

**DISSENTING STATEMENT OF  
COMMISSIONER AJIT PAI**

Re: *City of Wilson, North Carolina Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq.*, WC Docket No. 14-115, *The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601*, WC Docket No. 14-116.

In 1999, the State of Tennessee authorized municipal electric systems to provide Internet service within the boundaries of their service areas.<sup>1</sup> The legislation enjoyed widespread support among Tennessee's elected representatives. It passed the Tennessee General Assembly and the Tennessee Senate unanimously, each of which was under the control of the Democratic Party. The votes were 96-0 and 32-0, respectively.<sup>2</sup> The Republican Governor of Tennessee then signed the bill into law.<sup>3</sup>

Today, however, three unelected officials in Washington, DC, purport to rewrite Tennessee law on a party-line vote. Specifically, they attempt to empower Tennessee municipal electric systems to offer broadband service outside of their service areas—authority which those systems have *never* possessed. While they do not contest that Tennessee may prohibit municipal electric systems from offering Internet service *altogether*, the *Order* claims that the Volunteer State may not grant municipalities such authority on the condition that they only serve customers within their service areas. In other words, once the people's elected representatives allow municipalities to offer any Internet service at all, the camel's nose owns the tent.

This decision, along with the decision to preempt a similar North Carolina law,<sup>4</sup> does not make any sense. Even more importantly, it is unlawful. Supreme Court precedent makes evident that the FCC simply does not have the power to do what it claims to be doing. In taking this step, the FCC usurps fundamental aspects of state sovereignty. And it disrupts the balance of power between the federal government and state governments that lies at the core of our constitutional system of government. Whatever the merits of any particular municipal broadband project—and to be clear, on this question I take no position, deferring to voters and elected officials—I do not believe this agency has the power to preempt. I therefore dissent.

I.

Let's begin with the one key point that today's *Order* does not dispute: The Commission cannot preempt state laws that flat-out prohibit municipalities from offering broadband service. Why? The answer begins with Constitutional Law 101.

Our Constitution establishes a system of dual sovereignty between the States and the federal government, such that sovereignty rests concurrently with both the federal government and the States.<sup>5</sup> Specifically, the Tenth Amendment reserves all powers not specifically delegated to the federal government by the Constitution to the States or to the people.<sup>6</sup> Thus, States are not creations of the

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<sup>1</sup> Tenn. Code Ann. § 7-52-601.

<sup>2</sup> HB 1032, TENN. GEN. ASSEMBLY, <http://go.usa.gov/3cQfH> (last visited Feb. 24, 2015).

<sup>3</sup> *Id.*

<sup>4</sup> N.C. Gen. Stat. §§ 160a-340 through 160a-340.6.

<sup>5</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (citing *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)).

<sup>6</sup> *See* U.S. CONST. Amdt. 10.

central government. They are separate sovereigns. This distribution of sovereignty, otherwise known as federalism, is the defining feature of the relationship between the federal and state governments.

The relationship between a State and its political subdivisions (counties and cities), however, is an entirely different animal. Legally speaking, municipalities exist as arms of the State. As the Supreme Court has explained, municipalities are “created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . in [its] absolute discretion.”<sup>7</sup> Because a municipality is merely a department of the state, the state may withhold, grant or withdraw powers and privileges to a municipality as it sees fit. That is to say, cities and counties are not sovereign.<sup>8</sup> A municipality has “no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.”<sup>9</sup>

What does all of this mean for purposes of today’s *Order*? *First*, as a result of our system of dual sovereignty, the Supreme Court has advised that any “federal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with great skepticism.”<sup>10</sup> Specifically, in *Gregory v. Ashcroft*, the Court held that if Congress wishes to allow the federal government to preempt the States’ historic powers, it must make its intent “unmistakably clear.”<sup>11</sup> This has come to be known as the clear statement rule.

And *second*, because localities are merely creations of the State, any attempt by the federal government to interfere with a State’s governance of its own municipalities necessarily “constrains traditional state authority to order its government.”<sup>12</sup> Indeed, the D.C. Circuit has held that “interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty.”<sup>13</sup>

Each of these points applies to this *Order*. It should come as no surprise that any attempt by the Commission to preempt a state statute prohibiting municipalities from offering broadband service would trigger the clear statement rule. The Supreme Court case of *Nixon v. Missouri Municipal League* is squarely on point. In that case, the Court confronted the question of whether the FCC could use section 253 of the Communications Act to preempt a Missouri law that prohibited municipalities from providing telecommunications services. The Court concluded that Missouri’s ability to determine whether its municipalities could provide such services was part and parcel of the “traditional state authority to order its government.”<sup>14</sup> It therefore decided that the clear statement rule from *Gregory* applied.<sup>15</sup>

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<sup>7</sup> *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991) (alteration in original) (internal quotation marks and citations omitted) (quoting *Sailors v. Board of Ed. of Kent Cty.*, 387 U.S. 105, 108 (1967)).

<sup>8</sup> *Reynolds v. Sims*, 377 U.S. 533, 575 (1964) (“Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities”). Indeed, nothing in the U.S. Constitution prevents a State from abolishing municipalities altogether.

