NO. 21-661

In the Supreme Court of the United States

CITY OF EUGENE, 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 SIXTH 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

I. The oppositions confirm that the case presents conflict on an important issue that will have significant national impacts.

The court of appeals permitted a federal agency to preempt state and local authority not expressly prohibited by statute and expanded the bounds of implied preemption by prohibiting state and local governments from requiring cable operators to pay generally applicable fees for use of public property to provide broadband and other non-cable services, even though those fees are consistent with the Cable Act's[1] limits on state and local taxes, fees, or assessments. Respondent NCTA confirms the substantial importance of this issue: it affects the competitive landscape in a critical sector of our economy, and if preempted, every cost about which NCTA complains represents a commensurate loss of revenue to state and local governments. NCTA Opp. 7-9, 20-22. Moreover, the Sixth Circuit decision below squarely conflicts with the decision of the Oregon Supreme Court in *City of Eugene v. Comcast of Oregon II, Inc.*, 375 P.3d 446 (Or. 2016) ("*Comcast of Oregon*") on the critical issues raised. This Court should grant review to clarify its preemption doctrine and resolve the conflicting analyses adopted by the Sixth Circuit and Oregon Supreme Court.

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[1] Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-573 ("Cable Act" or "Act").

II. Clarification is needed to prevent the improper expansion of implied preemption when Congress preserves state or local authority to act.

Because the Cable Act preserves state and local authority many times over, this case presents an excellent vehicle for this Court to curb the broad expansion of implied preemption doctrine below.

1. The Government and NCTA deny that this case involves implied preemption, but then proceed to demonstrate that implied preemption doctrine is at the heart of the case.

The Government first (correctly) explains that the scope of express preemption provisions is determined by the "plain wording" that "Congress prescribed" in the statute. SG Opp. 15 (citations omitted). But because the Sixth Circuit found that Eugene's fee was *not* expressly precluded, *see id.* at 16-17 and Pet. 11, the Government justifies the decision below by invoking the implied preemption doctrine (without naming it) to argue that preemption here is "not confined to requirements that directly conflict" with federal law or that would make compliance with federal law impossible. SG Opp. 16. According to the Sixth Circuit and the Government, a provision that preempts "inconsistent" state and local action "encompasses actions … that would 'circumvent' or 'end-run,'" the statute. *Id.* (quoting App. 15a).

This test reads any federal statute that preempts state or local requirements "inconsistent with" a federal statute to impliedly preempt any requirements that are not expressly authorized by the statute. It grants federal agencies sweeping authority to preempt based on the agency's view of what a statute might have said rather than what it does say.

That presents exactly the danger this Court must prevent: preemption of state and local authority untethered to the statutory text or careful application of implied preemption jurisprudence. That danger extends far beyond the Cable Act. *Contra* NCTA Opp. 23-24. Even a cursory review identifies many federal statutes that contain "inconsistent with" preemption language.[2]

2. To use implied preemption in this way is even less tenable in view of the Cable Act's other provisions expressly preserving the state and local authority in question.

Section 556(a) preserves state and local authority by stating that "*[n]othing … shall* be construed to affect *any*" state or local authority "regarding matters of public health, safety, and welfare, to the extent consistent with the *express provisions*" of the Cable Act. 47 U.S.C. § 556(a) (emphasis added). Yet the Sixth Circuit preempted fees like Eugene's based on rights the Cable Act supposedly grants to cable operators "by implication," App. 23a, not the Act's express provisions. Section 541(d)(2) states that "*[n]othing … shall* be construed to affect the authority of any State" to regulate "*any* communications service *other than cable service*." 47 U.S.C. § 541(d)(2) (emphasis added). These provisions are the most "directly applicable" because they instruct courts and the Federal Communications Commission ("FCC") how to interpret the Act. Pet. 22; *contra* NCTA Opp. 18 (emphasis omitted). The Sixth

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[2] *E.g.*, 11 U.S.C. § 526(d) (debt relief); 12 U.S.C. § 4908(a)(2) (mortgage transactions); 12 U.S.C. § 5551(a) (consumer protection); 42 U.S.C. § 14502(a) (liability of volunteers); 42 U.S.C. § 14953(a) (adoption); 43 U.S.C. § 299(i) (coal and mineral rights).

