

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

SUPREME COURT
FILED

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**MOTION FOR JUDICIAL NOTICE IN SUPPORT OF
DEFENDANTS/RESPONDENTS' CITY AND COUNTY OF
SAN FRANCISCO, ET AL.'S ANSWERING BRIEF ON THE
MERITS**

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Pursuant to California Evidence Code section 452, and California Rule of Court, Rule 8.252(a), Defendants and Respondents City and County of San Francisco and City and County of San Francisco Department of Public Works (collectively “San Francisco”) hereby move that this Court take judicial notice of the following documents

A. Transcript of Oral Argument, *T-Mobile West LLC v. City & County of San Francisco*, Cal. Ct. App., First Dist., Div. 5, Case No. A144252 (Aug. 18, 2016). A true and correct copy of this transcript is attached hereto as **Exhibit A**.

The transcript is relevant to matters at issue in this proceeding, *to wit* the scope of telephone companies’ authority to install wireless equipment in the public right of way under their interpretation of Public Utilities Code section 7901. The transcript may be judicially noticed pursuant to Evidence Code section 452 (d)(1), as it is a record of proceedings in a court of this state.

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The City therefore respectfully requests that this Court take judicial notice of the transcript.

Dated: March 6, 2017

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Attorneys for Defendants and
Respondents CITY AND COUNTY OF
SAN FRANCISCO AND CITY AND
COUNTY OF SAN FRANCISCO
DEPARTMENT OF PUBLIC WORKS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

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

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

Case No. A144252
(San Francisco City and County
Super. Ct. No. CGC-11-510703)

Transcript of Oral Argument held on August 18, 2016

1 A144252

2

3 [Abrupt start of recorded material]

4

5 Male Voice: A-and as of, uh, 5:00 yesterday afternoon, uh, [Ms. Sorel] had
6 not responded to, uh, uh, a Motion to Consolidate in these other two related
7 appeals that have to do exactly with these injunctions. I filed a Notice of
8 [Moot] Issues on appeal in this court with my declaration. And it just shows
9 that all of the issues on appeal, especially these two A and B on Page 7 of
10 the restraining order, are now settled and moot. And they're settled in my
11 favor because at the time s-- Judge [Conger] did, I'll repeat: she had struck
12 my documents to show that there was another case pending on these exact same
13 issues. And in fact, it had -- the j-- injunctions had been denied.

14

15 And then there was an appeal held on June f-- 2nd, 2015. And, uh, the
16 judgment was finally issued on March 8th -- no, March 28th of 2015. And there
17 are still pending post-litigation issues that have to do with exactly these
18 matters. So what Ms. Sorel did was after the injunction was denied she just
19 went to another judge and judge-shopped, had the [vexation litigant] forced
20 against me as a defendant so that I could not defend against that.

21

22 And then when I came to this appea-- this court on the first appeal
23 that I appealed, the court denied me the right to appeal, which would have
24 addressed all of these issues. And then on the second appeal, the court
25 agreed to let me appeal but only on the limited issue of the denial of due

1 process. So the fact of the matter is there was another trial going on and
2 another case having to do with these exact same matters. And that's now
3 settled, so there's no reason for this injunction at this point. Furthermore,
4 this injunction has nothing to do with any of the elements of what elder
5 abuse is, none. There's-there's nothing in here that says that. I have never
6 harassed my mother. I've never attacked her. I've never done anything to her
7 or anything.

8
9 All I've ever done is responded to lawsuits that she has filed against
10 me where Ms. Sorel was the attorney, inducing her to file these lawsuits
11 against me on behalf of her other client, Mr. [Paresi], who is the respondent
12 in the related appeal who has embezzled -- and Ms. Sorel] knows that -- in
13 excess of one [million] dollars from my mother's trust. So --

14
15 The Court: [Mr. Mostafaro], you have a couple of minutes left.

16
17 Male Voice: I'll reserve.

18
19 The Court: You will reserve? Great. Ms. Soreg-- Sorel?

20
21 Male Voice: Thank you. Um . . .

22
23 The Court: [Unintelligible]?

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25 Ms. Sorel: Thank you.

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The Court: Y-- if you're going to address us, you should do it from the, uh, microphone, please.

Ms. Sorel: [Unintelligible] Thank you. As to Mr. Mostafaro's suggestion that the court should reopen, um, the briefing I think this court has fully addressed that in its order of June 9th, 2016. Um --

The Court: And by the way, y-you know, you are -- uh, we have of course read the briefs on both sides. And, uh, uh, if you are prepared to submit that would be fine.

