No. 20-17307

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANDREW COHEN, *et al.*

Plaintiffs-Appellants,

v.

APPLE INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Hon. William Alsup, District Judge

No. c 19-05322

BRIEF OF AMICUS THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, amicus curiae the Chamber of Commerce of the United States of America ("Chamber") hereby submits the following corporate disclosure statement:

The Chamber states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber offers an important perspective on the crucial role of preemption in creating and sustaining a consistent, nationwide market. *See, e.g.*, *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938 (2016); *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312 (2016); *Nw., Inc. v. Ginsberg*, 572 U.S. 273 (2014); *Nat'l Meat Ass'n v. Harris*, 565 U.S.

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[1] All parties have consented to the filing of this amicus brief. No counsel for a party authored this brief in whole or in part, and no person other than the amicus curiae, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

452 (2012); *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323 (2011); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011); *Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008). The Chamber has a special interest in this case, as manufacturers of cellular telephones, including some of the Chamber's members, make products designed to operate in a single, nationwide market and mobile network.

The development of reliable cell phone technology has been made possible, in part, by the federal government's uniform regulatory landscape. If individual states and localities had the authority to regulate radiofrequency emissions alongside the Federal Communications Commission ("FCC"), manufacturers like Apple would face significant hurdles in delivering cutting-edge technology to consumers. The Chamber's members—and indeed, anyone who owns or uses a cell phone—would suffer as a result.

SUMMARY OF THE ARGUMENT

Few technologies have had such impressive advances and palpable impacts on society as the modern cellular phone. In recent decades the mobile phone industry has grown by leaps and bounds, developing at a pace unrivaled in recent memory. The modern smartphone connects

human beings across the globe in a manner that would have been unimaginable even 30 years ago. Individual consumers, businesses, and government all count on a fast and dependable mobile network and have benefitted from its creation. Indeed, the COVID-19 pandemic has underscored our reliance on continued developments in broadband connectivity. This technological success is poised to continue, so long as the regulatory landscape remains hospitable to innovation and does not stifle it.

Since the dawn of radio, Congress has charged the FCC with sole and plenary responsibility for striking the right balance in regulating radio emissions. *See* Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064. The agency has played—and continues to play—a crucial role in speeding the nationwide development of new communications technologies and services, while ensuring that these services can be used safely in accordance with the best scientific understanding. And the FCC has endorsed the Food and Drug Administration's ("FDA") conclusion that "'[t]he weight of scientific evidence has not linked cell phones with any health problems.'" *Resolution of Notice of Inquiry, Second Report and Order, Notice of Proposed Rulemaking, and*

Memorandum Opinion and Order, 34 F.C.C.R. 11687 (2019) (2019 Radiofrequency Emissions Order) (quoting U.S. Food and Drug Administration, *Do cell phones pose a health hazard?*, shorturl.at/bjFMW).

Plaintiffs in this case advance a different vision. Under their theory, the FCC must share its historic responsibility to regulate radio waves with states, localities, and even individual jurors. The Constitution does not permit such an approach. The Communications Act of 1934 grants the Commission broad authority to regulate radio emissions, and Congress directed the agency to develop the specific radiofrequency standards at issue here when it revised the Communications Act in 1996. The Commission relied explicitly on this authority to create cell phone radiofrequency emission standards that govern all manner of electronic equipment imported to and offered for sale in the United States.

Plaintiffs' suit, however, stands as a direct obstacle to the FCC's ability to certify cell phones as safe for consumer use because it seeks to impose different maximum radiofrequency emission standards under *state* law—an approach expressly rejected by the agency on multiple

occasions. As the Supremacy Clause makes clear, state and local law that stands as an obstacle to duly promulgated federal regulations must yield. In this case, that straightforward principle requires that Plaintiffs' suit be declared preempted and dismissed. The "savings" clauses identified by Plaintiffs are irrelevant to this inquiry. And Plaintiffs' arguments related to the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, are inapposite. It is the Communications Act that provides the FCC with authority to act as the sole, national regulator of radio emissions, and to impose substantive standards on devices that emit radiofrequency emissions. And it was this authority that imbues the FCC's orders with preemptive force.

For these reasons, Plaintiffs' claims are necessarily preempted and cannot continue. To hold otherwise would allow Plaintiffs to second-guess the balance the FCC has struck in enabling safe, reliable, communications by radio on a nationwide basis. Should Plaintiffs prevail, the Commission's certification that a model phone—or any device—is not harmful would be virtually meaningless.

