No. 21-661

IN THE
Supreme Court of the United States

CITY OF EUGENE, OREGON, ET AL.
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION FOR INTERVENOR-RESPONDENT NCTA – THE INTERNET & TELEVISION ASSOCIATION

HOWARD J. SYMONS
IAN HEATH GERSHENGORN
JESSICA RING AMUNSON
Counsel of Record
LAUREN J. HARTZ
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001
(202) 639-6000
JAmunson@jenner.com

QUESTION PRESENTED

The Cable Act preempts and supersedes "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter." 47 U.S.C. § 556(c). The question presented is whether the Sixth Circuit correctly applied that express preemption clause to hold that states and localities cannot circumvent the Cable Act's restrictions by enacting laws imposing regulations on cable operators that the Cable Act bars franchising authorities from imposing.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Intervenor-Respondent NCTA – The Internet & Television Association ("NCTA"), the principal trade association of the cable television industry in the United States, states that it has no parent corporation and that no publicly held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ADMINISTRATIVE RULINGS

LEGISLATIVE MATERIALS

INTRODUCTION

Congress enacted the Cable Act in 1984 to establish a national policy for cable communications intended to promote competition and minimize unnecessary regulation of cable operators, while also assuring that cable systems would meet the reasonable needs and interests of their local communities. *See* 47 U.S.C. §§ 521 *et seq.* Under the Cable Act, a cable operator must obtain a franchise from a state or local authority to construct and operate a cable system in public rights-of-way. *Id.* § 541(b). The franchising authority may charge a fee as compensation for use of the public rights-of-way limited to a percentage of annual gross revenues from the operation of the cable system "to provide cable services." *Id.* § 542(a)-(b). The Cable Act also cabins the exercise of franchise power in various ways and expressly preempts any provision of state or local law or franchise that is "inconsistent with" the Communications Act, which includes the Cable Act. *Id.* § 556(c). Finally, recognizing that cable systems can deliver more than cable service, the Cable Act prohibits state and local governments from exercising their franchising authority to regulate information services and telecommunications services provided by cable operators over their cable systems. *Id.* §§ 522(7)(C), 541(b)(3), 544(b)(1).

Contravening the plain text, some state and local governments have disregarded the limitations of the Cable Act by demanding additional franchises and additional fees from cable operators for offering broadband and other non-cable services over the same facilities that the cable franchise, by law, already

authorizes cable operators to operate in the rights-of-way. *Id.* § 541(a)(2). These additional costs and burdens violate the statute. They place cable operators at a competitive disadvantage with providers of broadband or telecommunications services that pay only once to access the public rights-of-way, and exacerbate the disparity with other video service providers who do not pay any such fees. In the short run, excess fees and regulations on cable operators can raise consumer costs to the extent they are passed through. In the long term, they reduce consumer welfare by inhibiting investment and innovation—particularly in broadband deployment—contrary to the Cable Act's terms and Congress's aims. *See id.* § 521(4), (6).

Against this backdrop of escalating costs and burdens, the FCC issued a series of orders to correct regulatory practices that departed from the statute. Pet. App. 102a. These orders clarified that state and local governments may not exercise their franchising authority to regulate cable operators' broadband or telecommunications services or double-charge them for using the public rights-of-way to provide such services, and that state and local laws pursuing the same impermissible ends are preempted.[1]

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[1] *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101 (2007) ("*First Report and Order*"), *aff'd*, *All. for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008); *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer*

In what is now its third decision addressing issues arising from the FCC's orders, the Sixth Circuit, in a unanimous decision by Judge Kethledge, upheld the FCC's preemption determination on review under the Administrative Orders Review Act ("Hobbs Act"), 28 U.S.C. § 2342(1). That holding broke no new ground; it followed from the Cable Act's plain text—including its express preemption clause—as well as its structure and purpose. Petitioners seek review of the Sixth Circuit's unanimous decision, but there is no basis for this Court's intervention.

First, in claiming an "express conflict" between the decision below and *City of Eugene v. Comcast of Oregon II, Inc.*, Petitioners misunderstand the purpose of the Hobbs Act to provide a uniform interpretation of federal law for courts across the country. The Oregon Supreme Court addressed a private dispute years before the FCC issued the decision at issue here and without the benefit of the FCC's authoritative interpretation of the Cable Act or the Sixth Circuit's rationale for upholding it. Petitioners can only speculate whether the Oregon Supreme Court or any other court would break from those authorities today.

Protection and Competition Act of 1992, 22 FCC Rcd 19633 (2007) ("*Second Report and Order*"), *review granted in part, denied in part*, *Montgomery County v. FCC*, 863 F.3d 485 (6th Cir. 2017); *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, 34 FCC Rcd 6844 (2019) ("*Third Report and Order*"), *review granted in part, denied in part*, *City of Eugene v. FCC*, 998 F.3d 701 (6th Cir. 2021).

Second, this case is not a proper vehicle for resolving the question presented. Certain statutory provisions Petitioners now characterize as "most directly applicable to Congress's intent with respect to preemption" were not addressed below for the simple reason that Petitioners never raised them. These arguments are therefore not ripe for this Court's review, and the Court should not excuse Petitioners' waiver based on their claim that review is now or never—a claim that overreads *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051 (2019).