Ms. Sorel: I am, Your Honor.

The Court: Okay. Thank you very much. Now, Mr. Mostafaro, you do have a couple of minutes left. Ms. Sorel did point out that we ruled -- correctly or incorrectly we've ruled on June, 2016 on your effort to expand the briefing. Um, [crosstalk].

Male Voice: No, I don't -- I-I didn't file anything in this appeal to do that. What I did was in the other appeal that I had coming from the same exact case, where I had been denied the right to appeal, I filed a motion to reinstate the appeal. And the court denied that, acknowledging [olyamagon] and that I'm right but stating that under a specific rule of court it

1 couldn't reinstate the appeal because it was way too late, you know, to do
2 that.

3
4 So what I'm -- what I'm saying to this court is that because I was
5 limited under the vexatious litigant issue from addressing all of the issues
6 in the trial court that I was denied to address because it was -- the
7 vexatious litigant statute was, uh, enforced against me as a defendant in
8 that court, I've been denied due process across the board. And this court
9 does not have a complete record of everything that I could have put before
10 the court to see how the judge would have responded because she just
11 summarily struck everything -- not everything, but mostly everything, in
12 particular the specifics having to do with, um, the other case and the
13 litigation that's on -- th-that was ongoing. But --

14
15 The Court: Okay. Thanks very much.

16
17 Male Voice: Thank you very much, Your Honor.

18
19 The Court: I appreciate it. And we will take the matter under submission.

20
21 Male Voice: Thank you.

22
23 The Court: Uh, the next matter on the calendar is the T-Mobile West vs. San
24 Francisco matter. Uh, in this matter, uh, we provided the parties with a

25

1 focus letter, um, several days ago that informs you of the issues that, uh,
2 most intrigued us. Uh, and Mr. Thompson?

3
4 Mr. Thompson: Thank you, Your Honor. And may it please the court, we've
5 received the court's, uh, issues. And I recognize that the court has
6 addressed us towards two issues which are obviously core issues, one being
7 the definition and construction of the term incommode as used in Public
8 Utility Code Section 7901 and the other being whether aesthetics can ever
9 incommode any public use of the roads and highways under Section 7901.

10
11 One additional issue that I hope to, uh, raise to the court as well is
12 the importance in this case of the issue that even if the City had authority
13 under Section 7901 to, uh, consider aesthetics -- and-and they don't, and
14 I'll address that -- whether -- nonetheless in this case they have violated
15 Section 7901.1 of the Public Utilities Code by imposing on plants, imposing
16 on one -- singling out one section of telephone corporations, uh, a unique
17 set of requirements that is not imposed on any other [requirement].

18
19 The Court: And we're aware that was an issue [crosstalk]. And you certainly
20 can if you wish. [Crosstalk]

21
22 Mr. Thompson: Thank you, Your Honor -- just-just --

23
24 The Court: [Crosstalk]

25

1 Mr. Thompson: J-- thank you. And-and I would, uh, if the court, uh, will
2 allow, I'd like to reserve, um, at least three minutes for rebuttal. Um,
3 addressing the issue raised by the court of the definition of the word
4 incommode as used in Section 7901, I think it's important to understand that
5 the court is not addressing the definition of incommode in the abstract.
6 It's-it's not just: what does that word mean by itself? It has to address the
7 word as used in the statute and as the statute as a whole in context. Um, you
8 know, the p-- a word may have multiple meanings but as it appears in a
9 particular sentence d-d-dictates how that meaning might be.

10

11 In this case, Section 7901 is a grant of rights to telephone
12 corporations, the right to deploy lines and facilities and even to install
13 utility poles in the public right-of-way. That's a broad statewide grant.
14 The-the l-- only limit on that grant is that that i-installation shall not --
15 and this is the language of the statute -- shall not "incommode the public
16 use of the roads or highways."

17

18 The Court: By the way, i-is it unreasonable to say that when looking at the
19 context in which we interpret the word incommode that we don't start with the
20 general grant of authority under 7901, we start with the general
21 constitutional grant to municipalities as to certain police powers? Then we
22 find the general grant in 7901 that limits that. Then we find the incommode
23 exception to the exception.

