No. 08-759

In the Supreme Court of the United States

SPRINT TELEPHONY PCS, L.P., PETITIONER

v.

COUNTY OF SAN DIEGO, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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Notwithstanding respondents' valiant efforts to suggest otherwise, there can be no doubt that there is a circuit conflict concerning the interpretation of 47 U.S.C. 253(a)—one of the central provisions of the Telecommunications Act of 1996. The only open question is whether this case constitutes the optimal vehicle in which to address that conflict. The better view is that it does. The various vehicle problems asserted by respondents are illusory, and it is now clear that the other pending petition presenting the same question suffers from substantial vehicle problems of its own. The Court should grant review in this case to resolve the clear circuit conflict concerning the scope of Section 253(a) and to correct the Ninth Circuit's seriously flawed interpretation.

A. The Decision Below Creates An Acknowledged Conflict With The Decisions Of Several Other Circuits

Respondents first contend (Br. in Opp. 18-30) that this case does not present a circuit conflict warranting the Court's review. That contention plainly lacks merit.

1. For the reasons stated in the petition for certiorari, there is a clear and substantial circuit conflict on the interpretation of Section 253(a): specifically, on the question whether a state or local regulation that does not expressly prohibit the provision of telecommunications service is nevertheless preempted by Section 253(a) if it substantially impedes an entity from providing service. See Pet. 12-17. In the decision below, the Ninth Circuit overruled its earlier decision in *City of Auburn* v. *Qwest Corp.*, 260 F.3d 1160 (2001), cert. denied, 534 U.S. 1079 (2002), which had recognized that a regulation could be preempted by Section 253(a) if it "created a substantial . . . barrier" to the provision of telecommunications service. Pet. App. 8a-9a (quoting *City of Auburn*, 260 F.3d at 1176). The court instead held that it was insufficient for a challenging provider to show "the mere possibility of prohibition." *Id.* at 11a (citation omitted). In so doing, the Ninth Circuit expressly recognized that its "narrow" interpretation of Section 253(a) conflicted with the interpretations of the First, Second, and Tenth Circuits. See *id.* at 9a, 11a.

2. Respondents primarily contend (Br. in Opp. 22-30) that the petition should be denied because, while there may be a circuit conflict involving the interpretation of Section 253(a), that conflict properly concerns only the provision's use of the word "may," not its use of the successive phrase "have the effect of prohibiting." That is a puzzling contention. As we have explained, the decisions of the First, Second, and Tenth Circuits did not place substantial weight on the use of the word "may" in

interpreting Section 253(a); instead, those decisions merely sought to give meaning to the successive phrase "have the effect of prohibiting." See Pet. 18-19. Even if those decisions had focused on the word "may," however, it would not provide a basis for denying review in this case. Whatever the precise language in Section 253(a) that triggered the circuit conflict, respondents effectively concede that *some* conflict concerning the interpretation of Section 253(a) exists. See, *e.g.*, Br. in Opp. 30 (acknowledging "the circuit split identified by the Ninth Circuit"). And that conflict is evidently implicated by the question presented: *viz.*, whether Section 253(a) preempts a state or local regulation that does not expressly prohibit the provision of telecommunications service, but substantially impedes an entity from providing service. See Pet. i.

In the alternative, respondents argue (Br. in Opp. 18-21) that further review is unwarranted because, to the extent there is a divergence in the circuits' interpretations of Section 253(a), any divergence is relatively modest. Specifically, respondents suggest the Ninth Circuit did not hold that a regulation that does not expressly prohibit the provision of telecommunications service is preempted only if it effects a complete ban on the provision of service. That characterization of the Ninth Circuit's decision is mistaken. Although the court provided various examples of hypothetical regulations that would be preempted under its standard, each of those examples would be tantamount to a complete ban. For example, the court cited a regulation that "impose[s] an excessively long waiting period." Pet. App. 15a. Such a regulation would completely ban a carrier from providing service for the duration of the waiting period—even if, as respondents suggest (Br. in Opp. 20), the carrier may be permitted to provide service at some later date.

