No. 22-698

In The Supreme Court of the United States

ANDREW COHEN, ET AL., PETITIONERS

v.

APPLE INC.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Pursuant to its authority under the Communications Act of 1934, the FCC has set limits on the radiofrequency (RF) emissions a mobile device sold in the United States may emit without undergoing an environmental impact assessment. These limits incorporate a 50-fold safety margin from any observed effects of RF exposure. The FCC has stated that its RF rules are designed to balance safety and efficiency, two objectives that Congress charged the FCC with pursuing in the 1934 Act.

The question presented is whether the Ninth Circuit correctly held that the FCC's RF rules preempt state claims premised on the theory that RF emissions from FCC-approved devices are unsafe—or whether, as petitioners argue, every city and state in the country may impose its own competing RF limitations on FCC-approved devices.

CORPORATE DISCLOSURE STATEMENT

Apple Inc. certifies that it has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

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INTRODUCTION

Petitioners ask the Court to revisit its long-standing preemption doctrine without offering any reason that would justify such a request. This Court has previously declined to take up this exact issue involving the preemptive effect of the FCC's RF emissions regulations, and nothing has changed in the interim to suggest review is warranted now. As the United States explained in its invitation brief then—and as remains true today—the purported conflict of authority is the result of a single outlier decision that may well be revisited. The Ninth Circuit has merely joined every other court to confront the issue by holding that the FCC's regulations preempt conflicting state standards on RF emissions.

And that decision is correct. In promulgating the RF regulations, the FCC was acting both at the express direction of Congress and within the heartland of its delegated authority to regulate wireless radio communications. The FCC set the particular RF thresholds it designated—which incorporate a 50-fold safety margin from any observed effects of RF exposure—by carefully balancing the objectives Congress charged it with pursuing. And the FCC has explained that lower limits would degrade mobile devices' performance without providing any health benefits. Allowing juries (not to mention state legislatures and city councils) to subvert that balance by imposing myriad conflicting standards would plainly contravene Congress's intent, as expressly set forth in the governing statute, to promote an efficient and uniform wireless network.

The petition should be denied.

STATEMENT

I. STATUTORY AND REGULATORY BACKGROUND

A. The Communications Act Of 1934

The federal government has regulated radio technology for more than a century. *See*, *e.g.*, Radio Communication Act of 1912, 62d Cong. Ch. 287, 37 Stat. 302. In 1934, Congress centralized that regulatory authority in the Federal Communications Commission. Communications Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (47 U.S.C. §§ 151 *et seq*.).

In the 1934 Act, Congress charged the FCC with several important federal objectives. The FCC's central mandate is to achieve Congress's "purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available * * * to all the people of the United States * * * a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." 47 U.S.C. § 151. In carrying out that mandate, the FCC must promote "the policy of the United States to encourage the provision of new technologies and services to the public," *id*. § 157(a), including "efficient and intensive use of the electromagnetic spectrum," *id.* § 309(j)(3)(D). At the same time, the FCC must further Congress's "purpose of promoting safety of life and property through the use of wire and radio communications." *Id*. § 151.

To achieve those sometimes-conflicting objectives, Congress authorized the FCC "to regulate all aspects of interstate communication by wire or radio," and to

take "all regulatory actions necessary to ensure the achievement of the Commission's statutory responsibilities." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984) (quotation marks omitted). Specifically, Congress delegated to the FCC power to regulate technical features of wireless radio communications, including "the kind of apparatus to be used" and any "external effects" that may result. 47 U.S.C. § 303(e). The agency is also empowered to condition the manufacture, marketing, and sale of devices that emit radiofrequency energy on compliance with its rules. *Id*. § 302a. In 1996, Congress expressly confirmed the FCC's authority to regulate the "environmental effects of radio frequency emissions." Pub. L. No. 104-104, § 704(b), 110 Stat. 56.

B. The FCC's Regulation Of RF Emissions

1. Nearly all wireless communication technologies—including cell phones—use RF electromagnetic waves to operate. *See* FCC, Office of Eng'g and Tech., *Questions and Answers about Biological Effects and Potential Hazards of Radiofrequency Electromagnetic Fields*, OET Bulletin No. 56, at 2-3 (4th ed. 1999).[1] "The strength of a cell phone signal, and hence its range, has been positively correlated with the intensity of its RF emissions." *Farina v. Nokia Inc.*, 625 F.3d 97, 104 (3d Cir. 2010). But personal wireless devices like cell phones emit very low levels of RF energy, "well below the threshold for unacceptable rises in human

[1] http://transition.fcc.gov/Bureaus/Engineering_Technology/Documents/bulletins/oet56/oet56e4.pdf.

tissue temperature." *In re Proposed Changes in the Comm'n's Rules Regarding Hum. Exposure to Radiofrequency Electromagnetic Fields*, 34 F.C.C. Rcd. 11687, 11696 ¶ 14 (2019) ("2019 RF Order"). Such devices thus "pose no health risks." *Ibid*. In a review of nearly 200 peer-reviewed studies, the FDA concluded that "there are no quantifiable adverse health effects in humans caused by exposures at or under the current [radiofrequency] exposure limits." FDA, *Review of Published Literature between 2008 and 2018 of Relevance to Radiofrequency Radiation and Cancer*, at 5 (Feb. 2020).[2]

2. The FCC first began considering RF emissions in 1979. *In re Resp. of the Fed. Commc'ns Comm'n to Consider Biological Effects of Radio Frequency Radiation When Authorizing the Use of Radio Frequency Devices*, 72 F.C.C.2d 482 (1979). In a section of this notice titled "The Commission's Statutory Obligations," the agency explained that "[a] balance must be achieved between serving the public interest by fulfilling its needs for communications services and adequately protecting the populace against potentially adverse biological effects that may be attributable to excessive RF radiation." *Id.* at 489.

3. The FCC promulgated its first rules setting RF exposure standards in 1985. *In re Resp. of the Fed. Commc'ns Comm'n to Consider Biological Effects of Radiofrequency Radiation When Authorizing the Use of Radiofrequency Devices*, 100 F.C.C.2d 543 (1985)

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[2] https://www.fda.gov/media/135043/download.

