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# Stepping In: The FCC's Authority to Preempt State Laws Under the Communications Act

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SUMMARY

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# Stepping In: The FCC's Authority to Preempt State Laws Under the Communications Act

The line between federal and state authority plays a central role in modern communications law. Rather than fully displacing state law, the Communications Act of 1934 (Communications Act or Act) sets up a dual system of federal and state regulation. At the federal level, the Communications Act gives the Federal Communications Commission (FCC or Commission) broad authority to regulate wired and wireless telephony, radio transmissions, cable services, and matters that are ancillary to these areas. At the same time, however, the Act expressly preserves some state regulatory authority over these technologies. Consequently, the boundary between the FCC's authority and the states' has been a source of dispute.

The FCC has the upper hand in such conflicts. The Communications Act gives the FCC broad regulatory authority and, along with it, the ability to preempt state laws that conflict with or frustrate its regulatory actions. When the FCC is acting within its proper statutory authority, the U.S. Constitution's Supremacy Clause ensures that its actions prevail. Nevertheless, the FCC's statutory preemption authority is not boundless. The extent to which the FCC may displace state and local laws is limited by the scope of its regulatory jurisdiction, express statutory provisions preserving or defining the scope of state laws, and interpretive presumptions that courts have applied to preserve the usual constitutional balance between the federal and state governments.

Far from being an abstract debate, the FCC's ability to preempt state laws lies at the heart of many of its regulatory initiatives in recent years. In particular, preemption is at the forefront of the Commission's efforts to (1) remove net neutrality requirements, (2) maintain a lightly-regulated approach to Voice over Internet Protocol (VoIP), (3) accelerate deployment of fifth-generation wireless (5G) infrastructure, (4) facilitate municipal (or "community") broadband, and (5) promote the provision of cable television and internet services. State and local governments have challenged these initiatives in court. In some cases, courts have held that the FCC overstepped its statutory bounds. In other cases, the legal challenges remain ongoing, leaving a cloud of uncertainty over the FCC's actions.

This Report discusses these issues in more detail. It begins with an overview of the legal framework governing the FCC's preemption actions, first discussing general federal preemption principles and then explaining the FCC's preemption authority under the Communications Act. The Report then reviews recent FCC initiatives in which FCC preemption plays a key role. Specifically, it explains how the FCC has exercised its preemption authority—and the extent to which such authority has been challenged or is uncertain—in the areas of net neutrality, VoIP, 5G infrastructure deployment, community broadband, and state and local regulation of cable operators.

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The line between federal and state authority plays a central role in modern communications law. Rather than fully displacing state law, the Communications Act of 1934, as amended, sets up a "dual system" of federal and state regulation.[1] At the federal level, the Communications Act gives the Federal Communications Commission (FCC or Commission) broad authority to regulate the development and operation of the nation's wireless and wired communications services. This authority specifically includes regulating landline and mobile telephony (under Title II of the Act),[2] radio transmissions (under Title III),[3] and cable services (under Title VI).[4] The Act, as interpreted by the U.S. Supreme Court, also gives the FCC "ancillary jurisdiction" to regulate communications services closely related to the areas under its primary jurisdiction.[5] At the same time, however, the Act expressly preserves some state authority to act in these areas.[6] Consequently, the boundary between the FCC's authority and the states' becomes critical when the two regulatory regimes clash. The FCC's preemption authority gives it the upper hand in such conflicts. Under the U.S. Constitution's Supremacy Clause and the Communications Act, the FCC has broad authority to preempt state laws that conflict with or frustrate its actions.[7]

Nevertheless, the FCC's preemption authority is not boundless. First, courts have said that, as a general matter, the FCC may only preempt state laws governing a communications service if it has regulatory jurisdiction over that service.[8] For instance, Section 2(b) of the Act,[9] as interpreted by the Supreme Court, prohibits the FCC from regulating purely intrastate services under its ancillary jurisdiction.[10] Second, even if the Commission has regulatory authority, it must comply with specific provisions that either expressly preempt or expressly preserve state laws in a given

[1] 47 U.S.C. §§ 151–624.

[2] *Id.* §§ 201–276.

[3] *Id.* §§ 301–399b.

[4] *Id.* §§ 521–573.

[5] United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968) ([T]he authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."); United States v. Midwest Video Corp., 406 U.S. 649, 662 (1972) ("We therefore concluded . . . that the Commission does have jurisdiction over CATV 'reasonably ancillary to the effective performance of (its) various responsibilities for the regulation of television broadcasting . . . (and) may, for these purposes, issue 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,' as 'public convenience, interest, or necessity requires.'") (quoting *Sw. Cable Co.*, 392 U.S. at 178).

[6] *See, e.g.*, 47 U.S.C. §152(b) (" . . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . .").

[7] See the section "Overview of the FCC's Preemption Authority Under the Communications Act" for an overview of the FCC's preemption authority.

[8] *See, e.g.*, La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A] federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority."); Mozilla Corp. v. FCC, 940 F.3d 1, 75 (D.C. Cir. 2019) ("[I]n any area where the Commission lacks the authority to regulate, it equally lacks the power to preempt state law."); Public Service Com'n of Maryland v. FCC, 909 F.2d 1510, (D.C. Cir. 1990) ("The FCC cannot regulate (let alone preempt state regulation of) any service that does not fall within its Title II jurisdiction over common carrier services or its Title I jurisdiction over matters 'incidental' to communication by wire.").

[9] 47 U.S.C. § 152(b).

[10] AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 379–82 n.8 (1999) (rejecting the argument that 47 U.S.C. § 152(b) prevents the FCC from issuing rules implementing Title II's local competition provisions on the ground that Section 201(b) gives the FCC authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act," but noting that, "[i]nsofar as Congress has remained silent . . . , § 152(b) continues to function" and the FCC could not "regulate any aspect of intrastate communication . . . on the theory that it had an ancillary effect on matters within the Commission's primary jurisdiction.").

area. For example, Section 332(c)(7) of the Act provides that state laws governing the placement, construction, and modification of "personal wireless service facilities" are only preempted to the extent the laws "prohibit or have the effect of prohibiting the provision of wireless services" or unreasonably discriminate among providers of services.[11] Since this provision defines preemption in this area, the FCC may not preempt more broadly than what the provision allows.[12] Lastly, the FCC's preemption authority is, in some cases, limited by a "clear statement" rule informed by federalism principles. In particular, courts have held that the Commission may not preempt state law in a manner that upsets the "usual constitutional balance" between states and the federal government, absent a clear statement from Congress authorizing the preemption.[13]

The FCC's ability to preempt state laws lies at the heart of many of its regulatory initiatives in recent years, leading to conflict with state and local governments. In particular, preemption is at the forefront of the Commission's efforts to (1) remove net neutrality requirements, (2) maintain a deregulatory approach to Voice over Internet Protocol (VoIP) services, (3) accelerate deployment of fifth-generation wireless (5G) infrastructure, (4) facilitate municipal (or "community") broadband, and (5) promote the provision of cable television and internet services.

First, preemption has played a notable role in the Commission's deregulatory approach to net neutrality, i.e., the concept that internet service providers should "treat internet traffic the same regardless of source."[14] In 2018, the FCC reversed a prior rule that had imposed a number of net neutrality requirements on broadband internet access service (BIAS) providers.[15] In so doing, the Commission reclassified BIAS from a Title II "telecommunications service" to a Title I "information service" no longer subject to its primary jurisdiction.[16] To preserve its new deregulatory policy, the Commission also preempted any state laws that would impose the same requirements.[17] The U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit),[18] however, reversed the FCC's blanket preemption.[19] The court reasoned that because BIAS was now an information service not subject to its regulatory jurisdiction, the Commission no longer had affirmative regulatory authority to support the preemption.[20] The court, nevertheless, held open the possibility that the FCC could preempt state laws on a case-by-case basis under principles of conflict preemption.[21]

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[11] 47 U.S.C. § 332(c)(7)(B)(i).

[12] *See, e.g.*, City of Arlington, Tex. v. FCC, 668 F.3d 229, 250 (5th Cir. 2012) (stating that Section 332(c)(7)(A) "certainly prohibits the FCC from imposing restrictions or limitations that cannot be tied to the language of § 332(c)(7)(B)").

[13] *See, e.g.*, Nixon v. Missouri Municipal League, 541 U.S. 125, 140–41 (2004) ("[F]ederal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires. . . . The want of any 'unmistakably clear' statement to that effect would be fatal to respondents' reading.") (internal citations omitted).

[14] U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 689 (D.C. Cir. 2016).

[15] In the Matter of Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018) [hereinafter 2018 Internet Order].

[16] *Id.* at 312–13, paras. 2–4.

[17] *Id.* at 426–27, paras. 194, 195.

[18] References in this report to a particular circuit (e.g., the D.C. Circuit) refer to the U.S. Court of Appeals for that circuit.

[19] *Mozilla Corp. v. FCC*, 940 F.3d 1, 74 (D.C. Cir. 2019).

[20] *Id.* at 74–76.

[21] *Id.* at 85.

Second, the Commission has preempted states' regulation of VoIP services—i.e., services that enable users to make voice calls via the Internet—when the services interface with the Public Switched Telephone Network. Unlike net neutrality, the FCC has not made a determination on whether VoIP is a telecommunications service or an information service.[22] Nevertheless, it has relied on its ancillary authority to impose some requirements on these services, and it has sought to preempt state laws that impose more stringent common-carrier regulations on VoIP services.[23] Courts thus far have upheld the FCC's preemption of such state laws.[24]

Third, the Commission has used preemption to facilitate the rapid deployment of 5G service. In two orders issued in 2018, the Commission preempted state and local moratoria on deploying telecommunications facilities[25] and preempted certain requirements on deployment of small wireless facilities (e.g., 5G small cell sites, components of 5G infrastructure typically installed in large numbers and close together in densified areas to propagate high-frequency radio waves).[26] Specifically, the second of these orders preempted the charging of excessive fees and unreasonable non-fee requirements, such as rules mandating that the small cell sites meet unreasonable aesthetic requirements.[27] It also placed "shot clocks" governing how long state and local governments could take to review and respond to installation and construction applications.[28] In August 2020, the Ninth Circuit largely upheld these 2018 orders, vacating only the FCC's standards on permissible aesthetic requirements.[29] Several municipalities have sought review of this decision in the Supreme Court.[30] The FCC also issued a declaratory ruling in June 2020 clarifying when state and local governments must approve requests to modify existing wireless towers or base stations.[31] As with the 2018 orders, localities have challenged this declaratory ruling in the Ninth Circuit.

Additionally, the FCC has sought, unsuccessfully, to preempt state laws that limit municipalities' ability to provide broadband service. The Commission's approach to state laws restricting community broadband has varied depending on the nature of the laws and has been the subject of several court decisions. In a 2001 order, the FCC rejected petitions from cities asking it to preempt state laws imposing complete bans on municipally provided telecommunications services, concluding that it did not have authority to constrain states' control over their own governments without express authority from Congress.[32] The Supreme Court upheld the Commission's position in *Nixon v. Missouri Municipal League*, in which the Court agreed the agency could not preempt without a clear statutory statement.[33] In 2015, however, the FCC preempted state laws that restricted the geographical area in which municipalities could offer

[22] *See infra* "Voice over Internet Protocol (VoIP)."

[23] *Id.*

[24] *Id.*

[25] Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, 33 FCC Rcd. 7705 (2018) [hereinafter Moratorium Order].

[26] Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, 33 FCC Rcd. 9088 (2018) [hereinafter Small Cell Order].

[27] *Id.* at 9091, paras. 11–12.

[28] *Id.* at 9093, para. 13.

[29] City of Portland v. United States, 969 F.3d 1020 (9th Cir. 2020).

[30] Pet. for Writ of Certiorari, City of Portland v. FCC, No. 20-1354 (U.S. Mar. 22, 2021).

[31] Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests, 35 FCC Rcd. 5977 (2020) [hereinafter June 2020 Declaratory Ruling].

[32] In the Matter of Missouri Municipal League, Mem. Op. and Order, 16 FCC Rcd. 1162, 1169 (2002).

[33] 541 U.S. 125, 140–41 (2004).

broadband.[34] The Commission distinguished these laws from those at issue in *Nixon* by arguing they dealt with the manner in which interstate commerce is conducted, rather than whether municipalities may be able to participate in such commerce in the first place.[35] However, in *Tennessee v. FCC*, the Sixth Circuit vacated the Commission's order.[36] The court reasoned that even though these laws regulate interstate communications they still "implicat[ed] core attributes of state sovereignty" and, under the reasoning of *Nixon*, the FCC could not preempt them.[37]

Lastly, the Commission has preempted state and local laws regulating cable television operators in a manner it deems inconsistent with Title VI of the Act. Title VI expressly preserves state and local authority to regulate cable operators by requiring them to obtain an operating franchise from a state or local franchising authority.[38] Title VI places some limitations on this franchising authority, however. For instance, it caps allowable franchise fees and prohibits state and local authorities from unreasonably refusing to award a franchise.[39] In a number of orders, the FCC has laid out its view of these limitations and preempted state laws inconsistent with its interpretations.[40] Notably, the FCC's orders go beyond telling states the way in which they may use the franchising process to regulate cable service. In a 2018 order, the FCC preempted any state or local fee or requirement in connection with cable operators' access to public rights of way unless expressly allowed under Title VI, even if the fee or requirement relates to non-cable services.[41] This includes, the Commission explained, state or local fees or other requirements for cable operators' provision of broadband internet or other non-cable television services over public rights of way.[42] State and local governments, however, have brought legal challenges to this order, and it remains to be seen whether the Commission's actions will be upheld.[43]

This Report discusses these issues in more detail. It begins with an overview of the legal framework governing the FCC's preemption actions, first discussing general federal preemption principles and then explaining the FCC's preemption authority under the Communications Act. The Report then reviews recent FCC initiatives in which preemption plays a key role. Specifically, it explains how the FCC has exercised its preemption authority—and the extent to which such authority has been challenged or is uncertain—in areas such as net neutrality, 5G infrastructure deployment, community broadband, and state and local regulation of cable operators.

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[34] City of Wilson, N.C. Petition for Preemption of N.C. Gen. Stat. Sections 160A-340 et seq., 30 FCC Rcd. 2408 (2015).

[35] *Id.* at 2412, 2472–74, paras. 12, 154–58.

[36] 832 F.3d 597 (6th Cir. 2016).

[37] *Id.* at 611–13.

[38] 47 U.S.C. § 541.

[39] *Id.* §§ 541, 542.

[40] For an in-depth discussion of these orders, see CRS Report R46147, *The Cable Franchising Authority of State and Local Governments and the Communications Act*, by Chris D. Linebaugh and Eric N. Holmes.

[41] Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, MB Docket No. 05-311, FCC 19-80, 2019 WL 3605129, at *33, para. 88 (adopted Aug. 1, 2019) [hereinafter Third Order].

[42] *Id.* at *38, para. 105.

[43] *See* City of Pittsburgh v. FCC, No. 19-3478 (3d Cir. Oct. 28, 2019); State of Hawaii v. United States, No. 19-72699 (9th Cir. Oct. 24, 2019); Anne Arundel Cty. v. FCC, No. 72760 (D.C. Cir. Oct. 24, 2019); All. for Commc'ns Democracy v. FCC, No. 19-72736 (D.C. Cir. Oct. 23, 2019); Petition for Review, City of Portland v. United States, No. 19-72391 (9th Cir. Sept. 19, 2019); Pet. for Rev., City of Eugene v. FCC, No. 19-72219 (9th Cir. Aug. 30, 2019); City of Eugene v. FCC, No. 19-72391 (9th Cir. Nov. 26, 2019) (order granting motion to consolidate petitions and transfer petitions to the Sixth Circuit).

