Case Nos. 05-56076, 05-56435

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SPRINT TELEPHONY PCS L.P.,

Plaintiff-Appellant/Cross-Appellee.

vs.

COUNTY OF SAN DIEGO, et al.,

Defendants-Appellees/Cross-Appellants.

BRIEF OF AMICI CURIAE PORTLAND, OREGON; TACOMA, WASHINGTON; AND ANACORTES, WASHINGTON IN SUPPORT OF THE DEFENDANTS-APPELLEES COUNTY OF SAN DIEGO, et al.

On Appeal from the United States District Court
for the Southern District of California
No. CV-03-1398-BTM
Honorable Barry Ted Moskowitz, District Judge

Rehearing En Banc

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IDENTIFICATION OF AMICI

Amici curiae Portland, Oregon; Tacoma, Washington; and Anacortes, Washington are municipal corporations. Each has been or is engaged in litigation involving the application of 47 U.S.C. §253 or 47 U.S.C. §332, or both, and each has a substantial interest in having the Circuit, sitting *en banc,* adopt clear standards for the application of those provisions. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This Circuit, sitting *en banc,* should clarify the standards for applying 47 U.S.C. §253(a) and define the relationship between that section and 47 U.S.C. §332(c)(7). More particularly:

Based on the plain language of the law and the rulings of the Federal Communications Commission, this Court should confirm that under Section 253(a), a local law is not preempted unless it "prohibit[s]," or "effectively prohibit[s] the ability" of any entity to provide telecommunications service. The Court should explicitly reject the notion that a law may be preempted based on the possibility that it may prohibit entry, or based on speculation as to how a law might be applied. It should also make it clear (as is required by FCC rulings) that the plaintiffs bear the burden of showing a prohibition or effective prohibition, and that, at a minimum, this will generally require a factual showing that the

challenged regulation substantially inhibits or limits a provider from competing in a fair and balanced legal and regulatory environment.

Second, the Court should make clear that the mere retention of discretion in a local ordinance or regulation is not prohibitory, or effectively prohibitory.

Third, the Court should confirm that generally, Section 253 applies only to laws targeted at telecommunications companies or the provision of telecommunications services.

Finally, the Court should rule that Section 253 does not apply to the review of any ordinance with respect to tower siting.

These clarifications are necessary because the Court's current formulations of the standards applicable to Section 253 and to Section 332 are almost impossible to understand or to apply, and are leading to fundamentally inconsistent approaches at the district court level and even among appellate panels. Moreover, several courts, including the court in this case, have not applied the formula in a manner consistent with the decisions of the FCC. The FCC has declared that a plaintiff bringing an action under Section 253(a) bears the burden of proving that challenged ordinances have a real and material impact on plaintiff's ability to provide service. The failure to take FCC decisions into account is inconsistent with the directive of the Supreme Court in *National Cable and Telecommunications Ass'n v. Brand X Internet Service*, 545 U.S. 967 (2005), and

places this Circuit's approach to Section 253 at odds with the interpretation adopted by the majority of circuits.

ARGUMENT

I. THIS COURT SHOULD ABANDON THE "MAY PROHIBIT" STANDARD OF AUBURN.

A. The *Auburn* Standard Must Be Clarified.

In *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002), this Court announced that "Section 253(a) preempts 'regulations that not only 'prohibit' outright the ability of any entity to provide telecommunications services, but also those that 'may...have the effect of prohibiting' the provision of such services." 260 F.3d at 1175. It called the preemption "virtually absolute." *Id.* Neither statement was critical to the disposition of the case. There is no analysis of the "may prohibit" standard; as far as appears, the application and meaning of Section 253(a) were not at serious issue in the case. In context, the Court was simply quoting a statement from a now vacated decision from a district court in the Fourth Circuit. Indeed, the Circuit had earlier discussed the meaning of Section 253 and found that Section 253 was intended to "prevent explicit prohibitions on entry by a utility into telecommunications, and thereby to protect competition," and that its preemptive scope was limited, permitting regulations that advanced important state interests. *Commc'ns Telesystems Int'l v. Cal. Pub. Utils. Comm'n.*, 196 F.3d 1011, 1016-17

(9th Cir. 1999) ("*CTI*"). The *Auburn* decision does not remotely suggest that it intended to change the *CTI* rule. On the same page of the decision where the "may prohibit" language appears, the *Auburn* panel described Section 253 as barring "state and local regulations that 'prohibit or have the effect of prohibiting' any company's ability" to provide telecommunications services. 260 F.3d at 1175.

