No.

# In the Supreme Court of the United States

SPRINT TELEPHONY PCS, L.P., PETITIONER

*v.*

COUNTY OF SAN DIEGO, ET AL.

*ON PETITION FOR A WRIT OF CEPTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Section 253(a) of the Communications Act of 1934 (as added by the Telecommunications Act of 1996), 47 U.S.C. 253(a), provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." The question presented is as follows:

Whether a state or local regulation that does not expressly prohibit the provision of telecommunications service is nevertheless preempted by 47 U.S.C. 253(a) if it substantially impedes an entity from providing service.

## PARTIES TO THE PROCEEDING

Petitioner is Sprint Telephony PCS, L.P., a wholly owned subsidiary of Sprint Nextel Corporation. Respondents are the County of San Diego and Greg Cox, Dianne Jacob, Bill Horn, Ron Roberts, and Pam Slater-Price, Members of the Board of Supervisors of the County of San Diego.

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Sprint Telephony PCS, L.P., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-17a) is reported at 543 F.3d 571. The opinion of the court of appeals panel (App., *infra*, 18a-53a), as amended, is reported at 490 F.3d 700. The district court's order granting summary judgment to petitioner and denying summary judgment to respondents in relevant part (App., *infra*, 54a-89a) is reported at 377 F. Supp. 2d 886.

## JURISDICTION

The judgment of the court of appeals was entered on September 11, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 253 of the Communications Act of 1934 (as added by the Telecommunications Act of 1996), 47 U.S.C. 253, and the San Diego County Ordinance Amending the Zoning Ordinance Relating to Wireless Telecommunications Facilities (Wireless Ordinance), Ord. No. 9549 (2003) (codified at Zoning Ord. §§ 6980-6991), are reproduced in the appendix to this petition (App., *infra*, 92a-115a).

## STATEMENT

Petitioner brought suit against respondents in the United States District Court for the Southern District of California, claiming, *inter alia*, that the San Diego County Wireless Ordinance was preempted by Section 253(a) of the Communications Act of 1934 (as added by the Telecommunications Act of 1996). The district court granted summary judgment to petitioner and denied summary judgment to respondents on that claim. App., *infra*, 54a-89a. A panel of the court of appeals affirmed. *Id.* at 18a-53a. After granting rehearing en banc, however, the court of appeals reversed, holding that the Wireless Ordinance was not preempted. *Id.* at 1a-17a. In doing so, the court of appeals expressly recognized that its interpretation of Section 253(a) conflicted with those of several other circuits. See *id.* at 9a-10a.

1. a. Congress enacted 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 en-

courage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble, 110 Stat. 56. The Telecommunications Act was intended to "end[] the long-standing regime of state-sanctioned monopolies" in the provision of telephone service, *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999), and to "accelerate rapidly private sector deployment of advanced telecommunications [services] to all Americans by opening all telecommunications markets to competition," H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996).

Although the wireless communications industry was still in its relative infancy, Congress expressed particular concern about the need to remove barriers to competition in that industry. Specifically, the House Commerce Committee found that state and local zoning decisions concerning the placement of wireless facilities were "creat[ing] an inconsistent and, at times, conflicting patchwork of requirements" that was threatening to "inhibit the deployment" of wireless services. H.R. Rep. No. 204, 104th Cong., 1st Sess. 94 (1995).

In significant respects, the Telecommunications Act shifted the locus of regulatory authority over the telecommunications industry from the state and local level to the federal level. One of the Telecommunication Act's "central" provisions in this regard was its preemption provision, new Section 253 of the Communications Act of 1934, 47 U.S.C. 253. See *Cablevision of Boston, Inc.* v. *Public Improvement Comm'n*, 184 F.3d 88, 97 (1st Cir. 1999); see also *In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21,396, 21,440 (¶ 102) (1997) (noting that Section 253 was a "critical component of Congress' pro-competitive deregulatory national policy framework"). The subsection of that provision at issue here, Section 253(a), provides that "[n]o State or local

statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. 253(a). Section 253(a) was intended to "preempt[] almost all State and local barriers to competing with the telephone companies," S. Rep. No. 23, 104th Cong., 1st Sess. 5 (1995), and to ensure that federal telecommunications policy "would indeed be the law of the land and could not be frustrated by the isolated actions of individual municipal authorities or states," *In re Public Utility Comm'n*, 13 F.C.C.R. 3460, 3463 (¶ 4) (1997), petition for review denied, 164 F.3d 49 (D.C. Cir. 1999).

b. San Diego County, California, is the sixth largest county in the United States, with a population of nearly 3 million. See U.S. Census Bureau, 100 Largest U.S. Counties (July 1, 2007) <http://www.census.gov/popest/counties/CO-EST2007-07.html>. On April 30, 2003, the County's Board of Supervisors adopted the Wireless Ordinance. The stated purpose of that ordinance was to "provide a uniform and comprehensive set of standards for the development, siting and installation of wireless telecommunications facilities" in San Diego County. Zoning Ord. § 6982.

The Wireless Ordinance establishes a host of substantive and procedural requirements for the placement and design of wireless facilities, above and beyond the generally applicable requirements contained in preexisting provisions of the county's zoning ordinance. As a substantive matter, the Wireless Ordinance requires a provider to show that a proposed wireless facility is "necessary" to close a "gap" in the provider's service network. Zoning Ord. § 6984(a). The proposed facility, moreover, must be located in a "preferred zone" (*e.g.*, in certain listed areas) and at a "preferred location" within

that zone (*e.g.*, on an existing structure or a commercial or industrial building), unless the provider can show that such a location would not be "technologically or legally feasible." *Id.* § 6986(a)-(b). In addition, a proposed wireless facility must "be designed to minimize the visual impact to the greatest extent feasible * * * and to be compatible with existing architectural elements * * * and other site characteristics," *id.* § 6987(f); the facility must be "the minimum height required from a technological standpoint for the proposed site," *id.* § 6984(c)(1); and the facility must meet a number of other highly detailed design requirements (right down to the use of "non-reflective" colors and "graffiti-resistant coating[s]"), *id.* § 6986(a)-(e), (g)-(r).

