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# Can States Prohibit Municipalities from Offering Commercial Telephone Services to the Public?

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# Case at a Glance

The Telecommunications Act of 1996 provides that no state may prohibit "any entity" from providing telecommunications services. Missouri has a statute that prohibits its municipalities from providing commercial telephone services.

The municipalities assert that the Telecommunications Act specifically preempts the state statute. Thus, they argue, municipalities should be free to offer commercial telephone services. The Eighth Circuit agreed with the municipalities that the federal law preempts the Missouri statute.

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## ISSUE

Does 47 U.S.C. § 253(a) of the Telecommunications Act of 1996 preempt Missouri statute 392.4107, which prohibits municipalities from providing commercial telephone service?

## FACTS

Section 392.4107 of the Missouri statutes addresses the authority of municipalities with regard to telecommunications services. It permits a municipality to allow nondiscriminatory use of its rights of way and to provide certain kinds of telecommunications services, such as those for its own use, for emergency services, medical or educational purposes, or Internet-type services. However, it denies municipalities the authority to provide or offer for sale commercial telephone service.

The Missouri Municipal League, the Missouri Association of Municipal Utilities, City Utilities of Springfield, City of Columbia Water and Light, and the City of Sikeston Board of Utilities (the respondents) filed a

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joint petition on July 8, 1998, with the Federal Communications Commission (FCC), claiming that Section 392.4107 is preempted by Section 253(a) of the Telecommunications Act of 1996. Section 253(a) bars state or local laws from prohibiting any entity from providing any interstate or intrastate telecommunications service.

This was the second time that the FCC had been asked to invoke Section 253(a) to preempt state laws that prevented municipalities from engaging in the telecommunications business. Soon after the respondents' filing, the FCC issued an order denying a request by the City of Abilene, Texas, to preempt Texas statutes that were similar to Missouri's statute. While the respondents' petition was pending before the FCC, the District of Columbia Circuit affirmed the FCC's decision not to preempt the Texas statutes. *City of Abilene, Texas v. Federal*

*NIXON ET AL. V. MISSOURI  
MUNICIPAL LEAGUE ET AL.*  
DOCKET NOS. 02-1238, 02-1386,  
AND 02-1405

ARGUMENT DATE:  
JANUARY 12, 2004  
FROM: THE EIGHTH CIRCUIT

*Communications Comm'n.*, 164 F.3d 49 (D.C. Cir. 1999).

The State of Missouri filed comments with the FCC and asserted its right to control the activities of its own municipalities. The state urged the FCC to deny the respondents' petition. On January 12, 2001, the FCC issued its order and followed the *City of Abilene* decision. The FCC declined to hold that the Missouri statute was preempted by Section 253(a). *In re Missouri Municipal League*, 16 F.C.C. Rcd. 1157 (2001). The respondents appealed the FCC's decision to the Eighth Circuit. The State of Missouri again intervened. The Eighth Circuit reversed the FCC's decision. *Missouri Municipal League v. F.C.C.*, 299 F.3d 949 (8th Cir. 2002).

The Eighth Circuit ruled that the term "any entity" in the federal statute is both broad and clear and that municipalities are "entities" within the Act. Therefore, the states cannot in any way prevent municipalities from engaging in the commercial telecommunications business. Missouri, the FCC, and Southwestern Bell Telephone, L.P. (the petitioners) each filed petitions for writs of certiorari. The Court granted the writs and consolidated the petitions on June 23, 2003. 123 S.Ct. 2605 (2003); 123 S.Ct. 2606 (2003); 123 S.Ct. 2607 (2003).

## CASE ANALYSIS

The Telecommunications Act of 1996 created a new telecommunications regime designed to foster competition in local telephone markets. The purpose of the Act was to promote competition and reduce regulation in order to secure lower prices and higher-quality services for American telecommunications customers. The Act fundamentally restructured local telephone mar-

kets by providing that states may no longer enforce laws that impede competition. Section 253(a) of the Act provides that 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.

