No. 20-1354

IN THE
Supreme Court of the United States

CITY OF PORTLAND, OREGON, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly held that the FCC reasonably construed "effect of prohibiting" as that phrase appears in Sections 253 and 332 of the Communications Act.

2. Whether the Ninth Circuit correctly held that the FCC reasonably interpreted Section 253 with respect to the ability of municipalities to charge unreasonable fees.

RULE 29.6 STATEMENT

CTIA – The Wireless Association ("CTIA") has not issued any shares or debt securities to the public, and CTIA has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public. No parent or publicly held company owns 10 percent or more of CTIA's stock.

Competitive Carriers Association ("CCA") has no parent corporation and does not issue stock.

The Verizon companies participating in this filing ("Verizon") are the regulated, wholly owned subsidiaries of Verizon Communications Inc. No publicly held company owns 10% or more of its stock. Insofar as relevant to this litigation, Verizon and its subsidiaries' general nature and purpose is to provide communications services.

The Wireless Infrastructure Association ("WIA") has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

City of Portland v. United States, No. 18-72689, No. 19-70490, No. 19-70123, No. 19-70124, No. 19-70125, No. 19-70136, No. 19-70144, No. 19-70145, No. 19-70146, No. 19-70147, No. 19-70326, No. 19-70339, No. 19-70341, No. 19-70344, United States Court of Appeals for the Ninth Circuit. Judgment entered August 12, 2020.

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JURISDICTION

The judgment of the court of appeals was entered on August 12, 2020. Petitions for rehearing and rehearing en banc were denied on October 22, 2020. The petition for a writ of certiorari was filed on March 22, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

In 2018, the Federal Communications Commission (FCC or Commission) issued the *Small Cell Order*,[1] which construed two provisions of the Telecommunications Act of 1996 that preempt state or local measures that "prohibit or have the effect of prohibiting" interstate communications services. 47 U.S.C. §§ 253, 332(c)(7)(B)(i)(II). The Commission issued the *Order* after reviewing considerable evidence that some States and localities had adopted policies, such as charging exorbitant fees to site wireless infrastructure used to provide next-generation 5G wireless service, that would "impede[] the provision of telecommunications service." *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 491 (2002) (internal quotation marks omitted).

In the *Order*, the Commission exercised its well-established authority to interpret and apply the Communications Act. In doing so, it reaffirmed its longstanding construction of the "effective

[1] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9088 (2018) (*Small Cell Order or Order*).

prohibition" language that appears in both Sections 253 and 332 — a construction that the FCC has maintained since 1997 and that the courts of appeals have widely recognized as the governing construction. The FCC then applied that interpretation of the statutory language to specific State and local actions described in the record, including to siting fees. The Commission's application of this standard relied on the detailed record amassed through the notice and comment process. Reviewing that *Order*, the Ninth Circuit found in relevant part that the Commission had reasonably interpreted the text of the Act, and that the Commission's factual findings were supported by substantial evidence. Pet.App.11a-63a.

Petitioners contend that this routine administrative action taken by the FCC and upheld by the Ninth Circuit was in fact unreasonable, and that the decision below created circuit conflicts that warrant this Court's attention. The Petitioners are wrong. Contrary to Petitioners' claims, the decision below creates no conflicts worthy of this Court's review. And Petitioners' assertion that the Ninth Circuit's decision subjects localities to "immense" consequences rests on a mischaracterization of the FCC's order. Indeed, the Petition effectively concedes that Petitioners' real interest is in being able to charge unlimited amounts for right-of-way access, regardless of the effect this has on deployment in other jurisdictions, which is precisely the concern that motivated Congress and the Commission to take action. The petition should be denied.

STATEMENT OF THE CASE

1. a. Congress enacted the Telecommunications Act of 1996 ("1996 Act") to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, Preamble (1996); *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 115 (2005). To that end, the 1996 Act introduced sweeping reforms which, among other things, significantly limited state and local control over telecommunications services and facilities. Congress recognized that state and local approval processes for telecommunications deployment were "inconsistent and, at times," created "[a] conflicting patchwork of requirements" that could inhibit the provision or expansion of telecommunications services. H.R. Rep. No. 104-204, pt. 1, at 94 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 10, 61. Congress therefore concluded that it was in the national interest to create uniform, federal limitations on state and local authority to block telecommunications deployment, which would lower consumer costs and increase consumer options for advanced services.

Accordingly, the 1996 Act broadly preempts state and local conduct that burdens the provision of telecommunications services. Two provisions are particularly relevant here. First, Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any

entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Section 253 contains a safe harbor that permits certain state or local regulation: under Section 253(c), "a State or local government" may "require fair and reasonable compensation from telecommunications providers . . . for use of public rights-of-way" if the requirements operate "on a competitively neutral and nondiscriminatory basis" and any "compensation required is publicly disclosed." 47 U.S.C. § 253(c). As this Court has explained, Section 253 generally "prohibits state and local regulation that impedes the provision of telecommunications service." *Verizon Commc'ns, Inc.* 535 U.S. at 491 (internal quotation marks omitted).

Second, Section 332(c)(7) imposes similar restrictions on state and local authority to regulate wireless service. That provision preempts state and local "regulation of the placement, construction, and modification of personal wireless service facilities" that "prohibit[s]" or "effect[ively] prohibit[s]" wireless service. 47 U.S.C. § 332(c)(7)(B)(i)(II).

b. In the Communications Act of 1934, Congress granted the FCC authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Communications Act, including later-enacted provisions such as those in the 1996 Act. 47 U.S.C. § 201(b); *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377-378 (1999); *accord City of Arlington v. FCC*, 569 U.S. 290, 293 (2013).

The FCC has exercised that authority to construe the 1996 Act, including its preemption provisions. Soon after the 1996 Act was enacted, the FCC determined that a state or local measure has "the effect of prohibiting" service within the meaning of Section 253(a) if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *California Payphone Ass'n*, Memorandum Opinion and Order, 12 FCC Rcd. 14191, 14206, ¶ 31 (1997); Pet.App.18a, 84a-85a. In the ensuing 20 years, courts have consistently treated the *California Payphone* standard as the controlling test for whether state and local regulations have "the effect of prohibiting" service in violation of Section 253(a). *See, e.g.*, *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008); *Level 3 Commc'ns, LLC v. City of St. Louis*, 477 F.3d 528, 533 (8th Cir. 2007); *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2nd Cir. 2002).

