No. 08-759

IN THE
Supreme Court of the United States

SPRINT TELEPHONY PCS, L.P.,

Petitioner,

v.

COUNTY OF SAN DIEGO, ET AL.,

Respondents.

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

BRIEF *AMICUS CURIAE* OF THE CITY OF ST. LOUIS, MISSOURI, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The City is the Respondent in *Level 3 Communications, LLC, v. City of St. Louis*, No. 08-626.[1] That case was distributed for conference on December 30, 2008. The Petitioner in this case, Sprint Telephony PCS, L.P. ("Sprint"), has asked the Court to consider the two petitions together. Level 3 Communications, LLC ("Level 3"), filed an *amicus curiae* brief in this case asking the Court, among other things, not to consolidate the cases. Given the intermingling of the petitions, the City has a significant interest in ensuring that the Court is fully apprised as to what is at issue in both cases. The Court has not yet ruled on Level 3's petition for certiorari in Case No. 08-626.

SUMMARY OF ARGUMENT

For the same reason Level 3's petition should be denied in Case No. 08-626, Sprint's petition should be denied here. The Eight and Ninth Circuits correctly interpreted 47 U.S.C. § 253 according to its plain language, which also comports with the FCC's interpretation of the statute. There is no reason to

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[1] Pursuant to Rule 37.2, all parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, the City affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

depart from that plain language or to review a case that clearly and correctly applies it.

Section 253(a) provides that no state or local law or legal requirement "may prohibit or have the effect of prohibiting" the ability of any entity to provide telecommunications services. 47 U.S.C. § 253(a). In this case, the Ninth Circuit has made a simple and entirely appropriate correction to its earlier reading of Section 253(a), which had led some courts in the Circuit to conclude that the statute's use of the word "may" meant that the statute was violated if an ordinance *might*, under any possible circumstances, prohibit or effectively prohibit any entity from providing telecommunications service. In *Sprint*, the Ninth Circuit followed the Eighth Circuit in recognizing "may" means "is permitted to" not "might."

Both Sprint and Level 3 would have this Court assume that this simple correction places the Eighth and Ninth Circuit at odds with other Circuits. In fact, while the two cases are quite different in many important respects (as Level 3's *amicus* brief points out), the unifying factors are that: (a) in neither case did the company present any evidence that would suggest that the challenged regulations had any impact on it; and (b) in both cases, the local government defendants presented evidence that the challenged regulations were not prohibiting or effectively prohibiting the company from providing any services. Neither company showed that any Circuit would have upheld a

Section 253(a) challenge under such circumstances. There is no reason to grant certiorari in this case, just as there is no reason to do so in *Level 3*.

I. The Ninth Circuit Rejected a "Preemption-by-Speculation" Approach That Was Both Wrong and Judicially Unmanageable.

Over the course of the past decade, the Ninth Circuit developed and deemed itself "bound" by a reading of Section 253(a) that was utterly confusing to the courts and demonstrably wrong as a matter of linguistics. The decision below is best understood as a modest but important change in course. Sprint and *amici* greatly mischaracterize it.

A. The Ninth Circuit Deemed Itself Bound by a "May Prohibit" Standard.

The "may prohibit" standard reversed in *Sprint* had humble beginnings. In *Auburn*, the Ninth Circuit borrowed the sentence that would become the heart of the circuit's "may prohibit" test from a vacated district court decision from another circuit:

> Section 253(a) preempts "regulations that not only 'prohibit' outright the ability of any entity to provide telecommunications services, but also those that 'may . . . have the effect of prohibiting' the provision of such services."

City of Auburn v. Qwest Corp., 260 F.3d 1160, 1175 (9th Cir. 2001) (quoting *Bell Atl. v. Prince George's County,* 49 F. Supp. 2d 805, 814 (D. Md. 1999), *vacated and remanded on other grounds,* 212 F.3d 863 (4th Cir. 2000)). The district court's use of ellipsis, or the Ninth Circuit's reliance on it, may not have been intended to change the meaning of Section 253(a) in any substantive way. However, one year later, a district court in the Ninth Circuit vigorously objected to Qwest's claim that "may prohibit" was the substantive standard for preemption. Describing the phrase quoted in *Auburn*, the district court wrote:

> The quoted phrase simply misreads the plain wording of the statute, and implies that the statute bars not only those local requirements that actually prohibit or have the effect of prohibiting the ability to provide telecommunication service, but also those local requirements that *may* have that effect. That is not what the statute says. . . . A correct reading of the statute shows that Congress used the word "may" as a synonym for "is permitted to."

Qwest Corp. v. City of Portland, 200 F. Supp. 2d 1250, 1255 (D. Or. 2002) (internal citations omitted).

