No. 09-50975

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NEMESIO CASTRO,
on behalf of himself and all others similarly situated,

Appellant,

v.

COLLECTO, INC., doing business as
COLLECTION COMPANY OF AMERICA, and
US ASSET MANAGEMENT INC.,

Appellees.

Appeal from the United States District Court
for the Western District of Texas

Brief for Appellees

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Dated: February 16, 2010

CERTIFICATE OF INTERESTED PERSONS

***Castro v. Collecto, Inc., et al.,* No. 09-50975**

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

A. Parties

Plaintiff-Appellant: Nemesio Castro

Defendants-Appellees: Collecto, Inc., d/b/a Collection Co. of America
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C. Other Interested Persons/Entities

KG EOS Holding GmbH & Co., d/b/a The EOS Group, Hamburg, Germany. Ultimate parent company of both Collecto and US Asset Management.

EOS Holdings USA, Inc. Intermediate US subsidiary of EOS Holdings GmbH.

Lloyd's of London, London, England, UK. Insurer of Collecto and US Asset Management.

On October 5, 2009, Collecto and US Asset Management changed their d/b/a to EOS CCA upon consummation of the EOS Holdings acquisition.

/s/ Glenn B. Manishin
Glenn B. Manishin

Attorney of record for Appellees Collecto, Inc., d/b/a Collection Co. of America, and US Asset Management Inc.

STATEMENT REGARDING ORAL ARGUMENT

Appellees do not believe oral argument would significantly assist the Court's analysis and decision. As discussed in the body of this brief, the Court is not required to address the district court's application of the complex law of federal preemption under the Communications Act of 1934, 47 U.S.C. § 151 *et seq*., in that Appellant has waived any such issues by failing to address them in his brief in this appeal, and need not reach the issue of the "bona fide error" defense under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692e, in order to affirm the district court's final judgment.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Regulatory Decisions

Federal Statutes

State Statutes

Rules

Regulations

Treastises and Secondary Sources

STATEMENT OF JURISDICTION

Appellant Nemesio Castro ("Appellant" or "Castro") appeals from the October 27, 2009 final judgment of the United States District Court for the Western District of Texas, El Paso Division. [R.842.][1] This Court's jurisdiction is founded upon 28 U.S.C. § 1291.

STATEMENT OF THE CASE

This civil damages class action arises under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692e *et seq*. ("FDCPA"). The complaint alleged that Appellees illegally threatened the consumer class members by writing them to collect unpaid cellular telephone bills. Complaint ¶ 13 [R.12]. Appellant claims the correspondence is unlawful under the FDCPA because it "threaten[ed] suit on time-barred debts." Appellant's Br. at 3; Complaint ¶ 25 [R.13]; 15 U.S.C. § 1692e(5) (unlawful for debt collector to "threaten to take any action that cannot legally be taken").

The gravamen of Castro's theory is that Appellees Collecto, Inc. and US Asset Management Inc. (collectively "Appellees" or "Collecto")[2] are prohibited from filing any lawsuits on outstanding accounts — for which they were collecting

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1 Citations in this brief to the record on appeal utilize the convention "[R.___.]"

2 On October 5, 2009, Collecto and US Asset Management Inc. changed their d/b/a to "EOS CCA" upon consummation of their acquisition by The EOS Group (KG EOS Holding GmbH & Co) of Hamburg, Germany.

unpaid balances on behalf of cellular telephone provider Sprint Spectrum L.P. d/b/a Sprint PCS ("Sprint") — which "became delinquent more than 2 years" before such communications as a result of the statute of limitations in the federal Communications Act of 1934 (the "Act" or "FCA"), 47 U.S.C. § 151 *et seq*. Complaint ¶ 13 [R.12]. The complaint does not contend that any collection lawsuits were actually initiated or that the challenged Collecto correspondence is otherwise misleading or deceptive.

Section 415(a) of the Act governs actions "at law" by "all carriers" for "recovery of lawful charges." 47 U.S.C. § 415(a). In its order certifying a plaintiff's class, the district court (Montalvo, D.J.) reasoned in connection with the commonality and typicality criteria of Rule 23(a) that the two-year federal limitation applies because "[t]he express language of section 415 preempts any state statute of limitations period for legal actions by carriers." Order, March 4, 2009, at 8-9 [R.276-77]; *Castro v. Collecto, Inc.,* 256 F.R.D. 534, 2009 U.S. Dist. LEXIS 20324 (W.D. Tex. 2009). The district court's class certification decision did not examine whether section 415(a) should be accorded such preemptive force under the Supreme Court's relevant decisions, whether there was a congressional purpose or actual conflict justifying implied preemption, or whether later amendments to the FCA governing cellular services altered the scope of any preemptive effect of the federal statute of limitations.

Subsequently, in response to Appellees' motion to dismiss, the court revisited its prior *dictum*, holding in a thorough 45-page Memorandum Opinion and Order [R.797 *et seq*.] that "the determination of which statute of limitations applies to the Sprint debt is not simply a matter of reading the text of section 415 in isolation." Order, Oct. 27, 2009, at 39-40 [R.835-36]; *Castro v. Collecto, Inc.*, 2009 U.S. Dist. LEXIS 99703, *69 (W.D. Tex. Oct. 27, 2009). Reviewing in detail the language and purpose of 1993 statutory amendments related to so-called Commercial Mobile Radio Service ("CMRS") carriers, 47 U.S.C. § 332, as well as a large number of cases — including several not cited by Collecto — applying those provisions, the court explained:

> The FCA's statutory scheme and legislative history evince congressional intent that CMRS providers retain state law remedies in the event that issues arise relating to billing practices, which do not touch on rates o[r] market entry. This is supported by the decisions of numerous federal courts, as well as the FCC's own interpretation of section 332, which merits respect, if not *Chevron* deference.

Order, Oct. 27, 2009, at 30 [R.836].

The district court did not entertain oral argument on Appellees' motion to dismiss. After considering the matter for several months, it decided both Collecto's motion and Castro's parallel motion for partial summary judgment as to liability in the court's combined October 27 memorandum opinion. In addition to preemption, District Judge Montalvo's opinion also addressed, in the alternative, whether section 415(a) applies to deregulated wireless carriers in light of the

provision's use of the phrase "lawful charges," which the court concluded is a statutory term of art meaning tariffed rates inapplicable to deregulated, detariffed CMRS providers. [R.837.]

Finally, but without deciding whether the record revealed material questions of disputed fact precluding entry of judgment under Rule 56 for Appellant, the district court held that, even if Castro were correct that the two-year federal limitations period applied, Appellees' actions were shielded from FDCPA liability by the bona fide error defense of 15 U.S.C. § 1692k(c) . [R.839-41.] There the district court reasoned that prior opinions from counsel were not necessary for a bona fide error "because reasonable lawyers, as this case well demonstrates, readily disagree on whether the federal or state statute of limitations period applies." Order, Oct. 27, 2009, at 43 [R.839].

The district court therefore denied Castro's motion, granted the motion to dismiss and entered final judgment for Collecto. Castro filed a timely notice of appeal one day thereafter. [R.843.]

SUMMARY OF ARGUMENT

The central question in this appeal is whether lawsuits to collect unpaid cellular telephone debts arise under federal law and are therefore subject to the two-year statute of limitations in section 415 of the Communications Act, 47 U.S.C. § 415(a). The district court correctly held that section 415 does not

preempt state statutes of limitation for common law contract actions by wireless carriers, and thus that Castro's FDCPA complaint failed to state a claim upon which relief could be granted. Appellant's superficial argument that the provision's "plain meaning" requires federal preemption contradicts the "ultimate touchstone" of preemption analysis — congressional intent — which in the absence of an express preemption clause, as here, can only be decided by examination of the structure, purpose and legislative history of federal legislation.

The Communications Act does not and never has federalized all matters involving relations between common carriers and their customers. Indeed it cannot, because the Act has always expressly reserved regulation and enforcement of intrastate communications rates to state law. Therefore, Appellant's argument that by using the phrase "all actions at law" section 415(a) establishes a single, nationwide statute of limitations for all carrier collection lawsuits is incorrect. Castro's reliance on a purported federal policy of "uniformity" is unavailing since, as this Court has made clear, "the preemption inquiry is not resolved by or concerned with arguments of policy."[3]

The special provisions of the FCA applicable only to cellular and other wireless telecommunications providers makes this result inescapably clear. Under

[3] *Louisiana Health Serv. & Indem. Co. v. Rapides Healthcare Sys.*, 461 F.3d 529, 541 (5th Cir. 2006).

