No. 10-1064

In the Supreme Court of the United States

FRANCIS J. FARINA, PETITIONER

v.

NOKIA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether petitioner's state-law tort claims, which are based on the alleged harmfulness of cellular telephones that comply with the Federal Communications Commission's regulations setting standards for radiofrequency radiation, are preempted by federal law.

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States in this case. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. For nearly a century, the federal government has extensively regulated radio communications. See Radio Communication Act of 1912, ch. 287, 37 Stat. 302; Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162. In the Communications Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (47 U.S.C. 151 *et seq.*), Congress "centraliz[ed] authority" to regulate radio communications in a single federal agency, the Federal Communications Commission (FCC or Commission). 47 U.S.C. 151. In regulating the industry, the FCC's core mission is "to

make available * * * to all the people of the United States * * * a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." *Ibid.* The Communications Act further directs the FCC to "encourage the provision of new technologies and services to the public," 47 U.S.C. 157, and to facilitate the "efficient and intensive use of the electromagnetic spectrum," 47 U.S.C. 309(j)(3)(D). The Commission must also strive to protect the "safety of life and property through the use of wire and radio communication." 47 U.S.C. 151.

To facilitate the FCC's pursuit of those sometimes competing objectives, "Congress endowed" the agency "with comprehensive powers to promote and realize the vast potentialities of radio." *National Broad. Co.* v. *United States,* 319 U.S. 190, 217 (1943). In particular, Congress authorized the Commission to regulate the technical aspects of wireless radio communications services, including "the kind of apparatus to be used" and the "emissions" that such equipment may produce. 47 U.S.C. 303(e). This Court has held that "the Commission's jurisdiction over" such "technical matters * * * is clearly exclusive." *Head* v. *New Mexico Bd. of Exam'rs in Optometry*, 374 U.S. 424, 430 n.6 (1963).

2. Nearly every form of wireless communications—from television, radio, and cellular telephones to satellite communications networks and dispatch systems for police and fire departments—uses radiofrequency (RF) electromagnetic waves to send and receive signals. See FCC, Office of Eng'g and Tech., *Questions and Answers about Biological Effects and Potential Hazards of Radiofrequency Electromagnetic Fields*, OET Bulletin No. 56 (4th ed. 1999), at 2-3, http://transition.fcc.gov/Bureaus/Engineering_Technology/Documents/bulletins/

oet56/oet56e4.pdf. At high levels, RF energy can cause a potentially dangerous thermal effect: the heating of human tissue. *Id*. at 6-8.

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires federal agencies to evaluate the environmental effects of "major" regulatory actions "significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). Although NEPA is designed "to insure a fully informed and well-considered decision" that takes environmental concerns into account, *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978), the statute "does not mandate particular results, but simply prescribes the necessary process," *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Under regulations promulgated by the Council on Environmental Quality (CEQ), an agency is ordinarily required to prepare either an environmental impact statement (EIS) or an environmental assessment (EA) to evaluate the potential effects of its actions. See 40 C.F.R. Pts. 1501, 1502, 1508. An agency may, however, identify classes of actions, known as "categorical exclusions," 40 C.F.R. 1507.3(b)(2)(ii), for which neither an EIS nor an EA is required, based on the agency's determination that such actions "do not individually or cumulatively have a significant effect on the human environment," 40 C.F.R. 1508.4.

In 1985, the Commission adopted rules prescribing RF exposure standards for certain FCC-licensed facilities. *Responsibility of the FCC to Consider Biological Effects of Radiofrequency Radiation When Authorizing the Use of Radiofrequency Devices,* 100 F.C.C.2d 543 (1985) (*1985 RF Order*). Under those rules, an EA is required only for those facilities that exceed the FCC's

prescribed RF limits. The Commission based its RF standards on guidelines that had been developed by the American National Standards Institute (ANSI), a non-profit organization that has helped to develop and administer national consensus standards for American industry for nearly a century. *Id.* at 551. As the "[l]egal basis" for prescribing those standards, the FCC cited NEPA, as well as three provisions of the Communications Act (47 U.S.C. 154(i), 154(j), and 303(r) (1978)) that vest the FCC with broad rulemaking authority. 100 F.C.C.2d at 565.

