No. 20-1354

In The Supreme Court of the United States

CITY OF PORTLAND, OREGON, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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RULE 29.6 STATEMENT

The Rule 26.9 disclosure in the Petition for Certiorari remains accurate.

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REPLY BRIEF FOR THE PETITIONERS

Review is warranted. Respondents agree that the impact of the decision below is significant, permitting the Federal Communications Commission to redefine its authority to regulate the states and tens of thousands of local governments under 47 U.S.C. §253 and §332(c)(7). The decision blesses the Commission's reading of a preemption statute as authority to prescribe uniform nationwide rates, terms and conditions under

which state and local governments must grant wireless providers access to their property in the rights-of-way, and the rights-of-way themselves. Far from being a straightforward agency statutory interpretation that Respondents claim, the *Order* raises significant statutory and constitutional issues.

I. The Ninth Circuit's affirmance of the FCC's new "effective prohibition" standard lacks any limiting principle, in conflict with other circuits and at odds with this Court's precedent.

The Ninth Circuit's affirmance creates a conflict between it and other circuits the *Order*[1] explicitly rejected by adopting a "prohibition" standard with no limiting principle, favoring wireless provider business preferences over all else.

The decision below also conflicts with plain language precedent of its sister circuits in violation of *National Cable & Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

A. The Ninth Circuit affirmance created a circuit conflict.

The *Order* itself refutes the Government's claim that the FCC merely applied the existing *California*

[1] The *Order* is the *Small Cell Order*, Pet. App. 72a, but the objections also apply to overlapping portions of its companion *Moratorium Order*. Pet. 3 & n.1.

Payphone standard to new technology. SG Opp. 15-17 (citing *California Payphone Ass'n*, 12 FCC Rcd. 14,191, 14,210 (1997)), 19, 20 n.3; Ind. Opp. 16-21. If the FCC made no change, it would not have rejected multiple circuit decisions construing Sections 253 and 332 (some of which referenced *California Payphone*) as inconsistent with its new standard. Pet. 8-10.

There is no dispute that the *Order* applied *California Payphone* to Section 332 for the first time.[2] But it also changed the standard: Both the *Order* and *California Payphone* ostensibly define "effective prohibition" as a "material inhibition." But under the original *California Payphone*, a provider is not "materially inhibited" unless it can show that a challenged regulation is so restrictive that the provider "lack[s] a commercially viable opportunity" to participate in the market, even if it must significantly change its business plans. *California Payphone*, 12 FCC Rcd. at 14,210. *Accord, e.g.*, *Second Generation Props., L.P. v. Town of Pelham*, 313 F.3d 620, 632 n.13 (1st Cir. 2002) (Under Section 332, "once a carrier has adequate (though less than perfect) service in an area, local boards can deny applications by that carrier for additional towers without violating the effective prohibition clause.").

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[2] Petitioners do not contest, in the abstract, interpreting the "effect of prohibiting" language in 253 and 332 the same way. *See* SG Opp. 16. The *Order*, however, improperly removed *California Payphone's* limiting standard to overrule extensive precedent interpreting Section 332. Nor do we concede that Sections 253 and 332 are identical in force; textually, where Section 332(c)(7) applies, Section 253 does not.

The *Order*'s new test instead treats deviation from a provider's favored business plans as the standard. SG Opp. 17 (citing Pet. App. 116a, n.87). That change in focus—from assessing the actual impacts of the regulation on service provision, to equating interference with business plans as a prohibition—creates the conflict with other circuits, one unrelated to technology.

B. The decision below excised the required limiting standard from the statute.

Respondents implicitly concede a provider preference-based standard is taboo, claiming the FCC and the Ninth Circuit did not conclude "localities may never constrain a carrier's preferences," SG Opp. 17 (cleaned up), and citing other circuits that so held, *id.*, 20 n.3. But they cannot identify anything in the decision below or the *Order* articulating when a locality's denial of a small cell siting request would not constitute a "prohibition." The FCC's new test therefore lacks the "limiting standard" required by this Court in *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999). Pet. 20-21.

