Case No. A144252

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

T-MOBILE WEST LLC, CROWN CASTLE NG WEST LLC, AND EXTENET SYSTEMS (CALIFORNIA) LLC,

Plaintiffs/Appellants/Cross-Appellees,

v.

THE CITY AND COUNTY OF SAN FRANCISCO AND THE CITY AND COUNTY OF SAN FRANCISCO DEPARTMENT OF PUBLIC WORKS,

Defendants/Appellees/Cross-Appellants.

Appeal From the Superior Court of the State of California
for the County of San Francisco, Final Judgment
Honorable James McBride, Judge Presiding
Case No. CGC-11-51 0703

APPLICATION OF LEAGUE OF CALIFORNIA CITIES CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND SCAN NATOA, INC. FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF THE CITY AND COUNTY OF SAN FRANCISCO AND THE CITY AND COUNTY OF SAN FRANCISCO DEPARTMENT OF PUBLIC WORKS; PROPOSED *AMICUS CURIAE* BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FIVE	Court of Appeal Case Number: A144252
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Jeffrey T. Melching (SBN 180351) Ajit Thind (SBN 268018) RUTAN & TUCKER, LLP 611 Anton Boulevard, Suite 1400 Costa Mesa, CA 92626 TELEPHONE NO.: 714-641-5100 FAX NO. (Optional): 714-546-9035 E-MAIL ADDRESS *(Optional):* jmelching@rutan.com ATTORNEY FOR *(Name):* League of CA Cities, CSAC, and SCAN NATOA, Inc.	Superior Court Case Number: CGC-11-51 0703 *FOR COURT USE ONLY*
APPELLANT/PETITIONER: T-Mobile West LLC, Crown Castle NG West LLC and Extenet Systems (California) LLC RESPONDENT/REAL PARTY IN INTEREST: The City and County of San Francisco and the City and County of San Francisco Department of Public Works	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): League of CA Cities, California State Assn of Counties & SCAN NATOA, Inc.

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	**Nature of interest *(Explain):***
(1) League of California Cities	Amicus Curiae
(2) Cal. State Assn. of Counties	Amicus Curiae
(3) SCAN NATOA, Inc.	Amicus Curiae
(4) T-Mobile West LLC	Plaintiff and Appellant
(5) Crown Castle NG West LLC	Plaintiff and Appellant
(6) Extenet Systems (California) LLC	Plaintiff and Appellant
(7) The City and County of San Francisco	Defendant/Appellee/Cross-Appellant
(8) The City and County of San Francisco Dept. of Public Works	Defendant/Appellee/Cross-Appellant

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: March 4, 2016

Jeffrey T. Melching ▶ /s/

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

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APPLICATION TO FILE *AMICUS CURIAE* BRIEF

I. INTRODUCTION.

Pursuant to California Rules of Court, Rule 8.200, subdivision (c), the League of California Cities ("League"), and the California State Association of Counties ("CSAC"), and SCAN NATOA, Inc., which is the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors ("SCAN NATOA") (collectively, "*Amici*") respectfully request leave to file the brief submitted herewith in support of Defendants and Appellees City and County of San Francisco and the City and County of San Francisco Department of Public Works (collectively, the "City").

Appellants' Opening Brief was filed on September 11, 2015, the City's Answering Brief was filed on December 10, 2015, and the Reply Brief was filed on February 19, 2016. This Application is timely made within 14 days after the filing of the Reply Brief on the merits.

II. THE NATURE OF THE *AMICI'S* INTEREST.

The League is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee ("Committee"), comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and

identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

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

SCAN NATOA has a history spanning over 20 years representing the interests of over 300 members consisting primarily of local government telecommunications officials and advisors located in California. SCAN NATOA has identified this case as a matter of significance to its members.

Amici and their member cities, counties, and other constituents have a substantial interest in the outcome of this appeal and the ability to engage in discretionary review, including but not limited to aesthetic review, of telecommunications facilities. Many cities and counties in California have ordinances or regulations requiring telephone companies to undergo discretionary review and obtain permits before placing their facilities in the public right-of-way, like the ordinance at issue in this case. Those ordinances are not used to prohibit the use of the public rights of way, or to abridge any state-conferred rights of telecommunications applicants. Rather, they seek

to harmonize the utilitarian objectives of telecommunications applicants with cities' and counties other legitimate objectives, which include maintaining the quality and experience of travelling along, and being within, the rights of way.

