NO. _____

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

PETITION FOR WRIT OF CERTIORARI

JOSEPH VAN EATON
CHERYL A. LEANZA
BEST BEST & KRIEGER LLP
1800 K Street, NW
Suite 725
Washington, DC 20006
(202) 785-0600
Joseph.VanEaton@bbklaw.com

Counsel for City of Portland, Oregon, et al.

TILLMAN L. LAY
Counsel of Record
JEFFREY M. BAYNE
LAUREN L. SPRINGETT
SPIEGEL & MCDIARMID LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000
Tim.Lay@spiegelmcd.com

Counsel for City of Eugene, Oregon

(additional counsel listed on inside cover)

MICHAEL J. WATZA
KITCH DRUTCHAS WAGNER
VALITUTTI & SHERBROOK
One Woodward Avenue
Suite 2400
Detroit, MI 48226-5485
mike.watza@kitch.com

Counsel for City of Livonia, Michigan, et al.

QUESTION PRESENTED

The federal Cable Act requires cable operators to obtain a local franchise to provide cable service and imposes specific limitations on cable franchising, including limiting "tax[es], fee[s] or assessment[s]" imposed on cable operators "solely because of their status as such" to five percent of gross revenues derived from the cable system's operation to provide cable service. 47 U.S.C. § 542. Otherwise, local and state authority is preserved; only laws "inconsistent with" the Act are preempted. *Id.* § 556(c). The City of Eugene, Oregon, requires all companies with facilities in the public rights-of-way, including cable operators, to pay a seven percent fee on broadband and other non-cable service revenues. The Oregon Supreme Court and the Sixth Circuit agree, contrary to a Federal Communications Commission ruling, that this fee is not based solely on a cable operator's "status as such" and is not preempted by Section 542. Nevertheless, in conflict with the Oregon Supreme Court, the Sixth Circuit construed Sections 541(a)(2) and 544(b)(1) of the Cable Act to grant cable operators, "by implication," a federal right to use rights-of-way to provide non-cable services, subject only to Section 542's cable revenue-based fee; it therefore preempted fees like Eugene's.

The question presented is:

Whether the Sixth Circuit properly held, in conflict with the Oregon Supreme Court, that a fee which is consistent with the Cable Act's only express provision limiting state or local fees and taxes on cable operators is nonetheless preempted, based on its conclusion that other provisions of the Act grant cable operators, "by implication," a federal right to provide non-cable services over local rights-of-way subject only to a cable revenue-based fee.

PARTIES TO THE PROCEEDING

Petitioners are: City of Eugene, Oregon; City of Portland, Oregon; Anne Arundel County, Maryland; Boston, Massachusetts; City of Livonia, Michigan; District of Columbia; Fairfax County, Virginia; State of Hawaii; Howard County, Maryland; City of Kirkland, Washington; Lincoln, Nebraska; Los Angeles County, California; Prince George's County, Maryland; The Sacramento Metropolitan Cable Television Commission; Texas Coalition of Cities for Utility Issues; Michigan Municipal League; Michigan Township Association; Mid-Michigan Area Cable Consortium; PROTEC; and National Association of Telecommunications Officers and Advisors.

The Federal Communications Commission and the United States of America are respondents and were respondents in the court of appeals.

Respondents that were petitioners below:

Alliance for Communications Democracy; Alliance for Community Media; Baltimore, Maryland; Bellevue, Washington; City of Bellingham, Washington; City of Bloomington, Minnesota; City of Bowie, Maryland; Brookhaven, Georgia; Carmel, Indiana; City of Chicago, Illinois; College Park, Maryland; Colorado Communications and Utility Alliance; Chevy Chase Village, Maryland; Davis, California; City and County of Denver, Colorado; Dubuque, Iowa; Edmond, Oklahoma; Edmonds, Washington; City of Fridley, Minnesota; Gaithersburg, Maryland; Greenbelt, Maryland; King County, Washington; City of Lacey, Washington; Laredo, Texas; Laurel, Maryland; City of Los Angeles, California; County of Marin, California; Minneapolis, Minnesota; Montgomery County, Maryland; Mt. Hood Cable Regulatory Commission; National League of

Cities; North Metro Telecommunications Commission; North Suburban Communications Commission; North Dakota County Cable Communications Commission; Northwest Suburban Cable Communications Commission; Oklahoma City, Oklahoma; City of Olympia, Washington; City of Palo Alto, California; Philadelphia, Pennsylvania; City of Pittsburgh, Pennsylvania; City of Portland, Maine; Rainier Communications Commission; Ramsey/Washington Counties Suburban Cable Communications Commission II; City of St. Louis Park, Minnesota; City of St. Paul, Minnesota; City of San Antonio, Texas; City and County of San Francisco, California; City of Seattle, Washington; Sioux Falls, South Dakota; South Washington County Telecommunications Commission; Southwest Suburban Cable Commission; the City of Tacoma, Washington; Thurston County, Washington; City of Tumwater, Washington; United States Conference of Mayors; Wilmington, Delaware; and Yuma, Arizona.

Respondents that were petitioner intervenors below:

City of Aurora, Colorado; City of Austin, Texas; Bloomfield Township, Michigan; Chicago Access Corporation; City of Coral Gables, Florida; City of Dearborn, Michigan; City of Fairview, Oregon; Florida League of Cities, Inc.; City of Grandville, Michigan; City of Hudsonville, Michigan; Jamestown Township, Michigan; City of Kent, Washington; City of Madison Heights, Michigan; Meridian Township, Michigan; City of New York; the City of Omaha, Nebraska; City of Pembroke Pines, Florida; City of Southfield, Michigan, Washington Association of Telecommunications Officers and Advisors; and City of Worthington, Minnesota.

