No. _____

In The
Supreme Court of the United States

DAN M. LIPSCHULTZ, JOHN TUMA, MATTHEW SCHUERGER, KATIE J. SIEBEN, and VALERIE MEANS, in their official capacities as Commissioners of the Minnesota Public Utilities Commission,

Petitioners,

v.

CHARTER ADVANCED SERVICES (MN), LLC; CHARTER ADVANCED SERVICES VIII (MN), LLC,

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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QUESTIONS PRESENTED

The Communications Act distinguishes between "telecommunications services" and "information services." Telecommunications services are subject to common carrier regulation by the Federal Communications Commission (FCC), while the FCC has a policy against regulation of information services. The FCC has repeatedly declined to classify Voice over Internet Protocol (VoIP) service as either a telecommunications or an information service. Although VoIP service is a relatively new technology, it already has over 60 million subscribers in this country and is rapidly replacing traditional telephone service.

In this case, the Eighth Circuit became the first circuit court to reach the VoIP classification issue. Over a strong dissent, the panel majority classified VoIP service as an information service. The majority concluded that the FCC's policy against regulating information services conflicts with and preempts state regulation of VoIP service, despite the fact that the FCC has never applied this policy to VoIP.

The questions presented are:

1. Whether, in the absence of an FCC decision classifying VoIP service as an information service, FCC policy can conflict with and preempt state regulation of VoIP service.

2. Whether VoIP service is a telecommunications service or an information service, under the appropriate functional test for classification determinations from *Brand X*.

PARTIES TO THE PROCEEDINGS

Petitioners, Dan M. Lipschultz, John Tuma, Matthew Schuerger, Katie J. Sieben, and Valerie Means, in their official capacities as Commissioners of the Minnesota Public Utilities Commission, were the appellants in the court below.

Respondents, Charter Advanced Services (MN), LLC, and Charter Advanced Services VIII (MN), LLC, were the appellees in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Dan M. Lipschultz, John Tuma, Matthew Schuerger, Katie J. Sieben, and Valerie Means, in their official capacities as Commissioners of the Minnesota Public Utilities Commission, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 903 F.3d 715 (8th Cir. 2018), and reproduced in the petition appendix ("App.") at 1–18. The opinion of the District Court for the District of Minnesota is reported at 259 F. Supp. 3d 980 (D. Minn. 2017), and reproduced at App. 19–42.

JURISDICTION

The court of appeals entered its opinion and judgment on September 7, 2018, and denied a petition for rehearing on December 4, 2018. App. 2, 73–74. On March 1, 2019, Justice Gorsuch extended the time for filing a petition for certiorari to and including May 3, 2019. *See* Docket No. 18A889. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2, of the Constitution provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."

The following definitions in 47 U.S.C. § 153 are also pertinent:

(24) Information service. "The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."

(50) Telecommunications. "The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."

(53) Telecommunications service. "The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."

INTRODUCTION

The Communications Act distinguishes between "telecommunications services" and "information services." 47 U.S.C. § 153(24), (53). Telecommunications services are subject to common carrier requirements under Title II of the Communications Act, while information services are not. *Id.* § 153(51). The FCC also has a "long-standing national policy of nonregulation of information services." *In re Vonage Holdings Corp.*, 19 F.C.C. Rcd. 22404, 22416 ¶ 21 (2004).

Retail telephone service is the archetypal telecommunications service. To the consumer, VoIP service is functionally indistinguishable from traditional telephone service. Both transmit voice conversations between the caller and the called party without any change in the content of the conversation. The only difference is the underlying technology used to transmit the voice signal. App. 4, 48–50. VoIP services have rapidly replaced traditional telephone services and now have more than 60 million subscribers in this country. *In re Communications Marketplace Report*, F.C.C. 18-181 ¶ 205 (2018), 2018 WL 6839365, at *67.