The Commission initially excluded from its RF rules certain "relatively low-powered communications systems," including cellular phones. See *Responsibility of the FCC to Consider Biological Effects of Radiofrequency Radiation When Authorizing the Use of Radiofrequency Devices,* 2 F.C.C.R. 2064, 2065 ¶ 14 (1987). The Commission found "little likelihood" that those devices would "cause exposures in excess of the RF safety guidelines." *Id.* at 2065 ¶ 15. In 1992, however, ANSI adopted a new standard for RF exposure that was "generally more stringent" than its previous standard "in the evaluation of low-power devices, such as hand-held radios and cellular telephones." See *Guidelines for Evaluating the Envtl. Effects of Radiofrequency Radiation,* 11 F.C.C.R. 15,123, 15,127 ¶ 9 (1996) (*1996 RF Order*), on reconsideration, 12 F.C.C.R. 13,494 (1997) (*1997 RF Order*), aff'd, *Cellular Phone Taskforce* v. *FCC*, 205 F.3d 82 (2d Cir. 2000), cert. denied, 531 U.S. 1070 (2001).

The next year, the FCC began a proceeding to consider revising its rules to reflect ANSI's new RF standard. *Guidelines for Evaluating the Envtl. Effects of Radiofrequency Radiation*, 8 F.C.C.R. 2849 (1993). That proceeding was still pending when Congress en-

acted the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56. Section 704(b) of the 1996 Act directed the FCC to "complete action" within 180 days on its pending proceeding "to prescribe and make effective rules regarding the environmental effects of radio frequency emissions." 100 Stat. 152. The House Commerce Committee, which had drafted Section 704(b), explained that because "[a] high quality national wireless telecommunications network cannot exist if each of its component[s] must meet different RF standards in each community," the FCC should adopt uniform federal RF standards that strike "an appropriate balance" between "adequate safeguards of the public health" and "speed[y] deployment * * * of competitive wireless telecommunications services." H.R. Rep. No. 204, 104th Cong., 1st Sess. Pt. 1, at 94-95 (1995) (*House Report*).

In accordance with the deadline set by the 1996 Act, the Commission in August 1996 issued an order adopting new RF exposure guidelines. *1996 RF Order*, 11 F.C.C.R. at 15,124 ¶ 1. As authority for the rulemaking, the agency cited a variety of Communications Act provisions. See *id.* at 15,185 ¶ 171. For the first time, the agency applied its RF standards to wireless phones. *Id.* at 15,147 ¶¶ 63-64. The *1996 RF Order* established, for RF emissions from wireless phones, a maximum specific absorption rate (SAR) in human tissue of 0.08 W/kg averaged over the entire body, and 1.6 W/kg for localized exposure to areas such as the head. 47 C.F.R. 2.1093(d)(2). Unless the manufacturer or seller of wireless phones certifies that the phones comply with that limit, its application for equipment authorization must include an EA that analyzes the environ-

mental consequences of the requested authorization. See 47 C.F.R. 1.1307(b), 1.1308, 2.1091(c).

In crafting its new RF guidelines, the FCC placed "special emphasis on the recommendations and comments of Federal health and safety agencies," including the Environmental Protection Agency and the Food and Drug Administration, "because of their expertise and their responsibilities with regard to health and safety matters." *1996 RF Order*, 11 F.C.C.R. at 15,135 ¶ 28; see *id.* at 15,141-15,142 ¶ 49. The Commission concluded that its new RF rules "represent[ed] the best scientific thought" on the RF limits necessary "to protect the public health." *Id.* at 15,184 ¶ 168. The agency also determined that "these RF exposure limits provide a proper balance between the need to protect the public and workers from exposure to excessive RF electromagnetic fields and the need to allow communications services to readily address growing marketplace demands." *1997 RF Order*, 12 F.C.C.R. at 13,505 ¶ 29.