Where the proposed facility will be located in a residential area, any tower in the facility must be set back from the nearest lot by a distance of at least 50 feet, Zoning Ord. § 6985(c)(4), and certain types of towers may not be used, *id.* § 6985(c)(1). No matter where the facility is located, moreover, the provider must agree to share the facility with other providers, as long as it would be feasible and "aesthetically desirable" to do so. *Id.* § 6984(c)(9). And even if the proposed facility is in compliance with applicable requirements established by the Federal Communications Commission (FCC), the County may deny permission if the facility would interfere with its regional communications system. *Id.* § 6984(c)(11).

As a procedural matter, the Wireless Ordinance establishes four tiers of review for applications for wireless facilities, depending on the type of the facility and its location. Zoning Ord. § 6985(a). Lower-tier applications are subject to review by the Director of the Planning and Land Use Department (with or without community input); higher-tier applications require use permits and

may be reviewed directly by the Planning Commission. *Id.* § 6985(a)-(b). Regardless of the tier to which an application is assigned, however, a provider must comply with detailed application requirements. For example, the provider must submit a map showing "the gap [that] the facility is meant to close"; a "visual impact analysis," including photo simulations, the proposed color scheme, and a site map; and a detailed narrative with information about, *inter alia*, the facility's height, landscaping, maintenance, and noise levels. *Id.* § 6984(a)-(c). And the Director of the Planning and Land Use Department retains the discretion, "based upon specific project factors," to require the provider to submit additional information. *Id.* § 6984.

A provider seeking to build a wireless facility in San Diego County must also satisfy the generally applicable requirements contained in preexisting provisions of the county's zoning ordinance. Where a use permit is required—*i.e.*, for most "high-visibility" facilities or facilities located in residential or rural areas—the provider must submit still more information (such as an assessment of the environmental impact of the facility), Zoning Ord. § 7354(b), and the application must be considered at a public hearing, *id.* § 7356. Critically, the County retains the unfettered discretion to grant or deny the application based on "[a]ny * * * relevant impact of the proposed use." *Id.* § 7358(a)(6). If it grants the application, the County may impose any conditions on the use that are "reasonable and necessary or advisable under the circumstances," *id.* § 7362, and may revoke or modify the permit at any time, *id.* § 7382. A provider that fails to comply with any provision of the zoning ordinance is subject to criminal and civil penalties. *Id.* § 7703.

2. Petitioner is one of the Nation's largest providers of wireless telecommunications services (including mo-

bile telephone service). On July 15, 2003, petitioner, filed suit against respondents, the County of San Diego and the members of its Board of Supervisors, in the United States District Court for the Southern District of California.[1] Petitioner claimed, *inter alia*, that the San Diego County Wireless Ordinance was preempted by 47 U.S.C. 253(a).[2]

After the parties cross-moved for summary judgment on petitioner's Section 253(a) claim, the district court granted summary judgment to petitioner (and denied summary judgment to respondents) on that claim. App., *infra*, 54a-89a. As is relevant here, the district court held that the Wireless Ordinance was preempted by Section 253(a). *Id.* at 65a-74a.

The district court reasoned that the relevant inquiry under Section 253(a) was "whether the regulatory scheme established by the [Wireless Ordinance] prohibits or has the effect of prohibiting [petitioner] from providing wireless telecommunications service." App., *infra*, 65a. The district court noted that "[c]ourts applying

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[1] Another wireless provider, Pacific Bell Wireless (now a subsidiary of AT&T), joined in the complaint and subsequently settled.

[2] Petitioner also claimed that the Wireless Ordinance discriminated against some providers using public rights-of-way, in violation of 47 U.S.C. 253(c), and that plaintiffs were entitled to damages for the alleged violations of Section 253 pursuant to 42 U.S.C. 1983. See C.A. E.R. 11-12. The district court dismissed the Section 253(c) claim on the ground that Section 253(c) "does not provide an independent cause of action." *Id.* at 23. Petitioner abandoned that claim on appeal. As for the Section 1983 claim, the district court granted summary judgment to respondents on that claim on the ground that "section 253(a) does not give rise to a private right enforceable through [Section] 1983," App., *infra*, 81a, and the en banc court of appeals agreed that "[Section] 1983 claims cannot be brought for violations of [Section] 253," *id.* at 16a. Petitioner does not challenge that holding of the court of appeals in this petition.

section 253(a) have found that certain features of regulations, in combination, have the effect of prohibiting the provision of telecommunications services." *Id.* at 65a-66a. Those features, the court continued, "include * * * numerous submission or disclosure requirements, retention of discretion by the city to require further disclosures, public hearing requirements, unlimited discretion of the city to grant or deny permits, and civil and/or criminal penalties." *Id.* at 66a (citing cases). The court then determined that, "[l]ike the ordinances and regulations in the cases [cited], the [Wireless Ordinance] includes a number of features that have the collective effect of prohibiting the provision of telecommunications service." *Id.* at 70a. The court explained that the Wireless Ordinance "impose[s] burdensome submission requirements"; "unreasonabl[y]" requires providers to be willing to share their facilities, regardless of the terms; and "allow[s] for the exercise of unfettered discretion at every level of the application process." *Id.* at 70a-71a.[3]

3. A panel of the court of appeals affirmed. App., *infra*, 18a-52a. With regard to whether the Wireless Ordinance was preempted by Section 253(a), the panel stated that this case raised "almost identical" concerns to those

