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The FCC and Final Agency Action: Analyzing the Implications of Justice Thomas's Conflict Preemption Principles

by

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Introduction and Summary

On October 21, 2019, the U.S. Supreme Court denied a petition for *certiorari* in *Lipschultz v. Charter Advanced Services, LLC*. The Court let stand a 2018 decision by the U.S. Court of Appeals for the Eighth Circuit that the Charter Advanced Services' VoIP offering known as "Spectrum Voice" is an "information service" according to Title I of the Communications Act and FCC precedents. The Eighth Circuit held that the federal policy of nonregulation of information services preempted state regulation of Spectrum Voice as a traditional common carrier telecommunications service.

Justice Clarence Thomas authored an opinion concurring in the denial in *Charter Advanced*. His opinion appears to cast doubt on the legal basis for giving preemptive effect to the federal policy of nonregulation of Title I services, including the FCC's 2018 *Restoring Internet Freedom Order* (*RIF Order*). However, this *Perspectives from FSF Scholars* paper concludes that the Commission's Title I classification of broadband Internet access services in the *RIF Order* is a

"final agency action" under the Supreme Court's conflict preemption jurisprudence. Thus, preemption of conflicting state net neutrality laws does not pose concerns about executive and judicial lawmaking raised by Justice Thomas. Although the nonregulatory result in *Charter Advanced* is welcome, the *RIF Order* is distinguishable and rests on more solid legal basis.

This *Perspectives from FSF Scholars* paper examines Justice Thomas's concurring opinion in *Charter Advanced* against the backdrop of opinions he has authored in prior conflict preemption cases. It then analyzes the underlying basis of the Eighth Circuit's decision in *Charter Advanced* and considers the extent to which preemption of state regulation of Spectrum Voice is vulnerable to the concerns animating Justice Thomas's opinions in *Charter Advanced* and in prior cases. For the Commission, the likely implication of Justice Thomas's opinion is that the federal policy of nonregulation of information would be better secured by the agency proactively making Title I classification decisions rather than leaving such determinations up to judicial inferences based on agency precedents. The nonregulatory result in *Charter Advanced* can be strengthened by the Commission classifying interconnected VoIP services like Spectrum Voice under Title I.

At issue in *Lipschultz v. Charter Advanced Services, LLC* was the Minnesota Public Utility Commission's 2015 decision that Charter Advanced Services' Spectrum Voice offering is a "telecommunications service" subject to its traditional public utility regulation. Spectrum Voice is an interconnected VoIP service capable of converting traditional time-division multiplexing protocol into Internet Protocol (IP) for Spectrum Voice subscribers. Charter sought to prevent enforcement of the state's public utility regulation. In September 2018, the Eighth Circuit held that Charter's VoIP service is an "information service" within the meaning of Title I. The Eighth Circuit further held that any state regulation of an information service conflicts with the federal policy of nonregulation, thus preempting state regulation of Spectrum Voice.

Concurring with the Supreme Court's order denying review of the Eighth Circuit's decision, Justice Thomas nonetheless 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" according to the Court's 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 to "those federal standards and policies that are set forth in, or necessarily follow from, the statutory text."

It should be emphasized that Justice Thomas's opinion in *Charter Advanced* recognizes that federal standards or policies that are backed by an agency's congressionally-delegated authority are to be given preemptive effect in the event that they conflict with state laws. More precisely, in *Charter Advanced* and in his prior opinions in conflict preemption cases, Justice Thomas takes aim at federal policies that are untethered to an agency decision within its jurisdictional authority. His prior opinions pointedly criticize preemption based on judicial grab-bagging from an agency's general goals and aspirations, or judicial gleanings from random comments by agency officials, amicus briefs, musings made by regulators in letters, legislative history, and bills that failed to pass Congress. Hence, Justice Thomas's concurring opinion in *Charter Advanced* emphasizes the need for a final agency action that constitutes a concrete application of that federal policy rather than judicial gloss or speculation.

Justice Thomas's opinion in *Charter Advanced* is particularly noteworthy because of its potential implications for the *RIF Order*'s preemption of conflicting state net neutrality laws. The Commission's decision in the *RIF Order* to reclassify broadband Internet access services as a Title I information service was upheld by the U.S. Court of Appeals for the D.C. Circuit in *Mozilla v. FCC* (2019). But the panel's majority in *Mozilla* vacated the *RIF Order*'s express preemption section, while leaving open the possibility that state regulation of broadband services could be subject to conflict preemption in future cases.

