SUPREME COURT OF THE STATE OF CALIFORNIA

T-MOBILE WEST LLC, et al. Plaintiffs and Appellants, vs. THE CITY AND COUNTY OF SAN FRANCISCO, et al, Defendants and Respondents.	Case No. S238001 First Appellate District, Division Five, No. A144252 San Francisco County Superior Court No. CGC-11-510703

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After a Decision of the Court of Appeal of the State of California,
First Appellate District, Division Five
Case No. A144252

The Superior Court of the State of California,
County of San Francisco
The Honorable James McBride, Judge
Case No. CGC-11-510703

CONSOLIDATED ANSWER TO BRIEFS OF AMICI CURIAE BY RESPONDENTS CITY AND COUNTY OF SAN FRANCISCO AND CITY AND COUNTY OF SAN FRANCISCO DEPARTMENT OF PUBLIC WORKS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

State Statutes & Codes

Federal Statutes

San Francisco Statutes, Codes & Ordinances

Other Authorities

Other References

The City and County of San Francisco and the San Francisco Department of Public Works submit this consolidated answer to the briefs of amici curiae Pacific Bell Telephone Company and AT&T Mobility, LLC (collectively "Pac Bell"), American Consumer Institute Center for Citizen Research ("Consumer Institute"), CTIA—The Wireless Association® and the Wireless Infrastructure Association (collectively "CTIA"), and the Chamber of Commerce of the United States of America, the California Chamber of Commerce, the San Francisco Chamber of Commerce, the Bay Area Council, and the Silicon Valley Leadership Group (collectively "Chamber").

I. Public Utilities Code Section 7901 Does Not Preempt The Wireless Ordinance

A. Local Governments Have Long Exercised Discretionary Control Over the Location And Manner of Construction Of Telecommunications Equipment In The Public Right Of Way.

The statewide franchise granted to telecommunications companies to construct poles and install equipment in the public right of way is a qualified right; these facilities may not "incommode the public use of the road or highway." (Cal. Pub. Util. Code, § 7901 ("Section 7901").) The "incommode" clause reserves the local police power, permitting local governments to impose conditions that act as "a restriction of and burden upon a franchise already existing." (*W. Union Tel Co. v. City of Visalia*, (1906) 149 Cal. 744, 751 ("*City of Visalia*").)

Some amici supporting Appellants argue that the power reserved to local governments by Section 7901 is narrow. They contend, for instance, that wireless companies can install equipment in the public rights of way "largely free from local regulations." (Consumer Inst. Br. at 3; see also

CTIA Br. at 42.) These parsimonious accounts of Section 7901's reservation of local power are inconsistent with courts' understanding that this statute allows cities to "control[] the particular location of and manner in which all public utility facilities, including telephone lines, are constructed in the streets." (*Pac. Tel. & Tel. Co. v. City & County of San Francisco* (1959) 51 Cal.2d 766, 773 ("*Pac. Tel. I*").)

In *Pac. Tel. I*, this Court held that San Francisco lacked the power to require telephone companies to obtain a local franchise—but the telephone company conceded, and this Court accepted, that San Francisco could control *where* telephone equipment was placed, even if it could not control *whether* the telephone company provided service within its borders. (*Id.*) Other cases have held that local governments may exercise discretionary control over telecommunications equipment in the right of way. (See *City of Petaluma v. Pac. Tel. & Tel. Co.* (1955) 44 Cal.2d 284, 287 [discussing municipal corporations statute that "recognizes the power of a city to regulate the location and manner of installation of telephone lines and equipment"]; *Pacific Tel. & Tel. Co. v City & County of San Francisco* (1961) 197 Cal.App.2d 133 ("*Pac. Tel II*") ["installation of telephone poles and lines" is "under the control by the city of their location and manner of construction"]; *id.* at 152 ["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"]; cf. *City of Huntington Beach v. Cal. P.U.C.* (2013) 214 Cal.App.4th 566, 590 ["The right of telephone corporations to construct telephone lines in public rights of way is not absolute."].) Amici's view of the narrow power afforded by Section 7901 is irreconcilable with this longstanding recognition of cities' discretionary powers over the location of telephone facilities.

