No. _____

In The
Supreme Court of the United States

SANTA FE ALLIANCE FOR PUBLIC HEALTH AND SAFETY, ARTHUR FIRSTENBERG, and MONIKA STEINHOFF,

Petitioners,

v.

CITY OF SANTA FE; HECTOR BALDERAS, Attorney General of New Mexico; and the UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD I. TARGOW
Post Office Box 1143
Sebastopol, CA 95473
(707) 829-5190
rtargow@sonic.net

THERESA KRAFT
Counsel of Record
822 Little John Drive
Salisbury, MD 21804
(603) 568-2464
tkraft@theresakraft.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Radio frequency ("RF") radiation has been increasing exponentially with the proliferation of cell towers and antennas. Although such radiation has injured and displaced millions, no claim for injury by RF radiation has been permitted to go to trial in the United States since 1996, and no zoning board or city council has been permitted to take testimony about such radiation into account when considering applications for such facilities. A Congressional prohibition against consideration of "environmental effects" has been persistently understood as a prohibition against consideration of "health effects." Petitioners' desperate situations go unremedied and they suffer further injuries and losses with no haven in sight but this Court.

Without any avenue of redress for their injuries and property losses, Petitioners requested a declaratory judgment that the preemption with respect to the "environmental effects of radio frequency emissions" in the Telecommunications Act of 1996 ("TCA"), 47 U.S.C. § 332(c)(7)(B)(iv), and laws enacted by their City and their State in deference to that preemption, violate due process, free speech, the right to petition, the right of access to courts, and constitute a taking without just compensation, or in the alternative a judgment that "environmental effects" does not mean "health effects" in 47 U.S.C. § 332(c)(7)(B)(iv). The questions presented for review are:

1. Whether the preemption by 47 U.S.C. § 332(c)(7)(B)(iv) of any State remedy for injury by

QUESTIONS PRESENTED—Continued

telecommunications facilities without providing a substitute federal remedy violates the constitutional right of access to courts and conflicts with a century of Supreme Court jurisprudence.

2. Whether, consistent with its ordinary meaning, as well as its meaning in every other federal statute in which it occurs, the term "environment effects" in 47 U.S.C. § 332(c)(7)(B)(iv) should be interpreted to mean "effects on the environment" and not "effects on human health," thereby restoring to all Americans their fundamental rights to life, liberty, and property and adhering to the principle that statutes should be construed to avoid rendering them unconstitutional.

CORPORATE DISCLOSURE STATEMENT

The Santa Fe Alliance for Public Health and Safety is not a corporation and has no parent companies or subsidiaries.

RELATED PROCEEDINGS

Santa Fe Alliance for Public Health and Safety v. City of Santa Fe, No. 1:18-cv-01209, U.S. District Court for the District of New Mexico. Judgment entered May 6, 2020.

Santa Fe Alliance for Public Health and Safety v. City of Santa Fe, No. 20-2066, U.S. Court of Appeals for the Tenth Circuit. Judgment entered March 30, 2021. Rehearing denied May 27, 2021.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Santa Fe Alliance for Public Health and Safety, et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 993 F.3d 802 (10th Cir. 2021). The unpublished order denying the parties' petition for rehearing was filed on May 27, 2021 (App. 37).

The unpublished opinion of the district court is reported electronically at 2020 WL 2198120 (D.N.M. May 6, 2020).

JURISDICTION

The court of appeals entered its Opinion on March 30, 2021. A timely petition for rehearing and rehearing en banc was denied on May 27, 2021. Pursuant to Supreme Court Rules 13.1 and 13.3 and the Supreme Court's Order of March 19, 2020 regarding filing deadlines, this petition is filed within 150 days of the date of the court of appeals' Opinion. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional provisions include the First Amendment, which provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble and to petition the government for a redress of grievances;

the Fifth Amendment:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation;

and the Fourteenth Amendment, which provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., art. III, § 2 provides in relevant part, "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; . . . [and] to controversies to which the United States shall be a party."

28 U.S.C. § 2201(a) provides in relevant part, "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C. § 2202 provides in relevant part, "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

The challenged statutes and ordinances are: Section 704 of the Telecommunications Act of 1996, 47 U.S.C. §§ 332(c)(7)(B)(iv)-(v); City of Santa Fe Ordinance No. 2016-42, amending Santa Fe City Code, Chapter 27; City of Santa Fe Ordinance No. 2017-18, further amending Santa Fe City Code, Chapter 27; and the Wireless Consumer Advanced Infrastructure Investment Act, New Mexico Statutes Annotated 1978, Chapter 63, Article 9I, adopted September 1, 2018. The pertinent text of these laws is set out in the Appendix. App. 71-74.

STATEMENT OF THE CASE

Introduction

Petitioners Santa Fe Alliance for Public Health and Safety ("Alliance"), Arthur Firstenberg, and Monika Steinhoff seek restoration of basic constitutional rights whose denial has permitted a 25-year-long assault on the health of this nation and all its residents. The Alliance is an association of physicians, health care practitioners, psychotherapists, educators, artists, and others who have suffered personal injury, up to and including seizures, heart damage, cancer, and respiratory failure, and loss of homes and businesses rendered uninhabitable by the proximity of cell towers and antennas. App. 91-96. They are among the millions of people who have been forced out of their homes by such facilities, creating a growing class of environmental refugees. App. 100.

This petition brings two related questions before the Court: (1) Does the preemption clause in the Telecommunications Act of 1996 ("TCA") violate the right of access to courts guaranteed by the First Amendment? and (2) an issue of statutory interpretation, viz., Does "environmental effects" mean "health effects" in that preemption clause? Either an answer in the affirmative to the first question, or in the negative to the second, would restore all of the constitutional rights that necessitated the bringing of this action. To understand the incredible reach of that preemption clause and the depth and breadth of the deprivations it has been causing Americans for 25

years necessitates a summary of the complaint brought by Petitioners not only against the United States but against their City and their State Attorney General, and a review of the history of this unresolved legal issue for the past 35 years.

