

No. 20-1354

In the
Supreme Court of the United States

◆◆

CITY OF PORTLAND, OREGON, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

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

**BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES,
THE U.S. CONFERENCE OF MAYORS, AND
THE GOVERNMENT FINANCE OFFICERS ASSOCIATION
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

LISA SORONEN
STATE AND LOCAL
LEGAL CENTER
123 N. Capitol St. N.W.
Washington, DC 20001
(202) 434-4845

JOHN J. KORZEN
Counsel of Record
WAKE FOREST UNIVERSITY
SCHOOL OF LAW
APPELLATE ADVOCACY CLINIC
Post Office Box 7206
Winston-Salem, NC 27109
(336) 758-5832
korzenjj@wfu.edu

Counsel for Amici Curiae

Gibson Moore Appellate Services, LLC
206 East Cary Street ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

TABLE OF CONTENTS

	Page:
TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	1
I. This Case is Vitally Important to America’s Counties, Mayors, and Government Finance Officers	3
A. Houston (and all over), we have a problem.....	3
B. “Costs” and “caps” do not “fair and reasonable compensation” make	6
C. There is no pony in here	10
D. The \$81 billion question.....	13
CONCLUSION	17

TABLE OF AUTHORITIES

Page(s):

Cases:

<i>City of St. Louis v. Western Union Tel. Co.</i> , 148 U.S. 92 (1893).....	7
<i>Google LLC v. Oracle America, Inc.</i> , 141 S. Ct. 1183 (2021).....	10

Statutes:

47 U.S.C. § 253(a).....	6
47 U.S.C. § 253(c)	6, 7

Other Authorities:

1 <i>Samuel</i> 17	1
Carr, David, <i>Telecom’s Big Players Hold Back the Future</i> , New York Times (May 19, 2013), https://www.nytimes.com/ 2013/05/20/business/media/telecoms-big- players-hold-back-the-future.html	12
Crawford, Susan, <i>Captive Audience: The Telecom Industry and Monopoly Power in the New Gilded Age</i> (2013).....	16-17
Descant, Skip, <i>San Jose Fund Set to Pay Out First Round of Broadband Grants</i> , Govtech (Feb. 12, 2020), https://www.govtech.com/computing/san- jose-fund-set-to-pay-out-first-round-of- broadband-grants.html	9

- Dirksen, Senator Everett McKinley
Dies, Sept. 7, 1969, https://www.senate.gov/artandhistory/history/minute/Senator_Everett_Mckinley_Dirksen_Dies.htm 14
- Fernandez, Bob,
I felt nauseous, Bucks County woman says of plan for 48-foot 5G cell tower in her front yard, The Philadelphia Inquirer (Sept. 4, 2019), <https://www.inquirer.com/business/5gwireless-verizon-fios-bucks-county-doylestown-pole-20190904.html> 4, 5
- Javid, Sasha,
The Price is Right? Clock Phase of the C-band Auction Closes with \$80.9 Billion in Gross Proceeds, LinkedIn (Jan. 15, 2021), <https://www.linkedin.com/pulse/price-right-clock-phase-c-band-auction-closes-809-billion-sasha-javid/> 15
- Kennedy, Andrew,
Get ready for 500 new 30-foot-tall cell poles around Denver's neighborhoods, The Denver Post (Oct. 7, 2019), <https://www.denverpost.com/2019/10/07/denver-cell-polls-verizonberkeley/> 4
- Levin, Blair,
The FCC Ignores Reality in 5G Proposal, Benton Institute for Broadband & Society (Sept. 19, 2018), <https://www.benton.org/blog/fcc-ignores-reality-5g-proposal> *passim*
- McQuillin,
The Law of Municipal Corporations
§ 34:26 (3d ed. rev. 2006) 5

