No. ____

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

PETITION FOR A WRIT OF CERTIORARI

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January 23, 2023

QUESTION PRESENTED

Are state health and safety laws impliedly preempted, under a purposes-and-objectives theory, by the FCC's procedural guidelines for reporting how much radiation a cellphone emits?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Andrew Cohen, Timothy Hornick, Kaleah C. Allen, Kimberly Benjamin, Mark Weiler, Matt Koppin, Scott Cischke, Paul Coletti, Krystle 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, and June A. Hall were plaintiffs in the district court and appellants in the court of appeals.

Apple, Inc. was a defendant in the district court and appellee in the court of appeals. Samsung Electronic Media, Inc. was a defendant in the district court.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Cohen, et al. v. Apple Inc., et al.*, No. 3:19-5322 (N.D. Cal.) (reported at 497 F. Supp. 3d 769) (order granting summary judgment, issued October 29, 2020).
- *Cohen, et al. v. Apple, Inc., et al.*, No. 20-17307 (9th Cir.) (reported at 46 F.4th 1012) (opinion affirming summary judgment, issued August 26, 2022).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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INTRODUCTION

In the decision below, the Ninth Circuit deepened a split over whether certain FCC guidelines impliedly preempt state-law claims about cellphone safety. In the Fourth Circuit, these guidelines don't preempt any state-law claims. In the D.C. Court of Appeals, they preempt only some claims. And in the Third and Ninth Circuits, they preempt all such claims, based on a theory of implied purposes-and-objectives preemption.

Even standing alone, this split warrants review. But this case is about far more than cellphones. It presents this Court with a golden opportunity to resolve a deeper divide at the intersection of our federalism and the separation of powers—a divide over whose intent counts for preemption and how judges should discern that intent.

In some courts, it is Congress's intent. And that intent, as with any question of "statutory meaning," must be discerned through the "text and context of the law in question." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (lead opinion of Gorsuch, J.). But other courts, like the Ninth Circuit below, set aside "Congress's intent," focus instead on "whether the [] *agency* meant to pre-empt state law," and then hunt through the administrative record to find an answer. App. 26a (emphasis added).

By trading clear statutory evidence of congressional intent for "inference upon inference" about legislative and agency wishes, the courts in the Ninth Circuit's camp ignore "the legislative compromises actually reflected in the statutory text." *Va. Uranium*, 139 S. Ct. at 1908 (lead opinion of Gorsuch, J.). And by embarking on their own freewheeling judicial inquiry into what purposes an agency might have adopted, these courts risk displacing

"perfectly legitimate state laws on the strength of 'purposes' that only [they] can see." *Id.*

The Constitution's text requires a different balance between state and federal interests, one that preserves each state's "residuary and inviolable sovereignty." The Federalist No. 39, at 245 (James Madison). Only "the laws of the United States which shall be made in Pursuance" of the Constitution itself—that is, via the arduous processes of bicameralism and presentment—are "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Nothing in this text empowers judges to find preemption based on the supposed purposes of unelected bureaucrats.

The millions of regulations in the Federal Register "touch[] almost every aspect of daily life." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010). If all that's needed to preempt state law is for a court to decide that one of those regulations embodies some federal purpose or another, it's open season: Agency lawyers and private litigants can hunt for federal rules to serve as handy tools to block unwanted state policies.

This Court should set things right. *See Lipschultz v. Charter Advanced Servs.*, 140 S. Ct. 6, 7 (2019) (Thomas, J., joined by Gorsuch, J., concurring in the denial of certiorari) ("[I]n an appropriate case, we should consider whether a federal agency's policy can pre-empt state law."). This case cleanly presents an opportunity to resolve a longstanding split and, at the same time, to settle a far more fundamental rift in the jurisprudence of implied agency preemption. In doing so, the Court can ensure that lower courts remain faithful to the Constitution's balance between both the state and national governments, on the one hand, and the judicial, executive, and legislative powers, on the other.

OPINIONS BELOW

The Ninth Circuit's decision is reported at 46 F.4th 1012 (9th Cir. 2020) and reproduced at App. 1a. The district court's decision granting the respondent's motion for summary judgment is available at 497 F. Supp. 3d 769 (N.D. Cal. 2020) and reproduced at App. 34a.

JURISDICTION

The court of appeals entered judgment on August 26, 2022. On November 15, 2022, Justice Kagan extended the time within which to file a petition for a writ of certiorari to January 23, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following federal constitutional and statutory provisions are involved in this case and reproduced in the appendix: U.S. Const. art. VI, cl. 2, at App. 72a; 47 U.S.C. § 151, at App. 72a; 47 U.S.C. § 152(b), at App. 73a; 47 U.S.C. § 154(i) and (j), at App. 74a; 47 U.S.C. § 303(r), at App. 74a; 47 U.S.C. § 414, at App. 75a; 47 U.S.C. § 332(c)(3) & (c)(7), at App. 75a; and 47 U.S.C. § 152 note, at App. 79a.

STATEMENT

A. Legal background

1. The Supremacy Clause provides that "the Constitution[] and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. This mandate "supplies a rule of priority," *Va. Uranium*, 139 S. Ct. at 1901 (lead opinion of Gorsuch, J.): "Where state and

federal law directly conflict, state law must give way." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 617 (2011).[1]

"In all cases, the federal restrictions or rights that are said to conflict with state law must stem from either the Constitution itself or a valid statute enacted by Congress." *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020). That's because only "the Constitution, federal statutes, and treaties constitute 'the supreme Law of the Land,'" to which state law must yield. *Id.* (quoting U.S. Const. art. VI, cl. 2). "There is no federal preemption *in vacuo*." *Id.* A state law cannot be preempted "without a constitutional text, federal statute, or treaty made under the authority of the United States" that displaces it. *Id.*

When a law of the United States is said to preempt state law, our "system of dual sovereignty between the States and the Federal Government," *Gregory v. Ashcroft*, 501 U.S. 452, 457, 460 (1991), requires that the inquiry "start[] with the basic assumption that Congress did not intend to displace state law," *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). And it must end with "what can be found in the law itself." *Va. Uranium*, 139 S. Ct. at 1908 (lead opinion of Gorsuch, J.).