# General Federal Preemption Principles

The federal government's preemption of state law is "rooted" in the U.S. Constitution's Supremacy Clause.[44] The Supremacy Clause states that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof," shall be the "supreme Law of the Land" and that the "Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[45] Under the Supremacy Clause, Congress has the power to displace state law when it is acting pursuant to its enumerated constitutional powers.[46] As the Supreme Court has explained, federal law may preempt state law in one of three ways.[47] First, federal law may *expressly* preempt state law by stating which state laws are preempted.[48] Second, federal law preempts any *conflicting* state law. Such conflict preemption occurs when either (1) "compliance with both federal and state regulations is a physical impossibility" or (2) the "challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[49] Lastly, federal law may preempt an entire *field* of state regulation by occupying that field "so comprehensively that it has left no room for supplementary state legislation."[50]

The Supreme Court has also explained that regulations adopted by federal agencies "have no less preemptive effect" than statutes themselves.[51] While the "purpose of Congress" is the "ultimate touchstone" in any preemption analysis, whether by statute or regulation,[52] agencies generally do not need "express congressional authorization" to preempt state law.[53] Rather, the Supreme Court has said that when an agency promulgates regulations intending to preempt state law, the Court will uphold the preemption unless the agency "exceeded [its] statutory authority or acted arbitrarily."[54] Nevertheless, in some circumstances, the Court has required a plain statement from

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[44] Metro. Edison Co. v. Pa. Pub. Util. Comm'n, 767 F.3d 335, 341 (3d Cir. 2014) ("The doctrine of federal pre-emption, in turn, is rooted in the Supremacy Clause of the Constitution . . . .").

[45] U.S. CONST. art. VI, cl. 2.

[46] City of New York v. FCC, 486 U.S. 57, 63 (1988) ("When the Federal Government acts within the authority it possesses under the Constitution, it is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes."); Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981) ("But when Congress has chosen to legislate pursuant to its constitutional powers, then a court must find local law pre-empted by federal regulation whenever the 'challenged state statute "stands an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."'") (quoting Perez v. Campbell, 402 U.S. 637, 649 (1971)); Oxygenated Fuels Ass'n Inc. v. Davis, 331 F.3d 665, 667 (9th Cir. 2003) ("Congress has the authority, when acting pursuant to its enumerated powers, to preempt state and local laws.").

[47] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1480 (2018) ("Our cases have identified three different types of preemption—'conflict,' 'express,' and 'field' . . . .").

[48] *See, e.g.*, Chamber of Commerce of U.S. v. Whiting, 563 U.S. 582 (2011) ("When a federal law contains an express preemption clause, we 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.'") (quoting CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993)).

[49] Arizona v. United States, 567 U.S. 387, 399 (2012) (internal quotations and citations omitted).

[50] *Murphy*, 138 S. Ct. at 1480 (quoting R.J. Reynolds Tobacco Co. v. Durham Cty., 479 U.S. 130, 140 (1986)).

[51] Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982).

[52] Wyeth v. Levine, 555 U.S. 555, 565 (2009).

[53] *Id.* at 154; *see also* City of New York v. FCC, 486 U.S. 57, 64 (1988).

[54] *de la Cuesta*, 458 U.S. at 154; *see also City of New York*, 486 U.S. at 64 ("[I]n a situation where state law is claimed to be preempted by federal regulation, a narrow focus on Congress' intent to supersede state law is misdirected, for a preemptive regulation's force does not depend on express congressional authorization to displace state law. Instead, the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action.") (internal citations and quotations omitted).

Congress authorizing the preemption. In particular, the Court has said that Congress must be "unmistakably clear in the language of the statute" if it intends to preempt state law in a way that would upset the "usual constitutional balance" between states and the federal government.[55] The Court has applied this clear statement rule, for instance, to preemption that would infringe on states' management of their own officers and subdivisions.[56]

# Overview of the FCC's Preemption Authority Under the Communications Act

As with other federal agencies, the FCC generally may enact regulations that preempt state law as long as it does not "exceed[] its statutory authority" under the Communications Act or act arbitrarily. While straightforward in principle, determining whether a preemptive action exceeds the FCC's statutory authority is a complex question that generally depends on two factors: (1) whether the Commission has jurisdictional authority over the area of law it seeks to preempt, and (2) whether any specific provisions in the Communications Act limit or define its preemptive authority over that area. If the Commission has jurisdiction over an area, it may generally preempt state laws as long as it does not run afoul of any specific provisions that limit or define its preemption authority.[57] There are some exceptions to this general rule, however. For instance, Courts have required a plain statement from Congress before allowing the FCC to preempt in a manner that upsets the "usual constitutional balance" between states and the federal government. These issues are discussed further below.

## The FCC's Jurisdictional Authority

The Supreme Court and lower courts have recognized that, as a general matter, the FCC may only preempt state laws in areas where it has statutory authority to regulate.[58] Consequently,

[55] Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

[56] *Id.* ("Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers. For this reason, it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance.") (internal citations and quotations omitted); Nixon v. Mo. Mun. League, 541 U.S. 125, 140 (2004) ("[T]he liberating preemption would come only by interposing federal authority between a State and its municipal subdivisions . . . . Hence the need to invoke our working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory* requires.").

[57] *See* United States v. Shimer, 367 U.S. 374, 383 (1961) (declining to disturb an agency's preemption decision "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.").

[58] *See City of New York*, 486 U.S. at 63–64, 66; La. Pub. Serv. Comm'n v. FCC, 476 U.S 355, 374 (1986) ("[A] federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority."); Mozilla Corp. v. FCC, 940 F.3d 1, 75 (D.C. Cir. 2019) ("[I]n any area where the Commission lacks the authority to regulate, it equally lacks the power to preempt state law."); Pub. Serv. Comm'n v. FCC, 909 F.2d 1510, 1515 n.6 (D.C. Cir. 1990) ("The FCC cannot regulate (let alone preempt state regulation of) any service that does not fall within its Title II jurisdiction over common carrier services or its Title I jurisdiction over matters 'incidental' to communication by wire."). As the D.C. Circuit recently explained, Congress may give the Commission preemption authority even in an area where it has no regulatory authority. *Mozilla Corp.*, 940 F.3d at 75 ("Of course, if a federal law expressly confers upon the agency the authority to preempt, that legislative delegation creates and defines the agency's power to displace state laws."). While the majority maintained that Congress had to grant express preemption authority beyond the Commission's regulatory authority, the dissent in this case argued that such a grant of preemption

understanding the scope of the FCC's regulatory jurisdiction is critical to understanding its preemption power. The Supreme Court has explained that the FCC's regulatory jurisdiction takes two forms: its "primary jurisdiction" and its "ancillary jurisdiction."[59] The FCC's primary jurisdiction involves the "express and expansive authority" that the Communications Act expressly grants the FCC over "certain technologies."[60] In particular, different titles of the Act give the FCC "express and expansive authority" to regulate: (1) "telecommunications services," such as landline telephone services, as common carriers (under Title II of the Act);[61] (2) "radio transmissions, including broadcast television, radio, and cellular telephony" (under Title III of the Act);[62] and (3) "cable services, including cable television" (under Title VI of the Act).[63] These titles contain detailed provisions expressly setting forth the nature and scope of the FCC's authority. Title II, for instance, contains a host of requirements that apply to common carriers—such as requiring that they charge "just and reasonable rates," refrain from unreasonable discrimination, and allow other carriers to interconnect with their networks—while giving the FCC discretion to "forbear" from applying Title II requirements consistent with the public interest.[64] Title III, as another example, provides that, among other things, the Commission may classify radio stations, prescribe the services rendered by such stations, regulate the apparatus used in radio communications, and issue licenses to operators of radio stations.[65]

In addition to the Commission's primary jurisdiction, the Court has also recognized that the FCC may regulate under its "ancillary jurisdiction."[66] For the FCC to use its ancillary jurisdiction, "two conditions must be met": (1) "the subject of the regulation" must fall under the Commission's "general grant of jurisdiction" under Title I of the Communications Act,[67] which covers "all interstate and foreign communication by wire or radio"; and (2) the subject of the regulation must be "reasonably ancillary" to the "effective performance" of its primary

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authority could be implicit. *See id.* at 101 (Williams, J., dissenting) ("The same principle undergirds a congressional choice (express or implied) to grant an agency equivalent preemptive authority without any parallel federal regulation (by Congress or a federal agency)."). *See infra* "

Mozilla Corp. v. FCC" for a further discussion of this case.

[59] AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 380–81 (1999) ("For even though 'Commission jurisdiction' always follows where the Act 'applies,' Commission jurisdiction (so-called 'ancillary' jurisdiction) could exist even where the Act does not 'apply.' The term 'apply' limits the substantive reach of the statute (and the concomitant scope of primary FCC jurisdiction), and the phrase 'or to give the Commission jurisdiction' limits, in addition, the FCC's ancillary jurisdiction.").

[60] *Mozilla Corp.*, 940 F.3d at 75.

[61] 47 U.S.C. §§, 153, 301–399b; Comcast Corp. v. FCC, 600 F.3d 642, 645 (D.C. Cir. 2010) ("Congress has given the Commission express and expansive authority to regulate common carrier services, including landline telephony [under Title II].").

[62] 47 U.S.C. §§ 301–399b; *Comcast*, 600 F.3d at 645.

[63] 47 U.S.C. §§ 521–573; *Comcast*, 600 F.3d at 645.

[64] 47 U.S.C. §§ 160(a), 201(b), 202(a), 251(a).

[65] *Id.* §§ 303, 307; National Ass'n For Better Broadcasting v. FCC, 849 F.2d 665, 666 (D.C. Cir. 1988) ("Title III of the Act establishes a broad grant of authority to the Commission to regulate radio (and television) communications including classification of stations, prescription of the nature of services to be rendered, regulation of the apparatus used, study of new uses and encouragement of more and effective uses of radio, and ultimately the issuance of licenses to operate stations when it finds that the public interest will be served thereby.").

[66] *See, e.g.*, U.S. v. Sw. Cable Co., 392 U.S. 157, 178 (1968); U.S. v. Midwest Video Corp., 406 U.S. 649, 650 (1972).

[67] *See* 47 U.S.C. § 152(a) ("The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided . . . .").

jurisdictional responsibilities.[68] Where its primary or ancillary jurisdiction applies, the FCC has authority to "prescribe such rules and regulations" that "may be necessary in the execution of its functions" and are not "inconsistent with [the Communications Act]."[69]

The Commission's ancillary jurisdiction is limited, however, by Section 2(b) of the Act. Section 2(b) says that, except for several specific exceptions, "nothing [in the Act] shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service."[70] The Supreme Court has explained that, while this section does not limit the FCC's regulatory authority where the Act expressly applies (i.e., its primary jurisdiction), it does carve out intrastate matters from the Commission's ancillary jurisdiction.[71] However, the Court has also suggested (without expressly deciding) that Section 2(b)'s limitation does not apply when it is "not possible to separate the interstate and the intrastate components of the asserted FCC regulation."[72] Lower courts have fleshed out this "impossibility exception" further. These cases generally hold that Section 2(b) does not prevent the Commission from preempting state law where: (1) "the matter to be regulated has both interstate and intrastate aspects"; (2) "preemption is necessary to protect a valid federal regulatory objective"; and (3) "state regulation would negate the exercise by the [Commission] of its own lawful authority because regulation of the interstate aspects of the matter cannot be 'unbundled' from regulation of the intrastate aspects."[73]

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[68] American Library Ass'n v. FCC, 406 F.3d 689, 693 (D.C. Cir. 2005); *see also* S.W. Cable Co., 392 U.S. at 178 ("[T]he authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,' as 'public convenience, interest, or necessity requires.'"); U.S. v. Midwest Video Corp., 406 U.S. at 650) ("In [*Southwestern Cable*], . . . we sustained the jurisdiction of the Federal Communications Commission to regulate the new industry, at least to the extent 'reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting' . . . .").

[69] 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."); *see also* EchoStar Satellite L.L.C. v. FCC, 704 F.3d 992, 998 (D.C. Cir. 2013) (applying Section 4(i) of the Communications Act to the FCC's ancillary jurisdiction).

[70] 47 U.S.C. § 152(b).

[71] AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 379–82 n.8 (1999) (rejecting the argument that Section 2(b) prevents the FCC from issuing rules implementing Title II's local competition provisions on the ground that Section 201(b) gives the FCC authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act," but noting that "[i]nsofar as Congress has remained silent, . . . , § 152(b) continues to function" and the FCC could not "regulate any aspect of intrastate communication . . . on the theory that it had an ancillary effect on matters within the Commission's primary jurisdiction.").

[72] La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986) (distinguishing cases where lower courts held it was "*not* possible to separate the interstate and the intrastate components of the asserted FCC regulation.") (emphasis in the original).

[73] Mozilla Corp. v. FCC, 940 F.3d 1, 77–78 (D.C. Cir. 2019); California v. FCC, 905 F.2d 1217, 1243 (9th Cir. 1990) ("The impossibility exception, however, is a limited one. The FCC may not justify a preemption order merely by showing that some of the preempted state regulation would, if not preempted, frustrate FCC regulatory goals. Rather, the FCC bears the burden of justifying its entire preemption order by demonstrating that the order is narrowly tailored to preempt only such state regulations as would negate valid FCC regulatory goals."); Minn. Pub. Utils. Comm'n v. FCC, 483 F.3d 570, 578 (8th Cir. 2007) ("[T]he "impossibility exception" of 47 U.S.C. § 152(b) allows the FCC to preempt state regulation of a service if (1) it is not possible to separate the interstate and intrastate aspects of the service, and (2) federal regulation is necessary to further a valid federal regulatory objective, i.e., state regulation would conflict with federal regulatory policies.") (citing Qwest Corp. v. Scott, 380 F.3d 367, 372 (8th Cir. 2004)).

## Specific Statutory Provisions Addressing Preemption

Even when the FCC has jurisdictional authority, its preemption must be consistent with any express preemption provisions in the Communications Act. In a number of areas, the Act explicitly spells out the extent to which states' regulatory authority over a particular technology or service is displaced or preserved. Where such provisions apply, the Commission may not preempt state laws beyond what the statute allows.[74]

For example, Section 332(c)(7) of the Act (under Title III) defines the extent of states' regulatory authority over "personal wireless services." In particular, Section 332(c)(7)(B) provides that state or local regulations governing the "placement, construction, and modification of personal wireless services facilities . . . (I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[75] However, Section 332(c)(7)(A) provides that, other than Section 332(c)(7)(B)'s express limitations, nothing "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."[76] Circuit courts have held that the FCC may implement Section 332(c)(7)(B)'s limitations by clarifying the extent to which state laws are preempted by this section; however, in doing so, the Commission may not impose restrictions or limitations that "cannot be tied to the language of § 332(c)(7)(B)."[77]

Similarly, Section 253 of the Act (under Title II) defines the FCC's preemption authority over state laws regulating telecommunication services. It provides that "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."[78] Section 253 further states that if the FCC determines that any state or local requirement violates this provision, it "shall," after notice and an opportunity for public comment, "preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."[79] However, similar to Section 322(c)(7)(A), Section 253 also preserves a sphere of state and local authority, providing 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, on a competitively neutral and nondiscriminatory basis."[80]

Other parts of the Communications Act define in even greater detail the bounds of state authority over particular areas. For instance, Title VI in large part deals with state and local governments'

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[74] *See, e.g.*, *Mozilla*, 940 F.3d at 75 ("Of course, if a federal law expressly confers upon the agency the authority to preempt, that legislative delegation creates and defines the agency's power to displace state laws.").

