No. 07-1550

In The
Supreme Court of the United States

SOUTHWESTERN BELL TELEPHONE COMPANY d/b/a AT&T TEXAS,

Petitioner,

v.

TEXAS CABLE ASSOCIATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

The Texas Coalition of Cities for Utility Issues responds in support of the Petition for a Writ of Certiorari by Southwestern Bell Telephone Company d/b/a AT&T Texas ("AT&T Texas"), seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

A. TCCFUI's involvement with Senate Bill 5 legislation and litigation

The Texas Coalition of Cities for Utility Issues ("TCCFUI") is a statewide unincorporated non-profit association of more than a hundred Texas municipalities concerned with utility issues. Of particular concern to TCCFUI is the development of government policy on the use of municipal rights-of-way by private telecommunications and cable companies. This concern precipitated TCCFUI's active participation in the negotiation and development of the state legislation that is the focus of this case, popularly known as Senate Bill 5 and codified as Chapter 66 of the Texas Utilities Code.[1]

TCCFUI intervened, siding with the state in defense of the bill, when the Texas Cable Association launched its facial challenge to core provisions of

[1] This background about TCCFUI is drawn from its unopposed motion to intervene in the Texas Cable Association's challenge to Senate Bill 5.

Senate Bill 5. TCCFUI's objective was to ensure protection of the legislation's transitional provisions, designed to protect the reliance interests of Texas cities while the state's system for franchising cable operators moved from a municipal-level to a state-level system.

Thus, as a party-participant in both the district and appellate court proceedings below, TCCFUI is a respondent to AT&T Texas's certiorari petition; however, inasmuch as TCCFUI supports AT&T Texas's request that this Court review the judgment below, it is responding in support of, not in opposition to, the petition. *See* Supreme Court Rule 12.6.

As authorized by Supreme Court Rule 24.2, TCCFUI will not repeat here the sections of AT&T Texas's certiorari petition stating the question presented, listing the parties to the petition, providing citations to the decisions below, identifying the jurisdictional basis for review, and setting out the constitutional and statutory provisions involved. But, because of TCCFUI's unique interest in Senate Bill 5's transitional provisions, it will briefly supplement the petition's statement of the case.[2]

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[2] TCCFUI does not subscribe in every particular to the local franchising discussion in Part A and the opening sections of Part B of AT&T Texas's Statement of the Case. *See* AT&T Cert. Pet. 2-6. However, TCCFUI perceives no need to distract the Court with supplemental discussion here of any points that may be at variance with AT&T's characterization. It suffices that Senate Bill 5 was a product of hard-fought compromises and that both

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B. The Senate Bill 5 transition period and municipal reliance interests

In many TCCFUI member cities at the time of Senate Bill 5's consideration and passage, cable operators were providing local cable service under the auspices of unique, individualized municipal cable franchises that they had negotiated separately with each city. These cable operators included both participating members of the Texas Cable Association (typically referred to as "incumbent operators") and "overbuilders" (described by the court below as "companies that build cable systems in areas that are already served by another cable operator," AT&T Pet. App. 3a).

These municipal franchises were rarely, if ever, identical. Instead, their provisions typically were crafted to address specific local concerns. Among the varying provisions were the franchise fee amounts and formulas; customer service standards (*i.e.*, local standards for timeliness of installations, how to credit outages, and responsiveness of call-in assistance centers); and public service components (*e.g.*, "cable drops" to municipal and public school buildings and local "institutional network" capacity).[3] The duration

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AT&T Texas and TCCFUI are defending it, especially its transition provisions, against the challenge of the Texas Cable Association.

[3] The federal definition of "institutional network" is "a communication network which is constructed or operated by the

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of the local franchises also varied and, when Senate Bill 5 passed, the remaining "life" on these local franchises varied widely from city to city.