Given the *CTI* decision, the *Auburn* court's use of the "may prohibit" and "absolute" preemption language should never have been treated as the binding guide to interpretation of Section 253, *McMellon v. United States,* 387 F.3d 329, 333 (4th Cir. 2004), particularly given the narrowness of the issues that were before the Court.[1] "[T]he language of all cases must be taken and understood in light of the facts of the case in which the language was employed," *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 433 (9th Cir. 2000). Nonetheless, the

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[1] In *Auburn*, state law had preempted application of the challenged franchise requirements to wireline providers, so the only question before the court was whether application of the particular franchise requirements to wireless providers would violate Section 253, 260 F.3d at 1160. Qwest advised the Supreme Court that <u>*because*</u> *Auburn* involved wireless facilities, it provided a "poor vehicle" for review of any federal question regarding Section 253: "wireless operations place different and far fewer demands on rights-of-way, and they are subject to special federal protections against certain state and local restrictions" On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Respondent's Brief in Opposition at 7, *Tacoma v. Qwest*, No. 01-596 (U.S. 2001). Broad phrases contained in *Auburn* should never have been extended to control the disposition of other cases.

district courts and appellate panels have treated themselves as bound by the phrase "may prohibit," "like it or not," *Qwest v. City of Portland*, 385 F.3d 1236 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 2300 (2005). No appellate panel, however, has explained what "may prohibit" means, or how one is to determine whether a law "may prohibit" entry. The approaches have not been consistent. The *Portland* panel correctly recognized that this Circuit has rejected preemption-by-analogy, *Indep. Towers of Washington v. State of Wash.*, 350 F.3d 925, 929 (9th Cir. 2003), and required an "individualized preemption analysis," 385 F.3d at 1242, with findings of fact and law. The *San Diego* district court simply analogized the provisions in the zoning ordinances to those in *Auburn* and other cases, without attempting to determine, for example, whether the towers affected by the ordinance were needed to provide any services (the record showed Sprint already had towers in place).[2] *Sprint Telephony v. County of San* Diego, 377 F. Supp. 2d 886 (S.D. Cal. 2005). Some courts have suggested the existence of penalties may be significant, *Auburn*; and some have declared penalties lawful. *CTI, supra.* Some district courts have concluded that one cannot find that a regulation "may prohibit"

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[2] *Auburn* at one point defines a municipality's ability right to revoke a permit or franchise as the "ultimate cudgel," but then a few lines later, emphasizes that the right to revoke is not in and of itself prohibitory. These statements are not reconciled; what "combination" makes things prohibitory is never explained in *Auburn* – or in other cases, like the *San Diego* case, which simply repeat the formulations.

entry unless it is shown that a challenged regulation has had or will have a significant economic impact. *City of Portland, Or. v. Electric Lightwave, Inc.*, 452 F. Supp. 2d 1049 (D. Or. 2005); *Pac. Bell Tel. v. Cal. Dep't. of Transp.*, 365 F. Supp. 2d 1085 (N.D. Cal. 2005). But other courts appear to find harm based on mere speculation or allegations of burden, with little evaluation of the significance of the claimed burdens, and without considering whether the challenged law in fact prohibits or effectively prohibits the provision of services. *T-Mobile USA v. Anacortes,* No. C07-1644RAJ (W.D. Wash. May 6, 2008) (no consideration as to whether service could be provided using sites not subject to challenged permitting requirements). It is therefore important that this Court clarify the standard for applying Section 253; the law requires that it do so in a manner that will take it back to the tests first described in *CTI.*

B. The Court Should Find That Section 253(a) Is Not Triggered Unless There Is a Prohibition or Effective Prohibition.

Section 253 provides:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. (Emphasis added).

In *Qwest Communications Corp. v. City of Portland*, 200 F. Supp. 2d 1250, 1255 (D. Or. 2002), the district court explained that the word "may" in the preceding sentence has only one possible meaning: "is permitted to." No court in this Circuit has ever proposed an alternative interpretation that can be linguistically

squared with the plain language of the law. So read, the law requires a plaintiff bringing a Section 253 challenge to show that the law prohibits or effectively prohibits its ability to provide telecommunications service. The quotation in *Auburn,* by contrast, reformulated the plain language of the statute so that the Section 253 reaches not only prohibitions and effective prohibitions, but also laws that "may...have the effect of prohibiting" entry. 260 F.3d at 1175. As shown above, this reformulation (which arguably was just a matter of drafting convenience) has created a division as to how one is to determine when a law "may prohibit" entry, divorced from the statute's plain language. That would be a concern in any case, but it is of particular concern here.

