No. 10-1064

In The
Supreme Court of the United States

FRANCIS J. FARINA,
Petitioner,
v.

NOKIA, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, law firm and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights, freedoms and structural safeguards guaranteed by our Constitution.

CAC assists state and local officials in upholding valid and democratically enacted measures and historic common law remedies. CAC has filed *amicus curiae* briefs on preemption questions in this Court in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), and in this Term's cases, *Williamson v. Mazda Motor of Am., Inc.,* No. 08-1314 (decided Feb. 23, 2011), *AT&T v. Concepcion,* No. 09-893 (pending), and *PLIVA, Inc. v. Mensing*, Nos. 09-993, 09-1039, 09-1501 (pending).

CAC seeks to preserve the careful balance of state and federal power established by the Constitution, including its Amendments. CAC thus

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus's* intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

has a strong interest in this case and in the development of preemption law generally.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari raises important and unresolved questions regarding the Supremacy Clause and the appropriate role of Congress, federal agencies, and the courts in delineating the balance between the supremacy of federal law and respect for principles of federalism. Here, the particular question is whether frustration of a federal agency's "purposes and objectives" can impliedly preempt state law, even though Congress has expressly stated that the statute implemented by the agency has no implied preemptive effect. Obviously, Congress cannot disclaim any and all implied preemption—if it is truly impossible to comply with both federal and state law, courts must apply the federal law under the Supremacy Clause. But whenever possible, courts should give effect to Congress's express attempt to avoid implied preemption of state law. The Court should grant review to clarify when, if ever, it is appropriate to displace state law based on an agency's views when Congress has made clear its desire to avoid implied preemption.

The question raised by the Petition involves core preemption doctrine principles. Whether a state law claim is preempted by federal law is "guided by two cornerstones of [the Court's] pre-emption jurisprudence." *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009). "First, 'the purpose of Congress is the ultimate touchstone in every pre-emption

case.'" *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, (1996)). Second, preemption analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act," because "Congress does not cavalierly pre-empt state-law causes of action." *Id.* at 1194-95 & n.3 (quoting *Lohr*, 518 U.S. at 485). Together, these principles create a "presumption against pre-emption" except when "the clear and manifest purpose of Congress" dictates otherwise. *Id.* at 1195 & n.3.

In light of these two foundational principles of preemption doctrine, when Congress in the text of a statute expressly disclaims any implied preemptive effect, it is not clear what role, if any, the views of a federal administrative agency should play—except perhaps to assist the courts in determining whether it is impossible to comply with both federal and state law. Stated another way, in the face of such an express congressional statement against implied preemption, the views of an agency on the *legal* question of implied preemption—as opposed to the factual question of impossibility preemption—should be irrelevant under this Court's precedent.

Finally, this case highlights how a broad theory of implied obstacle preemption raises significant federalism concerns because it can lead to the unpredictable displacement of state laws. In what were three essentially factually and legally identical cases, the Third Circuit, the Fourth Circuit, and the District of Columbia Court of Appeals reached three different conclusions on whether the respective plaintiffs' state law claims

relating to radiofrequency (RF) radiation emitted by cell phones were impliedly preempted by federal law.[2] These mixed results emphasize the underlying difficulties and tensions resulting from an open-ended judicial inquiry into whether the "purposes and objectives" of federal law are "frustrated" by state law claims, underscoring the need for further guidance on implied preemption from this Court. Addressing this confusion is important because "the true test of federalist principle may lie . . . [in] cases where courts interpret the mass of technical detail that is the ordinary diet of the law." *Egelhoff v. Egelhoff*, 532 U.S. 141, 160-61 (2001) (Breyer, J., dissenting).

To resolve these important and open questions, about which the courts below are divided, *amicus* urges the Court to grant the Petition for Certiorari. Review is necessary here because the court below "has decided an important question of federal law that has not been, but should be, settled by this Court." S. Ct. Rule 10(c).

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[2] *Farina v. Nokia, Inc.*, 625 F.3d 97 (3d Cir. 2010) (state law claims entirely preempted); *Murray v. Motorola*, 982 A.2d 764 (D.C. 2009) (state law claims partially preempted); *Pinney v. Nokia*, 402 F.3d 430 (4th Cir. 2005) (state law claims not preempted at all). While the three courts disagreed on implied preemption, they all agreed that express and field preemption did not apply.

