

No. 21-629

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In The  
**Supreme Court of the United States**

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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.*

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

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**BRIEF OF AMICI CURIAE  
289 ORGANIZATIONS AND 34 INDIVIDUALS  
IN SUPPORT OF PETITIONERS**

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**INTERESTS OF AMICI CURIAE<sup>1</sup>**

Amici are 289 organizations and 34 individuals from 34 states and 29 countries, including seven national organizations, six international organizations, and one organization representing Latin America, the collective membership of which numbers in the hundreds of thousands. A diverse group, amici are uniformly agreed as to the adverse health effects of radio frequency (“RF”) radiation caused by wireless telecommunications infrastructure, yet are effectively forbidden, by provisions of the Telecommunications Act of 1996 (“TCA”), from exercising their constitutional rights to petition the government for redress as to the public health aspects of wireless facility siting decisions—or even to raise the topic. 47 U.S.C. § 332(c)(7)(B)(iv)–(v) (“Section 704”).

Section 704 prohibits States and municipalities from considering “the environmental effects” of RF radiation when making siting decisions for wireless telecommunications facilities. 47 U.S.C. § 332(c)(7)(B)(iv). For over two decades, members of amici have attempted to inform states and municipalities about the dangers of RF radiation, and the injuries occasioned by locating wireless facilities on public streets and sidewalks. Individual amici and members of amici are

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<sup>1</sup> Pursuant to this Court’s Rule 37, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity other than amici made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties have consented to the filing of this brief. Except as specifically noted in the description of each individual amicus, amici have no parent companies, subsidiaries, or affiliates. No amici have issued shares to the public.

imminently threatened with further injury because the provisions of Section 704 “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. to Pet. for Cert. 24. Amici agree with petitioners that this Court should declare Section 704 unconstitutional because it “deprive[s] them of any means of protecting themselves from RF radiation and of any remedy for injury by such radiation.” App. to Pet. for Cert. 90.

Individual amici and members of amici have been and will continue to be directly affected by the failures to protect public health and the environment as telecom companies rapidly construct enhanced 5G networks in their communities across America. Although the TCA expressly preserves State and local governmental authority over “placement, construction, and modification of personal wireless service facilities,” it imposes a content-based restriction with respect to “the environmental effects of radio frequency emissions,” which has been applied to preclude consideration—and even discussion—of health effects. 47 U.S.C. § 332(c)(7)(A), (B)(iv). Amici and their members have a right to speak and to be heard on the issue of health with respect to facility siting decisions, in order to protect their members’ health and the environment.

For example, principal *amicus curiae* Stop 5G Jax is a non-profit group of over 1,100 members based in Jacksonville, Florida, engaged in educating the public about the dangers of RF radiation, and opposing 5G

wireless facilities in Jacksonville, and Florida generally. Stop 5G Jax has spent hours with the Jacksonville City Council working to pass an ordinance that protects its members' health and property values, as well as aesthetics and cybersecurity. However, Stop 5G Jax has not been permitted to speak or present information on the topic of health, as a direct result of the restrictions in Section 704. The topic is simply off limits.

Compounding the problem, the lack of oversight runs from the bottom up, and from the top down, as the Federal Communications Commission ("FCC") also disclaims responsibility. Members of Stop 5G Jax performed "needs tests" around Jacksonville, checking cell signal strength and then calculating the effective radiated power for the telecommunications towers to the extent possible using the Wireless Transmission Facilities plans ("WTFs"). Based on the ranges listed in the WTFs, the calculated effective radiated powers ("ERPs") were excessively high. Stop 5G Jax sent this information to, *inter alia*, the FCC, only to receive a response indicating that Section 704 prohibits any action to address high RF emissions, and that deficiencies in local proceedings are not relevant to the FCC's review of the environmental effects of RF radiation.

The issues at stake in this case impact the advocacy and educational work of individual amici and members of amici regarding the adverse physical and medical effects of RF radiation from personal wireless service facilities.

A full list of amici can be found in the Appendix.



