IPhone Users Seek SCOTUS Review of Radiation Preemption Ruling
Julie Steinberg, Bloomberg Law, Jan 30, 2023
https://news.bloomberglaw.com/litigation/iphone-users-seek-scotus-review-of-radiation-preemption-ruling

- Certain iPhone models allegedly emit radiation above limits
- Circuit split widened; other preemption issues need guidance

IPhone users asked the US Supreme Court to review a decision disallowing claims alleging Apple Inc. failed to disclose that some phones can emit radiofrequency radiation above federal limits.

The US Court of Appeals for the Ninth Circuit said their claims were preempted by federal law, widening a circuit split over the preemptive effect of certain Federal Communications Commission guidelines, consumers said in a recently docketed petition for review. Its decision also presents a "golden opportunity" for much-needed guidance on when agency action preempts state-law claims, they said.

Andrew Cohen and others alleged that a lab hired by the Chicago Tribune found that the iPhone 7, 8, and X showed exposure above the federal limit when the phones were carried close to the body.

In August, the appeals court **affirmed** dismissal of their claims. The Telecommunications Act of 1934 gave the FCC broad authority to issue rules and authorized the agency to balance various factors in setting safe and uniform limits for RF radiation from cell phones, the court said.

The consumers' state-law tort and consumer-fraud claims are impliedly preempted because they "would interfere" with the FCC's purposes and objectives in issuing its guidelines, the appeals court said.

The Ninth Circuit deepened a circuit split over whether the FCC's procedural guidelines on reporting cellphone radiation information preempt state health-and-safety laws, the consumers said.

Circuit Split

In the Fourth Circuit, these guidelines don't preempt any state-law claims. In the D.C. Court of Appeals—the District's top court—they block state-law

safety claims, but don't impliedly preempt state-law misrepresentation claims. And in the Third and Ninth Circuits, they preempt all such claims, the consumers said.

Even standing alone, this split warrants review, they said.

But the decision is also "emblematic of a far more fundamental divide" among courts over whose intent counts for implied agency preemption and how judges should discern that intent, Cohen and the others said: "Is it Congress's intent or the agency's? The text of the statute or legislative history? The actual regulation or agency commentary?"

"Given the vast reach of the modern administrative state, these foundational questions are likely to recur again and again in a broad range of regulatory contexts," the consumers said.

Certain courts have taken the view that all that's required for an agency regulation to impliedly preempt state law is a generic grant of rulemaking authority, they said.

But the Supreme Court has rejected this type of "freewheeling inquiry" because "it invites unaccountable courts and agency lawyers to transform all manner of unsuspecting agency regulations into preemption vehicles on little more than a whim," the consumers said.

Only Congressionally mandated objectives can be the basis for preemption, the petition said.

Gupta Wessler PLLC and Fegan Scott LLC represent the petitioners. Morrison & Foerster LLP is counsel of record for Apple.

The case is **Cohen v. Apple, Inc.**, U.S., No. 22-698, docketed 1/27/23.

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