No. 06-1184

In the Supreme Court of the United States

SPRINT NEXTEL CORPORATION, ET AL., PETITIONERS

v.

NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record

THOMAS G. HUNGAR
Deputy Solicitor General

ERIC D. MILLER
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

MATTHEW B. BERRY
Acting General Counsel

JOSEPH R. PALMORE
Deputy General Counsel

DANIEL M. ARMSTRONG
JACOB M. LEWIS
Associate General Counsels

LAUREL R. BERGOLD
Counsel
Federal Communications Commission
Washington, D.C. 20554

QUESTION PRESENTED

Whether the Federal Communications Commission reasonably interpreted Section 332(c)(3)(A) of the Communications Act of 1934, 47 U.S.C. 332(c)(3)(A), which denies States "any authority to regulate * * * the rates charged" by a commercial mobile telephone service provider, to preempt States from requiring or prohibiting separate discrete charges, or "line items," on the bills of wireless telephone carriers.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Communications Act of 1934 (Communications Act or Act), 47 U.S.C. 151 *et seq.*, provides a federal framework for the regulation of communications services, including wireless telephone services. Title III of the Act, 47 U.S.C. 301 *et seq.*, gives the Federal Communications Commission (FCC or Commission) the exclusive authority to license the radio frequencies used in wireless communications. 47 U.S.C. 301, 303. In the exercise of that authority, the Commission has set aside and licensed radio frequencies for wireless telephone

service since the mid-1970s. See, *e.g., National Ass'n of Regulatory Util. Comm'rs* v. *FCC*, 525 F.2d 630, 636-637 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976).

Until 1993, wireless common-carrier services—including cellular telephone service—were subject to the same system of dual state and federal regulation that governs traditional wireline telephone services. See *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 360 (1986). Section 2(b) of the Communications Act, 47 U.S.C. 152(b), reserved to the States the authority to regulate *intrastate* common-carrier services, and a number of States required wireless carriers to set their intrastate rates in tariffs filed with public utility commissions. See, *e.g.*, *In re Petition on Behalf of the State of Haw., Pub. Util. Comm'n*, 10 F.C.C.R. 7872, 7879-7880 ¶¶ 30-38 (1995) (*Hawaii Pub. Util. Comm'n*). State regulation of intrastate wireless rates included oversight of the rate structures for those services.[1] See, *e.g., Connecticut Dep't of Pub. Util. Control* v. *FCC*, 78 F.3d 842, 847 (2d Cir. 1996); *In re Nationwide Cellular Serv., Inc.* v. *Public Serv. Comm'n*, 583 N.Y.S.2d 852, 853 (App. Div. 1992). In contrast, *interstate* wireless rates were regulated by the Commission under Title II of the Communications Act, 47 U.S.C. 201 *et seq.* Title II imposes

[1] A rate structure encompasses the manner in which a carrier expresses and calculates its charges for particular services. See *In re AT&T*, 74 F.C.C.2d 226, 235 (1979). "The pricing mechanisms employed to determine rates and charges as well as any interrelationships which exist among rate elements are part of rate structures." *In re AT&T*, 84 F.C.C.2d 158, 182 n.52 (1980). Individual "[r]ate elements are the basic building blocks of rate structures." *Ibid.*; accord *AT&T*, 74 F.C.C.2d at 235. While a rate structure may consist of only a single rate element, it also may include two or more discrete rate elements, such as a monthly fee, a per-minute charge, or a separate charge designed to pass through the costs of a tax.

a number of specific obligations on common carriers, including the filing of tariffs with the Commission to establish the rates, terms, and conditions of interstate service. 47 U.S.C. 203.

