No. 20-17307

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

APPLE, INC.,

Defendant-Appellee,

and

SAMSUNG ELECTRONIC MEDIA, INC.,

Defendant.

On Appeal from the United States District Court
for the Northern District of California,
No. 19-cv-05322 (Hon. William H. Alsup, U.S.D.J.)

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN

Scott L. Nelson
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Amicus Curiae

May 7, 2021

CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Citizen is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions and Statutes

Administrative Materials

INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a nonprofit consumer advocacy organization that appears on behalf of its nationwide membership before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen has a longstanding interest in the preservation of remedies available to consumers under state laws and has frequently filed briefs in the Supreme Court, as well as in this and other appellate courts, addressing arguments that state-law remedies are preempted by federal law.

Public Citizen is particularly concerned by the argument that regulatory actions taken by the Federal Communications Commission, an agency with neither public health expertise nor a statutory mandate to protect public health, impliedly preempt application of state law to matters implicating the ongoing scientific debate over the health effects of the radiofrequency (RF) radiation emitted by mobile phones. Any such application of implied preemption principles must be based on a careful

---

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund preparation or submission of this brief. No person or entity other than amicus made a monetary contribution to preparation or submission of this brief.

identification of the source of an agency's statutory authority to act and consideration of the extent to which the relevant statutes constrain the implied preemptive effect of any exercise of that authority. Here, the district court, at the FCC's urging, misread a provision in the Communications Act of 1934 as providing express authorization for the FCC's RF radiation standards. As a result, the court held inapplicable the stringent limits on the FCC's preemptive authority in a later statute, the Telecommunications Act of 1996, even though that statute is the source of the only express congressional authorization for the FCC's standards. Public Citizen submits this amicus brief to offer a more detailed discussion of these specific points, which we believe may assist the Court in resolving this case.

ARGUMENT

I. Section 303(e) of the Communications Act does not authorize FCC regulation of the radiological health effects of mobile phone emissions.

The district court ascribed preemptive effect to the FCC's RF exposure guidelines for mobile phones because it concluded that the guidelines were an exercise of the "comprehensive powers" conferred on the FCC by the Communications Act of 1934, ER-8 (quoting *NBC v.*

United States, 319 U.S. 190, 217 (1943)), including the power to regulate "the emissions" that wireless radio equipment produces, *id*. (quoting 47 U.S.C. § 303(e)). Section 303(e), the court later reiterated, "charges the Commission with regulating, as the public convenience, interest, or necessity requires, 'the kind of apparatus to be used' for wireless radio communications and 'the emissions' that such equipment may produce." ER-12.

The district court's reading of section 303(e) echoed the FCC letter attached to the statement of interest filed by the Department of Justice below. That letter asserted that the 1934 Act "expressly authorizes the Commission to adopt limits on radiofrequency emissions for mobile devices, including cell phones. *See* 47 U.S.C. § 303(e)." ER-1028. The letter went on to elaborate that, "[a]mong other things, the Communications Act empowers the Commission to regulate 'the kind of apparatus to be used' for wireless radio communications and 'the emissions' that such equipment may produce. 47 U.S.C. § 303(e)." ER-1030.

This reading of section 303(e) is incorrect.[2] Section 303(e), and any authorization it might provide for the FCC to issue regulations with preemptive effect, cannot serve as the basis for ascribing preemptive effect to the FCC's RF exposure standards because the FCC did not invoke section 303(e) as a source of its authority to issue those standards. And there was a good reason for that omission: When section 303(e) is read in its entirety, rather than misleadingly abridged as in the FCC letter, it is evident that the authority section 303(e) confers on the FCC to regulate radio equipment with respect to "the purity and sharpness of the emissions from each station and from the apparatus therein," 47 U.S.C. § 303(e), is authority to regulate the *signal quality* of radio transmissions, not to regulate regarding their radiological health effects.

