No. 08-626

IN THE

Supreme Court of the United States

LEVEL 3 COMMUNICATIONS, LLC,

Petitioner,

v.

CITY OF ST. LOUIS, MISSOURI,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

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The Telecommunications Act of 1996 provides that no state or local regulation "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)), reserving the authority "to manage the public rights-of-way [and] to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis" (*id.* § 253(c)).

Respondent City of St. Louis argues that this Court's review of the Eighth Circuit's construction of Section 253 is unwarranted because the record supposedly shows, and the Eighth Circuit supposedly held, that the City's ordinance had no adverse effect on petitioner; therefore, respondent asserts, its ordinance would not be preempted under any of the circuits' competing interpretations of Section 253. Respondent's argument rests on a substantial misstatement of both the record and the Eighth Circuit's decision. The exorbitant fees that St. Louis charges petitioner and other providers for access to that market inhibits competition by deterring entry and by trading off against the funds available to develop new services. But because money is fungible, those fees do not necessary limit particular service offerings in the city. The court of appeals accordingly sustained the ordinance not on the false premise that it had no effect on petitioner, but rather because the court avowedly read Section 253 narrowly to require petitioner to make a very particular showing: that Level 3 was unable to provide particular services in St. Louis as a result of the ordinance.

The Eighth Circuit had no justification for departing from this Court's correct understanding that Section 253 preempts any measure that "impedes the provision of telecommunications services" (*Verizon Commc'ns., Inc. v. FCC*, 535 U.S. 467, 491 (2002)) or "interfere[s] with the delivery of telecommunications services" (*Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004)). Like other circuits, which properly reject the Eighth Circuit's stringent standard of proof, the court of appeals should have held that an unreasonably large licensing fee like St. Louis's necessarily inhibits competition and triggers preemption under Section 253. Certiorari is warranted to correct that error and the circuit conflicts it spawned.[1]

I. THE EIGHTH CIRCUIT'S DECISION SERIOUSLY MISREADS SECTION 253.

As the petition demonstrated, the Eighth Circuit's decision suffers from at least two significant flaws.

First, the ruling below erroneously places determinative weight on the ordinance's effect on the services provided within that locality by the

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[1] This case also presents the best vehicle for resolving the twin circuit conflicts over the meaning of Sections 253(a) and (c). The telecommunications provider in No. 08-759, *Sprint Telephony PCS, L.P. v. San Diego, Cal.*, has requested that the Court not grant certiorari in this case and hear argument this Term, so that the *Sprint* petition can be consolidated with this one. For the reasons set forth in petitioner's *amicus* brief in No. 08-759 (which is reproduced as an Appendix to this reply, *infra*), that suggestion is not well founded.

particular telecommunications provider that happened to bring suit. Section 253(a) measures preemption by the burden of a municipal ordinance on "the ability of *any* entity to provide *any* interstate or intrastate telecommunications service," with no geographic restriction (emphases added). By definition, an "interstate" service is not offered in one particular locale. Congress recognized that public rights-of-way are not only an essential component of service to local markets but also constitute a significant bottleneck to *nationwide* communications across backbone networks traversing innumerable municipalities. The statute thus looks broadly to whether the local ordinance is of a type that inhibits the delivery of telecommunications services generally.

The court of appeals' holding that the City's ordinance is not preempted because petitioner elected to provide services in St. Louis misreads Section 253. The fact that petitioner – an international telecommunications provider which had already entered the market – did not limit its services or withdraw from the market is not determinative of the preemption inquiry. Indeed, Congress could not have intended the validity of the ordinance to turn on the coincidence of whether the plaintiff telecommunications provider happens to be small enough or so financially fragile that the municipality's fee renders it peculiarly unable to serve that market.

