

*CITY OF RANCHO PALOS VERDES, CALIFORNIA V.
ABRAMS**

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As the demand for wireless communication has rapidly grown, telecommunications towers have become a visually inescapable element of the United States landscape,¹ looming down upon formerly undisturbed wilderness areas, even within national and state preservations.² The Telecommunications Act of 1996 (“TCA”)³ facilitated this growth, improving wireless networks at what some have argued to be a high environmental cost. Critics of the TCA cite scenic impact as well as radiofrequency (“RF”) emission health concerns. Last term, the Supreme Court decided whether a plaintiff may enforce, through a § 1983 action,⁴ restrictions imposed by the TCA on the regulation of wireless communication facilities by local zoning authorities. That is, the Court determined whether a successful TCA plaintiff is entitled to remedies—declaratory relief, injunctive relief, damages, attorney’s fees, and costs—provided by § 1983. *City of Rancho Palos Verdes, Cal. v. Abrams*⁵ exhibits a commitment by the Court to meaningfully balance the need and demand for telecommunications expansion with the continuing importance of state and local control over land use matters. The convergence of environmental protection and principles of federalism⁶ in *Abrams* helps to explain the Court’s unanimous decision,⁷ and ultimately proves that the preclusion of § 1983 remedies is not necessarily the environmentally harmful outcome it would appear to be in the landmark *Sea Clammers* decision.⁸

* 125 S. Ct. 1453 (2005).

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¹ See Thomas A. Wikle, *Cellular Tower Proliferation in the United States*, GEOGRAPHICAL REV., Dec. 25, 2002, at 45 (noting that, as of 2002, “128,000 cellular antennae [were] distributed across the United States”).

² Mark Clayton, *Call of the Wild: Is it Cellular?*, CHRISTIAN SCI. MONITOR, Sept. 30, 2004, at 17 (noting “at least 30 national parks now sport cellphone towers or other antennas”).

³ 47 U.S.C.A. § 332 (2000).

⁴ 42 U.S.C.A. § 1983 (2000).

⁵ 125 S. Ct. 1453, 1457 (2005).

⁶ See Clive B. Jacques & Jack M. Beerman, *Section 1983’s “And Laws” Clause Run Amok: Civil Rights Attorney’s Fees in Cellular Facilities Siting Disputes*, 81 B.U. L. REV. 735, 791 (2001) (concluding that “[h]istory, precedent and concepts of federalism demonstrate that [wireless] providers should not be able to recover attorney’s fees” under § 1983).

⁷ Justice Scalia delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices O’Connor, Kennedy, Souter, Thomas, Ginsburg, and Breyer joined. Justice Breyer filed a concurring opinion in which Justices O’Connor, Souter, and Ginsburg joined. Justice Stevens filed a separate concurrence. 125 S. Ct. at 1455.

⁸ *Middlesex County Sewerage Authority v. National Sea Clammers Ass’n*, 453 U.S. 1 (1981).

BACKGROUND

Since the enactment of the TCA, the United States has experienced a vast proliferation of wireless communication towers, a phenomenon that has been dubbed by critics as the “pin-cushioning of America.”⁹ The outcome is consistent with the TCA’s intent to encourage expansion and improvement in the telecommunications industry through a reduction of regulatory barriers.¹⁰ With respect to zoning authority over tower siting,¹¹ the TCA provides that local governments may “not unreasonably discriminate among providers of functionally equivalent services”¹² or take actions that “prohibit or have the effect of prohibiting the provision of personal wireless services.”¹³ Additionally, the statute proscribes local governments from regulating “the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of [RF] emissions to the extent that such facilities comply with the [Federal Communications Commission (“FCC”)]’s regulations concerning such emissions.”¹⁴ Although the TCA has been instrumental in achieving the goal of improved wireless communication,¹⁵ it has raised environmental concerns with respect to human health, scenic wilderness, and wildlife.¹⁶

The environmental harm associated with the TCA’s federal preemption of local RF regulation is debatable. Human health concerns are interpreted as falling within the purview of “environmental harm” under the stat-

⁹ Carol R. Goforth, *A Bad Call: Preemption of State and Local Authority to Regulate Wireless Communication Facilities on the Basis of Radiofrequency Emissions*, 44 N.Y.L. SCH. L. REV. 311, 312 (2001). The expression derives from a comment by Vermont Senator Patrick Leahy, who on the Senate floor declared “I don’t want Vermont turned into a giant pincushion with 200-foot towers indiscriminately sprouting up on every mountain and in every valley, ruining the view that most of us have spent a lifetime enjoying.” Jared O’Connor, *National League of Cities Rising: How the Telecommunications Act of 1996 Could Expand Tenth Amendment Jurisprudence*, 30 B.C. ENVTL. AFF. L. REV. 315, 316 (2002-2003) (internal citation omitted).

