No.

IN THE

Supreme Court of the United States

SPRINT NEXTEL CORPORATION AND
T-MOBILE USA, INC.
Petitioners,

v.

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, *ET AL.*
Respondents.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 332(c)(3)(A) of the Communications Act, 47 U.S.C. § 332(c)(3)(A), prohibits states and localities from regulating the "rates charged" by wireless carriers, but does not preempt regulation of "other terms and conditions" of wireless service. The Federal Communications Commission held that state and local laws prohibiting wireless carriers from using "line items" on their bills to recover taxes and fees from their subscribers are preempted by section 332(c)(3)(A). The Eleventh Circuit reversed. The questions presented for review are:

1. Whether the Eleventh Circuit erred by relying on the presumption against preemption to guide its analysis of section 332(c)(3)(A) under *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984).

2. Whether the Eleventh Circuit erred by overturning the FCC's preemption decision under the first step of the *Chevron* analysis on the ground that Congress unambiguously preserved state and local laws prohibiting line item charges on wireless bills.

PARTIES TO THE PROCEEDING

The petitioners are Sprint Nextel Corporation and T-Mobile USA, Inc.

Respondents who were petitioners in the court of appeals below are: the National Association of State Utility Consumer Advocates and the Vermont Public Service Board.

Respondents who were respondents in the court of appeals below are: the Federal Communications Commission and the United States of America.

Respondents who were intervenors in the court of appeals below are: the National Association of Regulatory Utility Commissioners, AT&T Corporation, Cingular Wireless LLC, Leap Wireless International, Inc., Verizon, and the Cellular Telecommunications & Internet Association.

RULE 29.6 STATEMENT

Sprint Nextel Corporation ("Sprint Nextel") was formed by the recent merger of Sprint Corporation ("Sprint") and Nextel Communications, Inc. ("Nextel"), which was consummated on August 12, 2005. Sprint Nextel is a publicly traded corporation with no parent company. As of this filing, Sprint Nextel's records reflect that no publicly held company holds a 10 percent or greater ownership interest in Sprint Nextel.

T-Mobile USA, Inc. is an indirect wholly owned subsidiary of Deutsche Telekom AG ("DT"), which is a publicly held company (NYSE:DT) organized under the laws of the Federal Republic of Germany. DT is a holding company whose subsidiaries engage in telecommunications and related businesses. T-Mobile USA, Inc., together with others of DT's wholly owned subsidiaries, comprise DT's wireless division.

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The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 457 F.3d 1238. The decision of the Federal Communications Commission ("FCC" or "Commission") (Pet. App. 38a-140a) is reported at 20 F.C.C.R. 6448.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2006, and rehearing was denied on November 29, 2006. Pet. App. 34a-35a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 332 of the Communications Act, 47 U.S.C. § 332, is set forth at Pet. App. 159a-168a.

STATEMENT

In 1993, Congress adopted section 332(c)(3)(A) of the Communications Act, 47 U.S.C. § 332(c)(3)(A), which bars states and localities from regulating "the entry of or the rates charged" by wireless carriers. Congress added that, by enacting section 332(c)(3)(A), it was not preempting state and local regulation of the "other terms and conditions" of wireless service. Since then, wireless carriers generally have structured their rate plans to operate largely without regard to state boundaries. However, wireless carriers typically use "line items" – discrete charges on their bills that may vary by jurisdiction – to collect taxes and fees. They do so in order to make clear that some charges result from taxes and fees and because the use of line items permits carriers to collect taxes and fees only from subscribers in the taxing jurisdiction.

States and localities increasingly have imposed taxes and fees on wireless service. They also have recently taken steps to hide those taxes and fees from consumers by prohibiting wireless carriers from using line items to collect them. Construing section 332(c)(3)(A), the FCC held that line items are "rates charged" by wireless carriers and, therefore, that states and localities may not prohibit wireless carriers from using line items. After stating that the "presumption against preemption ... guides our understanding of the statutory language," the Eleventh Circuit vacated the FCC's decision. Pet. App. 23a. The court concluded that "section 332(c)(3)(A) unambiguously preserved the ability of the States to regulate the use of line items in cellular wireless bills." *Id.* at 25a.

The conclusion that Congress unambiguously addressed line items in section 332(c)(3)(A) and gave states and localities the ability to ban them is plainly wrong. As the D.C. Circuit stated in *Cellular Telecommunications Industry Ass'n ("CTIA") v. Federal Communications Commission ("FCC")*, 168 F.3d 1332, 1336 (D.C. Cir. 1999), "Section 332(c)(3)(A) leaves its key terms undefined. It never states what constitutes rate and entry regulation or what comprises other terms and conditions of wireless services." The FCC's interpretation of "rates charged" to include any "discrete charge identified separately on an end user's bill," Pet. App. 65a, was entirely reasonable – and fully in accord with the dictionary definitions on which the Eleventh Circuit based its contrary decision. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court should have upheld the FCC's decision.

