No. 10-1064

IN THE
Supreme Court of the United States

FRANCIS J. FARINA,

Petitioner,

v.

NOKIA, INC., ET AL.,

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

This case presents the question whether state-law claims for misrepresentations about cell-phone safety are impliedly preempted by the FCC's radio frequency (RF) radiation standard. That standard governs whether cell-phone companies must perform an environmental review before the FCC licenses their products. As the FCC and several courts have reiterated, the FCC issued the standard to comply with the National Environmental Policy Act (NEPA).

Respondents concede the existence of a clear circuit split on the principal question presented and do not seriously contest that courts are also divided on the two questions it includes: (1) whether a regulation issued under a statute that explicitly disclaims implied preemptive effect can impliedly preempt state law on a "frustration-of-purpose" theory, and (2) whether a NEPA regulation, which imposes no substantive requirements, may preempt substantive state law. Instead, mischaracterizing the case as a challenge to FCC regulations and misunderstanding NEPA, respondents suggest that the splits should be overlooked and that these important questions are not really presented here. Respondents are wrong on all counts.

ARGUMENT

1. Respondents repeatedly mischaracterize the case as a state-law challenge to the adequacy of the FCC's NEPA regulations addressing RF radiation. *See* Resp. Opp. 1, 13, 24, 28. This description is inaccurate, as is respondents' denial that the regulations are in fact NEPA regulations.

In issuing the regulations, the FCC expressly stated that they were promulgated to satisfy its "responsibilities under [NEPA] to evaluate the environmental significance of its actions." 47 C.F.R. § 2.1093(a). Because NEPA's requirements are procedural, not substantive, the regula-

tions do not require or forbid cell phones to emit any particular level of RF radiation. As the FCC previously explained to this Court:

> Licensees generally must determine whether their transmitters will cause human exposure above [certain] limits. If so, an EA [environmental assessment], and possibly an EIS [environmental impact statement], must be prepared and the Commission will then determine whether to allow transmission to occur. No further environmental analysis is required for transmitters that will not lead to exposures greater than the limits.

Br. for Resp. in Opp., *Citizens for the Appropriate Placement of Telecommc'ns Facilities v. FCC*, Nos. 00-393 *et al.*, at 4 (U.S. filed Dec. 2000) (FCC Opp.).

The FCC has repeatedly characterized the regulations as NEPA regulations. *See* FCC, Report and Order, Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 11 F.C.C.R. 15123, 15125 (1996) ("To meet its responsibilities under NEPA, the Commission has adopted requirements for evaluating the environmental impact of its actions."); FCC Opp. 3 (RF radiation regulations "specif[y] the emission levels above which human exposure to RF energy caused by FCC-licensed transmitters would require environmental analysis under NEPA").

Mr. Farina does not challenge the FCC's determination about the level of RF radiation that requires an EA or EIS before a phone may be marketed. He seeks a remedy for respondents' misrepresentations about the safety of their phones. The two are quite different. To prevail, Mr. Farina must establish that respondents stated that they know their phones to be safe, when they do not know (indeed, no

one yet knows) whether that is true. To remedy the misrepresentations, he seeks headsets to ameliorate RF exposure—not preparation of an EA or EIS (or a revised regulation concerning when an EA or EIS is required). The adequacy of the FCC's NEPA standard is not at issue.

Because this suit does not challenge the regulations, the Second and D.C. Circuit decisions on which respondents so heavily rely are inapposite. The Second Circuit case involved several federal claims, none similar to the state-law claims in this case. *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 88 (2d Cir. 2000) (describing claims under Americans with Disabilities Act, Rehabilitation Act, Administrative Procedure Act, and NEPA). The Second Circuit's resolution of those claims sheds no light on the preemption issues here.

The D.C. Circuit's decision rejecting a later challenge to the FCC's implementation of NEPA is likewise not pertinent. *EMR Network v. FCC*, 391 F.3d 269, 272 (D.C. Cir. 2004). This case presents no such NEPA-based challenge.

