Nos. 15-3291, 15-3555
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15-3291

STATE OF TENNESSEE,
Petitioner,

NATIONAL ASSOC. OF REGULATORY UTILITY COMMISSIONERS,
Intervenor,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents,

ELECTRIC POWER BD. OF CHATTANOOGA and CITY OF WILSON, NORTH CAROLINA,
Intervenors.

(caption continued on inside cover)

On Petition for Review from the Federal Communications Commission

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BRIEF OF FORMER FCC COMMISSIONER HAROLD FURCHTGOTT-ROTH AND WASHINGTON LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS, URGING VACATION OF ORDER

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No. 15-3555

STATE OF NORTH CAROLINA,
Petitioner,

INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE,
Intervenor,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents,

CITY OF WILSON, NORTH CAROLINA,
Intervenor.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Washington Legal Foundation states that it is a corporation organized under § 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock owned by a publicly owned company.

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INTERESTS OF *AMICI CURIAE*

Harold Furchtgott-Roth is a widely recognized authority on issues related to the economic impact of federal regulation in the communications sector.[1] He served as a commissioner of the Federal Communications Commission ("FCC") from 1997 through 2001. Before his appointment to FCC, Mr. Furchtgott-Roth was chief economist for the House Committee on Commerce and a principal staff member behind the Telecommunications Act of 1996. He is the author of several books, including *A Tough Act to Follow?: The Telecommunications Act of 1996 and the Separation of Powers Failure* (AEI Press 2005), which chronicles FCC's institutional failure to implement many of the reforms Congress mandated in the 1996 Act.

Washington Legal Foundation ("WLF") is a public interest law firm and policy center headquartered in Washington, D.C., with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has frequently appeared in this and other federal courts to ensure that administrative agencies adhere to the rule of law. *See, e.g., U.S.*

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[1] Pursuant to Fed.R.App.P. 29(c)(5), WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief. All parties have consented to the filing of this brief.

Telecom Assoc. v. FCC, No. 15-1063, *pet. for review filed* (D.C. Cir., March 23, 2015) (also filed in conjunction with former Commissioner Furchtgott-Roth); *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014). WLF also works to reduce threats to liberty by ensuring the federal government maintains a healthy balance of power. WLF has appeared in court to prevent too much power from being concentrated within a single branch of the federal government, *see, e.g., Nat'l Fed'n of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012); *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010); and to maintain the balance of power between the federal government and state governments. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452 (1991).

Amici take no position on whether state governments (operating through their local governmental units) should establish and/or maintain commercial enterprises that provide broadband Internet services to their citizens. But they strongly believe that the decision regarding whether state governments do so should be made by those governments alone. *Amici* believe that well-established federalism principles prohibit the federal government from making that decision for them.

The U.S. Supreme Court has held repeatedly that the Tenth Amendment prohibits the federal government from issuing directives requiring States to carry

out the policy preferences of the federal government. *Amici* believe that while FCC is entitled to adopt measures designed to promote competition in broadband Internet markets, it may not seek to do so by (as here) commandeering the resources of state government.

STATEMENT OF THE CASE

The facts of these consolidated cases are set out in detail in the briefs of Petitioners North Carolina and Tennessee. *Amici* wish to highlight several facts of particular relevance to the issues on which this brief focuses.

The States of North Carolina and Tennessee have both decided to exercise a portion of their sovereign powers by creating subordinate governmental units and authorizing them to engage in specific activities. *See, e.g.,* N.C. Const. Art. VII, § 1 (directing the General Assembly to "provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions," and authorizing it to give those entities "such powers and duties . . . as it may deem advisable."). The intervenors in these proceedings include two such subordinate state entities: the City of Wilson, North Carolina ("Wilson") and the Electric Power Board of Chattanooga, Tennessee ("EPB"). For many years, North Carolina has authorized Wilson to provide electrical power within a six-county geographical area defined by state law, and Tennessee has

granted similar authorization to EPB.

Until recently, the legislature of neither State had explicitly authorized subordinate governmental units to provide Internet service. In 1999, Tennessee adopted legislation authorizing municipal electrical systems to provide Internet service within the boundaries of their service areas, Tenn. Code Ann. § 7-52-601, and soon thereafter EPB began providing such service.