## INTRODUCTION AND SUMMARY OF ARGUMENT

Picture the Norman Rockwell painting, *Freedom of Speech*, depicting a local town meeting in which a blue-collar speaker in a plaid shirt and worn, stained jacket addresses a public body. Other attendees are older, more neatly and formally dressed, in rapt attention with a look of admiration for the lone speaker. The speaker is shown “standing tall, his mouth open, his shining eyes transfixed, he speaks his mind, untrammelled and unafraid.” Cole, *Free Speech Personified: Norman Rockwell’s inspiring and enduring painting*, *The Wall Street Journal*, Oct. 10, 2009. Imagine that the speaker’s message concerns the public health aspects of a matter under consideration by the public body.

Now picture the members of the public body to whom he is speaking pointedly, dramatically putting fingers in their ears to block out his words. For the members of the public body know that, by statute, they are not permitted to consider the speaker’s particular message, even though it directly relates to the matter under their consideration. Can Congress pass a statute that prohibits State and local bodies from considering—and even permitting discussion on—certain types of injuries or results pertaining to a local issue? That is the question presented by the petition for certiorari.

This case presents an important issue concerning the limitations the TCA imposes upon the authority



of State and local governments to consider injuries caused by wireless service facilities (including cell towers and transmitters). 47 U.S.C. § 332(c)(7). Section 704 contains two relevant parts. The first part, entitled “General authority,” expressly preserves the zoning authority of State and local governments “over decisions regarding the placement, construction, and modification of personal wireless service facilities” “[e]xcept as provided in this paragraph.” 47 U.S.C. § 332(c)(7)(A). The second part, entitled “Limitations,” “imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities.” *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 115 (2005). Petitioners challenge the limitation set forth in 47 U.S.C. § 332(c)(7)(B)(iv), which prohibits States and municipalities from considering the environmental effects of RF radiation when making siting decisions for wireless telecommunications facilities, to wit: “(iv) 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.”

The basis for this challenge is important, nationally and internationally. Cellular wireless technology, including telephone and other forms of wireless data transmission, transmit radio signals on bands of electromagnetic spectrum, commonly understood as

“waves.” In the United States, wireless cellular service has largely been transmitted between cellular devices and large radio towers. Now, companies offering the next generation of wireless service—known as 5G—are shifting to transmission via hundreds of thousands of densely spaced, shorter range, small wireless facilities, known as “small cells,” which technology necessitates the proliferation of the number of facilities in a given area. Cellular phones and towers transmit radio waves—and RF radiation—in all directions, and the waves can be absorbed and reflected by surrounding objects before reaching their intended destination, including the human body. Licensed carriers can install a base station and powerful antenna, and then flood all properties and occupants over a wide area with RF radiation. Section 704 deprives affected citizens, including members of amici, of any right at the State and local levels to notice and the opportunity to object to the installation of wireless facilities, even though these facilities will have devastating effects on them—in particular, those members of amici residing within range of the facilities. Those harmed by RF radiation have no legal recourse (whether before administrative bodies or in the courts) prior to or after the resulting property and bodily injuries.

Amici include members of organizations who, as a result of Section 704, have been precluded from even raising environmental or health effects of RF radiation from personal wireless service facilities. Applying their own interpretation of Section 704, State and local governments, and the courts, assert that they do not have

the authority to promulgate rules or requirements based on the health effects of RF emissions radiation because: (i) this issue is preempted by federal law; (ii) all testimony and other evidence relating to the health effects of a proposed wireless facility must be disregarded by States and municipalities; and (iii) there is no remedy for ongoing and imminent injuries which would have been subject to prevention, mitigation, or remediation through the local, State, and Federal substantive and procedural rights and remedies that Section 704 proscribes. Further, Section 704 prevents State and local governments from making decisions regarding the placement of cellular towers in the performance of their police power responsibilities to protect the health, safety, and welfare of their citizens. Section 704 is unconstitutional because it violates the freedom of speech, as well as access to the courts.

This case is of extreme significance to the hundreds of thousands of members of amici, as Section 704 disrupts a basic regulatory function of State and local government in this country. Amici include member organizations and one of their core functions is to provide education and advocacy on behalf of their members on health and legal issues, including the First Amendment. Because this case presents an ideal vehicle to clarify important areas of preemption and First Amendment jurisprudence that affects every State and local government in this country, this Court should grant certiorari and resolve the important questions presented in this case.