The decision below enables states and localities to hide taxes and fees from consumers. Bans on the use of line items may also effectively export taxes and fees to subscribers in other jurisdictions because wireless carriers may choose to raise rates nationally rather than adjust their rates in each

jurisdiction. Alternatively, carriers may adjust their other rates so that, for example, monthly charges vary from state to state. But as the FCC has determined, undesirable consequences would result, including making it more difficult for consumers to compare the rate plans offered by different wireless carriers.

More generally, the Eleventh Circuit's decision will impede efforts to avoid unnecessary regulation of the competitive wireless industry because the court erroneously read section 332(c)(3)(A) to unambiguously preserve state and local regulation. That provision does not "preserve" anything – it merely states that *Congress* did not intend to preempt certain matters by preempting state and local regulation of rate and entry issues, while not affecting the ability of the FCC to preempt when it determines that additional regulation is unwarranted.

Furthermore, the Eleventh Circuit's invocation of the presumption against preemption to guide its analysis was erroneous and has broad applicability, affecting many industries other than the wireless industry. One of the issues presented in *Watters v. Wachovia Bank, N.A.*, No. 05-1342 (U.S. argued Nov. 29, 2006) involves the relationship between the presumption against preemption and judicial review under *Chevron*. *See* Pet. Br. in 05-1342 at i. Depending on how the Court resolves that case, it may be appropriate to grant this petition and vacate the decision below in light of the Court's decision. Alternatively, it may be appropriate to grant this petition to determine whether the Eleventh Circuit erred by invoking the presumption against preemption and then concluding that section 332(c)(3)(A) unambiguously preserved state and local laws prohibiting the use of line items.

1. ***Wireless billing practices***. The most popular wireless rate plans include a monthly charge for a "bucket of minutes"

and separate charges for other items. For example, Nextel offers a plan that provides 450 minutes per month for $39.99 with additional minutes for $0.45. Those terms are available nationally. *See* http://nextelonline.nextel.com/NASApp/onlinestore/en/Action/DisplayPlanDetails?PLAN_ID=UPP1003. Taxes and fees are collected by means of line items that vary by state and locality. *Id.* Collectively, those terms comprise the "rate structure" of the plan. Each of the charges – the monthly charge for the bucket of minutes, the per-minute charge for additional minutes, and the taxes and fees – are "rate elements." *See Am. Tel. & Tel. Co.*, 74 FCC 2d 226, 235 (1979).

State and local governments have increasingly imposed gross receipts or similar taxes on wireless service and instructed wireless carriers that they may not pass those taxes through to subscribers by means of line items. In the Order overturned by the Eleventh Circuit, the FCC cited three laws banning carriers from using line items to collect such taxes and fees, each of which the Commission determined to be preempted by section 332(c)(3)(A). Pet. App. 66-68a & n. 87. In addition, two federal district court judges in Washington recently overturned another state law prohibiting the use of line items to collect state taxes. *See Peck v. Cingular Wireless, LLC*, No. C06-343Z (W.D. Wash. Oct. 24, 2006), *appeal docketed*, No. 06-36027 (9th Cir. Nov. 30, 2006) (Pet. App. 141a); *Hesse v. Sprint Spectrum, L.P.*, No. C06-0592-JCC (W.D. Wash. Jan. 18, 2007) (Pet. App. 151a).

The rationale state and local regulators provide for prohibiting line items is that particular taxes and fees are imposed on wireless carriers rather than upon subscribers. For example, the Indiana Regulatory Commission told carriers that the state gross receipts tax, unlike a sales tax, is not a tax on subscribers – even though, like a sales tax, the amount of the tax is determined by subscriber revenues – and instructed carriers not to pass it through to subscribers by

means of line items, although carriers could increase their other rates on account of the tax. Pet. App. 159-60a. In reality, any sales tax may be converted to a gross receipts tax simply by changing the name of the tax. By doing so, and prohibiting carriers from using line items to collect the tax, a state or locality effectively hides the tax from subscribers. Prohibiting line items may also effectively export the tax to residents of other jurisdictions. For example, using the Nextel rate plan example provided above, if some jurisdictions prohibit Nextel from using line items it might decide to raise its monthly charge for all subscribers. Raising monthly rates nationwide would mean that a prohibition on line items caused a rate increase outside the jurisdictions imposing the taxes.

