SUPREME COURT OF THE STATE OF CALIFORNIA

T-MOBILE WEST LLC, et al. Plaintiffs and Appellants, vs. THE CITY AND COUNTY OF SAN FRANCISCO, et al, Defendants and Respondents.	Case No. S238001 First Appellate District, Division Five, No. A144252 San Francisco County Superior Court No. CGC-11-510703

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,
County of San Francisco
The Honorable James McBride, Judge
Case No. CGC-11-510703

ANSWERING BRIEF ON THE MERITS OF RESPONDENTS CITY AND COUNTY OF SAN FRANCISCO AND CITY AND COUNTY OF SAN FRANCISCO DEPARTMENT OF PUBLIC WORKS

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INTRODUCTION AND SUMMARY OF ARGUMENT

The telephone corporations who are Appellants here contend that this Court must choose between progress and parochialism, because allowing cities to control the appearance of their streetscapes by regulating wireless equipment in the public right of way will destroy innovation in telecommunications.

Appellants posit a false choice. The statewide right to construct and maintain telephone poles and wires in the public right of way, granted by Public Utilities Code section 7901, has been restricted since its inception: telephone equipment may not "incommode the public use of the road or highway." This restriction has long been understood to reserve to cities the ability to "control[] the particular location of and manner in which all public facilities, including telephone lines, are constructed in the streets." (*Pacific Tel. & Tel. Co. v. City & County of San Francisco* (1959) 51 Cal.2d 766, 773.) San Francisco's exercise of this power with its wireless facilities permit ordinance—under which San Francisco approved ***more than 98% of the wireless facility permits*** Appellants sought through the time of the bench trial in this case—is consistent with the longstanding view of cities' police power, and has yet to destroy innovation in California or the Bay Area.

While the Court of Appeal in this case was the first California court to decide that cities' reserved power includes the right to impose aesthetic standards, its decision follows from the ordinary and natural meaning of the word "incommode," which includes causing inconvenience, disturbance, or discomfort. Because uses of the right of way encompass far more than traveling from one point to another, and because incommoding the public's use of the streetscape includes marring their views of the Painted Ladies or

the Marin Headlands with unsightly poles, wires, equipment boxes, and antennas, the Court of Appeal's decision is correct. Understanding "incommode" to encompass aesthetic concerns also harmonizes Section 7901 with other state statutes such as Public Utilities Code section 2902, which acknowledges that cities have broad power to assure "the health, convenience, and safety of the general public, including [in] matters such as . . . the location of the poles, wires, mains, or conduits of any public utility."

Appellants also argue that San Francisco has impermissibly discriminated against wireless technology by subjecting wireless facility installations, but not other kinds of equipment, to discretionary aesthetic review. Appellants base this argument on Public Utilities Code section 7901.1, which clarifies that cities "have the right to exercise reasonable control as to the time, place, and manner in which the roads . . . are accessed," but such control must "be applied to all entities in an equivalent manner." The Court of Appeal correctly rejected Appellants' contention, because the legislative history and context of Section 7901.1 make clear that this statute concerns only initial access to the public right of way for the construction of utility installations, which San Francisco regulates in the same manner for all utility providers.

But even if Section 7901.1 applies to the location and appearance of wireless facilities rather than merely to their construction, this statute bolsters rather than undermines San Francisco's power to enact reasonable restrictions on the "time, place, and manner" of their installation. Nor does San Francisco impermissibly discriminate against wireless technology. Section 7901.1's command that municipal controls must be applied to all entities in an equivalent manner is most sensibly understood to prohibit

cities from discriminating against particular companies who provide the same kind of service, not as a requirement to treat different kinds of utilities—which install different kinds of equipment in the public right of way—the same.

But in any event, San Francisco satisfies Section 7901.1's requirement of "equivalent" treatment. Only two kinds of utility providers have significantly increased their requests to install equipment in the public right of way in recent years: wireless companies and broadband providers. For both, San Francisco has adopted discretionary permitting requirements that allow these utilities to install equipment and provide services but regulate the equipment's location and appearance.

In short, while Appellants deploy broad rhetoric that San Francisco's regulations nullify their statewide franchise right and jeopardize their rollout of 5G wireless service, they never demonstrate that their ability to do business or provide service is impaired in any respect—nor could they, when they have received nearly all of the permits they have sought under San Francisco's wireless facility permitting regime.

Appellants also ask this Court to clarify its standards for when a facial preemption challenge succeeds. But because Sections 7901 and 7901.1 allow cities to control the location and appearance of wireless facilities so long as they do not impair utilities' ability to provide service, San Francisco's wireless ordinance fits comfortably within the power reserved to cities under state law, and neither contradicts state law nor invades an area of law that the Legislature has fully occupied. It is not preempted under any of the standards this Court has articulated, and so there is no reason in this case to further clarify the test. For these reasons, and others offered below, this Court should affirm the decision.

STATEMENT OF THE CASE

I. Factual Background

San Francisco is recognized worldwide as a uniquely beautiful city. Scenic vistas from its many hills and its distinctive Victorian architecture contribute to its beauty, as does its attention to urban design and form. San Francisco's beauty is of immense intangible value to its residents and visitors, and also creates tangible benefits by helping ensure its economic vitality and its strong property tax base, and by providing reason for millions of tourists to visit every year. (Appellants' Appendix ["AA"] 140; Reporter's Transcript ["RT"] 1048:06-21.)

San Francisco is also a compact and busy place. Many elements compete for space on its streets, including traffic signs, street and traffic lights and their controllers, fire hydrants, utility poles, parking meters, public transit shelters, news racks, advertising kiosks, bicycle racks, and more. (See *San Francisco Beautiful v. City & County of San Francisco* (2014) 226 Cal.App.4th 1012, 1025 (*San Francisco Beautiful*).) If their placement were unregulated, these streetscape elements would "create a cluttered visual environment" that would not only detract from the beauty of the city and the character of its neighborhoods but could lead to public safety risks like distracted driving or pedestrian hazards. (Respondents' Appendix ["RA"] 1-2; RT 1056:13-1058:06.)

In order to preserve its beauty and minimize clutter in the visual environment, San Francisco has long regulated elements placed in the roadway. These regulatory concerns are broadly addressed in San Francisco's General Plan (RA 139-145, 149-150, 187, 195-196), its "constitution for all future developments" which must guide its decisions

affecting land use (see, e.g., *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570). By initiative ordinance, San Francisco has banned new billboards since March 2002. (S.F. Planning Code, § 611, subd. (a) [added by Proposition G (Mar. 5, 2002)].) It has also enacted an ordinance adopting a Better Streets Policy, which requires that any approval for a public or private project in the right of way must consider and include the Better Streets design principles. (S.F. Admin. Code, § 98.1, subd. (d).) This ordinance specifically calls for reducing visual clutter on the streets. (*Id.* § 98.1, subd. (d)(5).)

To carry out the goal of improving the appearance of its streets and reducing visual clutter, San Francisco has created a design review committee charged with ensuring that all improvements in the public right of way are consistent with the design plan adopted pursuant to the Better Streets Policy. (S.F. Admin. Code, § 98.2.) The design principles adopted under this plan address public utilities in the streetscape in particular, noting that "well-organized utility design and placement can lead to minimization of street-scape clutter" and "improved pedestrian safety, qualify of life, and right-of-way aesthetics." (RA 1-2; RT 1056:13-1057:19.)

Technological change in recent years has driven utility providers' plans to expand two types of utility service whose equipment is placed in the public right of way: wireless service facilities and broadband facilities. Accordingly, San Francisco has enacted two ordinances in recent years to address those kinds of equipment. Broadband providers are expanding their ability to provide streaming video and other data service by bringing their fiber-optic networks closer to customers' homes and businesses. This expansion involves connecting the fiber-optic network to sizable equipment

cabinets mounted on the ground. (*San Francisco Beautiful*, *supra*, 226 Cal.App.4th at p. 1017.) After AT&T proposed to mount 726 of these cabinets on public sidewalks throughout the city (*id.*), San Francisco enacted Article 27 of the San Francisco Public Works Code, creating a permitting process to govern the location of surface-mounted facilities in the public right of way (S.F. Ord. No. 76-14 [Motion for Judicial Notice of Defendants/Respondents in the Court of Appeal ["Ct. App. RJN"], Ex. D]). This permitting process sets aesthetic standards for the location and placement of equipment cabinets mounted on public sidewalks. (S.F. Pub. Works Code, §§ 2703-2705.)

