No. 15-3291

In the United States Court of Appeals
for the Sixth Circuit

STATE OF TENNESSEE,
Petitioner

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
Intervenor

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents

ELECTRIC POWER BOARD OF CHATTANOOGA,
Intervenor

CITY OF WILSON, NC,
Intervenor

On Appeal from the FCC
FCC-1:15-25

BRIEF FOR THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER AND URGING REVERSAL

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STATEMENT OF INTEREST[1]

This amicus curiae brief is submitted in support of Appellant-Petitioner. *Amici* – the National Governors Association (NGA), the National Conference of State Legislatures (NCSL), and the Council of State Governments (CSG) – are national organizations whose members include State elected and appointed Executive and Legislative branch officials from across the United States who are constitutionally charged to govern their states. These organizations regularly file *amicus* briefs in cases that, like this one, concern federalism and raise preemption challenges.

In this case, the Court will decide whether the Federal Communications Commission ("FCC" or "Commission") exceeded its statutory authority under Section 706 of the Telecommunications Act of 1996 ("Act") Pub. L. No. 104-104, 47 U.S.C. § 1301 *et seq*. In March 2015, the Commission issued a final order that preempted duly enacted state laws in Tennessee and North Carolina governing certain aspects of broadband deployment by a Tennessee municipal electric system and a North Carolina municipality. *Memorandum Opinion and Order*, FCC 15-25, WC Docket No. 14-115 and 14-116, adopted on February 26, 2015, and released

[1] In accordance with Federal Rules of Appellate Procedure Rule 29(c)(5), *Amici* affirm that the parties' counsel did not author this brief in whole or in part, neither the parties nor their counsel contributed money to *amici* to fund the preparation or submission of this brief, and no other person other than the *amici* listed herein contributed money intended to fund the preparation or submission of this *amicus* brief.

March 12, 2015 (hereinafter "Order"). *Amici* urge this Court to overturn the Order because under 5 U.S.C. § 706(2)(C) it exceeds the Commission's statutory authority, erodes state sovereignty, and impairs the capacity of the states to govern.

ARGUMENT

I. THE COMMISSION HAS NEITHER EXPRESS NOR IMPLIED AUTHORITY UNDER THE ACT TO PREEMPT STATE LAWS.

A. Congress did not Grant the Commission Express or Implied Preemption Authority under the Act.

"[W]e do not read Section 706 to itself preempt state laws." *Order* at 153. With these words, the Court should conclude that this language effectively ends the preemption inquiry. The Commission's decision to preempt state laws governing municipal instrumentalities did not resolve a statutory ambiguity subject to *Chevron* deference. *United States v. Mead Corp*., 533 U.S. 218, 230 (2001). Instead, the Commission's arguments for preemption are an abuse of discretion because the Commission's decision ignores the plain language of Section 706, the Act's unambiguous statement that implied authority to preempt is prohibited, and the Act's legislative history.

The plain language of section 706(a) states that:

> 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 . . . 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.

5 U.S.C. § 706(a). Federal preemption of state law is prohibited absent direct federal-state conflict, or a "clear statement" of preemptive effect by Congress in statute. U.S. Const., Art. 6, Sec. 2. *See also Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 605 (1991) ("[W]hen considering pre-emption, we 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.") (Internal cites and quotations omitted). Nowhere in Section 706 is any form of the word "preempt" used nor should it be reasonably inferred from the plain text or legislative history. The Commission's preemption argument rests on several hollow legs.

First, the Commission draws an extreme conclusion from the phrase "shall encourage the deployment". *Order* at Section 706(a). This represents a fundamental misunderstanding of the state-municipal relationship. *See infra* at Section II. A. The Commission's exercise of preemption unconstitutionally infringes on the authority of states to govern their instrumentalities. The Commission contends that harm exists in the form of state laws that provide the framework for deployment of municipal broadband. This argument is flawed.

> Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature . . . It would follow that the ability of a state legislative (or, as here, administrative) body – which makes decisions and sets policy for the State as a whole – to consider and promulgate regulations of its choosing must be central to a State's role in the federal system.