Respondent that was a respondent intervenor below:

NCTA—The Internet & Television Association.

RULE 29.6 STATEMENT

Petitioners here are governmental agencies and therefore exempt from Rule 29.6, or are associations made up of governmental agencies which do not issue stock, have no parent corporation, and are not owned in any part by any publicly held corporation.

RELATED PROCEEDINGS

United States Court of Appeals (6th Cir):

City of Eugene, Oregon v. FCC (19-4161); *City of Portland, Oregon, et al. v. FCC* (19-4162); *State of Hawaii v. FCC* (19-4163); *Alliance for Communications Democracy, et al. v. FCC* (19-4164); *Anne Arundel County, Maryland, et al. v. FCC* (19-4165); *City of Pittsburgh, Pennsylvania v. FCC* (19-4166); *City of Chicago, Illinois, et al. v. FCC* (19-4183), (August 3, 2021) (petition for reh'g denied).

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OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-26a) is reported at 998 F.3d 701 (6th Cir. 2021). The Third Report and Order of the Federal Communications Commission (App. 27a-236a) is reported at 34 FCC Rcd. 6844 (2019).

JURISDICTION

The judgment of the court of appeals was entered on May 26, 2021 (App. 2a). Petitions for rehearing were denied on August 3, 2021 (App. 237a-238a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND ORDINANCE PROVISIONS INVOLVED

The following federal statutory provisions are involved in this case and reproduced in the appendix: 47 U.S.C. § 542(a), (b), (g)(1), (g)(2)(A), (i) (reproduced at App. 239a-242a); 47 U.S.C. § 541(a)(1)-(3), (b)(1), (b)(3), (d)(2); (reproduced at App. 243a-244a); 47 U.S.C. § 544(a), (b), (f)(1) (reproduced at App. 245a-246a); 47 U.S.C. § 556(a), (c) (reproduced at App. 247a); Pub. L. 104-104, § 601(c) (codified at 47 U.S.C. § 152 note) (reproduced at App. 248a). The following provisions of the Eugene Code ("EC") are involved in this case and reproduced in the appendix: EC § 3.005 (excerpt) (reproduced at App. 249a); EC § 3.405 (reproduced at App. 250a); EC § 3.410(3) (reproduced

at App. 251a); EC § 3.415(2) (reproduced at App. 252a).

INTRODUCTION

In conflict with the Oregon Supreme Court, the Sixth Circuit ruled that the federal Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-573, as amended ("Cable Act" or "Act"), preempts state and local governments from assessing fees on cable operators for use of the rights-of-way to provide non-cable services, such as broadband internet. In doing so, the Sixth Circuit upheld a Federal Communications Commission ("FCC") ruling that explicitly repudiated *City of Eugene v. Comcast of Oregon II, Inc.*, 375 P.3d 446 (Or. 2016) ("*Comcast of Oregon*"), where the Oregon Supreme Court held that the Cable Act did *not* preempt the City of Eugene, Oregon's ("Eugene") right-of-way fee on non-cable services, a fee that applies equally to all communications companies, including cable operators, using the rights-of-way.

The Oregon Supreme Court found fees on non-cable services are not preempted based on a straightforward textualist reading of the Cable Act, including its savings clauses preserving state and local authority. The Sixth Circuit upheld the FCC's invalidation of fees like Eugene's based not on the Cable Act's express provision limiting fees on cable operators, but on its conclusion that Eugene's fee was inconsistent with rights impliedly given to cable operators by the Cable Act to use the rights-of-way without paying any generally applicable fees on their provision of non-cable services like broadband internet services.

Review is needed to resolve the express conflict between a state court of last resort and a federal Court of Appeals as to an important question regarding the Cable Act's preemptive reach. State and local government revenues depend on tax and fee authority, and issues about a federal statute's preemption of that authority are critical to the balance of federalism. Moreover, review is needed now because this dispute arises from circuit court review of an agency decision pursuant to the Administrative Orders Review Act ("Hobbs Act"), 28 U.S.C. § 2342(1); a future circuit court split is therefore unlikely, if not impossible. *See PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055 (2019).

Further, review is appropriate because of the decision's significant impact on competition in the communications industry. Cable service subscriptions and revenues (and thus state and local government revenue from Cable Act franchise fees) are decreasing, while broadband internet revenues are growing. The Sixth Circuit's interpretation exempts cable operators, and only cable operators, from all otherwise generally applicable fees like Eugene's, granting them a unique, preferential advantage over broadband providers that are not also cable operators. Nothing in the Cable Act's text, history, or its subsequent amendments remotely suggests that Congress intended such favoritism. Federal law should not lightly be read to "'relieve'" some entities from "'their just share'" of state financial burdens. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2094 (2018) (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). Nor should "the Judiciary . . . create market distortions." *Id.* (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)).

This Court's review and resolution of the conflict between the Sixth Circuit and Oregon Supreme Court also would provide much needed clarity on the proper approach to implied preemption, particularly where, as here, a statute contains express preemption clauses that do not forbid a particular action at issue, together with express savings clauses that preserve state and local authority and also direct that the statute should not be construed to impair such authority. The Court should use this opportunity to make clear that, while express preemption or savings clauses may not foreclose implied preemption entirely, *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 869 (2000), courts may not lightly infer that Congress creates federal rights by implication that preempt state and local actions, *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582, 607 (2011) ("*Whiting*") (noting the "high threshold" necessary for "a state law . . . to be pre-empted for conflicting with the purposes of a federal Act") (plurality opinion) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110 (1992)).

