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

In the Supreme Court of the United States

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

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.

SOUTHWESTERN BELL TELEPHONE, L.P., PETITIONER

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.

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

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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The statute at issue in this case—47 U.S.C. 253(a)—should not be construed to preempt state laws allocating or denying authority to the political subdivisions of States. Such preemption would constitute a serious intrusion on state sovereignty, because it would dictate to States how and whether they are to allocate governmental authority among themselves and their political subdivisions. Accordingly, under the rule of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), Section 253(a)

may not be construed to have that effect unless it can be clearly shown that Congress considered and intended it to do so. Although Section 253(a) was clearly designed to ensure that the telecommunications market would be open, there is nothing in the language, structure, or context of Section 253(a) to indicate that Congress specifically considered and intended the intrusion on state sovereignty that would follow if Section 253(a) were applied to state laws allocating or denying authority to political subdivisions. The court of appeals therefore erred in holding that Section 253(a) preempts state laws prohibiting political subdivisions from providing telecommunications service.

A. The Rule Of *Gregory* v. *Ashcroft* Applies In This Case Because Respondents' Reading Of Section 253(a) Would Seriously Intrude On Core Attributes Of State Sovereignty

Respondents appear to argue that the *Gregory* rule should be weakened or does not apply at all in this case. They argue that Section 253(a), if construed to preempt state laws allocating or refusing to allocate authority to a State's political subdivisions, would not be "an extraordinary incursion on State sovereignty." Resp. Br. 24. That contention is wrong.

1. As the government's opening brief explained (at 12 & n.2), the lower courts, which have divided on the question presented in this case, have uniformly concluded that that question is governed by the rule of *Gregory* v. *Ashcroft*. Indeed, although respondents assert that the Eighth Circuit in this case merely "*assumed* that [the *Gregory*] 'plain statement' standard applied to Section 253(a)," Resp. Br. 4 (emphasis added), the Eighth Circuit in fact clearly *held* that it applied. See Pet. App. 6a (stating that "[a] second plain-

language standard also applies in this case" and citing *Gregory*), 7a ("[T]he *Gregory* rule requires us to determine whether the statutory language plainly requires preemption."). The basis of that holding was that this Court "requires that Congress make a plain statement that it intends to preempt state law where the preemption affects the traditional sovereignty of the states." *Id.* at 6a. In that respect, the Eighth Circuit, along with each of the other courts that have addressed the issue, was correct. Respondents' effort to avoid the reach of *Gregory* is mistaken.

The *Gregory* rule applies when federal law affects "the structure of * * * government" of a State, because it is "[t]hrough the structure of its government [that] a State defines itself as a sovereign." *Gregory*, 501 U.S. at 460, 462. An important part of a State's "structure of government" consists in the State's determination of which activities should be undertaken by the central state government or its agencies, which activities should be undertaken by the State's political subdivisions, and which activities should not be undertaken by government at all, at any level. States have "absolute discretion" in entrusting—or not entrusting—governmental powers to their political subdivisions, and "[w]hether and how to use that discretion is a question central to state self-government." *City of Columbus* v. *Ours Garage & Wrecker Service*, 536 U.S. 424, 437 (2002). Under respondents' construction of Section 253(a), the statute would limit a State's ability to make those central determinations with respect to one type of activity—the provision of telecommunications service. Section 253(a) cannot be construed to have that effect unless Congress's intent to intrude upon the State's sovereignty in that way is clear.

2. Respondents argue (Br. 28) that Section 253(a) does not directly implicate state sovereignty because it has to do not with a "State's power to delegate regulatory authority to its subdivisions," but with a State's "limitations on commercial activity by political subdivisions." Respondents' distinction is unsound.

The ways in which the citizens of a State authorize governmental commercial activity may express fundamental beliefs about self-government. The citizens of one State may believe that the state government and its subdivisions should leave commercial activities entirely to private business, because government participation in commercial activities may be unnecessarily costly, a deterrent to private entry into the marketplace, or a dangerous role for the government of a free people. The citizens of another State may believe, to the contrary, that state government and its subdivisions should participate in a wide variety of commercial activities to spur competition, ensure services in underserved markets, or conduct commerce with uniquely public concerns in mind. Other States may adopt views between those extremes. But whatever its views on the subject, a State's determination of the appropriate role of government in commercial activities may reflect deep-seated views about the proper role of government in society. Construing a federal law to dictate a State's determinations in this area may therefore intrude deeply into decisions that are fundamental to state sovereignty. Before the federal law may be so interpreted, it must satisfy the *Gregory* rule.

