

S238001

**IN THE SUPREME COURT OF CALIFORNIA**

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

v.

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

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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 in and for the  
County of San Francisco, Case No. CGC-11-510703  
The Honorable James McBride, Judge

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**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/DO-C-341138A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0907/DO-C-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.<sup>1</sup> 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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<sup>1</sup> Unless otherwise indicated, all statutory citations are to the Public Utilities Code.

innovative services. (See, e.g., *Pacific Telephone & 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.”<sup>2</sup> (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.<sup>3</sup> (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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<sup>2</sup> As discussed in note 4, *infra*, the City amended the Ordinance in response to the Superior Court’s Judgment.

<sup>3</sup> 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.)

D. **The Superior Court Approved The City's Discretionary Regime.**

Appellants challenged the Ordinance and the Department's implementing regulations in May 2011 before the Superior Court for the County of San Francisco. (A00840.) On November 26, 2014, the Superior Court issued its Final Judgment and Statement of Decision on Appellants' action for declaratory and injunctive relief. (A00836-40.) Departing from a long line of California precedent, the court held that Section 7901 permits municipalities to consider aesthetics in assessing whether proposed telecommunications facilities would "incommode the public use" of rights-of-way. (A00843, A00845-46.)

Even though the court found that other telecommunications providers deploying similarly sized or *larger* facilities were not subject to any site-specific permitting requirements, it nevertheless held that Appellants "failed to sustain their burden of proving" that the disparate treatment of personal wireless service facilities violates Section 7901.1's "equivalent manner" mandate. (A00848-49.) Finally, the court held that the Ordinance's technological and economic necessity requirements are preempted by Section 7901, the permit renewal and term limit provisions are preempted by Government Code § 65964(b), and the provisions relating

to facilities modifications are preempted by 47 U.S.C. § 1455(a). (A00837-38.)<sup>4</sup>

Petitioners filed a timely notice of appeal from the Superior Court's Judgment to the Court of Appeal for the First Appellate District, Division Five. (A00851.)

E. **The Court Of Appeal's Opinion And The Instant Appeal Squarely Present The Meaning And Vitality Of California State Law And Policy.**

On September 15, 2016, the Court of Appeal affirmed the Superior Court's decision. The court held that cities were free to "adjust the balance" (Opn. 1) between technological progress and other local concerns by burdening particular technologies with discriminatory regulation, because "[n]othing in section 7901 explicitly prohibits local government from conditioning the approval of a particular siting permit on aesthetic concerns." (Opn. 21.) To reach this conclusion, the Court of Appeal held that "'incommode the public use' means 'to unreasonably subject the public use to inconvenience or discomfort; to unreasonably trouble, annoy, molest,

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<sup>4</sup> The Board of Supervisors subsequently adopted Ordinance No. 18-15, which amended the Ordinance to comply with the Superior Court's Judgment. (See Opn. 7; Respondents' Motion for Judicial Notice, Exhibit B.) As amended, the Ordinance retains the original permitting structure and the aesthetics-based compatibility standards but eliminates the size-based tiers. (*Ibid.*) The applicable aesthetics-based compatibility standard under the amended Ordinance is determined solely by the location of the facility. (*Ibid.*)

embarrass, inconvenience; to unreasonably hinder, impede, or obstruct the public use.” (*Id.* at 21-22.)

With respect to Section 7901.1, the Court of Appeal found that Section 7901.1’s requirement that municipalities treat “all entities in an equivalent manner” applies only to “temporary access” to rights-of-way, and thus does not apply to the Ordinance, which, it concluded, governs permitting for long-term occupation of existing poles. (Opn. 24.)

The court evaluated Appellants’ facial preemption challenge using the stringent standard of review articulated in *U.S. v. Salerno* (1987) 481 U.S. 739, which allows a law to be struck down on a facial challenge only if “no set of circumstances exists” under which the law would be valid. (*Id.* at p. 745.) Although the *Salerno* test has never been adopted by the United States Supreme Court or this Court for facial preemption challenges, the Court of Appeal deployed the standard (without analysis) to reject Appellants’ challenge. Application of this standard proved determinative: because the court below could “imagine” a set of circumstances where “a large wireless facility might aesthetically ‘incommode’ the public use of the right-of-way,” it concluded that the Ordinance must be upheld. (Opn. 22.)

On September 30, 2016, Petitioners timely filed a Petition for Rehearing, which was denied on October 13, 2016. (Rehearing Or. 1.) The court modified its opinion in part, but did not alter the judgment. (*Ibid.*) The Court of Appeal’s decision became final on October 25, 2016, and

Appellants filed a timely Petition for Review before this Court. This Court unanimously granted Appellants' Petition for Review on December 21, 2016.

## DISCUSSION

### I. THE "NO SET OF CIRCUMSTANCES" TEST DOES NOT APPLY TO FACIAL PREEMPTION CHALLENGES.

The United States Supreme Court originated the "no set of circumstances" test, known in the Federal courts as the *Salerno* standard, to ensure that Federal statutes were not invalidated based solely on speculation or outlier applications. (*Salerno, supra*, 481 U.S. at p. 745; see also Dorf, *Facial Challenges to State & Fed. Statutes* (1994) 46 Stan. L. Rev. 235, 239-40.) The standard is controversial and has been criticized by courts and scholars alike for imposing insurmountable barriers to many would-be litigants seeking to vindicate constitutional rights. (See, e.g., *Janklow v. Planned Parenthood, Sioux Falls Clinic* (1996) 517 U.S. 1174, 1175 (opn. of Stevens, J., respecting the denial of petition for certiorari) [noting that "*Salerno's* rigid and unwise dictum has been properly ignored in subsequent cases"]; Dorf, *supra*, 46 Stan. L. Rev. at pp. 239-40 [explaining that the "truly draconian" *Salerno* standard will deter litigants from bringing facial challenges in the first instance].) This Court has never endorsed it in *any* context, and the Supreme Court of the United States has

made clear that even in Federal courts it is not appropriate to use in cases involving facial preemption challenges.

Nevertheless, the court below improperly imported this stringent Federal standard to hold that Appellants' facial preemption challenge to a local law could succeed only if Appellants established that "no set of circumstances exists under which the [Ordinance] would be valid." (Opn. 8.) Because it could "imagine" a set of hypothetical circumstances under which the Ordinance may be validly applied, it rejected Appellants' challenge. (*Id.* at p. 22.)

The Court of Appeal's endorsement of the *Salerno* standard is out of step with this Court's precedent and runs afoul of the United States Supreme Court's approach to facial preemption challenges. The decision ignores the unique balance of power issues raised by facial preemption challenges and threatens to undermine the consistency and efficacy of State law in a variety of contexts. For these reasons, it must be set aside.

A. **Neither This Court Nor The U.S. Supreme Court Has Applied The "No Set of Circumstances" Test To Facial Preemption Challenges.**

The *Salerno* "no set of circumstances" test should not have been applied here. This Court has never endorsed the test in *any* context—preemption or otherwise. (See *Parker v. State* (2013) 164 Cal.Rptr.3d 345, 355 ["We do not believe the California Supreme Court has ever endorsed the *Salerno* standard"], *review granted and opinion superseded on other*

*grounds* (2014) 167 Cal.Rptr.3d 658.) To the contrary, this Court has applied a more lenient standard in the context of facial constitutional challenges, requiring challengers to demonstrate only that a statute is invalid “in the *generality* or *great majority* of cases.” (*San Remo Hotel L.P. v. City & County of San Francisco* (2002) 27 Cal.4th 643, 673 [emphasis in original].)

This Court has certainly never applied the stringent “no set of circumstances” test to a facial preemption challenge. The California Constitution prohibits localities from enacting ordinances and regulations that are “in conflict with general [State] laws.” (Cal. Const. art. XI, § 7.) Charter cities such as San Francisco may adopt and enforce ordinances that conflict with general State laws, provided the subject of the regulation is a “municipal affair” rather than one of “statewide concern.” (*Id.* § 5; *American Financial Services, supra*, 34 Cal.4th at p. 1251.) This provision of the California Constitution is inapplicable where, as here, the provision of “telephone service is not a municipal affair; it is a matter of statewide concern.” (*Los Angeles, supra*, 44 Cal.2d at p. 280; accord, Gov. Code § 65964.1(c).)