When it adopted the new RF guidelines in 1996, the FCC declined to adopt a "broad-based preemption policy to cover all transmitting sources." *1996 RF Order*, 11 F.C.C.R. at 15,184 ¶ 168. The agency stated that "[o]nce states and localities have had an opportunity to review and analyze the guidelines we are adopting, we expect they will agree that no further state or local regulation is warranted." *Ibid.* The agency acknowledged at that time that "research and analysis relating to RF safety and health is ongoing," and it expressed its expectation that "changes in recommended exposure limits will occur in the future as knowledge increases in this field." *Id.* at 15,125 ¶ 4. The Commission explained that it would "work with industry and with the various agencies and organizations with responsibilities in this area

in order to ensure that [federal RF] guidelines continue to be appropriate and scientifically valid." *Ibid.*

On judicial review of the *1996 RF Order*, the Second Circuit rejected arguments that the FCC's RF exposure standards were inadequate to protect the public. *Cellular Phone Taskforce* v. *FCC*, 205 F.3d 82, 89-95 (2d Cir. 2000), cert. denied, 531 U.S. 1070 (2001). The court noted that "[a]ll of the expert [federal] agencies consulted" by the FCC had "found the FCC's approach to be satisfactory." *Id.* at 90. Observing that the establishment of "safety margins" is "a policy question, not a legal one," the court held that the FCC had acted reasonably in setting RF standards that, while sufficient to protect the public, would not unduly impede the provision of wireless "telecommunications services to the public in the most efficient and practical manner possible." *Id.* at 91-92 (internal quotation marks omitted). The court further held that the Commission, in conducting the rulemaking, had complied with the procedural requirements imposed by NEPA and the applicable CEQ regulations. *Id.* at 94-95; see *EMR Network* v. *FCC*, 391 F.3d 269 (D.C. Cir. 2004) (affirming the FCC's denial of a subsequent petition to consider revising its RF standards).

3. Petitioner filed a putative class action in the United States District Court for the Eastern District of Pennsylvania, alleging that mobile phones manufactured and sold by respondents in compliance with FCC RF standards are potentially hazardous to the health of cell phone users when the phones are used without headsets. The district court granted respondents' motion to dismiss, holding that petitioner's claims were preempted because they conflicted with federal law. Pet. App. 62a-115a.

4. The court of appeals affirmed. Pet. App. 1a-61a. The court concluded that "[a]llowing juries to impose liability on cell phone companies for claims like [petitioner's] would conflict with the FCC's regulations." *Id.* at 44a. The court observed that the Commission's RF standards for wireless phones "represent the FCC's considered judgment about how to protect the health and safety of the public while still leaving industry capable of maintaining an efficient and uniform wireless network." *Id.* at 43a. The court further explained that "[a] jury determination that cell phones in compliance with the FCC's SAR guidelines were still unreasonably dangerous would, in essence, permit a jury to second guess the FCC's conclusion on how to balance its objectives." *Id.* at 44a. The court concluded that lawsuits like this one "would hinder the accomplishment of the full objectives behind wireless regulation" by potentially "[s]ubjecting the wireless network to a patchwork of state standards" derived from disparate jury awards (*id.* at 46a), thereby "eradicating the uniformity" that "both Congress and the FCC recognized * * * as an essential element of an efficient wireless network" (*id.* at 45a).

"In concluding that state-law causes of action like [petitioner's] may disturb the FCC's balance of its statutory objectives," the court of appeals "afford[ed] some weight to the views of the FCC itself." Pet. App. 46a. The court concluded that in this case, where "the subject matter is technical and the relevant history and background are complex and extensive," the FCC's "explanation of how state law affects the regulatory scheme" was entitled to deference. *Ibid.* (quoting *Wyeth* v. *Levine,* 129 S. Ct. 1187, 1201 (2009)). The court noted that the Commission has "a unique understanding" of the Communications Act and "an attendant ability to make

informed determinations about how state requirements may pose an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ibid.* (quoting *Wyeth*, 129 S. Ct. at 1201).

The court of appeals explained that its finding of preemption was supported by the Commission's statement in the *1997 RF Order* that "the adoption of its SAR guidelines constituted a balancing of safety and efficiency." Pet. App. 46a (citing *1997 RF Order*, 12 F.C.C.R. at 13,496). The court also relied in part on an amicus brief filed by the FCC and the United States in a similar case, which explained "that state-law claims would upset that balance." *Id.* at 46a-47a (citing Gov't Amicus Br., *Murray* v. *Motorola, Inc.*, 982 A.2d 764 (D.C. 2009) (No. 07-cv-1074)). Observing that "[t]he FCC is in a better position to monitor and assess the science behind RF radiation than juries in individual cases," *id.* at 60a, the court held that lawsuits like petitioner's are preempted because "[a]llowing juries to determine" whether the FCC's RF regulations "are adequate to protect the public would 'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *id.* at 61a (quoting *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (brackets in original)).

