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Case No. _____

IN THE SUPREME COURT OF CALIFORNIA

T-MOBILE WEST LLC, CROWN CASTLE NG WEST LLC, AND EXTENET SYSTEMS (CALIFORNIA) LLC,

Plaintiffs and Petitioners,

v.

THE CITY AND COUNTY OF SAN FRANCISCO AND CITY AND COUNTY OF SAN FRANCISCO DEPARTMENT OF PUBLIC WORKS,

Defendants and Respondents.

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 City and County of San Francisco, Case No. CGC-11-510703

The Honorable James McBride, Judge

PETITION FOR REVIEW

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ISSUES PRESENTED FOR REVIEW

1. Whether, in the context of a facial preemption challenge, petitioners must show that "no set of circumstances" exists under which a challenged law could be validly applied?

2. Whether local authorities may "adjust the balance" between technological progress and aesthetics by enacting regulations that apply only to particular technologies, limiting their ability to provide services to California consumers, notwithstanding the Legislature's determination in Public Utilities Code § 7901 that there is a statewide interest in allowing access to the rights-of-way for those technologies?

3. Whether Public Utilities Code § 7901.1, clarifying that local authorities may exercise reasonable control over the "time, place, and manner" in which public rights–of-way are "accessed," is limited only to temporary or transient activities, or should be read more broadly to include long-term occupation?

WHY REVIEW SHOULD BE GRANTED

In order to guarantee the people of California the benefit of the continuing development of telecommunications technology, the State Legislature long ago granted telecommunications providers a statewide statutory right to use the public rights-of-way. This Court has consistently protected that right by holding that local laws inhibiting the deployment of new technologies are preempted. It is no accident that California—the engine of technology growth for the United States and the entire world—has long enjoyed deployment of state-of-the-art communications technologies that benefit all Californians.

The California of tomorrow will be even more exciting. The deployment of advanced fifth generation ("5G") wireless technology will unlock the potential of "super-fast wireless broadband, smart-city energy grids and water systems, immersive education and entertainment, and an unknowable number of innovations" facilitated by telephone communications. (*In re Use of Spectrum Bands Above 24 GHz for Mobile Radio Services* (2016) 31 FCC Rcd. 8014, 8270 ("*Spectrum Order*").) And while "5G buildout is going to be very infrastructure intensive, requiring a massive deployment of small cells" nationwide, these new wireless facilities are smaller and less intrusive than ever. (Remarks of FCC Chairman Tom Wheeler, *The Future of Wireless: A Vision for U.S. Leadership in a 5G World* (FCC 2016) 2016 WL 3430263, at *4 ("*Wheeler*

Remarks").) As it has for more than 150 years, the State franchise will enable telephone corporations to connect Californians to each other and the world.

At this critical moment in the deployment of new wireless technology, the City and County of San Francisco ("San Francisco" or "City") enacted an ordinance that turns back the clock. Although "wireless" facilities are the same size or smaller than legacy facilities already maintained in the rights-of-way, San Francisco subjects only wireless facilities to discretionary (and discriminatory) pre-deployment "aesthetic" review. This regime withdraws the primary benefits of the State franchise from the providers who are building the most advanced technology today and will build the 5G network of tomorrow. Indeed, cities across the State are already following San Francisco's lead, imposing their own onerous restrictions on wireless buildout.

The court below affirmed San Francisco's unlawful practice. In a published opinion applying an incorrect standard of review, the Court of Appeal wrongly held that this local intrusion on the State franchise is not preempted, creating two significant conflicts of authority and adopting a clearly erroneous interpretation of an important State statute. This Court should grant review to "secure uniformity of decision" and "settle [] important question[s] of law," (Cal. Rules of Court, rule 8.500(b)(1)), on

three key issues related to the State telecommunications franchise and the proper standard of review for facial preemption challenges:

First, the Court should grant review to resolve a split of authority regarding the standard of review applicable to facial preemption challenges. The court below incorrectly held that Petitioners' challenge could only succeed if there were "no set of circumstances" where the ordinance could be validly applied. This Court and other California courts have declined to apply this test to facial preemption challenges, (*see, e.g.*, *Am. Fin. Servs. Ass'n v. City of Oakland* (2005) 34 Cal.4th 1239, 1251-52; *San Francisco Apartment Ass'n v. City & Cty. of San Francisco* (2016) 3 Cal.App.5th 463, 702), and the U.S. Supreme Court, which originated the stringent language, has likewise declined to apply it to facial preemption challenges, (*see, e.g.*, *Arizona v. United States* (2009) 132 S.Ct. 2492, 2500.) The Court of Appeal's decision thus creates a significant split. This Court has an important role to play in clarifying the appropriate standard of review for facial preemption challenges, in order to protect the efficacy and consistency of State law and policy against local encroachment in various settings.