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[3] The district court also held that the Wireless Ordinance was not saved by 47 U.S.C. 253(c), which preserves the authority of a state or local government "to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers * * * for use of public rights-of-way on a non-discriminatory basis." App., *infra*, 74a-78a. The court reasoned that "Section 253(c) clearly does not apply to the extent that the [Wireless Ordinance] goes beyond regulating the public rights-of-way," *id.* at 75a, and that, even if the Wireless Ordinance could be interpreted to apply only to public rights-of-way, "many of its requirements would not qualify as management of the public rights-of-way," *id.* at 76a (internal quotation marks omitted). Respondents did not contend on appeal that the Wireless Ordinance was saved by Section 253(c).

raised in *City of Auburn* v. *Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), cert. denied, 534 U.S. 1079 (2002), in which the court had held that similar ordinances were preempted. App., *infra*, 48a. The panel explained that "[t]he [Wireless Ordinance], on its face, supplements the Zoning Ordinance by adding submission requirements to an already voluminous list." *Ibid.* "Those requirements," the panel continued, "are in addition to the open-ended discretion and threat of criminal penalties contained in the Zoning Ordinance." *Ibid.* The panel added that "[t]he [Wireless Ordinance] itself explicitly allows the decision maker to determine whether a facility is appropriately 'camouflaged,' 'consistent with community character,' and designed to have minimum 'visual impact.'" *Ibid.* (citations omitted). The panel therefore concluded that "the [Wireless Ordinance] imposes a permitting structure and design requirements that present[] barriers to wireless telecommunications within the County, and is therefore preempted by § 253(a)." *Ibid.*

4. After granting rehearing en banc, the court of appeals reversed, holding that the Wireless Ordinance was not preempted. App., *infra*, 1a-17a.

As is relevant here, the en banc court of appeals first noted that the panel in *City of Auburn* had "adopted [a] broad interpretation of [the] preemptive effect" of Section 253(a). App., *infra*, 8a. The court reasoned that, by erroneously relying on the use of the word "may" in that provision, the *City of Auburn* court had held that, "if a local regulation merely 'create[s] a substantial . . . barrier' to the provision of services or 'allows a city to bar' provision of services,' then Section 253(a) preempts the regulation." *Id.* at 8a-9a (quoting *City of Auburn*, 260 F.3d at 1176)).

The court of appeals then contended that "[*City of Auburn*'s] expansive reading of the preemptive effect of

§ 253(a) has had far-reaching consequences." App., *infra*, 9a. The court noted that "[t]hree of our sister circuits * * * have followed our broad interpretation of § 253(a), albeit with little discussion." *Ibid.* (citing *Puerto Rico Telephone Co.* v. *Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006); *TCG New York, Inc.* v. *City of White Plains*, 305 F.3d 67 (2d Cir. 2002), cert. denied, 538 U.S. 923 (2003); and *Qwest Corp.* v. *City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004)). The court also noted that, "[a]pplying our [*City of*] *Auburn* standard, federal district courts have invalidated local regulations in tens of cases across this nation's towns and cities." *Ibid.* (citing cases).

On the other hand, the court of appeals explained, the Eighth Circuit had "rejected the [*City of*] *Auburn* standard." App., *infra*, 10a (citing *Level 3 Communications, L.L.C.* v. *City of St. Louis*, 477 F.3d 528 (8th Cir. 2007), petition for cert. pending, No. 08-626 (filed Nov. 7, 2008)). The court concluded that the Eighth Circuit's critique of *City of Auburn* was "persuasive," reasoning that "Congress' use of the word 'may' * * * convey[s] the meaning that 'state and local regulations *shall not* prohibit or have the effect of prohibiting telecommunications services." *Ibid.* (emphasis added). The court also asserted that a "narrow" interpretation of Section 253(a) was "consistent with the FCC's." *Id.* at 11a (citing *In re California Payphone Association*, 12 F.C.C.R. 14,191 (1997)).

The court of appeals therefore overruled its earlier decision in *City of Auburn* and agreed with the Eighth Circuit that, in order to establish preemption, "a plaintiff * * * must show actual or effective prohibition, rather than the mere possibility of prohibition." App., *infra*, at 10a-11a (internal quotation marks and citation omitted). By contrast, under the court's standard, "a plaintiff's

showing that a locality could *potentially* prohibit the provision of telecommunications services is insufficient." *Id.* at 13a. The court further noted that, because petitioner's claim constituted a "facial challenge to the [Wireless] Ordinance," it was subject to the rule of *United States* v. *Salerno*, 481 U.S. 739 (1987), under which a claimant must show that "no set of circumstances exists under which the [challenged statute] would be valid." App., *infra*, 13a-14a.

Turning to the application of its standard, the court of appeals reasoned, with regard to the Wireless Ordinance's unfettered discretion, that "[i]t is certainly true that a zoning board *could* exercise its discretion to effectively prohibit the provision of wireless services, but it is equally true (and more likely) that a zoning board would exercise its discretion only to balance the competing goals of [the] ordinance." App., *infra*, 15a. Regarding the Wireless Ordinance's procedural requirements, the court similarly reasoned that, "[a]lthough a zoning board could conceivably use these procedural requirements to stall applications and thus effectively prohibit the provision of wireless services, the zoning board equally could use these tools to evaluate fully and promptly the merits of an application." *Ibid.* And regarding the Wireless Ordinance's substantive requirements, the court asserted that "[petitioner] has not identified a single requirement that effectively prohibits it from providing wireless services." *Id.* at 15a-16a.

