No. 21-661

In the Supreme Court of the United States

CITY OF EUGENE, 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 SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Title VI of the Communications Act of 1934 (Communications Act), as amended, 47 U.S.C. 521 *et seq.*, generally prohibits a cable operator from providing cable services over a cable system without obtaining a cable franchise from a franchising authority—typically a local or state government entity. 47 U.S.C. 541(b)(1). As conditions on the grant of a cable franchise, a franchising authority may require the cable operator to pay a franchise fee of up to five percent of its revenue from providing cable services; to reserve channel capacity for public, educational, or governmental use; and to provide free cable service for public buildings. Title VI states, however, that a franchising authority "may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with [Title VI]," 47 U.S.C. 544(a), and it expressly preempts "any provision of law of any State, political subdivision, or agency thereof, or franchising authority" that is "inconsistent with [the Communications Act]," 47 U.S.C. 556(c).

The Federal Communications Commission (FCC) determined that a fee imposed by petitioner City of Eugene, Oregon, on cable operators' use of rights-of-way to provide broadband Internet service is preempted because it is inconsistent with 47 U.S.C. 544(b)(1). That provision states that a franchising authority, "in its request for proposals for a franchise * * * , may not * * * establish requirements for video programming or other information services," which include broadband Internet service. *Ibid.* The question presented is as follows:

Whether the court of appeals properly upheld the FCC's determination that Title VI preempts petitioner City of Eugene's fee on cable operators' use of rights-of-way to provide an information service.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 998 F.3d 701. The report and order of the Federal Communications Commission (Pet. App. 27a-236a) is reported at 34 FCC Rcd 6844.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 2021. A petition for rehearing was denied on August 3, 2021 (Pet. App. 237a-238a). The petition for a writ of certiorari was filed on November 1, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Communications Act of 1934 (Communications Act), as amended, 47 U.S.C. 151 *et seq.*, the Federal Communications Commission (FCC or Com-

mission) has long regulated the provision of cable services. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 167-178 (1968). This Court has repeatedly upheld the FCC's authority to regulate the cable medium, see *ibid.*, including its authority to determine that federal law preempts certain state and local requirements, see, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 698-705 (1984).

At the same time, local (and some state) government entities have long exerted partially overlapping authority over cable providers, including by determining whether and on what terms "to grant cable franchises to applicants in their communities." *Alliance for Cmty. Media* v. *FCC*, 529 F.3d 763, 767 (6th Cir. 2008), cert. denied, 557 U.S. 904 (2009). "As part of th[e] negotiation process" over franchises, "cable operators frequently agreed to perform various activities on behalf of the public interest in exchange for a franchise." *Ibid.* The "overlapping authority of the FCC and municipalities" gave rise to "'regulatory uncertainty'" about their respective roles. *Ibid.* (citation omitted).

To address that uncertainty, Congress enacted the Cable Communications Policy Act of 1984 (Cable Act), Pub. L. No. 98-549, sec. 2, §§ 601-639, 98 Stat. 2780-2801. The Cable Act amended the Communications Act by adding Title VI, 47 U.S.C. 521 *et seq.*, in which Congress sought to "establish a national policy that clarified the current system of local, state and federal regulation of cable television." *Alliance for Cmty. Media*, 529 F.3d at 768 (brackets and citation omitted). The Cable Act embodied a policy of "continu[ing] reliance on the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the

franchise process." *Ibid.* (citation omitted); see *City of New York* v. *FCC*, 814 F.2d 720, 723 (D.C. Cir. 1987) (observing that the Cable Act struck a "balance" by "affirming the FCC's 'exclusive jurisdiction over cable service'" while "'preserving the critical role of municipal governments'" through "'the franchise process'" (citations omitted)), aff'd, 486 U.S. 57 (1988).

b. Under Title VI, in order to provide "cable service" in a given area, a "cable operator" generally must obtain a franchise from the area's franchising authority, typically a local or state government entity. 47 U.S.C. 541(b)(1). For purposes of Title VI, a "'cable operator'" is "any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system." 47 U.S.C. 522(5). The term "'cable service'" refers to "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. 522(6). Title VI further provides that a cable franchise "shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements." 47 U.S.C. 541(a)(2); see 47 U.S.C. 522(7) (defining a "'cable system,'" with certain exceptions, as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community").

