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' OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED FOR REVIEW

The Order granting review did not specify the issues to be briefed. Appellants therefore quote the Statement of Issues in the Petition for Review, as required by California Rule of Court 8.520(b)(2)(B):

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?

INTRODUCTION

The State of California has long been a technology trailblazer, promoting a wide range of advancements and cutting-edge services. For decades, the State has been among the primary drivers of American technological leadership. The story of the future has been written in California.

It is no coincidence that California is also a leader in the telecommunications field, because advanced communications services are what make many other innovative industries possible. For over 150 years, telecommunications providers have enjoyed a statewide statutory right to use the public rights-of-way in California for their facilities and equipment. This Court has repeatedly protected this broad statutory right against municipal overreach, finding that local enactments that hinder the deployment of emerging technologies are preempted. As a result, Californians have enjoyed state-of-the-art communications technologies and services for decades.

The deployment of advanced fifth generation ("5G") wireless will be the next step in the global wireless revolution, unleashing an array of game-changing applications and features. From smart cities to connected cars to virtual reality, 5G will transform the mobile experience as we know it today. The transformation is already underway in laboratories across the United States, as the wireless industry perfects the "[u]ltra-high-speed,

high-capacity, low-latency, secure mobile connectivity" consumers will expect from the next frontier of mobile services. (See Remarks of FCC Chairman Tom Wheeler, CTIA Super Mobility Show 2016 (Sept. 7, 2016) <http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0907/DOC-341138A1.pdf> [as of Jan. 18, 2017].)

While the rest of the country is moving forward to facilitate and streamline the wireless infrastructure deployments needed to support advanced services, some localities, such as the City and County of San Francisco ("San Francisco" or "City"), have enacted measures that stand in the way of this progress. Although wireless facilities are the same size or smaller than the legacy wireline and other utility facilities already deployed in the public rights-of-way, the City Ordinance here singles out wireless facilities for discretionary pre-deployment "aesthetic" review. By imposing discriminatory burdens only on providers that employ one particular telecommunications technology, the City has effectively nullified the State franchise's primary benefit—that is, encouraging the deployment of innovative systems. Cities across the State have taken note, moving forward with onerous local enactments that will curtail wireless buildout. (See, e.g., City of Am. Canyon, City Council Agenda Staff Report (Sept. 20, 2016) p. 1 ("Am. Canyon Staff Report") [imposing a moratorium on wireless deployments while the city develops wireless facility siting regulations similar to San Francisco's].)

The Court of Appeal's decision upheld the City's unlawful Ordinance. Applying an incorrect standard of review, the Court of Appeal sanctioned the City's burdens on the State franchise, declining to find San Francisco's regime preempted even though it impermissibly conflicts with State law and policy. The Court of Appeal's decision is contrary to longstanding California precedent and is at odds with the State franchise's intended purpose. For three independent reasons, this Court should reverse the Court of Appeal, find the City's discriminatory Ordinance preempted, and remand with instructions to enter judgment in Appellants' favor on Paragraph 5 of the Superior Court's Judgment (A00838).

First, the court below used an improper standard of review and incorrectly held that Appellants' challenge could succeed only if there were "no set of circumstances" under which the Ordinance could be validly applied. This standard, known as *Salerno* in the Federal courts, was born out of concern that legislatures should be given a degree of flexibility, and that laws should not be invalidated based on hypothetical concerns about possible applications. But both this Court and the United States Supreme Court have declined to apply this stringent standard in facial preemption challenges. (See, e.g., *American Financial Services Ass'n v. City of Oakland* (2005) 34 Cal.4th 1239, 1251-52; *Arizona v. United States* (2012) 132 S.Ct. 2492, 2500.) That is because facial preemption challenges raise different issues—the question is not about legislative flexibility, but rather

how to address the balance of power between two sovereigns, or between a sovereign and its subordinate entities. The Court of Appeal ignored this established distinction, offering no analysis as to why the strict "no set of circumstances" standard should be imported into the context of preemption challenges. Endorsement of the inflexible "no set of circumstances" test would have far-reaching consequences, potentially jeopardizing the uniformity and efficacy of statewide laws and policies in a variety of contexts.