The court of appeals suggested that a facial challenge could succeed if an ordinance "effect[ed] a significant gap in service coverage": for example, "[i]f an ordinance required * * * that all [wireless] facilities be underground" or "that no wireless facilities be located within one mile of a road." App., *infra*, 16a. Absent such a showing, however, the court concluded that "the [Wire-

less] Ordinance does not effectively prohibit [petitioner] from providing wireless services." *Ibid.*[4]

## REASONS FOR GRANTING THE PETITION

The en banc Ninth Circuit held in this case that a state or local regulation that does not expressly prohibit the provision of telecommunications service is preempted by 47 U.S.C. 253(a) only if it effects a complete ban on the provision of service. In so holding, the court of appeals expressly recognized that its interpretation of Section 253(a) conflicted with those of several other circuits. The court of appeals' analysis was deeply flawed, and the resulting rule promises to have substantial and harmful consequences for the telecommunications industry in general and the wireless industry in particular. This case, moreover, is an excellent vehicle for resolution of the circuit conflict concerning the interpretation of Section 253(a). In short, this case satisfies all of the Court's traditional criteria for granting review.

### A. The Decision Below Conflicts With The Decisions Of Several Other Courts Of Appeals

In the decision below, the en banc Ninth Circuit held that a state or local regulation that does not expressly prohibit the provision of telecommunications service is preempted by 47 U.S.C. 253(a) only if it effects a complete ban on the provision of service. App., *infra*, 16a. As the court expressly recognized, its "narrow" interpretation of Section 253(a) conflicts with the interpretations

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[4] Judge Gould concurred. App., *infra*, 17a. He reasoned that zoning ordinances could be preempted if "they would substantially interfere with the ability of the carrier to provide [telecommunications] services," but concluded, without elaboration, that "the record in this case shows that the telecommunications services here were not effectively barred by the zoning ordinance." *Ibid.*

of several other circuits. See *id.* at 9a, 11a. That clear and substantial circuit conflict warrants this Court's review.

1. Although they have used slightly different formulations of the applicable standard, three circuits—the First, Second, and Tenth—have held that a state or local regulation is preempted by 47 U.S.C. 253(a) if it substantially impedes an entity from providing telecommunications service.

In *Puerto Rico Telephone Co.* v. *Municipality of Guayanilla*, 450 F.3d 9 (2006), the First Circuit held that, for purposes of determining whether a regulation "ha[s] the effect of prohibiting the ability of any entity to provide any * * * telecommunications service," the relevant inquiry is whether "the [regulation] materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* at 18 (citing, *inter alia*, *In re California Payphone Association*, 12 F.C.C.R. 14,191, 14,206 (¶ 31) (1997)). The court added that "a prohibition does not need to be complete or 'insurmountable' to run afoul of § 253(a)." *Ibid.* (citation omitted). Applying that standard, the court invalidated a local ordinance that imposed a 5% fee on gross revenues from all telephone calls originating within the locality (and required providers to comply with associated reporting requirements). *Id.* at 11-12, 23-24. The court reasoned that the ordinance would "negatively affect [the challenging provider's] profitability"; give rise to "a substantial increase in [the provider's] costs"; and "place a significant burden" on the provider. *Id.* at 18, 19.

Similarly, in *TCG New York, Inc.* v. *City of White Plains*, 305 F.3d 67 (2002), cert. denied, 538 U.S. 923 (2003), the Second Circuit held that the test under Section 253(a) is whether a regulation "materially inhibits or

limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* at 76 (quoting *California Payphone Association*, 12 F.C.C.R. at 14,206 (¶ 31)). Like the First Circuit, the Second Circuit noted that "a prohibition does not need to be complete or 'insurmountable' to run afoul of § 253(a))." *Ibid.* (citation omitted). The court proceeded to invalidate a local ordinance that subjected non-incumbent providers to a host of substantive and procedural requirements (and pursuant to which the locality sought to impose a 5% gross-revenues fee on the challenging provider). *Id.* at 71-73, 82. Notably, in invalidating the ordinance, the court focused on a provision that gave the local council the unfettered discretion to reject any application for a franchise. *Id.* at 76. The court concluded that the ordinance was preempted because it would pose "obstacles * * * to [the challenging provider's] ability to compete in [the locality] on a fair basis." *Id.* at 76-77.

For its part, in *Qwest Corp.* v. *City of Santa Fe*, 380 F.3d 1258 (2004), the Tenth Circuit held that the relevant inquiry under Section 253(a) is whether a regulation "would 'materially inhibit' the provision of [telecommunications] services." *Id.* at 1271 (quoting *California Payphone Association*, 12 F.C.C.R. at 14,206 (¶ 31)). The court also observed that "an absolute bar on the provision of services is not required." *Ibid.* Applying that standard, the court invalidated a local ordinance that required providers to register with the locality and obtain lease agreements before using public rights-of-way. *Id.* at 1262-1263, 1275. Like the Second Circuit, the Tenth Circuit focused on the fact that the ordinance contained a provision giving the locality "broad discretion in determining whether or not to accept a registration or lease application." *Id.* at 1270. The court reasoned that the

provision would "den[y] telecommunications providers the fair and balanced legal and regulatory environment the [Telecommunications Act] was designed to create" and that other provisions would "create a significant burden" and impose "substantial costs" on the challenging provider. *Id.* at 1270, 1271 (internal quotation marks and citation omitted).

2. The Eighth Circuit, by contrast, has expressly repudiated the approaches of the First, Second, and Tenth Circuits. In *Level 3 Communications, L.L.C.* v. *City of St. Louis*, 477 F.3d 528 (2007), petition for cert. pending, No. 08-626 (filed Nov. 7, 2008), the Eighth Circuit contended that those circuits had "reach[ed] a conclusion contrary to a complete analysis of [Section 253(a)]." *Id.* at 533. The court reasoned that Section 253(a) could not be read to "result[] in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services." *Ibid.* The court therefore concluded that it was insufficient for a provider challenging a regulation under Section 253(a) to show "the mere possibility of prohibition." *Ibid.*

Confusingly, however, the Eighth Circuit—like the circuits whose approaches it purported to be rejecting—recognized that Section 253(a) "articulates a reasonably broad limitation on state and local governments' authority to regulate telecommunications providers," *Level 3 Communications*, 477 F.3d at 531-532; that a challenging provider "need not show a complete or insurmountable prohibition," *id.* at 533 (citing *TCG New York*, 305 F.3d at 76); and that the provider instead "must show an existing material interference with the ability to compete in a fair and balanced market," *ibid.* (citing *California Payphone Association*, 12 F.C.C.R. at 14,206 (¶ 31)). Still more confusingly, the court at one point suggested that the "material interference" standard was even *more*

exacting than the standard it was seemingly applying. See *id.* at 534 (concluding that there was "insufficient evidence from [the challenging provider] of any actual or effective prohibition, *let alone* one that materially inhibits its operations") (emphasis added). Although the Eighth Circuit purported to apply (and apparently did apply) a more stringent standard than the other circuits, it is thus somewhat unclear just how stringent that standard is in practice.

