No. 20-1354

In the Supreme Court of the United States

CITY OF PORTLAND, OREGON, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Subject to specified limitations and conditions, Sections 253 and 332(c)(7) of the Communications Act expressly preempt state and local measures that have the "effect of prohibiting" the provision of certain telecommunications and wireless services. 47 U.S.C. 253(a), 332(c)(7)(B)(i)(II). In implementing Section 253(a), the Federal Communications Commission (FCC or Commission) has long construed that standard to encompass state and local measures that materially inhibit a provider's ability to furnish a covered service in a fair and balanced environment. In the FCC order principally at issue here, the Commission reaffirmed its longstanding material-inhibition approach, explained that the same standard applies under Section 332(c)(7), and clarified how that approach applies to certain types of state and local restrictions on the deployment of "small cells" central to fifth-generation (5G) wireless service. The questions presented are as follows:

1. Whether the court of appeals properly upheld the Commission's longstanding interpretation of the "effect of prohibiting" standard as encompassing state and local requirements that materially inhibit the deployment of infrastructure used to provide interstate communications services.

2. Whether the court of appeals properly upheld the FCC's determinations concerning the application of the material-inhibition standard to fees that state and local governments charge providers for access to public rights-of-way.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-71a) is reported at 969 F.3d 1020. The orders of the Federal Communications Commission are reported at 33 FCC Rcd 9088 (excerpted at Pet. App. 72a-294a) and 33 FCC Rcd 7705.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2020. Petitions for rehearing were denied on October 22, 2020 (Pet. App. 295a-296a). On March 19, 2020, the Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The effect of that order was to extend the deadline for filing a petition for a writ of certiorari in this case to March 21,

2021. The petition for a writ of certiorari was filed on March 22, 2021 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, Congress amended the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, "[t]o promote competition and reduce regulation" in the telecommunications industry "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 Pmbl., 110 Stat. 56. "One of the means by which [Congress] sought to accomplish th[o]se goals was reduction of the impediments imposed by local governments upon the installation of facilities for wireless communications." *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 115 (2005). To that end, Congress enacted Sections 253 and 332(c)(7) of the Communications Act, which expressly preempt state or local measures that prohibit or "have the effect of prohibiting" interstate communications services. 1996 Act Tit. I, Subtit. A, § 101(a), 110 Stat. 70 (47 U.S.C. 253); Tit. VII, § 704(a), 110 Stat. 151 (47 U.S.C. 332(c)(7)).

Section 253, entitled "Removal of Barriers to Entry," 47 U.S.C. 253 (emphasis omitted), 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(d) directs the Federal Communications Commission (FCC or Commission) to implement that prohibition. It provides that

> [i]f, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) * * * , the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

47 U.S.C. 253(d). Section 253's other provisions clarify or qualify the scope of the general prohibition in Section 253(a). 47 U.S.C. 253(b)-(c) and (e)-(f). As relevant here, Section 253(c) states that

> [n]othing in [Section 253] 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, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

47 U.S.C. 253(c).

Section 332(c)(7) similarly "imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of [wireless] facilities." *Abrams*, 544 U.S. at 115. Section 332(c)(7)'s structure is inverted relative to that of Section 253, in that it states a general principle preserving state and local governments' authority over certain matters, and then enumerates various exceptions to that principle. Subparagraph (A) of Section 332(c)(7) states that, "[e]xcept as provided in [paragraph (c)(7)], nothing in [the Communications Act] shall limit or affect

the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. 332(c)(7)(A). Subparagraph (B) then sets forth "[l]imitations" that consist of express prohibitions on certain state and local measures. 47 U.S.C. 332(c)(7)(B) (emphasis omitted). As relevant here, subclause (c)(7)(B)(i)(II) states that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof * * * shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. 332(c)(7)(B)(i)(II).

b. Soon after those provisions were enacted, the FCC received a request to preempt a local regulation "that prohibited the installation of payphones on private property outdoors." Pet. App. 18a; see *In re California Payphone Ass'n Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Cal. Pursuant to Section 253(d) of the Communications Act of 1934*, 12 FCC Rcd 14,191, 14,191 (1997) (*California Payphone*). The Commission denied that petition because it "f[ound] the record insufficient to warrant preemption pursuant to [S]ection 253." *Id.* at 14,192. In doing so, however, the agency expressed its view that a state or local measure "'has the effect of prohibiting'" the provision of 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." *Id.* at 14,206 (quoting 47 U.S.C. 253(a)); see Pet. App. 18a.

Since then, every court of appeals to address *California Payphone* has cited the Commission's interpretation of Section 253 approvingly. See *Sprint Telephony PCS, L.P.* v. *County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (en banc), cert. denied, 557 U.S. 935 (2009); *Level 3 Commc'ns L.L.C.* 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, 1270-1271 (10th Cir. 2004); *TCG N.Y., Inc.* v. *City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002), cert. denied, 538 U.S. 923 (2003).

2. a. In recent years, the communications industry has undergone a "wireless revolution." Pet. App. 11a. Voice and data communications increasingly occur by means of wireless technologies that utilize the electromagnetic spectrum. Carriers currently are investing in a "fifth generation of cellular wireless technology," known as "5G," which delivers improved capacity, coverage, and speed to support advanced voice and data services. *Id.* at 14a.

