

Case Nos. 05-56076, 05-56435

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPRINT TELEPHONY PCS L.P.,
Plaintiff-Appellant/Cross-Appellee,

vs.

COUNTY OF SAN DIEGO, et al.,
Defendants-Appellees/Cross-Appellants.

**BRIEF OF AMICI CURIAE NATIONAL LEAGUE OF
CITIES, ET AL. IN SUPPORT OF DEFENDANTS-
APPELLEES COUNTY OF SAN DIEGO, ET AL.**

On Appeal from the United States District Court
for the Southern District of California

Rehearing En Banc

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Amici curiae submit this brief in support of Defendants-Appellees the County of San Diego, et al. (the “County”).¹ The district court concluded that 47 U.S.C. § 253, which was enacted as part of the Telecommunications Act of 1996 (“TCA”), preempted the County’s Wireless Telecommunications Facilities zoning ordinance (“WTO”). Amici curiae urge this Court to reverse the district court’s decision granting the plaintiff’s motion for summary judgment on its § 253 claim for a number of reasons.²

First, in basing preemption on § 253, the district court failed to heed the clear language of 47 U.S.C. § 332(c)(7)(A), which provides that “nothing in this chapter shall limit or affect the authority” of a local government “over decisions regarding the placement, construction, and modification” of wireless facilities. This Court should find that, consistent with Congressional intent, 47 U.S.C. § 337(c)(7) is the exclusive means of challenging the WTO’s regulation of wireless facilities construction.

Second, the district court failed to consider the clear language of 47 U.S.C. § 332(c)(3) – a provision of the Communications Act that pre-dates the TCA – and that preempts barriers to market entry of wireless carriers. Rather than nullifying § 332(c)(3), as the district court in effect did, this Court should find that preemption challenges by wireless carriers to local barriers to entry must be brought under § 332(c)(3), and not under § 253.

¹ Amici curiae are organizations that represent the interests of local governments. The identities of amici curiae are set forth in the attached appendix.

² All parties have consented to amici filing this brief.

Third, the district court failed to consider the differences between local regulation over use of the public rights-of-way and the exercise of local zoning authority. In the TCA, Congress separated the two issues by enacting § 253 and § 332(c)(7). As a result, this Court should find that § 253 does not preempt the WTO to the extent that it regulates wireless facilities construction on private property.

Fourth, the district court at the very least should have harmonized § 253 and § 332(c)(7). Congress intended § 332(c)(7) to establish the exclusive limitation on local regulation of wireless facilities. This Court should find therefore that local requirements that would be permissible under § 332(c)(7) cannot otherwise be preempted by § 253. Most notable among the requirements that the courts in the Ninth Circuit have found are preempted by § 253, but are allowed under § 332(c)(7), are public hearings and the discretion to deny permits to construct wireless facilities. See *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1176 (9th Cir. 2001); *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 719-20, 727 (9th Cir. 2005).

Fifth, assuming this Court agrees with the district court that plaintiff may challenge the WTO under § 253, this Court should find that *Auburn* and its progeny (which the district court was compelled to follow), are based on an overbroad, and hence erroneous, construction of the nature and extent of federal preemption under § 253. The *Auburn* panel made two fatal errors. First, the panel failed to consider the presumption against preemption that applies when local governments regulate in areas like telecommunications that are traditionally subject to local regulation. Instead, the panel held that preemption is “virtually absolute.” 260 F.3d at 1175. Second, the panel compounded this error by using an ellipsis when seemingly quoting the statutory language. The panel incorrectly

found that § 253(a) preempts local requirements that “may. . . have the effect of prohibiting the provision of such services.” *Id.* (internal quotation marks omitted; ellipsis in original). By deleting the words “prohibit or,” the panel altered the meaning of the statute in ways not intended by Congress.

Under the plain language of § 253(a), local requirements may not prohibit or have the effect of prohibiting the provision of telecommunications services. No reasonable construction of § 253(a) would allow a court to preempt a local requirement simply because it “may have the effect of prohibiting the provision of telecommunications services.” Nonetheless, as a result of *Auburn*’s two errors, courts in this circuit, including the district court here, are construing § 253(a) to effectively bar local regulation of telecommunications carriers even where there is *no evidence* in the record that the local ordinance *has actually prohibited* the provision of any service. See *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004) (finding preemption despite the absence of any evidence that the local ordinance had “effectively prohibited” plaintiff from providing “a single telecommunications service”); *Qwest Corp. v. City of Berkeley*, 433 F.3d 1253, 1257 (9th Cir. 2006) (finding that the court need not consider “the actual impact” of the local ordinance); *Sprint Telephony PCS, L.P. v. County of San Diego*, 377 F. Supp. 2d 886, 893 (S.D. Cal. 2005) (finding that there is no need to prove that a local ordinance “actually prohibit[s]” service).

