No. 08-759

IN THE

Supreme Court of the United States

SPRINT TELEPHONY PCS, L.P.,

Petitioner,

v.

COUNTY OF SAN DIEGO, *et al.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* OF PCIA – THE WIRELESS INFRASTRUCTURE ASSOCIATION, THE CALIFORNIA WIRELESS ASSOCIATION, AND NEWPATH NETWORKS, LLC, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JACQUELINE MCCARTHY
Director of Government Affairs
MICHAEL D. SAPERSTEIN, JR.
Public Policy Analyst PCIA – The Wireless Infrastructure Association
901 N. Washington St.
Suite 600
Alexandria, VA 22314

ROBERT JYSTAD
Counsel of Record
JULIAN K. QUATTLEBAUM, III
MARTHA HUDAK
CHANNEL LAW GROUP, LLP
100 Oceangate, Suite 1400
Long Beach, CA 90802
(310) 209-8515

Counsel for Amici Curiae

220446

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae consist of businesses and associations in the wireless infrastructure industry tasked with navigating the nationwide patchwork of regulations that often present insurmountable hurdles to developing the networks for wireless services. *Amici* support Sprint's petition for a writ of certiorari seeking review of the Ninth Circuit's latest decision on Section 253 of the Telecommunications Act of 1996, 110 Stat. 56, Pub. L. No. 104-104 (1996) ("TCA"), enacted as 47 U.S.C. § 253. Because *amici's* own and member businesses can only proceed at the level and pace that local regulations allow, *amici* and their members are actually and immediately harmed by regulations that burden deployment to the point of prohibition, particularly when they cannot bring facial challenges to prohibitive regulations. Therefore, pursuant to Rule 37.2, *amici* respectfully submit this brief in support of the petition for certiorari filed by Sprint Telephony PCS, L.P.

Amicus curiae PCIA—The Wireless Infrastructure Association ("PCIA") is the national trade association representing the wireless infrastructure industry. *Amicus curiae* The California Wireless Association ("CalWA") is a non-profit state-level trade association loosely affiliated with PCIA and also representing the

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. The parties have been given at least 10 days notice of amici's intention to file.

wireless infrastructure and wireless services industries. PCIA and CalWA's members develop, own, manage, and operate towers, rooftop wireless sites, and other facilities for the provision of all types of wireless services, including broadcasting and telecommunications services. Advocating for sensible deployment of wireless infrastructure, the two trade associations engage at the local level to counsel jurisdictions as they enact regulations on the siting of wireless infrastructure. A key function of this interaction is to educate localities on all of the public safety, economic and social benefits that wireless communications provide to their citizens. Accordingly, PCIA and CalWA advise jurisdictions to take these benefits into account and provide balanced regulations that protect the integrity of a community but also provide for the infrastructure that produces the full range of wireless services. Many of PCIA's members operate around the nation within the parameters of thousands of different jurisdictional regulations and are faced with inconsistent methods of challenging those regulations based upon their location in the United States.

CalWA and its members are directly impacted by the Ninth Circuit's decision in the instant case. Since the Ninth Circuit's first decision interpreting § 253, *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079, 122 S. Ct. 809, 151 L. Ed. 2d 694 (2002), infrastructure companies and wireless carriers have brought multiple challenges against jurisdictions throughout the Ninth Circuit. These challenges have assisted in controlling any tendencies jurisdictions might have in enacting ordinances that are even more burdensome than the

County of San Diego's wireless telecommunications ordinance ("County WTO"), the ordinance originally enjoined in this case. These challenges were uniformly successful and judges in several courts, including the Ninth Circuit itself, followed the Ninth Circuit's binding precedent. The court's latest decision, which has eviscerated the protections originally enacted in § 253, effectively eliminates the ability of CalWA's members to bring facial challenges to overly burdensome ordinances throughout California. It also creates a real possibility that opposition to wireless infrastructure will find a secure foothold in the enactment of unreasonable and discouraging local requirements.

