Supreme Court, U.S.
FILED
FEB 11 2009
OFFICE OF THE CLERK

No. 08-759

In The Supreme Court of the United States

SPRINT TELEPHONY PCS, L.P.,
a Delaware limited partnership,

Petitioner,

v.

COUNTY OF SAN DIEGO, a division of the State of California; GREG COX, in his capacity as a supervisor of the County of San Diego; DIANNE JACOB, in her capacity as a supervisor of the County of San Diego; PAM SLATER-PRICE, in her capacity as a supervisor of the County of San Diego; RON ROBERTS, in his capacity as a supervisor of the County of San Diego; and BILL HORN, in his capacity as a supervisor of the County of San Diego,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN J. SANSONE, County Counsel
COUNTY OF SAN DIEGO
THOMAS D. BUNTON, Senior Deputy*
1600 Pacific Highway, Room 355
San Diego, California 92101-2469
(619) 531-6456
Attorneys for Respondents

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does 47 U.S.C. section 253(a) apply to regulations that govern the construction of individual wireless facilities?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

CONSTITUTION AND STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

BRIEF IN OPPOSITION

Respondents County of San Diego, Greg Cox, Dianne Jacob, Bill Horn, Ron Roberts, and Pam Slater-Price (collectively the "County") submit this Opposition to the Petition for a Writ of Certiorari filed by Sprint Telephony PCS, L.P. ("Sprint").

INTRODUCTION/SUMMARY OF ARGUMENT

In an attempt to "create" a circuit split that does not exist, Sprint asserts that the Ninth Circuit held that "a state or local regulation that does not expressly prohibit the provision of telecommunications service is preempted by 47 U.S.C. [section] 253(a)[1] only if it effects a complete ban on the provision of service." (Sprint Petition at 12.)[2] Sprint contends that this purported interpretation of section 253(a) conflicts with decisions from other courts finding regulations that "materially inhibit" or "substantially impede" an entity from providing service preempted by section 253(a). (*Id.* at 13.)

Sprint's assertion is simply wrong. The Ninth Circuit never held that a regulation must completely ban telecommunications service in order to be preempted by section 253(a). Rather, consistent with

[1] Section 253(a) was enacted as part of the Telecommunications Act of 1996 (the "TCA").

[2] Unless otherwise indicated, all statutes referenced are contained in Title 47 of the United States Code.

section 253(a)'s plain language,[3] the Ninth Circuit held that a regulation must "prohibit or have the effect of prohibiting" an entity from providing service in order to be preempted. The Ninth Circuit did not further define the phrase "have the effect of prohibiting," but it cited examples of regulations that would have this impact. Those examples make it plain that the Ninth Circuit does not require that a regulation impose a "complete ban" for it to be preempted under section 253(a).

Since the circuit split identified by Sprint does not exist, this Petition should be denied.

Moreover, even if the circuit split existed, this case would be a poor vehicle for resolving the split. First, section 253(a) does not even apply to the County's Ordinance. The Ordinance regulates the construction of individual wireless facilities. The TCA contains a specific and exclusive provision that governs such ordinances – section 332(c)(7)(B)(i)(II). Therefore, the Ordinance would not be preempted even if the Court were to resolve the purported circuit split in the manner requested by Sprint.

Further, even if the Court were to adopt the "materially inhibit" or "substantially impede" standards advocated by Sprint, the outcome of this case

---

[3] Section 253(a) provides that "[n]o . . . local . . . regulation . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

would not change.[4] Sprint has pointed to no provision of the County's Ordinance that has materially inhibited or substantially impeded its ability to provide service. Moreover, the County submitted undisputed evidence that the Ordinance has not had this effect. Between the effective date of the Ordinance and when the County filed its summary judgment papers in the district court, the County granted four of the nine permit applications Sprint submitted to build wireless facilities. The other five applications were pending. Since the County granted Sprint's permit applications, there is ample evidence that the Ordinance has not materially inhibited or substantially impeded Sprint's ability to provide service.

Further, Sprint has mounted a facial challenge to the County's Ordinance. Therefore, Sprint must show that the Ordinance will have the requisite prohibitory effect in all circumstances. Sprint cannot make this showing even if the Court were to adopt the "materially inhibit" or "substantially impede" standards advocated by Sprint. Since the County has granted Sprint's permit applications applying the Ordinance,

---

[4] Sprint asserts that the First, Second, and Tenth circuits "have held that a state or local regulation is preempted by 47 U.S.C. [section] 253(a) if it ***substantially impedes*** an entity from providing telecommunications service." (Sprint Petition at 13) (emphasis added.) However, none of those circuits have even used the phrase "substantially impedes" in analyzing section 253(a) claims.

the Ordinance does not prohibit Sprint from providing service in all circumstances.

STATEMENT OF THE CASE

In April 2003, the County enacted Ordinance Number 9549 (the "Ordinance") governing the siting of wireless facilities. The Ordinance is part of the County's Zoning Ordinance. The Ordinance was enacted to "prescribe clear, reasonable and predictable criteria to assess and process application[s] in a consistent and expeditious manner, while reducing visual and land use impacts associated with wireless telecommunications facilities." (Excerpts of the Record ("ER") at 135, §1.) The Ordinance applies to all proposed wireless facilities in the unincorporated area[5] of the County, including those located on private property as well as those located within the County-owned rights-of-way. (*Id.*)

The Ordinance establishes four tiers. (*Id.* at 141-143, §6985(A).) A proposed wireless facility is

[5] Sprint notes that San Diego County is the sixth most populous county in the United States, with a population of nearly three million. Sprint fails to note, however, that the Ordinance only governs the unincorporated areas within the County, not the areas within incorporated cities. The California Department of Finance reports that the population of the unincorporated County was only 491,764 as of January 1, 2008. http://www.dof.ca.gov/research/demographic/reports/estimates/e-1_2006-07/documents/E-1table.xls

assigned to a tier based upon the location and type of facility involved. (*Id.*) A provider must obtain some type of permit from the County before it can build any wireless facility in the County. (*Id.*) The Zoning Ordinance establishes different names for the conditional use permits, such as administrative site plan, major use permit and minor use permit. (County's Supplemental Excerpts of the Record ("CER") at 23, §7150; *id.* at 37, §7366.) The use permit types, procedures (public hearings and appeals), placement of conditions on the grant of a use permit, and penalties for violating the terms of a use permit are part of the County's general zoning regulations that apply to all permit applications, not just applications for wireless facilities. (*Id.* at 23-31, §§7150-7172; *id.* at 32-45, §§7354-7388.)

