No. 17-628

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 A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENT WINDSTREAM IOWA COMMUNICATIONS, LLC

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QUESTION PRESENTED

In 2011 the FCC preempted States from setting access charges for certain intrastate Voice-over-Internet-Protocol calls. In this case the Eighth Circuit held that the FCC's *pre*-2011 regulations did not have a similar preemptive effect. No other court of appeals has disagreed on that issue – and none will, since the regulations are now obsolete. The question presented is whether the Eighth Circuit correctly interpreted the pre-2011 regulations.

PARTIES TO THE PROCEEDING

The Petition correctly lists the parties to the proceeding, except that Windstream Iowa Communications, Inc. is now Windstream Iowa Communications, LLC.

CORPORATE DISCLOSURE STATEMENT

Windstream Iowa Communications, LLC (formerly known as Windstream Iowa Communications, Inc., and as Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom) is a wholly-owned direct subsidiary of Windstream Services, LLC (formerly known as Windstream Corp.). Windstream Services, LLC is a wholly-owned direct subsidiary of Windstream Holdings, Inc. Windstream Holdings, Inc. is a publicly-traded company (NASDAQ:WIN) in which no publicly-held corporation has a 10% or greater ownership interest.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

BRIEF IN OPPOSITION

This case turns on the meaning of an FCC regulation that was superseded six years ago. In 2011 the FCC instituted exclusively federal regulation of all intercarrier telecommunications compensation. Here the Eighth Circuit held that under the old rules, before 2011, FCC regulations allowed States to set access charges for intrastate Voice-over-Internet-Protocol (VoIP) calls.

No other court of appeals has ever disagreed on that question – and since the governing law has now changed, it is unlikely that any ever will. The FCC's current regulation *does* preempt intrastate access charges, and there is no dispute that it is now the governing law on this issue. So this case turns on the meaning of a former regulation that, in the FCC's words, "is not relevant or applicable prospectively."

Sprint's Petition inflates the Eighth Circuit's holding beyond recognition. Contrary to Sprint's contention, the court below did not declare the FCC powerless to preempt any or all State regulation of intrastate "information services." Everyone – including the Eighth Circuit panel – agrees that the FCC's current regulations *do* preempt intrastate access charges for VoIP calls, like those at issue here. And everyone agrees that under the current statutory regime, the FCC has authority to do that. The panel below simply added to a long list of precedents holding that the FCC's previous, long-defunct regulations precluded only *inter*state access charges. That narrow holding was plainly correct,

as the FCC itself described its previous exemption as prohibiting "interstate access charges."

Above all, Sprint concedes that the holding below "no longer has relevance prospectively," Pet. 22, because the FCC's post-2011 regulations have superseded it. For that reason and the others stated herein, this case does not warrant this Court's review.

STATEMENT OF THE CASE

A. Sprint Withholds Payment For Iowa VoIP Calls.

Respondent Windstream is a local telephone company in Iowa. As relevant here, petitioner Sprint sold wholesale service to cable television companies that wished to offer VoIP telephone calling to their customers.[1] Sprint converted these cable customers' VoIP calls to traditional telephone signals, and transmitted them over the telephone network. When one of these cable customers called a Windstream customer, Sprint's system connected with Windstream's to complete the call. *See* Pet. at 5-6. Sprint also handles many telephone calls that originate in the traditional format (not VoIP), and also transfers that kind of call to Windstream's system. (Because Sprint converted VoIP signals before

[1] *See In re Time Warner Cable Request for Decl. Ruling that Competitive Local Exch. Carriers May Obtain Interconnection under § 251 of the Commc'ns Act of 1934, as Amended, to Provide Wholesale Telecomms. Servs. to VoIP Providers*, 22 FCC Rcd. 3513, ¶ 2 (2007).

transmitting them, Windstream had no way to tell which calls from Sprint's network originated in VoIP.)

This case involves only intrastate VoIP calls – ones where both "the calling and the called parties were situated in fixed geographic locations ... in Iowa." App. 3a. The dispute is over how Windstream should be compensated for completing such calls transmitted by Sprint. "For years, Sprint paid Windstream intrastate access charges" for such calls, "based on the rates set forth in the tariff that Windstream had submitted" to the Iowa Utilities Board pursuant to Iowa law. App. 4a. In 2009, however, Sprint began claiming that federal law preempted state regulation of intrastate VoIP calls, and ceased payment to Windstream for those calls. *Sprint Commc'ns, Inc. v. Jacobs*, 134 S.Ct. 584, 589 (2013). Although Sprint's position would have required the FCC to set access charges for intrastate VoIP calls, Sprint did not point to any FCC determination of what that rate should be. With Sprint refusing to pay, this dispute followed.