In 2004, the FCC opened a proceeding to seek comment on how to classify VoIP services. *In re IP-Enabled Services*, 19 F.C.C. Rcd. 4863, 4868 ¶ 6 (2004). The classification proceeding is still open, and the FCC has repeatedly declined other opportunities to classify VoIP service. *See* App. 6. In the absence of a classification, the FCC on multiple occasions "has extended certain Title II obligations to interconnected VoIP providers."

In re Telephone Number Requirements for IP-Enabled Services Providers, 22 F.C.C. Rcd. 19531, 19538 ¶ 14 (2007).

In this case, over a strong dissent, the Eighth Circuit decided to reach the classification issue that has bedeviled the FCC for years. It held that VoIP service is an information service and concluded that any state regulation of VoIP is preempted by the FCC's general policy against regulation of information services. App. 7–11.

The question of whether states may regulate VoIP service is of national importance to the communications industry and to millions of consumers. The Eighth Circuit's overreaching decision to classify VoIP service and find preemption is inconsistent with this Court's preemption precedents. Furthermore, the Eighth Circuit misclassified VoIP because it failed to follow the well-established methodology for classifying communications services. Accordingly, this Court's review is warranted. *See* Sup. Ct. Rule 10.

STATEMENT OF THE CASE

A. Telecommunications Services and Information Services

The Communications Act of 1934, as amended by the Telecommunications Act of 1996, distinguishes between two mutually-exclusive categories of communication services: "telecommunications services" and

"information services." 47 U.S.C. § 153(24), (53); *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975–77 (2005). "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used." 47 U.S.C. § 153(53). "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(50). In contrast, "information service" is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications. . . ." *Id.* § 153(24). Information services have data-processing capabilities beyond the mere transmission of data. *Brand X*, 545 U.S. at 976–77.

The FCC has authority to classify services as telecommunications or information services. *See id.* A classification determination has significant regulatory consequences: telecommunications services are subject to common carrier regulations under Title II of the Communications Act, 47 U.S.C. § 153(51), which includes the requirement that all charges and practices must be just and reasonable. 47 U.S.C. § 201(b). Information services are not subject to common carrier regulations, and the FCC also has a "long-standing national policy of nonregulation of information services." *In re Vonage Holdings Corp.*, 19 F.C.C. Rcd. 22404, 22416 ¶ 21 (2004).

B. Voice over Internet Protocol (VoIP) Service

This case involves fixed, interconnected VoIP service. Fixed service means that customers receive service in one location, typically their home, as opposed to mobile or nomadic service. App. 49. Interconnected service means the VoIP service transmits calls over the traditional public switched telephone network using standard telephone numbers. *Id.* This petition uses the term "VoIP" to refer to fixed, interconnected VoIP, unless otherwise noted.

"Consumers increasingly use interconnected VoIP service as a replacement for traditional voice service," a trend the FCC expects to continue. *In re IP-Enabled Services*, 24 F.C.C. Rcd. 6039, 6039 ¶ 2, 6046 ¶ 12 (2009). In the United States, there are 64 million subscriptions for VoIP, including 40 million residential subscriptions. *In re Communications Marketplace Report*, F.C.C. 18-181 ¶ 205 (2018), 2018 WL 6839365, at *67.

To consumers, VoIP service functions just like traditional landline service. Both services transmit voice conversations from one party to another over the public switched telephone network using standard 10-digit dialing. There is no difference in the services except for the technology used to transmit the voice signals. Traditional landline telephone service transmits signals by using "circuit switching" technology through a communications channel in a telephone network. App. 4, 48–50. By contrast, VoIP service transmits signals by using Internet Protocol (IP) data packets. *Id.* Because

the only significant difference is the technology used to transmit the consumer's voice, the FCC has found: "From the perspective of a customer making an ordinary telephone call, we believe that interconnected VoIP service is functionally indistinguishable from traditional telephone service." *In re IP-Enabled Services*, 24 F.C.C. Rcd. 6039, 6046 ¶ 12 (2009).

