NOT YET SCHEDULED FOR ORAL ARGUMENT

18-1051(L)

(and consolidated cases)

United States Court of Appeals
for the District of Columbia Circuit

MOZILLA CORPORATION, *et al.*,

Petitioners,

against

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of the Federal Communications Commission

BRIEF FOR *AMICI* THE CITY OF NEW YORK AND 27 OTHER LOCAL GOVERNMENTS, MAYORS, AND MUNICIPAL ORGANIZATIONS IN SUPPORT OF PETITIONERS

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August 27, 2018

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amici curiae* certify that:

(A) Parties and *Amici*: Except for the following *amici*, all parties and intervenors are listed in the Joint Brief for Government Petitioners, who filed a consolidated brief in Case Nos. 18-1055, 18-1088, and 18-1089. As of the date of this filing, in addition to the City of New York, the following have noticed their intent to participate as *amici*:

- American Council on Education, *et al.*;
- eBay Inc.;
- Electronic Frontier Foundation;
- Engine Advocacy;
- Computer & Communications Industry Association, *et al.*;
- Consumers Union;
- Members of Congress;
- National Association of State Utility Consumer Advocates and National Association of Regulatory Utility Commissioners;
- Professors Scott Jordan and Jon Peha;
- Professors of Communications Law; and
- Twilio, Inc.

(B) Ruling Under Review: References to the ruling at issue appear in the Joint Brief for Government Petitioners.

(C) Related Cases: Amicus curiae adopts the statement of related cases presented in the Joint Brief for Government Petitioners.

By: /s/ MacKenzie Fillow
August 27, 2018 MACKENZIE FILLOW

CERTIFICATE OF COUNSEL REGARDING CONSENT TO FILE AND NECESSITY OF SEPARATE AMICUS BRIEFING

As required by D.C. Circuit Rule 29(d), I certify that the City of New York is submitting a separate brief on behalf of a coalition of local governments, mayors, and municipal organizations due to our distinct interests in these cases. To our knowledge, this brief is the only amicus brief focusing on local-government issues. Accordingly, filing a joint brief would not be practicable.

On August 14-15, 2018, all parties and intervenors consented to the filing of this brief, except counsel for the United States of America, who indicated that he does not object to the filing of this brief.

As required by Fed. R. App. P. 29(c), I certify that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

By: /s/ MacKenzie Fillow
MACKENZIE FILLOW

August 27, 2018

CERTIFICATE OF CORPORATE DISCLOSURE

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the City of New York certifies that it submits this brief on behalf of an *ad hoc* coalition formed for the purpose of submitting a brief in this case, which is not incorporated and has no formal legal status. The coalition comprises cities, counties, townships, and elected mayors, as well as the International Municipal Lawyers Association (IMLA) and the California State Association of Counties (CSAC). IMLA is a non-profit corporation that is owned solely by its more than 2,500 members. CSAC is a non-profit corporation, whose membership consists of the 58 California counties.

By: /s/ MacKenzie Fillow
MACKENZIE FILLOW

August 27, 2018

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GLOSSARY OF TERMS AND ABBREVIATIONS

BIAS	Broadband Internet Access Service
Br. for Gov't Pet'rs	Brief for Government Petitioners
Commission or FCC	Federal Communications Commission
Government Petitioners	States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, the District of Columbia, the County of Santa Clara, Santa Clara County Central Fire Protection District, and the California Public Utilities Commission
Order	Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order*, 33 FCC Rcd. 311 (2018)
Telecommunications Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56

STATUTES AND REGULATIONS

The relevant statutes and regulations are set forth in the addenda to the Joint Brief for Government Petitioners.

INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT

Amici are municipalities, mayors, and municipal associations across the country committed to the principle of net neutrality because of our conviction that "[a]ccess to a free and open internet is a fundamental right of every citizen."[1] As petitioners have shown, the FCC's Order abandoning net neutrality reflects not just a misguided and harmful policy choice, but an unlawful one.

Amici also strongly oppose the Order's broad assertion of preemption, purporting to displace "any state or local measures" affecting BIAS. We agree with the government petitioners that the unqualified breadth of this exercise of preemption—sweeping in a wide range of state and local laws designed to protect the public—falters under the weight of the presumption against preemption, because Congress did not clearly authorize it.