A. The FCC did not rely on section 303(e).

In leading with the assertion that section 303(e) provides authority for the FCC to act preemptively with respect to radiological health effects,

[2]As the plaintiffs-appellants brief explains, the Communications Act's own provisions, including its savings clause, as well as the absence of conflict between state law and the FCC guidelines, would weigh heavily against implied preemption even if the guidelines could be grounded in some authority conferred by that Act and even if the limitations on preemption under the Telecommunications Act of 1996 discussed below were disregarded. *See* App'ts Br. 33–34, 36–38, 42-48.

the FCC's statement-of-interest letter obscured a critical fact: The Commission itself has never invoked section 303(e) as the source of its authority to issue the standards at issue. The FCC's 1996 Report and Order promulgating the guidelines nowhere cites or alludes to section 303(e), and nowhere mentions the Commission's authority to regulate the "purity and sharpness" of emissions. *See In re Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 11 FCC Rcd. 15123 (1996), ER-450–526. The Commission's 2019 order reaffirming those guidelines, released four months before its statement-of-interest letter in this case, likewise contains no citation of section 303(e) and makes no claim to be an exercise of authority to regulate "purity" or "sharpness" of emissions. *See In re Proposed Changes in the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies Targeted Changes to the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields*, 34 FCC Rcd. 11687 (2019), ER-866–1025.

Section 303(e)'s after-the-fact appearance in litigation documents, such as the statement-of-interest letter in this case, as the asserted basis for the claim that the FCC had authority to issue preemptive rules concerning health effects of exposure to RF radiation emissions appears to be a lawyer's effort to come up with a more solid basis for a claim to preemptive authority than the statutes the Commission itself invoked when taking action.[3] As such, however, it cannot be substituted for the Commission's own rationale for the guidelines under the longstanding principles of *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). "Even if other statutory provisions could support the Commission's asserted authority," a court "cannot supply grounds [for] the regulations that were not invoked by the Commission." *Business Roundtable v. SEC*, 905 F.2d 406, 417 (1990). Courts lack authority to assess agency actions "merely on the basis of interpretive theories that the agency might have adopted and

[3] The sentence on page 3 of the FCC's statement-of-interest letter citing section 303(e), *see* ER-1030, first appeared in slightly different form on page 2 of the United States' amicus brief opposing certiorari in *Farina v. Nokia*, No. 10-1064 (U.S. Aug. 26, 2011), https://www.justice.gov/sites/default/files/osg/briefs/2011/01/01/2010-1064.pet.ami.inv.pdf. Despite the Solicitor General's citation of section 303(e) in the *Farina* brief, the FCC did not take up the implicit suggestion that it rely on that provision when it reaffirmed its guidelines in 2019.

findings that (perhaps) it might have made." *Envtl. Def. Fund v. Adm'r, EPA*, 898 F.2d 183, 189 (D.C. Cir. 1990); *see also Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C Cir. 2017) (refusing to consider agency's litigation position that it had "inherent authority" to act when it did not rely on such authority in taking the action). What matters is what the agency did, not what lawyers later say it did.

B. Section 303(e) empowers the FCC to regulate to protect radio signal quality, not health impacts of radiation.

Not only did the Commission not rely on section 303(e), but it could not reasonably have invoked section 303(e) as the source of authority for its RF exposure guidelines even if it had wished to do so. The argument that section 303(e) provides authority for those guidelines seems plausible only when, as in the FCC's statement-of-interest letter, the provision is quoted selectively. Contrary to the FCC's letter, on which the district court relied, section 303(e) does not grant the FCC broad authority to regulate all "emissions" from radio equipment. Rather, section 303(e)'s reference to "emissions" is part of a focused grant of authority to regulate radio equipment and stations with respect to "the purity and sharpness of the emissions from each station and from the apparatus therein."

Construed, as it must be, in light of the plain meaning of the words as Congress would have understood them at the time of enactment, *see Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1738 (2020), the statute provides no authority to regulate with respect to the health effects of RF radiation. Rather, the statute authorizes the FCC to regulate specific listed qualities of signals emitted by radio equipment—that is, their "purity" and "sharpness." At the time of enactment (and still today) those qualities had nothing to do with the possible health effects of RF radiation. The potential health effects of such radiation result from its heating of human tissue, and possibly from mutagenic and carcinogenic impacts of RF radiation on DNA, not from how "sharp" or "pure" the signals are. The possibility that Congress would even have been focused on possible health effects of RF radiation in the 1930s, let alone that it would have delegated power to regulate such effects by using the phrase "purity and sharpness of … emissions," is farfetched.