Circuit's back-of-the-hand to these provisions poses substantial questions with far-reaching implications, because savings clauses like these are commonly found in other cooperative federalism statutes on subjects as varied as environmental law, drugs and medical devices, agriculture, vehicles, and more. Sandra Zellmer, *Preemption by Stealth*, 45 Hous. L. Rev. 1659, 1661 (2009); *contra* NCTA Opp. 23-24.

Although the mere existence of an explicit preemption or savings clause does not, in itself, preclude implied preemption via "ordinary preemption principles," *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 869 (2000), the Court's preemption precedent does not address what analysis is required before implying preemption when Congress specifically preserves the relevant state and local authority. It is "quite wrong" to consider a federal decision not to regulate "as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation." *Sprietsma v. Mercury Marine,* 537 U.S. 51, 65 (2002); Pet. 26. A statute's overall structure should inform its meaning. *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016). The Eleventh Circuit, for example, looked to the overall structure of a statute to hold that an express preemption provision implies that Congress did not intend to preempt more broadly. *Lawson-Ross v. Great Lakes Higher Educ. Corp.*, 955 F.3d 908, 920 (11th Cir. 2020); *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1253 (11th Cir. 2003).

3. Respondents emphasize the Sixth Circuit's reliance on Section 544(a)-(b), 47 U.S.C. § 544(a)-(b), and argue that state and local actions assessing fees for non-cable use of the rights-of-way are expressly preempted by that provision by virtue of Section 556(c). SG Opp. 18-19; NCTA Opp. 27. Section 544(a)

merely requires franchising authorities to act consistently with the Cable Act, and Section 556(a) similarly preserves local authority if consistent with the statute's express provisions. Actions outside the bounds of the Cable Act are not prohibited. *Contra* NCTA Opp. 14 (citing App. 23a). The only *express* prohibitions are in Section 544(b), but the Sixth Circuit used implied preemption to expand Section 544(b) far beyond its scope.

Section 544(b) applies only when a state or locality is acting as a cable franchising authority, and limits only what that authority may require when requesting cable franchise proposals and what requirements it may enforce in a cable franchise. 47 U.S.C. § 544(b)(1)-(2).[3] Subsection 541(b)(3) underscores that the Cable Act's limits merely prohibit franchising authorities from imposing requirements "*under this subchapter*" (*i.e.*, the Cable Act) and thus do not reach requirements imposed outside of the cable franchising process. 47 U.S.C. § 541(b)(3)(A)(i), 541(b)(3)(B) (emphasis added); *see also Comcast of Oregon* at 458-61. Eugene's broadband ordinance is not part of any cable franchise (let alone a request for franchise proposal). Pet. 7-8. In fact, Eugene's fee was not imposed until *after* the City had already granted

[3] The Sixth Circuit's reading of Section 544(b)(1) as reaching fees on information services, *see* SG Opp. 18, also conflicts with the plain text of the Cable Act's franchise fee provision, 47 U.S.C. § 542. Section 544(b)(1) bars "requirements for video programming or other information services." If this prohibits fees on information services, it also bars fees on video programming. But "video programming" is included in the definition of "cable service," 47 U.S.C. § 522(6), and Section 542 expressly permits fees on cable service revenues (but does not prohibit non-cable revenue fees, *infra* IV.1).

Comcast a cable franchise through a separate agreement. *Comcast of Oregon* at 449-50.

