

S238001

**IN THE SUPREME COURT OF CALIFORNIA**

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**T -MOBILE WEST LLC, et al.,**  
*Plaintiffs and Appellants,*

v.

**CITY AND COUNTY OF SAN FRANCISCO, et al.,**  
*Defendants and Respondents.*

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After a Decision of the Court of Appeal of the State of California,  
First Appellate District, Division Five, Case No. A144252

The Superior Court of the State of California in and for the  
County of San Francisco, Case No. CGC-11-510703  
The Honorable James McBride, Judge

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**APPLICATION AND BRIEF OF *AMICI CURIAE* CTIA—THE  
WIRELESS ASSOCIATION® AND THE WIRELESS  
INFRASTRUCTURE ASSOCIATION IN SUPPORT OF  
PLAINTIFFS AND APPELLANTS**

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## **APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF**

Pursuant to rule 8.520(f) of the California Rules of Court, CTIA—The Wireless Association® (“CTIA”) and the Wireless Infrastructure Association (“WIA”) respectfully apply for leave to file a brief as *amici curiae* in support of T-Mobile West LLC (“T-Mobile”), Crown Castle NG West LLC (“Crown Castle”), and ExteNet Systems (California) LLC (“ExteNet”) (collectively, “Appellants”).<sup>1</sup> CTIA, WIA, and their members have an abiding interest in this case, and in the deployment of essential new wireless facilities throughout California.

CTIA represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans and Californians to lead a 21st century connected life. The association’s members include wireless carriers, device manufacturers, suppliers, as well as application and content companies.

WIA is the principal organization representing companies that build, design, own, and manage telecommunications facilities throughout the world. WIA’s over 230 members include telecommunications carriers, infrastructure providers, and professional services firms that own and

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<sup>1</sup> No party or counsel for a party in this matter authored this *amicus* brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amici curiae* and their members, made a monetary contribution intended to fund the preparation or submission of this brief.

operate towers, rooftop wireless sites, and other telecommunications facilities.

CTIA and WIA work collaboratively with officials at all levels of government across the nation and in California to facilitate solutions to the deployment of next-generation wireless networks that are responsive to the needs of consumers and the sensitivities and concerns of states and localities. Among other things, they have worked with local organizations to publish a model ordinance and a checklist for reviewing wireless facilities.<sup>2</sup> They also actively participate in proceedings before the California Public Utilities Commission (“CPUC”) to streamline the deployment of wireless facilities, and WIA filed an *amicus* letter in this case urging the Court to grant the petition for review.

This case squarely implicates the ability of CTIA’s and WIA’s members to deploy next generation wireless solutions in California. The appellate court decision under review upheld San Francisco’s wireless siting ordinance, which imposes cumbersome and discriminatory permitting

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<sup>2</sup> See Press Release, CTIA, CTIA Statement on Joint Release of Model Ordinance and Checklist to Streamline Wireless Infrastructure Deployment, (Mar. 5, 2015), <http://www.ctia.org/resource-library/press-releases/archive/model-ordinance-checklist-wireless-infrastructure-deployment>; Press Release, PCIA, PCIA’s Adelstein Lauds Joint Release of Materials to Aid Deployment of Broadband Across America (Mar. 5, 2015), <http://www.pcia.com/pcia-press-releases/704-pcia-s-adelstein-lauds-joint-release-of-materials-to-aid-deployment-of-broadband-across-america>. WIA was formerly known as PCIA—The Wireless Infrastructure Association.

requirements on entities seeking to construct and install wireless facilities in rights-of-way. CTIA and WIA submit this brief to assist the Court in understanding not only why the decision wrongly applies California law, but also why it undermines State and federal wireless broadband deployment priorities and threatens the promise of wireless broadband for California. These arguments are complementary to, and not duplicative of, the briefing submitted by the Appellants.

For the foregoing reasons, CTIA and WIA request that the Court permit the filing of the attached *amicus curiae* brief in support of Appellants T-Mobile, Crown Castle, and ExteNet.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'C. Gilmore', written over a horizontal line.

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Dated: May 10, 2017

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## INTRODUCTION AND SUMMARY

Broadband plays an increasingly important role in the lives of all Americans—to educate, to identify and pursue job opportunities, to provide health information, and much more. And broadband is increasingly being supplied via wireless networks, which are able to expand service opportunities for low-income individuals, people with disabilities, and those living in rural areas. Small wireless facilities in particular are being used to densify networks and provide targeted coverage, and these small wireless facilities are often deployed most effectively in rights-of-way (“ROWS”).

Without timely and reasonable access to ROWs, however, broadband deployment goals are at risk. For this reason, California and federal policymakers are taking steps to identify and reduce ROW deployment barriers. The appellate court did not consider these important State and federal policies when it upheld San Francisco’s Ordinance. Its interpretation of Public Utilities Code Sections 7901 and 7901.1 should have been informed by those policies.

The appellate decision held that California law permits San Francisco—and by implication any California jurisdiction—to block the deployment of new wireless services on existing poles in the public ROWs for discretionary aesthetic reasons. The Court also held that even though the City’s Ordinance applies this aesthetic review only to *wireless*, but not to

other services using ROWs, such as electricity, gas, and wireline telephone, it was not unlawfully discriminatory. *T-Mobile West LLC v. City and County of San Francisco*, 3 Cal. App. 5th 334 (Cal. App. 1st Dist. 2016) (“Opinion”), *review granted*, 385 P.3d 411 (Cal. 2016). Both holdings were incorrect, as Appellants demonstrated in their briefs on the merits. Section 7901 does *not* permit localities to prevent Appellants or other State-certificated utilities from installing equipment in ROWs on unbridled aesthetic grounds. Moreover, the Ordinance—which subjects *only* wireless providers to aesthetic review—violates the bar against unreasonable discrimination in Section 7901.1.

The associations write separately to explain how the Ordinance is at odds with State and federal priorities to facilitate transformative wireless broadband solutions and will harm Californians. If not reversed, the Ordinance threatens the promise that wireless broadband holds for California, and will embolden other localities across the State to enact similar ordinances that will frustrate core State and federal policies to promote broader, improved public access to broadband. WIA and CTIA therefore agree with Appellants that the Court of Appeal decision under review wrongly applies California law and should be reversed, and that the San Francisco ordinance (S.F., Cal. Ordinance 12-11, *as amended by* S.F., Cal. Ordinance 18-15 (“Ordinance”)) should be invalidated.

## ARGUMENT

### I. THE LOWER COURT DID NOT CONSIDER IMPORTANT STATE AND FEDERAL PRIORITIES TO FACILITATE BROADBAND.

#### A. Broadband and Advanced Wireless Technologies Enable Transformative Solutions that Benefit Society.

The term “broadband” represents high-speed, high-quality Internet service, capable of supporting video (like YouTube), streaming media, VoIP (Internet phone), gaming, and interactive services, to name a few. *See* Federal Communications Commission (“FCC”), Types of Broadband Connections, [http://www.broadband.gov/about\\_broadband.html](http://www.broadband.gov/about_broadband.html) (visited May 8, 2017). Mobile broadband—which connects users to the Internet via a smartphone, tablet, wearable, or other mobile device—is an increasingly vital form of broadband, as evidenced by exploding consumer demand.

