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

IN THE

# Supreme Court of the United States

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI,
*Petitioner,*

-AND-

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES,
*Petitioners,*

-AND-

SOUTHWESTERN BELL TELEPHONE, L.P.,
FKA SOUTHWESTERN BELL TELEPHONE COMPANY,
*Petitioner,*

*v.*

MISSOURI MUNICIPAL LEAGUE, *ET AL.*,
*Respondents.*

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

## BRIEF OF THE UNITED STATES TELECOM ASSOCIATION, VERIZON, BELLSOUTH, AND CENTURYTEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## TABLE OF CONTENTS

*Page*

Table of Cited Authorities . . . . . . . . . . . . . . . . . . . . . ii

Interest of *Amici Curiae* . . . . . . . . . . . . . . . . . . . . . . 1

Summary of Argument . . . . . . . . . . . . . . . . . . . . . . 3

I. Proper Application Of The "Plain-Statement" Rule Of *Gregory v. Ashcroft* Mandates Reversal Of The Decision Below. . . . . . . . . 5

II. States Have Compelling Reasons To Prohibit Or Limit Their Political Subdivisions From Providing Telecommunications Services. . . 15

Conclusion . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 24

## TABLE OF CITED AUTHORITIES

*Page*

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*AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582 (N.D. Tex. 1998), *vacated and remanded as moot*, 243 F.3d 928 (5th Cir. 2001) . . . . . . . . . . . . . . . . . . . . . . . . . . . 19

*AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 6, 10

*Alarm Industry Communications Committee v. FCC*, 131 F.3d 1066 (D.C. Cir. 1997) . . . . . . . . . . . . . . 8

*Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland*, 49 F. Supp. 2d 805, 813 (D. Md. 1999), *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2000) . . . . . . . . . 10

*City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 8, 14

*City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied sub nom.*, *City of Tacoma v. Qwest Corp.*, 534 U.S. 1079 (2002) . . 18-19

*City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002) . . . . . . . . . . . . . . . . . . . 5-6, 7

*Department of Housing & Urban Development v. Rucker*, 535 U.S. 125 (2002) . . . . . . . . . . . . . . . . 9

*Page*

*Gregory v. Ashcroft*, 501 U.S. 452 (1991) . . . . . . . *passim*

*Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 6

*Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907) . . . 6

*In re Carter*, 131 B.R. 4 (D. Conn. 1991) . . . . . . . . 8

*Missouri Municipal League v. FCC*, 299 F.3d 949 (8th Cir. 2002) . . . . . . . . . . . . . . . . . . . . . . . . . . . . 14, 16

*Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 7-8

*Qwest Communications v. City of Berkeley*, 146 F. Supp. 2d 1081 (N.D. Cal. 2001) . . . . . . . . 19

*Qwest Corp. v. City of Santa Fe, New Mexico*, 224 F. Supp. 2d 1305 (D.N.M. 2002) . . . . . . . . . . . . . 20

*Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002) . . . . . . . . . . . . . . . . . . . . . . 13, 14

*Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) . . . 9

*Salinas v. United States*, 522 U.S. 52 (1997) . . . . . 14

*Southern Co. Services Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002) . . . . . . . . . . . . . . . . . . . . . . . . . . 8

*Page*

*Tafflin v. Levitt*, 493 U.S. 455 (1990) . . . . . . . . . . . . 5

*Transbrasil S.A. Linhas Aereas v. Department of Transportation*, 791 F.2d 202 (D.C. Cir. 1986) . . . 11-12

*Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) . . . . . 7

*Wilson v. Turnage*, 750 F.2d 1086 (D.C. Cir. 1984) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 12

**CONSTITUTION**

U.S. Const. amend. X . . . . . . . . . . . . . . . . . . . . . . . 5

**FEDERAL STATUTES**

11 U.S.C. § 101(15) . . . . . . . . . . . . . . . . . . . . . . . . . 8

15 U.S.C. §§ 79(a) to 79(z) . . . . . . . . . . . . . . . . . . 9

28 U.S.C. § 1367(d) . . . . . . . . . . . . . . . . . . . . . . . . 13

47 U.S.C. § 224 . . . . . . . . . . . . . . . . . . . . . . . . . . . 8

47 U.S.C. § 224(e)(2) . . . . . . . . . . . . . . . . . . . . . . . 8

47 U.S.C. § 253 . . . . . . . . . . . . . . . . . . . . . . . . . . . *passim*

47 U.S.C. § 253(a) . . . . . . . . . . . . . . . . . . . . . . . . . *passim*

47 U.S.C. § 253(c) . . . . . . . . . . . . . . . . . . . . . . . . 11, 18, 20

*Page*

47 U.S.C. § 253(d) . . . . . . . . . . . . . . . . . . . . . . . . . . 10, 11

47 U.S.C. § 275(a)(2) . . . . . . . . . . . . . . . . . . . . . . . . 8

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) . . . . . . . . . . . . . . . . . . . . 2

**CONGRESSIONAL MATERIALS**

*Hearings on S.1822, The Communications Act of 1994, Before the Senate Comm. on Commerce, Science, and Transp.,* 103rd Cong., 2d Sess. 466 (1994) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 9

S. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 10, 21

**ADMINISTRATIVE AGENCY DECISIONS**

*Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Report and Order and Order on Remand, FCC 03-36 (rel. Aug. 21, 2003) . . . . . . . . . . . . . . . . . . . . . . . 21

*Promotion of Competitive Networks in Local Telecommunications Markets*, 14 F.C.C.R. 12673 (1999) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 21

*TCI Cablevision*, 12 F.C.C.R. 21396 (1997) . . . . . . 10

*Page*

**STATE CASES**

*In re Lincoln Electric System*, 655 N.W.2d 363 (Neb.), *cert. denied, Nebraska Public Service Commission v. Lincoln Electric System*, 123 S. Ct. 2620 (2003) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 17

**STATE STATUTES**

Ark. Code Ann. § 23-17-409 (Michie 2002) . . . . . . 16

Fla. Stat. Ann. § 166.047 (1989 & Supp. 2003) . . . 16-17

Minn. Stat. Ann. § 237.19 (West 2003) . . . . . . . . . . 17

Mo. Ann. Stat. § 392.410(7) (West Supp. 2003) . . . 16

Nev. Rev. Stat. Ann. § 268.086 (Michie Supp. 2001) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 17

S.C. Code Ann. § 58-9-2600 (2002) . . . . . . . . . . . . 17

Tenn. Code Ann. § 7-52-602 (Supp. 2001) . . . . . . . 17

Tenn. Code Ann. §§ 7-52-601 to 611 (Supp. 2001) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 17

Tex. Util. Code Ann. §§ 54.201 to 261 (Vernon 2002) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 17

Utah Code Ann. §§ 10-18-101 to 306 (2003) . . . . . 17

*Page*

Va. Code Ann. § 15.2-2160 (Michie Supp. 2002) . . 17

Wash. Rev. Code § 54.16.330 (2003) . . . . . . . . . . . . 17

**MISCELLANEOUS**

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*Page*

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## INTEREST OF *AMICI CURIAE*

The United States Telecom Association ("USTA") is a not-for-profit trade association for the local telephone industry, which represents some 600 facilities-based incumbent wireline providers of local telephone service; twenty-three of its members provide local telephone service in Missouri.[1] The Verizon telephone companies ("Verizon")[2] together are the largest providers of wireline communications in the United States and offer local, long distance, data, and broadband (or high-speed data) services to customers in 49 states and the District of Columbia. BellSouth Corporation ("BellSouth") provides wireline communications, including local, long distance, broadband, and data services, to

[1] Pursuant to Rule 37.3(a) of this Court, consents of counsel for the Petitioners and for the Respondents have been obtained and filed with the clerk of the Court. Pursuant to Rule 37.6, no counsel for either party has authored this brief, in whole or in part, and no person or entity, other than the amici curiae, their members, or counsel, have made monetary contributions to the preparation or submission of this brief.

[2] The following Verizon telephone companies are wholly owned subsidiaries of Verizon Communications Inc., a publicly held company: Contel of the South, Inc. d/b/a Verizon Mid-States; GTE Midwest Incorporated d/b/a Verizon Midwest; GTE Southwest Incorporated d/b/a Verizon Southwest; The Micronesian Telecommunications Corporation; Verizon California Inc.; Verizon Delaware Inc.; Verizon Florida Inc.; Verizon Hawaii Inc.; Verizon Maryland Inc.; Verizon New England Inc.; Verizon New Jersey Inc.; Verizon New York Inc.; Verizon North Inc.; Verizon Northwest Inc.; Verizon Pennsylvania Inc.; Verizon South Inc.; Verizon Virginia Inc.; Verizon Washington, DC Inc.; Verizon West Coast Inc.; Verizon West Virginia Inc.

customers in nine southeastern states.[3] CenturyTel, Inc. ("CenturyTel") provides wireline communications, including local, long distance, broadband, and data services, primarily to rural customers, in twenty-two states across the country, including Missouri.

*Amici* have a vital interest in the proper construction of Section 253(a), 47 U.S.C. § 253 (a), which was enacted as part of the reforms established by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"). Throughout the country, a growing number of local governments are providing or seeking to provide telecommunications services. Unlike other competitors, these local governments can take advantage of their "regulator" status both to advantage themselves and to disadvantage competing private providers. Local governments control access to local public rights-of-way, and have misused that authority to attempt to require telephone companies to pay exorbitant rights-of-way fees or to install and "donate" facilities for local governments' own use. Local governments have even used their governmental status to secure discriminatory tax breaks and public funding for their ventures that are unavailable to non-governmental competitors and to exempt themselves from the regulatory requirements they impose on those competitors. This type of leverage uniquely and directly threatens Congress' goal, as expressed in Section 253, 47 U.S.C. § 253, of creating a level playing field for all telecommunications providers.