Accordingly, this *Perspectives* paper also analyzes the implications of Justice Thomas's opinion in *Charter Advanced* for future cases involving state net neutrality laws that conflict with the *RIF Order*. It finds that the Title I reclassification decision made by the Commission in the *RIF Order* distinguishes it from *Charter Advanced*. That agency decision and the federal policy of nonregulation of information services that the order enforces both follow from the Title I/Title II structure of the Communications Act. The *RIF Order*'s reclassification decision is a "final agency action" within the scope of the agency's jurisdiction and consistent with the Supreme Court's decision in *Brand X Internet Services v. NCTA* (2005). As such, the *RIF Order* is entitled to preemptive effect over and against conflicting state net neutrality laws. In *Charter Advanced*, by contrast, preemption rested on judicial interpretation of agency precedent because there was no affirmative Title I classification decision to rest on.

This *Perspectives* paper therefore agrees with the primary conclusion reached by FSF Board of Academic Advisors Member and Professor Daniel Lyons in his *Perspectives* published on November 18. According to Professor Lyons: "[T]he *RIF Order* is an order adopted via notice and comment that carries the force of law. Thus, courts are free to find that state net neutrality efforts are preempted to the extent that they conflict with the *RIF Order*." However, this *Perspectives* paper finds that Justice Thomas's prior opinions in conflict preemption cases furnish even stronger reasons for concluding that he and like-minded Justices would give preemptive effect to the *RIF Order* in future cases involving conflicting state net neutrality laws.

Justice Thomas's prior opinions in conflict preemption cases took aim at "freewheeling judicial inquiry into the facts of federal nonregulation" or speculation about what the agency might do in the future based on selective perusals of legislative and agency histories. For pending legal challenges against laws imposing Title II-like regulation at the state level in California and Vermont, by contrast, the *RIF Order*'s concrete affirmative application of the federal policy of nonregulation, achieved through its Title I reclassification decision, narrows the judicial analysis and avoids executive or judicial lawmaking. Conflict preemption claims involving the *RIFO* and state net neutrality laws in California and Vermont would thus be resolvable according 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 the federal and state regulations regarding the management of their interstate broadband networks, or whether state regulation thwarts federal objectives in keeping Title I information services nonregulated or at least subject to "light-touch" regulation.

A future court would likely recognize that a state law re-imposing Title II-like regulation at a local level effectively reverses the *RIF Order* and frustrates the accomplishment of the federal

policy of nonregulation that the Commission implemented via the *Order*'s Title I reclassification decision. And on that basis, such a court could give preemptive effect to the *RIF Order* without running afoul of the preemption principles and concerns identified by Justice Thomas.

I. Background on *Lipschultz v. Charter Advanced Services, LLC*

At issue in *Lipschultz v. Charter Advanced Services, LLC* was the Minnesota Public Utility Commission's 2015 decision that Charter Advanced Services' Spectrum Voice offering is a "telecommunications service" subject to its traditional public utility regulation.[1] Spectrum Voice is an interconnected VoIP service that features network protocol conversion capability. Interconnected VoIP services use Internet Protocol (IP) packets for voice calls and allow subscribers to exchange calls with traditional telephone users. When voice calls are transmitted via traditional time-division multiplexing protocol (TDM), the transmission is converted to IP by a "media gateway" on Charter's side of the interconnection point, allowing Spectrum Voice subscribers to receive those calls. Charter filed a legal action to prevent enforcement of the state's public utility regulation.

On May 2017, the U.S. District Court for the District of Minnesota ruled in Charter's favor. The District Court found that Spectrum Voice "acts on the customer's information – here a phone call – in such a way as to transform the information… [b]y altering the protocol in which that information is transmitted."[2] To date, the FCC has declined to classify interconnected VoIP services, including VoIP offerings featuring TDM-to-IP net protocol conversion such as Charter's, as either a Title I "information service" or a Title II "telecommunications service" under the Communications Act.[3] Still, the District Court held that Spectrum Voice's net protocol conversion capability "renders it an 'information service' under applicable legal and administrative precedent."[4] And the District Court held Minnesota's regulation of Spectrum Voice was preempted by the federal policy of nonregulation of Title I services.

