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Broad-Banned: The FCC's Preemption of State Limits on Municipal Broadband and the Clear Statement Rule

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BROAD-BANNED: THE FCC'S PREEMPTION OF STATE LIMITS ON MUNICIPAL BROADBAND AND THE CLEAR STATEMENT RULE

ABSTRACT

Congress instructed the FCC in the Telecommunications Act of 1996 to take action to ensure that advanced telecommunications capabilities were being timely deployed to all Americans. In 2015, the FCC preempted statutes in North Carolina and Tennessee that limited the powers of municipally owned internet service providers to expand their networks to nearby underserved communities. The FCC had determined, pursuant to Section 706 of the 1996 Act, that these state limits on municipal broadband networks were anticompetitive barriers to infrastructure investment in contravention of the express purpose of the Act. The FCC reasoned that the municipal broadband networks were filling gaps in the broadband market, where private internet service providers were unwilling to invest in infrastructure or providing lousy service due to the lack of competition in the local markets.

*North Carolina and Tennessee appealed the FCC order, arguing that the FCC did not have the authority to interpose itself between the States and their political subdivisions. Relying on the Supreme Court's earlier decision in *Nixon v. Missouri Municipal League*, which addressed a similar factual issue, the Sixth Circuit agreed with the States that the FCC lacked the authority to interfere with the States' management of their political subdivisions. This Comment argues that the Sixth Circuit should have applied a narrower reading of the clear statement rule, which would strike an appropriate balance between the FCC's unmistakably clear authority to regulate the deployment of broadband technology against the legitimate sovereign interests of the affected states.*

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INTRODUCTION

Upon the signing of the Telecommunications Act of 1996, President Clinton predicted that the Act would “help connect every classroom in America to the information superhighway by the end of the decade.”¹ Since the enactment of this bill, the Internet—the “information superhighway” to which President Clinton referred—has provided Americans with new opportunities in communication, education, healthcare, and the economy.² The benefits of these opportunities are particularly pronounced in rural America, where broadband empowers previously remote communities to become a part of the global community.³ Access to these opportunities has increasingly become a necessity, especially for students and professionals, as the Internet becomes more central to daily life in America.⁴ However, over two decades after the passage of the 1996 Telecommunications Act, approximately 24 million Americans still lack access to fixed broadband services.⁵

Around the country, communities that either lack access to broadband or are dissatisfied with their current service providers have banded together to launch their own municipal broadband services with the support of local governments.⁶ Nineteen states, however, have laws in force that restrict communities’ ability to form municipal broadband networks.⁷ These restrictions, nominally passed to prevent government boondoggles and ensure fair competition in the

¹ Statement by President William J. Clinton Upon Signing S. 652, 32 WEEKLY COMP. PRES. DOC. 218 (Feb. 8, 1996).

² COUNCIL OF ECONOMIC ADVISERS, THE DIGITAL DIVIDE AND ECONOMIC BENEFITS OF BROADBAND ACCESS 5–6 (2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160308_broadband_cea_issue_brief.pdf.

³ Press Release, FCC, FCC Takes Key Step Toward Auction to Expand Rural Broadband Access (Dec. 19, 2017), https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1219/DOC-348332A1.pdf; see, e.g., Cecilia Kang, *Broadband Law Could Force Rural Residents off Information Superhighway*, N.Y. TIMES (Aug. 28, 2016), <https://www.nytimes.com/2016/08/29/technology/broadband-law-could-force-rural-residents-off-information-superhighway.html> (describing how access to reliable high-speed Internet allowed Vick Family Farms to adopt new technology, allowing it to increase its international exports).

⁴ FCC 2018 Broadband Deployment Report, 33 FCC Red. 1660, 1748 (2018) (dissenting statement of Comm’r Rosenworcel) (“No matter who you are or where you live in this country, you need access to modern communications to have a fair shot at 21st century success.”); see also Gaby Galvin, *States Struggle to Bridge Digital Divide*, U.S. NEWS & WORLD REP.: BEST STATES (Mar. 16, 2017, 1:06 PM), <https://www.usnews.com/news/best-states/articles/2017-03-16/internet-access-a-staple-of-american-life-yet-millions-remain-under-connected> (discussing how tasks like applying for jobs or completing homework have “shifted largely online in recent years”).

⁵ FCC 2018 Broadband Deployment Report, 33 FCC Red. at 1679; see also *infra* note 25.

⁶ LENNARD G. KRUGER & ANGELE A. GILROY, CONG. RESEARCH SERV., R44080, MUNICIPAL BROADBAND: BACKGROUND AND POLICY DEBATE 3 (2016).

⁷ *Community Network Map*, COMMUNITY NETWORKS, <https://muninetworks.org/communitymap> (last visited Oct. 20, 2018).

telecommunications market,⁸ have often been the subject of intensive lobbying efforts from private internet service providers (ISPs).⁹

In 2014, two cities with existing municipal broadband networks—Wilson, North Carolina and Chattanooga, Tennessee—petitioned the Federal Communications Commission (FCC) to preempt statutes in their states that limited their ability to expand broadband services to neighboring, underserved communities.¹⁰ The FCC granted the petitions of Wilson and Chattanooga pursuant to its authority under Section 706 of the 1996 Telecommunications Act.¹¹ North Carolina and Tennessee promptly appealed the preemption, and the cases were consolidated in the Sixth Circuit.¹²

The Sixth Circuit overturned the FCC's preemption order in *Tennessee v. FCC*, reasoning that because this action interposed the federal government between the state and its political subdivisions, the clear statement rule enunciated by the Supreme Court in *Gregory v. Ashcroft* applied.¹³ When preemption would “upset the usual constitutional balance of federal and state powers,” courts apply the clear statement rule, which requires that Congress's intent to preempt be “unmistakably clear” in the text of the statute.¹⁴ The Sixth Circuit relied on the Supreme Court's application of the clear statement rule in *Nixon v. Missouri Municipal League*, in which the Court found that a different section of the Telecommunications Act of 1996 did not grant the FCC the authority to preempt a state statute prohibiting public utilities from providing telecommunications services.¹⁵ Because the Sixth Circuit found more than one reasonable interpretation of Section 706, the three-judge panel ruled that congressional intent was not clear, and therefore the FCC lacked the power to

⁸ KRUGER & GILROY, MUNICIPAL BROADBAND: BACKGROUND AND POLICY DEBATE, at 4, 8.

⁹ See, e.g., Jon Brodtkin, *Comcast Has a Lot to Lose if Municipal Broadband Takes Off*, ARS TECHNICA (Nov. 3, 2017, 11:40 AM), <https://arstechnica.com/tech-policy/2017/11/comcast-has-a-lot-to-lose-if-municipal-broadband-takes-off/>.

¹⁰ City of Wilson, North Carolina, 30 FCC Rcd. 2408, 2413 (2015) (mem. op. and order).

¹¹ *Id.* at 2414 (“Section 706(b) requires that the Commission ‘take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market,’ if it finds . . . that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion.” (citation omitted)). See generally Matthew Dunne, Note, *Let My People Go (Online)*, 107 COLUM. L. REV. 1126, 1146 (2007) (arguing that Section 706 confers preemption authority on the FCC and obligates it to preempt if it finds that state law hinders broadband deployment).

¹² *Tennessee v. FCC*, 832 F.3d 597, 609 (6th Cir. 2016).

¹³ *Id.* at 613.

¹⁴ *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985)).

¹⁵ *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140–41 (2004).

preempt these statutes.¹⁶ However, in a partial dissent, Circuit Judge White argued that the clear statement rule does not apply to federal regulation of local governments that does not concern states' core sovereign powers.¹⁷

What is clear, however, is that Congress did grant the FCC the authority to ensure that broadband technology is deployed efficiently and universally. This Comment proposes that the Sixth Circuit should have adopted Judge White's narrower reading of the clear statement rule to empower the FCC to preempt those state statutes that exclusively effectuate regulatory communications policy.¹⁸ As *Nixon* was factually analogous to *Tennessee v. FCC*, the Sixth Circuit relied on it extensively to reach its decision.¹⁹ However, some of the laws that the FCC preempted that were at issue in *Tennessee* are plainly distinguishable from those statutes that deal solely with core issues of state sovereignty, such as the statute at issue in *Nixon*.²⁰ By narrowing the application of the clear statement rule in *Tennessee*, the Sixth Circuit would have enabled the FCC to exercise the authority granted to it by Congress to ensure the timely deployment of broadband technology to all Americans.²¹

This Comment proceeds in four Parts. Part I provides an overview of broadband technology and the municipal broadband policy debate. Part II discusses Congress's instruction to the FCC in Section 706 of the 1996 Telecommunication Act and the FCC's 2015 preemption order. Part III analyzes the Sixth Circuit opinion overturning the order, demonstrates that Congress plainly meant to grant the FCC preemption authority in Section 706, and argues that the narrower application of the clear statement rule proposed by Judge White would better reflect congressional intent and alleviate concerns that had been raised in previous clear statement cases. Finally, Part IV addresses the implications of this proposed tailoring of the clear statement rule, including expanded access to broadband technology, the increased authority of the FCC in the broadband space, and concerns for judicial and legislative economy. This narrower reading of the clear statement rule will empower the FCC to better effectuate its congressional mandate by ensuring that state communications policies accord with federal communications policy.

¹⁶ *Tennessee*, 832 F.3d at 613.

¹⁷ *Id.* at 615 (White, J., concurring in part and dissenting in part).

¹⁸ *Id.*

¹⁹ *Id.* at 610 (majority opinion).

²⁰ *Mo. Mun. League*, 541 U.S. at 140–41.

