No. 20-17307

In the United States Court of Appeals for the Ninth Circuit

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

v.

APPLE, INC.,
Defendant-Appellee,

and

SAMSUNG ELECTRONIC MEDIA, INC.,
Defendant.

On Appeal from the United States District Court
for the Northern District of California, San Francisco
Case No.19-cv-05322 (The Hon. William H. Alsup)

BRIEF OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

The typical American checks their cell phone 150 times per day—once every six minutes. Our phones are the first thing many of us look at when we wake up and the last thing we see before we fall asleep. We carry them with us to school and to work, to exercise and to cook—all while storing them in our pockets or on our arms, as if they were a part of us.

This is a massive experiment in more ways than one. A lot has been said about the risks of skyrocketing "screen time"—especially while the COVID-19 pandemic has kept many of us trapped in our homes. But less discussed is an even more alarming risk—the radio-frequency, or RF, radiation our phones emit as they communicate with nearby base stations. A growing body of research, however, has created cause for concern: Animals develop rare tumors when exposed to RF radiation at rates similar to the RF radiation levels that we experience when using cell phones, and population and case studies also show meaningful cancer incidence.

Nevertheless, Apple promises consumers that its phones are safe and appropriate to use in close proximity to their bodies. These promises are misleading and false. And California law prohibits Apple from making them—companies may not misrepresent the safety of their products. This lawsuit seeks to stop Apple from continuing to do so.

In response to the lawsuit, Apple argued that it didn't matter if its statements about the safety of its phones were misleading or false. According to the company, *any* state regulation of such conduct is preempted by federal law. But Apple had a problem: There is no federal statute that preempts state regulation of cell phone radiation (or misrepresentations about phone safety). Nor is there even an agency regulation that purports to do so. So the company turned to a decades-old Federal Communications Commission order adopting guidelines for how the Commission will evaluate the environmental impact of radiation from the devices and facilities under its jurisdiction—one of which happens to be the cell phone.

But that order doesn't actually regulate cell phone radiation (or anything else, for that matter). It just establishes the *procedures* the FCC uses to evaluate environmental impact. And it does not even purport to preempt state law. To the contrary, it expressly *disclaims* any preemptive effect. That is unsurprising. The statutory authority on which it is based is the National Environmental Policy Act, a procedural statute that simply requires agencies to establish procedures to fully consider the environmental impact of their actions. That statute can't possibly be the basis for an agency's substantive regulation to preempt state law—it can't be a basis for an agency's substantive regulation at all.

And the twin statutes that do authorize the FCC to regulate substantive conduct contain express *no-preemption* clauses: The first specifically states that

"[n]othing" in the Act "shall in any way abridge or alter the remedies now existing at common law or by statute." 47 U.S.C. § 414. And the second reaffirms that—except in specific areas, of which cell phone radiation is not one—there can be no preemption of state law.

Undeterred by the actual text of the relevant statutes and the FCC's order, Apple pressed a "purposes-and-objectives" theory of implied preemption. The company argued that, even though it does not say so, the FCC's order embodies a set of federal purposes and objectives that oust any state law that might impose even modest regulations on what manufacturers may say or do about their phones' safety.

This theory should have been a nonstarter. As both the Supreme Court and this Court have made clear, the purposes-and-objectives brand of preemption is particularly unsuited to this kind of agency regulation, and so is only justified in a "small number of cases." *In re Volkswagen "Clean Diesel" Mktg. Sales Pracs. & Prods. Liab. Litig.*, 959 F.3d 1201, 1212 (9th Cir. 2020); *see, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). That is because the Supremacy Clause only affords preemptive effect to federal *law*—not "abstract and unenacted legislative desires." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1907–08 (2019) (plurality).

The district court lost sight of that fundamental principle here. Relying on a position the FCC has developed primarily in litigation (and which contradicts the position it took for decades in its actual orders), the district court purported to

unearth an expansive set of federal purposes—from uniformity to concerns about over-warning to a balance of competing interests—in the agency's regulation. The court then concluded that state health laws pose an obstacle to these newfound abstract objectives. Because every step along this path was wrong, this Court should reverse.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1332(a)(1), as modified by the Class Action Fairness Act of 2005, because at least one member of the class is a citizen of a different state than the defendant, there are more than 100 members of the class, and the aggregate amount in controversy exceeds $5 million, exclusive of interest and costs. 7-ER-1171. This Court has jurisdiction under 28 U.S.C. § 1291. The district court granted Apple's motion for summary judgment and entered judgment in its favor on October 29, 2020. 1-ER-2–3. The notice of appeal was timely filed on November 24, 2020. 2-ER-33–35.

STATEMENT OF THE ISSUES

1. Did the district court err when it held that an FCC order promulgated to satisfy the agency's obligations under NEPA—a purely procedural statute that confers no preemptive authority—could preempt state public-health laws under a "purposes-and-objectives" theory of implied conflict preemption?

2. Did the district court err in concluding that the FCC's procedural guidelines for complying with NEPA and setting technical standards to authorize pieces of equipment were somehow impeded by state public-health laws?

3. Did the district court improperly defer to the FCC's litigation position on the preemptive force of its own order, where that position was not found in the relevant regulations and represented a change from the agency's longstanding view on its ability to preempt state law?

PERTINENT RULES AND STATUTES

The pertinent rules and statutory provisions are set forth in a statutory addendum to this brief. *See* 9th Cir. R. 28-2.7.

STATEMENT OF THE CASE

A. Statutory and regulatory background

1. The radio-frequency radiation emitted by cell phones poses little-understood human health risks.

From our pockets and our bedsides, cell phones operate by sending and receiving electromagnetic energy from nearby base stations. *See* World Health Organization, *Electromagnetic fields and public health: mobile phones* (Oct. 8, 2014), https://perma.cc/QTV9-MXT4; 7-ER-1180. In modern smartphones, this happens constantly, through four (or more) distinct antennae. Sampson Hu & David Tanner, *Building Smartphone Antennas that Play Nice Together*, IEEE Spectrum (Oct. 23, 2018), https://bit.ly/3dTC2Uq.

When the cell phone was an emerging technology, scientists began to question whether regular exposure to this energy—known as radio-frequency, or RF, radiation—could have adverse health effects. *See* FDA Ltr. (May 19, 1999), https://perma.cc/C4KB-BCNS (nominating cell phone RF radiation for study by the National Toxicology Program).

Twenty years—and billions of cell phone users—later, those fears appear well-founded. Peer-reviewed studies now show "clear evidence" of an association between RF radiation exposure and cancerous heart tumors in animal subjects. *See* Nat'l Inst. of Env't Health Scis., News Release: High Exposure to Radio Frequency Radiation Associated with Cancer in Male Rats (Nov. 1, 2018), https://perma.cc/6QL5-9LJH; Charles Schmidt, *New Studies Link Cell Phone Radiation with Cancer*, Scientific American (Mar. 29, 2018), https://perma.cc/DU86-SG59. Population studies indicate that cell phone use—especially the use of the phone on the same side of the body, for long periods of time, and beginning at early ages—is associated with multiple types of brain cancer. *See* 7-ER-1182–86; Anthony B. Miller et al., *Risks to Health and Well-Being From Radio-Frequency Radiation Emitted by Cell Phones and Other Wireless Devices*, 7 Frontiers in Public Health at 2 (Aug. 2019), https://perma.cc/J9X6-TB2Q; National Cancer Institute, *Cell Phones and Cancer Risk*, https://perma.cc/9J3Z-ANPL. And there are even case studies indicating an association between carrying a cell phone near the chest and unusual breast cancers. *See* John G. West et al., *Multifocal Breast Cancer in*

Young Women with Prolonged Contact between Their Breasts and Their Cellular Phones, 2013 Case Reports in Medicine, https://perma.cc/2RSC-XFMD.

In light of these concerns, scientists who work in this area have sounded the alarm, urging further study and careful regulation. *See* Miller et al., *Risks to Health*, 7 Frontiers in Public Health at 5–6; 7-ER-1184 (discussing 150 scientists' appeal for more stringent federal regulation of RF radiation emissions); Ronald Melnick, *There's a clear cell phone-cancer link, but FDA is downplaying it*, The Hill (Nov. 13, 2018), https://perma.cc/M45L-ZLVS.

2. The FCC establishes procedural guidelines to guide its assessment of the environmental effects of cell phone RF radiation.

a. The twin Communications Acts grant the FCC basic regulatory authority over wire and radio communications.

When it enacted the Communications Act of 1934, Congress both created the FCC and charged it with making available "a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. To carry out this mandate, the Act provides the FCC with a range of rulemaking authority to exercise "as public convenience, interest, or necessity requires." *Id.* § 303. This includes the specific power to regulate "the kind of apparatus to be used with respect to its external effects and the purity and sharpness of emissions from each station and from the apparatus therein." *Id.*

§ 303(e). And it includes more general power to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary." *Id.* § 303(r). This law remained largely intact, with modest amendments, for the next sixty years, until Congress significantly updated it with the Telecommunications Act of 1996, Pub. L. No. 104-104 (1996), 110 Stat. 56 ("TCA").