"Although 5G transmits data at exceptionally fast speeds, it does so over relatively short distances." Pet. App. 14a. As a result, whereas earlier wireless technologies depended on "large, 200-foot towers" spaced widely apart, modern wireless networks require that carriers install smaller, low-powered "small cell" facilities "at a faster pace and at a far greater density of deployment than before." *Id.* at 76a; see *id.* at 133a-134a.

b. In 2017, recognizing that small-cell facilities present different regulatory issues from the construction of traditional communications towers, the FCC initiated proceedings to examine the effects of state and local regulation on communications infrastructure in the current wireless market. See generally *In re Accelerating*

Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, 32 FCC Rcd 3330 (2017). Commenters indicated that, although "[s]ome states and local governments have acted to facilitate the deployment of * * * next-gen[eration] infrastructure," state and local policies elsewhere have "materially imped[ed] that deployment in various ways." Pet. App. 95a.

The record before the Commission showed that, in "numerous, geographically diverse cities," "excessive fees" had "delay[ed] deployment of 5G services." Pet. App. 26a. "In one example, deployment had to be completely halted when a city tried to charge a one-time fee of $20,000 per small cell [installation], with an additional recurring annual fee of $6000." *Ibid.* A major carrier reported that it had yet to deploy a single small cell in Los Angeles County but had deployed more than 500 small cells in the City of Los Angeles, where fees were lower. *Id.* at 155a. In Portland, Oregon (a petitioner in this Court), city-imposed access fees of $7500 per site, with recurring fees of at least $3500 per site, likewise prevented deployment of small cells. See *id.* at 28a; see also Gov't C.A. Br. 69-72, 74 & n.16 (discussing additional examples in the record).

c. In 2018, drawing on that record, the Commission issued the declaratory ruling principally at issue here, which addressed the operation of Sections 253 and 332(c)(7) in the current communications marketplace. *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*,

33 FCC Rcd 9088 (2018) (Small-Cell Order) (excerpted at Pet. App. 72a-294a); see Pet. 5 n.1.[1]

i. The FCC reaffirmed its view, first articulated more than 20 years earlier in *California Payphone*, that Section 253(a)'s reference to state or local measures 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), encompasses any measure that "'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 14,206); see *id.* at 115a-116a. The Commission further determined that the parallel "effect of prohibiting" phrase in Section 332(c)(7)(B)(i)(II) should be construed in the same way. *Id.* at 112a. The FCC explained that this interpretive approach is "consistent with the basic canon * * * that identical words appearing in neighboring provisions of the same statute generally * * * have the same meaning." *Ibid.*; see *id.* at 112a n.82 (citing cases). The Commission found this approach especially appropriate here because Sections

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[1] Petitioners state (Pet. 5 n.1) that, although their "petition focuses on the analysis in the *Small Cell* Order," they also seek review of a second, "closely related" order, *In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd 7705 (2018) (Moratorium Order)—which was issued approximately two months before the Small-Cell Order, and which the court of appeals also reviewed and upheld, Pet. App. 13a, 48a-52a, 63a—"to the degree [the *Moratorium Order*] underlies the issues raised" in the petition regarding the Small-Cell Order. Because the certiorari petition does not advance any distinct contentions specific to the Moratorium Order, this brief likewise focuses on the Small-Cell Order.

253(a) and 332(c)(7)(B)(i)(II) address the same subject matter. See *id.* at 112a-113a.

In reaffirming *California Payphone*'s "materially inhibits" test and applying that standard to Section 332(c)(7)(B)(i)(II), the FCC clarified several aspects of its interpretation. Pet. App. 109a-128a. It disclaimed the view that "the 'mere possibility of prohibition'" alone justifies federal preemption. *Id.* at 124a n.99 (citation omitted). The Commission observed, however, that "a legal requirement can 'materially inhibit' the provision of services"—and therefore can be preempted —"even if it is not an insurmountable barrier" to the provision of those services. *Id.* at 110a. The FCC additionally explained that the "materially inhibits" standard applies both when carriers introduce new services and when they seek to improve existing services. *Id.* at 115a-116a. The Commission noted, for example, that "a state or local legal requirement" could be preempted if it "materially inhibit[ed]" a carrier's ability to "densify[ ] a wireless network" that is already in place. *Ibid.*

ii. The Small-Cell Order did not preempt any specific requirements that particular state or local governments had adopted. See Pet. App. 23a. Instead, it identified certain types of state and local requirements that the FCC viewed as preempted by Sections 253 and 332(c)(7)(b)(i)(II). See *id.* at 129a-203a. The Commission observed that, although certain of those requirements "once may have been tolerable when providers built macro towers several miles apart," they "now act as effective prohibitions when multiplied by each of the many" small cells that carriers must deploy. *Id.* at 134a.

Most relevant here, the Commission addressed "state and local fees and other charges associated with the deployment of wireless infrastructure." Pet. App.

104a; see *id.* at 129a-181a. The FCC agreed with the "numerous courts [that] have recognized" that such fees and charges "can effectively prohibit the provision of service." *Id.* at 104a. The agency found that inflated small-cell fees sometimes effectively prohibit service in the jurisdictions that charge them. *Id.* at 162a. It noted that, in other instances, inflated fee demands imposed by large urban jurisdictions deplete carriers' capital to support deployment in rural areas. *Id.* at 160a & n.195. In that way, the Commission explained, inflated fees in one jurisdiction may indirectly delay and deter deployment elsewhere. *Id.* at 162a.