Although the FCC issued a notice of proposed rulemaking on how to classify VoIP service in 2004, it has not resolved that question to date. *In re IP-Enabled Services*, 19 F.C.C. Rcd. 4863, 4868 ¶ 6 (2004); App. 6.

C. The Minnesota Public Utilities Commission Proceedings

The Minnesota Public Utilities Commission (MPUC) has jurisdiction over local "telephone service" in Minnesota. Minn. Stat. § 237.16. Charter Communications, Inc., through its affiliates, offers traditional telephone service and VoIP service in Minnesota and nationwide. App. 20–21. In a complaint filed with the MPUC, the Minnesota Department of Commerce alleged Charter had violated state laws and rules for telephone services. *Id.* at 24. As a result, the MPUC had to decide whether Charter's VoIP service is a "telephone service" under Minnesota law.

The MPUC issued an order, App. 43–72, finding that Charter's VoIP service is a telephone service under state law, because it is essentially indistinguishable from a traditional telephone service:

> The service allows customers to place calls from their home using a traditional touch-tone phone to recipients anywhere on the public switched telephone network. As acknowledged by Charter, calls using Charter's VoIP service are placed using traditional phone numbers assigned by the North American Numbering Plan. The service uses a customer's "existing phone wires, phones, and wall jacks." Moreover, Charter's VoIP service "does not require an Internet connection." The service "uses Internet protocol for transporting calls," but those "calls never touch the public Internet."

Id. at 50 (footnotes and internal citations omitted).

The MPUC directed Charter to comply with the state laws and rules that protect consumers of telephone services in Minnesota. *Id.* at 71–72. These laws, among other things, prohibit price gouging and unauthorized billing charges. *See* Minn. Stat. §§ 237.60, .665. They also protect consumer privacy. *See* Minn. R. 7812.0100, subp. 34, 7812.1000. The MPUC further found that federal law did not preempt its regulation of Charter's VoIP service. App. 64–70.

D. The Proceedings Below

Charter filed suit in the U.S. District Court for the District of Minnesota to seek a declaration that state regulation of its VoIP service is preempted by federal law and to enjoin MPUC regulation. App. 25. The parties completed discovery and cross moved for summary

judgment. *Id.* at 26. The district court found that Charter's VoIP service met the statutory definition of an information service and that state regulation was preempted because "telecommunications services are subject to state regulation, while information services are not." *Id.* at 29.

The MPUC appealed to the Eighth Circuit. A divided 2–1 panel affirmed. App. 1–18.

Referring to the FCC's policy against regulation of information services, the majority held that " 'any state regulation of an information service conflicts with the federal policy of nonregulation,' so that such regulation is preempted by federal law." App. 6–7 (quoting *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007)). Based on three paragraphs of statutory analysis, the majority "conclude[d] that the VoIP technology used by Charter Spectrum is an 'information service' under the Act," and thus state regulation is preempted by the FCC policy. *Id.* at 7–11.

In a footnote, the majority addressed the fact that the FCC has repeatedly declined to classify VoIP service:

> We note that while the FCC would be able to announce a classification decision regarding VoIP, it has so far declined to do so. We sometimes stay our hand while seeking the guidance of an administrative agency's perceived expertise when resolving a question concerning a statute ordinarily interpreted by the agency. Here the agency has decline[d] to

> provide guidance for well over a decade, so that we may, in our discretion, proceed according to [our] own light.

App. 7–8 n.3 (internal citations and quotation marks omitted).

Judge Grasz filed a dissent. App. 11–18. He emphasized that the issue of how VoIP technology fits into the federal-state regulatory scheme is for the FCC or Congress to resolve: "If new technology has made federal law insufficient to adequately address interconnected VoIP and its relationship to state law, then the FCC should use its existing authority to solve the problem or Congress should make any necessary statutory fixes." App. 18.