47 U.S.C. § 332(c)(3), added in 1993, state law as to "entry" or "rates" for cellular services is expressly preempted, but states are permitted to regulate (and thus adjudicate) "other terms and conditions" of wireless services. Under this structure, the district court was correct that section 415 does not apply to enforcement of service contracts by cellular carriers because "Congress gave that power to states to regulate [wireless] contracts by their own substantive laws,"[4] and that the interpretation of the Federal Communications Commission ("FCC") — namely that the CMRS amendments "do[] not generally preempt the award of monetary damages by state courts based on state tort or contact claims" — merits judicial deference.[5] Appellant does not contest these holdings or their underlying rationale. Moreover, relying solely on a plain meaning interpretation, Castro has waived any argument that implied preemption arises due to the Act's structure and purpose by neither preserving that issue below or raising it on appeal.

The Seventh Circuit's decisions in *Boomer v. AT&T Corp.,* 309 F.3d 404, 421-23 (7th Cir. 2002), and its progeny, do not change this analysis. *First*, Appellant's cursory suggestion that not following *Boomer* would "create a circuit split," Appellant's Br. at 7, is hardly a legitimate basis for reversal, at the very least because a circuit split *already* exists. The *Boomer* decision is a minority rule not

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4 Order, Oct. 27, 2009, at 41 [R.837].

5 *Id*. at 32, 41 [R.828, 838].

followed by any other Circuit, explicitly rejected by some and one that has never been endorsed by this Court. *Second*, *Boomer* says absolutely nothing about the two-year limitations period of section 415. *Third*, even under the *Boomer* approach, as many courts have held, actions based on state law that do not challenge the reasonableness of a rate, term or condition, such as claims (like those here) based on contract formation and breach of contract, are not preempted. Consequently, the Court can affirm the district court on this narrower ground without reaching the issue of whether to follow the Seventh Circuit's odd preemption jurisprudence.

The district court's alternative holdings should, if the Court needs to address them, be affirmed as well. Section 415(a) cannot apply to deregulated cellular carriers because its reference to "lawful charges" means, as the Supreme Court has stressed in a series of cases on the "filed tariff doctrine," rates set forth in tariffs carriers are required to file for FCC approval. Once the agency exercised its statutory authority to exempt CMRS providers from the tariff-filing requirement, the judge-made filed rate doctrine preempting state contract actions was displaced as a matter of law. Appellant's suggestion that Texas criminal law is relevant to interpretation of the FCA is meritless, as is Castro's argument that use of the phrase lawful charges in regulations promulgated by *other,* non-communications

administrative agencies pursuant to different statutes somehow demonstrates a plain meaning for that term.

District Judge Montalvo was cogently aware of the differing interpretations courts have accorded the FDCPA's bona fide error defense. But he reasoned, nonetheless, that "[e]ven if the Court had found the section 415 statute of limitations period applies to the Sprint debt, the proceedings of this case aptly demonstrate [Appellees] are entitled to a bona fide error defense as a matter of law."[6] Castro's contention that an error of law can be bona fide for purposes of the FDCPA only if based on a prior opinion of counsel fails. On the statute of limitations issue, no authoritative opinion is possible as the answer necessarily requires application of complex preemption analysis, on which reasonable lawyers can and do differ markedly. Appellant's unsubstantiated assertion that the challenged Collecto correspondence threatened litigation against the class members, being based entirely on an inference from letters that do not overtly indicate a lawsuit is forthcoming, in addition required denial of Castro's motion because the record presents a genuine issue of material fact warranting determination in favor of Collecto, as non-moving party, under the settled standards for summary judgment.

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[6] *Id*. at 43 [R.839].

ARGUMENT

The Court is presented in this appeal with several different grounds upon which to affirm the district court's judgment. If it agrees with the district court that section 415 does not preempt state contract law, the Court need not reach the subordinate issues of whether that provision is limited to tariffed charges and whether Collecto's actions were shielded under the FDCPA's bona fide error defense. Alternatively, the Court can affirm the judgment on the ground that, even if section 415 arguably preempts some aspects of state law, the Act's 1993 CMRS amendments save contract formation, breach and damages for adjudication by state courts because these matters do not involve assessment of the "reasonableness" of Sprint's cellular charges. Finally, whether or not the district court was correct as to preemption, the Court can and should affirm its denial of summary judgment for Castro because interpretation of the challenged correspondence, which does not explicitly threaten any legal action, is a factual question reserved for jury determination that cannot be decided against Appellees on this record.

I. THE DISTRICT COURT'S HOLDING THAT SECTION 415 OF THE COMMUNICATIONS ACT DOES NOT PREEMPT "ALL" STATE CONTRACT ACTIONS IS MANIFESTLY CORRECT

The district court's statutory analysis and application of federal preemption law was completely proper. Faced with a statutory provision that does not by its terms preempt any state law or remedy and a legislative scheme which, as amend-

ed in 1993 by Congress, forecloses state regulation of wireless service prices but explicitly retains other state laws unrelated to rates or market entry, the court correctly held that the four-year Texas limitations period would apply to contract lawsuits for collection of cellular telephone debts. Appellant's superficial arguments to the contrary — which curiously fail even to mention, let alone rebut, the district court's preemption holding — are misplaced.

A. Plain Meaning Statutory Construction Is Inapplicable To Implied Preemption Analysis

Appellant's principal contention is that the language of section 415(a) of the Act, 47 U.S.C. § 415(a), is "plain and unambiguous" and "means exactly what it says." Appellant's Br. at 8, 9. Invoking general canons of statutory construction, Castro maintains that the district court erred as a matter of law by supposedly "ignoring the plain text" of section 415(a) and "examin[ing] and rely[ing] upon legislative history." *Id*. at 6, 12-13.

This approach is invalid because the question of section 415's interpretation cannot be divorced in this case from preemption analysis, an issue addressed in extraordinary detail by the district court yet not discussed by Appellant. Federal law displaces state law, pursuant to the Supremacy Clause, when Congress — acting within the scope of its constitutional powers — so intends. Although section 415(a) provides that "all" actions by carriers to recover "lawful charges" are subject to a two-year limitations period, 47 U.S.C. § 415(a), it says absolutely

nothing about the relationship between federal and state law. Accordingly, there is no unambiguously expressed intent of Congress in the text of this section to displace state contract law or corollary statutes of limitations for contract actions.[7] Even under a plain meaning theory, therefore, there is nothing "plain" in section 415(a) that requires courts to eschew legislative history as an aid to statutory construction.

More importantly, congressional purpose or intent is the ***basic hallmark*** of preemption analysis. Consideration of federal preemption "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by" a federal statute "unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U. S. 218, 230 (1947). Accordingly, "'[t]he purpose of Congress is the ultimate touchstone'" of preemption analysis. *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516 (1992), *quoting Malone v. White Motor Corp.,* 435 U. S. 497, 504 (1978), and *Retail Clerks v. Schermerhorn,* 375 U. S. 96, 103 (1963)). As the Supreme Court has explained:

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[7] Generally, three situations exist in which federal law may preempt state law: (1) where a federal statute expressly contains language prohibiting or limiting state authority; (2) where a federal statute contains comprehensive language implying that federal law occupies the field of regulation; and (3) where state law is in direct conflict with a federal regulation. *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504 (1992); *Louisiana Pub. Serv. Comm. v. FCC,* 476 U.S. 355, 368-69 (1986); *Frank v. Delta Airlines Inc.,* 314 F.3d 195, 197 (5th Cir. 2002). Only the first of these even arguably requires a court to ascertain congressional purpose solely from the statutory language.

> Congress' intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.,* 430 U. S. 519, 525 (1977). In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, *see Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n,* 461 U. S. 190, 204 (1983), or if federal law so thoroughly occupies a legislative field "'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta,* 458 U. S. 141, 153 (1982), *quoting Rice v. Santa Fe Elevator Corp.,* 331 U. S. at 230.

Cipollone, 505 U.S. at 516.

Since there can be no question that section 415(a) does not contain an "express congressional command" displacing state law, the district court's use of statutory structure and purpose, as revealed in part through legislative history, was manifestly proper. "Preemption doctrine requires an examination of Congressional intent." *Planned Parenthood of Houston and Southeast Tex. v. Sanchez,* 403 F. 3d 324, 336 (5th Cir. 2005). Only "[w]hen Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,'" is there "'no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation." *Cipollone,* 505 U.S. at 517, *quoting Malone v. White Motor Corp.,* 435 U. S. at 505, and *California Federal Savings & Loan Assn. v. Guerra,* 479 U. S. 272, 282 (1987) (opinion of Marshall, J.).