²¹ 47 U.S.C. § 1302(a) (2012); *see also Tennessee*, 832 F.3d at 614 (White, J., concurring in part and dissenting in part) (finding that the FCC was correct in determining that Section 706 grants preemption authority).

I. BROADBAND TECHNOLOGY AND THE MUNICIPAL BROADBAND DEBATE

Broadband technology has developed rapidly over the last two decades, providing new opportunities for employment, healthcare, and education.²² But access to these opportunities has been dictated by users' proximity to high-density population centers.²³ Local, state, and federal government entities have responded to this access gap with various legislative and executive actions. This Part first provides an overview of the current state of broadband access in the United States, followed by an explanation of the advent of municipal broadband networks, and concludes with a description of the restrictive state government responses to municipal networks.

A. *Broadband Basics*

Broadband, commonly understood to be high-speed Internet, allows users to send and receive data using multiple frequencies, which increases the data transmission speed.²⁴ Broadband signals can be fixed—delivered using a physical transmission path—or mobile—received using a smartphone or similar device.²⁵ Rather than defining broadband by its underlying technology, the FCC defines broadband by the speed at which data is transmitted, allowing it to more easily update its standard as technology evolves.²⁶ In 2015, the FCC increased the benchmark for fixed broadband to 25 megabytes per second (Mbps) downstream (i.e., download speed) and 3 Mbps upstream (i.e., upload speed) citing the demand for streaming video services and simultaneous usage of multiple devices in a single household.²⁷ In practice, broadband service with these speeds allows users to download a three minute song in under two seconds and a two hour movie in about twenty-six minutes.²⁸ ISPs have begun to introduce fiber optic-based Internet services, which offer gigabit download speeds (1 Gbps), or about 1000 Mbps.²⁹ At these speeds, users can download

²² LENNARD G. KRUGER & ANGELE A. GILROY, CONG. RESEARCH SERV., R44080, MUNICIPAL BROADBAND: BACKGROUND AND POLICY DEBATE 1 (2016).

²³ *Id.* at 3.

²⁴ EXEC. OFFICE OF THE PRESIDENT, COMMUNITY-BASED BROADBAND SOLUTIONS 5 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/community-based_broadband_report_by_executive_office_of_the_president.pdf.

²⁵ FCC 2016 Broadband Progress Report, 31 FCC Rcd. 699, 710–12 (2016).

²⁶ *Id.* at 705.

²⁷ *Id.* at 706. This marked a significant increase over the previous benchmark of 4 Mbps downstream and 1 Mbps upstream, which had been in place since 2010. *Id.* The FCC maintained this standard in the FCC 2018 Broadband Deployment Report. 33 FCC Rcd. 1660, 1664–65 (2018).

²⁸ EXEC. OFFICE OF THE PRESIDENT, *supra* note 24.

²⁹ Mike Freeman, *Cox, Spectrum Upgrade Networks to Bring Gigabit Internet Speeds to San Diego*, SAN DIEGO UNION-TRIB. (July 11, 2018, 5:40 PM), <http://www.sandiegouniontribune.com/business/technology/sd->

100 songs in three seconds and a high-definition movie in sixty seconds.³⁰ Beyond its entertainment functions, “Americans increasingly rely on broadband for job opportunities, healthcare, education, public safety, and civic participation.”³¹

Although the broadband market as a whole has rapidly improved the quality and speed of its services, these improvements have not been evenly distributed throughout the United States.³² The FCC found in its 2018 Broadband Deployment Report that about 8% of Americans lacked access to broadband that meets the FCC’s 2015 benchmarks.³³ However, for Americans living in rural areas,³⁴ that number increased to about 31%, while the same was true for only 2% of their urban counterparts.³⁵

The broadband access gap between rural and urban Americans has been driven by the limited profitability of ISPs due to the mismatch between the high costs of infrastructure investment and small customer bases in rural communities.³⁶ Simply put, infrastructure costs increase with distance, and profitability increases with more customers.³⁷ Thus, ISPs are more willing to make the necessary capital investments to deliver high-quality broadband in densely populated urban areas where they can quickly recoup their investment while providing a reasonably priced product.³⁸ Unfortunately, rural areas are defined by the presence of few people over long distances, making the necessary infrastructure investment prohibitively expensive from ISPs’ perspective.³⁹

fi-cox-gigabit-20180710-story.html; see also *AT&T Fiber*, AT&T, <https://www.att.com/internet/fiber.html> (last visited Oct. 20, 2018); Google Fiber, GOOGLE, <https://fiber.google.com/about/> (last visited Oct. 20, 2018).

³⁰ Freeman, *supra* note 29. Approximately 18% of Americans now have access to gigabit Internet; however, the FCC has maintained the current standard of 25 Mbps/3 Mbps as it satisfies the statutory requirement. FCC 2018 Broadband Deployment Report, 33 FCC Rcd. at 1667–68.

³¹ FCC 2016 Broadband Progress Report, 31 FCC Rcd. 699, 774 (2016) (statement of Chairman Tom Wheeler).

³² *Id.* at 701.

³³ FCC 2018 Broadband Deployment Report, 33 FCC Rcd. at 1681 tbl.1.

³⁴ The FCC currently defines rural communities using the 2010 Census block identification. FCC 2016 Broadband Progress Report, 31 FCC Rcd. at 731 n.238. The U.S. Census Bureau defines urban areas based on several measures of density, and then all other areas are designated as rural. MICHAEL RATCLIFFE ET AL., U.S. CENSUS BUREAU, *DEFINING RURAL AT THE U.S. CENSUS BUREAU 2* (2016).

³⁵ FCC 2018 Broadband Deployment Report, 33 FCC Rcd. at 1681 tbl.1.

³⁶ EXEC. OFFICE OF THE PRESIDENT, *supra* note 24, at 9.

³⁷ *Id.*

³⁸ Jeff Stricker, Note, *Casting a Wider ‘Net’: How and Why State Laws Restricting Municipal Broadband Networks Must Be Modified*, 81 GEO. WASH. L. REV. 589, 596–97 (2013).

³⁹ *Id.* at 597.

B. *Municipal Broadband Networks*

Many underserved areas have begun to tackle the broadband access gap by creating municipal broadband networks.⁴⁰ These networks can take one of several forms: a publicly owned entity, a public-private partnership, or a cooperative.⁴¹ In a publicly owned municipal broadband network, the local government builds, finances, and operates the network.⁴² Public-private partnerships can take many forms, but are commonly characterized by a private entity contracting with the local government to provide broadband service in exchange for some form of economic incentive—whether an infusion of public capital or access to existing public infrastructure.⁴³ Cooperatives follow a model inspired by electric and telephone cooperatives that originated in the 1930s to serve rural communities, and are owned and governed by their customers.⁴⁴ In many rural communities, electric cooperatives can use their preexisting infrastructure to begin offering broadband service to their members at lower cost than new entrants into the market.⁴⁵

Today, municipal broadband networks have proliferated in small- and mid-sized rural communities.⁴⁶ As of 2015, nearly 500 municipalities had established some form of municipal broadband network.⁴⁷ Many of these networks have been built out through preexisting public utilities, like the Electric Power Board

⁴⁰ LENNARD G. KRUGER & ANGELE A. GILROY, CONG. RESEARCH SERV., R44080, MUNICIPAL BROADBAND: BACKGROUND AND POLICY DEBATE 1 (2016).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *See id.* at 2; *see also* SCOTT CARLSON & CHRISTOPHER MITCHELL, INST. FOR LOCAL SELF-RELIANCE & NEXT CENTURY CITIES, RS FIBER: FERTILE FIELDS FOR NEW RURAL INTERNET COOPERATIVE 10–12 (2016) (providing an overview of the structure and development of a multi-municipality broadband cooperative in rural Minnesota).

⁴⁵ Jay Schwarz, Wireline Advisor to FCC Chairman Ajit Pai, FCC, Remarks at the 2018 CEO Close-Up Conference of the National Rural Electric Cooperative Association 2–3 (Jan. 8, 2018). *See generally* Cecilia Kang, *How to Give Rural America Broadband? Look to the Early 1900s*, N.Y. TIMES (Aug. 7, 2016), <https://www.nytimes.com/2016/08/08/technology/how-to-give-rural-america-broadband-look-to-the-early-1900s.html> (discussing the emergence of utility cooperatives as broadband providers).

⁴⁶ KRUGER & GILROY, MUNICIPAL BROADBAND: BACKGROUND AND POLICY DEBATE, at 2. This was not always the case, however. In the mid-2000s, several major cities—Philadelphia, Chicago, Houston, and San Francisco, among others—contracted with Earthlink, a small private ISP, to build citywide wireless networks. John Blevins, *Death of the Revolution: The Legal War on Competitive Broadband Technologies*, 12 YALE J.L. & TECH. 86, 104–06 (2009). Unfortunately, these projects were scuttled due to a combination of “unduly restrictive” contracts and Earthlink’s inability to deliver on its promises. Christopher Teters, *Municipal Broadband in Kansas: The Fight for Community Manifest Destiny*, 25 KAN. J.L. & PUB. POL’Y 89, 103 (2015).

⁴⁷ EXEC. OFFICE OF THE PRESIDENT, *supra* note 24, at 13, 20–33.