ARGUMENT

I. The Court Should Grant Review To Clarify If An Agency's "Purposes Or Objectives" Can Serve As A Basis For Implied Preemption Even Though Congress Has Made Clear Its Intent To Avoid Impliedly Displacing State Law.

While the Court has on occasion looked to a federal agency's views on the preemptive effect of its regulations, *e.g., Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011), it is unquestionably true that the "purpose of Congress" is at the core of any preemption analysis. *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009). "Congress' intent, of course, primarily is discerned from the language of the . . . statute and the 'statutory framework' surrounding it." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996).

"[A]gencies have no special authority to pronounce on pre-emption absent delegation by Congress." *Wyeth*, 129 S. Ct. at 1201. So even as agencies "have a unique understanding of the statutes they administer" that may provide insights into "how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives *of Congress*,'" *id.* (emphasis added), this Court has never "deferred to an agency's *conclusion* that state law is pre-empted." *Id.* (emphasis in original). Instead, "the Court has performed its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of pre-emption." *Id.* 1200-

01. This is because, as the Court has explained in a different context, "[a]gencies may play the sorcerer's apprentice but not the sorcerer himself." *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001).

Here, Congress expressly disclaimed any implied preemptive effect of the Telecommunications Act (TCA) of 1996. Section § 601(c)(1) of the Act, Pub. L. No. 104-104, 110 Stat. 56, 143 (codified as Note to 47 U.S.C. § 152), states:

> Effect on Other Laws:
> (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.

At the same time the TCA expressly disclaims any implied preemptive effect, it also includes a narrow preemption provision,[3] demonstrating that Congress acted unequivocally when its purpose was to preempt state and local laws. Moreover, even before the TCA, in the Federal Communications

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[3] According to the TCA, the RF regulations of the Federal Communications Commission (FCC) preempt state and local regulations regarding "placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC's] regulations concerning such emissions." TCA § 704(a), *codified at* 47 U.S.C. § 332(c)(7)(B)(iv).

Act of 1934 (FCA), Congress provided a general savings clause stating: "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. *See* Cert. Pet. at 8-9, 17. Congress expressly stated when it intended to preempt state law and when it did not.

While these statutory provisions may seem clear, the courts below are divided in confusion about whether or not they impliedly preempt state law. In *Pinney v. Nokia*, the Fourth Circuit concluded that these statutory provisions "counsel against any broad construction of the goals of [the TCA] that would create an implicit conflict with state tort law." 402 F.3d at 458. It "determined that the FCA provides no evidence of a congressional objective to ensure preemptive national RF radiation standards for wireless telephones." *Id.*

In *Farina v. Nokia*, the Third Circuit agreed that these statutory provisions "can provide an indication of congressional intent as to a statute's objectives." 625 F.3d at 131-32. Indeed, it went so far as to say that the "No Implied Effect" provision "could indicate that Congress's objectives are more limited than they might otherwise be characterized. While an actual conflict would still be preempted, such a conflict would be harder to find under this less expansive view of the statute's objectives." *Id.* at 132. Moreover, citing to *Pinney*, the Third Circuit explained, "it is conceivable that

[the 'No Implied Effect' provision] could be dispositive," since "[i]t is a possible reading of [this provision] to conclude Congress made a conscious effort to limit the scope of any subsequent preemption analysis." *Id.* at 131.

However, citing to *Geier v. American Honda Motor Co.*, 529 U.S. 861, 884 (2000), the Third Circuit in *Farina* reached a different conclusion than the Fourth Circuit reached in *Pinney* by emphasizing that statutory text "is merely one data point out of many." *Id.* at 132. Extrapolating from Congress's concern over inconsistent state law regulations embodied in its express preemption provision relating to RF standards and wireless infrastructure, the Third Circuit concluded, "[w]e think Congress would be equally concerned with state regulations of cell phones." *Id.* But such speculation seems far removed from this Court's statement in *Wyeth* that congressional "silence on the issue . . . is powerful evidence that Congress did not intend [preemption of state-law claims]." 129 S. Ct. at 1200.