Similarly, providers have sought to install an increasing amount of wireless service equipment in San Francisco in recent years. (AA 138.) This equipment, sometimes called a "wireless facility," typically has several different components. Most of the wireless facilities installed in the public right-of-way are distributed antenna system nodes (see RT 351:05-355:01, 433:07-433:09, 720:12-720:23), which consist of antennas and optical equipment that connect to base station "hubs." (See AA 460-464 [¶¶ 20-44].) The facilities typically include one or more antennas, one or more equipment cabinets, and an electric meter and cut-off switch. Some also include a separate cabinet consisting of a battery back-up unit, which provides temporary power in case of an outage. (See RT 431:19-443:19, 639:08-644:23, 718:15-720:02, 720:24-724:20; AA 787-788; AA 820, AA 823, AA 829; RA 11-13, RA 118-122.) The antennas generally extend from the side of the utility pole or are added to the top of the pole. (See *id.*) The equipment cabinets, including the battery-back up units, are attached to the pole approximately a third of the way from the bottom. (See *id.*)

As requests to install this equipment in the public right of way increased, San Francisco in 2011 adopted an ordinance requiring permits to place wireless service equipment in the right of way, and setting aesthetic standards for issuance of those permits. (S.F. Ord. No. 12-11 [AA 138-193].) This ordinance ("Wireless Ordinance" or "Ordinance") describes the need to regulate the location of wireless facilities. As the Ordinance notes, the City is widely recognized for its beauty, which "is vital to the City's tourist industry and is an important reason for businesses to locate in the City and for residents to live here." (AA 140.) "Growing demand for wireless telecommunications has resulted in increasing requests from the wireless industry to place wireless antennas and other equipment on utility and street light poles in the public[] rights of way." (AA 138.) In light of this demand, "the City needs to regulate placement of such facilities in order to prevent telecommunications providers from installing wireless antennas and associated equipment in the City's public rights-of-way either in manners or in locations that will diminish the City's beauty." (AA 140.)

Under the current version of the Wireless Ordinance,[1] certain areas of the City are designated for heightened aesthetic review, such as areas zoned as residential or "neighborhood commercial";[2] historic districts; streets that the General Plan designates as the most significant to the City

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[1] San Francisco amended the 2011 version of the ordinance in response to the trial court's judgment in this case, as described in further detail in Statement of the Case Section II, below. (S.F. Ord. No. 18-15 [Ct. App. RJN, Ex. B].) Only the validity of the current version of the Wireless Ordinance is at issue here. (*Kash Ents. v. City of Los Angeles* (1977) 19 Cal.3d 294, 306 fn. 6 ["It is . . . an established rule of law that on appeals from judgments granting or denying injunctions, the law to be applied is that which is current at the time of judgment in the appellate court."] [internal quotation marks and citation omitted].)

[2] A neighborhood commercial district is typically the block or so of small retail and service establishments that serve the local neighborhood.

pattern; areas with views that are designated as "excellent" or "good"; and areas adjacent to parks and open spaces. (S.F. Pub. Works Code, § 1502 [defining Planning Protection Location, Zoning Protected Location, and Park Protected Location] [Ct. App. RJN, Ex. B., at pp. 5-7, 12].) For each of these different designations, the Ordinance establishes a standard for aesthetic compatibility for wireless equipment or facilities installed nearby. For instance, in a historic district, the Planning Department must determine that it would not "significantly degrade the aesthetic attributes that were the basis for the special designation" of the building or district. (*Id.* § 1502 [defining Planning Protected Location Compatibility Standard], § 1508.) For wireless equipment proposed for a view district, the standard is whether the proposed facility "would significantly impair" views. (*Id.*) San Francisco only issues a permit for the equipment if it satisfies the applicable aesthetic compatibility standard. (*Id.* §§ 1509-1510.) If the applicant seeks to install a wireless facility in an unprotected area, the permit is granted unless the proposed wireless facility would significantly detract from the defining characteristics of that neighborhood. (*Id.*§ 1502 [defining Tier A Compatibility Standard].)

In practice, San Francisco has granted most of the wireless facility permit applications that it has reviewed. At the bench trial in this case, the parties presented evidence about the effect of the Ordinance on Appellants' wireless facilities. That evidence demonstrated that San Francisco granted 173 wireless facility permit applications under the Wireless Ordinance through the time of trial, while denying only three—a grant rate of more than 98%. (RA 10; RT 1232:22-1235:17.) Of the permits the Department of Public Works made the tentative decision to grant, 26 were protested by members of the public, but the Director of Public Works nonetheless

approved 25 of the 26 protested applications, and the remaining application was withdrawn by the applicant. (RA 10 fn. 5.)

II. Procedural Background

T-Mobile West Corporation, NextG Networks of California, Inc. (now known as Crown Castle NG West LLC), and ExteNet Systems (California) LLC (collectively "Appellants") challenged Article 25. On April 2, 2012, Appellants filed their second amended complaint, which is the operative complaint in this action. (AA 453-489.)

At issue here is that complaint's third cause of action, which alleges that the Wireless Ordinance, and implementing City regulations,[3] are preempted by California Public Utilities Code sections 7901 and 7901.1 (AA 481-482.) The San Francisco Superior Court (McBride, J.) conducted a bench trial on that claim in January 2014. In November 2014, the court issued its final statement of decision (AA 840-850) and final judgment (AA 898-890), which determined that San Francisco's Wireless Ordinance's use of aesthetic standards was not preempted by Sections 7901 or 7901.1.[4]

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[3] Current versions of these regulations may be found at Ct. App. RJN, Ex. A.

[4] The Second Amended Complaint contained five causes of action. The first, a claim that the Wireless Ordinance's two-year duration for wireless facility permits was preempted by state law, was adjudicated in Appellants' favor on their motion for summary adjudication. (AA 478-480, 837.) The second, a takings claim, was dismissed by Appellants before trial. (AA 480-481, 837.) The third is the preemption claim that is at issue in this appeal. The fourth cause of action, a claim that some of Appellants were not required to obtain CEQA approvals from the City before obtaining a wireless facility permit, was adjudicated in San Francisco's favor at summary adjudication. (AA 482-483, 837.) The fifth cause of action, a claim that the Wireless Ordinance's provisions concerning modification of installed equipment were preempted by provisions of federal law governing modifications, was tried at the January 2014 bench trial, and the superior court found in Appellants' favor. (AA 483-485, 837-838.)

San Francisco's 2015 amendment to the Wireless Ordinance addressed, among other things, the issues the Superior Court decided adversely to the City. Accordingly, those issues are not before this Court.

The plaintiffs appealed. In a decision issued on September 15, 2016, and modified on denial of rehearing on October 13, 2016, the Court of Appeal for the First District, Division Five, rejected Appellants' claims and affirmed the judgment. The court first considered the scope of the statewide franchise granted by Section 7901, holding that the Legislature "intended the state franchise would coexist alongside local regulation." (*T-Mobile West LLC v. City & County of San Francisco* (2016) 3 Cal.App.5th 334, 349, review granted Dec. 21, 2016 ("*T-Mobile West*").) Then it considered the meaning of Section 7901's phrase, "incommode the public use of the road or highway," to determine the permissible scope of local regulation. (*Id.* at 351-352.) Noting that no previous case of the California courts had determined whether "incommode" could include aesthetic standards, the Court of Appeal adopted a dictionary definition defining the term to include "inconvenience or discomfort," and also found persuasive the Ninth Circuit Court of Appeals' decision in *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* ("*Palos Verdes Estates*"), which adopted the same definition. ((9th Cir. 2009) 583 F.3d 716, 723.) Because the court found that an aesthetically displeasing wireless installation could incommode the public's use of a roadway, it held that the Wireless Ordinance was not facially preempted by Section 7901. (*T-Mobile West* at pp. 354-355.)

Turning to Section 7901.1, the Court of Appeal held that this statute also does not preempt the ordinance because it regulates municipalities' ability to exercise reasonable control over ***entry*** into the public right of way through construction, not their ability to regulate the ***occupation*** of telephone equipment in the right of way. Because the statute regulates only construction, Appellants did not meet their burden of showing that it

preempted the Wireless Ordinance. (*T-Mobile West, supra*, 3 Cal.App.5th at pp. 357-358.)

