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Case No. S238001

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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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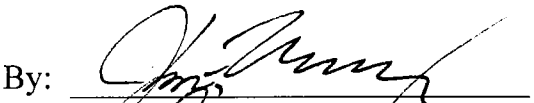
By: 

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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

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[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.)

In *Pacific Telephone & Telegraph Company v. City & County of San Francisco* (1961) 197 Cal.App.2d 133 ("*San Francisco II*"), San Francisco attempted to prohibit outright the installation of telecommunications fixtures on the basis that they "incommode" the public use. (*Id.* at 146.) In striking down the prohibition, the court acknowledged that "the city controls the particular location of and manner in which all public utility facilities, including telephone lines, are constructed in the streets and other places under the city's jurisdiction" and that "the telephone company concedes the existence of the power in the city to extract these requirements." (*Ibid.*, citing *Pacific Tel. & Tel. Co. v. City & County of San Francisco* (1959) 51 Cal.2d 766, 773-774 ["*San Francisco* "].)

In light of the City's abundant regulatory authority, the *San Francisco II* court found it "absurd to contend that the installation of telephone poles and lines, ***under the control by the city of their location and manner of construction***, is such an 'incommodation' as to make [the predecessor to Section 7901] inapplicable." (*San Francisco II*, *supra*, 197 Cal.App.2d at 146, emphasis added; see also *id.* at 152 ["because of the state concern in communications, the state has retained to itself the broader police power of granting franchises, leaving to municipalities the narrower police power of controlling the location and manner of installation."]; *City of Petaluma v. Pacific Tel. & Tel. Co.* (1955) 44 Cal.2d 284, 287 [recognizing the power of a city to regulate the location and manner of installation of telephone lines

and equipment].) Thus, *San Francisco II* confirms that local governments may properly regulate the location and manner of telecommunications facilities.

The most recent case to address local authority under California law over telecommunications facilities and the definition of "incommode" is *Palos Verdes Estates*, *supra*, 583 F.3d at 726, a case that was heavily relied on by the Court of Appeal in the case at bar. (See *T-Mobile West LLC v. City and County of San Francisco* (2016) 3 Cal.App.5th 334, 353-355.) In *Palos Verdes Estates*, a wireless telecommunications provider claimed, *inter alia*, that local aesthetic regulations of wireless antennas violated the Federal Telecommunications Act, 47 U.S.C. section 151 *et seq.*, because such regulations are not permitted under "applicable local standards." (*Id.* at 722, citing 47 U.S.C. § 332, subd. (c)(7)(B)(iii).) Like the City's Ordinance, the ordinance in *Palos Verdes Estates* provided that permit applications for wireless communication facilities may be denied for "adverse aesthetic impacts from the proposed time, place, and manner of use of the public property" — a clearly discretionary evaluation. (*Id.* at 720.) To resolve whether aesthetic regulation was permissible, the Ninth Circuit was required to determine whether the local regulations were consistent with state law, including Section 7901 and Section 7901.1. (*Id.* at 721-722.)

The Ninth Circuit initially requested guidance from this Court on the question, but this Court declined the request. (*Palos Verdes Estates*, *supra*,

583 F.3d at 721.) In the absence of guidance, the Ninth Circuit undertook the task of predicting "how the California Supreme Court would resolve the issue," (*id.* at 722, n.2) and held "the California Constitution gives the City the authority to regulate local aesthetics, and neither section 7901 nor section 7901.1 divests it of that authority." (*Id.* at 721-722).

Elaborating on its analysis of Section 7901, the Ninth Circuit found that telecommunications fixtures can result in aesthetic degradation that "incommodes" the use of the rights of way, stating:

> The experience of traveling along a picturesque street is different from the experience of traveling through the shadows of a Wireless Communications Facility, and we see nothing exceptional in the City's determination that the former is less discomforting, less troubling, less annoying, and less distressing than the latter. After all, travel is often as much about the journey as it is about the destination.

