Nos. 02-1238, 02-1386 and 02-1405

IN THE

Supreme Court of the United States

JEREMIAH W. NIXON, ATTORNEY GENERAL OF MISSOURI
Petitioner,

AND

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Petitioners,

AND

SOUTHWESTERN BELL TELEPHONE, L.P.,
F/K/A SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

V.

MISSOURI MUNICIPAL LEAGUE, *et al.*,
Respondents.

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

BRIEF OF LINCOLN ELECTRIC SYSTEM AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether Congress intended the term "any entity" in section 253(a) of the Telecommunications Act of 1996 to protect public as well as private entities from state barriers to entry into the telecommunications market.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES AND OTHER LAWS

MISCELLANEOUS

Lincoln Electric System submits this brief as *amicus curiae* under Sup. Ct. R. 37.3.[1]

INTEREST OF LINCOLN ELECTRIC SYSTEM AS *AMICUS CURIAE*

In enacting the Telecommunications Act of 1996 (Telecommunication Act), Congress sought to open up the local telecommunications market to increased competition from all comers. Lincoln Electric System (LES) is a municipal utility that has tried to utilize the competitive opportunities Congress envisioned in the Telecommunications Act, only to be stifled at every turn. Private industry incumbents have vigorously opposed LES' entry into the market and have thus far induced both the Nebraska Legislature and the Nebraska Public Service Commission (NPSC) to prohibit LES' efforts. This case will determine whether LES can continue to seek an opportunity to provide a competitive alternative to the incumbent private carrier.

Organized as an operating division of the City of Lincoln, Nebraska, LES currently provides electrical service to approximately 117,000 metered customers within Lincoln and a 195 square mile area in Lancaster County, where Lincoln is located. LES is governed by a board empowered under the Lincoln Municipal Code to use its property, personnel, facilities and equipment efficiently and effectively for the benefit of people living within its service area. Under Neb. Rev. Stat. § 86-119, LES is a governmental entity eligible to be a "telecommunications company."

LES has built and operates a network of electrical generation, transmission and distribution facilities. LES has also invested with other utilities in a 1500-megawatt generating plant in Wyoming called Laramie River Station. LES joins other municipally and cooperative

[1] The parties have consented in writing to the filing of this brief. Lincoln Electric System is the only entity to have paid for the preparation of this brief. Similarly, no counsel for a party authored any part of this brief.

utilities in the east to operate the Missouri-Iowa-Nebraska Transmission Line, an interregional 345 kilovolt transmission line to enhance regional reliability. LES also interconnects with the nation's interstate transmission grid as a member of the Mid-Continent Power Pool and the Midwest Independent Transmission System Operator.

The network of transmission lines LES maintains includes fiber optic lines that LES uses for monitoring and controlling the performance of its electrical facilities. This fiber optic transmission system has excess capacity capable of providing telecommunications service that LES has tried to put to productive use. In October 2000, LES applied to the NPSC for permission to operate as a telecommunications contract carrier within its existing Nebraska service area. LES intended to reach businesses and other governmental entities to offer them competitively priced telecommunications services, with the goal of encouraging local economic growth and development.

The application LES made was in response to the loss of a major employer in Lincoln. In May 2000, the Gallup Organization, which employs nearly 1,000 employees in Lincoln, announced it needed a suitable location to build a $45 million training center. *See* Mark Anderson, *Gallup's expansion plans may include a move to Omaha*, LINCOLN JOURNAL STAR, May 21, 2000, at 1A. While the Gallup Organization had been in Lincoln for over 30 years, its Lincoln location had become disadvantageous because of limited air service and because there was only one telecommunications company to provide access to high volume long distance telephone service. *Id.* Lincoln could not overcome these disadvantages, and the Gallup Organization announced plans to relocate to a riverfront site in Omaha by 2004. *See* Mark Anderson, *Gallup to build on river*, LINCOLN JOURNAL STAR, Sept. 28, 2000, at 1A. With its

application to the NPSC, LES hoped to prevent any other major employers from leaving the Lincoln area due to inadequate telecommunications services.

Though LES proposed to offer contract telecommunications services only within its existing service area, its application engendered vigorous opposition from many quarters. Besides the opposition of the incumbent telephone service provider, some 33 other parties intervened to oppose LES' application. The NPSC dismissed LES' application on two grounds. The agency held that no state statute specifically authorized LES to provide telecommunications services for-hire. Similarly, the NPSC concluded that Lincoln's home rule charter did not expressly grant LES authority to enter into the for-hire telecommunications business.

LES appealed the NPSC decision to the Nebraska Supreme Court. While the appeal was pending, the Nebraska Legislature interjected itself into the dispute. Bowing to intense lobbying from the incumbent telecommunications providers, the legislature enacted a ban on any municipality or any other agency or political subdivision of the state from offering commercial telecommunications services. *See* 2001 Neb. Laws 827. Before the Nebraska Supreme Court, LES argued that section 253(a) of the Telecommunications Act preempted this statutory ban on LES' telecommunications initiatives.