Were Plaintiffs successful in their suit, both industry *and* consumers would suffer. Because radiofrequency emissions are tied to

certain technical aspects of radio network transmission, state laws that set lower limits out of a concern for alleged health impacts would inevitably change (and likely diminish) the function of nationwide networks. Moreover, a patchwork of varied and contradictory standards across the nation would stifle innovation. And the implications would reach far beyond the FCC and cell phones. Under Plaintiffs' approach to preemption, the federal government would become one among many regulators, a result that would dramatically increase costs to everyday Americans and prevent new technologies from reaching consumers.

In this case, the Constitution makes clear that state law must yield. This Court should affirm.

ARGUMENT

I. THE FCC'S CERTIFICATION OF CELL PHONE RADIOFREQUENCY EMISSIONS PREEMPTS STATE TORT ACTIONS.

In passing the Communications Act of 1934, Congress entrusted the FCC with authority to regulate wireless communications. The Commission carries out that mandate, pursuant to more recent Congressional guidance pertaining specifically to radiofrequency emissions, whenever it certifies cellular telephones as approved for use

in the United States. Plaintiffs' lawsuit, which seeks to reassign responsibility for policing radiofrequency emissions to state juries, is necessarily preempted.

A. Congress Entrusted The FCC With Authority To Regulate Radiofrequency Emissions.

The FCC's exclusive authority to regulate radiofrequency emissions from all radiofrequency emitting devices, including cellular telephones, is clear from the FCC's governing statute, which entrusts the agency with creating and enforcing uniform standards nationwide. Indeed, for over a century, Congress has assigned to the federal government responsibility for regulating radio transmissions in the United States. This began with the Radio-Communications Act of 1912, which created a federal licensing regime to allocate frequencies. *See Nat'l Broad. Co. v. United States*, 319 U.S. 190, 210 (1943). With the rapid growth and widespread adoption of radio communications, Congress ultimately replaced that statute with the Federal Communications Act of 1934. The Act created the FCC:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available . . . a rapid, efficient, Nation-wide, and world-wide

> wire and radio communication service with adequate facilities at reasonable charges.

47 U.S.C. § 151.

Among other things, the Communications Act entrusts the Commission with regulating "the kind of apparatus to be used" for wireless radio communications and "the emissions" produced from it. 47 U.S.C. § 303(e). As radio technology developed and expanded through the decades, Congress continued to place its trust in the FCC as the "exclusive" authority governing radio communication. *Head v. N.M. Bd. of Exam'rs in Optometry*, 374 U.S. 424, 430 n. 6 (1963). In support of that mission, the FCC has regulated and authorized cellular radio technology on a nationwide basis from its very inception. *See Cellular Communications Systems*, 86 F.C.C.2d 469, 470 (1981).

In the 1980s—in accordance with its obligation under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, to consider the environmental impact of any "major" action that "significantly affect[s] the quality of the human environment," *id.* § 4332(2)(C)—the Commission used its authority under the Communications Act to promulgate regulations governing the effects of

radiofrequency emissions exposure on human beings. *See In re Responsibility of the F.C.C. to Consider Biological Effects of Radiofrequency Radiation*, 100 F.C.C.2d 543, 544 (1985). And in 1993, the FCC began a rulemaking to extend these regulations to cover cell phones. *See In re Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 8 F.C.C.R. 2849, 2851 (1993). With the passage of the 1996 Act, Congress ordered the FCC to complete its rulemaking. *See* Pub.L. No. 104–104, § 704(b), 110 Stat. 56, 152.

Under the resulting order, the FCC assumed responsibility for evaluating radiofrequency emissions from cell phones for the purpose of "protect[ing] the public and workers from exposure to potentially harmful RF fields." *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 11 F.C.C.R. 15123 ¶ 1 (1996) ("1996 Radiofrequency Emission Order"). Specifically, the Commission endorsed a maximum "specific absorption rate," *id.* ¶ 1, developed by the American National Standards Institute, *id.* at Appendix B, and mandated a testing regime that would determine whether devices were in compliance with the FCC's standards, *id.* ¶¶ 46–74; *see* 47 C.F.R. § 2.1093(d). Every iPhone (indeed, every cell phone) sold in the United

States today must comply with the FCC's radiofrequency regulations. *See* 47 C.F.R. §§ 2.803(a)(1), 24.51–.52.

From time to time in the years since its 1996 Radiofrequency Emissions Order, the Commission has reexamined its cell phone standards to ensure consistency with the best available scientific research. On each occasion, the agency has reaffirmed its standards. The Commission concluded its most recent reevaluation in 2019. *See* 2019 Radiofrequency Emissions Order. After a review spanning six years, the 2019 Radiofrequency Emissions Order determined—once again—that the "phones legally sold in the United States pose no health risks." *Id.* ¶ 14. Notably, the FCC made clear that it is the sole authority for evaluating the safety of cell phone radiofrequency emissions. As the Commission warned, "any claim as to the adequacy of the FCC required testing, certification, and authorization regime is no different than a challenge to the adequacy of the federal radiofrequency emission exposure limits themselves. Both types of claims would undermine the FCC's substantive policy determinations." *Id.* ¶ 14 n.49.