The court of appeals' holding is further flawed because it affords no weight to the fact that the ordinance significantly inhibits competition not only by deterring entry by other, smaller would-be

entrants, but also by diverting to the City funds that petitioner and other providers would otherwise use to develop and deploy additional services around the country. It furthermore fails to apply the proper "broader frame of reference" that "ask[s] how Congress could have envisioned the preemption clause [of Section 253] actually working" (*Nixon*, 541 U.S. at 133) if municipalities nationwide adopted the authority claimed by St. Louis and awarded by the Eighth Circuit to impose burdensome licensing requirements and exact exorbitant fees. Accepting that logical consequence of the court of appeals' ruling, the many billions of dollars in fees that would be charged to petitioner and other competitive providers would have a crushing effect on the delivery of telecommunications services.

Second, Congress specified the measure for determining whether fees sufficiently inhibit competition to trigger preemption in Section 253(c), which gives local governments limited authority to adopt fees that exact "fair and reasonable compensation" on a "competitively neutral and nondiscriminatory basis." Congress' determination in Section 253(c) to constrain the range of permissible right-of-way fees to those that are "fair and reasonable" necessarily rests on its conclusion that, left to their own devices, local governments would impose barriers to entry (including monopolistic fees) and thereby inhibit entry by competing telecommunications providers. *See* Pet. 16-17 n.1; *cf.* BIO 15 (embracing the view that "Section 253(a), as adopted, was primarily concerned with uprooting regulatory systems that granted telephone monopolies").

Indeed, respondent seemingly recognizes that its position rests on the claim that the only constraint on its power to set right-of-way fees is that imposed by "free markets" (BIO 24), such that it has the same power to set rents as any other landlord (*id.* at 24 n.16). On that reading, Section 253 allows the City to charge whatever fee reflects "the valuable right to place [a provider's] fiber optic cable and related facilities in the City's rights-of-way" (*id.* at 7) in light of the high "value of the real estate in St. Louis" (*id.* at 21 n.14). But public rights-of-way are dramatically different from the open market for housing: municipalities, by definition, hold a monopoly over the rights-of-way that must be traversed to construct a telecommunications network. Consequently, respondent's position is that it can charge monopoly rents without regard to their adverse effect on competition, as St. Louis has done with the bottleneck facility over which it has exclusive control. But that is precisely what Section 253 forbids.

By embracing the City's position, the Eighth Circuit's decision all but reads Section 253(c) out of the statute. The structure of the Act – in which Section 253(c) is an exception to the prohibition of Section 253(a) – necessarily implies that Congress intended the latter to have a broader preemptive sweep. But on the court of appeals' narrow reading of Section 253(a), it is hard to imagine a fee that is simultaneously so large that it precludes particular local services in violation of Section 253(a) but so small that it is saved as "fair and reasonable compensation" under Section 253(c). Put another way, the Eighth Circuit's decision implausibly

authorizes municipalities to enact *un*fair and *un*reasonable fees, so long as those fees cannot be traced to the plaintiff's decision to withdraw specific services from that jurisdiction.

The Eighth Circuit's ruling equally reads Section 253(c) out of the statute by affording no weight to the fact that, by imposing a substantially less onerous and expensive legal regime on the incumbent telecommunications provider, the ordinance impermissibly "discriminat[es]" (Section 253(c)) against new entrants to the St. Louis market. *See* Pet. 4, 9, 15, 20. Similarly, in several respects – such as the limitation on the types of services Level 3 may provide – the ordinance regulates telecommunications directly, not merely "the public rights-of-way." *See id.* at 22-23.

II. THERE IS NO MERIT TO THE CITY'S CLAIM THAT ITS ORDINANCE HAS "NO EFFECT" ON PETITIONER.

Certiorari is also warranted because this case presents an ideal vehicle in which to address the proper construction of Section 253. The record demonstrates that:

- petitioner pays roughly $140,000 in annual licensing fees just for access to public rights-of-way in St. Louis, nearly double Level 3's total annual revenue from all of its local customers in the City (Pet. 7 (citing C.A. J.A. 425-47))[2];

[2] That figure does not, as the City assumes without explanation, "exclude[] revenues where a call or service may originate in St. Louis and terminate elsewhere, or vice versa."

