IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-1379

MISSOURI MUNICIPAL LEAGUE, ET AL.,

PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

PETITION FOR REHEARING OR REHEARING *EN BANC*

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STATEMENT OF THE ISSUE AND ITS IMPORTANCE

Section 253 of the federal Communications Act proscribes State or local statutes and regulations that prohibit "any entity" from providing a telecommunications service. 47 U.S.C. § 253(a). In *Missouri Municipal League v. FCC*, 299 F.3d 949 (8th Cir. 2002), a panel of this Court held that the plain meaning of section 253 required the Federal Communications Commission ("FCC" or "Commission") to preempt a Missouri statute that barred the State's political subdivisions from providing telecommunications services. The panel thus vacated and remanded a Commission order declining to preempt the Missouri statute, notwithstanding the "plain statement" rule of statutory construction articulated in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and D.C. Circuit precedent holding that section 253(a) does not clearly indicate congressional intent to preempt a State's authority to restrict the activities of its own political subdivisions. The Commission and the United States respectfully move for rehearing and rehearing *en banc* of the panel decision.

The panel misapplied *Gregory's* "plain statement" rule by erroneously inferring an intent by Congress in section 253 to interfere with Missouri's governmental structure. The panel decision mistakenly inserts the FCC into the relationship between Missouri and its political subdivisions even though there is no "unmistakably clear" evidence that Congress intended such an intrusion. *Id*., 501 U.S. at 460. The adverse impact of this interpretive error is magnified because the panel decision expressly conflicts with an earlier decision of the District of Columbia Circuit, s*ee City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999), thus placing the FCC in the position of having to give effect to diametrically opposed court opinions. The conflict with the D.C. Circuit is particularly

significant for the agency, because an aggrieved party seeking judicial review of any future FCC decision addressing this issue under section 253 may elect to bring its petition either in the D.C. Circuit (as in *City of Abilene*) or in any circuit where the person resides or has its principal office (as in this case). *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2343. This petition thus presents an issue of exceptional importance, *see* Fed.R.App.P. 35(a)(1)(A), (b)(1)(B), and the Court should grant rehearing to correct the panel's error and restore uniformity to federal law.

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

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

Raygor v. Regents of the University of Minnesota, 122 S.Ct. 999 (2002)

BACKGROUND

Section 253 of the Communications Act. Congress added section 253 to the Communications Act as part of the Telecommunications Act of 1996 ("1996 Act"). The 1996 Act "was designed, in part, to erode the monopolistic nature of the local telephone service industry." *Iowa Utilities Board v. FCC*, 120 F.3d 753, 791 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom.*, *AT&T Corp v. Iowa Utilities Board*, 525 U.S. 366 (1999). To this end, section 253 abolishes the longstanding regulatory regime whereby states granted a monopoly to one company to provide local telephone service and shielded that single provider from competition by other companies: "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). Section 253(d) directs the FCC, after notice and an opportunity for public comment, to "preempt the enforcement" of a State or

local statute, regulation, or legal requirement that violates the general prohibition contained in section 253(a) and does not fall within certain "safe harbor" provisions specified in subsections (b) and (c). The FCC has executed this directive, for example, by preempting the enforcement of a state statute that shielded rural incumbent local exchange carriers from competition by other private providers of local telephone service. *Silver Star Telephone Co*., 12 FCC Rcd 15639 (1997), *recon. denied*, 13 FCC Rcd 16356 (1998), *aff'd sub nom*., *RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000).

<u>The Missouri Statute</u>. Missouri House Bill 620, codified in section 392.410(7) of the Revised Statutes of Missouri ("HB 620"), implements the State's decision not to enter the telecommunications business through its political subdivisions. Specifically, HB 620 provides:

> No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section.

Mo. Rev. Stats. § 392.410(7). HB 620 does not purport to prohibit or limit the ability of private companies to provide telecommunications services on a competitive basis.

<u>The Texas Precedent</u>. HB 620 is similar to a Texas statute that the Commission earlier had declined to preempt. *See Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd 3460 (1997) ("*Texas Order*"). The City of Abilene, Texas had sought preemption of the Texas statute, which prohibited the state's municipalities from providing telecommunications services or facilities. Denying the preemption petition, the Commission concluded that "the city of Abilene is not an 'entity' separate and apart from the state of Texas for the purpose of applying section 253(a) of the Act." *Texas Order*,

13 FCC Rcd at 3544 (¶ 179). In support of its interpretation of the term "entity" in section 253(a), the Commission relied on the Supreme Court's longstanding view that municipalities are not "sovereign entities" independent of the states from which they derive their authority: "[p]olitical subdivisions of States . . . . never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. . . ." *Id*., 13 FCC Rcd at 3545 (¶ 180) (quoting *Sailors v. Board of Educ*., 387 U.S. 105, 107-08 (1967) (footnote and internal quotations omitted)).