A franchising authority may condition the grant of a franchise on a cable operator's provision of certain facilities and services and its satisfaction of other requirements. Title VI requires a franchising authority to ensure that the cable operator satisfies certain criteria—for example, that "access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area." 47 U.S.C. 541(a)(3); see Pet. App. 8a. Title VI also expressly authorizes, but does not require, franchising authorities to impose other specified requirements. A franchising authority may require a cable operator to pay a "franchise fee"—defined as "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such." 47 U.S.C. 542(g)(1). A franchise fee may not exceed five percent of a cable operator's annual gross revenues from the provision of cable services. 47 U.S.C. 542(b). Title VI also authorizes, but does not require, franchising authorities to subject cable operators to "noncash" obligations, Pet. App. 9a—such as requirements that cable operators provide channel capacity for public, educational, and governmental use and that they provide free cable service for public buildings, see, *e.g.*, 47 U.S.C. 541(a)(4)(B), 544(b); Pet. App. 4a, 9a.

Franchising authorities "do not have unlimited discretion in negotiating, granting, and denying franchises." *Montgomery Cnty.* v. *FCC*, 863 F.3d 485, 487 (6th Cir. 2017); see *ACLU* v. *FCC*, 823 F.2d 1554, 1559 (D.C. Cir. 1987) (per curiam), cert. denied, 485 U.S. 959 (1988). Title VI prohibits "[a]ny franchising authority" from "regulat[ing] the services, facilities, and equipment provided by a cable operator except to the extent

consistent with [Title VI]," and from "impos[ing] requirements regarding the provision or content of cable services, except as expressly provided in [Title VI]." 47 U.S.C. 544(a) and (f)(1). And although Title VI authorizes a franchising authority, "in its request for proposals for a franchise," to "establish requirements for facilities and equipment," the franchising authority "may not * * * establish requirements for video programming or other information services," apart from requiring certain notices to subscribers of channel-position changes. 47 U.S.C. 544(b)(1); see 47 U.S.C. 544(h). Title VI also contains an express preemption provision, 47 U.S.C. 556(c), which states that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded," with an exception for franchises and laws that were in effect when Title VI was enacted in 1984. *Ibid.*; see 47 U.S.C. 557(a).

c. Although Title VI requires a cable operator to obtain a cable franchise to provide cable service over a cable system, the enacting Congress recognized that a cable system may also be used to provide other, *non*-cable services. See, *e.g.*, H.R. Rep. No. 934, 98th Cong., 2d Sess. 44 (1984) ("A facility would be a cable system if it were designed to include the provision of cable services * * * along with communications services other than cable service."). Non-cable services generally fall into one of two categories: "telecommunications service[s]" and "information service[s]." 47 U.S.C. 153(24) and (53). Title VI restricts franchising authorities' ability to regulate both types of services.

The Communications Act defines a "'telecommunications service'" as "the offering of telecommunications for a fee directly to the public * * * regardless of the facilities used." 47 U.S.C. 153(53). "[T]elecommunications services" are provided by "telecommunications carrier[s]," which are treated as "common carrier[s]" subject to the requirements of Title II of the Communications Act, 47 U.S.C. 201 *et seq.* 47 U.S.C. 153(51). Title VI generally precludes a franchising authority from requiring, prohibiting, or restricting a cable operator's provision of telecommunications services. See 47 U.S.C. 541(b)(3).

An "'information service'" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing." 47 U.S.C. 153(24). Providers of information services are not treated as common carriers and thus are not subject to Title II's requirements. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 976 (2005). The FCC currently classifies broadband Internet service as an information service. *Mozilla Corp.* v. *FCC*, 940 F.3d 1, 17 (D.C. Cir. 2019) (per curiam); see *id.* at 18-35 (upholding that classification). As noted above, Title VI generally prohibits a franchising authority from "establish[ing] requirements for * * * information services" in requests for proposals for a cable franchise. 47 U.S.C. 544(b)(1); see p. 5, *supra*.

