# 19-70123 (L)

**(18-72689, 19-70124, 19-70125, 19-70136, 19-70144, 19-70145, 19-70146, 19-70147, 19-70326, 19-70339, 19-70341, 19-70344, and 19-70490)**

## United States Court of Appeals for the Ninth Circuit

SPRINT CORPORATION,

*Petitioners*,

THE CITY OF NEW YORK and NATOA, *et al.*,

*Intervenors*,

*against*

FEDERAL COMMUNICATIONS COMMISSION,

*Respondent*.

On Petitions for Review of Orders of the Federal Communications Commission

**JOINT BRIEF FOR INTERVENORS THE CITY OF NEW YORK AND NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS**

NANCY L. WERNER
*General Counsel of NATOA*
3213 Duke Street #695
Alexandria, VA 22314
(703) 519-8035
nwerner@natoa.org

ZACHARY W. CARTER
*Corporation Counsel of the City of New York*
RICHARD DEARING
CLAUDE S. PLATTON
ELINA DRUKER
Attorney for the City of New York
100 Church Street
New York, New York 10007
212-356-2609 or -2502
edruker@law.nyc.gov

# TABLE OF CONTENTS

**Page**

## TABLE OF CONTENTS (cont'd)

**Page**

## TABLE OF CONTENTS (cont'd)

**Page**

# TABLE OF AUTHORITIES

**Page(s)**

## Cases

## TABLE OF AUTHORITIES (cont'd)

**Page(s)**

## TABLE OF AUTHORITIES (cont'd)

**Page(s)**



**Statutes**



**Constitional Provisions**

## TABLE OF AUTHORITIES (cont'd)

**Page(s)**

### Other Authorities

## TABLE OF AUTHORITIES (cont'd)

**Page(s)**

## CORPORATE DISCLOSURE STATEMENT

The City of New York is a governmental agency and therefore exempt from Rule 26.1.

The National Association of Telecommunications Officers and Advisors is a non-profit organization representing the interests of member municipalities, elected officials, and their advisors. The organization does not issue stock, have any parent company, or have a 10% or greater ownership interest held by any publicly traded company.

## INTRODUCTION

Intervenors the City of New York and the National Association of Telecommunications Officers and Advisors ("NATOA") challenge the Federal Communication Commission's new regulations that govern siting of small-cell wireless facilities for purposes of deploying the next generation digital cellular network, known as 5G. In net effect, the challenged FCC orders—the "Moratorium Order"[1] and the "Small Cell Order"[2]—require local governments to approve requests to use rights-of-way or municipal property for certain wireless deployments, such as installing boxes on top of city-owned traffic poles or refrigerator-sized containers on sidewalks. And because the FCC has imposed strict timelines and preempted many local standards, cities must grant applications without considering local rules, regulations, or public safety. Adding insult to injury, the FCC has barred cities from charging fair market value for this intrusion by limiting compensation to "costs."

---

[1] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling FCC 18-111, WC Docket No. 17-84, WT Docket No. 17-79 (rel. Aug. 3, 2018).

[2] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, FCC 18-133, WT Docket No. 17-79, WC Docket No. 17-84 (rel. Sept. 27, 2018).

Intervenors agree with the local-government petitioners that the Orders rest on a highly strained reading of the Telecommunications Act of 1996 (*see* Joint Opening Brief of Local Governments Petitioners ("LG's Br.") 29-34). And we agree that the Orders cross constitutional lines, because compelling cities to lease their rights-of-way and municipally owned property on the FCC's terms implicates the Takings Clause and the Tenth Amendment by denying just compensation, infringing on local police powers, intruding on traditionally local spheres of control, and conscripting local governments to administer a federal agency's regulatory agenda. *See* L.G.'s Br. 106–15.

But this Court need not actually determine whether the Orders are irrational or unconstitutional, because the FCC lacks authority to take these steps that—at a minimum—dramatically shift the federal-state balance and intrude on the core of traditional local prerogatives. The FCC locates its claim to authority in Sections 253 and 332(c)(7) of the Telecommunications Act, which bar local governments from erecting barriers to entry into the marketplace for providers of telecommunications and personal wireless services. The agency seeks to use the cloak of deference to reshape these provisions to cover even

minor impediments to deploying wireless-service facilities. But its general authority to interpret ambiguities in the Act cannot support the sweep of these Orders. Settled Supreme Court precedent bars an agency from intruding on areas of traditional local concern and pushing up against constitutional limits without a clear statement from Congress vesting it with such authority.

Here, the FCC's reading of the Telecommunications Act creates serious constitutional questions under the Fifth and Tenth Amendments. And the Act contains no clear statement authorizing the FCC to push these constitutional limits. Not only does the Act lack any clear statement authorizing such steps, but Congress expressly preserved local governments' authority to manage and receive reasonable compensation for use of their rights-of-way, as well as their authority over the "placement, construction, and modification" of personal wireless-service facilities. Thus, the FCC is not entitled to deference, and its *ultra vires* orders must be vacated.

## ISSUE PRESENTED FOR REVIEW

Are the FCC Orders at issue *ultra vires* because the Telecommunications Act contains no clear statement vesting the agency with authority to push constitutional limits and shift the traditional balance of federal-state authority by (a) effectively appropriating municipally owned property; (b) broadly displacing traditional local government police power to superintend municipal property and rights-of-way; and (c) conscripting local governments in service of a federal agency's regulatory agenda?

