Case No. 21-5435

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CTIA - THE WIRELESS ASSOCIATION

Plaintiff-Appellee/Cross-Appellant

v.

KENTUCKY 911 SERVICES BOARD; MIKE SUNSERI, in his official capacity as Administrator of the Kentucky 911 Services Board; JOSIAH KEATS, in his official capacity as Chair of the Kentucky 911 Services Board; UNKNOWN BOARD MEMBERS, in their official capacity as board members of the Kentucky 911 Services Board

Defendants-Appellants/Cross-Appellees

On Appeal from the United States District Court
for the Eastern District of Kentucky
Case No. 3:20-cv-43

AMICUS BRIEF OF COMMONWEALTH OF KENTUCKY IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTERESTS OF AMICUS CURIAE 1
STATEMENT OF THE CASE 2
SUMMARY OF ARGUMENT 8
ARGUMENT 8
CONCLUSION 15
CERTIFICATE OF COMPLIANCE 17
CERTIFICATE OF SERVICE 18

TABLE OF AUTHORITIES

Cases

Alden v. Maine,
527 U.S. 706 (1999) 1

Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers,
941 F.3d 1195 (9th Cir. 2019) (en banc) 14

CTIA - The Wireless Ass'n v. Ky. 911 Servs. Bd.,
--- F. Supp. 3d ---, 2021 WL 1214500 (E.D. Ky. Mar. 30, 2021) ..... *passim*

De Buono v. NYSA-ILA Med. & Clinical Servs. Fund,
520 U.S. 806 (1997) 14

Horseman's Benevolent & Protective Ass'n-Ohio Div., Inc. v. DeWine,
666 F.3d 997 (6th Cir. 2012) 9

Hueso v. Barnhart,
948 F.3d 324 (6th Cir. 2020) 12

In the Matter of: An Inquiry Into the State Universal Serv. Fund,
No. 2016-59, 2019 WL 720987 (Ky. P.S.C. Feb. 15, 2019) 2

Lorillard Tobacco Co. v. Reilly,
533 U.S. 525 (2001) 12, 14

Maryland v. King,
567 U.S. 1301 (2012) 1

Nat'l Lifeline Ass'n v. Fed. Commc'ns Comm'n,
983 F.3d 498 (D.C. Cir. 2020) 2

Printz v. United States,
521 U.S. 898 (1997) 1

Self-Ins. Inst. of Am., Inc. v. Snyder,
827 F.3d 549 (6th Cir. 2016) 8

Wyeth v. Levine,
555 U.S. 555 (2009) 9

Statutes

47 U.S.C. § 1510 ..... *passim*

Ky. Rev. Stat. § 15.020 1

Ky. Rev. Stat. § 154A.400 10
Ky. Rev. Stat. § 227.620 10
Ky. Rev. Stat. § 65.7621 3
Ky. Rev. Stat. § 65.7623 3
Ky. Rev. Stat. § 65.7629 3
Ky. Rev. Stat. § 65.7631 3
Ky. Rev. Stat. § 65.7634 3
Ky. Rev. Stat. § 65.7635 3
Ky. Rev. Stat. § 65.7636 ..... *passim*

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Reading Law: The Interpretation of Legal Texts (2012) 14
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Merriam Webster's Collegiate Dictionary (11th ed. 2014) 11
The Federalist No. 39 (J. Madison) 2

Rules

Fed. R. App. P. 29 1

Constitutional Provisions

U.S. Const. art. VI, cl. 2 1

INTERESTS OF AMICUS CURIAE[1]

The district court found that federal law preempts Kentucky's law securing funding for 911 services. *CTIA - The Wireless Ass'n v. Ky. 911 Servs. Bd.*, --- F. Supp. 3d ---, 2021 WL 1214500, at *10 (E.D. Ky. Mar. 30, 2021). By concluding that federal law overrides a statute passed by Kentucky's General Assembly and signed by its Governor, this decision carries meaningful consequences for Kentucky. In fact, "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citation omitted).

