No. 21-629

In the Supreme Court of the United States

SANTA FE ALLIANCE FOR PUBLIC HEALTH AND SAFETY, ET AL., PETITIONERS

v.

CITY OF SANTA FE, NEW MEXICO, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Section 704 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 151-152, provides that "[n]o 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 [Federal Communications] Commission's regulations concerning such emissions." 47 U.S.C. 332(c)(7)(B)(iv). The questions presented are as follows:

1. Whether Section 704 violates petitioners' First Amendment right to petition the government by pursuing claims in court.

2. Whether the term "environmental effects" in Section 704 includes effects on human health.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-36) is reported at 993 F.3d 802. The opinion and order of the district court (Pet. App. 39-70) is not published in the Federal Supplement but is available at 2020 WL 2198120.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 2021. A petition for rehearing was denied on May 27, 2021 (Pet. App. 37-38). The petition for a writ of certiorari was filed on October 25, 2021 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Communications Commission (FCC or Commission) has broad authority to regulate the use

of radio communications and the operation of equipment capable of producing electromagnetic energy. 47 U.S.C. 301, 302a, 303(a)-(f). Under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, the Commission has adopted regulations that specify safe radio-frequency exposure limits. See, *e.g.*, *Environmental Health Trust* v. *FCC*, 9 F.4th 893, 900-901 (D.C. Cir. 2021). Under those regulations, before the FCC authorizes the construction or use of any wireless facility, the applicant must first determine whether the facility will expose people to radio-frequency emissions in excess of those limits. 47 C.F.R. 1.1307(b). If no such exposure will occur, then no further action is required. But if the facility will result in such exposure, the applicant must prepare an environmental assessment describing the facility's likely effects. *Ibid.* An environmental assessment is a detailed accounting of the expected consequences of a specific action that may have a significant environmental impact—in this case, a Commission authorization of a transmitter or facility that exceeds the radio-frequency guidelines. See 47 C.F.R. 1.1308. The FCC then evaluates the environmental assessment—and potentially, an environmental impact statement—to determine whether and under what conditions to allow construction of the facility. See 47 C.F.R. 1.1314, 1.1315, 1.1317, 1.1319.

b. The Telecommunications Act of 1996 (TCA), Pub. L. No. 104-104, 110 Stat. 56, created a uniform system of regulations for the wireless industry and vested the FCC with enforcement and regulatory authority over that scheme. In enacting the TCA, Congress sought to "promote competition and higher quality in American telecommunications services and to 'encourage the rapid deployment of new telecommunications technologies.'" *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113,

115 (2005) (quoting TCA, Pmbl., 110 Stat. 56). "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." *Ibid.*

The TCA did not entirely divest state and local governments of their traditional "control over the siting of towers and other facilities that provide wireless services." *360° Commc'ns Co.* v. *Board of Supervisors*, 211 F.3d 79, 86 (4th Cir. 2000). Rather, the TCA states that, "[e]xcept as provided in [47 U.S.C. 332(c)(7)], nothing in [the statute] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. 332(c)(7)(A).

The limitations on local zoning authority appear in 47 U.S.C. 332(c)(7)(B). Among other things, the TCA precludes state and local governments from "unreasonably discriminat[ing] among providers of functionally equivalent services"; requires that state and local governments act on wireless-facility applications "within a reasonable period of time"; and mandates that decisions denying such applications "be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. 332(c)(7)(B)(i)(I), (ii), and (iii). In addition, the TCA provides that any suit to challenge a state or local government's "final action or failure to act" in such matters must be brought in a "court of competent jurisdiction" within 30 days. 47 U.S.C. 332(c)(7)(B)(v); see generally *City of Rancho Palos Verdes*, 544 U.S. at 116.

This case concerns the limitation in 47 U.S.C. 332(c)(7)(B)(iv). That provision, which the parties refer to as "Section 704," *e.g.*, Pet. 5, states:

> 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.