As a matter of statutory interpretation, Judge Grasz would have held that Charter's VoIP service is "either a telecommunications service or something entirely outside the primary categories of services in the Communications Act," but "[t]he one thing it cannot be is an information service." App. 15.

The MPUC filed a petition for rehearing, which was denied on December 4, 2018. Chief Judge Smith would have granted the petition. App. 73–74.

REASONS FOR GRANTING THE PETITION

This Court should review and reverse the Eighth Circuit for four reasons. First, the issue of whether and how states may regulate VoIP service is of

extraordinary importance to the communications industry and to millions of consumers of telephone services. VoIP service is rapidly replacing traditional landline telephone service in this country. If state regulation is preempted, consumers relying on VoIP service will not be covered by the legal protections that apply to traditional landline phone service, despite the fact that the two services are functionally indistinguishable to the consumers.

Second, the decision below is inconsistent with this Court's conflict preemption precedents, which require clear evidence of an actual conflict with federal agency regulations. *See Wyeth v. Levine*, 555 U.S. 555, 571 (2009); *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 885 (2000). Because the FCC has not classified VoIP service as an information service, there is not an actual conflict between state regulation of VoIP service and the FCC's information services policy. The Eighth Circuit erred by holding otherwise.

Third, when classifying communications services, the FCC uses a functional approach based on consumer perception, a methodology this Court has upheld. *See Brand X*, 545 U.S. at 991–93. Charter's VoIP service is a telecommunications service under this functional approach because, to the consumer, it functions like a traditional phone service. The Eighth Circuit misclassified VoIP because it failed to follow the well-established functional approach.

Fourth, the decision below conflicts with a Vermont Supreme Court opinion holding that some, but

not all, state regulation of information services is preempted. *In re Investigation into Regulation of Voice Over Internet Protocol (VoIP) Services*, 70 A.3d 997, 1006–08 (Vt. 2013).

I. Whether States May Regulate VoIP Service Is a Matter of National Importance.

The questions of how to classify VoIP service and whether states may regulate it are of extraordinary importance to the national communications market and to millions of consumers of telephone services.

VoIP service is rapidly replacing traditional telephone service in this country, a trend the FCC expects to continue. *In re IP-Enabled Services*, 24 F.C.C. Rcd. 6039, 6039–40 ¶ 2, 6046 ¶ 12 (2009). There are already 64 million VoIP subscriptions in this country, with total subscriptions growing at eight percent per year. *In re Communications Marketplace Report*, F.C.C. 18-181 ¶ 205 (2018), 2018 WL 6839365, at *67. At this rate, VoIP service could soon render traditional circuit-switched landline phone service virtually extinct. Other developed nations, such as Japan, are in the process of moving their entire telecommunications industry to VoIP-based systems. *See* Clifford S. Fishman & Anne T. McKenna, Wiretapping and Eavesdropping § 21.4 (2018); *see also* Mark C. Del Bianco, *Voices Past: The Present and Future of VoIP Regulation*, 14 CommLaw Conspectus 365, 379 (2006) (noting that Japan "created a stable regulatory environment for

consumers and carriers" of VoIP under which "VoIP expanded rapidly").

As VoIP service takes over the landline market, one of the most pressing questions is whether it should meet the standards and regulations applicable to the technology it is replacing. The Eighth Circuit determined that it need not. For VoIP consumers, their voice service functions just like traditional landline service. *In re IP-Enabled Services*, 24 F.C.C. Rcd. 6039, 6046 ¶ 12 (2009). But, because of the decision below, VoIP consumers in Minnesota and other states will not receive the protections of the laws and rules they would expect to cover their phone services. *See* Steven C. Judge, *VoIP: A Proposal for a Regulatory Scheme*, 12 Syracuse Sci. & Tech. L. Rep. 77 (2005) ("If a VoIP service offers a product that, from the consumer perspective, is identical in form and function to traditional phone services, then it must be regulated as if it were a traditional phone service."). The decision below raises significant consumer protection concerns, which will only increase as VoIP service continues to expand. *See* R. Alex DuFour, *Voice over Internet Protocol: Ending Uncertainty and Promoting Innovation Through a Regulatory Framework*, 13 CommLaw Conspectus 471, 480 (2005) ("[I]f VoIP is defined as an information service, the growing technology would become an increasing threat to important consumer interests as its usage grows.").