The affirmance conflicts with other circuits' near-consensus view that Section 332(c)(7)'s "effectively prohibit" language requires a limiting standard, implemented by assessing the materiality of the harm (the "gap") and the absence of alternative means to provide service. The Ninth Circuit upheld the *Order*'s explicit rejection of any meaningful assessment of harm or any consideration of alternatives. Pet. App. 120a n.94

(stating "[w]e are not holding that prior 'coverage gap' analyses are consistent with the standards we articulate here as long as they also take into account 'capacity gaps'" and rejecting obligatory consideration of alternatives in the First, Second, Third, Fourth, Seventh and Ninth Circuits).

Searching for a limiting standard, the Government resorts to the Ninth Circuit's reference to its prior decision adopting the *original California Payphone* test, holding "'[t]here must be an actual effect.'" SG Opp. 18 (quoting Pet. App. 18a). But nothing in the *Order* retains that constraint: Industry Respondents concede the Ninth Circuit rejected "petitioners' argument that the 'FCC must demonstrate...actual prohibition.'" Ind. Opp. 12 (quoting Pet. App. 19a). The Ninth Circuit's affirmance gives "prohibition" a completely elastic meaning, failing to distinguish between consequential and inconsequential effects. Pet. App. 116a, n.87; *see infra* at 6.

The Eighth Circuit applied the original *California Payphone*'s limiting standard because it was consistent with the law's text. *Level 3 Commc'ns, L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528, 533 (8th Cir. 2007), *cert. denied*, 557 U.S. 935 (2009); Pet. 10. The FCC's new standard does not, as is evident by its rejection of the Eighth Circuit's decision requiring an "'existing'" impact. SG Opp. 18 (quoting Pet. App. 124a); Pet. 17 (to prevail, the Eighth Circuit held a carrier must "'state with specificity what...service it might have provided'").

C. Overruling other circuits' plain language precedent raises significant issues under *Brand X*.

The Government argues that the statute's standard is ambiguous, thus permitting the FCC to deviate from prior appellate rulings. SG Opp. 20-21. Three circuit courts, however, held that it was unambiguous. Pet. 16-17.[3]

Respondents concede that the FCC's *Order* would be invalid under *Brand X* if a court of appeals held that the statute's text unambiguously forecloses the FCC's construction. Ind. Opp. 20; SG Opp. 20. That is *precisely* the case here. Pet. 16; *compare, e.g.*, *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 639 (2d Cir. 1999) (rejecting the "untenable position" that a provider "has the right...to construct any and all towers that, in its business judgment, it deems necessary" as denying "a local government's right...explicitly contemplated in" Section 332), *with Order*, Pet. App. 116a, n.87 (declaring that the statute protects "any covered service a provider wishes to provide, incorporating the abilities and performance characteristics it wishes to employ" (quotation marks omitted)). Because the courts have "already interpreted the statute," an inconsistent construction is "no longer...available for adoption by the agency." *U.S. v. Home Concrete & Supply, LLC*, 566 U.S. 478, 487 (2012).

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[3] The FCC did not base its decision on statutory ambiguity. Pet. 8; *see SEC v. Chenery*, 332 U.S. 194, 196 (1947).

Because this case arises under the Administrative Orders Review Act (Hobbs Act), 28 U.S.C. §2344, hypothetical future litigation reviewing the *Order* (SG Opp. 19, 20 & n.3; Ind. Opp. 19-21, 24) could occur only if the *Order* is an advisory, non-binding interpretive rule. *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055 (2019). This position is inconsistent with the FCC's claim of *Brand X* authority to overrule circuit courts, Pet. App. 91a, and such deference on brief, SG Opp. 20-21, as well as the Government's recent opposition to collateral attack on Hobbs Act rulings, *PDR Network, LLC*, Brief for the United States as *Amicus Curiae* in Support of Respondents, 2019 WL 670068 (No. 17-1705).[4]

II. Whether Sections 253 and 332(c)(7) grant the FCC authority to establish a nationwide rate regulation scheme and compel access to municipal property warrants review.

The FCC speculates its *Order* will transfer billions of dollars from state and local governments to the

[4] Industry Respondents claim Petitioners' *Brand X* argument was not preserved below, yet concede Petitioners argued the Ninth Circuit could not affirm the *Order* consistent with *Brand X*. Ind. Opp. 23-24. Industry Respondents contest "the manner" in which Petitioners seek review, but Petitioners may raise new arguments about a preserved issue, *Lebron v. National R.R. Passenger Corp*., 513 U.S. 374, 380 (1995). In any event, Petitioners fully preserved the issue. Local Gov't Br. at 16, 36; Smart Communities Reply Comments at 53-55, Docket Nos. 17-79, 17-84 (July 17, 2017).

wireless industry by requiring states and localities to lease access to their rights-of-way and property thereon at cost.[5] Pet. App. 79a. Its intention—unsupported by economic theory or the record[6]—is that if providers have more money, that money could be invested in underserved areas. This Court's review is required to determine whether this transfer of property rights from state and local governments to the wireless industry is consistent with Section 253, principles of federalism and the Constitution.

