No. 15-3291

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THE STATE OF TENNESSEE,
Petitioner,

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
Intervenor
v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents,

ELECTRIC POWER BOARD OF CHATTANOOGA; CITY OF WILSON, NORTH CAROLINA
Intervenors.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF OF PETITIONER, THE STATE OF TENNESSEE

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SUMMARY OF THE ARGUMENT

In the Federal Communications Commission's ("FCC") view, Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 1302, vests the agency with both the power and the duty to rewrite State laws defining the authority of the State's own subdivisions. Wielding this newfound power, the FCC has taken it upon itself to authorize municipal power boards like the Electric Power Board of Chattanooga ("EPB") to offer broadband services statewide and preempt portions of Tenn. Code Ann. § 7-52-601. This position is so remarkable that even the Department of Justice ("DOJ") has declined to defend it.

In its opening brief, the State of Tennessee showed that the Order invades an inviolable aspect of State sovereignty, exceeds the agency's statutory authority, contradicts controlling Supreme Court precedent, and represents a 180-degree turn by the agency away from nearly 20 years of precedent. The FCC's failure to grapple with these issues, much less rebut them, confirms that the Order must be set aside.

First, principles of federalism ingrained in our constitutional system protect certain fundamental aspects of State sovereignty from federal infringement. The FCC attempts to evade these principles by reframing the case, claiming that the Order merely effectuates "interstate communications competition policy" and does not intrude on "traditional state control over political subdivisions." FCC Br. at 3,

27. But this attempt to change the nature of State law and federal agency action fails. The Order directly targets quintessential elements of State sovereignty by defeating Tennessee and North Carolina's ability to create and define their component subdivisions. The Constitution prohibits the federal government from interposing itself between a State and its instrumentalities, and on this basis alone, the Order cannot stand.

Second, even assuming *arguendo* that the federal government could interfere in this way with a State's internal governance under some circumstances, the FCC fails to show that it has any authority to do so here. The agency makes no effort to identify anything in the text of Section 706 that could meet the "plain statement" standard required for permissible intrusions upon State control of municipal communication services. *See Nixon v. Missouri Mun. League*, 541 U.S. 125 (2004); *Gregory v. Ashcroft*, 501 U.S. 452 (1991). Instead, the FCC tries to sidestep *Gregory* and *Nixon's* controlling grasp by claiming the federalism concerns that animated those decisions are not implicated here. The FCC is wrong. Dictating the services that can be provided by a municipality has a clear impact on the structure of State government. The FCC used to recognize this, arguing with the DOJ's support in *Nixon* that a State's power to define its subdivisions was fundamental to State sovereignty. The FCC now repudiates this common sense

conclusion in pursuit of its new policy goals. But *Gregory's* plain statement standard has not changed, and it applies today just as it did in *Nixon.*

Third, the agency fails to rebut Petitioners' argument that Section 706 does not grant the FCC any authority at *all*. The FCC cites decisions by the D.C. Circuit and the Tenth Circuit to support its position that Section 706 grants the agency sweeping affirmative authority. But neither case is binding or even persuasive, and the agency fails to address Tennessee's arguments that their view of Section 706 is wrong. Finally, neither case sanctions reading Section 706 to convey the limitless reservoir of regulatory authority that the Order contemplates.

STANDARD OF REVIEW

Questions about the appropriate balance between State and federal power are "subject to *de novo* review." FCC Br. at 26 (quoting *Nat'l Oilseed Processors Ass'n v. OSHA*, 769 F.3d 1173, 1179 (D.C. Cir. 2014)).

In the rare instances when the federal government may interfere with traditional State authority over political subdivisions, courts demand an "unmistakably clear" statement of intent before finding that Congress authorized preemption. *See Gregory*, 501 U.S. 452, 460-61. For this reason, the FCC has previously conceded that "*Chevron* applies only where, after applying 'traditional tools of statutory construction,' a court cannot 'ascertain[] that Congress had an intention on the precise question at issue.'" Reply Brief for Federal Petitioners,

Nixon v. Missouri Mun. League, 541 U.S. 125, 2003 WL 22873090, at *5 n.1 (2004). As in *Nixon*, "here, the *Gregory* rule establishes that [the statute] does not preempt state laws prohibiting political subdivisions from providing [Internet] service. That eliminates the occasion for applying *Chevron*." *Id.*

ARGUMENT

I. THE FEDERAL GOVERNMENT CANNOT REWRITE STATE LAWS GOVERNING THE SCOPE OF MUNICIPAL POWERS

Courts have long embraced "the general conviction that the Constitution precludes the National Government [from] devour[ing] the essentials of state sovereignty." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547 (1985) (internal quotations omitted). When Congress "attempts to directly regulate the States as States, the Tenth Amendment requires recognition that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 286-87 (1981). Federalism is the bedrock of our constitutional design. It "adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012). And if there is any element of State sovereignty that the federal government is bound to respect, it is a State's ability to create and define its subordinate instrumentalities. *See Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) ("[T]he number, nature, and duration of powers conferred upon

[subdivisions] and the territory over which they shall be exercised rests in the absolute discretion of the state.").