We write to highlight one particularly troubling consequence of the FCC's broad assertion of preemption: its potential to displace even narrowly drawn state or local measures designed to preserve core public

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[1] *Statement From Mayor Bill De Blasio On Net Neutrality* (Nov. 22, 2017), available at https://on.nyc.gov/2w5gblL.

services that rely on the internet. Counting on our transmissions being treated on a net-neutral basis, municipalities have invested heavily in technologies that require access to low-latency, high-capacity internet. We now depend on the internet to transmit vast amounts of information on a real-time basis for essential government functions—including firefighting, police, traffic management, sanitation, and public transit. In the coming decades, the internet will grow increasingly vital to the provision of those services, and our residents will increasingly expect the standard of performance that internet-enabled services afford.

The Order would permit BIAS providers to discriminate against key government services, or to entirely block citizens' access to our websites, unless we pay for priority access. Municipalities, however, lack the financial resources to compete for priority in the marketplace. Discrimination and blocking could compromise our ability to fulfill our critical public mission by hindering timely responses to events unfolding in our communities.

The Order's broad preemption provision could bar state or local measures to prevent second-class status for internet communications relating to public services, whether through closely tailored regulations

or through conditions placed on grants of rights-of-way to use city streets and poles for the internet's fiber-optic backbone. Indeed, the Order purports to preempt even state and local attempts to prohibit the throttling of critical web traffic that informs police officers in the field, or the blocking of access to emergency management websites or portals for payment of local taxes or registration for public benefits.

When an agency's assertion of preemption threatens to so sharply impinge on municipalities' control over core government functions, the presumption against preemption is at its apex, and the congressional authorization for such preemption must be unmistakable. But there is no clear statement of congressional intent for the FCC's sweeping exercise of preemption in the Order. And preemption would undermine a key purpose of federalism—accountability of government officials to the electorate—by forcing municipalities to suffer the political consequences of a federal agency's decision to displace local authority. The Order's preemption provision is unlawful and must be vacated.

ARGUMENT

CONGRESS DID NOT AUTHORIZE THE ORDER'S SWEEPING PREEMPTION OF STATE AND LOCAL MEASURES TO PRESERVE CORE GOVERNMENT SERVICES THAT USE THE INTERNET

The Order purports to preempt nearly "any state or local measures … that would impose more stringent requirements for any aspect of broadband service that [the FCC] address[ed] in this order." Order ¶ 195. It leaves undisturbed only "the states' traditional role in generally policing such matters as fraud, taxation, and general commercial dealings"—and even this narrow category only "so long as the administration of such general state laws does not interfere with federal regulatory objectives." *Id.* ¶ 196.

As the government petitioners explain, this assertion of sweeping, prospective preemption exceeds the FCC's authority under the Telecommunications Act to superintend the Nation's broadband and mobile internet backbone (*see* Br. for Gov't Pet'rs at 41-47). Given the lack of statutory authorization and the presumption against preemption, the FCC may not override state or local measures to promote public welfare through regulation of BIAS providers' business

practices. *See Altria, Inc. v. Good*, 555 U.S. 70, 77 (2008) (the presumption bars preemption unless the preemptive purpose of Congress is "clear and manifest").[2]

This brief addresses an aspect of the Order's broad assertion of preemption that poses a particular threat to municipalities and requires an even more explicit statement of congressional authorization. The repeal of net neutrality would permit BIAS providers to impose throttling, blocking, and paid prioritization on local governments' internet data transmissions. As shown by the government petitioners (Br. for Gov't Pet'rs at 22-28) and discussed further below, such practices would hamper local governments' ability to effectively provide core services, involving public health, safety, and welfare, using the internet. The Order's preemption provision, however, purports to block States and municipalities from adopting even narrowly tailored rules to

[2] Although agency interpretations of ambiguous statutory provisions generally are entitled to deference, *Chevron U.S.A., Inc. v. Nat. Res. Def. Council Inc.*, 467 U.S. 837, 844 (1984), the presumption resolves any ambiguity against preemption, thereby removing the agency's discretion to fill in the statutory gaps, *cf. INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) ("Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve." (citation omitted)).

prevent these ill effects, or from conditioning BIAS providers' access to rights-of-way on carrying government data on a net-neutral basis.