A. Proceedings In The District Court.

On July 15, 2003, Sprint filed this lawsuit against the County alleging four causes of action. (*Id.* at 1-15.) Sprint's first cause of action alleged that the Ordinance, on its face, is preempted by section 253(a). Sprint's second cause of action alleged that the Ordinance violates section 253(c) and the Fourteenth Amendment to the United States Constitution. Sprint's third cause of action alleged that the Ordinance violates 42 U.S.C. section 1983. Sprint's fourth cause of action sought a declaratory judgment. Sprint also sought an order enjoining the County from enforcing its Ordinance as well as damages and attorneys' fees (under 42 U.S.C. §1988). This case was

assigned to United States District Court Judge Judith N. Keep. (ER at 25.)

On September 9, 2003, the County filed a motion to dismiss Sprint's complaint. On October 20, 2003, the district court granted the motion in part, and denied the motion in part. (*Id.* at 17-25.) The district court granted the County's motion to dismiss Sprint's second cause of action for violation of section 253(c) and the Fourteenth Amendment. The district court dismissed Sprint's section 253(c) claim without leave to amend. The district court dismissed Sprint's Fourteenth Amendment claim, with leave to amend. (*Id.* at 24.) Sprint did not amend that claim. (*Id.* at 180.)

On November 17, 2003, the County filed a motion for judgment on the pleadings. On January 5, 2004, in a published decision, the district court granted the County's motion in part, and denied the motion in part. *Sprint Telephony PCS, L.P. v. County of San Diego*, 311 F.Supp.2d 898 (S.D. Cal. 2004). The court dismissed Sprint's damages claim against the individual members of the County's Board of Supervisors. In all other respects, the district court denied the County's motion. The district court ruled that Sprint could recover damages and attorneys' fees under 42 U.S.C. section 1983 if it could show that the County's Ordinance was preempted by section 253(a).

Following Judge Keep's death, this case was reassigned to United States District Court Judge Barry Ted Moskowitz. (ER at 67.)

Thereafter, the parties filed cross-motions for summary judgment. In its moving papers, the County argued that, as a threshold matter, Sprint's action failed because section 332(c)(7)(B)(i)(II), not section 253(a), applies to facial challenges to zoning ordinances that govern the construction of individual wireless facilities. Alternatively, the County argued that none of the Ordinance provisions "prohibit or have the effect of prohibiting" Sprint from providing service in violation of section 253(a).

On July 8, 2005, the district court issued a ruling on the parties' cross-motions for summary judgment. In a published decision, the district court found that certain provisions of the Ordinance were preempted by section 253(a) and that those provisions could not be severed from the remainder of the Ordinance. *Sprint Telephony PCS, L.P. v. County of San Diego*, 377 F.Supp.2d 886, 895-900 (S.D. Cal. 2005). Therefore, the district court enjoined the County from enforcing the Ordinance. *Id.* at 900. The district court also found that Sprint could not recover damages or attorneys' fees under 42 U.S.C. section 1983 because section 253(a) does not create a private right of action. *Id.* at 900-903.

The district court began its decision by finding that Sprint could bring its facial challenge to the Ordinance under either section 332(c)(7)(B)(i)(II) or section 253(a). *Id.* at 891-892. Turning to the substance of Sprint's preemption claim, the district court cited the Ninth Circuit's decisions in *City of Auburn* v. *Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), and *Qwest*

Corp. v. City of Portland, 385 F.3d 1236 (9th Cir. 2004), for the proposition that "[s]ection 253(a) does not only preempt regulations that actually prohibit the provision of telecommunications services, but also preempts those that 'may . . . have the effect of prohibiting' the provision of such services." *Id.* at 893 (citations omitted) (ellipses in original.) Applying this standard, the district court found that several provisions of the Ordinance, "in combination" had the requisite prohibitory effect. *Sprint Telephony*, 377 F.Supp.2d at 893-899.

The County will identify each of the Ordinance provisions the district court found preempted in turn. The Ordinance requires an entity applying for a permit to construct a wireless facility to submit "[a] letter stating the applicant's willingness to allow other carriers to co-locate on their facilities wherever technically and economically feasible and aesthetically desirable." (ER at 141, §6984(c)(9).) The district court found that "[t]he requirement that applicants state their willingness to co-locate is unreasonable because it is unclear what the terms and conditions of co-location would be (e.g., whether the applicant would receive fair compensation)."[6] *Sprint Telephony*, 377 F.Supp.2d at 895.

---

[6] The County argued that this provision only requires an applicant to state whether it is willing to allow another wireless provider to locate a facility on the provider's existing facilities. The answer could be no. The Ninth Circuit did not explicitly address the County's argument in any of its opinions.

The Ordinance also authorizes the Director of the County's Department of Planning and Land Use (the "Director") to exempt a wireless provider from submitting the information normally required from applicants, and to "require additional information ***based upon specific project factors***." (ER at 140, §6984) (emphasis added.) The district court found that "[t]he provision that applicants provide 'any additional information' that may be required is overbroad. No limit is placed on what and how much additional information the Director may require." *Sprint Telephony*, 377 F.Supp.2d at 895.

Section 7358 of the County's Zoning Ordinance specifies the findings that must be made in order to grant all Major or Minor Use Permit applications (not just those for wireless facilities). Section 7358 provides in relevant part as follows:

> a. That the location, size, design, and operating characteristics of the proposed use will be compatible with adjacent uses, residents, buildings, or structures, with consideration given to:
>
> 1. Harmony in scale, bulk, coverage and density;
>
> 2. The availability of public facilities, services and utilities;
>
> 3. The harmful effect, if any, upon desirable neighborhood character;

> 4. The generation of traffic and the capacity and physical character of surrounding streets;
>
> 5. The suitability of the site for the type and intensity of use or development which is proposed; and to
>
> 6. Any other relevant impact of the proposed use; and
>
> b. That the impacts, as described in paragraph "a" of this section, and the location of the proposed use will be consistent with the San Diego County General Plan.
>
> c. That the requirements of the California Environmental Quality Act have been complied with.