The FCC overlooks these basic constitutional principles, claiming boundless authority to insert itself between States and their political subdivisions. The FCC's Brief is remarkable both for what it says and what it does not say.[1] In an effort to downplay the Order's aggressive action, the FCC paints Section 601 as simply "interstate communications policy regulation" and claims the Order's effect is merely "regulating interstate communications policy." *E.g.*, FCC Br. at 35-36, 41. But the FCC cannot bootstrap its way into controlling the structure and authority of a State's political subdivisions simply by declaring that the issues in this case are about "interstate communications competition policy." *Id.* at 27. The agency's attempt to recast the State laws and reframe the Order's reach fails.

A. The FCC Ignores Tennessee's Inviolable Right To Structure Its Subordinate Instrumentalities

The FCC fails to grapple with Tennessee's argument that defining the essential attributes of subdivisions, like the EPB's territorial reach and authority, is a core state function, beyond the reach of federal regulation and compulsion. *See*

[1] It is remarkable that the DOJ, which routinely joins FCC briefs in the U.S. Courts of Appeals and the Supreme Court, takes "no position" on the issues raised by Tennessee and North Carolina. Docket No. 58 (filed Nov. 5, 2015). The DOJ has refused to defend the agency's claim of authority or the constitutionality of its action against two States' constitutional and statutory challenges. The silence is deafening.

TN Br. at 9-22. Instead, the FCC blithely asserts that Section 601 does not reflect or govern a "core sovereign function." FCC Br. at 23. It offers no real explanation for this conclusory observation. Nor could it. Established precedent confirms that the power to create and define political subdivisions is an essential element of a State's inviolable sovereignty. *See FERC v. Mississippi*, 456 U.S. 742, 761 (1982); *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978); *Hunter*, 207 U.S. at 178; *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 638 (1819) (Marshall, J.). The FCC chooses to ignore these seminal cases rather than trying to distinguish them.[2]

Any such effort would be futile. It has long been settled that "whether and how" a State allocates powers to its political subdivisions "is a question central to state self-government." *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 425, 437 (2002).[3] Nothing is more fundamental to State sovereignty than

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[2] Intervenor the EPB claims that the seminal cases Tennessee cites do not support its position. EPB Br. at 47-48. The EPB is wrong. *FERC*, *Garcia*, *Fed. Maritime Comm'n v. S.C. Ports Auth.*, 535 U.S. 743 (2002), *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992) all reflect the Court's longstanding commitment to State sovereignty. The EPB's attempt to limit the import of these cases, by limiting them to their facts, claiming they dealt with other States' laws, or that they predated home rule, is unavailing. These cases, individually and together, confirm that the FCC has crossed the line between permissible regulation and unconstitutional intrusion into core State functions.

[3] The FCC asserts that *Ours Garage* is "far afield," because there was "no dispute" that "Congress could have denied states the ability to delegate [regulatory] power to cities." FCC Br. at 40. The FCC misses the point. *Ours Garage*

the ability to establish and order governmental subunits. A political subdivision is "created by the state for the better ordering of government, [and] has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Ysura v. Pocatello Educ. Ass'n*, 555 U.S. 353, 363 (2009).

For this reason, State power over political subdivisions is "often referred to as plenary, supreme, absolute, complete, or unlimited." 2 Eugene McQuillin, THE LAW OF MUNICIPAL CORPORATIONS § 4.3 (3d ed.). As this Court has observed, the "imperative of state sovereignty" prohibits Congress and federal agencies from "directly displac[ing] the States' freedom to structure integral operations in areas of traditional governmental functions." *Skills Dev. Servs., Inc. v. Donovan*, 728 F.2d 294, 297 (6th Cir. 1984). But the Order does just this.

By expanding both the boundaries and the powers of the EPB, the Order tramples upon "the governmental decisions" of the State that courts have long recognized constitute a fundamental and inviolable aspect of State sovereignty. *Hodel*, 452 U.S. at 284. The most basic governmental decision confronting a State is the structure, reach, and authority of its component instrumentalities. This

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confirms that States retain plenary control over the structure and authority of their subdivisions. *See Ours Garage*, 536 U.S. at 429. For this reason, the FCC has itself relied on the case to support its prior, correct belief that in matters such as these, the agency should respect State sovereignty. *See* Brief for Federal Petitioners, *Nixon v. Missouri Mun. League*, 541 U.S. 125, 2003 WL 22087499, at *14-16 (2004) ("FCC & DOJ Nixon Brief"). The FCC summarily dismisses the rest of the cases Tennessee relies on as "inapposite" without analysis. FCC Br. at 40.

necessarily includes deciding what activities subordinates may engage in and where they may do so. It is through these decisions that a State defines itself as a sovereign. *See Alden v. Maine*, 527 U.S. 706, 752 (1999). Indeed, States enjoy absolute discretion in allocating authority among their political subdivisions and drawing municipal boundaries. *See Hunter*, 207 U.S. at 178. If performing these functions is "not a core sovereign function," FCC Br. at 23, then what is? The FCC does not and cannot answer this question.

