

October 31, 2016

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Honorable Tani Cantil-Sakauye, Chief Justice,  
and the Associate Justices  
Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102-4789

Re: ***Amicus Letter of the Chamber of Commerce of the United States of America in Support of Petition for Review of T-Mobile West LLC et al. v. The City and County of San Francisco et al., Case No. S238001***

To the Honorable Court:

Pursuant to Rule 8.500(g) of the California Rules of Court, the Chamber of Commerce of the United States of America (“the Chamber”) respectfully submits this letter as *amicus curiae* urging this Court to grant review of the above-entitled case.

#### **INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT**

The Chamber is the world’s largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country—including a substantial number of businesses in California. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and federal and state courts. To that end, the Chamber regularly files briefs in cases that raise issues of vital importance to the Nation’s business community.

The Chamber’s members—which range from small businesses to multinational corporations—must comply with a wide variety of local, state, and federal regulations. The Chamber’s members therefore have a distinct interest in ensuring that preemption analysis is undertaken in a consistent and predictable manner.

The Chamber’s members have an interest in protecting their ability to bring meaningful pre-enforcement facial challenges based on preemption. Such challenges help our members to comply with State law by clarifying *ex ante* the scope of local ordinances that appear on their face to undermine State policy. In addition, pre-enforcement facial challenges help to remove regulatory uncertainty that can stifle investment and innovation. In California, some issues are reserved for the State, and local governments are constrained in their ability to impose different regimes. Facial preemption challenges are helpful because they can provide needed clarity about

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the proper bounds of government units' relative power, and where appropriate, vindicate statewide consistency in matters of law and policy.

The Court of Appeal's decision in this case threatens the Chamber's members' interests by imposing a misguided test for facial preemption challenges that is inconsistent with the preemption precedents of the U.S. Supreme Court and this Court. The Court of Appeal held that where, as here, a plaintiff challenges a local ordinance as preempted by a state statute, the challenge fails unless the plaintiff can demonstrate that there is "no set of circumstances . . . under which the [local] law would be valid." *T-Mobile West LLC v. City & Cty. of San Francisco* (2016) 3 Cal.App.5th 334, 2016 WL 6088425, at \*5 (as modified) (quotation marks and alterations omitted and emphasis added). Thus, it held that San Francisco's "Wireless Ordinance," which conditions telephone companies' ability to install wireless facilities on an "aesthetic approval" process, is not preempted by California Public Utility Code § 7901, which gives such companies the right to install facilities in the public right-of-way so long as they do not "incommode the public use." The court reached this holding because, in its view, there were hypothetical situations in which the installation of a wireless facility might violate both local law and state law. 2016 WL 6088425 at \*12.

This approach to preemption is inconsistent with case law from the U.S. Supreme Court and this Court, as well as other Court of Appeal decisions, which recognize a court should not conduct preemption analysis by assessing whether there are hypothetical situations in which state law and local law might yield the same result. Rather, under the correct standard, a local law is preempted when state and local provisions apply different standards to the same inquiry. Here, because state law and local law impose different standards on whether a telephone company may install wireless facilities, the local law is preempted. The Court of Appeal's preference for as-applied challenges makes little sense in the context of preemption analysis. A local law that serves different purposes, has different effects, and employs different standards than a state law is inconsistent with that state law, even if on occasion the same conduct would be prohibited by both laws.

In light of the importance of the question presented in this case and the inconsistency between the decision below and other authority, the Chamber urges this Court to grant the petition for review. *See* Cal. R. Ct. 8.500(b)(1).

## ARGUMENT

### **I. The Court of Appeal's Reliance on the "No Set of Circumstances" Formulation is Inconsistent with Precedent from the U.S. Supreme Court, this Court, and Other Decisions of the Courts of Appeal.**

The question presented in this case is straightforward: whether a state law that permits telephone and telegraph companies to construct and maintain their lines on public roads and highways "in such manner and at such points as not to incommode the public use," Publ. Util.

