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The Preemptive Effect of Federal Communications Act §§ 201–02 Postdetariffing

Luke J. Burton†

INTRODUCTION

The Federal Communications Act (FCA),1 which was originally enacted in 1934, is the primary means by which the federal government regulates the telecommunications industry.2 Because telecommunications services are used in interstate commerce, Congress has the power to effect such regulation through the Commerce Clause.3 With regard to consumer telecommunications contracts, the FCA embodies a policy of fair, reasonable, and nondiscriminatory rates.4 “Fair” and “reasonable” are standards which are adjudicated by the Federal Communications Commission (FCC) and thus open to interpretation during the regulatory process.5 “Nondiscriminatory” limits any “unjust or unreasonable” discrimination based on persons, classes of persons, or localities.6 These policies are codified at 47 USC §§ 201–02 and were formally enforced by the tariffing mechanism of 47 USC § 203 prior to the detariffing of telecommunications markets by

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1 Communications Act of 1934 (Federal Communications Act), Pub L No 73-416, 48 Stat 1064, codified as amended at 47 USC § 151 et seq.
2 Glen O. Robinson and Thomas B. Nachbar, Communications Regulation 13 (Thomson/West 2008).
4 See 47 USC §§ 201–02.
5 See 47 USC § 201(b).
6 See 47 USC § 202(a).
the FCC\textsuperscript{7} pursuant to the Telecommunications Act of 1996 ("1996 Act").\textsuperscript{8} Under the § 203 tariffing regime, telecommunications carriers were required to file tariffs that stated their "charges, classifications, regulations, [and] practices" with the FCC.\textsuperscript{9} These tariffs governed both the rates for exchange service between telecommunications carriers and the rates, terms, and conditions of service offered to consumers.\textsuperscript{10} The filing of these tariffs raised the issue of whether this regulation by the FCC preempted state law requirements for consumer contracts. When the tariffing regime was in effect, parties litigated the question of whether the FCA preempts state law. The Supreme Court ultimately resolved that issue, holding that federal law preempted state law challenges to the rates, terms, and conditions of service embodied in the tariffing mechanism.\textsuperscript{11} However, the FCC deregulated the telecommunications market for interstate, domestic, interexchange services in 1996 and abolished the tariffing mechanism for these services.\textsuperscript{12} Because regulation by the FCC is less direct in a detariffed regime, courts now disagree as to whether §§ 201–02 continue to exert preemptive force against state law contract requirements. Specifically, over the last decade, three appellate courts have weighed in—with differing results—on the question of whether the detariffed FCA preempts state law challenges to consumer telecommunications contracts.\textsuperscript{13}

This Comment argues that recent decisions of the Supreme Court suggest an innovative resolution to this circuit split. Part I provides background on the FCA and describes the environment in which the circuit split emerged. Part II details the current state of the law, including the circuit split, and


\textsuperscript{8} Pub L No 104–104, 110 Stat 56 (amending the FCA).

\textsuperscript{9} 47 USC § 203.

\textsuperscript{10} See id.


\textsuperscript{12} See Detariffing Order, 11 FCC 20730 (cited in note 7).

\textsuperscript{13} See In re Universal Service Fund Telephone Billing Practice Litigation, 619 F3d 1188, 1202 (10th Cir 2010) (holding that state law challenges are preempted); Ting v AT&T, 319 F3d 1126, 1146 (9th Cir 2003) (holding that state law challenges are not preempted); Boomer v AT&T Corp, 309 F3d 404, 423 (7th Cir 2002) (holding that state law challenges are preempted).
contrasts the analytical approaches of the relevant circuit courts. Part III discusses two recent Supreme Court decisions: *Global Crossing Telecommunications, Inc v Metrophones Telecommunications, Inc*\(^{14}\) and *Arizona v United States*.\(^{15}\) Part III first argues that the decision in *Global Crossing* suggests that the uniformity principle of §§201–03 which operated preemptively predetariffing continues to operate preemptively postdetariffing. Next, Part III asserts that the decision in *Arizona* stands for the proposition that Congressional non-regulation of a portion of a regulated field, as in the postdetariffing enforcement of §§201–02 by the FCC, exerts preemptive effect against state regulation of that portion of the field. Lastly, Part IV concludes.

I. BACKGROUND

A. The History of the FCA and the Filed-Rate Doctrine

In 1934, Congress enacted the FCA,\(^{16}\) which created the FCC and transferred regulation of the telecommunications market from the Interstate Commerce Commission\(^{17}\) to the FCC.\(^{18}\) The stated purpose of the FCA was to "make available ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."\(^{19}\) To further this goal, §§201 and 202 of the FCA established a policy of just, reasonable, and nondiscriminatory telecommunications service.\(^{20}\) Specifically, §201 required that "[a]ll charges, practices, classifications, and regulations ... shall be just and reasonable,"\(^{21}\) while §202 made it unlawful for any carrier to "make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services" or to "make or give any undue or unreasonable preference or advantage to any particular person,  

\(^{15}\) 132 S Ct 2492 (2012).
\(^{16}\) Communications Act of 1934, Pub L No 73-416, 48 Stat 1064, codified as amended at 47 USC §151 et seq.
\(^{17}\) Robinson and Nachbar, *Communications* at 440 (cited in note 2).
\(^{18}\) 48 Stat at 1064.
\(^{19}\) 48 Stat at 1064.
\(^{20}\) See 47 USC §§201–02.
\(^{21}\) 47 USC §201(b).
class of persons, or locality." Section 203 of the FCA established the enforcement mechanism for the policy of just, reasonable, and nondiscriminatory service created by §§ 201–02: a system of filed tariffs administered by the FCC. Under this system, telecommunications carriers were required to file tariffs—extensive documents which detailed the rates and terms of the service they would provide—with the FCC showing "all charges . . . and . . . the classifications, practices, and regulations affecting such charges." While carriers were free to file tariffs proposing any rates or terms of service, the FCC had the authority to reject tariffs which did not conform to the just, reasonable, and nondiscriminatory requirements of §§ 201–02 and to prescribe just and reasonable charges if the tariff filed by the carrier was unlawful under §§ 201–02.

Once the filed tariff had been accepted by the FCC, the carrier was prohibited from offering rates and terms different in any respect from those stated in the tariff. This prohibition is known as the "filed-rate doctrine," and the Supreme Court applied it to the telecommunications service in *American Telephone & Telegraph Co v Central Office Telephone, Inc.* In that case, the Court reasoned that because § 203(c) was modeled after similar provisions in the Interstate Commerce Act (ICA), the "filed-rate doctrine" of the ICA was applicable in the FCA context as well. Accordingly, the Court extended the principles of the ICA filed-rate doctrine, which requires that transportation

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22 47 USC § 202(a).
23 See 47 USC § 203.
24 47 USC § 203(a).
25 See 47 USC § 204.
26 See 47 USC § 205.
27 See 47 USC § 203(c).
29 Id at 222. For the ICA's filed-rate doctrine, see 49 USC § 13702(a) ("The carrier may not charge or receive a different compensation for the transportation or service than the rate specified in the tariff, whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device."). Compare this provision with the FCA's filed-rate doctrine provision found in 47 USC § 203(c) ("[N]o carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.").
carriers not extend rates or terms of service that differ from the carriers' filed tariffs, to telecommunications carriers.\textsuperscript{30} The Court went on to hold that the filed-rate doctrine operating within the FCC's regulatory regime preempted state law challenges to rates, terms, and conditions of telecommunications service.\textsuperscript{31}

