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

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Neither brief in opposition denies that wireless telecommunications facilities threaten the survival of the population of the United States, as alleged by Petitioners. App. 76. Neither respondent denies that construing Section 704 to prohibit states from protecting the public health has caused life-threatening injury to millions of Americans, exiled them from their homes and cities, and denied them any recourse or recompense for their injuries. Pet. 4; App. 91-96, 100, 143. Yet the United States makes the astonishing statement that this "raise[s] no serious doubt about the statute's constitutionality." Brief for the United States in Opposition ("US") at 16.

Both Respondents' briefs suffer similar infirmities: through misdirection, mischaracterization, and circular reasoning, they wish away the most fundamental deprivations of life, liberty, and property that go ignored, unheard, and without remedy by any agency or court at any level of government.

In its opening Statement, the United States says that under section 332(c)(7)(B)(v), "any suit to challenge a state or local government's 'final action or failure to act' . . . must be brought . . . within 30 days." US 3. This is misleading. Only persons aggrieved by a *violation* of Section 704—*i.e.*, telecommunications companies—may bring such an action. Persons aggrieved by *compliance* with Section 704—*i.e.*, the public—may *not* bring an action under that section. This, of course, cuts to the heart of Petitioners' complaint: they have no

recourse because of Section 704's preemption clause as interpreted to date.

Toward the end of its opening Statement, the United States obscures the issue with the same assertion as does the City of Santa Fe ("City"): that the Right to Petition does not mean the right to petition successfully. US 7; City 6. But when a court is precluded from listening to or even considering what a witness says, the right of access to courts is hollow and meaningless.

ARGUMENT

I. Section 704 Violates the Constitutional Right of Access to the Courts

The United States' contention that the Tenth Circuit did not address the question of whether Section 704 violates the right of access to courts (US 11) is erroneous. The Tenth Circuit addressed but refused to consider "the ability of state and local authorities to provide legal remedies for injuries" on the ground of lack of standing (App. 23), thus sidestepping the issue. Petitioners' standing to advance this claim is established in their Petition. Pet. 20-23. "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." Pet. 23.

On the merits of that question, the United States argues that Congress can pass a law that repeals the

constitutional right of access to courts. US 11. Petitioners respectfully disagree. In attempting to justify such a contention, the United States engages in selective reading of caselaw and federal statutes as well as mischaracterization of the Petition.

Environmental Health Trust v. FCC, 9 F.4th 893 (D.C. Cir. 2021), cited by the United States, is inapposite. Environmental Health Trust ("EHT") petitioned the FCC, not state governments, and not state courts. EHT assumed what Petitioners are challenging: the authority of the FCC over health.

The United States' reliance on *English v. General Electric Co.* for the general proposition that state law is "pre-empted to the extent that it actually conflicts with federal law" (US 11) is a selective reading of that case. The United States ignores the rest of this Court's ruling in *English*: "[C]ongressional intent to supersede state laws must be '"clear and manifest,"'" 496 U.S. 72, 79 (1990) and "we find no 'clear and manifest' intent on the part of Congress, in enacting § 210, to pre-empt all state tort laws that *traditionally* have been available to those persons who, like petitioner, allege outrageous conduct . . . ", *Id.* at 83 (emphasis in original) (citations omitted). Similarly here, where the preemption clause in the TCA does not even contain the word "health," there is no "clear and manifest" intent to preempt state tort laws that traditionally have been available for injury to health.

Indeed, the United States agrees with Petitioners that "[t]he presumption against preemption is . . . a

tool for discerning congressional intent where a statute is 'susceptible of more than one plausible reading'" (US 12 (citation omitted)) but forgets that that is precisely the case with the preemption clause in Section 704: there is more than one plausible reading. One reading deprives millions of Americans of their First, Fifth, and Fourteenth Amendment rights, and the other reading does not.

The United States, using circular reasoning and misquoting both the law and the Petition, argues that the FCC has authority over health because it has authority over "radio-frequency emissions" and "radio-frequency emissions" means "health." US 13, citing 47 U.S.C. §§ 301, 302a, 303(a)-(f). But neither the phrase "radio-frequency emissions" nor the word "health" appears in any of those sections of the United States Code. The phrase "radio frequency emissions" (with or without a hyphen) appears nowhere in the Communications Act *except* in Section 704 of the TCA, and the word "health" does not even appear in Section 704.

The United States next misquotes the Petition, alleging that it says "the FCC has 'disclaim[ed] expertise and authority' over the subject of radio-frequency emissions." US 13. The Petition actually says that the FCC disclaims expertise and authority over "health and safety," *not* over "radio-frequency emissions." Pet. 13, 16.