States and their political subdivisions have traditionally received "great latitude under their police powers" to pass laws to ensure the "protection of the lives, limbs, health, comfort, and quiet of all persons." *Gonzales v. Oregon* 546 U.S. 243, 270 (2006) (quotation marks omitted). And, as owners of streets, sidewalks, and poles, States and local governments have traditionally exercised broad authority to manage their rights-of-way over city streets, sidewalks, and poles. *See St. Louis v. W. Union Tel. Co.*, 148 U.S. 92, 101 (1893). The Order displaces this authority by barring state and local measures to maintain public safety and ensure the effective provision of core government services.

Such a deep intrusion into an area of core local concern requires especially clear and express authorization from Congress. *See Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); *see also City of Dallas v. FCC*, 165 F.3d 341, 349 (5th Cir. 1999) (holding that the FCC lacks authority to preempt local rights-of-way requirements without a clear statement from Congress). *Gregory*'s "clear-statement rule" is an interpretive canon that holds that "if Congress intends to alter the usual

constitutional balance between the States and the federal government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (quotation marks omitted); *accord Bond v. United States*, 134 S. Ct. 2077 (2014).[3]

This standard is not met here. Congress did not expressly authorize the FCC in Title I of the Telecommunications Act to strip States and local governments of the tools they need to provide government services effectively. Nor did Congress authorize the FCC to turn BIAS providers into gatekeepers of government websites. And the FCC's unauthorized assertion of preemption implicates a core federalism concern animating the Supreme Court's jurisprudence: the proper allocation of political accountability between the national and local governments. Without a clear statutory hook upon which to hang

[3] The federal agency asserting preemption cannot supply this authorization when Congress has declined to do so. *See Solid Waste Agency of N. Cook Cty. (SWANCC) v. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (declining to defer to agency interpretation of statute as permitting incursion into "States' traditional and primary power" and requiring "a clear statement from Congress"). Although this Court has not yet definitively resolved "whether 'an agency decision against preemption of a state or local law receives [*Chevron*] deference,'" *Delaware v. Surface Transp. Bd.*, 859 F.3d 16, 20-21 (D.C. Cir. 2017), those courts of appeals that have addressed the issue since the Supreme Court's decision in *Wyeth v. Levine*, 555 U.S. 555 (2009), "have been unanimous in concluding that *Chevron* deference does not apply to preemption decisions by federal agencies," *Del Grosso v. Surface Transp. Bd.*, 804 F.3d 110, 116-17 (1st Cir. 2015) (collecting cases).

the FCC's sweeping preemption authority, the Order oversteps, and its assertion of preemption must be vacated.

A. Municipalities use the internet to provide core government services and depend on net-neutral treatment of their transmissions.

The FCC impermissibly waived away local governments' very real concerns about the damage that the repeal of net neutrality would do to our ability to serve our fundamental functions—from managing weather emergencies to performing cutting-edge telemedicine at public hospitals—as the government petitioners have shown (*see* Br. for Gov't Pet'rs at 24-28 (discussing Santa Clara County's Comments on municipal internet dependence)). This is a deep flaw in the Order—both on procedural grounds, as the government petitioners demonstrate, and on substantive ones, as we amplify here—and it has the potential to reverberate nationwide.

Without net neutrality, state and local governments must be able to insist that BIAS providers not relegate data transmissions for core government services to second-tier status (or worse) or block the public's access to government services. To the extent that the Order's preemption clause bars measures designed to guarantee net-neutral

treatment for municipalities' data transmissions, it compromises local governments' ability to fulfill our central role—a harm that will only grow in the coming decades.

1. Vital local government services in the 21st century rely on the transfer of large amounts of data in real-time over the internet.

Local governments have spent millions of taxpayer dollars to develop and implement innovative tools to deliver vital services to their citizens via the internet. These services—which every day are proving their worth by saving lives and improving quality of life for our residents—often rely heavily on real-time, low-latency data transmissions, because public services like police, firefighting, traffic, and public transit are time-sensitive.

By linking vast networks of real-time data-collection devices with high-powered computer-processing capabilities, local governments are evolving to govern better and more efficiently. And evolve we must, as local-government officials are the ones held to account when municipalities fail to keep up with technology. Heeding the public's demands, over the last two decades local governments have embraced

data-heavy, internet-based applications designed to improve how we provide public services.