- if other local jurisdictions adopted the same fee structure, petitioner would be forced to pay well over a *billion* dollars in additional costs (*see id.* at 19); and
- the fees that petitioner pays the City would otherwise be used to develop additional services, which petitioner would use to compete against other providers (*see id.* at 16 (citing C.A. J.A. 423, 433)).

Furthermore, given that respondent does not contend that its fees bear "*any* relation" to its costs (Pet. App. 54a (emphasis added)), there is no serious argument that those fees represent permissible "compensation" for any service provided by the City. Nor are the fees "fair and reasonable." Respondent's assertion that its fees are "less than what Level 3 pays in other jurisdictions" (BIO 32) is substantially misleading: while a small minority of jurisdictions impose similarly massive fees (which petitioner believes are preempted as well), there are also a substantial number of jurisdictions that charge less – or nothing – for use of the public rights-of-way. *See, e.g.*, R.S. Mo. § 67.1840.2(1) (fees limited to "actual, substantiated costs); Cincinnati Mun. Code ch. 405 (no fee). St. Louis's fee of approximately $2.00 per foot is more than *ten times* the average fee that Level 3 pays for access to rights-of-way on its network. *See*

Contra BIO 8. The multi-million dollar figure of petitioner's "revenues attributed to the St. Louis market" cited by the City (BIO 7) is grossly inflated because it represents an estimate of the total revenue from a portion of *all* telecommunications that traverse the St. Louis segment of petitioner's network while traveling across the country. *See* C.A. J.A. 425-26, 768-69.

Level 3 Communications, Annual Report (Form 10-K), at F-88 (Feb. 29, 2008).

The City's contention that this case nonetheless is a poor vehicle to resolve the correct interpretation of Section 253 because petitioner failed to prove that the ordinance has any material adverse effect on it misstates both the record in this case and the legal conclusion that the Eighth Circuit drew from it. The court of appeals held that Section 253 preempts only local regulations that cause petitioner not to provide specific services in that local market. Pet. App. 11a, 13a. Petitioner candidly acknowledged that "it cannot be determined what services Level 3 might have provided or developed using the money that was otherwise paid to St. Louis." BIO 8 (quoting C.A. J.A. 384). On that basis, the court of appeals found dispositive that petitioner "cannot state with specificity what additional services it might have provided had it been able to freely use the money that it was forced to pay to the City for access to the public rights-of-way." Pet. App. 32a.

Contrary to the City's supported assertions, however, petitioner manifestly did *not* concede more broadly "that the ordinance had no impact" (BIO 22 n.15) and, in turn, the Eighth Circuit did not rest its decision on a non-existent "admission that the company could not identify any impact" (*id.* at 22-23). Rather, the record shows (and the court of appeals did not doubt) that the City's burdensome regime adversely affects competition (*see supra* at 6-7), but not in a fashion that is susceptible of identifying particular services that petitioner withdrew from the St. Louis market.

This Court's intervention is essential because the Eighth Circuit's exacting standard, if left in place, would effectively ensure that licensing fees like those imposed by St. Louis are upheld and that Section 253 is rendered a nullity. A fee for access to public rights-of-way generally will not cause a telecommunications provider to withhold service from a particular customer or to withdraw a particular service. The roughly $140,000 fee that the City requires petitioner to pay for access to public rights-of-way is a fixed cost for securing access to the city as a whole. It does not vary materially based on the number of subscribers petitioner has in St. Louis. The fee's effects on competition are not limited to rendering it uneconomical for petitioner to offer services to identifiable customers in the City. Rather, the burden of the fee undermines competition by reducing a provider's incentive to offer competitive services in St. Louis *at all* and by diverting funds that would otherwise be devoted to efforts at innovation.