Local governmental units in North Carolina (including Wilson) began offering commercial Internet service in the early years of the 21st century, despite the absence of express legislative authority to do so. A decision issued by the North Carolina Court of Appeals ultimately upheld the validity of those operations, ruling that they were permitted under a 1971 statute that authorized cities to operate "cable television systems" as public enterprises. *BellSouth Telecommunications, Inc. v. City of Laurinburg*, 168 N.C. App. 75 (citing N.C. Gen. Stat. § 160A-311(7)), *cert. denied*, 359 N.C. 629 (2005). In response, the North Carolina legislature adopted Session Law 2011-84, which regulates the provision of communications services by cities.[2] Among other provisions, Session Law 2011-84 states that a city must "[l]imit the provision of communications

[2] The legislation was referred to in proceedings before FCC as House Bill 129.

services to within the corporate limits of the city." N.C. Gen. Stat. § 160A-340.1(3).

On March 12, 2015, in response to petitions filed by Wilson and EPB, FCC issued a Memorandum Opinion and Order (the "FCC Order") declaring invalid the provisions of North Carolina and Tennessee law that barred Wilson and EPB from expanding the geographic scope of their Internet services. FCC claimed that it was empowered to invalidate those provisions by § 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302, which directs FCC to "encourage the deployment" of advanced telecommunications capabilities by utilizing, *inter alia*, "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." Wilson and EPB stated in their petitions that they would expand their Internet service areas despite the state laws preventing their expansion, if FCC would exercise its § 706 powers to declare those laws preempted.

FCC recognized that, as a result of its Order preempting state law, subdivisions of the States of North Carolina and Tennessee would be providing broadband Internet services of a sort that the elected leaders of those two States determined were not to be provided by any state governmental unit. It also recognized that the U.S. Constitution limits the authority of the federal government

to compel actions by States or to override state laws. FCC Order ¶ 167 (citing *United States v. Printz*, 521 U.S. 898 (1997)). FCC concluded, however, that its Order "would not compel any entity to take any action," noting that North Carolina and Tennessee themselves made the determination that state governmental units should be authorized to offer Internet services. *Ibid.* It concluded that once a State authorizes municipal Internet services, the Constitution permits the federal government to preempt a State's efforts to restrict that authorization. *Ibid* ("Once the state has granted that power, however, we do not believe a state is free to advance its own policy objectives when they run counter to federal policy regarding interstate communications.").

FCC also recognized the U.S. Supreme Court's directive that a federal statute should not be interpreted to constrain States' traditional authority to order their governments, unless the statute contains a "clear statement" to that effect. FCC Order at ¶¶ 154-166 (citing *Gregory*, 501 U.S. at 461; and *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004)). FCC concluded, however, that the "clear statement" rule was inapplicable to its interpretation of § 706 because: (1) "the issue before us concerns federal oversight of interstate commerce—an area where there has been a history of significant federal presence—not the inherent structure of state government itself"; and (2) "the question here is not whether municipal

systems can provide broadband at all, but rather whether the states may dictate the manner in which interstate commerce is conducted and the nature of competition that should exist for interstate communications." *Id.* at ¶ 12.

SUMMARY OF ARGUMENT

The Supreme Court has repeatedly held that the U.S. Constitution prohibits the federal government from commandeering a State's legislative or administrative apparatus for federal purposes. *Printz*, 521 U.S. at 933; *New York v. United States*, 505 U.S. 144, 174-75 (1992). FCC has violated that prohibition by effectively commanding North Carolina and Tennessee (through their subordinate governmental units) to operate expanded Internet services despite their state governments' decisions that they do not wish to do so.

The Constitution establishes a system of dual sovereignty, with both the federal government and state governments exercising sovereign powers within their respective spheres of responsibility. The Tenth Amendment makes explicit that the federal government may exercise only those powers expressly delegated to it by the Constitution: "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." *Printz* and *New York* held that among the powers *not* delegated to the United States by the Constitution is the power to commandeer

a State's legislative or administrative apparatus for federal purposes.

FCC argues that its Order does "not compel any entity to take any action." FCC Order ¶ 167. That argument is without merit. True, the FCC Order presumably permits North Carolina and Tennessee to avoid federal commandeering by repealing existing legislation and thereby barring its subordinate governmental units from offering *any* Internet services. But outright repeal is not a realistic response to the Order because it would entail loss of the States' substantial infrastructure investment. The Supreme Court applies its anti-commandeering case law even when the federal government nominally provides a State with an alternative to compliance, whenever (as here) the alleged alternative is not a "real option." *Nat'l Federation of Independent Business v. Sebelius* ["*Sebelius*"], 132 S. Ct. at 2605.

