SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

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

ANSWERING BRIEF ON THE MERITS OF RESPONDENTS CITY AND COUNTY OF SAN FRANCISCO AND CITY AND COUNTY OF SAN FRANCISCO DEPARTMENT OF PUBLIC WORKS

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INTRODUCTION AND SUMMARY OF ARGUMENT

The telephone corporations who are Appellants here contend that this Court must choose between progress and parochialism, because allowing cities to control the appearance of their streetscapes by regulating wireless equipment in the public right of way will destroy innovation in telecommunications.

Appellants posit a false choice. The statewide right to construct and maintain telephone poles and wires in the public right of way, granted by Public Utilities Code section 7901, has been restricted since its inception: telephone equipment may not "incommode the public use of the road or highway." This restriction has long been understood to reserve to cities the ability to "control[] the particular location of and manner in which all public facilities, including telephone lines, are constructed in the streets." (*Pacific Tel. & Tel. Co. v. City & County of San Francisco* (1959) 51 Cal.2d 766, 773.) San Francisco's exercise of this power with its wireless facilities permit ordinance—under which San Francisco approved ***more than 98% of the wireless facility permits*** Appellants sought through the time of the bench trial in this case—is consistent with the longstanding view of cities' police power, and has yet to destroy innovation in California or the Bay Area.

While the Court of Appeal in this case was the first California court to decide that cities' reserved power includes the right to impose aesthetic standards, its decision follows from the ordinary and natural meaning of the word "incommode," which includes causing inconvenience, disturbance, or discomfort. Because uses of the right of way encompass far more than traveling from one point to another, and because incommoding the public's use of the streetscape includes marring their views of the Painted Ladies or

the Marin Headlands with unsightly poles, wires, equipment boxes, and antennas, the Court of Appeal's decision is correct. Understanding "incommode" to encompass aesthetic concerns also harmonizes Section 7901 with other state statutes such as Public Utilities Code section 2902, which acknowledges that cities have broad power to assure "the health, convenience, and safety of the general public, including [in] matters such as . . . the location of the poles, wires, mains, or conduits of any public utility."

Appellants also argue that San Francisco has impermissibly discriminated against wireless technology by subjecting wireless facility installations, but not other kinds of equipment, to discretionary aesthetic review. Appellants base this argument on Public Utilities Code section 7901.1, which clarifies that cities "have the right to exercise reasonable control as to the time, place, and manner in which the roads . . . are accessed," but such control must "be applied to all entities in an equivalent manner." The Court of Appeal correctly rejected Appellants' contention, because the legislative history and context of Section 7901.1 make clear that this statute concerns only initial access to the public right of way for the construction of utility installations, which San Francisco regulates in the same manner for all utility providers.

But even if Section 7901.1 applies to the location and appearance of wireless facilities rather than merely to their construction, this statute bolsters rather than undermines San Francisco's power to enact reasonable restrictions on the "time, place, and manner" of their installation. Nor does San Francisco impermissibly discriminate against wireless technology. Section 7901.1's command that municipal controls must be applied to all entities in an equivalent manner is most sensibly understood to prohibit

cities from discriminating against particular companies who provide the same kind of service, not as a requirement to treat different kinds of utilities—which install different kinds of equipment in the public right of way—the same.

But in any event, San Francisco satisfies Section 7901.1's requirement of "equivalent" treatment. Only two kinds of utility providers have significantly increased their requests to install equipment in the public right of way in recent years: wireless companies and broadband providers. For both, San Francisco has adopted discretionary permitting requirements that allow these utilities to install equipment and provide services but regulate the equipment's location and appearance.

In short, while Appellants deploy broad rhetoric that San Francisco's regulations nullify their statewide franchise right and jeopardize their rollout of 5G wireless service, they never demonstrate that their ability to do business or provide service is impaired in any respect—nor could they, when they have received nearly all of the permits they have sought under San Francisco's wireless facility permitting regime.

Appellants also ask this Court to clarify its standards for when a facial preemption challenge succeeds. But because Sections 7901 and 7901.1 allow cities to control the location and appearance of wireless facilities so long as they do not impair utilities' ability to provide service, San Francisco's wireless ordinance fits comfortably within the power reserved to cities under state law, and neither contradicts state law nor invades an area of law that the Legislature has fully occupied. It is not preempted under any of the standards this Court has articulated, and so there is no reason in this case to further clarify the test. For these reasons, and others offered below, this Court should affirm the decision.

