Nos. 00-393, 00-407, 00-417 and 00-427

In the Supreme Court of the United States

CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES, ET. AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

DAVID FICHTENBERG, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

MICHAEL WORSHAM, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

CELLULAR PHONE TASKFORCE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 47 U.S.C. 332(c)(7)(B)(iv) (Supp. IV 1998), which preempts state and local zoning authorities from regulating the "environmental effects" of personal wireless telecommunications facilities, includes preemption of state and local regulation of the human health effects of such facilities.

2. Whether the preemptive effect of 47 U.S.C. 332(c)(7)(B)(iv) (Supp. IV 1998) violates the Tenth Amendment.

3. Whether the court of appeals correctly found that the Federal Communications Commission was not required to prepare an Environmental Impact Statement pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, when it promulgated rules implementing the provisions of that Act.

4. Whether Congress's delegation of authority to the FCC to promulgate rules governing the environmental effects of radiofrequency radiation violated the "nondelegation" doctrine.

5. Whether the court of appeals correctly found that the FCC was not required to solicit the comments of other agencies on record material newly submitted to the FCC during a reconsideration of its initial order promulgating rules governing the environmental effects of radiofrequency radiation.

6. Whether the court of appeals correctly held that the FCC's rules governing the environmental effects of radiofrequency radiation did not violate the Rehabilitation Act of 1973, 29 U.S.C. 794.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

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No. 00-393

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A22[1]) is reported at 205 F.3d 82.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2000. Petitions for rehearing were denied on June 6, 2000 (Pet. App. A23-A25) and June 15, 2000 (Pet. App. A26-A27). The petition for a writ of certiorari in No. 00-393 was filed on September 8, 2000. The petitions in Nos. 00-407, 00-417 and 00-427 were filed on September 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA), requires that in connection with "major Federal actions significantly affecting the quality of the human environment," federal agencies prepare an "environmental impact" statement (EIS) that assesses the environmental effects of a proposed project. 42 U.S.C. 4332(2)(C). Not all activities, however, are "major" actions requiring such an analysis. Under rules established by the Council on Environmental Quality (CEQ), the agency that administers NEPA, some projects require only an "environmental assessment" (EA), which may be followed by a "finding of no significant impact" (FONSI). 40 C.F.R. 1508.9, 1508.13. Other actions may be "categorically excluded" from environmental analysis. 40 C.F.R. 1508.4. Determining which level of environmental scrutiny to apply to specific categories of activities is largely left to the

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[1] Citations to "Pet. App." refer to the appendix to the petition in No. 00-393.

individual agencies. An agency must, however, define three "classes of action": those that "normally do require environmental impact statements," those that "normally do not require" any environmental evaluation, and those that "normally require environmental assessments but not necessarily environmental impact statements." 40 C.F.R. 1507.3(b)(2).

2. a. All types of wireless communications, including television, radio, cellular telephones, pagers, and similar devices, work by sending and receiving electromagnetic signals. The energy fields generated by the transmitters of radio signals, referred to as radiofrequency or RF radiation, can affect the environment. Specifically, high levels of RF energy can cause the heating of human tissue, known as a "thermal" effect.[2] In 1985, the Federal Communications Commission (FCC) implemented, pursuant to NEPA and directives issued by the CEQ, rules that specified the emission levels above which human exposure to RF energy caused by FCC-licensed transmitters would require environmental analysis under NEPA. *Biological Effects of Radiofrequency Radiation*, 100 F.C.C. 2d 543 (1985).

The exposure limits were based on RF safety standards that had been adopted in 1982 by the American

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[2] Microwave ovens work by virtue of the thermal effect of extremely high levels of RF energy. See Office of Engineering and Technology, FCC, *Questions and Answers About Biological Effects and Potential Hazards of Radiofrequency Electromagnetic Fields*, OET Bulletin 56, at 6 (4th ed. 1999). The FCC exposure limit for the general public is one-fiftieth of the point at which RF energy begins to cause any unhealthful thermal effect. See National Council on Radiation Protection and Measurements, *Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields*, NCRP Report No. 86, at 279-283 (1986) (reprinted at C.A. App. 305-307).

National Standards Institute (ANSI), a recognized standard-setting organization. 100 F.C.C. 2d at 551. ANSI established recommended levels of "maximum permissible exposure" or "MPE" for various radio frequencies, since various frequencies cause a thermal effect at different rates. Transmitting facilities that would not lead to human exposure above the limits were considered to have no adverse effect and required no environmental evaluation; preparation of an EA or an EIS was required for transmitters that could cause human exposure above the limits. *Id.* at 561.