Amicus curiae NewPath Networks, LLC, is a provider of a specialized low power wireless telecommunications infrastructure known as neutral host distributed antenna systems or DAS. DAS originated as a solution for providing wireless services in stadiums, convention centers and other large building complexes (in-building DAS) and in difficult to serve areas subject to natural impediments, such as canyon roads (outdoor DAS), the technology became valued for its small size and ability to provide the services of multiple wireless carriers using a single set of inconspicuously interconnected antenna nodes in, among others, areas where traditional cell sites may be infeasible, such as residential zones. The appeal of DAS in these areas is amplified by what is widely recognized as the rapidly growing replacement of traditional wireline telephony with wireless technologies.

NewPath has a direct interest in the outcome of this litigation and supports Petitioner Sprint Telephony PCS

in its petition for a writ of certiorari. NewPath has a case pending at the Ninth Circuit, *NewPath Networks, LLC v. City of Irvine*, App. Case Nos. 08-55755, 08-56010 (9th Cir., appeal filed June 5, 2008) ("NewPath v. Irvine"). NewPath, which contends that it is also protected under California public utility laws, succeeded in enjoining the City of Irvine's Wireless Communications Ordinance ("Irvine WCO") on grounds that the WCO was preempted under the Supremacy Clause by § 253. NewPath now faces the City's appeal of the District Court ruling, which was based in large measure on the original Ninth Circuit decision in *Sprint Telephony PCS, L.P. v. County of San Diego,* 490 F.3d 700, 715-716 (9th Cir. 2007) ("Sprint I"), *reversed en banc,* 543 F.3d 571 (9th Cir. 2008) ("Sprint II"). The outcome of that appeal, in all likelihood, will be directly related to the outcome of Sprint's efforts to have the Ninth Circuit's decision in *Sprint II* reversed or amended by this Court.

Moreover, NewPath's efforts in other jurisdictions, not only throughout the Ninth Circuit but across the country, will be substantially hampered by this Court's decision not to hear Sprint's appeal of the Ninth Circuit's reversal, which undid long-standing and widely recognized precedent upholding the viability of facial challenges to local zoning ordinances purporting to regulate the placement of wireless facilities.

SUMMARY OF ARGUMENT

This case involves the ability of local jurisdictions to adopt burdensome permitting requirements as a means of regulating entities seeking to deploy, maintain or upgrade wireless communications infrastructure.

This brief describes the real impacts that local regulation has on the deployment of wireless infrastructure and explains why the ability to bring facial challenges to local *ultra vires* actions, without being forced to wait months or years to compile adequate track record evidence, is critical to ensuring both the effectiveness of federal law and the realization of federal policy goals.

In particular, the split of authority among the federal circuits raises critical issues at the heart of federal telecommunication policies aimed at reducing regulation and promoting rapid deployment of advanced telecommunications services and the infrastructure necessary to sustain that effort. This split also threatens to undermine federal policies aimed at ensuring that local requirements governing deployment are rational and not based, directly or indirectly, on local regulation of radio frequency emissions. In the absence of a consistent and effective interpretation of the protections enacted in § 253, *amici*, which already face numerous local challenges to deployment, will see impediments mount and costs rise in a manner that will seriously undermine the use of new technologies and the ubiquitous provision of wireless services.

ARGUMENT

A. The Split of Authority over a Critical Issue in Federal Telecommunications Law Warrants Review

Amici agree with Petitioner Sprint Telephony PCS, L.P., that review is warranted in light of the split of authority among federal circuits. The Ninth Circuit's en banc decision in *Sprint II* directly conflicts with *Puerto Rico Tel. Co. v. Municipality of Guayanilla,* 450 F.3d 9 (1st Cir. 2006), *TCG New York, Inc. v. City of White Plains,* 305 F.3d 67 (2nd Cir. 2002), and *Qwest Corp. v. City of Santa Fe,* 380 F.3d 1258 (10th Cir. 2004). Furthermore, *Sprint II* and the Eighth Circuit's comparable decision in *Level 3 Commc'ns, Inc. v. City of St. Louis,* 477 F.3d 528 (8th Cir. 2007), form a wide gap between two disparate perspectives on the use of § 253 to facilitate the achievement of federal policy goals. As the Federal Communications Commission ("FCC") stated in 1997, shortly after the TCA was adopted: "Congress enacted section 253 to ensure that no state or local authority could erect legal barriers to entry to telecommunications markets that would frustrate the 1996 Act's explicit goal of opening local markets to competition." *In re TCI Cablevision of Oakland County, Inc.,* 12 F.C.C.R 21396, para. 7 (Sept. 19, 1997). Consistent with that articulation, the FCC has scrutinized local requirements under the lens of § 253 with the understanding that "clever men may easily conceal their motivations." *United States v. City of Black Jack,* 508 F.2d 1179, 1185 (8th Cir. 1974) (noting that, in the zoning context, policies that discriminate on the basis of race are easily veiled); *TCI,* 12 F.C.C.R at para. 8