Instead, the FCC claims the right to look behind every State law governing municipal authority, and to disallow any that are driven by what the agency believes are improper motivations. The Commission's conclusion that Section 601 does not reflect "traditional state control over political subdivisions" rests on nothing more than the agency's subjective speculation about the purpose behind the law. *See, e.g.*, FCC Br. at 49-51 (speculating about purposes behind Section 601); *id.* at 22 (proclaiming that the State laws "do not protect taxpayers or manage relations between neighboring towns"). The FCC emphasizes that preemption of the Tennessee and North Carolina laws hinged on its particularized assessment of the motivations of *these* State legislatures. *See id.* at 20, 49-50.[4]

[4] In this respect, the FCC's brief is in tension with the Order. The Order made clear that the FCC would "not hesitate to preempt similar statutory provisions." Order ¶ 16 (P.A.6). The agency's brief retreats from this position, stressing that the Order rested on "a careful examination of the specific laws" and "some state

Far from minimizing the intrusion, the FCC's defense of its Order represents a breathtaking assertion of federal power. The FCC has taken it upon itself to assess and judge not just the effect of a particular law, but the thought processes and intentions of the State legislatures that enacted that law. While it is manifestly improper for the agency to interpose itself between a State and its subdivisions for any reason, it is especially problematic for the FCC to claim that its power hinges on its own assessment of the "rightness" or "wrongness" of a State's motivations. Courts discredit "speculation about what 'may have motivated' the legislature." *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996); *see also Ross v. Berghuis*, 417 F.3d 552, 558 (6th Cir. 2005) (reprimanding lower court for "inappropriately speculat[ing] about the legislature's intent"). That instruction binds unelected federal regulators just as much as it does the federal courts.

What is more, the FCC's condescending characterization of the purposes behind the Tennessee and North Carolina laws reveals the agency's fundamental policy disagreement with State decisions about municipal broadband. *See* FCC Br. at 49-56. The FCC simply dislikes the approach that Tennessee and North Carolina have taken.[5] The FCC believes that the benefits of expanding broadband

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laws could present close questions." FCC Br. at 20, 24. The FCC cannot have it both ways.

[5] Intervenors and amici contend that there are public interest benefits to granting municipalities free rein to provide Internet services. *See, e.g.*, Wilson Br. at 4-10; EPB Br. at 6-8; N.C. League of Municipalities Br. at 3-14; Benton

outweigh any interest in proceeding incrementally, safeguarding the public fisc, or protecting inter-municipal relations. Intervenors' briefs confirm that the subdivisions, frustrated with their State laws, turned to the federal government as a more favorable venue for airing their grievances. *See* EPB Br. at 44-46 (chafing at State control over Chattanooga's structure and authority). But the FCC, a distant federal bureaucracy, should not be the arbiter of these disagreements; "the proper venue for this continuing discussion lies with the Tennessee General Assembly." *Ex Parte* Letter from Beth Harwell, Speaker of the House, Tennessee General Assembly, WC Docket No. 14-116, at 1 (Oct. 28, 2014).

Intervenor the EPB claims that Chattanooga's home rule status sweeps away State sovereignty concerns and helps the FCC achieve its goals. *See* EPB Br. at 31-33. The EPB's emphasis on Chattanooga's home rule status is puzzling. The implication is that Section 601 may be unlawful under State law because it conflicts with Chattanooga's home rule status. *See* EPB Br. at 44-46, 52. That claim is mistaken but, in any event, this is not a proper dispute for the federal

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Foundation Br. at 5-30; Internet Association Br. at 4-16. These arguments are identical to the arguments made to State legislatures by EPB and Wilson. Fundamentally, they are beside the point. Just as in *Nixon*, "the issue here does not turn on the merits of municipal [Internet] services." *Nixon*, 541 U.S. at 132.

communications regulator to resolve.[6] The irrelevance of Chattanooga's home rule status may be why the FCC devotes so little effort to the claim. *See* FCC Br. at 48.

Contrary to the EPB's argument, electing home rule, as permitted by State law, does not transform a municipality into an independent enclave, beyond the reach of the State's General Assembly. Home rule does not in any way limit the application of general laws like Section 601 within a given municipality. *See* Tenn. Opp. Att'y Gen. No. 93-48, 1993 WL 475432 (1993). Home rule status simply restricts the legislature from enacting private acts or charters directed solely at a home rule municipality. Tenn. Const. art. XI, § 9. That Chattanooga has adopted home rule thus has no relevance to this case.

