No. _____

In The
Supreme Court of the United States

CITY OF PORTLAND, OREGON, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit upheld a Federal Communications Commission (FCC) Declaratory Ruling that construed the phrase "effect of prohibiting" in 47 U.S.C. §253(a) and §332(c)(7)(B) to preempt any state or local requirement preventing a telecommunications or personal wireless service provider from offering any "covered service [the] provider wishes to provide" using any capability or performance goals "it wishes to employ." 33 FCC Rcd. 9088, ¶37 n.87 (2018). The decision is inconsistent with multiple circuit courts, incorrectly construed the statute to have no "limiting standard," *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), and misapplied *National Cable & Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). The FCC applied its new standard to prohibit local governments from charging above-cost rental fees for commercial network installations in municipal rights-of-way and on all municipal facilities thereon. In doing so, it emptied of meaning Section 253(c)'s safe harbor for "fair and reasonable compensation," in conflict with the uniform view of other circuits; and it denied localities' proprietary interests in rights-of-way and municipal property thereon, in conflict with this and other courts' precedent. The questions presented are:

1. Did the court of appeals err in upholding the FCC's interpretation of "effect of prohibiting" in light of its plain meaning, lack of a limiting standard, and *Brand X*?

2. Did the divided court of appeals err in affirming the FCC's interpretation of Section 253 to mandate access, at cost, to public property for private commercial use?

PARTIES TO THE PROCEEDING

Petitioners are: City of Albuquerque, New Mexico; City of Ann Arbor, Michigan; City of Atlanta, Georgia; City of Bellevue, Washington; City of Boston, Massachusetts; City of Bowie, Maryland; City of Brookhaven, Georgia; City of Chicago, Illinois; Clark County, Nevada; Culver City, California; City of Dallas, Texas; District of Columbia; City of Eugene, Oregon; Town of Fairfax, California; City of Gaithersburg, Maryland; City of Gig Harbor, Washington; Town of Hillsborough, California; Howard County, Maryland; City of Huntsville, Alabama; City of Kirkland, Washington; City of Lincoln, Nebraska; City of Los Angeles, California; City of Monterey, California; Montgomery County, Maryland; National League of Cities; City of Omaha, Nebraska; City of Philadelphia, Pennsylvania; City of Piedmont, California; City of Plano, Texas; City of Portland, Oregon; City of Rye, New York; City of San Bruno, California; City and County of San Francisco, California; City of San Jose, California; City of Santa Monica, California; and Texas Coalition of Cities for Utility Issues.

The Federal Communications Commission and the United States of America are respondents and were respondents in the court of appeals.

The remaining respondents listed below appeared as parties in the proceeding below, many appearing in more than one capacity, and are grouped by their alignment.

PARTIES TO THE PROCEEDING—Continued

Bloomfield Township, Michigan; City of Arcadia, California; City of Austin, Texas; City of Bakersfield, California; City of Baltimore, Maryland; City of Burien, Washington; City of Burlingame, California; City of Coconut Creek, Florida; City of College Park, Maryland; City of Dubuque, Iowa; City of Emeryville, California; City of Fresno, California; City of Huntington Beach, California; International City/County Management Association; International Municipal Lawyers Association; City of Issaquah, Washington; City of La Vista, Nebraska; City of Lacey, Washington; City of Las Vegas, Nevada; City of Medina, Washington; City of Myrtle Beach, South Carolina; City of Olympia, Washington; City of Ontario, California; City of Papillion, Nebraska; City of Rancho Palos Verdes, California; City of Rockville, Maryland; City of San Jacinto, California; City of Scarsdale, New York; City of Seat Pleasant, Maryland; City of Seattle, Washington; City of Shafter, California; City of Sugarland, Texas; City of Tacoma, Washington; City of Takoma Park, Maryland; City of Tumwater, Washington; City of Westminster, Maryland; City of Yuma, Arizona; Contra Costa County, California; County of Anne Arundel, Maryland; County of Los Angeles, California; County of Marin, California; King County, Washington; League of Arizona Cities and Towns; League of California Cities; League of Nebraska Municipalities; League of Oregon Cities; Meridian Township, Michigan; Michigan Coalition to Protect Public Rights-Of-Way; Michigan Municipal League; Michigan Townships Association;

PARTIES TO THE PROCEEDING—Continued

National Association of Telecommunication Officers and Advisors; City of New York, New York; Rainier Communications Commission; The Colorado Communications and Utility Alliance; Thurston County, Washington; Town of Corte Madera, California; Town of Ocean City, Maryland; and Town of Yarrow Point, Washington**.**

AT&T Services, Inc.; Competitive Carriers Association; CTIA—The Wireless Association; Puerto Rico Telephone Company, Inc.; Sprint Corporation; USTelecom—The Broadband Association; Verizon Communications, Inc.; and Wireless Infrastructure Association.

American Electric Power Service Corporation; American Public Power Association; Centerpoint Energy Houston Electric, LLC; Duke Energy Corporation; Entergy Corporation; Oncor Electric Delivery Company, LLC; Southern Company; Tampa Electric Company; Virginia Electric and Power Company; and Xcel Energy Services Inc.

RULE 29.6 STATEMENT

Petitioners here are governmental agencies and therefore exempt from Rule 29.6, or, are associations made up of governmental agencies which do not issue stock, have no parent corporation, and are not owned in any part by any publicly held corporation.

RELATED PROCEEDING

United States Court of Appeals (9th Cir):

City of Portland v. FCC, No. 18-72689, No. 19-70490, No. 19-70123, No. 19-70124, No. 19-70125, No. 19-70136, No. 19-70144, No. 19-70145, No. 19-70146, No. 19-70147, No. 19-70326, No. 19-70339, No. 19-70341, No. 19-70344 (August 12, 2020) (petition for reh'g denied, Oct. 22, 2020).

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App. 1a-71a, is reported at 969 F.3d 1020. The Declaratory Rulings of the Federal Communications Commission are reported at 33 FCC Rcd. 9088 (2018), excerpted at App. 71a-294a, and 33 FCC Rcd. 7705 (2018).

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2020. App. 10a. Petitions for rehearing were denied on October 22, 2020. App. 295a-296a. On March 19, 2020, this Court issued a standing order that extended the time for filing a petition for a writ of certiorari, which remains in effect and establishes a 150-day deadline for a timely petition—here, until March 22, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

47 U.S.C. §§253(a), (c) provide:

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

. . . .