It is startling to see the Government claim that use of un-preempted state sovereign authority amounts to applying a "different label" or "donning a different hat." SG Opp. 16, 18. The legitimate exercise of a state's constitutionally recognized power is not a ruse to circumvent federal law. "States retain substantial sovereign powers under our constitutional scheme …." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535 (2012); *United States v. Morrison*, 529 U.S. 598, 618 (2000).[4]

III. The decision below conflicts with that of the Oregon Supreme Court on an important question of federal law.

The decision below upheld the FCC's decision to explicitly "repudiate" the Oregon Supreme Court's opinion in *Comcast of Oregon*. App. 173a. Respondents' attempts to obscure the conflict are incorrect.

1. The Government asserts that the only "relevant part" of *Comcast of Oregon* (at 458-61) is its discussion of Section 541(b)(3) and contends that discussion is now irrelevant given the FCC's subsequent reclassification of broadband internet as

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[4] The Government's suggestion, SG Opp. 19, that *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), cures any misapplication of implied preemption illustrates why a clarification of the implied preemption doctrine is important. A clearer doctrine allows courts to ensure that the agency has conducted the textual analysis required at *Chevron*'s step one. As the Government brief suggests, the absence of clarity is an invitation to regulatory overreach that escapes review under *Chevron* step two.

an information service rather than a telecommunications service under federal law. SG Opp. 20-22. But the Oregon Supreme Court's decision was not based exclusively, or even primarily, on Section 541(b)(3).

Comcast of Oregon's critical holding (and the one with which the court of appeals decision squarely conflicts) is its determination that a Cable Act franchise does *not* confer a federal right to use local rights-of-way to provide any non-cable services. *Comcast of Oregon* at 456-58, 462-63. The Oregon Supreme Court explained that a Cable Act franchise establishes the right to construct a cable system and provide cable services, but any authorization to provide non-cable services must be "determined by other applicable laws" that the Cable Act's restrictions do not reach. *Id.* at 458. NCTA concedes that the Oregon Supreme Court considered these broader points. NCTA Opp. 17.

2. On these critical points, the conflict between the Oregon Supreme Court and Sixth Circuit is obvious. In construing Section 541(a)(2)'s authorization of the construction of a cable system over the public rights-of-way, the Oregon Supreme Court rejected Comcast's argument that a cable franchise implicitly confers "the right to use the cable system to provide services in addition to cable services that the cable system is physically capable of providing, including [broadband internet] services." *Comcast of Oregon* at 456. Instead, it concluded that "a plain reading of the statute suggests that the scope of Comcast's right to use the cable system [*i.e.*, its right to provide non-cable services] is determined by the franchise agreement or other provisions of law." *Id.* at

457.[5] In direct conflict, the Sixth Circuit held that Section 541(b)(1), "by implication," confers "the right to use [a cable] system to provide information service." App. 23a-24a.

The Government's cursory acknowledgement of this conflict, SG Opp. 22, underscores the need for this Court's review. It explains that the Sixth Circuit preempted "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." *Id.* at 22 (citing App. 23a-24a). In addressing this very point, the Oregon Supreme Court reasoned that, although Congress may have understood that cable systems might provide non-cable services, this "does not establish, as Comcast contends, that the Cable Act grants cable operators an affirmative right to provide non-cable services, prohibiting state or local authorities from regulating noncable services or charging fees for the right to provide noncable services over the cable system that occupies public rights of way." *Comcast of Oregon* at 457.

3. The Government also wrongly suggests there is no conflict because the Sixth Circuit relied on Section 544(b)(1), a provision the Oregon Supreme Court did not address, speculating that the Oregon Supreme Court did not evaluate Section 544(b)(1) "[b]ecause broadband Internet service was not then classified as an information service." SG Opp. 21. But

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[5] The Government properly finds a right to provide cable service in Section 541(b)(1)'s prohibition from offering cable service without a franchise. SG Opp. 17. But that only highlights the lack of similar statutory language evidencing a right to provide broadband internet or any other non-cable services.

the Oregon Supreme Court did not address Section 544(b)(1) because it held that a Cable Act franchise does not confer a federal right to provide non-cable services (including both information and telecommunications services alike). *Comcast of Oregon* at 456-58. That holding makes Section 544(b)(1)'s reference to "information service[]" irrelevant.

