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

BRIEF IN OPPOSITION FOR RESPONDENTS

GARRETT B. JOHNSON
TERRENCE J. DEE
MICHAEL B. SLADE
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
(312) 862-2000
Counsel for Motorola, Inc.

SEAMUS C. DUFFY
SUSAN M. ROACH
DRINKER, BIDDLE & REATH LLP
One Logan Square
Suite 2000
18th & Cherry Streets
Philadelphia, PA 19103
(215) 988-2700
Counsel for AT&T Mobility LLC and New Cingular Wireless Services, Inc.

DAVID C. FREDERICK
Counsel of Record
SCOTT K. ATTAWAY
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)
Counsel for AT&T Mobility LLC and New Cingular Wireless Services, Inc.

April 29, 2011

(Additional Counsel Listed Inside)

NEAL S. BERINHOUT
Associate General Counsel
AT&T MOBILITY LLC
1025 Lenox Park Boulevard
Suite C575
Atlanta, GA 30319
(404) 986-1427
Counsel for AT&T Mobility LLC

MARK H. KOLMAN
DEBORAH GOLDSTOCK RINGEL
KENNETH BERLINE TROTTER
DICKSTEIN SHAPIRO LLP
1825 Eye Street, N.W.
Washington, D.C. 20006
(202) 420-2200

CRAIG E. ZIEGLER
MONTGOMERY, MCCRACKEN, WALKER & RHOADS, LLP
123 South Broad Street
28th Floor
Avenue of the Arts
Philadelphia, PA 19109
(215) 772-1500

Counsel for Audiovox Communications Corporation

ROBERT C. HEIM
R. DAVID WALK, JR.
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
(215) 994-4000

JANE F. THORPE
SCOTT A. ELDER
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309
(404) 881-7000

ANDREW G. MCBRIDE
JOSHUA S. TURNER
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Cellco Partnership d/b/a Verizon Wireless

HOWARD D. SCHER
BUCHANAN INGERSOLL
& ROONEY PC
Two Liberty Place
50 South 16th Street
Suite 3200
Philadelphia, PA 19102
(215) 665-8700
Counsel for Cellular One Group

ROBERT E. WELSH, JR.
WELSH & RECKER, P.C.
2000 Market Street
Suite 2903
Philadelphia, PA 19103
(215) 972-6430
Counsel for Cellular Telecommunications Industry Association

CHARLES L. BABCOCK
DAVID T. MORAN
JACKSON WALKER LLP
Bank of America Plaza
901 Main Street
Suite 6000
Dallas, TX 75202
(214) 953-6000

MARK A. ARONCHICK
ROBERT L. EBBY
HANGLEY ARONCHICK
SEGAL & PUDLIN
One Logan Square
18th & Cherry Streets
27th Floor
Philadelphia, PA 19103
(215) 568-6200

Counsel for Ericsson Inc.

DANIEL H. WEINER
HUGHES HUBBARD &
REED LLP
One Battery Park Plaza
New York, NY 10004
(212) 837-6000

DAVID G. C. ARNOLD
LG ELECTRONICS
MOBILECOMM U.S.A., INC.
915 Montgomery Avenue
Suite 109, Royal Bank Plaza
Narberth, PA 19072
(484) 562-0008

Counsel for LG Electronics MobileComm U.S.A., Inc.

JAMES P. ULWICK
KRAMON & GRAHAM, P.A.
One South Street
Suite 2600
Baltimore, MD 21202
(410) 752-6030
Counsel for NEC Corporation of America

EDWARD M. CRANE
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
155 North Wacker Drive
Chicago, IL 60606
(312) 407-0700

STEVEN A. HABER
OBERMAYER REBMANN MAXWELL & HIPPEL LLP
One Penn Center, 19th Floor
1617 John F. Kennedy Boulevard
Philadelphia, PA 19103
(215) 665-3000

Counsel for Nextel Boost of the Mid-Atlantic, LLC, Nextel Boost West LLC, Nextel Communications of the Mid-Atlantic, Inc., Nextel West Corp.

RICHARD W. STIMSON
NOKIA INC.
Mail Drop 2-5-220
6021 Connection Drive
Irving, TX 75039
(214) 914-6128

STEVEN M. ZAGER
AKIN GUMP STRAUSS HAUER & FELD LLP
One Bryant Park
New York, NY 10036
(212) 872-1000

ASHLEY RODGERS ADAMS
AKIN GUMP STRAUSS HAUER & FELD LLP
300 West 6th Street
Suite 2100
Austin, TX 78701
(512) 499-6200

AMANDA R. ROGERS
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 877-4000

Counsel for Nokia Inc.

WALTER H. SWAYZE III
THEODORE C. FLOWERS
SEGAL MCCAMBRIDGE
SINGER & MAHONEY, LTD.
1818 Market Street
Suite 2600
Philadelphia, PA 19103
(215) 972-8015
Counsel for Panasonic Corp. of North America

MARY C. DOHERTY
MARSHALL, DENNEHEY,
WARNER, COLEMAN
& GOGGIN
1845 Walnut Street
21st Floor
Philadelphia, PA 19103
(215) 575-2600

RAYMOND B. BIAGINI
LISA M. NORRETT
MCKENNA LONG &
ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Philips Electronics North America Corporation

FRANCIS A. CITERA
GREENBERG TRAURIG, LLP
77 West Wacker Drive
Suite 3100
Chicago, IL 60601
(312) 456-8400

BRIAN T. FEENEY
GREENBERG TRAURIG, LLP
2700 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
(215) 988-7800

Counsel for Qualcomm Incorporated, Sony Electronics Inc.

JOHN B. ISBISTER
JAIME W. LUSE
TYDINGS & ROSENBERG LLP
100 East Pratt Street
26th Floor
Baltimore, MD 21202
(410) 752-9700

DANIEL T. FITCH
STRADLEY RONON STEVENS & YOUNG, LLP
2005 Market Street
Suite 2600
Philadelphia, PA 19103
(215) 564-8000

Counsel for Samsung Telecommunications America, LLC

ROCHELLE M. FEDULLO
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP
Independence Square West
The Curtis Center
Suite 1130 East
Philadelphia, PA 19106
(215) 627-6900
Counsel for SANYO North America Corporation

WALTER L. MCDONOUGH
SWARTZ CAMPBELL LLC
115 North Jackson Street
Media, PA 19063
(610) 566-9222

DOUGLAS S. BECK
SHOOK HARDY & BACON LLP
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550

Counsel for Sprint Nextel Corp.

EUGENE A. SCHOON
TAMAR B. KELBER
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

SUSAN K. HERSCHEL
HOYLE, FICKLER, HERSCHEL
& MATHES LLP
One South Broad Street
Suite 1500
Philadelphia, PA 19107
(215) 981-5700

Counsel for T-Mobile U.S.A., Inc.

MARK A. CASCIARI
PAUL H. VISHNY
PAUL E. FREEHLING
SEYFARTH SHAW LLP
131 South Dearborn Street
Suite 2400
Chicago, IL 60603
(312) 460-5000

JAMES M. MESNARD
SEYFARTH SHAW LLP
975 F Street, N.W.
Washington, D.C. 20004
(202) 463-2400

Counsel for Telecommunications Industry Association

QUESTION PRESENTED

Since 1934, Congress has charged the Federal Communications Commission ("FCC") with promoting "a rapid, efficient, Nation-wide . . . radio communication service with adequate facilities at reasonable charges" as well as the "safety of life and property through the use of . . . radio communications." 47 U.S.C. § 151. In a notice-and-comment rulemaking proceeding, the FCC balanced Congress's competing policy goals in promulgating regulations setting limits for radiofrequency emissions from mobile telephones. The FCC expressly declined requests by commenters that the agency adopt more stringent public health and safety standards based on its judgment (which incorporated the consensus view of federal health and safety agencies) that scientific studies did not warrant stricter limits and that such limits could impede the development of efficient, nationwide wireless communications services. The FCC's regulations were twice challenged on petition for review as insufficiently protective of health and safety; both challenges were rejected by the courts of appeals, and in both cases this Court denied certiorari.

