No. 08-___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Eighth Circuit err in holding, in acknowledged conflict with several other circuits, that local governments' fees and restrictions on telecommunication carriers' access to public rights-of-way are not preempted by federal law so long as they do not effectively preclude the plaintiff from providing telecommunications services?

RULE 29.6 STATEMENT

Petitioner Level 3 Communications, LLC is 100% owned by Level 3 Financing, Inc., which is itself 100% owned by Level 3 Communications, Inc., a publicly traded corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Level 3 Communications, LLC ("Level 3") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The district court's opinion invalidating provisions of the municipal ordinance at issue in this case (App. D, *infra*) is published at 405 F. Supp. 2d 1047. The court of appeals' opinion reversing (App. C, *infra*) is published at 477 F.3d 528. The district court's opinion on remand entering judgment for respondent (App. B, *infra*) is unpublished, but is available at 2007 WL 2860171. The court of appeals' subsequent opinion affirming (App. A, *infra*) is published at 540 F.3d 794.

JURISDICTION

The court of appeals entered its judgment on September 4, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This case involves two provisions of the Telecommunications Act of 1996. Section 253 of the Act is entitled "[r]emoval of barriers to entry." Section 253(a) provides:

> No state or local statute or regulation, or other State or local legal requirement, 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). Section 253(c) of the Act provides:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is disclosed by such government.

Id. § 253(c).

The Appendix reproduces the municipal ordinance challenged in this case, Chapter 23.64 of the St. Louis municipal code. App. F, *infra*.

STATEMENT OF THE CASE

Federal law preempts state and local regulations that impede the ability of telecommunications providers to furnish services. 47 U.S.C. § 253(a). With respect to fees for access to public rights-of-way, local governments are permitted only to charge carriers reasonable compensation on a competitively neutral basis. *Id.* § 253(c). Respondent has adopted an Ordinance that imposes significant burdens on the operations of non-incumbent telecommunications providers, including large fees for access to the public rights-of-way. The district court held that the Ordinance was preempted. The court of appeals reversed, expressly acknowledging that its decision conflicted with the decisions of multiple circuits in two separate respects.

1. In the Telecommunications Act of 1996 ("the Act") (codified as amended in United States Code

Titles 15, 18 and 47), Congress triggered a "fundamental[] restructur[ing] [of] local telephone markets" (*AT&T v. Iowa Util. Bd.*, 525 U.S. 366, 371 (1999)) by facilitating competition by new telecommunications providers, "even if that meant swallowing the traditional federal reluctance to intrude into local telephone markets" (*Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 489 (2002)). The very title of the Act specifies its purpose: "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 110 Stat. 56 (1996). The Act accomplishes those twin goals through two principal requirements: that incumbent carriers interconnect their existing facilities with those of new entrants; and that state and local governments eliminate obstacles to competition.

This case involves the latter mandate, the "very heart" of which (141 Cong. Rec. S8134, 8175 (daily ed. June 12, 1995) (Sen. Pressler)) is Section 253 of the Act, entitled "Removal of barriers to entry." That provision was enacted to eliminate pervasive state and local restrictions that protected "incumbent" telecommunications providers (such as the Bell Operating Companies) from local competition and thereby frustrated competition by would-be entrants. Particularly targeted was local governments' monopoly control over the public rights-of-way that carriers must traverse in order to operate, which had been aggressively leveraged to extract enormous fees from prospective entrants.

Section 253(a) responds to such exclusionary measures by preempting any state or local regulation that would "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). Congress thereby preempted any state or local law that "impedes the provision of telecommunications services." *Verizon*, 535 U.S. at 491. Although Congress in Section 253(a) broadly preempted state and local governments from applying regulations that would block telecommunications competition, in Section 253(c) it preserved their specific power "to manage the public rights-of-way [and] to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis."

2. Respondent City of St. Louis ("the City") has enacted a municipal Ordinance ("the Ordinance") that comprehensively regulates the construction, maintenance, and operation of telecommunications facilities in the City by non-incumbent telecommunications providers. *See* App. F, *infra* (reproducing the Ordinance); Court of Appeals Joint Appendix ("C.A. J.A.") 446-47 (Ordinance does not apply to incumbent carrier).

The City imposes on new telecommunications providers an array of regulations and costs as a condition on their entry into the St. Louis market. Some provisions of the Ordinance – not challenged here – require the provider to pay the actual costs that arise from use of the public rights-of-way, such as the costs associated with construction and excavation (Ch. 23.64.090(E); *see also generally* St. Louis Rev. Code Ch. 20.30), and of moving network

elements that interfere with any City project (Ch. 23.64.150(F)).

But the City also charges a further "license charge" – the equivalent of rent – for use of any public right-of-way. Ch. 23.64.090. That charge functions as a source of revenue for the City, as it is deposited into the City's general fund and is used to pay for expenses unrelated to public rights-of-way or telecommunications services generally. C.A. J.A. 159-60. The license charge is not based on the City's costs relating to the licensed provider's construction on and use of the public rights-of-way, which the City has not attempted to calculate. Instead, the City chose to base its fees on those charged by some other jurisdictions under regulatory schemes that pre-date Congress's enactment of Section 253. *Id.* 168, 171, 201, 2123. The license charge is computed as a multiple of the amount and type of conduit the telecommunications provider deploys or uses in the public rights-of-way. Ch. 23.64.090.