<sup>9</sup> *Ysursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 362 (2009) (citing *Williams v. Mayor of Balt.*, 289 U.S. 36, 40 (1933)).

<sup>10</sup> *Nixon v. Missouri Mun. League*, 541 U.S. 125, 140 (2004).

<sup>11</sup> *Gregory*, 501 U.S. at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

<sup>12</sup> *Nixon*, 541 U.S. at 130.

<sup>13</sup> *City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999).

<sup>14</sup> *Nixon*, 541 U.S. at 130.

<sup>15</sup> *Id.* Of course, the fact that this *Order* deals with broadband services while *Nixon* addressed telecommunications services is of no constitutional moment. The federalism implications are exactly the same. In any event, today the Commission in another item reclassifies broadband service as a telecommunications service. *Protecting and*

(continued...)

It is also apparent that any attempt by the Commission to preempt state prohibitions on municipalities offering broadband service would not satisfy the clear statement rule. The Court’s decision in *Nixon* is again instructive. There, Missouri municipalities argued that section 253 of the Communications Act gave the Commission the authority to preempt the Missouri statute at issue.<sup>16</sup> Here is what section 253 had to say in relevant part:

(a) In general

No 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.

...

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, *the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.*<sup>17</sup>

But despite the fact that section 253(a) *specifically contemplates the preemption of state laws* and section 253(d) *specifically directs the Commission to preempt state laws* that have the effect of prohibiting the offering of telecommunications services, the Supreme Court *still* concluded that section 253 did not contain the requisite clear statement necessary for the Commission to preempt. As Justice Souter explained in his opinion for the Court, it was ambiguous whether Congress intended the phrase “any entity” in section 253(a) to include state and municipal entities. The Court thus held that section 253 was insufficiently clear to satisfy *Gregory*’s clear statement rule.<sup>18</sup>

Here, the Commission relies on section 706 of the Telecommunications Act of 1996, not section 253 of the Communications Act, for its authority to preempt state laws governing municipal broadband. But if section 253 could not clear the high hurdle presented by *Gregory*, section 706 falls even further short of the mark.

For starters, while section 253 at least expressly mentions preemption, the text of section 706 makes no reference to it whatsoever. Section 706(a) urges the Commission to encourage broadband deployment using an enumerated list of tools that includes “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to entry.”<sup>19</sup> Preemption is nowhere discussed. Similarly, section 706(b) tasks the Commission with evaluating the current state of broadband deployment and, if necessary, “tak[ing] immediate action to accelerate deployment of such capability by removing barriers to infrastructure

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*Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-XXX (2015) (reclassifying broadband Internet access service as a telecommunications service).

<sup>16</sup> *Nixon*, 541 U.S. at 128.

<sup>17</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 253, 110 Stat. 56 (codified at 47 U.S.C. § 253) (emphasis added).

<sup>18</sup> *Nixon*, 541 U.S. at 140–41.

<sup>19</sup> Telecommunications Act § 706(a) (codified at 47 U.S.C. § 1302(a)).

investment and by promoting competition in the telecommunications market.”<sup>20</sup> Again, there’s no mention of preemption.<sup>21</sup>

In short, section 706 does not “point unequivocally to a commitment by Congress”<sup>22</sup> to permit the FCC to preempt state laws governing their own municipalities. Section 706 therefore does not satisfy the clear statement rule and does not permit the Commission to preempt state prohibitions on municipal broadband projects. Indeed, it’s far from certain that section 706 even gives the Commission the ability to preempt state laws regulating *private actors*—but more on that later.<sup>23</sup>

## II.

Notwithstanding all of this, the Commission nonetheless maintains that it can preempt the Tennessee and North Carolina laws at issue here. Why? According to the *Order*, the clear statement rule does not apply because Tennessee and North Carolina have not prohibited municipalities from offering broadband service altogether. They have only imposed restrictions on their ability to do so.<sup>24</sup>

The *Order* claims that the relevant Tennessee and North Carolina laws do not implicate “core attributes of state sovereignty.”<sup>25</sup> Instead, it asserts that when States impose restrictions on municipal broadband less onerous than a flat-out ban, such restrictions are magically transformed into an effectuation of a “state’s preferred communications policy objectives”—and therefore subject to federal preemption if they conflict with federal policy objectives.<sup>26</sup>

What difference does any of this make? A state is not stripped of its core sovereign power to govern its political subdivisions, which are arms of the state, merely because it grants them certain powers. Rather, “[t]he number, nature, and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rest[] in the absolute discretion of the state.”<sup>27</sup> And a state does not relinquish that “absolute discretion” simply by affording a municipality some, rather than plenary, authority to offer broadband service. Unfortunately for the Commission, all the lipstick in the world cannot disguise this pig.

## A.

Take, for example, the geographic restrictions set forth in the Tennessee and North Carolina laws at issue here. In Tennessee, a municipal electric system is authorized to offer broadband service within its

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<sup>20</sup> *Id.* § 706(b) (codified at 47 U.S.C. § 1302(b)).