Third, the policy arguments advanced by Petitioners and their *amici* do not justify this Court's review. Those arguments, claiming changed circumstances since 1984, would upend the competitive and deregulatory objectives that motivated Congress to enact the Cable Act and would lead to exactly the type of over-regulation that Congress sought to curb. In any event, those arguments should be addressed to Congress, not this Court.

Finally, while Petitioners frame this case as implicating important questions of implied preemption that need this Court's clarification, they all but ignore the express preemption clause that makes this case a straightforward one and renders implied preemption law inapposite. Even with respect to implied preemption, Petitioners have not identified any gap or confusion in preemption jurisprudence that warrants this Court's review.

In the end, Petitioners seek only the correction of what they mistakenly characterize as error by the Sixth Circuit, but there is no error for this Court to correct.

The Sixth Circuit properly construed and applied the Cable Act's express preemption clause. Its conclusion was buttressed by legislative history, and it advanced congressional purpose. Holding otherwise would give states and localities free rein to evade the limitations in Congress's carefully constructed regulatory framework and persist in the conduct that Congress intervened to stamp out.

STATEMENT

A. The Cable Act's limitations on franchising authority

The Cable Act established a national framework for cable communications that preserved the "critical role" of states and localities in the cable franchising process "while affirming the FCC's exclusive jurisdiction over cable service, and overall facilities which relate to such service." *All. for Cmty. Media v. FCC*, 529 F.3d 763, 767-68 (6th Cir. 2008) (quoting *City of N.Y. v. FCC*, 814 F.2d 720, 723 (D.C. Cir. 1987), *aff'd*, 486 U.S. 57 (1988)), *cert denied*, 557 U.S. 904 (2009).

The Cable Act requires a cable operator to obtain an authorization (a "franchise") from the appropriate state or local body (the "franchising authority") to access the public rights-of-way to construct and operate a cable system. *See* 47 U.S.C. §§ 522(9), 541(a)-(b). Under the Cable Act, a franchise "shall be construed to authorize the construction of a cable system over public rights-of-way." *Id.* § 541(a)(2).

A franchising authority may impose a fee on a cable operator in exchange for the rights-of-way access necessary to construct and operate the cable system.

That fee is limited to five percent of the annual revenues from the "operation of the cable system to provide cable services."[2] *Id.* § 542(b). The Act defines what constitutes a franchise fee subject to this limitation as "*any* tax, fee, or assessment of *any* kind" that a franchising authority can demand of a cable operator or its subscribers "solely because of their status as such." *Id.* § 542(g)(1) (emphases added). Although the Act excludes from the definition certain fees of "general applicability," it does not permit franchising authorities to impose any "tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers." *Id.* § 542(g)(2)(A).

The Cable Act likewise limits franchising authority over non-cable services provided through a cable system. As Congress understood when it enacted the law, cable systems have multiple uses. *See* H.R. Rep. No. 98-934, at 44 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4681 ("1984 House Report") (stating that the "term 'cable system' is not limited to a facility that provides only cable service" and includes the provision of "communications services other than

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[2] As originally enacted, this provision allowed franchising authorities to collect compensation for use of public rights-of-way up to five percent of the gross annual revenues derived by a cable operator from "the operation of the cable system." Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779, 2787. In 1996, Congress amended Section 542(b) to limit that compensation to a percentage of revenues from the provision of "cable services" to promote the use of cable systems for broadband and other non-cable services. Telecommunications Act of 1996, Pub. L. No. 104-104, § 303(b), 110 Stat. 56, 124-25. The Cable Act, as amended, is codified as Title VI of the Communications Act.

cable"). The Act reflects Congress's understanding that cable operators provide "telecommunications services" and "information services," among others, using their cable systems.[3] *See* 47 U.S.C. §§ 522(7)(C), 541(b)(3), 544(b)(1). The Act correspondingly limits how a franchising authority may regulate a multi-use system under the terms of the franchise. It authorizes the franchising authority to regulate *only* a cable operator's provision of cable services over a duly franchised cable system, and, even then, only "to the extent consistent with" the Cable Act. *See id.* §§ 541(b)(3)(D), 544(a), (b)(1). And it broadly provides that a franchise confers the right to "construct[]… a cable system" without limiting the services that a cable operator may offer over that system. *Id.* § 541(a)(2). To protect this federal framework, the Cable Act expressly "preempt[s] and supersede[s]" "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter." *Id.* § 556(c).

B. Transgressions of the Cable Act's limitations

Notwithstanding these limitations, states and localities increasingly demand that cable operators obtain additional authorizations and pay additional fees to provide non-cable services such as broadband over already-franchised cable systems. *See* JA166-67, 681-83

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[3] Telecommunications services include certain business data services and wireless telecommunications services. Information services include broadband Internet services. Pet. App. 119a & n.257.

(authorizations); JA160, 166-67, 853-55 (fees).[4] These governmental entities have enormous leverage because cable operators invest billions of dollars building and maintaining their cable systems. JA642-45. Cable operators cannot simply abandon their investments or decline to offer new services in order to effectively compete with rivals every time a state or locality proposes an additional requirement. Cable operators have therefore acquiesced to these demands, even while recognizing they are unlawful.

