

## **APPENDIX**

## TABLE OF CONTENTS

Appendix A	Opinion of the United States Court of Appeals for the Ninth Circuit (August 26, 2022) .....	App. 1a
Appendix B	Order of the United States District Court for the Northern District of California on Motion for Summary Judgement (October 29, 2020).....	App. 34a
Appendix C	Constitutional and statutory provisions involved .....	App. 72a

-App. 1a-

---

**APPENDIX A**

---

United States Court of Appeals,  
Ninth Circuit

---

No. 20-17307  
D.C. No. 3:19-cv-05322-  
WHA

---

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.

-App. 2a-

APPLE INC.,  
*Defendant-Appellee,*

and

SAMSUNG ELECTRONIC AMERICA, INC.,  
*Defendant.*

---

Appeal from the United States District Court  
for the Northern District of California  
William Alsup, District Judge, Presiding  
Argued and Submitted December 10, 2021

---

Filed August 26, 2022

---

Before: William A. Fletcher, Johnnie B. Rawlinson, and  
John B. Owens, *Circuit Judges.*

W. FLETCHER, Circuit Judge:

Cell phones emit radiofrequency (“RF”) radiation in the course of their ordinary operation. Pursuant to the Communications Act of 1934 and the Telecommunications Act of 1996 (“twin Communications Acts”), the Federal Communications Commission (“FCC”) has promulgated regulations establishing RF radiation standards for cell phones.

Plaintiffs-appellants (“plaintiffs”) Andrew Cohen and other individuals are users of iPhones manufactured by defendant-appellee Apple Inc. Plaintiffs brought suit

against Apple in the district court, alleging that Apple breached state tort and consumer-fraud laws by misrepresenting and failing to disclose the amount of RF radiation emitted by iPhones. The district court entered summary judgment for Apple, holding that the plaintiffs' state-law claims are preempted by federal law.

We have jurisdiction under 28 U.S.C. § 1291 and affirm. We hold that the district court had subject matter jurisdiction and that plaintiffs' claims are preempted.

## I. Background

We begin with an overview of RF radiation, of the relevant statutory structure, and of FCC regulation of devices that emit RF radiation.

### A. RF Radiation

Like radios and televisions, cell phones rely on radiofrequency electromagnetic waves, otherwise known as RF radiation, to receive signals. Cell phones also emit RF radiation to send signals. RF radiation is a subset of electromagnetic radiation. There are two forms of electromagnetic radiation: ionizing and non-ionizing. Ionizing radiation can be extremely dangerous. Among other things, it can alter a person's DNA. Non-ionizing radiation is much less dangerous and is incapable of damaging DNA. However, high levels of non-ionizing RF radiation can cause biological effects by increasing the temperature of tissues. Federal Communications Commission, *RF Safety FAQ*, <https://www.fcc.gov/engineeringtechnology/electromagnetic-compatibility-division/radio-frequency-safety/faq/rf-safety> [<https://perma.cc/DD6C-3SGM>] (last visited July 18, 2022). For example, RF radiation is used to heat food in microwave ovens. *Id.* Cell phones emit non-ionizing RF radiation, but not at high enough levels to cause thermal

effects. *Id.*

The effects of non-thermal RF radiation on human health are controverted. *Id.* While some studies have described adverse biological effects resulting from exposure to low levels of RF radiation at levels emitted by cell phones, many of these effects could not be replicated in later studies. *Id.* Current FCC regulations for cell phones set RF radiation limits far below the level at which adverse biological effects in laboratory animals have been observed.

### **B. Statutory Background**

Congress created the FCC through the Communications Act of 1934 (“1934 Act”), Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151 *et seq.*). The 1934 Act, as amended, instructed the FCC “to make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges,” for three purposes: (1) national defense, (2) “promoting safety of life and property through the use of wire and radio communications,” and (3) “securing a more effective execution of this policy by centralizing authority” previously granted to multiple agencies and “granting additional authority with respect to interstate and foreign commerce in wire and radio communication.” 47 U.S.C. § 151. The 1934 Act, as amended, declared it a national policy “to encourage the provision of new technologies and services to the public.” *Id.* § 157(a).

The 1934 Act “endowed the [FCC] with comprehensive powers to promote and realize the vast potentialities of radio.” *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 217 (1943). The Act, as amended, authorized 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 [statutory] provisions.” 47 U.S.C. § 303(r); *see also id.* § 154(i) (“The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”). The 1934 Act also authorized the FCC, “as public convenience, interest, or necessity requires,” to “[r]egulate the kind of [radio] 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.* § 303(e).

The 1934 Act contains a general savings clause. It provides: “Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.” *Id.* § 414.

In 1996, Congress passed the Telecommunications Act (“1996 Act”). Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. When the 1996 Act was passed, the FCC had initiated but had not completed a rulemaking proceeding concerning RF radiation. The 1996 Act directed the FCC to “complete action . . . to prescribe and make effective rules regarding the environmental effects of radio frequency emissions” within 180 days after the enactment of the Act. *Id.* § 704(b), 110 Stat. at 152.

The 1996 Act limits the FCC’s authority where its regulations would conflict with state and local land-use regulations. A specific savings clause provides, “[N]othing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.” 47 U.S.C. § 332(c)(7)(A). The Conference Report of the 1996 Act describes § 332(c)(7) as “prevent[ing] FCC]

preemption of local and State land use decisions and preserv[ing] the authority of State and local governments over zoning and land use matters.” H.R. Rep. No. 104-458, at 207–08 (1996) (Conf. Rep.). That is, the limitation placed on the FCC’s preemptive powers by § 332(c)(7) “relate[s] to local land use regulations and [is] not intended to limit or affect the Commission’s general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities.” *Id.* at 209.

The 1996 Act also contains a general savings clause. It 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.” 1996 Act § 601(c)(1), 110 Stat. at 143. The savings clause is not codified in the United States Code, but is included as part of the notes to 47 U.S.C. § 152.

The Hobbs Act governs judicial review of FCC final orders. Under the Hobbs Act, federal courts of appeals (except the Federal Circuit) have “exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of,” *inter alia*, “all final orders of the Federal Communications Commission made reviewable by [47 U.S.C. § 402(a)].” 28 U.S.C. § 2342; *see also* 47 U.S.C. § 402(a) (providing judicial review of the FCC’s orders and decisions, including “[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the [FCC]”).

FCC regulatory actions are subject to the National Environmental Policy Act (“NEPA”). For “[f]ederal actions significantly affecting the quality of the human environment,” NEPA requires federal agencies to include “a detailed statement” regarding the “environmental



impact of the proposed action.” 42 U.S.C. § 4332(2)(C)(i). NEPA “does not mandate particular results” but “imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.” *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 756–57 (2004) (first quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); and then citing *id.* at 349–50). Because the licensing of equipment that emits RF radiation may significantly affect the environment, NEPA obligates the FCC in such cases to consider the environmental impact of its proposed actions with respect to licensing.

### **C. FCC Regulation of Devices that Emit RF Radiation**

In 1979, the FCC issued a notice of inquiry (“1979 Notice of Inquiry”) to gather information relevant to “its regulatory responsibility to promote communications by radio in light of the increased concern about the biological effects of radio frequency radiation.” *In re Responsibility of the Federal Communications Commission to Consider Biological Effects of Radio Frequency Radiation When Authorizing the Use of Radio Frequency Devices*, 72 F.C.C.2d 482, 482, ¶ 1 (June 15, 1979).

The 1979 Notice of Inquiry was based on the FCC’s responsibilities under two statutes. First, the 1934 Act directs the FCC “to promote the use of radio communications service . . . as the public convenience, interest, or necessity requires,” and imposes on the FCC the “statutory obligation to make available, so far as possible a rapid efficient communication service at reasonable charges and to prevent interference between stations.” *Id.* at 487–88, 489, ¶¶ 12, 16 (internal ellipses and quotation marks omitted). The FCC noted that, in

fulfilling its statutory mandate under the 1934 Act, “[a] balance must be achieved between serving the public interest by fulfilling its needs for communications services and adequately protecting the populace against potentially adverse biological effects that may be attributable to excessive RF radiation.” *Id.* at 489, ¶ 17. Second, the FCC was required to comply with NEPA. The FCC noted its “explicit responsibilities under NEPA.” *Id.* at 488, ¶ 13.

In 1982, pursuant to its 1979 Notice of Inquiry, the FCC issued a notice of proposed rulemaking (“1982 NPRM”) regarding the biological effects of RF radiation. *In re* Responsibility of the Federal Communications Commission to Consider Biological Effects of Radiofrequency Radiation When Authorizing the Use of Radiofrequency Devices, 89 F.C.C.2d 214 (Feb. 18, 1982). The 1982 NPRM proposed expanding the definition of “major actions” that would subject RF radiation-emitting devices to FCC licensing requirements. *Id.* at 215, ¶ 2. The FCC identified the “legal basis” for its 1982 NPRM as follows:

The action proposed is based on the obligations imposed on the [FCC] by the National Environmental Policy Act of 1969 and is in furtherance of §§ 4(i) and 303(r) of the Communications Act of 1934, as amended, which permits the [FCC] to make rules and regulations not inconsistent with other existing laws, as may be necessary in the execution of its functions, with the additional view of securing the public welfare.

*Id.* pt. VI(3), at 255 (citation omitted). The 1982 NPRM acknowledged that NEPA required the FCC “to consider whether the equipment and operations it authorizes will ‘significantly affect the quality of the human

environment.” *Id.* at 251, ¶ 183 (quoting 42 U.S.C. § 4332(2)(c)).

In 1985, the FCC issued an order (“1985 RF Order”) amending its “rules implementing” NEPA. *In re Responsibility of the Federal Communications Commission to Consider Biological Effects of Radiofrequency Radiation When Authorizing the Use of Radiofrequency Devices*, 100 F.C.C.2d 543, 543, ¶ 1 (Mar. 14, 1985). The 1985 RF Order adopted the 1982 *Radio Frequency Protection Guides* drafted by the American National Standards Institute (“ANSI”). *Id.*; *see id.* at 547, ¶ 9. In adopting the ANSI guidelines as a standard, the FCC noted: “Although we have neither the expertise nor the jurisdiction to *develop* our own radiation exposure guidelines, we believe . . . that the [FCC] does have the expertise and authority to *recognize* technically sound standards promulgated by reputable and competent organizations such as ANSI.” *Id.* at 551, ¶ 25 (emphasis in the original).

The 1985 RF Order used the ANSI standard as a “triggering mechanism for environmental assessment.” *Id.* at 560, ¶ 51. Only applications for FCC authorization of radio and broadcast facilities not in compliance with the ANSI standard would require a thorough environmental impact analysis, including the submission of a narrative environmental statement. *Id.* at 560–61, ¶¶ 51–54. The 1985 RF Order excluded from its requirements any “relatively low-powered communications systems” such as mobile devices, which had a low likelihood of causing exposure exceeding the ANSI standard. *In re Responsibility of the Federal Communications Commission to Consider Biological Effects of Radiofrequency Radiation When Authorizing the Use of Radiofrequency Devices*, 2 FCC Rcd. 2064, 2065, ¶¶ 14–15

(Apr. 9, 1987); *see* 1985 RF Order, 100 F.C.C.2d at 561, ¶ 54. The ANSI standard, which the FCC adopted through its 1985 RF Order, explicitly excluded “low power devices such as hand-held, mobile, and marine radio transceivers” on the ground that while “[t]hese devices may emit localized fields exceeding the protection guides, [they] will result in a significantly lower rate of energy absorption than allowed for the whole body average.” ANSI, American National Standard Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz 10 (1982).

The FCC identified the “legal basis” for its 1985 RF Order as follows:

This action is based on the obligations imposed on the [FCC] by NEPA, and is in furtherance of §§ 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended. These provisions permit the [FCC] to make rules and regulations not inconsistent with other existing laws, “as may be necessary in the execution of its functions,” and “to carry out the provisions of” the Communications Act.