In 1993, Congress amended the Communications Act "to dramatically revise the regulation of the wireless telecommunications industry." *Cellnet Commc'ns, Inc.* v. *FCC*, 149 F.3d 429, 433 (6th Cir. 1998); see Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(b)(2), 107 Stat. 392 (47 U.S.C. 332). The amendments created two new regulatory categories of wireless service: "commercial mobile service" and "private mobile service." 47 U.S.C. 332(d)(1) and (3).[2]

Section 332(c)(3)(A) denies the States "any authority to regulate the entry of or the rates charged by any" commercial or private mobile service providers. 47 U.S.C. 332(c)(3)(A). At the same time, Congress said that in enacting that provision it was not preempting state and local regulation of "other terms and conditions" of wireless service. *Ibid*. Congress also provided States with the ability to petition the Commission for permission to regulate commercial mobile service rates, and it directed the Commission to grant such permission if the State demonstrates that "market conditions * * * fail to protect subscribers adequately from unjust and

[2] "[C]ommercial mobile service" includes any mobile service "that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." 47 U.S.C. 332(d)(1). The Commission's regulations refer to the commercial mobile services defined by the Act as "commercial mobile radio service," or "CMRS," 47 C.F.R. 20.3; they are more commonly known as cellular telephone services or commercial wireless telephony.

unreasonable rates or rates that are unjustly or unreasonably discriminatory." 47 U.S.C. 332(c)(3)(A)(i).

The 1993 amendments reflect a "general preference in favor of reliance on market forces rather than regulation." *In re Petition of N.Y. State Pub. Serv. Comm'n*, 10 F.C.C.R. 8187, 8190 ¶ 18 (1995). Thus, although cellular services are subject to Title II of the Communications Act, the Commission is authorized to forbear from regulating them under provisions of that Title if certain specified consumer-protection and public-interest criteria are satisfied. 47 U.S.C. 332(c)(1)(A).

The Commission has exercised its forbearance authority to exempt cellular providers from filing interstate tariffs. 47 C.F.R. 20.15(c); *In re Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Servs.*, 9 F.C.C.R. 1411, 1480 ¶ 179 (1994). In addition, the Commission consistently has denied States permission to regulate cellular rates and entry, concluding in each case that the States had failed to demonstrate that market forces were inadequate to protect consumers. See, *e.g.*, *In re Petition of Conn. Dep't Pub. Util. Control*, 10 F.C.C.R. 7025, 7059 ¶ 77 (1995), petition for review denied, 78 F.3d 842 (2d Cir. 1996); *Hawaii Pub. Util. Comm'n*, 10 F.C.C.R. at 7872; *In re Petition of the State of Ohio,* 10 F.C.C.R. 7842, 7852 ¶ 39, reconsideration denied, 10 F.C.C.R. 12,427, 12,439 ¶ 25 (1995).

The rates that cellular providers charge their customers thus are generally governed "by the mechanisms of a competitive marketplace," in which rates and terms of service are established by contract rather than by regulation. *In re Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17,021, 17,032 ¶ 20 (2000). Cellular providers typically operate without regard to state borders and, in

contrast to wireline carriers, generally have come to structure their offerings on a national or regional basis. A number of cellular operators with national networks offer national rate pricing plans, while others offer pricing plans on a multi-state, regional basis. *In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 21 F.C.C.R. 10,947, 10,959 ¶ 25, 10,967 ¶ 50, 10,983-10,984 ¶¶ 90-91 (2006).

2. In March 2005, the Commission issued a declaratory ruling construing Section 332(c)(3)(A)'s prohibition on state rate regulation of cellular providers to preempt state regulations that either prohibit or require the use of "line items"—defined as "discrete charge[s] identified separately on an end user's bill." Pet. App. 65a.

The Commission explained that Section 332(c)(3)(A) does not "specifically define 'rates,' 'entry,' or other key terms." Pet. App. 66a. The Commission pointed out, however, that it has consistently interpreted the statute broadly, barring States not only "from prescribing 'how much may be charged'" for cellular service, but also from prescribing "rate structures" and "rate elements." *Ibid.* (citation omitted). The Commission also noted that its prior statements had equated "line items" with "rate elements." *Id.* at 66a-67a (citing *In re Access Charge Reform*, 15 F.C.C.R. 12,962, 13,057 ¶ 218 (2000), aff'd in part and rev'd in part *sub nom. Texas Office of Pub. Util. Counsel* v. *FCC*, 265 F.3d 313 (5th Cir. 2001), cert. denied, 535 U.S. 986 (2002)); *In re Federal-State Joint Bd. on Universal Serv.*, 17 F.C.C.R. 24,952, 24,979 ¶ 54 (2002), reconsideration granted, 18 F.C.C.R. 4818 (2003).