This Court has followed that same approach. "The central inquiry in determining whether a federal statute preempts state law is the intent of Congress." *Corcoran v. United Health Care, Inc.*, 965 F.2d 1321, 1328 (5th Cir. 1992).

> In performing this analysis *we begin with any statutory language that expresses an intent to pre-empt, but we look also to the purpose and structure of the statute as a whole*.

Id. (emphasis supplied; citations omitted). Consequently, because section 415(a) does not expressly preempt any aspect of state law,[8] and in light of the Act's savings clause, 47 U.S.C. § 414,[9] preemption under this section can arise ***only*** by inference.[10] The district court's use of legislative purpose and history was therefore eminently proper and Appellant's plain meaning argument plainly fails.

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[8] In contrast, for instance, the Employee Retirement and Income Security Act ("ERISA") includes an express preemption clause. "ERISA contains a broad preemption provision — its provisions 'supersede any and all State laws insofar as they may ... relate to any employee benefit plan.' 29 U.S.C. § 1144(a). This language, the Supreme Court has held, is 'deliberately expansive,' and is designed to make regulation of employee benefit plans an exclusively federal concern." *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 979 (5th Cir. 1991), *quoting Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 107 (1987).

[9] "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414. The Act's savings clause "preserves existing state-law remedies." *Premiere Network Servs. v. SBC Comms., Inc.,* 440 F.3d 683, 692 n.12 (5th Cir. 2006).

[10] Courts "resort to principles of implied pre-emption — that is, inquiring whether Congress has occupied a particular field with the intent to supplant state law or whether state law actually conflicts with federal law, *see English v. General Electric Co.,* 496 U. S. 72, 79 (1990)" — where, as here, "Congress has been silent with respect to pre-emption." *Cipollone,* 505 U.S. at 532 (Blackmun, J, concurring).

In the context of this settled law, the district court correctly reasoned that preemption "is not simply a matter of reading the text of section 415 in isolation." [R.836]. It is sophistry to imply that whether section 415 controls by virtue of what Appellant characterizes as its plain language is not an argument that federal law supersedes state law. The two doctrines are even arguably co-extensive only where, as *Cipollone* implies in *dicta*, the statutory language contains an express provision overriding state law. In its undisputed absence here, Castro's citation of plain meaning analysis to assign as error the district court's reliance on legislative structure, purpose and history is woefully misguided.

B. The Communications Act Has Never Preempted All State Contract Actions

The language of section 415(a) is not conclusive for a second reason. The Communications Act does not and never has federalized all matters involving relations between common carriers (*i.e.*, providers of telecommunications services) and their customers. Pursuant to section 2(b) of the FCA, 47 U.S.C. § 152(b), all "charges, practices, services, facilities or regulations" for "intrastate communications service[s] by wire or radio" have, since its enactment, remained the province of state courts and state public utility commissions ("PUCs"). For regulated carriers, *i.e.*, those subject to Title II of the Act, 47 U.S.C. § 201 *et seq.*, this has always meant that intrastate services, and the corresponding tariffs on

which prices, terms and conditions for such services are premised, are a creature of state and not federal law.

As a consequence of this jurisdictional allocation between federal and state law, there have been periodic disputes between state PUCs and the FCC over their respective scope of regulatory authority, leading to a well-developed body of communications law pertaining to federal preemption. Several basic rules have emerged as a result. *First*, the Communications Act does not "occupy the field" so as to displace all operation of state law. Federal preemption can only arise in a more delineated and targeted fashion. *Louisiana Pub. Serv. Comm. v. FCC,* 476 U.S. 355, 368-69 (1986). *Second*, where the Act expressly prohibits or limits state authority, courts defer to congressional intent and find state law preempted. *Id.* *Third*, if a state law or regulation specific to communications directly conflicts with the provisions of the Act, implied preemption can arise. *Id.* *Lastly*, where the FCC reasonably determines that enforcement of a state law or regulation would undermine federal policies, and where the services or facilities in questions cannot be separated, the agency is empowered to affirmatively preempt state rules whether or not the Act itself expressly or impliedly so preempts. *E.g., North Carolina Utilities Commn. v. FCC,* 537 F.2d 787 (4th Cir.), *cert. denied,* 429 U.S. 1027 (1976). *See Choate v. Champion Home Builders Co.,* 222 F.3d 788, 792 (10th Cir.

2000); *Texas Ofc. of Pub. Util. Counsel v. FCC,* 183 F. 3d 393, 422-32 (5th Cir. 1999).

It is "well settled that the [FCA] 'does not completely preempt state-law causes of action.'" *Firstcom, Inc. v. Qwest Corp.,* 555 F.3d 669, 677 n.6 (8th Cir. 2009), *quoting Premiere Network Servs., Inc. v. SBC Comms., Inc.,* 440 F.3d 683, 692 n.11 (5th Cir. 2006).[11] Section 415(a) certainly does not, because it cannot. A claim by a common carrier to recover unpaid charges for *intrastate* telecommunications services arises, by virtue of section 2(b), under state law, not under the Act and federal law. Because the scope of federal authority (and FCC jurisdiction) granted by the FCA is confined to *interstate* services, *see* 47 U.S.C. §§ 201-02, therefore, Appellant's argument that by using the phrase "all actions at law" section 415(a) establishes a single, uniform nationwide statute of limitations for all carrier collection lawsuits is incorrect. Appellant's Br. at 10, 12. For purposes of section 415(a), "all" has never meant and cannot by definition mean literally "all" actions for "recovery of lawful charges," because the jurisdictional allocation of

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[11] There is thus no basis on which to contend that the Communications Act occupies the field such that all claims by or against common carriers become a matter of federal law. *Premiere Network Servs.,* 440 F.3d at 691 n.11; Order, Oct. 27, 2009, at 10-11 [R.807-08]. "[C]omplete preemption occurs when "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'". . . Under these rare circumstances, "any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim." *Smith v. GTE Corp.,* 236 F. 3d 1292, 1311 (11th Cir. 2001) (citations omitted).

the Communications Act exempts charges for intrastate services from the scope of the statute entirely.

"The burden of persuasion in preemption cases lies with the party seeking annulment of the state statute." *AT&T Corp. v. Public Utility Commn. of Texas,* 373 F. 3d 641, 645 (5th Cir. 2004). Having failed to show any express preemption, and having now waived an argument that implied preemption arises due to the Act's structure and purpose (by not raising it in his opening brief),[12] Appellant has not met this burden.

C. The Act's 1993 CMRS Amendments Reveal A Plain Congressional Intent To Preserve Applicability of State Law In Contract Matters Unrelated To the "Reasonableness" of Cellular Rates

The special provisions of the FCA applicable only to cellular and other wireless telecommunications providers makes this result inescapably clear. Section 332(c) of the Act states that for commercial mobile radio service ("CMRS") providers, which include cellular telephone carriers, no state or local government

> shall have any authority to regulate the entry of or rates charged by any commercial mobile service . . . except that this paragraph shall not prohibit a state from regulating the other terms and conditions of commercial mobile services.

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[12] FED. R. APP. P. 28(a)(9); *Atwood v. Union Carbide Corp.,* 847 F.2d 278, 280 (5th Cir. 1988) ("We liberally construe briefs in determining issues presented for review; however, issues not raised at all are waived.").

47 U.S.C. § 332(c)(3).[13] Thus, state PUCs (and state courts) may not apply state law as to "entry" or "rates" for cellular services, as those matters are expressly preempted by the Act.

The effect of these 1993 amendments is that cellular telephone prices, even for purely intrastate services, are no longer subject to tariffing, prior approval, cost justification or any other form of substantive regulation at the state level. Yet as its language makes clear, section 332(c)(3) does not preempt all application of state law to CMRS carriers or services.[14] If a law relates to a matter other than "entry of or rates charged by" cellular carriers, such as "other terms and conditions" of wireless services, regulation and liability under state law are unaffected.

In this context, there can be no argument that the 1993 amendments, unaddressed in Appellant's briefs below (and thus not considered by the district court until its ruling on Collecto's motion to dismiss), directly contradict the district court's initial *dictum* in its class certification order. [R.276-77.] For CMRS providers, state law applies, not pursuant the section 2(b) jurisdictional split between intrastate and interstate services but rather under section 332(c)(3)'s

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13 Added by the Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 394 (1993).

14 *See generally* L. Kennedy & H. Purcell, *Wandering Along the Road to Competition and Convergence — The Changing CMRS Roadmap,* 56 Fed. Comm. L.J. 489 (2004).

savings of non-rate or entry regulation. As many courts have held since then, section 332 does not preempt a variety of state law claims, including:

- state deceptive trade and advertising statutory challenges to a wireless provider's marketing and advertising practices. *Moriconi v. AT&T Wireless PCS, LLC,* 280 F. Supp. 2d 867, 876, 877-78 (E.D. Ark. 2003).

