

Case No. S238001

SUPREME COURT
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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Jorge Navarrete Clerk

Deputy

T-MOBILE WEST LLC, et al.,

Plaintiffs and Appellants,

vs.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants and Respondents.

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

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

**APPLICATION OF LEAGUE OF CALIFORNIA CITIES, CALIFORNIA
STATE ASSOCIATION OF COUNTIES, THE INTERNATIONAL
MUNICIPAL LAWYERS ASSOCIATION, AND SCAN NATOA, INC. FOR
LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF CITY AND
COUNTY OF SAN FRANCISCO, ET AL.; PROPOSED AMICI CURIAE
BRIEF**

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APPLICATION TO FILE AMICUS CURIAE BRIEF

I. INTRODUCTION

Pursuant to California Rules of Court, Rule 8.520(f), the League of California Cities (the “League”), the California State Association of Counties (“CSAC”), the International Municipal Lawyers Association (“IMLA”) and the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors (“SCAN NATOA”) (collectively, “*Amici*”) hereby submit this application to file an *amicus curiae* brief in support of Defendants and Respondents City and County of San Francisco and the City and County of San Francisco Department of Public Works (collectively, the “City”).

II. IDENTITY OF AMICI CURIAE, STATEMENT OF INTEREST, AND EXPLANATION OF HOW THIS BRIEF WILL ASSIST THE COURT

The League is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

CSAC is a non-profit corporation. The membership consists of 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this is a matter affecting all counties.

IMLA is a non-profit, non-partisan professional organization consisting of more than 2500 members. The membership is comprised of local government entities, including cities, counties and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, as well as state supreme and appellate courts.

SCAN NATOA has a history spanning over 20 years representing the interests of over 300 members consisting primarily of local government

telecommunications officials and advisors located in California. SCAN NATOA has identified this case as a matter of significance to its members.

Amici have an interest in preserving local governments' ability to engage in review processes that allow for intelligent and informed management of the public rights of way, including but not limited to, aesthetic review of telecommunications facilities. Cities and counties throughout California spend considerable time, money, and effort to plan and maintain rights of way that, in contrast to Appellants' allegations, **both** achieve the utilitarian purposes (*e.g.*, transmission of utility services and creation of public paths of travel) **and** serve as aesthetically pleasing public spaces (*e.g.*, through the placement of pedestrian walkways, landscaped parkways, landscaped medians, imposition of utility undergrounding requirements, sign programs, street sweeping requirements, and other means).

Because rights of way are varied and diverse spaces – in terms of available space, surrounding land uses and character, level of congestion, and a variety of other factors – they do not lend themselves to “one size fits all” planning approaches that Appellants advocate. Rather, local regulatory authority is designed to ensure that, in the context of the unique physical characteristics of each proposed use of the rights of way, the government respects both the important rights of telephone corporations and the rights and goals of other uses of, and users in, the rights of way. That authority is

not used to prohibit the use of the public rights of way, or to abridge any state-conferred rights of telecommunications applicants; it is used to harmonize the interest and rights of telecommunications applicants with cities' and counties' other legitimate objectives, which include maintaining the quality and experience of travelling along, and being within, the rights of way.

Amici and their counsel are familiar with the issues in this case, and have reviewed the lower court proceedings and the briefs on the merits filed with this Court. Counsel in this case for *Amici* has represented multiple public agencies in actions involving local authority to regulate telecommunications facilities. As statewide and nationwide organizations with considerable experience in this field, *Amici* believe that they can provide important perspective on the issues before the Court.

III. IDENTIFICATION OF AUTHORS AND MONETARY CONTRIBUTIONS

Pursuant to Rule 8.520(f)(4), of the California Rules of Court, the only persons who played a role in authoring the accompanying brief, in whole or in part, are the attorneys listed in the caption of this application, Jeffrey T. Melching and Ajit S. Thind of Rutan & Tucker, LLP. No parties to this case (or entities who are not parties to this case other than the listed attorneys) authored the brief in whole or in part. The undersigned prepared and

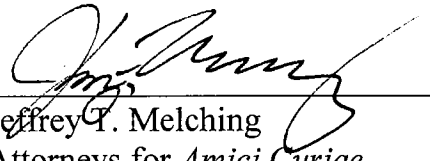
authored the brief *pro bono*, and no persons or entities were paid for the preparation or submission of the accompanying brief.