(". . . we are concerned that Troy and other local governments may be creating an unnecessary 'third tier' of telecommunications regulation"). Three federal circuits view § 253 in this same sense as a substantive restriction on state and local permitting requirements that threaten to impede the rapid deployment of critical telecommunication technologies and infrastructure. Two federal circuits read § 253 as a narrowly construed, and uncommonly used, tool for preventing local jurisdictions from erecting absolute and obvious barriers to new market entrants. This latter interpretation virtually eliminates facial challenges to wireless regulations and facilitates an atmosphere of no-holds barred zoning regulation of wireless infrastructure.

The split of authority arises and will continue to arise, in no small part, as a result of the confusing language of § 253. *St. Louis,* 477 F.3d at 531 (citing *N.J. Payphone Ass'n, Inc. v. Town of West New York,* 299 F.3d 235, 240 (3d Cir. 2002) ("[t]he language and structure of section 253 has, to understate the matter, created a fair amount of confusion")). Thus, a district court in the Seventh Circuit, which circuit has yet to take a position on facial challenges to § 253, elected not to follow the Eighth Circuit's reasoning and, rather, cited the multiple extra-circuit decisions on which the Ninth Circuit had relied to support its analysis initially in *Auburn* and, thereafter, in *Sprint I. Ill. Bell Tel. Co. v. Vill. of Itasca,* 503 F. Supp. 2d 928, 940 (N.D. Ill. 2007)

> "The Ninth Circuit, after reviewing district court cases from Texas and New York and a Fifth Circuit decision, explained, 'Taken together, these cases persuasively indicate

> that a regulatory structure that allows a city to bar a telecommunications provider from operating in the city prohibit[s] or ha[s] the effect of prohibiting the company's ability to provide telecommunications services under [§ 253]."'

(internal quotes omitted). *Sprint II*, with its reversal of *Sprint I*, now purports to align the Ninth Circuit with the Eighth Circuit, but it does not resolve the split of authority in the circuits as a whole. Rather, it renders the split even more apparent.

B. The Case Warrants Review Because the Federal Telecommunications Policies Impacted by *Sprint II* Are of Paramount Concern to the Country

The House Commerce Committee in conjunction with President-Elect Barack Obama's Transition Team recently produced an analysis of the impacts of wireless broadband deployment on the nation's economy. "Accelerated Wireless Broadband Infrastructure Deployment: Impact on GDP and Employment 2009-2010" (Pearce & Pagano, December 24, 2008) ("Pearce Report"). The Pearce Report relied in part on data from PCIA concerning the economic benefits of regulatory relief from lengthy delays associated with onerous local permitting processes. It drew several important conclusions:

1. "[N]ew wireless broadband investments of $17.4 billion will, within 24 months . . . , increase Gross Domestic Product ("GDP") by 0.9% to 1.3%, which translates in dollar

terms to $126.3 billion to $184.1 billion, and will result in an increase of between 4.5 million and 6.3 million jobs." (Pearce Report at p. 3.)

2. "By investing in both wireless broadband access infrastructure, both jobs and income are increased, not only by the direct investment in building new wireless towers and modifying existing towers, thereby expanding network capacity, speed, and reliability, but also by the indirect benefits of filling coverage holes and providing broadband services to more of the U.S." *Id.*

The Pearce Report noted that its results were largely based on data from PCIA, which calculated that additional wireless investments of $11.5 billion would be available if regulatory relief were provided in the form of the pending CTIA "shot-clock petition" at the FCC. *Id.* at p. 9. In the same report, CTIA noted that removal of the regulatory bottleneck carriers now face "would result in a flood of shovel ready construction almost immediately." *Id.* at p. 3 (internal quotes omitted).