FERC v. Mississippi, 456 U.S. 742, 761 (1982).

Although state laws may slow the speed at which municipal broadband enterprises can form, they do not present a calculable harm to the deployment of these enterprises. States, as sovereigns, enact laws on a myriad of policy issues that govern their political instrumentalities. This authority is fundamental to set statewide priorities, protect citizens, and provide a macro perspective that helps shape core economic, social, and budgetary directions. Preempting the sovereign authority of states is a blunt instrument disproportional to the alleged harm. Section 706 is not a grant of federal preemptive authority, but rather a general exhortation to federal and state regulators to encourage the deployment of advanced telecommunications capability to the public. The use of "and" between "Commission" and "each State [public utility] commission" signals congressional intent for *shared* jurisdiction over matters involving advanced telecommunications services.[2] With this simple conjunction Congress established the states as partners

[2] The Commission "do[es] not find this argument persuasive," and treats the conjunction as surplusage. While the canonical "preference for avoiding surplusage constructions is not absolute," the Commission's reliance on "other regulatory methods" as its touchstone for preemption requires that it ignore "and"

with the Commission and gave them the same instructions to encourage deployment of advanced communications services.[3] Section 706 is a clear instance of collaborative federalism whereby both federal and state regulators work to promote the deployment of advanced communications.

Second, the Commission's interpretation of the phrase "other regulating methods" demands careful scrutiny. The Commission argues that this phrase treats the Commission differently than state regulators, and contends that the Act directs "each to use the tools it has available to encourage the deployment of broadband". *Order* at 151. The Commission then declares that it may use federal preemption as a regulatory tool. *Id.* Nothing in Section 706(a) nor the canons of statutory construction support this conclusion. This phrase is but one item in a list of particular, not mandated regulatory tools available to both the Commission and to state regulators, including "regulatory forbearance." Sec. 706(a). The Act's list of

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because it is nonsensical that Congress intended to grant state regulators preemption authority over state laws. *Lamie v. United States Trustees*, 540 U.S. 526, 536 (2004). The Commission's omission damages the thoroughness, consistency, and persuasiveness of its arguments. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

[3] One also would expect Congress to use a more forceful verb than "encourage" in Section 706(a) to trigger such an aggressive step as federal preemption by the Commission. Instead, Congress chose this soft verb that means to "hearten" or "inspire". Merriam-Webster Online Dictionary (2015), http://www.merriam-webster.com (last visited 17 Sept. 2015). Such disproportionality is not "*consistent* with the public interest, convenience, and necessity" to uphold our federal form of government. (Italics added).

specific (e.g. price cap regulation), affirmative (e.g. measures that promote competition), and moderating (e.g. regulatory forbearance) tools limits the contextual meaning of the phrase. A word is known by the company it keeps (*noscitur a sociis*) to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). The Commission's aggressive reading of "other regulatory methods" to include federal preemption, which is neither an affirmative nor a moderate regulatory tool, is overly broad and contextually inconsistent with the full statutory passage. Absent express authority, this Court must hold that the Commission unpersuasively infers from "other regulatory methods," its power to preempt.[4]

Third, the most relevant plain statement in the Act regarding preemption counsels against its application here. 47 U.S.C. § 152 Notes. Congress affirmed this presumption by clearly stating that the Act and its amendments "shall not be construed to modify, impair, or supersede federal, state, or local law unless *expressly so provided*" in the Act. *Id*. (emphasis added). The Act's conferees

[4] *Cf. Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("*To give these same words a different meaning for each category would be to invent a statute rather than interpret one.*"). *See Sierra Club v. Kenney*, 88 Ill. 2d 110, 57 Ill. Dec. 851, 429 N.E.2d 1214 [1981]) (Court held that, in a statute granting a department of conservation the authority to sell "gravel, sand, earth or other material," the phrase "other material" could only be interpreted to include materials of the same general type and did not include commercial timber.)