<sup>21</sup> For purposes of Sections I, II, and III of this statement, I will assume *arguendo* that section 706 provides the Commission with some measure of independent authority. However, in Section IV, I will explain why I do not believe that section 706 delegates to the Commission *any* additional authority.

<sup>22</sup> *Nixon*, 541 U.S. at 141.

<sup>23</sup> *See infra* Section III.

<sup>24</sup> *Order* at para. 162.

<sup>25</sup> *Id.* at para. 157.

<sup>26</sup> *Id.* at para. 147.

<sup>27</sup> *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (emphasis added) (quoting *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907)).

service area, but not outside of those boundaries.<sup>28</sup> In North Carolina, a city may only provide broadband services within its city limits.<sup>29</sup>

These geographic restrictions go to the heart of a state’s “traditional [] authority to order its government.”<sup>30</sup> Indeed, the Commission’s claim to the contrary is absurd. A critical component of a state’s ability to order its government is the ability to organize its own municipal subdivisions. And a critical component of organizing municipalities is the power to define each subdivision’s geographic reach. For inherent in the concept of a *subdivision* is the idea that a locality will exercise authority over a limited geographic area within a State. For example, the definition of a “city” under North Carolina law is “a municipal corporation organized under the laws of this State for the better government *of the people within its jurisdiction*.”<sup>31</sup> Indeed, if a State could not confine a municipality’s activities to a specified geographic area, then there would be little point in maintaining local governments at all; it would be more efficient to do everything at the state level.

This is why the U.S. Supreme Court has made clear: “[T]he territory over which [a municipality’s powers] shall be exercised rests in the absolute discretion of the state.”<sup>32</sup> Thus, when the Commission tries to preempt provisions of Tennessee and North Carolina law that impose geographic restrictions on municipalities’ activities with respect to broadband, it is directly interfering with a core aspect of state sovereignty—namely the ability of Tennessee and North Carolina to make “arrangements for conducting their own governments”<sup>33</sup> and to determine “the territory over which [their municipalities’ powers] shall be exercised.”<sup>34</sup>

The implausibility of the Commission’s claim to the contrary is perhaps best illustrated by a couple of hypotheticals. Suppose, for example, that the federal government attempted to tell Tennessee that it could not limit the City of Chattanooga’s Police Department to enforcing the law in Chattanooga. Instead, once the State of Tennessee authorized the City of Chattanooga to have a police department, it was required to let Chattanooga’s police officers have free rein to patrol from Memphis to Knoxville. Would anyone seriously contend that such an edict from the federal government wouldn’t interfere with Tennessee’s ability to order its political subdivisions? Of course not.

Or suppose that the federal government tried to forbid North Carolina from limiting the City of Wilson’s Parks and Recreation Department to operating parks only within Wilson. Instead, if North Carolina wanted to allow Wilson to have a Parks and Recreation Department, it would have to permit the Department to operate parks from Asheville to the Outer Banks. Again, such a mandate from the federal government would obviously interfere with North Carolina’s ability to order its political subdivisions as it sees fit.

## B.

There are other problems with the Commission’s contention that it can preempt state restrictions on municipal broadband projects. To begin with, such a claim leads to an exceptionally strange result. While a state would be free to ban municipal broadband projects outright, it would be forbidden from

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<sup>28</sup> Tenn. Code Ann. § 7-52-601.

<sup>29</sup> N.C. Gen. Stat. §§ 160a-340.1(a)(3).

<sup>30</sup> *Nixon*, 541 U.S. at 130.

<sup>31</sup> N.C. Gen. Stat. § 160A-1(3).

<sup>32</sup> *Holt Civic Club*, 439 U.S. at 71.

<sup>33</sup> *Nixon*, 541 U.S. at 140.

<sup>34</sup> *Holt Civic Club*, 439 U.S. at 71.

imposing more modest restrictions on such projects. Or, in other words, the most severe state law restrictions on municipal broadband projects (prohibitions) *could not* be preempted, whereas less stringent restrictions (those that purportedly do not amount to prohibitions) *could* be preempted.

I highly doubt that Congress adopted, much less intended, such a convoluted framework when it enacted the Telecommunications Act of 1996, in part because this would lead to perverse consequences. For example, if a state is denied the power to authorize municipalities to offer broadband service with conditions, it will be less likely to authorize them to do so at all. And if, as the Commission suggests, municipal broadband projects truly advance section 706's aim of enhancing broadband deployment and competition, it would seem odd to interpret the statute in a manner that would push states toward prohibiting municipal broadband projects altogether.<sup>35</sup>

### C.

Moreover, the line the Commission draws between state prohibitions of municipal broadband projects (which it claims present “a different question”<sup>36</sup>) and state restrictions on such projects is artificial and thus untenable. This is because all conditions on the provision of services are effectively prohibitions when those specified conditions are not satisfied.

