No. 22-698

IN THE
Supreme Court of the United States

ANDREW COHEN, ET AL.,
Petitioners,

v.

APPLE, INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF BY CITY OF BERKELEY IN SUPPORT OF PETITIONERS

FARIMAH BROWN
BRENDAN DARROW
BERKELEY CITY
ATTORNEY'S OFFICE
2180 Milvia Street,
Fourth Floor
Berkeley, CA 94704
(510) 981-6998

LAWRENCE LESSIG
Counsel of Record
1563 Massachusetts Ave.
Cambridge, MA 02138
lessig@lessig.law

AMANDA SHANOR
3730 Walnut Street
Philadelphia, PA 19104
shanor@upenn.edu

MOTION TO FILE AMICUS BRIEF

Amicus moves this Court to permit it to file this brief, despite failing to give notice to Respondent Apple Inc. ten days before the Amicus brief was due. Respondent has objected to Amicus filing its brief because of this failure of notice. But because Respondent itself received a thirty-day extension of its own deadline for filing, Respondent received not only notice of Amicus' intent to file a brief more than ten days before its own brief was due, but the actual brief 30 days before its brief was due. Respondent was not in any sense disadvantaged by Amicus' omission. Therefore, because any error was harmless to Respondent, Amicus asks this Court to accept its filing.

Petitioner submitted its petition for certiorari to this Court on January 23, 2023. On February 13, this Court asked Respondent for a response. Both Amicus' and Respondent's brief would have been due on March 15. Under Rule 37.2 Amicus was obligated to notify Respondent on March 5 of its intent to file an amicus brief.

On March 1, 2023, Respondent petitioned this Court to extend its time to respond to April 14. This Court granted Respondent's motion on March 2. Amicus submitted its brief on March 15. That submission was more than ten days before Respondent's brief was due.

Rule 37.2 requires "An *amicus curiae* fling a brief under this subparagraph shall ensure that the counsel of record for all parties receive notice of its intention to file an *amicus curiae* brief at least 10 days prior to the due date for the *amicus curiae* brief, unless the *amicus*

curiae brief is filed earlier than 10 days before the due date."

Respondent has suffered no prejudice from Amicus' omission. To the contrary, Respondent has received more information about Amicus' argument prior to filing its own brief because of the extension this Court provided than it would have had in the ordinary case. Amicus therefore asks this Court to accept this brief, despite the failure to give notice.

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The City of Berkeley governs a population of 125,000. Its residents include the many students at the University of California at Berkeley. Those residents, and especially those students, use cellphones extensively.

For five years, the City litigated to defend an ordinance requiring retailers of cellphones to provide purchasers with a single-page notice about wireless RF exposure that tracked the information the Federal Communications Commission had long required manufacturers to provide consumers. The ordinance was challenged by CTIA – The Wireless Association, which claimed the ordinance was both preempted under federal law and invalid under the free speech clause of the First Amendment.

The City has a strong interest in protecting the health and safety of its residents. Yet the uncertainty around the preemptive reach of FCC regulations forced the City to bear the costs of defending its regulation for many years. Cities like Berkeley do not have litigation budgets of the size of national trade organizations like CTIA. Uncertainty in the scope of FCC preemption can thus chills cities from exercising the sovereign authority preserved to the states and localities by our federalist structure.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

A letter from an agency general counsel claiming authority to preempt state and local law was taken by the lower court in the case that affected Amicus as sufficient to supplant local and historic police power over health and safety: The absurdity of that outcome and the history of that case demonstrate the damage that the uncertainty around FCC preemption law is doing to federalism on the ground.

Amicus' case began in 2015, when CTIA, a trade association, challenged a local ordinance that required cellphone retailers to provide customers at the point of sale with the same information about RF exposure the FCC had long required manufacturers to provide customers.

After the City amended its ordinance, CTIA lost in the District Court and Court of Appeals on both its preemption and First Amendment claims. CTIA then sought certiorari to this Court, challenging the Ninth Circuit's First Amendment ruling alone. The Court vacated the decision in light of *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018). On remand, the Ninth Circuit reaffirmed. *CTIA - The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832 (9th Cir. 2019). Certiorari was denied. *CTIA - The Wireless Ass'n v. City of Berkeley*, 140 S. Ct. 658 (2019).

CTIA then renewed its preemption argument in the District Court. Based solely upon a letter from the general counsel of the FCC, the District Court found the ordinance preempted. As the court determined — again, based upon the letter alone — "the FCC *could*

properly conclude that the Berkeley ordinance – as worded – overwarns and stands as an obstacle to the accomplishment of balancing federal objectives by the FCC." *CTIA - The Wireless Ass'n v. City of Berkeley*, 487 F. Supp. 3d 821, 834 (N.D. Cal. 2020) (emphasis added). It "could" so conclude; a general counsel's letter operated as that determination.