The Commission explained that state regulations either prohibiting or requiring the recovery by a wireless carrier of specific costs through a separate line item

"clearly and directly affect the manner in which the * * * carrier structures its rates." Pet. App. 68a; see *id*. at 69a. For example, the Commission pointed out that a state prohibition on line items regulates the structure of a carrier's rates by permitting recovery of costs only through "an undifferentiated charge for service." *Ibid.* Conversely, the Commission noted, a state requirement that carriers "segregate particular costs into line items * * * similarly would limit a carrier's ability to set and structure its rates" by compelling the disaggregation of rate elements. *Ibid.* The impact on rates of state line-item regulation is "particularly evident," the Commission explained, when one "consider[s] that most [cellular] carriers * * * market and price their services on a national basis." *Ibid.* Absent preemption, the Commission found, a "carrier forced to adhere to a varying patchwork of state line item requirements * * * would be forced to adjust its rate structure from jurisdiction to jurisdiction." *Ibid.*

Apart from the preemptive effect of Section 332(c)(3)(A), the agency also observed that state regulations prohibiting or mandating line items "may be subject to preemption because they conflict with established federal policies." Pet. App. 74a. The Commission stated that state line-item requirements and prohibitions might be inconsistent with the "uniform, national, and deregulatory framework" for cellular telephone service established by Congress and the Commission, in which "prospective rates are established by the * * * carrier and customer in service contracts, rather than dictated by federal or state regulators." *Id*. at 74a-75a. The Commission noted that there was a "significant possibility" that such regulation would subject providers to a variety of disparate state requirements and prohibitions, which

would "undermine the benefits derived from allowing * * * carriers the flexibility to design national or regional rate plans." *Id.* at 75a. The Commission, however, did not make any final decision on conflict preemption, instead soliciting further comment on the question. *Id.* at 61a-65a.

The Commission decided not to issue a federal rule prohibiting carriers from assessing any line item not authorized or mandated by the government, as respondent National Association of State Utility Consumer Advocates (NASUCA) had proposed. Pet. App. 58a-59a. The Commission explained that "the provision of accurate and non-misleading information on a telephone bill may be useful information to the consumer in better understanding the charges associated with their service and making informed cost comparisons between carriers." *Id.* at 59a. The Commission made clear, however, that misleading line items were an unjust and unreasonable practice proscribed by Section 201(b) of the Communications Act, 47 U.S.C. 201(b). Pet. App. 61a-62a.

The Commission emphasized that its preemption ruling had no effect on the ability of States to levy and collect taxes or to create state universal-service support mechanisms to which cellular providers and other telecommunications carriers must contribute. Pet. App 56a-57a, 70a, 71a. The Commission also explained that its ruling applied only to state regulations that prohibited or required line items, thereby leaving undisturbed other forms of state regulation, including state truth-in-billing requirements that are consistent with federal rules. *Id.* at 72a. And the agency emphasized that its ruling did not prevent state regulations governing the disclosure of rates set by cellular providers or the neu-

tral application of state contractual or consumer fraud laws. *Ibid*.

In a separate section of its order, the Commission instituted a rulemaking to consider "the broader issue of the role of states in regulating billing," among other issues. Pet. App. 76a. The Commission invited parties to comment on the "proper boundaries of 'other terms and conditions' under section 332(c)(3)(A) of the Act" and the "relative roles of the Commission and the states in defining carriers' proper billing practices." *Id*. at 91a. The Commission specifically asked parties whether it should preempt state regulation of carriers' billing practices beyond line items, and the degree to which "conflict preemption" can be applied to all carriers under the Communications Act and the Commission's policies. The Commission also sought comment on whether requiring carriers to conform to a multitude of disparate state billing requirements relating to customer disclosure and details in bills stifles competition and unreasonably burdens interstate commerce. *Id.* at 89a. In addition, the Commission asked parties to address whether Sections 201(b) and 205(a) of the Communications Act, 47 U.S.C. 201(b), 205(a), give the Commission express authority to preempt state regulations that prescribe "billing format and content, including line-item charges." Pet. App. 90a.[3]