In 1992, ANSI issued new RF exposure standards. At about the same time, other organizations such as the congressionally chartered National Council on Radiation Protection and Measurements (NCRP) also issued RF protection standards. The following year, the FCC began a rulemaking proceeding to determine whether it should adopt one of the new standards to replace the 1982 ANSI standards. *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Notice of Proposed Rule Making*, 8 F.C.C.R. 2849 (1993) (*RF Notice*).

In the course of the rulemaking proceeding, the Commission received more than one hundred comments representing a broad range of interests. The Commission's staff also consulted with and/or received comments from a number of federal agencies that are responsible for the environment, human health and worker safety: the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), the Food and Drug Administration (FDA), and the National Institute for Occupational Safety and Health (NIOSH). *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Report and Order*, 11 F.C.C.R.

15,123, 15,129-15,131 (1996) (*RF Order*). When it made its ultimate decision, the FCC gave particular deference to the views of those agencies, which are "expert agencies with respect to determining appropriate levels of safe exposure to RF energy." *Id.* at 15,135. In accordance with the suggestions of the federal environmental and health agencies, the Commission ultimately adopted new guidelines based primarily on the RF exposure limits suggested by the NCRP. *Ibid.*

Under the new RF safety rules, as under the old ones, licensees generally must determine whether their transmitters will cause human exposure above the MPE limits. If so, an EA, and possibly an EIS, must be prepared and the Commission will then determine whether to allow transmission to occur.[3] No further environmental analysis is required for transmitters that will not lead to exposures greater than the limits. 47 C.F.R. 1.1307(b). Certain RF transmitters that operate at low power levels or in inaccessible locations and are thus extremely unlikely to cause exposure above the limits are categorically excluded from having to perform the initial assessment of RF exposure. 47 C.F.R. 1.1307(b); see also 40 C.F.R. 1507.3(b) (allowing agencies to create categorical exclusions). On petitions for reconsideration, the Commission reaffirmed the fundamentals of its initial decision. *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Second Memorandum Opinion and Order*, 12 F.C.C.R. 13,494 (1997) (*RF Reconsideration Order*).

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[3] As a practical matter, the FCC's experience is that licensees almost always ensure that their facilities will not cause excess exposure, and environmental analysis is rarely conducted.

b. Shortly before the Commission issued the *RF Order*, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, became law. Section 704(a) of that Act, entitled "National Wireless Telecommunications Siting Policy," added a new provision to the Communications Act of 1934, 47 U.S.C. 332(c)(7)(B)(iv),[4] which provides in pertinent part that "[n]o State or local government * * * 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." *Ibid.* In Section 704(b) of the Telecommunications Act Congress also directed that "[w]ithin 180 days * * * the Commission shall complete action in [the RF radiation rulemaking] to prescribe and make effective rules regarding the environmental effects of radio frequency emissions."[5]

The House Commerce Committee, which drafted the preemption provision, explained that the reason for the prohibition was that "siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of" advanced telecommunications services. H.R. Rep. No. 204, 104th Cong., 1st Sess. 94-95 (1995). The Committee explained that "local zoning decisions, while responsive

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[4] All citations in this brief to 47 U.S.C. 332(c)(7) refer to Supp. IV 1998.

[5] Congress also directed, in a provision not challenged by petitioners in this Court, that state and local zoning authorities act within a "reasonable period of time" after the filing of a request to build a communications tower and that denials of such requests "be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. 332(c)(7)(B)(ii) and (iii).

to local concern about the potential effects of radio frequency emission levels, are at times not supported by scientific and medical evidence." *Ibid.* In the *RF Order*, the Commission implemented the preemption provisions by adding Section 1.1307(e) to its rules, the language of which tracks the statute. 47 C.F.R. 1.1307(e).

c. In February 1997, the Cellular Telephone Taskforce submitted to the Commission a "complaint" claiming that the RF rules discriminate against persons who are hypersensitive to electromagnetic fields and thereby violate the Rehabilitation Act of 1973, 29 U.S.C. 794 (1994 & Supp. IV 1998). The Chief of the Office of Engineering and Technology, acting under delegated authority, ultimately dismissed the complaint because it addressed the activities of FCC licensees, not those of the agency itself. Letter from Richard M. Smith, Chief, OET, to Arthur Firstenberg, President, Cellular Phone Taskforce (Feb. 2, 1998) (C.A. App. 6119-6121). The FCC's rules implementing the Rehabilitation Act expressly do not apply to the "programs or activities of entities that are licensed or certified by the Commission." 47 C.F.R. 1.1830(b)(6).