further explained that "[t]his provision prevents affected parties from asserting that the [Act] impliedly preempts other laws." H.R. Conf. Rep. No. 104-458, 104th Cong, 2d Sess., 1996 U.S.C.C.A.N. 10, 201 (Jan. 31, 1996.) The Commission argues that while this plain statutory language prohibits implied preemption authority under the Act itself, it does not prevent the Commission from *inferring* authority to preempt because of its overly-broad interpretation of its regulatory power under Section 706. *Order* at 153. This absurd interpretation does not pass the reasonableness test because "[i]t is difficult to believe that Congress would have been concerned about implicitly superseding state law in the text of the Act, yet would implicitly give the Commission the authority to do the exact same thing." *Order* at 106 (Pai, Comm'r. dissenting).

The statutory history of Section 706(b) also confirms that Congress did not intend for the Commission to have preemption authority. *Order* at 107-108 (Pai, Comm'r. dissenting). The House-Senate conference committee specifically and intentionally cut express preemption language from the final bill that became law. *See* Sec. 652, Sec. 304(b) (104th Cong. 1995) (contained in "Title III – An End to Regulation"). "The fact that Congress expressly contemplated providing the Commission with the power to preempt in Section 706 but removed such language from the legislation strongly counsels against interpreting the provision to allow the Commission to preempt state law." *Order* at 108 (Pai, Comm'r. dissenting).

B. <u>The FCC's Arguments Fail to Meet the Appropriate Legal Standards for Federal Preemption of State Law.</u>

The Commission concedes that there is no express authority to preempt state laws under Section 706. *Order* at 153. The Commission's argument in defense of its Order must fall because it does not meet the relevant legal standards established by the U.S. Supreme Court.

i. The Commission Fails to Meet the Gregory Standard and Fails to Present a Valid Argument Under the Commerce Clause.

In *Gregory v. Ashcroft*, 501 U.S. 452 (1992), the Court held that a federal agency or court must find that Congress made a "plain statement" to preempt, which "must be plain to anyone reading the Act that it covers [the issue]." *Gregory* at 467. While the Commission admits that it may not preempt state laws that flatly prohibit municipal broadband service, it believes Section 706 authorizes it to preempt state laws that regulate municipal broadband service. *Order* at 167. The Commission's sophistry fails because it fuses content with form.

The historic police powers of states include the power to govern their political instrumentalities. The form a state chooses to exercise this power either through statutory prohibitions or policy regulations does not matter because the *Gregory* Court did not carve out a safe harbor in its "clear statement" rule for form. While "Congress may impose its will on the States" through its constitutional powers and "legislate in areas traditionally regulated by the States," this authority

rests with Congress, not unilaterally with unelected federal regulators. *Gregory*, 501 U.S at 460.

The FCC manipulates its fusion of content and form to argue that *Gregory* is inapplicable because federal interstate communications law is presumed to preempt conflicting state laws under the Commerce Clause. Order at 156. This Commerce Clause reliance is misplaced because the state laws at issue relate not to interstate, but to the *intrastate* actions of municipalities.[5] As a result the Commission has neither met the *Gregory* standard nor made a valid Commerce Clause argument.

ii. The Commission also Fails to Meet the Standard set forth in Nixon.

The Commission's claim that Section 706(a) grants preemption authority is further eroded under the *Nixon* standard. *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004). The *Nixon* Court declared that, "Congress needs to be clear before it constrains traditional state authority to order its government", and warned of "strange and indeterminate results" if federal agencies take preemption of state law too far. *Id.* at 130. *See also United States v. American Trucking Assns., Inc.,* 310 U.S. 534, 543 (1940) (Court will not construe a statute in a manner that leads

[5] Consolidated Government and Local Government Functions and Entities, Tenn. Code Ann. § 7: Local Government Functions; N.C. Gen. Stat. Ann. § 160A-340.1(a)(3); *Order* at 82 and 85. The Tennessee municipal utility admits that it is free under state law to build a statewide fiber network as a telecommunications provider, but that it may not use that network to offer broadband outside its electric service area because of the state law's geographic restriction. *Order* at 169.

to absurd or futile results). Under *Nixon's* set of facts, extending agency preemption authority to governmental entities would "mean that a State that once chose to provide broad municipal authority could not reverse course." *Nixon* at 137. Where a municipal corporation operates as a market participant, it is "highly unlikely" that a state's decision to limit or withdraw authority to municipal providers "would be 'neutral' in any sense of the word." *Id.* at 137-138.