Finally, as recent events in the marketplace amply demonstrate, the telecommunications industry is a risky,

[3] BellSouth's wholly owned domestic subsidiaries that provide wireline services include BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc.

capital-intensive business. Local governments' entry into the telecommunications market thus threatens the public fisc, which in turn may result in increased tax burdens on businesses and residents of the State, creates substantial market uncertainties, suppresses competing private investment, and can lead to serious municipal budgetary problems. For all these reasons, *amici* support the right of state governments to limit or prohibit their own political subdivisions from undertaking risky capital investments in competition with private entities.

## SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Eighth Circuit should be reversed. The Eighth Circuit held that the 1996 Act preempted the Missouri statute solely because Congress used the word "any" to modify "entity" in Section 253(a). In doing so, the Eighth Circuit construed Section 253(a) to impair the power of States to shape and control the activities of their political subdivisions, an essential attribute of state sovereignty. That interpretation works an extraordinary federal intrusion into the traditional authority of States to decide what powers they choose to grant (or withhold from) their own political subdivisions.

The Eighth Circuit read Section 253(a) to shield local governments from state laws that prohibit them from providing telecommunications services. That reading badly misinterprets the statute. The text, structure, context, and purpose of Section 253 all point in one direction: Section 253(a) was meant to *constrain* state and local regulatory authority over telecommunications providers, not to *insulate* local governments from state laws that define or restrict the very authority delegated to them by the States.

Simply put, the plain-statement rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991) – which requires that Congress be "unmistakably clear" when it purports to alter the constitutional balance between the Federal Government and the States – is not satisfied in this case. Congress did not define the term "entity" in the 1996 Act to include local governments, even though it has done so explicitly in other federal statutes. Neither the adjective "any" nor the noun "entity" constitutes the clear and unambiguous statement by Congress necessary to demonstrate that it wished to test the limits of its power and encroach drastically upon an essential element of state sovereignty – namely, the authority of a State to control the activities of its political subdivisions. Furthermore, construing the term "entity" to include "local government," as the Eighth Circuit did, would turn Section 253(a) into a circular and absurd provision by providing both state and local governments the power to seek preemption of their *own* laws. Under any reasonable reading of the statute, and certainly under *Gregory*'s stringent test, Congress clearly did not intend the term "entity" to include local governments.

Finally, the Eighth Circuit's decision also ignores the compelling reasons behind state laws that, like the Missouri statute, restrict or prohibit the right of local government to provide telecommunications services. States have legitimate, long-standing reasons to control the authority of their political subdivisions, including limiting their ability to engage in risky and capital-intensive commercial enterprises. Courts should not lightly assume that Congress handicapped the ability of state governments to make these critical policy decisions regarding the management of their political subdivisions. For all of these reasons, the Eighth Circuit's decision should be reversed.

## I. PROPER APPLICATION OF THE "PLAIN-STATEMENT" RULE OF *GREGORY v. ASHCROFT* MANDATES REVERSAL OF THE DECISION BELOW.

The Eighth Circuit held that Section 253(a) evinces an intent by Congress to override a state's traditional authority to control its own political subdivisions. That holding gravely misconstrues the statute itself and misapplies the plain-statement rule.

A. The Constitution creates a system of dual sovereignty between the Federal Government and the States. States "possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Gregory*, 501 U.S. at 457 (*citing Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)). In this system, the Federal Government has limited, enumerated powers, and the States retain all powers "not delegated to the United States by the Constitution, nor prohibited by it to the States." U.S. Const. amend. X. Among the most essential of these retained powers are those of self-organization or, stated otherwise, the manner in which a "State defines itself as a sovereign." *Gregory*, 501 U.S. at 460.

These powers include the right to prescribe the qualifications of a State's own officers, the ability to control its political processes, and the authority implicated here – the power to regulate the activities of its own political subdivisions. As this Court long has recognized, a State's power to organize itself into subdivisions and to delegate (or not to delegate) its powers to those subdivisions is a core structural authority that affects the State's exercise of all substantive powers. *See City of Columbus v. Ours Garage &*

*Wrecker Serv., Inc.*, 536 U.S. 424, 437 (2002) ("Whether and how to [subdivide and delegate substantive power] is a question central to state self-government."); *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) ("States have [wide latitude] in creating various types of political subdivisions and conferring authority upon them."); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) ("The number, nature and duration of the powers conferred upon [political subdivisions] . . . rests in the absolute discretion of the State.").

Congress may, of course, legislate in areas traditionally governed by the States if those areas are otherwise within the scope of its enumerated powers. In enacting the 1996 Act, Congress did just that. For most of the twentieth century, local telephone service was treated as a natural monopoly and was provided under a system of exclusive local franchises granted by the States. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). The 1996 Act created a new "national policy framework" for regulation of local competition that supplanted the state-run franchise system. *Id.*

Out of respect for our national system of dual sovereignty, this Court repeatedly has required that Congress be "unmistakably clear" when it purports to alter the constitutional balance between the Federal Government and the States. *Gregory*, 501 U.S. at 460. Thus, courts will not interpret a federal statute in such a way as to intrude upon an area traditionally regulated by the States absent a clear expression of congressional intent to do so. This rule not only protects the proper balance of power between the Federal Government and the States, but also implements "the doctrine that statutes should be construed so as to avoid difficult constitutional questions." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000). As applied in the context of state authority to create and define the powers of political subdivisions, the rule instructs that "federal courts should resist attribution to Congress of a design to disturb a state's decision on the division of authority between the state's central and local units." *City of Columbus*, 536 U.S. at 440.