Consumers today rely on mobile broadband to stay connected with friends and loved ones, search for jobs, take advantage of the latest healthcare advances, conduct financial transactions, and complete myriad day-to-day tasks more efficiently than ever before. *See* Thomas K. Sawanobori, *The Next Generation of Wireless: 5G Leadership in the U.S.*, CTIA White Paper (Feb. 9, 2016). This reliance is borne out by demand: Mobile data traffic grew 44 percent in North America in 2016, and will increase almost fivefold between 2016 and 2021. Cisco, *Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2016–*

2021, at 4, 33 (Feb. 7, 2017). Indeed, current generation “3G and 4G” mobile services drove mobile wireless data consumption overall to 1.8 billion Gigabytes per month last year in North America, an amount that is projected to grow sixfold by 2022. And on a per smartphone basis, mobile data traffic is projected to grow from 5.1 Gigabytes per month in 2016 to 25 Gigabytes by 2022. Ericsson, *Ericsson Mobility Report*, at 12-13 (Nov. 2016).

This demand will only increase with advances in 4G services to include even faster LTE (“Long Term Evolution”) technology, and the evolution toward next generation “5G” mobile services, which have the potential to reshape the mobile experience. These advanced wireless services include the ubiquitous connection of smart digital devices to the Internet—known as the Internet of Things (“IoT”)—which will enable machine-to-machine connections such as sensors, smart medical devices, home automation devices and appliances, wireless utility meters, connected cars, consumer electronics, and more. *See* David Witkowski, Joint Venture Silicon Valley, *Bridging the Gap: 21st Century Wireless Telecommunications Handbook*, at 8 (Sept. 2016).

IoT is expected to deliver smarter energy grids, safer transportation networks (including automated driving and in-vehicle services), mobile health care (devices that monitor human health and wellness), intelligent homes (with enhanced security and automation of household chores), smart

factories (optimizing equipment and operations), and immersive entertainment (enhanced resolution and virtual reality). *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies*, Public Notice, 31 FCC Rcd 13360, 13362 (WTB 2016) (“*Infrastructure PN*”). According to one research firm, 8.4 billion connected IoT devices will be in use this year—up 31 percent from 2016. This number is expected to reach 20.4 billion by 2020. News Release, Gartner, Inc., *8.4 Billion Connected “Things” Will Be in Use in 2017, Up 31 Percent From 2016* (Feb. 7, 2017). To meet this demand, wireless operators are expected to invest \$275 billion over the next decade to deploy 5G. See Accenture Strategy, *How 5G Can Help Municipalities Become Vibrant Smart Cities*, at 1 (Jan. 12, 2017) (“*Accenture Smart Cities Report*”).

The reasons for this explosion in demand for broadband, and advanced wireless services like 5G, are clear: mobile broadband offers tremendous benefits for the economy, consumers, and public safety.

First, broadband fuels economic growth. As the World Bank has recognized, “Broadband is not just an infrastructure. It is general-purpose technology that can fundamentally restructure an economy.” The World Bank, *2009 Info. and Commc’ns for Dev.: Extending Reach and Increasing Impact*, at 39 (2009). Indeed, for every 10 percent increase in broadband penetration in developed economies, there is a corresponding 1.21 percent

increase in economic growth. Intel, *Realizing the Benefits of Broadband*, at 3 (2010).

All told, the wireless industry as a whole generates more than \$400 billion in total U.S. spending. Coleman Bazelon & Giulia McHenry, *Mobile Broadband Spectrum: A Vital Resource for the American Economy*, The Brattle Group, at 10 (May 11, 2015). Looking forward to 5G, integrated technologies that assist in the management of vehicle traffic and electrical grids will produce \$160 billion in benefits and savings through reductions in energy usage, traffic congestion, and fuel costs. See Accenture Smart Cities Report at 1. And wireless-enabled smart grids could create \$1.8 trillion for the U.S. economy, saving consumers hundreds of dollars per year. See Deloitte, *Wireless Connectivity Fuels Industry Growth and Innovation in Energy, Health, Public Safety, and Transportation*, at 3 (Jan. 2017) (“Deloitte Wireless Connectivity Report”).

The result is more jobs, both across the country and in California. More than 4.6 million Americans have jobs that depend directly or indirectly on the wireless industry, see Roger Entner, *The Wireless Industry: Revisiting Spectrum, the Essential Engine of US Economic Growth*, Recon Analytics, at 18 (Apr. 2016), and a recent study found that smart city and 5G deployments will add more than 11,000 jobs in the short-term and as many as 375,000 long-term jobs in California alone, see Accenture Smart Cities Report at 5. Indeed, for every one percent increase

in broadband penetration in a state, employment is projected to increase up to 0.3 percent per year. WIA, *Unleashing the Economic Benefits of Broadband Expansion*, at 2 (2016) (“WIA Broadband White Paper”). Attracting high-tech businesses is therefore critical to states and municipalities, and businesses that depend on high-speed broadband services and “will not consider relocation or new locations unless local infrastructure meets their needs.” WIA Broadband White Paper at 1-2.

In addition, broadband benefits consumers. Today, more than half of American homes (50.8 percent) have only wireless phones, an increase of 2.5 percent from the second half of 2015, and more than 70 percent of all adults ages 25-34 are living in wireless-only households. Stephen J. Blumberg & Julian V. Luke, National Center for Health Statistics, *Wireless Substitution, July-December 2016*, at 1 (May 2017). With so many Americans relying solely on mobile networks, these networks are vital. WIA Broadband White Paper at 2. As the FCC has recognized, “wider and more robust [wireless] deployment is particularly important for individual consumers.” *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865, 12868 (2014) (“*Wireless Infrastructure Order*”).

Indeed, mobile broadband enables innovative businesses, cost-effective rural connections, enhanced productivity, mobile telemedicine, telework, distance learning, and other transformational applications.

Presidential Memorandum, *Unleashing the Wireless Broadband Revolution*, 75 Fed. Reg. 38385, 38387 (July 1, 2010). For example, 5G mobile broadband is helping to break down barriers for consumers with health and disability challenges, enabling people with vision-, hearing-, dexterity- and cognition-related conditions to participate meaningfully in our fast-paced society. Simply put, “[f]ew technological developments hold as much potential to . . . improve the quality of our lives as wireless high-speed access to the Internet. Innovative new mobile technologies hold the promise for a virtuous cycle—millions of consumers gain faster access to more services at less cost, spurring innovation, and then a new round of consumers benefit from new services.” *Id.*

Broadband also improves public safety. For example, wireless supports 911 voice and increasingly text connectivity, as well as emergency weather warnings, Amber Alerts and other safety-oriented public announcements. First responders also rely on mobile broadband to increase situational awareness, improve incident management, and rapidly transmit pictures and video. WIA Broadband White Paper at 4; CTIA, *Enabling the Wireless Networks of Tomorrow: Rules of the Road for Pole Attachments in States Across America*, at 3 (Apr. 2016) (“CTIA Pole Attachment White Paper”); FCC, *Connecting America: The National Broadband Plan*, at xiv

(Mar. 16, 2010) (“NBP”)<sup>3</sup>; *see also* Exec. Order No. 13616, *Accelerating Broadband Infrastructure Deployment*, 77 Fed. Reg. 36903, 36903 (June 20, 2012) (“Broadband access also affords public safety agencies the opportunity for greater levels of effectiveness and interoperability.”). In addition, “[t]he First Responder Network Authority, or FirstNet, is a federal entity in the planning stages of a nationwide broadband public-safety network to support such uses by first responders.” *See* WIA Broadband White Paper at 4; *see also* 47 U.S.C. § 1424.