The question presented is:

Whether the FCC's regulations setting forth a uniform national standard for radiofrequency emissions for all mobile phones sold in the United States and reflecting the FCC's balance of competing policy objectives preempt state-law claims that the federal standards are insufficiently protective and that FCC-compliant mobile phones are unsafe.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents AT&T Mobility LLC (f/k/a Cingular Wireless LLC); Audiovox Communications Corporation; Cellco Partnership d/b/a Verizon Wireless; Cellular One Group (n/k/a Alltel Group); Cellular Telecommunications Industry Association; Ericsson Inc.; LG Electronics MobileComm U.S.A., Inc.; Motorola, Inc.; NEC Corporation of America; New Cingular Wireless Services, Inc. (f/k/a AT&T Wireless Services, Inc.); Nextel Boost of the Mid-Atlantic, LLC; Nextel Boost West LLC; Nextel Communications of the Mid-Atlantic, Inc.; Nextel West Corp.; Nokia Inc.; Panasonic Corp. of North America (f/k/a Matsushita Electric Corp. of America); Philips Electronics North America Corporation; Qualcomm Incorporated; Samsung Telecommunications America, LLC (f/k/a Samsung Telecommunications America, LP); Sanyo North America Corporation; Sony Electronics Inc.; Sprint Nextel Corp. (f/k/a Sprint Corp.); T-Mobile U.S.A., Inc. (f/k/a Voicestream Wireless Corp.); and Telecommunications Industry Association state the following:

AT&T Mobility LLC (f/k/a Cingular Wireless LLC) has as its parent company AT&T Inc., and no publicly held company owns 10% or more of the stock of AT&T Inc.

Audiovox Communications Corporation has as its parent company Audiovox Corporation, and no publicly held company owns 10% or more of the stock of Audiovox Corporation.

Cellco Partnership d/b/a Verizon Wireless (Cellco), a general partnership formed under the law of the State of Delaware, is a joint venture of Verizon Communications Inc. and Vodafone Group Plc, which

indirectly hold a 55% and 45% interest, respectively, in Cellco. Both Verizon Communications Inc. and Vodafone Group Plc are publicly traded companies. As far as Cellco is aware, no publicly traded company owns 10% or more of the stock of either Verizon Communications Inc. or Vodafone Group Plc.

Cellular One Group (n/k/a Alltel Group) has the following two partners: Western and Alltel Group LLC, both of which are indirect, wholly owned subsidiaries of Cellco Partnership d/b/a Verizon Wireless.

Cellular Telecommunications Industry Association is a not-for-profit corporation that meets the requirements of Internal Revenue Code § 501(c)(6). It has no parent company and no stock. Accordingly, no publicly held company owns 10% or more of its stock.

Ericsson Inc. has as its parent company Ericsson Holding II Inc., a subsidiary of Telefonaktiebolaget LM Ericsson, which is publicly held and trades in the United States through American Depository Receipts under the name LM Ericsson Telephone Company.

LG Electronics MobileComm U.S.A., Inc. is a wholly owned subsidiary of LG Electronics, Inc., a publicly held Korean company. LG Electronics MobileComm U.S.A., Inc. is unaware of any publicly held company that owns 10% or more of the stock of LG Electronics, Inc.

On January 4, 2011, **Motorola, Inc.** was formally separated into two, independent companies. Motorola, Inc. changed its name to Motorola Solutions, Inc. The proper party in this action is Motorola Mobility, Inc. ("Motorola Mobility"). Motorola Mobility is a Delaware corporation, with its principal place of business in Illinois. Motorola Mobility Holdings, Inc. is the

parent company of Motorola Mobility, Inc. No publicly held company owns 10% or more of Motorola Mobility's stock.

NEC Corporation of America has as its parent company NEC Corporation, and no publicly held company owns 10% or more of the stock of NEC Corporation.

New Cingular Wireless Services, Inc. (f/k/a AT&T Wireless Services, Inc.) has the following parent companies: New BLS Cingular Holdings, Inc. and SBC Alloy Holdings, Inc. No publicly held company owns 10% or more of the stock of New BLS Cingular Holdings, Inc. or SBC Alloy Holdings, Inc.

Nextel Boost of the Mid-Atlantic, LLC, a Delaware limited liability company, is a wholly owned subsidiary of **Nextel Communications of the Mid-Atlantic, Inc.**, a Delaware corporation. **Nextel Boost West, LLC**, a Delaware limited liability company, is a wholly owned subsidiary of **Nextel West Corp.**, a Delaware corporation. Both **Nextel Communications of the Mid-Atlantic, Inc.** and **Nextel West Corp.** are wholly owned subsidiaries of Nextel Finance Company, which is a wholly owned subsidiary of Nextel Communications, Inc., which in turn is a wholly owned subsidiary of Sprint Nextel Corporation. Sprint Nextel Corporation is a publicly held Kansas corporation, and no publicly held company owns 10% or more of its stock. Zurich American Insurance Company may have a financial interest in the outcome of the proceeding, including an obligation to defend or indemnify the Nextel entities.

Nokia Inc., a Delaware corporation, is a wholly owned subsidiary of Nokia Holding Inc., a Georgia corporation, which is a wholly owned subsidiary of Nokia Corporation, a Finnish limited liability corpo-

ration. No publicly held company owns 10% or more of the stock of Nokia Corporation.

Panasonic Corp. of North America (f/k/a Matsushita Electric Corp. of America) has as its parent company Matsushita Electrical Industrial Co., Ltd., and no publicly held company owns 10% or more of the stock of Matsushita Electrical Industrial Co., Ltd.

Philips Electronics North America Corporation is a wholly owned subsidiary of Philips Holding USA Inc. One hundred percent of the shares of Philips Holding USA Inc. are, directly or indirectly, owned by Koninklijke Philips Electronics N.V., a publicly traded company. XL Insurance Global Risk may have a financial interest in the outcome of the proceeding.

Qualcomm Incorporated has no parent company, and no publicly held company owns 10% or more of its stock.

Samsung Telecommunications America, LLC (f/k/a Samsung Telecommunications America, LP) is a wholly owned subsidiary of Samsung Electronics America, Inc., which in turn is a wholly owned subsidiary of Samsung Electronics Co., Ltd., a publicly traded entity listed on the Korean Stock Exchange. Samsung Fire and Marine Insurance Co., Ltd., Chubb Insurance Co., Admiral Insurance Co., and Lexington Insurance Co. may have a financial interest in the outcome of the proceeding, including an obligation to defend or indemnify Samsung Telecommunications America, LLC.

SANYO North America Corporation is a wholly owned subsidiary of SANYO Electric Co., Ltd. SANYO Electric Co., Ltd. is not a publicly traded corporation; it is wholly owned by Panasonic Corporation, a Japanese corporation. Panasonic Corpora-

tion's stock is traded in Tokyo, Osaka, Nagoya and NY Exchanges.

Sony Electronics Inc. is an indirect, wholly owned subsidiary of Sony Corporation of America, which in turn is an indirect, wholly owned subsidiary of Sony Corporation, which exists under the laws of Japan. Sony Corporation's American Depository Receipts are traded on the New York Stock Exchange. No publicly held company owns 10% percent or more of the stock of Sony Corporation.

Sprint Nextel Corp. (f/k/a Sprint Corp.) has no parent company, and no publicly held company owns 10% or more of its stock. Continental Casualty Company, as an insurer of Sprint Nextel Corp., may have a financial interest in the outcome of the proceeding.

T-Mobile U.S.A., Inc. (f/k/a Voicestream Wireless Corp.) is an indirect, wholly owned subsidiary of Deutsche Telekom AG, a publicly traded company. No publicly held company owns 10% percent or more of the stock of Deutsche Telekom AG.

Telecommunications Industry Association has no parent company, and no publicly held company owns 10% or more of its stock.

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The Federal Communications Commission ("FCC") issued rules limiting the radiofrequency ("RF") energy that may be emitted by mobile phones. No mobile phone may be marketed anywhere in the United States unless it is certified as in compliance with FCC standards for RF emissions. On direct review of challenges to the FCC's regulations, the Second Circuit and subsequently the D.C. Circuit have upheld those rules, which mandate safe equipment and operational standards for mobile phones.

Both the Third Circuit below and the D.C. Court of Appeals correctly have held that those rules preempt conflicting claims, like petitioner's, seeking state-law rulings that the FCC's regulations are inadequate. Those courts agreed with the FCC's well-supported *amicus* submissions in multiple courts explaining that the agency struck a careful balance in weighing competing policy objectives to promote both "rapid, efficient, Nation-wide . . . radio communication service with adequate facilities at reasonable charges" and the "safety of life and property," 47 U.S.C. § 151, such that state-law claims upsetting the agency's balance pose an impermissible obstacle to federal objectives. The court below also emphasized correctly that the federal government has a long history of exclusive regulation over radio waves used for mobile phones; Congress had conferred specific rulemaking authority on the FCC in regulating mobile phone equipment standards; and the FCC had developed its standards through notice-and-comment rulemaking that balanced safety needs with national uniformity and mobile phone interoperability.