PCIA further estimates that costs associated with the zoning of new wireless facilities in difficult jurisdictions, not including renewal efforts, denial-related litigation or facial challenges to onerous requirements, amounts to roughly a billion dollars per year. These numbers are limited to deployment efforts and do not calculate the economic and social costs and missed benefits of ubiquitous wireless services, including

emergency response services and public safety. Equally important, these numbers are based on pre-*Sprint II* calculations and, in the event *Sprint II* is not overturned, it is almost certain that the number of difficult jurisdictions will increase.

Thus, "[t]he [TCA] itself unquestionably focuses on issues central to the national economy: '[The] Act . . . promotes competition and reduces regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.'" *Petersburg Cellular Pshp. v. Bd. of Supervisors,* 205 F.3d 688, 711 (4th Cir. 2000) (". . . the siting of telecommunications towers substantially affects interstate commerce . . .") (citing H.R. Rep. No. 104-204, at 47 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10).

In *Sprint II,* notwithstanding the widely recognized importance of the TCA on the country's economy and the court's own acknowledgment of the "dramatic" effect of the TCA,[2] the Ninth Circuit selectively focused its attention on the TCA's expressed concerns about monopolies to support a narrow interpretation of § 253. *Sprint II,* 543 F.3d at 575 ("Congress [chose to end the States' longstanding practice of granting and maintaining local exchange monopolies] by enacting 47 U.S.C. § 253, *a new statutory section that preempts state and local regulations that maintain the monopoly*

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[2] In *Sprint II,* the Ninth Circuit added: "The Act 'represents a dramatic shift in the nature of telecommunications regulation . . . '" 543 F.3d at 576 (citing *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n,* 184 F.3d 88, 97 (1st Cir. 1999)).

status of a telecommunications service provider") (emphasis added). This selective focus ignored the broader purposes of the TCA and § 253's role in accomplishing those purposes.[3]

Rather, there are three separate if interwoven purposes expressly identified in the TCA: (1) promote competition by, *inter alia,* preventing state and local protectionism; (2) facilitate cost containment by reducing regulatory burdens at the state and local level; and (3) encourage the rapid deployment of infrastructure necessary to support new telecommunications technologies.[4] *Auburn,* 260 F.3d at 1170 n.5 ("The full

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[3] This circumscribed focus is especially noteworthy in light of *Sprint I,* which noted: "Though the act did not 'federalize telecommunications land use law' (citation omitted), *it established meaningful limits beyond which state and local governments may not inhibit telecommunications by preventing the construction of wireless communications facilities.* Accordingly, we determine that local zoning ordinances...are within the preemptive scope of § 253(a) (removing barriers)." *Sprint I,* 490 F.3d at 718 (emphasis added).

[4] *See also* Deonne L. Brunning, "The Telecommunications Act of 1996: The Challenge of Competition," 30 CREIGHTON L. REV. 1255, 1256 (1997) *cited in Puerto Rico Tel. Co. v. Telecomms. Bd.,* 189 F.3d 1, 8 (1st Cir. 1999) ("describing the Act as intended (1) to promote competition and reduce regulation to secure lower prices and higher quality services for American telecommunications consumers, (2) to encourage the rapid deployment of new telecommunications technologies, and (3) to implement policies that will prevent harm to consumers from the implementation of competition"). Even in this characterization, deployment of infrastructure necessary to support new technologies stands as a separate purpose of the TCA.

title of the Act is 'An Act to *promote competition* and *reduce regulation* in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the *rapid deployment* of new telecommunications technologies'") (emphasis added).

The TCA's multidimensional focus is highlighted in its legislative history. "As the legislative history explains, the Act creates a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." *Core Commc'ns, Inc. v. Verizon Pa., Inc.*, 493 F.3d 333, 335 (3rd Cir. 2007) citing *Puerto Rico Tel. Co. v. Telecomms. Regulatory Bd.*, 189 F.3d 1, 7-8 (1st Cir. 1999) (quoting H.R. Conf. Rep. No. 104-458, at 113 (1996) (internal quotes omitted)). By focusing solely on the TCA's concern with locally supported monopolies, the Ninth Circuit could avoid addressing the impact its decision will have on the full range of goals identified by the TCA, specifically, the counterproductive impact its interpretation of § 253 will have on efforts to "reduce regulation" and the devastating impact its interpretation will have on infrastructure deployment efforts. *See, supra,* note 3.