3. Like the Eighth Circuit, the en banc Ninth Circuit in this case expressly repudiated the approaches of the First, Second, and Tenth Circuits, see App., *infra*, 9a, and noted that it was insufficient for a challenging provider to show "the mere possibility of prohibition," *id.* at 10a-11a (quoting *Level 3 Communications*, 477 F.3d at 533). Unlike the Eighth Circuit, however, the Ninth Circuit did not suggest that a provider could satisfy Section 253(a) by showing that a regulation "material[ly] interfere[d] with" the ability of any entity to provide telecommunications service, or by identifying a prohibition that was short of "complete or insurmountable." *Level 3 Communications*, 477 F.3d at 533. Instead, the court overruled its earlier decision in *City of Auburn* (which, it noted, had recognized that a regulation could be preempted if it "create[d] a substantial . . . barrier" to the provision of telecommunications service, App., *infra*, 8a-9a (quoting *City of Auburn*, 260 F.3d at 1176)), and held that a regulation is preempted by Section 253(a) only if it effects a complete ban on the provision of such service. *Id.* at 16a.[5]

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[5] While the Ninth Circuit suggested that a plaintiff could succeed in a challenge to a regulation if an ordinance "effect[ed] a significant gap in service coverage," App., *infra*, 16a, such a coverage gap would be tantamount to a complete ban, insofar as the carrier would be unable to provide any service in the area of the "gap" (and would

Regardless of how the Eighth Circuit's interpretation is characterized, therefore, it is clear that the Ninth Circuit's interpretation at a minimum conflicts with the interpretations of the First, Second, and Tenth Circuits. Because the decision below was issued by the en banc court, moreover, it is exceedingly unlikely that the Ninth Circuit will reconsider its interpretation. The resulting circuit conflict on the meaning of Section 253(a) merits this Court's review.

### B. The Court Of Appeals' Interpretation Of Section 253(a) Is Erroneous

The en banc Ninth Circuit erred, moreover, by holding that a state or local regulation that does not expressly prohibit the provision of telecommunications service is preempted by Section 253(a) only if it effects a complete ban on the provision of such service. See App., *infra*, 16a.

1. Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. 253(a). As many courts have noted, the language of Section 253 in general—and Section 253(a) in particular—is far from clear. See, *e.g.*, *New Jersey Payphone Ass'n* v. *Town of West New York*, 299 F.3d 235, 240 (3d Cir. 2002); *City of Abilene* v. *FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999). As this Court has already (if implicitly) recognized, however, the text of Section 253(a) comfortably accommodates an interpretation under which any regulation that substan-

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be unable to provide adequate service to the surrounding area). The Ninth Circuit did not identify any other circumstance in which a challenge to a regulation that stopped short of a complete ban would succeed under its standard.

tially impedes an entity from providing telecommunications service is preempted. See, *e.g.*, *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 491 (2002) (noting that Section 253(a) "prohibits state and local regulation that *impedes* the provision of 'telecommunications service'") (emphasis added).

Such an interpretation of Section 253(a) is preferable to the Ninth Circuit's cramped interpretation for two principal reasons. First, that interpretation, unlike the Ninth Circuit's interpretation, gives meaningful content to the second clause of Section 253(a), which preempts regulations that have the "effect of prohibiting" the ability to provide telecommunications service (in contrast with the first clause, which preempts regulations that "prohibit" the ability to do so). Cf. *Nixon* v. *Missouri Municipal League*, 541 U.S. 125, 138 (2004) (rejecting a reading of Section 253(a) under which the provision "would often accomplish nothing"). Second, that interpretation better effectuates Congress's underlying policy objectives in enacting the Telecommunications Act in general (and Section 253(a) in particular): namely, to eliminate barriers to competition and to ensure that telecommunications providers would not be subject to intrusive state and local regulation. See pp. 2-4, *supra*; cf. *Nixon*, 541 U.S. at 138 (rejecting an interpretation under which Section 253(a) "would hold out no promise of a national consistency").

2. In adopting its avowedly "narrow" construction of Section 253(a), see App., *infra*, 11a, the Ninth Circuit committed several fundamental errors of statutory interpretation.

a. The Ninth Circuit criticized those decisions that had adopted a broader construction of Section 253(a) (including its prior decision in *City of Auburn*) on the ground that they attached excessive significance to the

provision's use of the word "may." See App., *infra*, 8a-11a. In so reasoning, however, the Ninth Circuit was attacking a strawman. Neither the *City of Auburn* nor the decisions of other circuits placed substantial weight on the use of the word "may"; instead, those decisions merely sought to give meaning to the successive phrase "have the effect of prohibiting." See *City of Auburn*, 260 F.3d at 1176 (holding that "[t]he ordinances at issue in the present case include several features that, in combination, have the effect of prohibiting the provision of telecommunications services"); see also *Puerto Rico Telephone*, 450 F.3d at 18; *City of Santa Fe*, 380 F.3d at 1271; *TCG New York*, 305 F.3d at 76.