## STATEMENT OF THE CASE

In 2018, the FCC issued the two Orders at issue in these consolidated cases, purportedly acting under authority conferred by Congress in 47 U.S.C. §§ 253(a) and 332(c)(7)(B). The City of New York and NATOA both participated in the administrative proceedings and intervened in the various appeals, *see* 19-70123, Dkt. No. 1, which were transferred to the Ninth Circuit and, while not formally consolidated, are being briefed together. The City and NATOA submit this joint intervenors' brief in support of local-government petitioners.

### A. The statutory framework authorizing the FCC to promulgate rules for purposes of encouraging competition among telecommunication service providers.

The competition-based telecommunications regime created by the Telecommunications Act of 1996, Pub. L. No 104-104, 110 Stat. 56 ("Telecommunications Act"), "represents a dramatic shift in the nature of telecommunications regulation." *Sprint Telephony PCS, LP v. Cnty. of San Diego*, 543 F.3d 571, 575–76 (9th Cir. 2008) (en banc). The Telecommunications Act was designed "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 110 Stat. at 56; *see also* H.R. Rep. No. 104-458, at 113 (1996) (Conf. Rep.).

To achieve its laudable goals, Congress chose to "end the States' longstanding practice of granting and maintaining local exchange monopolies," which it did by adding 47 U.S.C. § 253 to the Communications Act of 1934. *T-Mobile USA Inc. v. City of Anacortes*, 572 F.3d 987, 991–92 (9th Cir. 2009). In Section 253, Congress provided that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the

ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a).

Aware that this sweeping mandate to eliminate monopolies had the potential to butt up against local governments' regulation of their rights-of-way, Congress added a savings clause. It provides that "[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers … for use of public rights-of-way," provided they do so on a competitively neutral and nondiscriminatory basis and publicly disclose any compensation. 47 U.S.C. § 253(c). Thus, Section 253(c) unambiguously cabins the scope of Section 253(a). Municipalities may not effectively prohibit telecommunication providers from competing in the marketplace, but their management of their rights-of-way and collection of reasonable compensation on a neutral basis are preserved.

"The [Telecommunications] Act also contained new provisions applicable only to *wireless* telecommunications service providers." *Sprint Telephony,* 543 F.3d at 576 (emphasis in original). In an era marked by the proliferation of unsightly megatowers for wireless

services, Congress recognized that municipal zoning ordinances limiting those towers could be used to effectively prohibit telecommunications services. Congress nonetheless expressly preserved local "regulation of the placement, construction, and modification of personal wireless service," provided that regulation "shall not unreasonably discriminate among providers of functionally equivalent services [or] prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7).[3]

The House had originally proposed "requiring the FCC to regulate directly the placement of wireless telecommunications facilities," but the House and Senate conferees decided instead to generally "preserve the authority of State and local governments over zoning and land use matters." *Sprint*, 543 F.3d at 576 (citing H.R. Rep. No. 104-204(I), § 107, at 94 (1995); H.R. Rep. No. 104-458, § 704, at 207-08 (1996) (Conf. Rep.); *see also T-Mobile*, 572 F.3d at 992. Thus, balancing the need for nondiscriminatory zoning against the potential intrusion into

[3] Nor may a local government unreasonably delay in acting on requests, deny an application without a written basis, or use its siting discretion to regulate radio frequency emissions. 47 U.S.C. § 332(c)(7)(B).

areas of core local-government concern, Congress enacted 47 U.S.C. § 332(c)(7)(A), which provides that, "[e]xcept as provided in this paragraph, nothing in [the Telecommunications Act] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." It then enumerates five express limitations on local governments' zoning authority: local governments cannot unreasonably discriminate among providers of functionally equivalent services, effectively prohibit the provision of personal wireless services, or regulate radio frequency emissions, and shall act on siting requests in a reasonable time period and provide written reasons for denying applications. 47 U.S.C. § 332(c)(7)(B).

### B. The Orders and their sweeping preemption of areas of traditional local-government authority.

Ignoring the limitations in 47 U.S.C. §§ 253(c) and 332(c)(7)(A), in 2018, the FCC promulgated two orders that directly impinge on the ability of local governments to "manage the public rights-of-way," 47 U.S.C. § 253(c), by micromanaging "the placement, construction, and

modification of personal wireless service facilities" in the rights-of-way and on municipally owned poles, *id.* § 332(c)(7)(A).

The Moratorium Order interprets Section 253(a) as preempting state or local actions that expressly or effectively "halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities" (Moratorium Order ¶ 149). This newfound preemption displaces even temporary prohibitions imposed by local governments to protect public safety and preserve the useful life of its assets, such as "freeze and frost" laws that delay roadwork during unsafe winter conditions (*Id.* ¶ 143).

Going several steps further, the Small Cell Order reads Section 253(a) and 332(c)(7)(B)(ii) as authorizing the FCC to (1) cap various fees relating to siting at "costs," (2) limit the aesthetic conditions local governments can place on applications to site wireless facilities in the rights-of-way and even on city-owned property in the rights-of-way, and (3) require states and local governments to act on wireless-siting applications within 60 or 90 days, depending on whether the application seeks to attach a small-cell facility to an existing pole or to use a new pole. The order purports to reach "any approval that a siting authority

must issue under applicable law prior to the deployment of personal wireless service facilities, including, but not limited to, zoning approval and building permit." 47 C.F.R. § 1.6002(f). And while the Small Cell Order claims not to require approval of any particular application, the Moratorium Order bars municipalities from refusing to issue permits for categories of structures (Moratorium Order ¶ 149)—so the Orders' combined effect is to require municipalities to lease out their own property at less than its fair market value.