STATEMENT OF THE CASE

1. *Structure of the Cable Act.* Congress enacted the federal Cable Act in 1984 to "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems." 47 U.S.C. § 521(3). Under the Act, Congress required a cable operator to obtain a cable television franchise from a state or locality in order to provide cable service. *Id.* § 541(b)(1). It permitted, but also capped, the fees and taxes that states and localities could impose on cable operators or cable services. *Id.* § 542. States and localities were also given primary

responsibility for ensuring cable systems are "responsive to the needs and interests of the local community." *Id.* § 521(2); H.R. Rep. No. 98-934, at 19 (1984). To that end, the Act left state and local governments with the authority to regulate the provision of services and the system so long as consistent with the Communications Act of 1934, 47 U.S.C. §§ 151-664 ("Communications Act"), of which the Cable Act is a part. 47 U.S.C. § 556(c); *see also id.* § 544(a) ("Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with [the Cable Act]"). While Congress recognized that cable operators might also provide other services in addition to cable service, the Cable Act specifically preserved state authority to regulate cable operators' provision of any other communications services. *Id.* § 541(d)(2).

Two provisions of the Cable Act are at the core of the conflict between the Sixth Circuit and Oregon Supreme Court:

a. First, the Cable Act permits, but also limits, the imposition of franchise fees on cable operators. 47 U.S.C. § 542(a). The Act defines a franchise fee 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." *Id.* § 542(g)(1).

As originally enacted in 1984, Section 542 capped franchise fees at five percent of the cable operator's revenue derived from the operation of the cable system. Congress amended this provision in the Telecommunications Act of 1996, which was enacted to promote competition and enable cable operators and local telephone companies (telecommunications providers) to enter each other's markets. Pub. L. No.

104-104, 110 Stat. 56 ("1996 Act"); *id.* § 302(a), 110 Stat. at 121 (adding Communications Act § 653, codified at 47 U.S.C. § 573); *id.* § 302(b)(1), 110 Stat. at 124 (repealing ban on telephone company provision of cable service); *Am. Tel. & Tel. Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Congress amended Section 542 to narrow the maximum franchise fee that could be imposed pursuant to the Cable Act to five percent of the cable operator's revenue derived from operating the cable system "to provide *cable services*." 1996 Act, § 303(b), 110 Stat. at 125 (amending 47 U.S.C. § 542(b)) (emphasis added). At the same time that it narrowed the Cable Act franchise fee revenue base, Congress added a new provision preserving state and local authority to obtain "fair and reasonable" compensation from anyone using the rights-of-way in the provision of telecommunications services. *Id.* § 101(a), 110 Stat. at 70 (codified at 47 U.S.C. § 253(c)).[1]

Congress also made it clear, in a subsection titled "no implied effect," that the 1996 Act and its amendments to the existing law "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided . . . ." 1996 Act, § 601(c)(1), 110 Stat. at 143 (codified at 47 U.S.C. § 152 note). To this anti-preemption clause,

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[1] In explaining the 1996 amendment to Section 542, the Conference Report to the 1996 Act confirms Congress intended to preserve state and local authority to impose fees on cable operators' non-cable services. H.R. Rep. No. 104-458, at 180 (1996) ("Conf. Rep.") ("[t]he conferees intend that, to the extent permissible under State and local law, telecommunications services, including those provided by a cable company, shall be subject to the authority of a local government to, in a nondiscriminatory and competitively neutral way, manage its public rights-of-way and charge fair and reasonable fees").

Congress added a "tax savings provision" that provided further interpretive guidance by sharply confining which provisions in the Act may be construed to preempt state and local fees and taxes: "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede . . . any State or local law pertaining to taxation, except as provided in [47 U.S.C. §§ 542, 573(c)] and section 602 of this Act." 1996 Act, § 601(c), 110 Stat. at 143.[2]

b. Second, the Cable Act provides that franchising authorities "may establish requirements for facilities and equipment" in their requests for franchise proposals or franchise renewal proposals, but that franchising authorities "may not . . . establish requirements for video programming or other information services." 47 U.S.C. § 544(b)(1). The FCC currently classifies broadband service as an "information service," as defined in the Communications Act. *See Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

2. *Eugene's fee on non-cable services.* Eugene granted a cable television franchise to Comcast, embodied in a franchise agreement. *See Comcast of Oregon* at 449. That agreement imposes on Comcast "the maximum cable franchise fee that federal law allows: five percent of Comcast's gross revenue 'derived . . . from the operation of the cable system to

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[2] 47 U.S.C. § 542 is the cable television franchise fee provision, 47 U.S.C. § 573(c) applies to open video systems fees, and Section 602 of the 1996 Act prohibits local authorities (but not states) from imposing fees and taxes on direct-to-home satellite services. While Subsection 601(c)(2) of the 1996 Act refers to "taxation," the provisions it references treat taxes and fees the same.

provide cable services.'" *Id.* (quoting 47 U.S.C. § 542(b)).

Separately, the Eugene Code ("EC") requires any entity that provides telecommunications service through facilities in the City's rights-of-way to obtain a license and pay a license fee equal to seven percent of its revenue from such licensed services. *Comcast of Oregon* at 450. As defined in the EC, "telecommunications service" includes broadband service but expressly excludes cable service.[3] All broadband service providers, including those who are also cable operators, are evenhandedly subject to this requirement, paying the relevant fee on only their broadband service revenues. Neither Eugene's broadband fee nor the Cable Act franchise fee duplicates the other or is assessed on the same services or revenue. If a cable operator provides no non-cable services, it is not subject to the EC's broadband license requirement or fee.

3. *The Oregon Supreme Court decision.* Comcast and Eugene disagreed as to whether the City's license fee, as applied to Comcast's non-cable services, was preempted by federal law, including the Cable Act. In 2016, their dispute reached the Oregon Supreme Court, which held that application of Eugene's license fee to Comcast is not preempted.

