Nos. 15-3291

IN THE 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 From an Order of the Federal Communications Commission

BRIEF OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST, IDENTITY, AND AUTHORITY TO FILE[1]

The American Legislative Exchange Council (ALEC) is the nation's largest non-partisan individual membership association of state legislators. Approximately 25% of state legislators are ALEC members. It serves to advance Jeffersonian principles of free markets, limited government, federalism, and individual liberty. ALEC has structural federalism and state constitutional interests in this litigation, reflected in its official policies and publications. In addition, ALEC filed public comments in the agency proceeding that is the source of this litigation.[2]

ALEC files this Amicus Curiae brief in support of the Petitioners and allied Intervenors, asking the Court to vacate the Order of the Federal Communications Commission ("FCC") preempting state law restrictions on local government ownership and operation of broadband networks. *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*

[1] In accordance with FRAP 29(c)(5), amicus states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amicus and its counsel has made a monetary contribution to the submission of this brief.

[2] *See* ALEC, Comments of ALEC, FCC 15-25 (Aug. 29, 2014), at http://apps.fcc.gov/ecfs/document/view?id=7521826040; ALEC, Reply to Comments of ALEC, 15-25 (Sept. 29, 2014), at http://apps.fcc.gov/ecfs/document/view?id=60000869702. *See also* Rep. Blair Thoreson and Sen. John Anderson, Letter to Chairman Wheeler (Jun 6, 2014), at: http://www.alec.org/wp-content/uploads/Wheeler_June_letter.pdf.

Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601, FCC 15-25 (rel. Mar. 12, 2015) ("Order").[3]

ALEC agrees with Petitioner's statutory and federal constitutional analysis found at pp. 9-14 of the Brief of Petitioner. ALEC believes Petitioner's arguments are correct and should be dispositive of the case. Given the traditional state power interests involving local governments that are implicated by the FCC's Order, the clear statement principle recognized in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), squarely applies. Congress nowhere, though, expressed a clear statement of intent to preempt states' unfettered discretion over their local governments.

Petitioner's analysis of why the FCC's Order is contrary to core principles of state autonomy as well as long-standing U.S. Supreme Court precedents concerning constitutional federalism warrants careful attention. *See* Brief of Petitioner, at 14-22. In this brief, ALEC adds depth to Petitioner's federalism analysis and conveys the seriousness of the principles at stake.

This brief addresses constitutional principles and public policy considerations from the perspective of the states and state legislators. State

[3] The FCC's Order, at p. 19, specifically singled out ALEC, along with a few private companies, as an organization "pressuring" states to pass legislation limiting municipal governments' ability to build broadband networks. This is simply not true. ALEC is an Internal Revenue Code 501(c)(3) non-profit organization. ALEC brings together stakeholders to discuss state-based policy models in an academic setting. *See, e.g.*, Findings of Fact, *Conclusions of Law, and Order in the Matter of the Complaint of Common Cause Minnesota Regarding [ALEC]* (February 3, 2015), State of Minnesota Campaign Finance and Public Disclosure Board. *Available at* http://www.cfboard.state.mn.us/bdinfo/investigation/02_03_2015_ALEC.pdf (last accessed September 23, 2015).

legislators swear oaths to uphold both the federal constitution and their state constitutions. As officeholders and policymakers, state legislators are uniquely attuned to principles of state structural constitutionalism. Those principles are critical to a functioning and responsible state. ALEC believes that state constitutional power dynamics between state and local governments deserve careful consideration. Such consideration was entirely absent from the FCC's Order.

It is emphatically the view of ALEC that the FCC's Order undermines the ability of states to effectively avoid local governmental conflicts of interest and similarly undermines states' ability to protect taxpayers from local governmental fiscal irresponsibility. Indeed, in ALEC's view, the FCC's Order infringes upon state autonomy by interfering with states' structural constitutional authority over local governments functions and fiscal operations.