(ER at 118-119, §7358.)

The district court concluded that under these standards, the County has "unfettered discretion" in deciding whether to grant a permit application. *Sprint Telephony*, 377 F.Supp.2d at 895. According to the district court, "the decision-maker can consider anything bearing on 'compatibility,' a subjective and hard-to-define standard in itself. Similarly, considerable discretion may also be exercised in determining whether the proposed facilities are 'camouflaged,'

'consistent with community character,' and have minimal 'visual impact.'" *Id.* (citation omitted.)[7]

Section 7362 of the Zoning Ordinance also gives the County authority to grant use permits with conditions:

> Use permits may be granted or modified subject to the performance of such conditions, including the provision of required improvements, . . . [which are] deem[ed] to be reasonable and necessary or advisable under the circumstances so that the objectives of the Zoning Ordinance shall be achieved.

(ER at 121, §7362.)

The district court found it unacceptable and a violation of section 253(a) that "the Director can impose whatever conditions the Director finds appropriate to further the stated purpose of the Zoning Ordinance, which includes the broad goals of public health, safety and welfare, preservation of community character and aesthetic quality, and minimization of

---

[7] The Ordinance prohibits "non-camouflaged monopoles, lattice towers and guyed towers" in residential and rural zones. (ER at 143 §6985(C)(1).) It requires a provider to obtain a Major Use Permit for other "non-camouflaged towers." (*Id.*, Tier 4.) The Ordinance also provides that "[a]ll facilities shall be designed to minimize the visual impact to the greatest extent feasible by means of placement, screening, landscaping with native species, whenever feasible, and camouflage. . . ." (*Id.* at 146-147, §6987(F).) The Ordinance specifically defines "camouflaged" and "community character." (*Id.* at 136, §6983(C); 137, §6983(C).)

intrusion into residential areas." *Sprint Telephony*, 377 F.Supp.2d at 895-896.

The Zoning Ordinance also requires public hearings where citizens can express their views whether the County's appointed and elected officials should grant a use permit for a wireless facility. (ER at 28, §7166(f); at 33, §7356; at 38, §7366(h).) The district court found "that there is nothing wrong with public hearings per se. However, here, there are no provisions restricting what can be discussed at the public hearings. The lack of restrictions on what types of objections or concerns can be raised at hearings . . . " renders the public hearing requirement preempted. *Sprint Telephony*, 377 F.Supp.2d at 896.

Finally, the Ordinance contains provisions that allow the County to enforce conditions that may be placed on a use permit. Those provisions authorize County officials to (1) modify or revoke a use permit following a hearing, and (2) file an action in court seeking civil or criminal penalties against those entities that violate use permit conditions. (ER at 43, §7382, at 46-48, §7703.) The district court noted that

> violation of a condition imposed solely in the discretion of the appropriate authority carries adverse consequences. The permit may be revoked or modified. Furthermore, any person violating any condition of a use permit shall be deemed guilty of a misdemeanor unless, in the discretion of the prosecutor, it is charged as an infraction.

Sprint Telephony, 377 F.Supp.2d at 896 (citation omitted.) The district court found that these provisions were preempted, without explanation. *Id.*

The district court found that all other provisions of the Ordinance were not preempted by section 253(a). However, the district court found that the preempted provisions of the Ordinance could not be severed from the non-preempted provisions. *Id.* at 899-900. Therefore, the district court enjoined the County from enforcing the entire Ordinance. *Id.* Judge Moskowitz also vacated Judge Keep's prior ruling that a plaintiff could state a claim under 42 U.S.C. section 1983 based on a section 253(a) violation. Judge Moskowitz concluded that there is no private right of action to enforce section 253(a) and therefore that provision cannot be enforced through 42 U.S.C. section 1983. *Id.* at 900-903. Judgment was entered on July 12, 2005. (ER at 179.)

On July 25, 2005, the County filed a Motion for Reconsideration/Motion to Alter Judgment or, in the Alternative, Motion for Stay Pending Appeal. On September 2, 2005, the district court denied the County's motion in its entirety. (*Id.* at 184-188.) In doing so, the district court reiterated its prior determination that a plaintiff bringing a facial challenge to an ordinance governing the construction of individual wireless facilities could proceed under either section 332(c)(7)(B)(i)(II) or section 253(a): "The County erroneously asserts that the Court concluded that facial challenges are not permitted under section 332(c)(7)(B)(i)(II). Actually, the Court recognized that there may be circumstances where facial challenges

may be brought under section 332(c)(7)(B)(i)(II). However, the Court found that nothing in section 332 precludes facial challenges under section 253(a)." (ER at 185 n.1) (citations omitted.)

B. Proceedings In The Ninth Circuit.

On July 14, 2005, Sprint filed a Notice of Appeal, appealing the district court's ruling in the County's favor on Sprint's 42 U.S.C. section 1983 claim. (*Id.* at 182-183.) On September 8, 2005, the County filed a Notice of Appeal, appealing the district court's ruling that the Ordinance is preempted by section 253(a). (CER at 93-94.)

On September 13, 2005, the County filed a motion in the Ninth Circuit seeking a stay of the district court's order enjoining the County from enforcing the Ordinance. On October 14, 2005, the Ninth Circuit granted the County's motion for a stay. (*Id.* at 96-97.)

On March 13, 2007, a three judge panel consisting of Eighth Circuit Senior Judge Myron H. Bright, Ninth Circuit Senior Judge A. Wallace Tashima and Ninth Circuit Judge Carlos T. Bea filed a published opinion affirming the district court's decision in all respects. *Sprint Telephony PCS, L.P. v. County of San Diego*, 479 F.3d 1061 (9th Cir. 2007).

On April 3, 2007, the County filed a Petition for Rehearing and Petition for Rehearing *En Banc*. On June 13, 2007, the three judge panel issued an amended opinion which did not change the result in

the case. *Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700 (9th Cir. 2007). The panel also denied the County's Petition for Rehearing and indicated that no more petitions for panel rehearing could be filed. The panel denied the Petition for Rehearing *En Banc*, without prejudice.

