No. 08-1027

In the Supreme Court of the United States

ALLIANCE FOR COMMUNITY MEDIA, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Communications Commission (FCC) has authority to adopt rules interpreting and implementing Section 621(a)(1) of the Communications Act of 1934, 47 U.S.C. 541(a)(1).

2. Whether the FCC reasonably construed 47 U.S.C. 541(a)(1), which provides that a local franchising authority "may not unreasonably refuse to award an additional competitive franchise" for cable television service.

3. Whether the FCC's order is supported by substantial evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-52a) is reported at 529 F.3d 763. The order of the Federal Communications Commission (Pet. App. 55a-329a) is reported at 22 F.C.C.R. 5101.

JURISDICTION

The judgment of the court of appeals (Pet. App. 53a-54a) was entered on June 27, 2008. A petition for rehearing was denied on October 29, 2008 (Pet. App. 330a-331a). On January 21, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including February 10, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Communications Act of 1934 (Communications Act), 47 U.S.C. 151 *et seq.*, gives the Federal Communications Commission (FCC or Commission) "regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio." *United States* v. *Southwestern Cable Co.,* 392 U.S. 157, 168 (1968) (citation omitted). That power includes "broad authority" to regulate cable television. *Id.* at 168, 172; see *Capital Cities Cable, Inc.* v. *Crisp,* 467 U.S. 691, 701-705 (1984).

Starting in the early 1970s, the Commission regulated cable operators by requiring them to obtain federal certificates of compliance before they could begin operations. A cable operator could not qualify for such a certificate unless it obtained a state or local franchise that complied with standards prescribed by the FCC. *Amendment of Pt. 74, Subpt. K, of the Comm'n's Rules & Regulations Relative to Cmty. Antenna Television Sys.,* 36 F.C.C.2d 143, 207-208 ¶¶ 177-179 (1972), aff'd, *ACLU* v. *FCC,* 523 F.2d 1344 (9th Cir. 1975). That regulatory regime reflected "deliberately structured dualism," *id.* at 207 ¶ 177, in that it provided for "[f]ederal regulation of some aspects" of cable television service, "with local regulation of others under federal prescription of standards for local jurisdictions," *id.* at 204 ¶ 171.

b. In 1984, Congress enacted the Cable Communications Policy Act of 1984 (1984 Cable Act), Pub. L. No. 98-549, 98 Stat. 2780. The 1984 Cable Act amended the Communications Act by adding Title VI, which was specifically directed to cable television services. Under

Title VI, a cable operator may not provide cable service in a given area without first obtaining a franchise from the state or local government. 47 U.S.C. 541(b); see 47 U.S.C. 522(5) (defining "cable operator"); 47 U.S.C. 522(6) (defining "cable service").

c. As originally enacted, 47 U.S.C. 541(a)(1) stated that a local franchising authority (LFA) "may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction." 1984 Cable Act § 621(a)(1), 98 Stat. 2786. In 1992, as part of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), Pub. L. No. 102-385, 106 Stat. 1460, Congress revised 47 U.S.C. 541(a)(1) to limit the power of LFAs to award or deny cable franchises. The amended statute provides: "A franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise." 47 U.S.C. 541(a)(1). The 1992 Cable Act also amended Section 541(a)(1) to provide that "[a]ny applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision" by bringing an action in a state or federal court. *Ibid.*; see 47 U.S.C. 555(a).

Congress found those changes to be necessary because, "[f]or a variety of reasons, including local franchising requirements," most cable subscribers had "no opportunity to select between competing cable systems." H.R. Rep. No. 862, 102d Cong., 2d Sess. 55 (1992). In amending Section 541(a)(1), Congress sought to ensure that consumers received the "benefits from competition" among cable providers. S. Rep. No. 92, 102d Cong., 1st Sess. 14 (1991).

d. More than a decade after the 1992 Cable Act was enacted, little progress had been made in the development of meaningful cable competition. In 2003, the General Accounting Office reported that cable subscribers in only "about 2 percent of markets ha[d] the opportunity to choose between two or more wire-based video operators." U.S. General Accounting Office, *GAO-04-8, Report to the Chairman, Sen. Comm. on Commerce, Science, and Transp.: Telecommunications—Issues Related to Competition and Subscriber Rates in the Cable Television Industry* 9 (Oct. 2003).