These demands impose real costs on consumers. JA638-39, 641. In the short term, cable customers pay because, consistent with the Cable Act, government fees are passed through to them. 47 U.S.C. § 542(c). Longer term, these costs divert capital from technological innovation, network improvements, and broadband deployment—"an important driver of consumer welfare and economic growth." JA652-53. Cable operators are major investors in broadband and provide necessary backhaul services for broadband and wireless deployment. JA142, 168-70. Congress designed the Cable Act to promote that investment. *See* 1984 House Report at 22-24, 44; 47 U.S.C. § 521(2), (4), (6). And Congress introduced national standards precisely because the "patchwork of regulations that would result from a locality-by-locality approach" would be "particularly inappropriate in today's intensely dynamic technological environment." H.R. Rep. No. 104-204(I), at 110 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 10, 78; 47 U.S.C. § 521(1), (3), (5).

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[4] "JA__" refers to the Joint Appendix in the Sixth Circuit.

The regulatory opportunism that preceded the FCC's adoption of the *Third Report and Order* impeded Congress's goal. It also put cable operators at a competitive disadvantage with new entrants in video and non-video businesses that did not face the same burdens. JA167-68; *see also* Telecommunications Act of 1996, Pub. L. No. 104-104, § 602, 110 Stat. 56, 144-45 ("1996 Act") (barring local governments from imposing a franchise fee on satellite video providers).

C. The FCC's clarifications of cable franchising practices

To combat these abuses and promote broadband investment, the FCC promulgated a series of regulations enforcing the Cable Act's limits.

The *First Report and Order* confirmed that franchise fees must be calculated based on a cable operator's revenues derived only from "cable services," 47 U.S.C. § 542(b), not "revenues from non-cable services," 22 FCC Rcd at 5146-47 ¶ 98, and that a franchising authority's jurisdiction does not extend to non-cable services offered by new entrant cable operators, *id.* at 5155 ¶ 121 (the "mixed-use" rule). The FCC also "preempt[ed] … local laws, regulations, practices, and requirements" in conflict with its rulings. *Id.* at 5156 ¶ 126. Various local franchising authorities petitioned for review. The Sixth Circuit rejected their petitions, and this Court denied certiorari. *All. for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), *cert denied*, 557 U.S. 904 (2009).

The *Second Report and Order* extended the same franchise fee clarification and mixed-use rule to

incumbent cable operators. 22 FCC Rcd 19633. On review, the Sixth Circuit approved several aspects of the *Second Report and Order* but remanded for the FCC to explain others. *Montgomery Cnty. v. FCC*, 863 F.3d 485 (6th Cir. 2017). Among other things, the Sixth Circuit directed the FCC to provide a more thorough explanation of the statutory basis for extending the mixed-use rule to incumbent cable operators that are not subject to common carrier regulation under Title II of the Communications Act, because the statute on which the *Second Report and Order* relied appeared to only apply to such common carriers. *Id.* at 489; *see* 47 U.S.C. § 522(7)(C). The FCC responded to that remand in the *Third Report and Order*, which announced the preemption ruling that Petitioners now challenge. 34 FCC Rcd 6844; *see also* Pet. App. 27a-236a.

The *Third Report and Order* elaborated on why the mixed-use rule announced in the *First Report and Order* applied to incumbent cable operators. The FCC first reaffirmed its conclusion in the *Second Report and Order*, *i.e.*, that 47 U.S.C. § 522(7)(C) supplied the legal underpinning for applying the rule to incumbents that are common carriers. Pet. App. 117a-128a (also finding this interpretation bolstered by 47 U.S.C. § 541(b)(3), which bars franchising authorities from regulating "the provision of telecommunications services" by a cable operator). The FCC then explained that the Cable Act also prohibits franchising authorities from regulating the non-cable services of incumbent cable operators that are not common carriers. Pet. App. 128a-131a. Because a "franchising authority may not regulate the services, facilities, and equipment provided by a cable operator

except to the extent consistent" with the Cable Act, 47 U.S.C. § 544(a), and "may not … establish requirements for video programming or other information services" (except for certain notice mandates for channel assignment changes), *id.* § 544(b)(1), (h), the FCC concluded that Title VI bars the exercise of franchising authority to regulate information services, as well as telecommunications services, provided by all incumbent cable operators. Pet. App. 128a-131a.

The *Third Report and Order* then addressed preemption. It explained that, although "Title VI does not permit franchising authorities to extract fees or impose franchise or other requirements on cable operators insofar as they are providing services other than cable services," there was ample evidence that states and localities were transgressing their limited authority under Title VI. Pet. App. 143a-145a. To combat that problem, the FCC "expressly preempt[ed] any state or local requirement, whether or not imposed by a franchising authority, that would impose obligations on franchised cable operators beyond what Title VI allows." Pet. App. 144a.