STATEMENT OF THE CASE

I. Factual Background

San Francisco is recognized worldwide as a uniquely beautiful city. Scenic vistas from its many hills and its distinctive Victorian architecture contribute to its beauty, as does its attention to urban design and form. San Francisco's beauty is of immense intangible value to its residents and visitors, and also creates tangible benefits by helping ensure its economic vitality and its strong property tax base, and by providing reason for millions of tourists to visit every year. (Appellants' Appendix ["AA"] 140; Reporter's Transcript ["RT"] 1048:06-21.)

San Francisco is also a compact and busy place. Many elements compete for space on its streets, including traffic signs, street and traffic lights and their controllers, fire hydrants, utility poles, parking meters, public transit shelters, news racks, advertising kiosks, bicycle racks, and more. (See *San Francisco Beautiful v. City & County of San Francisco* (2014) 226 Cal.App.4th 1012, 1025 (*San Francisco Beautiful*).) If their placement were unregulated, these streetscape elements would "create a cluttered visual environment" that would not only detract from the beauty of the city and the character of its neighborhoods but could lead to public safety risks like distracted driving or pedestrian hazards. (Respondents' Appendix ["RA"] 1-2; RT 1056:13-1058:06.)

In order to preserve its beauty and minimize clutter in the visual environment, San Francisco has long regulated elements placed in the roadway. These regulatory concerns are broadly addressed in San Francisco's General Plan (RA 139-145, 149-150, 187, 195-196), its "constitution for all future developments" which must guide its decisions

affecting land use (see, e.g., *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570). By initiative ordinance, San Francisco has banned new billboards since March 2002. (S.F. Planning Code, § 611, subd. (a) [added by Proposition G (Mar. 5, 2002)].) It has also enacted an ordinance adopting a Better Streets Policy, which requires that any approval for a public or private project in the right of way must consider and include the Better Streets design principles. (S.F. Admin. Code, § 98.1, subd. (d).) This ordinance specifically calls for reducing visual clutter on the streets. (*Id.* § 98.1, subd. (d)(5).)

To carry out the goal of improving the appearance of its streets and reducing visual clutter, San Francisco has created a design review committee charged with ensuring that all improvements in the public right of way are consistent with the design plan adopted pursuant to the Better Streets Policy. (S.F. Admin. Code, § 98.2.) The design principles adopted under this plan address public utilities in the streetscape in particular, noting that "well-organized utility design and placement can lead to minimization of street-scape clutter" and "improved pedestrian safety, qualify of life, and right-of-way aesthetics." (RA 1-2; RT 1056:13-1057:19.)

Technological change in recent years has driven utility providers' plans to expand two types of utility service whose equipment is placed in the public right of way: wireless service facilities and broadband facilities. Accordingly, San Francisco has enacted two ordinances in recent years to address those kinds of equipment. Broadband providers are expanding their ability to provide streaming video and other data service by bringing their fiber-optic networks closer to customers' homes and businesses. This expansion involves connecting the fiber-optic network to sizable equipment

cabinets mounted on the ground. (*San Francisco Beautiful, supra*, 226 Cal.App.4th at p. 1017.) After AT&T proposed to mount 726 of these cabinets on public sidewalks throughout the city (*id.*), San Francisco enacted Article 27 of the San Francisco Public Works Code, creating a permitting process to govern the location of surface-mounted facilities in the public right of way (S.F. Ord. No. 76-14 [Motion for Judicial Notice of Defendants/Respondents in the Court of Appeal ["Ct. App. RJN"], Ex. D]). This permitting process sets aesthetic standards for the location and placement of equipment cabinets mounted on public sidewalks. (S.F. Pub. Works Code, §§ 2703-2705.)

Similarly, providers have sought to install an increasing amount of wireless service equipment in San Francisco in recent years. (AA 138.) This equipment, sometimes called a "wireless facility," typically has several different components. Most of the wireless facilities installed in the public right-of-way are distributed antenna system nodes (see RT 351:05-355:01, 433:07-433:09, 720:12-720:23), which consist of antennas and optical equipment that connect to base station "hubs." (See AA 460-464 [¶¶ 20-44].) The facilities typically include one or more antennas, one or more equipment cabinets, and an electric meter and cut-off switch. Some also include a separate cabinet consisting of a battery back-up unit, which provides temporary power in case of an outage. (See RT 431:19-443:19, 639:08-644:23, 718:15-720:02, 720:24-724:20; AA 787-788; AA 820, AA 823, AA 829; RA 11-13, RA 118-122.) The antennas generally extend from the side of the utility pole or are added to the top of the pole. (See *id.*) The equipment cabinets, including the battery-back up units, are attached to the pole approximately a third of the way from the bottom. (See *id.*)