[75] 47 U.S.C. § 332(c)(7)(B).

[76] *Id.* § 332(c)(7)(A).

[77] City of Arlington v. FCC, 668 F.3d 229, 250–54 (5th Cir. 2012) (stating that Section 332(c)(7)(A) "certainly prohibits the FCC from imposing restrictions or limitations that cannot be tied to the language of § 332(c)(7)(B)," but also holding that the FCC is "entitled to deference with respect to its exercise of authority to implement § 332(c)(7)(B)(ii) and (v)"); *see also* Up State Tower Co., LLC v. Town of Kiantone, New York, 718 F. App'x. 29, 31 n.1 (2d Cir. 2017) ("We agree with the 5th Circuit that because the two FCC Orders cited herein are reasonable constructions of § 332(c)(7)(B), they 'are thus entitled to Chevron deference.'") (citing *City of Arlington*, 668 F.3d at 256).

[78] 47 U.S.C. § 253(a).

[79] *Id.* § 253(a), (d).

[80] *Id.* § 253(c).

ability to award franchises to cable operators.[81] While this title requires cable operators to obtain a franchise from a state or local franchising authority before providing cable service, it also prohibits franchising authorities from, among other things, (1) "unreasonably refus[ing]" to award franchises, (2) establishing requirements for "video programming or other information services," or (3) imposing franchise fees exceeding 5% of the cable operator's gross annual revenue.[82] Title VI further "preempt[s] and supersede[s]" "any provision of law of any State, political subdivision, or agency thereof . . . which is inconsistent with this chapter."[83]

Later sections of this report discuss the FCC's implementation of these various preemption provisions, and recent disputes surrounding that implementation, in greater detail.

### Clear Statement Rule

Even if the FCC has regulatory jurisdiction over the area it seeks to preempt and its preemption accords with any specific statutory provisions, its ability to preempt may still be limited by a "clear statement" rule. In particular, as previously discussed, the Supreme Court has said that Congress must be "unmistakably clear in the language of the statute" if it intends to preempt state law in a way that would upset the "usual constitutional balance" between states and the federal government.[84] The Supreme Court has relied on this rule to vacate the FCC's preemption of state laws governing their municipalities. Most relevantly, and as discussed later in this report, the Supreme Court and the Sixth Circuit have held that the FCC does not have authority to preempt state laws prohibiting or restricting municipalities from providing broadband service because, in part, Congress had not provided a "plain statement" of its intent to preempt such laws.[85]

## Current Issues

The FCC's ability to preempt state laws has been at the heart of many of its regulatory initiatives in recent years. In particular, preemption is at the forefront of the Commission's efforts to (1) remove net neutrality requirements, (2) maintain a lightly-regulated approach to VoIP services, (3) accelerate deployment of fifth-generation wireless (5G) infrastructure, (4) facilitate municipal (or "community") broadband, and (5) promote the provision of cable and internet services. State and local governments have challenged these initiatives in court, arguing that the FCC has exceeded its preemption authority. In some cases, courts have agreed that the FCC overstepped its statutory bounds. In other cases, the legal challenges remain ongoing, leaving a cloud of uncertainty over the FCC's actions.

This section discusses the FCC's preemption efforts in each of these areas, including the legal challenges and issues arising from them.

[81] In the context of cable television, a "franchise" refers to the right to operate a cable system in a given area. For more information, see CRS Report R46147, *The Cable Franchising Authority of State and Local Governments and the Communications Act*, by Chris D. Linebaugh and Eric N. Holmes.

[82] 47 U.S.C. §§ 541(a)(1), 542(b), 544(b).

[83] *Id.* § 556(c).

[84] Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (quoting Atascadero State Hosp. v. Scanion, 473 U.S. 234, 242 (1985)).

[85] Nixon v. Mo. Mun. League, 541 U.S. 125, 140–41 (2004); Tennessee v. FCC, 832 F.3d 597 (6th Cir. 2016).

## Net Neutrality

Preemption has played a key part in the FCC's efforts to establish a nation-wide policy on "net neutrality," which is the "principle that broadband providers must treat all internet traffic the same regardless of source."[86] In 2018, the FCC issued an order removing net neutrality regulations at the federal level.[87] At the same time, the Commission attempted to preempt any similar state regulations.[88] In the case *Mozilla v. FCC*, the D.C. Circuit upheld most of the FCC's repeal of net neutrality rules.[89] However, it vacated the FCC's blanket preemption of any state net neutrality laws.[90] As a result, states may be able to enact their own net neutrality laws. Some states, such as California, have already done so.[91] Nevertheless, *Mozilla* left room for state laws to be preempted on a case-by-case basis under principles of conflict preemption.[92] Thus, if a later court determines that a state law "actually undermines" the FCC's order, then such a law would still be preempted and unenforceable.[93] This section discusses the FCC's actions, the D.C. Circuit's *Mozilla* opinion, and ongoing issues surrounding state net neutrality laws in greater detail.

### FCC's Actions

As described in more detail in CRS Report R40616, *The Federal Net Neutrality Debate: Access to Broadband Networks*, by Patricia Moloney Figliola, the FCC's approach towards net neutrality in recent years has been in flux. In particular, the FCC has toggled between classifying broadband Internet access service (BIAS) as either: 1) a "telecommunications service," meaning a common carrier subject to regulation under Title II of the Act, or 2) an "information service" as defined in Title I of the Act.[94] The FCC has discretion to choose which category is most appropriate for BIAS, as evidenced by the Supreme Court and D.C. Circuit's application of the *Chevron* doctrine—under which courts generally defer to an agency's reasonable interpretation of an ambiguous statutory provision—to repeatedly uphold the Commission's different classification choices.[95]

The Commission's choice between the two categories is significant because they have been treated as "mutually exclusive," i.e., an information service is not subject to regulations

[86] USTA v. FCC, 825 F.3d 674, 689 (D.C. Cir. 2016).

[87] In the Matter of Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018) [hereinafter 2018 Internet Order].

[88] 2018 Internet Order, 33 FCC Rcd. at 427, para. 195 ("We therefore preempt any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order.").

[89] *Mozilla*, 940 F.3d at 18.

[90] *Id.* at 74.

[91] *See* "Next Steps."

[92] *Mozilla*, 940 F.3d at 85.

[93] *Id.*

[94] 47 U.S.C. §§ 153(24), (50)–(51), (53); *see also Mozilla*, 940 F.3d at 17 ("[T]he 1996 Telecommunications Act creates two potential classifications for broadband Internet: 'telecommunications services' under Title II of the Act and 'information services' under Title I. These similar-sounding terms carry considerable significance: Title II entails common carrier status, see 47 U.S.C. § 153(51) (defining 'telecommunications carrier'), and triggers an array of statutory restrictions and requirements (subject to forbearance at the Commission's election)").

[95] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986–1000 (2005); U.S. Telecom Ass'n v. FCC, 825 F.3d 674–706 (D.C. Cir. 2016); *Mozilla*, 940 F.3d at 18–35 (2019).

governing a telecommunications service under Title II.[96] Because Title I does not give the FCC any affirmative regulatory authority over information services—and because information services are necessarily outside of Title II—the Commission may only regulate information services pursuant to its ancillary authority or some other non-Title II source of affirmative authority.[97]

Furthermore, even if the FCC uses a non-Title II source of authority, it may not use this authority to impose net neutrality regulations on information service providers that amount to "*per se*" common carrier regulations. In a 2010 order, the FCC tried to impose net neutrality rules while still classifying BIAS as an information service.[98] The Commission grounded its legal authority for the rule in a non-Title II provision—Section 706 of the Telecommunications Act of 1996, which amended the Communications Act to, among other things, direct the Commission to "encourage the deployment on a reasonable and timely basis" of "advanced telecommunications capability."[99] The D.C. Circuit rejected this approach, however, in the 2014 decision *Verizon v. FCC*.[100] The court deferred to the FCC's interpretation that Section 706 was an independent grant of authority, sufficient to support the rules in the 2010 order.[101] Nevertheless, the D.C. Circuit held that the bulk of these net neutrality rules (specifically, rules prohibiting BIAS providers from blocking or discriminating against lawful content) amounted to "*per se*" common carrier rules.[102] According to the court, such common carrier rules ran "afoul" of the Act's definition of telecommunications carriers, as it provides that "a telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services."[103]

Given the *Verizon* decision, the FCC issued a new order in 2015 (2015 Open Internet Order) that addressed the flaw identified in *Verizon* by classifying BIAS as a Title II telecommunications service.[104] The 2015 Open Internet Order, among other things, imposed three bright-line net neutrality rules on BIAS providers. These rules banned BIAS providers from: (1) *blocking* lawful content, applications, services, or non-harmful devices, (2) *throttling* (i.e., impairing or degrading) lawful content, applications, services, or non-harmful devices, and (3) engaging in *paid prioritization*, defined as favoring some internet traffic over others in exchange for consideration.[105] The order also imposed a more flexible standard referred to as the "General Conduct Rule," which prohibited BIAS providers from "unreasonably interfer[ing] or unreasonably disavantag[ing]" users from accessing the content or services of their choice.[106] The

[96] *See Brand X*, 545 U.S. at 976 ("Information-service providers, by contrast, are not subject to mandatory common-carrier regulation under Title II, though the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications"); *Mozilla*, 940 F.3d at 19 ("[G]iven that 'telecommunications service' and 'information service' have been treated as mutually exclusive by the Commission since the late 1990s, a premise Petitioners do not challenge, we view *Brand X* as binding precedent in this case.") (internal citations omitted).

[97] *See Brand X*, 545 U.S. at 976; *Mozilla*, 940 F.3d at 76 ("Title I is not an independent source of regulatory authority.") (internal citations omitted).

[98] *See* In re Preserving the Open Internet, Report and Order, 25 FCC Rcd. 17905 (2010).

[99] *Id.* at 17968–17972; 47 U.S.C. § 1302(b).

[100] 740 F.3d 623 (D.C. Cir. 2014).

[101] *Id.* at 635–49.

[102] *Id.* at 650–59, 701.

[103] *Id.* at 650; *see also* 47 U.S.C. § 153(51).

[104] In the Matter of Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015) [hereinafter 2015 Open Internet Order].

[105] *Id.* at 5607–08.

[106] *Id.* at 5609.

following year, in *United States Telecom Ass'n v. FCC*, the D.C. Circuit upheld the FCC's 2015 Open Internet Order in its entirety.[107]

The Commission, however, reversed course in 2018 and issued a new order titled "Restoring Internet Freedom" (2018 RIF Order).[108] The 2018 RIF Order reclassified broadband Internet as an "information service" and eliminated the bright-line rules and General Conduct Rule.[109] Along with removing BIAS from Title II, the FCC also forsook any regulatory authority over BIAS based on Section 706 of the Telecommunications Act, concluding that it was not an independent grant of regulatory authority.[110] Furthermore, most relevant to this report, the 2018 RIF Order broadly preempted any state or local laws "that would effectively impose rules or requirements that [it] repealed or decided to refrain from imposing" or that imposed "more stringent requirements for any aspect of broadband service" addressed by the 2018 RIF Order.[111] The Commission reasoned that "[a]llowing state and local governments to adopt their own separate requirements, which could impose far greater burdens than the federal regulatory regime, could significantly disrupt the balance we strike here."[112] Consequently, it concluded that it should "exercise [its] authority to preempt any state or local requirements that are inconsistent with the federal deregulatory approach" it adopted.[113] While the 2018 RIF Order reclassified BIAS and removed the net neutrality requirements, it left in place (and in some cases enhanced) existing transparency requirements, requiring providers to disclose, among other things, any blocking, throttling, and paid prioritization practices.[114] The Commission also explained that the 2018 RIF Order restored the Federal Trade Commission's (FTC) jurisdiction over BIAS providers, since such providers are no longer common carriers, and that the FTC would be able to police BIAS providers' data security and privacy practices.[115]

### *Mozilla Corp. v. FCC*

In 2019, the D.C. Circuit weighed in on the 2018 RIF Order's legality in *Mozilla Corp. v. FCC*.[116] While the court upheld the bulk of the order, it vacated the 2018 RIF Order's "sweeping" preemption of "any state or local requirements that are inconsistent with [its] deregulatory approach."[117] The court reasoned that the FCC no longer has affirmative regulatory authority over BIAS, now that it is classified as an information service, and the Commission could not preempt state law in an area over which it does not have regulatory authority without an express

[107] 825 F.3d 674 (D.C. Cir. 2016).

[108] In the Matter of Restoring Internet Freedom, Report an Order, and Order, 33 FCC Rcd. 331 (2018) [hereinafter 2018 RIF Order].

[109] *Id.* at 312–13, paras. 2–4.

[110] *Id.* at 470–80, paras. 268–83.

[111] *Id.* at 427, para. 195.

[112] *Id.* at 426, para. 194.

[113] *Id.*

[114] *Id.* at 437–50, paras 215–38. As authority for these transparency requirements, the Commission cited section 257 of the Communications Act, which directs the commission to "identify[] and eliminat[e] . . . market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services." 47 U.S.C. § 257(a).

[115] *Id.* at 419–20, 434, paras. 181–84, 208. Under the Federal Trade Commission Act, common carriers are exempt from the FTC's jurisdiction. *See* 15 U.S.C. § 45(a)(2).

[116] 940 F.3d 1 (D.C. Cir. 2019).

[117] *Id.* at 74.

authorization from Congress.[118] The court left open, however, the possibility that specific state laws might be preempted on a case-by-case basis under principles of conflict preemption.[119] While the decision was unanimous on other aspects of the case, one member of the three judge panel, Judge Williams, dissented from the court's preemption holding.[120] Among other things, he reasoned that the majority's position asymmetrically favored regulation over deregulation by only allowing the Commission to ensure a national policy if it chose to affirmatively regulate BIAS under Title II.[121] Judge Williams further expressed skepticism that any laws would be preempted through conflict preemption, given the majority's rationale in overturning the Order's preemption.[122]

The majority and dissenting opinions in *Mozilla* contain a vigorous discussion of the FCC's preemption authority and demonstrate the challenges with determining the bounds of this authority in particular cases. Furthermore, the majority opinion in particular will likely inform district courts as they consider whether state net neutrality laws are preempted by the 2018 RIF Order under principles of conflict preemption. Consequently, these opinions are worth examining in further detail.