The Commission's interpretation of Section 706 contradicts the *Nixon* Court's reasoning because the Commission claims that its preemption authority governs only those state actions that inhibit municipal broadband deployment once permission to deploy has been granted. This ignores the key point of the *Nixon* analysis. If a narrowing statute "would have a prohibitory effect on the prior ability" of a municipality to deliver broadband, then the risk of federal preemption of that narrow statute would, effectively, command the state to "not reverse course" but only enact amendments that expand the original grant of authority. *Nixon* at 137.

The Commission's arguments in support of Section 706 preemption authority are unconstitutional and simply cannot survive under the *Nixon* and *Gregory* tests.

II. FEDERAL PREEMPTION OF STATE LAWS REGULATING MUNICIPAL BROADBAND HAS FAR-REACHING AND UNINTENDED CONSEQUENCES

A. The FCC's Ruling Unconstitutionally Redefines State Sovereign Authority.

The Commission's preemption constrains the sovereign authority of the states to govern their instrumentalities. Municipalities are the creatures of the sovereign states. Their relationship to the states is vastly different from the federal-state "dual sovereign" relationship. *City of Trenton v. State of New Jersey*, 262 U.S. 182, 185 (1923). The United States Supreme Court has said that, "the city is a political subdivision of the state, created as a convenient agency for the exercise of such of the governmental powers of the state as may be intrusted [*sic.*] to it." *Town of Mt. Pleasant v. Beckwith*, 100 U.S. 514, 520 (1879). Further, "where no constitutional restriction is imposed, the corporate existence and powers of counties, cities, and towns are subject to the legislative control of the State creating them." *Id.*

Regardless of whether a state is a Dillon's Rule state, Home Rule state, or hybrid of the two, municipalities are created and bound by state law, their actions are subject to judicial review in state courts, they are fiscally tied to the state, and they are ultimately responsible to the states.[6] States create political

[6] Thirty-nine states are known as "Dillon's Rule" states in which the state legislature controls "local government structure, methods of financing its activities, its procedures and the authority to undertake functions." (*See,* National League of

instrumentalities such as municipal corporations and "the 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." *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907). *See also* Charles Davidson and Michael Santorelli – Understanding the Debate Over Government-Owned Broadband Networks: Context, Lessons Learned, and a Way Forward for Policy Makers, http://www.nyls.edu/advanced-communications-law-and-policyinstitute/wp-content/uploads/sites/169/2013/08/ACLP-Government-Owned-BroadbandNetworks-FINAL-June-2014.pdf. (Last visited July 8, 2015) (The debate over whether or not municipal broadband networks are appropriate often comes down to a fundamental disagreement over the proper role of government in private markets). (Hereafter "Davidson and Santorelli").

State laws regulating areas traditionally occupied by the states are presumed constitutionally valid. *See Rice v. Santa Fee Elevator Corp*., 331 U.S. 218, 230 (1947). Courts have stressed congressional and agency restraint when addressing

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Cities, *Local Government Authority,* http://www.nlc.org/build-skills-andnetworks/resources/cities-101/city-powers/local-government-authority) (Last visited July 8, 2015). Ten states have granted their localities autonomy through their constitutions or by state statute and are called "Home Rule" states. *Id.* This means that states have devolved down to their localities significant autonomy to regulate their own governmental affairs that pertain to purely local concerns such as municipal zoning and sanitation, as opposed to statewide issues such as the legal age for consumption of alcoholic beverages or income tax. Home Rule states are also subject to significant judicial review. *Id*.

federal actions that would alter the balance of authority between states and their municipalities. "Whatever the scope of congressional authority in this regard, interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty." *City of Abilene*, *Texas v. Federal Communications Commission,* 164 F.3d 49, 52 (1999) and *Sailors v. Bd of Educ.* 387 U.S. 105, 107-108 (1967). The Order must fall because the Commission's preemption of state laws unconstitutionally interferes with the traditional powers of sovereign states to regulate their political subdivisions.

