No.

In the Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P.,
Petitioner,

v.

RICHARD W. LOZIER, JR., ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eighth 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 plaintiff below. Respondents Richard W. Lozier, Jr., Nick Wagner, and Geri Huser, sued in their official capacity as members of the Iowa Utilities Board, were the defendants below. Windstream Iowa Communications, Inc. and the Iowa Office of Consumer Advocate were intervenors.

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.

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Sprint Communications Company L.P. respectfully petitions for review of the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Eighth Circuit opinion from which Sprint appeals (Pet. App. 2a) is reported at 860 F.3d 1052 (8th Cir. 2017). The order denying rehearing (Pet. App. 1a) is unreported. The decision of the United States District Court for the Southern District of Iowa, Central Division, that the Eighth Circuit affirmed (Pet. App. 14a) is reported at 152 F. Supp. 3d 1144 (S.D. Iowa 2015). Prior to that district court opinion, the Eighth Circuit reversed the district court's previous decision. That Eighth Circuit opinion is reported at 798 F.3d 705 (8th Cir. 2015), and the preceding district court

opinion that the Eighth Circuit reversed is unreported, but available at No. 11-cv-183, 2014 WL 11310050 (S.D. Iowa Aug. 5, 2014). That 2014 district court decision followed a remand order from the Eighth Circuit, reported at 746 F.3d 850 (8th Cir. 2014), consistent with this Court's decision reversing the Eighth Circuit, reported at 134 S. Ct. 584 (2013). The opinion of the Eighth Circuit that this Court previously reversed is reported at 690 F.3d 864 (8th Cir. 2012). The district court decision that the Eighth Circuit affirmed in 2012 is unreported, but available at No. 11-cv-183, 2011 WL 13193313 (S.D. Iowa Aug. 1, 2011). Sprint filed suit here to challenge the enforcement of a decision of the Iowa Utilities Board, which is available at 2011 WL 459686. The Board's order denying reconsideration is available at 2011 WL 1148175.

JURISDICTION

The judgment below was entered on June 23, 2017. Sprint timely sought rehearing on July 7, 2017. The Eighth Circuit denied rehearing on August 2, 2017, making the petition due October 31, 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. 31a: 47 U.S.C. §§ 152, 153, 230.

INTRODUCTION

As this Court is aware from its decision in *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) ("*Brand X*"), the Communications

Act distinguishes "information services" from "telecommunications services." This distinction is of great importance for a number of reasons. In *Brand X*, the issue was whether the Federal Communications Commission ("FCC") permissibly concluded that Internet service is an information service and therefore not subject to onerous common carrier regulation.

Another important distinction—the distinction at issue in this case—is whether states may regulate information services. For more than thirty years, the FCC has held that it has exclusive jurisdiction over information services—called "enhanced services" before 1996—and regulated them lightly if at all. The FCC has maintained its position even though the Ninth Circuit disagreed with it in *California* v. *FCC*, 905 F.2d 1217, 1240 (9th Cir. 1990). Despite the Ninth Circuit's ruling in that case, and perhaps because the 1996 amendments to the Communications Act indicated congressional approval of the FCC's deregulatory policy, *see* 47 U.S.C. § 230—state legislatures and regulatory commissions have generally not attempted to regulate information services. But in this case the Eighth Circuit relied on *California* v. *FCC* in "holding that intrastate enhanced services were 'place[d] squarely within the regulatory domain of the states.'" Pet. App. 12a, *quoting* 905 F.2d at 1240.

The Eighth Circuit, like the Ninth Circuit, relied on Section 2(b) of the Act, 47 U.S.C. § 152(b), which states that the FCC lacks jurisdiction over "intrastate communication service by wire or radio of any carrier …." This holding is squarely at odds with the FCC's interpretation of Section 2(b) because the FCC, emphasizing the phrase "of any carrier," interpreted Section 2(b) to be limited to common carrier services such

as telecommunications service. Of course, the FCC's interpretation is subject to deference under *Chevron U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) and *City of Arlington* v. *FCC*, 569 U.S. 290 (2013), which held that deference is due to an agency's interpretation of the scope of its jurisdiction.

Whether states may regulate intrastate information services is an issue of vital importance. Information services have flourished under the FCC's policy of limited regulation. But now that the Eighth Circuit has resuscitated *California* v. *FCC*, states may pursue more regulatory approaches.