("1985 RF Order"). Relying on its "expertise to recognize a technically sound radiation standard," the FCC adopted exposure guidelines recommended by the American National Standards Institute (ANSI) for FCC-licensed radio facilities. *Id*. at 548 ¶ 11, 551 ¶ 24. The FCC excluded from these requirements "relatively low-powered communications systems" including mobile wireless devices, finding "little likelihood" they would "cause exposures in excess of the RF safety guidelines." *In re Resp. of the Fed. Commc'ns Comm'n to Consider Biological Effects of Radiofrequency Radiation When Authorizing the Use of Radiofrequency Devices*, 2 F.C.C. Rcd. 2064, 2065 ¶¶ 14-15 (1987).

4. In 1993, the FCC began revising its RF rules in light of ANSI's updated exposure standards, which extended to mobile devices. *In re Guidelines for Evaluating the Env't Effects of Radiofrequency Radiation*, 8 F.C.C. Rcd. 2849 (1993). That proceeding was still pending when Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

In Section 704(b) of that Act, Congress directed that within 180 days, "the Commission shall complete action in [the proceeding begun in 1993] to prescribe and make effective rules regarding the environmental effects of radio frequency emissions." *Ibid.* The House Commerce Committee, which had drafted the legislation, explained that because "[a] high quality national wireless telecommunications network cannot exist if each of its component[s] must meet different RF standards in each community," the FCC should adopt uniform RF standards that strike "an appropriate

balance" between "adequate safeguards of the public health" and "speed[y] deployment * * * of competitive wireless telecommunications services." H.R. Rep. No. 104-204, 104th Cong., at 94-95 (1995).

The FCC issued new RF rules later that year. *In re Guidelines for Evaluating the Env't Effects of Radiofrequency Radiation*, 11 F.C.C. Rcd. 15123, 15124 (1996) ("1996 RF Order"). Invoking its authority under multiple 1934 Act provisions, *id.* at 15185 ¶ 171 (citing 47 U.S.C. §§ 154(i), 157(a), 303(c), 303(f), 303(g), 303(r), 332(c)(7)), the FCC applied RF standards to wireless mobile devices, *id*. at 15147 ¶¶ 63-64. Based largely on the recommendations of federal health and safety agencies, the FCC set a maximum specific absorption rate (SAR) in human tissue of 0.08 W/kg averaged over the entire body, and 1.6 W/kg for localized exposure to areas such as the head. 47 C.F.R. § 2.1093(d)(2); 1996 RF Order, 11 F.C.C. Rcd. at 15135 ¶ 28, 15140-42 ¶¶ 46, 49, 15218. Citing the expert "consensus and the scientific support in the record," the agency concluded these limits would ensure "safe [RF] exposure from low-power devices designed to be used in the immediate vicinity of the body." 1996 RF Order, 11 F.C.C. Rcd. at 15146-47 ¶ 62. These "safety limits [we]re set to include a 50-fold safety margin from observed effects of radiofrequency energy exposure." FDA, *Statement From Jeffrey Shuren, M.D., J.D., Director of the FDA's Center for Devices & Radiological Health on the Recent*

National Toxicology Program Draft Report on Radiofrequency Energy Exposure (Feb. 2, 2018).[3]

The FCC enforced these standards by "requir[ing] routine SAR evaluation" "prior to equipment authorization" of mobile devices. 1996 RF Order, 11 F.C.C. Rcd. at 15147-48 ¶ 65. The FCC did not categorically rule out authorizing equipment that exceeded its RF limits, but any such authorization would be contingent on approval of an environmental assessment (EA) submitted by the applicant. *See* 47 C.F.R. §§ 1.1307(b), 1.1308, 2.1091(c). While it is theoretically possible to seek that approval, the FCC has explained that "[i]n reality," its rule "leads to a de facto compliance requirement, since most applicants and licensees * * * undertake measures to ensure compliance before submitting an application in order to avoid the preparation of a costly and time-consuming EA." 1996 RF Order, 11 F.C.C. Rcd. at 15200.

Thus, all cell phones sold in the United States "must meet the FCC's RF exposure standard." FCC, *Specific Absorption Rate (SAR) for Cell Phones: What It Means for You, Consumer Guides* (Oct. 15, 2019).[4] To ensure compliance, sellers must submit an application for equipment authorization to an FCC-authorized Telecommunication Certification Body. *See* 47 U.S.C. § 302a; 47 C.F.R. § 2.911. An applicant

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[3] https://www.fda.gov/news-events/press-announcements/statement-jeffrey-shuren-md-jd-director-fdas-center-devices-and-radiological-health-recent-national.

[4] https://www.fcc.gov/sites/default/files/sar_for_cell_phones_-_what_it_means_for_you.pdf.

must demonstrate its devices comply with the RF exposure limits by submitting results of testing consistent with agency-established protocols. *See* FCC, *Equipment Authorization Procedures*.[5] The FCC issues a certification authorizing sale only after confirming devices comply with RF limits. 47 C.F.R. § 2.907(a).

This regulatory scheme was the product of the FCC's careful reconciliation of competing statutory goals. As the agency explained, its "RF exposure limits provide 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." *In re Guidelines for Evaluating the Env't Effects of Radiofrequency Radiation*, 12 F.C.C. Rcd. 13494, 13505 ¶ 29 (1997) ("1997 RF Order").

5. The FCC has also required device manufacturers to inform consumers about RF emissions. Manufacturers must disclose "[s]pecific information" to consumers; "[u]sers must be fully informed of the operating requirements and restrictions"; and "[a]ll supported body-worn accessory operating configurations must be clearly disclosed to users, through conspicuous instructions." FCC, *In re Exposure Procedures and Equipment Authorization Policies for Mobile and Portable Devices* § 4.2.2(d) (Oct. 23, 2015).

6. In 2013, the FCC launched an inquiry to assess whether to amend its RF rules. *In re Reassessment of*

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[5] https://www.fcc.gov/engineering-technology/laboratory-division/general/equipment-authorization.

