No.

In the Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P.,
Petitioner,

v.

CENTURYTEL OF CHATHAM, LLC, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER J. WRIGHT
Counsel of Record
JARED P. MARX
TIMOTHY J. SIMEONE
HARRIS, WILTSHIRE &
GRANNIS LLP
1919 M Street, NW
Eighth Floor
Washington, D.C. 20036
(202) 730-1300
cwright@hwglaw.com

Counsel for Petitioner

October 30, 2017

QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred by rejecting the Federal Communications Commission's determination that failure to pay a tariffed charge is not a violation of the Communications Act—which will have the effect of turning the Commission into a "collection agency," contrary to the Commission's view of its proper role.

2. Whether the Fifth Circuit erred by rejecting the Federal Communications Commission's determination that it has exclusive jurisdiction over "information services," instead holding that states may regulate intrastate information services.

PARTIES TO THE PROCEEDING

Petitioner Sprint Communications Company L.P. ("Sprint") was the defendant below. The following parties (referred to collectively as "CenturyLink") are respondents here and were defendants below:

CenturyTel of Chatham LLC;
CenturyTel of North Louisiana LLC;
CenturyTel of East Louisiana LLC;
CenturyTel of Central Louisiana LLC;
CenturyTel of Ringgold LLC;
CenturyTel of Southeast Louisiana LLC;
CenturyTel of Southwest Louisiana LLC;
CenturyTel of Evangeline LLC;
CenturyTel of Missouri LLC;
Metbel Inc.;
CenturyTel of Idaho LLC;
Gallatin River Communications LLC;
CenturyTel of Northwest Louisiana Inc.;
CenturyTel of Lake Dallas Inc.;
CenturyTel of Port Arkansas Inc.;
CenturyTel of San Marcos Inc.;
Spectra Communications Group LLP;
CenturyTel of Arkansas Inc.;
CenturyTel of Mountain Home Inc.;
CenturyTel of Redfield Inc.;
CenturyTel of Northwest Arkansas LLC;
CenturyTel of Central Arkansas LLC;
CenturyTel of South Arkansas Inc.;
CenturyTel of North Mississippi Inc.;
Gulf Telephone Co.;
CenturyTel of Alabama LLC;
CenturyTel of Adamsville Inc.;
CenturyTel of Claiborne Inc.;
CenturyTel of Ooltewah Collegedale Inc.;

CenturyTel of Ohio Inc.;
CenturyTel of Central Indiana Inc.;
CenturyTel of Odon Inc.;
CenturyTel of Michigan Inc.;
CenturyTel of Upper Michigan Inc.;
CenturyTel of Northern Michigan Inc.;
CenturyTel of Midwest Michigan Inc.;
CenturyTel of Wisconsin LLC;
CenturyTel of USA Wisconsin LLC;
CenturyTel of Northern Wisconsin LLC;
CenturyTel of Northwest Wisconsin LLC;
CenturyTel of Central Wisconsin LLC;
CenturyTel of Midwest Kendall LLC;
CenturyTel of Midwest Wisconsin LLC;
CenturyTel of Fairwater Brandon Alto LLC;
CenturyTel of Larsen-Readfield LLC;
CenturyTel of Forestville LLC;
CenturyTel of Monroe County LLC;
CenturyTel of Southern Wisconsin LLC;
CenturyTel of Minnesota Inc.;
CenturyTel of Chester Inc.;
CenturyTel of Postville Inc.;
CenturyTel of Colorado Inc.;
CenturyTel of Eagle Inc.;
CenturyTel of the Southwest Inc.;
CenturyTel of Gem State Inc.;
CenturyTel of Montana Inc.;
CenturyTel of Wyoming Inc.;
CenturyTel of Oregon Inc.;
CenturyTel of Eastern Oregon Inc.;
CenturyTel of Washington Inc.;
CenturyTel of Cowiche Inc.; and
CenturyTel of Inter-Island Inc.

CORPORATE DISCLOSURE STATEMENT

Sprint is a Delaware limited partnership and is principally engaged in providing telecommunications services to the public. The partners of Sprint are US Telecom, Inc., Utelcom, Inc., UCOM, Inc., and Sprint International Communications Corporation—all of which are direct or indirect wholly owned subsidiaries of Sprint Corporation. Sprint Corporation is a publicly traded Delaware corporation. SoftBank Corp., a publically traded Japanese corporation, owns approximately 80% of Sprint Corporation's outstanding stock.