42 U.S.C. 332(c)(7)(B)(iv).

Although Section 704 limits state and local zoning authorities, it does not dictate the outcome of any state or local zoning decision. See *Cellular Phone Taskforce* v. *FCC*, 205 F.3d 82, 96 (2d Cir. 2000), cert. denied, 531 U.S. 1070 (2001). Rather, "[t]he only onus placed on state and local governments exercising their local power is that they may not regulate personal wireless service facilities that conform to the FCC Guidelines on the basis of environmental effects of [radio-frequency] radiation." *Ibid.*

2. a. Wireless facilities, such as cell towers and antennae, emit radio-frequency waves to connect cell phones to the broader telecommunications network for calls and internet access. See Pet. App. 77-79, ¶¶ 4-6; *id.* at 99-100, ¶¶ 34-35. Petitioners are individuals and an organization representing individuals who claim to have been injured by radio-frequency emissions due to the placement of wireless facilities in their communities, and who fear further proliferation of wireless facilities in and around Santa Fe, New Mexico. See *id.* at 91-96, ¶¶ 23-27. Petitioners are particularly concerned with wireless facilities that may be located in public rights of way, including streets and sidewalks. See *id.* at 77, ¶ 3; *id.* at 100-106, ¶¶ 37-45.

Petitioners sued the City of Santa Fe, the Attorney General of New Mexico, and the United States. See Pet.

App. 75. Petitioners' 22-count amended complaint focuses on Section 704 as well as three state and local decisions: (1) a 2018 New Mexico law, the Wireless Consumer Advanced Infrastructure Investment Act, 2018 NMSA §§ 63-9I-4(C), 63-9I-5(B), which provides that radio-frequency-emitting antennae in the public rights of way are not subject to land-use review, see Pet. App. 77, ¶ 3; (2) a Santa Fe ordinance (known as Chapter 27) that repealed many notice, hearing, and application requirements for wireless facilities in public rights of way, see *id.* at 102-105, ¶¶ 41-43; and (3) proclamations by the Mayor of Santa Fe that suspended the Land Development Code (including public-notice requirements) for wireless facilities on city-owned property, see *id.* at 107-108, ¶¶ 47-48. Petitioners allege that these laws and decisions taken together "remove all public protection from injurious facilities in the public rights-of-way and deprive injured parties of any remedy for their injuries." *Id.* at 111, ¶ 56; see generally *id.* at 40-41.

Petitioners' amended complaint included claims under state, local, and federal law. As relevant here, the amended complaint asserted that Section 704 violates both the First Amendment (Counts 4 and 19) and the Due Process Clause (Count 18). See Pet. App. 117-118, ¶¶ 76-81; *id.* at 137-138, ¶¶ 154-158; *id.* at 139-141, ¶¶ 159-165. Petitioners asked the court to declare Section 704 unconstitutional and to enjoin "the United States, its officers, agents, servants, employees, and attorneys" from enforcing it. *Id.* at 146-147, ¶¶ 19-20, 26; see *id.* at 143-144, ¶¶ 175-178. The amended complaint also included a "cause of action" alleging that the term "environment" in Section 704 does not mean "health," *id.* at 135-137, ¶¶ 149-157 (Count 17), and petitioners sought a declaration to that effect, *id.* at 146, ¶ 18.

b. The district court dismissed the claims against all defendants. Pet. App. 39-70. As relevant here, the court determined that petitioners had standing to assert their constitutional claims regarding Section 704, but that "none of [petitioners'] federal claims state a claim for relief." *Id.* at 68. The court noted that "other courts have consistently dismissed similar claims." *Id.* at 68-69.[1]

3. The court of appeals affirmed the district court's order in part and remanded in part for the limited purpose of allowing the district court to dismiss some claims without prejudice for lack of standing. Pet. App. 32-33.

a. With respect to the claims against the United States, the court of appeals first held that petitioners lacked standing to pursue their claim that Section 704 violates the Due Process Clause by preempting further state and local regulation of radio-frequency emissions. Pet. App. 23-24. The court explained that, in order for petitioners' injuries to be fairly traceable to Section 704, petitioners would need to plausibly allege that, "in the absence of" Section 704, "New Mexico and/or Santa Fe" would regulate "radio-frequency emissions to a greater degree than the FCC does." *Id.* at 23; see *id.* at 18-19. The court determined that petitioners' allegations did not "make such an inference plausible." *Id.* at 23.