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[3] The definition of "telecommunication service" in the EC is different than, and independent of, that used in the federal Communications Act. *Compare* EC §§ 3.005 (definition of "telecommunications service"), 3.410(1)(b), 3.415(2) *with* 47 U.S.C. § 153(50), (53). Under the EC, "telecommunications service" includes "all forms of telephone services and voice, data and video transport, *but does not include: (1) cable service*" and certain other services not relevant here. EC § 3.005 (emphasis added).

a. The Oregon Supreme Court rejected Comcast's argument that Eugene's fee is inconsistent with the Cable Act's cap on cable television franchise fees, 47 U.S.C. § 542. *Comcast of Oregon* at 462-63. The court held that under Section 542, "[a] fee is a franchise fee [under the Cable Act] if it is imposed on a company because it is a cable operator and not for any other reason." *Id.* at 463. Here, however, the Eugene fee was "imposed on Comcast because it provides telecommunications services [as defined in the EC] over the city's public rights of way," and "Comcast's status as a cable operator is only incidental." *Id.*

b. The Oregon Supreme Court also rejected Comcast's "effort to establish a right under [the Cable Act] to provide [broadband and other non-cable] services over the city's public rights of way" without paying Eugene's fee. *Id.* at 456. The court explained that the Cable Act does not "grant[] cable operators an affirmative right to provide non-cable services." *Id.* at 458. Rather, any right to provide non-cable services over facilities in the City's rights-of-way "is determined by other applicable law"—here, Eugene's Code. *Id.*

4. *The FCC decision.* In 2019, three years after the Oregon Supreme Court's decision upholding Eugene's fee as consistent with the Cable Act, the FCC issued an order that, among other things, broadly concluded that the only fee that may be charged to a cable operator for its use of the rights-of-way to provide any non-cable service is the Section 542 franchise fee limited to revenues derived from the operation of the system to provide cable service. The FCC expressly "repudiate[d]" the Oregon Supreme Court's reasoning in *Comcast of Oregon*. App. 173a-175a. The FCC added that *Comcast of Oregon*

"appears to have prompted an increasing number of states and municipalities to impose fees on franchised cable operators' provision of non-cable services." *Id.*

a. Contrary to the Oregon Supreme Court, the FCC held that Eugene's license fee, as applied to cable operators, was a "franchise fee" within the meaning of the Cable Act and thus inconsistent with the Act's franchise fee limitation in 47 U.S.C. § 542. App. 153a-158a.

b. The FCC also concluded, applying the "consistent with" language in 47 U.S.C. § 544(a), that local franchising authorities are prohibited from exercising Cable Act authority, or any other state-granted authority, to regulate "the provision of any service other than cable services offered over the cable systems of incumbent cable operators, except as expressly permitted in the Act." App. 117a, 128a-143a. The FCC made this a rule, which it claimed synthesized the Act's many provisions with respect to state and local authority. App. 117a.

Applying this construction of Section 544 to fees on cable operators' broadband service, the FCC stated that franchising authorities "may not lawfully impose fees for the provision of information services (such as broadband internet access) via a franchised cable system or require a franchise (or other authorization) for the provision of information services via such cable system." App. 129a-131a.

5. *The Sixth Circuit decision.* Numerous local governments petitioned for review of the FCC's order, and those petitions were ultimately transferred to the Sixth Circuit. App. 6a. Although the court rejected some of the FCC's reasoning, it upheld most of the FCC's order.

a. The Sixth Circuit found that the FCC's rule limiting regulation of non-cable services misstated the statute because "the Act nowhere states or implies that franchisors may regulate cable operators only as 'expressly permitted in the Act.'" App. 14a (quoting App. 117a).

b. Like the Oregon Supreme Court, but unlike the FCC, the Sixth Circuit held that Eugene's fee "is not a 'franchise fee' under § 542(g)(1); the fee does not count toward the § 542(b) cap; and its imposition is not, on that ground, 'inconsistent with' [the Cable Act]." App. 22a (quoting 47 U.S.C. § 556(c)). Because Eugene's fee is imposed based on the provision of broadband—not cable—service over the rights-of-way, the Sixth Circuit reasoned that the fee is not imposed on a cable operator solely because of its status *as a cable operator*, according to the Act's definition of "cable operator" (47 U.S.C. § 522(5)), which hinges on the provision of cable service. App. 22a.

c. The Sixth Circuit went on to find, however, that Eugene's fee, and fees like it, are preempted by Section 544(b)(1), the provision limiting conditions that may be included as part of a request for cable franchise proposals. The Sixth Circuit recognized Eugene did not impose its fee "as a condition for a cable franchise," App. 23a, but concluded that Eugene "circumvented" Section 544's limitation when it imposed its fee on information services "by means of the City's police power" over non-cable services. *Id.*[4]

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[4] The Sixth Circuit left open the possibility that a cable operator could be required to pay a fee for use of the rights-of-way to provide telecommunications services as defined under federal law. App. 17a n.2.

The Sixth Circuit justified its conclusion by citing 47 U.S.C. § 541(b)(1), which requires cable operators to obtain a cable franchise to offer cable service. The Sixth Circuit found Section 541(b)(1) "makes clear, albeit by implication, that a [Cable Act] franchise shall be construed to allow the cable operator to operate the cable system," and "Congress undisputedly contemplated that cable operators would use their facilities to provide both cable and non-cable services." App. 23a, 22a. The Sixth Circuit therefore concluded that by granting a Cable Act franchise, Eugene 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 that the city had "surrendered its right to exclude the cable operator from the City's rights-of-way." App. 24a. Having decided that the Cable Act implicitly grants a cable operator a federal right to provide broadband service via its cable television franchise, the court reasoned 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 § 544(b)(1) expressly barred the City from exercising its franchise power to that end." App. 24a.

