NO. 21-629

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

CITY OF SANTA FE'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARCOS D. MARTÍNEZ
Counsel of Record
City of Santa Fe
City Attorney's Office
200 Lincoln Avenue
Santa Fe, NM 87501
(505) 955-6512
mdmartinez@santafenm.gov

Counsel for Respondent City of Santa Fe

QUESTIONS PRESENTED

Petitioners raise two questions for review:

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

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

The Court should deny the Petitioners' request for review because the Petitioners have not demonstrated in their Petition that "a United States court of appeals ... has decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. Sup. Ct. R. 10.

REASONS FOR DENYING THE PETITION

I. Federal Preemption and the First Amendment's Guarantee to Petition the Government are Distinct Issues.

A. Preemption Involves which Jurisdiction's Law Controls, not what Rights are Enforceable.

The Petitioners apply case law unrelated to the applicable law in their case to assert that, prior to 1996, injured parties could seek "recompense for injury and death caused by RF radiation." Pet'rs Br. 24. To illustrate this assertion, the Petitioners cite *In re Yannon v. New York Telephone Co.* 86 A.D. 2d 241 (N.Y. App. Div. 1982), a workers' compensation case in which death benefits were awarded to the claimant, whose husband was employed for over 12 years as a microwave transmission unit repairman. The repairman died at the age of 60, after a prolonged period of progressive physical and mental

deterioration. The Petitioners contrast this case with *Robbins v. New Cingular Wireless PCS, LLC*, 854 F.3d 315, 320 (6th Cir. 2017). However, the comparison is inapt. Laws regarding workers' compensation in New York and New Mexico continue to recognize harms caused by radiation exposure. *See, e.g.*, N.Y. Workers' comp. Law § 28 (McKinney); N.M. Stat. Ann. § 52-3-42(B). Further, the *Robbins* case presented no workers' compensation claims. Rather, *Robbins* arose out of an appeal of a zoning decision by the Lexington-Fayette Urban County Planning Commission to permit a 125-foot cell phone tower. Moreover, the Sixth Circuit found that the residents had alleged no harms from the existing tower.

The Petitioners make similar errors of analogy about other precedent. For example, the Petitioners cite the *Bill Johnson's* case for the proposition that a federal court cannot preempt state law without creating a substitute federal remedy. Pet'rs Br. 26. But that was not the holding of this Court. This Court summarized the *Bill Johnson* case as follows: "In *Bill Johnson's*, we held that the [National Labor Relations] Board may not enjoin reasonably based state court lawsuits in part because of First Amendment concerns." *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 530 (2002). The case offered no support for the proposition that a federal law cannot preempt state law unless there is a federal remedy. Similarly, the Petitioners cite *Dan's City Used Cars* to support the claim that preemption requires a substitute federal remedy. However, *Dan's City Used Cars* addressed the preemptive scope of a provision of the Federal Aviation Administration Authorization Act of

1994 (FAAAA or Act) applicable to motor carriers. *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 254 (2013).

In *Dan's City*, this Court held "that state-law claims stemming from the storage and disposal of a car, once towing has ended, are not sufficiently connected to a motor carrier's service with respect to the transportation of property to warrant preemption under § 14501(c)(1)." *Dan's City Used Cars*, 569 U.S. at 255. In other words, *Dan's City Used Cars* is useful to analyze the scope of preemption, not the remedial scheme. The case does not stand for the proposition that no preemption can occur if federal law does not supply a remedy.

Thus, the Petitioners' proposition that the Federal Telecommunications Act of 1996 (TCA) has deprived the Petitioners of previously available private rights is unsupported by the precedent they cite.

