No.

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

PETITION FOR A WRIT OF CERTIORARI

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February 2011

QUESTIONS PRESENTED

The Federal Communications Commission (FCC) must authorize cell phones before they may be sold or used in the United States. The FCC has a radio frequency (RF) radiation standard for determining whether applications for authorization may be approved without an environmental analysis, as required under the National Environmental Policy Act (NEPA) for agency actions that may have a significant effect on the human environment. Under its regulations, the FCC may authorize cell phones that meet the RF radiation standard without requiring an environmental analysis under NEPA, but the agency may authorize phones that do not meet the standard only after completion of an environmental analysis.

The question presented, which has divided the lower courts, is whether state-law claims premised on cell phone companies' misrepresentations regarding the safety of their products are impliedly preempted because they frustrate the purposes of the FCC's RF radiation standard.

This question includes two more specific questions, on which the lower courts are also divided:

A. Whether a regulation based on authority conferred by a statute that explicitly disclaims any implied preemptive effect can impliedly preempt state law on a "frustration of purpose" theory of preemption.

B. Whether an agency's NEPA regulation, which imposes no substantive requirements, may preempt substantive state health, safety, or consumer-protection laws.

PARTIES TO THE PROCEEDING

Petitioner is Francis J. Farina.

Respondents are Nokia, Inc.; NEC America; Ericsson Wireless Communications, Inc.; Motorola, Inc.; Sprint PCS, L.P.; Audiovox Communications Corporation; Nextel Communications of the Mid-Atlantic, Inc.; Matsushita Corporation of America, also known as Panasonic Corporation; Philips Electronic North America Corp.; Qualcomm Incorporated, also known as Qualcomm, Inc.; Samsung Telecommunications America, L.P.; Sanyo North America, Inc., also known as Sanyo North America Group; Sony Electronics, Inc.; AT&T Wireless Services, Inc.; Cellco Partnership, also known as Verizon Wireless; Cingular Wireless LLC, also known as Southwestern Bell Wireless, formally known as Southwestern Bell Mobile Systems, Inc.; Voicestream Wireless Corporation, also known as Voicestream Wireless; LG Electronics MobileComm U.S.A., Inc.; and Cellular Telecommunication Industry Association, also known as CTIA.

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INTRODUCTION

This case presents the question whether state-law claims premised on cell phone companies' misrepresentations regarding the safety of their products are impliedly preempted because the claims are said to frustrate the purposes of a Federal Communications Commission (FCC) standard. Contrary to a decision of the Fourth Circuit and in partial disagreement with a decision of the District of Columbia Court of Appeals, the court of appeals in this case found such preemption even though Congress stated explicitly that the statute requiring issuance of the regulation shall have "no implied effect" and the FCC standard does not impose a substantive requirement, but rather was issued to satisfy the procedural requirements of the National Environmental Policy Act (NEPA).

In addition to the conflict over the preemptive effect of the specific FCC regulation at issue, the lower courts are divided over the effect of statutory provisions forbidding implied preemption and over the implied preemptive effect of NEPA regulations. Petitioners request that the Court grant certiorari to resolve the conflicts over these important questions of federal law.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit is reported at 625 F.3d 97, and is reproduced in the appendix at 1a. The decision of the United States District Court for the Eastern District of Pennsylvania granting Respondent's motion to dismiss is reported at 578 F. Supp. 2d 740, and is reproduced in the appendix at 62a.

JURISDICTION

The court of appeals entered its judgment on October 22, 2010. On December 27, 2010, a timely request for an extension of time was granted by Justice Alito, extending the time within which to file a petition for a writ for certiorari to and including February 22, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The Communications Act of 1934, 47 U.S.C. § 414, states:

> Exclusiveness of Chapter:
>
> Nothing 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.

Section § 601(c)(1) of the Telecommunications Act of 1996, Pub. L. No. 104-104 (47 U.S.C. § 152 note), states:

> Effect on Other Laws:
>
> (c) Federal, State, and Local Law–
>
> (1) No implied effect—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.

Section 704(b) of the Telecommunications Act of 1996 (not codified in the U.S. Code), states:

> Radio Frequency Emissions.—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.

The National Environmental Policy Act of 1969, 42 U.S.C. § 4332, provides, in relevant part:

> The Congress authorizes and directs that, to the fullest extent possible:
>
> . . .
>
> (2) all agencies of the Federal Government shall—
>
> . . .
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, ...