For example, cities are increasingly relying on sophisticated systems to provide police officers with real-time situational information that melds data drawn from public networks and residents' devices with city-owned sensors and databases. For example, the New York City Police Department's Domain Awareness System collects and analyzes data from over 54 million 911 calls; thousands of public, private, and commercial surveillance cameras, automatic license-plate readers, fixed and mobile radiation and chemical sensors; police databases; and acoustic sensors that pinpoint gunshots to within 25 meters.[4] Similarly, the City of Chicago's software, called Hunchlab, blends statistical modeling with real-time information and automatically pushes information about the context of an unfolding encounter to officers' smartphones in the field.[5] Minneapolis uses Field Watch, a system that

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[4] *See* Janine S. Hiller & Jordan M. Blanke, *Smart Cities, Big Data, and the Resilience of Privacy*, 68 HASTINGS L.J. 309, 321 (2017); Thomas Davenport, *How Big Data Is Helping the NYPD Solve Crimes Faster*, Fortune.com (July 17, 2016), available at https://tinyurl.com/zhumou6.

[5] *See* Timothy Mclaughlin, *As shootings soar, Chicago police use technology to predict crime*, Reuters.com (Aug. 5, 2017), available at https://tinyurl.com/yaapqdzp.

is activated during major events and enables officers to stream video from their iPhones over a public network to a command center and to locate the nearest fellow officer in the field.

Beyond traditional policing, local governments are starting to use internet-connected technologies to improve everything from traffic management to air quality. Researchers predict that adopting a "smart traffic system"—a system that employs dynamic traffic-light phasing and actively communicates with citizens about real-time parking and public-transportation options, would save city dwellers three entire working weeks per year by reducing congestion.[6] Such a system would also save lives by enabling police, firefighters, and ambulances to get to where they are needed more quickly.

New York City's Department of Transportation has deployed numerous internet-dependent technologies to improve traffic on the City's 6,000 miles of streets, which are used by over 5,000 public buses, 13,000 taxis, 60,000 for-hire vehicles, and millions of commuters every

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[6] Intel Press Release: *Smart Cities Technologies Give Back 125 Hours to Citizens Every Year* (March 12, 2018), available at https://tinyurl.com/y72o992m, releasing *Juniper Research Report: Smart Cities- What's In It For Citizens?* (Mar. 12, 2018), available at https://tinyurl.com/yaqeh497.

day. For example, the City adopted an active traffic-monitoring and signal-adjustment program, which sends real-time data from traffic video cameras, sensors, and EZ Pass readers to a traffic-management center that adjusts signals to move the flow of traffic more efficiently over 110 blocks in midtown Manhattan, reducing congestion and decreasing carbon emissions.[7] The City also installed signal-priority technology—on-board sensors that communicate wirelessly with traffic signals—on nearly 20 bus routes to automatically adjust traffic lights to improve bus services, resulting in a 10% improvement in travel time on most routes.

This kind of comprehensive, high-tech city planning is vitally important. According to a report from the American Society of Civil Engineers, Americans wasted 6.9 billion hours and 3.1 billion gallons of fuel to traffic delays in 2014—losing roughly $160 billion.[8] In addition to saving fuel and time, reducing congestion improves air quality to

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[7] Wuping Xin, et al., *"Midtown in Motion": A new active traffic management methodology and its implementation in New York City*, Report for Transportation Research Board 2013 Annual Meeting (Nov. 15, 2012), available at http://docs.trb.org/prp/13-4145.pdf.

[8] American Society of Civil Engineers, *Infrastructure Report Card, Roads* (2017), available at https://tinyurl.com/y8k8lxg2.

save lives. MIT's Laboratory for Aviation and the Environment estimates that air pollution caused by ground-level emissions causes 200,000 early deaths per year.[9] And, to work well, internet-connected municipal infrastructure will be expected to connect directly with private vehicles to facilitate computer-assisted or even fully autonomous driving.[10]

Smart-city planning to improve environmental quality likewise requires collecting, processing, and disseminating a large—and ever increasing—volume of data. One example is Chicago's Array of Things, designed primarily to improve urban environmental quality. The system employs a network of interactive, modular sensor boxes that collect real-time data on the city's temperature, barometric pressure, light, vibration, air quality, ambient sound intensity, and pedestrian and vehicular traffic, all of which is made publicly accessible through a web-based data portal that residents can access on their home

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[9] Jennifer Chu, *Study: Air pollution causes 200,000 early deaths each year in the U.S. (New MIT study finds vehicle emissions are the biggest contributor to these premature deaths)*, MIT News Office (Aug. 29, 2013), available at https://tinyurl.com/ps52l2u.