This mandate applies to "all preemption arguments"—not just express-preemption claims. *Kansas*, 140 S. Ct. at 804. Arguments that a state law "poses an obstacle" to the "purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)—no less than arguments that Congress has expressly preempted state law—"must be grounded in the text and structure of the statute at issue," *Kansas*, 140 S. Ct. at 804.

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[1] Throughout this petition, all internal quotation marks, citations, ellipses, and alterations are omitted unless otherwise noted.

As a result, "[i]mplied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives." *Chamber of Com. v. Whiting,* 563 U.S. 582, 607 (2011). The Supremacy Clause may never "be deployed . . . to elevate abstract and unenacted legislative desires above state law." *Va. Uranium*, 139 S. Ct. at 1907 (lead opinion of Gorsuch, J.).

2. Although this Court has frequently addressed the preemptive effect of statutes, it has supplied much less guidance about how to evaluate claims that an agency regulation impliedly preempts state law. And what little guidance it has provided has proved contradictory.

In the past, some language in this Court's cases has appeared to suggest that congressional purpose is largely irrelevant when determining whether agency action can impliedly preempt state law. Forty years ago, for instance, in *Fidelity Federal Savings and Loan Association v. de la Cuesta*, this Court said that a "focus on Congress' intent to supersede state law [is] misdirected" where an agency regulation is concerned—even as it went on to consider what could be discerned from the text of the statute. 458 U.S. 141, 154, 167–68 (1982). And shortly after, in *City of New York v. FCC*, the Court again appeared to favor a "focus" "on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action." 486 U.S. 57, 64 (1988).

By contrast, this Court's more recent cases have emphasized that courts considering claims of purposes-and-objectives preemption must remain focused on *Congress's* purposes, not an *agency's* purposes. As these cases explain, "evidence of Congress' purposes" must be located in the text of an enacted statute and requires more than a general delegation of rulemaking authority. *Wyeth*

v. Levine, 555 U.S. 555, 573–74 (2009) (rejecting an agency-focused preemption argument because it involved "an untenable interpretation of congressional intent"). After all, "only federal laws 'made in pursuance of' the Constitution, through its prescribed processes of bicameralism and presentment, are entitled to preemptive effect." *Va. Uranium*, 139 S. Ct. at 1907 (lead opinion of Gorsuch, J.). And so, even in the context of so-called agency preemption, this Court has made clear that it is only "*congressionally* mandated objectives" that the Supremacy Clause "seeks to protect." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 872 (2000) (emphasis added); *see also Wyeth*, 555 U.S. at 565 (the "purpose of Congress is the ultimate touchstone in every" preemption case).

B. Statutory and regulatory background

Congress grants the FCC basic regulatory authority over wire and radio communications. The FCC's authority to regulate telecommunications infrastructure comes from two statutes. The first, the Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934), tasks the agency with creating "a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. To that end, the Act directs the FCC to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary." 47 U.S.C. § 303(r). This law remained largely intact, with modest amendments, for the next sixty years, until Congress significantly updated it with the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

Both statutes expressly delimit their preemptive scope. Particularly relevant here, Congress prohibited

states from regulating "the placement, construction and modification of personal wireless service *facilities*"—that is, physical structures like cellphone towers—based on their "radio frequency emissions," if those facilities "comply with the Commission's [emissions] regulations." 47 U.S.C. § 332(c)(7)(B)(iv) (emphasis added). But it included no such express preemption provision covering wireless *devices*, like cellphones.

Congress includes two anti-preemption clauses in the relevant legislation. In addition to explicitly identifying the areas of state law that Congress specifically intended to preempt, the two telecommunications acts also explicitly provide that they do not preempt other areas of state law. The 1934 Act emphasizes that "[n]othing in this [Act] contained shall in any way abridge or alter the remedies now existing at common law or by statute." 47 U.S.C. § 414. And the 1996 Act contains a "No Implied Effect" clause, stating that "[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." 47 U.S.C. § 152 note (reproduced at App. 79a).

The FCC begins to consider the health effects of wireless radiation. For the first four decades of its existence, the FCC was not much concerned about the dangers of the radiation emitted by communications devices. The agency, in its own words, is "not a health and safety agency" and lacks the "expertise" or "jurisdiction" to set substantive health and safety standards. 12 F.C.C. Rcd. 13,494, 13,505, 13,538 (1997); 100 F.C.C.2d 543, 551 (1985). But after Congress enacted the National Environmental Policy Act in 1969, the FCC recognized

that, in some circumstances, it was now required to develop a framework to consider those health effects. *See* 49 F.C.C.2d 1313, 1313 (1974).

Following NEPA's enactment, the FCC set out to create a set of procedures that would facilitate the informed decisionmaking that NEPA requires. For licensing wireless-service facilities, the agency developed "processing guidelines" governing when the radiofrequency radiation emitted by a proposed facility required further environmental study before approval. 100 F.C.C.2d at 553. And in the early 1990s, the FCC began considering whether to extend a similar approach to the approval of low-powered wireless devices like cellphones. *See* 8 F.C.C. Rcd. 2849, 2850 (1993). But by the time Congress overhauled the Communications Act in 1996, the FCC still hadn't acted, and so Congress ordered the agency to complete its consideration of the issue. App. 5a. The FCC complied later that year. *See* 11 F.C.C. Rcd. 15,123 (1996).