The Nebraska Supreme Court agreed with LES' preemption argument. In a careful and thorough analysis of the issue, that court discussed the significance to LES' appeal of *Gregory v. Ashcroft*, 501 U.S. 452 (1991). Reviewing the federal precedent addressing the preemptive effect of 47 U.S.C. § 253(a), the Nebraska Supreme Court concluded that "Congress' use of the phrase 'any entity' in § 253(a) is indicative of an expansive statutory scope which includes a governmental entity, such as a municipally-owned utility, seeking to provide telecommunications services." *In re Application of Lincoln Elec. Sys.*, 265 Neb. 70, 79-80, 655 N.W.2d 363, 372

(2003). Because the legislative prohibition did not fall within the safe harbors of 47 U.S.C. §§ 253(b) or (c), the court held that the state provision was preempted by federal law.

Despite agreeing with LES that Congress had preempted the effort of the Nebraska Legislature to ban municipalities from offering telecommunications services, the Nebraska Supreme Court agreed with the NPSC that LES lacked authority under Nebraska municipal law to offer telecommunications services on a for-hire basis. Specifically, the court held that "the city of Lincoln had not, at this time, properly delegated authority to LES" to provide telecommunications services for hire. *Id.* at 88, 655 N.W. 2d at 377.[2]

Following the Nebraska Supreme Court's decision, the Lincoln City Council has adopted an ordinance expressly authorizing LES to provide for hire telecommunications services. Lincoln, Neb., Code § 4.24.070(e) (2003). LES currently has a new application pending before the NPSC to implement what LES originally proposed in its October 2000 application. *In the Matter of the Lincoln Electric System Seeking Contract Carrier Permit Authority*, NPSC Application No. C-2910. A decision reversing the Eighth Circuit in this case will empower the Nebraska Legislature to prevent municipalities from providing much-needed competitive telecommunications services in the Lincoln area, and thus end LES' efforts toward fulfilling the promises of the Telecommunication Act.

[2] Despite prevailing in the Nebraska Supreme Court, one intervenor petitioned for certiorari, as did the Nebraska Attorney General. This Court denied the two petitions for certiorari, presumably because the Nebraska Supreme Court had affirmed the NPSC decision on state municipal law grounds. *See Nebraska Pub. Serv. Comm'n v. Lincoln Elect. Sys.*, 123 S. Ct. 2620 (2003); *Nebraska Telecomm. Ass'n v. City of Lincoln*, 123 S. Ct. 2620 (2003).

SUMMARY OF ARGUMENT

With the Telecommunications Act Congress opened the existing telecommunications industry to greatly expanded competition. LES has tried to implement this goal with increased competition within its service area. Private telecommunications incumbents, cable providers and industry trade associations have all opposed LES and other public utilities whenever they can, and in Nebraska have succeeded in stifling competition from public utilities. While in 1996 Congress expressly manifested an intent for increased competition, incumbent private providers continue to oppose competition from public utilities with the same arguments heard in the 1930s against public support for rural electrification and in the late 1940s against public support for rural telephone systems. But the competition from public utilities in today's telecommunications market is wholly consistent with congressional intent in the Telecommunications Act and is capable of providing efficient services in a market otherwise dominated by private carriers.

Contrary to what incumbent private providers argue, the state regulatory process is not skewed in favor of public utilities. Congress has acted to restrict or even prohibit any regulatory bias against new private competitors. Moreover, in Nebraska, the legislature has acted to ensure regulatory parity between incumbent and new market entrants, regardless of whether the competitive entrant is a public or private provider. The fact that a majority of states allow public utilities to compete with private businesses in the telecommunications market indicates that most states believe their regulatory processes are not biased.

On the merits, the Eighth Circuit reached the correct result. This Court's precedent supports the Eighth Circuit's construction of the phrase "any entity" in 47 U.S.C. § 253(a). Moreover, the heightened federalism concerns expressed in *Gregory v. Ashcroft* are not present here, where a state is trying to restrict a public utility from competing with its private

counterparts, in a marketplace where Congress has express powers to regulate. In short, the Court should affirm the decision below as fully consistent with Congress' intent in adopting the Telecommunications Act and with this Court's precedents.

ARGUMENT

I. Competition from public entities will further the goals of Congress in enacting the Telecommunications Act of 1996.

No party or *amicus curiae* disputes that the Telecommunications Act represents a sweeping reform designed to bring competitive telecommunications to all areas of the country. Increased competition at the local level was among the primary objectives of the Telecommunications Act. *See* H.R. Conf. Rep. No. 104-458, at 126 (1996) (section 254(a) preempts barriers to both interstate and intrastate services); S. Conf. Rep. No. 104-230, at 147-78 (1996) (discussing expectation that local facilities-based competition would become available in 95% of nation's homes). Congress specifically intended the landmark legislation to promote competition, reduce regulation and encourage the rapid deployment of new telecommunications technologies. Telecommunications Act of 1996, Publ. L. No. 104-104, Preamble, 110 Stat. 56 (1996). Private *amici* Sprint Corporation, United States Telecom Association, *et al.*, however, argue that competition provided by governmental entities like LES is uneconomical and contrary to the congressional goals set forth in the Act.