First, at the same time Congress passed Section 253, it also passed Section 601(c), 47 U.S.C. § 152nt, which directs that the FTA "shall not be construed to modify, impair, or supersede Federal, State or local laws unless expressly so provided ...." Congress has explicitly directed the courts *not to expand* the reach of Section 253.

Second, an expansion of Section 253 is inconsistent with the basic, constitutionally based rules governing preemption. State and local laws are not to be preempted "unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Federal laws that do preempt must be read narrowly. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485

(1996). Section 253 is an express preemption provision and consistent with *Medtronic*, must be strictly construed in accord with its terms.[3]

Third, the FCC has ruled that Section 253(a) does not preempt ordinances unless those ordinances "actually prohibit or effectively prohibit" the ability of an entity to provide service. *In re Cal. Payphone Assoc., Petition for Preemption*, 12 F.C.C.R. 14191, 14209 (1997). Under *Brand X,* the courts of this Circuit are obligated to apply the FCC's interpretation, unless it is unreasonable, or the courts determine that it is not consistent with the plain language of the law. 545 U.S. at 982-86. No court has made either finding. Instead, what is striking is that the *Auburn* court ignored the FCC rulings on Section 253(a),[4] and no other appellate decision takes them into account.

To be sure, using the phrase "may prohibit" is not itself a problem if treated as a matter of drafting convenience; several courts and the FCC have used the same formulation in discussing the law. *In re Classic Telephone*, 11 F.C.C.R. 13082, 13097 (1996). The problem arises when the phrase is used to create a substantive rule of interpretation, as occurred in the *Portland* appeal. While this

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[3] The legislative history of Section 253 does not require a different approach, *see infra,* pp.12-13.

[4] The omission of any reference to FCC cases interpreting Section 253(a) is particularly striking because *Auburn* cites to FCC decisions in interpreting Section 253(c).

Court could attempt to bring its decisions in line with the FCC formulation, preemption analysis, and the plain language of the law by explaining what it means by the term "may prohibit," the better course is to abandon that formulation altogether, and return to the language of the statute, which requires a prohibition or effective prohibition.[5]

C. The Court Should Define What Constitutes an Effective Prohibition.

It is also appropriate for this Court to go a step further and explain how the courts are to determine whether a law prohibits, or effectively prohibits entry. Under *Brand X,* the starting point is the FCC cases interpreting those terms. The FCC has explained that a "prohibition" occurs when a law or regulation on its face or as applied "expressly preclude[s] an entity or class of entities from providing a particular service in a particular area." *Cal. Payphone,* 12 F.C.C.R. 14191, 14205. Thus, a decision actually denying a person access to the market is subject to challenge under Section 253, *Classic, supra*, as is a decision expressly limiting the

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[5] At least three different interpretations of "may prohibit" can be imagined. Telecommunications providers suggest that "may prohibit" means "might possibly prohibit," so that preemption can be based on simple allegations of burden. Second, the term "may" could refer to future events, and mean that the law requires either an actual past prohibition, or proof of an imminent, future prohibition. Finally, "may" could refer to something less than a complete prohibition, but with significant enough impact to amount to a prohibition. But given the plain language of the law, there is little reason to struggle with the term.

number of competitors in a market. *In re New England Pub. Commc'ns Council Petition for Preemption*, 11 F.C.C.R. 19713 (1997). It may be possible to decide "prohibition" cases based on the face of the statute, as the FCC has recognized.

However, where, as here, there is not an absolute bar to entry on the face of the statute, the question is whether the law "effectively prohibits" entry. In making that determination "we consider whether the Ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment," *Cal. Payphone*, 12 F.C.C.R. at 14206. At least where the issue is contested, the FCC has limited preemption to those cases in which a challenger can show, based on an examination of the facts, that municipal actions "*actually* prohibit or *effectively prohibit* the ability of a . . . service provider to provide service . . . ." *Id.* at 14209 (emphasis added). The plaintiff bears the burden of making that showing. *In re Pub. Util. Comm'n of Tex.*, 13 F.C.C.R. 3460, 3465 (1997). Regulations may be preempted only if the challenger shows that they deny providers a "commercially viable opportunity" to compete in a relevant geographic and product market. *Cal. Payphone*, 12 F.C.C.R. at 14210. It follows that the mere claim that a law is burdensome is not sufficient,

nor is the fact that complying with the regulation may impose costs.[6] As importantly, the FCC has made it clear that Section 253(a) does not permit preemption based on speculation as to the impact of a law or how it will be applied. *Pub. Util. Comm'n of Tex.*, 12 F.C.C.R. at 3465 (focus is actual impact); *Cal. Payphone.*