- Nee, Daniel,
*In Lavellette, Promise of 5G Technology
 Could Turn Shore Town Into Battleground*,
 Lavellette-Seaside Shorebeat (Dec. 10, 2018),
<https://lavellette-seaside.shorebeat.com/2018/12/in-lavellette-promise-of-5g-technology-could-turn-shore-town-to-battleground/> 4-5
- Nee, Daniel,
*Lavellette Reaches Agreement with
 Verizon on 5G Towers, More Proposed*,
 Lavellette-Seaside Shorebeat (Apr. 21, 2021),
<https://lavellette-seaside.shorebeat.com/2021/04/lavellette-reaches-agreement-with-verizon-on-5g-towers-more-proposed/> 5
- O'Donnell, Bob,
*C-Band Auction Points to Dramatic
 Shift in 5G*, Forbes (Jan. 27, 2021),
<https://www.forbes.com/sites/bobodonnell/2021/01/27/c-band-auction-points-to-dramatic-shift-in-5g/?sh=3208f06fa36c> 15
- Pressman, Aaron,
*Comparing 5G Plans: T-Mobile, Verizon,
 and AT&T*, Fortune (Nov. 26, 2020),
<https://fortune.com/2020/11/26/best-5g-mobile-plans-t-mobile-verizon-att-cell-phone-providers/> 8
- Preventing Agency Capture: Special
 Interest Influence and How to Limit It*
 (Daniel Carpenter &
 David A. Moss eds., 2014) 17

Shapiro, Sidney A. & Steinzor, Rena, <i>Capture, Accountability, and Regulatory Metrics</i> , 86 Tex. L. Rev. 1741 (2008).....	17
Silverman, Dwight, <i>'It's ugly'; Verizon 5G data boxes appear without notice on Houston front lawns</i> , Houston Chronicle, (Jan. 22, 2021), https://www.houston chronicle.com/business/article/Streamlined- 5G-buildout-puts-ground-15889021.php	4
<i>Stretched Thin and Feeling the Squeeze: The Harmful Effects of Small Cell Preemption on Local Governments</i> , Nat'l Ass'n of Telecom. Officers and Advisers (March 2021), https://ecfsapi. fcc.gov/file/1041585093152/NATOA%20 CWA%20Letter%20with%Report.pdf	6
U.S. Treasury. <i>About Auctions</i> , Fed. Commc'ns Comm'n, https://www.fcc.gov/auctions/about- auctions (last updated Aug. 9, 2006)	14
<i>Auction 107: 3.7 GHz Service</i> , Fed. Commc'ns Comm'n, https://www.fcc.gov/auction/ 107/factsheet#Licenses_offered	14
<i>Auction Designs</i> , Fed. Commc'ns Comm'n, https://www.fcc.gov/auctions/auction- designs (last updated Aug. 9, 2006)	14

*FCC Announces Winning
Bidders in C-Band Auction,*
Fed. Commc'ns Comm'n,
[https://docs.fcc.gov/public/
attachments/DOC-370267A1.pdf](https://docs.fcc.gov/public/attachments/DOC-370267A1.pdf) 15

*FCC Seeks Comment on
Mid-Band Spectrum Auction,*
Fed. Commc'ns Comm'n,
[https://docs.fcc.gov/public/
attachments/DOC-370863A1.pdf](https://docs.fcc.gov/public/attachments/DOC-370863A1.pdf) 16

*First Phase of Record-Breaking
5G Spectrum Auction Concludes,*
Fed. Commc'ns Comm'n,
[https://docs.fcc.gov/public/
attachments/DOC-369265A1.pdf](https://docs.fcc.gov/public/attachments/DOC-369265A1.pdf) 15

INTEREST OF AMICI CURIAE¹

The National Association of Counties (“NACo”) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation’s 3,069 counties through advocacy, education, and research.

The U.S. Conference of Mayors (“USCM”), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes more than 1,400 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The Government Finance Officers Association (GFOA) is the professional association of state, provincial, and local finance officers in the United States and Canada. The GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its more than 21,000 members are dedicated to the sound management of government financial resources.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This is a match between David and Goliath.² On one side of the ring, David, are the towns seeking to negotiate fair fees and other conditions when telecom providers install 5G cell towers in the towns’ rights-

¹ This brief was prepared by counsel for amici curiae and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. All parties have given written consent to the filing of this brief.