Amici espouse a "free" market theory by which they would have state governments guard against local competition by restricting those who may actually compete. *See* Brief of Sprint Corporation at 2; Brief of United States Telecom Association, *et al.*, at 16-17. They essentially argue that the Telecommunications Act's pro-competition goals would be undercut if private industry had to compete with public participants. But contrary to these claims, governmental participation in the market is well known and well accepted in the domestic economy, especially

in utilities markets. *See* Richard M. Hodgetts & Terry L. Smart, ECONOMICS 322 (1998) ("ECONOMICS") ("Government-owned utilities such as city gas and electric companies have long been common in this country."); *see also* Steven C. Carlson, *A Historical, Economic, and Legal Analysis of Municipal Ownership of the Information Highway*, 25 RUTGERS COMPUTER & TECH. L.J. 1, 44 (1999) ("*Municipal Ownership*") ("Federal law broadly permits local governments to provide utilities on a competitive basis."). Municipally-provided telecommunications services serve the pro-competition goals Congress had in the Telecommunications Act.

Questioning the propriety of government involvement in the marketplace is nothing new. Such protests usually claim to be insuring the purity of the competitive market, much like private *amici* claim today. But truly competitive, or "pure" markets, exist only in the abstract. *See* Milton Friedman, CAPITALISM AND FREEDOM 120 (1982) (noting that "there is no such thing as 'pure' competition," rather "competition is an ideal type, like a Euclidean line or point"); s*ee also* Robert Heilbroner & Lester Thurow, ECONOMICS EXPLAINED 162 (1998) ("ECONOMICS EXPLAINED") (explaining that markets are imperfect for many reasons, including inadequate information, unaccounted-for externalities, or the need to provide "pure" public goods (*e.g.,* military defense)).

Amici's worn arguments played prominently in Depression-era debates surrounding several New Deal programs, including the creation of the Rural Electrification Administration (REA) and Tennessee Valley Authority (TVA). Not only was government participation viewed as an acceptable economic measure, but Franklin Roosevelt was in fact elected President on a platform that encouraged local government participation in the utilities market:

> [W]here a community – a city or county or a district – is not satisfied with the service rendered or the rates charged by the private utility, it has the undeniable basic right, as one of its functions of Government, one of its functions of home

> rule, to set up, after a fair referendum to its voters has been had, its own governmentally owned and operated service.

The Portland Speech (Sept. 21, 1932), *in* 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1928-32 (1938). The reasoning then applies equally today:

> It is perfectly clear to me, and to every thinking citizen, that no community which is sure that it is now being served well, and at reasonable rates by a private utility company, will seek to hold or operate its own plant. [Rather] I might call the right of the people to own and operate their own utility something like this: a "birch rod" in the cupboard to be taken out and used only when the "child" [i.e., private utility] gets beyond the point where a mere scolding does no good.

Id.

Congress readily embraced these "corporation[s] with the power of government but possessed of the flexibility and initiative of a private enterprise," and quickly ushered in the REA and TVA, among others. *See* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. Doc. 73-15, at 1 (Apr. 10, 1933). The prominent role these public corporations played in the United States' subsequent economic recovery leaves no doubt as to their competitive efficacy.[3]

Big business was unmoved and later worked to oppose amendments to the Rural Electrification Act that would insert government into rural telecommunications markets. These amendments sought to meet the unserved telecommunications needs of rural America by facilitating the deployment of telecommunications systems in those areas through low-interest government loans. *See Rural Telephones: Hearings on S. 78, S. 121, S. 1254, and H.R. 2960 Before the Committee on Agriculture and Forestry of the United States Senate*, 81st Cong. 1-2 (1949) ("*Senate Hearings*"). The congressional record on these amendments is peppered with economics-based protests, quite similar to those of private *amici* today. *See, e.g., id.* at 242-43

[3] Likewise, LES' participation in a joint public-private investment in an interregional transmission line, and in the nation's power grid, *see* supra at 1-2, belies any concern that public utilities cannot cooperate with investor-owned utilities.

(statement of American Bankers Association) ("We believe that the making of direct loans by Government is not consistent with the American concept of a system of free enterprise."); *Id.* at 306 (statement of H.S. Dumas, President, So. Bell Telephone & Telegraph Co.) ("Surely this Congress can find a better way to meet the objectives which have been outlined by supporters of this bill without passing loosely drawn legislation which will constitute a threat of one of the finest industries which has ever been developed in our country."); *Id.* at 315 (statement of V.E. Cooley, President, Southwestern Bell Telephone Co.) (rural telephone service "should be left to the telephone companies for completion, without Federal subsidy and without adding to the taxpayer's burden" and "the present bill is in my opinion unsound and opposed to the public interest"); *Id.* at 331 (statement of V.E. Cooley) ("S. 1254 is unfair to private telephone companies and to the private telephone industry, and we feel that we are going to meet the demands on the rural areas as well as other places.")[4]

But like today, such reverence for supposed "free" market efficiencies was belied by gaps left by private industry in the telecommunications market. *See, e.g., id.* at 6 (statement of Lister Hill, United States Senator for the State of Alabama) ("Despite the many advances in recent years, the farm people of America are still isolated in large measure from each other and from their business and social centers . . . . the modern farmer needs and has a right to reliable telephone service to reach his markets, his suppliers, his doctor, his church, and his neighbors."); *Id.* at 8 (statement of Sen. Hill) ("[T]here is an urgent need for a program of Government Credit in this field."); *Id.* at 159 (statement of J.T. Sanders, Legislative Counsel of the National Grange) (noting that private industry was failing to meet undeniable telephone needs); *Id.* at 160

[4] The descendent of one of the former regional Bells, Southwestern Bell Telephone, L.P., is a Petitioner in this case, and another Bell successor is an *amicus,* proving the adage: the more things change, the more they stay the same.