(EPB) network in Chattanooga, Tennessee,⁴⁸ the Greenlight network in Wilson, North Carolina,⁴⁹ and the BVU Authority in Bristol, Virginia.⁵⁰

The most compelling argument in support of municipal broadband networks is that they can bridge the “digital divide” in underserved communities where private ISPs are either unwilling or unable to provide broadband services.⁵¹ Furthermore, municipal broadband services can offer the benefits of competition by providing an alternative in the vast majority of communities that only have one broadband provider.⁵² For example, in Wilson, North Carolina, Time Warner Cable responded to the creation of a municipal broadband network by holding rates steady, while they increased rates in neighboring service areas without a second provider option.⁵³ Finally, proponents argue that municipal broadband can bridge the financial digital divide—the access gap defined by socioeconomic status, as opposed to the previously discussed geographic digital divide—by providing low-income residents access to affordable broadband services without the profitability constraints of a private ISP.⁵⁴

Opponents principally rely on two somewhat counterintuitive arguments.⁵⁵ First, opponents of municipal broadband networks claim that the government is incapable of providing broadband services more efficiently than the private sector.⁵⁶ Second, these opponents argue that due to the government’s regulatory advantages, the private sector would be crowded out by their entrance into the broadband market.⁵⁷ On the government capability argument, opponents point to prominent municipal broadband failures, like those in Philadelphia⁵⁸ and St. Cloud, Florida,⁵⁹ which demonstrate that building out a broadband network can be a high-risk venture with the potential of wasting millions of taxpayer dollars.⁶⁰ Additionally, broadband technology’s rapid development poses a

⁴⁸ *Id.* at 13–14.

⁴⁹ *Id.* at 14–15.

⁵⁰ Teters, *supra* note 46, at 100.

⁵¹ KRUGER & GILROY, MUNICIPAL BROADBAND: BACKGROUND AND POLICY DEBATE, at 5; *see also* Anthony Sciarra, *Municipal Broadband: The Rush to Legislate*, 17 ALB. L.J. SCI. & TECH. 233, 255–57 (2007) (explaining how municipal broadband can improve service in the long run by filling service gaps in the short-run and increasing competition).

⁵² KRUGER & GILROY, MUNICIPAL BROADBAND: BACKGROUND AND POLICY DEBATE, at 4.

⁵³ EXEC. OFFICE OF THE PRESIDENT, *supra* note 24, at 15. Time Warner Cable also increased the broadband speeds they offered, “because of the competitive environment.” *Id.*

⁵⁴ KRUGER & GILROY, MUNICIPAL BROADBAND: BACKGROUND AND POLICY DEBATE, at 4.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Teters, *supra* note 46.

⁵⁹ *Id.*

⁶⁰ KRUGER & GILROY, MUNICIPAL BROADBAND: BACKGROUND AND POLICY DEBATE, at 4.

unique challenge for government entities, which lack the flexibility of the private sector in adopting new technologies due to cost and bureaucratic constraints.⁶¹ On the competition side, opponents argue that municipal broadband networks have inherent advantages over private ISPs, including ease of avoiding regulatory burdens and access to public capital.⁶² They further argue that government investments in broadband infrastructure would create disincentives for private investment in that same infrastructure, ultimately leading to even greater costs for the taxpayer.⁶³

C. State Legislative Efforts to Restrict Municipal Broadband

Today, nineteen states have some form of law that restricts the ability of municipalities to establish broadband networks.⁶⁴ These legislative restrictions have often been the result of substantial lobbying efforts by private ISPs, who would prefer not to compete with municipal broadband networks.⁶⁵ The American Legislative Exchange Council (ALEC), a free-market advocacy group, has developed a model that has inspired many of the recent laws restricting municipal broadband.⁶⁶ ALEC's model legislation includes four major prongs to protect private sector ISPs and local taxpayers.⁶⁷ First, the ALEC model proposes that municipalities should not be able to cross-subsidize its broadband network from any other municipal funds.⁶⁸ Second, it recommends that before establishing a municipal broadband network, the proposal should be subject to a substantial deliberative process that prioritizes public-private partnerships and mandates public hearings and referenda.⁶⁹ Third, the model proposes that municipal broadband networks should not be provided any

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Community Network Map*, *supra* note 7. The nineteen states include the following: Alabama, Arkansas, Colorado, Florida, Louisiana, Michigan, Minnesota, Missouri, Nebraska, Nevada, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. *Id.*

⁶⁵ *See* Blevins, *supra* note 46, at 109 (discussing the "intensive lobbying effort in multiple states to enact further restrictions on municipal entry into the broadband market"); Stricker, *supra* note 38, at 598 (describing efforts by private ISPs in Wisconsin and Pennsylvania to pass legislation restricting municipal broadband projects).

⁶⁶ *About ALEC*, AM. LEGIS. EXCHANGE COUNCIL, <http://www.alec.org/about/> (last visited Oct. 20, 2018); Jon Brodtkin, *ISP Lobby Has Already Won Limits on Public Broadband in 20 States*, ARS TECHNICA (Feb. 12, 2014, 7:00 AM), <https://arstechnica.com/tech-policy/2014/02/isp-lobby-has-already-won-limits-on-public-broadband-in-20-states/>.

⁶⁷ *Principles on Municipal/Government Owned Networks*, AM. LEGIS. EXCHANGE COUNCIL (May 5, 2017), <https://www.alec.org/model-policy/municipal-telecommunications-private-industry-safeguards-act/>.

⁶⁸ *Id.*

⁶⁹ *See id.* (describing principles to encourage public participation in the deliberative process).

advantages not available to private ISPs.⁷⁰ Finally, it suggests that municipal broadband networks must be thoroughly transparent as to their finances and make all records available for public review.⁷¹

In practice, these statutes vary in structure and effect from state to state.⁷² Four states—Arkansas, Missouri, Nebraska, and Texas—have complete bans on municipalities establishing broadband networks.⁷³ Most restrictions on municipal broadband raise entry costs through a variety of methods, including public referenda requirements and limits on funding mechanisms.⁷⁴ Some scholars have noted that some of these existing restrictions, while facially applicable to broadband, do not apply to municipal broadband networks in practice.⁷⁵ In Arkansas, for example, several municipalities have experimented with wireless municipal networks, despite the purported ban on such activities.⁷⁶

II. SECTION 706 AND THE FCC’S 2015 PREEMPTION ORDER

The Telecommunications Act of 1996 was the first major change to the nation’s communications law since the passage of the Communications Act of 1934.⁷⁷ Its passage reflected the understanding that emerging telecommunications technology would present both new opportunities for users and challenges for regulators.⁷⁸ Section 706 of the Act, titled “[a]dvanced telecommunications incentives,” serves as the primary source of FCC authority to regulate broadband technology.⁷⁹ This Part proceeds in two sections. Section A examines the grant of regulatory authority over broadband technology granted by Section 706 of the Telecommunications Act of 1996. Section B then describes and analyzes the FCC’s exercise of this power to preempt the restrictive municipal broadband statutes in North Carolina and Tennessee in its 2015 order.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Blevins, *supra* note 46, at 109.

⁷³ Stricker, *supra* note 38, at 608.

⁷⁴ Blevins, *supra* note 46, at 109–10.

⁷⁵ *Id.* at 111.

⁷⁶ *Id.*

⁷⁷ ANGELE A. GILROY, CONG. RESEARCH SERV., 96–223, THE TELECOMMUNICATIONS ACT OF 1996 (P.L. 104-104): A BRIEF OVERVIEW 1 (1998).

⁷⁸ *Id.*

⁷⁹ 47 U.S.C. § 1302(a) (2012).

A. *Section 706 of the Telecommunications Act of 1996*

Congress passed the Telecommunications Act of 1996 to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”⁸⁰ Section 706 of the Act instructs the FCC to act as follows:

[E]ncourage 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.⁸¹

It further instructs the FCC to undertake an annual study to “determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion,” and if not, “it shall take immediate action to accelerate deployment . . . by removing barriers to infrastructure investment.”⁸²

Section 706 defines advanced communications capability “as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”⁸³ The FCC retains the authority to interpret “the meaning of terms such as advanced, high-speed, and high-quality.”⁸⁴ The FCC has explained that it believes Congress intended that it define “advanced” based on the demands and needs of users, rather than a technological baseline, and thus it has taken a holistic approach that defines advanced by the speeds available to users.⁸⁵

In 1998, the FCC determined that “in light of the statutory language, the framework of the 1996 Act, its legislative history, and Congress’[s] policy objectives . . . Section 706 [did] not constitute an independent grant of authority.”⁸⁶ This interpretation was revised in the Commission’s 2010 Open

⁸⁰ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

⁸¹ 47 U.S.C. § 1302(a).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ FCC 2016 Broadband Progress Report, 31 FCC Rcd. 699, 705 (2016).

⁸⁵ *Id.*; *see supra* Section I.A.

⁸⁶ Deployment of Wireline Servs. Offering Advanced Telecomm. Capability, 13 FCC Rcd. 24,012, 24,047 (1998).

Internet Order, when it held that “Section 706(a) authorizes [it] . . . to take actions . . . that encourage the deployment of advanced telecommunications capability by any of the means listed in the provision.”⁸⁷ The D.C. Circuit upheld this new interpretation in *Verizon v. FCC*, holding that it was reasonable to conclude that Congress intended Section 706(a) to be an affirmative grant of authority to regulate broadband.⁸⁸ The court emphasized the importance of two limiting principles outlined by the FCC in the Open Internet Order.⁸⁹

The first principle mandates that Section 706 “must be read in conjunction with other provisions of the Communications Act, including, most importantly, those limiting the Commission’s subject matter jurisdiction to ‘interstate and foreign communication by wire and radio.’”⁹⁰ The second principle requires that “any regulations must be designed to achieve a particular purpose: to ‘encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.’”⁹¹

As a somewhat distinct matter, the Open Internet Order elaborates that Section 706(b) of the Act can also serve as an independent grant of authority if the FCC determines that advanced telecommunications services are not being deployed in a reasonable and timely fashion to all Americans.⁹² In 2010, the FCC determined that broadband had not been deployed in a reasonable and timely manner, and that the Section 706(b) powers had been triggered providing “express authority for . . . pro-investment, pro-competition rules.”⁹³ The D.C. Circuit upheld this interpretation, finding that “the provision may certainly be read to accomplish as much, and given such ambiguity we have no basis for rejecting the Commission’s determination that it should be so understood,” provided that the two limiting principles apply to Section 706(b) as well.⁹⁴

⁸⁷ Pres. the Open Internet: Broadband Indus. Practices, 25 FCC Rcd. 17,905, 17,969 (2010).