² 1 *Samuel* 17.

of-way. On the other side, Goliath, are the enormously powerful telecom providers demanding subsidized access to public property they do not own. As in the Bible, Goliath looms large and is heavily armed. But the referee—the FCC—has tied David’s hands behind his back and taken away his slingshot (the ability to negotiate fees). In the next arena—the Ninth Circuit—two more referees have agreed with the FCC. Therefore, David is about to lose by a technical knockout, unless this Court steps in to ensure a fair contest.

Amici agree with Petitioners’ contentions on why certiorari should be granted and this Court should review the FCC’s Small Cell Order. They submit this brief to let the Court know why this case is vitally important to America’s counties, mayors, and government finance officers. In a nutshell, local governments are being prevented from serving as stewards of public property, safety, and welfare. They have lost the ability to control their rights-of-way in a way that best serves their residents. First, the installation of 5G towers is already creating problems throughout the country, from its biggest cities to its smallest towns. Citizens reach out to their county commissioners and mayors, but these local officials are often powerless to help. Second, the FCC’s conclusion that localities are limited to recovering their “costs” when carriers install 5G towers on public rights-of-way, and that such fees are presumptively capped at \$270, does not provide the “fair and just compensation” Congress requires. Third, the FCC ignored reality when it concluded that 5G carriers will voluntarily “reinvest” in underserved areas the estimated \$2 billion they will save as a result of the FCC’s order. It does not make rational economic sense for corporations

to act that way. Allowing localities to negotiate fees will better address the digital divide. Finally, the FCC's conclusion that carriers cannot afford to pay an estimated \$2 billion in fees to local governments to use their rights-of-way to install 5G equipment is undermined by the recent auction in which the same carriers paid the federal government \$81 billion for the spectrum that will be used to offer 5G.

I. This Case is Vitally Important to America's Counties, Mayors, and Government Finance Officers.

For the reasons discussed below, the FCC's order has created the potential for imminent and irreversible harm to local governments all over America. Amici accordingly urge the Court to grant certiorari.

A. Houston (and all over), we have a problem.

In cities and towns all over America—from Houston to Denver to Bucks County to Lavallette—residents fear the loss of property values caused by 5G equipment, local government officials have lost control over their own rights-of-way, and carriers are installing 5G equipment at breakneck speed without comprehensive plans.³

In Houston, the first city where Verizon sold 5G service aimed at home users, boxes the size of refrigerators “were installed without warning” in the

³ One way to see the 5G small cell tower equipment at issue in this case would be to search Google Images using terms such as “5G small cell tower equipment” or “residential 5G small cell towers.”

rights-of-way of private property, “popping up on lawns all over Houston.” Dwight Silverman, *‘It’s ugly’; Verizon 5G data boxes appear without notice on Houston front lawns*, Houston Chronicle, Jan. 22, 2021), <https://www.houstonchronicle.com/business/article/Streamlined-5G-buildout-puts-ground-15889021.php>. Providers are doing this “in other cities around the United States, often without notice to homeowners.” *Id.* As a result, everyday looks like “bulk pickup day” on those yards. Citizens understandably fear their property values will decrease. *Id.*

In Denver, “the industry is infiltrating neighborhoods with 30-foot-tall metal poles.” Andrew Kennedy, *Get ready for 500 new 30-foot-tall cell poles around Denver’s neighborhoods*, The Denver Post (Oct. 7, 2019), <https://www.denverpost.com/2019/10/07/denver-cell-polls-verizionberkeley/>.

In Bucks County, residents returned home from work to learn that a 48-foot-tall small cell antenna would be placed in their yard’s right-of-way, four times taller than the lamppost it would replace. Bob Fernandez, *‘I felt nauseous,’ Bucks County woman says of plan for 48-foot 5G cell tower in her front yard*, The Philadelphia Inquirer (Sept. 4, 2019), <https://www.inquirer.com/business/5gwireless-verizon-fios-bucks-county-doylestown-pole-20190904.html>.

