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SUPREME COURT
FILED

Case No. _____

OCT 25 2016

Jorge Navarrete Clerk

IN THE
SUPREME COURT OF CALIFORNIA _____
Deputy

**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

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

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.)

considered decision.” (*Am. Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307 (recognizing *Salerno* does not apply to abortion rights for this reason); accord *Lozano v. City of Hazleton* (3d Cir. 2013) 724 F.3d 297, 313 n.22 (holding *Arizona* rejects application of *Salerno* to facial preemption challenges) *cert. denied* (2014) 134 S.Ct. 1491.)⁴

On rehearing, the Court of Appeal seized upon this Court’s acknowledgment that “[t]he precise standard governing facial challenges ‘has been a subject of controversy within [the California Supreme Court].’” (Rehearing Or. 2 (citation omitted).) But that observation is inapposite. None of the cases cited by the Court of Appeal on this point involved a facial *preemption* challenge. (See *Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, 36) (upholding State regulation against due process challenge); *City of San Diego v. Boggess* (2013) 216 Cal.App.4th 1494, 1498 (upholding State statute against Second Amendment challenge); *Coffman Specialties, Inc. v. Dep’t of Transp.* (2009) 176 Cal.App.4th 1135, 1140 (upholding State statute against several

⁴ At least one federal court of appeal has not followed *Lozano*. In *Puente Arizona v. Arpaio*, a Ninth Circuit panel asserted that “*Salerno*’s applicability in preemption cases is not entirely clear.” (9th Cir. 2016) 821 F.3d 1098, 1104). Relying on circuit precedent that had applied *Salerno* in the preemption context prior to *Arizona*, the panel determined that it should “continue applying *Salerno*” in preemption cases absent “more direction” from the en banc court or the U.S. Supreme Court. (*Ibid.*) Although the panel acknowledged that “some courts” had held “strict application of *Salerno*’s rule incompatible with substantive preemption doctrine,” (*id.* at p. 1104 n.6), it felt compelled to follow circuit precedent. Of course, this Court is not so bound.

constitutional attacks.) Thus, any controversy in those cases has no bearing on this case, which involves a preemption challenge. Indeed, the Court of Appeal did not dispute that this Court has never applied the “no set of circumstances” standard to a facial preemption challenge.

Nor is it relevant that this Court has sometimes said that a “statute must be upheld unless the party establishes the statute ‘inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions.’” (Rehearing Or. 2.) This Court has not equated that test with the inflexible “no set of circumstances” language. And even if it had, this Court has not applied the “total and fatal conflict” standard to a facial preemption challenge. (See, e.g., *O’Connell*, *supra*, 41 Cal.4th at pp. 1067-68; *American Financial*, *supra*, 34 Cal.4th at p. 1252; *Action Apartment*, *supra*, 41 Cal.4th at p. 1237.) By its terms, the “total and fatal conflict” standard applies only to “constitutional prohibitions.” (*Zuckerman*, *supra*, 29 Cal.4th at p. 46.) The standard is simply not relevant to determining whether “local legislation ‘duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.’” (*Action Apartment*, *supra*, 41 Cal.4th at p. 1242.)

B. The Courts Of Appeal Are Divided On The Appropriate Test For Facial Preemption Challenges.

Despite the clear practice of this Court and of the U.S. Supreme Court, the Courts of Appeal have divided on the application of the “no set

of circumstances” test to facial preemption challenges. Other Divisions of the First District Court of Appeal properly recognize that the test has no application to facial preemption challenges. (*See, e.g., San Francisco Apartment, supra*, 3 Cal.App.5th at p. 702 (finding San Francisco’s eviction control ordinance preempted despite “one or more conceivable set of circumstances under which the Ordinance and the Ellis Act could operate consistently”); *Fiscal v. City & Cty. of San Francisco* (2008) 158 Cal.App.4th 895, 910 (affirming determination that San Francisco’s handgun ordinance was preempted in its entirety despite the possibility of lawful application to “criminals who use handguns in the commission of their unlawful acts”).) However, some decisions, including the decision below, erroneously apply the test to facial preemption challenges.

The start of this divergence reveals how a few courts went awry. In *Hatch v. Superior Court*, (2000) 80 Cal.App.4th 170, Division One of the Fourth Appellate District applied the federal *Salerno* standard to resolve “a sort of preemption argument” concerning the dormant Commerce Clause of the U.S. Constitution, and a provision of the California Penal Code making it unlawful to seduce a minor over the Internet. (*Id.* at p. 194.) Citing *Salerno*, the court rejected the “sort of” preemption argument, reasoning that because some victims would be intrastate, the fact that “Internet communications routinely pass along interstate lines” did not “insulate pedophiles from prosecution” in California. (*Id.* at p. 195.) *Salerno* was

not necessary to the result in *Hatch*—the court’s finding that geographical proximity is a priority “for any ... adult whose intent is to seduce a child,” (*id.* at p. 195 n.19), would have been sufficient to show the law’s legitimacy under any preemption standard. But *Hatch* nevertheless marked the entry of the federal *Salerno* formulation into the California Appellate Reports.

The “no set of circumstances” standard has since been invoked in some State preemption challenges, though often with little or no analysis. In this case, for example, the Court of Appeal cites *Sierra Club v. Napa County Board of Supervisors*, (2012) 205 Cal.App.4th 162, 173 (holding Napa County lot-line adjustment ordinance not preempted by State law), as authority for the test, (Opn. 8.) *Sierra Club* cites *T.H. v. San Diego Unified School District*, (2004) 122 Cal.App.4th 1267, 1281 (holding school regulations not preempted by State or federal law), which in turn cites *Hatch*. None of these cases explains why they are applying a federal standard in the State preemption context; nor do they examine whether that standard applies even to federal preemption cases.

It does not appear that the Court of Appeal has attempted to square the progeny of *Hatch* with its own contrary precedent, or with contrary precedent from this Court and the U.S. Supreme Court. Because the *Hatch* line of cases imports a federal standard into the State preemption context,

misapplies that federal standard, and is inconsistent with opinions of this Court, it should not have been used by the court below.

C. **This Case Presents An Ideal Vehicle For Resolving The Split Of Authority Within The Courts Of Appeal.**

This case presents an ideal vehicle for resolving the split of authority inaugurated by *Hatch* and extended by the court below. *First*, all parties agree that Petitioners brought a facial preemption challenge. Thus, unlike *Hatch, supra*, 80 Cal.App.4th at p. 194, which applied *Salerno* in response to “a sort of preemption argument,” this case squarely presents a facial preemption challenge.

Second, this case cleanly presents the legal issue free from factual dispute. San Francisco “stipulated that telephone corporations installing facilities on utility poles other than wireless facilities, such as AT&T, and state video providers, such as Comcast, need only obtain utility conditions permits and temporary occupancy permits if the installation will take more than one day.” (Opn. 5.) In addition, “[t]he trial court found Plaintiffs’ equipment and facilities installed in the public rights-of-way to be ‘generally similar in size and appearance’ to equipment installed by ‘landline’ telephone corporations, cable television operators, and PG&E.” (*Id.* at p. 6.) Nevertheless, the Court of Appeal upheld the Ordinance because it could “imagine” a set of circumstances where “a large wireless facility might aesthetically ‘incommode’ the public use of the right-of-

way”—namely, if such facilities were “installed very close to Coit Tower or the oft photographed ‘Painted Ladies.’” (*Id.* at p. 22; *see also id.* at p. 8.) Thus, the only issue for this Court is whether the Court of Appeal applied the correct standard.

Third, the Court of Appeal’s misapplication of the “no set of circumstances” test resorts to “hypothetical musings” that “underscore[] the flaws inherent” in that standard. (*Doe v. City of Albuquerque* (10th Cir. 2012) 667 F.3d 1111, 1123; *see also Bruni v. City of Pittsburgh* (3d Cir. 2016) 824 F.3d 353, 363 (criticizing “dream[ing] up whether or not there exists some hypothetical situation in which application of the statute might be valid”).) On rehearing, Petitioners pointed out that even if the “no set of circumstances” test were the correct test, the court had not hypothesized a valid scenario because the Ordinance would not affect installation of wireless facilities in front of Coit Tower or the Painted Ladies.⁵ (*Cf. Patel, supra*, 135 S.Ct. at p. 2451 (“[W]hen assessing whether a statute meets th[e

⁵ As Petitioners explained to the Court of Appeal, (*e.g.*, Appellants Petition for Rehearing, at 7-9), the City prohibits above-ground utility poles in so-called “underground districts.” (Reporter’s Transcript 1211:21-24 (Jan. 28, 2014) (Ms. Lynn Fong, Department of Public Works, testifying that the City prohibits above ground utility facilities in underground areas); RA000180-82, RA000187, RA000195 (explaining City’s use of undergrounding in visually sensitive areas).) The Ordinance applies only where there are existing utility poles in the public rights-of-way. (A00194-95.) In those areas, the Superior Court found that the equipment installed by other users of the rights-of-way is similar in size and appearance, or larger, than the “wireless” equipment installed by Petitioners. (A00842, A00846-A00848.) Thus, with or without the Ordinance, Plaintiffs cannot install large facilities “very close” to Coit Tower or the Painted Ladies.

Salerno] standard, the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct.”.) In response, the court asserted that the Ordinance remained valid because there might be other unidentified “areas of aesthetic value where installation of a wireless facility could incommode public use.” (Rehearing Or. 3.)

This assertion reveals the court’s reluctance to exercise its duty “to say what the law is.” (*McClung v. Employment Dev. Dep’t* (2004) 34 Cal.4th 467, 469.) Rather than trade in hypotheticals, the Court of Appeal should have addressed whether the regulations that apply to wireless facility applications are at odds with California’s objectives in enacting a statewide franchise. “[I]n every case” where a telephone service provider exercises its rights under the State franchise to deploy covered communications facilities, the provider “is met head-on with a locally-imposed legal barrier.” (*San Francisco Apartment, supra*, 3 Cal.App.5th at p. 463 (holding local ordinance preempted after refusing to apply the “no set of circumstances” test).) This Court should grant review of this case to resolve the split of authority within the Courts of Appeal regarding the showing required in a facial preemption challenge.

II. **THIS COURT SHOULD RESOLVE A NEW SPLIT OF AUTHORITY AS TO WHETHER CALIFORNIA CITIES CAN STYMIE INNOVATION BY ADJUSTING THE BALANCE BETWEEN TECHNOLOGICAL ADVANCEMENT AND AESTHETICS.**

Independent of the standard of review, this Court should also grant review to resolve the new split of authority created when the Court of Appeal determined that Section 7901 allowed San Francisco to “adjust the balance” “between technological advancement and community aesthetics” by singling out one type of technology for disfavored treatment. (Opn. 1.) Under any standard, the decision below is inconsistent with longstanding precedent recognizing that Section 7901 reserves to the State the prerogative to balance technological advancement with other concerns, and that municipalities cannot stand in the way of progress by imposing unique burdens on particular communications services.

