**Case No. 21-16649**

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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RICHARD WOLF,

*Plaintiff-Appellant*,

v.

CITY OF MILLBRAE, et al.,

*Defendants and Appellees*.

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# AMICUS BRIEF BY LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF APPELLEE AND AFFIRMANCE

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Appeal From United States District Court
for Northern District of California
Case No. 04:21-CV-00967-PJH
The Honorable Phyllis J. Hamilton

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**CORPORATE DISCLOSURE STATEMENT PURSUANT TO FED. R. APP. P. 26.1**

The League of California Cities has no parent corporation, nor is it owned in any part by any publicly held corporation.

The California State Association of Counties has no parent corporation, nor is it owned in any part by any publicly held corporation.

Dated: August 22, 2022

RUTAN & TUCKER, LLP
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## I. INTEREST OF *AMICI*.

Amicus curiae the League of California Cities ("Cal Cities") is an association of 479 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The committee has identified this case as having such significance.

Amicus curiae California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the association's Litigation Overview Committee, comprised of county counsels throughout the State. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this is a matter affecting all counties.

The respective committees of Cal Cities and CSAC have determined that this case raises important issues that affect all California cities and counties and, potentially, cities and counties throughout the country. The current well-established rule under the Federal Telecommunications Act ("FTA") is that local government

agencies ("Local Agencies") are preempted from regulating:

> 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 [Federal Communications Commission's] regulations concerning such emissions.

47 U.S.C. § 332(c)(7)(B)(iv). Plaintiff-Appellant Richard Wolf ("Appellant") urges this Court to create an expansive, uncodified, exception to this rule that would circumvent Congress' preemption of Local Agency authority in cases that involve accommodations for persons with a disability under the Americans with Disabilities Act ("ADA") and/or the Fair Housing Act ("FHA").

Appellant's proposed rule would inject unnecessary uncertainty into local permitting processes. It would replace the FTA's clear mandate with a requirement that Local Agencies second-guess federally adopted standards for radio frequency emissions, even though those agencies have neither the expertise nor the resources to establish their own standards. If accepted, Appellant's rule would impede the ability of cities and counties to fulfill their statutory duties, impair their decision making, increase their legal and other operating costs, and increase the legal exposure for conduct that cities and counties have undertaken in good-faith compliance with federal laws. The interest of Cal Cities and CSAC members in this case is thus plain and sharp.

## II. STATEMENT REGARDING FED. R. APP. P. 29(a)(4)(E).

This brief has been authored solely by counsel for amici curiae Cal Cities and CSAC. No counsel for any party authored the brief in whole or in part. Neither the parties nor their counsel, nor any other person, besides the amici curiae and their counsel, contributed money that was intended to fund the preparation or submission of this brief.

## III. POINTS TO BE ARGUED BY *AMICI*.

The Court should uphold the District Court's ruling. The FTA preempts Local Agency regulation of the environmental effects of radiofrequency ("RF") emissions from wireless facilities to the extent such facilities comply with FCC regulations concerning such emissions. 47 U.S.C. § 332(c)(7)(B)(iv) ("Section 332 (c)(7)(B)(iv)"). Any Local Agency attempt to regulate in such a manner is illegal. Because the ADA and the FHA only require "***reasonable*** accommodations"[1] for persons with disabilities, the District Court correctly concluded that any requested accommodation requiring Local Agency regulation of RF emissions (beyond confirming compliance with applicable Federal Communications Commission

[1] The FHA uses the term "reasonable accommodations" (42 U.S.C. § 3604(f)(3)(B)) while the ADA uses the term "reasonable modifications" (28 C.F.R. § 35.130(b)(7)). The applicable legal test under both standards is the same. *Giebeler v. M&B Assocs.,* 343 F.3d 1143-1146-47 (9th Cir. 2003). For ease of reference, this brief uses the term "reasonable accommodations" to refer to the standard applicable under both statutes.

regulations) is *per se* unreasonable.[2]

The fact that Local Agencies implement federal laws when evaluating accommodation requests under the ADA and FHA does not alter the legal analysis and conclusion. Section 332(c)(7)(B)(iv) states "no ... local government ... may regulate …." The statute's plain words focus on the nature of the regulator (*i.e.*, "local government") not the legal basis for imposing the regulation (*e.g.,* the ADA or FHA).