ALEC has adopted important constitutional and policy positions concerning government-owned or municipal broadband networks and state law restrictions on them. ALEC's official model policy on this subject is the *Municipal Telecommunications Private Industry Safeguards Act*.[4] This model policy applies in those instances where local governments or their agents seek to provide

[4] ALEC, *Municipal Telecommunications Private Industry Safeguards Act*, at: http://www.alec.org/model-legislation/municipal-telecommunications-private-industry-safeguards-act/.

broadband services in competition with private providers. ALEC's model policy permits local governments to own and operate broadband and other advanced telecommunications services to that local government's inhabitants. It provides that principles of good government be adhered to through requirements such as public meetings and local voter approval. This model protects local taxpayers by prohibiting diversion of tax revenues to pay for local government broadband network expenses and debts. The model also includes safeguards to ensure that private providers with which local governments compete are not disadvantaged by the exercise of the local governments' bonding and taxing authorities or assessment of fees or taxes.

ALEC's overall public policy position concerning local government-owned broadband networks is also summarized as part of ALEC's statement of *Six Principles for Communications and Technology*:

> Local government entry into the provision of wholesale or retail Internet or broadband services in an attempt to create competition should be permissible only in unserved areas and only where no business case for private service exists, upon a vote by local citizens, and subject to protections against cross-subsidies through taxes or other local government service revenues.[5]

This policy reflects a strong preference for keeping separate the roles of government and private market providers.

[5] ALEC, *Six Principles for Communications and Technology*, available at: http://www.alec.org/model-legislation/six-principles-for-communications-and-technology/

The Tennessee and North Carolina laws at issue in the FCC's Order are consistent with the policy principles held by ALEC and summarized above. *See* Tenn. Code Ann. § 7-52-403(b), § 7-52-601; N.C. Gen. Stat. § 160A-340. More to the point of this litigation, Tennessee's and North Carolina's laws providing limited grants of authority concerning local government broadband ownership and operations in their respective states are reasonable exercises of state sovereign powers. Tennessee and North Carolina are among approximately twenty states that have made limited grants of authority to local governments to own and operate broadband networks. But the FCC's order infringes upon state sovereign authority over their local governments. ALEC seeks to vindicate state autonomy and state structural constitutionalism from the FCC's usurpation of state sovereign powers.

ALEC respectfully submits this Amicus Curiae brief pursuant to FRAP 29(a). All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The U.S. Constitution recognizes the sovereignty of *states*, not local governments. The Guarantee Clause provides that "The United States shall guarantee to every State in this Union a Republican Form of Government," U.S. Const. Art. IV, Cl. 1. The federal government does not guarantee anything, however, to local governments. Moreover, "[t]he 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." U.S. Const. Amend. X. State sovereignty necessarily implies immunities from federal intrusion for state governments and their internal structures.

Certainly, state autonomy necessarily implies that states may exercise unimpeded power over their local government creations. Long-standing Supreme Court jurisprudence makes clear that "[m]unicipal corporations are instrumentalities of the State for the convenient administration of government within their limits," *Louisiana ex rel. Folsom v. Mayor and Administrators of New Orleans*, 109 U.S. 285, 287 (1883).

The FCC's Order preempting Tennessee's and North Carolina's laws concerning local government broadband networks violated those states' rightful sovereign powers to structure their local governments according to their own discretion.

The underlying reasoning and result of the U.S. Supreme Court's decision in *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), reinforces the unlawfulness of the FCC's Order. In *Nixon*, the Court rejected a similar preemption claim concerning a state's refusal to authorize local government entry into the telecommunications services market, observing that "preemption would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, 'are created as convenient agencies for

exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.'" 541 U.S. at 140 (internal citations omitted). The FCC's preemptive theory based on Section 706, 47 U.S.C. § 1302, utterly fails in light of *Nixon*'s observation: "There 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." 541 U.S. at 135.

In a breathtaking usurpation of power, the FCC's Order violates core principles of state structural constitutionalism. The sovereign powers of all states reside in the people of each state, and are mediated through their state constitutions.

Whatever the differences between states in the manner of delegating powers to local governments, states remain the fountainhead of all powers ultimately given to their local municipalities.

States' absolute discretion over their local governments is manifest in their power to create, alter, or abolish local governments. Typically, states entrust that discretionary power to their legislatures. Thus, "the *legislature* creates, alters, and, in the absence of constitutional restrictions, can repeal charters and incorporating statutes and abolish municipal and public corporation at its will, and it invests them with such powers, mandatory and discretionary, and requires of them such duties, as it deems most expedient for the general good, and for the benefit of the

particular locality." John F. Dillon, 1 *Commentaries on the Law of Municipal Corporations* § 230 (5th ed. 1911), at 428.