In September 2018, the Eighth Circuit affirmed the District Court's ruling.[5] The Eighth Circuit held that Charter's VoIP service is an "information service" within the meaning of Title I of the Communications Act and in light of FCC precedents and judicial precedents, including *NCTA v. Brand X Internet Services* (2005).[6] Citing its circuit precedent in *Minnesota Public Utilities Commission v. FCC* (2007), the court further held that "'any state regulation of an information service conflicts with the federal policy of nonregulation,' so that such regulation is preempted by federal law," thereby precluding state regulation of Spectrum Voice.[7]

The State of Minnesota filed a petition for *certiorari* with the Supreme Court. Its petition presented two questions: (1) "Whether, in the absence of an FCC decision classifying VoIP service as an information service, FCC policy can conflict with and preempt state regulation of VoIP service"; and (2) "Whether VoIP service is a telecommunications service or an information service, under the appropriate functional test for classification determinations from *Brand X*."[8] Minnesota later filed a letter to the Court in which it claimed that the D.C. Circuit's rejection of the federal policy of nonregulation of information services as the basis for preemption in *Mozilla v. FCC* created a circuit split with the Eighth Circuit's decision in *Charter Advanced*.[9]

Minnesota's *certiorari* petition in *Charter Advanced* was unanimously denied by the Court on October 21, 2019.[10] Justice Clarence Thomas filed an opinion concurring in the denial.[11] That opinion was joined by Justice Neil Gorsuch. Justice Thomas agreed that Minnesota's petition failed to meet the Court's *certiorari* criteria. Yet he wrote separately to address preemption-related issues that were not raised in Minnesota's petition.

II. Justice Thomas's Critique of the Supreme Court's Conflict Preemption Jurisprudence

Justice Thomas's concurring opinion in *Charter Advanced* is best understood against the backdrop of several previous opinions in which he expressed disagreement with aspects of Supreme Court's conflict preemption jurisprudence. Under that jurisprudence, state laws may be preempted by federal law or regulation where (1) there is a physical impossibility in complying with both federal and state law; or (2) state law thwarts Congress's "purposes and objectives."[12] Justice Thomas has criticized both conflict preemption tests.

In *Wyeth v. Levin* (2009), Justice Thomas explained that the "physical impossibility" test has been narrowly construed by the Court because it recognizes that the "purposes and objectives" standard is overly broad.[13] Also, in *Merck Sharp & Dohme Corp. v. Albrecht* (2019), Justice Thomas expressed disagreement with the propriety of the "physical impossibility" test for determining whether conflicts triggering preemption exist.[14] According to Justice Thomas, there were conceivable situations where one could comply with both federal and state laws even when they clashed. Instead of the physical impossibility test, in both *Wyeth* and *Merck Sharp* Justice Thomas suggested a "logical contradiction" standard for determining when a federal law preempts state law.[15]

Furthermore, in *Wyeth*, Justice Thomas criticized the Court's use of the "purposes and objectives" test, under which "the Court routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law."[16] For example, Justice Thomas criticized the decision in *Hines v. Davidowitz* (1941) for basing preemption of a state's alien registration law on the Court's views about public sentiment, statements by members of Congress, and bills that failed to pass Congress.[17]

Also, Justice Thomas criticized *Geier* v. *American Honda Motor Co*. (2000).[18] In *Geier*, the Court upheld preemption of state tort law claims involving an alleged duty to install airbags in motor vehicles by relying on agency comments when promulgating a regulation, statements made by the government in its court briefing, and by regulatory history. Justice Thomas joined Justice Stevens' dissenting opinion in *Geier*, which called the government's "ex post administrative litigation position and inferences from regulatory history and final commentary."[19] Moreover, in *PLIVA, Inc. v. Mensing* (2011), a case involving state tort claims based on adequate warning label duty for federal regulated drugs, Justice Thomas wrote that "pre-emption analysis should not involve speculation about ways in which federal agency and third-party actions could potentially reconcile federal duties with conflicting state duties."[20] According to Justice Thomas, the Supremacy Clause does not require the judiciary to "strain to find ways to reconcile federal law with seemingly conflicting state law," including by

contemplating future contingent conflict.[21] Rather, preemption must be based on a conflict between the ordinary meaning of federal law and state law.