DISCUSSION

The court of appeals correctly held that petitioner's suit is preempted because the state-law rule it seeks to impose would conflict with the FCC's RF regulations. Those regulations are intended to strike "a proper balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be al-

lowed to provide telecommunications services to the public in the most efficient and practical manner possible." *1997 RF Order*, 12 F.C.C.R. at 13,496 ¶ 2. This Court has recognized that when a regulatory agency seeks "to achieve a somewhat delicate balance" of competing "statutory objectives," such a balance "can be skewed by allowing * * * claims under state tort law" that could produce different outcomes. *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001). The same concern justifies preemption in this case.

Petitioner contends that the Court should grant certiorari for three reasons. First, he asserts that the decision below conflicts with decisions of the Fourth Circuit and the District of Columbia Court of Appeals. Pet. 13-17. Second, he argues that the Court should review this case to clarify the impact of a savings clause in the 1996 Act. Pet. 17-22. Finally, petitioner maintains that this case presents an important issue regarding the preemptive effect of an agency's NEPA regulation on state laws. Pet. 22-25. None of those contentions justifies further review.

A. There Is No Conflict Among The Courts Of Appeals That Warrants This Court's Intervention At This Time

1. Petitioner argues (Pet. 13-15) that the decision below conflicts with *Pinney* v. *Nokia, Inc.*, 402 F.3d 430, cert. denied, 546 U.S. 998 (2005), in which a divided panel of the Fourth Circuit held that a lawsuit challenging the safety of wireless phones did not conflict with federal law. *Id.* at 456-458. But the decision in *Pinney* was issued before the FCC set out its views on the effect of state lawsuits on the federal regulatory scheme. In light of those views, which were central to the reasoning of the court below, see Pet. App. 46a, the Fourth Circuit

may reconsider its position if the issue arises in a future case. Accordingly, this Court's intervention would be premature at this time.

In *Pinney*, the Fourth Circuit gave almost no consideration to the preemptive effect of the FCC's RF regulations. Instead, the court focused its preemption analysis on a single provision of the Communications Act, 47 U.S.C. 332. As the court explained, Section 332 "(1) provides factors that the FCC must consider in managing the spectrum used for wireless services; (2) classifies wireless service providers that provide wireless service to the public for profit as 'common carriers' * * * ; (3) prevents states from regulating 'the entry of or the rates charged by' wireless service providers; and (4) limits in certain respects the ability of states and local zoning authorities to regulate the 'placement, construction, and modification' of facilities that provide wireless service." 402 F.3d at 457 (citations omitted). The Fourth Circuit concluded that it could "not infer from [Section] 332 the congressional objective of achieving preemptive national RF radiation standards for wireless telephones." *Ibid.* By focusing only on that statutory provision and failing to consider the independent preemptive effect of the Commission's RF rules, the court ignored the principle that, like statutes, the "statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988); see *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes.").

After the Fourth Circuit decided *Pinney*, the FCC and the United States made clear in amicus filings that

state lawsuits challenging the safety of FCC-certified wireless phones conflict with the federal policy objectives underlying the FCC's RF rules. In *Murray* v. *Motorola, Inc.*, 982 A.2d 764 (D.C. 2009), plaintiffs sued a number of cell phone companies and handset manufacturers under District of Columbia law, alleging that the plaintiffs had suffered injury as a result of using cell phones produced, sold, or promoted by the defendants. In their amicus brief in the D.C. Court of Appeals, the FCC and the United States argued that the Commission's RF regulations preempt any lawsuit asserting claims that wireless phones that complied with the FCC's RF standards were unsafe. Gov't Amicus Br., *Murray, supra* (No. 07-cv-1074) (FCC Amicus Br.).

The government's amicus brief in *Murray* contended that the lawsuit was preempted not only because the federal government had occupied the field of regulating technical standards for RF transmissions, FCC Amicus Br. 12-14, but also because the suit "plainly conflicts with the FCC's RF exposure regulations," *id.* at 15-18. Quoting the *1997 RF Order*, the amicus brief explained that the Commission's RF standards "are not simply a minimum requirement" that States are free to supplement, but instead "set the 'proper balance between the need to protect the public and workers * * * and the need to allow communications services to readily address growing marketplace demands.'" *Id.* at 17 (quoting *1997 RF Order*, 12 F.C.C.R. at 13,505 ¶ 29). Approximately two and a half years later, the FCC informed the court adjudicating a similar case that "[i]t continues to be the Commission's position * * * that state law claims premised on the contention that FCC-compliant cell phones are unsafe are preempted by federal law." Gov't Statement of Interest, Attachment 2, at 2,

Dahlgren v. *Audiovox Comm'cns Corp.*, No. 2002-CA-007884-B (D.C. Super. Ct. filed Sept. 17, 2010) .