Fed. Commc'ns Comm'n Radiofrequency Exposure Limits & Pol'ys, 28 F.C.C. Rcd. 3498, 3499-500 (2013). Again, the agency noted its "responsibility to provide a proper balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible." *Id.* at 3582 ¶ 236 (quotation marks omitted). It explained that "[t]he intent of [its] exposure limits is to provide a cap that both protects the public based on scientific consensus and allows for efficient and practical implementation of wireless services." *Ibid.*

In December 2019, after review of the latest scientific evidence and consultation with the FDA, the FCC unanimously concluded that the existing RF limits "reflect the best available information concerning safe levels of RF exposure for workers and members of the general public" and that "phones legally sold in the United States" under FCC certification procedures "pose no health risks." 2019 RF Order, 34 F.C.C. Rcd. at 11689 ¶ 2, 11696 ¶ 14. The FCC explained that the lower RF emission limits proposed by some commenters would result in devices that could not "reliably transmit any usable level of energy by today's technological standards," and that there was no scientific evidence that such strict limits would produce "any tangible benefit to human health." *Id.* at 11694 ¶ 12. The FCC therefore "decline[d] to initiate a rulemaking to reevaluate the existing RF exposure limits." *Id*. at 11692 ¶ 10. The agency also explained that existing

required disclosures are "adequate to inform consumers of [RF exposure] issues and do not risk contributing to an erroneous public perception or overwarning of RF emissions from FCC certified or authorized devices." *Id.* at 11697 ¶ 16.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Apple first released the iPhone 16 years ago. The FCC has certified for sale every iPhone model sold in the United States, 1-ER-7, a designation that indicates the agency's determination that the devices comply with RF limits and thus pose no health risk, 2019 RF Order, 34 F.C.C. Rcd. at 11696 ¶ 14.[6]

In August 2019, a *Chicago Tribune* article claimed that certain models of the iPhone may exceed the FCC's RF emissions threshold. 1-ER-10. Given its congressionally delegated responsibilities regarding the regulation of wireless devices, the FCC responded to the article by re-testing the implicated models. 1-ER-11. It "found no evidence of violations of the technical standards," concluding that "[t]he RF radiation exposure from each of the iPhones measured fell well within the safety limits." 1-ER-11.

B. Petitioners filed this putative class action two days after the *Tribune* article, 1-ER-10, and maintained it even after the FCC's responsive testing debunked the article. Petitioners' operative complaint

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[6] Citations to "ER" are to the Excerpts of Record filed with the Ninth Circuit below. 9th Cir. No. 20-17307, Dkt. 17-2–8.

premised their claims on three theories. First, they alleged the iPhone devices "exceeded the federal [RF] exposure limit." 7-ER-1169. Second, petitioners pivoted and attacked the adequacy of federal testing and certification protocols. Now acknowledging that "[t]hese phones are legally considered compliant" (after just claiming they were not), petitioners alleged they nonetheless exposed users to risk when used "in the ways that people use them in real life." 7-ER-1170. Third, petitioners alleged Apple's marketing was "deceptive and misleading" because—even though each iPhone was FCC-certified—Apple failed to disclose that "the RF radiation exposure far exceeds federal guidelines." 7-ER-1170. Petitioners' claims were premised on the theory that RF emissions cause a host of maladies, including "increased cancer risk," too many "harmful free radicals," "structural" changes to users' "reproductive system[s]," and "negative impacts on general well-being in humans." 7-ER-1184.

C. On the district court's invitation, Pet. App. 37a, the FCC filed a statement of interest arguing that petitioners' claims were (1) outside the district court's jurisdiction under the Hobbs Act, 28 U.S.C. § 2342, and (2) preempted because they "conflict[] with the FCC's judgment that cell phones that satisfy the FCC's RF standards pose no health risk and may be certified for sale in the United States." 6-ER-1029.

Following discovery and extensive briefing, the district court granted summary judgment for Apple. 1-ER-31.

D. The Ninth Circuit affirmed. It noted that on appeal, petitioners appeared to abandon any contention that iPhones did not comply with the FCC's requirements. Pet. App. 19a-20a.

The Ninth Circuit first held the Hobbs Act did not divest it of jurisdiction. The court reasoned that petitioners did "not challenge the validity of any of the FCC's final orders, either directly or indirectly"; rather, the "issue in this case [was] whether the FCC's concededly valid orders have preemptive effect." Pet. App. 21a. Because petitioners had "conced[ed]" that RF emissions from iPhones "are at levels below the maximum permitted by FCC regulations," Pet. App. 19a, the court did not consider the jurisdictional implications of petitioners' claim that iPhones exceeded federal limits. The court also did not directly address whether the Hobbs Act barred petitioners' failure-to-disclose claims.

On the merits, the Ninth Circuit held that petitioners' claims were preempted because they posed an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Pet. App. 25a. It explained that under this Court's precedent, state law is preempted "when it disturbs a balance [a] federal regulation has struck between 'conflicting policies that were committed to the agency's care by the statute.'" Pet. App. 27a (quoting *City of N.Y. v. FCC*, 486 U.S. 57, 64 (1988)). For a regulation to have such preemptive force, it must "fall within the scope of the [federal agency's] delegated authority" and "the agency

must have meant to pre-empt state law." Pet. App. 26a (alteration in original) (quotation marks omitted).

The Ninth Circuit determined that the 1934 Act "grants broad authority to the FCC to promulgate regulations that strike a balance among overlapping and potentially conflicting policies," including efficiency, safety, and promoting new technology. Pet. App. 27a-28a (quoting 47 U.S.C. §§ 151, 157(a)). And, the court held, the RF rules "were intended to strike such a balance." Pet. App. 27a-29a. Allowing state law to disrupt that scheme "would render the FCC's statutorily mandated balancing essentially meaningless." Pet. App. 31a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT OF AUTHORITY THAT WARRANTS THIS COURT'S INTERVENTION

A. There Is No Significant Conflict On The Preemptive Effect Of The FCC's Regulations

Petitioners' primary argument (at 13-20) is that the lower courts are split on whether the FCC's RF regulations preempt state-law claims. But any such conflict does not warrant this Court's review—as this Court has previously concluded in denying a petition presenting the very same question.

1. Any conflict is shallow, stale, and may resolve itself

a. As petitioners acknowledge (Pet. 16-19), the Ninth Circuit's decision here mirrors the Third Circuit's decision in *Farina v. Nokia Inc.* There, the plaintiff alleged that certain cell phones "expose[d] the user to dangerous amounts of radio frequency ('RF') radiation." 625 F.3d at 104. On this theory, the plaintiff claimed that "the marketing of cell phones as safe for use without headsets violates several provisions of Pennsylvania law." *Ibid.*

With Judge Scirica writing for the court, the Third Circuit held the plaintiff's claims were preempted. *Id.* at 123. The court explained that this "Court's preemption case law indicates that regulatory situations in which an agency is required to strike a balance between competing statutory objectives lend themselves to a finding of conflict preemption." *Ibid.* (citing *Buckman Co. v. Plaintiffs' Legal Comm'n*, 531 U.S. 341 (2001), *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), and *Wyeth v. Levine*, 555 U.S. 555 (2009)). That is because "[w]hen Congress charges an agency with balancing competing objectives," Congress "intends the agency to use its reasoned judgment to weigh the relevant considerations and determine how best to prioritize between these objectives." *Ibid.* "Allowing state law to impose a different standard permits a re-balancing of those considerations" and thus frustrates "the full purposes and objectives of Congress." *Id.* at 122, 123.