(*Palos Verdes Estates*, *supra*, 583 F.3d at 723.) Consistent with that reasoning, the court found that urban planning requires local decision making that reflects particular issues of local concern such as neighborhood personality. (*Id.* at 724.) The court further observed "it is a widely accepted principle of urban planning that streets may be employed to serve important social, expressive, and aesthetic functions." (*Id.* at 723-724.)

The Ninth Circuit thus held that under California law, local governments may regulate (and deny) telecommunications permit applications based on aesthetic considerations and reject "aesthetically offensive" attempts to utilize the right of way. (*Id.* at 724-725; see also *GTE*

Mobilenet of Calif. Ltd. Partnership v. San Francisco (N.D. Cal. 2006) 440 F.Supp.2d 1097, 1107 ["[T]he City has the authority to regulate the placement and appearance of telecommunications equipment installed on its public rights of way"].) While affirming the ability to regulate on the basis of aesthetics, the Ninth Circuit also warned that local agencies cannot "run roughshod over WCF permit applications simply by invoking aesthetic concerns" and would have to demonstrate substantial evidence for the decision and comply with federal law. (*Palos Verdes Estates*, *supra*, 583 F.3d at 725.)

Appellants attempt to minimize *Palos Verdes Estates* as "non-binding and controversial Federal authority." (AOB, p. 46.) *Amici* are mindful that "decisions of the federal courts interpreting California law are persuasive but not binding." (*Mesler v. Braggs Mgmt. Co.* (1985) 39 Cal.3d 290, 299.) However, while the decision is not binding, it is nevertheless entitled to great weight. (See *Adams v. Pacific Bell Directory* (2003) 111 Cal.App.4th 93, 97 ["although not binding, we give great weight to federal appellate court decisions"].)

Appellants also suggest that *Palos Verdes Estates* "directly conflicts" with the Ninth Circuit decision in *Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge* (9th Cir. 2006) 182 F. App'x 688, 690-91. (AOB, p. 47, fn. 15.) Appellants ignore that *Sprint PCS Assets* is an unpublished opinion and is not citable. In fact, the *Palos Verdes Estates* court noted that the

opinion in *Sprint PCS Assets* was not "a published opinion on which we may rely." (*Id.* at 722, n. 2.) More importantly, *Palos Verdes Estates* was decided by the Ninth Circuit ***three years later*** in 2009 and remains good law.

VII. THE DEPLOYMENT OF TELECOMMUNICATIONS INFRASTRUCTURE IS NOT THE ONLY IMPORTANT STATE INTEREST IMPLICATED IN THE USE AND MANAGEMENT OF THE RIGHTS OF WAY.

Amici readily acknowledge that the State has expressed an interest, dating back to the 19th Century, in ensuring the deployment of telecommunications infrastructure by granting telephone corporations rights to use the rights of way. But it is a false dichotomy to imply, as Appellants do, that local agencies must choose between respecting telephone corporations' state franchise rights and protecting other interests (such as aesthetic interests). To the contrary, the law and common sense both favor intelligent and informed decisions that accommodate the interests of Appellants, other utility providers, and other users of the rights of way.

The plain text of Section 7901 undermines Appellants' attempt to establish the deployment of new technologies as the paramount interest at stake in the use of the rights of way. Indeed, nothing in that statute indicates an intent to provide new or special benefits to "new" technologies:

> Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may 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.

The franchise right granted in Section 7901 was originally created in the 19th Century. While it admittedly applies to the deployment of new telecommunications technologies, the Legislature has not revised the franchise right to expand its scope. The rights available to Appellants are largely ***the same*** as those afforded to telegraph services, wireline telephone services, and the prior four generations of wireless telephone services. While the advent of 5G and the anticipated increase in applications for the use of the rights of way may have prompted the City to update its regulations, the City's update appropriately ensures that the multitude of interests at play in the rights of way continue to be advanced in harmony with one another.

The Court should disregard Appellants' erroneous efforts to suggest that the Legislature somehow favors the deployment of new technologies at the expense of other interests, even when the compromise of other interests is not necessary. First, Appellants mistakenly rely on citation to *San Francisco I*, *supra*, 51 Cal.2d 766. In that case, this Court rejected the notion that a local government could require a local franchise for a telephone company to operate, but acknowledged the city's authority to enact a permit process and regulate "the particular location and manner" in which public utilities are constructed. (*Id.* at 773-774.). Here, the City does not do what *San Francisco I* forbids (require a franchise), but does do what *San Francisco*

I allows (regulating the particular location and manner of wireless facility installations in the rights of way).

