

No. S238001

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IN THE SUPREME COURT OF THE STATE 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.*

SUPREME COURT  
**FILED**

MAY 16 2017

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

From the Superior Court, San Francisco County  
Case No. CGC-11-510703  
Judge James McBride, Judge Presiding

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**APPLICATION OF PACIFIC BELL TELEPHONE COMPANY  
AND AT&T MOBILITY, LLC FOR PERMISSION TO FILE BRIEF  
OF *AMICI CURIAE* AND  
BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANTS**

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Hans J. Germann  
(admission *pro hac vice* pending)  
MAYER BROWN LLP  
71 South Wacker Drive  
Chicago, IL 60606  
(312) 782-0600

Donald M. Falk (SBN 150256)  
[dfalk@mayerbrown.com](mailto:dfalk@mayerbrown.com)  
Samantha Booth (SBN 298852)  
MAYER BROWN LLP  
Two Palo Alto Square  
3000 El Camino Real  
Palo Alto, CA 94306  
(650) 331-2000  
(650) 331-2060 (fax)

*Attorneys for Amici Curiae*

**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

Attorneys for Amici Pacific Bell Telephone Company and AT&T Mobility, LLC, certify that their parent company, AT&T Inc., is the only interested entity or person that must be listed in this certificate under California Rules of Court, rule 8.208.

Dated: May 11, 2017

Respectfully submitted,

/s/ Donald M. Falk  
Donald M. Falk (SBN 150256)  
MAYER BROWN LLP

*Attorney for Amici Curiae*

**APPLICATION OF PACIFIC BELL TELEPHONE COMPANY AND  
AT&T MOBILITY, LLC FOR PERMISSION TO FILE BRIEF OF  
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To the Honorable Tani Cantil-Sakauye, Chief Justice:

Pacific Bell Telephone Company, dba AT&T California, and AT&T Mobility, LLC (collectively, “AT&T”) respectfully apply for permission to file the attached brief of *amici curiae* in support of appellants T-Mobile West LLC, *et al.*<sup>1</sup>

As one of California’s largest providers of wired and wireless communications services, including broadband technology, AT&T is acutely interested in the correct interpretation of the statutes at issue in this case. For more than a century, Pacific Bell and its predecessors have used and defended the rights granted under what is now Public Utilities Code section 7901.

Those rights remain of paramount importance. AT&T invested more than \$7.4 billion in updating California’s wired, wireless, and broadband networks from 2012 to 2014 alone, and an additional \$7.2 billion in similar updates from 2014 to 2016. Today, AT&T continues to be a leader in the installation of broadband throughout the state.

In particular, AT&T has spent years developing, implementing, and seeking regulatory approval for its Lightspeed and Gigapower projects, in the course of which it has installed fiber and associated equipment along streets throughout California. These continuing projects will exponentially increase the speed, capacity, and performance of the State’s communications and broadband networks by replacing traditional copper

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<sup>1</sup> No party and no counsel for any party in this case, nor any other person or entity, authored the proposed Amici brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief, other than the amici curiae and their counsel in this case. (See Cal. Rules of Court, rule 8.520(f)(4).)

wire cable systems with lightning-fast fiber optic networks. The use of copper wire for telephone service dates to the late 1880s, and is inherently limited by the relatively slow speed of electricity. Modern fiber optic networks, in contrast, use light signals which permit them to transmit data up to 100 times faster than traditional networks.

These and other investments in infrastructure are essential to create the type of communications speed, reliability, and innovative features required to spur further innovation and economic growth. The upgrades (1,443 from 2014 to 2016 alone) have permitted AT&T to offer consumers an ever-increasing array of products and services, including alternative video service, voice-over-Internet-protocol telephone service, and higher video-streaming quality. They have also increased bandwidth and allowed for faster broadband speeds, thus increasing the reliability of Internet service and products dependent upon that service throughout the State.

In order to connect households and businesses to these new and improved networks, however, providers like AT&T must place sidewalk-mounted utility cabinets every few blocks throughout urban service areas like San Francisco. The Legislature recognized the need for these cabinets in 2006 when it divested local governments of regulatory authority over broadband and video services, notwithstanding local protests that localities needed to be able to control the construction of “new video-capable telecommunication networks.” (Sen. Energy, Util. & Comm’n Com. on Assem. Bill No. 2987 (2005–2006 Reg. Sess.) as amended June 29, 2006.)

Despite the benefit of these services to consumers and the Legislature’s unambiguous intent to encourage their deployment, San Francisco and other local governments have tried to enact and enforce regulations that exceed their limited regulatory authority under Section 7901. Indeed, as the City acknowledges (Answering Brief on the Merits (ABM) 35), AT&T is one of the very few telecommunications providers

that has been willing to attempt infrastructure updates in San Francisco on a large scale. AT&T began the process of seeking permission for a city-wide infrastructure upgrade in 2007. (See, e.g., *San Francisco Beautiful v. City & County of San Francisco* (2014) 226 Cal.App.4th 1012, 1018.) Ten years later (and notwithstanding significant efforts on AT&T's part to mitigate the aesthetic impacts of its equipment to the extent technologically feasible), the project is less than half complete. During that time, the City has repeatedly interposed aesthetics-based regulatory roadblocks on both pole- and surface-mounted telecommunications equipment.

For example, AT&T was forced to obtain a writ of mandate to compel approval of dozens of surface-mounted facilities permits that the City rejected when hearing officers imposed a new requirement to identify alternate sites that contradicted the City's own regulations. (See *Pacific Bell Telephone Co. v. City & County of San Francisco* (Super. Ct. S.F. City and County, Order issued June 17, 2015, No. CGC 14-513672).) AT&T then had to return to court to enforce the writ when the City took the position that AT&T could not install equipment that was *smaller* and less noticeable than the cabinets named in the permits; the regulatory process had taken so long that smaller, more powerful equipment had become available in the meantime. (See *id.* (Order issued Nov. 7, 2016).)

Further, before it could submit permit applications under the new ordinance, AT&T had to win a judgment invalidating one term of that ordinance, which required a telephone corporation seeking to install a surface-mounted facility to first demonstrate that it had unsuccessfully offered to pay private property owners to provide a location for the equipment. (See *id.* (Order issued May 27, 2015) [invalidating S.F. Pub. Works Code § 2712(d)(4)].)

AT&T has since submitted permit applications that were denied because AT&T refuses to comply with a provision requiring a carrier to

plant and maintain a tree and 100 square feet of landscaping in the right-of-way, or else pay the City an “in-lieu” fee of nearly \$10,000 for use in general beautification. (See *id.* § 2710(a)(2) [specifying \$7500 for landscaping in lieu fee]; S.F. Dep’t of Pub. Works, Fee Schedule, at <http://sfpublicworks.org/sites/default/files/FY16-17%20fEE.pdf> (as of May 8, 2017) [in lieu tree fee is \$1906].) That is, the City is insisting that AT&T plant and maintain landscaping that will occupy much more of the right-of-way than AT&T’s equipment will, or pay a fee. AT&T has administratively appealed those permit denials, which are now before the City’s Board of Appeals.

In addition, AT&T has tried to build wireless facilities in the public rights of way in San Francisco, and it is right now starting to build “small cells” on street lights, utility poles, and other vertical infrastructure in the public right of way. This infrastructure will be critical to the deployment of the “5G” wireless network upgrade that will pave the way for autonomous vehicles, smart city services, and many other new and innovative services. With respect to these facilities, and like T-Mobile, AT&T has been subjected to the Personal Wireless Facility ordinance that is before this Court.

Under a correct interpretation of Section 7901, local ordinances that condition telecommunication carriers’ right to upgrade their equipment on the aesthetic whims of administrative officials cannot be enforced. AT&T accordingly has a critical interest in the outcome of this litigation.

The accompanying brief is designed to assist the Court’s resolution of the preemption question in several specific ways. Among other issues, the brief explains why the language and structure of Section 7901 preclude an interpretation of the phrase “incommode the public use of the road or highway” that would encompass aesthetic effects on the roadside or surrounding properties. In particular, the brief explains the common law

underpinnings of the statute’s key terms, which make clear that the only protected “public use of the road or highway” is travel. And the brief analyzes the reasons why the sort of radical revision to the terms of Section 7901 suggested by the court below (in order to include aesthetic considerations) should be a matter for the Legislature, not the judiciary. Any decision to change the character of the statute in that way would have significant economic effects, and would require delicate accommodations of both the public interest in deploying state-of-the-art telecommunications networks and local interests in the appearance of the streets. Policy balancing of that kind should be left to the Legislature.

### CONCLUSION

The application should be granted and the accompanying brief of *amici curiae* filed.

Dated: May 11, 2017

Respectfully submitted.