If anything, the test announced by the FCC is generous to challengers. In *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), the Supreme Court interpreted 47 U.S.C. §251(d)(2)(B), which prohibits certain actions that "impair the ability of the telecommunications carrier . . . to provide the services that it seeks to offer." In rejecting an FCC order that interpreted "impair" to reach a wide range of actions that might burden a new entrant, the Court emphasized that the Act's terms must be applied "in accord with the ordinary and fair meaning of those terms." 525 U.S. at 389-90.[7] A mere increase in a carrier's cost of doing business or some additional difficulty in conducting business did not constitute an

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[6] The case below is similar to *Cal. Payphone,* and cannot be squared with it. Plaintiffs are in the market, have not been excluded from access to any location by the challenged ordinance, and are at most complaining that they will have to go through a process to obtain access to particular locations. That falls far short of showing that the ordinance has *any* impact on the provision of service, much less that it makes entry commercially uneconomic.

[7] This approach is also consistent with the interpretation of the "prohibition" language in Section 332(c)(7), which looks to whether there is a ban or a policy to ban in determining whether there has been a prohibition. The district court recognized this language is similar to the language in Section 253(a).

"impairment," within the ordinary meaning of the word "impair." *Id.* at 389. If the term "impair" under Section 251(d)(2)(B) must be interpreted consistent with its ordinary meaning, so must the term "prohibit" in Section 253. If an "impairment" requires more than a demonstration of increased cost or additional difficulty, a "prohibition" under Section 253(a) must as well.

D. The Court Should Emphasize That Regulations That Are Not Targeted at the Ability To Provide Telecommunications Services Are Not Actionable Under Section 253(a).

Not only must there be a prohibition or effective prohibition; that prohibition must affect the "ability" of an entity to provide telecommunications services. The Supreme Court has noted that the inclusion of the term "ability" "complicates" the interpretation of Section 253(a). *Nixon v. Mo. Mun. League*, 541 U.S. 125, 134 (2004). But all but one court – the *Portland* appellate panel – has missed the significance of the phrase. Read narrowly (as Section 601(c) and preemption theory require), the term implies that Section 253 generally reaches only telecommunications-specific laws, as general laws affect not the "ability" to provide telecommunications service, but the ability to engage in a particular type of conduct altogether. So this Court should hold. Under that approach, a general law preventing business from discriminating based on race would never be subject to Section 253, nor would general traffic laws; both are aimed not at the business of providing telecommunications, but at generalized conduct. The approach is

consistent with *CTI,* and Congress' intent in adopting Section 253. Senator Gorton, who proposed the Senate compromise that would become Section 253, described state and local regulatory activities that violate Section 253(a) this way: "This will say that if a State or some local community decides that it does not like the bill and that there should be only one telephone company in its jurisdiction," the FCC would be able to step in and preempt the local law. 141 Cong. Rec. S8306 (June 14, 1995). Thus the purpose of Section 253 is to prevent states and localities from maintaining the "monopoly status of certain providers, on the belief that a single regulated provider would provide better or more universal service," *Cablevision of Boston v. Pub. Imp. Comm'n of Boston*, 184 F.3d 88, 97-98 (1st Cir. 1999). Section 253 had nothing to do with general laws.[8]

Such a holding is also a logical outcome of the "material impacts" test, *supra.* The very fact that a law is applied in other markets that are vigorously competitive suggests that the law will not prevent competition in the telecommunications industry. Yet the court below nonetheless found a prohibition, without recognizing that the application of elements of general zoning law strongly indicates that the county's ordinance is neither likely nor intended to bar

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[8] By contrast, ignoring the limiting term "ability" would allow providers to bring *facial* challenges to *any* state or local law that arguably imposed costs or burdens upon them (as most laws do), including state employment laws and commercial codes.

telecommunications companies from market entry.[9] This is particularly so given the telecommunication industry's size. It had revenues of $298 billion in 2005. FCC, Wireline Competition Bureau, Doc. No. 274025A1, *Telecommunications Industry Revenues 2005* (2007). Sprint reported 2007 operating revenues of over $40 billion.[10] It is hard to imagine how laws with which much smaller businesses can comply – including zoning laws – can be found to "prohibit" or "effectively prohibit" the ability to offer telecommunications.[11]

E. It Follows That Local Retention of Discretion Is Not Sufficient To Support A Finding of Prohibition.

The words "unfettered discretion" have taken on a life of their own in Section 253 cases. In *Auburn*, the term "unfettered discretion" appears only in the

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[9] Amici recognize that there are some instances where a general law would have a prohibitive effect: a law that stated that there could be only one of any type of utility in a community would be an example. The goal of such a law would still be to establish a monopoly in telecommunications. But absent some showing of a specific policy to achieve a prohibited end, the general rule is sound. It also avoids a significant interpretive problem. Section 253 is only a preemptive statute; it neither grants rights, nor requires any state or locality to grant rights to telecommunications companies, *see, e.g., Cablevision, supra*. Yet, in cases involving general laws, the courts are often required not only to preempt laws, but to require localities to grant positive rights. *See Anacortes*. That is inconsistent with Section 253 and the Tenth Amendment. *See infra*, p. 21-22.