B. Federal And State Regulation Of Carrier Compensation For VoIP Calls.

To ensure that customers of different telephone companies can call each other, federal law requires "[e]ach telecommunications carrier ... to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a). "[B]ecause people do not customarily pay for *receiving* phone calls, only for placing them," local

phone companies historically received compensation for completing calls by charging the carriers who passed the calls to them. *Global NAPs Cal., Inc. v. Pub. Utils. Comm'n of Cal.*, 624 F.3d 1225, 1228 (9th Cir. 2010). That compensation often took the form of "access charges," which "long-distance carriers paid [local phone companies] for the opportunity to use their networks at the start-and end-points of the calls." *In re FCC 11-161*, 753 F.3d 1015, 1110 (10th Cir. 2014) (parenthetical omitted). For interstate calls, "access charges were regulated by the FCC." *Id.* at 1111. "For traffic within a single state," on the other hand, "[t]he access charge was governed by state law and was typically set above interstate rates." *Ibid.*

This case involves how intercarrier compensation was set for intrastate long-distance calls that began in VoIP format. The current governing law on that issue is settled and uncontroversial: in 2011, the FCC determined that all compensation for VoIP calls, including intrastate calls, would no longer be subject to access charges. *In re Connect Am. Fund.*, 26 FCC Rcd. 17633, ¶¶ 648, 652 (2015); *see In re FCC 11-161*, 753 F.3d at 1113. Instead, the FCC now requires these payments be set by reciprocal-compensation agreements pursuant to 47 U.S.C. § 251(b) – that is, by actual "compensation agreements between carriers." *In re FCC 11-161*, 753 F.3d at 1015. All the parties and the courts below agree that this 2011 ruling is valid and binding nationwide, but does not apply retroactively to pre-2011 transactions. *See* Pet. 22; App. 10a. So the narrow issue here is of only historical interest: *before* 2011,

could States prescribe the access charges for intrastate long-distance VoIP calls?

Sprint does not contend that narrow, historical issue merits this Court's attention. Instead, Sprint mistakenly suggests that in deciding it, the Eighth Circuit somehow swept aside decades of the FCC's regulations on its general authority over intrastate information transmissions. *See* Pet. 8-9, 13-18, 25. But the Eighth Circuit did not discuss that broader issue. And for good reason: the history of those regulations shows Sprint's argument is far off the mark.

1. Pre-2011, the FCC Exempted Only Interstate Enhanced Services from Access Charges.

There is a longstanding "system of dual state and federal regulation over telephone service." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986). Federal law authorizes the FCC to regulate interstate communications, while reserving to the States authority to set "charges ... for or in connection with intrastate communication service by wire or radio of any carrier." 47 U.S.C. § 152(b); *see* Pet. 19. For intrastate voice calls, States traditionally used that authority to set tariffs for access charges. *In re FCC 11-161*, 753 F.3d at 1110.

"[I]n the late 1970's," the FCC began "distinguish[ing] between 'basic' service (like telephone service) and 'enhanced' service (computer-processing service offered over telephone lines)." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S.

967, 976 (2005). With respect to the latter, the FCC eschewed regulation and adopted "a regulatory policy of promoting competition in the enhanced services industry." *California v. FCC*, 905 F.2d 1217, 1224 (9th Cir. 1990); *see* Pet. 13-14 (discussing FCC's "*Computer II*" ruling).

Pursuant to that policy, in 1983 the FCC "established the so-called 'ESP exemption,' " which exempted enhanced services providers from certain access charges. App. 11a. The FCC recognized that many providers of "jurisdictionally interstate communications, including ... enhanced services providers," had been subject to "the generally much lower business service rates" rather than access charges. *In re MTS & WATS Mkt. Structure*, 97 F.C.C.2d 682, 715 (1983). The FCC therefore declined, temporarily at first, to "impose full carrier usage charges on enhanced service providers ... who are currently paying local business exchange service rates for their interstate access." *Ibid.*

