

SUPREME COURT OF THE STATE OF CALIFORNIA

T-MOBILE WEST LLC, et al.

Plaintiffs and Petitioners,

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 Superior Court  
No. CGC-11-510703

SUPREME COURT  
**FILED**

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**ANSWER TO PETITION FOR REVIEW**

**Jorge Navarrete Clerk**

The Honorable James McBride (Ret.), Judge

Deputy

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## INTRODUCTION

It is well settled that local government police power includes aesthetic regulation. In this case, the Court of Appeal found that this local police power could coexist with two different state laws: one granting telephone corporations a “franchise” to use the public right-of-way to install telephone lines, provided such lines do not “incommode the public use” (Pub. Util. Code, § 7901); and the other recognizing local government authority to “exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed” (Pub. Util. Code, § 7901.1). To reach this conclusion the Court of Appeal applied standard preemption analysis to find that nothing in the Public Utilities Code evinced the Legislature’s intent to divest local governments of this police power. The Court also found the term “incommode the public use,” which has been part of California law since 1857, includes consideration of the aesthetic impacts of the installation of wireless facilities on the public’s use of San Francisco’s streets and sidewalks.

Petitioners urge this Court to grant review in order to “secure uniformity of decision” among California’s Courts of Appeal on two separate issues. Petitioners are wrong as to both issues.

The first issue is whether the Court of Appeal adopted a novel test in resolving their facial preemption claim. The cases Petitioners cite, however, demonstrate no division among the lower courts as to how to analyze facial preemption. Moreover, not only is such a split illusory, Petitioners have not shown that the Court here would have reached a different outcome had it not relied on that test.

The second issue is whether the Court of Appeal correctly held that local governments can regulate the installation of telephone lines in the public right-of-way based on aesthetic concerns. Once again there is no disuniformity among



the lower courts. In fact, as the Court of Appeal acknowledged here, its decision is the only reported decision from a California state court to directly address this issue. Petitioners have attempted to manufacture division by misconstruing the holdings in the decisions they claim conflict with the Court of Appeal's decision, but the Court here properly distinguished those cases.

Petitioners also argue that this Court needs to review the decision below to "clarify" whether San Francisco is providing "equivalent" treatment to all telephone corporations as required by section 7901.1. The Court of Appeal correctly held that San Francisco applies its regulatory scheme for accessing the public right-of-way for construction in an equivalent manner to all utilities—not just Petitioners and other telephone corporations installing wireless facilities in the public right-of-way—as the law requires. Nothing about that aspect of the Court's decision presents a matter of statewide importance demanding this Court's review.

## STATEMENT OF THE CASE

### A. The City's Ordinance

This case concerns a 2011 ordinance adopted by the City and County of San Francisco ("San Francisco") Board of Supervisors that added Article 25 to the San Francisco Public Works Code ("Ordinance"). The Ordinance requires a telephone corporation to obtain a permit in order to install a "Personal Wireless Service Facility"<sup>1</sup> ("Wireless Facility") on existing utility, streetlight, and transit poles in San Francisco's public right-of-way. (S.F. Pub. Works Code, § 1500 [Appellants' Appendix ("A") A00194].) The Ordinance allows the San

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<sup>1</sup> Petitioners' Wireless Facilities generally consist of one or two antennas mounted at the top of the pole or attached to cross-beams, and one or two equipment boxes attached to the same pole or an adjacent pole. (See A00782-783; RT 431:19-440:04; 717:04-731:02; RA00118-122.)

Francisco Department of Public Works to deny an application for a Wireless Facility permit if the San Francisco Planning Department determines that the applicant's proposed Wireless Facility did not meet certain prescribed aesthetic standards.<sup>2</sup> (S.F. Pub. Works Code, §§ 1509, 1511(c)-(d) [A00203–205].)

**B. The Courts' Decisions in this Case**

After a bench trial, the trial court found that neither section 7901 nor 7901.1 preempted the Ordinance.<sup>3</sup> (A00845–849.)

The Court of Appeal affirmed the trial court's decision. In particular, the Court held that section 7901 did not prohibit local governments from requiring discretionary permits to install telephone lines in the public right-of-way. The Court rejected Petitioners' argument that this Court previously held in *Pacific Telephone and Telegraph Co. v. City and County of San Francisco* (1959) 51 Cal.2d 766, 774 ("*Pacific Telephone I*") that, because 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." (Court of Appeal Opinion filed September 15, 2016 ["Opn."] 13.) Rather, the Court of Appeal found the holding in *Pacific Telephone I* to be a narrow one—due to the franchise granted to

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<sup>2</sup> For example, for utility poles in historic districts, the Planning Department must determine whether a proposed Wireless Facility "would significantly degrade the aesthetic attributes that were the basis for the special designation of the district." (S.F. Pub. Works Code, § 1502 [A00197].) For poles on scenic streets, the Planning Department would look at whether the proposed Wireless Facility "would significantly degrade the aesthetic attributes that were the basis for the designation of the street for special protection under the General Plan." (S.F. Pub. Works Code, § 1502 [A00197].)