The lack of cable competition harmed consumers. Data compiled by the FCC showed that between 1995 and 2004, average prices for the types of cable packages purchased by most consumers rose by more than 90%. *Implementation of Sec. 3 of the Cable Television Consumer Prot. & Competition Act of 1992, Report on Cable Indus. Prices*, 21 F.C.C.R. 15,087, 15,087-15,090 ¶¶ 2, 7, 10 (2006). In the few communities "where wireline cable competition [was] present," however, cable prices were "17 percent lower" than elsewhere. *Id.* at 15,087 ¶ 2. Economists estimated that the persistent delay in the development of wireline cable competition was costing consumers billions of dollars each year.[1]

[1] George S. Ford & Thomas Koutsky, *Phoenix Center Policy Bulletin No. 13, "In Delay There Is No Plenty": The Consumer Welfare Cost of Franchise Reform Delay* 1-4, 13 (Jan. 2006) (estimating that, nationwide, the consumer welfare cost of one year's delay in introducing cable competition is $8.2 billion); Jerry Brito & Jerry Ellig, *Video Killed the Franchise Star: The Consumer Cost of Cable Franchising and Proposed Policy Alternatives*, 5 J. on Telecomm. & High Tech. L. 199, 227-229 (2006) (estimating the annual cost of delaying nationwide

Evidence suggested that at least some of the annual cost of forgone competition was attributable to the cable-franchising practices of LFAs. The Commission found "indications that in many areas the current operation of the local franchising process [was] serving as an unreasonable barrier to entry," either because the process took too long, or because excessive LFA demands deterred potential competitors from entering the market. *Implementation of Sec. 621(a)(1) of the Cable Commc'ns Policy Act of 1984 as amended by the Cable Television Consumer Prot. & Competition Act of 1992*, 20 F.C.C.R. 18,581, 18,584 ¶ 5 (2005). The Commission therefore initiated a rulemaking to determine whether the local franchising process was "hindering the federal communications policy objectives of increased competition in the delivery of video programming and accelerated broadband deployment," and, if so, "whether and how" the Commission could "remedy the problem." *Id.* at 18,587 ¶ 10.

2. After completing notice-and-comment procedures, the FCC issued the order that is the subject of this case. Pet. App. 55a-281a; see *id.* at 287a-321a (dissenting statements of Commissioners Copps and Adelstein). Based on its review of a "voluminous record"—which included hundreds of "comments filed by new entrants, incumbent cable operators, LFAs, consumer groups, and others"—the Commission concluded that federal rules were needed to ensure that the operation of the local franchising process would not create "an unreasonable barrier to entry for potential cable competitors." *Id.* at 77a-78a.

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cable competition to be $6.3 billion and listing results of other studies estimating annual costs ranging from $7.5 billion to $14 billion).

The Commission invoked its express rulemaking authority under 47 U.S.C. 201(b), which empowers the agency to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of" the Communications Act. Pet. App. 124a (quoting 47 U.S.C. 201(b)). That grant of authority, the Commission concluded, "necessarily includes Title VI of the Communications Act in general, and Section [541(a)(1)] in particular." *Id.* at 125a. The Commission also noted that other provisions of the Communications Act "reinforce the Commission's general rulemaking authority." *Ibid.* (citing 47 U.S.C. 152, 154(i), and 303(r)).

Having determined that it possessed rulemaking authority to interpret and implement Section 541(a)(1), the Commission proceeded to promulgate rules to address the most pressing problems in the franchising process. A particularly significant problem was prolonged delays that had resulted in unreasonable refusals to award competitive cable franchises. Pet. App. 81a-87a, 141a-142a. Those unreasonable delays had "obstructed and, in some cases, completely derailed attempts to deploy competitive video services." *Id.* at 81a. Some prospective entrants had "walked away from unduly prolonged negotiations" and had abandoned their efforts to compete in the cable market. *Id.* at 86a. "Others [had] filed lawsuits seeking a court order compelling the LFA to act, which entails additional delay, legal uncertainty, and great expense." *Id.* at 85a. Many applicants, frustrated by protracted franchise negotiations, had even "accepted franchise terms they considered unreasonable in order to avoid further delay." *Ibid.*

