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

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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Petitioner submits this supplemental brief to respond to the Brief for the United States as Amicus Curiae, submitted in response to the Court's order inviting the Solicitor General to express the government's views.

ARGUMENT

I. Like respondents, the government declares that the indisputable conflict between the decision below and *Pinney v. Nokia, Inc.*, 402 F.3d 430 (4th Cir.), *cert. denied*, 546 U.S. 998 (2005), should be disregarded because the Fourth Circuit decision preceded an FCC amicus brief in *Murray v. Motorola, Inc.*, 982 A.2d 764 (D.C. 2009), addressing the implied preemptive effect of the FCC's radiofrequency (RF) radiation guidelines. The views set forth in that brief, the government asserts, were "central to the reasoning of the court below," U.S. Br. 10 (citing Pet. App. 46a), and the Fourth Circuit "may reconsider" its holding in light of the FCC's views.

The government greatly overstates the impact of the *Murray* brief on the decision below. In finding conflict preemption, the Third Circuit mentioned the FCC's amicus brief only once. *See* Pet. App. 46a. Primarily, the court looked to FCC statements from the rulemaking record—which was available to and cited by the Fourth Circuit in *Pinney*. *See* Pet. App. 46a-50a; *Pinney*, 402 F.3d at 458. And while the court afforded the FCC's views on the regulatory scheme "some weight," it did "not defer to [the] agency's legal conclusion" on preemption. Pet. App. 46a.

In any event, the government's speculation that the Fourth Circuit will take the issue en banc and overrule its decision in *Pinney* is unfounded. Courts do not as a matter of course conform their decisions to the government's views, much less reverse their prior holdings simply because the government disagrees. *See, e.g., Wyeth v.*

Levine, 129 S. Ct. 1187 (2009) (finding no preemption notwithstanding government amicus brief arguing for it); *Etcheverry v. TriAg Service, Inc.*, 993 P.2d 366 (Cal. 2000) (finding preemption notwithstanding government amicus brief arguing against it).

Indeed, both courts that considered the FCC's *Murray* amicus brief disagreed with significant parts of it. *See* Pet. App. 34a, 37a (disagreeing with FCC's view on field preemption); *Murray*, 982 A.2d at 774, 775, 777-78, 787 (disagreeing with FCC's views on field preemption and, in part, on obstacle preemption).

The government also repeats respondents' contention that the conflict with *Pinney* is somehow diminished because that decision focuses on the statute, rather than the regulations. *See* Pet. Reply 4. The government seems to fault the Fourth Circuit for framing its decision in accordance with the manner in which the defendants there (also, for the most part, respondents here) made their argument. More importantly, the government's distinction between the statute and the regulations begs the question whether an agency may have purposes and objectives different from those delegated to it by Congress, such that state law that does not conflict with Congress's objectives in enacting a statute may be said to pose an obstacle to an agency's objectives in implementing the statute. That unsettled question is raised not only by this case, but also by several important pieces of federal legislation.[1]

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[1]In addition to statutes cited in the petition (at 20-21), other significant pieces of legislation that contain provisions limiting their preemptive effect include the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 916 (entitled "Preservation of State and Local Authority"), and the Patient Protection and

(continued...)

Moreover, the government's theory that the Fourth Circuit, in a later case, "may" reverse the holding in *Pinney* is tied to its incorrect characterization of Mr. Farina's claims. The government describes this case as a challenge to the safety of FCC-certified cell phones. But this case does not challenge either the FCC's guidelines or FCC certification of any phone. Rather, at issue is respondents' choice to represent—in written materials not regulated by the FCC—that their phones were safe for use without headsets, despite their knowledge that the safety of their products was not (and still is not) known. This Court has already rejected the theory that federal regulation insulates companies from accountability for voluntary marketing decisions outside the scope of the regulation. *See Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 (1995) (express preemption provisions do not "shelter [private parties] from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the [party's] alleged breach of its own, self-imposed undertakings"); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 526 (1992) ("[A] common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a requirement ... imposed under State law." (internal quotation marks omitted)). There is no reason to think the Fourth Circuit would conclude otherwise, as it would have to do to overrule *Pinney*.