<sup>3</sup> The trial court invalidated one part of the Ordinance, which required a permit applicant to show it had a specific need for a large Wireless Facility before San Francisco would grant a permit application for this type of facility. (A00889–890.) After the trial court's ruling, San Francisco amended the Ordinance to, inter alia, repeal the language the trial court found was preempted. (See Respondents' Motion for Judicial Notice on Appeal, Exh. B [amended Ordinance]; Opn. 7, fn. 8 [taking judicial notice of the amended Ordinance].)

telephone corporations in section 7901, local governments “cannot exclude telephone lines from the public right-of-way on the basis that no local franchise has been obtained.” (Opn. 13.)

The Court of Appeal also disagreed with Petitioners’ claim that section 7901 prohibited local governments from regulating the installation of telephone lines in the public right-of way based on aesthetic concerns. To reach that conclusion, the Court principally relied on its construction of the term “incommode the public use.” The Court found that this term was not limited to preventing physical obstructions (as Petitioners had argued), but included addressing local aesthetic concerns. (See Opn. 15–22.) In sum, as to these two arguments, the Court of Appeal’s decision is quite clear: “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.” (Opn. 10.)

The Court of Appeal also rejected Petitioners’ claim that the Legislature intended section 7901.1 to limit local authority under section 7901 to regulation of the time, place, and manner of utility installations. The Court found that both the language of section 7901.1 and its legislative history make clear that its purpose is to affirm and clarify that local government authority under section 7901 includes regulation of temporary construction activity—not to limit local authority. (Opn. 22–25.)

Finally, the Court of Appeal found that Petitioners had not proven that San Francisco did not treat all entities accessing the public right-of-way to install utility facilities in an “equivalent manner” as required by section 7901.1 subdivision (b). The Court found that San Francisco “uniformly requires” such

entities “to obtain temporary occupancy permits to access the right-of-way during construction.” (Opn. 25.)

## ARGUMENT

### I. THE COURT OF APPEAL’S PREEMPTION ANALYSIS PROVIDES NO BASIS FOR THIS COURT’S REVIEW

#### A. This Case Would Be A Poor Vehicle To Address Any Purported Disuniformity Among The California Courts On Facial Preemption Challenges

The thrust of Petitioners’ claim for review, and that of one of its amici, is that the Court of Appeal created disuniformity in California law by adopting an outlier test for facial preemption—that a local ordinance is preempted only if every application of the local ordinance conflicts with state law. (Petition for Review (“Petition”) at 11–22; Amicus Letter of Chamber of Commerce (“Chamber Letter”) at 2–7.) Not only is the supposed split illusory, as San Francisco shows *infra* in Section I.B, this case would be a poor vehicle for resolving any supposed split in the test for facial preemption. Nothing in the Court of Appeal’s disposition of this case turned on what preemption test it applied.

The Court of Appeal held that the term “incommode the public use” in section 7901 has a broad meaning that readily encompasses aesthetic concerns. (See Opn. 15–22.) Accordingly, the Court held that San Francisco’s Ordinance requiring consideration of aesthetic concerns in deciding whether to issue a Wireless Facility permit neither contradicts state law nor enters into an area fully occupied by state law. (Opn. 21–22.) Under any applicable test for preemption, therefore, San Francisco’s Ordinance is not preempted.

To reach that result, the Court of Appeal did not rely on the abstract proposition that separate state and local standards for Wireless Facilities might sometimes coincide. Instead, it found that an aesthetically objectionable

Wireless Facility could incommode the public right-of-way within the meaning of 7901, so that a municipality's police power under section 7901 includes the right to forbid it. Accordingly, under that interpretation, by enacting the Ordinance San Francisco neither created an obstacle to the state's fulfillment of its legislative objectives, nor entered into an area fully occupied by general law by—the very preemption tests Petitioners acknowledge and espouse (see Petition at 12–13).