III. Justice Thomas's Critique of the Basis for Preemption in *Charter Advanced*

Justice Thomas's opinion in *Charter Advanced* appears to cast doubt on the legal basis for giving preemptive effect to the federal policy of nonregulation of Title I services. Or, more likely, it appears to cast doubt on giving preemptive effect to that federal policy in the case of interconnected VoIP services with TDM-to-IP capability in the absence of a Title I classification decision by the FCC.

Justice Thomas wrote that "[i]t is doubtful whether a federal policy—let alone a policy of nonregulation—is 'Law' for purposes of the Supremacy Clause."[22] First, he explained that a federal policy of nonregulation is not likely a "final agency action" according to the Court's conflict preemption jurisprudence because such a policy does not mark the consummation of the FCC's decisionmaking process and because it does not determine Charter's rights or obligations.[23] Second, even assuming the federal policy is a final agency action, Justice Thomas explained that the Supremacy Clause only confers preemptive effect to "those federal standards and policies that are set forth in, or necessarily follow from, the statutory text."[24]

According to Justice Thomas, giving a federal policy of non-regulation preemptive effect is a concern because it expands the power of the Executive and the Judiciary. In particular, it effectively authorizes the Executive to make "Law" by declining to act. Also, it leads to what Justice Thomas described as "a freewheeling judicial inquiry into the facts of federal nonregulation, rather than the constitutionally proper inquiry into whether the ordinary meanings of state and federal law conflict."[25]

This *Perspectives* paper acknowledges the merits of Justice Thomas's prior criticisms of the Supreme Court's conflict preemption jurisprudence. And it acknowledges the surface plausibility that enforcement of a federal policy of nonregulation could improperly expand executive and judicial power in certain instances. Furthermore, it appears that the result in *Charter Advanced* does lie vulnerable to the concerns Justice Thomas articulated. There was no consummated agency process settling rights and obligations in the offering of Spectrum Voice, and the entire point of Charter's litigation was to obtain a Title I finding through judicial interpretation. However, some distinctions reflected in his concurring opinion need to be brought into sharper focus.

It should be emphasized that Justice Thomas's opinion in *Charter Advanced* does not deny that a federal policy may sometimes furnish a basis for preemption. His opinion includes the previously-quoted caveat that, assuming there is a final agency action, the Court's precedent in *Wyeth* "requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text."[26] Thus, federal standards or policies that are backed by an agency's congressionally-delegated authority are to be given preemptive effect in the event that they conflict with state laws. More precisely, Justice Thomas takes aim at federal policies that are untethered to an agency decision within its jurisdictional authority. His prior opinions in preemption cases pointedly criticize preemption based on federal

policies that amount to judicial grab-bagging from an agency's general goals and aspirations, or judicial gleanings from random comments by agency officials, amicus briefs, musings made by regulators in letters, legislative history, and bills that failed to pass Congress. Hence, Justice Thomas's concurring opinion emphasizes the need for a final agency action that constitutes a concrete application of that federal policy.

IV. Preemption Based on the Federal Policy of Nonregulation of Information Services

To understand how the federal policy of nonregulation of information services could furnish the basis for preemption of conflicting state laws, it is helpful to consider the Supreme Court's 2005 decision in *NCTA v. Brand X Internet* as well as the Court's conflict preemption precedents. Those cases bring into sharper focus Justice Thomas's critique of the preemptive basis in *Charter Advanced*. They also lay a foundation for the preemptive basis of the *Restoring Internet Freedom Order*.

The federal policy of nonregulation of Title I information services is primarily based on the Title I/Title II structure of the Communications Act.[27] As explained in Justice Thomas's opinion for the Court in *Brand X*: "The Act regulates telecommunications carriers, but not information-service providers, as common carriers."[28]

FCC enforcement of that federal policy of nonregulation necessarily involves agency decisionmaking as to what types of offerings fit within the statutory terms. The Communications Act defines a "[t]elecommunications service" as "the offering of telecommunications for a fee directly to the public … regardless of the facilities used," and it defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[29] In *Brand X*, the Court held that those terms were ambiguous and that it was within the Commission's delegated authority "to fill the statutory gap in reasonable fashion," subject to the *Chevron* framework.[30] The Court concluded that the Commission's declaratory ruling in its 2002 *Cable Modem Order* to classify cable modem Internet services as Title I information services was issued in the exercise of the agency's delegated authority to adopt binding legal rules. Although preemption was not at issue in *Brand X*, the decision provides an example of the Court upholding a federal policy of nonregulation that was applied in the context of a final agency decision and that is "set forth in, or necessarily follow from, the statutory text."

