No. 00-393

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

REPLY BRIEF OF CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES, et al. IN SUPPORT OF CERTIORARI

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Petitioners CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES, *et al.* ("CAPTF") submit this brief in reply to those portions of respondents FEDERAL COMMUNICATIONS COMMISSION ("FCC") and UNITED STATES OF AMERICA's consolidated opposition brief ("Resp. Br.") which address CAPTF's petition.

REPLY STATEMENT

This case challenges the constitutionality of the Telecommunications Act of 1996 and FCC implementing regulations. The Act and regulations violate the Tenth Amendment by requiring state and local government to enforce Federal regulatory standards which fail to protect citizens from the potential — and increasingly noted — harmful health effects of radiation emitted from wireless communication towers.

As described by respondents, the actions of Congress and the FCC would appear to be perfectly reasonable and responsible — *until one examines them closely*. It then becomes clear that despite going through the motions of consultation with various federal agencies (Resp. Br. at 4), the FCC wholly failed to address a crucial aspect of cell tower environmental safety — the *non-thermal* biological effects of radio frequency radiation ("RF"). The FCC made no effort to address the mounting evidence that such non-thermal effects are a grave health concern.[1] (*See* CAPTF Pet. at 7-10, 24.) This conspicuous gap in

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[1] As recently as November 25, 2000, Reuters News Service carried the following news dispatch concerning the effects of radio frequency radiation at the same frequencies as those constantly emitted from cell towers:

the federal scheme allows the unchecked flow of potentially harmful public exposure to radio frequency radiation. Respondents state that there is a trade-off between the goals for the rapid deployment of communications and public exposure to RF energy. (Resp. Br. at 21.) In weighing public exposure to RF energy it is not enough that the new information may be worthy of further inquiry or may be considered important research. (Resp. Br. at 23.) The question is whether or not the new information presents a seriously different picture than originally envisioned. The original picture adopted by ANSI, NCRP and the FCC was that the only adverse effect of this radiation on people was that it *heated* human tissue. A measured amount of energy added to a system results in a predictable and measurable response, *i.e.,* tissue heating, and nothing more. Protecting people from this radiation simply required that the levels be prevented from being intense enough to overheat people.

The "seriously different picture" that respondents continue to miss is that credible research reports on RF radiation bioeffects document physiological changes other than heating in living organisms caused by this radiation and that effects of long-term chronic exposure may be cumulative. Large electromagnetic radiation increases are a new and growing factor

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> LONDON, Nov. 25 (Reuters) — Children who use mobile phones risk suffering memory loss, sleeping disorders and headaches, according to research published in the medical journal The Lancet.
>
> Physicist Dr. Gerard Hyland raised new fears over radiation caused by mobile phones and said under 18-year-olds, who represent a quarter of Britain's 25 million mobile users, were more vulnerable because their immune systems were less robust.
>
> "Radiation is known to affect the brain rhythms and children are particularly vulnerable," Hyland said.

These findings simply cannot be disregarded.

in this environment to which living creatures respond in a myriad of ways across a range of frequencies and intensities well below the threshold of "thermal effects." In balancing the rapid deployment of communications using increasing amounts of RF emissions, the FCC *assumes* that this deployment will not harm humans and has made a choice to take a risk that the assumption of no [adverse] effects at non-thermal levels is correct. Despite severely restricted funding (indeed, no further funding of RF research at the EPA), numerous independent studies do indicate actual biological changes caused by this form of radiation. The FCC assumes that the old research based entirely on short-term studies can safely be applied to conclude that long-term continuous exposure to these levels of non-ionizing RF radiation would not harm people.

The citizens have a right to be heard on how much risk they are willing to accept by having a voice in their local governments. Because local governments are not permitted under the Act and regulations to take these concerns into account, citizens are being subjected to an unauthorized experiment on the adequacy of the FCC assumptions against their will, and have lost their voice in local government decisions.

State and local governments cannot be required to enforce such a flawed scheme against their own citizens, without violating the Tenth Amendment.

REPLY ARGUMENT

POINT

RESPONDENTS NEVER SQUARELY ADDRESS PETITIONERS' CONSTITUTIONAL ARGUMENTS

Nearly lost amid the arguments in respondents' opposition brief is the fact that this is a *constitutional case involving fundamental issues of federalism* and *a categorical violation of the Tenth Amendment*. (*See* CAPTF Petition, Point I.) Indeed, the Solicitor General largely sidesteps the actual constitutional arguments raised in the Petition. For example, with respect to petitioner's primary constitutional argument, respondents simply parrot the Second Circuit's incorrect view that the Telecommunications Act of 1996 "does not commandeer the processes of state and local zoning authorities because it does not compel those bodies to do anything at all." (Resp. Br. at 14.) Nowhere do respondents acknowledge the contrary fact pointed out in petitioners' brief, *i.e.*, that under the Act, local municipalities are routinely *required to approve construction of wireless facilities*. (CAPTF Petition at 17-18, *citing inter alia*, *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490 (2d Cir. 1999).) This compulsion transforms the statute from a routine preemption of state and local "legislative choices" (*cf.* Resp. Br. at 15) into a categorically unconstitutional "commandeering" of local governments "by directly compelling them to enact and enforce a federal regulatory program." *New York v. United States*, 505 U.S. 144, 161 (1992); *see also Printz v. United States*, 521 U.S. 898, 933 (1997). (*See* CAPTF Pet. at 14-20.)