This regulatory system has avoided an impractical and counterproductive patchwork approach, fostered innovation, and

accounted for and relied upon the latest scientific knowledge. *See* 2019 Radiofrequency Emissions Order ¶ 114 n.308 (underlining that the FCC struck "'the proper balance between protecting the public from RF-emissions exposure and promoting a robust telecommunications infrastructure'" and quoting *Robbins v. New Cingular Wireless PCS, LLC*, 854 F.3d 315, 319–20 (6th Cir. 2017)).

B. Plaintiffs' Attempt To Second-Guess FCC Radiofrequency Emissions Certifications Stands As A Direct Obstacle To Federal Law.

Plaintiffs' suit against Apple is a direct challenge to the FCC's regulatory regime. Plaintiffs argue that even though the FCC has issued safety standards for radiofrequency emissions, established a mandatory certification process for applying those standards, and concluded that all cell phones that comply with the agency's process "pose no health risks," 2019 Radiofrequency Emissions Order ¶ 14, individual consumers may nevertheless ask a jury to find these very same phones unsafe for human use under state tort law. The FCC's regulatory regime preempts such a claim, which would create a significant obstacle to the agency's ability to regulate cell phone radiofrequency emissions on a uniform, nationwide basis.

1. The Supremacy Clause mandates that federal law preempt conflicting state law.

Plaintiffs' approach to preemption is fundamentally incompatible with the American system of federalism, under which a state enactment is preempted by federal law where it stands as an obstacle to the accomplishment and full purposes and objectives of Congress. *See Gibbons v. Ogden*, 22 U.S. 1, 210–11 (1824); *Arizona v. United States*, 567 U.S. 387, 398–99 (2012); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *Savage v. Jones*, 225 U.S. 501, 533 (1912); *McDaniel v. Wells Fargo Invs.*, LLC, 717 F.3d 668, 674 (9th Cir. 2013). Despite Plaintiffs' claim that "Congress must explicitly delegate to a federal agency the authority to preempt state law," App'ts Br. at 26, Congress need not be explicit in its intention to override a state or local enactment that interferes with a federal statute or regulation. *See id.* Where "the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," state law must yield to federal enactments. *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 1297 (2016) (internal quotation marks omitted).

That the federal enactment comes in the form of agency action rather than a statute is irrelevant. As the Supreme Court has made clear, "[f]ederal regulations have no less preemptive effect than federal statutes." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) (internal quotation marks omitted). So long as the agency has acted pursuant to, and within the bounds of, its statutory authority, its validly promulgated regulation has the same preemptive force as a statute. *See Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Durnford v. MusclePharm Corp.*, 907 F.3d 595, 602 (9th Cir. 2018). Nor does it matter what form a state's conflicting law may take. State tort litigation can interfere with the execution of federal law in the same way a statute would, and thus is subject to precisely the same types of preemption. *See, e.g.*, *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001) ("State-law fraud-on-the-FDA claims inevitably conflict with the FDA's responsibility to police fraud consistently with the Administration's judgment and objectives.").

2. Plaintiffs' tort action is a direct obstacle to the FCC's regulation of radiofrequency emissions.

Plaintiffs' suit, and others like it, would destroy the FCC's ability to maintain a uniform, national regime governing cell phone radiofrequency emissions. Indeed, Plaintiffs' claims challenge directly the FCC's exclusive authority to certify what level and manner of cell phone radiofrequency emissions are safe for consumers, and thus which devices may be sold to the public. Class action litigants should not be permitted to second-guess and undermine federal regulatory determinations by creating and enforcing different standards. The impracticality of Plaintiffs' approach is manifest from their claims and the relief sought.

Plaintiffs allege that by using Apple's iPhones as advertised, they risk physical harm from radiofrequency emissions. *See* ER1205. Additionally, Plaintiffs claim that Apple failed to disclose that the normal use of iPhones would expose consumers to radiofrequency emission levels that exceed federal standards, and that Apple failed to warn about the supposed risk of such exposure. *See* ER1204. Plaintiffs' position is, apparently, that "even at five millimeters, plaintiffs' iPhones

do not meet the Commission's RF exposure standards." ER19. But such an assertion necessarily challenges the sufficiency of the FCC's testing procedures—and ultimately the agency's certification.