Section 704 should be declared unconstitutional because RF emissions of radiation from the operation of cellular facilities on sidewalks in front of homes, schools, and businesses will cause impermissible harm to humans, yet citizens are not allowed to petition their government to raise the issue of environmental or health effects of proposed facilities. If this Court chooses not to declare Section 704 unconstitutional, it should declare that the term “environmental effects,” as used in Section 704, does not include “health effects,” and that State and local governments, as well as the courts, are not prohibited from considering the health effects of RF radiation when making siting decisions for wireless service facilities.

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## ARGUMENT

### I. THE INJURIES FROM RADIO FREQUENCY RADIATION<sup>2</sup>

RF radiation has documented, serious health effects on humans. RF radiation can consist of a continuous wave (as in a microwave oven used to heat food) or it can be modulated, which is the form used for communication. The biological effects of continuous and

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<sup>2</sup> This section is largely supported by the voluminous expert evidence filed with the district court in support of petitioners’ motion for preliminary injunction (App. to Pet. for Cert. 431–735)—which the Tenth Circuit correctly observed that the district court wrongly failed to acknowledge or rule upon before dismissing the complaint. *Santa Fe Alliance for Public Health and Safety et al. v. City of Santa Fe, New Mexico*, 993 F.3d 802, 809 n. 3 (10th Cir. 2021).

modulated waves are quite different, with modulated frequencies being more biologically active. RF radiation is classified as non-ionizing radiation.

In environmental toxicology, conclusions are based on three different types of studies. These include epidemiological studies, which look at the association between an agent and an outcome (e.g., RF radiation exposure and cognitive defects) under normal exposures of the human population; *in vivo* studies (using living organisms, often laboratory animals), which demonstrate the cause–effect relationship between an agent and an outcome under carefully controlled conditions (e.g., brain damage in rats exposed to microwave radiation); and *in vitro* studies (in glassware), which are carefully controlled laboratory studies using tissue cultures or cells to determine mechanisms involved. The more these different types of studies align, the more confidence scientists have in reaching the conclusion that a particular agent has a particular effect.

With respect to RF radiation, all three types of studies demonstrate damage to the brain from RF radiation exposure in human and animal populations. Epidemiological studies show effects of exposure on cognitive functions in children. Divan et al., Prenatal and Postnatal Exposure to Cell Phone Use and Behavioral Problems in Children, 19 *Epidemiology* 6, 523–29 (2008). *In vitro* studies indicate effects on calcium balance in brain tissue. Blackman et al., Induction of Calcium-Ion Efflux from Brain Tissue by Radiofrequency Radiation, 1 *Bioelectromagnetics* 1, 24–32 (1980). Animal studies show permanent brain damage from

exposure to RF radiation. Salford et al., Nerve Cell Damage in Mammalian Brain after Exposure to Microwaves from GSM Mobile Phones, 111 *Environ. Health Perspects.* 7, 881–83 (2003). There is similar evidence for reproductive problems and other illnesses. Scientific evidence from well-constructed laboratory experiments and clinical trials needs to be compared with evidence from epidemiological (human population) studies. Each of these studies provides different types of information and their power comes when they all point in the same direction. Science requires a high level of evidence that the outcome (i.e., brain damage from RF radiation exposure) is not due to chance with a statistical confidence at or above 95%. Where that occurs, there is only a 5% probability that the result is due to chance or error.

The importance of these issues is best evidenced by two international appeals: the Doctors' Freiburger Appeal, out of Germany, and the 5G Space Appeal. From October 2002, the Freiburger Appeal was signed by over 3,000 physicians, with close to 50,000 other signatures of people involved in research on electromagnetic radiation. The Freiburger Appeal called for "A say on the part of local citizens and communities regarding the placing of antennae (which in a democracy should be taken for granted)," after observing:

We have observed, in recent years, a dramatic rise in severe and chronic diseases among our patients, especially:

- Learning, concentration, and behavioural disorders (e.g. attention deficit disorder, ADD)
- Extreme fluctuations in blood pressure, ever harder to influence with medications
- Heart rhythm disorders
- Heart attacks and strokes among an increasingly younger population
- Brain-degenerative diseases (e.g. Alzheimer's) and epilepsy
- Cancerous afflictions: leukemia, brain tumors

Moreover, we have observed an ever-increasing occurrence of various disorders, often misdiagnosed in patients as psychosomatic:

- Headaches, migraines
- Chronic exhaustion
- Inner agitation
- Sleeplessness, daytime sleepiness
- Tinnitus
- Susceptibility to infection
- Nervous and connective tissue pains, for which the usual causes do not explain even the most conspicuous symptoms.

