

S238001

IN THE SUPREME COURT OF CALIFORNIA

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

v.

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

SUPREME COURT
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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

**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”).¹ 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

¹ 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.² 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

² 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,



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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 (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”)³; *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.

³ <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”).