- state common law claims against a cellular telephone company alleging failure to disclose a practice of charging for the non-communications period beginning with initiation of calls. *Sanderson, Thompson, Ratledge & Zimny v. AWACS, Inc.,* 958 F. Supp. 947 (D. Del. 1997).

- state law challenges to the practice of "rounding up" cellular call charges. *Tenore v. AT&T Wireless Services,* 136 Wash. 2d 322, 962 P.2d 104 (1998).

Accordingly, both in general (section 2(b)) and as applied specifically to cellular services (section 332(c)), the Act's provisions expressly confine the scope of federal preemption and flatly contradict any conclusion that all state common law contract actions, ***or*** their corresponding statutes of limitation, are preempted.

The district court's extensive analysis of the CMRS amendments is in accord with this quite sensible conclusion. First, the court reasoned that Congress did not intend "the section 415 statute of limitations to apply to a contract dispute" because "Congress gave that power to states to regulate contracts by their own substantive laws." Order, Oct. 27, 2009, at 41 [R.837]. Second, the district court credited, and appropriately relied upon, the expert agency's interpretation that the amendments "do[] not generally preempt the award of monetary damages by state courts based

on state tort or contact claims." *Id*. at 32, 41 [R.828, 838].[15] Appellant does not contest these holdings or their underlying rationale. Consequently, Castro's general arguments on appeal do nothing to challenge the district court's legal conclusion as to the lack of preemptive effect from section 415(a)'s two-year limitations period.

D. Appellant's Reliance On "Implied Repeal" and Other General Maxims of Statutory Interpretation is Misplaced

Appellant suggests that Congress' concern for uniformity compels the legal conclusion that section 415 controls as against state law. *See* Appellant's Br. at 10-11. Yet it is not up to the judiciary to determine, of its own volition, whether a policy such as uniformity is sufficient to justify federal preemption. While an administrative agency can preempt based on policy considerations, a federal court cannot, as it is charged with deciding the law rather than fashioning new law on delegation from Congress.

"[P]re-emption analysis is, or at least should be, a matter of precise statutory [or regulatory] construction rather than an exercise in free-form judicial

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[15] The district court referenced the FCC's decision in *In re Wireless Consumers Alliance, Inc*., 15 FCC Rcd. 17021, 17022, ¶ 9, 2000 WL 1140570 (Aug. 14, 2000), in which the administrative agency held, *inter alia*, that because wireless providers enter into contracts with customers (rather than relying on federally filed tariffs), "the filed rate doctrine is inapposite because there are no filed rates or tariffs for CMRS services." Order, Oct. 27, 2009, at 41[R.828]. Notwithstanding the Seventh Circuit's contrary interpretation (*see* Section II(A), *infra*), this administrative statutory construction is entitled to judicial deference in preemption analysis. *O'Hara v. GMC,* 508 F.3d 753, 760 (5th Cir. 2007).

policymaking." *Wyeth v. Levine,* 129 S. Ct. 1187, 1208 (2009) (Thomas, J., concurring), *quoting Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 911 (2000) (Stevens, J., dissenting); Order, Oct. 27, 2009, at 12 [R.808], *quoting Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 459 (2005) (Breyer, J., concurring). Absent a congressional purpose from which courts can fairly infer implied preemption, it is up to the legislature to decide when and to what extent the policy of the Act or any other statute displaces state remedies.

Section 415(a) simply cannot "reflect[] Congress's desire to impose a uniform period . . . for claims by and against telecommunications carriers," Appellant's Br at 10, because at the very least, as demonstrated above, the Act does not generally preempt state law and remedies for some charges (*i.e.,* for intrastate calls) assessed for communications services. "Where there is no conflict between federal policy and the application of state law, 'a mere federal interest in uniformity is insufficient to justify displacing state law'. . . . 'To invoke the concept of 'uniformity' . . . is not to prove its need.'" *Marsh v. Rosenbloom,* 499 F.3d 165, 182 (2d Cir. 2007) (citations omitted).

As this Court has made clear, "the preemption inquiry is not resolved by or concerned with arguments of policy." *Louisiana Health Serv. & Indem. Co. v. Rapides Healthcare Sys.,* 461 F.3d 529, 541 (5th Cir. 2006). Accordingly, unless and until Appellant proffers evidence indicating a congressional purpose to

federalize collection actions, and thus a congressional intent to make section 415 override different state contract limitations periods — of which there is none — Castro's public policy plea for uniformity of limitations is beyond the power of this Court to implement.

Likewise, Appellant maintains that the district court erred by contravening certain traditional canons of statutory construction. Appellant's Br. at 11-13. The first of these — namely that courts "presume that a legislature says in a statute what it means," *id*. at 11 — merely reiterates Castro's meritless plain meaning argument. The second, that the district court's conclusion "rendered meaningless" section 415(a), *id*., is equally immaterial because there are a variety of carriers and services for which federally tariffed charges, and thus the two-year limitations period, continue to apply. *See infra* Section III(B). Furthermore, whether or not "detariffing is virtually universal," Appellant's Br. at 11, makes no difference because even if that were accurate (which it is not), Congress has allowed the FCC to detariff certain services, and Appellant has no standing to collaterally attack those decisions in this appeal.

Finally, Castro maintains that the district court's decision "amounts to a finding" that Congress "repealed . . . § 415(a) by implication." *Id*. at 13. But what the district court actually held was that the 1993 amendments for wireless services, discussed in detail in the prior section, preempted state regulation of cellular rates,

but not terms and conditions of contracts, remedies for breach and thus statutes of limitation. In that context, neither the CMRS amendments nor the district court's holding "repeal" anything, but rather simply show that Congress itself limited section 415's scope by fundamentally altering the statutory scheme applicable to wireless services.

II. THE DISTRICT COURT CORRECTLY REASONED THAT SECTION 415 IS LIMITED TO TARIFFED CHARGES

A. The Seventh Circuit's *Boomer* Jurisprudence Is Inapplicable, Incorrect And Should Be Rejected

In Appellant's reply brief on the question of class certification, the principal instance in which Castro addressed the legal theory underlying his complaint below, he maintained that "any attempt to collect amounts due for federally-regulated telecommunications services is controlled by the FCA" because under the Seventh Circuit's decision in *Boomer v. AT&T Corp.,* 309 F.3d 404, 421-23 (7th Cir. 2002), the Act governs "all claims it describes, regardless of whether they are based on federal or state law." Plaintiff's Reply in Support of Motion for Class Certification, at 1, 4 (Feb. 17, 2009) [R.253].[16] That is wrong.

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[16] In contrast, Castro later disclaimed reliance on preemption doctrine or the Seventh Circuit's *Boomer* jurisprudence. "Plaintiff contends he does not rely on these Seventh Circuit precedents and instead points to the plain language of section 415(a)." Order, Oct. 27, 2009, at 35 [R.831]. Appellant's opening brief does not reconcile this discrepancy.

The *Boomer* decision is not binding on this Court and is a minority rule not followed by any other Circuit. *Boomer* also says absolutely nothing about the two-year limitations period of section 415. The Seventh Circuit dealt solely with the question whether an arbitration clause in a carrier contract for traditional interstate wireline common carrier services (*i.e.*, long-distance telephone services) was enforceable. The court of appeals reasoned that, despite detariffing of Title II-regulated carriers, the judicially created filed rate doctrine — also known as the "filed tariff doctrine" — still applied to preempt state contract causes of action. 309 F.3d at 421-23.[17] *Boomer* did not deal with any section 415 or statute of limitations issue and did not arise in the context of cellular (CMRS) providers subject to the quite different preemptive scope of section 332(c) rather than traditional Title II rate regulation. Appellant's characterization of the Sprint services at issue in this case as "federally regulated," Appellant's Br. at 10, is thus both incorrect and irrelevant.

A Seventh Circuit decision is obviously not precedent which this Court is obligated to follow. Furthermore, *Boomer* and its follow-on opinion, *Dreamscape Design, Inc. v. Affinity Network, Inc.* 414 F.3d 665 (7th Cir.), *cert. denied,* 546

[17] "Under the filed tariff doctrine, courts may not award relief (whether in the form of damages or restitution) that would have the effect of imposing any rate other than that reflected in the filed tariff. This is so even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation." *Dreamscape,* 414 F.3d at 669.

