No. 06-1184

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.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The opposition filed by the National Association of State Utility Consumer Advocates ("NASUCA") and the National Association of Regulatory Utility Commissioners ("NARUC") does not seriously dispute that this case presents two recurring issues involving federal-state relations. Nor does the opposition rebut our showing that this case will have an important impact on the more than 220 million Americans who subscribe to wireless service and the wireless carriers that serve them. Indeed, the presence of those two national regulatory organizations in this case shows that they consider the questions presented to be of the utmost importance.

ARGUMENT

I. This Court Should Determine Whether The Eleventh Circuit Erred By Relying On The Presumption Against Preemption To Guide Its Application Of *Chevron*.

The first question presented involves the relationship between the presumption against preemption and review of agency decisions under the framework established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Eleventh Circuit invoked the presumption against preemption in this case, stating that it "guides our understanding of the statutory language." Pet. App. 23a. The court of appeals then held that 47 U.S.C. § 332(c)(3)(A) – which preempts state and local governments from regulating the "the entry of or the rates charged" by wireless carriers, but does not preempt regulation of "other terms and conditions" of wireless service – unambiguously preserves state regulation of line items on wireless bills. A court that did not invoke the presumption against preemption would not have reached that conclusion, but would have upheld the reasonable interpretation of section 332(c)(3)(A) provided by the Federal Communications Commission ("FCC" or "Commission").

Review of this issue is warranted because the Eleventh Circuit's decision conflicts with this Court's decision in *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996), which held that the presumption against preemption does not trump *Chevron*. In addition, although this Court recently considered the relationship between the presumption against preemption and *Chevron* in *Watters v. Wachovia Bank, N.A.*, No. 05-1342 (Apr. 17, 2007), it did not provide the guidance needed by the lower courts because it concluded that the relevant statutory language was dispositive.

NASUCA and NARUC argue that the decision below is not inconsistent with *Smiley*. *See* Opp. 25-27. At issue in *Smiley* was a decision by the Comptroller of the Currency that the statutory term "interest" includes "late fees." *Smiley*, 517 U.S. at 737. Under the statute at issue, the broader the definition of "interest," the broader the scope of preemption – just as in this case, the broader the meaning of "rates charged," the broader the scope of preemption. The Court concluded that the Comptroller's interpretation was entitled to *Chevron* deference. The Court assumed without deciding that *whether* a statutory provision is preemptive might be "decided *de novo* by the courts," but held that when the issue "is simply the meaning of a provision," *Chevron* applies. *Id.* at 745.

NASUCA and NARUC appear to recognize that, under *Smiley*, an agency interpretation of a term like "interest" is entitled to deference without regard to the presumption against preemption. They therefore contend that "[t]he FCC's ruling cannot be equated with a regulation defining a substantive term of the Act." Opp. 27. But that is exactly what the FCC's ruling was. The FCC defined "rates charged" to include charges listed in line items on customers' bills. Contrary to NASUCA and NARUC, the FCC did not address "whether the relevant statute is preemptive." *Id.*

There simply is no dispute that state and local governments are preempted from regulating the rates charged by wireless carriers – the only dispute here is whether charges in line items are "rates charged" within the meaning of the statute. Accordingly, there is no merit to respondents' attempt to distinguish this case from *Smiley*.

Review of the decision below will provide this Court with the opportunity to provide further guidance on the relationship between the presumption against preemption and *Chevron* – guidance that is needed because the court below thought that it could apply *Chevron* with a thumb on the scale. The relationship between the presumption and *Chevron* was at issue, but not resolved, in *Watters*. In that case the Comptroller concluded that states were preempted from regulating the mortgage lending activities of subsidiaries of national banks. The court of appeals reviewed the Comptroller's determination "through the framework established by *Chevron*" without any adjustment on account of the presumption against preemption and upheld his decision. *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556, 560 (6th Cir. 2005).

In her brief to this Court, the Michigan regulator argued that agency regulations that preempt state laws are not entitled to deference under *Chevron*. Brief for the Petitioner at 31-35, *Watters v. Wachovia Bank, N.A.*, No. 05-1342 (Apr. 17, 2007). This Court held that the deference issue presented "an academic question" because the regulation at issue "merely clarifies and confirms" what the statute provides. *Watters*, slip op. at 16. The dissenters disagreed and would have held that "when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for something less than *Chevron* deference." *Id.* at 20-21 (Stevens, J., dissenting).

Watters shows that issues involving the relationship between *Chevron* and the presumption against preemption are recurring issues involving the broad range of matters regulated by federal agencies. The dissenters' statement that "something less than *Chevron* deference" is warranted, while similar to the Eleventh Circuit's decision that the presumption should "guide[]" its analysis, appears to have been based on the dissenters' view that the Comptroller was not merely interpreting the National Bank Act, but was exercising the authority to preempt recognized in *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982). *See Watters,* slip op. at 11-12 (Stevens, J., dissenting). One point on which we agree with the respondents is that the FCC did not exercise *de la Cuesta* authority in this case. *See* Opp. 24 & n.16. To the contrary, like *Smiley* this is a case involving preemption resulting from the construction of a statutory term. In any event, *Watters* did not clarify the relationship between the presumption against preemption and review under *Chevron*. It may have raised the question whether there is a relevant difference between cases like *Smiley*, which involve construction of a statutory term, and cases in which an agency exercises its authority under *de la Cuesta*.