## SUMMARY OF ARGUMENT

As the local-government petitioners have shown (*see* LG's Br. Point III), there are serious questions about whether the Orders are sufficiently rational to withstand *Chevron* scrutiny. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 n.9 (1984). We agree that the Telecommunications Act is far less elastic than the FCC claims and that the FCC's reading bends the phrase common to both Sections 253 and 332—"effect of prohibiting"—well beyond its breaking point (LG's Br. 36–43). But even putting the irrational character of the FCC's reading to one side, the Orders must be vacated for a more fundamental reason: they exceed the FCC's authority under the Telecommunications Act.

Under *Chevron*'s two-step framework, the first question a court asks when confronted with a challenge to an agency action is whether the statute is clear, based on the text, legislative intent, and canons of statutory interpretation. If the statute is clear, the statute answers the question. If it is not, at the second step, agencies like the FCC have authority to interpret ambiguities and are due deference on their resolution of the statute's gray areas.

This case should be resolved against the agency at *Chevron*'s first step. The Orders are—at a minimum—constitutionally troubling. By purporting to bar fair compensation for use of municipally owned property, preempt local control over locally owned property and rights-of-way, and direct local officials to administer a federal regulatory regime under strict time constraints, the Orders raise serious takings questions, infringe on local police power, and potentially commandeer local officials (*see* LG's Br. Point IV). In seizing such sweeping authority, the FCC has given the Telecommunications Act an "improbably broad reach" with "deeply serious consequences" for local governments and for the "police power of the States." *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014).

The Orders' grave constitutional implications trigger the clear-statement rule—a canon of statutory interpretation that requires express congressional authorization to allow an agency to flex the outer limits of Congress's authority. The clear-statement rule recognizes that Congress legislates against a series of background principles—including the canon of constitutional avoidance and the presumption that Congress does not lightly intrude on local authority—and would not alter the ordinary scheme without saying so clearly. There must be a clear indication that Congress intended to allow the agency to intrude on core areas of local concern or create potential takings and commandeering questions before moving to *Chevron*'s second step. *Solid Waste Agency Northern Cook Cnty. v. United States Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001).

Here, the Telecommunications Act contains no clear statement authorizing the Orders' remarkable intrusion on local authority, so the Court need not reach *Chevron*'s second step. At best, in Sections 253(a) and 332(c)(7)(B), Congress gave the FCC limited preemptive authority. But nothing in those provisions clearly authorizes the FCC to take municipal property or displace local police powers and local

administration of rights-of-way in favor of a federal regulatory program. Indeed, to the contrary, in Section 253(c), Congress expressly preserved local governments' authority to "manage the public rights-of-way" and "require fair and reasonable compensation from telecommunications providers" for access to their rights-of-way. And Congress expressly withheld authority from the FCC over the "placement, construction, and modification" of wireless service facilities in Section 332(c)(7)(A), except in limited circumstances.

In short, given the serious constitutional implications raised by the Orders, ambiguity in the Telecommunications Act is not a sufficient basis for the agency's claim of authority or its related claim to interpretive deference. The absence of a clear statement is fatal; without one, the FCC is acting outside of its delegated authority, and its labored construction of the Act is due no deference under *Chevron*. Thus, this Court should vacate the FCC's *ultra vires* Orders. *See City of Arlington v. FCC,* 569 U.S. 290, 297–98 (2013) (when administrative agencies act "beyond their jurisdiction, what they do is *ultra vires*").

## ARGUMENT

### CONGRESS DID NOT AUTHORIZE THE ORDERS' SWEEPING PREEMPTION OF LOCAL CONTROL OVER RIGHTS-OF-WAY AND MUNICIPALLY OWNED PROPERTY

#### A. The Orders offend the Constitution by effecting a taking and intruding into the core of local-government authority.

As the local-government petitioners have demonstrated, the Orders do not pass muster under the Fifth and Tenth Amendments (*see* L.G.'s Br. Point IV). At a minimum, they create difficult constitutional questions.

##### 1. The Orders raise concerns under the Takings Clause.

The Orders raise serious Takings Clause issues by mandating private access to municipal property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (compelled installation of cable television equipment held to be "a permanent physical occupation" sufficient to constitute a taking of private property requiring payment of just compensation under the Federal Constitution). They require the City of New York and every other

municipality in the country to grant applications to use city-owned poles or other structures in the rights-of-way.

They also preempt municipalities from charging rent or fees for use of their property other than "a reasonable approximation of the local government's objectively reasonable costs" (Small Cell Order ¶ 32). By limiting compensation to costs on a pole-by-pole basis and setting a presumptive cap on costs at $270 per pole, the Small Cell Order could cause cities to lose millions of dollars in franchising revenue that would be earned from leasing access at fair market value (*Id.* ¶ 79).

For example, the City of New York has a longstanding franchising system under which it grants access to its assets (such as its poles) for fair market value (Local Government Petitioners' Excerpts of the Record ("LGER") 300-301, NYC Comments at 11–12). Mandating that New York City allow for-profit, commercial entities to use municipally owned structures at less than their fair market value raises serious takings issues—just as would mandating the use of private property without a reasonable return. *See United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) (holding Duncanville, Texas entitled to just

compensation for federal government's condemnation of a city-owned landfill).