As this language indicates, the FCC did not describe the ESP exemption as applying to intrastate access charges. To the contrary, the FCC repeatedly described it as applying *inter*state. In 1988 the FCC considered ending the exemption, but ultimately explained it had "decided not to eliminate the exemption from interstate access charges currently permitted enhanced service providers." *In re Amendments of Part 69 of the Comm'ns Rules Re Enhanced Serv. Providers*, 3 FCC Rcd. 2631, 2631 (1988). When the FCC made the exemption permanent in 1996, it explained that "ESPs should not be required to pay interstate access

charges." *In re Access Charge Reform Price Cap Performance Rev. for Local Exch. Carriers*, 11 FCC Rcd. 21354, 21478 (1996). Finally, when the FCC imposed the current VoIP compensation rules in 2011, it clarified that it was displacing "the ESP Exemption from interstate access charges." *Connect Am. Fund*, 26 FCC Rcd. 17633, ¶ 945 n.1905. Of course, the courts defer to the FCC's expert views on the meaning of its own regulations. *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 59, 63-64 (2011).

2. In the 1980s the FCC Tried, and Failed, to Preempt Intrastate Enhanced Services Regulations.

Consistent with the FCC's descriptions of the ESP exemption as applying to interstate access charges, its orders creating and applying that exemption did not discuss whether the FCC had authority to regulate *intra*state enhanced services. The FCC addressed that latter issue in separate proceedings in the 1980s.[2] Most prominently, in 1986 the FCC attempted to "preempt[] nearly all state regulation of the sale of enhanced services." *California*, 905 F.2d at 1239; *see* Pet. 15. The FCC concluded it had authority to do this, even as to intrastate transmissions. It reasoned that (1) the Communications Act only barred FCC jurisdiction over intrastate communications "of any carrier"; (2) "the term

[2] *In re Amendment of § 64.702 of the Comm'ns Rules & Regs. (Second Computer Inquiry)*, 77 F.C.C.2d 384 (1980) (*Computer II*); *In re Amendment of § 64.702 of the Comm'ns Rules & Regs. (Third Computer Inquiry)*, 104 F.C.C.2d 958 (1986) (*Computer III*).

'carrier' is synonymous with 'common carrier' for purposes of the Act"; and (3) "enhanced services, unlike basic telephone services, are not offered on a 'common carrier' basis." *California*, 905 F.2d at 1240.

In 1990, on direct review of the FCC's preemption order, the Ninth Circuit "reject[ed] the Commission's interpretation" and held that intrastate enhanced-services transmissions are "squarely within the regulatory domain of the states." *Ibid.* The Ninth Circuit held that "[t]he extent of the authority to regulate intrastate communications services reserved to the states by [the Act] does not turn on whether the services are provided on a common carrier or non-common carrier basis," but only on whether they are provided by "any carrier" at all. *Id.* at 1242.

The FCC acknowledged that holding in its later proceedings. In one of the orders that Sprint relies on here, for instance, the FCC cited the *California* decision in recognizing that "purely intrastate" communications were outside its exclusive jurisdiction. *In re Pet. for Decl. Ruling*, 19 FCC Rcd. 3307, 3320 (2004). But because the FCC had never held the ESP exemption to apply to intrastate transmissions, it never suggested that the holding of *California* had any impact on that exemption.

3. The FCC Finds a Separate, Uncontested Source of Statutory Authority to Preempt Intrastate Access Charges.

In the Telecommunications Act of 1996, Congress increased the FCC's authority to regulate intrastate communications. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378-380 & n.6 (1999). The Act specified, however, that all "restrictions and obligations" under the previous regulatory scheme would continue in force "until ... explicitly superseded by regulations prescribed by the Commission." 47 U.S.C. § 251(g). So for some years, States continued to regulate intrastate long-distance calls – including intercarrier compensation for VoIP calls. *In re FCC 11-161*, 753 F.3d at 1110, 1148. But in 2011, the FCC instituted a comprehensive reform that included a nationwide transition away from intercarrier access charges and toward reciprocal compensation agreements. *See generally Connect Am. Fund*, 26 FCC Rcd. 17633. This reform covered virtually all types of communication services: both intrastate and interstate, and both traditional voice and VoIP calls.

As authority for this reform, the FCC did not rely on the "common carrier" rationale the Ninth Circuit had rejected in 1990 – nor could it have, since the 2011 reform extended far beyond the enhanced services that had been at issue in *California*. Instead the FCC "changed its interpretation of [47 U.S.C.] § 251(b)(5)." *In re FCC 11-161*, 753 F.3d at 1116. That statute requires "reciprocal compensation agreements for the transport and termination of telecommunications."

