S238001

IN THE SUPREME COURT OF CALIFORNIA

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

v.

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

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

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

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PLAINTIFFS AND APPELLANTS' REPLY BRIEF ON THE MERITS

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INTRODUCTION

In its Answering Brief, the City and County of San Francisco ("City") does not deny that it singles out advanced technologies for discretionary (and discriminatory) "aesthetic" review that traditional utilities do not have to undergo. Instead, in defending its decision to impose onerous rules on wireless providers, the City doubles-down on its policies that disfavor advanced technology by proudly asserting that it *also* discriminates against advanced telecommunications services when offered over wireline facilities. But holding new technologies to a higher standard, or attempting to slow their proliferation, is precisely what Section 7901 of the Public Utilities Code was designed to prevent.[1] For over 150 years, Californians have enjoyed state-of-the-art communications technologies and services, helped in part by the State's long-standing commitment to encourage the deployment of advanced telecommunications technologies. Ordinances such as the City's threaten to reverse course and leave Californians behind as the rest of the country races toward revolutionary fifth generation ("5G") wireless technology. The City's Ordinance is a formidable roadblock to innovation.

It is no answer for the City to assert, as it does throughout its brief, that it approves a high percentage of applications under its discriminatory

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

and onerous regulations. There is no guarantee that the City will continue to approve these applications once the glare of judicial scrutiny fades, and these high approval rates do not account for the self-censoring that happens before applications are even filed. Given the City's complex, time-consuming, and discretionary procedures, carriers are dissuaded from filing all but sure-thing applications. And even if the City ultimately grants the majority of siting applications, the Ordinance's detrimental impact is still substantial. It imposes a time-consuming and costly review process that slows progress and frustrates deployment. This is completely at odds with the objectives of State law.

In their Opening Brief, Appellants showed that the Court of Appeal erroneously upheld the City's unlawful Ordinance by applying the wrong standard for facial preemption challenges and misinterpreting key terms of Section 7901 and 7901.1. The City does little or nothing to rebut these arguments. *First*, the court below relied on an incorrect standard of review to conclude that Appellants' challenge could succeed only if there were "no set of circumstances" under which the Ordinance could be validly applied. Appellants demonstrated that this standard, known as *Salerno* at the Federal level, has no place in facial preemption challenges. (Br. 18-34. See generally *United States v. Salerno* (1987) 481 U.S. 739.) Incredibly, the City pays little attention to a central issue in this appeal: whether the *Salerno* standard applies to facial preemption challenges. It claims that this

Court need not address this question because the Court below did not rely on the *Salerno* test in reaching its holding. But the opinion below explicitly incorporates that "no set of circumstances" standard in its holding and leaves no doubt that the test was outcome-determinative. (Opn. 15, 22.)

Moreover, in attempting to show why the central *Salerno* issue should not be determinative, the City mischaracterizes a number of preemption principles and gets others simply wrong. The City's brief confuses specific *types* of preemption with the question of what standard should be applied to analyze a facial preemption challenge. In fact, the City misstates the "no set of circumstances" test, erroneously characterizing it as another description of field preemption. This is plainly an incorrect description of the test.

Second, under any standard of review, the Ordinance is at odds with the statewide franchise set forth in Section 7901. For decades, Section 7901 has universally been understood to preclude municipalities from imposing obstacles on advanced telecommunications deployments, as the Ordinance does. The City turns this regime on its head, claiming that Section 7901 authorizes municipalities to regulate facility deployments based on mere aesthetic concerns, and to be *especially* vigilant when it comes to the deployment of new technology. That is the opposite of what the Legislature enacted in Section 7901. The City's power grab runs afoul of well-established precedent; no California court has ever read Section

7901 to reserve to localities the nearly limitless authority that the City seeks here.

To support its claim, the City seizes on Section 7901's limitation that telephone companies not "incommode the public use of the road or highway or interrupt the navigation of the waters." It stretches the meaning of "incommode" beyond recognition to encompass mere annoyance and aesthetic inconvenience, even though that reading conflicts with decades of case law and the plain meaning of the term. The City's reading of "incommode" would fatally undercut the State franchise, inviting a patchwork of local aesthetic regulations that could grind technological process to a halt.

