No. 22-698

In the Supreme Court of the United States

ANDREW COHEN, et al.,
Petitioners,

v.

APPLE, INC.
Respondent.

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

REPLY

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REPLY BRIEF FOR PETITIONERS

The decision below embraces a version of preemption in which the preemptive effect of an agency's order turns not on Congress's intent or the statutory or regulatory text, but instead on a freewheeling judicial hunt for purposes in informal agency commentary. This radical approach flouts this Court's precedent and our constitutional structure. Left to stand, it is a blueprint for implied purposes-and-objectives preemption run amok.

Apple acknowledges that the lower courts have long been divided over the question presented but insists that any split over the preemptive effect of the FCC's 1996 Order is too "shallow" or "stale" to justify review. It speculates—without explanation—that a conflict that has now persisted for over a decade will dissipate on its own. But just this month, another federal court in a different circuit confronted the same issue. After rejecting one circuit's view, and attempting to distinguish two others', it concluded that *some* claims were impliedly preempted, and that others were not. *See Walker v. Motorola Mobility LLC*, 2023 WL 3046518 (E.D. La. April 21, 2023).

This persistent and acknowledged split reflects a deeper doctrinal divide over whether and how the implied purposes and objectives of agency action may preempt state law. Despite this Court's repeated emphasis that it is *Congress*'s intent that is the touchstone of every preemption case, and despite this Court's warnings about the dangers of too readily implying obstacle preemption, courts have taken an agency's involvement as license to embark on their own open-ended inquiries into what purposes an agency might have had in mind when it undertook some long-ago action. This misguided approach

to preemption has nothing to recommend it. This Court should step in now and correct it.

I. The courts are intractably split on the question presented, and that split warrants this Court's review.

Apple now concedes that the courts have long been split over the preemptive effect of the FCC's 1996 Order. *Compare Pinney v. Nokia, Inc.*, 402 F.3d 430, 453, 457–59 (4th Cir. 2006), *with Farina v. Nokia Inc.*, 625 F.3d 97, 122–34 (3d Cir. 2010), *and Murray v. Motorola*, 982 A.2d 764, 775–85 (D.C. 2009). It dismisses that disagreement as "shallow" and unworthy of review. But there is no avoiding the fact that an FCC order affecting millions of cell phones has an entirely different meaning in different circuits, with no consensus in sight over how preemption should work under the telecommunications laws.

In an attempt to downplay the split, Apple suggests (at 16–17) that the D.C. Court of Appeals' decision in *Murray* can be reconciled with the Third Circuit's decision in *Farina* and the Ninth Circuit's decision below. True or not, there is no avoiding the fact that all these decisions, to one degree or another, dispatched statutory text in favor of an uncabined inquiry into agency purposes that purportedly could be unearthed after the fact from agency commentary. And there is no avoiding the fact that the Fourth Circuit has firmly rejected that approach, resting its decision instead on what Congress wrote in the statutes governing the FCC.

So Apple speculates that the Fourth Circuit might someday change its mind. It notes (at 18) that the Fourth Circuit reached its decision before the FCC began telling courts that the 1996 Order had preemptive effect, and suggests that it might therefore revisit that decision and

decide to defer to the agency's briefing on the issue. But the Fourth Circuit has now had ample time to revisit its decision in *Pinney*, and it has not done so. Just the opposite: It has explicitly reaffirmed *Pinney*'s interpretation of the Telecommunications Acts. *See Johnson v. Am. Towers, LLC*, 781 F.3d 693, 703 (4th Cir. 2015) (approving *Pinney*'s holding that the 1996 Act's "savings clause counsels against a finding that Congress intended to sweep aside all state claims in a particular area").

What's more, the disagreement among the lower courts is, contra Apple, far from "stale." Just this month, another court in a different circuit confronted this exact question. *See Walker*, 2023 WL 3046518, at *6–11. Believing that "[w]hat is a sufficient obstacle" for purposes of implied preemption "is a matter of judgment," the court, like the Third and Ninth Circuits and the D.C. Court of Appeal, went hunting for objectives that could preempt state law—not in the text of any statute, or even in the text of the 1996 Order, but rather in various other pieces of regulatory commentary. *Id.* at *9–10. It thus broke with the Fourth Circuit's careful attention to statutory text. But it also struck out anew, deciding that, "in light of the saving clauses, the historical role of the states in health and safety, and the state products liability statutes in existence at the time," certain defect claims were not impliedly preempted *Id.* at 10–11. As this decision illustrates, the breadth of the disagreement is only increasing. That alone is enough to justify this Court's review.