Summary of Complaint

The complaint underlying this appeal challenges federal, state, and city laws regarding the permitting and regulation of wireless telecommunications infrastructure. Specifically, Petitioners challenge: (1) those provisions of the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B)(iv)-(v) ("Section 704"), which prohibit states and municipalities from considering the environmental effects of RF radiation when making siting decisions for wireless telecommunications facilities; (2) repeal by the City of Santa Fe ("City") of land use regulations and notice requirements regarding telecommunications facilities in public rights-of-way (Ordinance Nos. 2016-42 and 2017-18); (3) three executive Proclamations issued by the Mayor of Santa Fe temporarily suspending the City's Land Development Code with respect to telecommunications facilities on city-owned property; and (4) the State of New Mexico's Wireless Consumer Advanced Infrastructure Investment Act ("WCAIIA"), NMSA 1978, § 63-9I (Repl. Pamp. 2018), which permits antennas and supporting structures in public rights-of-way, and exempts such facilities from land use regulations. App. 76-77.

For years, Respondents have been aware of the health issues presented by wireless telecommunications infrastructure. App. 76-77. For example, the City has been continuously informed about the dangers of RF radiation for almost two decades by a succession of citizen organizations (App. 102) and by Plaintiff Firstenberg who was appointed by the mayor in 2007 to advise the City on these issues. *Id*. The City included protections against RF radiation in previous versions of its land development code and previous versions of Chapter 27. App. 100-103. However, under the City's newly-enacted regulatory scheme, franchises are awarded for wireless facilities on the streets and sidewalks; wireless facilities are exempt from notice, hearing, and even application requirements (App. 104-105); and protections from RF radiation previously contained in Chapter 27 have been repealed. App. 102-104. Five franchises have now been awarded: Plateau Telecommunications, Inc.; Cyber Mesa Computer Systems, Inc.; Conterra Ultra Broadband, LLC; Computer Network Service Professional, Inc. dba NMSURF; and Mobilitie, LLC dba Broadband Network of New Mexico, LLC. App. 109. One franchisee, Cyber Mesa, is erecting antennas on the sidewalk surrounding Santa Fe Plaza, and Mobilitie and NMSURF are preparing to erect antennas on sidewalks in various parts of Santa Fe. App. 110. Petitioners are imminently threatened with further injury.

The complaint alleges that these laws "remove all public protection from injurious facilities in the public rights-of-way, infringe on the public's right to speak

about a danger to their own health, eliminate all public participation into the siting of such facilities, and deprive injured parties of any remedy for their injuries." App. 90. Therefore, Petitioners "seek a declaration that these laws, and any other laws that may be enacted by their City, their State, or the United States, that would deprive them of any means of protecting themselves from RF radiation and of any remedy for injury by such radiation, are unconstitutional, and to enjoin enforcement of these laws." App. 91.

In particular, Petitioners allege that "Section 704 deprives people injured, sickened and/or killed by such radiation of access to state courts for redress for their injuries, and provides them no substitute federal remedy," App. 117-118 (Fourth Cause of Action), and request that the operation of 47 U.S.C. §§ 332(c)(7)(B)(iv) and (v) be temporarily and permanently enjoined. App. 143-144 (Twenty-Second Cause of Action).

In the alternative, Petitioners seek a declaration that "environmental effects" does not mean "health effects" in Section 704. App. 135 (Seventeenth Cause of Action).

Statutory Framework

The Communications Act of 1934, as amended, vests enforcement and regulatory authority over the technical aspects of wired and wireless communications in the Federal Communications Commission

("FCC"). 47 U.S.C. § 303, "Powers and duties of Commission." No authority over the health aspects of communications is given to the FCC. While the FCC has adopted guidelines for human exposure to RF radiation, these are procedural guidelines only that are not enforceable. They are simply cutoff values to define "Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared," 47 C.F.R. § 1.1307, and were adopted to meet the FCC's responsibilities under the National Environmental Policy Act ("NEPA").[1]

The Telecommunications Act of 1996 ("TCA"), Pub. L. 104-104, amended the Communications Act to, *inter alia*, define the limits of local zoning authority over cell towers. In particular, Section 704 of the TCA, codified at 47 U.S.C. § 332(c)(7)(B)(iv), provides, "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities[2] on the basis of *the environmental effects of radio frequency emissions* to the extent that such facilities comply with the

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[1] *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, Report and Order, ET Docket 93-62, FCC 96-326, ¶ 5, 11 FCC Rcd. 15123 (1996).

[2] "Personal wireless service facilities" is defined in Section 704 to mean facilities that provide "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services." 47 U.S.C. § 332(c)(7)(C). Together these comprise different kinds of what are commonly known as "cell towers."

Commission's regulations concerning such emissions." (Emphasis added).

Chapter 27 of the Santa Fe City Code regulates telecommunications facilities in the public rights-of-way. On November 9, 2016, the City adopted Ordinance 2016-42 to amend Chapter 27 to, in part, authorize the awarding of franchises for the use of the public rights-of-way to provide telecommunications services. Ordinance 2016-42 (amending SFCC 1987 § 27-2.4(D) (2017)). On August 30, 2017, the City adopted Ordinance 2017-18, which repealed many franchise application requirements in order to streamline the review process, and eliminated virtually all land use regulations for antennas and towers in public rights-of-way. Ordinance 2017-18 (amending SFCC 1987 §§ 27-2.19(C), (E), and (G) (2017)).

Under these ordinances, the only requirement left for placing antennas and towers in public rights-of-way is possession of a franchise. Franchises are to be awarded to all telecommunications providers on a non-discriminatory basis, and franchisees are permitted to erect unlimited numbers of antennas and towers anywhere within the public rights-of-way, with no public hearings, no public comment, no public notice, no notice to neighbors, no setback or other regulatory requirements, no certification of compliance with the FCC's safety regulations, and without even submitting an application to the City. The only remaining requirement besides possession of a franchise is for telecommunications providers to comply with design guidelines that the City will have

adopted. SFCC § 27-2.19(C)(1)(a) (2017). But even this minimal requirement is not being enforced because under a new State law, WCAIIA, also challenged here, such facilities are exempt from all land use requirements. NMSA 1978 §§ 63-9I-4(C) and 5(B) (2018). City residents will have no warning before cell tower transmitters suddenly appear in front of their homes and businesses or outside their children's bedroom windows and school classrooms, and they will have no recourse. App. 105.