Applying those settled principles to the FCC's RF regulations, the court of appeals determined that the plaintiff's state-law claims would disrupt the balance Congress had charged the FCC with achieving. Like the Ninth Circuit, the Third Circuit highlighted Congress's "stated purpos[es]" of "mak[ing] available * * * a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." *Id.* at 124 (quoting 47 U.S.C. § 151). The court further noted Congress's directive that "the FCC must also consider the promotion of 'the safety of life and property.'" *Ibid.* (quoting 47 U.S.C. § 332(a)(1)); *contra* Pet. 17 (representing that *Farina* found only one "stated purpose" in the 1934 Act). And the court supplemented this analysis with legislative-history statements emphasizing the need for "uniform, consistent requirements" in the wireless field, "with adequate safeguards of the public health and safety." *Id.* at 124 (quoting H.R. Rep. No. 104-204, at 94). The RF regulations, the Third Circuit concluded, "represent the FCC's considered judgment about how to protect the health and safety of the public while still leaving industry capable of maintaining an efficient and uniform wireless network." *Id.* at 125. Allowing "a jury to second guess the FCC's conclusion" under any state's tort law would thus "hinder the accomplishment of the full objectives behind wireless regulation." *Id.* at 126.

b. Petitioners contend (at 15-16) that *Farina* and the decision below conflict with the D.C. Court of Appeals' decision in *Murray v. Motorola, Inc.*, 982 A.2d 764 (D.C. 2009). They are mistaken. In *Murray*, the

court held that "claims rest[ing] on allegations about the inadequacy of the FCC's RF radiation standard or about the safety of their FCC-certified cell phones" were "preempted." 982 A.2d at 777. Just as the Third and Ninth Circuits did, the court recognized that allowing such state-law tort claims would "necessarily upset [the] balance" the FCC had struck. *Ibid.*

Searching for a conflict, petitioners seize on *Murray*'s conclusion, at the motion to dismiss stage, that some state-law misrepresentation claims were not preempted. 982 A.2d at 783; *see* Pet. 13, 16. But *Murray* held only that certain *types* of misrepresentation claims were not yet subject to dismissal on preemption grounds, including the plaintiffs' claims that the defendants had misrepresented (1) that their phones were certified as compliant with RF limits and (2) that there can be "'absolutely no risk of harm associated with the use of cell phones.'" 982 A.2d at 783-84. These misrepresentation claims, the court held, conflicted with no FCC regulation and would not require plaintiffs "to prove that cell phones emit unreasonably dangerous levels of radiation." *Ibid.* In so concluding, the court emphasized that FCC counsel had declined "to state a position on the issue of whether claims that cell phones violated the FCC standard would be preempted." *Ibid.* The court's analysis on this issue also predated the 2019 RF Order in which the FCC made clear that its disclosure requirements establish both a ceiling and a floor. 2019 RF Order, 34 F.C.C. Rcd. at 11697 ¶ 16 (explaining that additional disclosures would improperly "overwarn[]"). And in any event,

when addressing the type of misrepresentation claims petitioners raise here—claims based on defendants' alleged failure to warn consumers that the FCC's standards were insufficient—*Murray* agreed that such claims would be preempted. *Id.* at 784 n.35.

The D.C. Court of Appeals' analysis is thus entirely consistent with that of the Third and Ninth Circuits. As *Farina* explained, the misrepresentation claims at issue in that case differed from those in *Murray* because the *Farina* plaintiff alleged that "defendants failed to disclose a defect in their phones—the level of RF emissions—that made them unsafe to operate." *Farina*, 625 F.3d at 122 n.26. Those claims were precisely the sort that *Murray* recognized *would* be preempted. 982 A.2d at 784 n.35. Likewise here, petitioners allege that Apple failed to warn that iPhones emit unsafe levels of RF radiation, in spite of the FCC's determination that those devices satisfied federal emission and disclosure requirements. Pet. App. 36a-37a. The Ninth Circuit did not hold that *all* misrepresentation claims related to RF emissions were preempted; it simply joined the other courts that have considered similar misrepresentation claims in holding petitioners' particular claims preempted.

c. Finally, petitioners invoke *Pinney v. Nokia, Inc.*, 402 F.3d 430 (4th Cir. 2005), which allowed state-law claims alleging that cell phones emit unsafe RF emissions to go forward. *Id.* at 439. The first appellate court decision to address preemption in this area, *Pinney* has not been followed by any court since. *See Farina*, 625 F.3d at 133; *Murray*, 982 A.2d at 778 n.19;

Fontana v. Apple Inc., 321 F. Supp. 3d 850, 855 (M.D. Tenn. 2018); *Firstenberg v. Monribot*, 350 P.3d 1205, 1216 (N.M. Ct. App. 2015).

It is not difficult to see why. First, *Pinney* failed to consider whether the FCC's regulations themselves have preemptive effect. Instead, the Fourth Circuit focused entirely on one provision of the 1934 Act (section 332), concluding that it could "not infer from" that provision "the congressional objective of achieving preemptive national RF radiation standards for wireless telephones." 402 F.3d at 457. The court thus failed to address whether the FCC's "statutorily authorized *regulations*" would "pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of N.Y. v. FCC*, 486 U.S. 57, 64 (1988) (emphasis added).

Second, the decision predated the FCC's consistent and comprehensive explanation of the preemptive effect of its RF regulations. *See*, *e.g.*, Amicus Brief of the United States and FCC, *Murray v. Motorola, Inc.*, No. 07-cv-1074, 2008 WL 7825518, at *18 (D.C. Apr. 8, 2008); Amicus Brief for the United States, *Farina v. Nokia, Inc.*, No. 10-1064, 2011 WL 3799082, at *9 (U.S. Aug. 26, 2011) ("Farina SG Brief"). This "explanation of how state law affects the regulatory scheme" is entitled to deference. *Wyeth*, 555 U.S. at 576; *see Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 53 n.1 (2011); *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 203-05 (2011).