Based on those findings, the FCC determined that state and local small-cell fees, "considered in the aggregate," have the effect of prohibiting wireless services, and thus are preempted under Sections 253(a) and 332(c)(7)(B)(i)(II), if they exceed a reasonable approximation of any actual costs that a locality must incur. Pet. App. 140a; see *id.* at 133a-147a, 174a-176a. Conversely, the agency "conclude[d] that states and localities do not impose an unreasonable barrier to entry when they merely require providers to bear the direct and reasonable costs caused by their decision to enter the market." *Id.* at 145a.

In support of its approach to preemption, the FCC in the Small-Cell Order also invoked "the text and structure" of the statute, and in particular the interplay between Section 253(a) and (c). Pet. App. 137a; see *id.* at 137a-140a. Those subsections, the Commission observed, "operate in tandem to define" the respective roles of the "federal government, states, and localities * * * in regulating the provision of telecommunications services." *Id.* at 137a. It explained that Section 253(a) "sets forth Congress's intent to preempt state or local legal requirements

that 'prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service,'" while Section 253(c) "reflects a considered policy judgment that 'nothing in [Section 253]' shall prevent states and localities from recovering certain carefully delineated fees." *Id.* at 137a-138a (quoting 47 U.S.C. 253(a) and (c)) (brackets omitted). The FCC viewed Section 253(c)'s "substantive standards for fees that Congress sought to insulate from preemption" as shedding light on Section 253(a)'s application to such fees. *Id.* at 140a.

The FCC noted, however, that it "need not decide" in the Small-Cell Order "whether Section 253(a) preempts all fees not expressly saved by Section 253(c) with respect to all types of deployments." Pet. App. 140a. Instead, the Commission simply "conclude[d], based on the record before [it], that with respect to Small Wireless Facilities, even fees that might seem small in isolation have material and prohibitive effects on deployment, particularly when considered in the aggregate given the nature and volume of anticipated Small Wireless Facility deployment." *Ibid.* (footnote omitted).

In response to comments urging the FCC to "establish a presumptively reasonable" amount for certain fees, the Commission declared that small-cell fees are presumptively reasonable if they do not exceed certain thresholds—$500 for application fees, and $270 per year for recurring fees. Pet. App. 177a (citation omitted); see *id.* at 177a-181a. The FCC anticipated that "there would be almost no litigation by providers over fees set at or below th[o]se levels." *Id.* at 180a. It further explained, however, that its approach left room for "local variances in costs," by allowing state and local governments to charge fees above the presumptively reasonable levels

where such fees "are (1) a reasonable approximation of costs, (2) those costs themselves are reasonable, and (3) are non-discriminatory." *Id.* at 180a-181a.

iii. The FCC confirmed that its interpretation of Sections 253 and 332(c)(7) applies to "state and local governments' terms for access to public [rights-of-way] that they own or control," including "terms for use of or attachment to government-owned property within such [rights-of-way]." Pet. App. 191a-192a; see *id.* at 191a-203a. The Commission rejected a contention that, "in providing or denying access to government-owned structures," state and local governments "function solely as 'market participants' whose rights cannot be subject to federal preemption under Section 253(a) or Section 332(c)(7)." *Id.* at 192a. The Commission explained that States and localities "hold the public streets and sidewalks in trust for the public," and that government-owned structures within public rights-of-way—such as traffic lights and lampposts—"are frequently relied upon to supply services for the benefit of the public." *Id.* at 200a-201a. It accordingly determined that a state or local government's role when managing public rights-of-way is generally "indistinguishable from its function and objectives as a regulator." *Id.* at 200a.

Commissioner (now Acting Chairwoman) Rosenworcel issued a statement approving in part and dissenting in part. Pet. App. 288a-294a; see Pet. 11-12.

3. Pursuant to 28 U.S.C. 2342 and 47 U.S.C. 402(a), petitioners—various local governments and associations of municipalities—petitioned for review of (*inter alia*) the Small-Cell Order or intervened to support such review. Pet. ii, 3; Gov't C.A. Br. 4-5. The court of appeals consolidated their challenges with other petitions challenging the Small-Cell Order, and it denied

the petitions with respect to the aspects of that Order that are relevant here. Pet. App. 1a-71a.[2]

a. i. The court of appeals upheld the Commission's interpretation of the term "effect of prohibiting" in Sections 253(a) and 332(c)(7). Pet. App. 17a-20a. The court explained that it had previously approved the FCC's "material inhibition" test, and it reaffirmed the "continuing validity" of that interpretation. *Id.* at 18a. The court acknowledged that, under its precedent, "[t]here must be an actual effect" on the provision of communications services in order "to trigger preemption," and that "'the mere possibility' of prohibition" is not enough. *Ibid.* (citation omitted). But the court concluded that the FCC's "material inhibition" test comported with that understanding. *Id.* at 19a.