Of course, the district court had it precisely correct. However, the Ninth Circuit reversed the district court, finding that both the district court and

the court of appeals were "bound" by the "may prohibit" test – "like it or not":

> We have previously ruled that regulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted. Like it or not, both we and the district court are bound by our prior ruling.

Qwest Corp. v. City of Portland, 385 F.3d 1236, 1241 (9th Cir. 2004) (emphasis in original).

Hence, the "may" standard became a *substantive* standard for interpretation, complicated by the fact that the *Portland* court did not explain what the term meant. In remanding the case to the district court, the Ninth Circuit suggested that the court was to make findings – suggesting that the "may" standard could require some showing of material effects. In other cases, however, the language of the court could have been read to mean that a prohibition could be established by court speculation. Thus, in 2006, the Ninth Circuit found that a City of Berkeley ordinance violated Section 253(a):

> The City argues Qwest failed to produce any facts showing how any section or combination of sections of [the ordinance] does what § 253(a) precludes – prohibiting or having the effect of

> prohibiting telecommunications service. . . . However, we explicitly rejected this argument in *Qwest Corp. v. City of Portland*. . . . [R]ather than considering the actual impact of [the Ordinance], we must determine whether the specific regulations . . . 'may have the effect of prohibiting the provision of telecommunications services' in the City.

Qwest Commc'ns Inc. v. City of Berkeley, 433 F.3d 1253, 1256-57 (9th Cir. 2006).

Not surprisingly given the muddle created by these decisions, the district courts also approached the "may" standard in dramatically different ways. On remand, the *Portland* court found that the "may" standard required a showing of significant economic impact. *Qwest Corp. v. City of Portland,* 2006 WL 2679543, *2-3 (D. Or. 2006). In this case, the district court allowed a facial challenge to move forward where there was *no* evidence of any prohibitory effects or even significant impacts. *Sprint Telephony PCS, L.P. v. County of San Diego,* 377 F. Supp. 2d 886, 893-96 (S.D. Cal. 2005). Rather, it was enough that Sprint list a number of requirements, characterize them as burdensome, and then say that the burdens "may" be a prohibition.

B. "May Prohibit" Is Not a Judicially-Manageable Standard for Preemption.

The decision below recognizes that the "may prohibit" standard is not only technically wrong as a matter of plain language interpretation; it is judicially unmanageable. The standard encourages telecommunications providers to challenge any local requirement they find objectionable, regardless of whether the requirement had a meaningful impact on competition or on any competitor. The speculative standard forces Article III courts to answer questions that they are not well-suited to answer without factual context.[2]

The district courts in the Ninth Circuit rightly expressed their concern with a "preemption-by-speculation" approach. As the *Portland* district court put it in deciding that the "may" standard required more than speculation:

> [A]lmost any regulation, considered in the abstract ***without factual context***, could be depicted as potentially

[2] It is obviously true that in some cases a "prohibition" can be established on the face of a statute – as where a statute purports to limit the number of providers that can offer service in a particular geographic area. It is likewise true that in some cases, the existence of an "effective prohibition" may not be contested, and factual development may not be necessary to resolve a case. Like *Level 3*, this case involves allegations of prohibition or effective prohibition that was contested by a local government that showed that there had been no prohibition or effective prohibition.

> prohibiting a telecommunications service. A $5.00 application fee would be prohibitory if the applicant had only $2.00. Unless the preemption analysis is ***somehow connected to reality,*** a telecommunications provider could rely on purely hypothetical scenarios to establish a violation of § 253(a).

Qwest v. Portland, 2006 WL 2679543 at *2 (D. Or. 2006) (emphasis added), *see id.* at *3 (noting challenge must have "basis in economic realty").

In rejecting the "may" standard, the Ninth Circuit properly rejects preemption by speculation, and restores the "connect[ion] to reality" that Section 253(a)'s plain language requires. Without it, judges find themselves making abstract decrees of "prohibitions" based only on judicial speculation. *See, e.g., Level 3 Commc'ns v. City of St. Louis*, 405 F. Supp. 2d 1047, 1056 (E.D. Mo. 2005) (listing City requirements and declaring, without analysis, that the court "believes" the requirements run afoul of Section 253(a)).

The problems associated with the preemption by speculation standard are perhaps best illustrated by Sprint's Petition in this case. Among other things, to show how the Ninth Circuit's decision fails to protect it, Sprint complains to this Court that San Diego County required it (and other providers) to use

"graffiti-resistant coatings" on wireless cabinets.[3] *See* Pet. 5; Pet. App. 111a. Sprint does not point to any record evidence that shows that this requirement is actually burdensome. Nothing in the record indicates the requirement has or is likely to have a material "effect" on Sprint's ability to compete in San Diego. This Court, like the courts below, is left to speculate about that "effect":

- Does painting really create a burden?
- If it does, is it really a significant burden?
- How difficult and time-consuming would it be for a provider to apply such paint?