3. On a related point, respondents observe that the FCC determined that "the objectives purportedly served by the Missouri statute could be equally well served through measures that are much less restrictive than an outright ban on entry" by political subdivisions

into the telecommunications market. Resp. Br. 18 (internal quotation marks omitted). Contrary to respondents' contention, however, that does not lessen the extent to which Section 253(a) would intrude on state sovereignty if interpreted as respondents desire. The FCC did state its view that States could take measures short of an outright ban to protect taxpayers from the commercial risks of the telecommunications business and the possible regulatory bias that could result if political subdivisions act as both regulators of and participants in the telecommunications market. See Pet. App. 25a-26a. But States may disagree with the FCC's analysis, and such disagreement may reflect an important judgment made by the affected State. Equally significant, even if the fiscal risks and regulatory pitfalls that attend government involvement in the telecommunications market had simple solutions, a State's fundamental decision that such commercial activity is—or is not —an appropriate role for government in a free society is itself a fundamental sovereign decision. The *Gregory* rule recognizes that Congress "does not readily interfere" with such decisions. *Gregory*, 501 U.S. at 461. Courts accordingly may not construe federal statutes to have that intrusive effect absent a clear showing that Congress considered and intended that result.[1]

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[1] Respondents are correct (Br. 17) that the FCC has not argued that its construction of Section 253(a) is entitled to deference in this case under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). *Chevron* applies only where, after applying "traditional tools of statutory construction," a court cannot "ascertain[] that Congress had an intention on the precise question at issue." See *id.* at 843 n.9. Here, the *Gregory* rule establishes that Section 253(a) does not preempt state laws prohibiting political subdivisions from providing telecommunications service. That eliminates the occasion

B. The *Gregory* Rule Requires That Ambiguities Be Resolved Against Construing Statutes To Intrude On State Sovereignty

Respondents argue that, "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." Resp. Br. 36. That contention is impossible to square with this Court's statement of the rule in *Gregory* itself: "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" state law in an area central to state sovereignty. *Gregory*, 501 U.S. at 460 (quoting *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 243 (1985)). In any event, none of the cases cited by respondents support their theory that the *Gregory* rule has some weaker force in cases involving a State's allocation of authority to political subdivisions.

1. In two of the cases respondents cite, *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597 (1991), and *City of Columbus* v. *Ours Garage & Wrecker Service*, *supra*, the Court held that Congress did *not* intend to restrict the authority of local governments when it enacted the federal statutes at issue. Congressional action that does not preempt state or local law poses no threat to state sovereignty. The decisions in those cases accordingly do not support respondents' position that courts may freely construe federal statutes to intrude on state allocations of authority to their political subdivisions.

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for applying *Chevron*. Cf. *National Fed'n of Fed. Employees* v. *Department of the Interior*, 526 U.S. 86, 100 (1999) ("[T]he [agency] should have the opportunity to consider these questions aware that the Statute permits, but does not compel, the conclusions it reached.").

In any event, neither *Mortier* nor *City of Columbus* presented a question analogous to the question presented in this case. In *Mortier*, a federal statute expressly provided that States could regulate pesticides in ways that did not conflict with federal law. 501 U.S. at 606. The question presented was whether that "express grant of regulatory authority to the States," *id.* at 607, impliedly preempted all local laws regulating pesticides. The rule announced in *Gregory* v. *Ashcroft* has no obvious application in the context of an "express grant of regulatory authority" to the States. Moreover, regardless of how the Court answered the question in *Mortier*, a state law analogous to the one in this case—a state law prohibiting localities from regulating pesticides—would continue to have full effect; there was no claim in *Mortier* that the federal statute granted localities authority they would not otherwise have had under state law. *Mortier* is accordingly not on point.