In Lavallette, Verizon targeted the town for 5G installation under a “continuing test rollout in communities across the country.” Daniel Nee, *In Lavallete, Promise of 5G Technology Could Turn Shore Town Into Battleground*, Lavellette-Seaside Shorebeat (Dec. 10, 2018), <https://lavallette-seaside.shorebeat.com/2018/12/in-lavallette-promise-of-5g-tec>

hnology-could-turn-shore-town-to-battleground/. Just last week, to avoid what would likely be “an unsuccessful multi-million dollar legal battle against the telecom giant,” the town reached an agreement on the placement of five small cell towers. *See* Daniel Nee, *Lavellette Reaches Agreement with Verizon on 5G Towers, More Proposed*, Lavellette-Seaside Shorebeat (Apr. 21, 2021), <https://lavellette-seaside.shorebeat.com/2021/04/lavellette-reaches-agreement-with-verizon-on-5g-towers-more-proposed/>.

In all, “more than one million small cell antennas” could be installed nationwide, “even as homeowners fear lower property values and local government officials say they will lose zoning control over rights-of-way in their municipalities.” Fernandez, *supra*.

This lack of local control over rights-of-way is not normal. Ordinarily, municipalities hold their streets and rights-of-way in trust for public use. *See, e.g.*, Eugene McQuillin, *The Law of Municipal Corporations* § 34:26 (3d ed. rev. 2006). Now town managers are being told that 5G deployment “is in the right-of-way and . . . we don’t control that anymore.” Fernandez, *supra*. Localities have less control over their rights-of-way than they had with prior technology, “resulting in puzzled and unhappy landowners.” Silverman, *supra*.

The speed of 5G deployment also concerns amici. The FCC has imposed strict time limits for the processing of 5G applications. These so-called “shot clocks” give local officials only 60 days to decide whether to allow installations on existing infrastructure in rights-of-way, such as lights and poles, and only 90 days to decide whether to allow carriers to install new structures. Pet. 213a.

Meanwhile, in their haste providers and their contractors are treating rights-of-way “like the wild west,” installing equipment without permits and damaging public property. *See Stretched Thin and Feeling the Squeeze: The Harmful Effects of Small Cell Preemption on Local Governments*, Nat’l Ass’n of Telecom. Officers and Advisers (March 2021), <https://ecfsapi.fcc.gov/file/1041585093152/NATOA%20CWA%20Letter%20with%20Report.pdf> (reporting survey results of 48 nationwide local governments in localities ranging in population from less than 5,000 to more than 500,000). A slower deployment that allowed more local control over rights-of-way would not have the “effect of prohibiting” 5G service, *see* 47 U.S.C. § 253(a), but more than half of surveyed localities report that companies are installing 5G equipment without permits, damaging public property, and failing to restore roads, sidewalks, or other infrastructure to their original condition following installation. *See Stretched Thin, supra*.

B. “Costs” and “caps” do not “fair and reasonable compensation” make.

On top of their concerns about their residents’ property values and damage to their rights-of-way, local governments are prohibited by the FCC order from negotiating “fair and reasonable compensation” for the use of the rights-of-way, in violation of the statute. *See* 47 U.S.C. § 253(c) (“Nothing in this section affects the authority of a State or local government . . . to require fair and reasonable compensation from telecommunications providers . . .”).

Limiting local rights-of-way licensing fees to a cost-basis and no more than \$270 per year is not “fair and reasonable compensation” to local government. If

local governments were allowed to negotiate without having to so limit their fees, the public would be better served because, as discussed below, local governments could broker agreements with carriers to better address the digital divide.

As contended by Petitioners, and as Judge Brees' dissent points out, the FCC has not explained how "all above-cost fees amount to an 'effective prohibition'" on 5G service. Pet. 63a. The FCC has not shown "an intrinsic relationship between a fee's approximation of costs and its prohibitive effect on service providers." Pet. 67a. The FCC has not shown that "above-cost fees effectively prohibit service in many, most, or [even] a plurality of cases." Pet. 69a.