Because of *Auburn*, those courts have made what should be a difficult burden – proving preemption of a local ordinance on a facial challenge – into a simple case of showing that even the most innocuous local requirement (*i.e.* that carriers provide local agencies with maps of their telecommunications facilities) may have the effect of prohibiting the provision of telecommunications services. This has led to the absurd result that courts in the Ninth Circuit routinely grant

summary judgment on § 253 preemption claims. They do so even where the plaintiffs are carriers that have served local areas for over one hundred years and where they make millions of dollars per year serving those areas, simply because these carriers could show that a local requirement might have the effect of prohibiting the provision of telecommunications services. Courts do so even though these carriers *could never* have proven that the ordinance actually prohibited any service. This Court should reverse the decision of the district court with respect to plaintiff's § 253 claim and, in so doing, overrule *Auburn*.

II. ARGUMENT

A. THE DISTRICT COURT USED THE WRONG STANDARDS TO DETERMINE WHETHER FEDERAL LAW PREEMPTED THE WTO

1. The District Court Failed To Apply the Presumption Against Preemption

Federal preemption of state and local laws is based on the Supremacy Clause of the United States Constitution (Art. VI, cl. 2), which invalidates State and local laws that “interfere with, or are contrary to federal law.” *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712 (1985) (internal quotation marks omitted). Acting pursuant to its enumerated powers, Congress can expressly preempt State and local laws. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (intent to preempt can be “explicitly stated in the statute’s language”).³

³ In § 253, § 332(c)(3), and § 332(c)(7), Congress expressly preempted certain types of local regulation of telecommunications carriers. See, e.g. *Auburn*, 260 F.3d at 1175 (there can be “no doubt” that § 253 “preempts expressly”); see also P.L. 104-104, Title VI, § 601 (reprinted in 47 U.S.C. § 152 (notes)) (“This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.”).

“[A] court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption.” *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Generally, preemption “will not lie unless it is the clear and manifest purpose of Congress.” *Id.* (internal quotation marks omitted).

When examining an express preemption provision, a court “must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ pre-emptive intent.” *CSX Transportation*, 507 U.S. at 664. Only then, and “as need be,” should a court turn its attention to the “structure and purpose” of the federal act. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 655 (1995). A court may also look to the legislative history to aid in its interpretation of the law where the scope of federal preemption is not clear from the text of the statute itself. *Topa Equities, Ltd. v. City of Los Angeles*, 342 F.3d 1065, 1070-71 (9th Cir. 2003). If need be, a court can look to any of these sources because, ultimately, the court’s determination as to the scope of federal preemption “must rest primarily on a fair understanding of congressional purpose.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996) (internal quotation marks omitted).

The Ninth Circuit had the opportunity to examine the scope of federal preemption under § 253(a) even prior to *Auburn*. In a well-reasoned decision, which *Auburn* failed to even cite, the court held that “federal preemption of state regulation in the area of telecommunications must be clear and occurs only in

limited circumstances.”⁴ *Communications Telesystems International v. California Public Utilities Commission*, 196 F.3d 1011, 1017 (9th Cir. 1999) (“CTP”). In so holding, the court implicitly recognized the “presumption against preemption.” In cases like this, the presumption requires that a court give an express preemption provision a “narrow interpretation.” *Air Conditioning and Refrigeration Institute v. Energy Resources Conservation and Development Commission*, 410 F.3d 492, 496 (9th Cir. 2005). Because of this presumption, a court cannot find that federal law preempts a local ordinance, based on a facial challenge, unless the court finds that “all possible” applications of the ordinance conflict with federal law. *Chemical Specialties Manufacturers Association, Inc. v. Allenby*, 958 F.2d 941, 943 (9th Cir. 1992).

In addition, where, as here, an express preemption provision is limited by a savings clause, a court must limit the scope of preemption to those areas clearly preempted by the applicable federal law:

In trying to extrapolate congressional intent in a case like this, when congressional language seems simultaneously to preempt everything and hardly anything, we have no choice but to temper the assumption that the ordinary meaning accurately expresses the legislative purpose, with the qualification that the historic police powers of the States were not meant to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 365 (2002) (internal quotation marks, alterations, and citations omitted).

⁴ Land use and management of the public rights-of-way are also areas traditionally reserved to local government. See *Cox v. State of Louisiana*, 379 U.S. 536, 554 (1965).

As discussed below, in relying on *Auburn* to grant plaintiff's motion for summary judgment, the district court overlooked these general principals. The district court erred, as did *Auburn* before it, by basing its decisions on an overly expansive view of the scope of federal preemption of local requirements under § 253(a), and an overly narrow view of the scope of the authority reserved to local governments under 47 U.S.C. § 253(c) to manage the public rights-of-way.

2. The District Court Ignored Well-Settled Principles of Statutory Construction

In finding that § 253 preempted the WTO, the district court ignored well-settled principles of statutory construction. First, whenever possible, the “provisions of a statute should be read so as not to create a conflict.” *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 370 (1986). Second, a court should avoid interpreting a statute in such a way that would render other sections redundant, inconsistent, superfluous or meaningless. *Padash v. INS*, 358 F.3d 1161, 1170-71 (9th Cir. 2004). Third, if a statute does not define a term, a court should construe it in accordance with its “ordinary, contemporary, common meaning.” *United States v. Smith*, 155 F.3d 1051, 1057 (9th Cir. 1998). Fourth, the title of a statute is a tool that is “available for the resolution of a doubt about the meaning of a statute.” *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (internal quotation marks omitted). As explained below, the failure to apply these basic principles contributed to the district court's erroneous preemption determination.