B. The Evolving Telecommunications Market and the 1996 Act

Prior to the 1970s, AT&T held a nearly complete monopoly on the market for telecommunications services.\textsuperscript{32} The FCC allowed this monopoly because AT&T persuaded it that telecommunications service was a "natural monopoly"—an economic area in which economies of scale, economies of scope, and network effects combined such that the most efficient economic system consisted of a single service provider.\textsuperscript{33} In the early 1970s, the natural monopoly concept began to erode—most notably with the Department of Justice's commencement in 1974 of the antitrust suit which would eventually break up AT&T.\textsuperscript{34} In the absence of a natural monopoly justification, competition was the natural regime to which regulators turned. In 1985, the FCC responded to this trend by attempting to exempt nondominant carriers—those other than AT&T—from the § 203 tariff-filing requirement.\textsuperscript{35} In 1989, AT&T responded to the FCC’s exemption of nondominant carriers by filing suit pursuant to § 203 to prevent MCI, a smaller rival, from operating with unfiled rates.\textsuperscript{36} The Supreme Court resolved this litigation in 1994, when the Court held that the FCC lacked the power to modify the FCA in this way.\textsuperscript{37} Specifically, the Court reasoned that the FCC’s partial exemption amounted to a

\textsuperscript{30} Central Office, 524 US at 222.

\textsuperscript{31} Id at 221–28.

\textsuperscript{32} See Robinson and Nachbar, Communications at 439–40 (cited in note 2).

\textsuperscript{33} See id at 440–42.

\textsuperscript{34} See United States v American Telephone and Telegraph Company, 552 F Supp 131 (DDC 1982). See also Robinson and Nachbar, Communications at 442 (cited in note 2).


\textsuperscript{36} See MCI Telecommunications Corp v American Telephone & Telegraph Co, 512 US 218, 222 (1994).

\textsuperscript{37} See id at 231–32.
fundamental revision of the statute, which was a change that only Congress could make.\textsuperscript{38} In response to this ruling, Congress passed the 1996 Act,\textsuperscript{39} which "effectively adopted the FCC's detariffing rationale."\textsuperscript{40} Specifically, the 1996 Act instructed the FCC to "forbear from applying any regulation or any provision of th[e FCA]" if the FCC determined that (1) such forbearance was consistent with the goals of §§ 201–02; (2) enforcement of the regulation was not necessary to protect consumers; and (3) forbearance was consistent with the public interest.\textsuperscript{41} Later that year, the FCC found that these conditions were met as to all carriers, including AT&T, whose dominant market share had sharply fallen in recent years.\textsuperscript{42} Based on this finding, the FCC issued an order of mandatory detariffing for the telecommunications market for interstate, domestic, interexchange services.\textsuperscript{43}

C. The Detariffing Process: Setting the Stage for Modern Preemption Litigation

According to the FCC's 1996 detariffing order, telecommunications carriers were allowed to negotiate rates, terms, and conditions of their service directly with consumers, rather than filing tariffs with the FCC.\textsuperscript{44} The FCC anticipated that carriers would enter into "short, standard contracts" with consumers\textsuperscript{45} and emphasized that the §§ 201–02 requirements of reasonable and nondiscriminatory terms were still in effect.\textsuperscript{46}

\textsuperscript{38} Id.
\textsuperscript{39} Pub L No 104–104, 110 Stat 56 (amending the FCA).
\textsuperscript{40} Ting v AT&T, 319 F3d 1126, 1132 (9th Cir 2003).
\textsuperscript{41} 47 USC § 160(a).
\textsuperscript{42} At this point, AT&T was no longer the dominant power it once was. The monopoly of AT&T was shattered when it was broken up by United States v American Telephone and Telegraph Co, 552 F Supp 131, 223 (DDC 1982) ("[T]he Federal Communications Commission has struggled, largely without success, to stop [anticompetitive] practices .... Some other remedy is plainly required; hence the divestiture of the local Operating Companies from the Bell System."). In 1995, AT&T sought and received reclassification as a non-dominant carrier in the interstate, domestic, interexchange market. See In the Matter of Motion of AT&T Corp to Be Reclassified As A Non-Dominant Carrier, 11 FCC 3271, 3273 (1995).
\textsuperscript{43} See Detariffing Order, 11 FCC at 20731–33 (cited in note 7).
\textsuperscript{44} Id at 20818–20.
\textsuperscript{45} Id at 20763.
\textsuperscript{46} See id at 20803 ("Our decision to forbear from requiring nondominant interexchange carriers to file tariffs for interstate, domestic, interexchange services does not affect such carriers' obligations under Sections 201 and 202 to charge rates, and to
The detariffing order also provided that "in the absence of tariffs, consumers will be able to pursue remedies under state consumer protection and contract laws in a manner currently precluded by the ‘filed-rate’ doctrine."47

That language alarmed AT&T, which filed a petition requesting that the FCC confirm that "federal, and not state, law governs the determination as to whether a nondominant interexchange carrier’s rates, terms, and conditions for interstate, domestic, interexchange services are lawful."48 In response, the FCC issued an Order on Reconsideration, which stated that the FCA "continues to govern determinations as to whether rates, terms, and conditions for ... services are just and reasonable.... [T]he [FCA] does not govern other issues, such as contract formation and breach of contract, that arise in a detariffed environment."49 With this assertion by the FCC, the question of whether the FCA preempts state law challenges to the rates, terms, and conditions of contracts for telecommunications services came to the forefront.

II. THE CIRCUIT SPLIT

A. Federal Preemption Doctrine and the Preemptive Effect of §§ 201–02

There are three situations in which, pursuant to the Supremacy Clause of the Constitution,50 state law is preempted by federal law: (1) express preemption, which occurs when a statute has an "express provision for preemption"; (2) field preemption, which occurs when "Congress intends federal law to occupy the field"; and (3) conflict preemption, in which state law is preempted "to the extent of any conflict with a federal statute."51 Because the FCA contains no express preemption provision, the first situation is irrelevant in the FCA context.52

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47 Detariffing Order, 11 FCC at 20751 (cited in note 7).
49 Id at 15057.
50 US Const Art VI, cl 2.
52 See In re Universal Service Fund Telephone Billing Practice Litigation, 619 F3d 1188, 1196 (10th Cir 2010) ("Because §§ 201 and 202 of the FCA do not contain an
In addition, the circuit courts which have addressed the issue have generally concluded that there is no field preemption in the FCA context because state law has some role to play in regulation of the telecommunications industry. The crux of the disagreement between these circuit courts is whether, through the conflict preemption doctrine, §§ 201–02 prevent state law from regulating rates, terms, and conditions of telecommunications service contracts.