47 C.F.R. § 2.1093, entitled *Radiofrequency radiation exposure evaluation: portable devices*, states, in relevant part:

> (a) Requirements of this section are a consequence of Commission responsibilities under the National Environmental Policy Act to evaluate the environmental significance of its actions.
>
> . . . .
>
> (c) Portable devices that operate in [listed cellphone services] are subject to routine environmental evaluation for RF exposure prior to equipment authorization

> or use. All other portable transmitting devices are categorically excluded from routine environmental evaluation for RF exposure prior to equipment authorization or use, except as specified in §§ 1.1307(c) and 1.1307(d) of this chapter. Applications for equipment authorization of portable transmitting devices subject to routine environmental evaluation must contain a statement confirming compliance with the limits specified in paragraph (d) of this section as part of their application.

STATEMENT OF THE CASE

This petition arises from a Pennsylvania state-law action by petitioner Francis Farina on behalf of a putative class of Pennsylvania consumers against respondent cell phone manufacturers and retailers. The court of appeals held that standards issued by the FCC impliedly preempt Mr. Farina's claims.

Factual and Regulatory Background

1. All wireless handheld telephones (commonly known as cell phones) send and receive electromagnetic energy, which is transmitted between the cell-phone antenna and base stations in the area in which the phone is located. The energy is not directional; that is, it is transmitted outward in all directions from the phone.

At certain levels, the energy generated by radio signals, known as radio frequency (RF) radiation, can be harmful to humans. *See* FCC, Questions and Answers about Biological Effects and Potential Hazards of Radiofrequency Electromagnetic Fields, Office of Eng'g. & Tech. Bulletin 56, at 6 (4th ed. Aug. 1999). It is widely accepted that, at high levels of exposure, RF radiation can cause biological damage by heating human tissue.

Scientific studies have also found biological effects at relatively low levels of exposure, including changes in the immune system, neurological effects, behavioral effects, alterations in brain tissue, and breaks in DNA strands. *Id.* at 8. According to the FCC, "whether or not such effects might indicate a human health hazard is not presently known." *Id.*; *see also*, *e.g.*, Bruce Stutz, *Are Cell Phones Safe? The Verdict Is Still Out*, Yale Env't 360, Aug. 2, 2010, *at* http://e360.yale.edu/content/feature.msp?id=2300; Cecilia Kang, *Cellphone cancer study inconclusive; researcher urges more study*, Wash. Post, Post Tech, May 16, 2010, *at* http://voices.washingtonpost.com/posttech/2010/05/cell_phone_cancer_study_produc.html.

Although (or because) the evidence is not conclusive, many physicians and public health researchers have warned that cell phone use may increase the risk of brain cancer and other conditions. *See*, *e.g.*, Third Cir. App. A897-902. The concern is particularly acute for children, whose developing brains are more susceptible to RF radiation exposure. In light of recent scientific data on the biological effects of cell phone use, a group of prominent scientists has compared the cell phone threat to the harm caused by asbestos, *id.* at A899, which was discovered only after decades of use caused irremediable lung damage and untreatable cancers in thousands of people. The studies and warnings issued by this group are consistent with other recent studies warning of the dangers of cell phone use and the biological effects of RF radiation emissions. *See*, *e.g.*, *id.* A904, A906-907. The use of headsets ameliorates the threat by distancing the brain from the RF transmissions. Nonetheless, and despite the serious health concerns and uncertain degree of risk, respondents advertised and marketed their cell phones, without headsets, as safe.

2. NEPA requires all agencies to consider the environmental impact of their proposed actions and to take procedural steps, including preparation of environmental assessments (EAs) or environmental impact statements (EISs), before taking any "major" action that may "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332(2)(C).

The FCC has regulatory jurisdiction over wireless telephone service as part of its authority over radio transmissions. The FCC regulates the spectrum available for cell phone use and sets technical standards associated with cell phone communication. Because cell phones transmit radio signals, FCC authorization is required before a particular cell-phone model may be sold or used in the United States. 47 C.F.R. § 2.803.

In 1982, the FCC first addressed human exposure to RF radiation from certain FCC-regulated facilities (but not from cell phones) by issuing a proposed level of RF radiation that facilities could emit without triggering the FCC's obligation to undertake a NEPA assessment. In so doing, the FCC "stress[ed] that the Commission has neither the expertise nor the primary jurisdiction to promulgate health and safety standards for RF and microwave radiation." FCC, Notice of Proposed Rulemaking, 89 F.C.C.2d 214, ¶ 183 (1982). The FCC explained, however, that NEPA required it to consider whether activities at facilities that it licensed significantly affected the environment. The FCC did not propose to impose any substantive requirements on its regulated industries, *id.* ¶ 187, nor could it have done so under the purely procedural requirements of NEPA. In addition, the FCC noted that state and local authorities had already adopted regulations regarding human exposure to RF radiation, and the Commission did not indicate any concerns about possible conflict

between those regulations and the FCC standard for transmission facilities. *Id.* ¶ 188.