Nor do amici supporting Appellants recognize the import of California Public Utilities Code section 2902—indeed, the briefs of CTIA, Pac Bell, and the Consumer Institute do not cite or acknowledge this statute. (CTIA Br. at 6-7; Consumer Inst. Br. at ii; Pac Bell Br. at 12-13.) Section 2902 establishes that cities have, and may not surrender, the power to regulate "the location of the poles, wires, mains or conduits of any public utility, on, under, or above any public streets" in order to safeguard "the health, convenience, and safety of the general public."[1] Moreover, as the amicus curiae brief of the League of California Cities et al. points out at pages 27-28, the Legislature has acknowledged that cities grant "discretionary permits" to wireless facilities in Government Code section 65850.6(a), and that cities control the "placement" of wireless facilities in Government Code section 65964.1(e). And the California Public Utilities Commission recognizes that local governments "may regulate the time, *location*, and manner of installation of telephone facilities in public streets." (*In re Competition for Local Exchange Service* (1998) 82 Cal. P.U.C.2d 510, 543-44 [Decision No. 98-10-058] [citing Cal. P.U.C. Gen. Order 159A & § 2902; emphasis added].) Thus, the right of cities to exercise their police powers of the location of wireless facilities is well established, and is

[1] Appellants contend that Section 2902 does not reserve to cities the power to regulate the appearance of wireless facilities, based on *Southern California Gas Co. v. City of Vernon* (1995) 41 Cal.App.4th 209, 217 ("*City of Vernon*"). They describe *Vernon* as a case "reject[ing] a locality's attempt to regulate aesthetics." (App. Reply Br. 27.) That is wrong; *Vernon* held that a city could not impose *safety features* on underground gas pipelines that were in addition to safety requirements already imposed by CPUC. (*City of Vernon, supra*, at pp. 216-17.) Moreover, while *City of Vernon* affirmed that the city could only regulate gas utility installations in order to prevent them from blocking city streets, this was because of the particular local franchise the utility had, which allowed any utility facilities that did not "interfere unreasonably with the ordinary travel or the use of the streets of the City." (*Id.* at p. 218, fn. 4.) That is not the language of Section 7901.

incompatible with a view that cities have only the narrow power to prevent the physical obstruction of their streets and sidewalks.

B. Section 7901 Permits Cities To Regulate The Appearance Of Wireless Facilities In The Public Right Of Way.

Cities' discretionary power over the location and manner of construction of wireless facilities includes the power to prevent telephone companies from installing needlessly ugly wireless equipment. Large wireless equipment, with unsightly wires and bulky boxes, can blight the appearance of historic districts, neighborhoods, and view corridors—as Appellants have admitted (Appellants' Opening Br. at 44, fn. 13), and none of Appellants' amici contest. Because this blight incommodes the public's use of San Francisco's streets and sidewalks under the ordinary meaning of "incommode," which connotes inconvenience or disturbance, San Francisco acts within its authority under Section 7901 in reviewing proposed wireless facilities to ensure that they do not unnecessarily mar its public right of way. In practice, San Francisco has granted nearly all of the permits that telephone companies have sought (Respondent's Appendix ["RA"] 10), demonstrating that San Francisco's Wireless Ordinance (S.F. Pub. Works Code §§ 1500-1529) does not compromise companies' ability to provide wireless service. But without the Wireless Ordinance's discretionary review process, San Francisco would lack any ability to check particularly large or ugly installations, and telephone companies would have no incentive to propose smaller and more discreet equipment.

