

No.

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**In the Supreme Court of the United States**

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ANDREW COHEN, TIMOTHY HORNICK, KALEAH C. ALLEN, KIMBERLY BENJAMIN, MARK  
WEILER, MATT KOPPIN, SCOTT CISCHKE, PAUL COLETTI, KRISTLE FAERYN, RODOLFO  
CABRERA, BRANDY DAVIS, WILLIAM ZIDE, DAVID HEDICKER, NANCY MAEKAWA,  
CATHERIN GOODWIN, KATHLEEN BOGGS, MARK KUNZE, ARIANA RYAN, BECKY  
WELLINGTON, M. GAIL SUNDELL, VICTOR PERLMAN, ZACHARY GOMOLEKOFF, GLENN  
JACOBS, JUNE A. HALL.

*Applicants,*

v.

APPLE, INC.

AND

SAMSUNG ELECTRONIC MEDIA, INC.

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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**APPLICATION FOR A 60-DAY EXTENSION OF TIME  
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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November 10, 2022

*Counsel for Applicants*

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**TO: The Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Ninth Circuit**

Applicants respectfully seek a 60-day extension of time within which to file a petition for a writ of certiorari to review the Ninth Circuit’s judgment in this case, to and including January 24, 2023. Absent an extension, the deadline for filing the petition will be November 24, 2022. This application is being filed on November 10, 2022—more than 10 days before the petition is due. *See* S. Ct. R. 13.5.

In support of this request, the applicants state as follows:

1. The Ninth Circuit entered judgment and issued its opinion on August 26, 2022, a copy of which is attached. This Court has jurisdiction under 28 U.S.C. § 1254(1).

2. This case involves a major preemption question that has split the circuits and been left unresolved for more than a decade: Are state-law health-and-safety claims impliedly preempted because they frustrate the purposes of certain guidelines issued by the Federal Communications Commission? Federal courts of appeals and the District of Columbia’s court of last resort have long been divided on this question. *Compare Pinney v. Nokia*, 402 F.3d 430, 457–58 (4th Cir. 2005), *with Farina v. Nokia, Inc.*, 625 F.3d 97, 125 (3d Cir. 2010), *and Murray v. Motorola, Inc.*, 982 A.2d 764, 777 (D.C. 2009). This disagreement prompted a petition for certiorari in *Farina v. Nokia*, No. 10-1064. And with the Ninth Circuit’s decision in this case, the split has only deepened.

3. This case was brought on behalf of a class of cell-phone users who allege various state-law claims arising out of the radio-frequency radiation emitted by Apple devices. The plaintiffs claim that the radiation, and the exposure that results from holding a device close

to the body, poses acknowledged health-and-safety risks that Apple failed to warn consumers about or protect them from in violation of state law.

4. The district court held that these claims were impliedly preempted by the FCC's guidelines for the approval of cell phones for sale in the United States. *Cohen v. Apple Inc.*, 497 F. Supp. 3d 769, 779–89 (N.D. Cal. 2020); *see also* 47 C.F.R. §§ 2.901 *et seq.*; FCC, Report and Order, *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 11 F.C.C.R. 15123 (1996). Acknowledging the existing circuit split on this question, the court sided with those courts that found similar claims impliedly preempted. *Cohen*, 497 F. Supp. at 786–88. According to the court, even though the FCC's guidelines said nothing about displacing more restrictive state or local obligations, the guidelines nevertheless achieved that result through a theory of implied purposes-and-objectives conflict preemption. *Id.* at 788. One of the objectives of the FCC's guidelines, the court decided, was to promote uniformity and efficiency. *Id.* at 781, 784. So any state regulation in this area, the court concluded, would stand “as an obstacle to the accomplishment and execution” of that objective. *Id.* at 780–81 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see also id.* at 784.