U.S. 1075 (2005), represent a minority rule that has been rejected by other Circuits. In *Enns v. NOS Comms. (In re NOS Comms.),* 495 F.3d 1052, 1059 (9th Cir. 2007), the court of appeals refused to follow *Boomer,* reasoning that in light of the "savings clause" of 47 U.S.C. § 414, "there is no indication that Congress intended every state law cause of action within the scope of the FCA to be preempted." *Accord, Ting v. AT&T,* 319 F.3d 1126, 1135-47 (9th Cir. 2003) (enforcing contractual arbitration clause under state law and rejecting *Boomer* reasoning).

This Court in *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC,* 379 F.3d 159 (5th Cir. 2004), similarly subjected a contractual arbitration clause to state law scrutiny for unconscionability, notwithstanding *Boomer,* although the Court did not decide which of the Seventh or Ninth Circuits was correct. *Id.* at 166 n.7. Likewise in *AT&T Corp. v. FCC,* 349 F.3d 692 (D.C. Cir. 2003), with respect specifically to CMRS providers, the D.C. Circuit held that:

> A state court oversteps its authority under 47 U.S.C.S. § 332 if, in determining damages, it does enter into a regulatory type of analysis that purports to determine the reasonableness of a prior rate or it sets a prospective charge for services. However, § 332 *does not generally preempt state courts from awarding monetary damages for breach of contract.*

Id. at 379 (emphasis supplied). Conversely, in *Bryan v. BellSouth Comms.,* 377 F.3d 424 (4th Cir. 2004), the court of appeals ruled that a customer's claim against a long-distance service provider under a North Carolina unfair trade practices

statute presented a question of federal law because it challenged the reasonableness of the provider's rate and therefore required dismissal under the filed-rate doctrine.

District courts have been more critical of *Boomer* and *Dreamscape,* emphasizing, for instance, that the Seventh Circuit's reasoning is "erroneous" because

> it attempts to treat customer service agreements, *i.e.*, contracts, the same as tariffs were treated under the Communications Act. The *Dreamscape* court held that "state law cannot operate to invalidate the rates, terms, or condition of a long-distance service contract . . . because such a result would be contrary to Congress's intent as expressed in Sections 201 and 202." *Dreamscape*, 414 F.3d at 674. Nothing in §§ 201 or 202 supports a finding that a customer service agreement, once entered, cannot be invalidated by state law. Rather, [the FCA] only preempt[s] state law to the extent that a plaintiff challenges the reasonableness or discriminatory effect of a rate, term or condition in the contract. *Actions based on state law that do not challenge the reasonableness of a rate, term or condition, such as claims based on contract formation and breach of contract, are not preempted*.

Manasher v. NECC Telecom, 2007 U.S. Dist. LEXIS 68795 (E.D. Mich. Sept. 18, 2007) (emphasis supplied). Similarly, in *Eyler v. ILD Telecomms., Inc.,* 2008 U.S. Dist. LEXIS 101267 at *27 (M.D. Fla. Nov. 25, 2008), the court explained that "Congress expressly recognized the continued viability of state common law and statutory remedies, *negating any notion that Congress intended to displace entirely any state cause of action relating to telephone billing;* section 414 makes clear that the causes of action in the federal statute are cumulative to available state-law actions" (emphasis supplied).

In sum, the Seventh Circuit precedent on which Appellant relies is a discredited minority rule, uniformly rejected by all other courts to consider whether the FCA inherently federalizes all causes of action related to telecommunications rates and charges.[18] Appellant's cursory suggestion to this Court that not following *Boomer* would "create a circuit split," Appellant's Br. at 7, is hardly a legitimate basis for reversal, at the very least because a circuit split *already* exists. On the merits, *Boomer* and *Dreamscape* relate only to whether, in the quite different context of traditional, wireline communications rather than CMRS wireless services, as here, the filed rate doctrine precludes state law from varying a carrier's rate. In all events, the Seventh Circuit's jurisprudence is either invalid, inapplicable, or both.

B. "Lawful Charges" Is A Term of Art Under the Communications Act Limited To Regulated, Tariffed Rates

The deregulation of CMRS providers under the 1993 amendments (section 332(c)) also forecloses reliance on the Act's statute of limitations for a second reason. The limitations period applies by its terms to actions at law by "carriers" to collect "lawful charges." 47 U.S.C. 415(a). "Carriers" is defined to mean "common carriers," *id*. § 153(10), which includes CMRS providers. *Id*.

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[18] As discussed below, the Seventh Circuit decisions also recognize an exception for state law actions (like this case) that do not require a court to assess or set a "reasonable" rate for telecommunications services. *See* Section III(A) *infra*.

§ 332(c)(1)(A). Nonetheless, the statutory term "lawful charges" is a reference to the traditional model of public utility ratemaking, under which a "schedule of charges," commonly known as a tariff, is filed by the common carrier with and subject to the review and approval of the FCC. *AT&T v. Central Office Tel. Co, Inc.*, 524 U.S. 214, 217 (1998) ("Section 203(a) of the Communications Act requires every common carrier to file with the FCC 'schedules,' *i.e.*, tariffs, 'showing all charges' and 'showing the classifications, practices, and regulations affecting such charges.'") (*citing* 47 U.S.C. § 203(a)). Once the agency exercised its authority to exempt CMRS providers from the tariff-filing requirement, the limitations period of section 415 — and with it the judge-made filed tariff doctrine preempting state contract actions — was displaced as a matter of law.

Pursuant to section 203, common carriers were historically required to file a tariff setting forth their rates with the FCC. *Central Office,* 524 U.S. at 217, 221-22; *Orloff v. FCC,* 352 F.3d 415, 418-19 (D.C. Cir. 2003).[19] This Title II regulatory structure was the "centerpiece" of the Act, requiring common carriers to submit their rates for FCC approval and charge customers only those rates. *MCI*

[19] 47 U.S.C. § 415(g) defines overcharges as "charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission," making clear that a carrier's "lawful charges" under section 415(a) are those included in its filed "schedule," *i.e.,* tariff. Order, Oct. 27, 2009, at 40 [R.836].

Telecomms. Corp. v. AT&T, 512 U.S. 218, 220 (1994).[20] The rates contained in the tariff filed with the FCC thus become that carrier's "lawful charge." *Central Office,* 524 U.S. at 222. It is the tariff which determines "when . . . the statute of limitations for purposes of Section 415(a) accrues." *MCI Telecomms. Corp. v. Teleconcepts, Inc.,* 71 F.3d 1086, 1100 (3d Cir. 1995). Naturally, a federal tariff is the equivalent of a federal regulation, "and so a suit to enforce it . . . arise[s] under federal law." *Cahnmann v. Sprint Corp.,* 133 F.3d 484, 488-89 (7th Cir. 1998); *Ivy Broadcasting Co. v. American Tel. & Tel. Co.,* 391 F.2d 486 (2d. Cir. 1968). A tariff, "required by law to be filed, is not a mere contract. It is the law." *Access Telecom, Inc. v MCI Telecomms. Corp.,* 197 F.3d 694, 711 (5th Cir. 1999); *Western Union Intl. v. Data Development,* 41 F.3d 1494, 1496 (11th Cir. 1995) (citing *Ivy Broadcasting*).

For services subject to tariff filings, "entitlement to lawful charges requires a carrier . . . to jump through many administrative hoops," which become the basis of its legal right to recover damages for nonpayment. *Union Tel. Co. v. Qwest Corp.,* 2004 U.S. Dist. LEXIS 28417 (D. Wyo. May 11, 2004). The corollaries to

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[20] Under this traditional public utility model, the FCC "reviewed and approved rates and determined what level of profits the regulated [common] carrier would earn. The carrier had to file its rates and make them publicly available; and it could not charge different rates without making a new filing and then waiting for a specified period of time (120 days under § 203(b)(1))." *Orloff v. FCC,* 352 F.3d at 18-19. *See generally* J. Kearney & T. Merrill, *The Great Transformation of Regulated Industries Law,* 98 COLUM L. REV. 1323, 1359-61 (1998)

this proposition are that (1) the limitations period of section 415 applies to actions *arising under the Act,* whether by a carrier or customer, to collect or challenge tariffed charges, *APCC Servs. v. Worldcom, Inc.,* 305 F. Supp. 2d 1 (D.D.C. 2001); *Union Tel. Co,* 2004 U.S. Dist. LEXIS. at *13, and (2) state law affecting rates is preempted by a tariff because it interferes with Congress' chosen method of ratemaking in that, pursuant to the filed-rate doctrine, the tariff cannot be "varied or enlarged by either contract or tort of the carrier." *Central Office,* 524 U.S. at 227. Combining section 203 and section 415, where a carrier is required to file tariffed rates, the tariff preempts state law causes of action, converting enforcement of the tariff — whether denominated as a claim for money damages pursuant the Act or state contract law — into a claim arising under the Act itself, and thus subject to the two-year limitations period of the FCA, not any state statute of limitations.