The court of appeals also upheld the FCC's "application of its standard" here. Pet. App. 19a. The court observed that the agency had made "factual findings, on the basis of the record before it, that certain municipal practices are materially inhibiting the deployment of 5G services," and it concluded that the statute required "[n]othing more." *Ibid.*

ii. As relevant here, the court of appeals also upheld the Commission's application of the material-inhibition standard to fees that exceed the actual costs that a state or local government must incur in connection with the deployment of small cells. Pet. App. 24a-30a. Petitioners contended that the FCC's cost-focused approach to fees

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[2] The court of appeals vacated certain aspects of the Small-Cell Order addressing the authority of local governments to adopt "aesthetic regulations." Pet. App. 13a; see *id.* at 30a-38a, 62a-63a. Those aspects of the Small-Cell Order are not at issue in this Court. See Pet. 3 ("On the aspects of the *Orders* at issue here, * * * the Ninth Circuit affirmed.").

was unsound because "no rational connection" exists between "whether a particular fee is higher than that particular city's costs, and whether that fee is prohibiting service." *Id.* at 26a. The court rejected that argument, explaining that the Commission's fee structure was not premised "on a determination that there was a relationship between particular cities' fees and prohibition of services," but instead reflected the agency's "f[inding] that above-cost fees, in the aggregate, were having a prohibitive effect on a national basis," and on the agency's further "f[inding]" that "there was no readily-available * * * 'alternative, administrable approach to evaluating fees without a cost-based focus.'" *Ibid.* (citation omitted).

The court of appeals also found that the Commission's findings had an adequate evidentiary basis. Pet. App. 27a-29a. It explained that the record supported the FCC's factual determinations that "high fees were inhibiting deployment both within and outside the jurisdictions charging fees." *Id.* at 28a. The court stated that petitioners' alternative approach "would require an examination of the prohibitive effect of fees in each of the 89,000 state and local governments under the [Commission's] jurisdiction, a nearly impossible administrative undertaking," and that petitioners had not "offer[ed] any other workable standard." *Id.* at 27a.

The court of appeals further observed that the Small-Cell Order "did not require local jurisdictions to justify all fees with costs," but instead had "adopted presumptively permissible fee levels." Pet. App. 29a. The court rejected petitioners' contention that, by identifying presumptively reasonable fee levels, the FCC was "in effect, setting rates." *Id.* at 30a. The court explained that the Commission was instead "determining a level at which fees would

be so clearly reasonable that justification was not necessary, and litigation could be avoided." *Ibid.*

iii. The court of appeals upheld the FCC's determination that the material-inhibition standard applies to certain types of municipal restrictions on access to public rights-of-way, including small-cell fees, and that such restrictions are not exempt from preemption. Pet. App. 42a-45a. The court rejected petitioners' contention that, "in controlling access to, and construction of, facilities in public rights-of-way," state and local governments "act[] like private property owners." *Id.* at 43a. The court explained that public "rights-of-way, and [the] manner in which * * * municipalities exercise control over them, serve a public purpose," and that "they are regulated in the public interest, not in the financial interests of the cities." *Id.* at 44a. The court accordingly found that such restrictions are "regulatory, not propriet[ary], and therefore [are] subject to preemption." *Ibid.*

b. Judge Bress dissented with respect to the FCC's determinations regarding the fees that state and local governments may charge providers in connection with the deployment of small cells. Pet. App. 63a-71a. He expressed the view that "fees are prohibitive because of their financial effect on service providers, not because they happen to exceed a state or local government's costs." *Id.* at 66a. Judge Bress observed that "a prohibition on all above-cost fees may well be justifiable." *Id.* at 70a. In his view, however, the Commission "ha[d] not adequately explained its basis" for that approach "on the present record." *Id.* at 67a, 71a.

ARGUMENT

The court of appeals correctly upheld the portions of the FCC's Small-Cell Order that are at issue here. In those portions, the Commission reiterated its longstanding interpretation of 47 U.S.C. 253; clarified that the same interpretation applies to parallel language in 47 U.S.C. 332(c)(7)(B)(i)(II); and explained how that approach would apply to particular issues that arise in the context of 5G wireless infrastructure. Neither the court's conclusion that the FCC has permissibly interpreted the statute, nor its determination that the Commission's approach was supported by the record in this proceeding, conflicts with any decision of this Court or of another court of appeals. Further review is not warranted.

1. Petitioners contend (Pet. 18-21) that the court of appeals erred in upholding the Commission's interpretation of Section 253(a). That argument lacks merit and does not warrant review.

a. 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). Since 1997, the year after that provision was enacted, the Commission has understood Section 253's "'has the effect of prohibiting'" language to mean that a state or local requirement is preempted 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." *In re California Payphone Ass'n Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Cal. Pursuant to Section 253(d) of the Communications Act of 1934*, 12 FCC Rcd 14,191, 14,206 (1997). The Ninth Circuit has long approved that

understanding, see Pet. App. 18a (citing *Sprint Telephony PCS, L.P.* v. *County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (en banc), cert. denied, 557 U.S. 935 (2009)), and every other court of appeals to address it has likewise cited *California Payphone* approvingly. See p. 5, *supra*.