The importance of wireless to public safety is highlighted in a recent study. According to that study, a one-minute improvement in emergency response time as a result of wireless connectivity translates to a reduction of eight percent in mortality, and wireless-enabled self-driving cars could translate to 21,700 lives saved. *See* Deloitte Wireless Connectivity Report at 3. Conversely, with half of the nation’s population living in homes with only mobile phones, lack of wireless access and mobile broadband can cost lives. WIA Broadband White Paper at 3.

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<sup>3</sup> <https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>.

**B. Given These Benefits, Expanding Access to Broadband and Wireless Broadband Is a Critical Priority.**

Recognizing these economic, consumer, and public safety benefits, federal and State policymakers have prioritized expanding access to broadband and advanced wireless services. For example, the prior Administration set a goal (since achieved) of providing at least 98 percent of Americans with access to 4G wireless broadband by the end of 2016. Fact Sheet, *Plan to Win the Future through the Wireless Innovation and Infrastructure Initiative* (Feb. 10, 2011); Fact Sheet, *Next Steps in Delivering Fast, Affordable Broadband* (Mar. 23, 2015). It also created the Broadband Opportunity Council (“BOC”), which is “singularly focused on increasing broadband investment and adoption.” *Id.*

Likewise, Congress, on a strong bipartisan basis, directed the FCC to develop a plan that ensures that every American has “access to broadband capability.” American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2), 123 Stat. 115, 516 (2009). The resulting FCC plan—the National Broadband Plan—calls broadband access an “*overarching national policy imperative*,” and recognizes that “[t]he United States should lead the world in mobile innovation, with the fastest and most extensive wireless networks of any nation.” NBP at 9, 151 (emphasis added). The 2012 Spectrum Act also advanced wireless broadband service by clearing spectrum for commercial auction, promoting billions of dollars

in private investment and creating tens of thousands of jobs, and directing the creation of a nationwide interoperable broadband communications network for first responders. Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156 (2012) (“Spectrum Act”); *see* H.R. Conf. Rep. No. 112-399, at 136 (2012).

California similarly has a long history of recognizing the importance of broadband and wireless deployment. As early as 2006, the State’s leadership declared it “an *executive priority* to promote widespread access to, adoption of, and new applications for broadband networks and advanced communication services.” Cal. Exec. Order No. S-23-06 (Oct. 27, 2006) (emphasis added). As the governor explained, “State action is needed” to expand broadband access in order to “enable continued improvements in healthcare, public safety, education, and the economy.” *Id.*; *see also* *Verizon California, Inc. v. Carrick*, 2008 Cal. PUC LEXIS 210, at \*11 (Jun. 12, 2008) (“The policy of the State of California is to encourage widespread deployment of advanced telecommunications services, such as high-speed internet access.”); *id.* at \*15 (“[A]long with our Federal colleagues, we have recognized the importance and added urgency of strengthening the [advanced telecommunications services] system . . .”).

Finding that “[i]ncreased broadband usage brings remarkable environmental and economic benefits to California,” the California Broadband Task Force issued a report in 2008 identifying ways to bring

“high-speed broadband infrastructure to all Californians” through a variety of technologies, including wireless. California Broadband Task Force, *The State of Connectivity: Building Innovation Through Broadband*, Final Report, at 50-51, 58 (Jan. 2008) (“CA Broadband Report”). The task force cautioned that while California “has consistently had higher levels of broadband availability and usage than many other states,” it was “fall[ing] behind other regions and countries.” *Id.* at 3.

More recently, the CPUC called the widespread deployment of broadband services an “important goal of the State of California” that plays a “critical role” in the lives of its citizens and society at large. *Applicability of the Commission’s Right-of-Way Rules to Commercial Mobile Radio Service Carriers*, Decision, 2016 Cal. PUC LEXIS 55, at \*19-20 (Cal. PUC 2016) (“*CPUC ROW Order*”). It explained that “broadband is a foundation for improved education, new industries, economic growth, job creation, global competitiveness, and a better way of life.” *Id.* at \*19. But like the task force before it, the PUC expressed concerns that “California lags behind other states, and other countries, in the speed, adoption, and value delivered by the State’s telecommunications network.” *State of Competition among Telecommunications Providers in California*, Decision Analyzing the California Telecommunications Market, 2016 Cal. PUC LEXIS 683, at \*255 (Cal. PUC Dec. 1, 2016) (“*CPUC Telecomm. Mkt. Decision*”).

Critically, the PUC has recognized the importance of wireless broadband, noting that “[m]ost Californians now use a wireless device as their primary Internet access tool.” *CPUC ROW Order* at \*21; *see also CPUC Telecomm. Mkt. Decision* at \*46 (“[T]he traditional landline phone has given way to newer, mostly mobile, phone technology. . . . What we did not anticipate is the evolution of the mobile phone from primarily a voice communications device to primarily an Internet portal . . .”). As discussed below, the PUC has found that “growing demand for wireless services requires constant expansion and augmentation of wireless infrastructure.” *CPUC ROW Order* at \*21-22.

**C. Improved Access to Wireless Broadband Requires Diverse Wireless Infrastructure, Including Small Cells that Depend on ROW Access.**

Wireless infrastructure is “the physical foundation that supports all wireless communications.” *Wireless Infrastructure Order*, 29 FCC Rcd at 12866. The ability of America’s wireless and infrastructure providers to support surging demand, expand broadband access, and enhance public safety is therefore inextricably tied to the extent to which they can deploy new or improved wireless facilities, or “cell sites.” *Id.* at 12866-67. “Simply put, we can’t have high-speed broadband without high-speed deployment.” Paul Kirby, *FCC Should Streamline Deployment of Wireless Facilities Within Six Months*, TR Daily, May 20, 2014 (quoting former

FCC Chairman Tom Wheeler). Cell sites include radio transmitters, or antennas, and other electronic equipment used to receive and transmit radio signals for wireless voice and data transmission.

Antenna installations on towers, tall buildings, and other tall structures are often referred to as “macrocell” sites and form the core of the network, enabling wireless service providers to deliver voice, text, and broadband communications to today’s wireless subscribers. Macrocell sites are effective for covering large geographic areas, because the antennas are typically mounted high in the air. Sometimes that means attaching the equipment to a new support structure, like a communications tower. Other times it means “collocating” equipment, *i.e.*, placing it on an existing tower, tall building, or other tall structure. Adding macrocells is the most efficient way to get wireless coverage and capacity to the most people. WIA, *The Role of Street Furniture in Expanding Mobile Broadband*, at 1 (2017) (“WIA Street Furniture White Paper”).

