No. 06-393

In the

Supreme Court of the United States

CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES *et al.*,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Congress, by requiring local zoning boards to approve the construction of cellular phone towers[1] without regard to the health impact of high frequency radiation, has commandeered legislative processes of the states to administer a federal program, in violation of the Tenth Amendment as interpreted by this Court in *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997).

2. Where Congress has failed to fund continuing Federal research into potential adverse health effects of radiation emission from cellular phone towers, does Congress have the power to prohibit State and local governments from protecting the health of their citizens by taking into account available research and official standards from other countries in regulating the placement of cellular phone towers?

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[1] For convenience, the phrase "cellular phone towers" is used as shorthand in this petition to cover all personal wireless services facilities (PWSF).

PARTIES TO PROCEEDING

The full list of petitioners in this Court is as follows: Citizens for the Appropriate Placement of Telecommunications Facilities; Christopher Beaver of Noe Valley Families Against the Antennas; Maggie Fox; Major Belkin, M. Sue Storm of Healthy Home Alliance; Joseph Bogacz; Candice Brown and Gary Brown of Families for Appropriate Cellular Tower Siting; Jerry Davis; Mary-Croughan Minihane; Libby Kelley; Silvia M. Siegel; Annegret C. Topel; David Gell and Andrew J. Hillman of Ulysses Citizens for Responsible Technology; Holly A. Fournier; Richard Gianttiasio of Northboro Residents for Responsible Tower Siting; Dale A. Newton, Jane and L. Newton, Bernard Greenberg, Lorinda A. Knowlton, and Roger Knowlton of Thistle Hill Neighborhood Alliance; Frank Goodrich; Marija Hughes, Mark Hutchins; Julie E. Jordan; Jeannine Karlsson; Dorothy Miller; Ed Steinman and Patricia Vaughey; Cathy Bergman-Venezia of The EMR Alliance; The EMR Alliance. There are no parent companies or wholly owned subsidiaries to be listed.

The parties to the proceeding in the Court of Appeals were Cellular Phone Taskforce, Ad-Hoc Association of Parties Concerned about the Federal Communications Commission Radio Frequency Health and Safety Rules, David Fichtenberg, Citizens for the Appropriate Placement of Telecommunications Facilities, John Bardis, Erica Zweig, of Telecommunications Master Plan Coalition of San Francisco, Christopher Beaver, of Noe Valley Families Against the Antennas, Major Belkin, Donna Casey, Maggie Fox, Eileen Lahey, Mark R. Shirley, M. Sue Storm, of Healthy Home Alliance, Joseph Bogacz, Candice Brown, Gary Brown of Families for Appropriate Cellular Tower Siting, Susan Clarke, of Environmental Health Advocacy League, Mary-Croughan Minihane, Libby Kelley, Silvia M. Siegel, Annegret C. Topel, of Citizens of Marin for Sensible Communications Planning, Jerry Davis,

Jean Foley, of Ulysses Citizens for Responsible Technology, Holly A. Fournier, Selectboard Member of Charlotte, VT and co-chair of Citizens for the Appropriate Placement of Telecommunications Facilities, Julianna Free, of Lifeline Resources, Inc., Anne Galloway, of Hardwick Action Committee, David Gell, Richard Gianattiasio, of Northboro Residents for Responsible Tower Siting, Dale A. Newton, Jane and L. Newton, Bernard Greenberg, Lorinda A. Knowlton, Roger Knowlton, of Thistle Hill Neighborhood Alliance, Cathy Bergman-Venezia, Frank Goodrich, Andrew J. Hillman, Marija Hughes, Mark Hutchins, Ralph E. Munston, of EMR Alliance, The EMR Alliance, Julie E. Jordan, of Coalition of Concerned Citizens for Responsible Technologies, Jeannine Karlsson, Commissioner of Town of Bedford Conservation Board, Patricia Kelley, Susan Lawrence, Emery Lazar, Dawn Mason, State of Washington Representative, Dorothy Miller, Advisory Neighborhood Commissioner, Edward Steinman, Peter de Pippo, Michael Worsham, The Communications Workers of America, AFL-CIO, CLC, CWA Local 7810, Rainer Waldman Atkins, Alan Golden, Virginia J. Moore-Ward and Faye Mueller-Hebert of the Rainier Valley Association for Safe Wireless Technology, Patricia Vaughey, Bill Jenkins of Olympia Washington Local 7810 of the Washington State Communication Workers of America (CWA) and the Council of Washington State CWA Locals, Petitioners. Cellular Telecommunications Industry Association, National Association of Broadcasters, Association for Maximum Service Television, Inc., Electromagnetic Energy Association and AT&T Wireless Services, Inc., Intervenors. Federal Communications Commission and United States of America, Respondents.

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The original opinion of the Court of Appeals is reported as *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000) and reproduced herein in the Appendix ("A") at A-1. The opinion of the United States Court of Appeals for the Second Circuit denying the petition for rehearing by the Cellular Phone Taskforce is reproduced at A-23. The opinion of the Second Circuit denying the petition for rehearing by Communications Workers of America is electronically reported at 2000 WL 862305 and reproduced herein at A-26. The Orders of the FCC are reported at 11 F.C.C. Rcd. 15123 (1996) and 12 F.C.C. Rcd. 13494 (1997) and have been lodged with the Clerk of this Court, due to their voluminous nature.

JURISDICTION

On February 18, 2000, the Court of Appeals affirmed the Orders of the FCC, thereby upholding the validity of the statutory and regulatory provisions in question. (A-22) On June 15, 2000, the Court of Appeals denied the timely petition for rehearing by the Communications Workers of America. Pursuant to Supreme Court Rule 13, this petition is filed within 90 days of that decision. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). Jurisdiction in the Court of Appeals was based on 28 U.S.C. § 2342(1).