The City also requires each non-incumbent provider, *inter alia*, to indemnify the City from any liability, even that arising from the City's own negligence (*id.* 23.64.080(H), .130(A)); maintain insurance and a performance bond (*id.* 23.64.120); and use only those contractors approved by the City (*id.* 23.64.140(D)). The City may require the new entrant to meet technical standards set by the City over and above those set by the Department of Streets (*id.* 23.64.140), install conduit for the City's own use (*id.* 23.64.080(G)), and provide any additional information the City requires (*id.* 23.64.050(A)(7)). Once granted, a license cannot be transferred to another telecommunications provider

without the City's permission, even when the transfer is part of a sale or merger of the entire company. *Id.* 23.64.170.

Even if a non-incumbent telecommunications provider meets all of the many criteria set by the Ordinance, there is no guarantee that it will receive a license. Compliance with the ordinance merely "empower[s]" the City to issue a license. *Id.* 23.64.050(C). The City can also effectively block a provider's ability to offer telecommunications services by withholding the other permits necessary for construction or maintenance of the provider's facilities. *Id.* 23.64.080(G). The City furthermore reserves the power to revoke a license if it determines that the telecommunications provider violated the Ordinance or an implementing agreement with the City. *Id.* 23.64.080(C). In that instance, the City deems the provider's equipment to be "abandoned" and subject to seizure. C.A. J.A. 166.

The City maintains a separate regulatory scheme applicable to the incumbent telephone company, Southwestern Bell Telephone Company ("SWBT") (now part of AT&T Corp.). *See* St. Louis Rev. Code Ch. 23.34. That ordinance imposes far fewer administrative requirements, and requires SWBT to pay a "gross receipts tax" calculated on certain revenues from customers in the City, in contrast to the license charge imposed on new entrants. *Id.* 23.34.020.

3. Petitioner Level 3 Communications, LLC is one of the "competitive" telecommunications providers that the Telecommunications Act was enacted to encourage. Level 3 operates an extensive domestic and international telecommunications

network that employs "next generation" fiber-optic technologies to deliver data, video, and "voice over internet protocol" services. Level 3 provides these services over an extensive fiber-optic network, which is largely built underground. The network connects Level 3's customers to the traditional public switched telephone network, to other customer locations, and to the Internet.

The Level 3 intercity network passes through St. Louis and connects to Chicago, Indianapolis, Kansas City, and hundreds of other cities around the United States. Within St. Louis and many other cities, the network also connects to local businesses through fiber-optic cable placed across public rights-of-way. As new customers purchase services, Level 3 continually expands the reach of its network.

As a landline communications provider, Level 3 depends on access to local government rights-of-way to construct and extend its fiber-optic network. Pursuant to the terms of the Ordinance and after extensive delays occasioned by negotiations with the City, Level 3 secured a license to operate as a telecommunications provider in St. Louis. In addition to the conditions set forth in the Ordinance, the license granted by the City regulates the services Level 3 is able to provide, allowing it to serve only as a "competitive access provider." C.A. J.A. 485.

Through 2004, the City charged Level 3 over $550,000 in franchise fees for access to the public rights-of-way, and it claims that the company owes it more than $100,000 for the ensuing year. C.A. J.A. 134. Those franchise fees far exceed Level 3's annual revenue from customers in the City (*see id.* 425-27 (revenues are approximately $80,000 annually)) and

the ten-percent tax on gross receipts that Level 3 would pay under the provisions applicable to the incumbent carrier (Ch. 23.32.250).

In 2004, Level 3 filed this suit against the City alleging that the Telecommunications Act preempts the Ordinance. The district court agreed. App. D, *infra*. Preliminarily, the court considered whether the Ordinance's provisions were cumulatively "so burdensome that they effectively" amount to a prohibition on telecommunications services within the meaning of Section 253(a). Pet. App. 48a (citation omitted). The district court assessed the burdens imposed by the Ordinance's provisions "in combination" and found that they "have the effect of prohibiting the ability to provide telecommunications services." *Id.*

The district court then turned to "whether provisions of the Ordinance are saved" as "fair and reasonable *compensation*." Pet. App. 50a (quoting 47 U.S.C. § 253(c) (emphasis added)). The district court concluded, based on the text and legislative history of the Act, that Congress intended "that telecommunications companies should only be required to pay their share of fees to enable local governments to recover the increased street repair and paving costs that result from repeated excavations of the rights-of-way." *Id.* 53a (quotation omitted). Accordingly, the court held that Section 253(c) does not save "revenue-based fees" from preemption. *Id.* 52a.

In this case, the City conceded that its fees "are not based on its costs." *Id.* 50a. It moreover offered no "evidentiary support that the fees at issue here have *any relation* to the City's costs in managing,

inspecting, and maintaining its rights-of-way." *Id.* 54a (emphasis added). Section 253(c) was accordingly inapplicable. *Id.*

4. The Eighth Circuit reversed and remanded. App. C, *infra*. The court of appeals held that, by its plain terms, Section 253(a) proscribes only those local laws that result in "actual or effective prohibition [on a telecommunications service], rather than the mere possibility of prohibition." Pet. App. 29a. "The plaintiff need not show a complete or insurmountable prohibition, but it must show an existing material interference with the ability to compete in a fair and balanced market." *Id.* 31a (citations omitted). Applying that standard, the court of appeals found it dispositive that the City had not "used [its] authority to *actually* exclude a provider or service," and that Level 3 had not identified any "additional services" it would have provided "had it been able to freely use the money that it was forced to pay to the City." *Id.* 32a (emphasis in original).

The court of appeals further held that Section 253(c) does not independently preempt local regulations, but instead serves solely as a savings clause for regulations on access to public rights-of-way that otherwise would be preempted by Section 253(a). Pet. App. 28a-29a. Because Level 3 had failed to prove that the Ordinance fell within the terms of Section 253(a), the court held that the City's license fee for access to rights-of-way could stand regardless of whether it exacted "fair and reasonable compensation" or discriminated against new entrants. *Id.* 33a n.2.