2. This case concerns an FCC order issued in 2019—the latest in a series of orders in which the Commission addressed, *inter alia*, a franchising authority's ability to regulate cable operators' provision of non-cable services.

a. In 2007, the FCC issued an order designed to reduce barriers to entry for new applicants (in particular, telephone companies) to obtain cable franchises. *In re Implementation of Section 621(a)(1) of the Cable Commc'ns Policy Act of 1984 as Amended by the Cable Television Consumer Prot. & Competition Act of 1982*, 22 FCC Rcd 5101 (2007) (*First Report and Order*). As relevant here, the Commission determined in the *First Report and Order* that franchising authorities may not use their authority under Title VI to "regulate" a new entrant's "entire network beyond the provision of cable services." *Id.* at 5155. The Commission derived that prohibition—known as the "mixed-use" rule—from the Act's definition of "cable system." *Ibid.* (capitalization omitted). That definition provides that the facility of a "common carrier" constitutes a cable system only "to the extent" that the facility distributes "video programming directly to subscribers." 47 U.S.C. 522(7)(C). Petitions for review of the *First Report and Order* were consolidated in the Sixth Circuit, which denied the petitions. See *Alliance for Cmty. Media*, 529 F.3d at 772-787; Pet. App. 4a.

While petitions for review of the *First Report and Order* were pending, the FCC issued another order, which in relevant part extended the mixed-use rule to incumbent cable operators. See *In re Implementation of Section 621(a)(1) of the Cable Commc'ns Policy Act of 1984 as Amended by the Cable Television Consumer Prot. & Competition Act of 1982*, 22 FCC Rcd 19,633, 19,640-19,641 (2007) (*Second Report and Order*). The Commission denied requests for reconsideration of that order in relevant part. See *In re Implementation of Section 621(a)(1) of the Cable Commc'ns Policy Act as Amended by the Cable Television Consumer Prot. & Competition Act of 1982*, 30 FCC Rcd 810 (2015) (*Reconsideration Order*).

The Sixth Circuit vacated the *Second Report and Order* and the *Reconsideration Order* in relevant part. *Montgomery Cnty.*, 863 F.3d at 492-493. The court concluded that the Commission had not identified a legal basis "for its application of the mixed-use rule to bar local franchising authorities from regulating the provision of non-telecommunications services by incumbent cable providers." *Id.* at 493. The court explained that the mixed-use rule was based on 47 U.S.C. 522(7)(C), which "applies only to Title II carriers" (*i.e.*, common carriers), but that "many incumbent cable operators are not Title II carriers." *Montgomery Cnty.*, 863 F.3d at 493. The court remanded to the FCC "to set forth a valid statutory basis" for applying its mixed-use rule to incumbent cable operators. *Ibid.*

b. In 2019, on remand from the Sixth Circuit, the FCC adopted the order at issue here. *In re Implementation of Section 621(a)(1) of the Cable Commc'ns Policy Act of 1984 as Amended by the Cable Television Consumer Prot. & Competition Act of 1992*, 34 FCC Rcd 6844 (2019) (*Third Report and Order*) (Pet. App. 27a-236a). The *Third Report and Order* reaffirmed the Commission's determination, which the Sixth Circuit had previously upheld, that the mixed-use rule applies to incumbent cable operators that are common carriers. See Pet. App. 119a-128a.

The FCC also identified the statutory basis for extending the mixed-use rule to incumbent cable operators that are not common carriers—*i.e.*, cable operators whose only non-cable services are not telecommunications services. See Pet. App. 128a-143a. The Commission explained that Section 544(a) prohibits a franchising authority from "'regulat[ing] the services, facilities and equipment provided by a cable operator except to

the extent consistent with [Title VI],'" and that Section 544(b)(1) "provides that franchising authorities 'may not . . . establish requirements for video programming or other information services.'" *Id.* at 128a (quoting 47 U.S.C. 544(a) and (b)(1)) (emphases omitted; second set of brackets in original). The Commission concluded that Title VI bars franchising authorities from regulating information services, such as broadband Internet service, provided by incumbent cable operators that are not common carriers. *Id.* at 130a-131a.