As requests to install this equipment in the public right of way increased, San Francisco in 2011 adopted an ordinance requiring permits to place wireless service equipment in the right of way, and setting aesthetic standards for issuance of those permits. (S.F. Ord. No. 12-11 [AA 138-193].) This ordinance ("Wireless Ordinance" or "Ordinance") describes the need to regulate the location of wireless facilities. As the Ordinance notes, the City is widely recognized for its beauty, which "is vital to the City's tourist industry and is an important reason for businesses to locate in the City and for residents to live here." (AA 140.) "Growing demand for wireless telecommunications has resulted in increasing requests from the wireless industry to place wireless antennas and other equipment on utility and street light poles in the public[] rights of way." (AA 138.) In light of this demand, "the City needs to regulate placement of such facilities in order to prevent telecommunications providers from installing wireless antennas and associated equipment in the City's public rights-of-way either in manners or in locations that will diminish the City's beauty." (AA 140.)

Under the current version of the Wireless Ordinance,[1] certain areas of the City are designated for heightened aesthetic review, such as areas zoned as residential or "neighborhood commercial";[2] historic districts; streets that the General Plan designates as the most significant to the City

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[1] San Francisco amended the 2011 version of the ordinance in response to the trial court's judgment in this case, as described in further detail in Statement of the Case Section II, below. (S.F. Ord. No. 18-15 [Ct. App. RJN, Ex. B].) Only the validity of the current version of the Wireless Ordinance is at issue here. (*Kash Ents. v. City of Los Angeles* (1977) 19 Cal.3d 294, 306 fn. 6 ["It is . . . an established rule of law that on appeals from judgments granting or denying injunctions, the law to be applied is that which is current at the time of judgment in the appellate court."] [internal quotation marks and citation omitted].)

[2] A neighborhood commercial district is typically the block or so of small retail and service establishments that serve the local neighborhood.

pattern; areas with views that are designated as "excellent" or "good"; and areas adjacent to parks and open spaces. (S.F. Pub. Works Code, § 1502 [defining Planning Protection Location, Zoning Protected Location, and Park Protected Location] [Ct. App. RJN, Ex. B., at pp. 5-7, 12].) For each of these different designations, the Ordinance establishes a standard for aesthetic compatibility for wireless equipment or facilities installed nearby. For instance, in a historic district, the Planning Department must determine that it would not "significantly degrade the aesthetic attributes that were the basis for the special designation" of the building or district. (*Id.* § 1502 [defining Planning Protected Location Compatibility Standard], § 1508.) For wireless equipment proposed for a view district, the standard is whether the proposed facility "would significantly impair" views. (*Id.*) San Francisco only issues a permit for the equipment if it satisfies the applicable aesthetic compatibility standard. (*Id.* §§ 1509-1510.) If the applicant seeks to install a wireless facility in an unprotected area, the permit is granted unless the proposed wireless facility would significantly detract from the defining characteristics of that neighborhood. (*Id.*§ 1502 [defining Tier A Compatibility Standard].)

In practice, San Francisco has granted most of the wireless facility permit applications that it has reviewed. At the bench trial in this case, the parties presented evidence about the effect of the Ordinance on Appellants' wireless facilities. That evidence demonstrated that San Francisco granted 173 wireless facility permit applications under the Wireless Ordinance through the time of trial, while denying only three—a grant rate of more than 98%. (RA 10; RT 1232:22-1235:17.) Of the permits the Department of Public Works made the tentative decision to grant, 26 were protested by members of the public, but the Director of Public Works nonetheless

approved 25 of the 26 protested applications, and the remaining application was withdrawn by the applicant. (RA 10 fn. 5.)

II. Procedural Background

T-Mobile West Corporation, NextG Networks of California, Inc. (now known as Crown Castle NG West LLC), and ExteNet Systems (California) LLC (collectively "Appellants") challenged Article 25. On April 2, 2012, Appellants filed their second amended complaint, which is the operative complaint in this action. (AA 453-489.)

