No. 15-3291

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THE STATE OF TENNESSEE,
***Petitioner*,**

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
Intervenor
v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
***Respondents*,**

ELECTRIC POWER BOARD OF CHATTANOOGA; CITY OF WILSON, NORTH CAROLINA
***Intervenors*.**

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF OF PETITIONER, THE STATE OF TENNESSEE

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REQUEST FOR ORAL ARGUMENT

Petitioner the State of Tennessee ("Tennessee") believes that this case presents straightforward issues that can readily be decided as a matter of law in Tennessee's favor. Nonetheless, Tennessee respectfully requests oral argument, pursuant to 6 Cir. R. 34(a), to respond to any questions that the Court may have.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the State of Tennessee's challenge to *In the Matter of City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq., The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601*, FCC 15-25 (rel. Mar. 12, 2015) ("Order") (P.A.1-116) under Section 402(a) of the Communications Act of 1934 ("Communications Act"), 47 U.S.C. § 402(a), and 28 U.S.C. §§ 2342(1) and 2344. The Order became effective upon release, Order ¶ 185 (P.A.76), and Petitioner timely filed its petition for review in this Court on March 20, 2015.

STATEMENT OF THE ISSUES

1. Under the Constitution, does the federal government have the power to rewrite Tennessee law to redefine the geographical area within which its units of local government may provide services?

(a) Does re-drawing territorial boundaries for local government violate the State's sovereignty?

(b) Can Congress authorize a unit of local government created by the State to exercise powers not vested in that unit by the State?

2. If Congress possesses the power to redefine the territory within which a State-created unit of local government may operate, does Section 706 of the

Telecommunications Act of 1996, 47 U.S.C. § 1302, constitute the requisite "plain statement" of its intent to exercise that authority?

3. Does Section 706 grant the FCC any independent authority, or is it a hortatory statement about how the FCC should use its existing authority and regulatory tools?

STATEMENT OF THE CASE

This appeal challenges the validity of an Order by the Federal Communications Commission ("FCC" or "Commission") pertaining to the provision of broadband services by State political subdivisions. *See* Order ¶¶ 3-4 (P.A.3-4). State laws in Tennessee and North Carolina grant municipal utilities limited authority to provide broadband services. Tenn. Code Ann. § 7-52-601; N.C. Gen. Stat. § 160A-340 *et seq*. In Tennessee, a municipal electric plant is authorized to provide Internet services, but only "within its [electric] service area." Tenn. Code Ann. § 7-52-601. Likewise, North Carolina allows municipalities to provide broadband services, subject to several conditions. N.C. Gen. Stat. §§ 160A-340 *et seq*.

On July 24, 2014, two municipal broadband providers, the Electric Power Board of Chattanooga, Tennessee ("EPB") and the City of Wilson, North Carolina ("Wilson") filed petitions with the FCC seeking to expand their authority to offer broadband. Order ¶ 17 (P.A.6). In their Petitions, the EPB and Wilson asserted

that their geographically limited grants of authority, and other procedural requirements, constituted "barriers" to broadband deployment that should be preempted by the FCC. Petition of the Electric Power Board of Chattanooga, WC Docket No. 14-116, at 1 (Jul. 24, 2014) ("EPB Petition") (P.A.400); Petition of the City of Wilson, WC Docket No. 14-115, at 2 (Jul. 24, 2014) ("Wilson Petition") (P.A.637).

On March 12, 2015, the FCC released the Order granting the petitions. The FCC agreed that the Tennessee and North Carolina laws constituted "barriers" to broadband deployment. Order ¶ 5 (P.A.4). The Order asserted that Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302, gives the agency both the authority and the duty to preempt such "barriers." *Id.* ¶ 10 (P.A.5). In particular, the Order excised from the Tennessee Code the phrase "within its [electric] service area," authorizing the EPB to offer broadband services State-wide. *Id.* ¶¶ 1, 77 (P.A.2, 38).

Two commissioners dissented. Commissioner Pai concluded that the Order "usurp[ed] fundamental aspects of state sovereignty," ignored Supreme Court precedent, and exceeded the FCC's authority. Order, Pai Dissent at 100-113 (P.A.100-113). Likewise, Commissioner O'Rielly concluded that the Order relied on an "illogical and tortured" reading of Section 706 that would vest the FCC with

"carte blanche" to take almost any action to promote broadband. *Id.*, O'Rielly Dissent at 114-115 (quotations omitted) (P.A.114-115).

On March 20, 2015, the State of Tennessee timely filed a petition for review of the Order. The State of Tennessee asks this Court to set aside the FCC's action and confirm the State's sovereignty over its subordinate units of government.

SUMMARY OF THE ARGUMENT

The United States Constitution is distinguished by the importance of federalism, a dual sovereign system in which the States are united under a federal government of enumerated—and limited—powers. There is nothing more central to the sovereignty of a State than how it chooses to establish, direct, and structure its subordinate instrumentalities.

The people's elected representatives in Tennessee authorized the creation of municipal electric systems and further empowered these municipal entities to provide broadband Internet services within the boundaries of their service areas. This limited grant of authority reflects the judgment of Tennessee's legislature about how best to structure its own internal government entities. In the Order, however, the FCC overrides Tennessee's choices, empowering municipalities to offer Internet services *outside* of their service areas. Far from being a simple matter of preemption, as the FCC claims, this intervention between the State and its subordinate entities is a manifest infringement on State sovereignty.

For years, the FCC recognized that it did not have the power to intrude in such State functions by giving to subordinate entities powers that the State withheld. The Supreme Court upheld this position in a 2004 case raising issues nearly identical to those here. In 2014, however, the FCC changed course, and publicly invited localities to petition the Commission to void state limits on municipal authority. The EPB and Wilson answered the FCC's invitation. Each filed a petition asking the agency to use federal law to do what their State governments refused: expand their authority to provide broadband services throughout their States, free from restriction.

The FCC sided with the EPB and Wilson, concluding that their States' geographically limited grants of authority and other requirements constituted "barriers" to broadband deployment that must be preempted. But by rewriting Tennessee and North Carolina State laws to expand municipal powers, the FCC infringes upon an inviolable aspect of State sovereignty, exceeds the agency's statutory authority, and contradicts controlling Supreme Court precedent.

The Order is an affront to State sovereignty, and it cannot stand. Courts have long understood the Constitution to preserve certain rights to the States, free from federal interference. A State's ability to establish subordinate subdivisions and prescribe their authority is a hallmark of State sovereignty. Neither Congress nor the FCC can direct a State as to the structure or authority of the organs of State

government. By stripping the States of authority to delineate the territorial reach of their subdivisions, the Order runs afoul of core constitutional principles and disrupts the carefully calibrated balance of power between the federal government and the States. Basic federalism principles compel rejection of the Order as an unacceptable intrusion into state sovereignty.

The FCC claims authority to take this sweeping action and presents the issue as a simple matter of preemption. The FCC is wrong. The federal government has no power to insert itself between a State and its subordinate entities, so this Court need not reach the questions of agency authority and whether traditional preemption analysis is relevant. But even if the Court goes beyond the core constitutional issues, the FCC's Order is unlawful.

To support its vast and novel claim to preemptive power here, the FCC points to Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302.[1] But the FCC's attempt to shoehorn into Section 706 such extraordinary authority to reorder State law fails for several reasons. *First*, the FCC can point to nothing in the statute's language that meets the Supreme Court's "plain statement"

[1] Section 706(a) instructs the FCC and State regulatory commissions to "encourage" broadband deployment to all Americans "by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 1302(a). Section 706(b), in turn, provides that the FCC "shall take immediate action to accelerate deployment of" advanced telecommunications capabilities "by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." *Id.* § 1302(b).

requirement for allowable intrusions into areas of state sovereignty. *Gregory v. Ashcroft*, 501 U.S. 452 (1991). This case represents a substantially greater invasion of State sovereignty than what was at issue in *Gregory*, but any intrusion upon a State's internal affairs requires, at a bare minimum, an unmistakably clear articulation by Congress. The Supreme Court has specifically held that intrusions upon municipal provision of communications services must at the very least meet the *Gregory* "plain statement" rule. *Nixon v. Missouri Mun. League*, 541 U.S. 125 (2004). The Court found in *Nixon* that even expressly preemptive language in another section of the 1996 Act, Section 253, did not meet this standard. Section 706, which does not mention preemption, lacks the requisite "plain statement," and for that reason, the Order must fail.

The FCC attempts to evade the controlling *Nixon* opinion by drawing a specious distinction between State *bans* on municipal communications services, which the agency acknowledges are subject to *Gregory*, and State *limitations* on municipal broadband, which the Commission asserts are different because they involve "communications policy" rather than core issues of sovereignty. Order ¶ 13 (P.A.6). This reasoning fails. A ban is merely a broader form of limitation, and States have just as much interest in prescribing where and how their subdivisions act as they do in whether their subdivisions take an action in the first place. Thus,

the same federalism concerns addressed in *Gregory* and *Nixon* doom the FCC's action here.

Second, Section 706 not only falls short of the *Gregory* standard, it is not an independent grant of authority *at all*. Read correctly, Section 706 is simply a hortatory policy statement. Until recently, the FCC recognized this. The agency's reversal on this point has been as abrupt as it has been profound. Suddenly, the FCC has discovered a vast reservoir of regulatory power that it can use to do nearly anything, so long as action is in service of increasing broadband deployment. The text of Section 706 has not changed; what has changed is the agency's desire to regulate matters that it previously recognized were beyond its reach. It defies "common sense" that Congress would have empowered the agency with such broad authority "in so cryptic a fashion." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 160 (2000). Indeed, the alleged grant of power here is so cryptic that it lay undiscovered for nearly 20 years after the statute was enacted.