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

If permission to file the accompanying brief is granted, *Amici* will address the issue of local authority to exercise discretion, including but not limited to discretion over aesthetic issues, when regulating the location and appearance of telecommunication facilities. *Amici* will also urge the Court to affirm the judgment of the Superior Court, and respectfully requests that the Court grant this application to file the accompanying brief *amicus curiae.*

Pursuant to Rule 8.200(c)(3), of the California Rules of Court, the only persons who played a role in authoring the accompanying brief, in whole or in part, are the attorneys listed in the caption of this application, Jeffrey T. Melching and Ajit S. Thind of Rutan & Tucker, LLP. No parties to this case (or entities who are not parties to this case other than the listed

attorneys) authored the brief in whole or in part. The undersigned prepared and authored the brief *pro bono*, and no persons or entities were paid for the preparation of the accompanying brief.

III. CONCLUSION.

For the foregoing reasons, *Amici* respectfully request permission to file the accompanying *amicus curiae* brief in support of the City in this action.

Dated: March 4, 2016

Respectfully submitted,

RUTAN & TUCKER, LLP
JEFFREY T. MELCHING
AJIT SINGH THIND

By: /s/
Jeffrey T. Melching
Attorneys for Amicus Curiae League of California Cities, California State Association of Counties, and the States of California and SCAN NATOA

AMICUS CURIAE BRIEF

Pursuant to California Rules of Court, Rule 8.200(c), the League of California Cities (the "League"), and the California State Association of Counties ("CSAC") and SCAN NATOA, Inc., which is the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors ("SCAN NATO") (collectively, "*Amici*") submit this *amicus curiae* brief in support of Defendants and Appellees City and County of San Francisco and the City and County of San Francisco Department of Public Works (collectively, the "City").

I. IDENTITY OF *AMICI CURIAE* AND STATEMENT OF INTEREST

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

CSAC is a non-profit corporation. The membership consists of 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and

is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this is a matter affecting all counties.

SCAN NATOA has a history spanning over 20 years representing the interests of over 300 members consisting primarily of local government telecommunications officials and advisors located in California. SCAN NATOA has identified this case as a matter of significance to its members.

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

Because rights of way are varied and diverse spaces – in terms of available space, surrounding land uses and character, level of congestion, and a variety of other factors – they do not lend themselves to "one size fits all" planning approaches. Rather, the exercise of local government discretion

allows for planning solutions that are calibrated to the unique physical characteristics of each proposed use of the rights of way. That discretion is not used to prohibit the use of the public rights of way, or to abridge any state-conferred rights of telecommunications applicants. It is used to harmonize the interest and rights of telecommunications applicants with cities' and counties' other legitimate objectives, which include maintaining the quality and experience of travelling along, and being within, the rights of way.

II. POINTS TO BE ARGUED BY *AMICI*

The Court should affirm that local governments have the authority to exercise discretion in the regulation of telecommunications facilities, and that such exercise of discretion is consistent with Public Utilities Code section 7901 and 7901.1. The Court should further affirm that in exercising such discretion, local governments may consider aesthetic matters.

III. FACTUAL BACKGROUND

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

IV. THE CITY HAS THE ABILITY TO REGULATE THE TELECOMMUNICATIONS FACILITIES THROUGH A DISCRETIONARY PROCESS

Appellant contends that local governments cannot engage in a discretionary review process when evaluating applications for the placement of telecommunication facilities in the right of way. (Opening Brief, § III(A).)

The "discretion *vs.* no discretion" distinction urged by Appellants finds no support in the statutes.

Neither Public Utilities Code section 7901 ("Section 7901") nor Public Utilities Code section 7901.1 ("Section 7901.1") distinguish between "ministerial" and "discretionary" actions. In fact, when the Legislature intends to restrict a local government's ability to use a discretionary process for wireless communications facilities, it does so explicitly. (*See* Gov. Code § 65850.6(a) ["A collocation facility shall be a permitted use ***not subject to a city or county discretionary permit*** if it satisfies the following requirements . . ."], emphasis added.) The Legislature made no parallel restriction in Section 7901 and Section 7901.1 because those statutes do not prohibit discretionary processes.