To eliminate undue delays, the Commission established time limits within which LFAs must render decisions on competitive franchise applications. When a company that is already authorized to access public rights-of-way (such as a telephone company) submits an application for a competitive cable franchise, the LFA must grant or deny the application within 90 days. Pet. App. 144a-149a. LFAs must act on all other competitive franchise applications within six months of their submission. *Id.* at 149a. If an LFA "fails to grant or deny an application by the deadline," it "will be deemed to have granted the applicant an interim franchise based on the terms proposed in the application." *Id.* at 154a-155a. That "interim franchise" will "remain in effect only until the LFA takes final action on the application." *Id.* at 155a. Thus, an LFA can immediately terminate an interim franchise simply by denying the pending application. The Commission predicted that interim franchises would "be the exception rather than the rule" because LFAs would have sufficient time to "either accept or reject applications within the applicable time frame." *Id.* at 158a.

The Commission also sought to narrow and clarify the "list of legitimate issues to be negotiated" between applicants and LFAs. Pet. App. 148a. The record showed that some LFAs were making unreasonable demands regarding build-out requirements, which prevent a competitor from gaining a foothold in a market by focusing on serving a smaller, more profitable geographic area. *Id.* at 94a-109a. In other cases, LFAs had made unreasonable demands that providers support institutional networks and public, educational, and governmental (PEG) channels. *Id.* at 113a-115a. The Commission also found that some LFAs were trying to assess cable-franchise fees in excess of 5% of the franchisee's gross revenues from providing cable service, even though 47

U.S.C. 542 establishes a 5% cap on such fees. Pet. App. 112a-113a. In addition, the record indicated that some LFAs had "made unreasonable demands unrelated to the provision of video services," withholding the grant of a competitive cable franchise unless the franchisee agreed to requests such as "the purchase of street lights," "the installation of cell phone towers," construction of "a new recreation center and pool," or "fund[ing] a $50,000 scholarship." *Id.* at 109a-111a.

To put an end to such practices, the Commission ruled that an LFA would "unreasonably refuse to award" a competitive franchise if it declined to grant a franchise because of the applicant's unwillingness to accept (1) certain entry-impeding build-out requirements, Pet. App. 159a-168a; (2) demands for payments or other contributions that would unlawfully circumvent the statutory franchise-fee cap, *id.* at 169a-187a; (3) demands for unreasonable undertakings related to PEG support and institutional networks, *id.* at 187a-196a; or (4) demands involving non-cable services and facilities, *id.* at 197a-199a. The Commission also provided guidance to clarify the boundary between reasonable and unreasonable LFA demands in those areas. *Id.* at 166a-169a, 173a-187a, 190a-199a.

The Commission preempted "local laws, regulations, practices, and requirements to the extent that: (1) provisions in those laws, regulations, practices," or requirements "conflict with the [FCC's] rules or guidance" for implementing Section 541(a)(1); "and (2) such provisions are not specifically authorized by state law." Pet. App. 200a-201a. At the same time, the Commission declined to preempt state-level franchising decisions or state laws, concluding that it lacked "a sufficient record to evaluate whether and how such state laws may lead to unreasonable refusals to award additional competitive franchises." *Id.* at 201a.

3. Numerous parties filed petitions for review of the FCC's order, and the court of appeals denied the petitions. Pet. App. 1a-52a. The court first held that the Commission had authority to adopt the rules in question. *Id.* at 17a-25a. The court explained that 47 U.S.C. 201(b), which contains a grant of general rule-making power, gives the FCC "clear jurisdictional authority to formulate rules and regulations interpreting the contours" of Section 541(a)(1). Pet. App. 20a.

Next, applying the principles set forth in *Chevron USA Inc.* v. *NRDC,* 467 U.S. 837 (1984), the court of appeals concluded that the Commission's rules were based on a permissible interpretation of Section 541(a)(1). Pet. App. 25a-49a. The court determined that the statutory phrase "unreasonably refuse to award" was ambiguous, *id.* at 27a-30a, and that the Commission had reasonably construed that ambiguous language, *id.* at 30a-49a. In particular, the court upheld the agency's finding that LFAs "unreasonably refuse to award" competitive franchises under Section 541(a)(1) when they unduly delay the processing of applications, *id.* at 31a-36a, or when they refuse to grant applications unless the applicants submit to unreasonable build-out demands, *id.* at 36a-40a, agree to pay franchise fees in excess of the limit set by Section 542, *id.* at 40a-43a, or accept unreasonable PEG obligations, *id.* at 43a-49a.

