation of Broadband Internet Access Providers* (July 17, 2017) ¶¶ 24–29, *attached to* Comments of Verizon (citing “various empirical studies of telecommunications industries find that increased regulation deters investment and innovation”).² A light-touch regulatory framework, on the other hand, encourages investments in infrastructure, and these investments ultimately redound to the benefit of consumers by producing lower costs and better service.

Unfortunately, an alarming number of state and local legislative bodies across the country are resisting this light-touch policy by considering their own regulations of broadband. While these state and local efforts are often motivated by politics rather than policy, they pose a real threat to the Commission’s efforts to faithfully implement Congress’s intent. Indeed, many states and localities have made clear that their legislative agenda is designed for the very *purpose* of countermanding work undertaken at the federal level.

Specifically, legislative bodies in nearly 30 States—including California, New York, and Washington—have considered adopting privacy laws aimed at ISPs in response to Congress’s repudiation of the Commission’s privacy rules. Many of these rules are more onerous than the Commission’s; they also differ from each other in their particulars, creating the prospect of a maze of inconsistent rules. For example, California’s AB 375 purports to ban ISPs from offering discounts or other benefits related to a customer’s privacy choices—even as an indirect consequence. A recently filed ballot initiative in California goes further, requiring most medium and large-sized businesses (including ISPs) to maintain detailed records of disclosed information, to allow users to opt out of information-sharing in a way that would impair service to customers, and—paradoxically—to provide the same level of service to all customers regardless of whether they opt out. *See* California Consumer Privacy Act of 2018, Initiative No. 17-0027.³ And New York has multiple privacy bills pending, including S3367, S3657, S5516, S5576, and S5603B.

Additionally, States and localities have given strong indications that they are prepared to take a similar approach to net neutrality laws if they are dissatisfied with the result of the *Restoring Internet Freedom* proceeding. Notably, the New York State Attorney General claims that “the role of the states in protecting consumers and competition on the Internet remains critical and necessary.” Comments of the New York Attorney General at 13.⁴ The City of Portland advised the Commission that it has adopted its own “policies” affecting the delivery of broadband. *See* Portland City Council Resolution No. 37303, ¶ 3 (July 12, 2017), *attached to* Comments of the City of Portland.⁵ And in Assembly Joint Resolution No. 7, the California legislature resolved that federal open Internet rules are among the State’s “high priorities,” suggesting that the State may take action if it disagrees with the Commission’s approach.

² Comments of Verizon, *Restoring Internet Freedom*, WC Docket No. 17-108 (July 17, 2017).

³ <https://oag.ca.gov/system/files/initiatives/pdfs/17-0027%20%28Consumer%20Privacy%29.pdf>. The proponents of this initiative have also recently filed an additional version of this proposed Act, Initiative No. 17-0039.

⁴ Comments of the People of the State of New York, *Restoring Internet Freedom*, WC Docket No. 17-108 (July 17, 2017).

⁵ Comments of the City of Portland, *Restoring Internet Freedom*, WC Docket No. 17-108 (July 14, 2017).

Allowing every State and locality to chart its own course for regulating broadband is a recipe for disaster. It would impose localized and likely inconsistent burdens on an inherently interstate service, would drive up costs, and would frustrate federal efforts to encourage investment and deployment by restoring the free market that long characterized Internet access service. See Pete Sepp, *Backers of Heavy-Handed Internet Rules Are All Thumbs*, Washington Examiner, Sep. 20, 2017 (“[L]eft-leaning local governments are repackaging efforts to burden their taxpayers with municipal fiber programs as well as new regulations that could hamper the rollout of more networks. Given the uneven fiscal track record of local government-sponsored Internet, these developments could signal new obstacles to a vibrant national network.”).⁶ Indeed, many of the commenters in the *Restoring Internet Freedom* proceeding have recognized that “it makes absolutely no sense to treat the internet one way in one state, while treating it different in another.” Comments of Consumer Action for a Strong Economy.⁷

Moreover, in the absence of preemption, States with the most restrictive rules effectively would have the final say on the appropriate level of regulation, as many broadband providers as a practical matter will need to comply with the strictest state rules. If a privacy law were enacted in one state, it could end up having an impact well beyond that one state, “because it would be difficult for technology companies with hundreds of millions of users to create a patchwork of state- and country-specific features to localize their effects.” Conor Dougherty, *Push for Internet Privacy Moves to Statehouses*, N.Y. Times, Mar. 26, 2017.⁸ Adding localities to the mix would only compound the problem.

It is accordingly critical that the Commission act decisively in its *Restoring Internet Freedom* proceeding to unambiguously preempt state and local broadband laws and thereby secure a uniform, light-touch regulatory framework for the Internet. Absent such action, or prompt action by Congress, the hard and important work necessary to correct the errors of the 2015 Title II order and the broadband privacy rules will be at risk of being effectively for naught.

II. The Commission Has Authority To Preempt Conflicting State Laws.

The Commission’s *Restoring Internet Freedom* proceeding is not just an opportunity to “restore broadband Internet access service to its long-established classification[s]” under the Communications Act. *Restoring Internet Freedom NPRM*, 32 F.C.C. Rcd. 4434, 4458. It also requires the Commission to ensure that the “free and open Internet” does not escape from the frying pan of federal common-carrier regulation only to fall into the fire of onerous and contradictory state regulation. Both the Commission and the courts have consistently recognized

⁶ <http://www.washingtonexaminer.com/backers-of-heavy-handed-internet-rules-are-all-thumbs/article/2634936>.