TABLE OF CONTENTS

Materials in the Appendix

TABLE OF AUTHORITIES

Cases

Regulatory Materials

Statutory Materials

In the
Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P.,
Petitioner,

v.

CENTURYTEL OF CHATHAM, LLC, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Sprint Communications Company L.P. respectfully petitions for review of the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit opinion from which Sprint appeals (Pet. App. 3a) is reported at 861 F.3d 566 (5th Cir. 2017). The order denying rehearing (Pet. App. 1a) is unreported. The decision of the United States District Court for the Western District of Louisiana, Monroe Division, that Sprint appealed (Pet. App. 34a) is reported at 185 F. Supp. 3d 932 (W.D. La. 2016). The Court issued a separate judgment in connection with that decision (Pet. App. 63a), which is not reported, but is available at No. 09-cv-1951, 2016 WL 2587997 (W.D. La. May 4, 2016). The district court

then supplemented those in an unreported "Ruling" (Pet. App. 67a), available at No. 09-cv-1951, 2016 WL 4005965 (W.D. La. July 25, 2016), and an unreported Memorandum Order (Pet. App. 65a).

JURISDICTION

The judgment below was entered on June 27, 2017. Sprint timely sought rehearing on July 11, 2017. The Fifth Circuit denied rehearing on August 1, 2017, making the petition due October 30, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Portions of the following relevant statutory provisions are reprinted in the Appendix at Pet. App. 97a: 47 U.S.C. §§ 153, 201, 206, 207, 208.

INTRODUCTION

The Fifth Circuit's decision in this case conflicts with two different interpretations of the Communications Act issued by the Federal Communications Commission. Each error will substantially hamper the Commission's ability to achieve important federal policy goals.

The underlying dispute in this case ultimately turns on whether "Voice over Internet Protocol" ("VoIP") service is an "information service" or a "telecommunications service" under the Communications Act. Sprint argues that VoIP calls are information services because, as explained below, the calls involve a "net protocol conversion" from Internet Protocol to the "time-division multiplexed" ("TDM") format used by

traditional phone calls. Sprint further argues that information services are not subject to state or federal tariffs.

The Fifth Circuit concluded that it does not matter whether VoIP calls are information services or telecommunications services. In the majority's view, Sprint is required to pay tariff charges, even if VoIP is an information service, because Sprint also provides telecommunications services. As Judge Higginson explained in dissent, that conclusion is plainly wrong and contrary to federal law.

After concluding that Sprint was subject to access charges on the calls at issue, whether or not they are telecommunications services, the Fifth Circuit went on to address CenturyLink's claim that Sprint violated Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), by withholding certain payments. Specifically, Sprint withheld payment of access charges it owed CenturyLink in order to recoup payments Sprint alleges CenturyLink unlawfully collected on VoIP calls. Sprint does not dispute that CenturyLink may bring a lawsuit alleging breach of contract, but Sprint contends that failure to pay tariff charges does not violate Section 201(b). That issue is important to the parties because, under Section 206, 47 U.S.C. § 206, CenturyLink may collect attorney's fees if it prevails on its argument that Sprint violated Section 201(b). As explained below, the issue is vitally important to the FCC (which did not participate below) because, if failure to pay is a violation of the Communications Act, parties may file complaints at the Commission under Section 208, 47 U.S.C. § 208.

The FCC has repeatedly ruled that failure to pay charges owed to a telephone company does *not* violate

Section 201(b). In an unbroken line of cases dating back to 1989, the Commission has made clear that the "statutory scheme does not constitute the Commission as collection agent for carriers with respect to unpaid tariffed charges." *Tel-Central* v. *United Tel. Co.*, Memorandum Opinion and Order, 4 FCC Rcd. 8338, 8340–41 ¶ 16 (1989). The Fifth Circuit's decision thus contravenes the Commission's interpretation of the Communications Act and will require the Commission to adjudicate claims that it believes the courts should decide.

In addition, whether failure to pay tariff charges violates the Communications Act is a very important issue as a practical matter. As Verizon showed in its amicus brief below, withholding payment is standard operating procedure when telecommunications companies dispute charges. And as Verizon also showed, carriers generally pay tariff charges promptly and later discover that they were overcharged. The Commission may be flooded with complaints it does not want to resolve.