Moreover, a Commission decision that a given service meets the definition of an information service under Title I appears to be the type of final agency action that would be accorded preemptive effect pursuant to the Court's conflict preemption jurisprudence. For example, in *Bennett v. Spear* (1997), the Court held that written statements made by the Fish and Wildlife Service and submitted to the Interior Department constituted a final agency action. Those written statements, submitted pursuant to the Endangered Species Act, found that a reclamation project proposed by the Department would jeopardize an endangered species, identified reasonable and prudent alternatives to avoid jeopardy, and addressed the impact of pursuing such alternatives. According to *Bennett*, "the Biological Opinion and accompanying Incidental Take Statement alter the legal regime to which the action agency is subject, authorizing it to take the endangered species if (but only if) it complies with the prescribed conditions."[31] Indeed, Court precedents

such as *Merck Sharp* make clear that preemptive effect extends not just to formal agency rules, but to any "agency action carrying the force of law."[32]

Similarly, a Title I or Title II classification decision by the FCC alters the legal regime to which the given service offering is subject; namely, by subjecting the service to a nonregulatory regime or to a common carrier regime. A declaratory ruling that classifies a service under Title I, including a ruling coupled with the adoption of transparency rules or other implementing rules pursuant to its ancillary authority, constitutes an agency action carrying the force of law.

Although the Eighth Circuit's finding that Spectrum Voice fits the definition of an information service is consistent with agency precedents,[33] a Title I finding does not necessarily follow from those statutory terms held to be ambiguous in *Brand X*. In other words, consistent with *Chevron* and *Brand X*, the Commission conceivably could declare interconnected VoIP service offerings with net protocol capability to be Title II services. Thus, in *Charter Advanced*, Justice Thomas appears to be disputing the propriety of the judiciary filling the interpretive gap and thereby preempting state law by speculating about how the Commission would have acted and then proceeding to act in the Commission's stead.

V. The FCC's "Final Agency Action": The Key Distinction Between the *Restoring Internet Freedom Order* and *Charter Advanced*

Importantly, because the FCC made a Title I reclassification decision regarding broadband Internet access services in the *Restoring Internet Freedom Order*, preemption of conflicting state laws would avoid the types of concerns raised by Justice Thomas.

As described earlier, the *RIF Order* reclassification decision was upheld by the D.C. Circuit in *Mozilla v. FCC*. Significantly, the *RIF Order*'s reclassification decision was based on the same basic reasoning as its earlier cable modem classification decision that was affirmed in an opinion written by Justice Thomas. In other words, *Mozilla* upheld the *RIF Order*'s reclassification decision in light of *Brand X*.

But the D.C. Circuit vacated the *RIF Order*'s express preemption section, including its directive preempting "any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order."[34] In particular, the D.C. Circuit in *Mozilla* described the federal policy of nonregulation as a "self-made agency policy" and not a congressional requirement conferring preemptive power.[35] This description appears at odds with the Title I/Title II structure of the Communications Act and with prior judicial precedents acknowledging the nonregulation/regulation distinction between the two titles, including *Brand X*. Even so, the D.C. Circuit's *per curiam* opinion concluded that "because no particular state law is at issue in this case and the Commission makes no provision-specific arguments, it would be wholly premature to pass on the preemptive effect, under conflict or other recognized preemption principles, of the remaining portions of the 2018 Order."[36]

The *RIF Order* is distinguishable from *Charter Advanced* insofar as the former involved an affirmative agency determination of the service classification at issue and the latter involved

agency inaction. Its Title I reclassification decision constitutes a "final agency action" in that it was the consummation of a notice-and-comment rulemaking process and legal consequences followed from it. Pursuant to the Communications Act and its Title I/Title II structure, the Commission determined the rights and obligations of broadband Internet access service providers' (ISPs): Broadband ISPs were freed from Title II regulation and left subject only to transparency requirements plus the jurisdictions of the Federal Trade Commission and the U.S. Department of Justice for purposes of consumer protection and antitrust. This is the same primary conclusion reached by FSF Board of Academic Advisors Member and Professor Daniel Lyons in his *Perspectives from FSF Scholars* paper, "Justice Thomas's Concurrence Says Little – and Much – About Preemption of State Net Neutrality Efforts."[37]