This case presents an opportunity to provide guidance on the relationship between the presumption against preemption and *Chevron* because, contrary to the Eleventh Circuit's holding in this case, section 332(c)(3)(A) is ambiguous. As the D.C. Circuit stated in *Cellular Telecommunications Industry Ass'n v. 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 service." Because Congress did not determine whether line item charges are "rates," this Court will have the opportunity

to address the relationship between the presumption against preemption and *Chevron* in this case. Although NASUCA and NARUC argue to the contrary, it is simply not plausible to conclude that the FCC erred in its construction of "rates charged" unless a reviewing court is strongly influenced by the presumption against preemption.[1]

Furthermore, as explained in our petition, even though litigation continues in the lower courts concerning the legality of line item bans, this case, arising on direct review of the FCC's decision, is the only case where it is clear that the agency's interpretation would be fully entitled to deference but for the presumption against preemption. Pet. 17. Other cases necessarily will raise the issue whether an agency interpretation is entitled to deference when the decision providing its interpretation has been vacated, meaning that those cases may not present an opportunity to address the relationship between the presumption against preemption and *Chevron*.[2]

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[1] On the merits, respondents first claim that a "rate" is a "'charge or payment' for a particular good or service." Opp. 21. But "'a line item is one of the charges a wireless customer pays in order to receive service.'" Pet. 12, *quoting Peck v. Cingular Wireless, LLC*, No. C06-343Z (W.D. Wash. Oct. 24, 2006) (Pet. App. 145a). Second, respondents claim that the FCC's construction of section 332(c)(3)(A) drains "other terms and conditions" of meaning and would permit preemption of state laws imposing taxes. But nothing in the FCC's order preempts state and local laws that merely affect the presentation of charges on bills. *See* Pet. 13-15. In addition, the FCC made clear that it was not preempting state and local taxes, but only rules prohibiting wireless carriers from recovering those taxes by means of line items. Pet. App. 70a.

[2] Respondents half-heartedly suggest that the FCC's decision is not entitled to deference because it "was adopted without any

II. Review Is Warranted Because The Eleventh Circuit's Decision Harms Consumers And Permits Unnecessary Regulation Of Wireless Carriers.

The second question presented is whether the Eleventh Circuit erred by holding that section 332(c)(3)(A) unambiguously preserves state laws banning line items. In our petition we showed that the Eleventh Circuit's decision permits state and local governments to hide taxes in wireless bills and undermines Congress's goal of deregulating wireless services as competition develops. Pet. 16-21. NASUCA and NARUC do not dispute that the decision permits states and localities to hide taxes, but instead contend that our "angst over 'hidden' State or local taxes is overblown." Opp. 15. In addition, they make the remarkable claim that Congress did not intend "to introduce a deregulatory scheme governing wireless service." *Id.* at 17.

On the latter point, it bears emphasis that Congress plainly eliminated state and local rate and entry regulation, the two primary forms of utility regulation. Moreover,

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prior notice." Opp. 26 n.17. There is no merit to that claim. The FCC's preemption decision was made by the full Commission in a declaratory ruling issued after the Commission received hundreds of comments, including an 18-page letter on preemption from Nextel and T-Mobile. Letter, FCC CG Docket No. 04-208 (Dec. 13, 2004). NASUCA held numerous meetings at the FCC where it "reiterated its opposition to wireless carriers' arguments that the Commission ought to preempt state laws governing their billing practices and descriptions." Ex Parte Presentation, FCC CG Docket No. 04-208, at 2 (Feb. 14, 2005). NARUC adopted a resolution stating that the FCC "should not preempt States from establishing more stringent standards for consumer protection" and presented it to the FCC. Ex Parte Presentation, FCC CG Docket No. 04-208, at 4 (March 2, 2005). Respondents had ample notice.

respondents ignore section 332(c)(1)(C), which instructed the FCC to issue an annual competition report and reduce regulation of wireless services as competition developed. Congress expanded and strengthened that provision to include all telecommunications carriers in 1996 by adding 47 U.S.C. § 160, which mandates forbearance from regulation when competition will protect consumers. As we showed in our petition, the wireless industry is much more competitive now than it was in 1993 and regulation therefore should be decreasing. *See* Pet. 19.

We also pointed out in our petition that the FCC tentatively concluded in the Order on review that it has authority to adopt regulations governing the "terms and conditions" of wireless service and then decide that further regulation is unwarranted. Pet. 18-21. NASUCA does not dispute our claim (Pet. 21) that it will challenge any regulations the FCC adopts that have a preemptive component in the Eleventh Circuit because, having erroneously concluded that Congress broadly preserved state and local regulation of "other terms and conditions" of wireless service, that court is likely to be receptive to arguments that the FCC exceeded its authority. Therefore, the court's erroneous decision in this case is likely to affect other FCC decisions – and there is no prospect for a conflict in the circuits to develop if, as it may, NASUCA challenges preemption orders in the Eleventh Circuit.