Consider, for example, a state law stating that a municipality may not offer broadband service so long as at least one private broadband provider is offering service to all residents of that municipality. The Commission likely would claim that such a law would be a restriction on municipal broadband projects subject to preemption under section 706 because it does not forbid a municipality from providing broadband service in all circumstances. But in reality, the state law functions as a prohibition as applied to any municipality where all residents are being offered broadband service by a private provider.

Or consider a state law providing that municipalities were authorized to operate municipal broadband projects beginning January 1, 2020. Would that condition as to timing be a restriction that could be preempted using section 706? Or would it be a prohibition on municipal broadband projects through the end of 2019 that could not be preempted?

In short, the heart of the Commission's analysis rests not on a principled distinction but semantics. And no matter what wordplay the Commission employs, it cannot escape one basic fact: Through preemption, the Commission is attempting to provide municipalities in Tennessee and North Carolina with authority that their state governments have not given them.

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<sup>35</sup> Indeed, it is worth noting that in 1997, the Commission explicitly encouraged states to impose restrictions on municipal entry into the telecommunications market that would fall short of a total prohibition.

[W]e encourage states to avoid enacting absolute prohibitions on municipal entry into telecommunications . . . . Municipal entry can bring significant benefits by making additional facilities available for the provision of competitive services. At the same time, we recognize that entry by municipalities into telecommunications may raise issues regarding taxpayer protection from the economic risks of entry, as well as questions concerning possible regulatory bias when separate arms of a municipality act as both a regulator and a competitor. We believe, however, that these issues can be dealt with successfully through measures that are much less restrictive than an outright ban on entry, permitting consumers to reap the benefits of increased competition.

*Pub. Util. Comm'n of Tex. et al.*, CCB Pols. 96-13, 96-14, 96-16, 96-19, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3549, para. 190 (1997).

<sup>36</sup> *Order* at para. 147.

Such action would interfere with “States’ arrangements for conducting their own governments”<sup>37</sup> because it would be inconsistent with the fundamental principle that a State has “absolute discretion” to determine the “number, nature, and duration” of the powers it wishes to entrust to its municipalities.<sup>38</sup> As a result, there must be a clear statement that Congress intended to give the Commission the authority to infringe upon the sovereignty of Tennessee and North Carolina in this manner—a clear statement that is nowhere found in section 706.

### III.

But it even gets worse for the Commission’s position. For not only does section 706 lack any clear statement necessary to preempt “States’ arrangements for conducting their own governments,” I also very much doubt that it even gives the Commission the authority to preempt *any* state laws, even those governing private actors.

For example, section 601(c)(1) of the Telecommunications Act of 1996 states: “NO IMPLIED EFFECT- This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.”<sup>39</sup> The Commission acknowledges that “[b]y its terms, section 601(c) prevents ‘implied’ preemption”<sup>40</sup> and nowhere claims that section 706 expressly refers to the preemption or impairment of state law.

Nonetheless, the Commission tries to circumvent this prohibition by claiming that section 601(c) only prevents the Act itself from being read to preempt state law by implication. Section 601(c), according to the Commission, does not prevent the Act from being read to implicitly give such preemptive powers to the Commission.<sup>41</sup> Nowhere does the *Order* contain any explanation for why Congress would have intended such an odd result. It is difficult to believe that Congress would have been concerned about implicitly superseding state law in the text of the Act yet would implicitly give the Commission the authority to do the exact same thing. No, section 601(c) “counsel[s] against any broad construction” of the 1996 Act “that would create an implicit conflict with state [] law.”<sup>42</sup> Here, that principle suggests not reading section 706 of the Telecommunications Act so broadly as to give the Commission the power to manufacture conflicts with state law. Hence, it counsels against interpreting section 706 to give the Commission the power to preempt state law.

There’s an additional problem with the Commission’s approach: Section 706(a) extends beyond the FCC. Remember that the text of that subsection gives the FCC “and each State commission with regulatory jurisdiction over telecommunications services” the *same direction*: to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”<sup>43</sup>

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<sup>37</sup> *Nixon*, 541 U.S. at 140.

<sup>38</sup> *Wisconsin Pub. Intervenor*, 501 U.S. at 607–08 (citations omitted); *Holt Civic Club*, 439 U.S. at 71 (quoting *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907)).

<sup>39</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(c), 110 Stat. 56 (codified at 47 U.S.C. § 152).

<sup>40</sup> *Order* at para. 153.

<sup>41</sup> *Id.*

<sup>42</sup> *Pinney v. Nokia, Inc.*, 402 F.3d 430, 458 (4th Cir. 2005).

<sup>43</sup> Telecommunications Act of 1996 § 706(a) (codified at 47 U.S.C. § 1302(a)).

Therefore, if section 706(a) authorizes the FCC to preempt state law, it would appear to empower State commissions to do the same. Recognizing the absurdity of this result (and perhaps how problematic it is from a federalism standpoint), the *Order* contends that the phrase “other regulating methods” in section 706(a) means one thing when applied to the FCC and another when applied to State commissions.<sup>44</sup> But nothing in the text of the statute supports that argument. Only by rewriting section 706(a), rather than interpreting it, can the Commission reach this result.<sup>45</sup>

As support for its position, the *Order* looks to the D.C. Circuit’s decision in *Verizon v. FCC*.<sup>46</sup> But there, the D.C. Circuit simply said that it was not implausible to believe that Congress would have granted authority to State commissions in section 706(a). The court nowhere stated that a single phrase in section 706(a)—“other regulating methods”—could mean two different things in the same provision.