⁷ Comments of Consumer Action for a Strong Economy, *Restoring Internet Freedom*, WC Docket No. 17-108 (August 30, 2017). See also Reply Comments of American Consumer Institute at 2; Reply Comments of Center for Individual Freedom at 3; Reply Comments of The Free State Foundation at 7; Reply Comments of International Center for Law & Economics at 5–6; Reply Comments of Information Technology and Innovation Foundation at 10; Reply Comments of National Grange at 2; Reply Comments of Tech Freedom at 7 (All of these comments were made by the named party in FCC WC Docket No. 17-108 on or around August 30, 2017).

⁸ <https://nyti.ms/2mFfAVU>.

that the Commission has the authority to preempt state laws that obstruct federal objectives. The Commission has repeatedly exercised this authority, and its actions have been upheld by courts.

As explained below, three separate provisions of the Telecommunications and Communications Acts, together with various grants of implementing authority, enable the Commission to expressly preempt state broadband laws by delegating authority to the Commission in the area of broadband. Indeed, Section 230(b)(2) explicitly directs the Commission to exercise its authority under these provisions to preempt state laws that interfere with the free market for broadband Internet access service. Finally, in addition to these statutory sources of authority, Congress’s disapproval resolution revoking the prior Commission’s privacy rules provides further support for preemption of similar state ISP privacy laws.

A. Both The Commission And Courts Have Long Recognized The Commission’s Authority To Preempt State Laws, Including to Effectuate Deregulatory Policies.

The Commission has long preempted state and local laws that frustrate federal policy for interstate services. The Commission has not hesitated to use its statutory authority to preempt state laws in furtherance of its congressional mandates, especially with respect to inherently interstate services within its exclusive jurisdiction, and courts have consistently recognized its power to do so.

Congress created the Commission so that, by “centralizing authority,” it could “more effective[ly] execut[e]” its policy aims for “interstate and foreign commerce in communication by wire and radio.” 47 U.S.C. § 151. The interconnected nature of many modern communications services requires uniform, nationwide regulation. For this reason, the D.C. Circuit recognized nearly half a century ago that the Communications Act “must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole. ... [F]ifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication.” *Gen. Tel. Co. of Cal. v. FCC*, 413 F.2d 390, 398–401 (D.C. Cir. 1969); *see also Ivy Broad. Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 491 (2d Cir. 1968) (holding that the “congressional purpose of uniformity and equality” in the Communications Act indicated that “questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law and that the states are precluded from acting in this area”).

As the Commission has reaffirmed many times, broadband Internet access service clearly “qualifies as ‘interstate and foreign communication by wire’ within the meaning of Title I of the Communications Act.” *Comcast Corp. v. FCC*, 600 F.3d 642, 646–47 (D.C. Cir. 2010) (quoting 47 U.S.C. § 152(a)); *see also Protecting & Promoting the Open Internet*, 30 F.C.C. Rcd. 5601, 5722 n.708 (2015) (“reaffirm[ing] that [broadband Internet access service] is an interstate service for regulatory purposes”); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic*, 24 FCC Rcd. 6475, 6496 n.69 (2008) (“We have consistently found that ISP-bound traffic is jurisdictionally interstate ... the Commission has likewise found that services that offer access to the Internet are jurisdictionally interstate

services.”); *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd. 5901, 5909 (2007) (“[W]e conclude that wireless broadband Internet access service is jurisdictionally interstate.”). Indeed, broadband Internet access service is an *inherently* interstate service: It connects Americans from across the country, freely and fluidly crossing state lines, and thus departs entirely from traditional notions of geographically bounded communications services. See *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd. 22,404, 22,419, 22,424 (2004) (“*Vonage Order*”) (concluding that “[t]he Internet’s inherently global and open architecture obviates the need for any correlation between Vonage’s ... service and its end users’ geographic locations” and that the “practical inseparability of other [similar] types of IP-enabled services ... would likewise preclude state regulation”); *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd. 3307, 3317 (2004) (“*Pulver.com Order*”) (“[S]tate-by-state regulation of a wholly Internet-based service is inconsistent with the controlling federal role over interstate commerce required by the Constitution.”); Reply Comments of R Street Institute at 9–10 (“Broadband is an inherently interstate service, so Net Neutrality and other regulations of broadband service should be administered solely by Federal agencies: namely, the FCC and FTC.”).⁹

The Commission can ensure nationwide uniformity for interstate services by preempting state and local laws that interfere with its exclusive jurisdiction over such services and are inconsistent with federal policies for those services, including federal policies providing for *less regulation*. The Commission has a long history of setting a deregulatory policy for an interstate service and preempting state and local laws that threaten to impede that policy, and courts have consistently upheld these exercises of the Commission’s preemptive power.

For example, in 1975, the Commission recognized a new category of for-profit, entrepreneurial mobile radio operators called Specialized Mobile Radio Systems (“SMRS”), declared that SMRS are *not* common carriers, and pre-empted state regulation of entry into the SMRS market. See *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 639–40 (D.C. Cir. 1976). The Commission explained that “federal preemption of possible assertion of state entry certification over SMR’s is essential to accomplishing the objectives of our 900-MHz allocation plan,” and that “rate-structured, common-carrier-type regulation is inconsistent with the free-market, competitive environment we feel is necessary.” *Inquiry Relative to the Future Use of the Frequency Band 806-960 Mhz*, 51 F.C.C.2d 945, 974 (1975). While the Commission in this instance restricted its preemption to state regulation of market entry, the Commission expressed its “hope and anticipation that the states will follow our lead towards a free, competitive environment for the SMR systems,” and “defer[red] judgment as to any action by the states relating to the regulation of other aspects of SMR operations.” *Id.* The D.C. Circuit upheld the Commission’s action, concluding that the preemption “appears reasonably necessary in order to create the atmosphere of free entry and competition which the Commission has determined is desirable as a means of maximizing the development of mobile radio technology.” *Nat’l Ass’n of Regulatory Util. Comm’rs*, 525 F.2d at 646. Because the Commission’s decision to classify SMRS as non-common carriers was “within its broad discretion under Title III, it