STANDARD OF REVIEW

Courts review questions about the proper balance between State and federal power as legal questions suitable for plenary review. *See Gregory*, 501 U.S. at 457-64; *Nat'l Oilseed Processors Ass'n v. OSHA,* 769 F.3d 1173, 1179 (D.C. Cir. 2014). Even in the limited instances where the federal government may be Constitutionally permitted to affect traditional State authority over internal

subdivisions, Courts demand an "unmistakably clear statement" of Congressional intent before finding that the national legislature has authorized preemption. *See Gregory*, 501 U.S. at 460-61; *Nixon*, 541 U.S. at 140-41; *see also Bond v. U.S.*, 134 S. Ct. 2077, 2089 (2014). This determination is purely legal, and the Court's alone to make. Because the FCC must point to clear statutory language authorizing its action, no deference is owed to any interpretation the Commission might proffer. *See Nixon*, 541 U.S. at 140-41.

ARGUMENT

I. THE FEDERAL GOVERNMENT CANNOT INTRUDE INTO FUNDAMENTAL AREAS OF STATE SOVEREIGNTY

Our constitutional separation of powers ensures a fundamental division between the States and the federal government, preserving certain sacrosanct areas of sovereignty for the States. The States' ability to create and define the authority of their political subdivisions is one such area. Congress's power ends at the State house door and does not extend to quintessential State functions, such as the creation and empowerment of State governmental subunits. This principle goes back to the earliest days of the Republic, and it is so well-understood that it has been rarely challenged. *See, e.g.*, *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 638 (1819) (Marshall, J.).

It is difficult to imagine a matter more clearly reserved to the States than the structure, power, and territorial reach of political subdivisions. *See Ex Parte* Letter from Alan Wilson, Attorney General, State of South Carolina, WC Docket No. 14-115, at 2 (Feb. 4, 2015) (P.A.1013) ("It is part of the state's self-governance to permit political subdivisions to perform certain acts."). Yet the Order overlooks foundational principles of our federalist system and undermines this aspect of State sovereignty. The Order purports to restructure Tennessee's political subdivisions, granting them unfettered geographic reach and authority that the Tennessee legislature withheld. If this is permissible, State sovereignty is a nullity.

A. States Have An Inviolable Right To Create And Define Their Own Political Subdivisions

Dual sovereignty "is a defining feature of our Nation's constitutional blueprint." *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002). The Constitution established a federal government of limited powers, reserving "[t]he powers not delegated to the United States" to "the States respectively, or to the people." U.S. Const. amend. X. Likewise, the Guarantee Clause ensures States' ability to operate as self-governing sovereigns by "guarantee[ing] to every state in this Union a Republican Form of Government." U.S. Const. art. IV, § 4.

Combined with the Constitution's federalist structure, these provisions respect the substantial sovereign powers of the States. *See New York v. United*

States, 505 U.S. 144, 162-63 (1992). When ratifying the Constitution, States "did not consent to become mere appendages of the Federal Government. Rather, they entered the Union 'with their sovereignty intact.'" *Fed. Maritime Comm'n*, 535 U.S. at 751(quotations omitted). With these core principles in mind, the Supreme Court has observed that the Constitution "leaves to the several States a residuary and inviolable sovereignty." *New York*, 505 U.S. at 188.

If this "inviolable sovereignty" has any meaning, it must extend to a State's right to structure its government. *See id.* at 162 ("[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions."). Indeed, the power to create and define the subdivisions for which a State is ultimately responsible has long been understood to form the bedrock of State sovereignty. *See* The Federalist No. 45, at 292-93 (Clinton Rossiter ed. 1961) ("The powers reserved to the several States will extend to . . . the internal order, improvement, and prosperity of the State."); *FERC v. Mississippi*, 456 U.S. 742, 761 (1982) ("[H]aving the power to make decisions and to set policy is what gives the State its sovereign nature."). The ability to make "fundamental . . . decisions" about the structure of its internal government is "the quintessential attribute" of State sovereignty. *FERC*, 456 U.S. at 761.

State subdivisions have no independent right to even exist, let alone act, absent State authorization. *See S. Macomb Disposal Auth. v. Washington Twp.*,

790 F.2d 500, 504 (6th Cir. 1986) ("Being a subdivision of the state, the 'State may withhold, grant or withdraw powers and privileges [from a municipality] as it sees fit.") (quoting *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923)). Thus, as this Court held, States retain "absolute control and complete sovereignty over municipalities." *City of Knoxville v. Bailey*, 222 F.2d 520, 525 (6th Cir. 1955); *see also Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 923 (6th Cir. 1998) (explaining that a State has a "fundamental interest in structuring its government"); *Hunter*, 207 U.S. at 178; *Trs. of Dartmouth Coll.*, 17 U.S. at 638.

A State's plenary right to define and change the authority of its own governmental instrumentalities is axiomatic because these public entities are "created for [the State's] purposes." *Trs. of Dartmouth Coll.*, 17 U.S. at 638; *see Hunter*, 207 U.S. at 178 (explaining that a State may "at its pleasure" alter or revoke municipal authority). After all, political subdivisions, such as municipalities, are created merely "as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them." *Hunter*, 207 U.S. at 178. The Supreme Court has explained that "'[t]he number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the state.'" *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (quoting *Hunter*, 207 U.S. at 178). Thus, municipalities may exercise only those powers that the

State "chooses to delegate to the subdivision." *City of Columbus v. Ours Garage &Wrecker Serv.*, 536 U.S. 425, 429 (2002). When it comes to ordering State subdivisions, "the State is supreme." *Hunter*, 207 U.S. at 179.

Whether derived from the structure of the Constitution, the Tenth Amendment, or the Guarantee Clause, these principles ensure that States retain an inviolable right to self-governance. *See New York*, 505 U.S. at 188; *Ours Garage*, 536 U.S. at 437. Creating and defining political subdivisions is an exercise "central to state self-government." *Ours Garage*, 536 U.S. at 437. Federal regulation of this vital State function, whether directly by Congress or a federal agency on some theory of delegated power, would contravene bedrock principles of federalism.[2]

While the Commerce Clause grants Congress power to regulate interstate commerce, *see* U.S. Const. art. I § 8, cl. 3, that power does not reach States' establishment of their own governmental subunits. *See Printz v. United States*, 521 U.S. 898, 923-24 (1997) (quotations omitted) (a law cannot be sustained under the Commerce Clause if it violates "the principle of state sovereignty"); *New York*, 505

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[2] By expanding the EPB's powers and boundaries, the Order infringes upon an inviolable aspect of State sovereignty and breaches the Constitution's guarantee of a republican form of government. *See* U.S. Const. art. IV, § 4; Laurence Tribe, AMERICAN CONSTITUTIONAL LAW 912 (3d ed. 2000) (suggesting that the Guarantee Clause "prohibit[s] federal measures that, regardless of subject matter, infringe upon the states' ability to maintain a republican government *of their choosing*") (emphasis in original). The Order dismisses Tennessee's judgment about how far to extend municipal jurisdiction, denying the State's right choose its own governmental structure.

U.S. at 176 (the Commerce Clause does not authorize Congress to "commandeer[] the legislative processes of states"). Courts routinely decline to interpret the Commerce Clause to usurp fundamental State sovereignty. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985) (the Commerce Clause retains a "significant measure" of sovereign authority for the States); *United States v. Lopez*, 514 U.S. 549, 564 (1995) (requiring valid exercises of the Commerce Clause to contemplate at least some "limitation on federal power").

The Constitution does not permit the federal government to create, reorder, or empower municipalities, which are subordinate units of State government, created at the State's pleasure and sole discretion. Congress could not do this directly, and the FCC certainly has no such power. What the FCC has forced Tennessee and North Carolina to do here is far more dramatic than even "administer[ing] a federal regulatory program," *New York*, 505 U.S. at 188; the FCC here empowers a State subdivision to offer services outside its boundaries, without authorization and contrary to the direction of its parent State.

B. The Order Overrides Tennessee's Sovereign Right To Structure Its Subdivisions

Like most States, Tennessee exercises broad control over its subordinate instrumentalities, including the EPB. Tennessee alone is responsible for defining the component subdivisions of the State, including the activities its subordinates may engage in and where they may do so.

The FCC mischaracterizes the Tennessee and North Carolina laws as being about communications policy rather than "a core state function in controlling political subdivisions." Order ¶ 13 (P.A.6). The Order offers no support for this, other than the observation that the State laws do "not limit[] the expenditures of a city" and so could not "further any core state function." *Id.*[3] But "core state function[s]" go well beyond laws that directly limit municipal expenditures. Like other geographic limitations in State law, the restriction here delineates the powers of a municipal subdivision within the context of State governance objectives. *See* Tenn. Code Ann. § 7-52-601.

In rewriting Tennessee law, the Order does much more than impose federal communications policy. It abandons past precedent and "redefine[s] the relationship between state and municipal governments," by expanding the "territorial jurisdiction of a local governmental unit." *Ex Parte* Letter from Herbert H. Slatery III, Attorney General, State of Tennessee, WC Docket No. 14-116 (Feb. 5, 2015) (P.A.1014-1015) ("Slatery Letter").

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[3] The Order is cavalier about the possibility that its mandate might result in direct costs to Tennessee taxpayers and seems to mandate that the State subsidize broadband operations even where they result in a loss. Order ¶ 62, n. 176 (P.A.31-32) (the concept of "failure" must be "something more than using taxpayer funds," and must, instead, "encompass whether the municipal broadband network is meeting the goals of the community," regardless whether it turns a profit); *id.* ¶ 65 (P.A.33-34) ("mere financial loss…itself does not demonstrate that municipal deployment is inconsistent with the goals of section 706").

1. Tennessee Has Traditionally Exercised Broad Control Over The Structure And Authority Of Subdivisions, Including The EPB

When Tennessee creates a political subdivision and delegates power to it, like any State, it does not normally hand the subdivision unlimited authority. *See, e.g.*, Ky. Rev. Stat. Ann. Title IX (delineating powers and responsibilities of counties, cities, and other local units). Rather, delegated power is tailored, geographically and functionally. By placing limits on delegated authority, Tennessee ensures that cities and other State subdivisions focus on the tasks for which they were created and do not jeopardize long-term prosperity in pursuit of peripheral ventures. At the same time, geographic limitations ensure that subdivisions and their ancillary agencies interact efficiently, and do not trip over one another to provide services to Tennessee's citizens. Tennessee's choice to establish parameters under which municipalities enter the broadband business is one example of this broader principle.