1985 RF Order, 100 F.C.C.2d at 565 (citations omitted) (first quoting 47 U.S.C. § 154(i); and then quoting 47 U.S.C. § 303(r)). The FCC identified two objectives in its 1985 RF Order: (1) “to clarify its policy with regard to potential hazards from RF radiation emitted by transmitting facilities that [it] license[s] or authorize[s];” and (2) “to comply with our legal obligations under NEPA.” *Id.* at 564.

In 1992, ANSI updated its guidelines, narrowing the scope of the exclusion of low-powered devices. In 1993, the FCC issued a notice of proposed rulemaking (“1993 NPRM”) to adopt ANSI’s updated 1992 guidelines, noting

that the narrower exclusion for low-powered devices was more protective than the broader exclusion in ANSI's 1982 guidelines. *In re* Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 8 FCC Rcd. 2,849, 2,849, 2,851, ¶¶ 1, 14 (Apr. 8, 1993). The FCC identified the "legal basis" for its 1993 NPRM as follows:

This action is a result of the [FCC's] legal obligations under the NEPA to provide the means by which to evaluate [FCC] actions with respect to environmental significance, and it is in furtherance of Sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended.

*Id.* at 2,854, ¶ 31(C) (citations omitted).

After issuance of the 1993 NPRM and while the FCC's rulemaking was pending, Congress enacted the Telecommunication Act of 1996. The 1996 Act directed the FCC to "complete action . . . to prescribe and make effective rules regarding the environmental effects of radio frequency emissions" within 180 days after the effective date of the Act. 1996 Act § 704(b), 110 Stat. at 152.

In 1996, the FCC issued an order ("1996 RF Order") adopting new RF radiation standards applicable to low-powered portable devices, including cell phones. *In re* Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 11 FCC Rcd. 15,123 (Aug. 1, 1996). The 1996 RF Order noted that ANSI had adopted updated RF radiation guidelines in 1992, and that the updated ANSI standard was "more restrictive in the amount of environmental RF exposure permitted." *Id.* at 15,126, ¶ 8. The more protective 1992 ANSI standard provided two tiers of exposure criteria: (1) controlled environments, in which those exposed to RF radiation are

aware of their potential for exposure (for example, as a condition of their employment), and (2) uncontrolled environments, in which exposed individuals have no knowledge or expectation that their RF radiation exposure may exceed permitted levels. *Id.* at 15,126, ¶ 8, 15,136, ¶ 35. The updated standard mandated a specific absorption rate (“SAR”) limit of 0.4 W/kg as averaged over the whole body and 8 W/kg for peak localized exposure (i.e., for a specific area of the body) for cell phones in controlled environments. *Id.* at 15,140, ¶ 46. It mandated an SAR limit of 0.08 W/kg for whole-body average exposure and 1.6 W/kg for peak localized exposure for cell phones in uncontrolled environments. *Id.*

The 1996 RF Order adopted the distinction drawn by the 1992 ANSI guidelines between controlled/uncontrolled environments. *Id.* at 15,139, ¶ 42. It also adopted the ANSI guidelines’ requirements for low-power devices whose radiating structure is in direct contact with or within 20 centimeters of the human body under conditions of normal use (e.g., cell phones). *Id.* at 15,146–47, ¶¶ 62–63. Because most low-power, portable devices were intended for use by consumers rather than solely in the workplace, the FCC mandated a 1.6 W/kg maximum RF exposure for cell phones, and routine SAR evaluation “either by laboratory measurement techniques or by computational modeling, prior to equipment authorization or use.” *Id.* at 15,147, ¶ 65.

The FCC’s 1996 RF Order satisfied FCC’s obligations under § 704(b) of the 1996 Act, which directed the FCC to “prescribe and make effective rules regarding the environmental effects of radio frequency emissions” within 180 days. 1996 Act § 704(b), 110 Stat. at 152. The FCC noted that the updated RF radiation guidelines “will protect the public and workers from exposure to

potentially harmful RF fields.” 1996 RF Order, 11 FCC Rcd. at 15,124, ¶ 1. The FCC also noted that the guidelines “will be of benefit both to the public and to the telecommunications industry [because t]hey will provide assurance that recent scientific knowledge is taken into account regarding future decisions on approval of FCC-authorized facilities and equipment.” *Id.* at 15,184, ¶ 169. The FCC identified provisions of the 1934 Act, as amended, as its statutory authority to issue the 1996 RF Order. *Id.* at 15,185, ¶ 171.

The regulatory scheme established by the FCC’s 1996 RF Order remains largely intact today. Under 47 C.F.R. § 2.1093(d)(1), “[a]pplications for equipment authorization of portable RF sources subject to routine environmental evaluation must contain a statement confirming compliance with the limits specified in § 1.1310 . . . .” In turn, 47 C.F.R. § 1.1310(c) provides: “The SAR limits for general population/uncontrolled exposure are 0.08 W/kg, as averaged over the whole body, and a peak spatial-average SAR of 1.6 W/kg, averaged over any 1 gram of tissue.” If the FCC determines that a device, such as the iPhone, complies with its RF radiation guidelines (tested at maximum power and under more extreme conditions than normal use) and other technical standards, the agency issues a certification authorizing sale of the device. 47 C.F.R. § 2.907. If the device “would cause human exposure to levels of RF radiation in excess of the limits in § 1.1310,” the applicant for equipment authorization must prepare an environmental assessment. *Id.* § 1.1307(b)(1)(i)(C). The proposed device can still be approved for sale if the FCC determines that it will not have a significant impact on the human environment. *Id.* § 1.1308(d). In practice, however, the FCC sees the RF radiation limits as a “de facto compliance requirement.” 1996 RF Order, 11 FCC Rcd. at 15226. According to an

amicus brief filed by the United States before the Supreme Court in 2011, cell phone manufacturers “have never attempted to obtain approval to sell non-compliant phones by submitting an [environmental assessment]” since the promulgation of the FCC’s RF radiation rules. Brief for the United States as Amicus Curiae at 19–20, *Farina v. Nokia, Inc.*, 565 U.S. 928 (2011) (No. 10-1064), 2011 WL 3799082, at \*19–20.

In 2013, the FCC issued a notice of inquiry (“2013 Notice of Inquiry”) soliciting public comments about whether the 1996 RF exposure limits should be reassessed. *In re* Reassessment of Federal Communications Commission Radiofrequency Exposure Limits and Policies, 28 FCC Rcd. 3,498, 3,498, ¶ 1 (Mar. 29, 2013). The 2013 Notice of Inquiry affirmed the FCC’s previous view that it must strike a balance between public safety and the public’s access to new telecommunications services. The FCC explained:

The [FCC] has a responsibility to provide a proper balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible. The intent of our exposure limits is to provide a cap that both protects the public based on scientific consensus and allows for efficient and practical implementation of wireless services. The present [FCC] exposure limit is a “bright-line rule.” That is, so long as exposure levels are below a specified limit value, there is no requirement to further reduce exposure. The limit is readily justified when it is based on known adverse health effects having



a well-defined threshold, and the limit includes prudent additional safety factors (e.g., setting the limit significantly below the threshold where known adverse health effects may begin to occur). Our current RF exposure guidelines are an example of such regulation, including a significant “safety” factor, whereby the exposure limits are set at a level on the order of 50 times below the level at which adverse biological effects have been observed in laboratory animals as a result of tissue heating resulting from RF exposure.

*Id.* at 3,582, ¶ 236 (footnote omitted) (internal quotation marks omitted).

In 2019, the FCC issued an order and resolution of notice of inquiry (“2019 RF Order”) that left intact its 1996 RF radiation guidelines, including for cell phones. *In re Proposed Changes in the Commission’s Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields*, 34 FCC Rcd. 11,687, 11,688, ¶ 2 (Dec. 4, 2019); *id.* at 11,696, ¶ 14. In *Environmental Health Trust v. FCC*, 9 F.4th 893 (D.C. Cir. 2021), the D.C. Circuit granted in part a petition challenging the 2019 RF Order and remanded to the FCC for further proceedings. The D.C. Circuit held that the FCC “failed to provide a reasoned explanation for its determination that its guidelines adequately protect against the harmful effects of exposure to radiofrequency radiation unrelated to cancer.” *Id.* at 900.

#### **D. Factual and Procedural Background**

Plaintiffs-appellants Andrew Cohen and other individuals are iPhone users. Defendant-appellee Apple, Inc., is a California corporation. Apple designs, manufactures, and sells consumer electronic products, including the iPhone.

In August 2019, the *Chicago Tribune* reported results of its independent investigation of RF radiation levels of popular cell phones sold in the United States. Sam Roe, *We Tested Popular Cellphones for Radiofrequency Radiation. Now the FCC Is Investigating.*, Chi. Tribune, Aug. 21, 2019, <https://www.chicagotribune.com/investigations/ct-cell-phone-radiation-testing-20190821-72qgu4nzkfda5kyuhteieh4da-story.html>. According to the report, RF radiation exposure from Apple's iPhone 7 "measured over the legal safety limit and more than double" what Apple found from its own testing. *Id.*

Two days after publication of the *Tribune's* report, plaintiffs filed a putative class action in the district court seeking to represent all iPhone users in the United States. Within a few weeks, a nearly identical complaint was filed in the district court on behalf of different named plaintiffs. The district court consolidated the two actions, and plaintiffs filed a consolidated amended class action complaint.

The complaint alleged that RF radiation emitted by iPhones regularly exceeded the federal exposure limit. The complaint relied heavily on the *Tribune's* testing of the RF radiation emitted by iPhones, citing the *Tribune's* report of data showing that RF radiation exposure to iPhone 7 models averaged 2.59 W/kg and 3.225 W/kg in two tests, both of which exceeded the federal exposure limit of 1.6 W/kg. Plaintiffs' counsel also conducted their own testing, using the same lab the *Tribune* had used. They tested additional iPhone models, and they tested at a zero-millimeter distance to replicate use of the iPhone against the skin. According to their testing, RF radiation emitted by iPhone 7 models reached 3.6 W/kg at a 5-millimeter separation distance. Based on data obtained

from this testing, the complaint alleged that Apple engaged in “deceptive and misleading” marketing by advertising iPhones as safe when used against the body (for example, by advertising the iPhone as “the Internet in your pocket” or showing people holding iPhones in their bare hands in commercials).

The *Tribune*’s story prompted the FCC to conduct further testing of iPhones. In December 2019, the FCC published the results of its own testing. The FCC’s further testing measured RF radiation exposure from iPhones as well within the safety limits. The testing revealed no evidence of violation of the FCC’s technical standards. Plaintiffs’ complaint alleged eight claims against Apple under state tort and consumer-fraud laws: (1) Apple intentionally misrepresented the safety of iPhones despite knowing that their RF radiation exceeded federal limits; (2) Apple failed to exercise reasonable care in not warning plaintiffs about unsafe RF radiation emitted by iPhones; (3) Apple violated California’s Unfair Competition Law by failing to disclose that iPhones emitted RF radiation at unsafe levels or levels exceeding the federal limit; (4) Apple violated California’s Consumers Legal Remedies Act by failing to disclose that iPhones emitted RF radiation at unsafe levels or levels exceeding the federal limit; (5) Apple violated California’s false advertising law by failing to disclose that iPhones emitted RF radiation at unsafe levels or levels exceeding the federal limit; (6) Apple violated various states’ consumer protection acts due to its dissemination of deceptive and misleading advertising materials; (7) Apple was unjustly enriched because plaintiffs did not receive products as marketed by Apple; and (8) Apple breached its implied warranty that iPhones were safe for ordinary use. The complaint sought class certification, a finding of liability against Apple, the establishment of a medical monitoring

fund under claims (1) and (2), money damages, appropriate injunctive relief, and attorney's fees.

On January 2, 2020, Apple moved to dismiss plaintiffs' complaint. Apple argued, *inter alia*, that plaintiffs lacked Article III standing and, assuming standing, that federal law preempted plaintiffs' claims. Following a hearing, the district court found that Apple had presented matters outside of the pleadings. The district court converted Apple's motion to dismiss into a motion for summary judgment.