The FCC grounded its ruling in the text and structure of the Act, including the express preemption provision in 47 U.S.C. § 556(c). Pet. App. 144a-145a. As the FCC explained, that provision meant "that Congress intended to preempt any state or local law (or any franchise provision) that is inconsistent with any provision of the Communications Act." Pet. App. 146a-148a. To explain why additional authorizations were inconsistent with the Act, the FCC relied principally on 47 U.S.C. § 541(a)(2). *See* Pet. App. 150a. Section

541(a)(2) states that cable franchises "shall be construed to authorize the construction of a cable system over public rights-of-way." 47 U.S.C. § 541(a)(2). Other provisions make clear that franchises also give cable operators the right to manage and operate the cable system. Pet. App. 150a-151a. And constructing, operating, and managing a cable system do not just mean providing cable services; after all, "[n]umerous provisions in Title VI evidence Congress's knowledge and understanding that cable systems would carry non-cable services—including telecommunications and information services." Pet. App. 151a.

The FCC therefore rejected the authority of states, localities, and franchising authorities to require separate authorizations for cable operators to provide non-cable services over their cable systems. Pet. App. 167a-168a. The FCC explained that several statutory provisions clearly state that franchising authorities cannot regulate franchised cable systems as to the provision of telecommunications services. *Ibid.* And 47 U.S.C. § 544(a) bars franchising authorities from "establish[ing] requirements for video programming or other information services." *Ibid.* If state and local governments cannot exercise their franchising authority to regulate non-cable services directly, the FCC explained, then they cannot use other authority to accomplish the same result. Pet. App. 168a.

In reaching these conclusions, the FCC "repudiate[d]" the reasoning in *City of Eugene v. Comcast of Oregon II, Inc.*, 375 P.3d 446 (Or. 2016). *See* Pet. App. 173a-174a. That case involved a dispute between the City of Eugene and its franchised cable

operator over provisions of the Eugene Code. The Eugene Code required any entity providing "telecommunications services" (as defined by local ordinance) through facilities in Eugene's rights-of-way to obtain a license and pay a seven percent license fee for those services. *See* Pet. App. 249a-252a. The Supreme Court of Oregon upheld this license fee even when imposed on cable operators with a cable system already franchised under Title VI and paying the franchise fee. *City of Eugene*, 375 P.3d 446. The FCC explained that the court's reasoning and conclusion misconstrued the Cable Act and were out of step "with the majority of courts that have found that a Title VI franchise authorizes a cable operator to provide non-cable services without additional franchises or fee payments to state or local authorities." Pet. App. 173a.

The *Third Report and Order* took effect on September 26, 2019.

D. The decision below

Petitioners sought review under the Hobbs Act, arguing that the FCC misinterpreted the law and violated the Administrative Procedure Act. Pet. App. 6a. After denying an emergency stay motion, *see* Pet. App. 6a, the Sixth Circuit (Kethledge, J.) issued a unanimous opinion denying the petitions in relevant part, *see* Pet. App. 13a-26a.

The court agreed with the FCC's bottom-line conclusion about the mixed-use rule. It relied on 47 U.S.C. § 544(a), which prohibits franchising authorities from regulating cable operators "except to the extent consistent with this subchapter," and 47 U.S.C. § 556(c),

which preempts any provision of law or franchise "inconsistent with this chapter." Pet. App. 14a. The court explained that although "Congress went out of its way not to suggest that federal law is the fountainhead of all franchisor regulatory authority," Congress also made clear that federal law limits that authority and preempts state or local action that violates or circumvents the Act. Pet. App. 15a. The court therefore agreed with the FCC that states and localities cannot "'end-run' the Act's limitations by using other governmental entities or other sources of authority to accomplish indirectly what franchising authorities are prohibited from doing directly." Pet. App. 15a-16a (quoting Pet. App. 148a).

The court then explained why the Act prohibits this type of regulation by franchising authorities. Its conclusion rested on the text and history of the Cable Act. As the Court explained, 47 U.S.C. § 541(a)(2) and 47 U.S.C. § 541(b)(1) make clear that a franchise includes authorization to construct and operate the cable system. Pet. App. 23a. The court found that with respect to operating that cable system, "Congress undisputedly contemplated that cable operators would use their facilities to provide both cable and non-cable services." Pet. App. 22a. That understanding is clear from provisions like 47 U.S.C. § 544(a), which bar franchising authorities from regulating "the services" (plural) provided by a cable operator. Pet. App. 23a. Moreover, Congress barred franchising authorities from "establish[ing] requirements for video programming or other information services"—including broadband services—in their requests for franchise proposals. Pet.

App. 23a (quoting 47 U.S.C. § 544(b)(1)). Putting those provisions together, the court explained, a franchising authority could not itself impose a broadband fee on a cable operator as a condition for a cable franchise. *Ibid.*

In the case of Eugene's license fee, the court continued, the question was "whether the City circumvented that limitation when it imposed the same fee on a cable operator by means of the City's police power." Pet. App. 23a. The court answered yes. It explained that the essence of franchising authority is granting or denying access to the public rights-of-way to build and operate a cable system. Once the franchisor grants that access, the cable operator has "the right to use its cable system, including—as Congress plainly anticipated—the right to use that system to provide information services." Pet. App. 24a. Imposing a "license fee" to use the very same cable system in the very same rights-of-way "is merely the exercise of [the City's] franchise power by another name." *Ibid.* And since 47 U.S.C. § 544(b)(1) explicitly prohibits that exercise of franchise power, the fee is inconsistent with Title VI and thereby preempted as applied to a cable operator. *Ibid.* (citing 47 U.S.C. §§ 544(a), 556(c)).