Plaintiffs respond that the FCC's radiofrequency emission regime cannot preempt their suit because "if Apple wanted to, it could sell devices that produce RF radiation far below the FCC's guidelines." App'ts Br. at 38. This improperly conflates "impossibility" preemption with the broader doctrine of conflict or obstacle preemption. To be sure, preemption unquestionably occurs where "'compliance with both federal and state regulations is a physical impossibility.'" *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)); *see, e.g.*, *Young v. Coloma-Agaran*, 340 F.3d 1053, 1057 (9th Cir. 2003). But that is not the end of the inquiry. As the Supreme Court has made clear, even where it is physically *possible* to comply with both federal and state law, preemption nevertheless occurs "where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona*, 567 U.S at 399 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

That is precisely the situation here. When it came to regulating cell phone radiofrequency emissions, the FCC was not concerned simply with setting a maximum standard. Instead, the FCC sought to strike a balance[2] pursuant to which devices that create radiofrequency emissions can be lawfully sold. In that respect, this case is analogous to *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001). There, plaintiffs brought a state tort action contesting the safety of a bone screw device approved by the FDA. *See id.* at 343. Rather than arguing explicitly that the FDA's approval process was inadequate, plaintiffs claimed that the bone screw manufacturer had secured the

[2] Although Plaintiffs claim that the FCC "neither had the authority" to balance competing factors of health and burdens on the industry "nor even purported to do so," Plaintiffs acknowledge that the FCC has stated explicitly that the radiofrequency emission standards reflected the agency's balance of competing concerns. App'ts Br. at 51 n.8; *see In the Matter of Procs. for Reviewing Requests for Relief from State & Loc. Reguls. Pursuant to Section 332(c)(7)(b)(v) of the Commc'ns Act of 1934 in the Matter of Guidelines for Evaluating the Env't Effects of Radiofrequency Radiation*, 12 F.C.C. Rcd. 13494 (1997) ("We continue to believe that these 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."); *see also* 2019 Radiofrequency Emissions Order ¶ 114 n.308.

FDA's approval by misrepresenting the intended use of their product. *See id.* at 346–47.

The Supreme Court held that the FDA's approval regime nevertheless preempted plaintiffs' claims because it "set[] forth a comprehensive scheme for determining whether an applicant has demonstrated that a product" satisfied the criteria for approval. *Id.* at 349. Plaintiffs' suit would have undermined that regulatory scheme. As the Court explained, "[a]s a practical matter, complying with the FDA's detailed regulatory regime in the shadow of 50 States' tort regimes will dramatically increase the burdens facing potential applicants—burdens not contemplated by Congress in enacting the [statutes governing FDA approval]." *Id.* at 350.

So too here. Congress entrusted the FCC with the sole regulatory authority to oversee radiofrequency emissions, and to set safety limits for products, like the iPhone that emit radiofrequency emissions. Acting on the authority granted to it by Congress under the Communications Act, the Commission has established a deliberate, carefully considered process through which it evaluates cell phone radiofrequency emissions before making a definitive determination as

to their safety. *See* 47 C.F.R. §§ 2.1093(d), 2.803(a)(1), 24.51–.52. Apple's iPhones satisfied this process and, as a result, received FCC certification.

Notwithstanding the FCC's certification, Plaintiffs ask that a court deem the iPhone *unsafe*. Plaintiffs' suit would thus replace the Commission's authority to make such a determination with that of a jury, which would decide under state law whether radiofrequency emissions from the iPhone are dangerous. If Plaintiffs were permitted to proceed with their claims, it would open the door for juries throughout the United States to likewise second-guess authoritative determinations by the FCC and other agencies. It is no wonder, then, that both the Third Circuit and Court of Appeals for the District of Columbia have rejected similar suits contesting the preemptive force of the FCC's regulations. *See Farina v. Nokia Inc.*, 625 F.3d 97 (3d Cir. 2010); *Murray v. Motorola, Inc.*, 982 A.2d 764, 772–74 (D.C. 2009). Only the Fourth Circuit has been receptive to the minimalist approach to preemption advanced by Plaintiffs', *see Pinney v. Nokia, Inc.*, 402 F.3d 430 (4th Cir. 2005), but that suit preceded both the 2019 Radiofrequency Emissions Order and multiple statements from the

FCC explaining that any attempt by state law to question cell phone radiofrequency emissions certification would undermine the Commission's objectives.