A. **Until The Decision Below, California Courts Uniformly Recognized That The State Franchise Is Designed To Remove Local Obstacles To The Deployment Of Emerging Telecommunications Technologies.**

This Court and the Courts of Appeal have long recognized that the State franchise created by Section 7901 embraces—and indeed is meant to foster—technological progress. “[T]he very purpose of section [7901]” is “to give [telephone] subscribers the benefit of the many and varied uses of telephone wires made possible by scientific development.” (*Pacific Telephone, supra*, 44 Cal.2d at p. 282.) In California, “the people expect

[providers] to use the most modern equipment.” (*Williams, supra*, 114 Cal.App.4th at p. 653 (quoting *Pac. Tel. & Tel. Co. v. City & Cty. of San Francisco* (1961) 197 Cal.App.2d 133, 147 (“*Pacific Telephone II*”)).) Section 7901 ensures that telephone corporations deploying wireless technologies can meet Californians’ expectations by guaranteeing these providers access to public rights-of-way.

One consequence of California’s embrace of technological advancement in the deployment of telecommunications facilities is that local governments may not “require a telephone company to obtain an additional franchise” to deploy particular technologies. (*Williams, supra*, 114 Cal.App.4th at p. 653.) “[T]he facilities by which a telephone company operates its lines of communication are neither static nor fixed quantities but may fluctuate with changing conditions and what may have been proper facilities a half century ago are not necessarily ones today.” (*Ibid.*) This “statewide concern” in deployment of modern facilities is of such importance that “any delegation from the state to the city of authority to control the right of [a provider] to do a telephone business should be clearly expressed, and any doubt as to whether there has been such a delegation must be resolved in favor of the state.” (*Pacific Telephone, supra*, 44 Cal.2d at p. 280.)

Accordingly, for more than 60 years, this Court and the Courts of Appeal have set aside local attempts to withhold the full rights of the State-

granted franchise from new telecommunications services and technologies. For example, in *Pacific Telephone, supra*, 44 Cal.2d at p. 282, this Court rejected Los Angeles' argument "that the state franchise does not give Pacific the right to use its telephone lines for the transmission of anything other than 'articulate speech.'" In *Pacific Telephone II, supra*, 197 Cal.App.2d at p. 147, the Court of Appeal dismissed San Francisco's assertion that that the franchise "does not include the placing of telephone wires under ground." And in *Williams, supra*, 114 Cal.App.4th at p. 651, the Court of Appeal rejected Riverside's argument that the franchise does not extend to facilities intended to carry "different forms of information, such as voice, music, video, computer data, facsimile material and other forms" over fiber optic facilities. In each case, California courts recognized that Section 7901 promotes the deployment of the newest and most advanced communications technologies, and that in doing so it forbids local jurisdictions from imposing additional regulatory approvals that uniquely burden particular advancements.

Today, there is no doubt that services enabled by wireless technologies—from video streaming to social media—represent the future of telecommunications. Yet San Francisco stipulates that its Ordinance subjects wireless facilities to unique, additional regulatory approvals that do not apply to other technologies or services, regardless of the burden these other services put on the rights-of-way (aesthetic or otherwise). Indeed, the

uncontested record reveals that the wireless facilities at issue here are in many cases identical in size and overall impact to traditional wireline, cable, and electrical facilities, which are not covered by the Ordinance. (Opn. 6.)⁶

Departing from the unbroken line of California precedent that recognizes that the State franchise promotes deployment of the most modern technologies and services, (*see Pacific Telephone, supra*, 44 Cal.2d at p. 282; *Pacific Telephone II, supra*, 197 Cal.App.2d at p. 147; *Williams, supra*, 114 Cal.App.4th at p. 651), the Court of Appeal permitted San Francisco to limit the scope and benefit of the statewide franchise as it applies to wireless providers using existing infrastructure in the rights-of-way by imposing discriminatory requirements. The decision below thus opened a conflict with a long history of cases recognizing that Section 7901 embraces technological advancement in communications equipment.

B. State Law Forecloses Localities From Using The Police Power To Regulate Aesthetics And From Using Aesthetics As A Proxy To Discriminate Against Technologies Covered By The State Franchise.

In addition to undermining the purpose and benefit of the State franchise, the Court of Appeal adopted a novel construction of Section 7901's text that deepens this split of authority. By the plain text of the

⁶ In some cases, the actual housing and equipment boxes are the same model, leaving no doubt that the City intends to subject wireless services to unique burdens. (A00848.) In other cases, equipment installed by other users of the rights-of-way is larger than Petitioners' equipment. (*Ibid.*)

statute, California's desire to encourage deployments in the public rights of way is so comprehensive that the only substantive restriction on telephone companies is that they may not "incommode the public use of roads or highways or interrupt the navigation of the waters." (§ 7901; *accord Sprint PCS Assets, L.L.C. v. City of La Cañada Flintridge* (9th Cir. 2006) 182 F.App'x 688, 690.) The result—as this Court has long made clear—is that localities may only regulate so "as to prevent unreasonable obstruction of travel" by placement of poles and wires. (*W.U. Tel. Co. v. City of Visalia* (1906) 149 Cal. 744, 750-51; *accord Pacific Telephone II, supra*, 197 Cal.App.2d at p. 146.)

No California court has ever suggested that deploying telephone cables or even telephone poles could "incommode the public use of the roads" based solely on appearance or annoyance, despite the obvious aesthetic intrusion that can result from overhead telecommunications lines and equipment. "[A]s a matter of statutory interpretation," that conclusion would make little sense because "use" denotes "active employment." (*Welch v. United States* (2016) 136 S.Ct. 1257, 1267.) As the City's urban planning documents acknowledge, aesthetic beauty contributes to "passive" enjoyment of "unique areas" and "notable landmarks." (RA000159, RA000163-65.) But a decrease in passive enjoyment cannot "incommode" active "use of roads" any more than it could "interrupt" active "navigation of the waters." (§ 7901.) Such a countertextual reading would engulf the

State franchise by “presuppos[ing] what in legal contemplation does not exist.” (*Haywood, supra*, 556 U.S. at p. 736.)

Indeed, although San Francisco defended its review process on the basis of aesthetics, the Court of Appeal thought “incommode” broad enough to encompass “inconvenience or discomfort ... trouble, annoy[ance], [and] molest[ation].” (Opn. 21-22.) If the City can deny a facility because someone claims annoyance, the right afforded by Section 7901 has been lost.

Departing from California precedent and statutory context, the Court of Appeal looked to a single, non-binding federal authority that concluded “incommode” is broad enough to accommodate so-called “aesthetic reasons” for regulating deployments. (Opn. 18-19 (citing *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716).⁷ The Court of Appeal distinguished *Visalia* and *Pacific Telephone II* on the ground that they purportedly did not address “aesthetic impacts.” (Opn. 18.) It asserted, without authority, that the regulation of aesthetics is a part of what *Pacific Telephone II* termed “the narrower police power of

⁷ The *Palos Verdes* court, *supra*, found the question difficult enough that it asked this Court to “decide whether PUC §§ 7901 and 7901.1 permit public entities to regulate the placement of telephone equipment in public rights-of-way on aesthetic grounds.” (583 F.3d at p. 721 n.2.) This Court denied the request, “concluding that a decision on that issue may not be determinative in the[] federal proceedings.” (*Ibid.*) The federal court proceeded to resolve the State law question without this Court’s guidance. Now that the Court of Appeal has imported this erroneous decision into California law, this Court should examine it.

controlling location and manner of installation” left to municipalities by Section 7901. (*Ibid.*)

This interpretation misreads the cases and creates an unnecessary split of authority regarding local police power. *Pacific Telephone II, supra*, 197 Cal.App.2d at p. 152, expressly held that the “narrower police power” left to municipalities includes “only state power to deal with the health, safety and morals of the people.” Courts have long recognized that the power to regulate aesthetics and possible annoyances belongs to a component of the police power distinct from the regulation of health, safety, and morals. (See, e.g., *Berman v. Parker* (1954) 348 U.S. 26, 32 (identifying “aesthetic” concerns as part of a “public welfare” component of the police power separate from “[p]ublic safety, public health, morality, peace and quiet, law and order”); *Lucas v. S. Carolina Coastal Council* (1992) 505 U.S. 1003, 1024 (locating “esthetic concerns” in “the broad realm” of police power).) Thus, regulation of aesthetics cannot be part of the “narrower police power” Section 7901 leaves to municipalities.

In addition, *Pacific Telephone II, supra*, 197 Cal.App.2d at p. 152, expressly located the “state concern in communications” in the “broader police power” that California “retained to itself.” (Accord *Pacific Telephone, supra*, 44 Cal.2d at p. 280 (“The business of supplying the people with telephone service is not a municipal affair; it is a matter of statewide concern.”); *Pacific Telephone I, supra*, 51 Cal.2d at p. 768

(similar.) Because the Ordinance advances its purported aesthetic concern by regulating telecommunications facilities based on the technology employed, the Ordinance is necessarily regulating “communications.” (*Cf. New York SMSA Ltd. P’ship v. Town of Clarkstown* (2d Cir. 2010) 612 F.3d 97, 105.) Thus, the Ordinance’s purported regulation of “aesthetics” is in truth regulation of “communications,” and therefore a part of the broader police power Section 7901 reserves exclusively to California.

The Court of Appeal’s mistaken reliance on nonbinding federal precedent overlooks this Court’s prior construction of Section 7901, and well-accepted delineations of the police power. This Court should grant review to resolve this split in authority and to vindicate California’s interest in promoting technological advancement.

C. **The Lower Court’s Break With Precedent Threatens To Undo The Pro-Innovation And Technology-Neutral Balance Struck By The Legislature, To The Detriment Of Californians.**

When the Legislature created a State franchise that embraces technological progress and removes local obstacles, it acted on the conviction that the construction and maintenance of telephone lines in the streets and other public places within California’s cities was essential to promoting information exchange “based upon a community of business and social interests of people,” the boundaries of which “do not necessarily conform to the boundaries of cities.” (*Pacific Telephone I, supra*, 51

Cal.2d at p. 772.) The State's superintendence over deployments in the rights-of-way was thus not an end unto itself, but a means for ensuring that the business and social interests of all Californians would benefit from investments in emerging telecommunications technologies despite any parochial interests that might threaten to intervene.

