

S238001

IN THE SUPREME COURT OF CALIFORNIA

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

v.

CITY AND COUNTY OF SAN FRANCISCO, et al., *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 State of California in and for the
County of San Francisco, Case No. CGC-11-510703
The Honorable James McBride, Judge

**PLAINTIFFS' AND APPELLANTS' CONSOLIDATED RESPONSE
TO BRIEFS OF AMICI CURIAE**

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SUPREME COURT
FILED

JUN 16 2017

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INTRODUCTION

The record in this case amply demonstrates the errors in the decision below and in the City and County of San Francisco's ("City") unprecedented limitation of the State franchise. Appellants respectfully submit this consolidated response to the briefs of amici curiae.

The sole amicus brief submitted in support of the City is notable for what it does not say. It, like the City's briefs, does not defend the Court of Appeal's misapplication of the "no set of circumstances" test, known at the federal level as the *Salerno* standard, to Appellants' facial preemption challenge. Nor does it attempt to deal with the longstanding policy of promoting telecommunications that has been established by the State Legislature, or the impact that overturning this policy will have on the citizens of the State of California. Instead, the brief filed by the League of California Cities, California State Association of Counties, the International Municipal Lawyers Association, and the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors (collectively, "the League") reads as an attempt to push aside this important state policy in favor of as much local control of the rights-of-way as possible, without any regard for the consequences. In doing so, it offers no new justifications for this novel interpretation of local power, and simply restates the arguments that the City has already offered—and that Appellants refuted in their reply brief.

In contrast, the amicus briefs filed in support of Appellants not only help rebut the City’s legal arguments, they dramatically illustrate the consequences of adopting the parochial, balkanized approach to rights-of-way that the City and its amici propound. The amicus briefs supporting Appellants reflect a range of interests: telecommunications providers, consumers, and the technology industry, which all have a stake in the offering of innovative services and the infrastructure needed to support them. (See American Consumer Institute Center for Citizen Research Br. (“ACI Br.”); Pacific Bell Telephone Company and AT&T Mobility, LLC Br. (“AT&T Br.”); CTIA – The Wireless Association® and the Wireless Infrastructure Association Br. (“CTIA/WIA Br.”); 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 Br. (“Chamber Br.”).)

As amici supporting Appellants make clear, the longstanding State policy embodied in Section 7901 of the Public Utilities Code is to encourage deployment of telecommunications facilities in the rights-of-way, which reflects a judgment that such deployments are in the interest of the citizens of the State.¹ The animating purpose of Section 7901 is thus to ensure that telecommunications carriers have the same ability to construct

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

facilities no matter where they are in the State. Reading a vast discretionary review power for localities into this Section, and allowing cities and counties to reject any application on the grounds of mere annoyance or other vague subjective criteria, would fatally undermine this important State policy and contradict this purpose, to the detriment of consumers across the State. As amici explain, ordinances like the City's will frustrate deployment and slow telecommunications progress, raising deployment costs and leaving California behind the rest of the country as it embraces revolutionary fifth generation ("5G") technology.

Taken together, the amicus briefs in this case confirm that this Court should reverse the Court of Appeal's decision and reiterate the importance of a unified State policy that promotes deployment of advanced communications services. As amici emphasize, time is of the essence. The race to unleash 5G technology is underway and the delays, burdens, and costs with discriminatory aesthetic review regimes like the Ordinance are taking their toll. Reaffirming California's embrace of innovative communications systems will not leave localities powerless against a wave of new and intrusive facilities. It will ensure that telecommunications innovation and progress can be pursued across the State, free from unnecessary distortions and burdens.

DISCUSSION

I. NO AMICUS DISPUTES APPELLANTS' SHOWING THAT THE COURT BELOW ERRONEOUSLY APPLIED THE SALERNO STANDARD.

The City has tried to downplay one of the central issues in this appeal: whether the court below erred in applying the rigid “no set of circumstances” standard of review to Appellants’ facial preemption challenge. (See Ans. Br. 38-42.) Following this lead, the sole amicus brief supporting the City makes no attempt to address this issue.