As this Court has recently observed, such amicus briefs reflect an agency's considered views, and courts must defer to the agency's interpretation of its own regulations as set forth in the briefs. *Talk Am., Inc.* v. *Michigan Bell Tel. Co.,* 131 S. Ct. 2254, 2257 n.1 (2011); *Chase Bank USA, N.A.* v. *McCoy*, 131 S. Ct. 871, 878 (2011). Since the Commission filed its brief in *Murray*, the appellate courts that have addressed the issue—the District of Columbia Court of Appeals in *Murray* and the Third Circuit in this case—have held that the FCC's RF rules preempt state lawsuits challenging the safety of wireless phones that comply with the rules. In their decisions, those courts properly took into account the Commission's description of how state lawsuits would pose an obstacle to the objectives underlying the agency's RF rules. See Pet. App. 46a-47a (affording "some weight to the views of the FCC," and deferring to the "'agency's explanation of how state law affects the regulatory scheme'") (quoting *Wyeth* v. *Levine,* 129 S. Ct. 1187, 1201 (2009)); *Murray*, 982 A.2d at 776-777 (giving "weight" to the FCC's views and finding "persuasive" the FCC's argument that verdicts holding defendants liable for injuries caused by FCC-certified cell phones would upset the policy balance that the FCC struck in its rules).

Although the Fourth Circuit in *Pinney* reached a different conclusion, it did so without the benefit of the FCC's views on the conflict between state lawsuits and the Commission's RF rules, and it did not adequately consider the preemptive scope of the FCC's standards. When courts assess whether state law conflicts with the policy objectives of an agency's regulations, "the

agency's own views should make a difference." *Williamson* v. *Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1139 (2011) (quoting *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 883 (2000)). That is especially true in cases such as this one, where "the subject matter is technical" and "the relevant history and background are complex and extensive." *Geier*, 529 U.S. at 883. In that context, the FCC "is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements." *Ibid.* (quoting *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 496 (1996)). Accordingly, in a future case, with the benefit of the FCC's views, and in light of the decisions in *Murray* and this case, the Fourth Circuit may reach a different conclusion. This Court's review is therefore unwarranted at this time.

2. Petitioner also asserts (Pet. 15-17) that the decision below conflicts with the decision of the District of Columbia Court of Appeals in *Murray*. That is incorrect. The court in *Murray* held that "insofar as plaintiffs' claims rest on allegations about the inadequacy of the FCC's RF radiation standard or about the safety of their FCC-certified cell phones, the claims are preempted under the doctrine of conflict preemption." 982 A.2d at 777.

As petitioner observes (Pet. 16), the *Murray* court held that its conflict-preemption ruling did not foreclose potential liability under the District of Columbia's consumer-protection law "for providing plaintiffs with false and misleading information about their cell phones, or for omitting material information about the phones." 982 A.2d at 783. Those claims, the court explained, would not require plaintiffs "to prove that cell phones emit unreasonably dangerous levels of radiation." *Ibid.*

Accordingly, the court permitted plaintiffs to proceed with allegations that the defendants had "falsely represented that [r]esearch has shown that there is absolutely no risk of harm associated with the use of cell phones," and that the defendants had failed to inform consumers of steps that could be taken to mitigate RF exposure, "[t]o the extent that these claims are not read as claims that cell phones are unreasonably dangerous." *Id.* at 784 (first brackets in original; internal quotation marks omitted).

Although petitioner contends (Pet. 16) that he made similar allegations here, the court of appeals explained that petitioner's claims "differ from those brought in *Murray*." Pet. App. 38a n.26. In this case, petitioner did not allege that respondents made misrepresentations that "there is absolutely no risk of harm from RF radiation"; he instead alleged that respondents claimed that their "cell phones were compliant with FCC guidelines and free from defects." *Id.* at 38a-39a n.26. Likewise, the court noted, petitioner's "allegations do not posit a failure to disclose information enabling users to mitigate risk, but simply that defendants failed to disclose a defect in their phones—the level of RF emissions—that made them unsafe to operate." *Id.* at 39a n.26. Accordingly, there is no conflict between *Murray* and the decision below even with respect to that narrow set of claims.