On June 27, 2007, the County filed a second Petition for Rehearing *En Banc*. On May 14, 2008, the Ninth Circuit granted the County's Petition. *Sprint Telephony PCS, L.P. v. County of San Diego*, 527 F.3d 791 (9th Cir. 2008). On June 24, 2008, oral argument was held in front of the *en banc* panel, which consisted of Ninth Circuit Chief Judge Alex Kozinski, Ninth Circuit Judges Andrew J. Kleinfeld, Michael Daly Hawkins, Sidney R. Thomas, Barry G. Silverman, Susan P. Graber, Ronald M. Gould, Marsha S. Berzon, Richard C. Tallman, Jay S. Bybee and Ninth Circuit Senior Judge A. Wallace Tashima, who was a member of the original three judge panel. On September 11, 2008, the *en banc* panel issued a unanimous published decision finding that no part of the Ordinance is preempted by section 253(a). *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (*en banc*). The *en banc* panel also affirmed the ruling by the district court and the three judge panel that damages and attorneys' fees are not available under 42 U.S.C. section 1983 for a violation of section 253(a). *Id.* at 580-581.

The *en banc* panel held that a plaintiff alleging a claim under section 253(a) must show that a regulation prohibits or has the effect of prohibiting an entity

from providing service. *Id.* at 578. The Ninth Circuit overruled its prior cases holding that the mere possibility that a regulation would prohibit an entity from providing service was enough to establish a violation of section 253(a). *Id.* at 577-579.

The Ninth Circuit concluded that "[o]n the face of the Ordinance, none of the requirements, individually or in combination, prohibits the construction of sufficient facilities to provide wireless services to the County of San Diego." *Id.* at 579-580. The Ninth Circuit specifically rejected Sprint's argument that the retention of discretion to grant or deny a permit application (and to impose conditions) was an effective prohibition. According to the Ninth Circuit,

> [a] certain level of discretion is involved in evaluating any application for a zoning permit. It is certainly true that a zoning board *could* exercise its discretion to effectively prohibit the provision of wireless services, but it is equally true (and more likely) that a zoning board would exercise its discretion only to balance the competing goals of an ordinance – the provision of wireless services and other valid public goals such as safety and aesthetics.

Id. at 580 (emphasis added.)

The Ninth Circuit stated that

> [t]he same reasoning applies to Sprint's complaint that the Ordinance imposes detailed application requirements and requires public hearings. Although a zoning board could

> conceivably use these procedural requirements to stall applications and thus effectively prohibit the provision of wireless services, the zoning board equally could use these tools to evaluate fully and promptly the merits of an application.

Id.

The Ninth Circuit also indicated that it was

> equally unpersuaded by Sprint's challenges to the substantive requirements of the Ordinance. Sprint has not identified a single requirement that effectively prohibits it from providing wireless services. On the face of the Ordinance, requiring a certain amount of camouflage, modest set-backs, and maintenance of the facility are reasonable and responsible conditions for the construction of wireless facilities, not an effective prohibition.

Id.

In addition to joining the unanimous *en banc* opinion, Judge Ronald M. Gould wrote a one paragraph concurring opinion. Judge Gould stated that

> [z]oning ordinances, in my view, will be preempted only if they would substantially interfere with the ability of the carrier to provide such services. Cases of a preempted zoning ordinance will doubtless be few and far between, and the record in this case shows that telecommunication services here were not effectively barred by the zoning ordinance.

Id. at 581 (Gould, J., concurring) (emphasis added.)

C. Proceedings In This Court.

On December 10, 2009, Sprint filed its Petition for a Writ of Certiorari. On December 22, 2009, the Court issued an order extending the time for the County to file an opposition to the Petition until February 11, 2009.

ARGUMENT

I

THE CIRCUIT SPLIT THAT SPRINT "IDENTIFIES" DOES NOT EXIST

In an effort to create a non-existent circuit split, Sprint repeatedly asserts that the Ninth Circuit held that "a state or local regulation that does not expressly prohibit the provision of telecommunications service is preempted by 47 U.S.C. [section] 253(a) only if it effects a complete ban on the provision of service." (Sprint Petition at 12.) Sprint is simply wrong. The Ninth Circuit applied the plain meaning of the phrase "prohibit or have the effect of prohibiting" as used in section 253(a), and never interpreted that phrase as outlawing only "complete bans." Since the Ninth Circuit did not adopt the standard that Sprint asserts creates an inter-circuit split, the Petition should be denied.

Based on section 253(a)'s plain language, the Ninth Circuit held that "a plaintiff must establish either an outright prohibition or an effective prohibition on the provision of telecommunications services;

a plaintiff's showing that a locality could *potentially* prohibit the provision of telecommunications services is insufficient." *Sprint Telephony*, 543 F.3d at 579 (emphasis in original.) The Ninth Circuit specifically recognized that "our interpretation is consistent with the [Federal Communications Commission's ("FCC")]." *Id.* at 578. In support of this statement, the Ninth Circuit quoted the FCC's decision in *In re California Payphone Ass'n*, 12 F.C.C.R. 14191, 14209 (1997), where the FCC determined that "to be pre-empted by § 253(a), a regulation 'would have to actually prohibit or effectively' prohibit the provision of services." *Id.* In *In re California Payphone Ass'n*, the FCC elaborated on the "has the effect of prohibiting" language used in section 253(a), stating that in determining whether an ordinance has this effect, it "consider[s] whether the Ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* at 14206. Since the Ninth Circuit cited the FCC's decision approvingly and that decision adopts a "materially inhibits" standard for showing effective prohibition, it is clear that the Ninth Circuit did not hold that only complete bans can amount to an effective prohibition.

Applying the "prohibit or have the effect of prohibiting" standard, the Ninth Circuit found that "[t]he Ordinance plainly is not an outright ban on wireless facilities. We thus consider whether the Ordinance effectively prohibits the provision of wireless facilities. We have no difficulty concluding that it does not." *Sprint Telephony*, 543 F.3d at 579. According to the

Ninth Circuit, "Sprint has not identified a single requirement that effectively prohibits it from providing wireless services." *Id.* at 580.