To be sure, Mr. Farina's complaint assumes that it is, at least, uncertain whether the FCC's 1996 guideline is

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[1](...continued)
Affordable Care Act, Pub. L. No. 111-148, § 1321(d) (entitled "No Interference with State Regulatory Authority"). The Third Circuit's reasoning could impair the effectiveness of these provisions as well.

adequate to ensure the safety of cell phones used without headsets. The FCC itself, however, when proposing its earlier RF radiation guideline, agreed that its role was not to establish safety standards and recognized that it had "neither the expertise nor the authority to develop its own health and safety standards." 100 F.C.C.2d 543, ¶ 49 (1985). Rather, although it has not done so, the Food and Drug Administration (FDA) has the authority to "prescribe performance standards for electronic products to control the emission of electronic product radiation from such products if [the agency] determines that such standards are necessary for the protection of the public health and safety." 21 U.S.C. § 360kk(a)(1). This provision also belies the government's suggestion (at 2) that the FCC has "exclusive" authority to regulate cell-phone "emissions" for health and safety purposes.

Furthermore, this Court has recognized that even federal regulation that reflects a balancing of interests does not necessarily preempt state law. *See Williamson v. Mazda Motor of Am.*, 131 S. Ct. 1131, 1137-38 (2011). And contrary to the FCC's contention here and in *Murray*, a state-law claim premised on disagreement with an agency's view of the safety of an agency-approved product does not necessarily frustrate agency objectives. *See Wyeth*, 129 S. Ct. 1187 (drug approval); *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005) (pesticide registration).

Nonetheless, the government (at 14) calls for deference because the underlying subject matter is "technical" and the background is "complex." Regardless of whether those characterizations are accurate, they are not pertinent here. As shown by each of the decisions to have considered the issue, one need not delve into either the technical aspects of telecommunications or the science of radiation to

examine the preemptive effect of the FCC guidelines on state-law warranty and misrepresentation claims.

Finally, the decision below also conflicts, in part, with the D.C. Court of Appeals' decision in *Murray*. *See* Pet. 15-16. The government (at 14-15) reiterates respondents' argument seeking to dismiss this conflict, an argument largely resting on mischaracterizations of petitioner's claims and to which petitioner has already responded. Pet. Reply 4.

II. Section 601(c) of the Telecommunications Act of 1996 (TCA) provides that the Act shall have "no implied effect" on federal, state, or local law "unless expressly so provided" in the Act. 47 U.S.C. § 152 note. The Third, Fourth, and Seventh Circuits and the D.C. Court of Appeals have all recognized that the provision bears on the preemptive effect of FCC regulations, but they have disagreed as to its effect. *See* Pet. App. 55a; *Pinney*, 402 F.3d at 458; *AT&T Commc'ns of Ill., Inc. v. Ill. Bell Tel. Co.*, 349 F.3d 402, 410 (7th Cir. 2003); *Murray*, 982 A.2d A.2d at 778 n.19.

The government does not deny that the decisions of the courts of appeals are in conflict as to whether section 601(c) bars implied obstacle preemption. In fact, the government does not address the lower courts' decisions at all on this point. Instead, taking a position contrary to *Pinney*, *Murray*, and the decision below, it argues that section 601(c) does not apply. In the government's view, because the FCC could have issued the guidelines before the TCA, section 601(c) is inapplicable even though the FCC ultimately issued the guidelines pursuant to the TCA's mandate. *See* FCC, Report and Order, Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 11 F.C.C.R. 15123, 15184 (1996) ("Section 704(b)

of the Telecommunications Act of 1996 requires that we prescribe and make effective these new rules by August 6, 1996."). However, although the FCC could have issued the guidelines before enactment of the TCA, it did not. And the plain language of the TCA brings the action that it *did* take within the scope of the statute.

Notably, the government does not deny that section 601(c), where it applies, bars action taken pursuant to the TCA from impliedly preempting state law, and it does not defend the Third Circuit's conclusion that implied obstacle preemption is somehow consistent with the language of section 601(c). Nor does the government deny that whether Congress may limit the preemptive effect of agency action through such a provision is an important question, affecting a number of critical federal statutes, that this Court has not addressed.

