No. 21-15969

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LIFELINE ASSOCIATION,

Plaintiff-Appellee,

v.

MARYBEL BATJER,
IN HER OFFICIAL CAPACITY AS A COMMISSIONER
OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION, ET AL.,

Defendants-Appellants.

On Appeal from an Order of the
United States District Court for the Northern District of California
No. 3:20-cv-08312-MMC (Hon. Maxine M. Chesney, J.)

BRIEF FOR AMICUS FEDERAL COMMUNICATIONS COMMISSION IN SUPPORT OF NEITHER PARTY

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GLOSSARY

California	Defendants-Appellants the commissioners of the California Public Utilities Commission
FCC	Amicus Curiae Federal Communications Commission
NaLA	Plaintiff-Appellee National Lifeline Association
New York PSC	Report & Order, *Petition of N.Y. State Public Service Commission to Extend Rate Regulation*, 10 FCC Rcd 8187 (1995)
Pittencrieff	Memorandum Opinion & Order, *Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd 1735 (1997)
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BRIEF FOR AMICUS FEDERAL COMMUNICATIONS COMMISSION IN SUPPORT OF NEITHER PARTY

INTRODUCTION

This case sits at the intersection of two regulatory regimes in the Communications Act. Section 254 allows states to "adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service," including through programs that subsidize service for low-income consumers. 47 U.S.C. § 254(f). Meanwhile, Section 332

withdraws state authority "to regulate … the rates charged" for mobile services (like cell phone service), while preserving state authority to regulate "other terms and conditions" and to impose "requirements … on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates." *Id.* § 332(c)(3)(A). The question here is whether California's $0 co-payment requirement for its LifeLine program is allowed under Section 254 or preempted under Section 332.

The Federal Communications Commission (FCC) has never addressed whether states may advance universal service by requiring wireless providers to offer minimum service standard plans with a $0 co-payment as a condition of receiving state subsidies through a voluntary program like California LifeLine. For that reason, the FCC writes in support of neither party.

This brief, however, makes three observations that might inform the Court's disposition. First, as a matter of statutory text, context, and common sense, California's $0 co-payment requirement might not "regulate" rates in the sense used in Section 332. *Id.* Second, FCC orders have consistently held that many state regulations that indirectly affect rates are not preempted, and these orders may provide apt analogies.

Third, the FCC has held (and the D.C. Circuit affirmed) that Section 332 exempts from preemption certain state requirements—including rate regulations—once wireless service "has become vital to universal service." *See Pittencrieff*, 13 FCC Rcd 1735, 1748 ¶25 (1997), *pet'n denied*, 168 F.3d 1332 (D.C. Cir. 1999). Other courts have endorsed that view as well. *See, e.g.*, *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 432–33 (5th Cir. 1999) (*TOPUC*); *cf. Sprint Spectrum, L.P. v. State Corp. Comm'n of State of Kan.*, 149 F.3d 1058, 1061–62 (10th Cir. 1998). Because the parties have not litigated this case under that universal service exception, the FCC asks the Court to take care not to cast doubt on California's ability to avail itself of *Pittencrieff* in a future proceeding should California choose to reenact a $0 co-payment requirement.[1]

STATEMENT OF INTEREST

The FCC is the federal agency charged to "execute and enforce" the Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, as amended. *See* 47 U.S.C. § 151. This brief is filed under Fed. R. App. P.

[1] The FCC takes no position whether this case is moot because California has not reinstated a $0 co-payment requirement since the district court ruled.

29(a)(2), and at the Court's invitation, to address whether 47 U.S.C. § 332(c)(3)(A) preempts California's Decision 20-10-006. *See* Dkt. 47.