In any event, regardless whether the Ninth Circuit's standard is properly characterized as preempting only regulations that effect a complete ban, it is clear that, applying its avowedly "narrow" standard, the Ninth Circuit would uphold a substantial array of regulations that would be preempted under the standards of at least three other circuits (and the Federal Communications Commission).* The resulting disuniformity in the interpretation of one of the Telecommunications Act's most important provisions merits immediate review.

B. This Case Is An Ideal Vehicle In Which To Resolve The Circuit Conflict

Respondents contend (Br. in Opp. 31-40) that this case would constitute a poor vehicle for review of the circuit conflict concerning the interpretation of Section 253(a). All of the vehicle problems that respondents identify are insubstantial.

1. Respondents first renew their contention (Br. in Opp. 31-35) that petitioner's preemption claim was governed not by Section 253(a), but rather by 47 U.S.C. 332(c)(7). As a preliminary matter, respondents' contention is entirely meritless, because Section 253(a) applies

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* Remarkably, respondents suggest (Br. in Opp. 19) that the Ninth Circuit's interpretation of Section 253(a) was consistent with the FCC's simply because the Ninth Circuit cited the FCC's ruling in *In re California Payphone Association*, 12 F.C.C.R. 14,191 (1997). As we have explained (Pet. 19-20), however, the Ninth Circuit wholly ignored the critical language in that ruling, in which the FCC made clear that, in determining whether a regulation effectively prohibits the ability to provide service, it would "consider whether the [regulation] materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* at 14,206 (¶ 31). And the Ninth Circuit repudiated the decisions of other circuits that had expressly embraced the FCC's standard. See Pet. App. 9a.

to challenges to "statutes" and "regulations" (such as the San Diego County Wireless Ordinance), whereas Section 332(c)(7) applies only to challenges to particular "decisions" made by local authorities. Critically, respondents fail to cite a single case that so much as hints that a provider may bring a preemption claim like petitioner's only under Section 332(c)(7) and not under Section 253(a). More broadly, respondents do not contend that the *substantive standard* for review under Section 332(c)(7) would be any different from the standard under Section 253(a)—nor could they, because, as the Ninth Circuit noted, the operative language in each provision is identical. See Pet. App. 13a. Instead, respondents merely argue (Br. in Opp. 35) that, if petitioner's claim were governed by Section 332(c)(7), it would be time-barred. That argument is forfeited, however, because respondents failed to raise it before the district court; to the contrary, before the district court, respondents argued only that any such claim would be *premature*. See C.A. E.R. 20. It was presumably for that reason that the court of appeals concluded that respondents' contention concerning the applicability of Section 332(c)(7) presented no bar to its reaching the question of how to interpret Section 253(a). See Pet. App. 13a. This Court should do likewise.

2. Respondents also argue (Br. in Opp. 38-40) that this case involves a facial challenge to the San Diego County Wireless Ordinance—and that, as such, it is subject to the standard for facial challenges articulated in *United States* v. *Salerno*, 481 U.S. 739 (1987), under which a plaintiff must show that the challenged statute or regulation is invalid in all of its applications. As we have explained, however, Section 253(a) expressly preempts any "statute" or "regulation" that prohibits or has the effect of prohibiting the ability of any entity to pro-

vide telecommunications services—and thus, by its terms, provides the entire substantive standard for a preemption challenge to a statute or regulation, without any need to import *Salerno* into the analysis. See Pet. 20-21. The Ninth Circuit's reliance on *Salerno* was a critical component of its ultimate holding that the Wireless Ordinance could not be preempted unless it effectively resulted in a complete ban on the provision of telecommunications service. See, *e.g.*, Pet. App. 16a. Far from constituting a justification for denying review in this case, the court's additional error in relying on *Salerno* constitutes a justification for granting it.