Turning to section 706(b), the case for interpreting the statute to permit the Commission to preempt state law is similarly unavailing. Under the Commission’s own interpretation of section 706(b), the provision only gives the Commission authority when the FCC determines that advanced telecommunications capability is *not* being deployed to all Americans in a reasonable and timely fashion. And the Commission asserts that it currently possesses the power to use section 706(b) to preempt state laws because it has made such a negative determination.<sup>47</sup> But that argument presents a pickle: What happens if the Commission finds at a later date that broadband *is* being deployed to all Americans in a reasonable and timely fashion? Once the Commission’s supposed section 706(b) authority evaporates, would any state laws that were preempted under section 706(b) cease to be preempted? That would seem to be the case since the Commission’s authority to preempt such laws would no longer exist. But this would be an odd result to say the least (notice the recurring theme here). Indeed, I am unaware of any similar statutory scheme involving preemption, which again suggests that Congress did not intend to give the Commission the power to preempt state law under section 706(b).<sup>48</sup>

Furthermore, the statutory history underlying section 706(b) also points in the same direction. When the Senate in 1995 passed the bill that became the Telecommunications Act of 1996, that legislation contained a precursor to section 706(b) that authorized the FCC, if it determined that broadband was not being deployed in a reasonable and timely fashion, to “preempt State commissions that fail to act to ensure [the] availability [of advanced telecommunications capability to all Americans].”<sup>49</sup> But Congress ultimately decided not to grant this preemptory power to the Commission and *eliminated that language from the final version of the bill*.

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<sup>44</sup> *Order* at para. 151.

<sup>45</sup> *Cf. Clark v. Martinez*, 543 U.S. 371, 378 (2005) (“To give these same words a different meaning for each category would be to invent a statute rather than interpret one.”).

<sup>46</sup> *Id.* (citing *Verizon v. FCC*, 740 F.3d 623, 638 (D.C. Cir. 2014)).

<sup>47</sup> *Order* at para. 137.

<sup>48</sup> Relying on a statement contained in a *dissenting* opinion by a U.S. Supreme Court Justice, the *Order* speculates that “Commission actions adopted pursuant to a negative section 706(b) determination would not simply be swept away by a future positive section 706(b) finding.” *Order* at note 374. But what authority would the Commission have to maintain the preemption of state law under section 706(b) without section 706(b) authority? Indeed, if Congress gave the Federal Emergency Management Agency (FEMA) authority to preempt state law during a hurricane, would anyone think that FEMA could continue to preempt that state law once the storm had passed, sunny skies had returned, and recovery efforts were over? Of course not. So too here. But more to the point, even asking this question is sure to trap the agency in the labyrinth of section 706(b)’s on-off authority; the only way to escape is not to enter in the first place. Here, that means not interpreting section 706 to provide the Commission with the authority to preempt state law.

<sup>49</sup> *See* S. 652 § 304(b) (104<sup>th</sup> Cong. 1995) (contained in “Title III—An End to Regulation”).

The fact that Congress expressly contemplated providing the Commission with the power to preempt in section 706 but removed such language from the legislation strongly counsels against interpreting the provision to allow the Commission to preempt state law. As the Supreme Court explained in a similar case involving a Conference Committee removing language from a House bill, Congress’s “action strongly militates against a judgment that Congress intended a result that it expressly declined to enact.”<sup>50</sup> Accordingly, there can be no doubt that neither the text of the statute nor its legislative history provides support for the argument that section 706(b) gives the Commission the power to preempt state law.

One more point regarding the statutory history merits mention. The discussion of preemption in both the Senate’s version of the Act only involved Commission authority to preempt *State commissions*. This *Order*, however, involves the preemption of statutes passed by the Tennessee and North Carolina *State legislatures*. Although the *Order* claims that this is helpful to the Commission’s case,<sup>51</sup> it actually cuts the other way. For if Congress was unwilling to give the Commission the authority to preempt State commissions, it strains credulity to believe that it intended to empower the Commission to take the far more serious step of displacing the will of a State’s democratically-elected legislators.

Finally, at the very least, section 601(c) and the text and statutory history of section 706 add substantial weight to the argument that section 706 does not give the Commission the authority to preempt state restrictions on municipal broadband. That is because they make it even more obvious that section 706 does not contain the “unmistakably clear” statement required by *Gregory*. Any interpretation that suggests otherwise requires one to grasp at statutory straws.

#### IV.

There is one last reason why section 706 doesn’t give the Commission authority to preempt Tennessee or North Carolina laws pertaining to municipal broadband projects. Up until this point, I have accepted for the sake of argument the premise that section 706 gives the FCC some measure of independent authority. But it doesn’t. The text, statutory structure, and its legislative history all make clear that Congress intended section 706 to be hortatory—not delegatory—in nature.