⁸⁸ 740 F.3d 623, 639 (D.C. Cir. 2014).

⁸⁹ *Id.* at 640.

⁹⁰ *Id.* (quoting 47 U.S.C. § 152(a) (2012)).

⁹¹ *Id.* (quoting 47 U.S.C. § 1302(a) (2012)).

⁹² Pres. the Open Internet: Broadband Indus. Practices, 25 FCC Rcd. at 17,972.

⁹³ *Id.* In its 2018 Broadband Deployment Report, the FCC found for the first time since 2010 “that advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.” FCC 2018 Broadband Deployment Report, 33 FCC Rcd. 1660, 1707 (2018). This finding was based on the policy changes that the FCC has made since the issuance of the 2016 Broadband Progress Report, rather than statistical findings from its deployment analysis. *Id.* While this positive finding means that the Section 706(b) grant of authority has theoretically been deactivated, this change does not affect this Comment’s retrospective analysis.

⁹⁴ *Verizon v. FCC*, 740 F.3d 623, 641 (D.C. Cir. 2014).

B. *FCC Order City of Wilson, North Carolina*

It is with this understanding of Section 706 that the FCC issued its 2015 order preempting two state statutes restricting municipal broadband. This order was issued in response to petitions from the EPB of Chattanooga, Tennessee and the City of Wilson, North Carolina asking that the FCC preempt restrictive statutes limiting their existing services.⁹⁵ This section will proceed by providing a brief overview of the services provided by these respective municipal broadband networks and of the laws in question in Tennessee and North Carolina. It will then examine the order issued by the FCC, including the arguments presented by the two dissenting commissioners from the five-member panel.

1. *EPB, Chattanooga, Tennessee*

The EPB began building out its fiber network in 1996 to improve the capabilities of its existing electric grid and begin offering Internet service to its customers.⁹⁶ By deploying broadband in conjunction with its electric smart grid,⁹⁷ EPB was able to take advantage of efficiency gains, share costs between the two systems, and raise additional revenue.⁹⁸ EPB first offered fiber services in 2009, and in 2010 was the first broadband provider in the nation to offer gigabit service to all its customers.⁹⁹ EPB claims that the expansion of its broadband services has created thousands of new jobs and attracted large corporations, such as Amazon and Volkswagen, to the Chattanooga area.¹⁰⁰ EPB also highlights the benefits to local schools, which all have 100 Mbps Internet speeds through EPB, and public libraries, which have become a model for libraries nationwide.¹⁰¹

Tennessee law currently allows municipal electric systems to provide Internet service, but prohibits them from offering these services in areas where they do not provide electric service.¹⁰² However, these same municipal electric

⁹⁵ City of Wilson, North Carolina, 30 FCC Red. 2408, 2414 (2015) (mem. op. and order).

⁹⁶ *Id.* at 2416.

⁹⁷ “Smart grid” refers to the newest generation of electricity infrastructure. Smart grid systems incorporate two-way communications technology, control systems, and computer processing to better monitor electricity and rapidly respond to problems. OFFICE OF ELEC., DEP’T OF ENERGY, GRID MODERNIZATION AND THE SMART GRID, <https://energy.gov/oe/activities/technology-development/grid-modernization-and-smart-grid> (last visited Oct. 20, 2018).

⁹⁸ *City of Wilson*, 30 FCC Red. at 2416.

⁹⁹ *Id.*; see *supra* Section I.B.

¹⁰⁰ *City of Wilson*, 30 FCC Red. at 2417.

¹⁰¹ *Id.* at 2418.

¹⁰² *Id.* at 2419.

systems have the authority to offer other telecommunications services anywhere in the state, regardless of their electric service territories.¹⁰³ EPB explained in its preemption request that it receives frequent requests to expand its broadband network to neighboring communities, which it argues are in “a digital desert.”¹⁰⁴ Thus, while EPB wanted to expand its broadband services to these neighboring communities, it was prohibited from doing so, even though Tennessee law allows it to provide telecommunications services to these same communities.¹⁰⁵ As such, EPB asked the FCC to preempt the phrase “within its service area” in the relevant Tennessee statute, allowing it to expand the service area for its broadband product.¹⁰⁶

2. *Greenlight, Wilson, North Carolina*

The City of Wilson began exploring options for construction of its own municipal broadband network in the 1990s in response to local “complaints about the high cost and low quality of available voice and video services.”¹⁰⁷ Wilson began its municipal broadband network by constructing a “fiber optic backbone connecting all City-owned facilities” in 2005, which was later expanded into a network offering service directly to consumers called Greenlight.¹⁰⁸ Wilson credits the creation of Greenlight with a variety of economic benefits, including reduced Internet prices for local residents, savings in government expenses, and widespread usage of the network in Wilson’s business community.¹⁰⁹ Notably, Wilson attributes the competition from its municipal broadband network with holding broadband prices from private ISPs steady, while prices increased for neighboring communities.¹¹⁰

The North Carolina legislature passed H.B. 129 in 2011 to limit the ability of municipalities to establish broadband networks.¹¹¹ The bill was the subject of intensive lobbying efforts, with Time Warner Cable, CenturyLink, and AT&T spending over \$1 million collectively to push the measure through.¹¹² The statute contains a panoply of restrictions on municipal broadband networks, which the FCC grouped into three general categories: measures to raise economic costs,

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 2423.

¹⁰⁷ *Id.* at 2423–24.

¹⁰⁸ *Id.* at 2424.

¹⁰⁹ *Id.*

¹¹⁰ EXEC. OFFICE OF THE PRESIDENT, *supra* note 24, at 15.

¹¹¹ *City of Wilson*, 30 FCC Rcd. at 2425–26.

¹¹² *Id.* at 2426.

“level playing field” obligations, and measures to impose delay.¹¹³ The measures to raise economic costs included prohibitions on pricing services below cost, requirements that they impute the costs typically encountered by private ISPs, and geographic limits on the service area.¹¹⁴ The level playing field obligations essentially prohibit the municipality from doing anything to support its broadband network without also offering that same service to private ISPs.¹¹⁵ Finally, the measures to impose delay require the municipality to conduct feasibility studies, hold hearings on those studies, hold referenda on incurring debt to finance the projects, and solicit proposals from private businesses to provide the services.¹¹⁶ The City of Wilson’s already existing network was grandfathered in under H.B. 129, but the statute prohibits the City from providing broadband services in neighboring communities where it already provides electricity.¹¹⁷ Wilson requested that the FCC preempt H.B. 129 by finding that it served “to thwart or unreasonably delay broadband investment and competition.”¹¹⁸

3. *The FCC Takes Action*

In February 2015, the FCC adopted the *City of Wilson, North Carolina* order in response to these two petitions on a three-to-two party-line vote.¹¹⁹ The three Democratic commissioners—Chairman Wheeler, Commissioner Clyburn, and Commissioner Rosenworcel—voted for the order granting in whole the petition from EPB and granting in part the petition from the City of Wilson.¹²⁰ The two Republican commissioners—Commissioner Pai and Commissioner O’Rielly—dissented and issued separate statements explaining their opposition.¹²¹ This section first describes the arguments laid out in the FCC’s holding and then turns to the arguments advanced by the two dissenting commissioners.

¹¹³ *Id.* at 2447–51.

¹¹⁴ *Id.* at 2447–48.

¹¹⁵ *Id.* at 2448.

¹¹⁶ *Id.* at 2449–50.

¹¹⁷ *Id.* at 2427.

¹¹⁸ *Id.* at 2430.

¹¹⁹ *Id.* at 2408. The FCC is composed of five commissioners appointed by the President for a term of five years; no more than three commissioners may be members of the same political party. 47 U.S.C. § 154 (2012). Historically, most votes on FCC orders were unanimous. Scott Wallsten, *The Partisan FCC*, TECH. POL’Y INST. (Feb. 16, 2016), <https://techpolicyinstitute.org/2016/02/16/the-partisan-fcc/>. However, under Chairman Wheeler, FCC votes became increasingly partisan, with Democratic Commissioners Wheeler, Clyburn, and Rosenworcel in opposition to Republican Commissioners Pai and O’Rielly. *Id.*

¹²⁰ *City of Wilson*, 30 FCC Rcd. at 2408.