The resulting guidelines do not regulate the amount of radiation a cellphone may emit. Instead, they regulate the information a cellphone manufacturer must provide the agency about its phones' radiation emissions. *Id.* at 15,126–27. The guidelines require that, when a cellphone manufacturer applies for a license to market a new phone, it must disclose to the agency whether the phone emits more radiation than a specified threshold. *See* App. 13a. If the phone emits *less* than that specified amount, the manufacturer need not provide any additional information on its radiation emissions. *See id.*; *see also* 110 F.C.C.2d 543, 560–61 (1985) (explaining how the FCC first set up these information-gathering processes). But if it emits more than the specified amount, to comply with NEPA,

the manufacturer must complete an environmental assessment of the device, and the agency, too, may need to prepare an environmental impact statement before the phone can be licensed. *See* App. 13a; 47 C.F.R. §§ 1.1307(b)(1), 1.1308(c). But, again, the guidelines do not impose any substantive radiation requirement for cellphone licenses—just an informational requirement.

For years, the FCC insisted that these guidelines did not preempt state law regarding cellphone radiation. *See, e.g.*, 100 F.C.C.2d at 557–58. And when the FCC issued its new device-approval guidelines in 1996, it was quite precise. The Commission refused as "too broad" an industry request to preempt all state tort law related to wireless radiation. 12 F.C.C. Rcd. 13,494, 13,529 (1997). In line with its explicit statutory authority to preempt state law governing wireless *facilities*, the FCC confirmed that its wireless-*facility* regulations preempt state law. *Id.*; *see also* 11 F.C.C. Rcd. at 15,183. But the agency did not attempt to give preemptive effect to its guidelines governing the radiation information it required from manufacturers of wireless devices. 12 F.C.C. Rcd. at 13,529.

In 2007, however, the agency changed course—at least informally. It didn't initiate a new rulemaking or even issue guidance documents on the preemption issue. Instead, its lawyers filed an amicus brief in the D.C. Court of Appeals, where the agency argued, for the first time, that its procedural guidelines "were not simply a minimum requirement that the states are free to supplement," but rather a "policy judgment" as to exactly how far cellphone radiation regulation could go. US & FCC Amicus Br., *Murray v. Motorola, Inc.*, 2008 WL 7825518, at *17.

C. Factual and procedural background

"[M]odern cell phones," this Court has recognized, have become "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley v. California*, 573 U.S. 373, 385 (2014). For years, that's exactly how Apple has marketed its flagship iPhone—as safe for users to keep in close bodily contact. But a growing body of research has highlighted just how little the scientific community knows about the health risks posed by wireless radiation. *See* Charles Schmidt, *New Studies Link Cell Phone Radiation with Cancer*, Scientific American (Mar. 29, 2018), https://perma.cc/DU86-SG59; Elkind, *How the FCC Shields Cellphone Companies from Safety Concerns*, ProPublica (Nov. 10, 2022), https://perma.cc/J479-8XLC. And independent testing has revealed that iPhones can emit radiation at levels that recent research indicates is dangerous to humans. App. 16a.

The plaintiffs in this case are users of Apple's iPhone. Apple failed to warn them of these risks; nor did it take steps to protect them. So in 2019, the plaintiffs sued Apple, asserting, among other claims, state-law claims of negligence, breach of warranty, consumer fraud, and unjust enrichment. App. 17a.

The district court held the claims were impliedly preempted by the FCC's procedural guidelines governing the radiation-emission information of cellphones, and the Ninth Circuit affirmed. Writing for the court, Judge Fletcher ruled that the state-law claims were impliedly preempted because they "would interfere" with the FCC's purposes and objectives in promulgating its guidelines. App. 31a.

In the Ninth Circuit's view, because an agency regulation was involved, this Court's decisions in *de la Cuesta* and *City of New York* meant that what mattered was "whether the federal agency meant to pre-empt state law"—not whether that was "Congress's intent." App. 26a. All that's required "for a regulation to have preemptive force," the court held, is (1) proof that an agency's regulation falls within the scope of a generic grant of rulemaking authority and (2) a showing that "the agency must have meant to pre-empt state law." App. 25a–26a.

The court found both conditions met here. As to the first, the court pointed to a few provisions in the 1934 Act granting the FCC "broad authority" to promulgate rules. App. 27a–28a; *see, e.g.*, 47 U.S.C. § 154(i) (authorizing the agency to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions"). And the court read the 1934 Act's general purposes clause as a "mandate" to "strike a balance among overlapping and potentially conflicting policies." App. 27a–28a.

As to the second, after digging through the regulatory record, the court concluded that the FCC "intended to strike such a balance" in establishing its procedural guidelines. App. 28a. The court did not quote anything in the actual regulation to support this view. Instead, it relied on assorted statements the agency had made both long before and long after it promulgated that regulation. *See id.* (citing 1979 order anticipating that other agencies might set standards, and expressing the aim that those standards achieve a balance); *id.* (citing 2013 statement "affirm[ing]" the agency's previous

statement about striking a balance). Drawing on the Third Circuit's reasoning in "an analogous case," alongside this Court's decision in *Geier*, Judge Fletcher concluded that to "[a]llow[] state law to impose a different standard permits a rebalancing of those considerations." App. 28a (quoting *Farina v. Nokia Inc.*, 625 F.3d 97, 123 (3d Cir. 2010)). That was enough for the agency's guidelines to impliedly preempt state law.

Congress's explicit instructions on the matter—as expressed in the statutes' various preemption and anti-preemption provisions—did not change the court's conclusion. The court held that the explicit "preemption provisions" in the 1996 Act, including the anti-preemption provision, were "irrelevant" because, in the court's view, the agency had promulgated the regulation exclusively under the 1934 Act. App. 32a. And it disregarded the 1934 Act's anti-preemption provision on the theory that this Court's decision in *Geier* deemed all such clauses irrelevant for implied-preemption inquiries. App. 29a–30a. After setting this text aside, the court concluded that allowing claims that would seek "more protective" standards "than those prescribed by the FCC" would "cause[] the federal law to defeat its own objectives." *Id.* Given that the Ninth Circuit's conclusion on preemption relied on what it saw as "the FCC's objectives," it saw no need to explain what it understood those congressional objectives to be.