¹⁰ The purpose of the TCA was “to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies . . .” H.R. REP. NO. 104-204(I), at 1 (1995).

¹¹ Congress feared “that local zoning restrictions could inhibit the development of the personal wireless communication service industry in the United States . . .” Jacques & Beerman, *supra* note 6, at 736.

¹² 47 U.S.C.A. § 332(c)(7)(B)(i)(I) (2000).

¹³ *Id.* § 332(c)(7)(B)(i)(II) (2000).

¹⁴ *Id.* § 332(c)(7)(B)(iv) (2000).

¹⁵ See generally Stephanie E. Niehaus, *Bridging the (Significant) Gap: To What Extent Does the Telecommunications Act of 1996 Contemplate Seamless Service?*, 77 NOTRE DAME L. REV. 641 (2002) (noting that although wireless provider options and subscriptions have increased, the United States’ telecommunications infrastructure is far from a seamless network).

¹⁶ For an in-depth look at the potential environmental harms created by cell towers, see generally B. BLAKE LEVITT ED., *CELL TOWERS: WIRELESS CONVENIENCE? OR ENVIRONMENTAL HAZARD?* (2001) (discussing effects on safety, health, aesthetics, and wildlife).

ute,¹⁷ such that local municipalities are not permitted to regulate RF emissions on the basis of human health. Critics of the TCA note that the FCC “has never claimed to be an expert in human health matters and generally relies on industry to set the standards. The effects of [RF] emissions are only now being studied, and everyone acknowledges that the scientific data is far from complete.”¹⁸ Yet the environmental impact may not be as harmful as it first appears. “As with any new technology that uses radiation, wireless antennas raise concerns about their potential for harming human health However, many modern technologies emit low levels of [RF] waves . . . and there is little evidence . . . that cellular antenna RF emissions are more dangerous than these.”¹⁹ The FCC’s Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation²⁰ arguably provide a more than adequate safeguard against any harmful effects of RF emissions.²¹ And it is at best unclear whether local and state governments possess any greater expertise than the FCC in crafting sensible and effective safety regulations to address potential human health dangers.

A more definite environmental concern raised by wireless towers is harm to wildlife, most notably to migratory birds. “The Fish and Wildlife Service says 350 species of neotropical birds—those that breed in North America in spring and summer and winter in Latin America—are vulnerable to flying with communications towers.”²² Estimates of bird deaths caused by cell towers range from five to fifty million per year.²³ The impact is particularly worrisome because “towers may disproportionately affect the rarest species, such as the endangered Kirtland’s warbler, which must pass through states in the East, which have the most towers.”²⁴ The problem has spawned several lawsuits, including an unresolved lawsuit brought in 2002 by the American Bird Conservancy against the FCC.²⁵

¹⁷ “‘Environmental effects’ is a euphemism which was apparently intended to encompass any impact that radio-frequency emissions may have on human health.” Goforth, *supra* note 9, at 312 (citing *Iowa Wireless Services v. City of Moline*, 29 F. Supp. 2d 915, 924 (C.D. Ill. 1998)).

¹⁸ *Id.*

¹⁹ Robert Long, *Allocating the Aesthetic Costs of Cellular Tower Expansion: A Workable Regulatory Regime*, 19 STAN. ENVTL. L.J. 373, 390–91 (2000).

²⁰ 11 F.C.C.R. 15123, 15128–36 (1996).

²¹ See H. Gregg Claycamp, *The Rationale for Negligible Risk Exemptions in the Telecommunications Act of 1996: Cellular Phone and Personal Communication System Transmitters*, 9 RISK 101, 102 (1998). “While hazards from high exposures to RF radiation are well-known, the exposures from cellular transmitters are, and will likely remain, very low The nature of biological effects from RF exposures . . . also obviate concern for adverse health effects from potential low-level exposures below the FCC’s cut-off.” *Id.*

²² Charles Seabrook, *FCC Probes Role of Cell, TV Towers in Bird Kills*, DAYTON DAILY NEWS, Aug. 24, 2003, at A4 (noting that “[t]he birds migrate at night. They are most susceptible to tower collisions when visibility is limited At those times, aircraft warning lights on the towers lure the birds.”).

²³ *Id.*

²⁴ *Songbirds: Communications Towers are Killing Millions*, AM. POL. NETWORK GREENWIRE, July 27, 1998.