B. Section 601 Does Not "Regulate Interstate Communications Competition Policy"

In an attempt to bring its Order into the realm of permissible federal action, the FCC tries vainly to recharacterize both the State laws at issue and the FCC's action. The FCC repeatedly asserts that Section 601 is nothing more than "interstate communications policy regulation" by the State of Tennessee, *see, e.g.*, FCC Br. at 17, 35-36, 41, and also argues that its Order simply regulates "competition in the interstate communications market." *Id.* at 48. Even if it were

[6] The EPB chafes at the co-existence of Section 601 with Chattanooga's status as a home-rule municipality. *See* EPB Br. at 39-46. But even if Section 601 conflicted with home rule principles, neither the FCC nor this Court is the correct forum to vindicate home rule "rights."

proper for the FCC to examine the purposes behind a state law to determine whether it should be preempted, the Commission is wrong about the nature of Section 601.

First, Section 601 cannot be reframed as routine regulation of interstate communications policy. Interstate communications regulation is generally applicable, neutral legislation directed at private individuals and businesses. *See, e.g.*, 47 C.F.R. § 54.706 (requiring all interstate telecommunications carriers to contribute to universal service funds); *id.* § 73.211 (specifying power requirements applicable to all FM broadcast stations). It is not legislation that effectuates the "governmental decisions" of the States, as Section 601 does. *Hodel*, 452 U.S. at 284.

Generally applicable interstate communications regulation, of course, might have incidental effects on a State's municipalities. Section 601, however, is clearly not neutral regulation with an incidental effect on Tennessee's subdivisions. It is a law aimed specifically at the authority that a State's subdivisions are permitted to exercise. It prescribes the EPB's geographic reach and articulates its authority to act. *See* Tenn. Code Ann. § 7-52-601; Part I.A, *supra*. It does not merely "serve communications competition policy goals." FCC Br. at 24. Instead, Section 601 articulates the authority and reach of "an arm . . . of the State." McQuillin, *supra* § 4.3.

Second, and relatedly, the FCC claims that its Order simply imposes federal communications policy on the States. *See* FCC Br. at 19-20, 24. But the Order goes far beyond merely "regulating interstate communications competition policy." FCC Br. at 27. It overrides Tennessee's ability to create and order its subdivisions, an inviolable area "central to state self-government." *Ours Garage*, 536 U.S. at 437; *see also* TN Br. at 14-21; NC Br. at 12-14; Part I.A, *supra*. By interfering with the State's governmental decisions, the Order regulates "the States as States." *Hodel*, 452 U.S. at 284. And when the federal government regulates "the States as States," its authority is circumscribed by the Tenth Amendment and longstanding principles of federalism. *See Donovan*, 728 F.2d at 297.

Moreover, the Order contains none of the hallmarks of interstate communications policy regulation; it is neither neutral nor generally applicable. The Order does not advance a uniform regulatory scheme in furtherance of national objectives. Instead, it targets two State governments and their relationship with their subordinate units as the objects of its action. One need look no further than the title of the FCC's underlying proceeding to see that the agency's goal was to isolate and redefine municipal authority to provide broadband services. This case has never been about promoting a uniform, nationwide "communications competition policy." FCC Br. at 27. It is about federal interference with two States' plenary control over their political subdivisions.

C. The FCC Mischaracterizes Tennessee's Position

The FCC mischaracterizes Tennessee's position as being that "any preemption of a law that regulates municipal providers is in all cases an unconstitutional assault on state sovereignty." *Id.* at 37. This is a straw man; as noted, a wide range of neutral telecommunications regulations apply to *all* service providers, whether or not those providers are arms of a State government. Tennessee acknowledges that the "Commission may regulate the provision of a telecommunication service that a local governmental unit is authorized by state law to provide." *Ex Parte* Letter from Herbert H. Slatery III, Attorney General, State of Tennessee, WC Docket No. 14-116, at 2 (Feb. 5, 2015) (P.A.1015).

It is thus not surprising that the cases that the FCC cites to tear down this straw man are irrelevant to the Order on review, which involves the FCC's forthright determination that a local government should have broader power than the State has granted. *First, Washington Department of Game v. Federal Power Commission*, 207 F.2d 391 (9th Cir. 1953), held only that "state laws cannot prevent the Federal Power Commission from issuing a license." *Id.* at 396. The court did not consider whether the federal government could rewrite State laws establishing and managing political subdivisions. In fact, the court did the opposite, emphasizing that it "[did] not touch the question as to the legal capacity of the City of Tacoma to initiate and act under the license once it is granted." *Id.*

But here the Commission *does exactly that*—granting a Tennessee subdivision unfettered power to provide service throughout the State despite the State's unambiguous rule to the contrary.