Third, the City misreads Section 7901.1, which allows localities to exercise "reasonable control" over the "time, place, and manner" of access to public rights-of-way, provided that all entities are treated "in an equivalent manner." The natural reading of this provision is that localities retain limited authority over when and how facilities are placed in the rights-of-way, which harmonizes well with the broad statewide franchise rights that telephone companies enjoy. The City resorts to legal gymnastics in an effort to prove that Section 7901.1's equivalent treatment mandate applies only to *temporary* construction activities and occupations of the rights-of-way, thus implicitly providing the City with broad powers to discriminate when it comes to permanent occupations. But the City cannot

overcome the plain language of the statute. This Court's analysis should begin and end with Section's 7901.1's text.

The City's failure to grapple with these issues, much less rebut them, confirms that the Ordinance must be set aside. Appellants respectfully request that this Court 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).

DISCUSSION

I. THE CITY CANNOT REFUTE APPELLANTS' SHOWING THAT THE COURT OF APPEAL ERRONEOUSLY APPLIED THE "NO SET OF CIRCUMSTANCES" TEST.

The City's muddled preemption arguments attempt to sidestep a central issue in this appeal: whether it is proper to apply the "no set of circumstances" test to a facial preemption challenge. As Appellants demonstrated, courts around the State and the nation, including the U.S. Supreme Court, have held that it is not. (See Br. 19-25.) This Court should reach the same conclusion. Because the Court of Appeal's use of *Salerno* to decide this case was out of step with this Court's precedent and runs afoul of the U.S. Supreme Court's approach in *Arizona*, it should be reversed. (See, e.g., *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1251-52; *Arizona v. United States* (2012) 132 S.Ct. 2492, 2500.)

Rather than grappling with *Salerno*, the City attempts to sidestep the issue by downplaying the Court of Appeal's error and mischaracterizing applicable preemption standards. The City contends that this Court need not decide whether *Salerno* applies to facial preemption challenges because, in its view, the Court of Appeal's misapplication of the standard was not outcome-determinative. (Ans. Br. 38.) The City is wrong. The Court below expressly relied on the standard in reaching its decision. (Opn. 15, 22.)

The City also confuses several preemption principles by trying to reframe the dispute here as about whether "impossibility" or "objects and purposes" preemption is the right analytic lens. (Ans. Br. 40-42.) That is not the issue before the Court. The City's enactment of an ordinance that allows it to reset the balance between technological progress and aesthetics stands as a clear obstacle to the State objective of promoting advanced telecommunications deployments throughout California. The only question remaining is whether Petitioners must demonstrate that there is "no set of circumstances" under which the Ordinance would be valid.[2] This question

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[2] Although it is true that there are "no set of circumstances" under which municipal action would be permitted in a preempted field, as the City notes, that is not the sense in which the Court of Appeal used the phrase. In the decision below, the Court of Appeal used this phrase to describe the standard to which it held Appellants' challenge—Appellants must show there are "no set of circumstances" where the Ordinance is not preempted. (Opn. 15.) The City thus fundamentally misapprehends the meaning of this term of art, which is central to this case.

answers itself. Even if there are some individual instances in which the City might apply the Ordinance that would not specifically block technological progress, the City's very assertion of authority to strike its own balance between deployment and aesthetics is at odds with the goals of the State franchise. For these reasons, the Ordinance must be set aside.

A. **The Court of Appeal's Misapplication Of The *Salerno* Standard Was Outcome-Determinative.**

The City essentially ignores Appellants' argument that the *Salerno* standard does not apply in the facial preemption context. Instead, the City rests on the theory that this Court need not decide whether the "no set of circumstances" test applies "because Appellants never show that anything turns on it." (Ans. Br. 38.) But the Court of Appeal's opinion belies this claim.

The court below explicitly invoked the "no set of circumstances" test in its holding, emphasizing that "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." (Opn. 15, original italics.) The court's use of italics to incorporate and emphasize the *Salerno* standard underscores the centrality of the test to its holding.

The Court of Appeal's reliance on hypotheticals further confirms that the *Salerno* standard was outcome-determinative. The court 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.'"[3] (Opn. 22.) As Appellants showed, engaging in this kind of "speculat[ion] about 'hypothetical' or 'imaginary' cases," (*Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442, 450) is only relevant in the rigid *Salerno* context, which requires Courts to "dream up" remote scenarios where application of the challenged law might be valid. (*Bruni v. City of Pittsburgh* (3d Cir. 2016) 824 F.3d 353, 363.) Where, as here, a court must resolve dueling assertions of authority between a sovereign and its subordinate, there is no reason to chase phantom hypotheticals. (See Br. 26-31 [explaining that facial preemption challenges are necessarily subject to a less demanding standard of review to ensure that local interests do not thwart State policies].)