3. a. The court of appeals affirmed the the Commission's orders. Pet. App. A1-A22. The court rejected the claim that the Commission had failed to take into account whether RF energy had deleterious nonthermal effects, finding that there was "room for disagreement * * * among experts in the field" regarding whether such effects existed and that "the FCC was justified in continuing to rely on the ANSI and NCRP standards." *Id.* at A10. The court held that the FCC had committed no error by not supplying the EPA and other agencies with publicly available studies that had been submitted to the FCC during the recon-

sideration proceeding. The FCC "could reasonably expect those agencies to keep abreast of scientific developments" and to "monitor all relevant scientific input" into the FCC's decision. *Ibid.*

The court rejected the claim that the FCC had violated NEPA because it did not prepare an EIS in connection with the rules. "[W]here an agency is engaged primarily in an examination of environmental questions, where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, but functional compliance is sufficient." Pet. App. A17 (quoting *Environmental Defense Fund* v. *EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973)). The court found that the FCC's orders "functionally satisf[ied] the CEQ's requirements for an EA and a FONSI." Pet. App. A17-A18.

The Court upheld the Commission's finding that, although 47 U.S.C. 332(c)(7)(B)(iv) precluded state and local governments from regulating the "placement, construction, and modification" of personal wireless service facilities "on the basis of the environmental effects of radio frequency emissions," that provision applied also to the operation of such facilities. The court noted that under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), deference must be accorded to the FCC's interpretation of the statute. Pet. App. A20. The court also noted that the savings provision of subsection (A) of the same statute provided only that the FCC may not "limit or affect the authority of a State or local government" over "the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. 332(c)(7)(A). Since "[s]ubsection (A) does not * * * preserve [state and local governments'] authority to regulate such facilities'

operations * * * the absence of the word 'operation' from the subsequent limitation on their authority under subsection (B)(iv) does not grant such power." Pet. App. A20.

The court rejected the claim that the preemption provision violates the Tenth Amendment. "The statute does not commandeer local authorities to administer a federal program," the court found, because "State and local governments are not required to approve or prohibit anything. The only onus placed on state and local governments * * * is that they may not regulate personal wireless service facilities that conform to the FCC Guidelines on the basis of environmental effects of RF radiation." Pet. App. A21. Straightforward preemption of that sort, the court found, does not violate the Tenth Amendment.

b. In its initial opinion, the court dismissed claims raised under the Rehabilitation Act and the Americans with Disabilities Act of 1990, 42 U.S.C. 1201 *et seq.* (ADA). Similar claims made before the agency had been resolved by the staff rather than the Commission itself, the court found, and therefore had not been the subject of a final, appealable agency order. Pet. App. A6. Pursuant to a petition for rehearing, the panel decided to address the merits of the claims notwithstanding their lack of finality. The ADA claim failed, the court found, because the relevant part of the ADA does not apply to the federal government. *Id.* at A25. The claim under the Rehabilitation Act lacks merit because that Act applies only to "the discriminatory denial of the benefits of a [federal] 'program or activity,'" and the construction of RF transmitters is not a program or activity of the FCC. *Ibid.*

ARGUMENT

Four parties, Citizens for the Appropriate Placement of Telecommunications Facilities (CAPTF), Cellular Phone Taskforce (CPT), Michael C. Worsham (Worsham) and David Fichtenberg (Fichtenberg), petition for a writ of certiorari. None of the petitions raises any issue that warrants this Court's review.

1. Petitioners Worsham and Fichtenberg claim that the Second Circuit has impermissibly interpreted 47 U.S.C. 332(c)(7)(B)(iv). That statute preempts state and local zoning authorities from regulating the "environmental effects" of personal wireless service facilities as long as the transmitter complies with the FCC's RF exposure standards. Petitioners contend (Worsham Pet. 10-14; Fichtenberg Pet. 32-35) that the court of appeals erroneously interpreted the term "environmental effects" to mean "human health effects." That claim is incorrect.

At the outset, the court below did not address the issue. The court stated in passing (Pet. App. A5) in the background section of its opinion that the preemption provision included human health considerations, but the court did not consider the question in its legal discussion and did not provide any analysis of it. For that reason alone, this case is unsuited for further review.