The FCC additionally determined that Title VI precludes state and local governments from using other authority outside the cable-franchise process to circumvent Title VI's limitations. Pet. App. 143a-168a. The Commission observed that Section 556(c) expressly "preempt[s] and supersede[s]" "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise * * * which is inconsistent with [the Communications Act]." *Id.* at 146a (quoting 47 U.S.C. 556(c)). The FCC determined that Section 556(c)'s broad text showed that Congress "intended that states and localities could not 'end-run' the Act's limitations by using other governmental entities or other sources of authority to accomplish indirectly what franchising authorities are prohibited from doing directly." *Id.* at 147a-148a.

The FCC explained that, under its interpretation, Title VI precludes a franchising authority or any other state or local governmental body from imposing fees on a cable operator for providing a non-cable information service, such as broadband Internet service. Pet. App. 131a, 136a, 143a-145a, 149a, 153a-167a. Although the Commission "d[id] not set forth an exhaustive list of state and local laws * * * that are deemed expressly

preempted," it noted that "preempted requirements include" the rights-of-way fee imposed by petitioner City of Eugene, Oregon, as applied to cable operators' broadband Internet service. *Id.* at 144a n.324.

The FCC reasoned that Section 544(a) and (b) preclude a franchising authority from imposing such a fee, which amounts to regulation of a cable operator's provision of an information service. See Pet. App. 131a, 136a, 143a. The Commission concluded that Section 556(c) preempts such a fee even it is purportedly imposed "outside the limited scope of" a state or local government's "authority under Title VI." *Id.* at 143a; see *id.* at 143a-145a, 149a. "Looking at the provisions of Title VI and the Act as a whole," the FCC "ha[d] little trouble concluding that Congress did not intend to permit states, municipalities, or franchising authorities to impose fees or other requirements on cable operators beyond those specified under Title VI." *Id.* at 149a. The FCC also determined that allowing a state or local government to charge a fee for a cable operator's use of rights-of-way to provide non-cable services—separate from and in addition to the franchise fee that a franchising authority may impose for a cable operator's franchise to provide cable services—is inconsistent with the statutory provisions capping franchise fees for cable services at five percent of an operator's revenues from providing cable services. *Id.* at 153a-167a (discussing 47 U.S.C. 542(g)).

3. Petitions for review of the *Third Report and Order* were filed in several circuits and ultimately consolidated in the Sixth Circuit. C.A. Order 1-2 (Jan. 15, 2020). The court granted the petitions in part and denied them in part. Pet. App. 1a-26a.

As relevant here, the court of appeals rejected petitioners' challenge to the FCC's determination that Title VI preempts petitioner City of Eugene's rights-of-way fee as applied to a cable operator's broadband Internet service. Pet. App. 13a-25a. The court stated that "the test for preemption under [Sections 544(a) and 556(c)] is whether state or local action is 'inconsistent with' a specific provision of the Act," and that "[t]he Act therefore preempts actions that violate or circumvent any of its provisions." *Id.* at 15a. The court "agree[d] with the FCC's conclusion that 'states and localities may not "end-run" the Act's limitations by using other governmental entities or other sources of authority to accomplish indirectly what franchising authorities are prohibited from doing directly.'" *Id.* at 15a-16a (citation omitted).

Applying that interpretation, the court of appeals explained that "[a] franchising authority in the City of Eugene therefore could not, consistent with § 544(b)(1), impose on a cable operator a seven-percent broadband fee as a condition for a cable franchise." Pet. App. 23a. The court reasoned that Section 544(a) precludes a franchising authority from regulating any of a cable operator's "'services'" except "'to the extent consistent with [Title VI],'" and that Section 544(b)(1) bars a franchising authority from establishing requirements for a cable operator's "'information services,'" which "undisputed[ly] * * * include[] broadband services." *Ibid.* (quoting 47 U.S.C. 544(a) and (b)(1)) (emphasis omitted). The court noted that Section 541 requires construing a cable franchise "'to authorize the construction of a cable system over public rights-of-way'" and "makes clear, albeit by implication, that a franchise shall be construed to allow the cable operator to operate the cable system." *Ibid.*