Appellants demonstrated, and amici have confirmed, that the court below erroneously relied on the rigid federal *Salerno* standard of review in deciding Appellants’ facial preemption challenge. (Br. 19-25; Reply Br. 5-7; Chamber Br. 2-11.) The Court of Appeal explicitly invoked the *Salerno* test in its holding, making clear that its view of the standard was outcome determinative. (Opn. 15. See Reply Br. 7-10.) However, the Court of Appeal’s reliance on the “no set of circumstances” test is inconsistent with precedent from this Court, the United States Supreme Court, and courts across the country. (See Chamber Br. 2-6. See also Br. 19-25.) The League does nothing to refute or even engage this line of argument. Nor does it attempt to defend the City’s implausible claim that the Court of Appeal’s express reliance on the *Salerno* standard in reaching its decision was somehow not outcome-determinative. (See Ans. Br. 38.)

As this Court's precedent makes clear, the stringent "no set of circumstances" test has no place in the context of a facial preemption challenge. Instead, facial preemption challenges are analyzed by evaluating whether the local enactment conflicts with State policy or enters an area reserved to the State. (See, e.g., *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067-68; *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1251-52.) If so, the local law cannot stand. The Court of Appeal departed from this established precedent and improperly relied on the rigid "no set of circumstances" test to reach its holding. (See Opn. 15.) On this basis alone, the decision below must be reversed.

II. THE LEAGUE'S RECYCLED ARGUMENTS ABOUT LOCAL POWER ARE FATALLY FLAWED.

While the League avoids *Salerno* altogether, the arguments that it does present on local power cover no new ground. Nor does the amicus brief grapple with any of the points raised in Appellants' Reply Brief. Instead, the League just repackages the same strained construction of the State franchise advanced by the City. It incorrectly interprets the State franchise to reserve to localities essentially unlimited power to regulate telecommunications technologies based on purely subjective "aesthetic degradation" concerns. (League Br. 13.) Under the League and the City's interpretation, Section 7901 gives municipalities free rein to hold new

technologies to a higher standard or slow deployment by enacting ostensibly “aesthetic” regulations such as the Ordinance. But as Appellants and amici have demonstrated, this is precisely what the State franchise is intended to prevent. (See, e.g., Reply Br. 16-30; AT&T Br. 19-23; ACI Br. 2-8.)

A. **Section 7901 Precludes Localities From Regulating Wireless Facilities Based On Aesthetic Concerns.**

Echoing the City, the League contends that under the State franchise, municipalities retain wide ranging police power to regulate telecommunications facilities based on aesthetics. (League Br. 9, 12-23.) In the League’s view, Section 7901 limits localities *only* in that they “may not prohibit telephone corporations from using the public rights of way.” (*Id.* at p. 10.) No California court has ever interpreted the State franchise so narrowly. The League’s unreasonably restrictive interpretation of Section 7901 contradicts the plain language of the statute, runs afoul of decades of California precedent, and is ultimately self-contradictory. (See Reply Br. 13-15.)

First, the League’s interpretation is belied by the plain text of the statute. Section 7901 expressly states that 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” to support communications networks. (§ 7901.) The statute is thus not framed as a pronouncement or reservation of local authority, as the League claims. Rather, the plain language of Section 7901 grants telephone companies an affirmative right to construct and operate the facilities necessary to engage in the telecommunications business across the State of California. The statute’s central focus is ensuring that telephone corporations may access the public rights-of-way throughout the State to ensure that Californians may enjoy state-of-the-art communications systems.

Second, as Appellants have explained, the League’s reading of Section 7901 conflicts with California precedent. (See Reply Br. 14-15, 19-22.) California courts have uniformly recognized that the State franchise’s primary purpose is to promote the deployment of advanced communications systems throughout the State. (See *Pacific Telephone & Telegraph Co. v. City of Los Angeles* (1955) 44 Cal.2d 272, 282 (*Los Angeles*); *Pacific Telephone & Telegraph Co. v. City & County of San Francisco* (1961) 197 Cal.App.2d 133, 147 (*Pacific Telephone II*); *Williams Communications, L.L.C. v. City of Riverside* (2004) 114 Cal.App.4th 642, 652 (*Williams*)). For decades, Section 7901 has been understood to forbid municipalities from erecting barriers to advanced telecommunications deployment. Courts have consistently held that Section 7901 authorizes telephone companies to “construct and maintain in