Both courts below correctly disagreed with an early and inadequately reasoned decision by a divided panel of the Fourth Circuit, which neither fully analyzed

the preemptive effect of the regulations at issue nor considered the FCC's views. After the Fourth Circuit decision issued, the FCC explained the operation of its rules in multiple *amicus* briefs to which the Third Circuit and the D.C. Court of Appeals gave significant weight when finding conflict preemption. As this Court has made clear, the expert "'agency's own views should make a difference'" to a court's conflict-preemption analysis. *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1139 (2011) (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000)).

Petitioner's assertion of a conflict warranting this Court's review has no merit. Any future case that might be brought in a Fourth Circuit jurisdiction will require that court to consider the FCC's views on preemption and the preemptive scope of FCC regulations, neither of which the Fourth Circuit has addressed. This Court therefore will likely benefit from further percolation of these issues and the Fourth Circuit's reconsideration of preemption, which may make any further review by this Court unnecessary. For similar and additional reasons, petitioner's two subsidiary questions concerning narrow and isolated components of the Third Circuit's preemption holding do not merit review.

Denial is further warranted because the issues presented by the interaction of the FCC's RF regulations and state tort law are of diminishing importance. Plaintiffs in the Fourth Circuit case voluntarily dismissed their claims, and there remains little if any pending litigation outside the District of Columbia (which is in agreement with the Third Circuit) raising the same preemption issues. As a practical matter, review would affect only the parties to this case and thus amounts to a plea for error correction.

Finally, it is clear that there is no error to correct. The decision below is a principled application of *Geier*, which held that agency rules intended to strike a particular balance between competing policy objectives preempt conflicting state law. The petition notably does not dispute the FCC's explanation that its rules strike a balance between the competing policy objectives that Congress directed the FCC to weigh. The Third Circuit's application of well-settled conflict preemption principles therefore was correct.

Accordingly, the petition should be denied.

STATEMENT

1. From the outset of commercial use of radio waves for communications, Congress has asserted federal control over all wireless services to ensure nationwide uniformity and compatibility. The Radio-Communications Act of 1912 prohibited "operation of radio apparatus without a license" and "imposed restrictions upon the character of wave emissions."[1] The Radio Act of 1927 strengthened those laws.[2] This Court recognized early on that "[n]o state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities."[3]

In the Communications Act of 1934 — which, as amended, remains the governing act today — Congress created the FCC to "make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at

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[1] *NBC v. United States*, 319 U.S. 190, 210 (1943); *see* ch. 287, 37 Stat. 302.

[2] *See* ch. 169, 44 Stat. 1162.

[3] *Federal Radio Comm'n v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266, 279 (1933).

reasonable charges." 47 U.S.C. § 151. Title III of the Act requires an FCC license "for the transmission of energy or communications or signals by radio," in order "to maintain the control of the United States over all . . . radio transmission." *Id.* § 301. The FCC has authority over every technical aspect of wireless radio communication, including "the kind of apparatus to be used" and their "emissions." *Id.* § 303(e). This Court has held that "federal control" over wireless "technical matters . . . is clearly exclusive."[4]

2. Wireless (or cellular) voice telephony became commercially viable only in recent decades. The FCC consistently has "assert[ed] federal primacy over . . . technical standards . . . for cellular service," because "a cellular subscriber traveling outside of his or her local service area should be able to communicate over a cellular system in another city."[5] The agency has declared "unlawful" any state action "inconsistent" with its own wireless "technical standards," which "apply nation-wide" and "without regard to state boundaries or varying local jurisdictions."[6]

Wireless telephone networks divide a given geographic area into distinct "cells" containing base stations that communicate with mobile phones and hand off calls to adjacent cells as mobile users move

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[4] *Head v. New Mexico Bd. of Exam'rs*, 374 U.S. 424, 430 n.6 (1963).

[5] *Cellular Communications Systems*, 86 F.C.C.2d 469, ¶¶ 79, 82 (1981).

[6] *Future Use of the Frequency Band 806-960 MHz*, 46 F.C.C.2d 752, ¶¶ 43-44 (1974); *see also Use of the Bands 825-845 MHz and 870-890 MHz*, 89 F.C.C.2d 58, ¶ 81 (1982) (precluding state laws that "could conflict with our standards").

around.[7] The geographic range of base stations and handsets increases as their RF emissions increase, making the level of RF emissions from mobile phones a key factor in the effectiveness and engineering of the national wireless network.[8]

The National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.*, requires federal agencies to evaluate the environmental effects of their actions. In the 1980s, the FCC decided that NEPA required it to evaluate the biological effects of human exposure to RF emissions from FCC-regulated facilities such as radio and television stations, satellites, cellular base stations, and low-power consumer devices such as mobile phones. In 1985, the FCC adopted RF exposure standards established by a panel of experts with the Institute of Electrical and Electronic Engineers, Inc. ("IEEE") and adopted by the American National Standards Institute ("ANSI"), a recognized standard-setting organization.[9] At that time, the FCC's rules excluded mobile phones (and other low-power devices) "from routine environmental evaluation with respect to RF radiation" because the FCC found "little likelihood" that those

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[7] *See* William C.Y. Lee, *Mobile Communications Engineering* 6, 10 (1982).

[8] *See Rural Telephone*, 18 FCC Rcd 20802, ¶ 52 (2003); FCC, Office of Eng'g & Tech., Questions and Answers about Biological Effects and Potential Hazards of Radiofrequency Electromagnetic Fields, OET Bulletin 56, at 3 (4th ed. Aug. 1999), *at* http://www.fcc.gov/Bureaus/Engineering_Technology/Documents/bulletins/oet56/oet56e4.pdf.

[9] *See Biological Effects of Radiofrequency Radiation*, 100 F.C.C.2d 543, ¶ 24 (1985).

devices might cause "exposures in excess of the RF safety guidelines."[10]

In 1992, ANSI/IEEE issued revised, and generally more stringent, scientifically based RF emissions standards, as did other expert organizations such as the congressionally chartered National Council on Radiation Protection and Measurements ("NCRP"). The FCC opened a new rulemaking proceeding to consider revising its rules.[11]

Congress subsequently directed the FCC within 180 days to "complete action in ET Docket 93-62 [its RF emissions rulemaking] to prescribe and make effective rules regarding the environmental effects of radio frequency emissions."[12] The House Commerce Committee, which drafted that provision, explained that "[a] high quality national wireless telecommunications network cannot exist if each of its component[s] must meet different RF standards in each community"; accordingly, the "national interest" required the FCC to strike an "appropriate *balance* in policy" between "adequate safeguards of the public health" and "speed[y] deployment . . . of competitive wireless telecommunications services."[13]

3. The FCC timely issued revised rules grounded in the rulemaking authority provided by Congress in 1934, which the Second Circuit upheld after chal-

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[10] *Biological Effects of Radiofrequency Radiation*, 2 FCC Rcd 2064, ¶¶ 15-16 (1987).

[11] *See* Notice of Proposed Rulemaking, *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 8 FCC Rcd 2849 (1993).

[12] Telecommunications Act of 1996, Pub. L. No. 104-104, § 704(b), 110 Stat. 56, 152 ("1996 Act").

[13] H.R. Rep. No. 104-204(I), at 94-95 (1995) (emphasis added).

lenge on a petition for review.[14] As relevant here, wireless phone RF emissions may not exceed a "specific absorption rate" in human tissue of 0.08 W/kg averaged over the body, and 1.6 W/kg for localized exposure to areas such as the head. *See First RF Order* ¶¶ 65, 71-72; 47 C.F.R. § 2.1093(d)(2). The FCC's rules incorporate a wide margin of safety, establishing a "limit for the general public" that "is one-fiftieth of the point at which RF energy begins to cause any unhealthful thermal effect."[15]

The FCC concluded that its revised rules "represent the best scientific thought and are *sufficient* to protect the public health." *First RF Order* ¶ 168 (emphasis added). The FCC squarely rejected claims that the RF limits it adopted "were not protective enough," concluding that, as directed by Congress, the revised limits "provide a *proper balance* between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible."