BACKGROUND

A. MOBILE SERVICES REGULATION

In 1982, Congress regulated mobile services by first enacting what is now 47 U.S.C. § 332(c). *See* Communications Amendments Act of 1982, Pub. L. No. 97-259, § 120(a), 96 Stat. 1087. That statute "entirely preempted" state and local authority over some mobile services while retaining states' "full jurisdiction" to regulate others. H.R. Conf. Rep. 97-765, at 56. Because that regime subjected similar services in direct competition to disparate regulation, Congress fundamentally revised the law in 1993. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, tit. VI, § 6002(b)(2)(A), 107 Stat. 312. These reforms sought "to enable similar wireless services to be regulated symmetrically and in ways that promote marketplace competition." *See* Report & Order, *Petition of N.Y. State Pub. Serv. Comm'n to Extend Rate Regulation*, 10 FCC Rcd 8187, 8187 ¶2 (1995) (*New York PSC*).

Congress amended Section 332(c)'s preemption provision in line with that pro-competitive purpose. As amended, Section 332(c)(3)(A) displaces only rate and market entry regulations while preserving state

authority over "other terms and conditions," including core consumer protection matters. *Id.* at 8203 ¶73. But preemption is not absolute: Section 332 allows states to petition for rate regulation authority, and it provides an automatic exemption—without prior FCC approval—for certain "requirements" that are "necessary to ensure the universal availability of telecommunications service at affordable rates." 47 U.S.C. § 332(c)(3)(A).

B. UNIVERSAL SERVICE REGULATION

In telecommunications law, "universal service" is the "catch-all phrase" referring to the "variety of regulatory programs" that further the FCC's charge "to make available … to all the people of the United States … wire and radio communication service … at reasonable charges." *See id.* § 151; STUART MINOR BENJAMIN & JAMES B. SPETA, TELECOMMUNICATIONS LAW AND POLICY 545 (4th ed. 2015).

Universal service programs have long taken a variety of forms. "Rather than relying on market forces alone," the FCC historically used "a combination of implicit and explicit subsidies" to achieve universal service. *TOPUC*, 183 F.3d at 406. Implicit subsidies use rate regulation; regulators manipulate rates for some customers to subsidize more affordable rates for others, for example by requiring above-cost rates in

low-cost urban areas so that below-cost rates can be offered in high-cost rural areas. *Id.* Explicit subsidies, by contrast, provide grants that offset service costs. *Id.* For example, since the 1980s the FCC's federal Lifeline and California's state LifeLine programs have subsidized service to low-income subscribers. *See, e.g.*, *Lifeline and Link Up Reform and Modernization*, 31 FCC Rcd 3962, 3969–70 ¶¶23–25 (2016); 3-ER-355–56.

In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, Congress opened local markets to competition and undercut the effectiveness of regulation-based implicit subsidies. *See TOPUC*, 183 F.3d at 406. Thus, Congress directed a new approach to universal service using "specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." 47 U.S.C. § 254(b)(5). This new Section 254 codified roles for the FCC and states in promoting "just, reasonable, and affordable" services. *Id.* § 254(i). In particular, Section 254(f) granted states authority to "adopt regulations … to preserve and advance universal service" in line with FCC rules. *Id.* § 254(f).

Not long after, the FCC first explained how Sections 254 and 332(c)(3) interact: Although Section 332(c)(3)(A)'s first sentence preempts "authority to regulate … the rates charged by" commercial

mobile services, 47 U.S.C. § 332(c)(3)(A), the second sentence provides "a specific exception for universal service rate and entry regulation" where commercial mobile service is "vital to universal service, such as where it has become a 'substitute for land line telephone.'" *Pittencrieff*, 13 FCC Rcd at 1747–48 ¶¶24, 25.

ARGUMENT

The FCC takes no position on this appeal's outcome because the agency has never directly addressed either issue on which California and the National Lifeline Association (NaLA) have focused this case: whether California's $0 co-payment requirement "regulate[s]" at all and, if so, whether it permissibly regulates the "terms and conditions" of wireless service. 47 U.S.C. § 332(c)(3)(A). Instead, the FCC writes (1) to provide context for the Court's reading of Section 332; (2) to alert the Court to prior agency orders addressing analogous issues; and (3) to urge the Court to dispose of this case in a way that does not inadvertently affect the important balance between state authority to advance universal service on the one hand and federal preemption on the other.

