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

BRIEF FOR CHILDREN'S HEALTH DEFENSE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Other Authorities

Federal Administrative Rules

Federal Agency Decisions

INTEREST OF AMICI CURIAE [1]

Children's Health Defense (CHD) is a national non-profit 501(c)(3) organization. CHD has no parent corporation. No publicly held company has a ten percent or greater ownership interest in CHD. CHD's mission is to end the epidemic of children's chronic health conditions by working to eliminate harmful exposures to environmental toxins, obtain justice for those already injured, and promote protective safeguards. CHD is involved in litigation before state and federal courts where implied federal agency regulation preemption over state health, safety and consumer laws is a significant issue.

The California Brain Tumor Association is a national non-profit 501(c)(3) organization. California Brain Tumor Association HD has no parent corporation. No publicly held company has a ten percent or greater ownership interest in California Brain Tumor Association. California Brain Tumor Association's mission is to prevent primary brain tumors through dissemination of information on causation, including those caused by wireless devices.

Wired Broadband, Inc. (WBI) is a 501(c)(3) non-profit corporation. WBI has no parent corporation. No publicly held company has a ten percent or greater ownership interest in WBI.

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[1] Counsel certifies that amici curiae gave notice of intent to submit this brief at least 10 days prior to filing. No person or entity other than the named amicus, their members or counsel has (1) paid in whole or in part for the preparation of this brief; or (2) authored in whole or in part this brief.

WBI's mission is to advocate safe technology for the public, for wired solutions for broadband data transfer, and in support of fiber optics and its proven performance as the fastest, most secure, cost effective, energy efficient, and environmentally safe means of providing increased capacity of broadband to the public, public schools, business, government, medical facilities and industry.

Consumers for Safe Cell Phones (CSCP) is a 501(c)(3) organization that educates consumers as to ways to reduce microwave radio frequency radiation (RFR) exposure from cell phones, tablets, WIFI routers and other wireless devices. CSCP has no parent corporation. No publicly held company has a ten percent or greater ownership interest in CSCP. CSCP's work centers on the fact that cell phones and associated cellular infrastructure emit non-ionizing RFR that has been shown by thousands of peer-reviewed studies to pose biological risks, including cancer, at or below the FCC's exposure limits.

Connecticut for Responsible Technology (CTRT) is a grassroots unincorporated not-for-profit organization, whose mission is to educate and promote safe technology through town and municipal awareness, legislative actions to limit the excessive exposures to EMF/EMR in our communities and schools.

Coloradoans for Safe Technology is an unincorporated not-for-profit organization that seeks to educate the public, and public representatives about the risks and downsides of

wireless technology and to promote the implementation of safe, efficient, alternatives.

National Health Federation (NHF) is a national non-profit 501(c)(4) organization. NHF has no parent corporation. No publicly-held company has a ten percent or greater ownership interest in NHF. The Mission of the National Health Federation includes protecting the health rights and freedom of individuals and healthcare practitioners.

The Alliance for Microwave Radiation Accountability, Inc., a non-profit organization working on behalf of the victims of Microwave Radiation Syndrome. We are registered as a corporation in the State of New York. We do not have 501(c)(3)status. We have no parent corporations or other ownership.

MocosafeG.org is a group of Montgomery County, MD residents who value safer technology, safer Internet access, and safer cell phone service for people who people who live, work, shop, or visit our County. We research, support, and promote wired and fiber technology infrastructure and devices. We encourage critical evaluation about how 4G and 5G cell antennas, cell poles, and cell towers are placed in environments where all living things exist and co-exist. We also strive for wireless facility zoning and code compliance that reflect maximum protections and provisions.

SUMMARY OF ARGUMENT

This case presents an important recurring question of federal law that requires resolution by the Court. The Petition should be granted.

Courts should first ensure Congress intended to grant agency preemption powers on the subject at hand, and then find preemption by regulation only when the agency has far more clearly expressed an intent to preempt within a rule or order that has been promulgated through appropriate agency proceedings.