Code § 7901, preempts a San Francisco ordinance requiring those same companies to obtain “aesthetic approval” in order to receive a permit to install and operate most wireless facilities in the public right of way, *T-Mobile West*, 2016 WL 6088425, at \*1-2 (describing San Francisco Bd. of Supervisors Ordinance No. 12-11). Because the state provision and the local Ordinance impose different standards—and therefore conflict—the Ordinance is preempted by the state provision. *See, e.g., Action Apartment Ass’n v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1242 (“If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.” (quotation marks and citation omitted)).

The Court of Appeal reached a different result because it applied a different test. It held that the Ordinance is not facially preempted so long as in some theoretical circumstance, application of the two standards would lead to the same result. For example, the court hypothesized that if a large wireless facility were “installed very close to Coit Tower or the oft photographed ‘Painted Ladies,’” it might both pose an aesthetic problem and “incommode” the use of the public rights of way. 2016 WL 6088425 at \*5, \*12. The court appeared to be applying *United States v. Salerno* (1978) 481 U.S. 739, 745, which held that for a facial challenge to be successful, plaintiffs must show that “no set of circumstances exists under which the Act would be valid.” *Id.* In the court’s view, there were some instances in which installation of a facility would violate both local and state law. Thus, there were a “set of circumstances . . . under which the [local law] would be valid,” foreclosing the facial preemption challenge.

Yet the U.S. Supreme Court and this Court generally have *not* applied this analysis to facial preemption challenges. To the contrary, those courts have invalidated state or local laws as preempted even where the application of state law and the application of federal law might reach the same result.

For example, in *Arizona v. United States* (2012) 132 S.Ct. 2492, 2502, the U.S. Supreme Court held that federal law preempted several provisions of an Arizona statute relating to unlawful aliens. As relevant here, the Court held that federal law, which gave the Attorney General discretion to choose which removable aliens to detain, preempted a provision known as Section 6, which allowed state officers to detain aliens for being removable under federal law. The Court held the state law was preempted even though, in some circumstances, state and federal authorities might agree on which aliens to detain. Notably, the Court did not find the *Salerno* formulation an obstacle to its conclusion. That was true even though Justice Alito, in dissent, argued that the facial challenge should fail because the United States had not demonstrated that “no set of circumstances exists under which the [statute] would be valid.” *Id.* at 2534 (Alito, J., concurring in part and dissenting in part) (quoting *Salerno*, 481 U.S. at 745); *see also id.* at 2515 (Scalia, J., concurring in part and dissenting in part) (similar).

The Court in *Arizona* also held that another provision of the Arizona law, Section 3, was preempted by federal law. Section 3 imposed a state criminal penalty for the failure to carry registration documents as required by federal law. The Court held Section 3 preempted in part because it gave the State “the power to bring criminal charges against individuals for violating a

federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.” *Id.* at 2503. Notably, the Court never suggested that such frustration would occur in *every* instance; to the contrary, it assumed that that in some cases state prosecution would be welcomed by federal officials. *Id.* Yet, once again, that was insufficient to avoid preemption.<sup>1</sup>

Nor is *Arizona*’s preemption analysis an outlier. For decades, the Supreme Court has explained that a proper preemption analysis must consider whether the purpose and effect of the state law conflicts with that of the federal law as a general matter. *See, e.g., Gade v. Nat’l Solid Wastes Mgmt. Ass’n* (1992) 505 U.S. 88, 105-07 (explaining that preemption analysis under Occupational Health and Safety Act must look to both the purpose and effect of the allegedly preempted state law, and that the existence of some “effect outside of the [preempted area]” is insufficient to survive preemption).

This Court’s decisions are similar. On numerous occasions, this Court has held that a local ordinance is preempted even though one could easily imagine cases in which both the state law and the ordinance could be applied to reach the same result. For example, in *O’Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1068, this Court considered whether the State’s criminal forfeiture provisions preempted Stockton’s vehicle forfeiture ordinance, which imposed forfeiture based on a larger class of drug offenses and at a lower threshold of proof than the State provisions. This Court found the Stockton ordinance preempted because it imposed different forfeiture rules than the State did, even though there would undoubtedly be cases where both the State’s and the city’s laws were satisfied. Similarly, in *Action Apartment Ass’n v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1237, this Court found Santa Monica’s “tenant harassment” ordinance preempted based on a conflict with the State’s litigation privilege, even though some cases of tenant harassment would fall under exceptions to the litigation privilege, and in those cases, the application of the ordinance would not conflict with the state privilege.