Tasked with this authority, the FCC has proceeded to regulate our basic telecommunications infrastructure. It has, for instance, considered and approved applications to construct or operate large transmitting facilities, such as radio broadcasting towers, ground-based satellite facilities, and similar structures. *See, e.g.*, FCC, Op. & Order, 38 F.C.C.2d 665 (1972), 703–64; 47 U.S.C. § 301. And more recently, the agency has also begun to regulate personal communications devices—including the cell phone. *See, e.g.*, 47 U.S.C. 302a(a)–(b).[1]

But in both statutes, Congress went out of its way to ensure that the scope of the FCC's authority was carefully cabined. The 1934 Act, for instance, established a regime of "dual" federalism, under which the FCC's jurisdiction extended only to interstate and international communications, while states largely retained jurisdiction over intrastate communications. *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S.

[1] The FCC filings comprising the regulatory history in this case were included in the record below and are reproduced in relevant part in the Excerpts of Record. For ease of reference, this brief cites the Excerpts of Record to identify those filings.

355, 369–70 (1986). To police the boundaries of that regime, Congress provided that "nothing" in the federal law should be construed to give the FCC jurisdiction with respect to such matters as "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." 47 U.S.C. § 152(b). And to further emphasize that the scope of this federal authority was limited, Congress included an explicit savings clause, specifying that "[n]othing in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute." 47 U.S.C. § 414.

When Congress enacted the TCA in 1996, it underscored this dual-sovereignty approach. Although the TCA's changes allowed the FCC to play a greater role in regulating *intra*state telecommunications, Congress took care to preserve a meaningful role for state regulation. It did this in two ways: first, by preserving the savings clause the 1934 Act inserted into the U.S. Code, and second, by *expressly* disclaiming any implied preemption of state or local law through a new provision—rarely found in any federal law—labeled "No Implied Effect." In this provision, Congress made clear that "[t]his 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." TCA § 601(c)(1) (codified at 47 U.S.C. § 152 note).

When it came to radiation, Congress reinforced this federalist balance by establishing a carefully crafted preemption framework to specifically circumscribe

the FCC's role. For RF radiation at wireless service *facilities*, such as cell towers or other large structures, Congress included an express preemption provision—under which the FCC could preempt any state and local regulations regarding the "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." 47 U.S.C. § 332(c)(7)(B)(iv). But Congress chose *not* to allow the FCC to displace state and local laws that might regulate RF radiation produced by low-power wireless *devices*, like those at issue here.

b. After Congress enacts NEPA, the FCC is forced to begin considering the health effects of RF radiation emissions when granting licenses to operate communications facilities.

For the first four decades of its existence, the FCC was not much concerned with the health effects of RF radiation. As the FCC has been the first to acknowledge, it is "not a health and safety agency" and lacks the "expertise" or "jurisdiction" to set substantive health and safety standards. *See, e.g.*, 4-ER-535; 2-ER-272.

But after Congress enacted NEPA in 1969, the FCC recognized that, in some circumstances, it was now required to consider those health effects. *See* 1972 Op. & Order, 38 F.C.C.2d at 703–04. That is because NEPA obligates all agencies to consider the environmental impact of any proposed actions—like the approval of a new telecommunications tower—that may "significantly affect[] the quality of the

human environment." 42 U.S.C. § 4332(2)(C). These obligations, however, do not require agencies to select the least environmentally damaging action available to them; instead, they mandate a process to ensure that agencies have "at [their] disposal all relevant information" about their projects' impacts. *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1356 (9th Cir. 1994). Typically, agencies fulfill this mandate by undertaking an Environmental Assessment to determine whether a particular action will have a significant effect on the environment—and then, if necessary, by preparing an Environmental Impact Assessment to analyze those impacts in full. *Id.*

The FCC soon realized that these additional steps might be triggered anytime it licensed a large communications facility because of the RF radiation those facilities emit. *See, e.g.*, 1972 Op. & Order, 38 F.C.C.2d at 703–04; 2-ER-153–54. The agency thus began a process to determine when those licensing decisions would require environmental assessment under NEPA, culminating in a rulemaking on the issue in 1985. *See* 2-ER-272.

In that order, the agency established a "processing guideline" for its evaluation of "human exposure to RF radiation." 2-ER-272; 2-ER-277. This guideline set a baseline level of RF radiation—typically expressed as the density of power over time at a particular radio wave frequency—that could serve as a "triggering mechanism" for when NEPA procedures were required. *See, e.g.*, 2-ER-269; 2-ER-277. If an

applicant for the license to operate a transmitting facility could demonstrate that its facility did not emit RF radiation in excess of the new guideline, the facility would be deemed as having no "significant effect on the environment" for NEPA purposes and accordingly "would not fall within" the statute's "analytical processes"—"at least with regard to RF radiation." 2-ER-277. By contrast, applications for facilities that were *not* in compliance would "require a more thorough analysis of their environmental impact." 2-ER-278.

Determining where to set that "triggering mechanism" posed challenges. 2-ER-277. The FCC had long disclaimed the expertise to set its own substantive standards for what might amount to safe RF radiation exposure levels. *See, e.g.*, 2-ER-259 ("[W]e would like to stress that the Commission has neither the expertise nor the primary jurisdiction to promulgate health and safety standards for RF and microwave radiation."); 2-ER-260–61 (emphasizing that the agency's NEPA actions would not impose a "substantive requirement" on regulated entities); *see also* 2-ER-221. And, although it preferred "to defer in this area to the expert federal health and safety agencies," those agencies largely had not acted. 2-ER-268; 2-ER-271.

But "the mere absence of a federal standard or individual agency expertise" could not "absolve" the FCC of "its NEPA responsibilities." 2-ER-267–68; 2-ER-271. So the agency defaulted to the latest standards set by a private organization, the

American National Standards Institute ("ANSI"),[2] as the triggering mechanism for environmental processing of FCC permitting and licensing actions. 2-ER-277; *see also* 47 C.F.R. § 1.1305(d) (1985); 51 Fed. Reg. 14999 ¶ 2 (1986); 3-ER-296–316. As the agency explained, although it lacked the expertise and jurisdiction "to develop [its] own radiation exposure guidelines," it could at least "recognize technically sound standards" promulgated by others to fulfill its "NEPA statutory obligation to assess the environmental impact" of its actions. 2-ER-270–71.

c. The FCC incorporates NEPA triggers into its process for authorizing cell phone equipment.

At first, the FCC didn't worry about whether low-power devices such as cell phones warranted any NEPA proceedings. *See* 3-ER-404; 3-ER-406–07. But the agency eventually changed its mind, in part because of the role it played in approving consumer electronics for public sale.

Beginning in 1968, out of concern that the use of household devices like microwaves could interfere with radio and TV reception, Congress had authorized the agency to establish procedures for approving the use of home electronic equipment. *See* 47 U.S.C. § 302a(a)–(b) (amendments to the 1934 Act authorizing the

[2] ANSI is a federation of industry representatives and technical experts that facilitates the development of voluntary "industry consensus standards" governing the safety of various products and their external effects. *See* Russell B. Swanson, OSHA, *Significance of ANSI standards with respect to OSHA requirements* (Feb. 28, 2001), https://perma.cc/CRH2-EVSU.

FCC to "make reasonable regulations" to limit "interference potential" and to set "minimum standards for home electronic equipment" to reduce its "susceptibility" to interference); FCC, Rep. & Order, 39 Fed. Reg. 5912 ¶¶ 2–5 (1974) (developing a consolidated "equipment authorization program" and corresponding "technical standards"). Under that program, companies seeking to sell certain consumer electronics were required to apply for approval to the FCC and to include in their applications information about their power output, bandwidth, and other characteristics. *Id.* at 5919 (codified at 47 C.F.R. § 2.909); *id.* at 5923 (now codified at 47 C.F.R. §§ 2.1046–47). This meant that every time the FCC approved a new device it was taking an "action" that might have environmental consequences requiring additional evaluation under NEPA.

As a result, after ANSI adopted new guidelines in 1992 for RF radiation exposure that included those devices, the FCC reconsidered its initial view and proposed revising its NEPA procedures to incorporate the updated standards. *See* 3-ER-432. But by 1995—three years after it first issued its proposal—the agency had yet to act. So, when it enacted the TCA, Congress specifically instructed the FCC to complete its pending NEPA rulemaking on the issue within 180 days. TCA § 704(b).

The FCC then complied. *See* 4-ER-450. It began by updating its 1985 guidelines for when actions with respect to large communications facilities (such as issuing licenses and permits) warranted NEPA proceedings. *See* 4-ER-495. And, in

addition to facilities, it also incorporated a NEPA trigger into its equipment authorization program for "low-power devices designed to be used in the immediate vicinity of the body," such as cell phones. 4-ER-468. And, because the FCC still lacked the expertise to set these triggers, it ultimately adopted a modified version of the 1992 ANSI guidelines. *See* 4-ER-455–57; 4-ER-459–60; 4-ER-468–69.

Here's how these procedures work. When a company like Apple wants to sell a new iPhone model, it must submit a statement confirming compliance with the agency's RF radiation guidelines. 47 C.F.R. § 1.1307(b); 2.1093. If the statement reflects that the device emits RF radiation below the agency's NEPA trigger, the application can be swiftly approved. *Id.*; *see also* 3-ER-328–29; 3-ER-334; 3-ER336–37. But if not, further processing may be required: Apple will need to complete an Environmental Assessment, and the agency may need to prepare an Environmental Impact Statement, *see* 47 C.F.R. §§ 1.1307(b), 1.1315, 1.1317, to fully evaluate the device's environmental effects. But even in that case, the FCC can still ultimately approve the device—it just has to give its environmental effects a "hard look" before doing so. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

Even as it incorporated a NEPA trigger for RF radiation into its equipment authorization process, however, the FCC recognized that research into the safety of RF radiation was ongoing, and pledged that it would monitor developments in the

science "to ensure that our guidelines continue to be appropriate and scientifically valid." 4-ER-452–53.

d. The FCC's NEPA standards remain unchanged for the next 25 years.