2. a. This case arises, in part, out of the advent of the newest generation of wireless broadband technology, known as "fifth-generation," or "5G." Pet.App.11a. 5G technology "is seen as transformational because it provides increased bandwidth, allows more devices to be connected at the same time, and is so fast that connected devices receive near instantaneous responses from servers." *Id.* at 14a. In addition to revolutionizing wireless service, the 5G rollout will have enormous positive impacts on the American economy. "[I]t is estimated

that wireless providers will invest $275 billion over the next decade in next-generation wireless infrastructure deployments, which should generate an expected three million new jobs and boost our nation's GDP by half a trillion dollars." Pet.App.75a.

In many initial deployments, 5G will be provided over a high-frequency spectrum that allows for tremendous capacity and speeds but does not propagate well over distances. These deployments rely on small wireless facilities known as "small cells," which can attach unobtrusively to traffic lights, street lamps, and other small structures within public rights-of-way. Pet.App.75a-76a. Carriers "must build out small cells at a faster pace and at a far greater density of deployment than before." *Id.* at 76a. Small cells therefore "raise different [regulatory] issues than the construction of large, 200-foot towers that marked . . . deployments of the past." *Id.*

In response to these developments, the FCC sought comment on the application of Sections 253 and 332(c)(7) to state and local measures directed at "the deployment of next-generation networks and services." *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd. 3266, ¶ 1 (2017). In particular, the FCC asked whether to "utilize [its] authority under Section 253" to "prevent states and localities from enforcing laws" in "a number of specific areas" that impede deployment and thus "effectively prohibit the provision of telecommunications service." *Id.* ¶ 101.

The FCC received numerous comments from a range of stakeholders, including detailed submissions from industry and local government groups. Collectively, these comments constituted an extensive record of circumstances in which jurisdictions have materially inhibited or limited the provision of telecommunications service by imposing steep per-site fees. For instance, AT&T explained that "localities in Maryland, California, and Massachusetts have imposed fees so high that it has had to pause or decrease deployments." Pet.App.96a; *id.* at 95a-97a. Another commenter reported that the town of Hillsborough, California, had assessed $60,000 in application fees and over $350,000 in other fees for a request to deploy 16 small cell sites—even after the deployment did not proceed. *Id.* at 96a n.49. Still another stated that "[a] county in Virginia required a $15,000 application fee per utility pole." Resp. C.A.Br. 9. And because wireless providers often need to install dozens or hundreds of small cell sites in a given jurisdiction in order to provide sufficient coverage and capacity, even fees that may seem moderate in isolation can quickly add up to hundreds of thousands of dollars a year—in a single locality. *See* FCC C.A.Br. 67 n.13 (explaining that fees such as $1000 per pole may collectively amount to hundreds of thousands of dollars a year in a particular city). The record was thus replete with evidence of excessive fees that were either prohibitive in themselves, or were prohibitive in the aggregate.

At the same time, commenters explained that many state and local governments have encouraged the deployment of these new wireless facilities. Across the country, many states have recognized the

unique nature of small wireless deployment and enacted laws that limit the fees local jurisdictions can charge and streamline construction approvals. Resp. C.A. Br. 8.

b. In 2018, the FCC released the declaratory ruling at issue in this case — the *Small Cell Order*, Pet.App.72a-294a — in order to clarify how Sections 253 and 332(c)(7) apply to the modern communications marketplace and small cell technology specifically.[2]

The FCC explained that the "challenge for policymakers" is that "[t]o support advanced 4G or 5G offerings," providers must install small cells quickly and at a far greater density than before. *Id.* at 76a. "To date," the FCC explained, "regulatory obstacles have threatened the widespread deployment of these

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[2] The FCC issued two orders that addressed the application of Sections 253 and 332(c)(7). In addition to the *Small Cell Order*, the FCC issued the *Moratoria Order*, which held that state or local government actions that impose a moratorium on siting application processing or facility deployment violate Section 253(a) when they effectively prohibit the deployment of 5G technology. *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd. 7705, ¶¶ 147-49 (2018). The court of appeals rejected petitioners' challenges to the *Moratoria Order*. Pet.App.13a. The questions presented in the petition pertain solely to rulings issued in the *Small Cell Order*. Thus, although petitioners state that they "seek[] review of the *Moratorium Order* to the degree it underlies the issues raised here," Pet. 5 n.1, only the *Small Cell Order* is at issue here. Nonetheless, because Petitioners claim to be challenging the *Moratoria Order*, this Brief cites to relevant portions that support the Commission's interpretations of the relevant statutes.

new services and, in turn, U.S. leadership in 5G." *Id.* The FCC therefore undertook a detailed examination of the state and local regulations discussed by the many commenters to determine whether those regulations "prohibit or have the effect of prohibiting" telecommunications deployment within the meaning of Sections 253(a) and 332(c)(7).

The Commission reaffirmed its longstanding construction of the "effective prohibition" standard, first announced in the *California Payphone* decision construing Section 253(a). Under *California Payphone*, "a state or local legal requirement constitutes an effective prohibition if it 'materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'" Pet.App.109a-110a (quoting *California Payphone*, 12 FCC Rcd. at 14206, ¶ 31). The Commission also concluded that this same construction should apply to the same language in Section 332. *Id.* 112a-113a. In the process, the agency stated that a prohibition need not be complete or insurmountable to be preempted, and that wireless providers can demonstrate a material inhibition without having to meet particular "coverage gap" or "least intrusive means" tests that have been employed by some courts. *Id.* 119a-127a. The Commission then applied that standard to the particular municipal practices documented in the record.