[10] Roberto Baldwin, *It takes a smart city to make cars truly autonomous*, Engadget.com (June 14, 2017), available at https://tinyurl.com/ybghq4c9.

computers or smartphones.[11] In addition to facilitating civic engagement and innovation through transparency, the data has a variety of local-government applications: it helps Chicago predict the need for road-salting during storms and anticipate floods, and suggests safe travel routes to citizens.[12]

These initiatives would all be hampered by the repeal of net neutrality. Other examples of susceptible internet-dependent smart-city innovations include:

- ***Web-based, public-facing, emergency-alert systems.*** Like many other cities, Portland, Oregon's Bureau of Emergency Management's messaging system and New York City's Emergency Management website and NotifyNYC notification system disseminate real-time emergency protocols to residents.
- ***Fire alert and dispatch systems.*** Portland, Oregon's police and fire rescue use a computer-assisted dispatch system that

[11] Array of Things Project Page, available at https://arrayofthings.github.io/

[12] Sean Thorton, *A Guide to Chicago's Array of Things Initiative*, Ash Center for Democratic Governance and Innovation at Harvard Kennedy School Data-Smart City Solutions (Jan. 2, 2018), available at https://tinyurl.com/ycl3vnpo.

coordinates with partner agencies in adjacent cities and townships to most efficiently dispatch emergency personnel. Data travels between agencies via broadband. Fire departments around the country have implemented systems that receive real-time alerts of possible fires directly from private automated-detection and home-security devices. As government petitioners explain, fire departments also use mobile command and control units that can be—and have already been—throttled during emergencies (*see* Br. for Gov't Pet'rs at 23).

- ***Utility grids.*** Similar to California's smart electric grid (*id.* at 24), the New York City Department of Environmental Protection's smart water grid monitors private and commercial water meters for leaks and overall system health, communicates with customers about usage, and improves billing accuracy. Installing 817,000 smart meters has saved New Yorkers nearly $100 million through leak alerts and real-time billing, which are accessed by the public through a web-based portal.

- ***Smart and web-based sanitation.*** Hundreds of cities have installed smart, sensor-equipped waste and recycling stations that communicate their real-time status to collection crews, allowing for more efficient garbage collection.[13] After installing over 700 smart public trash and recycling bins, New York City has seen 50-80% more efficient collection, shortened routes, and reduced idling time in the pilot area.[14] Deploying these types of connected devices is a small piece of a larger comprehensive sanitation program that interacts with residents via the internet. Residents across the Nation, from New York City to Madison, Wisconsin access an online portal to report that they have disposed of large items or notify trash collectors of missed garbage pick-ups.

In short, local governments are entering a new era in which web-based programs linked with data-collection devices and citizens' devices

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[13] *See* https://bigbelly.com/.

[14] NYC Mayor's Office of Tech + Innovation, *Report: Building a Smart + Equitable City* (Sept. 2015), available at https://tinyurl.com/y93aq24l.

collect, organize, analyze, and disseminate large amounts of data in real-time to anticipate the needs of our citizenry, to manage our resources more efficiently, and to protect our communities most effectively. Soon, our residents will come to expect smart services in all aspects of civic life, from policing to transportation.

2. The Order hinders the ability of local governments to invest in and deploy emerging technology to provide vital public services.