This Court’s preemption analysis asks only whether “the local legislation ‘duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.’” (*O’Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067-68 [emphasis deleted] [citing

*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897].)

If it does, the local law “conflicts with State law” and cannot stand. (See, e.g., *O’Connell, supra*, 41 Cal.4th at pp. 1067, 1076 [holding local vehicle forfeiture ordinance impinged “on an area fully occupied” by State law and was thus preempted].)

It is thus not surprising that this Court has decided countless preemption cases without ever invoking the “no set of circumstances” standard.<sup>5</sup> In *O’Connell, supra*, 41 Cal.4th at page 1076, for example, this Court held that a local vehicle forfeiture ordinance was preempted because it “impinge[d] on an area fully occupied” by State law. The Court did not apply or even reference the “no set of circumstances” test in reaching its result. (See *ibid.*) Likewise, in *American Financial Services, supra*, 34 Cal.4th at pages 1251-57, this Court concluded, without invoking *Salerno*, that a local predatory lending regulation was preempted because the “Legislature ha[d] fully occupied the field of regulation of predatory tactics in home mortgages.” And in *Action Apartment Ass’n, Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1237, this Court again resolved a facial preemption challenge without deploying the rigid *Salerno* standard. (See

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<sup>5</sup> The highest courts in other States have likewise declined to apply *Salerno*’s stringent standard in a variety of contexts. (See, e.g., *Caterpillar Inc. v. N.H. Dept. of Revenue Admin.* (N.H. 1999) 144 N.H. 253, 258 [declining to apply *Salerno* to a facial challenge to a State tax statute]; *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Com.* (Ore. 2009) 346 Or. 433, 444 [declining to apply the “under any circumstances” test to a facial challenge to State agency rules].)

*ibid.* [preempting a local tenant harassment ordinance to the extent it conflicted with the State litigation privilege].)

With respect to facial preemption issues, this Court's approach is consistent with that of the United States Supreme Court. That Court has declined to apply its own "no set of circumstances" standard to cases involving facial preemption.<sup>6</sup> (See, e.g., *Arizona*, *supra*, 132 S.Ct. at p. 2500.)

The U.S. Supreme Court directly confronted this question in *Arizona*. There, two Justices argued in separate dissents that the Court should apply *Salerno*. (See *Arizona*, *supra*, 132 S.Ct. at p. 2515 (conc. & dis. opn. of Scalia, J.); *id.* at p. 2534 (conc. & dis. opn. of Alito, J.)) But the majority declined, holding that Federal immigration policy preempted

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<sup>6</sup> Even outside of the preemption context, the U.S. Supreme Court's "commitment [to *Salerno*] is more honored in the breach than the observance." (Fish, *Choosing Constitutional Remedies* (2016) 63 UCLA L. Rev. 322, 368-69; see also Dorf, *supra*, 46 Stan. L. Rev. at p. 242 [contending that *Salerno* "ironically fails to adhere to the 'no set of circumstances' standard it announces"].) The Court has "failed to apply" the *Salerno* standard in "numerous cases," (Dorf, *supra*, 46 Stan. L. Rev. at p. 236) and several Justices have been critical of the test. (See, e.g., *Washington State Grange v. Wash. State Republican Party* (2008) 552 U.S. 442, 449 ["Some Members of the Court have criticized the *Salerno* formulation"]; *City of Chicago v. Morales* (1999) 527 U.S. 41, 55 n.22 (plurality) [dismissing the standard as "*Salerno's* dictum"]; *U.S. v. Frandsen* (11th Cir. 2000) 212 F.3d 1231, 1235 n.3 [noting the standard "has been subject to a heated debate in the Supreme Court, where it has not been consistently followed"].) In practice, the U.S. Supreme Court has been far "more willing to sustain facial challenges than the extreme *Salerno* standard would suggest." (Metzger, *Facial & As-Applied Challenges Under the Roberts Ct.* (2009) 36 Fordham Urb. L.J. 773, 774.)

an Arizona statute without invoking the “no set of circumstances” test. In the majority’s view, the relevant inquiry was whether the challenged State law interfered with Federal objectives, not whether the Court could conjure up a hypothetical scenario in which the State law may be validly applied. (See *id.* at p. 2500.) In its preemption analysis, the Court thus considered simply whether the challenged statute was “in conflict or at cross-purposes” with Federal policy. (*Ibid.*)

Most California lower courts have followed *Arizona* and this Court’s past practice, declining to apply the “no set of circumstances” test to facial preemption challenges.<sup>7</sup> (See, e.g., *Fiscal v. City & County of San Francisco* (2008) 158 Cal.App.4th 895, 910 [preempting a local handgun ordinance in its entirety despite possible lawful applications to “criminals who use handguns in the commission of their unlawful acts”]; *City of Watsonville v. State Dep’t of Health Services* (2005) 35 Cal.App.4th 875 [preempting local ordinance prohibiting water fluoridation without reference to “no set of circumstances test”]; *San Francisco Apartment*

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<sup>7</sup> It is not relevant that this Court has sometimes stated that a “statute must be upheld unless the challenger establishes that it ‘inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions.’” (Rehearing Or. 2 [citations omitted].) The total and fatal conflict standard has not been equated with the inflexible *Salerno* standard. But even if it had, this Court has not applied the “total and fatal” conflict standard to a facial preemption challenge. (See, e.g., *O’Connell, supra*, 41 Cal.4th at pp. 1067-68; *Action Apartment, supra*, 41 Cal.4th at p. 1237.) The standard is not used to determine whether “local legislation ‘duplicates, contradicts, or enters an area fully occupied by general law.’” (*Action Apartment, supra*, 41 Cal.4th at p. 1242.)

*Ass'n v. City and County of San Francisco* (2016) 3 Cal.App.5th 463, 487 [preempting local law despite “one or more conceivable set of circumstances” under which the local enactment and State law could operate consistently].)

But a few lower courts, including the court below, have gone awry, erroneously applying the standard to facial preemption challenges. (See, e.g., Opn. 8.) Where California lower courts have invoked *Salerno* in the preemption context, it is generally with little or no analysis. (See, e.g., Opn. 8; *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170; *Sierra Club v. Napa County Bd. of Supervisors* (2012) 205 Cal.App.4th 162, 173.) *Hatch* marked the entry of the Federal *Salerno* standard into the California Appellate Reports. (*Hatch, supra*, 80 Cal.App.4th at p. 194.) The Court of Appeal there cited *Salerno* in rejecting a “sort of preemption argument” regarding the dormant Commerce Clause and a provision of the California Penal Code making it unlawful to seduce minors over the Internet. (*Ibid.*) The court rejected the “sort of” preemption claim, concluding that because some victims would be intrastate, the fact that Internet communications “routinely” cross interstate lines did not “insulate pedophiles from prosecution” in California. (*Ibid.*)

The court in *Hatch* did not explain why it was applying *Salerno*'s strict test, nor did it examine the propriety of deploying the test in the preemption context. (*Hatch, supra*, 80 Cal.App.4th at p. 194.) What is

more, the *Salerno* standard was not even necessary to *Hatch*'s result. The court's finding that geographical proximity is a priority "for any . . . adult whose intent is to seduce a child" would have proven the State law's validity under any preemption standard. (*Id.* at p. 195, n.19.)

The court below similarly failed to explain why it applied a Federal standard in the State preemption context. Nor did it grapple with this Court's contrary precedent, or with contrary precedent from the U.S. Supreme Court. On rehearing, the Court of Appeal attempted to find support for applying *Salerno* by declaring that the standard governing facial challenges "has been a subject of controversy" within this Court. (Rehearing Or. 2 [citing *Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, 39].) This observation is misguided. *Zuckerman* did not involve a facial preemption challenge. It did not even consider, let alone endorse, *Salerno*'s "no set of circumstances" approach. (*Zuckerman, supra*, 29 Cal.4th at p. 39 [upholding State regulation against due process challenge].)<sup>8</sup>

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<sup>8</sup> Likewise, the two California Appellate Court decisions the Court of Appeal points to are not relevant. The cases neither involve facial preemption challenges nor examine the *Salerno* test. (See *City of San Diego v. Boggess* (2013) 216 Cal.App.4th 1494, 1498 [Second Amendment challenge]; *Coffman Specialties, Inc. v. Dep't of Transp.* (2009) 176 Cal. App.4th 1135, 1140 [due process and equal protection challenges].)