The court of appeals next determined that petitioners had standing to bring their First Amendment challenges to Section 704, but it affirmed the district court's dismissal of those claims under Federal Rule of Civil Procedure

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[1] Although New Mexico had not moved to dismiss, the district court "acted as though such a motion" was pending. Pet. App. 9 n.3. In addition, although petitioners had moved for a preliminary injunction, the court dismissed the suit without ruling on that motion or considering the supporting affidavits and exhibits that petitioners had submitted. See *id.* at 8-9 n.3.

12(b)(6). Pet. App. 26-27, 29-32. The court of appeals held that petitioners had failed to state a claim that Section 704 violated their right to free speech, because "nothing in [Section 704] * * * punishes, restricts, or prohibits any individual from speaking against radio-frequency emissions." *Id.* at 31.

The court of appeals likewise rejected petitioners' claim that Section 704 violates their First Amendment right to petition the government. The court explained that, although petitioners had alleged that the TCA (in conjunction with the challenged state and local actions) would "prevent" them "from succeeding on any of [their] efforts to petition the Santa Fe government regarding the health effects of radio-frequency emissions," the First Amendment does not "'speak in terms of successful petitioning.'" Pet. App. 30 (quoting *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 532 (2002)). Rather, "the case law uniformly rejects the contention that the First Amendment guarantees any success when petitioning." *Ibid.* The court concluded that petitioners' right-to-petition claim was "frivolous" because nothing in the TCA "preclude[s] any individual from, or penalize[s] any individual for, petitioning the government regarding radio-frequency emissions." *Ibid.*

In a footnote, the court of appeals observed that Count 17 of petitioners' complaint had "sought a declaration that the TCA did not preclude a locality from considering 'health' effects when approving or denying the placement of telecommunications facilities because impacts on human health are not an 'environmental effect' within" the meaning of 47 U.S.C. 332(c)(7)(B)(iv). Pet. App. 6 n.1. The court stated that, "[t]o the extent Count Seventeen advances a claim for relief rather than a mere legal argument supporting [petitioners'] other claims

against the TCA, it is not a constitutional claim, for it does not invoke any constitutional provision." *Ibid.* The court did not further address that issue.

b. Judge Lucero filed a concurring opinion. Pet. App. 33-36. Judge Lucero explained that he would have found standing for all of petitioners' claims regarding the TCA and would have affirmed the district court's dismissal of those claims on sovereign-immunity grounds. *Ibid.* He explained that the only potentially relevant waiver of sovereign immunity for petitioners' claims is 5 U.S.C. 702, which applies to "[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." Pet. App. 35 (citation and emphasis omitted; brackets in original). Judge Lucero observed that "[n]owhere in [petitioners'] claims is it alleged that any agency or officer of the United States acted or failed to act." *Ibid.* Instead, "[t]he named federal defendant is the United States in its entirety," and "there is no allegation that the FCC played any role in the events that led to this suit." *Ibid.*

c. Petitioners filed a petition for panel rehearing and rehearing en banc. The court of appeals denied the petition without any judge calling for a response. Pet. App. 37-38.

ARGUMENT

Petitioners' amended complaint asserted several challenges to Section 704 of the TCA. In this Court, however, petitioners contend only that (1) Section 704 infringes their First Amendment right to petition the government (and, in particular, their right of access to the courts), and (2) the provision does not bar localities from

considering "health" effects of radio-frequency emissions when regulating the placement of telecommunications facilities. See Pet. i-ii, 4, 32. Those arguments lack merit, and the decision below does not conflict with any decision of this Court or another court of appeals. Even if petitioners' arguments otherwise warranted this Court's review, this case would not be an appropriate vehicle for considering them because petitioners' claims against the United States are barred by sovereign immunity. Further review is not warranted.