24

25

1 Mr. Thompson: I will not dispute that, You Honor. Um, seven -- Section 79
2 -- obviously, as Your Honor points out, the Constitution grants the City
3 certain rights subject to, uh, in the context of statewide interest, they are
4 limited by general law. So here we have a statute. It -- the limit on the
5 grant to telephone corporations is that they not incommode the use of the
6 road or highway. That's not a broad use of incommode. It's not, as the City
7 might suggest or as the -- as Lower Courts found -- it's not to incommode the
8 public in general. It has to be in the context of the use of the road.

9
10 Now, the court doesn't come at this unaided. So this issue has been
11 addressed in the past by the California courts and also the California
12 legislature. In fact, I think the most --

13
14 The Court: How about -- how about the-the way that, uh, um, this, uh, um,
15 term incommode was, uh, construed, uh, by Palos Verdes? They started with the
16 Constitution, uh, municipal power and went on and construed the term
17 incommode. Uh, do you have difficulty in the way that they construed it?

18
19 Mr. Thompson: Yes, Your Honor, absolutely. Um, in-in -- this is going to
20 play back into what I was about to talk to you -- Palos Verdes Estates, in
21 Palos Verdes Estates, the Ninth Circuit made a couple of key fundamental
22 errors. The first fundamental error that led to many of its other ones is it
23 assumed that aesthetics was-was a police power within the power of a city in
24 general, what it -- and that it was a traditional function.

25

1 What it overlooked --

2
3 The Court: I'm sorry, Counselor. Y-your-your view is that the city -- that
4 controlled aesthetics is not within the, uh, local police power?

5
6 Mr. Thompson: Your Honor, I don't dispute that it's in the general police
7 power. What the Ninth Circuit overlooked was this is in the context of the
8 use of the public right-of-way by telephone corporations, which the
9 California Supreme Court in the first [PacTel] vs. San Francisco case held
10 was a statewide interest. It is not a unique local interest. And in the
11 second PacTel case, uh, this court found that the-the public -- the-the
12 police power that is reserved to cities under Section 7901 is a narrow police
13 power, that the State has reserved to itself -- in the context of telephone
14 corporations deploying in a public right-of-way, the State has reserved for
15 itself the broader police power regarding the rights-of-way and left to
16 cities only a narrow police power as defined in the Supreme Court in Western
17 Union vs. Visalia in 1905, where it said that this term incommode --
18 incommode the use of the road -- meant to not unreasonably obstruct travel.

19
20 Now, I think one of the most telling -- telling things that the c-- uh,
21 Ninth Circuit overlooked in Palo Verdes Estates is also this: in 1995 the
22 legislature had the opportunity and adopted Section 7901.1. And in doing
23 that, it had the opportunity and articulated its understanding of what the
24 scope of Section 7901 was at that time based on these historical, uh, cases,
25 so based on the c-- the cases and whatnot.

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The Court: And 7901.1 is specifically subject to 7901.

Mr. Thompson: Section 7901.1, um, articulates the authority of cities that they can exercise and be consistent with the grant to telephone corporations under Section 7901. Now, the thing that I --

The Court: [Crosstalk] 7901 or 7901.1 don't grant authority to local municipalities.

Mr. Thompson: Correct.

The Court: They define the scope of the State's interests and whatever is outside the scope of the State's interest th-the municipalities already have pursuant to the Constitution.

Mr. Thompson: The, uh, Section 7901 doesn't grant anything to cities. It limits -- it grants -- it's a grant to telephone corporations that inherently limits the authority of cities. And-and let me explain. So in the legislative history t-to the Section 7901.1, the legislature explained what 7901 meant. And it said that Section 7901 facilitated construction by minimizing the ability of local government to regulate construction by telephone corporations. It said -- and this is a quote: "A consequence of the statewide franchise is a lack of control by local government over construction in their

1 streets. The legislative history repeatedly describes the authority of cities
2 under Section 7901 as limited authority."

3

4 Now, that was their understanding, based on the prior cases. It
5 comports with the idea that at that time the legislature was attempting to
6 define what limited authority cities could exercise in Section 7901.1,
7 because up until then there was an understanding they essentially had none.

8

9 The Court: So-so your point is they have none except the -- cities have no
10 authority aside from what was granted in .1?