The decision below breaks with this authority, and in doing so, it furthers a division in the Courts of Appeal. Just last month, a different division of the First District Court of Appeal held that the Ellis Act, which protects property owners’ right to exit the residential rental business, preempted San Francisco’s eviction control ordinance even though, as San Francisco pointed out, there were “one or more conceivable set of circumstances under which the Ordinance and the Ellis Act could operate consistently.” *San Francisco Apartment Ass’n v. City & Cty. of San Francisco* (2016) 3 Cal.App.5th 463, 487; *see id.* (explaining that “the legality of [the ordinance] does not hinge on the circumstances of any particular individual [application]; rather, its legality hinges on ‘only the text of the measure itself.’” (quoting *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084)).

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<sup>1</sup> Following the Supreme Court’s decision in *Arizona*, at least one federal court of appeals has held that the Supreme Court’s decision precludes application of the *Salerno* standard to facial preemption challenges. *Lozano v. City of Hazleton* (3d Cir. 2013) 724 F.3d 297, 313 n.22.

So too, in *Fiscal v. City & County of San Francisco* (2008) 158 Cal.App.4th 895, 910, the Court of Appeal held that San Francisco's handgun ordinance was preempted in its entirety by state law despite the possibility that the ordinance could lawfully apply to "criminals who use handguns in the commission of their unlawful acts"—*i.e.*, even though, in at least some circumstances, both the handgun ordinance and the state law could apply at the same time, and reach the same result. Yet other decisions of the Courts of Appeal apply the "no set of circumstances" standard to facial preemption challenges. *See, e.g., Sierra Club v. Napa Cty. Bd. of Supervisors* (2012) 205 Cal.App.4th 162, 173 (quotation marks omitted) (cited by the Court of Appeal in this case).

## **II. Under the Proper Analysis, The Wireless Ordinance is Preempted Because It Requires the Application of a Different Legal Standard than State Law Imposes.**

As explained above, the Court of Appeal erred because it asked the wrong question. Instead of determining whether it could hypothesize a set of facts in which the Ordinance's "aesthetics" standard and the State's "incommodious" standard would lead to the same result, the court should have asked whether the Wireless Ordinance conflicts with Section 7901. The answer to that question is yes, because *every time that it is applied*, it imposes a different—and conflicting—standard than that imposed by state law.

Thus, even under the test in *Salerno*, T-Mobile's facial challenge should have succeeded. Under *Salerno*, a facial challenge will succeed when "no set of circumstances exists under which the Act would be valid." 481 U.S. at 745. But the local ordinance *always* applies a standard that conflicts with state law, and hence is *never* valid—even if there might be some class of cases in which local law and state law happen, for different reasons, to forbid the construction of a wireless facility.

Consistent with that analysis, even courts that apply the *Salerno* standard to preemption challenges do not interpret that standard (as the Court of Appeal did) to mean that so long as a court can hypothesize one scenario in which the two provisions can coexist, the state or local law is not preempted. As the Ninth Circuit explained in *United States v. Arizona* (9th Cir. 2011) 641 F.3d 339, 345-46, *aff'd in part, rev'd in part and remanded* (2012) 132 S. Ct. 2492, under the *Salerno* standard, "the question before us is not, as Arizona has portrayed, whether state and local law enforcement officials can apply the statute in a constitutional way." *Id.* Instead, "there can be no constitutional application of a statute that, on its face, conflicts with Congressional intent and therefore is preempted by the Supremacy Clause." *Id.*

Applying that analysis, Section 7901 is preempted. Section 7901 provides that telecommunications companies like T-Mobile may install telephone lines (including wireless equipment) in the public right-of-way "in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters." Pub. Util. Code § 7901. By contrast, the Wireless Ordinance provides that before telecommunications providers may install most wireless equipment in San Francisco's public rights-of-way, they must

“compl[y] with aesthetics-based compatibility standards.” *T-Mobile West LLC*, 2016 WL 6088425, at \*4. While the Court of Appeal held that the “incommodious” standard might, in some marginal cases, encompass concerns about aesthetics, it did not deny that the standards differ. *See id.* at \*9-12.