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

47 U.S.C. §§332(c)(7)(A), (B)(i) provide:

(7) Preservation of local zoning authority

(A) General authority

> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

INTRODUCTION

A divided Federal Communications Commission issued declaratory rulings interpreting Sections 253 and 332(c)(7), 47 U.S.C. §§253, 332(c)(7), to promote the deployment of new mobile wireless technology. *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9088 (2018) (*Small Cell Order* or *Order*), App. 72a-294a; Third Report and Order and Declaratory Ruling, 33 FCC Rcd. 7705 (2018) (*Moratorium Order*). On the aspects of the *Orders* at issue here, appealed pursuant to 47 U.S.C. §402(a) and 28 U.S.C. §2342, the Ninth Circuit affirmed.

The Ninth Circuit's decision blesses an FCC ruling that does not respect the authority of state and local governments that Congress preserved in Sections 253

and 332(c)(7). It upheld FCC rulings that are in tension with multiple circuit court decisions, those of this Court, and important principles of federalism.

Hundreds of thousands of small wireless facilities are forecast to be deployed in the next few years. The consequences of leaving these conflicts unresolved are immense. Under the decision below, localities cannot insist that commercial providers consider alternatives to fifty-fool poles and large equipment along the sidewalks of quant neighborhoods, on decorative lights in city plazas, alongside nature preserves, or on street signs and bus shelters, if doing so would be inconsistent with the provider's business plan. Localities and states will be forced to lease their property to wireless providers at cost-limited rates set by the FCC, with the same presumptive rate cap applying in San Francisco and in Tupelo, Mississippi. Delayed action will leave in doubt the proper standards to govern these deployments and will impact untold amounts of public and private spending. This Court's review is needed.

STATEMENT

I. Legal and factual background

A. Mobile wireless technology

In recent decades, mobile wireless technology has become near-ubiquitous for millions of people in the United States. To bring wireless signals to their customers, private wireless companies use towers and

other equipment located in the geographic areas they wish to serve. This case considers the legitimacy of FCC efforts to regulate state and local actions with respect to those wireless facilities. The FCC's action focused on the deployment of wireless facilities that satisfy the FCC's definition of "small wireless facilities" or "small cells." App. 15a; 47 CFR §1.6002(l).[1]

Small cells can be used to transmit any wireless technology, including fifth-generation technology (5G),[2] over short geographic distances—as little as 500 feet or less. But they are not small in physical size. The FCC's "small wireless facilities" definition includes up to fifty-foot towers, plus up to an additional twenty-eight cubic feet of other equipment, App. 80a-81a n.9, roughly the size of a large refrigerator. Local Gov't Excerpts of Record (LGER) at 524. Providers plan to deploy "hundreds of thousands of densely spaced small wireless facilities." *United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, 933 F.3d 728, 732 (D.C.

[1] The FCC issued two closely-related orders, the *Small Cell Order* and the *Moratorium Order*, both of which were reviewed by the same Ninth Circuit decision. This petition focuses on the analysis in the *Small Cell Order* but also seeks review of the *Moratorium Order* to the degree it underlies the issues raised here.

[2] Fifth-generation technology will be gradually implemented over the next decade and promises new innovations such as extremely fast mobile broadband data. U.S. Government Accountability Office, *5G Wireless: Capabilities and Challenges for an Evolving Network, Technology Assessment* (Nov. 2020), https://www.gao.gov/assets/gao-21-26sp.pdf.

Cir. 2019); App. 239a (predicting as many as 800,000 small cell deployments by 2026).

Small cells can be installed on or in buildings, on new or existing structures on private property, or in or on facilities in the rights-of-way. These placements can negate millions of dollars communities have expended to place utilities underground for safety and aesthetic reasons, as well as impact property values. LGER at 405-15, 583. Installing small cells can require the replacement of existing facilities and presents significant maintenance, repair and safety burdens. LGER at 257-58, 301, 419. For these reasons, states and localities must carefully weigh whether and what public assets to make available for commercial wireless facilities even though commercial providers often prefer to install small cell facilities in the public rights-of-way and structures thereon.

B. Statutory Provisions

Sections 253 and 332(c)(7) preclude state or local actions that "prohibit or have the effect of prohibiting the ability of any entity to provide . . . telecommunications service," 47 U.S.C. §253(a), or "the provision of personal wireless services," 47 U.S.C. §332(c)(7)(B)(i)(II). But Sections 253 and 332(c)(7) both preserve and constrain state and local authority. Section 253(a) preempts state and local "legal requirements" that prohibit or effectively prohibit the ability of any entity to provide telecommunications service in order to "end[] the States' longstanding practice of granting . . . local

exchange monopolies." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 405 (1999) (*Iowa Utils. Bd.*) (Thomas, J., concurring in part, dissenting in part). One of Section 253's safe harbors, Section 253(c), however, protects "the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers . . . for use of public rights-of-way." 47 U.S.C. §253(c). Section 332(c)(7)(A) protects local zoning authority by broadly preserving "the authority of a State or local government . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities", 47 U.S.C. §332(c)(7)(A), but preempts "regulations . . . that prohibit or have the effect of prohibiting" the provision of wireless services. *Id.* §332(c)(7)(B)(i).

II. FCC Order

A. Effective prohibition standard

1. To promote the deployment of small cells, in the *Order* the FCC altered its construction of the statute's effective prohibition standard and applied it to both Sections 253 and 332(c)(7). The new standard invalidates any "state or local legal requirement [that] materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service." App. 115a.[3] Unlike in the past, material

[3] Many services provided wirelessly, including high-speed Internet service, are not "covered services" and hence neither Section 253 nor 332 addresses the impact of local decisions on those services. *Restoring Internet Freedom*, Declaratory Ruling, Report

inhibitions were defined entirely in terms of a *provider's* plans: thus, a prohibition occurs if a particular local permit denial prevents a provider from adding more wireless facilities ("densifying" the network) or "introducing new services or otherwise improving service capabilities." *Id*. The new standard also applies where a state or local action prevents a provider from "incorporating the abilities and performance characteristics it wishes to employ," or "including facilities deployment to provide existing services more robustly, or at a better level of quality." *Id.* at 116a-117a n.87, 121a-122a n.95, 123a-124a n.97 (quoting *Moratorium Order*, 33 FCC Rcd. 7705, n.594). Citing this Court's precedent, *inter alia*, *City of Arlington, Texas v. FCC*, 569 U.S. 290, 307 (2013) (*City of Arlington*) and *National Cable & Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 983-86 (2005) (*Brand X*), the FCC broadly claimed the authority to interpret Sections 253 and 332(c)(7). App. 91a. It did not find the phrase "effect of prohibiting" ambiguous, and it acknowledged at least one circuit had found the statutory language was "unambiguous." *Id*. at 124a (quoting *Sprint Telephony PCS, L.P. v. Cnty. of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (*San Diego*)). The FCC "reject[ed]" circuit court opinions it found were in tension with its own view. App. 91a n.41, 119a-128a.