Although the Sixth Circuit's decision nowhere cites *Comcast of Oregon*,[5] its holding squarely conflicts with the Oregon Supreme Court's analytical approach to preemption; its holding that the Cable Act does *not* grant a cable operator a federal right to use local rights-of-way to provide non-cable services; and

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[5] That is so despite the fact that the Oregon Supreme Court's decision was cited many times in petitioners' briefs to the Sixth Circuit and again in their rehearing petition.

its ultimate conclusion that Eugene's fee is not preempted by the Cable Act.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's decision conflicts with that of the Oregon Supreme Court on an important question of federal law.

1. This Court's review is necessary to clarify the scope of the Cable Act's preemptive reach, given the stark difference between the Sixth Circuit's inferences about what Congress intended and the Oregon Supreme Court's reliance on the statute's plain text. According to the Sixth Circuit, cable operators—and only cable operators—have a unique federal right to use state and local rights-of-way to provide broadband and other non-cable services free from any state and local requirements beyond those imposed as part of Cable Act franchises. In contrast, the Oregon Supreme Court held that cable operators are subject to the same state and local requirements governing access to the rights-of-way to provide broadband and other non-cable services as non-cable operators.

The Sixth Circuit held that the Cable Act "makes clear, albeit by implication, that a franchise shall be construed to allow the cable operator to operate the cable system," and that this implicit right "includ[es]—as Congress plainly anticipated—the right to use that system to provide information services." App. 23a-24a. The court then found—also by implication—that in exercising this right, cable operators could not be required to pay any additional fee other than a Cable Act franchise fee limited to cable service-related revenues.

This reading of the Cable Act is incorrect and in direct conflict with the Oregon Supreme Court's.

Whereas the Sixth Circuit relied on its view of what Congress "contemplated" or "anticipated," App. 22a-24a, the Oregon Supreme Court held that the plain text of the Cable Act does not confer on cable operators a preemptive federal *right* to use state and local rights-of-way to provide non-cable services, much less the right to do so without paying applicable fees and taxes. *Comcast of Oregon* at 456-63. Although the Oregon Supreme Court acknowledged that the legislative history of the Cable Act shows that Congress was "aware that cable systems could be used to provide noncable communications services," and "that the Cable Act does not prohibit a cable operator from providing noncable services," it explained that even this legislative history "does not establish . . . that the Cable Act grants cable operators an affirmative right to provide non-cable services" or prohibit localities from "charging fees for the right to provide noncable services over the cable system that occupies public rights of way." *Id.* at 457.

Accordingly, the Oregon Supreme Court explained that "the question is not whether Comcast has a right to use the cable system; the question is the scope of that right," and "determining the scope of the rights required by [the Cable Act]" begins with the statute's text. *Id*. at 456. "[A] plain reading of the statute suggests that the scope of Comcast's right to use the cable system" must be determined by the specific terms of an individual franchise agreement or other provisions of law. *Id*. at 457.

2. The Sixth Circuit's and Oregon's Supreme Court's decisions also conflict on whether fees like Eugene's can be preempted as inconsistent with the Cable Act, even though the fee is consistent with Section 542—the Cable Act's express and only provision setting a federal limit on the state or local

taxes, fees, and assessments that may be imposed on cable operators. Both the Oregon Supreme Court and the Sixth Circuit recognized that (in the words of the Sixth Circuit) the "test for preemption under [47 U.S.C. §§ 544(a), 556(c)] is whether state or local action is 'inconsistent' with a specific provision of the Act." App. 15a; *see also Comcast of Oregon* at 458 n.13. And both courts found Eugene's fee to be consistent with Section 542, the provision of the Cable Act that addresses "tax[es], fee[s] and assessment[s]" that may be levied on cable operators. But the Sixth Circuit found the fee to be inconsistent with Section 544, adopting an expansive view of rights implied by that provision that directly conflicts with the Oregon Supreme Court's construction and disregards the express intent of Congress, contrary to this Court's precedent.

a. The Oregon Supreme Court's and Sixth Circuit's holdings that Eugene's fee on non-cable services is "consistent with" 47 U.S.C. § 542 were based on the Cable Act's text, specifically the Act's definition of "franchise fee" in Section 542(g)(1). The courts concluded that Eugene's fee is not imposed on cable operators "solely because of their status as such," *id*. § 542(g)(1); rather, it is imposed on cable operators (and other entities) because they provide other, non-cable services over facilities in the City's rights-of-way. *Comcast of Oregon* at 462-63; App. 22a. Eugene's fee is therefore not a Cable Act "franchise fee," it is not subject to Section 542's franchise fee cap, and its imposition on cable operators is consistent with Section 542. *Comcast of Oregon* at 463; App. 22a.[6]

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[6] Both courts thus rejected the "plain language" interpretation adopted by the FCC, which found that the Eugene fee was a

This focus on the specific text of Section 542's franchise fee limitation is consistent with Congress's intent, explicitly expressed in the 1996 Act. The 1996 modification of Section 542 to encompass only revenues derived from cable service did *not* prevent imposition of fees on other services, so long as the fees were not imposed on the cable operator solely because of its status as such—in other words, as long as the fees are not a "franchise fee" under Section 542(g). If there were any doubts, Congress dispelled them elsewhere in the 1996 Act. First, Congress affirmed that the change to Section 542 (and other amendments adopted by the Act) had "no implied effect" on state or local authority. 47 U.S.C § 152 note. Second, it confirmed that the Act's only intended limitations on local taxing authority were Section 542's limitation on franchise fees on cable operators, which both courts found did *not* bar Eugene's, or similar, fees, and two other provisions not applicable here.[7] *Id.* Sections 541 and 544, upon which the Sixth Circuit relied to uphold the FCC's preemption of Eugene's fee, App. 23a-25a, are not on that list.