Under Kentucky law, Attorney General Daniel Cameron serves as the Commonwealth's "chief law officer" with the duty to "attend to all litigation . . . in which the Commonwealth has an interest." Ky. Rev. Stat. § 15.020. This includes defending Kentucky's sovereign power to govern itself—or its "residuary and inviolable sovereignty." *See Printz v. United States*, 521 U.S. 898, 918–19 (1997) (quoting The Federalist No. 39, at 245 (J. Madison)). Although the Supremacy Clause makes federal law "the supreme Law of the Land," U.S. Const. art. VI, cl. 2, the States simultaneously "exist as a refutation of th[e] concept" that the federal government is "the ultimate, preferred mechanism for expressing the people's will," *Alden v. Maine*, 527 U.S. 706, 759 (1999).

[1] As the chief law officer of the Commonwealth of Kentucky, Attorney General Daniel Cameron may file this amicus brief without the consent of the parties or leave of the Court. *See* Fed. R. App. P. 29(a)(2).

This case concerns the intersection between the Supremacy Clause and the Commonwealth's ability to govern itself. As explained below, Kentucky's law operates safely within the sovereign bounds guaranteed to the States by the federal Constitution. The district court's judgment to the contrary should be reversed.

STATEMENT OF THE CASE

The Lifeline Program. The Federal Communications Commission created the Lifeline program by regulation in 1985 "to ensure that low-income consumers had access to affordable, landline telephone service following the divestiture of AT &T." *Nat'l Lifeline Ass'n v. Fed. Commc'ns Comm'n*, 983 F.3d 498, 503 (D.C. Cir. 2020) (citation omitted). Congress codified the program in 1996. *Id.*

Now, 25 years later, the Lifeline program allows low-income individuals to receive, as relevant here, free cell-phone services so that they can make phone calls, send text messages, and use the Internet. [Compl., R.1, PageID#6–7]. The cell-phone providers that offer these free services have no regular billing arrangements with their subscribers. [*See id.*]. Instead, the participating providers simply receive reimbursement from the Lifeline program of $7.25 per month for each user with a voice-only plan or $9.25 per month for each user with a broadband plan.[2] [*Id.* at PageID#7].

[2] The Commonwealth provides further reimbursement to Lifeline providers that operate in Kentucky. *Ky. 911 Servs. Bd.*, 2021 WL 1214500, at *1 n.2; *see, e.g.*, *In the Matter of: An Inquiry Into the State Universal Serv. Fund*, No. 2016-59, 2019 WL 720987, at *1 (Ky. P.S.C. Feb. 15, 2019).

911 services in Kentucky. This case concerns how the federal Lifeline program interacts with the Commonwealth's efforts to provide and pay for 911 services within its borders. Under Kentucky law, the Kentucky 911 Services Board leads the Commonwealth's efforts to provide a comprehensive and efficient response when someone in Kentucky dials 911 needing help. *See* Ky. Rev. Stat. § 65.7623; Ky. Rev. Stat. § 65.7629. To pay for these 911 services, the Board collects service charges. *See, e.g.*, Ky. Rev. Stat. § 65.7629(3). These service charges fund, among other things, local 911 call centers—known as public safety answering points—in all corners of the Commonwealth. *See* Ky. Rev. Stat. § 65.7631(4)–(6); *see also* Ky. Rev. Stat. § 65.7621(22).

These 911 service charges are paid to the 911 Services Board in several different ways. For Kentuckians with ongoing cell-phone plans, the 911 service charge appears as a line item on their monthly cell-phone bills. Ky. Rev. Stat. § 65.7635(1). After collecting the service charges from its customers, the provider sends the funds to the 911 Services Board, less an administrative fee that the provider keeps for itself. Ky. Rev. Stat. § 65.7635(4)–(5). By contrast, Kentuckians with prepaid cellular services pay the 911 service charge at the point of sale. Ky. Rev. Stat. § 65.7634(1), (3). The retailer then sends the payments to the 911 Services Board. Ky. Rev. Stat. § 65.7634(2), (4).

For the Lifeline program, however, the 911 Services Board collects 911 service charges differently. The contrast between how the Board previously collected these service charges and how it currently collects them is key to this appeal.

Until early 2020, Kentucky law required each Lifeline provider to pay a per-user service charge to the 911 Services Board while also allowing the provider to "bill and collect from each end user the charges calculated . . . with respect to each end user." Ky. Rev. Stat. § 65.7636(2) (amended Mar. 7, 2020). The old statute labeled a Lifeline provider a "collection agent of the service charge" and required the provider to "list the service charge as a separate entry on any bill which includes the service charge." Ky. Rev. Stat. § 65.7636(3) (amended Mar. 7, 2020). If a provider collected the service charge from an end user, the provider could keep an administrative fee "[t]o reimburse itself for the cost of collecting and remitting the service charge levied by this section." Ky. Rev. Stat. § 65.7636(6) (amended Mar. 7, 2020). The prior statute also allowed the Commonwealth to institute collection actions on behalf of the Board against end users for nonpayment. Ky. Rev. Stat. § 65.7636(4) (amended Mar. 7, 2020).