Moreover, the court of appeals' apparent understanding of the statute was correct and not in conflict with any decision of this Court or another court of appeals. When it enacted Section 332(c)(7)(B)(iv), Congress was clearly concerned with the biological effects of RF energy fields. The statute preempts only "to the extent that such facilities comply with the Commission's regulations concerning [RF] emissions." A tandem provision, Section 704(b) of the Telecom-

munications Act, gave the FCC 180 days to "complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions." Both the rulemaking proceeding and the FCC regulations to which Congress referred concerned almost exclusively the biological effects of RF energy. The original 1982 ANSI exposure standards that the FCC adopted in 1985 were based on the absorption of RF energy by the human body and the thermal effects in the human body of various levels of RF exposure. The 1992 ANSI standard, which the Commission proposed to adopt in ET Docket 93-62, see *RF Notice*, *supra*, likewise had to do entirely with human biological effects of RF fields. The statutory preemption of state and local consideration of environmental effects of RF to the degree that a transmitter complied with the FCC's rules thus necessarily was intended to include state and local consideration of biological effects.[6]

Petitioners mistakenly rely on a general presumption that ambiguous statutes should not be interpreted to preempt state law concerning health and safety. Worsham Pet. 9; Fichtenberg Pet. 33-34. That presumption does not apply where, as here, Congress's intent to preempt local consideration of biological effects is "clearly indicated by those considerations which are persuasive of the statutory purpose." *Maurer* v. *Hamilton*, 309 U.S. 598, 614 (1940). That

[6] The House Report discussing Section 704 of the Telecommunications Act further confirms that conclusion. The Report expressed Congress's concern that state and local authorities had interfered with the nationwide deployment of wireless communications systems for reasons that were "at times not supported by scientific *and medical* evidence." H.R. Rep. No. 204, *supra*, at 95 (emphasis added).

standard is amply satisfied by the statutory and administrative context of Section 332(c)(7)(B)(iv) as well as its legislative history. That Congress may have distinguished health effects from environmental effects (Worsham Pet. 13-14) in other statutes addressing different problems is of no moment in the face of Congress's evident intent here.

As petitioner Worsham notes, "[t]wo federal courts have essentially agreed with the Court of Appeals in the instant case." Pet. 12 (citing *AT&T Wireless PCS, Inc.* v. *City Council of Va. Beach*, 155 F.3d 423, 431 n.6 (4th Cir. 1988), and *Primeco Personal Communications* v. *Village of Fox Lake*, 35 F. Supp. 2d 643, 645 (N.D. Ill. 1999)). Petitioner Worsham asserts (Pet. 10), however, that the decision of the court of appeals "is arguably inconsistent with" the decision of the Second Circuit in *Freeman* v. *Burlington Broadcasters, Inc.*, 204 F.3d 311, cert. denied, 121 S. Ct. 276 (2000). The cited passage from *Freeman* states that the term "environmental effects" is not defined in the statute and that it "focus[es] on degradation of the natural environment, effects on historical landmarks, *and the biological effects of RF radiation*." *Id.* at 325 (emphasis added). Accordingly, *Freeman* is entirely consistent with the Second Circuit's holding in this case that the term "environmental effects" includes human health considerations. In any event, further review would not be warranted to resolve an intra-circuit discrepancy.

2. Petitioners CAPTF and Fichtenberg contend (CAPTF Pet. 14-21; Fichtenberg Pet. 35-38) that the preemptive effect of 47 U.S.C. 332(c)(7)(B)(iv) violates the Tenth Amendment. They claim that Congress has impermissibly commandeered the government apparatus of the states. The court of appeals correctly

rejected that claim, and its decision does not conflict with that of any other court of appeals or of this Court.[7]

Congress commandeers the legislative process of States "by directly compelling them to enact and enforce a federal regulatory program." *New York* v. *United States*, 505 U.S. 144, 161 (1992). In *New York*, the Court struck down Congress's requirement that the States either regulate radioactive waste under federal guidelines or take title to and dispose of the waste themselves. *Id.* at 174-175. Having no choice other than one of the two courses set forth by Congress, the States were thus pressed involuntarily into "the service of federal regulatory purposes." *Id.* at 175. Likewise, in *Printz* v. *United States*, 521 U.S. 898 (1997), the Court invalidated a federal statute that required local law enforcement officials to conduct background checks

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[7] There is a question whether petitioners have standing to present their claim. It is our position that individuals not acting in their official capacity generally lack standing to raise a Tenth Amendment claim, since they cannot establish that any personal injury would be redressed by a favorable decision, and the rights they advance in the litigation are rights of third parties. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Warth* v. *Seldin*, 422 U.S. 490 (1975); but cf. *Gillespie* v. *City of Indianapolis*, 185 F.3d 693, 700-703 (7th Cir. 1999) (discussing authorities and finding standing to raise Tenth Amendment claim), cert. denied, 120 S. Ct. 934 (2000). In the court of appeals, some individuals identified as state or local government officials were among the parties. See CAPTF Pet. ii-iii. Two of them (Holly A. Fournier and Jeannine Karlsson, see CAPTF Pet. ii) are listed as petitioners before this Court, although it is not clear whether they are acting in their official capacities and whether they are asserting in this litigation rights they hold by virtue of their official capacities. In addition, individual members of a collective governmental body ordinarily do not have standing to assert the rights of the body as a whole. See *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986).

of gun purchasers. That requirement, the Court held, "compel[led] the States to enact or administer a federal regulatory program." *Id.* at 933 (quoting *New York* v. *United States*, 505 U.S. at 188).