B. The text, structure, context, and particular purpose behind Section 253 do not reveal that Congress ever intended – let alone clearly – for the term "entity" to include a political subdivision of a State. The language of Section 253(a) does not approach the unmistakable clarity required by *Gregory.* 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) (emphasis added).

This language does not *obviously* identify a political subdivision of a State as an "entity." That is, nothing in the phrase "any entity" affirmatively sweeps political subdivisions within its scope. To be sure, the adjective "any" is broadly inclusive, but its scope cannot be understood without a clear understanding of the noun that "any" modifies.

Although it could have done so, Congress did not define the term "entity" as used in Section 253(a). The ordinary meaning of the word thus applies. *See Morales v. Trans World*

*Airlines, Inc.*, 504 U.S. 374, 383 (1992). In ordinary language, the word "entity" might theoretically include a governmental unit but most naturally connotes a commercial organization, such as "a natural person, a corporation, a partnership, a limited liability company, a limited liability partnership, a trust, an estate, [or] an association." *City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999) (*quoting Alarm Indus. Communications Comm. v. FCC*, 131 F. 3d 1066, 1070 (D.C. Cir. 1997)). At most, the term "entity" is ambiguous as to the particular boundaries of its scope. The D.C. Circuit reached this very conclusion, in analyzing the term as contained in other parts of the 1996 Act. *See S. Co. Servs. Inc. v. FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002) ("entity" in 47 U.S.C. § 224 "bears different meanings depending upon the context" and "[t]he most that can be said is that § 224(e)(2) is unclear on whether utilities or municipalities count as 'attaching entities'"); *Alarm Indus. Communications Comm.*, 131 F.3d at 1068 ("entity" in 47 U.S.C. § 275(a)(2) is ambiguous). Given the absence of any explicit direction from Congress regarding the precise meaning of "entity," there is simply no support for the proposition that Congress intended that term to encompass local governments.

Moreover, a review of other federal statutes makes clear that when Congress means to sweep governmental actors within the scope of the term "entity," it knows precisely how to do so. In the Bankruptcy Code, Congress expressly defined "entity" as "includ[ing a] person, estate, trust, *governmental unit*, and United States trustee." 11 U.S.C. § 101(15) (emphasis added); *see In re Carter*, 131 B.R. 4 (D. Conn. 1991) (state court is a governmental unit and thus an "entity" subject to the automatic stay provisions of the Bankruptcy Code). The fact that Congress has *not* done this in Section 253 strikes a direct blow to the contention that "entity," as used there, includes local governments. As this Court repeatedly has held, the juxtaposition of a statute that contains specific language with one that does not creates a strong inference that courts should not read that language into the latter statute; if Congress had wanted to incorporate the relevant terms, it would have said so. *See, e.g.*, *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 132 (2002) (analysis of related statute demonstrates that Congress "knew exactly how" to provide an innocent owner defense and reinforces the conclusion that no such defense exists in another statute that does not contain similarly express language).[4]

The context, purpose, and structure of Section 253 as a whole further undermine the proposition that local governments are included within the scope of the term "entity." *See, e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997) (meaning of statutory term that is ambiguous standing alone must be ascertained by reference to the specific statutory context in which it is used). The fundamental aim

[4] Respondents' effort to rely on a single statement by Senator Lott during hearings on the predecessor legislation to the 1996 Act that "the rural electric associations, *the municipalities*, and the investor-owned utilities[] are all positioned to make a real contribution" in the development of a competitive telecommunications market, is entirely misplaced. *See Hearings on S.1822, The Communications Act of 1994, Before the Senate Comm'n on Commerce, Science, and Transp.*, 103rd Cong., 2d Sess. 466 (1994) (statement of Sen. Trent Lott) (emphasis added). Senator Lott's statement was not made during a discussion of Section 253 but of an entirely different provision, the precursor to Section 103, which amended the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79(a) to 79(z), to authorize registered holding companies to invest in telecommunications under certain circumstances.

of Section 253 was to prevent state and local regulators from throwing anti-competitive roadblocks in the way of telecommunications companies otherwise subject to governmental authority. This distinction between state and local governments, on the one hand, and private telecommunications providers, on the other, reflects the central purpose of Section 253.

Congress adopted Section 253 as part of "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly *private sector* deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition," S. Rep. No. 104-230, 104th Cong., 2d Sess. at 1 (1996) (emphasis added). Section 253 in particular was intended to "end[] the States' longstanding practice of granting and maintaining local exchange monopolies," *Iowa Utils. Bd.*, 525 U.S. at 405 (Thomas, J., dissenting), and to protect telecommunications providers from a burdensome "third tier" of local regulation, *TCI Cablevision*, 12 F.C.C.R. 21396, 21441 (1997). Congress thus imposed "sweeping restrictions on the authority of .. . local governments to limit the ability of telecommunications companies to do business in local markets." *Bell Atlantic-Md., Inc. v. Prince George's County, Md.*, 49 F. Supp. 2d 805, 813 (D. Md. 1999), *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2000). And telecommunications companies, in turn, were given the right to seek federal preemption of any improper restrictions imposed on them by those governments. 47 U.S.C. § 253(d). To move local governments from the class of organizations whose actions are *subject* to preemption into the class of "entities" *entitled* to preemption would turn the purpose of Section 253(a) inside out.