⁹ Reply Comments of R Street Institute, *Restoring Internet Freedom*, WC Docket No. 17-108 (August 30, 2017).

follows that any state regulation inconsistent with the policy adopted may be pre-empted, unless such pre-emption is explicitly prohibited by statute.” *Id.*

Similarly, in 1978 the Commission issued an order preempting all state regulations affecting Multipoint Distribution Services (“MDS”), common-carrier systems by which stations transmit television content to consumers’ antennas, reasoning that state regulations impeded the Commission’s “‘immediate and preeminent interest in the development of MDS service as a whole.’” *N.Y. State Comm’n on Cable Television v. FCC*, 669 F.2d 58, 65 (2d Cir. 1982) (quoting *In re Orth-O-Vision, Inc.*, 69 F.C.C.2d 657, 669 (1978)). The Second Circuit upheld the order, rejecting the argument that the Commission could not preempt state law without “impos[ing] its own regulations” and concluding instead that “[f]ederal regulation need not be heavy-handed in order to preempt state regulation.” *Id.* at 66; *see also id.* (characterizing *Brookhaven Cable TV, Inc. v. Kelly*, 573 F.2d 765 (2d Cir. 1978) as upholding “the FCC’s preemption of state and local price regulation of one type of cable television programming where the FCC’s policy was to delay all price regulation so as to allow free-market pricing”).

Throughout the 1980s, the Commission continued to exercise its authority to preempt state law against the backdrop of a federal deregulatory regime, and courts repeatedly reaffirmed its authority to do so. *See, e.g., Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 880 F.2d 422 (D.C. Cir. 1989) (holding that the Commission had the authority to deregulate the market for inside wiring and could preempt state regulations of that market to the extent the Commission could establish that such regulation frustrates the federal “goal of a free and competitive market in those services”); *N.Y. State Comm’n on Cable Television v. FCC*, 749 F.2d 804, 812 (D.C. Cir. 1984) (upholding the FCC’s decision to preempt state and local entry regulation of satellite master antenna television, even though the FCC had not issued its own regulations, and concluding “that the Commission’s present reliance on market forces to regulate the entry of [satellite master antenna television] into the cable television marketplace is consistent with its statutory mandate”).

In its *Computer II* order, the Commission deregulated enhanced services and declared that its deregulatory policy preempted inconsistent state regulation. *Computer II Further Reconsidered Decision*, 88 F.C.C.2d 512, 523–24, 541–42 (1981). The D.C. Circuit upheld this decision in *Computer & Communications Industry Ass’n (“CCIA”) v. FCC*, explaining that “Courts have consistently held that when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission’s jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme.” 693 F.2d 198, 214 (D.C. Cir. 1982). The Court reiterated that the Commission could preempt state law by *deregulating* just as it could by *regulating*, *id.* at 217, a conclusion that the Supreme Court has since repeatedly affirmed. *See Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1428 (2014); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 66 (2002); *Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 384 (1983).

The Supreme Court confirmed the Commission’s preemption authority in *City of New York v. FCC*, 486 U.S. 57 (1988). There, the Court upheld FCC regulations that established technical standards to govern the quality of cable television signals and that preempted local authorities from imposing more stringent technical standards. The Court held that “a federal agency acting within the scope of its congressionally delegated authority may pre-empt state

regulation’ and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law.” *Id.* at 63–64. Because the Commission’s regulations had “explicitly stated [the Commission’s] intent to ... pre-empt state and local regulation,” the key question was simply “whether the Commission is legally authorized to” take that step pursuant to the statute. *Id.* at 65–66. The Court concluded that the Commission’s preemption was statutorily authorized because the Cable Act effectively endorsed the Commission’s previous exercises of preemption authority. *Id.* at 66–67 (noting that in the ten years prior to the Cable Act’s enactment the Commission had preempted similar regulations pursuant to “its broad delegation of authority” under Section 303(r) and that the Court had upheld similar exercises of FCC preemption).

More recently, the Commission issued two separate orders preempting state regulations in order to enforce the Communications Act’s statutory command that information services remain *unregulated*. In 2004, the Commission declared that an Internet application provided by Pulver.com that facilitated voice over Internet protocol (“VoIP”) services was an unregulated interstate “information service.” *Pulver.com Order*, 19 FCC Rcd. 3307, 3316–17. In doing so, the Commission concluded that state regulations that treated the Pulver.com Internet application as a telecommunications service “would almost certainly pose a conflict with our policy of nonregulation” and would therefore be preempted. *Id.* at 3316.

Similarly, the Commission preempted an order by the Minnesota Public Utility Commission applying “telephone company” regulations to Vonage’s VoIP service. *Vonage Order*, 19 FCC Rcd. 22,404. At that time, the Commission had not begun affirmatively regulating VoIP services, but concluded that the Minnesota order was preempted because it “directly conflicts with our pro-competitive deregulatory rules and policies governing entry regulations, tariffing, and other requirements arising from these regulations for services such as [Vonage’s service].” *Id.* at 22,415. The Commission noted that its decision to preempt the Minnesota order effectuated Congress’s command in Section 230(b)(2) to preserve a free market for the Internet and other interactive computer services and Congress’s command in Section 706 to promote competition in the local telecommunications market and remove barriers to infrastructure investment. *Id.* at 22,425–27. It concluded that Vonage’s service was interstate and that if it were classified as an information service—the Commission had not (and still has not) decided whether VoIP services were classified as information services or telecommunications services—Minnesota’s regulations would “produce[] a direct conflict with our federal law and policies, and impermissibly encroach[] on our exclusive jurisdiction over interstate services such as [Vonage’s].” *Id.* at 22,417. The 8th Circuit upheld this exercise of the Commission’s preemption authority. *See Minn. Pub. Util. Comm’n v. FCC*, 483 F.3d 570, 580–81 (8th Cir. 2007) (deferring to the Commission’s conclusion that because the Commission had set upon a “market-oriented policy allowing providers of information services to burgeon and flourish in an environment of free give-and-take of the market place without the need for and possible burden of rules, regulations and licensing requirements ... any state regulation of an information service conflicts with the federal policy of nonregulation.” (quotation marks omitted)).