city streets the necessary equipment to enable the company to operate its business.” (*Pacific Telephone II, supra*, 197 Cal.App.2d at p. 147.) As this Court has recognized, the State franchise is intended to grant telephone companies broad rights to promote advanced telecommunications facilities. Thus, “any delegation from the state to the city of authority to control the right of [telephone companies] to do [] 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.” (*Los Angeles, supra*, 44 Cal.2d at p. 280.)

By contrast, the League’s interpretation of the State franchise would give localities broad license to impose onerous and discriminatory regulations on deployments so long as telephone corporations were not entirely forbidden from accessing the public rights-of-way (though the League does not articulate how a local jurisdiction or telephone company would know when this line has been crossed). (See League Br. 10.) The League admits that it *expects* that localities will often intervene to police the aesthetics of proposed telecommunications deployments. It claims that Section 7901 “charged local agencies with a *responsibility* to reconcile [state franchise] rights with other competing important uses and purposes attendant to the right of way.” (*Id.* at p. 12 [emphasis added].) Armed with the duty to “adjust the balance” between “technological advancement and community aesthetics,” (Opn. 1.) cities across California could effectively

prohibit telephone corporations from using the public rights-of-way. (See League Br. 10.) This is almost a mirror-image reading of the statutory language, which seeks to transform a statewide right-of-access into a reservation of local authority through interpretive sleight of hand. The League's view of the State franchise would "defeat the very purpose of" Section 7901 by "interfer[ing] substantially with the ability of telephone companies to provide adequate communication service to the people of the state." (*Los Angeles, supra*, 44 Cal.2d at p. 282.)

Third, the League's construction of Section 7901 is internally inconsistent. In the context of communications infrastructure, unchecked subjective aesthetic restrictions can quickly result in prohibiting telephone corporations from using the public rights-of-way. (See League Br. 10.) And, as noted above, under the League's narrow reading of the State franchise, nothing would stop a city from denying myriad applications to access the rights-of-way for telecommunications deployments. For example, a sprawling city such as Los Angeles that grants telephone corporations access to construct a telecommunications facility at one location in a single right-of-way might technically comply with the League's view of Section 7901. After all, a city that permits a telephone corporation to use a single right-of-way has, in the League's view, not flatly *prohibited* access to the rights-of-way. But as Appellants explained, the

franchise is rendered a nullity if localities are permitted carte blanche to discriminate against emerging telecommunications facility deployments.

To support its argument, the League treads no new ground, offering the same lineup of theories and sources that the City has pointed to as support for its novel reading of Section 7901. Appellants already rebutted each of these canards. (Reply Br. 16-30.)

The League claims, for example, that localities may enact discriminatory measures like the Ordinance pursuant to their municipal police power to protect the “public health, safety, and welfare.” (League Br. 13.) It theorizes that “avoidance of aesthetic degradation,” is an “unquestionable facet” of municipal police power over which localities retain control. (*Ibid.*) The League is mistaken. California courts have clarified that the regulation of aesthetics falls outside the “narrower police power” that municipalities retain under the State franchise to “regulate the manner of ... placing and maintaining ... poles and wires [so] as to *prevent unreasonable obstruction of travel.*” (*Western Union Telegraph Co. v. City of Visalia* (1906) 149 Cal. 744, 750-51 [emphasis added] (*Visalia*)). Section 7901 thus prohibits—as a matter of statewide concern—use of general municipal police power in any manner that would hinder the deployment of advanced telecommunications equipment. (See, e.g., *Pacific Telephone II*, *supra*, 197 Cal.App.2d at p. 152 [finding that “because of the

state concern in communications,” California has “retained to itself” the “broader police power”].)