Alternatively, Nextel might adjust its rate plans so that, for example, subscribers pay $43 per month for a bucket of 450 minutes in a state with a $3 tax, $42 in a county with a $2 tax, and keep the monthly fee at $40 in a jurisdiction with no tax. But Nextel could not then advertise nationally its $40 per month for 450 minute rate plan, and it would be more difficult for consumers to compare Nextel's plans with those offered by other carriers. As the FCC stated, in that case the "patchwork of inconsistent rules" regulating line items "would undermine the benefits derived from allowing CMRS ["commercial mobile radio service"] carriers the flexibility to design national or regional rate plans." Pet. App. 75a.

2. ***The FCC's Order.*** In the FCC Order that was overturned by the Eleventh Circuit, the Commission concluded that "state regulations requiring or prohibiting the use of line items . . . constitute rate regulation and, as such, are preempted under section 332(c)(3)(A) of the Act." Pet.

App. 65a.[1] The Commission explained that "rates charged" does not refer only to "rate levels" – the amount of particular charges – but also extends to prohibitions on the use of particular "rate elements" that comprise a carrier's "rate structure." *Id.* at 66a. Thus, a state or local government may not prohibit a carrier from using a monthly fee, or a per-minute charge, or a line item, each of which is a "rate element." The Commission noted that it had recently equated "line items" with "rate elements" in permitting carriers to recover federal universal service contributions. *Id.*[2] The Commission gave three examples of state laws preempted as a result of its decision, two of which prohibited the use of line items to recover gross receipts taxes and one of which prohibited the use of line items to recover a state universal service fee. *Id.* at n. 87.[3]

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[1] Section 332(c)(3)(A) states that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."

[2] Section 254 of the Communications Act, 47 U.S.C. § 254, governs "universal service." It permits the FCC and states to require carriers to make "contributions," typically calculated as a percentage of revenues, to funds used to defray the cost of telecommunications service in certain areas – usually areas that are not densely populated and therefore more costly to serve. The FCC permits carriers to pass federal universal service contributions through to consumers by means of line items. 47 C.F.R. § 54.712(a).

[3] The Commission also found one example of a state law *requiring* the use of a line item. *Id.* at n. 88. We agree with the Commission that, as a logical matter, such laws also constitute regulation of the rates charged by wireless carriers. As a practical

The Commission noted that it previously had concluded that regulation of the "rates charged" by wireless carriers could not reasonably be limited to regulation of "rate levels" – the amount of particular charges – but necessarily extended to rules affecting rate structures and rate elements. Pet. App. 66a. In *Southwestern Bell Mobile Systems, Inc.*, 14 F.C.C.R. 19,898, 19,908 (1999), the Commission concluded that rules prohibiting carriers from "rounding up" to determine minutes of use and from charging for incoming calls regulated the "rates charged" by wireless carriers because such rules affected the rate structures used by wireless carriers. The conclusion that "rates charged" necessarily includes more than rate levels follows from this Court's conclusion in *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 223 (1998), that "[a]ny claim for excessive rates can be couched as a claim for inadequate services and vice versa."

The FCC made clear that it was not limiting "a state's authority to impose taxes or other regulatory fees" on wireless carriers. Pet. App. 71a. Nor was it preempting "state regulations that address the disclosure of whatever rates the CMRS provider chooses to set." *Id.* at 72a. Rather, it was preempting only state and local laws requiring or prohibiting the use of line items because of their "direct effect on the CMRS carrier's rates and rate structure." *Id.* at 73a. The Commission explained that Congress had directed that wireless rates are to be set in the competitive marketplace and, "To succeed in this marketplace, CMRS carriers typically operate without regard to state borders and, in contrast to wireline carriers, generally have come to

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matter, however, such requirements are unusual and do not present the serious practical problems caused by *prohibitions* on the use of line items.

structure their offerings on a national or regional basis." *Id.* at 74-75a. The Commission concluded: "Efforts by individual states to regulate CMRS carriers' rates through line item requirements ... would be inconsistent with the federal policy of a uniform, national and deregulatory framework for CMRS" because "there is the significant possibility that state regulation would lead to a patchwork of inconsistent rules requiring or precluding different types of line items, which would undermine the benefits derived from allowing CMRS carriers the flexibility to design national or regional rate plans." *Id.*

3. ***The Eleventh Circuit's Decision.*** The Eleventh Circuit vacated the FCC's preemption decision. The court's analysis began "with the assumption that the historic police powers of the states are not superseded by federal law unless preemption is the clear and manifest purpose of Congress." Pet. App. 22a (citation omitted). "Although the presumption against preemption cannot trump our review of the Order under *Chevron*," the court stated, "this presumption guides our understanding of the statutory language that preserves the power of the states to regulate 'other terms and conditions.'" *Id.* at 23a, *citing Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 743-44 (1996).