Although each of its subsections suggests a call to action (“shall encourage,” “shall take immediate action”), neither reads like nor is a delegation of authority. *For one*, neither subsection expressly authorizes the FCC to engage in rulemaking. Congress knows how to confer such authority on the FCC and has done so repeatedly: It has delegated rulemaking authority to the FCC over both specific provisions of the Communications Act (e.g., “[t]he Commission shall prescribe regulations to implement the requirements of this subsection”<sup>52</sup> or “the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section”<sup>53</sup>), and it has done so more generally (e.g., “[t]he Commission[] may prescribe such rules and regulations as may be necessary in the public

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<sup>50</sup> *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 200 (1974). See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442 (1987) (“Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.”) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)); *International Broth. of Elec. Workers v. NLRB*, 814 F.2d 697, 711 (D.C. Cir. 1987) (“Congress, however, decided against the modification of section 9 proposed by Senator Taft. This fact alone, we believe, ‘strongly militates against a judgment that Congress intended a result that it expressly declined to enact.’”) (quoting *Gulf Oil Corp.*, 419 U.S. at 200).

<sup>51</sup> *Order* at para. 152.

<sup>52</sup> Communications Act of 1934, as amended, § 227(b)(2).

<sup>53</sup> Communications Act of 1934, as amended, § 251(d)(1).

interest to carry out the provisions of th[e Communications] Act”<sup>54</sup>). Congress did not do either in section 706.

*For another*, neither subsection expressly authorizes the FCC to prescribe or proscribe the conduct of any party. Again, Congress knows how to empower the Commission to prescribe conduct (e.g., “the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge”<sup>55</sup>) and to proscribe conduct (e.g., “the Commission is authorized and empowered . . . to make an order that the carrier or carriers shall cease and desist”<sup>56</sup>). And again, Congress has repeatedly empowered the FCC to direct the conduct of particular parties (e.g., “[t]he Commission may at any time require any such carrier to file with the Commission an inventory of all or of any part of the property owned or used by said carrier,”<sup>57</sup> or “the Commission shall have the power to require by subpoena the attendance and testimony of witnesses”<sup>58</sup>). Congress did not do any of this in section 706.

*For yet another*, neither subsection expressly authorizes the FCC to enforce compliance by ordering payment for noncompliance. Where Congress has authorized the Commission to impose liability it has always done so clearly: For forfeitures, the Communications Act directs that “[a]ny person who is determined by the Commission . . . shall be liable to the United States for a forfeiture penalty”<sup>59</sup> and “[t]he amount of such forfeiture penalty shall be assessed by the Commission . . . by written notice.”<sup>60</sup> And for other liabilities, the Communications Act directs that “the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled.”<sup>61</sup>

The lack of express authority to issue rules, order conduct, or enforce compliance should be unsurprising, however, since section 706’s subsections lay out precisely *how* Congress expected the FCC to “encourage . . . deployment” and “take action”: Congress expected the FCC to use the authority it had given the agency elsewhere. The FCC already had the authority to adopt “price cap regulation” since it had started converting carriers from rate-of-return regulation to price-cap regulation in the early 1990s.<sup>62</sup> The Telecommunications Act established the FCC’s “regulatory forbearance” authority.<sup>63</sup> The Telecommunications Act also authorized the FCC to “remove barriers to infrastructure investment,”

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<sup>54</sup> Communications Act of 1934, as amended, § 201(b) (“The Commissioner [*sic*] may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.”); *see also* Communications Act of 1934, as amended, § 303(r) (“Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall— . . . [m]ake such rules and regulations and prescribe such restrictions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . .”).

<sup>55</sup> Communications Act of 1934, as amended, § 205(a).

<sup>56</sup> Communications Act of 1934, as amended, § 205(a).

<sup>57</sup> Communications Act of 1934, as amended, § 213(b).

<sup>58</sup> Communications Act of 1934, as amended, § 409(e).

<sup>59</sup> Communications Act of 1934, as amended, § 503(b)(1).

<sup>60</sup> Communications Act of 1934, as amended, § 503(b)(2)(E).

<sup>61</sup> Communications Act of 1934, as amended, § 209.

<sup>62</sup> *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990).

<sup>63</sup> Communications Act of 1934, as amended, § 10 (“[T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services . . .”).

specifically barriers to entry created by state or local laws,<sup>64</sup> and instructed it to identify and eliminate market entry barriers.<sup>65</sup> And as for “promoting competition in the telecommunications market,” the Telecommunications Act added a whole second part to Title II of the Communications Act, titling it “Development of Competitive Markets.”<sup>66</sup> In other words, Congress did in fact “invest[] the Commission with the statutory authority to carry out those acts” described in section 706<sup>67</sup>—it just did so through provisions other than section 706.