As relevant here, the FCC held that unreasonable fees for the deployment of small cells have the effect of prohibiting wireless services. Pet.App.129a-181a. The FCC explained that in some instances, "the fees

in a particular jurisdiction" effectively prohibit service by directly causing "reduced or entirely forgone deployment" of small cell facilities in that jurisdiction. *Id.* at 162a. In other situations, inflated fees charged by large "must-serve" jurisdictions can deplete carriers' resources and force them to delay or forgo deployment in more rural areas. *Id.* at 151a-152a & n.169. Citing circuit court decisions that had held the same, the Commission found that these unreasonable fees for facilities in some jurisdictions effectively prohibit deployment in other areas. *Id.* at 161a-162a. "[E]ven fees that might seem small in isolation," the FCC explained, "have material and prohibitive effects on deployment, particularly when considered in the aggregate given the nature and volume of anticipated [small cell] deployment." *Id.* at 140a. Accordingly, the Commission concluded that state and local fees for small cells have the impermissible effect of prohibiting wireless services when they exceed a reasonable approximation of any actual costs a locality must incur. *Id.* at 136a.

In so doing, the FCC was careful to make clear that a municipality may require wireless carriers to pay actual and reasonable costs that the municipality incurs, including application and permitting costs, as well as the costs of providing access to and maintaining public rights-of-way and government-owned structures, such as light poles, traffic lights, and utility poles. *See, e.g.*, Pet.App.144a-147a, 104a-106a, 191a-192a. To reduce the burden of calculating costs on local jurisdictions, and using state small cell laws as a guide, the FCC established a "safe harbor" under which small cell fees are presumptively reasonable if they do not exceed $500 in application

fees and $270 per year for all recurring fees. *Id.* at 177a-181a. States and localities may charge more than those amounts if they can show that their reasonable costs exceed the safe harbor levels. *Id.* at 180a.

The FCC acknowledged that Section 253(c) preserves the authority of state and local governments to "require fair and reasonable compensation" for "use of public rights-of-way on a nondiscriminatory basis." 47 U.S.C. § 253(c). The Commission concluded that its cost-based framework is consistent with Section 253(c) because that framework permits states and localities to seek reasonable compensation. Pet.App.142a-143a.

Finally, the FCC rejected petitioners' argument that the Commission lacked authority over municipal fees for, and limitations on, access to public rights-of-way and property located in the public rights-of-way, such as stoplights and utility poles. Pet.App.196a-200a. The FCC explained that, even assuming that Sections 253 and 332(c)(7) do not preempt municipal actions taken in a proprietary capacity, municipal regulation of public rights-of-way is undertaken in a regulatory capacity in furtherance of the public interest. *Id.* at 200a.

3. Various parties sought judicial review of the orders, and the appeals were consolidated in the Ninth Circuit. As relevant here, petitioners challenged the *Small Cell Order*, including the FCC's construction of "effectively prohibit" and its application that standard to state and local fees.

a. The court of appeals affirmed in relevant part. Pet.App.1a-71a.

With respect to the "effectively prohibit" standard of Sections 253 and 332(c)(7), the court explained that its en banc decision in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) had "recognized the continuing validity of the [FCC's] material inhibition test from *California Payphone*." Pet.App.18a. The court of appeals explained that while it had held in *Sprint* that "more than 'the mere possibility' of prohibition was required to trigger preemption," this approach "is consistent with the FCC's" material-inhibition test. *Id.* (quoting 543 F.3d at 578).

The court of appeals, therefore, rejected as inconsistent with *Sprint* petitioners' argument that "the FCC must demonstrate that an 'actual prohibition' of services is occurring before preempting any municipal regulations." Pet.App.19a. The court also rejected petitioners' argument that the *Small Cell Order* effectively "departed" from the "material inhibition" standard and "made it much easier to show an effective prohibition." *Id.* Rather, the court explained, the FCC had simply recognized that the widespread deployment of facilities necessary for 5G makes local regulations such as fees "more likely to have a prohibitory effect on 5G technology than it does on older technology." *Id.* at 20a. That conclusion, the court of appeals held, was "reasonably explained by the differences in 5G technology." *Id.*

The court of appeals next held that the FCC had reasonably concluded that some state and local fees

effectively prohibit service and are therefore preempted. Pet.App.25a. The record amply supported the FCC's finding that "above-cost fees, in the aggregate, were having a prohibitive effect on a national basis." *Id.* at 26a. In particular, substantial evidence supported the FCC's findings that "high fees were inhibiting deployment both within and outside the jurisdictions charging the fees," and that limiting fees to a cost basis would help carriers reinvest in areas previously not economically viable. *Id.* at 28a-29a. The court also concluded that the FCC's cost-based standard and the associated safe harbor for fees under a certain amount represented a reasonable approach in view of the significant administrability concerns raised by the prospect of individually evaluating the effects of the fees charged by the "89,000 state and local governments" in the country. *Id.* at 27a. Finally, the court held that the FCC's approach was consistent with Section 253(c), as "the calculation of actual, direct costs is a well-accepted method of determining reasonable compensation." *Id.* at 29a.

The court of appeals also rejected petitioners' argument that "the FCC lacks authority to regulate the fees they charge for access to [public] rights-of-way and to the property on the rights-of-way" because municipalities regulate public rights-of-way in a proprietary rather than a sovereign capacity. Pet.App.43a. The court held that the FCC had reasonably concluded that "the cities act in a regulatory capacity when they restrict access to the public rights-of-way" because those rights-of-way "serve a public purpose, and they are regulated in the

public interest, not in the financial interests of the cities." *Id.* at 44a.

b. Judge Bress dissented in part. Pet.App.63a-71a. In his view, the FCC had not adequately explained its conclusion that non-cost-based fees, in the aggregate, would effectively prohibit service. *Id.* at 69a. Judge Bress therefore would have vacated and remanded the *Small Cell Order*'s prohibition on above-cost fees. *Id.* at 70a.

4. Petitioners sought rehearing and rehearing *en banc*. No judge requested a vote for rehearing on en banc, and the petitions were denied. Pet.App.295a-296a.

REASONS FOR DENYING THE PETITION

In the decision below, the Ninth Circuit carefully reviewed the *Small Cell Order*, which made extensive factual findings and clarified the construction of Sections 253 and 332 of the Act. *See Iowa Utilities Bd.,* 525 U.S. at 377-378 (noting that Congress has delegated rulemaking authority to the FCC to carry out the provisions of the Communications Act). The Ninth Circuit upheld the sufficiency of the *Order*'s factual findings and found the agency's construction of the statutory provisions reasonable. That routine application of well-established principles of administrative review does not conflict with the decision of any other court of appeals. Moreover, Petitioners' contention that the decision inflicts "immense" consequences by leaving municipalities powerless to object to providers' siting preferences

and subjecting all localities to the same rate caps (Pet. 4) mischaracterizes the *Order*, which expressly acknowledges that municipalities may deny providers' siting requests, as long as the denial is consistent with the Act, and may recover their reasonable costs. This Court's review is not warranted.