In addition, the decision below would unreasonably distinguish telecommunications carriers from other companies. Section 201 governs only common carriers. Therefore, a company that provides information services but not telecommunications services cannot violate Section 201. Sprint and other companies that provide both telecommunications services and information services often compete with companies that are indisputably not common carriers and it would be unfair and undermine competition to treat companies like Sprint differently from their competitors.

Accordingly, the first question presented by this petition is whether the Fifth Circuit erred in determining that failure to pay a tariffed charge is a violation of the Communications Act. That decision will have the effect of turning the Commission into a "collection agency," contrary to the Commission's view of its proper role. It will also discriminate against companies that provide telecommunications services as well as information services by subjecting them to larger penalties for the same actions.

The second question presented by this petition is whether the Fifth Circuit erred by concluding that the calls at issue were subject to tariff charges even if they are properly classified as information services. Sprint is simultaneously filing a petition for a writ of certiorari presenting that issue in a case arising in the Eighth Circuit. Because, as explained below, that case is a better vehicle for addressing the issue, the Court may wish to hold the second question presented and grant, vacate, and remand on that issue if the Court reverses the Eighth Circuit's decision.

STATEMENT

This case concerns a dispute between phone companies over payments, called "intercarrier compensation," owed to each other for assistance in transporting phone calls. This is an area that the Federal Communications Commission heavily regulates, pursuant to express statutory authority in the Communications Act.

A. Intercarrier Compensation and the FCC

Phone companies historically exchanged intercarrier compensation pursuant to public price lists, called

tariffs. This case involves local phone company tariffs for completing long distance calls. Because local phone companies control the only connection to their customers' phones, they can charge others for completing phone calls to those subscribers. The fees charged for this are called "access charges," and when assessed pursuant to a tariff, "tariffed access charges." Historically, access charges subsidized local phone service by forcing long distance phone companies to pay relatively high rates for "accessing" the local telephone exchange.

The FCC sets rules for federal tariffs, but does not enforce payment of tariffed charges. Instead, under the "filed rate doctrine," valid tariffs have independent force of law. A party that believes it has not been properly paid pursuant to its tariff may sue in court for breach of tariff or breach of contract. Under longstanding FCC precedent, however, a company may not assert a cause of action pursuant to the Communications Act itself, and the FCC has no authority to force parties to pay tariffed charges.

As discussed below, parties have repeatedly challenged this arrangement, asserting that non-payment of tariffed access charges *does* violate the Communications Act. Specifically, many carriers have maintained that non-payment violates 47 U.S.C. § 201(b), which proscribes "unreasonable" and "unjust" conduct by carriers. But the FCC has without exception rebuffed that interpretation of the law, and until now, the courts have accorded the FCC deference on this issue.

B. Voice over Internet Protocol

This case arose over a dispute about intercarrier compensation for Voice of Internet Protocol (VoIP) phone calls. VoIP phone calls are calls that use "Internet Protocol," or "IP" data transmission to send voice data from one caller to another. Voice data sent using IP is split into digitized "packets," which are individually routed to their destination via the most efficient Internet pathway, and then reassembled at their destination (often after traveling different paths). This is distinct from the traditional telephone system, which uses a different format for data, called Time Division Multiplexing (TDM), and establishes a single dedicated line over which information passes during the entire length of a call.

The phone calls at issue here began in IP format as VoIP calls, but each call was made to a phone on the traditional phone network. That meant that, for the call to be completed, the IP formatted data needed to be reformatted into TDM data. In this case, it was cable companies that sought to offer VoIP calling. The cable companies provided a broadband connection and hardware to customers, but joined with Petitioner Sprint for call completion. Sprint transformed the call from IP to TDM format, and then delivered the call in TDM format to the traditional telephone network. Here, the parties on the traditional phone network were customers of Respondent CenturyLink, which arranged for its subscribers to receive the calls.

Starting in 2007, CenturyLink asserted that Sprint owed it tariffed access charges for completing the VoIP phone calls at issue here. For a period of time, Sprint acceded to CenturyLink's demand, and paid those charges. But in 2009, Sprint reconsidered

the issue, and concluded that CenturyLink was wrong that its tariffed access charges applied to the VoIP calls. Sprint explained that, because the calls originated in IP format and were transformed by Sprint from the IP format into TDM format, the VoIP calls were "information services," as opposed to "telecommunications services," both of which are statutorily defined terms in the 1996 Telecommunications Act. Since 1983, the FCC had exempted information services (then called "enhanced services") from tariffed access charges, because the high tariff rates burdened the emerging technologies. Sprint therefore stopped paying CenturyLink pursuant to its tariffs, and started paying a much lower rate, this time equal to what the FCC had found applicable to another category of information services, namely, $0.0007 per minute.