11

12 Mr. Thompson: Section --

13

14 The Court: In this area? In this area?

15

16 Mr. Thompson: They -- Section 7901.1 re-recognizes the authority they
17 had, which is to say -- so Visalia, for example -- recognized they had the
18 ability to regulate, um, to make sure that the installation doesn't obstruct
19 traffic. So that's the location. Obviously, if a telephone corporation wanted
20 to install a pole in the middle of the street that would obstruct traffic.
21 They can't do that. They can also say it has to be a certain number of feet
22 from the curb, for example, for safety purposes. These are things meant to
23 prevent incommoding the use of the road by the -- by-by the, uh, telephone
24 corporation. O-or I'm sorry -- by the public.

25

1 And that was the understanding. That was the understanding of the
2 legislature. And Section 7901.1 articulated that cities without interfering
3 with the t-- uh, telephone corporation's right to use the right-of-way were
4 able t-to regulate as to time, place and manner in which the right-of-ways
5 are accessed by telephone corporations. But at a minimum, that has to be
6 imposed on all entities in an equivalent manner, which makes sense. Look at
7 this case here. this is a case about city regulations governing installation
8 on existing telephone poles.

9
10 The Court: But doesn't 7901.1 address and focus on access? And don't your
11 clients have the same access to construct the facilities as any other?

12
13 Mr. Thompson: No, not at all, Your Honor. In fact, the-the record is
14 quite clear that no other entity -- no other telephone corporation, no other
15 cable operator, no electric company -- is required to obtain a site-specific
16 permit, much less a permit regar-- that looks at the aesthetics of their
17 installation, to install on these same utility poles. The-the City has
18 singled out a subset of telephone corporations based on their technology and
19 is attempting to regulate the aesthetics of those and in-in so doing giving
20 itself the power to exclude from the right-of-way altogether based purely on
21 the aesthetics.

22
23 And-and this is an important point I want to point out, and this is why
24 I emphasize that Section 7901 talks about incommoding the use of the road.
25 The City's ordinance at issue here -- the standards don't even re-- have to

1 do with the aesthetics from the road, right. Look at the -- they -- there's
2 one called the park-protected m-mis-- uh, um, standard. It says that the --
3 it looks at whether the installation will significantly impair views of a
4 city park or space or degrade the aesthetic nature of the park. It has
5 nothing to do with the-the-the use of the road or even the aesthetics of the
6 road. It's talking about the-the area as a whole. Same with the zoning
7 protected, uh, compatibility standard: it leaves to the departments the
8 ability to ch-- to-to decide whether there's consistency with the aesthetics
9 of the neighborhood as a whole unrelated to the parks. I-I'm sorry --
10 unrelated to the roads.

11
12 Um, so Palos Verdes Estates made the fundamental error, again, of
13 assuming that this was a historically local area when in fact occupation of
14 the right-of-way by, uh, telephone corporations is a statewide interest as
15 recognized by the Supreme Court in PacTel, uh, one.

16
17 The Court: Mr. Thompson, I simply want to point out you have three minutes
18 [crosstalk].

19
20 Mr. Thompson: Yeah. I was looking at my time.

21
22 The Court: [Crosstalk] want to reserve that. But-but you can choose not to,
23 of course.

24
25

1 Mr. Thompson: No, no. Let me, um, let me reserve. And I will, uh, thank
2 you, Your Honor.

3
4 The Court: Th-thank you. Uh, Ms. Bernstein?

5
6 Erin Bernstein: Good morning, Your Honor. May it please the court, Erin
7 Bernstein on behalf of the City and County of San Francisco. This is a case
8 about the City's power to maintain the appearance and safety of its public
9 rights-of-way. Or-or put slightly differently, uh, this is a case about
10 whether the City, uh, can prevent wireless companies from installing
11 facilities that obstruct scenic views or mar the historic streetc-- scapes
12 that make San Francisco a unique, uh, destination.

13
14 Uh, the court's two questions that, uh, the Focus Order directed: those
15 two really do go to the heart of the matter. This is all about whether or not
16 the City's wireless ordinance incommodes, uh, c-- whether the City's wireless
17 ordinance fits within that definition of incommoding the public right-of-way.

18
19 The Court: B-by the way, the phrase is incommode the use of the public
20 right-of-ways. So --

21
22 Erin Bernstein: Thank you, Your Honor.

23

24

25

1 The Court: I'm happy to have you tell us what that means, but that -- it may
2 be that those two words, the use of -- I guess that's three words -- um, are
3 important too.