The communities of business and social interests of Californians are now more geographically diverse than ever. This explosion in connectivity has increased the importance of California's statewide franchise. For example, the deployment of new 5G wireless technologies will vastly increase the data speeds available and unlock exciting services, from smart cities using energy saving tools and sensors to manage traffic, to autonomous cars, consumer products, and varied industrial uses, (*see Spectrum Order, supra*, 31 FCC Rcd. at p. 8270), and California is poised to be at the forefront of these advancements, (*see, e.g.*, U.C. Berkeley, *Smart Cities Research Center*, <http://smartcities.berkeley.edu/> (last visited Oct. 25, 2016); Miller, *California Cities Turn to Internet of Things to Solve Parking, Traffic Problems* (Oct. 28, 2015) *Government Technology*, <http://www.govtech.com/fs/California-Cities-Turn-to-Internet-of-Things-to-Solve-Parking-Traffic-Problems.html>.)

The State franchise is critical to such endeavors. Today's networks and the move to 5G demand the deployment of additional wireless facilities—especially small facilities, close to the consumer, located in

places like the rights-of-way. According to FCC Chairman Tom Wheeler, “5G buildout is going to be very infrastructure intensive, requiring a massive deployment of small cells” nationwide. (*Wheeler Remarks, supra*, 2016 WL 3430263, at p. *4; *see also* Remarks of FCC Comm’r Jessica Rosenworcel, *Five Ideas for the Road to 5G* (FCC 2016) 2016 WL 520292; Statement of FCC Comm’r Ajit Pai, *On The Removal of Regulatory Barriers to Small Cell Deployments* (FCC 2016) 2016 WL 4195716.) California’s wireless industry is prepared to unleash “[p]rivate investment in mobile wireless infrastructure” expected to “generate \$1.2 trillion in economic growth and create 1.2 million jobs” over the next five years. (CalChamber, *California Business Issues* (Jan. 2016) p. 57, <http://advocacy.calchamber.com/wp-content/uploads/policy/issue-reports/Internet-Communications-Technology-2016.pdf>.) Whether this infrastructure investment becomes reality “will be the result of decisions we must make today.” (*Wheeler Remarks, supra*, 2016 WL 3430263, at p. *2.)

The decision below threatens to stymie California’s ability to embrace innovation. It improperly permits localities to establish roadblocks for deployment that will have a significant negative impact on residents throughout the State. If allowed to stand, municipalities will for the first time be allowed to “adjust the balance” “between technological advancement and community aesthetics” set by the State. (Opn. 1.) This will harm Californians: If the deployment of facilities is obstructed in “the

streets in the city, the people throughout the state, the United States, and most parts of the world who can now communicate directly by telephone with residents in the city could no longer do so.” (*Pacific Telephone I, supra*, 51 Cal.2d at p. 773.) Because the Court of Appeal’s decision would allow municipalities to bottleneck wireless infrastructure deployments in contravention of State policy, this Court should review the decision for consistency with State law.

III. **THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT SAN FRANCISCO MUST TREAT ALL HOLDERS OF STATE FRANCHISES “IN AN EQUIVALENT MANNER,” AND CANNOT SINGLE OUT NEW TECHNOLOGIES FOR DIFFERENTIAL TREATMENT.**

This Court should also grant review to clarify that Section 7901.1 requires San Francisco to treat all right-of-way occupants “in an equivalent manner,” (§ 7901.1(b)), and to resolve a serious question that the decision below creates about the scope of “time, place, and manner” restrictions localities may impose on deployments in the rights-of-way.

Although San Francisco stipulated that the Ordinance regulates holders of State franchises on the basis of the technology they seek to install in the public rights-of-way, (Opn. 5), the Court of Appeal held that “the Ordinance is [not] preempted because section 7901.1 applies only to construction itself,” (*Id.* at p. 25.) From this supposed limitation, the Court of Appeal inferred that Section 7901.1 impliedly authorizes discrimination among “telephone corporations” for reasons such as aesthetics as long as

that discrimination applies only to long-term occupation of the rights-of-way and not to the temporary, transient activities undertaken during construction in the rights-of-way. (*Id.* at p. 24-26.) In other words, municipalities are free to regulate the right to attach facilities to existing utility poles based on technology, so long as they give everyone the same temporary street closure permits for accessing the existing poles during installation.

The decision merits review because it will undermine the right of access to public rights-of-way guaranteed by Section 7901. If Section 7901.1 authorizes municipalities to discriminate among providers of telecommunications services at any time, save for “construction itself,” (Opn. 25), municipalities can prevent the deployment of new technologies by subjecting them, as San Francisco has done, to additional discretionary review. In effect, “the company would be required to obtain numerous local franchises in order to give its subscribers the benefit of the many and varied uses of telephone wires made possible by scientific development.” (*Pacific Telephone, supra*, 44 Cal.2d at p. 282.) “Such a result would defeat the very purpose of section [7901], as it would interfere substantially with the ability of telephone companies to provide adequate communication service to the people of the state.” (*Ibid.*)

The Court of Appeal discounted this concern because it found that “the plain meaning of the word ‘access’ is ambiguous.” (Opn. 24.) As a

threshold matter, that conclusion should have led the court to find the Ordinance in conflict with State law, because “any doubt” as to the scope of the delegation from California to San Francisco “must be resolved in favor of the state.” (*Pacific Telephone, supra*, 44 Cal.2d at p. 280.) The plain text of Section 7901.1 should have led it to the same conclusion because the provision proclaims that its purpose is “consistent with Section 7901.” (§ 7901.1(a).)

Instead, the court read into the statute a “concern[] solely with ‘temporary access’ for construction purposes” based on the statute’s use of the phrase “time, place and manner” to define the permissible scope of regulation of the way in which public rights-of-way “are accessed.” (Opn. 24.) The phrase “time, place and manner” is borrowed from free speech jurisprudence, and absent contrary indicia should be interpreted consistently in this context. (*See, e.g., Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 850 n.3.) There is no doubt that in the free speech context, the phrase “time, place, and manner” extends well beyond temporary or transient regulations; valid time, place, and manner restrictions may extend for the full duration of occupation of a public place. (*See, e.g., Los Angeles All. For Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 378-79 (holding regulations banning certain “aggressive solicitation” practices are valid time, place, and manner restrictions under California’s liberty of speech clause); *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 803 (holding

New York City's sound-amplification guidelines are valid time, place, and manner restrictions under the First Amendment.) They are not narrowly constrained to the literal gatekeeping functions that occur at the boundary of a public place, which would be analogous to the limitation that the Court of Appeal created from whole cloth here. Thus, there is no basis to conclude, as the Court of Appeal did, that the Legislature's use of this phrase means the statute is concerned solely with temporary access for construction.⁸

The Court of Appeal also relied on legislative history for Section 7901.1 that emphasizes the need for construction management by local authorities. (Opn. 24-25.) But the legislative history does not support the argument, embraced by the court, that the statute imposes a bifurcated scheme under which Section 7901 addresses "whether, *once installed*, those facilities would 'incommode' the public right-of-way," and Section 7901.1 "how the applicant intends to install its facilities in the public right-of-

⁸ The sole authority cited by the Court of Appeal, *Palos Verdes, supra*, 583 F.3d at p. 724, asserts that under the First Amendment "[a]esthetic regulations are 'time, place, and manner' regulations." That claim is overbroad. Many aesthetic regulations are not valid time, place, or manner restrictions; "governments must have something more than a generalized esthetic interest" to justify regulation of speech. (*City of Indio v. Arroyo* (1983) 143 Cal.App.3d 151, 159 (holding city's sign ordinance violates federal and state speech guarantees); accord *City of Cincinnati v. Discovery Network, Inc.* (1993) 507 U.S. 410, 418, 430 (holding newsrack policy "cannot be justified as a legitimate time, place, or manner restriction" despite the city's "legitimate interests in safety and esthetics").)

way.” (Opn. 23.) Indeed, Section 7901 by its terms addresses “construct[ion of] lines of telegraph or telephone lines” and the “erect[ion of] poles, posts, piers, or abutments.” (§ 7901; cf. *Green v. State* (2007) 42 Cal.4th 254, 260 (“If the plain language of a statute is unambiguous, no court need, or should, go beyond that pure expression of legislative intent.”).)

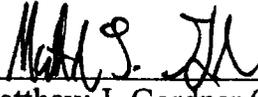
In sum, this Court should review the Court of Appeal’s interpretation of Section 7901.1 and clarify that it requires San Francisco to treat holders of State franchises “in an equivalent manner” to all other entities occupying utility poles in the public rights-of-way. (§ 7901.1(b).) Absent clarification, the decision by the Court of Appeal undermines both the requirement of equivalent treatment guaranteed by Section 7901.1 and the right of access to public rights-of-way guaranteed by Section 7901.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant their Petition for Review and, on review, reverse the Court of Appeal, and direct that court to enter an order invalidating the Ordinance.

Dated: October 25, 2016

Respectfully Submitted,



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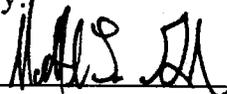
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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.504(d)(1), the undersigned certifies that this Petition for Review contains 8,400 words as counted by the word count feature of the Microsoft Word program used to generate this brief, not including the tables of contents and authorities, the Court of Appeal's order, the cover information, the signature block, and this certificate.

Dated: October 25, 2016

By:



Matthew J. Gardner

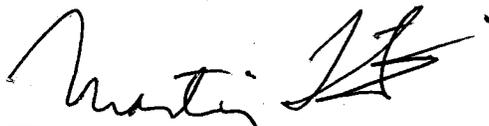
CERTIFICATE OF SERVICE

I, MARTIN L. FINEMAN, declare as follows:

I am over 18 years of age and not a party to this action. I am employed in San Francisco, California. My business address is 505 Montgomery Street, Suite 800, San Francisco, California 94111-6533. On October 25, 2016, I served true copies of the attached document titled **PETITION FOR REVIEW** on the Courts, interested parties, and amici curiae in this action as follows: **SEE ATTACHED SERVICE LIST**

BY FEDERAL EXPRESS: I served the forgoing documents by Federal Express for overnight delivery. I placed true copies of the document(s) in a sealed envelope addressed to each interested party as identified above. I placed each such envelope, with Federal Express fees fully prepaid, for collection and delivery at Davis Wright Tremaine LLP, San Francisco, California. I am familiar with Davis Wright Tremaine LLP's practice for collection and delivery. Under that practice, the Federal Express package(s) would be delivered to a courier or dealer authorized to receive document(s) on that same date in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 25, 2016, at San Francisco, California.