**B. Facial Preemption Challenges Should Properly Be Subject To A Less Demanding Standard Of Review To Ensure That Local Interests Do Not Thwart State Policies.**

There is a reason that even courts that have endorsed *Salerno* in some circumstances do not apply it to facial preemption cases. Facial preemption challenges raise different questions than do other kinds of facial constitutional challenges. Typically, non-preemption facial challenges attack the validity of a statute that allegedly violates an enforceable constitutional provision. (See *City of Los Angeles v. Patel* (2015) 135 S.Ct. 2443, 2449 [confirming that facial challenges may be brought under any “enforceable provision of the Constitution” such as the Second, Fourth, or Fourteenth Amendments]; Metzger, *Facial Challenges and Federalism* (2005) 105 Colum. L. Rev. 873, 877 [distinguishing garden-variety facial challenges as those that attack the validity of “a general rule embodied in a statute”].) In such cases, courts have expressed concern with unnecessarily intruding upon the ability of Federal and State legislatures to enact legislation. (See Metzger, *supra*, 105 Colum. L. Rev. at p. 878.)

In the paradigmatic *Salerno* case, for example, the court applies the “no set of circumstances” test to preserve legislative flexibility, ensuring that laws are not invalidated because of outlier applications. (See *Salerno*, *supra*, 481 U.S. at p. 745.) *Salerno* itself was animated by the Court’s desire to respect legislative judgment over premature constitutional attacks and overzealous judicial review. (See *ibid.*) In the ordinary case involving

facial challenges, courts have likewise raised concerns that such challenges may “short circuit the democratic process by preventing laws embodying the will of the people from being implemented.” (*Washington State Grange, supra*, 552 U.S. at p. 451.) Courts recognize that “a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.” (*Ibid.* [internal citation omitted].) With these concerns at stake, it may arguably be appropriate to apply the “no set of circumstances” test to afford legislatures some latitude to adopt democratic policies.

Facial preemption challenges are different. These challenges are necessarily subject to a less demanding standard because they do not implicate the authority of a single legislature. Rather, they define the balance between State and local (or Federal and State) authority. The purpose of the preemption doctrine is to “uphold the supremacy of the higher level of government and reap the benefits associated with national or state-wide uniformity.” (Weiland, *Federal & State Preemption of Environmental Law: A Critical Analysis* (2000) 24 Harv. Envtl. L. Rev. 237, 238.) Thus, when resolving power struggles between superior and subordinate units, concerns about respecting the legislative judgment of a single legislature are not relevant.<sup>9</sup>

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<sup>9</sup> Indeed, as this Court has recognized, in the preemption context, “the determination to preclude or allow local regulation” resides “exclusively with the state Legislature” and that body “can, of course, expressly authorize local entities to enact ordinances” that may otherwise be

Facial preemption challenges turn on the principle that local governments lack the authority to devise their own exceptions to general State laws. (See *Action Apartment, supra*, 41 Cal.4th at p. 1237.) At the State level, the preemption doctrine derives its authority from the fact that subordinate municipalities are creatures of the State. (See *Hunter v. City of Pittsburgh* (1907) 207 U.S. 161, 178 [noting that the “number, nature, and duration of powers conferred upon [subdivisions] . . . rests in the absolute discretion of the state”].) Facial preemption challenges are thus rightly subject to less rigorous review to ensure that parochial interests do not trample upon broader statewide objectives. (See *Fiscal, supra*, 158 Cal. App.4th at p. 911 [“If the preemption doctrine means anything, it means that a local entity may not pass an ordinance, the effect of which is to completely frustrate a broad, evolutionary statutory regime enacted by the Legislature”].) If anything, in this context the balance shifts the other way—the benefit of the doubt need not go to the local legislature, but should instead go to the policy objectives set by the State. For this reason, this Court has long recognized that the strict “no set of circumstances”

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preempted. (*O’Connell, supra*, 41 Cal.4th at p. 593, n.4.) Applying a more lenient standard to preemption claims does not carry the same danger of denigrating legislative judgments. As the higher sovereign, the State Legislature retains the power to readjust the balance as it sees fit. (See *City of Huntington Beach v. PUC of the State of California* (2013) 214 Cal.App.4th 566, 588 [concluding that a city’s policy argument about the legitimacy of mobile phone companies’ need for rights-of-way access “is better addressed to the Legislature”].)

standard is inapt in the preemption context and has declined to apply the test to facial preemption challenges. (See *supra*, Part I.A.)

The Court of Appeal's reliance on hypotheticals further "underscores the flaws inherent" in applying the *Salerno* standard to preemption challenges. (*Doe v. City of Albuquerque* (10th Cir. 2012) 667 F.3d 1111, 1123.) In its decision, the Court below resorted to "hypothetical musings" (*ibid.*) in an attempt to "dream up" scenarios where the Ordinance might be validly applied. (*Bruni v. City of Pittsburgh* (3d Cir. 2016) 824 F.3d 353, 363.) It upheld the Ordinance because it could "imagine" a scenario where a wireless facility "might aesthetically 'incommode' the public use of the right-of-way," if, for example, it was installed "very close to Coit Tower or the oft-photographed 'Painted Ladies.'" (Opn. 22 [citations omitted].) Courts have long warned against engaging in this kind of "speculat[ion] about 'hypothetical' or 'imaginary' cases." (*Washington State Grange, supra*, 552 U.S. at p. 450.) And where, as here, a court is confronted by dueling assertions of authority between a sovereign and its subordinate, conjuring remote hypotheticals has no place.

Even if the "no set of circumstances" test applied, the Court of Appeal failed to hypothesize a valid scenario in which the Ordinance would apply. (Cf. *Patel, supra*, 135 S.Ct. at p. 2451 ["When assessing whether a statute meets the [*Salerno*] standard, the Court has considered only applications of the statute in which it actually authorizes or prohibits

conduct.”].) The Ordinance does not apply near Coit Tower or the Painted Ladies.<sup>10</sup> The Court’s chosen hypothetical thus does not even relate to the actual provisions of the Ordinance. Attempting to minimize this flaw on rehearing, the court asserted that the Ordinance remained valid because there might be some other unspecified “areas of aesthetic value where installation of a wireless facility could incommode public use.” (Rehearing Or. 3.) Rather than chasing phantom hypotheticals, the Court of Appeal should have addressed whether the Ordinance’s burdensome wireless facility application requirements are at odds with California’s objectives in enacting the statewide franchise. (See, e.g., *Action Apartment, supra*, 41 Cal.4th at p. 1242.)

As this Court has long recognized, preemption cases require a flexible standard that permits courts to evaluate whether a local enactment conflicts with a State policy. Local enactments that thwart the underlying purpose of State legislation or run counter to the goals of the State cannot be upheld simply because there may be hypothetical scenarios in which the

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<sup>10</sup> The Ordinance only allows placement of wireless facilities on existing poles. The City prohibits above-ground utility poles in so-called “underground districts,” like the areas surrounding Coit Tower and the Painted Ladies. (Reporter’s Tr. 1211:21-23 (Jan. 28, 2014) [Testimony of Lynn Fong, Department of Public Works]; A000180-82, A000187, A000195 [explaining the City’s use of undergrounding in visually sensitive areas].) The Ordinance thus does not apply near Coit Tower or the Painted Ladies; it applies only where there are existing utility poles in the public rights-of-way. (A000194-95.) With or without the Ordinance, Appellants could not install facilities “very close” to either Coit Tower or the Painted Ladies.

outcomes would align. Doing so would hamstring the ability of the State to ensure uniform, consistent policy in areas of statewide concern. A locality has exceeded its authority by adopting laws in areas reserved to the State, or that contradict state policy. For this reason, this Court has not concerned itself with articulating a rigid standard of review for preemption challenges. (See, e.g., *Action Apartment, supra*, 41 Cal.4th at p. 1242.) Instead, the inquiry in any preemption claim (including those brought as facial challenges) must be whether “local legislation ‘duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.’” (*Ibid.*) If so, the local law is preempted.