In addition to not showing that negotiated fees would effectively prohibit 5G service, the FCC's order does not allow for the "fair and reasonable compensation" to local government guaranteed by Congress. See 47 U.S.C. § 253(c). The \$270 per year presumptive cap is not "fair and reasonable compensation" because it bears no relationship to a fair market price for leasing government rights-of-way. Localities are ordinarily permitted to charge rent for access to public rights-of-way and municipal property in the rights-of-way. See *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893). Yet here the FCC has concluded that local governments have only a regulatory interest in their rights-of-way when it comes to 5G deployment, with no proprietary interest whatsoever. See Pet. 191a-203a.

A \$270 yearly fee for a small cell tower placement works out to less than \$1 per day for the carrier. In contrast, carriers will charge all the many residents living near the same placement *\$70 or more*

per month for their 5G plans. *See, e.g.,* Aaron Pressman, *Comparing 5G Plans: T-Mobile, Verizon, and AT&T*, *Fortune* (Nov. 26, 2020), <https://fortune.com/2020/11/26/best-5g-mobile-plans-t-mobile-verizon-att-cell-phone-providers/>. Under the FCC's order, a fee above \$270 per year is presumptively unlawful, and local governments will bear the burden of showing that their actual costs exceed that presumptive cap. Pet. 23a-26a.

As a result of the FCC order, many communities will simply “lose revenues that they are using for such critical services as police, fire departments, and schools.” Blair Levin, *The FCC Ignores Reality in 5G Proposal*, Benton Institute for Broadband & Society (Sept. 19, 2018), <https://www.benton.org/blog/fcc-ignores-reality-5g-proposal>. Not only will communities lose revenue, they have had to increase staffing expenses to deal with permitting applications as a result of the FCC's order. *See Stretched Thin, supra* (reporting that 83% of mid-size localities and 63% of large localities report increased staffing expenses).

By preventing local government from negotiating for “fair and reasonable compensation,” the FCC's order eliminates any incentive for carriers to reach economically-efficient arrangements with local government. Local governments are interested in trying to find ways to improve broadband service. They have “a strong recent track record of endeavoring to enable and facilitate broadband deployment.” *FCC Ignores Reality, supra*. Through negotiations, localities and providers can reach deals that serve both their interests. *Id.* The FCC “infantilizes carriers,” apparently theorizing that

they cannot negotiate well with localities, which is “absurd.” *Id.*

Carriers have “leverage to walk away from any locality” creating too many obstacles, leverage that has allowed them to reach good deals with localities. *Id.* A prime example is the city of San Jose, where carriers and the city negotiated a deal that improves deployment, including a digital inclusion initiative and accelerated permitting. *Id.*; see also Skip Descant, *San Jose Fund Set to Pay Out First Round of Broadband Grants*, Govtech (Feb. 12, 2020), <https://www.govtech.com/computing/san-jose-fund-set-to-pay-out-first-round-of-broadband-grants.html>. Instead of such locally-appropriate deals, which have been reached in other cities as well, the FCC has imposed a “top-down, one-size-fits-all framework” on “thousands of diverse municipalities.” *FCC Ignores Reality, supra.*

The FCC order prevents local communities from working with private carriers by “taking away a tool they have at their disposal”—the ability to negotiate on behalf of the public on the use “of their assets as mounting locations for small cells.” *Id.* David’s slingshot has been seized.