The court held that "[t]he language of section 332(c)(3)(A) unambiguously preserved the ability of the States to regulate the use of line items in cellular wireless bills." Pet. App. 25a. The court relied primarily on the definition of a "rate" in the Oxford English Dictionary ("OED"), which defines "rate" as "[t]he amount of a charge or payment ... having relation to some other amount or basis of calculation." *Id.* The court concluded: "The prohibition or requirement of a line item affects the presentation of the charge on the user's bill, but it does not affect the amount that a user is charged for service. ... Because the presentation of line items on a bill is not a 'charge or

payment' for service, ... it is an 'other term or condition' regulable by the states." *Id.* at 26a. In the court's view, therefore, the Commission erred by concluding that "state regulation of the use of line items 'directly intrudes upon the carrier's ability to set rates and establish rate structures for [wireless] service.'" *Id.*

Although initially stating that prohibiting line items "does not affect the amount that a user is charged for service," *id.*, the court later said, "[t]hat the prohibition or requirement of a line item has some effect on the charge to the consumer does not necessarily place a regulation within the meaning of 'rates' and outside the ambit of state regulation of 'other terms and conditions.'" *Id.* at 28a. In particular, the court could not see how it made sense for the FCC to permit states to impose universal service charges on carriers but prohibit states from barring carriers' use of line items to collect those charges. To the contrary, in the court's view, "prohibiting the use of line items has an even more attenuated relationship with rates" than permitting states to impose universal service charges. *Id.* at 29a.

The court also stated that the Commission "misconstrued the legislative history of section 332(c)(3)(A)," which provides that "other terms and conditions" includes matters such as "'customer billing information and practices and billing disputes and other consumer protection matters.'" *Id.* at 31a, *quoting* H.R. Rep. No. 103-111 at 211 (1993). The court agreed with the Commission that substance rather than form should determine whether rules regarding line items should be considered "rates charged" or "other terms and conditions" of wireless service. Pet. App. 31a. But it stated that "[i]f the presentation of line items on consumer bills were a matter of 'rates' and not an 'other[] term or condition[]' of wireless service, then the Commission would be free to preempt virtually any form of state regulation of

wireless service, including laws regarding disclosure and consumer protection." *Id.* at 32a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit erred by holding that Congress unambiguously preserved state and local authority to prohibit the use of line items. As a practical matter, its decision will encourage state and local governments to adopt and hide taxes on wireless service. That will increase the cost of wireless service as well as obstruct wireless carriers' ability to offer national rate plans that collect taxes from subscribers in the taxing jurisdiction.

The decision also will interfere with the FCC's ability to exercise its power to preempt unnecessary state and local regulation. In 1993, Congress gave the FCC plenary authority to regulate wireless service, but simultaneously instructed the FCC to deregulate as competition developed. The wireless industry is now vigorously competitive and regulation should be decreasing rather than increasing. But the Eleventh Circuit's determination that Congress unambiguously preserved state and local regulatory authority will encourage the adoption of additional state and local regulations, contrary to Congress's directive. Particularly because the scheme for review of FCC decisions established in the Hobbs Act will likely result in review of any FCC decision preempting state and local regulation in the Eleventh Circuit, this Court should grant certiorari now to correct the Eleventh Circuit's erroneous interpretation of section 332(c)(3)(A) and to prevent future interference with efforts to deregulate the competitive wireless industry as Congress intended.

In addition, the Eleventh Circuit's invocation of the presumption against preemption was erroneous and will affect cases involving many different regulatory regimes. This Court heard argument in *Watters v. Wachovia Bank,*

N.A., No. 05-1342, in November 2006, in which the petitioner argued that a federal banking regulation is not entitled to *Chevron* deference on account of the presumption against preemption. As the Court's grant of certiorari in *Watters* indicates, the relationship between *Chevron* and the presumption against preemption is an important question of federal law that warrants review by this Court. It may be that the Court will resolve the issue in *Watters* in a manner that should result in the Court granting our petition, vacating the Eleventh Circuit's decision, and remanding for further proceedings. Alternatively, the Court may not reach the issue in *Watters*, in which case it should grant this petition.

I. THE ELEVENTH CIRCUIT WAS WRONG ON THE MERITS.

The Eleventh Circuit's decision is rife with error. There was no basis for the court to conclude that Congress "unambiguously" determined that laws regulating line items are not a form of rate regulation within the meaning of section 332(c)(3)(A). Congress simply did not address such laws in the text of the statute. Nor does the legislative history provide any basis to think that it was concerned about them. In *CTIA*, 168 F.3d at 1336, the D.C. Circuit emphasized that "Section 332(c)(3)(A) leaves its key terms undefined. It never states what constitutes rate and entry regulation or what comprises other terms and conditions of wireless services." That accurate statement cannot be reconciled with the Eleventh Circuit's view that Congress unambiguously drew the line between regulation of "rates charged" and regulation of "other terms and conditions" of wireless service. Congress certainly did not precisely address the treatment of line items under section 332(c)(3)(A), as would be required to overturn the FCC at the first step of the *Chevron* analysis.