The Commission's preemption chills not only state sovereign authority but also political accountability because "when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate . . . [I]t may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision". *New York v. United States*, 505 U.S. 144, 146 (1992). If *stare decisis* holds that "the Constitution has never been understood to confer upon Congress the ability to require the [S]tates to govern according to Congress' instructions," then it logically follows that unelected agencies like the Commission face a similar prohibition; otherwise, this would be the exception that swallows the rule, especially in an era where agency action has such potency. *New York*, 505 U.S. at 162. *See also South Carolina v. Baker*, 485

U.S. 505, 513 (1988) (noting "the possibility that the Tenth Amendment might set some limits on Congress' power to compel States to regulate on behalf of federal interests."). If this Court upholds the Order, it will allow the FCC to interfere directly with a state's ability to govern its municipalities and protect the vital interests of state residents:

> As these [municipal broadband] systems become more complex and ambitious, the costs associated with building and maintaining them rise inexorably, which raises the risk of costly—and potentially devastating—default by local government. Accordingly, states, which maintain ultimate responsibility for the financial health of the cities and towns in their borders, have a clear and compelling interest in overseeing the process by which GONs [government-owned networks] proposals are vetted and approved. Davidson and Santorelli at 105.

Neither the North Carolina nor Tennessee legislative and executive branches enacted laws that prohibited either municipal instrumentality from establishing broadband capacity to serve their residents within the city limits. Each state was constitutionally exercising its "traditional … authority to order its government" and engaging in a core aspect of state sovereignty by enacting laws governing the scope and scale of municipal broadband networks. *Nixon*, 541 U.S. at 130; *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978); *See also Order* at 104 (Pai, Comm'r. dissenting). Based on these facts, the Commission's Order unconstitutionally restricts the ability of Tennessee and North Carolina to appropriately regulate their municipalities. There is a legal distinction between

laws that are unconstitutional from those like the Tennessee and North Carolina laws that some factions do not support. If factions are unable to secure legislative changes, then the appropriate tool is the ballot box, not the cudgel of federal preemption.

B. The FCC's Ruling Fundamentally Alters the Federal-State Relationship.

The Constitution forms "an indestructible Union, composed of indestructible States" and a federal government of limited powers. *Texas v. White*, 74 U.S. 700, 725 (1869). S*ee also Gregory*, 501 U.S. at 457. Under the Constitution, the Founders affirmed that the states would retain a material share of their sovereignty, and that the preservation of the states as "distinct governments" was one of the necessary "auxiliary precautions" against centralized tyranny. The Federalist Nos. 45 and 51 (James Madison) (J. Cooke ed., 1961). The Constitution at Article IV, Section 4 and the Tenth Amendment, each provide protections against federal interference with fundamental state authority to govern their municipalities. *See* Deborah Merritt, *The Guaranty Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 25 (1988). ("[T]he words of the guarantee clause suggest a limit on the power of the federal government to infringe state autonomy. The citizens of a state cannot operate a republican government…enacting their own laws, if their government is beholden to Washington.").