The Ninth Circuit never equated an "effective prohibition" with a "complete ban." The Ninth Circuit provided ***examples*** of ordinance provisions that would "have the effect of prohibiting" wireless services. Some of those examples make it plain that the court believed that if enacted, these provisions would "have the effect of prohibiting service" even though they were not a "complete ban" on wireless services. For instance, the Ninth Circuit stated that "Sprint has pointed to no requirement that, on its face, demonstrates that Sprint is effectively prohibited from providing wireless services. For example, the Ordinance does not impose an excessively long waiting period that would amount to an effective prohibition." *Id.* An "excessively long waiting period" is not a complete ban on the provision of wireless services. The wireless company will be able to provide service, just not immediately. Nonetheless, the Ninth Circuit concluded that an Ordinance that imposed an "excessively long waiting period" would be an effective prohibition.

The Ninth Circuit also noted that "[w]e have held previously that rules effecting a 'significant gap' in service coverage could amount to an effective prohibition, and we have no reason to question that holding." *Id.* (citation omitted.) Sprint states that "such a coverage gap would be tantamount to a complete ban, insofar as the carrier would be unable to provide any service in the area of the 'gap' (and would

be unable to provide adequate service to the surrounding area.)" (Sprint Petition at 16 n.5.) Sprint is mistaken. Ordinance provisions that create a significant gap in coverage would not ban wireless companies from providing service within a jurisdiction such as the County. Rather, those provisions would limit the provider's ability to provide service within a certain part of the jurisdiction. This is certainly not a "complete ban" on wireless service.

The premise of Sprint's argument is simply incorrect. The Ninth Circuit never concluded an "effective prohibition" occurs only if a regulation imposes a "complete ban" on wireless services. Indeed, the examples provided by the Ninth Circuit demonstrate that the court understood that regulations that do not rise to a complete ban can have the effect of prohibiting an entity from providing service. Therefore, the Ninth Circuit's decision does not conflict with the decisions of the First, Second and Tenth circuits holding that regulations that "materially inhibit" an entity from providing service are preempted.[8]

---

[8] Citing *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 491 (2002), Sprint asserts that "[a]s this Court has already (if implicitly) recognized, however, the text of Section 253(a) comfortably accommodates an interpretation under which any regulation that ***substantially impedes*** an entity from providing telecommunications service is preempted." (Sprint Petition at 17-18) (emphasis added.) In *Verizon Communications*, the Court stated that "the 1996 Act prohibits state and local regulation that impedes the provision of 'telecommunications service,' § 253(a), and obligates incumbent carriers to allow competitors to enter their local markets, § 251(c)." 535 U.S. at 491 (footnote

(Continued on following page)

A. The Ninth Circuit Did Not Acknowledge The Circuit Split Identified By Sprint.

Sprint asserts that the Ninth Circuit acknowledged that its opinion created a split with the First, Second and Tenth circuits. (Sprint Petition at 2.) However, the difference between the circuits that the Ninth Circuit noted is not the same as the purported circuit split identified by Sprint. In this case, the Ninth Circuit rejected its prior interpretation of section 253(a) that a regulation that "may or might possibly" prohibit a telecommunications company from providing service is preempted. In doing so, the Ninth Circuit overruled its prior decision in *City of Auburn* (and subsequent Ninth Circuit cases that followed *City of Auburn*), which had adopted that interpretation.

In its opinion, the Ninth Circuit noted that in

> *Auburn*, we became one of the first federal circuit courts to interpret [section 253(a)]. We surveyed district court decisions and adopted their broad interpretation of its preemptive effect. In the course of doing so, we quoted § 253(a) somewhat inaccurately,

---

omitted.) Since the interpretation of section 253(a) was not an issue in *Verizon Communications*, the statement that Sprint cites is pure *dicta*. Moreover, Sprint does not explain the difference, if any, between the "materially inhibit" standard adopted by the FCC and explicitly followed by the First, Second and Tenth circuits and the "substantially impedes" standard advanced by Sprint.

> inserting an ellipsis in the text of § 253(a). We held that section 253(a) preempts regulations that not only prohibit outright the ability of any entity to provide telecommunications services, but also those that may have the effect of prohibiting the provision of such services.

Sprint Telephony, 543 F.3d at 576 (internal quotation marks, ellipses and citations omitted.)

However, the Ninth Circuit recognized in this case that Congress did not intend to preempt regulations that "may" or "might" have the effect of prohibiting service. According to the court,

> [i]n context, it is clear that Congress' use of the word "may" works in tandem with the negative modifier "[n]o" to convey the meaning that "state and local regulations shall not prohibit or have the effect of prohibiting telecommunications service." Our previous interpretation of the word "may" as meaning "might possibly" is incorrect. We therefore overrule *Auburn* and join the Eighth Circuit[9] in holding that "a plaintiff suing a

[9] The Ninth Circuit explicitly followed the Eighth Circuit's interpretation of section 253(a) in *Level 3 Communications v. City of St. Louis*, 477 F.3d 528, 532-33 (8th Cir. 2007). According to the Ninth Circuit, "[r]ecently, the Eighth Circuit rejected the *Auburn* standard and held that, to demonstrate preemption, a plaintiff must show actual or effective prohibition, rather than the mere possibility of prohibition." *Sprint Telephony*, 543 F.3d at 577 (internal quotation marks and citations omitted.) In a subsequent decision, the Eighth Circuit affirmed the district

(Continued on following page)

> municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition."

Id. at 578 (citation omitted.) Stated another way, the Ninth Circuit held that "a plaintiff must establish either an outright prohibition or an effective prohibition on the provision of telecommunications services; a plaintiff's showing that a locality could *potentially* prohibit the provision of telecommunications services is insufficient." *Id.* at 579.

The Ninth Circuit cited cases from three other circuits that had followed *City of Auburn*'s "broad interpretation of § 253(a), albeit with little discussion." *Id.* at 577.[10] Those cases were: *P.R. Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir.

---

court's grant of summary judgment in favor of the City of St. Louis. *Level 3 Communications, L.L.C. v. City of St. Louis*, 540 F.3d 794 (8th Cir. 2008). Level 3 has filed a Petition for a Writ of Certiorari, which is currently pending with this Court. United States Supreme Court Case No. 08-626.