Second, Appellants cite to *Pacific Telephone & Telegraph Company v. City of Los Angeles* (1955) 44 Cal.2d 272 ("*Los Angeles*") as evidence that Section 7901 is designed to promote innovation. *Los Angeles* has little to do with innovation; rather, the central dispute was whether "the grant of a state franchise to use highways and other public places in operating a telephone system necessarily contemplates that new streets will be opened and old ones lengthened as undeveloped areas become settled" (*id.* at 277) and whether the telephone corporation had forfeited its rights under the predecessor to Section 7901 by way of a franchise ordinance (*id.* at 278). As an aside, the city argued Section 7901's predecessor statute did not allow for the telephone corporation to transmit anything other than "articulate speech" through its lines. (*Id.* at 281.) Here, there is no dispute that Appellants' 5G technology is covered by Section 7901; nonetheless, any rights that Appellants have to construct are still limited by the rights of local agencies to prevent incommoding of public use of roads and highways.

Third, Appellants claim *San Francisco II* "interpreted Section 7901 to promote innovation and preclude discrimination against new communications systems." (AOB, p. 40.) Appellants overstate the scope of the opinion, which instead dealt with the city's attempt to outright prohibit the installation of telecommunications fixtures. On the issue of innovation,

the Court of Appeal, like this Court in *Los Angeles*, merely found that new technologies also fall within the rights offered by Section 7901's predecessor (197 Cal.App.2d at 147), not that those particular technologies were of special importance or somehow given extra protection from local agency regulation as Appellants seek to argue now.

Fourth, in *Williams Communications v. City of Riverside* (2003) 114 Cal.App.4th 642, 649 ("*Williams*"), the central issue for the Court of Appeal was whether the plaintiff's roll out of a fiber optic network qualified as a use of the right of way to provide telephone services. The Court of Appeal ultimately agreed with the plaintiff that it did qualify as a telephone corporation and was afforded the benefits of Section 7901. (*Id.* at 649-650.) Since there is no dispute here that Appellants possess statewide franchise rights under Section 7901, *Williams* does not stand for any proposition that is in dispute in this matter.

A. Appellants' Ominous Warnings Are Misplaced as Technological Innovation and Local Regulation Can Coexist

Throughout their brief, Appellants paint a bleak picture of the future, warning that the Court of Appeal's opinion "will have far-reaching and harmful consequences for Californians" and "threatens to unleash a new era of discriminatory regulation." (AOB, p. 7.) Appellants' scenario is an exaggeration — telephone corporations and local agencies have successfully co-existed for well over a century, despite carriers being subject to local right

of way regulations (including regulations that impose aesthetic standards). (See *Western Union Tel. Co.*, *supra*, 149 Cal. at 751.) Moreover, as demonstrated by the City's actual enforcement and interpretation of its Ordinance, the City granted 173 wireless facility permit applications under the Ordinance through the time of trial, while denying only three — a grant rate of more than 98%. (Respondent's Answering Brief, p. 8.) This high approval rate makes it clear that technological advancement and local regulation can still exist together, as they have through all of the prior generations of wireline and wireless infrastructure deployment.

Notably, when the Legislature intends to curb local agency discretion in the evaluation of a right-of-way permit, it does so explicitly. (See, e.g., Gov. Code § 65850.6(a) ["A collocation facility shall be a permitted use ***not subject to a city or county discretionary permit*** if it satisfies the following requirements . . ."], emphasis added.) The Legislature made no parallel restriction in Section 7901 and Section 7901.1 (nor later amended them) because those statutes do not prohibit discretionary processes.

To the contrary, in 2015, the Legislature placed new limits on the time within which telecommunications applications must be processed without purporting to place any limits on local government discretion. (Gov. Code § 65964.1(e) ["Except as provided in subdivision (a) [relating to deemed approval for failure to timely act on an application], ***nothing in this section limits or affects the authority of a city or county over decisions regarding***

the placement, construction, and modification of a wireless telecommunications facility"], emphasis added.)[2] Thus, when the Legislature had the opportunity to curb the exercise of discretion, it expressly declined to do so.