The District Court's decision is further confirmed in a historical and statutory note to Section 152 of the FTA, which states "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local laws ***unless expressly so provided in such Act or amendments***." Pub. L. No. 104-104, § 601(c)(1), 110 Stat. 143 (1996) (reprinted in 47 U.S.C. § 152, historical and statutory notes (emphasis added)). Congress' preemption of Local Agency regulatory authority in Section 332(c)(7)(B)(iv) did not modify, impair, or supersede any provision of the ADA or FHA – the test under both statutes was and

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[2] Cal Cities and CSAC do not oppose regulations by Local Agencies that address RF emissions that exceed the FCC's rules. Nor do they oppose legitimate efforts by Local Agencies to ascertain whether RF emissions comply with the FCC's rules. *See Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(iv) of the Communications Act of 1934*, Report and Order, 15 FCC Rcd. 22821, 22828–22829 (Nov. 13, 2000) [acknowledging that Local Agencies have a legitimate interest in compliance with the FCC's RF exposure rules].

remains whether a "reasonable accommodation" can be provided by the Local Agency. Further, to the extent one construes Section 332(c)(7)(B)(iv) to "impair" the ADA or FHA through the preemption of Local Agency regulation of RF emissions, that result is ***expressly*** mandated by the FTA and therefore consistent with the historical and statutory note to Section 152.

Finally, the District Court's analysis is consistent with relevant principles of statutory interpretation. Under the District Court's plain meaning, common sense, reading of the statutes, ***all*** of the applicable laws are satisfied, and there is neither need nor cause to create an uncodified exception to Section 332(c)(7)(B)(iv). This Court has the opportunity to create certainty on this issue by confirming what is already made plain in the statute: a Local Agency is prohibited by federal law from providing the relief sought by Appellant.

## IV. FACTUAL BACKGROUND.

*Amici* adopt the factual Statement of the Case section in Appellee's Answering Brief filed by the City of Millbrae ("Millbrae").

## V. ACCOMMODATIONS FOR DISABLED PERSONS THAT REQUIRE LOCAL AGENCY REGULATION OF THE ENVIRONMENTAL EFFECTS OF RF EMISSIONS ARE PREEMPTED BY THE FEDERAL TELECOMMUNICATIONS ACT AND THEREFORE UNREASONABLE.

The members of Cal Cities and CSAC have a duty and responsibility to implement the laws adopted by Congress. When those laws intersect, identifying

the legally correct outcome hinges on a clear understanding of what is prohibited, what is required, and what is allowed. Without that clarity, the members are impaired in their ability to implement (allegedly) conflicting federal policies, exposed to resulting costs and uncertainties of litigation, are drawn into regulatory roles for which they have limited if any expertise (*e.g.*, the regulation of environmental effects from RF emissions).

In this case the rules are clear, and there is neither need nor cause to create the uncertainty urged by Appellant. The FTA ***prohibits*** and preempts Local Agency regulation of RF emissions. 47 U.S.C. § 332(c)(7)(B)(iv). The ADA and FHA, in turn, ***require*** accommodations to persons with disabilities, but only if they are reasonable. 28 C.F.R. 35.130(b)(7)(i) [ADA]; 42 U.S.C. § 3604(f)(3)(B) [FHA]. Given this state of the law, the only ***allowed*** outcome is the one identified by the District Court, *i.e.*, that accommodations requiring Local Agency regulation of RF emissions that comply with the FCC's rules are *per se* unreasonable because they violate Section 332(c)(7)(B)(iv).

### A. The FTA Places Specific, Substantial, and Clear Limitations on Local Regulatory Authority Over RF Emissions from Wireless Facilities.

