No. 08-626

In the Supreme Court of the United States

LEVEL 3 COMMUNICATIONS, LLC,

Petitioner,

v.

CITY OF ST. LOUIS, MISSOURI.

Respondent.

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

BRIEF OF AT&T INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JEFFREY A. BERGER
Mayer Brown LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

JOHN MUENCH
Counsel of Record
SARAH E. RAUH
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

Counsel for Amicus Curiae

QUESTION PRESENTED

Amicus curiae will address the question of whether the Eighth Circuit's interpretation of 47 U.S.C. § 253(a), which widened a split among the courts of appeals, diverges from the text and purposes of the Telecommunications Act of 1996.

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INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae AT&T Inc. is one of the premier telecommunications companies in the United States and throughout the world. AT&T Inc.'s many affiliates (referred to collectively as "AT&T") serve tens of millions residences, businesses, and governmental institutions in all fifty states. AT&T operates one of the largest and most sophisticated global telecommunications networks, and is a leading provider of a variety of services, including local and long distance wireline, wireless, high-speed Internet, and Wi-Fi.

For over a century, AT&T has been on the technological vanguard of the industry. It strives to introduce cutting-edge services to its customers. Its never-ending mission to provide the newest, fastest, and best service offerings to cities and their residents implicates the public right-of-way in those locales.

Put simply, AT&T's network cannot function without facilities located in the public right-of-way. The rudiments of a telecommunications network—poles, wires, fiber optic conduits, equipment cabinets, and power sources—all occupy the right-of-way. Consequently, the maintenance and improvement of AT&T's network inextricably intertwines AT&T's operations with use of the public right-of-way.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

AT&T has a substantial interest in ensuring that Section 253 of the Telecommunications Act of 1996 (the "1996 Act") continues to serve one of its key purposes—fostering technological advancement in telecommunications for the benefit of all Americans. By virtue of its national network, AT&T has wide-ranging experience with a variety of local regulations concerning the public right-of-way. Consequently, AT&T is uniquely situated to offer a perspective on how municipal legislation limiting use of the public right-of-way can impede network maintenance and technological innovation.

SUMMARY OF THE ARGUMENT

The lower court's ruling spotlights a division among the circuits that this Court should resolve. The decisions of the Eighth Circuit (and other courts) reflect a crabbed, and ultimately incorrect, interpretation of the preemption provision in the 1996 Act. In the interest of encouraging the technological advancement of the telecommunications industry, Congress enacted Section 253. That provision bars state and local regulations that prohibit or have the effect of prohibiting the ability of entities to provide telecommunications services.

Some courts have construed Section 253 to preempt state or local regulations that impede or materially impair an entity's ability to provide services. However, the Eighth and Ninth Circuits rejected that view, adopting a far narrower test that in essence eliminates the "have the effect of prohibiting" clause from Section 253. By expressly diverging from the interpretation of Section 253 adopted by the First, Second, and Tenth Circuits, the lower court

construed the 1996 Act in a manner contrary to its text and purpose.

Apart from correcting this erroneous construction of Section 253, review is necessary for two key reasons. *First*, the threat to innovation is real. Currently, AT&T and other providers must run a gauntlet of state and local impositions before accessing the right-of-way to maintain and upgrade their networks. Many of these regulations are onerous to the point of deterring or significantly delaying development—the exact opposite of what Congress intended when it enacted the 1996 Act. *Second*, a uniform standard is needed to provide national providers like AT&T with the state-to-state and city-to-city consistency necessary to foster efficient technological advancement.

ARGUMENT

I. UNCHECKED STATE AND LOCAL REGULATION IMPEDES INNOVATION.

If permitted to stand, the lower court's constrained and incorrect interpretation of Section 253(a) would render the provision a dead letter. It would impose little to no limitation on state and local regulatory roadblocks that currently threaten to undermine development and deployment of advanced telecommunications services.

A. The Eighth Circuit's Ruling Contravenes The Text and Purpose of the 1996 Act.

As the petitioner explains, the lower court's ruling cannot be reconciled with the language and purpose of the 1996 Act. 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). The statute thus bars two types of regulations: (1) those that prohibit the ability of an entity to provide services; and (2) those that have the effect of prohibiting the ability of any entity to provide services. Under axiomatic canons of statutory construction, both the "prohibit" clause and the "have the effect of prohibiting" clause must be given meaning. *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) ("a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute") (internal quotation marks omitted).