I. The Court of Appeals' Decision on Petitioners' First Question Presented Was Correct and Does Not Warrant This Court's Review

The decision below correctly held that the Commission's construction of the "prohibit or have the effect of prohibiting" language found in Sections 253(a) and 332(c)(7)(B)(i)(II) of the Act was reasonable. Petitioners' objections to the Ninth Circuit's decision cannot obscure the fact that the Commission simply reaffirmed its 20-year-old construction of the "effective prohibition" language—which reflects Congress's intent to broadly preempt state and local regulations that impede telecommunications service—and explained how that standard applies to new wireless infrastructure technology. Petitioners identify no circuit conflict warranting review. And Petitioners' argument that this Court should grant certiorari to clarify the scope of *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), is not properly presented because it was not pressed or passed on below.

A. *The Court of Appeals Correctly Upheld the FCC's Interpretation of "Prohibit or Have the Effect of Prohibiting" in Sections 253 and 332*

1. In the *Small Cell Order*, the Commission, relying on its expertise and a detailed factual record, explained how the "prohibit or have the effect of prohibiting" language that appears in both Sections 253(a) and 332(c) applies to modern telecommunications networks and services and to the deployment of small cell technology, in particular. The Commission stated that the identical "effective prohibition" language in the two provisions should be interpreted identically. Pet.App.112a-113a. And it "reaffirmed" that the standard for finding an effective prohibition by a state or local government is the one it had announced in its 1997 *California Payphone* decision: a requirement is an effective prohibition if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* at 84a-85a, 115a-127a (citing *California Payphone Ass'n*, 12 FCC Rcd. at 14206, ¶ 31). Thus, far from effecting a sea change in the law, the Commission reaffirmed the application of a 20-year-old standard that had been applied by various courts of appeals, *see id.* at 109a-110a & n.78.

The Commission then explained how the statutory language and its familiar standard applies to the wireless communications networks of today. It clarified that the "material inhibition" standard is met, and "an effective prohibition occurs[,] where a state or local legal requirement materially inhibits a

provider's ability to engage in any of a variety of activities related to its provision of a covered service," including "filling a coverage gap . . . densifying a wireless network, introducing new services or otherwise improving service capabilities." *Id.* at 115a-116a & n.87. In making this determination, the Commission relied on detailed factual findings regarding both the changing nature of wireless technology—which requires more, smaller facilities in addition to existing towers in order to fill gaps and expand capacity—and its conclusion that existing state and local measures do prohibit or have the effect of prohibiting service. *See id.* at 75a-76a, 93a-94a, 112a-128a, 188a-189a & n.248. As the Commission explained, the extensive record before it showed a variety of local barriers to the deployment of the next generation of wireless and telecommunications facilities and networks. That record revealed that in response to new technologies, local governments had, among other things, adopted explicit moratoria on deployment, *Moratoria Order* ¶ 145; created *de facto* moratoria on deployment, *id.* ¶¶ 143 n.529, 149; imposed extensive delays on proposed networks (frequently lasting months or even years), Pet.App.97a-99a; and frequently sought to impose excessive fees amounting to monopoly rent for access to the public rights-of-way, *id.* at 95a-97a.

The Ninth Circuit correctly upheld the Commission's interpretation of "effect of prohibiting" in Sections 253(a) and Section 332. Contrary to Petitioners' contention before the Ninth Circuit and this Court (at Pet.18) that the Commission had substantially departed from its prior interpretation, the Court found that "*California Payphone*'s material

inhibition standard remains controlling." Pet.App.19a. Relying on its expertise and factfinding, "[t]he FCC has explained that [*California Payphone*] applies a little differently in the context of 5G, because state and local regulation . . . is more likely to have a prohibitory effect on 5G technology than it does on older technology." *Id.* at 19a-20a. The Court concluded: "The differences in the FCC's new approach are therefore reasonably explained by the differences in 5G technology." *Id.* at 20a.

The Ninth Circuit's determination that the Commission's interpretation was reasonable is nothing more than a run-of-the-mill administrative law decision. Given "the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000), the Ninth Circuit properly deferred to the Commission's conclusions about which local actions constitute a material inhibition under *California Payphone*. The Ninth Circuit's careful, thorough, and routine review of the Commission's statutory interpretation does not warrant this Court's review.

2. In criticizing the Commission's approach, Petitioners do not attempt to argue that the Commission's interpretation of "effect of prohibiting" in 253 and 332 is an unreasonable reading of the statutory text. *See* Pet.18-21. And they also fail to mention the Commission's longstanding interpretation in *California Payphone*. Instead, they resort to mischaracterizing the Ninth Circuit's decision, contending that the court permitted the FCC to "[e]quat[e] an effective prohibition with any

deviation from a provider's plans," thereby "leav[ing] the statute with no limiting standard." Pet. 18. But far from holding that any regulation disfavored by a provider is preempted, the *Order* retains the same limitation on preemption that the FCC has been applying for more than 20 years and that numerous courts of appeals have adopted or endorsed: to be preempted, a local regulation must materially inhibit the ability to provide telecommunications service. Pet.App.80a. And the *Order* leaves localities free to deny siting requests, so long as doing so is consistent with the statute, and to charge reasonable cost-based fees—regardless of the consequences for providers' plans. Pet.App.169a-172a & n.217. Petitioners' alarmist rhetoric misrepresents the agency's straightforward construction.

B. *There is No Circuit Split Warranting This Court's Review on the Meaning of "Effect of Prohibiting"*

The Commission's interpretation of "effect of prohibiting" creates no circuit split warranting this Court's review.

As an initial matter, the posture of this case makes it particularly apparent that there is no live conflict among the circuits. The Ninth Circuit held that the *Order*'s interpretation and application of the "effect of prohibiting" language in Sections 253 and 332 was reasonable. No circuit, besides the court below, has had the opportunity to apply Sections 253 and 332 in light of the Commission's clarification of that standard in the context of current wireless

technology. Petitioners can therefore point to no current circuit split meriting this Court's review.

