No. 20-1354

IN THE

Supreme Court of the United States

CITY OF PORTLAND, OREGON, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF THE PETITION

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SUMMARY OF ARGUMENT

This case raises two critical questions of federalism and constitutional law worthy of review by this Court. The first is whether the FCC has the authority to effect a permanent, physical occupation of state and municipal land in the absence of explicit Congressional authorization. The second is whether the FCC can effect such a taking without providing just compensation. The answer to both questions is no, and the Ninth Circuit erred in its contrary holdings. This Court should grant review to ensure that the Ninth Circuit's erroneous approach to takings does not authorize agencies across the federal government to intrude on the rights of state and local governments.

In this case, the FCC has exercised the power of eminent domain over state and municipal land without Congressional authority and failed to ensure the payment of just, market-rate compensation, effecting unconstitutional takings. The Ninth Circuit addressed these issues with only minimal analysis, essentially waving away the property rights of local government. The result threatens the constitutional balance between state property, federal regulation, and private commercial activity that is the bedrock of takings jurisprudence.

The Orders at issue in this case, promulgated by the FCC, constitute takings by mandating physical intrusions on municipal lands and forcing municipalities to accept below-market compensation for these intrusions. In holding otherwise, the Ninth Circuit ignored the mandatory physical intrusions and permanent installations that municipalities *must* accept from private for-profit companies. A proper

analysis also shows that the Orders effect takings because they both mandate access and cap the amount that municipalities can charge telecommunications companies well below the market rate. This unjust compensation violates the Takings Clause of the Fifth Amendment.

But the Orders' infirmities go deeper than the lack of just compensation: the FCC lacks the authority to order these takings in the first place. Neither 47 U.S.C. § 253 nor 47 U.S.C. § 332—the authority upon which the Orders are predicated—delegate the takings power to the FCC at all. Congress enacted §§ 253 and 332 to promote competition within the telecommunications industry and hinder the creation of monopolies, not to subvert the ability of state and local governments to rightfully exercise control over their lands.

Even if the Court were to conclude that the FCC did have *some* takings authority here, any such authority would be limited to the scope of the statute. By mandating that local governments cede control of their rights of way to private parties for below market rate compensation, the FCC has significantly overstepped whatever narrowly tailored eminent domain power it may have been granted.

The Court should grant the Petition in order ensure that the FCC's rules—and those created by future agency actions—are consistent not just with the statute, but with the Fifth and Eleventh Amendments and the prior decisions of this Court.

ARGUMENT

Respondent IMLA[1] files this brief in support of the Petition for Writ of Certiorari filed by City of Portland et al. (the "Petition"). As the Petition explains, the Court should grant review because the Ninth Circuit upheld two FCC orders[2] that went far beyond the statutory authority the FCC was granted in an opinion with widespread implications. We write separately to explain a related reason why the court should grant the Petition: the decision below, with essentially no analysis, affirmed the FCC's ability to order takings that exceed statutory authority and lack just compensation. If left in place, that decision will enable the FCC—and other agencies in the future—to continue to violate the Fifth and Eleventh Amendments.

I. As the Petition Explains, the Orders Exceed Statutory Authority.

Respondent IMLA agrees with Petitioners that this case presents an ideal vehicle for this Court to

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[1] IMLA has no parent or publicly held company owning 10% or more of the corporation's stock.

[2] The FCC issued two closely related orders: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 FCC Rcd. 9088 (2018) (the "Small Cell Order") and *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 FCC Rcd. 7705 (2018) (the "Moratoria Order"), both of which were reviewed by the same Ninth Circuit decision. Like the Petition, this brief focuses on the Small Cell Order but also seeks review of the Moratoria Order to the degree it underlies the issues raised here. We refer to the Small Cell Order and the Moratoria Order collectively as the "Orders."

provide guidance on what the FCC is "permitted under the plain language of their governing statutes and basic principles of federalism" and that "clarifying the substantive standards of Sections 253 and 332(c)(7) will provide much-needed guidance to local governments and industry members on the proper balance between federal, state and local authority that Congress struck. . . ." Pet. 38.

In particular, "whether the statute can be construed to compel private commercial access to municipal property at cost is an important question meriting review." Pet. 24. Granting review will also allow the Court to clarify what "fair and reasonable" compensation state and municipal governments are entitled to, as demanded by § 253(c). Pet. 27. These questions are particularly salient because the FCC's interpretation of §§ 253 and 332 would essentially render meaningless important safe harbor provisions that other circuits have respected. Pet. 24.