In *City of Columbus*, a federal statute generally preempted certain state or local regulation of motor carriers, but the statute specifically provided that the preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." 536 U.S. at 428 (quoting 49 U.S.C. 14501(c)(2)(A)). The question presented was whether that proviso saved the authority of political subdivisions, as well as States, to regulate motor vehicles, and the Court concluded that it does. The Court's statement of the governing rule clearly supports the government's position—not that of respondents—in this case: "*Absent a clear statement to the contrary*, Congress' reference to the 'regulatory authority of a State' should be read to preserve, not preempt, the traditional prerogative of the States to delegate their

authority to their constituent parts." *Id.* at 429 (emphasis added).[2]

2. Respondents also err in relying on *Lawrence County* v. *Lead-Deadwood School District*, 469 U.S. 256 (1985). See Resp. Br. 29- 30. In that case, a federal statute provided that local governments "may use [certain federal payments] for any governmental purpose." See 469 U.S. at 258. The federal statute was Spending Clause legislation, see *id.* at 269-270, and the Court held that a state law that expressly purported to dictate how localities must spend federal funds was preempted. As the Court explained, "pursuant to its powers under the Spending Clause, Congress may impose conditions on the receipt of federal funds, absent some independent constitutional bar." *Ibid.* The imposition of such conditions on the expenditure of federal funds is a far cry from the type of intrusion into state sovereignty at issue in this case. Indeed, the *Lawrence County* Court highlighted that distinction, emphasizing that it was not faced with a direct intrusion into areas of core state concern. "The Federal Government has not presumed to dictate manner in which counties may spend *state* in-lieu-of-tax payments." *Id.* at 269.

Although the Court thus held that the State's effort specifically to control the spending of the federal funds

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[2] Even if the Court had decided *City of Columbus* differently and held local law preempted, it would still fail to provide support for respondents' position here. In *City of Columbus*, as in *Mortier*, there can be little doubt that a state law analogous to the one here—a state law restricting municipalities from regulating motor vehicles—would have remained valid regardless of how the Court construed the scope of the federal preemption in *City of Columbus*. There was no claim in *City of Columbus* that the federal statute gave localities authority denied to them under state law.

was invalid, nothing in the opinion suggested that state laws prohibiting localities from engaging in specified activities would be invalid, and nothing in the Court's opinion suggests that the federal statute would have authorized localities to spend the funds for purposes that the State might forbid entirely. To the contrary, by providing that local governments may spend the federal funds "for any governmental purpose," the statute suggests strongly that state laws restricting the "governmental purposes" that local governments may pursue—*e.g.*, laws prohibiting localities from entering a particular commercial market—would continue to have effect, even under the federal statute.

3. Finally, respondents cite cases holding that, notwithstanding state laws that grant their subdivisions sovereign immunity, federal law may, without a clear statement, subject those subdivisions to suit. Resp. Br. 31. For example, respondents cite *Jinks* v. *Richland County*, 123 S. Ct. 1667 (2003), which held that a provision of the federal supplemental jurisdiction statute, 28 U.S.C. 1367(d), tolls a state statute of limitations for suits against municipalities in certain circumstances.

Jinks and the other cases cited by respondents are inapposite. As the Court explained in *Jinks*, "a State's authority to set the conditions upon which its political subdivisions are subject to suit in its own courts must yield to the enactments of Congress" so long as Congress acts "pursuant to a valid exercise of its enumerated powers." 123 S. Ct. at 1673. That rule is "merely the consequence of those cases * * * which hold that municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit." *Ibid.*; see, *e.g.*, *Monell* v. *Department of Soc. Servs. of the City of New York*, 436 U.S. 658 (1978); *Lincoln County* v. *Luning*, 133 U.S. 529 (1890). No "unmistakably clear" statement

of Congress's intent to subject the locality to suit is necessary, because subjecting municipalities to suit does not threaten any essential element of state sovereignty. *Jinks*, 123 S. Ct. at 1673.

Jinks provides no support for respondents, because this case has nothing to do with Eleventh Amendment sovereign immunity or with subjecting municipalities to suit. The holding of *Jinks* and the cases that preceded it is that, once a State has created political subdivisions, Congress's decision to provide for suits against those subdivisions under certain circumstances does not intrude on state sovereignty. But construction of a federal statute such as Section 253(a) to overturn a State's determination of how and whether to assign particular authority to its political subdivisions does intrude on state sovereignty, as this Court's cases make clear. See U.S. Br. 14-15. Accordingly, interpretation of Section 253(a) is subject to the *Gregory* rule, while application of the federal supplemental jurisdiction statute in *Jinks* was not.