2. In applying the new standard to Section 332(c)(7), the FCC rejected extensive case law developed in the circuit courts, some of which was based on

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and Order, 33 FCC Rcd. 311 (2017) (classifying broadband internet).

a plain language reading of the statute. While varying slightly, the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits adopted a framework that does not simply defer to provider business plans, but consistently considers the actual, not speculative, impact of a denial. The case law therefore focuses on the materiality of the denial and the absence of alternative means to provide service.[4] In rejecting those circuits' opinions, the FCC made plain that it rejected any test those courts have adopted to define the minimum impact cognizable under the statute. App. 120a-121a n.94. It concluded that any state or local policy that requires a carrier to deviate from "covered services that providers seek to provide—including the relevant service characteristics they seek to incorporate" would violate Sections 332(c)(7) and 253. *Id*. at 124a n.97.

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[4] *Green Mountain Realty Corp. v. Leonard*, 750 F.3d 30, 40 (1st Cir. 2014); *T-Mobile Cent., LLC v. Charter Township of W. Bloomfield*, 691 F.3d 794, 806 (6th Cir. 2012); *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715, 733 (9th Cir. 2005), *rev'd on other grounds sub nom. T-Mobile S., LLC v. City of Roswell, Ga*, 574 U.S. 293 (2015); *USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines*, 465 F.3d 817, 825 (8th Cir. 2006); *Omnipoint Commc'ns Enterprises, L.P. v. Zoning Hearing Bd. of Easttown Twp.*, 331 F.3d 386, 397-98 (3d Cir. 2003) (*en banc*); *VoiceStream Minneapolis, Inc. v. St. Croix Cnty.*, 342 F.3d 818, 833-35 (7th Cir. 2003); *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 639 (2d Cir. 1999) (*Willoth*); *AT&T Mobility Servs., LLC v. Village of Corrales*, 642 F. App'x 886 (10th Cir. 2016). The Fourth Circuit considers similar factors applied slightly differently. *T-Mobile Ne. LLC v. Fairfax Cnty. Bd. of Supervisors*, 672 F.3d 259, 266, 268 (4th Cir. 2012) (*Fairfax Cnty.*).

The FCC also specifically disapproved of opinions in the Eighth and Ninth Circuits that required proof of an "actual" local prohibition because, *inter alia*, focusing on local conditions in a particular case could ignore "serious effects that flow through in other jurisdictions as a result," *id*. at 109a n.76, 124a-128a (citing *Level 3 Commc'ns, L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528, 532 (8th Cir. 2007), *cert. denied*, 557 U.S. 935 (2009) (*St. Louis*); *San Diego*, 543 F.3d 571 (9th Cir. 2008) (*en banc*)).

B. Access to rights-of-way and municipal property thereon

Applying this standard, the *Small Cell Order* declared that "[right-of-way] access fees, and fees for the use of government property in the [right-of-way], such as light poles, traffic lights, utility poles, and other similar property suitable for hosting Small Wireless Facilities . . . violate Sections 253 and 332(c)(7)" unless those fees are "a reasonable approximation of the state or local government's costs" of processing applications and managing rights-of-way or government-owned property thereon. App. 135a-136a. Fees based on the fair market rental value of access to the right-of-way or municipal facilities thereon are preempted. The FCC also created a uniform nationwide limit on what constitutes a presumptively reasonable recurring fee for small wireless facilities in the right-of-way or municipal facilities in the right-of-way—$270/small wireless facility per year. The FCC placed on an individual

locality the burden to cost-justify any fee above that amount. App. 178a-179a.

The FCC concluded that non-cost-based fees have the effect of prohibiting service under Section 253(a) "when considered in the aggregate," even if such fees "might seem small in isolation." App. 138a-140a. According to the FCC, above-cost fees in one jurisdiction "materially and improperly inhibit deployment that could have occurred elsewhere." App. 151a. The FCC explained that limiting fees to cost recovery would reduce the fees providers pay in "high-demand area[s] like . . . cit[ies] or urban core" jurisdictions where they are deploying small wireless facilities, allowing them to use the savings to deploy facilities "in higher cost areas" elsewhere. App. 158a. The FCC relied on a study submitted by Corning, Inc., that estimated over two billion dollars in cost savings from reduced fees. App. 150a, 151a-152a & n.169, 153a. Although Commissioner Rosenworcel explained that "[n]ot one wireless carrier has said that this action will result in a change in its capital expenditures in rural areas," App. 292a (approving in part, dissenting in part), and the record contained evidence suggesting they would not, LGER at 681, 685-86; *id*. at 716-18, the FCC concluded that the savings might be used to supplement providers' capital budgets, which could lead to greater deployment in underserved areas. App. 150a-157a.

The FCC acknowledged that Section 253(c) preserves localities' ability to collect "fair and reasonable compensation" and that "there is precedent that 'fair and reasonable' compensation could mean not only

cost-based charges but also market-based charges." App. 142a-144a. It nevertheless "interpret[ed] Section 253(c)[ ] . . . to refer to fees that represent a reasonable approximation of actual and direct costs incurred by the government," which is the same cost-based limitation that the *Small Cell Order* interpreted Section 253(a) to impose. App. 142a-144a.

The *Small Cell Order* then rejected local governments' argument that Sections 253 and 332(c)(7) do not preempt state and local government actions taken in their roles as property owners. First, apparently believing that federal statutes are presumed to preempt state and local proprietary activities unless the statute provides otherwise, the FCC concluded that neither section "carves out an exception for proprietary conduct." App. 194a. Second, the FCC concluded that state and local governments act solely in a regulatory capacity "with respect to managing or controlling access to property within the public [rights-of-way]." App. 199a-201a. When combined with the FCC's *Moratorium Order*, which requires localities to receive and process applications for deployment, this ruling obliges localities to process applications for access to their property, or public property they hold in trust, and treats all denials as if they were regulatory and never as that of a property owner. In dissent, Commissioner Rosenworcel expressed her concern: "three unelected officials on this dais are telling state and local leaders all across the country what they can and cannot do in their own backyards." App 289a (approving in part, dissenting in part).

III. Ninth Circuit decision

The Ninth Circuit upheld the FCC's "effective prohibition" standard, accepting the FCC's prediction that "state and local regulation . . . is more likely to have a prohibitory effect on 5G technology than it does on older technology" because 5G technology "requires rapid, widespread deployment of more facilities." *Id*. at 19a-20a. The decision did not attempt to square the FCC's new standard with the precedent in other circuits, or recognize that the term "small wireless facility" is not limited to 5G.