Federal preemption of local laws over radio communications did not occur with the passage of the TCA in 1996. Federal regulation of radio communications began in 1910. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 210 (1943). Eventually, Congress fully occupied the field of radio communications, preempting state and local regulation over "communication by wire and radio" with the passage of the Communication Act, 47 U.S.C. § 151, 48 Stat. 1064, on June 19, 1934. In one early case interpreting the Communication Act, this Court observed that "[t]he Communications Act of 1934 did not create new private rights. The purpose of the Act

was to protect the public interest in communications." *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 14 (1942). Thus, at least as far back as 1934, Congress recognized the public interest in uniform regulations over radio and wired communication standards and private rights do not interfere with the recognition of public rights: "That a court is called upon to enforce public rights and not the interests of private property does not diminish its power to protect such rights." *Scripps-Howard Radio*, 316 U.S. at 14–15.

The Supremacy Clause forms the basis for federal preemption: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;" U.S. Const. art. VI, cl. 2. Moreover, as the Court has instructed, federal preemption of state and local laws does not create federal rights:

> It is equally apparent that the Supremacy Clause is not the 'source of any federal rights,' and certainly does not create a cause of action. It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so.

Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 324–25 (2015). Thus, the Petitioners' assumption that they are entitled to a federal remedy because the TCA has displaced local regulation of radio frequency emissions rests on an erroneous premise.

B. The Petitioners have Exercised their Right to Petition the Government.

The final clause of the First Amendment states: "Congress shall make no law… abridging… the right of the people… to petition the Government for a redress of grievances." U.S. Const. amend. I. The 10th Circuit correctly found that no provision in federal, state, or local law has prevented the Petitioners from exercising this right:

> To be sure, the Alliance alleges the relevant legislative acts prevent its members from succeeding on any of its efforts to petition the Santa Fe government regarding the health effects of radio-frequency emissions, but the amended complaint never identifies a provision of the TCA, WCAIIA, or the Amendments to Chapter 27 precluding any individual from, or penalizing any individual for, petitioning the government regarding radio-frequency emissions. Nor could the Alliance identify any such provision, as none exists.

Santa Fe All. for Pub. Health and Safety v. City of Santa Fe, New Mexico, 993 F.3d 802, 819 (10th Cir. 2021). The Petitioners assert that the 10th Circuit "confuses a petition with a remedy for injuries" Pet'rs Br. 25. However, the Petitioners are themselves confused over what the First Amendment guarantees under the Petition Clause. *Id.*

The right conferred in the Petition Clause of the First Amendment is not a guarantee that a petition will be successful: "Nor does the text of the First Amendment speak in terms of successful petitioning-it speaks simply of 'the right of the people ... to petition the Government for a redress of grievances.'" *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 532 (2002). The right to petition the City does not create an obligation that the City grant the wishes of the petitioner. To hold otherwise would create a federal mandate via the First Amendment. No case has ever held anything close to this dubious claim. As the Court has noted, the petition clause is not an absolute right that immunizes a petitioner from the consequences of false or baseless claims: "Nor do the Court's decisions interpreting the Petition Clause in contexts other than defamation indicate that the right to petition is absolute. For example, filing a complaint in court is a form of petitioning activity; but 'baseless litigation is not immunized by the First Amendment right to petition.'" *McDonald v. Smith*, 472 U.S. 479, 484 (1985). One may exercise the right to petition the government without any guarantee of success, but that does not make the right to petition meaningless, just as the First Amendment does not guarantee that listeners must believe a person's speech.

The 10th Circuit recognized this principle when it rejected the Petitioners' claim: "[T]he case law uniformly rejects the contention that the First Amendment guarantees any success when petitioning..." *Santa Fe Alliance*, 993 F.3d at 819. Consequently, the Court should deny the first issue presented by the Petition.