For pending legal challenges against laws imposing Title II-like regulation at the state level in California and Vermont,[38] as well as for any other future cases involving conflict preemption claims, the *RIF Order*'s concrete affirmative application of the federal policy of nonregulation narrows the judicial analysis and avoids the concerns about executive or judicial lawmaking expressed by Justice Thomas in *Charter Advanced* and other opinions. Instead of a "freewheeling judicial inquiry into the facts of federal nonregulation" or speculation about what the agency might do in the future, analysis applying the Court's conflict jurisprudence would focus on whether there is a "physical impossibility" for broadband ISPs to comply with both the federal and state regulations regarding the management of their interstate broadband networks, or whether state regulation thwarts federal objectives in keeping Title I information services nonregulated or at least subject to "light-touch" regulation.

Although the *RIF Order*'s express preemption section was vacated, a future court's conflict preemption analysis of state regulations of broadband Internet access services would likely agree with the Commission's point that:

> Because both interstate and intrastate communications can travel over the same Internet connection (and indeed may do so in response to a single query from a consumer), it is impossible or impracticable for ISPs to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance. Accordingly, an ISP generally could not comply with state or local rules for intrastate communications without applying the same rules to interstate communications.[39]

Additionally, a future court would also likely recognize that state regulations re-imposing Title II-like regulation at a local level effectively reverse the *RIF Order* and frustrate the accomplishment of a federal policy of nonregulation that the Commission implemented in the *Order*. Such state laws interfere with "the balanced federal regulatory scheme" of FCC transparency requirements combined with FTC and DOJ oversight.[40]

Moreover, state regulation imposing Title II-like requirements on broadband ISPs also creates a logical inconsistency that would likely furnish the basis for preemption according to Justice Thomas's understanding of federal preemption doctrine. That is, the *RIF Order*'s reclassification decision to keep broadband networks nonregulated and free from Title II regulation is logically inconsistent with state regulations imposing Title II-like requirements.

Finally, it deserves noting that Senior Judge Stephen Williams disagreed with the *Mozilla per curiam* opinion's decision to vacate the *RIF Order*'s preemption section.[41] He concluded that Congress's grant of power to the FCC to choose Title I entailed agency authority to choose a light-touch regulatory regime for interstate broadband Internet access services and that preemption protected federal choice of that regime from frustration by states.[42] In considering preemption claims involving state regulations of broadband services, courts in other federal circuits would not be bound by *Mozilla*'s conclusion that the federal policy of nonregulation of information services is merely agency created.[43] The view offered by Senior Judge Williams could bolster the basis for finding a conflict and preempting such state regulations. However, even the *per curiam* opinion in *Mozilla* leaves open the possibility that state regulation of broadband services could be found to conflict with the *RIF Order* and be preempted in future cases.[44]

VI. Conclusion

Justice Thomas's concurring opinion in *Charter Advanced* is directed toward instances in which preemption is based on improper executive and judicial lawmaking rather than the plain meaning of clashing federal and state laws. The FCC's Title I reclassification decision in the *Restoring Internet Freedom Order* is a final agency action and therefore does not appear vulnerable to such criticisms.

Seven of the justices were silent when the Supreme Court declined to hear *Charter Advanced*. Yet for the Commission, the likely implication of Justice Thomas's opinion, joined by Justice Gorsuch, is that the federal policy of nonregulation of information services would be better secured by the agency proactively making Title I classification decisions rather than leaving such determinations to judicial inferences based on agency precedents. The nonregulatory result in *Charter Advanced* can be strengthened by the Commission declaring that interconnected VoIP services like Spectrum Voice are Title I services.

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Further Reading

Daniel A. Lyons, "Justice Thomas's Concurrence Says Little – and Much – About Preemption of State Net Neutrality Efforts," *Perspectives from FSF Scholars*, Vol. 14, No. 40 (Nov. 18, 2019).

Randolph J. May, "The Ongoing Saga of Chevron and Net Neutrality," *Perspectives from FSF Scholars*, Vol. 14, No. 33 (Oct. 21, 2019).