The district court invited the FCC to participate as *amicus curiae*. The FCC filed a statement of interest on April 13, 2020, in which it made three main arguments. First, the FCC argued that "[t]o the extent that plaintiffs' claims effectively challenge the adequacy or reasonableness of FCC testing procedures for assessing compliance with RF limits, the [district court] lacks jurisdiction" under 28 U.S.C. § 2342(1). Second, the FCC argued that "plaintiffs' claims are preempted to the extent they suggest that RF emissions from cell phones certified by the FCC for sale in the United States are unsafe." The FCC argued that the FCC's regulations reflected congressional expectation that "the FCC . . . use its expert judgment to balance different policy objectives," including "between 'adequate safeguards of the public health' and 'speed[y] deployment of competitive wireless telecommunications services.'" The FCC contended that litigation such as plaintiffs' "is especially disruptive to the FCC's certification program because plaintiffs seek relief based on third-party testing that may have inaccurately measured the RF emissions of Apple's iPhones." Third, the FCC argued that the district court had no jurisdiction over plaintiffs' state-law claims that Apple failed to disclose that iPhones emitted RF radiation at unsafe

levels or levels exceeding the FCC's RF limits. Even if the district court had jurisdiction, the FCC argued, federal law preempted those claims.

In its statement of interest, the FCC asserted that Apple's iPhone (including the iPhone 7, the iPhone X, and the iPhone XS) complied with federal RF radiation guidelines. The FCC stated that it had tested each iPhone model for the specific bands of operations investigated by the *Chicago Tribune*, and had found that the tested phones produced maximum measured exposure of 0.946 W/kg for the iPhone 7, 0.799 W/kg for the iPhone X, and 1.35 W/kg for the iPhone XS—all well under the FCC's permitted maximum of 1.6 W/kg.

In October 2020, the district court entered summary judgment for Apple. The district court held that the FCC promulgated substantive RF radiation regulations under the 1934 Act rather than under NEPA. The district court found that the 1996 Act's general savings clause, 47 U.S.C. § 253, and § 601(c) of the 1996 Act did not change the normal operation of conflict-preemption analysis or limit the FCC's statutory authority to regulate RF radiation. The district court concluded that the FCC's regulation of RF radiation, as part of its equipment-authorization regime, preempted plaintiffs' claims. In reaching this conclusion, the district court relied on *Farina v. Nokia, Inc.*, 625 F.3d 97, 133–34 (3d Cir. 2010), in which the Third Circuit held that the FCC's regulations preempted similar claims under state law.

Plaintiffs timely appealed. On appeal, they concede that RF radiation emissions from Apple's iPhone are at levels below the maximum permitted by FCC regulations. Their primary arguments on appeal are that (1) neither the 1934 Act, 1996 Act, nor NEPA gives the FCC authority to preempt state law concerning cell-phone

radiofrequency radiation, and (2) the FCC’s RF radiation regulations do not preempt state-law causes of action that are premised on maximum levels of RF radiation below the maximum level set by the FCC.

## **II. Standard of Review**

We review a district court’s grant of summary judgment *de novo*. See *Zetwick v. County of Yolo*, 850 F.3d 436, 440 (9th Cir. 2017). “Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact.” *Id.* (citation omitted).

## **III. Analysis**

### **A. Subject Matter Jurisdiction Under the Hobbs Act**

Under the Hobbs Act, federal courts of appeals (except the Federal Circuit) have “exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the [FCC] made reviewable by [47 U.S.C. § 402(a)].” 28 U.S.C. § 2342(1); *see also* 47 U.S.C. § 402(a) (providing judicial review of FCC’s orders and decisions, including “[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the [FCC]”). In addition to direct challenges to agency orders, the Hobbs Act grants exclusive jurisdiction to courts of appeals over suits against private parties that would require the court to enjoin, set aside, suspend, or determine the validity of a final FCC order. *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 399–400 (9th Cir. 1996); *see also Pub. Watchdogs v. S. Cal. Edison Co.*, 984 F.3d 744, 765 (9th Cir. 2020) (Nuclear Regulatory Commission order).

Apple argues that the Hobbs Act broadly grants exclusive jurisdiction to courts of appeals over private suits that implicate the substance of agency

determinations. Citing two of our cases, Apple argues that “the Hobbs Act divests district courts of jurisdiction to pass on *any* issue that would require them to decide whether they ‘agreed’ or ‘disagreed’ with a determination made in an FCC final order,” and that the district court therefore did not have jurisdiction over this case.

We disagree. Neither case cited by Apple goes so far. In *Wilson*, 87 F.3d at 395, plaintiffs brought suit in district court against California television stations to recover payments for campaign advertisements that allegedly exceeded limits imposed by § 315(b) of the 1934 Act. The FCC had issued a declaratory ruling asserting its exclusive authority to adjudicate and enforce all claims under § 315(b). *Id.* We held that the Hobbs Act barred jurisdiction because the plaintiffs, in effect, had asked the district court to set aside determine the validity of the FCC’s declaratory ruling. *Id.* at 400. Similarly, in *Public Watchdogs*, 984 F.3d at 765, the plaintiff brought state-law claims against utility companies, alleging mishandling of nuclear waste, and arguing that the Nuclear Regulatory Commission (“NRC”) had improperly granted a licensing amendment. We held that the Hobbs Act barred the plaintiff’s “veiled challenge” to the NRC license grant in the district court. *Id.* In both cases, plaintiffs’ lawsuits in effect would have required the district court to set aside or determine the validity of an agency final order.

By contrast, plaintiffs in this case do not challenge the validity of any of the FCC’s final orders, either directly or indirectly. The issue in this case is whether the FCC’s concededly valid orders have preemptive effect. A holding that the FCC orders do, or do not, preempt plaintiffs’ state-law claims has no effect on their validity.

We therefore hold that the Hobbs Act does not deprive the district court of jurisdiction, and we reach the merits of the appeal.

## **B. Preemption**

Plaintiffs argue on two grounds that their state-law claims are not preempted. First, they argue that the FCC promulgated its RF Orders under NEPA. They argue that because NEPA is a purely procedural statute with no preemptive force, regulations promulgated under NEPA do not preempt their state-law causes of action. Second, they argue that even if the FCC's RF Orders were promulgated under either, or both, of the twin Communications Acts, the savings clauses in those Acts preserve their state-law causes of action.

We disagree with both grounds.

### **1. NEPA**

We agree with plaintiffs that NEPA is a purely procedural statute and that it has no preemptive force. However, we do not agree with plaintiffs that the FCC's RF Orders were promulgated under NEPA.

The twin Communications Acts grant to the FCC broad regulatory powers over wireless communication devices. The 1934 Act authorizes the FCC to: (1) "Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions," 47 U.S.C. § 303(e); (2) "Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Communications Acts]," *id.* § 303(r); and (3) "[P]erform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as



may be necessary in the execution of its functions,” *id.* § 154(i).

The 1996 Act directed the FCC to complete rulemaking for RF radiation that had already been initiated under the 1934 Act. Section 704(b) of the 1996 Act provides: “Within 180 days after the enactment of this Act, the [FCC] shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.” 1996 Act § 704(b), 110 Stat. at 152. Section 704(b) does not itself grant rulemaking authority. Rather, it requires the FCC to complete its preexisting rulemaking proceeding initiated in the 1993 NPRM under the authority of the 1934 Act. *See Farina*, 625 F.3d at 128 & n.28.

The FCC has been consistent in stating that its authority to regulate RF radiation-emitting communication devices comes from the 1934 Act. The FCC wrote in the 1982 NPRM that led to its 1985 RF Order, “The action proposed is . . . in furtherance of §§ 4(i) and 303(r) of the Communications Act of 1934 . . . , which permits the [FCC] to make rules and regulations . . . as may be necessary in the execution of its functions.” 1982 NPRM, 89 F.C.C.2d at 255. It wrote in connection with the 1985 RF Order itself, “This action is . . . in furtherance of §§ 4(i), 4(j), and 303(r) of the Communications Act of 1934[.]” 1985 RF Order, 100 F.C.C.2d at 565. It wrote in the 1993 NPRM that led to its 1996 RF Order, “This action is . . . in furtherance of Sections 4(i), 4(j), and 303(r) of the Communications Act of 1934[.]” 1993 NPRM, 8 FCC Rcd. at 2854. It wrote in its 2019 RF Order, “The [FCC’s] authority to adopt and enforce RF exposure limits pursuant to the Communications Act . . . is well established.” 2019 RF Order, 34 FCC Rcd. at 11,689 n.5.

NEPA, by contrast, grants no affirmative regulatory powers over wireless communications. It is a procedural statute designed to ensure that federal actions, including regulatory actions, are reviewed for their environmental consequences. *See* 42 U.S.C. § 4332. The FCC’s 1985, 1996 and 2019 RF Orders were not authorized by NEPA. Rather, they were constrained by NEPA. Several of the FCC’s statements reflect this understanding of NEPA. For example, the FCC wrote in its 1985 RF Order, “This action is based on the obligations imposed on the [FCC] by NEPA[.]” 1985 RF Order, 100 F.C.C.2d at 565. It wrote in its 1996 RF Order that it issued the order “to fulfill [its] responsibilities under NEPA.” 1996 RF Order, 11 FCC Rcd. at 15,183. It wrote in its 2019 RF Order, “The Commission’s authority to adopt and enforce RF exposure limits . . . consistent with NEPA is well established.” 2019 RF Order, 34 FCC Rcd. at 11,689 n.5.

We therefore reject plaintiffs’ argument that the FCC’s RF Orders were promulgated under NEPA.

## **2. The Twin Communications Acts**

Alternatively, plaintiffs argue that neither the 1934 Act nor the 1996 Act preempts their state-law claims. They make essentially two arguments. First, they argue that the 1934 Act does not provide authority to the FCC to promulgate regulations that preempt their state-law claims. Second, they argue that reading the 1934 and 1996 Acts together “makes clear that Congress did not authorize the FCC’s regulations to displace state law here.” We take each argument in turn.

### **a. Authority under the 1934 Act**

Plaintiffs argue that the 1934 Act does not authorize preemption by regulations promulgated under the Act,

and that its state-law causes of action are not preempted by the FCC's orders. We disagree.

“The Supremacy Clause provides the constitutional foundation for federal authority to preempt state law.” *Beaver v. Tarsadia Hotels*, 816 F.3d 1170, 1178 (9th Cir. 2016) (citing U.S. Const. art. VI, cl. 2; *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 630 (2012)). “Preemption of state law, by operation of the Supremacy Clause, can occur in one of several ways: express, field, or conflict preemption.” *Id.* (citing *Kurns*, 565 U.S. at 630–31). Absent express congressional preemption, federal law preempts state law “when the scope of a [federal] statute indicates that Congress intended federal law to occupy a field exclusively,” *Kurns*, 565 U.S. at 630 (alteration in original) (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)), or where “the state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’” *Beaver*, 816 F.3d at 1179 (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000)). Our “preemption analysis is driven by the presumption that ‘the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’” *Id.* (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).

A federal statute need not specify its preemptive force in order for the statute to have such force. The Supreme Court has stated, plainly and repeatedly: “A pre-emptive regulation’s force does not depend on express congressional authorization to displace state law[.]” *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 154 (1982); *see also City of New York v. FCC*, 486 U.S. 57, 64 (1988). While plaintiffs protest that “Apple dusts off two decades-old cases” (both *de la Cuesta* and *City of New*

*York* were decided in the 1980s), the Supreme Court has never overruled either case, and they remain good law. We have cited them as providing the standard governing agency preemption. See *MetroPCS Cal., LLC v. Picker*, 970 F.3d 1106, 1117 (9th Cir. 2020); *Barrientos v. 1801–1825 Morton LLC*, 583 F.3d 1197, 1208 (9th Cir. 2009) (specifically citing *de la Cuesta*, 458 U.S. at 154, for the proposition that “[a] pre-emptive regulation’s force does not depend on express congressional authorization to displace state law”). We therefore conclude that Congress need not expressly delegate preemptive authority to the FCC for its regulations to preempt state law.