Modern networks increasingly use various smaller antenna technologies, like Distributed Antenna Systems (“DAS”) or “small cells,” which are a fraction of the size of macrocells.<sup>4</sup> They are being deployed

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<sup>4</sup> DAS uses small nodes of antennas and associated equipment, which are densely distributed in a limited geographic area, to collect and transmit traffic (often from multiple wireless service providers) to a central communications hub site, typically through fiber. Small cells are small antennas and associated equipment that are deployed by individual carriers

(continued on next page)

closer to the subscriber—with little or no impact—on structures like utility poles, lamp posts, traffic signals, and other such “street furniture” in public ROWs, as well as in buildings. *See Wireless Infrastructure Order*, 29 FCC Rcd at 12866-87; *Infrastructure PN*, 31 FCC Rcd at 13363 n.16; CTIA Pole Attachment White Paper at 3-4; WIA Street Furniture White Paper at 2. These technologies provide coverage in targeted locations and additional capacity to handle calls and data in areas with concentrated demand for wireless services. *See Infrastructure PN*, 31 FCC Rcd at 13360. By augmenting macrocell infrastructure, small cells and DAS effectively bring the network closer to the end user, thus increasing speed and throughput. WIA Street Furniture White Paper at 1; *see* CTIA Pole Attachment White Paper at 3-4.

The photographs below depict some typical small cell installations, and show that the installations are consistent with other equipment installed in the ROWs by cable, wireline, and/or utility providers.

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(footnote continued)

to receive and transmit traffic. This equipment is typically no more than a few feet in any dimension. They can provide added services in areas that might otherwise be unavailable for traditional tall towers or macrocells. They connect with carriers’ core networks either through microwave radio facilities or through fiber.



(small cell installation on existing utility pole in Los Angeles, with electric distribution and other telecommunication installations)



(small cell installation in Virginia)



(small cell on municipal light pole in Manhattan)

Although small cells are physically smaller than macrocells and do not require the same elevation, they must be deployed more densely—meaning in many more locations, much closer together—to function effectively. *See Infrastructure PN*, 31 FCC Rcd at 13360, 13363 n.16; CTIA Pole Attachment White Paper at 3-4. For example, the coverage of small cells varies between ten to a few hundred meters, as opposed to the tens of kilometers served by macrocells. *Infrastructure PN*, 31 FCC Rcd at 13363 n.17; WIA Broadband White Paper at 4.

To deliver the consumer and public safety benefits of 4G LTE and 5G mobile broadband, providers will need to significantly densify their deployment of small wireless facilities, including small cells and DAS, for several reasons. *Infrastructure PN*, 31 FCC Rcd at 13360-61, 13363. First,

small wireless facilities can more intensely reuse scarce wireless frequencies, thus greatly increasing spectrum efficiency and data capacity within the network footprint. For example, deploying ten small cells in a coverage area that could be served by a single macrocell could result in a tenfold increase in capacity while using the same amount of spectrum. *Infrastructure PN*, 31 FCC Rcd at 13363. In addition, because small wireless facilities serve smaller geographic areas, they can be located close to end users to provide better quality connections using the higher spectrum bands (above 24 gigahertz) the government is making available for the transition to 5G services. Those spectrum bands do not propagate well over long distances and require sites that are closer together. *Id.*; *see also* Michael O’Rielly, Commissioner, FCC, Remarks at DAS and Small Cell Solutions Workshop, 2016 FCC LEXIS 1574, at \*2-3 (2016) (“[T]he use of high-band spectrum will only exacerbate the problem of insufficient siting. Millimeter waves only go so far, so small cells will need to be deployed expeditiously and in a cost-effective manner to realize the promise of 5G.”).

This densification translates into a substantial number of small cells needed to meet consumer demand and support the transition to 5G services. According to one estimate, up to 150,000 small cells will be constructed by the end of next year (2018), and that number will rise to nearly 800,000 by 2026. *Infrastructure PN*, 31 FCC Rcd at 13364 (citing John Fletcher, *Small Cell and Tower Projections through 2026*, SNL Kagan Wireless Investor

(Sept. 27, 2016)). To put these numbers in context, providers deployed approximately 307,000 cell sites—including towers and other macrocell sites, as well as small cells and DAS—over the course of the last thirty years. *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless*, Nineteenth Report, 31 FCC Rcd 10534, 10585 (WTB 2016).

California in particular has recognized that ROWs, and the poles and other street furniture they contain, are crucial to support the smaller deployments that will be needed to support the 5G evolution. ROWs are the ideal—if not the only—way to effectively deploy the tens of thousands of new small cells that are needed to meet demand and serve customers, especially in urban areas. As the CPUC has explained, the growing demand for wireless requires “constant expansion and augmentation of wireless infrastructure,” and that infrastructure (especially in urban areas) “must be particularly dense in to order to provide the services demanded by the public, from basic voice communications to broadband.” *CPUC ROW Order* at \*22. “Oftentimes, the most efficient way to obtain the required density is to use existing public utility infrastructure, especially utility poles.” *Id.*

Indeed, within the last year the PUC emphasized that the transformative role of 5G is tied to pole and ROW access. “[T]he pending introduction of 5G wireless . . . [is] an ‘event horizon of critical

importance.’ The fact that 5G will require perhaps ten times as many wireless antennas as currently deployed . . . can only mean that there will be increasing pressure put on a finite stock of poles and conduit in California. Poles and conduit are a major part of the expense of deploying telecommunications infrastructure.” *CPUC Telecomm. Mkt. Decision* at \*178. Because “access to poles and conduits is essential for the provision of . . . wireless service to retail end-users,” the PUC has warned that “lack of access to poles and conduit is a critical obstacle to making the telecommunications market fully competitive.” *Id.* at \*176-77. Like the federal government, California is therefore taking steps to remove barriers to access, discussed below.

**D. Providers Have Encountered Numerous Barriers that Delay the Deployment of Wireless Infrastructure, Including on Poles in ROWs.**

Providers must contend with numerous barriers to the deployment of critical wireless infrastructure, which can be “expensive, cumbersome, and time-consuming” and “slow deployment substantially.” *See Wireless Infrastructure Order*, 29 FCC Rcd at 12869-70. These barriers include: lengthy zoning or local permitting application processing times or moratoria; unreasonable siting denials that result in protracted and costly litigation; high application fees; arbitrary evaluation of an applicant’s business or technology choices; unfettered discretion to deny applications

based on vague and subjective aesthetic and other considerations; and inconsistent or unclear application procedures. *E.g.*, *Deployment of Advanced Telecomms. Capability to All Ams.*, 2016 Broadband Progress Report, 31 FCC Rcd 699, 751-52 (2016); 2015 Broadband Progress Report, 30 FCC Rcd 1375, 1455-56 (2015); Eighth Broadband Progress Report, 27 FCC Rcd 10342, 10404 (2012); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Notice of Proposed Rulemaking, 28 FCC Rcd 14238, 14240 (2013); NBP at 109-113.

Particularly relevant to next generation wireless and 5G deployments, these barriers also include difficulty accessing poles or ROWs and excessive costs to access those poles and ROWs. *E.g.*, 2016 Broadband Progress Report, 31 FCC Rcd at 751-52; 2015 Broadband Progress Report, 30 FCC Rcd at 1455-56; Eighth Broadband Progress Report, 27 FCC Rcd at 10404; *see Infrastructure PN*, 31 FCC Rcd at 13366-67. As the National Broadband Plan recognized, “the expense and complexity of obtaining access to public rights-of-way in many jurisdictions increase the cost and slow the pace of broadband network deployment.” NBP at 113. Likewise, the CPUC has found that “[c]ompetitive bottlenecks and barriers to entry in the telecommunications network limit new entrants and may raise prices for some telecommunications services above efficiently competitive levels,” and

“[o]ne particular bottleneck is access to utility poles.” *CPUC Telecomm. Mkt. Decision* at \*3.