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[14] *See* Report and Order, *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 11 FCC Rcd 15123 (1996) ("*First RF Order*"), *reconsideration denied*, Second Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Procedures for Reviewing Requests for Relief From State and Local Regulations*, 12 FCC Rcd 13494 (1997) ("*Second RF Order*"), *petitions for review denied*, *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000) ("*Cellular Taskforce*"), *cert. denied sub nom. Citizens for the Appropriate Placement of Telecomms. Facilities v. FCC*, 531 U.S. 1070 (2001) ("*Citizens*").

[15] Brief for the Respondents in Opposition at 3 n.2, *Citizens for the Appropriate Placement of Telecomms. Facilities v. FCC*, Nos. 00-393 et al. (U.S. filed Dec. 2000) ("U.S. *Citizens* Br."), *at* http://www.justice.gov/osg/briefs/2000/0responses/2000-0393.resp.pdf.

Second RF Order ¶ 2 (emphasis added); *see also id.* ¶¶ 5, 29, 31, 39.[16] The FCC stated that it would monitor future developments "to ensure that our guidelines continue to be appropriate and scientifically valid." *First RF Order* ¶ 4; *see Second RF Order* ¶ 32.

The FCC considered comments from more than 100 parties representing a broad range of interests, including expert federal agencies responsible for public health and safety. *See First RF Order* ¶¶ 12-27. The FCC explained that, although it is not a health and safety agency, its conclusions "represent[ed] a consensus view of the federal agencies responsible for matters relating to the public safety and health." *Id.* ¶ 2. Thus, the FCC accepted the advice of the Food and Drug Administration ("FDA"), which has overlapping authority "to protect the public health and safety from electronic product radiation," 21 U.S.C. § 360ii(a), not to continue to exempt mobile phones from routine compliance testing as the FCC's original rules had done; in so doing, the FCC rejected the revised ANSI/IEEE standard on that score as too lenient. *See First RF Order* ¶¶ 71-73. The FCC likewise accepted the advice of the Environmental Protection Agency to adopt in certain respects the RF exposure standards established by the NCRP, rather than ANSI/IEEE. *See id.* ¶ 28.

In reaching what it considered to be the proper balance, the FCC expressly rejected commenter requests to "adopt stricter standards tha[n] those advocated by federal health and safety agencies."

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[16] In adopting standards developed by ANSI/IEEE and the NCRP, the FCC explained that "[b]oth of these organizations are internationally recognized for their expertise in this area, and there is little evidence to support a claim that these guidelines are not based on science." *Second RF Order* ¶ 32.

Second RF Order ¶ 31. The Second Circuit found the FCC's approach reasonable, explaining that whether to adopt a stricter RF standard "is a policy question, not a legal one," because "an agency confronted with scientific uncertainty has some leeway" to impose "more regulation or less." *Cellular Taskforce*, 205 F.3d at 91. The FCC subsequently denied a petition to revise its RF rules in light of additional scientific studies, and the D.C. Circuit affirmed, finding "nothing in those studies so strongly evidencing risk as to call into question the [FCC's] decision to maintain a stance of what appears to be watchful waiting." *EMR Network v. FCC*, 391 F.3d 269, 274 (D.C. Cir. 2004).

Reflecting the considered judgments embodied in its rules, the FCC's consumer education materials have long provided that "[a]ny cell phone at or below these [RF] levels (that is, any phone legally sold in the U.S.) is a 'safe' phone."[17] The FDA similarly has informed the public that, "[s]ince there are no known risks from exposure to RF emissions from cell phones, there is no reason to believe that hands-free kits reduce risks,"[18] and the FDA more recently concluded that the "available scientific evidence — including World Health Organization (WHO) findings released May 17, 2010 — shows no increased health risk" from RF energy "emitted by cell phones."[19]

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[17] C.A. App. A691; http://www.fcc.gov/cgb/sar/.

[18] C.A. App. A698; http://www.fda.gov/Radiation-Emitting Products/RadiationEmittingProductsandProcedures/Home BusinessandEntertainment/CellPhones/ucm116293.htm.

[19] http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm 212273.htm; *see also*, *e.g.*, Peter D. Inskip et al., *Brain cancer incidence trends in relation to cellular telephone use in the United States*, 12 Neuro-Oncology 1147, 1151 (Nov. 2010) (concluding

4. In 2006, petitioner filed his Third Amended Complaint ("Complaint") as a putative class action in state court. Respondents, entities that manufacture and/or sell mobile phones and their trade associations, removed the case to the Eastern District of Pennsylvania. *See* App. 9a-10a. Petitioner does not allege any diagnosed injury; he brings his complaint only on behalf of those "who have *not* been diagnosed with any illness or injury resulting from the use of [mobile phones]." Compl. ¶ 115 (emphasis added).

The Complaint, moreover, concedes that respondents' wireless phones "comply with" the FCC's RF emissions rules. *Id.* ¶ 87. Instead, the Complaint directly challenges the careful balance struck by the FCC in those rules. It claims — despite the conceded fact that no one in the putative class has been diagnosed with any cognizable physical injury — that mobile phones that comply with the FCC's RF standards nevertheless cause "adverse biological effects," and pursuant to state law are "dangerous," "defective," and "potentially hazardous to the health and safety of" users, when used without headsets. *Id.* ¶¶ 2, 47, 126, 154. The Complaint alleges a civil conspiracy among all respondents (Count I) and violations of express and implied warranties (Counts II-IV); it seeks declaratory relief (Count VI) and remedies including the provision of headsets, money damages, punitive damages, and attorney's fees. *See id.* ¶¶ 124-165, 171-173.[20]

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that 30 years of data from "high-quality cancer registries do not provide support for the view that use of cellular phones causes brain cancer"), *available at* http://neuro-oncology.oxfordjournals.org/content/12/11/1147.full.pdf+html.

[20] Petitioner voluntarily dismissed Count V, which alleged unfair trade practices. *See* App. 9a n.6; Compl. ¶¶ 166-170.

5. The district court granted respondents' motion to dismiss, holding petitioner's claims preempted because they conflict with federal law. *See* App. 107a-115a. The court concluded that the "allegations unquestionably trample upon the FCC's authority to determine the maximum standard for RF emissions," because they would require a jury to find "that the FCC's [RF] maximum is inadequate to ensure the safe use of cell phones." App. 114a-115a.

6. The Third Circuit affirmed. It likewise found that success on petitioner's claims — which allege that mobile phones that *comply* with the FCC's RF emissions rules are nevertheless *unsafe* when used without headsets — would "erect an obstacle to the accomplishment of the objectives of Congress." App. 37a; *see* App. 37a-61a. The court held that the FCC's rules did not merely set a regulatory floor that states could supplement, but struck a particular balance "represent[ing] the FCC's considered judgment about how to protect the health and safety of the public while still leaving industry capable of maintaining an efficient and uniform wireless network." App. 43a. Thus, the court reasoned, "[a]llowing juries to perform their own risk-utility analysis and second-guess the FCC's conclusion would disrupt the expert balancing underlying the federal scheme." App. 45a. And subjecting wireless networks to a "patchwork of state standards would disrupt . . . uniformity" and "hinder the accomplishment of the full objectives behind wireless regulation." App. 46a. The court rejected the claim that a state headset requirement poses no conflict, reasoning that any such remedy would have to be premised on a state-law finding of liability that the FCC's standards are in fact unsafe,

which would "permit juries to second-guess the FCC's balance of its competing objectives." App. 60a.

The Third Circuit also held that the FCC's own explanation for why claims such as petitioner's give rise to conflict preemption "merits deference." App. 48a. In an *amicus* brief submitted to the D.C. Court of Appeals,[21] the FCC had explained that, in its rulemaking proceeding, the agency had "determined that wireless phones that do comply with its RF standards are safe for use by the general public," and that success on state-law claims alleging those standards to be *un*safe would "contravene the policy judgments of the FCC" and "upset" the "'proper balance'" struck in its RF rules. FCC *Amicus* Br. 15-17 (quoting *Second RF Order* ¶ 29). The FCC emphasized that its "RF exposure standards are not simply a minimum requirement that the states are free to supplement," noting that it had specifically "declined to set more stringent RF exposure limits, in light of the lack of scientific evidence" justifying them and "the potential for such limits to impede the development of efficient, nation-wide wireless communications services." *Id.* at 10, 17.

Like the Third Circuit, the D.C. Court of Appeals agreed with the FCC's conflict-preemption analysis because plaintiffs there also were "effectively seeking to lower the FCC's current . . . standard" and "undermine [its] policy decision about where to set the . . . safety margin." *Murray v. Motorola, Inc.*, 982 A.2d 764, 775 (D.C. 2009); *see* App. 38a, 47a-48a.

