

S238001

IN THE SUPREME COURT OF CALIFORNIA

T-MOBILE WEST LLC, et al., *Plaintiffs and Appellants,*

v.

CITY AND COUNTY OF SAN FRANCISCO, et al., *Defendants and Respondents.*

After a Decision 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

SUPREME COURT
FILED

APR 11 2017

Jorge Navarrete Clerk

Deputy

**PLAINTIFFS AND APPELLANTS' REPLY BRIEF ON THE
MERITS**

*Joshua S. Turner
(Admitted *Pro Hac Vice*)
Matthew J. Gardner (SB# 257556)
Megan L. Brown
(Admitted *Pro Hac Vice*)
Meredith G. Singer
(Admitted *Pro Hac Vice*)
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
TEL: (202) 719-7000
FAX: (202) 719-7049
jturner@wileyrein.com

T. Scott Thompson
(Admitted *Pro Hac Vice*)
Martin L. Fineman (SB#104413)
Daniel Reing
(Admitted *Pro Hac Vice*)
DAVIS WRIGHT TREMAINE, LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533
TEL: (415) 276-6500
FAX: (415) 276-6599
martinfineman@dwt.com

Counsel for Plaintiffs and Appellants
T-Mobile West LLC,
Crown Castle NG West LLC, and
ExteNet Systems (California) LLC

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Washington, D.C. 20006
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FAX: (202) 719-7049
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Daniel Reing
(Admitted *Pro Hac Vice*)
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San Francisco, CA 94111-6533
TEL: (415) 276-6500
FAX: (415) 276-6599
martinfineman@dwt.com

Counsel for Plaintiffs and Appellants
T-Mobile West LLC,
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INTRODUCTION

In its Answering Brief, the City and County of San Francisco (“City”) does not deny that it singles out advanced technologies for discretionary (and discriminatory) “aesthetic” review that traditional utilities do not have to undergo. Instead, in defending its decision to impose onerous rules on wireless providers, the City doubles-down on its policies that disfavor advanced technology by proudly asserting that it *also* discriminates against advanced telecommunications services when offered over wireline facilities. But holding new technologies to a higher standard, or attempting to slow their proliferation, is precisely what Section 7901 of the Public Utilities Code was designed to prevent.¹ For over 150 years, Californians have enjoyed state-of-the-art communications technologies and services, helped in part by the State’s long-standing commitment to encourage the deployment of advanced telecommunications technologies. Ordinances such as the City’s threaten to reverse course and leave Californians behind as the rest of the country races toward revolutionary fifth generation (“5G”) wireless technology. The City’s Ordinance is a formidable roadblock to innovation.

It is no answer for the City to assert, as it does throughout its brief, that it approves a high percentage of applications under its discriminatory

¹ Unless otherwise indicated, all statutory citations are to the Public Utilities Code.

and onerous regulations. There is no guarantee that the City will continue to approve these applications once the glare of judicial scrutiny fades, and these high approval rates do not account for the self-censoring that happens before applications are even filed. Given the City's complex, time-consuming, and discretionary procedures, carriers are dissuaded from filing all but sure-thing applications. And even if the City ultimately grants the majority of siting applications, the Ordinance's detrimental impact is still substantial. It imposes a time-consuming and costly review process that slows progress and frustrates deployment. This is completely at odds with the objectives of State law.

In their Opening Brief, Appellants showed that the Court of Appeal erroneously upheld the City's unlawful Ordinance by applying the wrong standard for facial preemption challenges and misinterpreting key terms of Section 7901 and 7901.1. The City does little or nothing to rebut these arguments. *First*, the court below relied on an incorrect standard of review to conclude that Appellants' challenge could succeed only if there were "no set of circumstances" under which the Ordinance could be validly applied. Appellants demonstrated that this standard, known as *Salerno* at the Federal level, has no place in facial preemption challenges. (Br. 18-34. See generally *United States v. Salerno* (1987) 481 U.S. 739.) Incredibly, the City pays little attention to a central issue in this appeal: whether the *Salerno* standard applies to facial preemption challenges. It claims that this

Court need not address this question because the Court below did not rely on the *Salerno* test in reaching its holding. But the opinion below explicitly incorporates that “no set of circumstances” standard in its holding and leaves no doubt that the test was outcome-determinative. (Opn. 15, 22.)

Moreover, in attempting to show why the central *Salerno* issue should not be determinative, the City mischaracterizes a number of preemption principles and gets others simply wrong. The City’s brief confuses specific *types* of preemption with the question of what standard should be applied to analyze a facial preemption challenge. In fact, the City misstates the “no set of circumstances” test, erroneously characterizing it as another description of field preemption. This is plainly an incorrect description of the test.

Second, under any standard of review, the Ordinance is at odds with the statewide franchise set forth in Section 7901. For decades, Section 7901 has universally been understood to preclude municipalities from imposing obstacles on advanced telecommunications deployments, as the Ordinance does. The City turns this regime on its head, claiming that Section 7901 authorizes municipalities to regulate facility deployments based on mere aesthetic concerns, and to be *especially* vigilant when it comes to the deployment of new technology. That is the opposite of what the Legislature enacted in Section 7901. The City’s power grab runs afoul of well-established precedent; no California court has ever read Section

7901 to reserve to localities the nearly limitless authority that the City seeks here.

To support its claim, the City seizes on Section 7901's limitation that telephone companies not "incommode the public use of the road or highway or interrupt the navigation of the waters." It stretches the meaning of "incommode" beyond recognition to encompass mere annoyance and aesthetic inconvenience, even though that reading conflicts with decades of case law and the plain meaning of the term. The City's reading of "incommode" would fatally undercut the State franchise, inviting a patchwork of local aesthetic regulations that could grind technological process to a halt.

Third, the City misreads Section 7901.1, which allows localities to exercise "reasonable control" over the "time, place, and manner" of access to public rights-of-way, provided that all entities are treated "in an equivalent manner." The natural reading of this provision is that localities retain limited authority over when and how facilities are placed in the rights-of-way, which harmonizes well with the broad statewide franchise rights that telephone companies enjoy. The City resorts to legal gymnastics in an effort to prove that Section 7901.1's equivalent treatment mandate applies only to *temporary* construction activities and occupations of the rights-of-way, thus implicitly providing the City with broad powers to discriminate when it comes to permanent occupations. But the City cannot

overcome the plain language of the statute. This Court's analysis should begin and end with Section's 7901.1's text.

The City's failure to grapple with these issues, much less rebut them, confirms that the Ordinance must be set aside. Appellants respectfully request that this Court reverse the Court of Appeal, find the City's discriminatory Ordinance preempted, and remand with instructions to enter judgment in Appellants' favor on Paragraph 5 of the Superior Court's Judgment (A00838).