II. The Court Should Reject the Petitioners' Request to Narrow the Interpretation of "Environmental Effects".

The Petitioners request a novel revision to the meaning of the term "environmental effects" in 47 U.S.C. § 332(c)(7)(B)(iv) as agencies like the FCC and courts, such as the 10th Circuit, have applied the term. Pet'rs Br. 32. The term "environmental effects" appears in the subsection of the statute that limits the zoning authority of local governments. As this Court has summarized:

> Congress enacted the Telecommunications Act of 1996 (TCA), 110 Stat. 56, to promote competition and higher quality in American telecommunications services and to "encourage the rapid deployment of new telecommunications technologies.'" *Ibid.* One of the means by which it sought to accomplish these goals was reduction of the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers.
>
> To this end, the TCA amended the Communications Act of 1934, 48 Stat. 1064, to include § 332(c)(7), which imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities, 110 Stat. 151, codified 47 U.S.C. § 332(c)(7).

> Under this provision, local governments may not... limit the placement of wireless facilities "on the basis of the environmental effects of radio frequency emissions," § 332(c)(7)(B)(iv).

City of Rancho Palos Verdes, Cal. v. Abrams, 544 U.S. 113, 116 (2005). Accord *T-Mobile S., LLC v. City of Roswell, Ga.*, 574 U.S. 293, 300 (2015). The Petitioners attempt to cast the interpretation of the term "environmental effects" in a dubious light, suggesting that agencies and courts have misconstrued the meaning of "environmental effects" to include the effects on human health. Pet'rs Br. 32. However, a review of the history of the FCC's regulation of human exposure to RF emissions reveals the opposite conclusion.

The FCC has regulated human exposure to RF emissions in the context of NEPA since 1985: "[T]he National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 et seq. (1976), requires the Commission to consider whether the facilities and operations it licenses or authorizes will significantly affect "the quality of the human environment." *In the Matter of Resp. of the Fed. Commun. Commn. to Consider Biological Effects of Radiofrequency Radiation When Authorizing the Use of Radiofrequency Devices.*, 100 F.C.C.2d 543, 564 (F.C.C. 1985). Since the FCC's declaratory ruling in 1985, the FCC has periodically re-examined its regulations to ensure that they reflect scientific consensus and technological changes. "In 1993, prompted by ANSI's revision of its standards in collaboration with the Institute of Electrical and

Electronic Engineers, Inc. ("IEEE"), the FCC began rulemaking procedures to determine whether it should strengthen its regulations." *Farina v. Nokia Inc.*, 625 F.3d 97, 106 (3d Cir. 2010).

During the FCC's rulemaking, Congress enacted the Telecommunications Act of 1996:

> While the FCC was considering the proposed guidelines, Congress passed the Telecommunications Act of 1996, Pub.L. No. 104–104, 110 Stat. 56 (the "Act"), several provisions of which affected the FCC's ongoing proceedings. In particular, the Act preempted state and local governments from regulating the placement, construction or modification of personal wireless service facilities on the basis of the health effects of RF radiation where the facilities would operate within levels determined by the FCC to be safe.

Cellular Phone Taskforce v. F.C.C., 205 F.3d 82, 88 (2d Cir. 2000).

The appellants in *Cellular Phone Taskforce* raised two issues that echo in this case: 1) whether the FCC exceeded its powers when it prohibited state and local governments from regulating the operation of personal wireless service facilities that conformed to the FCC's RF standards; and 2) whether 47 U.S.C. § 332(c)(7)(B)(iv) is unconstitutional both on its face and as applied. *Id.*

The 2nd Circuit held that the FCC did not exceed its authority when it prohibited local governments from regulating wireless service facilities that comply with the FCC's standards. Moreover, in arriving at this conclusion, the court noted that NEPA required the FCC to consider the "environmental effects" of RF emissions as alterations to the environment that have a proximate effect on human health: "NEPA only requires agencies to consider environmental effects, i.e., alterations to the environment that have a proximate effect on human health." *Cellular Phone Taskforce*, 205 F.3d at 95.

The Second Circuit found that the FCC met its obligations under NEPA and that the FCC's implementation of the statute was within Congress' delegation of authority to preempt local governments from considering the environmental effects of RF emissions. *Cellular Phone Taskforce*, 205 F.3d at 90.