That section 303(e) authorizes regulation of the technical quality of radio transmissions rather than their health effects is confirmed by the few instances in which it has been cited by appellate courts and the FCC itself over the history of the Communications Act. In 1951, the Supreme

Court described the subsection as authorizing the FCC to "promulgate standards of transmission" in a case where the FCC had authorized the use of a single standard for color television transmission because the quality of that system "had reached a state of development which justified its acceptance to the exclusion of … others" that produced unacceptable "color fidelity" and unsatisfactory "texture of the color picture," and were susceptible to "interference," among other things. *RCA v. United States*, 341 U.S. 412, 417 & n.6 (1951). Similarly, in *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311 (2d Cir. 2000), the Second Circuit held that section 303(e) is among the provisions of the Communications Act that provide the FCC with authority to protect signal quality by regulating radio equipment to address "RF interference phenomena." *Id.*at 320; *accord*, *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 416 (2002) (citing section 303(e) and *Freeman* for the proposition that the FCC has authority over "RF interference regulation"). The FCC's decisions invoking section 303(e)'s language regarding "emissions" as authority for some action have likewise consistently done so in matters involving issues of signal degradation or interference—issues that fall within the heartland of the plain meaning of the statutory references to

the "sharpness" and "purity" of emissions.[4] In short, judicial and Commission precedent provide no basis for construing section 303(e) to authorize regulation of emissions for purposes other than maintaining their "purity and sharpness." As the Commission's failure to invoke it as the basis for its guidelines confirms, that provision provides no support for the assertion that the Communications Act delegates the FCC authority to promulgate substantive radiological health standards with broad preemptive effect.

[4] *See In re Promoting Interoperability in the 700 MHz Commercial Spectrum*, 27 FCC Rcd. 3521, 3547 & n. 158 (2012); *In re Service Rules for 746–764, 776–794 MHz Bands*, 15 FCC Rcd. 5299, 5312 & n. 59 (2000); *In re a Re-Examination of Technical Regulations*, 99 F.C.C.2d 903, 905 (1984); *In re Request by Mr. John Quale & Mr. David E. Hilliard*, 96 F.C.C.2d 898, 900 (1984); *In re Applications of Colorado West Broadcasting*, 57 F.C.C.2d 550, 568 & n.21 (1975); *In re Eli & Harry Daniels*, 32 F.C.C.2d 196, 199 (1971); *In re Use of Special Signals for Network Purposes Which Adversely Affect Broadcast Service*, 22 F.C.C.2d 779, 780 (1970); *see also In re Updating the Commission's Rules for Over-the-Air Reception Devices*, 2021 WL 100407 at *10 n.102 (FCC Jan 7, 2021) (noting in passing that section 303(e) authorizes regulations concerning "antennas and other apparatus").

II. The Telecommunications Act of 1996, which required the FCC to issue its RF exposure guidelines, precludes giving implied preemptive effect to actions carried out under authority of that Act.

A. Because the FCC acted pursuant to the Telecommunications Act, section 601(c)(1)'s anti-preemption provision applies.

In contrast to section 303(e) of the Communications Act—which has nothing to do with health guidelines for RF radiation exposure—section 704(b) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *commanded* the FCC to issue its RF exposure guidelines: "Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions." Not surprisingly, therefore, the Commission expressly stated when promulgating the guidelines that it was implementing the requirements of the Telecommunications Act (as well as fulfilling responsibilities under the National Environmental Policy Act (NEPA)). ER-495–96. The Telecommunications Act, however, also disclaimed any implied preemptive effect on state laws. Section 601(c)(1) of that Act provides: "This 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. § 252 note.

As the district court recognized, section 601(c)(1) is "not an ordinary savings clause." ER-15. Rather, it falls into the category of statutory provisions that Justice Scalia once labeled *anti-preemption* provisions, *California Federal Savings & Loan v. Guerra*, 479 U.S. 272, 295 (1987) (Scalia, J., concurring in the judgment), which state explicitly that a statute shall have no preemptive effect except as stated expressly in its text. Thus, in the words of the district court, section 601(c)(1) "forbids … implied preemption of state and local law." ER-15. The district court ruled, however, that the Telecommunications Act's anti-preemption provision was inapplicable in this case because the court concluded, erroneously, that the original Communications Act (to which it held section 601(c)(1) does not apply) authorized the FCC to issue preemptive RF exposure regulations. *See id.* In fact, as explained above, the FCC issued the guidelines pursuant to its authority under the Telecommunications Act of 1996, not preexisting authority to regulate

"emissions" under the Communications Act. Accordingly, section 601(c)(1) applies.[5]