In sum, until March 2020, Kentucky law required Lifeline providers to pay 911 service charges but allowed them to collect those charges from end users.

Congress acts. In 2018, Congress passed legislation related to billing and collection practices in the telecommunications industry—the Wireless Telecommunications Tax and Fee Collection Fairness Act (the Collection Act). 47 U.S.C. § 1510(a).

With certain exceptions,[3] the Collection Act prohibits the Commonwealth from "requir[ing]" an entity "to collect from, or remit on behalf of, any other person a State or local tax, fee, or surcharge imposed on a purchaser or user with respect to the purchase or use of any wireless telecommunications service within the State." 47 U.S.C. § 1510(c)(1). Thus, relevant here, the Collection Act bars the Commonwealth from requiring Lifeline providers "to collect from, or remit on behalf of, any other person" a fee "imposed on" an end user. *See id.*

In 2019, the 911 Services Board stopped requiring Lifeline providers to pay the 911 service charge imposed under the old version of Ky. Rev. Stat. § 65.7636. [Sunseri Letter, R.1-1, PageID#25]. The Board took this step "to avoid confusion." [Board's Br. at 10]. And it asked the Kentucky General Assembly to fix the statute. [Defs. Memo., R.7-1, PageID#58].

House Bill 208. The General Assembly listened. During its next regular session, the legislature responded with House Bill 208, which passed the Kentucky Senate 34–0 and the Kentucky House of Representatives 80–2 before Kentucky's Governor signed it into law.[4]

[3] The Collection Act does not apply if (i) the provider is a resident of Kentucky or has its principal place of business in Kentucky or (ii) the collection or remittance "is in connection with a financial transaction." 47 U.S.C. § 1510(c)(1)–(2). This appeal does not implicate either exclusion.

[4] https://apps.legislature.ky.gov/record/20rs/hb208.html (last visited June 21, 2021).

HB 208 mainly deleted the language from the old statute allowing a Lifeline provider to collect the 911 service charge from an end user. 2020 HB 208, §§ 1(2)–1(7). More specifically, under HB 208, a Lifeline provider can no longer "bill and collect" the service charge "from each end user." *Id.* § 1(2)(b). And under the new statute, the Lifeline provider no longer serves as a "collection agent" of the service charge and can no longer keep an administrative fee for its collection efforts. *Id.* §§ 1(3), 1(6). HB 208 also removed the Commonwealth's ability to bring a collection action on behalf of the Board against a Lifeline end user. *Id.* § 1(4), (7).

With these deletions, HB 208 made the 911 service charge an independent payment obligation for Lifeline providers with no accompanying obligation for end users. The statute now states: "A Lifeline provider shall be liable for a [911] service charge equal to the amount of the [911] postpaid service charge levied under KRS 65.7629 and shall remit a monthly payment to the Kentucky 911 Services Board . . . ." Ky. Rev. Stat. § 65.7636(2). In explaining the need for HB 208, the General Assembly found that imposing the 911 service charge "on all Lifeline providers is critical to the funding and operation of emergency communication services in the Commonwealth." 2020 HB 208, § 2.

This lawsuit. Several months after HB 208 took effect, CTIA, which represents the wireless communication industry, sued. [Compl., R.1, PageID#4]. Relevant here,

CTIA alleged that the Collection Act preempts HB 208.[5] [*Id.* at PageID#12–14]. Relying on the "remit on behalf of" language in the Collection Act, CTIA argued that HB 208 impermissibly "requires each Lifeline provider to remit the [911] charge levied on each CMRS connection on behalf of the CMRS users." [*Id.* at PageID#13]. HB 208, CTIA alleged, "is inconsistent and conflicts with" the Collection Act. [*Id.*].