Appellants sought further review, which this Court granted on December 21, 2016.

STANDARD OF REVIEW

This Court's review of statutory interpretation and preemption questions is de novo. (See, e.g., *Bruns v. E-Commerce Exchge., Inc.* (2011) 51 Cal.4th 717, 724; *Apartment Assn. of Los Angeles Cty., Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 13, 21.)

ARGUMENT

I. Section 7901 Allows San Francisco To Regulate The Location Of Wireless Facilities Based On Aesthetic Standards.

San Francisco may issue location-based permits for the installation of wireless facilities, and to condition issuance of those permits on aesthetic standards, because wireless facilities that blight sensitive streets and sidewalks in the cityscape incommode the public's use of those places. San Francisco's exercise of this discretionary power does not interfere with state-granted franchise rights, which have long been understood to reserve to local governments the power to determine the "manner and location" of telecommunications facilities. (*Pacific Tel. & Tel. Co. v. City & County of San Francisco* (1961) 197 Cal.App.2d 133, 146 ("*Pac. Tel. II*").)

A. Section 7901 Reserves Cities' Police Power To Regulate The Location Of Wireless Facilities.

Public Utilities Code section 7901 provides that telephone companies, including the wireless companies who are Appellants here, "may construct lines of telegraph or telephone lines along and upon any

public road or highway . . ., and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines." (Cal. Pub. Util. Code, § 7901.[5]) This statutory language grants a statewide franchise: the right to engage in the telecommunications business in California. (See *W. Union Tel. Co. v. City of Visalia* (1906) 149 Cal. 744, 750 ("*City of Visalia*"); Black's Law Dictionary (10th ed. 2014) [defining "franchise" as "[t]he government-conferred right or privilege to engage in a specific business or to exercise corporate powers."].) This franchise right has existed in California for more than 150 years (see *Pac. Tel. & Tel. Co. v. City & County of San Francisco*, *supra*, 51 Cal.2d at p. 769 ("*Pac. Tel. I*")), and it extends to providers of modern telecommunications services, such as wireless companies (see *City of Huntington Beach v. Cal. P.U.C.* (2013) 214 Cal.App.4th 566, 587-88 ("*City of Huntington Beach*").[6]

The statewide franchise that Section 7901 grants is exclusive, and local governments may not condition the right to install wireless facilities on a local franchise grant. (*City of Visalia, supra*, 149 Cal. at p. 751; *Pac. Tel. I, supra*, at pp. 767-768.) But under the terms of the Section 7901 grant, franchisees' rights to erect poles and fixtures in the public right of way are not unlimited. (*City of Visalia* at p. 750.) A franchisee may not

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[5] All statutory references are to the California Public Utilities Code unless otherwise specified.

[6] The Legislature granted franchise rights to telegraph companies in its first session in 1850, including the right to construct telegraph lines that did not "incommode the public use" of roads and highways. (See 1850 Cal. Stats., ch. 128, at pp. 369-70.) In 1905, the Legislature repealed and reenacted the franchise right, adding telephone corporations. (1905 Cal. Stats., ch. 385, p. 492.) In 1951, the Legislature reenacted the provision as Section 7901 of the Public Utilities Code, without altering it. (1951 Cal. Stats., ch. 764, p. 2194.)

install facilities that "incommode the public use of the road or highway." (§ 7901.)

The "incommode" clause, this Court has held, operates to reserve local police power. Accordingly, local regulation, and local exercise of the police power, can permissibly act as "a restriction of and burden upon a franchise already existing" if it is within that reserved power. (*City of Visalia, supra*, 149 Cal. at p. 751.) Even as California courts have rejected local efforts to require a local franchise, they have recognized that localities retain the authority to "control . . . [the] location and manner of construction" of telecommunications facilities. (*Pac. Tel. II, supra,* 197 Cal.App.3d at p. 146; *id.* at p. 152 ["[T]he state has retained to itself the broader police power of granting franchises, leaving to the municipalities the narrower police power of controlling location and manner of installation."]; see also *Pac. Tel. I., supra*, 51 Cal.2d at p. 774 [local ordinance "control[led] the particular location of and manner in which all public utility facilities, including telephone lines, are constructed in the streets" and "[t]he telephone company concede[d] the existence of power in the city to exact these requirements"].)

B. The Reserved Local Power To Control The Location And Appearance Of Wireless Facilities Includes The Power To Preserve Areas Of Special Aesthetic Concern Because Blighting Those Areas Incommodes The Public's Use.

Appellants contend that to incommode the public's use of the right of way is to obstruct the path of travel—and nothing more. This interpretation of "incommode" is at odds with the plain meaning of that term, which has long been commonly defined to include inconvenience or disturbance. Appellants' parsimonious interpretation, moreover, is not compelled by any prior decisions of this Court, and would render Section

7901 inconsistent with related statutes and with the California Public Utilities Commission's ("CPUC") interpretation of the scope of local governments' power over their rights of way.

1. The Plain Meaning Of "Incommode" Is Broader Than Physical Obstruction.

"The fundamental principle of statutory interpretation is the ascertainment of legislative intent so that the purpose of the law may be effectuated." (*Troppman v. Valverde* (2007) 40 Cal.4th 1121, 1135 [internal quotation marks and citation omitted].) The words of a statute "should be given the meaning they bear in ordinary use" unless this construction would impede the statute's purpose or render it inconsistent with other statutory provisions. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

To "ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word." (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121-22.) At the time the Legislature adopted the statutory precursor to Section 7901, which contained a substantively identical "incommode" clause, Webster's 1828 dictionary defined "incommode" as "[t]o give inconvenience to; to give trouble to; to disturb or molest in the quiet enjoyment of something, or in the facility of acquisition. It denotes less than annoy, vex or harass." The modern dictionary definition of "incommode" is the same; Merriam-Webster currently defines it as "to give inconvenience or distress to: disturb,"[7] and the Oxford English Dictionary defines it as "[t]o subject to

[7] The Court of Appeal granted the City's request for judicial notice of the definitions of "incommode" provided in the 1828 Webster and current Merriam-Webster dictionaries. (*T-Mobile West, supra,* 3 Cal.App.5th at p. 343, fn. 9; Ct. App. RJN, Exs. K & L.)

inconvenience or discomfort; to trouble, annoy, molest, embarrass, inconvenience" (see *Palos Verdes Estates, supra*, 583 F.3d at p. 723 [adopting OED definition]). Accordingly, the Legislature in 1850 would have understood its use of the clause "incommode the public use" in the same ordinary way that term is understood today: to inconvenience or disturb the public in its use of the right of way.

Appellants construe "incommode" to mean physically obstruct or block, but there is no support for that narrow definition. Appellants primarily rely on *City of Visalia*'s discussion of a local ordinance that prescribed the location of telegraph poles and the height of the wires connecting them. (AOB 43-44; *City of Visalia, supra*, 149 Cal. at pp. 749-750.) While *City of Visalia* rejected the municipality's claim that it could require a local franchise, this Court nonetheless acknowledged the local ordinance was within the city's police power "to . . . regulate the manner of plaintiff's placing . . . its poles and wires as to prevent unreasonable obstruction of travel." (*Id.* at pp. 750-751.) But Appellants overread *City of Visalia* when they claim that it conclusively defined the incommode clause to mean obstruction. There is no indication in the case that this Court had occasion to consider the full scope of that term, and a case does not stand for a proposition it does not consider. (See *Natkin v. Cal. Unemployment Ins. Appeals Bd.* (2013) 219 Cal.App.4th 997, 1007 ["Decisions are not controlling authority for propositions not considered in the case."].)

In any event, *City of Visalia*'s facts are hard to square with a claim that cities can prevent telecommunications equipment from blocking the path of travel and nothing more. Visalia did more than forbid obstruction; it fixed the locations of the poles and set the height of the lines at a uniform

26 feet throughout the city. (*City of Visalia*, *supra*, 149 Cal. at pp. 747-748.) It also reserved to itself the right to "direct . . . and control" "the location of all poles and lines." (*Id.*at p. 747.) Such measures prevent telephone lines from inconveniencing city residents in their travel as well as from obstructing travel, and it is hard to see what purpose Visalia's requirement of uniform 26-foot-high wires could serve other than that city's aesthetic interest in visual uniformity. The ordinance that this Court approved in *City of Visalia* is consistent with the power San Francisco claims here.