Nor does the Eleventh Circuit's reliance on the OED's definition of "rate" – "the amount of a charge or payment ... having relation to some other amount or basis of calculation," Pet. App. 25a – provide support for the court's decision. As a district court concluded after the Eleventh Circuit issued its decision, "a line item is one of the charges a wireless customer pays in order to receive service." *Peck v. Cingular Wireless, LLC*, Pet. App. 145a. That fits comfortably into most definitions of "rate," including the definition in the OED, and is certainly "a permissible usage of the term," as the *Peck* court concluded. *Id.* In *Peck* and a more recent decision also involving wireless line item charges, *Hesse v. Sprint Spectrum, L.P.*, the district court judges cited *Black's Law Dictionary* (8th ed. 2004), which, like the OED, defines "rate" as "an amount paid or charged for a good or service." Plainly, a charge made by means of a line item falls into that definition. Therefore, the FCC permissibly concluded that prohibiting line items regulates the rates charged by wireless carriers, and the Eleventh Circuit erred by holding that Congress unambiguously preserved the ability of states and localities to ban line items.

As with its definitional analysis, the Eleventh Circuit was just wrong in saying repeatedly that laws prohibiting line items merely affect "presentation" on wireless bills. *See, e.g.*, Pet. App. 26a. If carriers respond to such laws by continuing to offer national rate plans, then the laws will affect the amounts particular subscribers pay for service, not just the presentation of those charges. As noted above, a likely response by carriers will be to raise monthly charges generally to cover different state and local taxes. For example, if a variety of states and localities impose taxes and fees varying widely, but averaging $5, a carrier barred from using line items in some jurisdictions might reasonably raise its monthly rate from $40 to $45 for a particular plan. That would mean that a subscriber in a jurisdiction with no taxes

and fees would suffer a $5 rate increase. Thus, subscribers in low-tax jurisdictions will pay more than they would if line items are permitted.[4] The alternative – which is highly impractical, particularly for city and county taxes – is to charge different amounts for the same service in different jurisdictions, and the FCC already has concluded that such a result would conflict with Congress's goal in adopting section 332(c)(3)(A) because it "would undermine the benefits derived from allowing CMRS carriers the flexibility to design national or regional rate plans." Pet. App. 75a.

The Eleventh Circuit also erred by suggesting that upholding the Commission's decision renders the phrase "other terms and conditions" in section 332(c)(3)(A) a dead letter. The Commission expressly stated that it was not preempting disclosure requirements. *See* Pet. App. 72a. Any state or local rule that truly affected only the *presentation* of rates – such as requirements that rates be disclosed in bold or in a particular font size or with particular descriptions – would not be preempted by the FCC decision at issue. In addition to rules governing presentation, a variety of other state laws that regulate "other terms and conditions" would be permissible. The FCC's decision invalidates only those laws that directly affect the charges wireless carriers make.

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[4] As the Second Circuit recognized, without the ability to pass through a state gross receipts tax only to subscribers in that state, "states would have an incentive to target telecommunications companies as sources of revenue, with the bulk of the tax incidence ultimately falling on out-of-state residents through nationwide averaging." *Conn. Office of Consumer Counsel v. FCC*, 915 F.2d 75, 79 (2d Cir. 1990) (pass through of gross receipts tax to customers as a surcharge did not violate the Communications Act, 47 U.S.C. § 201(b) or § 202(a)). The court warned that to disallow the surcharge would cause "an upward-spiraling of interstate telephone rates to a level bearing no relation to actual costs of service." *Id.*

In that connection, the Eleventh Circuit erred by failing to understand the FCC's distinction between the *direct* effect on rates of laws prohibiting line items and the *indirect* effect on rates of laws requiring carriers to make universal service contributions. As an initial matter, it is not clear why the court addressed this issue in resolving the case at the first step of the *Chevron* analysis, since the FCC's allegedly inconsistent application of a provision is an issue that should arise with respect to analysis of the reasonableness of the Commission's decision rather than with respect to the allegedly unambiguous meaning of the statute. In any event, there are two separate reasons why there is no merit to the court's contention that it makes little sense to conclude that states may require carriers to make universal service contributions but may not prohibit carriers from recovering them by means of line items. First, the Commission explained in its Order "that section 254(f) of the Act authorizes states to require CMRS providers to contribute to state universal service support mechanisms." Pet. App. 70a. As the more specific provision, section 254(f) should prevail even though universal service contribution requirements may be a form of rate regulation. *See CTIA*, 168 F.3d at 1336.