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APPENDIX

**COURT OF APPEAL ORDER
MODIFYING OPINION AND
DENYING REHEARING [NO
CHANGE IN JUDGMENT]**

AND

COURT OF APPEAL OPINION

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

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

v.

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

A144252

(San Francisco City and County
Super. Ct. No. CGC-11-510703)

**ORDER MODIFYING OPINION
AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]**

THE COURT:*

IT IS ORDERED that the opinion filed on September 15, 2016, is modified as follows and appellants' petition for rehearing is DENIED:

1. On page 2, the second full sentence on the page is deleted and replaced with the following sentence:

In 2011, the City and County of San Francisco (City) enacted an ordinance requiring all persons to obtain a site-specific permit before seeking to construct, install, or maintain certain telecommunications equipment, known as "Personal Wireless Service Facilities" (hereafter wireless facilities), in the public right-of-way.

2. On page 2, at the conclusion of the new second sentence mentioned above, a new footnote is added (with all following footnotes renumbered accordingly) that reads:

Under the City's ordinance, wireless facilities are antennas and related facilities used to provide or facilitate the provision of "Personal Wireless Service," which is defined as commercial mobile services provided under a license issued by the Federal Communications Commission.

* Before Simons, Acting P.J., Needham, J., and Bruiniers, J.

3. On page 4, in part I, a new final sentence is added to the first partial paragraph that reads:

The Ordinance also prohibits issuance of a Wireless Permit if the applicant seeks to “[i]ninstall a new Utility or Street Light Pole on a Public Right-of-Way where there presently are no overhead utility facilities.”

4. On page 9, in part II, at the conclusion of the first partial paragraph and following the citation to *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 267, a new footnote is added (with all following footnotes renumbered accordingly) that reads:

In a petition for rehearing, Plaintiffs insist the correct standard requires them “ ‘to show the statute is unconstitutional in all or most cases.’ ” (*City of San Diego v. Boggess* (2013) 216 Cal.App.4th 1494, 1504.) “The precise standard governing facial challenges ‘has been a subject of controversy within [the California Supreme Court].’ ” (*Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, 39.) “Under the strictest test, the statute must be upheld unless the party establishes the statute “ ‘inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions.’ ” [Citation.] Under the more lenient standard, a party must establish the statute conflicts with constitutional principles “ ‘in the generality or great majority of cases.’ ” [Citation.] *Under either test, the plaintiff has a heavy burden to show the statute is unconstitutional in all or most cases, and* “ ‘cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute.’ ” (*Coffman Specialties, Inc. v. Department of Transportation* (2009) 176 Cal.App.4th 1135, 1145, italics added; accord, *Boggess*, at p. 1504.) In suggesting we are compelled to apply a more lenient standard, Plaintiffs misplace their reliance on facial challenges involving First Amendment and abortion rights. (See, e.g., *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 342–343, 347 (plur. opn. of George, C.J.).)

5. On page 22, in part II.A., in the first complete paragraph, at the conclusion of the second sentence, a new footnote is added that reads:

Plaintiffs claim this hypothetical assumes facts that are not possible under the Ordinance because all utilities are underground at the former locations. The Ordinance provides: “The Department shall not issue a [wireless permit] if the Applicant seeks to: [¶] (1) Install a new Utility or Street Light Pole on a Public Right-of-Way where there presently are no overhead utility facilities.” However, Plaintiffs simply ask us to assume there are no overhead utility facilities near Coit Tower or the Painted Ladies. Even if we can assume as much, the Ordinance’s

ban on new utility poles is itself a challenged, but seemingly reasonable, aesthetic restriction. By referencing Coit Tower and the Painted Ladies, we do not mean to suggest these are the only areas of aesthetic value where installation of a wireless facility could incommode public use. We merely seek to illustrate why a facial challenge is inappropriate. We decline Plaintiffs' invitation to assume the Ordinance's aesthetic restrictions will only affect proposed installation of wireless facilities on existing utility poles that are already cluttered with other electrical and telecommunications equipment.

6. On page 23, in part II.B., the final sentence of the last complete paragraph is deleted and replaced with the following sentence:

Under the City's interpretation, subdivision (b) of section 7901.1 has no application to the Ordinance because it is not a regulation of "time, place, and manner of *construction*—but is instead a regulation that permits Wireless Facilities to be installed in the public right-of-way subject to certain siting criteria." (Italics added.)

7. On page 23, in part II.B., the first two sentences of the final partial paragraph are deleted and replaced with the following:

Plaintiffs, in their opening brief, contend section 7901.1 defines the limited authority local governments have under section 7901. In their view, sections 7901 and 7901.1 give local governments limited construction management authority, but only to prevent physical obstruction of the roads, not aesthetic incommodation. In the alternative, they contend that, even if the City has the authority to impose discretionary aesthetic regulation, the City's application of such control must be equivalent for "all entities." (See § 7901.1, subd. (b).) In their reply brief and a petition for rehearing, Plaintiffs refine their position and contend that section 7901.1 does not relate solely to temporary construction access to the right-of-way. However, Plaintiffs continue to maintain that section 7901.1 "does not expand [local government] authority," but defines the limited authority section 7901 reserved for local governments to regulate how the public right-of-way is accessed *and* occupied.

8. On page 25, in part II.B., immediately after the final full sentence on the page, insert a new footnote that reads:

In their petition for rehearing, Plaintiffs argue for the first time that the Ordinance regulates temporary construction activities. We are not required to address this forfeited argument. (See *People v. Holford* (2012) 203 Cal.App.4th 155, 159, fn. 2 ["it is 'too late to urge a point for the first time in a petition for rehearing, after the case ha[s] been fully considered and decided by the court upon the points

presented in the original briefs' "].) Suffice it to say, Plaintiffs have not met their burden to show the challenged portions of the Ordinance require anything different of them, as compared to AT&T, Comcast, or PG&E, with respect to temporary access to the right-of-way for construction purposes.

The modification effects no change in the judgment.

Date _____ Acting P.J.

Superior Court of the City and County of San Francisco, No. CGC-11-510703, James McBride, Judge.

Davis Wright Tremaine, Martin L. Fineman, T. Scott Thompson and Daniel P. Reing for Plaintiffs and Appellants.

Dennis J. Herrera, City Attorney, Yvonne R. Meré, Chief of Complex and Affirmative Litigation, William K. Sanders and Erin B. Bernstein, Deputy City Attorneys, for Defendants and Respondents.

Rutan & Tucker, Jeffrey T. Melching and Ajit Singh Thind for League of California Cities, California State Association of Counties and SCAN NATOA, Inc. as Amici Curiae on behalf of Defendants and Respondents.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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DIVISION FIVE

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v.

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A144252

(San Francisco City and County
Super. Ct. No. CGC-11-510703)

Sometimes tension exists between technological advancement and community aesthetics. (*Sprint PCS Assets v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, 720 (*Palos Verdes Estates*)). We address here the scope of local government authority to adjust the balance of those interests, consistent with state-wide regulation.

Telephone and telegraph companies have long exercised a franchise under state law 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.” (Pub. Util. Code, § 7901;¹ *Pac. Tel. & Tel. Co. v. City & County of S. F.* (1959) 51 Cal.2d 766, 771 (*Pacific Telephone I*)). State law also provides that local government maintains the right “to exercise reasonable control as to the time, place, and manner in which roads, highways,

¹ Undesignated statutory references are to the Public Utilities Code. Section 7901 provides: “Telegraph or telephone corporations may 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 may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, 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.”

and waterways are accessed. [¶] . . . The control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner.” (§ 7901.1, subs. (a), (b).) In 2011, the City and County of San Francisco (City) enacted an ordinance requiring all persons to obtain a site-specific permit before seeking to construct, install, or maintain certain telecommunications equipment, known as “Personal Wireless Service Facilities” (hereafter wireless facilities), on existing poles in the public right-of-way. In this appeal, we consider whether the ordinance, on its face, is preempted by sections 7901 and 7901.1. We affirm the trial court’s determination that portions of the ordinance that authorize consideration of aesthetics are not preempted by state law.

I. FACTUAL AND PROCEDURAL BACKGROUND

T-Mobile West LLC, Crown Castle NG West LLC,² and ExteNet Systems (California) LLC (collectively Plaintiffs) are considered “telephone corporations” under California law. (§ 234.) Plaintiffs’ business requires installation and operation of wireless facilities, including antennas, transmitters, and power supplies, on existing utility poles in the City’s public rights-of-way. These wireless facilities are considered “telephone lines.” (§ 233.)

In January 2011, the San Francisco Board of Supervisors adopted Ordinance No. 12-11 (Wireless Ordinance or Ordinance), which required Plaintiffs to obtain a wireless facility site permit (Wireless Permit) from the City’s Department of Public Works (DPW) before installing or modifying any wireless facility in the public right-of-way.³ In adopting the Ordinance, the Board of Supervisors observed:

“(1) Surrounded by water on three sides, San Francisco is widely recognized to be one of the world’s most beautiful cities. Scenic vistas and views throughout San

² Crown Castle NG West LLC has also appeared in this litigation as Crown Castle NG West Inc. and NextG Networks of California, Inc.

³ The Wireless Ordinance was codified as Article 25 of the San Francisco Public Works Code.

Francisco of both natural settings and human-made structures contribute to its great beauty.

“(2) The City’s beauty is vital to the City’s tourist industry and is an important reason for businesses to locate in the City and for residents to live here. Beautiful views enhance property values and increase the City’s tax base. The City’s economy, as well as the health and well-being of all who visit, work or live in the City, depends in part on maintaining the City’s beauty.

“(3) The types of wireless antennas and other associated equipment that telecommunications providers install in the public rights-of-way can vary considerably in size and appearance. The City does not intend to regulate the technologies used to provide personal wireless services. However, *the City needs to regulate placement of such facilities in order to prevent telecommunications providers from installing wireless antennas and associated equipment in the City’s public rights-of-way either in manners or in locations that will diminish the City’s beauty.*” (Italics added.) After the Ordinance was enacted, DPW adopted implementing regulations.

The Ordinance required a showing of technological or economic necessity for permit approval and created three “Tiers” of facilities based on equipment size. Tier I was defined to include only the smallest equipment (essentially, primary and secondary equipment enclosures, each less than 3 cubic feet in volume and no greater than 12 inches wide and 10 inches deep). Tier II was defined to allow equipment slightly larger in overall volume than Tier I (4 cubic feet), but with the same limits on width and depth. Tier III was defined as any equipment larger than Tier II. The Ordinance conditioned approval of permits for equipment in Tiers II and III on aesthetic approval by a City department responsible for the proposed site.