Unless the FCC's Order is vacated, the absolute discretion enjoyed by Tennessee and North Carolina over their local governments' functions, geographical boundaries, and fiscal operations will be undermined. Should the FCC's Order be left to stand, by necessary implication, the absolute discretion of all states over their respective local government creations will be destabilized and rendered precarious.

The FCC's Order must also be vacated in order to vindicate critical state public policy interests. States and state legislators must be vigilant in ensuring that local governments exercise delegated authority in an impartial manner. Limited state grants of authority concerning local government-owned broadband networks alleviate conflict of interest concerns associated with local government. Local governments exercise delegated authority over rights-of-way, zoning and land use permitting, and taxation. Those powers significantly impact the operations and competitiveness of broadband services within their jurisdictions. Where local governments are also in the broadband business, they face strong temptations to prefer their own broadband networks in permit processing or cut themselves special breaks on rights-of-way fees. States' ability to assure such impartiality and

reduce those conflicts posed by local government-owned broadband is threatened by the FCC's Order preempting state authority in this area.

State and local taxpayers must also be protected from fiscal irresponsibility by local governments. That states ensure their taxpayers are protected from government indiscretion—whether at the state or local level—is a policy imperative. States have strong interests in preventing local departments' financial mishaps because the resulting financial peril to local governments and their debt liabilities will become a burden to an entire state's fiscal well-being and resources.

By making limited grants of power to local governments to own and operate broadband networks, states safeguard local taxpayers from financial harms posed by risky government broadband projects. Innovating, investing, and competing in a rapidly changing, high-technology marketplace are foreign activities to local governments. The high up-front and operating costs of broadband networks also make for potentially enormous losses in the case of financial failure.

When government-owned broadband networks fail, taxpayers are on the hook for repaying banks and bondholders. In cases of failure, local governments' treasury funds become disproportionately directed to retiring debt obligations. Taxpayers, in turn, face the likely prospect of rate hikes to make up for local governments' budgetary shortfalls. Cuts to unrelated local government services, or tax rate or fee increases on unrelated government services are other lamentable

outcomes of government broadband project mishaps. Several states have reasonably concluded that their taxpayers should not be compelled to subsidize bailouts of failed government-owned networks.

Indeed, several highly publicized failures in government broadband projects reinforce the reasonableness of those states that have restricted local government ownership or operation of broadband networks. The FCC's Order undercuts the authority of states and state legislatures to forestall such financial blunders and to protect taxpaying citizens from their consequences.

ALEC, therefore, respectfully requests that Court vacate the FCC's Order.

ARGUMENT

I. LIMITED GRANTS OF POWER TO LOCAL GOVERNMENTS TO OWN AND OPERATE BROADBAND NETWORKS ARE ROOTED IN STATE STRUCTURAL CONSTITUTIONALISM

The U.S. Constitution recognizes *state* sovereignty, not local government sovereignty. The Guarantee Clause provides that "The United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const. Art. IV, Cl. 1. The federal government is not charged to guarantee anything to local governments. *See Reynolds v. Sims*, 377 U.S. 533, 575 (1964) ("Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities.").

Further, the Tenth Amendment declares: "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." U.S. Const. Amend. X. This reflects the constitutional framework of dual sovereignty. *See Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002). The United States and the 50 states are co-existent sovereigns with distinct, though occasionally overlapping, jurisdictions.

State sovereignty implies certain immunities for state governments and their constituent parts from federal interference. For example, Congress cannot commandeer the legislative or agency regulatory processes of states. *New York v. United States*, 505 U.S. 144 (1992). Likewise, Congress cannot commandeer state officials to carry out broad federal mandates. *Printz v. United States*, 521 U.S. 898 (1997). States also have discretion in deciding who are qualified to govern them. *Gregory*, 501 U.S. at 542.

State autonomy similarly entails certain immunities from federal interference with states' exercise of power concerning their local governments. A long, and by all accounts, unbroken line of U.S. Supreme Court cases affirm that "[m]unicipal corporations are instrumentalities of the State for the convenient administration of government within their limits," *Folsom*, 109 U.S. at 287; *Trenton v. New Jersey*, 262 U.S. 182, 187 (1923); *Ysursa v. Pocatello Educ.*

Assoc., 555 U.S. 353, 362 (2009). Even a century-and-a-half ago, the U.S. Supreme Court could still declare, "it is well-settled law, that the charters under which such [public] corporations are created may be changed, modified, or repealed, as the exigencies of the public service or the public welfare may demand." *Laramie County Com'rs v. Albany County Com'rs*, 92 U.S. 307, 310 (1876); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907)("[t]he number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state").