C. No Clear Congressional Intent To Preempt State Laws Allocating Political Authority To Their Subdivisions Can Be Shown Here

Respondents argue (Br. 8-14) that, because the phrase "any entity" in Section 253(a) is a broad one, Section 253(a) clearly preempts state laws prohibiting political subdivisions from providing telecommunications services, and there remains no ambiguity to which the *Gregory* rule applies.

1. Respondents are mistaken. To be sure, as a purely linguistic matter, Section 253(a) could be interpreted to preempt not only laws that keep private businesses out of the telecommunications business, but also laws that keep political subdivisions or even state

agencies from that business. A court applying the *Gregory* rule, however, must "look[] for a clear statement of what the [law] *includes*, not a clear statement of what it *excludes*." *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 546 (2002); see *Gregory*, 501 U.S. at 467 ("[I]n this case we are not looking for a plain statement that judges are excluded. We will not read the ADEA to cover state judges unless Congress has made it clear that judges are included."). The mere use of a phrase like "any entity" which, taken in isolation, is broad enough to encompass political subdivisions, may support the proposition that political subdivisions are not *excluded* by the language of the statute. But the mere use of such a general phrase is insufficient to establish that Congress clearly intended to *include* them.[3] Cf. *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246(1985) (not sufficient under clear statement rule that a general reference to "any recipient of Federal assistance" could refer to States).[4]

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[3] Respondents cite a number of cases (Br. 12 n.3) that have construed statutes containing the term "any" broadly. With the exception of *Salinas* v. *United States*, 522 U.S. 52, 57 (1997), discussed below at p. 13 note 4, *infra*, however, none of those cases applied *Gregory* or any other clear statement rule that requires courts to be certain of Congress's intent before adopting a broad construction of a statute. Those cases therefore support the proposition that the language of Section 253(a) is broad enough that, absent a clear statement rule, it could be construed to preempt state laws allocating authority to political subdivisions. The cases do not, however, support respondents' argument that the use of the term "any" is sufficient to satisfy the *Gregory* clear statement rule and *require* that broad construction.

[4] Respondents mistakenly argue (Br. 41-42) that this Court's decision in *Pennsylvania Department of Corrections* v. *Yeskey*, 524 U.S. 206 (1998), supports their position. In *Yeskey*, the statute at issue expressly applied to "any department, agency * * * or

2. More fundamentally, the *Gregory* rule precludes a court from construing a federal statute to interfere with state authority in areas that are central to self-government unless it can be shown that Congress intended that effect. In this case, there is nothing in the text, structure, or context of Section 253(a) to indicate that Congress ever considered or intended the intrusive effect that Section 253(a), as interpreted by respondents, would have on state self-government.

a. *Statutory Text.* As discussed, the use of the phrase "any entity" does not provide any indication that Congress particularly considered—and intended—the intrusive effect that Section 253(a) would have on state self-government. It suggests at most a general intent by Congress that Section 253(a) should preempt state laws that grant exclusive franchises or otherwise limit private participation in the telecommunications market. Indeed, a central goal of the 1996 Act was "to accelerate rapidly *private sector* deployment of advanced telecommunications * * * by opening all telecommunications markets to competition." S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1, 113 (1996) (emphasis added). Congress could easily have had just that general intent, without giving any consideration to the imposition on state sovereignty that would result if Sec-

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other instrumentality of a State." *Id.* at 210 (quoting 42 U.S.C. 12131(1)(B)). The Court held that *Gregory* was no obstacle to applying that statute to a state Department of Corrections, because the statutory text demonstrated that Congress specifically considered—and intended—to affect the internal operations of state government. In this case, there is nothing to suggest that Congress similarly considered and intended the effect on state sovereignty that would result if Section 253(a) were applied to preempt state laws allocating, or declining to allocate, authority to political subdivisions. See U.S. Br. 19-20.

tion 253(a) were construed to limit a State's structural decisions about how and whether to allocate authority among its political subdivisions. Accordingly, the statutory text itself does not establish that Congress intended such an intrusive effect.[5]

b. *Structure*. The structure of Section 253(a) similarly contains no suggestion or implication that Congress intended to interfere in a State's internal allocation of authority among governmental units. To the contrary, construing Section 253(a) to preempt state laws that perform such an allocation would raise its own difficulties. Under the broadest possible reading of "any entity" in Section 253(a), that term would include not merely political subdivisions, but also state departments and agencies as well. It is doubtful that Congress intended under Section 253(a) to preempt not merely laws that "prohibit or have the effect of prohibiting the ability of" private parties to provide