REASONS FOR GRANTING THE PETITION

The decision below exacerbates an acknowledged, longstanding conflict over whether the FCC's guidelines on reporting cellphone radiation preempt state health-and-safety laws. This conflict on an important issue of federal law by itself warrants certiorari. But the conflict is

also emblematic of a far more fundamental divide in the lower courts over whose intent counts for implied agency preemption and how judges should discern that intent: Is it Congress's intent or the agency's? The text of the statute or legislative history? The actual regulation or agency commentary? Given the vast reach of the modern administrative state, these foundational questions are likely to recur again and again in a broad range of regulatory contexts. Lower courts—some of them led astray by overbroad language in this Court's own cases—are badly in need of guidance.

I. This case presents an important issue that has deeply divided state and federal courts.

The decision below reinforces an existing split over whether the FCC's order requiring environmental assessments of cellphones that exceed specified radiation levels impliedly preempts state law. That split, in turn, implicates much deeper confusion in the jurisprudence of implied preemption.

A. Four appellate courts have considered whether the FCC's guidelines displace state law under an implied purposes-and-objectives theory of preemption. The Fourth Circuit has held that they do not. The Third and Ninth Circuits squarely disagreed. And the D.C. Court of Appeals has taken a hybrid approach, concluding that the guidelines impliedly preempt state-law safety claims, but do not impliedly preempt state-law misrepresentation claims.

1. Fourth Circuit: The first to consider this issue was the Fourth Circuit in *Pinney v. Nokia, Inc.*, 402 F.3d 430 (4th Cir. 2005). Recognizing that "the purpose of Congress is the ultimate touchstone in every preemption case," the court trained its focus on the text and structure of the relevant provisions in the telecommunications acts.

Id. at 453, 457–59. Looking closely at statutes' text, the Fourth Circuit concluded that there was simply "no evidence" of any "sweeping congressional objective" of "achieving preemptive national RF radiation standards for wireless telephones." *Id.* at 457–58.

Other textual evidence reinforced this conclusion. For one thing, no statutory provision in the 1934 Act even addresses "the subject of wireless telephones—let alone the more specific issue of the permissible amount of RF radiation" they emit. *Id.* at 457. The "complete absence" of a textual basis for preemption, the court concluded, indicates that Congress did not intend for the FCC to set preemptive national standards. *Id.*

For another, when Congress *did* want the statute to preempt state law, it said so explicitly: The telecommunications acts expressly preempt state regulations of radiation emissions from "personal wireless services *facilities*." *Id.* at 458 (quoting 47 U.S.C. § 332(c)(7)(A)). But they contain no such provision for wireless devices. That "Congress has been very careful to preempt expressly only certain areas of state law," the court held, indicates that it "preserv[ed] the remainder for state regulation." *Id.*

And the evidence that Congress did not want freewheeling implied preemption to displace state law was reinforced by the inclusion of explicit *anti*-preemption clauses in both the 1934 Act and the 1996 Act. The 1934 Act expressly leaves in place "remedies now existing at common law or by statute." 47 U.S.C. § 414. And the 1996 Act contains a provision titled "No Implied Effect," which states that "this Act shall not be construed to modify, impair, or supersede [state law] unless expressly so provided." 47 U.S.C. § 152 note. These provisions, the Fourth Circuit concluded, "counsel against any broad

construction of the goals of [the statute] that would create an implicit conflict with state tort law." *Pinney*, 402 F.3d at 458.

The court made clear that the agency's views—whatever they might be—do not control. The FCC's position, the court explained, "is not evidence of congressional intent, and we accord it no weight." *Id.* at 450. Because there was "no evidence that *Congress* intended" that state-law claims be "swept aside," the court could not do so. *Id.* at 459.

2. D.C. Court of Appeals: Five years later, the D.C. Court of Appeals split with the Fourth Circuit over whether the FCC's order could impliedly preempt state law under a purposes-and-objectives theory. *See Murray v. Motorola, Inc.*, 982 A.2d 764 (2009).

Unlike the Fourth Circuit, the court began its implied-preemption analysis not with a focus on the statutory text but instead with an emphasis on the agency's "rulemaking process." *Id.* at 775. Sifting through the comments and responses in the regulatory record, the court noted that the agency had, at points in its commentary, characterized its regulation as "provid[ing] a proper balance between the need to protect the public and workers from exposure to excessive RF electromagnetic fields and the need to allow communications services to readily address growing marketplace demands." *Id.* at 776. As the court saw it, the FCC's "explanations of the balance it sought to achieve" justified the conclusion that "state regulation that would alter the balance is federally preempted." *Id.*

In reaching this conclusion, the court explicitly disagreed with the Fourth Circuit's decision in *Pinney*. *See id.* at 778 n.19. According to the D.C. Court of Appeals, the "primary reason" it rejected the Fourth Circuit's

analysis was that the analysis had failed to "consider[] the views of the FCC." *Id.* The court also faulted the Fourth Circuit for relying on the statutory anti-preemption clauses as textual evidence that Congress intended to preserve state law. Without discussing (or quoting) the text of either clause, the court "declined to give [them] broad effect," because, in its view, "doing so would upset the careful regulatory scheme established by federal law." *Id.* (quoting *Geier*, 529 U.S. at 869).

Focusing entirely on the *FCC's* purposes, the court held that the FCC's order impliedly preempts state-law safety claims. *See id.* at 781. But the court did not extend that conclusion to state-law misrepresentation claims—because, it said, *those* claims would not "contravene" the FCC's "policy judgments." *See id.* at 777.

3. Third Circuit: A year later, the Third Circuit substantially expanded the preemptive sweep of the FCC's regulation. *See Farina*, 625 F.3d at 125. In contrast with *Murray*, *Farina* drew no distinction between state-law safety and state-law misrepresentation claims. For the Third Circuit, *all* state-law claims were impliedly preempted by the purposes and objectives of the FCC's order.