The only way Petitioners could plausibly allege that the Ninth Circuit's decision creates a circuit conflict concerning the FCC's construction of Sections 253(a) and 332(c) is if a court of appeals had held, before the *Small Cell Order*, that the text of those provisions unambiguously forecloses the "material inhibition" construction adopted by the FCC. *See Brand X*, 545 U.S. at 982 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."). But none of the cases cited by Petitioners holds that the *California Payphone* standard or the FCC's application of that standard is foreclosed by the plain text of the 1996 Act. *See Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 639-40 (2d Cir. 1999); *T-Mobile Ne. LLC v. Fairfax Cnty. Bd. of Supervisors*, 672 F.3d 259, 268 (4th Cir. 2012); *St. Louis*, 477 F.3d at 533; *360 degrees Commc'ns Co. of Charlottesville v. Bd. of Supervisors of Albemarle Cnty.*, 211 F.3d 79, 87 (4th Cir. 2000); *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 48 (1st Cir. 2009). Because no Circuit has found that the text of Sections 253 or 332 unambiguously forecloses the FCC's interpretation, there is no conflict as to whether the interpretation in the *Order* is reasonable.

Petitioners' contention that the Ninth Circuit's affirmance of the *Small Cell Order* conflicts with the Second and Fourth Circuit decisions cited above rests

on Petitioners' mischaracterization of the Order as adopting a standard that would "find that any local action that would deviate from the carrier's plans would be a barred prohibition." Pet.16-17. But that is erroneous for the reasons discussed above; the FCC expressly stated that "[o]ur standard does not preclude all state and local denials of requests for the placement, construction, or modification of personal wireless service facilities." Pet.App.120a n.94. Instead, relying on the robust evidence in the record, the FCC simply clarified that providing modern telecommunications service requires densification of networks and upgrades to new standards and technologies, and that the effective prohibition analysis must take these aspects of service provision into account to be consistent with *California Payphone*. *See id.* at 115a ("This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service capabilities."). Contrary to Petitioners' assertions, the FCC's standard, as clarified by the *Order*, continues to allow for "case-by-case decisionmaking," and is thus consistent with the approaches of prior circuits in that respect. *See* Pet.17.[3]

Petitioners are also incorrect in contending that the *Order* conflicts with decisions holding that prohibitory effects must not be "merely speculative". Pet.17 (citing the Eighth Circuit's *St. Louis* decision). But in *St. Louis*, the Eighth Circuit recognized that

[3] Those courts have also had no occasion to consider whether, as the Ninth Circuit held here, the FCC's approach in the *Small Cell Order* is consistent with the statute.

California Payphone is the appropriate standard for effective prohibition claims, explaining that "[a] plaintiff need not show a complete or insurmountable prohibition, but it must show an existing material interference with the ability to compete in a fair and balanced market." *St. Louis,* 477 F.3d at 533 (citation omitted). The court further observed that a plaintiff must show "actual or effective prohibition, rather than the mere possibility of prohibition," to succeed. *Id.* The FCC did not take issue with the Eighth Circuit's holding that prohibitions must be more than speculative possibilities. Pet.App.124a n.99.

Indeed, with respect to particular municipal practices that the *Order* found preempted, such as the imposition of above-cost fees, the FCC found a present prohibitory effect on the basis of record evidence. The Commission conducted a comprehensive review of the state of infrastructure deployment and wireless technology on a nationwide scale, something that the FCC is uniquely positioned to undertake. *See* Pet.App.90a-92a. The "record before [the agency]" showed that "with respect to [small cells], even fees that might seem small in isolation have material and prohibitive effects on deployment." *Id.* at 140a. The prohibitory impact was not speculative or hypothetical; the record demonstrated that excessive fees had already impeded deployment and that the aggregate effect of such fees would have an even greater impact absent FCC intervention. And addressing this prohibition required a blanket rule limiting fees to reasonable costs, as the "record [did] not reveal an alternative, administrable approach to evaluating fees without a cost-based focus." *Id.* at 161 n.199; *City of Portland v. United States*, Pet.App.27a

(noting that this Court has held "that an agency's rule 'easily' satisfies *Chevron*'s step two, reasonable interpretation requirement, when the agency concluded that its new approach would 'improve administrability.'" (quoting *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 58-59 (2011)).

C. *Petitioners' Brand X Arguments Are Forfeited And In Any Case Present No Issues For This Court To Review.*

Petitioners contend that this case presents an opportunity for this Court to "clarify" the application of *Brand X* where multiple circuits have issued prior decisions relating to a statute, alleging that *Brand X* requires a "far more searching review" than the FCC or Ninth Circuit conducted. Pet.21-23. But that issue is not properly before this Court. Because the issue was not raised before the Commission, Petitioners could not have properly raised it before the court of appeals, *see Globalstar, Inc. v. FCC*, 564 F.3d 476, 483 (D.C. Cir. 2009) (under 47 U.S.C. § 405(a), a court of appeals "lack[s] jurisdiction to review arguments that have not first been presented to the Commission."). And, indeed, Petitioners did not ask the court below to clarify the application of *Brand X* in the manner now presented in the Petition. Because this issue was not pressed or passed on below, it is not properly before this Court. *See Delta Airlines v. August*, 450 U.S. 346, 362 (1981) (noting that a question presented in a certiorari petition but "not raised in the Court of Appeals . . . is not properly before [the Court].").

Even if Petitioners' *Brand X* issue were properly before this Court, it is without merit. The Ninth Circuit considered and "reject[ed]," Pet.App.19a, Petitioners' argument that the FCC's interpretation of the effective prohibition language conflicted with the Ninth Circuit's own *Sprint Telephony* decision—the only case that Petitioners claimed to the court below to present a *Brand X* issue, *see* Pet. C.A.Br. 36-37. The FCC also addressed *Sprint Telephony* head on, determining that "that holding is not implicated by [the agency's] interpretations here." Pet.App.124a n.99; *see also id.* at 119a-127a (rejecting "alternative readings" of the effective prohibition language and addressing the cases that produced those readings). Under *Brand X*, nothing more was required.