²⁵ Rob Pavey, *Falling Bird Counts Raise Tower Fears*, AUGUSTA CHRON., Feb. 21,

But perhaps the most readily observable problem created by wireless towers is the unsightly imprint left upon natural scenery. “[C]ell towers often rise well above the tree line and do not fit harmoniously within their surroundings.”²⁶ Most frequently it is “the aesthetic impact of towers that drives people to fight construction so vehemently.”²⁷ Unlike RF emissions, the TCA permits local governments to regulate tower construction based on aesthetic or wildlife concerns, as long as the regulation does not otherwise unfairly differentiate between providers or have the effect of prohibiting wireless service.²⁸ Indeed, premising regulation on an environmental concern may work in favor of the local regulator. For example, in *Voicestream Minneapolis, Inc. v. St. Croix County*, the county successfully prevented the construction of a 185-foot tower in a scenic river district “designated under the Wild and Scenic Rivers Act in 1972 . . . to protect its outstandingly remarkable scenic, recreational and geologic values for present and future generations.”²⁹

However, municipalities are not always successful in preventing tower construction based on aesthetic criteria. In 1989, Mark J. Abrams received a permit from the City of Rancho Palos Verdes, California (“City”) “to construct a 52.5-foot antenna on his property for amateur use.”³⁰ The high elevation of the property “near the peak of the Rancho Palos Verdes Peninsula”³¹ made the location “both scenic and . . . ideal for radio transmissions.”³² After learning of unauthorized commercial use, the City obtained an injunction in 1999, “preventing Abrams from using his antenna for commercial purposes until he obtained a conditional use permit.”³³ The City Planning Commission denied Abrams’s permit application, noting that “permission to operate commercially ‘would perpetuate . . . adverse visual impacts’ from [Abrams’s] existing antennas and establish precedent for similar projects in residential areas in the future.”³⁴ In response, Abrams filed an action in federal district court claiming that the City violated his rights under the TCA.³⁵ “Abrams sought declaratory relief, injunctive re-

2005, at A01.

²⁶ Long, *supra* note 19, at 388.

²⁷ *Id.*; see Niehaus, *supra* note 15, at 653 (noting that “[t]hese concerns generally relate to the visibility of the structure above the tree line and the effect the structure will have on property values and the ‘character’ of the surrounding neighborhood.”). See also Iowa Wireless Services, 29 F. Supp. 2d at 918 (noting citizens’ concern that an additional tower would “blight the landscape”). For more on aesthetic effects, see *infra* notes 77–80 and accompanying text.

²⁸ See Niehaus, *supra* note 15, at 653.

²⁹ 342 F.3d 818, 822 (7th Cir. 2003). The court found that the county’s denial of a special exception permit did not have the effect of prohibiting the provision of personal wireless services in violation of the TCA. *Id.* at 821. See also 16 U.S.C. § 1271 (2000).

³⁰ *Abrams*, 125 S. Ct. at 1456.

³¹ *Id.*

³² *Id.*

³³ *Abrams v. City of Rancho Palos Verdes*, 354 F.3d 1094, 1096 (9th Cir. 2004).

³⁴ *Abrams*, 125 S. Ct. at 1456.

³⁵ *Abrams*, 354 F.3d at 1096. Abrams also filed in state court “a cross-complaint, alleg-

lief, damages, attorney's fees, and costs"³⁶ under § 1983, a remedial provision pertaining to civil actions for deprivation of rights.³⁷ Finding no valid reason for the City to deny Abrams's permit,³⁸ the district court ordered the City to grant the permit, but concluded that the TCA foreclosed all requested § 1983 remedies.³⁹ Abrams appealed to the Ninth Circuit.

The question in the Ninth Circuit appeal was "whether the TCA contains a comprehensive remedial scheme, evincing Congress's intent to preclude remedies under § 1983."⁴⁰ By satisfying the initial burden of proving a federal statutory right, a plaintiff creates a presumption of entitlement to § 1983 remedies, rebuttable only by proof that Congress either expressly or impliedly foreclosed such remedies.⁴¹ As the TCA contains no express foreclosure, the court focused on implied foreclosure, which occurs when Congress creates a comprehensive enforcement scheme incompatible with § 1983 enforcement.⁴² Disagreeing with the Third Circuit,⁴³ the Ninth Circuit Court of Appeals maintained that the TCA contains only *procedural* provisions such as expedited judicial review, and was hence compatible with § 1983 remedies.⁴⁴ The TCA's lack of *remedial* provisions, reasoned the court, was indicative not of congressional intent to foreclose damages, but of intent to preserve § 1983 relief.⁴⁵ Finding that the City failed to rebut the presumption of § 1983 remedies, the court held that Abrams was entitled to these damages.⁴⁶ The decision reinforced an already significant split among the courts as to the availability of § 1983 damages under the TCA.⁴⁷

ing that the city's permit requirement was preempted because it prohibited the use of frequencies allocated to him and his customers by the FCC." *City of Rancho Palos Verdes v. Abrams*, 101 Cal. App. 4th 367, 370, 373 (Cal. Ct. App. 2002) (holding that federal telecommunications law preempted the injunction).