Quite apart from its violation of the Constitution's anti-commandeering mandate, the FCC Order also runs afoul of the Supreme Court's "clear statement" rule. As FCC essentially concedes, § 706 of the Telecommunications Act of 1996 does not include unmistakably clear language that FCC is authorized to preempt state laws that organize their governments (that is, laws that set forth how various organs of state governments are to operate). The two state statutes in question—North Carolina's Session Law 2011-84 and Tenn. Code Ann. § 7-52-

601—are laws of that nature; among other things, they impose explicit geographic limitations on the areas within which governmental subdivisions may operate. Accordingly, in the absence of a clear congressional statement of an intent to override those limitations, § 706 does not provide FCC with authority to preempt those laws.

There is no legal basis for FCC's assertion that the "clear statement" rule is inapplicable to this case. FCC argues that even when (as here) a federal action would directly affect a State's internal governmental structure, the "clear statement" rule is inapplicable when the federal government is acting in an area where there has been a history of significant federal presence, such as federal oversight of interstate commerce. FCC Order ¶ 12. Nothing in *Gregory*, *Nixon*, or any other Supreme Court decision supports FCC's proposed exception to the "clear statement" rule, an exception that would create a gaping hole in the rule. Indeed, the Supreme Court applied the "clear statement" rule in *Nixon*, a case in which the plaintiff unsuccessfully sought federal preemption of a state statute nearly identical to the statutes at issue here.

While apparently conceding that the "clear statement" rule bars federal preemption of state laws that absolutely prohibit state subdivisions from offering broadband Internet services, FCC contends that it is entitled to preempt *less*

restrictive state laws that authorize the provision of Internet services within specified geographic areas. FCC Order ¶ 12. FCC's contention is illogical. Absolute prohibitions against the offering of broadband Internet services by state subdivisions constitute far greater "barriers to infrastructure investment," § 706, than do the geographical restrictions at issue in this case. Yet FCC would have us believe that Congress, in adopting § 706, intended to permit preemption of the less-severe barriers to infrastructure investment at issue here but not the more-severe barriers created by state laws (as in *Nixon*) that prohibit all municipal Internet services.

Judicial construction of federal antitrust law further demonstrates that courts are very hesitant, due to their federalism concerns, to subject the States to federal rules that limit anticompetitive behavior. Even though the Sherman Act makes unlawful "every" conspiracy in restraint of trade, the Supreme Court has consistently construed the statute as inapplicable to restraints of trade sanctioned by state law. The Court has explained its narrow construction of the statute as being based on an unwillingness to infer a congressional intent to impinge on state sovereignty in the absence of an explicit statement to that effect.

ARGUMENT

I. THE FCC ORDER IMPROPERLY INTRUDES ON STATE SOVEREIGNTY BY COMMANDEERING THE ORGANS OF STATE GOVERNMENT TO CARRY OUT FEDERAL POLICY

The legislatures of North Carolina and Tennessee have created a number of subordinate governmental units (including the City of Wilson and EPB) and have authorized them to provide Internet services. That authorization includes strict geographical limits, however. North Carolina's Session Law 2011-84 imposes a number of restrictions on municipal Internet services, including that a city must "limit the provision of communications services to within the corporate limits of the city." N.C. Gen. Stat. § 160A-340.1(3).[3] The Tennessee law authorizing EPB to provide Internet services limits that authorization to EPB's electrical service area, an area in and surrounding the City of Chattanooga, Tennessee. Tenn. Code Ann. § 7-52-601.

In adopting the Order, FCC disagreed with the state governments of North Carolina and Tennessee regarding the scope of the broadband Internet services that those States ought to be providing and thus decided to snatch the reins of state government from them. In order to promote competition in the local Internet

[3] Under a separate "grandfathering" provision contained in Session Law 2011-84, the City of Wilson is authorized to continue to provide Internet services to areas outside city limits but within Wilson County.

services market and to remove barriers to infrastructure investment, FCC seized control over subordinate units of state government from the States and told those units that they may go ahead with their plans to offer expanded Internet services to geographic areas forbidden to them by state law. FCC's power grab runs afoul of federalism principles embedded in the U.S. Constitution; those principles prohibit the federal government from commandeering a State's legislative or administrative apparatus for federal purposes.