[10] Sprint Nextel Annual Report (Form 10-K) at 33 (Feb. 21, 2008).

[11] Burdens obviously must be evaluated in context. Courts have sometimes neglected to consider whether the "burdens" allegedly created by challenged ordinances are meaningful.

discussion of Section 253(c), and there is used by the court in deciding whether a regulation is properly treated as a right-of-way regulation, or whether it should be treated as an effort to regulate beyond the protected bounds of Section 253(c). To the extent discretion is mentioned in the Section 253(a) analysis, it is with respect to "discretionary factors" that the localities had no right to apply under applicable law. In *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002), the term appears only in the Section 253(c) analysis. *White Plains* involved actual application of a law in a manner that had permitted the City to withhold action on a franchise for years. This actual impact was key to the decision. Nonetheless some courts in this Circuit are now suggesting that the reservation of discretion in an area where a locality has authority to act is unlawful. *Anacortes* at 7; *San Diego*, 377 F. Supp. 21 at 895. This Court should make it clear that this is error, and that the "unfettered discretion" rule is actually of limited scope.

The "unfettered discretion" test is not consistent with Section 253(a), first, because the mere reservation of discretion neither prohibits nor effectively prohibits entry within the meaning of the "material impacts" test discussed above. Indeed, while the term "unfettered discretion" is often used in case law, we have been unable to identify a single case that explains why discretion (as opposed to a particular application of the discretion) is prohibitory. Moreover, preempting based on "discretion" is inconsistent with the FCC decisions, which hold that laws

should not be preempted based on speculation as to how they will be applied. *In re State of Minn.*, 14 F.C.C.R. 21697 (1999), refused to declare that a proposed state agreement either did or did not violate Section 253, noting that whether a particular action is preempted turns on its "effect," not its theoretical potential. *Id.* at 21707. Where a challenged provision "could be implemented in a manner that does not contravene section 253(a)," it could not be preempted. *Id.* at 21709; s*ee also Cal. Payphone; Texas Utils.*

In addition, the test is at best a misleading guide for action because as this case illustrates, rarely, if ever, can an ordinance be treated as granting "unfettered discretion." To pass muster under *state* law, zoning ordinances are required to be "reasonably definite" so that they are capable of being understood and applied uniformly. 8 McQuillin, *Municipal Corporations* § 25.59 (3d ed. 2000). The degree of certitude required to some degree depends on the issue being addressed, *Id.* at § 25.62 (3d ed. 2000); *Echevarrieta v. City of Rancho Palos Verdes*, 86 Cal. App. 4th 472, 483 (Ct. App. 2001). The goal is to permit administrative bodies to address dynamically changing issues, and without discretion, it is as impossible for local zoning boards to act as it would be for a federal agency to act. But in any case, the standards, combined with the planning documents and local practices, must ensure that the process is not wholly arbitrary. *Cingular Wireless, LLC v. Thurston County*, 129 P.3d 300, 310-311 (Wash. Ct. App. 2006). In other words,

if, as the *San Diego* court believed, the standards at issue provided the County "unfettered discretion" to act willy nilly, those standards could have been challenged under state law, and the Section 253 issue should not have been reached. If the standards do provide adequate guidance, then by definition discretion is not unfettered, and the court is simply mistaken.[12]

What is true with respect to zoning laws is also true generally. Even where a local law appears to grant discretion, absent clear evidence to the contrary, the law is read to address only matters within the locality's jurisdiction. *City of Anchorage v. Richardson Vista Corp.*, 242 F.2d 276, 285 (9th Cir. 1957) ("where an ordinance is passed relating to a matter within the legislative power of the municipality all presumptions are in favor of its constitutionality, and reasonableness"); 6 McQuillin, *Municipal Corporations* § 20:7 (3rd ed. 2007). There is a presumption that the locality will *apply* the law consistent with those limitations, again, absent evidence that the contrary is intended. *Id.* Thus, a provision permitting a community to seek information in connection with a zoning application does not allow it to ask anything at all; it necessarily only permits a locality to require information related to matters the locality may properly consider.

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[12] We presume *San Diego* did not intend to establish a new standard for what constitutes permissible discretion in zoning laws. If that was the goal, the new standard would need to be defined, and its intrusion on state and local rights carefully considered in light of constitutional precepts.