The government (at 17) makes a brief stab at arguing that, because section 601(c) also "does not impliedly alter prior 'Federal . . . law,'" the RF guidelines must have an implied preemptive effect post-TCA if they would have had such an effect had they been issued before the TCA's enactment. The RF guideline for cell phones, however, did not exist prior to the TCA. Thus, applying section 601(c) to determine the preemptive effect of the guidelines does not in any way alter prior federal law.

III. The government concedes that the FCC issued its RF guidelines to comply with the National Environmental Policy Act (NEPA). And the regulation plainly states: "Requirements of this section are a consequence of Commission responsibilities under [NEPA] to evaluate the environmental significance of its actions." 47 C.F.R. § 2.1093(a). In administrative proceedings, the FCC has repeatedly described the RF guidelines as NEPA regu-

lations. *See* Pet. 6-7, 22-23 (citing FCC administrative statements); Pet. Reply 2 (same).

The government (at 18) now says, however, that the RF guidelines were "triggered" by NEPA but "promulgated" under FCC rulemaking authority granted by the Communications Act. The government argues that if the FCC did not elsewhere possess rulemaking authority, NEPA alone would not permit it to issue RF standards or "to condition cell phone approval on compliance with those standards."

To begin with, FCC regulations do not condition approval on compliance with the RF guidelines. The guidelines state whether an environmental analysis is required, not whether an application for authorization will be granted. *See* 47 C.F.R. § 2.1093(c), *quoted in part at* Pet. 3-4. No FCC regulation states that a cell phone that exceeds the RF guidelines will be denied (or that a phone that meets the guidelines will be granted). Rather, the sole consequence of exceeding the standard is that the applicant must submit an environmental assessment (EA). The government agrees on this point. *See* U.S. Br. 19.

Moreover, the government's argument conflates the FCC's authority over licensing of telecommunications devices with its NEPA obligations. The Communications Act did not require the FCC to address when an EA or environmental impact statement would be required as a condition of applying for a cell phone license. In fact, from the early 1980s until August 1996, the FCC licensed cell phones but did not have RF guidelines for them. In 1993, when the FCC proposed adopting RF guidelines for cell phones, it specified that it was doing so "[t]o meet its requirements under NEPA." FCC, In the Matter of Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 8 F.C.C.R. 2849 (1993). The

final rule adopting the guidelines reiterated the point. *See* 11 F.C.C.R. at 15124 (rule issued "[t]o meet [FCC's] responsibilities under NEPA"); 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)).

In a related argument, the government (at 19) contends that the RF guidelines are not procedural, but substantive, because they relate to the equipment-authorization process. But the government fails to explain how the fact that the guidelines relate to equipment authorization supports its conclusion that they are substantive. In fact, the RF guidelines for cell phones are among a lengthy list of "Equipment Authorization Procedures," most of which cannot be even remotely described as substantive. *See* 47 C.F.R. Part 2, subpart J; *see, e.g., id.* §§ 2.902 ("Verification"), 2.911 ("written application required"). And while the government notes that NEPA "provided no guidance" concerning the specific RF standards that the agency adopted, NEPA provides no substantive guidance as to the content of any rule undertaken pursuant to it, as the government elsewhere explains. *See* U.S. Br. 3 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

Nonetheless, the government argues that because, in practice, applicants have chosen to meet the standard rather than to perform an EA, the standard is effectively substantive. The applicants' choice about how to comply with the regulation cannot alter the nature of the regulation itself. As the government's brief (at 5-6, 19) explains, the RF guidelines impose only one requirement: to submit an EA if the device exceeds the stated RF level.

The government's efforts to characterize the RF standard as something other than a NEPA regulation reflects an obvious discomfort with the Third Circuit's conclusion that a rule that determines only when NEPA analysis is required before a federal agency acts can preempt substantive state law regulating private conduct. Indeed, the government does not contend that a regulation establishing a categorical exemption from a NEPA requirement can preempt state consumer protection law. Accordingly, once the government's effort to characterize the RF guidelines as substantive is rejected, there is little left of its argument on this issue.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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