Sprint not only stopped paying CenturyLink's tariffed access charges prospectively, but it also asked for a refund for charges from 2007 to 2009. CenturyLink denied the request, so Sprint stopped paying certain tariffed access charges due on non-VoIP calls, instead debiting its overpayment balance until it had recovered an amount equal to the refund that it claimed.

C. The Decisions Below

CenturyLink sued in federal district court for nonpayment of its tariffed access charges. CenturyLink further alleged that, by not paying tariffed access charges on non-VoIP calls to effect a refund, Sprint violated Section 201(b) of the Communications Act's prohibition on "unjust" and "unfair practices."

CenturyLink prevailed in district court. The Court ruled (1) that Sprint owed tariffed access charges on

its VoIP calls regardless of their regulatory classification, and (2) that Sprint violated Section 201(b) by not paying tariffed charges on non-VoIP calls in an attempt to recoup prior VoIP-related payments.

Sprint appealed, and in a split decision, the Fifth Circuit affirmed. The majority found that the VoIP calls here were subject to tariff, whether or not they were information services or telecommunications services. The majority also held that Sprint violated Section 201 by not paying tariffed access charges on non-VoIP phone calls.

Judge Higginson dissented. He concluded, first, that if VoIP calls are information services, they are not subject to tariffed access charges. The court's decision to the contrary, he wrote, "contravenes the FCC's policy decisions," and "raises questions of discrimination and would bestow an unfair advantage on non-carrier competitors." Pet. App. 30a (internal quotations and alterations omitted). Judge Higginson stated that the court should have remanded the case for a determination as to whether the VoIP calls were information services. Second, Judge Higginson also found that the court erred on the Section 201(b) issue as well. He concluded that, because the "Section 201(b) ruling is contingent on a federal law violation," that ruling should have been vacated as well. Pet. App. 33a.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's Decision that Non-Payment of Tariffed Access Charges Violates the Communications Act Contradicts an Important Policy Determination by the FCC.

The Fifth Circuit's decision contradicts the FCC's authoritative interpretation of the Communications Act and threatens its carefully-balanced policy determinations. This Court should grant certiorari to restore the deference owed to the FCC, and to prevent national harm to its policy goals.

A. The FCC Authoritatively Interprets the Communications Act.

Under *Chevron* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), courts must defer to the FCC's reasonable interpretation of Section 201(b) of the Communications Act. *See, e.g.*, *Glob. Crossing Telecomms., Inc.* v. *Metrophones Telecomms., Inc.*, 550 U.S. 45, 53 (2007) (holding that the "FCC has long implemented § 201(b) through the issuance of rules and regulations" whereby the FCC "insist[s] upon certain carrier practices, while [] prohibiting others as unjust or unreasonable"). Section 201(b) proscribes "unjust" and "unreasonable" practices by carriers, and the FCC's subject matter expertise makes it uniquely qualified to give meaning to those terms. *Id.*

The FCC's interpretation of the Communications Act also affects the scope of the FCC's responsibility to resolve disputes administratively. This is because 47 U.S.C. §§ 207 and 208 provide that parties may file

formal complaints with the FCC for any violation of the Communications Act. Thus, when the FCC determines that a practice violates the Communications Act, it is also determining that it will hear and resolve complaints concerning that practice. Conversely, when the FCC holds that a practice does not violate the Communications Act, it signals that it does not view the FCC as an appropriate forum for addressing that practice.