In *Murray v. Motorola*, the District of Columbia Court of Appeals disposed of the importance of the "No Implied Effect" provision in a footnote. 982 A.2d at 778 n.18. Relying on *Geier*, the court flatly dismissed the reasoning of the Fourth Circuit in *Pinney*, stating "we do not find the Fourth Circuit's conflict-preemption analysis persuasive." *Id.* "The primary reason" that the *Murray* court gave for not following *Pinney* was "that the [Fourth Circuit] appears to have reached its conclusion without considering the views of the

FCC." *Id.* Rather than looking to the text of the "No Implied Effect" provision to inform its preemption analysis as the courts did in *Pinney* and *Farina*, the court in *Murray* simply concluded "that state regulation that would alter the balance [struck by the FCC] is federally preempted . . . [g]iven the FCC's contemporaneous explanations of the balance it sought to achieve by rejecting a more stringent [RF] safety standard." *Id.* at 776.

Murray's emphasis on the "contemporaneous explanations" of federal agencies is in tension with *Pinney*'s and *Farina*'s examination of statutory text as evidence of congressional purpose. *Murray*'s elevation of agency explanations over express statutory text raises significant federalism concerns, since the institutional interests of federal agencies can often be at odds with congressional safeguards to preserve state laws. It is congressional purpose, not agency interest, that is the "touchstone" of preemption analysis. *Murray*'s view to the contrary "relies on an untenable interpretation of congressional intent and an overbroad view of an agency's power to pre-empt state law." *Wyeth*, 129 S. Ct. at 1199. Courts must "rely[] on the substance of state and federal law and not on agency proclamations of pre-emption." *Id.* at 1201.

The *Murray* court's blunt application of *Geier*'s caution against "giv[ing] broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law," *id.* at 778 n.19 (quoting *Geier*, 529 U.S. at 869), seems to go so far in the other direction as to completely

read the text of the "No Implied Effect" provision out of the TCA. The *Farina* court, on the other hand, applied *Geier* somewhat less expansively, emphasizing the uncontroversial principle that "a savings provision does not 'bar the ordinary working of conflict pre-emption principles.'" 625 F.3d at 131 (quoting *Geier*, 529 U.S. at 869). To the *Farina* court, the text of the "No Implied Effect" provision was an important "data point . . . to discern congressional intent," but still "merely one . . . out of many." *Id.* at 132. The *Pinney* court did not cite to or reference *Geier* at all, concluding instead that the "No Implied Effect" clause counsels against a "congressional objective of achieving preemptive national RF radiation standards for wireless telephones." 402 F.3d at 457. *Murray*, and to a lesser degree *Farina*, are symptomatic of "an overreading of *Geier* that has developed since that opinion was issued." *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1140 (2011) (Sotomayor, J., concurring).

The inconsistent treatment of the "No Implied Effects" provision as evidence of congressional purpose by the courts in *Pinney*, *Farina*, and *Murray*, the varying importance given to agency views, and the differing applications of *Geier* all demonstrate the need for further guidance from this Court on the question of what weight courts should give to congressional enactments expressly disclaiming any implied preemptive effect. This Court has never explained how an express textual statement against any implied preemptive effect should weigh into a "frustration of purposes" preemption analysis. This is an important question

because provisions disclaiming any implied preemptive effect are becoming increasingly common in federal statutes, at the same time that agency action remains an important part of federal regulation. *See* Cert. Pet. at 20-22.

II. The Division Among The Courts Below In Nearly Identical Cases Highlights The Need For The Court To Rein In Broad Theories Of Implied Obstacle Preemption That Lead To Unpredictable Results And Undercut The Constitution's Carefully Crafted Allocation Of Federal-State Authority.

There has long been criticism of "the Court's fuzzier notions of 'obstacle' preemption, under which state law is preempted whenever its practical effects would stand in the way of accomplishing the full purposes behind a valid federal statute." *See, e.g.*, Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 231 (2000). Broad "frustration of purposes" preemption is problematic because it invites judges to "invalidate[] state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law." *Wyeth*, 129 S. Ct. at 1205 (Thomas, J., concurring). The practical pitfalls of such a "freewheeling, extratextual, and broad evaluatio[n] of the 'purposes and objectives,'" *id.* at 1217, are evident here, with the courts in *Pinney*, *Farina*, and *Murray* reaching radically different conclusions on the basic elements of implied obstacle preemption.