The Third Circuit's conclusion turned on the belief—shared by the Court of Appeals in *Murray*—that the FCC's order struck a "balance" between competing objectives. *Id.* To support this view, the Third Circuit (again, like *Murray*), relied on the FCC's "considered judgment" in the agency's commentary that the emission guidelines "provide a proper balance" between safety and the efficiency. *Id.*

Unlike the court in *Murray*, however, the Third Circuit also attempted to find evidence that *Congress*, not just the agency, considered this type of balancing to be an

important federal objective. That mattered, the Third Circuit explained, because "the intent of Congress is the ultimate touchstone of preemption analysis." *Id.* at 115. And it read this Court's decision in *Geier* to indicate that "regulatory situations" in which Congress requires an agency "to strike a balance between competing statutory objectives lend themselves to a finding of conflict preemption." *Id.* at 123.

But the Third Circuit could find nothing in the actual text of the telecommunications acts demonstrating that Congress specifically directed the FCC to balance any set of competing objectives. The only "stated purpose" of the 1934 Act, the court noted, was to create "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." *Id.* at 124 (quoting 47 U.S.C. § 151).

So the Third Circuit turned to legislative history. It pointed to a House Report in the run-up to the passage of the 1996 Act that referenced, in the course of discussing *facilities* and *infrastructure* regulation, the need for "uniform, consistent requirements, with adequate safeguards of the public health and safety." *Id.* (emphasis added); *see also id.* (citing a Senate Report discussing Congress's new policies for regulating local telephone service providers). Relying on these reports, the Third Circuit held that Congress had "tasked" the FCC "not only with protecting the health and safety of the public, but also with ensuring the rapid development of an efficient and uniform network." *Id.* at 125. And, in the court's view, because the FCC "was required to weigh those considerations" in its regulation setting procedural guidelines for cellphones, allowing state-law claims to

proceed would "permit a jury to second guess the FCC's conclusion on how to balance its objectives." *Id.*

The Third Circuit also found the Fourth Circuit's textual arguments against preemption unavailing. The court acknowledged that Congress had enacted two different express preemption provisions, neither of which "cover [the plaintiff's] claims." *Id.* at 130 (citing 47 U.S.C. §§ 332(c)(3)(A), (c)(7)(B)(iv)). In the court's view, "Congress's express intent to preempt *some*" state-law claims supports an inference in favor of preemption of *other* state-law claims. *Id.* (emphasis added). If Congress was "clearly concerned" with state-law regulations of wireless infrastructure, the Third Circuit reasoned, then "[w]e think Congress would be equally concerned with state regulations of cell phones" too—even though it chose not to say so. *Id.* at 132.

As for the anti-preemption clauses, the court insisted that the statute's text could not defeat the purposes the court had discerned from the legislative history. Though a straightforward reading of the text might suggest that "Congress [had] made a conscious effort to limit the scope" of preemption, the court refused to adopt such an interpretation where it would "do violence to" what it perceived "the statute's objectives" to be. *Id.* at 131 (quoting *Geier*, 529 U.S. at 872).

4. Ninth Circuit: In the decision below, the Ninth Circuit joined the Third Circuit, deepening the split on the issue. App. 3a. Following the Third Circuit's lead, the court trained its attention on the FCC's own statements—unearthed in 1979 commentary on potential EPA or OSHA standards—that these agencies "must strike a balance between public safety and the public's access to new telecommunications services." App. 28a. Based on those statements, the court concluded that the FCC's

procedural guidelines are "the result of the agency's striking a balance between the conflicting policies." App. 29a.

And like the Third Circuit, the Ninth Circuit found little in the statutory text identifying conflicting purposes that the guidelines serve or mandating that the FCC balance them. It emphasized only that the 1934 Act granted "comprehensive powers" to the FCC to "make such rules and regulations . . . as may be necessary" and contained a general purposes clause. App. 4a; *see also* App. 27a–28a. The Ninth Circuit decided that nothing more was needed. It asserted that this Court's decisions in *de la Cuesta* and *City of New York* dictate that, when courts consider "whether a federal agency has preempted state regulation" under an implied purposes-and-objectives theory, "we do not focus on Congress's intent to supersede state law but instead ask whether the federal agency meant to pre-empt the state law." App. 26a.

B. That one regulation could be preemptive over *all* claims in one court, over *some* claims in another, and over *no* claims in another still, is evidence of deep doctrinal confusion over how implied preemption is supposed to work when an agency regulation is involved. Indeed, the deeper methodological issue at the heart of this case—*whose* intent counts for preemption involving agencies and *how* courts should discern that intent—has been answered in almost as many ways as it has been asked.

In some courts, the purpose of Congress in delegating to the agency, as revealed in the statute, is the "ultimate touchstone" in deciphering a regulation's preemptive scope. *See, e.g.*, *N.Y. Pet Welfare Ass'n, Inc. v. City of New York*, 850 F.3d 79, 87–89 (2d Cir. 2017) (carefully parsing statutory text in concluding that agency regulations do not impliedly preempt state law); *Varela v.*

FCA U.S. LLC, 505 P.3d 244, 251–54 (Ariz. 2022) (attempting to "be vigilant" and "avoid speculative conflicts far removed from" statutory text in rejecting an argument that an agency regulation preempted state law).

In other courts, as in the decision below, the purposes and objectives of Congress are all but irrelevant; instead, all that matters are the purposes and objectives of the agency. *See, e.g.*, *Priester v. Cromer*, 736 S.E.2d 249, 258–60 & n.17 (S.C. 2012) (neglecting even to mention the statutory text authorizing agency action in concluding that the purposes of an agency rule impliedly preempted state law); *Dowhal v. SmithKline Beecham Consumer Healthcare*, 88 P.3d 1, 4 (Cal. 2004) (dismissing explicit statutory text in concluding that the purposes of an agency regulation impliedly preempted state law). This confusion will not be resolved until this Court steps in.

II. The question presented raises fundamental federalism and separation-of-powers concerns, and this case is an ideal vehicle for resolving them.

The question presented here is exceptionally important. When an agency claims the authority to preempt state law, it is asking to invoke "an extraordinary power in a federalist system." *Gregory*, 501 U.S. at 460. All the more so when a private litigant (or an agency lawyer) asks a court to hold that an agency impliedly exercised that power sometime in the past. "Such broad assertions of administrative power 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).