In 1985, the FCC finalized its proposal by amending the regulations in which it specified actions that would be categorically excluded from NEPA's environmental analysis requirement because they lack significant effect and, therefore, would not call for environmental analyses under NEPA.[1] The FCC stated that applications for certain permits would trigger NEPA requirements if the facilities seeking the permits were not in compliance with the otherwise voluntary, privately promulgated health and safety guidelines for RF radiation established by the American National Standards Institute (ANSI) in 1982. FCC, Report and Order, Biological Effects of Radiofrequency Radiation, 100 F.C.C.2d 543, ¶ 1 (1985). As it had in its 1982 proposal, the FCC again acknowledged that it had "neither the expertise nor the authority to develop its own health and safety standards." *Id.* ¶ 49. The FCC's 1985 standard did not apply to many low-power devices, including wireless telephones.

In 1992, ANSI adopted new guidelines for permissible RF radiation exposure that applied to additional categories, including cell phones. *See* FCC, Notice of Proposed Rulemaking, Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 8 F.C.C.R. 2849, 2850

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[1]Established by NEPA, the Council on Environmental Quality (CEQ) coordinates federal environmental efforts and has issued NEPA regulations "to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act." 40 C.F.R. § 1500.1. CEQ has instructed agencies that they may identify categories of actions that are excluded from NEPA because such actions typically would not trigger an EA or EIS requirement. *Id.* §§ 1507.3(b), 1508.4.

(1993). The FCC then proposed replacing the 1982 ANSI guidelines with the 1992 version in its NEPA regulations. *Id.* at 2851. Because the 1992 ANSI guidelines addressed cell phones, the FCC's proposal suggested including cell phones in the FCC's NEPA regulations concerning when NEPA analysis was required and when it was categorically not required. *Id.*

While the FCC rulemaking was underway, Congress enacted the Telecommunications Act of 1996 (TCA), Pub. L. No. 104-104 (1996), which amended the Communications Act. The TCA did not authorize the FCC to issue substantive health or safety regulations addressing RF emissions, but it directed the FCC to complete the NEPA rulemaking within 180 days. *Id.* § 704(b); *see supra* p. 2. The TCA also includes a narrow preemption provision, applicable only to the siting and building of physical facilities, which states that the FCC's RF regulations preempt state and local regulations regarding "placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC's] regulations concerning such emissions." *Id.* § 704(a), *codified at* 47 U.S.C. § 332(c)(7)(B)(iv).[2]

In addition to the preemption provision with respect to the siting and building of facilities, the TCA has a no-preemption provision. The Communications Act, even before the TCA, contained a "savings" provision that remains in effect and states: "Nothing in this chapter contained shall in any way abridge or alter the remedies

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[2]The statute does not define "facilities." The court below held that "facilities" refers to physical infrastructure, not to cell phones. Pet. App. 31a-32a; *accord Pinney v. Nokia, Inc.*, 402 F.3d 430, 455 (4th Cir.), *cert. denied*, 546 U.S. 998 (2005).

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.[3] The TCA goes even further, expressly disclaiming any implied preemption of state or local law:

> Effect on Other Laws:
>
> (c) Federal, State, and Local Law–
>
> (1) No Implied Effect—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.

TCA, § 601(c)(1) (47 U.S.C. § 152 note).

After passage of the TCA, and in accordance with the TCA's requirement that the FCC conclude its RF rulemaking, the FCC on August 1, 1996, adopted new regulations, which it also referred to as "guidelines," addressing RF radiation emitted by its regulated facilities and cell phones. Under the new regulations, the FCC may approve licensing and authorization applications from facilities that emit less than a specified amount of RF radiation without undertaking environmental analysis under NEPA. FCC, Report and Order, Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 11 F.C.C.R. 15123 (1996). In addition to facilities, the 1996 regulations cover "portable devices," such as cell phones.

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[3] In the original statute, "this chapter" was "this Act." 48 Stat. 1064 (1934). The chapter includes all of the Communications Act of 1934 and subsequent amendments.

The FCC issued the 1996 regulations to satisfy its "responsibilities under [NEPA] to evaluate the environmental significance of its actions." 47 C.F.R. § 2.1093(a) (addressing RF radiation evaluation for cell phones); *see* 11 F.C.C.R. at 15125 (regulations issued to satisfy NEPA and "the requirements of the [TCA] for a timely resolution of this proceeding"). Accordingly, if an application for equipment authorization from a cell phone manufacturer shows that the phones emit more than the specified amount of RF radiation, FCC regulations require the completion of an environmental analysis (either an EA or EIS) in accordance with NEPA, before the application can be considered. In addition, the 1996 regulations include a preemption regulation that incorporates verbatim the narrow preemptive language of the TCA, 47 U.S.C. § 332(c)(7)(B)(iv), applicable only to the location, construction, or modification of facilities. *See* 47 C.F.R. § 1.1307(e). The 1996 regulations remain in effect today.