These barriers and delays have real consequences. For localities with existing wireless coverage, delays can mean the inability to take advantage of new high-speed technologies, such as 4G LTE and the evolution to 5G and IoT services, or persistent gaps in coverage and dropped calls—including emergency calls. *See* CA Broadband Report at 78 (“California’s broadband infrastructure is not world class. Only parts of the state have access to the fastest new broadband access services.”). But for localities without existing coverage, those same delays keep residents in the dark altogether. *See id.* (“Some Californians have to contend with slower broadband access—or none at all.”); *see also id.* at 19 (noting that “places without adequate broadband risk economic isolation”). Put simply, “Californians who lack reliable and affordable access to [broadband networks] are unable to participate fully in the economy and society of the 21st century.” *CPUC Telecomm. Mkt. Decision* at \*3; *see also id.* at \*63 (noting that “[w]ireless service is not available throughout California”).

**E. California and the Federal Government Have Taken Steps to Remove These Barriers and Improve ROW Access.**

Addressing these challenges has required a concerted, multi-year effort of State and federal policymakers—and that effort is ongoing.

In California, lawmakers have taken meaningful steps to remove deployment barriers and ensure reasonable access to poles and ROWs for wireless and other innovative service providers. In Public Utilities Code Section 709, for example, the legislature expressed its intent that “the policies for telecommunications in California” include “remov[ing] the barriers to open and competitive markets and promote fair product and price competition in a way that encourages greater efficiency, lower prices, and more consumer choice.” Cal. Pub. Util. Code § 709. To that end, Section 7901, at issue in this case, grants a statewide franchise to telephone corporations, including wireless providers, to construct their lines and facilities “along and upon any public road or highway, along or across any of the . . . lands within this State.” Cal. Pub. Util. Code § 7901; *see* Cal. Pub. Util. Code §§ 233, 234; *Opn.* at 2.

Indeed, as early as 1998, the PUC recognized through Decision 98-10-058 that nondiscriminatory access to poles and ROWs “is one of the essential requirements for facilities-based competition to succeed.” *Competition for Local Exchange Service*, Order, 1998 Cal. PUC LEXIS

879, \*181 (1998) (“*CLEC Order*”). That decision adopted ROW rules providing competitive local exchange carriers with nondiscriminatory access to public utility infrastructure, including poles, ducts, conduits, and ROWs. Nearly a decade later, the State’s leadership began calling for expanding broadband access in California by, among other things: (1) adopting a “technology-neutral approach to removing barriers to broadband deployment”; (2) pursuing “State action . . . to . . . remove further barriers to the development of world-class broadband networks”; (3) “limiting rights-of-way (ROW) fees assessed upon broadband providers”; (4) commencing a “statewide effort to streamline ROW permitting”; and (5) taking action to “accelerate deployment of wireless broadband.” Cal. Exec. Order No. S-23-06.

In 2008, a formal review commissioned by statute called for expediting wireless broadband deployment, including through the removal of certain burdens to infrastructure siting in ROWs. *See* CA Broadband Report at 58 (calling for the State to “Expedite Wireless Broadband Deployment,” including through “better align[ing] . . . Rights-of-Way (ROW) policies” given that “wireless broadband can provide an affordable solution for many of California’s communities”). As an outgrowth of that review, the PUC amended the State ROW rules to provide commercial mobile radio service (“CMRS”) providers with nondiscriminatory access to public utility infrastructure. *CPUC ROW Order* at \*1. The PUC found such

access “will facilitate investment in wireless infrastructure, encourage widespread deployment of broadband wireless services, [and] foster the provision of wireless service in previously unserved areas, and improve access to 911.” *Id.*

The PUC is also currently considering actions designed to improve access to poles and ROWs. These include consideration of a petition to extend the ROW rules for CMRS facilities to wireless facilities like DAS installed by CLECs. *See Petition of the Wireless Infrastructure Association to Consider Amendments to the Revised Right-of-Way Rules, Order Instituting Rulemaking* (Cal. PUC Apr. 3, 2017).<sup>5</sup> In addition, in a decision analyzing the California telecommunications market, the PUC has proposed to “guarantee non-discriminatory access to the physical infrastructure of the telecommunications network.” *CPUC Telecomm. Mkt. Decision* at \*258. Calling public utility poles and ROWs “infrastructure that makes modern communications possible,” the PUC has said it will “consider the importance of pole access in facilitating telecommunications competition with the goal of improving the efficiency of pole access.” *Id.* at \*260.

More generally, the California legislature has found that the deployment of wireless facilities to support advanced telecommunications technologies is a State concern. In Assembly Bill 57, which added Section

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<sup>5</sup> <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M183/K273/183273369.PDF>.

65964.1 to the California Government Code, the legislature “declare[d] that a wireless telecommunications facility has a significant economic impact in California and is not a municipal affair . . . but is a matter of statewide concern.” Cal. Gov. Code § 65964.1(c). Consistent with that finding, Section 65964.1 provides that a collocation or siting application for a wireless telecommunications facility is deemed approved if the locality fails to act on the application within “shot clocks” established by the FCC and all required notices have been provided. *Id.* § 65964.1(a).

Taken together, these California efforts to promote broadband deployment emphasize that access to ROW poles are a matter for the State to decide—not the cities.

At the federal level, the Telecommunications Act of 1996 was an important step toward removing deployment barriers. It directed the FCC to “encourage the deployment on a reasonable and timely basis” of advanced telecommunications capability, including broadband, to all Americans by “remov[ing] barriers to infrastructure investment.” Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 706 (1996) (“1996 Act”), *codified at* 47 U.S.C. § 157 note; *see* H.R. Conf. Rep. No. 104-458, at 1 (1996) (noting that the purpose of the 1996 Act is to “accelerate rapidly private sector deployment of advanced telecommunications”).

Particularly relevant to pole and ROW access, the 1996 Act added Section 253 and portions of Section 224 to the Communications Act.

Section 253 proscribes state and local government actions that “prohibit or have the effect of prohibiting” any entity’s ability to provide any telecommunications service. 47 U.S.C. § 253(a). While state or local governments may manage public ROWs and seek “fair and reasonable compensation” for their use, such management and compensation must be “competitively neutral and nondiscriminatory.” *Id.* § 253(c). Relatedly, Section 224 obligates any utility to make its poles and ROWs available for attachments at reasonable rates to telecommunications carriers, 47 U.S.C. § 224, and directs the FCC to adopt rate formulas and complaint procedures implementing Section 224 unless, as in California, the state certifies that it regulates pole attachment rates, terms, and conditions, *id.* § 224(b)-(c), (e).

The 1996 Act also added Section 332(c)(7) to the Communications Act, which requires action on a wireless siting application “within a reasonable period of time” and prohibits the denial of an application on the basis of radio frequency emissions if the provider complies with FCC regulations on that subject. 47 U.S.C. § 332(c)(B)(7)(i)-(ii), (iv). More recently, Congress passed Section 6409(a) of the Spectrum Act, which provides that “a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.” 47 U.S.C. § 1455(a).