The Ninth Circuit reviewed and upheld the FCC's *Order* as consistent with precedent. Therefore, no *Brand X* issue is presented here. Any such issue would arise only if a *different* circuit court in a future case found that the FCC's interpretation of Sections 332 and 253 conflicted with that circuit's prior precedent holding the interpretation unambiguously foreclosed—despite, as set forth above, the evident absence of any such conflict. To the extent that such a hypothetical case arises in the future, this Court would have the opportunity to determine whether it warranted review. In the meantime, this Court "do[es] not sit to decide hypothetical issues or to give advisory opinions," *Princeton Univ. v. Schmid*, 455

U.S. 100, 102 (1982), and it should reject Petitioners' invitation to do so.[4]

II. The Court of Appeals' Decision on Petitioners' Second Question Presented Was Correct and Does Not Warrant This Court's Review

A. *The Court of Appeals Correctly Upheld the FCC's Interpretation of Sections 253 and 332 as Limiting Small Cell Siting Fees to a Reasonable Approximation of a Locality's Costs*

Petitioners next offer a grab-bag of complaints about the FCC's application of the "effect of prohibiting" standard to local siting fees imposed for

[4] Petitioners cite to *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1145 (10th Cir. 2016) to suggest that review is somehow warranted, but that case is entirely inapposite. *Gutierrez-Brizuela* concerns whether an agency interpretation that runs counter to a court's prior interpretation under *Brand X* applies with full force in that Circuit before the Court of Appeals has affirmed the agency's new interpretation. But as previously noted, the Ninth Circuit did not apply *Brand X* in the opinion below at all, as it found the *Orders* consistent with its prior opinions. *See* Pet.App.19a ("The FCC's application of its standard in the Small Cell and Moratoria Orders is consistent with *Sprint*, which endorsed the material inhibition standard as a method of determining whether there has been an effective prohibition."). Petitioners appear to contend that the issues discussed in *Gutierrez-Brizuela* might someday materialize in a different case in a different circuit that evaluates the *Order*. To the extent that such a future case materializes, this Court would be able to determine whether that case represents the issues discussed in *Gutierrez-Brizuela*, and whether review is warranted.

the deployment of small cells. None of petitioners' various arguments has merit.

1. a. The Commission applied its interpretation of "effect of prohibiting" in Sections 253 and 332 to the fees charged by governments for the deployment of small cells. Based on a detailed examination of the record, *see* Pet.App.129a-166a, the Commission found that excessively high fees were effectively prohibiting service in two different ways. Such fees materially inhibit the provision of wireless service both by directly causing "reduced or entirely forgone deployment" of small cell facilities in jurisdictions with high fees, and by forcing providers to invest so much in "must-serve" jurisdictions that they cannot deploy service in other, less populated areas. *Id.* at 157a-162a. *See* pp. 9-10, *supra.* The Commission held: "the record reveals that fees above a reasonable approximation of cost, even when they may not be perceived as excessive or likely to prohibit service in isolation, will have the effect of prohibiting wireless service when the aggregate effects are considered, particularly given the nature and volume of anticipated Small Wireless Facility deployment." Pet.App.161a-162a.

Based on this assessment, the Commission determined that deployment fees are not prohibitive if "(1) the fees are a reasonable approximation of the state or local government's costs, (2) only objectively reasonable costs are factored into those fees, and (3) the fees are no higher than the fees charged to similarly-situated competitors in similar situations." *Id.* at 136a. The Commission also provided for a safe harbor: application fees of $500 or less and recurring

fees of $270 per year or less are presumptively reasonable, and need not be justified with data regarding costs. *Id.* at 178a-179a.

b. As the Ninth Circuit explained, this fee structure adopted by the Commission was supported by extensive factual findings. The FCC's determination that above-cost fees in the aggregate were prohibitory, along with the fact that there were no "alternative, administrable approach[es]," rendered the interpretation "reasonable," particularly in light of this Court's decision in *Mayo Foundation*, which held that agencies may take into account "improve[d] administrability" in exercising their statutory discretion. Pet.App.26a-27a (quoting *Mayo Foundation*, 562 U.S. at 58-59). The agency's explanation "made the requisite 'rational connection between the facts found and the choice made.'" Pet.App.27a (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). Meanwhile, as the Court noted, Petitioners offered no alternative approach beyond individually examining the prohibitive effect of each fee charged by the almost 100,000 governments under the FCC's jurisdiction, which would be "a nearly impossible administrative undertaking." Pet.App.27a.

Although the dissent would have held that the Commission insufficiently explained how non-cost-based fees were prohibitory, *see* Pet.App.63a-71a; Pet.30-32, that disagreement with the majority concerns only the application of well-established administrative-review standards to the specific facts of this case. Pet.App.69a (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29,

43 (1983)). Furthermore, as the majority explained, the record on which the Commission relied was replete with evidence from wireless providers about how exorbitant, non-cost-based fees prevented the deployment of small cell technology, as well as an economic study showing that lower fees would allow more than $2 billion in investment in 5G technology that would not otherwise be economically viable. Pet.App.28a-29a. The Commission determined that cost-based fees would address these identified problems that inhibit the provision of nationwide 5G service.

"Under the substantial-evidence standard, a court looks to an existing administrative record and asks whether it contains sufficien[t] evidence to support the agency's factual determinations." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (internal quotation marks and citation omitted). "Substantial evidence, this Court has said, is more than a mere scintilla. It means—and means only—such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation marks and citations omitted). As the Ninth Circuit correctly held, Pet.App.29a, the Commission's reliance on its detailed record to determine that non-cost-based fees were prohibitory easily meets this low bar. That case-specific conclusion does not warrant review.