Petitioners assert that the Act does not apply when a state is regulating its own subdivision. They argue that the ability of a state to define the authority of its subdivisions is a fundamental part of a state's sovereignty. If Section 253(a) of the Act included state subdivisions among the "entities" that neither states nor local governments can prohibit from entering the commercial telecommunications business, it would usurp the states' authority to define their own administrative and political structures. Such usurpation is clearly outside the scope of congressional authority. Separation of powers is a key element of our constitutional scheme. The division of power among sovereigns (between the federal government and the states) is critical to the protection of liberty. Dual sovereignty contemplates substance, not just form. The sovereign states have powers independent of the federal government and cannot be overruled by those of the federal government.

Unfortunately, the Supreme Court has never catalogued the fundamental decisions that lie beyond congressional control. The Founders, however, did observe in the Federalist Papers that the states' retained powers "extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

Petitioners maintain that the class of power "inherent" in state sovereignty includes the power to create and define the authority of its political subdivisions. The subdivisions of the states, including cities, counties, municipalities, and other such organizations, have no independent right to act or even to exist apart from the state. Further, the state's grant of power to a subdivision is not permanent. The state may, at its pleasure, modify or withdraw all such powers or vest them in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, or repeal the charter and destroy the corporation. To permit Congress to usurp the states' authority to withhold, grant, or withdraw powers and privileges through a federal statute would threaten one of the Constitution's structural protections. Absent an explicit grant of authority to Congress that permits the federal government to interfere, states retain the ability to define the authority of their political subdivisions. This principle is central to our constitutional scheme.

Petitioners further argue that the Commerce Clause does not give Congress the power to usurp a states' power over its municipalities. Clearly, the Commerce Clause is broadly worded, but it does have its limits. One of those limits is the point at which the power of Congress under the Commerce Clause meets the power of the states to determine their own organization and structure. The Commerce Clause cannot be used to interfere with a state's control over itself. Another limit is the historical intent of the Commerce Clause. Though the Commerce Clause was originally intended to break down the barriers to the free flow of trade, the Supreme Court has construed it to cover a broader

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range of activities. The Court has identified three broad categories of activity that Congress may regulate under its commerce power. It is authorized to regulate the use of the channels of interstate commerce; to regulate persons or things in interstate commerce; and to regulate those activities having a substantial relation to interstate commerce.

Petitioners argue that the only authority to support Congress's actions in this case is that the activity to be regulated has a substantial relation to interstate commerce. In determining what activity has a substantial relation to interstate commerce, the Supreme Court has permitted Congress to aggregate effects of seemingly local acts. But extending the aggregation principle too far threatens to erase the distinction between national and local authority. That threat is particularly real when the activities being aggregated are those at the core of state responsibility. When Congress attempts to directly regulate the states as states, the Tenth Amendment requires recognition that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress." *National League of Cities v. Usery*, 426 U.S. 833 (1976). This principle exists not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner. The Tenth Amendment protects the states from Congress's attempted usurpation in this case.

The federalism issues can be avoided by adopting a narrow construction of the Act, the petitioners argue. A narrow interpretation that does not include municipalities within the "any entity" phrase avoids usurping the states' powers.

Generally, Congress only preempts the states' historic sovereign powers when it uses language that is clear and manifest. In the past 20 years, the Supreme Court has consistently insisted on congressional compliance with the "clear and manifest" standard. A general reference to "any entity" does not clearly and manifestly preempt state authority.

The Telecommunications Act does not contain a pertinent definition or provision that references the ability of the states or their subdivisions to engage in the commercial telecommunications business. The sole basis for the Eighth Circuit's holding is that "any entity" is in all-inclusive term. A similarly broad term, "person," is also used at various places in the Code. However, when the Supreme Court applied the "clear and manifest" standard to "person," it found that term wanting. The Supreme Court held that "every person," as used in 42 U.S.C. § 1983, did not include a state, even though a state fits within some definitions of "person." That "any entity," so broadly defined, does not clearly and manifestly include the states and their subdivisions is additionally evident from the fact that beyond the Eighth Circuit, another court of appeals, two state supreme courts, a third state appellate court, a federal district court, and the FCC disagree about whether the term "any entity" extends to municipalities. This split among the courts, regardless of which one has correctly discerned congressional intent, demonstrates that the congressional language is neither clear nor manifest.