Hans Germann  
(admission *pro hac vice* pending)  
MAYER BROWN LLP  
71 South Wacker Drive  
Chicago, IL 60606  
(312) 782-0600

/s/ Donald M. Falk  
Donald M. Falk (SBN 150256)  
Samantha Booth (SBN 298852)  
MAYER BROWN LLP  
Two Palo Alto Square  
3000 El Camino Real  
Palo Alto, CA 94306  
(650) 331-2000

*Attorneys for Amici Curiae*

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Charles H. Mills, <i>Thompson’s Treatise on the Law of Highways</i> (3d ed. 1881), < <a href="https://ia601407.us.archive.org/30/items/cu31924069394082/cu31924069394082.pdf">https://ia601407.us.archive.org/30/items/ cu31924069394082/cu31924069394082.pdf</a> > .....	31
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## **INTEREST OF *AMICI CURIAE***

As California telecommunications service providers, Pacific Bell Telephone Company, dba AT&T California, and AT&T Mobility, LLC (collectively, “AT&T”) have a unique interest in the correct resolution of this case. Pacific Bell is the largest provider of wireline service in the State, with millions of customers and thousands of miles of telephone and broadband lines along, across, and under public roads and highways. Likewise, AT&T Mobility is one of the largest providers of wireless service, operating thousands of cell sites and wireless telephone antennas to provide coverage throughout the State. Two recent City ordinances seek unlawfully to restrict AT&T’s rights under Public Utilities Code section 7901. San Francisco’s new Personal Wireless Service Facility Site Permit ordinance (codified in Article 25 of the City’s Public Works Code) (the “Ordinance”) is directly at issue in this case, and applies to wireless telecommunications equipment mounted on existing utility poles. Like T-Mobile, AT&T is upgrading its wireless facilities to provide 5G service. AT&T is also subject to the City’s Surface-Mounted Facility Site Permit ordinance (Article 27 of the Public Works Code) (“Surface-Mounted Facility ordinance”), which imposes similar, but arguably more onerous, burdens on the installation of surface-mounted equipment in the public right-of-way. AT&T has been struggling for years to upgrade its broadband system by installing equipment cabinets that are subject to the Surface-Mounted Facility ordinance.

Both ordinances are premised on the notion that municipalities can restrict the installation of telecommunications equipment based solely on subjective, aesthetic judgments. That premise fundamentally misconceives the modest regulatory power afforded to local governments by Public Utilities Code section 7901, and undermines the Legislature’s intent that all Californians have access to an ever-evolving, state-of-the-art

telecommunications network unhindered by a patchwork of local regulatory measures. AT&T accordingly has a strong interest in the correct interpretation of Section 7901.

### INTRODUCTION AND SUMMARY OF ARGUMENT

This case turns on the meaning of a narrow limit on a broad state grant. Exercising its plenary authority over the roads and highways of the State, the Legislature granted telephone corporations the right to install their equipment “along and upon any public road or highway.” (Pub. Util. Code § 7901.) This grant is subject to a single limit: the equipment—which may include “poles, posts, piers, or abutments” as needed for any “necessary fixtures of their lines”—must be installed “in such manner and at such points as not to *incommode the public use of the road or highway.*” (*Ibid.* [emphasis added].) Except for its 1905 expansion to cover telephone corporations, this state-wide grant has continued in materially unchanged terms since 1850. (We accordingly use “Section 7901” to refer both to Public Utilities Code section 7901 and to its predecessors, primarily former Civil Code section 536.)

This Court has definitively construed Section 7901 as a preemptive, state-wide grant to telephone corporations of the right to place their facilities in the public right-of-way. This Court also has construed the limit on that grant to prohibit only “unreasonable obstruction of travel.” (*Western Union Telegraph Co. v. City of Visalia* (1906) 149 Cal. 744, 750–51 (*Visalia*)). Until the decision below, all published California authority had followed the latter holding.

San Francisco, however, has repeatedly tried to limit or nullify carriers’ rights under Section 7901. The latest attempt is the Ordinance now before the Court, which asserts unlimited veto power to block any installation of telecommunications equipment that, in the subjective opinion of City officials, “would significantly degrade the aesthetic attributes” of a

street or district. (E.g., S.F. Pub. Works Code § 1502.) That standardless power cannot be squared with the text and history of Section 7901.

As this Court recognized in *Visalia*, municipal power to prevent telecommunications carriers from “incommod[ing] the public use of the road or highway” is limited to “prevent[ing] unreasonable obstruction of travel.” (149 Cal. at 751.) This understanding accords with the plain text of the statute. On its face, the textual parallel between “incommode the public use of the road or highway” and “interrupt the navigation of the waters” reflects the statute’s focus on travel. And the explicit grant of rights to install poles, wires, and abutments—which inherently have aesthetic impact—weighs against the notion that subjective aesthetic considerations can override those rights.

While the City and the Court of Appeal have focused on dictionary definitions of “incommode,” their arguments have overlooked the clear and unambiguous statutory language stating *what* must not be incommoded: “the public use of [a] road or highway.” The phrasing of the statute was not coincidental, but drew upon well-settled principles of common law equating the “public use” of a road or highway with the right to travel on it. Indeed, the common law of nuisance recognized a claim against conduct that impaired the public use of a road, but only interference with *travel* was actionable. In contrast, the common law rejected the notion that the public’s right to use roads extended to other purposes. Tellingly, the California Legislature incorporated the same, established common law principles in a nuisance statute enacted in the same session as the first version of Section 7901.

Neither the City nor the Court of Appeal suggested (or could suggest) that the City’s attempt to exert broad aesthetic veto authority over the installation of telecommunications facilities is necessary to prevent unreasonable obstructions to public travel on roads or highways. Instead,

the Court of Appeal focused on an installation's potential impact on the aesthetics of the *neighborhood* surrounding the road, such as Coit Tower or the Painted Ladies, to use the examples in the opinion below. But Section 7901 says nothing about incommoding the aesthetics of properties and neighborhoods surrounding a public road or highway. And for good reason: if every local government were free to use its own local aesthetic preferences to limit providers' ability to install necessary equipment, the right granted by the Legislature in Section 7901 would become illusory.

If San Francisco's Ordinance is upheld, other cities will follow, creating a regulatory patchwork that will inevitably slow the deployment of new telecommunications technologies and discourage new investment in California. That would undercut the uniform, statewide telecommunications system that has been an object of State legislative policy since 1850 and continues as a priority to the present day.

Moreover, San Francisco's Ordinance confers virtually limitless discretion on the City's planning department. City officials may deny any permit they determine would "detract from *any* of the defining characteristics of [a] neighborhood." (S.F. Pub. Works Code § 1502 [emphasis added].) What constitutes a "defining characteristic" is not defined, nor is there any standard for assessing whether equipment would indeed "detract" from that unspecified characteristic.

If aesthetics are to be considered in connection with the deployment of new telecommunications equipment, that policy change should be guided by clear, uniform standards established by the Legislature. Otherwise, the California courts will be flooded with challenges to hundreds of individual ordinances and to the invariably inconsistent aesthetic sensitivities of local officials. And judicial review of the discretionary decisions by local functionaries would be nearly as *ad hoc*.

As a consequence, any radical revision to inject aesthetic values into Section 7901 should be accomplished by the Legislature, not piecemeal by local governments or the courts. The Legislature is uniquely qualified to make the policy judgments required to set a new balance between telecommunications development and aesthetics on California roads and highways, and to determine whether a change of that kind is desirable. California's scenic highway law and other legislation demonstrate the Legislature's ability to protect local aesthetic interests while setting forth criteria and standards to balance those interests against competing public uses of roads and highways. Should the Legislature determine that current law permits telecommunications carriers too much leeway to install equipment without sensitivity to aesthetic values, it can specify aesthetic standards for telecommunications carriers that will assure a uniform and balanced statewide scheme as Section 7901 does now.

## ARGUMENT

### **I. THE CITY'S EFFORT TO IMPEDE DEPLOYMENT OF TELECOMMUNICATIONS INFRASTRUCTURE CONFLICTS WITH THE LEGISLATURE'S CONTRARY POLICY ON A MATTER OF STATEWIDE CONCERN.**

It is well established that "the state in its sovereign capacity has the original right to control all public streets and highways, ... except in so far as that control is relinquished to municipalities by the state." (*Western Union Telegraph Co. v. Hopkins* (1911) 160 Cal. 106, 118 (*Hopkins*)). The Legislature has long exercised this control both to grant broad rights to telephone companies to deploy their facilities in the right-of-way and to make clear that municipal control over such deployments remains extremely limited. Although the Legislature *could* establish statewide standards to permit municipalities to prohibit or limit installations for aesthetic reasons, it has not yet done so. San Francisco has nevertheless

impermissibly attempted to claim veto power over a telephone company's use of the right-of-way based solely on subjective aesthetic considerations.