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[5] Respondents argue (Br. 40-41) that this Court's decision in *Salinas*, 522 U.S. at 57, stands for the proposition that the modifier "any" is sufficient, under the *Gregory* rule, to establish that Congress specifically intended the broadest possible reading of the term that follows. The Court's interpretation of the statute at issue in *Salinas*, however, was based not merely on the term "any," but on a number of other factors not present here. See Gov't Br. 21-22. Unlike Section 253(a), the statute at issue in *Salinas* expressly applied to "local * * * government" officials, 522 U.S. at 56, and thus it was clear that Congress specifically intended to regulate their conduct. Moreover, the interpretation at issue in *Salinas* did not implicate concerns central to state sovereignty to the same extent as would respondents' interpretation of Section 253(a). See *id.* at 22. A far closer analogy to this case is provided by *Raygor*, which did apply a clear statement rule and concluded that the term "any claim" is *not* sufficiently unambiguous to include claims that implicate core concerns of state sovereignty. See Gov't Br. 23-24.

telecommunications service, but also state laws that "prohibit or have the effect of prohibiting" a state energy department, public utility commission, or insurance commissioner from providing such service. Congress accordingly could not have intended the broadest possible reading of "any entity." The limiting principle that excludes state agencies or departments from the scope of that term excludes political subdivisions as well.

Respondents agree that preempting state laws that allocate authority among *state* governmental agencies and officials would be "absurd by anyone's lights." Resp. Br. 22. But they argue that their interpretation of Section 253(a) would not lead to that result, because another subsection—Section 253(b)—"ensure[s] that Section 253(a) would not produce results that are absurd, or that constitute an excessive incursion on State sovereignty." *Ibid.* Section 253(b), however, cannot do the work respondents' theory demands of it.

Section 253(b) provides:

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis * * * requirements necessary to * * * protect the public safety and welfare, ensure the continued quality of telecommunications service, and safeguard the rights of consumers.

47 U.S.C. 253(b). That provision is not a general saving clause for state laws whose preemption would be "absurd" or laws that would be "an excessive incursion on State sovereignty." It saves only state laws that are "necessary" to achieve the stated goals and that operate "on a competitively neutral basis." Thus, it saves laws that, for example, ban deceptive business practices. See, *e.g.*, *Cedar Rapids Cellular Tel., L.P.* v.

Miller, 280 F.3d 874, 880 (8th Cir. 2002). But Section 253(b) would appear not to save state laws that are "competitively *non*-neutral" because they treat different categories of potential providers differently and expressly prohibit or have the effect of prohibiting some such categories of providers, such as state agencies or officers, from entering the telecommunications market at all. See, *e.g.*, *RT Communications, Inc.* v. *FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000) ("competitive neutrality" means that rule must apply to "the market as a whole" rather than "one portion of a local exchange market"). If so, then state laws prohibiting state or local agencies or officers from providing telecommunications services would be preempted by Section 253(a) and not saved by Section 253(b)—just the result that respondents themselves concede is "absurd by anyone's lights."

Finally, although respondents argue (Br. 34) that the government's construction of Section 253(a) would require drawing lines between political subdivisions and private entities, respondents' view presents far more serious line-drawing problems. States operate with—and grant or deny powers to—a wide variety of different types of political subdivisions and other agencies. See Gov't Br. 18 n.3. Where a State has simply never clothed a particular subdivision (or state agency) with authority to operate in a commercial environment or where a State has created a limited-purpose subdivision or agency whose goals are far from the telecommunications market, respondents' position leads to indeterminancy. Courts would have to determine whether the restriction on the subdivision's or agency's authority is preempted under Section 253(a) as a "statute or regulation, or other State or local legal requirement," that "prohibit[s] or ha[s] the effect of

prohibiting the ability of [the subdivision or agency] to provide * * * telecommunications service." 47 U.S.C. 253(a). Nothing in Section 253(a) or in respondents' submission provides any guidance for resolving such questions.

c. *Context.* There is nothing in the context surrounding Section 253(a) that suggests that Congress considered—and intended—the intrusion on state sovereignty that would occur under respondents' construction of the statute. It is of course true that "Congress unquestionably intended utilities to be among the 'entities' protected by Section 253(a)." Resp. Br. 20. Congress clearly did intend to preempt state laws that closed the telecommunications market, including those that closed the market to electric or other utilities. Although preemption of such state laws does restrict state regulatory programs, that is the standard kind of restriction on state regulatory activity that attends federal preemption of state law generally, and it does not trigger application of the *Gregory* rule. But under respondents' construction, Section 253(a) would work a distinct and greater intrusion on state sovereignty, because it would result in federal regulation of the structure of state government and the allocation of authority among the State and its political subdivisions. There is no indication that Congress considered or intended that intrusion, and Section 253(a) accordingly may not, under *Gregory*, be construed to have that effect.