The structure of federal law confirms this reading. Although Congress directed that many provisions of the Telecommunications Act be inserted into the Communications Act,<sup>68</sup> section 706 was not one of them. Instead, it was left as a freestanding provision of federal law.<sup>69</sup> As such, the provisions of the Communications Act that grant rulemaking authority “under this Act” (like section 201(b)), that grant prescription-and-proscription authority “[f]or purposes of this Act” (like section 409(e)), and that grant enforcement authority for violations of “this Act” (like section 503) simply do not apply to section 706 of the Telecommunications Act. Indeed, the so-called subject-matter jurisdiction of the FCC under section 2 applies, by its own terms, only to “provisions of this Act”<sup>70</sup>—and so the “most important[]” limit the D.C. Circuit in *Verizon* thought applied to section 706 does not in fact exist.<sup>71</sup> In other words, the statutory superstructure that normally undergirds Commission action just does not exist for section 706 of the Telecommunications Act.

What is more, reading section 706 as a grant of authority outside the bounds of the Communications Act yields absurd results. As the Commission recognized in the *Advanced Services Order* with respect to “regulatory forbearance,” reading section 706 as an “independent grant of authority . . . would allow us to forbear from applying” certain provisions in the Act even when section 10 would not let us do so.<sup>72</sup> That same logic applies to every “regulating method” specified in section 706. If Congress had intended to grant the FCC almost limitless authority for “price cap regulation,” “removing barriers,” or “promoting competition,” what was the point of specifying limited authority in the Telecommunications Act’s actual amendments to the Communications Act?<sup>73</sup>

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<sup>64</sup> Communications Act of 1934, as amended, § 253.

<sup>65</sup> Communications Act of 1934, as amended, § 257.

<sup>66</sup> Communications Act of 1934, as amended, Title II, Part II, §§ 251–60.

<sup>67</sup> *Verizon v. FCC*, 740 F.3d 623, 638 (D.C. Cir. 2014) (quoting *Open Internet Order*, 25 FCC Rcd at 17969 ¶ 120).

<sup>68</sup> Telecommunications Act of 1996, as amended, § 1(b) (“[W]henver in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.)”); see also Telecommunications Act of 1996, as amended, § 101 (“Establishment of Part II of Title II. (a) Amendment.—Title II is amended by inserting after section 229 (47 U.S.C. 229) the following new part: . . .”). Notably, all of the provisions at issue in *AT&T v. Iowa Utils. Bd.* were in fact inserted into the Communications Act, and thus the Court could plausibly claim that “Congress expressly directed that the 1996 Act . . . be inserted into the Communications Act.” 525 U.S. 366, 377 (1999).

<sup>69</sup> For other examples, see Telecommunications Act of 1996, as amended, §§ 202(h), 704(c).

<sup>70</sup> Communications Act of 1934, as amended, § 2(a).

<sup>71</sup> *Verizon v. FCC*, 740 F.3d 623, 640 (D.C. Cir. 2014).

<sup>72</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24046, para. 73 (1998) (*Advanced Services Order*).

<sup>73</sup> The *Verizon* court asked the wrong question when it noted that it “might well hesitate to conclude that Congress intended to grant the Commission substantive authority in section 706(a) if that authority would have no limiting

(continued...)

Lastly, the history of section 706 confirms its hortatory nature. For years after 1998's *Advanced Services Order*, the Commission consistently interpreted the section to direct the agency to "use, among other authority, our forbearance authority under section 10(a) to encourage the deployment of advanced services."<sup>74</sup> And so the Commission has consulted section 706 in resolving one forbearance petition<sup>75</sup> after another<sup>76</sup> after another.<sup>77</sup> And the Commission has looked to section 706 when employing its authorities under the Communications Act to promote local competition<sup>78</sup> and to remove barriers to infrastructure investment (such as the Commission's authority over pole attachments).<sup>79</sup> In other words, our own history shows that we can meet section 706's goals without relying on it as an independent grant of authority.

And the actual legislative history clinches the point. Recall that the *Verizon* court looked to the Senate Report's description of section 706 as a "necessary fail-safe to ensure that the bill achieves its intended infrastructure objective."<sup>80</sup> That was a mistake because the provision described in the Senate Report was *not* the section 706 that Congress enacted. As reviewed above, when the Senate passed in 1995 the bill that became the Telecommunications Act of 1996, that legislation contained a precursor to section 706(b) that authorized the FCC to "preempt State commissions that fail to act to ensure [the] availability [of advanced telecommunications capability to all Americans]."<sup>81</sup> In other words, the Senate

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principle." *Verizon*, 740 F.3d at 639. But the question is not whether section 706 of the Telecommunications Act contains some "intelligible principle" and thus does not violate the non-delegation doctrine, *see Whitman v. American Trucking Associations*, 531 U.S. 457, 472 (2001). Instead, the question is one of congressional intent: Did Congress really intend to put specific limits on the Commission's forbearance authority in one place (section 10 of the Communications Act) only to largely eliminate them in another (section 706 of the Telecommunications Act)? Such an interpretation doesn't make sense.

<sup>74</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24047, para. 77 (1998) (*Advanced Services Order*).

<sup>75</sup> *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19469, para. 107 (2005), *aff'd by Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

<sup>76</sup> *Petition of ACS of Anchorage*, WC Docket No. 06-109, Memorandum Opinion and Order, 22 FCC Rcd 16304, 16356, para. 118 (2007).