C. **Applying The “No Set Of Circumstances” Test To Facial Preemption Challenges Could Have A Significant Effect On State Objectives.**

The Court of Appeal’s adoption of the *Salerno* standard threatens to undermine California’s interest in ensuring that local “ordinances and regulations [are] not in conflict with general [State] laws.” (Cal. Const. art. XI, § 7.) The “no set of circumstances” test erects a high hurdle for litigants seeking to protect and enforce State policies against local encroachment. From a practical perspective, mounting a successful challenge under the *Salerno* standard can be costly and onerous. (See Metzger, *supra*, 36 Fordham Urb. L.J. at p. 774 [noting high costs of developing the robust factual record necessary to prevail].) In many cases, *Salerno*’s stringent standard may deter would-be litigants from bringing

challenges in the first place. (See *ibid.*; see generally Dorf, *supra*, 46 Stan. L. Rev. at p. 239 [explaining that under the “draconian” *Salerno* standard, “a litigant bringing a facial rather than an as-applied challenge gains nothing”].) In others, potential challengers may decide that waiting to bring a post-enforcement challenge is too risky. (See Metzger, *supra*, 36 Fordham Urb. L.J. at p. 789.)

As the opinion below demonstrates, the *Salerno* standard makes prevailing in a facial challenge difficult, if not impossible. (See Opn. 15 [“Plaintiffs have not met their burden to show local government can *never, in any situation, exercise discretion to deny a permit for a particular proposed wireless facility*”] [emphasis in original].) Indeed, a locality need only produce a single example in which a challenged ordinance could be validly applied to defeat a facial challenge. (Dorf, *supra*, 46 Stan. L. Rev. at p. 241.) Under this rubric, a large number of laws would stand “merely because there exists some set of circumstances, no matter how small or insignificant,” under which a particular law could be validly applied. (*Id.* at p. 240.)

In the preemption context, scores of local enactments would likely be upheld even if they frustrate State objectives in the majority of their applications. (See generally Dorf, *supra*, 46 Stan. L. Rev. at p. 240.) Beyond stifling telecommunications technology and innovation, importing the rigid “no set of circumstances” test in the State preemption context will

have far-reaching consequences for the uniformity and efficiency of State laws and policies.

Countless California laws, from environmental protection policies to labor and employment regulations to home mortgage legislation, would be vulnerable to local encroachment under *Salerno*'s lens. (See, e.g., Health & Safety Code §§ 120335 [specifying immunization requirements for school children], 5433 [mandating minimum insurance coverage thresholds for transportation network companies and drivers], 5445.2 [establishing criminal background check requirements transportation network companies such as Uber and Lyft must complete before hiring drivers].) Allowing the erosion of statewide policies by applying *Salerno*'s inflexible standard jeopardizes the predictability and uniformity of California law. In the absence of reliable and meaningful preemption as intended by the Legislature, a patchwork of local enactments may result, subjecting citizens to a panoply of divergent rules and corresponding uncertainty. (See U.S. Chamber of Commerce Amicus Ltr. in Support of Petition for Review at pp. 8-9 [noting that the decision below could require carriers to comply with "tens or even hundreds of different local standards"]; Weiland, *supra*, 24 Harv. Envtl. L. Rev. at p. 276 [discussing the inherent problems with weak preemption jurisprudence].) Section 7901 is a perfect example of this. The Legislature meant to grant telephone corporations the right to

place their equipment in rights-of-way throughout the state—not only in parts of the State, resulting in a patchwork network.

**II. THE STATE FRANCHISE PROHIBITS LOCALITIES FROM USING THE POLICE POWER TO DISCRIMINATE AGAINST TECHNOLOGIES.**

In addition to applying the wrong standard of review, the Court of Appeal misread Section 7901, concluding that the provision allows municipalities to “adjust the balance” “between technological advancement and community aesthetics” by singling out new wireless technology for disfavored treatment. (Opn. 1.) This marks a radical departure from long-standing California precedent recognizing that the State franchise granted to telephone companies embraces, and is intended to foster, innovative telecommunications deployments throughout the State. As this Court has noted, “the very purpose of section [7901]” is “to give [telephone] subscribers the benefit of the many and varied uses of telephone wires made possible by scientific development.” (*Los Angeles, supra*, 44 Cal.2d at p. 282.)

The Court of Appeal’s decision turns this on its head, allowing municipalities to impose unique burdens on particular communications services. It allows municipalities to stand in the way of progress by enacting discriminatory regulations such as the Ordinance. But as this Court’s precedent makes clear, the City cannot use ostensibly “aesthetic” regulations to impose unique burdens on certain technology. Under any

standard, the Ordinance conflicts with Section 7901 because it discriminates against advanced technologies. On this alternative basis, the Court of Appeal's opinion should be reversed.

A. **The Ordinance Discriminates Against Innovative Wireless Facilities.**

The City has stipulated that the Ordinance subjects wireless facilities to unique, additional regulatory approvals that do not apply to other technologies or services, regardless of the burden that these other services put on the rights-of-way. (Opn. 5; see also A00636 [“The City does not require telecommunications providers . . . to obtain site-specific permits to install facilities on existing utility poles *other than* Personal Wireless Service Facilities”] [emphasis added].) Although it asserts that the Ordinance is intended to address “aesthetic” concerns, the record belies that claim.

The uncontested record confirms that the wireless facilities at issue here are in most cases (at most) identical in size and overall impact to traditional wireline telephone, cable, and electrical facilities. (See, e.g., Opn. 6 [quoting A00847] [remarking that Appellants' facilities are “generally similar in size and appearance” to facilities deployed by other rights-of-way users]; A00641 [noting that Crown Castle and certain cable providers use identical battery back-up units].) T-Mobile's typical wireless facilities, for example, consist of small pole-top antennas approximately

two feet tall, one or two small equipment cabinets, and an electric meter connecting to the power utility. (A00637.) The equipment cabinets generally range from approximately 17 x 24 x 6 inches to 26 x 26 x 9 inches in dimension. (*Ibid.*) Crown Castle's small cylindrical antennas are of a similarly modest size—much smaller than traditional cell towers and antennas. (See A00638 [noting that Crown Castle's installations can be as small as 2" in diameter and 24" tall].) Moreover, Appellants' reasonably sized wireless facilities do not create new eyesores on the City's landscape. Rather, the facilities at issue are located on existing utility or streetlight poles in the public rights-of-way whose very purpose is to accommodate various other telecommunications, cable, and electric power lines and equipment. (A00637-38.) Those existing utility poles are, themselves, approximately 40 feet tall. (*Ibid.*)

In some cases, Appellants' facilities are even *smaller* than those of other rights-of-way users. Near 36 Ashbury Street in San Francisco, for example, Crown Castle has installed on an existing utility pole a cylindrical antenna that is 6.1" in diameter and 24" tall, an electronic equipment box that is 16" wide, 35" tall, and 9" deep, an electric meter, and a disconnect switch. (A00642-43.) Directly across the street, a wireline telecommunications provider has installed wireline facilities that measure 30.25" wide, 24.75" tall, and 16" deep—over a foot wider and half-a-foot deeper than Crown Castle's facilities. (A00643.) And further down

Ashbury Street, the cable company has installed a battery back-up unit that is also larger than Crown Castle's nearby wireless facilities. (*Ibid.*) (See also A00642-44 [describing similar situations in which Appellants' facilities are actually smaller than those of other rights-of-way users at 21<sup>st</sup> Avenue and Lake Street, 453 Broderick Street, and the intersection of Asbury Street and Grove Street in San Francisco].)

Under the Ordinance, Crown Castle would be subject to burdensome, time-consuming, and resource-draining discretionary aesthetic review before it could install its modest facilities—and they may be denied in the face of opposition. The wireline and cable providers, meanwhile, would be free to install their facilities without comparable review. These incongruous results confirm that the City's claimed "aesthetic" concerns are nothing more than a pretext to discriminate against emerging forms of telecommunications technology.

The City promulgated the Ordinance not in spite of the significant need for deployment of wireless facilities to meet growing demand for cutting-edge telecommunications services, but because of it. In enacting the legislation the City noted that it was doing so in response to the "[g]rowing demand for wireless telecommunications services [that] has resulted in licensing requests from the wireless industry to place wireless antennas and other equipment on utility and street light poles in the public-rights of way." (A00138). The uncontested record thus shows that the

Ordinance is specifically designed to saddle wireless providers with unique impediments to deployment.