Factual and Procedural Background and Chronology

A. The Period from 1986-1996

The necessity of limiting exposure to RF radiation, and of placing its sources far from human habitation, are not in doubt.

On July 30, 1986, the Environmental Protection Agency ("EPA"), which had responsibility under its charter to conduct research and develop standards for human exposure to RF radiation,[3] and had had its own

[3] All functions formerly vested in the Bureau of Radiological Health ("BRH") were transferred to EPA by Section 2(a)(3)(ii)(C) of the Reorganization Plan No. 3 of 1970, 84 Stat. 2086, which created the EPA. The functions previously vested in the BRH included: "Carries out programs designed to reduce the exposure of man to hazardous ionizing and nonionizing radiation. Develops criteria and recommends standards for safe limits of radiation exposure. . . . Plans and conducts research on the health effects of radiation exposure." 33 Fed. Reg. 19044, 19051-52 (Dec. 20 1968). EPA is responsible for these functions with respect to all sources of radiation except for radiation from consumer products,

RF radiation research laboratory since 1971, issued a Notice of Proposed Recommendations, in which it proposed to develop human exposure standards for RF radiation for adoption and enforcement by other federal agencies. In this Notice, EPA stated: "*Effects occur in test animals exposed at RF radiation intensities found in the environment*."[4] (Emphasis added). The following year, EPA continued to sound the alarm. A "Summary of research performed by EPA scientists on low-frequency modulation of RF radiation" appears on pp. 166-168 of a 1987 House Subcommittee Report.[5] In this summary, EPA stated: "*it is not possible to assign a low intensity limit or threshold below which the exposures are without effect*." (Emphasis added). On June 19, 1995, EPA announced in a letter to the FCC that EPA's RF exposure guidelines were substantially complete. App. 150.

B. 1996—The Year of Confusion

The confusion began in 1996, when Congress passed the Telecommunications Act. In the TCA, Congress commanded the FCC to complete its rulemaking,[6]

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radiation used in the healing arts, and occupational exposures. Reorganization Plan No. 3, Section 2(a)(3)(ii).

[4] 51 Fed. Reg. 27318, 27318 (July 30, 1986).

[5] Health Effects of Transmission Lines: Oversight Hearing before the Subcommittee on Water and Power Resources of the Committee on Interior and Insular Affairs, House of Representatives, One Hundredth Congress, First Session, Serial No. 11-22 (October 6, 1987).

[6] TCA, Section 704(b).

begun in 1993 to comply with its responsibilities under NEPA to evaluate the environmental effects of RF radiation from the telecommunications facilities that it licenses.[7] The FCC, however, did not evaluate the effects of RF radiation on any aspect of the environment. Instead it interpreted its responsibility under NEPA to consist of evaluating the effects of RF radiation on human health.[8]

This created the illusion that the FCC had the authority and expertise to protect human health. And the illusion was compounded by Congress' command, which gave the impression that the FCC's NEPA guidelines had the force of law. The FCC has since then been a straw man that has been a convenient target for petitions, lawsuits, and criticism relating to the health effects of RF radiation but in reality has neither the power, expertise, nor ability to protect anyone or remedy injuries. And the assumption that "environmental effects" means "health effects" in the preemption clause of Section 704 is just that: an assumption. It is an assumption that has never been challenged or interpreted by any court, it has just been assumed.

The FCC obeyed Congress and completed its rulemaking. *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, Report and Order,

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[7] *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, Notice of Proposed Rulemaking, FCC 93-142, ¶ 2, 8 FCC Rcd. 2849 (1993).

[8] *Id.* ¶ 2.

ET Docket 93-62, FCC 96-326, ¶ 5, 11 FCC Rcd. 15123 (1996). In these guidelines, the FCC acknowledged that it "is not a health and safety agency," *id.* ¶ 28, and that the guidelines were unenforceable and were only "Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared" pursuant to its responsibilities under NEPA, as codified in 47 C.F.R. § 1.1307.[9]

This Alice-in-Wonderland world was compounded even further. Having no expertise to draft health standards, the FCC wrote that it "relies on expert health and safety agencies within the Federal Government, including the U.S. Environmental Protection Agency . . . "[10] However, instead of adopting standards that had been developed by EPA in order to protect the public health, which would have been mandatory and enforceable,[11] and which would have acknowledged that there is no safe level of exposure to RF radiation, the FCC adopted unenforceable guidelines that had been developed by private organizations whose

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[9] *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, Report and Order, ET Docket 93-62, FCC 96-326, ¶ 5 and Appendix C, p. 89, 11 FCC Rcd. 15123 (1996).

[10] 8 FCC Rcd. 2849, 2850 (1993), ¶ 11.

[11] EPA's guidelines were never issued. After intense lobbying by the Electromagnetic Energy Association, a telecommunications industry trade group (*Microwave News*, "Industry Pressures FCC to Adopt ANSI RF/MW Exposure Standard," Mar./Apr. 1996, pp. 1, 11-12, https://www.microwavenews.com/sites/default/files/sites/default/files/backissues/m-a96issue.pdf), Congress deleted the $350,000 that had been budgeted for the completion of EPA's guidelines. H.R. Rep. No. 104-384 at 66 (December 6, 1995).

purpose was to facilitate the development of wireless telecommunications, and which pretended that there is a safe level of exposure to RF radiation. These organizations were the Institute for Electrical and Electronics Engineers ("IEEE") and the National Council on Radiation Protection and Measurements ("NCRP"), which, despite its name, is not a government agency.[12]

C. The Telecommunications Act of 1996

Section 704 of the TCA contained within it a one-sentence preemption clause that has been assumed by courts—an assumption that has neither been challenged nor adjudicated—to relieve telecommunications companies of liability for injury by RF radiation from their facilities:

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

47 U.S.C. § 332(c)(7)(B)(iv). With this preemption clause in place, telecommunications companies proceeded to erect hundreds of thousands of cell towers

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[12] *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, Report and Order, FCC 96-326, ¶ 1 notes 1, 2.

throughout the United States without fear of being sued, and local governments and private citizens were powerless to stop them.