The "unfettered discretion" test would only make sense in most cases if Section 253 were read to require the elimination of discretion. But this it cannot do. The Tenth Amendment prohibits Congress from turning the states and localities into agents of the federal government. If – as some companies claim – the Section 253 converts localities into mere ministerial administrators, it cannot be squared with the Tenth Amendment: "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 933 (1997); *see also* pp. 21, 22, *supra*. This Court should make it clear that generally, the reservation of discretion, unless combined with clear evidence of a scheme to prohibit or an actual prohibition, is not actionable, and does not justify finding a violation of Section 253(a).

F. Applying Section 253 Without Regard To Impact, or Based on Speculation, or To Preempt Public Processes Raises Significant Constitutional Issues.

While the FCC and Supreme Court cases cited above certainly provide reason enough for this Court to revisit and restate its Section 253 analysis, it bears emphasizing that it is inconsistent with basic constitutional doctrine to read Section 253, as some plaintiffs have urged, to allow preemption based on speculation as to possible impact or as to how a law may be applied. It also bears emphasizing that if Section 253 were read to restrict public hearings – as has been argued based on

loose language in *Auburn,* unfortunately repeated in this case – this Court would be obligated to find the law unconstitutional.

The San Diego County briefs explain why reading *Auburn* to permit courts to strike down laws based on the possibility that they might be applied unlawfully is inconsistent with facial challenge jurisprudence. As the County points out, preempting an ordinance because it *may* prohibit entry – when it is clear that the ordinance can and has been applied to *permit* entry – turns the rules of facial challenges on their head. Ordinarily, to prevail on a facial challenge to a municipal regulation, a plaintiff must meet a high burden of proof by establishing that no set of circumstances exists under which the restriction would be valid. The fact that the restriction might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid. *S.D. Myers, Inc. v. City & County of San Francisco*, 253 F.3d 461, 467 (9th Cir. 2001) (*citing United States v. Salerno*, 481 U.S. 739 (1987)). In addition, however, adjudicating cases based on how a law *may* be applied necessarily requires the court to resolve issues where there is no injury in fact, but instead the mere possibility of injury. This raises a plethora of constitutional issues.

a. Federalism concerns. Because preemption is an extreme exercise of federal power over state and local government authority, *Gregory v. Ashcroft,* 501 U.S. 452, 459-61 (1991), the party asserting preemption bears the burden of

demonstrating preemption applies. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). To meet this burden, proponents of preempting a local government regulation cannot rely on speculative injuries or the possible occurrence of future events. *See Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978). Under *Exxon*, federal courts reviewing challenges to local authority under Section 253 must refrain from preempting based on potential or speculative harms. *Id.* at 130-31.

b. Article III concerns. Moreover, allowing a claim of preemption based only on speculative future events to proceed violates Article III of the Constitution, which limits courts to deciding actual "cases" and "controversies." The mere fact that a provision of law *may* be applied unlawfully has never been treated as sufficient to give rise to the injury in fact required to support a case or controversy, except in certain very limited categories involving fundamental constitutional rights. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) ("It has long been settled that a federal court has no authority 'to give opinions upon . . . abstract propositions . . . .'"); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 333 (2006) (finding that to satisfy the case or controversy limitation, a party must assert an injury fairly traceable to allegedly unlawful conduct). It bears repeating that the "[d]etermination of the scope . . . of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." *Longshoremen v. Boyd*, 347 U.S.

222, 224 (1954); *see also PSC of Utah v. Wycoff*, 344 U.S. 237, 239 (1953) (no Art. III jurisdiction to resolve questions based on "potential invasions" of rights).

c. First, Tenth and Eleventh Amendments. *Auburn* contains an unexplained reference suggesting requirements for "public hearings" create, in combination with other factors, a prohibition. 260 F.3d at 1179. Why public hearing and public processes are prohibitory was never explained by the court; it was surely aware that as governments, municipalities act (and must act) primarily through public processes. Nonetheless, as the County points out, combining this language with the "may prohibit" language, the *San Diego* district court concluded that Section 253 required the County to limit public speech on siting issues. 377 F. Supp. 2d at 896.[13] If that is what Section 253(a) requires, it is unconstitutional. The County has shown that such a reading would require a content-based restriction on speech. But such a reading would also violate other constitutional precepts. The Supreme Court has recognized that the basic instruments of democratic government – the right to petition government and to participate in its decisional processes – are constitutionally protected. *James v. Valtierra*, 402 U.S. 137, 139 (1971); *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found*, 538

[13] The court's discussion illustrates just how dangerous it is to apply Section 253 to laws that are not telecommunications-specific. Under the logic of the court, Section 253 authorizes telecommunications companies to invalidate basic public procedures of governments.