The Ninth Circuit panel divided but upheld the *Small Cell Order*'s rulings regarding fees and rents for access to rights-of-way and government-owned property thereon. It explained that "[t]he FCC did not base its fee structure on a determination that there was a relationship between particular cities' fees and prohibition of services," finding instead "that above-cost fees, in the aggregate, were having a prohibitive effect on a national basis." App. 26a. It also accepted the FCC's finding that "a nationwide reduction in fees in 'must-serve,' heavily-populated areas" could result in those savings being reinvested in economically unattractive areas. *Id*. at 29a. The Ninth Circuit thus adopted the FCC's view that one jurisdiction violates Section 253 if its market-based fees *may* affect deployment in other unidentified, far away jurisdictions. The majority also credited the FCC's finding that "there was no readily-available alternative" to its cost-based standard and upheld the FCC's interpretation that "fair and

reasonable compensation" under Section 253(c) is limited to cost recovery. *Id*. at 26a-28a.

Judge Bress issued a partial dissent on the issue of fees, explaining that "the FCC on this record has not adequately explained how all above-cost fees amount to an 'effective prohibition' on telecommunications or wireless services under 47 U.S.C. §§253(a) and 332(c)(7)(B)(i)(II)." *Id*. at 63a (Bress, J., dissenting in part). While Judge Bress agreed that excessive fees could have the effect of prohibiting services, he reasoned that "fees are prohibitive because of their financial effect on service providers, not because they happen to exceed a state or local government's costs." *Id*. at 66a. The dissent also found that "the FCC's approach lacks a limiting principle." *Id*. at 68a. Although the study submitted by Corning on which the FCC based its conclusions made the "commonsense observation" that reducing fees will produce savings to those that pay fees, that observation "would seemingly mean that any fee in any amount could qualify as an effective prohibition, once aggregated." *Id.* And even if those savings could potentially be reinvested in deploying small cell facilities in other jurisdictions, "it does not follow that every type of fee rises to the level of an 'effective prohibition,' which is the line Congress drew in the Telecommunications Act." *Id*. at 68a-69a. Judge Bress further concluded that the majority's and the FCC's "[c]oncerns about administrability, though important as a policy matter, must still be operationalized under the statute's effective prohibition standard," reasoning that a "rule prohibiting fees that exceed cost

by $1 would be equally administrable, but that does not mean such fees are invariably effective prohibitions on service, which is the relevant question under §§253(a) and 332(c)(7)." *Id.* at 70a.

The Ninth Circuit also held that "[m]unicipalities do not regulate rights-of-way in a proprietary capacity," and thus their actions with respect to rights-of-way and any government-owned property thereon (*e.g.,* municipal utility poles, streetlights, traffic signals) are subject to preemption. *Id.* at 42a-47a. The Ninth Circuit concluded that the FCC made a reasonable finding that such conduct is always regulatory in nature because, according to the court, rights-of-way "are regulated in the public interest, not in the financial interest of the cities." *Id*. at 44a.

REASONS FOR GRANTING THE PETITION

I. The Court should grant certiorari to ensure the phrase "effect of prohibiting" is consistent across the nation and subject to a meaningful, limiting standard.

A. The Ninth Circuit affirmance is inconsistent with other circuits.

1. The FCC's focus on a provider's plans as the sole factor defining the scope of effective prohibition, upheld by the Ninth Circuit, is inconsistent with the plain language readings of the Second and Fourth Circuits. Under the FCC's standard, an effective prohibition occurs when a provider is unable to offer "any

covered service a provider wishes to provide, incorporating the abilities and performance characteristics it wishes to employ. . . ." App. 116a n.87, 121a-122a n.95, 123a-124a n.97 (quoting *Moratorium Order*, 33 FCC Rcd. at ¶ 162 n.154). The Second Circuit rejected an almost identical standard that a provider "has the right . . . [under Section 332(c)(7)] to construct any and all towers that, in its business judgment, it deems necessary," because "[t]his untenable position founders on the statutory language." *Willoth*, 176 F.3d at 639. The court explained "such a rule would effectively nullify a local government's right to deny construction of wireless telecommunications facilities, a right explicitly contemplated in 47 U.S.C. §332(c)(7)(B)(iii)." *Id.*

The Fourth Circuit similarly held "the plain language of [Section 332(c)(7)(B)(i)(II)] . . . does not encompass the ordinary situation in which a local governing body's decision *merely limits* the level of wireless services available;" a carrier must establish "a legally cognizable deficit in coverage amounting to an effective absence of coverage, and that it lacks reasonable alternative sites to provide coverage." *Fairfax Cnty.*, 672 F.3d at 268 (emphasis added); *id.* at 279 (Davis, J., concurring in part and dissenting in part).

Both courts found, on plain language, a single permit denial could not be an effective prohibition without considering the materiality or severity of the impact on service and whether the adverse impacts could be avoided by alternate tower locations. *Willoth*, 176 F.3d at 639; *Fairfax Cnty.*, 672 F.3d at 268. The FCC's standard, in contrast, finds that any local action that would

deviate from the carrier's plans would be a barred prohibition. The circuit courts set a higher bar.

2. The FCC ruling also "reject[ed]" the Eighth Circuit's plain language holding that prohibitory effects must be actual, and not merely speculative. App. 124a. In *St. Louis*, the Eighth Circuit found that Section 253(a) was "clear" and that "no" statutory reading "results in a preemption of regulations which might, or may at some point in the future . . . prohibit services." *St. Louis*, 477 F.3d at 533. *St. Louis* therefore concluded a non-cost based right-of-way access fee did not effectively prohibit a service offering when the plaintiff company could not "state with specificity what additional service it might have provided" if not for the funds it paid to the city. *Id*. In contrast, the FCC found the opposite—that non-cost based fees are banned because they *might* deter deployment. *Infra* II.B.

3. In affirming a conclusive presumption that denials that prevent a provider from doing what it prefers are prohibitory, the decision below is also inconsistent with the Fourth Circuit's holding that Section 332's statutory text requires case-by-case decisionmaking. *360 degrees Commc'ns Co. of Charlottesville v. Bd. of Supervisors of Albemarle Cnty.*, 211 F.3d 79, 87 (4th Cir. 2000) (*Albemarle Cnty.*); *Fairfax Cnty.*, 672 F.3d at 266-77. *See also e.g.*, *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 48 (1st Cir. 2009). To be sure, different technologies might be effectively prohibited differently by particular local decisions. But the FCC may not predetermine the prohibitory effect of wide swaths of state and local requirements on a

vast array of communications services unmoored from a consideration of specific facts in each case, as "the Act anticipates." *Albemarle Cnty.*, 211 F.3d at 87.