[3] Section 201(b) requires "[a]ll charges, practices, classifications, and regulations for and in connection with" an interstate communications service to be "just and reasonable." 47 U.S.C. 201(b); see *Global Crossing Telecomms., Inc.* v. *Metrophones Telecomms., Inc.*, 127 S. Ct. 1513, 1520-1522 (2007). Section 205(a) authorizes the Commission, upon finding that any such charge, classification, regulation, or practice violates any provision of the Communications Act, to prescribe a "just, fair, and reasonable" charge, classification, regulation, or practice

3. Respondent NASUCA petitioned for review, and respondent National Association of Regulatory Utility Commissioners intervened in support of NASUCA, while petitioner Sprint Nextel, joined by other wireless carriers, intervened in support of the FCC. The court of appeals vacated the Commission's preemption ruling. Pet. App. 1a-33a, 36a-37a.

The court of appeals concluded that "[t]he language of section 332(c)(3)(A) unambiguously preserved the ability of the States to regulate the use of line items in cellular wireless bills." Pet. App. 25a. Acknowledging that the Communications Act does not define the phrase "rates charged," the court held, after examining several dictionary definitions, that the phrase denotes the "amount of a charge or payment." *Ibid.* In the court's view, "[t]he prohibition or requirement of a line item affects the presentation of the charge on the user's bill, but it does not affect the amount that a user is charged for service." *Id.* at 26a. In other words, "[s]tate regulations of line items regulate the billing practices of cellular wireless providers," and "not the charges that are imposed on the consumer." *Ibid.* "Because the presentation of line items on a bill is not a 'charge or payment' for service * * * it is an 'other term or condition' regulable by the states." *Ibid.* (citation omitted).

The court of appeals also held that the Commission "failed adequately to explain its conclusion that a line item falls within the definition of 'rates' because the use of line items has an alleged direct effect on rates." Pet. App. 28a. The fact that a state "prohibition or require-

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"to be thereafter followed" and to order carriers to "cease and desist from such violation." 47 U.S.C. 205(a).

ment of a line item has some effect on the charge to the consumer," the court stated, does not necessarily establish that it regulates "rates" and place it "outside the ambit of state regulation of 'other terms and conditions.'" *Ibid.* The court noted that the Commission has held that state regulations requiring cellular providers to contribute to state universal service funds are not barred by Section 332(c)(3)(A) because such regulations affect rates only indirectly. *Id.* at 29a (citing *In re Petition of Pittencrieff Commc'ns, Inc.*, 13 F.C.C.R. 1735 (1997), aff'd *sub nom. Cellular Telecomms. Indus. Ass'n* v. *FCC*, 168 F.3d 1332 (D.C. Cir. 1999)). The court failed to see any "logical distinction between what the Commission terms a 'direct effect' caused by the regulation of line items and the alleged 'indirect effect' caused by the imposition of universal service charges." *Ibid.*

Finally, the court of appeals expressed concern that the Commission's interpretation of the phrase "rates charged" in Section 332(c)(3)(A) to include matters having to do with "the presentation of line items on consumers bills" would "deprive[] the complementary phrase 'other terms and conditions' of all meaning" and would leave the Commission "free to preempt virtually any form of state regulation of wireless service, including laws regarding disclosure and consumer protection." Pet. App. 32a. Indeed, the court asserted that the Commission's interpretation of Section 332(c)(3)(A) would result in the preemption of "powers historically retained by the states, such as the imposition of state taxes," so long as they, too, had an impact on the way in which cellular providers recover their costs. *Ibid.*[4]

[4] In response to the FCC's petition for panel rehearing, the panel modified its decision to make clear that its decision vacated only that portion of the Commission's order that contained the preemption

DISCUSSION

The court of appeals erred by not according appropriate deference to the FCC's reasonable construction of Section 332(c)(3)(A), but its decision does not warrant further review at this time. The Commission has a pending proceeding on whether there are other bases for the preemption of state regulations mandating or prohibiting line items in cellular telephone bills. For that reason, the decision below is not of sufficient continuing importance at present to warrant the Court's attention.