This regulatory structure, and with it the filed-tariff doctrine (thus the two year FCA statute of limitations), no longer applies to cellular telephone services. Acting under its section 332(c)(1)(A) authority, the FCC detariffed CMRS providers by exempting them from the tariff-filing requirement. 47 C.F.R. § 20.15(c); *Connecticut Dep't of Public Utility Control v. FCC,* 78 F.3d 842, 846 n.1 (2d Cir. 1996). The difference is substantial and dramatic.

> Rates are determined by the market, not the Commission, as are the level of profits. With § 203 no longer applicable, there is no statutory

> provision even requiring that the carrier publicly disclose any of its rates, although competition will force it to do so. And if [a CMRS provider] wishes to change its advertised rates, or terms of service, it is free to do so without Commission approval and without waiting even for a moment. It may, for instance, run a commercial in the morning offering prospective customers a free cell phone, revoke the offer that afternoon, and then offer a cell phone for half price on the following day.

Orloff v. FCC, 352 F.3d at 418-19. As a result, the limitations period of section 415 is inapplicable to collection actions by cellular carriers, because their rates, and associated legal right to payment, are set by contract, subject to competitive market forces, not by tariff subject to FCC regulatory approval. *Id.*

In short, once the FCC changed the basic regulatory paradigm for CMRS by detariffing, it removed the filed-tariff doctrine from cellular telephone services, overriding the judicially created rule which, under *Central Office* and its string of predecessors, had preempted and thus federalized actions to collect a carrier's rates. As the Commission explained in its parallel orders detariffing some interstate long-distance services, the effect of this regulatory change was to substitute state contract and consumer protection laws (and with it the applicable state statutes of limitation) for remedies earlier available only as a matter of federal law under the FCA. *Policy & Rules Concerning the Interstate, Interexchange Marketplace,* Second Report and Order, 11 FCC Rcd. 20730, 20751 (1996) (after detariffing, consumers are "able to pursue remedies under state consumer protection and contract laws" and carriers are treated like all other businesses in

unregulated markets); *Policy & Rules Concerning the Interstate, Interexchange Marketplace,* Order on Reconsideration, 12 FCC Rcd. 15014, 15057 (1996) (end users have remedies under state contract and consumer protection laws defining the "legal relationship" between carrier and consumer). The FCA controls whether a detariffed communications rate is "just" and "reasonable," 47 U.S.C. §§ 201(b), 202(a), but "does not govern other issues, such as contract formation *and breach of contract,* that arise in a detariffed environment." 12 FCC Rcd. at 15057 (emphasis supplied).

Here, the debts on which Appellant bases his FDCPA claim all arose from charges that Castro incurred through his use of cellular services provided by Sprint, which is a CMRS provider. Appellant's Br. at 4-5; Order, Oct. 27, 2009, at 41[R.828]. Because Sprint is a CMRS provider, as a matter of law it does not have any tariffed "lawful charges" to which the limitations period in section 415(a) could apply. Instead, the four-year statute of limitations of Texas law governs any claims for recovery of the class members' debt. 8 Tex. Civ. Prac. & Rem. Code Ann. §§ 16.004, 16.051; *Stine v. Stewart,* 80 S.W.3d 586, 592 (Tex. 2002).

The FCC's CMRS detariffing decision "dissolved what the Supreme Court described as the 'indissoluble unity' between § 203's tariff-filing requirement and the prohibition against rate discrimination in § 202." *Orloff v. FCC,* 352 F.3d at 418, *quoting Texas & Pac. Ry. v. Abilene Cotton Oil Co.,* 204 U.S. 426, 440

(1907). As the district court recognized, "[t]he amendment of section 332 ushered in a new era of detariffing for mobile service providers, which preserved state actions that otherwise would not have been available to plaintiffs if the FCC regulated CMRS providers in the same manner as other telecommunications services." Order, Oct. 27, 2009, at 29 [R.825]. Contrary to Appellant's argument, Appellant's Br. at 11, this interpretation of preemption and section 415(a) does not at all render that provision superfluous. Section 415 continues in full force and effect with respect to those common carriers — such as international carriers, operator services providers, local "access" carriers and certain domestic long-distance carriers — that are required to file tariffed rates. *See* 47 C.F.R. § 20.15 (only CMRS providers are exempt from the tariff filing provisions of 47 U.S.C. § 203). It also applies to mandatory carrier-to-carrier "interconnection" contracts, 47 U.S.C. §§ 252-53, because those agreements, as creatures solely of federal law, create federal obligations that likewise displace state contract remedies. *Verizon Md., Inc. v. Global NAPs, Inc.,* 377 F.3d 355 (4th Cir. 2004); *see* note 22 *infra*.

The district court's application of these and other cases to hold that section 415's "lawful charges" phrase means tariffed rates (Order, Oct. 27, 2009, at 40-41 [R.836-37]) is manifestly correct. Appellant's suggestion that Texas criminal law is relevant to interpretation of the FCA, Appellant's Br. at 14, is meritless, as is Castro's argument that use of the phrase "lawful charges" in regulations promul-

gated by *other,* non-communications federal regulatory agencies suggests a plain meaning for that term. *Id*. How state legislatures and other federal agencies, operating under obviously different statutes, may define their governing provisions is not germane to interpretation of the FCA. In short, although Appellant obviously does not agree with the FCC's deregulation and detariffing of cellular rates, the decision to give the agency such authority was made by Congress. That legislative choice is one that merits this Court's respect and the impact of which bears directly on whether such federally deregulated services are subject to a statutory limitations period created for an earlier, monopoly telecommunications era in which filed tariffs were mandatory and necessarily reflected the imprimatur of the FCC as regulator.

III. THE FDCPA'S BONA FIDE ERROR DEFENSE IS FULLY APPLICABLE TO ANY ERROR OF LAW BY APPELLEES

This Court reviews a district court's grant of summary judgment *de novo,* applying the same legal test as the district court in determining whether summary judgment was appropriate. *United States v. Lawrence*, 276 F.3d 193, 195 (5th Cir. 2001). In assessing the district court's denial of Appellant's motion for partial summary judgment, the Court will "find any disputed facts in favor of the non-moving party and determine whether a genuine issue of material fact exists in the case." *Walker v. Thompson,* 214 F.3d 615, 624 (5th Cir. 2000). Under this standard of review, Appellant's motion was properly denied by the district court

and should be affirmed — although if the Court agrees with the district court on the statute of limitations, it need not reach either the bona fide error defense issue or Castro's parallel motion for partial summary judgment in order to affirm the judgment.

A. This Court Need Not Decide Appellant's FDCPA Issues To Affirm the District Court's Judgment Below

It is not necessary for this Court to decide the scope of preemption or the filed-rate doctrine in order to resolve this case, however, even if it *disagrees* with the district court's statute-of-limitations holding. Under *Boomer* and *Dreamscape,* actions based on state law that do not implicate the "reasonableness" of a carrier's rates are not preempted. *Dreamscape,* 414 F.3d at 672 (claims that require a court to determine the "reasonable" rate for communications services would interfere with Congress' intent to ensure uniform, reasonable rates through a regulatory agency); Order, Oct. 27, 2009, at 43 [R.839]. Thus, because here Appellees' challenged correspondence concerns only collection of unpaid cellular telephone debts, not the amount, nature or validity of the underlying prices themselves, even if the letters in fact threatened litigation (*see* Section III(C)) they do not invoke a federal claim and therefore any collection lawsuits, if and when filed, would not be subject to the FCA's limitations period.

The distinction between state law impacting rates and laws related to matters other than rate reasonableness is well-established in communications jurispru-

dence. For instance, the Seventh Circuit itself ruled more than two decades ago that the Communications Act did not preempt state common law fraud and deceit, or state statutory consumer protection, claims against long-distance telephone companies based on an alleged failure to disclose their practice of charging for uncompleted calls, ring time and holding time. *In re Long Distance Telecommunications Litigation,* 831 F.2d 627, 634 (6th Cir. 1987). Much later, the court of appeals held that, despite *Boomer* and *Dreamscape,* even some state law claims seeking damages arising from the actual amount billed are not preempted. *Fedor v. Cingular Wireless Corp.,* 355 F.3d 1069, 1074 (7th Cir. 2004) (claims alleging misapplication of monthly cellular minutes in contractual plans not preempted because the FCA only applies "where the court must determine whether the price charged for a service is unreasonable, or where the court must set a prospective price for a service"). And as Chief Justice Rehnquist explained in *Central Office,* the filed-tariff doctrine "need pre-empt only those suits that seek to alter the terms and conditions provided for in the tariff. This is how the doctrine has been applied in the past." *Central Office,* 524 U.S. at 229 (Rehnquist, C.J., concurring).[21]

[21] "The filed rate doctrine's purpose is to ensure that the filed rates are the exclusive source of the terms and conditions by which the common carrier provides to its customers the services covered by the tariff. It does not serve as a shield against all actions based in state law." *Central Office,* 524 U.S. at 230 (Rehnquist, C.J., concurring).