(statement of J.T. Sanders) ("Rural telephone development has gone about as far as it can go without new capital"); *Id.* at 161 (statement of J.T. Sanders) ("We believe that [private businesses] have utterly failed to extend adequate services into all areas where sound service can be extended.").

The subsequent passage of these amendments demonstrates that even within our capitalist system there is a role for public participation in the marketplace. Rather, Congress' establishment of entities such as the REA and TVA simply confirms the fact that "[e]conomic decisions made through the marketplace are not always better than decisions that governments can make. Much depends on whether those market transactions accurately reflect both the costs and benefits which result. Under some conditions, they do not." Thomas Sowell, BASIC ECONOMICS: A CITIZEN'S GUIDE TO THE ECONOMY 251 (2000) ("BASIC ECONOMICS"). The broad wording in section 253(a) of the Telecommunications Act is consistent with these prevailing views – that local public investment in telecommunications infrastructure may be appropriate and ought not to be prohibited. Congress certainly concluded so in section 253(a).

In short, government participation may not only be appropriate, but sometimes necessary. *See, e.g.*, ECONOMICS, at 322 (noting that the TVA was enacted in response to a serious national problem where "[n]o privately owned business could have completed this vast project and operated it to earn a profit"); s*ee also* BASIC ECONOMICS, at 253 ("[T]here are things that government can do more efficiently than individuals because external costs or external benefits make individual decisions, based on individual interests, a less effective way of weighing costs and benefits to the whole society."). Inadequate information, purely public goods, and unaccounted-for external costs and benefits are but a few economic justifications for public entities participating in the market place. ECONOMICS EXPLAINED, at 162. *See also* Peter F.

Drucker, POST-CAPITALIST SOCIETY 163 (1993) (noting that "[t]he one effective way to counteract a depression—that is, a prolonged period of structural change—is through investment in the infrastructure," *e.g.*, roads, bridges, harbors, public buildings, public lands); Allen Buchanan, ETHICS, EFFICIENCY, AND THE MARKET 22-25 (1985) ("Government itself may become the provider of a public good which the market fails to provide . . . ."). Indeed, private *amici*'s absolutist opposition to government participation in the market is thus not only unsupportable, but perhaps detrimental to Congress' goal of a robust telecommunications industry. *See* ECONOMICS EXPLAINED, at 163 ("[T]he existence and causes of market malfunction make *some* government intervention inescapable. We can then seek to use government power to repair individual market failures in order to strengthen the operation of the system as a whole.") (emphasis in original).

The rural telephone amendments to the REA illustrate the most fundamental need for government intervention, namely, to fill competitive voids left by private interests that fail to satisfy market demand that must be met. Such intervention can take many forms. In the case of the REA amendments, this meant that government had to facilitate the delivery of telecommunications services to rural America by way of subsidized loan arrangements; in the case of the TVA, active government participation in the utilities market was even more direct. LES' efforts are no different – LES has proposed telecommunications service to fill a need that no private provider has sought to supply. The Gallup Organization's departure from Lincoln makes clear the continuing need for municipal providers like LES to have an opportunity to fill a public need.

Private *amici*'s opposition to public investment and provision of basic services is unsurprising. *See Municipal Ownership*, at 44 ("Private companies have long protested the effects of government competition . . . ."). As Professor Sowell found:

> Business leaders are not wedded to a free market philosophy or any other philosophy. They promote their own self-interest any way they can, like other special interest groups. Economists and others who are in fact supporters of the free market have known that at least as far back as Adam Smith.

BASIC ECONOMICS, at 330. What private *amici* urge must be viewed skeptically.

Government participation in the telecommunications market is no less appropriate today than it was some three quarters of a century ago. Indeed, in its opinion below, the FCC specifically recognized the ability of municipal utilities to provide competition in rural markets where it might not otherwise exist:

> [W]e reiterate the Commission's urging in the Texas Preemption Order that states refrain from enacting absolute prohibitions on the ability of municipal entities to provide telecommunications service. The Commission has found that municipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry. In particular, we believe that the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities.

In the Matter of the Missouri Mun. League, et al., CC Docket No. 98-122, Memorandum Opinion and Order, FCC 00-443 ¶ 10 (rel. Jan. 12, 2001) ("*FCC Missouri Mun. League Order*"). Entities like LES clearly further the pro-competition goals of the Telecommunications Act.

Private *amici* also argue that the telecommunications industry is too risky for municipalities. *See* Brief of Sprint Corporation at 22; Brief of United States Telecom Association, *et al.*, at 22-23. They cite some examples of public works projects gone awry or far over initial budgets. *See id.*; Brief of United States Telecom Association, *et al.*, at 22-23. Yet, these examples say nothing about Congress' intent in enacting section 253(a). Cost overruns in public or private investments are not new. Moreover, any mistakes municipalities may have

made in investing in telecommunications infrastructure pale to the colossal meltdown in the private telecommunications industry in the late 1990s, when according to Sprint Corporation up to two trillion dollars of investor capital evaporated. *See* Brief of Sprint Corporation at 22.