D. The Period from 1997-2021

In 1997, 72 organizations, public officials, and individuals appealed the FCC's Orders adopting RF exposure guidelines to the United States Court of Appeals for the Second Circuit. The Second Circuit ruled that the FCC's Orders were not arbitrary and capricious, and that Section 704 did not violate the Tenth Amendment. The Supreme Court denied certiorari. *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (10th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001).

Since that time, no zoning board or city council in the United States has been permitted to hear testimony about injury by cell towers. Citizens may not object based on health, and scientists may not give expert testimony about health. If such testimony is given, decision-making bodies may not take such testimony into consideration. If they do consider such testimony, they are subject to lawsuits by telecommunications companies and reversal by courts. *See*, *e.g.*, *T-Mobile Northeast LLC v. Town of Ramapo*, 701 F.Supp.2d 446, 460 (S.D.N.Y. 2009):

> [H]ealth concerns played a prominent role in community opposition to the application. In Planning Board hearings on July 11, September 12, and October 17, 2006, town residents repeatedly spoke of their concern

> that T-Mobile's proposed facility would create a health hazard. The Court has no trouble concluding that the Town's decision was at least partly based on the environmental effects of the proposed tower's radio frequency emissions. [¶] . . . T-Mobile is entitled to summary judgment on this claim.

(Citation to the record omitted).

In 2013, the FCC issued a Notice of Inquiry in which it asked whether there was any basis upon which to revise its RF exposure guidelines.[13] Participants in the proceeding reentered the Wonderland world that has been operating since 1996. They assumed that the FCC has jurisdiction over health and that its guidelines are enforceable. They submitted thousands of pages of scientific evidence of harm. As before, the FCC disclaimed expertise to evaluate the evidence.[14] As before, the FCC claimed to rely on the advice of the expert health and safety agencies.[15] As before, the FCC failed to consult with those health and safety agencies before making its decision.[16] The FCC's exposure guidelines were not revised. The Environmental Health Trust and other parties filed an

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[13] *Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies*, FCC 13-39, Notice of Inquiry, ET Docket No. 13-84 (2013).

[14] *Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies*, FCC 19-126, § 153, Resolution of Notice of Inquiry, ET Docket No. 13-84 (2019).

[15] *Id.*

[16] *Id.* § 12.

appeal in the D.C. Circuit. *Environmental Health Trust v. FCC*, D.C. Cir., Case No. 20-1025.

On August 13, 2021, the D.C. Circuit ruled that the FCC's failure to evaluate the scientific evidence was arbitrary and capricious and ordered it to do so.[17] However, no matter what the FCC does, people who suffer injury and loss from telecommunications facilities still have no remedy. The contradictions between the preemption clause in Section 704, as construed to date, and the reality that the FCC has no jurisdiction over health[18] and that its human exposure guidelines are procedural only and do not have the force of law, have still not been faced and will continue to cause widespread injury and damage to the nation's public health.

As more and more people are being injured, they are putting increasing pressure on their local governments to protect them and, in 2018 and 2019, hundreds of cities and counties sued the United States and the FCC to regain at least partially their right to protect the public health, safety, and welfare. These cities and counties demanded the right to regulate the

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[17] *Environmental Health Trust v. FCC*, No. 20-1025 at 30-31, (D.C. Cir. Aug. 13, 2021).

[18] The D.C. Circuit erroneously cited *Banzhaf v. FCC*, 405 F.2d 1082, 1096 (D.C. Cir. 1968) in support of its assertion that the FCC has jurisdiction over health. *Banzhaf* held only that the FCC has the power to regulate the content of radio programming in the public interest. It also held that the FCC has "no special expertise" over matters of health, *id.* at 1097, and that "the Commission expressly refused to rely on any scientific expertise of its own." *Id.* at 1098.

placement and construction of telecommunications antennas, millions of which are beginning to be installed atop utility poles in the public rights-of-way outside people's bedroom windows as infrastructure for the next generation of wireless services, known as 5G. They did not challenge the constitutionality of the preemption clause in Section 704 and therefore were constrained to argue on the basis of aesthetics and fees instead of health, which was and is the real issue. The Ninth Circuit, in which their numerous actions were joined, accordingly deferred to the FCC, upholding its orders facilitating the placement of "small cells" in the public rights-of-way nationwide. The Supreme Court denied certiorari. *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020), *cert. denied sub nom. City of Portland, Oregon v. Federal Communications Commission*, No. 20-1354, 2021 WL 2637868 (June 28, 2021).

E. Proceedings Below

The district court had jurisdiction over Petitioners' federal claims under 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. §§ 2201 and 2202 (Declaratory Judgment Act), and 28 U.S.C. § 1343(a)(3) (civil rights claims), and was able to exercise supplemental jurisdiction over the state-law claims pursuant to 28 U.S.C. § 1367. App. 98. Only two Respondents, the United States and the City, moved to dismiss Petitioners' claims for lack of standing and for failure to state a claim under Fed. R. Civ. P. 12(b)(1) and (b)(6). The district court ruled that Petitioners had established standing to bring their constitutional claims,

but dismissed those claims under Rule 12(b)(6). App. 54, 69-70. The district court also dismissed Petitioners' claims against the New Mexico Attorney General *sua sponte*.

A three-judge panel of the Tenth Circuit denied Petitioners standing to assert their takings claims, their substantive due process claims against WCAIIA and the City Ordinances, and their substantive and procedural due process claims against Section 704. The court granted Petitioners standing to assert their procedural due process claims against WCAIIA and the City Ordinances; and their First Amendment free speech, right to petition, and access to courts claims against the TCA, WCAIIA and the City Ordinances; however, the court dismissed all these claims under Rule 12(b)(6).