Nothing in the Cable Act suggests that Congress intended to give cable operators a preferential exemption from fees imposed on their telecommunications or broadband competitors. To infer that the Act confers on cable operators their own unique, market-distorting federal exemption from state and local fees and taxes is directly at odds with the Act's explicit intent to implement a national policy favoring "vigorous economic competition," 47 U.S.C. § 257(b). Yet that is precisely the effect of the right

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franchise fee within the meaning of the Cable Act. App. 153a-158a.

[7] *See* note 2 *supra*.

that the Sixth Circuit concluded Congress, "by implication," granted to cable operators.

More generally, the Oregon Supreme Court's decision, but not the Sixth Circuit's, is consistent with this Court's precedent on preemption of state and local tax and fee authority. That precedent confirms that courts are not to assume a federal statute preempts such authority absent a clear and precise statement from Congress. This Court has recognized "the taxation authority of state government . . . as central to state sovereignty." *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 345 (1994) (citing *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976); *Union Pac. R.R. Co. v. Peniston*, 85 U.S. 5, 29 (1873)). Accordingly, this traditional and vital state power is preempted "only if that result is 'the clear and manifest purpose of Congress.'" *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). In the Cable Act, Congress clearly expressed the scope of its intent to limit state and local tax and fee authority over cable operators in Section 542 and nowhere else.

b. The Sixth Circuit and Oregon Supreme Court diverged as to whether any other provision of the Cable Act precluded fees otherwise permissible under Section 542.

The Sixth Circuit determined that Eugene's fee conflicts with Sections 541 and 544. Unlike Section 542, neither provision says anything about fees imposed on cable operators. To expand these provisions to preempt fees that comply with the Act's franchise fee provision (Section 542), the Sixth Circuit wrongly ventured beyond the statute's plain text.

As an initial step, the Sixth Circuit premised its analysis on its holding that Section 541 implicitly grants cable operators a federal right to provide non-cable services exempt from paying any fees on their

non-cable service revenues. Next, although the Sixth Circuit recognized that Eugene's fee is not directly prohibited by Section 544(b)(1) because it is not a condition on a cable franchise, it concluded that Eugene's fee nevertheless "circumvent[ed] 'the Act's limitations by . . . accomplish[ing] indirectly what franchising authorities are prohibited from doing directly.'" App. 24a (quoting App. 146a-148a).

The Oregon Supreme Court, in contrast, applied a straightforward textual analysis and correctly found that Eugene's non-cable services fee is unrelated to the cable franchising process, and did not involve a request for cable television franchise proposals. Rather, the fee was imposed pursuant to Eugene's authority under state law *after* the City had entered into a separate cable television franchise agreement with Comcast. *Comcast of Oregon* at 449-450. The Eugene Code explicitly separates the requirement to obtain a cable franchise to provide cable services from the requirement to pay a fee on other services provided over facilities in the rights-of-way. *Id.* at 451 (citing EC § 3.410(3)). Indeed, the Oregon Supreme Court found that "Comcast makes no argument establishing that the license-fee requirement is one imposed by the city under the subchapter of the Communications Act regulating cable services or cable franchising [the Cable Act]." *Id.* at 460. Thus, although the Oregon Supreme Court acknowledged Section 544's prohibition on laws inconsistent with the Act, *id.* at 458 n.13, it found that Eugene's fee did not violate that limitation.

3. The Sixth Circuit similarly conflicts with the Oregon Supreme Court on whether Congress meant what it said when it used the term "franchising authority," 47 U.S.C. § 522(10). Section 544(b)(1) applies only to requirements established by "the

franchising authority," *id.* § 544(b), but the Sixth Circuit stretched the statute's preemptive reach to also include "other governmental entities or other sources of authority." App. 15a-16a (quoting App. 146a-148a) (internal quotation marks omitted).

The Oregon Supreme Court, in interpreting another Cable Act provision that specifically refers to the "franchising authority," held "that Congress intended to limit cable franchising authorities functioning as cable franchising authorities . . . but not to limit the rights that those governmental entities otherwise have outside the cable franchising process." *Comcast of Oregon* at 460. "If Congress intended to protect cable operators from burdens generally imposed, rather than burdens imposed in the cable franchising process or in the enforcement of cable franchising terms, then Congress would have imposed those limits on state or local governments generally, rather than specifically on cable franchising authorities." *Id.*

4. Contrary to the Oregon Supreme Court, and admittedly "by implication," the Sixth Circuit adopted an expansive interpretation that extends Section 544's preemptive reach to state and local taxes, fees, and assessments unrelated to cable service and imposed by state and localities outside of their roles as cable television franchising authorities. The Sixth Circuit's expansive interpretation of the Cable Act's preemptive reach has significant ramifications not only for states, localities, cable operators, and other service providers across the country, but also for federal agencies' authority to venture beyond their governing statute's text to preempt state and local authority.

The Court should grant review to reverse the Sixth Circuit's expansive interpretation and restore

the fidelity to the Cable Act's text embodied in the Oregon Supreme Court's decision.

II. Unless the Court clearly establishes a high threshold for implied preemption, federal agencies and lower courts may preempt broadly with little tether to statutory text.

This case presents an appropriate vehicle for the Court to clarify the appropriate legal standard to determine when and how implied preemption occurs alongside express preemption. This Court should hold that where, as here, Congress adopted multiple statutory savings clauses protecting state and local authority, and expressly and precisely confined the statute's preemptive scope with respect to tax and fee authority, it is not permissible for a court or federal agency to nevertheless infer, without a strong textual basis, that Congress nonetheless intended to preempt state and local fees and taxes still further via another route.