Tennessee exercised its sovereign power to create and define the authority of its political subdivisions when it established the EPB and, indeed, the City of Chattanooga itself. *See* Chattanooga City Charter § 1.1 (Tenn. Priv. Acts 1869, as amended) (establishing Chattanooga and its general powers); *see also* Tenn. Code Ann. § 7-52-103 (delegating municipalities authority to provide electric service to consumers); *see generally* Elijah Swiney, *John Forest Dillon Goes to School: Dillon's Rule in Tennessee Ten Years After* Southern Constructors, 79 TENN. L.

REV. 103 (2011) (documenting the long-standing applicability in Tennessee of "Dillon's Rule," which interprets local government authority narrowly). The EPB is an instrumentality of the City of Chattanooga, governed by State law. *See Harris v. City of Chattanooga,* 507 F. Supp. 374, 375 (N.D. Ga. 1981).

Created by a private act of the Tennessee General Assembly in 1935 that amended Chattanooga's city charter, the EPB "was established . . . for the sole purpose of providing electric power to the people of the greater Chattanooga area." *See* EBP, Company History, *available at* https://www.epb.net/about/our-company-and-history/; EPB Petition at 30 (P.A.429). The EPB is part of Tennessee's considered approach to providing electric power throughout the State. To ensure that electrical power in Tennessee is distributed efficiently, the Tennessee General Assembly developed a regulatory framework governing both municipal power plants, *see* Tenn. Code Ann. § 7-52-101 *et seq.*, and electric co-operatives, *see id.* § 65-25-201 *et seq*.[4] In addition to their core function of providing electric power in their respective geographic regions, municipal electric systems like the EPB have limited authority to provide telecommunications services in areas that do not have existing small telephone cooperatives. *See id.* §§ 7-52-401, 7-52-403(b).

[4] Municipal power boards like the EPB serve over 70% of Tennessee's electric consumers. *See* Tennessee Municipal Electric Power Association, *available at* http://www.tmepa.org/History.htm (last visited Sept. 11, 2015). Complemented by electric co-operatives, Tennessee's regulatory approach ensures that electricity is delivered across the State.

With taxpayers on the financial hook for municipal broadband experimentation, Tennessee's General Assembly approached municipal broadband carefully, in a series of pilot projects. The State allowed municipal broadband service, but set careful parameters within which municipal power boards may enter the business. In particular, Tennessee law grants a municipal power board like the EPB authority to provide broadband service only "within its [electric] service area." Tenn. Code Ann. § 7-52-601. Enacted in 1999, Section 601 joined a long list of Tennessee statutes that define the authority and operating areas of particular subdivisions, agencies, and offices. *See, e.g.*, *id.* §§ 5-19-101 (authorizing counties to provide rubbish collection services to areas "within the county"); 5-7-105 (requiring courthouse and county buildings to be erected "within the limits of the county town" they serve); 7-52-403(b) (limiting service area in which municipal electric systems may offer telecommunications services).

Over the past two decades, the Tennessee General Assembly has repeatedly considered proposals by the EPB and others to expand municipalities' authority to provide broadband services outside of their service areas. *See* EPB Petition at 33-34 (P.A.432-433). Reaffirming its considered approach, the Tennessee General Assembly recently weighed, but declined to enact, two bills that would have broadened Section 601's grant of authority to include the entire State. *See* H.B.

1303, 109th Gen. Assemb. Reg. Sess. (Tenn. 2015); S.B. 1134, 109th Gen. Assemb. Reg. Sess. (Tenn. 2015).

Tennessee is not alone. States have reached varied judgments about promoting broadband. Some States decline to authorize any government-owned broadband networks. *See, e.g.*, Mo. Rev. Stat. § 392.410(7); Nev. Rev. Stat. §§ 268.086, 710.147. Others, like Tennessee, grant municipalities limited authority to enter the broadband marketplace. *See, e.g.*, Ark. Code Ann. § 23-17-409; Ala. Code § 11-50B-1; Cal. Gov. Code § 61100(af); Colo. Rev. Stat. § 29-27-201; Fla. Stat. § 350.81; Mich. Comp. Laws Ann. § 484.2252. These States stop short of prohibiting municipal broadband, but adopt regulations like public hearing, voting, or business plan approval requirements, in addition to specifying geographic areas a municipality may serve.

Different approaches to municipal broadband may reflect States' philosophies.[5] "Local self-government is one of the most cherished and fiercely contested ideas in the pantheon of principles by which Americans organize their system of governance." Dale Krane et al., HOME RULE IN AMERICA 1 (2001). "[T]he line between an appropriate sphere of local action and the authority of state government . . . has been a source of continuous conflict in state capitols." *Id.*

[5] *See, e.g.*, David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003) (describing state political culture reflected in evolution of "Dillon's Rule" interpreting local government authority narrowly); Swiney, 79 TENN. L. REV. at 116-19.

This is why "different state governments assign different responsibilities to different local governments," *id.* at 3, and "the degree of independence possessed by local governments varies from state to state." *Id.* at 4. Such preferences are not merely academic: States "regularly come to the rescue of local governments facing fiscal distress." David R. Berman, *State-Local Relations: Partnerships, Conflict and Autonomy, in* MUNICIPAL YEAR BOOK 2005, 55-56 (Int'l City/Cnty. Mgmt. Ass'n ed. 2005).

Against this backdrop, it is not surprising that State legislatures have taken different approaches to municipal broadband, as they do with all questions of local authority. States' decisions can reflect different considerations, including fiscal responsibility, concern over intrastate subsidies, potential conflicts of interest, and spending priorities, *see, e.g.*, Comments of the National Conference of State Legislatures, WC Docket Nos. 14-115, 14-116, at 5 (Aug. 28, 2014) (P.A.749); Comments of United States Telecom Association, WC Docket Nos. 14-115, 14-116, at 9-11 (Aug. 29, 2014) (P.A.978-980), in order to remain "attentive to the needs of their citizens." Comments of Glen Casada, Representative, General Assembly, and Ron Ramsey, Lt. Governor and Speaker, General Assembly, State of Tennessee, WC Docket No. 14-116, at 1 (Aug. 20, 2014) (P.A.744); *see also Ex Parte* Letter from Bill Haslam, Governor, State of Tennessee, WC Docket No. 14-116 (Feb. 6, 2015) (P.A.1017).

2. The Order Redefines Tennessee's Political Subdivisions

The FCC's Order rewrites State law to empower municipalities to offer broadband services throughout Tennessee. The FCC excised from the Tennessee Code four critical words, "within its service area," redefining the EPB's territorial jurisdiction. Order ¶¶ 1, 77 (P.A.2, 38). Indeed, the Order arguably extends the EPB's reach beyond Tennessee's borders, into Georgia.[6] Expanding the EPB's authority to provide broadband services beyond its service area, the Order "re-defin[es] the relationship between state and municipal governments," and is a remarkable expansion of federal authority. Slatery Letter at 1 (P.A.1014).

Whether, how, and where Tennessee authorizes its subordinate government units to provide broadband service falls squarely within the State's inviolable sovereign power. Nothing is more fundamental to State sovereignty than a State's ability to manage its own subdivisions. *See Ours Garage*, 536 U.S. at 437; *New York*, 505 U.S. at 188; *Miller*, 144 F.3d at 923. Tennessee's limited grant of broadband authority represents the policy judgment of the General Assembly about how to organize the State's internal operations. A State's choices about what kind of activity its municipalities undertake—and where—are not only an area

[6] The EPB offers services in northern Georgia. EPB Petition at 16 (P.A.415). Under the Order's logic, EPB can serve all of Georgia, and any Georgia law restricting the EPB's ability to offer broadband services would be subject to preemption. *See* Order ¶ 16 (P.A.6) (making clear that the FCC "will not hesitate" to preempt other State laws).

traditionally regulated by the States; they are decisions "central to state self-government." *Ours Garage*, 536 U.S. at 437.

Congress cannot directly regulate the structure of State subdivisions, or grant organs of State government power withheld by the State. The Order purports to do just this, running afoul of basic constitutional principles and elementary notions of State sovereignty. On this basis alone, this Court should vacate the Order.

II. EVEN IF THE FEDERAL GOVERNMENT COULD INTRUDE INTO THIS AREA, CONGRESS HAS NOT GRANTED THE FCC AUTHORITY TO DO SO.

As explained above, the Federal government is not Constitutionally empowered to rewrite State laws governing the scope of municipal powers. There is thus no act of Congress that could give the FCC the authority that it claims here. But even if Congress *did* have the power to invade this aspect of the State's internal administration, it could only do so after plainly stating that was its intention. It has not done so here. This lack of a plain statement of Congressional intent deprives the FCC of any claim of authority and is an alternative basis for vacating the Order. *See Brown & Williamson*, 529 U.S. at 125 (concluding that an agency "may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law'") (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

The FCC has constructed its claim to authority here solely on Section 706 of the Telecommunications Act of 1996, 47 U.S.C. §1302. *See* Order ¶¶ 10, 183-84 (P.A.5, 76). This represents a dramatic reversal. For the first time since the Act's enactment nearly 20 years ago, the FCC now views Section 706(a)'s instruction to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability" by using "regulating methods that remove barriers to infrastructure investment" not only as an affirmative grant of authority, but as a sweeping grant of preemptive power. *Id.* ¶¶ 9, 134 (P.A.4, 57). The FCC also relied on Section 706(b), which provides that if the FCC concludes that advanced telecommunications services are not being deployed to all Americans in a "reasonable and timely basis," it shall "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." *Id.* ¶ 134 (P.A.57). The FCC concluded that "section 706 authorizes the Commission to preempt State laws that specifically regulate the provision of broadband by the State's political subdivision" whenever it concludes those laws "stand as barriers to broadband investment and competition." *Id.* ¶ 11 (P.A.5). The FCC asserted that Tennessee's limited grant of municipal broadband authority is a "barrier[] to broadband infrastructure investment and that preemption will promote competition

in the telecommunications market by removing statutory barriers to such competition." *Id.* ¶ 5 (P.A.4).