A. Congress did not authorize the FCC to regulate rates for access to municipal property.

1. The Government incorrectly claims that the *Order* "neither prescribes nor caps rates for the deployment of small cells." SG Opp. 24. The *Order* prescribes a presumptively reasonable nationwide cap of $270/year/facility for access to rights-of-way and municipally-owned poles; a locality seeking to charge a higher fee must demonstrate that its fee is "objectively reasonable" and approximates cost. Pet. App. 179a-180a n.233. That is rate regulation.

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[5] Judge Bress's dissent explains that the "linchpin" study the FCC relied upon "is not about fees above cost" and therefore does not "tell us about...the burden such fees place on service providers." Pet. App. 67a.

[6] "Not one wireless carrier has said that this action will result in a change in its capital expenditures in rural areas." Pet. App. 292a (dissent of Commissioner Rosenworcel).

Nothing in Section 253(a) grants the FCC ratemaking authority over state and local property. Section 253(a) preempts state and local requirements that have the effect of prohibiting the provision of service. The FCC's cost standard is untethered from that statutory standard. The Ninth Circuit implicitly acknowledged as much: "The FCC did not base its fee structure on a determination that there was a relationship between particular cities' fees and prohibition of services." Pet. App. 26a. Judge Bress's dissent explains that whether a fee is prohibitive does not turn on whether it "happen[s] to exceed a state or local government's costs." Pet. App. 66a.

2. The Government cannot avoid this issue by claiming it was not presented below. SG. Opp. 23. It was. Local Gov't Br. 52-53; Local Gov't Reply Br. at 24. The Government is also wrong to claim that the Ninth Circuit "did not address it." SG. Opp. 23. The decision below addressed the issue as one of "administrability," reasoning that it would be "nearly impossible" to examine the effects of fees in individual localities. Pet. App. 26a-27a.

Focusing on "administrability," *id.*, incorrectly assumes that Congress intended to measure the prohibitory effect of requirements in one jurisdiction based on speculative effects in other jurisdictions, and therefore authorized the FCC to impose a nationwide ratemaking regime. It did not. Section 253(d) authorizes the FCC to resolve disputes under Section 253(a) and (b). Section 253(d) *excludes* disputes under Section 253(c), which preserves local authority to impose fair

and reasonable compensation for use of rights-of-way. Section 253(c) itself cannot be read to grant the FCC the broad authority claimed here. Pet. 28-29. Congress left compensation issues to the courts to resolve case-by-case. *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000); *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1189 (11th Cir. 2001).

B. The Ninth Circuit's interpretation of 253(c) creates circuit splits.

1. The *Order* interprets Section 253(c) as saving no fee that Section 253(a) otherwise prohibits. Respondents do not dispute that other circuits have ruled that Section 253(c) preserves fees that would otherwise be preempted under Section 253(a). SG Opp. 26; Ind. Opp. 36-37. Interpreting Section 253(c) as saving state and local actions "that would otherwise violate (a)" is the "*only* interpretation supported by the *plain language of the statute*." *Town of Palm Beach*, 252 F.3d at 1187 (emphasis added).

That the *Order* labels Section 253(c) as a savings clause cannot avoid the conflict, as Industry Respondents claim. Indeed, the Government essentially concedes the conflict. SG Opp. 26. It attempts to minimize this conflict by stating that the *Order* upheld below "addressed the application of Section 253(a) and (c) in this specific setting," but did not "prejudge the proper application of the provisions in other settings." *Id.* That, however, only confirms the need for this Court to resolve whether Section 253(c) preserves fees

otherwise preempted by Section 253(a), as multiple circuits have held. Pet. 24.