Within Tiers II and III, three additional subdivisions were created, depending on whether the proposed wireless facility was in a location designated as (1) unprotected,

(2) “Planning Protected” or “Zoning Protected,” or (3) “Park Protected.”⁴ Each of those subdivisions, in turn, triggered different aesthetic standards for approval. For example, if a wireless facility was proposed to be installed near a historic building or in a historic district, the City’s Planning Department needed to determine that it would not “significantly degrade the aesthetic attributes that were the basis for the special designation” of the building or district. Additionally, for any Tier III facility, a “necessity” standard required DPW to find that “a Tier II Facility is insufficient to meet the Applicant’s service needs.” DPW would not issue a Wireless Permit unless the relevant City department determined the proposed wireless facility “satisfie[d]” the applicable aesthetic compatibility standard.

If DPW approved a Tier III application after recommendation by the Planning Department, the approval from DPW was only “tentative,” and the applicant was then required to notice the public. “Any person” could protest tentative approval of a Tier III application within 20 days of the date the notice was mailed and then subjected the application to public hearing. After a final determination on a Tier III application, “any person” could appeal to the Board of Appeals.

On May 3, 2011, Plaintiffs filed an action for declaratory and injunctive relief. The operative second amended complaint asserted five causes of action: (1) violation of Government Code section 65964, subdivision (b);⁵ (2) an unlawful taking of Plaintiffs’

⁴ A “Planning Protected” location generally involves proposed locations adjacent to national historic landmarks or that the City has designated as having views rated as “good” or “excellent.” A “Zoning Protected” location is “within a Residential or Neighborhood Commercial zoning district under the San Francisco Planning Code.” A “Park Protected” location is adjacent to a City park or open space.

⁵ Government Code section 65964 provides: “As a condition of approval of an application for a permit for construction or reconstruction for a development project for a wireless telecommunications facility, as defined in Section 65850.6, a city or county shall not do any of the following: [¶] (a) Require an escrow deposit for removal of a wireless telecommunications facility or any component thereof. However, a performance bond or other surety or another form of security may be required, so long as the amount of the bond security is rationally related to the cost of removal. In establishing the amount of

property without due process of law; (3) violation of and preemption by sections 7901 and 7901.1; (4) preemption of DPW regulations granting the Planning Department review authority under the California Environmental Quality Act; and (5) violation of and preemption by the then-newly enacted section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 (47 U.S.C. § 1455). Plaintiffs' first and fourth causes of action were resolved by summary adjudication. Plaintiffs voluntarily dismissed their second cause of action before trial.

During the bench trial on the remaining third and fifth causes of action, Plaintiffs and the City stipulated that Comcast, AT&T, and PG&E have also installed certain equipment, including backup battery units, antennas, cut-off switches, power meters, and transformers, on utility poles in the City's public right-of-way. With respect to PG&E, it was stipulated the City granted PG&E a franchise to install its facilities in the public right-of-way and requires it to obtain temporary occupancy permits if the installation will take more than one day. The parties also stipulated that telephone corporations installing facilities on utility poles other than wireless facilities, such as AT&T, and state video providers, such as Comcast, need only obtain utility conditions permits and temporary occupancy permits if the installation will take more than one day. Comcast, AT&T, and PG&E are not required to obtain any site-specific permit as a condition of installing such facilities on existing utility poles.⁶

the security, the city or county shall take into consideration information provided by the permit applicant regarding the cost of removal. [¶] (b) Unreasonably limit the duration of any permit for a wireless telecommunications facility. Limits of less than 10 years are presumed to be unreasonable absent public safety reasons or substantial land use reasons. However, cities and counties may establish a build-out period for a site. [¶] (c) Require that all wireless telecommunications facilities be limited to sites owned by particular parties within the jurisdiction of the city or county.”

⁶ AT&T also installs “surface-mounted” facilities in the public right-of-way. By separate ordinance, the City requires AT&T to publicly notice its intent to install such a facility at a particular location, allows protests to be filed, and requires a hearing if protests are filed.

Following posttrial briefing and argument, the trial court issued its proposed statement of decision, to which both parties objected. On November 26, 2014, the trial court overruled the objections, issued its final statement of decision, and entered final judgment. The court ruled in favor of Plaintiffs on their fifth cause of action, holding that modification provisions of the Ordinance and DPW regulations violate section 6409 of the Middle Class Tax Relief and Job Creation Act. With respect to Plaintiffs' third cause of action, the trial court found portions of the Ordinance, conditioning issuance of a permit on economic or technological necessity, were preempted by section 7901. However, the court held the Ordinance's aesthetics-based compatibility standards were not preempted by sections 7901 or 7901.1.

In concluding that sections 7901 and 7901.1 did not impliedly preempt the City's power to impose aesthetic conditions, the court rejected Plaintiffs' argument that the public right-of-way is incommoded only by physical obstruction of travel. The court concluded *Palos Verdes Estates, supra*, 583 F.3d 716 "correctly viewed the public's right to the 'use of the road' as encompassing far more than merely getting from place to place." The trial court also agreed with the *Palos Verdes Estates* court that "the passage of [section] 7901.1 in 1995 codified and bolstered the right of local government to control and regulate construction of telecommunications facilities and for that reason . . . the Wireless Ordinance is not pre-empted by [section] 7901.1."

The trial court found Plaintiffs' equipment and facilities installed in the public rights-of-way to be "generally similar in size and appearance" to equipment installed by "landline" telephone corporations, cable television operators, and PG&E. Nonetheless, the trial court also rejected Plaintiffs' "secondary argument" that the Ordinance directly conflicts with the equivalence requirement found in section 7901.1, subdivision (b). The court agreed Plaintiffs had failed to sustain their burden of proving the Ordinance was invalid on its face because of this lack of equivalency. The court further explained: "[T]urning to the merits of Plaintiffs' contention[,] the Court agrees that the term all entities means just that and is not limited to telephone and telegraph corporations. However, Plaintiffs have failed to provide reasoning or authority that justifies a finding

that [section] 7901.1 requires that all entities, whatever or whoever they may be, must be subject to regulation under the Wireless Ordinance or something similar.”

Plaintiffs filed a timely notice of appeal from the judgment.⁷ After Plaintiffs filed their notice of appeal, the Board of Supervisors adopted Ordinance No. 18-15 (the Amended Ordinance) in order to comply with the trial court’s judgment.⁸ In relevant part, the Amended Ordinance retains the same basic permitting structure, but simplifies the standards applicable to proposed wireless facilities by removing the size-based tiers. (See S.F. Public Works Code, §§ 1502–1503.) The Amended Ordinance continues to require compliance with aesthetics-based compatibility standards, but the applicable standard is now determined solely by the location of the facility. (See *id.*, §§ 1502, 1508–1510.) All wireless facilities are now subject to the public notice and protest provisions formerly only applicable to Tier III facilities. (See *id.*, §§ 1512–1513.)⁹

II. DISCUSSION

The question on appeal is whether the Ordinance, on its face, conflicts with and is preempted by sections 7901 and 7901.1. Plaintiffs contend the Legislature preempted local regulation by giving Plaintiffs the right to install telephone lines in the public right-of-way “in such manner and at such points *as not to incommode the public use of the*

⁷ The City filed a cross appeal, which was voluntarily dismissed.

⁸ On December 10, 2015, the City asked us to take judicial notice of, among other things, the Amended Ordinance. We deferred ruling on the unopposed request and now grant it with respect to the Amended Ordinance, its implementing regulations, and dictionary definitions of “incommode.” (Evid. Code, §§ 451, subd. (e), 452, subds. (b), (h), 459; *Dailey v. City of San Diego* (2013) 223 Cal.App.4th 237, 244, fn. 1 [“we may take judicial notice of postjudgment legislative changes that are relevant to an appeal”].) In all other respects, the request is denied because the documents the City asks us to notice are irrelevant.

⁹ Intervening legislative amendments may moot an appeal (*Callie v. Board of Supervisors* (1969) 1 Cal.App.3d 13, 18), but it is undisputed that the Amended Ordinance reenacted aesthetic conditions for issuance of a Wireless Permit. The differences between the 2011 Wireless Ordinance and the Amended Ordinance are irrelevant to our analysis, and we refer to them interchangeably as the Ordinance.

road or highway or interrupt the navigation of the waters.” (§ 7901, italics added.) Plaintiffs also argue the Ordinance violates the “equivalent treatment” requirement of section 7901.1, subdivision (b), because only wireless providers are required to obtain site-specific permits to install their equipment within the right-of-way. The City, on the other hand, maintains the Ordinance is not preempted by either section 7901 or section 7901.1.¹⁰ Specifically, the City insists the plain meaning of the term “incommode” is broad enough “to be inclusive of concerns related to the appearance of a facility” and section 7901.1, subdivision (b), does not apply to the Ordinance. We agree with the City on both points.

We review questions of statutory interpretation and preemption de novo. (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089, fn. 10; *Lewis C. Nelson & Sons, Inc. v. Clovis Unified School Dist.* (2001) 90 Cal.App.4th 64, 69.) “ ‘[T]he construction of statutes and the ascertainment of legislative intent are purely questions of law. This court is not limited by the interpretation of the statute made by the trial court ’ ” (*Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal.App.4th 383, 391–392.)

“Facial challenges consider only the text of a measure, not the application of the measure to particular circumstances.” (*San Diego Gas & Electric Co. v. City of Carlsbad* (1998) 64 Cal.App.4th 785, 803; accord, *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) “Facial challenges to legislation are the most difficult to successfully pursue because the challenger must demonstrate that ‘ ‘no set of circumstances exists under which the [law] would be valid.’ ” [Citation.]’ [Citation.] Thus, the moving party must establish that the challenged legislation inevitably is in total, fatal conflict with applicable prohibitions.” (*Sierra Club v. Napa County Bd. of Supervisors* (2012) 205 Cal.App.4th 162, 173.) “[O]ur task is to determine whether the statute can constitutionally be applied. ‘To support a determination of facial unconstitutionality,

¹⁰ The League of California Cities, the California State Association of Counties, and SCAN NATOA, Inc. (the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors) filed an amicus curiae brief in support of the City’s position.

voiding the statute as a whole, [plaintiffs] cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute Rather, [plaintiffs] must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.' ” (*Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 267.)

Preemption analysis “consists of four questions, which in order of increasing difficulty may be listed as follows: (1) Does the ordinance duplicate any state law? (2) Does the ordinance contradict any state law? (3) Does the ordinance enter into a field of regulation which the state has expressly reserved to itself? (4) Does the ordinance enter into a field of regulation from which the state has implicitly excluded all other regulatory authority?” (*Bravo Vending v. City of Rancho Mirage, supra*, 16 Cal.App.4th at p. 397.) “ ‘[A]bsent a clear indication of preemptive intent from the Legislature,’ we presume that local regulation ‘in an area over which [the local government] traditionally has exercised control’ is not preempted by state law. [Citation.] ‘The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption.’ ” (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1242; *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149.)