In so ruling, the Eighth Circuit acknowledged that "[t]he language and structure of section 253 has,

to understate the matter, 'created a fair amount of confusion'" in the courts (Pet. App. 27a (quoting *New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 299 F.3d 235, 240 (3d Cir. 2002))), and that other circuits "disagree with our understanding" of the statute (*id.* 28a).

The Eighth Circuit specifically rejected the rulings of other circuits in two separate respects. The court disagreed with the holding of the First and Tenth Circuits that Section 253 preempts license fees that impose indirect, as well as direct, burdens on the provision of telecommunications services. Pet. App. 30a (citing, *inter alia*, *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004); *Puerto Rico v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006)). In the Eighth Circuit's view, "No reading results in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services, as our sister circuits seem to suggest." *Id.*

The Eighth Circuit also explicitly rejected the Sixth Circuit's holding that a licensing fee is subject to preemption under Section 253(c) even if it "did not violate [S]ection 253(a)." Pet. App. 28a (citing *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000)).

6. On remand, the district court entered summary judgment for the City (App. B, *infra*), reasoning that "the only course of action left is for the Court to enter judgment in [the City's] favor" (Pet. App. 20a). The Eighth Circuit, in turn, affirmed, reasoning that the district court did not abuse its discretion in refusing to conduct further proceedings

on the burden imposed by the Ordinance. App. A, *infra*.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the court of appeals erroneously truncated the preemptive effect of critical provisions of the Telecommunications Act and, in so doing, exacerbated a recurring conflict in the courts of appeals. Only this Court's intervention can bring much-needed uniformity and stability to this important area of federal law.

More particularly, the ruling below significantly curtailed the preemptive effect of Section 253(a)'s barrier to local restrictions on telecommunications services by holding that only regulations that effectively prevent the individual plaintiff company from providing services are barred. That reading is squarely foreclosed by the Act's text, structure, and purpose.

As the court of appeals itself recognized, its ruling also expands not just one, but two, different conflicts in the circuits on questions that are central to the Telecommunications Act's operation and that are determinative of the lawfulness of similar licensing regimes adopted by local governments across the Nation. Only this Court can resolve these ever-expanding conflicts over the Act's operation and eliminate the substantial uncertainty that both telecommunications providers and local governments now confront. This continued and indeed increasing inconsistency strengthens the very barriers to entry to the provision of competitive telecommunications services that Congress adopted the Act to eliminate.

I. The Eighth Circuit's Ruling Misconstrues Central Provisions Of The Telecommunications Act Of 1996.

Section 253(a) of the Telecommunications Act preempts any provision of state or local law that would "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). Reading Section 253(a)'s bar on laws that "prohibit" services to refer only to regulations that forbid or preclude the provision of telecommunications, the court of appeals held that Section 253(a) applies only if a telecommunications provider can demonstrate that the challenged regulation created an "existing material interference" in its ability to provide services. Pet. App. 31a. Under that standard, the Eighth Circuit held that the Ordinance was not preempted because the City had neither "*actually* exclude[d]" any service nor effectively prevented Level 3 from offering "additional services." *Id.* 32a.

The Eighth Circuit reasoned that its rigidly narrow construction was dictated by the statute's "clear" meaning. *Id.* 30a. But that cramped reading of Section 253(a)'s protective scope is wrong. The only thing that is "clear" about Section 253 is that it "is quite inartfully drafted and has created a fair amount of confusion." *New Jersey Payphone Ass'n v. Town of W.N.Y.*, 299 F.3d 235, 240 (3d Cir. 2002). *Cf. Nixon v. Mo. Mun. League*, 541 U.S. 125, 134 (2004) (meaning of "ability" in Section 253(a) is "not clear").

The court of appeals erred in three separate respects, which together and separately demonstrate that the ambiguity of Section 253(a) is properly

resolved by holding that a local regulation is preempted when it inhibits competitors' entry into local telecommunications markets. Specifically, the Eighth Circuit misunderstood the text of Section 253(a), the purpose of the Telecommunications Act, and the statutory structure. This Court should accordingly reaffirm its prior recognition that Section 253(a) preempts not only local regulations that exclude providers, but also laws that "*impede*[] the provision of telecommunications services" (*Verizon Comms., Inc. v. FCC*, 535 U.S. 467, 491 (2002) (emphasis added)), or "*interfere* with the delivery of telecommunications services" (*Nixon*, 541 U.S. at 140 (emphasis added)).

First, the court of appeals misread the text of Section 253(a). Contrary to the court of appeals' assumption, the term "[p]rohibit" commonly has a less absolute meaning than that adopted below, and properly refers to actions that "hold back," "hinder," or "obstruct." Random House Webster's Unabridged Dictionary 1546 (2d ed. 1998). For example, a plan of action may be "cost prohibitive" even if it technically could be pursued, albeit only at an economic loss.

The Eighth Circuit further misconstrued the text by overlooking that the essential question under Section 253(a) is *what* must be "prohibited" for preemption to attach. The court of appeals assumed that the statute looks only to the effect of regulation on the particular services offered by the specific provider asserting preemption. The Telecommunications Act, however, forbids any state or local requirement that has a prohibitive effect on "the ability of *any* entity to provide *any* interstate or

intrastate telecommunications service." 47 U.S.C. § 253(a) (emphasis added).