As described in the history above, the FCC has regulated human exposure to RF emissions for more than a quarter of a century. After the passage of the TCA, the FCC interpreted "environmental effects", consistent with its prior regulations, to include the effects on human health. Put differently, the FCC's analysis of "environmental effects" has considered the effects on human health since 1985 and that did not change with the passage of the TCA.

Finally, the appellants in *Cellular Phone Taskforce* sought a Petition for Certiorari review, which the Supreme Court did not grant. See *Citizens for the*

Appropriate Placement of Telecommunications Facilities v. F.C.C., 531 U.S. 1070 (2001).

This Court has addressed whether Chevron deference should apply to the FCC's interpretation of another passage in the TCA. See *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290 (2013). One of the pillars of the Chevron doctrine is that statutory ambiguities "will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." *City of Arlington,* 569 U.S. at 296.

In *City of Arlington*, the Court concluded that Chevron deference was warranted and rejected arguments that such deference infringed on states' rights. As the Court noted, "This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew." *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 305 (2013) (citing *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 379 n.6 (1999)). Likewise, in this case the Court should defer to the FCC's interpretation of the term "environmental effects" because the TCA properly delegated authority to the FCC to do so. *City of Arlington*, 569 U.S. at 301.

In sum, both prior to and after the passage of the Telecommunications Act of 1996, the FCC has considered the term "environmental effects" to include alterations to the environment that have a proximate effect on human health. The Second Circuit affirmed that interpretation, as have all other circuits

that have considered the question. *See Brehmer v. Planning Bd. of Town of Wellfleet*, 238 F.3d 117, 121 (1st Cir. 2001); *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 495 (2d Cir. 1999); *Farina v. Nokia Inc.*, 625 F.3d 97, 125 (3d Cir. 2010); *T-Mobile Ne. LLC v. Loudoun County Bd. of Sup'rs*, 748 F.3d 185, 194 (4th Cir. 2014); *Robbins v. New Cingular Wireless PCS, LLC*, 854 F.3d 315, 320 (6th Cir. 2017); and *Santa Fe All. for Pub. Health & Safety v. City of Santa Fe, New Mexico*, 993 F.3d 802, 812 (10th Cir. 2021).

The Petitioners assert that there is a circuit split between the 4th Circuit and the other circuits based on the *Pinney v. Nokia case*. Pet'rs Br. 31. The Petitioners misconstrue the *Pinney* case, however, and they have failed to account for the 4th circuit's more recent decision in *T-Mobile Ne. LLC v. Loudoun County Bd. of Sup'rs*, 748 F.3d 185, 194 (4th Cir. 2014), which is consistent with other circuits. Finally, the *Pinney* case was not about whether the TCA forbade local governments from considering the health effects on humans, but whether particular plaintiffs could sue phone manufacturers like Nokia. *Pinney v. Nokia, Inc.*, 402 F.3d 430, 439 (4th Cir. 2005).

III. Conclusion

The Petitioners misunderstand the law and what rights are enforceable. The Petitioners have not met their burden of showing that "a United States court of appeals ... has decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. Sup. Ct. R. 10. To answer the Petitioners'

first question, does the preemption clause in the TCA violate the right of access to courts guaranteed by the First Amendment? The answer is no, it does not. As the history of this case itself demonstrates, the Petitioners have petitioned the courts, exercising their First Amendment right to do so. To answer their second question, do environmental effects include health effects? The answer is yes, environmental effects include the effects on human health. Because these questions are answerable based on existing precedent and case law, the 10th Circuit committed no errors in the case below. Therefore, the Court should deny the Petitioners' request for a writ of certiorari.

Respectfully submitted,

MARCOS D. MARTÍNEZ
Counsel of Record
City of Santa Fe
City Attorney's Office
200 Lincoln Avenue
Santa Fe, NM 87501
(505) 955-6512
mdmartinez@santafenm.gov

Counsel for Respondent City of Santa Fe

January 28, 2022