And the United States' attempt to distinguish the Atomic Energy Act's ("AEA's") savings clause from the TCA's savings clause fails. US 15. The AEA, says

the United States, "'contains no provision preempting state law in so many words.'" *Id.*, quoting *Virginia Uranium, Inc. v. Warren*, 139 S.Ct. 1894, 1902 (2019). Nor does the TCA preempt health "in so many words." Its preemption clause does not contain the word "health" at all.

As is amply shown in the Petition, the FCC has no expertise over health, has been granted no authority over health by Congress, disclaims expertise over health, and if this Court nevertheless interprets Section 704 to preempt state tort claims for injury, then Section 704 is unconstitutional. No other federal law that gives preemptive power over state tort remedies to a federal agency that lacks expertise and authority in the preempted area has ever been upheld by this Court.

Amazingly, the City argues that workers injured by telecommunications facilities can still sue for damages under workers' compensation laws, *i.e.*, that the preemption clause of Section 704 does not apply. City 2. But a workers' compensation board is as much an instrumentality of a state as a state court. The City cites no caselaw to justify such a distinction.

The City next proceeds to misread *Robbins v. New Cingular Wireless PCS, LLC*, 854 F.3d 315 (6th Cir. 2017). City 2. The City erroneously states that "the Sixth Circuit found that the residents had alleged no harms from the existing tower." City 2. But there was no existing tower, only a proposed tower. The core of the Sixth Circuit's ruling is not whether harms were

alleged from an existing tower, but that "RF-emissions-based tort suits" are preempted under Section 704. *Id.* at 320.

The City next mischaracterizes *Bill Johnson's Restaurants, Inc. v. Nat'l Labor Relations Bd.*, 461 U.S. 731 (1983) (City 2), drawing a conclusion that is the opposite of the City's own quotation about that case. "'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,'" writes the City, quoting *BE&K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 530 (2002). The City concludes the case offers "no support" for the proposition that state tort law should not be preempted absent a substitute federal remedy. But that is precisely what this Court's "First Amendment concerns" were in *Bill Johnson's*: "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. . . ." 461 U.S. at 742.

The City similarly mischaracterizes *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251 (2013) (City 2-3), which was not solely about the "scope of preemption," as the City contends, but was also about the constitutional infirmity that would result from the total lack of a remedy for injury: "[I]f such state-law claims are preempted, 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." *Id.* at 265. The doubts expressed by this Court about the constitutionality of a lack of a remedy for loss of one's vehicle must be multiplied many-fold with respect to the loss of one's life, property, and liberty that underlie the Petition in the present case.

Next, the City mischaracterizes federal law, stating, "Federal regulation of radio communications began in 1910." City 3. Like the United States, the City here is reading "health" into statutes that do not mention "health." And the City's contention that the Communications Act "did not create new private rights" (City 3) is irrelevant. The Communications Act did not repeal constitutional rights. When there is tension between the Supremacy Clause on the one hand and the First, Fifth, and Fourteenth Amendments on the other hand, a statute should be interpreted, if possible, to avoid such a question, *i.e.*, that "environment" does not mean "health" in the Telecommunications Act.

II. "Environment" Does Not Mean "Health" in the TCA or Any Other Federal Law

The United States begins its argument on this issue with the astonishing statement that the principle of constitutional avoidance does not come into play even when credible allegations, supported by evidence already filed in the district court (App. 8, n.3), show the most fundamental deprivations of life, liberty, and property one can imagine to millions of Americans.

This raises "no serious doubt" about the constitutionality of Section 704, according to the United States. US 16, discussing *Nielsen v. Preap*, 139 S.Ct. 954, (2019). The United States also ignores the point made in *Nielsen* that constitutional avoidance "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Id.* at 972 (citation and quotation marks omitted). Petitioners have, in their petition and herein, amply fulfilled both criteria: they have shown the constitutional questions arising from the ambiguity embedded in the statute.

The United States does not deny that "environment" has never been construed to mean "health" in *any* federal law except the TCA. *All* of the cases cited by the United States in support of the proposition that "environment" means "health" concern the TCA, and *none* of those cases involved a challenge to that interpretation. The United States' contention that the TCA does not define "environmental effects" is off the mark. Some other federal laws do not define it either, but when Congress has meant "health" it has *always* said so explicitly. Pet. 37-39.

The City's contention that the National Environmental Policy Act ("NEPA") defines "environment" to include "health" (City 8) is incorrect. NEPA does not define "environment" or "environmental effect." Like all other federal laws, when NEPA means "health" it says so explicitly and distinguishes it from "environment." The City correctly quotes NEPA as requiring consideration of "the quality of the human environment."

But the word "health" does not appear in that sentence. It appears in the statement of NEPA's purpose: "to prevent or eliminate damage to the environment and biosphere *and* stimulate the health and welfare of man." 42 U.S.C. § 4321. (Emphasis added).