¹²¹ *Id.* at 2506 (Pai, Comm’r, dissenting); *id.* at 2519 (O’Rielly, Comm’r, dissenting).

a. Reasoning of the Order

In the order, the FCC explained both the legal reasoning for its power to preempt state laws regulating the provision of broadband services by a state's municipal subdivisions under Section 706 and applied that reasoning to the laws challenged in the two petitions.¹²² The FCC employed a three-step argument to demonstrate its preemptory powers. First, the majority asserted that Congress granted the FCC broad authority to regulate broadband in Section 706 and affirmatively mandated that they take action to ensure deployment of broadband by removing barriers to broadband infrastructure investment and promoting competition.¹²³ Second, the majority explained that since Congress had granted the FCC broad authority to act in this sphere, the FCC can “preempt state laws regarding interstate communication where they conflict with federal communications policy” consistent with their other powers.¹²⁴

Finally, the FCC reasoned that it could preempt state laws regulating the provision of broadband services by their political subdivisions when those laws meet two independent criteria.¹²⁵ The first criterion is that the law must effectuate communications policy, which falls under the jurisdiction of the FCC for regulatory purposes, rather than merely exercising a state's core power over its political subdivisions.¹²⁶ Thus, the FCC cannot require a state to grant a political subdivision authority to provide broadband services, as that would be a matter of the state's core power over its political subdivisions.¹²⁷ However, once a state has granted a subdivision authority to provide broadband services, the state policy must be consistent with federal communications policy.¹²⁸ The second criterion, informed by the congressional mandate in Section 706, is that the law must serve as a barrier to broadband infrastructure investment or be an impediment to competition.¹²⁹

Applying this legal analysis to the challenged laws, the FCC concluded that preemption would remove barriers to broadband infrastructure investment and promote competition in the broadband market.¹³⁰ First, the FCC found that EPB and the City of Wilson had invested in broadband infrastructure in their

¹²² *Id.* at 2463 (majority opinion).

¹²³ *Id.* at 2466–67.

¹²⁴ *Id.* at 2469.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 2470.

¹²⁸ *Id.*

¹²⁹ *Id.* at 2469.

¹³⁰ *Id.* at 2430.

respective communities in response to market failures on the part of private ISPs.¹³¹ In the absence of these statutory limits on the exercise of their existing authority to provide broadband services, EPB and the City of Wilson had indicated an intention to invest in broadband infrastructure to begin serving neighboring communities that continued to suffer from those same market failures.¹³² Further, the FCC found that the entrance of EPB and the City of Wilson into the broadband market had spurred a “virtuous cycle of competition,” which prompted private ISPs to improve the quality of their services and reduce rates for customers.¹³³

The FCC also responded to the policy arguments that preemption would be anti-competitive and that municipal broadband projects are prone to failure.¹³⁴ In this instance, the FCC argued, the anti-competitive concerns were not applicable, as both EPB and the City of Wilson had initiated their broadband services in response to market failures, investing where private ISPs had elected not to.¹³⁵ Similarly, they reasoned that the fears of municipal broadband failure were not applicable to the EPB or City of Wilson petitions, since both services were financially sound.¹³⁶

b. Reasoning of the Dissent

The two dissenting commissioners—Commissioner Pai and Commissioner O’Rielly—issued independent statements, but both relied on the same three major arguments.¹³⁷ First, the dissenting commissioners argued that the distinction the FCC created between laws that effectuate communications policy and those that deal with core powers of state authority over their municipal subdivisions is untenable.¹³⁸ Both pointed out that this distinction yields an absurd result: the FCC has no power to preempt a state law that completely denies a political subdivision the authority to provide broadband services, but a state would “relinquish [its] absolute discretion simply by affording a

¹³¹ *Id.* at 2431.

¹³² *Id.*

¹³³ *Id.* at 2433–35.

¹³⁴ *Id.* at 2435–37.

¹³⁵ *Id.* at 2433.

¹³⁶ *Id.* at 2438–39.

¹³⁷ *See id.* at 2519 (O’Rielly, Comm’r, dissenting). Commissioner O’Rielly also expressed his “profound opposition” to the concept of any government entity offering broadband services, comparing it to economic practices in Cuba, China, Russia, and Venezuela. *Id.* However, this policy position is not central to the legal arguments in his dissent. *Id.*

¹³⁸ *Id.* at 2511 (Pai, Comm’r, dissenting); *id.* at 2520 (O’Rielly, Comm’r, dissenting).

municipality some, rather than plenary, authority to offer broadband service.”¹³⁹ As both asserted that these laws do involve matters of core state sovereignty, they argued that there must be a clear statement of congressional intent to grant this authority, per the holding in *Nixon v. Missouri Municipal League*.¹⁴⁰

Commissioners Pai and O’Rielly further argued that Section 706 does not grant the FCC any preemptory authority.¹⁴¹ Commissioner Pai highlighted Section 601(c)(1) of the Act, which states that the Act should not be construed to “modify, impair, or supersede Federal, State, or local law” unless expressly provided.¹⁴² Turning to the provisions of Section 706, Commissioner Pai argued that each of the provisions are constructed in such a way to make it unlikely that Congress intended to convey preemptory authority.¹⁴³ Commissioner Pai also interpreted the legislative history of the statute to suggest that the removal of an explicit grant of preemption authority indicated that Congress did not intend to grant any preemption authority.¹⁴⁴

Finally, both commissioners argued that Section 706 does not grant the FCC any independent authority whatsoever.¹⁴⁵ Despite the apparently affirmative language instructing the FCC to take action to encourage broadband deployment, both dissenting commissioners argued that the language of Section 706 does not expressly grant the FCC power to engage in rulemaking, order conduct, or enforce compliance and is therefore “hortatory” in nature.¹⁴⁶ This argument is contradicted by the D.C. Circuit’s holding in *Verizon v. FCC*, discussed above, where the court upheld the Commission’s interpretation that Section 706 contained an affirmative grant of power.¹⁴⁷

¹³⁹ *Id.* at 2509 (Pai, Comm’r, dissenting).

¹⁴⁰ *Id.* at 2507; *id.* at 2521 (O’Rielly, Comm’r, dissenting); *see infra* Section III.A.

¹⁴¹ *City of Wilson*, 30 FCC Red. at 2511 (Pai, Comm’r, dissenting); *id.* at 2520 (O’Rielly, Comm’r, dissenting).

¹⁴² *Id.* at 2512 (Pai, Comm’r, dissenting).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 2513–14. *But see* Lee Dean Whatling, Note, *Tennessee v. FCC and the Clear Statement Rule*, 51 GA. L. REV. 947, 966 (2017) (arguing that removal of explicit preemption language from Section 706 could have resulted from legislative drafters’ incomplete understanding of the clear statement rule).

¹⁴⁵ *City of Wilson*, 30 FCC Red. at 2514 (Pai, Comm’r, dissenting); *id.* at 2520 (O’Rielly, Comm’r, dissenting).

¹⁴⁶ *Id.* at 2514–15 (Pai, Comm’r, dissenting); *id.* at 2519–20 (O’Rielly, Comm’r, dissenting).

¹⁴⁷ *Verizon v. FCC*, 740 F.3d 623, 639 (D.C. Cir. 2014). As a brief aside, the two Republican commissioners at the time—Robert McDowell and Meredith Attwell Baker—also opposed the notion that Section 706 granted any regulatory authority to the FCC. Pres. the Open Internet: Broadband Indus. Practices, 25 FCC Red. 17,905, 18,052 (2010) (McDowell, Comm’r, dissenting); *id.* at 18,093 (Attwell Baker, Comm’r, dissenting).

III. ADOPTING A NARROWER APPLICATION OF THE CLEAR STATEMENT RULE

The Sixth Circuit overturned the FCC's preemption order in 2016, finding that the FCC's preemption order dealt with an issue of core state sovereignty, and therefore the FCC required a clear statement of congressional intent before it could act.¹⁴⁸ The majority declined to address a number of questions, including whether Congress could act in this policy sphere and whether Section 706 granted the FCC any preemption authority.¹⁴⁹ However, in her partial dissent, Judge White argued that Congress could act in this sphere, that Section 706 did confer preemption authority on the FCC, and that the court should apply a narrower reading of the clear statement rule to uphold preemption of those laws that exclusively effectuate communications policy.¹⁵⁰

Pursuant to its Commerce Clause powers, Congress created the FCC “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio.”¹⁵¹ By enacting the 1996 Telecommunications Act, Congress plainly delegated to the FCC the authority to take action with regards to broadband technology to “promote competition in the local telecommunications market [and] remove barriers to infrastructure investment.”¹⁵² As such, the courts should apply a narrower reading of the clear statement rule, as suggested by Judge White. This narrower application of the clear statement rule would have directed the Sixth Circuit to uphold the FCC's exercise of its preemption power to promote competition and remove barriers to infrastructure investment in the broadband market as it applies to those state laws that exclusively effectuate communications policy.¹⁵³

This Part proceeds in four sections. Section A analyzes the Sixth Circuit's holding in *Tennessee v. FCC*, including the partial dissent from Judge White that this Comment proposes should be adopted. This Part then addresses two of the questions left unanswered by the Sixth Circuit's majority holding. Section B establishes that Congress has the authority to regulate broadband technology and section C demonstrates that the affirmative grant of power in Section 706 includes preemption authority. Finally, section D argues that the narrower application of the clear statement rule suggested by Judge White better comports

¹⁴⁸ *Tennessee v. FCC*, 832 F.3d 597, 610 (6th Cir. 2016); see *infra* note 191 and accompanying text.

¹⁴⁹ *Tennessee*, 832 F.3d at 613–14.

¹⁵⁰ *Id.* at 614 (White, J., concurring in part and dissenting in part).

¹⁵¹ 47 U.S.C. § 151 (2012).

¹⁵² 47 U.S.C. § 1302(a) (2012).

¹⁵³ See *Tennessee*, 832 F.3d at 615 (White, J., concurring in part and dissenting in part). *Contra id.* at 610 (majority opinion).

with congressional intent and assuages some of the concerns raised by dissenting justices in earlier clear statement rule cases.