FCC regulations dictate the specific testing procedures to which a cell phone manufacturer must submit its products for review. *See* 47 C.F.R. §§ 2.803(a)(1), 24.51–.52. In creating these procedures, the FCC sought to produce a uniform regulatory scheme. *See* ER1042 (FCC Statement of Interest[3]) ("[I]f plaintiffs were to prevail in that challenge, they would undermine the FCC's efforts to create and implement a uniform and reliable process for certifying that cell phones comply with RF limits."). Plaintiffs argue that "the FCC's standards don't even ensure uniformity in the first place" because "Apple is equally free to manufacture an iPhone that not only meets the FCC's standards but

[3] While the district court found the FCC's views to be instructive, it did not grant the agency's statement of interest any deference. *See* ER28 ("[P]laintiffs correctly note that we do not defer 'to an agency's conclusion that state law is preempted.'"). Similarly, this Court need not defer to the FCC's Statement of Interest in order to find preemption, which is clear from the agency's regulations and orders. At the same time, the FCC's Statement of Interest provides a clear, lucid, and concise explanation of how the agency's regulations preempt the claims at issue here.

also complies with state and local laws." App'ts Br. at 51. This misses the point and ignores the disruption their theory would create.

The purpose of a uniform regulatory scheme is to ensure that businesses like Apple may rely on the approval of *one* regulatory process rather than having to run the administrative gauntlet in each jurisdiction where it seeks to do business. If a company *chooses* to vary the amount of radiofrequency emissions its devices produce, that is its own decision—but it can still be confident that its products, having been certified by a federal agency, are legal throughout the nation. Because "[t]he rule of state tort law for which petitioners argue would stand as an 'obstacle' to the accomplishment of that objective," *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 886 (2000), Plaintiffs' claims are necessarily preempted.

C. The District Court Properly Rejected Plaintiffs' Claim That The FCC Lacks Sufficient Statutory Authority To Be The Exclusive Regulator Of Radiofrequency Emissions.

Plaintiffs do not dispute that Congress has granted the FCC authority to regulate cell phone radiofrequency emissions. Instead, Plaintiffs claim that while the FCC may have a mandate to regulate cell

phone emissions, its statutory authority is somehow insufficient to preempt Plaintiffs' suit. But Plaintiffs are wrong to focus on NEPA, rather than the Communications Act, as the locus of FCC authority, and their arguments that savings clauses in the Communications Act preclude preemption are wholly without merit.

1. The Communications Act—not NEPA—is the source of the FCC's regulatory authority.

The FCC's authority to regulate radio emissions is firmly grounded in the Communications Act, and has been for more than 80 years. *See* Section I.A, *supra*. With respect to radiofrequency emission safety standards for cellphones, specifically, Congress expressly directed the agency to establish such rules when it amended the Communications Act in 1996. Thus, as Plaintiffs themselves acknowledge, *see* App'ts Br. at 23, when it took the action directed by Congress in the 1996 Act and promulgated its 1996 Radiofrequency Emissions Order regulating cell phone radiofrequency emissions, the Commission stated expressly that it did so "pursuant to the authority contained in Sections 4(i), 7(a), 303(c), 303(f), 303(g), 303(r) and

332(c)(7) of the Communications Act of 1934." 1996 Radiofrequency Emissions Order ¶ 171.

To avoid preemption, Plaintiffs minimize the FCC's clear statutory authority to regulate radiofrequency emissions by arguing that NEPA—not the Communications Act—is the true source of the FCC's regulatory authority. According to Plaintiffs, because NEPA imposes merely a *procedural* requirement that agencies evaluate the effects of their actions on the quality of the human environment, the result of any such evaluation cannot have preemptive force. *See* App'ts Br. at 39–42.

But the fact that NEPA conveys no substantive authority on the agency is neither controversial nor beneficial to Plaintiffs' argument. As the district court concluded, NEPA may have been what initially led the Commission to consider environmental impacts of radiofrequency emissions, but the agency ultimately promulgated substantive standards (as it must) pursuant to its organic statute, the Communications Act. *See* ER8. It is this statute that allows the Commission to take any actions at all, and it is this statute that imbues the Commission's standards with preemptive force—not NEPA.

Nor does it matter, as Plaintiffs claim, that the FCC "is not a health and safety agency," and thus, according to Plaintiffs, "lacks either the expertise or the primary jurisdiction to set substantive standards." App'ts Br. at 37. This misses the point entirely. The FCC clearly has the authority to set nationwide radiofrequency emissions limits, 47 U.S.C. § 303(e), and the FCC simply could not set one power level or emissions limit for purposes of mitigating radiofrequency interference and let other agencies set different standards for health effects. The same radio waves would necessarily be the subject of each standard. The Commission is thus obligated to consider radiofrequency emissions health effects when it sets power limits and other standards for radiofrequency emissions. Indeed, *that* is what NEPA requires—that the agency consider the potential environmental impacts of the decisions that it makes pursuant to its statutory authority.