[10] None of these cases involved challenges to ordinances that regulate the construction of individual wireless facilities. The cases involved the validity of franchise fees charged by local governments for the use of rights-of-way by land line telephone companies. The Ordinance does not require wireless providers to pay rent or franchise fees to locate their facilities within the County's rights-of-way. Moreover, this is the first case in which a circuit court has considered whether an ordinance that regulates the construction of individual wireless facilities is preempted by section 253(a). Since no circuit split exists on the issue of whether ordinances that give local governments discretion to deny applications for wireless facilities are preempted by section 253(a), Sprint's Petition should be denied for this additional reason.

2006); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004); and *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002).[11] It is apparent that the Ninth Circuit was referring to the "may" or "might possibly" prohibit standard that the court adopted in *City of Auburn*.

In *City of Santa Fe*, the Tenth Circuit held that

> [s]ection 253(a) bars any legal requirement which ***may have the effect*** of prohibiting

---

[11] In *City of White Plains*, the Second Circuit did not directly discuss or rely on the Ninth Circuit's interpretation of section 253(a). It did not cite a Ninth Circuit case in the portion of its opinion interpreting section 253(a). The Second Circuit correctly held that an ordinance must prohibit or have the effect of prohibiting an entity from providing service in order to violate section 253(a). 305 F.3d at 76. However, the Second Circuit misapplied that standard by concluding that discretion to deny an application alone is an effective prohibition. *Id.* This is consistent with the Ninth Circuit's prior interpretation of the scope of section 253(a) in *City of Auburn*.

In any event, *City of White Plains* is distinguishable because that case challenged the city's discretion to deny a "franchise" to a landline telephone company. If an entity is denied a franchise, it cannot operate anywhere within the municipality. The franchise decision is a single up/down vote that determines the ability of an entity to provide service. The County's Ordinance, on the other hand, governs the construction of individual wireless facilities. If a permit application is denied under the Ordinance, Sprint will be able to continue using its existing facilities to provide service and will be able to submit another application for the same facility, perhaps at a different location or using a different design. Thus, the denial of a permit application under the Ordinance does not have anywhere near the same potential for a prohibitory effect as the denial of a franchise.

> the ability of an entity to provide telecommunications service. Thus, the provision [giving discretion to the city to decide whether to enter into a lease agreement] is undoubtedly prohibitive because the city ***can use it*** to outright deny leases to a telecommunications carrier.

380 F.3d at 1270 n.9 (emphasis added.)[12] Thus, it is clear that the Tenth Circuit was following *City of Auburn*'s "may" or "might" standard. Since discretion can be exercised to say both "no" and "yes" to a permit application, there cannot be an effective prohibition unless section 253(a) prohibits ordinances that "may" or "might" be used to prohibit an entity from providing service.

In *Municipality of Guayanilla*, the First Circuit also stated that "[s]ection 253(a) preempts laws that 'may prohibit or have the effect of prohibiting' the provision of telecommunications services." 450 F.3d at 18.[13] This is the same interpretive error that the Ninth Circuit made in *City of Auburn*.[14] Under its

---

[12] As discussed above, the Ninth Circuit rejected Sprint's argument that the retention of discretion alone is enough to prove that an ordinance is an effective prohibition. *Sprint Telephony*, 543 F.3d at 580.

[13] In *Municipality of Guayanilla*, the First Circuit did not cite *City of Auburn* or any other Ninth Circuit case to support its interpretation of section 253(a). Indeed, elsewhere in the opinion, the First Circuit appeared to acknowledge that a regulation "must prohibit or have the effect of prohibiting" to be preempted under section 253(a). 450 F.3d at 18.

[14] The Eighth Circuit has stated that "[b]y inserting the word 'that' before 'may'" the First Circuit in *Guayanilla*,

(Continued on following page)

plain language, section 253(a) only preempts laws that "prohibit or have the effect of prohibiting" the provision of telecommunication services.

This circuit split – to the extent it exists – is irrelevant because Sprint does not contend that *City of Auburn*'s "may" or "might" standard should be adopted by this Court. Indeed, Sprint states that the "proposition that Section 253(a) preempts regulations that either 'actually prohibit or effectively prohibit' the ability to provide [telecommunications] service . . ." is "unobjectionable." (Sprint Petition at 19.) Nor could Sprint make this argument because the "may" or "might" standard is contrary to the plain language of section 253(a).

B. Cases From The First And Tenth Circuits As Well As Prior Cases From The Ninth Circuit Did Hold That Regulations That "May" Or "Might" Prohibit An Entity From Providing Service Were Preempted.

Sprint asserts that

> [t]he Ninth Circuit criticized those decisions that had adopted a broader construction of Section 253(a) (including its prior decision in *City of Auburn*) on the ground that they attached excessive significance to the provision's use of the word "may." In so reasoning, however, the Ninth Circuit was attacking a

---

"distorted" the "most precise meaning of section 253(a)." *Level 3 Communications*, 477 F.3d at 533.

> strawman. Neither the *City of Auburn* [decision] nor the decisions of other circuits placed substantial weight on the use of the word "may"; instead, those decisions merely sought to give meaning to the successive phrase "have the effect of prohibiting."

(Sprint Petition at 18-19.)

Sprint is wrong on both counts. Those decisions improperly read "may" as allowing courts to preempt regulations that "might possibly" prohibit an entity from providing service. Further, those decisions gave *significance to the phrase "have the effect of prohibit*ing" by inserting the word "may" in front of the phrase so that ordinances that might possibly have the effect of prohibiting an entity from providing service were preempted. However, section 253(a) only preempts ordinances that "have the effect of prohibiting an entity from providing service." The Ninth Circuit *did not attack a strawman – it corrected* a serious misinterpretation of section 253(a).