In this case, the FCC's intention to *not preempt* state tort, consumer and health and safety laws touching emissions from devices *other than* personal wireless facilities is clear. The Ninth Circuit's contrary opinion was erroneous and must be corrected.

ARGUMENT

I. How to Analyze Implied Obstacle Conflict Preemption

All parties agree that this matter is about "implied obstacle conflict preemption." *See* App. 27a ("the conflict between the FCC's RF radiation regulations and plaintiffs' state law claims poses a sufficient obstacle to the full accomplishment of the FCC's objectives).[2] Petitioners refer to the issue as "purposes-and-objectives" preemption. Petitioners state that this case presents "a golden opportunity to resolve a deeper divide at the intersection of our

[2] Amici will therefore not address express, field or "impossibility" preemption doctrines.

federalism and the separation of powers—a divide over whose intent counts for preemption and how judges should discern that intent." Petition p. 1. The Court should require that lower courts first ensure Congress intended to grant agency preemption powers on the subject at hand, and then find implied preemption by regulation only when the agency clearly expressed an intent to preempt as part of a rule or order that has been promulgated through appropriate agency proceedings.

Petitioners correctly state that for agency regulation purposes-and-objectives preemption, the principal guiding source of authority is Congressional intent expressed through the "text and context of the law in question." Petition at 1, 4. Here, the "law in question" has component parts: two statutes (the Communications Act of 1934, as amended,[3] and the National Environmental Policy Act[4]), and two sets of interrelated FCC-promulgated "rules,"[5] one embodied in 47 C.F.R. Part 1, subpart I, which institute "Procedures Implementing the National Environmental Policy Act of 1969," and the other, in 47 C.F.R. Part 2, subpart J, setting out equipment authorization rules.

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[3] Communications Act, 47 U.S.C. § 151 et seq.

[4] National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, et seq.

[5] *See* 5 U.S.C. § 551(4).

A. Statutory Preemption

The first step is a statutory analysis, in this case as to NEPA and the 1934 Communications Act as amended in pertinent part in 1996. Do the statutes convey an intent to preempt? What are the "purposes and objectives" set forth in the statute? What is the stated scope? To the extent there remains ambiguity, what assistance does legislative history, such as committee and conference reports and floor debate offer? What is the context behind the legislation? These are reliable guideposts for determining the then-Congress' legislative intent years after passage.

There can be no claim that NEPA provides any implied preemptive force. All agree: NEPA is procedural. Assuming arguendo that the pre-1996 Communications Act impliedly granted preemptive power to the Commission regarding RF-related health and safety, a position Amici do not concede, the question then is whether FCC's regulations in issue were promulgated pursuant to the Commission's substantive pre-1996 47 U.S.C. Title III authority. Then there is the question of the expressly and impliedly preemptive scope of the 1996 amendments about state health, safety and consumer laws.[6]

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[6] There are substantial arguments that the pre-1996 Communications Act did not grant implied preemptive authority in this area, and Amici reserve the right to make those arguments during the merits phase. Amici demonstrate below that the 1996 amendatory statute did not expressly or impliedly preempt state laws *as to devices other than personal wireless service facilities*.

B. Implied Agency Regulation Preemption

Any judicial "purposes-and-objectives preemption" analysis for an agency's legislative rule must, as with a statute, start and end with the regulation. If there is ambiguity, then the agency's promulgating order can serve the same function as legislative history. The agency's contemporaneous decisions interpreting and applying the regulation may also shed light, using post-*Kisor*[7] *Auer* deference.[8]

Agencies rationalize, justify and promulgate regulations using the narrative and analysis in an order, but their *quasi*-legislative action manifests only through the actual rules. It is the *regulation*, not the promulgating order, that has preemptive effect, and it is the *regulation* that should be the primary object of analysis when, as here, the court case is not a facial challenge to the regulation pursuant to the Administrative Procedure Act (APA)[9] but instead involves the affirmative defense of preemption in private litigation. App. 20a-21a. In this context the promulgating order in a rulemaking proceeding is merely legislative history and a secondary resource. To the extent the promulgating order does not speak to the preemption question, contemporary interpretive orders applying the regulation in an adjudication

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[7] *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

[8] *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

[9] Administrative Procedure Act, 5 U.S.C. § 551 et seq.

also may be useful, and even entitled to *Auer* deference, when appropriate.