4
5 Erin Bernstein: I think they are, Your -- I-I think they are very
6 important, Your Honor. And I-I think that the Palos Verdes court, uh, really
7 did hone in on what the public use of the right-of-way is. Um, to turn to the
8 first, uh, question that the court had in its Focus Order, we're not left
9 entirely unmoored when we, uh, have a term like incommode that's not defined
10 by the legislature. Uh, the California Supreme Court helped us out here by
11 saying in [Wasash] that when you have an undefined term you look at the
12 dictionary. And whether or not we look at the 1828 dictionary definition or a
13 more modern one, incommode is not limited to the cramped definition that the
14 wireless companies give it. I-it's really a more capacious term. The 1828
15 dec-- dictionary [Tega] says that untimely visitors, uh, can incommode one or
16 a fashionable dress. Uh, these aren't physical obstructions. It's-it's a much
17 broader term.

18
19 And I really think that, uh, the Palos Verdes court got it right when
20 it adopted that capacious understanding. We don't merely use roads to drive
21 on, but rather we, uh, we use them to experience the city. We use them, uh,
22 as scenic byways. And-and I think the Palos Verdes court correctly pointed
23 to, uh, some federal and state statutes that, uh, that-that get us there.

24
25

1 The Court: In light -- in light of, uh, uh, that opinion and, uh, looking
2 at, uh, the, uh, the subsequent passage of 7901.1, um, what if, uh, anything
3 is that significant in-in, uh, your view of, uh, incommode, the use?
4

5 Erin Bernstein: I think that the Ninth Circuit -- uh, the Ninth Circuit's,
6 uh, [discussion] of 7901.1 is a little bit different, uh, from-from our
7 understanding of that statute. I think the wireless companies', uh, focus on
8 79 -- 7901.1 is really a red herring. 7901.1 is a construction statute. It
9 talks about accessing, uh, accessing the public rights-of-way, um, and that
10 we have to treat everybody equally in the way we permit construction. And the
11 City does that. We-we require everybody to have excavation permits and
12 temporary occupancy permits when they dig up our public rights-of-way.
13

14 Um, but really 7901.1 does not describe the outer bounds of the City's
15 authority, um, under 7901. What 7901 does do: it gives a broad franchise
16 right to the wireless companies. We don't quibble with that. But it preserves
17 the City's traditional police powers, which is the California Supreme Court
18 has repeatedly upheld in [Ehrlich and Landsgate] and other cases, is a
19 longstanding traditional power of cities. Um, and it's not -- it's not a-a
20 small power. It's not [nindias]. These are -- these are really core city
21 powers because they don't just affect how we see the city; they affect
22 aesthetics and public safety. And aesthetics also affect the, uh, the economy
23 of the city.
24
25

1 Um, when you drive down a public right-of-way, th-the public safety,
2 uh, the public safety issue might not be immediately apparent. Uh, but when
3 you drive down a public right-of-way, uh, p-- planning, uh, the Planning
4 Department has something that they call [Vision Require]. Uh, when you have
5 wires and boxes and billboards with flashing lights it's very difficult to
6 focus on the things, uh, that keep pedestrians and motorists and cyclists
7 safe. And so when the City is regulating for aesthetics it's also regulating,
8 uh, public safety.

9
10 In addition, you know, aesthetics is really important for the economy
11 of cities like San Francisco. Um, were the city, as, uh, wireless companies,
12 uh, present to this we're entirely powerless to regulate on aesthetics. They
13 would be able to construct, let's say a ten-foot by ten-foot facility in
14 front of the Painted Ladies or on Lombard Street. And I think it'd be safe to
15 say that we would all experience that, uh, construction as a loss, not just
16 a-a visual loss of the historic beauty of the city but also as a loss to our
17 tourist economy and, uh, to property values. And I think when we look at that
18 we see the-the sort of capacious meaning of incommode and aesthetics that the
19 legislature had in mind when it passed 7901.

20
21 Um, one final matter: I think it's important to note that the record at
22 trial here shows that the City's not denying wireless companies their
23 franchise and applying aesthetic standards. Uh, it was undisputed at trial
24 that, uh, at the time of trial, which was I think two years ago, we had, uh -
25 - the City had permitted over 170 facilities and had denied only three. Um,

1 so I think it's really important to show that, you know, aesthetics are-are
2 important but we're not exercising unfettered discretion here.

3
4 The Court: As to a, uh, facial challenge, uh, has [Appellant], uh, met its
5 burden?