For its part, the FCC has taken significant steps to reduce barriers to wireless infrastructure investment and deployment. In 2009, the Commission interpreted provisions in Section 332(c)(7) to adopt “shot clocks” establishing 90 days as a reasonable time for zoning decisions regarding collocations, and 150 days for other local siting decisions. *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009), *aff’d sub nom. City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013). In 2014, the FCC updated and tailored its process for evaluating the impact of proposed deployments (including small wireless facilities) on the environment, and clarified and implemented statutory requirements related to state and local government review of infrastructure siting applications. *See Wireless Infrastructure Order*, 29 FCC Rcd 12865. As a follow-on to that proceeding, the FCC last year established new exclusions that eliminate historic preservation review for many small facilities given their limited potential to affect historic properties. *See First Amendment to Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, Public Notice, 31 FCC Rcd 8824 (WTB 2016).

Currently, the FCC is considering actions to help expedite the deployment of next generation wireless infrastructure by providing guidance on how federal law applies to local government review of wireless

facility siting applications and local requirements for gaining access to ROWs. *See generally Infrastructure PN; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 17-38 (rel. Apr. 21, 2017) (“*Wireless Infrastructure NPRM/NOI*”).<sup>6</sup> The FCC also just formed a new federal advisory committee, the Broadband Deployment Advisory Committee (“BDAC”), to provide advice and recommendations over the next two years on ways to accelerate the deployment of high-speed Internet access. As part of that initiative, BDAC is expected to make recommendations to facilitate ROW access reform. *See Establishment of the Broadband Deployment Advisory Committee*, Public Notice, 32 FCC Rcd 1037 (WCB/WTB 2017).

In addition, the Chairman and Commissioners of the FCC have all stressed the importance of removing barriers to wireless broadband deployment—including improving ROW access. Chairman Pai, for example, has emphasized the need for siting reform to enable 5G, cautioning that “[w]ithout a paradigm shift in our nation’s approach to wireless siting and broadband deployment, our creaky regulatory approach is going to be the bottleneck that holds American consumers and businesses back.” Ajit Pai, Commissioner, FCC, Remarks at The Brandery on A

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<sup>6</sup> [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0421/FCC-17-38A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0421/FCC-17-38A1.pdf).

*Digital Empowerment Agenda*, Cincinnati, Ohio, at 7 (Sept. 13, 2016). Commissioner O’Rielly has called access to local ROWs “an area that is ripe for attention,” noting that “[a]ppropriate pressure will need to be applied to ensure that localities are not delaying access to rights of way—either intentionally or via sheer incompetence.” Michael O’Rielly, Commissioner, FCC, Remarks before Hogan Lovells’ Technology Forum: *The 5G Triangle*, at 2 (May 25, 2016). And Commissioner Clyburn has highlighted the need to streamline deployment to achieve the country’s broadband connectivity goals, explaining “[w]e must ensure that all providers are able to deploy and upgrade their infrastructure at the lowest cost and quickest pace.” Mignon L. Clyburn, Commissioner, FCC, Keynote Remarks at the #Solutions2020 Policy Forum, Georgetown University Law Center, at 4 (Oct. 19, 2016).

As discussed below, the Opinion upends these efforts and is fundamentally at odds with both State and federal broadband priorities.

## **II. THE CITY’S APPROACH UNDERMINES STATE AND FEDERAL BROADBAND PRIORITIES AND HARMS CONSUMERS.**

### **A. The Opinion Jeopardizes the Deployment of Beneficial New Technologies in Critical ROWs.**

The FCC recently emphasized that “[b]ecause providers will need to deploy large numbers of wireless cell sites to meet the country’s wireless broadband needs and implement next generation technologies, there is an

urgent need to remove any unnecessary barriers to such deployment, whether caused by Federal law, Commission processes, local and State reviews, or otherwise.” *Wireless Infrastructure NPRM/NOI* at ¶ 2. By upholding the Ordinance, the Opinion impedes the deployment of beneficial new wireless technologies (including 5G) in California, and compromises State and federal policies intended to promote such deployment.

As discussed in Appellants’ briefs, the Ordinance subjects wireless facilities—and only wireless facilities—to discretionary aesthetic approval. Wireless applicants must, for example, demonstrate that their proposed facility will not “significantly detract from any of the defining characteristics of the neighborhood,” and the city must evaluate whether the facility will “significantly degrade the aesthetic . . . attributes” of certain locations. Appellants Opening Br. 13; S.F., Cal. Ordinance 18-15. The subjective nature of the Ordinance upheld by the Court of Appeal gives San Francisco—and potentially any other locality in California that follows suit—essentially unfettered discretion to selectively deny ROW access to wireless facilities on aesthetic grounds. Consequently, instead of deploying needed facilities, wireless providers may face costly and potentially endless battles (including litigation) with municipal authorities about overbroad aesthetic requirements, with consumers stranded in the middle.

The Opinion’s chilling effect on wireless broadband deployment undercuts a key objective of California’s statewide franchising scheme, namely the advancement of communications technology throughout the State. As observed by Appellants, California court precedent confirms that Section 7901 “favors deployment of new and cutting-edge communications technology, and forbids localities from enacting discriminatory regulations that disfavor innovative facilities.” Appellants Opening Br. at 42. Consistent with those principles, Section 7901 provides “telephone corporations” with a broad right to “construct . . . telephone lines along and upon any public road or highway, along or across any of the . . . lands within this State,” and “erect . . . other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway.” Cal. Pub. Util. Code § 7901.<sup>7</sup>

California courts have described the broad preclusive effect of Section 7901 and its predecessor, former Section 536, on local regulations. For example, this Court long ago determined that Section 536 constitutes a State-granted franchise to operate lines in the public State and municipal ROWs, and that this right is superior to a local franchise. *W. Union Tel. Co. v. City of Visalia*, 149 Cal. 744, 750-51 (1906) (“*Visalia*”). The Court

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<sup>7</sup> The City stipulated and the Court of Appeal held that Appellants are “telephone corporations” and their wireless facilities are “telephone lines” within the meaning of the statute. Opn. at 2; *see* Cal. Pub. Util. Code §§ 233, 234.

reiterated that finding more than half a century later, concluding that “[t]he right and obligation to construct and maintain telephone lines has become a matter of state concern. For this reason, the city cannot today exclude telephone lines from the streets upon the theory that ‘it is a municipal affair.’” *Pac. Tel. & Tel. Co. v. City & County of San Francisco*, 51 Cal. 2d 766, 774 (1959).

California courts have likewise described the narrowness of Section 7901’s “incommode” restriction, emphasizing that it is meant to prevent construction that unreasonably impedes travel through or use of ROWs by the public. In *Visalia*, the Court observed that the city had only the authority to “regulate the manner of the . . . placing and maintaining [the] poles and wires *as to prevent unreasonable obstruction of travel.*” *Visalia*, 149 Cal. at 750-51 (emphasis added). Similarly, the Court of Appeal has interpreted “incommode” to mean the prevention of “unreasonable obstruction of the public *use.*” *See Pac. Tel. & Tel. Co. v. City & County of San Francisco*, 17 Cal. Rptr. 687, 694 (Cal. Ct. App. 1961) (emphasis added). As a result, the authority of a locality to prescribe regulations on the basis of “incommode” does not encompass taking into account vague aesthetic concerns which have nothing to do with travel through or public use of the ROW. *See Appellants Opening Br.* at 43-48.