**B. California Courts Have Long Affirmed That The State Franchise Is Intended To Prevent Localities From Imposing Obstacles On New And Emerging Telecommunications Technologies.**

The State franchise has promoted emerging forms of communications technology throughout the State since its enactment in 1905.<sup>11</sup> (See *Pacific Telephone & Telegraph Co. v. City and County of San Francisco* (1959) 51 Cal.2d 766, 770 (*Pacific Telephone I*)). In Section 7901, the Legislature extended to telephone corporations “a franchise from the state to use the public highways for the prescribed purpose *without the necessity for any grant by a subordinate legislative body.*” (*Id.* at p. 771 [emphasis added].) These franchise rights are vested rights protected by the State and Federal constitutions that cannot be taken away and necessarily extend to all of California and to advancements in technology. (*Postal Telegraph-Cable Co. v. Railroad Comm. of California* (1927) 200 Cal. 463, 472; *Williams, supra*, 114 Cal. App.4th at pp. 650 n.4, 651-54).

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<sup>11</sup> Originally limited to telegraph lines, in 1905, the California Legislature repealed Section 536 and re-enacted it to include “telephone corporations” and “telephone lines.” (*Pacific Telephone & Telegraph Co. v. City & County of San Francisco* (1959) 51 Cal. 2d 766, 769-70.) The “legislative intention in reenacting [the] statute was to extend to telephone corporations the same offer previously made to telegraph corporations without any other change in its effect or operation.” (*Ibid.*)

In keeping with the franchise's objectives, California courts have interpreted Section 7901 broadly, to facilitate the deployment of "modern facilities" regardless of whether they were in existence at the time of the statute's enactment. (*Pacific Telephone & Telegraph Co. v. City & County of San Francisco* (1961) 197 Cal.App.2d 133, 147 (*Pacific Telephone II*) [concluding that the State franchise permitted the placing of telephone wires underground even though such "modern facilities were not in existence" in 1905].)

California courts have reiterated Section 7901's principal purpose—promoting advancement in communications technology throughout the State—for generations of emerging technologies. For example, in *Los Angeles, supra*, 44 Cal.2d at page 282, this Court rejected the City of Los Angeles's claim that a telephone company's State franchise rights extend only to transmissions of "articulate speech." Declining to accept the City's narrow reading of the franchise, this Court read Section 7901 broadly, reasoning that the statute was intended to help telephone companies "give its subscribers the benefit of the many and varied uses of telephone wires made possible by scientific development." (*Ibid.*)

*Los Angeles* confirms that the State franchise confers substantial rights upon telephone companies to promote innovation and ensure that Californians always have access to state-of-the-art communications systems. It also clarifies that Section 7901 forbids localities from imposing

barriers to emerging forms of telecommunications technology. The Court recognized that Section 7901 embodied the State Legislature's desire to provide telephone companies cohesive statewide regulation, not fractured local policies. (See *Los Angeles, supra*, 44 Cal.2d at p. 280 ["The business of supplying the people with telephone service is not a municipal affair; it is a matter of statewide concern"]; see also *Pacific Telephone I, supra*, 51 Cal.2d at p. 776; *Pacific Telephone II, supra*, 197 Cal.App.2d at p. 148 ["[T]he right to . . . conduct a telephone business is a matter of statewide concern and not a municipal affair"] [emphasis in original].) Accordingly, "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.) Section 7901 thus supersedes local attempts to limit the franchise.<sup>12</sup>

Six years later, in *Pacific Telephone II, supra*, 197 Cal.App.2d at pages 146-47, the court again interpreted Section 7901 to promote innovation and preclude discrimination against new communications systems. In that case, the court rejected San Francisco's argument that the

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<sup>12</sup> The California Legislature has made clear that it views the deployment of advanced telecommunications technology as a matter of tremendous statewide concern. (See Gov. Code § 65964.1(c) ["The Legislature finds and declares 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."].)

State franchise did not extend to “the placing of telephone wires under ground.” (*Ibid.*) The court found that San Francisco’s interpretation of the State franchise was “too restrictive,” observing that Section 7901 grants telephone companies the right to “construct and maintain in city streets the necessary equipment to enable the company to operate its business” regardless of the kind of technology deployed. (*Id.* at p. 147.) The State franchise embraces the newest and most advanced communications technologies because “the people expect [franchisees] to use the most modern equipment.” (*Ibid.*)

Finally, in *Williams, supra*, 114 Cal.App.4th at page 651, the court upheld the State franchise against encroachment from a local licensing fee that Riverside levied on Williams Communications. Riverside argued that the State franchise did not apply to Williams because the company used its facilities to provide open video, cable TV, and Internet services, rather than traditional telephone services. (*Ibid.*) The court rejected the City’s argument, invalidating the licensing fee and holding that the State franchise extended to “different forms of information, such as voice, music, video, computer data, facsimile material and other forms” offered over fiber optic facilities. (*Id.* at pp. 651, 654.) “Although the types of services provided by Williams are different because of technological advances, the basic principle remains the same: regulation of such services is a matter of state concern.” (*Id.* at p. 653.)

Emphasizing that the State franchise is intended to foster new and emerging communications technologies, the court in *Williams* noted that, in other enactments, the State Legislature had manifested its intent to boost “the development and deployment of new technologies, and the equitable provision of services in a way that efficiently meets consumer need and encourages the ubiquitous availability of a wide choice of state-of-the-art services.” (*Williams, supra*, 114 Cal.App.4th at p. 654 [quoting Stats. 1996, ch. 300 § 2 [adopting Government Code § 50030 concerning municipal permit fees].) With these statewide objectives in mind, the court concluded that discriminatory measures like local licensing fees simply cannot stand. So too here. Like the unlawful licensing fee in *Williams*, the Ordinance subjects emerging wireless facilities to unique burdens. Where, as here, “conflicting local regulations would stifle the growth of [telecommunications providers] and impede their ability to serve the public interest,” such regulations must yield. (*Williams, supra*, 114 Cal.App.4th at p. 652.)

*Los Angeles, Pacific Telephone II*, and *Williams* all stand for the same principle: Section 7901 favors deployment of new and cutting-edge communications technology, and forbids localities from enacting discriminatory regulations that disfavor innovative facilities. Today, the services offered using Appellants’ wireless technologies represent the next frontier of telecommunications. Yet the City subjects these facilities and

the services they offer to onerous regulatory review that does not apply to other technologies or services that likewise burden the public rights-of-way. In upholding this discriminatory practice, the Court of Appeal departed from an unbroken line of California precedent extolling the virtues of technological progress over parochial local concerns. Section 7901 forbids the City from limiting the scope and benefit of the franchise as it applies to wireless providers, which is precisely what the Ordinance does. For this reason, the Court of Appeal's decision should be reversed.

C. **Section 7901 Prohibits A Locality From Using Its Police Power To Discriminate Against Technologies.**

To foster technological innovation and facilitate deployments in the public rights-of-way, the plain text of Section 7901 places one narrow limitation on telephone companies: they may not “incommode the public use of roads or highways or interrupt the navigation of the waters.” (§ 7901; accord, *Sprint PCS Assets, L.L.C. v. City of La Cañada Flintridge* (9th Cir. 2006) 182 F.App’x 688, 690 [“By the plain text of the statute, the only substantive restriction on telephone companies is that they may not ‘incommode the public use’ of roads.”].) “Incommode” has long been interpreted narrowly, and this Court has made clear that localities may only regulate in this sphere so “as to prevent unreasonable obstruction of travel” by the placement of poles and wires. (*Western Union Telegraph Co. v. City*

of *Visalia* (1906) 149 Cal. 744, 750-51; see also *Pacific Telephone II*, *supra*, 197 Cal.App.2d at p. 146.)