Appellants also argue that Section 7901 supplies a broad mandate for technological progress, ousting cities' discretionary powers in order to promote the development of telecommunications facilities. But " '[n]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.' " (*County of Sonoma v. Cohen* (2015) 235 Cal.App.4th 42, 48, review withdrawn (June 10, 2015) [quoting *Rodriguez v. United States* (1987) 480 U.S. 522, 525-526 (per curiam)].) San Francisco does not dispute that innovation and better service are purposes underlying Section 7901—but the Legislature's reservation of local power to prevent inconvenience to everyday users of city streets also serves its purposes and cannot simply be discarded.

Nor have Appellants demonstrated that there is an inevitable tradeoff between technological progress and the welfare of everyday users of the right of way. This case comes to the Court following a bench trial where the parties presented evidence about the effect of San Francisco's ordinance

on Appellants' ability to install wireless facilities in the public right of way; that evidence demonstrated that San Francisco granted more than 98% of the permits they sought (RA 10), hardly an example of aesthetic review as a pretext to prohibit wireless facilities. The planned 5G facilities that Appellants make a central theme of their opening brief were not raised at the bench trial, and Appellants made no factual record that the Ordinance will impede their rollout. But if these 5G facilities are as small and unobtrusive as Appellants claim, then they will likely receive ready approval, consistent with San Francisco's past record of approving Appellants' proposed wireless facilities after discretionary aesthetic review. And in the event they are not and San Francisco threatens Appellants' exercise of their statewide franchise rights, Appellants may challenge the Ordinance as applied to those denials. (*T-Mobile West LLC, supra*, 3 Cal.App.5th at p. 356.)

Appellants claim that their understanding of the innovation-promoting purposes of Section 7901 is grounded in cases following *City of Visalia*. (AOB 38-42.) They rely on *Pacific Telephone II*, *supra*, and on *Pacific Telephone & Telegraph Co. v. City of Los Angeles* (1955) 44 Cal.2d 272 ("*City of Los Angeles*"). But these cases do not support their argument. Both cases hold that evolving kinds and uses of telephone equipment are encompassed within Section 7901's statewide franchise grant. (*Pac. Tel. II*, *supra*, 197 Cal.App.2d at pp. 146-147; *City of Los Angeles* at p. 282.) But neither case considers any regulation similar to the one San Francisco defends here. It is true that *Pacific Telephone II* considers and rejects the contention that all use of the streets by a telephone company incommodes the public and therefore may be prohibited—but that is a far way removed from the Wireless Ordinance, which allows the installation of wireless

facilities, and under which the City approved 98% of the wireless permits Appellants sought through the time of trial. Appellants also rely on *Williams Communications, LLC v. City of Riverside* (2003) 114 Cal.App.4th 642, which holds that the state franchise right applies to a telecommunications provider who offered voice, video, cable, and other services over its fiber optic facilities. *Williams*, too, offers guidance only as to the scope of the state franchise and not as to the scope of local regulation contemplated by the incommode clause.

Other authority also undermines Appellants' position. This Court has characterized the right-of-way rights granted to telephone companies as a "limited right." (*County of Los Angeles v. S. Cal. Tel. Co.* (1948) 32 Cal.2d 378, 387; see also *City of Huntington Beach, supra*, 214 Cal.App.4th at p. 590 ["The right of telephone corporations to construct telephone lines in public rights of way is not absolute."].) And the Ninth Circuit Court of Appeals has adopted the definition of "incommode" that San Francisco urges here. (*Palos Verdes Estates, supra*, 583 F.3d at p. 723.) Finding that the public use of roadways "encompasses more than just transit," the circuit court held that unsightly wireless facilities inconvenience the public and thereby incommode the public use.. (*Id.* at pp. 723-724.) Although not binding on this Court, federal appellate decisions "provide persuasive . . . authority," (*People v. Bradford* (1997) 15 Cal.4th 1229, 1292), and *Palos Verdes Estates* notably overruled a prior, unpublished decision of the Ninth Circuit holding that the incommode clause did not permit cities to impose aesthetic standards on wireless facilities. (See *Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge* (9th Cir. 2006) 182 Fed.Appx. 688 [nonprecedential].)

2. Construing "Incommode" To Encompass Concerns Beyond Physical Obstruction Harmonizes Section

7901 With Other Enactments And With CPUC's Understanding Of Local Power.

Courts construing a statute also look to "whether . . . a construction of one provision is consistent with other provisions of the statute" or with "provisions relating to the same subject matter." (*Lungren v. Deukmejian*, *supra*, 45 Cal.3d at p. 735.) "An interpretation that renders related provisions nugatory must be avoided." (*Id.*) This canon supplies an additional reason to reject Appellants' narrow view of incommode: other statutory provisions concerning local governments' power over the placement of public utility equipment indicate a much broader scope of local power, as do past interpretations by CPUC.

Public Utilities Code section 2902 states that municipalities cannot surrender to CPUC their power "in matters affecting the health, convenience, and safety of the general public, including matters such as . . . the location of the poles, wires, mains, or conduits of any public utility." Accordingly, Section 2902 reserves to local governments the power to determine the "location" of utility installations. (*Southern Cal. Gas Co. v. City of Vernon* (1995) 41 Cal.App.4th 209, 217, as modified on denial of reh'g (Jan. 18, 1996) [emphasis removed].) Section 2902's express reservation of power to cities to protect the "convenience" of the general public in matters such as "the location of the poles [and] wires" of public utilities cannot be reconciled with a view that the only incommodity cities can block is obstruction of the path of travel. Similarly, Government Code section 65964, which concerns local land use permits for wireless facilities, acknowledges that local wireless facility permitting decisions may be based on "public safety reasons or substantial land use reasons."[8] This

[8] Appellants must concede the relevance of this provision, since they brought a claim against the City based on a different clause of this

provision's reference to "land use reasons" in connection with the duration of wireless facility siting permits suggests a broader power than the ability to prevent obstruction.

San Francisco's position here is also consistent with CPUC's interpretations of the scope of local power under the Public Utilities Code. In interpreting that code, CPUC's views are "given presumptive value as a consequence of the agency's special familiarity and presumed expertise with satellite legal and regulatory issues." (*PG&E Corp. v. Cal. P.U.C.* (2004) 118 Cal.App.4th 1174, 1194 [citing *Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11].) In a general order issued in 1996, at a time when wireless facilities were larger and were typically installed on private property, CPUC stated that "the impacts of cell sites and [switching equipment] are highly localized" and that the statewide interest in better service may sometimes compete with local concerns about equipment location. (Cal. P.U.C. Gen. Order 159A (May 8, 1996);[9] see also *In Re Cellular Mobile Radiotelephone Util. Facilities* (1996) 66 Cal. P.U.C.2d 257 [Decision 96-05-035] [adopting Gen. Order 159A].) CPUC expressly adopted as one of its goals that "the public health, safety, welfare, and zoning concerns of local government are addressed." (*Id.*) Because "local governments are often in a better position than [CPUC] to measure local impact and to identify alternative sites" for cell sites and switching equipment located on private property, CPUC decided that it would "generally defer to local governments to regulate the location and design of

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provision. (AA 464.) Appellants prevailed on this claim, and the City amended its Wireless Ordinance in response. (AA 837, S.F. Ord No. 18-15 [Ct. App. RJN, Ex. B, at 34].)

[9] This order as originally paginated is available at http://docs.cpuc.ca.gov/PUBLISHED/Graphics/611.PDF.

cell sites and [switching equipment]" by allowing local governments to decide whether to issue land use approvals in the first instance. (*Id.*) Where a local government frustrates the state interest in cellular service by unreasonably denying land use approvals, however, wireless companies could seek approval directly from CPUC, which will preempt inconsistent local action. (*Id.* at pp. 3-4.)