B. Section 601(c)(1) precludes a finding of conflict preemption.

Section 601(c)(1) is a binding statutory command that courts not give implied preemptive effect to exercise of the authorities conferred by the Telecommunications Act. The Supreme Court's decisions make clear that statutory prohibitions on preemption, such as section 601(c)(1), are fully effective to bar the kind of implied preemption asserted here, based on claims that state law stands as an obstacle to Congress's purposes and objectives. Preemption, including implied conflict preemption, is first and foremost a matter of statutory construction and congressional intent. *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1912 (2019) (Ginsburg, J., concurring in the judgment). In considering the preemptive effect of any federal law, courts must use normal interpretive tools to determine congressional intent with respect to preemption as manifested in

[5] The FCC also based the guidelines on NEPA. There is no serious argument, however, that NEPA, a statute that governs procedures federal agencies must follow when making discretionary decisions, reflects a specific delegation of authority to the FCC (or any agency) to issue *substantive* rules that preempt state law. *See* App'ts Br. 32–33.

statutory language and structure. *Id.* at 1901 (lead opinion of Gorsuch, J.); *see In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 959 F.3d 1201, 1214 (9th Cir. 2020). Express statutory language aimed precisely at the issue of whether the statute may be construed to preempt specific types of state laws is the best possible indication of congressional intent with respect to implied preemption: A court should not infer intent to preempt state law based on inconsistency with the purposes and objectives of federal law when Congress has expressly stated an *anti-preemptive* intention in the text of the statute itself. *See*, *e.g.*, *Volkswagen*, 959 F.3d at 1221, 1225.

For this reason, as explained further below, the Supreme Court has often given effect to congressional commands that statutes may not be construed to preempt state laws and has rejected claims of implied preemption that conflict with such express statements of anti-preemptive intent. And the Court has held that statutory disclaimers of congressional intent to preempt, where their terms apply, are controlling in cases involving implied conflict preemption, just as in cases involving other forms of preemption.

1. Preemption turns on congressional intent as manifested in statutory language.

Recognition of Congress's authority to limit the implied preemptive effect of federal law stems from first principles governing preemption. The Constitution's Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land; … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. The Supremacy Clause requires "preemption" of state laws only where giving them effect would be in derogation of the supremacy of the Constitution or a valid federal law enacted under it—that is, where state law stands in contradiction to some applicable command of federal law. *See Murphy v. NCAA*, 138 S. Ct. 1461, 1479 (2018). All forms of preemption, in other words, involve "a clash between a constitutional exercise of Congress's legislative power and conflicting state law." *Murphy*, 138 S. Ct. at 1480. Importantly, though, not all differences between state law and federal law give rise to preemption because not all involve contradictory or conflicting federal and state commands. *See*, *e.g.*, *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323 (2011); *Wyeth v. Levine*, 555 U.S. 555 (2009); *Sprietsma v. Mercury*

Marine, 537 U.S. 51 (2002). Whether such a contradiction exists depends on what the federal law commands.

For this reason, the Supreme Court has said time and again that in determining the preemptive effects of federal law, "[t]he purpose of Congress is the ultimate touchstone." *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963); *see*, *e.g.*, *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016); *Wyeth*, 562 U.S. at 565. This proposition holds good in "every pre-emption case," *Hughes*, 136 S. Ct. at 1297, "[w]hatever the category of preemption asserted"—be it express, implied, or field preemption. *Va. Uranium*, 139 S. Ct. at 1912 (Ginsburg, J., concurring in the judgment).

It follows that, in the first instance, "'[e]vidence of pre-emptive purpose,' whether express or implied, must … be 'sought in the text and structure of the statute at issue.'" *Va. Uranium*, 139 S. Ct. at 1907 (lead opinion of Gorsuch, J.) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). Thus, a litigant claiming preemption based on conflict between state law and the requirements, purposes, or objectives of federal law "must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law." *Id.* at 1901.

Courts considering such claims, moreover, must respect both "what Congress wrote" and "what it didn't write." *Id.* at 1900. The inquiry turns on "what can be found in the law itself," *id.* at 1908, not on "abstract and unenacted legislative desires," *id.* at 1907.

In light of these principles, courts must give effect to legislation aimed at preventing the use of implied preemption doctrines to find unintended preemptive effects of federal statutes. Disregard of such statutory provisions would violate the cardinal rule that preemption of whatever stripe—express preemption, implied field preemption, and implied conflict preemption—is *always* a matter of congressional intent discernible from statutory text and structure. *Va. Uranium*, 139 S. Ct. at 1901 (lead opinion of Gorsuch, J.); *id.* at 1912 (Ginsburg, J., concurring in the judgment). Where a statute enacted by Congress manifests an intent to allow operation of requirements of state law—even requirements that might otherwise appear to conflict with federal law—that statute does not preempt state law. *See*, *e.g.*, *Wyeth*, 555 U.S. at 575; *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 256 (1984). In such a case, effectuating the law enacted by Congress requires giving effect to its command that state laws *not* be disturbed. Put another way, if a federal

statute does not in some way require displacement of state law, such displacement cannot be necessary to ensure the federal statute's "supremacy."