To skirt the limits recognized in binding Supreme Court cases, the FCC acknowledged that it lacked authority to preempt state *bans* on municipal broadband, but it concluded that once a State authorizes *some* municipal broadband service, Section 706 obligates the FCC to remove *any* limitation that could serve as a barrier to deployment. *See id.* ¶ 11 (P.A.5). The FCC claimed authority to preempt whenever "a state has authorized municipalities to provide broadband, and then chooses to impose regulations on that municipal provider in order to effectuate the state's preferred communications policy objectives." *Id.* By expanding a Tennessee municipality's limited grant of authority to provide service, however, the Order far exceeds the FCC's statutory authority and contravenes controlling Supreme Court precedent.

A. The FCC Has Historically Recognized That It Must Respect States' Power Over Their Instrumentalities

This is not the first time the federal government has been asked to intervene in State control over subdivisions' ability to offer communication services. As here, some municipalities in the past have chafed at State limitation. But the FCC has traditionally respected States' authority, recognizing that it cannot interfere with State regulation of municipal communications services because States may "limit the authority of their political subdivisions in all . . . respects." *In re Public*

Utility Commission of Texas, et al. Petitions for Declaratory Ruling, 13 F.C.C.R. 3460, 3547 ¶ 184 (1997). Thus, "states maintain authority to determine, as an initial matter, whether or to what extent their political subdivisions may engage in proprietary activities." *Id.* at 3548 ¶ 186.

In 2001, the Missouri Municipal League brought to the FCC a question nearly identical to the one in the present Order. There, the League asked the agency to preempt State bans on municipal broadband services, invoking Section 253 of the Communications Act, which is aimed at removing barriers to service.[7] The FCC rejected the petition, because a State "retains *substantial sovereign power* to decide what [services] to authorize its political subdivisions to undertake." *Missouri Municipal League Order*, 16 F.C.C.R. 1157, 1158 ¶ 5 (2001) (emphasis added). The FCC acknowledged that the petition implicated core areas of State sovereignty, and held that a federal statute could not "preempt traditional State

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[7] Section 253 provides, in relevant part:

> "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." 47 U.S.C. § 253(a).
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> "If, . . . the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission *shall preempt the enforcement* of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." *Id.* § 253(d) (emphasis added).

powers unless Congress has made its intention to do so unmistakably clear in the language of the statute." *Id.* Finding no clear statement in Section 253, the Commission concluded that it could not "preempt the enforcement of [the State law] to the extent that it limits the ability of municipalities or municipally owned utilities, acting as political subdivisions of the State of [Missouri], from providing telecommunications services or facilities." *Id*. at 1161-62 ¶ 9.

The Supreme Court affirmed the FCC, explaining that "federal preemption meant to unshackle local governments from entrepreneurial limitations" would be unusual and problematic. *Nixon*, 541 U.S. at 133. "The trouble is that a local government's capacity to enter an economic market turns not only on the effect of straightforward economic regulation below the national level (including outright bans), but on the authority and potential will of governments at the State or local level to support entry into the market." *Id.*

The Court relied on the long-standing principle that Congress must speak clearly before intruding into a State's internal affairs. *Id.* at 140-41. The Court rejected municipalities' arguments that the FCC had authority to preempt local regulations under Section 253. *Id.* With States' control over their municipalities at stake, the Court found it "highly unlikely that Congress intended to set off on such uncertain adventures" without a plain statement authorizing preemption. *Id.* at 134.

Consistent with *Nixon*, the FCC's position for the past fifteen years has been clear: States have the sovereign right and responsibility to regulate their political subdivisions' authority to offer communication services. During this time, States have been free to regulate municipal communication offerings to fit with State governance priorities.

Signaling a stark departure from the FCC's precedent, in April 2014, the FCC Chairman invited a new municipal communications proceeding, asserting FCC power to preempt State laws affecting municipal broadband. Chairman Wheeler encouraged municipalities to file petitions asking the FCC to override State law and expand municipal broadband service. *See* Remarks of Tom Wheeler, Chairman, FCC, at 5 (Apr. 30, 2014), *available at*: http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0430/DOC-326852A1.pdf. Explaining his view that the FCC "has the power . . . to preempt state laws that ban competition from community broadband," Chairman Wheeler made clear that he "intend[s] to exercise that power" to ensure that municipal broadband services are not "inhibited by state laws." *Id.*

In response, the EPB filed a petition seeking preemption of the phrase "within its service area" in Section 601 of the Tennessee Code. EPB Petition at 16 (P.A.415). "Freed from the electric service area limitation of Section 601," the EPB would be able to offer broadband services throughout Tennessee. *Id.* at 3

(P.A.402). Wilson filed a nearly identical Petition. *See* Wilson Petition at 1 (P.A.635).[8]

The FCC granted the petitions, abandoning its long-standing respect for State sovereignty. The FCC has done this without *any* statutory authorization, much less the sort of clear command that shows Congressional intent to interfere with the State's laws governing its municipalities' functions.

B. At A Minimum, A "Plain Statement" Of Congressional Intent Would Be Required Here

This case involves direct and specific interference with a State's power to arrange and empower its own internal subdivisions. As such, preemption is simply the wrong analytic lens with which to view the issues presented here. The federal government lacks any authority to interpose itself between Tennessee and its political subdivisions. But the Supreme Court has recognized that even where Congress *does* possess some authority to impact internal State government affairs, the power to preempt a State's ordering of its internal government affairs is subject to a higher standard of scrutiny than a typical preemption analysis. *See Gregory*, 501 U.S. at 460.

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[8] In North Carolina, municipalities are granted limited authority to enter the broadband marketplace. *See* N.C. Gen. Stat. § 160A-340. Among other things, municipalities must establish separate "enterprise funds" to provide broadband services, publish independent audit reports, and hold public hearings before offering services. *Id.* §§ 160A-340.1(a)(2), 160A-340.3.

What distinguishes cases like *Gregory*—and compels more exacting scrutiny—from the typical case is the impact preemption has on the structure of State government. Unlike preemption cases involving ordinary economic regulation, preemption here would override Tennessee's ordering of its own political subdivisions. *See* Part I.B, *supra*. For this reason, even where the Constitution permits federal interference in State affairs, preemption can only be found if Congress made its intention "unmistakably clear in the language of the statute." *Gregory,* 501 U.S. at 460 (internal citations omitted). *Gregory's* "plain statement rule" acknowledges that "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461; *see Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 733 (6th Cir. 2013) (noting that the plain statement rule "compels Congress to legislate deliberately and explicitly before departing from the Constitution's traditional distribution of authority").

There should be little doubt that if Congress has any power here, *Gregory* controls. The Supreme Court addressed a nearly identical question and determined that federal intrusion into a State's power over municipal subdivisions triggers

Gregory's heightened standard. *See Nixon*, 541 U.S. at 140-41. At a bare minimum, that is the standard that this Court must apply in this case.[9]

In *Nixon*, as here, the Court considered whether the FCC had authority to adjust municipal power to provide communications. There, the issue was whether Section 253 of the Communications Act allowed the FCC to preempt a Missouri law prohibiting municipalities from providing telecommunications services. *See id.* at 128-30. Because Missouri's ability to determine whether municipalities could provide services was an inherent aspect in "traditional state authority to order its government," the Court applied *Gregory* and required a plain statement authorizing the FCC to act. *Id.* at 140-41 ("[F]ederal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of [a] plain statement"). Even though Section 253 expressly grants the agency some preemptive authority, *see* 47 U.S.C. § 253(d),[10] the Court found it unclear whether that power extended to State

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[9] *Nixon* involved the Supreme Court affirming the FCC's prior, correct belief that in matters such as these, the agency should respect State sovereignty. The Court was able to affirm the FCC's decision using *Gregory*, and did not address the question of whether this was an area of inviolable State sovereignty that permitted no Federal intrusion under any circumstances.

[10] Under Section 253, "[n]o State or local statute or regulation . . . may 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). If the Commission

limitations on municipally-provided communication services. *Nixon*, 541 U.S. at 141. Because the statute lacked the requisite plain statement, the Court rejected claims that the FCC could preempt State laws regulating local government services. *See id.*at 140-41.

The Order confronts this same scenario, yet it brushes *Gregory* and *Nixon* aside. Tellingly, the Order spends no time contending that Section 706 satisfies *Gregory's* plain statement requirement. Nor could it. There is no plausible argument that the text of Section 706 meets *Gregory's* exacting standard. *See* Part II.C, *infra*. As a result, the FCC takes a different, and more difficult, tack to distinguish *Gregory* and *Nixon*. But the FCC's arguments conflate routine preemption analysis with the heightened standard under *Gregory,* and in any event are foreclosed by *Nixon.*

1. The FCC's Attempts to Distinguish *Gregory* Are Baseless

Attempting to distinguish *Gregory*, the Order asserts the plain statement rule is inapplicable because of the "history of significant federal presence" in broadband. Order ¶ 155 (P.A.65) (citing *United States v. Locke*, 529 U.S. 89 (2000)). The FCC reasons that the "presumption against preemption" does not apply "when the State regulates in an area where there has been a history of

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determines that a State or local government has violated this command, Section 253 provides that "the Commission *shall preempt the enforcement* of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." *Id.* § 253(d) (emphasis added).

significant federal presence." *See id.* ("Because we read section 706 to give preemptive authority for State laws that target the regulation of broadband once a State has permitted cities to provide service, as opposed to laws that go to the 'historic police powers of the States,' the *Gregory* clear statement rule does not apply in this context.").