### 2. The Orders implicate the Tenth Amendment by intruding on areas of core local concern.

The Orders also butt up against Tenth Amendment limitations at every turn by intruding on the exercise of local police powers and interfering with local control over rights-of-way. Such an astounding degree of interference with local-government policing, property, and personnel may even exceed Congress's legislative power. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1476, 1479 (2018) (explaining that "[t]he legislative powers granted to Congress are sizable, but they are not unlimited," and that "all other legislative power is reserved for the States, as the Tenth Amendment confirms"). At a minimum, the Orders straddle the line drawn by the Tenth Amendment by displacing local police powers.

The Orders require local governments to act on wireless-siting applications and forbid them from withholding access to categories of municipal property from private companies—even when a city needs to reserve its own poles for municipal uses. But city-owned poles are

erected and maintained, at significant cost, for public-safety purposes such as traffic and pedestrian signals, street lights, and safety cameras and equipment (LGER-300, NYC Comments at 11). And as cities begin to deploy cutting-edge Internet-of-Things technologies to enhance public welfare, they are increasingly looking to city-owned property to host sensors to monitor and respond to conditions such as air quality and traffic density (LGER-702).

For example, the New York City Police Department temporarily mounts cameras on traffic poles when the City is on high alert, such as during the New York City Marathon or when the United Nations is in session.[4] And recent New York State legislation calls for installation of hundreds of speed cameras in schools zones.[5] But cameras cannot be installed on poles that are already encumbered by small-cell facilities

[4] Claire Meyer, *How to secure Temporary events Post-Marathon Bombing*, SECURITY MAGAZINE (Feb. 1, 2014), available at https://perma.cc/YV8S-55VY.

[5] Vivian Wang, *Speed Cameras Will Surround Every New York City Public School*, NEW YORK TIMES (March 19, 2019), available at https://perma.cc/4G7B-4Y6C.

because collocation of devices can compromise the integrity of electrified poles.[6]

Thus, in effect, a federal agency invoking a statute designed to encourage competition among telecommunications providers is preventing the City of New York from using its own traffic poles to host police cameras near schools and forcing the City to favor 5G industry applicants over every other applicant that seeks to use municipal property or open a sidewalk. But local governments have traditionally received "great latitude under their police powers" to pass laws to ensure the "protection of the lives, limbs, health, comfort, and quiet of all persons." *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (quotation marks omitted). The FCC's efforts to displace this authority are deeply problematic.

---

[6] For a deep dive into the City's delicate and complex electrical grid, see Emily Rueb, *How New York City Gets its Electricity*, NEW YORK TIMES (Feb. 10, 2017), available at https://perma.cc/YT8H-2A7P. Because of the design of its grid, New York City does not allow collocation on its poles, because if critical traffic or lighting activities become compromised, it must be able to identify the responsible entity "without dispute among multiple wireless occupants" (LGER-301, NYC Comments at 12*See also Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report & Order, 29 FCC Rcd 12865, ¶ 239 (2014) (prior order limiting collocation requirements to utility-owned poles).

As owners of streets, sidewalks, and poles, local governments have traditionally exercised broad authority to manage their rights-of-way. *See St. Louis v. W. Union Tel. Co.*, 148 U.S. 92, 101 (1893). While the "primary and fundamental object of all public highways is to furnish a passage-way for travelers," they have also been put "to numerous other uses," such as "for the reception of sewers, water pipes, gas pipes, … trenches for wires for telegraph, telephone and other purposes, which all require in their construction the disruption of the pavements and the temporary interruption, at least, of the rights of travelers in the public highways." *N.Y. Elec. Lines Co. v. Squire*, 107 N.Y. 593, 604 (1888), *aff'd* 145 U.S. 175, 191 (1892). The "police power" has long been understood to encompass the "due and orderly arrangement of the various and conflicting claims to privileges in the streets"—that is, superintending various work on streets and sidewalks. *Id.*

Since 1885, the City of New York has been tasked with "form[ing] a comprehensive plan by which these various enterprises may be harmonized and carried on without detriment to each other, and with due regard to the rights of the public." *Id.* Taking up this mantle, the City issues franchises for use of its rights-of-way, requires all wires to

be installed underground in certain high-density areas, requires compliance with local landmarks-preservation laws and environmental laws, issues permits to perform work on and under streets and sidewalks, and imposes an annual "embargo" on any non-emergency street-openings in hotspots during the City's crushing tourism season, roughly between Thanksgiving and New Year's Day.[7] Mistakenly claiming a "substantial history of federal involvement" in such purely local matters (Small Cell Order at ¶ 99, n.280), the Orders purport to preempt such traditional rights-of-way management.[8]

The Orders fail to account, for example, for the mayhem and gridlock that would ensue from opening up a sidewalk in midtown Manhattan around the winter holidays—an oversight that confirms why such decisions are traditionally matters under local control. Facing preemption of aesthetic standards and imposition of tight 60- and 90-

---

[7] NYC Office of the Mayor, Citywide Event Coordination and Management, *Memorandum Regarding Permit Embargo for the 2017/2018 Holiday Season* (Oct. 13, 2017), available at https://perma.cc/RQZ4-BLJ.