In addition to these stated goals of the TCA, the FCC and this Court have both recognized the unstated but equally important goal of regulatory consistency. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 127-8, 125 S. Ct. 1453; 161 L. Ed. 2d 316 (2005) ("Context

here, for example, makes clear that Congress saw a national problem, namely, an inconsistent and, at times, conflicting patchwork of state and local siting requirements, which threatened the deployment of a national wireless communication system") (internal quotes and citations omitted). In *TCI,* cited *supra,* the FCC explained its concern as follows:

> "Each local government may believe it is simply protecting the interests of its constituents. The telecommunications interests of constituents, however, are not only local. They are statewide, national and international as well. We believe that Congress' recognition of this fact was the genesis of its grant of preemption authority to this Commission.
>
> "This concern is exacerbated by the potential for multiple, inconsistent obligations imposed on a community-by-community basis. Such a patchwork quilt of differing local regulations may well discourage regional or national strategies by telecommunications providers, and thus adversely affect the economics of their competitive strategies."

TCI, 12 F.C.C.R. at para. 106.

Sprint II abandons this concern with consistency as well because it cannot be reconciled with the Ninth Circuit's revised interpretation of § 253, which effectively rules out preemption of local ordinances unless the ordinance constitutes a blatant, if not express,

attempt to protect an existing monopoly provider by prohibiting new entrants into the market. *Sprint II*, 543 F.3d at 576, 580. *Sprint II*, therefore, encourages localities to select their own unique regulatory apparatus to govern placement of wireless facilities, untouched by the statute's preemptive force. The Ninth Circuit's efforts at unifying its decision in *Sprint II* with its prior ruling on 47 U.S.C. § 332, *MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715 (9th Cir. 2005), bears this out. *Sprint II*, 543 F.3d at 578 (". . . [in MetroPCS] we rejected the plaintiff's argument that, because the city's zoning ordinance granted discretion to the city to reject an application based on vague standards such as necessity, the ordinance necessarily constituted an effective prohibition") (internal quotes omitted). As *Abrams* points out: "Congress ultimately rejected the national approach and substituted a system based on cooperative federalism." *Abrams*, 544 U.S. at 128. But the Court added: "State and local authorities would remain free to make siting decisions. They would do so, however, subject to *minimum federal standards*—both substantive and procedural—as well as federal judicial review." *Id.* (emphasis added). In the absence of an effective mechanism for challenging ordinances that exceed these "minimum federal standards," there can be no expectation of regulatory consistency in the siting of wireless telecommunications facilities.

Moreover, it can readily be seen that *Sprint II* will reverse years of effort at accomplishing these federal goals. The decision is already producing deleterious effects. Several California cities and counties immediately responded to the issuance of *Sprint II* by

initiating or reinstating plans to adopt rigorous zoning ordinances or by abandoning plans to tailor their ordinances in light of *Sprint I* and related litigation.

On January 7, 2009, the City of Glendale adopted a moratorium on the placement of all wireless facilities, including collocations, in all areas of the city zoned residential and in all public rights-of-way. The moratorium was proposed after residents objected to the City's approval of several T-Mobile applications for encroachment permits to place their facilities in public rights-of-way because of concerns about health impacts due to radio frequency emissions. The purpose of the moratorium was to terminate permit approvals until the City adopts a new ordinance governing these placements. In its report to the Council, city staff made the following assertion about the effects of *Sprint II* in that it ". . . create[s] . . . an opportunity to review and analyze existing ordinances and the current state of the law so that . . . the City may safeguard Residential Areas from the intrusion of incompatible and potentially disruptive uses through the development of a new ordinance relating to . . . Wireless Facilities." Report to City Council (City of Glendale) (Jan. 7, 2009), p. 2. The Glendale Report notes that "many cities have become engaged in comprehensive reviews of their zoning and right-of-way ordinances *in order to consider stricter requirements for placements of wireless antennas*." *Id.* at p. 9 (emphasis added). It then identifies pending or ongoing actions in the cities of Pasadena, Walnut Creek, Burbank, Huntington Beach, Irvine, Los Angeles, Ventura County, San Francisco, San Diego, La Canada-Flintridge, and Orange County. *Id.* at 9-11.