**A. The Legislature Has Repeatedly Exercised Its Power Over Public Roads And Highways To Encourage Installation of Telecommunications Infrastructure.**

In one of its very first Acts, the California Legislature used its control over the State's roads, highways, and navigable waterways to foster the development and deployment of telecommunications technologies. Months before California was admitted to the Union, the Legislature authorized telegraph companies to "construct lines of telegraph along and upon any of the public roads and highways, or across any of the waters within the limits of this State, by the erection of the necessary fixtures, including posts, piers, or abutments, for sustaining the cords or wires of such lines." (Stats. 1850, ch. 128, § 150.) That right to build infrastructure was qualified only by the proviso that such construction could not "incommode the public use of said roads and highways, or injuriously interrupt the navigation of said waters." (*Ibid.*) That statute, part of California's first Corporations Law, became section 536 of the first Civil Code in 1872. (See, e.g., *Pacific Telephone & Telegraph Co. v. City & County of San Francisco* (1959) 51 Cal.2d 766, 769 [*"Pacific Telephone v. San Francisco P"*]; *County of Los Angeles v. Southern California Telephone Co.* (1948) 32 Cal.2d 378, 381 [*"SoCal Telephone"*].)

Former Civil Code section 536 was amended to extend the grant to "telephone corporations" in 1905. (See *SoCal Telephone*, 32 Cal.2d at 382.) Since that time, telephone corporations have been authorized to "construct ... telephone lines along and upon any public road or highway" or waterway and to "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.” (Pub. Util. Code § 7901 [Section 536 was recodified, unchanged, as Section 7901 of the Public Utilities Code].)

This Court quickly settled two aspects of the grant. First, the only limitation on the right to install equipment is that an installation cannot create an obstruction of the road or waterway. (*Visalia*, 149 Cal. at 750–51.) And second, the grant under Section 7901 creates a statewide franchise that precludes local governments from requiring a local franchise or levying local rents or fees for the use of the public right-of-way to install telephone equipment. (*SoCal Telephone*, 32 Cal.2d at 380, 388, 393; *Pacific Telephone v. San Francisco I*, 51 Cal.2d at 771.)

This Court has also held that Section 7901 encompasses a right to maintain and expand service and to use the latest technologies. Thus, the Court rejected San Francisco’s effort to charge for the right to run cables underground. (See *Pacific Telephone v. San Francisco I*, 51 Cal.2d at 767, 777.) The Court recognized that “telephone system[s] must be continually expanded to meet the demands of the public.” (*Pacific Telephone & Telegraph Co. v. City of Los Angeles* (1955) 44 Cal.2d 272, 277 (*Pacific Telephone v. Los Angeles*).) And the Court acknowledged that Section 7901 authorized telephone corporations to install new forms of equipment to provide new services permitted by improving technology, which by 1959 included “teletypewriter, public mobile telephone, telephotograph, and the transmission of television and radio programs.” (*Pacific Telephone v. San Francisco I*, 51 Cal.2d at 767, 772–73, 777.)

In 1995, the Legislature responded to assertions by some companies that “cities have absolutely no right to control *construction*” by adding Section 7901.1. (Assem. Com. on Utils. and Commerce, Rep. on Sen. Bill No. 621 (1995-1996 Reg. Sess.) as amended July 7, 1995, pp. 1–2 [emphasis added].) The Legislature made no changes to Section 7901,

which the courts had already construed to grant telephone companies broad rights subject only to the proviso that they not interfere with public travel. Rather, the Legislature added Section 7901.1 to confirm that municipalities have the limited authority to impose temporary time, place, and manner controls on the construction process.

The next year, to curtail local efforts to skirt the ban on franchise fees, the California Telecommunications Infrastructure Development Act expressly limited the fees that local governments may charge to process permits for the exercise of rights under Section 7901. (See Stats. 1996, ch. 300 (S.B. 1896)).<sup>1</sup> Observing that existing law “encourage[d] the development and deployment of new technologies” and the “expansion of telecommunications networks in order to bring greater choice to consumers,” the Legislature underscored its policy “to position the state on the leading edge of the telecommunications revolution.” (*Id.* § 2(a).)

To serve the same goals, the Digital Infrastructure and Video Competition Act of 2006 (“DIVCA”) extended Section 7901 beyond telephone companies to local video service providers. (See Pub. Util. Code §§ 5840(q)(1), 5885.) Some local governments opposed DIVCA because “the new video-capable telecommunication networks require installation of large refrigerator-sized boxes every couple hundred homes.” (Sen. Energy, Util. & Comm’n Com. on Assem. Bill No. 2987 (2005–2006 Reg. Sess.) as amended June 29, 2006, Comments.) Yet the Legislature approved DIVCA almost unanimously. (See Concurrence in Sen. Amendments to Assem. Bill 2987 (2005–2006 Reg. Sess.) as amended Aug. 28, 2006 [showing Assembly vote of 77-0 and a Senate vote of 33-4].) Further,

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<sup>1</sup> Those fees are limited to “the reasonable costs of providing the service for which the fee is charged” and, in accordance with “existing law” (Stats. 1996, ch. 300, § 2), cannot “be levied for general revenue purposes.” (Gov’t Code § 50030.)

recognizing that some localities might abuse their limited permitting authority to prevent the deployment of new installations in the right-of-way, the Legislature required local entities to approve or deny applications for encroachment permits within 60 days. (Pub. Util. Code § 5885(c).)

As the Legislature's adoption of DIVCA makes clear, the construction and placement of communications infrastructure in the public right-of-way continues to be "a matter of state concern and not a municipal affair" (*Pacific Telephone v. San Francisco I*, 51 Cal.2d at 768), just as it has been for more than one hundred years. Today, no less than in 1850, it remains the Legislature's policy that the installation of communications infrastructure is a legitimate and desirable use of the public rights-of-way throughout the State, and that parochial attempts to limit such installations must yield to the State's overriding authority.

**B. San Francisco Has Tried To Undercut Carriers' Rights Under Section 7901 By Imposing Burdensome Aesthetic Regulations.**

Under the Ordinance at issue here, a carrier must obtain a permit if it wants to install or modify wireless telecommunications equipment in the public right-of-way. But permits may be denied for many reasons other than the obstruction of travel. Among other things, the City may deny a permit if an official reaches the standardless conclusion that the proposed wireless equipment—even a new antenna or cabinet on an existing telephone pole—would "significantly degrade the aesthetic or natural attributes" of various protected streets or areas. (S.F. Pub. Works Code § 1502 [Park Protected Location Compatibility Standard; Planning Protected Compatibility Standard].) The Ordinance sweeps most of the City into one protected category or another, as shown by a City Public Works Department map (attached at p. 48–49, *infra*, see Cal. Rules of Court, rule 8.520(h)) that displays the various zones qualifying as protected locations

under San Francisco Public Works Code section 1502.<sup>2</sup> (See S.F. Dep't of Pub. Works, Wireless Service Facilities, at <<http://sfpublicworks.org/services/permits/wireless-service-facilities>>; Map, at <<http://sfpublicworks.org/sites/default/files/319-WirelessMap.pdf>>.) But installations may be barred even in *unprotected* areas by a standardless aesthetic determination that the equipment would “significantly detract from any of the defining characteristics of the neighborhood.” (S.F. Pub. Works Code § 1502 [Tier A Compatibility Standard].)

Further, the City may require the carrier to plant (and maintain) a “street tree” (the variety to be selected by the City) in the public right-of-way as a condition of the permit. (*Id.* § 1506.) If a tree cannot be planted nearby without interfering with the wireless equipment or the public use of the sidewalk, the City may exact an “in-lieu payment” to be deposited “into the Department’s ‘Adopt-A-Tree’ fund.” (*Id.* § 1506(b).) Thus, the City not only claims the right to veto equipment that does not obstruct travel on a public road or highway, but it attempts to exact a payment—in cash or in kind—for the privilege of exercising state-granted rights under Section 7901. That is nothing more than a disguised franchise fee, which is clearly impermissible. (See *Pacific Telephone v. San Francisco I*, 51 Cal.2d at 771.)

The City has not confined its present assault on Section 7901 to wireless equipment. The Surface-Mounted Facility ordinance, *supra* p.15, codified in Article 27 of the San Francisco Public Works Code, imposes similar restrictions on telecommunications cabinets and other structures

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<sup>2</sup> To be “Unprotected,” an area must not be near a wide variety of structures or areas, including any area “designated as being ... significant to City pattern, defining City form, or having important street view for orientation.” (S.F. Pub. Works Code § 1502 [Planning Protected Local; Planning Protected Local Compatibility Standard].)

mounted on the surface of the public right-of-way (“surface-mounted facilities”). As enacted in 2015, that ordinance requires a telephone corporation seeking to install a surface-mounted facility to first demonstrate that it has unsuccessfully offered to pay private property owners to provide a location for the equipment. (See S.F. Pub. Works Code § 2712(d)(4).) A judgment from the Superior Court forestalled that effort to undermine Section 7901. (*Pacific Bell Telephone Co. v. City & County of San Francisco* (Super. Ct. S.F. City and County, Order issued May 27, 2015, No. CGC 14-541846).)