In sum, the FCC's Orders, without any explicit Congressional authority, upset localities' right to "charge rent for access to the public rights-of-way and other municipal property thereon," via a strained interpretation of §§ 253 and 332. Pet. 28; *see also City of St. Louis v. Western Union Tel. Co.*, 149 U.S. 465 (1893).

We file this brief to stress that the FCC's Orders implicate an additional constitutional concern: violating the takings clause of the Fifth Amendment by improperly suggesting the FCC's authority to delegate eminent domain. The Orders, as presently constructed, give private telecommunications eminent domain authority that Congress did not intend to bestow upon them through §§ 253 and 332(c)(7).

Because the Orders constitute a taking, the Court's clear explanation of the meaning of "fair and reasonable" is especially needed.

II. The Orders are Takings Under the Fifth Amendment.

As noted by several parties at the Ninth Circuit and before the FCC, the Orders are takings under the Fifth Amendment because they mandate that municipalities grant applications to use city-owned poles or other structures in municipal rights-of-way. A touchstone of takings jurisprudence is that municipalities have the affirmative right to charge rents for government owned rights of way. *St. Louis*, 149 U.S. 465. The Supreme Court has "invariably" held that "a permanent physical occupation of real property" is a "taking." *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 427 (1982) (compelled installation of cable television equipment was found to be a "permanent physical occupation" sufficient to constitute a taking).

This principle applies to the property of local governments, as well. When the federal government takes "independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation [under the Fifth Amendment] to pay just compensation for it." *United States v. Carmack*, 329 U.S. 230, 242 (1946); *see also United States v. 50 Acres of Land*, 469 U.S. 24, 30 (1984) ("[I]t is most reasonable to construe the reference to 'private property' in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States.").

The Orders explicitly compel municipalities to grant wireless infrastructure companies physical access and the right to install equipment on areas "that [the municipalities] own or control, including areas on, below, or above public roadways, highways, streets, sidewalks, or similar property, as well as their terms for use of or attachment to government-owned property within such [rights of way], such as new, existing and replacement light poles, traffic lights, utility poles, and similar property suitable for housing Small Wireless Facilities." App. 119a. This explicit and direct physical occupation of state and municipal owned property is precisely the sort of physical occupation the Court considered a taking in *Loretto*.

In its decision, the Ninth Circuit only briefly considered the Fifth Amendment challenges to the Orders and provided only a cursory analysis, without meaningfully addressing the important federalism concerns present. The court erred in finding that the Orders did not constitute a taking because it did not properly consider the physical intrusions that they authorized. The court merely stated that "[The Small Cell Order] does not compel access to property in a manner akin to *Loretto*" because "the Small Cell Order precludes state and local governments from charging unreasonable fees when granting applications, and it continues to allow municipalities to deny access to property for a number of reasons." App. 52a.

This is incorrect. The Small Cell Order compels precisely such a physical occupation and mandates access in all but a few specific situations. In *Loretto*, the required physical installation of cable lines on property was considered a taking without just compensation. 458 U.S. at 424. In this case, the Orders

require municipalities to grant applications for the installation of permanent privately owned equipment on city-owned poles and structures. Like the forced installation of cable television equipment in *Loretto*, here, the required installation of wireless communications equipment constitutes a physical taking under the Fifth Amendment.

III. The FCC Lacks the Eminent Domain Authority the Orders Would Require.

Because Congress did not delegate its eminent domain power to the FCC or any private parties and the Orders fail to provide market-rate compensation to states and municipalities, the Orders are unauthorized takings in violation of the Fifth Amendment.

A. Neither § 253 nor § 332 delegate eminent domain authority to the FCC.

The FCC cannot exercise eminent domain authority without an express delegation from Congress—which Congress has not provided here. "[T]he taking of private property for public use is deemed to be against the common right and authority so to do must be clearly expressed." *Delaware, L. & W. R. Co. v. Morristown*, 276 U.S. 182, 192 (1928); *see also* 1A NICHOLS ON EMINENT DOMAIN § 3.03[3][d] (2021). In §§ 253 and 322, Congress did not confer upon the FCC any authority to utilize or to further delegate federal eminent domain powers. But that is exactly what the Orders unconstitutionally purport to do.