A. Federalism Principles Embedded in the Constitution Bar the Federal Government from Commandeering a State's Legislative or Administrative Apparatus for Federal Purposes

The Constitution establishes a system of dual sovereignty between the States and the federal government. Under our federal system, "the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

The constitutionally mandated balance of power between the States and the federal government "was adopted by the Framers to ensure the protection of our fundamental liberties." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any

one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny from either front." *Gregory*, 501 U.S. at 458.

The Supremacy Clause provides that "th[e] Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const., Art. VI, cl. 2. Thus, any federal law adopted pursuant to Congress's delegated powers trumps any contrary law adopted by a State. Nonetheless, as the Supreme Court has repeatedly emphasized, state sovereignty is preserved by "the Constitution's conferral upon Congress of not all governmental powers, but only discrete enumerated ones, Art. I, § 8." *Printz*, 521 U.S. at 919. The Tenth Amendment expressly confirms the existence of residual state sovereignty, asserting that "[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." If Congress adopts a statute that falls outside of its enumerated powers, the law is not part of "the supreme Law of the Land" and thus may not be invoked as the basis for preempting contrary state law. *Printz*, 521 U.S. at 924-25.

Among the powers *not* conferred on the federal government is the power to commandeer a State's legislative or administrative apparatus for federal purposes.

The Constitution "confers upon Congress the power to regulate individuals, not States." *Id*. at 920. "Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York*, 505 U.S. at 161 (quoting *Hodel v. Va. Surface Mining & Reclamation Assoc., Inc*., 452 U.S. 264, 288 (1981)). Nor may it seize control of a State's administrative apparatus and conscript the services of individuals employed at one of the levels of the state government. *Printz*, 521 U.S. at 935. "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions to administer or enforce a federal regulatory program." *Ibid.*[4] *See also EEOC v. Kentucky Retirement Systems*, 16 Fed. App'x. 443, 452-53 (6th Cir. 2001) (anti-commandeering principles barred the EEOC from requiring Kentucky to adopt the EEOC's preferred rules for calculating disability benefits).

The States of North Carolina and Tennessee have determined that no portion of their respective state governments are to provide broadband Internet services

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[4] *Printz* held unconstitutional a federal statute that required state law enforcement officials to conduct background checks on prospective handgun purchasers. 521 U.S. at 928-33. *New York* held unconstitutional a federal statute that required each State to take title to low-level radioactive waste generated within the State, unless it agreed to regulate those wastes in accordance with a congressionally prescribed plan. *New York*, 505 U.S. at 176-77.

outside of specified, geographically compact areas. The FCC Order purports to overrule those determinations. If the Order is affirmed, North Carolina and Tennessee will begin providing—through their subordinate governmental units—expanded Internet service that they do not wish to provide, all for the purpose of advancing FCC's goal of promoting competition in the broadband Internet market. As *New York* and *Printz* make clear, such commandeering of the organs of state government exceeds the federal government's enumerated powers under the Constitution.

B. Contrary to FCC's Assertion, the Order Effectively Compels North Carolina and Tennessee to Provide Internet Service that They Do Not Wish to Provide

Citing *Printz*, FCC recognized that the Constitution limits the authority of the federal government to compel States to implement a federal regulatory program. FCC Order ¶ 167. It asserted that *Printz* is inapposite, however, because its Order "would not compel any entity to take any action." *Ibid*. It stated that its Order did not authorize "interference with a state's prerogative" to determine that the State would offer no Internet services whatsoever. *Ibid.* Accordingly, FCC apparently concluded, all North Carolina and Tennessee need do if they do not wish to be subject to the Commission's Order is to repeal the statutes that authorize subordinate governmental units to offer broadband Internet services. But so long

as the authorizing legislation remains in place, FCC stated, "a state is [not] free to advance its own policy objectives when they run counter to federal policy regarding interstate communications." *Ibid*.

FCC's efforts to distinguish *Printz* are unavailing. While North Carolina and Tennessee could, in theory, avoid being required to provide expanded Internet service by abandoning all existing services altogether, FCC makes no effort to demonstrate that such abandonment is a realistic option. In recent decades, the two States—operating through such subordinate units as Wilson and EPB—have invested substantial sums in the development of the infrastructure necessary to support their Internet services. Requiring immediate abandonment of those services would cause subordinate government units (and thus the States themselves) to suffer substantial financial losses. Thus, such abandonment is not a realistic option for the States.