Petitioner argues (Pet. Reply Br. 4) that the Third Circuit "mischaracteriz[ed]" his "claims as challenges to the adequacy of the FCC's regulations." To the contrary, the court of appeals correctly recognized that petitioner could not prevail unless he convinced a jury that the FCC's RF rules were insufficient to protect the public. "In order for [petitioner] to succeed, he necessarily

must establish that cell phones abiding by the FCC's SAR guidelines are unsafe to operate without a headset. In other words, [petitioner] must show that these standards are inadequate—that they are insufficiently protective of public health and safety." Pet. App. 38a; accord *Murray*, 982 A.2d at 784-785 n.35 (a claim "that defendants omitted telling plaintiffs that the FCC SAR standards are not adequate * * * would be preempted," even if couched in failure-to-warn terms). In any event, even if the court of appeals had misunderstood or misconstrued petitioner's claims, that case-specific error would not warrant this Court's review. See Sup. Ct. R. 10.

B. The 1996 Act Did Not Divest The FCC Of Its Pre-Existing Authority To Promulgate Regulations Having Preemptive Effect

Petitioner argues (Pet. 17-22) that the Court should grant certiorari to consider whether a statutory savings clause that expressly disclaims implied preemption bars a finding of conflict preemption. That issue, however, is not properly presented by this case.

In contending that the FCC's RF regulations cannot impliedly preempt petitioner's lawsuit, petitioner relies on Section 601(c)(1) of the 1996 Act, which provides: "This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." 47 U.S.C. 152 note (1996 Act § 601(c)(1), 110 Stat. 143). By its terms, that savings clause applies only to provisions of, or amendments made by, "this Act," *i.e.*, the 1996 Act. Long before the 1996 Act became law, however, "health and safety considerations were already within the FCC's mandate,"

and the agency's "RF regulations were promulgated under the rulemaking authority granted by" the Communications Act of 1934. Pet. App. 50a (citing 47 U.S.C. 151, 332(a)); see *1996 RF Order*, 11 F.C.C.R. at 15,185 ¶ 171 (invoking the Commission's authority under several provisions of the Communications Act, but without mentioning the 1996 Act). Indeed, the FCC first adopted RF standards for communications devices in 1985, more than a decade before Congress enacted the 1996 Act. See *1985 RF Order*, 100 F.C.C.2d at 566.

To be sure, Section 704(b) of the 1996 Act directed the FCC to complete its then-pending RF rulemaking within 180 days of the statute's enactment. 1996 Act § 704(b), 110 Stat. 152. But that section merely set a deadline for completing a pending rulemaking; it did not grant new substantive authority to the agency or amend any of the agency's powers. Even if the 1996 Act had never become law, the Commission would still have had the authority to extend its RF emission standards to wireless phones under pre–1996 Act provisions of the Communications Act. The Third Circuit's finding of conflict preemption based on the FCC's RF regulations therefore was not inconsistent with the 1996 Act's savings clause.

Petitioner's reliance on the 1996 Act's savings clause is doubly misplaced because that provision does not simply address preemption of state law. Rather, Section 601(c)(1) provides in addition that the 1996 Act does not impliedly alter prior "Federal * * * law." 47 U.S.C. 152 note. By its terms, Section 601(c)(1) thus precludes any construction of the 1996 Act that would divest the FCC of its pre-existing Communications Act authority to promulgate RF regulations having preemptive effect.

C. The Fact That The FCC's RF Regulations Serve In Part To Carry Out The Agency's NEPA Obligations Does Not Prevent The Regulations From Having Preemptive Effect

Petitioner further contends (Pet. 22-25) that the FCC's RF regulations cannot have preemptive effect because they were promulgated in part to comply with the agency's procedural obligations under NEPA. That argument lacks merit.