Noting that the Act defines "telecommunications" as including "communications traffic of any geographic scope," the FCC concluded that it could require reciprocal compensation agreements even for intrastate communications traffic. *Id.* at 1115-16 (quoting 47 U.S.C. § 153(50)).[3] The FCC acknowledged that it had previously interpreted § 251(b)(5) as requiring reciprocal compensation agreements only for local traffic, but discarded that reading as "inconsistent with the statutory terms." *Connect Am. Fund*, 26 FCC Rcd. 17633, ¶ 761.

The FCC expressly applied its new requirements prospectively to VoIP calls. Reiterating that it "has authority to bring all traffic within the section 251(b)(5) framework for purposes of intercarrier compensation, including traffic that otherwise could be encompassed by the interstate and intrastate access charge regimes," the FCC stated that "we exercise that authority now for all VoIP-PSTN traffic." *Id.* ¶ 943. But, consistent with § 251(g)'s grandfathering of previous obligations, the FCC confirmed that its "intercarrier compensation framework for VoIP[ ] traffic will apply prospectively." *Id.* ¶ 945.

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[3] The FCC further noted that, "[l]ike other forms of carrier traffic, intrastate access traffic falls within the scope of the broad term 'telecommunications,' " and that "[h]ad Congress intended to exclude ... 'intrastate' traffic[ ] 'from the reciprocal compensation framework, it could have easily ... use[d] more restrictive terms.' " *Connect Am. Fund*, 26 FCC Rcd. 17633, ¶ 765 (citation omitted).

On direct review of the FCC's action, the Tenth Circuit noted that "Congress intended the 1996 Act to apply to intrastate communications and expressly allowed the FCC to preempt state law." *In re FCC 11-161*, 753 F.3d at 1120. It therefore applied *Chevron* deference and upheld the FCC's new interpretation. *Ibid.*

C. In This Case, The Board And The Courts Uniformly Rule For Windstream.

Consistent with these holdings, in this case all the parties and the courts below agree that current law prohibits intrastate access charges. There also is no dispute that the pre-2011 ESP exemption prohibited *inter*state access charges for enhanced data services. *See* Pet. 13-18; App. 12a. The question here is whether the ESP exemption applied to intrastate VoIP calls. On that issue Sprint has lost at every turn, before a host of decisionmakers – State and federal, administrative and judicial.

In its dispute with Windstream, Sprint initially filed a complaint with the Iowa Utilities Board, which in February 2011 "disagreed" with Sprint, "ruling that the intrastate fees applied to VoIP calls." *Sprint Commc'ns v. Jacobs*, 134 S.Ct. 584, 589 (2013). Sprint then "commenced two lawsuits." *Ibid.* It challenged the Board's order in Iowa state court, *ibid.*, but the Iowa court "upheld the Board's decision" for substantially the reasons given by the Board. *See* 798 F.3d 705, 706 (8th Cir. 2015).

Sprint also filed this case against the members of the Board (co-respondents here) in the United States District Court for the Southern District of Iowa, seeking "an injunction against enforcement of the IUB's order." 134 S.Ct. at 585. Because the ultimate dispute involved Sprint's obligations to Respondent Windstream, Windstream intervened. The district court initially abstained from decision, but this Court reversed that order. *Id.* at 584. On remand, after the Eighth Circuit ruled that the state-court decision lacked preclusive effect in federal court, 798 F.3d 705, the district court granted summary judgment on the merits in favor of Respondents. App. 32a.

The district court first recognized that the Telecommunications Act of 1996 authorizes the FCC to regulate intrastate VoIP calls. App. 26a. But because the FCC did not exercise that authority until 2011 – after the calls at issue here – the court noted that the question is "how this type of traffic was regulated before the 1996 Act." App. 28a. It held that the FCC's pre-2011 ESP exemption applied only to interstate communications, and therefore preserved State jurisdiction over intrastate access charges. *Ibid.* In doing so, the court joined several other courts and State commissions that had previously found the pre-2011 ESP exemption not to preempt access charges for intrastate VoIP calls.[4]