The statutory language is thus sweeping, and its plain text dictates, consistent with the Act's overriding and express purpose of encouraging competition through forced deregulation, that the preemption inquiry focus on whether the challenged restriction limits providers' entry into the relevant market – *i.e.*, whether the law has the practical effect of inhibiting the provision of telecommunications services by providers. The mere fact that the plaintiff telecommunications provider – here, Level 3 – entered the market notwithstanding the burdens of the challenged regulation does not end the preemption inquiry.

The conclusion that the Eighth Circuit misread the text of Section 253(a) is reinforced by the fact that the ruling below largely nullifies that provision's prohibition on even those local regulations that have the "effect" of prohibiting telecommunications services. Indeed, under the court of appeals' reading of the Act, it is hard to see how any of the local rules that concerned Congress in adopting the Telecommunications Act would, in fact, be preempted. In adopting the Eighth Circuit's construction, the Ninth Circuit, for its part, concluded that Section 253(a)'s textually comprehensive "effect" provision would operate only to proscribe such far-fetched and entirely imaginary ordinances as laws dictating that "all facilities be underground [notwithstanding that] wireless facilities must be above ground," or that "no wireless facilities be located within one mile of a road." *Sprint Telephony PCS v. County of San Diego*, 2008 U.S.

App. LEXIS 19316, at *22 (9th Cir. Sept. 11, 2008) (en banc). That reading cannot be squared with this Court's admonition that Section 253(a) be read to "work like a normal preemptive statute" and certainly that it not be read in a way that "would often accomplish nothing." *Nixon*, 541 U.S. at 138.

Second, the Eighth Circuit's interpretation of Section 253(a) fails because it contravenes the very purpose of the statute. The ruling below grants local governments an extraordinarily broad power to undermine competition by limiting the entry of telecommunications providers into local markets – including by enforcing regulations that discriminate against the "new entrants" that the Act was designed to encourage. The "primary purpose" of the Act was the opposite: "to reduce regulation and encourage the rapid deployment of new telecommunications technologies." *Reno v. ACLU*, 521 U.S. 844, 857 (1997). The statute is indeed "the most deregulatory telecommunications legislation in history." 142 Cong. Rec. H1145, H1146 (daily ed. Feb. 1, 1996) (Rep. Linder). Under the regime envisioned by the Eighth Circuit, however, it would be all but impossible "to achieve the entirely new objective of uprooting the monopolies" in local telecommunications that existed before the Act (*Verizon*, 535 U.S. at 488-89), given the strangle-hold that local governments would continue to possess over the provision of telecommunications services by new carriers.

Monetary fees unhinged from actual costs have a unique capacity to obstruct competitive telecommunications services because they raise expenses and limit the development and deployment of equipment and new technologies. The record in

this case, for example, demonstrates that the roughly $100,000 that the City demands annually from Level 3 is diverted from funds that the company would use to provide additional and improved services to customers. C.A. J.A. 423, 433. At the same time, that exorbitant charge concededly bears no relationship whatsoever to actual costs incurred by the local government in ceding the right-of-way. *See supra* at 8-9.

In the Telecommunications Act, Congress sought to spur competition by providers that were new entrants to local markets. These would-be competitors come in all sizes: some are major corporations, while others are start-ups with limited resources. Many have the financial wherewithal to pay almost any fee that a local government could plausibly impose and would agree to pay that fee if the provider had no practical choice but to traverse a particular right-of-way – *even if* the fee would make the provision of local competitive telecommunications services uneconomical on a standalone basis. Yet, under the Eighth Circuit's view, a local government's assessment of any outrageous and competition-inhibiting charge does not amount to a preempted "prohibition" under Section 253(a) as long as it is paid, regardless of the disincentives and financial dislocations it creates.[1]

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[1] Congress cannot have logically intended the test for preemption under Section 253(a) to be whether the challenged regulation imposes a greater burden than the market will bear. That rule would be self-executing; no statutory preemption provision would be needed to enforce it. Nor is the market a logical measure of reasonable burdens. In any given

The practical harm caused by the court of appeals' ruling cannot be discounted. The Eighth Circuit essentially concluded that, because Level 3 elected to proceed to construct its network and provide service even in the face of a licensing regime that imposed unreasonable and discriminatory fees and regulations, the company had essentially defeated its own claim. In order to establish a violation of Section 253(a), the court of appeals would implausibly require that a non-incumbent provider such as Level 3 (a) succumb to an onerous regime like the City's by abandoning that local market, (b) suffer significant customer losses as a consequence, and then (c) initiate costly litigation against the local government in the hope of prevailing on a claim under the Telecommunications Act.

The court of appeals' ruling is further contrary to the Act's purposes because it fails to account for the burden that would arise from the adoption of similar

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municipality, the market may bear costs that would be uneconomical if measured from the perspective of the services provided only to local customers in that jurisdiction. A telecommunications system reflects so-called "network effects," by which the benefit of each additional subscriber includes not just revenues derived from that individual, but the value to all other users of the network of the connection to the new subscriber. *See, e.g.*, Bridger M. Mitchell, Alternative Measured-Service Rate Structures for Local Telephone Service 7 (1980). The same effect arises from the addition of an entirely new city to the network and, conversely, a disproportionate loss arises from the failure to serve the city. The result is that Level 3 simply cannot afford *not* to serve a significant city such as St. Louis, even in the face of the massive and discriminatory costs imposed by the Ordinance.

restrictions by other jurisdictions around the nation. As this Court has previously explained, "[t]o get at Congress's understanding" of Section 253(a)'s intended scope, "a broader frame of reference" is "needed" – one that "ask[s] how Congress could have envisioned the preemption clause actually working." *Nixon*, 541 U.S. at 133. Congress could not have intended that local jurisdictions would continue to enrich themselves at the expense of the national telecommunications infrastructure and consumer welfare. *See, e.g.*, Dionne Searcey, *Spotty Reception: As Verizon Enters Cable Business, It Faces Local Static*, Wall Street J., Oct. 28, 2005, at A1 (identifying $13 million "wish list" demanded by Tampa, Fl. as condition of expanding high-speed network).