III. THE EIGHTH CIRCUIT CORRECTLY RECOGNIZED THAT ITS RULING GIVES RISE TO TWO CONFLICTS IN THE CIRCUITS.

This Court's review of the Eighth Circuit's erroneous construction of Section 253 is all the more warranted because, as the court of appeals expressly acknowledged, its ruling gives rise to two separate circuit conflicts. Pet. App. 30a, 34a; *see also Sprint Telephony PCS, L.P. v. County of San Deigo*, 542 F.3d 571, 577 (9th Cir. 2008) (en banc). As explained by the *amicus* brief in support of the petition

> The circuit split described in the petition has material repercussions for providers with nationwide networks, like AT&T, which face conflicting Section 253 standards across the country. . . . To mitigate such disincentives for technological advancement, the Court should establish a uniform standard for Section 253.

AT&T *Amicus* Br. 18-19. *See also* Pet. 30-31 (demonstrating that national uniformity is essential).

Respondent principally contends that no circuit finds "a violation of Section 253(a) in the face of evidence that the challenged ordinance had no material 'effect' on the plaintiffs." BIO 28-29. But that argument rests on the misstatement of the record discussed above. Of note, despite all of the City's rhetoric, none of the decisions giving rise to a circuit conflict rests in *any* respect on a finding that the plaintiff telecommunications provider failed to provide *any* particular service in the defendant municipality. Rather, the ordinances in those cases, like this one, exacted substantial fees, did not mandate that the local government grant licenses, or discriminated in favor of the incumbent service provider. *See* Pet. 24-27.

Respondent's alternative argument is that the circuits apply a uniform rule because every court of appeals has "relied on the FCC's test" that Section 253 preempts local regulations that have a "material" effect on competition. BIO 29. But while several courts of appeals cite that formulation at a *very* high level of generality, the Eighth Circuit correctly recognized that they nonetheless interpret it very differently, applying a substantially more lenient standard for finding that the costs imposed by a

licensing regime give rise to preemption under Section 253. *See Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271 (10th Cir. 2004) ("substantial cost"); *TCG NY, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002) (fee greater than that imposed on incumbent service provider); *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (fees, if adopted by other jurisdictions served by the provider, would "significantly increase [the provider's] costs and reduce the profitability of its operations"). The fee invalidated in *Guayanilla*, for example, was five percent of the provider's revenues (450 F.3d at 12 & n.3), which is *trivial* compared to St. Louis's exorbitant charge. *See supra* at 6-7.

Further, unlike the Eighth Circuit, other courts of appeals account for the effect of the challenged ordinance beyond the mere ability of the specific plaintiff telecommunications provider to supply services in that particular jurisdiction. For example, the Second and Tenth Circuits have held that Section 253 preempts provisions that grant a municipality the discretion not to issue a license, even when that discretion is not exercised. *See White Plains*, 305 F.3d at 76; *Santa Fe*, 380 F.3d at 1270. The City avers that it has never "chosen not to execute a license" that has been authorized by the City's Board of Public Service. BIO 4. But the same was true in *White Plains* and *Santa Fe*. Respondent's further assertion that "the district court found it did not" have "unfettered discretion" in licensing (*id.* at 20), is incorrect: the court only discussed an entirely separate provision governing the submission of licensing information (*see* Pet. App. 57a-58a

(discussing Ch. 23.64.050(B)); and respondent notably does *not* deny that it retains the discretion to deny a license even when the Board approves it. *See* Ch. 23.64.050(C) (City is merely "empower[ed]" to issue a license); Pet. 6.

Finally, the City ignores the conflict created by the Eighth Circuit's ruling that St. Louis's ordinance is not preempted notwithstanding that it discriminates in favor of the incumbent and against competitive providers such as petitioner. Thus, in *White Plains*, the Second Circuit invalidated a license fee that discriminated in favor of the incumbent provider. 305 F.3d at 79-80. The Second Circuit would necessarily invalidate St. Louis's ordinance, given that incumbents there not only are subject to a far less onerous regulatory regime, but pay a fee of only 10% of revenues, in contrast to the nearly 200% fee paid by petitioner. *See* Pet. at 7.

Because the Eighth Circuit's decision misconstrues an essential provision of the Telecommunications Act in conflict with decisions of other circuits, certiorari should be granted.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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