The FTA lies at the foundation of the "wireless revolution that has taken place since 1996 when Congress passed amendments ... to support the then nascent technology." *City of Portland v. United States*, 969 F.3d. 1020, 1031 (9th Cir. 2020)

("*Portland"*). One of the core policies of the FTA is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment and new telecommunications technologies." *Sprint Telephony PCS, L.P. v. County of San Diego,* 543 F.3d 571, 575 (9th Cir. 2008), *see also Ting v. AT&T,* 319 F.3d 1126, 1143 (9th Cir. 2003) ["the purpose of the ... [FTA] is to 'provide for a pro-competitive, deregulatory national policy framework ... by opening all telecommunications markets to competition.'" (quoting H.R. Rep No. 104-458, at 113 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 124)].

The federal policy promoting rapid deployment comes at the expense of Local Agency regulatory authority. The FTA establishes general rules that "nothing in this chapter shall limit or affect the authority of ... local government ... over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332 (c)(7)(A). But there are exceptions to the general rule, and they are significant. *See T-Mobile South, LLC v. City of Roswell, Ga..,* 574 U.S. 293, 305-306, 135 S.Ct. 808, 190 L.Ed.2d 679 (2015) The FTA preempts regulations that:

- "discriminate among providers of functionally equivalent services" (47 U.S.C. § 332 (c)(7)(B)(i)(I));
- "prohibit or have the effect of prohibiting the provision of personal

wireless services" (47 U.S.C. § 332 (c)(7)(B)(i)(I)); and/or

- "regulate the placement, construction, and modification of personal wireless services facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications Commission's (FCC)] regulations concerning such emissions" (47 U.S.C. § 332 (c)(7)(B)(iv)).

For the first two categories of preemption, the limits on acceptable local regulation and the associated legal tests have been the source of vigorous debate in the courts, Congress, and regulatory agencies over the last 26 years. *See, e.g., Sprint Telephony PCS, L.P. v. County of San Diego,* 543 F.3d 571 (9th Cir. 2008) (en banc) [interpretation of scope of preemption under FTA]; 47 U.S.C. § 1455 [further statutory limitations on Local Agency regulatory authority]; *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.,* 33 FCC Rcd. 9088 (2018) [FCC order imposing further limits Local Agency regulatory authority]; *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.,* 33 FCC Rcd. 7705, 7775–91 (2018) [same]; *Portland*, 969 F.3d at 1020, 1033-1035 [upholding FCC's preemption of Local Agency regulatory authority in some respects, but preserving Local Agency regulatory authority in other respects].

In contrast, Local Agency preemption relating to the environmental effects of

RF emissions – the category that is the subject of this appeal – has been the source of minimal debate because the rule is clear:

> The ***FCC*** is obligated to evaluate the ***potential impacts of human exposure to radiofrequency emissions*** under the National Environmental Policy Act. *See* Pub. L. 104-104, 110 Stat. 56 (1996); 47 C.F.R. § 1.1310. In the Telecommunications Act, ***Congress preempted all municipal regulation of radiofrequency emissions*** to the extent that such facilities comply with federal emissions standards. 47 U.S.C. § 332(c)(7)(B)(iv).

*Portland*, 969 F.3d. 1020, 1046 (emphasis added). Thus, when evaluating a wireless facility application, a Local Agency's consideration of RF emissions is limited to whether the facility will comply with FCC standards. *Id.* 47 U.S.C. § 332 (c)(7)(B)(iv); H.R. Conference Report No. 104-458, 201 (1996); *see also Guidelines for Evaluating the Envtl. Effects of Radiofrequency Radiation,* 11 FCC Rcd. 15, 123 (1996) [FCC standards]. Local Agency regulations that stretch beyond the FCC's standards are preempted. U.S. Const. art. VI, cl. 2 ["This Constitution, and the Laws of the United States ... shall be the supreme Law of the Land ...."]; *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 103 (2d Cir. 2010) ["state and local laws that conflict with federal law are 'without effect.'"].