CONSTITUTIONAL PROVISIONS

The constitutional provisions involved in this case are as follows:

> Article I, Clause 8 of the United States Constitution, which provides that "Congress shall have power to regulate commerce . . . among the several states. . . ."

Additional constitutional and statutory authorities are reproduced in the Appendix at A-28 through A-39.

STATEMENT OF THE CASE

This case challenges the Constitutionality of the Telecommunications Act of 1996 and FCC implementing regulations. Petitioners seek review of a Second Circuit decision upholding the constitutionality of the Act, to determine whether it conflicts with a line of Tenth Amendment/Commerce Clause decisions rendered by this Court in *New York v. United States*, 505 U.S. 144 (1992), *Printz v. United States*, 521 U.S. 898 (1997), *Alden v. Maine*, 527 U.S. 706 (1999) and *United States v. Morrison*, 529 U.S. __, 120 S. Ct. 1740 (2000). Review is also sought to resolve the direct conflict between the Second Circuit decision and a recent concurring opinion by Fourth Circuit Judge Niemeyer in *Petersburg Cellular Partnership v. Board of Supervisors*, 205 F.3d 688 (4th Cir. 2000).

In *New York*, this Court determined that under the Tenth Amendment, Congress could not compel states to pass legislation addressing a critical problem of public policy, *i.e.*, the shortage of disposal sites for hazardous radioactive waste. (505 U.S. at 175-177) This holding was expressly reconfirmed in *Printz*. 521 U.S. at 933. This case is the mirror-image of *New York*, inasmuch as it presents the issue of whether Congress may compel state or local governments to pass zoning legislation which *fails* to adequately address a crucial policy issue: *i.e.*, the health risks associated with radio frequency radiation from cellular phone tower sites. Petitioners contend that such an Act of Congress violates the holdings of both *Printz* and *New York*, as well as that of the very recent decision in *Alden*, which prohibits the Federal Government from infringing upon the "residuary and inviolable sovereignty" retained by the states (527 U.S. at 715, *quoting The Federalist No. 39*, at 245), and *Morrison*, which reconfirms that states possess a plenary police power which cannot be overridden by Congress. (120 S.Ct. at 1754) In *Petersburg*, *supra*, Circuit Judge Niemeyer concluded in his concurring opinion that provisions of the Act imposing

conditions on state and local regulation of the siting of cellular phone facilities were inconsistent with the principles of Federalism enunciated by this Court in these decisions.

Proceedings Below

Petitioners are "Citizens for the Appropriate Placement of Telecommunications Facilities" of Charlotte, Vermont, together with numerous other community citizens organizations and individual citizens from other parts of the country. Petitioners participated in administrative and judicial challenges to FCC regulations concerning the environmental and health effects of radio frequency emissions from cellular telephone facilities. The challengers appealed to the Second Circuit Court of Appeals from two final opinions and orders of the FCC. These orders set standards for human exposure to radio frequency radiation emitted from transmitters and facilities regulated by the FCC, including "personal wireless service facilities," commonly known as cellular phone towers. They also, *inter alia*, announced rules implementing section 704 (c)(7)(B)(iv) of the Telecommunications Act of 1996, which precluded state or local governments from regulating the siting of wireless service facilities on the basis of environmental effects, including health effects, provided the facilities comply with the aforementioned FCC emissions standards. *See Guidelines for Evaluating the Scientific Effects of Radiofrequency Radiation*, 11 F.C.C. Rcd. 15123 (1996) ("First Report and Order"); *Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, 12 F.C.C. Rcd. 13494 (1997) ("Second Memorandum Opinion and Order").[2] Petitioners challenged the substantive guidelines on a number of statutory grounds and asserted that the regulatory prohibition, as well as the statutory provision on which it is

[2] Due to their voluminous nature, copies of these agency opinions have been lodged with the Clerk's office.

based (*codified* at 47 U.S.C. Sec. 332(c)(7)(B)(iv)), is unconstitutional facially and as applied.

The Second Circuit rejected all of petitioners' claims and upheld both of the FCC Orders. With respect to the Constitutional claims, the panel found that the prohibition on state regulation of the siting of wireless facilities was within the scope of Congress' legislative power under the Commerce clause and that the "statute does not commandeer local authorities to administer a federal program in violation of the federalism principles embodied in the Tenth Amendment and set forth" in *New York* and *Printz*. (205 F.3d at 96.) (A-21) By decisions dated June 6, 2000 and June 15, 2000, respectively, the Second Circuit denied rehearing of its decision. (A-23) (A-26)

The Telecommunications Act of 1996:
The Clash Between Federal Policy and State Regulation

A primary purpose of the Telecommunications Act of 1996 was to "encourage the rapid deployment of new telecommunications technologies" such as wireless or cellular telephone service. (Pub. L. No. 104-104.) The Act instituted a major overhaul of wireless telecommunications regulation, in order to encourage the construction of a broad national network of communications towers for use by providers of cellular telephone and other wireless services. *See Petersburg*, 205 F.3d at 697. As Congress recognized, there were obvious tensions between the federal policy to encourage proliferation of cellular telephone facilities and state and local governments' desire to maintain control over local land use regulation. A clash between the two was inevitable. Indeed, as the legislative history reflects, a primary purpose of the Act was to override local zoning regulators, who were believed to standing in the way of industry plans for expansion. (*See id. quoting* H.R. Rep. No. 104-204 at 94 (1995) noting the legislators' view that "a conflicting patchwork" of state and local zoning requirements

was "inhibiting deployment" of wireless services.) Local concerns over the environmental effects of radio frequency emissions were a particular bone of contention, and local zoning decisions based on such concerns were singled out for preemption, allegedly because they were "at times not supported by scientific and medical evidence." (*See id quoting* H.R. Rep. No. 104-204 at 95.)