The Sixth Circuit found the opposite, concluding that Eugene's fee "is merely the exercise of its franchise power by another name" because the Cable Act authorizes the provision of non-cable services. App. 24a. It thus reached Section 544(b)(1) only because it first parted with the Oregon Supreme Court on the scope of federal rights conferred by a Cable Act franchise. That fundamental conflict supports granting the petition, not denying it.

IV. Respondents are incorrect on the merits and competitive impact.

1. Respondents do not dispute that Section 542 is the specific provision Congress enacted to limit fees imposed on cable operators; they instead claim fees such as Eugene's amount to a prohibited information services requirement imposed on cable operators. SG Opp. 17-18; NCTA Opp. 27. But Congress specifically addressed state and local "tax[es], fee[s], or assessment[s] of any kind" in Section 542, adopting a detailed definition of cable franchise fees and capping only those defined fees. Taxes, fees, and assessments "of any kind" falling outside Section 542 (like Eugene's) do not violate the fee cap. By implying additional, unwritten limitations on taxes, fees, and assessments in Sections 541 and 544, the Sixth Circuit ignored the obvious: had Congress intended to preclude "tax[es], fee[s], or assessment[s] of any kind" on cable operators' provision of non-cable services, it

could have done so in the franchise fee section. It turns textual analysis on its head to leap over the Act's specific tax and fee provision and imply additional tax and fee limitations from other provisions of the Act that do not even mention taxes, fees, or assessments.[6]

2. Departure from the statutory language is not justified by NCTA's assertion that allowing for fees on cable operators' non-cable services would "double charge" for the same rights. NCTA Opp. 2, 21, 26-27. As the Oregon Supreme Court correctly explained, the right to construct a cable system does not inherently grant with it the right to provide whatever services a cable operator may wish to offer over that system, much less to do so without paying generally applicable fees. *Comcast of Oregon* at 456-58, 462-63. Nor is Eugene's broadband fee assessed on cable service revenue. Pet. 8. No language in the Cable Act bars taxes or fees for use of the rights-of-way should an operator wish to engage in additional lines of business beyond providing cable service.

The balance struck by Congress, as properly reflected in *Comcast of Oregon*, ensures competitive neutrality between cable operators' and non-cable operators' provision of non-cable services. Petitioners

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[6] This conclusion is confirmed by Section 541(d)(2) (reserving State authority to regulate non-cable services) and by the tax savings provision of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(c), 110 Stat. 56, 143-44 (codified at 47 U.S.C. § 152 note). Pet. 16. NCTA argues that this provision was not raised below, NCTA Opp. 18, but it was in Eugene's rehearing petition. In any event, the issue—whether the Cable Act, as amended by the 1996 Act, preempts Eugene's fee—was raised below, and that is sufficient. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001); *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 535 (1992).

do not dispute that a cable franchise grants a cable operator the right to construct and operate a cable system in the right-of-way. But that right does not also confer on an operator federal immunity from all other generally applicable fees, regulations, or requirements relating to non-cable services. This is hardly an exceptional result. It is no different from requiring restaurants to obtain both food service and liquor licenses and pay taxes on both food and liquor sales.

Contrary to NCTA's claims, it is the decision below, not the fee at issue, that creates competitive disparities. A cable operator providing broadband internet service would be immune from fees on broadband services, paying only a fee based on its (declining) revenue from cable services. Br. of Amici International Municipal Lawyers Association et al. 17-19. Its non-cable competitors, however, would be subject to those fees. This competitive disparity is exactly what Congress intended to prevent when it amended the Cable Act in 1996. *See* Pet. 5-6, 16-17.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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