“A local ordinance *duplicates* state law when it is ‘coextensive’ with state law. [Citation.] [¶] A local ordinance *contradicts* state law when it is inimical to or cannot be reconciled with state law. [Citation.] [¶] A local ordinance *enters a field fully occupied* by state law in either of two situations—when the Legislature ‘expressly manifest[s]’ its intent to occupy the legal area or when the Legislature ‘impliedly’ occupies the field. [Citations.] [¶] When the Legislature has not expressly stated its intent to occupy an area of law, we look to whether it has *impliedly* done so. This occurs in three situations: when ‘ “(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate

clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the” locality.’ ” (*O’Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067–1068.)

A. *Implied Preemption by Sections 7901 and 7901.1*

Plaintiffs raise several discrete arguments for reversal. First, Plaintiffs urge section 7901 gave them a right to construct and maintain their facilities in public rights-of-way throughout the state “without further discretionary approval by local governments.” They do not claim “the City lacks all authority to regulate the telephone corporations’ exercise of their [s]ection 7901 rights, rather Plaintiffs argue that the Wireless Ordinance is an act in excess of the limited [ministerial] authority the Legislature reserved to the City.” In the alternative, Plaintiffs argue that section 7901’s plain language indicates the Legislature impliedly sought to prohibit *any* local government regulation of aesthetics.

Plaintiffs’ first argument appears to be premised on the mistaken understanding that local government has no authority to regulate Plaintiffs’ installations unless specifically authorized to do so by statute. The relevant question is not, as Plaintiffs posit, whether section 7901 or section 7901.1 “grants” the City discretionary regulatory power or the power to consider aesthetics. The question is really whether either section *divests* the City of its constitutional powers. Our review of the California Constitution, statutory provisions, and the relevant case law lead us to believe section 7901 is a limited grant of rights to telephone corporations, with a reservation of local police power that is broad enough to allow discretionary aesthetics-based regulation.

The California Constitution provides: “A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” (Cal. Const., art. XI, § 7.) “Often referred to as the ‘police power,’ this constitutional authority of counties or cities to adopt local ordinances is ‘the power of sovereignty or power to govern—the inherent reserved power of the state

to subject individual rights to reasonable regulation for the general welfare.” [Citation.] The police power extends to legislative objectives in furtherance of public peace, safety, morals, health and welfare.’ ” (*Cotta v. City and County of San Francisco* (2007) 157 Cal.App.4th 1550, 1557.) “Under the police power . . . , [municipalities] have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. [Citation.] . . . [¶] If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.” (*Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885.) The local police power generally includes the power to adopt ordinances for aesthetic reasons. (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 886 [imposition of aesthetic permit conditions “have long been held to be valid exercises of the city’s traditional police power”]; *Disney v. City of Concord* (2011) 194 Cal.App.4th 1410, 1416 [“settled . . . that cities can use their police power to adopt ordinances for aesthetic reasons”].)

Telegraph and telephone corporations have long been granted the right (franchise) to construct their lines along and upon public roads and highways throughout the state. (*Sunset Tel. and Tel. Co. v. Pasadena* (1911) 161 Cal. 265, 272–273 [discussing former Civ. Code, § 536]; *Pacific Telephone I, supra*, 51 Cal.2d at pp. 770–771.) That franchise, however, also has long been subject to regulation to ensure such lines do not “incommode” the public’s use of those roads and highways. (Former Civ. Code, § 536, as amended by Stats. 1905, ch. 385, § 1, pp. 491–492; Stats. 1951, ch. 764, pp. 2025, 2194, 2258 [reenacting former Civ. Code, § 536 as Pub. Util. Code, § 7901].) Since 1951, section 7901 has provided: “Telegraph or telephone corporations may 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 may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, *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.*” (Italics added.) The Legislature later confirmed local government’s “right to exercise reasonable control as to the time, place,

and manner in which roads, highways, and waterways are accessed” in its enactment of section 7901.1. (§ 7901.1, subd. (a), added by Stats. 1995, ch. 968, § 1, p. 7388.)

The City concedes Plaintiffs are “telephone corporations” seeking to install “telephone lines” under section 7901. (See §§ 233, 234; *City of Huntington Beach v. Public Utilities Com.* (2013) 214 Cal.App.4th 566, 587–588; *GTE Mobilenet of Cal. Ltd. v. City of San Francisco* (N.D.Cal. 2006) 440 F.Supp.2d 1097, 1103 [“wireless carriers are included in the definition of ‘telephone corporation’ in § 7901, and . . . the definition of ‘telephone line’ in § 7901 is broad enough to reach wireless equipment”].) It is undisputed that local government cannot entirely bar a telephone corporation from installing its equipment in the public right-of-way. (*Pacific Telephone I, supra*, 51 Cal.2d at p. 774.) Furthermore, cities may not charge franchise fees to telephone corporations for the privilege of installing telephone lines in the public right-of-way. (*Huntington Beach*, at p. 587.) But section 7901 does not grant telephone corporations unlimited rights to install their equipment within the right-of-way. Rather, section 7901 clearly states that such installations must not “incommode the public use of the road or highway or interrupt the navigation of the waters.” (§ 7901.) Furthermore, “section 7901 grants [Plaintiffs] the privilege to construct infrastructure upon public rights-of-way, subject to a municipality’s ‘right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed.’ (§ 7901.1, subd. (a).)” (*Huntington Beach*, at p. 569, fn. omitted.)

In *Pacific Telephone I, supra*, 51 Cal.2d 766, our Supreme Court held the construction and maintenance of telephone lines in public streets is a matter of state concern, not a municipal affair, under article XI of the California Constitution. (*Id.* at p. 768.) It was, by then, “settled that [former] section 536 of the Civil Code constitutes ‘a continuing offer extended to telephone and telegraph companies . . . which offer when accepted by the construction and maintenance of lines’ [citation] gives a franchise from the state to use the public highways for the prescribed purposes without the necessity for any grant by a subordinate legislative body.” (*Id.* at p. 771.) Accordingly, the City could not require the telephone company to obtain a separate local franchise (*ibid.*), in addition

to the state franchise, or in the absence of such a local franchise “exclude telephone lines from the streets upon the theory that ‘it is a municipal affair’ ” (*id.* at p. 774).

Plaintiffs suggest the *Pacific Telephone I* holding is determinative and that, if the construction and maintenance of telephone lines is a statewide concern, localities may not regulate Plaintiffs’ access to the right-of-way by requiring a discretionary permit. Plaintiffs read the opinion far too broadly. The *Pacific Telephone I* holding is a narrow one: cities cannot exclude telephone lines from the public right-of-way on the basis that no local franchise has been obtained.¹¹ Opinions are not authority for propositions not considered. (*People v. Avila* (2006) 38 Cal.4th 491, 566.) Importantly, in *Pacific Telephone I*, the telephone company conceded the City retained the power to require it to obtain permits before installation or excavation in the right-of-way. (*Pacific Telephone I, supra*, 51 Cal.2d at pp. 773–774.)

“The right of telephone corporations to construct telephone lines in public rights-of-way is not absolute. It has been observed by our Supreme Court that section 7901 grants ‘a limited right to use the highways and [does so] only to the extent necessary for the furnishing of services to the public.’ (*County of L. A. v. Southern Cal. Tel. Co.* (1948) 32 Cal.2d 378, 387.) The text of section 7901 provides that telephone lines may not ‘incommode the public use of the road or highway’ (*Ibid.*) Section 7901.1 states ‘[i]t is the intent of the Legislature, consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed.’ (§ 7901.1, subd. (a).) ‘The control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner.’ (§ 7901.1, subd. (b).) [¶] In addition, section 2902 states that municipal corporations may

¹¹ *Sunset Tel. and Tel. Co. v. Pasadena, supra*, 161 Cal. 265 stands for a similarly narrow proposition. Plaintiffs also misplace their reliance on *In re Johnston* (1902) 137 Cal. 115, which is not on point. *Johnston* involved former section 19 of article XI of the California Constitution, which gave gas and water companies a franchise to install pipes in the right-of-way, limited only by “ ‘such general regulations as the municipality may prescribe for damages and indemnity for damages.’ ” (*Johnston*, at p. 119.)

not ‘surrender to the [Public Utilities Commission] its powers of control to supervise and regulate the relationship between a public utility and the general public in matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility, the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets, and the speed of common carriers operating within the limits of the municipal corporation.’ ” (*City of Huntington Beach v. Public Utilities Com.*, *supra*, 214 Cal.App.4th at pp. 590–591.) Thus, “the Public Utilities Code specifically contemplates potential conflicts between the rights of telephone corporations to install telephone lines in the public right-of-way and the rights of cities to regulate local matters such as the location of poles and wires.” (*Id.* at p. 591.)

Instead of preempting local regulation, the statutory scheme (§§ 2902, 7901, 7901.1) and the above authority suggest the Legislature intended the state franchise would coexist alongside local regulation. In arguing “[t]here is no meaningful difference between regulating entry in a blanket fashion versus regulating entry on a case-by-case basis,” Plaintiffs seek to divert our attention from the only question before us. Case-by-case regulation is meaningfully different. Requiring a local franchise, as the City did in *Pacific Telephone I*, has the immediate effect of prohibiting the telephone corporations’ use of the public right-of-way, whereas local regulation on a site-by-site basis does not have the same impact. As stated by Amici Curiae, the exercise of local planning discretion “is not used to prohibit the use of the public rights of way, or to abridge any state-conferred rights of [telephone corporations]. It is used to harmonize the interest and rights of [telephone corporations] with cities’ and counties’ other legitimate objectives” Plaintiffs cannot meet their burden on a facial challenge by suggesting the City may apply the Ordinance so as to prohibit their use of the right-of-way altogether. (*Arcadia Unified School Dist. v. State Dept. of Education*, *supra*, 2 Cal.4th at p. 267 [“ ‘[t]o support a determination of facial unconstitutionality, voiding the statute as a whole, [plaintiffs] cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the

statute’ ”].) Plaintiffs have not met their burden to show local government can *never, in any situation*, exercise discretion to deny a permit for a particular proposed wireless facility. Thus, we turn to Plaintiffs’ second argument—that section 7901 implicitly prohibits *any* local government regulation of wireless facility aesthetics.