But the Surface-Mounted Facility ordinance contains other objectionable provisions, which have not yet been challenged in court, though Pacific Bell is now administratively appealing the denial of permits on some of these grounds. For example, the Surface-Mounted Facility ordinance makes the subjective “Aesthetic Character of the streetscape” a specific criterion in permit approval (S.F. Pub. Works Code § 2704(b)(2).) And the ordinance requires a carrier to plant and maintain a tree and 100 square feet of landscaping in the right-of-way, or else pay a similar “in-lieu” fee to the City’s “Adopt-A-Tree” fund for use in general beautification—currently almost \$10,000. (See *id.* § 2710(a)(2) [specifying \$7500 for landscaping in-lieu fee]; S.F. Dep’t of Pub. Works, Fee Schedule, at <http://sfpublicworks.org/sites/default/files/FY16-17%20fEE.pdf> [in-lieu tree fee is \$1906].) The Surface-Mounted Facility ordinance also requires carriers to decorate their equipment with any mural that the City may select. (S.F. Pub. Works Code § 2711.)

The City thus treats the installation of both wireless and surface-mounted communications infrastructure in the right-of-way as something it need not tolerate if it finds the installation unattractive. Even if it deigns to find an installation aesthetically acceptable, the City demands some kind of compensation to promote general “beautification.” The City’s approach

cannot be squared with Section 7901's prohibition on local franchise fees. (See, e.g., *Pacific Telephone v. San Francisco I*, 51 Cal.2d at 771.) In granting telecommunications providers broad, statewide rights to deploy facilities along California roads and highways, the Legislature necessarily concluded that the installation of telecommunications infrastructure is an appropriate, desirable, and presumptively lawful use of the right-of-way.

## II. SECTION 7901 PREEMPTS THE ORDINANCE.

### A. Section 7901 Allows Municipalities To Prevent Unreasonable Interference With Travel, Not To Prohibit Telecommunications Installations On Aesthetic Grounds.

The dispositive question here is whether the term “incommode the public use of the road or highway” includes purely aesthetic considerations. It does not.

This Court long ago construed the extent of the delegated police power over the placement and maintenance of telecommunications equipment on or along roads or highways. In *Visalia*, this Court held that municipal power to “regulate the manner of [a carrier's] placing and maintaining its poles and wires” is limited to “prevent[ing] unreasonable obstruction of travel.” (149 Cal. at 750–51.)

Until the decision below, the Court of Appeal routinely applied this straightforward interpretation against the City. Thus, a telegraph company could install its “wires and conduits” along with “manholes” along and beneath Market Street, so long as the equipment did not “interfere with the normal and ordinary uses of the street for purposes of travel and traffic.” (*Postal Telegraph-Cable Co. v. City & County of San Francisco* (1921) 53 Cal.App. 188, 192.) And in rejecting the City's attempt to charge Pacific Bell's predecessor a fee for access to install telephone lines underground, the Court of Appeal recognized that the “restriction” on the grant in Section 7901 “means [only] that ... the city has authority to so regulate the placing

and maintaining of the wires and poles as to prevent unreasonable obstruction of travel.” (*Pacific Telephone & Telegraph Company v. City and County of San Francisco* (1961) 197 Cal.App.2d 133, 146 (*Pacific Telephone v. San Francisco II*) [internal quotation marks omitted].)

The Attorney General of California confirmed this Court’s understanding in an official opinion. As that opinion observed, an equipment installation is permissible so long as it does “not interfere with the primary use of the road for highway purposes” or “the primary use of [the waters] for navigation and commerce.” (Op. No. 52-56, 22 Ops.Cal.Atty.Gen. 1, 3–4 (July 2, 1953).)

As explained below, this Court’s interpretation of the limitations on local control under Section 7901 was and is well grounded.

**1. The statutory text and structure confirm that the grant to telephone corporations is limited only by interference with travel, not aesthetics.**

This Court’s statutory interpretation in *Visalia* was correct and should not be disturbed. When construing a statute, the Court “begin[s] with the plain language of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context, because the language employed in the Legislature’s enactment generally is the most reliable indicator of legislative intent.” (*Fluor Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1198 [internal quotation marks omitted].)

Shredding this “statutory context” (*id.*), the City and the decision below isolate the term “incommode” from both “public use” and “road or highway,” and then ascribe to “incommode” the broadest available dictionary definition, along with an imaginative conception of how the public might “use” a road. But statutory terms cannot be plucked out of context and then drained of their legal meaning. On the contrary, “[w]hen

interpreting the text of a specific provision, [this Court] consider[s] the language of the entire legislative scheme and related statutes in ascertaining the Legislature’s intended purpose.” (*People v. Rodriguez* (2016) 1 Cal.5th 676, 686.)

Section 7901 provides for local regulation only to protect the “public use of the road or highway” (emphasis added), not the highway’s appearance or the views of surrounding property. The protected “use” is use as a road, not as a backdrop to be admired or a blank space to be looked through. And the Legislature’s selection of the word “use” places the focus of the statute on the public utility or function of roads and highways, rather than on visual enjoyment. Travel *is* the “public use” of any “road or highway,” and the reason that the State has a paramount interest in roads in the first place. (See *Hopkins*, 160 Cal. at 118.)

Moreover, any potential ambiguity in the meaning of “public use of the road” is dispelled by the structure of the statute, which uses “incommode the public use of the road or highway” in parallel with “interrupt the navigation of waters”—the very next phrase in Section 7901. As the Attorney General has observed, there is no “rational distinction between the use of public roads and highways and a use to be made along or across the waters.” (Op. No. 52-56, 22 Ops.Cal.Atty.Gen. at 3–4.) Neither the City nor the Court of Appeal provided any basis in law or history to conclude that by “public use of [a] road or highway” the Legislature meant to allow the invocation of activities other than travel as a basis to restrict the scope of the rights granted to telecommunications companies.

For an additional reason, the text of Section 7901 precludes any interpretation that would provide municipalities with an aesthetics-based veto on the installation of telephone equipment. The statute explicitly authorizes the installation of “poles, posts, piers, or abutments” along with

“insulators, wires, and other necessary fixtures of [telephone] lines.” (Pub. Util. Code § 7901.) But if the aesthetics of the roadside or surrounding area were a permissible basis to reject an installation, the rights granted by Section 7901 would be hollow. It could always be argued that the equipment enumerated in Section 7901 affects the aesthetics of the roadside and surrounding area, and on that basis the installation could be denied. The state-granted right would depend entirely on the aesthetic predilections of hundreds of local governments, which would undercut the Legislature’s intent that California have a statewide, state-of-the-art telecommunications system without local interference.

Indeed, the Ordinance provides a good example of the mischief that could occur. The Ordinance provides scant objective criteria for use in the ultimate judgment about a proposed installation’s aesthetics, leaving it to the subjective whims of City officials as to whether a particular proposed installation passes aesthetic muster. Even a proposed installation in an “Unprotected” area of the City is subject to purely discretionary review to ensure that it does not “detract from any of the defining characteristics of the neighborhood”—whatever that means. (S.F. Pub. Works Code § 1502; see p. 24, *supra*.) Telecommunications equipment, no less than overhead trolley lines, power lines, etc., are proper uses of the right-of-way that inherently have a visual impact. But that has been true since Section 7901’s original enactment in 1850. If the statute is to be radically revised to permit consideration of aesthetics, the Legislature, not the courts, should make that revision.

**2. Section 7901 incorporates common law principles recognizing travel—not aesthetic enjoyment—as the only protected “public use” of roads.**

The City and the decision below overlooked settled principles of statutory interpretation in their reliance on a broad dictionary definition of

the word “incommode” in isolation. The statutory phrase “incommode the public use of the road or highway” reflects well-entrenched common law principles limiting the legally protected “public use” to travel.