There is little comfort to be had on this issue from the narrow "impossibility exception" that this Court recognized in *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355 (1986). In that case, the Court held that telecommunications facilities that carry both interstate and intrastate communications may be subject to *both* state and federal rules—even though the Court recognized in that case that the relevant state rules conflicted with federal rules. *Id.* at 376–77. Thus, if Section 2(b)(1) gives states jurisdiction over intrastate information services, states may pursue policies that otherwise would be preempted as conflicting with federal law, as long as they can define an intrastate component of a communications service.

This Court should grant the petition and uphold the FCC's interpretation of the statute so that states do not waste their resources by embarking on an unwise and unlawful course of attempting to regulate information services.

STATEMENT

This petition concerns the division of authority between the Federal Communications Commission and state public utility commissions to regulate "information services" under the Federal Communications Act of 1934 and Telecommunications Act of 1996. The Eighth Circuit decision below rejected the FCC's repeated statements—over nearly four decades—that it has *exclusive* regulatory authority over information services, and ruled that states may regulate *intrastate* information services.

I. Factual and Regulatory Background

A. VoIP Technology: Voice over Internet Protocol ("VoIP") is a way of sending voice messages using "Internet Protocol," or "IP" format, which is the standard by which all data is transmitted over the Internet. The use of Internet Protocol to send voice data causes that data to be split into small "packets," which are individually routed to their destination and then reassembled. VoIP is thus different from the traditional telephone system, which uses a different format for data, and also establishes a single line over which information passes during the entire length of a call.

In the early days of the Internet, VoIP messages went exclusively from computer to computer. As VoIP technology improved, however, companies sought ways for consumers to initiate VoIP calls on the Internet but reach an ordinary telephone, and vice versa. By the late 1990s, cable television companies, which had already begun to sell consumers access to the Internet, found themselves well situated to develop such systems. But among the challenges they encountered was that traditional telephones are not connected to

the Internet Protocol network, and more importantly, do not send or receive messages in Internet Protocol format. Traditional telephones are connected instead to the "Public Switched Telephone Network"—the "PSTN"—which sends and receives messages in a format called "Time Division Multiplexing," or "TDM." (That name reflects the fact that traditional phone calls have to be mixed, or "multiplexed," so that one wire can deliver calls to several locations at once.)

Because the phone calls at issue began in IP format as VoIP calls, however, the cable companies could only allow their VoIP customers to call ordinary phones by transforming the call information into TDM form. Cable companies seeking to sell this kind of VoIP service thus actually needed to package *two* services for customers: the service of initiating VoIP calls, and the service of transforming the calls into TDM format.

In this case, a cable company called MCC Telephony of Iowa, L.L.C. ("Mediacom") sought to offer VoIP calling. Mediacom itself provided a broadband connection and hardware to customers, but joined with Petitioner Sprint to transform the resulting call information from IP to TDM format, and then to deliver the TDM call information to the traditional telephone network.

B. "Intercarrier Compensation": The dispute in this case involves the fees that Intervenor Windstream charged Sprint for delivering the Mediacom VoIP calls to Windstream's end-user customers. Such payments between carriers are known as "intercarrier compensation." Here, Windstream sought to collect "access charges," which is one category of fee that may be paid *by* a carrier whose customer makes (or "origi-

nates") a call *to* the carrier that delivers (or "terminates") that call to its customer. In the case of traditional telephone calls over the Public Switched Telephone Network ("PSTN"), the "access charges" assessed may be "interstate" or "intrastate," depending on whether the call crosses state lines.

Prior to Congress's adoption of the Telecommunications Act of 1996 ("1996 Act"), authority to regulate telecommunications often turned on whether that traffic was "interstate" or "intrastate." With respect to traditional telephone calls, the FCC had exclusive authority to regulate "interstate" traffic, and state commissions had exclusive authority to regulate "intrastate" traffic.[1]

Before the 1996 Act, VoIP services for consumers like those provided by Mediacom and Sprint in this case did not exist. *See, e.g.*, *Sw. Bell Tel., L.P.* v. *Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1076 (E.D. Mo. 2006) ("VoIP 'had not emerged from the labs in any meaningful way' at the time the [1996 Telecommunications] Act was enacted," *quoting* Remarks of Michael K. Powell, then-Chairman, Federal Communications Commission, Oct. 19, 2004). But other computer-based telecommunications services did exist—then called "enhanced services" and later renamed "information services" under the 1996 Act, 47 U.S.C.