The City cites *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, (2d Cir. 2000) as precedent for whether the FCC exceeded its powers by preempting state and local governments on questions of health, and whether Section 704 is therefore unconstitutional. City 9-11. But the Second Circuit only addressed Tenth Amendment claims, not Due Process, Free Speech, or Right to Petition claims, and was not presented with the question of whether "environmental effects" means "health effects." And whether or not the FCC has preempted state and local governments is irrelevant to the present case, which is asking this Court to rule on whether *Congress* may preempt state tort law on the basis of non-enforceable rules issued by an agency which has no jurisdiction over the subject of those rules.

Like the cases cited by the United States, *all* of the cases cited by the City in support of the proposition that "environment" means "health" (City 12) concern the TCA and *none* involved a challenge to that interpretation. In each of the cases cited, "health" was either assumed to be within the scope of "environment" or was declared to be so in *dicta*. Indeed, this is so even in cases cited within the cited cases as authority for that proposition. *See, e.g.*, *AT&T Wireless PCS, Inc. v. City Council*, 155 F.3d 423, 431, n.6 (4th Cir. 1998),

cited in *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490, 495 (2d Cir. 1999).

The other case cited by the City, *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290 (2013) (City 11), had to do with the FCC's power to set time limits for local governments' decisions on cell tower applications, and had nothing to do with health *or* environment. The scope of *City of Arlington*, implicating the principles of *Chevron* deference, was limited to matters over which the FCC has jurisdiction and authority, *not* matters over which it has no authority.

III. Sovereign Immunity Cannot Prevent a Challenge to an Unconstitutional Law

The United States' contention that sovereign immunity protects it from a challenge to the constitutionality of a federal statute (US 17-18) is without merit. None of the cases cited by the United States concerned a challenge to the constitutionality of a statute.

The Federal Rules of Appellate Procedure permit challenges to the constitutionality of a federal statute even when the United States is not a party:

> If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is

> raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

Fed. R. App. P. 44(a). The presence of the United States as a party is not required. Plaintiffs named the United States as a party in order to give it the opportunity to defend the constitutionality of Section 704. By asking this Court to dismiss this case on the basis of sovereign immunity, the United States is arguing for the reversal of *Marbury v. Madison*, 5 U.S. 137 (1803), which has been the basis for constitutional challenges to federal laws for over two centuries.

IV. The Court Should Decide This Issue of Great National Importance, as Well as Resolve a Conflict Between Circuits

The assertions of the United States and the City to the contrary notwithstanding, a long-standing split in opinion between the Third and Fourth Circuits on the intention of Congress remains to be decided by this Court and is centrally implicated in the present case. The United States contends the circuit split is not relevant here, because it concerns the health effects of cell phones and not cell towers. US 15-16. The City contends there is no longer a circuit split because in 2014 the Fourth Circuit affirmed a district court's decision to reverse the denial of a permit that was based partially on radio frequency emissions. City 12, citing *T-Mobile Northeast LLC v. Loudoun County Bd. of Sup'rs*, 748 F.3d 185, 194 (4th Cir. 2014).

Both the City and United States ignore what the circuit split is about. It is about whether there was a Congressional objective to "balance" health and safety against the development of wireless technology. The Third Circuit concluded there was such an objective, *Farina v. Nokia Inc.*, 625 F.3d 97 (3d Cir. 2010), *cert. denied*, 565 U.S. 928 (2011), while the Fourth Circuit concluded there was no evidence of such an objective. *Pinney v. Nokia, Inc.*, 402 F.3d 430 (4th Cir. 2005), *cert. denied*, 546 U.S. 998 (2005). That question was not raised in *Loudoun County*. The circuit split on that question remains. It is implicated in the present case because the purported Congressional objective to strike such a "balance" was relied on by the Tenth Circuit in the ruling that is on appeal here. App. 12.

Indeed, *Loudoun County* only underscores the need for the Supreme Court to step in and restore to all Americans their rights to protect themselves from harm:

> Even though the Board had given other valid reasons for its decision, the court issued an injunction requiring the Board to issue the necessary permits for the site, concluding that if it remanded the case, the valid reasons would only become a subterfuge for the invalid environmental reason . . . We affirm the district court's ruling[ ].

748 F.3d at 189.

This Court should decide this case, not only because there is a circuit split, but because it brings an

issue of exceptional importance to the nation. Supreme Court Rule 10(c) provides for Supreme Court review where "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." A law that has resulted in severe injury to millions of Americans, their exile from their homes and cities, without any possibility of remedy or recompense, and which threatens the survival of all Americans, is a more important question of federal law than almost any other, requiring settlement by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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