This court should grant review because the Ninth Circuit affirmance permits the FCC to adopt a nationwide rule that is inconsistent with other circuits' plain language that constrain the FCC's interpretive authority. *Infra* I.C.

B. The agency's construction lacks a required limiting standard.

Equating an effective prohibition with any deviation from a provider's plans, as the Ninth Circuit's affirmance does, leaves the statute with no limiting standard, ignoring this Court's guidance and the conclusions of eight circuit courts. The scope of effective prohibition adopted by the FCC provides no direction to enable a provider, a locality, or a court to distinguish between permissible and impermissible local action—between material and immaterial effects. It may be, for example, that the proposed service "improvement" is well below any accepted industry service quality threshold, or that the new area to be served measures a few hundred feet. But the *Order* offers nothing to distinguish prohibitory wheat from chaff.

1. This Court previously reversed the FCC in similar circumstances. In *Iowa Util. Bd.*, 525 U.S. at 388, the Court reviewed the FCC's interpretation of another provision of the Communications Act, 47 U.S.C. §251(d)(2)(B), which directed the FCC to adopt

rules giving new entrants access to incumbent telecommunications providers' networks when the failure to provide such access would "impair" a new entrant's ability to "provide the services it seeks to offer." 47 U.S.C. §251(d)(2)(B). This Court reversed the FCC's decision to adopt a one-sided interpretation which took, as its sole deciding factor, the new entrant's business plans. The FCC assumed any deviation from those plans would increase the new entrant's costs or decrease its service quality, thereby "impair[ing]" its ability to provide service. *Iowa Util. Bd.*, 525 U.S. at 388-89.

The statutory "impair" provision at issue in *Iowa Utilities* directly parallels the statutory "prohibit" language at issue here. In *Iowa Utilities*, the Court found:

> the Commission's assumption that *any* increase in cost (or decrease in quality) imposed by denial . . . "impair[s]" the entrant's ability to furnish its desired services . . . is simply not in accord with the ordinary and fair meaning of those terms.

Id. at 889-90 (emphasis original, alteration supplied). The Court explained that an increase in the new entrant's costs or decrease in its profits, without more, does not mean that a new entrant's ability to provide service has been "impaired" under the legal standard of the statute. *Id*. at 390. Rather, "the Act requires the FCC to apply some limiting standard, rationally related to the goals of the Act. . . ." *Id.* at 388.

So, too, here. That a fee or other local requirement may increase a provider's costs or decrease its profits does not, without more, mean that the requirement has "effectively prohibited" the provider's ability to provide service. *Any* deviation from "any covered service a provider wishes to provide, incorporating the abilities and performance characteristics it wishes to employ," *Order*, App. 116a-117a, n.87, cannot, *ipso facto*, mean a service provider's ability to provide a covered service has been prohibited. As in *Iowa Utilities*, the FCC may not delegate its own responsibility under the statutory standard. *Iowa Util. Bd.*, 525 U.S. at 389.

2. The failure of the FCC to adopt a limiting standard makes even more troubling the FCC's rejection of precedent in eight circuits which do adopt a limiting standard. App. 115a-116a, 120a-121a & n.94. Those courts recognize that, in Section 332(c)(7), Congress struck "a delicate balance between the need for a uniform federal policy and the interests of state and local governments in continuing to regulate the siting of wireless communications facilities." *VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 829 (7th Cir. 2003). Their legal tests effectuate Congress's balance. Section 332(c)(7) "reflects the balance between the national interest of facilitating the growth of telecommunications and the interest of local governments in making decisions based on zoning considerations. The protection of this balance has been a primary concern in our development of standards to address claims brought under [it]." *Fairfax Cnty.*, 672 F.3d at 265 (internal citation omitted). The First Circuit aptly explains, "[i]nquiries into the existence and type of

[service] gap are merely helpful analytic tools toward" answering the statutory question of whether "a given decision, ordinance, or policy amounts to an effective prohibition on the delivery of wireless services." *Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620, 631-32 (1st Cir. 2002); *accord, e.g.*, *Willoth*, 176 F.3d at 641; *National Tower, LLC v. Plainville Zoning Board of Appeals*, 297 F.3d 14, 20 (1st Cir. 2002); *Albemarle Cnty.*, 211 F.3d at 86. The Ninth Circuit thus rejected the required limiting standard adopted by other circuits which embodies the congressionally mandated balance.

An agency receives deference only "within the bounds" of statutory uncertainty. *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 525 (2009); *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004); *City of Arlington*, 569 U.S. at 307. The Ninth Circuit improperly allowed the FCC to exceed the bounds of the statute's text by sweeping away 20 years of careful application of law to facts effectuating Congress's text. The FCC may not transform the effective prohibition standard into an empty vessel that will hold anything commercial providers wish to pour into it.

C. *Brand X* and *Chevron* do not resolve the conflicts and their proper application should be clarified.

Under *Brand X*, a court's prior construction of a statute prevails over an agency's if a judicial precedent holds "the statute unambiguously forecloses the agency's interpretation." *Brand X*, 545 U.S. at 982-83.

Once a court, based on plain language, declares what the law is, an agency is not free to trump that determination, *id.* 983-986; *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 982-83 (1984). As shown above, several circuits, based on a plain language analysis, adopted interpretations of the "prohibition" provisions of Sections 253(a) and 332(c)(7) that are at odds with the FCC's interpretation of those same provisions, and the Ninth Circuit affirmed. Under *Brand X*, the FCC was not free to simply cast aside the plain language decisions of federal courts of appeals, and the Ninth Circuit failed to consider whether the FCC's resolution, based on the purported characteristics of 5G, properly took into account the other circuits' plain language determinations of what the law is. Even on technical issues, the FCC is bound by the statutory language as authoritatively interpreted by the federal courts. The FCC's *Order* exceeds those bounds.

1. The Court should grant review to clarify the application of *Brand X* where a court of appeals upholds an agency decision that rejects the plain language reading of other circuits. Some parties will surely claim that the *Order*, having been upheld in the Ninth Circuit, is the definitive nationwide interpretation of the statute. But at least one circuit court has concluded that an agency's revision to existing circuit precedent is "not legally effective . . . until [the circuit court] discharge[s] its obligation under *Chevron* step two and *Brand X* to determine that the statutory provisions at issue were indeed ambiguous." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1145 (10th Cir. 2016)

(Gorsuch, J.). This Court should grant review to clarify the limits of *Brand X* and *Chevron* under these circumstances. *See*, *e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415-16 (2019).