Second, this Court should grant review to resolve the split of authority the decision below creates regarding municipalities' ability to regulate rights-of-way use based on claimed aesthetic or similar concerns. This Court and the Courts of Appeal have long recognized that the purpose

of the State franchise established by Section 7901 of the Public Utilities Code is to foster deployment of technologically advanced telecommunications facilities and services to the public. (*See, e.g.*, *Pac. Tel. & Tel. Co. v. City of Los Angeles* (1955) 44 Cal.2d 272, 282 ("*Pacific Telephone*"); *Williams Commc'ns, LLC v. City of Riverside* (2003) 114 Cal.App.4th 642, 653.) Yet, the decision below permits the City to "adjust the balance" between technological advancement and other concerns, (Opn. 1), and to single out individual telecommunications technologies for less favorable treatment. The Court of Appeal's decision jeopardizes decades of precedent establishing the proper role of municipalities with regard to the State franchise granted to telephone corporations.

Third, this Court should grant review to clarify that Section 7901.1 of the Public Utilities Code requires San Francisco to treat all rights-of-way occupants "in an equivalent manner." Section 7901.1 permits municipalities to exercise "reasonable control" over the "time, place, and manner" of access to public rights-of-way, and provides that all entities must be treated "in an equivalent manner." In holding that Section 7901.1 applies to only temporary construction activities and occupations of the public rights-of-way, the court below permits localities to discriminate among technologies or providers in regulating long-term occupation. This poses a grave threat to the rights guaranteed by Section 7901. This unfortunate and novel interpretation of Section 7901.1 comes at a critical

time in the rollout of innovative wireless facilities. If not corrected, the Court of Appeal's holding threatens to open the floodgates for discriminatory regulation, undermine the buildout of new technologies, and leave Californians behind when it comes to innovative telecommunications services—precisely the benefits the statewide franchise was designed to secure. This Court should grant review to correct the Court of Appeal's misreading of the statute and prevent a rush of new ordinances that could undermine well-established State franchise rights.

STATEMENT OF THE CASE

A. The State Franchise

Since 1850, the State of California has by statute authorized the construction and maintenance of telegraph and telephone lines in the roads, highways, and other public places in this State. (*Pac. Tel. & Tel. Co. v. City & Cty. of San Francisco* (1959) 51 Cal.2d 766, 769 ("*Pacific Telephone I*").) Section 7901 empowers "telegraph or telephone corporations" to "construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and ... erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines."[1] As the court below acknowledged and the City stipulated,

[1] Unless otherwise indicated, all statutory citations are to the Public Utilities Code.

Petitioners are "telephone corporations" and their wireless facilities are "telephone lines" within the meaning of the statute. (Opn. 2.)

The State franchise is not an unlimited right. Companies must exercise the franchise "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." (§ 7901.)

Section 7901.1 preserves for municipalities the ability to exercise "reasonable control" with respect to the "time, place, and manner" in which telecommunications companies access public rights-of-way. (§ 7901.1(a).) But municipal power in this sphere is circumscribed, and at a minimum, must "be applied to all entities in an equivalent manner." (§ 7901.1(b).)

B. The City Ordinance

In January 2011, the San Francisco Board of Supervisor adopted Ordinance No. 12-11, codified as Article 25 of the San Francisco Public Works Code ("Ordinance"). (A00192-93.) The Ordinance imposes several restrictions on the deployment of wireless facilities on existing poles, including placing a two-year term limit on facility permits, providing no means for continuance or automatic renewal of previously granted permits, and requiring permit applicants to obtain environmental approval from the City Planning Department. (A00194-216.) In addition, the Ordinance conditions permits for "wireless" equipment on aesthetic approval by the City and a showing of technological or economic necessity. The Ordinance

applies only where there are existing utility poles and equipment in the public rights-of-way, and only to wireless facilities used to provide "personal wireless service." (A00194-96.) No similar requirements are applied to other telecommunications facilities, regardless of whether they have similar—or even greater—visual impact on the rights-of-way.

In May 2011, Petitioners challenged the Ordinance, along with implementing regulations issued by the San Francisco Department of Public Works, on both State and federal preemption grounds before the Superior Court for the State of California and County of San Francisco. Petitioners argued that the Ordinance interfered with or prevented Petitioners from exercising their franchise rights in violation of Sections 7901 and 7901.1, and that as applied to modifications of existing eligible facilities, the Ordinance was preempted by 47 U.S.C. § 1455(a). Petitioners sought declaratory and injunctive relief.

C. The Superior Court Decision

On November 26, 2014, the Superior Court issued its final statement of decision on Petitioners' action for declaratory and injunctive relief. (A00840.) The court held that Section 7901 permits municipalities to consider aesthetics in assessing whether proposed telecommunications facilities would "incommode the public use" of rights-of-way. (A00843, A00845-46.)