A. *The Sixth Circuit's Decision in Tennessee v. FCC*

After the FCC issued the order preempting the North Carolina and Tennessee laws, North Carolina filed an appeal to the Fourth Circuit and Tennessee filed an appeal to the Sixth Circuit.¹⁵⁴ The cases were consolidated in the Sixth Circuit, which ultimately vacated the FCC's preemption order.¹⁵⁵

Petitioners argued that the order violated the Tenth Amendment by infringing on the states' right to determine the boundaries of their political subdivisions.¹⁵⁶ Further, they reasoned that even if Congress did have the authority to redefine the authority of a state's political subdivisions, Section 706 does not contain a clear statement of that intent as required by *Gregory v. Ashcroft* and applied in *Nixon v. Missouri Municipal League*.¹⁵⁷ The FCC argued that its preemption order affected only statutes that effectuated communications policy contrary to federal communications policy, and therefore it did not affect any issues of state sovereignty over political subdivisions.¹⁵⁸

This section proceeds by first providing an overview of the Sixth Circuit's holding, including a discussion of the principal precedent relied on by the court in *Nixon v. Missouri Municipal League*. It then turns to and advocates for the adoption of the partial dissent from Judge White, which accepted the FCC's distinction between statutes that effectuate communications policy versus those that deal with core sovereign authority.

1. *The Majority's Holding*

The Sixth Circuit's decision in *City of Wilson* rested primarily on the Supreme Court's holding in *Nixon v. Missouri Municipal League*.¹⁵⁹ The *Nixon* case mirrored the case before the court in many ways, but dealt with a different part of the 1996 Telecommunications Act.¹⁶⁰ Section 101(a) of the Act authorized the FCC to preempt "state and local laws and regulations expressly or effectively prohibiting the ability of any entity to provide telecommunications

¹⁵⁴ *Id.* at 609 (majority opinion).

¹⁵⁵ *Id.* at 609–10.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 610; *see infra* Section III.A.1.

¹⁵⁸ *Tennessee*, 832 F.3d at 611.

¹⁵⁹ *Id.* at 610.

¹⁶⁰ *Id.* at 610–11.

services.”¹⁶¹ Relying on this Section of the Act, the Missouri Municipal League petitioned the FCC to preempt a Missouri law which prohibited the state’s political subdivisions from providing or offering for sale any telecommunications services.¹⁶² The FCC declined to preempt the Missouri statute after determining that the phrase “any entity” was not meant to include political subdivisions of a state.¹⁶³ The Missouri Municipal League appealed to the Eighth Circuit, which reversed the FCC’s decision, holding that the phrase “any entity” did contemplate political subdivisions.¹⁶⁴

The Supreme Court subsequently overturned the Eighth Circuit’s decision, applying the clear statement rule enunciated in *Gregory v. Ashcroft*¹⁶⁵ to hold that “any entity” was not sufficiently clear to interpose the federal government between a state and its political subdivisions and justify the anomalous results this interpretation would create.¹⁶⁶ In *Gregory*, two Missouri state judges challenged the state’s mandatory retirement provision on the grounds that it violated the federal Age Discrimination in Employment Act (ADEA).¹⁶⁷ The Court held that applying ADEA to redefine the requirements for the state’s constitutional officers would “upset the usual constitutional balance of federal and state powers.”¹⁶⁸ Thus, to rule that ADEA preempted the mandatory retirement provision, the Court required that there be an unmistakably clear statement of Congress’s intent to do so in the statute.¹⁶⁹ This principle became the clear statement rule that the Court then applied in *Nixon v. Missouri Municipal League*.¹⁷⁰

The Court in *Nixon* highlighted three anomalous byproducts that upholding the Eighth Circuit’s interpretation would produce.¹⁷¹ First, the Court found in the absence of a state prohibition on municipal telecommunications services, such as Missouri’s, municipalities would still require an affirmative grant of power from the state to provide telecommunications services and therefore preemption would not have any practical effect.¹⁷² Further, the Court held that

¹⁶¹ *Nixon v. Mo. Mun. League*, 541 U.S. 125, 128 (2004).

¹⁶² *Id.* at 129.

¹⁶³ *Id.* at 130.

¹⁶⁴ *Id.* at 131.

¹⁶⁵ 501 U.S. 452, 470 (1991) (citing *EEOC v. Wyoming*, 460 U.S. 226, 244 n.18 (1983)).

¹⁶⁶ *Nixon*, 541 U.S. at 138.

¹⁶⁷ 501 U.S. at 455–56.

¹⁶⁸ *Id.* at 460.

¹⁶⁹ *Id.*

¹⁷⁰ 541 U.S. at 140–41.

¹⁷¹ *Id.* at 138.

¹⁷² *Id.* at 135.

preemption would “treat States differently depending on the formal structures of their laws authorizing municipalities to function.”¹⁷³ Finally, the Court decided that preemption would create a “national crazy quilt” that “would result not from free political choices[,]” but from conflicts between federal preemption authority and municipal authority.¹⁷⁴ Justice Stevens dissented, arguing that “any entity” plainly encompassed municipal-run utilities, and the Court’s decision should therefore be based solely on the law before it rather than a series of hypotheticals used to illustrate the potential for an absurd result.¹⁷⁵

The Sixth Circuit found that the fact pattern in *Nixon* was sufficiently analogous to require that the clear statement rule apply in *Tennessee v. FCC*.¹⁷⁶ Like the statute at issue in *Nixon*, the statutes in Tennessee and North Carolina defined the powers of the states’ political subdivisions, even if they also effectuated communications policy.¹⁷⁷ Furthermore, allowing the FCC to preempt these statutes would have had similar results to the proposed preemption in *Nixon*.¹⁷⁸ By preempting these statutes, the FCC would create an anomalous situation whereby a state could completely ban a political subdivision from providing broadband services, but once that state opened the door to municipal broadband, it could have no influence on broadband implementation.¹⁷⁹ Additionally, the court found that without this anomalous result, the clear statement rule would still be triggered, as preemption would interpose federal regulators between the state and its political subdivisions.¹⁸⁰

Turning to the language of Section 706, the Sixth Circuit held that it does not contain a clear statement authorizing preemption of state laws regulating the provision of broadband services by its municipal subdivisions.¹⁸¹ The court found that the language of Section 706 was unclear regarding whether infrastructure investment referred to both public and private infrastructure, or merely private infrastructure.¹⁸² Additionally, it reasoned that the reference to promoting competition was not a directive to preempt “a state’s allocation of powers between itself and its subdivisions.”¹⁸³ Once again, comparing to the

¹⁷³ *Id.* at 138.

¹⁷⁴ *Id.* at 136.

¹⁷⁵ *Id.* at 148 (Stevens, J., dissenting).

¹⁷⁶ *Tennessee v. FCC*, 832 F.3d 597, 611 (6th Cir. 2016).

¹⁷⁷ *Id.* at 611.

¹⁷⁸ *Id.* at 610–11.

¹⁷⁹ *Id.* at 611.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 613.

¹⁸² *Id.*

¹⁸³ *Id.*

statute at issue in *Nixon*, the court held that the “any entity” language, which the Supreme Court had held did not encompass public utilities, was broader than the language at issue in Section 706. As a result, preemption was not authorized under the Act.¹⁸⁴

Importantly, the Sixth Circuit limited its holding to this issue. The court did not question the policy rationale asserted by the FCC in favor of municipal broadband expansion and emphasized that it did not address the following legal questions:

- (1) [W]hether § 706 provides the FCC any preemptive power at all[;]
- (2) whether Congress, if it is clear enough, could give the FCC the power to preempt as it did in this case[;]
- (3) whether, if the FCC had such power, its exercise of it was arbitrary or capricious in this case[;]
- and (4) whether and to what extent the clear statement rule would apply to FCC preemption if a State required its municipality to act contrary to otherwise valid FCC regulations.¹⁸⁵

The court’s decision to refrain from addressing these issues left open many questions about the extent of the FCC’s power under Section 706 and the future efforts by the federal government to expand municipal broadband. This Comment discusses these ambiguous issues in greater detail in the remainder of Part III.

2. *The Argument from the Partial Dissent*

Judge White issued a partial dissent in which she agreed with many of the conclusions from the FCC order.¹⁸⁶ First, she concluded that Section 706 was an affirmative grant of preemptory power if state laws acted as a barrier to infrastructure investment and competition.¹⁸⁷ Judge White concurred with the majority that the clear statement rule, as applied in *Nixon*, applies to actions taken by the FCC that would interfere with a state’s authority to define the powers of its political subdivisions.¹⁸⁸ She further concurred that in many cases, a statute can both effectuate communications policy and address a state’s power over its political subdivisions.¹⁸⁹ In cases that deal with both a core state interest and effectuate communications policy, such as Tennessee’s territorial limitations on the provision of broadband services, *Nixon* requires that the FCC’s

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 613–14.

¹⁸⁶ *Id.* at 614–15 (White, J., concurring in part and dissenting in part).

¹⁸⁷ *Id.* at 614.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

authority come from a clear statement of congressional intent, even if the communications policy is paramount.¹⁹⁰

However, Judge White argued that there is an actual distinction between statutes that effectuate a communications policy and those that deal with a state's core sovereign powers.¹⁹¹ Judge White agreed with the FCC's conclusion that some of these statutes solely effectuated communications policy.¹⁹² For example, she argued that North Carolina's provisions, which required municipalities to impute costs that would traditionally be encountered by private ISPs, were solely an expression of communications policy and had little to do with the state's sovereign power over its political subdivisions.¹⁹³ Judge White concluded that since the provisions concerned exclusively regulatory and commercial matters, Section 706 granted the FCC the authority to preempt them.¹⁹⁴ This distinction leaves open the question of how the FCC should distinguish between statutes that are exclusively regulatory and commercial versus those with a dual purpose, and whether those determinations would be granted any judicial deference.