Petitioners' straw-man reading of the Court of Appeal's opinion is incorrect. While the Court stated "Plaintiffs have not met their burden to show local governments can *never, in any situation*, exercise discretion to deny a permit for a particular wireless facility" (Opn. 15 [emphasis in original]), Petitioners take the statement out of context. That statement was made in the course of rejecting Petitioners' claim that local governments are completely precluded from issuing discretionary permits for the installation of Wireless Facilities—based on its holding that "the Legislature intended the state franchise would coexist alongside local regulation." (Opn. 14.) Petitioners had hypothesized that, if local governments could exercise their discretion in issuing permits, then it would be theoretically possible for them to reject every permit application for a wireless facility, and thereby defeat the state's objectives in enacting section 7901. (See Opn. 14.) The Court rejected this far-fetched claim on the basis of the unsurprising proposition that "to 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." (Opn. 14 [quoting *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 267 (internal citation marks and alterations omitted)].) Courts do not invalidate local laws based on sheer supposition that local governments could apply them to defeat state objectives.

Nor does the Court's discussion of a hypothetical in which a telephone corporation could install Wireless Facilities in front of Coit Tower or the Painted Ladies (Opn. 22) indicate that it misapprehended the standard for a facial challenge or applied a test that was overly deferential to local governments. Before looking at this hypothetical situation, the Court had already found that section 7901 did not preempt the Ordinance's aesthetic regulations. As the Court noted on rehearing, "the Ordinance's ban on new utility poles is itself a challenged, but seemingly reasonable aesthetic restriction." (Order Modifying Opinion and Denying Rehearing filed October 13, 2016 2–3.) The Court offered this hypothetical only as one example of when San Francisco could, consistent with the Ordinance and section 7901, deny an application for a permit to install a Wireless Facility.<sup>4</sup> It was not, as Petitioners seem to suggest, the only basis for upholding the Ordinance.

Because a Wireless Facility may incommode the public use of a street or sidewalk by marring its appearance, the Court of Appeal correctly determined that San Francisco's Ordinance was not facially preempted by section 7901. But the Court acknowledged that the local exercise of reserved power could in some cases go too far. It was for this reason that the Court noted that the limits of section 7901's reservation of local power are best addressed in an as-applied challenge. (Opn. 22.) There, a court can determine whether San Francisco had

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<sup>4</sup> Petitioners argue that the Court "had not hypothesized a valid scenario because the Ordinance did not affect the installation of wireless facilities in front of Coit Tower or the Painted Ladies." (Petition at 21 & fn 5.) This argument is based on the mistaken notion that the Ordinance bans the installation of Wireless Facilities in underground areas. While the Ordinance does not allow a telephone corporation to install a new utility pole in an area where utility facilities have been undergrounded, it does not prohibit the installation of Wireless Facilities on existing streetlight or transit poles in an undergrounded street. (S.F. Pub. Works Code, § 1500 (c)(1) [A00195].)

implemented the Ordinance's permitting requirements to exceed the bounds of the "incommode" standard.

**B. There Is No Disuniformity Among the California Courts Concerning The Test For Facial Preemption Cases**

As the Court of Appeal correctly held, "[f]acial 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].)" (Opn. 8.) As the Court stated, the question in a facial preemption case is whether, by enacting a particular measure, a local government has contradicted state law or entered an area fully occupied by it. (Opn. 8–10.) A facially preempted local law can be applied in "no set of circumstances" because the law itself is invalid in light of its intrusion into a statewide domain or its interference with legislative objectives.

For that reason, many Courts of Appeal have cited the "no set of circumstances" test, or the "total and fatal conflict" test, in facial preemption cases.<sup>5</sup> (See, e.g., *Sturgeon v. Bratton* (2009) 174 Cal.App.4th 1407, 1419 [applying test to claim that federal law preempted state law]; *San Francisco Apartment Assn. v. City and County of San Francisco* (2016) 3 Cal.App.5th 463, 487; *Browne v. County of Tehama* (2013) 213 Cal.App.4th 704, 716; *Sierra Club v. Napa County Board of Supervisors* (2012) 205 Cal.App.4th 162, 173; *Rental Housing Owners Assn. of Southern Alameda County, Inc. v. City of Hayward* (2011) 200 Cal.App.4th 81, 89–90 [all applying tests to state law preemption

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<sup>5</sup> As this Court has held, the "no set of circumstances" and "total and fatal conflict" tests are in essence the same. (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 346–347.)

claims].) This Court has never disapproved the lower courts' use of this language in preemption cases.<sup>6</sup>

Despite the repeated use of these tests, Petitioners claim that “[o]ther Divisions of the First District Court of Appeal properly recognize that the test has no application to facial preemption challenges.” (Petition at 18, citing *San Francisco Apartment Assn.*, *supra*, 3 Cal.App.5th, at p. 463; *Fiscal*, *supra*, 158 Cal.App.4th, at p. 895.) Petitioners’ citation to *San Francisco Apartment Assn.* is curious, because the Court in that case expressly approved the use of the “no set of circumstances” test. (*San Francisco Apartment Assn.*, *supra*, 3 Cal.App.5th, at p. 463, 487.)