³⁶ *Abrams*, 354 F.3d at 1096.

³⁷ 42 U.S.C.A. § 1983 (2005). "Section 1983 provides a federal cause of action for citizens whose federal rights, both constitutional and statutory, have been violated by a state actor under color of state law. . . . Section 1983 creates no rights. Rather, it provides a remedy for rights established elsewhere in federal law." Jacques & Beerman, *supra* note 6, at 743.

³⁸ For a discussion of the standards applied to aesthetic regulation of tower siting, see *infra* notes 82–84 and accompanying text.

³⁹ *Abrams*, 354 F.3d at 1096. The issue of whether a § 1983 action should be available under the TCA is discussed at length in Jacques & Beerman, *supra* note 6.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 1096–97.

⁴³ See *Nextel Partners, Inc. v. Kingston Township*, 286 F.3d 687 (3d Cir. 2002) (holding that the TCA creates a comprehensive remedial scheme that provides private judicial remedies such that a claim for remedial relief under § 1983 may not be asserted).

⁴⁴ *Abrams*, 354 F.3d at 1098–99.

⁴⁵ *Id.*

⁴⁶ *Id.* at 1101.

⁴⁷ Compare *Omnipoint Communications, Inc. v. City of White Plains*, 175 F. Supp. 2d 697, 707 (S.D.N.Y. 2001) and *SBA Communications, Inc. v. Zoning Comm'n*, 164 F. Supp. 2d 280, 294–95 (D. Conn. 2001) (holding that § 1983 does apply) with *Primeco Pers. Communications, L.P. v. City of Mequon*, 242 F. Supp. 2d 567, 581 (E.D. Wis. 2003) and *Qwest*

The City petitioned the Supreme Court for a writ of certiorari on May 25, 2004,⁴⁸ and was granted certiorari on September 8, 2004.⁴⁹ Underlying the parties' formalistic arguments was a broader debate over the purpose of the TCA and the role of local government in regulating telecommunications. Depicting local governments as beholden to rampant NIMBY-ism, the respondents argued for a greater need for § 1983 remedies to help effectuate the TCA's purpose of encouraging telecommunications expansion without undue local interference.⁵⁰ Conversely, in portraying the TCA as a necessary compromise between the need for national telecommunications networking and the importance of continuing local regulation,⁵¹ the petitioners intimated that § 1983 remedies were far too drastic a measure.

Formalistic arguments focused around the application of *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, in which the Supreme Court held that the Federal Water Pollution Control Act Amendments of 1972 ("Clean Water Act")⁵² and the Marine Protection, Research, and Sanctuaries Act of 1972 ("Marine Protection Act")⁵³ provided a comprehensive remedial scheme that supplants any remedy that would otherwise be available under § 1983.⁵⁴ Citing the Third Circuit's decision in *Nextel Partners, Inc. v. Kingston Township*,⁵⁵ the petitioners argued that, de-

Corp. v. City of Santa Fe, 224 F. Supp. 2d 1305, 1314–16 (D.N.M. 2002) (holding that § 1983 does not apply).

⁴⁸ Petition for a Writ of Certiorari, *City of Rancho Palos Verdes, Cal. v. Abrams*, 125 S. Ct. 26 (2004) (No. 03-1601).

⁴⁹ *City of Rancho Palos Verdes, Cal. v. Abrams*, 125 S. Ct. 26 (2004).

⁵⁰ See Brief for the Respondents at 1-3, *Abrams*, 125 S. Ct. 26 (2004) (No. 03-1601) [hereinafter Brief for the Respondents].

NIMBY [Not In My Back Yard] describes the common phenomenon of individuals stridently opposing the placement of unpopular facilities in their communities even when everyone agrees that such facilities are necessary to the public good and should be placed somewhere—but always elsewhere Wireless service providers encountered this NIMBY problem in its classic form beginning in the 1990s, when demand for wireless service exploded but consumers who enjoyed the benefits of that service opposed siting of antennas in their communities.

Id. at 2. For extensive discussion of the NIMBY problem in the context of cellular tower siting, see generally Steven J. Eagle, *Wireless Telecommunications, Infrastructure Security, and the NIMBY Problem*, 54 CATH. U. L. REV. 445 (2005).

⁵¹ See Brief for the Petitioners at 1–4, *Abrams*, 125 S. Ct. 26 (2004) (No. 03-1601) [hereinafter Brief for the Petitioners].

⁵² 33 U.S.C.A. § 1365(e) (2005).

⁵³ *Id.* § 1415(g)(5) (2005).

⁵⁴ 453 U.S. 1, 22 (1981).