2. Nor does the Government dispute the conflict between the decision below and *City of Dearborn*, 206 F.3d 618, on whether rent-based compensation is permissible under Section 253(c). SG Opp. 26-27; *see* Pet. 27-28. It instead claims that this Court's review is not warranted because the Sixth Circuit analyzed "the 'particular' fee before it...based on several case-specific factors." SG Opp. 26. But that is the conflict. The decision below replaces case-specific analysis of a particular fee, including providers' historical willingness to pay and other market evidence, with an inquiry limited solely to determining cost reimbursement.

C. The decision below raises important questions about a federal agency's authority to redefine state and local governments' proprietary interests in order to preempt them.

1. According to the Government, the Ninth Circuit relied "on the special nature of the public rights-of-way" to find that the state and local actions at issue are not proprietary, and thus subject to preemption. SG Opp. 27. This sweeping ruling is incorrect and ignores differences in state laws that determine property interests. Pet. 35-37. Moreover, the *Order* does not just apply to the rights-of-way themselves. Without explanation, it also "extend[s] to...terms for use of or attachment to government-owned property within such

[rights-of-way]." Pet. App. 191a-192a. Whatever "special nature" public rights-of-way may have, that does not inevitably extend to *all* government-owned facilities located thereon. Neither Respondents here nor the court below offer any response to this argument.

Contrary to Respondents, and the decision below, the standard for whether a state or local government acts in a proprietary capacity is whether it is "participating in the market," regardless of the reason for entering the market. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809-10 (1976). The market participation doctrine applies to property held in public trust. *See e.g.*, *Omnipoint Commc'ns v. City of Huntington Beach*, 738 F.3d 192, 200 (9th Cir. 2013). And there is indeed a market. Commercial infrastructure providers install thousands of facilities in the right-of-way for lease by wireless providers at market-based, not cost-limited, rates. *E.g.*, Local Gov't Excerpts of Record at 494-96; Mobilitie Comments, Docket Nos. 17-79, 17-84, Attachment 1, at 9 (June 15, 2017).

2. The Government is correct that "[p]ublic rights-of-way are traditionally held 'in trust for the public.'" SG Opp. 27 (quoting Pet. App. 200a). But this only highlights the important principles of federalism at stake. When a locality "exact[s] compensation, which is in the nature of rental" for a private entity's use of the rights-of-way, that is "compensation to the general public." *City of St. Louis v. W. Union Tel. Co.*, 148 U.S.

92, 99-101, *reh'g denied*, 149 U.S. 465 (1893).[7] The decision below is wrong that local governments, and the public, have no legitimate interest in ensuring local taxpayers receive anything more than cost reimbursement for private commercial use of publicly funded facilities and rights-of-way. Section 253 does not authorize the FCC to displace local governments as trustee of municipal rights-of-way and property.

That displacement underscores the important constitutional issues at stake, particularly when combined with other elements of the *Order* that require localities to accept and process applications for placement on proprietary property; limit grounds for denying access; and require localities to enter into agreements by a time specified by the FCC (or face court actions). Pet. App. 22a-23a, 87a-90a. This is not "preemption" but instead affirmatively imposes obligations on local governments to further federal policy.

The Government claims that the Tenth Amendment does not apply to Congress's exercise of Commerce Clause authority. SG Opp. 28. But that argument was rejected by this Court in *Printz v. United States*, 521 U.S. 898, 923-24 (1997). "When a 'Law...for carrying

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[7] The second *St. Louis*, 149 U.S. 465 (1893), did not "abrogate" the first, Ind. Opp. 29 n.5; it *denied* the petition for rehearing. Respondents' claim that preemption is allowed unless the statute "*require*[*s*] that municipalities be permitted in all situations to charge rents untethered to costs," Ind. Opp. 29 n.5, runs afoul of this Court's refusal to "infer pre-emption of the States' historic police powers absent a clear statement of intent by Congress." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111-12 (1992) (citations omitted).

into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions [including the Tenth Amendment]...it is not a 'Law...*proper* for carrying into Execution the Commerce Clause.'" *Id*. at 923-24 (quoting The Federalist No. 33, at 204 (A. Hamilton)).

The clear effect of the *Order*, as upheld by the Ninth Circuit, is to commandeer municipal property and resources to serve a federal program of promoting 5G deployment while prohibiting municipalities from receiving fair market value for that property. That presents important Tenth and Fifth Amendment issues, as well as issues of statutory authority. IMLA Br. 5-14.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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