Nor do *amici* properly acknowledge the discipline the electorate imposes on those who spend the public fisc. Indeed, the budgets and spending decisions of a municipality are likely more transparent than the annual reports or SEC filings that private businesses provide their investors. Unwise public investments costing taxpayers can easily lead to repercussions at the ballot box, easily more so than in the corporate boardroom. *See* ECONOMICS EXPLAINED, at 162 ("When private markets don't work, the usual remedy is government. How do we then determine the level of provision of such publicly provided goods? We eschew the market mechanism and avail ourselves of another means of decision-making: voting.").

II. Congress and individual states like Nebraska have provided a level playing field

A recurring theme private *amici* argue is that municipal utilities do not compete with private telecommunication businesses on a level regulatory playing field. *See* Brief of Sprint Corporation at 17-21; Brief of United States Telecom Association, *et al.*, at 15-24. Municipalities can discriminate in favor of their own entities, these *amici* argue, by granting their municipal entities preferential access to public rights-of-way. In addition, public entities may have condemnation authority, while private entities will not. Public competitors also allegedly benefit from tax subsidies and may be able to misuse confidential business information obtained during the licensing process of private competition.

These arguments inappropriately ignore the safeguards Congress enacted in the Telecommunications Act, as well as the fact that at least in Nebraska, the legislature and the NPSC have ensured a level regulatory playing field. Likewise, states have created a cause of

action for misuse of confidential business information, should such a hypothetical risk actually mature into harm. LES' three year and as yet unsuccessful experience in trying simply to enter the market and make use of its available telecommunications capacities contradicts any argument that state regulatory agencies cannot be impartial as between private and public providers.

In enacting subsection 253(a) of the Telecommunications Act, Congress specifically preempted all state and local laws that "prohibit or have the effect of prohibiting any entity" from providing telecommunications services. Moreover, subsection 253(c) of that act requires states and municipalities to manage public rights-of-way "on a competitively neutral and nondiscriminatory basis . . . ." These two sections have been construed to prohibit a municipality from imposing a franchise application requirement, fees unrelated to the costs of right-of-way maintenance and even burdensome permit applications. *See City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1177-78 (9th Cir. 2001); *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1093-1100 (N.D. Cal. 2001). Moreover, standards or requirements that a city might establish do not, *ipso facto*, benefit only a public competitor. They are as likely to benefit the incumbent private provider. *Cf. WH Link, LLC v. City of Otsego*, 664 N.W.2d 390, 392 (Minn. Ct. App. 2003) (city required new private operator of open video system to match incumbent cable provider's service area). Congress anticipated either eventuality when it adopted subsections 253(a) and 253(c). If, as private *amici* assert, such barriers exist, section 253 provides them with an appropriate remedy.

Private *amici* also assert that the public regulatory process unduly favors public competitors, so much so that investment in telecommunications services will be discouraged. *See* Brief of Sprint Corporation, at 19-20; Brief of United States Telecom Association, *et al.*, at 21-22. But these unfounded assertions of regulatory bias do not stand up to scrutiny. For

example, any private incumbent local exchange carrier who also operates as a competitive local exchange carrier or wireless affiliate will present the same general regulatory parity concerns for cross-subsidization, accounting requirements or rate regulation. Any regulatory concerns on these issues would be equally applicable to any provider of both cable television and telecommunications services. And in any case, LES has tried for three years to put its existing capacity to use for the benefit of customers in LES' service area, only to be thwarted by the state's regulatory authority. Indeed, LES' situation vividly demonstrates precisely why the preemptive scope of section 253(a) should apply to municipally-owned telecommunications providers.

More importantly, the Nebraska Legislature and the NPSC have already enacted statutes and rules that ensure regulatory parity. For instance, any concern that a political subdivision may discriminate against its privately-owned competitors when granting access to public rights-of-way was fully addressed by sections 86-704(3) and (4) of the Nebraska Telecommunications Regulation Act, which prohibit any such discriminatory conduct:

> (3) Consent from a governing body for the use of a public highway within a municipality shall be based upon a lawful exercise of its statutory and constitutional authority. Such consent shall not be unreasonably withheld, and a preference or disadvantage shall not be created through the granting or withholding of such consent. A municipality shall not adopt an ordinance that prohibits or has the effect of prohibiting the ability of a telecommunications company to provide telecommunications service.
>
> (4) (a) A municipality shall not levy a tax, fee, or charge for any right or privilege of engaging in a telecommunications business or for the use by a telecommunications company of a public highway other than:
>
> (i) An occupation tax authorized under section 14-109, 15-202, 15-203, 16-205, or 17-525; and
>
> (ii) A public highway construction permit fee or charge to the extent that the fee or charge applies to all persons seeking use of the public highway in a substantially similar manner. All public highway construction permit fees or charges shall be directly related to the costs incurred by the municipality in

> providing services relating to the granting or administration of permits. Any highway construction permit fee or charge shall also be reasonably related in time to the occurrence of such costs.
>
> (b) Any tax, fee, or charge imposed by a municipality shall be competitively neutral.

Neb. Rev. Stat. § 86-704(3) and (4) (emphasis added).