1. a. The court of appeals correctly rejected petitioners' argument that Section 704 violates their First Amendment right to petition the government for a redress of grievances. See Pet. App. 29-31. "The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives." *Borough of Duryea* v. *Guarnieri*, 564 U.S. 379, 388 (2011). But "the text of the First Amendment [does not] 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 Constr. Co.* v. *NLRB*, 536 U.S. 516, 532 (2002). Because nothing in Section 704 "preclud[es] any individual from, or penaliz[es] any individual for, petitioning the government regarding radio-frequency emissions," it does not infringe the right to petition. Pet. App. 30. And even if petitioners cannot successfully petition the city of Santa Fe to enact more demanding radio-frequency emissions standards, they remain free to "seek relief from Congress or the FCC as to allowable [radio-frequency emission] levels." *Id.* at 64. The Constitution does not entitle petitioners to more. See, *e.g.*, *Minnesota State Bd. for Cmty. Colls.* v. *Knight*, 465 U.S. 271, 285 (1984).

Indeed, recent events confirm that Section 704 does not preclude petitioners from petitioning the government—including by seeking relief in court. As petitioners acknowledge (Pet. 17), individuals who are concerned about the health effects of radio-frequency emissions recently petitioned the D.C. Circuit for review of an FCC decision declining to amend the Commission's radio-frequency emissions standards. *Environmental Health Trust* v. *FCC*, 9 F.4th 893, 900 (2021). The D.C. Circuit ultimately granted those petitions in part and remanded without vacatur for "the Commission to provide a reasoned explanation for its determination that its guidelines adequately protect against harmful effects of exposure to radiofrequency radiation unrelated to cancer." *Id.* at 914.[2]

b. Petitioners' primary contention in this Court (Pet. 24-32) focuses on the question whether Section 704, in addition to expressly preempting state and local governments from acting based on the health effects of radio-frequency emissions, impliedly preempts certain state-

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[2] Petitioners' amici take issue with the Tenth Circuit's free-speech holding. 289 Orgs. & 34 Individuals Amici Br. 16-17. But because petitioners chose not to raise the free-speech claim in their petition, see Pet. i, ii, 4, this Court should not consider it, see, *e.g.*, *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Bell* v. *Wolfish*, 441 U.S. 520, 531 n.13 (1979); *Knetsch* v. *United States*, 364 U.S. 361, 470 (1960). In any event, the lower courts correctly rejected petitioners' free-speech claim because Section 704 does not prohibit or regulate speech at all. See Pet. App. 31-32, 62-64. While amici complain (Br. 17) that local government officials are unable to act in response to petitioners' speech, "[n]othing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Minnesota State Bd. for Cmty. Colls.*, 465 U.S. at 285.

law tort actions that could be viewed as an end-run around that express preemption. That issue is not presented here. The court of appeals did not expressly address it. See Pet. App. 29-31; see also, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to consider argument not addressed by the court of appeals because this Court is "a court of review, not of first view"). And this is not a tort suit: Petitioners sued the United States, the City of Santa Fe, and the Attorney General of New Mexico for declaratory and injunctive relief; they did not seek damages from any party alleged to have emitted radiation. See Pet. App. 144-148 (requests for relief). If petitioners bring tort claims against such parties and a court holds the claims to be preempted, petitioners can challenge that holding at that time.