DISCUSSION

I. THE CITY CANNOT REFUTE APPELLANTS' SHOWING THAT THE COURT OF APPEAL ERRONEOUSLY APPLIED THE "NO SET OF CIRCUMSTANCES" TEST.

The City's muddled preemption arguments attempt to sidestep a central issue in this appeal: whether it is proper to apply the "no set of circumstances" test to a facial preemption challenge. As Appellants demonstrated, courts around the State and the nation, including the U.S. Supreme Court, have held that it is not. (See Br. 19-25.) This Court should reach the same conclusion. Because the Court of Appeal's use of *Salerno* to decide this case was out of step with this Court's precedent and runs afoul of the U.S. Supreme Court's approach in *Arizona*, it should be reversed. (See, e.g., *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1251-52; *Arizona v. United States* (2012) 132 S.Ct. 2492, 2500.)

Rather than grappling with *Salerno*, the City attempts to sidestep the issue by downplaying the Court of Appeal's error and mischaracterizing applicable preemption standards. The City contends that this Court need not decide whether *Salerno* applies to facial preemption challenges because, in its view, the Court of Appeal's misapplication of the standard was not outcome-determinative. (Ans. Br. 38.) The City is wrong. The Court below expressly relied on the standard in reaching its decision. (Opn. 15, 22.)

The City also confuses several preemption principles by trying to reframe the dispute here as about whether "impossibility" or "objects and purposes" preemption is the right analytic lens. (Ans. Br. 40-42.) That is not the issue before the Court. The City's enactment of an ordinance that allows it to reset the balance between technological progress and aesthetics stands as a clear obstacle to the State objective of promoting advanced telecommunications deployments throughout California. The only question remaining is whether Petitioners must demonstrate that there is "no set of circumstances" under which the Ordinance would be valid.² This question

² Although it is true that there are "no set of circumstances" under which municipal action would be permitted in a preempted field, as the City notes, that is not the sense in which the Court of Appeal used the phrase. In the decision below, the Court of Appeal used this phrase to describe the standard to which it held Appellants' challenge—Appellants must show there are "no set of circumstances" where the Ordinance is not preempted. (Opn. 15.) The City thus fundamentally misapprehends the meaning of this term of art, which is central to this case.

answers itself. Even if there are some individual instances in which the City might apply the Ordinance that would not specifically block technological progress, the City's very assertion of authority to strike its own balance between deployment and aesthetics is at odds with the goals of the State franchise. For these reasons, the Ordinance must be set aside.

A. **The Court of Appeal's Misapplication Of The *Salerno* Standard Was Outcome-Determinative.**

The City essentially ignores Appellants' argument that the *Salerno* standard does not apply in the facial preemption context. Instead, the City rests on the theory that this Court need not decide whether the "no set of circumstances" test applies "because Appellants never show that anything turns on it." (Ans. Br. 38.) But the Court of Appeal's opinion belies this claim.

The court below explicitly invoked the "no set of circumstances" test in its holding, emphasizing that "Plaintiffs have not met their burden to show local government can *never, in any situation*, exercise discretion to deny a permit for a particular proposed wireless facility." (Opn. 15, original italics.) The court's use of italics to incorporate and emphasize the *Salerno* standard underscores the centrality of the test to its holding.

The Court of Appeal's reliance on hypotheticals further confirms that the *Salerno* standard was outcome-determinative. The court upheld the Ordinance because it could "imagine" a scenario where a wireless facility

“might aesthetically ‘incommode’ the public use of the right-of-way,” if, for example, it was installed “very close to Coit Tower or the oft photographed ‘Painted Ladies.’”³ (Opn. 22.) As Appellants showed, engaging in this kind of “speculat[ion] about ‘hypothetical’ or ‘imaginary’ cases,” (*Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442, 450) is only relevant in the rigid *Salerno* context, which requires Courts to “dream up” remote scenarios where application of the challenged law might be valid. (*Bruni v. City of Pittsburgh* (3d Cir. 2016) 824 F.3d 353, 363.) Where, as here, a court must resolve dueling assertions of authority between a sovereign and its subordinate, there is no reason to chase phantom hypotheticals. (See Br. 26-31 [explaining that facial preemption challenges are necessarily subject to a less demanding standard of review to ensure that local interests do not thwart State policies].)

The City does nothing to engage or refute this line of argument. Nor does the City attempt to respond to the absurd results that would result from applying the rigid *Salerno* standard in the facial preemption context.

³ As Appellants explained, the Court of Appeal’s chosen hypothetical fails in any event. The Ordinance does not apply near Coit Tower or the Painted Ladies, meaning the Court’s hypothetical does not even relate to the Ordinance’s real world effects. (Br. 29-30. Cf. *City of Los Angeles v. Patel* (2015) 135 S.Ct. 2443, 2451 [“When assessing whether a statute meets [the *Salerno*] standard, the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct.”]; fn. 9, *infra*.)

Requiring that State and local policies diverge in every conceivable set of circumstances before there is preemption would cripple the State's ability to ensure uniform policy in areas of statewide concern. In the simplest terms, a local law that leads to conflicting outcomes most of the time can just as obviously serve as an obstacle to State objectives as a local law that conflicts in every potential case.

Moreover, the very idea of the facial preemption challenge is to afford plaintiffs the chance to show that the underlying principle behind the local law conflicts with State law without having to go through the time and expense of developing extensive record evidence. Here, for example, the fact that the City has arrogated to itself the power to make decisions about whether to favor or disfavor particular technologies is fundamentally and irrevocably at odds with Section 7901. That remains true regardless of how the City ultimately exercises the authority that it claims for itself. Accordingly, this Court has declined to apply the "no set of circumstances" test to facial preemption challenges. (See *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067-68 [deciding a facial preemption challenge without invoking the *Salerno* standard]; *American Financial Services Assn.*, *supra*, 34 Cal.4th at p. 1251-57 [same]; *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1237 [same].)

Instead, this Court has analyzed such cases simply by evaluating whether the local enactment conflicts with State policy or enters an area

reserved to the State. (See, e.g., *O'Connell*, *supra*, 41 Cal.4th at p. 1076 [striking a local vehicle forfeiture ordinance because it “impinge[d] on an area fully occupied” by State law].) If so, the local enactment cannot stand. The Court of Appeal departed from this well-established precedent and relied on an improper Federal standard to reach its holding. For this reason, the opinion below must be reversed.