When North Carolina (in 2011) and Tennessee (in 1999) adopted legislation authorizing municipal broadband services, they had no notice that FCC would later use that authorization as its basis for seizing from the States their control over local governmental units. Indeed, the Order represents a reversal of FCC's longstanding position that it lacked statutory and constitutional authority to preempt state laws restricting municipal broadband services. *See, e.g., Missouri Municipal League*

Order, 16 F.C.C.R. 1157, 1158 ¶ 5 (2001) (subsequent history omitted). Having initiated municipal broadband service on the understanding that they would be permitted to do so on a geographically restricted basis, North Carolina and Tennessee cannot fairly be expected to bear the financial losses that they would incur as their only alternative to FCC's intrusion on their state sovereignty.[5]

Indeed, the Supreme Court recently rejected a similar federal government effort to avoid application of the Constitution's anti-commandeering principles. In *Sebelius*, 26 States challenged a federal statute that required States to substantially expand coverage (and thus substantially increase expenditures) under state-run Medicaid programs. The statute threatened to cut off billions of dollars in Medicaid funding to any State that did not agree to the Medicaid expansion.

The federal government argued that the law did not run afoul of the anti-commandeering principle articulated in *Printz* and *New York* because the States were not *required* to expand their Medicaid programs. Rather, they had an alternative: forfeit all Medicaid funding. The Court rejected that effort to distinguish *Printz* and *New York*. Seven justices determined that abandoning all

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[5] Given the States' reliance on FCC's former position, the federal government could plausibly be held liable for losses incurred by States in responding to the FCC order. *See, e.g., United States v. Winstar Corp.*, 518 U.S. 839 (1996). Nothing in the Telecommunications Act of 1996 suggests that Congress authorized FCC to incur such liabilities.

Medicaid funding was not a realistic alternative for any State and thus that the challenged legislation amounted to an unconstitutional commandeering of state government. *Sebelius*, 132 S. Ct. at 2601-07 (plurality); *id*. 2657-66 (Scalia, J., dissenting).[6]

The Court concluded that by threatening not only to withhold new funding but also to cut off all existing Medicaid funding to States that declined to adopt the prescribed federal program, Congress "crossed the line distinguishing encouragement from coercion" (particularly because States had established their Medicaid programs without any warning that Congress would later require vast changes in the programs), and thus that the challenged statute could not be upheld as an exercise of Congress's power under the Spending Clause. *Id.* at 2603 (plurality) (quoting *New York*, 505 U.S. at 175). The Court explained that such coerced acceptance of a federal program undermines federalism because "when the State has no choice [to refuse the federal funds], the Federal Government can achieve its objectives without accountability, just as in *Printz* and *New York*"; that

[6] Justice Scalia (joined by Justices Kennedy, Thomas, and Alito) fully concurred with Chief Justice Roberts's plurality opinion that Congress acted unconstitutionally in requiring States to expand their Medicaid programs. *Sebelius*, 132 S. Ct. at 2666-67 (Scalia, J., dissenting). His dissent from the Court's disposition of the Medicaid expansion issue focused solely on the proper remedy for that violation. *Id.* at 2667-68.

is, "state officials can[not] fairly be held politically accountable for choosing to accept or refuse the federal offer." *Ibid* (plurality); *id*. at 2660 (Scalia, J., dissenting) ("When Congress compels the States to do its bidding, it blurs the lines of political accountability.") (citing *Printz* and *New York*).

Similarly, because it is not a realistic option for North Carolina and Tennessee to prohibit broadband Internet services altogether, FCC has effectively required the States to expand their Internet services in a manner that violates state law. Commandeering the organs of state government in this manner violates the federalism principles upheld in *Sebelius*, *Printz* , and *New York.*[7]

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[7] We do not understand FCC to be arguing that expansion of Internet services should be deemed "voluntary" action by North Carolina and Tennessee for the additional reason that any expansion would be the result of voluntary actions undertaken by Wilson and EPB officials. Any such argument would be frivolous. Wilson and EPB are subordinate units of the States, and any expansion of Internet services undertaken by those officials cannot be deemed the voluntary actions of North Carolina and Tennessee when higher-level state officials have determined that the States should not undertake those actions. As the Supreme Court made clear in *Nixon*, the Constitution does not distinguish between state-level officials and local government officials with respect to federalism issues. 541 U.S. at 140 (rejecting preemption of state regulation of municipal telecommunications services, in part because doing so "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") (citations omitted). Indeed, the Court has recognized that States possess "absolute discretion" when deciding "the number, nature, and duration of the powers" conferred on local governmental units "*and the territory over which they shall be exercised*." *Sailors v. Bd. of Educ*., 387 U.S. 105, 108 (1967) (emphasis added).