Several courts have interpreted Section 253 with this "cardinal principle" in mind. The Second Circuit recognized the distinction between the two clauses, noting that "a prohibition does not need to be complete or 'insurmountable' to run afoul of § 253." *TCG N.Y., Inc.* v. *City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002). The court accordingly construed the phrase "have the effect of prohibiting" to encompass "obstacles" to the provision of telecommunications services. *Ibid.* These "obstacles" included (1) the city's right "to reject any application based on any" public interests deemed pertinent and (2) "the extensive delays" in the application process. *Ibid.* Because these "obstacles" affected the entity's "ability to compete," the ordinance violated Section 253. *Id.* at 77.

The Tenth Circuit similarly held that an ordinance imposing a complex application process—in

which the provider had to submit a map of existing facilities and "detailed preliminary engineering plans"—"create[d] a significant burden." *Qwest Corp.* v. *City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004). When combined with "broad discretionary language" in the ordinance, those provisions had "the effect of prohibiting [entities] from providing telecommunications services." *Ibid.* (internal quotation marks omitted). Moreover, the Court ruled that "[g]iven the substantial costs" it imposed, the ordinance "would 'materially inhibit' the provision of services" and accordingly violated Section 253(a). *Id.* at 1271.

Likewise, the First Circuit held that a gross revenue fee violated Section 253 because it "negatively affect[ed]" the entity's profitability by imposing "a substantial increase in costs." *Puerto Rico Tel. Co.* v. *Municipality of Guayanilla*, 450 F.3d 9, 18-19 (1st Cir. 2006). The cost increase placed "a significant burden" on the entity that had the effect of prohibiting its ability to provide services. *Id.* at 19.

Several principles may be distilled from these decisions. *First*, "[a] regulation need not erect an absolute barrier to entry in order to be found prohibitive." *Santa Fe*, 380 F.3d at 1269; *TCG*, 305 F.3d at 76 ("a prohibition does not need to be complete or 'insurmountable' to run afoul of § 253(a)").

Second, the proper test "in determining whether an ordinance has the effect of prohibiting the provision of services" is "'whether the ordinance materially inhibits or limit's the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'" *TCG*, 305 F.3d at 76 (quoting *In re Cal. Payphone Ass'n*, 12

FCC Rcd 14191, at ¶ 31 (1997)); *Puerto Rico*, 450 F.3d at 19.

Third, a municipal or state regulation "'materially inhibit[s]" (*Santa Fe*, 380 F.3d at 1270) or limits the ability of an entity to provide services if it "create[s] a significant burden" (*id*. at 1270; *Puerto Rico*, 450 F.3d at 19), imposes an "obstacle" (*TCG*, 305 F.3d at 76), forces an entity to incur "substantial costs" (*Santa Fe*, 380 F.3d at 1271; *Puerto Rico*, 450 F.3d at 19), or impairs an entity's "ability to compete" (*TCG*, 305 F.3d at 76-77).

An ordinance thus violates Section 253(a) if it "*impedes* the provision of 'telecommunications service.'" *Verizon Commc'ns, Inc.* v. *FCC,* 535 U.S. 467, 491 (2002) (emphasis added). An ordinance need not physically prevent an entity from providing services in order to trigger Section 253; any other rule would ignore that the language "have the effect of prohibiting" must mean something different than "prohibit." Instead, ordinances imposing "substantial costs" that chill development of new technologies or create "obstacles" that deter deployment "impede" the provision of services in violation of Section 253(a). *TCG*, 305 F.3d at 76; *Santa Fe*, 380 F.3d at 1271, *Puerto Rico*, 450 F.3d at 19.

The Eighth Circuit's ruling—along with the Ninth Circuit's recent decision in *Sprint Telephony PCS, L.P.* v. *County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (en banc)—departed from this well-grounded interpretation. Pet. App. 29a. The Eighth Circuit "disagree[d] with the approach of [its] sister circuits" because, in its view, "they reach a conclusion contrary to a complete analysis of the section." Pet. App. 30a. While the Eighth and Ninth Circuits recite the statutory standard, for all practical pur-

poses they have failed to give meaningful content to the "have the effect of prohibiting" language, and consequently their interpretation is not faithful to the fundamental purposes of the Act. See, *e.g.*, *Sprint*, 543 F.3d at 579-80 (ruling that a regulation did not "effectively prohibit[] the provision of wireless facilities" because "none of the requirements * * * prohibits the construction of sufficient facilities").