Notably, while the FCC has addressed RF emissions from cell phones to satisfy its obligations under NEPA and pursuant to provisions of the Communications Act (as amended) that expressly disavow implied preemptive effect, Congress has conferred authority upon another agency to issue preemptive radiation standards for consumer products. Specifically, under the Radiation Control for Health and Safety Act of 1968, Congress directed the Food and Drug Administration (FDA) to "by regulation prescribe performance standards for electronic products to control the emission of electronic product radiation from such products if [the FDA] determines that such standards are necessary for the protection of the public health and safety." 21 U.S.C. § 360kk(a)(1). If the FDA issues regulations prescribing such health and safety standards, those regulations preempt conflicting state and local standards.

Id. § 360ss. The FDA, however, has never issued regulations prescribing standards applicable to RF radiation emitted by wireless telephones.

Proceedings Below

This case was brought by petitioner Francis Farina as a class action on behalf of Pennsylvania consumers, alleging claims for breach of warranty and violation of state unfair and deceptive trade practices laws, against manufacturers and sellers of cell phones. Mr. Farina alleges that cell phones, as currently manufactured, cause adverse biological effects when used without headsets because holding a cell phone so that the antenna is against the head may expose the user to dangerous amounts of RF radiation. The complaint turns on allegations that respondents' cell phones are unsafe to operate without headsets, and that respondents knew of the potential danger yet misleadingly warranted that the products are safe to operate without the use of headsets and are free from defects. The complaint seeks statutory damages and injunctive relief, including requiring a notice to correct respondents' misrepresentations and provision of headsets.

Shortly after the case was filed in state court, it was removed to federal court on the basis of "complete preemption" and subsequently transferred to the federal district court for the District of Maryland as part of a multi-district litigation (MDL) proceeding.[4] Mr. Farina, along with

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[4]The "complete preemption" doctrine is an exception to the well-pleaded complaint rule. Under the doctrine, "when a federal statute wholly displaces the state-law cause of action through complete pre-emption," the state-law claim is removable because "[w]hen the federal statute completely pre-empts the state-law cause of action, a claim [that] comes within the scope of that cause

(continued...)

several other MDL plaintiffs, moved to remand based on lack of federal jurisdiction. The MDL court denied that motion and dismissed all of the cases in the MDL on the basis of preemption. The Fourth Circuit reversed, holding that the plaintiffs' alleged only state-law claims and that those claims did not arise under federal law because the "complete preemption" doctrine did not apply. Therefore, the court held, the motion to remand the removed cases should have been granted because the federal courts lacked subject matter jurisdiction. *Pinney*, 402 F.3d at 445-46, 451. (As discussed *infra* at 15-16, with respect to the one MDL case in which federal jurisdiction was proper on the basis of diversity of citizenship, the court went on to hold that the FCC's RF radiation standard did not preempt the plaintiffs' state-law claims.)

Mr. Farina's case was then remanded to state court in Pennsylvania. When Mr. Farina later added a new defendant, respondents again removed, this time under the Class Action Fairness Act, 28 U.S.C. §§ 1132(d), 1453. *See* Pet. App. 12a-13a.

Back in a federal district court, now in the Eastern District of Pennsylvania, respondents filed another motion to dismiss, again arguing, as they had in the MDL proceedings, that Mr. Farina's claims were expressly preempted and impliedly preempted under both field preemption and conflict preemption theories. Although it rejected the express preemption and field preemption arguments, the district court held that the claims were impliedly preempted by the FCC's RF radiation standards. Relying

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[4](...continued)
of action, even if pleaded in terms of state law, is in reality based on federal law." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003).

on the FCC's obligation under NEPA to determine the environmental impact of its actions, and apparently misunderstanding that the RF standard does not impose a substantive requirement on manufacturers and sellers of cell phones, the court stated that the allegations in the complaint "trample upon the FCC's authority to determine the maximum standard for RF emissions." *Id.* at 114a.

The Third Circuit affirmed, holding that Mr. Farina's claims were neither expressly preempted nor preempted under a field preemption theory but that, notwithstanding the Communications Act's savings clause and the TCA's explicit prohibition against implied preemption, this case posed an obstacle to the accomplishment of the agency's objectives and, therefore, was impliedly preempted. In effect, the Third Circuit treated the agency's regulations concerning when NEPA analysis is required as substantive requirements that impliedly impose both a floor and a ceiling on the protections that may be provided consumers against RF radiation.[5]

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is In Direct Conflict With Decisions Of The Fourth Circuit And The District Of Columbia Court Of Appeals.