B. The FCC Has Determined That a Failure to Pay Tariffed Charges Does Not Violate the Communications Act.

In a series of decisions dating to the late 1980s, the FCC held that non-payment of tariffed access charges does not violate any part of the Communications Act. For example:

- *Tel-Central* v. *United Tel. Co.*, Memorandum Opinion and Order, 4 FCC Rcd. 8338, 8340–41 ¶ 16 (1989) ("[T]h[e] statutory scheme does not constitute the Commission as collection agent for carriers with respect to unpaid tariffed charges. In the normal situation, if a carrier has failed to pay the lawful charges for services or facilities obtained from another carrier, the recourse of the unpaid carrier is an action in contract to compel payment....");
- *Long Distance/USA, Inc., Am. Sharecom, Inc.* v. *Bell Tel. Co. of Pa.*, 7 FCC Rcd. 408 (1992) ("This statutory scheme does not, however, constitute the Commission as collection agent for carriers with respect to unpaid tariffed charges. In the normal situation, if a carrier has failed to pay the lawful charges for services or facilities obtained

from another carrier, the recourse of the unpaid carrier is an action in contract to compel payment or a termination or disconnection of service until those charges have been paid.");

- *American Sharecom, Inc.* v. *Mountain States Tel. & Telegraph Co.*, Memorandum Opinion and Order, 8 FCC Rcd. 6727, 6729 (1993) ("This statutory scheme does not, however, establish the Commission as a collection agent for carriers with respect to unpaid tariffed charges.");
- *C.F. Commc'ns Corp.* v. *Century Tel. of Wis.*, Memorandum Opinion and Order, 8 FCC Rcd. 7334, 7336 (1993) ("This statutory scheme does not, however, establish the Commission as a collection agent for carriers with respect to unpaid tariffed charges. In the normal situation, if a carrier has failed to pay the lawful charges for services or facilities obtained from another carrier, the recourse of the unpaid carrier is an action in contract to compel payment or a termination of service until those charges have been paid.");
- *Beehive Tel., Inc.* v. *Bell Operating Cos.*, Memorandum Opinion and Order, 10 FCC Rcd. 10,562, 10,569 n.90 (1995) ("This Commission is not a collection agent for carriers with respect to unpaid tariffed charges;" thus, "[t]he BOCs' cross-claim does not allege a violation of the Act over which we have jurisdiction.") (interior quotation marks omitted);
- *America's Choice Commc'ns, Inc.* v. *LCI Int'l Telecom Corp.*, Memorandum Opinion and Order, 11 FCC Rcd. 22,494, 22,504 (1996) ("Sections 206-209 of the Act are not intended to allow carriers

> to use the Commission as a means of collecting allegedly unpaid charges from customers.").

The FCC articulated this even more clearly in a pair of decisions from 2011 and 2013. There, a company called All American Telephone complained to the FCC that AT&T's failure to pay their tariffed access charges violated Section 201(b). All American specifically asserted that AT&T's nonpayment constituted impermissible "self-help," because AT&T had stopped paying tariffed access charges without filing a formal "rate complaint." *All Am. Tel. Co.* v. *AT&T Corp.*, 26 FCC Rcd. 723, 728 (2011) ("*All American*").

The FCC unequivocally denied the complaint. The FCC first held, as it had numerous times before, that "a failure to pay tariffed access charges does not constitute a violation of the Act." *Id.* (original appears in all italics). For "twenty years," the FCC noted, this "long-standing Commission precedent" had provided the same. *Id.* More importantly, the FCC clarified that non-payment of tariff charges *to effect self-help* did not render non-payment a violation of the Act. The FCC explained that, while it did not "endorse" non-payment of tariffs "outside the context of any applicable tariffed dispute resolution provisions," such non-payment did not "violate[] the Act itself [including Section 201(b)]." *Id.* at 728 ¶ 13.

On reconsideration, the FCC reiterated its conclusion. It explained, first, that "the Act generally governs a carrier's obligations to its customers, and not vice versa," so that a failure *to pay* a carrier did not implicate the Communications Act, even when the customer was itself a common carrier. *All Am. Tel. Co.* v. *AT&T Corp.*, 28 FCC Rcd. 3469, 3473 (2013) (*"All*

American Reconsideration"). Then, the FCC concluded that, "although a customer-carrier's failure to pay another carrier's tariffed charges may give rise to a claim in court for breach of tariff/contract," failure to pay did not state a claim for "breach of the Act itself." *Id.*

C. The Fifth Circuit's Erroneous Decision Will Require the FCC to Become a Collection Agency.

In decisions like *All American*, the FCC has made clear that it will not consider claims involving non-payment of tariffed access charges because non-payment does not violate Section 201(b). Nor will it analyze whether the non-payment was justified. In *All American*, the FCC simply found that non-payment of tariffed access charges never violates Section 201(b). 26 FCC Rcd. at 731 ¶ 18 ("[T]he provisions of the Act and our rules regarding access charges apply only to the provider of the service, not to the customer; and they govern only what the provider may charge, not what the customer must pay. Thus, failure to pay does not breach any provisions of the Act or Commission rules.").