Throughout Section 253, Congress clearly distinguished between state and local governments as regulators, on the one hand, and private telecommunications providers on the other. The opening phrase of Section 253(a) proscribes any "State *or local statute or regulation*, or other State *or local legal requirement*" that hinders the ability of telecommunications providers to offer services, making clear that the actions of local governments are among those that the statute seeks to restrain, not to protect. 47 U.S.C. § 253(a) (emphases added). Similarly, Section 253(c) preserves the preexisting "authority of a State *or local government*" to manage rights-of-way or to require compensation "from telecommunications providers," *id.* § 253(c) (emphasis added), reinforcing the distinction between local governments as regulators and the telecommunications providers that are the entities subject to the exercise of that local regulatory authority. Finally, Section 253(d) provides that the Federal Communications Commission ("FCC") must preempt state or local law if it "determines that a State *or local government* has permitted or imposed any statute, regulation, or legal requirement that violates" Section 253. *Id.* § 253(d) (emphasis added). Section 253(d) drives home the point that local governments are among those whose regulatory actions are constrained by Section 253, not those – such as private telecommunications providers – that are within the zone of interests that Section 253 protects and thus entitled to invoke its preemptive force.[5]

[5] The fact that the statute uses the specific phrases "local government" and "local regulation" in subsections (a), (c) and (d) makes it even more implausible that the general term "entity" was meant to include local governments, and again, shows that when Congress means to cover local governments, it knows how to do so. *Transbrasil S.A. Linhas Aereas v. Dep't of Transp.*, 791 F.2d 202,

(Cont'd)

Indeed, reading the term "entity" in Section 253(a) to include local governments produces absurdly circular results. Accepting that local governments are "entities" under Section 253(a) would mean that a local government's telecommunications operation is entitled to preemption of the local government's own "local statute[s] or regulation[s]" – potentially nullifying a local government's ability to control its own operations – because Section 253(a) prohibits both state and local regulations that limit the ability of "any entity" to provide telecommunications services. It should go without saying that Congress could not have intended to protect local governments from *themselves* by awarding them a federal right to preempt their own enactments. Indeed, if the term "entity" can be stretched to include governmental units, there is no principled stopping point to its expansion: States themselves could be covered "entities" under Section 253(a). This would mean that Section 253(a) also preempts State laws restraining the State itself or State agencies from entering into the telecommunications business. These nonsensical results argue forcefully against any such reading.

In short, in light of the statutory text, context, purpose, and structure, as well as the absurd results produced by the reading adopted by the Court of Appeals, it is simply impossible to hold that Section 253 meets the stringent test of *Gregory*'s plain-statement rule.

The Eighth Circuit's contrary conclusion ignores this backdrop, and instead hinges solely on Congress' use of the

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205 (D.C. Cir. 1986) ("'[W]here different terms are used in a single piece of legislation, the court must presume that Congress intended the terms have different meanings.'") (quoting *Wilson v. Turnage*, 750 F.2d 1086, 1091 (D.C. Cir. 1984)).

word “any” to modify “entity.” But as the Court recently made clear, Congress’ use of the modifier “any” in a statute does not, without more, satisfy *Gregory*’s plain-statement rule. In *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533 (2002), the Court examined the scope of the supplemental jurisdiction statute, 28 U.S.C. § 1367(d), which provides for the tolling of a state statute of limitations for “any claim” that a federal court dismisses under its supplemental jurisdiction. The question presented was whether Section 1367(d) applies to claims that are filed against non-consenting States and ultimately dismissed on Eleventh Amendment grounds. If a federal statute could toll a state limitations period for such claims, that would have resulted in an “abrogation,” 534 U.S. at 541, of State sovereign power. Thus, *Raygor* clearly implicated the plain-statement rule of *Gregory*.

The Court held that, although Section 1367(d) pertains on its face to “any” claim, it could not be read to apply to the particular ones at issue:

> With respect to the claims the tolling provision covers, one could read § 1367(d) to cover any claim “asserted” under subsection (a), but we have previously found similarly general language insufficient to satisfy clear statement requirements. For example, we have held that a statute providing civil remedies for violations committed by “‘any recipient of federal assistance’” was “not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment” even when it was undisputed that a State defendant was a recipient of federal aid. Instead, we held that “when Congress chooses to subject the States to federal

> jurisdiction, it must do so specifically." Likewise, § 1367(d) reflects no specific or unequivocal intent to toll the statute of limitations for claims asserted against nonconsenting States. . . .

*Id.* at 544-45 (citations omitted).