B. The Ordinance Conflicts With Well-Established State Objectives.

Although the *Salerno* standard was outcome-determinative for the Court of Appeal, the Ordinance should be preempted under any standard because its intent and effect is to discriminate against advanced telecommunications technologies, something that California law plainly precludes. (See Br. 35-38.) Longstanding precedent recognizes that Section 7901 embraces, and is intended to promote, innovative telecommunications deployments throughout the State. (See *Pacific Telephone & Telegraph Co. v. City of Los Angeles* (1955) 44 Cal.2d 272, 282 (*Los Angeles*).) As this Court has explained, the “very purpose” of the State franchise is “to give [telephone] subscribers the benefit of the many and varied uses of telephone wires made possible by scientific development.” (*Ibid.*) The franchise has long been understood to encourage deployment of the newest and most advanced communications technologies because “the people expect [franchisees] to use the most

modern equipment.” (*Pacific Telephone & Telegraph Co. v. City & County of San Francisco* (1961) 197 Cal.App.2d 133, 147 (*Pacific Telephone II*).)⁴

The Ordinance stands in the way of the technological progress that the State franchise is intended to promote.⁵ It imposes unique burdens on particular communications services and empowers the City to use ostensibly “aesthetic” regulations to discriminate against emerging technologies. (See Br. 12-14.) The services offered using Appellants’ wireless technologies represent the next frontier of telecommunications. Yet the Ordinance subjects these facilities and services to onerous regulatory review that does not apply to other technologies or services that impose similar (or even greater) burdens on the public rights-of-way. (See Br. 35-37 [explaining that the facilities at issue are subject to discriminatory treatment even though they are in most cases identical in size and overall impact or in some cases even *smaller* than traditional wireline telephone, cable, and electrical facilities].)

⁴ The California Legislature has likewise confirmed that the deployment of advanced telecommunications technology is a statewide objective that should not yield to contrary local interests. (See Gov. Code § 65964.1(c).)

⁵ The City’s Brief is littered with a constant refrain: that the Ordinance supposedly does not burden technological innovation because 98% of wireless facility permits have been approved. (See, e.g., Ans. Br. 1.) This is sheer sophistry. Among other things, the City’s misleading statistic ignores the costs and delays inherent in the Ordinance’s discriminatory aesthetic review, even where an application is granted. (See Part II.C, *infra*.)

The City does not deny that the Ordinance discriminates against new technology. Instead, it celebrates this fact. The City's Answering Brief frankly concedes that the City enacted the Ordinance not in spite of the significant need for more facility deployments to meet the growing consumer demand for advanced telecommunications services, but *because of it*. (See, e.g., Ans. Br. 5, 7 [explaining that the Ordinance was enacted in response to "[g]rowing demand for wireless telecommunications"] [internal quotations omitted].) As the City concedes, the Ordinance targets the "[t]echnological change in recent years" that has driven "plans to expand" wireless service and broadband facilities. (*Id.* at p. 5.) The City's claimed concerns are thus nothing more than a pretext to discriminate against emerging telecommunications technologies, to try to slow their spread. (See *infra*, Part II.A.) Because the Ordinance is specifically designed to erect unique barriers to advanced communications deployments, it is fundamentally at odds with Section 7901.

The City attempts to minimize the conflict between the Ordinance and the State franchise by devising a narrow interpretation of Section 7901 that defies both logic and precedent. It contends that the State franchise was enacted simply to grant telephone companies "the right to do business throughout California" without interference from "local franchise requirement[s]." (Ans. Br. 43, 41. See also *id.* at p. 12.) And, in the City's view, "[t]here 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.” (*Id.* at p. 41.)

The City is wrong. The State franchise has never been understood to confer only the limited “right to engage in the telecommunications business in California” free from local franchise requirements. (Ans. Br. p. 12.) Such an interpretation would be contrary to the language of Section 7901. Section 7901 has universally been understood to confer *both* the right to do business *and* the right to build the facilities necessary to conduct that business. (See *Pacific Telephone II*, *supra*, 197 Cal.App.2d at p. 147.)

The City’s unreasonably narrow interpretation of Section 7901 contradicts the plain language of the statute. The Legislature did not simply state that telephone and telegraph companies may “operate” or “do business” throughout the State without negotiating “local franchises.” In fact, none of these words are even used in the statute. Rather, Section 7901 specifically states that telephone corporations “may construct lines of telegraph or telephone lines” and “may erect poles, posts, piers or abutments for supporting the insulators, wires, and other necessary fixtures of their lines.” (§ 7901.) The language of the statute is thus primarily concerned with constructing facilities, not with the right to do business, which runs completely counter to the reading offered by the City.

In addition to running afoul of the statute's plain language, the City's interpretation also strips the State franchise of the practical benefits it is intended to secure. A State franchise is meaningless if localities can thwart telephone companies' ability to build the facilities necessary provide service to consumers. Allowing municipalities to restrict infrastructure deployments to remote edges of city boundaries, for example, would destroy a telephone company's ability to provide service throughout the State even though the company might, as a technical matter, still retain "the right to do business" in California. (Ans. Br. 43.) Moreover, the City's narrow construction of the franchise ignores the Legislature's primary purpose of promoting the deployment of advanced communications systems throughout the State. (See *infra*, Part II.B.)

California courts thus have sensibly rejected the reading proffered by San Francisco. They have uniformly recognized that if the State franchise means anything at all, it necessarily grants telephone companies the right to build the facilities needed to offer advanced communications services to citizens throughout the State. (*Pacific Telephone II*, *supra*, 197 Cal.App.2d at p. 147.) Section 7901 has consistently been held to authorize telephone companies to "construct and maintain in city streets the necessary equipment to enable the company to operate its business," regardless of the aesthetic impact such facilities may have. (*Ibid.*) The City's contrary reading would "defeat the very purpose of" Section 7901 by "interfer[ing]

substantially with the ability of telephone companies to provide adequate communication service to the people of the state.” (*Los Angeles, supra*, 44 Cal.2d at p. 282.)

C. **The City’s Preemption Analysis Is Irrelevant And Wrong.**

Rather than grappling with Appellants’ substantive *Salerno* arguments, the City focuses its preemption discussion on the divide between field preemption and conflict preemption. (Ans. Br. 40-43.) These are red herrings. Appellants do not claim that field preemption completely excludes cities from playing any role in the siting of telecommunications infrastructure; the plain text of both Sections 7901 and 7901.1 make clear that cities may regulate the placement of facilities that “incommode” the public rights of way, so long as they do so in a neutral and non-discriminatory manner. The preemption here arises from the conflict between the underlying *purpose* of Section 7901 (i.e., to permit and encourage the deployment of telecommunications facilities) and the Ordinance (which the City admits is designed to restrict the deployment of these facilities). The question of field versus conflict preemption is thus of no moment here, and the City’s claims to the contrary reflect a fundamental misunderstanding of the preemption issues at play. By focusing exclusively on this question of field versus conflict preemption, the City offers no response to the actual issue before this Court, which is whether it is proper to apply the rigid *Salerno* standard to facial preemption

challenges, regardless of the specific type of preemption asserted. (Br. 18-34.)