These Acts contain unusually elaborate enforcement provisions, conferring authority to sue for this purpose both on government officials and private citizens. The [Clean Water Act], for example, authorizes the EPA Administrator to respond to violations of the Act with compliance orders and civil suits He may seek a civil penalty of up to \$10,000 per day, and criminal penalties also are available.

Id. at 13–14 (internal citations omitted).

⁵⁵ 286 F.3d 687 (3d Cir. 2002).

spite the simplicity of the TCA's remedial provisions, they are "comprehensive in the relevant sense,' providing 'private judicial remedies that incorporate both notable benefits and corresponding limitations.'"⁵⁶ This position was supported in an amicus brief filed by the U.S. government, which noted that a "statutory scheme need not be complex in order to be sufficiently comprehensive to reflect an intent to foreclose resort to § 1983."⁵⁷ Specifically, the petitioners pointed to the TCA's provisions for local administrative review, expedited judicial review, and a thirty-day statute of limitations as conclusive evidence of congressional intent to supersede § 1983.⁵⁸

The respondents asserted that these provisions fell well short of the judicial relief provided for in *Sea Clammers* or *Smith v. Robinson*,⁵⁹ the only other Supreme Court case in which a remedial scheme was found sufficiently comprehensive to supplant § 1983.⁶⁰ As argued in an amicus brief, "[t]he bare-bones right of action created by [the TCA] hardly qualifies as an enforcement 'scheme' at all, let alone a comprehensive one."⁶¹ The respondents further maintained that *Sea Clammers* and its progeny "do not hold, as petitioners and the United States suggest, that the § 1983 remedy is barred whenever Congress states elsewhere, in a statute conferring a federal right, that a plaintiff may obtain relief in the courts for a violation of that right."⁶²

The Supreme Court agreed with the respondents in rejecting the assertion that "the availability of a private judicial remedy is not merely indicative of, but conclusively establishes, a congressional intent to preclude § 1983 relief."⁶³ However, the majority noted that private statutory remedies normally indicate congressional intent to foreclose more expansive relief under § 1983.⁶⁴ According to Justice Stevens in concurrence, the majority hence failed to adequately acknowledge the strong presumption that "Congress intended to preserve, rather than preclude, the availability of § 1983."⁶⁵ The Court found no evidence that the TCA was intended to complement § 1983, but rather that § 1983 conflicted with the TCA's expedited

⁵⁶ Brief for the Petitioners, *supra* note 51, at 19.

⁵⁷ Brief for the United States as Amicus Curiae Supporting Petitioners at 10, *Abrams*, 125 S. Ct. 26 (2004) (No. 03-1601).

⁵⁸ Brief for the Petitioners, *supra* note 51, at 23–25.

⁵⁹ 468 U.S. 992 (1984).

⁶⁰ Brief for the Respondents, *supra* note 50, at 21–22. *But see* Brief for the Petitioners, *supra* note 51, at 23–25 (citing *Great American Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366 (1978)) (Petitioners point out additional cases in which remedial schemes have supplanted 42 U.S.C. § 1985(3), which serves a similar function as § 1983.).

⁶¹ Brief of Public Citizen, Inc. as Amicus Curiae Supporting Respondent at 2, *Abrams*, 125 S. Ct. 26 (2004) (No. 03-1601).

⁶² Brief for the Respondents, *supra* note 50, at 22–23.

⁶³ *Abrams*, 125 S. Ct. at 1459.

⁶⁴ *Id.* at 1458.

⁶⁵ *Id.* at 1464 (Stevens, J., concurring).

judicial review and limited remedies.⁶⁶ In particular, the Court was wary of the availability of attorney's fees under § 1983, "which would have a particularly severe impact in the [TCA] context, making local governments liable for the (often substantial) legal expenses of large commercial interests for the misapplication of a complex and novel statutory scheme."⁶⁷ Hence, the majority disagreed both with the lower court's heavy presumption of non-preclusion, as well as its ultimate conclusion that the TCA's provisions were not in conflict with § 1983.

The Court also disagreed with the interpretation of the TCA's alleged saving clause upon which the Court of Appeals partially premised its decision. The TCA states that no provision of the statute shall "be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided."⁶⁸ While the Court of Appeals read this as an indication of Congressional intent not to preclude § 1983, the Supreme Court observed that the clause merely indicates that the TCA must leave unaffected the pre-TCA operation of § 1983.⁶⁹ The purported saving clause thus having no bearing, the Court reversed and remanded the judgment of the Court of Appeals.⁷⁰

ANALYSIS

The passage of the TCA ushered in a bleak era for municipalities wishing to regulate tower siting based on environmental concerns,⁷¹ but the Court's decision in *Abrams* is a significant victory both for local government and for environmentalism. This case comes after another important victory in *Sprint Spectrum L.P. v. Mills*, where a school district's attempt to limit RF emissions 13,000 times below the federal maximum was not preempted by the TCA because the school district acted in a proprietary capacity rather than a regulatory capacity.⁷² That is, publicly owned property may contain a lease provision restricting RF emissions more stringently than the FCC's guidelines.⁷³ While *Abrams* does not reallocate local

⁶⁶ *Id.* at 1460.