“Along with Congress, ‘a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.’” *Barrientos*, 583 F.3d at 1208 (quoting *City of New York*, 486 U.S. at 63–64). First, for a regulation to have preemptive force, it must fall “within the scope of the [federal agency’s] delegated authority,” *id.* at 583 F.3d at 1208 (alteration in original) (quoting *de la Cuesta*, 458 U.S. at 154), or, in other words, it must be “statutorily authorized,” *City of New York*, 486 U.S. at 64. Second, the agency must have “meant to pre-empt” state law. *MetroPCS*, 970 F.3d at 1117 (quoting *Barrientos*, 583 F.3d at 1208). “Where, as here, we consider whether a federal agency has preempted state regulation, we do not focus on Congress’s ‘intent to supersede state law’ but instead ask ‘whether [the federal agency] meant to pre-empt [the state law].’” *Id.* (quoting *Barrientos*, 583 F.3d at 1208).

Importantly, the intent to pre-empt need not be express. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884–85 (2000). Under the doctrine of implied conflict preemption, “[t]he statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts

with such regulations or frustrates the purposes thereof.” *City of New York*, 486 U.S. at 63. In other words, it must be either “impossible to comply with both state and federal requirements,” or the state law must stand “as an obstacle to the accomplishment and execution of the full purposes and objectives of [the federal agency].” *MetroPCS*, 970 F.3d at 1118. State law may pose such an obstacle when it disturbs a balance the federal regulation has struck between “conflicting policies that were committed to the agency’s care by the statute.” *Barrientos*, 583 F.3d at 1208 (alteration in original) (quoting *City of New York*, 486 U.S. at 64). The balance struck by the federal agency should not be disturbed “unless it appears from the statute or its legislative history that [the balance] is not one that Congress would have sanctioned.” *City of New York*, 486 U.S. at 64 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)).

As an initial matter, the plaintiffs argue that because matters of health and safety, such as the biological effects of cell phone RF radiation, fall within states’ historic police powers, the presumption against preemption applies in this case. We assume, without deciding, that the presumption applies. Nevertheless, the presumption is overcome because the conflict between the FCC’s RF radiation regulations and plaintiffs’ state law claims poses a sufficient obstacle to the full accomplishment of the FCC’s objectives. *See Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000).

As discussed above, the FCC’s RF radiation regulations were promulgated pursuant to §§ 4(i), 4(j) and 303(r) of the 1934 Act. The regulations thus fall within the scope of the agency’s delegated authority under the 1934 Act. The 1934 Act grants broad authority to the FCC to

promulgate regulations that strike a balance among overlapping and potentially conflicting policies. These policies include the promotion of “a rapid, efficient, [n]ation-wide, and worldwide . . . communication service,” the promotion of “safety of life and property through the use of wire and radio communications,” “national defense,” and the encouragement of “provision of new technologies and services to the public.” 47 U.S.C. §§ 151, 157(a). The FCC’s RF radiation regulations, as applied to cell phones, were intended to strike such a balance.

In its 1979 Notice of Inquiry, the FCC noted that, in fulfilling its statutory mandate under the 1934 Act, “[a] balance must be achieved between serving the public interest by fulfilling its needs for communications services and adequately protecting the populace against potentially adverse biological effects that may be attributable to excessive RF radiation.” 1979 Notice of Inquiry, 72 F.C.C.2d at 489, ¶ 17. The 2013 Notice of Inquiry affirmed the FCC’s previous view that it must strike a balance between public safety and the public’s access to new telecommunications services. *See* 2013 Notice of Inquiry, 28 FCC Rcd. at 3,582, ¶ 236.

Plaintiffs’ state-law claims would disrupt the balance struck by the FCC. In an analogous case, the Third Circuit has explained:

The reason why state law conflicts with federal law in these balancing situations is plain. When Congress charges an agency with balancing competing objectives, it intends the agency to use its reasoned judgment to weigh the relevant considerations and determine how best to prioritize between these objectives. Allowing state law to impose a different standard permits a rebalancing of those considerations. A state-law

standard that is more protective of one objective may result in a standard that is less protective of others.

*Farina*, 625 F.3d at 123. The same reasoning applies in this case. The FCC's adoption of specific RF radiation limits for cell phones is the result of the agency's striking a balance between the conflicting policies of public safety and the public's access to telecommunications technologies.

The savings clause in § 414 of the 1934 Act does not help plaintiffs. We quoted it above. For the convenience of the reader, here it is again: "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414.

On appeal, plaintiffs do not press the allegations in their complaint that Apple's iPhones emit RF radiation at levels above the maximum permitted by FCC regulations. For purposes of appeal, they concede that Apple's iPhones comply with the FCC's RF radiation regulations. They write, "On appeal, [plaintiffs] pursue only their claims that Apple devices are unsafe 'in spite of' compliance with federal standards and that Apple fails to disclose their dangers." Plaintiffs' concession that Apple's iPhone complies with emission levels prescribed by the FCC is fatal to their appeal.

If plaintiffs were to press the allegations in the complaint that Apple's iPhones exceeded the maximum RF radiation levels permitted by the FCC, and were to argue that the state-law remedies they seek were premised on Apple's violations of the FCC's RF radiation standards, this would be a different appeal, and the savings clause might have some force. *Cf. Stengel v.*

*Medtronic Inc.*, 704 F.3d 1224, 1233 (9th Cir. 2013) (en banc). However, this is not their argument. Plaintiffs' argument on appeal is that state-law causes of action premised on RF radiation emission standards more protective than those prescribed by the FCC are not preempted.

In *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), the Supreme Court wrote that it “has repeatedly ‘decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.’” *Id.* at 870 (quoting *United States v. Locke*, 529 U.S. 89, 106–107 (2000)). Consistently with *Geier*, we have held that § 414, the savings clause of the 1934 Act, preserves only those rights not inconsistent with the statutory requirements. *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1010 (9th Cir. 2010). Section 414 cannot be read expansively to “abrogate the very federal regulation of mobile telephone providers that the [1934 Act] intended to create.” *Id.* at 1011 (quoting *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 987 (7th Cir. 2000)). “Said otherwise, we infer that Congress did not intend the saving provisions in a federal law to be interpreted in a way that causes the federal law ‘to defeat its own objectives,’” including those implemented by federal regulations. *In re Volkswagen “Clean Diesel” Mktg., Sales Pracs., & Prods. Liab. Litig.*, 959 F.3d 1201, 1214 (9th Cir. 2020) (quoting *Geier*, 529 U.S. at 872).

In *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998), the Supreme Court refused to construe § 414 as saving state-law tort and breach of contract claims from preemption under the 1934 Act's filed rate doctrine. The Court wrote:

A claim for services that . . . directly conflict with the tariff—the basis for both the tort and contract



claims here—cannot be “saved” under § 414. “Th[e saving] clause . . . cannot in reason be construed as continuing in [customers] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.”

*Id.* at 227–28 (alteration and omission in original) (quoting *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)).

So too here. The 1934 Act authorizes the FCC to balance the overlapping and potentially competing factors in setting safe and uniform limits for RF radiation from cell phones. Allowing state tort law to prescribe lower levels of RF radiation than the levels prescribed by the FCC would interfere with the nationwide uniformity of regulation that is the aim of the Act, and would render the FCC’s statutorily mandated balancing essentially meaningless. If state law were allowed to prescribe such levels, it would “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Beaver*, 816 F.3d at 1179 (quoting *Crosby*, 530 U.S. at 372–73).

We therefore hold that the FCC’s regulations under the 1934 Act, setting upper limits on the levels of permitted RF radiation, preempt state laws that impose liability premised on levels of radiation below the limits set by the FCC.

**b. Reading the 1934 and the 1996 Acts Together**

Plaintiffs argue that the preemptive scope of the FCC’s RF radiation regulations cannot be determined solely by consulting the 1934 Act. They argue that the 1934 and 1996 Acts must be read together. They write in their brief that it was in the 1996 Act “that Congress carefully delineated the limited scope of the FCC’s

preemptive authority.” We disagree. We hold that the scope of preemption of the FCC’s RF radiation regulations is controlled by the 1934 Act, and that the preemption provisions of the 1996 Act are irrelevant.

As discussed in detail above, the FCC’s RF radiation regulations were promulgated under §§ 4(i), 4(j), and 303(r) of the 1934 Act. The 1996 Act directed the FCC to complete within 180 days a pending rulemaking proceeding with respect to RF radiation for cell phones. 1996 Act § 704(b), 110 Stat. at 152. But the 1996 Act did not provide the underlying authority for adopting the RF radiation regulations. It merely directed the FCC to complete quickly the pending rulemaking proceeding under the 1934 Act.

As also discussed above, there are two preemption provisions in the 1996 Act. First, there is a narrowly focused savings clause. Section 332(c)(7)(A) of the 1996 Act provides, “[N]othing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.” 47 U.S.C. § 332(c)(7)(A). This provision protects the placement, construction, and modification of state and local “facilities,” such as cell phone towers, from preemption under the 1996 Act. It has nothing to do with RF radiation emissions from cell phones.

Second, there is a general savings clause. Section 601 of the 1996 Act 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.” 1996 Act § 601(c)(1), 110 Stat. at 143 (emphasis added). By its plain

terms, this provision applies only to “this Act”—that is, to the 1996 Act. It does not apply to the 1934 Act.

Because § 332(c)(7)(A) applies only to “facilities,” and § 601(c)(1) applies only to the 1996 Act, the preemption provisions of the 1996 Act do not affect the preemptive scope of the FCC’s RF radiation regulations under the 1934 Act.

### **Conclusion**

We hold that the Hobbs Act does not deprive the district court of jurisdiction in this case. We hold, further, that the FCC’s regulations of the RF radiation of cell phones, promulgated under the 1934 Act, preempt plaintiffs’ state-law claims as they are presented to us on appeal.

**AFFIRMED.**

---

**APPENDIX B**

---

**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA**

ANDREW COHEN,  
TIMOTHY HORNICK,  
KALEAH C. ALLEN,  
KIMBERLY BENJAMIN,  
MARK WEILER, MATT  
KOPPIN, SCOTT  
CISCHKE, ALBERT  
COLLINS, PAUL  
COLETTI, KRYSTLE  
FAERN, RODOLFO  
CABRERA, BRANDY  
DAVIS, WILLIAM ZIDE,  
DAVID HEDICKER,  
NANCY MAEKAWA,  
CATHERINE GOODWIN,  
KATHLEEN BOGGS,  
KIMBERLY MODESITT,  
MARK KUNZE, ARIANA  
RYAN, BECKY  
WELLINGTON, M. GAIL  
SUNDELL, VICTOR  
PERLMAN, and  
ZACHARY GOMOLEKOF,  
on behalf of themselves and  
all others similarly situated,

No. C 19-05322 WHA

**ORDER ON  
MOTION FOR  
SUMMARY  
JUDGMENT**

October 29, 2020

Plaintiffs,

- against -

APPLE, INC.,

Defendant.

### **INTRODUCTION**

In this putative class action, this order holds that the FCC's radio frequency radiation exposure regulations preempt plaintiffs' tort and consumer-fraud claims.

### **STATEMENT**

At all material times, defendant Apple, Inc., manufactured and sold a series of industry-defining smartphones known as the iPhone: a cellphone with a broad range of additional functions based on advanced computing capability, large storage capacity, and internet connectivity. Like other forms of wireless communication, these smartphones relied on radiofrequency electromagnetic waves (RF radiation) to send and receive signals. The oscillation of electrical charges in the phone antennas would generate RF radiation emanating from those antennas. The closer to the body the phone remained while in use, the more RF radiation a user would get.

For at least the last forty years, scientists have weighed in on the health risks associated with RF radiation exposure from radio transmitters. Unlike ionizing radiation (such as X-rays), which is always potentially harmful to human tissue, non-ionizing radiation, such as phones emit, is incapable of breaking the chemical bonds so as to damage DNA. High levels of RF radiation, however, can cause adverse thermal effects,

like a burn. More controverted is the purported existence of non-thermal effects caused by lower levels of RF radiation. Such effects, if they exist, may include an increased risk of cancer, cellular stress, structural and functional changes to the reproductive system, learning and memory deficits, genetic damage, and neurological disorders.

Based on its review of the science, the Federal Communications Commission has promulgated RF exposure standards that all cellphones must comply with before being sold in the United States. *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 11 F.C.C.R. 15123 ¶ 171 (1996) (*1996 RF Order*). Plaintiffs, purchasers of nine different iPhone models, seek to hold Apple to account for selling iPhones that allegedly do not comply with the Commission's RF emissions standards.