Beyond these specific instances of FCC preemption, courts have made clear that the Commission has discretion to determine that preemption is appropriate to protect federal prerogatives. So long as the Commission is acting pursuant to congressionally delegated authority, its decision to preempt state law is lawful if it determines that “preemption is

necessary for the full accomplishment of lawful Commission objectives,” *N.Y. State Comm'n on Cable Television*, 749 F.2d at 813, a determination to which courts are obliged to defer. *See id.* (“[I]f the Commission has chosen rationally among competing policies, we cannot reverse because we would have chosen other means of effectuating the congressional mandate.”); *Minn. Pub. Util. Comm'n*, 483 F.3d at 580 (“The FCC's conclusions regarding the conflicts between state regulation and federal policy deserve ‘weight’—the agency has a ‘thorough understanding of its own [regulatory framework] and its objectives and is uniquely qualified to comprehend the likely impact of state requirements.’” (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000))).

Taken together, this body of precedent demonstrates that the Commission has regularly preempted state and local laws that it deemed to conflict with its exclusive jurisdiction and federal deregulatory policy. The Commission has done so in a variety of domains—including information services—for well over forty years. It has also done so on a categorical basis without necessarily engaging in a case-by-case assessment of particular state laws. And in doing so, the Commission has consistently met with deference from—and the approval of—federal courts. The Commission would not break new ground if it were to preempt state broadband laws that threaten to conflict with the restoration of a light-touch regulatory federal policy for broadband. Because broadband Internet access service is an inherently interstate service, and because state broadband laws conflict with a federal policy of light-touch regulation, the Commission can explicitly preempt state broadband laws.

B. Section 706(a) Enables The Commission To Preempt State Laws That Frustrate The Deployment Of Broadband.

As courts have observed, “Congress passed the Telecommunications Act of 1996 ... to ‘promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.’” *U.S. Telecom Ass'n v. FCC*, 290 F.3d 415, 417 (D.C. Cir. 2002) (quoting preamble to the Act); *see also 360 degrees Commc'ns Co. of Charlottesville v. Bd. of Sup'rs of Albemarle Cty.*, 211 F.3d 79, 86 (4th Cir. 2000) (explaining that the Act’s purpose is “to provide for a pro-competitive, deregulatory national policy framework ... by opening all telecommunications markets to competition”) (quoting H.R. Conf. Rep. No. 104–458, at 113 (1996)); *Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 575 (9th Cir. 2008) (same).

One of the cornerstones of the 1996 Act was Section 706(a). This provision states that “[t]he Commission and each State commission ... shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability [i.e., “high-speed, switched, broadband telecommunications capability”] ... by utilizing ... measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” 47 U.S.C. § 1302(a). Section 706(a) therefore allows the Commission to preempt state and local laws that frustrate the federal agenda for advancing the deployment of broadband Internet access. State and local broadband laws indeed present serious obstacles to the deployment of broadband Internet access: They discourage investment in broadband infrastructure and impede technological innovation and thus inhibit competition and impose barriers to infrastructure investment. They also would run counter to the restoration of a

light-touch regulatory regime as the chosen federal means for promoting broadband deployment. Accordingly, the Commission can and should preempt these laws pursuant to Section 706(a).

Under the D.C. Circuit’s recent holding that Section 706(a) confers substantive rulemaking authority, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), this provision would clearly authorize FCC preemption of state and local broadband laws. In *Verizon*, the D.C. Circuit found that Section 706(a) can “be read to vest the Commission with actual authority to utilize such ‘regulating methods’ to meet” the provision’s goal, *id.* at 638–39, by granting the FCC “affirmative authority to promulgate rules governing broadband providers,” *id.* at 643. On this view, Section 706(a) can be reasonably interpreted to give the Commission authority to adopt regulations concerning ISPs that promote broadband deployment. This in turn necessarily implies that the Commission also has authority to issue regulations preempting state broadband laws with the opposite effect: “[A] federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation’ and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law.” *City of New York*, 486 U.S. at 63–64. According to the D.C. Circuit, FCC regulations preempting state broadband laws would be “statutorily authorized,” and such regulations would therefore “pre-empt any state or local law that conflicts with [the] regulations or frustrates the purposes thereof.” *Id.* at 64.

But even if Section 706(a) does not provide substantive *rulemaking* authority, it nevertheless confers at least preemptive power upon the Commission. Section 706(a) unmistakably imposes an affirmative obligation on both states and the federal government to promote broadband investment and deployment—an obligation the Commission must honor. *Cf. Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 954 (D.C. Cir. 2016 (explaining that the Administrative Procedure Act allows courts to compel agencies to take discrete actions they are statutorily obligated to perform). Section 706(a) requires “each state commission,” as well as the FCC, to “encourage the deployment [of broadband Internet access service] ... by utilizing ... measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” And because Congress cannot, consistent with the Tenth Amendment, commandeer state commissions to implement this federal regulatory scheme, *see New York v. United States*, 505 U.S. 144, 161 (1992), the reference to state commissions must be read as a directive for the Commission to set parameters for *permissible* state action in promoting the deployment of broadband. State actions that fall within the federally set boundaries satisfy Section 706(a); state actions that do not are preempted.