In any event, preemption of state tort law would not violate petitioners' right of access to the courts. The Supremacy Clause provides that the laws of the United States "shall be the supreme Law of the Land * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, Cl. 2. Accordingly, it has long been settled that state laws that conflict with federal law are "without effect." *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981); see *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819). And even in the absence of an express preemption provision, state law is "pre-empted to the extent that it actually conflicts with federal law," including when "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *English* v. *General Elec. Co.*, 496 U.S. 72, 79 (1990) (citation omitted); see, *e.g.*, *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 869 (2000). In the tort-

law sphere as elsewhere, the fact that a preemptive federal statute alters the applicable rule of decision does not mean that it deprives any litigant of his right to access the courts.

Petitioners' contrary arguments lack merit. Petitioners cite (Pet. 25-27) several cases in which this Court has described or applied the presumption against preemption, which instructs that "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors preemption,'" particularly when the provision operates in an area that traditionally falls within the States' police powers. *CTS Corp.* v. *Waldburger*, 573 U.S. 1, 19 (2014) (opinion of Kennedy, J.) (citation omitted); see *Dan's City Used Cars, Inc.* v. *Pelkey*, 569 U.S. 251, 265 (2013); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 488 (1996) (opinion of Stevens, J.); *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984); *Bill Johnson's Rests., Inc.* v. *NLRB*, 461 U.S. 731, 742-743 (1983). But that presumption does not suggest that it is "constitutionally infirm," Pet. 25, for Congress to preempt state law, even in areas traditionally regulated by the States. The presumption against preemption is not a constitutional limit on Congress's powers, but is simply a tool for discerning congressional intent where a statute is "susceptible of more than one plausible reading." *CTS Corp.*, 573 U.S. at 19. Although this Court will not lightly conclude that Congress intended broad preemption of state law, nothing in the Constitution forbids Congress from choosing that course.

Indeed, as petitioners acknowledge (Pet. 27-28), this Court has repeatedly held that Congress may preempt state tort actions to ensure that state courts do not do via

common-law tort liability what States and local governments are barred from doing by legislation. See, *e.g.*, *Mutual Pharm. Co.* v. *Bartlett*, 570 U.S. 472, 476 (2013); *Kurns* v. *Railroad Friction Prods. Corp.*, 565 U.S. 625, 637-638 (2012); *PLIVA, Inc.* v. *Mensing*, 564 U.S. 604, 624 (2011); *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 243 (2011); *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001); *Geier*, 529 U.S. at 866. As petitioners further acknowledge (Pet. 27-28), many of those decisions found state tort actions preempted "even in the absence of a federal substitute remedy."

Petitioners' attempts to distinguish those cases fail. Petitioners observe (Pet. 28) that "the regulatory agencies whose rules had preemptive effect [in those cases] had expertise and jurisdiction over the subject matter of those lawsuits." But here too, Congress has authorized the FCC to regulate devices and facilities that produce radio-frequency emissions, see 47 U.S.C. 301, 302a, 303(a)-(f), and Congress has expressly precluded state and local governments from imposing radio-frequency emissions standards that differ from those the FCC has established, 47 U.S.C. 332(c)(7)(B)(iv).

Petitioners alternatively suggest (Pet. 28) that this case is distinguishable from this Court's prior decisions because the FCC has "disclaim[ed] expertise and authority" over the subject of radio-frequency emissions. But even assuming that an agency could "disclaim" authority over a subject that Congress has expressly entrusted to it, petitioners are wrong to assert that the FCC has done so with respect to radio-frequency emissions. Petitioners highlight (Pet. 13) the fact that, when the Commission adopted its radio-frequency emission standards in 1996, it "place[d] special emphasis on the recommendations and comments of Federal health and

safety agencies," including the Environmental Protection Agency (EPA), "because of their expertise and their responsibilities with regard to health and safety matters." *In re Guidelines for Evaluating the Envtl. Effects of Radiofrequency Radiation*, 11 FCC Rcd 15,123, 15,135 (1996), corrected on other grounds by 1996 WL 434707 (FCC Aug. 1, 1996), aff'd, 205 F.3d 82 (2d Cir. 2000), cert. denied, 531 U.S. 1070 (2001). But acknowledging the expertise of other agencies and heeding their recommendations does not constitute a disavowal of the FCC's authority to regulate.[3]

c. Petitioners also cannot show that the decision below conflicts with any decision of this Court or of another court of appeals.