2. The Ninth Circuit also correctly held that the FCC's fee limitation does not run afoul of Section 253(c), which preserves cities' authority to require "fair and reasonable" compensation from providers. *See* Pet.App.29a-30a. The phrase "fair and

reasonable" confers interpretive discretion on the FCC, and the Commission reasonably explained that the phrase is generally understood to include cost-based fees, *see* Pet.App.142a-144a & n.149,; *NetCoalition v. SEC*, 615 F.3d 525, 536 (D.C. Cir. 2010) (noting SEC's "flexibility" in construing "fair and reasonable"). That construction allows cities and states to be compensated for the use of their rights-of-way without leaving them "unconstrained" to charge carriers exorbitant fees. Pet.App.172a. As the Ninth Circuit held, this interpretation of the ambiguous term "fair and reasonable" was permissible. Pet.App.29a-30a. Although Petitioners contend that the Commission should not be able to interpret "fair and reasonable" to allow for cost recovery, Pet.29, they fail to explain how it was unreasonable for the Commission to construe that term to allow for cost recovery here, as it frequently is in other contexts.[5] *E.g.*, *NetCoalition*, 615 F.3d at 536 (noting multiple examples of SEC rules that construe "fair and reasonable" to allow for the recovery of cost-based fees).

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[5] Relying on this Court's since-abrogated 1893 decision in *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893), petitioners argue (at Pet.28) that the FCC has upset "Congress's preservation" of municipalities' "authority" to charge "non-cost-based rents" for access to public rights-of-way. Petitioners do not point to any evidence that Congress intended in Section 253(c) — which provides only that municipalities may charge "fair and reasonable" fees — to *require* that municipalities be permitted in all situations to charge rents untethered to cost. And even if *City of St. Louis* somehow supported their construction of Section 253(c)—petitioners do not explain how it does—this Court abrogated that decision in *City of St. Louis v. Western Tel. Co.*, 149 U.S. 465, 470 (1893).

3. Petitioners claim that, by interpreting Section 253(a) to prohibit non-cost-based fees, and by likewise limiting "fair and reasonable compensation" to cost-based fees, the *Small Cell Order* rendered the savings clause in Section 253(c) superfluous. Pet.24-26. Quite the contrary. The FCC expressly and repeatedly affirmed the operation of Section 253(c) as a savings clause. *See, e.g.,* Pet.App.136a n.132, 138a-140a, 142a-144a. Indeed, the Commission expressly relied on Section 253(c) in construing Section 253(a), noting that "[the agency's] interpretation of Section 253(a) is informed by this statutory context." *Id.* at 139a. The Commission's careful analysis of the two statutory provisions and the Congressional intent behind them led the Commission to "view the substantive standards for fees that Congress sought to insulate from preemption in Section 253(c) as an appropriate ceiling for state and local fees that apply to the deployment of Small Wireless Facilities in public ROWs." *Id.* at 140a. Rather than rendering Section 253(c) superfluous, the Commission in fact used it as a guide to ensure that its statutory interpretation properly balanced the interplay between the different provisions of Section 253.

4. Petitioners also contend that "[t]his Court's intervention is necessary" to "prevent a federal agency from transforming a preemption provision into a license to fabricate a nationwide cross-subsidizing rate regulation regime for municipal assets." Pet.33. Petitioners are incorrect.

First, Petitioners again mischaracterize the FCC's *Order*. The Commission has not required "cross-subsidization" by municipalities, as all municipalities

remain able to collect their reasonable costs. *See* Pet.App.104a-106a. Petitioners argue that preventing municipalities from extracting rents at the highest possible levels is improper "subsidization" because it frees up resources for providers to deploy "in economically unattractive jurisdictions at the expense of jurisdictions charging market rates where services are actually being deployed." Pet.30. But Petitioners' argument assumes that localities are entitled to use their monopoly control of rights-of-way to charge carriers the highest rate possible for access to those rights-of-way. That assumption, completely divorced from Section 253, takes into account neither whether such fees would materially inhibit the provision of wireless service nor whether the fees are "fair and reasonable." Petitioners' transparent intent to extract the maximum possible price for access to their rights-of-way no matter the impact on nationwide buildout shows *exactly* why Congress enacted Sections 253 and 332 and why the FCC decided, based on an extensive record, that it needed to take action. *See* Pet.App.169a-172a.

Second, Petitioners' claim that a nationwide approach to determining prohibitory fees conflicts with Section 253 finds no support in the statute. To the contrary – the purpose of the 1996 Act was "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for *American telecommunications consumers* and encourage the rapid deployment of new telecommunications technologies." 1996 Act at Preamb. (emphasis added).

To get around this national focus, Petitioners contend that "the straightforward language of Section 253(a) preempts state or local requirements that have the effect of prohibiting carriers' ability to provide service *within the state or locality's jurisdiction*." Pet. 32-33 (emphasis added). But the italicized language appears nowhere in the statute. In fact, the statute preempts state and local requirements that "have the effect of prohibiting the ability of any entity to provide *any interstate or intrastate telecommunications service*." 47 U.S.C. § 253(a) (emphasis added). The "straightforward language" of Section 253 thus preempts any local requirement that effectively prohibits service, whether that impact is felt inside or outside the locality's jurisdictional boundaries. The FCC's *Order* recognized these basic principles and made determinations based on the record about how particular practices violate the 1996 Act, just as the statute intends. *See* Pet.App.159a-162a.

5. Finally, petitioners contend that this Court's review is warranted because municipalities act in a proprietary capacity when they impose fees for infrastructure deployment in public rights-of-way and those fees are thus not subject to preemption. Therefore, they argue, the FCC lacked authority to conclude that excessive fees are preempted.[6] That argument is meritless.

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[6] Petitioners mischaracterize the *Small Cell Order*'s reasoning. The *Order* does not, as petitioners argue (Pet.33), "compel states and localities to enter into the business of leasing their rights-of-way and property . . . to private parties." Nothing in the *Small Cell Order* compels a locality to approve any particular siting

Petitioners assert that the Ninth Circuit contravened this Court's precedent by permitting "the FCC to categorically preempt a vast range of state and local government conduct" without first determining whether that conduct is proprietary, rather than regulatory, in nature. Pet.34-35. In petitioners' view, that determination is required by *Building & Construction Trades Council of the Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island Inc.*, 507 U.S. 218, 231-32 (1993) (*Boston Harbor*), which held that the National Labor Relations Act did not preempt municipal actions taken as a market participant. But the FCC made that very determination. Pet.App.199a-203a. The Commission reviewed the record with respect to municipal activities undertaken in the rights-of-way and concluded that states and localities "hold the public streets and sidewalks in trust for the public," and — unlike a private property owner — manage those rights-of-way in furtherance of regulatory objectives such as public safety and welfare. *Id.* at 200a. The Ninth Circuit held that the FCC's determination was a "reasonable conclusion based on the record." *Id.* at 44a. The Ninth Circuit's decision rests on precisely the distinction between regulatory and proprietary action that petitioners argue is required.