To begin with, the constricted view of Section 253 adopted by the Eighth and Ninth Circuit disregards that section's focus on state and municipal regulation that "may prohibit or have the effect of prohibiting *the ability* of any entity" to provide such services. The lower court paid no heed to the use of the word "ability," which refers to the "[p]hysical, mental, financial, or legal power to perform." WEBSTER'S NEW COLLEGE DICTIONARY 2 (1999). Local or state regulations that create "obstacles" to deployment (*TCG*, 305 F.3d at 76), impose "substantial costs" on such deployment (*Santa Fe*, 380 F.3d at 1271; *Puerto Rico*, 450 F.3d at 19), or affect an entity's "ability to compete" (*TCG*, 305 F.3d at 77) may "impede" the financial power of an entity to offer telecommunications services.

Yet, the rulings in the Eighth and Ninth Circuits, which minimize the "have the effect of prohibiting" language, as a practical matter, may insulate such regulations from the scrutiny that Congress intended Section 253 to create. Municipalities may "impede" (*Verizon*, 535 U.S. at 491) the provision of telecommunications services—and thus may effectively prohibit an entity's ability to provide those services—through subtle, but nonetheless unreasonably cumbersome requirements for access to the

right-of-way. See *infra* Section II.B. The high burden of proof the Eighth and Ninth Circuits would impose on providers limits the opportunities to challenge such regulations. For instance, the Ninth Circuit ruled that an ordinance only "would effectively prohibit" an entity "from providing services" if it imposed a requirement with which the entity could not physically comply and still offer services, such as undergrounding wireless facilities. *Sprint*, 543 F.3d at 580.

Such a test conflates "prohibit" with "have the effect of prohibiting," writing the latter clear out of the statute. Under the Eighth and Ninth Circuit rules, even if a regulation imposes "a substantial increase in costs" (*Puerto Rico*, 450 F.3d at 19), or impairs an entity's "ability to compete" (*TCG*, 305 F.3d at 76-77) Section 253 would afford little protection. For instance, both a reduction in the geographic scope of a service or a delay in the deployment of a new service caused by state and local regulations affect an entity's "ability to compete," but in the Eighth and Ninth Circuits, a provider faced with such impediments may have no remedy.

The Eighth and Ninth Circuits' rulings also run contrary to the purposes of the 1996 Act. "Congress enacted the Telecommunications Act of 1996 (TCA) to promote competition and higher quality in American telecommunications services and to 'encourage the rapid deployment of new telecommunications technologies.'" *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 115 (2005) (internal citation omitted). Yet, unassailable restrictions on providers' abilities to make network improvements in the public right-of-way discourages precisely the type of technological advancement that Congress sought to

promote. As explained below, local regulations have been and continue to be a brake on the rapid deployment of cutting-edge services, such as enhanced wireless, high speed data transmission, and Internet Protocol-based voice and video. Whereas the lower court's constrained reading of Section 253 would fail to curb such state and local regulatory excesses, the First, Second, and Tenth Circuits have adhered to an interpretation of Section 253 that is more faithful to its text and purpose.

B. Providers Face a Gauntlet of Barriers to the Public Right-of-Way.

As providers strive to offer new services and improve their existing networks—moving towards the realization of the 1996 Act's goals—they face a complex web of state and local impediments to their use of the public right-of-way.

More established telecommunications entities need to access the public right-of-way to provide new and advanced services no less than new entrants, such as Level 3. Indeed, the 1996 Act equally protects incumbents' and competitors' access to the right-of-way. This equivalency reflects, among other things, the notion that one locality's incumbent is another's new entrant. While AT&T serves as an incumbent local exchange carrier in some areas, it serves as a competitive local exchange carrier in others. Moreover, innovation is hardly the unique province of newcomers: established entities are powered by strong engines of technological development.[2]

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[2] AT&T does not concur with the petitioners' implication that there is a distinction to be made between new entrants and established providers for purposes of Section 253. Moreover, AT&T disagrees with the notion that its affiliate (Southwestern

In many localities, established providers already own and operate facilities in the right-of-way. To maintain the strength of their existing networks, they must perform work on those facilities in the right-of-way. For example, if underground wires begin to outlast their natural lives, they must be replaced, a form of maintenance that often necessitates encroachment into the right-of-way.