The court of appeals held that the City had "circumvented that limitation when it imposed the same fee on a cable operator by means of the City's police power." Pet. App. 23a. The court explained that, when the City had "granted a cable operator there a franchise under § 541(b)(1)," it had "granted the cable operator the right to use its cable system, including—as Congress plainly anticipated—the right to use that system to provide information services," and had "surrendered its right to exclude the cable operator from the City's rights-of-way." *Id.* at 24a. But the City had "impose[d] a seven-percent 'license fee' upon the same cable operator to use the same cable system on the same 'rights-of-way.'" *Ibid.* (citation omitted). The court concluded that "the City's imposition of a 'license fee' equal to seven percent of the operator's revenues from broadband services is merely the exercise of its franchise power by another name," and that Section 544(b)(1) "expressly barred the City from exercising its franchise power to that end." *Ibid.*

The court of appeals rejected the FCC's alternative rationale that fees imposed on a cable operator's non-cable services are inconsistent with the statutory cap on franchise fees for the operator's cable services. Pet. App. 18a-22a. The court reasoned that such a fee for non-cable services falls outside Title VI's definition of the "'franchise fee'" subject to that five percent cap as a tax, fee, or assessment imposed "on a cable operator * * * solely because of [its] status as such." 47 U.S.C. 542(g)(1); see Pet. App. 18a-21a. In the court's view, "[w]hat gives a person the status of a cable operator" as defined in Title VI "is the person's provision of cable services," but "the City of Eugene's fee on broadband services, by definition, is not imposed based on the operator's provision of cable services." Pet. App. 22a.

ARGUMENT

The court of appeals correctly upheld the FCC's determination in the *Third Report and Order* that Title VI expressly bars petitioner City of Eugene from imposing its seven percent fee for using its rights-of-way on cable operators providing broadband Internet service. The court's decision does not conflict with any decision of this Court, of another court of appeals, or of the highest court of any State. Further review is not warranted.

1. Petitioners contend (Pet. 13-28) that the court of appeals erred in upholding the Commission's application of Title VI's preemption provisions to state and local governments' fees for cable operators' use of rights-of-way to provide information services. That argument lacks merit and does not warrant further review.

a. Title VI expressly preempts franchising authorities and other state or local government entities from subjecting cable operators to requirements that are not consistent with Title VI. Section 544(a) provides that "[a]ny franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with [Title VI]." 47 U.S.C. 544(a). Section 556(c) provides (with an exception that is irrelevant here) that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded." 47 U.S.C. 556(c).

A requirement is not consistent with Title VI if it is "'incompatible'" with the statute, *e.g.*, if the requirement "violate[s] or circumvent[s] any of its provisions." Pet. App. 15a (citation omitted). The court of appeals accordingly agreed with the FCC that "states and localities

may not 'end-run' the Act's limitations by using other governmental entities or other sources of authority to accomplish indirectly what franchising authorities are prohibited from doing directly." *Ibid.* (brackets and citation omitted).

Applying that interpretation, the court of appeals correctly upheld the FCC's determination that the City of Eugene's rights-of-way fee, as applied to cable operators' broadband Internet service, is not consistent with Title VI and therefore is expressly preempted. Pet. App. 22a-25a. Section 544(b)(1) bars a franchising authority, in its request for proposals for a cable franchise, from "establish[ing] requirements for * * * information services." 47 U.S.C. 544(b)(1). It is "undisputed" in this case that information services include broadband Internet service. Pet. App. 23a. And Title VI requires that a cable franchise be "construed to authorize"—indeed, the whole point of a franchise is to enable—a cable operator to construct and operate a cable system over rights-of-way. *Ibid.* (quoting 47 U.S.C. 541(a)(2) and citing 47 U.S.C. 541(b)(1)).

A local government like the City of Eugene "circumvent[s]" that limitation when it "impose[s] the same fee on a cable operator by means of the City's police power." Pet. App. 23a. By granting a cable operator a cable franchise, on whatever terms it prescribes consistent with Title VI (including a franchise fee), a government "grant[s] the cable operator the right to use its cable system, including—as Congress plainly anticipated—the right to use that system to provide information services." *Id.* at 24a. The City of Eugene has thereby "surrendered its right to exclude the cable operator from [its] rights-of-way." *Ibid.* Permitting the same government to impose additional requirements, such as a separate fee, "upon

the same cable operator to use the same cable system on the same 'rights-of-way'" contravenes the fundamental statutory structure and design. *Ibid.* (citation omitted). Such a fee, even if styled as an exercise of a government's police power, "'accomplish[es] indirectly what franchising authorities are prohibited from doing directly,'" a result that is "not 'consistent with' Title VI and is therefore preempted." *Ibid.* (citations omitted).

b. Petitioners' contrary arguments lack merit.