5. The Ninth Circuit affirmed. Adopting the district court's implied conflict preemption theory, it held that the 1934 Communications Act's broad, general grant of authority to the FCC to promulgate regulations for “the promotion of a ‘rapid, efficient, nationwide, and world-wide communication service’” and “the promotion of ‘safety of life and property through the use of wire communications’” was sufficient to permit the agency's equipment-guidelines regulation to preempt state health-and-safety regulations concerning cell

phones. Op. at 32 (quoting 47 U.S.C. §§ 151, 157(a)). Although the FCC had never said it was doing so, the Ninth Circuit reasoned that the agency had exercised that authority here. Op. at 33. The Ninth Circuit discerned the agency’s objectives in promulgating its equipment guidelines to include striking a balance between safety and “the public’s access to new telecommunications services.” Op. 33. In the court’s view, any state-law claims that imposed additional obligations on cell-phone companies frustrated those objectives, and so were impliedly preempted. Op. 33–36.

6. In reaching this conclusion, the Ninth Circuit deepened a circuit split that has persisted for over a decade. It has now sided with the Third Circuit in *Farina*, 625 F.3d at 123, and the D.C. Court of Appeals in *Murray*, 982 A.2d at 777. But the Fourth Circuit has rejected these courts’ pro-preemption view. *See Pinney*, 402 F.3d at 457–58. In *Pinney*, the Fourth Circuit held that state-law claims concerning the safety risks of cell-phone radio-frequency radiation were not preempted by the FCC’s guidelines. *Id.* Examining the text of the guidelines, the Fourth Circuit explained that, because they were not promulgated pursuant to the 1934 Communications Act in the first place, that law could not serve as the basis for preemption. *Id.* at 457. And, the Fourth Circuit held, the other statutes that authorized the FCC to promulgate regulations—one of which included an explicit provision prohibiting *any* implied preemption of state law, *see* 47 U.S.C. § 152 note—counseled against a broad reading of the agency’s preemptive authority. *Id.* at 458. The Fourth Circuit also recognized what the Ninth and Third Circuits did not: that the FCC’s guidelines set only a regulatory floor, not a ceiling—meaning that state-law health-and-safety claims did not conflict with the regulation’s purposes or objectives at all. *Id.*

7. The applicant respectfully requests a 60-day extension of time to file a petition for a writ of certiorari seeking review of the Ninth Circuit's ruling and submits that there is good cause for granting the request. Applicants' counsel has been heavily engaged with other appellate matters, including arguments in the Ninth Circuit in *Meeks v. Experian*, No. 21-17023 on November 18, 2022, and in the Fourth Circuit in *Reetz v. Aon Hewitt*, No. 21-2267, on December 7, 2022. In addition, applicants' counsel have multiple appellate briefs due in this Court (*Lombardo v. St. Louis*, No. 22A220, *TD Bank v. Pulliam*, No. 22-288, *Ragan v. Ragan*, No. 21A689), in the Sixth Circuit (*Bradford v. Team Pizza*, No. 22-3561), the Ninth Circuit (*Saucillo v. Swift*, No. 22-55560), the Eleventh Circuit (*Louis v. Bluegreen*, No. 22-12217, *Mayer v. Holiday Inn*, No. 22-11734), the Texas Supreme Court (*LG Chem v. Morgan*, No. 21-0994), the New Mexico Supreme Court (*Sanchez v. United Debt Co.*, No. S-1-SC-39563) and California state appellate courts (*Montemayor v. Ford*, No. B320477, *Kielar v. Hyundai Motor Co*, No. C096773, *Liapes v. Facebook*, No. A164880). Applicant's counsel also have pre-planned travel over the holiday period. Extending the deadline to file the petition in this case to January 24, 2023 will allow applicant's counsel to carefully research and prepare the petition in this case.

## CONCLUSION

For the foregoing reasons, the applicants respectfully request that the Court extend the time within which to file a petition for a writ of certiorari in this matter to and including January 24, 2023.

Dated: November 10, 2022

Respectfully Submitted,

/s/ Matthew W.H. Wessler

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**CERTIFICATE OF SERVICE**

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I, Matthew W.H. Wessler, a member of the Supreme Court Bar, hereby certify that on November 10, 2022, a copy of the accompanying Application for a 60-Day Extension of Time to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was sent by commercial carrier and by electronic mail to:

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All parties required to be served have been served.

November 10, 2022

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