At issue here is that complaint's third cause of action, which alleges that the Wireless Ordinance, and implementing City regulations,[3] are preempted by California Public Utilities Code sections 7901 and 7901.1 (AA 481-482.) The San Francisco Superior Court (McBride, J.) conducted a bench trial on that claim in January 2014. In November 2014, the court issued its final statement of decision (AA 840-850) and final judgment (AA 898-890), which determined that San Francisco's Wireless Ordinance's use of aesthetic standards was not preempted by Sections 7901 or 7901.1.[4]

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[3] Current versions of these regulations may be found at Ct. App. RJN, Ex. A.

[4] The Second Amended Complaint contained five causes of action. The first, a claim that the Wireless Ordinance's two-year duration for wireless facility permits was preempted by state law, was adjudicated in Appellants' favor on their motion for summary adjudication. (AA 478-480, 837.) The second, a takings claim, was dismissed by Appellants before trial. (AA 480-481, 837.) The third is the preemption claim that is at issue in this appeal. The fourth cause of action, a claim that some of Appellants were not required to obtain CEQA approvals from the City before obtaining a wireless facility permit, was adjudicated in San Francisco's favor at summary adjudication. (AA 482-483, 837.) The fifth cause of action, a claim that the Wireless Ordinance's provisions concerning modification of installed equipment were preempted by provisions of federal law governing modifications, was tried at the January 2014 bench trial, and the superior court found in Appellants' favor. (AA 483-485, 837-838.)

San Francisco's 2015 amendment to the Wireless Ordinance addressed, among other things, the issues the Superior Court decided adversely to the City. Accordingly, those issues are not before this Court.

The plaintiffs appealed. In a decision issued on September 15, 2016, and modified on denial of rehearing on October 13, 2016, the Court of Appeal for the First District, Division Five, rejected Appellants' claims and affirmed the judgment. The court first considered the scope of the statewide franchise granted by Section 7901, holding that the Legislature "intended the state franchise would coexist alongside local regulation." (*T-Mobile West LLC v. City & County of San Francisco* (2016) 3 Cal.App.5th 334, 349, review granted Dec. 21, 2016 ("*T-Mobile West*").) Then it considered the meaning of Section 7901's phrase, "incommode the public use of the road or highway," to determine the permissible scope of local regulation. (*Id.* at 351-352.) Noting that no previous case of the California courts had determined whether "incommode" could include aesthetic standards, the Court of Appeal adopted a dictionary definition defining the term to include "inconvenience or discomfort," and also found persuasive the Ninth Circuit Court of Appeals' decision in *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* ("*Palos Verdes Estates*"), which adopted the same definition. ((9th Cir. 2009) 583 F.3d 716, 723.) Because the court found that an aesthetically displeasing wireless installation could incommode the public's use of a roadway, it held that the Wireless Ordinance was not facially preempted by Section 7901. (*T-Mobile West* at pp. 354-355.)

Turning to Section 7901.1, the Court of Appeal held that this statute also does not preempt the ordinance because it regulates municipalities' ability to exercise reasonable control over ***entry*** into the public right of way through construction, not their ability to regulate the ***occupation*** of telephone equipment in the right of way. Because the statute regulates only construction, Appellants did not meet their burden of showing that it

preempted the Wireless Ordinance. (*T-Mobile West, supra*, 3 Cal.App.5th at pp. 357-358.)

Appellants sought further review, which this Court granted on December 21, 2016.

STANDARD OF REVIEW

This Court's review of statutory interpretation and preemption questions is de novo. (See, e.g., *Bruns v. E-Commerce Exchge., Inc.* (2011) 51 Cal.4th 717, 724; *Apartment Assn. of Los Angeles Cty., Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 13, 21.)

ARGUMENT

I. Section 7901 Allows San Francisco To Regulate The Location Of Wireless Facilities Based On Aesthetic Standards.

San Francisco may issue location-based permits for the installation of wireless facilities, and to condition issuance of those permits on aesthetic standards, because wireless facilities that blight sensitive streets and sidewalks in the cityscape incommode the public's use of those places. San Francisco's exercise of this discretionary power does not interfere with state-granted franchise rights, which have long been understood to reserve to local governments the power to determine the "manner and location" of telecommunications facilities. (*Pacific Tel. & Tel. Co. v. City & County of San Francisco* (1961) 197 Cal.App.2d 133, 146 ("*Pac. Tel. II*").)

A. Section 7901 Reserves Cities' Police Power To Regulate The Location Of Wireless Facilities.

Public Utilities Code section 7901 provides that telephone companies, including the wireless companies who are Appellants here, "may construct lines of telegraph or telephone lines along and upon any