CPUC has adopted the same principle of deference to local concerns with respect to wireless installations in the public right of way. It has acknowledged that local governments have an interest in "managing local [rights of way]" and has stated that they "may regulate the time, ***location***, and manner of installation of telephone facilities in public streets." (*In re Competition for Local Exchange Service* (1998) 82 Cal. P.U.C.2d 510, 543-44 [Decision No. 98-10-058] [citing Cal. P.U.C. Gen. Order 159A & § 2902; emphasis added].) In accord with that deference, CPUC determined that it would not "intervene in disputes over municipal [right of way] access" unless a telephone company seeking access "contends that local action impedes statewide goals" and can demonstrate that it has made "a good-faith effort to obtain all necessary local permits and to negotiate mutually acceptable terms of access with the local governmental body." (*Id.*)

Taken together, Section 2902, Government Code section 65964, and CPUC's interpretations underscore that cities' authority is sufficiently broad to encompass a discretionary decision as to where wireless facilities do and do not belong, based on the convenience and welfare of local residents.

3. San Francisco's Ordinance Appropriately Prevents Wireless Companies From Marring The Cityscape

While Permitting Them To Provide Sufficient Service.

Appellants never contest the findings San Francisco made in adopting the Wireless Ordinance: that the City's unique beauty is important to the well-being of its residents, to its economic vitality, and to the strength of its sizable tourist industry. (AA 140.) They do not contest that wireless facilities can mar the appearance of historic districts, ruin views, or interfere with the public's enjoyment of city streets. (See AOB 44, n. 13 ["It is no secret that wireline facilities can sometimes be a sore sight on public rights-of-way."].) Having waived these arguments, Appellants cannot rely on them in this case. (See *Employers Mut. Cas. Co. v. Philadelphia Indem. Ins. Co.* (2008) 169 Cal.App.4th 340, 350 [argument not raised or supported in opening brief on appeal is waived].) Accordingly, it is undisputed that San Francisco's Wireless serves its important aesthetic purposes.

At oral argument in this case before the Court of Appeal, Appellants admitted that if their interpretation of Section 7901 is correct, then San Francisco cannot prevent them from installing wireless facilities in front of the famous Painted Ladies on Alamo Square Park. (Transcript of Oral Argument at 18:10-20:1 [City's Motion for Judicial Notice, Ex. A].) And under federal law, San Francisco could not thereafter prevent them from expanding the size of those facilities. (See Pub. L. No. 112-96, 126 Stat. 156, § 6409(a) (2012); *Acceleration of Broadband Deployment by Improving Wireless Facility Siting Policies, Report and Order*, 29 FCC Rcd. 12865 (2014), at pp. 127-128.[10]) In this Court, Appellants attempt to unravel their admission, claiming that the Wireless Ordinance "does not

[10] This Federal Communications Commission decision is available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-153A1.pdf.

apply near Coit Tower or the Painted Ladies" because there are no existing utility poles in those locations, and the Ordinance only allows wireless facilities to be placed on existing poles. (AOB 30, n. 10.) But under their view of Section 7901, telephone companies may place "poles" as well as other facilities in the public rights of way so long as they do not obstruct the path of travel. Although Appellants have not to date challenged San Francisco's ordinances prohibiting new utility poles in underground-utility areas (see S.F. Pub. Works Code, § 913; *id.* § 1500, subd. (c)(1)), their theory of Section 7901 would certainly allow them to do so on the same preemption grounds they raise here. Furthermore, the Wireless Ordinance does not prohibit the installation of wireless equipment installed on existing streetlight poles or transit poles, including in the aesthetically sensitive districts where new utility poles are prohibited. (S.F. Pub. Works Code, § 1500(c)(1).)

Appellants also contend that aesthetic review is standardless. But San Francisco's Wireless Ordinance in fact contains standards; it requires the Planning Department to evaluate a proposed wireless facility with reference to the reasons why a particular district is protected or subject to heightened review (such as historic resources or views). And there are remedies if a city engages in arbitrary aesthetic standard-setting. Under federal laws preempting some local powers, "[a] city that invokes aesthetics as a basis for a [wireless telecommunications facilities] permit is required to produce substantial evidence to support its decision. . . ." (*Palos Verdes Estates, supra*, 583 F.3d at p. 725.) Under state law, a writ of administrative mandamus or an as-applied challenge under Section 7901 are available remedies.

Appellants also never argue that, even if aesthetics is a permissible basis for regulating the location and appearance of wireless facilities, San Francisco's ordinance nonetheless has gone too far and impaired their ability to provide effective wireless service. Appellants waived that argument at trial. In this Court, they hypothesize that their ability to install facilities in the future for 5G service will be impaired, but they rely entirely on speculation and materials outside of the record. This is an insufficient basis to strike down the Wireless Ordinance. (See *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 267 [facial challenge cannot prevail based on hypotheticals that the law could be applied in an unconstitutional way].)

Appellants have failed to demonstrate that San Francisco's Wireless Ordinance is an unreasonable effort to prevent wireless facilities from incommoding the public's use of San Francisco's streetscape.

C. Section 7901 Does Not Require San Francisco To Treat Different Technologies And Equipment The Same.

Appellants contend that "Section 7901 prohibits a locality from using its police power to discriminate against technologies." (AOB 43 [emphasis and initial capitals omitted].) But Section 7901 says nothing about discrimination or whether telephone companies may be regulated differently than other franchises. Moreover, the cases Appellants cite in this section of their brief have nothing to do with discrimination or distinctions a city may make among different technologies and different kinds of facilities. Instead, Appellants largely cite cases establishing that providing telecommunications services is a matter of statewide concern, such that localities are reserved only a narrower police power. These arguments merely duplicate their arguments about the scope and

interpretation of Section 7901, which San Francisco addresses *supra* at pages 17-22.

II. Section 7901.1 Does Not Preempt The Wireless Ordinance.

Enacted by the Legislature in 1995, Section 7901.1 states in relevant part that,

> a) It is the intent of the Legislature, consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed.
>
> (b) The control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner.

Appellants contend that Section 7901.1 operates as a further restriction on cities' power, by restricting their ability to control the location of wireless facilities in the public right of way to time-place-manner restrictions, and by requiring them to treat all facilities in the right of way exactly the same. Appellants err. As the legislative history of Section 7901.1 makes clear, this statute was intended to expand municipalities' power to control the ***construction*** of telephone infrastructure at a time when the market was deregulating and new telephone companies were seeking access to local markets. It was never intended to apply to the permanent location of equipment or to the installation of facilities by entities not subject to Section 7901. Because San Francisco does not regulate Appellants' construction differently from any other entity, their facial challenge fails.

But even if Appellants' view of the statute is correct, and San Francisco is required to regulate the permanent location of all utility equipment in the right of way "in an equivalent manner," Appellants' claim nonetheless fails because the only two kinds of equipment that are presently

being installed in San Francisco's rights of way in significant numbers—wireless facilities and the surface-mounted equipment cabinets that support broadband service—are in fact subject to equivalent regulations, including aesthetic standards.

A. Section 7901.1 Applies Only To Construction Access By Telephone Companies, Not To Local Governments' Location Decisions.

Section 7901.1 acknowledges cities' ability to exercise reasonable control over how the public rights of way "are accessed." According to the Merriam-Webster dictionary, "access" means

> a : permission, liberty, or ability to enter, approach, or pass to and from a place or to approach or communicate with a person or thing . . . b : freedom or ability to obtain or make use of something . . . c : a way or means of entering or approaching . . . d : the act or an instance of accessing something[11]

These definitions encompass both occupation or permanent access (as in the second definition above, the ability to make use of something) and entry or temporary access (as in the first definition, permission to enter or pass). Accordingly, as the Court of Appeal held, the meaning of "accessed" in statute is ambiguous; it could be read to mean temporary or permanent access to the public right of way. (*T-Mobile West, supra*, 3 Cal.App.5th at p. 357.)

"If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1163 [internal quotation marks and citation omitted].) These sources speak with one voice: Section 7901.1 is

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[11] The Court of Appeal cited this dictionary in defining "accessed." (*T-Mobile West, supra*, 3 Cal.App.5th at p. 357.)

concerned exclusively with municipalities' management of the construction activities of telephone companies, and does not impose new barriers to their control of the location of wireless facilities.