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[1] *See In re Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 11 FCC Rcd. 15,499, 15,544 ¶ 83 (1996), *vacated sub nom. IUB* v. *FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part sub nom. Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467 (2002) and *vacated in part*, 301 F.3d 957 (8th Cir. 2002).

§ 153(24). As set forth in detail in the body of this petition, the FCC recognized that such nascent computer-based services should be protected from certain costly legacy regulatory regimes applicable to traditional telephone services, so as to encourage the development and deployment of new technologies. The Commission therefore created the "ESP exemption," which exempted enhanced services from the application of "access charges." *See, e.g.*, *In re MTS & WATS Mkt. Structure*, 97 F.C.C.2d 682, 715 (1983); *In the Matter of Access Charge Reform Price Cap*, 11 FCC Rcd. 21,354, 21,480 (1996) (finding "no reason to extend this [antiquated access charge] regime to an additional class of users, especially given the potentially detrimental effects on the growth of the still-evolving information services industry").

In the decades since 1983, the FCC has repeatedly reaffirmed that policy determination. *See, e.g*, *In re IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863, 4904 ¶ 61 (Mar. 10, 2004) (indicating that if VoIP are information services, then the ESP exemption would apply). And Congress underscored that determination in adopting the Telecommunications Act of 1996 by directing that "[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

With respect to "enhanced services" or "information services," then, the question of whether federal or state regulators have authority over VoIP calls does *not* turn on whether those calls are "interstate" or "intrastate." Instead, under the 1996 Act, authority

over such VoIP calls turns on whether they are an "information service," 47 U.S.C. § 153(24)—again, formerly known as an "enhanced service"—or a "telecommunications service," 47 U.S.C. § 153(53). Under federal law, information services must remain largely unregulated, while telecommunications services are subject to joint common-carrier regulation by both the federal government and the states.[2]

C. Procedural History: The procedural history of this case—which has already been before this Court once in *Sprint Commc'ns, Inc.* v. *Jacobs*, 134 S. Ct. 584 (2013)—is complex.

Prior to 2009, Windstream took the position that its Iowa-filed tariffs required Sprint to pay access charges when a Mediacom customer made an intrastate long-distance VoIP call to a Windstream customer, and Sprint paid those fees. In 2009, however, Sprint determined that Windstream's charges violated the Telecommunications Act and stopped paying them. The IUB, however, disagreed with Sprint, holding that Iowa state law imposed Windstream's state tariff access charge rates on the VoIP calls at issue here. The IUB accordingly ordered Sprint to pay Windstream under those state tariffs.[3]

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[2] *Brand X*, 545 U.S. at 975 ("The Act regulates telecommunications carriers, but not information-service providers, as common carriers."); 47 U.S.C. §§ 201–276 (regulating common carriers); 47 U.S.C. § 152(b) (state authority).

[3] The IUB's ruling was limited to intrastate VoIP calls made between 2009, when Sprint stopped paying access charges, and 2011, when Windstream modified its tariff in compliance with the Federal Communications Commission Order that comprehensively resolved the issue of intercarrier compensation—

In response to the IUB's ruling, Sprint sued in federal court under the All Writs Act and the Supremacy Clause of the Constitution. Sprint argued that the Communications Act preempted the IUB from ordering Sprint to pay Windstream pursuant to state tariffs. Because of then-existing Eighth Circuit law, Sprint also filed a parallel suit in state court, and the district court abstained from hearing Sprint's federal case. Sprint lost its appeal of that decision in the Eighth Circuit, but prevailed before this Court, which ordered the federal case to proceed. *See Sprint Commc'ns, Inc.* v. *Jacobs*, 134 S. Ct. at 584.