In concluding that preemption of the Texas statute was not warranted, the Commission applied a rule of statutory interpretation that the Supreme Court established in *Gregory v. Ashcroft*, 501 U.S. 452, when preemption affects the traditional sovereignty of the States. The issue in *Gregory* was whether the Age Discrimination in Employment Act (the "ADEA") preempted a Missouri law that required certain state judges to retire at age seventy. In deciding whether Congress intended to alter the existing balance of federal and State powers, the Supreme Court explained that it was "not looking for a plain statement that judges are excluded" from the ADEA. *Gregory*, 501 U.S. at 467. Rather, the Supreme Court stated that it would "not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*." *Id*. (emphasis in original). Although it noted that the ADEA need not "mention judges explicitly," the Supreme Court stressed that "it must be plain to anyone reading the Act that it covers [state] judges." *Id*. Finding no "plain statement" that the federal statute covered appointed state judges, the Supreme Court concluded: "Therefore, it does not." *Id*.

In view of *Gregory's* "plain statement" rule, the Commission concluded that it could not intrude upon the relationship between Texas and its municipalities in the absence of statutory language showing that Congress plainly intended such an intrusion:

> Section 253(a) is directed at state and local statutes, regulations and legal requirements that "prohibit or have the effect of prohibiting the ability of any entity" to provide telecommunications services. Section 253(a) thus appears to prohibit restrictions on market entry that apply to independent entities subject to state regulation, not to political subdivisions of the state itself. If we were to construe the term "entity" in this context to include municipalities, which, we noted above, are merely "instrumentalities" of the state, section 253 effectively would prevent states from prohibiting their political subdivisions from providing telecommunications services, despite the fact that states could limit the authority of their political subdivisions in all other respects.

Texas Order, 13 FCC Rcd at 3546-47 (¶ 184).

On review, the D.C. Circuit affirmed the Commission's *Texas Order*. *City of Abilene*, 164 F.3d 49. As an initial matter, the D.C. Circuit "assume[d] *arguendo* that Congress, acting within its constitutional authority, may – through the Supremacy Clause – supersede a State law limiting the powers of the State's political subdivisions." *Id.*, 164 F.3d at 51. The D.C. Circuit observed, however, that "interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty," because "[l]ocal governmental units within a State have long been treated as mere 'convenient agencies' for exercising State powers." *Id.*, 164 F.3d at 52 (citation omitted). Given that the preemption issue there implicated the relationship between Texas and its political subdivisions, the D.C. Circuit stated that it was "in full agreement with the Federal Communications Commission that § 253(a) must be construed in compliance with the precepts laid down in *Gregory v. Ashcroft*." *Id*.

Following *Gregory's* holding that "courts should not simply infer this sort of congressional intrusion," the D.C. Circuit concluded: "Like the Commission, we

therefore must be certain that Congress intended § 253(a) to govern State-local relationships regarding the provision of telecommunications services." *Id*. Applying that test, the D.C. Circuit determined that "it was not plain to the Commission, and it is not plain to us, that § 253(a) was meant to include municipalities in the category of 'any entity.'" *Id*., 164 F.3d at 54. Accordingly, the D.C. Circuit found that the Commission had properly denied the preemption petition. The court denied Abilene's petition for rehearing or rehearing *en banc*, with no members requesting a vote. *City of Abilene v. FCC*, Order (D.C. Cir. Mar. 11, 1999) (No. 97-1633).

The Missouri Municipals' Petition for Preemption of HB 620. On July 8, 1998, the Missouri Municipal League, the Missouri Association of Municipal Utilities, City Utilities of Springfield, Columbia Water & Light, and the City of Sikeston Board of Utilities (collectively, the "Missouri Municipals") petitioned the FCC to preempt HB 620 pursuant to section 253. The Missouri Municipals filed their petition after the Commission released its *Texas Order*, but before the D.C. Circuit decided *City of Abilene*.