Second, the FCC's reliance on *Lawrence County v. Lead-Deadwood School District No. 40-1*, 469 U.S. 256 (1985) is also misplaced. In *Lawrence*, the Court decided that a State could not "regulate the distribution of funds that units of local government in that State receive from the Federal Government." *Id.* at 257-58. The federal government may clearly "impose[] a condition on its disbursement of federal funds." *Id.* at 269.[7] But the federal government's power to direct the expenditure of federal money is unrelated to this case, which involves granting State subdivisions authority that has been withheld by the State.

The FCC offers a parade of horribles to argue that Tennessee has "prove[n] too much." FCC Br. at 41. The FCC claims that in Tennessee's view, "a state could create a municipal television or radio broadcaster and then forbid that broadcaster from complying with federal regulation of the frequency or strength of a broadcast, or indecency requirements, or indeed non-communications regulations such as OSHA." *Id.*

[7] The Court emphasized that a different question would be presented if the federal government had "presumed to dictate the manner in which counties . . . spent *state* [funds]." *Id*. at 269 (emphasis added). Ironically, the FCC is cavalier about the Order's impact on State funding priorities. *See, e.g.*, FCC Br. at 3; Order ¶ 62 n. 176 (P.A.32) (dismissing possibility that its mandate may burdens State taxpayers).

The FCC's examples do nothing to undercut Tennessee's actual argument because they are oriented against the straw man position that the State has never adopted. However, they do highlight just how unusual the Order actually is.

Requiring broadcasters (whether owned by the State or a private entity) to comply with generally applicable frequency strength regulations, indecency requirements, or OSHA regulations is different in kind from what the FCC has done through the Order. The Order restructures Tennessee's internal subdivisions. It aggrandizes municipalities' powers and expands the boundaries of where they may act. *See* Order ¶¶ 168-69 (P.A.71). It is neither neutral nor generally applicable. Instead, it targets two State governments and rewrites their laws to authorize subordinate instrumentalities to provide Internet services where they otherwise could not. The Order does not contemplate garden-variety preemption aimed at regulation of private entities; it directly interferes with the structure of State government. The Constitution and long-standing federalism principles forbid the federal government from inserting itself in these governmental decisions.

II. *GREGORY* AND *NIXON* FORECLOSE THE FCC'S READING OF SECTION 706

Even where Congress has the power to affect the State's internal administration of its political subdivisions, it can only do so after plainly stating that is its intention. *See Gregory*, 501 U.S. at 460; *Nixon*, 541 U.S. at 140-41. Section 706 contains no such plain statement. The FCC appears to concede as

much, declining to even raise a contrary argument.[8] On this alternative basis, the Court should vacate the Order.

A. The FCC's Attempt to Distinguish *Gregory* Is Futile

The FCC's scattershot attempt to distinguish *Gregory* fails. The agency acknowledges that "interference with a state's ability to define its constitutional officers" intrudes upon a fundamental aspect of State sovereignty and is thus subject to *Gregory's* heightened standard of scrutiny. FCC Br. at 42. But it tersely contends that this case is distinguishable. It is difficult to see how interfering with a State's officers triggers a heightened standard of review while dictating the territorial reach of a State's subordinate instrumentalities merits a lesser bar. Indeed, the DOJ and the FCC have previously taken precisely the opposite view, arguing that "[a] State's determination of which political subdivisions to create and what powers to allocate to them, like its determination of the qualifications of its

[8] Intervenor Wilson makes a half-hearted argument that Section 706 meets *Gregory's* plain statement standard. Wilson Br. at 56-60. It claims that when Congress sent the FCC on "the journey" of promoting broadband for "all Americans," under Section 706, it implicitly spoke with the requisite clarity. *Id.* at 59-60. Far from it. Even if there were an "implicit" statement in Section 706, an "implicit" statement is not a plain statement. The power to rewrite State laws delineating the geographic boundaries of subdivisions is hardly "plain to anyone reading" Section 706. *Id.* at 57 (quoting cases); *see* TN Br. at 42-49; *Verizon v. FCC*, 740 F.3d 623, 637 (D.C. Cir. 2014); *Haight v. Thompson*, 763 F.3d 554, 570 (6th Cir. 2014) (concluding that broad, general language did not satisfy *Gregory's* "imperative of clarity").

judges, is a matter that goes to 'the structure of its government.'" FCC & DOJ Nixon Br., 2003 WL 22087499 at *14 (quoting *Gregory*, 501 U.S. at 460).

What compels more exacting scrutiny here, as in *Gregory*, is the impact the Order has on the structure of State government. If anything, the Order represents a substantially greater invasion of State sovereignty than *Gregory*. It would be incongruous to conclude that a State exercises its "traditional state control over subdivisions" by specifying the qualifications of State officers, but not the subdivision boundaries over which they hold office. FCC Br. at 20. Here, as in *Gregory*, preemption could be found only if Congress made its intention "unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (internal citations omitted).