By the time the case returned to district court, however, the Iowa state court had ruled that state law permitted Windstream to charge tariffed rates. On remand, then, the IUB argued that principles of *res judicata* precluded Sprint from re-litigating the validity of the IUB's order in federal court. The district court agreed and dismissed for a second time. *Sprint Commc'ns Co., L.P.* v. *Bernsten*, No. 11-cv-183, 2014 WL 11310050 (S.D. Iowa Aug. 5, 2014). The Eighth Circuit reversed that decision on appeal, finding that, contrary to the IUB's assertion, *federal* communications law controls here, and that only federal courts are empowered to definitively interpret that law. *Sprint Commc'ns Co., L.P.* v. *Jacobs*, 798 F.3d 705

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prospectively only—to eventually eliminate such payments altogether. *See In re Connect America Fund*, 26 FCC Rcd. 17,663 ¶ 736 *et seq.* (2011) ("*CAF Order*") (providing also that, in the interim, intrastate compensation rates would be no higher than interstate rates).

(8th Cir. 2015). The Eighth Circuit therefore remanded for a determination "whether the . . . VoIP calls at issue [here] are information services" subject to federal law, or "telecommunications services subject to state access charges." *Id.* at 708.

On remand, the district court reached the merits, but declined to analyze whether Sprint provided telecommunications services or information services. Instead, it ruled that Windstream's state tariff applied *regardless* of the answer to that question, Pet. App. 30a, and granted summary judgment.

D. Decision Below: On June 23, 2017, the Eighth Circuit affirmed, agreeing with the district court that Windstream's tariffed access charges apply regardless of whether the VoIP calls are information services. Agreeing with the Ninth Circuit's decision in *California* v. *FCC*, the Eighth Circuit held that the ESP exemption "applie[d] only to interstate access charges," and not "to the intrastate access charges that the Board seeks to enforce in this case." Pet. App. 12a. Sprint timely sought panel rehearing and rehearing *en banc*, which the Eighth Circuit denied on August 2, 2017. Pet. App. 1a.

E. Related Fifth Circuit Case: In 2011, another local phone company, CenturyLink, sued Sprint in federal district court for the Western District of Louisiana over a nearly identical issue. Just as here, Sprint received VoIP calls originated in Internet Protocol format; transformed them into ordinary phone calls; and delivered them to CenturyLink, the local phone company. CenturyLink sought to impose tariffed access charges, and Sprint objected to those charges on grounds that the FCC had exempted information services from them. But as here, the district

court enforced CenturyLink's tariffed access charges, and also declined to determine whether VoIP calls are information services. Sprint appealed to the Fifth Circuit, and on June 27, 2017, the court ruled against Sprint in a 2-1 decision.

Fifth Circuit judge Stephen Higginson dissented on the issue here. Agreeing with Sprint, Judge Higginson recognized that the FCC had made a policy determination to "permit[] IXCs [that is, long distance carriers] to benefit from the ESP exemption when they provide[] information services." *CenturyTel of Chatham, LLC v. Sprint Commc'ns Co., L.P.*, No. 16-30634, 2017 WL 2772579, at *12 (5th Cir. June 27, 2017). Simply put, companies like Sprint are subject to "tariff access charges when they act[] as IXCs" (handling traditional calls) and to "the ESP exemption" when "they act[] as information service providers" (transforming Internet Protocol calls to TDM). *Id.* Judge Higginson therefore stated that the district court should have determined whether the calls at issue are information services. *Id.* at *13. If VoIP calls are information services, Judge Higginson concluded, the FCC's longstanding ESP exemption should exempt the VoIP calls from tariffed access charges.

As in this case, Sprint timely sought panel rehearing and rehearing *en banc* from the Fifth Circuit, which it denied on August 1, 2017. Sprint is also petitioning for certiorari in that case; the petition is being filed simultaneously with this petition, and should be considered by the Court in conjunction with it.

REASONS FOR GRANTING THE PETITION

I. The Eighth Circuit's Decision Conflicts with an Important Federal Policy.

Pursuant to nearly forty years of FCC precedent, the VoIP traffic at issue here is an "information service" exempt from traditional common carrier regulation, both state and federal. Like the Ninth Circuit decision in *California* v. *FCC*, 905 F.2d 1217 (9th Cir. 1990)—on which the decision below relies—the Eighth Circuit here found directly to the contrary, in conflict with clear FCC policy. The court below thereby both broadened and deepened the conflict, breathing new life into what had been an outlying and outdated Ninth Circuit decision.