The FCC determined in the Small-Cell Order that the same interpretation should apply to the parallel "effect of prohibiting" phrase in Section 332(c)(7). 47 U.S.C. 332(c)(7)(B)(i)(II); see Pet. App. 112a-113a. That approach comports with settled principles of statutory interpretation. See Pet. App. 112a & n.82 (citing, *inter alia*, *Puerto Rico* v. *Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016)). And it is especially appropriate here because Sections 253(a) and 332(c)(7) both "apply to wireless telecommunications services as well as to commingled services and facilities." *Id.* at 112a-113a (footnote omitted). Petitioners do not appear to dispute the FCC's conclusion that the two provisions should be interpreted in pari materia.

b. Petitioners contend (Pet. 18-21) that the FCC's long-settled interpretation lacks a limiting principle. Petitioners assert that the agency adopted, and that the court below upheld, an approach that "[e]quat[es] an effective prohibition" on services—which Section 253(a) would preempt—"with any deviation from a provider's plans." Pet. 18; see Pet. 16-17. Neither the FCC nor the Ninth Circuit has so construed the statute.

Nothing in the Small-Cell Order suggests that wireless carriers may "construct any and all towers," or small cells, that they "deem[] necessary" in their "business judgment." Pet. 16 (citation omitted). To the contrary, the FCC made clear that state and local measures

have the effect of prohibiting service only if they "materially inhibit[] or limit[]" a carrier's ability to "compete in a fair and balanced legal and regulatory environment." Pet. App. 85a (citation omitted); see *id.* at 115a-128a. The Commission's test does not allow carriers to "compel access to any particular state or local property." *Id.* at 172a n.217. Nor does it "preclude all state and local denials of requests for the placement, construction, or modification of personal wireless service facilities." *Id.* at 121a n.94. Instead, "whether such decisions amount to an effective prohibition must be resolved on a case-by-case basis." *Id.* at 172a n.217.

To be sure, the FCC observed that the statutory bar against measures that have the effect of prohibiting a service encompasses "any covered service a provider wishes to provide, incorporating the abilities and performance characteristics it wishes to employ." Pet. App. 116a n.87 (citation omitted). But the Commission did not conclude that every *limitation* on any covered service is effectively prohibitory. It merely recognized that the terms "telecommunications service," 47 U.S.C. 253(a), and "personal wireless service," 47 U.S.C. 332(c)(7), are broad enough to encompass not only rudimentary telephone and wireless services, but also new and improved forms of service as to which characteristics such as speed and capacity are essential attributes. See Pet. App. 124a n.97. Petitioners thus are wrong in construing (Pet. 17) the Small-Cell Order to imply that localities may never constrain a carrier's "prefer[ences]."

For similar reasons, the decision below is not inconsistent with this Court's decision in *AT&T Corp.* v. *Iowa Utilities Board*, 525 U.S. 366 (1999). Petitioners observe that the Court there rejected an interpretation of a different statutory provision that would have deemed "*any*

increase in cost (or decrease in quality)" to be an "impair[ment]" of an entrant's ability to furnish services. Pet. 19 (quoting *Iowa Utilities Board*, 525 U.S. at 389-390). Neither the Commission nor the court of appeals, however, embraced such a reading of Section 253(a).

Petitioners are likewise mistaken in imputing (Pet. 17) to the Commission and the court of appeals the view that Section 253(a) preempts state and local requirements whose potential "prohibitory effects" on a service are "merely speculative." The FCC explained that its interpretation of Section 253(a) does not conflict with lower-court decisions that had deemed a "mere possibility of prohibition" insufficient. Pet. App. 124a n.99 (citation omitted). It expressed disagreement with those lower-court decisions only to the extent that they required "evidence of an existing or complete inability to offer a telecommunications service." *Id.* at 124a. The court of appeals, in turn, explained that "more than 'the mere possibility' of prohibition [is] required to trigger preemption" and that "[t]here must be an actual effect." *Id.* at 18a. And the court upheld the FCC's determinations that certain types of state and local practices (such as above-cost small-cell fees) are subject to preemption because the agency had made, and the record supported, "factual findings * * * that certain municipal practices are materially inhibiting the deployment of 5G services." *Id.* at 19a.

c. Petitioners contend (Pet. 15-18, 20-21) that review is warranted to resolve a conflict between the decision below and decisions of other circuits. That argument lacks merit.

Petitioners assert (Pet. 16-17) that the decision below conflicts with rulings that "require[] case-by-case decisionmaking" and a finding that the "impact on service" is "material[] or sever[e]." They contend (Pet. 17)

that the decision below conflicts with the Eighth Circuit's holding that preemption under Section 253(a) is not triggered by a state or local requirement that "may at some point in the future * * * prohibit services." *Level 3 Communications L.L.C.* v. *City of St. Louis*, 477 F.3d 528, 533 (2007). As discussed above, see pp. 8, 12, 18, *supra*, neither the FCC nor the Ninth Circuit has viewed a mere possibility of effect on service as sufficient to trigger preemption under the statute.