1. The Sixth Circuit decision is an application of implied preemption, and more particularly, implied obstacle preemption.[8] The Sixth Circuit found that Section 542 permits fees like Eugene's and that Section 544(b)(1) does not directly prohibit them. The Sixth Circuit did not identify in the Act any express grant of authority to cable operators to provide non-cable service via the right-of-way exempt from paying the same fees that other providers must pay.

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[8] Implied obstacle preemption occurs when Congress does not expressly preempt, but federal and state law conflict, or, when state or local law "'stands as an obstacle'" to the "full purposes and objectives of Congress." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Moreover, because a cable operator easily could, and after *Comcast of Oregon* did, comply with the Eugene fee while also complying with cable franchise requirements embodied in cable franchises, the provisions do not impose conflicting obligations.

Rather, the Sixth Circuit inferred that Congress meant to provide, without saying so, a federal right to provide non-cable service pursuant to a cable franchise without paying the applicable non-cable fee. App. 24a (quoting App. 146a-148a). While *Geier* held that an express preemption provision like Section 542 does not preclude consideration of implied obstacle preemption, courts or agencies may not cavalierly create implied rights, and on the basis of those implied rights, preempt otherwise valid state and local laws. *Id.* at 869.

The Sixth Circuit's conclusion that states and localities cannot use their sovereign authority to "do indirectly what cannot be done directly" short-circuits preemption analysis and demonstrates the danger of the Sixth Circuit's implied preemption unmoored from statutory text. *All* implied preemption analysis asks whether an action not directly prohibited is nonetheless proscribed. *See Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894 (2019). The Sixth Circuit recognized "Congress went out of its way *not* to suggest that federal law is the fountainhead of all franchisor regulatory authority." App. 15a (emphasis in original). It therefore should have asked whether Congress intended to abolish state and local sovereign authority, which was specifically not preempted, and in fact was expressly preserved. This Court's direction is needed to ensure lower courts adhere as closely as possible to the statutory text in implied preemption cases.

2. The Cable Act's text demonstrates the Sixth Circuit's finding of implied preemption is inappropriate. "Any evidence of pre-emptive purpose, whether express or implied, must . . . be 'sought in the text and structure of the statute at issue.'" *Va. Uranium* at 1907 (cleaned up) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)).

a. The Sixth Circuit ignored the multiple, express provisions Congress enacted to confine the statute's preemptive reach. Section 556(a) states, "[n]othing in this subchapter *shall be construed* to affect any" state or local authority "regarding matters of public health, safety, and welfare." 47 U.S.C. § 556(a) (emphasis added). Section 541(d)(2) holds the same. *Id*. § 541(d)(2) ("Nothing in this subchapter shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service."). In the 1996 Act, Congress clarified that its amendments to the Cable Act "*shall not be construed* to modify, impair, or supersede Federal, State, or local law unless *expressly* so provided . . . ." 47 U.S.C. § 152 note (emphasis added). And it also clarified that neither Section 541 nor Section 544—the two Cable Act provisions relied upon by the Sixth Circuit—was intended to limit state or local tax authority. *Id*. § 152 note.

To ignore the statutory text most directly applicable to Congress's intent with respect to preemption was error. Justice Scalia once observed that, "[u]nless [an anti-preemption provision] serves no function . . . [it] forecloses" implied obstacle preemption. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 96 (1987) (Scalia, J., concurring in part and concurring in the judgment).

b. The Sixth Circuit's use of implied preemption also violates the Cable Act's precise and detailed division of labor between federal and state and local authority, codifying "deliberately structured dualism." *Cap. Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 702 (1984) (internal quotation marks omitted). Some Cable Act requirements are adopted and enforced federally, 47 U.S.C. § 534 (must-carry of local broadcast television); some are set federally but enforced locally, *id.* §§ 552, 544(e) (minimum customer service and technical standards); some are based on locally determined needs and interests that vary from community to community, *id.* §§ 531, 546 (local access channels and institutional networks for non-residential subscribers); some adopt a federal minimum but permit additional state or local protections, *id.* §§ 551, 552, 554(i) (privacy, customer service and equal employment opportunity).

Other Cable Act provisions confirm the statute's detailed and specific preemptive scope. For example, Congress established several anti-leveraging provisions that prevent states or localities from using their cable franchising authority to regulate telecommunications service as defined under federal law; those provisions, *inter alia*, prohibit a franchising authority from imposing obligations on a cable operator through the cable franchising process that have "the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service." 47 U.S.C. § 541(b)(3)(B). But Congress also specifically preserved state authority to regulate the provision of any non-cable service. *Id.* § 541(d)(2). Congress did not preclude states or localities from regulating non-cable service, much less directly preclude states or localities from imposing taxes, fees, or assessments for use of the

rights-of-way under authority arising outside of the Cable Act. Rather, it required that any regulations be "consistent" with the Cable Act. *Id*. § 556(a).

The Act's precise preemption provisions, coupled with its multiple broad "non-preemption" provisions, support a conclusion that implied preemption is not Congress's intent. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 69 (2002). Reading additional preemption into this precisely calibrated scheme thwarts the goals Congress expressly adopted in the Cable Act.

3. While there is certainly a sound argument that implied preemption, and particularly implied obstacle preemption, has no application in the face of a carefully balanced regulatory scheme where the scope of preemption is defined by explicit preemptive and saving clauses, *Geier* holds that the existence of an express preemption provision does not preclude a finding of an implied preemption. *Geier* at 869. As this case illustrates, it is important for the Court to clarify how implied preemption operates alongside express preemption.

a. In addressing a federal statute that is carefully calibrated to preserve state and local authority, the Court held in *Whiting* that "a high threshold must be met if a state law is to be pre-empted for conflicting with a purposes of the federal Act." *Whiting* at 607 (internal quotation marks omitted). "When a federal law contains an express preemption clause, we 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress's preemptive intent.'" *Whiting* at 594 (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)).