Second, a requirement that carriers make universal service payments does not *directly* affect rates, as the FCC also stated. Pet. App. 70-71a. A carrier is not required to pass such costs through to its subscribers, and at least in some cases a carrier may choose not to pass some costs through to subscribers.[5] In contrast, a rule prohibiting the

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[5] In *Wireless Consumers Alliance*, 15 F.C.C.R. 17021, ¶ 23 (2000), the Commission concluded that a carrier might respond to a judgment awarding damages because it had falsely advertised its rates by ceasing to advertise falsely, rather than raising its rates.

use of line items directly affects the charges carriers require their subscribers to pay. A rule prohibiting the use of a line item to collect a $3 tax, for example, effectively reduces the amount of that line item to $0. Of course, a carrier may choose to raise other rate elements, such as its monthly fee, to make up for that reduction in the line item. But as shown above, that either will affect the amounts that particular subscribers pay or undermine Congress's decision to permit carriers to offer national or regional rate plans. In short, a prohibition on line items directly involves the carrier-subscriber relationship. In contrast, a requirement that wireless carriers make universal service contributions directly affects the state-carrier relationship and only indirectly affects the rates carriers charge subscribers.

In addition, as discussed below, the court erred by concluding that section 332(c)(3)(A) "preserved" state regulation of "other terms and conditions" of wireless service and by relying on the presumption against preemption. Each of those errors contributed to the Eleventh Circuit's conclusion that section 332(c)(3)(A) unambiguously permits states to ban line items. The statute does not precisely address the issue and the FCC's construction of the statute was entirely reasonable.

The recent district court decisions from the Western District of Washington – *Peck* and *Hesse* – illustrate that the Eleventh Circuit erred. Both cases involve RCW 82.04.500 (2006), which imposes a business and occupation tax surcharge that the state legislature indicated is not to be passed through to consumers by means of line items. In both cases, subscribers sued wireless carriers challenging their use of line items to collect the tax, and two different district court judges rejected the challenges, relying on the FCC Order at issue in this case.

The district court in *Peck* initially deferred to the FCC's decision, concluding that "[t]he FCC's interpretation of 'rates' meets the second prong of the *Chevron* test because it is a permissible usage of the term," after noting that the mandate had not issued from the Eleventh Circuit. Pet. App. 145a. The court subsequently issued an order denying reconsideration, stating that the fact that the Eleventh Circuit's mandate had not issued "was immaterial to the Court's prior ruling" because "the Court finds that Plaintiff's claims are preempted by 47 U.S.C. § 332(c)(3)(A)." Pet. App. 150a. In *Hesse*, the district court deferred to the FCC's interpretation of the provision even though the agency's decision had been vacated. Pet. App. 153a. Neither court invoked the presumption against preemption nor concluded that Congress had unambiguously preserved state regulation of "other terms and conditions" of wireless service.

II. FURTHER REVIEW IS WARRANTED.

This Court should grant the petition for three reasons. First, the Eleventh Circuit's erroneous decision already is harming wireless carriers and their subscribers. Second, that court's flawed construction of the Communications Act threatens to hamper the FCC's ability to eliminate excessive regulation, which will further harm wireless carriers and their subscribers. Third, the court's reliance on the presumption against preemption conflicts with decisions of this Court and other courts of appeals.

A. *The Eleventh Circuit's Erroneous Decision Harms Wireless Carriers and Their Subscribers.*

As already discussed, the Eleventh Circuit's decision will encourage states, counties, and cities to enact and hide taxes on wireless service. There is no sound public policy basis to encourage that result. Wireless carriers are likely to respond to prohibitions on using line items by raising their monthly

rates nationwide to recover the increased costs, which will reward high-tax jurisdictions by permitting them to effectively export some taxes – another bad policy result. If wireless carriers instead respond by adopting separate rate plans for different taxing jurisdictions, that will harm consumers by making it more difficult for them to compare the rates charged by different carriers. In short, the Eleventh Circuit's decision already is harming wireless carriers and their subscribers.

Although the decision in *Peck* is on review in the Ninth Circuit, it does not make sense to wait to see if a conflict in the circuits develops. The appellant in *Peck* has argued that the FCC's Order is not entitled to *Chevron* deference because it has been vacated by the Eleventh Circuit, and it is not clear whether the Ninth Circuit nevertheless will defer to the FCC's decision. Although the wireless carrier might prevail in *Peck* even without the benefit of deference to the FCC's decision, that is not certain because the statute is ambiguous. Therefore, it makes sense for the Court to grant review in this case because *Peck* either will involve the preliminary question whether a vacated FCC decision is entitled to *Chevron* deference or will be decided without respect to deference issues. This case, in contrast, squarely presents the questions whether the FCC permissibly construed section 332(c)(3)(A) under *Chevron* and whether the *Chevron* analysis is affected by the presumption against preemption. Because the scheme for judicial review of FCC decisions established in the Hobbs Act, 28 U.S.C. § 2341 *et seq.*, centralizes review in one court of appeals, it may be that those issues will not be presented squarely in any future case.