Similarly, in Nebraska there is no justifiable concern over how a political subdivision will exercise its power of eminent domain, because every telecommunications carrier in Nebraska possesses the same or similar powers of condemnation. *See, generally*, Neb. Rev. Stat. §§ 86-701 to 86-707. Likewise, the Nebraska Telecommunications Universal Service Fund Act (Neb. Rev. Stat. §§ 86-316 to 86-329) and the NPSC's existing regulations relating to universal service set forth in Neb. Admin. Code, tit. 291, ch. 10, already prescribe the obligations of all types of contract carriers, whether private or public. Service quality standards for both private and public contract carriers are covered in Neb. Admin. Code, tit. 291, ch. 5, § 003.18. Moreover, rates for both incumbent and competitive carriers alike are guided by the same regulatory strictures. *See* Neb. Rev. Stat. § 86-141; Neb. Admin. Code, tit. 291, ch. 5, § 002.31. In short, the experience of Nebraska is that the legislature and the NPSC have ensured that municipal and investor-owned businesses compete on equal terms.

Yet, private *amici* erroneously suggest that a complete prohibition of government entry is the *only* way to ensure a "level playing field." *See* Sprint Corporation Brief at 22-25; United States Telecom Association Brief at 16-17. To support this contention, *amicus* Sprint Corporation alludes to a handful of states that have enacted legislation prohibiting the provision of telecommunications services by governmental entities in violation of 47 U.S.C. § 253(a). *See* Brief of Sprint Corporation at 23 n.19. Of the seven states identified by *amicus* Sprint Corporation, however, only four – Arkansas, Missouri, Nevada and Texas – actually prohibit

government entry.[5] Indeed, the vast majority of states either expressly or implicitly authorize the provision of telecommunications services by governmental entities.[6] Thus, contrary to private *amici*'s arguments, the majority sentiment expressed by these state legislatures is that competition by governmental entities in the telecommunications marketplace should be encouraged and does not require additional regulatory oversight.

III. The term "any entity" in section 253(a) includes LES and other municipal providers of telecommunications services

The various Petitioners and *amici* urge that 47 U.S.C. § 253(a) improperly alters the constitutional balance between the states and the federal government if it is read to preempt state regulation of telecommunications activities by municipalities. Instead, their argument goes,

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[5] Despite *amicus* Sprint Corporation's representations, Tennessee expressly authorizes any municipality operating an electric plant to own *and* operate a telecommunications network. Tenn. Code § 7-52-401. Both private *amici* erroneously cite Tenn. Code § 7-52-601, *et seq*., which applies to municipal cable operations. In contrast, Tenn. Code § 7-52-401, *et seq*., applies to municipal telecommunications operations. Likewise, Alabama permits municipalities to provide "advanced telecommunications services." Ala. Code § 11-50B-3. Although Nevada prohibits a municipality with a population of over 25,000 from selling communications services, it nevertheless allows such cities to purchase and construct telecommunications facilities. Nev. Rev. Stat. § 268.086. Moreover, Missouri's restrictive provision set forth at Mo. Stat. § 392.410.7 will expire by operation of law on August 28, 2007. And Nebraska's restrictive statutes (*i.e.*, Neb. Rev. Stat. §§ 86.128(1)(b) and 86.575(2)) were invalidated by the Nebraska Supreme Court. *In re Lincoln Elec. Sys.,* 265 Neb. at 79-80, 655 N.W.2d at 372.

[6] Once again, the reality of private *amici*'s minority position is borne out by the greater number of states that authorize the provision of telecommunications services by a governmental entity. *See, e.g.,* Alaska Stat. § 42.05.990(4); Ariz. Rev. Stat. § 9-511(A); Cal. Const., Art. XI, § 9; Colo. Rev. Stat. § 40-1-103; Del. Code Ann. tit. 26, § 102(2); Ga. Code Ann. § 46-5-162(17); Idaho Code §§ 62-603(14) and 62-610B(5); Ind. Code §§ 8-1-2-1(a) and (h); Ky. Rev. Stat. Ann. § 96.531; Mass. Gen. Laws, ch. 164, § 47E; Mich. Comp. Laws § 484.2102(cc); Miss. Code Ann. § 77-3-1; N.H. Rev. Stat. Ann. § 362:2(I); Okla Stat. tit. 17, § 139.102(27); Or. Rev. Stat. § 759.005(1)(b)(A); 66 Pa. Cons. Stat. § 102; and S.D. Codified Laws §§ 9-41, 49-31-1(28), 49-31-5.1. Indeed, the Minnesota statute cited by private *amici* (*i.e.*, Minn. Stat. § 237.19) merely requires a municipal entity to obtain 65 percent voter approval prior to entering the telecommunications market. This type of requirement is unremarkable and does not equate to a restriction on the provision of telecommunications services. *Cf.* Conn. Gen. Stat. § 7-233ii and N.D. Cent. Code § 40-33.02.

courts must first apply the "plain statement rule" from *Gregory v. Ashcroft*, 501 U.S. 452 (1991), before concluding that section 253(a) does, in fact, preempt such state action. In enacting section 253(a), Petitioners claim that Congress failed to satisfy the *Gregory* decision because Congress did not specifically note that municipalities fall within the broad meaning of "any entity." Because section 253(a) expressly preempts conflicting state law – unless the safe harbors of sections 253(b) or (c) apply – the only dispute that Petitioners present under *Gregory* is whether "any entity" actually means all types of entities, or whether that provision must be read to exclude entities owned by cities or other political subdivisions of a state. By ignoring the fundamental precepts of *Gregory* and its progeny, Petitioners erroneously conclude that the Eighth Circuit decision was inconsistent with this Court's prior preemption decisions.