While the FCC's standards have been questioned,[3] the "virtue" of Section 332

[3] Many can and have questioned the scientific accuracy of the FCC's standards. *See Environmental Health Trust v. Federal Communications Commission*, 9 F.4th 893, 903, (D.C. Cir. 2021) [FCC's final order resolving notice of inquiry regarding guidelines for exposure to RF emissions was arbitrary and capricious in failing to

(c)(7)(B)(iv) is its clarity and simplicity, which allows local agencies to faithfully and consistently carry out the FTA's directive.

### B. Accommodations that Require the City to Regulate Wireless Facilities on the Basis of RF Emissions are Unreasonable.

The ADA and FHA require reasonable accommodations for persons with disabilities. *Updike v. Multnomah Cty.*, 870 F.3d 939, 951 (9th Cir. 2017) ["The failure to provide a reasonable accommodation can constitute discrimination" under the ADA]; 28 C.F.R. § 35.130(b)(7)(i) [reasonable modification requirement under ADA]; 42 U.S.C. § 3604(f)(3)(B) [reasonable accommodation requirement under FHA]. To be legally required, a requested accommodation must, first and foremost, be reasonable. *Id.* The test of reasonableness is often fact specific. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002); *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 818 (9th Cir. 1999).

Here, however, the test is not fact based because the accommodation requested by Appellant is preempted. 47 U.S.C. § 332(c)(7)(B)(iv); *Portland*, 969 F.3d. 1020, 1046; *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 103 (2d Cir. 2010). Local Agencies simply lack the legal power to grant an accommodation that requires regulation based on RF emissions. when those

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respond to record evidence that exposure to RF radiation levels below current limits could cause negative health effects]. But the remedy for those shortcomings is with the FCC, and Local Agencies remain bound to follow the published standards until they are updated.

emissions otherwise comply with the FCC's rules. 47 U.S.C. § 332(c)(7)(B)(iv). Because the accommodation is legally impossible, it is *per se* unreasonable.

Further, even if one indulges the assumption that a Local Agency ***could*** regulate wireless facilities based on RF emissions that comply with the FCC's rules, the accommodation request would still be unreasonable. It would, in the District Court's words "improper[ly] ... subject a defendant to the threat of litigation for the purpose of accommodating a plaintiff under the ADA." 2021 WL 3727072, *3, (*citing Willis v. Pac. Mar. Ass'n.*, 244 F.3d 675, 681-82 (9th Cir. 2001)).

### C. Contrary to Appellant's Claim, the Reasonable Accommodations He Seeks Would Violate Federal Law.

Appellant seeks to avoid the application of Section 332(c)(7)(B)(iv) by arguing that "complying with *federal* law (*i.e.*, the ADA and FHA) is not violative of the [FTA]" because "reasonable accommodations" are not "local" regulation. (AOB, pp. 11, 20.) But the FTA focuses on the ***regulator*** not the regulation or the source of the regulatory authority. Section 332(c)(7)(B)(iv) states "***No*** state or ***local government*** or instrumentality thereof ***may regulate*** ... personal wireless service facilities on the basis of the environmental effects of radio frequency emissions ..." By its plain words, the statute focuses on the entity doing the regulating (*i.e.*, Millbrae), not the statutory basis for exercising that regulatory authority (*i.e.*, the ADA and/or the FHA).

The regulatory authority here is a Local Agency, the City of Millbrae.

Millbrae is the entity from which Appellant demanded a reasonable accommodation. Millbrae is the entity that Appellant sued when the requested accommodation was not provided. And Millbrae is the "local government" that is preempted from regulating under Section 332(c)(7)(B)(iv). Nothing in the words or structure of the FTA allows for an exception to that preemption.

### D. The District Court's Interpretation of the FTA, the ADA, and the FHA Follows the Plain Meaning Rule, it Harmonizes the Statutes, and it Complies with Other Applicable Principles of Statutory Interpretation.