Among the cities identified in the Glendale Report is the City of Irvine, which also recently adopted a moratorium as a result of an injunction issued by district court in *NewPath v. Irvine*, cited *supra*, based largely on *Sprint I*. The purpose of the moratorium was to permit the City sufficient time to revise the Irvine WCO, which was similar to the County WTO, to bring it into conformance with *Sprint I's* interpretation of § 253. The staff report on the moratorium noted that the district judge "did, however, acknowledge that the City retains the right to craft a reasonable discretionary regulatory structure to address the installation and/or augmentation of wireless telecommunications facilities." Request for Council Action (City of Irvine) (September 9, 2008), pp. 2-3. Shortly after the ruling in *Sprint II* was issued, the City determined that it was no longer necessary to "craft a reasonable discretionary regulatory structure" and added the following comment to the home page of its web site: "The United States Court of Appeals for the Ninth Circuit has issued a ruling favorable to the City of Irvine's original wireless ordinance" and added a link to the slip opinion.[5]

The district court that enjoined Los Angeles County's Zoning Ordinance wrote: "The Court has little trouble concluding that this process is so burdensome and Byzantine as to erect a barrier to providing telecommunications services." *NextG Networks of Cal., Inc. v. County of Los Angeles*, 522 F. Supp. 2d 1240, *26 (C.D. Cal. 2007). The County thereafter drafted extensive revisions to its zoning code, adding administrative approvals for certain types of facilities

[5] http://www.cityofirvine.org.

in specified locations, and relocated provisions concerning placement of wireless facilities in the public rights-of-way from the zoning code to the public works code. The revisions were near adoption but, following *Sprint II*, no further action has been taken.

The City and County of San Francisco recently adopted a moratorium on construction of wireless facilities and was involved in extensive revisions to its zoning code which would have included adoption of standards for administrative approval of right-of-way facilities. At a recent meeting with industry, city staff communicated that the Board of Supervisors would not support the proposed standards.

The City of San Diego is presently subject to multiple lawsuits that raise § 253 as a challenge to its wireless telecommunications regulations, policies and guidelines. *See, e.g., American Tower Corp. v. City of San Diego*, Case No. 07cv0399 (S.D. Cal., filed, as amended, August 29, 2007). The City has refused to alter its tremendously difficult permitting requirements and refuses to renew any existing wireless facilities unless those facilities are brought into conformance with its rigorous camouflaging requirements. The City has already stated that it has no concerns regarding cost of compliance and no concern regarding impact to the network. Notwithstanding these onerous conditions, the City refuses to modify its own monopoles and towers, even as it requires removal and replacement of monopoles directly adjacent to its own facilities.

C. The Court Also Should Hear This Case Because It Raises Important Issues of Federalism

The FCC noted the constitutional importance of § 253 when it wrote:

> "Congress sought to strike a balance in the 1996 Act. Obligations were imposed on incumbent carriers to create conditions essential to the development of competition. At the same time, Congress recognized the need for State and local governments to continue respond to truly local issues. *Section 253 plays an important role in this regime.*"

TCI, 12 F.C.C.R. at par. 107 (emphasis added). The Court has identified this "balance" as a form of "cooperative federalism." *Abrams*, 544 U.S. at 128; *Core Commc'ns*, 493 F.3d at 335 ("To achieve these goals, the [TCA] provides that various responsibilities are to be divided between the state and federal governments, making it an exercise in what has been termed cooperative federalism").