Nor is there merit to respondents' claims that there is no reason for this Court to be concerned that the Eleventh Circuit's decision authorizes state and local governments to hide taxes in wireless bills. As an initial matter, the typical wireless customer pays 17% in state and local taxes, more than twice the average amount imposed on other goods and services. *See* http://www.mywireless.org/issuestaxes/. As respondents note, Texas recently added a new tax and

ordered wireless carriers not to collect it by means of line items. Opp. 15 n.10. If the decision below stands, more state and local governments undoubtedly will avail themselves of the opportunity to impose taxes that cannot be identified.

In a decision released on the day the petition for a writ of certiorari was filed, *AT&T Corp. v. Rudolph*, 2007 U.S. Dist. LEXIS 13962 (E.D. Ky. Feb 27, 2007), a district court invalidated a newly enacted Kentucky law barring telecommunications carriers from recovering a state gross receipts tax by means of line items.[3] The court first rejected AT&T's Commerce Clause challenge. The court acknowledged that a carrier might respond to the ban by raising its rates generally, including its rates on out-of-state customers, but noted that Kentucky permitted carriers to recover the gross receipts tax "by rolling it into the rates of only their Kentucky customers." *Id.* at *31. Accordingly, because a carrier might choose *not* to export the tax to customers outside Kentucky, but instead to raise its rates in Kentucky only, the court concluded that the line item ban did not violate the Commerce Clause.

The Kentucky district court then invalidated the line item ban on First Amendment grounds. It agreed that line items "'provide carriers a timely and effective means of informing their customers what portions of their total bill are attributable to taxes.'" *Id.* at *33 (quoting AT&T's motion). With respect to Kentucky's contention that the ban on line

[3] *Rudolph* involved a challenge by an interexchange carrier. The court also invalidated the Kentucky law at the request of a local exchange carrier. *BellSouth Telecomm., Inc. v. Farris*, 2007 U.S. Dist. LEXIS 13993 (E.D. Ky. Feb. 27, 2007). A preliminary injunction has been granted to wireless carriers in a case that was stayed pending appeal of the other cases. *Cingular Wireless LLC v. Rudolph*, No. 3:05-cv-81-KKC (E.D. Ky. March 23, 2007).

items advanced the state's interest in preventing misleading speech, the court noted that the statute prohibits all line items "whether the line item contains accurate information or not." *Id.* at *42. The court invalidated the Kentucky statute because it "prohibits substantially more speech than necessary to advance the government's interest in preventing Kentucky citizens from being misled." *Id.* at *44. Having found the statute unconstitutional under the First Amendment, the court declined to address AT&T's preemption argument. *Id.* at *46-47.

Together with the Washington decisions discussed in our petition (Pet. 15-16) and the Texas litigation cited by respondents, the Kentucky decision shows that litigation will continue concerning the permissibility of line item bans. In addition, the Kentucky court correctly concluded that such bans either will cause carriers to increase rates on all their subscribers or will cause them to abandon national and regional rate plans. Consumers are harmed as a result of either choice. If carriers raise their rates generally, subscribers essentially pay for taxes imposed by jurisdictions where they do not reside. If wireless carriers abandon their national and regional rate plans, customers will find it more difficult to compare the rates charged by different carriers.

Rather than requiring the lower courts to continue to evaluate First Amendment and Commerce Clause arguments, it makes sense for this Court to address the issue now. Although preemption is based on the Supremacy Clause, it seems more consistent with the constitutional avoidance canon for this Court to determine whether the FCC permissibly interpreted section 332(c)(3)(A) than to require additional litigation concerning the First Amendment and the Commerce Clause. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

Finally, NASUCA and NARUC note the Solicitor General's absence from this case and suggest that his absence supports their contention that the case does not warrant further review. Opp. 18-19. As an initial matter, wireless carriers and their subscribers, rather than the FCC, will bear the brunt of the Eleventh Circuit's decision because they will pay the hidden taxes the decision will encourage. In any event, it bears note that the FCC sought rehearing in the Eleventh Circuit, arguing that the court had erroneously construed section 332(c)(3)(A) in ways that will harm wireless carriers and their subscribers. The FCC explained that, if the decision below stands, a wireless carrier "almost certainly would find it necessary to pass through the cost of [a state and local] tax to its customers nationwide in its general rates for service." FCC Petition for Rehearing by the Panel at 8. The FCC added that "[c]ustomers in other states would thus bear the costs of that state tax through their payment of higher CMRS charges, solely because the taxing state's regulation does not permit the CMRS carrier to impose a line item on its customers in that state." *Id.* at 8-9. In its Order, the FCC considered the possibility that carriers instead would abandon national rate plans and, because of that possibility, concluded that state regulation of line items is "inconsistent with the federal policy of a uniform, national and deregulatory framework" for wireless service. Pet. App. 75a.

The Court may rely on those statements by the FCC. Alternatively, the Court may find it useful to call for a response from the federal respondents.

CONCLUSION

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

Respectfully submitted.

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