A. The FCC has Long Exempted "Information Services" from Traditional Regulatory Burdens.

The court below held that Windstream's state-tariffed intrastate access charges apply to the VoIP calls at issue here regardless of whether those calls are "information services" under the Telecommunications Act of 1996. *Sprint Commc'ns Co., L.P. v. Lozier*, 860 F.3d 1052, 1058 (8th Cir. 2017). More specifically, the Eighth Circuit held that, even assuming those calls *are* information services, "the ESP exemption does not apply." *Id.* That holding conflicts with decades of FCC decisions establishing federal policy to the contrary.

As early as 1980, the FCC's *Computer II* decision sought to "remove[] the threat of regulation from markets which were unheard of in 1934 [when the Communications Act was adopted] and bear none of the important characteristics justifying the imposition of economic regulation by an administrative agency." *In*

re Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 F.C.C.2d 384, 423 (1980) ("*Computer II*"). In that decision, the Commission specifically found that the market for "enhanced services"—as opposed to "basic services"—should be left unregulated.

Computer II first explained what it meant by basic and enhanced services. The Commission defined "basic services" to include only a "pure transmission capability over a communications path" without changes to the information transmitted. 77 F.C.C.2d at 420. "Enhanced services," in contrast, involved "computer processing applications . . . used to act on the content, code, protocol" or "other aspects of the subscriber's information." *Id.*

The FCC then found that "the public interest benefits" from "distinguishing basic and enhanced services" in this manner "and regulating only the former…." *Id.* at 428. The Commission reasoned that providers of "enhanced services" were *not* providing common carriage, *id.* at 431–32, and that removing "regulatory barriers" applicable to such services would permit "greater access to new and innovative service by a larger segment of the populace." *Id.* at 430. In short, the Commission concluded that it was unwise to subject the "fast-moving, competitive market" for enhanced services to traditional common carrier regulation. *Id.* at 434.

In the decades since the *Computer II* decision, the Commission has repeatedly reaffirmed its conclusions there. First, on reconsideration in *Computer II* itself, the FCC confirmed that "the provision of enhanced services is *not* a common carrier public utility offering," and "efficient utilization and full exploitation of

the interstate telecommunications network would best be achieved if these services are free from public utility-type regulation." *In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry),* 88 F.C.C.2d 512, 541 n.34 (1981) ("*Computer II Further Reconsideration Order*") (emphasis added). Accordingly, the Commission expressly stated that "States . . . may not impose common carrier tariff regulation on a carrier's provision of enhanced services." *Id.*

Next, in 1983, the Commission applied these principles of non-regulation to the specific issue relevant to this case. Namely, the FCC exempted enhanced services providers from paying per-minute access charges to local phone companies. *See Mts & Wats Mkt. Structure*, 97 F.C.C.2d at 715 ¶ 83. As with other protections from regulation, this was intended to encourage the development of new communications technology.

Then, in its first *Computer III* order in 1986, the Commission again reaffirmed the more general principle that it had "preempted the states" in connection with enhanced services. *In re Amendment of Sections 64.702 of the Commission's Rules*, 104 F.C.C.2d 958, 1125 (1986) ("*Computer III*"), *modified on recon.,* 2 FCC Rcd. 3035 (1987), *further modified on recon.,* 3 FCC Rcd. 1135 (1988). The Commission explained that "since the provision of enhanced services is not common carriage," such services should remain "free from regulation." *Id.*

In 1988, the Commission then revisited the access charge issue that it had first addressed in 1983. The resulting *ESP Exemption Order* reiterated that the Commission had previously determined that applying access charges to enhanced service providers ("ESPs")

"might unduly burden their operations and cause disruptions in providing service to the public." *In re Amendments of Part 69 of the Commission's Rules Relating to Enhanced Serv. Providers*, 3 FCC Rcd. 2631, 2631 (1988) ("*ESP Exemption Order*"). Accordingly, the Commission explained, its rules provided that "enhanced service providers [were] treated as end users" that were *not* subject to "access charges." *Id.* n.8.[4]