State and Local Input In Siting Decisions: The Compromise Enacted Into Law

Despite Congress's wish to prevent local governments from frustrating the federal policy of expansion, it also recognized that "there are legitimate State and local concerns involved in regulating the siting" of cellular telephone towers (*see* H.R. No 104-204 at 94-95), and that these authorities could not be completely excluded from the siting process. Congress therefore considered ways to provide for limited state and local input, while denying localities authority to base siting decisions on their independent assessment of health effects of radio frequency radiation in their communities. Under the House version of the Act, the FCC was given "authority . . . to regulate directly the siting of towers" (*Petersburg* at 205 F.3d at 698), while input from State and local governments was to come through their participation in a "negotiated rulemaking committee," along with industry representatives and public safety agencies. H.R. Conf. Rep. No. 104-458 at 207 (1996). The committee's purpose was to recommend a national siting policy for the FCC to implement which ensured that "the siting of facilities cannot be denied on the basis of Radio Frequency (RF) emission levels which are in compliance with Commission (RF) emission levels." (H.R. 104-204 at 94.)

In contrast to the House bill, the Senate version of the Act permitted local governing bodies to continue to regulate the siting of cellular towers. *See Petersburg*, 205 F.3d at 698.

To resolve the conflict between the House and Senate versions of the bill, the Conference Committee created a new section 704 which was eventually enacted into law. This section preserved state and local authority over zoning and land use, *provided* that these governing bodies regulate in accordance with federally imposed standards enumerated in that section. (*See infra.*) The statute thereby delegates *responsibility* for siting decisions to local government, while retaining significant federal control over the *outcome* of such local regulation. In considering the constitutionality of such a siting arrangement, it is important to bear in mind the observation of this Court in *New York*, in connection with the choice of radioactive waste sites:

> If a federal official is faced with the alternative of choosing a location, or directing the states to do it, the official may well prefer the latter as a means of shifting responsibility for the ultimate decision.

(505 U.S. at 183)

Section 704

Specifically, Section 704 imposes substantive, procedural and evidentiary standards on state and local siting regulation, which in practical terms can effectively dictate the outcome of local zoning board deliberations. The procedural/evidentiary standards include requirements that zoning decisions regarding the placement, construction or modification of towers be issued "in writing," "in a reasonable period of time" and be "supported by substantial evidence contained in a written record." (47 U.S.C. Sec. 332 (c)(7)(B)(ii) and (iii).)

Substantively, the section prohibits state and local regulators from "unreasonably discriminating among providers"; mandates that local regulations "not prohibit or have the effect of prohibiting the provision of personal wireless services" (47 U.S.C. Sec. 332(c)(7)(B)(i)) and, most significantly for this petition, provides that:

> No state or local government or instrumentality thereof may regulate the placement, construction or 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 facilities.

47 U.S.C. Sec. 332 (c)(7)(B)(iv).

The section also provides an enforcement mechanism, which makes the decisions of local authorities reviewable in state or federal Court "on an expedited basis." (47 U.S.C. Sec. 332(c)(7)(B)(v).)

The FCC Standards

The FCC adopted radio frequency emission standards in 1996 based on "thermal effects" from radiation (that is, the heating of human tissue — as in microwave ovens). The standards do not require any minimum distance between transmitters and human habitations. Although these standards are revised every ten years, to date no emission standards have been established by the FCC based on non-thermal "biological effects" from emissions at below-heating levels (that is, alterations of human cells, various cancers and other diseases).[3]

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[3] As applied, the FCC standards do not take into account numerous research reports finding non-thermal effects. *See* B. Blake Levitt, *Electromagnetic Fields: A Consumer's Guide to the Issues and How to Protect Ourselves.* (Harcourt Brace, 1995).

Recent research in Europe, Australia and elsewhere has shown that cell phone frequencies may cause biological harm. In England, the U.K. Independent Expert Group on Mobile Phones, commissioned by the British government, issued a report in May, 2000, recommending that children under age 16 be discouraged from using cell phones. The report further recommends avoiding the siting of cell phone antenna installations near residences, schools, and hospitals. (One can examine the report at: http://www.iegmp.org.uk) The British minister of education has already sent notices to all British schools about the potential health risks for children from mobile phones.

Practical Consequences of Supreme Court Reversal of Opinion Below

In the event the Court should decide to set aside the preemption provisions of the Telecommunications Act of 1996 and the obsolescent FCC RF emissions regulations, the result will not be an anarchy of obstinate small town resistance to communications progress in the nation. Every local community has its share of residents and institutions who *want* access to reliable wireless communications technology, including:

Fire departments
Local and state police
Emergency ambulance services
Small businesses
Parents of teenagers
Repair services, etc.

These citizens, taxpayers, and public servants already do, and will continue to, urge elected zoning boards to approve construction of telecommunications towers.

The major change will be that local tower siting decisions will be made by *local* elected officials familiar with local

conditions who will be sensitive to the placement of towers close to schools, playgrounds, recreation areas, nursing homes, hospitals, residential areas and the like, and will exercise judgment based on these local conditions in light of current research into potential health effects of RF emissions. Concerned local citizens and public health officers are now able to keep elected local government officials informed about research developments *around the world* thanks to universal access to the Internet.[4]

The objective of this case is not to hobble technological progress, but to empower local officials to make intelligent decisions based on reliable information and direct knowledge of the communities they serve.