Although the court of appeals ruled that the effect of WCAIIA and the City Ordinances is to deprive Petitioners of notice and an opportunity to be heard, App. 28, it ruled that legislative acts do not have to provide due process. App. 28. Although it ruled that Petitioners have been denied the right to petition their local government regarding RF radiation, and have no remedy for injury in any court, App. 26-27, the court of appeals held that Petitioners cannot assert their right to petition or access to courts claims because Petitioners retain a right to petition the FCC to change its RF exposure standards. App. 29-30. Although the court ruled that Petitioners have suffered injury in fact because their City is prohibited from paying attention to speech about RF radiation, App. 26, it ruled that

Petitioners cannot assert a free speech claim because, while the City may not consider what they say, Petitioners can still say it. App. 31.

F. Petitioners' Standing

The burden of establishing a federal court's subject matter jurisdiction rests upon the party asserting jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). To satisfy this burden, the party must show: (1) one plaintiff has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged actions of each defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* at 560-561.

In evaluating an appeal from a case that was resolved on a motion to dismiss, the factual allegations in the complaint are accepted as true. *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1935 (2019).

1. Injury in Fact

In December 2018, after Petitioners had experienced specific harm from specific facilities erected pursuant to the Mayor's Proclamations of Emergency (App. 93-96), after five franchises had been awarded (App. 109), and after three franchisees had announced the specific locations of some of their proposed facilities

(App. 110), Petitioners filed the present action. These injuries are not generalized grievances. Petitioners allege not that RF radiation increases symptoms but that it is a cause of major diseases for Petitioners as well as the general public. App. 81-88. Cell tower radiation has caused Petitioner Firstenberg laryngospasm, heart arrhythmias, and elevated cardiac enzymes, indicating damage to cardiac and/or skeletal muscle, all of which are life-threatening. App. 93-94. Radiation from cell towers has cost these people their property, their liberty, their livelihood, and nearly their lives. App. 91-93. Laryngospasm, irregular heartbeat, elevated blood pressure, damage to heart muscle, crippling pains, and loss of six homes are not "generalized harms." Petitioners and their members have already been injured by RF radiation, infringing their rights to remain in their own home, continue in their business and frequent public places in their own city. App. 91-96, 113-114, 116-117, 129.

2. Traceability

The causal connection of Petitioners' injuries to the action of the United States is clear: Section 704, as applied, has prohibited the City and State from protecting the public health. App. 111, 117-118, 138, 139-140. The placement of antennas on the sidewalks, which the City could not authorize were it not prohibited from fulfilling its obligation to protect its citizens' health, and which has been delayed pending the outcome of this lawsuit, would deprive Petitioners and Petitioners' members of their lives, liberty, and

property, violating their rights under the First, Fifth, and Fourteenth Amendments. App. 113-118, 137-142 (Counts 1, 2, 3, 4, 18, 19, and 20). "[F]airly traceable" does not require a defendant's action to be "the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (finding petitioners had standing to challenge federal law even though subsequent decisions by other governmental entities also caused harm, explaining the "fairly traceable" prong "does not exclude injury produced by determinative or coercive effect upon the action of someone else"). If the predicted result is premised on the actions of third parties, this type of "predictable effect of Government action on the decisions of third parties" is sufficient to establish traceability. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). Petitioners' claimed constitutional injuries are the direct result of the State Respondents' interpretation of and reliance on Section 704. *See Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 516 (2007) ("The parties' dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court.").

3. Redressability

Petitioners sufficiently alleged redressability: there are presently no antennas on the sidewalk in front of their homes and businesses (App. 107), and retaining the status quo would redress Petitioners' grievances. The invalidation of Section 704 would restore their ability to protect themselves from such

installations, which has been denied them by the City explicitly on the basis of preemption by Section 704. App. 105-106. Petitioners have asserted discrete and particularized injuries, and they have asserted the violation of procedural rights that bar relief from those injuries. A decision that health is not preempted will likely redress their grievances. *See Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury.") (Emphasis in original).

The joint effect of Section 704, WCAIIA, and the amended Chapter 27 of the Santa Fe City Code is not just to "permit" but to mandate the universal placement of wireless telecommunications facilities without ever considering the effects of these facilities on the health of American citizens. Petitioners' injuries cannot be redressed only by an injunction against the State Respondents because no court can grant such an injunction unless Section 704 is reconstrued or invalidated.

REASONS FOR GRANTING THE PETITION

Attempts to obtain protection from RF radiation by petitioning or suing the FCC are futile, because the FCC has no jurisdiction over health, its exposure limits are unenforceable, and regardless of the outcome of those petitions or lawsuits, people will still have no

remedy for their losses as long as the preemption clause remains in place and is construed as it has been until now. Either a declaration that the preemption clause is unconstitutional, or a holding that "environmental effects" does not mean "health effects," would restore to all citizens the rights guaranteed them under the Constitution and vitiate the necessity of suing their local governments.

I. THE PREEMPTION OF STATE COURT REMEDIES FOR INJURY WITHOUT PROVIDING A SUBSTITUTE FEDERAL REMEDY VIOLATES THE RIGHT OF ACCESS TO COURTS

Prior to 1996, injured parties could seek recompense for injury and death caused by RF radiation. *See In re Yannon v. New York Telephone Co.*, 86 A.D.2d 241 (N.Y. App. Div. 1982) (upholding Workers' Compensation award to widow of man killed by low-level RF radiation). But since 1996, the preemption clause in the TCA has resulted in dismissal of all claims for injury by RF radiation. *See*, *e.g.*, *Robbins v. New Cingular Wireless PCS, LLC*, 854 F.3d 315, 320 (6th Cir. 2017) ("Allowing RF-emissions-based tort suits would . . . shift the power to regulate RF emissions away from the FCC and into the hands of courts and state governments."); *Accord Goforth v. Smith*, 991 S.W.2d 579 (Ark. 1999); *Jasso v. Citizens Telecom. Co. of Cal.*, No. 2:05-cv-2649-GEB-EFB-PS, 2007 WL 2221031 (E.D. Cal. July 30, 2007); *Stanley v. Amalithone Realty, Inc.*, 94 A.D.3d 140, 146 (N.Y. App.