To the contrary, last year, the Legislature adopted Assembly Bill 57, which placed new limits on the time within which telecommunications applications must be processed ***without*** purporting to place any limits on local government discretion. (Gov. Code § 65964.1(e) ["Except as provided in subdivision (a) [relating to deemed approval for failure to timely act on an application], ***nothing in this section limits or affects the authority of a city or county over decisions regarding the placement, construction, and modification of a wireless telecommunications facility***"], emphasis added.)[1]

[1] Rather than acknowledging this express preservation of local agency authority, Appellants claim that "municipal affairs" language in a different

Thus, when the Legislature had the opportunity to curb the exercise of discretion, it sought instead to preserve local authority to make decisions over the placement, construction, and modification of wireless facilities.

Reinforcing this conclusion, in 2006 the Legislature adopted Government Code section 65964 as part of the California Permit Streamlining Act. Section 65964 acknowledges, but partially limits, local government authority to place conditions of approval on wireless telecommunications facility applications. The Permit Streamlining Act applies to discretionary, not ministerial, applications. (Gov. Code §§ 65921 [Permit Streamlining Act applies to "development projects"], 65928 [ministerial projects exempted from definition of "development project"]; *Findleton v. Bd. of Supervisors* (1993) 12 Cal.App.4th 709, 713.) Moreover, conditions of approval are one of the hallmarks of discretionary permitting processes, and are ***expressly permitted*** by Government Code section 65964.

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

The "real world" need for the preservation of local government discretion is evident. The public rights of way are diverse and varied. *Amici* city and county members' streets include dense urban thoroughfares, quiet country roads, bucolic neighborhoods, and countless other streetscapes. Some rights of way are amenable to undergrounding of equipment, while in other rights of way the area beneath the street is crowded with pre-existing infrastructure. Some rights of way have medians, parkways, and sidewalks, while others do not. The variation in neighborhood character, pre-existing infrastructure, and streetscape designs, coupled with the specific facets of each proposed installation, make "one-size-fits-all" (i.e., non-discretionary) approaches to permitting a recipe for poor outcomes and unintended consequences.[2]

The common sense means to avoid those outcomes and consequences – which is permitted under existing law – is to use discretionary processes that (1) recognize wireless applicants' state-conferred rights while (2) preserving local discretion to ensure that access ***is provided*** in a manner that

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

avoids unnecessary degradation to the quality of the rights of way. As discussed below, this pragmatic view of the need to exercise discretion on a case-specific basis is supported by the plain language of the California Constitution, the Public Utilities Code, and the applicable case law.

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

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

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

(*Berman v. Parker* (1954) 348 U.S. 26, 32-33 [75 S.Ct. 98]; *Metromedia Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 861; *Landgate, Inc. v. California Coastal Comm'n.* (1998) 17 Cal.4th 1006, 1023 [aesthetic preservation is

"unquestionably [a] legitimate government purpose"]; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 881-882 [aesthetic regulations fall within police power].)

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

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

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

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

> [municipal corporations may] regulate the

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

(Pub. Util. Code, § 2902, emphasis added.) While Section 2902 "does not confer any powers upon" local agencies, it does enumerate the "[pre-] existing municipal powers [that] are retained by the municipality" – including the power to regulate telecommunications fixtures for the convenience of the general public. (*Southern Cal. Gas Co. v. City of Vernon* (1995) 41 Cal.App.4th 209, 217.) In *City of Huntington Beach v. Public Utilities Com.* (2013) 214 Cal.App.4th 566, 590, the Court of Appeal reviewed Section 2902 in the context of wireless facilities and specifically found that "municipal corporations may not 'surrender to the [CPUC] its powers of control to supervise and regulate the relationship between a public utility and the general public in matters affecting the health, convenience, and safety of the general public'." Those powers flow from California Constitution, Article XI, section 7, and Section 2902 confirms that the Public Utilities Code does not require the surrender of the City's authority.

Appellants attempt to minimize the importance of Section 2902, claiming that "[n]othing in Section 2902 suggests that reasonable control

over the time, place, and manner of access to the public rights of way cannot be exercised through ministerial permits based on objective standards." (Appellant's Reply Brief, p. 31.) The converse is also true, and it is more important here: nothing in Section 2902 prohibits the exercise of discretion. Given that the Legislature has seen fit to expressly restrict the exercise of discretion when that is what it intended to do (Gov. Code § 65850.6), there is no basis to impose an implied preemption of local discretion here.