Construction of new facilities needed to deploy cutting-edge technology similarly necessitates access to the public right-of-way. For instance, providers may need to place new equipment near public roads and sidewalks. The construction and placement of this new equipment may require excavation and construction of new conduits. Laying new fiber-optic cable, for instance, often requires digging in and eventually resurfacing the right-of-way.

Yet, in city after city, legislative roadblocks individually and cumulatively impede the ability of AT&T and other providers to access the right-of-way for such improvement. A patchwork of regulations control how and when they may perform necessary work to maintain and improve their networks. Fee and franchise requirements are frequent. Permitting ordinances are ubiquitous; in some instances, a provider must obtain multiple permits to begin construction of a single facility in the public right-of-way. Conditions often accompany the permits, and they frequently place significant financial and administrative burdens on providers.

Bell Telephone Company) somehow is free from certain taxes and fees in St. Louis to which petitioner must adhere. Pet. 6. Nonetheless, AT&T agrees with the petitioner that the Eighth Circuit misinterpreted Section 253, exacerbating a circuit split desperately in need of resolution by this Court.

Examples of the impositions faced by providers around the country help to illustrate the problem:

- Providers of telecommunications services are often subjected to mandatory disclosure of sensitive financial, proprietary, and strategic information that may constitute an effective prohibition on the ability of an entity to create and provide innovative telecommunications services. *Santa Fe*, 380 F.3d at 1262; *TCG,* 305 F.3d at 81. Naturally, state and local governments need to know some information about telecommunications providers operating in the right-of-way.

But the "submission of a wide range of financial information" bearing no relation "to use of the city's rights-of-way" may force providers to reveal their strategic plans years into the future. *AT&T Comms. of Southwest, Inc.* v. *City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998) (AT&T demonstrated a substantial likelihood of success on the claim that Section 253(a) preempted the franchise ordinance where many of the requirements were "totally unrelated to use of the city's rights-of-way"); see *BellSouth Telecomms., Inc.* v. *Town of Palm Beach*, 252 F.3d 1169, 1180 (11th Cir. 2001) (ordinance's informational requirements "not limited to, requests for information concerning the rights-of-way").

Similarly, telecommunications providers are often required to submit detailed maps that show the precise location of existing and future facilities. *XO Missouri, Inc.* v. *City of Maryland Heights*, 256 F. Supp. 2d 987, 990, 997 (E.D. Mo. 2003); *Qwest Corp.* v. *City of Portland*, No. Civ. 01-1005JE, 2006 WL 2679543, at *7 (D. Or. Sept. 15, 2006). Such mapping requirements may impose "substantial costs." For example, a mandate that maps be provided in a

particular format may result in extraordinary expenses if any entity does not maintain that information in the desired format and has to transform the information to comply with an ordinance. *XO Missouri*, 256 F. Supp. 2d at 992 (ordinance required "provider to furnish maps of the location of all its facilities in a format designated by the City Engineer"); *NextG Networks of California, Inc.* v. *County of Los Angeles,* 522 F. Supp. 2d 1240, 1249-1250 (C.D. Cal. 2007) (ordinance required providers to "produce various customized maps * * * in the number prescribed and drawn to a scale specified by the Director").

Another cost, perhaps even more significant, is the price of competitive disadvantage. If a competitor can learn from a public submission about a provider's planned expenditures on new facilities in a city, it may gain an advantage in terms of its own competitive decisions. The price of deployment of facilities used to support new and innovative telecommunications services then becomes disclosure of providers' strategic plans to any and all competitors.

Such disclosures may affect an entity's "ability to compete" (*TCG*, 305 F.3d at 76-77) and cause "a substantial increase in costs" (*Puerto Rico*, 450 F.3d at 19) by obviating the first-mover advantage that is critical to success—and provides the financial impetus for innovation—in the telecommunications industry. AT&T, and perhaps other providers as well, have either not deployed facilities that would have provided new services, or faced significant delays in deploying such facilities, as a result of onerous informational requirements that bear no rational relationship to reasonable right-of-way management. Such regulations "impede," "materially inhibi[t],"

and limit a provider's "ability to compete." *Verizon*, 535 U.S. at 491; *TCG*, 305 F.3d at 76-77.