Plaintiffs appear to concede the Ordinance does not duplicate or contradict state law. Instead, they appear to focus on whether the Ordinance has “manifested its intent to ‘fully occupy’ ” any area of regulation exceeding that necessary to prevent physical obstruction of travel on the public right-of-way. (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 898.) Accordingly, the question is whether the Legislature impliedly preempted the City’s power to condition approval of a Wireless Permit on aesthetics-based standards? “The Legislature’s ‘preemptive action in specific and expressly limited areas weighs against an inference that preemption by implication was intended elsewhere.’ [Citations.] In addition, . . . ‘[p]reemption by implication of legislative intent may not be found when the Legislature has expressed its intent to permit local regulations. Similarly, it should not be found when the statutory scheme recognizes local regulations.’ ” (*Big Creek Lumber Co. v. County of Santa Cruz, supra*, 38 Cal.4th at p. 1157.)

“In general, courts are cautious in applying the doctrine of implied preemption: ‘[I]n view of the long tradition of local regulation and the legislatively imposed duty to preserve and protect the public health, preemption may not be lightly found.’ [Citation.] Where local legislation clearly serves local purposes, and state legislation that appears to be in conflict actually serves different, statewide purposes, preemption will not be found.” (*San Diego Gas & Electric Co. v. City of Carlsbad, supra*, 64 Cal.App.4th at p. 793.)

The Ordinance unquestionably allows the City to condition approval of a particular Wireless Permit on aesthetic considerations. Plaintiffs contend the Legislature impliedly preempted such local regulation by giving telephone corporations the power to install telephone lines 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.” (§ 7901, italics added.) Plaintiffs’ position is that “incommode” means only physical obstruction of travel in the public right-of-way. The City, on the other hand, points out that the dictionary definition of “incommode” is broader and includes “inconvenience, discomfort, and disturbance beyond mere blockage.” (See Merriam Webster Online Dictionary <<http://www.merriam-webster.com/dictionary/incommode>> [as of Sept. 15, 2016] [defining “incommode” as “to give inconvenience or distress to: disturb”]; Webster’s Dictionary (1828) <<http://webstersdictionary1828.com/Dictionary/incommode>> [as of Sept. 15, 2016] [defining “incommode” as “[t]o give inconvenience to; to give trouble to; to disturb or molest in the quiet enjoyment of something, or in the facility of acquisition”; denoting “less than annoy, vex or harass”; e.g., “We are incommoded by want of room to sit at ease”].) We must construe the statute.

“The relevant principles that guide our decision are well known. ‘Our function is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citation.] To ascertain such intent, courts turn first to the words of the statute itself [citation], and seek to give the words employed by the Legislature their usual and ordinary meaning. [Citation.] When interpreting statutory language, we may neither insert language which has been omitted nor ignore language which has been inserted. (Code Civ. Proc., § 1858.) The language must be construed in the context of the statutory framework as a whole, keeping in mind the policies and purposes of the statute [citation], and where possible the language should be read so as to conform to the spirit of the enactment. [Citation.]’ [Citations.] [¶] We also must endeavor to harmonize, both internally and with each other, separate statutory provisions relating to the same subject.” (*Lewis C. Nelson & Sons, Inc. v. Clovis Unified School Dist.*, *supra*, 90 Cal.App.4th at pp. 69–70.) “‘It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.’ A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.’” (*Rodriguez v. Superior Court* (1993) 14 Cal.App.4th 1260, 1269.)

“When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word.” (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121–1122.) “If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute)” (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) “When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.” (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1008.) “We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.” (*People v. Jenkins* (1995) 10 Cal.4th 234, 246.) “The court will apply common sense to the language at hand and interpret the statute to make it workable and reasonable.” (*Wasatch Property Management*, at p. 1122.)

In contending the trial court erred by adopting the broader interpretation of “incommodate,” Plaintiffs rely on *Western Union Tel. Co. v. Visalia* (1906) 149 Cal. 744, 750 (*Visalia*) and *Pacific Tel. & Tel. Co. v. City & County of San Francisco* (1961) 197 Cal.App.2d 133, 152 (*Pacific Telephone II*). In *Visalia*, a telegraph company challenged an assessment imposed on a purported local franchise to operate telegraph lines within the city of Visalia. (*Visalia*, at p. 745.) Our Supreme Court concluded there was no such local franchise because former Civil Code section 536 had already given the telegraph company “the right, of which the city could not deprive it, to construct and operate its lines along the streets of the city.” (*Visalia*, at p. 750.) The court continued: “[N]evertheless [the telegraph company] could not maintain its poles and wires in such a manner as to unreasonably obstruct and interfere with ordinary travel; and the city had the authority, under its police power, to so regulate the manner of . . . placing and

maintaining its poles and wires as to prevent unreasonable obstruction of travel.” (*Id.* at pp. 750–751.)

In *Pacific Telephone II*, *supra*, 197 Cal.App.2d 133, the City argued that the telephone company could not claim a franchise under former section 536 of the Civil Code without first proving that the construction and maintenance of its poles and lines in San Francisco streets would not “incommode” the public use thereof. (*Id.* at p. 145.) Division One of this court rejected the argument, reasoning that the City’s interpretation of former Civil Code section 536 was too restrictive. “Obviously, the Legislature in adopting section 536 knew that the placing of poles, etc., in a street would of necessity constitute some incommmodity to the public use, but *the restriction necessarily is limited to an unreasonable obstruction of the public use.* [¶] . . . [¶] It is absurd to contend that the installation of telephone poles and lines, *under the control by the city of their location and manner of construction*, is such an ‘incommodation’ as to make section 536 inapplicable. Such a construction of that section would make it completely inoperable.” (*Pacific Telephone II*, at p. 146, italics added.)

Neither *Pacific Telephone II* nor *Visalia* considered the issue presented here—whether the aesthetic impacts of a particular telephone line installation could ever “incommode the public use.” We decline Plaintiffs’ invitation to consider the opinions as authority for propositions not considered. (*People v. Avila*, *supra*, 38 Cal.4th at p. 566.) In fact, the *Pacific Telephone II* court stated, “because of the state concern in communications, the state has retained to itself the broader police power of granting franchises, *leaving to the municipalities the narrower police power of controlling location and manner of installation.*” (*Pacific Telephone II*, *supra*, 197 Cal.App.2d at p. 152, italics added.) Thus, the case does not support Plaintiffs’ position that section 7901 prohibits local government from considering aesthetics when issuing individual Wireless Permits. It simply leaves open the question—what kind of control over location and manner can local government exercise?

Although California courts have not yet addressed this precise issue in any published opinion, authority from the United States Court of Appeals for the Ninth

Circuit is directly on point. In *Palos Verdes Estates*, *supra*, 583 F.3d 716, the city of Palos Verdes Estates denied, for aesthetic reasons, two permits to construct wireless facilities in the public right-of-way. (*Id.* at p. 719.) A city ordinance authorized Palos Verdes Estates to deny such permit applications on aesthetic grounds. (*Id.* at pp. 720–721.)

When the telephone company challenged the permit denials, the *Palos Verdes Estates* court found no conflict between the city’s consideration of aesthetics and section 7901. The key to that conclusion was the court’s observation that article XI, section 7 of the California Constitution grants local government authority to regulate local aesthetics and “neither [section] 7901 nor [section] 7901.1 divests it of that authority.” (*Palos Verdes Estates*, *supra*, 583 F.3d at pp. 721–722.) The court construed the statutory language, “to ‘incommode’ the public use,” as meaning “to ‘subject [it] to inconvenience or discomfort; to trouble, annoy, molest, embarrass, inconvenience’ or ‘[t]o affect with inconvenience, to hinder, impede, obstruct (an action, etc.).’ ” (*Id.* at p. 723.) It also observed, “ ‘public use’ of the rights-of-way is not limited to travel” and that “[i]t is a widely accepted principle of urban planning that streets may be employed to serve important social, expressive, and aesthetic functions.” (*Ibid.*)

Likewise, section 7901.1 did not preempt the local ordinance, as it “was added . . . in 1995 to ‘bolster the cities’ abilities with regard to construction management and to send a message to telephone corporations that cities have authority to manage their construction’ ” (*Palos Verdes Estates*, *supra*, 583 F.3d at p. 724, italics added, quoting Sen. Com. on Energy, Utilities, and Communications, Analysis of Sen. Bill No. 621 (1995–1996 Reg. Sess.)) “If the preexisting [‘incommodation’] language of [section] 7901 did not divest cities of the authority to consider aesthetics in denying [wireless facility] construction permits, then, a fortiori, neither does the language of [section] 7901.1, which only ‘bolsters’ cities’ control.” (*Palos Verdes Estates*, *supra*, 583 F.3d at p. 724.) The court concluded, “there is no conflict between [the city’s] consideration of aesthetics in deciding to deny a [wireless] permit” and sections 7901 and 7901.1. (*Palos Verdes Estates*, at p. 724.)

Three years earlier, another panel of the Ninth Circuit reached the opposite conclusion in an unpublished decision *Sprint PCS v. La Cañada Flintridge* (9th Cir. 2006) 182 Fed.Appx. 688, 689, 691 (*La Cañada Flintridge*). The *La Cañada Flintridge* court rejected the dictionary definition of “incommode” and, instead, relied on *Pacific Telephone II*’s narrow construction of “incommode.” (*Id.* at pp. 690–691.) The court determined the city could only prevent “ ‘unreasonable obstruction of the public use,’ ” because “[t]he text focuses on the function of the road—its ‘use,’ not its enjoyment. Based solely on § 7901, it is unlikely that local authorities could deny permits based on aesthetics without an independent justification rooted in interference with the function of the road.” (*Id.* at pp. 690–691.)

Plaintiffs ask us to rely on *La Cañada Flintridge*, contending that *Palos Verdes Estates* inadequately addresses California authority. Plaintiffs’ criticism is not well taken. The *Palos Verdes Estates* court cites *Pacific Telephone I* for the proposition that a “telephone franchise is a matter of state concern but city still controls the particular location and manner in which public utility facilities are constructed in the streets.” (*Palos Verdes Estates, supra*, 583 F.3d at pp. 722–723, fn. 3.) We have already expressed our disagreement with Plaintiffs’ broader reading of *Pacific Telephone I* and thus cannot fault the *Palos Verdes Estates* court for implicitly reaching the same conclusion or not discussing *Visalia, supra*, 149 Cal. 744, *In re Johnston, supra*, 137 Cal. 115, or *Sunset Tel. and Tel. Co. v. Pasadena, supra*, 161 Cal. 265.