There is a wealth of information available about how other nations are handling human health concerns. The following schedule shows present maximum emission standards set by other countries around the world — *all* of them lower than the 1996 FCC permitted levels. These standards are sugges-

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[4] Some of the leading websites are:

www.bioelectromagnetics.org
(Research organization of scientists)

www.iegmp.org.uk/IEGMPtxt.htm
(The Stewart report from England)

www.nrpb.org.uk.NIR-is.htm
(National Radiological Protection Board in England)

www.rsc.ca
(Royal Society of Canada)

www.microwavenews.com
(Newsletter edited by former NRDC staffer)

www.land-sbg.gv.at/
celltower/english/salzburg_resoluton_e.pdf
(Salzburg Resolution)

tive of what might be applied by individual local communities to tower siting decisions.

	Measurement in Public Exposure Limits: Microwatts Per Centimeter Squared[5]
United States	200.0
Italy	10.0
Poland	10.0
China	6.6
Switzerland	4.2
Russia	2.4
Moscow	2.0
Austria	0.1

The real answer, of course, is for Congress to appropriate funds for a comprehensive and continuing EPA-supervised study of non-thermal biological effects at different emission levels — that is why the outcome of this case is so important.

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[5] The FCC limits vary depending on frequency. VHS limits are shown in the table. At cellular and personal communication services telephone frequencies, the FCC limits begin at about 500 microwatts and run as high as 1,000. *See FCC OET Bulletin 65*, (ed. 97-01) at pp. 67-68. Data for the other countries comes from: *Microwave News*, January/February 2000 "Switzerland Adopts Strict Limits for Cell Towers and Power Lines." pp. 1-6; *Microwave News*, January/February 2000, "Italian Wireless Radiation Limits Enter Second Year,"p.7; *Microwave News*, July/August 2000, "Efforts to Harmonize RF/MW Exposure Standards in Disarray," pp. 1-8; *Microwave News*, September/October 1999, "U.K. Parliamentary Panel Seeks Stricter RF Limits, More Research," pp. 1-10; *Microwave News*, September/October 1999 "Chinese RF/MW Exposure Standard Is the Strictest," pp. 9-10.

Currently there is no U.S. Government-funded research program into the non-thermal biological effects of RF emissions. EPA, which formerly conducted such research, lost all of its research funding in 1996, and has done nothing since. So long as telecommunications companies only have to comply with "thermal effects" standards and can otherwise put up towers pretty much wherever they want, the industry will obviously do all it can to *prevent* more research into biological effects. Right now, the federal government's approach is: let's permit the cell phone companies to put up the towers, and we'll worry about human health problems later.

REASONS FOR GRANTING CERTIORARI

Much as *New York v. United States*, this case "implicate[s] one of our Nation's newest problems of public policy and perhaps our oldest question of constitutional law." 505 U.S. at 149. The public policy problem here concerns the health effects of radio frequency emissions from cellular phone facilities. The constitutional question concerns the proper relationship between "the Federal government and the states" *id.* — or, more precisely, state-created local zoning boards. Specifically, the issue is who will be accountable to the electorate for the Federal radio frequency emissions standards: The Federal government itself, which is responsible for setting the standards, or the local zoning boards, which, as demonstrated below, have had the standards thrust upon them. Petitioners submit that while Congress has substantial power to preempt State legislation under the commerce clause, the Tenth Amendment precludes Congress from treating state and local legislative bodies as puppets on a Federal string.

Both the public policy question and the constitutional question are of overriding national importance necessitating review by this Court. Indeed, the gravity of the policy question underscores the great significance of the constitutional question. Since the mid-1990s, there has been a veritable

explosion in the number of telecommunication facilities for wireless phone systems, which customarily consist of a tower, antennas and an equipment box with radios. *See* Foster, Heverty and Pugh, "An Analysis of Facility Siting Issues Under Section 704 of the Telecommunications Act of 1996," 30 *The Urban Lawyer*, 729 (1998).[6]

As a result of such cell tower proliferation, federal standards which govern tower emissions have a critical impact on virtually every community across the country, and the effects of those regulations, for good or ill, reach as far as the radio-emissions themselves that penetrate the very homes of millions of Americans. As noted above, under the Telecommunications Act of 1996, these federal standards are *exclusive* and preempt local health regulation. As the authors of a recent article put it:

> In one fell swoop, Congress removed from control of the local governments one of the biggest issues confronting them in the tower siting arena: local opposition based on fear of cancer or other ill effects from the radio emissions of wireless facilities.

Foster, *et al.*, 30 *Urban Lawyer* at 740, *citing Genessee Tel. Co. v. Szmigel*, 174 Misc.2d 567, 570, n. 3 (Sup. Ct. Monroe Cty, 1997).

It is imperative that such a sweeping exercise of federal power with such far reaching consequences in such a crucial area of public health and safety (1) be made in accordance with constitutional principles, and (2) be subject to the effective scrutiny of the people through the electoral process.

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[6] As one commentor has noted, "the wireless communication industry in America has consistently grown at a rate that has outpaced the wildest predictions of economists and industry leaders." Note, "Wireless Facilities Are A Towering Problem," 40 *Wm. & Mary L. Rev.*, 975, 979 (1999).

Regrettably, neither is the case here, as further demonstrated below. Rather, this is a case where Congress has violated the Tenth Amendment by compelling state-created entities to "enact and enforce a federal regulatory program," (*New York, supra*, 505 U.S. at 151,[7] *quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264, 288 (1981)), thereby evading Congressional accountability to the public (*New York*, 504 U.S. at 168-69) and "restrict[ing] those political processes which can obviously be expected to bring about the repeal of undesirable legislation. . . ." *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.10 (1938).