The Order's repeal of net neutrality and sweeping exercise of preemption will significantly hinder the provision of vital government services over the internet. The Order allows BIAS providers, for the first time, to block or prioritize traffic based on ability to pay or other criteria—for example slowing vital government communications in favor of commercial data.[15]

Purportedly to encourage investment in the internet's infrastructure, the Order changes how BIAS providers can manage

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[15] The country's largest BIAS providers claim currently to have a policy against throttling or paid prioritization, but most have refused to commit to continue these policies. *See* Jacob Kastrenakes, *ISPs Won't Promise To Treat All Traffic Equally After Net Neutrality*, The Verge (Dec. 15, 2017), available at https://tinyurl.com/y9z29p35. *See also* Br. for Gov't Pet'rs at 19-20.

their networks. It allows providers to charge websites to access a priority track, on the assumption that latency-sensitive businesses such as streaming video and multi-person online gaming will pay for access to a fast lane (*see* Order ¶ 254 & n.916). And it allows providers to block websites or to charge users to access segments of the internet (*id.* ¶ 263). It also authorizes BIAS providers to bundle services with preferred devices—for example, throttling traffic from disfavored devices or limiting subscribers' ability to connect non-affiliated smart thermostats or home-security systems (*id.* ¶ 220 & n.813). This is a radical shift in the legal landscape, as net-neutral treatment of all internet traffic has been the norm since the start of the internet.

The Order is at cross-purposes with local governments' fundamental interests. The FCC's new approach ignores that local governments—which superintend the very streets and poles that undergird the internet backbone—are not on an equal footing with commercial enterprises to bid for priority access. Indeed, in relying on competition in the market (*see* Order ¶ 153), the Order gives short shrift to the fact that core local-government services are not for-profit activities. The FCC's approach also ignores that BIAS providers are

often on the other side of a bargaining table from local governments, as when negotiating rights-of-way agreements, and can use their newfound right to throttle or block government websites to secure unintended and unwarranted advantages.

As a result, municipalities can no longer expect that crucial government services will be carried on a net-neutral basis—a basic assumption underlying local governments' use of and considerable investment in new technology.[16] To work effectively, the web-based tools that local governments are now using, as well as those in the technological pipeline, depend on the continued availability of reliable high-speed internet.

For example, a citywide dynamic traffic-phasing system is viable only if the processing center can reliably receive data in real-time from

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[16] Local governments worldwide are projected to spend $41 trillion on the Internet of Things over the next two decades. Aneri Pattani, *Building the city of the future – at a $41 trillion price tag*, CNBC.com (Oct. 25, 2016), available at https://tinyurl.com/y9upgsfg. As just one example, Chicago recently invested $160 million in its Smart Lighting Project, a citywide modernization initiative to ensure reliable outdoor lighting. It uses a wireless lighting-management system that provides real-time outage updates and is part of the City's Smart Grid Network, integrating with 311 and 911 systems to automatically create work tickets based on citizen complaints to replace lights or to bring light levels up as part of accident responses. *See* City of Chicago Office of the Mayor Press Release, *Mayor Emanuel Launches Historic Streetlight Modernization Program* (Sept. 19, 2017), available at https://tinyurl.com/y84jzzua.

a multitude of devices. But the necessary internet speeds may soon be out of municipalities' reach. Likewise, latency-sensitive law-enforcement tools that are designed to inform split-second decisions would be rendered less effective if data transmitted over BIAS is throttled. The police need applications to pinpoint the precise location from where gunshots were *just* fired, or to inform officers that a suspect has a firearm *before* they approach him.

Municipal-run networks are not a nationwide panacea. Not all municipalities have the resources to develop costly private networks. Among municipalities that have such networks, some have only wireless capabilities, which are more susceptible to capacity and coverage limitations than wireline networks. As a result, as our need for capacity grows, municipalities will look to joint public-private network solutions. Moreover, most municipal services cross into the public network at several stages, either when drawing information from residents and their devices or pushing information back to them. Thus, providers might interfere with critical information flow at several points. In the case of traffic management, for example, this interference might entail the slowing or stopping of data from vehicles and raw data

from traffic sensors en route to the central system, and the slowing of the output from the central system back to traffic cameras or to private devices. And, because some critical municipal sensors share "last mile" capacity with the internet writ large, throttling, blocking, and paid prioritization can result in fast-tracked data like gaming or entertainment passing ahead of critical government communications.[17]

Perhaps because the FCC neglected to include preemption in its proposed rulemaking (*see* Br. for Gov't Pet'rs at 39 n.24), it failed to account for the mischief the Order would work on municipalities, whose growing uses for low-latency, high-capacity access—although not as lucrative as multi-player online gaming or streaming video—are no less valuable to Americans' lives.

B. There is no clear statement in Title I of the Telecommunications Act authorizing the FCC to preempt state and local measures to preserve municipalities' use of the internet.