I. REGULATION IS GENERALLY ABOUT CONTROL, NOT INDUCEMENT.

The parties focus on whether California's $0 co-payment requirement "regulate[s] … the rates charged" for wireless service. 47

U.S.C. § 332(c)(3)(A). This preemptive language must be read "not in a vacuum, but with reference to the statutory context, structure, history, and purpose," as well as "common sense."[2] *Abramski v. United States*, 573 U.S. 169, 179 (2014) (cleaned up).

The word "regulate" has an "accepted legal definition." *United States v. Frame*, 885 F.2d 1119, 1126 n.5 (3d Cir. 1989). By contrast to more casual senses that might cover *any* efforts to sway conduct, the legal sense of "regulate" implies actual "control," not mere inducement or indirect influence. *See Regulate*, BLACK'S LAW DICTIONARY (West 11th ed. 2019).

As the FCC understands California's LifeLine rules, the $0 co-payment requirement does not control anything except California's own expenditures. Participation in LifeLine is voluntary. *See, e.g.*, 3-ER-209; 3-ER-289; 4-ER-521. Providers can withdraw from LifeLine at any time, provided that they give a 30-day notice to customers and fulfill existing contractual obligations. *See* 3-ER-299. And withdrawal from California

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[2] California errs in calling preemption "disfavored" in this context, as California relies on an inapt conflict preemption case. Cal. Br. 30–31. Section 332(c)(3)(A) is an express preemption provision; there is no presumption against preemption because "the plain wording" controls. *See Int'l Bhd. of Teamsters, Local 2785 v. FMCSA*, 986 F.3d 841, 853 (9th Cir. 2021) (cleaned up).

LifeLine would not preclude participation in the federal Lifeline program. *See, e.g.*, 2-ER-159 ¶64; 3-ER-242; 3-ER-356. NaLA's argument (at 30–35) that Section 332 contains no express voluntary participation exception is inapt if, under a common sense reading of the statute, the word "regulate" does not encompass rules for a voluntary program because those rules do not use sovereign power to control conduct.

II. SECTION 332 ALLOWS REGULATIONS THAT INDIRECTLY AFFECT RATES.

California alternatively argues (at 33–34, 45–46) that the $0 co-payment requirement regulates "terms and conditions" as Section 332(c)(3)(A) allows. The FCC takes no position whether the $0 co-payment requirement is a consumer protection "condition"; the agency generally declines to "expound" on the "demarcation between preempted rate regulation and retained state authority over terms and conditions" outside of a sufficiently developed agency record. *See, e.g.*, *New York PSC*, 10 FCC Rcd at 8203 ¶74.

Nevertheless, Section 332(c)(3)(A)'s reservation of state authority over terms and conditions is further evidence that Congress used "regulat[ion]" of "rates" in a narrow, legal sense. 47 U.S.C. § 332(c)(3)(A).

The logical inference from Section 332(c)(3)(A)'s reserved authority is that not every rule indirectly influencing rates is preempted; many legal requirements might affect rates without being rate regulations. The FCC has consistently said so,[3] and courts have agreed with this inference. *See, e.g.*, *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1257–58 (11th Cir. 2006); *CTIA v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999).

