No. 15-3555

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF NORTH CAROLINA,
Petitioner,

INDEPENDENT TELEPHONE &
TELECOMMUNICATIONS ALLIANCE,
Intervenor,

v.

FEDERAL COMMUNICATIONS COMMISION;
UNITED STATES OF AMERICA,
Respondents,

CITY OF WILSON, NORTH CAROLINA,
Intervenor.

On Petition for Review from the
Federal Communications Commission

REPLY BRIEF OF PETITIONER

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Dated: November 23, 2015

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THE COMMISSION ERRONEOUSLY PREEMPTED NORTH CAROLINA'S LEGISLATION SPECIFYING THE TERMS AND CONDITIONS FOR THE PROVISION OF COMMUNICATIONS SERVICES BY CITIES.

In an attempt to rebut North Carolina's arguments, both the Federal Communications Commission ("the Commission") and the City of Wilson ("the City") misconstrue the applicable standard of review, fail to distinguish controlling legal precedent, and improperly focus on speculative effects of Session Law 2011-84 as a matter of public policy. Plain and simply, Congress could have granted preemption authority to the Commission in Section 706 of the Telecommunications Act of 1996 ("the Act"), 47 U.S.C. § 1302, but chose not to. Accordingly, the wisdom of the challenged law, which concerns the powers of North Carolina's state-created municipalities, is a matter solely for the General Assembly, as the democratically elected arm of the people of the State.

I. The Commission Engages In A Backward Analysis At Outcome-Determinative *Chevron* Step One, Improperly Ignores *Gregory* And *Nixon*, And Advances Irrelevant Policy Arguments.

To the extent the Commission implies that North Carolina "concedes" that deference to the Commission is warranted (FCC Br 24), the Commission misunderstands both the standard outlined in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and the nature of North

Carolina's arguments. *Chevron* does not stand for automatic deference to government agencies but requires an independent analysis of statutory language. The Supreme Court's decisions in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), confirm the importance of a comprehensive step-one inquiry where, as here, a challenged law implicates traditional areas of state authority. Application of step one of *Chevron* here is outcome-determinative, and the Commission's inferential arguments concerning implied preemption authority are irrelevant.

A. When Viewed Together With Other Portions Of The Act And Its Legislative History, Section 706 Plainly Does Not Allow Preemption.

The Commission upends *Chevron*'s two-step analysis. "First, always, is the question whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Under step one, the judiciary "must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9 (citations omitted). As the Commission admits, Congress "knows to speak . . . in capacious terms when it wishes to enlarge[] agency discretion." *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1868 (2013); (FCC Br 25).

Rather than beginning with a plain-language reading of Section 706, the Commission proceeds by assuming, incorrectly, that Section 706 is ambiguous regarding preemption. Only with a preliminary finding of ambiguity could the Commission turn to what is essentially a step-two argument under *Chevron*—that Congress implicitly intended to authorize preemption under Section 706, and that the Commission's interpretation in this respect was "reasonable." (FCC Br 21, 22-34)

The Commission, in fact, ignores North Carolina's step-one argument that the plain language of Section 706, when viewed together with Sections 253 and 601(c) of the Act, demonstrates that Congress did not intend to authorize preemption of state laws regulating their municipalities' authority to provide broadband. (NC Br 17-18, 20, 21-22); *see also Gregory*, 501 U.S. at 465 (applying *noscitur a sociis* as a rule of statutory construction—"that a word is known by the company it keeps").

To the extent the Commission's response to Tennessee's argument concerning the legislative history of Section 706 addresses a similar argument by North Carolina, the Commission mischaracterizes this claim as an inference "that Congress intended *sub silentio* to withdraw" preemption power from the Commission, rather than support for the proposition that Congress never intended to grant such power in the first place. (*Compare* FCC Br 34 *with* NC Br 17-18)

Because step one of *Chevron* is outcome-determinative for the reasons argued in North Carolina's principal brief, the Commission's arguments regarding its view that Section 706 confers broad authority, including implicit preemption power, are irrelevant, and this Court need not consider such claims.