More than 200 years later, however, the federal-state balance of power has shifted because of the increased scope of federal preemption. Commissioner O'Rielly in his dissent from the FCC Order warned that ". . . the types of [state] restrictions under scrutiny are not necessarily specific to communications policy." *Order* at 115 (O'Rielly, Comm'r. dissenting). Commissioner O'Rielly's statement is borne out by the real and disturbing attempts in recent years by various federal agencies to preempt entire bodies of state law by regulatory fiat. Examples of attempted federal agency preemption are evident in proposed rules by the federal National Highway Traffic Safety Administration (NHTSA), the Food and Drug Administration (FDA), and the Office of the Comptroller of the Currency (OCC).[7] The Commission's Order, moreover, runs afoul of President Obama's preemption memorandum to Executive Branch department and agency heads. *Preemption*

[7] NHTSA's proposed roof crush rule would have only permitted continuance of state statutes that mirrored new federal regulations. "Thus, all differing state statutes and regulation would be preempted." National Highway Traffic Safety Administration, 70 Fed. Reg. 49223, 49245 (proposed Aug. 23, 2005). The FDA unsuccessfully attempted to insert preemption language into the preambles of proposed rules including its proposed prescription drug labelling rule declaring that, "under existing preemption principles, FDA approval of labeling … preempts conflicting or contrary State law." Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3934 (effective June 30, 2006). The OCC attempted to preempt states from taking enforcement actions under the National Bank Act, but the Supreme Court held that states are not preempted from enforcement actions. *Cuomo v. The Clearing House Association*, 557 U.S. 519 (2009).

Memorandum for the Heads of Executive Departments and Agencies, 74 FR 24693 (May 22, 2009) ("Memorandum"). The Memorandum outlined the Administration's policy that "preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption." *Id.* Even the president acknowledged that "[i]n recent years . . . executive departments and agencies have sometimes announced that their regulations preempt State law, including State common law, without explicit preemption by the Congress, or an otherwise sufficient basis under applicable legal principles." *Id.* Agencies have no special authority to pronounce on preemption absent delegation by Congress. *Wyeth v. Levine*, 555 U.S. 555, 576-577 (2009). Where Congress has not authorized a federal agency "to preempt state law directly," the Court established it was not proper to defer to "an agency's *conclusion* that state law is preempted." *Id.* at 576. The court should follow this rule here.

The courts remain ground zero for deciding the constitutional line between federal and state authority. *New York*, 505 U.S. at 155. Upholding the Order would signal to other unelected federal agencies and departments a treacherous green light to pursue agency preemption of state laws where, like here, Congress has not granted express or implied authority.

C. The FCC's Ruling Invites Unintended Policy and Fiscal Consequences for States.

The Order, if upheld, may stunt rather than stimulate broadband deployment because it invites states to enact outright prohibitions to avoid federal preemption. *Cf. Nixon*, 541 U.S. at 132 ("[I]t does not follow that preempting state or local barriers to governmental entry into the market would be an effective way to draw municipalities into the business . . ."). The Order leaves states with two options - either enact outright bans on municipal broadband networks, or enact statutes that conform to the public policy directives of the Commission's bureaucrats, which may not parallel the interests of individual sovereign states to craft "carefully-tailored conditions that ensure such projects will be successful and not burden taxpayers." *Order* at 116 (O'Reilly, Comm'r. dissenting).

Commissioner O'Rielly warned further that, "[t]he [O]rder is downright hostile to the states, accusing them of passing laws that "allegedly" but do not actually protect taxpayers from risk." *Id.* It seems that no state-required protection, no matter how beneficial to taxpayers, could survive the FCC's skepticism. *Id.* Outright prohibition of municipal broadband by the states would result in the "strange and indeterminate results," foretold by the *Nixon* Court. *Nixon,* 541 U.S. at 133.

The Commission's audacious exercise of preemption exposes its indifference to responsible governance. Order at 71 ("Some argue that by