3. Respondents additionally contend (Br. in Opp. 36-38) that resolution of the question whether Section 253(a) preempts a state or local regulation that substantially impedes the provision of telecommunications service would not be outcome-dispositive in this case. That contention, however, is belied by the decisions of the district court and the court of appeals panel, both of which held that, under the "substantial barrier" standard articulated by the Ninth Circuit in *City of Auburn*, the challenged provisions of the San Diego County Wireless Ordinance were preempted. See Pet. App. 47a-48a, 70a-74a. It is also belied by the decisions of other courts, which have routinely invalidated similar requirements under the substantial-impediment standard. See Pet. 24-25. In addition to challenging the Wireless Ordinance on its face, moreover, petitioners presented substantial evidence that the Wireless Ordinance had in fact "delayed or in some cases eliminated [petitioner's] ability to develop its network in San Diego and decreased [petitioner's] market share due to [its] inability to obtain the required wireless coverage to attract customers." Pet. C.A. Br. 19; see, *e.g.*, C.A. E.R. 218-244. Respondents' contention (Br. in Opp. 38) that petitioner "provid[ed] no

evidence regarding the impact of the [Wireless] Ordinance" is, therefore, simply false. Because resolution of the question presented would plainly be outcome-dispositive in this case, and because there is no obstacle to the Court's reaching that question here, the Court should grant the petition.

C. This Case Is A Better Vehicle For The Court's Review Than *Level 3 Communications*

Because this case is an ideal vehicle for resolving the circuit conflict concerning the interpretation of Section 253(a), the Court should grant review here. In the petition, we suggested that the Court may also wish to grant review in another pending case presenting the same issue. See *Level 3 Communications, L.L.C.* v. *City of St. Louis*, No. 08-626 (petition filed Nov. 7, 2008). As a result of additional briefing since the petition was filed, however, it is now clear that there are substantial vehicle problems with *Level 3 Communications*. The Court should therefore grant only the instant petition and hold the petition in *Level 3 Communications* pending the disposition of this case.

1. Most notably, *Level 3 Communications* presents issues concerning the interpretation not only of Section 253(a), but also of Section 253(c), which preserves the authority of state and local governments to manage public rights-of-way. The legal and factual complexities of the Section 253(c) issues decisively counsel against further review in that case.

a. Although the provider in *Level 3 Communications* does not separately rely on Section 253(c) in its question presented, the provider asks this Court to resolve not only the circuit conflict concerning the interpretation of Section 253(a), but also an additional circuit conflict on the issue whether a regulation may be pre-

empted under Section 253(c) regardless whether it falls within the scope of Section 253(a). See 08-626 Pet. 23, 29-30. As a preliminary matter, it is far from clear whether that conflict would independently merit the Court's review, because only one circuit has suggested that a provider may pursue a discrete preemption claim under Section 253(c)—and it did so only in passing. See *TCG Detroit* v. *City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000) (noting that "[a] violation of § 253(c) might well *not* involve violating § 253(a)").

Even assuming that it would be desirable to resolve any circuit conflict concerning the interpretation of Section 253(c), however, it is far from clear whether *Level 3 Communications* would be a suitable vehicle in which to do so, because the provider does not appear to have contended before the court of appeals that Section 253(c) provided a discrete basis for preemption. Although the provider asserts (without elaboration) that it made that argument below, see Level 3 Communications Amicus Br. 3, it did not argue in its brief below that Section 253(c) provided a discrete basis for preemption; to the contrary, it asserted that *TCG Detroit*, the one circuit decision to adopt that rule, was "largely devoid of any analysis." Br. of Appellee at 39, *Level 3 Communications, L.L.C.* v. *City of St. Louis*, 477 F.3d 528 (8th Cir. 2007) (Nos. 06-1398 & 06-1459). To the extent the court of appeals in *Level 3 Communications* suggested that a provider may not pursue an affirmative preemption claim under Section 253(c), therefore, that suggestion constituted mere dictum. See *Level 3 Communications*, 477 F.3d at 531-532 (08-626 Pet. App. 27a-29a).