Div. 2012). *See also Murray v. Motorola*, *Inc.*, 982 A.2d 764 (D.C. App. 2009) (permitting tort claims for injury by pre-1996 cell phones and barring claims about phones manufactured in or after 1996).

The court of appeals' decision in this case that the right of access to courts is not infringed because Petitioners can "petition[] the government regarding radio-frequency emissions" (App. 30) confuses a petition with a remedy for injuries. The FCC's rules allow such petitions, but the FCC is not a court, cannot hear tort claims, and cannot award damages. The court of appeals' unstated assumption that different emission standards could guarantee safety is supported by no evidence and denied by Petitioners. App. 76-77. Moreover, the FCC has no jurisdiction over health and its RF exposure guidelines, at whatever level it sets them, are not enforceable and do not guarantee compliance. *See supra* at 8. Preemption without a federal remedy is a violation of basic rights. The fact that Petitioners have no remedy at law for injuries to their bodies or their properties, together with the failure of Congress to provide any substitute federal remedy at all, is constitutionally infirm, as this Court has reminded us repeatedly.

> "[B]ecause the States are independent sovereigns in our federal system," the Court "'assum[es] that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"

CTS Corp. v. Waldburger, 573 U.S. 1, 18-19 (2014) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Such statements have appeared in this Court's opinions for a century. *See Bill Johnson's Restaurants, Inc. v. Nat'l Labor Relations Bd.*, 461 U.S. 731, 742-743 (1983), in which a unanimous Court ruled:

> If the Board is allowed to enjoin the prosecution of a well-grounded state lawsuit, it necessarily follows that any state plaintiff subject to such an injunction will be totally deprived of a remedy for an actual injury . . .
>
> *Considering the First Amendment right of access to the courts* and the state interests identified in cases such as *Linn* [*v. Plant Guard Workers*, 383 U.S. 53 (1966)] and *Farmer* [*v. Carpenters*, 430 U.S. 290 (1977)], however, we conclude that the Board's interpretation of the Act is untenable.

(Emphasis added). In *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 265 (2013), the Court again unanimously found no preemption in the absence of a substitute federal remedy:

> [I]f such state-law claims are preempted [by the Federal Aviation Administration Authorization Act of 1994], no law would govern resolution of a non-contract-based dispute arising from a towing company's disposal of a vehicle previously towed or afford a remedy

> for wrongful disposal. . . . No such design can be attributed to a rational Congress;

And again, from *Medtronic, Inc. v. Lohr*, 518 U.S. at 488-489:

> Medtronic's sweeping interpretation of the [Medical Device Amendments of 1976] would require far greater interference with state legal remedies, producing a serious intrusion into state sovereignty while simultaneously wiping out the possibility of a remedy for the Lohrs' alleged injuries. . . . [W]e cannot accept Medtronic's argument . . . ;

In *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238, 251 (1984), the court said, simply:

> It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct;

Accord English v. General Electric Company, 496 U.S. 72, 83 (1990); *United Workers v. Laburnum Corp.*, 347 U.S. 656, 663-664 (1954); *New York Central Railroad Co. v. White*, 243 U.S. 188, 201 (1917).

Conversely, in *Brusewitz v. Wyeth LLC*, 562 U.S. 223 (2011), a preemption provision in the National Childhood Vaccine Injury Act of 1986 barred state tort claims because a substitute federal remedy was provided.

This Court has occasionally, in recent years, found preemption of state tort remedies even in the absence

of a federal substitute remedy. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001); *Pliva, Inc. v. Mensing*, 564 U.S. 604 (2011); *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625 (2012); *Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. 472 (2013). In those cases, however, and in contrast to this case, the regulatory agencies whose rules had preemptive effect had expertise and jurisdiction over the subject matter of those lawsuits. They were the Food and Drug Administration (over medical devices in *Buckman*, and over drug safety in *Pliva* and *Bartlett*), and the Department of Transportation (over car safety in *Geier*, and over locomotive parts in *Kurns*).

The precedents set in those cases cannot apply to an agency that disclaims expertise and authority over the subject of the claimed preemption and cannot apply to the FCC in the instant case. In *Sierra Pacific Holdings, Inc. v. County of Ventura*, 204 Cal.App.4th 509, 517 (Cal. App. 2012), a California court wrote that "We have not found any case holding that state law is preempted by nonmandatory standards . . . Such standards are not 'law' and are not subject to the principle of preemption." Petitioners here have also found no cases to the contrary.

Moreover, Section 704 says nothing about state common law; indeed, to the contrary, and Section 601(c)(1) of the TCA provides that State and local laws shall *not* be preempted unless expressly so provided:

> NO IMPLIED EFFECT—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

In *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005), this Court addressed the effect of Section 601(c)(1) on the preemption clause in 47 U.S.C. § 332(c)(7)(B)(iv). A property owner sued the city under 42 U.S.C. § 1983 for denial of his application to build a telecommunications tower on his property, in violation of Section 704. This Court held that his right to sue under § 1983 was not preserved under Section 601(c)(1) because Section 704 provides a specific remedy for violation of its provisions. In so ruling, the Court confirmed that Section 601(c)(1) preserves existing remedies for which the TCA provides no substitute:

> We therefore hold that the TCA—by providing a judicial remedy different from § 1983 in § 332(c)(7) itself—precluded resort to § 1983.

544 U.S. at 127. The TCA does *not* provide a judicial remedy for persons injured by RF radiation and therefore does *not* preclude state court tort actions for damages.