Conflict preemption occurs if it is impossible for private parties to comply with federal and state law simultaneously or if state law stands as an obstacle to the accomplishment of the full purposes and methods of Congress. The first case, in which it is impossible to comply with federal and state law requirements simultaneously, is known as actual conflict preemption. The second case, in which state law stands as a barrier to the full accomplishment of the purposes and methods intended by Congress, is known as obstacle conflict preemption. With regard to the conflict between state law standards for consumer contracts and FCA §§ 201–02, there is no actual conflict preemption because it is possible for telecommunications providers to comply with both the FCA and state law. Rather, the question raised is a question of obstacle conflict preemption:

express preemption provision, only field and conflict preemption are at issue in this case.

Two circuit courts held that there is no field preemption while one circuit court thought it likely that there is no field preemption but declined to reach the issue. See In re Universal, 619 F3d at 1196 ("The FCC's detariffing orders, however, explicitly contemplate a role for state law . . . . Accordingly, because state law expressly supplements federal law in the regulation of interstate telecommunications carriers, field preemption does not apply.") (citation omitted); Ting, 319 F3d at 1136, quoting Marcus v AT&T Corp, 138 F3d 46, 54 (2d Cir 1998) ("[F]ield preemption is not an issue because state law unquestionably plays a role. . . . [T]he Communications Act does not manifest a clear Congressional intent to preempt state law actions prohibiting deceptive business practices, false advertising, or common-law fraud.") (citations omitted); Boomer v AT & T Corp, 309 F3d 404, 424 (7th Cir 2002) ("Prior to detariffing, this court held that the Federal Communications Act completely preempted state law challenges . . . . [F]ollowing detariffing, there appears to be some role for state law . . . . But we need not resolve this issue today.") (citations omitted).

See In re Universal, 619 F3d at 1196; Ting, 319 F3d at 1146; Boomer, 309 F3d at 417.


do state law challenges to rates, terms, and conditions of telecommunications contracts conflict with the purposes and methods intended by Congress in enacting the FCA?

In the FCA context, the Seventh Circuit held in 2002 in *Boomer v AT & T Corp*\(^{58}\) that the FCA preempts state law challenges to rates, terms, and conditions of consumer telecommunications contracts through obstacle conflict preemption.\(^{59}\) In 2003, the Ninth Circuit in *Ting v AT&T*\(^{60}\) split with the Seventh, holding that such challenges are not preempted by the FCA.\(^{61}\) Finally, in 2010, the Tenth Circuit in *In re Universal Service Fund Telephone Billing Practice Litigation*\(^{62}\) sided with the Seventh and held that such challenges are preempted by the FCA.\(^{63}\)

### B. The *Boomer* Decision: State Law Challenges Preempted

The Seventh Circuit was the first circuit court to address the preemption issue when it ruled that state law-based challenges to the validity of arbitration clauses in consumer telecommunications contracts were preempted.\(^{64}\) In *Boomer*, the plaintiff filed a putative class action against AT&T alleging that AT&T had overcharged consumers.\(^{65}\) AT&T moved to compel individual arbitration pursuant to the terms of the service agreement with the plaintiff.\(^{66}\) The district court denied the motion based on "genuine issues of material fact" as to whether the arbitration clause was valid under Illinois state law.\(^{67}\) AT&T appealed to the Seventh Circuit, which ruled that the FCA preempted Boomer's state law challenge to the arbitration

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\(^{58}\) 309 F3d 404 (7th Cir 2002).

\(^{59}\) See id at 417.

\(^{60}\) 319 F3d 1126 (9th Cir 2003).

\(^{61}\) Id at 1146 ("[N]either [of the state laws under which this challenge was brought] conflicts with § 201(b) or § 202(a), because neither law interferes with Congress' chosen method in effectuating the purposes of the federal law.").

\(^{62}\) 619 F3d 1188 (10th Cir 2010).

\(^{63}\) Id at 1201 ("[A]lthough detariffing ended the strict uniformity imposed by § 203's filed-rate doctrine, it did not lessen the preemptive force of the uniformity requirements that remained in §§ 201 and 202."). See also notes 128–131 and accompanying text.

\(^{64}\) *Boomer*, 309 F3d at 418.

\(^{65}\) Id at 410.

\(^{66}\) Id at 411.

\(^{67}\) Id.
The court also impliedly held that the FCA preempted all state law challenges to rates, terms, and conditions of consumer telecommunications contracts.\(^6\)

The Seventh Circuit provided three main reasons for its decision that the state law challenge was preempted. First, §§ 201–02, “and the [FCA] in general, demonstrate a congressional intent that customers of individual long-distance carriers receive uniform terms and conditions of service,” a policy that would be contravened by permitting this state law challenge.\(^7\) Regarding the statutory language, the Boomer court first concluded that “[s]ections 201 and 202, read together, demonstrate a congressional intent that individual long-distance customers throughout the United States receive uniform rates, terms and conditions of service.”\(^8\) To bolster this assertion, the court looked to the Supreme Court’s holding in Central Office that §§ 201–02 exhibit a policy of antidiscrimination.\(^9\) Yet, as the Boomer court observed, permitting “a state law challenge to the validity of the terms and conditions of a telephone service agreement would result in the application of fifty bodies of law, and this would inevitably lead to customers in different states receiving different terms and conditions,” thereby violating the uniformity principle.\(^10\)

Second, the Court reasoned that because the purportedly unfavorable arbitration terms were priced into the service rate, invalidating such terms in some states but not in others would lead to discriminatory pricing.\(^11\) Specifically, the court recognized that “arbitration offers cost-saving benefits to telecommunication providers” and that irregularly voiding these clauses based on contradictory state laws would reduce the overall cost savings.\(^12\) Faced with increased costs,

\(^{68}\) Boomer, 309 F3d at 423.

\(^{69}\) See id ("Allowing state law challenges to the validity of the terms and conditions contained in long-distance contracts, however, results in the very discrimination Congress sought to prevent. . . . Section 201(b) clearly demonstrates Congress’s intent that federal law determine the fairness and reasonableness of contractual terms, as opposed to state law principles such as unconscionability.").

\(^{70}\) Id at 418.

\(^{71}\) Id.

\(^{72}\) Boomer, 309 F3d at 418, citing Central Office, 524 US at 223.

\(^{73}\) Boomer, 309 F3d at 418.

\(^{74}\) Id at 419.

\(^{75}\) Id.
telecommunications carriers would increase rates in states which disallowed arbitration agreements but not in states which allowed them. The court concluded that allowing challenges to the arbitration clause based on state law would inevitably lead to some form of price discrimination. While the court conceded that the uniformity principle only prohibited "unreasonable" or "undue" discrimination, it found that the "labyrinth" of differing rates, terms, and conditions that would result indeed violated the uniformity principle.

Third, because § 201 "declares unlawful rates, terms and conditions which are not just and reasonable, [it] demonstrat[es] Congress's intent that federal law govern the validity of the terms and conditions of long-distance service contracts." The court reasoned that any challenge to the terms and conditions of a long-distance service contract—even a challenge based on state law unconscionability or consumer protection grounds—was essentially a claim that the terms and conditions were not fair and reasonable. Thus, allowing such state law-based challenges would "open the door for direct conflicts between federal and state law on the validity of terms and conditions contained in a long-distance service contract." This result would contradict the method of FCA enforcement intended by Congress—regulation by the FCC.

Finally, the Boomer court addressed the plaintiff's contention that the demise of the § 203 tariffing process opened the door for state law challenges. The court disagreed, finding that § 203 "merely served as a mechanism by which the FCC could assure compliance with the standards set forth in Sections 201 and 202." Following the FCC's detariffing order, the substantive requirements of §§ 201 and 202 remain.