⁶⁷ *Id.* Discussion of attorney's fees figured prominently in oral arguments, with Justices Scalia and Kennedy particularly concerned about the potential costs imposed upon small municipalities. Justice Stevens also noted that attorney's fees might not be necessary to incentivize TCA actions, as TCA plaintiffs tend to be well-financed corporations rather than typical § 1983 plaintiffs. Transcript of Oral Argument at 41–50, *Abrams*, 125 S. Ct. 1 (2005) (No. 03-1601) [hereinafter Oral Argument].

⁶⁸ TCA § 601(c)(1), 110 Stat. 143, note following 47 U.S.C. § 152 (2000).

⁶⁹ *Abrams*, 125 S. Ct. at 1461–62.

⁷⁰ *Id.* at 1462; *Abrams v. City of Rancho Palos Verdes*, 406 F.3d 1094 (9th Cir. 2005) (on remand ordering affirmation of the judgment of the district court).

⁷¹ Long, *supra* note 19, at 404.

⁷² 283 F.3d 404, 417–20 (2d Cir. 2002) (noting that the municipality owned the property, and the RF limitations were included within the lease of space to the telecommunications company).

⁷³ *Id.*

regulation based on RF emissions, by eliminating fear of § 1983 remedies, the decision does allow local governments to more freely experiment with alternative limitations as in *Sprint Spectrum*. For example, a local government concerned by RF exposure could attempt to validate the regulation on the basis of setback safety standards: “a tower too close to property lines creates a hazardous situation because the tower may fall onto adjoining pieces of property in harsh weather conditions.”⁷⁴ However, because towers that comply with the FCC’s guidelines may in fact pose little human health danger with respect to RF emissions, it is questionable whether *Abrams* will have a significant environmental effect in this respect.

The Court’s decision has greater environmental effect with respect to aesthetic regulation of tower siting. Cellular towers have severely impacted scenic wilderness,⁷⁵ and “[d]espite a landscape dotted with wireless antennas, the need for new antennas appears to be unabated.”⁷⁶ Cellular towers are now being sited in naturally scenic areas traditionally reserved for wilderness, such as “the forests of South Jersey’s 1.1-million-acre Pinelands preserve.”⁷⁷ Towers have even been constructed within our national parks.⁷⁸ “The result, critics say, is a much-degraded visual experience when a tower sprouts on an otherwise pristine landscape”⁷⁹ Creative attempts at camouflaging are widespread,⁸⁰ but cellular towers rarely blend truly with nature.⁸¹ As construction persists at a rapid pace, tower aesthetics will un-

⁷⁴ Long, *supra* note 19, at 405; *id.* at 406 (“Despite the reality that most towers are now built in collapsible segments that cause a tower to fall close to its base, courts have, on occasion, accepted this line of reasoning.”).

⁷⁵ See, e.g., O’Connor, *supra* note 9, at 315–16.

[T]he tip of Kearsarge reaches a modest 2937 feet, though its distance from the White Mountains allows panoramic views that reach from Vermont’s Green Mountains to Boston. The geographic isolation that provides hikers to Kearsarge’s summit with such a view, however, also provides telecommunications equipment with ideal unobstructed radio wavelengths. In 1997, U.S. Cellular Corporation planted a 180-foot lattice cell tower atop Mount Kearsarge, prompting local outrage ranging from litigation brought by citizens of Warner, to press describing the tower as a “huge, glittering one-finger salute.”

Id.

⁷⁶ Brief of Local Governments and Related Associations as Amici Curiae in Support of Petition for a Writ of Certiorari at 18, *Abrams*, 125 S. Ct. 26 (2004) (No. 03-1601).

⁷⁷ Karen Masterson, *Digital Phone Era Dawns in Pinelands to Clear the Way*, PHILA. INQUIRER, Jan. 17, 2000, at B03 (“And they want to put these things up in scenic places, like near the pygmy pine forests.”).

⁷⁸ Clayton, *supra* note 2, at 17 (noting there is even a cellular tower in view of Old Faithful in Yellowstone Park).