Respectfully submitted,

Dated: May 11, 2017

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AMICUS CURIAE BRIEF

I. INTRODUCTION

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Because rights of way are varied and diverse spaces — in terms of available space, surrounding land uses and character, level of congestion, and a variety of other factors — they do not lend themselves to “one size fits all” planning approaches that Appellants advocate. Rather, local regulatory authority is designed to ensure that, in the context of the unique physical characteristics of each proposed use of the rights of way, the government respects both the important rights of telephone corporations and the rights and goals of other uses of, and users in, the rights of way. That authority is not used to prohibit the use of the public rights of way, or to abridge any state-conferred rights of telecommunications applicants; it is used to harmonize the interests and rights of telecommunications applicants with

cities' and counties' other legitimate objectives, which include maintaining the quality and experience of travelling along, and being within, the rights of way.

III. POINTS TO BE ARGUED BY AMICI

The Court should affirm the Court of Appeal's holding that local governments have the authority to exercise discretion in the regulation of telecommunications facilities, that such exercise of discretion is consistent with Public Utilities Code section 7901 ("Section 7901"), and that such discretion may take into account aesthetic matters. In addition, the Court should affirm the Court of Appeal's ruling that Public Utilities Code section 7901.1 ("Section 7901.1") applies only to temporary construction activities.

IV. FACTUAL BACKGROUND

Amici agree with and adopt the Factual Background in the Answering Brief filed by the City.

V. THE PUBLIC RIGHTS OF WAY MUST ACCOMMODATE A DIVERSE SET OF FACILITIES AND INTERESTS

The rights of way are crowded public spaces. (See *San Francisco Beautiful v. City & County of San Francisco* (2014) 226 Cal.App.4th 1012, 1025.) They are occupied by streets, sidewalks, curbs, and gutters; cars, bicycles, and pedestrians; trees, grass, landscaping, and irrigation equipment; overhead and underground transmission lines for power, telephone, cable television and internet services; water, sewer, and storm drain pipes and

infrastructure; signage, signal, and other traffic control infrastructure; and fire hydrants, parking meters, transit shelters, news racks, advertising kiosks, and bicycle racks. The purposes served by these facilities are equally diverse. They include transportation, communication, information, commerce, public health, and public safety.

In addition to those utilitarian purposes, the public rights of way are also important community spaces. They are arguably the most utilized public spaces in many of our lives. Recognizing this, cities and counties throughout California have devoted considerable thought and resources to make travel along the public rights of way both useful and pleasing. Examples of those efforts include the establishment of public art programs, the installation of meandering sidewalks and decorative landscaping, the formation of undergrounding districts, and the imposition of limitations on billboard advertising.

Cities and counties are the agencies primarily responsible for managing the rights of way to ensure that all of the uses, infrastructure, and interests implicated in these public spaces are accommodated. The Legislature has placed limitations, but not prohibitions, on that management authority to ensure that local regulations do not unduly hinder the deployment of telecommunications infrastructure. The rules are simple: (1) local agencies may not prohibit telephone corporations from using the public rights of way (Pub. Util. Code § 7901); (2) local agencies may regulate the

relationship between a public utility and the general public in matters affecting the health, convenience, and safety of the general public, including the location of the poles, wires, mains, or conduits on, under, or above public streets (Pub. Util. Code § 2902), (3) local agencies may regulate the time, place, and manner in which the public rights of way are accessed (Pub. Util. Code § 7901.1), and (4) local agencies may regulate telephone corporations' infrastructure to ensure that it does not incommode the public use of the rights of way (Pub. Util. Code § 7901).

Following those mandates, cities and counties throughout California have created local regulatory processes to manage, not prohibit, the deployment of multiple generations of wireless infrastructure by ensuring that installations occur in a manner that best harmonizes with the other interests at play in the public rights of way. In San Francisco, this process has yielded permit approvals in 98% of the applications received. A survey of other cities in California revealed similar results: dozens of cities have ordinances that regulate aesthetics for telecommunications facilities in the public rights of way, and the overwhelming majority of all applications have been granted. (See, e.g., Pasadena Municipal Code § 12.22 *et seq.*; Irvine Municipal Code § 2-37.5-1 *et seq.*) Permit denials occur only as a last resort, in outlier cases. As-applied review of those denials is appropriate to ensure that the local agency decisions comply with the legislative mandates.