Even appeals to preemptive federal constitutional powers are null and void insofar as they interfere with the absolute and unfettered discretion states enjoy over their local governments. "A political subdivision, 'created by the state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.'" *Ysursa*, 555 U.S. at 363 (quoting *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933)). As the U.S. Supreme Court unambiguously stated in *Hunter*, 207 U.S. at 178-179:

> The state, therefore, at its pleasure, may modify or withdraw all such powers…hold it itself, or vest it in other agencies, expand or contract the territorial area…repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects, the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

Petitioners have excellently restated U.S. Supreme Court jurisprudence in these respects. *See* Brief of Petitioners at 9-14. Similarly, Petitioners have persuasively shown how the FCC's Order wrongfully overrode Tennessee's rightful sovereign powers to structure its local governments according to its own discretion. *See id*. at 14-22.

The U.S. Supreme Court's decision in *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), also reflects these federalism principles in the course of rejecting a claim that Section 253 of the Telecommunications Act of 1996 preempted Missouri's ban on local governments providing telecommunications services. 47 U. S. C. § 253. The principled reasoning of *Nixon* applies equally to this case. As the Court recognized in *Nixon*, "preemption would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, "are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." 541 U.S. at 140; *quoting Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597, 607–608 (1991) (internal citations omitted); and *Columbus* v. *Ours Garage & Wrecker Service, Inc*., 536 U.S. 424, 433 (2002). The FCC's preemptive theory based on Section 706 fares no better in the face of *Nixon*'s observation: "There 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." 541 U.S. at 135.

To the extent that U.S. Supreme Court jurisprudence takes for granted the states' autonomy and absolute discretion over their local governments, the FCC's Order takes for granted its own power to infringe upon states' sovereignty and discretionary authority. Accordingly, ALEC believes that the Court's review of the FCC's order would be enhanced by careful consideration of state structural constitutionalism.

A. There are Core Principles of Constitutionalism Common to All States

There is a core set of principles common to all states' relationships with local governments. First, though, the sovereign powers of all states reside in the people of each state. *See, e.g.*, Dillon, *Law of Municipal Corporations* § 98, at 156 ("The people are the recognized source of all authority, State and municipal; and to this authority it must come at last, whether immediately or by a circuitous process").

That sovereignty is mediated through state constitutions. The constitutions, laws, and jurisprudence of states differ from one another in the manner by which powers are conferred upon local government. For instance, many states closely adhere to the "Dillon Rule":

> It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers, and no others*: First, those granted in *express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the declared objects and purpose of the corporation,—not simply convenient, but indispensible. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by courts against the corporation, and the power is denied.

Dillon, *Law of Municipal Corporations* § 237, at 449-450. Many states may also make provisions for local government "Home Rule." Under this approach, states make broad grants of power to local governments, leaving those local governments wide latitude in defining their own purposes and policies. *District of Columbia v. John R. Thompson Co., Inc*., 346 U.S. 100, 108-109 (1953) (discussing the theory of underlying state constitution provisions for local government home rule).

In other words, states have intricate structural systems in place for allocating and defining the duties and responsibilities of local governments. Regardless of the differences in how powers are delegated to local governments, states remain the fountainhead for all those delegated powers. "Municipal corporations, so far as their organization and purely municipal relations and regulations are concerned, being simply agencies of the State that creates them for conducting the affairs of government, are subject alone to the control of the legislature, which in these respects is not limited by the Federal Constitution." Dillon, 1 *Municipal Corporations* § 92, at 144-145.

States' absolute discretion over local governments is epitomized by their power, in the final instance, to create, alter, or abolish local governments. "[T]he *legislature* creates, alters, and, in the absence of constitutional restrictions, can repeal charters and incorporating statutes and abolish municipal and public corporation at its will, and it invests them with such powers, mandatory and discretionary, and requires of them such duties, as it deems most expedient for the general good, and for the benefit of the particular locality." Dillon, 1 *Municipal Corporations* § 230, at 428.