There is also no conflict with the First District’s *Fiscal* decision, because the Court did not even discuss the test. The purported conflict Petitioners describe depends entirely on their straw-man version of the Court of Appeal’s holding, *i.e.* that the Ordinance is facially valid only because application of section 7901’s standard and the Ordinance’s standard might sometimes coincide to reach the same result.

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<sup>6</sup> Rather, this Court has decided preemption cases without mentioning this test. (See, e.g., *American Financial Services Assn. v. City of Oakland* (2016) 343 Cal.4th 1239; *O’Connell v. City of Stockton* (2007) 41 Cal.4th 1061; *Action Apartment Assn. Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232.) Some Court of Appeal decisions do the same. (See, e.g., *Fiscal v. City and County of San Francisco* (2008) 158 Cal.App.4th 895; *Personal Watercraft Coalition v. Board of Supervisors*, (2002) 100 Cal.App.4th 129 [citing tests only when discussing void for vagueness claim].) This is not to suggest that the matter is entirely settled; this Court has considered but not held that a statute may be facially unconstitutional when the “vast majority of its applications” are unconstitutional. (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 502 [internal quotation marks and citations omitted].) But, for the reasons offered in Section I.A., *supra*, the resolution of this case does not at all depend on which test is correct.)



**II. THERE IS NO DISUNIFORMITY AMONG THE CALIFORNIA COURTS ON WHETHER LOCAL GOVERNMENT AUTHORITY UNDER SECTIONS 7901 AND 7901.1 INCLUDE AESTHETIC REGULATION**

**A. Unlike Other Ordinances Preempted By Section 7901, San Francisco's Ordinance Neither Prohibits Petitioners From Using Their Telephone Lines For Any Form Of Communications Nor From Installing Any Type of Telephone Line**

Petitioners are correct that “for more than 60 years, this Court and the Courts of Appeal have set aside local attempts to withhold full rights of the State-granted franchise from new telecommunications services and technologies.” (Petition at 24–25.) Where Petitioners err is in asserting a conflict with that line of cases, which do not address the issue before the Court of Appeal in this case.

*Pacific Telephone and Telegraph Co. v. City of Los Angeles* (1955) 44 Cal.2d 272, considered whether the plaintiff could “use its telephone lines for the transmission of anything other than ‘articulate speech.’” (*Ibid.*, at p. 282.) This Court held that Civil Code 536, which is now section 7901, prohibited local governments from limiting the statewide franchise in that manner:

Section 536, which authorizes telephone companies to construct their lines along public highways, places no restrictions upon what may be transmitted by means of electrical impulses over those lines, and we are of the view that the rights of Pacific with respect to the uses to which its lines may be put are correctly declared in the judgment. If the state franchise granted to a telephone company were limited to the transmission of “articulate speech,” 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.

(*Id.*)

Likewise, in *Williams Communications, LLC v. County of Riverside* (2003) 114 Cal. App. 4th 642, plaintiff established that it was a “telephone company,” because the “bulk of its income is derived from telephone

transmission services.” (*Ibid.*, at p. 654.) Relying on this Court’s ruling in *City of Los Angeles*, the Court of Appeal rejected the county’s argument that plaintiff was not entitled to “the protection afforded by section 7901” because it uses its telephone lines to transmit “other data.” (*Ibid.*)

These cases do not conflict with the Court of Appeal’s holding that neither section 7901 nor 7901.1 preempt the Ordinance’s aesthetic regulations. Unlike those cases, San Francisco recognizes that Petitioners’ Wireless Facilities are “telephone lines” as that term is used in section 7901, even though they transmit both voice and data. Moreover, San Francisco does limit Petitioners use of the Wireless Facilities they install in the public right-of-way pursuant to a permit issued under the Ordinance. San Francisco’s application for a Wireless Facility permit does not even ask an applicant to specify how it intends to use a Wireless Facility once it is permitted.