increasing the likelihood of spending on municipal broadband, preemption harms other municipal priorities…[h]owever, section 706 directs us specifically to focus on measures to enhance broadband deployment ….”). In stark contrast to the Commission's responsibilities, states have broad jurisdiction and policy responsibilities spanning critical issues such as improving schools, growing economic opportunity, maintaining highways and transit, protecting health and welfare, and fighting crime. *See* Davidson and Santorelli at x. Sovereign states must balance those core policy objectives, and this obligation brings with it a responsibility to require certain actions be taken either to avoid or redress municipal fiscal distress. *Fiscal Federalism, Political Will, and Strategic Use of Municipal Bankruptcy*, 79 U. Chi. L. Rev. 281, 298 (2012) ("Federal intervention therefore might appear to offend conceptions of federalism that generally exclude state-municipal relationships from federal intrusion."). In worst-case situations, municipalities have access under Chapter 9 of federal bankruptcy law, but even that access first requires state consent. *See United States v. Belkins*, 304 U.S. 27, 47-53 (1938). Despite the Commission's preemption action, States remain accountable to help protect their political subdivisions from bankruptcy.

States have a strong interest in overseeing the process by which municipal broadband networks are designed and approved because states maintain ultimate responsibility for the well-being of the cities and towns within their borders.

Davidson and Santorelli at xiv. Building and maintaining municipal broadband networks cost money and time. Once a broadband network is up and running, its costs do not end at start-up because the investment is a long-term commitment. Municipalities that construct broadband networks must constantly manage, maintain, and upgrade their networks to stay competitive with private providers. If a municipal broadband network expands too fast, loses customers, experiences service interruptions, misses revenue projections, or encounters some other difficulty, those costs raise the risk of financial default by local government, the diversion of resources from other priorities, or other negative outcomes such as credit downgrades. *Id*. at xiv.

Removing states from the decision-making process over municipal broadband networks is irresponsible because what is at stake is the potential fiscal failure of not just a startup business, but an entire local government that provides an array of services on which the public depend. This is not a theoretical parade-of-horribles.[8] The list of recovery efforts by the states to bail out municipal actions

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[8] The MacArthur Foundation has funded a multi-year study by George Mason University's Center on State and Local Leadership analyzing municipal fiscal challenges in the wake of the Great Recession, including Chapter 9 bankruptcy to restructure financially-distressed municipalities, in six major urban centers: Baltimore, Chicago, Detroit, Pittsburgh, Providence, and San Bernadino. https://fiscalbankruptcy.wordpress.com/macarthur-grant (last visited August 4, 2015).

continues to grow.[9] While the current scope and scale of municipal broadband in Chattanooga and Wilson appears manageable, thanks to those state laws preempted by the Commission, municipal broadband networks have a history of overpromising and under-delivering, leaving taxpayers at risk:

Provo, Utah spent nearly $60 million building an incomplete network, incurring debt along the way. The municipality ultimately could not pay for nor handle the burden of being an Internet service provider because subscribership was well below projections and only one-third of available homes were connected to the network. Davidson and Santorelli at 83. Eventually, the city sold its distressed network to Google for the princely sum of one dollar, but still had to pay off nearly $40 million in bond debt for the network and incurred additional costs as a result of its deal with Google. *Id*.

Groton, Connecticut is another example of a failed municipal system that collapsed because the projected customer base, revenues, new jobs, and ability to compete with incumbent Internet providers failed to materialize. *Id*. at 82. Groton sold its network for $550,000 -- a loss of over $30 million. *Id*. at 80. The city and

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[9]The state of Michigan contributed $350 million to assist the city of Detroit in exiting bankruptcy. Isadore, Chris and Hicken, Melanie, http://money.cnn.com/2014/01/22/news/economy/syder-detroit-state-bailout/ (last visited July 13, 2015). California and Pennsylvania have also assisted their cities through financial crises. S*ee* Bellin, Judah, http://www.city-journal.org/2014/eon1014jb.html (last visited July 15, 2015) and Esquivel, Paloma and Mozingo, Joe http://www.latimes.com/local/california/la-me-san-bernardino-bankruptcy-20150519-story.html (last visited July 13, 2015).

its taxpayers will have to pay $27.5 million in bond debt over the next fifteen years. *Id*. at 81.