- Even after providers comply with an array of ordinances (often at great cost), they may still be denied access to the public right-of-way by acts of unfettered administrative discretion. *Santa Fe,* 380 F.3d at 1270 (city had "unfettered discretion" to deny access to public right-of-way); *TCG*, 305 F.3d at 81 (ordinance permitted consideration of any factor deemed to be in the public interest in deciding whether to grant a franchise); *XO Missouri*, 256 F. Supp. 2d at 996 (license could be denied based on any factors the "administrator may deem relevant") (internal quotation marks omitted); *NextG (Los Angeles)*, 522 F. Supp. 2d at 1251 (same). For some cities, highly subjective aesthetic considerations alone can determine whether a provider may access the right-of-way. *Sprint PCS Assets, L.L.C.* v. *City of La Canada Flintridge*, 435 F.3d 993, 994 (9th Cir. 2006) (administrator could deny permit if proposed project had a "negative aesthetic impact"); *NextG Networks of California, Inc.* v. *City of Huntington Beach,* SACV 07-1471, slip op. at 25 (C.D. Cal. Feb. 7, 2008) (same).

Decision-making marked by unbounded discretion or subjective considerations invokes the "prohibit" clause because an arbitrary decision to deny access to the right-of-way directly bars the provision of services. *Santa Fe*, 380 F.3d at 1270 ("broad discretionary language has been repeatedly held to be prohibitive"). It also implicates the "have the effect of prohibiting" clause because the lack of certainty combined with the "substantial costs" of complying with state and local regulations (*id*. at 1270-71) may

"impede" or "materially inhibit" the provision of services.

- Excessive and unreasonable fees and payments unrelated to the management of the right-of-way may also have the effect of prohibiting the ability of a provider to offer new services. While Congress recognized that some fees are appropriate if they relate to the management of the right-of-way (see 47 U.S.C. § 253(c)), some municipalities demand payment of significant fees bearing no connection to expenses incurred by the City in governing the right-of-way. *Puerto Rico*, 450 F.3d at 12 (imposing a 5% gross revenue fee); *City of Dallas*, 8 F. Supp. 2d at 593 (imposing a 4% gross revenue fee on *all* operations in Dallas regardless of connection to the right-of-way). Others require providers to incur the significant cost of creating excess conduit capacity and dedicating it to the municipality. *Santa Fe*, 380 F.3d at 1272-73 (requiring entity to build double the conduit capacity and dedicate the excess to the City, at an estimated cost increase of 60%); *City of Dallas*, 8 F. Supp. 2d at 593 (requiring dedication of ducts and fiber optic strands to the City's exclusive use). While the construction of a modest amount of conduit space may not impede the ability of providers to offer new services, excessive requests for in-kind transfer of extra conduit space may impose precisely the "substantial costs" (*Santa Fe*, 380 F.3d at 1271) and concomitant decline in profitability (*Puerto Rico*, 450 F.3d at 19) that "impede" or "materially inhibit" the provision of services.

- Obtaining permits may be a normal cost of doing business, but in some localities telecommunications providers face permitting processes "so burdensome and Byzantine as to erect a barrier to providing

telecommunications services." *NextG* (*Los Angeles*), 522 F. Supp. 2d at 1250. Overly complex, layered, and time-consuming permitting standards and procedures can pose material, and at times prohibitive, costs. *NextG Networks of California, Inc. (Huntington Beach)*, slip op. at 22-23; *NextG Networks of California, Inc.* v. *City and County of San Francisco*, No. C 08-00958, 2008 WL 2563213, at *9 (N.D. Cal. June 23, 2008). In some instances, a convoluted permitting process may take so much time as to eliminate the competitive advantage from being the first on the market, and thus the potential profitability of an innovation. See *supra* p. 12. This is especially true for large-scale deployments of innovative network improvements where compliance with draconian permitting processes is necessary for each and every encroachment into the right-of-way. Such "extensive delays" are precisely the "obstacles" that Section 253(a) prohibits. *TCG*, 305 F.3d at 76.

- As a condition of obtaining a permit, some municipalities require providers to forego their rights to judicial recourse. *TCG*, 305 F.3d at 82. Such provisions force providers to waive their right to challenge the legality not only of burdensome processes that affect the ability of entities to offer services, but also other municipal regulations unrelated to the right-of-way. *Ibid*. In essence, providers are asked to leave their legal rights at the city line.