Neither § 253 nor § 332 contain any "express terms" authorizing the FCC to use eminent domain or to further delegate eminent domain authority. They

are anti-discrimination provisions intended to prevent telecommunications companies from establishing monopolies. *See Joint Brief of Intervenors City of New York and National Association of Telecommunications Officers and Advisors* 5-8, No. 19-70123 (9th Cir. Jun. 17, 2019), ECF No. 95.

Not only does neither section expressly grant eminent domain authority, both contain language explicitly *preserving* the rights of state or local government to manage public rights-of-way so long as they do so in a way that does not violate the nondiscrimination provisions. *See* 47 U.S.C. §§ 253(c) ("Nothing in this section affects the authority of a State or local government to manage the public rights-of-way . . . ."); *see also* 332(c)(7)(B). The statutory history confirms this intent. As the Ninth Circuit has observed, in creating the 1996 Telecommunications Act, House and Senate delegates opted to generally "preserve the authority of State and local governments over zoning and land use matters." *Sprint v. Cnty. of San Diego*, 543 F.3d 571, 576 (9th Cir. 2008) (citing multiple legislative reports).

The Orders go far beyond preventing state and municipal governments from creating monopolies or preempting discriminatory municipal activity. The ability to exclude rights of way access to one's property is the prerogative of any landowner, including local governments. An agency can only abrogate this right with explicit congressional authority. By abrogating this right in the absence of such authority, the FCC has engaged in an taking in violation of the Fifth Amendment.

B. To the extent § 253 or § 332 delegate eminent domain authority to the FCC, the Orders exceed the scope of that authority.

Even if the Court concludes that §§ 253 and 332 contain *some* congressional authorization of eminent domain power through "necessary implication," "the grant of authority to condemn for specified purposes must be construed as limited to the enumerated purpose." *Western Union Tel. Co. v. Pennsylvania R. Co.,* 195 U.S. 540, 569 (1904) ("The exercise of the power of eminent domain . . . must [] be given in express terms or by necessary implication . . . ."); *see also* 1A NICHOLS ON EMINENT DOMAIN § 3.03[6][b] (2021) ("Even when the power of eminent domain has been expressly granted, the grant must be construed strictly against the grantee.") But the Orders expand any plausible eminent domain authority well beyond the statutory language.

In § 253, Congress chose to "end the States' longstanding practice of granting and maintaining local exchange monopolies." 543 F.3d at 576. It did not, through "necessary implication," grant unlimited authority to override local control of municipally-owned property. Even if Congress *has* granted the FCC some amount of eminent domain authority in those sections, the FCC must act within the statutory language to make use of that power. The new regulation oversteps this by permitting private companies to use eminent domain authority to demand modification of any eligible support structure at below-market rate rates, without regard to whether there is any prohibition of services.

The statutory language confirms that the taking here is beyond its purpose. Indeed, while the statute directs the FCC to preempt the enforcement of certain state or local "statute[s], regulation[s] or legal requirement[s]," 47 U.S.C. § 253(d), that authority expressly does not extend to such management of public rights of way or demands of fair and reasonable compensation for their use. Section 253(c) provides that "[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers . . . for use of public rights-of-way."[3] It cannot be the case that Congress conferred eminent domain power by "necessary implication" to accomplish goals *expressly prohibited* by the statute.

When the FCC uses §§ 253 and 332 for purposes beyond remedying a prohibition on telecommunications services, *see* 47 U.S.C. § 253(a), or the enumerated purposes in § 332, it exceeds its statutory authority. But when it does so by intruding on rights intentionally preserved within the statute of municipalities to manage their property or rights of way, it is engaging in a taking in violation of the Fifth Amendment.

C. The Orders do not provide just compensation as required by the Fifth Amendment.

The Takings Clause of the Fifth Amendment bars the federal government from taking public land

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[3] *See also* 47 U.S.C. § 332(c)(7)(A) (containing similar limitations that apply to § 332).

without just compensation. U.S. Const. amend. V; *50 Acres of Land*, 469 U.S. at 105. This Court has long held that just compensation requires the payment of a fair market value so as to be consistent with the "basic equitable principles of fairness." *United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979).