The City also confuses the “no set of circumstances” test articulated in *Salerno* with field preemption, asserting that the test is “apt” in the context of field preemption. (Ans. Br. 42-43.) The City’s description of the “no set of circumstances” standard as being relevant solely in the field preemption context simultaneously gets the test wrong and fundamentally misapprehends the meaning of the phrase. It is not meant to refer to field preemption, where there are “no set of circumstances” in which local regulation is permitted. (See *id.* at p. 42 [citing *Cal. Grocers Assn. v. City of Los Angeles* (2011) 52 Cal.4th 177].) Rather, as used in *Salerno*, and by the court below, “no set of circumstances” refers to what a plaintiff must show to invalidate a challenged law. (See *Salerno, supra*, 481 U.S. at p. 745; Opn. 15, 22.) As Appellants explained, and the City cannot refute, *Salerno*’s “no set of circumstances” standard is a heavy burden that has no place in the context of a facial preemption challenge. (Br. 18-34.)

II. SECTION 7901 HAS NEVER BEEN UNDERSTOOD TO ALLOW CITIES TO REGULATE WIRELESS FACILITIES BASED ON AESTHETIC CONCERNS.

The City caricatures Appellants’ argument as presenting a false choice “between progress and parochialism.” (Ans. Br. 1.) But there is no choice to be made here. That is the point—the Legislature has already spoken on the issue and it has chosen technological progress, by enacting

the broad statewide franchise in Section 7901 and then placing strict limits on local regulation in Section 7901.1. Telephone corporations' State franchise to construct facilities in the rights-of-way precludes the City from "adjust[ing] the balance" "between technological advancement and community aesthetics" by discriminating against new and innovative wireless technology. (Opn. 1.) "[A]ny delegation from the state to the city of authority to control the right of [telephone companies] to do [] business should be clearly expressed, and any doubt as to whether there has been such a delegation must be resolved in favor of the state." (*Los Angeles, supra*, 44 Cal.2d at p. 280.)

A. **The City Admits That Its Ordinance Is Designed To Impose Unique Burdens On Advanced Telecommunications Facilities.**

In its effort to respond to Appellants' showing that the Ordinance places unique burdens on wireless facilities, the City acknowledges that it discriminates against wireless facilities, but argues that this is acceptable because it *also* disfavors other new technology. (See, e.g., Ans. Br. 5-7, 25-26.) The City asserts that the Ordinance does not *impermissibly* discriminate against wireless technology "because [the City] regulates other burgeoning technologies in an equivalent manner." (*Id.* at p. 32.) The implication is that the City is free to discriminate against wireless facilities because, from time to time, it also discriminates against some other advanced forms of telecommunications technology.

Despite the City's protestations that it discriminates against all new technology equally, this is not true. The City points to Article 27 to support its argument, claiming that the provision places "equivalent" restrictions on the construction of surface-mounted broadband facilities. (Ans. Br. 6, 35-36. See S.F. Ord. No. 76-14 (Article 27).) But Article 27 only applies to *new* builds of standalone equipment, not the placement of facilities on *existing* poles, which Article 25 uniquely burdens. The City offers no reason for imposing the same onerous requirements on providers that merely seek to add attachments to existing poles as those that apply to deployments of new freestanding street furniture and equipment. As Appellants argued, the requirements imposed on wireless facilities are unique. (Br. 35-38.)

Regardless of whether the burdens the City imposes on wireless facilities and other rights-of-way users are equivalent, though, the City's argument only emphasizes its improper motives. Singling out emerging technologies for onerous aesthetic review is discriminatory and cannot be saved by singling out *all* emerging and advanced technologies for disfavored treatment. Rather than distancing itself from the fact that the Ordinance discriminates against advanced telecommunications deployments, the City doubles-down and admits that the Ordinance was designed as part of an overall policy to put the brakes on the widespread deployment of innovative new facilities. (See, e.g., Ans. Br. 34.) It

acknowledges that it is attempting to hinder deployments of “the only two kinds of equipment that are presently being installed in San Francisco’s rights of way in significant numbers—wireless facilities and [] surface-mounted equipment cabinets.” (*Id.* at pp. 25-26.) Indeed, the City concedes that the Ordinance is targeted at “the kinds of utilities that are currently adding significant infrastructure to its streets,” such as broadband providers. (*Id.* at p. 34.) Because “[t]he use of cell phones has grown exponentially” and wireless companies plan to deploy facilities that will be installed “in many more locations ... than ever before in order to upgrade their networks for 5G service,” the City took it upon itself to enact the Ordinance to stymie the technological revolution it saw unfolding across California.⁶ (*Id.* at pp. 34-35 [internal quotations omitted].) The City’s Answering Brief and the uncontested record confirm that the Ordinance’s primary purpose is to erect powerful barriers to advanced wireless facility deployments—precisely what Section 7901 forbids.

B. The State Franchise Precludes Localities From Imposing Obstacles On New Telecommunications Technologies.

As Appellants argued in their Opening Brief, over a century of California case law establishes that the State franchise is intended to secure

⁶ The City’s efforts to undermine telecommunications advancement are paying off. “Dropped calls, slow data and spotty service” are rampant throughout San Francisco. (CBS News, San Francisco Cellphone Service Shockingly Bad For A Global Tech Capitol (Jan. 3, 2017), *available at* <http://sanfrancisco.cbslocal.com/2017/01/03/san-francisco-cellphone-service-shockingly-bad-for-global-tech-capitol/>.)

Californians' access to the most advanced telecommunications infrastructure by preventing localities from erecting barriers to innovative deployments. (See *Los Angeles*, *supra*, 44 Cal.2d 133, *Pacific Telephone II*, *supra*, 197 Cal.App.2d 272, and *Williams Communications, L.L.C. v. City of Riverside* (2004) 114 Cal.App.4th 642 (*Williams*).) In response, the City misreads *Los Angeles*, *Pacific Telephone II*, and *Williams*, claiming that these cases merely “hold that evolving kinds and uses of telephone equipment are encompassed within Section 7901’s statewide franchise grant” and “offer[] guidance only as to the scope of the state franchise and not as to the scope of local regulation.” (Ans. Br. 17, 18.) But the scope of the rights conferred by the State directly affects the scope of the power retained by municipalities; they are two sides of the same coin. And each case makes clear that Section 7901 promotes the deployment of the most advanced communications technology and supersedes local attempts to limit the franchise.