II. The Regulations in Issue

The Ninth Circuit concluded, erroneously, that the regulations in issue have all-encompassing preemptive effect as against injured mobile device users, when in fact the regulations merely bind those regulatees who seek *Commission action* that might affect the environment before any agency action and then again when the agency decides whether to grant or withhold a license or equipment registration under its Title III authority.

A. NEPA Rules

The environmental processing rules do not directly control whether the FCC will ultimately grant or deny an application; they merely ensure that the Commission is aware of the environmental consequences of contemplated action, whatever that may be. Indeed, on their face they do not determine "safety" or even set a floor or ceiling for emissions. Regulatees can seek Commission action by way of equipment approval of devices that emit at lower and even higher levels than those stated in 47 C.F.R. §§ 1.1307 and 1.1310; it is just that if the emissions exceed the stated levels, then an Environmental Assessment (EA), Finding of No Significant Impact (FONSI) or Environmental Impact Statement (EIS) will be required before the Commission will take action and consider the application. The FCC can then decide whether to approve the equipment registration application despite the excess. App. 13a-14a. The levels are

there to determine whether a categorical exemption applies or if, instead, an EA or EIS must be performed. They are *permissive* but also *presumptive* for this purpose. They are not, however, *definitive* for either NEPA or equipment approval purposes.

The NEPA regulations appear in 47 C.F.R. Part 1 ("Practice and Procedure"), Subpart I ("Procedures Implementing the National Environmental Policy Act of 1969"). They are procedural on their face, as they are found in the Commission's *procedural rules*. 47 C.F.R. § 1.1301 (Basis and Purpose) state the purpose: to "… implement Subchapter I of [NEPA]."[10] 47 C.F.R. § 1.1303 (Scope) also could not be clearer about what the regulations address: "… all *Commission actions* that may or will have a significant impact on the quality of the human environment." (Emphasis added).

The remaining 47 C.F.R. Part 1, Subpart I rules set out the "*Commission actions* … which are categorically excluded from environmental processing." (47 C.F.R. § 1.1306), the *Commission actions* "that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared" (47 C.F.R. § 1.1307), how the *Commission* will assess those *actions* that "may

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[10] As the Ninth Circuit noted, NEPA does not mandate particular results but imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions. App. 7a, 45a (quotation marks removed).

have a significant environmental effect" using the environmental assessment to decide whether to issue a "Finding of No Significant Impact" (and therefore end environmental processing) or to require an Environmental Impact Statement (47 C.F.R. § 1.1308) before it will take any *Commission action*.

These rules are about the FCC's implementation of NEPA, a purely procedural statute governing how federal agencies are to assess the environmental impact of agency actions. They have no other purpose, objective or scope and are not impliedly preemptive.

B. Equipment Rules

The twist is that the FCC imported its NEPA Part 1, Subpart I "exposure evaluation" principles into the equipment authorization rules. The Ninth Circuit did not express this well, but the "substance," and the place where the FCC is exercising its organic and substantive Congressional authority,[11] appears in the

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[11] Equipment registration grants do serve as a 47 U.S.C. § 301 "License for radio communications or transmission of energy." It is indeed an aspect of the Commission's § 303(e) authority to "[r]egulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein." App. 5a, 22a. Nothing in §§ 301 or 303(e), however, claim preemptive effect over health, safety, consumer, or tort laws relating to claims of injury, nor is it obvious that such state laws could present an obstacle to achievement of their purposes-and-objectives. That is why the FCC has historically refused to preempt state laws when asked to do so, both before and after 1996. Part IV, *infra*.

Commission's equipment authorization rules. These regulations are in a different part of 47 C.F.R.: Part 2, Subpart J ("Equipment Authorization Procedures"), which address a host of issues beyond emissions levels.