The Orders prohibit states and municipalities from charging rent or fees for use of their property other than "a reasonable approximation of the local government's objectively reasonable costs." App. 104a. By limiting compensation to costs on a pole-by-pole basis and setting a presumptive cap on costs at $270 per pole, *id.* 201a, the Orders will cause local governments to lose millions of dollars in franchising revenue that would be earned from leasing access to these for-profit companies at fair market value. As recognized by *564.54 Acres of Land*, such a limitation constitutes an unlawful taking because there is more value to the land than simply the cost of construction or maintenance. *Id.*

The Ninth Circuit erred by ignoring the longstanding requirement that takings be compensated by fair market value, instead characterizing the remuneration offered by the Orders as "preclud[ing] state and local governments from charging unreasonable fees when granting applications." App. 52a. But the Orders limit the amount that municipalities can charge to the "costs" incurred as a result of these telecommunication companies' actions—or less. App. 136a. These "costs" are definitionally lower than the fair market value that the municipalities are entitled to recover under a Fifth Amendment taking.

IV. The Court Should Grant Review to Resolve These Critical Constitutional Questions.

As Petitioner has explained, whether §§ 253 & 332 give "the FCC such sweeping authority over state and local government property is worthy of this Court's review." Pet. 38. But the importance of reviewing this case goes far beyond the scope of statutory powers involved and implicates core constitutional questions regarding agency powers.

A. This case provides a vehicle for addressing agencies that overreach by using eminent domain powers without congressional authorization or just compensation.

This case cleanly presents the question of whether the FCC's Orders violate the Fifth Amendment by exercising the federal government's eminent domain power without explicit authorization or just compensation. These critical issues of federalism and constitutional law likewise merit review by this Court. And as explained above, the Ninth's Circuit decision departs sharply from Supreme Court precedent. Leaving the decision below in place invites federal agencies to use constitutional powers they have not been granted and will have serious, nationwide consequences.

Just as this case provides a good vehicle for review of the questions of FCC authority, *see* Pet. 38, it is a proper vehicle for review of the FCC's assertion of the eminent domain power with no Congressional delegation. Clarifying the standard for delegation of eminent domain authority will provide guidance to the

FCC, other agencies, states, and municipalities before the improper use of those powers becomes widespread.

B. This case also provides a vehicle for addressing constitutional violations where private parties take state property without congressional abrogation of Eleventh Amendment sovereign immunity.

When applied to states, the Orders affirmed by the Ninth Circuit also violate the Eleventh Amendment because they delegate the takings power to private entities without explicitly abrogating state sovereign immunity. This issue is presented in in *PennEast Pipeline Co. v. New Jersey*, No. 19-1039 ("*PennEast*"), in which this Court granted the Petition for Writ of Certiorari.[4]

At issue in *PennEast* is a statute explicitly authorizing private gas companies "to acquire 'necessary rights-of-way' . . . 'by the exercise of the right of eminent domain.'" *In re PennEast Pipeline Co.*, LLC, 938 F.3d 96, 100 (3d Cir. 2019) (as amended) (quoting 15 U.S.C. § 717f(h)). There, in striking down the statute, the Third Circuit recognized that this "Court has held that Congress can abrogate the sovereign immunity of the States 'only by making its intention to do so unmistakably clear in the language of the statute' in question." *Id.* at 97 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). The explicit delegation of the eminent domain power did not

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[4] Respondent IMLA, along with several other state and local government organizations, filed a merits amicus brief in support of Respondents in *PennEast*. https://perma.cc/PQA6-Y8EQ.

automatically abrogate sovereign immunity. *Id.* at 107. The Third Circuit additionally held that "Congress cannot abrogate sovereign immunity under its Commerce Clause powers." *Id.* at 108 (citing *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 59 (1996)).

As explained above, in this case, the Orders authorize a taking by granting private parties a mandatory right to enter, modify, and add to state-owned property. *See* 47 C.F.R. § 1.6100 (referring to "State or local government" throughout). The Orders therefore purport to abrogate state sovereign immunity, but without the explicit grant of eminent domain power present in *PennEast*, and—like *PennEast*—with *no* explicit abrogation of sovereign immunity. Moreover, as in *PennEast*, the FCC's authority is generally grounded in the Commerce Clause. *See* 47 U.S.C. § 151. In other words, this case raises the same issues as *PennEast*, but with even less constitutional support than the *PennEast* statute.

The Ninth Circuit's opinion, therefore, is inconsistent with the Third Circuit's holding in *PennEast*. Because of this split and the importance of the Eleventh Amendment question to principles of federalism, the Court should grant review to address that question as well. Regardless of this Court's ultimate decision in *PennEast*, however, this case will not be fully resolved. The Ninth Circuit's errors regarding the Fifth Amendment will remain, at least with regard to the tens of thousands of local governments in this country, and the Court should therefore independently grant review in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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