The City does nothing to engage or refute this line of argument. Nor does the City attempt to respond to the absurd results that would result from applying the rigid *Salerno* standard in the facial preemption context.

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[3] As Appellants explained, the Court of Appeal's chosen hypothetical fails in any event. The Ordinance does not apply near Coit Tower or the Painted Ladies, meaning the Court's hypothetical does not even relate to the Ordinance's real world effects. (Br. 29-30. Cf. *City of Los Angeles v. Patel* (2015) 135 S.Ct. 2443, 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."]; fn. 9, *infra*.)

Requiring that State and local policies diverge in every conceivable set of circumstances before there is preemption would cripple the State's ability to ensure uniform policy in areas of statewide concern. In the simplest terms, a local law that leads to conflicting outcomes most of the time can just as obviously serve as an obstacle to State objectives as a local law that conflicts in every potential case.

Moreover, the very idea of the facial preemption challenge is to afford plaintiffs the chance to show that the underlying principle behind the local law conflicts with State law without having to go through the time and expense of developing extensive record evidence. Here, for example, the fact that the City has arrogated to itself the power to make decisions about whether to favor or disfavor particular technologies is fundamentally and irrevocably at odds with Section 7901. That remains true regardless of how the City ultimately exercises the authority that it claims for itself. Accordingly, this Court has declined to apply the "no set of circumstances" test to facial preemption challenges. (See *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067-68 [deciding a facial preemption challenge without invoking the *Salerno* standard]; *American Financial Services Assn., supra*, 34 Cal.4th at p. 1251-57 [same]; *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1237 [same].)

Instead, this Court has analyzed such cases simply by evaluating whether the local enactment conflicts with State policy or enters an area

reserved to the State. (See, e.g., *O'Connell*, *supra*, 41 Cal.4th at p. 1076 [striking a local vehicle forfeiture ordinance because it "impinge[d] on an area fully occupied" by State law].) If so, the local enactment cannot stand. The Court of Appeal departed from this well-established precedent and relied on an improper Federal standard to reach its holding. For this reason, the opinion below must be reversed.

B. <u>The Ordinance Conflicts With Well-Established State Objectives.</u>

Although the *Salerno* standard was outcome-determinative for the Court of Appeal, the Ordinance should be preempted under any standard because its intent and effect is to discriminate against advanced telecommunications technologies, something that California law plainly precludes. (See Br. 35-38.) Longstanding precedent recognizes that Section 7901 embraces, and is intended to promote, innovative telecommunications deployments throughout the State. (See *Pacific Telephone & Telegraph Co. v. City of Los Angeles* (1955) 44 Cal.2d 272, 282 (*Los Angeles*).) As this Court has explained, the "very purpose" of the State franchise is "to give [telephone] subscribers the benefit of the many and varied uses of telephone wires made possible by scientific development." (*Ibid.*) The franchise has long been understood to encourage deployment of the newest and most advanced communications technologies because "the people expect [franchisees] to use the most

modern equipment." (*Pacific Telephone & Telegraph Co. v. City & County of San Francisco* (1961) 197 Cal.App.2d 133, 147 (*Pacific Telephone II*).)[4]

The Ordinance stands in the way of the technological progress that the State franchise is intended to promote.[5] It imposes unique burdens on particular communications services and empowers the City to use ostensibly "aesthetic" regulations to discriminate against emerging technologies. (See Br. 12-14.) The services offered using Appellants' wireless technologies represent the next frontier of telecommunications. Yet the Ordinance subjects these facilities and services to onerous regulatory review that does not apply to other technologies or services that impose similar (or even greater) burdens on the public rights-of-way. (See Br. 35-37 [explaining that the facilities at issue are subject to discriminatory treatment even though they are in most cases identical in size and overall impact or in some cases even *smaller* than traditional wireline telephone, cable, and electrical facilities].)

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4 The California Legislature has likewise confirmed that the deployment of advanced telecommunications technology is a statewide objective that should not yield to contrary local interests. (See Gov. Code § 65964.1(c).)

5 The City's Brief is littered with a constant refrain: that the Ordinance supposedly does not burden technological innovation because 98% of wireless facility permits have been approved. (See, e.g., Ans. Br. 1.) This is sheer sophistry. Among other things, the City's misleading statistic ignores the costs and delays inherent in the Ordinance's discriminatory aesthetic review, even where an application is granted. (See Part II.C, *infra*.)