[8] The Orders claim that Section 253(a)-preemption is appropriate because they reach areas that the federal government has traditionally regulated (Small Cell Order ¶ 99 n.280). But this ignores that the Orders squarely regulate the construction and leasing of sidewalks, streets, and municipal assets in the rights-of-way—matters that are as local as it gets and have long been regulated locally.

day deadlines to process siting applications, cities reviewing such applications will be unable to hold telecommunication providers to the same facially neutral rules that apply to other entities. The Orders also compromise existing processes for franchising or negotiating leases to attach to municipal poles or otherwise use municipally owned property, doing violence to the City of New York's highly successful franchise system.[9]

The Orders thus cross into traditional local police powers or—at a minimum—butt up against them, raising serious constitutional questions under the Tenth Amendment. *See Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991).

[9] The City's scheme attains high levels of wireless deployment not only in core business districts but at the fringes of the city through incentives for development in less lucrative neighborhoods (LGER 300-301, NYC Comments at 11–12). Indeed, the FCC applauded this as a model approach. FCC Public Notice: *Comment Sought on Streamlining Deployment of Small Cell Infrastructure; Mobilitie LLC Petition for Declaratory Ruling*, 31 FCC Rcd 13360, 13371 (WTB 2016) at 8 (Dec. 22, 2016), available at https://perma.cc/BL8N-XRK7.

### 3. The Orders also implicate the Tenth Amendment by conscripting local officials to administer the FCC's regulatory agenda.

Running further afoul of our constitutional architecture, the Orders raise significant Tenth Amendment concerns by micromanaging how cities manage their rights-of-way—displacing local priorities and commandeering the local administrative apparatus to administer a federal agency's regulatory agenda.

The Supreme Court has recently reiterated that the anti-commandeering doctrine bars the federal government from forcing local governments to administer federal regulatory programs. *See Murphy*, 138 S. Ct. at 1477. The Orders try to do just that by seizing control over existing local machinery for processing applications to open streets and install items on sidewalks and city-owned poles. The Orders direct officials to ignore local regulations, constrain their ability to reject or delay approving applications, and set priorities for local decision-makers. *See also Printz v. United States*, 521 U.S. 898, 925–26 (1997) (federal law cannot compel local law-enforcement officials to implement a federal program by carrying out background checks under strict time-limits).

In a city like New York, spanning over 300 square miles and 12,750 miles of sidewalk, a single application seeking permission to use five municipally owned poles requires an inspector to travel hours between poles. Given its sheer size, New York City has developed a complex apparatus for allowing streets to be opened and inspecting and authorizing installations of equipment on city-owned poles or in the rights-of-way. By imposing limitations at every turn, the Orders displace the City's locally tailored approach and force it to instead hire fleets of inspectors to administer a federal regulatory scheme for rights-of-way management. *Murphy*, 138 S. Ct. at 1476–77.

The Orders thus force local governments to implement—and answer for—a national agenda that they had no hand in drafting, without regard to the wishes of their electorate or competing requests for access to poles or sidewalk-opening permits—whether speed cameras in school zones or lead pipe remediation. But the federal government may not force local governments to "bear the brunt of public disapproval, while the federal officials who devised the regulatory program … remain insulated from the electoral ramifications of their decision." *New York v. United States*, 505 U.S. 144, 169 (1992).

Maintaining clear lines of accountability between the national and state governments disciplines both sovereigns, because each will suffer the consequences at the voting booth for its policy choices. *See Printz*, 521 U.S. at 920 (explaining that the Framers deliberately selected a system in which state and federal governments would remain separately accountable); *see also Nat'l Fed'n of Ind. Bus. v. Sebelius*, 567 U.S. 519, 578 (2012) ("[P]olitical accountability [is] key to our federal system.").

### B. These grave constitutional concerns demand a clear statement that Congress conferred such sweeping authority on the FCC.

The Orders assert that the FCC has broad interpretive authority to advance nationwide deployment of 5G, and that this policy authority allows it to intrude on areas traditionally reserved for local governments (*see* Small Cell Order ¶ 1). But that's mistaken. The Orders' constitutional problems and affronts to federalism trigger the clear-statement rule.

"No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." *City of Arlington*, 569 U.S. at 297 (emphasis in

original). When agencies act outside of this authority, as the FCC has done here, "what they do is ultra vires." *Id.*

Courts interpret Congress's grant of rulemaking authority to administrative agencies under the familiar two-step *Chevron* framework. If a statute is clear, the agency must follow it. Only if there is an ambiguity for the agency to resolve should a Court proceed to the second step to "determine if the agency has reasonably interpreted the parameters of its statutory authority." *Id.*

This case should be resolved at *Chevron*'s first step. At step one, in determining whether an agency has stayed within the bounds of its authority, courts look to the text of the statute, the statutory purpose as evinced by legislative history, and the "traditional tools of statutory construction"—*i.e.*, interpretive canons—to test whether the text is clear. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 n.9 (1984).[10] If

[10] The Supreme Court regularly applies interpretive canons at *Chevron*'s first step. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1617, 1625–30 (2018) (presumption against implied repeals); *Solid Waste Agency Northern Cook Cnty.*, 531 U.S. at 172–73 (constitutional-avoidance canon and presumption against preemption); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574–75 (1988) (constitutional-avoidance canon). As does this Court and other courts of appeals. *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 815–16 (9th Cir. 2016) (canon of constitutional avoidance); *Zivkovic v. Holder*, 724

*(cont'd on next page)*

an interpretive canon resolves an apparent ambiguity, "*Chevron* leaves the stage." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (citation omitted); *INS v. St. Cyr*, 533 U.S. 289, 320 n. 45 (2001) (applying presumption against retroactivity to resolve ambiguity, so that "there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve"). This makes sense because the notion that agencies are more likely to get the answer right, given their expertise, does not apply to questions of basic statutory construction—which is generally the judiciary's province. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446–48 (1987) (pure questions of statutory construction are for the courts, while case-by-case questions of interpretation are for agencies).