Moreover, Section 706(a) imposes a mandatory obligation on the FCC: The FCC “*shall* encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,” and they shall do so “in a manner consistent with the public interest, convenience, and necessity.” 47 U.S.C. § 1302(a) (emphasis added). This language imposes a *mandatory* requirement and cannot be merely a discretionary goal. *See, e.g., Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting that a statute’s “use of a mandatory ‘shall’ ... impose[s] discretionless obligations”); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (“[T]he mandatory ‘shall’ ... normally creates an obligation impervious to judicial discretion”); *Black’s Law Dictionary* 1375 (6th ed. 1990) (“As used in statutes ... [shall] is generally imperative or mandatory.”). Indeed, it is obvious that the requirements of section 706(b)—*i.e.*, annual inquiries concerning the availability of Internet access—are mandatory, and that section uses the same “the-Commission-shall” structure as Section 706(a). The Commission

has consistently recognized as much. *See, e.g., Protecting and Promoting the Open Internet*, Dissenting Statement of Commissioner Ajit Pai, 30 F.C.C. Rcd. 5601, 5974–75 n.580 (citing the Vonage Order and noting that “the Commission has looked to section 706” when, among other times, it was “employing its authorities under the Communications Act to promote local competition”). The Commission therefore cannot deny that Section 706(a) imposes a mandatory legal obligation. *See Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2445 (2014) (“Agencies ... must always ‘give effect to the unambiguously expressed intent of Congress.’”) (quoting *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007)).

The Commission’s implementing authorities enable it to fulfill its mandatory obligation under Section 706(a), regardless of the ultimate scope of that provision, by preempting state and local broadband laws that would undermine broadband deployment. Section 303(r) of the Communications Act, for example, authorizes the Commission to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter.” 47 U.S.C. §§ 303 (r); see also *id.* § 303(f) (authorizing Commission to “[m]ake such regulations not inconsistent with law as it may deem necessary ... to carry out the provisions of this chapter”). These provisions permit the Commission, at least with respect to *mobile* broadband, to carry out its obligation under Section 706(a). Similarly, Section 154(i) of the Communications Act, which applies to both fixed and mobile broadband, empowers the Commission to promulgate “any and all acts ... rules and regulations, and ... orders, not inconsistent with this chapter, as may be necessary in the execution of [its] functions.” 47 U.S.C. § 154(i).¹⁰

Finally, as explained above in Part I, state broadband laws would seriously impede further successful deployment of broadband Internet access. The possibility of 50 different sets of rules (or a handful of particularly onerous sets of state rules) regulating myriad aspects of Internet access—*e.g.*, how ISPs handle customer data, how they price their services, and how they manage their networks—would impose costly requirements, hamstringing technological innovations, and create severe regulatory uncertainty; these costs would inevitably hinder investment in broadband Internet. *See, e.g., Restoring Internet Freedom NPRM*, 32 F.C.C. Rcd. 4434, 4448–49 (noting that the Commission’s decision to impose heavy-handed common-carrier regulations on ISPs “has resulted in negative consequences for American consumers—including depressed broadband investment and reduced innovation because of increased regulatory burdens and regulatory uncertainty ... Internet service providers have finite resources, and requiring providers to divert some of those resources to newly imposed regulatory requirements adopted

¹⁰ In many of the cases affirming FCC preemption, *see supra* Part II.A, the courts cited Section 154(i) as the relevant source of authority for the Commission’s actions. *See, e.g., CCIA*, 693 F.2d at 217 (“[W]e perceive no critical distinction between preemption by Title II regulation and preemption by the exercise of ancillary jurisdiction. ... ‘Federal regulation need not be heavy-handed in order to preempt state regulation.’”); *Nat’l Ass’n of Regulatory Util. Comm’rs*, 880 F.2d at 429–30 (citing *United States v. Sw. Cable Co.*, 392 U.S. 157, 178 (1968) for the proposition that the “Commission may take actions ‘reasonably ancillary to effective performance’ of its responsibilities for regulation of interstate communication”); *N.Y. State Comm’n on Cable Television*, 749 F.2d at 807 (same); *Brookhaven Cable TV*, 573 F.2d at 767 (holding that the Commission’s preemption fell within its authority under Section 154(i), reasoning that “a policy of permitting development [of special pay cable] free of price restraints at every level is reasonably ancillary to the objective of increasing program diversity, and far less intrusive than the mandatory origination rules approved in [*United States v. Midwest Video Corp.*, 406 U.S. 649 (1972)]”).

under Title II will, unsurprisingly, reduce expenditures that benefit consumers”). Moreover, state and local regulation of broadband would conflict with a federal deregulatory regime as the chosen means for promoting broadband deployment, thereby undermining the efficacy of the federal approach.

In short, because Section 706(a) legally obligates the Commission to “encourage the deployment” of broadband Internet access service “on a reasonable and timely basis,” and because these state laws interfere with that deployment, the Commission may lawfully preempt those laws. As explained below, *see infra* Part II.F, this is particularly so when Section 706 is read in light of Section 230(b)(2).

C. Section 153’s Codification Of Light-Touch Regulation For Information Services Authorizes The Commission To Preempt State Laws That Interfere With Congress’s Deregulatory Command For Such Services.

As with Section 706(a), Section 153 of the Communications Act, together with the Commission’s various implementing authorities, enables the Commission to preempt state and local broadband laws.