Amici supporting appellants offer various reasons why the "incommode" clause in Section 7901 does not encompass San Francisco's important aesthetic concerns. Some amici offer the same argument that Appellants rest on: that *City of Visalia* definitively concludes that to

"incommode" the public's use of the right of way means "to unreasonably obstruct and interfere with ordinary travel," and nothing more. (CTIA Br. at 44; see also Pac. Bell Br. at 21.) None respond, however, to San Francisco's argument that *City of Visalia*'s holding concerned only whether Visalia could require a local franchise, and therefore the case had no reason to consider the full scope of the "incommode" clause. (Respondents' Br. at 15.) *City of Visalia* cannot foreclose a claim that it had no reason to consider.[2]

Pac Bell disputes San Francisco's argument that the ordinance at issue in *City of Visalia* was concerned with the appearance of facilities as well as obstruction; the requirement that utility poles placed by the telegraph company "shall be of the uniform height of twenty-six feet above the surface of the ground" likely served aesthetic concerns. (See *City of Visalia*, *supra*, 149 Cal. at p. 748.) Pac Bell argues that this 26-foot height limit was simply to ensure that travel on the roadways would be unobstructed by wires, but trucks 20 or more feet high were likely no more common in 1906 than today. (See Cal. Veh. Code § 35250 ["No vehicle or load shall exceed a height of 14 feet measured from the surface upon which the vehicle stands . . . ."].) Pac Bell also points to language in Section 3 of the Visalia ordinance stating that "poles and wires shall be placed and maintained so as not to interfere with travel" on roadways, arguing that this

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[2] Similarly irrelevant is the Attorney General opinion that Pac Bell relies on (Pac Bell Br. at 27-28); this opinion says that telephone companies must construct their lines across navigable waters "so as not to interfere with the primary use of the property for navigation and commerce." Op. No. 52-56, 22 Ops.Cal.Atty.Gen. 1 (July 2, 1953). Section 7901's prohibition against "incommod[ing] the public use" of roads is distinct from its prohibition against "interrupt[ing] the navigation of the waters," as discussed further below at page 15, and accordingly the Attorney General's opinion about the proper interpretation of one prohibition does not bear on the interpretation of the other.

demonstrates the ordinance's purpose to prevent obstruction. (Pac Bell Br. at 36 [citing *City of Visalia, supra*, 149 Cal. at p. 747]) But Section 3 does not purport to set out Visalia's legislative purposes, and a separate section of the Visalia ordinance, Section 2, granted the Visalia city council the right to direct and control the placement of lines and poles. This separate Section 2 does not mention obstruction or interference with travel (*City of Visalia, supra*, 149 Cal. at p. 747), which undermines Pac Bell's claim that the purpose of the ordinance was merely to prevent obstruction.

Some amici supporting Appellants contend that aesthetic harms cannot incommode the public's use of the right of way because the only use of highways and streets contemplated by Section 7901 is travel. Under amici's view, surveying the Victorian homes lining Haight Street or the historic street lamps along Market Street is not a "use" of those streets that the Legislature recognized with Section 7901. (See Consumer Inst. Br. at 5; Pac Bell Br. at 50-51.) Pac Bell supports this argument with citation to 19th century decisions and English common law, which it argues established that the "public use" of a road or highway could only mean the right to pass. (Pac. Bell. Br. at 30-31.) But the far-flung cases Pac Bell cites do not support its claim that the Legislature intended "public use" to be restrictive. *Stackpole v. Healy* (1819) 16 Mass. 33, for instance, concerns the right of members of the public to use public roads for private purposes, holding that "[i]t is not lawful . . . for the public to put their cattle into the highway to graze." Similarly, *Stinson v. City of Gardiner* (1856) 42 Me. 248, 255, holds that a child using a road as a playground instead of for travel may not recover in tort for injuries she sustains as a result of a defective railing. *Stackpole* and *Stinson* may speak to a 19th century legislature's view of private individuals' interest in public roads, but they

say nothing about the *local government's* police power over public roads. Other cases cited by Pac Bell recognize the public's easement protecting the right to pass on public roads but do not speak to other interests unrelated to that easement. (See, e.g. *Town of Troy v. Cheshire R. Co.* (1851) 23 N.H. 83, 92 ["In general, towns are not the owners of highways, though there unquestionably may be cases where the towns, instead of a mere easement, have thought it judicious to purchase the fee of the land itself."]; *People v. Marin Cty.*, 103 Cal. 223, 226-27 (1894) ["The easement of the public in and to a public highway is as sacred as any other property right, and cannot be divested by the action of the owner of the servient tenement in which it exists"].)