Section 7901.1 itself suggests that "access" refers to construction access rather than occupation of the public right of way when it says that it relates to municipalities' reasonable control over the "time, place, and manner" in which roadways are accessed: a statute that governed long-term occupation of the roadway have no need to reference the "time" of access, and a statutory scheme that did not permit municipalities to control what kinds of facilities were installed would not refer to the "manner" of access. (See *T-Mobile West*, *supra*, 3 Cal.App.5th at p. 357; *Palos Verdes Estates, supra*, 583 F.3d at pp. 724-25 [reference to "time, place and manner" in which roadways "are accessed" "can refer only to when, where, and how telecommunications service providers gain entry to the public rights-of-way"].) Section 7901.1 also states that it is a clarifying enactment, showing the "intent" of the Legislature and framed as "consistent with 7901," and the enrolled bill report states that the bill "would not change current law, but would simply clarify existing municipality rights." (Governor's Off. of Planning & Research, Enrolled Bill Rep. on Sen. Bill No. 621 (1995-1996 Reg. Sess.) Aug. 31, 1995, p.3 [Appellants' Supplemental Appendix ("SA") at 1035].) But if it were read as Appellants claim, Section 7901.1 would not be consistent with 7901 or existing law at all. It would instead enact a new and significant restriction on municipalities' power to make reasonable distinctions between utility installations based on conditions and local circumstances. Since the Legislature disclaimed change in the text itself, this Court should reject any reading that would make such a change.

The legislative history of Section 7901.1 also demonstrates that this provision was intended to bolster cities' ability to regulate utility construction, not to limit their ability to regulate utility placement. While the digest prepared by the Legislative Counsel does not shed light on whether "accessed" means entry or occupation, committee reports describe the measure as a bill regulating construction. According to these reports, the bill expresses "the intent of the Legislature that local governments have the ability to exercise reasonable control . . . with regard to ***construction projects*** by telephone companies." (Sen. Com. on Energy, Utils. & Communications, Sen. Bill 621 Analysis, Apr. 25, 1995 (1995-1996 Reg. Sess.) ("Senate Utilities Com. Report") [SA 981] [emphasis added]; see also Sen. Rules Com., Off. of. Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 621 (1995-1996 Reg. Sess.) [SA 994] [similar]; Sen. Rules Com., Off. of Sen. Floor Analyses, unfinished business report re Sen. Bill 621 (1995-1996 Reg. Sess.) [SA 1020] [similar].) The reports describe the problem the bill was intended to address: "lack of control by local government over construction in their streets," resulting in cities' inability to plan and supervise construction, and fiscal harm to cities from "multiple street cuts caused by uncoordinated construction," which in turn shortens the useful life of streets. (Senate Utilities Com. Report, *supra*, at 1 [SA 981]; see also SA 995, 1004-1005 [Assembly Com. Utilities & Commerce Report], 1021.) Accordingly, the Legislature intended the bill to "bolster cities' abilities with regard to construction management and to send a message to telephone corporations that cities have authority to manage their construction." (Senate Utilities Com. Report, *supra*, at 2 [SA 982]; see also SA 996, 1005, 1022.)

Finally, the context of the bill's enactment demonstrates its construction focus: during the 1990s, the telephone carrier market was deregulated, and incumbent carriers like Pacific Bell were exposed to competition as new carriers entered local markets. (Senate Utilities Com. Report at p. 2 [SA 982] ["The opening of telephone markets to competition has created many new telephone companies who desire to exercise their state franchise rights."].) New companies had incentives to race to the market and obtain market share first; to do so they tried to "excavate more quickly and secretively," and that chaotic construction activity created the harms the Legislature sought to address. (*Id.*)

Appellants' briefing offers no persuasive reason to disregard the overwhelming import of this legislative history and hold that Section 7901.1 applies beyond construction. (AOB 50-55.) Appellants first rely on the plain text of Section 7901.1, noting that its text does not specify that it applies to construction. But of course, if the Legislature used "accessed" in the sense of "permission to enter," the first definition in the Merriam-Webster dictionary, then there is no reason why the Legislature would have specified that it did not intend "access" to mean "occupation." Appellants also rely on the phrase "time, place, and manner," noting that this phrase is not subject to any temporary qualification. Appellants are correct that in free speech cases, valid time-place-and-manner regulations may extend for the duration of a speaker's occupation of a public place. But they need not. This phrase does not remove the ambiguity of the word "accessed." Appellants next rely on their reading of Section 7901; they argue that discriminatory treatment of different technologies, and impeding the installation of new kinds of facilities, are not permitted by Section 7901 and accordingly Section 7901.1 cannot be read "consistent with Section 7901"

if it allows local governments to distinguish between the manner in which different facilities can occupy the public rights of way. This argument depends on the correctness of Appellants' view of Section 7901, and for the reasons offered *supra* at Section I.B., their view lacks merit. Third, Appellants argue that the legislative history makes only "passing reference to managing construction activities." (AOB 53.) This argument is specious; the legislative history instead is primarily concerned with construction activities, and no fair reading holds otherwise.

Appellants' fourth argument about Section 7901.1, found at AOB 54-55, supports San Francisco's position rather than theirs. They contend that Section 7901 preserves some unspecified quantum of police power to local governments, and Section 7901.1 fleshes out the municipal authority preserved under Section 7901. Under this view, Section 7901.1 is not limited to temporary construction activity, but instead permits cities to exercise "reasonable control" as to the "time, place, and manner" in which telephone companies occupy the right of way, so long as cities regulate all occupants of the right of way equally. But, as explained in greater detail *infra* at Section II.D., this argument supports San Francisco's view that local governments possess the reserved police power to set aesthetic standards, since aesthetic standards are restrictions on the time, place, or manner of installation. (Appellants' fifth argument about Section 7901.1, that San Francisco discriminates in construction access, is addressed in the following Section II.B.)

The Court of Appeal in this case is not the first to acknowledge that Section 7901.1 concerns the construction activities of telephone companies. The Second District Court of Appeal has done the same, stating that "[t]he Legislature clarified in section 7901.1 that local governments retain their

constitutional authority to impose regulations with regard to the time, place, and manner ***of construction*** of telephone lines in public rights of way, so long as such regulations are 'reasonable.'" (*City of Huntington Beach, supra*, 214 Cal.App.4th at p. 593 [emphasis added].) This Court should join them and definitively hold that Section 7901.1 bolsters local authority concerning construction access for telephone equipment, but does not further narrow the police power reserved to local government under Section 7901.

B. San Francisco Does Not Impermissibly Discriminate In Providing Construction Access.

In their petition for rehearing to the Court of Appeal, Appellants for the first time in this litigation claimed that even if Section 7901.1 applies only to construction access, San Francisco's wireless ordinance impermissibly discriminates against them. The Court of Appeal correctly rejected this argument as waived. (*T-Mobile West, supra*, 3 Cal.App.5th at p. 358, n. 16.) Appellants renew their argument before this Court. (AOB 55-56.) It remains waived, because it was never raised to the superior court that tried their claims. (See *Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 422 ["It is settled that points not raised in the trial court will not be considered on appeal. This rule precludes a party from asserting on appeal claims to relief not asserted in the trial court."] [internal citations omitted].)

But in any event, the contention is wrong: San Francisco does not impermissibly discriminate in providing construction access, because it requires all entities "occupying any part of the street or sidewalk for building construction operations or for any other purpose" to obtain a temporary occupancy permit (S.F. Pub. Works Code, §§ 724, 724.1-724.5, 726; RT 1235:19-1241:25; RA 19-21), to obtain an excavation permit if the

construction involves any excavation (S.F. Pub. Works Code, §§ 2.4.1 et seq.; RT 1283:3-1283:5), and to comply with City guidelines for construction in the public right of way (AA 324-432; RT 1242:1-1243:11). These permits are required for all utilities, including Appellants, video service providers, and electrical utilities, and thus they provide access "in an equivalent manner" to San Francisco's streets. (§ 7901.1(b).)

Appellants' contrary argument is that, because San Francisco regulates the location of wireless facilities but not other facilities pursuant to Article 25, and because Article 25 requires a Personal Wireless Facility Site permit before telephone companies may "construct" wireless facilities (AA 140) then San Francisco's ordinance discriminates. That argument is simply an effort to bootstrap Appellants' claims about differential permitting for ***occupying*** roadways into a claim about ***constructing*** the facilities that will occupy the roadways. Of course Appellants may not obtain a temporary occupancy permit for construction that they have no authority to engage in, but that is hardly discriminatory unless San Francisco grants temporary occupancy permits for the construction of unauthorized facilities to other entities. Appellants make no showing that that is the case.