C. FCC's Claim that It Has a Strong Regulatory Interest Does Not Alter the Federalism Analysis

FCC also sought to justify its preemption Order by comparing the strength of its interests to those of North Carolina and Tennessee. It noted that "the issue before us concerns federal oversight of interstate commerce—an area where there has been a history of significant federal presence." FCC Order ¶ 12. FCC stated that federalism concerns were of reduced importance because the case involved issues of unique interest to the federal government (the oversight of interstate commerce) and did not raise issues "of the most fundamental sort for a sovereign entity." *Id.* ¶¶ 154-155. It asserted that the state laws at issue "serve as state-law communications policy regulations, as opposed to a core state function in controlling political subdivisions." *Id.* ¶ 13.

State officials throughout the country likely would strongly disagree with FCC's assessment of the importance of laws imposing geographical limits on an exercise of power by subordinate governmental units. *See City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999) ("interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty.") More importantly, FCC's efforts to justify its preemption decision based on the relative

importance of its interests are fundamentally misguided. *Printz* makes clear that balancing efforts of that sort are out of place when addressing federalism concerns. *Printz*, 521 U.S. at 931-32. The Court explained:

> There is considerable disagreement over the extent of the burden [imposed on state officials by the challenged federal law], but we need not pause over that detail. Assuming [it] were true [that the challenged law served very important purposes and that the burden imposed on state officials was minimal, that] might be relevant if we were evaluating whether the incidental application to the States of a federal law of general applicability excessively interfered with the functioning of state governments. But where, as here, it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a "balancing" analysis is inappropriate. It is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect.

Printz, 521 U.S. at 932 (emphasis in original). It added, "[N]o case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Id.* at 935.

Moreover, FCC has badly misinterpreted preemption law. FCC notes that when deciding whether state law is preempted by a federal statute, the federal courts generally adopt a "presumption against preemption." FCC Order ¶ 155. It notes further that this statutory-construction rule sometimes is not applied when state law "regulates in an area where there has been a history of significant federal

presence." *Id.* (quoting *United States v. Locke*, 529 U.S. 89, 107-08 (2000)). From those basic premises, FCC jumps to the unfounded conclusion that federalism concerns must take a back seat whenever state regulations touch on "an area of traditional federal regulation." *Id.* *Locke* and similar cases do no more than establish rules for discerning the meaning of statutes that have more than one plausible interpretation. They have nothing whatsoever to do with Tenth Amendment limits on the power of the federal government to interfere with the apparatus of state government.

As *Locke* and similar preemption cases recognize, the Supremacy Clause grants Congress the right to enact laws that preempt a State's regulation of private entities located within the State, provided they are drafted clearly enough to overcome the presumption against preemption. But Congress has *no* authority under the Constitution to commandeer a State's legislative and administrative apparatus for federal purposes, even when it is operating "in an area of traditional federal regulation."

II. *GREGORY*'S "CLEAR STATEMENT" RULE APPLIES HERE AND DEMONSTRATES THAT CONGRESS HAS NOT AUTHORIZED FCC TO PREEMPT STATE LAW

Quite apart from its violation of the Constitution's anti-commandeering mandate, the FCC Order also runs afoul of the Supreme Court's "clear statement" rule. When Congress adopts universally applicable regulatory rules, it is generally entitled to apply those rules to state governments as well as to the private sector. *See, e.g., Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985). But whenever application of such laws to state governments threatens to "upset the usual constitutional balance of federal and state powers," the Supreme Court applies its "clear statement" rule to the congressional enactment. *Gregory*, 501 U.S. at 460. That is, "If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Ibid* (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)). This clear statement rule "is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id*. at 461.