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76 Id.
77 Boomer, 309 F3d at 419–20.
78 Id at 420.
79 Id at 418.
80 Id at 421 ("While Boomer challenges the arbitration clause under the state law doctrine of unconscionability and various state consumer protection statutes, in essence the question is the same—whether the term is fair and reasonable.").
81 Boomer, 309 F3d at 421.
82 Id (holding that a regime in which federal law could favor arbitration clauses while state law disfavors them is unacceptable).
83 Id.
84 Id.
Accordingly, the court held that the intention of Congress in passing the 1996 Act was that the FCC continue to ensure compliance with §§ 201–02 post-detariffing. Specifically, the court held that the FCC retained power to regulate the telecommunications market to ensure uniform and reasonable rates, terms, and conditions and that consumers retained their ability to challenge unfair rates, terms, and conditions under FCA § 208.

C. The Ting Decision: State Law Challenges Not Preempted

The Ninth Circuit split with the Seventh Circuit in 2003 when it issued its decision in Ting, holding that the state law-based claims brought by the plaintiffs in that case were not preempted. In Ting, the plaintiff brought a state class-action suit alleging that AT&T’s new consumer service agreement (CSA) violated California’s consumer protection and contract laws. The district court ruled that the FCA did not preempt state law challenges to the terms of the CSA because “Congress removed the filing requirement with the intention of ending the preemptive regime of the filed-rate doctrine.” The Ninth Circuit affirmed the district court’s holding. In ruling that the plaintiff’s state law challenges were not preempted, the Ninth Circuit analyzed two main issues: (1) whether allowing state law challenges to proceed was compatible with the purpose of the FCA following the 1996 amendment that allowed detariffing by the FCC; and (2) whether allowing state law challenges to

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85 Boomer, 309 F3d at 421–22, quoting 47 USC § 160(a)(1) ("Congress believes that these goals can be met without tariffs. In fact, in authorizing the FCC to forego the tariff-filing requirement, Congress required the FCC to first assure itself that the filing of a tariff was 'not necessary to ensure that the charges, practices, classifications, or regulations ... are just and reasonable and are not unjustly or unreasonably discriminatory.'").

86 Id.

87 See Ting, 319 F3d at 1146 ("We therefore conclude that neither the CLRA nor California's unconscionability law conflicts with § 201(b) or § 202(a), because neither law interferes with Congress' chosen method in effectuating the purposes of the federal law.").

88 Id at 1134.

89 Id.

90 Id at 1152 ("In sum, we affirm the district court's conclusion that the Legal Remedies Provisions are unenforceable as unconscionable under California law, the application of which is not preempted by §§ 201(b) and 202(a) of the Federal Communications Act.").
proceed was compatible with the method chosen by Congress to enact that purpose.\textsuperscript{91}

The \textit{Ting} court first asked whether §§ 201–02, standing alone, embody a congressional purpose of uniformity in rates, terms, and conditions of service. For a variety of reasons, the court answered in the negative. First, relying on Supreme Court precedent, the court reasoned that the principle of uniformity arose from the nondiscrimination principles of §§ 201–02 in combination with the tariffing requirements of § 203.\textsuperscript{92} To support this finding, the court referenced “nearly 70 years of case law[, which] plainly demonstrate[d] that the principle of uniformity [was] not derived from § 202(a) alone, but from the mandate to publish rates” contained in § 203.\textsuperscript{93} Second, the court observed that §§ 201–02 had never before been invoked to preempt state law regulation of rates, terms, and conditions on the basis of uniformity—that role had always been reserved for § 203.\textsuperscript{94} Third, the \textit{Ting} court relied on these first two points to conclude that without § 203, the congressional intention to preempt state law ceased to exist.\textsuperscript{95} Specifically, while the court observed that the “substantive principles of reasonableness and nondiscrimination remain[ed] intact,” and thus continued to govern telecommunications contracts, it found that preemption by uniformity “was a product of the filed rate doctrine which, by definition, did not survive detariffing.”\textsuperscript{96}

Fourth, the court distinguished precedent that seemed to suggest the existence of an independent uniformity principle in § 202(a)\textsuperscript{97} by noting that the cases pointing to that conclusion

\textsuperscript{91} \textit{Ting}, 319 F3d at 1138 (“We first examine the purpose of §§ 201(b) and 202(a) and then discuss Congress’ chosen method to effectuate the statutes’ objectives in the detariffed environment.”).

\textsuperscript{92} See id.

\textsuperscript{93} Id. See also 47 USC § 203(a) (“Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges ... and showing the classifications, practices, and regulations affecting such charges.”).

\textsuperscript{94} \textit{Ting}, 319 F3d at 1138 (“[S]ave for Boomer, no court has ever referred to § 201 or § 202 in declaring a carrier’s tariff immune from state-law challenge. That role had always been reserved for § 203 and the filed rate doctrine.”).

\textsuperscript{95} Id at 1139.

\textsuperscript{96} Id.

\textsuperscript{97} See 47 USC § 202(a) (“It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services ... or to make or give any undue or unreasonable preference or
were all heard under regulatory schemes that "included some form of a federal tariff filing requirement." In contrast, the current regulatory environment "is completely detariffed and highly competitive." Fifth, the court observed that even when §§ 201-02 were interpreted in the context of a tariffed market, some amount of reasonable variation in terms and conditions was allowable. For example, the court noted that in the tariffed regime, "contractual differences between customers of different states violated § 202(a) only if those differences lack a neutral and rational basis." Finally, the Ting court characterized the Boomer court's holding that the uniformity principle survived detariffing as "mere identification of favorable text," when in fact a clear finding of congressional purpose is required to support such a conclusion of preemption of state law.

Having found that allowing state law challenges did not conflict with the congressional purpose underlying the FCA, the Ting court next examined the issue of whether permitting such challenges conflicted with the method of enforcement Congress intended. The central question in the Court's analysis of this issue was whether the detariffing process represented a minor modification in the FCC's enforcement power or a significant shift away from the allocation of enforcement responsibility to the FCC. First, the court relied heavily on the Supreme Court's opinion in MCI Telecommunications Corp v American Telephone & Telegraph Co to show that the tariffing requirements of § 203 were central to the enforcement of the FCA. Indeed, in MCI, the Supreme Court described the tariff-filing requirement as "the heart of the common-carrier section of

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advantage to any particular person, class of persons, or locality.

