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**FCC’s “Final Agency Action” to Restore Internet Freedom Preempts State
Net Neutrality Laws**

by

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Pursuant to the Constitution’s Article VI Supremacy Clause, federal laws and regulations preempt conflicting state laws. But may state laws be preempted when they clash with a federal policy of nonregulation? The answer to that question may well determine whether the Federal Communications Commission’s 2018 *Restoring Internet Freedom Order (RIF Order)* preempts state net neutrality laws that impose regulatory requirements inconsistent with the federal policy.

In seeking the answer, Supreme Court Justice Clarence Thomas’s October 2019 concurring opinion in *Lipschultz v. Charter Advanced Services, LLC* is instructive. On the one hand, Justice Thomas’s opinion criticized giving preemptive effect to the federal policy of nonregulation of “information services” absent a “final agency action” by the FCC. But on the other hand, the FCC’s *RIF Order* satisfies the jurisprudential criteria that Justice Thomas identified for preempting conflicting state laws.

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In *Charter Advanced*, the Supreme Court let stand a decision by the Eighth Circuit Court of Appeals holding that Charter’s VoIP offering called “Spectrum Voice” is an “information service” according to Title I of the Communications Act and agency precedents. The FCC never made any decision regarding the classification of VoIP offerings like Charter’s. Nevertheless, the Eighth Circuit held that the federal policy of nonregulation of information services preempted Minnesota’s public utility regulation of Spectrum Voice.

Justice Thomas agreed with the Court’s denial of review in *Charter Advanced* but separately addressed preemption issues that were not raised by Minnesota. He wrote that “[i]t is doubtful whether a federal policy – let alone a policy of nonregulation – is ‘Law’ for purposes of the Supremacy Clause.” Justice Thomas explained that a federal policy of nonregulation is not likely a “final agency action” under conflict preemption jurisprudence because it does not mark the consummation of the FCC’s decisionmaking process and it does not determine Charter’s rights or obligations. Also, Justice Thomas explained that the Supremacy Clause only confers preemptive effect on “those federal standards and policies that are set forth in, or necessarily follow from, the statutory text.” Justice Neil Gorsuch joined Justice Thomas. The remaining justices were silent on preemption.

A cursory reading of Justice Thomas’s *Charter Advanced* opinion may appear to cast doubt the legal basis for preempting state laws that conflict with the *Restoring Internet Freedom Order*. However, the *RIF Order* is distinguishable from *Charter Advanced* and it avoids the concerns raised by Justice Thomas.

In *Charter Advanced* and in his prior opinions in conflict preemption cases, Justice Thomas took aim at “freewheeling judicial inquiry into the facts of federal nonregulation” or speculating about what the agency might do in the future based on perusals of legislative and agency histories. And, indeed, the preemptive result in *Charter Advanced* rested on judicial interpretation of agency precedent rather than an actual FCC classification decision. By contrast, the *RIF Order*’s repeal of net neutrality regulation and reclassification of broadband Internet access services as information services constituted a “final agency action” as a matter of administrative law and under the Supreme Court’s conflict preemption jurisprudence. That FCC’s action in the *RIF* proceeding was the consummation of a notice-and-comment rulemaking process.

Justice Thomas’s opinion in *Charter Advanced* recognized that federal standards or policies that are backed by an agency’s congressionally-delegated authority preempt state laws in the event of a conflict. The *RIF Order* is on solid ground here because it interpreted statutory terms that the Supreme Court held were ambiguous and subject to agency interpretation in *Brand X Internet Services v. NCTA* (2005). The FCC thus acted within its delegated authority when it implemented the federal policy of nonregulation of information services that follows from the Title I/Title II structure of the Communications Act.

Applying *Brand X*, the D.C. Circuit upheld the *RIF Order*’s broadband services reclassification decision in *Mozilla v. FCC* (2019). The *Mozilla* decision vacated the *Order*’s express preemption section. Yet it left open the possibility that state net neutrality laws could be subject to conflict preemption in future cases. California and Vermont laws that effectively re-impose the very net neutrality regulation the FCC has now repealed are subject to pending legal challenges.

The *RIF Order*'s decision reclassifying broadband Internet services as Title I information services effectively narrows the judicial analysis of state net neutrality laws to the tests set out in conflict preemption jurisprudence. Those tests focus on whether there is a "physical impossibility" for broadband Internet service providers to comply with both federal and state regulation regarding the management of their interstate broadband networks, or whether state regulation thwarts federal objectives in keeping information services nonregulated.

Courts considering conflict preemption claims would likely agree that state laws re-imposing Title II-like regulation at a local level effectively reverse the *RIF Order*. And they would likely recognize that state net neutrality laws frustrate accomplishment of the federal policy of nonregulation as implemented by the FCC. Thus, courts could give preemptive effect to the *RIF Order* without running afoul of the concerns over executive or judicial lawmaking identified by Justice Thomas.

For the FCC, the implication of Justice Thomas's opinion in *Charter Advanced* is that the federal policy of nonregulation of information services is better secured by the agency proactively making Title I classification decisions rather than relying on judicial inferences from agency precedents. Under this view, the preemptive basis for the FCC's "final agency action" to restore Internet freedom for broadband Internet services is secure. And the nonregulatory result in *Charter Advanced* can be better secured against conflicting state laws by the FCC declaring that interconnected VoIP services like Spectrum Voice are information services.

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