But even if Pac Bell were correct that the 1850 Legislature that enacted Section 7901's predecessor contemplated travel as the only public use of the roads, it would be irrelevant to the outcome here, for two reasons. First, San Francisco's interest in the appearance of its roads is closely connected to the public's use of these roads for travel. As the City's Better Streets Policy lays out, and the City's trial evidence supported, "well-organized utility design and placement" that minimizes visual clutter improves "pedestrian safety" and reduces incidents of distracted driving. (RA 1-2; Reporter's Transcript 1056:13-1058:06.) In addition to promoting safe travel, preserving the attractiveness of San Francisco's roadways encourages the public to travel them. The Board of Supervisors expressly found that San Francisco's appearance "is vital to the City's tourist industry," among other things. (S.F. Ord. No. 12-11 [Appellant's Appendix 140].) Accordingly, ensuring that San Francisco's public roads are attractive promotes the public's use of those roads for

travel, and wireless facilities that needlessly blight attractive roads incommode the public's use of those roads for travel.

Second, regardless of what the 19th-century Legislature understood as the purpose of roads and highways, the Legislature has subsequently recognized that municipalities have an interest in "the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets" because it affects "the health, convenience, and safety of the general public." (Cal. Pub. Util. Code, § 2902.) This express recognition of a diffuse public interest in the right of way goes far beyond the 19th-century common law view that the roads are a path for travel and nothing more.

Pac Bell also argues that the phrase "incommode the public use of the roads" had a specific meaning at common law that the Legislature intended to incorporate into Section 7901's predecessor. Here, Pac Bell relies on 19th-century treatises explaining what constituted a public nuisance with respect to roads and highways. (Pac Bell Br. at 31-32.) But these authorities are irrelevant in the absence of any indication that the Legislature intended to incorporate the law of nuisance into Section 7901 or its predecessors, or to reserve to local governments only the power to prevent nuisances on public roads. To the contrary, Section 2902 recognizes that local governments retain a wide range of their police powers to protect "the health, convenience, and safety of the general public" with respect to "the location of the poles, wires, mains or conduits of any public utility, on, under, or above any public streets."[3]

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[3] Moreover, even if 19th-century nuisance law was the measure of cities' powers over utility facilities in the right of way, Pac Bell offers only a partial account of that body of law. A nuisance need not be obstruction; as one 19th-century treatise explains, a foul smells from adjoining ditches can be a nuisance, as can a shooting party held near a highway "with the

Amicus Consumer Institute makes other arguments that the Legislature intended "incommode" to mean only physical obstruction. It contends that Section 7901's prohibition of telecommunications facilities that "interrupt" the navigation of the waters, adjacent to its prohibition of facilities that "incommode" the public use of roads, demonstrates that the Legislature was concerned with physical obstruction alone. (Consumer Inst. Br. at 5.) This argument has it backwards, because the Legislature chooses different words when it wants to mean different things. (See, e.g., *Playboy Ents., Inc. v. Superior Court* (1984) 154 Cal.App.3d 14, 21 ["Where the same word or phrase might have been used in the same connection in different portions of a statute but a different word or phrase having different meaning is used instead, the construction employing that different meaning is to be favored."].) That the Legislature chose the capacious word "incommode" with reference to the public use of roads indicates that it was concerned with a broader range of inconveniences with regard to roads than navigable waters, where the "interrupt[ion]" of navigation was its only concern.

C. Permitting Cities to Regulate the Location And Appearance Of Wireless Facilities In The Right Of Way Does Not Threaten Statewide Franchise Rights.

Several amici supporting Appellants contend that San Francisco's Wireless Ordinance will impair the ability of wireless companies to provide telecommunications services to the public. These amici repeat and amplify

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noise and disturbance consequent upon such assemblage." (Angell & Durfee, A Treatise on the Law of Highways (2d ed. 1868 by Choate), §§ 233, 255 [available at https://goo.gl/GzdqMn].) That treatise also explains that "[c]onvenience and safety are the essential conditions of a well-maintained highway," and that whether the condition of a road constitutes a nuisance depends on road's context, i.e. on how it is used and on its surroundings. (*Id.* § 259.)

the arguments of Appellants that telephone companies' transition to 5G wireless service—which will involve many small-cell installations—is jeopardized by the Wireless Ordinance. Amici hypothesize that local governments will use standardless, discretionary aesthetics permitting ordinances as a pretext to quash the rollout of new technologies.