REASONS FOR DENYING THE PETITION

I. This Court's Intervention Is Unnecessary.

A. There is no actual conflict of authority.

There is no "express conflict" that warrants this Court's review. *Contra* Pet. 3. The Sixth Circuit did not disagree with, or even address, the Oregon Supreme Court's decision. That is unsurprising, as the purpose of the FCC's order and its review under the Hobbs Act was

to provide a controlling interpretation of federal law. The Oregon Supreme Court lacked that interpretation when it adjudicated a private dispute years before the FCC issued its order, and Petitioners can only speculate about how it would rule today.

The divergence that Petitioners claim is not the type of split that warrants review. The Oregon Supreme Court's decision in 2016 came three years before the FCC promulgated its *Third Report and Order*. The court confronted a private dispute between the City of Eugene and its franchised cable operator over a provision of the Eugene Code—not a petition for review of an agency order under the Hobbs Act. The FCC was not a party or amicus in the action, and the court did not have the benefit of the factual findings, statutory interpretation, and policy rationales that the agency would later articulate. *See* Pet. App. 27a-236a.

This context is important. It means a state court issued a decision before the expert federal agency rendered its interpretation of the relevant federal statutory provisions it is charged with interpreting and enforcing, and before a federal court of appeals exercised its authority under the Hobbs Act to determine the validity of that interpretation. Indeed, the Oregon Supreme Court acknowledged that its role was to construe a federal statute using the "methodology prescribed by federal courts." *City of Eugene*, 375 P.3d at 456 (quotation marks omitted). But state courts no longer have to predict how federal courts would construe the statute, because the federal court of appeals charged under the Hobbs Act with providing an authoritative interpretation has now done so.

Petitioners can only speculate on how the Oregon Supreme Court would apply the decision below. That type of speculation is not a basis for this Court's intervention.

The Oregon Supreme Court's reliance on 47 U.S.C. § 541 underscores this point. The principal argument in *City of Eugene* was that the Eugene Code's license fee was barred by the Internet Tax Freedom Act ("ITFA"), 47 U.S.C. § 151 note, ITFA §§ 1101-1109, which prohibits state and local governments from imposing taxes on Internet access. That argument turned on whether the license fee was a "fee imposed for a specific privilege, service, or benefit conferred" (which is permissible), or a "charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes" (which is not). ITFA § 1105(8)(A)(i). To answer that question, the court considered whether the cable operator had a preexisting right to provide broadband service over its cable facilities in the city's rights-of-way by virtue of its cable franchise. *City of Eugene*, 375 P.3d at 455-61. The court's conclusion that the cable operator did not have that preexisting right was based on 47 U.S.C. § 541—the provision that the Sixth Circuit subsequently clarified in its decision below. *See supra* 14-15.[5]

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[5] The Oregon Supreme Court did not have occasion to consider 47 U.S.C. § 544(b)(1), a key part of the Sixth Circuit's analysis, *see* Pet. App. 23a, because that provision concerns the authority of franchising authorities to establish requirements for "information services." At the time *City of Eugene* was decided, broadband service was classified as a "telecommunications service" under federal law.

Ultimately, this is an ordinary case of express federal preemption. A federal agency interpreted a federal law to preempt state and local regulation, and a federal court agreed with the agency's conclusion. No state or federal court has looked at the same question with the benefit of the FCC's order and the Sixth Circuit's decision and arrived at a different result.

B. This case is a bad vehicle.

This case is not a suitable vehicle for resolving the question presented by Petitioners. Petitioners make several arguments based on what they characterize as the "anti-preemption clause" and the "tax savings provision" in the 1996 Act, including an argument that the former is the "statutory text *most directly applicable to Congress's intent* with respect to preemption." Pet. 22 (emphasis added); *see also* Pet. 5-7, 16. Yet despite the alleged importance of these provisions, Petitioners did not make these arguments below in the Sixth Circuit; in fact, Petitioners never even cited these provisions in their briefs. Petitioners therefore waived any argument based on this statutory text. *See Puckett v. United States*, 556 U.S. 129, 134 (2009).

In any event, these waived arguments do not require a different outcome. Section 601(c)(1), the so-called "anti-preemption clause," is inapposite because this case involves the application of an *express* preemption clause. Pet. App. 15a, 146a-148a. Moreover, this preemption does not involve a "law pertaining to taxation," which renders the "tax savings provision" in Section 601(c)(2) inapplicable (and even if the preemption here did implicate taxation, preemption of the particular "taxes"

at issue would be authorized by the exception in Section 601(c)(2) for "sections 622 and 653(c) of the Communications Act of 1934"). The point is simply that this Court should not be the first to opine on the meaning of these provisions never argued below. This is "a court of final review and not first review." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam) (quotation marks omitted). This Court ordinarily "do[es] not decide in the first instance issues not decided below." *NCAA v. Smith*, 525 U.S. 459, 470 (1999). There is no basis to depart from that ordinary rule here.