### *Majority Opinion's Preemption Analysis*

In its preemption analysis, the court started with the basic principle, articulated by the Supreme Court, that an agency "may preempt state law only when and if it is acting within the scope of its congressionally delegated authority."[123] From there, the court reasoned that, "[b]y the same token, in any area where the Commission lacks the authority to regulate, it equally lacks the power to preempt state law."[124] The court recognized, as a caveat, that, "[o]f course, if a federal law expressly confers upon the agency the authority to preempt, that legislative delegation creates and defines the agency's power to displace state laws."[125]

Applying this framework to the 2018 RIF Order's preemption, the court concluded that the preemption was unlawful because the FCC did not have regulatory authority over BIAS and Congress had not granted it authority to displace state laws in areas which it does not have regulatory power.[126] The court explained that the Commission's "regulatory jurisdiction falls into two categories": (1) the "express and expansive authority" it has over common carriers under Title II, radio transmissions under Title III, and cable services under Title VI; and (2) its "ancillary authority," allowing it to regulate matters "reasonably ancillary to the effective performance" of its express authority.[127] The FCC's preemption "could not possibly be an exercise of the Commission's express statutory authority," the court said, because by reclassifying BIAS as an information service it "placed broadband *outside* of its Title II jurisdiction."[128] Further, the court reasoned, broadband is not a radio transmission under Title II or cable service

[118] *Id.* at 74–76.

[119] *Id.* at 85

[120] *Id.* at 95 (Williams, J., dissenting).

[121] *Id.* at 99–100.

[122] *Id.* at 106–07.

[123] *Id.* at 74–75 (quoting La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986)).

[124] *Id.* at 75.

[125] *Id.*

[126] *Id.* at 75–76.

[127] *Id.* at 124.

[128] *Id.* at 124–25 (emphasis in original).

under Title VI.[129] Further, the preemption did not fall under the FCC's ancillary authority because it was not related to the Commission's "effective performance" of its "statutorily mandated responsibilities" under Title II, III, or VI.[130] Since the Commission had neither express nor ancillary authority—and since "Congress [did not] statutorily grant the Commission freestanding preemption authority to displace state laws even in areas in which it does not otherwise have regulatory power"—the court concluded that the preemption directive could not stand."[131]

While the Commission articulated two other theories for its preemption—the "impossibility exception" and the "federal policy of nonregulation for information services"—the court rejected both in turn.[132] The impossibility exception, the court explained, is simply an exception to Section 2(b) of the Act's limitation on the FCC's authority over "intrastate communication."[133] According to the court, the impossibility exception "presupposes the existence of statutory authority to regulate," and the Commission may not use it as a "substitute for that necessary delegation of power from Congress."[134]

The court found the FCC's reliance on a "federal policy of nonregulation for information services" equally unavailing.[135] The Commission marshalled several different provisions supporting this policy, including (1) Section 230(b)(2), which states that the "policy of the United states [is] to preserve the vibrant and competitive free market . . . for the Internet," (2) the statement in the "telecommunications carrier" definition that telecommunications carriers shall only be treated as common carriers "to the extent [they are] engaged in providing telecommunications services," and (3) Section 10(e),[136] which provides that states may not enforce Title II provisions that the Commission has chosen not to apply.[137] However, none of these provisions, the court explained, give the FCC affirmative authority to regulate information services. The policy statement in Section 230(b)(2) is "just that"—a policy statement, rather than a "delegation of regulatory authority."[138] Similarly, the definition of telecommunications carrier is "not an independent source of regulatory authority," but in fact contains a "*limitation* on the Commission's authority."[139] Lastly, because the Commission took broadband "out of Title II," the court explained, Section 10(e) "has no work to do here," as it only applies to forbearance under Title II.[140]

Lastly, the court rejected the argument—which it said was "invent[ed]" by the dissenting opinion—that the Commission's preemption power flows from its authority, under the *Chevron* doctrine, to classify BIAS as either a Title I information service provider or a Title II telecommunications service.[141] The majority explained that the dissenting opinion "makes the

[129] *Id*.

[130] *Id.* at 25. The court further noted that the Commission "seemingly agrees," as it did not claim ancillary authority in the 2018 RIF Order or its briefing. *Id.* at 126.

[131] *Id.* at 75–76.

[132] *Id.* at 76–80.

[133] *Id.* at 77–78.

[134] *Id.* at 78.

[135] *Id.*

[136] 47 U.S.C. § 160(e).

[137] *Mozilla*, 940 F.3d at 78–80.

[138] *Id.* at 78–79.

[139] *Id.* at 79 (emphasis in original).

[140] *Id.*

[141] *Id.* at 82.

mistake of collapsing the distinction between (i) the Commission's authority to make a threshold classification decision, and (ii) the authority to issue affirmative and State-displacing legal commands within the bounds of the classification scheme the Commission has selected (here, Title I)."[142] According to the majority, the "agency's power to do the former says nothing about its authority to do the latter."[143]

While the court vacated the 2018 RIF Order's express preemption directive, it explained that it was not considering whether the order could have preemptive effect under principles of conflict preemption. The court explained that conflict preemption—which asks whether a state law "*under the circumstances of the particular case* stands an obstacle to the objectives of Congress"—is inherently fact-specific and cannot be resolved in the abstract, "let alone in gross."[144] It recognized, however, that "If the Commission can explain how a state practice actually undermines the 2018 RIF Order, then it can invoke conflict preemption."[145]

### *Judge Williams's Dissent*

While the panel was unanimous on the bulk of the decision, Judge Williams dissented from the preemption portion of the decision.[146] Judge Williams argued that the Communications Act impliedly gave the Commission authority for its broad preemption.[147] Judge Williams reasoned that, under *Chevron*, "Congress implicitly delegated to the FCC the power to determine whether to locate broadband under Title II, where it would be potentially subject to the full gamut of regulations designed for natural monopoly, or under Title I, which itself authorizes virtually no federal regulation."[148] Judge Williams argued that "[t]he consequences of the Commission's choice of Title I depend on its having authority to preempt," as without it the Commission "de facto yields authority over interstate communications to the states."[149] The majority's refusal to recognize this authority, Judge Williams contended, resulted in an "asymmetry" based on the majority's "staunch[] belie[f] that preemption serves solely to protect *affirmative* federal *regulations*," rather than a federal deregulatory scheme.[150]

Judge Williams also criticized the specific logic behind the majority's decision. In particular, he faulted the majority's reliance on the "maxim" that an agency may only preempt state law if either (1) it has "affirmative regulatory authority" over the area, or (2) there is an express statutory authorization otherwise giving it preemption authority.[151] First, Judge Williams took issue with the maxim itself because it requires *express* authorization in the absence of regulatory

[142] *Id.* at 84.

[143] *Id.*

[144] *Id.* at 81.

[145] *Id.* at 85.

[146] *Id.* at 95 (Williams, J., dissenting).

[147] *Id.* at 96–97 ("But Supreme court decisions make clear that a federal agency's authority to preempt state law need not be expressly granted . . . . Inquiry into that question proceeds in the usual way of discerning congressional intent. . . . Congress implicitly delegated to the FCC the power to determine whether to locate broadband under Title II, where it would be potentially subject to the full gamut of regulations designed for natural monopoly, or under Title I, which itself authorizes virtually no federal regulation. . . . The consequences of the Commission's choice of Title I depend on its having authority to preempt.").

[148] *Id.* at 97 (Williams, J., dissenting).

[149] *Id.*

[150] *Id.* at 99 (Williams, J., dissenting).

[151] *Id.* at 100–01 (Williams, J., dissenting).

authority.[152] Judge Williams wrote that the formulation was "entirely the majority's handiwork" and is at odds with "our living in a world where judicial interpretation of statutes rarely insists on an express provision outside the context of a clear statement rule or its equivalent."[153] According to Judge Williams, because Congress may preempt state law even when it chooses not to regulate, it may also make a "choice (express or implied) to grant an agency equivalent preemptive authority without any parallel federal regulation."[154]

Along with questioning the maxim itself, Judge Williams argued that it is "inapplicable" because the Commission does in fact have affirmative regulatory authority over BIAS.[155] Judge Williams explained that there is "no doubt" that "the day before adoption of [the 2018 RIF Order], the Commission had authority to apply Title II to broadband."[156] While the Commission's reclassification of broadband "forswore any *current* intention to use Title II vis-à-vis broadband" it was not "a permanent renunciation of that power."[157]

Judge Williams further rejected the idea that case-by-case application of conflict preemption principles would save the order from being "eviscerate[ed]."[158] According to Judge Williams, the "majority's view of preemption seems to render any conflict unimaginable" because the majority "rejects the idea that the Commission has exercised authority as to which [a state's] enforcement of a Title II equivalent *could* stand as an obstacle."[159] The majority, Judge Williams wrote, "conspicuously never offers an explanation of how a state regulation could ever conflict with the federal white space to which its reasoning consigns broadband."[160]

## Next Steps

The D.C. Circuit's decision in *Mozilla* is now final. The D.C. Circuit declined to rehear the case *en banc*, and the parties did not seek Supreme Court review by the July 6, 2020 deadline.[161] With the change in presidential administration, it is possible that the FCC might reconsider its position on net neutrality. The new Acting Chairwoman, Commissioner Jessica Rosenworcel, dissented from the 2018 RIF Order, arguing that the decision put the FCC "on the wrong side of history, the wrong side of the law, and the wrong side of the American public."[162] Absent new FCC action, future legal disputes surrounding net neutrality will likely focus on state laws.[163]

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[152] *Id.* at 100–01 (Williams, J., dissenting).

[153] *Id.* at 100 (Williams, J., dissenting).

[154] *Id.* at 101 (Williams, J., dissenting).

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.* at 106 (Williams, J., dissenting).

[159] *Id.* (internal quotations omitted).

[160] *Id.*

[161] Order Denying Petition for Rehearing En Banc, Mozilla Corp. v. FCC, No. 18-1051, 2020 U.S. App. LEXIS 3726 (D.C. Cir. 2020); Amy Keating and Alan Davidson, *Next Steps for Net Neutrality*, BLOG.MOZILLA.ORG (July 6, 2020), https://blog.mozilla.org/netpolicy/2020/07/06/next-steps-for-net-neutrality/ ("Today is the deadline to petition the Supreme Court for review of the D.C. Circuit decision in *Mozilla v. FCC*. After careful consideration, Mozilla—as well as its partners in this litigation—are not seeking Supreme Court review of the D.C. Circuit decision.").

[162] 2018 RIF Order, 33 FCC Rcd. at 846–48 (Statement of Jessica Rosenworcel, dissenting).

[163] Parties may no longer bring actions challenging the 2018 RIF Order, since the 60 day period for challenging the Order has passed. *See* 28 U.S.C. § 2344 ("Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.").

As discussed in the previous section, *Mozilla* left an opening for states to impose net neutrality requirements at the state level. A number of states have already enacted such laws. Some of these laws—specifically those of California and Washington—would require all BIAS providers operating in the states to comply with net neutrality requirements similar to those in the 2015 Open Internet Order.[164] Other laws or executive orders—such as those of Vermont and New York—would prohibit state agencies or instrumentalities from contracting with BIAS providers unless they certify they comply with net neutrality principles.[165]

Some of these state net neutrality laws are subject to legal challenges. In particular, BIAS providers have brought legal actions in federal district courts arguing that the 2018 RIF Order preempts California's and Vermont's laws.[166] Courts have not yet passed judgment on these challenges. However, on February 23, 2021, the district court overseeing challenges to California's law rejected the plaintiffs' motion for a preliminary injunction, thus allowing the law to go into effect.[167] Furthermore, on July 7, 2020, in a case that could be a bellwether for these state net neutrality cases, a federal district court rejected arguments that the 2018 RIF Order preempted a Maine law imposing privacy requirements on BIAS providers.[168] The plaintiffs argued that Maine's law conflicted with the policy established by the 2018 RIF Order that the "best way to protect consumers' privacy interest without imposing costly burdens on [internet service providers] is to pair mandatory privacy disclosures with FTC enforcement of those disclosures."[169] However, the court rejected this argument, reasoning that the Order "is not an instance of affirmative deregulation," but instead was the FCC's decision "that it lacked authority to regulate in the first place and would defer to the FTC's enforcement of existing antitrust and consumer protection laws."[170] Even assuming that an "abdication of authority" could result in preemption, the court said that plaintiffs failed to identify "any conflict between the FCC's proclamation that the FTC is the proper federal regulator of ISPs, and Maine's decision to impose privacy protections at the state level."[171] While this case dealt with state-level privacy requirements, courts weighing challenges to state net neutrality laws might take a similar approach, concluding that the 2018 RIF Order cannot preempt state laws because it is an "abdication," rather than an affirmative assertion, of authority.[172] On the other hand, the argument that state net neutrality laws conflict with the 2018 RIF Order may be stronger than in the privacy context, since these laws generally re-impose the same requirements the Order removed.

Courts may be even less likely to hold that the 2018 RIF Order preempts state laws that only prohibit state agencies and subdivisions from contracting with BIAS providers unless they abide by net neutrality requirements. As discussed in more detail below, the Supreme Court has said

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[164] California Internet Consumer Protection and Net Neutrality Act of 2018, CAL. CIV. CODE §§ 3100–3104 (2018); WASH. REV. CODE § 19.385.020 (2018). California's law in fact goes beyond the 2015 Open Internet Order by prohibiting zero rating practices. CAL. CIV. CODE § 3101.

[165] VT. STAT. ANN. tit. 3, § 348 (2018); *id.* tit. 3 app'x, § 3-85; N.Y. COMP. CODES R. & REGS. tit. 9, § 8.175 (2018).

[166] Complaint, Am. Cable Ass'n v. Scott, No. 2:18-CV-00167 (D. Vt. Oct. 18, 2018); First Am. Compl., Am. Cable Ass'n v. Becerra, No. 2:18-CV-02684 (E.D. Cal. Aug. 5, 2020). While the U.S. Department Justice also sued to block California's net neutrality law, it dropped this case on February 8, 2021. *See* Pl.'s Notice of Dismissal, United States v. California, 2:No. 18-cv-02660 (Feb. 8, 2021).

[167] Oral Ruling Den. Mot. for Prelim. Inj., Am. Cable Ass'n v. Becerra, No. 2:18-CV-02684 (E.D. Cal. Feb. 23, 2021).

[168] ACA Connects v. Frey, No. 1:20-cv-00055 (D. Me. July 7, 2020).

[169] *Id.* at *9.

[170] *Id.*

[171] *Id.* at *10.

[172] *Id.*

that Congress needs to make a "plain statement" in order to preempt state law in a way that would infringe on states' management of their own officers and subdivisions.[173]

Aside from legal challenges, Congress might weigh in on the dispute surrounding net neutrality and preemption. While no bills have yet been introduced that would expressly give the FCC authority for the broad preemption that was struck down in *Mozilla*, some bills from the 116th Congress would have established statutory net neutrality requirements. In particular, the Save the Internet Act—which passed the U.S. House of Representatives and was not taken up in the U.S. Senate—would have repealed the 2018 RIF Order and "restore[d]" the 2015 Open Internet Order.[174] Restoring the 2015 Open Internet Order would not necessarily preempt existing state net neutrality laws, though. In that order, the FCC declined to preempt the field of net neutrality regulation, opting instead to determine whether any state laws conflict with the order's "carefully tailored regulatory scheme" on a case-by-case basis.[175] Other bills, such as H.R. 1101, H.R. 1006, H.R. 2136, and H.R. 1096 would have taken a different approach than the Save the Internet Act.[176] These bills would have amended Title I to include net neutrality requirements, such as prohibitions on blocking or throttling lawful internet traffic, and given the FCC limited regulatory and enforcement authority to implement the requirements.[177] While some of these bills were silent on the preemption of state law, H.R. 2136 would have expressly preempted state laws "relating to or with respect to internet openness obligations for provision of broadband internet access service."[178]

## Voice over Internet Protocol (VoIP)

Similar to its approach to internet access itself, the FCC has taken a hands off approach to regulating internet enabled communications—most notably VoIP, which enables users to make voice calls using the internet. As discussed further below, the FCC has not clearly taken a position on whether VoIP is a telecommunications service or an information service. However, it has

[173] Nixon v. Mo. Mun. League, 541 U.S. 125, 140 (2004) ("[T]he liberating preemption would come only by interposing federal authority between a State and its municipal subdivisions . . . . Hence the need to invoke our working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement Gregory requires."); *see "Nixon v. Missouri Municipal League," infra*, for more discussion.