The Part 2 equipment registration regulations have an express basis and purpose statement, in 47 C.F.R. § 2.901: "In order to carry out its responsibilities under the Communications Act and the various treaties and international regulations, and in order to promote efficient use of the radio spectrum …."

The "exposure evaluation" rules for mobile devices are in 47 C.F.R. § 2.1091. They do not even mention consumer health or safety and, as noted, they are *permissive* and *presumptive* but not *definitive*. Regulatees can seek Commission equipment approval of devices that emit at higher levels. To do so they would perform a NEPA EIS (App. 14a) and seek a "good cause" waiver from the presumptive levels pursuant to 47 C.F.R. § 1.3 ("Suspension, amendment, or waiver of rules").

The rules regulate permittees, but they do not purport to regulate the public that uses registered devices in a manner that would limit users' state-law personal rights. Facially, they do not appear to have either the purpose or objective of eliminating the public's common law or state law rights and remedies.[12] Nor does any FCC rule

[12] The courts have held that state and local jurisdictions may not regulate "interference" but that is because the state/local entity is regulating a conflict between two emitting devices. Here, the claim is that the regulations deprive users of their

provide any method for recompense for past personal injury or economic damages. The lack of a commensurate federal remedy strongly argues against preemption of a state-level remedy. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984); *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 663-64 (1954); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

C. Ninth Circuit Looked Past the Rules and Applicable Orders

The Ninth Circuit nonetheless found that the FCC's "emissions" regulations impliedly preempt state health and safety laws governing cell phone (radio frequency) radiation emission levels. It did so even though the very order promulgating the Part 1 and Part 2 regulations in 1996 and 1997 expressly *refused* to preempt state law over consumer devices after requests that the agency do so, and contemporaneous orders thereafter also disclaimed any intent to preempt. It did so even though the FCC has—before and after the 1996 amendments—consistently declined to preempt state health and safety laws for consumer devices except when given express preemptive power. It did so even though no statute or agency regulation provides any remedy to users for damages they suffer.

The question, according to the Ninth Circuit, is whether the federal agency "meant to preempt

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state law rights relating to injury from the device, *i.e.*, that the regulation regulates *non-regulated* parties by stripping their state law right to damages for injuries they sustain.

the state law." App. 26a. To answer this, the court resorted to inference-drawing to determine whether the FCC *impliedly* invoked substantive *implied* preemptive authority by trying to *infer* agency intention not expressed in the purposes, objectives or scope of the regulation or the agency orders promulgating and/or interpreting the regulation. The lower court held that the Petitioners' claims would "disrupt the balance between public safety and the public's access to new telecommunications" that the FCC had "struck" in its NEPA and equipment registration/authorization rules, App. 28a, and thus "found" preemption, even though the relevant and contemporaneous agency orders expressly disclaimed an intention to preempt in this area.

III. The 1996 Congress Granted Preemption for Personal Wireless Service Facilities but Not Mobile Devices

Any preemptive intent must be discerned through the legislative vehicle and—if necessary—the purposes-and-objectives stated in related legislative history surrounding the law. Here, Congress intentionally inserted multiple savings clauses in the Communications Act, both before 1996 and then again in 1996. App. 5a, 6a. These clauses, while not determinative, cannot be casually disregarded. Nor can the fact that Congress has taken care to specifically list discrete preemptive powers when it wanted the Commission to have them.

For example, Congress expressly prohibited state and local *zoning* authorities from

"regulat[ing] 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." 47 U.S.C. § 332(c)(7)(B)(iv)(emphasis added). This subsection was added to § 332(c)(7) by Sec. 704(a) of the Telecommunications Act of 1996, 110 Stat. 56, 152, 104 P.L. 104. Sec. 704(b) (codified in 47 U.S.C. § 332, note), then required the FCC to complete its then-ongoing proceeding "to prescribe and make effective rules regarding the environmental effects of radio frequency emissions." Sections 704(a) and (b) worked in tandem: Subsection (b) required the FCC to finish its NEPA emissions rulemaking, and (a) preempted *local zoning*-based emissions regulation inconsistent with those rules *for personal wireless facilities* only.