Petitioners do not ask the Court to act as an ultimate arbiter of whether the federal standards are desirable or undesirable, but only to grant review to determine whether the *manner* in which they have been imposed upon localities is in conformity with the democratic structures of the constitution established by the Framers. *Cf.* Calabresi, "Textualism and the Countermajoritarian Difficulty," 66 *Geo.Wash.L.Rev.* 1373, 1391 (1998) (Supreme Court enforcement of jurisdictional lines of federalism and separation of power is "democracy enhancing" and "has the potential to make our system of Madisonian democracy function better.")

This Court has recently granted certiorari in Tenth Amendment cases where, arguably, the significance of the underlying issues pales in comparison to that presented here. For example, in *Printz*, the federal regulation in question consisted of relatively innocuous, temporary requirements that local chief law enforcement officers perform background checks on would-be purchasers of firearms. 521 U.S. at 903-04. Similarly, in *Reno v. Condon*, the Court granted certiorari to review the Tenth Amendment ramifications of the Driver's

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[7] The holding in *New York* is fully applicable to *local* subdivisions of states, as this Court made clear in *Printz*, which invalidated legislation impressing local chief law enforcement officers into federal service.

Privacy Protection Act, 528 U.S. ___, 120 S. Ct. 666, 671 (2000). While *Printz* and *Reno* undoubtedly involved important issues, of still greater importance are those presented in the case at bar.

THE 10th AMENDMENT PRESERVES THE SYSTEM OF DUAL SOVEREIGNTY ESTABLISHED BY THE FRAMERS

A recent line of decisions handed down by this Court has breathed new life into the Tenth Amendment. Chief among these are the decisions in *New York v. United States* and *Printz v. United States*. In *New York* and *Printz*, this Court forcefully reconfirmed the long-standing principle that "Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" 505 U.S. at 161 *quoting Hodel, supra*, 452 U.S. at 288. *See also New York, supra*: "the Constitution has never been understood to confer upon Congress the ability to require states to govern according to Congress' instructions." *citing Coyle v. Smith*, 221 U.S. 559, 565 (1911); *Printz*, 521 U.S. at 925: ". . . the Federal Government may not compel the states to implement, by legislation or executive action, federal regulatory programs."[8]

The historical record conclusively establishes that the Framers "designed a system in which the state and federal governments would exercise concurrent authority over the people — who were, in Hamilton's words, 'the only proper objects of government.'" *Printz*, 521 U.S. at 919-20, *quoting The Federalist No. 15; Accord, Alden, supra*, 527 U.S. at 714.

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[8] Commandeering the legislative power of the states to serve federal ends is antithetical to the "system of dual sovereignty" established by "the Framers, who explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not states." *Printz*, 521 U.S. at 918, 920, *quoting Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *New York, supra*, 505 U.S. at 166.

Moreover, any act which threatens to "compromise the structural framework of dual sovereignty" is "categorically" unconstitutional and "no comparative assessments of the various interests [involved] can overcome that fundamental defect." *Printz*, 521 U.S. at 932-33.

RESPECTING THE SPIRIT OF DUAL SOVEREIGNTY PRESERVES DEMOCRACY

While the categorical rule may appear doctrinaire and inflexible, it serves vital constitutional purposes, *inter alia*, by preserving the accountability of elected officials to the electorate — the very basis of democratic government. As explained in *New York*:

> . . . where the Federal Government directs the States to regulate, it may be *state officials who will bear the brunt of public disapproval*, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. (505 U.S. at 169) (Emphasis added.)

Accord Petersburg, 205 F.3d at 701. *See also Printz*, observing that where state governments are forced to implement a Federal program, state officials are "put in a position of taking the blame for its burdensomeness and its defects." (521 U.S. at 930, *quoting* Merrit, *Three Faces of Federalism: Finding a Formula for the Future*, 47 Vand. L. Rev. 1563, 1580, n. 65 (1994)).[9]

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[9] *See also Alden*, 527 U.S. at 715: "When the Federal Government asserts authority over a State's most fundamental political process, it strikes at the heart of the political accountability so essential to our liberty and republican form of government."

ARGUMENT

POINT I

CERTIORARI IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN THE FOURTH CIRCUIT AND THE SECOND CIRCUIT ON THE CONSTITUTIONALITY OF SECTION 704 OF TELECOMMUNICATIONS ACT OF 1996

The Fourth Circuit Decision

In *Petersburg*, *supra*, a divided panel of the Fourth Circuit reversed the District Court and upheld a decision of the Board Supervisors of Nottaway County, Virginia denying an application to erect a cellular telephone tower. Applying the federalism principles elucidated above, Fourth Circuit Judge Niemeyer wrote a concurring opinion declaring that Section 704 of the Telecommunications Act "'commandeers' the County's legislative process and is therefore unconstitutional under the Tenth Amendment." 205 F.3d at 705 *quoting New York*, 505 U.S. at 175.

Judge Niemeyer recognized that the functions of the local zoning board were legislative in nature. 205 F.3d at 699. The Telecommunications Act therefore effectively imposes federal standards on this legislative process.

As Judge Niemeyer recognized:

> through a compromise involving a partial preemption approach, [Congress] enacted § 704(a) of the Telecommunications Act, imposing federal standards on state and local legislative processes, thus leaving state and local legislative boards responsible and accountable for any fall-out in making siting decisions. Through this blend of assigned power, Congress apparently believed it could effect a federal policy promoting the erection of

> telecommunications towers, while preserving local interests in the process. But this particular blend erases the constitutional lines dividing power between the federal and state sovereigns and therefore becomes a categorical violation of the Tenth Amendment.