Moreover, such a broad and unpredictable displacement of state law is contrary to the text and history of the Constitution and threatens the Constitution's carefully crafted federal-state balance of power.

A. As Demonstrated By The Division Among The Courts Below, Application Of "Frustration Of Purposes" Preemption Is Inherently Unpredictable.

"Frustration of purposes" preemption requires judges to first determine the "purposes and objectives of Congress," and second to determine whether state law "stands as an obstacle to the accomplishment and execution" of these purposes and objectives. *Geier*, 529 U.S. at 899 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Focusing on the text of the TCA and FCA, the Fourth Circuit in *Pinney* first concluded that "Congress'[s] actual goal" was "establishing a nationwide network of wireless telephone service coverage." 402 F.3d at 458. Next, because "wireless telephones . . . are not part of the infrastructure [necessary to provide wireless service]," the Fourth Circuit concluded that "a headset requirement would not stand as an obstacle to Congress's goal of achieving nationwide coverage." *Id.* at 456. Thus, the Fourth Circuit found no basis for implied obstacle preemption.

In *Farina*, the Third Circuit reached the opposite conclusion. First, it viewed Congress's

"purposes and objectives" as the "competing interests relevant to RF regulations—safety and efficiency." 625 F.3d at 125. Relying extensively on legislative history and statements by the FCC, the Third Circuit concluded that the statutory mandate was for the FCC to weigh and balance "protecting the health and safety of the public" with "ensuring the rapid development of an efficient and uniform network." *Id.* Next, the Third Circuit took issue with the Fourth Circuit's preemption analysis in *Pinney*, stating that its "focus on the headset requirement is misplaced," and "misapprehends the effect a finding of liability would have in this kind of suit." *Id.* at 133. Although the Third Circuit essentially conceded that the text of the statute weighed against preemption, *id.* at 131-32, it nonetheless held that "Farina's claims are preempted" because it believed "allowing suits like Farina's to continue is to permit juries to second-guess the FCC's balance of its competing objectives." *Id.* at 133-34.

The District of Columbia Court of Appeals in *Murray* also took issue with the Fourth Circuit's view in *Pinney* that plaintiffs' claims "focus . . . on whether states could require headsets" rather than serve as a challenge to "the adequacy of the FCC's [safety] standard." 982 A.2d at 778 n.19. Relying primarily on the "FCC's contemporaneous explanations of the balance it sought to achieve by rejecting a more stringent safety standard," the *Murray* court concluded that "state regulation that would alter the balance is federally preempted." *Id.* at 776. The court agreed with the FCC that the plaintiffs' claims "would necessarily upset [the]

balance [the agency struck] and . . . contravene the policy judgments of the FCC." *Id.* at 777. But the court in *Murray* did not hold that all of the plaintiffs' claims were preempted. Instead, it allowed the plaintiffs' claims relating to cell phones acquired prior to federal standards to proceed, *id.* at 781, as well as the plaintiffs' false representation claims.

The decisions in *Pinney*, *Farina*, and *Murray* highlight the practical difficulties judges face in applying a "frustration of purposes" preemption analysis. *See Williamson*, at 1143 (Thomas, J., concurring) (criticizing the majority's "psychoanalysis" of agency regulators to determine implied preemption). It is unsurprising that, as demonstrated here, different judges reach different conclusions as to the "purposes and objectives" of regulators after examining the oftentimes competing and contradictory statements of Congress and federal agencies. Adding to this difficulty, judges are also asked to determine whether each of the objectives they identify is "significant" or not. *Williamson*, 131 S. Ct. at 1136. It is also unsurprising that, as again demonstrated here, judges have different views on whether a state regulation presents an obstacle to a "significant" congressional objective.