Such speculation provides no basis to strike down the Wireless Ordinance, since a challenger "cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application" of the Wireless Ordinance. (*Arcadia Unified Sch. Dist. v. State Dept. of Educ.* (1992) 2 Cal.4th 251, 267 [internal quotation marks omitted].) And amici conspicuously ignore the trial record in this case, which contains no evidence that San Francisco's application of its Wireless Ordinance has impeded Appellants' ability to provide service or significantly raised their cost of providing service in the six years that it has been in effect. To the contrary, the trial below demonstrated that San Francisco approves nearly all of the wireless facility permit applications that it receives. (RA 10.) Amici the League of California Cities et al. ("League") report the same of other jurisdictions that regulate wireless facilities for aesthetics. (League Br. at 11 ["dozens of cities have ordinances that regulate aesthetics for telecommunications facilities in the public rights of way, and the overwhelming majority of all applications have been granted"].)

Moreover, as San Francisco argued in its Respondents' Brief, a locality that arbitrarily denied wireless permits on the basis of spurious or pretextual aesthetic judgments, or for any other reason, would be subject to administrative mandamus. Wireless companies also have federal remedies under the Telecommunications Act of 1996 (U.S. Pub. L. No. 104-104, 110

Stat. 56). When a locality denies a wireless facility permit, it must issue its decision in writing and must support its decision by substantial evidence contained in a written record. (47 U.S.C., § 332(c)(7)(B)(iii); see also *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, 725 ("*Palos Verdes Estates*") ["A city that invokes aesthetics as a basis for a WCF permit denial is required to produce substantial evidence to support its decision, and, even if it makes that showing, its decision is nevertheless invalid if it operates as a prohibition on the provision of wireless service in violation of 47 U.S.C. § 332(c)(7)(B)(i)(II)."].) These substantive and procedural protections ensure that local aesthetic criteria are not applied pretextually or arbitrarily.

II. Section 7901.1 Does Not Preempt The Wireless Ordinance.

There is a division among amici supporting Appellants about the meaning of Public Utilities Code section 7901.1. CTIA agrees with Appellants that Section 7901.1 applies both to construction activity and to wireless facilities' occupation of the public right of way (CTIA Br. at 45-46), while Pac Bell and the Consumer Institute argue that the Court of Appeal correctly concluded that Section 7901.1 applies only to wireless companies' construction activity (Pac Bell Br. at 42; Consumer Inst. Br. at 5).

Under either interpretation of Section 7901.1, the Wireless Ordinance is not preempted. If Pac Bell and the Consumer Institute are correct, then Section 7901.1 has no application to the Wireless Ordinance because this ordinance does not regulate construction, and because all utilities must obtain a temporary occupancy permit in order to perform construction in the public right of way. (See Respondents' Br. at 31-32.) If

CTIA and Appellants are correct that Section 7901.1 applies to the location of wireless facilities in the public right of way as well as to construction, then this statute only bolsters San Francisco's authority to regulate the locations and appearances of wireless facilities, because it expressly authorizes cities to "exercise reasonable control" over the "place[] and manner" in which telephone companies occupy the public right of way with equipment. (§ 7901.1(a).)

Nor does the Wireless Ordinance conflict with Section 7901.1's nondiscrimination command, which provides that reasonable local control must "be applied to all entities in an equivalent manner." (§ 7901.1(b).) This provision requires only that San Francisco regulate all wireless facilities in the same way, not that it apply standards for one kind facility to all kinds of facilities. (See Respondents' Br. at 32-34.) CTIA and Appellants make no argument that San Francisco discriminates among wireless companies in granting wireless facility permits.