- Liability-shifting provisions place onerous risks on providers. For instance, some municipalities require providers to indemnify against any liability arising from use of the public right-of-way, even liability that results from the City's own negligence. Pet. 5. Such open-ended risks for incurring "substantial costs" related to litigation may "'materially

inhibit' the provision of services" in violation of Section 253(a). *Santa Fe*, 380 F.3d at 1271.

- Removal provisions further give providers pause before deploying new facilities. In some instances, municipal regulations allow a city to order the removal of a provider's facilities for any "material violation" of *any* municipal law. *XO Missouri*, 256 F. Supp. 2d at 997. Oftentimes, there is little or no guidance as to what constitutes a material violation. *Ibid*. Naturally, providers may be unwilling to invest millions in network construction if they face a complete loss of value years down the line because of a violation of a law that has no relationship to right-of-way use.

Individually, these regulatory roadblocks undercut Section 253's promise of swift technological advancement. But even if any single category of regulation did not impede the provision of services by itself, the cumulative weight of state and local regulation may violate Section 253. The burdens on providers multiply quickly. In most instances, a single permit will not open the right-of-way for all necessary repair or improvement. Instead, providers must comply with whatever processes exist for every discrete project in the public right-of-way. In the aggregate, these regulations may cause a material "increase in a [company's] costs" and consequently "reduce the profitability of its operations." *Puerto Rico*, 450 F.3d at 18-19. Such "substantial costs" may create "a significant burden" on the ability of providers to offer services. *Santa Fe*, 380 F.3d at 1270-71.

In sum, AT&T and other providers have faced and will continue to face a panoply of state and local regulations that share one common feature: they "impede" or "materially inhibit" the provisions of ser-

vices. Onerous regulatory burdens that mandate the release of proprietary information or the waiver of a provider's right to challenge local laws deter entities from spending the time and energy to improve their networks. Moreover, there is a significant disincentive for providers to make a large capital investment in facility upgrades if a municipality can order their removal for vaguely specified violations of other municipal laws.

Such regulations not only threaten to obstruct technological innovation, but also to impair maintenance of our nation's existing telecommunications network. If routine upkeep of network functions cannot occur without acquiescence to illegal regulatory burdens, providers may have less incentive to perform such repairs given their "substantial costs." *Santa Fe*, 380 F.3d at 1271. The resulting disrepair of our national telecommunications infrastructure cannot be what Congress had in mind when it enacted Section 253.

Perhaps most alarming is that many of the regulations adopted by state and local governments bear little relation to control of the public right-of-way. Congress unquestionably preserved *some* state and local power to manage the public rights-of-way. 47 U.S.C. § 253(c). However, forcing a provider to cede its legal rights to challenge state or local laws hardly constitutes management of the public way. Nor does the exaction of unreasonable in-kind benefits—such as the forced creation of excess conduit space solely for a government's benefit—represent a justifiable exercise of right-of-way management.

Congress intended Section 253 to prevent this result. The 1996 Act was supposed to "reduce regulation in order to secure lower prices and higher qual-

ity services for American telecommunications consumers." Preamble, Pub. L. No. 104-104, 110 Stat. 56, 56 (1996). Congress used deregulation to "encourage the rapid deployment of new telecommunications technologies." *Ibid*; *see also* H.R. Conf. Rep. No. 104-458, at 113 (1996) (Congress created the Act "to provide for a pro competitive, de-regulatory national policy framework designed to accelerate rapidly private-sector deployment of advanced telecommunications and information technologies"). The rejection of the First, Second, and Tenth Circuit standard conflicts with these goals. By essentially negating the "have the effect of prohibiting" clause, the lower court's ruling opens the door to myriad local "obstacles" to the right-of-way. Those most harmed are ultimately those Congress sought to help: state and local residential consumers, businesses, and governments that benefit from access to the best and newest technology.

This case presents the Court with an appropriate vehicle to place Section 253 back on course. The Court should reverse the constrained reading of Section 253 adopted by the lower court. Instead, it should recognize that the First, Second, and Tenth Circuits better adhere to the text and purpose of Section 253 and protect against local regulations that impair the financial and legal capability of a provider to offer services. Such a ruling would be a critical step in ensuring that the 1996 Act protects the development of new technologies.