Section 706 of the Telecommunications Act of 1996 does not contain a "clear statement" that Congress authorized FCC to preempt state regulation of

Internet services provided by subordinate governmental units, and FCC does not seriously contend otherwise.[8] It does not address municipal broadband Internet services or preemption of state law. Indeed, the language of § 706 strongly suggests that Congress intended the statute to be purely hortatory and not an independent grant of regulatory authority. *See* Tennessee Br. 49-57.

A. Section 706 Does Not Include Unmistakably Clear Language Indicating that FCC Is Authorized to Preempt State Regulation of Municipal Internet Service

The Supreme Court held in *Nixon* that § 101(a) of the Telecommunications Act of 1996, 47 U.S.C. § 253, flunked the "clear statement" test; *i.e.*, it did not include unmistakably clear language that Congress intended to preempt state laws that regulate municipal Internet services. *Nixon*, 541 U.S. at 140-41. Yet the case that FCC is authorized to intervene is far stronger under § 253 than under § 706. Section 253 explicitly limits state regulation of telecommunications services.

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[8] Section 706(a), 47 U.S.C. § 1302, states:

> 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.

Section 253(a) states, "No State or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[9] Section 253(d) explicitly authorizes preemption of state laws that violate § 253(a). If, as *Nixon* held, § 253 does not authorize FCC preemption of state laws that regulate municipal Internet services, then *a fortiori*, neither does § 706. That section, unlike § 253, includes no explicit limitations on state regulation and no authorization for preemption of state laws.

Indeed, the opening words of § 706 ("The Commission and each State commission with regulatory authority over telecommunications services shall encourage . . .") make it particularly unlikely that Congress sought to use the statute to grant FCC the preemption authority that it failed to grant in § 253. The opening words indicate that Congress wanted FCC and the States to work together to encourage expansion of telecommunications services, not that it was authorizing FCC to interfere with the internal workings of state governments.

Rather than arguing that § 706 satisfies the "clear statement" rule, FCC

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[9] The Supreme Court held that Congress did not provide a clear statement that § 253(a) applied to state regulation of municipal providers of telecommunications services because the word "entity" was ambiguous; *i.e.*, "entity" did not necessarily include a government body. *Nixon*, 541 U.S. at 133-34.

asserts that the rule is inapplicable. It argues that *Gregory* did not intend the "clear statement" rule to apply to "federal oversight of interstate commerce," because that is "an area where there has been a history of significant federal presence." FCC Order ¶ 12. But nothing in *Gregory* suggests that the Supreme Court intended to limit the "clear statement" rule in this manner.[10] Moreover, FCC's argument fails to explain *Nixon*, in which the Court applied the "clear statement" rule in a case involving federal oversight of the very same interstate commerce at issue here.

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[10] FCC's suggestion that *Gregory* did not involve federal oversight of interstate commerce is incorrect. The case addressed the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621-634. At issue was whether the ADEA barred Missouri from enforcing a state constitutional provision that imposed a mandatory retirement age on state judges. The Court noted that it had previously upheld the extension of the ADEA to employment by state and local governments as a valid exercise of Congress's powers under the Commerce Clause. 501 U.S. at 467-68 (citing *EEOC v. Wyoming*, 460 U.S. 226 (1983)). *Gregory* did not decide whether the ADEA was also a valid exercise of Congress's powers under the Fourteenth Amendment. The Court said that even if the Fourteenth Amendment also authorized the expansion, its decision would be unchanged, because its "clear statement" rule applied to federal intrusions into state government without regard to whether Congress was acting pursuant to the Commerce Clause or the Fourteenth Amendment. *Id.* at 469. Importantly, the Court indicated that where (as here) a litigant asserts that Congress sought to alter the usual constitutional balance between the States and the federal government through the exercise of its Commerce Clause powers, the Court applies a more exacting constitutional analysis than it does in Fourteenth Amendment cases. *Id.* at 464 ("As against Congress' powers 'to regulate Commerce . . . among the several States,' U.S. Const., Art. I, § 8, cl. 3, the authority of the people of the States to determine the qualifications of their government officials may be inviolate.").

B. FCC Conflates the "Clear Statement" Rule with the Presumption Against Preemption

Furthermore, the FCC's analysis confuses the "clear statement" rule with the presumption against preemption. FCC asserts:

> We find that *Gregory*'s clear statement rule does not apply here. "Where it applies, the presumption requires the that courts start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." . . . However, in areas beyond these "historic police powers of the States," the *Gregory* presumption against preemption has no place. Specifically, the Supreme Court has explained that "an assumption of nonpre-emption [*sic*] is not triggered when the State regulates in an area where there has been a history of significant federal presence."