i. Petitioners suggest (Pet. 28-31) that the decision below is in tension with this Court's decisions in *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113 (2005), and *Virginia Uranium, Inc.* v. *Warren*, 139 S. Ct. 1894 (2019). Petitioners observe (Pet. 28-29) that the TCA contains a savings provision, which states that the statute "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so

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[3] Petitioners suggest (Pet. 10-11, 13 & n.11) that EPA previously took the view that radio-frequency emissions are unsafe at any level. But in the runup to the 1996 rulemaking, EPA stated that the majority of studies showed that "no significant health effects are associated with chronic, low-level exposure to [radio-frequency] radiation." Letter from Margo T. Oge, Dir., Office of Radiation & Indoor Air, EPA, to Thomas P. Stanley, Chief Eng'r, Office of Eng'g & Tech., FCC, Encl. 4-5 (Nov. 16, 1993) (on file with the Office of the Solicitor General). EPA subsequently determined that the FCC's exposure limits had "addresse[d]" EPA's "concerns about adequate protection of public health." Letter from Carol M. Browner, EPA, to Reed E. Hundt, Chairman, FCC (July 25, 1996) (on file with the Office of the Solicitor General).

provided," § 601(c)(1), 110 Stat. 143. They note (Pet. 29) that in *City of Rancho Palos Verdes*, this Court held that, notwithstanding the savings clause, the express judicial remedy in 47 U.S.C. 332(c)(7)(B)(v) precluded a property owner from suing a city under 42 U.S.C. 1983 based on the denial of a facility application. Petitioners suggest that the result here should be different because "[t]he TCA does *not* provide a judicial remedy for persons injured by [radio-frequency] radiation." Pet. 29. But because petitioners do not assert tort claims arising from radio-frequency exposure, the application of the savings clause to such claims is not at issue here. Nothing in the decision below conflicts with *City of Rancho Palos Verdes*.

Petitioners' reliance (Pet. 29-31) on *Virginia Uranium* is likewise misplaced. In determining that the Atomic Entergy Act (AEA) did not preempt a Virginia-law ban on uranium mining, the plurality in that case noted the AEA's inclusion of a savings clause. *Virginia Uranium*, 139 S. Ct. at 1902 (discussing 42 U.S.C. 2021(k)). But petitioners ignore the most salient difference between the AEA and Section 704. "Unlike many federal statutes," including Section 704, "the AEA contains no provision preempting state law in so many words." *Ibid.* Thus, nothing in *Virginia Uranium* suggests that the TCA's savings provision necessarily shields state-law tort suits—which are not at issue here—from the express preemption provision in Section 704.

ii. Petitioners are also wrong in suggesting (Pet. 31-32) that this Court should grant review to resolve an asserted conflict between the Third Circuit's decision in *Farina* v. *Nokia Inc.*, 625 F.3d 97 (2010), cert. denied, 565 U.S. 928 (2011), and the Fourth Circuit's decision in

Pinney v. *Nokia, Inc.*, 402 F.3d 430, cert. denied, 546 U.S. 998 (2005). Any conflict between those decisions is not implicated here, because those decisions considered different legal authorities and a different preemption issue. *Farina* and *Pinney* addressed whether the FCC's regulations of radio-frequency emissions from cell phones preempted certain state-law tort claims. This case, by contrast, concerns whether Section 704 preempts state and local decisions regarding placement of wireless facilities.

2. Petitioners contend (Pet. 33-40) that Section 704's reference to "the environmental effects of radio frequency emissions," 47 U.S.C. 332(c)(7)(B)(iv), does not encompass the health effects of radio-frequency emissions. That argument lacks merit.