C. Even If Section 7901.1 Applies To Telephone Companies' Occupation Of The Right Of Way, San Francisco Does Not Impermissibly Discriminate Because It Regulates Other Burgeoning Technologies In An Equivalent Manner.

The thrust of Appellants' argument is that San Francisco impermissibly discriminates against their and only their technology by requiring site-specific permits for their installations but not the installations of other utilities. Their argument is wrong for two independent reasons.

First, Section 7901.1's equivalence command is most sensibly understood as applying only to entities regulated by Division 4, Chapter 3 of the Public Works Code, i.e. telephone and telegraph companies. That is apparent from the context of its enactment; the Legislature was concerned about the proliferation of competitive telephone carriers' landline facilities in the wake of deregulation, and its concerns were heightened by the fact that only telephone companies have statewide franchises, which limited cities' control over their installations. (See, e.g., Sen. Rules Com., Off. of. Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 621 (1995-1996 Reg. Sess.), at p. 2.) The requirement of equivalent treatment prevents cities from picking favorites among competitors in the telephone market, and does not allow them to protect their incumbent landline carriers like Pacific Bell.

To read Section 7901.1's equivalence command more broadly would also create tension with the statute itself, which is framed as a clarifying enactment "consistent with Section 7901." (§ 7901.1(a).) Imposing a broad new command to treat all utility corporations in the same manner would hardly be "consistent" with Section 7901, which concerns telephone and telegraph corporations alone. It would also be inconsistent with Public Utilities Code section 5885(a), which since 2007 has required public entities to provide equivalent treatment between state-franchised video service providers and telephone companies. This provision would be unnecessary if Section 7901.1 already imposed that requirement.

Accordingly, because Section 7901.1 does not impose a requirement of equivalent treatment among all utilities but only among all telephone and telegraph corporations, Appellants' claims fail. While they complain of treatment different from video and electrical utilities, they never establish

or claim that landline providers receive different treatment when they install the same equipment. Appellants note that landline providers have installed equipment boxes that are similar in size to one of the boxes Appellants install as part of their wireless facilities. (AOB 14, 35.) But this box is comparable to only one component of Appellants' facilities, the equipment cabinet, and Appellants' facilities typically also include one or more antennas, an electric meter and cut-off switch, and sometimes also a separate cabinet containing a battery back-up unit. (See *supra* at 9.) Treating different equipment differently is not impermissible discrimination. (See *GTE Mobilnet of Cal. L.P. v. City & County of San Francisco* (N.D. Cal. 2006) 440 F.Supp.2d 1097, 1106 [holding that "equivalence in Section 7901.1 must take "into account the type of entity being regulated" including the difference between wireless and landline providers].) In addition, Appellants offered no evidence at trial as to ***when*** the comparable boxes were installed by other utilities, or whether those utilities intend to place more of them in the public right of way. There is no need for new aesthetic controls on equipment that is not being added or expanded but is merely being replaced. But allowing a significant amount of new equipment into the public right of way is a different matter.

Second, and independently, even if Section 7901.1's equivalence command applied to permanent installations by all utility providers, San Francisco would nonetheless prevail here because it has adopted ordinances providing for "equivalent" treatment for all of the kinds of utilities that are currently adding significant infrastructure to its streets. The use of cell phones has grown exponentially in recent decades, a trend that will only continue. As Appellants acknowledge, they intend "a massive deployment of small cells" that will be installed "more densely – *i.e.* in many more

locations" in the public right of way than ever before in order to upgrade their networks for 5G service. (AOB 10-11 [internal quotation marks and citations omitted].) The only other utility provider that is installing a significant amount of new infrastructure on San Francisco's streets is AT&T, which as part of its U-verse project intends to "upgrade broadband speed and capabilities based on internet protocol technology, using an expanded fiber-optic network." (*San Francisco Beautiful v. City and County of San Francisco, supra*, 226 Cal.App.4th at p. 1017.)

As discussed in greater detail *supra* at pages 8-9, in response to AT&T's plans to add significant numbers of new cabinets to public sidewalks as part of the U-verse project, San Francisco enacted Article 27 of the Public Works Code. Article 27 is equivalent to the Wireless Ordinance at issue here. It requires the Department of Public Works to issue a discretionary permit (S.F. Pub. Works Code, § 2700(a)); it requires the City to address whether the facility will be located in an appropriate location in the right of way (*id.* § 2703(a)); and it prohibits the facility in locations near historic resources, adjacent to open spaces, or on streets that are specially designated as appropriate to the urban form, among other criteria (*id.* § 2704(c)). It requires seeking the input of the Planning Department, which assesses the aesthetic impacts of the proposed facility location, or the Recreation and Parks Department if the proposed facility location is adjacent to a public park. (*Id.* §§ 2708, 2709.) These requirements find close parallels in the aesthetic review provisions of the Wireless Ordinance, which also restrict locations in historic districts, near parks, and on important streets. (S.F. Pub. Works Code, § 1502; *supra* at pp. 10-11.) Accordingly, San Francisco treats these utilities in an "equivalent" manner. And the Legislature's reference to "equivalent"

treatment rather than identical treatment indicates that local governments have some discretion in responding to the differences among utilities in matters such as the type of the equipment they seek to install.

D. If Section 7901.1 Applies To Telephone Companies' Occupation Of The Public Right Of Way, Then San Francisco's Ability To Control The Location Of Wireless Facilities Is Further Confirmed.

If Appellants are correct that Section 7901.1 applies to telephone companies' occupation of the public right of way, rather than merely their entry into it, then this supplies yet more reason to uphold San Francisco's use of aesthetic standards in permitting the location of wireless facilities. Section 7901.1 specifies that municipalities "have the right to exercise reasonable control as to the time, ***place***, and manner" in which their roadways are accessed. (Emphasis added.) Indeed, Appellants themselves admit that "[t]he natural reading of the provision is that localities retain some control over when and how facilities are placed in the rights-of-way, despite the broad franchise granted in Section 7901." (AOB 51.) Moreover, nothing in Section 7901.1 restricts a city's control of the "place" in which it permits telephone facilities, so long as that control is "reasonable," nor does 7901.1 limit cities' control to preventing obstruction of the right of way.

The Legislature's invocation of the familiar "time, place, and manner" test from free speech jurisprudence is telling; the words of a statute "are normally construed in light of existing statutory definitions or judicial interpretations." (*Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481, 487.) In speech cases, the time-place-and-manner framework offers the government latitude to regulate. "[L]egislation will be upheld as a reasonable time, place, and manner regulation so long as it is (i) narrowly

tailored, (ii) serves a significant government interest, and (iii) leaves open ample alternative avenues of communication." (*Los Angeles Alliance For Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 364.) It "need not be the least restrictive or least intrusive means" of serving the government's objectives. (*Snatchko v. Westfield LLC* (2010) 187 Cal.App.4th 469, 492, as modified on denial of reh'g (Sept. 3, 2010).) Free speech cases concerning newsracks provide an analogy: cases have upheld local regulations on the appearance and placement of newsracks for aesthetic reasons, notwithstanding the speech interests of newspaper distributors, so long as there are sufficient remaining locations for newspaper distribution. (See, e.g., *Duffy v. City of Arcadia* (1987) 195 Cal.App.3d 308, 312; *Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 304.)

San Francisco does not suggest that this Court should import wholesale the test for content-neutral speech restrictions into Section 7901.1 jurisprudence. Rather, the concerns that courts should bear in mind in applying Section 7901.1's time-place-and-manner standard are similar: So long as local rules regulating the location of telephone companies' installations serve the public welfare, and so long as localities approve a sufficient number of locations so that the quality of service or the exercise of the franchise is not impaired, then local rules should be upheld as reasonable under Section 7901.1.

Applying that test here, this Court should reject Appellants' challenge to the Wireless Ordinance. The City's interest in the appearance of its rights of way, and the immense importance of that appearance to San Francisco's economic vitality, have never been contested by Appellants. Equally important, while Appellants claim conclusorily that the Wireless Ordinance nullifies their franchise rights (AOB 3), they never demonstrated

at the trial in this case that the Wireless Ordinance has impaired their ability to provide service to any degree. To the contrary, the evidence showed that San Francisco has approved 98% of the permit applications that Appellants have presented to it. And if Appellants find in the future that their ability to provide wireless service is impeded by the Ordinance, they may challenge it as applied to those permit denials.