Los Angeles confirms that Section 7901 embodied the Legislature’s desire to ensure that telephone companies are subject to consistent statewide regulation, not fractured local policies.⁷ (See *Los Angeles*, *supra*, 44 Cal.2d at p. 280 [“The business of supplying the people with telephone

⁷ The Court in *Los Angeles* was troubled by frameworks that would require “numerous local franchises.” (*Los Angeles*, *supra*, 44 Cal.2d at p. 282.) But these “numerous local franchises” are nothing compared to what the Ordinance requires: hundreds or even thousands of site-by-site approvals for modest deployments on existing poles.

service is not a municipal affair; it is a matter of statewide concern.”].) The court rejected a narrow construction of Section 7901, concluding that the franchise is intended to bolster “the ability of telephone companies to provide adequate communication service to the people of the state” and ensure that Californians always have access to state-of-the-art communications systems. (*Id.* at p. 282.)

Pacific Telephone II likewise affirms that Section 7901 grants telephone companies expansive rights to “construct and maintain in city streets the necessary equipment to enable the company to operate its business,” including the construction of facilities underground. (*Pacific Telephone II, supra*, 197 Cal.App.2d at p. 147.) There, the court emphasized that a locality’s authority over the location and manner of telephone facility construction “necessarily is limited” such that localities may prevent only “unreasonable obstruction[s]” of the rights-of-way. (*Id.* at p. 146.) Finally, *Williams* interpreted the State franchise broadly, confirming that “conflicting local regulations” that stifle telecommunications “growth” and “impede [providers’] ability to serve the public interest,” as the Ordinance does, cannot stand. (*Williams, supra*, 114 Cal.App.4th at p. 652.)

All three cases confirm that a locality’s ability to limit the State franchise is extremely narrow. (See *Los Angeles, supra*, 44 Cal.2d at p. 280 [“The business of supplying the people with telephone service is not a

municipal affair; it is a matter of statewide concern.”]; *Pacific II*, *supra*, 197 Cal.App.2d at pp. 148, 150; *Williams*, *supra*, 114 Cal.App.4th at p. 653 [“Although the types of services provided ... are different because of technological advances, the basic principle remains the same: regulation of such services is a matter of state concern.”]. See also Gov. Code § 65964.1(c) [“The Legislature finds and declares that a wireless telecommunications facility has a significant economic impact in California and is not a municipal affair..., but is a matter of statewide concern.”].) The key principle animating all three cases is the same: Section 7901 encourages deployments of new and cutting-edge facilities, and forbids localities from enacting discriminatory regulations, like the Ordinance, that disfavor emerging technologies.

C. **The City’s Novel And Overly Broad Interpretation of “Incommode” Would Render The Rights Secured By The State Franchise Meaningless.**

Section 7901 places one limitation on the rights that it confers to telephone companies: they may not “incommode the public use of the road or highway or interrupt the navigation of the waters.” (§ 7901.) “Incommode” has consistently been interpreted by California courts narrowly. As the City admits, no California court had ever even *suggested* that “incommode” could be read so broadly as to encompass mere aesthetics or annoyance until the lower court’s decision. (Ans. Br. 1.) Yet according to the City, this Court should now invest “incommode” with a

nearly limitless reach, encompassing mere “inconvenience, disturbance, or discomfort,” (*ibid.*) and anything that may “annoy, molest, [and] embarrass.” (*Id.* at p. 15.) The City’s interpretation of “incommode” ignores the plain text of Section 7901 and the statewide interest in the deployment of advanced telecommunications technology.

As the sole support for its broad interpretation of “incommode,” the City resorts to expansive and vague dictionary definitions, ignoring the broader context of the State franchise. (Ans. Br. 14-15.) But as with all other statutory terms, “[i]ncommode” cannot be read in isolation. (*Robinson v. Shell Oil Co.* (1997) 519 U.S. 337, 341 [“The plainness or ambiguity of statutory language is determined by reference to ... the specific context in which that language is used, and the broader context of the statute as a whole.”].) Instead, it must be understood within the context of Section 7901, which defines the term with respect to the active “use” of the roads and highways and “navigation” of the waters. (§ 7901. See also *Welch v. United States* (2016) 136 S.Ct. 1257, 1267 [determining that “as a matter of statutory interpretation” the term “use” denotes “active employment”] [internal quotations omitted].) The City’s interpretation of “incommode” is inconsistent with the concept of active “use” because it would extend to mere decreases in passive aesthetic enjoyment of the rights-of-way. Stretching “incommode” so broadly reads “use” out of Section 7901: a reduction in the aesthetic appeal of the rights-of-way

cannot “incommode” active “use of the road,” nor can it “interrupt” “navigation of the waters.” (§ 7901.)

The City’s novel construction of “incommode” also runs afoul of well-established precedent. As this Court has confirmed, localities may only regulate so “as to prevent unreasonable obstruction of travel” by the placement of telecommunications facilities. (*Western Union Telegraph Co. v. City of Visalia* (1906) 149 Cal. 744, 750-51 (*Visalia*).) “Obviously, the Legislature in adopting [Section 7901] knew that the placing of poles, etc., in a street would of necessity constitute some incommmodity to the public use.” (*Pacific Telephone II, supra*, 179 Cal.App.2d at p. 146.) That is why “incommode” must be interpreted narrowly, as “necessarily ... limited to an unreasonable obstruction of the public use.” (*Ibid.*)

The City’s view of “incommode” represents a substantial expansion of local authority that cannot be reconciled with California case law. (See *Visalia, supra*, 149 Cal. at pp. 750-51; *Pacific Telephone II, supra*, 179 Cal.App.2d at p. 146.) Under the City’s reading, a locality could enact discriminatory regulations anytime it concludes that a proposed facility will cause mere aesthetic annoyance. The Legislature could not have intended such a result. Telephone facilities and equipment have *always* posed some aesthetic intrusion on city rights-of-way. (See *Preferred Communications, Inc. v. City of Los Angeles* (9th Cir. 1994) 13 F.3d 1327, 1330 [noting the “disruption and visual blight caused by additional ... wiring”].) Indeed,

that undoubtedly was one of the reasons that the State decided a statewide right was necessary in the first place, to prevent municipalities from resisting placement of wireline facilities in their rights-of-way. It is thus not surprising that no California court has ever declared that aesthetic irritation alone can “incommode” the public rights-of-way. The City’s boundless reading of “incommode” would eviscerate Section 7901’s objective of promoting the deployment of advanced telecommunications facilities by granting municipalities a nearly unfettered right to enact discretionary obstacles that impede deployment. “Incommode” simply cannot be read to swallow the State franchise as the City insists.