II. The lower courts' broader methodological divide over implied agency preemption also warrants this Court's review.

The split over the preemptive effect of the FCC's cell-phone radiation guidelines is also only the beginning. Thanks in part to confusion about the meaning of this Court's cases, the lower courts remain deeply divided over the proper methodological approach for discerning the implied preemptive effect of agency action. This is an "appropriate case" to clarify that persistent confusion. *Cf. Lipschultz v. Charter Advanced Servs.*, 140 S. Ct. 6, 7 (2019) (Thomas, J., joined by Gorsuch, J., concurring in the denial of certiorari) (recognizing the need for the Court to "consider whether a federal agency's policy can pre-empt state law").

Apple quibbles (at 21–22) with the examples on this score, attempting to downplay the disagreement in the lower courts. But it largely misses the point: While the precise details vary, the core problem is the same. Some courts privilege Congress, some privilege statutory text, and others are willing to neglect the plainest indications of congressional intent in pursuit of their own preferred understanding of agency purpose.

That methodological divide is evident in the very decisions that comprise this split: The Fourth Circuit trained its attention on Congress, while the D.C. Court of Appeals all but ignored it. *Compare Pinney*, 402 F.3d at 453, 457–59, *with Murray*, 982 A.2d at 775–85. And the Third and Ninth Circuits likewise embarked on their own freewheeling inquiries into legislative and regulatory history, plucking out the pieces they found relevant and discarding inconvenient statutory text. *See, e.g.*, *Farina*, 625 F.3d at 124 (relying on House and Senate Reports

addressing issues unrelated to cell-phone radiation to discern congressional objective of advancing uniformity); App. 7a (relying on 1979 FCC order to explain what balance the 1996 Order "intended to strike").

As the petition explained (at 20–26), nothing about this disagreement is academic. Implied purposes-and-objectives preemption already encourages courts to prioritize their own policy preferences over statutory text. But when extended to the *agency* context, all bets are off. Without guardrails, courts can—and do—trawl through the endless detail of an administrative record, stretching back years before or after a regulatory enactment, to unearth evidence of their preferred agency purpose.

Apple suggests (at 23) that sufficient constraints can be found in this Court's caselaw. But what it identifies only underscores the problem. The requirement that there be an "actual conflict" between a state regulation and an agency purpose is not especially meaningful if courts can unearth whatever implied purposes they wish from an agency record. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000). Likewise, the requirement that the agency action must fall "within the scope of the [congressionally] delegated authority" is no limit at all if that requirement can be satisfied by a general grant of rulemaking authority. *See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982). All the more so because Apple says only that the *action* must fall within the agency's delegated authority—without regard to whether the impliedly preemptive purpose that is later ascribed to that action did so.

And the balancing theory Apple derives from this Court's decisions is especially fraught. According to Apple (at 24–25), cases like *Geier* allow courts to find preemption

anytime Congress enacts a statute that confers broad rulemaking power on an agency and articulates a few general, hortatory objectives that the agency could decide to balance against one another.

That is not what *Geier* said. It explained that an agency action could preempt state law *only* when Congress specifically commanded the agency, in taking that action, to balance a particular set of objectives. 529 U.S. at 872; *see* 15 U.S.C. § 1392(a). It did not approve agency preemption on the same sort of theory without such a clear congressional command.

But Apple is not alone in its confusion. The majority side of the split on the question presented in this case—along with other courts across the country—shares its view. This Court should grant the petition to clarify that what it has repeatedly said about statutory preemption applies to agencies, too: Every preemption case must hew closely to congressional intent.

III. The Ninth Circuit's decision was wrong.

The Ninth Circuit's mistaken application of implied purposes-and-objectives preemption embodies many of these problems.

Apple does not defend the Ninth Circuit's view that a generic grant of rulemaking authority somehow suffices to convey to an agency the authority to displace state law. Rather, it says (at 28–29) that the Ninth Circuit *also* relied on the existence of a few generic, hortatory purposes sprinkled throughout the 1934 Act.

But the Ninth Circuit was not circumspect about its rule: So long as an agency was "statutorily authorized" to issue its regulation in the first place, the court said, it would "not focus on" "Congress's intent" at all, and

instead "ask whether the federal agency meant to preempt the state law." App. 26a. There is no way that is correct. Stacking "inference upon inference" about hidden agency desires found nowhere in the agency's actual regulation as a replacement for the words Congress itself used ignores "the legislative compromises actually reflected in the statutory text." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1908 (2019) (lead opinion of Gorsuch, J.)