III. Under Any Plausible Preemption Analysis, San Francisco's Wireless Ordinance Is Not Preempted Because It Prevents Only Those Installations That "Incommode" The Public And It Does Not Impair The Exercise Of Statewide Franchise Rights.

Appellants also ask this Court to decide whether a plaintiff mounting a facial preemption challenge to a local ordinance must demonstrate that the ordinance conflicts with state law in all circumstances, or only most of them. This Court has sometimes stated that a facial challenge can succeed only where the plaintiff shows that the challenged law "inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions," and sometimes that the plaintiff must show a constitutional violation in "the generality or great majority of cases" (*Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 46-47 [internal quotation marks and citations omitted]; see also *In re Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126 ["The standard governing facial challenges has been a matter of some debate"].) But there is no reason in this case to decide the question once and for all, because Appellants never show that anything turns on it. (See *Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.* (2013) 57 Cal.4th 197, 218 ["we need not settle the precise formulation of the [facial challenge] standard because under any of the versions we have articulated the due process claim here would fail"].)

Because Sections 7901 and 7901.1 reserve to cities their police power to regulate the location and manner of installation of wireless facilities, and because cities may preclude installations that inconvenience the public's use of roadways—such as by distracting the public from views of the Painted Ladies with unsightly poles, antennas, and boxes—the Wireless Ordinance fits comfortably within the police powers retained by San Francisco. Accordingly, it is valid even under the more lenient generality-of-cases test. Appellants neither show that the Wireless Ordinance is inimical to the state franchise created by Section 7901 nor that it invades an area of law that the Legislature has reserved to itself.

A. Applicable Preemption Standards

"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." (Cal. Const., art. XI, § 7.) A conflict exists between state and local law "if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. . . . [L]ocal legislation is contradictory to general law when it is inimical thereto." (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897-898 [internal quotation marks and citations omitted].) Local legislation enters an area that is fully occupied by general law when the Legislature has expressly indicated an intent to fully occupy that area, "or when it has impliedly done so in light of recognized indicia of intent." (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1150 ["*Big Creek Lumber*"].)

The party claiming a conflict between state law and a local ordinance "has the burden of demonstrating preemption." (*Big Creek Lumber, supra,* 38 Cal.4th at p. 1149.) That burden is particularly heavy

where "there is a significant local interest to be served that may differ from one locality to another." (*Id.* [internal quotation marks and citation omitted].) When a local government exercises its police power "in an area over which it traditionally has exercised control . . ., California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is ***not*** preempted by state statute." (*Id.*) Here, because the City has a significant local interest in preserving its unique beauty, and because authority over the public right of way is an area of traditional local control (*Pac. Tel. II*, 197 Cal.App.2d at pp. 146, 152), Appellants' burden is a heavy one.

B. There Is No Contradiction Between State Law And The Wireless Ordinance.

This Court recently stated that "[t]he 'contradictory and inimical' form of preemption does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands. Thus, no inimical conflict will be found where it is reasonably possible to comply with both the state and local laws." (*City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, 743 [internal citations omitted].) Justice Liu's concurring opinion articulated a broader test for contradiction preemption that includes instances where local law " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' " of the Legislature. (*Id.* at p. 764 [conc. opn. of Liu, J.] [quoting *Sprietsma v. Mercury Marine* (2002) 537 U.S. 51, 64-65].)

Under either of these formulations, San Francisco's Wireless Ordinance does not contradict state law. Section 7901 grants to telephone companies a statewide franchise, and local governments may not impose a

local franchise requirement. (See *supra* at pp. 15-16.) But cities' ability to "control[] the particular location of and manner in which all public facilities, including telephone lines, are constructed in the streets" has long been recognized. (*Pac. Tel. I, supra*, 51 Cal.2d at p. 773; *id.* at p. 774 [noting that the telephone company "concede[d] the existence of power in the city to exact these requirements"].) To the extent that this Court interprets Section 7901.1 to apply to the long-term occupation of roadways by wireless facilities, it only confirms that cities have the power to control the "place" of installation. (See *supra* at pp. 39-40.) There is no inimical contradiction between a statewide requirement that telephone companies must be allowed to do business in San Francisco and local requirements concerning where the instrumentalities of that business may be installed.

Nor, on the record before this Court, have Appellants met their burden to show that the Wireless Ordinance stands as an obstacle to accomplishing the purposes of the statewide franchise. To the contrary, the record demonstrates that San Francisco has granted nearly all of the wireless facility permits that Appellants have sought, and Appellants have never shown that complying with the Wireless Ordinance has compromised their ability to provide wireless service. Instead they posit that their planned rollout of 5G services, which they say will involve more and denser wireless facilities than ever before, will bring the Wireless Ordinance into conflict with state law. But on a facial challenge, Appellants "cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the [law]." (*Arcadia Unified School Dist. v. State Dept. of Education, supra*, 2 Cal.4th at p. 267 [internal quotation marks and citation omitted].) Instead their remedy is to challenge applications of the Wireless

Ordinance to their 5G rollout plans in the event San Francisco applies the ordinance in a way that impairs their ability to provide 5G service.

C. The Public Utilities Code Does Not Occupy The Field Of The Location Of Public Utilities In The Right Of Way.

Where it desires to, the Legislature may oust cities' authority to regulate in an area of statewide concern. In such a case, the "no set of circumstances" formulation of the preemption test is apt: Because the local government retains no power to legislate, its enactment is invalid in every instance, regardless of whether it is possible to comply with both state and local law. (See, e.g., *Cal. Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177 [describing field-occupying state law as "the exclusive realm reserved for the state"].)

But that is not the case here; this Court has long construed the incommode clause to reserve the local police power to regulate telephone facilities that incommode the right of way (*City of Visalia*, *supra*, 149 Cal. at p. 751), and the Legislature has recently acted to "bolster" cities' power in this area. (Senate Utilities Com. Report, *supra*, at p. 2 [SA 982].) There is no express preemption clause in Section 7901, nor does it imply any ouster of local power other than the power to require a local franchise. (See *supra* at pp. 15-16.) Accordingly, if San Francisco is correct that to "incommode" the public right of way is to inconvenience the public, then its Wireless Ordinance operates within the power reserved to it.

Application of the factors for finding implied field preemption leads to the same conclusion. This Court has stated that the Legislature implies an intent to fully occupy a field of law where

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a

> paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.

(*Sherwin-Williams Co. v. City of Los Angeles, supra*, 4 Cal.4th at p. 898 [internal quotation marks and citations omitted].) None of these indicators is present here; to the contrary, the Legislature has directly expressed that municipalities have the power to regulate "in matters affecting the . . . convenience . . . of the general public, including matters such as . . . the location" of facilities. (§ 2902.)

The "paramount state concern" that the Legislature has expressed and implied with Section 7901 is that telephone corporations have the right to do business throughout California, and local regulation may not interfere with that right. But reasonable local controls of the "location and manner" of the installation of telephone facilities have long existed alongside the state franchise. (See *Pac. Tel. II, supra*, 197 Cal.App.3d at p. 146; see also *Pac. Tel. I, supra*, 51 Cal.2d at p. 773-74.) Nor do they adversely affect transient citizens, so long as telephone companies' ability to provide service remains intact. Because there is no indication on this record that San Francisco's Wireless Ordinance has impaired Appellants' ability to provide telephone service, statewide telephone franchise rights and the Wireless Ordinance can coexist, and Appellants have not met their heavy burden of demonstrating that the Legislature intended to oust San Francisco's power here.

CONCLUSION

For the reasons offered above, this Court should affirm.

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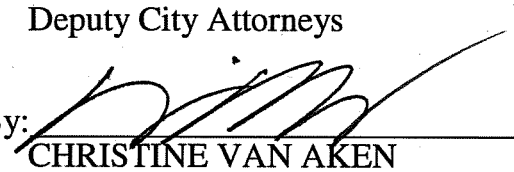
By: 
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 12,522 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on March 6, 2017.

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PROOF OF SERVICE

I, Pamela Cheeseborough, declare as follows:

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in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

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I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed March 6, 2017, at San Francisco, California.

Pamela Cheeseborough