The *noscitur a sociis* rule of construction tells us that Section 704(b) was not intended to lead to "implied obstacle conflict preemption" through the FCC emissions regulations for *all devices*. It was the foundation for the *express preemption* in Section 704(a), which applies only to *local zoning-based emissions regulation* over *personal wireless facilities.* This is confirmed by H.R. Rep. No. 104-204, 94-95 (1996), where Section 704(a) and (b) are discussed in tandem and the only "equipment" that is mentioned is "personal wireless facilities."

The 1996 Congress also granted express preemptive powers relating to state-level public and private restrictions of "over-the-air receiving

devices" ("OTARD," which are end-user non-mobile transmitting and receiving devices) in Pub. L. 104–104, title II, § 207, Feb. 8, 1996, 110 Stat. 114.[13]

The 1996 Congress gave express preemption powers over personal wireless service facilities, but it did not go farther and include the "mobile devices" that connect to personal wireless service facilities. This, in combination with the multiple savings clauses, strongly implies no preemptive intent for mobile devices.

IV. The FCC Has Repeatedly Refused to Preempt State Law for Injury From Mobile Devices

The difference in treatment Congress gave to personal wireless service facilities one the one hand and other mobile devices on the other surely gave pause to the FCC, because when the industry asked for preemption of state law for equipment other than personal wireless facilities, and separately sought state tort law preemption over end-user "OTARD" antennas, the Commission said no. Several times, before and after 1996.

The FCC so declined in the 1996 RF Order that rests at the heart of the Ninth Circuit's decision. *See In re Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 11 FCC Rcd 15123, 15183, ¶¶ 164-168 (1996) ("1996 Order"). One of the commercial parties sought reconsideration of this refusal and the Commission again said no for any equipment other than personal wireless service facilities. *See*

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[13] The FCC soon thereafter implemented these restrictions in its own rules. *See*, 47 C.F.R. §§ 1.1307(e), 1.4000.

In re Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934; Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation; Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Amendment of the Commission's Rules to Preempt State and Local Regulation of Commercial Mobile Radio Service Transmitting Facilities, 12 FCC Rcd 13494, 13529, ¶¶ 88, 90 (1997) (1997 RF Order). The Ninth Circuit ignored these statements so it could nonetheless conclude there is preemption. App. 11a-13a.

Similarly, the FCC refused to preempt state tort and consumer law remedies for "OTARD" antennas. *In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, 13 FCC Rcd 18962, 18971, ¶ 15 (1998).[14]

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[14] … If we did not permit private safety-based restrictions, we would effectively be preempting portions of state tort liability law. Tort law provides property managers and their insurance carriers with a legitimate interest in safety matters and gives them an incentive to be professional in the imposition of restrictions. Safety standards associated with the insurance process are a traditional and respected means of protecting the public. Because homeowners' associations by definition are focused on the problems that face a particular area or development, we believe that they are in a unique position to assess the safety needs of their individual communities.

The Commission later found that 47 U.S.C. § 332 does not "generally preempt state court award of monetary damages based on state contract or consumer protection laws" in the context of a class action suit alleging false advertising, even for the personal wireless service that benefits from the restriction in § 332(c)(7)(B)(iv). *In the Matter of Wireless Consumers Alliance, Inc.; Petition for a Declaratory Ruling Concerning Whether the Provisions of the Communications Act of 1934, as Amended, or the Jurisdiction of the Federal Communications Commission Thereunder, Serve to Preempt State Courts from Awarding Monetary Relief Against Commercial Mobile Radio Service (CMRS) Providers (a) for Violating State Consumer Protection Laws Prohibiting False Advertising and Other Fraudulent Business Practices, and/or (b) in the Context of Contractual Disputes and Tort Actions Adjudicated Under State Contract and Tort Laws*, 15 FCC Rcd 17021 (2000), *recon denied*, 16 FCC Rcd 5618 (2001).