Of course, we are not bound by the Ninth Circuit’s opinion on matters of state law. (*Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1317.) Although the *Palos Verdes Estates* opinion is not binding, we find it persuasive. (*Adams v. Pacific Bell Directory* (2003) 111 Cal.App.4th 93, 97; *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 299.) We agree with the City and the *Palos Verdes Estates* court that Plaintiffs’ interpretation of “incommode” is too narrow and inconsistent with the term’s plain meaning. Plaintiffs’ other textual arguments, grounded in *La Cañada Flintridge*, are no more convincing. According to Plaintiffs, because the express language of section 7901 provides that telephone corporations may not install their equipment in a

location or manner that “incommode[s] the public use of the road or highway or interrupt[s] the navigation of the water,” the Legislature must have intended “incommode” be limited to physical obstructions of travel.¹² Plaintiffs’ argument rests on the faulty assumption that “use” of a public road means nothing beyond transportation thereon. We agree with the *Palos Verdes Estates* court that public use of the right-of-way is not limited to travel and that streets “may be employed to serve important social, expressive, and aesthetic functions.” (*Palos Verdes Estates, supra*, 583 F.3d at p. 723.)

We believe the *La Cañada Flintridge* court reached the wrong result through a cursory analysis, in which it interpreted “incommode” too narrowly and adopted a myopic view of the function of public roads. (*La Cañada Flintridge, supra*, 182 Fed.Appx. at pp. 690–691.) Furthermore, although we are not precluded from considering unpublished federal decisions, we note that even within the Ninth Circuit *La Cañada Flintridge* has no precedential value. (*Bowen v. Ziasun Technologies, Inc.* (2004) 116 Cal.App.4th 777, 787, fn. 6; U.S. Cir. Ct. Rules (9th Cir.), rule 36-3(a) [“[u]npublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion”].)

Nothing in section 7901 explicitly prohibits local government from conditioning the approval of a particular siting permit on aesthetic concerns. In our view, “incommode the public use” means “to unreasonably subject the public use to inconvenience or

¹² The Legislature’s use of the terms “use” and “enjoyment” in other, unrelated provisions of state law does not convince us that the omission of the latter term here is significant. (See *Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 595 [“when ‘ ‘ ‘ a statute on a particular subject omits a particular provision, the inclusion of such a provision in another statute concerning a related matter indicates an intent that the provision is not applicable to the statute from which it was omitted’ ’ ’ ” (italics added)].) Nor are we persuaded by Plaintiffs’ reliance on out-of-state tort cases that involved liability related to a utility company’s actual physical obstruction of public roads. Neither these opinions, nor other inapposite out-of-state cases cited by Plaintiffs, address the question before us. Nor do they suggest the meaning of “incommode” is limited to physical obstruction of travel.

discomfort; to unreasonably trouble, annoy, molest, embarrass, inconvenience; to unreasonably hinder, impede, or obstruct the public use.” (See *Palos Verdes Estates, supra*, 583 F.3d at p. 723.)

We cannot agree with Plaintiffs that our construction of the term “incommode” is limitless and “effectively nullif[ies] the Section 7901 franchise.” We can certainly imagine that a large wireless facility might aesthetically “incommode” the public use of the right-of-way, if installed very close to Coit Tower or the oft photographed “Painted Ladies,” but present no similar “incommodation” in other parts of the urban landscape. Plaintiffs also argue: “Even if aesthetics were a theoretically proper basis for regulating the installation of telephone lines in the public rights of way under Section 7901, the City’s treatment of other equipment in the public rights of way emphasizes that there are no legitimate grounds for claiming that wireless equipment may incommode the use of the public rights of way.” Should Plaintiffs be denied a Wireless Permit in an area already cluttered with other electrical and telecommunications equipment, we again have no doubt they may pursue an as-applied challenge. Presented only with a facial challenge, we cannot assume the City will apply the Ordinance in this manner. (*Arcadia Unified School Dist. v. State Dept. of Education, supra*, 2 Cal.4th at p. 267.)

The trial court did not err in determining the Ordinance is not facially preempted by sections 7901 and section 7901.1.

B. *Direct Conflict Preemption by Section 7901.1*

Plaintiffs also argue that the Ordinance directly conflicts with section 7901.1, subdivision (b), because the City “has singled out wireless equipment” by requiring providers of commercial mobile services alone to obtain site-specific permits while “ignoring the aesthetics of identical equipment installed by other right of way occupants.” Plaintiffs assert the trial court’s conclusion the Ordinance does not facially conflict with section 7901.1, subdivision (b), “is inconsistent with its [other] factual and legal holdings”—i.e., that other occupants’ equipment is similar in size and appearance and that site-specific permitting requirements are not imposed on other occupants of the right-of-way.

Section 7901.1 provides: “(a) It is the intent of the Legislature, *consistent with Section 7901*, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways *are accessed*. [¶] (b) The control, to be reasonable, shall, at a minimum, *be applied to all entities in an equivalent manner*. [¶] (c) Nothing in this section shall add to or subtract from any existing authority with respect to the imposition of fees by municipalities.” (Italics added.) Plaintiffs and the City agree that section 7901.1, subdivision (b), applies only to construction activities. They use the term in different senses, however.

The City maintains: “[T]he use of the phrase ‘time, place, and manner in which the roads, highways, and waterways are *accessed*’ clearly refers to local authority to control *temporary* uses of the public right-of-way during construction. This term implies that the legislature intended to make clear local governments could prevent accommodations both through section 7901 and by controlling the use of the public right-of-way during construction—even if the facilities once constructed (i.e., underground utility facilities) could not themselves incommode the public right-of-way.” (Italics added.) In other words, “[t]he inquiry under section 7901 is whether, *once installed*, those facilities would ‘incommode’ the public right-of-way. Construction management regulations permitted under section 7901.1 . . . address *how* the applicant intends to install its facilities in the public right-of-way.” Under the City’s interpretation of section 7901.1, subdivision (b) of the statute has no application to the Ordinance because it is not a regulation of “time, place, and manner of *construction*—but is instead a regulation that permits Wireless Facilities to be installed in the public right-of-way subject to certain siting criteria.” (Italics added.)

Plaintiffs, on the other hand, contend that section 7901.1 does not relate solely to temporary construction access to the right-of-way. Plaintiffs’ position is that section 7901.1 “does not expand [local government] authority,” but rather defines the limited authority section 7901 reserved for local governments to regulate how the public right-of-way is accessed *and* occupied. “In other words, Section 7901.1 tells us that the way local governments can enforce the limits of telephone corporations’ statewide franchise rights

and ensure they do not ‘incommode the public use’ of the streets is to assert ‘reasonable control’ over the ‘time, place, and manner’ in which telephone corporations access the public rights of way.” (Fn. omitted.) Plaintiffs maintain “[s]ection 7901 does not describe local authority, [s]ection 7901.1 does.”

“Access” means “a way of getting near, at, or to something or someone”; “a way of being able to use or get something”; “permission or the right to enter, get near, or make use of something or to have contact with someone.” (See Merriam Webster Online Dictionary <<http://www.merriam-webster.com/dictionary/accessed>> [as of Sept. 15, 2016].) Although the plain meaning of the word “accessed” is ambiguous, the remainder of section 7901.1 and its legislative history make clear the section is concerned solely with “temporary access” for construction purposes. (See *Palos Verdes Estates, supra*, 583 F.3d at pp. 724–725 [agreeing the Legislature’s use of phrase “time, place and manner” in which rights-of-way “are accessed” “can refer only to when, where, and how telecommunications service providers gain entry to the public rights-of-way”].)

Enactment of section 7901.1 was premised on an understanding that the section 7901 franchise “provide[s] the telephone corporations with the right to *construct and maintain* their facilities. Local government has limited authority to manage or control that *construction*. [¶] . . . [¶] . . . This bill is intended to bolster the [cities’] abilities with regard to *construction management* and to send a message to telephone corporations that cities have authority to manage *their construction*, without jeopardizing the telephone corporations’ statewide franchise.” (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 621 (1995–1996 Reg. Sess.) as amended May 3, 1995, pp. 1, 3, italics added.)

The legislative history of section 7901.1 also provides: “To encourage the statewide development of telephone service, telephone corporations have been given state franchises to build their networks. This facilitates construction by minimizing the ability of local government to regulate construction by telephone corporations. Only telephone companies have statewide franchises; energy utilities and cable television companies obtain local franchises. [¶] . . . [¶] Cities interpret their authority to manage telephone

company *construction* differently. Telephone corporations represent their rights under state franchise differently as well, sometimes taking the extreme position that cities have absolutely no right to control *construction*. This lack of clarity causes frequent disputes. Among the complaints of the cities are a lack of ability to plan maintenance programs, protect public safety, minimize public inconvenience, and ensure adherence to sound construction practices. Cities are further concerned that *multiple street cuts caused by uncoordinated construction* shortens the life of the streets, causing increased taxpayer costs, as described in a recently commissioned study.” (Assem. Com. on Utilities and Commerce, Rep. on Sen. Bill No. 621 (1995-1996 Reg. Sess.) as amended July 7, 1995, pp. 1–2, italics added.)

If we were to accept Plaintiffs’ construction of section 7901.1, we would necessarily ignore this legislative history and, more importantly, eliminate the effect of section 7901.1’s “consistent with section 7901” language. Had the Legislature intended to narrow and restrict local government’s existing authority under section 7901, we cannot imagine it would have included the “consistent with section 7901” language. Nor would an enrolled bill report make clear that Senate Bill No. 621 “would not change current law, but would simply clarify existing municipality rights” and “reduce disputes between telephone companies and cities, as well as result in fewer inconveniences to citizens without infringing on the telephone companies[’] right to construct and maintain their facilities.” (Governor’s Off. of Planning & Research, Enrolled Bill Rep. on Sen. Bill No. 621 (1995–1996 Reg. Sess.) Aug. 31, 1995, p. 3.)

We understand section 7901.1 as affirming and clarifying a subset of the local government powers, reserved under section 7901, to regulate telephone lines in the right-of-way. Even if the meaning of “all entities” is not limited to telephone and telegraph corporations, Plaintiffs have not met their burden to show the Ordinance is preempted because section 7901.1 applies only to construction itself. With respect to temporary access to the right-of-way for construction purposes, the record shows the City uniformly requires AT&T, Comcast, PG&E, and Plaintiffs to obtain temporary occupancy permits to access the right-of-way during construction. Of course, if the Legislature disagrees

with our conclusions, or wishes to grant the wireless industry further relief from local regulation, it remains free to amend sections 7901 and 7901.1.

III. DISPOSITION

The judgment is affirmed. The City is to recover its costs on appeal.

BRUINIERS, J.

WE CONCUR:

SIMONS, Acting P. J.

NEEDHAM, J.

Superior Court of the City and County of San Francisco, No. CGC-11-510703, James McBride, Judge.

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