Second, under any standard of review, the Ordinance conflicts with the State telecommunications franchise, set forth in Section 7901 of the Public Utilities Code.[1] The Ordinance subjects wireless facilities—and only wireless facilities—to discriminatory aesthetic review, slowing progress and frustrating deployment. The Court of Appeal held that the City could "adjust the balance" between technological progress and other local concerns, including aesthetics. (Opn. 1.) In doing so, the Court of Appeal departed from well-established precedent holding that the State franchise itself sets this balance. Telephone corporations such as Appellants have the right to use the most modern facilities available, and municipalities cannot impose new and unique burdens on franchise holders just because those companies wish to deploy new technologies or provide

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

innovative services. (See, e.g., *Pacific Telelephone & Telegraph Co. v. City of Los Angeles* (1955) 44 Cal.2d 272, 282 (*Los Angeles*); *Williams Commc'ns, LLC v. City of Riverside* (2003) 114 Cal.App.4th 642, 653.) To reach a contrary conclusion, the Court of Appeal adopted a novel and expansive interpretation of the word "incommode" that conflicts both with the plain meaning of that term and with decades of prior case law.

Third, the Court of Appeal misread Section 7901.1 of the Public Utilities Code, which permits municipalities to exercise "reasonable control" over the "time, place, and manner" of access to public rights-of-way, so long as all entities are treated "in an equivalent manner." The court below adopted an illogical reading of this provision, holding that the equivalent treatment mandate applies only to *temporary* construction activities and occupations of the rights-of-way. (Opn. 25.) In the court's view, municipalities are thus free to discriminate among technologies and providers when regulating long-term occupations, and local authority is circumscribed only when dealing with temporary rights-of-way occupations. This strained interpretation cannot be reconciled with Section 7901's paramount objective of precluding localities from erecting barriers to deployment. It is not only nonsensical as a policy matter, it is belied by the plain text of the statute.

The City has tried to downplay the import of the Court of Appeal's decision, claiming that it will not impact California consumers. (See Ans.

to Petition for Review at pp. 16-17.) The City is wrong. If allowed to stand, the opinion will have far-reaching and harmful consequences for Californians. The Court of Appeal's decision explicitly conflicts with this Court's and the Legislature's recognition that deployment of modern telecommunications technology is a statewide issue that overrides local, parochial concerns. As a result, it threatens to unleash a new era of discriminatory regulation, undermine the deployment of new technologies, and make it more difficult for Californians to receive and access innovative services, including those promised by 5G and beyond—the very benefits the State franchise is intended to cement.

The Ordinance conflicts with the State franchise and must be set aside. This Court should reverse the Court of Appeal's opinion and vindicate the Legislature's policy of retaining a robust State franchise that secures Californians' access to cutting edge technology for generations to come.

STATEMENT OF THE CASE

Plaintiffs and Appellants T-Mobile West LLC ("T-Mobile"), Crown Castle NG West LLC ("Crown Castle"), and ExteNet Systems (California) LLC ("ExteNet") (collectively "Appellants") appeal from a final Judgment of the Court of Appeal, First Appellate District, Division Five (Case No. A144252) affirming the decision of the Superior Court on Appellants' request for declaratory and injunctive relief to prevent the City and its

Department of Public Works from enforcing Ordinance No. 12-11 and its implementing regulations.

A. The State Franchise Promotes Facility And Service Deployment, With Narrowly Prescribed Local Controls.

California's State telecommunications franchise, codified at Section 7901 of the Public Utilities Code, 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 to "erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines[.]" (§ 7901.) As the City stipulated and the Court of Appeal held, Appellants are "telephone corporations" and their wireless facilities are "telephone lines" within the meaning of the statute. (Opn. 2; see Pub. Util. Code §§ 233, 234).