Finally, the court of appeals rejected petitioners' claims that the FCC's rules were arbitrary and capricious and unsupported by substantial evidence. Pet. App. 49a-52a. Citing the "massive record" compiled by the agency, the court found "ample record evidence supporting the Commission's finding that the operation of the franchising process had impeded competitive entry in multiple ways." *Id.* at 50a-51a. The court determined that "the Order's attempt to remedy the problem of undue delay was consistent with the evidence before the Commission," which "created a picture of excessive delay in the grant of new franchises." *Id.* at 51a. Similarly, the court found "substantial evidence" in the record "that build-out requirements were posing significant obstacles to new entrants in providing video and broadband services." *Ibid*. The court stated in addition that "the record demonstrated that LFAs were imposing various demands on service providers, including those unrelated to cable service, those involving excessive franchise fees, and those involving excessive PEG requirements, that were significantly escalating prospective entrants' costs and thereby deterring entry." *Id.* at 51a-52a. On the basis of its review, the court concluded that "the administrative record fully supported the agency's rulemaking." *Id.* at 52a.

ARGUMENT

Petitioners contend (Pet. 18-38) that the FCC exceeded its statutory authority when it adopted rules implementing Section 541(a)(1), which provides that local franchising authorities may not "unreasonably refuse to award an additional competitive franchise" for cable television service. 47 U.S.C. 541(a)(1). They further argue (Pet. 39-40) that the agency's order is not supported by substantial evidence. The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioners argue (Pet. 23-27) that the Commission lacked authority to adopt the rules at issue in this

case. That is incorrect. As the court of appeals recognized, the Commission's rules represent a permissible exercise of its statutory authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of" the Communications Act. 47 U.S.C. 201(b); see Pet. App. 17a-25a.

a. The court of appeals' resolution of this issue follows logically from this Court's decision in *AT&T* v. *Iowa Utilities Bd.*, 525 U.S. 366 (1999), which explained that "the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act.'" *Id.* at 378 (citation omitted). In *AT&T*, the Court held that Section 201(b) permitted the FCC to adopt rules implementing 47 U.S.C. 251 because the Telecommunications Act of 1996, Pub. L. No. 104-104, § 101(a), 110 Stat. 61, which included Section 251, "was adopted, not as a freestanding enactment, but as an amendment to, and hence *part of*, an Act which said that '[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.'" 525 U.S. at 378 n.5 (citation omitted). Similarly, the statutory language at issue here was part of an amendment inserted into—and thus made part of—the Communications Act. Relying on *AT&T*, the court of appeals correctly reasoned that 47 U.S.C. 541(a)(1) "qualifies as a 'provision[] of this Act' within the meaning of section 201(b)," and that the FCC therefore "possesses clear jurisdictional authority to formulate rules and regulations interpreting" that provision. Pet. App. 20a.

Only one other court of appeals—the Seventh Circuit—has directly addressed the question whether the FCC has authority to interpret and implement Section 541. Like the court of appeals in this case, that court rejected the argument that "the FCC was not granted regulatory authority over" Section 541. *City of Chicago* v. *FCC,* 199 F.3d 424, 428 (1999), cert. denied, 531 U.S. 825 (2000).

b. Petitioners suggest (Pet. 25-26) that the grant of rulemaking authority in Section 201(b) applies only to Title II of the Communications Act, which concerns common-carrier regulation. They rely on *Global Crossing Telecommunications, Inc.* v. *Metrophones Telecommunications, Inc.*, 550 U.S. 45 (2007), which involved a portion of Section 201(b) that is expressly limited to common carriers, *id.* at 47-48. Petitioners' reliance on *Global Crossing* is misplaced because Section 201(b)'s grant of rulemaking authority, which is at issue here, contains no such limitation.