Several related interpretive canons that fall under the umbrella of clear-statement rules—including the assumption that Congress does not intrude on traditional local-government functions, the canon of constitutional avoidance, and the presumption against preemption—are implicated here. Reduced to their essence, these rules bar reading a statute to create potential constitutional problems in the absence of a

---

F.3d 894, 898–99 (7th Cir. 2013) (presumption against retroactivity); *Arangure v. Whitaker*, 911 F.3d 333, 342 (6th Cir. 2018) (presumption of *res judicata*).

clear statement from Congress that it intended to flex the outer edges of its authority. *Solid Waste Agency Northern Cook Cnty.*, 531 U.S. at 172–73 (avoiding a Tenth Amendment problem); *United States v. Sec. Indus. Bank*, 459 U.S. 70, 82 (1982) (avoiding a Takings problem); *City of Dallas v. FCC*, 165 F.3d 341, 349 (5th Cir. 1999) (holding that the FCC lacks authority to preempt local rights-of-way requirements without a clear statement from Congress).

In part, the requirement of a clear statement stems from a prudential concern not to needlessly reach constitutional issues. It also reflects a simple interpretive principle: the assumption that Congress does not casually authorize administrative agencies to take actions that would push the limits of congressional authority. *Gregory*, 501 U.S. at 460–61; *accord Bond*, 134 S. Ct. at 2090. Thus, the clear-statement requirement assures that Congress has affirmatively considered the potential disruption to our federalist structure and determined that its benefits justify the burden. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272–73 (1994); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

Because the FCC's reading of the Act, at a minimum, raises thorny constitutional questions, *see supra* Point A, this Court should require a clear statement from Congress that it intended such a result. This clear-statement framework was the backdrop against which Congress enacted the Telecommunications Act and informs what Congress expected of this Court in construing its preemptive scope. *See Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997) ("[J]ust as we will not infer from an ambiguous statute that Congress meant to encroach on constitutional boundaries, we will not presume from ambiguous language that Congress intended to authorize an agency to do so."). "[I]f Congress means to push the constitutional envelope, it must do so explicitly." *Id.*

### C. Nothing in the Telecommunications Act grants the FCC authority to intrude so significantly on local governments' prerogatives.

There is no clear statement in the Act authorizing the FCC to create significant takings issues, infringe on a traditional local power, and potentially commandeer local officials. To the contrary, the text of the Act and its legislative history confirm that Congress never intended to interfere with local management of rights-of-way, and certainly did

not intend to allow the FCC to do so. Given the deeply troubling constitutional implications of the Orders and lack of direct textual support for the FCC's position, the statutory gymnastics underlying the Orders are insufficient to support them. Because Congress has not spoken clearly, *Chevron* should leave the stage. *Epic*, 138 S. Ct. at 1630. Thus, the FCC is not due any deference in its claim that Sections 253(a) and 332(c)(7) authorize the effects of its *ultra vires* Orders.

### 1. Section 253 expressly preserves local authority over rights-of-way and precludes the FCC from preempting that authority.

Section 253(a), on which the FCC relies as a source of authority for the Orders, contains no clear statement of congressional intent to authorize the FCC to take local property or preempt local rights-of-way authority. It merely provides that local governments cannot enact laws or rules that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). This is far from a clear statement authorizing the Orders.

To the contrary, it is clear that Congress intended to (and did) preserve local authority over rights-of-way and expressly guarded

against attempts by the FCC to interfere with it. Section 253(c) of the Act states:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis….

47 U.S.C. § 253(c). This provision is unambiguous. *See Virginia Uranium v. Warren*, No. 16–1275, 587 U. S. ___, Slip Op. at 6, 2019 U.S. LEXIS 4177 at *14 (June 17, 2019) (describing a similarly worded section of the Atomic Energy Act "as a non-preemption clause"). There is no preemption so long as the municipality is managing its rights-of-way or collecting compensation in accordance with the terms of Section 253(c).

The legislative history confirms this plain meaning. Congress enacted Section 253(a) to encourage competition. *See Sprint Telephony*, 543 F.3d at 576. To advance this purpose, Congress gave the FCC limited authority to preempt schemes that created local monopolies. But Congress was clear that it did not intend to allow the FCC to reach local rights-of-way, as Senator Gorton summarized:

> [T]he rules that a city or a county imposes on how its street rights of way are going to be utilized, whether there are aboveground wires or underground wires, what kind of equipment ought to be used in excavations, what hours the excavations should take place, are a matter of primarily local concern and, of course, they are exempted by subsection (c) of this section.