Until the lower court's decision, no California court had ever even suggested that telephone facilities could "incommode the public use of the roads" based solely on mere aesthetics or annoyance. (See *Opn. 19*.) Even though traditional wireline telephone facilities and equipment have always posed some aesthetic intrusion on the rights-of-way (see *Preferred Communications, Inc. v. City of Los Angeles* (9th Cir. 1994) 13 F.3d 1327, 1330 [rejecting city's argument that the "disruption and visual blight caused by additional . . . wiring" justified a "one area-one operator" cable franchising regime]), courts have never proclaimed that aesthetic concerns alone could "incommode" the public rights-of-way.<sup>13</sup>

To the contrary, courts have acknowledged that in enacting the franchise, the "Legislature . . . knew that the placing of poles [and facilities] in a street would of necessity constitute some incommode to the public use." (*Pacific Telephone II*, *supra*, 197 Cal.App.2d at p. 146.) Section

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<sup>13</sup> It is no secret that wireline facilities can sometimes be a sore sight on public rights-of-way. For this reason, the California Public Utilities Commission has occasionally noted the desirability of undergrounding facilities. (See *Cal. Community Television Ass'n. v. Gen. Telephone Co. of Cal.* (Cal. P.U.C. 1970) 87 P.U.R.3d 340, 340, ["It is the policy of this state and of this commission . . . that undergrounding of . . . installations is desirable for aesthetic reasons"].) While aesthetics can drive policy in other areas, no court has suggested that aesthetic concerns created by previous generations of communications technology "incommode" the public rights of way within the meaning of Section 7901.

7901 has thus been understood to protect the deployment of wireline facilities despite the aesthetic imposition of overhead wires and equipment, which can be even more intrusive than wireless facilities. (Cf. *id.* at p. 147 [“A sensible interpretation of section [7901] is that it grants a franchise to telephone companies to construct and maintain in city streets the necessary equipment to enable the company to operate its business of providing communication for the people of the cities, the state, the nation and even foreign countries.”].)

Yet, in this case, the City invented, and the Court of Appeal accepted, a reading of “incommode” that stretches the term beyond recognition. The Court of Appeal interprets “incommode the public use of the roads” as expansive enough to include “inconvenience or discomfort . . . trouble, annoy[ance], [and] molest[ation].” (Opn. 21-22.) That interpretation is so broad that it affords “incommode” an almost limitless reach—any irritation, no matter how trivial or idiosyncratic, could serve as a source of “inconvenience or discomfort.” This reading is far removed from the ordinary meaning of this term, endorsed by this Court in prior precedent, which speaks to a physical obstruction of the active use of the rights of way. (See, e.g., *Western Union Telegraph, supra*, 149 Cal. at pp. 750-51.) Indeed, giving local jurisdictions such a broad veto on the installation of facilities would render the “right” guaranteed by the Section 7901 essentially meaningless.

The narrower construction of “incommode” historically adopted by this Court is also more consistent with basic tenets of statutory interpretation and the rest of the language of the statute, because public “use” denotes “active employment.” (*Welch v. United States* (2016) 136 S.Ct. 1257, 1267.) As the City’s urban planning documents acknowledge, aesthetic beauty is not “active employment.” Rather, it contributes only to “passive” enjoyment of “unique areas” and “notable landmarks.” (RA000159, RA000163-65.) This is not merely a semantic distinction; the distinction between active and passive uses is a bedrock issue in planning. Reading an interference with passive enjoyment as something that can “incommode” active “use of roads” or “interrupt” active “navigation of the waters” thus conflates two concepts that are simply different in kind. The Court of Appeal’s broad definition would entirely undermine Section 7901 by “presuppos[ing] what in legal contemplation does not exist.” (*Haywood v. Drown* (2009) 556 U.S. 729, 736.)<sup>14</sup>

To support its overbroad and erroneous reading of “incommode the public use,” the Court of Appeal relied on a single, non-binding and controversial Federal authority. (Opn. 18-19 [citing *Sprint PCS Assets*,

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<sup>14</sup> Further, the Legislature’s own characterization of Section 7901 in the legislative history further undermines the Court of Appeal’s definition. The Enrolled Bill Report for the bill enacting Section 7901.1 articulates the Legislature’s understanding of the “current law” under Section 7901 as granting telephone corporations a statewide franchise to construct telephone lines “provided they do not *prevent the public use of the road or highway or interrupt the navigation of the waterway.*” (A01033 [emphasis added].)

*L.L.C. v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716] [interpreting State law such that “incommode” can encompass “aesthetic reasons”].)<sup>15</sup> In *Palos Verdes Estates, supra*, 583 F.3d at page 721, note 2, the Ninth Circuit initially sought guidance from this Court on whether the State franchise permits “public entities to regulate the placement of telephone equipment in public rights-of-way on aesthetic grounds.” This Court denied the request, reasonably concluding that given the various Federal issues raised in the case, “a decision on that issue may not be determinative in the[] federal proceedings.” (*Ibid.*) The Federal court, however, proceeded to bypass the Federal issues and decide the State law question without this Court’s guidance. (*Ibid.*) *Palos Verdes Estates’* conclusion is erroneous and conflicts with this Court’s prior, narrow interpretation of “incommode” in *Western Union Telegraph, supra*, 149 Cal. at pages 750-51. Now that the Court of Appeal has imported this illogical interpretation of “incommode” into California case law, this Court has the opportunity to correct the Ninth Circuit’s erroneous reading of State law and confirm its prior construction of the phrase. (See *Kansas Public Employees Retirement Sys. v. Reimer & Koger Assoc., Inc.* (8th Cir. 1996)

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<sup>15</sup> It is important to note that *Palos Verdes Estates* directly conflicts with another Ninth Circuit decision, *La Cañada Flintridge* (9th Cir. 2006) 182 F.App’x 688 (holding that Section 7901 and Section 7901.1 preempted the City of La Cañada Flintridge’s ordinance, which allowed the city to deny telecommunications facility permits based on aesthetics).

77 F.3d 1063 [“State courts, of course, are not bound to follow federal interpretations of state law.”].)

The Court of Appeal’s decision was also based on a fundamental misunderstanding of *Pacific Telephone II*’s discussion of the “narrower police power.” (Opn. 18.) The Court of Appeal reasoned that *Pacific Telephone II* did not address the “aesthetic impacts” of facilities. It claimed that the regulation of aesthetics is part of what *Pacific Telephone II* considered “the narrower police power of controlling location and manner of installation” left to municipalities by the State franchise. (*Ibid.*) But *Pacific Telephone II*, *supra*, 197 Cal.App.2d at page 152, expressly held that a municipality’s “narrower police power” includes only the “power to deal with the health, safety, and morals of the people.” In doing so, the court cited *Western Union Telegraph*, in which this Court explained that under Section 7901, the “city had the authority, under its police power, to so regulate the manner of plaintiff’s placing and maintaining its poles and wires as to **prevent unreasonable obstruction of travel.**” (*Western Union Telegraph*, *supra*, 149 Cal. at pages 750-51 [emphasis added].)

The Court of Appeal misapplied and extended two cases, and its holding conflicts with well-established precedent that regulation of aesthetics and possible annoyances falls within the realm of general police powers separate and apart from the narrower police power discussed in *Pacific Telephone II*. (See, e.g., *Berman v. Parker* (1954) 348 U.S. 26, 32

[identifying “aesthetic” concerns as part of a “public welfare” component of the police power separate from “[p]ublic safety, public health, morality, peace and quiet, law and order”]; *Lucas v. S. Carolina Coastal Council* (1922) 505 U.S. 1003, 1024 [locating “esthetic concerns” in the “broad realm” of police power].) Aesthetic regulations by definition cannot be part of the “narrower police power” that Section 7901 leaves to municipalities.

To the extent that municipalities could retain police power over aesthetics, Section 7901 prohibits—as a matter of statewide concern—use of this general police power in any manner that may hinder deployment of telephone equipment. California courts have consistently reviewed municipal use of its local police power in light of California’s statewide concern. (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”]; *Los Angeles, supra*, 44 Cal.2d at p. 280 [“The business of supplying the people with telephone service is not a municipal affair; it is a matter of statewide concern.”]; *Pacific Telephone I, supra*, 51 Cal.2d at p. 776 [similar].) This “statewide concern” in deployment of modern facilities is of such importance that “any delegation from the state to the city of authority to control the right of [a provider] to do a telephone business should be clearly expressed, and any doubt as to whether there has been such a delegation must be resolved in favor of the state.” (*Los Angeles, supra*, 44 Cal.2d at p. 280.)

The Court of Appeal's mistaken reliance on non-binding Federal precedent runs afoul of this Court's prior construction of Section 7901 and well-accepted delineations of the local police power. This Court should overturn the Court of Appeal's decision and invalidate San Francisco's Ordinance.