*Raygor* therefore reinforces that *Gregory* requires more than the existence of the word "any" in a federal statute before the statute can be read to overturn traditional federal-state relations: it requires an affirmative indication that Congress clearly intended to intrude into matters at the heart of State sovereignty. No such indication exists here. As the D.C. Circuit explained, the fact that it is "linguistically possible to include a municipality under the heading 'entity'" is not a sufficient basis to find preemption. *City of Abilene*, 164 F.3d at 52. Because "[i]f it were, *Gregory*'s rule of construction would never be needed." *Id.* at 53.[6]

As the foregoing shows, the Eighth Circuit's erroneous reading of Section 253(a) drives a wedge between the State

[6] The Eighth Circuit ignored *Raygor* entirely and instead relied heavily on this Court's decision in *Salinas v. United States*, 522 U.S. 52 (1997). *See Mo. Mun. League v. FCC*, 299 F.3d 949, 954-55 (8th Cir. 2002). This reliance is misplaced. The federal bribery statute at issue in *Salinas* did not involve, as here, federal intrusion into the core power of the States to organize their own structures of governance. *See Salinas*, 522 U.S. at 60. Furthermore, the Court in *Salinas* was concerned that the reading of the bribery statute advanced by the petitioner, in reliance on *Gregory*, would "strain[] and distort[]" that statute. *Id.* at 59 (citation omitted). As discussed above, in this case, it is the Eighth Circuit's interpretation that "depart[s] from the statute's terms." *Id.* at 60. There is no conflict between the clearly superior reading of Section 253(a) and the plain-statement rule of *Gregory*, and *Salinas* is thus irrelevant.

and its own political subdivisions, creating rights in the political subdivision that may be asserted against the State and overriding the State's choice of what rights and duties to delegate to its subdivision. The Eighth Circuit's reading cannot be justified in light of the text, structure, context, and purpose of Section 253. This Court should correct the Eighth Circuit's misapplication of *Gregory* and the plain-statement rule, which will in turn ensure that States retain their sovereign power to make choices about their governmental structures and thereby ensure the responsible operations of their political subdivisions.

## II. STATES HAVE COMPELLING REASONS TO PROHIBIT OR LIMIT THEIR POLITICAL SUBDIVISIONS FROM PROVIDING TELECOMMUNICATIONS SERVICES.

The Eighth Circuit's decision also ignores one certainty: States regularly restrict or control the authority of their political subdivisions. It is well within the purview of the States to do so, and those choices – and the public policies that undergird them – should not be second-guessed.Courts should not (and under *Gregory* cannot) lightly assume that Congress intended to override these judgments and mandate unilaterally that the provision of telecommunications by local governments is a public good.

In fact, this issue is becoming a growing concern for a number of States. In increasing numbers, local governments are competing or seeking to compete with private industry to offer traditional telephone, cable, Internet access, or broadband services. A study released in January 2001 estimated that 61 local governments offered Internet access services, 32 provided high-speed data services, and 18 offered local dial tone services.[7] Those numbers have increased dramatically since that date. The American Public Power Association reported that at the end of 2002 over 500 government utilities offered some type of broadband telecommunications services, from fiber leasing, to Internet access, to local telephone service.[8] This trend is expected to continue as more and more local governments consider building telecommunications and broadband networks. *See, e.g.*, Dinesh Kumar,*Large Number of Municipal Utilities Eying the Broadband Market, Communications Daily*, Apr. 1, 2003, at 3.

In response to this trend, at least twelve States, including Missouri,[9] have passed laws that address the entry of their political subdivisions into the telecommunications market.[10]

[7] Jeffrey A. Eisenach, *Does the Government Belong in the Telecom Business?* 8.1 Progress on Point, 18-23 (Jan. 2001), *at* http://pff.org/publications/ POP8.1GovtTelecom 011001 LOGO.pdf.

[8] *See* American Public Power Association, *Public Power: Powering the 21st Century with Community Broadband Services* (Jan. 2003), *at* http://www.appanet.org/legislativeregulatory/ broadband/ CommunityBroadbandFact.pdf.

[9] The Missouri statute provides, in relevant part: "No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service . . ." Mo. Ann. Stat. § 392.410(7) (West Supp. 2003). The statute was extended by the Missouri legislature in July of 2002 and now has an expiration date of August 28, 2007. *See Mo. Mun. League*, 299 F.3d at 952 n.3.

[10] These states are Arkansas (Ark. Code Ann. § 23-17-409 (Michie 2002)), Florida (Fla. Stat. Ann. § 166.047 (1989 & Supp.

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These laws range from procedural protections that attempt to equalize the competitive status of local governments and private competitors to outright bans on local governments providing telecommunications.[11] As discussed below, there are ample justifications for these prohibitions.

A. Because local governments have at their disposal delegated police powers, those that compete directly with private companies can enjoy several unfair advantages. In most areas, local governments set the terms and conditions for their competitors' access to public rights-of-way.