The decision below is in direct conflict with the Fourth Circuit's decision in *Pinney*, which held that the claims alleged in this *same case* and similar cases presenting identical claims were not preempted. *See* 402 F.3d at 457-59. Similar state-law claims were also considered by the District of Columbia Court of Appeals, which held that

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[5]Other issues addressed in the decisions below are no longer at issue.

some of the claims were impliedly preempted and that others were not. *See Murray v. Motorola, Inc.*, 982 A.2d 764 (D.C. 2009).

As noted above, *supra* p. 12, *Pinney* rejected the applicability of the complete preemption doctrine to several cases, including this one, in the MDL proceeding of which *Farina* was a part. In addition, because one of the MDL cases was in federal court on the basis of diversity jurisdiction, the Fourth Circuit also considered whether the claims alleged were actually preempted—that is, whether preemption was available as a defense, as opposed to a basis for jurisdiction. Like the Third Circuit in this case, the Fourth Circuit rejected the defendants' express preemption and field preemption arguments. In direct contrast to the Third Circuit, however, the Fourth Circuit held that the plaintiffs' claims—virtually the same claims at issue here—were not impliedly preempted by the Communications Act, the TCA, or FCC regulations.

First, the Fourth Circuit noted that the FCC's RF radiation standard for cell phones was not promulgated pursuant to a substantive mandate found in the TCA; it was promulgated pursuant to NEPA. 402 F.3d at 457. Second, the court considered the TCA's preemption provision, 47 U.S.C. § 332(c)(7)(B)(iv), *see supra* pp. 8-9, and found that the statute's "specificity" as to the preemptive scope of the FCC's RF radiation standards for wireless service facilities "weighs against a finding that Congress has an implicit goal of making preemptive the RF radiation standards for all other types of wireless telecommunications equipment, including wireless telephones." 402 F.3d at 458. Third, the Fourth Circuit looked to the statute's savings clause, 47 U.S.C. § 414, and the "No Implied Effect" provision, *id.* at § 152 note, *see supra* p. 2, and recognized that these clauses "counsel against any broad

construction of the goals of [the relevant statutory provisions] that would create an implicit conflict with state tort law." 402 F.3d at 458. For all these reasons, the Fourth Circuit concluded that the state-law claims did not conflict with the purposes and objectives of Congress and the FCC.

Having determined that the plaintiffs' claims posed no conflict with Congress's objectives, the court in *Pinney* next considered whether the specific relief sought—provision of headsets—would "stand as an obstacle to Congress' actual goal of establishing a nationwide network of wireless telephone service coverage." *Id.* The court held that it would not.

Directly contrary to the holding and analysis in *Pinney*, the court below held that liability in this case "would conflict with the FCC's regulations" by "permitting a jury to second guess the FCC's conclusion on how to balance its objectives"—protecting "the health and safety of the public while still leaving the industry capable of maintaining an efficient and uniform wireless network." Pet. App. 43a. The decision below is impossible to square with the Fourth Circuit's rejection of exactly the same implied preemption arguments.

In *Murray*, in which the plaintiffs alleged facts similar to those at issue in *Farina* and *Pinney*, the District of Columbia Court of Appeals reached a conclusion different from that of both the Third and the Fourth Circuits. Rejecting the Fourth Circuit's analysis, *Murray* held that "state regulation" that would "alter the balance" that the FCC sought to achieve through its RF regulation was preempted. 982 A.2d at 776. And it found that claims based on allegations about the adequacy of the FCC standard or the safety of FCC-authorized cell phones were therefore preempted. *Id.* at 777-78. It further found that claims

seeking damages based on the non-thermal effects of cell-phone radiation were also preempted, notwithstanding that the FCC standard does not address non-thermal effects. *Id.* at 778-79.

Contrary to the decision below, however, *Murray* allowed some claims to go forward. The court held that claims about false or misleading statements or omissions that do not depend on proof that cell phones are unreasonably dangerous are not preempted. *Id.* at 783. For example, *Murray* allowed a claim based on the allegation that defendants falsely represented that "[r]esearch has shown that there is absolutely no risk of harm associated with the use of cell phones" to go forward. *Id.* at 784.[6]

Here, Mr. Farina's claims are based on breach of warranty and violation of consumer protection laws that prohibit affirmative misrepresentations about the quality and attributes of consumer goods. As in *Murray*, the complaint here alleges that respondents misrepresented that their cell phones were absolutely safe, without disclosing that the safety of cell phones at current levels of RF radiation has not been established and that the scientific evidence is inconclusive. *See*, *e.g.*, Third Am. Complaint ¶¶ 54, 55, 57-59. In dismissing the case in its entirety, the Third Circuit decision directly conflicts with this part of the holding in *Murray*.