III. **SECTION 7901.1 FORBIDS THE CITY FROM SINGLING OUT NEW TECHNOLOGIES FOR DIFFERENTIAL TREATMENT.**

The Court of Appeal also incorrectly held that Section 7901.1's mandate that municipalities treat right-of-way applicants "in an equivalent manner" when imposing "time, place, and manner" restrictions applies only to *temporary* occupation of the rights-of-way—in effect, limiting this statute to the issuance of construction permits. (Opn. 24.) The court's reading of Section 7901.1 is wrong. The statute's plain text, structure, and legislative history all compel the conclusion that Section 7901.1 applies to all rights-of-way occupation, not just transient activities. Moreover, the Court of Appeal's illogical reading of the provision would allow municipalities to undermine the State franchise's primary purpose of fostering technological progress. But even if this Court accepted the Court of Appeal's tortured interpretation of Section 7901.1, the Ordinance still runs afoul of the provision's equivalent treatment mandate.

*First*, the plain text of Section 7901.1 makes clear that the statute applies to all rights-of-way occupation. Section 7901.1 allows

municipalities to exercise reasonable control over the “time, place, and manner” of access to the rights-of-way, so long as “all entities” are treated “in an equivalent manner.” (§ 7901.1(b).) Nothing in the text limits the provision to temporary construction activities and occupations of the rights-of-way. Indeed, nothing in the statute even suggests that the provision is time-limited. The natural reading of the provision is that localities retain some control over when and how facilities are placed in the rights-of-way, despite the broad franchise granted in Section 7901. Where, as here, “the plain language of a statute is unambiguous, no court need, or should, go beyond that pure expression of legislative intent.” (*Green v. State* (2007) 42 Cal.4th 254, 260.) This Court’s analysis should begin and end with Section 7901.1’s text.

Longstanding precedent recognizes that the phrase “time, place, and manner,” used in Section 7901.1, is not subject to any temporal limit.<sup>16</sup> In the free speech context, the phrase “time, place, and manner” extends well beyond temporary or transient regulations. Valid time, place, and manner restrictions may extend for the full duration of occupation of a public place. (See, e.g., *Los Angeles All. For Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 378-79 [holding regulations banning certain “aggressive solicitation” practices are valid time, place, and manner restrictions under

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<sup>16</sup> The phrase “time, place and manner” originates in free speech jurisprudence, and should be interpreted consistently in this context. (See, e.g., *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 850 n.3.)

California's liberty of speech clause]; *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 803 [holding New York City's sound-amplification guidelines are valid time, place, and manner restrictions under the First Amendment].)

*Second*, the statutory structure of the State franchise confirms that Section 7901.1 applies to municipal control of all rights-of-way occupation. Section 7901.1 expressly states that municipal control exercised pursuant to the provision must be "consistent with Section 7901." (§ 7901.1(a).) But Section 7901.1 cannot be read to authorize discriminatory treatment of the kind advanced in the Ordinance while remaining "consistent with Section 7901." As explained above (see *supra*, Part II.B), the State franchise was enacted to promote technological innovation and widespread deployment.

The Ordinance thwarts this central goal: it imposes burdensome requirements exclusively on right-of-way occupants that deploy wireless facilities, thereby infringing on the ability of Californians to receive "the benefit of the many and varied uses of telephone wires made possible by scientific development" (*Los Angeles, supra*, 44 Cal.2d at p. 280) or have access to "the most modern equipment" (*Pacific Telephone II, supra*, 197 Cal.App.2d at p. 147). Reading Section 7901.1 to authorize discriminatory treatment of non-transient rights-of-way occupation thus undermines the State franchise and fails to harmonize the provisions as required. Instead, Section 7901.1 should be understood to require municipalities regulating

right-of-way occupation to treat entities in an equivalent manner, and to prohibit discriminatory treatment. Such a reading properly recognizes the relationship between Sections 7901 and 7901.1.

*Third*, the statute's legislative history supports reading Section 7901.1 to apply to all right-of-way occupation. The Court of Appeal pointed to legislative history to suggest that Section 7901.1 should be limited to temporary rights-of-way occupation. (Opn. 24-25.) The passages cited by the court characterize Section 7901.1 as applying to the management of "construction." (See *ibid.*) But the use of "construction" in the legislative history cannot bear the weight that the Court of Appeal rested on it. Section 7901 uses the same term: it authorizes providers to "construct" and "erect" telecommunications facilities. (§ 7901.) Yet Section 7901 is widely understood to allow franchisees to use rights-of-way to build facilities in the first instance and maintain them on an *ongoing* basis. (See *Pacific Telephone I, supra*, 51 Cal.2d at 774 [describing the franchise as an offer "for the construction and maintenance of communication lines"].) Neither the City nor the court below can offer an explanation as to why references to "construction" in Section 7901.1's legislative history supports a temporal limitation while "construct" carries no such connotation in Section 7901. That Section 7901.1's legislative history makes passing reference to managing construction activities is of no moment.

*Fourth*, the City's reading of Section 7901.1, endorsed by the Court of Appeal, results in an incoherent approach to municipal authority. The Court of Appeal concluded that the "discretionary aesthetics-based regulation" in the Ordinance was permissible under local police power. (Opn. 10.) But such a conclusion requires an exceptionally narrow reading of Section 7901.1 that creates an illogical patchwork of municipal authority.

In the City's view, Section 7901.1 independently confers narrow authority upon municipalities: the ability to regulate temporary rights-of-way occupation, subject to an equivalent treatment limitation. (See Opn. 23.) Under its theory, the narrow municipal authority conferred by Section 7901.1 is supplemented by vast and amorphous police power that, when cobbled together, empower the City to impose aesthetic regulation without an equivalent treatment limitation. This crabbed theory of municipal power in the context of the State franchise must be rejected. The Legislature could not have intended this bizarre result.

A far simpler and more cohesive reading of Section 7901.1—a statutory provision appended to Section 7901 decades after the development of Section 7901—is that it describes the municipal authority preserved under Section 7901. Thus, the State franchise gives broad rights of occupation to communications providers, which municipalities may regulate as to "time, place, and manner," but any such regulation must be

done in a manner that treats all occupants, and potential occupants, equally. This interpretation is further supported by a reading of the legislative history as a whole, which reveals that the Legislature understood Section 7901 to grant telephone corporations broad rights and left municipalities with “limited” authority. (See, e.g., A00994 [Senate Rules Committee] [“These franchises provide the telephone corporations with the right to construct and maintain their facilities. Local government has *limited authority* to manage or control that construction.”] [emphasis added]; A01001 [Assembly Committee on Utilities and Commerce] [same]; A01004 [same]; A00981 [Senate Committee on Energy, Utilities and Communications] [same].) It is incongruous to suggest that cities had broad authority to prohibit installation altogether based on aesthetics but needed legislation to clarify that they could require a permit governing temporary activities during installation.

*Finally*, even assuming that Section 7901.1 applies only to temporary occupation of rights of way, as the City contends, the Ordinance would still be invalid because it unlawfully discriminates against wireless facilities even on that basis. The Ordinance requires “any Person seeking to *construct, install*, or maintain a Personal Wireless Service Facility in the Public Rights-of-Way to obtain a Personal Wireless Service Facility Site Permit.” (A00140 [emphasis added].) An entity may not enter the rights-of-way to build or install facilities until it has obtained a permit, satisfying

the various levels of review and approval that the Ordinance sets forth. Thus, the Ordinance prohibits wireless providers—and no other telecommunications franchisees—even from *temporarily* occupying the rights-of-way until they complete the City’s aesthetic review and meet the Ordinance’s other cumbersome application requirements. Because the Ordinance fails to treat all right-of-way occupants “in an equivalent manner” (§ 7901.1(b)), it must be set aside.

IV. **IF ALLOWED TO STAND, THE LOWER COURT’S DECISION WILL HAVE FAR-REACHING AND HARMFUL CONSEQUENCES FOR CALIFORNIANS.**

The State franchise embraces technological progress, making its integrity more important than ever as the nation approaches a critical moment in the advancement of communications technology. The City’s approach threatens to hinder the roll-out of advanced services needed to upgrade networks, promote universal broadband, and support the “Internet of Things” (IoT).