B. THE DISTRICT COURT SHOULD NOT HAVE APPLIED § 253 TO THE WTO

1. Section 332(c)(7) Provides Plaintiff with the Exclusive Remedy for Challenging Local Requirements for Wireless Facility Siting

In the TCA, Congress included separate provisions to preempt State and local requirements for wireline carriers (§ 253) and wireless carriers (§ 332(c)(7)).⁵ Section 332(c)(7)(A) states that “nothing in this chapter shall limit or affect the authority” of local governments “over decisions regarding the placement, construction, and modification of personal wireless service facilities,” subject only to the limitations in § 332(c)(7)(B). This section, therefore, clearly applies to the WTO because the WTO governs decisions over the placement and construction of wireless facilities throughout the County. Section 332(c)(7) explicitly forbids the courts from preempting under § 253 local requirements for the placement of wireless facilities. Consistent with this Court’s duty to find a meaning in every provision in the Communications Act, this Court must find that plaintiff’s claim that federal law preempts the WTO should have been brought under § 332(c)(7), not § 253.

The unusually clear legislative history shows that Congress intended § 332(c)(7) to safeguard precisely the type of local regulation of wireless facilities that the County exercised in the WTO. In § 332(c)(7), Congress made a choice to maintain a measure of State and local control over the placement of wireless facilities. Congress intended this section to prevent “preemption of local and State

⁵ The reasons for the two separate provisions were obvious in 1996 when Congress enacted the TCA. Until recently, wireless carriers built their facilities on private property – large towers near major roadways or tall buildings in urban areas. *See generally* http://en.wikipedia.org/wiki/Cell_site; http://en.wikipedia.org/wiki/Distributed_Antenna_System.

land use decisions and preserve[] the authority of State and local governments over zoning and land use matters except in . . . limited circumstances.” H.R. Conf. Rep. No. 104-458, at 207-08 (1996) (“Conf. Rep.”).⁶ The two “limited circumstances” that Congress intended to be exceptions to the preservation of local authority are found in § 332(c)(7)(B)(i). See *id.* at 208.

First, local requirements may not “unreasonably discriminate among providers of functionally equivalent services.” 47 U.S.C. § 332(c)(7)(B)(i)(I). Congress’s explanation of this restriction underscores the validity of the purposes of the WTO:

The intent of the conferees is to ensure that a State or local government does not . . . unreasonably favor one competitor over another. The conferees also intend that the phrase “unreasonably discriminate among providers of functionally equivalent services” *will provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements* even if those facilities provide functionally equivalent services.

Id. at 208 (emphasis added). Notably, Congress expressly stated that local governments retain the discretion to deny permits based on “visual, aesthetic or safety concerns.”

Second, local requirements may not “prohibit or have the effect of prohibiting personal wireless services.” 47 U.S.C. § 332(c)(7)(B)(i)(II). Again, Congress spoke directly in support of the WTO: “It is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made on a case-by-case basis.” *Id.*

⁶ A conference report is considered the most reliable evidence of legislative intent “because it represents the final statement of the terms agreed to by both houses.” *Auburn Housing Authority v. Martinez*, 277 F.3d 138, 147 (2d Cir. 2002).

The district court here incorrectly focused its attention on the use of the word “decisions” in § 332(c)(7). *Sprint*, 377 F. Supp. 2d at 891 (“section 253(a) applies to facial challenges of ordinances whereas section 332(c)(7) applies to individual siting *decisions* made under an ordinance”). In so doing, the district court ignored the language preceding the word “decisions” in § 332(c)(7)(A), which is the “authority of a State or local government . . . over decisions.” Local governments exercise their “authority . . . over decisions” by enacting ordinances that contain the requirements for obtaining permits.

The district court erred, therefore, by construing § 332(c)(7)(A) to just apply to “*decisions*.” This section clearly provides a legal basis to challenge local *regulations*. See *MetroPCS*, 400 F.3d at 730 (“A city-wide general ban on wireless services would certainly constitute an impermissible prohibition of wireless services under the TCA.”).

This Court should find that the district court erred by preempting the WTO under § 253.

2. Section 332(c)(3) Provides Plaintiff with the Exclusive Remedy for Challenging Local Barriers To Market Entry

Before Congress enacted the TCA, Congress amended the Communications Act to preempt State and local authority to regulate “the entry of or the rates charged” by wireless carriers. 47 U.S.C. § 332(c)(3)(A). This section preempted “the ability [of State’s and local government’s] to authorize wireless carriers to operate.” *GTE Mobilnet of California L.P. v. City and County of San Francisco*, 440 F. Supp. 2d 1097, 1107 (N.D. Cal. 2006).