Despite that pledge, the FCC has done little. To date, the FCC has kept the regime it established 25 years ago, despite multiple opportunities to revisit it. *See, e.g.*, 4-ER-531 (1997 order preserving 1996 regulations); 4-ER-538 (same).

In 2013, for instance, the agency opened a new notice of inquiry to reevaluate its RF radiation regulations—including its NEPA triggers, its procedures for testing separation distances between portable devices and users, and its guidance concerning the scope of disclosures regarding radiation risk. *See* 5-ER-602–03; 5-ER-683–706.

But several years later, rather than address those issues, the agency summarily terminated its inquiry. Notwithstanding growing scientific concerns, *see supra* 5–7, it concluded that there was "no appropriate basis for" revisiting its NEPA triggers or exposure evaluation procedures. 6-ER-866. With respect to the disclosure of RF radiation risks, the agency simply stated that it "maintains several webpages that provide information" on the topic to the public, and "recommend[s]" that device operating manuals "include operating instructions and advisory statements" on the subject. 6-ER-874–75. And—echoing a position it had begun to advance in litigation, *see, e.g.*, Brief of the United States and the FCC as Amicus Curiae in Support of

Appellees, *Murray v. Motorola*, 982 A.2d 764 (D.C. 2009), 2008 WL 7825518—the agency insisted that any claims regarding the adequacy of its "required testing, certification, and authorization regime" amounted to a "challenge to the RF exposure limits themselves," which would supposedly "undermine" what the FCC now called "substantive" policy determinations. 6-ER-878.

e. The FCC expressly declines to preempt state and local law over this period.

Over most of its history of setting NEPA triggers for RF radiation, however, the FCC had in fact expressly declined requests from regulated entities that it deem its NEPA regulations to preempt state and local law. In 1985, for instance, the agency acknowledged that "various state and local jurisdictions around the country either have adopted or have proposed standards for exposure of the general public to RF radiation." 2-ER-275–76. The agency expressed sympathy for these state and local regulations, noting that they were occurring "largely due to the lack of a federal standard" set by the EPA or other expert agencies. *Id.* And it expressly declined to intervene itself. *See id.*; 3-ER-428.

To be sure, after Congress included an express preemption provision in the TCA with respect to wireless *facilities*, the FCC incorporated that provision into its regulations. *See* 4-ER-494–95. But it expressly declined to go further, and even expressed uncertainty as to what the legal basis for any broader preemption might be. *See id.* (refusing to issue any broad preemption statement, and noting that

licensees encountering any purported obstacles should identify both the evidence and the legal basis for preemption); 4-ER-553 (declining to revisit that conclusion). In response to an industry request that the agency "specify a federal rule of liability for torts related to RF emissions," the FCC was even more emphatic, noting that "such action is beyond the scope of this proceeding" and "question[ing] whether such an action, which would preempt too broad a scope of legal actions, would otherwise be appropriate." 4-ER-553.

B. Factual and procedural background

1. The plaintiffs in this case are iPhone users who discovered that, when they used their iPhones as advertised—held to the ear for a phone call, used close to the body, or stored in the back pocket—they risked being exposed to significant amounts of RF radiation. *See* 7-ER-1172–94. Specifically, in independent testing, the plaintiffs' iPhone models emitted RF radiation at levels that were dangerous to humans—and even in excess of the level set by the FCC's NEPA triggers. *See, e.g.*, 7-ER-1170; 7-ER-1183–99. Yet Apple failed to warn its customers of the risks its phones posed. 7-ER-1194; 7-ER-1199. Nor did it take steps to protect consumers from these risks. *See* 7-ER-1194; 7-ER-1199; 7-ER-1204. Instead, it marketed its products as safe to use—constantly and even right against the skin. *See* 7-ER-1187–88; 7-ER-1204.

2. Based on this conduct, the plaintiffs brought a putative class action against Apple in the Northern District of California, asserting claims of negligence, breach of warranty, consumer fraud, and unjust enrichment. 7-ER-1200–229.

Apple argued that these claims were all impliedly preempted by the FCC's regulations. ER-5-832–61. The FCC also weighed in, insisting that its regulations impliedly preempted any claim that a cell phone it had certified for sale in the United States was unsafe based on RF emissions—or that sought additional safety disclosures. 5-ER-849–50.

The district court agreed. It recognized that the Ninth Circuit "has not considered the issue," and that the circuits are split on the question. 1-ER-25–27; *see also Pinney v. Nokia*, 402 F.3d 430, 457–58 (4th Cir. 2005) (FCC's NEPA triggers for RF radiation in cell phones lacked preemptive power); *Farina v. Nokia*, 625 F.3d 97, 122–34 (3d Cir. 2010) (disagreeing). Adopting the Third Circuit's view, the district court held that the plaintiffs' claims are impliedly preempted by the FCC's regulations. 1-ER-25. In reaching this conclusion, it acknowledged that the agency had promulgated its RF radiation regulations to satisfy its NEPA obligations, and that NEPA was a procedural statute that could not preempt state law. *See* 1-ER-8–9; 1-ER-12. It also recognized that the TCA could not delegate the authority for the FCC to promulgate preemptive regulations, given that its express savings clause "forbids" the "implied preemption of state and local law." 1-ER-15.

To sidestep this problem, the court reasoned that it was the 1934 Act that provided the FCC with authority to develop its NEPA triggers for RF radiation—in spite of the agency's express understanding that the regulation was promulgated under NEPA. As the court saw it, although the FCC had "begun its review" under NEPA, it *ultimately* promulgated its cell phone emissions standards under the 1934 Act. 1-ER-12 (emphasis omitted). And without even referencing the 1934 Act's express savings clause, the court held that that statute conferred broad preemptive authority on the FCC, allowing it to use its modern regulations on cell phones to displace all state and local laws that might impose higher standards. 1-ER-11–12; 1-ER-19–23.

SUMMARY OF ARGUMENT

I.A. To establish that some purpose of a federal law impliedly preempts state law, a litigant must meet a "high threshold," *Chamber of Com. of the U.S. v. Whiting*, 563 U.S. 582, 599 (2011) (plurality)—especially when they argue that a federal regulation, not the statute itself, does the preempting, *Wyeth*, 555 U.S. at 565.[3] This form of preemption—"implied" conflict preemption—cannot be used to oust state law based on a "freewheeling judicial inquiry" into whether state law is somehow "in tension with federal objectives." *Whiting*, 563 U.S. at 607. Instead, the litigant must point specifically to the text of a federal statute (or a constitutional text) and show, using

[3] Unless otherwise specified, all internal quotation marks, citations, alterations, and emphases are omitted.

the traditional tools of statutory interpretation, both that Congress explicitly conferred on an agency the authority to displace state law and that the agency's action actually fell within the scope of that delegation. *See id.*; *New York v. FERC*, 535 U.S. 1, 18 (2002); *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1679 (2019).

I.B. Apple cannot meet this demanding standard. Here, the inquiry begins with a "presumption against pre-emption" because matters of health and safety are "primarily, and historically, matters of local concern." *Medtronic v. Lohr*, 518 U.S. 470, 475, 494 (1996).

To overcome that presumption, some federal statute must either explicitly preempt those historic laws or delegate to an agency the authority to do so. Congress has done neither. The FCC promulgated its RF radiation guidelines to satisfy its obligations under NEPA, a procedural statute incapable of conferring preemptive power on the agency. *See Pinney*, 402 F.3d at 547. Congress's twin substantive telecommunications statutes are even less helpful. Both include express savings clauses foreclosing interference with preexisting state tort remedies. *See* 1934 Act, 47 U.S.C. § 414; TCA § 601(c)(1) (47 U.S.C. § 152 note). And the TCA includes an express preemption clause that forecloses *any* implied preemption of state law and conspicuously declining to extend preemption to reach state regulation of devices like cell phones. *See* TCA § 601 (47 U.S.C. § 152 note) (express "no implied"

preemption clause); 47 U.S.C. § 332(c)(7)(B)(iv) (express preemption clause authorizing FCC to preempt state regulation of *facilities* only).

But even if Apple could somehow show that these laws convey Congress's clear and manifest purpose to displace state law here, the FCC has never done so. The agency's RF radiation regulations simply set a trigger for when and how cell phones must undergo additional NEPA processing before being approved for sale. *See* 4-ER-493. That is nothing more than a number dictating when a manufacturer may have to complete additional environmental reporting before seeking approval. And the agency's equipment authorization procedures more generally just set a floor on those devices' technical capabilities. *See, e.g.*, 47 U.S.C. § 302a(a)–(b) (authorizing "minimum" standards for home electronic equipment); 47 C.F.R. §§ 2.909, 2.1046–47 (setting such standards). Those technical requirements are "not impeded" by state laws that build on the floor they set by either encouraging companies to produce devices that emit even less RF radiation, or holding companies accountable for misrepresenting device safety. *See In re Volkswagen*, 959 F.3d at 1221.