Section 332(c)(7)(B)(iv) does not commandeer the processes of state and local zoning authorities because it does not compel those bodies to do anything at all. Rather, the statute simply limits the factors state and local zoning authorities may consider in the exercise of their ordinary zoning functions. Those authorities may not deny a permit "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." 47 U.S.C. 332(c)(7)(B)(iv). They are permitted to grant or deny permits on any other basis. Indeed, Congress expressly provided that with the exception of RF and a few other matters not before the Court, "nothing * * * shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. 332(c)(7)(A). That proviso leaves intact all other traditional bases for land use decisions, such as aesthetics or neighborhood character, or other local zoning laws. Local authorities throughout the country have successfully rejected tower siting proposals on such grounds. See, *e.g.*, *Sprint Spectrum, L.P.* v. *Willoth*, 176 F.3d 630 (2d Cir. 1999); *Aegerter* v. *City of Delafield*, 174 F.3d 886 (7th Cir. 1999); *AT&T Wireless PCS, Inc.* v. *Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307 (4th Cir. 1999); *AT&T* v. *City Council of Va. Beach*, *supra*.

This case thus falls squarely within the principle that federal law may "displace state regulation" even though

this serves to "curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981). Indeed, this Court "long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers." *Id.* at 291; see also *Testa* v. *Katt*, 330 U.S. 386 (1947). The court below thus properly held (Pet. App. A21) that "State and local governments are not required to approve or prohibit anything" and correctly rejected petitioners' Tenth Amendment claims.

Petitioner CAPTF contends (Pet. 16) that the decision below conflicts with the decision of the Fourth Circuit in *Petersburg Cellular Partnership* v. *Board of Supervisors*, 205 F.3d 688 (2000) (per curiam). In that case, the Fourth Circuit upheld a county's decision to permit a communications tower to be built, but there was no agreement on a single rationale. Only a single judge, Judge Niemeyer, would have upheld the county's decision on the ground that certain federal limitations on the county's decision violated the Tenth Amendment. See *id.* at 691; *id.* at 696-705 (opinion of Niemeyer, J.).[8] Accordingly, the Fourth Circuit did not take a position regarding the Tenth Amendment issue

[8] The other judge voting to uphold the county's decision based his determination on the ground that the county's decision did not violate any provision of the Telecommunications Act. 205 F.3d at 706-710 (opinion of Widener, J.). The third judge dissented from the court's disposition, on the ground that the county's decision did violate a provision of the Act and that that provision did not violate the Tenth Amendment. *Id.* at 710-720 (opinion of King, J.).

in that case, and the Fourth Circuit's decision in that case therefore does not conflict with the decision of the Second Circuit here.[9]

Also without merit is the claim of CAPTF (Pet. 21) that the decision below conflicts with *Alden* v. *Maine*, 527 U.S. 706 (1999), because, in petitioner's view (Pet. 22), the federal government has allegedly "defaulted on its obligation to protect public health," and it therefore "may not simultaneously *prevent the States from taking action to do so*." The proposition on which petitioner relies—that federal courts must analyze whether a federal law adequately protects the public health before permitting it to preempt state law—has nothing to do with the Court's decision in *Alden*, which addressed Congress's power to authorize lawsuits against a State in its own courts under federal law.[10] In any event, the court below correctly found that the FCC's RF exposure standards, which were formulated by expert scientific groups that reviewed exhaustive studies and were supported by every federal health and safety

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[9] In any event, even the position urged by Judge Niemeyer in his concurring opinion in *Petersburg Cellular* does not conflict with the decision of the court below in this case. Judge Niemeyer's opinion expressed his belief that 47 U.S.C. 332(c)(7)(B)(iii), which requires a state or local decision regarding the placement of cellular towers to be "in writing and supported by substantial evidence contained in a written record," 47 U.S.C. 332(c)(7)(B)(iii), violates the Tenth Amendment. He appears to have accepted that the provision at issue here—47 U.S.C. 332(c)(7)(B)(iv)—is constitutional. 205 F.3d at 703-704.

[10] Insofar as petitioner's real claim has to do with Congress's spending priorities, see CAPTF Pet. 24-28, petitioner has no standing to air generalized grievances about those priorities. See *Schlesinger* v. *Reservists Comm. To Stop the War*, 418 U.S. 208 (1974).

agency, provide adequate protection to the public. Pet. App. A9.