Burlington, Vermont began offering residents and businesses access to its municipal broadband network deployed originally for exclusive use by city agencies in 2005. After securing millions of dollars in financing, the municipal system seemed poised to succeed, but by 2008 revenues did not cover debt payments and, by 2009, the system's debt load led the city council to conclude that the system was "too deeply indebted to break even." The Burlington system remains in debt and continues to struggle to expand its user base. Santorelli and Davidson at 18.

From these failures, states have learned valuable policy lessons and have passed laws aimed at preventing future poor planning and fiscal disasters due to failed municipal broadband efforts. *See*, Eric Null, "*Municipal Broadband: History's Guide,"* I/S: A Journal of Law and Policy, Vol. 91, at 21 (2013). For instance, following a string of municipal broadband failures, Florida became a success story because of state involvement. Davidson & Santorelli at 106-107. The Florida legislature began developing a framework in 2005 to aid municipalities wishing to enter into the broadband market. The provisions included "ample notice of public hearings, discussion of numerous aspects of the proposed government owned network at the hearings, develop[ing] a business

plan", as well as various boundaries the municipalities were to be aware of concerning financing the deal. *Id*. Instead of going further into the fiscal crevasse of municipal broadband market failures, the State began to see "enormous growth and innovation throughout [their] broadband ecosystem." *Id*. The State not only became a national leader in broadband, it also outpaced the national average of broadband adoption.[10]

Currently, there are nineteen states with laws that help shape municipal broadband expansion.[11] Those laws require that municipalities think carefully about their plans and include reasonable requirements like feasibility studies that demonstrate proof of sustainability, and obtaining citizen input through the referendum process. *See*, The National Conference of State Legislatures,

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[10] "As of the end of 2012, 74 percent of Florida households had a fixed broadband connection, with millions more accessing the Internet wirelessly. With respect to supply side issues, 99.5 percent of the population had access to a wireline broadband connection by the end of 2012, while 96 percent had access to at least two. Nearly everyone in the state—98.3 percent of the population—had access to at least three wireless broadband providers." Davidson & Santorelli at 108.

[11] These states are Tennessee, North Carolina, Alabama, Arkansas, Colorado, Florida, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Nevada, Pennsylvania, South Carolina, Texas, Utah, Virginia, Washington, and Wisconsin. *See*, National Conference of State Legislatures, http://www.ncsl.org/research/telecommunications-and-information-technology/ 2013-enacted-broadband-legislation635201203.aspx. For example, Colorado's Broadband Deployment Act provision would likely be preempted by the Order. http://www.leg.state.co.us/clics/clics2014a/csl.nsf/ fsbillcont3/2FB597CE228EC 3BA87257C8600687651?open&file=1327_enr.pdf, as would Georgia's BILD Act, http://www.legis.ga.gov/legislation/en-US/Display/20132014/HB/176. Many other laws will be adversely impacted if the Order stands.

http://www.ncsl.org/research/telecommunications-and-information-technology/broadband-statutes.aspx (last visited July 15, 2015). All of these laws exist to protect taxpayer dollars in the event that a municipality cannot sustain its excursion into the realm of advanced broadband services, as well as to prevent their nondiscriminatory treatment. Those state laws could be subject to federal preemption if the Commission's order is upheld.

If states can no longer require even the most basic provisions to ensure non-discrimination, transparency, citizen referenda on debt issuance, and public review of business plans and revenue models, then full information necessary to safeguard against preventable dangers is absent. *See generally* O'Rielly dissent at 116. If the Commission's Order stands, states will be blocked from any material front-end involvement in how their municipal instrumentalities pursue the process of proposing, building, and maintaining networks. Unilateral municipal action invites riskier behavior than should normally be the case. Surely this Court can agree that this is not a desirable result for our citizens.

For these reasons, *amici* urge this Court to set aside and vacate the Commission's Order.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because:

This brief contains 5,664 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word-counting function of Microsoft Office 2010.

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 in 14-point Times New Roman.

DATED: September 18, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2015, pursuant to 6 Cir. R. 25, I electronically filed the foregoing *amici curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case that are registered CM/ECF users will receive service accomplished by the CM/ECF system.

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