II. Every step the district court took to reach its contrary view was flawed.

A. It began by disregarding the statutory basis for the FCC's regulations. It is a bedrock principle of administrative law that, to identify the statutory basis of a regulation, courts must look to the regulation itself. A regulation may only be defended based on a "reasoned basis," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State*

Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983), and one that was "articulated *in the order* by the agency itself," *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) (emphasis added). Here, the "reasoned basis" the agency identified was the need to satisfy the agency's NEPA obligations—not to fulfill some substantive mandate. *See* 2-ER-277; 4-ER-453. The agency's *only* reference to the 1934 Act was a housekeeping reference at the end of its order to explain why its substantive responsibilities could entail NEPA obligations in the first place. 4-ER-496. But a reference "mentioned only in passing" cannot provide the "reasoned basis" for a regulation. *Off. of Commc'n of United Church of Christ v. FCC*, 560 F.2d 529, 533 (2d Cir. 1977).

B. Even if the agency had acted pursuant to the substantive communications statutes, the district court was still wrong to find that these statutes somehow conveyed Congress's "clear and manifest purpose" to confer freewheeling preemptive authority on the FCC. *Wyeth*, 555 U.S. at 565.

Nothing in those laws resembles the specific, delicate balancing schemes the Supreme Court has, in rare cases, found adequate to preempt state health and safety laws under an implied conflict preemption rationale. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 875, 881 (2000). The provisions of the 1934 Act that the district court described as "regulatory powerhouses" are hopelessly general. 1-ER-12; 1-ER-15 (citing 47 U.S.C. § 154(i) and 47 U.S.C. § 303(r)). And even if other provisions confer

on the FCC the authority to set uniform technical standards for authorizing equipment, *see* 47 U.S.C. §§ 151, 301, 303(e), they convey no hint that Congress "intend[ed] its enactment as the exclusive means of meeting" the problem of cell phone safety. *Hillsborough Cnty., Fla. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 716–17 (1985). That makes sense: Merely approving a particular product for use doesn't foreclose state tort actions concerning its safety. *See Wyeth*, 555 U.S. at 567, 573–76.

And that is especially true here, given that Congress (1) included an express savings clause prohibiting implied preemption, (2) explained exactly how far the FCC's preemption of state laws regarding RF radiation could go—wireless facilities, not devices, and (3) stopped short of authorizing preemption in these circumstances. *See* TCA § 601(c)(1) (47 U.S.C. § 152 note); 47 U.S.C. §§ 332(c)(7)(A), 332(c)(7)(B)(i)-(v).

C. The FCC's contrary position warrants no deference. Although it "may be helpful" to consider an agency's "explanation of how state law affects" a regulatory scheme it administers, the weight of that explanation "depends on its thoroughness, consistency, and persuasiveness." *Wyeth*, 555 U.S. at 576–77. The FCC's views are none of those things.

First off, they are inconsistent. After spending decades framing its RF radiation regulations as setting nothing more than a trigger for further NEPA processing, the FCC has only recently begun to argue that those guidelines set a substantive,

preemptive safety standard too. *Compare, e.g.*, 2-ER-241, *with* 6-ER-1041; *and* 4-ER-495, *with* 6-ER-1041–43; *and* 6-ER-1045–46.

Nor are the agency's views "thorough[]" or "persuasive." *Wyeth*, 555 U.S. at 577. The FCC has never identified which provisions of the substantive communications statutes supposedly confer on it the authority to preempt state law, preferring to rely on either legislative history or its own generic arguments divorced from statutory authority. *See, e.g.*, 6-ER-1041. But such "abstract and unenacted" desires fall short of identifying preemptive authority that "can be found in the law itself." *Virginia Uranium*, 139 S. Ct. at 1907–08.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment on federal preemption grounds de novo. *In re Bard IVC Filters Prod. Liab. Litig.*, 969 F.3d 1067, 1073 (9th Cir. 2020); *Banuelos v. Constr. Laborers' Tr. Funds for S. Cal.*, 382 F.3d 897, 902 (9th Cir. 2004).

ARGUMENT

I. The Supremacy Clause does not permit the FCC's NEPA triggers for RF radiation to impliedly preempt state law.

It is a tall order to establish that an agency regulation preempts state law under a theory of implied conflict preemption. A litigant must show not only that Congress had the "clear and manifest purpose" of delegating preemptive authority to an agency, but also that the agency acted within the scope of that authority to displace

state law. *Wyeth*, 555 U.S. at 565; *La. Pub. Serv. Comm'n*, 476 U.S. at 369. Apple can do neither. No statute conveys Congress's intent to delegate preemptive authority to the FCC. And, regardless, there is no conflict here.

A. Congress must explicitly delegate to a federal agency the authority to preempt state law.

The Constitution provides that the "laws of the United States" are the "supreme law of the land," and, accordingly, that those laws may preempt state law. U.S. Const. art. VI, cl. 2. This mandate "supplies a rule of priority" that, when state and federal law conflict, state law must give way. *Virginia Uranium*, 139 S. Ct. at 1901. But because this rule was born out of our "system of dual sovereignty between the States and the Federal Government," the "delicate balance" it struck means that *every* question of preemption "starts with the basic assumption that Congress did not intend to displace state law." *Gregory v. Ashcroft*, 501 U.S. 452, 457, 460 (1991); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). And it ends with "what can be found in the law itself," *Virginia Uranium*, 139 S. Ct. at 1908, not "abstract and unenacted legislative desires," *id.* at 1907.

It is for this reason that the "the purpose of Congress is the ultimate touchstone" in every preemption case. *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963); *Wyeth*, 555 U.S. at 565 (explaining that federal law cannot preempt state law "unless that was the clear and manifest purpose of Congress"). That purpose must be discerned "from either the Constitution itself or a valid statute enacted by

Congress," *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020), not a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," *Whiting*, 563 U.S. at 607. That is because "[t]here is no federal preemption *in vacuo*, without a constitutional text or a federal statute to assert it." *Puerto Rico Dep't of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). Ultimately, then, courts must look "to the text and context of the law in question" and be "guided by the traditional tools of statutory interpretation." *Virginia Uranium*, 130 S. Ct. at 1901.

When a litigant urges that a statute *expressly* preempts state law, this inquiry is straightforward: "[T]he plain wording" of that clause "contains the best evidence of Congress's pre-emptive intent." *In re Volkswagen*, 959 F.3d at 1211. But in rare cases, a litigant may also prevail on the theory that a statute *impliedly* preempts state law, including by showing that "the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* This "implied obstacle preemption" inquiry, too, turns on text and structure; "[i]nvoking some brooding federal interest or appealing to a judicial policy preference" is never enough. *Virginia Uranium*, 130 S. Ct. at 1901. Whatever its theory, "a litigant must point specifically to a constitutional text or a federal statute that does the displacing or conflicts with state law." *Id.*

But when it comes to a claim that an *agency regulation* preempts state law, the inquiry is different. "[A]n agency literally has no power to act, let alone pre-empt"

state regulation, "unless and until Congress confers power upon it." *FERC*, 535 U.S. at 18. And an agency's power extends only as far as Congress says. *La. Pub. Serv. Comm'n*, 476 U.S. at 374. So a court assessing whether a federal regulation has preemptive effects must consider not only whether Congress conferred on the agency the authority to displace state law, but also whether the regulation at issue falls within the scope of that delegation. *Id.* at 369; *Merck*, 139 S. Ct. at 1679. After all, to hold that an agency's action outside the limits of its statutory jurisdiction has preemptive effect would give the agency the "power to override Congress." *La. Pub. Serv. Comm'n*, 476 U.S. at 375.

This high bar is typically met in one of two ways. First, a litigant can point to a statutory provision that explicitly authorizes preemption, and then show that the agency's action fell under the scope of that provision. *See, e.g.*, *id.* at 374–75. Alternatively, the litigant can show that (1) Congress explicitly empowered the agency to strike a "delicate balance" between competing objectives set out in the statute itself, (2) the agency's action in fact struck such a balance, and (3) state law would impermissibly interfere with that balance. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001); *Wyeth*, 555 U.S. at 576–81.

In only a handful of cases have litigants successfully made this demanding showing. *Compare Geier*, 529 U.S. at 879–81 (agency regulation displaced state law where Congress explicitly instructed agency to balance competing statutory

objectives of safety and practicability and where regulation struck that balance), *and Buckman*, 531 U.S. at 349, 350 (similar, where agency was instructed to "ensure" that regulated products were both "reasonably safe and effective" and "on the market within a relatively short period of time"), *with Williamson v. Mazda Motor of Am.*, 562 U.S. 323, 335 (2011) (statutory command to assess "cost-effectiveness" simply authorized agency to set "a minimum standard" that could be "supplemented through state tort law").