The Fourth Circuit has not had the opportunity to revisit this question in the years since it issued *Pinney*. Were it to do so, it could reconsider its reasoning with the benefit of the FCC's views, the growing weight of authority from other circuits, and assessment of the full statutory and regulatory scheme. There is no need for the Court to intervene now.

2. This Court previously rejected a petition raising this same question

This Court has already been presented with the opportunity to address the purported split petitioners raise. It declined.

The plaintiff in *Farina* sought this Court's review of the Third Circuit's decision. *See* Petition for a Writ of Certiorari, *Farina v. Nokia, Inc.*, No. 10-1064, 2011 WL 704764 (U.S. Feb. 22, 2011). Much like petitioners here, the plaintiff argued that a split between *Farina*, *Pinney*, and *Murray* warranted this Court's review. *See id.* at *13-17.

On this Court's invitation, the United States filed a brief opposing certiorari. *See* Farina SG Brief, 2011 WL 3799082. The United States explained that *Farina* and *Murray* were entirely consistent, as both cases held that claims alleging the inadequacy of the FCC's RF regulations were preempted. *Id.* at *14-16. Turning to *Pinney*, the United States observed that the decision "was issued before the FCC set out its views on the effect of state lawsuits on the federal regulatory scheme" and that the Fourth Circuit had given "almost no consideration to the preemptive effect of the FCC's

RF regulations." *Id.* at *10-11. The United States thus opined that "in a future case" that adequately discussed the FCC's views and the relevant regulations, "the Fourth Circuit may reach a different conclusion." *Id.* at *14.

This Court denied certiorari. *Farina v. Nokia, Inc.*, 565 U.S. 928 (2011). It should do so again here. The decision below did not "deepen[]" any purported split. *Contra* Pet. 1. Instead, it merely joined the weight of authority rejecting an outdated, outlier decision. And it came after the FCC yet again offered its longstanding explanation for why its regulations in this area are preemptive. There is even less reason for this Court to review this issue now than there was a decade ago.

B. There Is No Conflict Of Authority In Preemption Jurisprudence More Generally

Perhaps recognizing that this Court has previously declined to take up the question of the preemptive effect of the FCC's RF regulations, petitioners attempt to identify a broader divide in preemption jurisprudence—both among the lower courts and within this Court's decisions. That effort fails.

1. There is no confusion in the lower courts on how to assess a regulation's preemptive effect

Petitioners attempt to conjure generic "confusion" in the lower courts. They suggest that some courts look exclusively to the statutory text in determining whether a regulation preempts state law, while others

entirely ignore that text in favor of agency statements or policy preferences. Pet. 19-20. But the cited decisions are readily reconciled: all of them recognize the relevance of both the statutory text and the agency's purposes in satisfying its statutory mandate.

Thus, for example, petitioners praise *New York Pet Welfare Ass'n, Inc. v. City of N.Y.*, 850 F.3d 79 (2d Cir. 2017), for relying on statutory text. Pet. 19. But the Second Circuit also expressly recognized that "in evaluating preemption by a regulation, we focus on the agency's intent." 850 F.3d at 87. Similarly, petitioners characterize *Varela v. FCA US LLC*, 505 P.3d 244 (Ariz. 2022), as stating that courts should " 'avoid speculative conflicts far removed from' statutory text." Pet. 20 (quoting 505 P.3d at 253). What *Varela* actually said is that courts should "avoid speculative conflicts far removed from the text of *laws and authorized regulations*." 505 P.3d at 253 (emphasis added). Thus, the court "review[ed] the administrative record * * * to determine whether the [a]gency has conveyed an authoritative message establishing a federal policy." *Id.* at 254.

Nor does petitioners' characterization of cases that purportedly deemed Congress's purposes "all but irrelevant" withstand scrutiny. Pet. 20. Petitioners describe *Priester v. Cromer*, 736 S.E.2d 249 (S.C. 2012), as "neglecting even to mention the statutory text authorizing agency action." Pet. 20. That is incorrect: the court expressly stated that "[t]he Motor Safety Vehicle Act [*sic*] indeed directs the DOT to establish 'minimum standard[s] for motor vehicle performance, or motor

vehicle equipment.'" *Priester*, 736 S.E.2d at 258 (quoting 49 U.S.C. § 30102) (second alteration in original, emphasis omitted). And petitioners claim that *Dowhal v. SmithKline Beecham Consumer Healthcare*, 88 P.3d 1 (Cal. 2004), supposedly "dismiss[ed] explicit statutory text in concluding that the purposes of an agency regulation impliedly preempted state law." Pet. 20. But the court merely relied on this Court's precedent to conclude that "recognizing conflict preemption would not nullify the [statute's] savings clause." *Dowhal*, 88 P.3d at 7-8 (citing *Geier*, 529 U.S. at 869).[7]

Petitioners thus provide no evidence that lower courts are inconsistently applying this Court's preemption cases or are otherwise "badly in need of guidance." Pet. 13.

2. There is no inconsistency in this Court's preemption cases

Petitioners' search for a cert-worthy issue finally lands at this Court's own cases. Petitioners argue this Court's older preemption cases improperly "suggest" that congressional intent is "largely irrelevant" to determining whether agency regulations preempt state law, while "more recent cases have emphasized that courts considering claims of purposes-and-objectives

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[7] Petitioners also rely on a comment by the West Virginia Supreme Court that it was "stuck between a rock and a jurisprudential hard place" in determining whether conflict preemption applied. *Morgan v. Ford Motor Co.*, 680 S.E.2d 77, 94 (W. Va. 2009). But *Morgan* simply expressed its belief that this Court's analysis in *Geier* was "flawed," before applying *Geier* consistent with the Supremacy Clause—hardly a basis for certiorari.

preemption must remain focused on *Congress's* purposes, not an *agency's* purposes." Pet. 5 (emphasis in original). But this Court has consistently instructed that both Congress's purpose *and* the agency's purpose are critical to determining whether a regulation preempts state law.

A regulation preempts conflicting state law if two requirements are met. First, there must be "actual conflict" between a regulation and state law—which, this Court has made clear, does not require "an express statement of pre-emptive intent." *Geier*, 529 U.S. at 884. And because "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law," a "narrow focus on Congress's intent to supersede state law [is] misdirected." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982).