Thus, every time a telecommunications operator like T-Mobile seeks to install wireless equipment in San Francisco, the city will apply a standard inconsistent with the state law “incommodious” standard—and the operator will have to satisfy two different standards, even though state law requires it to satisfy only one. That is sufficient to demonstrate that the Wireless Ordinance is preempted, even though there might be some class of cases where the two inquiries lead to the same result, *i.e.*, true eyesores placed in iconic locations that are so disturbing to the public as to be “incommodious.” *Id.* at \*12.

Once again, precedent from this Court and the U.S. Supreme Court supports the point. As discussed above, in *O’Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1071-72, this Court held that the State’s criminal forfeiture provisions preempted Stockton’s vehicle forfeiture ordinance because the latter applied different standards—in particular, it imposed a lower threshold of proof (preponderance of the evidence, rather than beyond a reasonable doubt) than the state provision. It did not matter that in some cases, both standards could be satisfied; the mere application of the City’s higher standard violated the state law, because *every time* the City’s law applied, it required application of the wrong standard.

U.S. Supreme Court cases are similar. As described above, in *Arizona*, the Court held that because Arizona applied different legal standards from the federal government on the detention and imposition of criminal penalties on immigrants, Arizona’s law was preempted.

Likewise, in the context of agency rulemaking (rather than preemption), the Supreme Court has held that when an agency enacts a rule that systematically requires application of an incorrect test, the rule is facially invalid. In *Sullivan v. Zebley* (1990) 493 U.S. 521, the Court considered a facial challenge to the government’s method of determining whether a child is eligible for social security benefits based on disability. *Id.* at 523. The statute provided that a child could obtain benefits if he suffered from an impairment of “comparable severity” to an impairment that would entitle an adult to benefits, but the implementing regulations limited a child’s, but not an adult’s, ability to demonstrate impairment based on illnesses other than those specifically delineated in the regulations. *Id.* at 529-31.

The Supreme Court held that the regulations were facially invalid because they were “simply inconsistent with the statutory standard.” *Id.* at 536. That was so even though many children who would be denied benefits under the regulations also would be denied benefits under a standard that complied with the statute. The Court specifically rejected the argument that as-applied challenges would be sufficient to address the issue. *Id.* at 536 n.18. As the Court explained, it “fail[ed] to see why” a child should be forced to bring an as-applied challenge, or “why a facial challenge is not a proper response to a systemic disparity between the statutory

standard and the Secretary's approach to child-disability claims." *Id.*; see also *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.* (1995) 515 U.S. 687, 731-32 (Scalia, J., dissenting) (explaining that under a hypothetical statute prohibiting "premeditated killing of a human being" and an implementing regulation prohibiting "killing a human being," "[a] facial challenge to the regulation would not be rejected on the ground that, after all, it *could* be applied to a killing that happened to be premeditated. It *could not* be applied to such a killing, because it does not require the factfinder to find premeditation, as the statute requires." (internal quotation marks omitted)).

The same is true here: There is simply no reason why T-Mobile's challenge should have to wait for a case in which the "incommodious" and "aesthetic" standards lead to different results. Every time the "aesthetic" standard is applied, it contradicts the State's "incommodious" standard. It is therefore preempted.

### **III. The Court of Appeal's Insistence on As-Applied Challenges Makes Little Sense in the Context of Preemption Analysis, which Requires Consideration of the Purpose and Effects of a Law.**

In rejecting T-Mobile's facial challenge to the San Francisco ordinance, the Court of Appeal indicated that preemption cases should generally be brought as as-applied rather than facial challenges. Yet as-applied challenges are a poor fit for preemption cases. A proper preemption analysis requires looking to both the purpose and effects of the challenged law—questions that cannot be meaningfully answered if the court considers only the specific facts of the case before it.