Most of the time, however, when a statute delegates rulemaking authority to an agency, it simply authorizes the agency to set a regulatory floor that states may build upon. Consider, for instance, the statutory regime at issue in *Wyeth*. There, the Supreme Court considered whether a state tort suit arguing that a drug's label contained insufficient warnings of its dangers created an obstacle to Congress's purposes and objectives in enacting the Food, Drug, and Cosmetic Act. *Id.* at 563–64. That Act authorized the FDA to make an expert judgment whether a drug was "safe for use" under the conditions specified in the proposed labeling, and to assess whether there was "substantial evidence" that the drug had the effect that labeling represented it had. *Id.* at 567. And it included an express savings clause ensuring that state law could only be invalidated if there were a "direct and positive" conflict with the FDCA. *Id.*

Examining this regime, the Supreme Court explained that the FDCA included no indicia that Congress intended for the FDA's drug labeling regulations or its resulting judgments to preempt state tort suits. *Id.* at 574–81. The agency could not be "presumed to have performed a precise balancing of risks and benefits" simply because it assessed whether the drug was "safe and effective under the conditions set forth in its labeling." *Id.* at 575. And, especially when Congress had legislated against a backdrop of state regulation of health and safety matters, the Court refused to conclude that approving a particular drug label for use somehow "establishe[d] both a floor and a ceiling for drug regulation"; instead, Congress's intent was plainly to establish only a floor states could build upon. *Id.* at 573, 578.

B. The text and structure of the authorizing statutes here demonstrate that Congress did not authorize the FCC to preempt state regulation of cell phone RF radiation.

Apple's attempt to displace the claims in this case based on a "purposes-and-objectives" theory of implied conflict preemption founders under these cornerstone principles. There is a strong presumption against preemption when the federal government regulates health and safety matters. And Apple cannot overcome that presumption here because no statute confers on the FCC the necessary textual authority to preempt state tort claims concerning the safety of cell phone RF radiation.

1. The presumption against preemption establishes a high bar here.

To begin with, and as the district court itself acknowledged, the presumption against preemption applies with full force here. *See* 1-ER-17. Because matters of health and safety are "primarily, and historically, matters of local concern," states traditionally enjoy "great latitude" under their police powers to craft protective laws in both areas. *Medtronic*, 518 U.S. at 475. Tort claims like the plaintiffs', which assert the dangers of consumer products (or their manufacturers' failure to fully disclose those risks), fall well within this latitude. *See Pinney*, 402 F.3d at 457; *Farina*, 625 F.3d at 116. Indeed, the FCC's administrative filings have long recognized as much. *See, e.g.*, 2-ER-275–76 (discussing state and local legislation concerning RF radiation); 3-ER-428 (similar).

The presumption against preemption creates a particularly high bar for the theory that an agency regulation impliedly preempts state law. That is because "an agency cannot supply, on Congress's behalf, the clear legislative statement of intent required to overcome the presumption against preemption." *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 97 n.9 (2d Cir. 2006) (Calabresi, J.), *aff'd by an equally divided court sub. nom. Warner-Lambert Co., LLC v. Kent*, 552 U.S. 440 (2008). The presumption is "in significant part an effort to promote congressional—rather than executive or bureaucratic—deliberation on certain issues, and to cabin executive officials by calling for express legislative authorization." Cass R. Sunstein, *Law and Administration*

After Chevron, 90 Colum. L. Rev. 2071, 2114 (1990). As a result, the presumption "does not snatch a policy decision from the political branches. It instead insists that the choice to [expressly preempt state law] be made by the first political branch, rather than the second." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 732 (6th Cir. 2013) (Sutton, J., concurring).

2. No statute conveys Congress's clear and manifest purpose of delegating freewheeling preemptive authority to the FCC.

To overcome this presumption, Apple must point to a statute in which Congress made its intention to confer the authority to supplant state health and safety laws "clear and manifest." *Wyeth*, 555 U.S. at 565. There is none here.

Start with NEPA, the only statutory authority the FCC claimed to be basing its decision on. NEPA is a procedural statute that doesn't empower agencies to regulate anything. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) (NEPA only prohibits "uninformed—rather than unwise—agency action"). All it mandates is that, before taking any substantive action that might have an environmental impact, an agency must create a set of "procedures" to allow it to take a "hard look" at the environmental consequences of that action. *Id.* at 350. Those procedures apply to all agencies, and do not vest them with substantive regulatory authority, let alone free-ranging preemption authority. *See id.*; *La. Pub. Serv. Comm'n*, 476 U.S. at 374 (federal agencies may preempt state law only when acting within the

scope of congressionally delegated authority); *Pinney*, 402 F.3d at 457 (FCC's NEPA triggers lacked preemptive force). Were it otherwise, implied conflict preemption would automatically apply to an enormous body of agency action, from public housing siting decisions to approvals for projects to rehabilitate ailing infrastructure. NEPA's text and structure give no indication Congress intended such a sweeping effect and no court—including the district court here—has ever suggested as much.

The 1934 Act fares no better. All it does (as relevant here) is allow the FCC to license or authorize communications equipment and to generally promulgate regulations as needed to carry out its provisions. *See* 47 U.S.C. § 301 (giving the FCC the sole authority to license "any apparatus" for the "transmission of . . . communications or signals by radio"); *id.* § 303(e) (empowering the FCC to regulate "the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein"); *id.* § 302a(a)-(b) (1974 and 1982 amendments empowering the FCC to set "minimum performance standards for home electronic equipment" to reduce its susceptibility to radiation interference); *id.* § 303(r) (allowing the FCC to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter").

But nowhere, in either its text or structure, does this statute convey to the FCC the authority to displace state and local governments' historic role safeguarding

health and safety—either by explicitly instructing the agency to strike the sort of delicate balance that state regulation would disrupt, or by including any other textual indication that Congress intended that effect. *See Pinney*, 402 F.3d at 458 ("[T]he [1934 Act] provides no evidence of a congressional objective to ensure preemptive national RF radiation standards for wireless telephones."). Just the opposite: When Congress passed this law in the mid-1930s, it expressly foreclosed *any* interference with preexisting state tort remedies by providing that "[n]othing" in that act "shall in any way abridge or alter the remedies now existing at common law or by statute." 47 U.S.C. § 414.

If there were any doubt as to Congress's view on preemption, the 1996 TCA definitively resolves it. There, Congress specifically instructed the FCC to complete action in its pending proceeding to set guidelines for what RF radiation levels would trigger NEPA review, demonstrating that Congress was keenly aware of the agency's consideration of this precise issue. *See* TCA § 704(b). And Congress also explained exactly when and where that proceeding could preempt state law—conferring the authority to preempt state laws concerning *facilities*,[4] but conspicuously omitting any authority to preempt state laws concerning *devices*. *See* 47 U.S.C. § 332(c)(7)(B)(iv).

[4] "Facilities" are physical structures that provide wireless services, like cell phone towers—not devices like cell phones. *See Pinney*, 402 F.3d at 455; *Farina*, 625 F.3d at 118–20.

Congress, in other words, was "very careful to preempt expressly only certain areas of state law, preserving the remainder for state regulation." *Pinney*, 402 F.3d at 458.

"Its silence on [that] issue, coupled with its certain awareness" that the FCC's procedures addressed all RF-emitters, facilities and cellphones alike, "is powerful evidence that Congress did not intend [FCC] oversight to be the exclusive means of ensuring" cell phone safety. *See Wyeth*, 555 U.S. at 575 (reaching this conclusion because Congress expressly preempted state regulations for medical devices but not prescription drugs). The TCA's "specificity" in this respect "weighs against" a finding that Congress extended to the FCC the authority to preempt "all *other* types of wireless telecommunications equipment, including wireless telephones." *Pinney*, 402 F.3d at 458 (emphasis added).

All the more so because the TCA declined to establish the sort of balancing regime that's missing from the 1934 Act. Indeed, its inclusion of an *additional* express savings clause forbidding implied preemption underscores the conclusion that Congress extended the FCC's preemptive authority no further than it said. *See* TCA § 601(c)(1) (47 U.S.C. § 152 note). Taken together, the two statutes' savings clauses stand for the proposition that Congress did not intend for courts (or agencies) to engage in freewheeling preemption inquiries over whether unenacted purposes and objectives somehow displace state laws. *Pinney*, 402 F.3d at 458 ("These savings clauses counsel against any broad construction of the goals of [the 1934 Act or the TCA] that would

create an implicit conflict with state tort law.") To the contrary: It went so far as to pass a provision designed to "prevent[] affected parties from asserting that the bill impliedly preempts other laws." H.R. Rep. No. 104–458 at 201 (1996), https://perma.cc/76VV-V9E6.

The upshot: Neither NEPA, the 1934 Act, nor the TCA betrays any hint that Congress extended to the FCC the broad preemptive authority to displace state and local governments' historic role in protecting public health and safety.

C. The FCC's RF radiation NEPA triggers don't conflict with more stringent state health and safety laws.

Even supposing that the FCC could, in this context, have the authority to preempt state health and safety laws, the claims in this case pose no "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The FCC's NEPA triggers for RF radiation just set a processing guideline for when further procedures under NEPA are required before a device may be authorized. And the agency's equipment authorization procedures similarly just set a floor for what sorts of technical attributes devices must have to be authorized for use. A claim that those devices are unsafe as a matter of *state* law—or that Apple improperly failed to warn consumers of their dangers—poses no obstacle to the execution of those procedures.

For starters, the FCC's RF radiation guidelines are explicit that *all* they do is establish a specific "triggering mechanism" for when the agency must undertake a

full NEPA rulemaking. *See* 2-ER-560; 4-ER-453; 4-ER-493; *see also* 47 C.F.R. § 1.1307(b) (explaining that RF radiation in excess of the amounts specified requires environmental assessment); *id.* § 2.1093(a) (noting that RF radiation requirements are a "consequence of Commission responsibilities under [NEPA]"); *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 87, 94–95 (2d Cir. 2000) (noting that the guidelines "were required" by NEPA).