The Texas Legislature, therefore, had to determine how to integrate the phase-out of the municipal franchising system, which was at the core of Senate Bill 5, with the fact that cities all across the state had built up significant reliance interests in the extant municipal franchises – and with the fact that both the substantive provisions and the remaining time under those franchises varied widely. No simple "on-off" switch could account for these differences consistently with the need for a smooth transition that took into account *all* affected interests – state, municipal, consumers, incumbent providers, overbuilders, and new telecommunications entrants.

In 1984, Congress had to confront the same conundrum about existing local franchises when it enacted broad federal cable reform legislation. It solved the problem by establishing a transitional grandfathering system, allowing existing local franchises to continue until they expired. *See* 47 U.S.C. § 557. The Texas Legislature took a similar approach. In simple terms, it provided in Senate Bill 5 for a transition period that required cable operators to honor their existing local agreements with municipalities until they expired, while allowing those same

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cable operator and which is generally available only to subscribers who are not residential subscribers." 47 U.S.C. § 531(f).

cable operators to obtain the new state-issued franchises anywhere outside their existing local franchise areas. In short, the state-level franchise system was available to everyone, with the only difference being that cable operators had to complete their agreed obligations under existing local franchise agreements in the specific areas covered by those agreements.

C. TCCFUI's argument that the relief being sought required participation of the Cable Association's individual members

The Cable Association's facial challenge sought to abrogate the local obligations that remained for its members during Senate Bill 5's transitional, "grandfather" phase. TCCFUI was among those defending the grandfathering rules, arguing to the district court that the Cable Association had failed to identify any concrete harm to any of its members and noting an apparent acknowledgement that "some local franchises imposed *less* onerous requirements than state-level ones." TCCFUI Post-Argument Letter Brief at 2-3 (emphasis in original).

On appeal, TCCFUI argued that the Cable Association had failed to satisfy the third prong of the three-part *Hunt* test[4] for associational standing. The argument was that, because the local impact of Senate Bill 5's transitional rules would vary tremendously

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[4] *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

from local franchise to local franchise, the Cable Association's claim for relief under its facial challenge could not be determined without participation of its individual members.

The court of appeals rejected TCCFUI's *Hunt*-based argument. AT&T Pet. App. 15a-16a n.4 (concluding that "member participation is not required here"). In the same discussion, the court of appeals also rejected AT&T Texas's *Salerno* "no-set-of-circumstances"[5] argument about the Cable Association's facial challenge. *Id.*

REASONS FOR GRANTING THE PETITION

I. AT&T Texas presents a question the Court should consider.

TCCFUI subscribes to the reasons AT&T Texas gives for why its petition should be granted. *See* AT&T Cert. Pet. 11-29. TCCFUI agrees, for example, that the courts of appeals are divided on the applicability of *Salerno* to associational facial challenges. In addition, TCCFUI agrees that, at a minimum, the Court should grant the petition, vacate the judgment below, and remand the case for further consideration in light of *Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184 (2008).

[5] *United States v. Salerno*, 481 U.S. 739 (1987).

TCCFUI adds here a related point, discussed further below, not directly addressed in the petition.[6]

II. Distinguishing between the applicability of the *Salerno* test and the third prong of *Hunt*'s associational standing test in the context of facial constitutional challenges is an added reason for granting the writ.

TCCFUI argued – unsuccessfully – to the court of appeals that the Cable Association did not satisfy the third prong of *Hunt*'s test for associational standing. This limitation is a prudential one, not grounded in Article III of the Constitution. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 557 (1996). An association does not satisfy this part of the *Hunt* test unless "neither *the claim asserted* nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343 (emphasis added). TCCFUI's position was that the Cable Association's claim that Senate Bill 5's transitional provisions work a blanket disadvantage to its members could not possibly be tested without participation of the association members actually subject to the widely varying local

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[6] As a respondent and party to the proceeding below, TCCFUI "may seek reversal of the judgment of the Court of Appeals on any ground urged in that court." *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 783 n.14 (1980). TCCFUI does not perceive its argument as different in kind from AT&T Texas's, but, to the extent it is, the Court still may consider it.

franchises that were being grandfathered. The reason was that some of the grandfathered local franchises very well could be *less* onerous than a state franchise under Senate Bill 5.