That the Commission is not a health and safety agency in no way strips its regulation of radio waves of preemptive effect. *See City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 630 (1973) (preemptive effect given to Federal Aviation Administration regulations "necessary to protect the public health and welfare" originally

submitted to agency by the Environmental Protection Agency); *Farina*, 625 F.3d at 127. Indeed, agencies often act in concert, relying on the expertise of one to inform the regulations of another. This redounds to the benefit of regulated entities and the public that relies on uniform national standards.

Here, the FCC relied on agencies like the FDA to inform its radiofrequency emission standards. *See, e.g.*, 2019 Radiofrequency Emissions Order ("We take to heart the findings of the Food & Drug Administration (FDA), an expert agency regarding the health impacts of consumer products, that [t]he weight of scientific evidence has not linked cell phones with any health problems." (internal quotation marks omitted) (alteration in original)). But the FDA lacks authority to regulate cell phone radiofrequency emissions itself. Under Plaintiffs' theory, *no* agency could promulgate radiofrequency emission standards and expect them to preempt contrary state law. Such an outcome would be absurd on its face and would cripple the ability of federal agencies to regulate in any area that requires diverse expertise.

2. Congress did not preclude the FCC's radiofrequency emission standards from having preemptive force.

Plaintiffs argue that even if the FCC acted pursuant to its statutory authority under the Communications Act in issuing radiofrequency emission standards, Congress expressly limited the ability of the agency to preempt state law. *See* App'ts Br. 34–36. Specifically, Plaintiffs suggest that the inclusion of savings clauses in the Communications Act and 1996 Act prevent the FCC's radiofrequency emission regulations from preempting Plaintiffs' tort action. But, as the Supreme Court has made clear, "neither an express pre-emption provision nor a saving clause 'bar[s] the ordinary working of conflict pre-emption principles.'" *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001) (quoting *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000)). That command applies with full force here and is necessary to protect the reliance interests of regulated entities that must conform their conduct to federal law.

Plaintiffs, for instance, cite a clause in the Communications Act providing that "[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute,

but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414, *cited by* App'ts Br. at 34. While such a provision suggests that the Communications Act did not preempt the entire field of state law relating to telecommunications, *see Farina*, 625 F.3d at 121, it cannot be read to mean that FCC regulations promulgated pursuant to the Act are incapable of preempting state law. If that were the case, the statute would be largely ineffectual. *See Am. Tel. & Tel. Co. v. Cent. Off. Tel., Inc.*, 524 U.S. 214, 227–28 (1998) ("Th[e saving] clause . . . cannot in reason be construed as continuing in [customers] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." (alteration in original) (quoting *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907))); *AT&T Corp. v. Fleming & Berkley*, 131 F.3d 145 (9th Cir. 1997) (notwithstanding 47 U.S.C. § 414, "appellants' common law claims in this case are preempted").

Plaintiffs likewise claim that a saving clause contained in 601(c)(1) of the 1996 Act shows that Congress did not intend the FCC's regulations to have preemptive effect. *See* App'ts Br. 35 (citing 47

U.S.C. § 152 note). But that provision provides 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 (emphasis added). It in no way eroded the preemptive force of regulations promulgated pursuant to any other statute, such as the provisions added by the Communications Act of 1934 (including Sections 301 and 303(e)). *See Farina*, 625 F.3d at 131 ("[W]e hesitate to read § 601(c)(1) in a way that disclaims preemption even in the face of an actual conflict.").

Finally, Plaintiffs make much of the 1996 Act's preemption of local regulation of wireless "facilities" based on their radiofrequency emissions, *see* 47 U.S.C. § 332(c)(7)(B)(iv), arguing that Congress's decision to "confer[] the authority to preempt state laws concerning *facilities*, but conspicuously omit[] any authority to preempt state laws concerning *devices*," App'ts Br. at 34 (footnote omitted), implies that it intended to preclude preemption elsewhere. But this provision is merely an exception to 47 U.S.C. § 332(c)(7)(A), which states that "[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or

instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." *Id.* Because cell phones likely are not "facilities" for purposes of the statute, *see Farina*, 625 F.3d at 757–59; *Murray*, 982 A.2d at 772–74; *Pinney*, 402 F.3d at 454–55, the two provisions are entirely irrelevant to evaluating whether the FCC's cell phone radiofrequency emission standards preempt state law.[4] And if cell phones *are* "facilities," then 47 U.S.C. § 332(c)(7)(B)(iv) expressly preempts Plaintiffs' suit. Either way, Plaintiffs have identified nothing in the Communications Act or the 1996 Act suggesting that Congress limited the preemptive effect of the Commission's cell phone radiofrequency emission regulations.