Thus, as the law stands, consumers' ability to bring state-law claims depends on the state in which they live: Consumers in Maryland and other states of the Fourth

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[6] *Murray* also held that claims based on injuries caused by phones acquired prior to August 1996, when the FCC issued the current standard, or phones that did not comply with the current standard, were not preempted. 982 A.2d at 781, 782.

Circuit can bring claims that consumers in Pennsylvania and other states of the Third Circuit cannot, while consumers in the District of Columbia can bring some claims barred in the Third Circuit but are prohibited from bringing other claims allowed in the adjoining states of the Fourth Circuit. The petition should be granted to resolve the direct conflict created by these three appellate-court decisions.

II. The Decision Below Exacerbates A Conflict Over The Important Question Whether Federal Regulations May Impliedly Preempt State Law When A Statutory Provision Expressly Disclaims Implied Preemption.

The FCC derives its authority from Congress, which, through the Communications Act, delegated to the FCC authority to regulate communications by wire and radio and, in the TCA, directed the FCC to complete its then-pending rulemaking regarding RF emissions. Congress also limited the express preemptive effect of that rulemaking to state laws concerning the location or construction of facilities. Congress further specified that the Communications Act does not "in any way abridge or alter" common-law or statutory remedies. 47 U.S.C. § 414. And it stated, in a provision entitled "No Implied Effect," that the TCA "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided." *Id.* at § 152 note (§ 601(c)(1)). Although this Court has held that a savings clause such as § 414 does not bar the operation of conflict preemption, *see Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000), it has never addressed the effect of a statutory provision that explicitly disclaims any implied preemptive effect.

This case raises that important question—whether the objectives of an agency regulation may preempt state law where the statute that authorizes or (as in the TCA) requires the agency to act explicitly states that the statute has no implied preemptive effect. That is, may a court find implied preemption on the basis of "frustration of purposes" of a regulation promulgated pursuant to a statute that Congress has stated does not impliedly preempt state law? On this question, the courts of appeals are also in conflict.

To begin with, the courts have treated the provision directly at issue here—the "No Implied Effect" clause, § 601(c)(1)—in strikingly dissimilar ways. The Fourth Circuit in *Pinney* held that the clause showed that Congress did not intend RF radiation standards for cell phones to be preemptive. *See Pinney*, 402 F.3d at 458. Likewise, the Seventh Circuit has held that § 601(c)(1) "precludes a reading that ousts the state [law] by implication." *AT&T Commc'ns of Ill. v. Ill. Bell Tel. Co.*, 349 F.3d 402, 410 (7th Cir. 2003) (rejecting challenges to Illinois statute mandating methodology for determining rate that local telephone company could charge to use its network).

In direct conflict, the court below, although it acknowledged that "it is conceivable that § 601(c)(1) could be dispositive," Pet. App. 55a, held that Congress's express disavowal of implied preemption was, in essence, ineffective because "a savings provision does not 'bar the ordinary working of conflict pre-emption principles.'" *Id.* (citing *Geier*, 529 U.S. 869). The court thus construed the "No Implied Effect" provision to mean only that "Congress's objectives are more limited than they might otherwise be characterized." *Id.* at 56a. The court did not explain how its holding represented merely a "more limited" reading or how its reading was consistent with § 601(c)(1). Similarly,

in a footnote, the District of Columbia Court of Appeals dismissed § 601(c)(1) and *Pinney*'s reliance on it. *See Murray*, 982 A.2d at 778 n.19.

The question presented by § 601(c)(1) is likely to recur. On February 2, 2011, a bill was introduced in the Oregon legislature to require disclosure on cell phones that the safety of the devices has not been established.[7] And San Francisco has adopted an ordinance requiring disclosure of the amount of RF radiation emitted by cell phones, which is currently being challenged in federal district court, in part on the theory that the ordinance is preempted. *See CTIA - The Wireless Ass'n v. City & County of San Francisco*, N.D. Cal. CV-10-3224, Complaint, filed July 23, 2010.

More broadly, on the question whether Congress may by statute grant authority to regulate while withholding implied authority to preempt, the Third Circuit's decision conflicts in principle with decisions construing the Nutrition Labeling in Education Act (NLEA), which similarly disclaims implied preemptive effect. *See* 21 U.S.C. § 343-1 note (Pub. L. No. 101-535, § 6(c)(1)) (NLEA "shall not be construed to preempt any provision of State law, unless

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[7]The pending bill (designated LC 1273 in the state legislature) would require a warning on cell phone packages and the back of the phones stating:

> This is a radio-frequency (RF), radiation emitting device that has nonthermal biological effects for which no safety guidelines have yet been established. Controversy exists as to whether these effects are harmful to humans. Exposure to RF radiation may be reduced by limiting your use of this device and keeping away from the head and body.