The FCC reasserts that no plain statement is required "[b]ecause interstate communications has long been understood to be within the jurisdiction of the federal government." FCC Br. at 44. But this argument, premised on a misreading of *United States v. Locke*, 529 U.S. 89 (2000), offers no response to Tennessee's showing that *Locke* is inapposite. *See* TN Br. at 32-33. *Locke's* standard preemption analysis only applies where the issue does not involve an intrusion on core State sovereignty. *See Locke*, 529 U.S. at 100-03.

Nixon makes this clear. That case involved interstate telecommunications, in which there was the same "history of significant federal presence" that the FCC

asserts here. FCC Br. at 43. *Nixon* contemplated the same intrusive federal action as the Order. It addressed a municipality's request that the FCC restructure and enlarge the subdivisions of a State to expand municipal communications services. *See Nixon*, 541 U.S. at 128-30. Yet the Supreme Court makes no reference to *Locke* in *Nixon*. That is because *Locke* has no place in a case that triggers *Gregory's* plain statement standard. *See* TN Br. at 32-33. The FCC offers no explanation for the Supreme Court's failure to grapple with *Locke* in the *Nixon* decision, which involves issues essentially identical to those here.

Next, the agency tries to evade *Gregory* by pointing to other cases in which "the FCC had preempted state regulation of interstate communications." FCC Br. at 43-44. The FCC claims that because interstate communications "has long been understood to be within the jurisdiction of the federal government, these cases do not look for a separate, 'clear statement' of legislative intent." *Id.* at 44. These cases are unpersuasive because, as the FCC concedes, *Gregory* "was issued after these decisions." *Id.* at 44 n.7. But these cases would still be far afield even if they were decided post-*Gregory*.

The cases the FCC points to are ordinary preemption cases. *See* FCC Br. at 43-44 (citing cases). *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), for example, does not involve any of the inviolable State sovereignty concerns raised by the Order. Indeed, in *Crisp*, the FCC preempted "state regulation of the signals

carried by cable system operators." *Id.* at 698. The State regulations at issue applied generally to *all* cable system operators. Preemption in *Crisp* may have had an incidental impact on municipal cable providers, but unlike the Order, it did not target subdivisions and attempt to expand their authority and territorial boundaries.[9] Cases like *Crisp* do not apply *Gregory's* heightened plain statement standard because preemption would not have impacted a State's internal governmental structure. *See Nixon*, 541 U.S. at 140-41; *City of Abilene v. FCC*, 164 F.3d 49, 53 (D.C. Cir. 1999).

Finally, the FCC cites *EEOC v. Massachusetts*, 987 F.2d 64, 68 (1st Cir. 1993), to suggest that *Gregory's* holding was narrow. FCC Br. at 43. To be sure, *Gregory's* holding was narrow because it addressed the rare instances when the federal government directly attacks State sovereignty. *See EEOC*, 987 F.2d at 69 (acknowledging that *Gregory's* plain statement standard applies when preemption would impact "a decision of the most fundamental sort for a sovereign entity,"

[9] If anything, *Crisp* reinforces the sharp contrast between garden-variety preemption and the Order's aggressive action. While the FCC and EPB point to a number of ordinary preemption cases like *Crisp* and *Hyperion*, they cannot point to any case affirming the agency's unbridled power to restructure State subdivisions. *See In re AVR, L.P., d/b/a Hyperion of Tennessee*, 14 FCC Rcd 11064 (1999) (analyzing a typical preemption case involving private telecommunications providers).

such as "the structure of [State] government"). But this is such a case, and where *Gregory* is triggered, its holding is clear and demanding.[10]

The FCC's brief shows that the Order—and the FCC's overall perspective—is far more aggressive than the federal intervention in *Gregory*. The FCC appears to fault Tennessee for failing to justify the purpose of Section 601. *See* FCC Br. at 50. This is improper. Tennessee does not need to convince the FCC of the propriety of its sovereign decisions about the structure, power, and territorial reach of its subordinate instrumentalities.[11] The FCC's contrary suggestion denigrates the judgment of democratically-elected legislatures and reinforces the agency's hubris.

B. The FCC's Reading of *Nixon* Is Fatally Flawed

The FCC also fails to distinguish this case from *Nixon*. It continues to rely on its untenable distinction between flat bans on municipal communications services, which it acknowledges are subject to *Gregory*, and limitations on such

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[10] Moreover, *EEOC* holds only that *Gregory* does not apply where the statute at issue admits of "no textual uncertainty." *EEOC*, 987 F.2d at 70. Here, there is no plausible argument that Section 706 contains an unmistakably clear statement manifesting Congress's intent to rewrite State laws governing subdivisions. *See* TN Br. at 42-49.