The Eighth Circuit's blinkered assessment of the City's fee ignores this Court's admonition. The Eighth Circuit's analysis began and ended with the question whether Level 3 (an international telecommunications service provider) determined to construct its fiber-optic network and to provide services. The court accorded no significance to the fact that the fee imposed by the Ordinance far exceeded any fair compensatory cost to the City and the meager revenues Level 3 derives from customers in the City. The court's analysis also failed to come to grips with the fact that multiplication of the City's charge by other local governments across petitioner's 110,000-mile telecommunications network would be financially paralyzing. If every municipality imposed the per-foot fees authorized by the Eighth Circuit here, Level 3 would face additional annual costs in the *billions* of dollars. *See Massachusetts Turnpike*

Auth. v. Level 3 Commnc'ns, LLC, Level 3's Motion for Summary Judgment, Case No. 1:06-cv-11816-DPW, at 23-24 (D. Mass. Mar. 19, 2008) (demonstrating that a fee of $2.79/ft, which is comparable to the fees imposed by St. Louis, would cost over $2.8 billion per year if applied across Level 3's entire network). Congress could not plausibly have intended that result.

At bottom, the unchecked power to charge whatever a market will bear for access to rights-of-way gives local governments monopoly power over providers' access to customers. The City's attempt to leverage its complete control over public rights-of-way within its jurisdiction by exacting exorbitant monopoly rents from new entrants lies at the very heart of the local obstacles to competition that Congress enacted Section 253(a) to eliminate. "Without access to local government rights-of-way, provision of telecommunications service using land lines is generally infeasible . . . ." *TCG NY v. City of White Plains*, 305 F.3d 67, 79 (2d Cir. 2002).

The Eighth Circuit's reading also confounds the Act's "promise of national consistency" (*Nixon*, 541 U.S. at 138) and "uniformity" in regulation (141 Cong. Rec. S8134, S8174 (daily ed. June 12, 1995) (Sen. Hollings)), which is critical to ease the entry of providers into the marketplace. The court of appeals' decision leaves local governments with the unchecked power to impose a dizzying array of inconsistent fees and restrictions as a condition of access to local public rights-of-way. The rule applied by the Eighth Circuit in this case permits each local government to impose its own unique variety of unreasonable and competitively biased fees and regulations (such as

those that favor the incumbent carrier over new entrants), provided only that these measures do not literally preclude the plaintiff telecommunications provider from offering services. Section 253, by contrast, was enacted to provide "a guarantee of uniformity across the country," without which new entrants would face the "uncertainty of not knowing what every city will do, of not knowing what every State will do." *Id.* at S8176 (Sen. Pressler).

Third, the Eighth Circuit's ruling cannot be reconciled with the structure of the Act – in particular, the relationship between Sections 253(a) and 253(c). Fees for access to public rights-of-way were a sufficiently central concern to Congress that it enacted a special provision governing their validity, authorizing "State or local government[s] to manage the public rights-of-way [and] to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis." 47 U.S.C. § 253(c). The Eighth Circuit's reading of Section 253(a), however, puts it at cross-purposes with Section 253(c).

The Eighth Circuit deemed Section 253(c) to be irrelevant on the ground that it is an "exception" to the preemptive sweep of Section 253(a). Pet. App. 28a. That makes no sense. On the court of appeals' reading, Section 253(c) is no "exception" at all because Section 253(a) leaves local governments free to impose any regulatory fees or restrictions except those few measures that directly interfere with the provision of particular telecommunications services. The decision below thus all but reads Section 253(c) out of the statute, for the "exception" for "reasonable" and neutral fees never implicates the general

prohibition and thus never comes into play. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[W]ords of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole.").

The far better and more logical reading of Section 253 is that fees for access to public rights-of-way function as "prohibitions" on telecommunications services barred by Section 253(a), unless they are "fair and reasonable" and non-discriminatory (for example, because they are based on the city's costs) and thus saved from preemption by Section 253(c). That reading allows the two subsections to work together as Congress intended to promote telecommunications services while balancing the legitimate needs of local governments for fair compensation. Because, in this case, the district court found (and the court of appeals did not dispute) that the exorbitant fees exacted under the Ordinance are not reasonable and bear no relationship to the City's own costs, they are preempted because they serve no purpose other than to obstruct market entry.[2]

In this case, the City frankly acknowledges never even having undertaken a study of its costs (C.A. J.A.

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[2] A ready point of reference for determining the "reasonableness" of a franchise fee is provided by Title VI of the Act, which limits such fees imposed on cable television providers to five percent of gross revenues. 47 U.S.C. § 542.