In *Gregory*, the Court addressed whether the federal Age Discrimination in Employment Act of 1967 (ADEA) prohibited Missouri from imposing mandatory retirement on state judges based on age. *Id.* at 455. The Court recognized that enforcing the ADEA in favor of Missouri's constitutional officers imposed federal regulation on matters traditionally left to the states, but it did not doubt that the federal government could upset the usual constitutional balance of federal and state powers. *Id.* at 460. The Court reasoned in *Gregory* that a "plain statement rule" was necessary because "'[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" *Id*. at 461 (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989)) (other quotation omitted). But *Gregory* did not establish a talismanic approach, as the Court itself characterized the rule as "nothing more than an acknowledgement that the States retain substantial sovereign

powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id*.

Indeed, the test enunciated in *Gregory* does not fit the circumstances presented here. At issue in *Gregory* was the attempt of the federal government to countermand a compulsory retirement age for state court judges. While Petitioners cast this case as one involving the power of states to regulate what their political subdivisions can do, it does not present the federalism concerns addressed in *Gregory*. There is no dispute here that the Commerce Clause empowers Congress to regulate the telecommunications industry and to preempt conflicting state law under that Clause and the Supremacy Clause. The state laws being preempted are laws that regulate commerce, not the state's power to establish the type of judiciary it has. In other words, Congress should have a freer hand to preempt conflicting state law when Congress is regulating interstate commerce under express authority conferred it in the Commerce Clause.

This conclusion is also consistent with this Court's Commerce Clause market participant precedent. One of the principal purposes of the Commerce Clause was to remove barriers to interstate commerce. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 231 (1824) (J. Johnson, concurring). In determining whether state practices that restrict interstate commerce passed constitutional muster, the Court has distinguished between states as regulators and states as market participants. As explained in *Reeves, Inc. v. Stake*, 447 U.S. 429, 435 (1980), state regulations that inhibit interstate commerce are open to being struck down, while state regulations that increase competition or result in direct state participation in commerce will be protected. In LES' case, the legislature tried to regulate interstate commerce by eliminating the participation in the market by its political subdivisions. This effort to ban interstate commerce is

inconsistent with this Court's market participation precedents and not part of the federal balance the Court tried to protect in *Gregory*.

Petitioner Southwestern Bell argues that unless the FCC's position is sustained, states will be able to abolish a political subdivision, but if a state maintains a political subdivision, the state will be unable to prevent the subdivision from offering telecommunications services. *See* Brief of Southwestern Bell at 11. There is nothing illogical with that result. Congress can regulate how states participate in the telecommunications market without prescribing how the state organizes itself into political subdivisions. It is fully consistent with the Commerce Clause that a state can elect to create or eliminate a particular subdivision, but if the state maintains a particular subdivision, and if interstate commerce is involved, as here, Congress can regulate the state and its subdivision under the Commerce Clause.

The limited nature of the state interest here is also reflected in the FCC's decisions involving section 253(a). In the FCC decision that the Eighth Circuit reversed, the FCC addressed a circumstance like that of LES, where a division of a municipality was attempting to offer telecommunications services. *FCC Missouri Mun. League Order,* at ¶¶ 1-2. The FCC, however, had previously observed that the phrase "any entity" could encompass a municipally-owned corporation. *Id*. at ¶¶ 9, 20. The FCC thus agrees that if a municipality created a non-profit corporation to offer telecommunications services, that corporation would be within the phrase "any entity" found in section 253(a).[7] This is not to say that municipalities must be permitted to set up their own corporations, as they may be prohibited from doing so by other unrelated provisions of state law. But the federal balance *Gregory* sought to maintain is

[7] The FCC's narrow distinction at least explains why it does not argue a *Chevron* deference standard in its brief to support its construction of section 253(a).

unaffected if the preemptive effect of section 253(a) simply turns on the organizational format the municipality uses to offer telecommunications services.

The Court's decision in *Salinas v. United States*, 522 U.S. 52 (1997) also supports the decision below. In *Salinas*, the Court addressed whether a federal bribery statute that by its terms applied to "any business transaction," actually applied only to bribes affecting federal funds. The Court rejected the defendant's attempt to narrow the obviously broad scope of the law, finding that "[t]he word 'any,' which prefaces the business or transaction clause, undercuts the attempt to impose this narrowing construction." *Id*. at 57 (citations omitted). The Court held that the proper inquiry is simply whether it is "plain to anyone reading the Act that the statute encompasses the conduct at issue." *Id*. at 60 (quotation omitted).