Statutes that, like Section 7901, “use[] terms that have accumulated settled meaning under the common law” must be construed to “incorporate the established meaning” in the absence of evidence that the Legislature intended something different. (*Metropolitan Water District v. Superior Court* (2004) 32 Cal.4th 491, 500–01.) This Court “presume[s] ... that in enacting a statute the Legislature was familiar with the relevant rules of the common law, and, when it couches its enactment in common law language, that its intent was to continue those rules in statutory form.” (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 625 [citing *Baker v. Baker* (1859) 13 Cal. 87, 95–96; *Morris v. Oney* (1963) 217 Cal.App.2d 864, 870], superseded by statute on unrelated grounds as recognized in *People v. Chiu* (2014) 59 Cal.4th 155.) The presumption is “particularly appropriate in considering the work of the first session of our Legislature.” (*Ibid.*)

1. Here, when Section 7901’s earliest predecessor was enacted, the “public use” of a “public road or highway” had acquired a settled legal meaning from common law decisions that defined the public’s right to use a road or highway. For example, the Supreme Judicial Court of Massachusetts had held that it was “clear that the public have no other right, but that of passing and repassing” along a public highway. (*Stackpole v. Healy* (1819) 16 Mass. 33, 34.) The Massachusetts court, then a leading jurisdiction, relied on an English decision from Lord Mansfield holding that “the king has nothing in a highway, but a passage for himself and his people.” (*Ibid.* [citing *Chester v. Aker*, 1 Burr. 143, and noting that “[t]his has been the settled law, certainly, ever since the time of Edw. 4”].) The law of other states accorded with this view. (E.g., *Town of Troy v. Cheshire Ry.* (1851) 23 N.H. 83, 93 [public use is “a right to use the road for the

purpose of passing and re-passing”] [collecting cases]; (*Stinson v. City of Gardiner* (1856) 42 Me. 248, 254 [“The public have no right in a highway, excepting the right to pass and repass thereon.”]; *In re Philadelphia & Trenton R.R.* (Pa. 1840) 6 Whart. 25, 43–44 [state dominion over public roads is limited to “[t]he right of passage by land or by water”].)

This Court’s early decisions reflected a similar understanding of the public use of a “public street” as a “right to pass and repass over it at pleasure.” (*City & County of San Francisco v. Sullivan* (1875) 50 Cal. 603, 606.) Public highways were impressed with a public “trust for the objects of their creation, viz. to enable the people to pass and repass over such roads at will.” (*People v. Marin County* (1894) 103 Cal. 223, 231.) Indeed, this Court quoted *Stackpole* in characterizing the public right in a public road as “the right of passage.” (*Porter v. City of Los Angeles* (1920) 182 Cal. 515, 519 [quoting 16 Mass. at 34].)

2. What it meant to “incommode” the public use of a road or highway likewise had an established meaning—namely, the unreasonable obstruction of travel. A body of law addressed the circumstances under which a temporary or otherwise lawful “obstruction[] of a highway” could become sufficiently “unreasonable” to give rise to “a public nuisance.” (See, e.g., Charles H. Mills, *Thompson’s Treatise on the Law of Highways* (3d ed. 1881) p. 313, at <<https://ia601407.us.archive.org/30/items/cu31924069394082/cu31924069394082.pdf>> .) The prevailing rule in 1850 when the Legislature gave telegraph carriers the right to place equipment in the public right-of-way was that “[a]ny unauthorized obstruction which unnecessarily *incommodes* or *impedes* the lawful use of a highway is a public nuisance at common law.” (*Id.* at 314 [emphases added].) If a “highway” was “*incommodious* from being out of repair,” a traveler would gain a temporary right-of-way over the land adjoining the public highway as necessary for safe passage. (*Id.* at 3 [emphasis added].)

These principles track Blackstone’s recognition that a “nuisance” to the public as a “whole” might arise from “[a]nnoyances in highways, bridges, and public rivers, by rendering the same *inconvenient or dangerous to pass*, either positively, by *actual obstructions*; or negatively, by want of reparations.” (4 Blackstone’s Commentaries 167 [emphases added].) In contrast, Blackstone explained, a visually objectionable use did not give rise to any cognizable injury under the common law. (See 3 Blackstone’s Commentaries 217.)

The Legislature is presumed to have been aware of these established principles when it first enacted Section 7901’s predecessor in 1850 (and repeatedly reenacted it in nearly identical terms since then), and again when, in 1872, it codified the provision as Civil Code section 536. Indeed, the same Legislature that enacted the first version of Section 7901 incorporated Blackstone’s discussion relating to the obstruction of highways nearly verbatim in a contemporaneous nuisance statute: “If any person shall *obstruct or injure* ... any public road or highway, ... or shall continue such obstruction to so as to render the same *inconvenient or dangerous to pass*, ... [the] person so offending shall ... be fined ... and every such nuisance ... removed and abated ....” (Stats. 1850, ch. 99, § 124, p. 244; cf. 4 Blackstone’s Commentaries 167.)

Without considering either the statutory or the common law context of Section 7901, the Court of Appeal resorted to a dictionary definition of “incommode,” divorced from “public use” of the right-of-way, and decided that aesthetics fit. But even if the Court of Appeal was right in its flexible interpretation of “incommode,” the aesthetic concerns the court identified do not relate to any public use of a road or highway. Rather, the court below focused on an equipment installation’s potential impact on the aesthetics of locations like Coit Tower or the Painted Ladies—*i.e.* impacts on the neighborhoods surrounding the road, not on the public use of the

road. Section 7901 says nothing about incommoding the aesthetics of properties and neighborhoods surrounding a public road or highway. The words of the statute simply do not stretch far enough to preserve the Ordinance from preemption.

**3. The Legislature has confirmed that travel is the “public use of a road or highway,” and has protected aesthetic values through explicitly targeted legislation.**

The Legislature has confirmed, both explicitly and implicitly, that the “public use of roads” refers to travel, not aesthetics.

The Vehicle Code defines “road,” “highway,” and related words specifically in terms of their purpose for travel. Thus, a “[r]oad” means any existing vehicle route ... with significant evidence of prior regular *travel* ....” (Veh. Code § 527 [emphasis added].) And a “[h]ighway” or a “street” “is a way or place of whatever nature, publicly maintained and open to the use of the public *for purposes of vehicular travel*.” (Veh. Code §§ 360, 590 [emphasis added].) Even a “[s]idewalk” is defined in terms of “pedestrian *travel*.” (Veh. Code § 555 [emphasis added].) These definitional statutes make clear that, in the Legislature’s continuing usage, travel *is* the “public use of [a] road or highway.” (Pub. Util. Code § 7901.)

In contrast, when the Legislature wants to place aesthetic limits on the public use of roads or highways, including impacts on adjacent land, it has done so explicitly. Streets and Highways Code sections 260 through 263.9 collectively “provide that certain portions of the state highway system shall be designated as ‘state scenic highways’ and be given ‘special scenic conservation treatment.’” (*Malick v. Department of Transportation* (1993) 17 Cal.App.4th 1829, 1831 [quoting Sts. & Hy. Code § 260].) The statute specifically authorizes the Department of Transportation to “take into consideration ... not only safety, utility, and economy but also beauty,” including “the impact of the highway on the landscape” and “the scenic

appearance of the scenic corridor, the band of land generally adjacent to the highway right-of-way.” (Sts. & Hy. Code § 261.) The ensuing sections govern planning and design standards, physical means of designating a highway as scenic, and specific criteria for scenic designation. The California Wild and Scenic Rivers Act (Pub. Res. Code §§ 5093.53–55) likewise confirms that the Legislature knows how to protect the State’s scenic resources when it decides aesthetic concerns outweigh travel, economic development, or other public interests.

The Legislature undoubtedly has the capacity to alter the balance of power between state and local governments created by Section 7901. The Legislature could authorize the kind of local aesthetic regulation San Francisco enacted, for example, by establishing fixed statewide criteria as it did with scenic highways. But the Legislature has not done so. And without state-granted authority, the City cannot give its streets—and effectively *all* of its streets—a special exemption from Section 7901 based purely on aesthetics. (See Map cited at pp. 23–24, *supra*, and attached at pp. 48–49, *infra*.)

**B. The City And The Court Of Appeal Advance No Sound Basis To Construe Section 7901 To Include Aesthetic Considerations.**

The City and the Court of Appeal do not root their reading of Section 7901 in the well-established meaning of the statutory terms. Instead, they rely on their own policy views, and the Ninth Circuit’s equally unsupported views, in advocating an interpretation that contradicts the Legislature’s policy choices.

*First*, the decision below rests on the notion that the “public use” of roads and highways is not limited to facilitating the flow of traffic, because streets also serve “important social, expressive, and aesthetic functions” that could be inconvenienced by telecommunications infrastructure. (See

typed opn. 21.) This reading has no basis in law, history, or common sense. As explained above (at pp. 30–31), the only cognizable “public use” of a “public road” is travel: the right to “pass and repass.”

The supposed “social” or “expressive” functions of roads or highways do not expand the “public use of [a] road or highway.” Any “social” or “expressive” functions of roads—as locations for marches, parades, and so forth—are derived from the public use of travel, not separate from it. Cities may not use those derivative functions as a basis to curtail the rights granted by Section 7901.

*Second*, the City and the Court of Appeal ignored the Legislature’s conclusive determination that the installation of communications infrastructure *is* an appropriate use of the right-of-way. A permissible yet unattractive use of the right-of-way thus cannot be deemed to incommode the public use, any more than driving or parking an unattractive vehicle on the City’s streets could be deemed to incommode the public use.