For this reason, this Court should find that Congress did not intend § 253(a) to apply to wireless carriers. Congress had already prevented local governments from erecting barriers to these carriers’ efforts to enter the local markets. Contrary

to well-settled principles of statutory construction, allowing plaintiff to proceed under § 253(a) to prove a barrier to entry would essentially nullify § 332(c)(3). Indeed, Congress addressed this issue in the TCA, when it stated the “[n]othing in [§ 253] shall affect the application of section 332(c)(3)” to wireless carriers. 47 U.S.C. § 253(e). This Court should find, therefore, that to the extent plaintiff is challenging the WTO as a barrier to entry, it must assert that claim under § 332(c)(3).

3. Section 332(c)(7) Provides Plaintiff with the Exclusive Remedy for Challenging Local Zoning Ordinances

The WTO regulates both a wireless carrier’s use of private property and the public rights-of-way. See *Sprint*, 377 F. Supp. 2d at 897. The district court failed to recognize the significance of this fact when it held that § 253(a) preempted the WTO.

Section 332(c)(7) is entitled “Preservation of local zoning authority.” Under well-settled principles of statutory construction, this Court must give meaning to Congress’s use of the word “zoning” in § 332(c)(7). Because Congress did not define the word, this Court must look to its plain and ordinary meaning.

The word zoning is commonly defined as the “legislative division of a region, most commonly a city, into separate districts with different regulations within the districts for land use, building size, etc.” 8 Eugene McQuillin, *Law of Municipal Corporations*, § 25.01 (3d ed.); see also *Merriam-Webster On Line Dictionary* (<http://www.merriam-webster.com/dictionary/prohibit>) (“to partition (a city, borough, or township) by ordinance into sections reserved for different purposes (as residence or business)”). As the Supreme Court explained:

Building zone laws . . . began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in

respect of the use and occupation of private lands in urban communities.

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386-87 (1926). Thus, local zoning laws typically regulate the types of activities that are allowed in different areas, and the densities, heights, locations, sizes, etc. of buildings on private properties in those areas. *See generally*, 8 McQuillin, §§ 25.01, 25.23-29.

Regulating a wireless carrier's use of the public rights-of-way is not *zoning*. It is instead "a delegation of police power of the state government" to make "necessary and desirable regulations which are reasonable and manifestly in the interest of public safety and convenience." 7A McQuillin, § 24.565. It "embraces regulation of pedestrian and vehicular traffic, prevention of nuisances and obstructions" as well as the "maintenance of streets in a condition that is safe, healthy and convenient for public use." *Id.*; *see* Cal. Pub. Util. Code § 2902 (reserving to local governments the authority to regulate the "use and repair of public streets by any public utility, [including] the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets").

The district court, therefore, erred in finding that § 253(a) preempted the WTO to the extent the WTO regulates a wireless carrier's use of private property to construct wireless facilities. A wireless carrier challenging a local zoning ordinance like the WTO, must challenge the zoning aspect of the ordinance under § 332(c)(7). *See MetroPCS*, 400 F.3d at 735 (federal supremacy is "fully vindicated in the TCA's anti-discrimination and anti-prohibition provisions"). Any other holding would limit local zoning authority in ways not intended by Congress. For example, in contrast with right-of-way use permits, zoning permits are generally discretionary and local governments routinely require voluminous information, public notice and a hearing. *See, e.g., id.* at 718-19. Congress

understood this when it enacted the TCA. *See* Conf. Rep., at 208 (recognizing that a local decision could require a “zoning variance or a public hearing”).⁷

Indeed, the district court’s rejection of the County’s assertion that 47 U.S.C. § 253(c) saves the WTO from preemption by § 253(a) aptly demonstrates the inherent problem with applying § 253 to a zoning ordinance like the WTO. After noting that § 253(c) does not save local ordinances that contain requirements that are “*more than necessary* to ‘manage the rights-of-way,’” *Sprint*, 377 F. Supp. 2d at 888 (quoting *Auburn*, 260 F.3d at 1178), the district court found that § 253(c) “clearly does not apply to the extent that the WTO goes beyond regulating the public rights-of-way and arguably does not apply to the WTO at all,” *Sprint*, 377 F. Supp. 2d at 888-89. The district court’s reading leads to the absurd result that a court could preempt a zoning ordinance under *Auburn*’s overly generous reading of § 253(a), even though the court could also find that the savings clauses in § 253 did not apply.

This Court should find that § 253 does not preempt the WTO to the extent that the WTO regulates the use of private property to construct wireless facilities.