(205 F.3d at 705-06)[10]

The Second Circuit Decision

Despite the serious federalism issues raised by the Telecommunications Act, the Second Circuit in this case brushed aside petitioners' constitutional arguments in a single paragraph. *Cellular Phone Task Force, supra*, 205 F.3d at 96. (A-21) According to the Circuit Court, Congress did not commandeer local authorities in violation of *Printz* and *New York*, because "[s]tate and local governments are [purportedly] not required to approve or prohibit anything" under the statute. (*Id.*) (A-21) This conclusion is directly contrary to the Second Circuit's own jurisprudence, which demonstrates that local authorities are routinely required to approve tower construction under the Act.

For example, in *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490 (2d Cir. 1999), the Second Circuit reviewed a decision by a local town board on Long Island to deny permits to construct two wireless communication "cell sites." At public hearings on the applications before the board, the "vast majority" of speakers "expressed concern that the rfes [radio frequency emissions] emitted by the cell sites might

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[10] By its express terms, Judge Niemeyer's opinion does not deal with subsection (iv) of Section 332(c)(7)(B), which is at issue here. Nonetheless, his reasoning is fully applicable to the case at bar. No less than subsection (iii), subsection (iv) imposes federal standards on local zoning boards and therefore contravenes the Tenth Amendment under the holding espoused by Judge Niemeyer — a holding which is in direct conflict with the decision of the Second Circuit in this case.

cause cancer." (*Id.* at 492.) Finding that the health concerns expressed by residents could not constitute substantial evidence under the Telecommunications Act and that the remaining evidence was insufficient to support the board's decision, the Second Circuit expressly held "that an injunction ordering the Town to issue the permits was an appropriate remedy." (166 F. 3d at 497.) Thus, despite the town board's obvious misgivings about the health effects of the cell sites, it was *compelled* by the Telecommunications Act to exercise its legislative authority in accordance with the mandate of the Federal government, rather than its own policy preferences, and to approve construction. This is precisely the unconstitutional result which the Second Circuit panel in *this* case said would *not* come about under the Act. Clearly, the Second Circuit was wrong and ignored its own prior case law in this field.

Nor is *Oyster Bay* an aberration. The Court explicitly noted that "the majority of district courts which have heard these cases have held that the appropriate remedy is injunctive relief, in the form of an order to issue the relevant permits." (*Id. citing Iowa Wireless Servs., v. City of Moline* 1998 WL 879518 (C.D. Ill.) at *9 (ordering defendant to grant plaintiff a special use permit "with all deliberate speed"); *OmniPoint Corp. v. Zoning Hearing Bd. of Pine Grove, TP*, 20 F. Supp. 2d 875, 881-92 (E.D. Pa. 1998) (ordering zoning board to issue requested special exception permit and declining to remand because to do so would "frustrate the TCA's intent to provide aggrieved parties full relief on an expedited basis"), *aff'd*, 181 F.3d 403 (3rd Cir. 1999); *Illinois RSA No. 3 v. County of Peoria*, 963 F. Supp. 732, 747 (C.D. Ill. 1997) (concluding that injunction directing defendant to issue permit is appropriate relief under TCA); *BellSouth Mobility Inc. v. Gwinnett County Georgia*, 944 F. Supp. 923, 929 (N.D. Ga. 1996) (granting plaintiffs' request for writ of mandamus and ordering defendant to grant plaintiffs' requested permit).

These cases also conclusively refute the Second Circuit's suggestion that Congress was merely exercising its "authority to offer states the choice of regulating the activity according to federal standards or having state-law pre-empted by federal regulation." (205 F.3d at 96, *quoting New York*, 505 U.S. at 167.) (A-21) As *Oyster Bay* and the cases cited therein demonstrate, *there is no choice at all*. If the local authorities fail to follow the federal standards on their own, the federal courts will compel them to do so. *Accord Petersburg*, 205 F.3d at 702.

This conclusion is borne out by the legislative history of Section 704 cited above, which demonstrates that Congress did not leave local governments with a choice, but consciously chose to require them to continue to consider cell tower zoning issues in conformity with *federal* standards.

In addition, Judge Niemeyer recognized that any choice offered to local authorities under the Act is at best a Hobson's choice:

> The choice suggested — that Nottoway County comply with § 704(a) of the Telecommunications Act or end its role as a land-use regulator — is no less coercive than the choice offered the states in *New York*. Indeed, it is not a choice at all. The Telecommunications Act does not suggest it, and it cannot be implied except in an ontological sense: one has a "choice" to avoid obeying a governmental body by ending his own existence. To suggest that a local body withdraw from land-use regulation and leave the construction of structures in the community to the whims of the market is nothing short

> of suggesting that it end its existence in one of its most vital aspects. *Petersburg*, 205 F.3d at 703. (*Id.*) [11]

The concurrence went on to note that "land use decisions are a core function of local government," and described the chaos that would follow should local authorities "abandon their land use power." (*Id.*) Requiring local zoning boards to forego this fundamental power violates the residuary inviolable sovereignty retained by the states. *Alden*, 527 U.S. at 715.

Petitioners respectfully submit that Judge Niemeyer's interpretation is clearly the more persuasive, and that the Second Circuit's reading of the statute disregards its obvious effect. Plainly, to prohibit local authorities from disapproving cell tower construction based on health concerns has exactly the same effect as expressly requiring them to approve such construction.

Finally, the Second Circuit declared that it had "no doubt" that Congress possessed the legislative authority under the Interstate Commerce Clause "to preempt state and local governments from regulating the operation and construction of a national telecommunications infrastructure. . . ." (205 F.3d at 96.) Evidently, the Court considered this to be the decisive factor establishing the constitutionality of the Act. However, the conclusion that Congress has legislative jurisdiction under the commerce clause to regulate telecommunications simply does not resolve the constitutionality of the act under the Tenth Amendment. As this Court recently observed:

> In *New York* and *Printz*, we held federal statutes to be unconstitutional not because Congress lacked legislative

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[11] In *New York*, states were given the coercive "choice" of "either accepting ownership of [radioactive] waste, or regulating according to the instructions of Congress." (505 U.S. at 175.)