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[4] *Pac. Bell Tel. Co. v Global NAPs*, 2008 Cal. PUC LEXIS 410, at *16-19 (Cal. Pub. Utils. Comm'n, Sept. 18, 2008), *aff'd, Global NAPs Cal., Inc. v. Pub. Utils. Comm'n of Cal.*, 2008 U.S. Dist. LEXIS 118584, at *28 (C.D. Cal. Dec. 23, 2008) (rejecting argument that FCC "preempt[ed] [State] 'regulation' of ... VoIP

A unanimous Eighth Circuit panel affirmed. The Eighth Circuit first clarified that this case involves only "the access charge regime" that was in place before "November 2011," when the FCC promulgated its current rules. App. 10a. The court disagreed with Sprint's argument that the FCC's pre-2011 "enhanced service providers (ESP) exemption ... applie[d] to the disputed intrastate long-distance VoIP calls." App. 11a. The court noted the FCC's reliance, in its 2011 *Connect America Fund* order, to "the ESP Exemption from interstate access charges." App. 12a. Since the FCC had never suggested to the contrary, the Eighth Circuit held that "[t]he ESP exemption previously applied only to interstate access charges," and "decline[d] Sprint's invitation to extend it to ... intrastate access charges." *Ibid*. It accordingly ruled that, under the pre-2011 rules, Sprint was required to pay intrastate access charges pursuant to Iowa law.

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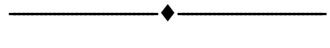
services"), *aff'd*, 624 F.3d 1225 (9th Cir. 2010); *Arbitration Between Level 3 Commc'ns Pursuant to § 252(b)(2) of the Commc'ns Act of 1934, as Amended by the Telecomms. Act of 1996, for Rates, Terms, and Conditions of Interconnection*, 2005 Kan. PUC LEXIS 166, at *120, 135-39 (Kansas Corp. Comm. Feb. 4, 2005) (FCC's preemptive regulation "does not apply to interexchange IP-PSTN traffic, and thus access charges ... apply to such traffic"); *Hollis Tel. Inc.*, 2009 N.H. PUC LEXIS 113, at *31-32 (N.H. Pub. Utils. Comm'n, Nov. 10, 2009) (FCC had not preempted "enforcement of [an] existing intrastate tariff" for VoIP calls); *Palmerton Tel. Co. v. Global NAPs S.*, 2010 Pa. PUC LEXIS 245, at *62 (Penn. Pub. Utils. Comm'n, Mar. 16, 2010) (VoIP "traffic cannot be exempted from the application of appropriate jurisdictional carrier access charges").

D. Sprint Forfeits The Issue In Its Parallel Case In The Fifth Circuit.

Windstream is aware of only one other pending case involving intrastate access charges for pre-2011 VoIP calls – and in that case, Sprint has abandoned the preemption issue.

Sprint had a similar dispute with a local telephone company in Missouri. *See CenturyTel of Chatham, LLC v. Sprint Commc'ns Co.*, 861 F.3d 566 (5th Cir. 2017). There too, the district court held that "state access tariff rates [for VoIP calls] are not preempted," finding the FCC had "explicitly reject[ed] federal preemption as applied to VoIP-to-traditional-format transfers." *Id.* at 572 (citations omitted). Sprint appealed other rulings of the district court, but "never raised preemption in its opening brief," and so the Fifth Circuit held that "the state-law tariffs cannot be challenged here." *Id.* at 573. Sprint's petition for certiorari in that case concedes that "the Fifth Circuit did not address [whether] state tariffs may not be applied to information services," and primarily focuses on other questions not implicated here. *See* Pet. for Cert. at 18, No. 17-627.



REASONS FOR DENYING THE WRIT

This is very likely the only court of appeals decision that ever will address whether the pre-2011 ESP exemption applied to intrastate VoIP calls. The FCC has settled the issue for calls that occur after November 2011, and no other pending cases from before 2011

present the issue. In the only other case that might have – *CenturyTel of Chatham* – Sprint forfeited the issue in the Fifth Circuit.

Sprint wrongly claims the decision below "leaves decades of calls for which such carriers *can* collect access charges." Pet. 22. In reality, the last calls that could have been governed by the pre-2011 rules took place six years ago. Windstream is aware of no plausible legal claim that has that long of a limitations period. And aside from *CenturyTel of Chatham*, Sprint identifies no other pending cases regarding pre-November 2011 access charges.