This absolute discretion that states possess encompasses at least five critical aspects of local government: structural organization, geographical boundaries, policy functions, fiscal operations, and personnel administration. As will be seen, unless the FCC's Order is vacated, the sovereign powers of all states over their local government's functions, geographical boundaries, and fiscal operations will be destabilized and rendered precarious.

B. The FCC's Order Infringes Upon State Constitutional Authority Over Local Government Functions

The FCC's Order interferes with Tennessee's and North Carolina's sovereign authority over local government policy functions by effectively granting local governments a broad default power to provide broadband services. It circumscribes the power of states to make limited grants of power to local

governments concerning broadband services. In so doing, a federal agency gives all local governments default authority to enter into the broadband services market in competition with private providers.

The power to define the policy functions and purposes of local governments is an essential element to states' absolute discretion over their local government creations. "[B]eing simply agencies of the State that creates them for conducting the affairs of government," Dillon, 1 *Municipal Corporations* § 92, at 144-145, and the practical necessity of local governments to carry out state responsibilities and policies, the authority to define local government functions is a *sine qua non* of state autonomy. As Judge Dillon recognized with respect to state legislative authority over a local government:

> The legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality; or it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses, or it may exercise directly within the locality any or all the powers usually committed to a municipality. So viewed, its acts cannot be regarded as sometimes those of an agency of the State and at others those of a municipality; but, its character and nature remaining at all times the same, it is great or small according as the legislature shall extend or contract the sphere of its action.

Dillon, 1 *Municipal Corporations* § 92, at 155-156.

North Carolina's "non-discrimination" requirements that local government-owned broadband providers permit "access to private communications service providers on a first-come, first-served basis to rights-of-way, poles, or conduits,

owned, leased, or operated by the city" according to "the same terms and conditions as that given" to a local government-owned provider are also logically incident to states powers over the functions of their local governments. N.C. Gen. Stat. § 160A-340.1(a)(5) (hereafter generally referred to as "Section 340.xx"). *See* Order at ¶ 86.

Certainly, state laws requiring public meetings, public notice, feasibility studies, and local voter approval of any special proprietary undertaking by local government—in this case broadband services—are included within states plenary authority over their local governments. *See* Dillon, 1 *Municipal Corporations* § 370, at 634 (discussing the requirement that local government elections be held at the time and place provided by charter or by statute); Dillon, 2 *Municipal Corporations* § 511, at 833 (discussing general requirements of meetings and notice typically contained in local government's charter or authorizing statute).

Every reason exists to assume that local voter approval requirements may be adopted by states as procedural prerequisites to the functions states assign to local governments. One example of such voter approval occurs in North Carolina's requirement in Section 340.4 of a city- or joint agency-held special election "on the question of whether the city may provide communications service" before incurring debt relating to communications service facilities. *See* Order at ¶ 89. In apparent attempt to minimize the illiberality of denying local votes of the people

through federal administrative agency order, the FCC's Order rolled Section 340.4, public notice requirements, public hearing requirements, and several other sections together and called them a "holistic barrier" to broadband investment justifying federal preemption. *See* Order at ¶¶ 93-94.

Repeating unsubstantiated mantras about barriers to broadband investment[6] cannot justify infringements on the ability of states to define the basic functions of their local government creations and set ground rules concerning when and how those functions are carried out.

C. The FCC's Order Infringes Upon State Constitutional Authority Over Local Government Geographical Boundaries

The FCC's Order opines that Tennessee's and North Carolina's laws granting authority for local government-owned broadband services within their own geographic territories are barriers to broadband investment, and on that basis the agency preempts those state law restrictions. *See* Order at 38, ¶ 75. In so doing,

[6] While outside the scope of this Brief, it is difficult to see how the FCC can sustain the claim that state laws operate as "barriers to broadband investment and competition," (*e.g.*, Petitioner's Brief at p. 23) given some of the FCC's own studies regarding broadband investment. For example, in a 2010 report entitled *Connecting America: The National Broadband Plan* ("*Connecting America*"), the FCC estimated that "290 million Americans—95% of the U.S. population—live in housing units with access to terrestrial, fixed broadband infrastructure capable of supporting actual download speeds of at least 4 Mbps." p. 18. *Available at* https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf (last accessed September 23, 2015). Another Report analyzing *Connecting America*, and cited *infra*, states "[i]f wireless broadband is included in the metric, that coverage number jumps to 98 percent of all Americans with access to quality Internet connections." *NTU Policy Paper #129: Municipal Broadband "Wired to Waste."*

the FCC infringes on the sovereign authority to define the territorial limits of their local government creations.