The State franchise grants telephone corporations broad access to rights-of-way throughout the State. But it 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.)

The statute also preserves a limited role for municipal authority over telecommunications companies. Section 7901.1 permits municipalities to exercise "reasonable control" with respect to the "time, place, and manner"

in which telecommunications companies access public rights-of-way. (§ 7901.1(a).) However, such municipal power is circumscribed. Municipal control exercised pursuant to the statute must be "consistent with Section 7901" (*ibid.*) and must "at a minimum, be applied to all entities in an equivalent manner." (§ 7901.1(b).) Taken together, it is well-settled that these provisions mean that cities continue to exercise some control over the placement of telecommunications facilities in their rights of way, but in doing so they cannot disfavor specific services or technologies, or impose discriminatory obligations on particular providers. As explained in more detail below, the City's Ordinance does both.

B. The Wireless Infrastructure Landscape In California And The Nation Demands Additional, Changing Infrastructure.

Consumer demand for innovative wireless technologies and services continues to skyrocket. (See WIA Amicus Ltr. in Support of Petition for Review at p. 3 ["The amount of data transmitted on wireless networks in the United States is projected to multiply six-fold between 2015 and 2020"].) Innovation in the wireless industry is moving at an aggressive pace, with carriers poised to introduce revolutionary 5G services in the coming months and years. 5G wireless technology will transform today's wireless experience, unlocking "super fast wireless broadband, smart-city energy grids and water systems, immersive education and entertainment, and an unknowable number of innovations." (*In re Use of Spectrum Bands*

Above 24 GHz for Mobile Radio Services (2016) 31 FCC Rcd. 8014, 8270 (statement of FCC Chairman Tom Wheeler).) To achieve 5G's promise, however, wireless networks will require access to public rights-of-way for additional infrastructure deployments. (See *Order Instituting Rulemaking Regarding the Applicability of the Commission's Right-of-Way Rules To Commercial Mobile Radio Service Carriers* (Cal.P.U.C. 2016) D-16-01-046, R. 14-05-001 [2016 WL 537758] [noting the need for "constant expansion and augmentation of wireless infrastructure" to meet the growing demand for wireless services, particularly in "urban settings" such as the City].)

Innovation has brought the nation a long way from reliance solely on familiar large-scale antennas mounted on dedicated towers. While such sites are still necessary in some circumstances, small wireless facilities, often most effectively deployed in the rights-of-way, are increasingly necessary to handle expanded traffic volumes, and will be the lynchpin of the 5G telecommunications networks of tomorrow. (WIA Amicus Ltr. at p. 4.) Perhaps counter-intuitively, these smaller, lower-power cells vastly increase traffic capacity, by allowing the same band of spectrum to be more efficiently shared among a larger number of users over a given geographic area. In part because of this, and in part because of the unique propagation characteristics of the frequencies used for 5G, "5G buildout is going to be very infrastructure intensive, requiring a massive deployment of small

cells" nationwide. (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, *4 ("*Wheeler Remarks*").) "Small cells range in size, with some as small as a slightly thicker iPad, going up to the size of a large hiker's backpack." (Cheng, *The carriers' not-so-secret weapon to improve cell service,* CNET (June 9, 2013) <https://www.cnet.com/news/the-carriers-not-so-secret-weapon-to-improve-cell-service/> [as of Jan. 18, 2017].) Because they are orders of magnitude "smaller and less obtrusive" than traditional cellular towers and antennas, they can—indeed must—be deployed "more densely – *i.e.*, in many more locations – to function effectively." (Public Notice, *Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies* (FCC 2016) DA 16-1427, WT Docket No. 16-241, 1 (*Wireless Siting Inquiry*).)