Section 153 distinguishes between two categories of services: “telecommunications services,” which are subject to common-carrier regulation under Title II, *see* 47 U.S.C. § 153(50)–(53), and “information services,” which are not, *see Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967, 975 (2005); *Verizon*, 740 F.3d at 630.¹¹ Section 153’s distinction between regulated “telecommunications carriers” and unregulated “information service” providers essentially codifies the fundamental distinction the Commission had previously made between regulated “basic” services and unregulated “enhanced” services. *See Brand X*, 545 U.S. at 976–77; *Verizon*, 740 F.3d at 629–30. This distinction is clear-cut: The myriad statutory provisions imposing restrictive common-carrier rules upon telecommunications carriers contained in Title II are structurally and substantively distinct from the relatively few and non-invasive provisions dealing with broadband housed in Titles I and VII of the Communications Act—which comprises, among other things, the Communications Act and the Telecommunications Act. Thus, the Communications Act’s definition of “information service,” when read against the backdrop of Title II’s common-carrier provisions and the *Computer II* regulatory regime, creates a substantive rule of light-touch regulation for information services: Whereas providers of information services are not directly subject to any substantive statutory requirements, “telecommunications carrier[s] shall be treated as ... common carrier[s]” and subject to Title II’s regulatory scheme. 47 U.S.C. § 153(51).

This history and statutory structure have consistently led the Commission to conclude that the clear command of the Communications Act is that information services remain *unregulated*. In its *Pulver.com* Order, for example, the Commission concluded that Section 153 evinces a congressional “preference that information services not be regulated.” *Pulver.com Order*, 19 FCC Rcd. 3307, 3318 n.64. The Commission explained that “federal authority has

¹¹ Section 332 draws a similar distinction between “commercial mobile services,” which are subject to common-carrier regulation, and “private mobile services,” which are not. 47 U.S.C. § 332(c)–(d). Section 332 therefore supports the exercise of preemption authority for the same reasons that Section 153 does so.

already been recognized as preeminent in the area of information services, and particularly in the area of the Internet and other interactive computer services, which Congress has *explicitly stated should remain free of regulation*,” *id.* at 3316 (emphasis added). And in its Vonage Order the Commission noted the “long-standing national policy of nonregulation of information services,” *Vonage Order*, 19 FCC Rcd. 22,404, 22,426–27, describing its consistent finding that “the market for [information] services [is] competitive and best able to ‘burgeon and flourish’ in an environment of ‘free give-and-take of the market place without the need for and possible burden of rules, regulations and licensing requirements,’” *id.* at 22,417 (quoting *Amendment of Section 64.702 of the Commission’s Rules and Regulations*, Docket No. 20828, Final Decision, 77 F.C.C.2d 384, 425–33, paras. 109–27 (1980)). Indeed, the Commission recognized as much in its Notice of Proposed Rulemaking in this proceeding. *See Restoring Internet Freedom NPRM*, 32 FCC Rcd. 4434, 4441 (“[W]e propose to reinstate the information service classification of broadband Internet access service and return to the light-touch regulatory framework first established on a bipartisan basis during the Clinton Administration.”).

Courts have also repeatedly recognized that Section 153 of the Communications Act and the preexisting regime it codified provide for “light-touch” regulation of information services (or “enhanced” services). *See U.S. Telecomm. Ass’n v. FCC*, 855 F.3d 381, 393–94 (D.C. Cir. 2017) (Brown, J., dissenting from denial of rehearing en banc) (“For nearly two decades, the federal government respected the [Communications] Act’s deregulatory policy. Presidents enforced it, Congresses did not alter it, and the [Commission] gave the Internet only a light-touch regulation. When FCC regulation went beyond a light touch, this Court intervened.”); *Minn. Pub. Util. Comm’n*, 483 F.3d at 580 (“The FCC has promoted a market-oriented policy allowing providers of information services to burgeon and flourish in an environment of free give-and-take of the market place without the need for and possible burden of rules, regulations and licensing requirements.”) (quotation marks and citation omitted); *Vonage Holdings Corp. v. Minn. Pub. Util. Comm’n*, 290 F. Supp. 2d 993, 1001 (D. Minn. 2003) (“By clearly separating information services from telecommunications services, the Court finds ample support for the proposition that Congress intended to keep the Internet and information services unregulated.”); *FTC v. Verity Int’l, Ltd.*, 194 F. Supp. 2d 270, 278 (S.D.N.Y. 2002) (“[A]lthough the FCC has left ‘enhanced’ or ‘information’ services essentially unregulated, it retains jurisdiction over them.”); *Prodigy Servs. Corp. v. Johnson*, 125 S.W.3d 413, 418 (Tenn. Ct. App. 2003) (“On the federal level, for purposes of regulation, the law has always made a distinction between regulated telecommunication services and unregulated information services.”).

As with Section 706(a), the Commission’s implementing authorities enable it to effectuate Section 153’s codification of “light-touch” regulation of information services. In addition to other provisions such as Section 303(r), Section 154(i) allows the Commission to implement Section 153’s substantive distinction between information services and telecommunications services by way of preemption of countervailing state laws. Section 153 imparts Congress’s command that providers of information services, and particularly ISPs, remain free from common carrier regulation. *See Verizon*, 740 F.3d at 650 (citing Sections 153(51) and 332(c)(2)). This is particularly true when the text and structure of the statutory scheme is read in light of Congress’s explicit policy directive that the Internet and other interactive computer services, including services that provide access to the Internet, remain unfettered by *both* federal *and* state regulation. *See infra* Part II.F. That Section 153 does not explicitly give the Commission deregulatory *rulemaking* authority is immaterial in light of

Section 153’s specific purpose; if Congress had intended this supposed omission to be significant, it would have made that fact explicit, as it did elsewhere in the Communications Act. *See, e.g.*, 47 U.S.C. § 257(a) (providing that the FCC “shall . . . eliminate[e], by regulations pursuant to its authority under this chapter (*other than this section*), market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services”) (emphasis added)).

Section 153 precludes the Commission from imposing common carrier regulations on information services, *see Verizon*, 740 F.3d at 650 (citing Sections 153(51) and 332(c)(2)), and it obligates the Commission to ensure that this light-touch regulatory policy is not frustrated by countervailing state or local regulations. Section 153, together with the Commission’s implementing authorities, allows the Commission to preempt broadband laws that do so.