b. Even more troubling, the provider in *Level 3 Communications* seemingly asks the Court to consider (and decide) whether, as a factual matter, the challenged requirements of the ordinance at issue would fall within

the scope of Section 253(c): specifically, whether the challenged fees constitute "fair and reasonable compensation," and whether other challenged requirements constitute "manage[ment] of the public rights-of-way * * * on a competitively neutral and nondiscriminatory basis." See 08-626 Pet. 21-23. As reflected by the lengthy discussions in the district court's opinion in *Level 3 Communications* (and in the provider's brief on appeal), the application of Section 253(c) in that case would present a variety of complex factual issues, including (1) the calculation of the fees charged by the municipality for use of public rights-of-way; (2) the relationship between those fees and the municipality's actual costs; (3) the disparate effect of those fees on incumbent and competitive providers; (4) the comparative effect of those fees on companies providing both local and long-distance service and companies providing only one type of service; and (5) the relative effect of those fees on telecommunications providers and other utilities using public rights-of-way. See *Level 3 Communications, L.L.C.* v. *City of St. Louis*, 405 F. Supp. 2d 1047, 1056-1063 (E.D. Mo. 2005); Br. of Appellee at 37-52, *Level 3 Communications, supra* (Nos. 06-1398 & 06-1459). This Court, of course, does not ordinarily "grant * * * certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

c. In its amicus brief in this case, the provider in *Level 3 Communications* suggests (Br. 3) that "the proper construction of Section 253(a) cannot be understood without reference to the exception provided by Section 253(c)." To the extent that is true, however, there is no reason why the Court could not consider in this case any relevance of Section 253(c) to the *interpretation* of Section 253(a), even if Section 253(c) does not by its terms apply here. See Pet. 28 n.10. And in the

event that certiorari is granted in this case, the provider in *Level 3 Communications* can—and "no doubt will," Level 3 Communications Amicus Br. 6—file an amicus brief on the merits, in which it will be able to bring to the Court's attention any arguments about the relevance of Section 253(c) to the interpretation of Section 253(a) (and any pertinent facts in its case that illustrate that relevance). Because the petition in *Level 3 Communications* presents a host of complicating factual and legal issues concerning the application and interpretation of Section 253(c), the Court should hold that petition pending its resolution of the pure legal issue concerning the interpretation of Section 253(a) in this case.

2. In its amicus brief, the provider in *Level 3 Communications* contends (Br. 4) that its petition "more directly presents the circuit conflict over the proper construction of Section 253(a)," on the ground that more of the cases in the circuit conflict involve regulations governing access to public rights-of-way than regulations governing the provision of wireless telecommunications services more generally. Even if that is true as an empirical matter, it is hard to see why it would be a basis for granting review in that case rather than this one. Both cases plainly implicate the same circuit conflict over the proper construction of Section 253(a); indeed, the provider in *Level 3 Communications* cited (and discussed at length) the Ninth Circuit's decision in this case in setting out the circuit conflict in its petition. See 08-626 Pet. 24, 27-28.

To the extent the factual context is relevant, however, this case arises in perhaps the most important context in which Section 253(a) currently applies. As we have explained, the demand for wireless telecommunications services continues to grow, and, at the same time, local communities have sought to push the envelope by

imposing ever more stringent limitations on the construction or modification of wireless facilities. See Pet. 28-29. And as amicus PCIA points out, numerous localities in the Ninth Circuit have responded to the decision in this case by "initiating or reinstating plans to adopt rigorous zoning ordinances or by abandoning plans to tailor their ordinances in light of" earlier decisions construing Section 253(a) more broadly. Br. 14-15; see *id.* at 15-17 (citing examples). The Ninth Circuit's decision, moreover, seemingly goes even further than the Eighth Circuit's decision in *Level 3 Communications* in narrowing the scope of Section 253(a). See Pet. 16-17.

If the en banc Ninth Circuit's decision is allowed to stand, localities in the Nation's largest and most populous circuit will be free to impose draconian restrictions on the placement and design of wireless facilities, as the County of San Diego did here. The Ninth Circuit's decision is therefore of enormous practical, as well as legal, significance. For the reasons stated in the petition and this reply, it merits the Court's review.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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