The FCC's citation to *Locke* is inapposite. The agency conflates *Gregory's* heightened plain statement rule, which applies where preemption would impact a State's internal government structure, with traditional preemption analysis, which applies in generic preemption cases. As *Nixon* makes plain, a reviewing court must first determine whether the federal law infringes on areas of traditional state sovereignty. If it does, the court applies *Gregory's* plain statement rule. *See Nixon,* 541 U.S. at 140-41. That is why the Supreme Court's *Nixon* decision does not even mention *Locke*, despite the significant history of federal presence in interstate telecommunications (at issue in *Nixon*).[11]

Only when there is no question of intrusion on State sovereignty do courts perform the standard preemption analysis, which includes a general "presumption against preemption." This can be seen from *Locke* itself, which did not involve issues of State sovereignty. *Locke* concluded that State regulations governing maritime operations were preempted by federal statutes pertaining to maritime

[11] The Order offers no explanation for the Supreme Court's failure to address *Locke* in *Nixon*.

tanker transports. 529 U.S. at 100-03,116-17. A traditional field and conflict preemption case, *Locke* held that the "'assumption' of nonpre-emption" that applies generally in *all cases "*is not triggered when the State regulates in an area where there has been a history of significant federal presence." *Id.* at 108.

Locke has no application in a case that triggers *Gregory's* plain statement standard. The plain statement rule applies where the federal government "threaten[s] to trench on the States' arrangements for conducting their own governments," *Nixon* at 541 U.S. at 140, which are areas of the highest traditional State concern. It is axiomatic that there is not "a history of significant federal presence" in these areas; that is the very reason that *Gregory* demands a plain statement from Congress to preempt. *Locke*, 529 U.S. at 108; *see Gregory*, 501 U.S. at 460. A case that applies *Gregory* thus, by definition, excludes *Locke.*

The FCC's analysis of whether this is an area of traditional State concern begins and ends with its erroneous application of *Locke.*[12] A careful examination of *Gregory* and its progeny makes clear that the FCC's Order infringes upon a deep-rooted aspect of State sovereignty: a State's ability to "structure . . . its government." *Gregory*, 501 U.S. at 460. *Gregory's* plain statement rule has been

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[12] Even if *Locke* were relevant, the Order would fail under it. The presumption against preemption may not apply "when the State regulates in an area where there has been a history of significant federal presence." *Locke*, 529 U.S. at 108. Here, there is no federal history of regulating broadband, much less municipal broadband. *See Comcast Corp. v. FCC*, 600 F.3d 642, 654 (D.C. Cir. 2010).

applied in cases such as this one, where the federal government intrudes upon a State's ability to order its internal governmental units and expands municipal powers. *See Nixon,* 541 U.S. at 140-41; *City of Abilene v. FCC*, 164 F.3d 49, 53 (D.C. Cir. 1999) (clarifying that the plain statement requirement applies when "the federal statute is susceptible of a construction that intrudes on State sovereignty"). Likewise, the Supreme Court recently invoked *Gregory's* plain statement requirement where a federal statute threatened to undermine State criminal jurisdiction, an area it deemed "of traditional state responsibility." *Bond*, 134 S. Ct. at 2089. The "triggering condition" for applying the plain statement rule is simply that preemption would affect a "traditionally sensitive area[]" of State sovereignty such as the structure of the State government. *Hayden v. Pataki*, 449 F.3d 305, 325 (2d Cir. 2006).

Here, there can be no serious question that the Order undermines traditional State sovereignty and political determination. Expanding the powers of State subdivisions—as the Order purports to do—not only invades a "traditional prerogative of the states," *Ours Garage*, 536 U.S. at 428, it also undermines a "quintessential attribute" of State sovereignty. *FERC*, 456 U.S. at 761. A State's power to define the authority of subdivisions it creates, and for which it is responsible, is the bedrock of sovereignty. It is "[t]hrough the structure of its government" that "a State defines itself as a sovereign." *Gregory*, 501 U.S. at 460.

With sovereignty at stake, the Constitution demands, *at a minimum*, clear, unambiguous language authorizing such extraordinary federal interference. *See* Part I.A, *supra*.[13]

2. The FCC's Attempt to Avoid *Nixon* Must Be Rejected

Nixon's holding and logic compel the conclusion that the FCC's Order is impermissible. Answering a nearly identical question, *Nixon* rejected the use of preemption under Section 253 of the Communications Act to overturn a State ban on municipalities offering telecommunications service. *Nixon* confirms the applicability of *Gregory's* exacting plain statement standard here and makes clear that the FCC does not have the expansive power it claims.

Nevertheless, the FCC tries to distinguish the Missouri law in *Nixon* from the Tennessee and North Carolina laws to claim that *Nixon* "does not [apply] . . . or foreclose the possibility of preemption under Section 706." Order ¶ 160 (P.A.67). Under the FCC's reading of *Nixon*, the fact that Missouri *entirely* prohibited its municipalities from offering service is the lynchpin to the Court's holding. The

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[13] Accepting the FCC's interpretation of Section 706 would raise serious constitutional questions about the limits of Congressional authority. *See* Part I.A., *supra*. "[W]here an otherwise acceptable construction of a statute would raise constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988); *see Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001). As in *Gregory*, this Court should apply the plain statement rule to "avoid a potential constitutional problem." *Gregory*, 501 U.S. at 464.

"primary concern" driving the *Nixon* Court, the FCC asserts, was that "if Missouri's flat ban . . . were preempted, '[t]he municipality would be free of the statute, but freedom is not authority, and in the absence of some further, authorizing legislation the municipality would still be powerless to enter the telecommunications business." *Id.* ¶ 162 (P.A.68) (citing *Nixon*, 541 U.S. at 135).

The FCC argues that *Nixon* is distinguishable because under Tennessee and North Carolina laws, municipalities have *some* authority to provide broadband services. Unlike the flat ban in *Nixon*, Tennessee and North Carolina have granted municipalities limited authority to provide broadband services, subject to conditions. *See, e.g.*, Tenn. Code Ann. § 7-52-601. In the FCC's view, because Tennessee and North Carolina have granted municipalities a limited "underlying authorization" to provide broadband service, preemption here would not "leave the municipality powerless to enter the . . . business," thus ameliorating the "primary concern" the *Nixon* Court had with preemption. Order ¶¶ 161, 162 (P.A.68). The Order concludes that States may prohibit municipalities from offering broadband altogether, but may not *condition* grants of power once made.

This attempt to distinguish *Nixon* fails. First, the fact that *Nixon* addressed a flat ban was not critical; *Nixon* focused on the lack of clear statement authorizing the FCC to override State sovereignty. Second, the federalism problems identified in *Nixon* apply with equal force here.

a. The Distinction Between A Flat Ban and Limited Grant of Authority Is Untenable

The FCC misreads *Nixon*. The *Nixon* Court rested its decision on the absence of a plain statement of preemptive power in Section 253, not the fact that the Missouri law was a flat prohibition on service. *See Nixon*, 541 U.S. at 140-41. The *Nixon* Court emphasized that preemption would "trench on the states' arrangements for conducting their own governments." *Id.* at 140. Concerned by agency interference with State sovereignty, the Court invoked the plain statement rule to analyze Section 253 and conclude that it did not empower the FCC to preempt State law.

The distinction the FCC draws between flat bans and limited grants of authority has no foundation in *Nixon*. The *Nixon* Court did not frame the issue as turning on the scope of the Missouri law. Rather, the Court focused on FCC authority. *See id.* at 128-29. The Court explained that Section 253 "authorizes preemption of state and local laws and regulations expressly or effectively 'prohibiting the ability of any entity' to provide telecommunications services." *Id.* at 128 (citing 47 U.S.C. § 253). The question was whether the phrase "any entity" in Section 253 "includes [a] State's own subdivisions," so as to permit the FCC to override a State's authority to restrict its "political inferiors'" delivery of telecommunications services. *Id.* at 128-29. The Court found it "farfetched" to think Congress would interfere with State authority without "any clearer signal

than the phrase 'ability of any entity.'" *Id.* at 138. The fact that the Missouri law was a flat ban rather than a partial restriction played no role in the decision.[14]

Nixon's discussion makes clear that the FCC lacks the preemptive authority claimed here. Preempting Tennessee's law would contravene *Nixon*'s admonishment that "[t]here is, after all, no argument that the Telecommunications Act of 1996 is itself a source of federal authority granting municipalities local power that state law does not." *Id.* at 135. Preemption here does much more than scuttle a State's "separate communication policy goals," as the FCC claims. Order ¶ 156 (P.A.66). It expands the territorial jurisdiction of a local governmental unit and "manifestly infringe[s] on the sovereignty of a state." Slatery Letter at 2 (P.A.1015). By rewriting Tennessee law, the FCC does what *Nixon* said it could not: grant the EPB power to offer municipal broadband throughout the State—authority the Tennessee General Assembly withheld. *See* EPB Petition at 33-34 (P.A.432-433).

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[14] Taken to its logical conclusion, the FCC's reasoning suggests it could use its authority under Section 253 to preempt Tennessee's regime, despite *Nixon's* holding that Section 253 did not contain the proper statement of Congressional intent. This anomalous result illustrates that the Commission's analysis began in the wrong place. *Nixon* shows that the inquiry must begin—and end—with the agency's authority under federal law. The FCC acknowledges this problem, but offers no answer to it, noting only that it "do[es] not decide whether Section 253 could, consistent with *Nixon*, be interpreted to preempt state laws that empower municipalities to provide telecommunications – advanced or otherwise – but then place regulatory burdens on those municipal providers." Order ¶ 165, n.446 (P.A.69).

b. *Nixon's* Federalism Concerns Make Clear That Preemption Is Impermissible Here

The Order runs afoul of another aspect of *Nixon*. In explaining that Section 253 lacked a plain statement authorizing the FCC to preempt, the Court employed several hypotheticals to "illustrate the implausibility" of preemptive authority. *Nixon*, 541 U.S. at 138-39. These hypotheticals underscored the Court's federalism concerns, which apply with equal force here.