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2003)), Minnesota (Minn. Stat. Ann. § 237.19 (West 2003)), Nevada (Nev. Rev. Stat. Ann. § 268.086 (Michie Supp. 2001)), South Carolina (S.C. Code Ann. § 58-9-2600 (2002)), Tennessee (Tenn. Code Ann. §§ 7-52-601 to 611 (Supp. 2001)), Texas (Tex. Util. Code Ann. §§54.201 to 261 (Vernon 2002)), Utah (Utah Code Ann. §§ 10-18-101 to 306 (2003)), Virginia (Va. Code Ann. § 15.2-2160 (Michie Supp. 2002)), and Washington (Wash. Rev. Code § 54.16.330 (2003)). In addition, the statute at issue in the case before the Nebraska Supreme Court was intended to limit the provision of telecommunications services by municipalities. *In Re Lincoln Elec. Sys.*, 655 N.W. 2d 363, 371-72 (Neb.), *cert. denied*, *Neb. Pub. Serv. Comm'n v. Lincoln Elec. Sys.*, 123 S. Ct. 2620 (2003).

[11] *See, e.g.*, Fla. Stat. Ann. § 166.047 (1989 & Supp. 2003) (imposing taxes on prices of telecommunications services provided by public entities); Minn. Stat. Ann. § 237.19 (West 2003) (requiring municipalities to obtain 65% super-majority of voters before providing telecommunications services); Tenn. Code Ann. § 7-52-602 (Supp. 2001) (requiring municipalities to meet disclosure and voting requirements); Va. Code Ann. § 15.2-2160 (Michie Supp. 2002) (requiring localities with telecommunications operations to file annual reports with Virginia Commission and mandating that private providers have nondiscriminatory access to public rights-of-way, poles, conduits, and other publicly owned facilities).

The 1996 Act grants States and local governments the authority to manage the public rights-of-way and to require "fair and reasonable compensation" for their use.[12] Under this system, and as authorized by state law, local governments may require private companies to obtain their permission in order to access streets, sidewalks, utility poles, conduits, or public lands to install facilities. In exchange for this access, private companies may be required to pay compensation to local governments. Despite the dictate that local governments charge only "fair and reasonable compensation," some localities have charged excessive rights-of-way fees as a precondition to access the rights-of-way. Others have exacted fees that are wholly unrelated to the actual costs of managing the rights-of-way but that instead raise revenue, charging "rent" based on a percentage of the providers' gross revenue. *See, e.g.*, *City of Auburn v. Qwest Corp*, 260 F.3d 1160, 1176 (9th Cir. 2001) (holding that rights-of-way fees based on a percentage of private companies' gross revenues violate Section 253(c)), *cert. denied*, *City of Tacoma v. Qwest Corp.*, 534 U.S. 1079 (2002). Private companies must absorb these charges or pass them along to customers through higher rates or charges. These unwarranted fees are particularly discriminatory as applied to wireline telephone companies because other

[12] Specifically, the 1996 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 publicly disclosed by such government.

47 U.S.C. § 253(c).

competitors that provide the same services using different technologies (*e.g*., wireless or Internet telephony providers) do not incur these rights-of-way charges.

Local governments have employed their regulatory authority over the public rights-of-way in order to discriminate against private competitors and leverage their advantage in other ways. Specifically, local governments have imposed onerous permit or application requirements that complicate or delay competitors' access to the public rights-of-way,[13] and have even exempted themselves from the very requirements they impose on private companies. For example, after beginning to compete with the local incumbent cable provider, a city in Florida apparently required the private cable company to pay five percent of its gross revenues as a franchise fee, a fee from which the city exempted itself. *See* Kathryn A. Tongue, *Municipal Entry into the Broadband Cable Market: Recognizing the Inequities Inherent in Allowing Publicly Owned Cable Systems to Compete Directly Against Private Providers*, 95 NW. U. L. REV. 1099, 1118 (2001). Furthermore, local governments have required private companies to provide free conduit or other facilities as a condition for access to public rights-of-way, thus misusing their regulatory authority to gain a zero basis

[13] *See, e.g.*, *Qwest Communications v. City of Berkeley*, 146 F. Supp. 2d 1081, 1098-1100 (N.D. Cal. 2001) (application required the submission of the identity and legal status of carrier, a map and description of existing and proposed encroachments, a description of the services, three-year business plan, technical qualifications, information to establish that applicant has all necessary governmental approvals, and any other information deemed necessary by city); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 587-88, 593 (N.D. Tex. 1998), *vacated and remanded as moot*, 243 F.3d 928 (5th Cir. 2001).

asset for their own use in competition with private companies.[14] Local provision of telecommunications services thus creates incentives directly contrary to Congress' command that localities administer rights-of-way "on a competitively neutral and nondiscriminatory basis." 47 U.S.C. § 253(c).