States' power, typically wielded by legislatures, to establish, increase, decrease, or otherwise adjust the geographic limits or boundaries of local governments, is "an incident to the legislative power to create and to abolish municipalities at pleasure." Dillon, 1 *Municipal Corporations* § 355, at 619; *id.* § 353, at 615 ("[u]nless specifically restrained by the State Constitution, the legislature may delegate this power [to determine the extent of territory to be included within corporate limits] to appropriate local bodies or boards or officers").

Indeed, local government boundary adjustments and territorial annexations commonly take place through state-appointed boards or commissions. State Constitutions regularly make such authorizations, and state statutes routinely supply implementing directions and details. I*d*. State courts are often tasked with ensuring process compliance with state law.

States have active and intricate systems for determining geographical boundaries for local governments. The FCC's order short shrifts those systems simply pointing to the desire of certain local government-owned broadband networks to provide extra-jurisdictional service and by labeling Tennessee's and

North Carolina's provisions barriers to broadband investment. Those are inadequate bases for turning state-local government power relationships inside out.

D. The FCC's Order Infringes Upon State Constitutional Authority Over Local Governmental Fiscal Operations

The FCC's Order preempts several provisions North Carolina statutory restrictions and directives concerning fiscal operations of local government-owned broadband by labeling them holistic barriers to investment, measures to raise economic costs, or delay tactics. *See, e.g.*, Order at ¶ 81 *et seq*. The Order ignores the obvious state structural constitutional implications of its Order because of administrative law precedents in run-of-the-mill cases. Incursions made by Order, though, into state sovereignty present decidedly different dynamics from the run-of-the-mill case. Simply because the FCC is nonplussed about principles of state structural constitutionalism does not cause those principles to go away.

North Carolina Section 340.1(a)(7)'s bar on local government-owned broadband providers from "subsidiz[ing] the provision of communications service with funds from any other non- communications service, operation, or other revenue source, including any funds or revenue generated from electric, gas, water, sewer, or garbage services," falls squarely within a state's absolute discretion over local government taxing and spending authority. To wit:

> In the general power of the legislature, as well as in its power to create municipal corporations, may be found the right to authorize them, when

> created, *to impose or levy local rates, taxes, and assessments* upon their inhabitants, and upon all property within the limits of the designated taxing district, which is ordinarily coextensive with the territorial limits of the municipality.
>
> In the absence of special constitutional restriction, the legislature may *confer the taxing power upon municipalities* in such measure as it deems expedient—in other words, with such limitations as it sees fit, as to the rate of taxation, the public purposes for which it is authorized, and the objects (the persons, business and property) which shall be subjected to taxation; but it cannot, of course, confer any greater power than the State itself possesses, and it must observe the restrictions and limitations of the organic law.

Dillon, 4 *Municipal Corporations*, § 1375, at 2395-2396; *id*. § 1376, at 2396-2397. By deeming Section 340.1(a)(7) a "measure to raise economic costs" and preempting it on that basis, the FCC necessarily acts as if the discretion in these fiscal matters belongs to the agency. *See* Order at ¶ 82. The principles and authorities cited make plain: discretion over how local governments exercise fiscal operations resides in states and state legislatures.

North Carolina Section 340.4's previously cited requirement for special elections as a prerequisite to local government entry into the broadband business is also inexorably tied to local government fiscal operations. Merely labeling such a local vote of the people a "delay measure" comes to nothing. Cursory denials that its Order implicates state autonomy principles concerning local government fiscal operations and mere label-affixing does offer satisfactory reasons for infringing those principles.

II. STATES HAVE PUBLIC POLICY REASONS FOR GRANTING LIMITEDAUTHORITY FOR LOCAL GOVERNMENT-OWNED BROADBAND NETWORKS

States are constitutionally obligated to protect the rights of their citizens and to promote their prosperity.[7] Those obligations inform how states exercise their traditional, sovereign power to define and limit the functions and duties of local governments.