The League next claims that Section 2902 supports its broad theory of municipal power under Section 7901. (League Br. 14-15.) But Section 2902 actually confirms California courts’ longstanding recognition that Section 7901 *forbids* municipalities from adopting aesthetics-based regulations. As the League concedes, Section 2902 “does not confer any powers upon” municipalities. (League Br. 15 [quoting *Southern Cal. Gas Co. v. City of Vernon* (1995) 41 Cal. App.4th 209, 217 (*Vernon*)].) Instead, the statute merely clarifies that municipalities are not required to relinquish *all* of their general authority over “matters affecting the health, convenience, and safety of the general public.” (§ 2902.)

Courts have made clear that Section 2902’s reach is limited. In *Vernon*, for example, the court *rejected* a locality’s attempt to regulate aesthetics under Section 2902, explaining that municipalities retain control only over “matters involving the flow of traffic and the use and repair of public streets.” (*Vernon, supra*, 41 Cal.App.4th at p. 217. Accord, *Visalia, supra*, 149 Cal. at p. 750-51 [holding localities may only regulate so “as to prevent unreasonable obstruction of travel” by the placement of telecommunications facilities].) The League points to *City of Huntington Beach v. Public Utilities Commission* (2013) 214 Cal.App.4th 566 (*Huntington Beach*), suggesting the case indicates that localities may retain

control over the relationship between a public utility and the general public. (League Br. 15). But *Huntington Beach* fails to ascribe broad municipal power to Section 2902 as the League claims. In that case, the court concluded only that the California Public Utilities Commission (“CPUC”) violated the procedural rights of a city by ruling on a case that the parties had agreed should be adjudicated in State court. (*Huntington Beach, supra*, 214 Cal.App.4th at pp. 591-93.) Taken together, *Huntington Beach* and *Vernon* confirm that Section 2902 provides no basis for interpreting Section 7901 to grant municipalities the limitless powers that the League asserts here.²

Finally, the League echoes the City’s Answering Brief by claiming that Section 7901’s use of the term “incommodate” preserves for localities unlimited power to enact aesthetics-based regulation of communication facilities. (League Br. 16-23.) Section 7901 places a single, narrow limitation on telephone corporations’ right to access the public rights-of-way: they may not “incommodate the public use of the road or highway or

² The League also claims that Government Code Section 65964.1(e) bolsters its expansive view of local authority because the provision notes that localities retain some limited control over the placement, construction, and modification of facilities. The League misses the point. The statute reaffirms that deployment of advanced telecommunications technology is a statewide objective that should not yield to contrary local interests. (See Gov. Code § 65964.1(c) [finding and declaring that “a wireless telecommunications facility has a significant economic impact in California and is not a municipal affair ... but is a matter of statewide concern”]. See also Gov. Code § 65850.6(e) [finding and declaring the same with respect to collocated wireless telecommunications facilities].)

interrupt the navigation of the waters.” (§ 7901.) Following the City’s lead, the League relies on an expansive dictionary definition to interpret “incommode” so broadly as to encompass every “inconvenience or discomfort” as well as anything that might “annoy, molest, [or] embarrass.” (League Br. 16, n. 1 [citing 7 Oxford English Dict. (2d ed. 1989)].)³

As Appellants and amici have explained, this reading of “incommode” is at odds with decades of California case law and would almost completely hollow out the rights granted by the State franchise. (Reply Br. 22-30; AT&T Br. 28-29.) This Court has confirmed that localities may only regulate so as to “prevent unreasonable obstruction of travel” by the placement of telecommunications facilities. (*Visalia, supra*, 149 Cal. 744, 750-51.) Incommode must be interpreted narrowly because in adopting Section 7901, “[o]bviously, the Legislature ... knew that the placing of poles, etc., in a street would of necessity constitute some incommmodity to the public use.” (*Pacific Telephone II, supra*, 197 Cal.App.2d at p. 146.) Telecommunications facilities, like trolley lines, power lines, and other rights-of-way occupants have an inherent visual impact, which is why the Legislature enacted Section 7901 and ensured that telephone corporations would be able to deploy facilities free from the aesthetic whims of different localities.

³ The relevance of a 1989 dictionary definition to a term used in a statute enacted in 1905 is dubious at best.