[174] H.R. 1644, 116th Cong. (2019); S. 682, 116th Cong. (2019).

[175] 2015 Open Internet Order, 30 FCC Rcd. at 19810, para. 432.

[176] H.R. 1101, 116th Cong. (2019); H.R. 1006, 116th Cong. (2019); H.R. 2136, 116th Cong. (2019); H.R. 1096, 116th Cong. (2019).

[177] H.R. 1101, 116th Cong. § 1 (2019) ("The Commission shall enforce the obligations established in subsection (a) through adjudication of complaints alleging violations of such subsection but may not expand the internet openness obligations for provision of broadband internet access service beyond the obligations established in such subsection, whether by rulemaking or otherwise."); H.R. 1006, 116th Cong. § 2 (2019) (giving the Commission authority to promulgate rules implementing disclosure requirements under the bill and directing the Commission to enforce the duties under the law "through adjudication of a complaint alleging that a service violates one or more such duties" but prohibiting the FCC from imposing "regulations on broadband internet access service or any component thereof under title II"); H.R. 2136, 116th Cong. § 2 (2019) ("The Commission shall enforce [the law's obligations] through adjudication of complaints alleging violations . . . but may not, under any provision of law, whether by rulemaking or otherwise—(A) expand the internet openness obligations for provision of broadband internet access service beyond the obligations established in [this law]; or (B) expand the internet openness obligations for the offering or provision of specialized services beyond the obligations established in [this law]."); H.R. 1096, 116th Cong. § 2 (2019) (amending Title I to include transparency requirements and prohibitions on blocking, impairment and degradation, and paid prioritization).

[178] H.R. 2136, 116th Cong. § 2 (2019).

nonetheless used its ancillary authority to impose some requirements on VoIP services, and it has preempted state laws that would impose more regulations.[179] Courts have, thus far, upheld the FCC's preemption of such state laws.[180]

## Background

The FCC first addressed the rise of "IP-enabled services" in a Notice of Proposed Rulemaking issued on March 10, 2004.[181] In this notice, the Commission observed that services and applications provided over the internet were becoming competitive with, and potentially replacing, services traditionally provided by incumbent telecommunications carriers.[182] Since issuing its Notice of Proposed Rulemaking, the Commission has relied on its ancillary authority to extend several Title II requirements to VoIP service providers when the service interfaces with the Public Switched Telephone Network.[183] Most recently, on December 13, 2019, the FCC issued a notice seeking comment on whether truth-in-billing requirements should extend to VoIP providers.[184] Since issuing its first notice, the FCC has not affirmatively classified VoIP as either a "telecommunications service" or an "information service," instead relying on VoIP's interstate nature and the Commission's various statutory responsibilities to regulate VoIP through its ancillary authority.[185]

## State Action and Legal Challenges

As discussed, the Communications Act creates a model of "dual federalism" over the nation's communications networks. To the extent the FCC relies on its ancillary authority, it may not regulate purely intrastate communications, which remain the province of the states.[186] However, under the FCC's "impossibility exception," the FCC may use its ancillary authority to displace state regulation when state regulation affects both intrastate and interstate communications and distinguishing between intrastate and interstate effects is impossible or impractical.[187]

Some states have addressed VoIP through regulation. In 2005, Florida became the first state to deregulate VoIP.[188] In 2003, conversely, the Minnesota Public Utilities Commission issued an

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[179] Vonage Holdings Corp., 19 FCC Rcd. 22404, 22411, para. 14 (2004) (relying on "impossibility" preemption to preempt a state regulatory order).

[180] *See* Vonage Holdings Corp. v. Neb. Pub. Serv. Comm'n, 564 F.3d 900, 904 (8th Cir. 2009); Charter Advanced Servs. (MN) LLC v. Lange, 903 F.3d 715, 719 (8th Cir. 2018).

[181] IP-Enabled Services, 19 FCC Rcd. 4863 (2004).

[182] *See id.* at 4865–67.

[183] *E.g.*, IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers, 20 FCC Rcd. 10245 (2005) (requiring VoIP providers to supply 911 emergency calling capabilities); Universal Service Contribution Methodology, 21 FCC Rcd. 7518 (establishing universal service contribution obligations for VoIP providers); Implementation of the Telecommunications Act of 1996, 22 FCC Rcd. 6927 (2007) (extending consumer privacy requirements to VoIP providers); IP-Enabled Services, 22 FCC Rcd. 11275 (2007) (extending Telecommunications Relay Service requirements to VoIP providers).

[184] *Consumer and Governmental Affairs Bureau Seeks to Refresh the Record on Truth-In-Billing Rules To Ensure Protections for All Consumers of Voice Services*, FED. COMMC'NS COMM'N (Dec. 13, 2019), https://ecfsapi.fcc.gov/file/1213540824304/DA-19-1271A1.pdf.

[185] *See* "State Action and Legal Challenges" *infra*.

[186] *See* "The FCC's Jurisdictional Authority" for more discussion of "impossibility" preemption.

[187] *Id.*

[188] FLA. STAT. ANN. § 364.01(3) (2011); *id.* § 364.011(3).

order requiring Vonage, a VoIP provider, to comply with state common carrier regulations.[189] Vonage petitioned the FCC for review of Minnesota's order, and the FCC issued an order (Vonage Order) on November 12, 2004 concluding that Vonage was not subject to Minnesota's common carrier regulations.[190] The FCC reached this conclusion under its theory of "impossibility" preemption, stating that intrastate communications made over VoIP were practically indistinguishable from interstate communications.[191] The FCC further noted that state regulation of VoIP directly conflicted with the FCC's "pro-competitive deregulatory rules and policies."[192] This would be true regardless of whether VoIP were classified as an "information service" or a "telecommunications service."[193] Minnesota challenged the FCC's order in federal court, where the Eighth Circuit upheld the order on the grounds that the FCC's exercise of "impossibility" preemption was not arbitrary or capricious.[194]

Because the FCC has declined to classify VoIP as either a telecommunications service or an information service and has instead relied on its ancillary authority and "impossibility" preemption to displace state action, states have continually pushed the boundaries of permissible state regulation. For example, Nebraska attempted to require VoIP providers to collect state Universal Service Fund fees, arguing that the Vonage Order preempted only "traditional telephone company" regulations.[195] However, federal courts routinely affirm the FCC's power to preempt these regulations using "impossibility" preemption.[196] By contrast, at least one federal court has taken a different approach. In *Charter Advanced Services (MN) LLC v. Lange*, the Eighth Circuit held that VoIP is an "information service" under the Communications Act and is therefore not subject to Title II regulation.[197] The court then restated an earlier conclusion of the Eighth Circuit—that "any state regulation of an information service conflicts with the federal policy of nonregulation"—in holding that because VoIP is an information service, no state regulation would stand.[198]

As discussed *supra*, the FCC attempted to preempt state regulation of another "information service" in its 2018 RIF Order to no avail.[199] The FCC's bases for preemption invalidated in *Mozilla v. FCC* closely track those articulated in the VoIP context: the "federal policy of deregulation for information services" and "impossibility" preemption.[200] When the Supreme Court denied review in *Charter Advanced Services*, Justice Clarence Thomas authored a concurrence to express his doubt that a federal policy of nonregulation could preempt state

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[189] In re Complaint of the Minn. Dep't of Commerce Against Vonage Holding Corp Regarding Lack of Authority to Operate in Minn., No. P-6214/C-03-108, 2003 WL 22336092 (Minn. P.U.C. Sept. 11, 2003), *enjoined by* Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n, 290 F. Supp. 2d 993 (D. Minn. 2003).

[190] Vonage Holdings Corp., 19 FCC Rcd. 22404 (2004).

[191] *See id.* at 22412, para. 15.

[192] *Id.* at 22415, para. 20.

[193] *Id.* at 22415–17, paras. 20–22.

[194] Minn. Pub. Utils. Comm'n v. FCC, 483 F.3d 570, 578–79 (8th Cir. 2007).

[195] Vonage Holdings Corp. v. Neb. Pub. Serv. Comm'n, 564 F.3d 900, 904 (8th Cir. 2009) (preempting state regulation).

[196] *See, e.g.*, *id.*; N.M. Pub. Regulation Comm'n v. Vonage Holdings Corp., 640 F. Supp. 2d 1359, 1370 (D.N.M. 2009) (dismissing declaratory judgment action by state requiring Vonage to pay into New Mexico Universal Service Fund).

[197] 903 F.3d 715, 719 (8th Cir. 2018).

[198] *Id.* (quoting *Minn. Pub. Utils. Comm'n*, 483 F.3d at 580).

[199] *See* "Net Neutrality."

[200] *Compare* Mozilla v. FCC, 904 F.3d 1, 76–80 (D.C. Cir. 2019) *with Charter Adv. Servs.*, 903 F.3d at 719; *see also Minn. Pub. Utils. Comm'n*, 483 F.3d at 576.

regulation.[201] Justice Thomas explained that the constitutional source of preemption authority, the Supremacy Clause, "requires that pre-emptive [sic] effect be given only to those federal standards and policies that are set forth in, or necessarily flow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures."[202] Consequently, allowing an agency policy of nonregulation to have preemptive effect "authorizes the Executive to make 'Law' by declining to act, and it authorizes the courts to conduct 'a freewheeling judicial inquiry' into the facts of federal nonregulation."[203]

However, VoIP differs from BIAS in that VoIP services frequently use telephone numbers and connect users to traditional telecommunications networks. On this basis, the FCC has relied on its ancillary authority to affirmatively regulate VoIP providers, in contrast to its approach to BIAS.[204] Whereas the *Mozilla* court did not find BIAS to fall under any FCC jurisdictional authority absent a classification as a Title II "telecommunications service," the FCC has repeatedly relied on its ancillary jurisdiction to regulate VoIP without facing legal challenges for doing so.[205]

## Wireless Facility Siting for Fifth Generation (5G) Networks

Preemption has also played a leading part in the FCC's efforts to speed the deployment of fifth generation (5G) wireless infrastructure. The infrastructure necessary to support 5G wireless networks involves the placement of "small cell" wireless equipment on existing structures, including municipally owned property. In 2018, the FCC acted to preempt state and local authority to regulate the placement of small cells when such regulations "materially inhibit" the deployment of 5G infrastructure. The Commission also set "shot clocks" that control the timeframe in which local governments must review applications for small cell siting. In 2020, the FCC clarified its rules requiring state and local governments to approve requests to modify existing wireless facilities when the modification "does not substantially change the physical dimensions" of the facility. These regulatory actions have been challenged in federal courts by municipalities and public utilities, and while the Ninth Circuit largely upheld the FCC's 2018 actions, litigation concerning the 2020 action is still ongoing, with proceedings stayed until July 2021.[206]

### Technical Background

Mobile wireless services function by transmitting information between devices over radio waves through a network of antennae and similar equipment. Each node in these networks is a *cell site*: a

[201] Lipschultz v. Charter Adv. Servs. (MN), LLC, 140 S. Ct. 6 (2019) (Thomas, J., concurring).

[202] *Id.* at 7 (quoting Wyeth v. Levine, 555 U.S. 555, 586 (2009) (Thomas, J., concurring).

[203] *Id.* at 7–8 (quoting *Wyeth*, 555 U.S. at 588 (Thomas, J., concurring). Justice Thomas nonetheless concurred in the denial of certiorari because the petition did not raise the basis of preemption. *Id.*

[204] *See, e.g.*, 47 CFR § 9.11 (requiring interconnected VoIP service providers to provide 911 service); 47 CFR § 54.706 (requiring interconnected VoIP providers to contribute to federal universal service support mechanisms); 47 CFR § 64.604 (requiring VoIP contributions to Telecommunications Relay Service fund).

[205] *E.g.*, IP-Enabled Services E911 Requirements for IP-Enabled Service Providers, 20 FCC Rcd. 10245, 10261-10266, paras. 26-35 (2005).

[206] *See* City of Portland v. United States, 969 F.3d 1020 (9th Cir. 2020) (upholding all of the FCC's requirements except for its aesthetic requirements); Order, League of Cal. Cities v. FCC, No. 20-71765 (9th Cir. Mar. 19, 2021), ECF No. 59 (granting FCC's motion to stay the proceedings). In addition to this ongoing challenge, several municipalities have petitioned the Supreme Court to review the Ninth Circuit's decision pertaining to the FCC's 2018 action. Pet. for Writ of Certiorari, City of Portland v. FCC, No. 20-1354 (U.S. Mar. 22, 2021).

collection of communications equipment capable of receiving and transmitting wireless signals over a given area (a *cell*).

In legacy networks (e.g., 3G, 4G), telecommunication providers use macro cell sites (e.g., tall towers, antennas, radio equipment) to provide coverage over wide areas. 5G networks leverage 4G macro cell sites but also rely on "small cells" with coverage areas of hundreds of feet.[207] Because the coverage area is small, an effective 5G network requires placement of a large number of cell sites in close proximity to each other. These small cell sites are much smaller than those that support extant wireless networks and may therefore be attached to existing structures, rather than requiring construction of freestanding macro cell towers.[208]

## State and Local Authority

Constructing wireless facilities or attaching wireless equipment to existing structures generally requires some sort of government approval depending on who controls the site of construction. With the exception of federal lands, state or local authorities manage construction projects. For cell site projects, typical state and local concerns include historical preservation, environmental protection, public safety, accessibility requirements, and aesthetics.[209]

To date, a number of states have passed or proposed legislation to speed up the permitting process for small cell deployment.[210] These laws generally address this objective by placing time limits (or "shot clocks") on application processing and limiting or capping fees charged by local authorities for small cell site applications.[211]

## FCC Statutory Authority and Procedure

Two provisions of the Communications Act—Sections 253 and 332—address how FCC authority over interstate communications intersects with local land use authority. First, Section 253 permits the FCC to preempt enforcement of any act of state or local government that "prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[212] It contains two exceptions, however. First, Section 253(b) provides that:

> [n]othing in this section shall affect the ability of a State to impose, on a competitively neutral basis . . . requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.[213]

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[207] For further technical background, *see* CRS Report R45485, *Fifth-Generation (5G) Telecommunications Technologies: Issues for Congress*, by Jill C. Gallagher and Michael E. DeVine.

[208] Small Cell Order, 33 FCC Rcd. 9088, 9089 para. 3 (2018); *see also* 47 CFR § 1.6002(l) (defining "small wireless facilities").

[209] *See generally Municipal Action Guide: Small Cell Wireless Technology in Cities* at 5, NAT'L LEAGUE OF CITIES (2018) (outlining potential issues faced by municipalities in managing small cell sites), https://www.nlc.org/wp-content/uploads/2018/08/CS_SmallCell_MAG_FINAL.pdf.

[210] *See* Michael T.N. Fitch, *Legislation Streamlining Wireless Small Cell Deployment Enacted in 25 States*, NAT'L L. REV. (July 8, 2019), https://www.natlawreview.com/article/legislation-streamlining-wireless-small-cell-deployment-enacted-25-states.