II. REVIEW IS NEEDED TO DEVELOP A UNIFORM, NATIONAL RULE.

The circuit split described in the petition has material repercussions for providers with nationwide networks, like AT&T, which face conflicting Section

253 standards across the country. "[A]n array of local telecommunications regulations that vary from community to community is likely to discourage or delay the development of telecommunications competition." *In re TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, 21442 (1997). To mitigate such disincentives for technological advancement, the Court should establish a uniform standard for Section 253.

The current patchwork approach creates a strategic quandary for providers: it is difficult to plan and deploy network improvements when a carrier faces disparate legal standards that vary depending on the circuit. AT&T, for example, is a nationwide provider of wireline, wireless, and data services. It constantly seeks to upgrade its network and deploy new and innovative services in all fifty states in which it operates. Yet, a municipal regulation that may be struck down in New York and Denver may pass muster in Kansas City or San Francisco. While regulations naturally will vary from jurisdiction to jurisdiction, the measure of their legality should remain constant throughout the land.

State-by-state inconsistency is the antithesis of the uniformity necessary to achieve the stated goals of the 1996 Act. The unpredictability inherent in navigating a welter of municipal regulations analyzed under differing interpretations of Section 253 can impede "the rapid deployment of new telecommunications technologies." Preamble, 110 Stat. at 56. It becomes extremely difficult for providers to create plans that gaze several years into the future when it is not certain the test by which a municipal ordinance will be examined.

The result may be an unfortunate disparity of offerings. For example, the services available in Albuquerque in 2008 may not be found in St. Louis until several years later, if at all, when all state and local regulatory hurdles can be cleared. In the meantime, consumers, businesses, and governments cannot obtain and use the newest and best technologies. Costs rise as administrative hindrances increase, and the companies are required to maintain multiple networks or technologies, undermining the purpose of the 1996 Act "to secure lower prices * * * for American telecommunications consumers." Preamble, 110 Stat. at 56.

The interest in development of advanced telecommunications systems is national, not local. As the FCC has explained, "[t]he telecommunications interests of constituents * * * are not only local." Rather, "[t]hey are statewide, national and international as well." *In re TCI Cablevision*, 12 FCC Rcd at 21442. "[A] patchwork quilt of differing local regulations may well discourage regional or national strategies by telecommunications providers, and thus adversely affect the economics of their competitive strategies." *Ibid.*

The lack of uniformity also creates tension with another focus of the 1996 Act—universal service. Congress articulated several principles of universal service in the Act, including a commitment that "[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation." 47 U.S.C. § 254(b)(2). Accordingly, providers must still provide certain services even if state and local regulations impose "substantial costs" (*Santa Fe*, 380 F.3d at 1271) or "negatively affect" an entity's profitability (*Puerto Rico*, 450 F.3d at 18). In

other industries, an entity that faces such impediments may cease serving that area, but telecommunications providers have no viable option for "exit" where they must comply with universal service and/or carrier of last resort obligations. Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine,* 91 Colum. L. Rev. 473, 506-508 (1991). Even if discontinuing service were an economically viable option—and in many instances it is not—providers like AT&T cannot refuse to provide service.

By granting the petition and resolving the issue, the Court will infuse clarity into a statutory context desperately in need of it. The unduly narrow standard adopted by the Eighth and Ninth Circuits does not accord with the statutory text, which restricts state and local regulation that either "prohibits" or has "the effect of prohibiting" a provider's ability to offer services. See *supra* pp. 6-8. The realignment of Section 253 with Congress's purposes will create a uniform standard. Such consistency will assist providers in their quest to bring the most advanced telecommunications services to market as rapidly as possible. It will alleviate the current confusion that hampers providers' abilities to satisfy the goals of the Act.

"The Telecommunications Act of 1996 was nothing if not a complex balancing act among many conflicting interests. Not the least of these were the interests of state and local governments in continuing to regulate certain aspects of this industry, and the need for a uniform federal policy." *Aegerter* v. *City of Delafield*, 174 F.3d 886, 887 (7th Cir. 1999). The lower court's decision swings the pendulum too far in the direction of state and local interests, undercut-

ting the uniform federal policy Congress sought to create. This case presents the appropriate vehicle to set the statutory mechanism back to equilibrium.

CONCLUSION

The Court should grant the petition and reverse the decision of Eighth Circuit as inconsistent with the text and purpose of Section 253.

Respectfully submitted.

JEFFREY A. BERGER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

JOHN MUENCH
Counsel of Record
SARAH E. RAUH
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

Counsel for Amicus Curiae

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