The problem is not resolved if the court were to decree that anything that seems (to the court) to impose a "substantial burden" should be preempted. First, this would likely lead to an excessively broad preemption, a reading inconsistent with this Court's preemption teachings. *Altria Group v. Good*, 129 S. Ct. 538, 543 (2008). But perhaps even more troubling, such a holding would only further ensnare the courts in assessing the reasonableness and the burdens of various local requirements:

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[3] A wireless installation does not usually involve only an antenna. Rather, there will often be large cabinets or other structures, housing the electronic devices associated with the antennas.

- Can *any* paint be required or are *all* paint requirements too burdensome?

- Does Section 253 require local governments to incur the cost of cleaning and shielding wireless facilities free of charge to the provider?

- Can the company be required to remove graffiti?

Quite literally, every legal requirement that obligates a provider to do anything – even, for example, obeying traffic signals or heeding antidiscrimination laws, would be subject to challenge. The path leads to endless litigation and has very little to do with Section 253 itself.[4] To be sure, Congress could have crafted a statute that broadly preempted *any and all* local requirements regardless of whether they "prohibit" or effectively achieve that result. But Section 253(a) does no such thing. The Ninth Circuit rightly returned the standard for preemption to one that is judicially manageable – Section 253's plain language.

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[4] Sprint incorrectly argues that its challenge and similar challenges to local governments would not implicate Section 253(b). The FCC explicitly ruled that Section 253(b) does apply to local governments. *In re Classic Telephone*, 11 F.C.C.R. 13082, 13100 ¶ 34 (1996).

C. Sprint and *Amici* Greatly Overstate the Effect of the Ninth Circuit's Elimination of the "May Prohibit" Test.

Sprint and *amici* wrongly cast the Ninth Circuit's decision to eliminate the "may prohibit" test as doing something much more draconian. According to Sprint and *amici*, the Ninth Circuit ruled that Section 253 preempts a local requirement only if it effects a "complete ban" on the provision of such service. Pet. 16, 17; *see also* Brief of *Amici Curiae* NextG Networks of Cal., Inc. and the DAS Forum, 7 (indicating that under Ninth Circuit's standard, cities may "impose any requirement and take any action so long as it does not lead to a specific construction permit denial"). The Ninth Circuit said precisely the opposite. Pet. App. 11a. The court held that under Section 253(a), a provider must show "actual ***or effective*** prohibition. *Id.* (emphasis added). The Ninth Circuit's change in Section 253(a) is thus not one that preempts "complete bans" while preserving requirements that will "effectively" achieve the same result.

Contrary to Sprint's arguments (and those of Level 3),[5] the court noted that its standard was

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[5] Sprint correctly concedes that the Eighth Circuit also adopted a test consistent with the FCC test, Pet. 15, a point that Level 3 tried to obscure. Level 3 Reply Br. 10. Sprint also argues, incorrectly, that the Eighth Circuit thought that the "effective prohibition" standard was less rigorous than the "material impact" standard. Pet. 16. Rather, the Eighth Circuit formulation correctly recognized that Section 253 requires (a) a prohibition or effective prohibition; (b) of the ability of an entity

consistent with the FCC's. Pet. App. 11a. The FCC has clearly noted that there are *two* distinct inquiries under Section 253(a). *In re Cal. Payphone*, 12 F.C.C.R. 14191, 14204-14206 ¶¶ 27, 30-31 First, the FCC asks whether a local requirement serves as an "express legal prohibition" that "completely bar[s] prospective competitors from lawfully providing . . . service." *Id.* ¶ 30. But this does not end the analysis. Even if there is no express bar, the FCC proceeds to assess whether a local requirement "has the effect of prohibiting" the ability to provide service. *Id.* ¶ 31. To do so, the FCC asks whether the local requirement "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* A fact-finder must assess the "practical effect" of a local requirement. *Id* ¶ 27. A plaintiff challenging a local requirement bears the burden:

> Parties seeking preemption of a local legal requirement . . . must supply us with *credible* and *probative evidence* that the challenged requirement falls

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to provide any telecommunications service. The court properly recognized that there was no prohibition or effective prohibition of any kind, let alone one that had a material effect on the ability to provide telecommunications service. *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 534 (8th Cir. 2007). Sprint's graffiti complaint is an illustration of another requirement where there was no evidence of (and it is hard to imagine) any prohibition, much less an impact on the provision of telecommunications services.