Finally, the petitioners note that the language of the statute itself accommodates only one logical reading. Section 253(a) says that 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 interstate or intrastate telecommunications service. The statute describes its involvement in telecommunications regulation from two different directions. The first is the source of the regulation, the state and local government. The second direction is the source of competition—"any entity" that wishes to provide any interstate or intrastate telecommunications service. The Eighth Circuit's reading of the statute makes the source of regulation part of the source of competition. That reading makes no sense. Though a state may be unable to interfere with the decisions of private companies to enter the telecommunications business, obviously the state must be able to make the same choice about whether to enter that business itself. The statute cannot logically be read to take such basic authority away from a state.

Respondents argue that the plain meaning of Section 253(a) preempts Missouri's ban on municipal entry into the telecommunications markets. There is no dispute in this case that Missouri has enacted a statute that prohibits municipalities from providing telecommunications service. If, however, municipalities are entities within the meaning of Section 253(a), then the Missouri statute must be preempted.

Municipalities are, in the ordinary English usage of the term, unquestionably "entities." Indeed, this point is so clear that the petitioners appear not to dispute it. The *Black's Law Dictionary* definition, quoted by the Eighth Circuit, explicitly defines "entity" to include subdivisions of state governments. The *Oxford English Dictionary* defines "entity" as a thing that has a real existence, as opposed to a relational function. It would be very odd to

say that municipalities do not have a real existence.

Petitioners insist that municipalities are not entities because they are part of the state and dependent upon it for any powers they may be authorized to wield. It is true, of course, that municipalities are created and empowered by the state. But once a municipality is created it is, in ordinary usage, an entity with a real existence. Indeed, if municipalities were not entities because they owe their existence and their powers to the state, then private corporations, which also owe their existence and powers to the state, would not be entities under Section 253(a). Municipalities are clearly separate entities from the state. They can sue and be sued. They can enter into contracts and own property. The Supreme Court has repeatedly ruled that municipalities do not partake of the states' sovereign immunity under the Constitution. Also, Congress has made municipalities, but not states, subject to suit under the Sherman Antitrust Act and under 42 U.S.C. § 1983. It is abundantly clear that a municipality has an existence separate from the state that created it.

Respondents further note that the most conspicuous feature of the language of Section 253(a) is its inclusiveness. The language evinces a desire to foreclose any possible claim that some potential entrants into the telecommunications market are unprotected. The choice of the term "entity" is itself evidence of its breadth. It is hard to think of any term that could be more inclusive. Congress did not choose a narrower and more ambiguous term, such as "person." It did not try to list the various kinds of potential entrants into telecommunications markets that might be covered by the section. The distinguishing characteristic of the term "entity" is precisely

its inclusiveness. It is the word one would use if one wanted to omit no possibilities.

The respondents reason that if there is any doubt that Section 253(a), interpreted according to its plain meaning, is fully inclusive, that doubt is removed by Congress's use of the term "any." The Supreme Court has repeatedly ruled that the modifier "any" precludes a narrow construction of the modified term. Congress prohibited barriers that prevent "any entity" from competing. As a matter of ordinary meaning, the modifier "any" means that the modified phrase is to be interpreted as expansively as possible. The term "entity" is a notably inclusive term. Thus, the phrase "any entity," if given its plain meaning, unquestionably includes municipalities. The meaning of Section 253(a) could hardly be clearer.

Respondents further postulate that there are powerful reasons to interpret Section 253(a) to include municipalities that seek to provide telecommunications services. Municipalities are a singularly important source of competition in the telecommunication market. Congress knew that when it enacted the Telecommunications Act. Municipalities are typically well positioned to compete in rural areas. For example, respondents noted an FCC case study in Iowa where consumers had exceptional access to advanced telecommunications services that was encouraged by municipal involvement in the deployment of telecommunications services.