But on the view of certain courts, all that's required for an agency regulation to impliedly preempt state law is a generic grant of rulemaking authority. *Any* regulation

promulgated within the scope of an agency's broad authority, the theory goes, can be used to justify preemption if, after hunting through reams of regulatory history, a court can divine some purpose that conflicts with state law. *See, e.g.*, *Farina*, 625 F.3d at 124–26.

This theory of preemption reflects exactly the type of freewheeling inquiry that this Court has recognized as illegitimate. *See Va. Uranium*, 139 S. Ct. at 1908 (lead opinion of Gorsuch, J.) (rejecting forms of preemption that displace "perfectly legitimate state laws on the strength of 'purposes' that only [courts] can see"). That is because it invites unaccountable courts and agency lawyers to transform all manner of unsuspecting agency regulations into preemption vehicles on little more than a whim. Such a view of preemption marks a serious incursion into our federalist form of government and is fundamentally inconsistent with the Supremacy Clause.

But courts that adhere to this view do so largely because overbroad language in this Court's older agency preemption cases continues to generate doctrinal confusion. *See, e.g.*, App. 26a–27a, 30a (relying on *Geier*, 529 U.S. at 870, 881, *de la Cuesta*, 458 U.S. at 154, and *City of New York*, 486 U.S. at 64). This case presents an excellent vehicle to resolve this confusion and reject once and for all the view that it is courts and agencies—rather than Congress—that preempt state law.

A. For starters, the Ninth Circuit's view of how implied purposes-and-objectives preemption works when an agency regulation is involved expands on an already-dubious form of preemption, enabling deep intrusions into state sovereignty.

Even when agency pronouncements are not involved, purposes-and-objectives preemption encourages courts to lower the bar for when federal law may oust state

law. Freed from having to locate an explicit textual command to preempt, purposes-and-objectives preemption emboldens courts to replace "strict statutory construction" with their own "policy choices" about what a law's purpose might be. *Equal Rts. Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 601 (4th Cir. 2010); *see, e.g.*, *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 580 (7th Cir. 2012) (musing about what one might "reasonably assume" Congress's purposes were); *McDaniel v. Wells Fargo Invs., LLC*, 717 F.3d 668, 676 (9th Cir. 2013) (looking to the legislative history for evidence that Congress "[p]referr[ed] flexibility to rigidity"). As scholars, lower courts, and members of this Court have recognized, that makes it far easier to displace state law—and thus to "usurp[] the residual power that the Constitution guarantees to the states." *Varela*, 505 P.3d at 253; *see also* Nelson, *Preemption*, 86 Va. L. Rev. 225, 303 (2000); *Wyeth*, 555 U.S. at 594–604 (Thomas, J., concurring).

But whatever can be said in favor of purposes-and-objectives preemption when a *statute* is doing the preempting, it raises far graver concerns when extended to agency action. There are millions of regulations in the federal register. Many were promulgated pursuant to an agency's general rulemaking authority. If all that is needed for any one of those regulations to have preemptive force is for a court to decide that they embody a federal purpose that conflicts with state law, virtually any state law could be preempted. Private litigants, together with agency lawyers, could hunt through the federal register for regulations that could be used to disturb inconvenient state policies. And they could hunt through the bench for courts who would aid them in doing so.

The federalism concerns here are evident. Because agencies, "[u]nlike Congress," are "clearly not designed to represent the interests of States," *Geier*, 529 U.S. at 908 (Stevens, J., dissenting), they have no incentives at all "to take state regulatory interests into account," Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 Sup. Ct. Rev. 253, 279 (2011). Whatever purposes courts can unearth from agency regulations are therefore unlikely to have weighed state concerns carefully—if at all. Uncritically wielding those purposes to oust state law runs afoul of the basic notions of federalism that ordinarily animate preemption law.

B. A view of agency preemption unmoored from Congress likewise disturbs the distribution of power between the federal branches. "[B]eyond siphoning governmental power reserved for the states, implying preemption too readily risks usurping legislative authority to enact laws." *Varela*, 505 P.3d at 253. After all, "[u]nder the Supremacy Clause, . . . the relevant inquiry is whether *Congress* intended to displace state law." Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1435 (2001) (emphasis added); *see also Va. Uranium*, 139 S. Ct. at 1907 (lead opinion of Gorsuch, J.). When all preemption requires is for an enterprising agency lawyer to persuade a court that a regulation embodies an expansive set of purposes or objectives, the executive and judicial branches "improperly inflate[]" their own power at Congress's expense. *Varela*, 505 P.3d at 253.

That threat to congressional primacy is especially concerning when courts unearth an agency's preemptive power by "wander[ing] far from the statutory text." *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d

524, 572 n.12 (2013) (Jones & Elrod, JJ., dissenting). By trading the clearest evidence of congressional intent—the statute—for "inference upon inference about hidden legislative wishes," courts ignore "the legislative compromises" Congress actually made. *Va. Uranium*, 139 S. Ct. at 1908 (lead opinion of Gorsuch, J.). And by embarking on their own "freewheeling judicial inquiry" into what purposes or objectives an agency might have adopted, *Whiting*, 563 U.S. at 607, courts risk displacing "perfectly legitimate state laws on the strength of 'purposes' that only [they] can see," *Va. Uranium*, 139 S. Ct. at 1908 (lead opinion of Gorsuch, J.).

Of course, Congress may choose to displace overlapping state law—or to empower an agency to do so. But neither agencies nor courts are permitted to arrogate Congress's power to themselves under the guise of federal preemption.

C. Lower courts that stray from basic federalism and separation-of-powers principles often cite this Court's own precedent to justify their approach. Like the Ninth Circuit here, they read cases from decades ago as authorizing courts to ignore congressional intent and defer entirely to an agency's views. *See* App. 26a (seizing on statement from *de la Cuesta* in 1982 that regulations may have "preemptive force" so long as they fall "within the scope of [] delegated authority"); *see also Dowhal*, 88 P.3d at 8 (interpreting *Geier* to permit courts to disregard any and all anti-preemption clauses).