By purporting to preempt state and local measures intended to preserve core municipal functions, the FCC has given the

[17] When carving out Internet-of-Things devices as exempt "non-broadband Internet access service data services," the FCC recognized that such devices share "last-mile capacity" with the newly deregulated broadband internet (Order ¶ 23).

Telecommunications Act an "improbably broad reach" with "deeply serious consequences" for local governments and for the "police power of the States," triggering *Gregory*'s clear-statement rule. *Bond*, 134 S. Ct. at 2090. This Court should thus "refer to basic principles of federalism embodied in the Constitution to resolve ambiguity" and "insist on a clear indication that Congress meant to reach purely local [activities]." *Id.*; *see also New York v. United States*, 505 U.S. 144, 170 (1992) (applying the clear-statement rule to avoid statutory interpretation that would "upset the usual constitutional balance of federal and state powers" (quotation marks omitted)).

The FCC's exercise of preemption fails under the clear-statement rule because there is no express authorization in Title I of the Telecommunications Act for sweeping preemption of measures designed to ensure the effective provision of core government services.[18] Parts of the Telecommunications Act expressly authorize the FCC to preempt

[18] In the Order (¶¶ 200-01), the FCC invokes "impossibility preemption," contending that it would be impractical to separate interstate from intrastate web traffic. But nowhere does the Order suggest that government-specific data is either interstate in nature or difficult to separate from non-government data. *Cf. Minn. Pub. Util. Comm'n v. FCC*, 483 F.3d 570, 578 (8th Cir. 2007). Moreover, as the government petitioners persuasively explain (Br. for Gov't Pet'rs at 42 n.25, 45-47), impossibility preemption is unavailable here.

some aspects of state and local law, such as those directed at cable-television services and both wireline and wireless telecommunications services. 47 U.S.C. §§ 253, 332(c)(7), 541-47. But no provision expressly authorizes the FCC to trump state and local governments' rules requiring BIAS providers, when classified as "information services," to treat critical government services on an unmediated and untrammeled (*i.e.*, net-neutral) basis. Indeed, the multiple express preemption clauses in the Telecommunications Act show that Congress knows how to preempt state and local law in this arena when it means to.

Unlike in Title I, in Title II Congress specifically mandated that the FCC "preempt the enforcement of [a state or local] statute, regulation, or legal requirement" if the agency determines that the state or local law prohibits "the ability of any entity to provide any interstate or intrastate telecommunication service." *Id.* § 253(a), (d). And even when expressly authorizing preemption, Congress did so precisely, carving out the type of local-government services at issue here: the FCC may not bar States or local governments from regulating telecommunication services to "protect the public safety and welfare[,] … safeguard the rights of consumers," "manage the public rights-of-

way, or … require fair and reasonable compensation from telecommunications providers … for use of public rights-of-way." *Id.* § 253(b), (c).

The absence of a comparable express preemption clause for information services confirms Congress's intent. Further punctuating the point, Section 601(c)(1) ("No implied effect") provides that the Act and its amendments "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." *Id.* § 152 note. Based on this no-implied-effect clause, the Fifth Circuit concluded that even if there were a discernible federal policy that might be frustrated without preemption authority, such concerns cannot override the requirement, arising out of *Gregory*'s federalism principles, of a plain statement conferring preemptive authority. *See City of Dallas*, 165 F.3d at 349 (holding that the FCC lacks authority to preempt, given "the statutory text, read in the light of *Gregory*'s and § 601(c)(1)'s warnings against implied preemption").

"[T]he background principles of our federal system … belie the notion that Congress would use … an obscure grant of authority to

regulate areas traditionally supervised by the States' police power." *Gonzales*, 546 U.S. at 274. There is no clear statement that the FCC may, under Title I, preempt "state or local measures" designed to ensure that municipalities can effectively employ the internet to provide core government services. The "historic police powers of the States" may not be superseded so lightly. *Rice v. Santa Fe El. Corp.*, 331 U.S. 218, 230 (1947).[19]

C. The FCC's assertion of preemption in this area blurs the clear delineation of accountability for the provision of government services.