Although the Ninth Circuit confidently asserted that the text of Section 253(a) is "unambiguous," see App., *infra*, 11a, it made no effort to explain why the "have the effect of prohibiting" clause of Section 253(a) should be limited to regulations that effect a complete ban, rather than regulations that erect "substantial . . . barrier[s]" to the provision of telecommunications service. *Id.* at 8a-9a (quoting *City of Auburn*, 260 F.3d at 1176). Instead, the court merely stated (and repeatedly restated) the unobjectionable proposition that Section 253(a) preempts regulations that either "actually prohibit or effectively prohibit" the ability to provide such service. See, *e.g.*, *id.* at 11a (citation omitted).

b. The Ninth Circuit also erred by suggesting that its construction of Section 253(a) was "consistent with the FCC's." App., *infra*, 11a. In so doing, the court cited an FCC ruling for the generic proposition that Section 253(a) preempts regulations that either "actually prohibit or effectively prohibit" the ability to provide telecommunications service. *Ibid.* (citing *California Payphone Association*, 12 F.C.C.R. at 14,209 (¶ 38)).

In the same ruling on which the Ninth Circuit relied, however, the FCC made clear that, in determining whether a regulation "'has the effect of prohibiting' the ability of any entity to provide [telecommunications] service," it would "consider whether the [regulation] materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *California Payphone Association*, 12 F.C.C.R. at 14,206 (¶ 31).[6] While the Ninth Circuit suggested that the FCC's interpretation of Section 253(a) would be entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), see App., *infra*, 11a, it seemingly made no effort to come to terms with the FCC's actual interpretation of the operative statutory language.

c. The Ninth Circuit compounded its other interpretive errors by erroneously relying on the standard for facial challenges articulated in *United States* v. *Salerno*, 481 U.S. 739 (1987), in order to narrow still further the

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[6] All of the other courts of appeals to have addressed the construction of Section 253(a) have discussed (and, to varying degrees, relied upon) the quoted language from the FCC's ruling in *California Payphone Association*. See *Level 3 Communications*, 477 F.3d at 533; *Puerto Rico Telephone*, 450 F.3d at 18; *City of Santa Fe*, 380 F.3d at 1271; *TCG New York*, 305 F.3d at 76. The FCC, moreover, has repeatedly cited (and relied upon) that language in subsequent rulings. See *In re Public Utility Comm'n*, 13 F.C.C.R. 3460, 3470 (¶ 22) (1997), petition for review denied, 164 F.3d 49 (D.C. Cir. 1999); *In re Low Tech Designs, Inc.*, 13 F.C.C.R. 1755, 1775-1776 (¶ 38) (1997); *In re Pittencrieff Communications, Inc.*, 13 F.C.C.R. 1735, 1751-1752 (¶ 32) (1997), petition for review denied, 168 F.3d 1332 (D.C. Cir. 1999); *TCI Cablevision*, 12 F.C.C.R. at 21,439 (¶ 98); see also *In re Cheyenne River Sioux Tribe Telephone Auth.*, 17 F.C.C.R. 16,916, 16,936-16,937 (2002) (statement of Commissioner Copps).

standard for preemption under Section 253(a) in the context of a challenge to an ordinance. In *Salerno*, this Court held that a plaintiff bringing a facial challenge to a statute must show that the statute is invalid in all of its applications. See *id.* at 745. Section 253(a), however, expressly preempts any "statute," "regulation," or other "legal requirement" that prohibits or has the effect of prohibiting the ability of any entity to provide telecommunications services. By its terms, therefore, Section 253(a) provides the entire substantive standard for a preemption challenge to a statute or regulation (such as the San Diego County Wireless Ordinance), without any need to import *Salerno* into the analysis. The Ninth Circuit thus erred by relying on *Salerno* to reach the conclusion that the Wireless Ordinance could not be preempted unless it effectively resulted in a complete ban on the provision of telecommunications service. See, *e.g.*, App., *infra*, 16a. This Court should grant review in order to eliminate the resulting circuit conflict and correct the Ninth Circuit's seriously flawed interpretation.

### C. The Question Presented Is An Important One That Is Ripe For This Court's Review

The question presented in this case—*i.e.*, whether Section 253(a) preempts a state or local regulation that substantially impedes the provision of telecommunications service—is a recurring one of obvious importance to the telecommunications industry. As noted above, Section 253(a) is widely recognized as one of the most significant provisions of the Telecommunications Act of 1996. See p. 3, *supra*. The interpretation of Section 253(a) has a direct effect on the ability of telecommunications providers to offer more, and more advanced, telecommunications services, consistent with the overriding purpose of the Telecommunications Act. Indeed, the

willingness of telecommunications providers to make investments in new technologies in the first place depends crucially on their ability to implement those technologies free of interference from state and local law. At a minimum, therefore, the question presented here is comparable in importance to questions this Court has previously considered concerning the interpretation of this or other provisions of the Telecommunications Act. Cf., *e.g.*, *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113 (2005) (whether an individual may enforce the limitations in 47 U.S.C. 332(c)(7) through an action under 42 U.S.C. 1983); *Nixon*, 541 U.S. at 125 (whether the phrase "any entity" in Section 253(a) includes political subdivisions of States).

Because state and local governments have continually sought to impose restrictions on the operations of telecommunications companies, moreover, questions concerning the scope of preemption under Section 253(a) arise with remarkable frequency. As the en banc Ninth Circuit recognized in the decision below, lower courts have considered challenges to local regulations under Section 253(a) "in tens of cases across this nation's towns and cities," App., *infra*, 9a (citing cases), and numerous other cases are currently pending nationwide, see, *e.g.*, *Newpath Networks LLC* v. *City of Irvine*, Nos. 08-55755 & 08-56010 (9th Cir. appeal filed May 2, 2008) (challenge to local wireless ordinance); *NextG Networks of California, Inc.* v. *City of Huntington Beach*, No. 8:07-cv-01471 (C.D. Cal. filed Dec. 27, 2007) (same); *New York SMSA Limited Partnership* v. *Town of Clarkstown*, No. 7:07-cv-07637-CS (S.D.N.Y. filed Aug. 28, 2007) (same). Especially in light of the ongoing proliferation of litigation, this Court's intervention is warranted in order to provide definitive resolution concerning the interpretation of Section 253(a).