See Cecilia Kang, *Oregon considers cell phone radiation label*, Wash. Post, Post Tech, Feb. 8, 2011, *at* http://voices.washingtonpost.com/posttech/2011/02/oregon_state_senator_chip_shie.html.

such provision is expressly preempted"). In conflict with the decision below, courts have held that this provision precludes implied preemption. *See*, *e.g.*, *Holk v. Snapple Beverage Corp.*, 575 F.3d 329 (3d Cir. 2009); *Lockwood v. ConAgra Foods, Inc.*, 597 F. Supp. 2d 1028, 1032 (N.D. Cal. 2009); *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 509 F. Supp. 2d 351, 355 (S.D.N.Y. 2007). *But cf. Dowhal v. SmithKline Beecham Consumer Healthcare*, 88 P.3d 1, 7-9 (Cal. 2004) (finding a state law impliedly preempted notwithstanding a savings clause directed expressly to that state law).

Also contrary to the Third Circuit's treatment of § 601(c)(1), the FDA reads the NLEA provision to "clearly manifest[] Congress's intention" that there is no preemption under the NLEA outside the scope of that statute's express preemption provision. 56 Fed. Reg. 60528, 60530 (1991); *see* 58 Fed. Reg. 2462 (1993) ("[T]he *only* State requirements that are subject to preemption are those that are affirmatively different on matters that are covered by [the express preemption provision] of the act.") (emphasis added).

Other statutes, too new to have been addressed in litigation, also expressly limit or eliminate any implied preemptive effect. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1041 (enacted July 21, 2010);[8] Consumer Product Safety

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[8]"Sec. 1041(a)(2) states: "Rule of Construction.—This title, other than sections 1044 through 1048, may not be construed as annulling, altering, or affecting, or exempting any person subject to the provisions of this title from complying with, the statutes, regulations, orders, or interpretations in effect in any State, except to the extent that any such provision of law is inconsistent with the (continued...)

Improvement Act, Pub. L. No. 110-314, § 231 (enacted Aug. 14, 2008), *at* 15 U.S.C. § 2051 note.[9] The reasoning in the opinion below calls into doubt the efficacy of these deliberate attempts by Congress to limit the preemptive scope of important enactments, and will encourage litigants and courts to ascribe implied preemptive effect to regulations promulgated under these laws in defiance of Congress's expressly stated intent.

The petition should be granted to resolve the recurring question whether Congress may preclude "frustration of purpose" preemption or whether an agency's objective can

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[8](...continued)
provisions of this title, and then only to the extent of the inconsistency."

Section 1041(b) states: "Relation to Other Provisions of Enumerated Consumer Laws That Relate to State Law.—No provision of this title, except as provided in section 1083, shall be construed as modifying, limiting, or superseding the operation of any provision of an enumerated consumer law that relates to the application of a law in effect in any State with respect to such Federal law."

[9]Section 231 states: "Rule With Regard to Preemption.—The provisions of [statutes implemented by the Consumer Product Safety Commission] establishing the extent to which those Acts preempt, limit, or otherwise affect any other Federal, State, or local law, any rule, procedure, or regulation, or any cause of action under State or local law may not be expanded or contracted in scope, or limited, modified or extended in application, by any rule or regulation thereunder, or by reference in any preamble, statement of policy, executive branch statements, or other matter associated with the publication of any such rule or regulation. In accordance with the provisions of those Acts, the Commission may not construe any such Act as preempting any cause of action under State or local common law or State statutory law regarding damage claims."

preempt state law even when Congress has expressly stated that it cannot. This question will only grow in importance in light of Congress's increasing use of no-implied-preemption clauses. A clear answer is called for to ensure that states do not misunderstand the scope of the authority they retain and whether authority can be taken away from them, notwithstanding these clauses, based on the implications of agency action.

III. This Case Raises The Important Question Whether An Agency's Determinations About The Applicability Of NEPA's Requirements Preempt Substantive State Laws Governing The Conduct Of Private Actors.