2. Guidance from this Court is required to ensure that federal agencies and federal courts conduct the proper analysis under *Chevron* and *Brand X*. To properly apply *Brand X* requires a far more searching review of the FCC's *Order* than occurred in this case. Both the Ninth Circuit and the FCC failed to give sufficient consideration to the question. In separate footnotes, the FCC referenced *Brand X* and conducted almost no analysis of plain language precedent. App. 91a n.41, 124a n.99. The Ninth Circuit did not mention *Brand X* at all, and appears to have ignored its application to the FCC's action. This Court should act to clarify that such analysis is required when an agency rejects the circuit courts' plain language reading.

II. Whether the statute can be construed to compel private commercial access to municipal property at cost is an important question meriting review.

A. In conflict with six circuits, the Ninth Circuit rendered Section 253(c)'s preemption savings clause meaningless.

Section 253(a) preempts state or local actions that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," 47 U.S.C. §253(a), but is

followed by two savings clauses, 47 U.S.C. §§253(b), (c). Section 253(c) provides, in pertinent part, that "nothing in [Section 253]" affects "the authority of a State or local government to . . . require fair and reasonable compensation . . . for the use of public rights-of-way. . . ."

1. Until the decision below, every circuit addressing the question has concluded that, by its plain language, Section 253(c) is a safe harbor, saving some right-of-way fees that Section 253(a) would otherwise preempt. *Sw. Bell Tel., L.P. v. City of Houston*, 529 F.3d 257, 262 (5th Cir. 2008); *St. Louis*, 477 F.3d at 532; *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 77 (2d Cir. 2002) *(TCG N.Y., Inc.)*; *N.J. Payphone Ass'n v. Town of West New York*, 299 F.3d 235, 240 (3d Cir. 2002); *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1187 (11th Cir. 2001) (*BellSouth*); *Cablevision, Inc. v. Pub. Improvement Comm'n*, 184 F.3d 88, 98 (1st Cir. 1999). Indeed, the Eleventh Circuit made clear that interpreting Section 253(c) as a "safe harbor provision[] . . . is the only interpretation supported by the plain language of the statute." *BellSouth Telecomms., Inc.*, 252 F.3d at 1187.

2. In the decision below, a divided panel upheld the FCC's interpretation that (1) Section 253(a) preempts fees that exceed a locality's costs of processing applications and managing rights-of-way, and (2) Section 253(c)'s preservation of "fair and reasonable compensation" protects only fees based on "the calculation of actual, direct costs." App. 28a-35a. Thus, according to the Ninth Circuit, Section 253(c) does not

preserve any fees that would otherwise be preempted under Section 253(a).

The Ninth Circuit's construction of the relationship between the preemptive scope of Section 253(a) and the safe harbor of Section 253(c) therefore conflicts with the First, Second, Third, Fifth, Eighth and Eleventh Circuits' interpretation of the clear text and structure of Section 253.

3. The Ninth Circuit's reading of Section 253(c) also conflicts with this Court's precedent on statutory savings clauses, which is especially critical for preemption statutes. "[T]he purpose of Congress is the ultimate touchstone in every preemption case. . . . Congress' intent, of course, is primarily discerned from the language of the pre-emption statute and the statutory framework surrounding it." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) (citations and internal quotation marks omitted).

In Section 253(a), Congress preempted fees that would prohibit or have the effect of prohibiting the provision of telecommunications services, unless those fees fell within Section 253(c)'s safe harbor for "fair and reasonable compensation." If, as the divided panel held, Section 253(a) preempts non-cost-based fees, while Section 253(c)'s "fair and reasonable compensation" safe harbor preserves only cost-based fees, then Section 253(c) would be superfluous. "A cardinal principle of statutory construction" is that "a statute ought . . . to be construed so that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or

insignificant." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004).

This Court has expressed particular hostility toward interpretations of preemption statutes that render savings clauses superfluous. By limiting the scope of savings clauses to matters that "would not be preempted," such interpretations "read[] the savings clause out of [the statute] entirely." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 741 (1985). *See also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868 (2000) ("The saving clause assumes that there are some significant number of common-law liability cases to save"); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 100 (1992). That is precisely the effect of the Ninth Circuit's decision.

4. The conflicts spawned by the Ninth Circuit's decision merit this Court's review. These conflicting interpretations throw the Section 253(c) safe harbor into question, and also threaten state and local governments' ability to receive fair and reasonable compensation for use of their rights-of-way and government-owned property thereon.

Savings clauses like Section 253(c) are critical to our system of federalism. Allowing an agency to write Congress's savings clause out of the statute represents a dangerous substitution of an un-elected agency's policy preferences for the statutory balance Congress struck between promoting federal interests and protecting state and local government authority over public property.

B. This Court should resolve the circuit conflict over the meaning of "fair and reasonable compensation" under Section 253(c).

1. In conflict with the Ninth Circuit's conclusion that "fair and reasonable compensation" under Section 253(c) is limited to cost recovery, at least one other circuit has determined that "fair and reasonable compensation" includes rent-based compensation. In *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000) (*TCG Detroit*), the Sixth Circuit ruled that a municipality's particular gross revenue-based fee for use of the rights-of-way "is 'fair and reasonable compensation,' within the meaning of the Act." *Id.* at 624-25.

The decision below confirms a divide in how the circuits have addressed non-cost-based compensation under Section 253(c). Citing *TCG Detroit* and an earlier Ninth Circuit decision, the Second Circuit explained that "[t]he two other circuits that have addressed the question have split." *TCG N.Y., Inc.*, 305 F.3d at 78 (2d Cir. 2002) (citing *TCG Detroit*, 206 F.3d at 624-25; *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1179 & n.19 (9th Cir. 2001) (*City of Auburn*), *overruled on other grounds by San Diego*, 543 F.3d 571 (*en banc*)). The Second Circuit, however, ultimately declined to reach the "difficult" question of "whether 'reasonable compensation' can include gross revenue fees." *Id.* at 79. Likewise, when the Tenth Circuit was presented with this same issue, it too did not resolve it, finding that the fee at issue "fails even the totality of the circumstances test for 'fair and reasonable'" adopted by the Sixth Circuit. *Qwest Corp. v. City of Santa Fe*, 380

F.3d 1258, 1272-73 (10th Cir. 2004). Indeed, the need for clarification is evident from the Ninth Circuit's inconsistent approach to this question—first observing, in *dicta*, that non-cost-based fees are "objectionable," *City of Auburn*, 260 F.3d at 1179 & n.19; then "declin[ing to construe *Auburn*] . . . to mean that all non-cost based fees are automatically preempted," *Qwest Commc'ns Inc. v. City of Berkeley*, 433 F.3d 1253, 1257 (9th Cir. 2006), *overruled on other grounds*, *Sprint*, 543 F.3d at 578; and now limiting Section 253(c)'s safe harbor to cost recovery fees.