3. The court of appeals found that the FCC was not required to prepare an environmental impact statement because the rulemaking process, which extensively considered the environmental effects of RF energy, amounted to "functional compliance" with NEPA; the rulemaking was, the court held, equivalent to an EA and a FONSI. Pet. App. A17-A18. Petitioner Cellular Phone Taskforce contends (Pet. 9-12) that the decision conflicts with decisions of other courts holding that the functional compliance test may lawfully be applied only to actions of the EPA and not to the actions of other federal agencies.

Petitioner's claim is incorrect. No federal regulation, statute, or other source of law prohibits the application of the functional compliance test to agencies other than EPA. The cases cited by petitioner either declined to apply the test to a particular agency or stated in dictum that the test applied only to EPA. None of them held that the test could not be applied in any circumstances to any other agency. There is thus no conflict.

As a matter of policy, the Executive Branch believes that the functional compliance test should not be applied to agencies other than EPA, and the government therefore does not ordinarily argue that environmental analyses conducted by agencies other than EPA functionally comply with NEPA. Because that policy has not been expressed in any formal manner, such as regulation or other publication, the Second Circuit did not commit legal error when it found that the FCC had functionally complied with NEPA. Moreover, in light of the extensive scientific analysis performed by the standard-setting organizations that crafted the FCC's guidelines (as well as the commentary received by the

FCC from pertinent federal agencies, including EPA), the finding below that the FCC had functionally complied with NEPA was supported by the record. Further review of the court of appeals' application in this case of the "functional compliance" test is accordingly not warranted.

In any event, the Second Circuit's judgment was correct for a reason other than the one on which it relied. The court's reasoning on this point implicitly assumes that some kind of environmental analysis was required. We argued before the court of appeals, however, that an agency's promulgation of rules that themselves implement NEPA and determine when an EIS is required, is not subject to the preparation of an EIS. The Seventh Circuit adopted that position in *Heartwood, Inc.* v. *United States Forest Service*, 230 F.3d 947 (2000).

As CEQ has interpreted and implemented NEPA, each federal agency specifies which of its actions will be subject to environmental analysis. 40 C.F.R.1507.3. Under the CEQ's approach, which is "entitled to substantial deference," *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979), an agency's regulations to determine when to prepare an EIS are not themselves subject to the EIS requirement. Rather, such rules are "more like an implementing procedure than a federal action of the type contemplated in 42 U.S.C. § 4332(2)(C)," and the categories specified by the rules "are not proposed actions, [but] categories of actions for which an EA or EIS has been deemed unnecessary." *Heartwood*, 230 F.3d at 953. The rules do not "authoriz[e] any activity or commi[t] any resources to a project that might impact the environment." *Id.* at 954. Accordingly, rules such as the FCC's rules in this case implementing

NEPA are not subject to the requirement that what might be termed a "meta-EIS" must be prepared.

4. Petitioners Worsham, Cellular Phone Taskforce and Fichtenberg contend that Congress impermissibly delegated to the FCC the authority to promulgate the RF exposure rules. Worsham Pet. 14-16; CPT Pet. 18-22; Fichtenberg Pet. 31-32. They claim that Congress articulated no "intelligible principle" to guide the FCC's determination of the issue. The court below did not address that issue, and on that ground further review is therefore not warranted.

In any event, the FCC's authority to promulgate the RF regulations does not violate the Constitution. Congress may delegate its legislative functions to agencies "under broad general directives." *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). In delegating its authority, Congress must only "lay down * * * an intelligible principle to which the [agency] is directed to conform" in order for the delegation to be constitutional. *Ibid.* (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928)).

Petitioners claim that the only congressional delegation of authority to the FCC to craft the RF rules is contained in Section 704(b) of the Telecommunications Act, which states that "[w]ithin 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions." That delegation, they assert, provides constitutionally insufficient guidance.

Petitioners' argument rests on a fundamentally mistaken premise. Section 704 was not the source of the FCC's authority to act in this case, but is instead simply a congressional requirement that the FCC timely resolve an ongoing rulemaking. Indeed, the FCC first

implemented RF rules in 1985, and it began the rulemaking under review three years before the passage of the Telecommunications Act. The agency thus acted under its broad authority to regulate communications conveyed by the Communications Act of 1934.