Daniel A. Lyons, "Conflict Preemption of State Net Neutrality Efforts After *Mozilla*," *Perspectives from FSF Scholars*, Vol. 14, No. 29 (Oct. 4, 2019).

Seth L. Cooper, "Resurgence in Broadband Deployment Vindicates FCC's Pro-Investment Policies," *Perspectives from FSF Scholars*, Vol. 14, No. 29 (Sept. 19, 2019).

Daniel A. Lyons, "State Net Neutrality Mandates and the Dormant Commerce Clause: Some Preliminary Thoughts," *Perspectives from FSF Scholars*, Vol. 14, No. 14 (May 21, 2019).

Randolph J. May, "Thinking the Unthinkable – Part IV," *Perspectives from FSF Scholars*, Vol. 14, No. 8 (Apr. 1, 2019).

Daniel A. Lyons, "Express and Conflict Preemption of State Net Neutrality Efforts," *Perspectives from FSF Scholars*, Vol. 14, No. 4 (Feb. 5, 2019).

Seth L. Cooper, "VoIP Services in Minnesota Surmount Another Hurdle," *FSF Blog* (Dec. 6, 2018).

Seth L. Cooper, "The Case for Keeping VoIP Free from Legacy Regulation," *FSF Blog* (Oct. 27, 2017).

Seth L. Cooper, "Court Decision Supports FCC Proposal to Define Title I Internet Service," *FSF Blog* (May 22, 2017).

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[1] *See Charter Advanced Services (MN), LLC v. Lange*, 903 F.3d 715 (8th Cir. 2018), cert. denied, *Lipschultz v. Charter Advanced Services, LLC*, 589 U.S. ___, Slip Op. No. 18-1386 (October 21, 2019) (hereinafter "*Charter Advanced*").
[2] *Charter Advanced Services (MN), LLC v. Lange*, 259 F.Supp.2d 980, 987 (D.Minn. 2017).
[3] 47 U.S.C. §153 (24), -(53). For a discussion of interconnected VoIP services and policy issues surrounding prospective FCC classification of those services, see Daniel A. Lyons, "The Challenge of VoIP to Legacy Federal and State Regulatory Regimes," *Perspectives from FSF Scholars*, Vol. 8, No. 9 (April 3, 2013), available at: https://freestatefoundation.org//wp-content/uploads/2019/09/The-Challenge-of-VoIP-to-Legacy-Federal-and-State-Regulatory-Regimes-040213.pdf.
[4] 259 F.Supp.2d at 985.
[5] 903 F.3d 715.
[6] 545 U.S. 967.
[7] *Lange*, 903 F.3d at 718 (quoting *Minnesota Public Utilities Commission v. FCC*, 483 F.3d 750, 580 (8th Cir. 2007)).
[8] Pet. For A Writ of Cert., *Lipschultz*, 589 U.S. ___, Case No. 18-1386 (U.S. Sup.Ct.) (filed May 1, 2019), at i.
[9] Ltr., *id*. (filed Oct. 3, 2019) at 1.
[10] 589 U.S. ___, Slip Op. No. 18-1386.
[11] *See id*. (Thomas, J., concurring in denial of cert.).
[12] *See, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-373 (2000).
[13] 555 U.S. 555, 590 (2009) (Thomas J., concurring in judgment).
[14] ___ U.S. ___, 139 S.Ct. 1686, Slip Op. No. 17-290 (2019) (Thomas, J., concurring), at 1-2.
[15] *Id*. (Thomas, J., concurring) (citing 555 U.S. at 590 (Thomas, J., concurring in judgment)), at 2.
[16] 555 U.S. at 587 (Thomas, J., concurring in judgment).
[17] 555 U.S. at 594-596 (Thomas, J., concurring) (criticizing *Hines*, 312 U.S. 52). *See also id*., 555 U.S. at 594 (explaining that cases applying the "purposes and objectives" test "improperly rely on legislative history, broad a textual notions of congressional purpose, and even congressional inaction in order to preempt state law").
[18] 555 U.S. at 597-599 (Thomas, J., concurring) (criticizing *Geier*, 529 U.S. 861).
[19] 555 U.S. at 625 (quoting *Geier*, 529 U.S. at 910-911 (Stevens, J., dissenting)).
[20] *PLIVA, Inc. v. Gladys Mensing, Actavis Elizabeth, LLC*, 564 U.S. 604, 623 (2011).
[21] *Id*. at 624.
[22] *Charter Advanced*, 589 U.S. ___, Slip Op. No. 18-1386 (Thomas, J., concurring in denial of cert.)(quoting U.S. CONST. Art. VI, cl. 2), at 2.
[23] *Id*. (Thomas, J., concurring in denial of cert.), at 2.
[24] *Id*. (Thomas, J., concurring in denial of cert.), at 2.