Refocusing implied obstacle preemption on the statutory text, as suggested by *Whiting,* requires

reversal of the Sixth Circuit's decision. As discussed *supra*, the Sixth Circuit preempted by implying a federal right based on its view of congressional objectives, and then finding Eugene's ordinance was "incompatible" with that implied right, thereby broadening the Cable Act's preemptive sweep beyond state or local laws that directly conflict with the Act's provisions. App. 15a-16a. "Implied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives . . . ." *Whiting* at 607 (internal quotation marks omitted).

The Cable Act is not itself the source of state or local authority to regulate communications providers, or to charge them for use of public property. That authority has long been recognized to flow directly from the authority of the state as sovereign. *City of St. Louis v. W. Union Tel. Co.*, 148 U.S. 92, 100-02 (federal government authorization to use public right-of-way does not prevent state and local charges for its use), *reh'g denied*, 149 U.S. 465 (1893). The Cable Act effectively recognizes that authority and allocates state and local authority by types of services provided. *City of Dallas v. FCC*, 165 F.3d 341, 348 (5th Cir. 1999) (finding that, although the Cable Act "may have expressly recognized the power of localities to impose franchise requirements, it did not create that power," and that an FCC ruling that the Cable Act has impliedly preempted that power was invalid); App. 15a ("federal law is [not] the fountainhead of all franchisor regulatory authority"). Anticipating that other services might be provided by a cable operator does not imply that they can be provided without the right-of-way owner's permission and without compensation. Congress's decision to preempt state action deriving from one source of authority does not

imply a concurrent decision to preempt all sources of state authority. *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1349 (2020) (statute that deprives state courts of jurisdiction over federal law claims does not impact "state court jurisdiction over claims brought under other sources of law."). When state and local governments exercise a source of authority, expressly preserved by statute, to achieve a result not expressly precluded, that is not "circumvention" at all. Courts must "respect not only what Congress wrote but, as importantly, what it didn't write." *Va. Uranium* at 1900.

Just as in the statute at issue in *Whiting* at 587, Congress in the Cable Act left states and localities an explicit lane for activity where they were permitted to act; Eugene acted within the lane Congress preserved for it. That an express preemption provision does not necessarily preclude obstacle preemption is not a license for an agency or a court to abandon fidelity to a statute's text, including provisions that explicitly limit its preemptive reach.

A plurality of this Court has recognized a textual approach to obstacle preemption would avoid these issues. *Whiting* at 607. To aid the lower courts in implementing implied preemption jurisprudence, which is "already [] difficult to apply," *Geier* at 873, a majority of the Court should clearly preserve precise statutory schemes from being overridden by implied rights.

b. Even without *Whiting*'s ruling on obstacle preemption, *Geier* recognized "a court should not find pre-emption too readily in the absence of clear evidence of a conflict . . . ." *Geier* at 885 (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990)). In *Geier*, the regulation's express purpose was to provide manufacturers with "a range of choices"; state

common law would have narrowed that range and therefore thwarted the federal goal. *Id.* at 875. In this case, it is the Sixth Circuit's decision to preempt that thwarts Congress's choice to preserve state and local authority. It would also be useful for the Court to clarify that, consistent with *Geier*'s "clear evidence" standard, courts should not engage in the sort of free-ranging "implied right" approach of the Sixth Circuit, which overlooks the textual significance of the Cable Act's express franchise fee and savings clause provisions.

c. Such a clarification is also consistent with traditional tests applied in preemption cases, including the assumption that Congress does not lightly preempt as articulated in the clear- statement rule and the presumption against preemption. Although in *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016), the Court rejected reliance on the presumption against preemption where Congress adopts an express preemption clause, it has not abandoned that standard in implied obstacle preemption cases. Moreover, the Court recently reiterated that it "assum[es] . . . the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Merck Sharp & Dohme Corp. v. Albrecht,* 139 S. Ct. 1668, 1677 (2019) (internal quotation marks omitted). Both tests, if applicable, would also require reversal of the Sixth Circuit, as that court effectively created a presumption in *favor* of broad preemption through its creation of implied federal rights. When Congress has precisely preempted some actions and expressly directed the statute not be construed to impair state and local authority in other areas historically preserved to them, textual approaches and

presumptions against preemption both preclude creation of implied rights not found in the statute's plain text.

What is dangerous about the decision below is that its preemption is divorced from the Cable Act's strict text and applies none of the traditional rules for statutory construction to determine congressional intent. Such an approach, if allowed to stand, will necessarily lead to inconsistency in analysis and, as in this case, federal agency and court overreach.

4. This case provides an important opportunity for the Court to adopt a clearer standard for review of implied obstacle preemption that confirms that the Cable Act's detailed and precise statutory text and its express preemption and savings provisions do not permit the broad preemptive sweep attributed to it by the Sixth Circuit.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

JOSEPH VAN EATON
CHERYL A. LEANZA
BEST BEST & KRIEGER LLP
1800 K Street, NW
Suite 725
Washington, DC 20006
(202) 785-0600
Joseph.VanEaton@bbklaw.com

Counsel for City of Portland, Oregon, et al.

TILLMAN L. LAY
Counsel of Record
JEFFREY M. BAYNE
LAUREN L. SPRINGETT
SPIEGEL & MCDIARMID LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000
Tim.Lay@spiegelmcd.com

Counsel for City of Eugene, Oregon

MICHAEL J. WATZA
KITCH DRUTCHAS WAGNER VALITUTTI & SHERBROOK
One Woodward Avenue
Suite 2400
Detroit, MI 48226-5485
mike.watza@kitch.com

Counsel for City of Livonia, Michigan et al.

November 1, 2021