Then, in 1996, Congress adopted the Telecommunications Act, which supplemented this policy of nonregulation by statute and replaced the terms "basic services" and "enhanced services" with the terms "telecommunications services" and "information services," respectively. *See, e.g.*, *Brand X*, 545 U.S. at 992–93 (describing this name change). Following that name change, the Commission again reaffirmed its "national policy of nonregulation" of what were now called information services. *In re Pulver.com*, Memorandum Opinion and Order, 19 FCC Rcd. 3307, 3318 (2004) ("*Pulver Order*"); *see also id* at 3316 ("Although the 1996 Act uses different terminology . . . than used by the Commission in its *Computer Inquiry* proceeding," the terms "'enhanced services' and 'information services' should be interpreted to extend to the same functions….") In fact, the *Pulver Order* emphasized, "[p]assage of the 1996 Act *increases* substantially the likelihood that any state attempt to impose economic regulation [on an enhanced service] would conflict

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[4] As a practical matter, this treatment permitted ESPs to purchase business lines at flat rates—*i.e.*, rates that are not traffic sensitive—like other end users, rather than pursuant to federal or state tariffs. *Southwestern Bell*, 461 F. Supp. 2d at 1075–76.

with federal policy." *Id.* at 3318 (emphasis added). The Commission further explained:

> In section 230 of the 1996 Act, Congress expressed its clear preference for a national policy "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services" unfettered by Federal or State regulation. Courts have repeatedly recognized this congressional intent and, as a result, have rejected state attempts to regulate such services. In addition, in section 706 of the 1996 Act Congress required the Commission to encourage deployment of advanced telecommunications capability to all Americans by using measures that "promote competition in the local telecommunications market."

Id. at 3318–19.

Also relevant here is the Commission's 2011 *CAF Order*, which comprehensively reformed intercarrier compensation, including the complete elimination of access charges over time. *See CAF Order*, 26 FCC Rcd. at 18,016 (2011). There the Commission again explained that "information service providers" had long been permitted under "Commission rules" to "purchase access to the exchange as end users." *Id.* at 18,015. The Commission made clear that, "under the ESP exemption," end users purchased flat-rate business lines "rather than"—*in lieu* of—paying intercarrier access charges. *Id.*

Against this backdrop of more than thirty years of the FCC's "national policy of non-regulation" of information services, *Pulver Order*, 19 FCC Rcd. at 3318, the Eighth Circuit's conclusion that the ESP exemption does not "preclude[]the application of intrastate

access charges" is perplexing. *Lozier*, 860 F.3d at 1058. In support of its finding that "the ESP exemption does not apply," the Eighth Circuit cited only *California* v. *FCC*. As set forth directly below, however, that case erroneously rejected the FCC's longstanding non-regulatory policy and its reasonable interpretation of the relevant statute.

B. The Eighth Circuit's Decision Conflicts with the FCC's Interpretation of the Communications Act and its National Policy of Non-Regulation of Information Services.

The court below cited *California* v. *FCC* as "holding that intrastate enhanced services were 'place[d] squarely within the regulatory domain of the states.'" *Lozier*, 860 F.3d at 1058. That is what the Ninth Circuit's decision held—but in doing so, it rejected the Commission's reasonable construction of the statute and undermined the agency's longstanding policy of non-regulation of enhanced services.

1. *California* v. *FCC* was wrongly decided.

California v. *FCC* arose out of the FCC's orders in the *Computer III* proceeding. The state petitioners, including California, challenged two primary determinations in those decisions. Most relevant here was "petitioners['] challenge [to] the Commission's decision to preempt state regulation of communications common carriers' provision of enhanced services on the ground that it violates section 2(b)(1) of the Communication Act." 905 F.2d at 1223.

Because *California* v. *FCC* was decided before the adoption of Telecommunications Act of 1996, regulatory authority over the enhanced services at issue there turned on Sections 1 and 2 of the Communications Act. Those provisions established "a system of dual state and federal regulation over telephone service." *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. at 360. Section 1 gave the FCC authority to ensure "rapid, efficient, Nation-wide" wire and radio communications, while Section 2(b) reserved jurisdiction to the states "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*...." 47 U.S.C. § 152(b)(1) (emphasis added).