2. On the question presented—whether federal law preempts claims that cell-phone companies misrepresented their products as known to be safe—respondents agree that the courts are in conflict. They assert (at 21), however, that the Fourth Circuit—which disagrees with the Third Circuit and the D.C. Court of Appeals—will eventually take the issue en banc and reverse its holding in *Pinney v. Nokia, Inc.*, 402 F.3d 430 (4th Cir. 2005). Such speculation could be offered as reason to deny review of any question on which courts are in conflict, for it is always possible that a lower court will one day overrule a precedent. That hypothetical possibility is no more real in this case than in any other.

Respondents also suggest that *Pinney*'s holding should be discounted because its discussion focused on 47 U.S.C. § 332 (a provision that respondents below and as defendants in *Pinney* argued expressly preempted the plaintiffs' claims), as opposed to FCC regulations. But the Fourth Circuit explicitly rejected the argument that the FCC's NEPA regulations had preemptive effect. 402 F.3d at 457. While it is unclear what aspect of the regulatory scheme respondents believe the Fourth Circuit overlooked, it is in any event unimportant. A precedent is no less binding, and a conflict no less real, because a party disagrees with its analytical approach.

Moreover, the decisions of the Third Circuit and the D.C. Court of Appeals also conflict: the D.C. Court of Appeals held that claims that cell-phone companies made misrepresentations about product safety are not preempted if they do not require proof that cell phones are unreasonably dangerous, but the Third Circuit held that those claims are preempted. *Compare Murray v. Motorola, Inc.*, 982 A.2d 764, 783 (D.C. 2009), *with* Pet. App. 37a, 44a.

Respondents argue (at 16-17) that the conflict with *Murray* can be ignored because the Third Circuit did not recognize it. But a court cannot avoid a conflict by denying that it exists. Here, Mr. Farina asserts the same misrepresentation claims that the D.C. Court of Appeals allowed. The Third Circuit purported to avoid a conflict by mischaracterizing the claims as challenges to the adequacy of the FCC's regulations. *See* Pet. App. 37a-38a. That the two courts treated the same claims so differently does not obviate the conflict; rather, their differing treatment *is* the conflict. Regardless of whether the Third Circuit acknowledged it, its decision is irreconcilable with that of the D.C. Court of Appeals on the precise claims in this case.

3. On the subsidiary questions presented, respondents contend (at 19) that the "no implied effect" provision of the Telecommunications Act of 1996 (TCA), § 601(c)(1), is inapplicable because the FCC's regulations were issued pursuant to the agency's general rulemaking authority, as well as NEPA and TCA § 704(b), which mandated that the FCC complete its rulemaking. Respondents likewise contend that because NEPA was not the sole authority for the FCC's action, the question whether a NEPA regulation can preempt substantive state law is not presented.

These contentions are meritless. Because the TCA both directs the FCC to complete its RF rulemaking and contains § 601(c)(1), the courts that have ruled on preemption in this and similar cases have agreed that § 601(c)(1) applies—they have disagreed only about its meaning. The courts have also addressed the import of the fact that the regulation was issued to satisfy NEPA, again disagreeing on the answer. A ruling for Mr. Farina on either of these questions would require reversal of the decision below, making this case a strong vehicle for addressing these issues. And because the FCC, like other agencies, will always cite its general rulemaking authority as a basis for issuing a rule, respondents' theory would make the questions presented unreviewable in every case.

4. Although this Court has stated that a provision generally "saving" state law from preemption does not foreclose conflict preemption, *see Geier v. Am. Honda Motor Corp.*, 529 U.S. 861, 869 (2000), the Court has never addressed a provision such as § 601(c)(1), through which Congress directly seeks to bar obstacle preemption. The lower courts disagree about the effect of such express congressional disavowal of implied preemption. *Compare Pinney*, 402 F.3d at 458; *AT&T Commc'ns of Ill., Inc. v. Ill. Bell Tel. Co.*, 349 F.3d 402, 410 (7th Cir. 2003), *with* Pet.

App. 55a; *Murray*, 982 A.2d at 778 n.19. *See* Pet. 20 (citing cases).