Complicating things further, lower court judges are told that not just any kind of obstacle will do, but that they should only preempt state regulation that "stands as an obstacle to the . . . *full* purposes and objectives of Congress." *Geier*, 529 U.S. at 899 (emphasis added). Indeed, under "the

vague and 'potentially boundless' doctrine of 'purposes and objectives' pre-emption," *Wyeth*, 129 S. Ct. at 1207 (Thomas, J., concurring) (quoting *Geier*, 529 U.S. at 907 (Stevens, J., dissenting)), it would have been surprising if all three courts here had actually reached the same conclusions. Unpredictability seems endemic to this "utterly unconstrained" doctrine. *Williamson*, 131 S. Ct. at 1143 (Thomas, J., concurring).

B. The Application Of "Frustration Of Purposes" Preemption In This Case Raises Significant Federalism Concerns.

Beyond problems of unpredictability, "implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution." *Wyeth*, 129 S. Ct. at 1205 (Thomas, J., concurring). Federal law preempts state laws and remedies pursuant to the Constitution's Supremacy Clause. *E.g.*, *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 501 (1984) (explaining that federal preemption occurs "by direct operation of the Supremacy Clause"). The Supremacy Clause "mapped out America's new legal hierarchy," AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 300 (2005), providing:

> 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.

U.S. CONST. art. VI, cl. 2.

The text of the Supremacy Clause makes "supreme" the "*Laws* of the United States made in Pursuance [of the Constitution]." U.S. CONST. art. VI, cl. 2 (emphasis added). This ensures that only those provisions that have gone through the "single, finely wrought and exhaustively considered, procedure[s]" specified in the Constitution will be given effect. *INS v. Chadha*, 462 U.S. 919, 951 (1983); U.S. CONST. art. I, § 7.

The Supremacy Clause thus plays a key role in our federalist system, given that the constitutional procedures for making federal law in a bi-cameral, representative legislature are "the principal means chosen by the Framers to ensure the role of the States in the federal system." *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 550-51 & n.11 (1985) (citing, *inter alia*, Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954)). "[T]he built-in restraints that our system provides through state participation in federal governmental action . . . . ensure that laws that unduly burden the States will not be promulgated." *Id.* at 556. *Accord* The Federalist No. 62, 408 (James Madison) (B. Wright ed. 1961) (noting that

the provision of equal state representation in the Senate in Article I, § 3, represents "a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty").

Broad, implied purposes or general policy reasons are not "[l]aws," which, under Article I, require express agreement among two legislative houses and two democratically-elected branches of government. *See Thompson v. Thompson*, 484 U.S. 174, 191 (1988) (Scalia, J., concurring in the judgment) ("An enactment by implication cannot realistically be regarded as the product of the difficult lawmaking process our Constitution has prescribed."). The Supremacy Clause's textual specification of "Laws of the United States which shall be made in Pursuance [of the Constitution]," U.S. CONST. art. VI, cl. 2, "thus requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures." *Wyeth*, 129 S. Ct. at 1207 (Thomas, J., concurring).

While the Supremacy Clause affirmed in the text of the Constitution that valid federal law would always trump state law, this strong supremacy rule "comes into play only when courts cannot apply both state law and federal law, but instead must choose between them." Nelson, 86 VA. L. REV. at 251. *See also* Viet D. Dinh, *Reassessing the Law of Pre-emption*, 88 GEO. L.J. 2085, 2087-88 (2000) (describing the Supremacy

Clause as a "constitutional choice of law rule . . . that gives federal law precedence over conflicting state law"). In this way, state authority is respected and state and local innovation encouraged, while ensuring that when the federal government duly acts, its enactments become the law of the land.

Preempting state law in order to give effect to an agency's implied "purposes and objectives" in the face of contrary, express congressional disapproval of such preemption leaves states, as well as consumers and manufacturers, in complete confusion about the applicability of state law. This is particularly troubling here, where the state public health and safety laws are impliedly preempted not by the elected representatives of the people in Congress nor by substantive health and safety agency regulations—but rather by the FCC's procedural standards for authorizing cell phones before they can be sold in the United States. *See* Cert. Pet. at 22-25 (discussing the FCC's regulatory standards for authorizing cell phones both with and without an investigation into personal or environmental hazards).

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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