4. In the Event this Court Finds that Plaintiff Can Claim Preemption Under Either § 253 or § 332(c)(7), this Court Must Harmonize the Features of Both Sections

In the event this Court finds that a wireless carrier can claim preemption under either § 253 or § 332(c)(7), the Court must make every effort to harmonize the obvious differences between the two. Those differences are apparent from *Auburn* and *MetroPCS*. In finding preemption under § 253(a), the panel in *Auburn*

⁷ In refusing to find that certain provisions of the WTO could be severed, the district court failed to consider separating the zoning and public right-of-way management aspects of the WTO. *See Sprint*, 377 F. Supp. 2d at 899-900.

appeared to be especially concerned about two elements of the ordinances at issue in that case: (i) that a franchise could not be granted without public hearings; and (ii) that local governments reserved the right to deny a franchise, which the court referred to as the “ultimate cudgel.”⁸ *Auburn*, 260 F.3d at 1176. *MetroPCS*, on the other hand, upheld the city’s wielding of the “ultimate cudgel” – the denial of an application for a conditional use permit to construct a wireless facility. *MetroPCS*, 400 F.3d at 726. The panel was also not troubled by the fact the city held *two* public hearings before denying MetroPCS’s application, or that the city could deny an application to construct a wireless facility based on “a purely aesthetic determination that a certain neighborhood is blighted with too many wireless antennas.” See *id.* at 717-26.

The district court attempted to harmonize those conflicting provisions. The court recognized that, despite § 253, under § 332(c)(7) local governments “may, in the exercise of their zoning authority, impose aesthetic requirements.” *Sprint*, 377 F. Supp. 2d at 899. The court in *Cox Communications v. City of San Marcos*, 204 F. Supp. 2d 1260, 1268 (S.D. Cal. 2002), similarly recognized that, because Congress contemplated in § 332(c)(7) that local governments would conduct public hearings, construing § 253 to preempt such hearings would “frustrate the purposes” of § 332(c)(7)(B). See also *MetroPCS, Inc. v. City and County of San Francisco*, 2006 WL 358034, at *2-4 (N. D. Cal., Feb. 15, 2006) (relying on the panel decision in *MetroPCS* to grant defendant summary judgment on a § 253 claim).

⁸ This holding threatens the legitimacy of any franchise requirement since requiring regulatory approval has little meaning if local governments are not free to deny approval or to enforce the requirement for approval.

This Court can harmonize § 253 and § 332(c)(7) in one of two ways. First, this Court could find that § 253 does not apply to local ordinances like the WTO that simply establish permit requirements for individual wireless facilities, as opposed to franchises to provide wireless services. See *Auburn*, 260 F.3d at 1174-75. In the alternative, this Court should find that § 253(a) preempts hearings or the ability to deny permits based on local land use concerns (i.e., aesthetics, necessity) only where the local ordinance regulates wireline carriers, and not where it regulates wireless facilities.

C. THE DISTRICT COURT SHOULD NOT HAVE FOUND THAT § 253 PREEMPTS THE WTO

The district court relied extensively on *Auburn* to find that: (i) § 253(a) preempted the WTO, and (ii) § 253(c) did not save the WTO from preemption. See *Sprint*, 377 F. Supp. 2d at 892-96. As discussed below, other circuit courts and district courts in this circuit have expressed misgivings and concerns over the breadth of *Auburn*. This Court should not only reverse the district court's decision, it should now reexamine and overrule *Auburn* because the panel in that case ignored the plain meaning of § 253. In so doing, this Court will provide better guidance to other panels and district courts in this circuit that will in the future be called upon to apply this Court's precedents to the matters before them.

1. Section 253(a) Only Preempts Local Requirements that “Prohibit or Have the Effect of Prohibiting” the Provision of Telecommunications Services

Auburn held that § 253(a) preempts local ordinances that “may . . . have the effect of prohibiting the provision” of telecommunications services. *Auburn*, 260 F.3d at 1175 (internal quotation marks omitted). In so holding, the panel erred.

First, *Auburn* improperly altered the statutory language by using an ellipsis to delete words that are critical to its meaning. Specifically, *Auburn* incorrectly

interpreted § 253(a) to preempt local requirements that *may have the effect of prohibiting* the provision of telecommunications services. This interpretation simultaneously and improperly ascribes two different meanings to the word “may” in the same sentence. The clause provides that no State or local regulation “may prohibit or have the effect of prohibiting” the provision of telecommunications service. Clearly, Congress used the word “may” to express permission, and when combined with the word “no” shows Congress’s intent to deny local governments the authority to prohibit the provision of service. By using an ellipsis, however, *Auburn* mistakenly used the word “may” to modify the term “have the effect of prohibiting” and thereby express possibility, namely to bar regulations that could possibly have the effect of prohibiting telecommunications service. By misreading Congress’s plain words in this manner, the court turned the presumption against preemption on its head. See *City of Portland v. Electric Lightwave, Inc.*, 452 F. Supp. 2d 1049, 1059 (D. Or. 2005) (*Auburn*’s interpretation “appears to depart from the plain meaning of the statute and extend the barrier for local regulation of telecommunications services beyond what Congress intended”). Section 253(a) must be construed to preempt only those local requirements that “prohibit” or that “have the effect of prohibiting” the provision of telecommunications services.