Plaintiffs filed this action in September 2019, seeking to represent “[a]ll persons who have owned or leased an iPhone for personal or household use in the United States.” A few weeks later, plaintiffs’ counsel filed a nearly identical complaint, also in our district, on behalf of different named plaintiffs. Prior orders related and consolidated the two actions. Following an initial case management conference, plaintiffs filed their consolidated amended class action complaint, now our operative complaint (Dkt. Nos. 47, 51, 53).

The operative complaint alleged seven disclosure-related claims and one negligence claim for medical monitoring. Plaintiffs based the latter on an allegedly increased risk of harm they may face due to their use of iPhones as advertised. The disclosure-related claims alleged that Apple marketed its phones for use on or in close proximity to the body, but failed to disclose that such

use would allegedly expose consumers to RF radiation levels above the federal standards, and failed to disclose the alleged risk attendant to such exposure.<sup>1</sup>

Apple sought dismissal under a litany of theories, including preemption, lack of standing, and various pleading deficiencies. Following a hearing, an order found that matters outside the pleadings had been presented in Apple's briefs without sufficient justification. Apple's motion became one for summary judgment under Rule 56 and discovery opened immediately (Dkt. Nos. 62, 75, 89).

Given the necessary application of FCC regulations and guidance, and particularly the extent to which its regulations could preempt plaintiffs' claims, the Court invited the Commission to participate as an *amicus curiae*. The Commission accepted, filing a statement of interest addressing the application of its regulations and guidance to plaintiffs' claims.

After some discovery ensued, Apple moved again for summary judgment on the dispositive issues of preemption and jurisdiction.

Following a hearing, the undersigned judge ordered Apple to produce all communications between Apple and the FCC prior to and related to any certification involved in this action and all communications regarding the *Chicago Tribune* story. Plaintiffs were allowed a supplemental brief to explain the significance of the produced communications to the pending motion, and Apple an opportunity to respond. Promptly, Apple filed an

---

<sup>1</sup> The complaint also alleged claims for relief against another smartphone manufacturer, Samsung Electronic America, Inc. When both parties moved to dismiss, Samsung also moved to compel arbitration. A week later, plaintiffs voluntarily dismissed their claims against Samsung.

emergency motion for clarification and an extension of time to produce the communications. A prior order granted the motion, and extended the briefing deadlines as well.

Now, plaintiffs all but abandon any reliance on what communications Apple did produce and instead rehash arguments made in their briefs. The single document plaintiffs found relevant demonstrated, in that instance, that Apple, not the FCC, bore responsibility for its disclosures to consumers in their user manuals.

This order follows full briefing, a telephonic hearing (due to the ongoing public health emergency), and supplemental briefing.

#### ANALYSIS

Plaintiffs seek to hold Apple liable for selling iPhones that allegedly exceeded the Commission's RF radiation exposure limits, making the phones unsafe. All agree, however, that the Commission certified each and every iPhone model as compliant with its RF regulations. And, the Commission has determined that all certified cellphones pose no health risks. Plaintiffs nevertheless insist that a jury should decide whether the iPhones exceed the federal RF exposure standards here, not the administrative agency tasked with developing and administering the safety program. Under ordinary conflict preemption principles, a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of a federal law is pre-empted. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The basic question, then, is whether plaintiffs' tort and consumer-fraud claims that would have juries administer the Commission's regulations would stand as an obstacle to the regulations' own objectives. This order answers yes, and holds that the claims must be deemed preempted.



Before reaching the preemption determination, however, three threshold issues regarding the statutory basis for the RF regulations must be addressed, following a review of the statutory and regulatory background.

The Communications Act of 1934 established the Federal Communications Commission as the centralized authority for regulating wire and radio communication, charging the Commission with making available

a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication

....

47 U.S.C. § 151. To achieve its broad objectives, Congress endowed the Commission “with comprehensive powers to promote and realize the vast potentialities of radio.” *Nat’l Broad. Co. v. FCC*, 319 U.S. 190, 217 (1943). One such power included the authority “to regulate ‘the kind of apparatus to be used’ for wireless radio communications and ‘the emissions’ that such equipment may produce” (Dkt. No. 101-1, FCC Statement at 3, quoting 47 U.S.C. § 303(e)).<sup>2</sup>

---

<sup>2</sup> The Communications Act is located at Chapter 5 of Title 47 of the United States Code. 47 U.S.C. §§ 151 *et seq.* The “short title” of the chapter is “Communications Act of 1934.” 47 U.S.C. § 609. The

The Commission has played a central role in the development of cellular radio technology since its inception, establishing the basic regulatory structure for the cellular mobile radio service in 1981. *Cellular Communications Systems*, 86 F.C.C.2d 469, 470 (1981). At the service's regulatory core is the Commission's sole jurisdiction over radio licensing pursuant to Section 301 of the 1934 Act. On the equipment side, the rules required compliance with minimum technical standards to ensure efficient and effective use of the radio spectrum licensed for cellular service. The regulations and guidance expressly asserted federal primacy over the area of technical standards, finding that "any state licensing requirements adding to or conflicting with them could frustrate federal policy." *Id.* ¶¶ 79–83.

In establishing technical standards for all radio communications, the Commission also took into account its obligations under the National Environmental Policy Act of 1969. These standards required environmental assessment of proposed transmitting facilities and operations that exceeded applicable health and safety standards for RF radiation exposure. Although NEPA imposed only procedural requirements, the Commission adopted substantive technical requirements as well, out of "concern that any significant impact on the human environment caused by excessive exposure to RF radiation should be considered as part of FCC procedures for licensing and approving transmitting facilities and

---

Telecommunications Act of 1996 contained provisions that amended the Communications Act of 1934 and provisions that did not. Somewhat haphazard use of the Telecommunications Act to refer to the codified Communications Act has led to some confusion. Unless otherwise specified, this order will refer to the codified Act as the Communications Act only.

operations.” *Responsibility of the Federal Communications Commission to Consider Biological Effects of Radiofrequency Radiation When Authorizing the Use of Radiofrequency Devices*, 2 F.C.C.R. 2064 ¶ 2.

The 1985 rules largely adopted safety guidelines prepared by the American National Standards Institute in 1982, but excluded low-power devices such as cellphones. In 1993, however, a rulemaking commenced in light of a new ANSI standard that was “generally more stringent in the evaluation of low-power devices.” *1996 RF Order*, 11 F.C.C.R. 15123 ¶ 9. In the meantime, Congress enacted the Telecommunications Act of 1996, which, in Section 704(b), directed the Commission to “complete action” within 180 days on its pending proceeding “to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.”

And so it did, issuing an order adopting new RF exposure guidelines the same year. *1996 RF Order*, 11 F.C.C.R. 15123 ¶ 1. Consistent with the 1992 ANSI/IEEE standard, the Commission adopted RF exposure limits for cellphones for the first time. *Id.* ¶¶ 63–64. Despite court challenges and regular reevaluation by the Commission, the 1996 exposure limits and basic regulatory framework have remained in place.

Periodically since their establishment, the Commission has reviewed the 1996 standards to ensure they have kept pace with current knowledge and changing needs. To that end, a 2013 inquiry requested comment to determine whether the federal RF exposure limits and policies, including the prescribed testing parameters, needed reassessment. In 2019, an order found that the current research continued to support the existing standards, concluding that the 1996 RF exposure limits and testing parameters remained sufficient to protect

human safety. The order thus terminated the 2013 notice of inquiry. Notably, the Commission determined that “phones legally sold in the United States pose[d] no health risks.” *Resolution of Notice of Inquiry, Second Report and Order, Notice of Proposed Rulemaking, and Memorandum Opinion and Order*, 34 F.C.C.R. 11687 ¶ 14 (2019) (*2019 RF Order*).

Although the *2019 RF Order* came in December 2019, the Commission announced its proposed findings in August 2019. Two weeks later, the *Chicago Tribune* reported that it (the newspaper) had conducted an independent investigation finding that many major cell phones sold in the United States, including the iPhone models it tested, exposed consumers to RF radiation levels in excess of the Commission’s limits. It based its findings on independent testing it had ordered from an “FCC-recognized accredited lab.” Although Apple tested most of its iPhones at a test separation distance of five millimeters, pursuant to the federal guidelines, the *Tribune* tested the phones at both five and two millimeter separation distances — the two millimeter distance approximating the distance a phone carried in pants or shirt pockets would be from the body. The phones allegedly exceeded the FCC limits at each distance, including at the five-millimeter distance used by Apple in its certification filing. As will be discussed below, Apple and the Commission dispute the significance of the independent testing.

Two days after the *Tribune* published its story, plaintiffs filed this putative class action. In September 2019, plaintiffs’ counsel conducted their own RF emissions testing. Counsel enlisted the same lab as had the *Tribune*, but added additional iPhone models and a zero millimeter testing distance to replicate use of the phones against the

skin. The reason for testing the phones in this manner was intertwined with plaintiffs' theories of liability. As discussed, Apple's marketing allegedly deceived and misled plaintiffs into believing that iPhones could be used on or in close proximity to the body without exceeding FCC RF exposure limits. For example, Apple touted its iPhones as "the Internet in your pocket," "your life in your pocket," and a "studio in your pocket." When tested to imitate this closer use, plaintiffs allege that iPhones exceeded the federal limits.

In December 2019 and one day before plaintiffs filed their amended complaint, the previously announced *2019 RF Order* issued. The order formally rejected claims that RF exposure testing of cell phones should be done with "zero spacing." It found such against-the-body testing unnecessary for reasons discussed in more detail below. Pertinent to plaintiffs' disclosure-related claims, the order found that even if consumers normally used Commission-certified phones at a closer distance than tested, and even if a certified phone exceeded the federal limits under such normal use against the body, the order found that large safety margins had been built into the existing testing requirements and RF exposure limits would still sufficiently protect human safety. *FCC 2019 RF Order*, 34 F.C.C.R. 11687 ¶ 14.

Also in December 2019, the Commission published the results of testing it undertook in response to the *Tribune's* claims of noncompliance. Each of the implicated phones had been tested at the test separation distances used in each device's original certification filing (not at two millimeters, as the *Tribune* additionally had) and consistent with OED's parameters. For iPhones, the FCC Lab tested at five millimeters. The RF radiation exposure from each of the iPhones measured fell well within the

safety limits. The Lab found no evidence of violations of the technical standards.

Taking a closer look at the Commission's rules, the RF radiation exposure regulations fall within the equipment authorization procedures found in Part 2 of the rules. 47 C.F.R. §§ 2.901 *et seq.* The Chief of the Office of Engineering and Technology (OET) is charged with administering the equipment authorization program. 47 C.F.R. § 0.241(b). Section 2.901 sets forth the "basis and purpose" of the equipment authorization rules:

In order to carry out its responsibilities under the Communications Act and the various treaties and international regulations, and in order to promote efficient use of the radio spectrum, the Commission has developed technical standards for radio frequency equipment and parts or components thereof. The technical standards applicable to individual types of equipment are found in that part of the rules governing the service wherein the equipment is to be operated.

Prior to marketing or use, cellphone manufacturers must ensure compliance with the RF exposure limits, using device-type specific criteria for demonstrating compliance. Third-party accrediting organizations recognized by the Commission, known as Telecommunication Certification Boards, review and grant applications for certification if the device is found capable of complying with applicable technical standards and if granting the application would serve the public interest, convenience, and necessity. Once certification has been granted, Commission maintains its regulatory grip by acting on complaints of noncompliance. To that end, it may require a manufacturer to investigate the complaint or it may do so on its own through its OET

Laboratory. Manufacturers must provide a sample of the device as well as pertinent records upon request. If upon inspection it is determined that the equipment does not comply with the technical standards, the device's certification may be revoked. 47 C.F.R. §§ 2.803, 2.805, 2.915, 2.937, 2.939, 2.945, 2.1093, 24.51, 24.52.