B. Congress's Ability to Grant this Authority

Among the issues that the Sixth Circuit declined to address in its opinion was the question of "whether Congress . . . could give the FCC the power to preempt as it did in this case."¹⁹⁵ Thus, as a threshold issue, Congress's authority to regulate the broadband market must be established. It is settled law that "[a]s long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States."¹⁹⁶ As outlined in the FCC's authorizing statute, the Communications Act of 1934, the agency was created pursuant to Congress's power under the Commerce Clause.¹⁹⁷ The Supreme Court has since established three broad categories of activity that may be regulated under the Commerce Clause: (1) "the use of the channels of interstate commerce[;]" (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce[;]" and (3) "those activities having a substantial relation to interstate commerce."¹⁹⁸ It has been well established that the Internet is a channel or

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 615.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 614.

¹⁹⁵ *Id.* at 613 (majority opinion).

¹⁹⁶ *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

¹⁹⁷ 47 U.S.C. § 151 (2012).

¹⁹⁸ *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

instrumentality of interstate commerce, and thus the FCC has the authority to impose its will on the states with regards to broadband deployment policy.¹⁹⁹

C. *The FCC's Preemption Power Under Section 706*

While the FCC's preemption authority under Section 706 is central to this discussion, no court has answered the question of whether the FCC has any preemptory authority under Section 706. As discussed above, two subsections of Section 706 confer regulatory authority on the FCC.²⁰⁰ The FCC took a circuitous route to its current interpretation of the Section 706 grant of authority.²⁰¹ Shortly after the 1996 Act's passage, the FCC interpreted Section 706(a) to confer no independent authority,²⁰² but then revised that interpretation in its 2010 Open Internet Order, which the D.C. Circuit upheld in *Verizon v. FCC*.²⁰³ The FCC also interpreted Section 706(b) for the first time in the 2010 Order, concluding that it was also an independent grant of authority.²⁰⁴

On the face of the statute, the language of Sections 706(a) and (b) both appear to broadly grant regulatory authority.²⁰⁵ Section 706(a) instructs the Commission to "encourage . . . deployment on a reasonable and timely basis" of broadband technology, using one of several enumerated methods, or "other regulating methods that remove barriers to infrastructure investment."²⁰⁶ Similarly, Section 706(b) says that the Commission "shall take immediate action to accelerate deployment of [broadband] capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."²⁰⁷ The D.C. Circuit, the only court to have directly addressed the validity of the FCC's broad interpretation of Section 706 authority, concluded that the interpretation was valid.²⁰⁸ In *Tennessee v. FCC*, the Sixth

¹⁹⁹ See, e.g., *United States v. Person*, 714 F. App'x 547, 551 (6th Cir. 2017) ("[T]he Internet . . . [is a] channel of interstate commerce." (citing *United States v. Tykarsky*, 446 F.3d 458, 470 (3d Cir. 2006))); *United States v. Giboney*, 863 F.3d 1022, 1026 (8th Cir. 2017) ("The [I]nternet is an instrumentality and channel of interstate commerce." (quoting *United States v. Havlik*, 710 F.3d 818, 824 (8th Cir. 2013))); *United States v. Morgan*, 748 F.3d 1024, 1033 (10th Cir. 2014) ("We have decided the Internet is an instrumentality of interstate commerce.").

²⁰⁰ 47 U.S.C. § 1302(a)–(b) (2012); see *supra* Section I.D.

²⁰¹ See *supra* Section II.A.

²⁰² *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 FCC Rcd. 24,012, 24,047 (1998).

²⁰³ *Verizon v. FCC*, 740 F.3d 623, 639 (D.C. Cir. 2014).

²⁰⁴ *Pres. the Open Internet: Broadband Indus. Practices*, 25 FCC Rcd. 17,905, 17,972 (2010).

²⁰⁵ 47 U.S.C. § 1302(a)–(b) (2012).

²⁰⁶ 47 U.S.C. § 1302(a).

²⁰⁷ 47 U.S.C. § 1302(b).

²⁰⁸ *Verizon*, 740 F.3d at 639.

Circuit did not reach the issue,²⁰⁹ though the partial dissent concurred with the FCC's interpretation that Section 706's grant of authority included preemptory powers.²¹⁰

Based on the text of the Section 706 and the apparent judicial consensus that it contains a broad grant of authority, this Comment assumes that Section 706 does in fact contain a clear grant of preemptory authority that the FCC may exercise.

D. Applying Judge White's Narrower Clear Statement Rule

Judge White's narrower reading of the clear statement rule strikes a proper balance between unmistakably clear congressional intent and concerns about preserving the proper balance between federal and state sovereignty. Judge White found that Section 706 unmistakably conferred preemption authority on the FCC for generally restrictive state statutes.²¹¹ She did, however, agree with the majority that it was unclear whether this preemption authority was meant to extend to state laws restricting municipal authority.²¹² Judge White proposed that the court could and should draw a line between two types of statutes considered.²¹³ She argued that "certain powers and spheres are historically so clearly confided to the States that Congress should not be understood to preempt the States' authority to act freely in those areas unless its intent is clear."²¹⁴ However, Judge White distinguished these types of statutes from those that happen to affect local governments but solely effectuate policy decisions about how the communications market should operate.²¹⁵ Under this narrowed reading of the clear statement rule, Judge White proposed that these statutes could be preempted under the FCC's Section 706 power.²¹⁶ This narrow reading would preserve the authority that has plainly been granted to the FCC to preempt barriers to investment and competition in the broadband market, while simultaneously protecting the sovereign interests of states.

This narrower reading of the clear statement rule would also address some of the primary concerns raised in the dissents in both *Nixon v. Missouri Municipal League* and *Gregory v. Ashcroft*. In his dissent in *Nixon*, Justice

²⁰⁹ 832 F.3d 597, 613 (6th Cir. 2016).

²¹⁰ *Id.* at 614 (White, J., concurring in part and dissenting in part).

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 615.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *See id.*

Stevens argued that the statute at issue—Section 253 of the 1934 Communications Act, as amended by Section 101 of the 1996 Act—contained an unmistakably clear purpose and mandate, which the Court should not toss aside.²¹⁷ The statute at issue instructed the FCC to preempt any “State or local statute or regulation . . . [that would] prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”²¹⁸ The majority held that the phrase “any entity” was sufficiently vague to invoke the clear statement rule enunciated in *Gregory v. Ashcroft*, and decided that Congress did not intend for the statute to cover municipally owned utilities.²¹⁹ In his dissent, Justice Stevens argued that the legislative history showed that Congress specifically contemplated the role of public utilities in expanding access to telecommunications services.²²⁰ Therefore, he argued, the phrase “any entity” should be read to encompass them.²²¹

Justice Stevens’s dissent echoes concerns that were raised by Justice White in his partial dissent in *Gregory v. Ashcroft*, when the clear statement rule was initially proposed.²²² Justice White worried that the enunciation of the clear statement doctrine as applied in *Gregory* constituted a judicially created restraint on Congress’s legislative authority, amounting to an intrusion on a coequal branch of government.²²³ Instead, Justice White argued that the Court should apply unambiguous statutes as written against the states and not create new hurdles for Congress to clear.²²⁴

Applying the narrower reading of the clear statement rule would help alleviate the concerns raised by these two dissents, while still striking a balance in favor of preserving constitutional federalism. As applied to Justice Stevens’s dissent, the narrow reading of the clear statement rule would have encouraged the Court to acknowledge the plain meaning of the statute—that any entity meant *any* entity—while also allowing the Court to reach the same conclusion, which preserved the core interest of the state in determining how it orders its political

²¹⁷ *Nixon v. Mo. Mun. League*, 541 U.S. 125, 142–43 (2004) (Stevens, J., dissenting).

²¹⁸ 47 U.S.C. § 253(a) (2012).

²¹⁹ *Nixon*, 541 U.S. at 141 (majority opinion).

²²⁰ *Id.* at 143 (Stevens, J., dissenting).

²²¹ *Id.* (“The assertion that Congress could have used the term ‘any entity’ to include utilities generally, but not municipally owned utilities, must rest on one of two assumptions: Either Congress was unaware that such utilities exist, or it deliberately ignored their existence when drafting §253. Both propositions are manifestly implausible . . .”).

²²² *See Gregory v. Ashcroft*, 501 U.S. 452, 474–77 (1991) (White, J., dissenting).

²²³ *Id.* at 477.

²²⁴ *Id.* at 478.

subdivisions. As applied to Justice White's dissent, this narrowed clear statement rule would have lessened the threat of a judicially created restraint on congressional power by applying statutes as written when possible, while still preserving the Court's desire to refrain from unnecessarily upsetting the balance of state and federal power.

Thus, under this revised regime, the FCC's preemption of North Carolina and Tennessee's statutes limiting Wilson and Chattanooga from expanding their broadband services would have been upheld in part as it pertained to those North Carolina statutes that solely effectuated communications policy.²²⁵ As discussed above, Congress may regulate the Internet under its Commerce Clause authority, as it is a channel or instrumentality of interstate commerce, and therefore Congress would have been able to take this preemptory action.²²⁶ Further, Section 706 contains a broad grant of power, limited by the policy directives to expand access to broadband and other limits contained within the Communications Act, which clearly empowers the FCC to preempt statutes that contravene federal communications policy.²²⁷ Thus, while adopting the narrow reading of the clear statement rule would allow the FCC to exercise this power as it pertains to state statutes that solely effectuate communications policy, it would still preserve the balance between state and federal power on issues of core state sovereignty.²²⁸

IV. IMPLICATIONS

Narrowing the application of the clear statement rule in *Tennessee v. FCC* as proposed by Judge White would have three major implications, each on a different level of federal policy. On the most micro level, it would expand the FCC's ability to effectuate the stated broadband policy goals of the federal government.²²⁹ On a slightly broader level, it would expand the authority of the FCC—and potentially other federal agencies—to preempt state statutes that affect local governments but do not affect core issues of state sovereignty. On a systemic level, this narrower application of the clear statement rule would increase the level of scrutiny applied by the courts, raising concerns about judicial economy, but resulting in positive effects for legislative economy. This Part will address each implication in turn.