It is not obvious that there is any difference between the *Salerno* "no-set-of-circumstances" requirement that facial challenges must meet in order to be viable and *Hunt*'s third-prong associational standing inquiry about whether an association's claim for relief must give way because it requires participation of individual members. Certainly, the lower courts have difficulty discerning any difference and do not seem to apply either doctrine with useful consistency.

The Fifth Circuit in this case effectively merged them into a single analysis, culminating in the umbrella conclusion that the facial challenge could proceed without the participation of any individual members of the Cable Association. Yet, the Eleventh Circuit, also effectively treating the two matters (*Salerno* on the one hand, and *Hunt*'s third prong on the other) as opposite sides of the same coin, reached the opposite result. *See Georgia Cemetery Ass'n v. Cox*, 353 F.3d 1319, 1322 (11th Cir. 2003) (holding that the facial challenge could not proceed without participation of individual members).

The Eleventh Circuit's *Georgia Cemetery* opinion openly acknowledges confusion about whether the *bona fides* of the facial challenge at issue there is to be evaluated using *Salerno*'s "no-set-of-circumstances"

rubric or *Hunt*'s "individual participation of members" third-prong rubric. It explains that it is reaching the same conclusion "[w]hether viewed as a standing argument or a merits argument," then, in the next paragraph, cites both *Salerno*'s and *Hunt*'s basic tests. 353 F.3d at 1322.

Even more recently, another circuit – the Eighth – has addressed virtually the identical issue in a facial challenge context, employing *Hunt*'s associational standing analysis without even citing *Salerno* and its test. *See Missouri Protection and Advocacy Svcs., Inc. v. Carnahan*, 499 F.3d 803, 809-10 (2007) (rejecting a facial constitutional challenge on associational standing grounds because the lawsuit "may not properly go forward without the participation of one or more individual[s]").[7]

AT&T Texas is correct in urging that the question of how to apply the *Salerno* test for facial constitutional challenges lodged by associations, instead of the specifically affected individual entities, deserves this Court's consideration. Adding to the reason for review in this particular case is the continued tentativeness in the lower courts in handling the interplay

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[7] The Second and Tenth Circuits also have used the need for individual members' participation as a reason to reject constitutional challenges by associations under *Hunt*'s third prong. *See Rent Stabilization Ass'n of New York v. Dinkins*, 5 F.3d 591, 595-97 (2d Cir. 1993); *Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Social and Rehabilitation Svcs.*, 958 F.2d 1018, 1021-23 (10th Cir. 1993).

between the *Salerno* principle and associational standing rules under *Hunt*'s third prong in the facial challenge context.

The issues in this case provide the Court an opportunity to provide lower courts further useful clarification about how to adjudicate broad, association-based facial constitutional attacks on state legislation forged from intricate compromises among competing interests. The question raised by the third prong of *Hunt*, as does the question raised by the *Salerno* test highlighted by AT&T Texas, implicates the concerns about the speculative nature of facial challenges that this Court recently raised in *Washington State Grange*, *supra*, 128 S.Ct. at 1191 (observing that "[c]laims of facial invalidity often rest on speculation"). Both are aimed at alleviating that concern when the circumstances demand it. Clarification of which mode of analysis – *Salerno*'s or *Hunt*'s – is better applied to the circumstance of facial constitutional challenges by associational litigants is an added reason for the Court to hear this case – or, at a minimum, grant the petition, vacate the judgment, and remand for consideration in light of the concerns addressed in *Washington State Grange*.

CONCLUSION

The Court should grant AT&T Texas's petition for a writ of certiorari.

Respectfully submitted,

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