Petitioners principally contend (Pet. 20-28) that the court of appeals misapplied principles of "implied preemption, and more particularly, implied obstacle preemption." Pet. 20. That argument misconceives the court of appeals' decision and the FCC's order. As the court and the Commission each recognized, Sections 544(a) and 556(c) *expressly* preempt actions by franchising authorities and by local and state governments, respectively, that regulate cable operators in a manner inconsistent with Title VI. Pet. App. 14a-15a, 146a-147a. "[B]ecause the statute 'contains [those] express preemption clause[s],'" the key question is the scope of preemption that Congress prescribed, and to ascertain that scope courts "'focus on the plain wording of the clause[s].'" *Puerto Rico* v. *Franklin Cal. Tax-Free Trust*, 579 U.S. 115, 125 (2016) (quoting *Chamber of Commerce* v. *Whiting*, 563 U.S. 582, 594 (2011)). For the same reason, as petitioners appear to acknowledge, "any presumption against preemption" that might apply in the context of implied preemption is inapposite here. *Ibid.*; see Pet. 27.

Petitioners acknowledge (Pet. 15) that Title VI preempts state and local requirements that are not "consistent" (or are "inconsistent") with Title VI's requirements. See 47 U.S.C. 544(a), 556(c). That criterion

for preemption inherently turns on a local or state requirement's substantive compatibility with the federal statutory scheme. And preemption under those provisions is not confined to requirements that directly conflict with the specific terms of a particular statutory provision or that would make compliance with federal law "impossible"; such requirements would be superseded under ordinary conflict-preemption principles even if Title VI contained no express preemptive language. *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 64-65 (2002) (citation omitted). Instead, as the Commission and the court of appeals recognized, Title VI's inconsistency standard encompasses actions by local or state governments that would "circumvent" or "'end-run'" the limitations on their authority that Title VI imposes. Pet. App. 15a (citation omitted).

Petitioners contend (Pet. 13, 21) that the court of appeals relied too heavily on "implication[s]" and "infer[ences]" from the statute. That is incorrect. The court's conclusion that Title VI precludes the fees at issue here was grounded principally in Section 544(b)(1)'s proscription on franchising authorities' regulation of cable operators' information services, and on the incongruity of allowing the same government entities to impose such regulation under a different label. Pet. App. 23a-24a. As additional support for that conclusion, the court recognized that the Title VI provision (Section 541) requiring a cable operator to obtain a franchise and authorizing a franchising authority to award one clearly contemplates that the legal effect of a franchise is to enable the operator to build and use a cable system. And when it enacted the Cable Act, Congress understood that the operation of a cable system may entail providing non-cable services. Section 541(a)(2) requires a

franchise to be "construed to authorize the construction of a cable system over public rights-of-way." 47 U.S.C. 541(a)(2). The logical implication of Section 541(b)(1)'s proscription on a cable operator's providing cable service over a cable system "without a franchise" is that, by granting a franchise, a government entity authorizes the franchisee to provide such services. 47 U.S.C. 541(b)(1); see Pet. App. 23a-24a.

Petitioners additionally contend (Pet. 14-17) that the City of Eugene's rights-of-way fee cannot be deemed inconsistent with Title VI because the court of appeals concluded that the fee does not violate Title VI's provision capping the amount of a franchise fee, 47 U.S.C. 542. See Pet. App. 18a-22a. The FCC disagrees with the court's rejection of that alternative basis for finding such fees preempted. But even accepting that aspect of the court's decision, petitioners' conclusion that the City's fee cannot be preempted does not follow.