The FCC's Order on Review. In an order released on January 12, 2001, the Commission declined to preempt "the enforcement of HB 620 to the extent that it limits the ability of municipalities or municipally-owned utilities, acting as political subdivisions of the state," to provide telecommunications services or facilities. *Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri*, Memorandum Opinion and Order, 16 FCC Rcd 1157, 1158 (2001) ("*Order on Review*") ¶ 2. Consistent with its previous finding in the *Texas Order*, and as compelled by *Gregory* and *City of Abilene*, the Commission determined that "political subdivisions of a state, such as a

municipality, are not 'entities' under section 253(a) of the Act." *Order on Review*, 16 FCC Rcd at 1158, ¶ 2. Finding that "under Missouri law, municipally-owned utilities are generally part of the municipality, itself, and therefore are not separate and apart from the state of Missouri," the Commission concluded that such utilities "are not entities subject to section 253(a)." *Id*. The Missouri Municipals then filed a petition for review in this Court.

The Panel Decision. The panel vacated the *Order on Review* and remanded to the Commission for further consideration. The panel acknowledged "Missouri's important interest in regulating its political subdivisions," 299 F.3d at 955, and held that the *Gregory* standard "applies in this case." 299 F.3d at 952. Parting company with the D.C. Circuit, however, the panel held that the "words 'any entity' plainly include municipalities and so satisfy the *Gregory* plain-statement rule." 299 F.3d at 953.

First, since Congress did not define the key term "entity" in the 1996 Act, the panel "presume[d]" that "'the ordinary meaning of that language accurately expresses the legislative purpose.'" *Id*. (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992)). Citing *Black's Law Dictionary*, the panel stated that "[t]here is no doubt that municipalities and municipally owned utilities are entities under a standard definition of the term." *Id*. Noting that "as political subdivisions of the state, municipalities should not be considered independent entities," the panel nonetheless concluded without citation that "[t]he plain meaning of the term 'entity' includes all organizations, even those not entirely independent from other organizations." *Id*.

The panel next observed that "Congress's use of 'any' to modify 'entity' signifies its intention to include within the statute all things that could be considered as entities."

299 F.3d at 953-54. The panel stated that the word "any" "has an expansive meaning" and "prohibits a narrowing construction of a statute." 299 F.3d at 954. The panel placed special emphasis on *Salinas v. United States*, 522 U.S. 52 (1997), a case involving the construction of a federal bribery statute: "*Salinas* held that by using the clearly expansive term 'any,' Congress expressed its intent to alter [the federal-state] relationship. We conclude that the same must be said about the preemption provision set forth in § 253." 299 F.3d at 955. The panel criticized the D.C. Circuit for not considering and discussing *Salinas* and "view[ed] the lack of such a discussion as detracting from the persuasiveness of its opinion." *Id*. Summing up its analysis, the panel stated (*id*.):

> [W]e conclude that because municipalities fall within the ordinary definition of the term "entity," and because Congress gave that term expansive scope by using the modifier "any," individual municipalities are encompassed within the term "any entity" as used in § 253(a). This language would plainly include municipalities in any other context, and we should not hold otherwise here merely because § 253 affects a state's authority to regulate its municipalities.

DISCUSSION

The Court should grant rehearing because the panel decision misapplied the demanding *Gregory* "plain statement" standard. The panel improperly inferred congressional intent to reach into state sovereignty and alter Missouri's governmental structure based only on the appearance of the undefined term "entity" in section 253(a), preceded by the modifier "any." But inferences of this sort are precisely what the *Gregory* rule of construction forbids: "Congressional interference with this decision of the people of Missouri" – in this context, defining the contours of authority delegated to Missouri's political subdivisions – "would upset the usual constitutional balance of federal and state powers." *Gregory*, 501 U.S. at 460. For this reason, "if Congress intends to alter the 'usual constitutional balance between the States and the Federal

Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Id*. (citations omitted).

Nothing in the relevant statutory language of section 253 supplies the "unmistakably clear" evidence necessary to conclude that Congress intended to alter the federal-State balance and interfere with Missouri's dominion over its political subdivisions. The panel's holding thus stands in stark contrast to *Johnson v. Bank of Bentonville*, in which another panel of this Court, applying the *Gregory* standard, required – and found – highly specific language in a federal banking statute indicating that Congress intended to alter the federal-State balance of power. 269 F.3d 894, 895 (8th Cir. 2001) ("clear language" of federal statute "leaves no doubt" that Congress intended to preempt state constitutional provisions limiting interest rates charged by local banks).