While the Ninth Circuit has taken a different approach—stretching the term “incommode” beyond its clear obstruction of use meaning to

include “[t]he experience of traveling along a picturesque street,” *Sprint PCS Assets L.C.C. v. City of Palos Verdes Estates*, 583 F.3d 716, 723 (9th Cir. 2009) (“*Palos Verdes*”), and finding that a company can “access” ROWs in “aesthetically offensive” ways, *id.* at 725—its incorrect interpretations of these State statutes are not controlling. It is well established that state courts are not bound by federal interpretations of state law. *See Sunset Tel. & Tel. Co. v. Pomona*, 172 F. 829, 835 (9th Cir. 1909) (“That a construction of a state statute by the highest court of the state, which establishes a rule of property within the state, will be adopted by the federal courts, is well-established law.”); *Kansas Public Employees Retirement Sys. v. Reimer & Koger Assoc., Inc.*, 77 F.3d 1063, 1067 (8th Cir. 1996) (““State courts, of course, are not bound to follow federal interpretations of state law.””); *see also* Michael W. Shonafelt, *Whose Streets? California Public Utilities Code Section 7901 in the Wireless Age*, 35 *Hastings Comm. & Ent. L.J.* 371, 385-86, 388 (2013).

Finally, in 1991 the California State legislature adopted Section 7901.1, which reads in relevant part: “It is the intent of the Legislature, *consistent with Section 7901*, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways *are accessed*.” Cal. Pub. Util. Code § 7901.1(a) (emphasis added). CTIA and WIA concur with the Appellants that in this context “accessed” refers to all ROW occupation and not, as the

Court of Appeal would have it, just to temporary occupation. *See* Appellants Opening Br. at 50-55.

In sum, as one practitioner has recognized, “[a] discretionary threshold for telephone corporations’ entry into the public rights of way . . . is . . . blind to the existence of the section 7901 statewide franchise.” *See* Shonafelt, 35 Hastings Comm. & Ent. L.J. at 387. By disregarding the balance that Section 7901 struck between promoting robust ROW use for innovative communications services while protecting public travel through and use of the ROWs, the Opinion discourages wireless broadband deployment and thus undermines the purpose of the statute and the State policies supporting it.

This is also not what Congress envisioned when it passed the 1996 Act. Congress adopted that legislation “to promote competition and higher quality in American telecommunications services and to ‘encourage the *rapid* deployment of new telecommunications technologies.’” *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (quoting 1996 Act, 110 Stat. 56) (emphasis added). Its objective was to *remove* barriers to the deployment of new telecommunications technologies, not make them higher.

For example, as noted above, the 1996 Act added Section 253 to the Communications Act. Section 253(a) proscribes state and local action that may “prohibit or have the effect of prohibiting” telecommunications

services. 47 U.S.C. § 253(a). When interpreting Section 253(a), and consistent with the broader objectives of the 1996 Act, some federal courts have cautioned against ordinances that afford municipalities unfettered discretion to impede ROW access. *See, e.g., TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76, 81-82 (2d Cir. 2002); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004); *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006). *But see Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 580 (9th Cir. 2008) (“*Sprint PCS*”).<sup>8</sup>

The Ordinance here presents the same concerns courts have recognized as being contrary to the deployment of advanced communications services, including broadband. It affords the City essentially unfettered discretion to deny wireless facility permits on the

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<sup>8</sup> The FCC is currently considering requests to reconcile differing court interpretations of Section 253(a) by adopting the standard once announced by the Ninth Circuit in *Auburn*, which held that a ROW ordinance giving the locality “unfettered discretion” to deny a franchise based on “unnamed factors” is contrary to Section 253. *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1176-80 (9th Cir. 2001), *overruled*, *Sprint PCS*, 543 F.3d at 578; *see, e.g.,* ExteNet Comments, WT Dkt. No. 16-421, at 26-30 (Mar. 8, 2017), <https://ecfsapi.fcc.gov/file/10309100812004/Final%20ExteNet%20comments%20FCC%20small%20cell%20deployment%20proceeding.pdf>; T-Mobile Comments, WT Dkt. No. 16-421, at 15-20 (Mar. 8, 2017), <https://ecfsapi.fcc.gov/file/10308877606536/030817%20T-Mobile%20WT%20Dkt%2016-421%20Comments.pdf>; WIA Comments, WT Dkt. No. 16-421, at 22, 32-39 (Mar. 8, 2017), <https://ecfsapi.fcc.gov/file/10309896707250/WIA%20Comments%20WT%20Docket%20NO%2016-421%20-%20Mar%208%202017.pdf>.

basis of subjective and undefined aesthetic factors. *See* Appellants Opening Br. at 13. As the California Wireless Association (“Calwa”) has explained, “[w]hat the wireless industry is now facing in many jurisdictions is *effective* prohibition of services resulting from,” among other things, “decisions that . . . use ‘aesthetics’ as a proxy” for other discretionary factors. Calwa Reply Comments, WT Dkt. No. 16-421, at 12-13 (Apr. 7, 2017).<sup>9</sup>

**B. The Ordinance Unlawfully Singles Out Wireless Deployments, Discriminating on the Basis of Technology.**

The San Francisco Ordinance unlawfully singles out wireless installations for aesthetically-based ROW review. By allowing the denial of ROW access on grounds that apply only to wireless providers and technologies but not to other ROW users, the Opinion is contrary to the plain language of Section 7901.1 and once again undermines State and federal statutes and policies. If allowed to stand, it will encourage other California localities to similarly discriminate against wireless providers.

As a threshold matter, the Ordinance cannot be squared with the text of Section 7901.1. While the statute gives municipalities “the right to exercise reasonable control” as to the time, place, and manner in which roads and highways are accessed, it includes an important caveat: For that control to be reasonable, it must “at a minimum, be applied *to all entities* in

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<sup>9</sup> <https://ecfsapi.fcc.gov/file/1040743571379/CalwaFCCReplyComments16-421v3%20docx.pdf>.

an *equivalent manner*.” Cal. Pub. Util. Code § 7901.1 (emphasis added). That the Ordinance discriminates against wireless as compared to other ROW deployments—including those of similar size and appearance—is unquestioned. Indeed, the Opinion acknowledges as much.

First, the Opinion notes that, like wireless attachers, cable and wireline providers and utilities all install equipment on poles in city ROWs: “Plaintiffs and the City stipulated that [cable, wireline, and utility providers] have also installed certain equipment, including backup battery units, antennas, cut-off switches, power meters, and transformers, on utility poles in the City’s public right-of-way.” Opn. at 5. Next, the Opinion explains that wireless attachments are similar in size and appearance to cable, wireline, and utility equipment: “The trial court found Plaintiffs’ [wireless] equipment and facilities installed in the public rights-of-way to be ‘generally similar in size and appearance’ to equipment installed by ‘landline’ telephone corporations, cable television operators, and [the local utility].” *Id.* at 6. Finally, the Opinion concedes that site-specific permits are only required for wireless attachments: “The parties also stipulated that telephone corporations installing facilities on utility poles other than wireless facilities . . . need only obtain utility conditions permits and temporary occupancy permits if the installation will take more than one day. [Cable, wireline, and utility providers] are not required to obtain any

site-specific permit as a condition of installing such facilities on existing utility poles.” *Id.* at 5.