6
7 Erin Bernstein: I think the appellant has not met its burden on a facial
8 challenge for a couple of reasons. Uh, first of all, you know, the
9 hypothetical, uh, that I gave the court here of the, uh, of the large
10 facility in front of the Painted Ladies or on Lombard Street -- um, whether
11 or not we're operating at the outer margins in some cases of what could
12 incommode the public use of the public rights-of-way, uh, I think certainly
13 w-we can imagine, uh, any number of facilities like that one that would
14 seriously vex or in the way or, you know -- and under any of these
15 definitions o-of-of incommode.

16
17 I think we also have to look at the fact that Plaintiffs have not met
18 their burden, uh, to-to surpass the presumption against preemption here. Uh,
19 we haven't talked a lot about the preemption standard but here we have to,
20 uh, we have to assume that if they have not carried a burden to show that the
21 legislature intended to displace local regulation in this area, then-then
22 [tie] goes to the City. So I-I think for-for a couple of reasons, they have
23 not met their, uh, burdens.

24
25

1 Um, one final note, uh, is that there's -- while we're talking about
2 the City ordinance here, this is a case that has statewide impact. Uh, before
3 this, uh, this very district are two other cases, uh, involving a Burlingame
4 ordinance and a Livermore ordinance and other ordinance like -- ordinances
5 like this throughout the state that have, uh, previously been unchallenged.
6 This is not a new exercise of local authority. And what, uh, the wireless
7 companies are asking this court to do is really effect a sea change in
8 California's aesthetic regulation. Thank you. [I'll submit].

9
10 The Court: Thank you. Mr. Thompson, what about, uh, the Painted Ladies? What
11 about Lombard Street? Uh, are you saying that, uh, under 7901 and, uh, .1 the
12 City would have no right to limit, uh, uh, the installation of wireless
13 facilities in that area?

14
15 Mr. Thompson: Uh, Your Honor, there are two points. And I'm glad you
16 asked about those because I was going to bring it up. Uh, the first one is
17 under this ordinance, this ordinance doesn't apply there. This ordinance only
18 applies to our installation on existing utility poles, Section 1500C1 of
19 their ordinance.

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21 The Court: [Here] we go.

22
23 Mr. Thompson: Yeah. No, I understand. So-so my point --

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25 The Court: But I'm just saying your description of 7901 --

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Mr. Thompson: Sure.

The Court: -- is, as I understand it, they -- wh-whatever this particular ordinance says, they would have -- the City of San Francisco would have no right to pass an ordinance that enabled it to, uh, prevent, uh, facilities on a p-- you know, in the street with the Painted Ladies or Lombard Street.

Mr. Thompson: Uh, yes. And so my point is, number one, that's not at issue in this case because there would already be a utility pole there that they've allowed others to install without a permit. Okay? So in other words, Verizon or AT&T, uh, or the electric company right now could go do that. They could install a utility pole because they don't have to get site-specific permits. Yes, at the outer bounds under Section 7901 that is theoretically possible. Uh --

The Court: What's theoretically possible, that they [couldn't]?

Mr. Thompson: That-that-that an installation on -- in the right-of-way could be installed in front of an attractive, uh, building, for example, uh, because that --

The Court: They would have no right to stop it.

1 Mr. Thompson: Cor-correct. Um, now, I-I would point out again -- and this
2 brings me to my first point -- the City complains about the appearance and
3 safety of the right-of-way. If that were legitimately their concern, why are
4 they not requiring any other right-of-way occupants to en-- obtain these
5 types of site-specific permits? They've chosen wireless as a technology to
6 single out. We're using the same poles. The record quite clearly showed that
7 in some cases our -- we're using the same exact, you know, little brown metal
8 box as the -- as the cable operators that don't require any permit. The City
9 doesn't look at any of that existing equipment as to aesthetics.

10
11 The second thing: looking at the, uh, the City's b-- dictionary definition is
12 so broad it flips the other direction. If-if the City can deny a telephone
13 line or a telephone pole on the grounds that it would possibly, uh, vex
14 somebody it literally would gut Section 7901. They would allow cities
15 throughout the state to second-guess the ability of telephone providers,
16 telephone corporations, to deploy in the public right-of-way. It would
17 interfere with that statewide right, that statewide interest that the Supreme
18 Court has int-- uh, identified.