The distinction between actions challenging the reasonableness of common carrier rates and those relating to the other aspects of the carrier-customer relationship has been applied in a series of recent cases, all of which permit state law causes of action that do not implicate the price-setting process. For example, *In re Universal Serv. Fund Tel. Billing Practices Litig.,* 300 F. Supp. 2d 1107, 1121 (D. Kan. 2003), limited *Boomer* so as not to preempt substantive state unconscionability claims against communications contract arbitration clauses, reasoning that the Act preempts only challenges that "are in essence arguments that the terms and conditions of defendants' service contracts are unjust and unreasonable." *Manasher v. NECC Telecom,* 2007 U.S. Dist. LEXIS 68795, 2007 WL 2713845, at *14 (E.D. Mich. Sept. 18, 2007), upheld the viability of state consumer protection claims arising from an allege practice of charging unauthorized fees "because they do not challenge the reasonableness or discriminatory effect of Defendant's rates, terms or conditions [but] [i]nstead, they challenge Defendant's allegedly deceptive misrepresentations."

Additionally, *Schad v. Z-Tel Communications, Inc.,* 2005 U.S. Dist. LEXIS 529, 2005 WL 83337, at *4 (N.D. Ill. Jan. 12, 2005), ruled that remand was appropriate for state law claims that a carrier overcharged customers by deceptively labeling various line-item charges because they did not present any "substantial federal question." And *Castellanos v. U.S. Long Distance Corp.,* 928 F

Supp. 753, 754-55 (N.D. Ill. 1996), held that state law claims based on an allegation of "slamming" by long distance carriers, who allegedly ran up charges by assessing customers unnecessary reconnect fees to their original carriers, were not preempted because they did not affect the reasonableness of charges for the telecommunications services in question.

This case is no different. Here the Court is not called on to assess, determine or even consider whether the charges for which Appellees seek collection are "reasonable." Castro makes no claim that Sprint's cellular rates were improperly applied, discriminatory, undisclosed, unreasonable or in any other way unlawful. "In this case, Plaintiff has not made any allegations[] which implicate Sprint's rates or market entry." Order, Oct. 27, 2009, at 43 [R.839]. Rather, the complaint alleges simply that threatening a collection lawsuit is impermissible, under the FDCPA, because such claims are time-barred by the Communications Act's statute of limitations. "[T]he claims in this case are limited to whether mailing the letter was in violation of the FDCPA." March 4, 2009 Order, at 16 [R.284].

Consequently, as in the many cases allowing state law claims against CMRS and other carriers that do not enmesh a court in evaluating rate reasonableness, the district court correctly held that this cause of action is totally unrelated to any consideration of the validity of the rates themselves and is not preempted under the FCA. Thus, regardless of whether *Boomer* correctly extended the filed tariff

doctrine after detariffing, any collection lawsuits that might be initiated by Appellees would arise under state law, not the Act, making section 415's two-year limitations period inapplicable as a matter of law.

B. Appellees' Legal and Collection Procedures Were Both Bona Fide and Reasonable for Purposes of the FDCPA

Appellant maintains that Collecto cannot rely on the FDCPA's bona fide error defense, 15 U.S.C. § 1692k(c), on grounds that the alleged mistake here is one of law and that the "reasonable procedures" clause of the provision mandates prior advice of counsel before corresponding with debtors. Appellants' Br. at 18-19, 21-22. Yet Castro never discusses what the district court actually held. It is that glaring omission which compels this argument to futility.

District Judge Montavlo was cogently aware of the differing interpretations courts have accorded the bona fide error defense. Order, Oct. 27, 2009, at 12-16 [R.808-12]. He reasoned, nonetheless, that:

> Even if the Court had found the section 415 statute of limitations period applies to the Sprint debt, the proceeding of this case aptly demonstrate Defendants are entitled to a bona fide error defense as a matter of law. Plaintiff suggests that Defendants should have relied on the opinion of a lawyer or should have sought legal advice from in-house counsel. *Whether Defendants consulted with a lawyer on which statute of limitations applies to the Sprint debt, however, is irrelevant because reasonable lawyers, as this case well demonstrates, readily disagree on whether the federal or state statute of limitations period applies*.

Id. at 43 [R.839] (emphasis supplied).

Appellees utilized a trade association chart of various statutes of limitation, but also referred collection matters to local attorneys before any lawsuit could be filed. *Id*. at 44 [R.840]. Accordingly, the district court concluded that "there is literally no other procedure Defendants could have implemented to avoid collection of the debt, other than to simply refrain from collecting cellular telephone bills." *Id*. That is because "even [the district court] had to delve deeply into the FCA's history for several months in reconsidering the issue before coming to its own conclusion that the state limitations period applies to [cellular] debt collection actions, rather than section 415." *Id*.

This conclusion is not only sagacious, it is inescapable. There is no authoritative source upon which any debt collector, or its counsel, can rely to determine to what extent section 415(a) gives way to state law, as that result arises only from application of preemption analysis. While preemption cases under the FCA are legion, moreover, few (if any at all) reported decisions specifically decide on the applicable statute of limitations.[22] Thus, "because reasonable attorneys can

[22] Counsel for Appellant falsely represents, without explanation, that "[o]ther courts have agreed § 415(a) means exactly what it says." Appellant's Br. at 9. The district court, however, expressly rejected Appellant's references to the *Martin* and *Firstcom* decisions, the former because the court there, in the transcript provided by Appellant, merely recited a portion of Judge Montalvo's class certification opinion, Order, Oct. 27, 2009, at 42-43 [R.838-39], and the latter because it did not involve CMRS services, instead traditional long-distance. *Id*. *See* Reply Memorandum In Support of Defendant's Motion to Dismiss the Complaint, Or Alternatively For Judgment On the Pleadings, at 4-5 & Exh. 1 (July 10, 2009) [R.766]. Moreover, the *Firstcom* case involved a claim concededly

and do disagree on which statute of limitations applies," *id*., consultation with counsel before corresponding with debtors would have been meaningless. The law does not require futile acts.

Appellant does not directly challenge the district court's finding that the practice of referring possible collection cases to local attorneys, "coupled with the chart, are reasonably calculated to avoiding an application of the incorrect statute of limitations." *Id*. Whether or not this was a finding of fact subject to appellate reversal only for clear error, Castro blithely dismisses the entire topic by asserting, without legal citation, that it is immaterial because "the legal review process concerning whether to file a collection case takes place after Collecto has sent the collection letter." Appellants' Br. at 21 (emphasis in original). That does not appear to be, and certainly should not be, the law. As the district court set out, some courts have held that where the applicable statute of limitations is unclear, debt collectors cannot be liable under the FDCPA because they have not knowingly or intentionally misrepresented the legal status of the underlying debt. Order,

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arising under the FCA related to "unbundling" among local exchange carriers and, as a result, obviously invoked the Act's two-year federal limitations period, *Firstcom,* 555 F.3d at 674-75, such that no party even argued for application of a state statute of limitations. The purported Queens, New York county court order cited on appeal, *Palisades Collection LLC v. Larose,* No. 42046/47 (Queens Co. Sept. 23, 2009), which is not available via Lexis, indeed does reach an implied conflict preemption holding but contains no analysis whatever and is a mere few paragraphs long. Appellant's Br. at 9, *citing* R.795-96. *See* Fed. R. App. P. 32.1(b) (requiring appellate party to "file and serve a copy of [an unpublished] … order … with the brief or other paper in which it is cited" if "not available in a publicly accessible electronic database").

Oct. 27, 2009, at 14 [R.810], *citing Simmons v. Miller,* 970 F. Supp. 661, 664-65 (S.D. Ind. 1997), *Pescatrice v. Otovitz,* 539 F. Supp. 1375, 1379-80 (S.D. Fla. 2008), and *Almand v. Reynolds & Robin, P.C.,* 485 F. Supp. 1361, 1367 (M.D. Ga. 2007). This is not a case in which the debt collector has sought to shield itself from liability by essentially claiming "ignorance of the law," Appellants' Br. at 21, but rather one in which the timeliness of a contract claim for damages was to be determined, *by counsel,* before initiation of any formal legal proceedings.