Petitioners also rely (Pet. 26-27) on the D.C. Circuit's decision in *Accuracy in Media, Inc.* v. *FCC,* 521 F.2d 288 (1975), cert. denied, 425 U.S. 934 (1976). That case did not even mention Section 201(b). Instead, it involved the Commission's authority to regulate the Corporation for Public Broadcasting (CPB) under 47 U.S.C. 396(g)(1)(A). The CPB's governing statute contained a provision stating that nothing in the statute "shall be deemed * * * to authorize" the FCC "to exercise any direction, supervision, or control over" the CPB, 47 U.S.C. 398(a), and the D.C. Circuit construed that provision to bar the FCC from regulating the CPB under Section 396(g)(1)(A). *Accuracy in Media,* 521 F.2d at 292-297. No such prohibition applies to Section 541(a)(1).

c. Even if a question concerning the scope of the Commission's authority under Section 201(b) otherwise warranted this Court's review, this case would be a poor vehicle for considering it, because the rules at issue here do not rest exclusively on that provision. Instead, the Commission determined that even apart from Section 201(b), it possessed rulemaking authority under 47 U.S.C. 303(r) and under several other statutory provisions. Pet. App. 125a. This Court has observed that Section 303(r) "continues to give the Commission broad rulemaking power 'as may be necessary to carry out the provisions of this chapter,' which includes the body of the Cable Act as one of its subchapters." *City of New York* v. *FCC*, 486 U.S. 57, 70 n.6 (1988) (citation omitted); see *United Video, Inc.* v. *FCC,* 890 F.2d 1173, 1183 (D.C. Cir. 1989) (noting that "[t]he Commission's power under § 303(r) is broad" and is sufficient to support regulation of syndicated programming on cable systems). A ruling in petitioners' favor on the scope of Section 201(b) would leave undisturbed the Commission's independent invocation of authority under Section 303(r).

2. Petitioners argue (Pet. 28) that the court of appeals' decision rests on a "[m]isapplication of *Chevron*." Even if that were true, a misapplication of the settled *Chevron* standard would not warrant this Court's review. See Sup. Ct. R. 10. In any event, petitioners' *Chevron* claim is insubstantial.

a. In accord with two decisions of the D.C. Circuit, the court of appeals correctly determined that the statutory term "unreasonably" is ambiguous. Pet. App. 28a-29a (citing *Orloff* v. *FCC,* 352 F.3d 415, 420 (2003), and *Capital Network Sys., Inc.* v. *FCC,* 28 F.3d 201, 204 (1994)); see *Global Crossing*, 550 U.S. at 57-58 (identifying ambiguity in the Communications Act's prohibition of "unjust or unreasonable" practices). The court of appeals therefore appropriately gave "substantial deference to the interpretation the Commission accords" that term. Pet. App. 29a (quoting *Capital Network Sys.,* 28

F.3d at 204). As the court recognized, "the generality" of the term "unreasonably" "opens a rather large area for the free play of agency discretion." *Id.* at 28a (quoting *Orloff,* 352 F.3d at 420).

To remove any remaining doubt concerning the statute's ambiguity, the court of appeals went on to consider the statutory structure and context. Pet. App. 29a-30a. In the course of its analysis, the court observed that "Congress's provision of judicial review as a means to monitor a given LFA's compliance with section [541(a)(1)] suggests that it is not instantaneously apparent whether a refusal to grant a prospective franchisee's application is necessarily reasonable or not." *Id.* at 30a. Contrary to petitioners' suggestion (Pet. 28), the court did not adopt "a *per se* rule * * * that when Congress explicitly provides for court review, it creates a substantive 'gap' that an agency may fill with regulations." Instead, the court merely cited the judicial-review provision to confirm its determination that the term "unreasonably" is ambiguous.

b. Petitioners also assert (Pet. 33) that the court of appeals "erred at Step Two of *Chevron*." After carefully examining each of the rules challenged by petitioners, the court of appeals correctly held that the FCC's interpretation of the ambiguous statutory language was reasonable. Pet. App. 30a-49a. Petitioners' case-specific challenges to the court's ruling lack merit.