2. In addition to conflicting with the Sixth Circuit's interpretation of "fair and reasonable compensation" as used in Section 253(c), the Ninth Circuit's decision upsets Congress's preservation of local authority over rights-of-way and municipal facilities in the rights-of-way. Absent specific federal or state law to the contrary, localities are permitted to charge rent for access to the public rights-of-way and other municipal property thereon, and that rent is not limited to cost recovery. *See City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893) (noting that the fees paid to a municipality for the use of its rights-of-way were rent, not a tax). Indeed, Congress has endorsed non-cost-based rents for use of rights-of-way, even in areas where it has imposed federal limits on state and local authority. In the context of cable television franchises, for instance, federal law preserves localities' authority to impose a non-cost-based franchise fee for use of the rights-of-way to provide cable service, so long as the fee does not exceed five percent of a cable operator's gross

revenue from providing cable services. 47 U.S.C. §542. Those fees are "essentially a form of rent: the price paid to rent use of public rights-of-way." *City of Dallas v. FCC*, 118 F.3d 393, 397 (5th Cir. 1997); *see also* H.R. Rep. No. 98-934, at 26 (1984) (explaining that franchise fees are "for the operator's use of the public ways").

3. When Congress intends to empower the FCC to regulate rates, it has said so specifically. 47 U.S.C. §205. And when Congress wants to limit rates for communications service providers' access to third party facilities to cost recovery, it has also stated so with specificity. In Section 224 of the Communications Act, Congress required that rates charged by utilities for access to their "pole[s], duct[s], conduit[s], or right-of-way" be "just and reasonable," 47 U.S.C. §224(a)(4), (b), a statutory phrase "which is defined in terms of recovery of additional costs," *TCG N.Y., Inc.*, 305 F.3d at 78. In Section 253, however, Congress used different language and did not confine compensation to cost recovery. *Id.*; *TCG Detroit*, 206 F.3d at 624-25. Particularly given Congress's longstanding awareness and acceptance of state and local governments charging rent for private use of their rights-of-way, Section 253(c)'s broadly worded preservation of "fair and reasonable compensation" does not reflect an intent to limit fees to cost recovery. *See Chamber of Com. of the U.S. v. Whiting*, 563 U.S. 582, 599 (2011) ("Absent any textual basis, we are not inclined to limit so markedly the otherwise broad phrasing of the saving clause").

C. A federal agency may not transform a preemption provision into a federal rate regulation regime mandating private commercial access to municipal property.

If allowed to stand, the Ninth Circuit's decision to limit fees to cost, coupled with the FCC's creation of a uniform $270/year threshold above which fees are presumptively unlawful, App. 23a-26a, establishes a nationwide federal rate regulation scheme for access to municipal assets that requires communities in one part of the country to subsidize deployments in other parts of the country. Indeed, the stated purpose of the *Small Cell Order* is to "stimulate" the deployment of services in economically unattractive jurisdictions at the expense of jurisdictions charging market rates where services are actually being deployed. *See* App. 78a-79a. But Section 253's language reflects Congress's straightforward intent to prevent a locality from imposing excessive fees or other requirements that prohibit service in its own jurisdiction. By upholding the FCC's reading of Section 253 as a license for it to create a nationwide cross-subsidization rate regulation scheme for access to municipal property, the Ninth Circuit set a dangerous precedent for agency overreach.

1. The Ninth Circuit acknowledged that "[t]he FCC did not base its fee structure on a determination that there was a relationship between particular cities' fees and prohibition of services." App. 26a. Instead, the divided panel upheld the FCC's conclusion that whether a fee "ha[s] the effect of prohibiting" a

provider's ability to provide services, 47 U.S.C. §253(a), depends on the relationship between the amount of the fee and a locality's cost of processing applications and managing rights-of-way. According to the majority, an above-cost fee has the effect of prohibiting services, even if the fee does not have the effect of prohibiting services in the jurisdiction where that fee is imposed.

As Judge Bress explained in his dissent, that is not what the statute says. A fee "may well prohibit service, but that is because of the financial toll it inflicts, not because it exceeds the city's costs." App. 67a (Bress, J., dissenting in part). While the Ninth Circuit and FCC may believe it is good policy for localities to only recover their costs, that policy preference is unmoored from the statute's language. Congress's sole focus in Section 253 is on whether a jurisdiction's fee (or other requirement) has the effect of prohibiting an entity's ability to provide services in that jurisdiction.

2. The divided panel also accepted the FCC's argument that all above-cost fees have the effect of prohibiting service because lowering such fees to costs in some jurisdictions "*could* result in carriers reinvesting" the savings in other jurisdictions. App. 28a-29a. (emphasis added). But, as Judge Bress pointed out, that reasoning "lacks a limiting principle." *Id.* Relatedly, the panel majority's reliance on speculative impacts also creates a direct conflict with the Eighth Circuit's *St. Louis* decision, which requires a factual showing of the prohibitory effect of any non-cost based fee. *St. Louis*, 477 F.3d at 533-34. Any fee—no matter how small—will impose costs on a provider, reducing

the amount of money that a provider may (or may not) otherwise invest in providing services elsewhere. "But it does not follow that every type of fee rises to the level of an 'effective prohibition,' which is the line Congress drew in the Telecommunications Act." App. 68a-69a (citing *Cal. Payphone Ass'n*, Memorandum Report and Order, 12 FCC Rcd. 14191, 14209 (1997)). *Accord Iowa Utils. Bd.*, 525 U.S. at 390 n.11 (1999) (disagreeing "that a business can be impaired in its ability to provide services—even impaired in that ability 'in an ordinary, weak sense of impairment'—when the business receives a handsome profit but is denied an even handsomer one" (internal citation omitted)).

Although little evidence or economic theory supports the FCC's suspect claim that reducing fees in an area where services are already provided will lead wireless providers to voluntarily devote the savings to deploy facilities in other, economically unattractive areas, the critical problem is that Congress never granted the FCC authority to construct a nationwide, cross-subsidizing rate regulation regime for access to municipal property. That some specific authorization was required is apparent given the significant federalism interests involved: If Congress had intended for Oregon municipalities to subsidize deployment in rural Maine through compelled lower-than-market rates for use of Oregon municipalities' public assets, one would expect some hint of that in the statute. Instead, the straightforward language of Section 253(a) preempts state or local requirements that have the effect of prohibiting carriers' ability to provide service

within the state or locality's jurisdiction, whether through imposing excessive fees or other requirements. Yet after the Ninth Circuit's decision, jurisdictions with market-based, rather than cost-based, fees will find their fees preempted under Section 253 even if providers are able to, and in fact do, provide services in their jurisdictions. This Court's intervention is necessary to restore Section 253's scope to that which Congress intended and to prevent a federal agency from transforming a preemption provision into a license to fabricate a nationwide cross-subsidizing rate regulation regime for municipal assets.