Nowhere do they purport to do anything substantive. This is not at all surprising. Given that the regulations are purely procedural, if Apple applies for authorization to sell an iPhone model exceeding their NEPA triggers, the only consequence is itself procedural—the manufacturer must include an environmental assessment that "explain[s] the environmental consequences" of the phone in its application, and the agency might follow up with further environmental processing before approving the device. *See* 47 C.F.R. §§ 1.1307(b), 1.1308(a)–(b), 2.1091(c). And it makes sense, too, given that the FCC has long explained that it is not a health and safety agency, and lacks either the expertise or the primary jurisdiction to set substantive standards as if it were. *See, e.g.*, 4-ER-535; 2-ER-259–60.

More stringent state health and safety laws don't interfere with this process. Apple can both submit to the FCC's NEPA procedures and comply with California law, either by producing devices that meet state standards, or by warning consumers as to how to use their existing devices safely. *See Whiting*, 563 U.S. at 605 (no

preemption when [a] federal program could "operate[] unimpeded by the state law"); *In re Volkswagen*, 959 F.3d at 1221 (explaining that the EPA's ability to enforce a federal law prohibiting car manufacturers from "tampering" with vehicles after their sales was "not impeded" by "parallel" state rules, "and so there is no basis to infer" intent to preempt them).

The plaintiffs' claims are no more of an obstacle to Congress's objectives in enacting the 1934 Act or the TCA. The equipment authorization, licensing, and technical requirement regimes those statutes authorize simply set a floor—not a floor and a ceiling—on when and how companies like Apple may sell their devices. After all, if Apple wanted to, it could sell devices that produce RF radiation far below the FCC's guidelines. So state laws that "build on" the FCC's "floor" by requiring companies to account for additional factors in manufacturing and selling devices pose no obstacle to the FCC's continued enforcement of its own, relaxed standards. *See Wyeth*, 555 U.S. at 579–80. In this way, the FCC's equipment authorization scheme is no different from other mechanisms for federal approval of particular devices or products—like the FDA drug approval process at issue in *Wyeth*. *See id.* at 567. There, the fact that an agency approves a particular good for sale doesn't preclude states from enforcing their own more stringent safety or disclosure standards. *See id.* at 567, 580–81; *Whiting*, 563 U.S. at 605. So it is here.

II. The district court erred by relying on the 1934 Act to justify its conclusion that the FCC's standards are capable of impliedly preempting state law.

In reaching its pro-preemption conclusion, the district court focused almost exclusively on the 1934 Act as the source of the FCC's relevant authority—reprising much of the Third Circuit's erroneous logic in *Farina* along the way. 1-ER-15–16; 1-ER-19–20; 1-ER-26–27. This account fails for two reasons.

First, it disregards the actual statutory basis for the relevant federal regulations. As we explained above, *see supra* Part I.C., the regulations addressing RF radiation in telecommunications components like cell phones were—by the FCC's own admission—promulgated to satisfy the agency's obligations under NEPA, not the 1934 Act. *Second*, even if the FCC's NEPA guidelines could somehow be seen as emanating from the substantive telecommunications statutes, both of the relevant laws—the 1934 Act and the 1996 TCA, which amended the 1934 Act—must be read together when considering Congress's view on preemption. And what they say is clear: Congress wanted only a specific subset of federal laws—those relating to wireless *facilities*—to be capable of displacing state and local laws.

A. It is NEPA, not the 1934 Act, that authorized the FCC's NEPA triggers for RF radiation and controls the preemption analysis.

As even the district court was forced to acknowledge, NEPA "imposes only procedural requirements on federal agencies." 1-ER-12 (quoting *DOT v. Public Citizen*,

541 U.S. 752, 756 (2004)). Under that law, the FCC was "required" to adopt certain guidelines for performing an "environmental assessment of proposed transmitting facilities and operations that exceed[] applicable health and safety standards for RF radiation exposure." 1-ER-8. The FCC did exactly that—first in 1985 and then, in 1996, with an updated regulation that included guidelines for cell phones, and that continued to rely on NEPA as the sole source of statutory authority that included guidelines for cell phones. 1-ER-9. From there, the district court should have adopted the straightforward conclusion that NEPA controlled the preemption analysis—and failed to authorize any preemption here.

Instead, the court sidestepped this regulatory history. Despite acknowledging that the FCC had acted to fulfill its NEPA obligations, it held that the agency had actually promulgated "substantive technical requirements" and that those technical requirements were adopted under the authority delegated to the agency by the 1934 Act, not anything else. 1-ER-8; *see also Farina*, 625 F.3d at 124, 128–29 (similar).

Both steps of this analysis are wrong. To begin, as we explained above, the FCC's RF radiation guidelines only set a triggering mechanism for NEPA proceedings. *See supra* Part I.C. They therefore don't impose any "substantive requirements"—regarding safety or anything else—on cell phones or their RF radiation emissions. Indeed, if it were true that the guidelines included specific safety-based requirements (such as a mandate that phones satisfy a particular emission rate),

the district court presumably would have found some reference to that requirement in the governing regulations. Yet nowhere in its opinion does it cite one.

Nor was the district court correct about the *source* of the agency's authority to promulgate the RF radiation triggers. The district court defended its reliance on the 1934 Act as "the statutory basis" for the agency's regulation by pointing to the sections of that statute the FCC listed at the tail end of the order promulgating its guidelines. 1-ER-12; *see also Farina*, 625 F.3d at 128 (similar). But the regulation's *only* reference to the 1934 Act is a housekeeping reference explaining why the agency has substantive obligations that might require NEPA assessment. *See* 4-ER-496. When it came to the agency's actual explanation of its decision-making, it focused entirely on its NEPA obligations. *See* 4-ER-496–97. It was, in other words, NEPA—and NEPA alone—that the agency gave as the reasoned basis for its RF radiation regulations. *See Burlington Truck Lines, Inc*, 371 U.S. at 168–69.

That choice matters. Courts may not "supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm*, 463 U.S. at 43. A single stray cite in a 103-page filing does not afford cover for an agency's later justification of its regulation. *See Fed. Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 397 (1974) (agency rationale must be "unambiguously provided"); *Hanson v. Colvin*, 760 F.3d 759, 762 (7th Cir. 2014) (mere mention of an issue is insufficient); *Off. of Commc'n of United Church of Christ*, 560 F.2d at 533 (likewise for a rationale "mentioned only in passing"). And

when an agency's initial order falls short in this respect, it cannot later fill in the gaps in litigation. *Burlington Truck Lines, Inc*, 371 U.S. at 168–69 (agency's order may be upheld only on the basis "articulated in the order by the agency itself."). That basic rule carries the day here.

B. Even on their own terms, nothing in the twin telecommunications laws permits the FCC's NEPA triggers to preempt more stringent state regulation of cell phone RF radiation.

The district court's logic also fails on its own terms. Nothing in the 1934 Act authorizes the freewheeling purposes-and-objectives preemption inquiry the district court engaged in here. That is true for two independent reasons: (1) By its terms, the 1934 Act does not provide the FCC with the broad authority the district court held it had, and (2) there is no way to divorce the 1934 Act from its more modern partner, the 1996 TCA—the two must be read together. Doing that makes clear that Congress did not authorize the FCC's regulations to displace state law here.

1. The 1934 Act. According to the district court, the 1934 Act and its amendments delegated to the FCC the authority to establish a "uniform, nation-wide" "equipment-authorization regime" that balanced the "competing objectives of safety and efficiency." 1-ER-19; *see also Farina*, 625 F.3d at 124–25 (similar). Any state regulation of RF emissions, in the court's view, would "threaten that careful balance," and so tort claims brought under that state law are impliedly preempted. *See* 1-ER-19.

But it was mistaken: Far from authorizing this sort of "purposes-and-objectives" preemption, the 1934 Act prohibits it. In its savings clause—entirely ignored by the district court—the Act says explicitly that "nothing" therein "shall in any way abridge or alter the remedies now existing at common law or by statute." *See* 47 U.S.C. § 414. It is that statutory provision, not some judicially divined purpose of the federal law, that provides the rule of decision here. *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991) ("The best evidence of th[e] purpose [of a statute] is the statutory text adopted by both Houses of Congress and submitted to the President."). That is because a savings clause must receive all the weight of any ordinary congressional enactment and be interpreted consistent with its surrounding text and structure. *See Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740–41 (1985).[5]

The district court supported its alternative interpretation by first pointing to two provisions it characterized as "regulatory powerhouses." 1-ER-12; 1-ER-15 (citing 47 U.S.C. § 154(i) and 47 U.S.C. § 303(r)). It read these provisions—which delegate general rulemaking authority to the FCC—to authorize a purposes-and-objectives

[5] Of course, a savings clause that is "absolutely inconsistent with the provisions of the act in which" it is found will not operate to "bar the ordinary working of conflict preemption principles." *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1355 (2020); *Geier*, 529 U.S. at 869. But there is no inconsistency here. After all, conflict preemption analysis can't bar the working of ordinary statutory interpretation principles either. *Cf. In re NOS Communications*, 495 F.3d 1052, 1058 (9th Cir. 2007) ("[I]f Congress intended to preempt the entire field of telecommunications regulation, there would be nothing for Section 414 to 'save,' and the provision would be mere surplusage.").

form of implied conflict preemption for any agency regulation promulgated thereunder. 1-ER-12.