D. Section 303 Authorizes The Commission To Preempt State And Local Broadband Laws That Regulate Mobile ISPs.

There is also statutory authority that supports preemption of state broadband laws in the *mobile* context specifically. Section 47 U.S.C. § 303 authorizes the Commission to “[p]rescribe the nature of the service to be rendered by each class of licensed [radio] stations and each station within any class,” and also to “[m]ake such rules and regulations . . . as may be necessary to carry out the provisions of” the Communications Act. 47 U.S.C. § 303(b), (r). The D.C. Circuit held in 2012 that “[a]lthough Title III does not ‘confer an unlimited power,’” *Cellco P’ship v. FCC*, 700 F.3d 534, 542 (D.C. Cir. 2012) (quoting *NBC v. United States*, 319 U.S. 190, 216 (1943)), these provisions empower the Commission to set rules “about ‘the nature of the service to be rendered’ by entities licensed to provide mobile-data service,” and to “defin[e] the form mobile-internet service must take for those who seek a license to offer it,” *id.* at 542–43.

Section 303(r) is therefore an example of congressional “delegat[ion of] rulemaking authority to the FCC . . . more generally,” and one that applies to mobile broadband providers. *Protecting and Promoting the Open Internet*, Dissenting Statement of Commissioner Ajit Pai, 30 F.C.C. Rcd. 5601, 5971 (citing, *inter alia*, Section 303(r)). Indeed, the Commission has previously relied upon Section 303 as authority for preempting state and local laws that conflict with pro-competitive federal policy. *See Promotion of Competitive Networks*, 15 F.C.C. Rcd. 22,983, 23,031–32 (2000) (identifying Section 303 as “source of authority to promulgate regulations” preempting “state or local regulations that unreasonably restrict a customer’s ability to place antennas used for the transmission or reception of fixed wireless signals [because these state and local regulations] impede the full achievement of important federal objectives, including the promotion of telecommunications competition and customer choice and the ubiquitous deployment of advanced telecommunications capability”). And, as noted above, the Supreme Court has endorsed the Commission’s preemption of state laws pursuant to Section 303(r). *See City of New York*, 486 U.S. at 66–67 (noting that at the time the Cable Act was passed, the Commission had, “[f]or the preceding 10 years, . . . pre-empted state and local technical standards under its broad delegation of authority [under Section 303] . . . as a means of implementing its legitimate discretionary power to determine what the ‘public convenience, interest, or necessity requires’ in this field” (quoting 47 U.S.C. § 303)).

Again, state and local broadband laws would hinder a primary purpose of the Telecommunications Act, “to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.” *Promotion of Competitive Networks*, 15 F.C.C. Rcd. 22,983, 23,029 (quoting Telecommunications Act of 1996, Pub. L. No. 104-04, 110 Stat. 56, 56 (1996)). And these laws undeniably would affect “the nature of the service” offered by mobile broadband providers. 47 U.S.C. § 303(b). State and local broadband laws restrict how mobile broadband providers provide their services by limiting how providers handle traffic on their network, and they limit the ways in which mobile broadband providers can share information with other parties; in many cases these laws would define personal information so broadly as to affect the actual provision of the Internet access service itself. State broadband laws thereby constrain, in a variety of ways, the kinds of customized, innovative services that ISPs can provide their customers. Section 303, at least as interpreted by the D.C. Circuit, therefore authorizes the Commission to explicitly preempt these laws as they apply to mobile broadband providers.

E. Section 230(B)(2) Confirms That These Statutory Provisions Authorize The Commission To Preempt State Laws That Interfere With A Free Market For Broadband Internet Access Service.

As explained above, three separate sources of statutory authority empower the Commission to preempt state broadband laws: a combination of Section 706(a); Section 153; and Section 303, together with any necessary implementing authority. But these provisions should not be read in isolation. Section 230(b)(2), which the D.C. Circuit has said should be used to “shed light” on other provisions of Title 47 of the U.S. Code, *see Comcast*, 600 F.3d at 654, confirms the conclusion that they may be relied upon in the service of preemption.

Despite the debate in some circles whether and how the FCC should regulate broadband, there is absolutely no question what Congress’s views on the question are. Section 230(b)(2) expressly provides that it is the policy of the United States “to preserve the vibrant and *competitive free market* that presently exists for the Internet and other interactive computer services [i.e., “any *information service*, system, or access software provider that provides . . . computer access by multiple users to a computer server, including specifically . . . access to the Internet”], *unfettered by Federal or State regulation.*” 47 U.S.C. § 230(b)(2) (emphasis added). This provision reaffirms that one of the core purposes of Section 153, Section 706, and Section 303 is to maintain the free market for Internet access services, and it shows that these provisions empower—indeed, *direct*—the Commission to safeguard a free market for broadband Internet access service from state regulation. Preemption in service of a deregulatory scheme is not only appropriate; it is congressionally prescribed.

At the very least, Section 230(b)(2) corroborates the *reasonableness* of interpreting these statutory provisions to authorize preemption of state laws that undermine federal telecommunications policy. And because these interpretations are at minimum reasonable, if the Commission were to adopt them that decision would be entitled to deference. *See City of Arlington, Tex. v. FCC*, 569 U.S. 290, 307 (2013) (“[T]he preconditions to deference . . . are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency

interpretation at issue was promulgated in the exercise of that authority.”). There is therefore no reason for the Commission to stay its hand: The Commission should exercise its statutory authority and protect the free market for Internet access services by preempting state broadband laws.

F. Congress’s Disapproval Of The Commission’s Privacy Rules Provides Support For The Preemption Of State ISP Privacy Laws.