This result demonstrates dramatically how very far preemption law has strayed from federalist principles. The District Court's conclusion, like the Ninth Circuit's in the instant case, makes a mockery of state and local prerogatives, even in the heartland of police power over health and safety concerns.

It is essential that this Court clarify the preemption standards for agency action. As it stands, state and local governments across the country are at the mercy of the slightest whiff of agency consideration, as stated by nothing more than a letter from an agency general counsel. Certainly, if the values of federalism are to survive, something more is required to preempt the historic authority of state and local governments.

SUMMARY OF ARGUMENT

The Petition is correct that there is a circuit split about the law of preemption as it applies to the FCC and the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (TCA) specifically. There are two clear lines of authority interpreting the preemptive power of the agency. In this case, the Ninth Circuit applied a standard that turns federalism on its head. This Court should grant review and, at a minimum, adopt a standard that requires a clear statement in a

notice and comment proceeding before the FCC may assert any preemptive effect from its regulation.

ARGUMENT

I. DECISIONS INTERPRETING THE PREEMPTIVE EFFECT OF THE TCA ARE IN CONFLICT.

Petitioners are correct that the circuits are split on the appropriate standard to apply when determining whether state law has been preempted by the TCA.

In Petitioners' case, the court held in effect that a "federal agency's policy can pre-empt state law." *Lipschultz v. Charter Advanced Servs.*, 140 S. Ct. 6, 7 (2019) (Thomas, J., joined by Gorsuch, J., concurring in the denial of certiorari). Despite statutory text that included no express preemption authority covering wireless *devices* as opposed to wireless *facilities*, 47 U.S.C. § 332(c)(7)(B)(iv), and statutory text that included an explicit "no implied effect" clause, 47 U.S.C. § 152 note ("[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments"), the court held that Petitioners' state law tort claim had been impliedly preempted by the "FCC's purposes and objectives in promulgating its guidelines." Pet'rs' App. 31a. The question, according to the Ninth Circuit, was "whether the *federal agency* meant to pre-empt state law," *id.* (emphasis added), not whether Congress' statute did.

This was the same approach applied in the District Court in the case litigated by Amicus. *See CTIA - The*

Wireless Ass'n v. City of Berkeley, 487 F. Supp. 3d 821 (N.D. Cal. 2020). There too, the question was whether the agency intended to preempt state law, not whether Congress did. But in Amicus' case, that intent was inferred not from any rulemaking, or any procedure that afforded Amicus the opportunity for notice and comment. Instead, that intent was inferred from a letter, apparently requested by a party to the litigation, from the general counsel of the FCC. That letter, the District Court held, demonstrated that the ordinance "overwarn[ed]" consumers about cellphone radiation. *Id.* at 834. Because the court concluded that the FCC was "tasked with balancing the competing objectives of ensuring public health and safety and promoting the development and growth of the telecommunications network and related services," a letter from the general counsel of the FCC was sufficient to identify a disturbance in that "balance," and displace even complementary local regulations. *Id.* at 833.

The Ninth Circuit's practice is the most extreme in a line begun by the D.C. Court of Appeals and continued in the Third Circuit. In *Murray v. Motorola, Inc.*, 982 A.2d 764 (D.C. 2009), the court found preemption for state law tort claims not in the statutory text, but in the comments of an FCC "rulemaking process." *Id.* at 775. Because the court found it was the FCC's purpose to strike a "balance" between safety concerns and market needs, the court held the FCC's order preempted a state-law safety claim. *Id.* at 776. That rule would not, however, preempt a state-law misrepresentation claim. *Id.* at 781–84.

The D.C. Court of Appeals' approach was then expanded by the Third Circuit in *Farina* v. *Nokia, Inc.*,

625 F.3d 97 (3d Cir. 2010). There the court held that *all* state-law tort claims were impliedly preempted by the intent of the FCC's orders, because, as the court held, all such claims would affect the "balance" intended to be struck by the FCC's regulations. *Id.* at 133–34. That need to "balance" competing objectives was found not in the text of the statute. Instead, careful mining of the legislative history led the Third Circuit to conclude that Congress had intended the agency to possess the power to preempt any state law that might be found to affect that "balance." *Id.* at 124, 132.

This "balance"-preserving practice of these courts is fundamentally different from the approach in the Fourth Circuit. In *Pinney v. Nokia, Inc.*, 402 F.3d 430 (4th Cir. 2005), the court concluded, after examining the statute, that there was no "sweeping congressional objective" of "achieving preemptive national RF radiation standards for wireless telephones." *Id.* at 457–58. Indeed, to the contrary, as that court concluded, the "complete absence" of any textual basis for preemption shows that Congress did not intend the FCC to set preemptive national standards for any regulation that might affect cellphones. *Id.* at 457.