Second, the agency's preemptive action must also be "within the scope of" its congressionally "delegated authority." *Ibid*. Thus, Congress's intent—and "the text and structure of the statute" it enacted—is far from "irrelevant." *Contra* Pet. 4-5, 24. To the contrary, "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). An agency action is safely within the bounds of delegated authority when it "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." *de la Cuesta*, 458 U.S. at 154, 159 (quotation marks omitted). This Court's preemption

cases—whatever their age—require examination of the text and structure of the relevant statute to discern that congressional intent.

Thus, as this Court has repeatedly explained, a regulation has preemptive force when the agency has struck a balance between congressionally mandated objectives and that balance would be disrupted by a conflicting state-law regime. In *Geier*, for instance, a federal regulation provided car manufacturers "with a range of choices" for passive restraint devices—a decision that balanced the frequently competing objectives of "lower[ing] costs, overcom[ing] technical safety problems, encourag[ing] technological development, and win[ning] widespread consumer acceptance." 529 U.S. at 875. A state law mandating airbags in all cars "would have presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* at 881. In its analysis, this Court emphasized that "[p]re-emption fundamentally is a question of congressional intent" and accordingly rejected a proposed analysis that would "take from" the agency "the very ability to achieve the law's congressionally mandated objectives." *Id.* at 872, 884; *accord* Pet. 30.

This Court echoed that reasoning in *Buckman Co. v. Plaintiffs' Legal Commission*. Observing that "the federal statutory scheme amply empowers the FDA to punish and deter fraud" and that the FDA uses this authority "to achieve a somewhat delicate balance of statutory objectives," this Court concluded that

"balance" would be impermissibly "skewed by allowing" state fraud-on-the-FDA claims. 531 U.S. at 348.

By contrast, when state-law claims would not disrupt an agency's balancing of congressionally mandated objectives, no conflict exists. For example, in *Wyeth v. Levine*, this Court held that a state suit alleging a drug label was unsafe was not preempted by FDA regulations that set less stringent requirements for drug labels. That was because Congress had enacted the Federal Food, Drug, and Cosmetic Act "to bolster consumer protection against harmful products," and there was no persuasive evidence, either from Congress or from the agency, that this purpose would be frustrated by claims that provided greater consumer protection. 555 U.S. at 574. Petitioners suggest that *Wyeth* rejected the more general proposition that an agency's regulation balancing competing objectives can ever have preemptive force. Pet. 28-29. In fact, the Court simply rejected the contention that the FDA had "set[] a ceiling on" drug labels through its regulation, concluding that argument was "belied by the record." 555 U.S. at 581 n.14 (noting "the FDA did not consider and reject a stronger warning"); *see id.* at 612 (Alito, J., dissenting) (faulting majority for finding "that the FDA failed to consider (and strike a 'balance' between) the specific costs and benefits associated with" a certain drug use); *accord Farina*, 625 F.3d at 130 ("*Wyeth* was not a balancing case.").

II. THE COURT OF APPEALS' DECISION WAS CORRECT

Petitioners argue that, even if there is no conflict, the decision below is wrong. Pet. 26-32. Of course, any case-specific "misapplication of a properly stated rule of law" would not warrant this Court's review. Sup. Ct. R. 10. Regardless, the Ninth Circuit's decision is correct.

A. The Ninth Circuit Correctly Held Petitioners' Claims Preempted

The Ninth Circuit carefully adhered to this Court's preemption doctrine. It explained that for a regulation to have preemptive force, it must "fall within the scope of the [federal agency's] delegated authority" and "the agency must have meant to pre-empt state law." Pet. App. 26a-27a (alteration in original) (quotation marks omitted) (citing *de la Cuesta* and *City of N.Y.*). Thus, state law is preempted "when it disturbs a balance the federal regulation has struck between 'conflicting policies that were committed to the agency's care by the statute.'" Pet. App. 27a (quoting *City of N.Y.*, 486 U.S. at 64).

Assessing the first requirement, the court determined the 1934 "Act grants broad authority to the FCC to promulgate regulations that strike a balance among overlapping and potentially conflicting policies." Pet. App. 27a-28a. And the RF regulations—which promote congressional policies of safety, efficiency, and nationwide uniformity—fall well within the substantive scope of that authority. Pet. App. 27a-28a. In reaching

this conclusion, the court relied on sections 151 and 157(a) of the Act, which express Congress's intent that the FCC pursue "the promotion of 'a rapid, efficient, [n]ation-wide, and worldwide * * * communication service,' the promotion of 'safety of life and property through the use of wire and radio communications,' 'national defense,' and the encouragement of 'provision of new technologies and services to the public.' " Pet. App. 27a-28a (quoting 47 U.S.C. §§ 151, 157(a)); *see*, *e.g.*, *Geier*, 529 U.S. at 872 (relying on 15 U.S.C. § 1392(a)'s direction that agency "shall establish" safety standards that "shall be practicable" and "shall meet the need for motor vehicle safety" to conclude that a regulation allowing choice of restraint devices preempted state law precluding such choice).

Addressing the second requirement, the court relied on the FCC's consistent statements, *see supra* pp. 4-9, to conclude that the RF regulations "were intended to strike such a balance" among these congressionally mandated objectives. Pet. App. 27a-29a. Indeed, the FCC has repeatedly stated that its regulations balance multiple competing objectives by imposing both a floor and a ceiling on RF requirements. *Compare* 2019 RF Order, 34 F.C.C. Rcd. at 11689 ¶ 2, 11694 ¶ 12, 11696 ¶ 1 (declining to amend existing RF standards and explaining that proposed lower limits would result in devices that could not "reliably transmit any usable level of energy" without scientific evidence that those lower limits would produce "any tangible benefit to human health"), *and id.* at 11697 ¶ 16 (explaining that additional disclosures would

improperly "overwarn[]"), *with Wyeth*, 555 U.S. at 581 n.14 (rejecting the argument that the FDA intended to set both a floor and a ceiling because "the FDA did not consider and reject a stronger warning"). The court thus correctly held that "[a]llowing state tort law to prescribe lower levels of RF radiation than the levels prescribed by the FCC would interfere with the nationwide uniformity of regulation that is the aim of the Act, and would render the FCC's statutorily mandated balancing essentially meaningless." Pet. App. 31a.[8]

B. Petitioners' Arguments Against Preemption Lack Merit

Petitioners offer no reason to disturb the Ninth Circuit's analysis.