1. Congress did not define the term "entity" in section 253 or anywhere else in the 1996 Act. Faced with this definitional void, the panel "presume[d] that 'the ordinary meaning of that language accurately expresses the legislative purpose.'" 299 F.3d at 953 (citation omitted).[1] Citing only *Black's Law Dictionary*, the panel next asserted that "municipalities and municipally owned utilities are entities under a standard definition of the term."[2] *Id*. The panel then concluded – without citation – that "[t]he plain meaning

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[1] *Cf. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (finding undefined term "interconnection" in section 251 of 1996 Act to be ambiguous and deferring to FCC's interpretation); *RT Communications, Inc*., 201 F.3d at 1268-69 (finding undefined term "competitively neutral" in section 253 to be ambiguous and deferring to FCC's interpretation).

[2] *Cf. Alarm Industry Communications Committee v. FCC*, 131 F.3d 1066 (D.C. Cir. 1997) (faulting FCC's "wooden use" of *Black's Law Dictionary* to attempt to define ambiguous term "entity" in 47 U.S.C. § 275).

of the term 'entity' includes all organizations, even those not entirely independent from other organizations." *Id*.

This analysis misapprehends the relevant inquiry under *Gregory*. As the D.C. Circuit observed, "it is not enough that the statute could bear this meaning. If it were, *Gregory's* rule of construction would never be needed." *City of Abilene*, 164 F.3d at 52-53. Rather, "it must be plain to anyone reading the Act" that Congress specifically intended to include political subdivisions within the meaning of "entity" in section 253(a). *Gregory*, 501 U.S. at 467. Neither Congress' use of the undefined term "entity" nor *Black's Law Dictionary* sheds any light on this critical question.

Pertinent to determining the preemptive scope of section 253 in this context is the Supreme Court's longstanding view that municipalities are not "sovereign entities" independent of the states from which they derive their authority: "'Political subdivisions of States – counties, cities or whatever – never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions….'" *Sailors v. Board of Educ.*, 387 U.S. 105, 107-08 (quoting *Reynolds v. Sims*, 377 U.S. 533, 575 (1964)). The Supreme Court confirmed this principle just last Term:

> To repeat the essential observation made in [*Wisconsin Public Intervenor v.*] *Mortier*: "The principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental power of the State as may be entrusted to them in its absolute discretion." 501 U.S., at 607-608 (internal quotation marks and alterations omitted). Whether and how to use that discretion is a question central to state self-government.

City of Columbus v. Ours Garage and Wrecker Service, Inc., 122 S.Ct. 2226, 2234 (2002). *See also United Building & Construction Trades Council v. Mayor of Camden*,

465 U.S. 208, 215 (1984) ("a municipality is merely a political subdivision of the State from which its authority derives"); *City of Abilene*, 164 F.3d at 52 ("the relationship between a State and its municipalities, including what limits a State places on the powers it delegates, has been described as within the State's 'absolute discretion'") (quoting *Sailors*, 387 U.S. at 107-08).

The panel cannot properly ignore this precedent holding that municipalities are mere "convenient agencies" designed to exercise only those powers delegated by States. Given *Gregory's* requirement that "it must be plain to anyone reading the Act," the Commission correctly concluded that Congress's use of the undefined term "entity" did not constitute the sort of "plain statement" that would justify federal interference with the State's relationship with its municipalities.

2. Nor does the appearance of the modifier "any" before the term "entity" clarify whether "Congress deliberated over the effect this would have on State-local government relationships or that it meant to authorize municipalities, otherwise barred by State law, to enter the telecommunications business." *City of Abilene*, 164 F.3d at 53. Just last Term, the Supreme Court held that the federal supplemental jurisdiction statute, 28 U.S.C. § 1367(d) – which contained the key phrase "any claim" – did not express a clear congressional intent to alter the federal-state balance and did not toll a state limitations period for a claim against a State. *Raygor v. Regents of the University of Minnesota*, 122 S.Ct. 999, 1006-07 (2002).[3] Although noting that the broad language of the statute may not clearly *exclude* tolling for claims against nonconsenting States dismissed on Eleventh

[3] The relevant statutory language provided that "[t]he period of limitations for *any claim* asserted under [this section] . . . shall be tolled while the claim is pending and for a