However, the fact that two district court judges agreed with the FCC's interpretation of the statute, notwithstanding the Eleventh Circuit's contrary determination, further calls into question the Eleventh Circuit's decision that Congress

unambiguously decided that state and local regulation of line items is permissible.

B. *The Eleventh Circuit's Decision Interferes With Congress's Goal of Eliminating Unnecessary Regulation.*

Because "[n]o state lines divide the radio waves," Congress has long recognized that "national regulation is . . . essential to the efficient use of radio facilities." *Fed. Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933). Wireless service, of course, uses the radio spectrum. Through a number of enactments, Congress has specifically encouraged the development of wireless competition on a national basis by centralizing regulatory authority in the FCC and ordering it to deregulate wireless service as competition developed.

In 1993, Congress amended the Communications Act to underscore the need for a federal regulatory framework governing the developing wireless industry. In particular, it excepted section 332, which governs "mobile services," from section 2(b) of the Act, 47 U.S.C. § 152(b), which divides wireline telecommunications regulation into interstate and intrastate spheres. *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). By doing so, Congress eliminated the traditional limitation on federal authority over intrastate communication services insofar as they relate to the provision of wireless service. *See also* Leonard J. Kennedy & Heather A. Purcell, *Section 332 of the Communications Act of 1934: A Federal Regulatory Framework That Is "Hog Tight, Horse High, and Bull Strong,"* 50 Fed. Comm. L.J. 547 (1998).

Congress simultaneously enacted section 332(c)(1) of the Act, which limits the extent to which the Commission's authority to regulate wireless service should be exercised. 47 U.S.C. § 332(c)(1). More specifically, Congress provided

that the FCC could decide which of the more than 20 statutory provisions governing common carriers ought to apply to wireless carriers. In making that decision, Congress directed the FCC to consider whether, in light of the state of competition, regulation was necessary to ensure that rates are "just and reasonable," whether enforcement of each provision was "necessary for the protection of consumers," and whether the "public interest" favored enforcement or forbearance. Congress later used section 332(c)(1) as the model for section 10 of the Communications Act, 47 U.S.C. § 160, which directs the Commission to forbear from enforcement of any statutory provision or regulation applying to any common carrier when competition renders regulation unnecessary. Section 10(e) prohibits states from enforcing provisions of the Communications Act after the FCC has decided to forbear from enforcement of the provision.

The wireless industry is intensely competitive, and far more competitive than it was in 1993. The most recent annual competition report from the FCC indicates that 94% of Americans live in counties served by four or more wireless carriers. *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 21 F.C.C.R. 10947, ¶ 41 (2006). In contrast, in 1993 licenses had been issued to only two carriers in any market and the Department of Justice and the FCC agreed that there was little competition between the cellular duopolists. *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 10 F.C.C.R. 8844, ¶ 65 (1995). The number of wireless subscribers has grown from 10 million to more than 200 million in that period and, therefore, under the plan Congress adopted regulation should be decreasing rather than increasing. As a general matter, in petitioners' view, the FCC should adopt whatever regulations are warranted and provide that additional state and local regulations that do not apply to companies in other competitive industries are preempted.

That is what happened in this case. In the first portion of its decision, which wireless carriers did not challenge, the FCC applied its truth-in-billing principles to wireless carriers to ensure that line items on wireless bills would be clear and non-misleading. Pet. App. 52a.[6]

The Eleventh Circuit's decision threatens to limit the FCC's ability to implement the deregulatory scheme Congress adopted. A court that used the presumption against preemption to guide its analysis and concluded that Congress "unambiguously preserved" state regulation of "other terms and conditions" of wireless service, Pet. App. 25a, including the ability to prohibit line items, is likely to conclude that Congress unambiguously preserved state and local regulation of all sorts of matters.

Contrary to the Eleventh Circuit's statements regarding "other terms and conditions," *id.* at 23a, section 332(c)(3)(A) does not *preserve* anything. Section 332(c)(3)(A) merely provides that by preempting state regulation of rates and entry in 1993, Congress did not intend to preempt regulation of other terms and conditions. The provision, entitled "State Preemption," first bars states from regulating "the entry of or the rates charged by any commercial mobile service" and then adds that "this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." That is not the language of preservation. Congress would have preserved a state role by stating that

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[6] In the further notice of proposed rulemaking attached to the FCC Order on review, the FCC tentatively concluded that it could adopt additional specific "truth-in-billing" rules and preempt state and local regulations. Pet. App. 92-93a (¶ 53). Wireless carriers, including petitioners, have urged the FCC to take a similar course with respect to any "point of sale" disclosures it might adopt. *See* Pet. App. 95-96a (¶ 55) *et seq.*

nothing *in the Act* authorizes preemption. That is the language of section 332(c)(7), which was adopted contemporaneously with section 332(c)(3)(A). Section 332(c)(7), entitled "Preservation of Local Zoning Authority," states that "nothing in this Act" shall limit state or local authority over certain decisions relating to the placement of wireless towers. 47 U.S.C. § 332(c)(7). By choosing not to preserve state regulation of "other terms and conditions," Congress did not interfere with the FCC's ability to preempt state and local regulation in the course of exercising its broad authority over wireless service. *See City of New York v. FCC*, 486 U.S. 57, 64 (1988); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982).