1. The Ninth Circuit adhered to this Court's precedent

First, petitioners contend the court "badly misread" *de la Cuesta* and *City of New York* by interpreting those cases as instructing that "a generic grant of rulemaking authority" by Congress is sufficient to "convey the requisite congressional purpose." Pet. 28-29. They argue that both cases defined "the 'crucial' question" regarding congressional intent as "whether Congress has, in fact, 'authorized [an agency] to preempt state

[8] Contrary to petitioners' and amici's view (Pet. 11; City of Berkeley Br. 8-9; CHD Br. 23-27), there is no requirement as to where or how an agency's intent be expressed, so long as it is consistent. *See Geier*, 529 U.S. at 884 ("[T]he Court has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists."); Farina SG Brief at 13.

and local regulation.'" Pet. 28 (quoting *City of N.Y.*, 486 U.S. at 66) (alteration in petition). According to petitioners, the Ninth Circuit bypassed that "crucial question" by asking only whether the regulations here were "'authorized' by a congressional enactment." Pet. 27-28 (quoting Pet. App. 26a).

Petitioners mischaracterize both this Court's decisions and the decision below. To the extent petitioners argue that Congress must have specifically authorized an agency to preempt, they are wrong. As this Court has held, a "pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *de la Cuesta*, 458 U.S. at 154.

To the extent petitioners argue that the Ninth Circuit relied solely on Congress's generic grant of rulemaking authority, they are equally wrong. Petitioners suggest the court cited only the portion of the 1934 Act providing that the FCC may "make such rules and regulations, not inconsistent with law, as may be necessary to carry out" its obligations. Pet. 27 (citing Pet. App. 22a, 27a-28a); *see* 47 U.S.C. § 154(i). But the Ninth Circuit also invoked Congress's express "purpose" that the FCC "make available * * * a rapid, efficient, [n]ation-wide, and worldwide * * * communication service," "promot[e] safety of life and property," and "encourage[] the provision of new technologies and services to the public." Pet. App. 4a, 28a (quoting 47 U.S.C. §§ 151, 157(a)).

Petitioners provide no basis for concluding these statutory mandates are insufficient. They first contend section 151 is irrelevant to identifying "the purpose of Congress," *Wyeth*, 555 U.S. at 565, because it merely "identif[ies] several generic purposes." Pet. 30. But surely the best evidence of Congress's purpose in granting the FCC regulatory authority is the statutory text that repeatedly identifies Congress's "purpose[s]" in doing so. 47 U.S.C. § 151. Petitioners also attempt to dismiss section 151 because it "does not mandate that the agency engage in any particular rulemaking" or "direct that the agency must consider any competing objectives." Pet. 31. But Congress *did* mandate that the FCC "shall" "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter." 47 U.S.C. § 303(r). Even more specifically, the FCC "shall" "[r]egulate the kind of apparatus to be used with respect to its external effects." *Id.* § 303(e). Regulating cell phones' RF emissions is necessary to regulate the "external effects" of a radio "apparatus." And sections 151 and 157 plainly state that in carrying out that mandate, the FCC must promote efficiency, safety, and the provision of new technology, 47 U.S.C. §§ 151, 157(a)—thus "direct[ing]" the FCC to consider these oftentimes "competing

objectives." *Contra* Pet. 31; *see Geier*, 529 U.S. at 872 (relying on similar statutory objectives).[9]

The Ninth Circuit thus correctly gave preemptive effect to "federal standards and policies that are set forth in, or necessarily follow from, the statutory text." *Wyeth*, 555 U.S. at 586 (Thomas, J., concurring in the judgment). In adopting the RF regulations, the FCC exercised its core regulatory authority, doing so at the express direction of Congress. The federal objectives that the Ninth Circuit identified in the RF regulations do not derive from "some brooding federal interest" or a "judicial policy preference," *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (plurality op.); they come directly from the statute. *Contra* Pet. 21.

Indeed, it is difficult to see how petitioners could reconcile their position with Congress's clear purpose, manifested in the 1934 Act, of ensuring a uniform and national wireless network. *Farina*, 625 F.3d at 126. Were petitioners correct, each state—and every city within each state, *see* City of Berkeley Br.—could impose its own RF limits on cell phones based on its own

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[9] Petitioners appear to abandon their argument that the RF regulations were promulgated under NEPA. To the extent they intend to preserve this argument (*see*, *e.g.*, Pet. 9, 11 (describing the regulations as "procedural guidelines" that impose only "an informational requirement")), it is wrong: the FCC has consistently invoked its authority under the 1934 Act in promulgating its RF regulations. *See* Pet. App. 22a-24a; *Farina*, 625 F.3d at 106 n.2; Farina SG Brief at 18-21. The FCC has also consistently described its RF regulations as substantive "exposure limits." *See*, *e.g.*, 1996 RF Order, 11 F.C.C. Rcd. at 15147 ¶ 62; 2019 RF Order, 34 F.C.C. Rcd. at 11696 ¶ 14; 47 C.F.R. § 1.1310.

competing balancing of the relevant interests. The RF emissions in question are not some mere byproduct of cell phone use; they are how cell phones connect to the network. *See* FCC, Questions and Answers, *supra*, at 2-3. If petitioners' view prevailed, the strictest jury in the strictest city or county might effectively dictate the RF limits for all cell phones, displacing federal RF standards and degrading the quality of wireless service nationwide. Congress created the FCC and charged it with regulating to ensure "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service" (47 U.S.C. § 151) precisely to avoid that result.

2. The Ninth Circuit correctly held that the 1934 and 1996 Acts' express preemption and savings clauses do not bar conflict preemption

Petitioners argue that various express preemption and savings clauses bar the application of conflict preemption here. Pet. 29-30. But petitioners ignore this Court's oft-repeated rule that "neither an express pre-emption provision nor a saving clause 'bar[s] the ordinary working of conflict pre-emption principles.'" *Buckman*, 531 U.S. at 352 (quoting *Geier*, 529 U.S. at 869); *see also de la Cuesta*, 458 U.S. at 162 (provisions of a statute "explicitly pre-empting and incorporating state law" "do not imply that Congress intended no further pre-emption of state law").

Specifically, petitioners invoke the statutory prohibition on certain state regulations of wireless service

facilities, 47 U.S.C. § 332(c)(7)(B)(iv), contending that the absence of a similar prohibition on state regulations of wireless devices demonstrates that Congress did not intend to preempt such state regulations. Pet. 30-31. In support, they cite this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), which observed that an express preemption provision "implies" that other matters are not preempted. *Id.* at 517. But this Court has since made clear that "[t]he fact that an express definition of the pre-emptive reach of a statute 'implies' * * * that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995).