The district court agreed. It reasoned that "KRS 65.7636 requires Lifeline service providers to 'remit on behalf of' end users by paying 911 service fees on behalf of end users enrolled in the Lifeline Free Only Service Plans, without the presence of a financial transaction." *Ky. 911 Servs. Bd.*, 2021 WL 1214500, at *9. The court found that "[t]his payment clearly provides a benefit to end users because end users do not have to pay a fee that, until KRS 65.7636 was enacted, they were required to pay." *Id.* On this basis, the district court entered a declaratory judgment that "2020 HB 208 conflicts with and is preempted by federal law" and permanently enjoined the "Board, its administrator, and its board members from enforcing or authorizing third-parties to enforce 2020 HB 208." *Id.* at *10.

The Defendants appealed. [Notice of Appeal, R.17, PageID#168].

[5] CTIA also alleged that two other federal laws preempt HB 208. [Compl., R.1, PageID#14–19]. The district court granted the Defendants' motion to dismiss as to those claims. *Ky. 911 Servs. Bd.*, 2021 WL 1214500, at *5–8. This amicus brief does not address those issues, but notes that CTIA has filed a cross-appeal to address them. [Notice of Cross-Appeal, R.20, PageID#204 (docketed as No. 21-5483)].

SUMMARY OF ARGUMENT

Under HB 208, there are no circumstances under which a Lifeline end user must pay a 911 service charge. It follows that a Lifeline provider complying with HB 208 does not implicate the Collection Act by remitting a payment "on behalf of" an end user that is "imposed on" the end user. This point becomes even clearer after comparing HB 208 to the statute it amended. For these reasons, the Collection Act does not preempt HB 208.

ARGUMENT

This appeal requires the Court "to navigate the quagmire that is preemption."[6] *Self-Ins. Inst. of Am., Inc. v. Snyder*, 827 F.3d 549, 553 (6th Cir. 2016). Although preemption can occur in several ways, the district court found that HB 208 conflicts with federal law.[7] *See Ky. 911 Servs. Bd.*, 2021 WL 1214500, at *9 ("[B]ecause KRS 65.7636 conflicts with the [Collection] Act, the law is preempted."), at *10 ("HB 208 conflicts with and is preempted by federal law"). Conflict preemption can arise in two circumstances: "when compliance with both federal and state [law] is a physical impossibility, or when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (cleaned up) (citations omitted). The district court relied on the former ground

[6] The Commonwealth takes no position on the Board's threshold argument that CTIA lacks associational standing. [Board Br. at 19–27].

[7] As noted below, this case also can be understood as an express-preemption challenge, but that framing does not change this case's bottom line. *See infra* n.9.

to upend HB 208. *See Ky. 911 Servs. Bd.*, 2021 WL 1214500, at *9. But "[i]mpossibility pre-emption is a demanding defense," *Wyeth v. Levine*, 555 U.S. 555, 573 (2009), that asks whether "adherence to the one precludes adherence to the other," *Horseman's Benevolent & Protective Ass'n-Ohio Div., Inc. v. DeWine*, 666 F.3d 997, 1000 (6th Cir. 2012).

HB 208 and the Collection Act can easily operate in tandem. HB 208 imposes an independent payment obligation on Lifeline providers that is in no way connected to a duty imposed on Lifeline end users. HB 208 provides that "[a] Lifeline provider shall be liable for a [911] service charge" and that the provider "shall remit a monthly payment to the Kentucky 911 Services Board." Ky. Rev. Stat. § 65.7636(2). HB 208 contains no accompanying responsibility for Lifeline end users. More to the point, nothing in HB 208 obligates Lifeline end users to pay some or all of the 911 service charge. In fact, the statute allows the Commonwealth to file a collection action on behalf of the Board against a Lifeline provider—not an end user. *See* Ky. Rev. Stat. § 65.7636(2)–(3). In every way, HB 208 levies the 911 service charge only on Lifeline providers with no requirement of payment by end users.

This simple fact forecloses CTIA's preemption argument. The Collection Act, by its terms, only prohibits requiring a Lifeline provider to remit a charge "on behalf of" an end user that is "imposed on" the end user.[8] *See* 47 U.S.C. § 1510(c)(1). Thus,

[8] CTIA does not argue that HB 208 requires Lifeline providers to "collect" a 911 service charge from an end user in violation of the Collection Act.

for preemption purposes, the operative question is whether HB 208 impermissibly requires Lifeline providers to pay a charge "on behalf of" end users that is "imposed on" those end users.