Given the important role that § 253 plays in maintaining the TCA's version of "cooperative federalism," any interpretation of § 253 that threatens to undermine that balance should be suspect and should be a compelling reason for certiorari. It is not surprising that the FCC sees § 253's role in this balance of power as important. *TCI*, 12 F.C.C.R. at par. 107. First, § 253 is the backstop to the TCA's main thrusters for promoting competition, §§ 251 and 252. Properly applied, § 253 ensures that competition has sufficient "lift" by

thwarting local efforts to impede competition, and it can do so without the heavy hand of national control. *Abrams*, 544 U.S. at 128. Second, the structure of § 253 is itself evidence of a concern for balance. The anti-prohibition provisions in § 253(a), as they were understood at the FCC and interpreted in *Auburn* and *Sprint I*, form a platform for identifying the "minimum federal standards" that should restrict local authority in support of the TCA's "pro-competitive, deregulatory framework." *Id. Sprint I*, 490 F.3d at 718 ("Though the act did not federalize telecommunications land use law (citation omitted), it established meaningful limits beyond which state and local governments may not inhibit telecommunications by preventing the construction of wireless communications facilities"). Sections 253(b) and 253(c) then describe the authority that is reserved to state and local jurisdictions, respectively, notwithstanding § 253(a). However, if a court is allowed to effectively remove § 253(a) from this equation, as *Sprint II* does by narrowly construing its ability to preempt regulatory overreaching, the balance is undone and cooperative federalism is transformed into a euphemism for local control.

In fact, this Court has expressed serious reservations about the impacts of a misread of § 253(a):

> "... the practical implication ... is to read out of § 253 the words 'or ha[s] the effect of prohibiting,' by which Congress signaled its willingness to preempt laws that produce the unwanted effect, even if they do not advertise their prohibitory agenda on their faces. Even

> if § 253 permitted such a formalistic distinction between implicit and explicit repeals of authority, the result would be incoherence of policy; *whether the issue is viewed through the lens of preventing anticompetitive action or the lens of state autonomy from federal interference, there is no justification for preempting only those laws that self-consciously interfere with the delivery of telecommunications services.* . . . the dissent ends up reading [§ 253(a)] in a way that disregards its plain language and entails a policy consequence that Congress could not possibly have intended."

Nixon v. Mo. Mun. League, 541 U.S. 125, 139-140 (2004) (emphasis added).

D. The Court Needs To Clarify the Application of *United States v. Salerno*

A further reason for granting certiorari is *Sprint II's* confused treatment of the "no set of circumstances" test articulated in *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987). Even though *Sprint II* noted that "[t]he Supreme Court and this court have called into question the continuing validity of the *Salerno* rule," it improperly limited that debate to First Amendment challenges.[6] *Sprint II*, 543

[6] Note Justice Scalia's dissent in *City of Chicago v. Morales*, 527 U.S. 41, 77, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) ("... until recently we have – except in free-speech cases subject to the doctrine of overbreadth – required the facial challenge to be a (Cont'd)

F.3d at 579 n.3. The court held that "[i]n cases involving federal preemption of a local statute . . . the rule applies with full force." *Id.*

However, *Sprint II* failed to fully explore the tension surrounding *Salerno*, which is described in detail in a non-First Amendment case, *Morales*, 527 U.S. at 55 n.2 (plurality opinion) ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself").

By its own admission, the court's interpretation of *Salerno* eviscerates the industry's ability to use § 253 to challenge oppressive ordinances that discourage deployment. *Sprint II*, 543 F.3d at 579. Under that interpretation, likelihood of abuse of discretion, with or without supporting evidence, is insufficient to sustain a facial challenge where there is the possibility of a lawful application of the ordinance. *Id.* at 580 (speculating that "it is equally true (and more likely) that a zoning board would exercise its discretion only to balance the

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(Cont'd)

go-for-broke proposition . . ."). Note also that this case involves the values the First Amendment seeks to promote. This case can be compared to billboard cases in as much as a billboard is analogous to wireless infrastructure. Both types of infrastructure are equally critical to reaching the audience of their customer-speakers. The First Amendment prohibits not only content-based restrictions that censor particular points of view, but also content-neutral restrictions that unduly constrict the opportunities for free expression. *City of Ladue v. Gilleo*, 512 U.S. 43, 55, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994).

competing goals of an ordinance"). The court's views belie the industry's repeated experiences with publicly disfavored cell sites and widespread efforts to use zoning ordinances to discourage deployment. Moreover, in this setting, the distinction between facial and as-applied challenges is misleading.[7] Even if *Salerno* controls, this case also offers the opportunity to recognize the validity of facial challenges when it is clear that there is "no set of circumstances" in which an ordinance is not overly burdensome or does not grant unfettered discretion and, therefore, impairs the public goals which Congress has sought to promote. *Morales,* 527 U.S. at 71 (Breyer, J., concurring) ("The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion *in every case*").