But that approach conflicts with this Court's modern preemption jurisprudence, which emphasizes that preemptive intent must be discerned from "the text and structure" of a *statute*. *Va. Uranium*, 139 S. Ct. at 1907 (lead opinion of Gorsuch, J.). As courts and commentators have recognized, this conflict puts courts considering

agency preemption "between a rock and a jurisprudential hard place." *Morgan v. Ford Motor Co.*, 680 S.E.2d 77, 94 (W.Va. 2009); *see also* Rubenstein, *Delegating Supremacy?*, 65 Vand. L. Rev. 1125, 1127 (2012) (broad interpretations of these cases "subvert[] Congress's critical role in preemption decisions"); Mendelson, *A Presumption Against Agency Preemption*, 102 Nw. U. L. Rev. 695, 710 (2008) (noting that these decisions are difficult to reconcile with the presumption against preemption).

Only this Court can solve the problem. And its guidance is sorely needed. *See, e.g.*, Young, *supra*, at 278 (noting that the "limits of executive-agency and judicial preemption remain uncertain"); *see also* Sharp, *Toward (A) Faithful Agency in the Supreme Court's Preemption Jurisprudence*, 18 Geo. Mason L. Rev. 367, 368 (2011) (worrying that there may be "a puzzling and fundamental disconnect" between some of the Court's preemption cases); Pursley, *Preemption in Congress*, 71 Ohio St. L.J. 511, 513–14 (2010) (preemption doctrine is "profoundly under-theorized"). Indeed, members of this Court have called for "an appropriate case" to resolve "whether a federal agency's policy can pre-empt state law." *Lipschultz*, 140 S. Ct. at 7 (Thomas, J., joined by Gorsuch, J., concurring in the denial of certiorari).

D. This is just such an appropriate case. As explained above, courts' division over the preemptive reach of the FCC's cellphone-radiation guidelines rests on their fundamental disagreement about how agency preemption works. *Compare Pinney*, 402 F.3d at 458, 457–59 (agency preemption requires clear evidence of congressional intent), *with Murray*, 982 A.2d at 776–78 & n.19 (what matters is the agency's "policy judgments"); *see also Farina*, 625 F.3d at 124–25 (relying on agency views and

legislative history); App. 26a–31a (relying on agency views and a general grant of rulemaking authority).

III. The decision below is wrongly decided under this Court's preemption cases and lacks any limiting principle.

This Court should also grant certiorari because the decision below is wrong. This Court has explained time and again that "the purpose of Congress"—not the whim of the Executive—"is the ultimate touchstone in every pre-emption case." *Wyeth,* 555 U.S. at 565. But not for the Ninth Circuit here, which paid no more than lip service to this fundamental principle. It acknowledged that, in every preemption case, state law may not be superseded "unless that was the clear and manifest purpose of Congress." App. 25a. Yet less than a page later, it turned right around and held that, when an agency regulation is involved, "we do not focus on Congress's intent to supersede state law but instead ask whether the *federal agency* meant" to do so. App. 26a (emphasis added). This topsy-turvy inquiry makes the "ultimate touchstone" no more than a mere afterthought. That flouts this Court's precedent and our constitutional structure. And it is a recipe for agency preemption run amok.

A. Whenever preemption stems from a federal statute, the analysis "must be guided by two cornerstones": first, "that the purpose of Congress is the ultimate touchstone" in any preemption case, and second, that "the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress." *Wyeth*, 555 U.S. at 565.

These principles hold just as true when agency action is said to preempt state law. *See, e.g., id.* To be faithful to Congress's central role in any preemptive scheme, courts

"must interpret the statute" under which an agency acts "to determine whether Congress has" in fact "given [the agency] the power" to preempt. *New York v. FERC,* 535 U.S. 1, 18 (2002). That question must be approached with the same care as "any other about statutory meaning" would be—looking to both the relevant text of the statute in question and the broader statutory context in which it arises, and employing all "the traditional tools of statutory interpretation" in doing so. *Va. Uranium,* 139 S. Ct. at 1901 (lead opinion of Gorsuch, J.).

And courts must likewise afford due emphasis to the presumption against preemption. *Wyeth*, 555 U.S. at 565. Because agencies are not equipped or designed to value state interests, the states' regulatory autonomy is *at least* as important for preemption by federal regulation as it is for preemption by federal statute. *See supra* Part II.A; Mendelson, *supra*, at 709–11.

B. The Ninth Circuit lost sight of these basic principles. Relying on *de la Cuesta* and *City of New York*, the court held that, when it comes to implied purposes-and-objectives preemption via agency regulation, courts have no meaningful duty to "focus" on congressional intent. App. 26a. So long as an agency regulation is itself "authorized" by a congressional enactment, the regulation can impliedly preempt state law if that is what a court believes the agency "meant" to do. *Id.* Under that theory, the FCC's 1996 regulation easily clears this "authorization" bar because Congress, as it has done on many occasions, conferred on the FCC the broad, general power to "make such rules and regulations, not inconsistent with law, as may be necessary to carry out" the agency's obligations. App. 22a, 27a–28a; 47 U.S.C. § 154(i). From there, it was easy enough for the Ninth Circuit to sift through reams of regulatory history to find

some mention of an agency purpose capable of displacing state law. *See* App. 28a–29a, 31a (relying on a "1979 Notice of Inquiry" to identify the FCC's "purposes").

But the Ninth Circuit badly misread *de la Cuesta* and *City of New York*. Those decisions do not stand for the proposition that any time an agency regulation is involved, the "purpose of Congress" is essentially irrelevant on the question of preemption. To the contrary, *de la Cuesta* emphasized that any preemption analysis "requires [courts] to examine congressional intent," including whether it was within the agency's "statutory authority" to issue a preemptive regulation. *de la Cuesta,* 458 U.S. at 152, 154, 159. And the Court in *City of New York* specifically asked whether agency preemption of state laws was something that "Congress would have sanctioned." *City of New York,* 486 U.S. at 69.