⁷⁹ *Id.*

⁸⁰ See Arthur H. Rotstein, *Cell Phone Towers Hidden with “Nature,”* DESERET NEWS, Sept. 15, 2002, at M01. “[T]he affluent Seattle suburb of Redmond was threatened with court action by three telecommunications firms after requiring them to disguise a cell tower as an evergreen tree Through mediation, Redmond and the companies settled on a 100-foot pole painted green, with all cables and antennas inside.” *Id.*

⁸¹ See, e.g., Carin Rubenstein, *The Girded, The Bland And the Prickly*, N.Y. TIMES, July 11, 2004, at 14WC (describing a disguised tower as “a mutant conifer”).

doubtedly continue to be a growing source of concern, both among environmentalists and NIMBYists.

Because of the absence of clear guidelines regarding aesthetic regulation under the TCA, the unavailability of § 1983 damages is of particular importance with respect to such restrictions. Although the TCA permits local aesthetic regulation under general and nondiscriminatory standards,⁸² “a few generalized expressions of concern” over aesthetics cannot alone support a permit denial.⁸³ Rather than pre-established standards for permissible aesthetic tower-siting regulation, the courts have engaged in case-by-case factual inquiries: “Because few people would argue that telecommunications towers are aesthetically pleasing, a local zoning board’s aesthetic judgment must be grounded in the specifics of the case.”⁸⁴ Absent clear-cut rules with which municipalities may safely comply, crafting local tower-siting regulation risks lawsuits contesting the criteria for rejection of permits. The amicus briefs filed by numerous state and local government organizations in support of the petitioners evince the criticality of this point, as well as the importance of the *Abrams* decision.⁸⁵

There . . . appears to be no let-up in the lawsuits that wireless carriers are filing against local governments when their applications for permits are denied. Emboldened by the Ninth Circuit’s decision, wireless carriers may be even more willing to take cash-strapped cities to court to challenge zoning decisions that don’t go their way.⁸⁶

⁸² *Aegerter v. City of Delafield*, 174 F.3d 886, 891 (7th Cir. 1999).

⁸³ *New Par v. City of Saginaw*, 301 F.3d 390, 398 (6th Cir. 2002).

⁸⁴ *VoiceStream*, 342 F.3d at 831 (internal quotation omitted) (citing *Southwestern Bell Mobile Sys. v. Todd*, 244 F.3d 51, 61 (1st Cir. 2001)).

⁸⁵ *See, e.g.*, Brief of the National League of Cities, et al. as Amicus curiae Supporting Petitioners, *Abrams*, 125 S. Ct. 26 (2004) (No. 03-1601); Brief of Local Governments and Related Associations as Amici Curiae Supporting Petitioners, *Abrams*, 125 S. Ct. 26 (2004) (No. 03-1601). *See also* Laurie Dichiara, *Wireless Communication Facilities: Siting for Sore Eyes*, 6 BUFF. ENVTL. L.J. 1, 2 (1998-1999) (noting that “the proliferation of wireless facility sites is one of the most significant contemporary land use challenges facing local communities”).

⁸⁶ Brief of Local Governments, *supra* note 76, at 18.

Many cities in California and other states must close huge budget deficits. Fighting these claims could lead to ruinous damages and fee awards. For example, the City of Carlsbad, California, recently agreed to pay AT&T Wireless \$250,000 in attorney’s fees to settle a wireless siting dispute after AT&T Wireless had asked for \$640,000. The district court had previously ruled that Carlsbad’s decision to deny AT&T Wireless a conditional use permit to construct a wireless facility was not based on substantial evidence.

The threat of lawsuits may chill local government regulation, even with respect to restrictions that are most likely permissible under the TCA.⁸⁷ Without exposure to § 1983 damages, municipalities are far more likely to regulate on the basis of aesthetics.

Municipalities may also be more willing to incorporate other environmental considerations, such as wildlife impact, in determining whether to grant permits for tower construction. For example, municipalities could implement uniform design requirements that do not discriminate between providers. “Tower design . . . affects bird kills. Guy wires, for instance, often kill as many birds as the tower. A self-supporting tower is less likely to attract and kill birds.”⁸⁸ Although a design requirement could potentially lead to litigation if it had the practical effect of prohibiting the provision of personal wireless services, *Abrams* makes this a more acceptable risk.

By precluding § 1983 damages against local governments, the Court’s decision also helps to properly rebalance judicial application of the TCA. While the creation of a seamless telecommunications network requires regulations to be implemented nationally, land use control has traditionally fallen within the realm of local government.

As the First Circuit describes, the TCA “works like a scale that, inter alia, attempts to balance two objects of competing weight: on the one arm sits the need to accelerate the deployment of telecommunications technology, while on the other arm rests the desire to preserve state and local control over land use matters.”⁸⁹

By ensuring that local governments are not chilled from exercising power within their traditional regulatory sphere, *Abrams* preserves and facili-

⁸⁷ See Brief of the National League of Cities, *supra* note 85, at 13.