In addition, although the court found that no other occupants of utility poles in the public rights-of-way were required to "obtain any site-specific permit as a condition of installing facilities" similar in size and appearance to Petitioners' facilities (and sometimes even larger), (A00847-49), the court held that Petitioners failed to sustain their burden of proving that the disparate treatment of personal wireless service facilities violates Section 7901.1's "equivalent manner" mandate, (A00846.) Finally, the court held that the technological and economic necessity requirements are preempted by Section 7901, and the provisions relating to facilities modifications are preempted by 47 U.S.C. § 1455(a). (A00849-50.)

Petitioners filed a timely notice of appeal from the Superior Court's judgment to the Court of Appeal of the First Appellate District, Division Five.

D. The Court Of Appeal Decision

On September 15, 2016, the Court of Appeal affirmed the Superior Court's decision. With respect to Section 7901, the court held "[n]othing in section 7901 explicitly prohibits local government from conditioning the approval of a particular siting permit on aesthetic concerns" because "'incommode the public use' 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.'" (Opn. 21-22.)

In addition, the Court of Appeal found that Section 7901.1 and its requirement that municipalities treat "all entities in an equivalent manner" applies only to "temporary access" because the statute authorizes "time, place, and manner" regulation, and thus does not apply to the Ordinance, which governs permitting for long-term occupation of existing poles. (Opn. 24.) The court did not examine whether its construction of "time, place, and manner" was consistent with case law.

In analyzing Petitioners' facial preemption challenge, the Court of Appeal applied a standard of review under which a provision is preempted only if "no set of circumstances exists" under which the law would be valid. (Opn. 8.) Using this standard—which has never been adopted by this Court—the court rejected Petitioners' facial challenge because it could "imagine" a set of circumstances where "a large wireless facility might aesthetically 'incommode' the public use of the right-of-way." (*Id.* at p. 22.)

On September 30, 2016, Petitioners timely filed a Petition for Rehearing, which was denied on October 13, 2016. (Rehearing Or. 1.) The court modified its opinion in part, but did not alter the judgment. (*Ibid.*)

DISCUSSION

I. THIS COURT SHOULD RESOLVE A SPLIT OF AUTHORITY OVER THE PROPER STANDARD OF REVIEW IN FACIAL PREEMPTION CHALLENGES TO ENSURE THE EFFICACY AND CONSISTENCY OF STATE LAW.

This Court should grant review to resolve a split of authority regarding the showing challengers must make when bringing a facial preemption challenge to a local ordinance. The court below held that Petitioners' facial preemption challenge could succeed only if Petitioners established that "no set of circumstances exists under which the [Ordinance] would be valid," (Opn. 8), even though this Court has never applied that test to a facial preemption challenge, (*see, e.g.*, *American Financial*, *supra*, 34 Cal.4th at pp. 1251-52), and other divisions have rejected it, (*see, e.g., San Francisco Apartment*, *supra*, 3 Cal.App.5th at p. 702.)

This Court has an important role to play in clarifying the proper standard for facial preemption challenges, in order to protect the efficacy and consistency of State law and policy against local encroachment in various settings. The "no set of circumstances" test employed by the Court of Appeal effectively converts facial challenges into as-applied challenges. (Dorf, *Facial Challenges to State & Fed. Statutes* (1994) 46 Stan. L. Rev. 235, 239.) In the preemption context, this result threatens to undermine California's interest in ensuring that local "ordinances and regulations [are]

not in conflict with general laws," (Cal. Const. art. XI, § 7), because municipalities may perceive that California courts will refrain from "laying down [the] broad, clear rules" that more often emerge from facial challenges, (*see* Fallon, *Fact & Fiction About Facial Challenges* (2011) 99 Cal. L. Rev. 915, 964.)

Effectively barring facial preemption challenges may also cause many would-be litigants to refrain from attempting to vindicate their State-law rights due to the "substantial impediments" associated with as-applied litigation. (Metzger, *Facial & As-Applied Challenges Under the Roberts Ct.* (2009) 36 Fordham Urb. L.J. 773, 774.) For example, would-be litigants may be deterred by the increased financial costs associated with establishing a robust enough factual record. Or they may decide that waiting to bring a post-enforcement challenge is too risky. (*See id.* at p. 789.)

A. Neither This Court Nor The U.S. Supreme Court Apply The "No Set Of Circumstances" Test To Facial Preemption Challenges.

This Court has never applied the "no set of circumstances" test to a facial preemption challenge. Instead, this Court's preemption test asks whether "the local legislation 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.'" (*O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067-68 (emphasis deleted).) If it does, the local legislation cannot stand.