U.S. 188, 199 (2003). Further, the Tenth Amendment prohibits the federal government from turning states and local governments into mere instrumentalities, *see, p.*18, *supra.* Commandeering and directing the legislative and administrative processes of local governments runs afoul of this command. Of course, Congress may preempt local and state laws when acting within the scope of its Commerce Clause power, and may also encourage states and localities to participate in a federal program so long as the federal law does not cross the line between "coercion" and cooperation. *New York v. United States*, 505 U.S. 144, 166 (1992). But, for reasons suggested in the thoughtful opinion by Judge Niemeyer of the Fourth Circuit in *Petersburg Cellular v. Board of Supervisors of Nottaway County,* 205 F.3d 688 (4th Cir. 2000), the effect of the decision below is to cross that line. Finally, the Guarantee Clause, Art. IV, § 4 (and the Eleventh Amendment) presuppose the continued existence of the states and "those means and instrumentalities which are the creation of their sovereign and reserved rights," *Hevering v. Gerhardt*, 304 U.S. 405, 415 (1938). It is hard to imagine a greater intrusion than a federal law that requires states and localities to proscribe public processes and public input.

In sum, all of these doctrines, combined with the presumption against preemption, should lead this Court to restate its *Auburn* rule. The Court should make it clear that under Section 253(a), a local law is not preempted unless a

plaintiff carries its burden of showing that the challenged law prohibits, or effectively prohibits the ability of any entity to provide any interstate or intrastate telecommunications service. It should explicitly reject the notion that a law may be preempted based on the possibility that it may prohibit entry, or based on speculation as to how a law might be applied, and find that plaintiffs must at least show an actual and material impact on their ability to provide services. The Court should make clear that the mere retention of discretion in a local ordinance or regulation is not prohibitory, or effectively prohibitory, and finally, confirm that Section 253 generally applies only to telecommunications-specific laws. This will lead to a decisional law that properly recognizes distinctions between cases that involve development of telecommunications-specific regulatory schemes that are actually intended to pick the winners and losers in competition; and the many cases that simply apply long-standing rules and principles to telecommunications providers.[14]

[14] The primary focus of Section 253 was to protect new entry into the market. Oddly enough, many of the Section 253 cases have involved efforts by long-present incumbents to avoid rules with which they have easily complied in the past. That is not a concern of Section 253. *See, e.g., Qwest Corp. v. City of Santa Fe*, 224 F. Supp. 2d 1305 (D. N.M. 2002); *Sw. Bell Tel. LP v. City of Houston*, 2008 WL 2102283 (5th Cir. 2008).

II. REVISING THE *AUBURN* TEST IS CONSISTENT WITH THE DECISIONS OF THE CIRCUIT COURTS.

Revising the *Auburn* test as described above is consistent with decisional law in the majority of circuits.

As the County has pointed out, the Eighth Circuit has expressly rejected the "may prohibit" test adopted in *Auburn. Level 3 Commc'ns v. St. Louis,* 477 F.3d 528 (8th Cir. 2007). The Second Circuit and Eleventh Circuits, while occasionally using the phrase "may prohibit," have adopted the FCC's tests for determining when there is a prohibition or effective prohibition. *White Plains, supra; BellSouth v. Palm Beach,* 252 F.3d 1169 (11th Cir. 2001). In the Tenth Circuit, the court only found a prohibition after examining the impact of a challenged regulation, and concluding it would cause a "massive increase" in costs, *Qwest v. City of Santa Fe,* 380 F.3d 1258, 1271 (10th Cir. 2004). Likewise, in *Puerto Rico Telephone Co., Inc. v. Municipality of Guayanilla,* 450 F.3d 9, 18 (1st Cir. 2006), the court found a prohibition because the evidence showed the new fees at issue would render the business unprofitable.

Moreover, revising the test would do little violence to the appellate case law in this Circuit, if read narrowly and confined to the facts of the cases before the court. *CTI* is completely consistent with the approach recommended by amici. While *Auburn* is not, it is best understood as a case involving franchising or wireless entities, where there was little dispute as to the prohibitory effect of the

ordinances. The focus of the case was Section 253(c). In *Qwest Communications Corp. v. City of Berkeley*, 202 F. Supp. 2d 1085 (N.D. Cal. 2001), the City admitted that its proposed ordinance was burdensome, and the case really turns on the fact that the City was proposing to determine whether particular providers were or were not common carriers – an issue the Court thought was a matter for the California Public Utilities Commission to determine. It is time to revisit, and revise, the *Auburn* test.