*Third*, the decision below based its expansive view of “incommode the public use of [a public] road or highway” on the Ninth Circuit’s decision in *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716 (*Palos Verdes*). But *Palos Verdes* should carry no weight here. To begin with, the *Palos Verdes* opinion did not cite a single one of this Court’s many precedents construing Section 7901, despite the federal court’s duty to rest its state-law holdings on available California authority. (See, *e.g.*, *Andrade v. City of Phoenix* (9th Cir. 1982) 692 F.2d 557, 559.) Instead, the Ninth Circuit proceeded as if it were writing on a blank slate.

The background of *Palos Verdes* further undercuts its persuasive value. The panel ignored the California authorities even after originally certifying the statutory question to this Court, which refused to decide the question because the state-law issue might “not be determinative in the

federal proceedings.” (Denial of Request for Certification, *Sprint PCS Assets v. City of Palos Verdes Estates* (Cal. Jan. 3, 2008, No. S152481).) Rather than accepting the available guidance from this Court and the Court of Appeal—or certifying the question again when it became clear that the state-law issue *would* be dispositive—the *Palos Verdes* panel ruled on an issue of California law without acknowledging the pertinent California precedents, and did so in a way that directly contradicted the view of a prior Ninth Circuit panel.<sup>3</sup> Given the even division among federal judges on the issue, *Palos Verdes* lacks even persuasive force here.

*Fourth*, the City tries to make *Visalia* stand for nearly unlimited local power to dictate the location and appearance of telecommunications equipment. But *Visalia* stands for no such thing. To begin with, the Visalia City Council explicitly declared that its ordinance was designed to ensure that telegraph “poles and wires shall be placed and maintained so as not to interfere with travel on said highways.” (149 Cal. at 747 [quoting Section 3 of the Visalia ordinance].) No one disputes that localities have power to regulate the size and location of telecommunications equipment to the extent needed to ensure that travel is unobstructed and safe.

The City nonetheless professes to be unable “to see what purpose Visalia’s requirement of uniform 26-foot-high wires could serve other than that city’s aesthetic interest in visual uniformity.” (ABM 16.) The Visalia

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<sup>3</sup>The *Palos Verdes* opinion was issued and published at the same time that a directly contrary published decision of another Ninth Circuit panel was withdrawn and reissued in pertinent part as an unpublished and nonprecedential memorandum. (*Sprint PCS Assets LLC v. City of La Canada Flintridge* (9th Cir. 2006) 435 F.3d 993, superseded by (9th Cir. 2006) 448 F.3d 1067, and (9th Cir. 2006) 182 Fed. App’x. 688.) For a discussion of that case and the issues it raises, which mirror those in this case, see Shonafelt, *Whose Streets? California Public Utilities Code Section 7901 In The Wireless Age* (2013) 35 *Hast. Comm. & Ent. L.J.* 371, 382–88.

City Council could see more clearly when it declared that its rules were aimed at preventing interference with “travel.” (149 Cal. at 747.) Indeed, the height of poles and cables—now a matter within the regulatory authority of the California Public Utilities Commission—has a direct effect on the travel, because wires that are too low can threaten the safety of all travelers.

And so this Court clearly and appropriately held, consistent with the purpose expressed by the Visalia City Council, that the city’s police power allowed it only to “regulate the manner of plaintiff’s placing and maintaining its poles and wires as to prevent unreasonable obstruction of travel,” and “that the ordinance in question was not intended to be anything more, and is nothing more, than the exercise of this authority to regulate.” (149 Cal. at 750–51.)

**C. The Ordinance Is Therefore Preempted By Section 7901.**

The legal standards for determining whether a state law preempts a local one are well established, and at least two forms of preemption apply here.<sup>4</sup>

First, the Ordinance is preempted because it is “contradictory” or “inimical” to Section 7901. (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 898.) Here, the State “has created a right” to place telecommunications equipment in the public right of way “and [has] defined the conditions under which [that right] may be enjoyed.” (*In re Johnston* (1902) 137 Cal. 115, 120.) The only limitation the State has placed on that right is that telecommunications equipment may not

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<sup>4</sup> Accordingly, as T-Mobile explains (Opening Brief on the Merits (OBM) 18–34) and the City does not meaningfully dispute, the Court of Appeal was mistaken to conclude that a state statute cannot preempt a local ordinance unless there is no conceivable set of circumstances under which the two laws would *not* conflict.

“incommode the public use,” which, as established above, means the equipment may not unreasonably obstruct public travel. (*Visalia*, 149 Cal. at 750–51.) By authorizing the City’s Department of Public Works to restrict access to the public right-of-way simply because City officials find particular telecommunication equipment unattractive—a reason that has nothing to do with obstructing travel—the Ordinance “imposes [a] ... burden[.]” on the exercise of a State-granted right that is contradictory to State law. (*Johnston*, 137 Cal. at 120.) The Ordinance is preempted for this reason alone.

Second, the Ordinance is preempted because it addresses a “subject matter [that] has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action.” (*Sherwin-Williams*, 4 Cal.4th at 898.) The Legislature has long occupied the field of the installation of telecommunications equipment along public roads and highways, leaving to localities only the task of ensuring that equipment does not obstruct or endanger public passage. By seeking to ban equipment for purely aesthetic reasons, the Ordinance intrudes upon the regulatory sphere that the Legislature has reserved to itself. Because “it is well settled that local regulation is invalid if it attempts to impose additional requirements in a field which is fully occupied by [State] statute,” the Ordinance is preempted for this reason as well. (*American Financial Services Ass’n v. City of Oakland* (2005) 34 Cal.4th 1239, 1252.)

This Court’s analysis should not be clouded by the mistaken premise of the City and the decision below, *i.e.*, that Section 7901 is a modest state intrusion on local prerogatives that is subject to presumptions against state interference with plenary local power. (See typed opn. 9–10; ABM 13.) That is backwards. Section 7901 operates in areas of statewide, not local, concern. As noted above, it has long been “recognized that the state in its

sovereign capacity has the original right to control all public streets and highways, ... except in so far as that control is relinquished to municipalities by the state.” (*Hopkins*, 160 Cal. at 118.) The State has not “relinquished” control of “public streets and highways” where the installation of telecommunications equipment is concerned. (*Ibid.*) On the contrary, the Legislature explicitly retained that control for itself, and continues to control such matters (most recently with the passage of DIVCA), providing local governments with authority to address only installations that would incommode the “public use of [a] road or highway.” (Pub. Util. Code § 7901.) The Legislature’s retention of control is consistent with this Court’s long-standing recognition that the provision of telecommunications service is itself “a matter of statewide concern.” (*Pacific Telephone v. Los Angeles*, 44 Cal.2d at 280.)

In short, the construction and placement of telecommunications infrastructure along the roads and waters is “a matter of state concern and not a municipal affair.” (*Pacific Telephone v. San Francisco I*, 51 Cal.2d at 768.) As a result, local government power in this area is not plenary, but is limited to what the Legislature has delegated. The Legislature has not delegated to local governments the ability to prohibit telecommunications infrastructure in the right-of-way for purely aesthetic reasons, and hence preemption applies.

**D. Additionally, The Ordinance’s Street Tree Requirement And In-Lieu Fee Are Plainly Preempted As Unlawful Exactions For Use Of The Right-Of-Way.**

Even if Section 7901 permitted local aesthetics-based regulation, one section of the Ordinance is clearly preempted as an unlawful exaction for the use of the right-of-way. San Francisco Public Works Code section 1506 asserts authority to condition a wireless facility permit on the carrier’s

planting and maintaining a “street tree” in the public right-of-way.<sup>5</sup> (S.F. Pub. Works Code § 1506(a), (c).) If a tree cannot be planted nearby without interfering with the wireless equipment or the sidewalk, the City may exact an “in-lieu payment’ into the [Public Works] Department’s ‘Adopt-A-Tree’ fund.” (*Id.* § 1506(b).) That payment is currently \$1906. (See *ibid.* (citing *id.* § 807(f)); see *id.* § 807(f); S.F. Dep’t of Pub. Works, Fee Schedule, at <<http://sfpublicworks.org/sites/default/files/FY16-17%20fEE.pdf>>.) Of course, it would cost even more to plant and perpetually maintain a tree.<sup>6</sup>

Requiring a carrier either to pay for a tree and its maintenance, or to remit nearly \$2000 to the City-wide Adopt-A-Tree Fund, is a straightforward exaction for the privilege of exercising the carrier’s state-granted right under Section 7901. Yet an unbroken line of precedent forbids the imposition of local fees for the exercise of rights granted under Section 7901, because “[t]he very purpose of the grant for the use of State easements [over the roads and highways] was to spare the companies the expense of acquiring easements over privately owned lands ....” (*County of Los Angeles v. General Telephone Co. of Cal.* (1967) 249 Cal.App.2d 903, 907.) Thus, this Court has rejected the contention that a locality can require a telephone company “to pay for the privilege of maintaining its lines and poles.” (*SoCal Telephone*, 32 Cal.2d at 380.) On the contrary, a “telephone

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<sup>5</sup> Forcing a wireless provider to install an additional potential obstruction in the right-of-way turns the proviso in Section 7901 on its head; the statute authorizes local governments to prevent obstruction of the right-of-way, not to increase it.