201), which are minimal. The Ordinance requires telecommunications providers – not the City – to pay not only all of the costs relating to construction, but also a separate fee to excavate on public rights-of-way, as well as the cost of moving any network element that interferes with any City project. Ch. 23.64.090(E), .150(F); Ch. 20.30. The entire budget of the City's Communications division is paid by cable television franchise fees, revenue wholly unrelated to the fees at issue here. C.A. J.A. 159-60. Revenues from the license fees paid by Level 3 and other non-incumbent telecommunications providers, by contrast, are deposited into the City's general fund to finance municipal operations, such as parks and schools. *Id.*[3]

The non-fee provisions of the Ordinance challenged by Level 3 are similarly not saved from preemption because they cannot be understood as a legitimate means of managing the public rights-of-way *at all*. 47 U.S.C. § 253(c). Several provisions of the Ordinance expressly regulate telecommunications *services*, rather than use of the City's rights-of-way. The Ordinance thus avowedly regulates not merely the use of public rights-of-way but the "operation . . . and use of a communications transmission system." Ch. 23.64.030(A). The license in this case, for example, precludes Level 3 from offering anything other than "competitive access provider services" in

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[3] The fees exacted from new entrants are a particularly attractive source of revenue for the City because, unlike taxes, they are exacted from parties that do not have a role in the local democratic process.

the City. C.A. J.A. 485. In fact, the City acknowledges that the agency charged with enforcing the Ordinance does not "manage the public rights-of-way." *Id.* 165.

Nor are the remaining measures "competitively neutral." 47 U.S.C. § 253(c). Other equivalent users of public rights-of-way – such as electric and gas utilities – are exempt from its provisions. C.A. J.A. 165, 180. Equally important, the incumbent telecommunications carrier in the City is not required to comply with the Ordinance. *Id.* 446-47. Yet there is no material difference between the use of public rights-of-way by Level 3 and those companies. As the regulatory manager of the City's Communications Division acknowledged, "Digging is digging." *Id.* 165.

Certiorari should be accordingly granted to correct the Eighth Circuit's erroneous construction of Sections 253(a) and 253(c).

II. The Eighth Circuit's Decision Expands Two Conflicts Over The Important And Recurring Question Of Section 253's Preemptive Effect.

As the Eighth Circuit candidly acknowledged, its decision compounds two conflicts in circuit law governing the preemptive scope of Sections 253(a) and 253(c). Pet. App. 29a-30a; *supra* at 10. As a result, the ability of local governments to impose fees and similar restrictions on telecommunications providers under a single, uniform federal law now varies dramatically based on nothing more than accidents of geography. That plainly was not Congress's intent.

1. The conflict in the circuits is widespread and entrenched. The Eighth Circuit denied en banc review of its ruling. App. E, *infra*. Its decision has in turn been embraced by the Ninth Circuit in its recent en banc decision in *Sprint Telephony PCS v. County of San Diego*, 2008 U.S. App. LEXIS 19316 (9th Cir. Sept. 11, 2008). In *County of San Diego*, the en banc Ninth Circuit overruled its prior precedent and "join[ed] the Eighth Circuit" in adopting a "narrow interpretation of the preemptive effect of § 253(a)." *Id.* at *15. The Ninth Circuit accordingly held that "a plaintiff suing a municipality under [S]ection 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition" (*id.* at *14), and thus is required to prove that "the *actual* effects of the city's ordinance" amount to a practical prohibition on providing services (*id.* at *16 (emphasis in original)). In so holding, the Ninth Circuit expressly rejected the law adopted in "[t]hree of our sister circuits," which affords Section 253(a) a more functional scope. *Id.* at *13.

The opposite rule governs in the First, Second, and Tenth Circuits. In *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006), the First Circuit invalidated a municipal ordinance conditioning access to municipal rights-of-way on payment of a five-percent fee on gross revenues from outgoing calls. The First Circuit held that Section 253(a) bars not only direct barriers to operations imposed by a local government, but also any requirements that, if imposed cumulatively by numerous municipalities, would "significantly increase a [provider's] costs and reduce the profitability of its operations." *Id.* at 18. That

broader, more practical inquiry, the court of appeals explained, was required by "the interconnected nature of utility services across communities and the strain that the enactment of [similar] fees in multiple municipalities would have." *Id.* at 17. The First Circuit further held that Section 253(c) does not save a fee from preemption unless, "at the very least," the fee is "*related* to the actual use of rights of way and . . . the costs of maintaining those rights of way are an essential part of the equation." *Id.* at 22 (citation and alterations omitted).

Likewise, the Second Circuit held in *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002), that an ordinance has "the effect of prohibiting" telecommunications services and thus is preempted by Section 253(a) if it creates "obstacles . . . to [the provider's] ability to compete," regardless of whether those barriers are direct or indirect. *Id.* at 76. Applying that rule, the Second Circuit held that Section 253(a) invalidated an ordinance that gave a local government discretion in deciding not to grant a license (even if that discretion was not exercised) and where negotiations over the license gave rise to "extensive delays" in the provider's ability to deliver its services. *Id.* The court of appeals also invalidated provisions of the ordinance that "required disclosures to be made about the telecommunications services to be provided, the sources of financing for the telecommunications services, and the qualifications to receive a franchise." *Id.* at 81. Those requirements, the Second Circuit explained, "were relevant only for regulating telecommunications, which § 253 does not permit [a local government] to do, not for regulating use of the rights-of-way, which

[it] may do." *Id.* Finally, the court of appeals struck down limitations on the providers' ability to transfer their rights to third parties, reasoning that "a provision of sweeping breadth whose main purpose is to force each new telecommunications provider to receive [a local government's] blessing before offering services, even if its services represent no change from the services offered and burdens imposed by a prior franchisee, is invalid." *Id.* at 82.

The Tenth Circuit has taken a similar tack. In *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004), the Tenth Circuit invalidated a municipal ordinance that imposed a fee and numerous administrative conditions as prerequisites to telecommunications providers' access to public rights-of-way. According to the Tenth Circuit, Section 253(a) preempts state and local measures that "materially inhibit the provision of services," which it interpreted (in contrast to the Eighth Circuit, Pet. App. 30a) to include an ordinance that imposes "substantial costs." 380 F.3d at 1271. Applying that standard, the court held that Section 253(a) preempted an ordinance that "create[s] a significant burden" by requiring telecommunications providers to secure a lease, pay significant rents, and provide additional conduit space for the local government. *Id.* at 1270.