The FCC has consistently recognized the important role of the states in protecting health and safety and its own lack of expertise with respect to health matters. That is why the FCC, in its implementing and interpreting orders, has consistently refused formal requests for an order or rule preempting state law in connection with exposure related matters, except when Congress itself specifically inserted pre-emptive authority

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(Notes omitted).

like it did for personal wireless service facilities in 47 U.S.C. § 332(c)(7)(b)(iv), a provision all agree is inapplicable here.

The agency's official reluctance to preempt state law predates the 1996 amendment, and this indicates the Commission did not intend to preempt under its 1934 act Title III authority either. The FCC noted in a 1979 Notice of Inquiry, **"[w]e emphasize that the information we request … is not for the purpose of our promulgating radio frequency radiation health and safety standards. That is a function of the health and safety agencies**." *In re the Responsibility of the Federal Communications Commission to Consider Biological Effects of Radio Frequency Radiation When Authorizing the Use of Radio Frequency Devices*, 72 FCC 2d 482, 495, ¶ 33 (1979)(emphasis added). The Ninth Circuit cites this order, but it somehow still concludes the regulation impliedly preempts. App. 28a.

In a related 1984 Notice of Proposed Rulemaking, the FCC emphasized its own lack of expertise in this area, stating, "**we would like to stress that the Commission has neither the expertise nor the primary jurisdiction to promulgate health and safety standards for RF and microwave radiation**." *In re Responsibility of the Federal Communications Commission to Consider Biological Effects of Radiofrequency Radiation when Authorizing the Use of Radiofrequency Devices*, 89 FCC 2d 214, 251, ¶ 183 (1982) (emphasis added). The Commission went on to add,

> We are aware of the adoption of regulations in this area by local and state authorities, particularly in view of the present lack of a federal standard for exposure of the general population to RF radiation. **In most cases we see no significant conflict between local standards of which we are aware and our responsibility 'to make available . . . a rapid, efficient . . . wire and radio communication service** . . .'.

89 FCC 2d at 253, ¶ 188 (internal citation omitted; emphasis added). The lower court cited to this order, but claims it supports implied preemption. App. 8a, 23a.

In the 1985 report and order that followed, the FCC dismissed commentators' concerns about varied state and local RF exposure standards and refused to preempt such standards. *See In re Responsibility of the Federal Communications Commission to Consider Biological Effects of radiofrequency radiation when authorizing the use of radiofrequency devices*, Report and Order, 100 FCC 2d 558 at ¶¶ 42-43 (1985) ("1985 RF Order"). The Commission wrote,

> The issue of federal preemption of such local and state RF standards was a recurring theme in many of the comments. Several of the respondents stressed the need for a federal radiation standard to preempt possibly inconsistent and nonuniform

> state and local regulation of RF radiation. Others called for the issuance of a Commission policy statement on federal preemption of state and local RF exposure standards that may adversely affect operations and public availability of interstate telecommunications services.
>
> **We have reviewed these comments closely and given the matter serious consideration. However, we do not believe it is necessary at this time to resolve the issue of federal preemption of state and local RF radiation standards**…

Id. (emphasis added). The court below cites this order as supporting the proposition preemption had already occurred. App. 9a, 10a, 23a, 24a.

In a related 1990 order, the FCC again denied a request to preempt state and local regulation of RF radiation standards affecting communications services to the public. *In re National Association of Broadcasters Petition for Issuance of a Declaratory Ruling to Preempt State and Local Regulation of RF Radiation Standards that Affect Communications Services to the Public*, 5 FCC Rcd 486 (1990). The Commission noted, "Any specific problems warranting action by the Commission can be brought to our attention on a case-by-case basis." *Id.* at ¶ 3.

In 1996, the FCC issued the 1996 Order at the heart of this case, adopting new RF radiation standards. *See 1996 Order*. The Commission

considered comments from more than 100 parties, many of whom requested that the Commission establish "[f]ederal preemption of state and local regulations concerning RF radiation exposure." *1996 Order* at ¶ 164 and Appendix D.