(i.) Respondents' sole attempt to find legislative history that would support their position consists of a single sentence in a statement made by Senator Lott at a hearing two years before the 1996 Act was passed. Respondents contend that Senator Lott's statement "places Congress's intentions * * * beyond doubt."

See Resp. Br. 20. But this Court has long recognized that "[i]n surveying legislative history * * * the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Garcia* v. *United States*, 469 U.S. 70, 76 (1984) (internal quotation marks omitted). The Court has therefore "eschewed reliance on the passing comments of one Member, *Weinberger* v. *Rossi*, 456 U.S. 25, 35 (1982), and casual statements from the floor debates." *Ibid.* It follows *a fortiori* that the remarks of a single Member that were made not in floor debates on legislation, but in a committee hearing held two years before the legislation was enacted, are not a reliable guide to legislative intent.[6]

In any event, Senator Lott's comment does not establish even that Senator Lott—much less Congress as a whole—considered and intended that Section 253(a) would work the serious intrusion on state sovereignty that respondents advocate. At the 1994 hearing, Senator Lott stated:

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[6] Respondents point out (Br. 21) that Senator Lott was "a Senate manager of the Telecommunications Act" in 1996. His future status as a manager of the legislation could not add to the authority of his comments in a committee hearing two years earlier. This Court stated in *McCaughn* v. *Hershey Chocolate Co.*, 283 U.S. 488, 493 (1931), that it did not "think of significance the fact * * * that statements inconsistent with the conclusion which we reach were made to committees of Congress or in discussions on the floor of the Senate by Senators who were not in charge of the bill." Senator Lott's statement was one "made to [a] committee[] of Congress" by someone who was not, at the time it was made, "in charge of the bill." Under *McCaughn*, therefore, it is not "of significance."

> I think the rural electric associations, the municipalities, and the investor-owned utilities, are all positioned to make a real contribution in this telecommunications area, and I do think it is important that we make sure we have got the right language to accomplish what we wish accomplished here.

The Communications Act of 1994: Hearings on S. 1822 Before the Senate Comm. on Commerce, Science and Transportation, 103d Cong., 2d Sess. 379 (1994). In that sentence, Senator Lott indicated that he believed that the new legislation should contain "the right language to accomplish what we wish accomplished here." But he did not state precisely what he "wish[ed] to accomplish here," and his statement accordingly fails to provide any support for an inference that Congress specifically considered and intended the effect on state sovereignty that would be entailed by preempting state laws allocating functions and authority to political subdivisions.

Moreover, the bill at the time Senator Lott spoke was different from the bill as enacted. It contained not only a provision similar to present Section 253(a), but also an additional subsection, later omitted, that provided that "an electric, gas, water, or steam utility may provide telecommunications services." See 140 Cong. Rec. 1130 (1994) (Section 230(b) of the proposed legislation as introduced). Both Senator Lott's statement and the comments of a witness who appeared the same day representing public power companies appear to have addressed that now-omitted provision, rather than the provision that became Section 253(a) itself. They accordingly provide no guide to the interpretation of Section 253(a).

(ii.) Respondents argue that, in preempting state laws that restrict or prohibit the entry of utilities generally into the telecommunications market, Congress "was well aware * * * that utilities are often owned by municipalities." Resp. Br. 20. But publicly owned electric utilities serve only 14.6% of electric customers and provide only 13.7% of the megawatt-hours of electric power generated nationwide. American Public Power Ass'n, *2003 Annual Directory and Statistical Report* 13, 14. They are therefore relatively minor players in the electric power industry. In any event, although Congress was aware elsewhere in the 1996 legislation that municipal utilities exist, see 47 U.S.C. 224(a)(1), nothing in the text, structure, or context of Section 253(a) suggests that Congress considered or intended to preempt state laws defining the authority of the political subdivisions of States. Accordingly, Section 253(a) may not be construed to have that effect.

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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