To the end that citizens' rights are respected and prosperity is promoted, local governments must exercise delegated authority in an impartial manner. Taxpayers must also be protected from local government fiscal irresponsibility. These important public policy interests ground the decisions of several states – and state legislatures – to restrict local government ownership and operation of broadband networks.

The FCC's casual dismissal of these interests is inherently unreasonable. Indeed, such dismissal is doubly unreasonable considering publicly available evidence of local government-owned broadband project failures, which was also casually dismissed by the FCC. [8]

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[7] *See, e.g.*, Tenn. Const. Art. 1 § 8, Tenn. Const. Art. 11 § 16; N.C. Const. Art. 1 § 19

[8] *See*, Andrew Moylan and Brent Mead, *NTU Policy Paper #129: Municipal Broadband "Wired to Waste*" ("*Wired to Waste*"), National Taxpayers Union (April, 2012). *Available at*, http://www.ntu.org/governmentbytes/detail/ntupolicypaper129municipalbroadbandwiredtowaste (last accessed August 4, 2015).

A. States Policy Interests in Avoiding Government Conflicts of Interest

States have important interests in avoiding conflicts of interest that result when government institutions assume proprietary functions in the same market as private industry.[9] Conflicts exist when local governments engage in direct business competition with private market providers over whom the same local governments exercise regulatory authority. Such conflicts create temptations for local governments to misuse their powers to favor themselves over private competitors.

A serious public policy problem with local government ownership of broadband networks is the institutional conflict of interest they create. Local governments typically exercise delegated authority concerning rights-of-way, zoning and land use permitting, and taxation. Those powers significantly impact the operations and competitiveness of broadband services within their jurisdictions. Where local governments are also in the broadband business, they face strong temptations to prefer their own broadband networks in permit processing or to cut themselves special breaks on rights-of-way fees.

Limited grants of authority to local government-owned broadband networks alleviate conflict of interest concerns. Limited grants of authority also reflect the judgment of states favoring clear distinctions between the public and private sector

[9] *Id.*

institutions and roles. According to this obvious distinction, government is principally the neutral enforcer of public laws, whereas individuals or corporate business entities are private actors who transact or compete in the free marketplace consistent with public laws. Granting local governments limited authority to own and operate broadband networks keep government confined to matters of legal enforcement and public administration, while keeping private broadband network operators concentrated on the ends of free market enterprise.

B. States Policy Interests in Ensuring Fiscal Responsibility and Protecting Taxpayers

States have important public policy interests in ensuring fiscal responsibility in all branches, agencies, and operations—whether statewide or local. Similarly, it is a policy imperative of states to ensure that their taxpayers are protected from government indiscretion—whether at the state or local level.

State legislators must consistently exercise discretionary power to safeguard local government fiscal soundness from dangers such as: overspending, over-indebtedness, lack of transparency and recordkeeping, pursuit of risky ventures, misuse of funds on subject matters outside the core competencies of local government, and diversion of funds from high-priority to low-priority functions. For local governments, the assured presence of a taxpayer rate base offers a

tempting source of leverage for significant debt financing. When local governments spend too much from the public treasury or go too deeply into debt, local taxpayers face the dismal prospects of economically painful tax hikes and cuts to core government services. States also have strong interests in preventing the statewide spill-over effects of their local departments' financial mishaps, since the resulting financial peril to local governments and their debts liabilities become a burden on an entire state's fiscal well-being and resources.

Limited grants of authority to local governments to own and operate broadband networks are sensible means to ensure local government fiscal soundness. Such limited grants of power safeguard local taxpayers from financial harms posed by risky government broadband projects.[10]

As many state legislatures have recognized, the broadband Internet access services market is highly competitive, inherently risky, and extremely expensive.

While some local governments do engage in some proprietary activities, such activities are largely peripheral. State governments and local governments invariably perform their core functions in a non-market setting and operate by

[10] Assuming, *arguendo*, the FCC's assertion that municipalities will substantially aid in "broadband investment" and "infrastructure investment," states still possess compelling interests in protecting taxpayers living within their boundaries from local government misuse of funds. For example, the FCC estimates "serving the 250,000 housing units with the highest gaps accounts for $14 billion of the broadband availability gap… [T]his represents less than two-tenths of 1% of all housing units in the United States. The average amount of funding per housing unit to close the gap for these units with terrestrial broadband is $56,000 [per housing unit]." *Connecting America*, *supra* n.6, at p. 138.

bureaucratic incentives. Innovating, investing, and competing in a rapidly changing high-technology marketplace are foreign activities to local governments.