141 Cong. Rec. S8306, 8308 (daily ed. June 14, 1995).

During the congressional debates, there was extensive discussion of the scope of subsection (c)'s preemption: Section 253 was designed to allow preemption to "remov[e] barriers to entry," such as where "a State or a city … says only one telephone company can operate in a given field." 141 Cong. Rec. S8213 (daily ed. June 13, 1995) (Statement of Senator Gorton). On the other hand, "cities, counties, local communities should control the use of their own streets and should not be required to come to Washington, D.C. to defend a permit action for digging up a street." *Id.* This history affirms that "local governments['] control over their public rights of way … should be retained locally" and that "the Federal Communications Commission not be able to preempt such actions." *Id*. Section 253(a) is far from a clear statement supporting the FCC's extraordinary Orders with—at a minimum—deeply troubling

constitutional consequences; if anything, the text of Section 253(c) suggests there is no such authority.

### 2. Section 332(c)(7) confirms that the FCC is precluded from using Section 253 to regulate placement of personal wireless facilities.

Section 332(c)(7) further undermines any claim that Section 253 of the Act clearly authorizes the Orders. Indeed, the text of Section 332(c)(7) only confirms that Congress did not intend for the FCC to create Fifth or Tenth Amendment problems by preempting local-government control of rights-of-way or municipally owned property. Section 332(c)(7) bars local government regulations that "prohibit or have the effect of prohibiting the provision of personal wireless services," but expressly preserves local "regulation of the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7). Congress further protected local siting authority in Section 332(c)(7)(A) by making clear that Section 332(c)(7) is the only part of the Telecommunications Act that authorizes any preemption of siting decisions:

> Except as provided *in this paragraph*, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality

> thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities….

47 U.S.C. § 332(c)(7)(A) (emphasis added); *see also* H.R. Rep. No. 104-458, at 207-08 (1996) (Conf. Rep.) (explaining that Section 332(c)(7) "preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances" set forth in Section 332(c)(7)(B)). This language could not be clearer in precluding the FCC from relying on Section 253(a) as a source of authority to displace local governments' "decisions regarding the placement, construction, and modification of personal wireless service facilities"—as any preemption of these decisions is permitted only in the narrow context of the specific circumstances enumerated in Section 332(c)(7)(B).

The FCC cannot claim that the preemptive effect of the Orders—reaching rights-of-way and even municipally owned property—is authorized by any of the five express limitations enumerated in Section 332(c)(7)(B).[11] Certainly, there is no clear statement in Section

---

[11] As local-government petitioners have explained (LG's Br. 78–79), and the FCC has itself recognized, Section 332(c)(7)(B) applies only to local governments' acts

*(cont'd on next page)*

332(c)(7)(B) (or elsewhere in the Act) that could be read as evincing some congressional intent to authorize the constitutionally troubling effects of the Orders. To the contrary, Section 332(c)(7)(A) confirms that Congress did not allow the FCC to create the constitutional thicket that the Orders have wrought, and certainly not by using Section 253(a).

### 3. The FCC fails to identify clear authorization for the Orders' severe interference with local governments' prerogatives.

The FCC attempts to expand its preemptive authority under the Act by lowering the threshold for what acts of a state or local government constitute an effective prohibition. Intervenors agree with local-government petitioners that the FCC's new reading of the Act is irrational (*see* LG's Br. Section II.A). What's more, the mere fact that the FCC must strain so hard to find a hook on which to hang its

---

taken "in their role as land use regulators and does not apply to such entities acting in their proprietary capacities." *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report & Order, 29 FCC Rcd 12865, 12964 (2014); *see also Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002) (Section 332(c)(7) "does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity"). And it's well settled that Section 332(c)(7)(B)'s "effective prohibition" preemption requires a showing of an actual or effective prohibition, not just a "mere possibility of prohibition." *Sprint Telephony,* 543 F.3d at 578; *see also* LG's Br. 16; 36–43.

authority to issue the Orders is itself powerful evidence that the Act contains no clear congressional authorization for them.

The FCC has claimed that its broad general preemption authority was confirmed by the Supreme Court in *City of Arlington v. FCC*, 569 U.S. 290 (2013). But that's not the case. In *City of Arlington*, there was a bona fide ambiguity in the statute for the agency to resolve. The question before the Court was whether the agency was due *Chevron* deference in resolving an ambiguity related to its jurisdiction. *Id.* at 296–97. The Court held that labeling the agency's action as one concerning "jurisdiction" did not diminish the deference owed, reasoning that there is no meaningful difference between describing an action as within the bounds of the FCC's statutory authority and describing it as within its jurisdiction. *Id.* at 297. Agencies have discretion within the bounds of their authority and act *ultra vires* outside of them. *Id.*

*City of Arlington* involved Section 332(c)(7)'s general preservation over local zoning authority, with enumerated narrow exceptions where that authority can be circumscribed. *Id.* at 294. The FCC had interpreted one of those enumerated limitations, that local governments "shall act on any [siting] request … within a reasonable period of time,"

47 U.S.C. § 332(c)(7)(B)(ii), as requiring local zoning authorities to act within 90 days, *City of Arlington*, 569 U.S. at 295. The Court noted that Congress clearly intended to preempt local zoning timelines, "explicitly supplant[ing] state authority by *requiring* zoning authorities to render a decision 'within a reasonable period of time.'" *Id.* at 305 (emphasis in original). Finding this express delegation of authority, the Court moved to *Chevron*'s second step to find 90 days was a reasonable way to resolve the ambiguity.