The FCC issues licenses to use the electromagnetic spectrum pursuant to 47 U.S.C. 307(a), which accords the agency authority to grant licenses "if public convenience, interest, or necessity will be served thereby." Accord 47 U.S.C. 309(a). The public interest standard continues to be the touchstone of FCC regulation. In connection with its licensing function, Congress has granted the FCC the power to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions" of the Communications Act. 47 U.S.C. 303(r); accord 47 U.S.C. 154(i); 47 U.S.C. 303(f) (1994 & Supp. IV 1998). The Commission also has direct authority to "determine the power which each station shall use," 47 U.S.C. 303(c) and to "[r]egulate the kind of apparatus to be used with respect to its external effects," 47 U.S.C. 303(e). This Court long ago held Congress's expansive delegation of authority to the agency to be constitutional. *National Broad. Co.* v. *United States*, 319 U.S. 190, 225-226 (1943). The Court ruled that the "public interest" standard was "as concrete as the complicated factors for judgment in such a field of delegated authority permit." *Id.* at 216 (quoting *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940)). Those cases foreclose petitioners' delegation argument.[11]

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[11] Petitioners CPT and Worsham appear to claim (CPT Pet. 20-21; Worsham Pet. 16) that the decision below conflicts with *American Trucking Ass'ns, Inc.* v. *EPA*, 175 F.3d 1027 (D.C. Cir. 1999),

Petitioner Worsham further asserts (Pet. 14-15) that it violated the delegation doctrine to give the FCC authority to establish standards in a health and safety field in which the agency acknowledged it lacked expertise. That argument is mistaken.

The RF exposure rules govern the activities of entities that are licensed and heavily regulated by the FCC. Congress has charged the FCC with "mak[ing] available * * * a rapid, efficient, Nation-wide, and world-wide wire and radio communications service," 47 U.S.C. 151 (1994 & Supp. IV 1998), has declared it "the policy of the United States to encourage the provision of new technologies and services to the public," 47 U.S.C. 157(a), and has established procedures to ensure the "efficient and intensive use of the electromagnetic spectrum," 47 U.S.C. 309(j)(3)(D) (Supp. IV 1998). There is a trade-off between those goals and public exposure to RF energy: all risk from RF energy could be eliminated by prohibiting wireless communications technologies. Congress has entrusted to the FCC the process of striking the appropriate balance, a subject squarely within the agency's expertise.

To be sure, the Commission stated that it "does not have the expertise to make independent judgments on such alleged health effects as 'electrosensitivity' or other reported effects on human health. This is the responsibility of the federal health and safety agencies."

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cert. granted, 120 S. Ct. 2003 (No. 99-1257) and 120 S. Ct. 2193 (No. 99-1426). Those cases involve a substantially different regulatory scheme than does this case, and the resolution of those cases is unlikely to affect the settled analysis of the Communications Act delegation of authority to the FCC, as directly upheld by this Court in cases such as *National Broadcasting Co.* and *Pottsville Broadcasting Co.*

RF Reconsideration Order, 12 F.C.C.R. at 13,538. As the agency acknowledged when it first implemented RF exposure rules, it lacks expertise to "*develop* our own radiation exposure guidelines," but "does have the expertise and authority to *recognize* technically sound standards promulgated by reputable and competent organizations such as ANSI." 100 F.C.C. 2d at 551. Moreover, the FCC consulted extensively with EPA, FDA, OSHA and other federal health and safety agencies, all of which concurred in the final standard. *RF Order*, 11 F.C.C.R. at 15,129-15,131; *RF Reconsideration Order*, 12 F.C.C.R. at 13,538. EPA in particular had been working on its own set of RF exposure rules and it had extensive familiarity with the scientific and medical literature. Pet. App. A10. In short, the RF regulations culminated from a multi-disciplinary, multi-agency effort in which the FCC took the lead. There was no constitutional infirmity in that process.

5. Petitioner Cellular Phone Taskforce claims (Pet. 12-15) that the court below erred in finding that the FCC did not violate the Administrative Procedure Act. CPT argues that during the reconsideration proceeding the FCC was required to solicit the comments of the health and safety agencies on new record material concerning "non-thermal" effects. The court of appeals properly rejected that claim of error.

By the time of its first order, the FCC had already consulted extensively with all of the federal health and safety agencies; the discussions included possible non-thermal effects of RF energy. See Pet. App. A7-A16. Moreover, ANSI and NCRP had reviewed extensive scientific literature on non-thermal effects and found such phenomena not to be supported by the evidence. *Id.* at A9. As the FCC found, no further consultation

was needed: "we have considered carefully well over 150 sets of comments filed in this proceeding and have already consulted extensively with all of the relevant health and safety agencies." *RF Reconsideration Order*, 12 F.C.C.R. at 13,506. As found in an analogous context, "[i]t is not enough that the [new] information may be worthy of further inquiry or may be considered important research. [The question is] whether or not the new information presents a seriously different picture" than that originally envisioned. *Wisconsin* v. *Weinberger*, 745 F.2d 412, 420 (7th Cir. 1984). The court of appeals correctly concluded that "it was reasonable for the FCC to continue to rely on the ANSI and NCRP standards absent new evidence indicating that the fundamental scientific understanding underlying the ANSI and NCRP standards was no longer valid." Pet. App. A9-A10.[12]