Second, *Auburn* ignored the title of § 253, which is “Removal to Barriers to Entry.” Indeed, the legislative history demonstrates that the title of § 253 aptly describes its purpose: to insure that “States may not exercise [their] authority [under §§ 253(b), (c)] in a way that has the effect of imposing entry barriers or other prohibitions preempted by” § 253(a).” Conf. Rep., at 126. Rather than simply applying the holding in *Auburn*, a number of district courts in this circuit have looked at whether the local ordinances establish barriers to entry. See, e.g., *Time Warner Telecom of Oregon, LLC v. City of Portland*, 452 F. Supp. 2d 1084,

1093 (D. Or. 2006) (the court should consider a “challenged regulation’s actual economic effect on a carrier’s ability to provide telecommunications services”); *Pacific Bell Telephone Co. v. California Department of Transportation*, 365 F. Supp. 2d 1085, 1088 (N. D. Cal. 2005) (plaintiff must show that the “requirement at issue has or may act as a ‘barrier to entry’ into the telecommunications market”); *Qwest Corp. v. City of Portland*, 2006 WL 2679543, at *2 (D. Or., Sept. 15, 2006) (plaintiff “must at least demonstrate that the [challenged] requirement is or may be a barrier to entry into the City’s telecommunications market”).

Third, *Auburn* did not analyze the meaning of the term “prohibit.” In fact, the court’s extremely broad construction of § 253(a) would appear to suggest that any inconvenience or cost imposed by a local ordinance could be a prohibition. Such an interpretation of § 253(a) is clearly mistaken. Since the term “prohibit” is not defined in the TCA it must be construed according to its plain and ordinary meaning. To “prohibit” is “to forbid by authority” or “to prevent from doing something.” Merriam-Webster On Line Dictionary (<http://www.merriam-webster.com/dictionary/prohibit>). Thus, under this plain and ordinary meaning, a local requirement is not preempted unless it: (i) directly prevents the provision of service through a single legislative act; or (ii) has the effect of preventing the provision of service by indirect means or cumulative action.

Indeed, the first time a Ninth Circuit panel considered a § 253 claim it correctly construed § 253 narrowly, holding that § 253 “was designed to prevent explicit prohibitions on entry by a utility into telecommunications.” *CTI*, 196 F.3d at 1017. Supreme Court precedent also favors narrow construction of the term “prohibition.” In considering another provision of the TCA designed to promote competition (47 U.S.C. § 251(d)(2)), the Supreme Court held that conditions that increase costs or decrease service quality for a competitor do not unlawfully

“impair” the ability to provide service. *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 390 (1999). At worst, the allegedly infirm provisions of the WTO could increase a carrier’s costs to provide services. If minor cost increases would not “impair” the provision of service, they cannot logically be construed to have the effect of “prohibiting” the provision of services. See *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271 (10th Cir. 2004) (preempting a local ordinance under § 253 because of the “substantial costs” that must be incurred to comply with the ordinance).

Fourth, *Auburn*’s facial challenge approach to § 253(a) ignored the analysis required for facial challenges. A court may only preempt an ordinance based on a facial challenge if the court finds the ordinance “is unconstitutional in every conceivable application, or it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad.” *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1997) (internal quotation marks and alterations omitted). Like the panel in *Auburn*, the district court erred by preempting the WTO based on the “collective effect” that various provisions of the ordinance might have on the provision of service, *Sprint*, 377 F. Supp. 2d at 895, rather than looking at whether “every conceivable application” of the ordinance would be preempted.

For all of these reasons, other circuit courts have widely refused to follow *Auburn*. In *Level 3 Communications, L.L.C. v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007), the court correctly held that “no reading [of § 253(a)] results in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services.” The court held instead that “a plaintiff suing a municipality under section 253(a) must show *actual or effective* prohibition, rather than the mere possibility of prohibition.” *Id.* (emphasis added); see *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002) (internal

quotation marks omitted) (carrier must show that “the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment”); *Puerto Rico Telephone Co., Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (same); *Santa Fe*, 380 F.3d at 1269 (“the mere naked requirement of a registration or lease with the city is not prohibitive within the meaning of the statute”); *New Jersey Payphone Association, Inc. v. Town of West New York*, 299 F.3d 235, 242 (3d Cir. 2002) (finding that § 253(a) preempts a local ordinance granting payphone company an *exclusive* franchise).

The Federal Communications Commission (“FCC”) has also rejected the view that a telecommunications carrier can successfully mount a facial challenge to a local ordinance under § 253(a).⁹ The FCC has ruled that carriers asking the FCC to preempt local ordinances under 47 U.S.C. § 253(d) must show that those ordinances “actually prohibit or effectively prohibit” the ability of an entity to provide service. *In re California Payphone Association, Petition for Preemption*, 12 F.C.C.R. 14191, at ¶ 31 (Jul. 17, 1997). The FCC has also required carriers claiming preemption to include in the record “credible and probative evidence” that the challenged requirement has the effect of prohibiting service. *In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21,396, at ¶ 101 (Sept. 19, 1997). As the FCC clearly stated: “We will exercise our authority only upon such fully developed factual records.” *Id.* Yet, the district court, based on *Auburn*, preempted the WTO despite the complete absence of any factual record that the ordinance had the actual effect of prohibiting service.

⁹ The FCC’s construction of § 253 is entitled to deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984).