As discussed above, in *City of Auburn* the Ninth Circuit adopted an incorrect test for determining whether a regulation is preempted under section 253(a). The Ninth Circuit expanded on this test in *City of Portland*, 385 F.3d at 1239-1241. There, the court first repeated the holding from *City of Auburn* that section 253(a) preempts "regulations that not only prohibit outright the ability of any entity to provide telecommunications services, but also those that 'may . . . have the effect of prohibiting the provision of such services.'" 385 F.3d at 1239 (citation

omitted) (ellipsis in original.) Moreover, the "may prohibit" test was directly responsible for resolution of that case. The district court had rejected the plaintiff's section 253(a) challenge because "Qwest has not pointed to a single telecommunications service that it, or any other entity, is effectively prohibited from providing because of the Cities' revenue-based fees or any of the other challenged requirements." *Id.* at 1241 (internal quotation marks and citations omitted.) In reversing, the Ninth Circuit stated that

> [w]e do not agree that Qwest was required to make an actual showing of "a single telecommunications service that it . . . is effectively prohibited from providing." We have previously ruled that regulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted. Like it or not, both we and the district court are bound by our prior ruling.

Id. (emphasis in original.)

Similarly, in *Qwest Communications v. City of Berkeley*, 433 F.3d 1253 (9th Cir. 2006),

> [t]he City argue[d] Qwest failed to produce any facts showing how any section or combination of sections of Ordinance 6630 does what § 253(a) precludes – prohibiting or having the effect of prohibiting telecommunications services. Specifically, the City contends that Qwest must show the actual impact of Ordinance 6630 on Qwest's ability to provide telecommunications services.

Id. at 1256. The Ninth Circuit rejected that argument, asserting that "rather than considering the actual impact of Ordinance 6630, we must determine whether the specific regulations of Ordinance 6630 'may have the effect of prohibiting the provision of telecommunications services' in the City. As explained below, the regulations of Ordinance 6630 have that prohibiting effect." *Id.* at 1256-1257 (citations omitted.)

The First and Tenth circuits also gave substantive meaning to the word "may" and held that regulations that possibly could "have the effect of prohibiting" an entity from providing service were preempted. Therefore, the Ninth Circuit was correct in holding that only regulations that "prohibit or have the effect of prohibiting" a company from providing service are preempted by section 253(a).

Because Sprint does not ask this Court to resolve the circuit split identified by the Ninth Circuit and because it is clear that only regulations that prohibit or have the effect of prohibiting an entity from providing service are preempted, this Petition should be denied.[15]

---

[15] Indeed, since the Ninth Circuit has recently abandoned the "may" or "might" standard and the Eighth Circuit has also rejected that standard, it is likely that the First and Tenth circuits will follow suit.

II

THIS CASE IS A POOR VEHICLE FOR RESOLVING THE ALLEGED CIRCUIT SPLIT

Even if a circuit split existed, this case presents a poor vehicle for reviewing the alleged split. First, section 253(a) does not apply to regulations that govern the construction of individual wireless facilities. Second, even if the "materially inhibit" or "substantially impede" standards were explicitly applied to the Ordinance, it would not be preempted by section 253(a). Third, Sprint challenged the Ordinance on its face. The undisputed facts establish that the Ordinance does not have the effect of prohibiting Sprint from providing service under all circumstances.

A. Section 253(a) Does Not Apply At All.

As Sprint acknowledges, there is a threshold question whether section 253(a) applies here. Sprint is challenging the Ordinance, which regulates the construction of individual wireless facilities. There is a specific provision within the TCA that governs such ordinances. Section 332(c)(7). That provision provides as follows:

> (7) **Preservation of local zoning authority**
>
> (A) General authority
>
> Except as provided in this paragraph, nothing in this chapter shall limit or affect

the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof –

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.[16]

---

[16] On pages three and twenty-three of its Petition, Sprint cites the House Report for the TCA commenting on a provision contained in the House bill dealing with the siting of wireless facilities. Under the House bill, the FCC was required "to prescribe a national policy for the siting of commercial mobile radio services facilities." H.R. Rep. No. 104-204 at 94 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 60. The House bill, however, did not become law. The Conference Committee rejected the house proposal, instead choosing to preserve local government authority over the siting of wireless facilities. H.R. Conf. Rep. No. 104-458 at 208 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 222. *Sprint Spectrum L.P. v. City of Carmel*, 361 F.3d 998, 1003 (7th Cir. 2003) ("As the Conference Committee explained: 'The conference agreement creates a new [§332(c)(7)] which prevents [FCC] preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances

(Continued on following page)

Section 332(c)(7)(A) specifically states that "[e]xcept as provided in this paragraph, nothing in this ***chapter*** shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." (Emphasis added.) Sections 253(a) and 332(c)(7)(B) are part of the same chapter – Chapter 5, Wire or Radio Communication. Since the Ordinance governs the "placement, construction, and modification of personal wireless service facilities," section 253(a) does not apply to the Ordinance under the plain language of the TCA. Congress intended section 332(c)(7)(B) to be the exclusive limitation on this type of local government regulation and did not intend section 253(a)'s general provisions to trump section 332(c)(7)(B).

"The district court . . . held that facial challenges to a local government's wireless regulations could be brought under either § 253(a) or § 332(c)(7). . . ." *Sprint Telephony*, 543 F.3d at 575. On appeal, the County argued that the district court erred and that section 253(a) was inapplicable. The Ninth Circuit did not consider this question: "[B]ecause Sprint's suit hinges on the statutory text that we interpreted above – 'prohibit or have the effect of prohibiting' – we need not decide whether Sprint's suit falls under

---

set forth in the conference agreement.'") (citation omitted) (for the exception see section 332(c)(7)(B)(v)). Therefore, the portion of the House Report cited by Sprint is simply irrelevant.

§ 253 or § 332. As we now hold, the legal standard is the same under either." *Id.* at 579.

Sprint asserts that the district court was wrong and that it could bring this lawsuit only under section 253(a). According to Sprint, "Section 253(a) applies to challenges to 'statutes' and 'regulations' . . . , whereas Section 332(c)(7) applies only to challenges to particular 'decisions' made by local authorities." (Sprint Petition at 26 n.7.) However, section 332(c)(7)(B)(i)(II) specifically provides that "[t]he ***regulation*** of the placement, construction, and modification of personal wireless service facilities by any State or local government . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services." (Emphasis added.) Thus, by its plain terms, section 332(c)(7)(B)(i)(II) also applies to regulations. Further, in section 332(c)(7)(B)(i)(II), Congress sought to preserve "local government zoning authority." Congress understood that zoning authority is contained in zoning ordinances. Congress also understood that zoning decisions are made pursuant to zoning ordinances. Therefore, section 332(c)(7)(B)(i)(II) would apply here. Since section 332(c)(7)(B)(i)(II) applies, section 253(a) does not apply. Section 332(c)(7)(A).