The portion of the 1996 Order titled *Federal Preemption* notes, "[i]n the past, parties have requested that the Commission preempt state and local authority over RF exposure matters. **To date the Commission has declined to preempt on health and safety matters**." 1996 Order at ¶ 164 (emphasis added). The 1996 Order continues, "the Commission has hesitated to intrude on the ability of states and localities to make regulations affecting health and safety." 11 FCC Rcd 15182, ¶ 166; *see also* ¶ 167. The Order concludes by denying petitions that requested a broad-based preemption policy to cover all transmitting sources. 11 FCC Rcd at 15183, ¶ 168.

In 1997, responding to petitions to reconsider aspects of the 1996 order—including requests to "broaden [the FCC's] authority to preempt state and local regulations concerning RF exposure"—the FCC again declined to preempt. 1997 RF Order, 12 FCC Rcd at 13529, ¶¶ 4, 88, 90. Rejecting an argument that the Commission should "specify a federal rule of liability for torts related to RF emissions," the 1997 RF Order states, "we believe that such action is beyond the scope of this proceeding and **we question whether such an action, which would preempt too broad a scope of legal actions, would otherwise be appropriate**." 1997 RF Order at ¶ 90 (emphasis added). The

Ninth Circuit somehow reads this express preemption refusal as an implied preemption indicator. App. 11a-13a.

FCC orders issued after 1997 in connection with RF emissions rules continue this theme. In 2013, the FCC issued a notice of inquiry soliciting public comments about whether the RF emissions rules in the 1996 Order should be reassessed. *In re Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies*, 28 FCC Rcd 3498 (2013). Notably, the notice did not raise the question of preemption, and the Order that was issued to resolve the notice left the Commission's prior orders on preemption intact. *See In re Proposed Changes in the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields*; *Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies; Targeted Changes to the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields,* 34 FCC Rcd 11687 (2019). The 2019 order clearly expressed that states are preempted from regulating personal wireless service *facilities* based on RF emission considerations. 34 FCC Rcd at 11740, ¶ 114. The FCC, however, did not disturb its previous orders rejecting state law preemption in connection with RF emissions for all matters other than personal wireless service facilities. Nonetheless, the court below thought this non-action in 2013 and 2019 represented an implied statement of already-

existing implied preemption. App. 14a-17a, 23a-24a, 28a.

The Ninth Circuit decided—on little more than intuition—that the FCC did not mean what it said when it promulgated its emission regulations, and, in fact, had a secret but exactly opposite intent all along. The lower courts' disregard of the FCC's multiple refusals to preempt (including within the 1996 Order itself) suggests that courts are in critical need of this Court's definitive guidance.

V. This Court Should Clarify that an Agency's Intent to Preempt Must Be Sourced From Explicit Statements in Officially-Promulgated Agency Regulations and Orders

To find that the FCC "meant" to preempt state law in its 1996 Order, the Ninth Circuit ignored the long history of unambiguous FCC orders against preemption and relied in part on the artful statement prepared by the FCC for litigation purposes in this case. App. 18a-19a. This *post-hoc* search for hidden intent was misplaced.

An agency regulation promulgated through an agency proceeding conducted pursuant to the Administrative Procedure Act, or other authorizing statute, at least arguably qualifies as being "made in pursuance" of the U.S. Constitution. *See Fidelity Federal Sav. And Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982) ("Federal regulations have no less preemptive effect than federal statutes."). And the orders that promulgate the rule after APA-consistent procedures have some standing; they are akin to the legislative history behind a statute and provide the rationale and substantial evidence

basis for the adopted rule. From both a constitutional perspective and a policy perspective, an express statement of the intent to preempt (or, as here, an intent to *not* preempt) made as part of the actual order promulgating the rule offers foundation for finding whether an agency "meant" to preempt state law. In other words, the regulation may sometimes not expressly state a preemptive intent, but the promulgating order should. At minimum, there should be some contemporaneous interpretation that clearly provides preemptive effect.