[11] Nevertheless, Tennessee explained that the State pursued pilot projects to test municipal broadband while protecting State interests such as fiscal responsibility, preventing intrastate subsidies, conflicts of interest, and spending priorities. *See* TN Br. at 20. The FCC's summary dismissal of these very real interests, FCC Br. at 49-50, is remarkable, as is its failure to address Intervenor NARUC's argument that the Order is arbitrary and capricious.

services, which it claims authority to preempt. FCC Br. at 46-47. For all of the reasons Tennessee has articulated, this reasoning fails. TN Br. at 35-38. That the EPB and Wilson might have some "existing authority absent the preempted laws" to enter the market is irrelevant. FCC Br. at 47. Nothing in *Nixon* suggests that the key to the decision was that the Missouri law imposed a flat ban. Nor does the opinion suggest that the outcome would have been different had localities sought to remove more narrow restrictions on their authority.

The FCC claims that *Nixon* "specifically noted that the 'indeterminate results'" that troubled the Court "would not arise in states that allow home rule." *See id.* at 48. *Nixon* did nothing of the sort. The Court merely noted that one of its hypotheticals contemplated a "general law" city and not a "home rule" city with "authority to do whatever is not specifically prohibited by state legislation." *Nixon*, 541 U.S. at 135 n.3. But this distinction is inapplicable to Tennessee because "home rule" in Tennessee does not confer such boundless authority to municipalities. *See* Part I.A, *supra.* Further, *Nixon* clarified that, as a general matter, there is "no argument that the Telecommunications Act of 1996 is itself a source of federal authority granting municipalities local power that state law does not." *Id.* at 135.[12]

[12] The broader implication from Intervenors' home rule arguments is that the FCC could rewrite State laws as applied to home rule localities, but not others. This yields absurd results. If home rule status is the lynchpin to federal preemption

The FCC implausibly asserts this case will not result in the "national crazy quilt" that the Court feared would follow from preemption of State municipal communications laws. *Id.* at 136. The Commission reasons that any variation in which cities offer service would stem not from federal intervention but "from the decisions of states on the fundamental issue of whether cities can provide broadband." FCC Br. at 48. This is wrong. Under the Order's approach, States that have authorized limited municipal broadband services will, due to federal preemption, have to shoulder larger municipal broadband experiments than they wish to authorize. The reach of municipal broadband services within a given State will not spring "free from political choices," but rather from the decision of distant federal policy-makers about how far such services should extend. *Nixon*, 541 U.S. at 136.

Further, the Order may discourage States from authorizing municipal broadband in the first place. States may decide to ban municipal broadband experimentation outright rather than risk unleashing boundless federal intervention by authorizing limited municipal broadband projects.[13] These are the same

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authority, then the agency may preempt a State law as applied to Chattanooga, but not neighboring municipalities that have yet to adopt home rule. This unprecedented conditional theory of preemptive power must be rejected. Taken to its logical conclusion, the EPB's approach would create the very patchwork that concerned the *Nixon* court. *Nixon*, 541 U.S. at 136.

[13] Variances in the FCC's views of what State municipal broadband laws it ultimately chooses to preempt may contribute to the "national crazy quilt," of

"uncertain adventures" that animated the Court's decision in *Nixon* and that compel rejection of this Order.

III. SECTION 706 IS NOT AN INDEPENDENT SOURCE OF ANY REGULATORY AUTHORITY, LET ALONE THE LIMITLESS POWER CLAIMED HERE.

The FCC claims support for reading Section 706 as an independent grant of authority from *Verizon* and *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014). Neither case is persuasive and, in any event, their conclusions are erroneous. Section 706's text, structure, and history compel reading the statute as an exhortation, not a delegation.

The D.C. Circuit's conclusion that Section 706 may grant the FCC some independent authority is unpersuasive *dicta*. *Verizon's* ultimate holding was that the Commission's anti-blocking and anti-discrimination rules imposed impermissible common carrier regulation on broadband providers. *See Verizon*, 740 F.3d at 649-50, 655-59. Determining whether Section 706 provided the FCC with the requisite statutory authority for the rules was thus unnecessary to the

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which *Nixon* forewarned. As the FCC emphasizes, its decision to preempt the Tennessee and North Carolina laws rested on its analysis of those particular laws and their motives. *See, e.g.*, FCC Br. at 20. Some State laws may survive the FCC's review while others are stricken. *See id.* This ad hoc approach would "treat States differently depending on the formal structures of their laws," which *Nixon* precludes. *Nixon*, 541 U.S. at 138.

outcome of the case.[14] This Court has confirmed that "when the facts of the instant case do not require resolution of the question, any statement regarding the issue is simply *dicta*." *United States v. Hardin*, 539 F.3d 404, 415 (6th Cir. 2008). Further, *Verizon* did not consider whether the FCC might use Section 706 to claim preemptive powers and thus does not support the FCC's action here.[15] If anything, the *Verizon* court's claim that the statute is ambiguous (and its application of *Chevron* step two) undercuts any claim that Section 706 contains a "plain statement" of preemption. *See Verizon*, 740 F.3d at 637.