Thus, despite the recognized similarities between wireless and wireline, cable, and utility attachments, the Ordinance uniquely requires *only wireless* providers to obtain site-specific ROW permits after undergoing discretionary pre-deployment aesthetic review. *See id.* at 2 (noting that the Ordinance “require[s] all persons to obtain a site-specific permit before seeking to construct, install, or maintain . . . *wireless* facilities . . . on existing poles in the public right-of-way”) (emphasis added). Because these ROW permitting requirements are not applied “to all entities in an equivalent manner,” Cal. Pub. Util. Code § 7901.1, they are contrary to the plain language of Section 7901.1, *see* Appellants Opening Br. at 50-51. As Appellants clearly demonstrate in their brief, the Opinion’s findings to the contrary lack merit and should be reversed by this Court. *Id.* at 50-56. Indeed, if the California legislature had intended to allow localities to regulate ROW use solely on the basis of technology, Section 7901.1’s prohibition against discriminatory regulation would make no sense.

Moreover, the Ordinance thwarts broader State and federal efforts to *prevent* discrimination on the basis of technology. In California, the CPUC has stated that “[n]ondiscriminatory access to the incumbent utilities’ poles, ducts, conduits and rights of way is one of the essential requirements for

facilities-based competition to succeed.” *CLEC Order*, 1998 Cal. PUC LEXIS 879, at \*180-81. In addition, the State’s leadership has found that “[a] technology-neutral approach to removing barriers to broadband deployment will encourage lower prices and creation of more consumer choices.” Cal. Exec. Order No. S-23-06. Here, the Ordinance is neither nondiscriminatory nor technology-neutral, undermining both State priorities.

Finally, Section 253 of the federal Communications Act is a useful reference point. While Section 253 reserves to localities the authority to manage their ROWs, they must do so on a “competitively neutral and nondiscriminatory basis.” 47 U.S.C. § 253(c); *see N.J. Payphone Ass’n v. Town of West New York*, 299 F.3d 235, 243-46 (3d Cir. 2002) (“*N.J. Payphone*”); *Classic Telephone, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13103 (1996). Courts interpreting Section 253(c) have struck down local regulations that discriminate against some ROW users but not others. *See, e.g., N.J. Payphone*, 299 F.3d at 247 (finding that town’s ordinance was “facially discriminatory” in that it permitted the town to choose one service provider to provide pay telephone service to the exclusion of all others).

**C. The Opinion Will Make It More Difficult for Californians to Receive 5G and Other Innovative Services.**

Unless reversed by this Court, the Opinion will allow the San Francisco Ordinance to stand, further emboldening localities throughout California to adopt restrictive ordinances that limit the ability of wireless providers to deploy state-of-the-art wireless services and technologies to all Californians. Indeed, after the *Palos Verdes* decision, localities began to revisit their wireless ordinances and expand their regulatory powers over public ROWs. As one practitioner explained, “[c]ities throughout the state interpreted the Ninth Circuit’s approbation of local control as a blank check to draft lengthy and onerous wireless site requirements or to mandate fully discretionary zoning approvals . . . as a precondition to entry into the public rights of way.” Shonafelt, 35 Hastings Comm. & Ent. L.J. at 386.

If left unchanged, the Opinion will reinforce this trend, resulting in a city-by-city patchwork of regulations in which some jurisdictions continue to add ROW barriers for wireless deployments based on vague discretionary factors, while others choose to remove barriers to encourage those deployments. In the case of the former, the barriers may be too high to justify the delay and expense, deterring deployment altogether. As a result, residents of some California communities will be left behind and risk missing out on the benefits of 5G and other advanced wireless services. As the Calwa recently explained:

Currently, the exact same deployment project can take years to complete in one [California] City, and 30 days in their neighboring jurisdiction. The extreme variance between local governments regarding siting applications leaves it nearly impossible to effectively plan and upgrade critical wireless infrastructure.

Calwa Comments, WT Docket No. 16-421, at 1 (filed Mar. 7, 2017).<sup>10</sup>

But creating a state of haves and have-nots is precisely the opposite of the cohesive networks that State and federal policymakers seek to encourage to close the digital divide. The Court can help avoid this outcome by acting now to reaffirm the parameters of the statewide franchise right under Section 7901 and 7901.1, as discussed above, bearing in mind the deployment goals those statutes embody. As FCC Chairman Pai aptly noted just recently: “If we do our job—if we can make the deployment of wireless infrastructure easier, consistent with the public interest—then we can help close the digital divide in our country.” *Wireless Infrastructure NPRM/NOI*, Statement of Chairman Ajit Pai.

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<sup>10</sup> [https://ecfsapi.fcc.gov/file/10308679616640/030817\\_CalWA\\_FCC%20Small%20Cell%20Comments\\_FINAL.pdf](https://ecfsapi.fcc.gov/file/10308679616640/030817_CalWA_FCC%20Small%20Cell%20Comments_FINAL.pdf).

## CONCLUSION

For the foregoing reasons, the Court should reverse the Court of Appeal, invalidate the City's Ordinance, and remand with directions to enter Judgment in Appellants' favor.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'C. M. Crowe', written over a horizontal line.

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Dated: May 10, 2017

**CERTIFICATE OF LENGTH OF BRIEF**

The undersigned certifies that, pursuant to the word count feature of the Microsoft Word program used to generate this brief, it contains 8,831 words, exclusive of the matters that may be omitted under rule 8.520(c)(3).



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Craig E. Gilmore

Dated: May 10, 2017

## **PROOF OF SERVICE**

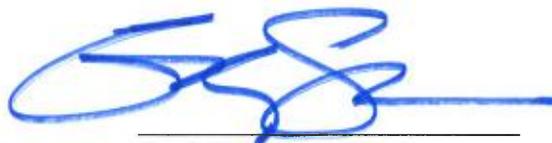
I, Craig E. Gilmore, declare as follows:

I am over the age of eighteen and am not a party to this action. I am employed in Washington, DC. My business address is 1800 M Street, NW, Suite 800N, Washington, DC 20036.

On May 10, 2017, I served the foregoing document described as **APPLICATION AND BRIEF OF *AMICI CURIAE* CTIA—THE WIRELESS ASSOCIATION® AND THE WIRELESS INFRASTRUCTURE ASSOCIATION IN SUPPORT OF PLAINTIFFS AND APPELLANTS** on the following persons in the manner indicated: **SEE ATTACHED SERVICE LIST**.

**[BY MAIL]** I am familiar with the practice of Wilkinson Barker Knauer, LLP for collection and processing correspondence for mailing. Correspondence so collected and processed is deposited with the U.S. Postal Service on that same day in the ordinary course of business. On this date, a copy of the foregoing document was placed in a sealed envelope, with postage fully prepaid, addressed as set forth herein, and such envelope was placed for collection and mailing at Wilkinson Barker Knauer, LLP, Washington, DC, following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 10, 2017, at Washington, DC.

A handwritten signature in blue ink, consisting of stylized, overlapping loops and a long horizontal stroke extending to the right.

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