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[7] The debate . . . over when litigants should be able to challenge statutes as "facially" invalid, rather than merely invalid "as applied":

> ". . . reflects mistaken assumptions. There is no single distinctive category of facial, as opposed to as-applied, litigation. All challenges to statutes arise when a litigant claims that a statute cannot be enforced against her. . . . Accordingly, debates about the permissibility of facial challenges should be recast as debates about the substantive tests that should be applied to enforce particular . . . provisions."

Richard H. Fallon, Jr., "Commentary: As-Applied and Facial Challenges and Third-Party Standing," 113 HARV. L. REV. 1321, 1321 (2000).

E. *Sprint II* Would Foster Anti-Competitive Actions Contrary to the TCA's Goals

Finally, as described throughout, § 253 must be read in light of the TCA's express focus on stimulating a competitive marketplace. In this vein, the FCC has decided that the proper method of determining whether a regulation "has the effect of prohibiting" telecommunications under Section 253(a) is "whether the [regulation] materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *In re Cal. Payphone Ass'n,* 12 F.C.C.R. 14191, 14206 (1997). As Petitioner notes, "[a]ll of the other courts of appeals [beyond the Ninth Circuit] to have addressed the construction of Section 253(a) have discussed (and to a varying degree relied upon)" this language. Petitioner Br. at 20 n.6.

It thus becomes important to recognize that competition is not only internal to the wireless telecommunications industry, but also external and includes wireline telephone companies, cable companies, electric companies offering broadband over power line services, and even satellite providers. Burdensome regulations applied specifically to one aspect of the broader telecommunications market undoubtedly "materially inhibits [and] limits the ability of" wireless providers to compete against other telecommunications providers "in a fair and balanced regulatory environment." *Cal. Payphone*, cited *supra.*

CONCLUSION

As an FCC report recently noted, "Cell phones rank just behind keys when it comes to items that Americans don't leave home without."[8] Additionally, approximately one out of seven Americans has "cut the cord."[9] For these users, their wireless devices are their only telephones. As wireless usage expands for broadband data and mobile media, carriers will need to develop additional facilities to meet subscriber demand. More importantly, carriers need to be able to provide a strong, high-quality signal in residential areas so that wireless users can be protected in case of an emergency. E911 is a service activated when a wireless caller dials 911, and allows first responders to identify the caller's location. The Ninth Circuit's affirmation of excessive restrictions on wireless infrastructure deployment will thwart technological innovation and the deployment of infrastructure that is necessary to support it.

Amici therefore respectfully request that the Court grant Petitioner's request for a writ of certiorari.

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[8] *In re:* Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Radio Services, *Twelfth Report*, WT Dkt. No. 07-71, 23 F.C.C.R. 2241 (Feb. 4, 2008) (*quoting* Marguerite Reardon, "Will Unlocked Cellphones Free Consumers?" www.USAToday.com, Jan. 24, 2007).

[9] *See, e.g.*, Stephen J. Blumberg, Ph.D., and Julian V. Luke, "Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January – June 2007" (Division of Health Interview Statistics, National Center for Health Statistics, 2007)

Respectfully submitted,

ROBERT JYSTAD
Counsel of Record
JULIAN K. QUATTLEBAUM, III
MARTHA HUDAK
CHANNEL LAW GROUP, LLP
100 Oceangate, Suite 1400
Long Beach, CA 90802
(310) 209-8515

JACQUELINE MCCARTHY
Director of Government Affairs
MICHAEL D. SAPERSTEIN, JR.
Public Policy Analyst PCIA – The Wireless Infrastructure Association
901 N. Washington St., Suite 600
Alexandria, VA 22314

Counsel for Amici Curiae