Discriminatory and burdensome rights-of-way access regulations slow and threaten to prevent the deployment of better service and new technology. “[E]ach month spent negotiating with a municipality for access to local rights of way is another month that consumers must wait for faster service[.]” (Remarks of Commissioner Ajit Pai at the Brandery, *A Digital Empowerment Agenda* (FCC 2016) 2016 WL 4923284, \*8). As networks evolve and consumer demand explodes, rules like San Francisco’s

result in slower connectivity, higher prices, gaps in service, fewer consumer choices, and less innovation. The FCC has noted this repeatedly, and indeed is now in the process of seeking additional input on how to promote national broadband access and advanced services, such as 5G. (See, e.g., *Wireless Siting Inquiry, supra*, at p. 1.)

The Ordinance specifically targets the kind of small cell facilities that will be the lynchpin of future 5G networks. (See *Wheeler Remarks, supra*, at \*4.) “[T]he nature of [5G] technology makes the review and approval by community siting authorities, and the associated costs and fees, all the more critical. . . . If siting for a small cell takes as long and costs as much as siting for a cell tower, few communities will ever have the benefits of 5G.” (Remarks of FCC Chairman Tom Wheeler as Prepared for Delivery before the Competitive Carriers Association (FCC 2016) 2016 WL 5122942, \*5.)

If the Court of Appeal’s decision is allowed to stand, other municipalities will likely impose similar burdensome regulations on small cell construction, installation, and maintenance. (See Am. Canyon Staff Report at p. 1 [halting wireless deployments while American Canyon reviews San Francisco’s ordinance in an effort to develop similar regulations].) This could stymie the deployment of 5G networks, leaving California unable to meet the growing need for wireless capacity created by the proliferation of billions of connected devices. So, while the rest of the

country has access to “low-latency, ultra-fast, and secure” 5G networks to support innovative mobile technologies such as autonomous vehicles, smart city utility grids, and transportation networks (*Wheeler Remarks, supra*, at \*2), California may fall behind.

Erosion of the State franchise also threatens access to *existing* services on which Californians depend. As the FCC has recognized, “[m]any public safety services and technologies are undergoing radical change as underlying networks transition from legacy to IP-based modes,” including “the transition of the nation’s 911 system to Next Generation 911 (NG911); the evolution of first responder communications from land mobile radio (LMR) to LTE, including the development of FirstNet; and the emergence of enhanced emergency alerting services that rely on IP-based technologies to communicate with the public.” (Notice of Inquiry, *Fifth Generation Wireless Network and Device Security* (FCC 2016) DA 16-1282, PS Docket No. 16-353, at p. 15.) Preventing carriers from building needed wireless infrastructure will impede access to emergency services as they evolve for use on next generation networks.

From a broader perspective, regulations like those enacted by San Francisco disrupt what the FCC has called the “virtuous cycle” of investment and demand-creation. (Remarks of FCC Chairman Tom Wheeler, Prepared Remarks for 2014 CTIA Show (FCC 2014) 2014 WL 4446674, \*3.) Discrimination against new technology hinders new entrants

in particular, distorting the market by making it easier for certain companies and sectors to obtain needed access to rights-of-way. Such onerous and discriminatory regulations also distort rational network planning. As companies seek to maximize their speed to market, they may avoid certain municipalities for deployment of cutting-edge technology. Google Fiber has explained, “[t]he expense and complexity of obtaining access to public rights-of-way in some jurisdictions may increase the cost and slow the pace of broadband network investment and deployment” so that jurisdictions selected for deployment “typically have city leaders . . . who work closely with us to develop a clear plan for how to build Fiber throughout the area in a way that’s efficient and the least disruptive.” (Testimony of Michael Slinger, Director of Google Fiber City Teams, Google Inc., Before the House Committee on Energy and Commerce Subcommittee on Communications and Technology, Hearing on “Promoting Broadband Infrastructure Investment” (July 22, 2015) pp. 1, 4 <<http://docs.house.gov/meetings/IF/IF16/20150722/103745/HHRG-114-IF16-Wstate-SlingerM-20150722.pdf>> [as of Jan. 18, 2017].) Wireless and internet communications do not stop at municipal boundaries, a fact that underpins the State franchise embodied in Section 7901.

Unfortunately, San Francisco is not the first municipality to be hostile to wireless deployments. (See Comments of the California Wireless Association, Federal Communications Commission, WC Docket No. 11-59,

at pp. 6-7 (filed Sept. 30, 2011) <<https://ecfsapi.fcc.gov/file/7021712388.pdf>> [as of Jan. 18, 2017] [discussing the rise of litigation against municipalities over policies impeding wireless deployments].) Unless this Court corrects the decision below, localities across the State may be emboldened to follow suit, adopting varied and discriminatory access regimes. As amici supporting the Petition for Review point out, the Court of Appeal's decision enables every municipality in California to promulgate similar ordinances, making it essentially impossible to exercise the state franchise. (Chamber Amicus Ltr. at pp. 9-10; WIA Amicus Ltr. at p. 3 [noting that the opinion will "embolden other localities across the state to enact their own restrictive ordinances that will frustrate core state and federal policies to promote the public's access to broadband"].) This is the sort of "balkanization" that both national and state telecommunications policy have tried to avoid. (See *Wireless Siting Inquiry* at p. 2 [describing Federal regulatory tools available to prevent localities from hindering robust wireless deployment].) Municipalities should not be encouraged to prioritize their own technological and aesthetic preferences over State policy, technological progress, and providers' statutory franchise rights.

Worse, these distortions and limits bring no discernible benefit to the citizens of San Francisco or the State. San Francisco's discriminatory ordinance is wholly unable to vindicate the local interests it claims. Correcting the decision below and allowing wireless facilities to exercise

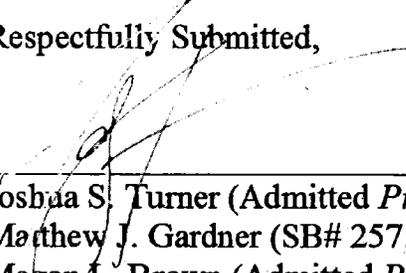
their State franchise rights in the same way that all other telecommunications providers do will not cause a proliferation of enormous or unsightly deployments on cherished landmarks, for reasons explained in Part II.A, *supra* (describing the minimal visual impact Appellants' facilities have on the rights-of-way as compared to legacy facilities currently occupying the rights-of-way).

### CONCLUSION

In light of the foregoing, Appellants respectfully request that this Court reverse the Court of Appeal, invalidate the City's Ordinance, and remand with directions to enter Judgment in Appellants' favor.

Dated: January 20, 2017

Respectfully Submitted,

  
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## STATUTORY ADDENDUM

### **Cal. Pub. Util. Code § 7901**

Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.

### **Cal. Pub. Util. Code § 7901.1**

(a) It is the intent of the Legislature, consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed.

(b) The control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner.

(c) Nothing in this section shall add to or subtract from any existing authority with respect to the imposition of fees by municipalities.

## CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.504(d)(1), the undersigned certifies that this Plaintiffs and Appellants' Opening Brief On The Merits contains 13,833 words as counted by the word count feature of the Microsoft Word program used to generate this brief, not including the cover, the tables of contents and authorities, the signature block, the statutory addendum, the certificate of service, and this certificate.

Dated: January 20, 2017

A handwritten signature in black ink, appearing to read "Martin L. Fineman", written in a cursive style with a large, stylized flourish at the end.

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Martin L. Fineman

## CERTIFICATE OF SERVICE

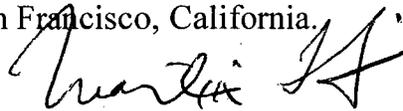
I, Martin L. Fineman, declare as follows:

At the time of service, I was over 18 years of age and not a party to this action. I am employed in San Francisco, California. My business address is 505 Montgomery Street, Suite 800, San Francisco, California 94111-6533. On January 20, 2017, I served true copies of the document(s) described as **PLAINTIFFS AND APPELLANTS' OPENING BRIEF ON THE MERITS** on the interested parties in this action as follows: **SEE ATTACHED SERVICE LIST**

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 20, 2017, at San Francisco, California.

A handwritten signature in black ink, appearing to read "Martin L. Fineman", written over a horizontal line.

Martin L. Fineman

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