The City deploys a strawman in an attempt to undermine Appellants’ reading of “incommode.” It asserts that under Appellants’ interpretation of “incommode,” the City could not “prevent [Appellants] from installing wireless facilities in front of the famous Painted Ladies on Alamo Square Park.” (Ans. Br. 22.)⁸ But this case does not present a question about the construction of *new poles*. Rather, the Ordinance targets only new

⁸ Appellants object to the City’s Motion for Judicial Notice, which is completely improper. Not only is the “transcript” provided by the City both unofficial and incomplete, the City’s Answering Brief mischaracterizes the contents of even this pseudo-transcript. (See, e.g., Ans. Br. 22 [making erroneous claims about Appellants’ admissions at oral argument].) In any event, while courts may take notice of the *existence* of official records, courts may not take judicial notice of the truth of hearsay statements in court files, which is what the City asks here. (See *Johnson & Johnson v. Superior Court* (2011) 192 Cal.App.4th 757, 768.)

attachments to *existing poles*.⁹ The placement of new poles may well raise different concerns about physical obstruction and travel impairments than the purely aesthetic concerns involved here, but that is not the issue before this Court. None of the City's parade of horrors involve the conduct that the Ordinance actually regulates, i.e. adding small attachments to existing infrastructure.

The City points to a litany of sources that it claims support its capacious interpretation of "incommode," but the cited authorities fail to bolster the City's position. *First*, the City misreads *Visalia*, claiming that the case supports its broad reading of "incommode" because the case "approved" an ordinance allowing a locality to set a uniform requirement of 26-foot-high wires to serve "aesthetic interest[s]." (Ans. Br. 16.) *Visalia* did no such thing. It simply concluded that the ordinance in question "was in the nature of a contract" between two parties and clarified that localities had the authority to "regulate the manner of plaintiff's placing and maintaining its poles and wires as to prevent unreasonable obstruction of travel." (*Visalia, supra*, 149 Cal. at pp. 750-51.) The City's claim that uniform height regulation could only have aesthetic motivations is absurd. Requiring that there be uniform clearance under wires is precisely the kind

⁹ The City's hypothetical does not relate to the real world effects of the Ordinance. The City prohibits above-ground utility poles in "underground districts" such as Alamo Square Park. (A00194-95; Reporter's Tr. 1211:21-24 (Jan. 28, 2014).)

of decision that local jurisdictions can make to ensure that travel underneath these facilities is not “incommode[d].”

Second, the City’s reliance on Section 2902, Government Code Section 65964, and various California Public Utility Commission (“CPUC”) decisions is mistaken. (Ans. Br. 18-21.) Contrary to the City’s claims, these authorities reinforce Section 7901’s basic principle that localities may not adopt aesthetic-based regulations that discriminate against emerging forms of telecommunications technology.

Section 2902 “does not confer any powers upon a municipal corporation but merely states that certain existing municipal powers are retained by the municipality.” *Southern Cal. Gas Co. v. City of Vernon* (1995) 41 Cal.App.4th 209, 217 [holding that a municipality did not have jurisdiction over the design and construction of proposed gas pipelines] (*Vernon*).) The statute merely clarifies that municipalities are not required to relinquish all of their general authority over “matters affecting the health, convenience, and safety of the general public.” (§ 2902.) Indeed, *Vernon* rejected a locality’s attempt to regulate aesthetics under Section 2902, explaining that municipalities retain control only over “matters involving the flow of traffic and the use and repair of public streets.” (*Vernon, supra*, 41 Cal.App.4th at p. 217.) If anything, Section 2902 confirms the propriety of Appellants’ construction of “incommode.”

Government Code Section 65964 likewise does not support the City's reading of "incommode." To the contrary, it places further limits on municipal power over telecommunications facilities. Among other things, this provision prohibits localities from limiting the duration of wireless facility siting permits to a term of less than ten years "absent public safety reasons or substantial land use reasons." (Gov. Code § 65964(b).) The City claims that the statute's passing reference to public safety and land use suggests localities retain "broader power" to regulate advanced telecommunications deployments. (Ans. Br. 19-20.) But "public safety reasons" and "*substantial* land use" concerns are far removed from the power to regulate based on mere annoyance, which is what the City claims here. (*Ibid.*; Gov. Code § 65964(b), italics added.)

Nor does the CPUC precedent the City cites support its expansive view of municipal authority. As the City admits, the CPUC grants localities some deference over the time, location, and manner of facility construction "unless a telephone company seeking access 'contends that local action impedes statewide goals.'" (Ans. Br. 21 [quoting *In re Competition for Local Exchange Service* (1988) 82 Cal. P.U.C.2d 510, *22 [Decision No. 98-10-058]].) Thus, where, as here, the Ordinance impedes clear statewide objectives, local deference has no place. Indeed, the CPUC "continues to reserve jurisdiction to preempt those matters which are inconsistent with the overall statewide communications objectives." (*In re*

Cellular Mobile Radiotelephone Util. Facilities (1996) 66 Cal. P.U.C.2d 257 [Decision 96-05-035]. See also *In re Competition for Local Exchange Service* (1988) 82 Cal. P.U.C.2d 510, *22 [Decision No. 98-10-058].)

Third, the City's citation to non-binding and controversial Federal authority in support of its overbroad reading of "incommode the public use" is unpersuasive. (Ans. Br. 18 [citing *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716 (*Palos Verdes Estates*)].) *Palos Verdes Estates* does not, as the City falsely states, "overrule[]" *Sprint PCS Assets, L.L.C. v. City of La Cañada Flintridge* (9th Cir. 2006) 182 F.App'x 688 (*City of La Cañada*). (*Ibid.*) Rather, *Palos Verdes Estates* directly conflicts with *City of La Cañada*. (See *Palos Verdes Estates, supra*, 583 F.3d at p. 721, n.2 [explaining that whether municipalities "have the power to consider aesthetics ... has not been resolved in a published opinion on which we may rely"].) Further, as Appellants explained, *Palos Verdes Estates'* conclusion is erroneous and conflicts with this Court's prior interpretation of "incommode" in *Visalia, supra*, 149 Cal. at pages 750-51. (Br. 46-47.)