Ultimately, the "real world" need for the preservation of local government discretion is evident. The public rights of way are diverse and varied. *Amici's* city and county members' streets include dense urban thoroughfares, quiet country roads, bucolic neighborhoods, and countless other streetscapes. Some rights of way are amenable to undergrounding of equipment, while in other rights of way the area beneath the street is crowded with pre-existing infrastructure. Some rights of way have medians, parkways, and sidewalks, while others do not. The variation in neighborhood character, pre-existing infrastructure, and streetscape designs, coupled with the specific facets of each proposed installation, make "one-size-fits-all"

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[2] Rather than acknowledging this express preservation of local agency authority, Appellants claim that "municipal affairs" language in a different portion of Government Code section 65964.1 was intended to result in broad preemption of local agency regulatory authority. That interpretation is wrong. The "municipal affairs" language was added to clarify that Government Code section 65964.1 was intended to apply to charter cities (in addition to general law cities). (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 57 (2015-2016 Reg. Sess.) as amended Aug. 18, 2015, p. 9 ["AB 57 includes a legislative finding and declaration that a wireless telecommunications facility has a significant economic impact in California and is a matter of statewide concern. Accordingly, the bill's provisions apply to all cities and counties in California, including charter cities and counties, although the bill does not explicitly state it."].)

(i.e., non-discretionary) approaches to permitting a recipe for poor outcomes and unintended consequences.[3]

The common sense means to avoid those outcomes and consequences — which is permitted under existing law — is to use discretionary processes that (1) recognize wireless applicants' state-conferred rights while (2) preserving local discretion to ensure that access is provided in a manner that avoids unnecessary degradation to the quality of the rights of way. To the extent Appellants are concerned that local agencies will routinely deny permit applications simply by invoking baseless aesthetic concerns (AOB, pp. 56-60), their concern is of no consequence. As the Ninth Circuit easily addressed, "a city that invokes aesthetics as a basis for a [wireless] permit denial is required to produce substantial evidence to support its decision" and comply with federal law. (*Palos Verdes Estates*, *supra*, 583 F.2d at 725.) Therefore, even with an ordinance that allows for consideration of aesthetics or other discretionary criteria, the local agency will still need to produce more

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[3] Instead of acknowledging this reality, Appellants fall prey to the doomsday assumption that local agencies will exercise discretion irresponsibly and/or without regard to wireless applicants' state and federally conferred rights. But well established tenets of statutory construction require (i) that ordinances be construed in a manner consistent with other laws and (ii) the assumption that an ordinance will be applied illegally is improper in the facial challenge context. (*Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 267; *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 814.)

than a "mere scintilla of evidence"[4] to have its decision affirmed. (See *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.)

VIII. PUBLIC UTILITIES CODE SECTION 7901.1 CONFIRMS, BUT DOES NOT CIRCUMSCRIBE, LOCAL AGENCY AUTHORITY OVER TELECOMMUNICATIONS PERMITTING FOR FACILITIES IN THE PUBLIC RIGHTS OF WAY.

Section 7901.1 reinforces, rather than limits, local governments' regulatory authority over telecommunications facilities. That provision was added to the Public Utilities Code in 1995 to "bolster the cities' abilities with regard to construction management and to send a message to telephone corporations that cities have authority to manage their construction, without jeopardizing the telephone corporations' statewide franchise." (Sen. Com. on Energy, Utilities, and Communications, Analysis of Sen. Bill No. 621 (1995-1996 Reg. Sess.) April 25, 1995.) Indeed, the legislative history of Section 7901.1 makes it clear that the design of the statute was to deal with construction activities of telephone corporations:

> To encourage the statewide development of telephone service, telephone corporations have been given state franchises to build their networks. This facilitates construction by minimizing the ability of local government to regulate construction by telephone corporations. Only telephone companies have statewide franchises; energy utilities and cable television companies obtain local franchises. [¶] ... [¶] ... Cities interpret their authority to manage telephone company