This Court's intervention is especially warranted because the current inconsistency in the interpretation of Section 253(a) among the circuits itself disserves one of the primary objectives of the Telecommunications Act: namely, to avoid subjecting telecommunications providers in general (and wireless providers in particular) to "an inconsistent and, at times, conflicting patchwork of requirements," depending on where the providers' facilities are located. H.R. Rep. No. 204, 104th Cong., 1st Sess. 94 (1995). As matters currently stand, in the Ninth Circuit, virtually any regulation that does not expressly prohibit the provision of telecommunications service (with the exception of an entirely fanciful regulation providing that "all [wireless] facilities be underground" or that "no wireless facilities be located within one mile of a road," App., *infra*, 16a) will be upheld as not preempted by Section 253(a). By contrast, in the First, Second, and Tenth Circuits (and possibly even in the Eighth Circuit), a regulation that substantially impedes the provision of telecommunications service will be invalidated, even if it does not result in a complete ban. The resulting disuniformity necessitates immediate intervention without further percolation.

Finally, if the decision below is allowed to stand, it threatens to embolden localities in the Nation's largest and most populous circuit—and, indeed, beyond—to enact burdensome ordinances similar to the County of San Diego's. In fact, in the short time since the decision below, the City of Berkeley, California, has already withdrawn proposed changes to its preexisting wireless ordinance that would have eliminated some of its most onerous requirements—changes that, ironically enough, were initially proposed in response to the panel's opinion. See Memorandum from Wendy Cosin, Deputy Planning Director, to Members of the Berkeley Planning Commis-

sion, at 1-3 (Nov. 5, 2008) <http://www.tinyurl.com/berkeleymemo>. As noted above, moreover, litigation concerning other ordinances is currently ongoing in courts in the Ninth Circuit—and the decision below will obviously make it more difficult for the challenges to those ordinances to succeed. See p. 22, *supra*. In light of the clear and substantial circuit conflict concerning the scope of Section 253(a) and the vital importance of the question presented, further review is plainly warranted.

### D. This Case Is An Ideal Vehicle For Considering The Question Presented

Should the Court decide to resolve the circuit conflict concerning the interpretation of Section 253(a), this case is an optimal vehicle for the Court's review.

1. This case cleanly presents the question whether Section 253(a) preempts a state or local regulation that substantially impedes the provision of telecommunications service, and it is clear that the resolution of that question would be outcome-dispositive here. As the district court and the court of appeals panel correctly determined, the San Diego County Wireless Ordinance contains numerous features that, when viewed either collectively or in isolation, erect substantial obstacles to the provision of wireless service. See App., *infra*, 47a-48a (court of appeals panel); *id.* at 70a-74a (district court).

Most notably, the Wireless Ordinance imposes a host of substantive and procedural requirements for the placement and design of wireless facilities, ranging from the requirement that a provider agree to share the proposed facility with other providers, Zoning Ord. § 6984(c)(9), to the requirement that the provider supply a "visual impact analysis" and a detailed narrative with information about the facility's design and maintenance, *id.* § 6984(b)-(c). Lower courts applying a substantial-

impediment standard have routinely invalidated such elaborate requirements under Section 253(a). See, *e.g.*, *Qwest Communications, Inc.* v. *City of Berkeley*, 433 F.3d 1253, 1257 (9th Cir. 2006); *City of Santa Fe*, 380 F.3d at 1270; *City of Auburn*, 260 F.3d at 1175-1176. The burden imposed by those substantive and procedural requirements is compounded by the fact that the County retains the discretion to grant or deny any application requiring a use permit based on "[a]ny * * * relevant impact of the proposed use," Zoning Ord. § 7358(a)(6), and to revoke or modify the permit at any time, *id.* § 7382. As courts have noted in invalidating similar provisions, such unfettered discretion constitutes the "ultimate cudgel" that a locality may use to deny the provision of wireless service. *City of Auburn*, 260 F.3d at 1176; see, *e.g.*, *City of Santa Fe*, 380 F.3d at 1270. Because the Wireless Ordinance constitutes nothing less than a shadow regulatory regime for the provision of wireless services within San Diego County, there can be no doubt that it substantially impedes the provision of telecommunications service within the county. Under the correct interpretation of Section 253(a), therefore, the Wireless Ordinance would comfortably be held to be preempted.

Before the court of appeals, respondents contended that petitioner's preemption claim was governed not by Section 253(a), but rather by 47 U.S.C. 332(c)(7), which provides, in the specific context of "decisions" concerning the placement of wireless facilities, that a state or local regulation "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." App., *infra*, 7a. To the extent respondents renew that contention before this Court, however, it would not give rise to any sort of vehicle problem. As a preliminary

matter, that contention plainly lacks merit.[7] But more broadly, as the en banc court of appeals noted, the "relevant" language in each provision—*i.e.*, that a state or local regulation that either prohibits or effectively prohibits the provision of services is preempted—is "identical." See *id.* at 13a. Because "the legal standard is the same under either [provision]," the en banc court of appeals ultimately (and correctly) held that it was unnecessary to address respondents' contention. *Ibid.* For the same reason, this Court would not need to address that contention either, and there is therefore no obstacle to the Court's reaching, and resolving, the question presented here.