Start with the "on behalf of" requirement. This phrase "traditionally" meant "as the agent or representative of." Bryan A. Garner, *Garner's Modern American Usage* 94 (3d ed. 2009). Some sources define the phrase more broadly to mean "in the interest of" or "as a representative of." *See Merriam Webster's Collegiate Dictionary* 110 (11th ed. 2014). No matter how broadly the phrase sweeps, HB 208 does not require Lifeline providers to make a payment "on behalf of" end users. That is because HB 208 imposes no obligation on Lifeline end users to pay the 911 service charge. Without an obligation on end users, providers cannot do anything on their behalf. Instead, under HB 208, the Lifeline provider pays the 911 service charge on behalf of *itself*—the only party statutorily obligated to pay the service charge and the only party against whom Kentucky can bring a collection action.

Think about the issue this way. In several circumstances, Kentucky law imposes a fee on firms that enables them to operate within the Commonwealth. *See* Ky. Rev. Stat. § 154A.400(1)(c) ("Persons applying to become lottery retailers shall be charged a uniform application fee for each lottery outlet. Retailers chosen to participate in on-line games shall be charged a uniform annual fee for each on-line outlet."); Ky. Rev. Stat. § 227.620(4)(a)2. (imposing license fee "for each established place of business" for re-

tailers of manufactured homes, mobile homes, or recreational vehicles). Although payment of these fees allows a business to serve customers in Kentucky, no one would say that firms pay these fees "on behalf of" their customers. Instead, businesses pay these fees so that they can operate in Kentucky. So too with HB 208. It imposes a fee that providers pay to provide Lifeline services within Kentucky. Simply put, paying a fee to provide a service to customers is not paying a fee "on behalf of" those customers.

Even if the Court disagrees, the Collection Act's "imposed on" requirement serves as another independent basis to reverse the district court's judgment. To recap, the Collection Act forbids requiring a Lifeline provider to remit a payment "on behalf of" an end user that is "*imposed on* a purchaser or user with respect to the purchase or use of any wireless telecommunications service." 47 U.S.C. § 1510(c)(1) (emphasis added). Viewed from the perspective of the "imposed on" requirement, a conflict with the Collection Act can only arise if Kentucky law "impose[s]" a charge on an end user.

HB 208 does not fit that bill. As summarized above, it imposes a charge only on Lifeline providers. It states: "*A Lifeline provider* shall be liable for a [911] service charge equal to the amount of the [911] postpaid service charge levied under KRS 65.7629 and *shall remit* a monthly payment to the Kentucky 911 Services Board . . . ." Ky. Rev. Stat. § 65.7636(2) (emphasis added). No provision of HB 208 imposes any payment obligation on Lifeline end users. Although the district court discussed the "on behalf of" aspect of the Collection Act, it devoted no analysis to the "imposed on" requirement (other than to quote it). Even if the Court agrees with the district court's reasoning as

to the "on behalf of" requirement, the "imposed on" provision is a sufficient ground to reverse the district court's judgment.[9]

Although the Court could end its analysis here, the statutory history of Ky. Rev. Stat. § 65.7636 confirms that there is no conflict between the Collection Act and HB 208. *See Hueso v. Barnhart*, 948 F.3d 324, 336 (6th Cir. 2020) ("[W]e must read the current [statute] against the backdrop of its 'statutory history—the statutes repealed or amended by the statute under consideration.'" (emphasis omitted) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012))).

The statutory scheme that HB 208 amended operated very differently. The old statute imposed a payment obligation on Lifeline providers, but also made them "collection agent[s]" that "may bill and collect" the 911 service charge "from each end user." Ky. Rev. Stat. § 65.7636(2), (2)(b), (3) (amended Mar. 7, 2020). The prior statute also allowed Lifeline providers to take an administrative fee from amounts collected from

[9] CTIA's complaint framed this as a conflict-preemption case, and the district court followed suit. [Compl., R.1, PageID#13]; *Ky. 911 Servs. Bd.*, 2021 WL 1214500, at *9–10. Because the Collection Act provides that the States "may not require" certain actions, 47 U.S.C. § 1510(c)(1), this case also can be viewed as an express-preemption one. But the analysis in that context proceeds similarly. In considering express preemption, the Court "identif[ies] the domain expressly preempted because an express definition of the preemptive reach of a statute supports a reasonable inference that Congress did not intend to pre-empt other matters." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (cleaned up) (citations omitted). The "domain expressly prohibited" by the Collection Act is a state law that requires a Lifeline provider to pay a fee on the end user's behalf and that is imposed on the end user. *See id.* Because HB 208 deals with "other matters," it is not expressly preempted. *See id.*

end users. Ky. Rev. Stat. § 65.7636(6) (amended Mar. 7, 2020). And it allowed the Commonwealth to institute collection actions on behalf of the Board against end users. Ky. Rev. Stat. § 65.7636(4) (amended Mar. 7, 2020).