It would be paradoxical if, in undertaking an inquiry so focused on discerning the existence of preemptive purpose in a statute's text and structure, courts could ignore the most significant evidence of such purpose: statutory provisions expressly aimed at defining or limiting a statute's preemptive effect. After all, it is "the statutory language" that "necessarily contains the best evidence of Congress' pre-emptive intent." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013) (citation omitted). That proposition, fundamental in resolving all issues of statutory construction, is no less applicable to a "*non-preemption* clause," *Va. Uranium*, 139 S. Ct. at 1902 (lead opinion of Gorsuch, J.), than to an express preemption clause. *See*, *e.g.*, *Guerra*, 479 U.S. at 282) (plurality).

2. The Supreme Court's decisions have repeatedly given effect to statutes precluding implied preemption.

Consistent with its insistence on the primacy of a statute's terms in determining the law's preemptive effect, the Supreme Court has frequently treated statutory provisions similar to the anti-preemption

provision here—that is, provisions stating that nothing in a statute shall be construed or interpreted as having preemptive effect—as dispositive of issues of implied preemption. Indeed, the Court has recognized that such statutes are precisely aimed at addressing the existence or scope of implied conflict preemption.

For example, the Supreme Court has described the McCarran-Ferguson Act, which provides, in terms strikingly similar to the Telecommunications Act's anti-preemption provisions, that no federal statute "shall be construed to invalidate, impair, or supersede" state laws regulating the business of insurance, 15 U.S.C. § 1012(b), as "a federal statute directed to implied preemption by domestic commerce legislation." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 428 (2003). Indeed, the Supreme Court has held that the language effectively reverses the direction of conflict preemption: Even where "there is a direct conflict between [a] federal … statute and [state] law," the "terms of the McCarran Ferguson Act" provide that "federal law must yield." *Dep't of Treas. v. Fabe*, 508 U.S. 491, 502 (1993).

Similarly, the Supreme Court has relied on anti-preemption provisions in federal labor laws in holding that state laws are not

impliedly preempted. For example, in *Retail Clerks v. Schermerhorn*, the Court held that a provision added to the National Labor Relations Act (NLRA) by the Taft Hartley Act, providing that "[n]othing in this Act shall be construed" to authorize agency shop agreements in states whose laws prohibit them, 29 U.S.C. § 164(b), foreclosed an argument that state laws providing remedies against unlawful agency shop agreements are subject to implied preemption. *See* 375 U.S. at 99–105. Stating that it would be "odd" to find implied preemption in such circumstances, *id.* at 99, the Court held that the statute indicated that Congress had "chose[n] to abandon any search for uniformity" in the area governed by the statute, *id.* at 104, and that implied preemption of state law would render the anti-preemption provision "empty and largely meaningless," *id.* at 102.

Likewise, in *Malone v. White Motor Corp.*, 435 U.S. 497 (1978), the Court held that, before the passage of the Employment Retirement Income Security Act (ERISA), the NLRA did not impliedly preempt state laws regulating collectively bargained employee pension plans. The Court stressed that, unlike ERISA, the NLRA had no express preemption provision with respect to employee benefit plans, while a pre-ERISA

federal statute that specifically related to pension plans, the Welfare and Pension Plans Disclosure Act (Disclosure Act), contained two anti-preemption provisions similar to that of the Telecommunications Act. One provided that "[t]he provisions of this Act … shall not be deemed to exempt or relieve any person from any liability [or] duty … provided by any present or future law … of any State," *id.* at 505, while another stated that "[n]othing contained in this subsection shall be construed to prevent any State … from otherwise regulating [a pension] plan," *id.* The Court held that these provisions "clearly indicated that Congress at that time recognized and preserved state authority to regulate pension plans." *Id.* Therefore, the Court held, the provisions precluded implied preemption under both the Disclosure Act and the NLRA.