Title VI permits franchising authorities to regulate aspects of a cable operator's provision of cable services. See, *e.g.*, 47 U.S.C. 541(a)(2)-(4), 542, 544(b). But Congress has placed separate, generally more restrictive limitations on a franchising authority's ability to regulate *non*-cable services of a cable operator. See 47 U.S.C. 541(b)(3) (telecommunications services); 47 U.S.C. 544(b)(1) (information services). The court of appeals' conclusion that the City of Eugene's fee "is not a 'franchise fee' under § 542(g)(1)," and that its "imposition is not, *on that ground*, 'inconsistent with' Title VI," Pet. App. 22a (emphasis added; citation omitted), does not mean the fee comports with all of Title VI.

Petitioners also argue (Pet. 17) that the City's rights-of-way fee cannot conflict with Sections 541 and 544 because, unlike Section 542, those provisions do not mention

cable-operator fees specifically. But Section 544(b)(1) broadly states that a franchising authority "may not * * * establish *requirements* for video programming or other information services." 47 U.S.C. 544(b)(1) (emphasis added). A local-law obligation to pay a fee in order to access rights-of-way is indisputably a "requirement[]" (*ibid.*) within the meaning of that provision. That Congress employed an expansive term without listing fees by name "does not demonstrate ambiguity. It demonstrates breadth." *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998) (citation omitted).

Petitioners additionally contend (Pet. 18-19) that Section 544(b) limits the regulatory power only of franchising authorities, not of local and state governments more generally. Section 556(c), however, expressly preempts the "law of any State, political subdivision, or agency thereof" that is "inconsistent with" the Communications Act. 47 U.S.C. 556(c). It is "not 'consistent with' Title VI" for a franchising authority to "'us[e] other governmental entities'" to circumvent limitations that Congress placed on the franchising authority's ability to regulate cable operators. Pet. App. 24a (citations omitted). In any event, the City of Eugene itself granted franchises to cable operators. *Ibid.*; Pet. 7. A local government cannot sidestep federal preemption by simply donning a different hat and referring to its "exercise of its franchise power by another name." Pet. App. 24a.

Finally, to the extent petitioners contend (*e.g.*, Pet. 16-17) that the Cable Act preempts only state or local laws that regulate cable operators specifically, and that the City of Eugene's rights-of-way fee is not preempted because it is not limited to cable operators, that contention lacks merit. Section 544(b)(1) expressly

prohibits franchising authorities from imposing requirements on cable operators' information, *i.e.*, *non*-cable, services. A franchising authority would violate that prohibition if it "establish[ed]" a "requirement[]" on a cable operator's "information services" as a condition of a franchise, 47 U.S.C. 544(b)(1), even if it imposed the same requirement on other, non-cable-operators' information services. And a state or local law that attempts to achieve the same result through exercise of the police power is likewise "inconsistent with" the Cable Act and thus is expressly "preempted." 47 U.S.C. 556(c). Section 556(c) draws no distinction between laws that apply specifically to cable operators and those that do not; it "deem[s] to be preempted and superseded" "any provision of law" of a state or local government that is "inconsistent with" the Communications Act. *Ibid.*

c. At a minimum, the FCC's interpretation of the scope of Title VI's preemption provisions, and of the specific provisions with which it found certain fees (including the City of Eugene's) to be inconsistent, embodies a reasonable reading that is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This Court has repeatedly applied *Chevron* to uphold agencies' interpretations of the scope of statutory provisions that had preemptive consequences. See, *e.g.*, *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 496 (1996); *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 739-744 (1996); see also *Cuomo* v. *Clearing House Ass'n*, 557 U.S. 519, 525 (2009) (applying *Chevron* framework but ultimately finding statutory text "clear"). Under *Chevron*, the FCC's "position prevails if it is a reasonable construction of the statute, whether or not it is the only possible

interpretation or even the one a court might think best." *Holder* v. *Martinez Gutierrez*, 566 U.S. 583, 591 (2012); see *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4 (2009).

The court of appeals found it unnecessary to address the additional weight that the FCC's interpretation is due under *Chevron* because it found no "ambiguity" in the statute. Pet. App. 6a. But if the Court views the relevant Title VI provisions as ambiguous, the Commission's approach reflects at least a permissible interpretation for all of the reasons set forth above.