B. *Gregory* And *Nixon* Emphasize The Importance Of A Comprehensive *Chevron* Step-One Analysis In The Present Matter.

Here, the Commission does not dispute the existence of the plain statement rule derived from *Gregory* and ratified in *Nixon* that "Congress needs to be clear before it constrains traditional state authority to order its government." *Nixon*, 541 U.S. at 130. Where preemption would affect core state authority, the *Gregory*/*Nixon* rule is akin to a rule of statutory construction that fits within *Chevron* step one. The Commission admits that the *Gregory*/*Nixon* rule would be outcome determinative under Section 706 where a law implicates a state's core sovereign functions. (FCC Br 16, 22) Because Session Law 2011-84 fits into the preceding category, the Commission's Order must be vacated.

1. The Commission does not dispute North Carolina's arguments concerning its sovereign right to create and control the authority of its political subdivisions.

The ability of North Carolina to regulate the composition and powers of its political subdivisions as a fundamental attribute of state sovereignty is undisputed.

(NC Br 12-14, 20-21) The Commission makes no attempt to distinguish any of the cases, statutes, and constitutional provisions cited by North Carolina for this proposition. Indeed, the Commission admits that "*Nixon* makes clear that the decision whether municipalities may provide telecommunications goes to 'States' arrangements for conducting their own governments,' which implicates *Gregory*." (FCC Br 46)

The irrefutable nature of North Carolina's arguments with respect to sovereignty underscores the fact that the Commission's "careful line" between laws that "effectuate communications policy" and laws that involve "core state control of political subdivisions" is a distinction without a difference in the present case. (FCC Br 22, 35; Order, P.A. 62 ¶146) Because North Carolina's municipalities only have powers conferred upon them by the State, and because such powers are subject to modification and revocation, any North Carolina law that speaks to the scope of municipal authority necessarily involves core State control over political subdivisions. The Commission's claim that Session Law 2011-84 ceases to involve "core state control of political subdivisions" merely because that law also relates to broadband communications is nothing more than sleight of hand. Instead, the state/federal overlap triggers the *Gregory*/*Nixon* rule.

2. The *Nixon* court's concern with "strange and indeterminate results" is analogous to the consequences resulting from preemption of Session Law 2011-84.

The Commission further attempts to distinguish *Gregory* as a non-FCC case (despite *Gregory*'s ratification in *Nixon*) (FCC Br 23-24), and *Nixon* on the basis that "strange and indeterminate results" would not result from preemption here (FCC Br 47). The Commission ignores *Nixon*'s express concern with preemption in situations similar to the instant matter, where the effect of preemption would be to reinstate an older authorization that predates the challenged legislation:[1]

> Finally, consider the result if a State that previously authorized municipalities to operate a number of utilities including telecommunications changed its law by narrowing the range of authorization . . . that would mean that a State that once chose to provide broad municipal authority could not reverse course . . . The result, in other words, would be the federal creation of a one-way ratchet. A State or municipality could give the power, but it could not take it away later.

Nixon, 541 U.S. at 136-37. Like Section 253 of the Act, which was at issue in *Nixon*, Section 706 "would not work like a normal preemptive statute if it applied to a

[1] Prior to the passage of Session Law 2011-84, no statute expressly authorized the municipal provision of "broadband or high-speed Internet access service," but the North Carolina Court of Appeals read such authorization into a statute related to "cable television system[s]." *Compare* N.C. Sess. L. 2011-84 § 1(a) *with BellSouth Telecommunications, Inc. v. City of Laurinburg*, 168 N.C. App. 75, 83, 606 S.E.2d 721, 726, *cert. denied*, 359 N.C. 629, 2005 N.C. LEXIS 982 (2005).

governmental unit," and it would be "farfetched" to assume Congress intended such a result without a clear directive. *Id.* at 138.

3. Congress has made no plain statement of preemption consistent with *Gregory*/*Nixon* but a plain statement to the contrary.