Before the Ninth Circuit, the FCC argued that "the key words in § 2(b)(1) are "for or in connection with intrastate communication service by wire or radio *of any carrier*." *California* v. *FCC*, 905 F.2d at 1240. As the Ninth Circuit acknowledged, "the term 'carrier' is synonymous with 'common carrier' for purposes of the Act…." *Id.* Accordingly, the FCC explained, regulation of enhanced services was *not* reserved to the states under § 2(b)(1) because enhanced services are *not* provided as common carrier services. *Id.*

This argument reflected the Commission's earlier careful consideration—in the *Computer II* decision discussed above—of whether to apply common carrier regulation to enhanced services. The Commission there pointed out that "[b]ecause enhanced service was not explicitly contemplated by the Communications Act of 1934," the Act did not mandate the application of "traditional regulatory mechanism[s]." 77 F.C.C.2d at 430. And, as a practical matter, enhanced

service providers were not engaged in "common carriage," *i.e.*, "the quasi public undertaking to 'carry for all people indifferently.'" *Id.* at 431. Rather, "[i]nherent in the offering of enhanced services is the ability of service providers to custom tailor their offerings to the particularized needs of their individual customers." *Id.* Again, then, the Commission concluded in *Computer II*—as before the Ninth Circuit—that "providers of these [enhanced] services" are *not* "common carriers." *Id.*

In response to this argument, the Ninth Circuit stated that it "reject[ed] the Commission's interpretation of § 2(b)(1)." *California* v. *FCC*, 905 F.2d at 1240. In the court's view, the language "of any carrier" meant that the reservation of authority to the states "applies to communications services provided by common carriers such as AT&T and the BOCs as distinguished from communications services provided by non-common carriers such as IBM." *Id.* In other words, "[w]hen services are provided by communications *carriers*," the "statute makes no distinction" based on the kinds of *services*. *Id.* (emphasis added)

The Ninth Circuit's analysis missed the whole point of *Computer II*. Again, the Commission there had expressly found that enhanced service providers are *not* common carriers when they are providing such services. *Computer II*, 77 F.C.C.2d at 431. And, again, the *ESP Exemption Order* clarified that enhanced service providers were to be treated as *end users*, and *not* as carriers, when they were providing enhanced services—even if they were otherwise interexchange carriers. 3 FCC Rcd. at n.8. Dating all the way back to *Computer II*—and also before the Ninth Circuit—the FCC reasonably maintained that the Act did *not* give

states the authority to make a different determination.

2. The Eighth Circuit's Decision Renewed and Deepened the Conflict with the FCC's National Policy of not Subjecting Information Services to Traditional Common Carrier Regulation.

Before the Eighth Circuit's decision below, changes in the legal landscape suggested that the Ninth Circuit's opinion in *California* v. *FCC* may have no longer been good law. At a minimum, it was an outlying decision with little practical effect, because subsequent developments had restored the Commission's exclusive authority over enhanced services.

In particular, *California* v. *FCC* was decided before the *Brand X* decision in which this court clarified that a court of appeal's interpretation of law must cede to a reasonable construction by the agency charged with implementing that law. *Brand X*, 545 U.S. 967 (2005). Similarly, *California* v. *FCC* also predated this Court's decision in *City of Arlington,* where this Court determined that courts must defer to an agency construction of a statutory provision regarding the extent of the agency's own jurisdiction.

Had it been decided *after* these decisions, the Ninth Circuit case should have come out the other way. The court would have been obliged to defer to the FCC's reasonable view that enhanced service providers (or providers of "information services" under the Act) are *not* common carriers when they are providing such services, and therefore *not* subject to traditional common carrier regulations. *Computer II*, 77 F.C.C.2d at 431; *see also CenturyTel of Chatham*, 2017 WL

2772579, at *12 ("IXCs pa[y] tariff access charges when they act[] as IXCs" (handling traditional calls) and "pa[y] the ESP exemption rate when they act[] as information service providers" (transforming Internet Protocol calls to TDM) *(*Higginson, J.*,* dissenting*)*.

Of course, the Eighth Circuit's decision in this case *was* decided well after both *Brand X* and *City of Arlington*. Yet the Eighth Circuit followed the Ninth Circuit's incorrect and outdated decision, rather than the FCC's determinations from both before and after adoption of the 1996 Act that the states lack authority over "enhanced services" (or "information services" in the post-1996 Act terminology). The upshot of the Eighth Circuit decision is thus that the states *do* have authority over *intrastate* information services.