The Communications Act, as amended, provided the statutory basis for the equipment authorization program. The provisions relevant to cellphone RF exposure limits include the general rulemaking provisions, Sections 154(i) and 303(r) — both grant authority 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” — and section 303(e), which charges the Commission with regulating, as the public convenience, interest, or necessity requires, “the kind of apparatus to be used” for wireless radio communications and “the emissions” that such equipment may produce.

As discussed, plaintiffs raise three threshold arguments concerning the statutory basis for the regulatory scheme at issue. *First*, plaintiffs argue that the regulations were promulgated under NEPA, which they assert cannot impose substantive obligations capable of conflicting with state law. Plaintiffs correctly note that NEPA is a procedural statute that “does not mandate particular results” but rather “imposes only procedural requirements on federal agencies.” *DOT v. Public Citizen*, 541 U.S. 752, 756 (2004) (internal quotation marks omitted). What plaintiffs ignore, however, is that while the Commission began its review in light of NEPA, it subsequently chose to mandate “particular results” by promulgating *substantive* rules under its longstanding

Communications Act authority, delegated by Congress in 1934. *1996 RF Order*, 11 F.C.C.R. 15123 ¶ 171.

Plaintiffs rely on *Jasso v. Citizens Telecommunications Co. of CA, Inc.*, 2007 WL 2221031 at \*7 (E.D. Cal. Jul. 30, 2007) (Judge Edmund Brennan), for the proposition that NEPA imposes no substantive requirements, and is therefore irrelevant. But *Jasso* goes on to explain what is relevant: that the Commission decided to adopt substantive requirements under the Communications Act when it promulgated its RF regulations. 2007 WL 2221031 at \*7; *see, e.g.*, 47 C.F.R. § 27.52. It is these substantive requirements that preempt.

*Second*, we must determine whether a 1996 Act saving clause (quoted below) amending the Communications Act curtailed authority to impliedly preempt plaintiffs' claims. Although a saving clause raises the inference that Congress did not intend to preempt state law, the existence of a saving clause does not foreclose or limit the operation of ordinary preemption principles. *Geier*, 529 U.S. at 869, 874 (2000). Pursuant to such principles, "we infer that Congress did not intend the saving provisions in a federal law to be interpreted in a way that causes the federal law 'to defeat its own objectives, or potentially, as the Court has put it before, to destroy itself.'" The competing inferences simply mean we "interpret a saving clause as [we] would any statutory language: giving effect to its plain language and meaning in a way that best comports with the statute as a whole." *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, 959 F.3d 1201, 1214 (9th Cir. 2020) (quoting *Geier*, 529 U.S. at 872).

Plaintiffs argue that a saving clause within a provision titled "Removal of barriers to entry," granted authority to



preempt certain state and local requirements, but only after providing notice and an opportunity for public comment. 47 U.S.C. § 253(b). That much is true. Plaintiffs go further, however, reading the 1996 Act to require notice-and-comment rulemaking in all cases of preemption. Plaintiffs paraphrase the law as follows (Opp. at 16) (emphasis and ellipses added by plaintiffs):

In 47 U.S.C. § 253(b), Congress expressly preserved state authority to “impose, on a competitively neutral basis . . . requirements necessary to preserve and advance universal services, *protect the public safety and welfare*, ensure the continued quality of telecommunications services, and *safeguard the rights of consumers*.” (emphasis added). In 47 U.S.C. § 253(d) it authorized the FCC to preempt “the enforcement” of state or local statutes, regulations, or “legal requirement[s]” that do not meet those statutory requirements, “to the extent necessary to correct such violation or inconsistency.” [footnote omitted.] Such preemptive action must be preceded by “notice and an opportunity for public comment.” *Id.*

Section 253 actually provides, in part (emphasis added):

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

*Nothing in this section* shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.<sup>3</sup>

[...]

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

Plaintiffs' version of the law suffers two key omissions: *First*, plaintiffs omit Subsection (a) entirely, which expressly preempts state and local law standing as industry barriers to entry; *second*, plaintiffs strip Subsection (b) of its key limitation — that it applies to Section 253 only. Rather than generally preserve state authority over specific regulatory objectives, as plaintiffs suggest, Subsection (b) merely claws back those

---

<sup>3</sup> Section 254 established a federal-state joint board to work with the Commission in advancing “universal service,” a program to ensure that consumers in rural, insular, and high-cost areas have access to modern communications networks capable of providing voice and broadband service, both fixed and mobile, at rates that are reasonably comparable to those in urban areas.

objectives from Subsection (a)'s preemptive reach. Subsection (d), on the other hand, enforces this intricate boundary: If, after providing notice and an opportunity for public comment, the Commission determines the state or local regulation violates Subsections (a) or (b), the state or local regulation *shall* be preempted. No such action has been taken here, nor could it have, as the legal requirement plaintiffs seek to impose does not yet exist. Nothing in the plain language of Section 253 otherwise affects our analysis. *In re Volkswagen*, 959 F.3d at 1214.

*Third*, plaintiffs put Section 601(c)(1) of the 1996 Act forward (included in notes to 47 U.S.C. § 152):

NO IMPLIED EFFECT. — This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

Unlike Section 253(b), Section 601(c)(1) is not an ordinary saving clause. It forbids both implied repeal of federal law and implied preemption of state and local law. Rather than express a preference one way or the other, the manifest purpose is to preserve a pre-existing balance between the various sources of law. And, by its terms, the provision applied only to provisions of, or amendments made by “this Act,” the 1996 Act. The plain language of Section 601(c)(1) thus preserves the authority delegated under the 1934 Act unless expressly otherwise provided by the 1996 Act. *In re Volkswagen*, 959 F.3d at 1214.

Plaintiffs take an alternative reading, assuming that Section 601(c)(1) of the 1996 Act also applied to the 1934 Communications Act. 47 U.S.C. §§ 151 *et seq.* The plain language militates against such a reading. Two further points, however, confirm the plain meaning. *First*, Section 1(b) of the 1996 Act states:

Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 *et seq.*).

Section 1(b) emphasizes the distinction between the 1996 Act and the 1934 Act. We must read Section 601(c)(1) as applying to “[the 1996 Act] and the amendments made by [the 1996 Act]” to the Communications Act of 1934. *Second*, Section 601(c)(1) itself is not an amendment to the code but instead a note to Section 152. Its placement as a note comports with its plain language. Plaintiffs’ alternative take would abolish implied preemption long exercised under the Communications Act in a provision that Congress left out of the Communications Act itself.

On the merits of Section 601(c)(1), plaintiffs do not identify any provision of the 1996 Act that affects the Commission’s authority to regulate RF radiation exposure. Instead, plaintiffs argue that “Section 601(c)(1) emphasizes Congress’s clear intent that preemption must be express and a result of the legislative process or notice and comment rulemaking” (Opp. at 17). Without pointing to any express provision of the 1996 Act, plaintiffs ask that we read into Section 601(c)(1) an intent to substantively alter longstanding Communications Act authority. By the provision’s own terms, plaintiffs reading is verboten.

To be sure, the 1996 Act did circumscribe the Commission’s broad authority somewhat, removing from it the power to “limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction and modification of personal wireless service facilities.” 47

U.S.C. § 332(c)(7)(A). The new Section 332(c)(7) “prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances . . . .” H.R. Conf. Rep. 104-458, at 208–09 (1996). But, echoing Section 601(c)(1)’s intent to preserve, the Conference Report also provided:

The limitations on the role and powers of the Commission under this [Section 332(c)(7)] relate to local land use regulations and are not intended to limit or affect the Commission’s general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities.

*Id.* at 209. Plaintiffs’ claims do not involve local land use regulations.

Having rejected plaintiffs’ arguments that the Telecommunications Act altered the Commission’s general authority over radio telecommunications pursuant to the Communications Act, the question becomes whether plaintiffs’ tort and consumer-fraud claims stand as an obstacle to the federal equipment-authorization regime.

The Supremacy Clause provides that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.” State law can be preempted by constitutional text, by federal statute, or by a federal regulation. *P.R. Dep’t of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988); *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Where, as here, we consider whether a federal agency has preempted state regulation, we do not focus on Congress’s “intent to supersede state law” because a “preemptive

regulation's force does not depend on express congressional authorization to displace state law." *De la Cuesta*, 458 U.S. at 154. Instead, we ask "whether [the federal agency] meant to preempt [the state law], and, if so, whether that action is within the scope of the [federal agency's] delegated authority." *Ibid.*

Apple's conflict preemption theory relies on the proposition that a state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of a federal law. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). To evaluate whether a state law poses an obstacle to the implementation of a federal program, the "pertinent question" is whether the state law "sufficiently injure[s] the objectives of the federal program to require nonrecognition." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 583 (1979).<sup>4</sup>

To find obstacle preemption, we infer that Congress made "a considered judgment" or "a deliberate choice" to preclude state regulation when a federal enactment clearly struck a particular balance of interests that would be disturbed or impeded by state regulation. *Arizona v. United States*, 567 U.S. 387, 405 (2012). For example, a state law imposing criminal penalties on aliens who sought or engaged in unlawful employment "would interfere with the careful balance struck by Congress," because "Congress made a deliberate choice not to impose criminal penalties" for the same conduct. *Id.* at 405–06. Similarly, where federal safety regulations "deliberately sought a

---

<sup>4</sup> This order assumes without deciding that a presumption against preemption applies here. See *Wyeth v. Levine*, 555 U.S. 555, 565, 565 n.3 (2009). While Congress has long exerted control over radio communications, state governments have traditionally regulated the field of public health and welfare. State-law actions based on the risks associated with RF emissions fall within the traditional police power.

gradual phase-in” of airbags to give manufacturers more time and increase public acceptance, state tort law requiring the immediate installation of airbags would have “stood as an obstacle” to the phase-in program “that the federal regulation deliberately imposed.” *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 879–81 (2000). Where Congress has determined the appropriate balance, state regulation involving a different method of enforcement may upset that balance and be displaced by federal law even where the state “attempts to achieve one of the same goals as federal law.” *Arizona*, 567 U.S. at 406.

The Supreme Court likewise found preempted state tort law that sought to impose liability for alleged fraudulent misrepresentations made to the FDA in the medical device context, where Congress had “amply empower[ed]” the FDA to punish misrepresentations and the FDA had used this authority to reach a balance between ensuring both that medical devices are reasonably safe and effective, and that an approved device is on the market within a relatively short period of time. *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 353 (2001). “[F]lexibility” in “pursu[ing] difficult (and often competing) objectives” was essential to the FDA’s mandate. *Id.* at 349. Although state tort law would further the FDA’s safety objective, it would increase the burdens on industry by requiring compliance with various state standards and diminish the expediency of the approval process. *Id.* at 350–51.

Plaintiffs summarize their claims in their opposition (Opp. at 11):

Plaintiffs seek to hold Apple accountable for selling iPhones that do not comply with FCC RF emissions standards. Plaintiffs’ disclosure-related claims allege that Apple marketed its phones for

use on or in close proximity to the body, but did not disclose to consumers (a) that such usage would expose them to RF radiation levels exceeding the federal SAR limit of 1.6 W/kg or (b) the risks attendant to that exposure. Plaintiffs further allege that, when used as advertised, the iPhones emit RF radiation at levels that exceed the FCC safety threshold (SAR limit) and therefore pose an increased risk of harm to Plaintiffs, for which Plaintiffs seek medical monitoring. Plaintiffs assume that the FCC's RF emissions standards and SAR limit are appropriate.

Plaintiffs' vague allegation "that Apple marketed its phones for use on or in close proximity to the body" has caused some difficulty in nailing down the scope of the claims. The complaint recounted the debate over test separation distances and reported the results of laboratory testing measured at a distance of two millimeters and zero millimeters. The Commission's procedures, on the other hand, impose only a five-millimeter minimum test separation distance. And the *2019 RF Order* rejected proposals to require testing at a closer distance. 34 F.C.C.R. 11687 ¶ 15 & n.47. Now, plaintiffs argue that "neither the FCC RF emissions standards nor the FCC's testing procedures will be called into question" and that plaintiffs' "claims do not turn on the issue of test separation distance" (Opp. at 20). Rather, each and every claim supposedly relies on the alleged fact that even at five millimeters, plaintiffs' iPhones do not meet the Commission's RF exposure standards.