The extremism of the opposite rule is demonstrated in the case Amicus was forced to litigate. The regulation at issue in that case did not affect the manufacturers of cellphones, or the siting or character of cellphone facilities, or even the exposure of manufacturers to tort liability. Instead, it simply required retailers of cellphones — actors not regulated by the FCC — to provide a one-page flyer that essentially directed consumers to read the manual provided with

their cellphone to understand the risks from cellphone radiation. That information was held by the Ninth Circuit to be neither false nor misleading. *CTIA - The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 848 (9th Cir. 2019). Nonetheless, though it simply echoed the information buried in cellphone manuals, it was held by the District Court to upset the policy "balance" assertedly struck by the agency, if only in a general counsel's letter. *CTIA - The Wireless Ass'n v. City of Berkeley*, 487 F. Supp. 3d 821, 833–34 (N.D. Cal. 2020).

How true and non-misleading information could be "overwarning" was not explained by the general counsel. *See id.* at 827, 832. Perhaps the FCC believed consumers would have already read the warning once, and once was enough. Or that most would not even notice the warning, and that was the FCC's intent, so that drawing attention to the unread warning would constitute "overwarning." Regardless, the FCC had made no findings about how much "warning" their required information had achieved. *Id.* (The City by contrast had provided survey data to demonstrate that very few had any knowledge of the FCC warnings.) The FCC provided no metric for knowing when additional truthful information transformed an adequate warning into overwarning. *Id.* Instead, the mere possibility of overwarning, as suggested not by agency rulemaking or any notice-and-comment proceeding, but instead by a simple letter from the general counsel, was held sufficient to displace local law. *Id.* at 834.

II. THE STANDARD APPLIED BY THE NINTH CIRCUIT WRONGLY RESTRICTS STATE AUTHORITY WITHOUT ANY CLEAR STATEMENT BY THE FCC.

The Ninth Circuit views the judgment about whether to preempt state regulation as within the discretion of the FCC. Because it reads the FCC as having been given the power to "balance" safety concerns with the economic needs of the cellphone industry, any state regulation that might affect that "balance" is deemed preempted. Pet'rs' App. 27a–28a.

For the reasons offered by the Petition, this power is plainly not within the meaning of Congress' statute. The Ninth Circuit grounded its analysis on the general purpose clause of the 1934 Act. Pet'rs' App. 27a–28a. Yet nothing in that clause, or in the 1934 Act generally, requires the FCC to "balance" anything regarding cellphones, a technology that would become dominant only a half century later.

Amicus, however, would suggest an additional reason why such an inference should not be drawn: federalism. Petitioners rightly argue that traditional police powers should not be preempted unless Congress makes its intent "clear and manifest." Pet. 31 (citing *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008)). That same principle should apply even more strongly to preemption by the FCC. The FCC should not be permitted to preempt state regulation by implication. If the agency intends its regulations to displace state regulation, or if it intends its regulation to occupy the field of even complementing state regulations, the

agency must be obligated to state that conclusion directly in a notice and comment proceeding. States should not be forced to litigate over the preemptive implications of FCC rules that say nothing about preemption.

In the case affecting Amicus, the FCC had not expressly displaced complementing warnings to consumers. The agency's 2019 Order held that additional warnings were not required; it did not address whether they would be permitted. *CTIA - The Wireless Ass'n v. City of Berkeley*, 487 F. Supp. 3d 821, 827, 832 (N.D. Cal. 2020). Yet the District Court "elevate[d] [an] abstract and unenacted legislative desire[] [to avoid 'overwarning'] above state law," *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1907 (Gorsuch, J., plurality opinion) — based not on any notice-and-comment proceeding, but upon a letter of the general counsel, purporting to represent the position of the agency.

Even if the agency has the power to preempt state law under the TCA, this Court should direct that it should only be held to have achieved that preemptive effect when it states its intent expressly. Courts should not permit the agency to "pile inference upon inference," *United States v. Lopez,* 514 U.S. 549, 567 (1995), to conclude that even the most traditional exercise of state police power has been preempted *sub silentio* by the FCC.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari, and reverse the decision of the Ninth Circuit.

Respectfully submitted,

FARIMAH BROWN
BRENDAN DARROW
BERKELEY CITY
ATTORNEY'S OFFICE
2180 Milvia Street,
Fourth Floor
Berkeley, CA 94704
(510) 981-6998

LAWRENCE LESSIG
Counsel of Record
1563 Massachusetts Ave.
Cambridge, MA 02138
lessig@lessig.law

AMANDA SHANOR
3730 Walnut Street
Philadelphia, PA 19104
shanor@upenn.edu