The FCC has also noted that municipalities also serve large cities, such as Los Angeles, Seattle, Cleveland, and San Antonio, and could be potential competitors in those areas as well. Also, the legislative history of the Act could not be more explic-

it in stating that municipal utilities are among the "entities" whose right to enter telecommunications markets is protected by Section 253(a). The Joint Explanatory Statement by the conference committee on the bills that became the Telecommunications Act stated that explicit prohibitions on entry by a utility into telecommunications are preempted under this section. The Senate Report that accompanied the provision that became Section 253(a) explained, in its summary of the major features of the bill, that this provision "allows all electric, gas, water, steam, and other utilities to provide telecommunications." Elsewhere, the Senate Report also discussed at great length the importance of electric utilities as potential competitors in telecommunications markets. Congress unquestionably intended municipal utilities to be among the entities protected by Section 253(a).

Respondents argue that interpreting the section according to its plain meaning is not an extraordinary incursion into state sovereignty. Congress will often grant or deny local governments certain limited powers, notwithstanding state law to the contrary. The Supreme Court has ruled that Congress may grant local governments certain prerogatives that state law cannot override. Also, the Supreme Court has interpreted acts of Congress in a way that has resulted in their interfering in a state's internal allocation of authority among itself and its political subdivisions. The Court has given no indication that this constitutes a troubling affront to state sovereignty. Clearly, there is no serious intrusion into state sovereignty by Section 253(a).

Respondents also assert that interpreting Section 253(a) to preempt the Missouri statute raises no sub-

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stantial constitutional questions. Petitioners argue that the section would be unconstitutional if it were interpreted in accordance with its plain meaning. The respondents say this argument has no foundation. They admit that some extreme federal intrusions into a state's decision about how to organize its internal affairs would violate the Constitution. Section 253(a), however, imposes only the most limited, and reasonable, restrictions on state authority. Section 253(a) does not commandeer any state because it does not compel any state to do anything. Rather, it requires the states only to refrain from enacting anti-competitive barriers to entry.

Finally, the petitioners assert that under the principle of *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Supreme Court may not interpret Section 253(a) according to its plain meaning. Rather, the Court should insist on a more explicit statement of Congress's intention to prohibit state laws that prevent municipalities from entering telecommunication markets. In the respondent's view, this contention is wrong for a number of reasons. First, the presumption of *Gregory v. Ashcroft* applies only when a statute is ambiguous. This statute is not ambiguous, but has a plain meaning. Second, even when the *Gregory* presumption does apply, it does not automatically require that every ambiguity be resolved by limiting the scope of an act of Congress.

The Supreme Court has made clear that the effect of federal legislation on the internal allocation of power within a state is a factor to be considered in determining the proper interpretation of an ambiguous statute, but is not necessarily decisive. Essentially, the petitioners' claim is that the prohibition contained in Section 253(a) cannot apply to municipalities unless

Congress explicitly refers to municipalities in the text of the statute. The Supreme Court has never imposed that kind of rigid rule on Congress even in cases dealing with state sovereign immunity in which federalism concerns are arguably at the highest level.

### SIGNIFICANCE

The dividing line between federal and state sovereignty is barely discernible. Each case argued before the Supreme Court provides an opportunity to incrementally brighten the line. Obviously, important federal interests must outweigh the states' interest in controlling the subject matter at hand. In this case, the subject matter is the telecommunications industry, and specifically intrastate and interstate telephone services. Congress' Act states that no state law shall have the effect of prohibiting "any entity" from providing interstate or intrastate telecommunications service. The state of Missouri has prohibited its municipalities from offering local telephone service. Will Congress's interest in fostering competition in the telecommunication industry outweigh the states' interest in controlling its own political subdivision? The Supreme Court will decide.

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