They do not. Those provisions merely provide the FCC with generic authority to promulgate regulations as "may be necessary" in the execution of the agency's functions. *See* 47 U.S.C. § 154(i); 47 U.S.C. § 303(r). They do not instruct the agency to either (1) preempt state law or (2) promulgate regulations based on a specific and deliberate balancing of competing objectives. As a result, they cannot confer any preemptive force on FCC regulations.

To see why, compare these provisions to those considered in *Geier*. There, Congress explicitly instructed the Department of Transportation to promulgate motor vehicle safety standards that struck a balance between being "practicable" and "meet[ing] the need for public safety." *Id.* at 875, 881; 15 U.S.C. § 1392(a) (1996). By giving the DOT the authority to set that balance, Congress empowered the agency to do more than simply establish a baseline for particular safety requirements. It conveyed the authority to craft a comprehensive scheme for automobile safety—in other words, to set both a floor and a ceiling on what sorts of safety devices were required.

And that's just what the DOT did. Under this authority, it promulgated a rule that provided car manufacturers with a range of choices among passive restraint devices. *Geier*, 529 U.S. at 875. Instead of imposing one single standard requiring every

car to employ airbags or seatbelts, the agency instead called for a gradual phase-in of a mix of passive restraints to "spur technological development and win consumer acceptance." *Wyeth*, 555 U.S. at 579–80 (describing the DOT's rule). But because the plaintiff's claim would have *required* car manufacturers to install airbags, it presented an obstacle to achieving "the variety and mix of devices that the federal regulation sought." *Geier*, 529 at 881.

The 1934 Act could not be more different. The district court's supposed "regulatory powerhouses," Sections 154(i) and 303(r), simply contain hortatory, general language empowering the FCC to promulgate regulations—not, as in *Geier*, instructions to establish a delicate balancing scheme for an explicit purpose. That distinction matters: If generic delegations of rulemaking authority carry preemptive weight, virtually *every* delegation would morph into a blanket grant of preemptive authority for any agency at any time. But the Supreme Court has rejected just this approach. *See Wyeth*, 555 U.S. at 567, 573–76 (no implied preemption for FDA regulation promulgated under statute delegating general rulemaking authority to "protect the public health" and "assure the safety, effectiveness, and reliability of drugs").

To bolster its preemption theory, the district court turned next to 47 U.S.C. § 151. But this provision carries no more preemptive weight than the others. All it does is articulate the broad "purposes" of the 1934 Act. *See id.* (identifying the statute's goals

of creating a "rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges" for the "purposes of" the "national defense," "promoting safety of life and property," and "securing a more effective execution" of those policies by centralizing authority in the FCC rather than diffuse agencies). In the district court's view, this generic provision authorized the FCC to displace state law for two reasons: (1) it supposedly instructed the agency to "balanc[e] safety and efficiency" to the exclusion of any state regulation, and (2) it prioritized "uniformity," which could be disrupted if states build upon federal standards. 1-ER-27–28; *see also Farina*, 625 F.3d at 126–27 (relying on the same provision). Not so.

As we have just explained, a statutory provision that simply lists a series of assorted purposes falls far short of the type of specific balancing command that may, in limited circumstances, permit an agency regulation to displace state laws under a purposes-and-objectives theory of conflict preemption. *See Williamson*, 562 U.S. at 335 (rejecting the view that the "mere existence" of a "cost-effectiveness judgment" could somehow impliedly preempt states from imposing stricter standards).[6]

[6] In this case, the district court latched on to § 151's reference to promoting "safety" in an attempt to justify the agency's position that its RF-radiation guidelines could displace state health and safety laws. *See* 1-ER-7–8; 1-ER-19; 1-ER-25. Section 151 cannot bear this weight. Not only does that provision provide the *only* reference to health and safety in the entire statutory scheme, but the FCC has never understood itself as having the expertise of a "health and safety agency." 4-ER-535. Particularly where the 1934 Act carefully avoids displacing existing state remedies, a single

Nor does § 151 reveal Congress's purpose of empowering the FCC to establish "uniform technical standards" that displace any state regulation of telecommunications equipment. "[G]eneralized pleas for uniformity" cannot "substitute[] for concrete evidence that adopting state law would adversely affect administration of [] federal programs." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 730 (1979). So the "comprehensiveness" of a particular statutory or regulatory scheme is insufficient, on its own, to show that Congress "intend[ed] its enactment as the exclusive means of meeting the problem" before it. *Hillsborough Cnty., Fla*, 471 U.S. at 716–17 (quoting *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 415 (1973)).

Instead, the way in which Congress typically makes clear that its desire for "uniformity" will oust state law is by saying so directly in the statute. *See, e.g.*, *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655–58 (1995) (explaining how Congress ensured that ERISA plans "would be subject to a uniform body of benefits law" by including an "expansive" express preemption provision that preempted conflicting state laws); *see also Virginia Uranium*, 139 S. Ct. at 1901, 1907–08 (requiring courts to "point specifically" to statutory text "that does the displacing" and rejecting any invocation of "some brooding federal interest"); *Niz-Chavez v.*

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reference to safety in a list of general statutory purposes falls far short of conveying congressional intent to permit the FCC to do so.

Garland, – S. Ct. –, 2021 WL 1676619, at *9 (Apr. 29, 2021) ("[N]o amount of policy-talk can overcome a plain statutory command.").

That is why, without more, the setting of a single, uniform standard operates—for preemption purposes—as a floor that states may supplement. *See, e.g.*, *Williamson*, 562 U.S. at 335 (cautioning against treating all federal standards "as if they were *maximum* standards" as opposed to "a *minimum* standard potentially supplemented through state tort law"); *Wyeth*, 555 U.S. at 574–76 (explaining that Congress did not intend to set a *ceiling* on safety when it required the FDA to determine whether a "drug is safe and effective under the conditions set forth in its labeling"); *Oxygenated Fuels Ass'n Inc. v. Davis*, 331 F.3d 665, 671–72 (9th Cir. 2003) (California fuel standard could build upon federal floor).

So it is here. Even if the calls for an "efficient" and "Nation-wide" radio communication service in the 1934 Act's general purposes provision suggest that Congress approved of the FCC's establishing *uniform* standards for the devices and facilities it regulates, there is no evidence that Congress thought those standards should be *exclusive*. Just the opposite: By including a savings clause in the statute, Congress expressly contemplated that existing state remedies would continue to apply—however varied the results might be.[7]

[7] The district court also seized on a few additional provisions to support is uniformity-based theory of implied conflict preemption. *See* 1-ER-8; 1-ER-12; 1-ER-19–17 (identifying 47 U.S.C. §§ 301 and 303(e) as provisions authorizing the FCC to

2. The 1996 Act. The district court compounded its flawed interpretation of the 1934 Act by dismissing the relevant provisions of the TCA, which amended the 1934 Act. That mistake was particularly egregious because it was in *that* law that Congress carefully delineated the limited scope of the FCC's preemptive authority for RF radiation regulations.

As we explained above, *see supra* Part I.B.2, when it passed the TCA Congress recognized the agency's pending proceeding to set NEPA triggers for RF radiation and set forth a detailed preemption regime for those regulations. Under that framework, it conspicuously preempted only state regulation of wireless services *facilities*—not devices like cell phones—while also explicitly stating that nothing in the act should be construed to have any implied preemptive effect. *See* TCA § 704(b) (instructing the agency to "complete action" in its pending RF-radiation rulemaking); 47 U.S.C. § 332(c)(7)(A) (explicitly saving from preemption state or local regulation of facilities "[e]xcept as provided in this paragraph"); *id.* § 332(c)(7)(B)(iv) (preempting state laws that regulate certain facilities "on the basis of the

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establish a "uniform, nation-wide regime" of equipment authorization, including the creation of "technical standards for radio frequency equipment" capable of preempting all conflicting state regulation). But neither of these provisions supply the missing indicia of congressional purpose to delegate the authority to displace state law. Indeed, not even the FCC saw these provisions as relevant to its cell-phone RF radiation guidelines—neither appears in the agency's orders promulgating them. *See* 4-ER-496; 2-ER-281.

environmental effects of radio frequency emissions"); TCA § 601(c)(1) (47 U.S.C. § 152 note) (stating that there should be no implied preemption).

The district court deemed this intricate preemption regime irrelevant because the plaintiffs' claims "do not involve local land use regulations." 1-ER-16. But that conclusion misses the point entirely. By setting forth exactly how far the FCC's authority to preempt state and local regulations with respect to RF radiation extends, Congress showed it knew how to authorize preemption in this space and yet chose not to for regulations regarding cell phones. *See Wyeth*, 555 U.S. at 574 ("If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point . . . . But despite its 1976 enactment of an express pre-emption provision for medical devices, Congress has not enacted such a provision for prescription drugs."); *see also Cipollone v. Liggett Grp.*, 505 U.S. 504, 517 (1992) ("Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.").

C. The district court erred in concluding that the unexpressed purposes and objectives of the FCC's regulations conflict with state law.

Compounding all these errors, the district court did not even identify an actual conflict between state law and the regulatory regime established by the FCC's orders. Instead, it just assumed that the FCC's authority to set technical standards for cell phones, as well as its authority to ensure that those standards apply uniformly across

the country, would somehow be impeded by state efforts to enforce their own standards. 1-ER-25.