The Ninth Circuit was correct to hold that it was reasonable for the FCC to conclude that municipalities are acting in a regulatory capacity.

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request—whether the request seeks access to public rights-of-way or otherwise. Rather, the FCC held only that fees for use of public rights-of-way are preempted to the extent they effectively prohibit service.

Given that public rights-of-way are held in trust for the public, municipalities' interest in those rights-of-way is primarily (if not exclusively) regulatory. *See, e.g.,* Pet.App.199a-200a; *Liberty Cablevision of P.R., Inc. v. Municipality of Caguas*, 417 F.3d 216, 221-22 (1st Cir. 2005) (municipalities' interest in streets is governmental, not proprietary); *NextG Networks of New York, Inc. v. City of New York*, No. 03-9672, 2004 WL 2884308 (S.D.N.Y. Dec. 10, 2004) (access to street light poles for wireless facilities was an exercise of City's regulatory, not proprietary, authority subject to Section 253); *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872 (9th Cir. 2006); *AT & T Co. v. Vill. of Arlington Heights*, 620 N.E.2d 1040, 1044 (Ill. 1993); *City of Mission v. Popplewell*, 294 S.W.2d 712, 715 (Tex. 1956) ("Courts everywhere decline to recognize that the city possesses any property rights in the streets . . . ." (quoting McQuillen on Municipal Corporations, 2d Ed., p.12, ¶ 2902)). As the FCC recognized, municipalities have an obligation to manage public rights-of-way in the public interest, and thus do not act in the same manner as a private property owner would. Pet.App.199a-200a. And in the very case relied upon by Petitioners, this Court held that whether a municipality is acting to further "its purely proprietary interests," or instead acting in the public interest, is a key consideration in determining whether the municipality is acting in regulatory or a proprietary capacity.[7] *Boston Harbor*,

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[7] Petitioners' assertion that the FCC has somehow "commandeer[ed]," Pet.37, public rights-of-way in violation of the Tenth Amendment is meritless. As the court of appeals correctly held, the *Small Cell Order* simply "confers on private entities . . . a federal right to engage in certain conduct subject

507 U.S. at 231. Because municipalities impose siting fees concerning public rights-of-way in furtherance of the public interest, it was reasonable for the FCC to conclude that they do so in a regulatory capacity.

The decisions on which petitioners rely (Pet.34) do not suggest otherwise. Those decisions are distinguishable because they concerned municipality-owned buildings or parks, not public rights-of-way. *See Sprint Spectrum L.P. v. Mills*, 283 F.3d 404 (2d Cir. 2002) (wireless carrier's request to place an antenna on a school rooftop); *Superior Communications v. City of Riverview*, 881 F.3d 432 (6th Cir. 2018) (city-owned property at issue analogized to school rooftop); *Omnipoint Communications, Inc. v. City of Huntington Beach*, 738 F.3d 192 (9th Cir. 2013) (construction of telecommunications towers in two city-owned parks). Government buildings and parks do not raise the public policy concerns of public rights-of-way.

In sum, just as with its interpretation of the effective prohibition standard, the FCC issued a clear, targeted ruling on municipal fees that was based on ample record evidence. The Ninth Circuit correctly upheld that use of agency discretion.[8]

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only to certain (federal) constraints." *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480 (2018).

[8] Amicus Curiae the International Municipal Lawyers Association (IMLA) raises additional, constitutional challenges to the *Orders* not raised in the Petition. Under this Court's rules, however, "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1; *see Yee v. City of Escondido*, 503 U.S. 519, 535 (1992)

B. *There is No Circuit Split Warranting this Court's Review Regarding Cost-Based Fees*

Petitioners allege the existence of several conflicts between the Ninth Circuit and other courts of appeals regarding the prohibition of above-cost fees. But none of those supposed conflicts warrant this Court's review.

1. First and foremost, as discussed above, *see supra* p. 19, the posture of this case makes clear that there is no live circuit conflict. No court of appeals besides the Ninth Circuit has evaluated the Commission's determination that above-cost municipal fees are prohibitory in certain contexts. Given the deference due to the agency's interpretation of the Communications Act, there is simply no reason to believe that any circuit will disagree with the Ninth Circuit's ruling in this case. To the extent that a court does disagree with the Ninth Circuit's interpretation in the future, this Court could step in at that point.

2. In any event, Petitioners vastly overstate the extent of any conflict between the Ninth Circuit's decision and those of other courts of appeals. Petitioners first contend that the Ninth Circuit is the only court of appeals that does not interpret Section 253(c) as a safe harbor. Pet.24-25. But that claim is false. In the *Small Cell Order*, the Commission expressly held that Section 253(c) acts as the statute's

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(quoting Rule 14.1 and noting that, except in "the most exceptional cases," this Court "ordinarily do[es] not consider questions outside those presented in the petition for certiorari"). Amicus's additional claims are not properly before this Court.

safe harbor provision, *see, e.g.,* Pet.App.136a n.132, 138a-140a, 142a-144a. In upholding this determination, the Ninth Circuit acknowledged that Section 253(c) ensures that states and localities "can manage public rights-of-way and require reasonable compensation for their use," and determined that the cost-based fees contemplated by the FCC were consistent with Section 253(c). Pet.App.16a, 29a. Just as other circuits have concluded that Section 253(c) is a safe harbor, so has the Ninth Circuit.

Petitioners also claim (Pet.27-28) a broad split on whether non-cost-based fees are prohibitory, but the cases they cite show the opposite. As Petitioners acknowledge, only one Court of Appeals has actually upheld a non-cost based fee under Section 253(c). *See TCG Detroit v. City of Dearborn,* 206 F.3d 618, 624 (6th Cir. 2000) (upholding district court's decision that a non-cost-based franchise fee set at four percent of franchisees' gross revenue was permissible under the Act). Other Circuits have not reached the issue, and so Petitioners are left to claim an intra-circuit split in the Ninth Circuit as reason for this Court to grant review. Pet.28. But the decision below resolved any intra-circuit tension, and in any event this Court does not review intra-circuit disagreements. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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