III. The Court Should Disregard Pac Bell's New Challenges To The Wireless Ordinance.

Pac Bell devotes considerable ink to attacking San Francisco's surface-mounted facilities ordinance, which regulates the hundreds of equipment cabinets that utility companies attach to sidewalks in the public right of way. (Pac Bell Br. 15, 24-25.) That ordinance, codified in Article 27 of San Francisco's Public Works Code, is not challenged here. Similarly, Pac Bell argues that San Francisco Public Works Code section 1506—which permits (but does not mandate) the City to require telephone companies to plant and maintain street trees to screen wireless equipment, or pay an in lieu fee where planting a tree is not feasible—is an unlawful

franchise fee. (Pac Bell Br. 39-42.) Although Appellants mentioned the street tree provision of the Wireless Ordinance in their amended complaint (CT 240), they have never urged the courts that the street tree provision is a franchise fee or an unlawful exaction. (See, e.g., Corrected Appellants' Opening Br., Case No. A144252 (Aug. 28, 2015) at 10-11 [mentioning S.F. Public Works Code, § 1506 in statement of facts only].)

This Court should disregard both of these challenges because they are new issues introduced by an amicus on appeal. "California courts refuse to consider arguments raised by amicus curiae when those arguments are not presented in the trial court, and are not urged by the parties on appeal." (Cal. Assn. for Safety Educ. v. Brown (1994) 30 Cal.App.4th 1264, 1275.) Pac Bell offers no reason to depart from that settled rule here; in the event it wishes to press these claims it may do so by bringing its own case. Moreover, the street tree claim is meritless in any event. The Wireless Ordinance allows the City to require a street tree but does not mandate a street tree in every instance, and Pac Bell points to no evidence in the record of the circumstances where the City has required one.

IV. Under Any Plausible Preemption Analysis, San Francisco's Wireless Ordinance Is Not Preempted.

The United States Chamber of Commerce et al. devote their amicus brief to preemption issues, arguing that the Court of Appeal erred in upholding the Wireless Ordinance because it applied the wrong preemption standard. The Chamber argues that the Court of Appeal rested its holding on the fact that "there were hypothetical situations in which the installation of a wireless facility might violate both local law and state law." (Chamber Br. at 1 [citing *T-Mobile West LLC v. City & County of San Francisco*

(2016) 3 Cal.App.5th 334, 355-56, review granted Dec. 21, 2016 ("*T-Mobile West*")].) The Chamber argues that the Court of Appeal should instead have asked whether the Wireless Ordinance applies a different standard to wireless facility applications than Section 7901. (Chamber Br. at 7.) If the standards are different, argues the Chamber, then the local standard is preempted because it conflicts with the Legislature's determination of what standard ought to apply. (*Id.*)

The Chamber misunderstands the Court of Appeal's holding. That court did not uphold the Wireless Ordinance because the same wireless facility could hypothetically both obstruct a sidewalk (in violation of state law) and offend aesthetic standards (in violation of the Wireless Ordinance). Instead, the Court of Appeal held, "[i]n our view, '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.' " (*T-Mobile West, supra*, 3 Cal.App.5th at p. 355 [quoting *Palos Verdes Estates, supra*, 583 F.3d at p. 723].) Under that interpretation of state law, "a large wireless facility might aesthetically 'incommode' the public use of the right-of-way." (*T-Mobile West, supra*, 3 Cal.App.5th at p. 355.) In other words, the Court held, San Francisco's Wireless Ordinance does not establish a different standard for wireless facilities; instead it is an application of Section 7901's standard because Section 7901 reserves to localities the power to prevent unreasonable inconveniences and discomforts. Nor does the Wireless Ordinance undermine the purposes of state law, as the Chamber argues in Section III of its amicus brief, because under a proper interpretation of the "incommode" clause, the Wireless

Ordinance serves the Legislature's purposes in prohibiting wireless facilities that incommode the public use of the right of way.

In short, if the Court of Appeal's interpretation of Section 7901 is correct, then the City should prevail in this case regardless of what precise formulation of the facial-challenge preemption test this Court applies. Accordingly, the Court should await a case where the result depends on the proper test for preemption before further clarifying its preemption analysis on a facial challenge. (See *Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.* (2013) 57 Cal.4th 197, 218 ["we need not settle the precise formulation of the [facial challenge] standard because under any of the versions we have articulated the due process claim here would fail"].)

CONCLUSION

This Court should affirm the decision below.

Dated: June 15, 2017

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