Inter alia, petitioners contend (Pet. 34) that the absence of any specific deadline in Section 541(a)(1) means that "Congress intended to leave the timing of the franchising process to localities," and that the court of appeals should have invalidated the FCC's imposition of deadlines based on "the traditional interpretive doctrine of '*expressio unius est exclusio alterius*.'" That argument suffers from several flaws. First, the *expressio unius* canon is inapplicable here, because petitioners have not identified a "series of terms from which an omission bespeaks a negative implication." *Barnhart* v. *Peabody Coal Co.,* 537 U.S. 149, 168 (2003) (citation omitted). Instead, they merely observe that Congress mandated a deadline in some provisions of the Communications Act, but not in Section 541(a)(1). Second, even if the canon were applicable, it is "an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Cheney R.R.* v. *ICC,* 902 F.2d 66, 69 (D.C. Cir.), cert. denied, 498 U.S. 985 (1990).

As the court of appeals recognized, when "a statute includes an 'express deadline' for one category of decisions but not another, the absence of a statutory deadline for the latter category 'could mean either that no deadline was contemplated by Congress, or that Congress left the choice to [the agency] whether or not to impose a deadline.'" Pet. App. 34a (quoting *General Motors Corp.* v. *NHTSA,* 898 F.2d 165, 170 (D.C. Cir. 1990)). The court therefore reasonably construed "the absence of a statutory deadline" to mean "that Congress authorized, but did not require, the FCC to impose time limits on the issuance of new franchises." *Ibid.* In reaching that conclusion, the court of appeals sensibly recognized "the obvious difference between a statutory *requirement* * * * and a statutory *authorization*." *Alaska Dep't of Envtl. Conservation* v. *EPA,* 540 U.S. 461, 491 (2004).

Petitioners also object (Pet. 35-37) to various other aspects of the FCC's order. Essentially, those complaints amount to fact-bound policy disagreements with the FCC over what constitutes an "unreasonable" refusal to award a competitive franchise under Section 541(a)(1). The court of appeals correctly declined to disturb the FCC's findings concerning the circumstances in which a refusal to award a competitive franchise would be "unreasonable." Those findings reflect sensitive policy judgments that are vested in the Commission, and there is no reason for this Court to revisit those judgments.

More generally, petitioners argue (Pet. 37) that "Congress intended" for the "reasonableness of franchise requirements to be assessed on a case-by-case basis, through a local process." They contend that the FCC's adoption of federal rules is inconsistent with the "case-by-case" process that Congress contemplated. But there is nothing unusual or inappropriate about an agency's promulgation of rules to guide a "case-by-case" review process that is prescribed by the statute the agency is charged with implementing. As the court of appeals observed, this Court has previously upheld administrative rules in analogous contexts. In *AT&T,* for example, "although the Communications Act specifically provides for judicial review of state commission decisions arbitrating interconnection disputes among telephone companies," this Court "upheld the FCC's authority to issue rules governing the states' resolution of such disputes." Pet. App. 24a (citing *AT&T,* 525 U.S. at 377-385). The Court in *AT&T* held that "Congress's 'assignment[]' of the adjudicatory task to state commissions did not 'logically preclude the [FCC]'s issuance of rules to guide the state-commission judgments.'" *Ibid.* (quoting *AT&T,* 525 U.S. at 385); see *United States* v. *Haggar Apparel Co.,* 526 U.S. 380, 391 (1999) ("Deference can be given to [administrative] regulations without impairing the authority of the court[s] to make factual determinations, and to apply those determinations to the law, *de novo*.").[2]

3. Petitioners assert several additional challenges (Pet. 18-23) to the FCC's interpretation of Section 541(a)(1). Those challenges lack merit.

a. Petitioners contend (Pet. 14-15) that this case "implicates basic principles of federalism" because the Commission improperly infringed on the authority of local officials, and that this Court "should intervene to restore the careful balance struck by Congress" in Title VI. As the court of appeals recognized, however, the Commission's order in this case was fully consistent with the federal statutory scheme governing cable franchising. Congress, not the Commission, limited LFAs' authority by prohibiting them from "unreasonably refus[ing] to award an additional competitive franchise." 47 U.S.C. 541(a)(1); see 47 U.S.C. 555(a) (providing for judicial review of a franchising authority's denial of a competitive cable franchise application). The Commission simply adopted rules and policies that reasonably interpreted that express statutory prohibition. Thus, the issue in this case is not whether LFAs "will be allowed