The Fifth Circuit attempted to limit its decision to a subset of non-payment cases involving recoupment of disputed charges. But the FCC has not adopted such an approach, and such a limitation is illusory. With respect to the FCC, the Fifth Circuit turned FCC precedent on its head by concluding that the Commission had "determin[ed] that improper 'self-help' can be a violation of [Section 201(b) of] the 1996 Telecommunications Act." Pet. App. 24a. The FCC has never held that "self-help" violates Section 201(b). To the contrary, the FCC expressly distinguished its "self-help"

decisions as *not* relating to Section 201(b). *See Bell-Atlantic Delaware, Inc.* v. *Glob. NAPs, Inc.*, 15 FCC Rcd. 20,665, 20,677 ¶ 29 (2000) (holding that the decisions in which it had addressed issues of self-help "only mean that the use of 'self-help' undercuts a claim of irreparable injury for the purpose of emergency relief"); *All American*, 26 FCC Rcd. at 728 ¶ 13 n.37 (explaining that the FCC's "self-help" decisions did not "(1) involve[] a claim for collection of tariffed charges; [or] (2) hold[] that the alleged failure to pay tariffed charges constitutes a violation of the [Communications] Act").

Moreover, there is no logical limitation to the Fifth Circuit's holding. Virtually *all* non-payment is "self-help," and sometimes that non-payment is warranted. But if *unjustified* non-payment violates Section 201(b), then the FCC will need to decide whether payment is justified or not in order to determine whether it has jurisdiction. That will effectively make the Commission a collection agent, contrary to its understanding of its proper role. The Fifth Circuit's decision therefore undermines the FCC's implementation of the Communications Act.

The Fifth Circuit's decision also separately treats common carriers more harshly than non-carriers, defying the fundamental "policy of nondiscriminatory rates," which "is violated when similarly situated customers pay different rates for the same services." *AT&T Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998). Section 201 applies only to common carriers, so that a *non*-common carrier—a business customer or other non-telephone company—who refused to pay tariffed charges would, even under the Fifth Circuit's law, *avoid* the penalties related to Section

201; a common carrier who did the same would not. This contravenes the bedrock principle that all customers who purchase from tariffs be treated identically.

II. The Fifth Circuit's Application of Federal Tariffs to VoIP Calls Contravenes the FCC's Policy Decisions.

The Fifth Circuit also erred by determining that tariffed access charges apply to information services.

Beginning in 1983, the FCC exempted what were then called "enhanced services" from the tariffed access charge regime. *See In re Connect America Fund*, 26 FCC Rcd. 17,663, 18,016 ¶ 957 n.1959 (2011) ("*CAF Order*") (explaining the origin of the ESP exemption). "Enhanced services" were, in essence, communications services that involved computing rather than simply transmitting a message without any change. Enhanced services stood in contrast to "basic services," which were traditional phone services that involved essentially no computer processing. The FCC called this exception to the tariff regime the "Enhanced Services Provider exemption," or "ESP exemption." The FCC reaffirmed the rule in 1988, noting again that the legacy access charge regime would place a harmful burden on new technologies. *In re Amendments of Part 69 of the Commission's Rules Relating to Enhanced Serv. Providers*, Order, 3 FCC Rcd. 2631, 2631 ¶ 2 n.8 (1988).

In 1996, Congress codified these concepts of basic and enhanced services in the Communications Act as "telecommunications services" and "information services," respectively. *See Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 992–93

(2005) (describing this name change). Congress also then grandfathered the ESP exemption alongside the ordinary tariffing regime. *See* 47 U.S.C. § 251(g); *CAF Order*, 26 FCC Rcd. at 18,016 ¶ 957. As the FCC later explained, this meant that, from 1996 until the FCC otherwise acted, "telecommunications services" would be subject to tariffed access charges, while "information services" would enjoy the ESP exemption. *Id.*

Before the district court and the Fifth Circuit, Sprint argued that VoIP calls are information services, and therefore not subject to tariffs. VoIP calls are information services because they require a conversion to transform IP format calls to traditional format calls, which meets the statutory definition of information services rather than telecommunications services. *See* 47 U.S.C. § 153(24), (50), (53) (setting forth the relevant statutory definitions); *In re Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Servs. Are Exempt from Access Charges*, 19 FCC Rcd. 7457, 7459 (2004) (noting the importance of a "net protocol conversion" in identifying information services); *PAETEC Commc'ns, Inc.* v. *CommPartners, LLC*, No. 08-0397, 2010 WL 1767193, at *3 (D. D.C. Feb. 18, 2010) (holding that VoIP calls are information services because of the change in call format); *Sw. Bell Tel., L.P.* v. *Mo. Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055 (E.D. Mo. 2006), *aff'd*, 530 F.3d 676 (8th Cir. 2008) (same).