Ultimately, however, the outcome is the same. The equipment-authorization regime is statutorily authorized and, examining the regulations, the legislative and regulatory history, and the agency's own views, as this



order now will, it is evident that the Commission intended to create a uniform, nation-wide regime that balanced competing objectives of safety and efficiency. This order finds that plaintiffs' claims threaten that careful balance in the equipment-authorization regime, whether plaintiffs challenge the testing procedures or merely seek to enforce the existing RF standards.

As discussed, the Communications Act of 1934 established the Commission with expansive powers extending to all regulatory actions "necessary to ensure the achievement of the Commission's statutory responsibilities." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979). In 1981, that broad regulatory was put to use in establishing the basic regulatory structure for the cellular mobile radio service. *Cellular Communications Systems*, 86 F.C.C.2d 469, 470 (1981). In so doing, the Commission invoked its sole jurisdiction over radio licensing pursuant to Section 301 of the 1934 Act. The equipment authorization program under the 1981 rules, as today, required compliance with minimum technical standards to ensure efficient and effective use of the radio spectrum allocated for cellular service. At that time, federal primacy was asserted over the area of technical standards because "any state licensing requirements adding to or conflicting with them could frustrate federal policy." *Id.* ¶¶ 79–83.

The Telecommunications Act of 1996 and its legislative history reveal that Congress contemplated continued control over radio telecommunications. The relevant House Committee believed that

it is in the national interest that uniform, consistent requirements, with adequate safeguards of the public health and safety, be appropriate balance in policy and will speed deployment and the

availability of competitive wireless telecommunications services which ultimately will provide consumers with lower costs as well as with a greater range and options for such services.

H.R. Rep. 104-204, pt. 1, at 94. Even where the 1996 Act curtailed its power to preempt local land use regulation, the Act expressly did not “limit or affect the Commission’s general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities.” H.R. Conf. Rep. 104-458, at 208-09.

Exercising that general authority, the first RF exposure rules for cellphones hit the books in 1996. The exposure limits “provided 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*, 13 F.C.C.R. 7268 ¶¶ 5, 29. The 2013 Notice of Inquiry maintained this view, explaining:

The intent of our exposure limits is to provide a cap that both protects the public based on scientific consensus and allows for efficient and practical implementation of wireless services. The present Commission exposure limit is a “bright-line rule.” That is, so long as exposure levels are below a specified limit value, there is no requirement to further reduce exposure. . . . Our current RF exposure guidelines are an example of such regulation, including a significant “safety” factor, whereby the exposure limits are set at a level on the order of 50 times below the level at which adverse biological effects have been observed in

laboratory animals as a result of tissue heating resulting from RF exposure.

*In re Reassessment of FCC Radiofrequency Exposure Limits and Policies*, 28 F.C.C.R. 3498, 3582 (Mar. 29, 2013). The *2019 RF Order* provided an example of how RF exposure limits factor into the backstage goal of promoting industry growth (rather than safety). In rejecting proposals for lower RF exposure limits, the order concluded that “[n]o device could reliably transmit any usable level of energy by today’s technological standards while meeting those limits.” *2019 RF Order*, 34 F.C.C.R. 11687 ¶ 12.

As discussed, the regulations themselves fall within the Commission’s equipment authorization program consisting of “technical standards for radio frequency equipment” developed “to carry out its responsibilities under the Communications Act . . . to promote efficient use of the radio spectrum . . . .” 47 C.F.R. § 2.901. Telecommunications Certification Boards review and grant applications for certification if the device is found capable of complying with applicable technical standards and if granting the application would serve the public interest, convenience, and necessity — the guiding principles behind all discretionary action taken or authorized by the Commission. 47 C.F.R. §§ 2.915, 2.937, 2.939, 2.945, 2.1093, 24.51, 24.52; *see* 47 U.S.C. § 303 (setting forth the powers and duties of the Commission to be exercised “as public convenience, interest, or necessity requires”).

The *2019 RF Order*, which resolved an inquiry into the currency of the 1996 rules, made two additional determinations key to our conflict analysis. *First*, it “decline[d] to revisit [its] RF exposure evaluation procedures for consumer portable devices, especially

phones.” *2019 RF Order*, 34 F.C.C.R. 11687 ¶ 14. To the extent plaintiffs’ claims challenge the adequacy of its testing procedures, the *2019 RF Order* rejected similar claims that cellphone RF exposure evaluation should “require testing with a ‘zero’ spacing — against the body —” finding such testing unnecessary for four reasons (*ibid.*) (emphasis added and footnotes omitted):

*First*, phones are tested against the head without any separation distance to represent normal use conditions during a phone call. *Second*, at maximum power, even though they are not consistently operated at such power levels. This means that testing is performed under more extreme conditions than a user would normally encounter, so any potential dangers at zero-space would be mitigated. *Third*, actual testing separation distances tend to be less than the 2.5 cm prescribed for many devices. For example, phones with tethering capabilities (i.e., “hotspot mode”) are tested at a maximum separation distance from the human body of 1 cm. *Fourth*, our existing exposure limits are set with a large safety margin, well below the threshold for unacceptable rises in human tissue temperature.<sup>5</sup>

Certain manufacturers, the order pointed out, use “features like proximity sensors, which reduce power when close to a user’s body, to ensure they are compliant even if the phones are used in a nonconforming manner . . . . Power control and discontinuous transmission on the devices assures that devices operate well below maximum

---

<sup>5</sup> All agree that iPhones are tested with a five millimeter spacing rather than one centimeter.

power for the vast majority of the time, and hence result in lower RF exposure.” *Id.* ¶ 14 n.47.

The order concluded that “even if certified or otherwise authorized devices produce RF exposure levels *in excess of Commission limits under normal use*, such exposure would still be well below levels considered to be dangerous, and therefore *phones legally sold in the United States pose no health risks.*” *Id.* ¶ 14 (emphasis added). The Commission also provided its view that “any claim as to the adequacy of the FCC required testing, certification, and authorization regime is no different than a challenge to the adequacy of the federal RF exposure limits themselves. Both types of claims would undermine the FCC’s substantive policy determinations.” *Id.* ¶ 14 n.49.

*Second*, pertinent to the disclosure-related claims, the *2019 RF Order* also affirmed a commitment to “ensur[ing] that relevant information is made available to the public.” To that end, “the Commission maintains several webpages that provide information about RF exposure to the public” and “guidance from the FCC Laboratory continue recommending that device manuals include operating instructions and advisory statements for RF exposure compliance.” *Id.* ¶ 16. The FCC Laboratory has stated that operating manuals must include “[s]pecific information . . . to enable users to select body-worn accessories that meet the minimum test separation distance requirements.” KDB 447498 D01, at 11.<sup>6</sup>

The order also emphasized the importance of the “context and placement of RF exposure information” to avoid giving the misimpression that FCC-certified cell

---

<sup>6</sup> Both sides agree that guidance from the FCC Laboratory carries the same weight as the Commission’s regulations.

phones are unsafe. In the end, “[g]iven the federal safety determination” that RF emissions from certified cell phones pose no health risks, the Commission concluded that the information on its website “and in device manuals” was not only “adequate to inform consumers of [RF exposure] issues,” but also did “not risk contributing to an erroneous public perception or overwarning of RF emissions from FCC certified or authorized devices.” *2019 RF Order*, 34 F.C.C.R. 11687 ¶ 16.

In sum, the Communications Act charged the Commission with enabling a uniform, nationwide network for radio communications and empowered it with broad authority to accomplish that broad goal. Specifically, it held general authority over the regulation of radio facilities and management of the available spectrum. Regulations promulgated thereunder have long required radio facilities and their components meet minimum technical standards to ensure efficient and effective use of the radio spectrum allocated for cellular service. And in promulgating the RF exposure standards at issue, the Commission established uniform standards that balanced competing objectives of safety and efficiency.

Against this history and framework, we also consider the Commission’s views of plaintiffs’ claims. As in *Geier*, “the agency’s own views should make a difference.” 529 U.S. at 883. As discussed, the Commission’s General Counsel filed a statement of interest addressing the claims here.

At bottom, the Commission tells us that its equipment-authorization scheme preempts plaintiffs’ claims here. To the extent plaintiffs contend that Apple should be held liable under state law for selling iPhones that might exceed the RF exposure limits when tested in ways not required by the agency’s own rules, plaintiffs’ claims

challenge the testing procedures themselves. And, “if plaintiffs were to prevail in that challenge, they would undermine the FCC’s efforts to create and implement a uniform and reliable process for certifying that cell phones comply with RF limits” (FCC Statement at 15). In this way, plaintiffs’ claims are no different than claims that certified phones are unsafe even though they comply with the federal exposure limits. Allowing this case to proceed and “permitting alternative state [certification] standards to arise via the imposition of liability” in this lawsuit “would conflict with the [Commission’s] deliberate policy choice.” *Farina v. Nokia*, 625 F.3d 97, 123 (3d Cir. 2010); *see also Geier*, 529 U.S. at 881.

The statement also addressed the discrepancy between plaintiffs’ third-party testing and both its and Apple’s testing. While it could not explain why the third-party testing deviated from the results of Apple and the Commission, it posited that the third-party tests may not have been conducted in accordance with the prescribed procedures. The proper position of a phone during the test can be critical to obtaining accurate results. “Modern cell phones have a very large number of sensors, transmitters and antennas which need to be properly configured to ensure that the tests are conducted in the worst-case permissible operation . . . . Testing each cell phone under its worst-case configuration requires detailed understanding of its design and antenna arrangements; most of this information is non-public and proprietary” (FCC Statement at 16). The statement thus concluded, with regard to the technical standards, that “[t]hese complex technical issues of phone design and configuration underscore the need for a uniform certification regime. Lawsuits like this one would needlessly disrupt the Commission’s certification process

and improperly impede the marketing of cell phones that the FCC has found to be safe” (*ibid.*).

Finally, the statement addressed the impact of its *2019 RF Order* on plaintiffs’ disclosure-related claims (FCC Statement at 17–19). Noting that state disclosure requirements that stand as an obstacle to the implementation of federal disclosure rules are preempted by federal law, *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1135-36 (9th Cir. 2005), the order stated that it “has a legitimate interest in guarding against ‘overwarning’ about the potential dangers of a product sold to consumers” (*id.* at 18). In its view, “[p]laintiffs’ claims regarding the adequacy of Apple’s disclosures risks precisely the kind of ‘overwarning’ regarding RF exposure that concerned the” Commission in its *2019 RF Order* (FCC Statement at 19):

If plaintiffs were to prevail on such claims, Apple could be compelled to disclose that its FCC-certified cell phones exceed the FCC’s RF exposure limits in some circumstances, even though “such exposure would . . . be well below levels considered to be dangerous” given the “large safety margin” built into the FCC’s limits. *See 2019 RF Order* ¶ 14. Any such disclosures would “risk contributing to an erroneous public perception” regarding the safety of FCC-certified cell phones. *See id.* ¶ 16. Therefore, insofar as plaintiffs’ claims are based on the premise that Apple has a duty to disclose additional information about the RF emissions of its FCC-certified cell phones, they conflict with the FCC’s considered policy judgment regarding how best and in what form to disseminate relevant information about RF



exposure to the public. They are thus beyond the Court's jurisdiction and in any event preempted.

Putting it all together, the statement concluded:

The FCC's testing parameters reflect the agency's considered policy judgment about the best way to evaluate and ensure the safety of cell phones made available for sale in the United States. To the extent that plaintiffs' lawsuit challenges the validity or sufficiency of those parameters, the Court lacks jurisdiction to entertain those claims. To the extent plaintiffs assert claims that cell phones certified for sale in the United States are nonetheless unsafe, their claims are preempted. Finally, insofar as plaintiffs contend that Apple was required to provide additional consumer disclosures regarding its FCC-certified cell phones, those claims conflict with the FCC's contrary determination that its existing disclosure requirements adequately inform the American public. Accordingly, they are likewise beyond the Court's jurisdiction and in any event preempted.