In sharp contrast to the provisions in Section 332(c)(7) and its clear preemption of unreasonable delays, nothing in Section 253 allows the FCC to supplant local management of sidewalks, poles, or personnel, because Section 253(c)'s savings clause unambiguously withholds such authority—as is clear when the canons of statutory interpretation are applied to the text. Indeed, the concurrence in *City of Arlington* emphasized that courts should consider "the statute's text, its context, the structure of the statutory scheme, and canons of textual construction," and its "purposes, including those revealed in part by legislative and regulatory history," "in determining whether the statute is ambiguous." *Id.* at 309–10 (Breyer, J., concurring). Here, where the

agency's Orders trigger the clear-statement rule, there is no ambiguous term, because the "statutory text," read in light of that rule, "forecloses the agency's assertion of authority." *Id.* at 301.

The FCC's assertion of its interpretive authority would write Sections 253(c) and 332(c)(7)(A) out of the Act. Both of those provisions were included by Congress for the specific purpose of preserving state and local rights. They are precisely the kind of statutory limitations that an unaccountable federal agency ought not to be able to displace without a clear statement from Congress. The FCC cannot simply ignore specific directives from Congress limiting its authority by invoking its general interpretive authority, and then assert *Chevron* deference to avoid judicial review. The Supreme Court has rejected this "fox-in-the-henhouse" approach to statutory interpretation. *City of Arlington*, 569 U.S. at 307. "[B]y taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority," courts can ensure that "[w]here Congress has established a clear line, the agency cannot go beyond it." *Id.*

Particularly given the serious constitutional implications, the FCC's interpretive authority cannot overcome Congress's statement

that nothing in the Act limits local governments' authority over "decisions regarding the placement, construction, and modification of personal wireless service facilities," other than those limitations set out in paragraph Section 332(c)(7). Nor can the FCC use the backdoor of Section 253(a) to preempt siting decisions that are expressly preserved in Section 332(c)(7) or rights-of-way management and reasonable compensation measures preserved in Section 253(c).

#### 4. The FCC cannot create serious constitutional problems to achieve a national policy agenda without Congress's permission.

The FCC also claims that it may act to "remove regulatory barriers" to the deployment of wireless facilities in the rights-of-way through sweeping preemption of local-government measures—even though Congress has not expressly conferred that power upon it—because it believes that doing so will advance its policy goals (Small Cell Order ¶ 1). But the FCC knows that the restrictions on its power are stricter than that; it recently acknowledged that its "role is to achieve the outcomes Congress instructs, invoking the authorities that Congress has given," and "not to assume that Congress must have given [the agency] authority to address any problems [it] identifies," because

"an agency literally has no power to act … unless and until Congress confers power upon it." *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, FCC 17-166 at ¶ 160 (2018).

And, in any event, Section 253 has two key purposes—a reading that acknowledges one but ignores the other does not comport with the statute. As the FCC is well aware, the section's dual purposes are to eliminate monopolies *while also preserving local authority over rights-of-way*. As Rep. Barton aptly summarized during the legislative debate on the Act:

> [The Act] explicitly guarantees that cities and local governments have the right to not only control access within their city limits, but also to set the compensation level for the use of that right-of-way.
>
> [But the Act] does not let the city governments prohibit entry of telecommunications service providers for pass through or for providing service to their community.

141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995) ("The Federal Government has absolutely no business telling State and local government[s] how to price access to their local right-of-way.").

Accordingly, the FCC cannot act to advance one of the twin aims of Section 253 by compromising the other, particularly in an area where

a clear statement is needed. And because there is no clear statement from Congress authorizing the sweeping and deeply troubling scope of the Orders, the agency lacks authority to adopt them, regardless of whether the Orders might help achieve its desired policy ends. Application of the clear-statement requirement establishes a bright line marking the limits of the FCC's authority, and the agency cannot go beyond it. *City of Arlington*, 569 U.S. at 307.

## CONCLUSION

The orders should be vacated.

Dated: New York, NY
June 17, 2019

Respectfully submitted,

NANCY L. WERNER
*General Counsel*
Attorney for NATOA

By: /s/ Nancy L. Werner
NANCY L. WERNER

3213 Duke Street #695
Alexandria, VA 22314
(703) 519-8035
nwerner@natoa.org

ZACHARY W. CARTER
*Corporation Counsel*
*of the City of New York*
Attorney for the City of New York

By: /s/ Elina Druker
ELINA DRUKER

RICHARD DEARING
CLAUDE S. PLATTON
Assistant Corporation Counsel

100 Church Street
New York, NY 10007
212-356-2609
edruker@law.nyc.gov

## STATEMENT OF RELATED CASES

The *Orders* on appeal have not previously been the subject of review by this Court or any other court. All petitions for review of these *Orders* have been consolidated before this Court under either *City of Portland v. FCC*, No. 18-72689, or *Sprint Corp. v. FCC*, No. 19-70123, as appropriate, and are being briefed together under to the Briefing Order for the cases.

Dated: New York, NY
June 17, 2019

/s/ Elina Druker
ELINA DRUKER

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,513 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in Century School Book, 14-point font.

Dated: New York, NY
June 17, 2019

/s/ Elina Druker
ELINA DRUKER

## CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: New York, NY
June 17, 2019

/s/ Elina Druker
ELINA DRUKER

## ADDENDUM

All applicable statutes and regulations are contained in the brief or addendum of Local Governments Petitioners.

Dated: New York, NY
June 17, 2019

/s/ Elina Druker
ELINA DRUKER