Some local governments, for example, would like to ensure that underserved areas receive 5G service by “pricing permits in less attractive areas significantly less than the more attractive areas or prioritizing permitting requests that are in areas of under-adoption.” *Id.* The FCC’s order makes such efforts “ineffective if not illegal.” *Id.* While “such locally-led efforts are more likely to narrow the digital divide than the FCC’s order,” the FCC “provides carriers with economic incentive to cherry-pick

locations. . . . [and] will likely exacerbate, rather than alleviate, the digital divide.” *Id.*

The FCC in part justifies its limits on local government leasing fees by the need for “rapid” deployment. *See* Pet. 20a. But the 5G roll-out will necessarily occur over a long period of time, proceeding on a city-by-city basis. *See* Pet. 15a. And the fees paid to local communities for occupying their rights-of-way are only a tiny portion of the total deployment costs. *See* Silverman, *supra*. Moreover, even rapid changes in technology do not justify the FCC’s twisting of the statutory “fair and reasonable compensation” textual mandate. *See, e.g., Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1183, 1214 (Thomas, J., dissenting) (noting that “rapidly changing” “technological, economic, and business-related circumstances” have “been a constant where computers are concerned”).

And, if avoiding delay is the goal, the FCC order is unlikely to achieve that anyway, because its order “will likely lead to litigation over . . . the meaning of such terms as ‘cost-based,’ that will delay, rather than accelerate, next-generation broadband deployment.” *FCC Ignores Reality, supra*.

In short, the FCC has unjustly limited the ability of local governments to negotiate fees for small cell installations in their rights-of-way.

C. There is no pony in here.

The Ninth Circuit majority acknowledged that the FCC’s order “limiting 5G fees *could* result in carriers reinvesting an additional \$2.4 billion in areas ‘previously not economically viable.’” Pet. 29a (quoting the Corning Study) (emphasis added). The

“could” is telling. Carriers have no obligation to invest in unserved areas. There is no reason to expect they voluntarily will. The FCC’s provider “reinvestment” theory that carriers will finally reach underserved areas—embraced by the Ninth Circuit majority—is reminiscent of President Ronald Reagan’s “pony joke.”⁴ While optimism is often an admirable trait, in this case carriers have no obligation to redeploy savings resulting from the FCC order in underserved areas. There is no pony in here.

The FCC’s order depends on the “fallacy” that if the FCC reduces costs for carriers to mount small cell equipment on public property in profitable parts of the country, then the carriers will voluntarily increase their expenditures in less profitable areas. *See FCC Ignores Reality, supra*. Of course, “[t]hat simply is not how investment decisions are made.” *Id.* Or, as Judge Brees put it below in dissent, all “the Corning Study conveys is that if fees are reduced, it will produce cost savings to those who pay the fees.” Pet. 68a. Unlike the Ninth Circuit majority, Judge Brees rejected the FCC’s “reinvestment” theory. Pet. 68a-69a.

As “rational economic actors,” carriers will not “apply new profits (created by FCC preemption) to deploy in otherwise-unattractive areas.” *FCC Ignores Reality, supra*. Carriers of 5G “have the same incentives as other corporate entities.” *Id.* In 21st Century America, “stock-buybacks, debt reduction, or dividend support are higher priorities than new

⁴ When asked why he kept digging through a large pile of manure, an optimistic boy exclaimed, “There must be a pony in here somewhere.”

capital investments in networks,” and “[n]othing the FCC is doing changes those incentives.” *Id.*

Moreover, even accepting the Corning Study’s \$2.5 billion figure, that is only “about 1% of what the FCC and industry claim is the necessary new investment needed” and is therefore “not likely to have a significant impact.” *Id.* Focusing on state and local government fees is really a “distraction” from “broadband deployment economics,” which are “very challenging” and should be addressed through “creative collaborations” between the private sector and state and local government. *Id.*

Though the FCC’s “purported rationale” for eliminating local governments’ ability to negotiate fees with carriers is that carriers will make new investments in underserved areas, “industry gets all the benefits (reduced fees to access state and local property) with no obligations to reinvest the resulting profits in rural broadband.” *Id.*

In short, the FCC’s “reinvestment” theory ignores history and economically rational corporate behavior. There is nothing surprising or evil about telecom providers simply pocketing the estimated \$2 billion in savings resulting from the FCC’s order. See David Carr, *Telecom’s Big Players Hold Back the Future*, New York Times (May 19, 2013), <https://www.nytimes.com/2013/05/20/business/media/telecoms-big-players-hold-back-the-future.html>. (“[H]istory has demonstrated that left to their own devices, companies will gouge the rich, leave out the poor, cherry-pick markets and focus solely on their profits. It isn’t evil, it’s just the way things work.”) (quoting Professor Susan Crawford). But there is certainly at least naivete in the FCC expecting

telecom providers—unilaterally—to put their savings toward providing 5G communications in underserved areas.