<sup>77</sup> *Petition of the Embarq Local Operating Companies For Forbearance et al.*, WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478, 19503-04, para. 46 (2007), *aff'd by Ad Hoc Telecommunications Users Committee v. FCC*, 572 F.3d 903 (D.C. Cir. 2009).

<sup>78</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3840, para. 317 (1999) ("Our overriding objective, consistent with the congressional directive in section 706, is to ensure that advanced services are deployed on a timely basis to all Americans so that consumers across America have the full benefits of the 'Information Age.'"); *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22426-27, paras. 36-37 (2004).

<sup>79</sup> *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5317, 5330, paras. 173, 208 (2011); *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Notice of Proposed Rulemaking, 22 FCC Rcd 20195, 20209, para. 36 (2007).

<sup>80</sup> S. Rep. No. 104-23 at 50-51 (1995); *see Verizon*, 740 F.3d at 639.

<sup>81</sup> *See* S. 652 § 304(b) (104th Cong. 1995) (contained in "Title III—An End to Regulation").

version would have let the FCC step into the shoes of the state commissions and exercise their authority under federal law if they failed to act. That’s a “fail-safe.” But the enacted version contained, as the Conference Report dryly put it, “a modification” to that section: This preemptory language was excised.<sup>82</sup> In other words, Congress contemplated giving the FCC fail-safe authority in section 706, but then expressly decided not to do so.

In short, whether one looks at the statute’s text, structure, or history, only one conclusion is possible: Congress did not delegate substantive authority to the FCC in section 706 of the Telecommunications Act.

But even if one agrees with the D.C. Circuit’s *Verizon* decision to the contrary, the court’s reasoning bolsters the argument that section 706 does not contain the “unmistakably clear” statement required by *Gregory*. Under *Chevron*, an agency’s reasonable interpretation of a statute is entitled to deference “if the statutory language does not reveal the ‘unambiguously expressed intent of Congress.’”<sup>83</sup> In its *Verizon* brief, the Commission argued that its interpretation of section 706 was entitled to such deference.<sup>84</sup> The court ultimately agreed, concluding that the Commission’s asserted authority under section 706 was a “reasonable interpretation of an ambiguous statute.”<sup>85</sup> The D.C. Circuit contended that “Congress ha[d] not ‘directly spoken’ to the question of whether section 706(a) is a grant of regulatory authority” *at all*<sup>86</sup>—much less whether it grants the Commission authority to preempt state laws. Accepting, for the sake of argument, the Commission’s and court’s arguments as true, I find it difficult to see how section 706 could be at the same time both “ambiguous” as to whether it gives the FCC any authority at all and “unmistakably clear” as to Congress’ intent to allow the FCC to preempt state restrictions on municipal broadband projects.<sup>87</sup>

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The elected representatives of the people of Tennessee and North Carolina have chosen to grant limited authorizations to municipalities in their respective states to offer broadband services. Most notably, they have allowed municipalities to provide service only within a specified geographic area. Reasonable people can disagree about the wisdom of such policies. Some believe that the conditions imposed by Tennessee and North Carolina are too restrictive. Others believe that municipal governments shouldn’t be in the broadband business at all. As I said earlier, I will leave that debate to others.

What is clear, however, is that the FCC does not have the legal authority to override the decisions made by Tennessee and North Carolina. Under the law, it is up to the people of those two states and their elected representatives—not the Commission—to decide whether and to what extent to allow municipalities to operate broadband projects. Today’s *Order* is therefore unlawful.

During the Clinton Administration, the City of Abilene asked the FCC to preempt a Texas law prohibiting Abilene and other Texas municipalities from entering the telecommunications business. The FCC described the city’s request as follows: “Abilene asked the FCC to take the extraordinary step of

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<sup>82</sup> S. Rep. No. 104-230 at 210 (1996).

<sup>83</sup> Brief for Appellee/Respondents at 23, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (11-1355) (citing *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842–43 (1984)).

<sup>84</sup> *Id.* at 25–30.

<sup>85</sup> *Verizon*, 740 F.3d at 637.

<sup>86</sup> *Id.* at 638.

<sup>87</sup> US Telecom notes that “[i]f the underlying grant of authority in Section 706 is ‘ambiguous,’ the statute by definition does not contain a ‘plain statement’ of Congressional intent.” Comments of US Telecom at 15, WCB Docket No. 14-115 (filed Aug. 29, 2014).

preempting a State's sovereign power to regulate its own municipalities.”<sup>88</sup> In 1997, the Commission stayed within its legal bounds and refused to take that “extraordinary step.” Unfortunately, the agency does not exhibit the same restraint today.

This decision violates the constitutional principles that lie at the heart of our system of government. The FCC is treating Tennessee and North Carolina as mere appendages of the federal government rather than the separate sovereigns that they are. For all of these reasons, I dissent.

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<sup>88</sup> Brief for Respondents at 11, *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999) (97-1633, 97-1634).