Amendment grounds, the Supreme Court emphasized that "we are looking for a clear statement of what the rule *includes*, not a clear statement of what it *excludes*." *Raygor*, 122 S.Ct. at 1007 (emphasis in original) (citing *Gregory*, 501 U.S. at 467). *Raygor* contradicts the panel's assertion – based on its view of the holding of *Salinas v. United States*, 522 U.S. 52 – "that by using the clearly expansive term 'any,' Congress expressed its intent to alter" the federal-state relationship. 299 F.3d at 955. The fact that *Raygor* does not even discuss *Salinas* further undermines the panel's heavy reliance on *Salinas* in this context.[4] *Raygor* thus supports the proposition that a general reference to a modifier such as "any" is not sufficient to satisfy the *Gregory* plain statement standard.[5]

The panel's emphasis on *Salinas* is misplaced for other reasons, as well. First, unlike here, there was no suggestion in *Salinas* that Congress had altered the federal-state balance of powers and encroached upon State sovereignty. As the panel conceded, "the state [in *Salinas*] had no interest in allowing its officials to take bribes." 299 F.3d at 955.

Moreover, in contrast to the dearth of evidence concerning the meaning of the relevant language in section 253, there was ample textual and historical evidence that the bribery statute at issue in *Salinas* "was designed to extend federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds."

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period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. § 1367(d) (emphasis added).

[4] The panel decision also relies on other Supreme Court decisions for the unremarkable proposition that the word "any" has an expansive meaning. *See* 299 F.3d at 953-54. Unlike *Raygor*, none of the cited cases involve federal interference with State sovereignty. Thus, they have no bearing on the proper application of the *Gregory* plain statement rule in this case.

[5] Pursuant to Rule 28(j) of the Fed.R.App.P., counsel for the Commission brought the *Raygor* decision to the panel's attention by letter dated March 1, 2002. The panel decision did not discuss *Raygor*.

Salinas, 522 U.S. at 58. "The enactment's expansive, unqualified language both as to the bribes forbidden and the entities covered" undercut the defendant's attempt to impose a narrowing construction to overturn his conviction. *Id.*, 522 U.S. at 56. This textual evidence included not merely the word "any," but also "the broad definition of the 'circumstances' to which the statute applie[d]" and the fact that the statute did not "limit the type of bribe offered." *Id*., 522 U.S. at 57. And, significantly, the Supreme Court emphasized that Congress had amended the statute and expanded its coverage to redress the negative effects of a narrow judicial construction of the predecessor bribery statute. *Id*., 522 U.S. at 58.

Given this extensive textual and historical evidence that Congress intended the statute to apply to bribes that did not affect federal funds, the bribery statute in *Salinas* (unlike section 253, or the statutes at issue in *Gregory* and *Raygor*) was not "susceptible of two plausible interpretations, one of which would have altered the existing balance of federal and state powers." *Id*., 522 U.S. at 59. Rather, the text of the statute was "unambiguous on the point under consideration," and the Supreme Court thus found no need to apply the principle articulated in *Gregory*. *Id*., 522 U.S. at 60.

For these reasons, the panel's reliance on *Salinas* was error, leading it to conclude that the modifier "any" provided "unmistakably clear" evidence that Congress intended to reach into State sovereignty and alter Missouri's governmental structure.

3. Finally, Missouri pointed out that the term "entity," broadly construed, could include a host of State agencies and subdivisions, and argued that, if § 392.410(7) were held to be preempted, the State would be unable to prevent its own agencies from providing telecommunications services. 299 F.3d at 955-66. The panel dismissed this

argument as “fanciful.” *Id*. But the logic of the panel’s holding would bar Missouri from prohibiting subunits of its own government from providing telecommunications services. The panel decision thus apparently is tantamount to a ruling that Missouri itself must enter the telecommunications business, because a refusal to do so would “prohibit” an “entity” from providing telecommunications services. There is not the slightest evidence that Congress intended such an extraordinary result.

CONCLUSION

Congressional interference with the decision of the people of Missouri to define and limit the authority delegated to the State's political subdivisions undeniably upsets the usual constitutional balance of federal and state powers. Missouri's decision is "of the most fundamental sort for a sovereign entity. Through the structure of its government . . . a State defines itself as a sovereign." *Gregory*, 501 U.S. at 460. The panel erred by reading section 253 to require the FCC to interfere with Missouri's governmental structure in the absence of "unmistakably clear" evidence of congressional intent. For the foregoing reasons, this Court should grant rehearing, or in the alternative, rehearing *en banc*.

Respectfully submitted,

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