The new statute, by contrast, scrubs all end-user payment obligations from Kentucky law. No longer do Lifeline providers serve as "collection agent[s]." No longer can they "bill and collect from each end user." No longer can they deduct an administrative fee from amounts they collect. And the Commonwealth can no longer bring a collection action against an end user. Simply put, under HB 208, there is no mechanism for a Lifeline provider—or the 911 Services Board for that matter—to collect any money from an end user to pay the 911 service charge. In sum, acting against the backdrop of the prior statute, the General Assembly remedied any arguable conflict with the Collection Act by removing all payment obligations for Lifeline end users. Without a payment obligation, it is impossible for a Lifeline provider to make a payment "on behalf of" of an end user that is "imposed on" that end user.

The district court's rationale for concluding otherwise cannot stand up to scrutiny. The district court acknowledged that the General Assembly's "intention in enacting HB 208's amendments to KRS 65.7636 was to comply with Section 1510," but found that "the state has failed to do so." *Ky. 911 Servs. Bd.*, 2021 WL 1214500, at *9. The court explained:

> Now . . . KRS 65.7636 requires Lifeline service providers to "remit on behalf of" end users by paying 911 services fees on behalf of end users enrolled in the Lifeline Free Only Service Plans, without the presence of a

> financial transaction. This payment clearly provides a benefit to end users because end users do not have to pay a fee that, until KRS 65.7636 was enacted, they were required to pay.

Id. Thus, the district court relied on the fact that, under the *prior* statute, an end user could pay a 911 service charge to conclude that, under the *new* statute, a Lifeline provider's payments "clearly provide[] a benefit to end users." *See id.* There are several problems with this line of reasoning.

First, it interprets Ky. Rev. Stat. § 65.7636 based on what it used to say, not what it currently says. The district court identified no case law that endorses preempting current state law based on statutory language that the state legislature removed. That is because preemption turns on what state law *says*—present tense. *See De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 815 (1997) (considering "the actual operation of the state statute" in deciding whether federal law preempts it). If the Court upholds the district court's decision, it will limit the States' ability to cure a potential preemption issue created by a new federal law. There, of course, is nothing unusual about a state legislature amending state law to avoid federal preemption. *See Reilly*, 533 U.S. at 551 ("Although [federal law] prevents States and localities from imposing [certain] requirements or prohibitions . . . that language still leaves significant power in the hands of States . . . ."); *see also Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1197 (9th Cir. 2019) (en banc) ("[T]he Nevada legislature entirely repealed S.B. 223 and replaced it with Senate Bill 338, with the specific intent to avoid the ERISA preemption issues of S.B. 223."). The district court's reasoning, if sustained, will limit

state legislatures' ability to adopt new laws to ensure that intervening federal law does not preempt the States' policy choices.

Second, the district court's rationale ignores the "imposed on" language in the Collection Act while stretching the term "on behalf of" beyond its ordinary meaning. Taking each in turn, beyond reciting the "imposed on" provision while quoting the Collection Act, the district court took no account of this dispositive statutory language. Nor did the district court grapple with how a Lifeline provider can make a payment "on behalf of" an end user when the end user has no responsibility for making such a payment. Instead, according to the district court, the Collection Act preempts HB 208 simply because the latter "clearly provides a benefit to end users." *See Ky. 911 Servs. Bd.*, 2021 WL 1214500, at *9. But the question under the Collection Act is not whether HB 208 "benefit[s]" end users in some undefined sense, but whether it requires Lifeline providers to make a payment "on behalf of" end users that is "imposed on" end users.

CONCLUSION

The Court should reverse the district court's judgment finding that the Collection Act preempts HB 208.

Respectfully submitted by,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because the brief contains 4,009 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the has been prepared in 14-point Garamond font using Microsoft Word.

s/Matthew F. Kuhn

CERTIFICATE OF SERVICE

I certify that on June 28, 2021, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Matthew F. Kuhn