The regulation held to preempt Mr. Farina's claims does not impose a substantive standard on wireless phones. Rather, as the regulation and the regulatory history make clear, 47 C.F.R.§ 2.1093(c) states the level of RF radiation that a cell phone can emit without triggering the FCC's NEPA obligation to evaluate the device's environmental effect before authorizing the device for sale. The FCC did not issue the standard to impose a substantive obligation on companies, but "[t]o meet its responsibilities under NEPA." 11 F.C.C.R. at 15124; *see* 47 C.F.R.§ 2.1093(a); Pet. App. 6a ("Although the FCC does not possess individual agency expertise with respect to the development of public health and safety standards, . . . the Commission concluded that NEPA obligated it to regulate RF radiation.") (citations omitted).

Accordingly, if a company applies for authorization to sell a cell phone that does not meet the standard, FCC regulations do not require the FCC to reject the application or the company to make any change to its product. They require only the preparation of an EA, and

potentially an EIS, before the application can be granted. Similarly, meeting the standard does not mean that the company is in compliance with some federal requirement that displaces any others to which it might be subject; meeting the standard means only that the agency does not have to take the procedural steps required by NEPA before it acts.

To be sure, manufacturers have generally chosen to stay within the level stated in the regulation so as to avoid the delay that would result if the FCC undertook the NEPA analysis. Nonetheless, the regulation is, by express statement of the FCC, a regulation issued to implement NEPA. 47 C.F.R. § 2.1093(a) ("Requirements of this section are a consequence of Commission responsibilities under [NEPA] to evaluate the environmental significance of its actions."); 11 F.C.C.R. at 15125 (Report and Order finalizing regulation); FCC, Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 12 F.C.C.R. 13494, 13499 ¶ 13 (1997) (amending parts of 1996 guidelines and reiterating that rules issued to comply with NEPA). And NEPA is a procedural statute that "does not mandate particular results" but rather "imposes only procedural requirements on federal agencies." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756 (2004) (internal quotation marks omitted); *see Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.").

To petitioner's knowledge, no court has ever before held that an agency's decision to categorically exclude an action from NEPA's procedural requirements preempts

application of state substantive law to private conduct.[10] And in contrast to the Third Circuit, the Fourth Circuit in *Pinney* found no preemption in part because the regulations on which the preemption theory was based were promulgated pursuant to NEPA, not pursuant to a mandate of the Communications Act. 402 F.3d at 457; *see also Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 548 (1978) ("NEPA does not repeal by implication any other statute.") (citation omitted).

The holding that an agency's rule as to what activities are categorically excluded from NEPA's procedural requirements can have preemptive effect on state law has implications for numerous federal regulatory agencies, regulated entities, and the public. NEPA's requirements apply to *every* agency and to *any* action that might have a significant environmental effect. *See* 42 U.S.C. § 4332(2)(C). Under the Third Circuit's analysis, agency regulations identifying regulatory actions that will not trigger NEPA requirements could have broad substantive, preemptive effect on state laws regulating the conduct of the private actors whose activities would be considered in a NEPA analysis, if one were required. *See*, *e.g.*, 7 C.F.R. § 372.5(c) (Animal and Plant Health Inspection Serv., Dep't of Agric.); 10 C.F.R. Part 1021.410 (Dep't of Energy); 18 C.F.R. § 380.5 (Federal Energy Regulatory Comm'n); 21 C.F.R. §§ 25.30-25.34 (FDA); 65 C.F.R. § 10229 (Dep't of

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[10] *Murray* addressed the fact that the FCC's RF regulations are NEPA regulations only in a footnote, finding that the distinction between NEPA regulations and substantive regulations was "not ... important." The court suggested that by instructing the FCC to finalize its pending rulemaking, the TCA had somehow transformed the NEPA guideline into a substantive requirement. 982 A.2d at 778 n.19.

Health and Human Servs.); Bureau of Land Mgmt., Dep't of Interior, 516 Dep'tal Manual 11, § 11.8(b) (2008).

Similarly, under the Third Circuit's approach, agency decisions that EIS's were not required in particular cases because of the absence of a significant environmental impact could suddenly operate to preempt the application of state environmental, safety, health, and consumer protection standards to the underlying private conduct. Yet "it is apparent that the express intent of NEPA is not to exclude state environmental regulation, but to encourage cooperation with local governments to achieve the Congressional goal of environmental protection." Joan Newman, *A Consideration of Federal Preemption in the Context of State and Local Environmental Regulation*, 9 UCLA J. Envtl. L. & Pol'y 97, 108 (1990). Indeed, NEPA has long co-existed with an array of state environmental laws. *See*, *e.g.*, Nicholas Robinson, *SEQRA's Siblings: Precedents from Little NEPA's in the Sister States*, 46 Albany L. Rev. 1155, 1157-58 & nn. 16-19 (1982) (citing state "mini-NEPA" laws).

Because the potential effect of claims to "NEPA preemption" are so far-reaching, the Court should grant the petition to address this significant issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 2011