The Commission's failure to persuasively distinguish *Gregory*/*Nixon* is fatal to its argument, as the Commission admits in its brief. First, the Commission admits that it found, below, "that Section 706 granted the authority to 'preempt state laws that regulate the provision of broadband by a state's political subdivisions,' *but only when* those laws serve 'to effectuate communications policy as opposed to core state control of political subdivisions.'" (FCC Br 16 (emphasis added)) Second, the Commission reiterates that, as between laws "that go to a state's core sovereign control of its political subdivisions" and laws "that instead effectuate a state's policy preferences regarding interstate competition in the field of communications," it "is *only* the latter" that the Commission "found authority to preempt, thus avoiding intrusion into a state's sovereign prerogatives." (FCC Br 22 (emphasis added)) Thus, under a proper *Chevron* step-one analysis, as reinforced by *Gregory*/*Nixon*, there is no room for deference to the Commission. This Court should reject the Commission's inferential arguments attempting to link a so-called affirmative grant

of authority to promulgate regulations to a finding of implied preemption authority inherent in Section 706.[2]

C. It Is Unnecessary For This Court To Consider Speculative Arguments Concerning The Potential Effects Of Session Law 2011-84.

This case is not about whether Session Law 2011-84 is wise public policy. Reasonable people can and do disagree about that. In fact, the Commission admits that North Carolina's goals in passing Session Law 2011-84 were not "necessarily illegitimate." (FCC Br 51) And the Commission previously acknowledged in *Nixon* that its disapproval of a state's policy as inconsistent with the goals of the Act was insufficient, standing alone, to justify preemption. *Nixon*, 541 U.S. at 131-32. Yet the Commission focuses at length on the wording of the challenged legislation, the intent behind its passage, and the potential effects Session Law 2011-84 might have on the people of North Carolina and their ability to access broadband internet. (FCC Br 7-10, 13-15, 18-19, 50-56) Because the plain language of the Act is outcome-determinative, such speculation as to whether, in practice, Session Law 2011-84 will

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[2] The Commission's citation of Supreme Court precedent involving the preemption of state laws by federal regulations ignores the fact that the Commission has promulgated no regulation alleged to be in direct conflict with Session Law 2011-84. (FCC Br 31-32); *see also City of Arlington*, 133 S. Ct. at 1874 (noting that step-two *Chevron* deference to an action by an agency with rulemaking authority is not warranted where the action is not rulemaking).

serve as a barrier to broadband access is unwarranted. Policy questions are purely a matter for North Carolina's democratically elected legislature. *See Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015) ("If constitutional requirements are met, the wisdom of the legislation is a question for the General Assembly.").

II. The City Of Wilson Conflates Steps One And Two Of *Chevron*, Misstates North Carolina's Position On Two Matters, And Raises Irrelevant Policy Arguments.

The City takes the mutually inconsistent positions of arguing both that "*Chevron* deference" to the Commission is warranted and that Section 706 is clear and must be applied as written. (*Compare* City Br 36, 60 *with* City Br 61) The City's brief also misstates North Carolina's arguments concerning sovereignty and the circumstances under which preemption of state laws regulating municipalities would be appropriate. (City Br 49, 51) Finally, the City's brief suffers from similar flaws as those discussed above concerning policy matters within the purview of North Carolina's General Assembly. (City Br 1-34, 48-49, 51)

A. The City's Claim That Section 706 Plainly Allows Preemption Conflates *Chevron* Step Two With *Chevron* Step One.

North Carolina generally agrees with the City's statement that "extraneous means of gleaning Congress's intent in enacting Section 706[] would be inappropriate in this case" because, "when a statute is clear, it must be applied as written." (City

Br 60-61 (citing *CSX Transp. v. Ala. Dep't of Revenue*, 562 U.S. 277, 295 (2011)) However, the City adopts an overly broad definition of "extraneous" sources, attempting to avoid the *Nixon* hypothetical discussed in Part I.B.2 above, which is not an extraneous source of congressional intent, but an illustration of the practical and illogical consequences of preemption in the present matter.