Petitioners additionally observe (Pet. 20-21) that, before the Commission issued the Small-Cell Order, some courts of appeals considering preemption issues under Section 332(c)(7) had articulated varying standards that focused primarily or exclusively on whether a "gap" in coverage existed. Pet. 21 (citation omitted); see, *e.g.*, *MetroPCS, Inc.* v. *City & Cnty. of San Francisco*, 400 F.3d 715, 731-735 (9th Cir. 2005), abrogated on other grounds by *T-Mobile South, LLC* v. *City of Roswell*, 574 U.S. 293 (2015). But those decisions addressed earlier generations of wireless service, which carriers could provide through a much smaller number of much larger towers. In that context, network characteristics like speed, capacity, and latency had little practical significance. By contrast, when considering the contemporary wireless marketplace in the order at issue here, the FCC reasonably determined that "the vast majority of new wireless builds are going to be designed to add network capacity and take advantage of new technologies, rather than plug gaps in network coverage," and that the statute should not be construed as limiting preemption to instances where carriers can demonstrate a coverage gap. Pet. App. 123a (citation omitted); see *id.* at 119a-124a.

Even in their earlier decisions, moreover, the courts of appeals did not conclude that the approach subsequently embodied in the Small-Cell Order is unambiguously foreclosed by the statutory text. *MetroPCS*, 400 F.3d at 734; see *Omnipoint Holdings, Inc.* v. *City of Cranston*, 586 F.3d 38, 48 (1st Cir. 2009) ("[T]he [statute] provides no guidance on what constitutes an effective prohibition, so courts * * * have added judicial gloss."). Although the statute requires an actual effect on service, Sections 253 and 332(c)(7) do not specify how severe an impact must be to constitute an effective prohibition. See Pet. App. 18a-19a; see also *id.* at 64a (Bress, J., dissenting in part) ("The Act does not define what it means for a local policy to 'have the effect of prohibiting' service."). Petitioners do not identify any court of appeals decision holding that the statutory language unambiguously precludes the Commission's current approach.[3]

In light of the FCC's intervening, reasonable interpretation, those other circuits would not be bound in future

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[3] Based on the statutory text, the Second and Fourth Circuit decisions that petitioners discuss (Pet. 15-17) rejected arguments that any limitation on a provider's ability to construct a facility is preempted. See *T-Mobile Ne. LLC* v. *Fairfax Cnty. Bd. of Supervisors*, 672 F.3d 259, 268 (4th Cir. 2012) (explaining that "the language of [Section 332(c)(7)(B)(i)(II)] does not encompass the ordinary situation in which a local governing body's decision merely limits the level of wireless services available"); *Sprint Spectrum, L.P.* v. *Willoth*, 176 F.3d 630, 639 (2d Cir. 1999) (rejecting, based on the language of Section 332(c)(7)(B)(i)(II), a provider's argument that it "ha[d] the right * * * to construct any and all towers that, in its business judgment, it deem[ed] necessary to compete effectively"). Neither court had occasion to address the approach the Commission took in the Small-Cell Order, which implements the agency's longstanding interpretation that a material inhibition is necessary for preemption.

cases to reject the Commission's current approach based on their earlier constructions of an ambiguous provision. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 983-986 (2005). Petitioners assert (Pet. 21-23) that review is warranted to clarify the contours of *Brand X*. But resolution of this case calls for straightforward application of that precedent.

2. Petitioners contend (Pet. 23-26, 33-38) that the court below erred in upholding the portions of the Small-Cell Order that addressed the application of Sections 253 and 332(c)(7) to above-cost small-cell fees and terms for access to public rights-of-way. Those arguments lack merit and do not warrant review.

a. The court of appeals properly upheld the Small-Cell Order's application of the FCC's interpretation of Sections 253 and 332(c)(7) to above-cost fees charged by state and local governments. Pet. App. 24a-30a.

i. The administrative record in this case supported the Commission's "factual finding" that, given the volume and density of facilities needed to operate small-cell networks, above-cost small-cell fees in the aggregate "were inhibiting deployment both within and outside the jurisdictions charging the fees." Pet. App. 28a; see *id.* at 26a. The record identified "numerous, geographically diverse cities[] where excessive fees [we]re delaying deployment" of small cells within the jurisdictions that imposed the fees. *Id.* at 26a; see Gov't C.A. Br. 69-72, 74 & n.16. And the court of appeals concluded that the FCC had "easily met" the substantial-evidence standard in showing that small-cell fees in certain jurisdictions were effectively prohibiting deployment of 5G technology in other areas of the country. Pet. App. 29a; see *id.* at 28a-29a. The court noted that the Commission

had "reasonably relied" on a study in which "economists * * * estimated that limiting 5G fees could result in carriers reinvesting an additional $2.4 billion in areas 'previously not economically viable.'" *Id.* at 28a-29a. Together with "firsthand reports of service providers," that study supported the FCC's "conclusion that a nationwide reduction in fees in 'must-serve,' heavily-populated areas[] would result in significant additional deployment of 5G technology in other[,] less lucrative areas of the country." *Ibid.*

The court of appeals also correctly upheld, as reasonable, the Commission's determination that fees should be tied to the actual costs a locality incurs. Pet. App. 25a, 29a-30a. The court noted the FCC's explanation "that the calculation of actual, direct costs is a well-accepted method of determining reasonable compensation." *Id.* at 29a. The court additionally observed that "there was no readily-available alternative" to the Commission's "cost-based standard" and that petitioners did not "offer any other workable standard." *Id.* at 26a-27a. The court explained that petitioners' approach would "require an examination of the prohibitive effect of fees in each of the 89,000 state and local governments under the FCC's jurisdiction," a "nearly impossible administrative undertaking." *Id.* at 27a.