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[21] Brief of the United States and the FCC as Amicus Curiae in Support of Appellees, *Murray v. Motorola Inc.*, Nos. 07-cv-1074 et al. (D.C. filed Mar. 31, 2008), 2008 WL 7825518 ("FCC *Amicus* Br."); C.A. App. 774-804.

Both courts disagreed, however, with the contrary holding of a divided panel of the Fourth Circuit in *Pinney v. Nokia, Inc.*, 402 F.3d 430 (4th Cir.), *cert. denied sub nom. Nokia, Inc. v. Naquin*, 546 U.S. 998 (2005), which had found similar claims not to be preempted. *See* App. 58a-60a. The *Pinney* majority issued its ruling without considering (or seeking) the FCC's views and "essentially ignored the FCC's RF emissions regulations." FCC *Amicus* Br. 21. The *Pinney* dissent would have found the suit preempted, because claims asserting that the FCC's RF limits are unsafe under state law, "if successful, *will* result in the complete invalidation of federal regulatory standards." 402 F.3d at 461 (Kiser, J., dissenting).[22]

REASONS FOR DENYING THE PETITION

I. PETITIONER'S ASSERTION OF A CONFLICT WITH *PINNEY* WARRANTING THIS COURT'S REVIEW HAS NO MERIT

A. *Pinney*'s Analysis Of Preemption Is Incomplete And Overlooked The Preemptive Effect Of FCC Regulations And The FCC's Own View Of Preemption In This Context

1. Both the Third Circuit and the D.C. Court of Appeals correctly gave significant weight to the FCC's *amicus* views, in holding that state-law claims challenging the adequacy of the FCC's RF regulations are preempted because they pose a conflict with the careful balance struck by the FCC in those regulations. *See* App. 48a ("[W]e think the FCC's

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[22] The Solicitor General authorized an *amicus* brief expressing the FCC's view that *Pinney* was wrong, but the Fourth Circuit denied rehearing en banc before the government brief was to be filed, depriving that court of the FCC's views. *See* Petition for a Writ of Certiorari at 16, *Nokia Inc. v. Naquin*, No. 05-198 (U.S. filed Aug. 10, 2005), 2005 WL 1902082.

position on preemption merits deference."); *Murray*, 982 A.2d at 776 (giving "weight" to FCC's reasoning on preemption). In contrast, the divided panel of the Fourth Circuit in *Pinney* did not fully consider the preemptive effect of the regulations themselves and did not consider or seek the FCC's views on that subject at all, despite being the first court of appeals to rule on the conflict-preemption issue.[23]

As a result, any perceived conflict between the result reached in *Pinney* and the decision below does not warrant this Court's plenary review. The Court should wait until the Fourth Circuit has the opportunity to analyze the preemptive effect of the FCC's regulations in light of the FCC's own views in the first instance, as well as the subsequent precedent uniformly rejecting *Pinney*. If the Fourth Circuit then disavows *Pinney*, there never will be any conflict to resolve. If that court were to adhere to *Pinney* (or if another court of appeals or state court of last resort sides with it), then this Court would have the benefit of that court's reasons for rejecting the FCC's position on conflict preemption. Either way, resolution of the question presented will benefit from further percolation.

Consideration of the FCC's views by lower courts in a case like this is important. When an agency strikes a balance between competing policy goals, its "'own views should make a difference'" on conflict preemption. *Williamson*, 131 S. Ct. at 1139 (quoting *Geier*, 529 U.S. at 883). Particularly where, as here, Congress has "'delegated . . . authority to implement the statute; the subject matter is technical; and the

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[23] A district court also has declined to follow *Pinney*, citing the district court's decision here. *See Bennett v. T-Mobile USA, Inc.*, 597 F. Supp. 2d 1050, 1052-53 (C.D. Cal. 2008).

relevant history and background are complex and extensive,'" the "'agency is likely to have a thorough understanding of its own regulation and its objectives and is "uniquely qualified" to comprehend the likely impact of state requirements.'" *Id.* (quoting *Geier*, 529 U.S. at 883 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996))).

Congress delegated authority to the FCC to regulate wireless devices and services, which necessarily required the FCC to strike, as it did, a "proper balance" between protecting public health and safety and enabling a uniform, national wireless network. *Second RF Order* ¶¶ 2, 5, 29. The subject matter of RF emissions standards is highly technical, and the FCC has a thorough understanding of its own regulation of RF emissions and the impact of state rules that threaten to undermine the FCC's national standards. Since *Pinney*, the FCC vigorously has asserted preemption of state-law claims challenging the balance struck in its regulations, and there is "'no reason to suspect that'" those consistent *amicus* submissions, which specifically apply the agency's general views on preemption in this context dating back to 1974 (*see supra* p. 4), "'reflect[] anything other than "the agency's fair and considered judgment on the matter."'" *Williamson*, 131 S. Ct. at 1139 (quoting *Geier*, 529 U.S. at 884 (quoting *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997))); *see also Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880-81 (2011).[24]

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[24] The FCC submitted two *amicus* briefs in *Murray*, one to the Superior Court for the District of Columbia in 2005, the other (on which the Third Circuit relied) to the D.C. Court of Appeals in 2008. *See* C.A. App. 661-89, 774-804. And the FCC recently confirmed that its "amicus brief in *Murray* . . . contin-

A Fourth Circuit panel would likely revisit the issue in light of the FCC's subsequently expressed *amicus* views and the well-reasoned precedent deferring to them. First, the general principle that an earlier panel's holding binds subsequent panels does not necessarily apply "if newly emergent authority, even though not directly controlling, offers a convincing reason for believing that the earlier panel would change its course."[25] That is certainly the case here. Second, an appeal in which a future panel felt constrained by *Pinney* would in any event be "a strong candidate for a rehearing en banc" for the same reasons, and because it would address "a conflict created by a pre-existing decision of the same circuit [where] no other circuits have joined on that side of the conflict."[26] Petitioner therefore offers no persuasive reason to invoke this Court's certiorari jurisdiction.

2. Petitioner also purports (at 16) to find a conflict between *Farina* and *Murray*. There is no conflict, and the Third Circuit *expressly disavowed* creating one. *Murray* held that claims challenging the FCC's RF standards as unsafe under state law

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ues to reflect the agency's position." Letter from Austin C. Schlick, General Counsel, FCC, to Tony West, Ass't Attorney General – Civil Division, DOJ, at 1 (Sept. 13, 2010), attached to DOJ Statement of Interest, *Dahlgren v. Audiovox Communications Corp.*, No. 2002 CA 007884 B (D.C. Super. Ct. filed Sept. 17, 2010).

[25] 16AA Charles Alan Wright et al., *Federal Practice and Procedure* § 3981.1, at 431-32 (4th ed. 2008); *cf. National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-85 (2005) (agency interpretation of a statute valid under step two of *Chevron* supersedes prior inconsistent judicial construction).

[26] Fed. R. App. P. 35 advisory committee's note (1998 Amendments).

are preempted, just as the Third Circuit did here, and both courts agreed with the FCC. *See supra* pp. 11-12. *Murray* also held narrowly that "claims about false or misleading statements or omissions" that do "not necessarily depend for their success upon proof that cell phones are unreasonably dangerous" would not be preempted. 982 A.2d at 783. *Murray* reiterated, however, that claims alleging in effect that respondents should have informed consumers "that the FCC [RF] standards are not adequate . . . *would be preempted*." *Id.* at 784 n.35 (emphasis added).

The Third Circuit made clear that it was creating no conflict, explaining that petitioner's claims "differ from those" that might fall within *Murray*'s narrow exception, because the "alleged representations made by [respondents] did not state that there is absolutely no risk of harm from RF radiation; they merely stated that cell phones were compliant with FCC guidelines and free from defects." App. 38a-39a n.26 (citing Compl. ¶¶ 141, 149).[27] In asserting such a conflict, petitioner disagrees with the Third Circuit's reading of their complaint. But this Court does not sit to correct alleged errors by lower courts in construing a complaint's factual allegations.

B. Petitioner's Two Subsidiary Questions Do Not Merit Review

Petitioner asserts (at i) that the main "question includes two more specific questions," the first concerning the effect of a 1996 Act savings clause, the second

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[27] Petitioner alleges that the user "manuals . . . delivered with the phones" provided, "in virtually identical language for all of the manufacturers and sellers," that, "'[i]n August, 1996, the [FCC] adopted RF exposure guidelines with safety levels for handheld wireless phones'" and that "'[t]he design of your phones complies with the FCC guidelines.'" Compl. ¶ 141.

rooted in the assertion that NEPA provided the sole regulatory authority for the FCC's RF emissions regulations. *See* Pet. 17-25. Because those questions are admittedly subsidiary to the conflict-preemption question, which does not merit review, independent review of those sub-issues likewise is unwarranted.