The fallacy of the City's so-called *Chevron* step-one argument is its admission that "Section 706 does not on its face explicitly preempt state barriers to municipal broadband initiatives." (City Br 56) As the City acknowledges, *Gregory* requires that the desired Congressional intent "must be plain to anyone reading the Act." 501 U.S. at 467 (quotation marks omitted). The City's interpretation of Section 706 requires an inferential leap, starting with a proposition this Court has never decided (that Section 706 confers a broad grant of authority on the Commission rather than stating an aspirational goal)[3] and then proceeding with an assumption that Congress implicitly intended preemption to fall within such a grant of power. This reading

[3] It is noteworthy that the analysis in *Nixon* appears inconsistent with the claim that Section 706 is anything other than hortatory. In *Nixon*, the Court affirmed the Commission's position that it had no authority to preempt state laws prohibiting municipalities from providing telecommunications services under Section 253 of the Act, even though the Commission "minced no words in saying that participation of municipally owned entities in the telecommunications business would 'further the *goal* of the 1996 Act to bring the benefits of competition to *all Americans*.'" 541 U.S. at 131 (emphasis added); *cf.* (City Br 44-45, 52-54, 57-59).

does not follow from a plain reading of the Act and has no role at *Chevron* step one. The requests in the City's brief for "*Chevron* deference" to the Commission (City Br 36, 60) fall under step two of the analysis, which this Court need not consider for the reasons discussed above.

B. North Carolina Has Not Claimed Its Laws Are "Inviolate," And Has Articulated A Clear Relationship Between Session Law 2011-84 And Its Core Sovereignty.

The City misstates North Carolina's argument in two respects. First, the City argues that state laws concerning municipalities cannot be viewed as "inviolate." (City Br 48) Second, the City posits that North Carolina has failed to show a relationship between Session Law 2011-84 and its core State sovereignty. (City Br 51)

1. North Carolina has not claimed its laws are inviolate, but that preemptive intent must be clear.

Contrary to the City's characterization, North Carolina's position is not "that any law that a State adopts concerning the authority of its political subdivisions is inviolate under principals [sic] of federalism" (City Br 48), but that Congress must make clear its intention to preempt such laws. North Carolina disputes the City's claim that the Commission "would have *unquestionable* authority to preempt" a law identical to Session Law 2011-84 but applying only to private entities. (City Br 49

n.18 (emphasis added)) The City conflates Section 706 and Section 253 of the Act. Express preemption language is wholly absent from Section 706 whereas Section 253 contains express preemption language applicable to private entities, making the City's analogy to Section 253 inapt. With or without *Gregory*/*Nixon*, the same *Chevron* step-one analysis discussed in Part I.A would apply.

2. North Carolina has articulated a clear relationship between Session Law 2011-84 and its core sovereignty.

The City incorrectly claims that "North Carolina has made no substantive argument or provided any explanation of how exactly Session Law 2011-84 implicates a core or traditional state function. so." (City Br 50) The City's statement that North Carolina's argument is "unsupported and unexplained" (City Br 50), reflects an inaccurate characterization of the contents of North Carolina's principal brief, which contains a detailed discussion of sovereignty that the Commission, itself, has not disputed, as discussed in Part I.B.1 above.

C. The Public Policy Rationale For Session Law 2011-84 Is Not At Issue.

The City spends the first 34 pages of its brief alleging that Session Law 2011-84 is a bad law. It further professes that Session Law 2011-84 will "not even do what it pretends to do" and posits that "competition law is intended to protect competition, not competitors." (City Br 48, 51) The overemphasis on policy

arguments that have no bearing on the proper outcome of this case (*see* Part I.C.), highlights the City's lack of legal arguments to rebut North Carolina's logical conclusion that the plain language of the Act reflects Congress's intent not to allow preemption under Section 706. The plain language of the Act constitutes the beginning and end of the analysis in this case under *Chevron*, *Gregory*, and *Nixon*.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above and in North Carolina's opening brief, North Carolina respectfully requests that this Court reject the Commission's preemption of the specific provisions of North Carolina Session Law 2011-84 identified in Paragraph 181 of the Order by vacating the Order, and remanding the matter to the Commission with instructions to deny the petition by the City of Wilson in its entirety.

Respectfully submitted, this the 23rd day of November, 2015.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains no more than 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). There are a total of 2,857 words.

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CERTIFICATE OF SERVICE

I, John Foster Maddrey, hereby certify that on November 23, 2015, the foregoing **REPLY BRIEF OF PETITIONER** was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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