> within the proscription of Section 253(a).

In re TCI Cablevision of Oakland County, Inc., Memorandum Opinion and Order, 12 F.C.C.R. 21396 at 21440, ¶ 101 (1997) (emphasis added).[6]

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[6] Contrary to Level 3's *amicus* arguments, this evidentiary requirement is not merely something mentioned in the FCC guidelines for Section 253 complaints. Amicus Curiae Brief 5, n.2. The FCC expressly declined to find that Section 253 preempts legal requirements in the absence of an assessment of how those requirements have been applied:

> CPA further argues that the City's very involvement in the contracting process for installing payphones outdoors on the public rights-of-way "amounts to an arbitrary and potentially absolute barrier to entry" proscribed by section 253(a). We cannot agree that the City's exercise of its contracting authority as a location provider constitutes, *per se,* a situation proscribed by section 253(a). The City's contracting conduct would implicate section 253(a) only if it materially inhibited or limited the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment in the market for payphone services in the Central Business District. In other words, the City's contracting conduct would have to actually prohibit or effectively prohibit the ability of a payphone service provider to provide service outdoors on the public rights-of-way in the Central Business District. As described above, the present record does not permit us to conclude that the City's contracting conduct has caused such results.

12 F.C.C.R. 14209 at ¶ 38.

Like the FCC, the Ninth Circuit simply requires a provider to make a basic factual showing that the requirement – such as the need for "graffiti-resistant" paint – effectively prohibits it from providing service. Here, Sprint failed to make any showing of an effective prohibition, much like Level 3 failed to make any showing of an adverse effect in Case No. 08-626.

The Ninth Circuit rightly steers away from the incorrect and unmanageable "may" standard by adopting the Eighth Circuit's plain language interpretation of Section 253:

> We therefore overrule *Auburn* and join the Eighth Circuit in holding that 'a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.'

Pet. App. 11a (citing *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532 (8th Cir. 2007)). As a result, the Ninth Circuit adopts a standard that is aligned with the FCC and that, contrary to Sprint's claim, gives effect to *both* prongs of Section 253(a)'s test. When this standard is applied to the record, Sprint's abstract challenge to the County's basic local requirements – like Level 3's challenge to the City of St. Louis's requirements – is exposed as utterly meritless.

Much like Level 3, Sprint does not offer any serious argument that the plain language interpretations of Section 253 is wrong – only that the statute ought to be interpreted differently to make it (in Sprint's view) more beneficial. This does not justify departure from the plain language. Given the recent trend of decisions that have interpreted Section 253 correctly, the Court need not intervene.

II. The Court Need Not Intervene Where the Record Shows No Meaningful Impact on the Provider's Ability To Provide Service in the Market.

Once the "may prohibit" test is correctly set aside, it becomes clear that these cases are not about conflicting legal standards, but the lack of relevant facts. While there are many important differences between the *Level 3* and *Sprint* cases, the reason both providers ask the court to adopt a standard divorced from the statute's plain language is clear: these cases involved significant showings of facts by defendants that the claim of the plaintiff lacked merit, and no substantive counter by the plaintiff.

Just as we have shown with respect to Level 3, *see* City of St. Louis's Brief in Opposition, Case No. 08-626, at 19-25, Sprint has fallen far short of showing anything approaching a prohibition or effective prohibition. Sprint does not discuss the impact of the County's requirements; it merely lists them. Pet. 24. In contrast, the County of San Diego,

like the City of St. Louis,[7] provided the courts with evidence of the ordinance's lack of "prohibitory" impact. For example, the County showed that of the ten (10) permit applications Sprint had submitted under the ordinance, the County had already granted six (6) of them. County's Supplemental Excerpts of the Record at 50, ¶ 4. The County also pointed out that not one of Sprint's applications had been denied, and that there was no evidence in the record indicating that the County was responsible for any processing delays. County Petition for Panel Rehearing and Rehearing *En Banc* at 5 (9th Cir. Apr. 3, 2007).

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[7] As we said St. Louis's Brief in Opposition at 20:

> Level 3 was in the market, and had been operating pursuant to the St. Louis ordinance for some years and was rolling out new services in the City. There was no evidence that it was being forced to leave the market, or to cut back service. Level 3 was unable to identify any service it had been prohibited or effectively prohibited from providing, and admitted that, "it cannot be determined what services Level 3 might have provided or developed" with the money it paid the City. C.A.J.A. 384. The City further showed that it has never attempted to limit the types of telecommunications services that Level 3 can provide, C.A.J.A. 416. C.A.J.A. 397-98. It showed, more generally, that the market was highly competitive.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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