Indeed, district courts in this circuit have struggled to try to reconcile the controlling authority of *Auburn* with the plain language of § 253(a). See, e.g., *Portland*, 2006 WL 2679543, at *2 (plaintiff “must rely on more than speculation to show a potential prohibitory effect”); *Pacific Bell*, 365 F. Supp. 2d at 1088 (plaintiff must “come forward with sufficient evidence” that a local requirement is a “barrier to entry”); *Time Warner*, 452 F. Supp. 2d at 1093 (“analysis of a challenged regulation should not be completely divorced from economic reality”).

The sweeping scope of *Auburn* is apparent from a recent decision in a case in which GTE (which does business as Verizon Wireless) challenged a local ordinance requiring it to obtain major encroachment permits to construct wireless facilities in the public rights-of-way. See *GTE Mobilnet of California, L.P. v. City and County of San Francisco*, 2007 WL 420089 (N.D. Cal., Feb. 6, 2007). The city showed that Verizon Wireless had built an extensive network of facilities *on private property* in San Francisco, which it was using to serve tens of thousands of customers and earn tens of millions of dollars annually.¹⁰ Despite this evidence, the court found that § 253(a) preempted the city ordinance. *Id.* at *1-4. The court found that “a showing that an ordinance ‘may have’ the effect of prohibiting a protected interest is sufficient to sustain a facial challenge.” *Id.* at *3. That

¹⁰ In granting the city’s motion to compel discovery to obtain this evidence, the district court previously held that “[w]hether the City’s actions ‘may have’ the effect of prohibiting services must certainly be a relative inquiry, depending on a comparison of the cost and other burdens of obtaining the required permits as against the rewards provided by participating in the City’s telecommunications market.” *GTE Mobilnet of California L.P. v. City and County of San Francisco*, 2006 WL 2827885, *3-4 (N.D. Cal., Oct. 3, 2006). Yet, because of *Auburn*, the court did not look at these factors when it subsequently granted summary judgment to Verizon Wireless.

holding aptly shows the illogic of *Auburn*. To follow *Auburn*, the court had to ignore evidence in the record that Verizon Wireless did not even need these permits, or any permits allowing it to use the public rights-of-way, to enter and serve the San Francisco market.

Finally, *Auburn* based its finding that § 253(a) preempted the local ordinances at issue on an unspecified “combination of” factors. *Auburn*, 260 F.3d at 1176. In so doing, the court provided little guidance to local governments and the courts. This defect has led to a considerable amount of litigation, and left local governments and the district courts guessing as to what weight should be given to any particular factor. This Court should correct this untenable situation now.

2. Section 253(c) Grants Local Governments Broad Authority to Manage the Public Rights-of-Way

Section 253(c) preserves local authority to “manage the public rights-of-way.” The phrase “manage the public rights-of-way” means “control over the right-of-way itself, not control over companies with facilities in the right-of-way.” *Auburn*, 260 F. 3d at 1177. Despite this seemingly broad language, *Auburn* narrowly construed the authority reserved to local governments under § 253(c). See *id.* at 1177-80.

Working with a meager factual record, *Auburn* erroneously determined that certain local franchise requirements were not proper right-of-way management:

- **Legal Qualifications:** Given the congestion of essential facilities and the risk of damage to those facilities, local governments must limit access to the rights-of-way to companies with legal authority to provide services. The most direct method to establish this status is to request a copy of the relevant state and/or federal license.

- **Financial assurances:** Accidents involving telecommunications facilities can disrupt the provision of other services, cause property damage and serious personal injuries. To protect taxpayers from unrecovered damages, local governments should be allowed to obtain assurances that companies using the public rights-of-way have adequate financial ability to compensate parties who may be injured by their facilities.
- **Service Descriptions:** Local government should be allowed to obtain a description of the services franchise applicants will provide because carriers providing different types of services, or using different types of facilities to provide those services, may be subject to different requirements under federal, state and local law.
- **Excess Capacity:** Repeated excavation in a very short time period hurts businesses along construction routes, traffic management and pavement quality. Where local governments know that future applicants will seek to install facilities in a block, they should be able to use their right-of-way management authority to minimize excavation by requiring later applicants to purchase facilities from earlier applicants.
- **Discretion to Grant, Deny or Revoke:** Where franchise application procedures and franchise provisions reflect right-of-way management authority, the discretion to deny or revoke a franchise is merely a method to enforce legitimate regulations. Under the applicable standards of review, this Court must presume that local officials will exercise their discretion in a manner consistent with applicable state and federal law.

Relying exclusively on *Auburn*, the district court found that certain requirements in the WTO “would not qualify as ‘management of the public rights-of-way’.” *Sprint*, 377 F. Supp. 2d at 898 (quoting *Auburn*, 260 F.3d at 1177). As did the panel in *Auburn*, the district court erred by narrowly construing the phrase “manage the public rights-of-way” to be limited to such matters as the coordination of construction schedules, determination of insurance, bonding and indemnity requirements, enforcement of building codes, and the like. *Sprint*, 377 F. Supp. 2d at 898. This Court should reverse the district court, and thereby overrule *Auburn*, and find instead that the types of local requirements described above are all permitted under § 253(c).