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[4] Substantial evidence must be "of ponderable legal significance" and is not synonymous with "any" evidence. (*Lucas v. Southern Pacific Co.* (1971) 19 Cal.App.3d 124, 136.) Such evidence must be reasonable in nature, credible, and of solid value. (*Ibid.*)

> ***construction*** differently. Telephone corporations represent their rights under state franchise differently as well, sometimes taking the extreme position that cities have absolutely no right to control ***construction***. This lack of clarity causes frequent disputes. Among the complaints of the cities are a lack of ability to plan maintenance programs, protect public safety, minimize public inconvenience and ensure adherence to sound construction practices. Cities are further concerned that ***multiple street cuts caused by uncoordinated construction*** shortens the life of the streets, causing increased taxpayer costs, as described in a recently commissioned study.

(Assem. Com. on Utilities and Commerce, Rep. on Sen. Bill No. 621 (1995–1996 Reg. Sess.) as amended July 7, 1995, p. 2, emphasis added.)

In its briefing, Appellants attack the Court of Appeal's finding that Section 7901.1 only applies to construction activities, seeking to instead construe Section 7901.1 as a limitation on the powers afforded to local agencies under Section 7901. There are multiple fundamental problems with Appellants' argument.

First, by its plain words, Section 7901.1 states only that the "exercise of reasonable control over the time, place, and manner in which roads, highways, and waterways are accessed" is consistent with Section 7901. Nothing in Section 7901.1 says that it is intended to place limits on whatever other powers local governments may have under Section 7901. Second, the legislative history plainly states that Section 7901.1 is intended to "bolster" Section 7901. Under no circumstance could one credibly claim that "bolster" means "limit." Third, the legislative history of Section 7901.1 indicates that it was intended to focus on construction management, while Section 7901

contains no parallel restriction on the scope of its application. Fourth, and finally, Section 7901.1 does not purport to limit, restrict, or redefine the regulatory authority, conferred by the California Constitution and acknowledged in Section 2902, to regulate "the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets" to protect the public convenience.

In summary, in the public utility context, the Legislature has specifically confirmed — through Public Utilities Code sections 7901, 7901.1, and 2902 — local agencies' authority to regulate facilities installed by telephone corporations.

IX. CONCLUSION

For the foregoing reasons, *Amici* urge the Court to affirm the decision of the Court of Appeal and trial court.

Respectfully submitted,

Dated: May 11, 2017

RUTAN & TUCKER, LLP
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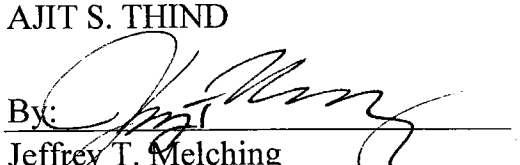

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.520(b)(1) of the California Rules of Court, the enclosed brief is produced using 13-point Roman type including footnotes and contains approximately 7,274 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Respectfully submitted,

Dated: May 11, 2017

RUTAN & TUCKER, LLP
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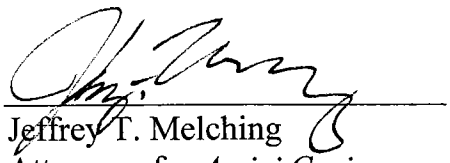
By: 
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PROOF OF SERVICE

(T-Mobile West LLC, et al. v. City and County of San Francisco, et al.
California Supreme Court, Case No. S238001*)*

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 611 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-1931.

On May 11, 2017, I served on the interested parties in said action the within:

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

as stated below:

☒ (BY FEDEX) by depositing in a box or other facility regularly maintained by FedEx, an express service carrier, or delivering to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed as shown above, with fees for overnight delivery provided for or paid.

I certify that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on May 11, 2017, at Costa Mesa, California.

I declare under penalty of perjury that the foregoing is true and correct.

Shelley Aronson
(Type or print name)

S Aronson
(Signature)

SERVICE LIST
T-Mobile West LLC v. City and County of San Francisco
Supreme Court of the State of California Case No. S238001

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