The District Court's common-sense reading of the FTA, the ADA, and the FHA aligns with multiple principles of statutory construction. First, and most fundamentally, "under the 'plain meaning' rule, '[w]here the language [of a statute] is plain and admits of no more than one meaning the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.'" *Smallwood v. Allied Van Lines, Inc.*, 660 F.3d 1115, 1121 (9th Cir. 2011), quoting *Carson Harbor Vill., Ltd v. Unocal Corp*, 270 F.3d 863, 878 (9th Cir. 2001). Here, (1) Section 332(c)(7)(B)(iv) plainly forbids and preempts local regulation based on the environmental effects of RF emissions, and (2) the ADA and the FHA only require ***reasonable*** accommodations (28 C.F.R. 35.130(b)(7)(i) [ADA]; 42 U.S.C. § 3604(f)(3)(B) [FHA].) Combining those plain meanings leads to the inevitable result reached by the District Court, *i.e.*, that the accommodation sought by Appellant is *per se* unreasonable.

Second, even if a conflict in the statutes existed, the court's duty is to reach a reading that harmonizes their meaning. *BNSF Railway Company v. California Department of Tax and Fee Administration*, 904 F.3d 755, 761 (9th Cir. 2018). The court is not at "liberty to pick and choose among congressional enactments" and must instead strive "to give effect to both." *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). "A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing 'a clearly expressed congressional intention' that such a result should follow." *Epic Systems Corp v. Lewis*, --- U.S. ---, 138 S.Ct. 1612, 1624, 200 L.Ed.2d 889 (2018).

Appellant claims he satisfies its heavy burden with a historical and statutory note to 47 U.S.C. § 152 that states: "This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local laws ***unless expressly so provided in such Act or amendments***." Pub. L. No. 104-104, §601(c)(1), 110 Stat 143 (1996) (reprinted in 47 U.S.C. § 152, historical and statutory notes (emphasis added)). But instead of supporting Appellant's argument, the historical and statutory note reinforces the District Court's conclusion. The FTA ***expressly*** forbids Local Agency regulation of the environmental effects of RF emissions. Therefore, to the extent that preemption under Section 332(c)(7)(B)(iv) impairs Local Agencies' ability to provide accommodations under the ADA and/or

the FHA, that result is expressly contemplated and authorized by the historical and statutory note.

Third, to the extent one perceives a conflict between the FTA and the ADA/FHA, the FTA must control. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *BNSF Railway Company v. California Department of Tax and Fee Administration*, 904 F.3d 755, 766 (9th Cir. 2018), quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc*., 482 U.S. 437, 445, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987) (emphasis omitted).

Here, the FTA specifically addresses the limitations on local regulatory authority over the environmental effects of RF emissions. In contrast, the ADA, and FHA generally provide a "reasonable accommodation" standard that applies across the spectrum of policies, programs, and activities of local agencies. Therefore, the FTA's specific limitations must control.

## VI. CONCLUSION.

For the foregoing reasons, *Amici* urge the Court to uphold the District Court's determination that the accommodations sought by Appellant under the ADA and FHA are *per se* unreasonable because they would require regulations that are preempted by Section 332(c)(7)(B)(iv).

Dated: August 22, 2022

Respectfully submitted,

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## STATEMENT OF RELATED CASES

The League of California Cities and The California State Association of Counties is unaware of any pending relating cases.

Dated: August 22, 2022

RUTAN & TUCKER, LLP
JEFFREY T. MELCHING

By: */s/ Jeffrey T. Melching*
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Attorneys for Amici Curiae LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES

**CERTIFICATE OF SERVICE**

Case Name: *Richard Wolf v. City of Millbrae, et al*. No. 21-16649

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 22, 2022.

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 22, 2022, at Irvine, California.

Dated: August 22, 2022

*/s/ Jeffrey T. Melching*
Jeffrey T. Melching

## FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS

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**9th Cir. Case Number(s)** 21-16649

I am the attorney or self-represented party.

**This brief contains 3,220 words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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