1. This case is an inappropriate vehicle for addressing those subsidiary questions in any event because both are based on the inaccurate premise that the FCC's rulemaking authority was rooted solely in the 1996 Act[28] or NEPA.

As the court below explained, "[a]lthough RF standards were issued to satisfy NEPA obligations, the regulations were promulgated pursuant to the FCC's rulemaking authority under, *inter alia*, 47 U.S.C. §§ 154(i) and 303(r)" — provisions that, since 1934, have authorized the FCC to promulgate legally binding rules and regulations. App. 6a n.2; *see First RF Order* ¶ 171 (ordering clause invoking those and other statutory authorities); *Second RF Order* ¶ 162 (same); *infra* pp. 27-28. And "health and safety considerations were already within the FCC's mandate." App. 50a (citing 47 U.S.C. §§ 151, 332(a), each requiring the FCC to promote the "safety of life and property" in regulating "wire and radio communications" (§ 151) and "mobile services" (§ 332)).[29] As this

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[28] The 1996 Act savings clause relied on by petitioner applies by its terms solely to 1996 Act provisions. *See* 47 U.S.C. § 152 note (§ 601(c)(1) of the 1996 Act, 110 Stat. 143, hereinafter "§ 601(c)(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.") (emphases added).

[29] The *Pinney* majority stated that the FCC's rules "were not promulgated pursuant to a mandate contained in § 332 . . . ,

Court has held, "Congress has delegated to the [FCC] the authority to 'execute and enforce' the Communications Act" and "promulgate binding legal rules." *Brand X*, 545 U.S. at 980-81 (quoting § 151 and according *Chevron* deference to validly promulgated FCC rules).

The 1996 Act directed the FCC to conclude its then-pending RF rulemaking, but the FCC proposed and enacted its regulations primarily under authority that long pre-dated the 1996 Act. As the Solicitor General explained to this Court, the FCC "acted under its broad authority to regulate communications conveyed by the Communications Act of 1934." U.S. *Citizens* Br. 20. Because the RF rules are not grounded solely on 1996 Act or NEPA provisions but rather on the FCC's long-established rulemaking authority, this case is an inapposite vehicle for considering either of petitioner's sub-issues.

2. Neither sub-issue merits further review for additional, independent reasons.

1996 Act Savings Clause. The savings clause enacted in 1934 provides that the Communications Act does not "in any way abridge or alter the remedies now existing at common law or by statute." 47 U.S.C. § 414. Petitioner concedes "that a savings clause such as § 414 does not bar the operation of conflict preemption." Pet. 17 (citing *Geier*, 529 U.S. at 869); *see also Williamson*, 131 S. Ct. at 1136 ("saving clause" does not "foreclose or limit the operation of ordinary conflict pre-emption principles"). Indeed, "this Court has repeatedly 'decline[d] to give broad

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but rather pursuant to" NEPA. 402 F.3d at 457. But the court did not examine the question of the FCC's authority under the other statutory provisions cited in its orders. *See infra* p. 21.

effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law,'" *Geier*, 529 U.S. at 870 (quoting *United States v. Locke*, 529 U.S. 89, 106-07 (2000)) (alteration in original), explaining in the specific context of § 414 that "'the act cannot be held to destroy itself,'" *AT&T Co. v. Central Office Tel. Co.*, 524 U.S. 214, 228 (1998) (quoting *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)).

The 1996 Act's savings clause is unique because it expressly preserves "Federal" as well as "State" law, on its face thus appearing to prefer neither but rather to preserve a pre-existing balance between those two sources of law. *See* § 601(c)(1) ("this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided"). The Third Circuit below thus "hesitate[d] to read § 601(c)(1) in a way that disclaims preemption even in the face of an actual conflict." App. 56a.

The court also found that "the broad instruction in [§ 704(b) of the 1996 Act] to promulgate rules governing RF emissions appears sufficient to authorize the FCC to pass preemptive regulations." App. 57a. It would have been anomalous for Congress to require the FCC "to prescribe and make effective rules regarding the environmental effects of radio frequency emissions" in § 704(b), only to render the resulting regulations a nullity in the face of conflicting state law; nothing in § 601(c)(1)'s preservation of "Federal" and "State" law suggests such a self-defeating result.

Reasoning analogously, this Court recently held that the Federal Arbitration Act ("FAA") preempts state laws declaring that prohibitions on class-action arbitration in consumer contracts of adhesion are unconscionable. *See AT&T Mobility LLC v. Concepcion*,

No. 09-893 (U.S. Apr. 27, 2011). Although the FAA contains a "saving clause" that expressly "preserves generally applicable contract defenses," the Court held the state rule preempted because "nothing in [the FAA] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives," primarily that arbitration agreements be enforced "according to their terms." *Id.*, slip op. at 9. Here, Congress charged the FCC with balancing competing policy objectives, and state rules that would undermine the FCC's lawful balance of Congress's objectives are likewise preempted.

Petitioner asserts a conflict with *Pinney* over § 601(c)(1), *see* Pet. 18; *see also* Constitutional Accountability Center *Amicus* Br. 5-18, but no such conflict exists. Presumably because *Pinney* lacked the FCC's views on the preemptive effect of its rules, it focused too narrowly on § 332, a provision that governs wireless services generally and that the Fourth Circuit found in and of itself not to exhibit an intent by Congress to preempt conflicting state law. *See* 402 F.3d at 457. From that narrow perspective, the *Pinney* majority found that the two "savings clauses counsel against any broad construction of the goals of § 332 and § 332(c)(7) that would create an implicit conflict with state tort law." *Id.* at 458.

As the FCC subsequently explained, however, the *Pinney* majority "essentially ignored the FCC's RF emissions regulations" in its unduly limited focus on § 332. FCC *Amicus* Br. 21. Moreover, because § 601(c)(1) expressly preserves *federal* as well as state law, it "is better read to simply confirm" that "the federal government has maintained exclusive authority over technical matters concerning radio communications for over eighty years." *Id.* at 25;

see Freeman v. Burlington Broadcasters, Inc., 204 F.3d 311, 323 (2d Cir. 2000) (holding that § 601(c) preserves longstanding federal law). Because *Pinney* is an early decision that has now become the sole outlier, and because *Pinney* did not carefully analyze the effects of the FCC's regulations, there is no savings-clause conflict to review. If the Fourth Circuit is asked to reconsider *Pinney*'s non-preemption conclusion, it likewise will have to consider, for the first time, the FCC's views and the Third Circuit's extended and careful reasoning on the construction of § 601(c)(1). *See* App. 54a-58a.

Petitioner mistakenly claims (at 18) that the asserted conflict over § 601(c)(1) spans more broadly, citing only *AT&T Communications of Illinois, Inc. v. Illinois Bell Telephone Co.*, 349 F.3d 402 (7th Cir. 2003), which held that "federal law leaves a gap-filling role for the states" on certain ratemaking issues. *Id.* at 410. That case held merely that state law is not preempted if there is *no* conflicting federal law on the issue at hand — an unremarkable proposition on which there is no debate here.

Petitioner asserts (at 19) that "[t]he question presented by § 601(c)(1) is likely to recur," citing a San Francisco ordinance whose particular labeling requirements may never take effect[30] and an unenacted bill in Oregon requiring certain point-of-sale RF disclosures. The unformed nature of those pro-

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[30] *See* Stipulation and Order Regarding Temporary Stay and Vacating Present Briefing Schedule ¶ 4, *CTIA v. City & County of San Francisco*, No. 3:10-cv-3224 WHA (N.D. Cal. Feb. 3, 2011) (Doc. 44) ("The City has advised CTIA that it intends to make substantive revisions to the disclosures required by the Ordinance and the accompanying Regulations that could impact the issues presented in this litigation.").

posals shows the issue is far from pressing, and this Court ordinarily declines to accept cases based on speculation over the course of future state and local legislative efforts.