Nor should this Court excuse Petitioners' waiver based on their claim that review is now or never. According to Petitioners, the Hobbs Act means that this Court will never have an opportunity to consider their arguments if it declines to do so here. Pet. 3. But Petitioners overread *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051 (2019). There, the Court in fact declined to address whether the Hobbs Act provides the exclusive opportunity to challenge the FCC's interpretation announced in an agency order. *Id.* at 2055-56. Yet four justices agreed that "the Hobbs Act does not expressly preclude judicial review of agency legal interpretations in enforcement actions." *Id.* at 2066 (Kavanaugh, J., concurring). Petitioners' claim that further percolation of the issues is "unlikely, if not impossible" is therefore unsupported and entirely speculative. Pet. 3.

C. The policy considerations cited by Petitioners and their *amici* cut against this Court's review.

Petitioners argue the decision below sets bad policy. They warn of a "significant impact on competition in the communications industry," including "market distortions" caused by "preferential advantage" of cable operators over other broadband providers. Pet. 3, 16-17. These arguments turn the policy considerations that motivated Congress on their head. The *Third Report and Order* and the decision below interpreted the law in a manner consistent with the statutory text and the legislative judgment it embodies. Petitioners should take their disagreement with that judgment to Congress, not this Court.

Congress was concerned about market distortions when it passed the Cable Act—just not the ones that Petitioners allege. Congress passed the Cable Act to establish a national policy for cable communications intended to promote competition and minimize unnecessary regulation of cable operators. *See* 47 U.S.C. § 521(4), (6). At the time, Congress confronted evidence that franchising authorities were abusing their power over cable providers, which was hurting infrastructure investment, technological innovation, competition, and consumer pocketbooks. *See supra* 1-2, 5-9. Those abuses persisted even after the Cable Act was passed, and they spurred Congress to take action to limit local regulation yet again in the 1996 Act. Pet. App. 158a-160a; *see also* 47 U.S.C. § 541(b)(3) (prohibiting franchising authority regulation of telecommunications services).

The same types of problems were the impetus for the FCC's orders on cable-franchising practices. The

failures by franchising authorities to adhere to the Cable Act's limits simply became untenable: the costs and burdens of franchise fees and demands in excess of what is permitted under the Cable Act exacerbated the disparity between cable operators and satellite and online video providers who do not face the same regulation. Cable operators were required to pay excessive fees for rights-of-way access that their wireless and other broadband competitors did not. Even when states and localities imposed so-called "generally applicable" fees on the use of a cable system to provide non-cable services, those fees had the effect of requiring cable operators—and only cable operators—to pay multiple times over for use of the very same rights-of-way access while their competitors paid only once. *See* Pet. App. 163a-165a nn.371-372. The FCC intervened with its *Third Report and Order* not to tilt the playing field in favor of cable operators, as Petitioners claim, but to level it in the way Congress intended for the benefit of competition and consumers.

Petitioners fail to acknowledge this reality, and they offer no response to the thick record of "abuses of state and local authorities" that the FCC sought to prevent. Pet. App. 170a. They also ignore the FCC's factual findings about "the harm posed by the state and local requirements" preempted by the *Third Report and Order*, including adverse effects on the very broadband infrastructure investment that Congress sought to promote. Pet. App. 171a-172a. In fact, Petitioners freely admit that states and localities disregard the Cable Act's franchise fee cap; they routinely collect additional fees, including based on revenues for *non*-cable services, and

they demand duplicative franchises to offer *non*-cable services, like "certificates" to offer broadband service. These types of abuses were Congress's overarching concern when it legislated—not the ability of state and local governments to charge multiple times for the same access to the same rights-of-way for the same facilities. *Contra* Pet. 3; Int'l Mun. Lawyers Amicus Br. 7-8, 15-19.

Petitioners and their *amici* offer various reasons why Congress might weigh policy considerations differently today. Petitioners say that broadband Internet revenues are supplanting cable subscriptions, meaning that state and local governments are not collecting the same revenue from franchise fees. Pet. 3; *see also* Int'l Mun. Lawyers Amicus Br. 17. Whatever the merits of those arguments, Congress plainly did not consider them at the time it legislated. Petitioners and their *amici* are free to raise changed circumstances with Congress and seek new legislation, but they are not entitled to a judicial revision of the law that Congress passed.

The bottom line is that the FCC interpreted the law to advance the objectives Congress actually cared about. Here, the FCC concluded that "preemption … will advance" the Cable Act's purpose to "'minimize unnecessary regulation that would impose an undue economic burden on cable systems.'" Pet. App. 169a-170a (quoting 47 U.S.C. § 521(6)). That conclusion was correct, and Petitioners' policy arguments provide no basis for this Court to intervene and reverse it.

D. There is no need for the Court to "clarify" preemption law.

Petitioners also attempt to reframe their question presented as a general plea for a clarification of preemption law. But the Petition seeks only error correction, and its effort to identify a broader problem within this Court's preemption jurisprudence falls flat.