The court of appeals properly held that the statute does not foreclose the Commission's above-cost approach. Pet. App. 27a-29a. The court noted that even petitioners "d[id] not contend" that the alternative methodology implicit in their challenge to the FCC's approach "is required by statute." *Id.* at 27a. It determined that the Commission's approach "is consistent with the language and intent of Section 253(c)," which

preserves state and local governments' ability to require "'fair and reasonable' compensation for use of their rights-of-way." *Id.* at 29a (quoting 47 U.S.C. 253(c)).[4]

ii. Petitioners' contrary arguments lack merit.

Petitioners challenge (Pet. 32-33) the FCC's determination that fees charged in one jurisdiction can be preempted based on their effects in other jurisdictions. They assert (*ibid.*) that Section 253(a)'s text limits federal preemption to "state or local requirements that have the effect of prohibiting carriers' ability to provide service within the [same] state or locality's jurisdiction." No party presented that argument to the court of appeals, which accordingly did not address it. Consistent with its ordinary practice as a "'court of review, not of first view,'" the Court should not grant review to "address [that] question neither pressed nor passed upon below." *Timbs* v. *Indiana*, 139 S. Ct. 682, 690 (2019) (citation omitted).

In any event, the statutory language that petitioners invoke does not support their claim. Section 253(a) provides that "[n]o 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) (emphasis

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[4] Although the dissenting judge below disagreed with the panel majority concerning the above-cost fees issue, Pet. App. 63a (Bress, J., dissenting in part), he did not conclude that the statute precludes the Commission's approach. See *id.* at 66a n.2, 70a (disclaiming a suggestion that Ninth Circuit precedent established a "'legal' bar" to the Commission's approach, and acknowledging that "a prohibition on all above-cost fees may well be justifiable"). Judge Bress concluded only that the FCC's explanation of its above-cost approach to fees was inadequate "on the present record." *Id.* at 71a; see *id.* at 63a-71a.

added). That broad language does not foreclose the FCC from determining that a requirement imposed by one locality can effect a barrier to entry into other areas.

Petitioners also assert (Pet. 33) that the decision below authorizes the FCC "to fabricate a nationwide cross-subsidizing rate regulation regime for municipal assets." But the Small-Cell Order neither prescribes nor caps rates for the deployment of small cells. Acknowledging "local variances in costs," Pet. App. 181a, the Commission made clear that local governments do not unlawfully constrain the provision of service "when they merely require providers to bear the direct and reasonable costs caused by their decision" to deploy small cells, *id.* at 145a.

In response to a suggestion of some commenters, the Commission did establish presumptively reasonable fee levels (up to $500 for application fees, and up to $270 per year for recurring fees) that it deemed sufficiently "likely to comply with Section 253(a)." Pet. App. 177a (capitalization and emphasis omitted); see *id.* at 178a-179a. In identifying those thresholds, however, the FCC did not engage in rate-setting, but instead merely "determin[ed] a level at which fees would be so clearly reasonable that justification was not necessary, and litigation could be avoided." *Id.* at 30a. And the Commission made clear that, although it anticipated that litigation would generally be unnecessary for fees below those thresholds, its approach did not categorically preclude state and local governments from adopting rates above those thresholds if their own reasonable costs exceeded those levels and their rates are nondiscriminatory. *Id.* at 180a.

Petitioners separately contend (Pet. 25-26) that the FCC and the court of appeals misinterpreted Section

253(a) and (c) in a manner that renders the latter provision "superfluous." That argument lacks merit. Petitioners posit (Pet. 25) that Section 253(c) recognizes an exception to or limitation on Section 253(a)'s general bar on measures that have the effect of prohibiting the provision of service. They ascribe (*ibid.*) to the Small-Cell Order and the decision below a view that "Section 253(a) preempts non-cost-based fees," while Section 253(c) "preserves only cost-based fees," which in their view renders Section 253(c) redundant. See Pet. 24-25.

The interpretation that petitioners ascribe to the Small-Cell Order and the court of appeals would not necessarily cause Section 253(c) to be surplusage. By its terms, that provision clarifies the scope of what "this section [*i.e.*, Section 253]" addresses. 47 U.S.C. 253(c). That proviso, enacted simultaneously with the general provision in Section 253(a) in the 1996 Act, Tit. I, Subtit. A, § 101(a), 110 Stat. 70 (47 U.S.C. 253(a) and (c)), might be understood as delineating Congress's intention about the bounds of the general bar as applied to fees, which might otherwise be ambiguous. Construing the provision as clarifying limitations that Congress viewed as inherent and merely wished to confirm does not deprive it of effect.