A. The Decision Below Is Incorrect

1. The court of appeals erred in vacating the Commission's determination that Section 332(c)(3)(A) bars States from requiring or prohibiting line items in wireless bills. Pet. App. 25a-33a. Section 332(c)(3)(A) denies States "any authority to regulate * * * the rates charged" by a cellular provider, but it does not preempt their regulation of "other terms and conditions" of wireless service. That provision, however, "never states what constitutes rate * * * regulation or what comprises other terms and conditions of wireless service." *Cellular Telecomms. Indus. Ass'n* v. *FCC*, 168 F.3d 1332, 1334, 1336 (D.C. Cir. 1999). By leaving gaps as to "the scope and definition of statutory terms," Congress implicitly delegated authority to the Commission to elucidate the statute's meaning. *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2346 (2007); see *National Cable & Telecomms. Ass'n* v. *Brand X Internet*

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ruling, and that the effect of the decision was to remand the case to the Commission. Pet. App. 36a-37a. Thereafter, the court denied petitions for rehearing *en banc* filed by the intervenors representing wireless carriers. *Id.* at 34a-35a.

Servs., 545 U.S. 967, 980 (2005); *Chevron USA Inc.* v. *NRDC*, 467 U.S. 837, 843-844 (1984). The court of appeals should have accepted the agency's reasonable interpretation of the statute, "even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X*, 545 U.S. at 980; see *Chevron*, 467 U.S. at 843-844 & n.11. The court of appeals erred in failing to defer to the FCC's reasonable construction of Section 332(c)(3)(A).

The court of appeals discussed the "presumption against preemption," Pet. App. 23a, but that principle does not justify the court's failure to defer. First, the court of appeals itself correctly recognized that the presumption cannot "trump" the *Chevron* standard of review in this case. *Ibid.* Moreover, the presumption is of little help in interpreting an *express* preemption provision like Section 332(c)(3)(A). See *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 744 (1996); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 495 (1996) (explaining that "our interpretation of the pre-emption statute" in the Medical Device Amendments of 1992, Pub. L. No. 102-30, 106 Stat. 238, "is substantially informed by" FDA regulations, and citing *Chevron*). And, in any event, the presumption is out of place here because the "'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000); cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 547 U.S. 71, 88 (2006). Cellular telephone service can be provided only through the use of radio frequencies licensed by the FCC, see 47 U.S.C. 301, 303, and thus there has been a significant federal role in the regulation of such service since its inception.

2. The court of appeals relied upon the definition of "rate" in several dictionaries as "[a]n amount paid or charged for a good or service," Pet. App. 25a, but that definition does little to eliminate the inherent ambiguity concerning the treatment of a line item in a cellular bill. Even if "rate" had a single unambiguous meaning—which it does not, see, *e.g.*, *Webster's Third New International Dictionary* 1884 (1993) (listing 7 definitions of "rate" as a noun)—"[a]mbiguity is a creature * * * of statutory context." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). The Commission did not interpret the word "rate" in isolation and find that term to be synonymous with line items. Instead, it construed the statutory phrase "regulate * * * the rates" in accordance with the established meaning of that phrase in utility regulation—namely, that rate regulation is not limited to the review of the dollar amount charged by the carrier, but includes oversight of the carrier's rate structure and the individual elements of that rate structure.[5] Pet. App.

[5] Traditionally, "[t]he establishment of a rate for a regulated industry" has involved not only "the adjustment of the general revenue level to the demands of a fair return" but also "the adjustment of a rate schedule conforming to that level so as to eliminate discriminations and unfairness from its details." *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 584 (1942); see *Permian Basin Area Rate Cases*, 390 U.S. 747, 796 (1968) (FPC's rate-setting power included authority to require a rate structure for natural gas under which prices "were computed according to the method by which gas is produced"). And before the adoption of Section 332(c)(3)(A), States had regulated wireless telephone rates by, among other things, exercising oversight over the carriers' rate structures. See, *e.g.*, *Connecticut Dep't of Pub. Util. Control*, 78 F.3d at 847 (Connecticut reviews whether cellular carriers' "rate structures were unreasonable or discriminatory"); *Hawaii Pub. Util. Comm'n*, 10 F.C.C.R. at 7879 ¶ 32 (Hawaii "monitor[s] rate design and structure" of wireless carriers); *Nationwide Cellular Serv., Inc.* v.