Therefore, this case is vitally important. Unless this Court grants certiorari, the FCC order will “facilitate a large transfer of wealth from the public to private enterprises—and leave American communities and states no better positioned to bridge digital gaps between urban and rural or between rich and poor.” *FCC Ignores Reality, supra*.

D. The \$81 billion question.

The \$81 billion question in this case is how can the FCC conclude that carriers must be spared \$2 billion in fees to local governments for licensing their rights-of-way when the federal government recently earned \$81 billion from those same carriers in a licensing auction of the spectrum that will undergird 5G deployment. In limiting local government fees to cost basis and presumptive caps, the FCC’s logic is at odds with its own auction, in which it imposed no cost-basis limitation and carriers paid more than \$81 billion to the federal government.

The FCC relied on the Corning Study to conclude that by limiting state and local governments to recovering their costs, carriers would save more than \$2 billion. Pet. 151a; *see also* Pet. 25a, 28a-29a. The FCC further reasoned that wireless service providers would voluntarily use those savings to deploy 5G services “in other parts of the country.” Pet. 21a.

The \$2 billion in savings might call to mind the old saying from the 1960s, “A billion here, a billion there,

and pretty soon you're talking real money.”⁵ For 21st Century national telecom providers, however, that amount is more akin to a rounding error. The FCC's recent spectrum auction illustrates the point.

The FCC auctions off electromagnetic spectrum—the radio frequencies necessary to provide 5G services—by using a competitive bidding system to “award the licenses to those who will use them most effectively” and generating proceeds for the U.S. Treasury. *About Auctions*, Fed. Commc'ns Comm'n, <https://www.fcc.gov/auctions/about-auctions> (last updated Aug. 9, 2006). Typically, the FCC auctions off spectrum licenses in blocks, which are a function of two factors: the number of frequencies being licensed and the number of different regions in which they are being offered. *Auction 107: 3.7 GHz Service*, Fed. Commc'ns Comm'n, https://www.fcc.gov/auction/107/factsheet#Licenses_offered.

The FCC commonly runs spectrum auctions as simultaneous multiple-round (“SMR”) auctions, offering up multiple licenses over a number of frequencies. *Auction Designs*, Fed. Commc'ns Comm'n, <https://www.fcc.gov/auctions/auction-designs> (last updated Aug. 9, 2006); *Auction 107: 3.7 GHz Service*, Fed. Commc'ns Comm'n, <https://www.fcc.gov/auction/107/factsheet>. In an SMR auction, the bidding of licenses is broken into rounds of a predetermined length. *Id.* The rounds continue until there is one with no new bids, thereby ending the auction. *Id.* By the very nature of this system, there is no cap on the

⁵ The line was widely attributed to Senator Everett Dirksen. *See, e.g.,* Senator Everett McKinley Dirksen Dies, Sept. 7, 1969, https://www.senate.gov/artandhistory/history/minute/Senator_Everett_Mckinley_Dirksen_Dies.htm.

amount bidden and no requirement that the federal government's license fees be limited to cost basis.

Deemed a “record-breaking success” by then-FCC Chairman Ajit Pai, the FCC held its most recent spectrum SMR auction, Auction 107, in December 2020, generating net proceeds of more than \$81 billion (\$81,114,481,921 to be exact). *FCC Announces Winning Bidders in C-Band Auction*, Fed. Commc'ns Comm'n, <https://docs.fcc.gov/public/attachments/DOC-370267A1.pdf>; *First Phase of Record-Breaking 5G Spectrum Auction Concludes*, Fed. Commc'ns Comm'n, <https://docs.fcc.gov/public/attachments/DOC-369265A1.pdf>.