Due to their general governmental powers, local governments enjoy additional unfair advantages over private companies. They can exercise eminent domain or condemn property in order to acquire plant, facilities or property of other providers for their own use. Local governments may issue tax-free, interest-free or reduced-interest loans to raise capital to pay for operating expenses. They may secure tax advantages that are unavailable to their nongovernmental competitors because local governments do not pay federal income taxes and, in the absence of state law to the contrary, are not subject to property or income taxes. Localities have the ability to use public funds and raise taxes to subsidize losses, maintain artificially low rates, or shift costs to customers of electric or other services where the locality faces no competition. Further, by virtue of their "insider" status, local governments have access to proprietary information

[14] Numerous federal court decisions have struck down requirements that private companies build and dedicate telecommunications facilities to municipalities as a condition for placing private telecommunications infrastructure under the city streets. *See, e.g.*, *City of Auburn*, 260 F.3d at 1179 (*citing City of Dallas*, 8 F. Supp. 2d at 593); *see also Qwest Corp. v. City of Santa Fe, N.M.*, 224 F. Supp. 2d 1305, 1309 (D.N.M. 2002) (holding that Section 253 preempts local requirement that private provider "dedicate all conduit laid upon the City's property to the City" and upon installation of new conduit "install double the amount of capacity needed for the applicant's own use").

about their competitors gained through the rights-of-way permitting process and bidding processes for other government projects. For the same reason, they may also receive preferential treatment in the awarding of government contracts.

These unfair advantages deter private sector investment – a central goal of the 1996 Act. Congress passed the 1996 Act to establish "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." S. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (emphasis added). The FCC has also recognized that "only facilities-based competition" can "fully unleash competing providers' abilities and incentives to innovate." *Promotion of Competitive Networks in Local Telecommunications Markets*, 14 F.C.C.R. 12673, 12676 (1999); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Report and Order and Order on Remand, FCC 03-36, ¶ 70 (rel. Aug. 21, 2003) ("We reaffirm the conclusion in the UNE Remand Order that facilities-based competition serves the Act's overall goal."). The 1996 Act thus envisioned competition among multiple private companies that offer services using their own equipment and facilities.

For this goal of facilities-based competition to be realized, private companies must have incentives to invest the enormous up-front capital that telecommunications equipment and facilities necessarily require. Private industry has little economic incentive to invest in upgrading networks or building out new facilities in areas in which local governments have an unmerited advantage over competitors or where the return on those investments is undermined by artificially subsidized rates. For these many reasons, a State, such as Missouri, might rationally conclude that local provision of telecommunications services is not worth the candle, and instead focus its statewide telecommunications policy on the encouragement of private investment in new infrastructure.

B. In addition, state laws prohibiting local governmental telecommunications enterprises are also justified as a means of ensuring that public funds are not placed at risk through commercial investments. Telecommunications is a volatile, technologically complex, and capital-intensive industry. News accounts are filled with examples of municipal-owned networks that have lost money, diverted funds from other pressing priorities, and overburdened taxpayers. States clearly have an interest in protecting the coffers of their political subdivisions, since the States could be forced to bail out such failed ventures or rescue localities from insolvency. And this, in turn, could lead to increased tax burdens on businesses and residents to cover these losses.

For example, in the late 1990s the city of Eugene, Oregon planned an 800-mile digital telecommunications network. The city scrapped those plans several years later when it concluded that its original estimate of $6 million was too low and its network would eventually cost $240 million to complete. Janet Colwell, *Broadband's Broad Price Tag, Faced With Hard Numbers, Eugene is Scaling Back Plans for a Citywide Telecom Network*, Oregon Business, Apr. 1, 2001, at 39. In Tacoma, Washington, the city built a fiber optic high-speed network called "Click!". In 1997, the city's budget estimate for the project was $40 million. By the year 2000, the city's costs had more than doubled, to almost $90 million, and Tacoma Public Utilities was forced to assess a more than 50% surcharge on customer bills.[15] In Grant County, Washington, a government utility raised electricity rates to subsidize losses for its telecommunications operations. Although the utility had invested $60 million in a fiber-optic network that served 9,000 households, in early 2003, only 4,100 taxpayers had purchased Internet, telephone or television services from the municipal utility and officials projected a scant $2 million in revenues for 2003, revenues which were not expected to cover operations and maintenance. Bert Caldwell, *Utilities May Want To Move Slowly*, The Spokesman-Review, Apr. 10, 2003, at A-16.

In sum, states such as Missouri must be permitted to decide whether their political subdivisions can or should compete in the private marketplace, as Missouri has done here. Indeed, at the end of the day, a State may well be liable for its political subdivisions' investment "mistakes" in this rapidly evolving and competitive market and should be entitled to take responsible steps to prevent such fiscal crises. All courts that have considered the question agree that the power of a State to oversee and control the activities of its localities is an essential aspect of sovereign authority. *See supra*, at 5-6. Entirely absent from the Eighth Circuit's decision is the recognition that the Missouri legislature has both the responsibility and the right to weigh these concerns and determine that the telecommunications marketplace is best left to private providers.

[15] Paul Guppy, *When Government Enters the Telecom Market: An Assessment of Tacoma's Click! Network*, 9.7 Progress on Point 5-6 (Feb. 2002), *at* http://www.pff.org/publications/pop9.7guppyclick.pdf.

## CONCLUSION

For these reasons, *amici curiae* USTA, Verizon, BellSouth, and CenturyTel respectfully urge this Court to reverse the decision of the Eighth Circuit.

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