Coupled with the obvious fact that state statutes of limitation can be and are often ambiguous or conflicting, and that the laws of all 50 states are arguably encompassed within Appellant's interpretation of the bona fide error defense, this compels the conclusion that the district court was correct in finding that Appellees took reasonable steps because there "is literally no other procedure [Collecto] could have implemented." That result is all the more evident in light of Appellant's conclusory assertion that "[Appellees] first make a threat of a lawsuit, then ask whether they may legally sue on the debt they are seeking to collect." Appellant's Br. at 21 (emphasis in original). That is incorrect since, as addressed in the next section, the facts show the Collecto correspondence did not overtly or by implication threaten litigation.

C. Appellant Is Not Entitled to Partial Summary Judgment Because, Even If He Were Correct Legally, Disputed Issues of Material Fact Remain For Trial

Appellees expressly argued in opposition to Castro's summary judgment motion that material questions of fact precluded entry of judgment for plaintiff under FED. R. CIV. P. 56. Defendant's Response In Opposition To Plaintiff's Motion for Partial Summary Judgment, at 5-9 & Exh. 1 (June 29, 2009) [R.710]. Collecto emphasized that although Castro characterized the collection letters as threats to file lawsuits, their actual text was not to that effect, maintaining that interpretation of the letters presented a disputed question of material fact for the jury. The substance of the correspondence states only that Sprint "has authorized CCA to place our account with an attorney in your area for *collection and/or legal action* in our client's name." Appellant's Br. at 5; R.17-18 (emphasis supplied). It further cautions that *"[u]pon review of your account, if you are sued by the attorney,* you *could* incur additional court costs which *could* substantially increase your outstanding balance." *Id*. (emphasis supplied).

A material fact is genuinely undisputed for purposes of Rule 56 if no reasonable jury could find the fact in favor of the party against whom summary judgment is sought. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986). This Court has held that courts must "find any disputed facts in favor of the non-moving party [in order to] determine whether a genuine issue of material fact exists

in the case." *Walker v. Thompson,* 214 F.3d 615, 624 (5th Cir. 2000).[23] It is plausible, if not compelling, that a reasonable jury could find that the correspondence at issue does not in fact "threaten suit on time-barred debts." Appellant's Br. at 3. And of course, "in the absence of a threat of litigation or actual litigation, no violation of the FDCPA has occurred when a debt collector attempts to collect on a potentially time-barred debt that is otherwise valid." *Freyermuth v. Credit Bureau Servs., Inc.,* 248 F.3d 767, 771 (8th Cir. 2001).

There are a number of cases exploring what constitutes an unlawful threat of litigation for purposes of 15 U.S.C. § 1692e(5), suggesting a fact-based inquiry with no general rule emerging. Several factors are particularly applicable here. These include: (1) the correspondence does not overtly or explicitly state a lawsuit will be filed in the absence of payment;[24] (2) the wording used is conditional, namely "if" the lawyer decides to initiate a collection suit, and does not indicate

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[23] On summary judgment, inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587-88 (1986).

[24] *Compare, e.g., Baker v. GC Services Corp.,* 677 F.2d 775, 779 (9th Cir. 1982), in which the court of appeals affirmed a district court post-trial finding of fact that a debt collection letter stating "[u]nless we receive your check or money order, we *will* proceed with collection procedures" was a threatened lawsuit for FDCPA purposes (emphasis supplied), and *Russey v. Rankin,* 911 F. Supp. 1449 (D.N.M. 1995), in which the district court denied summary judgment to the plaintiff under the FDCPA based on collection letters stating that "the above referenced creditor has filed [a] claim against you with this office…" and "we are mailing this notice in advance of any action by our office."

that an attorney has as yet been asked to consider filing a collection action;[25] (3) the second letter [R.19-20] does not at all reference potential litigation, stating only that Sprint may use the debtor's publicly reported assets "in evaluating further collection activity on this account" (Appellant's Br. at 5),[26] and (4) Appellant has not contended he has or may adduce extrinsic evidence of statements or conduct by Collecto on which to base a fair inference that the letter, in context, in fact threatened litigation.[27]

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[25] *Compare, e.g., United States v. National Financial Services, Inc.,* 98 F. 3d 131, 138 (4th Cir. 1996), in which the court of appeals held that letters from a debt collector's lawyer stating he was "consider[ing]" a suit and that "only your immediate payment will stop further legal action" unlawfully threatened a lawsuit for FDCPA purposes because they "connote that a real attorney, acting like an attorney, has considered the debtor's file and concluded in his professional judgment that the debtor is a candidate for legal action. Using the attorney language conveys authority, instills fear in the debtor, and escalates the consequences."

[26] *Compare, e.g., Peter v. GC Services, LP,* 310 F. 3d 344, 349-50 (5th Cir. 2002), in which this Court held that a letter stating "to avoid further collection activity, your student loan must be paid in full" was not misleading for FDCPA purposes, although not discussing whether the correspondence amounted to an unlawful threat of litigation. It is important to note in this regard that the complaint does not purport to assert an FDCPA claim for any misleading or deceptive communications by Appellees other than by threatening litigation on allegedly time-barred debts. Complaint ¶ 25 [R.13]. *See Bentley v. Great Lakes Collection Bureau,* 6 F.3d 60 (2nd Cir. 1993).

[27] *Compare, e.g., Walker v. National Recovery, Inc.,* 200 F. 3d 500, 504 (7th Cir. 1999), a case brought by counsel for Appellant, in which the court of appeals reversed dismissal of an FDCPA claim based on the plaintiff's contention that she would "adduce evidence of the letter's effect on readers, and that she does not propose to rest on the text of the letter alone." The Seventh Circuit has also established a "safe haven" for debt collectors wishing to avoid claims of threatening litigation. *Bartlett v. Heibl,* 128 F. 3d 497, 501 (7th Cir. 1997) (Posner, J.), which includes the following in pertinent part as a recommended "form" letter — "If you want to resolve this matter without a lawsuit, you must, within one week of the date of this letter, either pay Micard $316 against the balance that you owe (unless you've paid it since your last statement) or call Micard at 1-800-221-5920 ext. 6130 and work out arrangements for payment with it. If you do neither

All of these could support a rational jury finding that the letters of which Castro complains are not, on their face or as reasonably viewed by an unsophisticated consumer, in fact a threat of litigation. That means summary judgment could not properly be entered for Appellant on his FDCPA claim. Where the parties "disagree upon the proper inferences to be drawn from the letters sent by [a debt collector] . . . [s]uch a disagreement, if reasonable, is one for resolution by the trier of fact, not by the court in a summary judgment context." *Jeter v. Credit Bureau, Inc.,* 760 F. 2d 1168, 1176 (11th Cir. 1985) (reversing grant of summary judgment to FDCPA plaintiff). Since the complaint here does not allege that collection lawsuits were in fact filed against class members, therefore, it is a jury issue, inappropriate for summary judgment, whether the correspondence Appellees sent inferentially constitutes the "threat of litigation" that is a prerequisite to FDCPA liability. *Freyermuth,* 248 F.3d at 771. Consequently, the district court properly denied Appellant's motion for partial summary judgment and its decision should be affirmed.

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of these things, I will be entitled to file a lawsuit against you, for the collection of this debt, when the week is over." The language of the letters at issue in this case, which do not represent that Collecto is "entitled to file a lawsuit," is clearly one step further removed from such lawful correspondence.

CONCLUSION

For all the foregoing reasons, the district court's dismissal of the complaint, denial of partial summary judgment and entry of final judgment in favor of Appellees should all be affirmed in their entirety.

Respectfully submitted,

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Dated: February 16, 2010

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) in that the brief contains 11,876 words, as calculated by the Microsoft Word 2007 software application, excluding those parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and FIFTH CIR. R. 32.2; and

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5), the type style requirements of FED. R. APP. P.. 32(a)(6) and the related provisions of FIFTH CIR. R. 31.2 in that the brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font and , for footnotes only, 12-point Times New Roman font.

/s/ Glenn B. Manishin
Glenn B. Manishin

Counsel for Appellees Collecto, Inc., d/b/a Collection Co. of America, and US Asset Management Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of February, 2010, he caused a copy of the foregoing "Brief for Appellees" to be served on counsel for Nemesio Castro by filing a copy thereof via the Court's ECF system, which will provide email notice of and a link to a PDF electronic copy of the brief to all counsel of record.

Printed copies of the brief were in addition served via first-class mail, postage prepaid, on Daniel Edelman, Esq., counsel for Appellant, at his office address (120 South LaSalle Street, 18th Floor, Chicago, IL 60603).

/s/ Glenn B. Manishin
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