One FCC order in particular may provide an apt analogy. The FCC has held that "a regulation does not necessarily run afoul of section 332(c)(3) solely because it may make it more difficult for some carriers to offer service." *See* Twelfth Report & Order, *Federal-State Joint Board on Universal Service*, 15 FCC Rcd 12208, 12262–63 ¶110 (2000). So, for example, rules affecting "a carrier's right to receive federal universal service support" are *not* preempted entry regulations if they do not affect the carrier's "legal right to do business in a state." *Id.*; *cf. Wireless*

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[3] *See, e.g.*, *Pittencrieff*, 13 FCC Rcd at 1745 ¶20 (no preemption of rules that merely "have an impact on the costs of doing business"); Memorandum Opinion & Order, *Sw. Bell Mobile Sys., Inc.*, 14 FCC Rcd 19898, 19908 ¶23 (1999) (no preemption of state law contract or consumer fraud claims); Memorandum Opinion & Order, *Wireless Consumers Alliance, Inc.*, 15 FCC Rcd 17021, 17034 ¶23 (2000) (the "indirect and uncertain effects of monetary damage awards" do not trigger preemption).

Consumers Alliance, 15 FCC Rcd at 17034 ¶23 (noting that "rate regulation activities" impose "mandatory corporate actions that are required"). The FCC's emphasis on whether a rule affects the "legal right to do business" or requires "mandatory corporate actions" is consistent with rate regulation's historic role as a direct, market-wide control.

III. SECTION 332 DOES NOT PREEMPT RATE REGULATIONS THAT ENSURE AFFORDABLE UNIVERSAL SERVICE.

By focusing on whether California's $0 co-payment requirement amounts to rate regulation, the parties have largely ignored Section 332(c)(3)(A)'s second sentence. That language provides, under certain circumstances, that preemption does not "exempt" wireless providers from requirements imposed by a state commission "on all providers of telecommunications services necessary to ensure the universal availability of telecommunications services at affordable rates." 47 U.S.C. § 332(c)(3)(A). Under the FCC's longstanding interpretation, that exemption extends to rate regulation when "necessary to ensure the universal availability of telecommunications service at affordable rates." *See Pittencrieff*, 13 FCC Rcd at 1748 ¶25. In resolving this case, the Court should take care not to rule in a way that would undermine that potentially available universal service exception.

A. States Can Impose Universal Service Requirements If Wireless Service Is A Substitute For Land Line Service.

1. After first generally preempting states' "authority to regulate … the rates charged" for wireless service, Section 332(c)(3)(A)'s second sentence clarifies that the statute does not "exempt providers" from "requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates." 47 U.S.C. § 332(c)(3)(A). The FCC has long read this as "an exception" to the general bar on rate regulation, *Pittencrieff*, 13 FCC Rcd at 1748 ¶25, and several courts have agreed. *See, e.g.*, *TOPUC*, 183 F.3d at 432–33; *CTIA*, 168 F.3d at 1336–37; *cf. Sprint Spectrum*, 149 F.3d at 1061–62.

In other words, the FCC recognizes that Section 332 allows rate regulation—including "requiring … carriers to charge lower rates than they otherwise would charge"—if that regulation is "necessary to ensure universal service." *Pittencrieff*, 13 FCC Rcd at 1748 ¶25. The statute permits this rate regulation so long as two requirements are met. First is a substitutability requirement: to ensure that exempt requirements actually further universal service, wireless services must be "a substitute for land line telephone exchange service for a substantial portion of the

communications" in the regulating state.[4] 47 U.S.C. § 332(c)(3)(A). Second is a parity requirement: exempt regulations must apply to "all providers of telecommunications services necessary to ensure the universal availability of telecommunications services at affordable rates." *Id.*

2. This view of Section 332(c)(3)(A) makes textual and historical sense. Congress's exception for "requirements" relating to "universal availability" of services "at affordable rates" reflects the dynamic nature of universal service. *Id.* When Congress amended Section 332 in 1993, rate regulation and implicit subsidies had long been a cornerstone of universal service policy. *See supra* pages 5–6. But explicit support for low-income consumers was an emerging part of the strategy: The FCC had launched the federal Lifeline program in 1985, *see* 2-ER-175 ¶24, so Congress was aware in 1993 that different "requirements" (not just rate

[4] California has previously found that although "many households continue to maintain wireline service, … some households have chosen to rely solely on wireless service for their telecommunications needs." 3-ER-290; *see also* Decision 16-12-025, at 38 (Dec. 8, 2016) ("We are persuaded that wireless voice service is, in general, a reasonable economic substitute for landline voice service."), available at https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M171/K031/171031953.pdf.

regulation) supported "universal" and "affordable" telecommunications service through diverse mechanisms. 47 U.S.C. § 332(c)(3)(A).