The Tenth Circuit further held that the fees were not saved from preemption by Section 253(c) as "fair and reasonable compensation," because they neither were "limited to a recovery of costs" nor otherwise accounted for "the extent of the use contemplated, the amount other telecommunications providers would be willing to pay, and the impact on the profitability of

the business." *Id.* at 1272. Likewise, the Tenth Circuit held that Section 253(c) offered no shelter to the requirement that the carrier provide the government with conduit capacity, since such requirements are "not competitively neutral because they place the risk on the [provider] who first installs any conduit." *Id.* at 1273. Finally, the Tenth Circuit's rule governing the preemptive scope of Section 253(a) separately invalidated an ordinance provision that granted the municipality "broad discretion in determining whether or not to accept a registration or lease application." *Id.*

As both the Eighth and Ninth Circuits expressly recognized, different rules of law would have been applied – and they would have dictated a different outcome – had this case arisen within the First, Second, or Tenth Circuits. Pet. App. 29a-30a (acknowledging conflict with First and Tenth Circuits); *County of San Diego*, 2008 U.S. App. LEXIS 19316, at *13 (acknowledging conflict with First, Second, and Tenth Circuits).[4] The Eighth and Ninth Circuits avowedly adopt a "narrow interpretation of the preemptive effect of § 253(a)" (*County of San Diego*, 2008 U.S. App. LEXIS 19316, at *15), holding that the statute applies only to the vanishingly small group of local rules that in practice would proscribe the provision of telecommunications services, such as

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[4] The Eighth Circuit's opinion in this case also acknowledged a conflict at the time with the Ninth Circuit. Pet. App. 45a-46a. As noted in the text (*supra* at 24), the en banc Ninth Circuit subsequently overruled its prior precedent to adopt the standard applied by the ruling below. *County of San Diego*, 2008 U.S. App. LEXIS 19316 at *13.

a requirement that wireless services be provided underground even though cell phone towers cannot function in that fashion. By contrast, in the First, Second, and Tenth Circuits, ordinance provisions like those imposed by St. Louis are preempted whenever they impose a substantial burden or cost – albeit a surmountable one – on the telecommunications provider. *City of Santa Fe*, 380 F.3d at 1271 ("substantial cost"); *City of White Plains*, 305 F.3d at 76 ("obstacles . . . to [the provider's] ability to compete"); *Municipality of Guayanilla*, 450 F.3d at 18 (fees, if adopted by other jurisdictions, would "significantly increase a [provider's] costs").

The conflict is outcome determinative in this case. The Ordinance challenged by Level 3 has all of the features that the First, Second, and Tenth Circuits have held violate Section 253(a). The City has significant and unconstrained discretion to allow a telecommunications provider to offer services or to limit the types of service a provider may offer. That is so because the Ordinance only "empower[s]" the issuance of the license, which also may be withheld if the City chooses to deny other permits that are required to operate or if "the proposed use is inconsistent" with the City's undefined criteria. *Compare City of White Plains*, 305 F.3d at 76 (finding similar ordinance terms preempted); *City of Santa Fe*, 380 F.3d at 1273 (same). Furthermore, negotiations over the terms of a license can give rise to significant delays, as the ten-month delay in this case well demonstrates (C.A. J.A. 396), and the City wields a veto power over the subsequent transfer of the license. *Compare City of White Plains*, 305 F.3d

at 76, 82 (preempting ordinance based on substantial delays and control over license transfers).

Once the license is issued, moreover, the St. Louis Ordinance imposes a significant cost on telecommunications providers. Indeed, the more than $500,000 in fees paid by Level 3 are many times the revenue the company obtained from customers in the City. *Compare Municipality of Guayanilla*, 450 F.3d at 17 (invalidating five-percent fee on outgoing calls from municipality that would have reduced, but not eliminated, provider's profits). The burden imposed by the City's Ordinance is further heightened by the obligations to build conduits for the City and to indemnify the City even for its own negligence – provisions that bear no rational connection to the limited authority the Act reserves for local governments to provide non-discriminatory access to rights-of-way.

The conflict does not end there. The First, Second, and Tenth Circuits would also hold that the provisions of the Ordinance are not saved from preemption as "fair and reasonable compensation" under Section 253(c) because (as noted *supra*) it is undisputed that the fees bear no relationship to the City's own costs.

The Eighth Circuit also correctly recognized that its decision squarely conflicts with *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000). *See* Pet. App. 29a. The Sixth Circuit in that case held that a licensing fee is preempted if it exacts more than "fair and reasonable compensation" under Section 253(c), without regard to whether it amounts to an effective prohibition on telecommunications services under Section 253(a). *Id.* at 624. In this

case, the district court deemed the fee imposed by the Ordinance to be unreasonable because it bears no relationship to the City's own costs. Pet. App. 54a. The Eighth Circuit, by contrast, held that Section 253(a) was not implicated by the Ordinance and on that basis expressly pretermitted any inquiry into the reasonableness of the fee under Section 253(c).