Respondents suggest (at 21, 22) that the Fourth and Seventh Circuits did not actually address § 601(c). In fact, the Fourth Circuit quoted § 601(c)(1) and stated that it "counsels against any broad construction of the goals" of the statute "that would create an implicit conflict with state tort law." *Pinney*, 402 F.3d at 458. The Seventh Circuit likewise quoted the provision and stated that it "precludes a reading that ousts the state legislature by implication." *AT&T Communc'ns*, 349 F.3d at 410. That the Seventh Circuit was addressing the preemptive effect of the TCA in a different context does not diminish the direct conflict between its holding that the provision "precludes" implied conflict preemption and the Third Circuit's contrary holding.

Here again, respondents theorize that if the Fourth Circuit had an opportunity to consider the FCC's *Murray* brief, it would reach a different conclusion about § 601(c)(1). That suggestion is unlikely because the brief's analysis of § 601(c)(1) consists of only two sentences and proffers an implausible reading. The FCC brief argued that the plaintiff's state-law claims were barred by both field and conflict preemption, and its reading of § 601(c)(1) was directly tied to its field preemption theory: "Given that § 601 provides that the 1996 Act is not meant to impliedly 'modify, impair, or supersede *Federal* ... law,' the provision is better read to simply confirm that the federal government continues to occupy the field." FCC *Murray* Br. 25 (Third Cir. App. A804) (emphasis in original). Omitting by ellipsis the critical words "State, or local," the FCC simply ignored that § 601(c)(1) also addresses state and local law. Moreover, the FCC's reading of § 601(c)(1) was based explicitly on its view that the FCC occupies the relevant

field. Every court to consider that position has rejected it. *See* Pet. App. 36a-37a; *Murray*, 982 A.2d at 787; *Pinney*, 402 F.3d at 459.

Echoing the FCC's focus on the word "federal," respondents dismiss the conflict between the Third Circuit's treatment of § 601(c)(1) and other courts' (and the Food and Drug Administration's) treatment of a similar provision of the Nutrition Labeling and Education Act (NLEA) because the NLEA provision does not include the word "federal." Respondents offer no explanation why this difference ameliorates the conflict over the provisions' effect on implied preemption of *state* law, or how it could alter the meaning of Congress's direction that the TCA would have "no implied effect" on state law. That the statute *also* preserves federal law offers no basis for disregarding its prohibition on implied displacement of state law.[1]

Respondents do not contest that these provisions of the TCA and the NLEA, as well as provisions in other statutes, *see* Pet. 20-21, give rise to the important question whether Congress may successfully disclaim obstacle preemption. That question is at the fore of this case: whether agency action may preempt state law on a frustration-of-purposes theory where Congress has stated that the statute on which the agency action is based does not impliedly preempt state law.

5. As discussed above, the FCC's RF radiation standards are NEPA regulations, providing "guidelines for evaluating the environmental effects of radiofrequency

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[1]Respondents' citation (at 22) to *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 323 (2d Cir. 2000), which held that § 601(c) preserves federal law, is thus irrelevant.

radiation." 11 F.C.C.R. 15123. Respondents argue that the guidelines are not procedural NEPA regulations, but rather substantive regulations, because when the FCC issued the regulations it cited statutory provisions that give it general rulemaking authority, as well as NEPA. The FCC's boilerplate citation to these generic provisions, however, does not change the nature of its action. The FCC has stated repeatedly that the regulations at issue are NEPA regulations. *See supra* at 2 (citing FCC materials).

Attempting to deride the petition for characterizing the guidelines as NEPA regulations while also saying the FCC has "categorically excluded" cell phones from NEPA review, respondents betray misunderstanding of both NEPA and the regulations. As explained in the petition (at 6-7 & n.1) and the FCC brief in opposition to the petition in *Citizens for the Appropriate Placement of Telecommunications Facilities*, *supra* (at 2-5), an agency must prepare an EIS before undertaking an action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Under regulations issued by the Council on Environmental Quality (CEQ), other actions may be "categorically excluded" from the requirement of environmental analysis if the agency determines that, as a class, such actions lack significant environmental effect. 40 C.F.R. § 1508.4.

The FCC's RF guidelines, "implemented, pursuant to NEPA and directives issued by the CEQ, ... specif[y] the emission levels above which human exposure to RF energy caused by FCC-licensed transmitters would require environmental analysis under NEPA." FCC Opp. 3. Transmitting facilities that would not cause exposure above the stated level are categorically excluded from the requirement of an environmental assessment, and transmitters

above that level are required to perform the assessment. *Id.* at 4.