The decision also raises significant concerns about market competition between VoIP service and traditional phone service. "[B]y declining to classify

interconnected VoIP as an information service, the FCC keeps regulations between the two technologies closer to parity. At the very least, the FCC avoids placing the services in wholly disparate regulatory regimes." Marc Elzweig, *D, None of the Above: On the FCC Approach to VoIP Regulation*, 2008 U. Chi. Legal F. 489, 527 (2008). The Eighth Circuit, by classifying VoIP service as an information service and preempting state regulation, handed VoIP providers a major competitive advantage, which the FCC has repeatedly declined to do. *See* Amy L. Leisinger, *If It Looks Like a Duck: The Need for Regulatory Parity in VoIP Telephony*, 45 Washburn L.J. 585, 612 (2006) ("VoIP telephony's classification as an 'information service' would shift the competitive balance among telecommunications service providers in favor of VoIP" and "unfair competitive practices and other antitrust problems will result."); *see generally* Rob Frieden, *The FCC's Name Game: How Shifting Regulatory Classifications Affect Competition*, 19 Berkeley Tech. L.J. 1275 (2004). An information services classification for VoIP also provides an incentive for carriers to abandon traditional telephone infrastructure and transfer customers to VoIP in order to escape regulation.

The Eighth Circuit reached its holding based on three paragraphs of statutory analysis, without any discussion of the significant policy consequences. App. 7–11. The questions presented deserve far more attention and this Court's review.

The importance of the questions presented are also shown by the frequency with which the VoIP

classification issue has arisen in other circuit courts. Unlike the Eighth Circuit, though, the other circuits avoided reaching the classification issue, on various grounds, and thus avoided the significant consequences of a potential misclassification. *See CenturyTel of Chatham, LLC v. Sprint Commc'ns Co.*, 861 F.3d 566, 573–74 (5th Cir. 2017) (rejecting the argument that the tariff rates Sprint must pay to connect to customers of its VoIP service turned on "whether its VoIP[ ] service qualified as an information service or a telecommunications service"); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 851 F.3d 1324, 1328–29 (D.C. Cir. 2017) (per curiam) (holding an association lacked standing to seek an order compelling the FCC to classify VoIP service as a telecommunications service); *In re FCC 11–161*, 753 F.3d 1015, 1048–49 (10th Cir. 2014) (finding not ripe the question of whether a VoIP service provider may obtain universal service funds, which are only available to entities that provide telecommunications services); *see also Centennial P.R. License Corp. v. Telecomms. Regulatory Bd. of P.R.*, 634 F.3d 17, 38 (1st Cir. 2011) ("We are hesitant to insert ourselves into the classification and regulation of VoIP traffic on such a muddled record. VoIP presents a number of sensitive technical and policy considerations better left to the FCC and state commissions.").

II. The Decision Below Conflicts with This Court's Preemption Precedent Requiring Clear Evidence of an Actual Conflict with Federal Regulation.

This Court's preemption precedent requires clear evidence of an actual conflict with federal regulation or policy. *See Wyeth*, 555 U.S. at 571; *Geier*, 529 U.S. at 885. The Eighth Circuit held that state regulation of VoIP service conflicts with the FCC's policy on information services. But the FCC has not classified VoIP service as an information service. Because the FCC has not extended its information services policy to VoIP, there is not clear evidence of an actual conflict between state regulation of VoIP and the FCC's information services policy.