As previously noted, the U.S. Supreme Court recognizes that consideration of whether a state law is preempted by a federal one requires a court to consider not only "the legislature's professed purpose" but also "the effects of [the state] law" in practice. See, e.g., *Gade*, 505 U.S. at 105. Cases considering preemption under state law recognize the same principle. For example, in *California Grocers Ass'n v. City of Los Angeles* (2011) 52 Cal.4th 177, 190, this Court explained that in analyzing a preemption claim, "[p]urpose alone is not a basis for concluding a local measure is preempted." *Id.* Instead, courts must apply a "nuanced inquiry" that considers both the statute's purpose and the "ultimate question" of "whether the effect of the local ordinance is in fact to regulate in the very field the state has reserved to itself." *Id.*; see also *People v. Mueller* (1970) 8 Cal.App.3d 949, 954 (finding no preemption where State Fish and Game Code and local ordinance had different purposes and local provision only "incidentally affected the preempted area").

This Court has further held that where the question is whether the local law conflicts with the state statute by "materially interfer[ing]" with application of the state provision, the analysis must consider both the purpose and the effect of the local legislation. E.g., *Wells Fargo Bank v. Town of Woodside* (1973) 33 Cal.3d 379, 383-84 (holding ordinance preempted under purpose and effects analysis). Decisions from the Courts of Appeal reflect the same analysis. See, e.g.,

*Suzuki v. City of Los Angeles* (1996) 44 Cal.App.4th 263, 271-76 (holding that municipal nuisance ordinance was not preempted by state zoning law based on analysis of ordinance’s “purpose and effects”); *Cal. Veterinary Med. Ass’n v. City of W. Hollywood* (2007) 152 Cal.App.4th 536, 551-52 (holding that municipal ordinance regarding animal declawing was not preempted by the California Veterinary Medical Practice Act and Business Professions Code based on purpose and effects analysis, and stating that “it is not only the stated purpose but also the direct, practical effect of the local legislation that determines its validity”).

Requiring plaintiffs to bring as-applied challenges in preemption cases does not fit with the “purpose and effects” inquiry required by federal and state case law. With respect to purpose, it makes little sense to analyze whether, in some particular set of circumstances, the purpose of a local ordinance will comport with the state scheme. To the contrary, a local ordinance will have the same purpose with respect to all of its applications (whether real or hypothetical).

In this case, the purpose of San Francisco’s Wireless Ordinance is to avoid the placement of wireless facilities “in manners or in locations that will diminish the City’s beauty.” *T-Mobile West LLC*, 2016 WL 6088425, at \*2 (quoting Ordinance No. 12-11). That is true no matter where in the city the standard is applied. And that purpose plainly differs from, and conflicts with, Section 7901’s goal of avoiding only “incommodious” installations—*i.e.*, avoiding installations that obstruct the ability to travel in the public right-of-way. *Id.* at \*9.<sup>2</sup> The purpose of the Ordinance, and its inconsistency with state law, will not change depending on how the law is applied to particular circumstances, whether in theory (as the Court of Appeal imagined in its Coit Tower and Painted Ladies hypotheticals), or in practice (as the Court of Appeal invited in future as-applied challenges). *See T-Mobile West LLC*, 2016 WL 6088425, at \*12.

Along the same lines, as-applied challenges are a poor fit for the consideration of “effects” that a preemption challenge requires. Proper analysis of the effects of a law must consider those effects in the aggregate, not just in a particular case, and not just in the marginal case, as suggested by the Court of Appeal. *See id.* That is because a local law’s effects on the function of state law, and the achievement of a state objective, will necessarily have a cumulative effect: while one application of the statute may cause a *de minimis* conflict with state law, that conflict may become significant and unworkable when repeated many times over. In addition,

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<sup>2</sup> The Court of Appeal adopted a broader definition of “incommode the public use”: It held that the phrase “means ‘to unreasonably subject the public use to inconvenience or discomfort; to unreasonably trouble, annoy, molest, embarrass, inconvenience; to unreasonably hinder, impede, or obstruct the public use.’” *T-Mobile West LLC*, 2016 WL 6088425, at \*12 (citation omitted). Even under that definition, however, the purpose and scope of Section 7901 and the Wireless Ordinance conflict with one another. The Wireless Ordinance focuses *solely* on aesthetics—it prohibits any installation that is insufficiently attractive. By contrast, even under the Court of Appeal’s interpretation, State law requires consideration of a broader set of factors, of which aesthetics is only one.



where multiple localities may enact legislation on a topic that is inconsistent with state law—and inconsistent with provisions from other localities—the effect of such confusing and duplicative regimes must be considered in the aggregate.