Confused about the meaning of a categorical exclusion under NEPA, respondents (at 25) direct the Court to the Second Circuit's decision rejecting the claim that the FCC improperly failed to perform an EIS or EA under NEPA before issuing its NEPA guidelines for RF radiation. No such claim is at issue in this case, which presents no NEPA and no Administrative Procedure Act challenge. The point here is that the Third Circuit held that regulations stating a NEPA standard—which phones are categorically excluded and which are not—preempt state substantive law. That extraordinary result conflicts with decisions of other courts and has far-reaching implications. *See* Pet. 24-25.

6. Respondents' primary refrain is that the conflicts are unimportant, the decision below is correct, and the questions are not worthy of review because the FCC stated in *Murray* that state-law claims such as those at issue here are preempted. Respondents' repeated assertion that the FCC's view has carried the day since the *Murray* brief was filed tells only part of the story.

As noted above, the courts that have considered the FCC's *Murray* brief have disagreed with much of it. The D.C. Court of Appeals rejected the brief's assertion of field preemption and also held, contrary to the FCC's argument, that several of the plaintiffs' claims posed no obstacle to the FCC's regime. *Murray*, 982 A.2d at 774, 775, 777-78, 787. The Third Circuit, which mentioned the FCC brief almost as an afterthought, Pet. App. 46a, likewise disagreed with the FCC's view on field preemption. *Id.* at 34a, 37a. No court agrees with respondents that the brief is dispositive.

In addition, the FCC's position on conflict preemption applies only to state-law claims that "seek[] to impose a stricter standard for RF emissions than required by the FCC." FCC *Murray* Br. 16-17 (Third Cir. App. A794-95); *see* Letter from FCC (Sept. 13, 2010), *cited in* Resp. Opp. 16 n.24 ("It continues to be the Commission's position ... that state law claims premised on the contention that the FCC-compliant cell phones are unsafe are preempted by federal law."). Even if the FCC regulations stated a standard for cell-phone RF emissions (as opposed to stating when emissions require NEPA analysis), Mr. Farina does not seek to impose a stricter standard, or any RF standard at all. Rather, he seeks to hold respondents accountable for representing that their phones were safe, without disclosing that their safety has not been definitively established and that the scientific evidence is inconclusive. *See*, *e.g.*, Third Am. Complaint ¶¶ 54, 55, 57-59. The FCC regulations did not require respondents to make those representations and do not provide immunity for the consequences of respondents' unregulated marketing choices.

As the Third Circuit noted, the FCC's regulations reflect a balancing of a variety of factors. Pet. App. 39a. Regulatory decisions often do, but contrary to the Third Circuit's assumption, *id.* at 40a, preemption does not automatically follow. *Compare Williamson v. Mazda Motor of Am.*, 131 S. Ct. 1131, 1137-38 (2011) (no preemption), *with Geier*, 529 U.S. at 877-79 (2000) (preemption). And ultimately, the Third Circuit did not find that Mr. Farina's state-law claims frustrate the objectives of the FCC's NEPA regulations, but only that they reflect disagreement with the FCC's view that cell phones are safe. Pet. App. 45a. An agency's view on a matter does not impliedly preempt state law, however, absent an indication in "the

rulemaking record" that the agency intends preemption. *See Williamson*, 131 S. Ct. at 1139 (fact that standard was based in part on agency's judgment about costs does not preempt state law based on different judgment, absent indication in "rulemaking record" of preemptive intent). Even putting aside that the TCA disclaims implied preemption, the record here contains no such indication.[2]

CONCLUSION

The petition should be granted.

Respectfully submitted,

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[2]Likewise, although § 704(b) of the TCA specifically addresses the FCC's NEPA regulations for RF radiation, the legislative record shows no preemptive intent with respect to those regulations. Respondents quote the House Commerce Committee's statement that "'[a] high quality national wireless telecommunications network cannot exist if each of its component[s] must meet RF standards in each community.'" Resp. Opp. 6 (quoting H.R. Rep. No. 104-204(I), at 94-95 (1995). This statement does not address the regulations at issue, but "siting and zoning decisions of non-federal units of government." H.R. Rep. No. 104-204(I), at 95.