2. These twin conflicts over the proper construction of Section 253 are intolerable. As noted *supra* at 19-20, the very purpose of the Telecommunications Act was to provide a uniform, deregulatory environment in which new competitors would not only enter markets for local and long-distance services, but also develop new markets for emerging telecommunications technologies that previously had been stifled by exclusionary regulation and charges. The current regime of inconsistent legal rules interpreting the statute's central preemption provision, however, encourages the further growth of a crazy quilt of local regulation, as providers within the Eighth and Ninth Circuits are subject to a litany of restrictions and fees on their operations. In contrast to the Eighth Circuit's ruling in this case, federal courts applying the majority reading of Section 253 "have invalidated local regulations in tens of cases across this nation's towns and cities." *County of San Diego*, 2008 U.S. App. LEXIS 19316, at *13.[5]

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[5] In addition to the rulings of the First, Second, and Tenth Circuit discussed in the text, see, *e.g.*, *Qwest Commc'ns Corp. v. City of New York*, 387 F. Supp. 2d 191, 193-94 (E.D.N.Y. 2005) (invalidating ordinance that gave the city unfettered discretion

As noted, Level 3's network alone reaches more than 100,000 miles in jurisdictions throughout the country. National and international telecommunications providers such as Level 3 face the significant burden of not merely complying with burdensome local rules but doing so in the face of

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to deny or revoke the franchise); *XO Missouri, Inc. v. City of Maryland Heights*, 256 F. Supp. 2d 987 (E.D. Mo. 2003) (preempting under Section 253 a local law that was based on the St. Louis Ordinance challenged here); *TC Systems, Inc. v. Town of Colonie*, 263 F. Supp. 2d 471, 482-84 (N.D.N.Y. 2003) (following *TCG New York v. City of White Plains* and invalidating "almost identical" local ordinance and franchise agreement); *AT&T Commc'ns of the Southwest v. City of Dallas*, 8 F. Supp. 2d 582 (N.D. Tex. 1998) (granting preliminary injunction to AT&T when ordinance gave city unfettered discretion to deny application, and "place[d] conditions on a franchise for telecommunications services [not] related to the use of the rights of way, including onerous application and reporting requirements and provision of ducts and fiber to the city"), *vacated as moot by* 243 F.3d 928 (5th Cir. 2001); *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805, 814-15 (D. Md. 1999) (invalidating ordinance that required lengthy application, gave county unfettered discretion to deny or revoke the license, prohibited transfer and assessed fees), *vacated and remanded on other grounds* 212 F.3d 863 (4th Cir. 2000); *PECO Energy Co. v. Twp. of Haverford*, No. Civ. A 99-4766, 1999 WL 1240941, at *8-*9 (E.D. Pa. 1999) (preempting local ordinance that imposed a "Kafkaesque" application process and allowed unfettered discretion to deny the application); *see also Montgomery County Maryland v. Metromedia Fiber Network, Inc.*, 326 B.R. 483, 493 (S.D.N.Y. 2005) (upholding denial of claim for franchise fees owed by bankruptcy debtor because fees were demanded under a regulatory scheme that imposed significant application requirements on new entrants and was therefore preempted by Section 253).

conflicting interpretations throughout the country of whether those requirements are preempted by federal law. That result cannot be countenanced. As the Federal Communications Commission has opined, "[a] patchwork quilt of differing local regulations[,] may well discourage regional or national strategies by telecommunications providers, and thus adversely affect the economics of their competitive strategies." *In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21,396, 21,442 (1997).

The importance of the question presented to telecommunications providers, local governments, and consumers is moreover manifest. Local jurisdictions nationwide have adopted restrictions and fees on the operations of telecommunications services. Level 3 and other telecommunications providers are presently litigating the lawfulness of many other such measures in numerous states.[6]

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[6] The many pending challenges to similar ordinances include *Qwest Corp. v. City of Portland*, No. 06-36022 (9th Cir.) (pending appeal of 2006 WL 2679543 (D. Or.) in which, on remand from 385 F.3d 1236 (9th Cir. 2004), the district court once again declined to preempt city ordinances relating to placement of fiber-optic networks); *and Qwest Commc'ns Corp. v. Maryland-National Capital Park & Planning Comm'n*, Second Amended Complaint, Case No. 8:07-cv-2199-RWT (D. Md. Oct. 6, 2008) (challenging linear-foot fees and licensing process unilaterally imposed by interjurisdictional park commission on existing network facilities on park land) (*see also* 533 F. Supp. 2d 572 (D. Md. May 16, 2008) (denying TRO)); *Qwest Corp. v. Elephant Butte Irrigation District of N.M.*, First Amended Complaint, Case No. 6:07-cv-163-MV/WDS (D.N.M. Nov. 15, 2007) (claiming Section 253 preempts unilateral fee

Only this Court's prompt intervention can resolve the proper construction of Section 253 and bring a close to this growing litigation.

In sum, had this case arisen in several other Circuits, the Ordinance would have been found preempted under the terms of the Telecommunications Act. Given the obvious importance of the question presented, certiorari should be granted.

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increases and other requirements imposed on fiber optic installation); *Verizon NY, Inc. v. City of Auburn*, Complaint, Case No. 5:08-cv-00308-GTS-GJD (N.D.N.Y. Mar. 18, 2008) (claiming city's attempt to unilaterally increase rent for use of city-owned conduit that was maintained by carrier constituted a violation of Section 253 in the absence of evidence that increased rent was related to city's costs); and *Verizon Northwest, Inc. v. City of Sandy*, Complaint, Case No. 3:08-cv-00587-MO (D. Or. May 15, 2008) (challenging city ordinance and resolution requiring relocation of above-ground network to underground, and requiring carrier to pay disproportionate share of costs and provide free services to city) ; *Level 3 Commc'ns v. City of Memphis*, Case No. Complaint, 2:06-cv-2547-BBD-tmp (W.D. Tenn. August 28, 2006) (pending case alleging preemption of city ordinance and franchise agreement under state and federal laws).

CONCLUSION

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

Respectfully submitted,

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November 7, 2008