> authority over the subject matter, but *because those statutes violated the principles of federalism contained in the Tenth Amendment.*

Reno v. Condon, 120 S. Ct. at 671. (Emphasis added.)

POINT II

THE SECOND CIRCUIT DECISION CONFLICTS WITH RECENT DECISIONS OF THIS COURT PRESERVING THE INVIOLABLE SOVEREIGNTY RETAINED BY THE STATES

The Second Circuit decision conflicts with the Supreme Court's recent decision in *Alden v. Maine*, 527 U.S. at 715, which held that in exercising its enumerated powers, *the Federal Government may not infringe upon the "residuary and inviolable sovereignty" retained by the States* under the Constitution (*quoting The Federalist No. 39* at 245).

As the Court recognized in *Alden*: "the founding document 'specifically recognizes states as sovereign entities.'" (*Id. quoting Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.15 (1991). Therefore, under the Constitution, "Congress is bound to treat the states in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.") *Alden*, 527 U.S. at 749.

An attribute of such inviolable sovereignty is the duty to ensure that citizens are not left unprotected in the face of potentially lethal threats to their lives, health and safety. This is not merely the State's right, it is arguably the most fundamental obligation of government and the cornerstone of the social compact as understood by the Framers themselves.

Relevant historical sources (*cf. Alden*, 527 U.S. at 713, 715-16) confirm that the preservation of life was considered *a paramount duty of government* and one of the key reasons

it exists. No less a personage than John Locke, the esteemed political writer whose thought so influenced the Framers, declared that the "great and chief end . . . of men's uniting into commonwealths, and putting themselves under government" is for "the mutual preservation of their *lives*, liberties and estates." Locke, *Second Treatise of Government*, Sections 123, 124. (Emphasis added.) Speaking through Jefferson, the founding generation incorporated Locke's principle into the Declaration of Independence itself, which declares that securing life was one of the three primary purposes for which "Governments are instituted among men."

So basic is this obligation, plaintiffs submit that it is of equal stature with sovereign immunity from lawsuits, and with those "political functions" which "lie[ ] at the heart of representative government" and are thus "reserved to the states under the Tenth Amendment." *Gregory*, *supra*, 501 U.S. at 463.[12]

The Federal Government may, of course, exercise the power to set public health standards in areas relating to interstate commerce. However, where it has defaulted on its obligation to protect public health, the Federal Government may not simultaneously *prevent the States from taking action to do so*. Such preemption would be irreconcilable with the "dignity and essential attributes inherent in" the State's status as sovereigns. (*Alden*, 527 U.S. at 714) Yet that is precisely what the Telecommunications Act and the FCC regulations

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[12] In the present day, recent decisions of this Court also confirm that the power to protect the people from threats to health and safety is part of the traditional powers retained by the States. *U.S. v. Morrison*, 529 U.S. ___, 120 S.Ct. 1740 (2000) (confirming that the Founders reposed the plenary police power in the States.) Indeed, this Court has very recently reconfirmed that the field of health care "is a subject of traditional state regulation . . ." *Pegram v. Herdich*, 530 U.S. ___, 120 S. Ct. 2143, 2158 (2000), *quoting New York State Conference of Blue Cross and Blue Shield v. Travelers Ins. Co.*, 514 U.S. 645, 654-655 (1995).

do, by leaving citizens exposed to the potential health effects of the radio frequency radiation from cellular towers and by simultaneously tying the hands of state and local officials who wish to intercede to protect the well-being of their citizens.

Based on the administrative record before the Second Circuit, it is apparent that the FCC has been hobbled by Congress in its ability to update emissions standards and to take meaningful regulatory steps to safeguard the public. As the scientific literature amply demonstrates, the level of Federal research on this issue by EPA is wholly inadequate to this day, at a time when findings by researchers around the world demonstrate the pressing need for a heavily-funded federal human health-oriented research program.[13]

The power and responsibility to protect public health and safety cannot lapse. When the Federal Government fails to exercise it, the power necessarily reverts to the people of the States as part of their inviolable sovereignty. This principle is also enshrined in the Declaration, wherein one of the chief complaints against the British Crown is that the king impeded

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[13] For example, an 18-year study by Dr. Bruce Hocking in Sydney, Australia found that children living close to broadcast towers for four TV stations and an FM radio station suffered twice as many deaths from leukemia as children residing farther away. The radiation levels were no more than 8 microwatts per square centimeter, 125 times lower than the 1996 FCC standards. (Hocking B, Gordon IR, Grain HL, Hatfield GE, *Cancer Incidence and Mortality and Proximity to TV Towers. Med J Aust* 165(11-12):601-605, 1996.)

Adult leukemias were nine times higher than expected within the first half kilometer of a BBC TV and FM transmitter in Sutton Coldfield near Birmingham, England. Dr. Helen Dolk and associates observed that the leukemia incidence was almost double expected levels within two kilometers. The maximum radiation level measured was only 5.7 microwatts per square centimeter. (Helen Dolk, *et al. Cancer Incidence Near Radio and Television Transmitters in Great Britain. American Journal of Epidemiology*, Vol. 145, No. 1 (January 1997) pp. 1-9.)

the passage of "laws most wholesome and necessary to the public good" by "refusing his assent" and by "dissolving colonial legislatures":

> whereby the Legislative Powers, incapable of annihilation . . . returned to the People at large for their exercise. . . .