[211] *E.g.* COLO. REV. STAT. §§ 29-27-403, 38-5.5-108 (2020); DEL. CODE ANN. tit. 17 §§ 1605, 1609 (1974).

[212] 47 U.S.C. § 253(a), (d); *see* "Overview of the FCC's Preemption Authority Under the Communications Act."

[213] *Id.* § 253(b).

Further, Section 253(c) reserves to state and local governments "the authority . . . to manage public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis" for use of such rights of way.[214]

Similar to Section 253, Section 332 prohibits state and local governments from using local zoning authority in a manner that "prohibit[s] or ha[s] the effect of prohibiting the provision of wireless services."[215] It further prohibits state and local governments from "unreasonably discriminat[ing] among providers of functionally equivalent services," and it requires them to "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time."[216] Apart from these requirements and a few specific limitations,[217] Section 332 preserves state and local authority over decisions regarding the "placement, construction, and modification of personal wireless service facilities."[218]

Both of these statutes provide mechanisms through which a party subject to a state or local requirement may challenge the requirement. Section 253 permits parties to file a petition with the FCC to preempt enforcement of a requirement that violates the section.[219] Section 332 allows such a party to bring an action in federal court.[220]

In addition to these statutory provisions, Section 6409(a) of the Spectrum Act of 2012[221] requires that state and local governments approve any request to modify an existing wireless facility "that does not substantially change the physical dimensions" of the facility.[222] While this provision does not direct the FCC to preempt state action or provide a mechanism for parties to challenge state action, as Sections 253 and 332 do, Section 6409(a) is enforced by the Commission and therefore the Commission may promulgate regulations implementing it.[223]

## The FCC's Orders

In 2018, the FCC issued two orders addressing state and local authority over small cell siting. The first of these orders prohibits localities from instituting moratoria on processing applications relating to telecommunications infrastructure deployment, including cell sites (Moratorium Order).[224] The second order clarifies the FCC's position that a state or local requirement "effectively prohibits" the provision of services articulated in Sections 253 and 332 when such requirement "materially inhibits" the deployment of telecommunications facilities (Small Cell

[214] *Id.* § 253(c).

[215] *Id.* § 332(c)(7)(B); *see* "Overview of the FCC's Preemption Authority Under the Communications Act."

[216] *Id.* §§ 332(c)(7)(B)(i)(II), 332(c)(7)(B)(ii).

[217] Section 332 also prohibits state and local governments from "unreasonably discriminat[ing] among providers of functionally equivalent services." *Id.* § 332(c)(7)(B). State and local governments are also prohibited from regulating "the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." *Id.* § 332(c)(7)(B)(iv).

[218] *Id.* § 332(c)(7)(A).

[219] *Id.* § 253(d); *see also* 47 CFR § 1.1.

[220] 47 U.S.C. § 332(c)(7)(B)(v).

[221] Pub. L. No. 112-96, title VI, 126 Stat. 156, 232 (codified as 47 U.S.C. § 1455).

[222] 47 U.S.C. § 1455(a).

[223] *See* 47 U.S.C. § 1403(a) (directing the FCC to implement and enforce the Spectrum Act "as if [it] is a part of the Communications Act of 1934").

[224] Moratorium Order, 33 FCC Rcd. 7705 (2018).

Order).[225] In 2020, the FCC issued a declaratory ruling clarifying its rules implementing Section 6409(a) of the Spectrum Act (June 2020 Declaratory Ruling).[226] Recognizing that 5G deployment will not depend solely on small cells, the June 2020 Declaratory Ruling addresses FCC regulations governing state and local approval of modifications to existing wireless equipment.[227]

### *The Moratorium Order*

The FCC in the Moratorium Order made clear that "explicit refusals to authorize deployment and dilatory tactics that amount to *de facto* refusals to allow deployment" of telecommunications facilities violate Section 253.[228] The Commission focused both on "express moratoria"—written legal requirements that prevent or suspend the processing of permits and applications necessary for deploying wireless facilities—and "de facto moratoria" that effectively prevent or suspend such processing but are not codified.[229] Both express and de facto moratoria, the FCC observed, inherently violate Section 253 because such moratoria "prohibit or have the effect of prohibiting" deployment of facilities necessary to provide telecommunications service.[230] The Commission rejected the argument that such moratoria do not violate Section 253 because they are time-limited, noting that some localities impose "temporary" moratoria without definite end dates or continually extend such moratoria.[231]

The FCC also determined that the exceptions in Section 253(b) and Section 253(c) do not ordinarily apply to express and de facto moratoria. As mentioned, Section 253(b) reserves "the ability of a State" to impose requirements on a "competitively neutral basis" that are necessary to "preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[232] The Commission reasoned that this exception generally would not apply because it discusses only the authority of a state, and the absence of any indication that the exception applies to local government would preclude its application to municipal moratoria.[233] Further, the FCC noted that even if local moratoria fell within Section 253(b)'s jurisdictional scope, most moratoria would not meet the exception's substantive requirements, such as being "competitively neutral" or being necessary for any of the four "public interest" purposes listed in the subsection.[234] The Commission acknowledged, however, that in "limited situations" a moratoria may be necessary to

[225] Small Cell Order, 33 FCC Rcd. 9088 (2018).

[226] Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests, 35 FCC Rcd. 5977 (2020) [hereinafter June 2020 Declaratory Ruling]; *see also* Acceleration of Broadband Deployment by Improving Wireless Siting Policies, 30 FCC Rcd. 31, 43, paras. 135-241 (2014) [hereinafter 2014 Infrastructure Order] (promulgating regulations under Section 6409(a)).

[227] June 2020 Declaratory Ruling, 35 FCC Rcd. at 5978–79, para. 2.

[228] Moratorium Order, 33 FCC Rcd. at 7775, para. 140. Because the Moratorium Order relies on Section 253, it applies to all facilities used in the provision of telecommunications service, not just wireless facilities. *Compare* 47 U.S.C. § 253(a) (applying to any legal requirement that affects "any interstate or intrastate telecommunications service) *with* 47 U.S.C. § 332(c)(7) (singling out "personal wireless service facilities").

[229] *Id.* at 7777, 7780, paras. 145, 149.

[230] *Id.* at 7779, 7782, paras. 147, 151.

[231] *Id.* at 7779–80, para. 148.

[232] 47 U.S.C. § 253(b).

[233] Moratorium Order, 33 FCC Rcd. at 7782-83, para. 154.

[234] *Id.* at 7783-84, para. 155–56.

"protect the public safety and welfare," such as in the instance of a natural disaster that results in a widespread power or telecommunications outage.[235]

The Commission likewise concluded that Section 253(c) does not apply. As mentioned, Section 253(c) reserves to state and local governments "the authority . . . to manage public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis" for use of such rights of way.[236] Per the Moratorium Order, Section 253(c)'s applicability to a moratorium depends on whether moratoria may constitute management of public rights-of-way.[237] Although Section 253 does not define management of public rights-of-way, past FCC precedent specifies "coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them" as examples of public rights-of-way management.[238] From this precedent, the Commission concluded that Section 253(c) applies to "certain activities that involve the actual use of the right-of-way," rather than activities that preclude access to the right-of-way at all.[239] Thus, the FCC held that Section 253(c) did not apply to moratoria.

### *The Small Cell Order*

In comparison to the relatively narrow issue addressed in the Moratorium Order, the Small Cell Order deals with a wide range of topics relating to state and local government authority to slow the deployment of small wireless facilities. Most notably, the Small Cell Order addresses (1) when state or local actions "prohibit or effectively prohibit" the provision of wireless service, and (2) the timeframes within which state and local governments must act on small cell applications.

With respect to the first issue, and in contrast to the Moratorium Order, the FCC based the Small Cell Order on Sections 253 *and* 332—both of which include the same "prohibit or effectively prohibit" language. The Small Cell Order applied the "prohibit or effectively prohibits" language to reach three rulings:

- the appropriate standard for determining whether state or local conduct "prohibit[s] or effectively prohibit[s]" the provision of service under Sections 253 or 332 is whether the conduct "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment";[240]
- state and local fees associated with the deployment of wireless infrastructure only comply with this "materially limits or inhibits" standard if they are non-discriminatory and reasonably approximate the state or locality's reasonable costs;[241] and

[235] *Id.* at 7784-85, para. 157.

[236] 47 U.S.C. § 253(c).

[237] Moratorium Order, 33 FCC Rcd. at 7786, para. 159.

[238] *Id.* at para. 160 (quoting TCI Cablevision of Oakland Cty., 12 FCC Rcd. 21396, 21441, para. 103 (1997)).

[239] *Id.* at 7786–87, para. 160.

[240] Small Cell Order, 33 FCC Rcd. 9088, 9102, para. 35 (2018) (quoting California Payphone Ass'n, Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Cal., 12 FCC Rcd. 14191, 14206, para. 31 (1997) [hereinafter *California Payphone*]).

[241] *Id.* at 9112-13, para. 50.

- aesthetic requirements only comply with the "materially limits or inhibits" standard if they are reasonable, non-discriminatory, and "objective and published in advance."[242]

With respect to the appropriate standard, the FCC relied on FCC precedent that first articulated the "materially inhibit" standard.[243] The Commission further adopted the interpretations of the First, Second, and Tenth Circuits, which held that a legal requirement can meet the "materially inhibit" standard even if it does not present an "insurmountable barrier" to the entry or provision of wireless services.[244] The FCC clarified that wireless service is "materially inhibited" not only when legal requirements materially inhibit the introduction of wireless service, but also when legal requirements materially inhibit improvement of existing services, such as by densifying an existing network.[245]

Regarding fees, the Commission concluded that fees "materially inhibit" the provision of wireless service unless they reasonably approximate the state or local government's costs, take into account only "objectively reasonable costs," and are "no higher than the fees charged to similarly-situated competitors in similar situations."[246] The FCC relied in part on the text of Section 253(c), which permits state and local governments to collect "fair and reasonable compensation from telecommunications providers, on a competitively neutral basis, for use of public rights-of-way on a nondiscriminatory basis."[247] The FCC did not decide whether Section 253(a) preempts all fees not expressly reserved by Section 253(c), but concluded that in the context of small wireless facilities, otherwise "small" fees may materially inhibit facility deployment when considered in the aggregate, given the expected volume of small wireless facilities.[248] The Commission also identified a "safe harbor" of presumptively valid fees, including a $500 "upfront" application fee for up to five small wireless facilities or a $1,000 non-recurring fee for a new utility pole, and $270 per small wireless facility per year for all recurring fees.[249]

Addressing aesthetic requirements, the FCC noted that such requirements impose additional cost on wireless providers and therefore may materially inhibit the provision of wireless service in violation of Sections 253 and 332.[250] The FCC concluded that the harms aesthetic requirements are meant to address are analogous to the "costs" borne by state and local governments and therefore aesthetic requirements that are reasonably directed at resolving these harms would be permissible.[251] To demonstrate this, the aesthetic requirements must not burden small wireless facilities more than similar infrastructure deployments, and they must "incorporate clearly-defined and ascertainable standards, applied in a principled manner."[252]

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[242] *Id.* at 9132, para. 86.

[243] *Id.* at 9102, para. 35 (citing *California Payphone*, 12 FCC Rcd. at 14206, para. 31).

[244] *Id.*; *see, e.g.*, TCG N.Y., Inc. v. City of White Plains, 305 F.3d 67, 76 (2d Cir. 2002); P.R. Telephone Co. v. Municipality of Guayanilla, 450 F.3d 9, 18 (1st Cir. 2006); RT Commc'ns v. FCC, 201 F.3d 1264, 1268 (10th Cir. 2000).

[245] Small Cell Order, 33 FCC Rcd. at 9104, para. 37.

[246] *Id.* at 9112-13, para. 50.

[247] *Id.* at 9113–14, para. 52 (citing 47 U.S.C. § 253(c)).

[248] *Id.* at 9114, para. 53.

[249] *Id.* at 9129, para. 79.

[250] *Id.* at 9132, para. 87.

[251] *Id.*

[252] *Id.* at 9132, paras. 87–88.

Lastly, in addition to clarifying when state or local actions "prohibit or effectively prohibit" wireless service under Sections 253 and 332, the Small Cell Order separately set forth "shot clocks" governing review of applications for wireless facilities. The Commission set a time limit of 60 days for attachment of a small wireless facility to an existing structure and 90 days for a new structure.[253] For authority, the FCC relied on Section 332(c)(7)'s requirement that localities "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable time," as well as on that section's "prohibit or effectively prohibit" language.[254] The Small Cell Order explains that in situations where a jurisdiction misses the shot clock deadline, the applicant should, in most cases, be able to obtain expedited relief in court under Section 332(c)(7), which directs courts to decide suits brought by any adversely affected person on an "expedited basis."[255] According to the Order, in such cases, applicants should have a relatively low hurdle to clear in establishing a right to expedited judicial relief," since missing the shot clock would amount to a presumptive violation of Section 332(c)(7).[256]

### *The June 2020 Declaratory Ruling*

In 2014, the Commission issued rules implementing Section 6409(a) ("2014 Infrastructure Order"), including specifying what qualifies as "substantially chang[ing] the physical dimensions" of a wireless facility and setting a 60-day shot clock for facility modifications.[257] After a coalition of municipalities challenged this order in court, the Fourth Circuit affirmed the 2014 Infrastructure Order, holding that the Commission had statutory authority to make its rules and had not defined any terms in Section 6409(a) unreasonably.[258]

The June 2020 Declaratory Ruling clarifies the rules implemented by the Commission in the 2014 Infrastructure Order. Recognizing that localities had inconsistently applied the 2014 Infrastructure Order's 60-day shot clock, the FCC clarified that the shot clock begins when (1) the party applying for the modification "takes the first procedural step" required by the local jurisdiction's review process, and (2) the applicant demonstrates in writing that the proposed modification is covered by Section 6409(a).[259] In addition to addressing the shot clock, the June 2020 Declaratory Ruling further elaborates what qualifies as "substantially chang[ing] the physical dimensions" of a wireless facility, addressing several definitional ambiguities found in the regulations issued under the 2014 Infrastructure Order.[260]

## Legal Challenges

A number of parties, including state and local governments, utilities, telecommunications providers, and interest groups have petitioned federal courts for review of the FCC's orders. While the Ninth Circuit recently upheld the bulk of the Small Cell and Moratorium Orders—

[253] *Id.* at 9092, para. 13.

[254] *Id.* at 9148–49, paras. 117–118.

[255] *Id.* at 9149, para. 120.

[256] *Id.*

[257] 2014 Infrastructure Order, 30 FCC Rcd. 31, 43, paras. 135–241 (2014).

[258] Montgomery Cty., Md. v. FCC, 811 F.3d 121 (4th Cir. 2015).

[259] June 2020 Declaratory Ruling, 35 FCC Rcd. at 5986, para. 16.