Intention clearly derived from the legislative rule itself or an express statement to preempt in an order provides a clear, textual basis upon which a court may find an agency's intent to preempt, thus reducing the risk that a court will displace state law based on speculations or inferences about an agency's intent. *Wyeth v. Levine*, 555 U.S. 555, 588 (2009) (Thomas, J., concurring) (warning against finding preemption based on "freewheeling, extratextual, and broad evaluations" of the purposes-and-objectives of federal law, and noting that to comply with the constitution, evidence of preemptive purpose must be sought in the text and structure of the provision at issue). Additionally, a rule or order promulgated under the APA is surrounded by procedural protections[15] that help to

[15] *See generally*, 5 U.S.C. § 553(c) (requiring agency to consider views and arguments of interested persons in rulemaking); 5 U.S.C. § 553(b) (describing notice requirements for formal rulemaking); 5 U.S.C. § 555(e) (requiring agency to explain denials of requests in agency

ensure the weighty decision to displace state law is well-considered. *Wyeth*, 555 U.S. at 577 ("The weight we accord [an] agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness").

Further instructive as to how and why a formal agency rule or order is a more substantial foundation for a court finding of preemption is the 2003 FCC order dealing with preemption of a county zoning ordinance. *See In re Petition of Cingular Wireless L.L.C. for a Declaratory Ruling that Provisions of the Anne Arundel County Zoning Ordinance are Preempted as Impermissible Regulation of Radio Frequency Interference Reserved Exclusively to the Federal Communications Commission*, 18 FCC Rcd 13126 (2003) ("2003 Cingular Preemption Order"). The 2003 Cingular Preemption Order held, using field preemption analysis, that specific sections of the Communications Act of 1934 preempted a county ordinance requiring, as a condition of receiving a zoning certificate, that owners and users of telecommunications facilities show that their facilities would not interfere with county public safety communications systems. *Id.* at ¶¶ 1, 27.

Before issuing the order, the Commission received thirteen comments and four reply comments, as well as filings by four local governments and the Local and State Government Advisory Committee. *Id.* at ¶ 9. The Order recites

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proceedings); 5 U.S.C. § 556 (requiring agency to maintain a full record of the proceedings that underlie its rulemaking decisions).

the history of the conflict leading up to the petition, *see id.* at ¶¶ 3-8, canvasses Commission and federal court decisions regarding federal preemption of state and local regulation of radio frequency interference, *see id.* at ¶¶ 12-17 and considers the county ordinance considering this precedent. *Id.* at ¶ 18. The Order describes and addresses in detail the county's arguments against preemption. *Id.* at ¶¶ 19-22. The Order discusses the ways the county's ordinance *actually* impedes wireless service in the county, *id.* at ¶ 24, and the ways the practical concerns raised by the county might be addressed despite a finding of preemption. *Id.* ¶¶ 25-26. In sum, the order demonstrates a depth of consideration and analysis that sets out the agency's justification for exercising implied preemptive authority.

If the rule is ambiguous the courts should require clear and direct indications of intent to preempt from agencies within their orders. We have that here, and all the signs point to non-preemption. The Ninth Circuit searched the FCC's orders trying to find preemptive mice when all it needed to do was recognize the anti-preemptive elephant-sized statements in those same orders. The Court should establish that clear statements are necessary and when they exist the courts should rely on those, not launch a purposes-and-objectives snipe hunt like that below.

CONCLUSION

The Court should grant the petition for certiorari in this case in order to provide essential guidance, so that in the future, lower courts first ensure Congress intended to grant agency preemption powers on the subject at hand, and then find preemption by regulation only when the agency has far more clearly expressed an intent to preempt within a rule or order that has been promulgated through appropriate agency proceedings.

In this case the FCC's intention to *not preempt* state tort, consumer and health and safety laws touching emissions from devices *other than* personal wireless facilities, consistent with the same distinction in the Communications Act is clear. The Ninth Circuit's divination exercise that led to a contrary opinion was erroneous and must be corrected.

Respectfully Submitted,

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