3. *Auburn* Should be Limited To Its Narrow Facts

The local ordinances that *Auburn* found were preempted by § 253, based solely on a facial challenge, were all specific to telecommunications carriers. Those ordinances also required telecommunications carriers to obtain franchises for the privilege of providing telecommunications services. See *Auburn*, 260 F.3d at 1166. Without a franchise, a telecommunications carrier cannot enter a market. Accordingly, unreasonable burdens on obtaining or operating under a franchise – not necessarily those identified by *Auburn* – could in theory impose a barrier to entry.

Other courts in this circuit, however, have not limited *Auburn* in that manner. Some district courts, like the district court here, have extended the reach of *Auburn* to preempt local ordinances that simply require telecommunications carriers to obtain permits to construct their facilities. See *Sprint*, 377 F. Supp. 2d 889-90; *GTE*, 2007 WL 420089, at *1-4; *NextG Networks of California, Inc. v. City of San Francisco*, 2006 WL 1529990, *4-5 (N.D. Cal., June 2, 2006). At the very least, this Court should find that the *Auburn* facial challenge analysis only

applies to local ordinances that require a franchise or other permit to enter the market.

The district courts have also extended *Auburn* to local ordinances that are *not* specific to telecommunications carriers. In *Portland*, the court expressed “doubt whether *City of Auburn* can be read so broadly as to apply to ordinances that are not specific to the telecommunications permitting process.” *Portland*, 385 F.3d at 1282. Despite the *Portland* dicta, district courts in this circuit, including the district court here, have uniformly held that *Auburn* applies to such ordinances. *Sprint*, 377 F. Supp. 2d at 897; see *Pacific Bell*, 365 F. Supp. 2d at 1088 n.2; *NextG*, 2006 WL 1529990, at *6. This Court should find, instead, that the *Auburn* facial challenge analysis only applies to local ordinances that are specific to telecommunications carriers.

III. CONCLUSION

Based on the foregoing, amici curiae join with the County of San Diego and ask that this Court sitting *en banc* reverse the decision below granting plaintiff summary judgment with respect to its claim under 47 U.S.C. § 253.

Dated: June 4, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the “Word Count” feature in my Microsoft Word for Windows software, this brief contains 6,958 words up to the signature lines that follow the brief’s conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on June 4, 2008.

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APPENDIX
IDENTITY OF AMICI CURIAE

Amicus National League of Cities (“NLC”) is the country’s largest and oldest organization serving municipal government, with more than 1,600 direct member cities and 49 state municipal leagues that collectively represent more than 18,000 United States communities. Founded in 1924, the NLC strengthens local government through research, information sharing, and advocacy on behalf of hometown America.

Amicus National Association of Counties (“NACo”) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation’s 3,066 counties. NACo advances issues with a unified voice before the federal government, improves the public’s understanding of county government, assists counties in finding and sharing innovative solutions through education and research, and provides value-added services to save counties and taxpayers money.

Amicus International Municipal Lawyers Association (“IMLA”) is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. Owned solely by over 2500 members, IMLA services as an international clearinghouse of legal information and cooperation on municipal legal matters. IMLA collects from and disseminates information to its membership across the United States and Canada and helps governmental officials prepare for litigation and develop new local laws.

Amicus National Association of Telecommunications Officers and Advisors (“NATOA”) has represented the telecommunications needs and interests of local governments for over twenty years. NATOA is a professional association advising individuals and organizations responsible for

telecommunications policies and services in local governments throughout the country.

Amicus League of California Cities (“California League”) is an association of all 478 California cities united in promoting the general welfare of cities and their citizens. The California League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys representing all 16 divisions of the League from all parts of California. The Legal Advocacy Committee monitors appellate litigation affecting municipalities and identifies those that are of statewide significance.

Amicus New Jersey State League of Municipalities (“NJ League”) is a voluntary association created to help communities do a better job of self-government through pooling information resources and brainpower. The NJ League is authorized by statute and has been serving local officials throughout the State since 1915. All of New Jersey’s 566 municipalities are members of the NJ League.

Amicus California State Association of Counties (“CSAC”) is a non-profit corporation made up of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels’ Association of California and is overseen by CSAC’s Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide.

PROOF OF SERVICE

I, Kiana V. Davis, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, 1 Dr. Carlton B. Goodlett Place, Room 234, San Francisco, CA 94102-4682.

On June 4, 2008, I served two copies of the following document:

BRIEF OF AMICI CURIAE NATIONAL LEAGUE OF CITIES, ET AL. IN SUPPORT OF DEFENDANTS-APPELLEES COUNTY OF SAN DIEGO, ET AL.

on the following persons at the locations specified:

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BY EXPRESS OVERNITE SERVICES: I caused true and correct copies of the above documents to be placed and sealed in an envelope (or envelopes) addressed to the addressee(s) and I caused such envelope(s) to be delivered to Express Services Overnight for overnight courier service to the office(s) of the addressee(s).

I declare under penalty of perjury that the foregoing is true and correct.
Executed June 4, 2008, at San Francisco, California.

KIANA V. DAVIS