[260] *Id.* at 5989–99, paras. 24–44; *see* 47 CFR 1.6100(b)(7) (defining "substantial change" for purposes of Section 6409(a)).

vacating only the Small Cell Order's aesthetic requirements—the litigation surrounding the June 2020 Declaratory Ruling is ongoing.[261]

In the challenges to the Small Cell and Moratorium Orders, state and local governments challenged the FCC's action under a number of theories, including a number of evergreen administrative law doctrines such as the "arbitrary and capricious" standard and *Chevron* deference framework.[262] The local governments argued that the FCC's orders go beyond what Sections 253 and 332 permit and do not articulate administrable standards.[263] They further argued that the orders violated the Constitution by, among other things, compelling them to enforce or administer a federal regulatory program in violation of the Tenth Amendment.[264]

However, in August 2020, in *City of Portland v. United States*, the Ninth Circuit largely upheld both orders.[265] As a threshold matter, the Court upheld the FCC's application of its "material inhibition" standard to determine when municipal regulations "prohibit or effectively prohibit" the provision of services under Sections 253 or 332.[266] The court reasoned that this standard was consistent with Ninth Circuit precedent and that any differences in the way the FCC now applied this standard in the 5G context could be "reasonably explained" by the differences in technology.[267] Moving on to the orders' specific rulings, the court held that the Small Cell Order's fee limitations and shot clocks, and the Moratorium Order's definitions of express and de facto moratoria, were consistent with the statutory provisions and were not arbitrary or capricious.[268] The court vacated and remanded, however, the Small Cell Order's aesthetics requirements.[269] It reasoned that Section 332 "expressly permits some difference in treatment of different providers, so long as the treatment is reasonable."[270] Consequently, the FCC's blanket prohibition that municipalities may not impose aesthetic requirements on small wireless facilities more burdensome than similar infrastructure deployments was, according to the court, inconsistent with Section 332.[271] The court further held that the FCC acted arbitrarily and capriciously by prohibiting aesthetic requirements.[272] The court explained that aesthetic regulation of small cells "should be directed to preventing the intangible public harm of unsightly or out-of-character deployments," and that such harms are "at least to some extent, necessarily subjective."[273] Separate from the statutory and administrative law issues, the court rejected the constitutional arguments advanced by the municipalities.[274] Most notably, the court rejected the argument that

[261] City of Portland v. United States, 969 F.3d 1020 (9th Cir. 2020) (upholding all of the FCC's requirements except for its aesthetic requirements); Order, League of Cal. Cities v. FCC, No. 20-71765 (9th Cir. Mar. 19, 2021), ECF No. 59 (granting FCC's motion to stay the proceedings). Additionally, several municipalities have asked the Supreme Court to review the Ninth Circuit's decision upholding the Small Cell and Moratorium Orders. Pet. for Writ of Certiorari, City of Portland v. FCC, No. 20-1354 (U.S. Mar. 22, 2021).

[262] *See* Brief for Petitioners, City of Portland v. United States, No. 18-72689 (9th Cir. June 10, 2019), ECF No. 62.

[263] *Id.* at 29–34.

[264] *Id.* at 106–16.

[265] City of Portland v. United States, 969 F.3d 1020 (9th Cir. 2020).

[266] *Id.* at 1035.

[267] *Id.*

[268] *Id.* at 1037–39, 1043–45, 1047–48.

[269] *Id.* at 1040–1043.

[270] *Id.* at 1040.

[271] *Id.* at 1040–41.

[272] *Id.* at 1042.

[273] *Id.* (internal quotations and citations omitted).

[274] *Id.* at 1048–49.

the orders violated the Tenth Amendment by requiring the municipalities to "enforce federal law."[275] The court explained that, rather than "commandeer[ing] State and local officials in violation of the Tenth Amendment," the orders simply "confer[red] on private entities a federal right to engage in certain conduct subject to only certain (federal) constraints."[276]

Several cities have petitioned the Supreme Court to review the Ninth Circuit's decision, though the Court has not yet acted on this petition.[277] In addition to the Small Cell and Moratorium Order challenges, a consortium of municipalities in California and Oregon have challenged the June 2020 Declaratory Ruling, alleging that the FCC violated the Administrative Procedure Act, the Constitution, and the Communications Act in issuing it.[278] These proceedings have been stayed until July 2021, with no briefing schedule currently set.[279] However, one possible point of contention may be whether the Declaratory Ruling impermissibly promulgated new "rules," rather than merely clarifying existing rules.[280]

### Legislative Activity

Two bills from the 116th Congress addressed state and local authority over small cell siting. One of these bills, the STREAMLINE Small Cell Deployment Act (STREAMLINE Act),[281] would have largely adopted the FCC's conclusions in the Small Cell Order. Notable differences between the STREAMLINE Act and the Small Cell Order include slightly different "shot clock" times and the presence in the STREAMLINE Act of a "deemed granted" remedy (i.e., allowing a wireless provider's application to be deemed granted after a sufficient period of inaction). Another bill, the Accelerating Broadband Development by Empowering Local Communities Act,[282] would have invalidated the Small Cell Order and Moratorium Order.

## Community Broadband

A number of local governments throughout the United States offer consumers an option to receive broadband service from a public entity (known as "community broadband" or "municipal broadband"). A number of states currently place restrictions on local government ability to provide community broadband services. The FCC has attempted to preempt state restrictions on community broadband when such restrictions are inconsistent with FCC regulations; however, a recent Sixth Circuit decision held that the FCC could not preempt state regulation of community broadband without an express statutory grant of preemption authority from Congress. Even if Congress expressly grants the FCC authority to preempt state restrictions on community broadband, such a delegation of authority is likely to face constitutional challenges. The FCC's approach to community broadband, particularly as it implicates the authority of states, involves

[275] *Id.* at 1049.

[276] *Id.* (internal quotations and citations omitted).

[277] Pet. for Writ of Certiorari, City of Portland v. FCC, No. 20-1354 (U.S. Mar. 22, 2021).

[278] Pet. for Rev., League of Cal. Cities v. FCC, No. 20-71765 (9th Cir. June 22, 2020).

[279] Order, League of Cal. Cities v. FCC, No. 20-71765 (9th Cir. Mar. 19, 2021), ECF No. 59.

[280] *Id.*; *see also* Nat'l League of Cities, Comment on Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests, 8-9 (Oct. 29, 2019) (asserting that changing the Commission's Section 6409(a) rules through a declaratory ruling "would not comport with the APA's requirements"). *See generally* 5 U.S.C. § 553 (setting forth procedures for rulemaking).

[281] S. 1699, 116th Cong. (2019).

[282] H.R. 530, 116th Cong. (2019).

issues under *Gregory v. Ashcroft*'s "plain statement" rule and, in some cases, the Tenth Amendment.[283]

## Background

Municipal broadband or community broadband refers generally to any arrangement in which a local government participates in the provision of high-speed internet service to members of its community.[284] Government participation can range from public-private partnerships to broadband cooperatives or publicly owned networks. The Institute for Local Self-Reliance identifies more than 560 communities in the United States served by some form of municipal broadband.[285]

The FCC has historically been supportive of community broadband. In its 2010 National Broadband Plan, the Commission noted that restricting deployment of community broadband "in some cases restricts the country's ability to close the broadband availability gap."[286] As early as 2000, the Commission favorably acknowledged direct public investment in broadband infrastructure by municipalities.[287]

## FCC Action and Statutory Authority

A number of states currently restrict municipal participation in the provision of broadband service. Some states, such as Nebraska, directly prohibit local governments from participating in the provision of broadband service.[288] Other states require municipalities to obtain a certain amount of local support in a referendum before offering broadband service.[289] Some states, such as Utah, require municipalities to undergo a series of steps before they may provide broadband service.[290]

### *Nixon v. Missouri Municipal League*

In several instances, municipalities have petitioned the FCC to preempt state laws that restrict municipal participation in broadband or telecommunications. One of the earliest of these petitions involved a Missouri law, passed in 1997, that prohibited municipalities from providing "telecommunications service."[291] Municipalities petitioned the FCC to preempt this law under Section 253, which, as mentioned, enables the FCC to preempt state or local requirements that "may prohibit or have the effect or prohibiting the ability of any entity to provide" a

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[283] *See* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (articulating the "plain statement" rule); U.S. CONST. amend. X (reserving to the states "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States").

[284] For more background on community broadband generally, *see* CRS Report R44080, *Municipal Broadband: Background and Policy Debate*, by Lennard G. Kruger and Angele A. Gilroy.

[285] *Community Network Map*, COMMUNITY BROADBAND NETWORKS (last visited Mar. 19, 2020), https://muninetworks.org/communitymap.

[286] FED. COMMC'NS COMM'N, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 169 (2010), https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf.

[287] FED. COMMCN'S COMM'N, DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY: SECOND REPORT 61, 63-64, 72-73, paras. 140, 150, 181-82 (2000), https://transition.fcc.gov/Bureaus/Common_Carrier/Orders/2000/fcc00290.pdf.

[288] NEB. REV. STAT. § 86-594 (2020).

[289] *E.g.*, MINN. STAT. § 237.19 (2020).

[290] UTAH CODE ANN. § 10-18-202 (2020).

[291] MO. ANN. STAT. § 392.410 (2016). The law explicitly carves out "internet-type services" from its application. *Id.*

telecommunications service.[292] The FCC, however, declined to preempt the Missouri law based on its understanding that Section 253's reference to "any entity" does not extend to political subdivisions of a state.[293] The FCC relied on the "clear statement" rule of *Gregory v. Ashcroft* in reaching this conclusion, determining that an intent to apply Section 253 to political subdivisions was not sufficiently clear from the statute's text to support abrogating the state's power.[294] The case reached the Supreme Court, which affirmed the FCC's decision in the case *Nixon v. Missouri Municipal League*.[295] Writing for the majority, Justice Souter invoked the Court's "working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism" in the absence of a plain statement required under *Gregory*.[296] Justice Souter observed that section 253's reference to "any entity" is susceptible to multiple readings and therefore insufficiently clear.[297]

### *Tennessee v. FCC*

The cities of Wilson, North Carolina and Chattanooga, Tennessee later brought petitions to preempt state laws restricting the development of municipal broadband in their respective states. Tennessee permits any municipality operating an electric plant to offer cable, video, and internet services only "within its service area."[298] North Carolina similarly restricts city-owned communications providers to providing service "within the corporate limits of the city providing the communications service."[299] Both Wilson and Chattanooga sought to expand coverage of their broadband networks beyond what state law would permit and asked the FCC to preempt their respective state's law to allow expansion.

The Commission granted the cities' petitions, relying on Section 706 of the Telecommunications Act of 1996.[300] Section 706 provides, in relevant part:

> The Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . 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.[301]

Though Section 706 does not explicitly mention preemption of state law, the FCC interpreted "regulating methods that remove barriers to infrastructure investment" to "undoubtedly" include preemption.[302] The Commission squared this interpretation with the Supreme Court's decisions in *Gregory* and *Nixon* by determining that the "clear statement" rule did not apply to issues of "federal oversight of interstate commerce," rather than direct limitations on state government.[303]

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[292] *See* 47 U.S.C. § 253; "FCC Statutory Authority and Procedure", *supra*.

[293] Mo. Mun. League, 16 FCC Rcd. 1157, 1162, para. 9 (2001).

[294] *Id.* at 1169, para. 19.

[295] 541 U.S. 125 (2004).

[296] *Id.* at 140.

[297] *Id.*

[298] TENN. CODE. ANN. § 7-52-601 (2020).

[299] N.C. GEN. STAT. ANN. § 160A-340.1(a)(3) (2020).

[300] 30 FCC Rcd. 2408 (2015).

[301] 47 U.S.C. § 1302.

[302] 30 FCC Rcd. at 2411–12, 2468–69, paras. 9, 145.

[303] *Id.* at 2412, 2472–74, paras. 12, 154–58; *see* United States v. Locke, 529 U.S. 89, 107–08 (2000) ("an 'assumption'

In the Commission's view, "the question . . . is not whether the municipal systems can provide broadband at all, but rather whether the states may dictate the manner in which interstate commerce is conducted and the nature of competition that should exist for interstate communications."[304] The FCC therefore preempted the Tennessee and North Carolina laws, but emphasized that it would only preempt state laws in instances where a state chooses to permit municipalities to provide broadband, but also limits the municipalities' exercise of that authority.[305]

Following a petition for review from Tennessee and North Carolina, the Sixth Circuit overturned the Commission in *Tennessee v. FCC*.[306] Contrary to the Commission's determinations, the court determined that the clear statement rule applied to the FCC's exercise of preemption authority under Section 706. The court noted that, as in *Nixon*, Tennessee and North Carolina had "made discretionary determinations for their political subdivisions" by passing the laws at issue.[307] The FCC's distinction between preempting state authority over political subdivisions and preempting regulation in a traditionally federal space was, the Sixth Circuit determined, a false one: the court noted that the Tennessee and North Carolina laws "implicate core attributes of state sovereignty *and* regulate interstate communications," rather than one or the other.[308] Having determined that the clear statement rule applied, the court held that Section 706 does not include a clear statement authorizing preemption of Tennessee and North Carolina's laws.[309] The court maintained, however, that its holding did not address whether Section 706 provides any preemptive authority at all or whether Congress could, consistent with the Constitution, provide the FCC with the power to preempt state laws regulating municipal broadband.[310]

## Constitutional Issues

The courts in *Nixon* and *Tennessee* both relied on the "clear statement" rule to determine that Congress had not delegated to the FCC the power to preempt state restrictions on municipally owned broadband or communications networks. Consequently, neither court reached the issue of whether such a delegation would be constitutional.

The United States operates as "a system of dual sovereignty between the States and the Federal Government."[311] Within this system, states "retain substantial sovereign authority" over those aspects not delegated to the federal government by the Constitution.[312] Among the reserved rights under this state sovereign authority is the right to manage state government through the creation of political subdivisions.[313] Relatedly, the Supreme Court has observed that a municipal

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of nonpre-emption [sic] is not triggered when the State regulates in an area where there has been a history of significant federal presence.").

[304] 30 FCC Rcd. at 2412, para. 12.

[305] *Id.*, para. 11.

[306] 832 F.3d 597 (6th Cir. 2016).

[307] *Id.* at 611.

[308] *Id.* at 612.

[309] *Id.* at 613.

[310] *Id.*

[311] Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

[312] *Id.*; *see* U.S. CONST. amend. X.

[313] U.S. CONST. amend. X; *see* Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 607–08 (1991) ("The principle is well settled that local 'governmental units 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.'" (quoting Sailors v. Bd. of Ed. of Kent Cty., 387 U.S. 105, 108 (1967) (alteration in original))); City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536

government "has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator."[314] Political subdivisions, in other words, are arms of a state without any sovereign authority of their own, absent a delegation of such power from a state.[315]

Because the *Nixon* and *Tennessee* courts determined the FCC lacked a "plain statement" of authority to preempt state restrictions on municipal broadband and telecommunications services, neither court discussed whether such a grant of authority—if made plainly—would be constitutionally permissible. Federal courts have upheld federal legislation that permits municipalities to take actions contrary to state law in other contexts.[316] The *Nixon* court indirectly suggested that a clear statement might be sufficient to support such preemption.[317] Because these constitutional issues remain unaddressed, any legislative action taken to preempt state restrictions on community broadband may be subject to constitutional scrutiny.

## Legislative Activity

As of the date of this report, one bill has been introduced in the 117th Congress that would address community broadband.[318] Additionally, several legislative proposals from past congresses address community broadband. **Table 1** summarizes these proposals.

U.S. 424, 437 (2002) ("Whether and how to [allocate municipal authority] is a question central to state self-government.").

[314] Williams v. Mayor of Baltimore, 289 U.S. 36, 40 (1933).

[315] *See* Hunter v. Pittsburgh, 207 U.S. 161, 178–79 (1907) ("The number, nature, and duration of the powers conferred upon [municipal corporations] rests in the absolute discretion of the state.")