The opinions in *California Federal Savings & Loan v. Guerra*, 479 U.S. 272, express an even more powerful recognition of Congress's authority to limit the implied preemptive effect of its statutes through provisions stating that nothing in them may be construed to have such effect. *Guerra* rejected the claim that a California statute requiring pregnancy leave not required under federal law was impliedly preempted by Title VII. A four-Justice plurality emphasized that Title VII provides

expressly that "[n]othing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State … other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title." 479 U.S. at 281–82 (quoting 42 U.S.C. § 2000e-7). The plurality also pointed to a provision precluding anything in the statute from being "construed as invalidating any provision of State law on the same subject matter unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof." *Id.* at 282 (quoting 42 U.S.C. § 2000h-4). The plurality stated that these provisions "severely limit Title VII's pre-emptive effect" and leave "no need to infer congressional intent to pre-empt state laws from the substantive provisions of Title VII." *Id.* Justice Scalia, concurring in the judgment, emphasized that these provisions are "*antipre-emption* provisions," *id.* at 295, and that the first of the two was by itself sufficient to dispose of the case, because, under its plain language, California's law imposing additional duties on employers "cannot be pre-empted," *id.* at 296.

As these decisions illustrate, statutory language providing that a statute shall not be construed or interpreted to preempt state law is precisely targeted at precluding or limiting implied preemption. Indeed, if such language had no impact on implied preemption analysis, it would be meaningless. As Justice Scalia once observed, "[u]nless it serves no function, [such anti-preemption] language forecloses preemption on the basis of conflicting 'purpose'" within the non-preempted sphere of authority it defines. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 96 (1987) (Scalia, J., concurring in the judgment). Construing statutory language to have no effect, of course, runs contrary to "the cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute." *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) (internal quotation marks omitted).

Of course, not every savings clause includes language that gives it such broad effect. In *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), for example, the Supreme Court held that a savings clause that, by its terms, only carved out an exception to a statute's *express* preemption clause did not bar the operation of implied preemption where

state law would disrupt the balance drawn by an agency in exercising rulemaking authority conferred by the statute. *See id.* at 869–70.

Section 601(c)(1) of the Telecommunications Act, however, is not just a limited carve-out from an express preemption clause, nor is it otherwise confined to specific parts of the 1996 Act. *Cf. Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987) (pointing out that a savings clause only applied to "this section" and did "not purport to preclude pre-emption of state law by other provisions of the Act"). Rather, section 601(c)(1) provides sweepingly that the 1996 Act, including all of the amendments it made, shall not be construed to preempt state law unless it does so expressly. That language cannot be squared with giving implied preemptive effect to agency action implementing the 1996 Act's requirements.

3. The Telecommunications Act leaves no room for preemption here.

The Supreme Court has suggested that such language may not bar preemption in instances where there is an outright contradiction between state and federal law (barring language such as that in McCarran-Ferguson providing for *reverse* preemption in such instances) or when the application of state law would be "absolutely inconsistent with the

provisions of the act" and allow the federal statute "to destroy itself." *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1355 (2020) (citing *AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 228 (1998)); *see Volkswagen*, 959 F.3d at 1214. But the state-law obligations that the plaintiffs in this case invoke would not have any such effect; as their brief explains, mobile phone companies can readily comply with both the state-law tort duties they seek to enforce and the federal guidelines. App'ts Br. 50. Nothing in federal law or in the FCC's regulation suggests that the Telecommunications Act would "destroy itself" if cell phones that assertedly met the FCC's standard for marketing approval without additional environmental analysis were subject to state-law disclosure requirements or tort-law standards concerning sale of dangerous products.

The district court's failed attempt to ground the FCC's guidelines in a specific, pre-existing delegation in the Communications Act was thus critical to its preemption ruling. A proper recognition that express authority in the FCC's organic statutes for regulation of the health impacts of mobile phone emissions of RF radiation must be sought in the Telecommunications Act of 1996, and that the FCC in fact explicitly

relied on that authority in issuing its guidelines, necessarily calls the anti-preemption provision of the 1996 Act into play. And that provision does not allow for implied preemption of state law on the "freewheeling" ground that it conflicts with the purposes and objectives of federal law. *Williamson*, 562 U.S. at 341 (Thomas, J., concurring in the judgment).

CONCLUSION

This Court should reverse the decision of the District Court.

Respectfully submitted,

/s/Scott L. Nelson
Scott L. Nelson
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Amicus Curiae

May 7, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately-spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word for Microsoft 365), contains 5,103 Public words. The electronic version of the foregoing brief has been scanned for viruses and is virus-free according to the anti-virus program used (Windows Defender).

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on May 7, 2021.

/s/ Scott L. Nelson
Scott L. Nelson