This reading also makes sense of the provision as a whole: The first sentence provides a general rule against state entry and rate regulation; the second sentence provides an automatic exception for certain universal service requirements; and the third sentence allows other exceptions with the FCC's approval. *See id.* Courts have agreed that the FCC's reading "reflects Congress's unambiguous intent as expressed in the plain language of the statute," *TOPUC*, 183 F.3d at 432–33, and "gives meaning to each sentence" consistent with "the statute's purpose to limit state rate and entry but not universal service regulation," *CTIA*, 168 F.3d at 1336–37.

The FCC's interpretation also "harmonizes" Section 332 with Section 254. *Id.* at 1337. In 1996, Congress authorized states to "adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service." 47 U.S.C. § 254(f). Section 332(c)(3)(A) is not an inconsistent FCC rule; indeed, its second sentence contemplates "requirements" like those a state commission might enact with Section 254(f) authority. Under ordinary rules of interpretation, "subsequent acts" like Section 254 "can shape or focus" the "range of plausible

meanings" in an earlier act like Section 332. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (cleaned up). In short, some Section 254(f) "regulations" might be exempt Section 332(c) "requirements."

3. California might reasonably argue that its $0 co-payment requirement—if readopted in the future—should survive preemption under the FCC's *Pittencrieff* interpretation. The requirement is designed to "advance universal service" through LifeLine (*e.g.*, 3-ER-210), and NaLA has not argued that it is "inconsistent with the [FCC's] rules"—just with Section 332. 47 U.S.C. § 254(f). That the rule affects rates is of no moment; Section 332(c)(3)(A)'s universal service exception permits "requiring … carriers to charge lower rates than they otherwise would charge." *Pittencrieff*, 13 FCC Rcd at 1748 ¶25. So, even if the requirement were rate regulation, it might yet be permissible.

For this Court to interpret the universal service exception's scope in a context that the FCC has not previously addressed might have important consequences for state authority to advance universal service—one of the Communications Act's central policies. *See* 47 U.S.C. § 151. But this record was not developed in light of *Pittencrieff* or the cases that endorse it. Accordingly, the FCC urges the Court, should it

rule against California, to limit its analysis to the issues California raised and leave the possible application of the universal service exception for another day. This approach would avoid potentially unforeseen policy consequences and would follow this Court's practice "not [to] create a direct conflict with other circuits"—like the D.C. (in *CTIA*), Fifth (in *TOPUC*), and Tenth (in *Sprint Spectrum*)—without "a strong reason to do so." *See United States v. Cuevas-Lopez*, 934 F.3d 1056, 1067 (9th Cir. 2019) (cleaned up).

B. The Court Should Avoid Unnecessarily Restricting The Universal Service Exception.

NaLA may ask the Court to address the universal service exception's scope now rather than later. Indeed, NaLA has resisted Section 332(c)(3)(A)'s second sentence by objecting that California's requirement does not apply to "all providers of telecommunications services in California," but only to "certain service plans offered only by wireless carriers." NaLA Br. 42 (cleaned up). That argument rests on a contestable reading of the statutory text that, if adopted, might unduly restrict state authority under the universal service exception. The Court should not unnecessarily reach or endorse it.

1. Section 332(c)(3)(A)'s second sentence reads in full:

> "Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates."