Petitioners also briefly invoke two generic savings clauses—one from the 1934 Act and one from the 1996 Act—that provide that those Acts do not alter existing laws or remedies. Pet. 30 (citing 47 U.S.C. § 414; 110 Stat. at 143, 47 U.S.C. § 152 note). But as the Ninth Circuit correctly recognized, "this Court has repeatedly decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law." Pet. App. 30a (quoting *Geier*, 529 U.S. at 870 (alteration in original) (quotation marks omitted)). In fact, this Court has refused to construe the 1934 Act's savings clause as saving state claims from preemption, explaining "the act cannot be held to destroy itself." *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998) (quotation marks omitted). Nor do petitioners have any response to the

Ninth Circuit's conclusion that the 1996 Act's savings clause, by its plain terms, applies only to that Act—meaning that it is irrelevant to the FCC's preexisting preemptive authority under the 1934 Act. Pet. App. 32a-33a.

3. The Ninth Circuit correctly considered the FCC's views

Finally, petitioners suggest the FCC's views are entitled to no weight because they have changed over time. Pet. 9. Petitioners point to statements in which the FCC purportedly "insisted" its RF "guidelines did not preempt state law regarding cellphone radiation." *Ibid.*; *see also* Children's Health Defense Br. 15-23.

Petitioners "overread[]" those statements. *Farina*, 625 F.3d at 127. Although the FCC had "previously refused to express a view on whether state and local RF regulations are preempted, its refusal was explicitly based on the fact that no significant conflict between state law and its regulations existed." *Ibid.*; *see*, *e.g.*, 1997 RF Order, 12 F.C.C. Rcd. at 13498 ¶ 10. Once such evidence of a conflict presented itself, the FCC consistently maintained its position that the RF regulations have preemptive force. *See*, *e.g.*, Farina SG Brief at 11-13 (discussing FCC's consistent position in amicus briefs); *Chamber of Commerce v. Whiting*, 563 U.S. 582, 608 (2011) (relying on government's position in litigation briefs that a state law did not conflict with a federal scheme). Because the FCC's "explanation of state law's impact on the federal scheme" has been

"thorough[], consisten[t], and persuasive[]," it is entitled to "weight." *Wyeth*, 555 U.S. at 577.

III. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED

Even had petitioners identified a question worthy of this Court's attention, at least two features of this case would make it a poor vehicle for resolving that question.

First, petitioners' theory of liability has shifted repeatedly during this case. Between their complaint, summary judgment, and the Ninth Circuit appeal, petitioners have at times premised their claims on the assertion that iPhone RF emissions "exceed[] federal guidelines" (*e.g.*, 7-ER-1169-70; 1-ER-18-19), but at other times have relied on the theory that the FCC's RF limits are inadequate (*e.g.*, Pet. App. 20a). This repeated reformulation of petitioners' claims leaves it unclear precisely what state-law claims they now ask this Court to assess for a potential conflict with federal law.

That uncertainty may also exacerbate a jurisdictional issue. Under the Hobbs Act, the courts of appeals—not the district courts—have "exclusive" jurisdiction to "determine the validity of" certain final FCC orders. 28 U.S.C. § 2342(1). Depending on the precise nature of petitioners' claims, the Hobbs Act may preclude some or all of them. 6-ER-1038-1039, 1044-1046 (FCC statement of interest asserting jurisdictional objections under Hobbs Act to certain of petitioners' claims). In particular, petitioners' claim that

iPhones exceed federal RF limits necessarily challenges the validity of the FCC's equipment authorizations, which certified those phones as compliant with the federal RF limits. Such a claim could and should have been pressed in a direct challenge to those equipment authorizations through the required procedures—not raised for the first time in the district court. *See*, *e.g.*, 47 C.F.R. § 2.923 ("Persons aggrieved by virtue of an equipment authorization action may file with the Commission a petition for reconsideration or an application for review."). Similarly, petitioners' claim that Apple was required to disclose that its FCC-certified iPhones were unsafe challenges the 2019 RF Order's determination that additional disclosure requirements would constitute "overwarning." 2019 RF Order, 34 F.C.C. Rcd. at 11697 ¶ 16. That order could be challenged only in a court of appeals. *See Env't Health Tr. v. Fed. Commc'ns Comm'n*, 9 F.4th 893 (D.C. Cir. 2021) (reviewing challenge to that same order).

While the Ninth Circuit concluded the Hobbs Act posed no bar to its review, Pet. App. 21a, the court did not specifically address each of petitioners' claims. Because petitioners had at that point disclaimed the operative complaint's contention that iPhones violated the RF regulations, the court did not consider whether that claim represented a direct challenge to the FCC's contrary orders authorizing iPhones for sale. Pet. App. 21a. But although petitioners' principal theory in the Ninth Circuit may have been different from the one in their operative complaint, it is the operative complaint that dictates subject-matter jurisdiction. *See*, *e.g.*,

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 814 (1988) ("[T]he district court's jurisdiction is determined by reference to the well-pleaded complaint, not the well-tried case."). Nor did the Ninth Circuit directly address its jurisdiction over petitioners' disclosure claims—perhaps because of petitioners' limited focus on that theory. Were this Court to grant review here, however, it would be required to wrestle with the uncertain nature of petitioners' claims and the uncertain jurisdictional issues that result.

Second, the D.C. Circuit in 2021 remanded for further explanation part of the 2019 RF Order, in which the FCC had declined to reconsider its existing RF limits. *See Env't Health Tr.*, 9 F.4th 893. The court did not vacate the Order or any of the underlying regulations, which remain in force and retain their full preemptive effect. The court did, however, direct the FCC to provide further "explanation for its determination that its [RF] guidelines adequately protect against harmful effects of exposure to radiofrequency radiation unrelated to cancer." *Id.* at 914. Specifically, the agency was instructed to further explain "its decision to retain its testing procedures for determining whether cell phones * * * comply with its guidelines" and to address "the health implications of long-term exposure to RF radiation, the ubiquity of wireless devices, and other technological developments." *Ibid.* The FCC thus may soon offer additional explanation of its RF regulations and testing procedures that could be relevant. *Cf. Geier*, 529 U.S. at 883 ("[T]he agency's own views should make a difference."). It would be inadvisable

for this Court to grant certiorari now when the agency may subsequently offer further explanation for the regulations at issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL 14, 2023