Virginia Uranium, Inc. v. Warren, 139 S. Ct. 1894 (2019) is instructive, and closely parallel to the instant case. It was a case, as here, about radiation hazards. In that case, the Court refused to find preemption of a state prohibition of uranium mining. "[U]nder the

A[tomic E[nergy] A[ct]," wrote the Court, "'the promotion of nuclear power is not to be accomplished "at all costs."'" *Id.* at 1908 (quoting *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 222 (1983)). So too, here, the promotion of wireless communications should not be accomplished at all costs.

The Court in *Virginia Uranium* refused to "'cut back on pre-existing state authority outside the N[uclear] R[egulatory] C[omission]'s jurisdiction' . . . [A]n activity like mining [is] far removed from the NRC's historic powers." *Id.* at 1904 (citation omitted). So, too, here, human health is outside the FCC's jurisdiction and historic power and Section 704 does not cut back on pre-existing state authority to protect health.

The Court in *Virginia Uranium* invoked the savings clause in the Atomic Energy Act in declining to read implied preemption: "'Nothing in this section [that is, § 2021] shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.'" *Id.* at 1902 (bracketed material in original). The Court called this "a *non-preemption* clause." *Id.* (Emphasis in original). So, too, here, Section 601(c)(1) of the TCA is a *non-preemption* clause. It says that state and local laws may not be preempted unless *expressly* so provided in the TCA. There is no express preemption of state tort remedies for injury in the TCA.

Finally, the Court rejected petitioner Virginia Uranium's contention that state regulation of mining would disrupt the "balance" Congress sought to achieve between developing nuclear power and protecting health and environment. *Id.* at 1907. A similar contention has been put forth to support preemption of state tort actions for injury by RF radiation, and has resulted in a conflict in the courts of appeals that needs resolution.

The Third Circuit, in *Farina v. Nokia*, 625 F.3d 97 (3rd Cir. 2010), *cert. denied*, 565 U.S. 928 (2011), ruled that a class action against wireless providers brought in state court was preempted, holding that a jury decision would upset the "balance between safety and efficiency" that Congress had intended. *Id.* at 123. The same argument, under the same set of facts, was rejected by the Fourth Circuit in *Pinney v. Nokia, Inc.*, 402 F.3d 430 (4th Cir. 2005), *cert. denied*, 546 U.S. 998 (2005):

> The district court concluded that the Naquin plaintiffs' claims are preempted because their cases stand as an obstacle to "Congress' objectives of achieving national uniformity in wireless telecommunications services and striking a balance between the proliferation of wireless services and the need to protect the public from any harmful effects of RF exposure." . . . [¶] We conclude that the district court erred because the [TCA] provides no evidence of such an objective.

Id. at 457 (citation omitted). In the present case, the Tenth Circuit, citing case law rather than any wording in the TCA, held that the TCA "struck a balance" between preserving "the traditional authority of state and local governments" and creating "uniform standards governing new telecommunications facilities." *Santa Fe Alliance*, 993 F.3d at 811. App. 12.

It is time for this Court to resolve this division of opinion in the courts of appeals.

II. "ENVIRONMENT" DOES NOT MEAN "HEALTH" IN THE TCA OR ANY OTHER FEDERAL LAW

In the foregoing section, Petitioners argue that Section 704 of the TCA (47 U.S.C. § 332(c)(7)(B)(iv)), as construed to date, violates the First Amendment. The constitutional question can be avoided, however, if the word "environment" in Section 704 is given its ordinary meaning, consistent with the meaning of that word in every other federal statute in which it occurs. "Environment" has never been interpreted to mean "health" by any court in any other statute.

The important question of whether "environmental effects" means "health effects" in Section 704 has never been adjudicated.[19]

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[19] In 2000, in *Cellular Phone Taskforce v. FCC*, Nos. 00-393, 00-407, 00-417 and 00-427, this Court was presented with the question of whether Section 704 violates the Tenth Amendment. The Court did not grant certiorari on that question. Since then, the Court has reviewed challenges under 47 U.S.C. § 332 several

A. Standard of Review

"In determining whether federal law preempts a state statute, we look to congressional intent. . . . We begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990).

An act of Congress should not be construed to violate the Constitution if any other possible construction remains available. *Edmond v. United States*, 520 U.S. 651, 658 (1997); *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1977).

B. No Deference Should Be Accorded the FCC on a Subject over Which It Has No Jurisdiction

In *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), this Court ruled that a federal agency's interpretation of a federal statute that it administers is entitled to deference, provided the provision in question falls within the agency's area of expertise. In such cases, courts defer to "those with

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times, but has never ruled on its constitutionality. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005) (no damages available for violating the TCA); *City of Arlington, Tex. v. FCC*, 569 U.S. 290 (2013) (FCC interpretation of "reasonable period of time" is appropriate); and *T-Mobile S., LLC v. City of Roswell, Ga*., 135 S.Ct. 808 (2015) (any denial of an application for a cell phone tower must be based on substantial evidence and in writing).

great expertise and charged with the responsibility for administering the provision." *Id.* at 865.

As the FCC has repeatedly and consistently denied expertise on matters of health and safety, no deference should be accorded the FCC's interpretation of "environmental effects" as meaning "health effects." *See Inquiry Concerning Biological Effects of Radio Frequency Radiation When the Use of Radio Frequency Devices is Authorized*, FCC 79-364, ¶ 20, 44 Fed. Reg. 37008, 37011 (June 25, 1979) ("The Commission's position is that it has neither the responsibility nor the authority to establish health and safety radiation standards."); *see also Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, ET Docket No. 93-62, Report and Order, ¶ 28, 11 FCC Rcd. 15123, (1996) ("[T]he Commission has stressed repeatedly that it is not a health and safety agency . . . ").

Neither the TCA nor the rest of the FCC's authorizing statute, the Communications Act, gives the FCC any authority over health or environment. The TCA contains the word "environmental" nowhere other than in Section 704. The TCA does not contain the word "environment." Neither the TCA nor the rest of the Communications Act uses the word "health" in connection with RF radiation. Even the RF exposure guidelines that the FCC issued in 1996 were adopted not under the authority of the Communications Act

but under the mandate of NEPA, and are procedural guidelines only that are not enforceable.[20]

In *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, (2013), this Court confirmed that while general deference to the FCC's interpretations of the TCA is appropriate, *id.* at 307, "for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted." *Id.* at 306. The particular issue in *Arlington*, on which this Court deferred to the FCC, was that agency's interpretation of what constitutes a "reasonable period of time" for a city to act on applications to build telecommunications facilities. *Arlington* did not involve issues of health or the environment.