98 Ting, 319 F3d at 1139.
99 Id.
100 Id at 1140.
101 Id.
102 Ting, 319 F3d at 1141 ("A finding of obstruction, however, depends on more than a mere identification of favorable text. Indeed, we recognize that § 202(a) evinces a congressional intent that customers receive non-preferential treatment. But, in order to determine whether Congress' goals are truly being frustrated, the obstruction inquiry examines congressional purpose.").
103 Id at 1141.
104 Id.
106 Ting, 319 F3d at 1141-42.
the Communications Act."\textsuperscript{107} Next, the \textit{Ting} court pointed to the fact that Congress had not replaced § 203 with an alternate enforcement mechanism to conclude that the regulatory scheme was no longer capable of being enforced\textsuperscript{108} and that Congress had intended the competitive market, which included state law protections, to further the goals of §§ 201–02.\textsuperscript{109} The court also relied on both the legislative history of the 1996 Act and the context in which the 1996 Act was passed to demonstrate that Congress intended a dramatic overhaul of the regulatory scheme in which the preemptive effect of § 203 no longer played a role.\textsuperscript{110} To support this conclusion, the \textit{Ting} court looked to the emphasis which Congress placed on competition in the 1996 Act\textsuperscript{111} and the contemporary understanding in Congress that the 1996 Act would greatly decrease the regulatory involvement of the FCC.\textsuperscript{112}

To further support its conclusion that the detariffing process represented a significant shift of power away from the FCC, the \textit{Ting} court also pointed to regulatory action by the FCC that supported the market-based theory of enforcement.\textsuperscript{113} In particular, the court cited the FCC's opinion and order in \textit{Orloff v Vodafone Airtouch Licenses},\textsuperscript{114} an administrative adjudication in which the FCC deferred to the market as a means of enforcing the antidiscrimination standards of § 202(a).\textsuperscript{115} Moreover, the court noted the lack of a federal

\textsuperscript{107} Id at 1141, quoting \textit{MCI Telecommunications}, 512 US at 229.

\textsuperscript{108} \textit{Ting}, 319 F3d at 1142, quoting \textit{MCI Telecommunications}, 512 US at 229 ("Pursuant to the Court's interpretation of the regulatory scheme in \textit{MCI}, unless Congress replaced the filing requirement with an alternative means of enforcement, the regulatory scheme is not 'susceptible of effective enforcement' following detariffing.").

\textsuperscript{109} \textit{Ting}, 319 F3d at 1142 ("Congress' new market-based method contains no such restriction [like the filed-rate doctrine]. The market not only encourages carriers to remain flexible, it protects consumers through state contract and consumer protection laws, and ensures reasonable rates through competition rather than rate filing.").

\textsuperscript{110} Id at 1143.

\textsuperscript{111} Id.

\textsuperscript{112} See \textit{Ting}, 319 F3d at 1143, quoting Cong Rec S8188-04, S8197 (daily ed June 12, 1995) ("Congress envisioned the 1996 Act as a dramatic break with the past that would revitalize long distance service by greatly decreasing the scope of the FCC's role. The Senate floor manager, Senator Larry Pressler, stated that 'this is the most comprehensive deregulation of the telecommunications industry in history.'").

\textsuperscript{113} Id at 1145.

\textsuperscript{114} 17 FCCR 8987 (2002) (hereinafter "\textit{Orloff Opinion and Order}").

\textsuperscript{115} \textit{Ting}, 319 F3d at 1144, citing \textit{Orloff Opinion and Order}, 17 FCCR at 8996–97 ("[\textit{Orloff}] demonstrates that while the FCC continues to 'govern' § 201 and § 202, state law is no longer excluded as it was under the filed rate doctrine, because Congress's
common law of contracts under which the FCC could arbitrate disagreements such as the one at issue in Ting.\textsuperscript{116} Since federal common law is limited to situations in which there is significant conflict between state and federal law, and creation of federal common law is disfavored, the court reasoned that the conspicuous absence of federal common law weighed in favor of relying on state law to arbitrate disputes.\textsuperscript{117} For these reasons, the Ting court concluded that there was no conflict between permitting state law challenges and the method of enforcement of §§ 201-02 established by Congress in the 1996 Act.\textsuperscript{118} Having thus determined that state law challenges conflicted with neither the purpose for which Congress enacted the FCA nor the method of enforcement that Congress intended, the Ting court held that the plaintiffs' state law-based challenges to the terms of the CSA were not preempted.\textsuperscript{119} While the specific holding of the Ting court applied only to the specific California laws in question, language underpinning the holding states that state law is not preempted by §§ 201-02 as long as the state law is part of a competitive market framework.\textsuperscript{120} By referencing “[s]tate contract and consumer protection laws” in the general sense and “state laws of general applicability,” the court implies that the FCA does not preempt essentially any state law which bears on rates, terms, and conditions of consumer telecommunications contracts.\textsuperscript{121}

D. The In re Universal Decision: The Tenth Circuit Sides with the Seventh Circuit

Eight years after the Ting case, the Tenth Circuit joined the circuit split when it issued its decision in In re Universal.\textsuperscript{122} The

\textsuperscript{116} Ting, 319 F3d at 1146.
\textsuperscript{117} See id.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} See Ting, 319 F3d at 1145 ("By definition, the deregulated marketplace encompasses state laws of general applicability. Here, California's unconscionability law is not unlike that of most other states, and even if it were, it does not make an otherwise competitive market non-competitive. The same can be said of the CLRA. State contract and consumer protection laws, including California's CLRA and unconscionability law, form part of the competitive framework to which the FCC defers.").
\textsuperscript{121} See id.
\textsuperscript{122} 619 F3d at 1188.
In re Universal opinion is the result of multidistrict litigation involving numerous putative class action suits against multiple defendants, including AT&T. AT&T moved to compel arbitration based on the consumer service agreements in place with the plaintiffs. The district court granted the request as it applied to all non-California plaintiffs, holding that the request was collaterally estopped for California plaintiffs based on the district court decision in Ting, which was later affirmed by the Ninth Circuit. The non-California plaintiffs appealed, alleging that state law unconscionability provisions invalidated the arbitration clause contained in the CSA. The Tenth Circuit, like the Seventh, held that the FCA preempts state law challenges to rates, terms, and conditions of consumer telecommunications contracts. The In re Universal court focused its analysis on two main issues: (1) whether the uniformity principle of §§ 201–02 survived detariffing; and (2) the precise contours of preemption post-detariffing. While the issue of survival of the uniformity principle is key to both the Boomer and Ting opinions, the In re Universal court was the first to address the exact scope of conflict preemption.

In considering whether the uniformity principle survived detariffing—and ultimately determining that it did—the In re Universal court first examined the language of the statute in order to determine congressional intent. The court found that the antidiscrimination principles embodied in both § 201(b) and § 202(a) “demonstrate[d] a congressional intent that individual long-distance customers throughout the United States receive uniform rates, terms and conditions of service.” Unlike the Ting court, the In re Universal court did not find it dispositive that the body of case law on the uniformity principle “focus[ed] predominantly on § 203’s filed-rate doctrine rather than the

123 Id at 1194.
124 Id at 1194–95.
125 182 F Supp 2d 902 (ND Cal 2002).
126 See In re Universal, 619 F3d at 1195. See also Ting, 319 F3d at 1152.
127 In re Universal, 619 F3d at 1195.
128 See id at 1200–01.
129 Id at 1197–99.
130 Id at 1200–02.
131 See In re Universal, 619 F3d at 1199–1202.
132 Id at 1197–98.
133 Id at 1198, quoting Boomer, 309 F3d at 418.
uniformity principle embodied in §§ 201 and 202." The In re Universal court interpreted that focus as arising from the centrality of § 203 as an enforcement mechanism in the tariffing regime rather than as an indication of the source of the uniformity principle. In line with this, the court noted that post-detariffing cases focused heavily on §§ 201–02. The court reasoned that the language of the 1996 Act indicated the preservation of the uniformity principle. Indeed, rather than authorizing a blanket forbearance from applying § 203, the 1996 Act authorized forbearance when consistent with the principles of §§ 201–02. To the In re Universal court, this formulation constituted an explicit mandate by Congress that “the uniformity goals of §§ 201 and 202 would remain, even in the event the FCC determined the then-existing means of achieving this uniformity, § 203’s filed-rate doctrine, was no longer the preferred mechanism for accomplishing this goal.”