19
20 Um, and my last point: the City's vur-- version is that under Section
21 7901 they've historically had this broad authority. But yet if that were the
22 case, why did -- why did the legislature in Section 7901.1 need to explain
23 that they had authority over construction? If they've -- if the authority is
24 as broad as they say it always has been, how could it not have included
25 construction? It clearly is not as broad as it w-- as they claim it was. The

1 legislature, as I've pointed out, understood that it was a very narrow
2 authority for cities under Section 7901. And as a result --

3
4 The Court: Wasn't there some reference -- a-a-and I may be r-- miss
5 recalling this. In the, uh, legislative history that there were -- the
6 municipalities that had expressed concern that under 7901 they didn't have
7 the right to do that and that that was a factor prompting the legislature
8 [crosstalk]?

9
10 Mr. Thompson: Yeah. In fact -- yes, in fact the legislative history
11 explained that, you know, there are a few things. Telephone corporations were
12 claiming that they had no authority at all, that they couldn't require
13 permits at all. The cities complained as a result of that they were having
14 trouble managing, you know, uh, street cuts, things like that, and-and needed
15 clarification. My point is --

16
17 The Court: Clarification?

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19 Mr. Thompson: Yeah.

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21 The Court: I mean that's -- so-so not to say that you have to concede it was
22 only clarification or not but why wouldn't that be an --? And that's one of
23 the problems with, you know, generally relying on legislative history or this
24 statute was passed, doesn't that prove that another statute must be
25 interpreted more or less narrowly -- uh, but doesn't that answer your

1 question about: if it's as broad as San Francisco says, why was there a need
2 for .1 to be [crosstalk]?

3
4 Mr. Thompson: Well, you know, if-if it's -- my point is if it's as broad
5 to include aesthetics then it had to have included construction. But it
6 wasn't even broad enough to include construction or apparently, um, there was
7 some dispute about that. Uh --

8
9 The Court: [It was] the clarification.

10
11 Mr. Thompson: But they didn't clarify that it went beyond that.

12
13 The Court: [Crosstalk]

14
15 Mr. Thompson: And-and, importantly, to the extent they have any authority
16 it has be ins-- in -- on all entities in an equivalent manner.

17
18 Uh, if there are no other questions, I-I rest. Thank you, Your Honor.

19
20 The Court: Thank you both very much. We'll take the matter under submission.

21
22 Do we have, uh, from the AG's Office counsel on [NL]?

23
24 Male Voice: We do.

25

1 The Court: Do we have Miss [Greyson]?

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3 Miss Greyson: Yes, Your Honor.

4

5 The Court: Uh, I'm sorry. Do we have Miss Greyson on the line?

6

7 Male Voice: Yes.

8

9 Miss Greyson: Yes, you do, Your Honor.

10

11 The Court: [Crosstalk] Uh, great. On the NL case, Miss Greyson, if you would
12 state your appearance, please . . .

13

14 Miss Greyson: [File with] Elizabeth Greyson on behalf of Minor Appellant
15 and al.

16

17 The Court: And, uh, for the Attorney-General?

18

19 Jim Killing: Jim Killing for Respondent, Your Honor. I beg your pardon.

20 Jim Killing for Respondent, Your Honor.

21

22 The Court: Great. Uh, we, uh, sent you a, uh, focus letter, uh, because of
23 the posture, uh, that each side has taken. The, uh -- we've asked that you
24 focus on the proper scope of the remand, uh, to the trial court. And, uh, I

25

1 appreciate this was an issue addressed in your briefing, but if you wish to
2 add additional comments you may. Miss Greyson?

3

4 Miss Greyson: Yes, Your Honor. I'm not certain we need a remand. I think
5 the most important feature to be considered is that it would not be
6 appropriate to allow Mr. [Saldano], the victim of the arson, a second att-- a
7 second opportunity to submit evidence.

8

9 The Court: Should we allow the person who committed the arson a second
10 opportunity?

11

12 Miss Greyson: I don't think anyone should have a second opportunity with
13 respect to the evidence. I think the evidence has come in. What we do with it
14 is an appellate sort of issue. What it proves is subset to substantial
15 evidence review. But I don't think we need to -- we need a redo at -- on the
16 evidentiary phase [at] these proceedings.

17

18 The Court: Well, Miss Greyson, [crosstalk] realistically it-it's not really
19 susceptible to appellate review because it's not clear what the court based
20 its order on. And, uh -- yes? Go ahead.

21

22 Miss Greyson: I think there's a distinct question about whether the court
23 can be asked to create a new order versus whether there should be a new
24 evidentiary hearing with a new opportunity.

25