C. Public Utilities Code Section 7901 Does Not Prohibit Discretionary Permitting; Nor Does It Prohibit Consideration of Aesthetic Issues.

Section 2902's right to regulate for the protection of the public convenience is echoed in Section 7901, which applies specifically to telecommunications facilities. Under Section 7901, telecommunications companies may only operate "in such manner and at such points as not to incommode the public use of the road or highway." (*County of Los Angeles v. Southern California Tel. Co.* (1948) 32 Cal.2d 378, 384; *Pacific Tel. & Tel. Co. v. City of Los Angeles* (1955) 44 Cal.2d 272 ["the state franchise held by Pacific gave it the right to construct and maintain its lines and equipment in the streets"].) Plainly, the carrier's right to operate conferred under Section 7901 is qualified. It may not be exercised in a "manner" and at "points" that "incommode" the "public use of the road."[3] Neither the plain

[3] The term "incommode" means to "subject to inconvenience or discomfort; to trouble, annoy, molest, embarrass, inconvenience" or "[t]o

language nor the structure of Section 7901 indicate an intent to strip local governments of the pre-existing municipal powers to regulate public utilities that is provided by the California Constitution and acknowledged in Section 2902.

Appellants seek to limit the scope and meaning of Section 7901 by claiming that the words "incommode the public use of the road or highway" are limited to the obstruction of travel. This utilitarian view of the "use" of the rights of way is too narrow. Cities and counties throughout the state spend significant time, energy, and money designing, constructing, and maintaining streetscapes. They require medians, landscaping, sidewalks, and public art; restrict roads from truck use to lower noise; prohibit on-street parking, and take a variety of additional actions designed to improve the experience of using the rights of way.

These efforts demonstrate that the public's use of the rights of way extends beyond mere travel. As the Ninth Circuit Court of Appeals has acknowledged, "it is a widely accepted principle of urban planning that streets may be employed to serve important social, expressive, and aesthetic functions." (*Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, 723-724 ("*Palos Verdes Estates*"), citing, Ray Gindroz, *City Life and New Urbanism, 29 Fordham Urb. L.J. 1419, 1428*

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affect with inconvenience, to hinder, impede, obstruct (an action, etc.)" (7 The Oxford English Dictionary 806 (2d ed. 1989).)

(2002) ["A primary task of all urban architecture and landscape design is the physical definition of streets and public spaces as places of shared use."]; Kevin Lynch, The Image of the City 4 (1960) ["A vivid and integrated physical setting, capable of producing a sharp image, plays a social role as well. It can furnish the raw material for the symbols and collective memories of group communication."]; Camillo Sitte, City Planning According to Artistic Principles 111-12 (Rudolph Wittkower ed., Random House 1965) (1889) ["One must keep in mind that city planning in particular must allow full and complete participation to art, because it is this type of artistic endeavor, above all, that affects formatively every day and every hour of the great mass of the population . . . ."].) On this point, the Ninth Circuit continued "[a]s Congress and the California Legislature have recognized, the "public use" of the roads might also encompass recreational functions." (*Palos Verdes Estates*, 583 F.3d 716, 723-724, Cal. Pub. Util. Code § 320 [burying of power lines along scenic highways]; 23 U.S.C. § 131(a) [regulation of billboards near highways necessary "to promote . . . recreational value of public travel . . . and to preserve natural beauty"].)

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

D. Public Utilities Code Section 7901.1 Confirms, But Does Not Circumscribe, Local Agency Authority Over Telecommunications Permitting For Facilities in the Public Rights of Way.

Section 7901.1 reinforces local governments' regulatory authority over telecommunications facilities. That provision was added to the Public Utilities Code in 1995 to "bolster the cities' abilities with regard to construction management and to send a message to telephone corporations that cities have authority to manage their construction, without jeopardizing the telephone corporations' statewide franchise." (S. Comm. on Energy, Utilities, and Commerce, Analysis of S.B. 621, Reg. Sess., at 5728 (Cal. 1995).) Through Section 7901.1, the Legislature stated its intent 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."