Petitioners’ reliance on *Pacific Telephone and Telegraph Co. v. City and County of San Francisco* (1961) 196 Cal.App.2d 133 (“*Pacific Telephone II*”), is misplaced for a different reason. In that case, San Francisco argued that plaintiff’s franchise right was limited to installing and maintaining overhead telephone lines, so it could not place those facilities underground. (*Ibid.* at pp. 146–147.) In rejecting that argument, the Court held that “the right to make an excavation for the purpose of installing its conduits is subject to the requirement (as in the case of installing poles) of obtaining a permit for such excavation from the city, following the prescribed procedure. Defendant’s contention that such an excavation ‘incommodes’ the use by the public of the streets and public places and hence is denied by section 536 has no more basis than the similar contention made concerning the construction and maintenance of poles.” (*Ibid.* at p. 147.)

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Unlike the San Francisco requirements at issue in *Pacific Telephone II*, San Francisco's Ordinance here neither proscribes nor limits the types of facilities Petitioners may install on existing utility, streetlight, and transit poles as part of a permitted Wireless Facility. For example, the record here shows that some of Petitioners' Wireless Facilities on existing utility poles are connected by fiber-optic lines to hubs, while others are completely wireless micro cells. (See Reporter's Transcript ("RT") 744:1-744:17.) San Francisco did not consider the differences in these facilities when issuing Wireless Facility permit. San Francisco's only concern is whether those different types of Wireless Facilities satisfy the Ordinance's aesthetic standards.

**B. No California Court Has Found That Section 7901 Forecloses Local Regulation Of The Installation of Telephone Lines In The Public Right-Of-Way Pursuant To The Police Power**

As the Court of Appeal correctly held, under the California Constitution "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'].) (Opn. 11.) Despite this well-settled law, Petitioners suggest that the Court of Appeal has broken from a long line of cases that have limited local authority under section 7901 to "prevent[ing] unreasonable obstruction of travel" by placement of poles and wires." (Petition at 27; quoting *Western Union Telegraph Co. v. City of Visalia* (1906) 149 Cal. 755, 750-751; citing *Pacific Telephone II*, 197 Cal.App.2d, at p. 152.)

This is the same argument Petitioners made before the trial court and the Court of Appeal. Both courts correctly found that Petitioners had misconstrued

the holdings in those cases. For the same reasons, review is not necessary to resolve any conflict between the Court of Appeal's decision here and those decisions.

The trial court found that *City of Visalia* had “nothing to do with the extent of local regulation permitted under Civil Code § 536 (the predecessor to Public Utilities Code, § 7901) but rather whether Visalia's ordinance regulating Western Union's place of poles and wires created a franchise on which a tax could be levied.” (A00843.) The trial court found that in *Pacific Telephone II* the Court of Appeal “did not consider the definition or ‘incommode’ nor the limitation of local regulation permitted by § 536.” (A00843–844.)

The Court of Appeal reached similar conclusions:

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. [Citation.] 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.

(Opn. 18.)

This Court need not grant review, because there is no conflict between the Court of Appeal's decision in this case, and any other decision from this Court or the Court of Appeal, concerning the extent of local authority to regulate the installation of telephone lines in the public right-of-way based on aesthetic concerns.

Moreover, while San Francisco acknowledges that the regulation of utilities, and the promotion of innovation in communications systems, are

matters of statewide importance, the record below demonstrated that as of the time of trial San Francisco had denied only three of Petitioners' applications for permits for Wireless Facilities, while granting 173 of those applications.

Respondents' Appendix ("RA") 00010. Petitioners' contention that the Court of Appeal's decision threatens innovation or alters the balance the Legislature has struck between local regulation and a statewide franchise is baseless.

**III. WHETHER THE COURT OF APPEAL CORRECTLY HELD THAT SAN FRANCISCO TREATED ALL TELEPHONE CORPORATIONS IN AN "EQUIVALENT MANNER" AS REQUIRED BY PUBLIC UTILITIES CODE SECTION 7901.1, SUBDIVISION (B) DOES NOT MERIT REVIEW BY THIS COURT**

Public Utilities Code section 7901.1, subdivision (a), provides: "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." In holding that section 7901.1 subdivision (a) did not preempt the Ordinance, the Court of Appeal held: "We understand section 7901.1 as affirming and clarifying a subset of local powers, reserved under section 7901, to regulate telephone lines in the public right-of-way." (Opn. 25.)

The "subset" of local authority that the Legislature determined needed to be affirmed and clarified, by its adoption of section 7901.1, was that section 7901 allowed local governments to manage construction in the public right-of-way by utilities. As the Court found, the Legislature adopted section 7901.1 to "bolster the [cities'] ability 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 corporation's statewide franchise." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis