No. S238001

IN THE SUPREME COURT OF THE STATE 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 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

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

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.*[1]

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

[1] 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. & Commc'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.

/s/ Donald M. Falk

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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 I*"]; *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)).[1] 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. & Commc'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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[1] 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.)