Finally, petitioner claims (at 19-22) that the decision below "conflicts in principle" with decisions construing a savings clause in the Nutrition Labeling and Education Act of 1990. *See* 21 U.S.C. § 343-1 note (NLEA "shall not be construed to preempt any provision of State law, unless such provision is expressly preempted"). The text of that provision is significantly different from § 601(c)(1), which expressly saves "*Federal*" as well as "State" law, and creates no conceivable conflict.[31]

NEPA. The FCC's rules establish "[l]imits" for RF emissions from mobile phones and require that applications for their sale or use "confirm[] compliance with the limits." 47 C.F.R. § 2.1093(c), (d)(2). Petitioner asserts that this regulation "does not impose a substantive standard on wireless phones," Pet. 22, and seeks review of the question whether such a supposedly non-substantive "NEPA regulation . . . may preempt substantive [state] laws," Pet. i. That question is a red herring based on a convoluted set of inaccurate premises and does not merit review.

At the outset, there is no conflict on whether the FCC's rules impose a "substantive standard." Even *Pinney* found that they did; if not, there would have been nothing that might preempt state law. *See* 402 F.3d at 440 (FCC's rules "limit the amount of RF

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[31] Petitioner also cites two laws "too new to have been addressed in litigation," Pet. 20, which for that reason plainly do not merit review (and in any event likewise contain very different statutory language, *see* Pet. 20-21 nn.8-9).

radiation that . . . wireless telephones[] may emit"). Both the Second Circuit and the D.C. Circuit considered the FCC's rules to be binding substantive standards, in rejecting claims that they were insufficiently protective of health and safety. *See supra* pp. 8-9. As petitioner himself concedes, "FCC authorization is required before a particular cell-phone model may be sold or used in the United States," which confirms the substantive nature of the FCC's regulations. Pet. 6 (citing 47 C.F.R. § 2.803).

Petitioner's characterization of the FCC's rules as purely "NEPA regulation[s]" is likewise incorrect because they were promulgated pursuant to longstanding Communications Act authority. *See supra* pp. 18-19; *infra* pp. 27-28. NEPA is a procedural statute that "does not mandate particular results" but rather "imposes only procedural requirements on federal agencies." *DOT v. Public Citizen*, 541 U.S. 752, 756 (2004) (internal quotation marks omitted). The FCC began its review in light of NEPA, but it chose to mandate "particular results" by promulgating *substantive* rules having the force of law, invoking the authority delegated by Congress in 1934.

Petitioner bases his "non-substantive rule" argument on the theory that an applicant conceivably could seek FCC approval of a non-compliant phone by submitting a formal "environmental assessment" under NEPA attempting to justify a higher RF limit — something petitioner concedes has never been attempted, and that in any event would *not* benefit his own request for a *lower* RF limit. Pet. 22-23. Petitioner asserts that "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 pri-

vate conduct." Pet. 23-24. In this variant, petitioner shifts from claiming that the rules are grounded in NEPA to suggesting that the FCC has somehow "categorically exclude[d]" (*id.*) mobile phones from NEPA requirements.

The Second Circuit, however, squarely rejected claims that the FCC improperly excluded cell phones from NEPA review, finding that the FCC's two RF orders "functionally satisf[ied]" NEPA's requirement to prepare an environmental assessment reaching a finding of no significant impact. *Cellular Taskforce*, 205 F.3d at 94. Petitioner's claim that the FCC's rules merely established procedural triggers for the preparation of additional environmental impact statements under NEPA is mistaken because the agency plainly intended to set bright-line limits. *See Second RF Order* ¶ 5 (concluding that the FCC's RF exposure limits "provide a proper balance between the need to protect the public and workers from exposure to excessive RF electromagnetic fields and the need to allow communications services to readily address growing market-place demands").

Having constructed his question on a series of faulty premises, petitioner asserts that the decision below could be read to mean that "agency regulations identifying regulatory actions that will not trigger NEPA requirements could have broad substantive, preemptive effect on state laws." Pet. 24. But this Court has made clear in numerous cases that preemption depends on the specifics of an agency's rules. *Compare*, *e.g.*, *Geier*, 529 U.S. at 877-83 (finding 1984 version of regulation preemptive because the agency sought a particular balance between competing policies), *with Williamson*, 131 S. Ct. at 1137-40 (finding 1989 version of same regulation non-

preemptive because the agency struck no such balance). The Court need not speculate on the preemptive effect of the regulations that petitioner cites (at 24-25), and he identifies no decision addressing the hypothetical NEPA issue he raises.

C. The Specific Issues Presented Here Are Of Diminishing Importance

The Complaint alleges that FCC-compliant mobile phones are unsafe without headsets. The Naquin plaintiffs, whose claims *Pinney* held were not preempted, voluntarily dismissed their case, so there is no live conflict with *Pinney* itself.[32] *Pinney* also dismissed four consolidated cases for lack of subject-matter jurisdiction. *See* App. 28a n.21. Three were voluntarily dismissed by plaintiffs, and the fourth led to the decision below. In a separate case that considered whether plaintiffs had a sufficient scientific basis for their claims, the Fourth Circuit itself affirmed exclusion of the plaintiff's expert and dismissal.[33] Several cases pending in the D.C. Superior Court seek to fall within *Murray*'s narrow exception for non-preempted claims, but that exception is inapplicable here. *See supra* pp. 16-17. Moreover, the issue is not important for this Court to consider because there is no conflict on preemption between the Third Circuit and the District of Columbia. *See id.*[34]

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[32] *See* Agreed Order, *In re Wireless Tel. Radio Frequency Emissions Products Liab. Litig.*, MDL No. 1421, Civil No. 01-MD-1421 (D. Md. Nov. 6, 2006) (Doc. 171).

[33] *See Newman v. Motorola, Inc.*, 78 F. App'x 292 (4th Cir. 2003) (per curiam).

[34] Although respondents petitioned for a writ of certiorari in *Pinney* in 2005, myriad subsequent events make review here unnecessary.

II. THE DECISION BELOW IS CORRECT

Pursuant to the Supremacy Clause, U.S. Const. art. VI, § 2, "state law is naturally preempted to the extent of any conflict with a federal statute." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000). State law poses a conflict where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002) (internal quotation marks omitted). "Federal regulations," moreover, "have no less pre-emptive effect than federal statutes." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *see Wyeth v. Levine*, 129 S. Ct. 1187, 1200 (2009) ("[A]n agency regulation with the force of law can pre-empt conflicting state requirements.") (internal quotation marks omitted).

When the FCC acts pursuant to "a broad grant of authority to reconcile conflicting policies," this Court will "not disturb" its judgment "unless it appears . . . that the accommodation is not one that Congress would have sanctioned." *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (internal quotation marks omitted). Thus, a court will not interfere with the FCC's "reasonable accommodation of the competing policies committed to the FCC's care." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984).

The FCC has authority to promulgate substantive rules promoting "a rapid, efficient, Nation-wide . . . radio communication service with adequate facilities at reasonable charges," along with the "safety of life and property through the use of . . . radio communications." 47 U.S.C. § 151; *see also*, *e.g.*, *id.* §§ 154(i), 301, 303(c), (e), (f), (r), 307(a); FCC *Amicus* Br. 3-4, 14 (invoking § 151). As the Solicitor General has

explained, balancing those competing policy goals requires a "trade-off": whereas "all risk from RF energy could be eliminated by prohibiting wireless communications technologies" altogether, "Congress has entrusted to the FCC the process of striking the appropriate balance, a subject squarely within the agency's expertise." U.S. *Citizens* Br. 21.

The FCC found the RF limits it adopted to "provide a *proper balance* between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible." *Second RF Order* ¶ 2 (emphasis added). The FCC specifically rejected claims that those limits "were not protective enough," thus confirming that its aim was to strike a balance between competing objectives that would preempt conflicting state law. *Id.* ¶ 5; *see Cellular Taskforce*, 205 F.3d at 91; FCC *Amicus* Br. 17.[35]

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[35] Petitioner erroneously claims (at 16) that "the FCC standard does not address non-thermal effects." The FCC expressly rejected a stricter standard to address "non-thermal effects," finding a lack of scientific support. *Second RF Order* ¶ 31; *see also* App. 60a ("Regulatory assessments and rulemaking call upon a myriad of empirical and scientific data and medical and scientific opinion, especially in a case, such as RF radiation, where the science remains inconclusive."). The FCC has explained that its decision not to tailor its rules and regulations to address non-thermal effects was a "decision not to regulate" that "should be given preemptive effect." FCC *Amicus* Brief 20 (citing *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983)). Petitioner mistakenly claims (at 6-7) that, in 1982, the FCC expressed no concerns about state regulation of RF energy from communications equipment, when in fact the FCC said that it would "closely examine" any such potential "conflict," *Biological Effects of Radiofrequency*

In *Geier*, this Court found that a state-law claim that vehicles must include airbags was preempted by a federal rule expressly permitting automobile manufacturers to choose among various vehicle restraint devices, based on the agency's balancing of competing federal policy objectives. *See* 529 U.S. at 875-82. As the Court recently explained, "[a]t the heart of *Geier* lies our determination that giving auto manufacturers a choice among different kinds of passive restraint devices was a *significant objective* of the federal regulation." *Williamson*, 131 S. Ct. at 1136.