The U.S. Supreme Court has recognized this principle with respect to preemption of state law by federal statutes. For example—and as discussed above—in *Arizona*, the Court held that federal law preempted Section 3 of the Arizona statute, which made it a state misdemeanor for an alien to fail to carry a registration document as required by federal law. 132 S.Ct. at 2501-03. The Supreme Court found Section 3 preempted in part because if it “were valid, every State could give itself independent authority to prosecute federal registration violations,” which, taken together, would frustrate the Federal Government’s control over enforcement. *Id.* at 2502; *see id.* at 2503 (noting that while decision rested on field preemption, statute was also in conflict with federal law).

The Court made a similar point in *Gobeille v. Liberty Mutual Insurance Co.* (2016) 136 S.Ct. 936, 945, where it held that the Employee Retirement Income Security Act (ERISA) preempted a Vermont statute and regulation requiring that all health insurers file reports with the State containing claims data and certain other information. Vermont argued that ERISA did not preempt the state provision because, in the particular case, the challenger failed to “demonstrate[] that the reporting regime in fact has caused it to suffer economic costs” from compliance. *Id.* The Supreme Court rejected Vermont’s argument, holding that it was irrelevant whether Vermont’s law imposed a burden, because preemption turns on whether “plans will face the *possibility* of a body of disuniform state reporting laws and, even if uniform, the necessity to accommodate multiple governmental agencies.” *Id.* (emphasis added). Thus, the Court held that “[a] plan need not wait to bring a pre-emption claim until confronted with numerous inconsistent obligations and encumbered with any ensuing costs”; instead, a facial challenge was appropriate. *Id.*

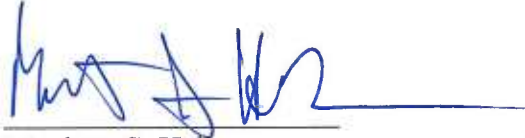
This Court, too, has made the same point. For example, in *Fiscal*, the Court held that state law preempted a local gun control law. The Court explained: “If every city and county were able to opt out of the [statewide] statutory regime [governing firearms] simply by passing a local ordinance, the statewide goal of uniform regulation . . . would surely be frustrated.” 158 Cal.App.4th at 919.

The same is true here. Under the reasoning of the decision below, every municipality in California could apply its own version of an “aesthetics” standard to wireless installations. This would make it difficult, if not impossible, for telephone corporations to exercise the “franchise” state law grants them “to construct their lines along and upon public roads and highways throughout the state.” *T-Mobile*, 2016 WL 6088425, at \*7. Indeed, the need to comply with tens or even hundreds of different local standards would belie this Court’s statement that “the construction and maintenance of telephone lines in the streets and other public places within the city . . . is today a matter of state concern and not a municipal affair.” *Pac. Tel. & Tel. Co. v.*

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*City & Cty. of San Francisco* (1956) 51 Cal.2d 766, 768; see *T-Mobile*, 2016 WL 6088425, at \*7. Properly viewed, then, the effect of the Wireless Ordinance plainly conflicts with state law.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Matthew S. Hellman', with a long horizontal line extending to the right.

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cc: All Counsel

**CERTIFICATE OF SERVICE**

Re: *T-Mobile West LLC et al. v. The City and County of San Francisco et al.*, Case No. S238001

I, Matthew Hellman, declare as follows:

I am over the age of 18 and not a party to the within action. My business address is 1099 New York Avenue, N.W., Suite 900, Washington D.C. 20001. I served a true copy of the attached Amicus Letter of the of the Chamber of Commerce of the United States of America in Support of Petition for Review on the following by placing a copy in a sealed envelope addressed to the parties listed below, which was deposited for overnight delivery, postage prepaid, on October 31, 2016.

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I declare under penalty of perjury that the forgoing is true and correct.

Executed on October 31, 2016 at Washington, D.C.

  
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