Sprint does not actually argue there are other cases pending. Instead it tries to transform the issue from the narrow question of what the FCC *did* in its historical ESP exemption, to the much broader one of what the FCC *currently can do* to preempt State regulation of *any* intrastate information services. Sprint is mistaken: this case plainly is the molehill the courts below understood it to be, not the mountain Sprint would like to make of it.

I. The FCC's Intrastate Jurisdiction Is Not At Issue.

As just explained, this case is about the application of one defunct FCC regulation (the pre-2011 ESP exemption) to one factual situation (intrastate transmissions). That is the only issue the Eighth Circuit decided. Contrary to Sprint's suggestions, this case does not present the broader question whether the FCC *can*

preempt state regulations of intrastate information transmissions. Far from it: everyone, including the panel below, agrees that the FCC's 2011 regulations are valid and do just that. *See* App. 10a.

Sprint's Petition grasps at straws trying to show otherwise. It seizes on a citation parenthetical in the Eighth Circuit's opinion, describing the Ninth Circuit's conclusion in *California* that the FCC could not regulate intrastate enhanced services. Pet. 3-4, 22-23. But the Eighth Circuit did not even mention this issue anywhere else in its opinion. Instead, the court below squarely rested its holding on what the ESP exemption itself did, not on what the FCC had statutory authority to do. *See* App. 12a-13a. The Eighth Circuit explained that the FCC itself described the pre-2011 ESP exemption as "interstate," and the court below simply declined to extend the exemption further by judicial construction. *Ibid.*

Nevertheless, Sprint's Petition trumpets the *California* citation parenthetical as the Eighth Circuit's "holding." *See* Pet. 3 (quoting App. 12a). To put it mildly, that is overblown. The opinion below does not address the FCC's jurisdiction over intrastate transmissions, either as to VoIP calls or as to any others. And Sprint points to no disagreement among the courts of appeals on that issue. This Court does not sit to review citation parentheticals in court of appeals opinions.[5] Certiorari is not warranted.

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[5] The district court did appear to accept the holding of *California*, in an aside from its ruling that the ESP exemption did not

II. Even If The *California* Holding Were At Issue, That Would Not Merit Certiorari.

In any event, Sprint's criticism of *California* is unsubstantiated. Sprint portrays that decision as a mortal threat to the nation's information-technology architecture (Pet. 22-25) – but it points to no other, current FCC policies that are imperiled by the holding of *California*.[6] Nor does Sprint point to any other court that has ever disagreed with the holding of *California.*

Neither of those failures is surprising: as the district court noted, *California* addressed the FCC's intrastate jurisdiction as it stood "before 1996" (App. 28a), at which time Congress expanded FCC authority over intrastate communications. *See* App. 21a ("The [1996] Act altered the division of power between the federal government and the states" by allowing FCC "regulations on local carriers") (citing *AT&T*, 525 U.S. at 377-78). It was under this current, expanded authority that the Tenth Circuit upheld the FCC's 2011 preemption of intrastate access charges for VoIP calls. *In re FCC 11-161*, 753 F.3d at 1120. So even if *California* were

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apply by its terms. App. 28a (finding it "unsurprising" that the ESP exemption did not apply intrastate, "because before 1996, the F.C.C. had no authority to regulate intrastate enhanced services"). But the Eighth Circuit did not adopt or even comment on that conclusion. This Court does not sit to review dicta in district court opinions, either.

[6] The *California* court vacated and remanded that decision for the unremarkable reason that the FCC failed to demonstrate "that the order is narrowly tailored to preempt only such state regulations as would negate valid FCC regulatory goals." 905 F.2d at 1243.

relevant to *this* case, its holding (at least as to VoIP access charges) has been overtaken for *other* cases by the 1996 amendments and the FCC's 2011 order. There simply is no need to revisit it now.

Ultimately, Sprint's attack on the *California* decision seems to be a case of wishful thinking. Since the ESP exemption applied only interstate, Sprint tries to turn elsewhere: it thinks it would be rid of its intrastate VoIP access-charge obligations if only it could go back to the 1980s and revive the FCC's across-the-board preemption of State enhanced-services regulations. Maybe – although Sprint still would have to show that VoIP calls *are* "enhanced services," which the courts below declined to decide. App. 13a. But more importantly, it is far too late to raise that issue now. Sprint identifies no court of appeals that has ever disagreed with *California*. Even in this litigation, Sprint has never previously argued that *California* should somehow be set aside and the 1980s regulations resuscitated. So – unsurprisingly – the courts below did not consider doing so. Neither should this Court.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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