The City does not deny that the Ordinance discriminates against new technology. Instead, it celebrates this fact. The City's Answering Brief frankly concedes that the City enacted the Ordinance not in spite of the significant need for more facility deployments to meet the growing consumer demand for advanced telecommunications services, but *because of it*. (See, e.g., Ans. Br. 5, 7 [explaining that the Ordinance was enacted in response to "[g]rowing demand for wireless telecommunications"] [internal quotations omitted].) As the City concedes, the Ordinance targets the "[t]echnological change in recent years" that has driven "plans to expand" wireless service and broadband facilities. (*Id.* at p. 5.) The City's claimed concerns are thus nothing more than a pretext to discriminate against emerging telecommunications technologies, to try to slow their spread. (See *infra*, Part II.A.) Because the Ordinance is specifically designed to erect unique barriers to advanced communications deployments, it is fundamentally at odds with Section 7901.

The City attempts to minimize the conflict between the Ordinance and the State franchise by devising a narrow interpretation of Section 7901 that defies both logic and precedent. It contends that the State franchise was enacted simply to grant telephone companies "the right to do business throughout California" without interference from "local franchise requirement[s]." (Ans. Br. 43, 41. See also *id.* at p. 12.) And, in the City's view, "[t]here is no inimical contradiction between a statewide requirement

that telephone companies must be allowed to do business in San Francisco and local requirements concerning where the instrumentalities of that business may be installed." (*Id.* at p. 41.)

The City is wrong. The State franchise has never been understood to confer only the limited "right to engage in the telecommunications business in California" free from local franchise requirements. (Ans. Br. p. 12.) Such an interpretation would be contrary to the language of Section 7901. Section 7901 has universally been understood to confer *both* the right to do business *and* the right to build the facilities necessary to conduct that business. (See *Pacific Telephone II*, *supra*, 197 Cal.App.2d at p. 147.)

The City's unreasonably narrow interpretation of Section 7901 contradicts the plain language of the statute. The Legislature did not simply state that telephone and telegraph companies may "operate" or "do business" throughout the State without negotiating "local franchises." In fact, none of these words are even used in the statute. Rather, Section 7901 specifically states that telephone corporations "may construct lines of telegraph or telephone lines" and "may erect poles, posts, piers or abutments for supporting the insulators, wires, and other necessary fixtures of their lines." (§ 7901.) The language of the statute is thus primarily concerned with constructing facilities, not with the right to do business, which runs completely counter to the reading offered by the City.

In addition to running afoul of the statute's plain language, the City's interpretation also strips the State franchise of the practical benefits it is intended to secure. A State franchise is meaningless if localities can thwart telephone companies' ability to build the facilities necessary provide service to consumers. Allowing municipalities to restrict infrastructure deployments to remote edges of city boundaries, for example, would destroy a telephone company's ability to provide service throughout the State even though the company might, as a technical matter, still retain "the right to do business" in California. (Ans. Br. 43.) Moreover, the City's narrow construction of the franchise ignores the Legislature's primary purpose of promoting the deployment of advanced communications systems throughout the State. (See *infra*, Part II.B.)

California courts thus have sensibly rejected the reading proffered by San Francisco. They have uniformly recognized that if the State franchise means anything at all, it necessarily grants telephone companies the right to build the facilities needed to offer advanced communications services to citizens throughout the State. (*Pacific Telephone II*, *supra*, 197 Cal.App.2d at p. 147.) Section 7901 has consistently been held to authorize telephone companies to "construct and maintain in city streets the necessary equipment to enable the company to operate its business," regardless of the aesthetic impact such facilities may have. (*Ibid.*) The City's contrary reading would "defeat the very purpose of" Section 7901 by "interfer[ing]

substantially with the ability of telephone companies to provide adequate communication service to the people of the state." (*Los Angeles*, *supra*, 44 Cal.2d at p. 282.)