<sup>6</sup> As explained above (at pp. 15, 24–25), the San Francisco Public Works Code provisions applicable to surface-mounted facilities (to which AT&T is also subject) require carriers to plant and maintain 100 square feet of landscaping in the right-of-way in addition to a street tree, or else pay nearly \$10,000 for general City beautification. (See S.F. Pub. Works Code § 2710(a)(2).)

company may use the streets without paying for the privileges.” (*Williams Communications, LLC v. City of Riverside* (2003) 114 Cal.App.4th 642, 648.)

The in-lieu fees and related in-kind exactions cannot be justified as purported mitigation for aesthetic impacts without effectively overruling these precedents. Every type of telecommunications equipment—and certainly the “poles, posts, piers, ... abutments[,] ... insulators, [and] wires” named in Section 7901—has some aesthetic impact. If municipalities can charge carriers for aesthetic mitigation, then effectively they are charging for access to the right-of-way. That cannot be right, and is yet another reason why the statutory phrase “incommode the public use of the road or highway” does not include the aesthetic effects of telecommunications equipment.

Further, San Francisco’s attempt to shift the costs of its urban beautification program onto telecommunications carriers does not fit within the City’s narrow authority under Government Code section 50030, which restated “existing law” under Section 7901. (Stats. 1996, ch. 300, § 2(b).) The Legislature enacted Section 50030 because cities were exacting illegal franchise fees under the guise of “permit fees.” (Assem. Floor, 3d reading, Sen. Rules Com. analysis of Sen. Bill 1896 (1995–1996 Reg. Sess.) as amended June 27, 1996.)

That provision forbids levying any fee “for general revenue purposes,” and allows only a “permit fee” that “shall not exceed the reasonable costs of providing the service for which the fee is charged.” (Gov’t Code § 50030; see also *Williams Communications*, 114 Cal.App.4th at 654–55; Comment, *As a Matter of Fact, I Do Own the Whole Damned Road: Municipal Impediments to Advanced Telecommunications Services Through Control of the Public Right of Way* (1997) 28 Pacific L.J. 947, 949.) But the City recovers its permit processing costs by other charges—

and the Adopt-A-Tree fund provides no services to wireless providers. Moreover, San Francisco's Street Tree "in-lieu payment," goes into the City's general, City-wide "Adopt-A-Tree" fund. (S.F. Pub. Works Code § 1506(b).) It is precisely the kind of fee that section 50030 forbids.

### **III. PUBLIC UTILITIES CODE SECTION 7901.1 PROVIDES NO BASIS FOR LOCAL AESTHETIC REGULATION.**

The Court of Appeal was correct on one issue: that Public Utilities Code Section 7901.1, which authorizes localities to "exercise reasonable control" over the "time, place, and manner" in which "roads [and] highways" are "accessed," applies "only to construction" activities. (Typed opn. 25.) Likewise, the City concedes that the plain intent of "Section 7901.1 ... was ... to bolster cities' ability to regulate utility *construction* ...." (ABM 28 [emphasis added].)

Section 7901.1 does not, however, provide any basis for aesthetic regulation of telecommunications installations. *First*, the Legislature's selection of the word "accessed," a term that does not appear in Section 7901, underscores that Section 7901.1 is about the construction and maintenance of telecommunications equipment. The statutory term "accessed" refers to the temporary entry of construction crews onto a site, and not to the continuing presence of telecommunication equipment in the public right-of-way.

*Second*, the legislative history confirms this understanding. Section 7901.1 was enacted in response to local complaints that the installation of new equipment "often requires excavation of the streets," and a lack of coordination amongst "eager[]" telecommunications carriers was leading to unnecessary "congestion and traffic disruptions." (Sen. Floor, 3d reading analysis of Sen. Bill No. 621 (1995-1996 Reg. Sess.) as amended Aug. 31, 1995.) This straightforward interpretation of Section 7901.1 is also compatible with the policy underlying Section 7901. As the legislative

materials make clear, the simultaneous deployment of work crews from competing carriers throughout city streets *did* in fact pose the threat of temporary “unreasonable obstructions” to travel. Sections 7901.1 and 7901 therefore work in tandem to further the State’s longstanding policy goals.

Thus, Section 7901.1 merely recognized the authority of municipalities to mitigate temporary inconvenience or obstructions to travel associated with construction activities. Aesthetic regulation of the equipment to be installed exceeds the limited authority recognized in Section 7901.1, and the City correctly does not argue otherwise here.<sup>7</sup>

**IV. SUBJECTIVE AESTHETIC RESTRICTIONS WOULD HINDER TELECOMMUNICATIONS DEPLOYMENT AND UNDERCUT THE STATEWIDE SYSTEM THAT SECTION 7901 WAS DESIGNED TO PROMOTE.**

If the Court were to affirm the decision below, other municipalities would undoubtedly follow the City’s lead in order to favor local residents’ concerns over the State’s established policy of encouraging telecommunications development. And there is no meaningful limit if a municipality may exercise its subjective judgment about the aesthetics of every installation of telecommunications equipment. Facilities could be barred from some areas because they are already considered beautiful, and

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<sup>7</sup>In its briefs, T-Mobile argues that the Ordinance violates Section 7901.1 by discriminating against wireless carriers in favor of, for example, landline carriers. As part of this argument, T-Mobile maintains that Section 7901.1 applies not only to access for construction purposes, but also to the ongoing occupation of the right-of-way by telephone equipment. Regardless of T-Mobile’s more expansive reading of Section 7901.1, any such discrimination by a municipality among and between telephone corporations would be barred by Section 7901 itself. This Court long ago held that a municipality’s police power would not permit it to “exclude a telegraph company from such use of its streets as was expressly authorized by” the statute. (*Hopkins*, 160 Cal. at 118.) The grant to “corporations” in the plural under Section 7901 is no coincidence: Section 7901 is “a grant to all [telephone or telegraph] corporations” as a “class.” (*Id.* at 122.)

from other areas on the ground that they are undergoing beautification projects, and from the least attractive areas in order to keep their aesthetic character from getting worse: in other words, telecommunications equipment could arguably be barred from any neighborhood, in any city. That is exactly what the Ordinance does in authorizing City functionaries to reject any application to install wireless equipment based on a determination that the equipment would “significantly detract from any of the defining characteristics of” even a “neighborhood” that is “Unprotected.” (S.F. Pub. Works Code § 1502 [“Tier A Compatibility Standard”].)

The deployment of new technologies and services will be substantially impeded and inevitably delayed if the grant of rights under Section 7901 can evaporate whenever a local government objects to the appearance of telecommunications equipment. The prolonged regulatory process that would ensue would postpone consumers’ access to cutting-edge services while depriving some consumers of new telecommunications technologies altogether. The increased regulatory burden also would discourage telecommunications corporations from deploying fiber and installing upgraded wireless facilities. This result would squarely contradict the explicit state policy to “increase investment in broadband infrastructure and close the digital divide.” (Pub. Util. Code § 5810(a)(2)(E).)

Moreover, permitting localities to hinder or forbid the installation of telecommunications infrastructure based on subjective aesthetic concerns would fragment the uniform statewide telecommunications system that Section 7901 was designed to encourage. (See *Pacific Telephone I*, 51 Cal.2d at 774–75.) Some cities would decide that most equipment cabinets or wireless antennas fall short of their aesthetic standards. Some would welcome new services and the equipment that delivers them. And some would fall in between.

No such fragmentation arises from the objective criteria used to determine when an installation would “unreasonably obstruct and interfere with ordinary travel.” (*Visalia*, 149 Cal. at 750.) That is a matter of measuring clearances and imposing appropriate permit conditions to minimize interference during the construction process.

As the City all but acknowledges (ABM 34–35), aesthetic regulation is at bottom a local government effort to slow the rate of telecommunications deployment on public streets in order to satisfy the highly localized aesthetic preferences of politically powerful residents. That motivation contradicts the well-established state policy of encouraging the rapid “expansion of telecommunications networks.” (Stats. 1996, ch. 300, § 2.) Any such rebalancing of communications and aesthetic interests should come from the Legislature, not from a sweeping judicial reinterpretation of statutory language that has been materially unchanged since 1850.