Finally, in an attempt to present its discriminatory aesthetic review process as reasonable, the City claims that it had granted 98 percent of permit applications under the Wireless Ordinance through the time of trial. (See, e.g., Ans. Br. 1, 3, 8.) The City's repeated citation to this self-serving statistic is unhelpful. It does not account for deployments that were not

pursued or applications that were never submitted due to the City's onerous review process. It sheds no light on the costs, burdens, and delays associated with obtaining approval. And it offers no guarantee that approvals will continue following resolution of this case. In any event, as the City concedes, the Ordinance is designed to saddle advanced wireless technologies with unique burdens. (Ans. Br. 25-26, 34.) The Ordinance's discriminatory treatment is fatal; no number of approvals can cure this fundamental defect.

The City ultimately cannot escape the fact that the Ordinance subjects innovative telecommunications technologies to burdensome, time-consuming, and resource-draining discriminatory aesthetic review. The Ordinance permits localities to deny Californians access to the advanced telecommunications technologies that the State franchise is intended to secure. The unreasonable costs and delays associated with the Ordinance will frustrate the deployment of transformative 5G technologies, including the Internet of Things ("IoT") and revolutionary public safety platforms. (See Br. 56-61.) The state franchise prohibits municipalities from prioritizing their own technological preferences over State objectives, technological progress, and providers' statutory franchise rights. This Court should overturn the Court of Appeal's decision and invalidate the Ordinance.

III. THE CITY'S INTERPRETATION OF SECTION 7901.1 IS FATALLY FLAWED.

Section 7901.1 serves to clarify the power reserved to localities in light of the broad franchise rights granted by Section 7901. It provides that, “consistent with Section 7901,” municipalities may exercise “reasonable control as to the time, place, and manner in which [public rights-of-way] are accessed.” (§ 7901.1.) For control to be reasonable, it must, “at a minimum, be applied to all entities in an equivalent manner.” (*Ibid.*) The only sensible way to harmonize Section 7901 and Section 7901.1 is to understand the latter as an attempt to codify the powers that municipalities retained under Section 7901 to manage the occupation of the rights-of-way. (See Br. 50-51.) Here, “the plain language of [Section 7901.1] is unambiguous,” and so “no court need, or should, go beyond that pure expression of legislative intent.” (*Green v. State* (2007) 42 Cal.4th 254, 260.)

Nevertheless, the City makes several contradictory arguments to dispute Appellants’ logical reading of Section 7901.1. (See Ans. Br. 25-38.) The City’s muddled interpretations cannot be reconciled with the plain language of Section 7901.1 or the relationship between Sections 7901 and 7901.1.

First, the City suggests that the plain language of Section 7901.1 undermines Appellants’ reading of the statute. It posits that if Section

7901.1 governed long-term occupations of the rights-of-way, rather than transient activities, the statute would not refer to the “time” or “manner” of access. (Ans. Br. 27.) This misses the point. Appellants do not argue that Section 7901.1 applies *only* to long-term rights-of-way occupations. Instead, Appellants have demonstrated that Section 7901.1 applies to *all* rights-of-way occupation, whether transient or long-term. (Br. 50.) Reading “access” to encompass both short- and long-term occupations is consistent with the remainder of the provision, which affords municipalities control over the “time, place, and manner” of that access. (See, e.g., *Los Angeles All. For Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 378-79 [confirming that valid time, place, and manner restrictions may extend for the full duration of occupation in the First Amendment context].) The City fails to demonstrate that “access” includes *only* transient occupations.

Second, the City contends that Appellants’ reading of Section 7901.1 would “enact a new and significant restriction” on municipal power and thus contradict the Legislature’s intent that the provision merely “clarify” existing local authority. (Ans. Br. 27.) Reading Section 7901.1’s equivalent treatment mandate as applying to long-term occupations does not enact a “new and significant restriction” on municipal authority. Appellants’ reading clarifies that localities retain some control over when and how facilities are placed in the rights-of-way, despite the broad

franchise rights granted to telecommunications companies in Section 7901. Section 7901.1 allows municipalities to exercise reasonable control over the “time, place, and manner” of access to the rights-of-way, so long as “all entities” are treated “in an equivalent manner.” (§ 7901.1.) This is not a “new and significant restriction;” it is the natural reading of the statute. Nothing in the text suggests that the provision is limited to temporary construction activities and occupations of the rights-of-way, as the City claims.¹⁰

Moreover, the City’s argument is internally inconsistent. In characterizing Section 7901.1, the City describes the provision both as an attempt to “expand municipalities’ power to control the construction of telephone infrastructure” *and* as a “clarifying enactment” that did “not change current law.” (Ans. Br. 25, 27 [internal quotations and italics omitted].) The City cannot have it both ways. It is correct that Section 7901.1 is a clarifying enactment, which perforce means that it does not expand municipalities’ power over facility deployments.

Third, the City builds on its erroneous argument that Section 7901.1 applies only to construction activities, contending that it treats all

¹⁰ If anything “enact[s] a new and significant restriction” on the balance between State and local power, it is the City’s construction of Section 7901.1. (Ans. Br. 27.) In the City’s view, localities are free to discriminate against emerging forms of technology so long as construction permits are doled out in an equivalent manner. This is a breathtaking encroachment upon the State franchise that nullifies Section 7901’s goal of promoting telecommunications advancements.

companies equally in controlling temporary access to the rights-of-way. (Ans. Br. 31-32.) It insists that all entities are treated equally because all must obtain temporary occupancy permits. (*Ibid.*) The City's claim is incorrect. Wireless providers subject to the Ordinance must undergo onerous site-specific aesthetic review and satisfy the Ordinance's cumbersome application requirements before even entering the rights-of-way for construction. (See A00140.) Other entities are not so burdened. This is precisely the kind of discriminatory treatment that Section 7901.1 forbids.¹¹

Fourth, the City argues that even if Section 7901.1 applies to all rights-of-way occupation, the Ordinance is permissible because it does not discriminate among telephone providers. In the City's view, Section 7901.1's equivalent treatment mandate extends only to telephone and telegraph companies. (Ans. Br. 33.) In other words, according to the City's argument, the City is free to discriminate between telephone companies and cable providers under Section 7901.1 so long as all

¹¹ Appellants established that even if Section 7901.1 applied only to construction activities, the Ordinance would still be invalid because it unlawfully discriminates against wireless facilities. (Br. 55-56.) The City suggests that this argument has been waived. (Ans. Br. 31.) It has not. (See Reporter's Tr. 20:2-16 (Mar. 19, 2014).) Moreover, this Court is not bound by the Court of Appeal's erroneous determination that the argument has been waived. (See *Dieckmeyer v. Redevelopment Agency of City of Huntington Beach* (2005) 127 Cal.App.4th 248, 259 ["A party may raise a new theory on appeal where it involves a purely legal question."].)

telephone companies are discriminated against equally.¹² This argument is nonsensical. According to the language of the statute, Section 7901.1 applies to “all entities” accessing the public rights-of-way. (§ 7901.1(b).)