D. The decision to preempt state and municipal proprietary actions conflicts with precedent and raises constitutional issues.

A federal requirement that state and local governments must make their property available at cost in furtherance of a federal policy raises serious constitutional concerns. Neither Section 332(c)(7) nor 253 evinces any congressional intent to compel states and localities to enter into the business of leasing their rights-of-way and property like streetlights to private parties. To reach a contrary conclusion, the FCC and Ninth Circuit ignored this Court's presumption that Congress preempts only state and local regulatory conduct, but not their conduct as property owners, absent a clear statement.

1. This Court has cautioned that "[i]n the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests . . . this Court will not infer such a restriction" in a preemption statute. *Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I. Inc.*, 507 U.S. 218, 231-32 (1993) (*Boston Harbor*). Sections 253 and 332(c)(7) contain no such express or implicit indication, the former applying only to "legal requirements" and the latter reaching only "regulatory actions." Accordingly, until the decision below, the circuits addressing the issue have held that "the Telecommunications Act does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity." *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002) (*Sprint Spectrum L.P.*); *accord Superior Commc'ns v. City of Riverview*, 881 F.3d 432, 444-45 (6th Cir. 2018) ("§253 is inapplicable" where the city acted "in its capacity as a property owner"); *Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 201 (9th Cir. 2013) ("the [Telecommunications Act] . . . does not address a municipality's property rights as a landowner."). In other words, Sections 253 and 332(c)(7) cannot preempt any state or local conduct without first determining that the particular conduct at issue is regulatory, and not proprietary, in nature.

2. Contrary to the approach taken by other circuits, the Ninth Circuit permitted the FCC to categorically preempt a vast range of state and local

government conduct relating to rights-of-way *and* municipal facilities in the right-of-way with the sweeping conclusion that "[m]unicipalities do not regulate rights-of-way in a proprietary capacity." App. 45a.

The preemptive reach of the Ninth Circuit's decision is substantially amplified because it permitted the FCC to lump municipal property in the rights-of-way (*e.g.*, streetlights, signs and traffic signals) together with municipal rights-of-way. The decision below therefore threatens the ability of municipalities to act in a proprietary capacity with respect to any of these kinds of municipal facilities—a threat carrying substantial ramifications that the Ninth Circuit failed to grasp.

3. The Ninth Circuit upheld the FCC's sweeping declaration about the non-proprietary nature of municipal interests in rights-of-way and infrastructure. App. 186a-187a. This reasoning conflicts with this Court's precedent making clear that the proprietary or regulatory nature of a state or local government action depends on the particular action in question—for instance, the government acts in a proprietary capacity when it is participating in a market—*not* the government's motive. *Reeves, Inc. v. Stake*, 447 U.S. 429, 432 (1980); *compare Boston Harbor*, 507 U.S. at 232 (finding that a certain state act "constitutes proprietary conduct" and was thus not preempted by the National Labor Relations Act), *with Wis. Dep't of Indus., Labor & Human Rels. v. Gould, Inc.*, 475 U.S. 282, 289 (1986) (finding that a different state act was "tantamount to

regulation" and thus preempted by the National Labor Relations Act).

Take, for example, the price charged for installing private commercial facilities on public property. Whether to grant others access to one's property, and under what conditions and at what prices, are quintessentially proprietary decisions. *See Sprint Spectrum L.P.*, 283 F.3d at 421 (explaining that "a private individual . . . would plainly have the right simply to refuse to" allow another to install facilities on his property, as well as "the right to decline to lease the property except on agreed conditions"). Just like any other property owner, municipalities have proprietary interests in whether to grant access to their property and the rates for such access. *See id.* ("The [public] School District has the same right in its proprietary capacity as property owner . . . ").

Yet neither the Ninth Circuit nor the FCC considered the range of different actions that states and local governments might take before concluding that their interests were, by definition, only regulatory. Neither considered that localities may not wish to lease space on traffic signals because of complicating operational factors, because of the alterations required to the facilities, or because of the burden created if a community must enter into a new leasing business subject to federal regulation. Nor did the Ninth Circuit or FCC consider the differences in state law regarding the scope and nature of local governments' property interests in the rights-of-way and governmentally-owned fixtures located thereon. This Court has long recognized that

"[p]roperty interests are created and defined by state law." *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 451 (2007) (quoting *Butner v. United States*, 440 U.S. 48, 55 (1979)). The record before the FCC confirmed the range of state laws regarding interests in the rights-of-way, including state law that gives governmental bodies property interests in rights-of-way. *See*, *e.g.*, LGER at 756-759 (Delaware Department of Transportation "has both proprietary and regulatory authority over the State's rights of way"); Tex. Transp. Code, §202.052 (authorizing Texas Department of Transportation to lease a highway asset or space above or below a highway provided the asset is not needed for highway purposes and the department received *fair market value* for the asset, subject to authorized exceptions).

4. By failing to engage in the fact-specific analysis other circuits have applied when evaluating preemption under Sections 253 and 332, the Ninth Circuit created a loophole through which federal agencies may circumvent this Court's *Boston Harbor* presumption, and substantially expand federal powers, by simply declaring that local actions with respect to rights-of-way and municipal facilities thereon are "regulatory" and subject to preemption without specific Congressional authorization.

The effect of the Ninth Circuit's decision is to affirm the FCC's transformation of a straightforward preemption statute into a license to commandeer state and local rights-of-way and facilities for a federal purpose in contravention of U.S. Const., amend. X. *See*

Printz v. United States, 521 U.S. 898, 935 (1997) ("Congress cannot compel the States to enact or enforce a federal regulatory program"). While the decision below has immediate and significant impacts on state and local authority to control access to and receive fair compensation for small wireless facilities' use of their rights-of-way, its potential implications regarding federal agency preemption of state and local control over their public property are far broader. Whether the court below properly construed Sections 253 and 332(c)(7) as giving the FCC such sweeping authority over state and local government property is worthy of this Court's review.

III. This case is a good vehicle for review.

Consideration of the Ninth Circuit ruling below offers the proper vehicle for the Court to provide guidance to constrain the FCC and other agencies from aggrandizing their authority beyond that permitted under the plain language of their governing statutes and basic principles of federalism. And clarifying the substantive standards of Sections 253 and 332(c)(7) will provide much-needed guidance to local governments and industry members on the proper balance between federal, state and local authority that Congress struck at a time when hundreds of thousands of deployments governed by these provisions will occur.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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