(*See, e.g.*, *id.* at p. 1076 (holding Stockton's vehicle forfeiture ordinance "impinges on an area fully occupied" by State statutes); *American Financial*, *supra*, 34 Cal.4th at p. 1252 (holding Oakland's ordinance regulating predatory lending preempted because "the [State] Legislature has fully occupied the field of regulation of predatory tactics in home mortgages"); *Action Apartment Ass'n, Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1237 (holding Santa Monica's "tenant harassment" ordinance preempted to the extent it conflicts with State litigation privilege).)

As this Court's practice recognizes, facial preemption challenges pose different questions than do other kinds of facial challenges. The paradigmatic non-preemption facial challenge is an attack on a statute that violates an enforceable constitutional provision. (*See, e.g.*, *City of Los Angeles, Cal. v. Patel* (2015) 135 S.Ct. 2443, 2449.) In such cases, it may arguably be appropriate to apply the "no set of circumstances" test to afford the Legislature maximum room to adopt democratic policies. (*See Cal. Redevelopment Ass'n. v. Matosantos* (2011) 53 Cal.4th 231, 278 (conc. & dis. opn. of Cantil-Sakauye, C.J.).)[2] Facial preemption challenges are

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[2] This Court need not decide whether the "no set of circumstances" test is appropriate in non-preemption contexts because it has not endorsed the test in any context. (*See Parker v. State* (2013) 164 Cal.Rptr.3d 345, 355 ("We do not believe the California Supreme Court has ever endorsed the *Salerno* standard[.]"), *review granted and opinion superseded on other grounds* (2014) 167 Cal.Rptr.3d 658.)

different. "Fundamental to the doctrine of preemption is the distinction between state and local laws: local governments lack the authority to craft their own exceptions to general state laws." (*Action Apartment, supra*, 41 Cal.4th at p. 1247.) Facial preemption challenges are thus rightly subject to a less demanding standard to ensure that parochial interests do not obstruct State policies. (*See id.* at p. 1242; *O'Connell, supra*, 41 Cal.4th at pp. 1067-68.) A local law need not contravene State law in every conceivable hypothetical in order to present a barrier to the State's objectives.

This Court's approach is consistent with that of the U.S. Supreme Court, which originally developed the "no set of circumstances" test—known at the federal level as the *Salerno* standard—to ensure that federal statutes were not invalidated based upon speculation or outlier applications. (*United States v. Salerno* (2007) 481 U.S. 739, 745; *see also Wash. State Grange v. Wash. State Republican Party* (2008), 552 U.S. 442, 450 (warning courts not to "speculate about 'hypothetical' or 'imaginary' cases"); Dorf, *supra*, 46 Stan. L. Rev. at p. 238.) *Salerno* is thus born of respect for legislative judgments and a desire to limit unnecessary constitutional decisions.

These concerns do not have the same relevance when resolving assertions of authority between superior and subordinate government units. Accordingly, the U.S. Supreme Court recognizes that the rigorous *Salerno*

test is inapt in the preemption context.[3] In preemption analysis, the court asks whether the challenged statute is "in conflict or at cross-purposes" with the enactment of the higher sovereign. (*Arizona*, *supra*, 132 S.Ct. at p. 2500 (holding federal immigration policy preempts Arizona statute); *see also Haywood v. Drown* (2009) 556 U.S. 729, 736-42 (holding federal cause of action for civil rights violations preempts "local policy" of shielding correctional officers from inmate suits).)

In *Arizona*, the U.S. Supreme Court directly confronted the question of whether to apply *Salerno* in a facial preemption challenge. There, two justices argued in separate dissents that the court should apply *Salerno*. (*See* 132 S.Ct. at p. 2515 (conc. & dis. opn. of Scalia, J.); *id.* at p. 2534 (conc. & dis. opn. of Alito, J.).) The majority declined, focusing on the more relevant question of whether the challenged state anti-immigration law interfered with federal objectives. "[T]he court's determination" not to apply *Salerno* "in the face" of dissenting opinions was "plainly a

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[3] Even outside the preemption context, scholars have observed that the U.S. Supreme Court's "commitment [to *Salerno*] is more honored in the breach than the observance," (Fish, *Choosing Constitutional Remedies* (2016) 63 UCLA L. Rev. 322, 368-69), and several justices have been critical, (*see, e.g.*, *Wash. State Grange*, *supra*, 552 U.S. at p. 449 ("[S]ome Members of the Court have criticized the *Salerno* formulation."); *City of Chicago v. Morales* (1999) 527 U.S. 41, 55 n.22 (plurality) (labeling test "*Salerno's* dictum"); *Janklow v. Planned Parenthood, Sioux Falls Clinic* (1996) 517 U.S. 1174, 1175 (opn. of Stevens, J., respecting the denial of the petition for certiorari) (labeling test "a rhetorical flourish" "unsupported by citation or precedent").) Indeed, *Salerno's* asserted preference for as-applied challenges appears "false as an empirical matter." (Fallon, *supra*, 99 Cal. L. Rev. at p. 917.)