In its Reply Brief, Appellants attempt to construe/contort Section 7901.1 as a statute that limits the scope of authority conferred under Section 7901. There are multiple fundamental problems with that argument. First, by its plain words, Section 7901.1 states only that the "exercise of reasonable control over the time, place, and manner in which roads, highways, and waterways are accessed" is ***consistent with*** Section 7901. Nothing in Section 7901.1 says that it is intended to ***place limits on*** whatever ***other*** powers local governments may have under Section 7901. Second, the legislative history

plainly states that Section 7901.1 is intended to "bolster" section 7901. The parties can (and do) disagree about the meaning of the word "bolster" in this context, but under no circumstance could one credibly claim that "bolster" means "limit." Third, Section 7901.1 focuses on construction management (S Comm. on Energy, Utilities, and Commerce, Analysis of S.B. 621, Reg. Sess., at 5728 (Cal. 1995)), while Section 7901 contains no parallel restriction on the scope of its application. Fourth, and finally, Section 7901.1 does not purport to limit, restrict, or redefine the regulatory authority, conferred by the California Constitution and acknowledged in Section 2902, to regulate "the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets" to protect the public convenience.

In summary, in the public utility context, the Legislature has specifically ***confirmed*** – through Public Utilities Code sections 7901, 7901.1, and 2902 – local agencies' authority to regulate facilities installed by telephone corporations. As discussed below, the case law also confirms such authority.

E. State and Federal Case Law Supports The City's Exercise of Regulatory Authority Over Telecommunication Facilities.

California and federal cases lend further support to the City's exercise of regulatory authority. In *Western Union Tel. Co. v. Visalia* (1906) 149 Cal. 744, the California Supreme Court upheld a municipal requirement that all

telephone poles be a uniform height of 26 feet, and that the poles be made available to the city for purposes of hanging fire alarms and police wires. (*Id.* at 748.) Neither of those requirements directly impacted the ability to use the roads for travel and traffic. It is, after all, the base of the poles, and not their height or the equipment strung on them, that affects travel and traffic. The uniform height regulation was plainly aesthetic, and the alarm and police wire regulations were plainly for public safety purposes that had ***nothing*** to do with "obstruction" of traffic along the roads in Visalia. Yet both of those purposes were upheld by the California Supreme Court as a proper exercise of the city's regulatory authority under Section 7901's predecessor statute. (*Id.* at 751.)

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

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

The most recent case to address local authority under California law over telecommunications facilities is *Palos Verdes Estates,* 583 F.3d 716, 726, a case that Appellants hope this Court will ignore. In that case, a wireless telecommunications provider claimed, *inter alia*, that local aesthetic regulations of wireless antennas violated the Federal Telecommunications Act, 47 U.S.C. section 151 *et seq.*, because such regulations are not permitted under "applicable local standards." (*Id.* at 722, citing 47 U.S.C. § 332, subd. (c)(7)(B)(iii).) Like the City's Ordinance, the ordinance in *Palos Verdes*

Estates provided that permit applications for wireless communication facilities may be denied for "adverse aesthetic impacts from the proposed time, place, and manner of use of the public property" – a discretionary evaluation. (*Id.* at 720.) To resolve whether aesthetic regulation was permissible, the Ninth Circuit Court of Appeals was required to determine whether the local regulations were consistent with state law, including Section 7901 and Section 7901.1. (*Id*. at 721-722.)

The Ninth Circuit initially requested guidance from the California Supreme Court on the question, but the California Supreme Court declined the request. (*Palos Verdes Estates, supra,* 583 F.3d at 721.) In the absence of guidance, the Ninth Circuit undertook the task of predicting "how the California Supreme Court would resolve the issue," (*id.* at 722, n.2) and held "[T]he California Constitution gives the City the authority to regulate local aesthetics, and neither section 7901 nor section 7901.1 divests it of that authority." (*Id.* at 721-722).

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

> The experience of traveling along a picturesque street is different from the experience of traveling through the shadows of a Wireless Communications Facility, and we see nothing exceptional in the City's determination that the former is less discomforting, less troubling, less annoying, and less distressing than the latter.

> After all, travel is often as much about the journey as it is about the destination.