Facilitating efficient wireless deployments in rights-of-way across the country will thus be critical to 5G's success. (See *Wireless Siting Inquiry, supra,* at p. 1 [launching inquiry to determine whether Federal law can be leveraged to streamline "local government review of wireless facility siting applications"].) As the industry has confirmed, without access to the rights-of-way, "it is often neither technologically feasible nor economically viable to deploy the infrastructure needed to reach residents and businesses." (WIA Amicus Ltr. at p. 4.)

Appellants are engaged in multiple facets of this thriving wireless ecosystem. That includes the provision of wireless services directly to consumers, as well as fiber optic transport of wireless telecommunications. T-Mobile provides commercial mobile radio services ("CMRS"), personal and advanced wireless services, and other telecommunications services to consumers. Crown Castle and ExteNet provide telecommunications services consisting of fiber optic transport of customers' voice and data communications from wireless equipment in the public rights-of-way to support companies like T-Mobile. Each of the Appellants is heavily involved in building the facilities needed for wireless communications, and each faces significant challenges from the City's Ordinance.

C. The City Ordinance Restricts Deployment Of Wireless Facilities In Public Rights Of Way.

In January 2011, the San Francisco Board of Supervisors adopted Ordinance No. 12-11, codified in Article 25 of the San Francisco Public Works Code ("the Ordinance"). (A00192-93.) The Ordinance imposes burdensome requirements on facilities used to provide "personal wireless service" when deployed on existing utility poles and equipment in the public rights-of-way. (A00140.) Notably, the Ordinance does *not* allow the placement of new poles, and this case does not involve construction of such structures.

The Ordinance conditions permits for wireless facilities on subjective aesthetic approval by the City. For instance, the Ordinance requires the Department of Public Works ("the Department") to evaluate whether proposed wireless facilities would "significantly degrade the aesthetic . . . attributes" of adjacent City Parks, open spaces, historic districts, or other designated locations. (A00144; A00146.) Similarly, as amended the Ordinance requires applicants to demonstrate that the proposed facility "would not significantly detract from any of the defining characteristics of the neighborhood."[2] (Respondents' Motion for Judicial Notice, Exhibit B.)

The original Ordinance also required applicants to make a showing of technological or economic necessity for proposed wireless facilities. (A000157; see also A000149.) It imposed arbitrary term limits on permits with no opportunity for automatic renewal. (A00174.) Any modifications of the size, appearance, or power of existing facilities subjected a permit request or application to full review.[3] (A00174-76.)

It is undisputed that the Ordinance singles out wireless facilities for disfavored treatment. The City has not imposed similar requirements—or for that matter, any site-specific permit requirements—on other rights-of-

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[2] As discussed in note 4, *infra*, the City amended the Ordinance in response to the Superior Court's Judgment.

[3] As discussed in more detail below, the Superior Court held that the provisions described in this paragraph are unlawful.

way users, regardless of whether they have a similar (or even greater) aesthetic impact on the City's rights-of-way. (See A00846-47 (Sup. Ct. Statement of Decision).) Wireline telecommunications facilities are not subject to comparable requirements even though such facilities are often the same size or larger than Appellants' wireless facilities. (*Id.* at A00847 [finding that Appellants' facilities are "generally similar in size and appearance to the pieces of equipment installed on utility poles in the public rights-of-way by other right-of-way occupants"]; see also *infra*, Part II.A [discussing the Ordinance's discriminatory approach].) Indeed, as the trial court explained, "no site-specific permit is required for [wireline providers] . . . to install battery backup units," even though such facilities use "cabinets that are identical to the cabinets used by Plaintiffs for their battery backup units." (*Id.* at A00848.)

While the Ordinance does not apply to providers of telecommunications services that use other technologies in San Francisco's rights-of-way, such as legacy wireline facilities, it has a tremendous impact on Appellants' ability to construct and maintain facilities to meet consumers' growing telecommunications demand. T-Mobile, Crown Castle, and ExteNet all deploy and rely on wireless facilities that must obtain site-specific permits and are subject to aesthetic review under the Ordinance. (A00476.)