Although Petitioners spend page after page discussing preemption jurisprudence, Pet. 4, 20-28, it remains unclear what clarification they claim is needed. If Petitioners are suggesting that this case demonstrates the need to clarify preemption in the context of savings clauses, *see* Pet. 22, they are mistaken. This Court has addressed that question in the past and rejected the type of "special burden" that Petitioners urge this Court to adopt. *See Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 867-74 (2000). To the extent the Petition is really an invitation for this Court to overturn *Geier*, *see* Pet. 24, it should be denied. Petitioners have not even attempted to show the "special justification" this Court requires to depart from the doctrine of stare decisis. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019). At any rate, this case is a bad vehicle for examining that question since Petitioners waived their argument with respect to two of the savings clauses they claim the Sixth Circuit overlooked. Pet. 22; *see supra* 18-19.

In reality, Petitioners are seeking a rule for this case only. They say this Court needs to address implied preemption "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." Pet. 4; *see also* Pet. 20 (seeking a special preemption rule for cases where "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"). They cite no other statutory scheme that fits that description, much less one that has led to divergent preemption analyses or conflicting results in the lower courts.

This case does not implicate unsettled questions of preemption law, and the Petition should be denied.

II. The Decision Below Is Correct.

A. The Cable Act's express preemption clause bars state and local regulation inconsistent with the Act.

The Sixth Circuit's decision is correct. The Cable Act's express preemption clause broadly provides that "*any* provision of law of *any* State, political subdivision, or agency thereof, or franchising authority, or *any* provision of *any* franchise granted by such authority, which is *inconsistent* with this chapter *shall* be deemed to be preempted and superseded." 47 U.S.C. § 556(c) (emphases added).

The Sixth Circuit interpreted the key terms of the preemption clause to mean what they say. "Congress' use of 'any' to modify" a noun "is most naturally read to mean" *all* of that noun, "whatever kind." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 220 (2008); *see also United States v. Gonzales*, 520 U.S. 1, 5 (1997). Here,

that means *all* state and local requirements of whatever kind inconsistent with the Act. *See* Pet. App. 146a-148a. "[T]he mandatory 'shall' … creates an obligation impervious to … discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); *see also Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171-72 (2016). This signifies that if the preconditions for "shall" are met—here, a state or local requirement is "inconsistent" with the Communications Act—the result must follow: the requirement is preempted. "[I]nconsistent," in turn, means "incompatible" with "or merely 'inharmonious.'" *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1888 (2019). Putting those terms together, the Sixth Circuit correctly concluded that "the test for preemption … is whether state or local action is 'inconsistent with' a specific provision of the Act." Pet. App. 15a. Petitioners do not argue otherwise. *See* Pet. 15.

As the Sixth Circuit found, this express preemption clause bars states and localities from using their police power to regulate cable systems in a manner that franchising authorities cannot. Pet. App. 23a-24a; *see also* Pet. App. 16a. The text and purpose of the Cable Act compel this reading. A franchise is a grant of access to the public rights-of-way for constructing and operating a cable system. 47 U.S.C. §§ 522(9), 541(a)(2), (b)(1); *see infra* 26-28. If the city then imposes *another* requirement or fee on the same operator to use the same cable system in the same rights-of-way for broadband or other non-cable services, that additional regulation circumvents the Cable Act and is therefore preempted. 47 U.S.C. §§ 544(a), 556(c).

Under the contrary view that Petitioners urge this Court to adopt, the carefully drawn limitations on cable regulation in the Cable Act would be meaningless. Petitioners' theory would allow states and localities to invoke their police power to impose precisely the regulatory burdens that federal law bars franchising authorities from implementing. This would eviscerate the Cable Act's framework in clear contravention of Congress's objective of "*minimiz[ing]* unnecessary regulation that would impose an undue economic burden on cable systems," *id.* § 521(6) (emphasis added), and in so doing frustrate the deployment of broadband and other innovative services over those systems.

The Sixth Circuit therefore asked the right question—whether specific provisions of the Cable Act bar franchising authorities from imposing regulations like Eugene's on cable operators—and it got the right answer, properly preempting the exercises of state or local police power on the same basis.

B. The additional licensing requirements and fees at issue are inconsistent with the Act.

The Cable Act prohibits franchising authorities from imposing additional fees and requirements on cable operators like those in the Eugene Code.

The statutory text confirms that Congress understood and intended a cable franchise to allow cable operators to provide multiple services using their facilities. Under 47 U.S.C. § 541(a)(2), the franchise "shall be construed to authorize the construction of a cable system over public rights-of-way." Other provisions of the Act recognize that non-cable services

will be provided through that cable system. For example, 47 U.S.C. § 544(a) refers to "services" beyond just cable services. Similarly, 47 U.S.C. § 544(b)(1) bars franchising authorities from establishing requirements for certain non-cable services in their requests for proposals for a cable franchise. That provision states that franchising authorities cannot "establish requirements for … information services," 47 U.S.C. § 544(b)(1), which includes broadband services, *see* Pet. App. 23a. State and local governments are also barred from exercising their franchising authority to regulate a cable operator's provision of "telecommunications services." 47 U.S.C. § 541(b)(3). Thus, Congress intended that cable operators would receive access to the public rights-of-way to construct and operate a cable system that would deliver both cable services and other services.

Petitioners do not dispute that the franchise authorizes the construction and operation of a cable system to provide cable service. Instead, they take issue with the Sixth Circuit's conclusion that the Act "also makes clear, albeit by implication, that a franchise shall be construed to allow the cable operator to operate the cable system" to provide non-cable services. Pet. App. 23a. But that reference to "implication" does not negate the express preemption clause, nor does it transform this case into one involving implied preemption. Congress's intent to preempt inconsistent regulation is clear, 47 U.S.C. § 556(c), and so is its understanding of a franchise as authorizing the construction and operation of the cable system to provide both cable and non-cable services.

It would make little sense for Congress to bar franchising authorities from establishing requirements related to services other than cable unless Congress intended that cable operators would *operate the cable facilities to provide multiple services*. *See* 47 U.S.C. § 541(b)(1). Several other provisions likewise limit franchising authority over the "provision" of services, not just the construction of a cable system, and therefore confirm Congress's intent to address authority over the operation of the system as well as its construction. *Id.* §§ 541(b)(3), 544(a), (f).

Given that clear intent, the preemption analysis is straightforward. The Cable Act expressly preempts a state or local government from exercising its franchising authority to regulate a cable operator's provision of information services over its cable system. *Id.* §§ 544(b)(1), 556(c). The Sixth Circuit enforced this principle in the context of a license fee dispute, but the principle is not limited to license fees. *See* Pet. App. 24a (explaining that the "imposition of a 'license fee' equal to seven percent of the operator's revenues from broadband services is merely the exercise of … franchise power by another name"); *see also* Pet. App. 131a (construing the ban on regulation of information services to prohibit local franchising authorities from "*impos[ing] fees for the provision of information services* (such as broadband Internet access) via a franchised cable system" (emphasis added)). Nor is preemption limited to information services. *See* 47 U.S.C. § 541(b)(3).

The Cable Act expressly preempts *any* and *all* state or local demands for additional franchises, or their

equivalents, to operate the *same* cable system for which the operator already holds a Title VI franchise. That franchise, after all, "*shall* be construed" under 47 U.S.C. § 541(a)(2) to authorize the operator to construct its "cable system" in the public rights-of-way to provide both cable services and non-cable services. Pet. App. 167a-168a. Thus, any requirement for additional authorization to provide other services through a franchised cable system conflicts with the Cable Act's express terms and must be preempted.

C. Preemption serves Congress's intent.

Petitioners resist this conclusion, arguing that preemption disrespects Congress's intent. Not so.

Petitioners claim that preemption "thwarts Congress's choice to preserve state and local authority," particularly as to tax and fee authority. Pet. 27. But none of the savings provisions empower states or localities to exercise their police power in a manner that conflicts with federal law. "[W]hen federal officials determine ... that restrictive regulation of a particular area is not in the public interest, States are not permitted to use their police power to enact such ... regulation." *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984) (internal quotation marks omitted). The Cable Act, like countless other federal schemes, leaves ample room for state and local regulation of general application that is consistent with federal law. Pet. App. 176a-177a. For example, states and localities can exercise "rights-of-way management" (including "enforcement of building and electrical codes") and manage "such matters as fraud, taxation and general commercial dealings," so long as their actions are

consistent with Title VI. *Ibid.*; *see also* Pet. App. 179a-180a & n.414. The Sixth Circuit's opinion does not upset this "deliberately structured dualism." Pet. 23 (quoting *Cap. Cities Cable*, 467 U.S. at 702). It simply assures that states and localities stay in their lane.

Petitioners are also wrong that the court below "lightly infer[red]" that Congress preempted a core state and local function of raising revenue through taxes. Pet. 4. The Sixth Circuit faithfully and rigorously applied the text to reach its conclusion. *See supra* 24-29. In arguing otherwise, Petitioners rely on cases and standards that have no bearing here. This is not a case where the court below relied solely on the purposes of the statute as opposed to its text. *Chamber of Com. of the U.S. v. Whiting*, 563 U.S. 582, 594 (2011); *contra* Pet. 4. The presumption against preemption does not apply here because the statute "contains an express pre-emption clause." *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016) (quotation marks omitted); *contra* Pet. 27. Nor does this case involve the Commerce Clause and its related presumptions. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2094 (2018); *contra* Pet. 3.

Petitioners also suggest that preemption simply cannot be what Congress intended because it would lead to incongruous results. Pet. 3, 13, 16-17. Yet the result in this case is precisely what Congress intended when it moved to protect cable operators and their customers from the predations of states, localities, and franchising authorities. *See supra* 1-2. Congress created a federal scheme whereby cable operators alone were required to run the gauntlet of the franchising process to gain access to the public rights-of-way. At the same time, and in

recognition of the critical role cable operators would play in fostering competition and developing new non-cable service offerings, Congress limited franchising authority to the regulation of cable service only. In so doing, Congress tried to remove the thumb on the scale *against* cable operators—not skew the market in their favor. Unless preempted, requirements and fees like those in the Eugene Code would undo Congress's choice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

HOWARD J. SYMONS
IAN HEATH GERSHENGORN
JESSICA RING AMUNSON
Counsel of Record
LAUREN J. HARTZ
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001
(202) 639-6000
JAmunson@jenner.com

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