Auction 107 auctioned licenses for spectrum in the mid-band range, frequencies that are “at the very heart of [] 5G networks” because “[t]hey offer a great combination of reasonably good coverage and enough open frequency space to enable high-speed connections.” Bob O'Donnell, *C-Band Auction Points to Dramatic Shift in 5G*, *Forbes* (Jan. 27, 2021), <https://www.forbes.com/sites/bobodonnell/2021/01/27/c-band-auction-points-to-dramatic-shift-in-5g/?sh=3208f06fa36c>.

In total, the FCC's Chief Data Officer estimated that Auction 107 cost telecom providers \$93.9 billion dollars, after including the accelerated clearing and relocation payments that winners must pay to current satellite incumbents. Sasha Javid, *The Price is Right? Clock Phase of the C-band Auction Closes with \$80.9 Billion in Gross Proceeds*, LinkedIn (Jan. 15, 2021), <https://www.linkedin.com/pulse/price-right-clock-phase-c-band-auction-closes-809-billion-sasha-javid/>.

The federal government’s proceeds from 5G spectrum auctions will increase, because the FCC is gearing up to host another auction in October 2021 (Auction 110) to auction midband spectrum in the 3.45-3.55 GHz band with a proposed reserve price of \$14.7 billion. *FCC Seeks Comment on Mid-Band Spectrum Auction*, Fed. Commc’ns Comm’n, <https://docs.fcc.gov/public/attachments/DOC-370863-A1.pdf>. Collectively, the FCC’s spectrum auctions generate funds for the U.S. Treasury by requiring buyers to purchase an essential piece of the 5G buildout—spectrum.

It is thus inconsistent for the FCC to conclude that local government fees must be lowered by \$2 billion or they will “materially inhibit” 5G deployment by wireless service providers—while at the same time allowing the federal government to generate more than \$81 billion in net proceeds from the very same providers to provide the very same service.

What we have here is an obliteration of federalism. An unelected federal agency has regulated what state and local governments can charge carriers for access to their public property while it imposes a bidding war to maximize what the federal government receives for access to its less concrete property interests in spectrum.

* * * * *

How did America reach this point, where a federal agency is blithely giving away local public rights-of-way to telecom providers for a song? For the past three decades, wireless networks “have been subject to less and less government oversight.” Susan Crawford, *Captive Audience: The Telecom Industry*

and Monopoly Power in the New Gilded Age, 160 (2013). As explained by Professor Crawford:

There is a constant, easy, friendly flow between government and industry in the communications world bounded by the suburbs of Arlington, Virginia, and Bethesda, Maryland. Regulators switch jobs and become the regulated; the regulated leave their posts and take leadership roles in trade associations; everyone stays in touch.

Id. at 7. The policies that “led to the current situation” have been coordinated by “legions of lobbyists, hired-gun economists, and credulous regulators.” *Id.* at 260. We are faced with a regulatory agency that has seemingly been captured by the regulated, the proverbial henhouse guarded by the fox. *See, e.g., Preventing Agency Capture: Special Interest Influence and How to Limit It* (Daniel Carpenter & David A. Moss eds., 2014); Sidney A. Shapiro & Rena Steinzor, *Capture, Accountability, and Regulatory Metrics*, 86 *Tex. L. Rev.* 1741 (2008).

Fortunately, while the referees below have not required a fair match, the technical knockout is not yet final. This Court should enter the ring.

CONCLUSION

The petition for a writ of certiorari should be granted.

April 2021

Respectfully submitted,

LISA SORONEN
STATE AND LOCAL
LEGWAL CENTER
123 N. Capitol St. N.W.
Washington, DC 20001
(202) 434-4845

JOHN J. KORZEN
Counsel of Record
WAKE FOREST UNIVERSITY
SCHOOL OF LAW
APPELLATE ADVOCACY
CLINIC
Post Office Box 7206
Winston-Salem, NC 27109
(336) 758-5832
korzenjj@wfu.edu

Counsel for Amici Curiae