The statutory sources of authority described above apply with equal force to both state laws governing the provision of broadband Internet access service and state privacy laws aimed at ISPs. Both kinds of laws affect the way ISPs can provide service and discourage investment by threatening ISPs with costly and potentially contradictory regulations. And with respect to ISP privacy laws, Congress’s recent action revoking the prior Commission’s ISP privacy rules provides additional support that preemption is consistent with congressional intent: Congress has expressed its policy preference for a uniform, technology-neutral federal privacy framework administered by the FTC.

In 2016, the Commission pushed the Federal Trade Commission (“FTC”) aside and appointed itself the regulator responsible for consumer privacy on the Internet. *ISP Privacy Order*, 31 FCC Rcd. 13,911, 13,918. Six months later, Congress passed a disapproval resolution revoking the Commission’s privacy order under the CRA. *See* Act of Apr. 3, 2017, Pub. L. No. 115-22, 131 Stat. 88 (2017) (“disapprov[ing]” the Commission’s privacy rules and declaring that they “shall have no force or effect”). Congress’s disapproval resolution vacates the rules, which are “treated as though [they] had never taken effect.” 5 U.S.C. § 801(f). Moreover, unlike a judicial decision to vacate and remand an action to the Commission, Congress’s disapproval resolution prevents the Commission from reviving its invalidated privacy rules: Absent further congressional action, the Commission is now prohibited from repromulgating its *ISP Privacy Order* or adopting “a new rule that is substantially the same.” 5 U.S.C. § 801(b)(2).

In repealing the Commission’s privacy rules, Congress recognized that the Commission’s appropriation of authority would lead to a confusing and inconsistent set of federal consumer privacy rules, with some rules applying to ISPs and other rules applying to other companies. The apparent purpose of Congress’s action was to restore the FTC as the nation’s *exclusive* Internet privacy regulator and prevent the Commission *and States* from regulating in this area.

Both Congress and the President made clear that their intent in repudiating the Commission’s privacy rules was to reallocate responsibility over privacy issues from the FCC back to the FTC, and thereby ensure a uniform privacy framework administered by the national, primary regulator for online consumer-protection and privacy issues. Members of Congress repeatedly referred to the FTC’s longstanding role as the nation’s privacy regulator and spoke of the need for *uniform* national privacy rules. *See, e.g.*, 163 Cong. Rec. at H2479 (statement of Rep. Burgess) (“The [FCC’s] rules are a departure from the privacy protections that have been applied by the [FTC] for years.”); *id.* at H2489 (Mar. 28, 2017) (statement of Rep. Blackburn) (noting that the FCC “unilaterally swiped jurisdiction from the [FTC],” which “has served as our Nation’s sole online privacy regulator for over 20 years”); *id.* at H2492 (statement of Rep. Walden) (preferring the FTC’s “proven case-by-case approach to privacy enforcement”); *id.* at H2493 (statement of Rep. Flores) (“Consumers expect their privacy to be protected the same

way no matter what type of entity holds their data. ... We are simply restoring a more stable regulatory playing field to ensure that consistent, *uniform* privacy security standards are maintained to protect consumers and future innovation. Once Congress rejects these rules, the FCC can turn back to cooperating with the FTC to ensure that both consumer privacy across all aspects of the internet is provided through vigorous enforcement and also that innovation is allowed to flourish.” (emphasis added)); *id.* at H2495 (statement of Rep. Matsui) (“Repealing the FCC’s privacy action is a critical step toward *restoring a single, uniform set of privacy rules for the internet.*” (emphasis added)); *id.* at H2496 (statement of Rep. Scalise) (“The FTC’s light touch in case-by-case enforcement had fostered an internet economy that has become the envy of the world, much to the benefit of all American families and consumers across this country. ... The bottom line is that families expect and deserve to be protected online with a set of robust and *uniform* privacy protections.”).

Similarly, the Office of Management and Budget expressed the Executive Branch’s intention to ensure that the FTC is able to enforce *uniform* privacy rules that treat ISPs the same as other companies. See Executive Office of the President, Office of Management and Budget, *Statement of Administration Policy: S.J. Res. 34 – Disapproving the Federal Communications Commission’s Rule on Privacy of Customers of Broadband Services* (Mar. 28, 2017) (“[T]he [privacy] rule departs from the *technology-neutral* framework for online privacy administered by the [FTC]. This results in rules that apply *very different regulatory regimes* based on the identity of the online actor.”) (emphasis added).

Allowing States or localities to impose their own privacy regimes would stand as a direct obstacle to Congress’s and the President’s intent to secure a uniform, national privacy standard for ISPs. Chairman Pai was thus correct to commit to “working with the [FTC] to restore the FTC’s authority to police Internet service providers’ privacy practices,” and more broadly to “end[ing] the uncertainty and confusion that was created in 2015 when the FCC intruded in this space.” Press Release, Statement of FCC Chairman Ajit Pai on President Trump Signing into Law the Congressional Resolution of Disapproval (Apr. 3, 2017).¹² The Commission can further this objective by declaring in its upcoming *Restoring Internet Freedom* Order that Congress’s exercise of the CRA also supports preemption of state ISP privacy laws.

CONCLUSION

The Commission’s authority to protect a deregulatory federal policy by preempting state and local laws has been confirmed time and again, by both the Commission and the courts. Here, three separate sources of statutory authority allow the Commission to explicitly preempt state laws governing broadband Internet access service and state privacy laws aimed at ISPs. And Congress’s disapproval resolution provides additional evidence of congressional intent to preempt in particular state ISP privacy laws that would disrupt the intended uniform, national framework. In short, the Commission has the tool of preemption “to preserve the vibrant and competitive free market that presently exists for the Internet.” 47 U.S.C. § 230(b)(2). It should not hesitate to use that tool in order to prevent the subversion of that unambiguous and vital federal policy.

¹² https://apps.fcc.gov/edocs_public/attachmatch/DOC-344205A1.pdf.