III. TOWER SITING ORDINANCES ARE NOT REVIEWABLE UNDER SECTION 253

47 U.S.C. § 332(c)(7) states: "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a . . . local government . . . over decisions regarding the placement, construction, and modification of personal wireless facilities." This language governs Section 253's applicability to tower siting.

However, by focusing on the word "decisions," *San Diego* found a facial challenge to tower siting ordinances could be brought under Section 253.[15] The

[15] The court also seemed concerned that unless Section 253 could be applied, wireless providers might be unable to bring facial challenges to tower ordinances. The County and amici *National League of Cities et. al.* address this issue, but it is worth emphasizing that if Congress decided that tower placement issues were to be addressed via Section 332, then that is how they must be addressed. Whether or not that forecloses facial challenges is irrelevant. Nor is it significant that Section

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court reasoned that because Section 332 covers *decisions*, it did not limit Section 253 challenges to the underlying ordinances themselves. 377 F. Supp. 2d at 891. But the focus is wrong, because on its face Section 332 insulates not merely the decisions themselves, but rather local "authority" from challenge under other provisions of the Act. The decision reads the term "authority" out of the Act.

As this case illustrates, reviewing zoning ordinances under Section 253 patently *affects* local authority, by subjecting it to complete preemption, and by limiting what the locality may consider in making zoning decisions, and how it may make them. *Anac*ortes actually prohibits and forecloses any individualized decision by directing the locality to issue the permit. Such effects are prohibited by the plain language of Section 332(c)(7). In analogous circumstances, this court has recognized that legislation protecting state and local laws against federal intrusions must be read broadly to effectuate its terms. *Comenout v. Wash.*, 722 F.2d 574 (9th Cir. 1983). That is also commanded by preemption doctrine and its presumption against preemption, *CTI,* 196 F.3d at 1017, as well as Section 601(c)

(footnote continued from previous page)

253 includes a subsection excluding Section 332(c)(3) but not Section 332(c)(7) from its sweep. Because Section 332(c)(7) contains its own language that makes all other provisions of Title II of the Act inapplicable, including an additional exemption in Section 253 was unnecessary and inappropriate, as Congress meant for the limitation to apply more broadly. Section 332(c)(3) was adopted prior to Section 253, and Congress simply chose to include the exemption as part of the addition of Section 253, rather than as an amendment to Section 332(c)(3).

of the Telecommunications Act, discussed *supra,* p.7. Finally, it is consistent with the structure of Section 332. Section 704(a) of Pub. L. No. 104-104, which contains the language codified at 47 U.S.C. §332(c)(7), is titled "NATIONAL WIRELESS TELECOMMUNICATIONS SITING POLICY." Not only was Section 332 designed to preserve local zoning authority (as the court below recognized), the provision was designed to establish the national policy for tower siting; tossing Section 253 into the mix upsets the balance Congress struck.[16]

[16] And it may ultimately be circular. Before a local law could be preempted, a court would have to determine whether it was protected from preemption by Section 253(b), which protects exercises of police power from preemption. Zoning is an exercise of lawful police power; and since any exercise of that power that complies with Section 332(c)(7) would by definition be lawful, the court would be obligated to uphold any ordinance that passed muster under Section 332(c)(7).

CONCLUSION

Based on the foregoing, amici curiae urge the Court to rule that Section 253 does not apply in cases involving zoning of wireless towers; to adopt standards for application of Section 253(a) consistent with the plain language of the Act; and to reverse the order of the district court finding that the County's ordinance is preempted.

Dated: June 4, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 6,860 words up to the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on June 4, 2008.

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PROOF OF SERVICE

I, Joseph Van Eaton, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am a member of the law firm of Miller & Van Eaton, P.L.L.C., 1155 Connecticut Ave., N.W., Ste 1000 Washington, D.C., 20036-4320.

On June 4, 2008, I mailed the BRIEF OF AMICI CURIAE PORTLAND, OREGON; TACOMA, WASHINGTON; AND ANACORTES WASHINGTON IN SUPPORT OF THE DEFENDANTS-APPELLEES COUNTY OF SAN DIEGO, et al., to the Clerk of the Court, and to the following persons at the locations specified:

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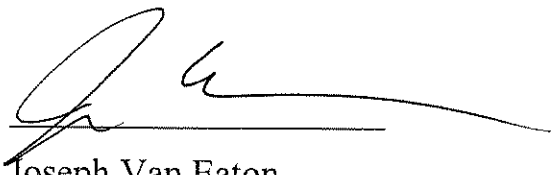

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