D. Plaintiffs Cannot Avoid Preemption By Invoking The Presumption Against Preemption.

Even starting with a presumption that Congress does not intend to preempt state law (as the district court did, *see* ER14), the regular

[4] The two-way nature of radio communications, particularly in the cellular context, mean that as a practical matter it is simply not possible to split the responsibility for regulating power levels between two different sovereigns. A cellular network must be designed to work in concert; if the FCC regulated base stations but states and local governments were free to regulate handsets, the necessary technical coordination of signal strengths and power levels would not be possible.

tools of statutory interpretation compel the conclusion that Plaintiffs' suit cannot proceed. The Court need not apply the presumption here, though, because of the longstanding federal interest in this subject matter.

The subject of the FCC's regulation is, first and foremost, radiofrequency emissions. Since nearly the inception of radio as a viable service, the federal government has exercised exclusive regulatory authority in this area. Under such circumstances, a presumption against preemption would make little sense. Indeed, the Supreme Court has made clear that the presumption "is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000); *see Nat'l Fed'n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 724 (9th Cir. 2016) ("we have recognized that 'preemptive intent is more readily inferred' in . . . 'an area of the law where the federal interest is dominant.'" (quoting *Montalvo v. Spirit Airlines*, 508 F.3d 464, 471 (9th Cir. 2007))).

Here, the regulated area is radio transmissions, not public health. To say otherwise—that the presumption against preemption should

apply because the Commission's standards touch upon health and therefore extend into a realm traditionally left to the states, *see* App'ts Br. at 31—would render the term "police powers" so expansive as to be essentially meaningless. *See Dep't of Revenue v. Davis*, 553 U.S. 328, 365 (2008) (Stevens, J. dissenting) ("This is but a reformulation of the phrase 'police power,' long abandoned as a mere tautology."). And it would be especially odd for Congress to have granted the FCC broad authority to regulate radio emissions while leaving it powerless to consider the health and safety impacts of those emissions regulations. Instead, in situations such as this, "a court need look no further than 'the ordinary meanin[g]' of federal law, and should not distort federal law to accommodate conflicting state law." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 623 (2011) (plurality) (quoting *Wyeth*, 555 U.S. at 588 (Thomas, J., concurring in judgment)). Because Plaintiffs' suit is an obstacle to the straightforward application of the FCC's radiofrequency emissions regime, as authorized by the Communications Act and 1996 Act, it is necessarily preempted.

II. A PATCHWORK STANDARD FOR LIABILITY WOULD IMPEDE INDUSTRY AND STIFLE INNOVATION IN WIRELESS SERVICES AND BEYOND.

As Congress recognized when enacting the 1996 Act, "[a] high quality national wireless telecommunications network cannot exist if each of its component[s] must meet different RF standards in each community." House Report No. 104-204 at 95. Plaintiffs' suit seeks to create precisely the patchwork regime that Congress sought to prevent—one in which juries of every state and territory would be free to question the FCC's expert determinations as to the safety of cell phone radiofrequency emissions in unpredictable, idiosyncratic ways.

Such a system would yield more than just busy dockets and a regulatory nightmare for wireless device manufacturers that operate nationally; it would stifle innovation and investment in new cellular technology, as the decision to spend millions on research and development would become an increasingly risky prospect. If states were given the freedom to impose their own radiofrequency emissions limits, as they do with things like water flow from shower heads, Apple could be forced to design and sell different iPhones for California, Illinois, and Mississippi. *Cf.* Cal. Code Regs. tit. 20, § 1605.3(h)(5)

(limiting maximum flow rate for California-compliant shower heads to 1.8 gallons per minute—.7 less than federal standard).

This would have particularly damaging effects on the market for wireless devices, because the national nature of cellular networks means that Americans expect to be able to travel throughout the nation and have their phones work at their destinations in the same way they work at home. But a phone engineered to meet a unique California emission standard may not connect as well in Wyoming, for example, or a phone designed to work in Mississippi under a Mississippi standard could end up being incompatible with a network of wireless facilities in California designed to accommodate court-imposed lower emissions levels under state law. Perhaps more than any other industry, cellular device manufacturers and network operators require national consistency in regulation of technology in order to ensure that their devices work as consumers expect, and they cannot continue to thrive if forced to conform to a balkanized set of standards cobbled together through tort actions across the country. *Cf. Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 161 (1989) (Florida law protecting boat design preempted because "[t]he prospect of all 50

States establishing similar protections . . . . could pose a substantial threat to the patent system's ability to accomplish its mission of promoting progress in the useful arts").