Striking the proper balance between public health and safety and a national, uniform, and competitive wireless network was a significant objective of the FCC — indeed, it was the primary objective. As the court below properly concluded, "[t]his is a situation 'in which the Federal Government has weighed the competing interests relevant to the particular requirement in question, reached an unambiguous conclusion about how those competing considerations should be resolved in a particular case or set of cases, and implemented that conclusion via a specific mandate on manufacturers or producers.'" App. 44a (quoting *Lohr*, 518 U.S. at 501). The court properly held petitioner's claims to be preempted.

Radiation, 89 F.C.C.2d 214, ¶ 188 (1982) (cited at Pet. 6-7), and explaining further that "[i]t is imperative that no additional requirements be imposed by the states which could conflict with our standards and frustrate the federal scheme for the provision of nationwide cellular service," *Use of the Bands 825-845 MHz and 870-890 MHz*, 89 F.C.C.2d 58, ¶ 81; *see supra* p. 4 & n.6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GARRETT B. JOHNSON
TERRENCE J. DEE
MICHAEL B. SLADE
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
(312) 862-2000
Counsel for Motorola, Inc.

NEAL S. BERINHOUT
Associate General Counsel
AT&T MOBILITY LLC
1025 Lenox Park Boulevard
Suite C575
Atlanta, GA 30319
(404) 986-1427
Counsel for AT&T Mobility LLC

DAVID C. FREDERICK
Counsel of Record
SCOTT K. ATTAWAY
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

SEAMUS C. DUFFY
SUSAN M. ROACH
DRINKER, BIDDLE & REATH LLP
One Logan Square
Suite 2000
18th & Cherry Streets
Philadelphia, PA 19103
(215) 988-2700
Counsel for AT&T Mobility LLC and New Cingular Wireless Services, Inc.

MARK H. KOLMAN
DEBORAH GOLDSTOCK RINGEL
KENNETH BERLINE TROTTER
DICKSTEIN SHAPIRO LLP
1825 Eye Street, N.W.
Washington, D.C. 20006
(202) 420-2200

CRAIG E. ZIEGLER
MONTGOMERY, MCCRACKEN,
WALKER & RHOADS, LLP
123 South Broad Street
28th Floor
Avenue of the Arts
Philadelphia, PA 19109
(215) 772-1500

Counsel for Audiovox Communications Corporation

ROBERT C. HEIM
R. DAVID WALK, JR.
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
(215) 994-4000

JANE F. THORPE
SCOTT A. ELDER
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309
(404) 881-7000

ANDREW G. MCBRIDE
JOSHUA S. TURNER
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Cellco Partnership d/b/a Verizon Wireless

HOWARD D. SCHER
BUCHANAN INGERSOLL
& ROONEY PC
Two Liberty Place
50 South 16th Street
Suite 3200
Philadelphia, PA 19102
(215) 665-8700
Counsel for Cellular One Group

ROBERT E. WELSH, JR.
WELSH & RECKER, P.C.
2000 Market Street
Suite 2903
Philadelphia, PA 19103
(215) 972-6430
Counsel for Cellular Telecommunications Industry Association

CHARLES L. BABCOCK
DAVID T. MORAN
JACKSON WALKER LLP
Bank of America Plaza
901 Main Street
Suite 6000
Dallas, TX 75202
(214) 953-6000

MARK A. ARONCHICK
ROBERT L. EBBY
HANGLEY ARONCHICK SEGAL & PUDLIN
One Logan Square
18th & Cherry Streets
27th Floor
Philadelphia, PA 19103
(215) 568-6200

Counsel for Ericsson Inc.

DANIEL H. WEINER
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, NY 10004
(212) 837-6000

DAVID G. C. ARNOLD
LG ELECTRONICS MOBILECOMM U.S.A., INC.
915 Montgomery Avenue
Suite 109, Royal Bank Plaza
Narberth, PA 19072
(484) 562-0008

Counsel for LG Electronics MobileComm U.S.A., Inc.

JAMES P. ULWICK
KRAMON & GRAHAM, P.A.
One South Street
Suite 2600
Baltimore, MD 21202
(410) 752-6030
Counsel for NEC Corporation of America

EDWARD M. CRANE
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
155 North Wacker Drive
Chicago, IL 60606
(312) 407-0700

STEVEN A. HABER
OBERMAYER REBMANN
MAXWELL & HIPPEL LLP
One Penn Center, 19th Floor
1617 John F. Kennedy Boulevard
Philadelphia, PA 19103
(215) 665-3000

Counsel for Nextel Boost of the Mid-Atlantic, LLC, Nextel Boost West LLC, Nextel Communications of the Mid-Atlantic, Inc., Nextel West Corp.

RICHARD W. STIMSON
NOKIA INC.
Mail Drop 2-5-220
6021 Connection Drive
Irving, TX 75039
(214) 914-6128

STEVEN M. ZAGER
AKIN GUMP STRAUSS
HAUER & FELD LLP
One Bryant Park
New York, NY 10036
(212) 872-1000

ASHLEY RODGERS ADAMS
AKIN GUMP STRAUSS
HAUER & FELD LLP
300 West 6th Street
Suite 2100
Austin, TX 78701
(512) 499-6200

AMANDA R. ROGERS
AKIN GUMP STRAUSS
HAUER & FELD LLP
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 877-4000

Counsel for Nokia Inc.

WALTER H. SWAYZE III
THEODORE C. FLOWERS
SEGAL MCCAMBRIDGE
SINGER & MAHONEY, LTD.
1818 Market Street
Suite 2600
Philadelphia, PA 19103
(215) 972-8015
Counsel for Panasonic Corp. of North America

MARY C. DOHERTY
MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN
1845 Walnut Street
21st Floor
Philadelphia, PA 19103
(215) 575-2600

RAYMOND B. BIAGINI
LISA M. NORRETT
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Philips Electronics North America Corporation

FRANCIS A. CITERA
GREENBERG TRAURIG, LLP
77 West Wacker Drive
Suite 3100
Chicago, IL 60601
(312) 456-8400

BRIAN T. FEENEY
GREENBERG TRAURIG, LLP
2700 Two Commerce Square
2001 Market Street
Philadelphia, PA 19103
(215) 988-7800

Counsel for Qualcomm Incorporated, Sony Electronics Inc.

JOHN B. ISBISTER
JAIME W. LUSE
TYDINGS & ROSENBERG LLP
100 East Pratt Street
26th Floor
Baltimore, MD 21202
(410) 752-9700

DANIEL T. FITCH
STRADLEY RONON STEVENS & YOUNG, LLP
2005 Market Street
Suite 2600
Philadelphia, PA 19103
(215) 564-8000

Counsel for Samsung Telecommunications America, LLC

ROCHELLE M. FEDULLO
WILSON ELSER MOSKOWITZ
EDELMAN & DICKER LLP
Independence Square West
The Curtis Center
Suite 1130 East
Philadelphia, PA 19106
(215) 627-6900
Counsel for SANYO North America Corporation

WALTER L. MCDONOUGH
SWARTZ CAMPBELL LLC
115 North Jackson Street
Media, PA 19063
(610) 566-9222

DOUGLAS S. BECK
SHOOK HARDY & BACON LLP
2555 Grand Boulevard
Kansas City, MO 64108
(816) 474-6550

Counsel for Sprint Nextel Corp.

EUGENE A. SCHOON
TAMAR B. KELBER
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000

SUSAN K. HERSCHEL
HOYLE, FICKLER, HERSCHEL & MATHES LLP
One South Broad Street
Suite 1500
Philadelphia, PA 19107
(215) 981-5700

Counsel for T-Mobile U.S.A., Inc.

MARK A. CASCIARI
PAUL H. VISHNY
PAUL E. FREEHLING
SEYFARTH SHAW LLP
131 South Dearborn Street
Suite 2400
Chicago, IL 60603
(312) 460-5000

JAMES M. MESNARD
SEYFARTH SHAW LLP
975 F Street, N.W.
Washington, D.C. 20004
(202) 463-2400

Counsel for Telecommunications Industry Association

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