²²⁵ *Tennessee v. FCC*, 832 F.3d 597, 614–15 (6th Cir. 2016) (White, J., concurring in part and dissenting in part).

²²⁶ *See supra* Section III.B.

²²⁷ *See supra* Section III.C.

²²⁸ *Tennessee*, 832 F.3d at 614–15 (White, J., concurring in part and dissenting in part).

²²⁹ *See* 47 U.S.C. § 1302(a) (2012) (stating the policy goals of the statute).

A. *Expanding Broadband Access*

Consistent with the stated purpose of Section 706, narrowing the application of the clear statement rule to this grant of authority would increase the ability of the FCC to guarantee access to advanced communications technologies for all Americans. Congress instructed the FCC to take action to eliminate those gaps where possible.²³⁰ The FCC in turn determined that municipal broadband networks serve as a viable answer to those gaps in some circumstances.²³¹ By empowering the FCC to exercise its congressionally granted power to preempt statutes that solely effectuate communications policy, it could eliminate barriers to investment in broadband infrastructure, such as the measures to impute cost in the North Carolina statute.²³²

Of course, this limited preemption would still leave in place many municipal broadband restrictions that do concern issues of core state sovereignty.²³³ Ultimately, states have a legitimate sovereign interest in determining how their municipalities interact with one another and in setting procedural and financial requirements for their political subdivisions.²³⁴ However, these procedural hurdles are not insurmountable barriers. For example, Colorado law requires municipalities to hold referenda before providing broadband services.²³⁵ In 2017, Fort Collins, Colorado placed a municipal broadband measure on the ballot, which attracted nearly half a million dollars in campaign spending by opposition groups.²³⁶ Despite this substantial opposition from incumbent ISPs, the measure passed in Fort Collins with approximately 57% of the vote.²³⁷ Thus, Colorado municipalities remain able to explore innovative alternatives to spur increased or improved broadband access, even as Colorado's referendum requirement—which undoubtedly concerns core state sovereignty—remains in effect.

Furthermore, opponents of the FCC's preemption order argued that preemption would create an anomaly whereby states could completely prohibit their municipalities from entering the broadband marketplace, but once they

²³⁰ 47 U.S.C. § 1302(a)–(b).

²³¹ City of Wilson, North Carolina, 30 FCC Rcd. 2408, 2411 (2015).

²³² *Id.*

²³³ See *Tennessee*, 832 F.3d at 614–15 (White, J., concurring in part and dissenting in part).

²³⁴ *Id.* at 614.

²³⁵ COLO. REV. STAT. ANN. § 29-27-201 (West 2017); see also Jon Brodtkin, *Sorry, Comcast: Voters Say “Yes” to City-Run Broadband in Colorado*, ARS TECHNICA (Nov. 8, 2017, 11:18 AM), <https://arstechnica.com/tech-policy/2017/11/voters-reject-cable-lobby-misinformation-campaign-against-muni-broadband/>.

²³⁶ Brodtkin, *supra* note 235.

²³⁷ *Id.*

allow them any authority, the state would be constrained in dictating how those same municipalities exercise that authority.²³⁸ It is accurate that the FCC would not be able to compel a state to allow its municipalities to enter the broadband market if it maintains an outright ban on the practice, as this would infringe on the state's core sovereignty.²³⁹ However, as previously mentioned, only four states currently have outright bans,²⁴⁰ and thus this change would expand the ability of municipalities to fill market gaps in other states with some type of municipal broadband limit in force that exclusively effectuates communications policy.²⁴¹ Thus, while this power would not solve the problem of state limits on municipal broadband entities in every instance, it would tackle a sufficient number to be a worthwhile exercise of the FCC's preemptory power.

B. Expanded FCC Power

This more limited application of the clear statement rule would mean that the FCC could successfully preempt certain state statutes that courts would currently protect with the clear statement rule.²⁴² The Commission would have to discern which statutes deal with core aspects of state sovereignty from those that merely effectuate regulatory communications policy. While this Comment does not suggest that such a determination should be afforded *Chevron* deference,²⁴³ ultimately the decision by the agency about which category the statute falls into would necessarily be afforded some level of deference by the reviewing court.²⁴⁴ Providing any deference to agency determinations about

²³⁸ *City of Wilson*, North Carolina, 30 FCC Rcd. 2408, 2510 (2015) (Pai, Comm'r, dissenting).

²³⁹ *Tennessee*, 832 F.3d at 610; *see also id.* at 614 (White, J., concurring in part and dissenting in part); *City of Wilson*, 30 FCC Rcd. at 2473 (suggesting that in the case of a flat ban on municipal broadband the Commission would be powerless to preempt).

²⁴⁰ Stricker, *supra* note 38, at 608.

²⁴¹ *See City of Wilson*, 30 FCC Rcd. at 2475 (“[W]e find that the preemption of state communications regulation on municipal broadband providers—where the state has given an underlying authorization—will have the effect of promoting competition and infrastructure investment and is consistent with the state’s grant of authority to municipalities . . .” (footnote omitted)); *see also Community Network Map*, *supra* note 7 (showing those states with restrictions less than a flat ban).

²⁴² *See Tennessee*, 832 F.3d at 615 (White, J., concurring in part and dissenting in part) (stating that applying this narrower reading would have allowed FCC to preempt law that the Sixth Circuit found was protected by the clear statement rule).

²⁴³ *See id.* (arguing that *Chevron* deference does not apply to the FCC’s determination that it has authority to preempt, as distinguished from its decision whether to use that authority, because the statute’s silence or ambiguity is what triggers the clear statement rule). *See generally* *Chevron*, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (establishing the test for deference accorded to agency interpretations of unclear authorizing statutes).

²⁴⁴ *See, e.g.,* *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (establishing that courts may defer to administrative decisions that do not carry the force of law if they find that they were reached through a thorough, valid, and consistent decision-making process). While the preemption at issue in *Tennessee v. FCC* was not an

which statutes deal with issues of core sovereignty and which solely effectuate policy that contravenes the federal interest would be a wholly new power for federal agencies.

C. Concerns About Judicial and Legislative Economy

Applying this narrower clear statement rule would require courts to apply a higher level of scrutiny to the statutes in preemption cases. As Judge White notes in her partial dissent in *Tennessee v. FCC*, courts would have to determine which state statutes deal with core issues of state sovereignty and which merely effectuate a policy that affects local governments.²⁴⁵ While this distinction could often be easy to draw, as evidenced by the statutes at issue in *Tennessee*, reasonable judges may often disagree as to whether the statutes affect a core issue of state sovereignty or merely effectuate broadband regulatory policy.²⁴⁶ Arguably, making this distinction could raise concerns about judicial economy, as it will require judges to inquire as to the purpose and effect of restrictive statutes to determine whether their effect on local governments is core or tangential to the state's sovereign powers. This inquiry could potentially yield unclear and inconsistent results across districts and circuits.

However, the current system is comparably unclear. Scholars have argued that rules such as the clear statement rule are meant to serve as notice to Congress to better construct statutes in order to clearly convey intent to the courts.²⁴⁷ However, a survey of legislative drafters found that the clear majority of them were completely unaware of the clear statement rule.²⁴⁸ Further, while courts have repeatedly made clear what does not satisfy the clear statement rule, what does satisfy the rule remains ambiguous.²⁴⁹ Applying this narrower reading of the clear statement rule would ensure that apparent congressional intent is effectuated to the fullest extent possible without running afoul of constitutional federalism concerns. It would also ameliorate the concerns raised in *Gregory* by Justice White, that the clear statement rule would act as a judicially created restraint on Congress's legislative authority.²⁵⁰

interpretive rule subject to *Skidmore* deference, the lesser form of deference adopted in *Skidmore* is illustrative of the more searching inquiry that may be required in these cases. *Id.*; see also Dunne, *supra* note 11, at 1159 (suggesting that "a reviewing court might need to accord some level of deference to the agency determination").

²⁴⁵ 832 F.3d at 615 (White, J., concurring in part and dissenting in part).

²⁴⁶ *Id.* at 611–12, 615.

²⁴⁷ Whatling, *supra* note 144, at 962–63.

²⁴⁸ *Id.* at 964.

²⁴⁹ *Id.* at 972–75.

²⁵⁰ *Gregory v. Ashcroft*, 501 U.S. 452, 477 (1991) (White, J., dissenting).

CONCLUSION

Section 706 of the 1996 Telecommunications Act contains a clear directive to the FCC to ensure that broadband technology is deployed to all Americans, along with a broad grant of authority to accomplish this directive. In its order preempting the Tennessee and North Carolina statutes that restricted the abilities of their municipal broadband providers to expand their services to neighboring communities, the FCC exercised this authority to accomplish Congress's stated policy ends. However, the Sixth Circuit's decision in *Tennessee v. FCC* undercut the ability of the FCC to eliminate barriers to investment and competition in the broadband market.

The clear statement rule, as applied to the congressional grant of authority to the FCC in Section 706, has served to create a shield for states to contradict federal communications policy. At the behest of private ISPs, states have passed statutes restricting the abilities of their municipalities to enter the broadband market or expand their services, creating a less competitive environment for the incumbent ISPs. By applying the narrower reading of the clear statement rule as proposed by Judge White, the courts would empower the FCC to the full extent that Congress intended, allowing it to better ensure universal access to broadband technology for all Americans.

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