Applying this standard to the federal statute before it, the Court in *Salinas* concluded that "[t]he text of [the bribery statute] is unambiguous on the point under construction here" and thus "the plain-statement requirement articulated in *Gregory* . . . does not warrant a departure from the statute's terms." *Id*. As *Salinas* illustrates, this Court has found that the use of "any" as a modifier is sufficiently clear to satisfy the *Gregory* plain statement rule. *See also United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'")

The Eighth Circuit's decision is perfectly consistent with *Gregory* and *Salinas*. No part of section 253(a) remotely resembles the ADEA provision addressed in *Gregory*. Section 253(a) makes no exceptions and creates no confusion as to its reach: "*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 telecommunication service." 47 U.S.C. § 253(a) (emphasis added). An objective reading of this provision leaves no

question that Congress intended to preempt all state regulation of entry into the telecommunications service industry by any entity. A narrower reading, such as that suggested by Petitioners, is contrary to the expansive language Congress used and would "press statutory construction to the point of disingenuous evasion [of] a constitutional question." *Salinas*, 522 U.S. at 60 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 57 n.9 (1996)). The statute's plain text leaves no doubt that Congress intended to insert the federal power into this traditional state concern and, thus, the Eighth Circuit properly applied this Court's *Gregory* principle.

The Eighth Circuit's approach in addressing the preemptive scope of section 253(a) undercuts any claims of the Petitioners that the Tenth Amendment or federalism concerns are in any way implicated. The Eighth Circuit recognized that for purposes of interpreting section 253(a), it did not matter whether the entity included within the protective language ultimately had the power or authority to provide telecommunications services under state law. Before engaging in the application of the "plain statement rule," the Eighth Circuit noted:

> It is true that as political subdivisions of the state, municipalities should not be considered independent entities. Nevertheless, the question before us is not the source from which municipalities derive their power, but whether they are included within the meaning of "any entity" as used in § 253(a). The plain meaning of the term "entity" includes all organizations, even those not entirely independent from other organizations.

Missouri Municipal League v. Federal Communications Comm'n., 299 F.3d 949, 953 (8th Cir. 2002).

The federal question remains whether "any entity" – whether public or private – is entitled to the protections of the Telecommunications Act and secure from prohibitory statutes enacted by state legislatures to prohibit entry into the field of telecommunications. Municipalities and their utility departments are certainly entities for purposes of section 253(a). Answering that question in no way answers, or needs to answer, the question of whether the

protected entity possesses the inherent or conferred authority to provide telecommunications services in the first instance. Thus, it is unnecessary for this Court to delve into issues of sovereignty, federalism or Tenth Amendment rights. Section 253(a) does not mandate that all political subdivisions be authorized to enter the telecommunications field. Rather, it simply protects those entities that may have the authority, based on home rule power or constitutional or statutory authorization, from prohibitory legislation precluding their entry.

The *Salinas* decision likewise confirms the Eighth Circuit's proper adherence to this Court's precedent. As in *Salinas*, the Eighth Circuit faced a federal statute in which Congress clearly sought the broadest reach possible by employing the modifier "any" before the word "entity." Petitioners attempt to obscure this clarity by arguing that Congress *could have* intended to exclude municipalities from the meaning of "any entity." But as illustrated in *Salinas*, the approach to statutory interpretation used in *Gregory* is not a license to create an ambiguity simply by raising *possible* varying interpretations of an Act. *Salinas*, 522 U.S. at 60 ("[A statute] need only be plain *to anyone* reading the Act that the statute encompasses the conduct at issue.") (quotation omitted). *See also Gregory*, 501 U.S. at 476 (White, J., concurring in part, dissenting in part, and concurring in the judgment) (observing that the Court historically applied the plain statement rule only to "whether Congress intended a particular statute to extend to the states *at all*") (emphasis in original). Thus, in *Salinas* the Court found no ambiguity in Congress' command when it used the term "any" and, accordingly, concluded that the bribery statute did not offend the *Gregory* principle. It follows that the Eighth Circuit properly found that the plain statement rule does not preclude Congress' clear intent to preempt state regulation in this area of traditional state governance.

The Court's decision in *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533 (2002), cited by Petitioners, is inapposite. *Raygor* concerned whether 28 U.S.C. § 1367(d) tolled the statute of limitations for claims against non-consenting states that are subsequently dismissed on Eleventh Amendment grounds. *Id.* at 542. Section 1367(d) purported to apply to "any claim," but the Court expressed reservations over reading the statute with such an expansive scope in the absence of clearer congressional intent that it apply to states. *Id.* at 542-44. The Court ultimately found that Congress had not sufficiently expressed its clear intent to have section 1367 apply to the states for purposes of abrogating their Eleventh Amendment immunity. *Id.* at 544-46. *Raygor* is inapposite because there is no question that Congress intended that section 253 apply to the states – the statute in fact *limits* its reach to the states and local government. 47 U.S.C. § 253(a). Thus, the concerns in *Raygor* that Congress did not sufficiently express its intent to have the statute apply to the states is not be present here.

CONCLUSION

In 1996, Congress acted to open up the local telecommunications market to competition. Consistent with that goal, the Eighth Circuit properly interpreted the phrase "any entity" in section 253(a) to include municipal utilities such as LES. Accordingly, LES urges the Court to affirm the Eighth Circuit, which will allow LES to proceed further with its efforts to fulfill Congress' objective of enhanced competition through the Telecommunications Act.

Respectfully submitted,

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