The cases thus both acknowledged the "crucial" question whether Congress has, in fact, "authorized [an agency] to pre-empt state and local regulation"—not just whether Congress generically authorized the agency to promulgate rules. *Id.* at 66; *see also de la Cuesta,* 458 U.S. at 154 (focusing on "whether the [agency] meant to pre-empt [the state law] and, if so, whether *that action* is within the scope of [its] delegated authority" (emphasis added)); *id.* at 161–62 (closely examining the agency's statutory mandate and concluding that "the statutory language suggests that Congress expressly contemplated, and approved," the agency's "promulgation of regulations superseding state law").

That view accords with this Court's more recent implied preemption jurisprudence. In *Wyeth*, for instance, a drug manufacturer argued that Congress's delegation of authority to "an expert agency to make drug labeling decisions that strike a balance between competing

objectives" was a legitimate congressional "purpose" capable of impliedly preempting state law. 555 U.S. at 573. This Court rejected that view, finding "no merit" in the argument because it "relies on an untenable interpretation of congressional intent and an overbroad view of an agency's power to pre-empt state law." *Id.* The Ninth Circuit made no effort to reconcile its contrary view with this clear understanding.

This was only the Ninth Circuit's first in a series of mistakes. Even if such a generic grant of rulemaking authority could, under some circumstances, convey the requisite congressional purpose, a court cannot reach that conclusion without carefully examining the text and context of the statute, "guided by the traditional tools of statutory interpretation." *Va. Uranium,* 139 S. Ct. at 1901 (lead opinion of Gorsuch, J.).[2] Yet the Ninth Circuit declined to do this. Not only did it fail to carefully interpret the FCC's general rulemaking authority in the first place, but it essentially ignored the rest of the statute—including the intricate preemption regime that Congress *did* enact.

By setting exacting terms governing the FCC's authority to preempt state and local regulation regarding radiation from wireless *facilities*, Congress showed that it

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[2] There are good reasons to doubt that a general grant of rulemaking authority can have this effect on its own. Such a grant is "never intended to be completely limitless." Mendelson, *supra,* at 716. It doesn't authorize agencies to "bypass other federal laws," *id.*, or to "invoke[] the outer limits" of constitutional power without "a clear indication that Congress intended that result," *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001). Nor should it suffice to authorize an agency to supersede state law. After all, it generally represents "*less* power for the agency than a specific (and presumably more thoughtfully contemplated) delegation represents." Mendelson, *supra*, at 716 (emphasis added).

knew how to authorize preemption in this space—yet it chose not to do so for regulation regarding radiation from personal devices like cellphones. *See* 47 U.S.C. § 332(c)(7). "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992); *see also Wyeth*, 555 U.S. at 574 (holding that the FDA lacked the authority to preempt state law related to prescription drugs given Congress's decision to enact an express preemption provision for medical devices). Had the court paid attention to these provisions, it would have been forced to conclude that it was Congress's "clear and manifest purpose" to *deprive* the agency of further preemptive authority—not to confer it. All the more so because Congress carefully included two separate *anti*-preemption provisions explicitly preserving state law. *See* 47 U.S.C. §§ 414, 152 note.

The Ninth Circuit defended its choice to ignore the statutes' terms by invoking *Geier*. But *Geier* offers no support for the court's decision. In *Geier*, Congress explicitly directed the agency to balance a set of "congressionally mandated objectives." 529 U.S. at 872; *see* 15 U.S.C. § 1392(a) (requiring that the agency "shall establish" motor vehicle safety standards and that each such standard "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms").

Here, there is no similar statutory command. The most the Ninth Circuit could muster was a nod in the direction of the 1934 Act's general purposes clause. *See* App. 27a–28a. But all that clause does is identify several generic purposes, and the only command it contains is one directing that the FCC "shall execute and enforce the provisions of this chapter." 47 U.S.C. § 151. Unlike in

Geier, it does not mandate that the agency engage in any particular rulemaking, and unlike in *Geier*, it does not direct that the agency must consider any competing objectives. The Ninth Circuit nonetheless read this provision as a mandate that the FCC "strike" a balance. In doing so, the court did precisely what members of this Court have warned courts against doing—"overreading *Geier*." *See Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 338 (2011) (Sotomayor, J., concurring); *see also Wyeth*, 555 U.S. at 573 (rejecting exactly this type of balancing argument).

C. Even setting aside this Court's precedent, the Ninth Circuit's decision cannot be reconciled with the Constitution's text, structure, or history. Under the Supremacy Clause, only "the laws of the United States which shall be made in Pursuance" of the Constitution itself—*i.e.*, only "the laws" that are "made" through bicameralism and presentment—are "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. This insistence on bicameralism and presentment as a prerequisite for preemption was no accident. "[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985).

And that structure is especially important when it comes to preemption. Preemption is "an extraordinary power in a federalist system," *Gregory*, 501 U.S. at 460, and so courts "must assume Congress does not exercise [it] lightly." *Id.* For Congress to preempt the states' "historic police powers," it must make its purpose "clear and manifest." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008). But when Congress hasn't done so at all—or indeed, when it has signaled its *opposite* intent through a

savings clause—the Constitution does not empower unelected judges and bureaucrats to freelance on preemption.

D. Left to stand, the decision below threatens to radically empower courts and federal agencies to displace state law—and to ignore Congress's intent in doing so. As one scholar has put it, "[i]t seems hard to imagine that Congress would wish a general rulemaking delegation to include the power to do away with any relevant state law." Mendelson, *supra*, at 716. Yet that broad view of agency preemption is now the law in the Ninth Circuit and other lower courts. "No matter how desirous of protecting their policy judgments, agency officials cannot invest themselves with power that Congress has not conferred." *Mozilla Corp. v. FCC*, 940 F.3d 1, 83 (D.C. Cir. 2019) (per curiam). And neither can the Ninth Circuit.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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