Moreover, as AT&T notes, such a broad reading of “incommode” overlooks the clear and unambiguous statutory language stating what must not be incommoded: “the public *use* of [a] road or highway.” (AT&T Br. 17 [citing § 7901] [emphasis added]. See also ACI Br. 4-5.) By inserting the term “use” into Section 7901, the Legislature “places the focus of the statute on the public utility or function of roads and highways, rather than on visual enjoyment.” (AT&T Br. 28.) Travel, not aesthetics, is the “public use” of the roads and highways. The term “incommode” simply cannot be stretched to provide municipalities with the aesthetics-based veto over the installation of telecommunications facilities that the City and the League seek.

B. The League’s Reading Of Section 7901.1 Must Be Rejected.

The League also rehashes the City’s convoluted arguments to dispute the natural reading of Section 7901.1. For all of the reasons articulated in Appellants’ Opening and Reply Briefs, these arguments fail. (Br. 50-56; Reply Br. 31-36.) Section 7901.1 clarifies the limited power reserved to localities in light of the broad franchise rights granted to telephone corporations under Section 7901. “[C]onsistent with Section 7901,” municipalities may exercise “reasonable control as to the time, place, and manner in which [public rights-of-way] are accessed.” (§ 7901.1(a) [emphasis added].) For control to be reasonable, it must, “at a

minimum, be applied to all entities in an equivalent manner.” (§ 7901.1(b).) The only sensible reading of this command is that localities retain *limited* authority over when and how facilities are placed in the rights-of-way.

Insisting that Section 7901.1’s equivalent treatment mandate applies only to temporary construction activities and occupations of the rights-of-way is illogical. (See, e.g., League Br. 30-32.)⁴ Nothing in the text of the statute suggests that the provision is cabined to temporary construction activities and occupations of the rights-of-way. Limiting Section 7901.1’s reach to temporary construction activities leads to absurd results. Under this interpretation, Section 7901.1 would vest municipalities with broad powers to discriminate against *permanent* occupations in the rights-of-way. The Legislature could not have intended such an incongruous outcome. Whether embodied in Section 7901 or Section 7901.1, the State franchise has been understood to reflect an anti-discrimination principle that precludes regulations such as the Ordinance that discriminate among emerging technologies and divergent rights-of-way occupants.⁵

⁴ Certainly, such an interpretation is inconsistent with the language of Section 7901.1, which states that municipalities’ reasonable control must be exercised “consistent with Section 7901.” (§ 7901.1(a).)

⁵ AT&T interprets Section 7901.1 to merely recognize that “the authority of municipalities to mitigate temporary inconvenience or obstructions to travel associated with construction activities.” (AT&T Br. 43.) Although AT&T’s interpretation of Section 7901.1 differs from Appellants’, the result is the same: the State franchise prohibits

III. THE RECORD CONFIRMS THAT, IF ALLOWED TO STAND, THE DECISION BELOW WILL JEOPARDIZE CALIFORNIANS' ACCESS TO ADVANCED TELECOMMUNICATIONS TECHNOLOGIES.

The League attempts to minimize the damage the decision below will have on Californians, if affirmed. It paints an overly optimistic picture of the City of San Francisco's aesthetic review process, once again relying on the City's self-serving purported 98% application grant rate. (League Br. 11, 27.) The League further claims—without citation—that “[a] survey of other cities in California revealed similar results.” (*Id.* at p. 11.)⁶

But the League makes no attempt to address, much less rebut, Appellants' showing that the 98% approval statistic fails to reflect several important considerations. It does not account for deployments that were not pursued or applications withheld due to onerous review processes. (See Reply Br. 29-30.) Nor does the statistic fully reveal that 78% of the approvals granted were for mere modifications or legacy sites that had to be reapproved following the Ordinance's enactment. Indeed, of the 173 applications the City granted through the time of trial, 135 were applications for modifications or legacy sites. (See RT 1270:14-1273:15.) Only 38 of the applications granted through the time of trial were for new

“discrimination by a municipality among and between telephone corporations.” (*Ibid.*) Section 7901.1 provides no basis for localities to enact discriminatory aesthetics-based regulations like the Ordinance.