2. Petitioners do not contend that the decision below conflicts with any decision of another court of appeals interpreting the relevant provisions of Title VI. Instead, petitioners assert (Pet. 13-20) that the decision below conflicts with the decision of the Supreme Court of Oregon in *City of Eugene* v. *Comcast of Oregon II, Inc.*, 375 P.3d 446 (2016). That contention lacks merit.

Comcast of Oregon addressed in relevant part whether application of the City of Eugene's rights-of-way fee to a cable operator providing broadband Internet service was inconsistent with 47 U.S.C. 541(b)(3), and was therefore preempted. 375 P.3d at 458-461. As discussed above, Section 541(b)(3) limits a franchising authority's ability to regulate *telecommunications* services provided by a cable operator. *Inter alia*, that provision bars a franchising authority from requiring a cable operator "to obtain a franchise under [Title VI] for the provision of telecommunications services," and from "impos[ing] any requirement under [Title VI] that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator." 47 U.S.C. 541(b)(3)(A)(i) and (B). That provision was pertinent in *Comcast of*

Oregon because, while that suit was pending, the FCC classified broadband Internet service as a telecommunications service, rather than an information service. See 375 P.3d at 452-453.

The Supreme Court of Oregon held that the City of Eugene's rights-of-way fee was not inconsistent with Section 541(b). *Comcast of Or.*, 375 P.3d at 458-461. The court acknowledged that Section 541(b) was susceptible of more than one interpretation, but it adopted a "narrow" reading based on its analysis of the provision's text, context, and legislative history. *Id.* at 459; see *id.* at 459-461. Because broadband Internet service was not then classified as an information service, the Supreme Court of Oregon had no occasion to address whether the City's rights-of-way fee was inconsistent with Section 544(b)(1), the key provision on which the court of appeals relied here, which precludes a franchising authority from imposing requirements on a cable operator's provision of information services. And because *Comcast of Oregon* predated the *Third Report and Order*, the state court had no opportunity to consider the FCC's most recent analysis of the Cable Act's preemptive scope.

Here, in contrast, the court of appeals addressed whether the application of the City of Eugene's rights-of-way fee to cable operators' provision of broadband Internet service is inconsistent with Section 544(b)(1)'s restrictions on regulation of a cable operator's *information* services. Pet. App. 22a-24a. In 2018, after the Supreme Court of Oregon's decision in *Comcast of Oregon* and before the FCC issued the *Third Report and Order*, the Commission had reclassified broadband Internet service as an information service, see *Mozilla Corp.* v. *FCC*, 940 F.3d 1, 17 (D.C. Cir. 2019) (per curiam), and that classification was subsequently upheld by the

D.C. Circuit, see *id.* at 18-35. The court of appeals here noted that it was "not address[ing] the question" decided in *Comcast of Oregon*: "whether a state or local government (as opposed to a franchising authority) may impose a fee on telecommunications services provided by cable operators." Pet. App. 17a n.2 (citation omitted). The court observed that "[t]he question whether a fee of that sort would circumvent Title VI's limits on franchisor regulation of a cable operator's telecommunications services is neither fully briefed nor clearly presented on the facts here." *Ibid.*; see Pet. 11 n.4.

Petitioners assert (*e.g.*, Pet. 13-14, 18-19) that, in various respects, the court of appeals' reasoning is in tension with that of the Supreme Court of Oregon. That contention does not warrant further review.

For example, petitioners contend (Pet. 13-14) that the court of appeals construed Section 541(a) and (b) to confer on a cable operator a freestanding, implicit right to provide non-cable services over its cable system, but that the Supreme Court of Oregon declined to recognize such a right. Petitioners mischaracterize the court of appeals' reasoning. The court concluded that, in circumstances where Title VI would preclude a franchising authority from subjecting information services to particular fees or other requirements as a condition of a cable franchise, the authority's imposition of those requirements (on its own or through another entity) under its police power is a circumvention of, and thus inconsistent with, Title VI. Pet. App. 23a-24a. The court found that inconsistency to be particularly clear because the activity on which the City of Eugene seeks to impose fees—namely, the provision of information services over a cable system—is one that Congress in enacting Title VI *expected* cable operators to undertake. See

ibid. In any event, even if inconsistencies between the two courts' analyses might lead to divergent results in future cases, petitioners identify no conflict in the court's holdings as they stand today. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is recused in this case.