It is simply irrelevant to argue — as respondents do — that the statute "leaves intact all *other traditional bases* for land-use regulation," apart from public health. (Resp. Br. at 14.) (Emphasis added.) The fact remains that where a municipality wishes to deny a cell tower permit based on potential health

effects on the community, and no legitimate grounds exist for denying the application for aesthetic, historic or other non-health reasons, the *municipality is compelled by the Act to approve construction.* (*See Town of Oyster Bay*, 166 F.3d at 497.) That is the fatal constitutional defect of the statute which compromises the federal system of dual sovereignty. (*See* CAPTF Pet. at 14-15.) While the Federal government devised the controversial emission standards, it is the *local government* which must put its stamp of approval on such cell tower construction and be exposed to the political consequences. The Federal government evades all accountability. *Id.*

Respondents are equally off base in their response to Petitioners' constitutional argument based on this Court's decision in *Alden v. Maine*, 527 U.S. 706 (1999). (*See* Resp. Br. at 16 asserting that petitioners' argument "has nothing to do" with *Alden.*) Respondent's cite the *specific* holding of *Alden* regarding state sovereign immunity (Resp. Br. at 16) but ignore the *general constitutional principle* upon which the decision is based. That principle is that the Federal government may not infringe upon the "residuary and inviolable sovereignty" retained by the states. (517 U.S. at 715.) Based on *Alden*, petitioners assert that the primary power and duty of state government under such "inviolable sovereignty" is to protect citizens from threats to life and health. (*See* CAPTF Pet., Point II.) The Telecommunications Act and FCC implementing regulations are unconstitutional because they *violate* this *inviolable* power.

Respondents also argue that Judge Niemeyer in *Petersburg Cellular Partnership v. Board of Supervisors*, 205 F.3d 688 (4th Cir. 2000) actually endorsed the constitutionality of 47 U.S.C. 332(c)(7)(B)(iv). (Resp. Br. at 16, n.9.) However, the constitutional reasoning of Judge Niemeyer's opinion fully supports CAPTF's position — as pointed out in the Petition. (*See* CAPTF Petition at 17, n.10.) The conflict with the

Second Circuit decision is therefore undeniable and certiorari should be granted to reconcile this split in the circuits.

Finally, for the first time in this case, respondents suggest that there is "a question" about petitioners' standing to raise the Tenth Amendment issues here. (Resp. Br. at 13, n.7.) That question is answered in the *affirmative* by a case cited in respondents' own brief, *Gillespie v. City of Indianapolis*, 185 F.3d 693, 700-703 (7th Cir. 1999), *cert denied*, 120 S.Ct. 934 (2000) finding that a private citizen has standing to challenge a statute on Tenth Amendment grounds. Moreover, CAPTF's position has been expressly endorsed by over seventy municipalities who have filed amici curiae briefs in support of the petitioners. *See e.g.*, Amici Curiae Brief of Towns of Islip, Brookhaven, Smithtown, Huntington and Oyster Bay, Long Island; Amici Curiae Brief of Town of Lincoln, Mass and Lincoln Planning Board; and Amici Curiae Brief of the Vermont delegation.[2]

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[2] Contrary to respondents' suggestion, petitioners are not airing "generalized grievances" regarding Congressional spending policies. (*See* Resp. Br. at 16, n. 10.) Rather, the meager appropriations for FCC, EPA and other federal research into the health and biological effects of non-thermal radiation explain why the FCC standards are outdated and inadequate and why the Second Circuit's unquestioning confidence in them was naive and misplaced. (*See* CAPTF Pet. at 24-28.) In sharp contrast to the U.S. failure to fund research into potential health and biological effects from non-thermal radiation emissions from mobile phones and towers, on December 8, 2000, Great Britain's Department of Health announced a comprehensive research program to cost several million pounds. The agency said that "any research undertaken must be independent and scientifically rigorous." (*See* http://www.doh.gov.uk/mobile.htm) The full report on which the British government research program is founded is available on the Internet at http://www.iegmp.org.uk/IEGMPtext.htm.