First, the *Nixon* Court expressed concern with "federal creation of a one-way ratchet" whereby a State "could give the power, but . . . could not take it away later." *Id.* at 137. This troubled the Court because it "would mean that a State that once chose to provide broad municipal authority could not reverse course." *Id.* So too, here. Tennessee grants municipal power boards authority to offer broadband service within their service areas. By preempting the geographical limitation, the FCC puts States on notice that once they authorize municipal broadband service of any kind, they may not revoke or limit that authority. While private providers could "come and go" from the marketplace at will, States would be left in shackles, unable to leave the market "for the law expressing the government's decision to get out would be preempted." *Id.*

Second, the Order poses the same danger of "uncertain adventures" in funding that some States have declined to authorize. *See id.* If the FCC is permitted to open the doors for municipalities to offer broadband service "where

would the necessary capital come from?" *Id.* at 136. For, as the *Nixon* Court explained, there "is no contention that the Telecommunications Act of 1996 by its own force entails a state agency's entitlement to unappropriated funds from the state treasury." *Id.* So too here. Without State legislation authorizing these expanded offerings and providing funding, municipalities in Tennessee and North Carolina may still "be powerless" to expand their service offerings. *Id.* While a municipality may "claim a federal law sanction to provide expanded broadband service, it would lack state authorization to do so." Slatery Letter at 3 (P.A.1016).

Third, recognizing FCC authority claimed in the Order would result in the same "national crazy quilt" that the *Nixon* Court warned against. *Nixon,* 541 U.S. at 136. While States that have chosen to ban municipal broadband services or take no action would remain free from the FCC's preemptive clutch, others (like Tennessee and North Carolina) that have authorized limited municipal broadband experiments will, owing to federal preemption, find themselves saddled with larger municipal programs. The resulting "crazy quilt" would spring "not from free political choices but from the fortuitous interaction of a federal preemption law with the forms of municipal authorization law." *Id.* In the end, States may choose to forego authorizing municipal broadband ventures in the first instance, a result

that contravenes Section 706's purpose.[15] As in *Nixon*, such a result must be based on a clear and unambiguous signal of Congress' intent. *Id.* at 138.

Finally, fulfilling *Nixon's* prophecy, the FCC confirms it will seek to promote broadband deployment without regard to competing policy or funding issues. The Commission states that Section 706 "directs us specifically to focus on measures to enhance broadband deployment" regardless of other "municipal priorities." Order ¶ 71 (P.A.37); *see also supra* n.3. Unlike the FCC, however, the Tennessee General Assembly *does* have to balance all of these "municipal priorities," which is why it alone is best suited to make these judgments. Order ¶ 71 (P.A.37). State and municipal budgets are finite; if the State must spend money subsidizing broadband, that may take away from other budgetary priorities that the State believes are important. A State's continued funding of municipal trash services, affordable housing, and other services could be characterized as "barriers" to broadband deployment if they divert funding from broadband.

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[15] The practical effect of the FCC's Order is to prohibit limited experimentation with broadband; even the smallest concession to municipal broadband service opens a Pandora's box of federal intervention. This creates a perverse incentive for States to decline to authorize any municipal broadband entry, undermining the FCC's goal of encouraging broadband deployment under Section 706. If, as the FCC professes, it seeks to encourage broadband deployment and competition for all Americans, it would be "absurd" and "futile" to deter States from authorizing any municipal broadband. *Nixon*, 541 U.S. at 138. Such an absurd outcome must be avoided. *See id.*; *see also Bryant v. Dollar Gen. Corp.*, 538 F.3d 394, 402 (6th Cir. 2008) ("Established principles of statutory interpretation caution against interpretations that lead to . . . an absurd result. . .").

The FCC's Order attempts to skirt these issues, arguing that it is not holding *in this Order* that all laws indirectly affecting broadband are preempted. *Id.* ¶ 150 (P.A.63). This is cold comfort, because the agency identifies no real limits on its claimed authority. The most it will say is that "[a]lthough a law could have an indirect effect . . . it *may not* rise to the level of a restriction on competition or barrier to broadband deployment." *Id.* ¶ 149 (P.A.63) (emphasis added). Moreover, the Order's admission that the agency believes it must preempt in favor of broadband deployment *regardless of the effect* that this has on other State programs and priorities, *id.* ¶ 71 (P.A.37), underscores the need for caution in granting power of this kind to a single-issue, unelected federal agency. Indeed, this is one of the primary reasons that *Nixon* held that federal preemption in an area of fundamental State sovereignty is subject to a heavier burden. Courts, and the States, must be certain that this degree of interference with traditional State authority is what Congress intended.

C. Section 706 Lacks A Plain Statement Of Congress's Intent To Insert the Federal Government Between The States And Municipal Subdivisions

As explained below, Section 706 is not an independent grant of regulatory authority. But even assuming, *arguendo*, that Section 706 confers *some* regulatory authority, the FCC must identify language in Section 706 that makes Congress's intent to "alter the usual constitutional balance between the States and the Federal

Government . . . unmistakably clear" in order to meet the plain statement standard of *Gregory* and *Nixon*. *Gregory*, 501 U.S. at 460. The FCC made no attempt to do so and there is no serious argument that such language exists.

Broad, general language will not satisfy *Gregory's* plain statement requirement. *See Haight v. Thompson*, 763 F.3d 554, 570 (6th Cir. 2014) (holding broad statutory language entitling inmate plaintiffs to "appropriate relief" did not satisfy *Gregory's* "imperative of clarity" standard so as to permit recovery of monetary damages from the States); *Jackson v. Sedgwick Claims Mgmt. Servs. Inc.*, 731 F.3d 556, 568-69 (6th Cir. 2013) (concluding that RICO could not supplant a State law because "RICO lacks a clear statement of Congress's intent" to federalize traditional State law tort claims). Under *Gregory*, the language authorizing preemption must be specific and unmistakable. Courts must ask whether an interpretation that infringes on a State's sovereignty would be "plain to anyone reading the [statute]." *Gregory*, 501 U.S. at 467. In short, federal law "may not be interpreted to reach into areas of State sovereignty unless the language of the [statute] compels the intrusion." *City of Abilene*, 164 F.3d at 52.

"[C]lear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation." *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) (plurality); *see Bond*, 134 S. Ct. at 2090 (concluding that a "general definition does not constitute

a clear statement that Congress meant the statute to reach" traditional state responsibilities like the regulation of local criminal conduct). For this reason, "it is incumbent upon the federal courts to be certain of Congress's intent" before concluding that federal law will intrude upon the power of a State to structure its government. *Gregory*, 501 U.S. at 460. *Gregory's* plain statement rule addresses "what to do when the text fails to indicate whether Congress focused on the effect on State sovereignty. *Gregory's* answer is—do not construe the statute to reach so far." *City of Abilene*, 164 F.3d at 53. Here, the FCC did the opposite.

Section 706 does not "point unequivocally to a commitment by Congress" to empower the FCC to preempt State laws governing their own municipalities. *Nixon*, 541 U.S. at 141. In fact, it does not mention preemption at all. The statute falls well short of establishing a plain statement of Congressional intent to permit preemption here.

The FCC cites subsections (a) and (b) of Section 706 as authority, *see* Order ¶¶ 134-36 (P.A.57-58), but neither provision contains any suggestion of preemptive intent. Section 706(a) directs the FCC and State regulatory commissions to "encourage" broadband deployment "by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 1302(a). Section 706(a)'s broad reference

to "other regulating methods," like Section 253's vague reference to "any entity," does not provide the plain statement necessary to authorize federal encroachment on a State's management of its subdivisions. *See Gregory*, 501 U.S. at 460; *Nixon*, 541 at 140-41.

Construing Section 706(a) as granting the FCC preemptive power directly conflicts with the statute's plain language. Section 706(a) expressly contemplates a role for State regulatory action, directing both the FCC and "each State commission with regulatory jurisdiction over telecommunications services" to encourage broadband deployment.[16] 47 U.S.C. § 1302(a). Explicitly preserving a role for State regulatory action, Section 706(a) belies any plausible argument that Congress intended to preempt State laws and exclude State commissions from accelerating broadband deployment. To the contrary, Congress envisioned that States would play an equal role in the promotion of broadband.

Section 706(b) adds that the FCC "shall take immediate action to accelerate deployment of [advanced telecommunications capabilities] by removing barriers to infrastructure investment and by promoting competition in the telecommunications market," if it finds, upon inquiry, that such capabilities are not being deployed to "all Americans in a reasonable and timely fashion." *Id.* § 1302(b). The FCC interprets Section 706(b) as permitting it to immediately take any action it deems

[16] This is one of the many reasons that Section 706 is best interpreted as a hortatory instruction, rather than a grant of power. *See* Part III, *infra*.

necessary, without limitation. But a direction to take "immediate action" of an unspecified type is the kind of broad, general language that courts have found does not meet *Gregory*. *See Bond*, 134 S. Ct. at 2090. The Act does not define what "immediate action" means, and thus is "hardly forthright enough to pass *Gregory*." *Nixon*, 541 U.S. at 141. Reading the vague instruction in Section 706 as encompassing the preemptive power that the FCC has asserted here "brush[es] aside the ordinary meaning" of the statute and "sweep[s] in" regulatory powers that Congress did not contemplate. *Bond,* 134 S. Ct. at 2091.