Without clear congressional authorization for its sweeping preemption of state and local police power, the Order blurs the lines of accountability between the federal government and the States and municipalities in a way that raises serious federalism concerns. The FCC's deregulate-and-preempt strategy impermissibly obscures the federal government's role in disabling individual local governments from providing effective public services in the 21st century.

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[19] There are bills currently pending in Congress that, although vigorously opposed, would authorize express preemption if adopted, such as H.R. 4682, the proposed "Open Internet Preservation Act." Evidently, Congress does not believe it has already vested the FCC with preemptive authority.

Residents expect their local governments to continue implementing new technology—catered to their specific local needs—to provide public services on par with similar cities around the world, and to match the efficiencies that private industry increasingly can offer via the internet. If Congress chooses to adopt a policy that makes it more difficult for local governments to effectively implement this new technology, it must make its intention explicit, so that our residents know to lay the blame for their local government's failures at the federal doorstep.

The FCC's assertion of sweeping, prospective preemption, without clear and manifest authorization from Congress, violates federalism-based accountability principles because it allows Congress to avoid taking ownership over the FCC's policy, while forcing local governments to sit idly by as their access to unmediated broadband internet is stripped away in favor of a preferred federal policy of deregulation. The federal government may not force local governments to "bear the brunt of public disapproval, while the federal officials who devised the regulatory program … remain insulated from the electoral ramifications of their decision." *New York v. United States*, 505 U.S. at 168. This

Court recognized this concern when it rejected the FCC's attempt to preempt state common-carrier regulations of cable leased channels for two-way communication using its general authority under the Communications Act. *Nat'l Ass'n of Regulatory Comm'ners v. FCC*, 533 F.2d 601, 619 (D.C. Cir. 1976). The Court reasoned that the FCC had no authority to preempt in an area that was traditionally within both federal and state reach, absent an express preemption clause. *See id.*

Maintaining clear lines of accountability between the national and state governments disciplines both sovereigns, because each will suffer the consequences at the voting booth for its policy choices. *See Printz v. United States*, 521 U.S. 898, 920 (1997) (explaining that the Framers deliberately selected a system in which state and federal governments would remain separately accountable); *New York v. United States*, 505 U.S. at 168-89 (stating that federal commandeering of state officials is problematic because it blurs the lines of accountability); *see also Nat'l Fed'n of Ind. Bus. v. Sebelius*, 567 U.S. 519, 578 (2012) ("[P]olitical accountability [is] key to our federal system."). The FCC, which is not directly accountable politically, does not face this consequence.

The risk of crossed lines is particularly acute in deregulatory schemes, where the effect of federal policy is less readily apparent. To avoid confusion and to take credit for implementing popular national policies, Congress makes its deregulatory objectives clear. *See* Carter H. Strickland, Jr., *Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations*, 34 ECOLOGY L.Q. 1147, 1204 (2007). For example, in 1978 Congress enacted the Airline Deregulation Act to deregulate the airline industry. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). It included an express preemption provision prohibiting States from enacting any law relating to "rates, routes, or services of any air carrier." *Id.* at 378-79.

So too, when Congress deregulated the trucking industry, it again used an express preemption clause to ensure that States would not undo deregulation. *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008). Likewise, in authorizing the FCC to forbear from regulating telecommunications carriers' provision of telecommunication services (but not information services) and preempt state regulation in that

area, Congress crafted very specific conditions and expressly preempted state enforcement. 47 U.S.C. § 160(a), (e).

Congress, legislating against this historical backdrop, knows how to preempt state and local measures that it concludes may undermine a federal deregulatory regime, when that is its goal. Nowhere in the FCC's statutory mandate did Congress authorize the agency to deregulate-and-preempt broadband internet without classifying it as a telecommunications service.

CONCLUSION

For the foregoing reasons, and the reasons discussed by the government petitioners, amici respectfully request that the Court vacate the preemption provision of the FCC's Order.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation and typeface requirements of Rule 32(a)(5)-(7) of the Federal Rules of Appellate Procedure because, according to the word count feature of the word processing program used to prepare this brief, the brief contains 5,430 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(3), and because this brief has been prepared in a proportionally spaced typeface using MS Word in 14-point Century Schoolbook type.

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August 27, 2018

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the accompanying brief for *amici* the City of New York and 27 other local governments, mayors, and municipal organizations in support of petitioners by using the CM/ECF system on August 27, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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