The chilling effect on local government zoning authority as a consequence of applying § 1983 for violations of the 1996 Act is significant Many local governments will decide that visual, aesthetic and safety concerns are ‘not worth fighting for’ in light of the possibility of having to pay their opponents’ legal fees.

Id.

⁸⁸ Pavey, *supra* note 25, at A01.

⁸⁹ Robert B. Foster & Mitchell A. Carrel, *Patchwork Quilts, Bumblebees, and Scales: Cellular Networks and Land Use Under the Telecommunications Act of 1996*, 36 URB. LAW. 399, 399 (noting that “courts have struggled to find the right balance between its sometimes contradictory goals.”). See Mariah E. Murphy, *A Proposal for Achieving Consistency in the Implementation of the Telecommunications Act of 1996, and Maintaining Local Land Use Laws*, 19 TEMP. ENVTL. L. & TECH. J. 205, 212–14 (2001) (noting that “Congress wished to prevent the arbitrary denial of the placement of towers facilitating the use of wireless transmissions, while vesting the ultimate decision regarding the placement of such towers in the local governing agencies”). See also Jennifer A. Floyd, *Preemption of Local Governments’ Authority to Limit Wireless Phone Service is a Tough “Cell” Under the Telecommunications Act*, 66 MO. L. REV. 205, 206 (2001) (noting that “[a] debate currently exists as to the scope of land use control rights that Congress intended to provide local governments” under the TCA).

tates a balanced interaction between these opposing objectives. The decision leaves untouched the TCA's substantive prohibitions,⁹⁰ while allowing municipalities to less perilously reject permit applications and attempt innovative regulations that may fall outside of the TCA's prohibitions.

In this way, *Abrams* also demonstrates that the statutory preclusion of § 1983 remedies can actually have a pro-environmental outcome. The *Sea Clammers* case, which established the comprehensive remedial scheme standard for § 1983 preclusion,⁹¹ has widely been considered a blow to environmentalism.⁹² The plaintiffs in *Sea Clammers* "alleg[ed] damage to fishing grounds caused by discharges and ocean dumping of sewage and other waste,"⁹³ but were unable to recover § 1983 damages because the Clean Water Act and Marine Protection Act supplanted the remedies.⁹⁴ The Supreme Court's decision in *Sea Clammers* had a negative environmental impact because it weakened the incentive for plaintiffs to bring suit under the Clean Water Act (and weakened the disincentive for pollution). Conversely, the outcome in *Abrams* suggests that municipalities are more likely to attempt aesthetic or environmental tower siting regulation. On the other hand, the Court's decision will probably not disincentivize suits brought under the TCA, since typical plaintiffs in TCA actions—large and well-funded telecommunications companies⁹⁵—are unlikely to be dissuaded by the unavailability of § 1983 remedies.⁹⁶ *Abrams* can only be seen as an environmental victory, which if nothing else should encourage more environmentally thoughtful placement or concealment of new telecommunications facilities. Hence, although the preclusion of § 1983 remedies has in the past been associated with a negative environmental outcome, *Abrams* proves that the preclusion doctrine established by the Supreme Court in *Sea Clammers* in fact cuts both ways.

The need for a reliable nationwide telecommunications network will only grow in coming years, driven by consumer demand for convenience as well as by business demand for dependable and accommodating communications infrastructure. The construction of tall and unsightly wireless towers will likely continue to be an inevitable byproduct of this demand. In

⁹⁰ See *supra* notes 12–14 and accompanying text.

⁹¹ See *supra* note 54 and accompanying text.

⁹² See Joel A. Mintz, *Can You Reach New "Greens" if you Swing Old "Clubs": Underutilized Principles of Statutory Interpretation and Their Potential Applicability in Environmental Cases*, 7 ENVTL. LAW. 295, 313 (2000-2001) (noting that the "application of the equity of the statute doctrine might [have] yield[ed] a more favorable result to advocates of environmental protection and environmental justice"). Cf. Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 429 (1989) (characterizing *Sea Clammers* as a pro-development exercise of judicial restraint).

⁹³ *Sea Clammers*, 453 U.S. at 1.

⁹⁴ *Id.* at 21.

⁹⁵ See Oral Argument, *supra* note 67, at 41–50.

⁹⁶ Small plaintiffs, such as *Abrams*, are far more likely to be dissuaded from a potentially expensive trial by the lack of § 1983 remedies.

drafting the TCA, Congress recognized that, in order to stimulate the provision of a valuable communal good, it was necessary to overcome the NIMBY mentality associated with cellular tower construction.⁹⁷ Fortunately, in *Abrams*, the Supreme Court did not lose sight of an equally important concern of Congress: retaining local tower-siting regulation that does not unduly interfere with the provision of wireless services.

⁹⁷ See Brief for the Respondents, *supra* note 50, at 1–3.