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[12] Petitioner CPT claims (Pet. 15) that it was arbitrary for the FCC to have "eschewed serious health-agency evaluation * * * while simultaneously disclaiming its own expertise." The court below found that the FCC "could reasonably expect [the health and safety] agencies to keep abreast of scientific developments" and "expect the agency with primacy in evaluating environmental impacts to monitor all relevant scientific input into the FCC's reconsideration." Pet. App. A10. Petitioner does not challenge that finding. Indeed, in a letter which we provided to the court of appeals pursuant to Federal Rule of Appellate Procedure 28(j), EPA recently informed the agency that "[t]he information base on non-thermal effects has not changed significantly since the EPA's original comments in 1993 and 1996. * * * The majority of currently available studies suggests * * * that there are no significant non-thermal human health hazards. It therefore continues to be EPA's view that the FCC exposure guidelines adequately protect the public from all scientifically established harms that may result from RF energy fields generated by FCC licensees." Letter from Robert Brenner, Acting Deputy Assistant

Petitioner Fichtenberg raises the additional administrative law claim that the FCC without explanation switched from an earlier RF exposure standard that required exposure to be "as low as reasonably achievable" (ALARA) to the current standards. Fichtenberg Pet. 28-31. Contrary to petitioner's assertion (Pet. 28), ALARA was never the standard; rather petitioner urged that the agency make it the standard.[13] The FCC explained that a very low standard would not strike a proper "balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible." *RF Reconsideration Order*, 12 F.C.C.R. at 13,496. The court below affirmed that finding (Pet. App. A11-A12), and there is no cause to question that conclusion.

6. Finally, petitioner CPT's claim (Pet. 23-25) that the court of appeals improperly rejected its claim under the Rehabilitation Act lacks merit. The argument is that the decision below conflicts with decisions of other courts of appeals that local zoning is a "program or activity" of the relevant governmental unit.

The Rehabilitation Act of 1973, 29 U.S.C. 794 (1994 & Supp. IV 1998), bars discrimination against or denial of benefits to an "otherwise qualified individual with a disability" on the basis of the handicap "under any

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Administrator for Air and Radiation to Dale Hatfield, Chief, FCC Office of Engineering and Technology (Apr. 30, 1999).

[13] The requirement of 47 U.S.C. 324 that transmitters "use the minimum amount of power necessary to carry out the communication desired" pertains to interference between stations, not potential health effects of RF fields, which were unknown in 1934 when Section 324 was enacted.

program or activity conducted by any Executive agency." Petitioner claimed below that the proliferation of transmitters was causing discrimination against persons especially sensitive to RF fields. The court of appeals held that "CPT does not allege that electrically sensitive people are being denied the benefit of, or are subject to discrimination under, any 'program or activity' of the FCC," and it dismissed the charge. Pet. App. A25.

That holding was correct. The FCC's regulations implementing the Rehabilitation Act expressly state that the rules do not apply to the "programs or activities of entities that are licensed or certified by the Commission." 47 C.F.R. 1.1830(b)(6). Both this Court and the D.C. Circuit have affirmed that approach. *Community Television of S. Cal.* v. *Gottfried*, 459 U.S. 498 (1983); *California Ass'n of the Physically Handicapped, Inc.* v. *FCC*, 840 F.2d 88 (D.C. Cir. 1988).

That reasoning defeats petitioner's contention that the Second Circuit's judgment conflicts with the decision of the Ninth Circuit in *Bay Area Addiction Research & Treatment, Inc.* v. *City of Antioch*, 179 F.3d 725 (1999). That case applied the Rehabilitation Act to the zoning activities of a governmental unit. The FCC does not engage in zoning activities, and Congress's preemption of certain aspects of local zoning decisions does not render the FCC a zoning administrator. There is no conflict between the decision under review and that of the Ninth Circuit.[14]

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[14] Petitioner CPT also raises (Pet. 24-25) a number of procedural complaints about the FCC's alleged failure properly to address petitioner's Rehabilitation Act claims. Those complaints are effectively moot in light of the Second Circuit's decision on rehearing to address petitioner's arguments on the merits and its ruling on

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2000

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the merits that the FCC's orders in this case did not violate the Rehabilitation Act. See Pet. App. A25.