[316] *See, e.g.*, Lawrence Cty. v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256, 257–61 (1985) (holding that a federal statute authorizing local government to spend payments "for any governmental purpose" preempts state statute requiring such funds to be spent in a particular manner); City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 324–26, 341 (1958) (permitting city's exercise of eminent domain over state-owned lands to construct federally authorized dam).

[317] *See* Nixon v. Mo. Mun. League, 541 U.S. 125, 140 (2004) (observing that "in some instances," preemption of a state restriction on municipal activity might "operate straightforwardly to provide local choice").

[318] H.R. 1783, 117th Cong. (2021).

**Table 1. Introduced Community Broadband Legislation**

| Bill No. | Short Title | Congress | Summary |
|---|---|---|---|
| S. 240 | Community Broadband Act | 114th | Would have prohibited state law from "prohibiting or substantially inhibiting" provision of telecommunications service by a public provider |
| S. 597, H.R. 1106 | States' Rights Municipal Broadband Act | 114th | Would have amended Section 706 to explicitly permit states to regulate municipal broadband |
| H.R. 6013 | Community Broadband Act | 114th | Would have amended Section 706 to explicitly forbid states from prohibiting or effectively prohibiting municipal broadband |
| S. 2853 | None | 115th | Would have amended Section 706 to include language that would prevent the FCC from relying on Section 706 as a grant of authority |
| H.R. 7302 (incorporated into H.R. 2), S. 4131 | Accessible, Affordable Internet for All Act | 116th | Would have amended Section 706 to prohibit states from forbidding provision of advanced telecommunications capability by a public provider, public-private partnership, or cooperatively organized provider |

**Source:** CRS compilation of introduced bills.

A bill corresponding to H.R. 7302 (116th Congress) has been introduced as H.R. 1783 in the 117th Congress.[319]

## Cable Operators

Lastly, the Commission has preempted state and local laws regulating cable operators in a manner it deems inconsistent with Title VI, which is the portion of the Communications Act governing cable communications.[320] In particular, the Commission has (1) banned state and local governments from taking actions it deems an "unreasonable refusal" to award a cable franchise, (2) required state and local governments to count certain costs toward a statutory cap on cable franchise fees, and (3) limited state and local governments from regulating non-cable services provided by cable operators.[321]

### Title VI

Title VI codifies a "deliberately structured dualism" in the regulation of cable.[322] On the one hand, Title VI gives the FCC authority over various operational aspects of cable such as technical standards governing signal quality,[323] ownership restrictions,[324] and requirements for carrying local broadcast stations.[325] On the other hand, it preserves state authority by requiring cable

[319] H.R. 1783, 117th Cong. (2021).

[320] 47 U.S.C. §§ 521–73.

[321] CRS Report R46147, *The Cable Franchising Authority of State and Local Governments and the Communications Act*, by Chris D. Linebaugh and Eric N. Holmes, discusses the FCC's preemption under Title VI and the legal issues raised by such preemption in more detail. Consequently, this section only provides a brief overview of this topic.

[322] All. for Cmty. Media v. FCC, 529 F.3d 763, 767 (6th Cir. 2008)

[323] 47 U.S.C. § 544(e); 47 C.F.R. §§ 76.601–76.640.

[324] 47 U.S.C. § 533; 47 C.F.R. §§ 76.501–76.502.

[325] 47 U.S.C. § 534; 47 C.F.R. § 76.56.

operators to obtain a "franchise" from the relevant state or local authority in the region in which it wishes to provide service.[326] It further allows state and local governments to place conditions on its award of franchises, such as requiring cable operators to designate "channel capacity" for public, educational, and government (PEG) programs.[327]

Title VI, nevertheless, places important limitations on state and local authority. In particular, it caps the "franchise fees" charged to cable operators at 5% of the operator's gross annual revenue derived from cable services.[328] Title VI also prevents franchising authorities (i.e., state and local governments responsible for regulating cable operators) from "unreasonably refus[ing] to award an additional competitive franchise,"[329] and it prohibits those authorities from regulating "video programming or other information services."[330]

## FCC Actions

In a series of orders, the FCC has sought to limit state and local authority over cable operators by elaborating on Title VI's restrictions. These orders have built on one another and have responded to, and been shaped by, court decisions reviewing their legality. This subsection, consequently, discusses the orders and court decisions together in chronological order.

The FCC issued its first order on this issue in 2007 (First Cable Order).[331] In the First Cable Order, the Commission sought to remove burdensome state and local requirements preventing new entrants into the cable market. It did this largely by clarifying when practices by franchising authorities amount to an "unreasonabl[e] refus[al]" to award a franchise.[332] The First Cable Order explained that such practices include, among other things, failing to make a final decision on franchise applications within timeframes specified in the order or requiring cable operators to "build out" their cable systems to provide service to certain areas or customers as a condition of granting the franchise.[333] The First Order also provided guidance on which costs count toward the 5% franchise fee cap. Among other things, it explained that in-kind expenses unrelated to provision of cable service—such as requests that the cable operator provide traffic light control systems—count toward the 5% cap.[334] Lastly, the FCC clarified the limits of franchising authority jurisdiction over "mixed-use" networks providing both cable and non-cable services. It maintained that, under Title VI, franchise authorities only have jurisdiction over cable services.[335] Consequently, the FCC said that franchising authorities may not withhold franchises based on issues related to non-cable services or facilities (the "mixed-use" rule).[336] Although state and local franchising authorities and their representative organizations challenged the legality of the First Cable Order, the Sixth Circuit denied those challenges.[337] In *Alliance for Community Media v.*

[326] 47 U.S.C. §§ 541(a)–(b), 522(10).

[327] *Id.* §§ 531, 541(a)(4)(B).

[328] *Id.* § 542.

[329] *Id.* § 541.

[330] *Id.* § 544(a), (b).

[331] Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, 22 FCC Rcd. 5101 (2007) [hereinafter First Order].

[332] *Id.* at 5103.

[333] *Id.* at 5134–37, 5142–43, paras. 66–73, 87–91.

[334] *Id.* at 5149–50, paras. 105–108.

[335] *Id.* at 5155, para. 121.

[336] *Id.*

[337] All. for Community Media v. FCC, 529 F.3d 763 (6th Cir. 2008).

*FCC*, the Sixth Circuit upheld both the FCC's authority to issue rules construing Title VI and the specific rules in the First Cable Order itself.[338]

The First Cable Order applied only to new entrants to the cable market. However, the FCC shortly thereafter adopted another order (Second Cable Order) extending many of the First Cable Order's rulings to incumbent cable television service providers as well.[339] Following the release of the Second Cable Order, the Commission received three petitions for reconsideration, to which it responded with a further order in 2015 (Reconsideration Order).[340] In the Reconsideration Order, the FCC affirmed the Second Cable Order's extension of the First Cable Order's rulings to incumbent cable operators.[341] Most notably, the Reconsideration Order also clarified that "in-kind" (i.e., noncash) payments exacted by franchising authorities, even if *related* to the provision of cable service, may count toward the maximum 5% franchise fee allowable under Section 622.[342]

In 2017, in the case *Montgomery County v. FCC*, the Sixth Circuit vacated the FCC's determinations in the Second Cable Order and Reconsideration Order on both the issue of incumbent providers and cable-related in-kind expenses.[343] Regarding incumbent providers, the court held that the FCC's extension of its mixed-use network rule to incumbent cable providers was "arbitrary and capricious" in violation of the Administrative Procedure Act (APA).[344] To support its mixed-use rule, the FCC had relied on the statutory definition of "cable system," which explicitly excludes common carrier facilities except to the extent they are "used in the transmission of video programming directly to subscribers."[345] However, the court explained that, unlike most new entrants, incumbent cable providers are generally not common carriers.[346] Consequently, the Commission needed to identify a statutory provision that supported applying the mixed-use rule to non-common carrier entities, which it failed to do.[347] Furthermore, the court held that the Commission's inclusion of cable-related in-kind expenses in the 5% franchise fee cap was arbitrary and capricious.[348] The court reasoned that the FCC gave "scarcely any explanation at all" for its decision to expand its interpretation of "franchise fee" to include cable-related exactions.[349]

In response to *Montgomery County*, the FCC adopted a new order on August 1, 2019 (Third Cable Order), which clarifies its interpretations of the Cable Act.[350] Among other things, the order reiterates the FCC's position that in-kind (i.e., non-monetary) expenses, even if related to cable

[338] *Id.* at 772–87.

[339] Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, 22 FCC Rcd. 19633 (2007) [hereinafter Second Cable Order].

[340] Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, 30 FCC Rcd. 810 (2015) [hereinafter Reconsideration Order].

[341] *Id.* at 816, paras. 14–15.

[342] *Id.* at 814–16, paras. 11–13.

[343] 863 F.3d 485 (6th Cir. 2017).

[344] *Id.* at 493.

[345] Second Cable Order, 22 FCC Rcd. 19633, 19640, para. 17 (2007).

[346] *Id.* at 492–93.

[347] *Id.*

[348] *Id.* at 491–92

[349] *Id.*

[350] Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, 34 FCC Rcd. 6844 (2019) [hereinafter Third Cable Order].

service, may count toward the 5% franchise fee cap.[351] Per the Sixth Circuit's admonition, the FCC provided additional justification for this decision, reasoning that, among other things, the statutory definition of franchise fee is broad enough to encompass such expenses and none of the specific statutory exceptions to this definition excludes them entirely.[352] The Third Cable Order also reiterates its application of the mixed-use rule to incumbents, relying this time on the Title VI provision prohibiting franchising authorities from "establish[ing] requirements for video programming or other information services."[353]

Beyond clarifying that franchising authorities cannot use their Title VI authority to regulate the non-cable aspects of a mixed-use cable system, the Third Cable Order explicitly preempts state and local laws that "impose[] fees or restrictions" on cable operators for the "provision of non-cable services in connection with access to [public] rights-of-way, except as expressly authorized in [Title VI]."[354] The Commission responded specifically to an Oregon Supreme Court case, *City of Eugene v. Comcast*. In this case, the court upheld the City of Eugene's imposition of a 7% fee—pursuant to a city ordinance, rather than the franchising process—on the revenue a cable operator generated from its provision of broadband internet services.[355] The Third Cable Order rejects *City of Eugene*'s conclusion, however, and preempts the type of state regulation that case upheld.[356] The FCC reasoned that Title VI establishes the "basic terms of a bargain" by which a cable operator may "access and operate facilities in the local rights-of-way."[357] It explained that, although Congress was "well aware" that cable systems would carry non-cable services as well as cable, it nevertheless "sharply circumscribed" the authority of state and local governments to "regulate the terms of this exchange."[358]

Several cities, franchising authorities, and advocacy organizations have filed petitions for review of the Third Cable Order in various courts of appeals,[359] and these petitions have been consolidated and transferred to the Sixth Circuit.[360] These petitioners generally allege that the Third Cable Order violates the Communications Act and the U.S. Constitution and is arbitrary and capricious under the APA.[361] The same parties filed a motion with the FCC to stay the Third Cable Order, which the Commission denied.[362] The Petitioners also filed a motion to stay the

[351] *Id.* at 6850–52, para. 12.

[352] *Id.* at 6849–58, paras. 11–22.

[353] *Id.* at 6883, para. 122 (citing 47 U.S.C. § 544(b)(1)).

[354] *Id.* at 6892-93, para. 88.

[355] 375 P.3d 446, 450–51, 463 (Or. 2016).

[356] Third Order, 2019 WL 3605129, at *30, para. 80.

[357] *Id.* at *32, para. 84.

[358] *Id.* at *33, para. 88.

[359] *See* City of Pittsburgh v. FCC, No. 19-3478 (3d Cir. Oct. 28, 2019); State of Hawaii v. United States, No. 19-72699 (9th Cir. Oct. 24, 2019); Anne Arundel Cty. v. FCC, No. 72760 (D.C. Cir. Oct. 24, 2019); All. for Commc'ns Democracy v. FCC, No. 19-72736 (D.C. Cir. Oct. 23, 2019); Pet. for Rev., City of Portland v. United States, No. 19-72391 (9th Cir. Sept. 19, 2019); Pet. for Rev., City of Eugene v. FCC, No. 19-72219 (9th Cir. Aug. 30, 2019).

[360] City of Eugene v. FCC, No. 19-72391 (9th Cir. Nov. 26, 2019) (order granting motion to consolidate petitions and transfer petitions to the Sixth Circuit); City of Eugene v. FCC, No. 19-4161 (6th Cir. Dec. 2, 2019) (docketing case in the Sixth Circuit).

[361] *See, e.g.*, Pet. for Rev. at 2, City of Eugene v. FCC, No. 19-72219 (9th Cir. Aug. 30, 2019); Pet. for Rev. at 2, City of Portland v. United States, No. 19-72391 (9th Cir. Sept. 19, 2019).

[362] Order Denying Mot. for Stay, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, MB Docket No. 05-311, DA 19-1149, 2019 WL 5861929 (Nov. 6, 2019).

order pending appeal, which the Sixth Circuit denied.[363] Oral argument in the case has been scheduled for April 2021.[364]

# Conclusion

The scope of the FCC's preemption authority is not simply an academic issue. The Commission's authority to displace state law is central to many of its regulatory initiatives and continues to be litigated in federal courts. Delineating the contours of the FCC's preemption authority can become complex once specific statutory provisions are brought to bear on particular issues. However, at its core the analysis involves applying the basic principles of preemption. As with preemption generally, Congress's purpose is the ultimate "touchstone" for determining the scope of the FCC's preemption authority.[365] Courts determine this purpose by examining the FCC's regulatory authority and any specific statutory provisions limiting its ability to preempt state laws.[366] This analysis is also informed by federalism considerations on rare occasions, with courts requiring a clear statement from Congress authorizing the FCC to preempt state law in a way that upsets the usual balance between the state and federal government.[367]

Any congressional attempts to address the FCC's authority to preempt may benefit from consideration of each of these issues. To ensure that the Commission has jurisdictional authority to preempt, any desired exercise of preemption should arise under a regulatory function delegated to the FCC—and, should Congress so desire, it may delegate new functions to the FCC by statute.[368] If Congress seeks to address the bounds of specific statutory limits on the Commission's preemption authority, it may explicitly spell out those limits. And to mitigate constitutional concerns in areas that might disrupt the "normal constitutional balance," ensuring that any preemptive language is a "clear statement" of congressional intent to preempt could remain key.[369]

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[363] Per Curiam Op., City of Eugene v. FCC, No. 19-4161 (6th Cir. Mar. 19, 2020), ECF No. 32.

[364] City of Eugene v. FCC, No. 19-4161 (6th Cir. Feb. 18, 2021), ECF No. 66. While a detailed discussion is beyond the scope of this report, this case raises complex issues of statutory interpretation, as well as administrative and constitutional law, as discussed in more detail in CRS Report R46147, *The Cable Franchising Authority of State and Local Governments and the Communications Act*, by Chris D. Linebaugh and Eric N. Holmes.

[365] Wyeth v. Levine, 555 U.S. 555, 565 (2009).

[366] *See, e.g.*, "Overview of the FCC's Preemption Authority Under the Communications Act," *supra*.

[367] *See, e.g.*, "Clear Statement Rule," *supra*.

[368] *See* Mozilla, 940 F.3d 1, 75 (D.C. Cir. 2019).

[369] *See* Nixon v. Mo. Mun. League, 541 U.S. 125, 140 (2004).

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