[2] Petitioners compare this case (Pet. 37-38) to *Ragsdale* v. *Wolverine World Wide, Inc.,* 535 U.S. 81 (2002), but the comparison is inapt. In *Ragsdale,* the Court held that a Labor Department regulation was inconsistent with the Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6. The Court concluded that the regulation created an "irrebuttable presumption" for which there was "no empirical or logical basis," *Ragsdale*, 535 U.S. at 90; "worked an end run around important limitations of the statute's remedial scheme," *id.* at 91; imposed on employers a penalty that had "no substantial relation to the harm suffered by the employee in the run of cases," *id.* at 93; and was "disproportionate and inconsistent with Congress' intent," *id.* at 95. There are no such deficiencies in the rules at issue here.

to do their own thing, but * * * whether it will be the FCC or the federal courts that draw the lines to which they must hew." *AT&T*, 525 U.S. at 379 n.6. Principles of federalism have no meaningful bearing on the choice between those alternatives. See *ibid.*

Petitioners argue (Pet. 14-15) that the Commission seeks "to control the franchising process by preempting local laws that provide for public hearings, public notice, and other incidents of the legislative process through which franchises are issued." But as petitioners concede (Pet. 35), the Commission has preempted such laws only "to the extent [that they] would prevent a locality from meeting the Commission's deadlines." That type of preemption is entirely consistent with the well-established principle that statutorily authorized federal regulations "will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York*, 486 U.S. at 64; see *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes.").

b. This case also does not present any serious constitutional issues. There is no basis for petitioners' suggestion (Pet. 19-20) that the deemed grant of an interim franchise would create a Fifth Amendment concern. Under the Commission's rules, if an LFA fails to grant or deny a competitive franchise application by the FCC-prescribed deadline, it "will be deemed to have granted the applicant an interim franchise based on the terms proposed in the application." Pet. App. 155a. As the court of appeals explained, that is merely "a means of enforcement" of the deadlines for action on an application. *Id.* at 13a. That regulatory framework is fundamentally different from the "alternative approach" hypothesized by petitioners (Pet. 20), "under which the federal government issued franchises authorizing private parties to use and occupy state and local property." Moreover, the Commission's rules provide that an interim franchise "will remain in effect only until the LFA takes final action on the application." Pet. App. 155a. Thus, if an LFA is unwilling to accept the terms proposed in a particular application, it can limit the duration of an interim franchise—or prevent such a franchise from taking effect in the first place—simply by denying the application.[3]

Likewise, the Commission's order does not offend the Tenth Amendment. Cf. Pet. 20. "[I]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *Watters* v. *Wachovia Bank, N.A.,* 550 U.S. 1, 22 (2007) (quoting *New York* v. *United States,* 505 U.S. 144, 156 (1992)). The Commerce Clause "is a grant of plenary authority to Congress" to regulate interstate commerce. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 276 (1981). This Court has long recognized that the Commerce Clause authorizes federal regulation of cable television. See *City of New York,* 486 U.S. at 63-66; *Capital Cities Cable, Inc.* v. *Crisp.*, 467 U.S. 691, 698-700 (1984); *United States* v. *Southwestern Cable Co.,* 392 U.S. 157, 177-178

[3] Even if a deemed grant of an interim franchise could fairly be characterized as a "taking" of property, it would not violate the Fifth Amendment. "[S]o long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional." *United States* v. *Riverside Bayview Homes, Inc.,* 474 U.S. 121, 128 (1985). In the present setting, Congress has ensured the availability of "just compensation" by authorizing LFAs to assess franchise fees on all cable franchisees. Pet. App. 214a.

(1968). Where, as here, a federal regulatory scheme "is supported by affirmative constitutional grants of power to Congress, it is not inconsistent with the Tenth Amendment." *New York,* 505 U.S. at 173.