The Tenth Circuit's opinion in *In re 11-161* is likewise unpersuasive. That court confronted an FCC order reforming the agency's universal service regime. In that case, the FCC's order rested on a number of statutory provisions, unlike the agency's bald reliance on Section 706 here. *See In re 11-161*, 753 F.3d at 1038-40. Because the FCC relied on other sources of statutory authority, the Tenth Circuit confirmed only that Section 706 may be "an additional source of support" for the

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[14] The FCC claims that because the D.C. Circuit upheld a transparency rule in *Verizon*, its analysis of Section 706 was not *dicta*. FCC Br. at 29 n.5. This is wrong. *Verizon* noted that the FCC relied on "a plethora of statutory provisions" to support the transparency rule. *Verizon*, 740 F.3d at 634. The court's analysis of Section 706 was not necessary to uphold the rule; it is *dicta*.

[15] A concurrence suggesting that State laws prohibiting municipal broadband infrastructure may be an example of a "barrier" to investment is unpersuasive. *Id.* at 660 n.2 (Silberman, J., concurring in part and dissenting in part). Judge Silberman did not contemplate the scenario presented here, in which the FCC purports to expand the authority and territorial reach of municipalities.

FCC's action. *Id.* at 1054. It did not squarely decide whether Section 706 constitutes a freestanding grant of independent regulatory authority, nor did it consider whether Section 706 confers the remarkable preemptive power claimed here. *See id.*

More fundamentally, the FCC does not seriously grapple with Tennessee's arguments that *Verizon* and *In re 11-161* are unpersuasive because their view of Section 706 is wrong. *See* TN Br. at 51-55. The FCC urges this Court to just defer to those decisions and not engage in its own analysis. The FCC does not explain why Section 706, unlike a traditional delegation of authority, does not expressly authorize the FCC to engage in rulemaking, to prescribe conduct, or to enforce compliance. Nor does the FCC address the fundamental problems with reading Section 706 as an affirmative grant of authority. The agency ignores that Section 706(a)'s reservation of authority for "state commissions" precludes reading the provision to confer preemptive authority. *See* 47 U.S.C. § 1302(a) (providing that whatever is delegated to the FCC is also delegated to "each state commission"). Likewise, the agency fails to address Section 706(b)'s remarkable time limit. *See* TN Br. at 54-55. Section 706(b) only contemplates action if the FCC determines that advanced telecommunications capability is not being deployed to all Americans. *See id.* § 1302(b). Congress has not previously delegated preemptive

power with an expiration date and the FCC offers no reason why it would have done so here.

The FCC contends that Section 706 is part of Congress's effort to encourage broadband deployment. FCC Br. at 28. It notes that Congress "has repeatedly recognized the increasing importance of encouraging the deployment of a robust broadband infrastructure" and cites legislation enacted after Section 706 aimed at this goal. *Id.* But this proves Tennessee's point: Congress intended the provision to be a general instruction, and it has reaffirmed that choice several times by enacting broadband legislation without clarifying that the agency has the vast reservoir of power it claims here. This is "persuasive evidence" that Section 706 is a hortatory policy statement. *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827-28 (2013).

The FCC fails to articulate any limiting principle for its claimed powers under Section 706. In the agency's view, it must preempt whenever it determines that removing a State law has the potential to speed broadband deployment. *See* Order ¶ 141 (P.A.59).[16] This logic turns Section 706 into the kind of "boundless"

[16] Amicus Senator Markey attempts to transform Section 706 into a grant of authority. The views of the "House author" twenty years later should be taken with a grain of salt. *See Quern v. Mandley*, 436 U.S. 725, 736 n.10 (1978) (noting "*post hoc* observations by a single member of Congress carry little if any weight"). Further, Senator Markey's view of Section 706—like the FCC's—offers no limiting principle. His attempts to cabin Section 706 prove that under the government's view, Section 706 is nearly limitless. He claims that Section 706 is

claim to authority that *Verizon* rejected. *See Verizon*, 740 F.3d at 639 ("[W]e might well hesitate to conclude that Congress intended to grant the Commission substantive authority . . . if that authority would have no limiting principle.").

CONCLUSION

The State of Tennessee respectfully requests that the Court vacate the Order.

Respectfully submitted:

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limited by the "public interest, convenience, and necessity" standard that appears elsewhere in the Communications Act and says that the FCC's actions "must be designed to accelerate deployment." Markey Br. at 13. These are not meaningful limits.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The undersigned hereby certifies as follows:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,927 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in size 14 Times New Roman.

/s/ Joshua S. Turner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Reply Brief was served on all parties or their counsel of record through the CM/ECF system to their electronic addresses of record on this 23rd day of November, 2015 if they are registered users or, if they are not, by placing a true and correct copy in the United States mail to their address of record:

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