Freiburger Appeal, Interdisziplinäre Gesellschaft für Umweltmedizin e. V. (Oct. 9, 2002) (available at:

[https://www.powerwatch.org.uk/pdfs/20021019\\_englisch.pdf](https://www.powerwatch.org.uk/pdfs/20021019_englisch.pdf)).

The 5G Space Appeal has been signed, to date, by over 7,100 scientists and 4,400 medical doctors, with a total of nearly 300,000 signatures. The 5G Space Appeal lists all diseases, environmental effects, and extensive scientific references, and lists all international laws that are being violated. International Appeal, Stop 5G on Earth and in Space (available at <https://www.5gspaceappeal.org/the-appeal>).<sup>3</sup>

The evidence that RF radiation is harmful to human health is overwhelming. Exposure to RF radiation has increased with the proliferation of wireless services.

Based on this large body of research, amici believe RF radiation-emitting antennas should not be located on sidewalks or streets in front of homes, businesses, and schools. People must be permitted to present testimony before State and municipal authorities, and in the courts, regarding the adverse health effects of RF radiation on people, plants, and animals.

## **II. SECTION 704 IMPERMISSIBLY RESTRICTS SPEECH BASED ON THE CONTENT OF THE MESSAGE**

A citizen's access to government must be meaningful. A single sentence in Section 704 prohibits amici

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<sup>3</sup> It is noted for purposes of disclosure, that one of the petitioners, Arthur Firstenberg, is a co-author of the 5G Space Appeal.



and their members from effectively presenting the content of health issues to their State and local government. In particular, Section 704 guts citizens' rights to effectively communicate with their representatives, to be heard, and to help shape ideas, public opinion, and the broader culture. Amici and their members are instructed not to speak at public hearings regarding RF radiation and, if they do speak about health issues, decisions made by their elected representatives are subject to remand. Thus, amici and their members have no way to present their injuries from wireless facilities that emit RF radiation. If they are injured by wireless facilities, they have no remedy. For example, as a result of the laws of the City of Santa Fe and State of New Mexico at issue in this case, citizens will not even receive notice before wireless facilities are erected outside their bedroom windows. Yet the Tenth Circuit decision in this case precludes citizens from presenting health issues and the resulting injuries to State and local authorities, or in a court of law, based solely on the content of their message.

This Court has held that speech regulation is content based when it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). In *Reed*, the Town of Gilbert's ordinance prohibited all outdoor signs, but exempted 23 categories, many of which were defined exclusively by their subject matter. *Id.* at 159. This Court invalidated the ordinance as content based because it "single[d] out specific subject matter for differential treatment,"

noting that the ordinance’s restrictions on political, ideological, and nonprofit, religious, and charitable event signs “depend[ed] entirely on the communicative content of the sign.” *Id.* at 164, 169. The sign ordinance at issue in *Reed* treated signs differently based on the sign’s subject matter, a black-letter content-based restriction. Justice Alito’s concurrence explains the problem: “Limiting speech based on its ‘topic’ or ‘subject’ favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth.” *Id.* at 174 (Alito, J., concurring) (citation omitted). *See also Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020) (plurality opinion) (*Reed*’s “description” of “content-based” regulation “applies to a law that ‘singles out specific subject matter for differential treatment.’” (quoting *Reed*, 576 U.S. at 169)).

The fundamental flaw with Section 704 is that it regulates speech before public bodies and the courts based solely on subject matter—such as by treating speech about the aesthetics of a wireless facility more favorably than speech about injuries resulting from the same facility. Exposure to RF radiation is harmful to humans. When it comes to the First Amendment, this Court should be “concerned about government chilling the citizen—not the other way around.” *Horvath v. City of Leander*, 946 F.3d 787, 802 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part). *See, e.g., Multimedia Holdings Corp. v. Cir. Ct. of Fla.*, 544 U.S. 1301, 1304 (2005) (“[S]pecial First Amendment concerns” are raised

when a regulation “may chill protected speech.”); *Cf. Hoggard v. Rhodes*, 141 S. Ct. 2421 (2021) (Thomas, J., respecting denial of cert.).