In any event, in the Small-Cell Order, the FCC underscored that it "need not decide today whether Section 253(a) preempts all fees not expressly saved by Section 253(c) with respect to all types of deployments." Pet. App. 140a. The Commission simply "conclud[ed], based on the record before [it], that with respect to Small Wireless Facilities, even fees that might seem small in isolation have material and prohibitive effects on deployment, particularly when considered in the aggregate given the nature and volume of anticipated Small

Wireless Facility deployment." *Ibid.* (footnote omitted). That context-specific record-based determination does not prejudge the proper application of the provisions in other settings.

iii. Petitioners contend (Pet. 23-26) that the court of appeals' decision upholding the FCC's approach to above-cost fees conflicts with decisions of other circuits. That argument likewise reflects a misunderstanding of the Commission's position and of the court's decision upholding it. Petitioners identify (Pet. 24) judicial decisions that they read to construe Section 253(c) as "a safe harbor, saving some right-of-way fees that Section 253(a) would preempt." As discussed above, the Small-Cell Order did not suggest that Section 253(c) could never function in that manner. It simply addressed the application of Section 253(a) and (c) in this specific setting. Petitioners identify no decision that has rejected the FCC's approach in this context.

Petitioners contend (Pet. 27) that the decision below also creates a circuit conflict on the question whether "fair and reasonable compensation" under Section 253(c) "includes rent-based compensation." See Pet. 27-29. Petitioners cite a single decision that they contend resolved that question. See Pet. 27 (citing *TCG Detroit* v. *City of Dearborn*, 206 F.3d 618 (6th Cir. 2000)).[5] They acknowledge (Pet. 27) that the court in *TCG Detroit* confined its analysis to the "particular" fee before it. The Sixth Circuit affirmed the district court's decision upholding the fee based on several case-specific factors—including the fact that the provider "had agreed in earlier negotiations to a fee almost identical to what it was

[5] Petitioners acknowledge (Pet. 27-28) that the other decisions they discuss reserved judgment on that issue.

[then] challenging as unfair." *TCG Detroit*, 206 F.3d at 625. Any tension between that fact-specific ruling and the decision below does not warrant this Court's review.

b. The court of appeals also properly upheld the FCC's determination that state and local governments' terms of access to public rights-of-way are not exempt from the generally applicable framework of Sections 253 and 332(c)(7). Pet. App. 42a-45a.

i. The court of appeals recognized that, "when a municipality is acting like a private business, and not acting as a regulator or policymaker," this Court has generally declined to infer federal preemption. Pet. App. 43a (citing *Building & Constr. Trades Council* v. *Associated Builders & Contractors*, 507 U.S. 218, 231-232 (1993)). The Court has also long recognized, however, that state and local governments may not evade preemption by characterizing as proprietary activities that in fact are "tantamount to regulation." *Wisconsin Dep't of Indus., Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282, 289 (1986). The court below properly applied that principle in upholding the FCC's determination that the restrictions on access to public rights-of-way described in the record here are not analogous to conduct of private actors. Pet. App. 44a-45a.

Public rights-of-way are traditionally held "'in trust for the public,'" and governments routinely manage them (and public infrastructure within them, such as lampposts and utility poles) based on "regulatory objectives, such as aesthetics or public safety and welfare." Pet. App. 200a (citation omitted). Based on the special nature of public rights-of-way, the FCC and the court of appeals correctly determined that the types of municipal

restrictions described in the record here at least typically serve "regulatory" rather than "proprietary" objectives. *Id.* at 44a-45a.

Contrary to petitioners' contention (Pet. 36-37), the FCC was not required to address the full "range of different actions that states and local governments might take" with regard to municipally controlled public rights-of-way. The Commission acknowledged that preemption might be unwarranted in some "discrete" instances where localities engage in proprietary activity concerning public rights-of-way or public property within them. Pet. App. 201a n.272. It thus did not mandate preemption of any specific fee or other requirement imposed by an identified state or local government. *Id.* at 202a n.277. Instead, the FCC merely sought to discourage state and local governments from endeavoring to evade preemption by characterizing "municipal policy disfavoring wireless deployment in public [rights-of-way]" as proprietary conduct. *Id.* at 202a.

Petitioners contend (Pet. 37) that the court below allowed the FCC "to commandeer state and local rights-of-way and facilities for a federal purpose," in violation of the Tenth Amendment. That is incorrect. In "interpreting and enforcing the [1996 Act] * * * to ensure that municipalities are not charging small cell providers unreasonable fees," the agency did not "compel[] states to enforce a federal program." Pet. App. 53a-54a. Congress enacted the 1996 Act "pursuant to its delegated authority under the Commerce Clause, to ensure that municipalities are not charging small cell providers unreasonable fees." *Ibid.*; see *id.* at 54a ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that

power to the States." (quoting *New York* v. *United States*, 505 U.S. 144, 156 (1992))).

ii. Petitioners contend (Pet. 36) that review on this point is warranted to resolve a conflict with the Second Circuit's decision in *Sprint Spectrum L.P.* v. *Mills*, 283 F.3d 404 (2002). That argument lacks merit. The *Sprint Spectrum* court addressed a wireless carrier's request to place an antenna on a school rooftop, not a public right-of-way. See *id.* at 408. And because the case involved "a single lease agreement with respect to [that] single building," the court found "no basis for an inference that the School District sought to establish [a] general municipal policy" against the provision of covered communications services. *Id.* at 420-421.

Here, by contrast, the Commission's Small-Cell Order did not purport to address the scope of federal preemption for restrictions on access to government property outside public rights-of-way. See Pet. App. 199a n.268. The court of appeals' decision upholding that aspect of the order is similarly limited to that setting. *Id.* at 42a-45a. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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