This order agrees with the Commission. The equipment-authorization regime represents a "deliberate choice" to establish uniform technical standards embodying a careful balance between safety and efficiency. If successful, plaintiffs' claims could set the stage for a patchwork of state-required testing procedures, increasing the burden on manufacturers and thereby upsetting the efficiency that the uniform standards and testing procedures provide. *Geier*, 529 U.S. at 879–81; *Buckman*, 531 U.S. at 353. As it stated, "[l]awsuits like this one would needlessly disrupt the Commission's certification process and improperly impede the marketing of cell phones that the FCC has

found to be safe” (FCC Statement at 16). Even though plaintiffs’ state-law claims “attempt[ ] to achieve one of the same goals as federal law” — namely, safety — the enforcement of the equipment-authorization regime by state tort suits such as plaintiffs’ would upset the balance struck by the regulations and must fall aside. *Arizona*, 567 U.S. at 406.

Our court of appeals has not considered this issue, but decisions in analogous cases outside of our circuit agree. In *Murray v. Motorola, Inc.*, 982 A.2d 764, 769–70 (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. *Murray* held that “insofar as plaintiffs’ claims rest[ed] on allegations about the inadequacy of the FCC’s RF radiation standard or about the safety of their FCC-certified cellphones, the claims [were] preempted under the doctrine of conflict preemption.” *Id.* at 777.

The panel further 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.” Those claims, the court explained, would not require plaintiffs “to prove that cell phones emit unreasonably dangerous levels of radiation.” *Id.* at 783. Accordingly, *Murray* 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 the[ ] claims [were] not read

as claims that cell phones are unreasonably dangerous.”  
*Id.* at 784.

The United States and the Commission jointly filed an amicus brief in *Murray*, arguing that the Commission’s RF regulations preempted any lawsuit asserting claims that wireless phones in compliance with the FCC’s RF standards were unsafe. The government contended both that federal law had occupied the field of technical standards for RF transmissions, and that the suit “plainly conflict[ed] with the FCC’s RF exposure regulations.” 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.’” Amicus Br. of the United States and the F.C.C., *Murray*, No. 07-cv-1074 at 12–18.

In *Farina v. Nokia*, 625 F.3d 97, 104 (3d Cir. 2010), *cert. denied*, 565 U.S. 928 (2011), the plaintiff brought a putative class action claiming that the operation of cellphones without a headset exposed the user to unsafe amounts of RF radiation, challenging the manufacturer’s marketing of its cellphones without a headset as safe. *Farina* dismissed the complaint. It found that “[a] jury determination that cellphones in compliance with the FCC’s [RF exposure] guidelines were still unreasonably dangerous would, in essence, permit a jury to second guess the FCC’s conclusion on how to balance its objectives.” Such a result, the panel observed, would disturb the “balancing of safety and efficiency” embodied in the Commission’s exposure limits. The panel further noted that the “resulting state-law standards could vary

from state to state, eradicating the uniformity necessary to regulating the wireless network.” *Id.* at 126–27.

On petition for a writ of certiorari, the Supreme Court invited the Solicitor General to express the views of the United States. Relying on *Buckman*, 531 U.S. at 348, the United States opined that “[t]he court of appeals correctly held that petitioner’s suit [was] preempted because the state-law rule it [sought] to impose would conflict with the FCC’s RF regulations[,]” again asserting that the Commission “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 allowed to provide telecommunications services to the public in the most efficient and practical manner possible.” The government also noted that it had consistently “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.” Brief for the United States as Amici Curiae, *Farina*, No. 10-1064, 2011 WL 3799082 at \*9–12.

The outlier is *Pinney v. Nokia, Inc.*, 402 F.3d 430, 456–58 (4th Cir. 2005), *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. *Pinney* was decided before the Commission set out its views in *Murray* and *Farina*. The panel gave almost no consideration to the preemptive effect of the Commission’s RF regulations, instead focusing its preemption analysis on a single provision of the Communications Act, Section 332. *Pinney* 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 Section 332 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.").

Relying on *Geier* and *Wyeth*, plaintiffs argue that their claims can only be conflict preempted if Congress expressly mandated that the Commission balance varied interests when regulating device RF exposure (Opp. at 17). Plaintiffs' argument runs afoul of the same principle ignored by *Pinney*. A "preemptive regulation's force does not depend on express congressional authorization to displace state law." *De la Cuesta*, 458 U.S. at 154. But, while Congress need not expressly grant an agency the power to preempt state law, plaintiffs argue that Congress must nevertheless expressly charge the agency with balancing competing objectives. Not so. Plaintiffs' argument may be wise legislative policy, but the Constitution leaves such policy choices to Congress, not the courts. As the Supreme Court recognized long ago, "[b]ecause Congress could neither foresee nor easily comprehend the fast-moving developments in the field, it 'gave the Commission . . . expansive powers.'" *N.B.C. v. United States*, 319 U.S. 190, 219 (1943); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73 (1968). In 1996, Congress left those powers largely intact, only carving out the Commission's (implied) authority to preempt local and state land use decisions. H.R. Conf. Rep. 104-458 at 208; see also 47 U.S.C. § 704(a). Even then, Congress ensured that its agency had the final say on RF

exposure limits and compliance therewith. *Ibid.* To view that grant of broad discretion to the Commission as somehow limiting its powers would be counterintuitive.

Next, plaintiffs correctly note that we do not defer “to an agency’s conclusion that state law is preempted.” *Wyeth*, 555 U.S. at 576–77. Instead, the weight accorded to an agency’s explanation of the impact state law has on the federal scheme it administers depends on its thoroughness, consistency, and persuasiveness. *Ibid.* This is so because even though “agencies have no special authority to pronounce on preemption absent delegation by Congress, they do have a unique understanding of the statutes they administer 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.*

Plaintiffs nevertheless argue that the statement should receive no weight because its position runs contrary to “decades of” policy that regarded state law as complementary, as well as previous decisions deciding against broad preemption of state tort law (Opp. at 19). Plaintiffs overstate the Commission’s past reluctance to preempt. True, it chose not to adopt a federal rule of liability in 1997. But, outside of the local land use fights well-documented in the legislative and regulatory histories, there is no talk of other lawsuits, certainly none analogous to plaintiffs’ at the time. The order itself merely noted that the topic was not before it and prudently “question[ed] whether such an action, which would preempt too broad a scope of legal actions, would otherwise be appropriate.” *1997 RF Order*, 13 F.C.C.R. 7268 ¶ 90. And, when lawsuits like plaintiffs’ were actually filed, the Commission did take a stance, filing amicus

briefs that consistently outlined its exclusive regulatory authority over cellphone RF emissions and the threat such litigation would pose to its regulatory scheme. FCC Amicus Br., 2008 WL 7825518 at \*9; U.S. Amicus Br., *Farina*, 2011 WL 3799082 at \*9. The Commission's present views have remained consistent with its past views, the legislative and regulatory history, and the regulations themselves. This order thus finds no reason to discount the agency's views.

Finally, plaintiffs argue that unlike *Farina* and *Murray*, wherein the consumers sought to impose liability even though their phones met the federal RF safety limit, our plaintiffs allege that their cell phones *exceed* the Commission's safety limit, supposedly meaning their claims cannot conflict with federal objectives. Not so. Although plaintiffs attempt to enforce the same exposure limits set by the Commission, their claims still risk disturbing the balance struck by the Commission by "needlessly disrupt[ing] the Commission's certification process and improperly impeded[ing] the marketing of cell phones that the FCC has found to be safe" (FCC Statement at 16).<sup>7</sup>

This argument fails for another reason. The Commission is amply empowered to investigate complaints and petitions calling into question the

---

<sup>7</sup> The operative complaint addresses Apple's marketing of iPhones as performing larger-than-life functions "in your pocket." As discussed, the Commission found that all certified cellphones are safe, even if they exceed the RF exposure standards during use closer to the body than tested. To the extent plaintiffs' disclosure-related claims allege that Apple overstates the safety of its product, such claims are preempted in light of the Commission's safety determination and the balance it reached between safety and overwarning.

continued compliance of certified devices with its technical standards. *See Buckman*, 531 U.S. at 341. In April 2020, for example, the FCC's Enforcement Bureau announced that it had entered into a consent decree with BLU Products, Inc., to resolve an investigation into whether the company's GRAND MAX mobile phone violated the Commission's RF limits. As part of the investigation, the FCC Lab tested the phone and found that it did not comply with the Commission's RF limits. Under the terms of the consent decree, "BLU Products admit[ted] that it violated the Commission's rules, [promised to] implement a compliance plan, and [to] pay a \$130,000 civil penalty." *BLU Products, Inc.*, DA 20-305, ¶¶ 2-3 (Enf. Bur. released April 2, 2020).

Notably, the *Chicago Tribune* story that plaintiffs detailed extensively in the operative complaint spurred the Commission to investigate the *Tribune's* claims of noncompliance, as discussed. The FCC Lab tested commercially-available iPhones as well as a model iPhone provided by Apple, and each demonstrated compliance when tested at the test separation distances used in their original certification filing (not at two millimeters, as the *Tribune* additionally had) and consistent with OED's parameters. The Lab found no evidence of violations of the technical standards. Apple's iPhones have thus demonstrated compliance with its exposure limits not once but twice (Dkt. No. 104-11). Allowing a federal jury to now second-guess the agency determinations would interfere with the balance struck in the equipment-authorization program. The federal regulations must displace plaintiffs' claims.

Plaintiffs suggest that such a ruling would leave consumers without any remedy. Not so. Aside from enforcement bureau actions as described, which are



triggered by complaints or petitions filed with the Commission, plaintiffs may also challenge agency rulemaking directly. The *2019 RF Order* involved here, for example, is the subject of two consolidated petitions for review in the Court of Appeals for the District of Columbia Circuit. See *Environmental Health Trust v. FCC*, No. 20-1025 (lead); *Children's Health Defense v. FCC*, No. 20-1138 (consolidated). And, this order should not be read as standing for the proposition that all state-law claims that touch upon the federal RF regulations are preempted. If, for example, the expertise in administering its delegated authority. Enforcement Bureau were to determine that a previously-authorized device no longer complied with its RF exposure standards, consumers may have state-law remedies against the manufacturer, the compliance question already resolved by the Bureau.

#### CONCLUSION

To the extent stated herein, Apple's motion for summary judgment is GRANTED. The parties' pending discovery disputes are DENIED AS MOOT. Judgment against plaintiffs and in favor of Apple will be entered separately.

IT IS SO ORDERED.

Dated: October 29, 2020

---

WILLIAM ALSUP  
United States District Judge

---

**APPENDIX C**

---

**CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED**

**U.S. Const. art. VI, cl. 2**

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

\* \* \*

The Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, as amended and codified at 47 U.S.C. § 151 *et seq.*, provides in relevant part:

**47 U.S.C. § 151. Purposes of chapter; Federal  
Communications Commission created**

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more

effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

**47 U.S. Code § 152. Application of chapter**

...

(b) Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio

communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

**47 U.S.C. § 154. Federal Communications Commission**

...

**(i) Duties and powers**

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

**(j) Conduct of proceedings; hearings**

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

...

**47 U.S.C. § 303. Powers and duties of Commission**

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

...

(r) Make 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, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

...

**47 U.S.C. § 414. Exclusiveness of chapter**

Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

\* \* \*

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, as amended and codified at 47 U.S.C. § 151 *et seq.*, provides in relevant part:

**47 U.S.C. § 332. Mobile services**

...

**(c) Regulatory treatment of mobile services**

...

**(3) State preemption**

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall

exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

...

**(7) Preservation of local zoning authority**

**(A) General authority**

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

**(B) Limitations**

**(i)** The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

**(I)** shall not unreasonably discriminate among providers of functionally equivalent services; and

**(II)** shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

**(ii)** A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

**(iii)** Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial

evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate 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 Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph—

(i) the term “personal wireless services” means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term “personal wireless service facilities” means facilities for the provision of personal wireless services; and

(iii) the term “unlicensed wireless service” means the offering of telecommunications



services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

...

\* \* \*

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, also contains the following uncodified provision (at 47 U.S.C. § 152 note):

**Sec. 601. Applicability of consent decrees and other law**

...

(c) Federal, state, and local law.—

(1) No implied effect.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

(2) State tax savings provision.—Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act.