There is no doubt that local governments have, pursuant to their police powers, the ability to regulate for the health, welfare, and safety of their citizenry. *See De Buono v. Nysa-Ila Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) (noting, “the historic police powers of the State include the regulation of matters of health and safety” (citing *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985)); *see also Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 109 (1949) (concluding the Court would be “trespassing on one of the most intensely local and specialized of all municipal problems” if it concluded New York’s traffic regulation banning advertising vehicles “had no relation to the traffic problem of New York City”). Section 704 expressly acknowledges that principle. Yet, in the same breath, Section 704 precludes citizens from raising injuries, resulting in the untested, rubber-stamp approval of wireless antennas and towers within the public rights-of-way with no public hearings, no public comment, no setback or other regulatory requirements, and without regard to health issues. App. to Pet. for Cert. 105.

Additionally, although Section 704 does not even contain the word “health,” it has been interpreted to preempt all discussion of the health effects of RF radiation to an individual or a community. In practice, this means that city officials instruct the public not to speak about health at public hearings on cell tower

siting, and, if the public nevertheless does speak about health, elected representatives have to, in essence, “put their fingers in their ears.” This has effectively silenced the public in most municipalities considering siting of wireless facilities. In those few places where the public are still courageous enough to speak at public hearings, and in those even fewer places where elected officials are still courageous enough to deny a permit for a cell tower, courts have overturned those approvals because of the content of the message presented to the local authority. *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. . . . T-Mobile is entitled to summary judgment on this claim.”).

This Court should grant certiorari to articulate a judicially administrable standard restricting the power of Congress to prevent State and local agencies from considering the effects on citizens’ health from facilities demonstrably damaging to individuals whose homes or places of employment are in close proximity to them. Such a standard would allow States and localities—appropriately—to retain their authority over the decisions that most affect the health, welfare, and safety of their citizenry.

### **III. THE OPINION OF THE TENTH CIRCUIT SHOULD BE OVERTURNED**

Given the foregoing, the principal flaw in the Tenth Circuit’s opinion is evident: it confuses the

ability to speak with the ability to be heard. When a public body is precluded from listening to or even considering what the speaker says, the right to speak is hollow and meaningless. In Count Four of their complaint, petitioners alleged Section 704, as well as State and local provisions, infringe on their First Amendment right to petition the government by foreclosing the ability of local officials to consider their speech about the health effects of exposure to RF radiation. The Tenth Circuit incorrectly dismissed petitioner’s First Amendment Claim 19 for failure to state a claim because “nothing in the TCA or the Amendments to Chapter 27 punishes, restricts, or prohibits any individual *from speaking* against radio-frequency emissions.” *Santa Fe Alliance*, 993 F.3d at 819. Claim 20 was incorrectly dismissed on the same basis. *Id.* Finally, the Tenth Circuit’s conclusion that Section 704 preempts petitioners of virtually all of their constitutionally protected civil liberties is incorrect and unconstitutional.<sup>4</sup>

Through its role as the ultimate arbiter in upholding the Constitution and ensuring its fair application to all citizens, this Court has the responsibility to

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<sup>4</sup> Amici also wish to point out that the majority opinion of the Tenth Circuit panel offers a truncated and highly sanitized account of the events giving rise to this lawsuit based on the allegations in the underlying complaint. Although at this stage of the case the panel was required to accept petitioners’ factual allegations as true, the majority opinion ignores most of the facts plausibly alleged in the complaint, particularly in the panel’s standing analysis. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

review wholesale restrictions of constitutional rights: “[t]here must be a ‘fit between the legislature’s ends and the means chosen to accomplish those ends.’ [T]hese standards ensure not only that the State’s interests are proportional to the resulting burdens . . . but also that the law does not [serve an improper purpose such as] seek[ing] to suppress a disfavored message.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011) (rejecting Vermont legislature’s rationale for imposing speaker and viewpoint-based restrictions on the sale of prescription data to pharmaceutical companies because legislature failed to establish that such restrictions actually furthered the State’s legitimate interest in protecting the privacy of medical providers and patients). See *Church of the Lakumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) (“[T]he effect of a law in its real operation is strong evidence of its object.”). The Tenth Circuit’s holding—i.e., that it is beyond the court’s role to examine the wisdom of a law vis-à-vis the burdens it imposes—contradicts this Court’s longstanding jurisprudence and eviscerates the judiciary’s mandate to uphold constitutional rights against undue infringement.



**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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