As the Third Circuit explained, "although the FCC's RF regulations were triggered by the Commission's NEPA obligations, health and safety considerations were already within the FCC's mandate, 47 U.S.C. §§ 151, 332(a), and all RF regulations were promulgated under the rulemaking authority granted by the [Communications Act]." Pet. App. 50a; see *1996 RF Order*, 11 F.C.C.R. at 15,185 ¶ 171; *1997 RF Order*, 12 F.C.C.R. at 13,562 ¶ 162. Indeed, the FCC could not properly have relied on NEPA alone as authority for its RF regulations, since NEPA does not vest agencies with any substantive powers beyond those they already possess. See *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 767-770 (2004). Thus, if no other statute authorized the FCC to establish RF standards and to condition cellphone approval on compliance with those standards, NEPA would neither require nor permit the agency to take those steps. The FCC's determination that the Communications Act authorized it to promulgate the RF regulations therefore was essential to the lawfulness of the rules.

Petitioner is also wrong in asserting (Pet. 22) that the FCC's RF rules do "not impose a substantive standard on wireless phones." As petitioner acknowledges, "FCC authorization is required before a particular cell-

phone model may be sold or used in the United States." Pet. 6 (citing 47 C.F.R. 2.803). As part of the equipment-authorization process, an applicant ordinarily must certify that its cell phones will not "cause human exposure to levels of radiofrequency radiation in excess of" the RF limits prescribed by the FCC. 47 C.F.R. 1.1307(b). And while NEPA governed the process by which the FCC considered the likely environmental effects of cell-phone approval, NEPA provided no guidance concerning the particular RF limits the agency should adopt. See, *e.g.*, *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (explaining that NEPA "does not mandate particular results, but simply prescribes the necessary process").

As petitioner emphasizes (Pet. 22-23), the FCC's RF rules do not categorically preclude the agency from approving cell phones with emissions in excess of the regulatory limits. Rather, an applicant who seeks approval to market such phones may prepare an EA that analyzes the environmental consequences of equipment authorization. 47 C.F.R. 1.1307(b), 1.1308. When it adopted the current RF limits for cell phones, however, the Commission anticipated that its RF rules would create "a *de facto* compliance requirement, since most applicants and licensees who are not categorically excluded * * * undertake measures to ensure compliance before submitting an application in order to avoid the preparation of a costly and time-consuming EA." *1996 RF Order*, 11 F.C.C.R. at 15,200. Consistent with that expectation, the FCC has informed us that, when wireless phone manufacturers have sought FCC authorization to sell wireless phones since the RF limits took effect, they have always certified that their phones do not exceed those limits, and have never attempted to obtain ap-

proval to sell non-compliant phones by submitting an EA.

The Commission's RF guidelines thus were not simply procedural in nature, but reflected the agency's *substantive* determination that its standards for wireless phones would "provide a proper balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible." *1997 RF Order*, 12 F.C.C.R. at 13,496 ¶ 2.[*] This Court has repeatedly recognized that when a federal agency's rule reflects a balancing of competing considerations, the federal regulation preempts any state laws that could disrupt the balance struck by the agency. See, *e.g.*, *Buckman*, 531 U.S. at 349-351; *Geier*, 529 U.S. at 874-886. The fact that the FCC's RF rules were also adopted to satisfy NEPA obligations does not alter this longstanding principle of conflict preemption. The Third Circuit properly applied this principle when it concluded that the FCC's RF rules preempted petitioner's lawsuit.

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[*] The House Committee that drafted Section 704(b) of the 1996 Act explained that "[a] high quality national wireless telecommunications network cannot exist if each of its component[s] must meet different RF standards in each community." *House Report* 95. It further stated that it intended for the FCC to adopt "uniform, consistent [RF] requirements, with adequate safeguards of the public health and safety," in order to "speed deployment" of "competitive wireless telecommunications services" and "provide consumers with lower costs" and "a greater range" of service "options." *Id.* at 94. Although the House Committee made those statements to address the specific concern that divergent local RF standards could obstruct the construction of wireless telecommunications facilities such as cell towers and antennas, the same fundamental concern applies to cellular telephone handsets.

In any event, the NEPA issue raised by petitioner does not present any significant question that warrants this Court's review. Petitioner speculates (Pet. 24) that under the Third Circuit's analysis, "agency regulations identifying regulatory actions that will not trigger NEPA requirements could have broad substantive, preemptive effect on state laws regulating the conduct of the private actors whose activities would be considered in a NEPA analysis, if one were required." But petitioner has failed to identify any past or currently pending case presenting that question, and neither the court below nor the Fourth Circuit in *Pinney* discussed the NEPA issue in any detail. Review by this Court would therefore be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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