Petitioners assert (Pet. 20) that "directing state and local governments to grant franchises * * * for use of state and local property would raise significant Tenth Amendment issues." The FCC's rules, however, do not direct LFAs to grant franchises, nor do they prescribe any particular elements that a franchise must include. Instead, the rules give LFAs a choice: They can grant *or deny* competitive franchise applications within a reasonable time frame, or, by failing to act in a timely manner, they can allow federal rules to fill the regulatory void with an interim franchise. And even after an interim franchise takes effect, the LFA remains free to deny the application, and thus immediately end the interim franchise.

c. Petitioners suggest (Pet. 21-22) that the decision below conflicts with the Fifth Circuit's decision in *City of Dallas* v. *FCC,* 165 F.3d 341 (1999). That is incorrect. Unlike the decision below, which concerned the Commission's construction of Section 541, *City of Dallas* involved the FCC's interpretation of 47 U.S.C. 573. 165 F.3d at 344-345. That provision governs "open video" systems, which are regulated differently from cable systems. *Inter alia*, Section 573 exempts operators of open video systems from the federal franchising requirement that Section 541 imposes on cable operators. See 47 U.S.C. 573(c)(1)(C).

In *City of Dallas,* the Fifth Circuit held that the FCC lacked authority to preempt local franchising requirements for open video systems because LFAs possessed the ability to impose such requirements independent of

Section 541. 165 F.3d at 347-349. That holding hinged on the fact that Section 541 did *not* apply to regulation of open video systems. In this case, by contrast, there is no dispute that Section 541 *does* apply to the cable franchising decisions of LFAs. And as the Fifth Circuit noted in *City of Dallas,* Section 541 "codified and restricted local governments' independently-existing authority to impose franchise requirements" by "plac[ing] limits on the conditions and restrictions a local franchising authority may impose." 165 F.3d at 348-349. In this case, the court of appeals correctly upheld the FCC's reasonable efforts to implement those statutory limits on LFAs' franchising discretion.

Without elaboration or explanation, petitioners also contend (Pet. 22 & n.5) that the decision below is "at odds with" this Court's decision in *City of New York*, 486 U.S. 57, and with the D.C. Circuit's decision in *National Cable Television Association* v. *FCC,* 33 F.3d 66, 68-69 (1994) (*NCTA*). In fact, the decision below is fully consistent with those decisions. Like the court below, this Court in *City of New York* upheld the FCC's authority to preempt local laws that conflict with FCC regulations. 486 U.S. at 63-70. And like the court below, the D.C. Circuit in *NCTA* rejected a challenge to the FCC's interpretation of the cable franchise requirements set forth in Section 541. 33 F.3d at 70-75. "Implicit in the court's deference to the FCC's interpretations [in *NCTA*] was an acknowledgment that the agency possessed the underlying regulatory authority to promulgate rules construing" Section 541. Pet. App. 22a. In its decision in this case, the court of appeals explicitly upheld the regulatory authority that the D.C. Circuit had implicitly recognized in *NCTA*.

4. Finally, petitioners assert (Pet. 39-40) that the court of appeals misapplied the substantial-evidence standard in reviewing the factual findings underlying the FCC's order. As with petitioners' *Chevron* argument, that contention involves an alleged misapplication of a settled legal standard and therefore presents no issue worthy of this Court's review. In any event, the court of appeals did not err in reviewing the Commission's factual determinations.

According to petitioners, the court of appeals did not properly weigh the evidence in the administrative record because it failed to "take into account whatever in the record fairly detracts from [the] weight" of the evidence on which the agency based its action. Pet. 39 (quoting *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 488 (1951)). That contention reflects a misunderstanding of the court of appeals' decision. The court acknowledged petitioners' assertion that "the Order is based on a record replete with 'allegations against LFAs which are anonymous, hearsay-based, inaccurate, and outdated.'" Pet. App. 49a (citation omitted). It found, however, that "[n]otwithstanding petitioners' contention, * * * the FCC's rulemaking activity was rooted in a sufficient evidentiary basis," *ibid.,* which the court went on to describe, *id.* at 50a-52a.

The court of appeals' opinion makes clear that it considered the record as a whole. Contrary to petitioners' suggestion, the court was not required to catalogue in its opinion all the evidence on each side. See *Consolo* v. *FMC,* 383 U.S. 607, 620 (1966) (a court conducting substantial-evidence review is not to undertake "the time-consuming and difficult task of weighing the evidence" itself). Moreover, even if the court of appeals had erred in its application of the substantial-evidence test, petitioners make no effort to show that the correct application of the test would have led to a different outcome. See *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 & n.1 (1992) (Under the substantial evidence standard, an agency's factual findings may be set aside only if a "reasonable factfinder would have to conclude" that the agency was wrong—that is, only if the agency would have to find that the evidence compels a contrary conclusion.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2009