Once the In re Universal court determined that the uniformity principle remained in force after the FCC’s detariffing order, it turned its focus to delineating the “precise scope of the uniformity principle set out in §§ 201 and 202.” Implicit in this analysis was an indication by the court that at least some preemption existed in the FCA context—the question remained how much. After finding little postdetariffing case law on the exact scope of §§ 201–02, the court focused its attention on the opinions of the FCC issued in administrative adjudications. Specifically, the court found the FCC’s response to AT&T’s request for clarification as to the effect of detariffing on the preemptive scope of §§ 201–02 relevant. In its response, the FCC stated that § 201 and § 202 of the Communications Act “continue[d] to govern determinations as to whether rates, terms, and conditions for interstate, domestic, interexchange services are just and reasonable, and are not unjustly or unreasonably discriminatory,” but that “the Communications

134 In re Universal, 619 F3d at 1198.
135 Id.
136 Id.
137 Id at 1199.
138 In re Universal, 619 F3d at 1199.
139 Id.
140 Id.
141 Id at 1200.
Act d[ld] not govern other issues, such as contract formation and breach of contract, that arise in a detariffed environment."142 The In re Universal court found that this order clearly delineated the FCC’s opinion on the scope of preemption: §§ 201 and 202 preempted state law challenges to rates, terms, and conditions but did not preempt challenges to other contract issues.143

However, the In re Universal court still had to decide whether the opinion of the FCC was dispositive. First, the court looked to Wyeth v Levine144 for guidance on this question.145 Under Wyeth, “[a]n agency’s conclusion that state law is preempted is not necessarily entitled to deference.”146 Rather, “[t]he weight [] accorded the agency’s explanation of state law’s impact on the federal scheme depends on [the interpretation’s] thoroughness, consistency, and persuasiveness.”147 After concluding that the FCC’s analysis was “consistent with the FCA’s overarching goal of prohibiting state-by-state variations in the rates, terms, and conditions of interstate telecommunications services,” the court chose to defer to the FCC’s interpretation of the scope of §§ 201–02 in the detariffed world.148 Thus, the court held that the FCA preempted state law challenges to rates, terms, and conditions but that the FCA did not preempt challenges to other aspects of the contract, such as formation, breach, and issues regarding the legal relationship between the two parties.149

E. Summing up: Key Issues in Conflict

In determining whether state law challenges to rates, terms, and conditions of consumer telecommunications contract

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142 See In re Universal, 619 F3d at 1200, quoting Order on Reconsideration, 12 FCC 15014 at ¶ 77.
143 In re Universal, 619 F3d at 1200.
145 In re Universal, 619 F3d at 1200.
146 Id.
147 Id, quoting Wyeth, 555 US at 577.
148 In re Universal, 619 F3d at 1201–02.
149 See id at 1200–02, quoting Order on Reconsideration, 12 FCC Rcd 15014 at ¶77 (“[T]he FCC ordered that §§ 201 and 202 of the Communications Act ‘continue[d] to govern determinations as to whether rates, terms, and conditions for interstate, domestic, interexchange services are just and reasonable.’ . . . The district court’s deferral to the FCC’s order . . . is therefore correct.”).
conflict with the purposes and intended methods of Congress and are thus preempted, these circuit courts focused on two main issues. First, the courts analyzed whether allowing state law challenges to the rates, terms, and conditions of consumer telecommunications contracts frustrated the overarching purposes of Congress in enacting the FCA. Second, the courts considered whether allowing such state law challenges conflicted with the method of enforcement Congress envisioned for the FCA. While the courts approached the analysis slightly differently, the analysis in all cases was governed by the obstacle conflict preemption standard from *Crosby*: state law must not "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."150

1. Do state law challenges conflict with the purpose of Congress in enacting the FCA?

Regarding the first prong of these courts' analyses, the key overarching purpose of the FCA the circuit courts identified is the "uniformity principle"—the Congressional intention that customers receive uniform terms and conditions of service. Indeed, all three circuit courts agreed that §§ 201–03, taken together, demonstrate Congressional endorsement of the uniformity principle.151 The courts differed, however, on the question of whether the uniformity principle survived the demise of § 203 as a primary enforcement mechanism. Both the *Boomer* and the *In re Universal* courts held that the uniformity principle survived the detariffing process, while the *Ting* court held that it did not because § 203 was a key part of the statutory text which led to the principle.152 To reach this holding, the *Boomer* court held that, far from being a key component of the uniformity principle, "[s]ection 203... merely served as a mechanism by which the FCC could assure compliance with the standards set forth in [s]ections 201 and 202."153 The *Boomer* court further found that "[f]ollowing detariffing, [the goals of the

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151 There is disagreement as to how much of §§ 201–03 must be taken together to obtain the uniformity principle. The *Ting* court held that § 203 is required, see *Ting*, 319 F3d at 1138, while the *Boomer* and *In re Universal* courts held that §§ 201–02 are sufficient. See *Boomer*, 309 F3d at 422; *In re Universal*, 619 F3d at 1197.
152 See *Ting*, 319 F3d at 1138.
153 *Boomer*, 309 F3d at 421.
uniformity principle] remain, as do the substantive requirements of Sections 201 and 202.” Similarly, the In re Universal court held that “the uniformity principle embodied in §§ 201 and 202 of the FCA survived detariffing.” In contrast, the Ting court held that “the principle of uniformity is not derived from § 202(a) alone, but from the [§ 203] mandate to publish rates together with the discrimination principles reflected in §§ 201(b) and 202(a).” The disagreement between the circuit courts over the survival of the uniformity principle in the detariffed world is central to the circuit split.

2. Do state law challenges conflict with the methods of enforcement of the FCA Congress intended?

Regarding the second prong of these courts’ analyses, the key question the circuit courts analyzed was whether Congress intended disputes over rates, terms, and conditions to be governed exclusively by federal law or whether Congress left room for state law to supplement federal law in this area. The Boomer court found that permitting state law challenges was both unnecessarily duplicative of the standards of fairness and reasonableness embodied in § 201 and likely to lead to conflicts with the resolution of such disputes under federal law. Thus, the Boomer court found that “Congress intended federal law to govern the validity of the rates, terms and conditions of long-distance service contracts.” In contrast, the Ting court found that “Congress’ fundamental purpose in enacting the 1996 Act was to replace the old monopoly-based regime with one based on market competition.” Thus, the court held that the success of that “market-based method depend[ed] in part on state law for the protection of consumers in the deregulated and competitive marketplace,” thereby creating a “complimentary [sic] role between federal and state law” in the detariffed environment. The In re Universal court did not address the issue of Congress’s planned FCA enforcement method, instead deciding that the