In asserting that the word "environmental" should be interpreted to exclude "health," petitioners invoke principles of constitutional avoidance. See Pet. 32, 39-40. But that canon comes into play only "when a serious doubt is raised about the constitutionality of an act of Congress." *Nielsen* v. *Preap*, 139 S. Ct. 954, 971 (2019) (brackets, citation, and internal quotation marks omitted). As discussed above, construing Section 704's preemptive scope to reach health effects would raise no serious doubt about the statute's constitutionality.

Because the term "environmental effects," 47 U.S.C. 332(c)(7)(B)(iv), is "undefined" in the TCA, courts should "give the term its ordinary meaning," *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). The term "environmental effects" is commonly understood to include the "natural or artificial disturbance of the physical, chemical, or biological components that make up the environment." Pet. App. 67 (quoting *Black's Law Dictionary* 675 (11th ed. 2019)). Consistent with that

definition, numerous courts "have held the term 'environmental effects' includes effects on human health." *Ibid.* (citing *Freeman* v. *Burlington Broadcasters, Inc.*, 204 F.3d 311, 325 (2d Cir.), cert. denied, 531 U.S. 917 (2000); *Cellular Tel. Co.* v. *Town of Oyster Bay*, 166 F.3d 490, 494 n.3 (2d Cir. 1999); *Firstenberg* v. *City of Santa Fe*, 782 F. Supp. 2d 1262, 1271 (D.N.M. 2011), rev'd on other grounds, 696 F.3d 1018 (10th Cir. 2012); *T-Mobile Ne. LLC* v. *Town of Ramapo*, 701 F. Supp. 2d 446, 460 (S.D.N.Y. 2009)); see *AT & T Wireless PCS, Inc.* v. *City Council*, 155 F.3d 423, 431 n.6 (4th Cir. 1998) (noting that "health concerns from radio emissions" are "preclude[d]" by 47 U.S.C. 332(c)(7)(B)(iv)).

Petitioners point out (Pet. 37-38) that certain other statutes define the term "environment" more narrowly. But petitioners draw the wrong lesson from those definitions. While other United States Code provisions give the term "environment" narrow statute-specific meanings, the TCA includes no comparable limiting definition of the term "environmental effects." The term therefore carries its ordinary meaning, which encompasses effects on human health.

3. Even if petitioners' claims regarding Section 704 otherwise warranted this Court's review, this case would be a poor vehicle for considering them. As the United States argued below—and as the concurring judge in the court of appeals agreed—petitioners' claims against the United States are barred by sovereign immunity.

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 260 (1999) (citation omitted). Neither the "[g]eneral jurisdictional statutes such as 28 U.S.C. § 1331," nor the "declaratory judgment statute, 28 U.S.C. § 2201," constitutes

such a waiver. *Wyoming* v. *United States*, 279 F.3d 1214, 1225 (10th Cir. 2002). And "a waiver of sovereign immunity 'will be strictly construed, in terms of its scope, in favor of the sovereign.'" *Sossamon* v. *Texas*, 563 U.S. 277, 285 & n.4 (2011) (quoting *Lane* v. *Pena*, 518 U.S. 187, 192 (1996)).

As Judge Lucero explained, "the only potentially relevant exception to" sovereign immunity for petitioners' claims is that contained in 5 U.S.C. 702. Pet. App. 35. That provision waives sovereign immunity for "[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." *Ibid.* (quoting 5 U.S.C. 702) (emphasis omitted). Yet "[n]owhere in [petitioners'] claims is it alleged that any agency or officer of the United States acted or failed to act." *Ibid.* Thus, "[u]nder the plain text of § 702, [petitioners'] claims do not fit within that waiver of sovereign immunity." *Ibid.*; see *Trudeau* v. *Federal Trade Comm'n*, 456 F.3d 178, 187 (D.C. Cir. 2006) (stating that the relevant portion of Section 702 "refer[s] to a claim against an 'agency' and hence waives immunity only when the defendant falls within that category").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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