Congress granted no authority to the FCC in Section 704 to determine for the nation what constitutes safe levels of RF radiation. All Congress did was command the FCC to complete the rulemaking that it had begun three years earlier in order to satisfy its procedural obligations under NEPA: "Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions."[21]

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[20] *See* n.1, *supra*.

[21] TCA § 704(b).

C. Congress Did Not Intend to Include "Health" as Part of the Term "Environmental"

As in *Virginia Uranium*, Congressional intent is to be found in the text of a law and not its history. This Court rejected "[e]fforts to ascribe unenacted purposes and objectives to a federal statute." 139 S. Ct. at 1907. "[I]t is our duty to respect not only what Congress wrote but, as importantly, what it didn't write." *Id.* at 1900. It didn't write about health in the TCA.

In prohibiting states from adopting stricter regulations than the FCC regarding the environmental effects of RF radiation, Congress did not intend to prohibit States and municipalities from exercising their obligations to protect the public health. Nowhere in the House or Senate committee reports or in the Conference Committee Report or anywhere else in the Congressional Record on the Senate and House bills that became the TCA does the word "health" appear in connection with Section 704. If the final bill had said that States and municipalities could not protect their citizens' "health," it is unlikely the legislators would have voted for it.

In the ordinary use of the words, "environment" is external to an organism and "health" is internal. "Environment" means "the circumstances, objects or conditions by which one is surrounded," while "health" means "the general condition of the body." Merriam-Webster dictionary, www.merriam-webster.com. "Environment" is "[t]he totality of the natural world, often

excluding humans," while "environmental" is "1. Relating to or associated with the environment. 2. Relating to or concerned with the impact of human activities on the natural world." *The American Heritage Dictionary*, Fifth Edition 596 (2011).

Since the TCA does not define "environment," "environmental," or "environmental effect," we may look to other federal statutes for guidance as to what Congress intended.

The Comprehensive Environmental Response, Compensation and Liability Act defines "environment" as: "(A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C. 1801 et seq.], and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States." 42 U.S.C. § 9601(8) (bracketed material in original).

The Clean Air Act defines "adverse environmental effect" as "any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas." 42 U.S.C. § 7412(a)(7).

These definitions do not include the word "health" or any reference to effects on human beings. When Congress has meant "health" in a piece of legislation, it has always said so explicitly. "Health effects" and "environmental effects" are both used in the Clean Air Act, and they do not mean the same thing. When both are referred to, the act uses both terms. Thus, it refers to substances that "cause adverse effects to human health *or* adverse environmental effects," 42 U.S.C. § 7412(b)(3)(B); 42 U.S.C. § 7412(b)(3)(C); "health *and* environmental impacts," 42 U.S.C. § 7509(d)(2); "public health or welfare *or* environmental quality," 42 U.S.C. § 7609(b). (Emphases added).

The Toxic Substances Control Act refers to "the health *and* environmental effects of the relevant chemical substance," 15 U.S.C. § 2604(a)(3)(B)(i), and "information relating to toxicity, persistence, and other characteristics which affect health *and* the environment." 15 U.S.C. § 2602(15)(A)(ii). The Federal Insecticide, Fungicide, and Rodenticide Act refers to the protection of "health *and* the environment" throughout. 7 U.S.C. §§ 136(q)(1)(F), 136(q)(1)(G), 136(x), 136w(c)(5), 136w(d)(1), etc. The Resource Conservation and Recovery Act addresses "environment *and* health," 42 U.S.C. § 6901(b). Its purpose is "to protect human health *and* the environment," 42 U.S.C. §§ 6921(d)(2), (d)(3), (d)(4), (g), etc. Section 7 of the Energy Supply and Environmental Coordination Act is titled "Protection of public health *and* environment." 15 U.S.C. § 793. The National Environmental Policy Act's purpose is to "prevent or eliminate damage to the

environment and biosphere *and* stimulate the health and welfare of man." 42 U.S.C. § 4321. (Emphases added).

In its recent decision in *Environmental Health Trust v. FCC*, the D.C. Circuit found that the FCC's guidelines address *only* health and *not* environment ("The Commission also completely failed to acknowledge, let alone respond to, comments concerning the impact of RF radiation on the environment"[22]) and ordered the FCC "to address the impacts of RF radiation on the environment."[23] The implication of that court's statements is that, consistent with its ordinary meaning and its meaning in every other federal statute, "environment" does *not* mean "health."

D. If "Environment" Is Given Its Ordinary Meaning, the Constitutional Questions Raised in This Lawsuit Would Be Avoided

If "environment" is accorded either its common definition or its definition in the United State Code, questions about the constitutionality of Section 704 would be avoided. Citizens would be restored their rights to notice and an opportunity to be heard on matters pertaining to their life and liberty, their rights to speak to and be heard by their elected officials about threats to their lives and properties, their rights to go

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[22] *Environmental Health Trust v. FCC*, No. 20-1025 at 22 (D.C. Cir. Aug. 13, 2021).

[23] *Id.* at 31.

to court to ask for a remedy for injuries, and their rights to compensation for loss of their properties. City, County, and State officials would be restored *their* rights to speak about health, to listen to their constituents, and to protect the public health, safety and welfare when making siting decisions and issuing permits for telecommunications facilities, and when enacting and amending sections of their land use ordinances and statutes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THERESA KRAFT
Counsel of Record
822 Little John Drive
Salisbury, MD 21804
(603) 568-2464
tkraft@theresakraft.com

RICHARD I. TARGOW
Post Office Box 1143
Sebastopol, CA 95473
(707) 829-5190
rtargow@sonic.net

Counsel for Petitioners

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