154 Id.
155 In re Universal, 619 F3d at 1197.
156 Ting, 319 F3d at 1138 (emphasis omitted).
157 See Boomer, 309 F3d at 420–21.
158 Id at 420.
159 Ting, 319 F3d at 1141.
160 Id.
survival of the uniformity principle was sufficient to find preemption.¹⁶¹

III. RESOLVING THE SPLIT

The holding of the Boomer and In re Universal courts that state law challenges to rates, terms, and conditions of consumer telecommunications contracts are preempted is the proper resolution to this circuit split. Two recent Supreme Court decisions provide significant support to the position of these two circuit courts. First, with regard to the inquiry into Congress’s purpose for the FCA, the Supreme Court’s 2007 holding in Global Crossing Telecommunications, Inc v Metrophones Telecommunications, Inc¹⁶²—that Congress, in enacting the 1996 Act, expected the FCC to continue applying the principles embodied by § 201¹⁶³—lends strong support to the argument that the uniformity principle survived detariffing. Second, with regard to the inquiry into Congress’s method of FCA enforcement, the Supreme Court’s recent decision in Arizona v United States¹⁶⁴ indicates that purposeful nonregulation by Congress and purposeful nonexercise of regulatory power by the executive branch¹⁶⁵ are each preemptive of a complementary role for state law.¹⁶⁶

A. Global Crossing: Uniformity Survived Detariffing

In Global Crossing, the Supreme Court dealt with the issue of whether the FCC’s regulatory definition of “unreasonable practice” under FCA § 201(b) was a reasonable statutory interpretation.¹⁶⁷ In the case, Metrophones, a payphone operator, sued Global Crossing, a long-distance carrier, under the FCA’s private right of action.¹⁶⁸ Metrophone based its case

¹⁶¹ See notes 132–143 and accompanying text.
¹⁶³ See id at 57.
¹⁶⁴ 132 S Ct 2492 (2012).
¹⁶⁵ Note that the FCC, while constitutionally part of the executive branch, is an independent agency. See 47 USC 154.
¹⁶⁶ See Arizona, 132 S Ct at 2505–07.
¹⁶⁸ See Global Crossing, 550 US at 52. The FCA’s private right of action is located at 47 USC § 207.
on the FCC’s identification of certain business practices as “unreasonable practices,” which are prohibited under § 201.\textsuperscript{169} Among other things, Global Crossing’s amici alleged in defense that the FCC’s interpretation of the word “practice” in § 201 originated in a tariffed environment, but in the detariffed environment, the word “practice,” and the phrase “unreasonable practices,” might have had different meanings.\textsuperscript{170} Thus, Global Crossing argued that the FCA’s § 201 prohibition on “unreasonable practices” might apply differently, or not at all, after detariffing.\textsuperscript{171} The Court, however, disagreed, holding that the FCC’s interpretation of the statutory language survived detariffing.\textsuperscript{172}

The analogy between the \textit{Global Crossing} case and the disagreement between the \textit{Ting, In re Universal}, and \textit{Boomer} courts over the survival of the uniformity principle is striking. Just like the plaintiffs in these cases, Global Crossing argued that a legal principle which existed prior to detariffing did not survive detariffing. Given this similarity, the Court’s decision in \textit{Global Crossing} is instructive.

While the \textit{Global Crossing} Court recognized that tariff filing was the traditional centerpiece of the FCC’s regulatory regime and that the detariffed regime was different from the tariffed regime in significant ways, the Court did “not concede that these differences require[d] a different outcome.”\textsuperscript{173} Although the Court noted that the market had changed drastically, it found the fact that “when Congress rewrote the law to bring about [detariffing], it nonetheless left § 201(b) in place” to indicate a congressional intent to preserve portions of the previous regulatory regime.\textsuperscript{174} Accordingly, the Court reasoned that “the statute [following the 1996 amendments] permit[ed], indeed it suggest[ed] that Congress likely expected, the FCC to pour new substantive wine into its old regulatory bottles.”\textsuperscript{175} With this language, the Court thus endorsed the proposition that the principles central to §§ 201–02 survived the demise of § 203.

\textsuperscript{169} See \textit{Global Crossing}, 550 US at 52.
\textsuperscript{170} See id at 57.
\textsuperscript{171} See id.
\textsuperscript{172} See id.
\textsuperscript{173} \textit{Global Crossing}, 550 US at 57.
\textsuperscript{174} Id.
\textsuperscript{175} Id.
Admittedly, it could be argued that the uniformity principle is a fundamentally different concept than a single FCC statutory interpretation. Furthermore, since this is a *Chevron* deference case, the treatment of the FCC's statutory interpretation by the Court is quite gentle.\(^{176}\) But because the FCC has endorsed the continued preemptive effect of §§ 201–02,\(^{177}\) *Chevron* deference may be due to that stance as well.\(^{178}\) While this decision by the Court may not be dispositive, it makes it far more likely that the uniformity principle survived detariffing. And because this conclusion disfavors differing state law regimes, it weighs heavily in favor of the argument that §§ 201–02 have an ongoing preemptive effect.

B. Arizona: Conscious Federal Inaction Preempts State Action

In *Arizona v United States*, four elements of Arizona's recently enacted immigration statute, "SB 1070," were challenged by the United States on preemption grounds.\(^{179}\) The Court struck down three of the challenged requirements as preempted and allowed the fourth to stand until its interpretation and implementation became more concrete.\(^{180}\) The *Arizona* ruling is a notable development in preemption jurisprudence because the offending provisions of state law at issue in the case, rather than obviously conflicting with federal law, were at least superficially in harmony with it.\(^{181}\) The Court's rulings on two of the challenged provisions, § 5(C) and § 6, have implications for the law of conflict preemption.

Section 5(C) of SB 1070 provided for criminal penalties for immigrants who sought work despite not being authorized to

\(^{176}\) Indeed, the Court sounds almost dubious when it states that "this circumstance, by indicating that Congress did not *forbid* the agency to apply § 201(b) differently in the changed regulatory environment, is sufficient to convince us that the FCC's determination is lawful." Id.

\(^{177}\) See *Order on Reconsideration*, 12 FCC at 15057 (cited in note 48).

\(^{178}\) The issue of what level of deference an agency's own interpretation of its jurisdiction is due is currently before the Supreme Court. See *City of Arlington, Texas v Federal Communications Commission*, 668 F3d 229 (2012), cert granted 133 S Ct 524 (2012).

\(^{179}\) *Arizona*, 132 S Ct at 2497. The Arizona statute at issue in the case was the Support Our Law Enforcement and Safe Neighborhoods Act, 2010 Ariz Legis Serv Ch 211, codified at Ariz Rev Stat Ann § 13-2929.

\(^{180}\) *Arizona*, 132 S Ct at 2510.