**V. THE IMPOSITION OF AESTHETIC LIMITATIONS ON TELECOMMUNICATIONS EQUIPMENT IN THE RIGHT-OF-WAY IS A MATTER FOR THE LEGISLATURE.**

If aesthetic considerations are to limit the statewide rights granted to telephone corporations by Section 7901, that policy judgment and its implementation are matters for the Legislature. Should the Legislature see the need, it can add aesthetic limitations to Section 7901 and institute statewide criteria and standards. And the Legislature can select the best state agency to implement those standards—perhaps the Department of Transportation, which oversees scenic highways, or the California Public Utilities Commission, which regulates the undergrounding of utility lines. But if this Court rules that municipalities have that power, the result will be a patchwork of subjective regulations that differ from city to city and neighborhood to neighborhood.

The balance chosen by the Legislature placed the continuing statewide development and deployment of telecommunications above all interests in the public roads and highways other than the recognized “public use” of travel. The Legislature reaffirmed this choice in enacting DIVCA. Overriding cities’ concerns about the installation of equipment cabinets (see p. 22–23, *supra*), the Legislature promoted the “ubiquitous” “development and deployment of ... state-of-the-art services” necessary to “allow California businesses and residents to compete in national and international markets.” (Stats. 1996, ch. 300, § 2(a)(1)–(2).) State government has long emphasized the “commercial” functions of roads over aesthetic values (Rep. of the Com. for Scenic Preservation of State Highways (1931) at p. 8, 13)—except in exceptional circumstances, such as scenic highways, to be identified by the Legislature or state agencies exercising delegated legislative power. As the Committee for Scenic Preservation of State Highways noted long ago, however, as important as it may be “to maintain scenic beauties ... to bring people to California, it is of greater importance to open up business and employment opportunities that will keep them ....” (*Id.* at p. 22 [emphasis added].)

Interpreting Section 7901 to give municipalities the unfettered right to deny utility installations based on subjective aesthetic judgments (as the Ordinance does) would eviscerate the statewide telecommunications system that the Legislature intended, *i.e.* one unhindered by the vagaries of municipal regulation. Instead, the courts will be flooded with “as applied” challenges to local aesthetics ordinances, on an installation-by-installation basis, and the local courts will become the regulators and arbiters of aesthetics under Section 7901, without any guarantee of consistency from court to court. If aesthetics are to become part of the scheme under Section 7901, the solution is for the Legislature to change the law and provide uniform aesthetic criteria. But municipalities cannot unilaterally adopt their

own competing priorities. Nor should the Court alter the balance the Legislature has settled upon. San Francisco's parochial concerns must yield unless and until the Legislature determines otherwise.

### CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: May 11, 2017

Respectfully submitted.

Hans Germann  
(admission *pro hac vice* pending)  
MAYER BROWN LLP  
71 South Wacker Drive  
Chicago, IL 60606  
(312) 782-0600

Donald M. Falk (SBN 150256)  
Samantha Booth (SBN 298852)  
MAYER BROWN LLP  
Two Palo Alto Square  
3000 El Camino Real  
Palo Alto, CA 94306  
(650) 331-2000

*Attorneys for Amici Curiae*

# **ATTACHMENT**

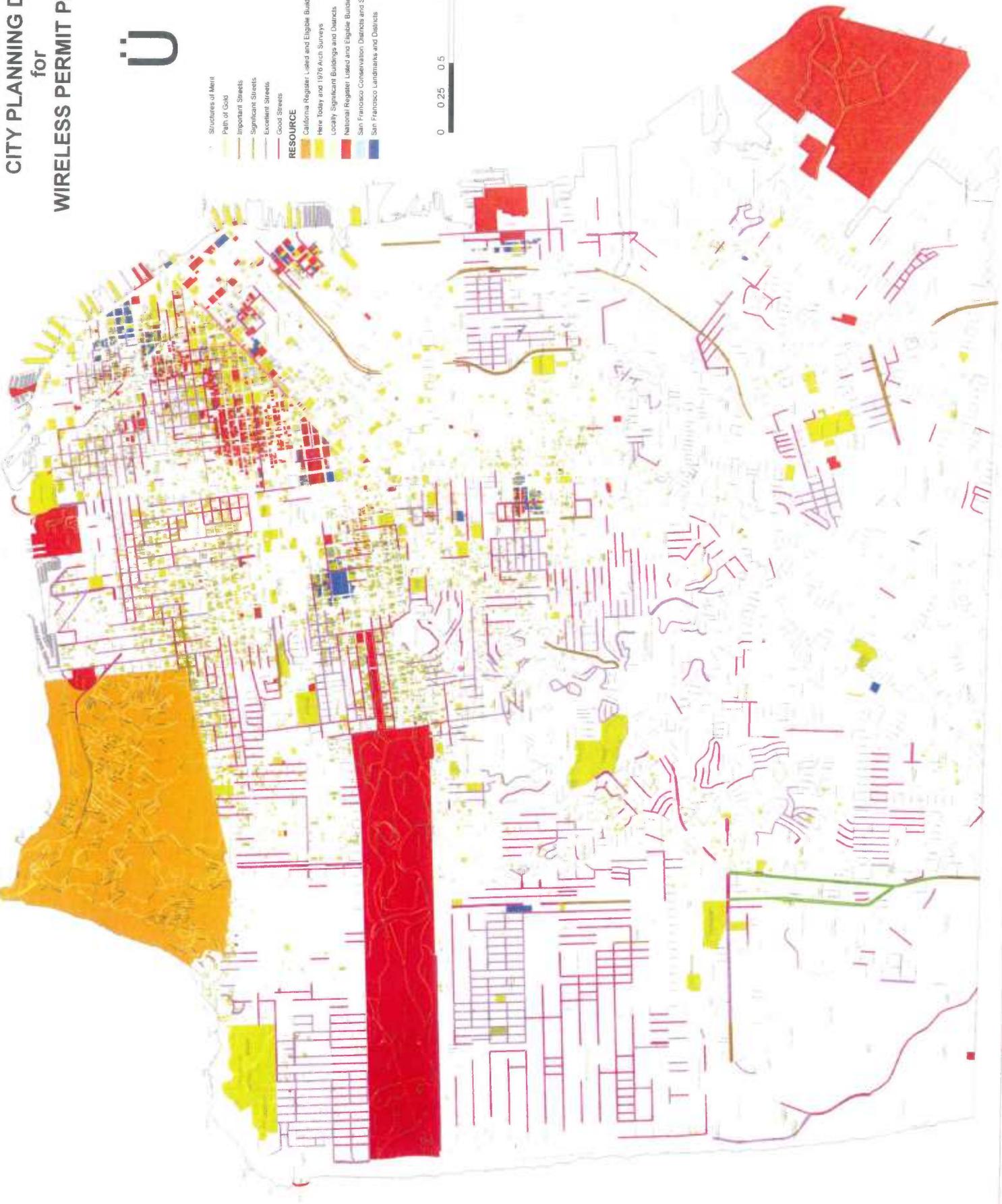
# CITY PLANNING DATA for WIRELESS PERMIT PROJECT



- Structures of Merit
- Path of Gold
- Important Streets
- Significant Streets
- Excellent Streets
- Good Streets

**RESOURCE**

- California Register Listed and Eligible Buildings and Districts
- Historic Landmarks
- Locally Significant Buildings and Districts
- National Register Listed and Eligible Buildings and Districts
- San Francisco Conservation Districts and Significant Buildings
- San Francisco Landmarks and Districts



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Dated: May 11, 2017

Respectfully submitted.

/s/ Donald M. Falk  
Donald M. Falk (SBN 150256)  
MAYER BROWN LLP

*Attorney for Amici Curiae*

I, Kristine Neale, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is: Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306-2112. On May 11, 2017, I served the foregoing document(s) described as:

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Matthew John Gardner  
Megan L. Brown  
Meredith S. Singer  
Joshua S. Turner  
Wiley Rein LLP  
1776 K Street, NW  
Washington, DC 20006

Martin Lee Fineman  
Davis Wright Tremaine LLP  
505 Montgomery Street, Suite 800  
San Francisco, CA 94111

William Kirk Sanders  
Dennis Jose Herrera  
Office of the City Attorney  
One Dr. Carlton B. Goodlett Place  
City Hall, Room 234  
San Francisco, CA 94102

T. Scott Thompson  
Daniel P. Reing  
Davis Wright Tremaine LLP  
1919 Pennsylvania Avenue, NW  
Suite 800  
Washington, DC 20006

Erin Brianna Bernstein  
Christine Bohrer Van Aken  
Office of the City Attorney  
1390 Market Street, 7th Floor  
San Francisco, CA 94102

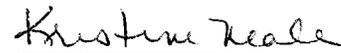
California Courts of Appeal  
First Appellate District, Division Five  
350 McAllister Street  
San Francisco, CA 94102

Hon. James McBride  
San Francisco Superior Court  
400 McAllister Street  
San Francisco, CA 94102

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\_\_\_\_\_  
Kristine Neale