[25] *Id*. (Thomas, J., concurring in denial of cert.) (citing *Wyeth*, 555 U.S. at 588 (Thomas, J., concurring)) (additional cite omitted), at 3.
[26] *Id*. (Thomas, J., concurring in denial of cert.) (citing *Wyeth*, 555 U.S. at 588 (Thomas, J., concurring)), at 2.
[27] *See Restoring Internet Freedom Order ("RIF Order")*, WT Docket No. 17-108, (released Jan. 4, 2018), at ¶¶ 202-204 (describing the history of Congress's approval of the federal policy of nonregulation of information services and citing provisions of the Communications Act confirming Congress's approval).
[28] 545 U.S. at 975.
[29] 47 U.S.C. §153 (24), -(53).
[30] 545 U.S. at 980 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 865-866 (1984)).
[31] 520 U.S. 154, 178 (Justice Thomas joined the Court's opinion).
[32] ___ U.S. ___, 139 S.Ct. 1668, Slip Op. No. 17-290, at 15.
[33] *See Charter Advanced*, 903 F.3d at 718-719 (FCC, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, 11 F.C.C.R. 21905, 21956 ¶ 104 (1996) ("Non-Accounting Safeguards Order")) (additional internal cites omitted).
[34] *See Mozilla v. FCC*, ___ F.3d ___, Slip Op. No. 18-1051 (D.C. Cir. Oct. 1, 2019), at 121-122. (citing FCC, *RIF Order*", at ¶ 195).
[35] *Id*. at 130.
[36] *Id*., at 144-145.
[37] Daniel A. Lyons, "Justice Thomas's Concurrence Says Little – and Much – About Preemption of State Net Neutrality Efforts," *Perspectives from FSF Scholars*, Vol. 14, No. 40 (Nov. 18, 2019), at: https://freestatefoundation.org/wp-content/uploads/2019/11/Justice-Thomass-Concurrence-Says-Little-–-and-Much-–-About-Preemption-of-State-Net-Neutrality-Efforts-111819.pdf.
[38] *See U.S. v. California*, Case No. 18-01539 (E.D. Cal.) (filed Sept. 30, 2018); *American Cable Assoc. v. Scott*, Case No. 18-00167 (D. Vt. filed Oct. 18, 2018).
[39] WT Docket No. 17-108, ¶ 200.
[40] *Id*., at ¶ 198.
[41] *See* ___ F.3d ___, Slip Op. No. 18-1051 (Williams, J. dissenting).
[42] *Id*. (Williams, J. dissenting), at 6.
[43] As indicated previously, Eight Circuit precedent recognizes state regulation of information services are preempted by the federal policy of nonregulation of information services. *See Lange*, 903 F.3d at 718; *Minnesota Public Utilities Commission*, 483 F.3d at 580.
[44] For an analysis of future conflict preemption cases involving state "net neutrality" laws, *see* Daniel A. Lyons, "Conflict Preemption of State Net Neutrality Efforts After *Mozilla*," *Perspectives from FSF Scholars*, Vol. 14, No. 29 (October 4, 2019), available at: https://freestatefoundation.org//wp-content/uploads/2019/10/Conflict-Preemption-of-State-Net-Neutrality-Efforts-After-Mozilla-100419.pdf. For an analysis of the RIF ORDER and the FCC's authority to preempt state "net neutrality" laws in light of classic constitutional principles articulated by Chief Justice John Marshall, see Randolph J. May and Seth L. Cooper, "John Marshall's Jurisprudence Supports Preemption of California's Net Neutrality Law," 20 *The Federalist Society Review* 26 (Jan. 28, 2019), available at: https://fedsoc.org/commentary/publications/john-marshall-s-jurisprudence-supports-preemption-of-california-s-net-neutrality-law.