The legislative history of Section 706 confirms that Congress considered and rejected granting the FCC preemptive power under Section 706. When the Senate passed the bill that later became the Telecommunications Act of 1996, the legislation contained a precursor to Section 706 that would have authorized the FCC to "preempt State commissions that fail to act" to ensure the availability of advanced telecommunications services. *See* S. 652, 104th Cong. § 304(b) (1995).[17] But Congress ultimately declined to grant the FCC this power, deleting the provision. *See* H.R. Rep. No. 104-458, *reprinted in* 1996 U.S.C.C.A.N. 10, 225 ("Joint Conference Report"). A legislative deletion "strongly militates against a

[17] By removing any express preemption provision from the legislation, Congress retreated from even attempting to grant the FCC any preemptive authority at all.

judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974).

Moreover, if Section 253 fell short of the high hurdle imposed by the plain statement rule, then Section 706 certainly cannot clear it. *See Nixon*, 541 U.S. at 140-41. Unlike Section 706, Section 253 expressly grants the FCC preemptive authority. Section 253(a) prohibits State and local regulations that "have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a) (emphasis added). If the Commission determines that a State or local regulation violates Subsection (a)'s prohibition, Subsection (d) provides that the Commission "*shall preempt* the enforcement of such statute, regulation, or legal requirement . . ." 47 U.S.C. § 253(d) (emphasis added). Even with this strong statement specifically contemplating preemptive authority, the Court *still* held that Section 253 did not contain the plain statement *Gregory* requires to permit preemption. *See Nixon*, 541 U.S. at 140-41; *id.* at 138 ("We think it farfetched that Congress meant § 253 to [permit preemption under *Gregory*] . . . in the absence of any clearer signal than the phrase 'ability of any entity'").[18] Section 706, perhaps even more than Section

[18] Section 601(c) of the Telecommunications Act of 1996 also counsels against the FCC's claim to preemptive authority. That Section states that the Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." 47 U.S.C. § 152(c). Section 601(c) confirms that *Gregory's* rigorous plain statement standard has not been met.

253, is "not limited to one reading, and neither statutory structure nor legislative history points unequivocally to a commitment by Congress" to permit the FCC to preempt State laws governing municipalities. *Id.* at 141.

Finally, if any doubt remained that Section 706 lacks the required clear statement, the D.C. Circuit's recent discussion of the statute should put the issue to rest. *See Verizon v. FCC*, 740 F.3d 623, 637 (D.C. Cir. 2014). While the D.C. Circuit's conclusion that Section 706 grants regulatory authority is erroneous for reasons set forth below, *see* Part III, *infra*, even the D.C. Circuit conceded in its analysis under *Chevron* step one that the language of Section 706 is, at most, ambiguous with respect to the authority it grants the agency.

The D.C. Circuit explained that "Congress ha[d] not 'directly spoken' to the question of whether section 706(a) is a grant of regulatory authority" at all, let alone whether the statute grants the FCC preemptive authority. *Id.* at 638; *see also AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 397 (1999) ("It would be a gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity"). A statute that is ambiguous under *Chevron* cannot contain the "unmistakabl[e]" statement of Congressional intent necessary to clear *Gregory. Gregory*, 501 U.S. at 460-61. As a dissent to the Order recognized, it would defy logic for Section 706 to be "at the same time both 'ambiguous' as to whether it gives the FCC any authority at all and 'unmistakably

clear' as to Congress's intent to allow the FCC to preempt state restrictions on municipal broadband." Order, Pai Dissent at 112 (P.A.112).

III. SECTION 706 DOES NOT INDEPENDENTLY GRANT ANY REGULATORY AUTHORITY, LET ALONE THE EXPANSIVE POWER CLAIMED HERE

Not only does Section 706 fail to provide the plain statement of Congressional intent required under *Gregory* and *Nixon*, it does not grant the FCC *any* independent authority. Section 706 is hortatory—not delegatory—in nature. Yet the Commission here relies *only* on Section 706.[19] Thus, even if the Court were to conclude that *Nixon* and *Gregory* do not require a plain statement of congressional intent here, the FCC still lacks statutory authority to preempt Tennessee's regime.

A. Section 706 Is Not An Independent Grant Of Authority

When an agency examines a long-existing statute and claims to discover the power to alter a fundamental regulatory paradigm, courts are skeptical, because Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001); *see also Utility Air Regulatory Grp. v.*

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[19] The ordering clause cites only Section 706 and Sections 151 and 152 of the Communications Act as the relevant statutory authority. Order ¶ 183 (P.A.76). Sections 151 and 152 are merely jurisdictional—establishing the FCC, 47 U.S.C. § 151, and the Act's reach, *id.* § 152. *See Comcast Corp.*, 600 F.3d at 645-47 (explaining that Title I of the Communications Act is only a "general jurisdictional grant" and not an enunciation of delegated authority). The Commission's claimed authority for the Order hangs entirely on Section 706.

EPA, 134 S. Ct. 2427, 2444 (2014) (requiring Congress to "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance'"). For this reason, courts have held that newfound statutory interpretations that "bring about an enormous and transformative expansion" in an agency's regulatory authority "without clear congressional authorization" are unreasonable. *Utility Air,* 134 S. Ct. at 2444.

Although the history, text, and structure of Section 706 confirm that the statute should not be read as an affirmative delegation of authority, the D.C. Circuit recently found that the statute may grant *some* independent authority. *See Verizon*, 740 F.3d at 635 (concluding that the FCC's interpretation of Section 706 as granting it some limited authority represented "a reasonable resolution of a statutory ambiguity"). This conclusion was *dicta*, unnecessary to the holding of the case (which was that anti-blocking and anti-discrimination rules impermissibly imposed common carrier regulation); it thus should not serve as persuasive authority here. But the conclusion is also erroneous, because it ignores the absurd results that follow if Section 706 is deemed an independent grant of authority.[20]

[20] Judge Silberman's concurrence cited "state laws that prohibit municipalities from creating their own broadband infrastructure" as an example of a "barrier" to investment, but the majority did not consider FCC authority over municipal broadband ventures. *Verizon*, 740 F.3d at 660 n.2 (Silberman, J., concurring in part and dissenting in part). *Verizon* did not address whether the FCC might use Section 706 to claim preemptive powers and thus does not lend support for the FCC's sweeping action here. *See also* Part III, *infra*.

The FCC itself treated Section 706 as an exhortation for almost twenty years, only recently seizing upon it to conjure unprecedented powers. *Compare Advanced Services Order*, 13 F.C.C.R. 24012, 24044 (1998) ("[W]e agree . . . that Section 706(a) does not constitute an independent grant of . . . authority") *with* Order ¶ 143 (P.A.60) ("Sections 706(a) and 706(b) show a broad delegation of authority to use all available regulatory tools."). Historically, the Commission understood that "section 706 does not constitute an independent grant of authority" but rather "directs the Commission to use the authority granted in other provisions." *Advanced Services Order*, 13 F.C.C.R. at 24045, 24047 ¶¶ 69, 77.[21] As a result, the Commission has in the past always cited Section 706 among a litany of sources of authority, rather than making any attempt to rely on it alone. *See, e.g., Connect America Fund Order*, 29 F.C.C.R. 8769, 8804 ¶ 111-112 (2014).

In a radical departure, the FCC has now interpreted Section 706 as an affirmative grant of unprecedented regulatory powers to achieve its desired policy objectives. *See* Order ¶ 10 (P.A.5). Without "clear congressional authorization,"

[21] Under the *ejusdem generis* canon of interpretation, the catchall "other regulating methods that remove barriers to infrastructure investment" must refer to preexisting authority. *Yates v. United States*, 135 S. Ct. 1074, 1086 (2015). The Commission's reliance on Section 706 merely begs the question of which underlying authority permits the action at issue. The Commission points to none.

this vast expansion of the FCC's regulatory authority must be rejected. *Utility Air*, 134 S. Ct. at 2444.[22]

The problems in reading Section 706 as a grant of authority are evident from the provision's text and structure.[23] When Congress intends to grant the FCC authority to act, it makes the delegation plain in the text of the statute. *See, e.g.*, 47 U.S.C. § 227(b)(2) ("The Commission shall prescribe regulations . . ."); *id.* §§ 205(a), 251(d)(1), 251(h)(2), 254(g), 227(b)(2). Yet Section 706 does not contain any of the hallmarks of a delegation: it does not expressly authorize the FCC to engage in rulemaking, to prescribe conduct, to proscribe conduct, or to enforce compliance.

Further, Congress enacted Section 706 as a free-standing provision, outside of the FCC's enabling legislation, the Communications Act. *See In the Matter of*

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[22] The Commission cannot take any action, preemptive or otherwise, where it is has not been authorized by Congress. *See New York v. FERC*, 535 U.S. 1, 18 (2002). Under any standard of review, the Commission's claim of preemptive authority here would fail.

[23] The Tenth Circuit's recent decision in *In re FCC 11-61* is not to the contrary. *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), *cert denied*, 1358 S. Ct. 2072 (2015). That decision involved an Order reforming the FCC's universal service regime, wholly unlike the FCC action here. *Id.* at 1038-40. Rather than relying solely on Section 706 to justify the order, the FCC cited other statutory provisions to justify its revised rules. *Id.* at 1052 (noting that the FCC relied on Section 706 only "as an alternative basis" and "to the extent necessary" to support the Order). In reviewing the FCC's Order, the Court did not squarely decide whether Section 706 is a grant of authority, much less whether the FCC possesses the preemptive authority asserted here. *See id.* at 1054.

Preserving the Open Internet, 25 F.C.C.R. 17905, 17950 n.248 (2010) (recognizing that Section 706 is "not part of the . . . Act"). It was originally codified as a note to a policy statement in 47 U.S.C. § 157 and today is housed within the Broadband Data Improvement Act in chapter 12 of title 47. *See* 47 U.S.C. § 1302. Thus, the provisions of the Communications Act that empower the FCC to engage in rulemaking,[24] order conduct,[25] and enforce compliance[26] are inapplicable to Section 706. By choosing to leave Section 706 as a free-standing enactment, Congress made plain that the provision was only a "general instruction to the FCC" to accelerate broadband. *NCTA v. Gulf Power Co.*, 534 U.S. 327, 339 (2002); *cf.* 47 U.S.C. § 1403 (directing the Spectrum Act to be implemented and enforced as "part of the Communications Act of 1934"). Congress reaffirmed that choice by *twice* amending Section 706 after the FCC had announced its previous interpretation of the statute as being merely hortatory, without in any way correcting this interpretation. Pub. L. No. 107-110, 115 Stat. 1425, Title X, § 1076(gg), (2002); Pub. L. No. 110-385, 122 Stat. 4096, Title I, § 103(a), (2008); S. Rep. No. 110-204, at 3 n.3 (2007). This serves as "persuasive evidence" that the

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[24] *See, e.g.,* 47 U.S.C. § 201(b) (permitting the FCC to make "such rules and regulations as may be necessary" to carry out the provisions of the Act).