And even if Apple is right that the court looked to generic statutory purposes to justify its decision, that is precisely our point: A court can always find generic purposes somewhere in a statute, but that comes nowhere close to demonstrating that it was Congress's clear and manifest intent that an agency displace any state law it wishes so long as it somewhere (or someday) invokes those purposes. An approach that sanctions—indeed, prioritizes—a court's own freewheeling judicial inquiry into what purposes an agency might have adopted risks displacing "perfectly legitimate state laws on the strength of 'purposes' that only [the court] can see." *Id.*

Apple itself seems to acknowledge as much when (at 30) it looks beyond the provisions the Ninth Circuit relied on. It suggests that 47 U.S.C. § 303(e) somehow conveys a preemptive mandate to the FCC when it comes to the "external effects" of an "apparatus." But there is a very good reason why the Ninth Circuit did not rely on that provision: Read in its entirety, it confers on the FCC the authority to regulate the *signal quality* of radio transmissions, not to regulate their radiological health effects. *See* 47 U.S.C. § 303(e) (the FCC may regulate radio equipment with respect to "the purity and sharpness of the emissions from each station and from the apparatus

therein"). That is why the FCC never cited § 303(e) when it promulgated its standards, and why the provision does not supply any indicia that Congress intended for the FCC's radiofrequency radiation procedures to be able to displace state law.

Nor can Apple explain away the Ninth Circuit's disregard for the rest of the statutory scheme—the express pre-emption clause where Congress made clear exactly when and how it wanted the FCC's radiofrequency radiation guidelines to preempt state law, and the express *anti*-preemption provisions that safeguard state law.

The most Apple can do is note (at 32) that these sorts of provisions cannot "bar[] the ordinary working of conflict pre-emption principles." But it is ordinary conflict preemption principles that require courts to examine the full "statutory scheme," including "the nature and scope of the authority granted by Congress to the agency." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *see Va. Uranium*, 139 S. Ct. at 1901 (lead opinion of Gorsuch, J.) (explaining that congressional intent, as with any question of "statutory meaning," must be discerned through the "text and context of the law in question").

And while an express preemption clause may not "*entirely* foreclose[] any possibility of implied pre-emption," BIO at 33 (emphasis added), the provision in the 1996 Act bars the preemption the Ninth Circuit found here. Where Congress has authorized preemption in a parallel context, explicitly instructed an agency to complete a rulemaking, and included a rare anti-preemption provision in its enactment, the inference is clear: When Congress wanted the FCC's radiofrequency

radiation procedures to be capable of preempting state law, it said so.

And Apple's complaints about the savings clauses (at 33–34) are likewise misguided. True, this Court has observed that the provision in the 1934 Act doesn't preserve common-law rights that would be "absolutely inconsistent with" other statutory provisions. *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 221–23, 227–28 (1998). But Apple does not even attempt to identify any such inconsistency here. And although the 1996 Act's provision focused on the preemptive effect of that statute, the fact that Congress felt the need to spell out its preemptive effect is strong evidence that it did not think the agency possessed that authority already.

IV. This case is an ideal vehicle to clear up the confusion in the lower courts.

Finally, Apple attempts (at 35–38) to gin up problems with this case as a vehicle. These all fail. This case is the ideal vehicle to resolve a longstanding split on the preemptive effect of the FCC's processing guidelines, and it provides the perfect opportunity to remind the lower courts that "broad assertions" of an agency's power to preempt state law "demand unmistakable legislative support." *In re MCP No. 165*, 20 F.4th 264, 268 (6th Cir. 2021) (Sutton, C.J., dissenting from the denial of initial hearing en banc).

First, there is nothing confusing or unmanageable about the plaintiffs' claims. From the outset, the plaintiffs brought claims for negligence and various misrepresentation and state unfair competition claims, alleging that Apple cellphones emit radiation at unsafe levels when carried in close proximity to the human body. At one point, they argued that one reason the levels were

unsafe was because they exceeded federal limits, but the plaintiffs have long abandoned that theory and cannot revive it now. Apple's attempt to portray the claims as in flux thus falls flat.

Second, Apple suggests (at 35–37) that the Hobbs Act jurisdictional challenge it made in the Ninth Circuit would somehow impair this Court's review. But that is false. The Ninth Circuit correctly rejected that challenge, explaining that the issue in this case is whether an order that is "*concededly valid*" has a "preemptive effect." App. 21a (emphasis added). As a result, the court explained, the plaintiffs' claims did not seek to set aside or in any way attack that order. *Id.*

Third, Apple advises this Court (at 37–38) to wait to address this issue in light of the D.C. Circuit's remand on the 2019 Order in *Environmental Health Trust v. FCC*, 9 F.4th 893 (D.C. Cir. 2021). But the Ninth Circuit's decision had nothing to do with the 2019 Order. The Ninth Circuit held that the FCC impliedly preempted the plaintiffs' claims 25 years ago in its 1996 Order. Whatever "additional explanation" the agency does—or doesn't—decide to supply on remand will have no bearing on that Order's supposed preemptive effect.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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