Due to characteristics of scale and scope involved in delivering broadband services, significant up-front costs are required to enter into such ventures. High cash flows are also critical to ongoing operations, including routine maintenance and technological upgrades. Such high costs also make for potentially enormous losses in the case of financial failure.

Doomed local government-owned broadband projects are ultimately the financial responsibility of local taxpayers. When government-owned broadband networks fail, taxpayers are on the hook for repaying banks and bondholders. In cases of failure, local governments treasury funds become disproportionately directed to retiring debt obligations. Taxpayers, in turn face the likely prospect of rate hikes to make up for local governments' budgetary shortfalls. Cuts to unrelated local government services, or tax rate or fee increases on unrelated government services are other lamentable outcomes of government broadband project mishaps. Several states have reasonably concluded that their taxpayers should not be compelled to subsidize bailouts of failed government-owned networks through taxes, fees, or higher utility rates.

Indeed, several highly publicized failures in government broadband projects reinforce the reasonableness of those states that have restricted local government

ownership or operation of broadband networks. State legislators, including ALEC members, have been attuned to news of such financial blunders and to their practical consequences for taxpaying citizens. As ALEC pointed out to the FCC, "at the end of fiscal year 2013, Utah's UTOPIA had net assets totaling negative $146 million, with a total debt exceeding $500 million," and "six years into operations in Lafayette, Louisiana, LUS Fiber's debt exceeds $160 million, with revenues falling 30 percent below its business plan projections."[11] Case studies and analyses of failed government broadband projects have also come to the attention of state legislators.[12] It is surely reasonable for states to respond to such highly publicized instances of local government broadband network financial ruin with laws intended to avoid their repetition.

It was arbitrary and capricious for the FCC to displace the authority of states to restrict local government-owned broadband. The FCC's Order must be vacated,

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[11] *See* ALEC, Comments of ALEC, FCC-15-25. *See also* Joseph P. Fuhr, Jr., "UTOPIA, a Failing Government-Owned Network in Utah," Coalition for the New Economy (December 5, 2012), at: http://www.coalitionforthenewеconomy.org/wp-content/uploads/2012/12/12.5.12-UTOPIA- Final1.pdf; Steve Titch, *Lessons in Municipal Broadband From Lafayette, Louisiana*, Policy Study 424, Reason Foundation (November 2013), at: http://reason.org/files/municipal_broadband_lafayette.pdf.

[12] *See, e.g.*, Charles M. Davidson & Michael J. Santorelli, *Understanding the Debate Over Government-Owned Broadband Networks: Context, Lessons Learned, and a Way Forward for Policy Makers: Lafayette Case Study*, Advanced Communications Law & Policy Institute at New York Law School (June 2014), at: http://www.nyls.edu/advanced-communications-law-and-policy-institute/wp-content/uploads/sites/169/2013/08/ACLP-Government-Owned-Broadband-Networks-FINAL-June-2014.pdf; *Wired to Waste*, *supra*, n. 8.

if states and state legislatures are to be able to effectually ensure that their local governments exercise delegated authority in an impartial manner and that their taxpayers are protected from fiscal irresponsibility by their local governments. Indeed, the public policy reasons that drove approximately twenty states to restrict local government-owned broadband networks are also firmly grounded in state structural constitutional imperatives analyzed above.

CONCLUSION

ALEC requests that the Court vacate the FCC's Order.

Respectfully submitted,

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FRAP 26.1 DISCLOSURE

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule Rule 26.1, *amicus*, the American Hospital Association, makes the following disclosure:

1. Is *amicus* a subsidiary or affiliate of a publicly owned corporation? No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No publicly owned corporation or other publicly held entity has a direct financial interest in the outcome of this litigation due to the participation of the *amicus*.

/s/ Jonathon Hauenschild

CERTIFICATE OF COMPLIANCE WITH FRAP 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 6,973 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/ Jonathon Hauenschild

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amicus Curiae Brief was served on all parties or their counsel of record through the CM/ECF system to their electronic addresses of record on this 25th 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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