2. The question presented in this case is also presented in another petition currently pending before the Court. See *Level 3 Communications, L.L.C.* v. *City of St. Louis*, No. 08-626 (filed Nov. 7, 2008). That case involves a challenge by a non-incumbent landline provider to a particular licensing agreement with a local government, pursuant to which the provider agreed to pay certain fees, and to submit to certain regulatory requirements, as a condition of obtaining access to public rights-of-way. See *Level 3 Communications*, 477 F.3d at 530-531 (08-626 Pet. App. 24a-25a). At a minimum, the Court should grant review in this case, because it is an ideal

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[7] That is because Section 253(a) applies to challenges to "statutes" and "regulations" (such as the San Diego County Wireless Ordinance), whereas Section 332(c)(7) applies only to challenges to particular "decisions" made by local authorities. As the court of appeals panel explained, therefore, respondents' contention "ignores the plain meaning and structure of the [Telecommunications Act]." App., *infra*, 40a. Tellingly, respondents have cited no decision holding that a provider may bring a preemption claim like petitioner's only under Section 332(c)(7) and not under Section 253(a).

vehicle for resolving the circuit conflict concerning the interpretation of Section 253(a). Because *Level 3 Communications* arises in a distinct but complementary factual context, the Court may wish to grant review in that case as well (and to consolidate the cases for briefing and oral argument).

*Level 3 Communications*, however, presents one additional complication that this case does not. Because the provider in *Level 3 Communications* was specifically seeking access to public rights-of-way, that case implicates the meaning not only of Section 253(a), but also of Section 253(c), which preserves the authority of state and local governments to "manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers[] on a competitively neutral and nondiscriminatory basis." 47 U.S.C. 253(c).

In its petition before this Court, the provider in *Level 3 Communications* asks the Court not only to resolve the circuit conflict concerning the interpretation of Section 253(a), but also an additional (and less substantial) circuit conflict on the issue whether a regulation may be preempted under Section 253(c) regardless whether it falls within the scope of Section 253(a). See 08-626 Pet. 23, 29-30.[8] And the provider appears to go further and to encourage the Court to address fact-intensive issues concerning whether the requirements in that case were "saved" by Section 253(c), regardless whether Section

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[8] The provider in *Level 3 Communications* does not appear to have contended before the Eighth Circuit that Section 253(c) provided a discrete basis for preemption. To the contrary, in its brief on appeal, the provider asserted that the Sixth Circuit's decision in *TCG Detroit* v. *City of Dearborn*, 206 F.3d 618 (2000)—the sole court of appeals decision to adopt such a rule—was "largely devoid of any analysis." Br. of Appellee at 39, *Level 3 Communications*, *supra* (Nos. 06-1398 & 06-1459).

253(c) merely creates an exception to preemption under Section 253(a) or provides a discrete basis for preemption. Specifically, the provider seemingly asks the Court to consider (and decide) whether the challenged fees constitute "fair and reasonable compensation," and whether the challenged regulatory requirements constitute "manage[ment] [of] the public rights-of-way * * * on a competitively neutral and nondiscriminatory basis." See *id.* at 21-23.[9] This case, by contrast, presents only the pure legal issue concerning the interpretation of Section 253(a), shorn of any potentially complicating legal or factual issues concerning the interpretation or application of Section 253(c).[10]

Regardless whether the Court grants the petition in *Level 3 Communications*, however, it should grant the instant petition. This case particularly merits review because it arises in perhaps the most important context in which Section 253(a) currently applies: namely, the preemption of local regulations targeted at the wireless communications industry. Although the wireless industry constituted only a fraction of the overall telecommunications industry at the time the Telecommunications

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[9] The district court in *Level 3 Communications* held that some of the challenged requirements, but not others, were saved by Section 253(c). See 405 F. Supp. 2d 1047, 1056-1063 (E.D. Mo. 2005) (08-626 Pet. App. 49a-67a). The court of appeals did not reach any issue concerning the application of Section 253(c), in light of its holding that the provider had failed to establish preemption under Section 253(a). See 477 F.3d at 534 & n.2 (08-626 Pet. App. 33a & n.2).

[10] Although petitioner in this case claimed in its complaint that the San Diego County Wireless Ordinance discriminated against some providers using public rights-of-way, in violation of Section 253(c), petitioner abandoned that claim on appeal, and respondents did not contend on appeal that the Wireless Ordinance was saved by Section 253(c). See pp. 7 n.2 & 8 n.3, *supra*.

Act of 1996 was enacted, there are now more than 241 million mobile telephone users in the United States, and nearly the entire population lives in areas in which mobile telephone service is provided. See FCC, Twelfth Annual Report on the State of Competitive Market Conditions With Respect to the Wireless Industry, Report No. 08-28, at 5, 6 (2008) <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-28A1.pdf>.

The demand for wireless services continues to grow, and, in order to satisfy that demand (and to provide access to new technologies), wireless providers are under continual pressure to expand and improve their networks. At the same time, however, local communities are often resistant, even openly hostile, to the construction or modification of wireless facilities. See Steven J. Eagle, *Wireless Telecommunications, Infrastructure Security, and the NIMBY Problem*, 54 Cath. U. L. Rev. 445, 454 (2005) (noting that, "[w]hile the majority of adult Americans now enjoy the benefits of wireless communications," those benefits are "vulnerable to more parochial concerns" and local governments "are in a practical position to block or hinder the national telecommunications network"); see also, *e.g.*, Malcolm J. Tuesley, Note, *Not in My Backyard: The Siting of Wireless Communications Facilities*, 51 Fed. Comm. L.J. 887 (1999).

As a practical matter, the Court's decision in this case will determine how far local governments can go in imposing restrictions on the placement and design of wireless facilities. If the Ninth Circuit's decision is allowed to stand, one of the central promises of the Telecommunications Act—that wireless providers can offer services free of intrusive and inconsistent state and local regulation—will go unfulfilled. The question presented in this case is of obvious and enormous practical and legal significance. This case therefore warrants the Court's review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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