The provision of the Telecommunications Act forbidding States from filling the regulatory vacuum left by Congress and the FCC is therefore repugnant to the Tenth Amendment and basic principles of American democracy.

Congress Has Failed to Fund EPA Research Into Biological Effects of RF Emissions on Human Health

The real problem here is that the most recent FCC standards set in 1996, are still based on thermal effects, despite newer information coming from scientific sectors largely outside of the U.S. The current FCC standards were adopted from decades-old research reviewed by the National Council on Radiation Protection (*NCRP Report No. 86*, issued April 2, 1986), and from the American National Standards Institute (*EEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3kHz to 300 GHz*, approved Sept. 26, 1991, with a cut-off date for scientific papers of December, 1985). Both Professional agencies have a 5-to-7 year built-in time lag in their review process, and their respective RF committees are comprised almost entirely of physicists, engineers and bioelectromagnetics researchers — not professionals from the public health sector. In other words, dated, inappropriate research, reviewed by authorities from inappropriate professions, is being used to reach conclusions about public safety concerning radio frequency radiation. Why has there been no better updating of the FCC standards? The answer is obvious: because

Congress has not appropriated adequate funds to conduct non-thermal research by the key federal agency — EPA.

The Court of Appeals premised its refusal to disturb the FCC regulations in large part on the Court's confidence in the Environmental Protection Agency (EPA) keeping the FCC informed on new developments which would require changes in the FCC's existing maximum emissions standards. As the Court of Appeals said:

> Moreover, it was not arbitrary and capricious for the FCC to conclude that it need not supply the new evidence to the other federal agencies with expertise in the area. It could reasonably expect those agencies to keep abreast of scientific developments in carrying out their missions. For instance, the EPA had participated not only in the hearings and comments leading to the promulgation of the Guidelines, but also had been on the verge of releasing its own draft guidelines pertaining to the health effects of RF radiation in 1996. *It was fully reasonable for the FCC to expect the agency with primacy in evaluating environmental impacts to monitor all relevant scientific input into the FCC's reconsideration, particularly because the EPA had been assigned the lead role in RF radiation health effects since 1970. See* 42 U.S.C. § 2021(h).

(205 F.3d at 91) (A-10) (Emphasis added.)

The Court's reliance on the EPA was technically correct but substantively naive. What the Court did not realize was that *Congress terminated funding for radiation research by EPA* in 1996, and no staff has been available at EPA to conduct such research for the past five years.

This Court can properly take judicial notice of the federal budget levels for this agency. Reproduced on the following page is a "Summary of EPA Budget and Staffing for RF Radiation Activities from FY 1990-2000" recently supplied

Summary of EPA Budget and Staffing for RF Radiation Activities from FY1990–2000

(Extramural Dollars Only)

FY	90	91	92	93	94	95	96	97	98	99	00
FTE	2.3	2.2	2.1	2.1	2	2	0.5	0.5	0.5	0.5	0.5
$(K)	$0	$40	$25	$543[a]	$73[b]	$140[c]	$0	$0	$25[d]	$0	$0

[a] Includes grant funds ($510,000) under EPA/NIEHS Interagency Agreement DW75935939.

[b] Includes funds ($50,000) for Cooperative Agreement (CX823714) with the National Council on Radiation Protection and Measurements (NCRP).

[c] Includes funds ($50,000) for Cooperative Agreement (CX823714) with NCRP.

[d] $25K completes total funding ($125,000) for Cooperative Agreement (CX823714) with NCRP.

by the agency in response to a request from Senator Joseph I. Lieberman of Connecticut. It will be seen that only one-half of a staff member is presently assigned to perform EPA's "lead role" in RF radiation health effects, and such has been the case since 1995. It will also be seen that *total* research expenditures in the five years since 1995 amount to a final payment of *$25,000* on a cooperative agreement entered into with NCRP in 1994. Nothing more. In contrast, the EPA research expenditures from 1990 through 1995 totaled *$821,000*. While the Court of Appeals was theoretically correct in its reliance on EPA's lead research responsibility, in practical terms the Court was dead wrong. There is *no* Congressionally funded research into the biological effects of cellular tower RF emissions in the agency to which Congress assigned the "lead role" in 1970.

This is a perfect example of lack of accountability. Citizens should be allowed to decide whether inaction by their own elected Congressional delegations is the result of large campaign contributions and intense lobbying from the telecommunications industry.[14]

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[14] The Court can take judicial notice of the official reports filed with the Federal Elections Commission (FEC), summarized on the Internet website of the Center for Responsive Politics (CRP) (website: www.crp.org). At the time the Telecommunications Act of 1996 was under discussion in 1994-95, political action committees for local and long distance phone companies contributed over $4 million to key members of Congress (data from CRP reported in *USA Today* issue of October 16, 1995).

During the period of actual passage of the Act, FEC filings, together with lobbying reports filed with the House and Senate, showed substantially greater expenditures for 1996-97, amounting to a grand total of $29,425,097.

For the current Congress, campaign contributions from telephone utilities reported to the FEC (as of August 30, 2000, even before the start of final election campaigning): $5,503,169.

These financial pressures on key Congressional committee members may — or may not — explain the failure of Congress to fund ongoing research into the potential hazards to human health resulting from the FCC's maximum RF emissions standards for wireless telecommunications facilities. But the stark fact remains that *no such federally-funded research is being conducted by EPA*, and the main premise of the Court of Appeals decision was in error.

That may please the telecommunications business interests, but is it a responsible approach to federalism? We say it is not what the Framers of the Constitution intended, and the preemption provisions in the Act should be declared unconstitutional.

CONCLUSION

The Petition for Certiorari should be granted.

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