The Fifth Circuit, however, did not even consider the question whether the calls here were information services or telecommunications services. With respect to charges under state tariffs, the panel held that "Sprint never raised preemption in its opening brief." Pet. App. 15a. That perplexing holding is plain error.

In the summary of argument in Sprint's opening brief, Sprint first argued that "if VoIP is an information service, then Section 251(b)(5)'s reciprocal compensation regime applies instead of the state access charge regime." Sprint Op. Br. 10. That is a claim of preemption, plain and simple. Sprint alternatively argued that "even if Section 251(g) applies, then the state access charge regime would *still* not apply here… because…the only compensation regime that Section 251(g) could have grandfathered for *information services* was the 'ESP exemption,' under which information services providers did *not* pay ordinary tariffed access charges." *Id.* That also is plainly an argument that Section 251(g) preempted state laws insofar as they purport to apply tariffed access charges to information services. The argument section of Sprint's brief then explained in detail how federal law had displaced state law with respect to intercarrier compensation issues and, moreover, did not permit carriers to collect federal access charges on information services either.

On account of its erroneous waiver decision, the Fifth Circuit did not address Sprint's argument that federal law provides that state tariffs may not be applied to information services. However, the Eighth Circuit addressed that issue in *Sprint* v. *Lozier* and erroneously held that intrastate tariffs may be applied to VoIP calls. 860 F.3d 1052 (8th Cir. 2017). As we explain in the petition for a writ of certiorari in that case, that decision breathes new life into the otherwise-defunct Ninth Circuit view that states can independently regulate information services.

The Court should grant certiorari to review the Eighth Circuit's decision because it squarely presents

the issue whether federal law preempts the application of state tariffs to VoIP calls if they are information services. If the Court rules in Sprint's favor on that issue, it would be appropriate to grant the second question presented in the petition, vacate the decision below, and remand. Notwithstanding the Fifth Circuit's claim that Sprint waived the issue, a decision by this Court reversing the Eighth Circuit's decision would require the Fifth Circuit to reconsider its decision. For example, if the Court holds, as Sprint argued to the Fifth Circuit, that state access charge regimes do not apply to information services because, under Section 251(g) of the Communications Act, the ESP exemption applies instead, the court would have to concede that Sprint raised that issue.

Reversal of the Eighth Circuit's decision would also bear on whether federal tariffs apply to information services. Although no federal tariffs were involved in the Eighth Circuit case, there is no plausible argument under which the ESP exemption applies to intrastate VoIP calls but not interstate VoIP calls. This is particularly true in light of Judge Higginson's admonition in his dissent that companies cannot be denied the ESP Exemption merely because they provide traditional phone services in other instances. The Respondents undoubtedly will defend the Eighth Circuit's decision on the ground that telecommunications carriers like Sprint should be subjected to tariffed access charges on VoIP calls even if they are information services, as the Fifth Circuit erroneously held. But in rejecting that argument with respect to state tariffs

the Court would necessarily reject it with respect to federal tariffs as well.

CONCLUSION

The Court should grant the first question presented and hold that the court erred by concluding, contrary to the FCC's position, that failing to pay tariffed access charges violates Section 201(b) of the Communications Act.

Whether or not the Court grants the first question presented, it should hold the petition pending resolution of the issues presented in *Sprint* v. *Lozier*, and grant, vacate, and remand for reconsideration of the second question presented if warranted by the Court's judgment in that case.

Respectfully submitted,

CHRISTOPHER J. WRIGHT
Counsel of Record
TIMOTHY J. SIMEONE
JARED PAUL MARX
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, NW
Eighth Floor
Washington, D.C. 20036
(202) 730-1325
cwright@hwglaw.com

Counsel for Petitioner

OCTOBER 30, 2017