Any FCC preemption decision could be challenged in the Eleventh Circuit. *See* 47 U.S.C. § 402(a) (permitting judicial review of FCC orders other than those listed in 47 U.S.C. § 402(b) in any federal court of appeals other than the Federal Circuit). In addition, the Eleventh Circuit held in the decision at issue that the National Association of State Utility Consumer Advocates ("NASUCA") has standing to challenge FCC orders as a consumer of wireless service. Pet. App. 3a. NASUCA is likely to challenge any FCC preemption decision in that court. Accordingly, the Eleventh Circuit's decision in this case is likely to interfere significantly with the FCC's ability to adopt one set of national rules governing wireless service.

C. *The Eleventh Circuit's Reliance on the Presumption Against Preemption Is Contrary to Decisions of This Court and Other Courts of Appeals.*

The Eleventh Circuit preceded its conclusion that Congress "unambiguously preserved the ability of the States to regulate the use of line items in cellular wireless bills" with the statement that the presumption against preemption

"guides our understanding of the statutory language that preserves the power of the States to regulate 'other terms and conditions.'" Pet. App. 25a, 23a. It seems clear that the court's reliance on the presumption led it to erroneously conclude that Congress had spoken precisely to the issue of line items when in fact, as the D.C. Circuit concluded in *CTIA*, 168 F.3d at 1336, section 332(c)(3)(A) does not define its terms and is far from clear with respect to the line between rate regulation and regulations of other terms and conditions of wireless service.

Citing *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 743-44 (1996), the Eleventh Circuit stated that the presumption against preemption does not "trump" *Chevron*, but instead "guides" the court's analysis. In fact, however, this Court made clear in *Smiley* that the presumption plays no role in a case like this. The issue in *Smiley* was whether the Comptroller of the Currency had permissibly concluded that "interest" in 12 U.S.C. § 85 includes late fees. The Court assumed without deciding that the presumption against preemption might play a role when the issue was whether a statute was preemptive. But when, as in *Smiley*, the issue was "simply the meaning of a provision," the Court held that the presumption plays no role – even though the broader the meaning of "interest," the broader the scope of preemption. 517 U.S. at 744. So too here. Section 332(c)(3)(A) is plainly preemptive and the issue is simply whether "rates charged" includes line items. The presumption against preemption plays no role under *Smiley* – neither to "trump" *Chevron* nor to "guide" the court to a conclusion it would not otherwise reach. Similarly, in *New York v. Federal Energy Regulatory Commission*, 535 U.S. 1, 18 (2002), the Court declined to invoke the presumption against preemption when the issue was "whether Congress has given FERC the power to act as it has."

In *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556 (6th Cir. 2005), the Sixth Circuit followed those decisions. It declined to invoke the presumption against preemption to consider whether the Comptroller of the Currency had erred by preempting Michigan laws regulating mortgage companies that are subsidiaries of national banks. The court "decline[d] Michigan's invitation to frame the issue as whether Congress has expressly and clearly manifested its intent to preempt state laws such as Michigan's," as would have been appropriate if the presumption applied, and instead analyzed the issue "through the framework established by *Chevron*." *Id.* at 560. This Court granted the petition for a writ of certiorari filed by the Commissioner of the Michigan Office of Insurance and Financial Services claiming that the Comptroller's decision is not entitled to deference under *Chevron*. In her brief, the Commissioner argued that giving effect to the Comptroller's regulations would conflict with the presumption against preemption. Pet. Br. in No. 05-1342 at 25-26.

If this Court again concludes that the presumption against preemption does not affect the analysis under *Chevron*, it may be appropriate to grant this petition, vacate the Eleventh Circuit's judgment, and remand for further proceedings in light of its opinion. If the Court does not reach the issue of the relationship between the presumption and *Chevron*, it should grant the petition. As the grant in *Watters v. Wachovia* shows, the issue is a recurring one that affects a broad range of federal actions and warrants this Court's attention. Moreover, the Eleventh Circuit's invocation of the presumption against preemption conflicts with the Sixth Circuit's judgment in *Watters*, as well as this Court's decision in *Smiley*.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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