⁶ The League's vague assertion that an unidentified “survey” revealed “similar results” should be given no credence at all.

sites. (*Ibid.*) The League also fundamentally fails to acknowledge the costs, burdens, and delays associated with obtaining approval. And of course neither the City nor the League can offer any assurance that approvals will continue following resolution of this litigation.

The amici support Appellants' showing that, if affirmed, the decision below would have far-reaching and harmful consequences for Californians. (See Br. 56-61; CTIA/WIA Br. 14-31; ACI Br. 12-16.) The integrity of the State franchise matters now more than ever as the United States accelerates towards a revolution in telecommunications technology. Innovative 5G mobile services and the ubiquitous connection of smart devices to the Internet, known as the Internet of Things ("IoT"), are expected to transform consumers' mobile experience in the near-term. (See CTIA/WIA Br. 15.) Smart energy grids, safer transportation networks, mobile health care, connected homes and factories, cutting-edge public safety communications tools, and immersive entertainment are just a few examples of the consumer benefits the telecommunications industry is on the cusp of unleashing. (See CTIA/WIA Br. 15-16, 19-20; Chamber Br. 17.) Consumer demand for mobile services is already high, and, with these innovations, it is expected to skyrocket even farther. (See ACI Br. 10; CTIA/WIA Br. 14 [estimating mobile traffic will increase almost fivefold between 2016 and 2021].)

To achieve their full potential and meet consumer demand, the transformative services the wireless industry stands ready to unveil will

require ready access to the rights-of-way to support deployments of new or improved wireless infrastructure. (See Br. 11; CTIA/WIA Br. 28-29 [noting the substantial number of small cell deployments needed to meet consumer demand and support the 5G transition].) Yet discriminatory regulations like the Ordinance threaten to delay or derail the deployment of new technologies and better services. For localities with existing wireless coverage “delays can mean the inability to take advantage of new high-speed technologies ... or persistent gaps in coverage and dropped calls—including emergency calls,” and for localities without existing coverage, “those same delays keep residents in the dark altogether.” (CTIA/WIA Br. 33.) The result is coverage gaps, slower connectivity, higher prices, fewer consumer choices, and less investment and innovation.

Amici have also explained that empowering localities to enact discretionary and discriminatory regulations like the Ordinance will create an unwieldy patchwork of regulations across the State that could grind technological progress to a halt. (ACI Br. 13; AT&T Br. 18, 43; Chamber Br. 16-17; CTIA/WIA Br. 52.) The costs and burdens associated with patchwork regulation are multiplied when localities take matters of broad Statewide concern into their own hands. (ACI Br. 1, 12-16 [noting that a grant of local authority over Statewide projects exacerbates “the number of regulatory schemes that must be satisfied, increases the number of proceedings, decision-makers and decisions.”].) The struggle to meet

aesthetic demands on a community-by-community basis would make infrastructure investment and deployment in California difficult, if not impossible. There is no doubt that balkanizing control over telecommunications facilities would inevitably slow deployment and increase the overall cost of a project and, ultimately, the cost to consumers. (*Id.* at pp. 13-14.)

Furthermore, roadblocks like the Ordinance will deprive Californians of the economic growth that comes with the deployment of broadband technology. (See CTIA/WIA Br. 16-18.) The wireless industry is expected to invest \$275 billion over the next decade to deploy 5G, creating more than 4.6 million jobs including as many as 11,000 short-term and 375,000 long-term jobs in California. (See ACI Br. 11; Chamber Br. 16; CTIA/WIA Br. 16-17.) The heavy burdens associated with regulations like the Ordinance will stifle this economic growth and job creation. As amici note, rules like the Ordinance discourage investment, reduce job growth, and hinder innovation. (See AT&T Br. 44 [noting that increased regulatory burdens will “discourage telecommunications corporations from deploying fiber and installing upgraded wireless facilities”]; ACI Br. 9 [explaining that the faster the deployments, the “quicker investors can achieve a return on their investment,” and the more likely they are to engage in “continued investment”].) Granting localities broad power over deployment may also undermine marketplace competition by enhancing