66a. See *Nader* v. *FCC*, 520 F.2d 182, 204 (D.C. Cir. 1975) ("[W]ithin the power to prescribe charges is the power to determine and prescribe those elements that make up the charge."). Since a line item in a wireless bill causes a carrier to disaggregate or unbundle a component of service and associate a charge with it, regulation of line items directly implicates the carrier's rate structure. Thus, the Commission reasonably determined that state requirements and prohibitions on the use of line items constitute regulation of rate structures and are a form of rate regulation proscribed by Section 332(c)(3)(A). Pet App. 66a-69a. The court of appeals' contrary reading, even if it would also constitute a permissible interpretation of the statute, cannot foreclose the Commission's own reasonable construction. *Brand X*, 545 U.S. at 980; *Chevron*, 467 U.S. at 843-844.

Even looked at in isolation, the dictionary definitions of "rates" relied upon by the court of appeals do not show that the Commission's interpretation of Section 332(c)(3)(A) is unreasonable. A line item, as defined by the Commission, is a "discrete charge identified separately on an end user's bill." Pet. App. 65a. It is a com-

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Public Serv. Comm'n, 583 N.Y.S.2d 852, 853 (App. Div. 1992) (New York regulates the "rate structures" of intrastate cellular service).

The Commission's construction also is consistent with agency precedent construing the scope of preempted rate regulation in Section 332(c)(3)(A) to include "both rate levels and rate structures" for cellular telephone service. *In re Southwestern Bell Mobile Sys., Inc.*, 14 F.C.C.R. 19,898, 19,907 ¶ 20 (1999). The Commission has stated that "states not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements * * * or specify which among the [cellular] services provided can be subject to charges" by providers. *Ibid.*; see *In re Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. at 17,025 ¶ 8; *Cellco P'ship* v. *Hatch*, 431 F.3d 1077, 1080 (8th Cir. 2005), cert. denied, 127 S. Ct. 433 (2006).

ponent of the price that a customer must pay to receive cellular telephone service, and as such is one of the building blocks for the "amount paid or charged" for that service. *Id.* at 25a (quoting *Black's Law Dictionary* 1268 (7th ed. 1999)). Thus, a line item is an integral part of the rate for cellular service even under the dictionary definitions cited in the court's decision. State requirements or prohibitions with respect to those rate elements constitute rate regulation that is preempted by Section 332(c)(3)(A) even under the court of appeals' reading of that provision.

The court of appeals stated that the Commission's interpretation was contrary to the language of the statute because the prohibition or requirement of a line item "affects the *presentation* of the charge on the user's bill, but it does not affect the *amount* that a user is charged for service." Pet. App. 26a (emphasis added). That statement overlooks the Commission's finding that "line item regulation would affect a * * * carrier's rates and rate structure." *Id.* at 69a. The effect on the rate structure would come about, the Commission explained, because a "carrier forced to adhere to a varying patchwork of state line item requirements, which require costs to be broken out or combined together in different manners, would be forced to adjust its rate structure from jurisdiction to jurisdiction." *Ibid.*

Moreover, because wireless carriers "generally have come to structure their offerings on a national or regional basis," Pet. App. 75a, the Commission found that state-specific line-item regulation "would affect" the dollar amounts that individual customers pay for service, *id.* at 69a. As the Commission had explained in an earlier order, which it cited in the order at issue here, "all of the nationwide operators offer some version of a

national rate pricing plan in which customers can purchase a bucket of [minutes] to use on a nationwide or nearly nationwide network without incurring roaming or long distance charges." *In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 19 F.C.C.R. 20,597, 20,644 ¶ 113 (2004); see Pet. App. 75a n.104. When a State prohibits a carrier with such a rate structure from using a separate line item to pass through the cost of a state tax to its customers in that State, the carrier that wishes to maintain a consistent national or regional price system can recover the cost only by increasing its base service charges to *all* of its customers, regardless of where they are located.[6] As a result, customers in other States will bear the costs of the state tax through their payment of higher base charges. Alternatively, a carrier could abandon national pricing and adjust its rates in each State based on that jurisdiction's taxes and fees. Either way, state regulation of line items would affect the amount a carrier charges. The court's assertion that a prohibition on line items "does not affect the amount that a user is charged" simply ignores the Commission's findings on that point. *Id.* at 26a.