FCC Order ¶¶ 154-155 (quoting *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2256 (2013); and *Locke*, 529 U.S. at 107-08).

Both of the cases cited by FCC address the presumption against preemption. As explained above, the presumption against preemption is a tie-breaking rule of statutory construction generally applicable to federal laws that arguably preempt *any type of state law*. It is wholly distinct from *Gregory*'s "clear statement" rule, which applies whenever "Congress intends to alter the usual constitutional balance between the States and the Federal Government" by applying generally applicable federal laws to the workings of state government. 501 U.S. at 460. So, when FCC refers to "the *Gregory* presumption against preemption," it is conflating two

distinct rules of construction. The limitations on the "presumption" referenced by FCC apply to the presumption against preemption, not to *Gregory*'s "clear statement" rule. As noted, *Gregory* applies to *all* federal statutes that seek to regulate the workings of state government and thereby alter the usual "constitutional balance"—regardless of the importance a federal agency may place on the federal objective it is seeking to further.

While apparently conceding that the "clear statement" rule applies to federal preemption of state laws (as in *Nixon*) that absolutely prohibit state subdivisions from offering broadband Internet services, FCC contends that it is entitled to preempt *less restrictive* state laws that authorize the provision of Internet services within specified geographic areas. FCC Order ¶ 12. FCC's contention is illogical. Absolute prohibitions against the offering of Internet services by state subdivisions constitute far greater "barriers to infrastructure investment," § 706, than do the geographical restrictions at issue in this case. Yet FCC would have us believe that Congress, in adopting § 706, intended to permit preemption of the less-severe barriers to infrastructure investment at issue here but not the more-severe barriers created by state laws (as in *Nixon*) that prohibit all municipal Internet services. Nothing in the language of § 706 supports such an illogical result; and the statute unquestionably does not include a "clear statement" to that effect.

C. *Parker* Immunity Indicates that Federal Policies Favoring Competition Do Not Trump Federalism Concerns

Finally, judicial construction of federal antitrust law provides useful guidance in construing the scope of § 706. Section 1 of the Sherman Act, 15 U.S.C. § 1, makes unlawful "every contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several States." Despite that sweeping prohibition of conspiracies in restraint of trade, the Supreme Court has consistently interpreted the Sherman Act as not applying to restraints of trade sanctioned by state law. *Parker v. Brown*, 317 U.S. 341 (1943); *N.C. State Bd. of Dental Examiners*, 135 S. Ct. 1101 (2015). A state law or regulatory scheme creates what has come to be known as "*Parker* immunity" whenever, "first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of the anticompetitive conduct." *Id.* at 1112.

Importantly, the Supreme Court has repeatedly acknowledged that its narrowing construction of the Sherman Act is based on federalism concerns. *Parker* "conferred immunity on anticompetitive conduct by the States when acting in their sovereign capacity" in recognition of "Congress' purpose to respect the federal balance and to 'embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution.'"

Id. at 1110 (quoting *Community Communications Co. v. Boulder*, 455 U.S. 40, 53 (1982)). As the Court explained in *Parker*, "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351.

FCC asserts that the North Carolina and Tennessee statutes at issue have the effect of reducing competition in the market for broadband Internet services; it asserts the right under § 706 of the Telecommunications Act of 1996 to preempt those statutes in order to promote competition. But the federalism principles that led the Supreme Court to conclude that Congress did not intend the Sherman Act to apply to anticompetitive conduct undertaken by the States should lead this Court to conclude similarly that Congress did not intend § 706—a statute that does not replicate the Sherman Act's unequivocal condemnations of anticompetitive conduct—to apply to States' restrictions on the commercial activities of their own subordinate governmental units.

CONCLUSION

Amici curiae respectfully request that the Court vacate the FCC Order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* Harold Furchtgott-Roth and Washington Legal Foundation. Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of *amici curiae* is in 14-point, proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (WordPerfect X5), the word count of the brief is 6,792, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of September, 2015, I electronically filed the brief of *amici curiae* Harold Furchtgott-Roth and Washington Legal Foundation with the Clerk of the Court for the U.S. Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
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