Appellants nevertheless claim the City's ordinance is so "burdensome" as to run afoul of an asserted paramount State interest in the deployment of new and emerging technologies. The claim of burden is largely unsupported by facts, and the assertion of a paramount state interest is overstated. The overwhelming approval rate for applications to place telecommunications facilities in the right of way belies the Appellants' naked assertion of undue burden in the permit application, review, and approval processes. If any burden is imposed on a telephone corporation, it is through the denial of an application — the appropriate subject of an as-applied challenge to the City's ordinance, not a facial challenge. As to the state's interest in new technologies, *Amici* acknowledge the existence of state-conferred rights, but maintain that the Legislature has charged local agencies with a responsibility to reconcile those rights with other competing important uses and purposes attendant to the right of way.

As detailed below, the City's ordinance balances the Appellants' state franchise rights with the multitude of other right of way management interests, in a manner that comports with all applicable laws.

VI. LOCAL AGENCIES MAY ADOPT REVIEW PROCESSES THAT ALLOW FOR INTELLIGENT AND INFORMED MANAGEMENT OF THE PUBLIC RIGHTS OF WAY, INCLUDING BUT NOT LIMITED TO AESTHETIC REVIEW OF TELECOMMUNICATIONS FACILITIES

Appellants contend that "the Court of Appeal's decision. . . allows municipalities to impose unique burdens on particular communications

services . . .[and]. . . allows municipalities to stand in the way of progress by enacting discriminatory regulations” that conflict with Section 7901. (Appellants’ Opening Brief [“AOB”], p. 34.) As the Court of Appeal found, Appellants’ view is contradicted by the California Constitution, the Public Utilities Code, case law, and the plain text and application of the City’s ordinance.

A. Under The California Constitution, The City May Regulate Public Utility Infrastructure In Order To Protect The Public Health, Safety, And Welfare

The root of local agency authority is the Constitutional police power. Specifically, California Constitution, article XI, section 7, states “[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” Under that power, local agencies may protect the public health, safety, and welfare of its residents. Avoidance of aesthetic degradation is one unquestionable facet of the police power:

An attempt to define [the police power’s] reach or trace its outer limits is fruitless, for each case must turn on its own facts. . . . The concept of public welfare is broad and inclusive The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled.

(Berman v. Parker (1954) 348 U.S. 26, 32-33; see also Metromedia Inc. v. City of San Diego (1980) 26 Cal.3d 848, 861; see, e.g., Landgate, Inc. v.

California Coastal Comm'n. (1998) 17 Cal.4th 1006, 1023 [aesthetic preservation is “unquestionably [a] legitimate government purpose”]; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 881-882 [aesthetic regulations fall within police power].)

Consistent with those authorities, California Constitution article XI, section 9, recognizes that a city may, under its organic law, regulate persons or corporations that furnish its inhabitants with “means of communication.” Thus, the California Constitution allows cities and counties to impose regulations, including discretionary and aesthetic regulations, on utilities so long as those regulations are “not in conflict with general laws.” (Cal. Const., art. XI, § 7; see also Cal. Const., art XII, § 8 [“A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the [California Public Utilities] Commission.”].)

As discussed below, to ensure that local regulations do not “conflict with general laws” the Legislature, state courts, and federal courts, have carefully preserved local regulatory authority over matters involving the location and manner of proposed fixtures in the rights of way.

B. Public Utilities Code Section 2902 Confirms Local Agencies' Authority To Regulate Matters Affecting The Health, Convenience, And Safety Of The General Public

The Legislature intended that a state-conferred franchise to use the rights of way coexist with local regulations. For example, Public Utilities Code section 2902 (“Section 2902”) provides:

[municipal corporations may] regulate the relationship between a public utility and the general public in matters affecting the health, *convenience*, and safety of the general public, including matters such as the use and repair of public streets by any public utility, *the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets*, and the speed of common carriers operating within the limits of the municipal corporation.

(Pub. Util. Code, § 2902, emphasis added.) While Section 2902 “does not confer any powers upon” local agencies, it does enumerate the “[pre-] existing municipal powers [that] are retained by the municipality” — including the power to regulate telecommunications fixtures for the convenience of the general public. (*Southern Cal. Gas Co. v. City of Vernon* (1995) 41 Cal.App.4th 209, 217.)

In *City of Huntington Beach v. Public Utilities Commission* (2013) 214 Cal.App.4th 566, the Court of Appeal reviewed Section 2902 in the context of wireless facilities and specifically found that “municipal corporations may not ‘surrender to the [CPUC] its powers of control to supervise and regulate the relationship between a public utility and the general public in matters affecting the health, convenience, and safety of the general public’.” (*Id.*, at 590.) Those powers flow from California Constitution, article XI, section 7, and Section 2902 confirms that the Public Utilities Code does not require the surrender of the City’s authority.