47 U.S.C. § 332(c)(3)(A). NaLA assumes that the "necessary to ensure" qualifier modifies "requirements." That is the only reason why an exempt requirement would need to apply to every provider in California. But that might not be right; the nearest-reasonable-referent canon, for example, might suggest that "necessary to ensure" modifies "telecommunications services," which is closer in the sentence. *Cf. Hall v. U.S. Dep't of Agric.*, 984 F.3d 825, 837–38 (9th Cir. 2020) (describing and applying the canon).

The interpretation that the canon supports may also make better sense in context. "Universal service is an evolving level of telecommunications services" that changes as "advances in

telecommunications" take hold. 47 U.S.C. § 254(c)(1). Services might move in and out of necessity over time as conditions change. Given this, the relevant regulated class for an exempt "requirement" might not be *all* telecommunications providers in California. *Id.* § 332(c)(3)(A). Rather, a "requirement" may need to apply only to "all providers" that offer a particular class of services that are "necessary to ensure" (i.e., conducive to) affordable universal service. *Id.*; c*f. Ayestas v. Davis*, 138 S. Ct. 1080, 1093 (2018) (recognizing that "necessary" usually means "convenient … or conducive to the end sought," not "essential"). And providers of state-subsidized wireless plans may fit that description.[5]

NaLA's contrary view would preserve only requirements that, for example, treat land line and wireless providers the exact same. But these services are fundamentally different (even if they function similarly enough to serve as market substitutes) and thus may call for different rules. Other provisions in Section 332 prove the point; in Section 332(c)(1)(A), for example, Congress allowed the FCC to "specify" that

[5] In any event, it is not clear why the relevant "requirement" applicable to "all providers" would be the $0 co-payment requirement specifically, not the more general principle that all voluntary participants in California LifeLine—whether wireline or wireless—must adhere to the program's eligibility rules, including those particular to wireline versus wireless providers. *See* 47 U.S.C. § 332(c)(3)(A).

certain requirements applicable to land line providers are "inapplicable" to wireless providers. 47 U.S.C. § 332(c)(1)(A). And California, too, has recognized "that there are differences in technologies and jurisdiction" that can call for different wireless and wireline rules. *See* 3-ER-288.

2. The FCC has never addressed the best reading of the universal service exception's "necessary to ensure" qualifier. As a result, the agency has not spoken directly to the issues that this case implicates: Whether exempt requirements must apply to all providers (or perhaps to all wireless plans), or whether states can tailor requirements to the specific plans that are "necessary" for affordable universal service. 47 U.S.C. § 332(c)(3)(A). The answer will have important consequences for the scope of state authority to advance universal service. Questions of this significance should not be decided on records in which the parties have paid only passing attention to the relevant text.

Moreover, because the text is susceptible to more than one reasonable interpretation, Congress likely intended for the FCC to make the call in a proper agency-level proceeding. *Cf. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378–78 (1999) (holding that the FCC's broad rulemaking authority extends to later added provisions). If the Court concludes that it must address NaLA's interpretation, it should at least

not adopt NaLA's reading as "unambiguous," thereby leaving room for the FCC to act in a future proceeding. *Cf. Nat'l Cable & Telecoms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005) (holding that the FCC may adopt a construction contrary to a prior judicial holding if the statutory provision is ambiguous).

CONCLUSION

Although the FCC takes no position on this appeal's ultimate resolution, the agency respectfully requests that the Court not unnecessarily opine on the scope of Section 332(c)(3)(A)'s universal service exception in a way that would restrict agency action in the future.

Dated: August 29, 2022

Respectfully submitted,

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- ◉ is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
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Signature s/Adam G. Crews **Date** Aug 29, 2022

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CERTIFICATE OF FILING AND SERVICE

I certify that on August 29, 2022, I caused the foregoing Brief for Amicus Federal Communications Commission in Support of Neither Party to be filed with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit using the Court's CM/ECF system, which caused a true and correct copy of the same to be served on all attorneys registered to receive such notices.

/s/ *Adam G. Crews*

Adam G. Crews

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