With respect to intercarrier compensation for VoIP calls, that holding no longer has relevance prospectively. As even the Eighth Circuit acknowledged below, the FCC has now "'br[ought] *all* [telecommunications] traffic within § 251(b)(5)['s]'" requirement that carriers enter into reciprocal compensation agreements going forward. *Lozier*, 860 F.3d at 1058 (quoting *CAF Order*, 26 FCC Rcd. at 18,009). When that transition is complete, carriers like Windstream will therefore no longer be able to apply inflated access charges—with their implicit subsidies *from* long distance telephone services *to* local services—to VoIP calls. But that still leaves decades of calls for which such carriers *can* collect access charges—notwithstanding the FCC's clear intent to the contrary—at least in the Eighth Circuit.

More importantly, the Eighth Circuit's reasoning—like that of *California* v. *FCC*—is not limited to the context of access charges for VoIP calls. Again, the

court below held that state law applies to the calls at issue here "[*r*]*egardless* of the classification of the calls as information services or telecommunications services" simply because the calls were intrastate. Pet. App. 13a (emphasis added). Under that holding, states have authority (at least in the Fifth and Eighth Circuits, and perhaps the Ninth Circuit) to regulate the intrastate aspects of *any* information service.

The decision below thus opens the door to state attempts to regulate information services. And given the Fifth Circuit's almost-simultaneous decision, state legislatures and regulatory commissions may believe there is a sound basis for state regulation notwithstanding the FCC's contrary view.

Furthermore, although there is an "impossibility exception" to concurrent state regulation, this Court applied it narrowly in *Louisiana Pub. Serv. Comm'n* v. *FCC*. The Court held in that case that a telecommunications trunk may be subject to depreciation under both state and federal rules despite the regulators' conflicting goals—keeping rates low versus rapidly modernizing networks. 476 U.S. at 364–65. With that model, lawyers could define an intrastate component to many information services. And even though state regulation may conflict with the goals of federal regulation—usually resulting in preemption—it appears that preemption would result only if it were physically impossible to apply state regulation in addition to federal regulation.[5]

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[5] In *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 375, n.4, this Court noted that the Fourth Circuit, applying the impossibility exception, had upheld a proposition in *North Carolina*

This would have far-reaching consequences that go far beyond the VoIP issue considered by the lower courts in this case. For example, email is an information service that has been regulated exclusively at the federal level—or, perhaps it is more accurate to say that the Commission has decided not to regulate email and would argue that any state attempt to regulate email is preempted. In addition, the FCC has proposed to reclassify Internet service—the service pursuant to which consumers gain access to websites—as an information service, and regulate it lightly.[6]

Utils. Comm'n v. *FCC*, 552 F.2d 1036 (4th Cir. 1977). In that case, after the FCC held that subscribers must be permitted to buy their own telephones rather the lease them from the phone competitor, the FCC further concluded that contrary state laws were preempted. That is a narrow exception: not only did the policy of state and federal regulators differ, the state regulators would have required consumers to use different telephones for intrastate and interstate calls, even though it is often not possible to know when answering a phone call where the caller is.

[6] After this Court upheld the FCC's classification of Internet service as an information service in *Brand X*, the next FCC administration changed its interpretation and classified Internet service as a telecommunications service. *In re Protecting & Promoting the Open Internet*, 30 FCC Rcd. 5601 ¶ 29 (2015). That new interpretation was upheld by the D.C. Circuit. *U.S. Telecom Ass'n* v. *FCC*, 825 F.3d 674, 689 (D.C. Cir. 2016) (petitions for certiorari pending). However, following the most recent change of administration, the FCC has proposed to revert to its classification of Internet service as an information service. *In re Restoring Internet Freedom*, 32 FCC Rcd. 4434, 4435 (2017).

If the decision below stands, states may attempt to impose more heavy-handed regulation, even though such an approach would plainly undermine the federal scheme. Because, for example, many emails begin and end in the same state, then states could require Internet service providers to comply with state regulations with respect to those communications. Or states might be able to impose taxes on Internet service providers based on an estimated percentage of communications deemed to be intrastate. The Court should not allow the door to be opened to such possibilities. Rather, it should grant the petition for a writ of certiorari and hold that the Eighth Circuit erred by concluding that states may regulate intrastate information services.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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