C. Public Utilities Code Section 7901 Does Not Prohibit Consideration of Aesthetic Issues.

Section 2902's right to regulate for the protection of the public convenience is echoed in Section 7901, which applies specifically to telecommunications facilities. Under Section 7901, telecommunications companies may only operate "in such manner and at such points as not to incommode the public use of the road or highway." (*County of Los Angeles v. Southern California Tel. Co.* (1948) 32 Cal.2d 378, 384; see also *Pacific Tel. & Tel. Co. v. City of Los Angeles* (1955) 44 Cal.2d 272, 277 ["the state franchise held by Pacific gave it the right to construct and maintain its lines and equipment in the streets"].) The carrier's right to operate conferred under Section 7901 is qualified. It may not be exercised in a "manner" and at "points" that "incommode" the "public use of the road."¹ Neither the plain language nor the structure of Section 7901 indicate an intent to strip local governments of the pre-existing municipal powers to regulate public utilities that is provided by the California Constitution and acknowledged in Section 2902.

Appellants nevertheless seek to unreasonably limit the scope and meaning of Section 7901 by claiming that the words "incommode the public

¹ The term "incommode" means to "subject to inconvenience or discomfort; to trouble, annoy, molest, embarrass, inconvenience" or "[t]o affect with inconvenience, to hinder, impede, obstruct (an action, etc.)" (7 Oxford English Dict. (2d ed. 1989) p. 806.)

use of the road or highway” are limited to the obstruction of travel alone. (AOB, pp. 45-47.) This utilitarian view of the “use” of the rights of way is too narrow. As the Ninth Circuit Court of Appeals has acknowledged, in addition to their utilitarian purposes “it is a widely accepted principle of urban planning that streets may be employed to serve important social, expressive, and aesthetic functions.” (*Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, 723-724 (“*Palos Verdes Estates*”), citing Ray Gindroz, *City Life and New Urbanism* (2002) 29 *Fordham Urb. L.J.* 1419, 1428 [“A primary task of all urban architecture and landscape design is the physical definition of streets and public spaces as places of shared use.”]; Kevin Lynch, *The Image of the City* (1960) p. 4 [“A vivid and integrated physical setting, capable of producing a sharp image, plays a social role as well. It can furnish the raw material for the symbols and collective memories of group communication.”]; Camillo Sitte, *City Planning According to Artistic Principles* (Rudolph Wittkower ed., Random House 1965) (1889) pp. 111-12 [“One must keep in mind that city planning in particular must allow full and complete participation to art, because it is this type of artistic endeavor, above all, that affects formatively every day and every hour of the great mass of the population”].) On this point, the Ninth Circuit continued “[a]s Congress and the California Legislature have recognized, the ‘public use’ of the roads might also encompass recreational functions.” (*Palos Verdes Estates, supra*, 583 F.3d at 723-724, *Pub. Util.*

Code § 320 [burying of power lines along scenic highways]; 23 U.S.C. § 131(a) [regulation of billboards near highways necessary “to promote . . . recreational value of public travel . . . and to preserve natural beauty”].)

The Ninth Circuit has it right. The rights of way are used by the public for more than mere travel, and therefore the public’s use can be “incommoded” by more than mere obstruction of travel.

D. State and Federal Case Law Supports the City’s Exercise of Regulatory Authority Over Telecommunication Facilities.

California and federal cases lend further support to the City’s exercise of regulatory authority over telephonic facilities. In *Western Union Telegraph Company v. City of Visalia* (1906) 149 Cal. 744, this Court upheld a municipal requirement that all telephone poles be a uniform height of 26 feet, and that the poles be made available to the city for purposes of hanging fire alarms and police wires. (*Id.* at 748.) Neither of those requirements directly impacted the ability to use the roads for travel and traffic. It is, after all, the base of the poles, and not their height or the equipment strung on them, that affects travel and traffic. The uniform height regulation was plainly aesthetic, and the alarm and police wire regulations were plainly for public safety purposes that had nothing to do with “obstruction” of traffic along the roads in Visalia. Yet both of those purposes were upheld by this Court as a proper exercise of the city’s regulatory authority under Section 7901’s predecessor statute. (*Id.* at 751.)