3. The court of appeals faulted the Commission for failing to reconcile its determination that a state re-

[6] Although a carrier could theoretically decide not to pass on the costs of the state tax to any of its customers, the record before the Commission shows that it is highly unlikely that a carrier would elect such an option. See Comments of Verizon Wireless 11-12 (July 14, 2004); Comments of CTIA—The Wireless Association 5 (July 14, 2004); Comments of Leap Wireless International, Inc. 9 (July 14, 2004). Thus, unless the carrier completely retooled its pricing structure and established a separate base price for citizens in the taxing State that passed through the state tax, the burdens of that tax in all likelihood would be exported to citizens of other States.

quirement or prohibition on line items is proscribed by Section 332(c)(3)(A) with its prior determination that a State may require cellular providers to contribute to the state universal service fund. Pet. App. 29a (citing *Pittencrieff,* 13 F.C.C.R. at 1735). In fact, no inconsistency exists.

First, as the Commission pointed out, Section 254(f) of the Communications Act, 47 U.S.C. 254(f), expressly authorizes States to require cellular providers to contribute to state universal service support mechanisms. Pet. App. 70a. In interpreting Section 332(c)(3)(A) not to preempt States from requiring cellular providers from contributing to universal service funds, the Commission reasonably interpreted Section 332(c)(3)(A) in a manner that gives effect to the statutory policy underlying Section 254(f). See *Pittencrieff*, 13 F.C.C.R. at 1737 ¶ 4.

Second, the requirement that a carrier contribute to a state universal service fund is an obligation that the State imposes upon the carrier, not a regulation governing the rates that the carrier charges its customers. Whereas state requirements or prohibitions on line items directly regulate rates by dictating the rate structure for wireless service, Pet. App. 66a-69a, a requirement that a carrier contribute to a universal service fund—like the imposition of any other valid state tax or fee—does not have the same "direct effect on the * * * carrier's rates and rate structure," *id.* at 73a. The Commission could therefore reasonably distinguish between the two types of requirements. Ultimately, drawing the fine distinctions necessary in this area "involves difficult policy choices" that are committed to the Commission. *Brand X*, 545 U.S. at 980.

Finally, the court of appeals suggested that the Commission's interpretation of Section 332(c)(3)(A) would render that provision's carve-out for "other terms and conditions" superfluous because it would permit the preemption of "virtually any form of state regulation of wireless service, including laws regarding disclosure and consumer protection." Pet. App. 32a. That concern is without foundation. The Commission held that Section 332(c)(3)(A) preempts state regulations that mandate or prohibit the use of line items because such regulations have "a direct effect on the [cellular] carrier's rates and rate structures." *Id.* at 73a. Thus, the Commission's ruling does not speak to state regulations that have no effect, or only an indirect effect, on cellular telephone rates.

Moreover, although the court of appeals stated that the Commission's ruling would permit the preemption of state disclosure and consumer protection laws, Pet. App. 32a, the Commission made clear that "state regulations that address * * * disclosure * * * and the neutral application of state contractual or consumer fraud laws, are *not* preempted by section 332." *Id.* at 72a (emphasis added). The court of appeals similarly asserted that "state taxes[] would be preempted" by the Commission's construction of Section 332(c)(3)(A), *id.* at 32a, even though the Commission itself construed Section 332(c)(3)(A) *not* "to limit a state's authority to impose taxes or other regulatory fees," *id.* at 71a. The Commission's ruling was "limited to state regulations that require or prohibit the use of line items." *Id.* at 75a. In finding error in the Commission's construction of Section 332(c)(3)(A), the court of appeals invoked a parade of horribles that the Commission had expressly disavowed.