\(^{181}\) See id at 2503, 2505.
work in the United States.\textsuperscript{182} Rather than conflicting with a federal statutory scheme, § 5(C) operated in an area not addressed by federal law.\textsuperscript{183} Specifically, federal law, while it implemented a comprehensive scheme to reduce employment of illegal aliens by placing legal sanctions on employers,\textsuperscript{184} was silent on the issue of criminal penalties for employees.\textsuperscript{185} Nonetheless, despite the lack of direct conflict with a federal statute, the Court held that § 5(C) disrupted the regulatory scheme of the Immigration Reform and Control Act of 1986 (IRCA)\textsuperscript{186} and was thus preempted.\textsuperscript{187}

In reaching this conclusion, the Court reasoned that because Congress had provided a "comprehensive framework" for enforcing employment restrictions on illegal aliens and because the legislative history of the IRCA demonstrated that Congress intentionally chose not to impose criminal penalties, § 5(C) of SB 1070 represented a "conflict in the method of enforcement" chosen by Congress.\textsuperscript{188} Then, the Court relied on preemption precedents stating that "[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy"\textsuperscript{189} and that "[w]here a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, then the pre-emptive inference can be drawn—not from federal inaction alone, but from inaction joined with action"\textsuperscript{190} to hold that the Arizona statute creating this "conflict in the method of enforcement" was preempted.\textsuperscript{191}

The legal principle—that a state law which regulates an area that Congress chose not to regulate while enacting a comprehensive regulatory scheme over a broader area can be conflict preempted—has significant implications for the FCA rates, terms, and conditions preemption question. As in Arizona, Congress's decision in enacting the 1996 Act to leave §§ 201–02

\begin{footnotes}
\item[182] Id at 2503. Section 5(C) of SB 1070 is codified at Ariz Rev Stat Ann § 13-2928(C).
\item[183] Arizona, 132 S Ct at 2503.
\item[184] See 8 USC § 1324a(a)(1). See also Arizona, 132 S Ct at 2504.
\item[185] See Arizona, 132 S Ct at 2504.
\item[186] Pub L No 99-603, 100 Stat 3359 (1986).
\item[187] Arizona, 132 S Ct at 2505.
\item[188] Id at 2504–05.
\item[189] Id at 2505, quoting Motor Coach Employees v Lockridge, 403 US 274, 287 (1971).
\item[191] Arizona, 132 S Ct at 2505.
\end{footnotes}
without a specific federal enforcement mechanism\textsuperscript{192} represents "a comprehensive federal scheme [that] intentionally leaves a portion of the regulated field without controls"\textsuperscript{193}—in this case, without an enforcement mechanism beyond the general enforcement power of the FCC under §§ 205 and 208 of the FCA.\textsuperscript{194} Furthermore, Congress's affirmative abrogation of the previous enforcement mechanism (tariffing) strongly suggests that the lack of a specific enforcement mechanism is by design. It then follows that state law intrusion into the enforcement of §§ 201–02, a regime which Congress clearly intended to leave without specific controls, conflicts with the method of enforcement Congress intended in the detariffed environment.

The \textit{Arizona} case also challenged § 6 of SB 1070, which authorized state officers to arrest any person who the officers have probable cause to believe has committed an offense which makes that person removable from the United States.\textsuperscript{195} As with § 5(C), § 6 did not directly conflict with the purpose of any federal laws.\textsuperscript{196} Nonetheless, the Court concluded that § 6 impinged on the statutory grant of enforcement discretion to the federal government.\textsuperscript{197} Even though deportation is an area in which state law has some room to operate, the Court held that the encroachment of the Arizona state law into an area in which Congress had delegated enforcement discretion to the executive branch resulted in preemption of § 6.\textsuperscript{198}

This holding also informs the FCA rates, terms, and conditions preemption analysis. As with removal of illegal

\textsuperscript{192} The FCC's general methods of enforcing §§ 201–02 have not been abrogated by Congress in any sense. The FCC continues to have enforcement power under § 205 and § 208 of the FCA. See 47 USC §§ 205, 208.

\textsuperscript{193} \textit{Arizona}, 132 S Ct at 2505, quoting \textit{Isla Petroleum Corp}, 485 US at 503.

\textsuperscript{194} See 47 USC §§ 205, 208.

\textsuperscript{195} \textit{Arizona}, 132 S Ct at 2505. Section 6 of SB 1070 is codified at Ariz Rev Stat Ann § 13-3883(A)(5).

\textsuperscript{196} See \textit{Arizona}, 132 S Ct at 2505–06. Indeed, federal law also authorizes proceedings to remove such persons from the country. Id.

\textsuperscript{197} See id at 2506 ("By authorizing state officers to decide whether an alien should be detained for being removable, § 6 violates the principle that the removal process is entrusted to the discretion of the Federal Government.").

\textsuperscript{198} \textit{Arizona}, 132 S Ct at 2507 ("In defense of § 6, Arizona notes a federal statute permitting state officers to 'cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.' . . . By nonetheless authorizing state and local officers to engage in these enforcement activities as a general matter, § 6 creates an obstacle to the full purposes and objectives of Congress.") (citation omitted).
aliens, the regulation of consumer telecommunications contracts is an area in which there is a role for state law.\(^{199}\) Indeed, if that were not the case, field preemption would apply. State law, as discussed in Part II.D, can operate in areas of contract formation, breach, and other areas ancillary to rates, terms, and conditions.\(^{200}\) And as with immigration enforcement, Congress has delegated enforcement authority to the executive branch—in this case, the FCC.\(^{201}\) It then follows that state law impingement on the statutory grant to the FCC to regulate rates, terms, and conditions conflicts with the enforcement regime intended by Congress.

**IV. Conclusion**

As discussed in Part II.E, two main disagreements constitute the FCA rates, terms, and conditions preemption split between three of the federal circuit courts. The first such disagreement is represented by the divide between the holdings of the Seventh and Tenth circuits that the uniformity principle survived the detariffing process and the Ninth Circuit’s holding that the uniformity principle was inextricably linked to the tariffing regime of §203. The uniformity principle weighs strongly in favor of preemption because a regime in which state law is allowed to operate would result in non-uniform rates, terms, and conditions of service. The Supreme Court’s decision in *Global Crossing* suggests that the underlying principles of §§201–02, including the uniformity principle, survived detariffing. This fact weighs heavily in favor of the Seventh and Tenth Circuits’ position that the FCA preempts state law under the uniformity principle.

The second such disagreement is the divergence between the Seventh Circuit’s holding that state law regulation of rates, terms, and conditions is incompatible with federal enforcement and the Ninth Circuit’s holding that state law regulation would

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\(^{199}\) See, for example, *Boomer*, 309 F3d at 424 (“[F]ollowing detariffing, there appears to be some role for state law.”). See also *Ting*, 319 F3d at 1136 (“[F]ield preemption is not an issue because state law unquestionably plays a role in the regulation of long-distance contracts.”).

\(^{200}\) See text accompanying note 149.

\(^{201}\) See 47 USC §151 (“[T]here is created a commission to be known as the 'Federal Communications Commission' . . . which shall execute and enforce the provisions of this chapter.”). As before, note that the FCC is an independent agency. See note 165.
effectively supplement federal regulation in this area. If state law regulation is indeed incompatible, it serves as an obstacle to the full accomplishment of the purposes of Congress and is thus preempted. The ruling of the Supreme Court in Arizona v United States—in which the Court held that intentional nonregulation by Congress and nonexercise of regulatory power by the executive branch each preempt state law methods of enforcement—supports the Seventh Circuit's analysis and ultimate finding of incompatibility. Given these two recent legal developments, the rulings of the Seventh and Tenth Circuits that the FCA preempts state law challenges to rates, terms, and conditions of telecommunications contracts should prevail over the Ninth Circuit's ruling that the FCA does not preempt state law in this way.