Sprint claims that "one of the central promises of the Telecommunications Act [was] that wireless providers can offer services free of intrusive and inconsistent state and local regulation. . . . " (Sprint Petition at 29). Sprint is mistaken. The House bill would have created uniform national standards for

the siting of wireless facilities. However, the House's approach was rejected in favor of the current law which preserves local authority over the siting of wireless facilities. Congress understood that local zoning ordinance provisions will vary from municipality to municipality and from state to state.

Sprint also asserts that this Court would not need to reach the question of whether section 253(a) applies here. Sprint is incorrect. The Ninth Circuit did not reach this question because it assumed that section 253(a) applied, but concluded that the Ordinance was not preempted under that section. If the Ninth Circuit had concluded that the County's Ordinance was preempted under section 253(a), it would have needed to reach the threshold issue of section 253(a)'s applicability because there is a 30-day statute of limitations for section 332(c)(7)(B)(i)(II) claims. Section 332(c)(7)(B)(v). If only section 332(c)(7)(B)(i)(II) applies to the Ordinance because it governs the construction of individual wireless facilities, Sprint's lawsuit is time barred.[17] Therefore, this Court will also need to reach this threshold question in order to resolve Sprint's preemption challenge.

---

[17] Sprint filed its complaint 46 days after the Ordinance became effective. (ER at 1; 151-152.)

B. If The Standard Sprint Advocates Were Specifically Applied To The Ordinance, It Would Not Be Preempted Under Section 253(a).

Sprint asserts that "[t]he question presented in this case – *i.e.*, whether Section 253(a) preempts a state or local regulation that substantially impedes the provision of telecommunications service – is a recurring one. . . ." (Sprint Petition at 21.) Deciding whether a given regulation "substantially impedes" the provision of telecommunications service necessarily involves a fact intensive analysis of the regulation being challenged as well as an examination of the facts showing whether the regulation has had a real world impact on an entity's ability to provide telecommunications service. The Court should decline Sprint's invitation to engage in this fact intensive inquiry.

Moreover, if the "materially inhibit" or "substantially impede" standards were explicitly applied (the Ninth Circuit implicitly applied the "materially inhibit" standard) to the Ordinance, it would not be preempted under section 253(a). The Ninth Circuit had no trouble concluding that the Ordinance does not effectively prohibit Sprint from providing service and Sprint has offered no explanation why any of the Ordinance provisions materially inhibit or substantially impede its ability to provide service.

Indeed, how does holding a public hearing on a permit application prohibit an entity from providing service? Allowing the public to have its say does not

mean that a permit application will be denied. Assuming that the district court was correct and the Ordinance requires wireless providers to share existing facilities, this provision also does not prohibit an entity from providing service. Rather, it makes more locations available from which wireless companies can provide additional service. The fact that the County can require additional information does not mean that it will be burdensome for a company to provide the additional information requested. Similarly, the authority to impose conditions does not mean that a provider will have difficulty complying with the conditions. Authority to revoke a use permit (following a hearing) and to file a lawsuit against a company that does not comply with the conditions of its permit does not effectively prohibit an entity from providing service. The wireless company will have full due process rights and will only suffer negative consequences if it failed to satisfy a condition that was designed to protect the public. Finally, discretion to deny a permit application alone does not prohibit an entity from providing service because that discretion can be exercised to grant a permit application. Indeed, Congress specifically acknowledged that local governments have the authority to deny applications to install individual wireless facilities. Section 332(c)(7)(B)(iii) ("Any decision by a State or local government . . . ***to deny*** a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.") (emphasis added.)

Further, Sprint challenged the County's Ordinance on its face, providing no evidence regarding the impact of the Ordinance. The County, however, provided undisputed evidence showing that it had granted four of the nine permit applications Sprint submitted between the time the Ordinance was enacted and the County moved for summary judgment in the district court. (CER at 50, ¶ 4.) The other five Sprint permit applications were still pending. (*Id.*) Given these undisputed facts, the Ordinance could not have "materially inhibited" "substantially impeded" or "had the effect of prohibiting" Sprint from providing service.

C. In Any Event, The Ordinance Is Not Facially Invalid.

Sprint alleged that the Ordinance violates section 253(a) on its face. Sprint did not allege, and did not provide any evidence that the Ordinance, as applied, has "prohibited or had the effect of prohibiting" it from providing service. In *United States v. Salerno*, 481 U.S. 739, 745 (1987), this Court held that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." In *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 580 (1987), the Court held that the "no set of circumstances" test applies to

facial statutory preemption challenges. *See also Anderson v. Edwards*, 514 U.S. 143, 155 n.6 (1995).[18]

Thus, even if the Court were to adopt Sprint's proposed "substantially impedes" test, it would make no difference to the outcome of this case because Sprint cannot show that in all circumstances the County will exercise its discretion to deny Sprint's applications and therefore will under all circumstances substantially impede its ability to provide service.

Indeed, as discussed above, Sprint challenged the County's Ordinance on its face, providing no evidence regarding the impact of the Ordinance. The County, however, offered undisputed evidence showing that the County had granted four out of the nine permit applications Sprint submitted between the time the Ordinance was enacted and the County moved for summary judgment in the district court. (CER at 50, ¶ 4.) The other five Sprint permit applications were still pending. (*Id.*) The undisputed evidence also showed that the County had not denied a single application to construct a wireless facility submitted by any entity since the Ordinance was enacted. (*Id.* at ¶ 3.) Given these undisputed facts, it is evident that

---

[18] Sprint argues that a plaintiff bringing a facial challenge under section 253(a) should not be required to show that a regulation will be invalid under all circumstances. Sprint, however, offers no persuasive reason why a statute containing an express preemption clause should be exempt from the "no set of circumstances" test.

there are circumstances in which the Ordinance can be applied in a manner that does not have the effect of prohibiting Sprint from providing service. Therefore, the Ordinance is not facially invalid.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

DATED: February 11, 2009.

JOHN J. SANSONE,
County Counsel

THOMAS D. BUNTON,
Senior Deputy

Attorneys for Respondents