B. Review Is Not Warranted At This Time

Despite the deficiencies in the decision below, review by this Court is not warranted at this time. The decision does not conflict with any decision of any other court of appeals. More importantly, in addition to ruling on the preemptive effect of Section 332(c)(3)(A), the Commission observed that state regulations prohibiting or mandating line items "may be subject to preemption because they conflict with established federal policies." Pet. App. 74a. The Commission pointed out that state line-item requirements and prohibitions might be "inconsistent with the federal policy of a uniform, national, and deregulatory framework" for cellular telephone service, in which rates are established by the carrier and its customers in service contracts, "rather than dictated by federal or state regulators." *Id.* at 74a-75a. Because the court of appeals remanded the case to the Commission, *id.* at 37a, the agency on remand will have an opportunity to decide whether to bar state line-item regulations on the basis of conflict preemption.

That means of preemption is entirely distinct from that governed by Section 332(c)(3)(A), and it therefore remains an option that is available to the Commission, even under the decision of the court of appeals. See *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 154 (1982) ("A pre-emptive regulation's force does not depend on express congressional authorization to displace state law."); see also Br. in Opp. 24 (noting that "the FCC distinguished the express preemption it found from any implied preemption that it believed—but did not conclude—might also apply"); Pet. Reply 4 ("[W]e

agree with the respondents * * * that the FCC did not exercise *de la Cuesta* authority in this case.").

More broadly, the Commission in the pending rulemaking is considering whether it should invoke conflict preemption to prohibit state regulation of wireless billing practices, a category that includes line-item regulations. Pet. App. 88a-94a. In that rulemaking, the Commission is also evaluating whether Sections 205(a) and 201(b) of the Communications Act expressly authorize the agency to preempt state regulations that prescribe billing format and content, including line-item charges. *Id.* at 90a; see p. 8 & note 3, *supra*. As part of those inquiries, the Commission is considering whether the obligation of wireless carriers to satisfy the disparate billing regulations of 50 different States impedes competition and impermissibly burdens interstate commerce. Pet. App. 89a. The Commission has not decided whether it can preempt state regulation of line items or other state billing practices on the basis of any of the theories described above, and if so, whether it should exercise such authority. But the matter remains pending.

The court of appeals held only that the agency erroneously interpreted Section 332(c)(3) to prohibit States from requiring or prohibiting line items on cellular telephone bills. The court's interpretation of that one provision of the Communications Act does not foreclose the Commission from deciding on remand or in the pending rulemaking whether to preempt state line-item regulations based on other provisions in the statute, or based on a conflict between those regulations and the Communications Act as a whole. See generally *City of New York* v. *FCC*, 486 U.S. 57 (1988); *De la Cuesta*, 458 U.S.

at 154.[7] If the Commission decides to preempt such regulations, either on remand or in a future rulemaking order, then this Court's review of the preemptive scope of Section 332(c)(3)(A) may be unnecessary. Moreover, even if the case returned here after such an administrative decision, the Court could consider both the scope of Section 332(c)(3)(A) and the alternative basis for preemption in the same case. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001). In light of the clear possibility that the Commission could reach the same result using alternative grounds, the interlocutory nature of this case makes this Court's review premature. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

[7] The court of appeals stated in dicta that Section 332(c)(3)(A) "preserved" state authority to regulate line items in wireless bills, Pet. App. 25a, but it did not purport to resolve whether the Commission could use conflict preemption as a basis for barring States from requiring or prohibiting line items. While the Commission made tentative findings and observations concerning conflict preemption, *id.* at 74a, 89a-90a, it based its decision solely on the preemptive effect of Section 332(c)(3)(A), *id.* at 65a-76a. The court of appeals vacated only "the preemption ruling set forth in the Declaratory Ruling," *id.* at 37a, that is, the FCC's determination that "the express language of section 332(c)(3)(A)" preempts state regulation requiring or prohibiting line items, *id.* at 33a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

THOMAS G. HUNGAR
Deputy Solicitor General

ERIC D. MILLER
Assistant to the Solicitor General

MATTHEW B. BERRY
Acting General Counsel

JOSEPH R. PALMORE
Deputy General Counsel

DANIEL M. ARMSTRONG
JACOB M. LEWIS
Associate General Counsels

LAUREL R. BERGOLD
Counsel
Federal Communications Commission

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