[25] *See, e.g.*, 47 U.S.C. § 409(e) ("[T]he Commission shall have the power to require by subpoena the attendance and testimony. . .").

[26] *See, e.g.,* 47 U.S.C. § 151 (providing the FCC "shall execute and enforce the provisions of [the Act]").

FCC's prior interpretation "is the one intended by Congress." *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827-28 (2013) (quotations omitted).

Construing Section 706 as more than an exhortation would produce absurd results, particularly in the context of preemption. By its terms, Section 706(a) directs both the FCC and "each state commission with regulatory jurisdiction over telecommunications service" to "encourage the deployment" of broadband. 47 U.S.C. § 1302(a). The FCC claims that this provision applies "differently" to it and State commissions, empowering each entity to use the regulatory tools at its disposal to "encourage the deployment of broadband." Order ¶ 151 (P.A.63). But nothing in the text of the statute supports that argument. *Id.*, Pai Dissent at 107 (P.A.107). Whatever Section 706(a) might delegate to "the Commission," it also delegates to "each State commission," suggesting coterminous, not preemptive, powers. 47 U.S.C. § 1302(a); *see* Part II.C, *supra*.[27]

Reading Section 706(b) as an affirmative grant of preemptive authority likewise yields absurd results. Under the FCC's interpretation, the Commission is only authorized to act if it determines that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion. *See* Order ¶ 141 (P.A.59). But what happens if the FCC later determines that advanced

[27] *Verizon* is not to the contrary. *See Verizon*, 740 F.3d at 638. Although the D.C. Circuit noted that it was not implausible that Congress could have granted authority to State commissions, it *is* implausible that Congress granted State commissions *preemptive authority*.

telecommunications capabilities *are* being deployed? Order, Pai Dissent at 107 (P.A.107). The FCC's authority would presumably be extinguished. Would previously preempted State laws be reinstated? The Order's answer, in a footnote, is unsatisfying, for it suggests that regulatory authority, once created, never really goes away, and thus the Commission's rules and orders designed to spur broadband deployment remain in effect forever, even after their *raison d'etre* has vanished. *Id.* ¶ 137, n.374 (P.A.58). Congress could not have intended to delegate substantive authority, let alone vast preemptive authority, in such a complex way based only on a direction to take "immediate action" if the Commission identifies a problem. *See Nixon*, 541 U.S. at 139.

B. Even If Section 706 Is Found To Contain Some Grant Of Authority, That Authority Is Not Unlimited

Although the D.C. Circuit construed Section 706 to provide the FCC with *some* authority, it made clear that such authority could not be unlimited. *See Verizon*, 740 F.3d at 639 ("[W]e might well hesitate to conclude that Congress intended to grant the Commission substantive authority in section 706(a) if that authority would have no limiting principle."). The Order's explanation of the FCC's authority under Section 706 has no limiting principle. In the FCC's view, if it finds that removing any state regulation has the potential to speed broadband deployment, it is not only empowered, but *obligated* to preempt. *See* Order, O'Rielly Dissent at 115 (P.A.115) (remarking that any preemption that "may

'incent the use of the Internet' is apparently now fair game for [the] FCC" under Section 706).[28]

The logic of the FCC's sweeping approach puts at risk other provisions of Tennessee's regime governing municipalities. *See, e.g.*, Tenn. Code Ann. § 7-52-602(1) (requiring a municipal electric system to file a "detailed business plan" before it may provide broadband services); *id.* § 7-52-602(4) (requiring the municipal governing board to hold a public hearing on the provision of such services). For example, the FCC could find that requiring a "detailed business plan" is too onerous and constitutes "a barrier" to "overall broadband investment" that the agency is obliged to preempt. Order ¶ 4 (P.A.4).

The Order's reasoning likewise imperils a range of modest regulations in other States. Michigan, for instance, requires a competitive bidding process before a public entity may provide telecommunications service. The Order, however, would *require* the FCC to preempt this requirement if it concludes that preemption would "promote *overall* competition" in the broadband market. *Id.* (emphasis in original). Other States have similar restrictions that may also be at risk. *See, e.g.*, Fla. Stat. Ann. § 350.81 (requiring municipalities to provide a special business plan

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[28] And, as noted, the FCC has conceded that its calculation of whether preemption is required will take into account *only* the impact on broadband, not potential ramifications of preemption on other State priorities. *See* Part II.A, *supra.*

prior to providing communications service); Minn. Stat. Ann. § 237.19 (requiring voters to approve provision of municipal broadband).

This "boundless" claim to authority under Section 706 "compel[s] the conclusion that Congress could never have intended the provision to set forth anything other than a general statement of policy." *Verizon*, 740 F.3d at 639-40; *see Comcast Corp.*, 600 F.3d at 655(rejecting interpretation that would "virtually free the Commission from its congressional tether").

CONCLUSION

The State of Tennessee respectfully requests that the Court vacate the Order.

Respectfully submitted:

Dated: September 18, 2015

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The undersigned hereby certifies as follows:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,676 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in size 14 Times New Roman.

/s/ Joshua S. Turner

Statutory Addendum

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U.S. Const. art. IV, § 4

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. Const. amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

47 U.S.C. § 152

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A.

(b) Exceptions to Federal Communications Commission jurisdiction

Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

47 U.S.C. § 253

(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.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(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.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply--

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

47 U.S.C. § 402

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

47 U.S.C. § 1302

(a) In general

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) Inquiry

The Commission shall, within 30 months after February 8, 1996, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) Demographic information for unserved areas

As part of the inquiry required by subsection (b), the Commission shall compile a list of geographical areas that are not served by any provider of advanced telecommunications capability (as defined by subsection (d)(1)) and to the extent that data from the Census Bureau is available, determine, for each such unserved area--

(1) the population;

(2) the population density; and

(3) the average per capita income.

(d) Definitions

For purposes of this subsection:

(1) Advanced telecommunications capability

The term "advanced telecommunications capability" is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) Elementary and secondary schools
The term "elementary and secondary schools" means elementary and secondary schools, as defined in section 7801 of Title 20.

Tenn. Code Ann. § 7-52-601

(a) Each municipality operating an electric plant described in § 7-52-401 has the power and is authorized within its service area, under this part and on behalf of its municipality acting through the authorization of the board or supervisory body having responsibility for the municipal electric plant, sometimes referred to as "governing board" in this part, to acquire, construct, own, improve, operate, lease, maintain, sell, mortgage, pledge or otherwise dispose of any system, plant, or equipment for the provision of cable service, two-way video transmission, video programming, Internet services, or any other like system, plant, or equipment within or without the corporate or county limits of such municipality, and, with the consent of such other municipality, within the corporate or county limits of any other municipality. A municipality may only provide cable service, two-way video transmission, video programming, Internet services or other like service through its board or supervisory body having responsibility for the municipality's electric plant. A municipality providing any of the services authorized by this section may not dispose of all or substantially all of the system, plant, and equipment used to provide such services, except upon compliance with the procedures set forth in § 7-52-132.

(b) The services permitted by this part do not include telephone, telegraph, and telecommunications services permitted under part 4 of this chapter.

(c) Notwithstanding subsection (a), a municipality shall not have any power or authority under subsection (a) in any area where a privately-held cable television operator is providing cable service over a cable system and in total serves six thousand (6,000) or fewer subscribers over one (1) or more cable systems.

(d) Notwithstanding subsection (a), a municipality shall not have any power or authority under subsection (a) in any area of any existing telephone cooperative that has been providing cable service for not less than ten (10) years under the authority of the federal communications commission.

(e)(1) Notwithstanding this section, the comptroller of the treasury shall select, not later than August 1, 2003, a municipal electric system providing services in accordance with this part to provide, as a pilot project, the services permitted under this section beyond its service area but not beyond the boundaries of the county in which such municipal electric system is principally located; provided, that:

(A) The municipal electric system receives a resolution from the legislative body of the county regarding service in unincorporated areas of the county, or any other municipality within such county regarding service within such municipality, requesting the municipal electric system to provide such services to its residents; and

(B) The municipal electric system obtains the consent of each electric cooperative or other municipal electric system in whose territory the municipal electric system will provide such services.

(2) The comptroller shall expand the pilot project established in subdivision (e)(1) to include one (1) municipal electric system located in the eastern grand division of the state that proposes to provide services in accordance with this part. Not later than August 1, 2004, the comptroller shall select the municipal electric system pilot project pursuant to this subdivision (e)(2), subject to the requirements of subdivisions (e)(1)(A) and (e)(1)(B).

(3) The comptroller shall report to the general assembly, not later than January 31, 2008, with recommendations regarding whether the pilot projects permitted by this part should be continued or expanded to other systems. The comptroller shall evaluate the efficiency and profitability of the pilot project services of the municipal electric system in making such recommendation; provided, that the comptroller shall not so evaluate a pilot project system that is not providing service in competition with another cable service provider.

(4) There shall be no other municipal electric system selected to provide pilot project services until the comptroller issues the recommendation required by subdivision (e)(3).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Brief was served on all parties or their counsel of record through the CM/ECF system to their electronic addresses of record on this 18th day of September, 2015 if they are registered users or, if they are not, by placing a true and correct copy in the United States mail to their address of record:

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