(*Palos Verdes Estates, supra,* 583 F.3d at 723.) Consistent with that reasoning, the court found that urban planning requires local decision making that reflects particular issues of local concern such as neighborhood personality. (*Id.* at 724.) The court thus held that under California law, local governments may regulate (and deny) telecommunications permit applications based on aesthetic considerations and reject "aesthetically offensive" attempts to utilize the right-of-way. (*Id.* at 724-725; see also *GTE Mobilenet of Calif. Ltd. Partnership v. San Francisco* (N.D. Cal. 2006) 440 F.Supp.2d 1097, 1107 ["[T]he City has the authority to regulate the placement and appearance of telecommunications equipment installed on its public rights of way"].) While affirming the ability to regulate on the basis of aesthetics, the Ninth Circuit also warned that local agencies cannot "run roughshod over WCF permit applications simply by invoking aesthetic concerns" and would have to demonstrate substantial evidence for the decision and comply with federal law. (*Palos Verdes Estates, supra*, 583 F.3d at 725.)

Amici are mindful that "decisions of the federal courts interpreting California law are persuasive but not binding." (*Mesler v. Braggs Mgmt. Co.*, (1985) 39 Cal.3d 290, 299.) However, the Court should not ignore the Ninth Circuit's persuasive, well-reasoned, and on-point analysis in *Palos*

Verdes Estates of Public Utilities Code sections 7901 and 7901.1. (*See Adams v. Pacific Bell Directory*, (2003) 111 Cal.App.4th 93,97 ["although not binding, we give great weight to federal appellate court decisions"].) Instead the Court should carefully consider the Ninth Circuit's analysis of issues that are identical to this case.

Appellants seek to distinguish and minimize *Palos Verdes Estates* on various grounds. (Appellants' Opening Brief, p. 29.) Initially, Appellants' disagreement stems from their own historical reading of the case law and interpretation that "local governments in California have *not* traditionally exercised control over utilities in the public rights of way." (Appellants' Opening Brief, p. 30, emphasis original.) As illustrated above, that is a fundamentally wrong interpretation of local regulatory authority and the very text of Article XI, Section 7 of the California Constitution and Public Utilities Code sections 2902, 7901 and 7901.1 – all of which clearly give local governments regulatory authority.

Appellants' citation to *San Francisco I, supra,* 51 Cal.2d 766 is also unavailing. In that case, the California Supreme Court rejected the notion that a local government could require a local franchise for a telephone company to operate. Here, the City does not impose a requirement to obtain a franchise, but rather require compliance with a permitting ordinance. More importantly, in *Pacific Tel.,* the public utility plaintiff ***conceded*** the city's authority to enact a permit process and regulate "the particular location and

manner" in which public utilities are constructed. (*Id.* at 773-774.) Appellants have obviously misinterpreted *Pacific Tel.* and its application to the nature of the present dispute.

Finally, Appellants ask this Court to look favorably upon the Ninth Circuit's language in *Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge* (9th Cir. 2006) 182 F. App'x 688, 690-91 (Opening Brief, p. 26), but ignore that it is an unpublished opinion and is not citable. In fact, the *Palos Verdes Estates* court noted that the opinion in *Sprint PCS Assets* was not "a published opinion on which we may rely." (*Id.* at 722, n. 2.) More importantly, *Palos Verdes Estates* was decided by the Ninth Circuit ***three years later*** in 2009 and remains good law.

As described above, for more than a hundred years, both California and federal courts have affirmed that local agencies in California have the power to regulate telecommunication facilities in a discretionary manner. Further, the courts have also confirmed that this authority exists even when regulating public utilities. Should this Court hold otherwise, it would create new precedent that will cause uncertainty and insecurity among local governments that regularly deal with regulating telecommunications facilities and the resulting impacts on residents in and visitors to each municipality.

V. CONCLUSION

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

Dated: March 4, 2016

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief is produced using 13-point Roman type including footnotes and contains approximately 4,669 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

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

On March 4, 2016, I served on the interested parties in said action the within:

APPLICATION OF LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND SCAN NATOA, INC. FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF THE CITY AND COUNTY OF SAN FRANCISCO DEPARTMENT OF PUBLIC WORKS; PROPOSED AMICUS CURIAE BRIEF

as stated below:

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

Executed on March 4, 2016, at Costa Mesa, California.

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

Valerie Bloom	/s/
(Type or print name)	(Signature)

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