This need to ensure that the market for cellular devices is national, and not subject to differing regional requirements, was precisely what led the Commission to establish uniform, preemptive technical rules when it first enabled cellular services 40 years ago. *See In the Matter of an Inquiry into the Use of the Bands 825-845 Mhz & 870-890 Mhz for Cellular Commc'ns Systems; & Amend. of Parts 2 & 22 of the Commission's Rules Relative to Cellular Commc'ns Sys.*, 86 F.C.C.2d 469, 503–04 & n.74 (1981) ("nationwide" nature of the cellular network requires that "[t]he technical standards set forth in this *Report and Order* are the minimum standards necessary to achieve the desired goals and any state licensing requirements adding to or conflicting with them could frustrate federal policy.").

Moreover, if cell phone manufacturers and operators, who provide uniform, nationwide service, were required to comply with the regulatory regimes of every state (much less juries within a state), a standard in a jurisdiction with a large market share could quickly

become effectively the *only* standard, displacing the role of the FCC. Under such circumstances, states like California, New York, Texas, or Florida could assume a role as national regulator, leaving the FCC on the sidelines. *Cf. Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 652 (9th Cir. 2017) (Missouri egg farmers challenging national effect of California's regulation of chicken enclosures).

The Commission's cell phone radiofrequency emissions regulatory regime, of course, would not be the only victim of Plaintiffs' restrictive approach to preemption. Were Plaintiffs to prevail, the FCC's ability to regulate the nation's airways in a variety of other contexts would be substantially undermined. For example, the FCC is in the process of implementing changes to its Over-the-Air Reception Devices (OTARD) rule in an attempt to create uniform standards to "allow fixed wireless service providers to bring faster internet speeds, lower latency, and advanced applications . . . to all areas of the county, and to rural and underserved communities in particular." *In the Matter of Updating the Commission's Rule for Over-the Air Reception Devices*, 36 FCC Rcd. 537, ¶ 1 (2021). Yet a group of petitioners in the D.C. Circuit is now challenging the FCC's congressionally granted authority to preempt

conflicting state and local regulations using many of the same arguments concerning the health effects of radiofrequency emissions advanced by Plaintiffs here. *See Children's Health Defense v. FCC*, 21-1075 (D.C. Cir. filed Feb. 26, 2021). A determination by this Court that the FCC lacks authority to regulate based on the health effects of radiofrequency emissions would call into question the preemptive effect of nearly every FCC regulation that applies to radio transmission.

Other industries outside of those that rely on FCC regulations would likewise suffer if Plaintiffs had their way. As it did with the FCC, *see* Section I.B.2, *supra*, Congress often entrusts federal agencies with crafting regulatory regimes that balance multiple objectives, particularly for industries where nationwide uniformity is essential. For example, this Court recognized that "regulating the aviation industry requires a delicate balance between safety and efficiency," and that "Congress enacted a '*uniform* and *exclusive* system of federal regulation,'" "precisely because of 'the interdependence of these factors.'" *Montalvo v. Spirit Airlines*, 508 F.3d 464, 471 (9th Cir. 2007) (emphasis added) (quoting *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 638–39 (1973)). Consequently, courts have

repeatedly upheld the implied preemptive power of federal aviation statutes. *See id.*; *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 74 (2d Cir. 2019); *Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 224 (2d Cir. 2008). But Plaintiffs' theory would undermine agencies' ability to strike these delicate balances, eliminating the preemptive force of regulations that appear to fall outside an agency's "generic authority." App'ts Br. at 44; *see also id.* at 46. For industries that rely on consistent and uniform standards, the resulting chaos would be catastrophic.

Simply put, adopting Plaintiffs' approach would undermine the conditions necessary for commerce and innovation to thrive because it would destroy the carefully balanced regulatory regimes that Congress has directed federal agencies to establish. As the district court properly concluded, "[i]f successful, plaintiffs' claims could set the stage for a patchwork of state-required testing procedures, increasing the burden on manufacturers and thereby upsetting the efficiency that the uniform standards and testing procedures provide." ER25 (citing *Geier*, 529 U.S. at 897–81). Highly innovative areas like cellular communication, which rely on a single, nation-wide standard in order to function, cannot be

expected to succeed if inventors, manufacturers, and retailers are subjected to ever-changing and contradictory standards of liability imposed by juries across the country.

CONCLUSION

Because Plaintiffs' suit presents a clear obstacle to the FCC's regulatory regime, the district court did not err in dismissing it. That decision should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 29(a)(5) of the Federal Rules of Appellate Procedure and 9th Circuit Rule 32-1 because this brief contains 6,939 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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