That was wrong. As we explained above, *see supra* Part I.C, the FCC's RF radiation guidelines aren't even mandatory. Nothing in the regulations prohibits Apple from manufacturing an iPhone that emits RF radiation in excess of the FCC's own NEPA trigger and still obtaining approval—the only difference is that it must comply with additional environmental processing. *See* 47 C.F.R. §§ 2.1093(c), 1.1307. And Apple is equally free to manufacture an iPhone that not only meets the FCC's standards but also complies with state and local laws. So the FCC's standards don't even ensure uniformity in the first place.[8] At most, all they do is control the process for authorizing an individual piece of equipment for sale. But that function will operate unimpeded regardless of whether states ask companies to make additional

[8] The district court, like the Third Circuit before it, reached a contrary conclusion by characterizing the agency's equipment-authorization procedures as the product of a delicate balancing of competing factors, and then holding that state regulation would present an obstacle to that balancing regime. *See* 1-ER-20; *Farina*, 625 F.4d at 125. But the agency neither had the authority to do this (for all the reasons given above) nor even purported to do so. The agency's only reference to balancing in its regulations was to note, in its 1997 order, that it still thought its NEPA triggers struck a "proper balance" between health concerns and "marketplace demands." *See* 4-ER-529–30; 4-ER-535. And the agency made this point just to emphasize that the triggers struck the right balance *for environmental processing pursuant to NEPA*. Suffice to say: An agency cannot simply say the word "balance" and, as a result, oust otherwise applicable state law that Congress itself intended to coexist. *See, e.g.*, *Wyeth*, 555 U.S. at 576–81.

disclosures—or otherwise impose conditions above the floor set by the FCC. *See Wyeth*, 555 U.S. at 573–76; *In re Volkswagen*, 959 F.3d at 1221.[9]

D. The district court erred in deferring to the FCC's litigation position on preemption, and this Court should not defer either.

Finally, to support its view on preemption, the district court cloaked its conclusions in those adopted by the FCC in litigation. *See* 1-ER-28. That, too, was error.

It is by now a cornerstone of preemption law that "an agency's conclusion that state law is preempted" is entitled to no deference. *Wyeth*, 555 U.S. at 576. The agency's views "about the impact of tort law on federal objectives" may, however, be "given some weight," but only "when the subject matter is technical," the "relevant history and background are complex and extensive," and where the agency is acting in a prescribed role as an expert. *Id.* But the weight that explanation warrants "depends on its thoroughness, consistency, and persuasiveness." *Id.* And here, each of these factors cuts against deference.

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[9] The district court's concern that state disclosure requirements would somehow interfere with federal law because they would amount to "overwarning" cannot overcome this basic point. 1-ER-24. After all, the FCC's decision not to require disclosures is not the sort of federal disclosure rule that can displace state law. *See, e.g.*, 6-ER-875; *Wyeth*, 555 U.S. at 573–81 (failure-to-warn claims not preempted by federal approval of particular label); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65–68 (2002) (Coast Guard's "decision not to regulate a particular aspect of boating safety is fully consistent with an intent to preserve state [] authority").

Start with consistency. The district court thought that the FCC's "present views have remained consistent with its past views" because the agency had filed earlier litigation-facing briefs taking the same pro-preemption position as it did here. 1-ER-29 (relying on two amicus briefs). But litigation-facing briefs cannot supply a definitive answer when determining whether an agency has taken a consistent position on "state law's impact on the federal scheme." *Wyeth*, 555 U.S. at 577. Instead, to evaluate the deference owed to an agency's view, a court must consider the full range of relevant agency pronouncements. *See id.* (primarily evaluating the agency's regulations); *see also Geier*, 529 U.S. at 875–81 (considering both formal and informal agency statements). And when the district court *did* point to the agency's formal pronouncements, *see* 1-ER-29 (citing the FCC's 1997 order), it glossed over their inconsistencies in favor of the FCC's newfound view.

Had the district court performed the proper analysis, it would have seen that the FCC abruptly changed course on two key positions.

First, for decades, the agency had explicitly disclaimed—in its formal rulemakings—both the expertise and the jurisdiction to set substantive health and safety standards for telecommunications components. *See, e.g.*, 2-ER-271 (1985 order noting that the FCC has "neither the expertise nor the jurisdiction to develop [its] own radiation exposure guidelines"); 4-ER-535 (1997 order "stress[ing] repeatedly that [the FCC] is not a health and safety agency"); 4-ER-484 (1996 order conceding

that the FCC "is not an agency with primary jurisdiction" on this issue and so "not normally . . . in a position to determine independently" whether a particular measure was safe). That is why it adopted RF radiation triggers under its NEPA authority—not under any authority to set substantive health and safety standards (it has none)—and relied on standards developed by industry outsiders. *See, e.g.*, 2-ER-241; 4-ER-453; 4-ER-459–60; 4-ER-535.

But beginning in 2007, the agency informally changed course. It began telling courts its RF radiation guidelines set *substantive* standards that definitively established what exposure levels were safe, rather than triggers for when further environmental processing would be required. *See, e.g.*, US & FCC Amicus Br., *Murray*, 2008 WL 7825518, at *15–18 (arguing that the agency's standards "are not simply a minimum requirement" to fulfill the agency's procedural obligations, but instead a substantive "policy judgment" focused on protecting health and safety and "allowing the spread of wireless communications services"). And it began to insist that its standards were promulgated under expansive authority the agency located in the substantive communications statutes instead of the NEPA authority its orders had discussed. *See, e.g.*, Brief of the United States as Amicus Curiae, *Farina v. Nokia*, 625 F.3d 97 (3d Cir. 2010), No. 10-1064, 2011 WL 3799082, at *4, 18.

Second, for most of its history the FCC expressly declined to preempt state and local regulation of RF radiation. For instance, in 1985 it directly acknowledged that

"various state and local jurisdictions around the country either have adopted or have proposed standards for exposure of the general public to RF radiation." 2-ER-275–76. And—in the very order the FCC now relies on to argue for preemption—the agency expressly declined to preempt state and local regulations any more than the TCA did out of concern for "preempt[ing] too broad a scope of legal actions." 4-ER-553; *see also* 4-ER-495 (emphasizing that it had "traditionally been reluctant to preempt state or local regulations enacted to promote *bona fide* health and safety objectives"). Yet in subsequent litigation, the agency has now freely discarded this concern, without explaining its about-face.

These sharp departures from past agency practice are exactly the sorts of key inconsistencies that undermine an agency's view of its own preemptive power. In *Wyeth*, for instance, the FDA had long "cast federal labeling standards as a floor upon which States could build and repeatedly disclaimed any attempt" to preempt claims like the plaintiffs'. 555 U.S. at 577–79. Yet, in its preamble to a 2006 regulation, the agency suddenly adopted the contrary position. *See id.* The Supreme Court rejected such a "dramatic change in position" as incapable of justifying deference. *Id.* (noting that the agency's view was "inherently suspect" given that it was adopted without affording interested parties the opportunity to comment).

The situation here is not just similar—it is worse. Like the FDA in *Wyeth*, the FCC for years expressly declined to displace state and local regulation of RF

radiation. And, before promulgating the order that supposedly displaces state law, the FCC never sought notice and comment on the preemptive reach of its RF radiation regulations. *See* 3-ER-431–32. But unlike the FDA, the FCC *never* adopted a view of this particular preemption issue in any formal rulemaking. Instead, the agency's formal order expressly *declined* to extend the preemptive reach of its RF radiation regulations any further than the TCA said it should. Only later, in litigation-facing briefs and a few informal orders, did the agency start arguing for an expansive view of preemption. *See* 6-ER-869; 5-ER-639–40.

Similar flaws infect the district court's cursory view that the FCC's view was both thorough and persuasive. For instance, in its statement arguing in favor of preemption here, the FCC failed to identify *any* provisions of the 1934 Act or TCA that confer on it the authority to preempt state law. Instead, the agency offered generic arguments completely divorced from any statutory authority whatsoever—simply insisting that Congress "expected [it] to use its expert judgment to balance" the policy objectives of "public health" and "speed[y] deployment . . . of competitive wireless telecommunications services." 6-ER-1041. But no statute authorizes this kind of delicate balancing procedure and the agency identified none. All it offered in support were snippets of a single report contained in the legislative history from the 1996 TCA. *See id.* (citing H.R. Rep. No. 104-204 at 94–95, *reprinted in* 1996 U.S.C.C.A.N. 10, 61–62).

Even *if* unenacted statements found in a bill's legislative history were capable of authorizing an agency to promulgate a rule carrying preemptive force—and they cannot, *see Virginia Uranium*, 139 S. Ct. at 1908—the statements relied on by the FCC here do nothing of the sort. The reference quoted by the agency to an "appropriate balance" in the relevant report concerned the RF emissions of *facilities*, not cell phones. *See* H.R. Rep. No. 104-204(I), at 95. But, as we have explained, the actual text Congress enacted treats these two types of emitters quite differently—so the agency's reliance on this reference is actually self-defeating. *See* 47 U.S.C. § 332(c)(7)(B)(iv); *Pinney*, 402 F.3d at 455; *Farina*, 625 F.3d at 118–20. Because the district court's analysis completely overlooked this fundamental error, its decision to defer to the agency's position cannot be sustained.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Circuit Rule 32-1 because this brief contains 13,902 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

April 29, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2021, I electronically filed the foregoing brief with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit using the CM/ECF system. All participants are registered CM/ECF users and will be served by the CM/ECF system.

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