The City ignores the statute’s plain language, insisting that because Section 7901.1 must be exercised “consistent with Section 7901,” and Section 7901 extends the statewide franchise only to telephone and telegraph companies, the equivalent treatment mandate must be cabined to those entities. (Ans. Br. 33.) But Section 7901.1(a)’s reference to exercising municipal power “consistent with Section 7901” merely clarifies that municipal authority over the “time, place, and manner” of rights-of-way access is circumscribed and must yield to the broad franchise rights conferred by Section 7901.¹³ It does not authorize municipalities to

¹² The City suggests that Appellants failed to show that the Ordinance is discriminatory because wireless providers sometimes install new equipment of differing sizes and, in the City’s view, “treating different equipment differently is not impermissible discrimination.” (Ans. Br. 34.) The City misses the point. As this Court has made clear for years, subjecting emerging forms of telecommunications technology to categorically disparate treatment is precisely the kind of discrimination that Section 7901 forbids. (See *supra*, Part II.B.)

¹³ The City’s citation to Article 27 is also unavailing. That ordinance applies only to new builds of standalone equipment, which is not at issue here. (See *supra*, Part II.A.) Moreover, Articles 25 and 27 both target advanced telecommunications deployments: broadband and wireless facilities. Imposing onerous requirements on providers *because* they intend to deploy such emerging technologies is the very type of discrimination that Sections 7901 and 7901.1 are designed to prevent. (See *supra*, Part II.B.) Even if the City has engaged in “equivalent” discrimination against both wireless telecommunications and broadband providers, its improper motives violate Sections 7901 and 7901.1.

discriminate amongst different classes of rights-of-way occupants, as the City suggests.

Finally, the City posits that even if Section 7901.1 applies to long-term occupations of the rights-of-way, it may nevertheless impose discretionary aesthetic review. (Ans. Br. 36-38.) To support its novel claim, the City notes that courts have upheld “time, place, and manner” restrictions based on aesthetic concerns in the First Amendment context. (*Ibid.*) But this ignores Section 7901’s central purpose. (See *supra*, Part II.) The City cannot enact “time, place, and manner” restrictions that are “consistent with Section 7901” if, like the Ordinance, the restrictions are intended to impede technological progress. (§ 7901.1(a).)

By its very design, the Ordinance fails to treat all rights-of-way occupants in an “equivalent manner,” as the plain language of Section 7901.1 demands, and thus, it must be set aside.

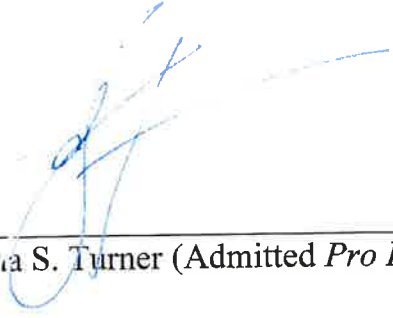
CONCLUSION

Appellants respectfully request that this Court reverse the Court of Appeal, invalidate the City’s Ordinance, and remand with directions to enter Judgment in Appellants’ favor.

Dated: April 11, 2017

Respectfully Submitted,

WILEY REIN LLP
DAVIS WRIGHT TREMAINE, LLP



Joshua S. Turner (Admitted *Pro Hac Vice*)

Counsel for Plaintiffs and Appellants
T-Mobile West LLC,
Crown Castle NG West LLC, and
ExteNet Systems (California) LLC

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.504(d)(1), the undersigned certifies that this Plaintiffs and Appellants' Reply Brief On The Merits contains 8,365 words as counted by the word count feature of the Microsoft Word program used to generate this brief, not including the cover, the tables of contents and authorities, the signature block, the statutory addendum, the certificate of service, and this certificate.

Dated: April 11, 2017



Martin L. Fineman

CERTIFICATE OF SERVICE

I, Martin L. Fineman, declare as follows:

At the time of service, I was over 18 years of age and not a party to this action. I am employed in San Francisco, California. My business address is 505 Montgomery Street, Suite 800, San Francisco, California 94111-6533. On April 11, 2017, I served true copies of the document(s) described as **PLAINTIFFS AND APPELLANTS' REPLY BRIEF ON THE MERITS** on the interested parties in this action as follows: **SEE ATTACHED SERVICE LIST**

BY FEDERAL EXPRESS: I served the forgoing documents by Federal Express for overnight delivery. I placed true copies of the document(s) in a sealed envelope addressed to each interested party as identified above. I placed each such envelope, with Federal Express fees fully prepaid, for collection and delivery at Davis Wright Tremaine LLP, San Francisco, California. I am familiar with Davis Wright Tremaine LLP's practice for collection and delivery. Under that practice, the Federal Express package(s) would be delivered to a courier or dealer authorized to receive document(s) on that same date in the ordinary course of business.

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

Executed on April 11, 2017, at San Francisco, California.



Martin L. Fineman

SERVICE LIST

William Sanders, Esq.
Deputy City Attorney
City and County of San Francisco
1 Dr. Carlton B. Goodlett Place
City Hall, Room 234
San Francisco, CA 94102
Counsel for Defendants and Respondents

Erin Bernstein, Esq.
Deputy City Attorney
City and County of San Francisco
Fox Plaza
1390 Market Street, 7th Floor
San Francisco, CA 94102
Counsel for Defendants and Respondents

Jeffrey Melching, Esq.
Ajit Singh Thind, Esq.
RUTAN & TUCKER, LLP
611 Anton Boulevard, Suite 1400
Costa Mesa, CA 92929
Counsel for Amici Curiae League of California Cities, California State Association of Counties, and SCAN NATOA, Inc.

D. Zachary Champ, Esq.
Director, Government Affairs
D. Van Flet Bloys, Esq.
Senior Government Affairs Counsel
WIRELESS INFRASTRUCTURE ASSOCIATION
505 Montgomery Street, Suite 500
Alexandria, VA 22314
Counsel for Amicus Curiae, the Wireless Infrastructure Association

Matthew S. Hellman, Esq.
Scott B. Wilkens, Esq.
Adam Unikowsky, Esq.
Erica Ross, Esq.
JENNER & BLOCK LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001
*Counsel for Amicus Curiae, the Chamber of Commerce of the United States
of America*

Janet Galeria, Esq.
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
*Counsel for Amicus Curiae, the Chamber of Commerce of the United States
of America*

Clerk of Court
Court of Appeal
First Appellate District
350 McAllister Street
San Francisco, CA 94102
(via electronic filing)

Clerk of Court
San Francisco County Superior Court
500 McAllister St., Room 103
San Francisco, CA 94102