C. <u>The City's Preemption Analysis Is Irrelevant And Wrong.</u>

Rather than grappling with Appellants' substantive *Salerno* arguments, the City focuses its preemption discussion on the divide between field preemption and conflict preemption. (Ans. Br. 40-43.) These are red herrings. Appellants do not claim that field preemption completely excludes cities from playing any role in the siting of telecommunications infrastructure; the plain text of both Sections 7901 and 7901.1 make clear that cities may regulate the placement of facilities that "incommode" the public rights of way, so long as they do so in a neutral and non-discriminatory manner. The preemption here arises from the conflict between the underlying *purpose* of Section 7901 (i.e., to permit and encourage the deployment of telecommunications facilities) and the Ordinance (which the City admits is designed to restrict the deployment of these facilities). The question of field versus conflict preemption is thus of no moment here, and the City's claims to the contrary reflect a fundamental misunderstanding of the preemption issues at play. By focusing exclusively on this question of field versus conflict preemption, the City offers no response to the actual issue before this Court, which is whether it is proper to apply the rigid *Salerno* standard to facial preemption

challenges, regardless of the specific type of preemption asserted. (Br. 18-34.)

The City also confuses the "no set of circumstances" test articulated in *Salerno* with field preemption, asserting that the test is "apt" in the context of field preemption. (Ans. Br. 42-43.) The City's description of the "no set of circumstances" standard as being relevant solely in the field preemption context simultaneously gets the test wrong and fundamentally misapprehends the meaning of the phrase. It is not meant to refer to field preemption, where there are "no set of circumstances" in which local regulation is permitted. (See *id.* at p. 42 [citing *Cal. Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177].) Rather, as used in *Salerno*, and by the court below, "no set of circumstances" refers to what a plaintiff must show to invalidate a challenged law. (See *Salerno*, *supra*, 481 U.S. at p. 745; Opn. 15, 22.) As Appellants explained, and the City cannot refute, *Salerno*'s "no set of circumstances" standard is a heavy burden that has no place in the context of a facial preemption challenge. (Br. 18-34.)

II. <u>SECTION 7901 HAS NEVER BEEN UNDERSTOOD TO ALLOW CITIES TO REGULATE WIRELESS FACILITIES BASED ON AESTHETIC CONCERNS.</u>

The City caricatures Appellants' argument as presenting a false choice "between progress and parochialism." (Ans. Br. 1.) But there is no choice to be made here. That is the point—the Legislature has already spoken on the issue and it has chosen technological progress, by enacting

the broad statewide franchise in Section 7901 and then placing strict limits on local regulation in Section 7901.1. Telephone corporations' State franchise to construct facilities in the rights-of-way precludes the City from "adjust[ing] the balance" "between technological advancement and community aesthetics" by discriminating against new and innovative wireless technology. (Opn. 1.) "[A]ny 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.)

A. **The City Admits That Its Ordinance Is Designed To Impose Unique Burdens On Advanced Telecommunications Facilities.**

In its effort to respond to Appellants' showing that the Ordinance places unique burdens on wireless facilities, the City acknowledges that it discriminates against wireless facilities, but argues that this is acceptable because it *also* disfavors other new technology. (See, e.g., Ans. Br. 5-7, 25-26.) The City asserts that the Ordinance does not *impermissibly* discriminate against wireless technology "because [the City] regulates other burgeoning technologies in an equivalent manner." (*Id.* at p. 32.) The implication is that the City is free to discriminate against wireless facilities because, from time to time, it also discriminates against some other advanced forms of telecommunications technology.

Despite the City's protestations that it discriminates against all new technology equally, this is not true. The City points to Article 27 to support its argument, claiming that the provision places "equivalent" restrictions on the construction of surface-mounted broadband facilities. (Ans. Br. 6, 35-36. See S.F. Ord. No. 76-14 (Article 27).) But Article 27 only applies to *new* builds of standalone equipment, not the placement of facilities on *existing* poles, which Article 25 uniquely burdens. The City offers no reason for imposing the same onerous requirements on providers that merely seek to add attachments to existing poles as those that apply to deployments of new freestanding street furniture and equipment. As Appellants argued, the requirements imposed on wireless facilities are unique. (Br. 35-38.)

Regardless of whether the burdens the City imposes on wireless facilities and other rights-of-way users are equivalent, though, the City's argument only emphasizes its improper motives. Singling out emerging technologies for onerous aesthetic review is discriminatory and cannot be saved by singling out *all* emerging and advanced technologies for disfavored treatment. Rather than distancing itself from the fact that the Ordinance discriminates against advanced telecommunications deployments, the City doubles-down and admits that the Ordinance was designed as part of an overall policy to put the brakes on the widespread deployment of innovative new facilities. (See, e.g., Ans. Br. 34.) It