Preemption, which is based on the Supremacy Clause, "specifies that federal law is supreme in case of a conflict with state law." *Murphy v. NCAA*, 138 S. Ct. 1461, 1479 (2018). A conflict occurs when state laws "prevent or frustrate the accomplishment of a federal objective" or make it "impossible" to comply with both federal and state law. *Geier*, 529 U.S. at 873. Both federal statutes and federal regulations can have preemptive effect. This Court, however, will not find that agency regulations preempt state law, absent "clear evidence of a conflict." *Id.* at 885.

Under this standard, courts do not speculate about what a federal agency might do. Instead, they look to the agency's existing policies to assess whether there is clear evidence of an actual conflict. *See Wyeth*, 555

U.S. at 571 (holding that a state failure-to-warn action against a drug manufacturer was not preempted by FDA regulation because, "absent clear evidence that the FDA would not have approved a change" to the drug's label to comply with state warning requirements, "we will not conclude that it was impossible for Wyeth to comply with both federal and state requirements"); *see also Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 72 (1st Cir. 2006) (holding that a FCC order "does not clearly preempt state authority" because it is, "at best, ambiguous on the question, and ambiguity is not enough to preempt state regulation").

Here, there is no evidence of an actual conflict between the MPUC's decision and the FCC, because the FCC has not classified VoIP service as an information service and has not otherwise extended its information services policy to VoIP. The FCC has issued orders on VoIP but, in its own words, it has "refrained from deciding how VoIP should be classified or how that classification would affect state regulation." Brief of the Federal Communications Commission as Amicus Curiae in Support of Plaintiffs-Appellees at 28, *Charter Advanced Services (MN), LLC v. Lange*, No. 17-2290, 2017 WL 4876900 (8th Cir. Oct. 26, 2017) (hereinafter "FCC Br."). Thus, state regulation of VoIP does not conflict with the existing federal policy on information services, as set by the federal agency with the relevant authority and expertise. *See Brand X*, 545 U.S. at 992 (Congress has "le[ft] federal telecommunications policy in this technical and complex area to be set by the

Commission, not by warring analogies" by lawyers in court.).

The FCC also has not issued any orders that expressly preempt state regulation of fixed VoIP services, a fact that distinguishes this case from *Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570 (8th Cir. 2007). There, the court upheld a FCC order that expressly preempted state regulation of "nomadic" or mobile VoIP, because "it would be impractical, if not impossible, to separate the intrastate portions of VoIP service from the interstate portions." 483 F.3d at 574. This rationale rested on the FCC's exclusive jurisdiction over interstate communications. *See* 47 U.S.C. § 152(a). The court noted that the FCC's order did not address fixed VoIP, and that the rationale could not justify preemption of fixed services, which can segregate interstate calls under the FCC's exclusive jurisdiction from intrastate calls subject to state regulation. *Minn. Pub. Utils. Comm'n*, 483 F.3d at 582–83. The court declined to rule on preemption as to fixed VoIP services, "until presented with an [FCC] order preempting state regulation of fixed VoIP service providers." *Id.* at 582.

The FCC has never issued such an order, despite several opportunities to do so. Instead, the FCC has chosen "not to further exercise its preemptive power to dictate a uniform national answer" for fixed VoIP service. *Ill. Pub. Telecomms. Ass'n v. FCC*, 752 F.3d 1018, 1025 (D.C. Cir. 2014). The FCC's decision not to issue another preemptive order is a legitimate exercise of its discretion. *See* Sarah E. Light, *Regulatory Horcruxes*,

67 Duke L.J. 1647, 1672 (2018) ("Even when Congress delegates power to agencies to preempt or to interpret statutory provisions that will have preemptive effect, the agency need not always choose to exercise that authority—a form of nonpreemption, which is often a matter of conscious choice.").

Because the FCC has not extended its information services policy to VoIP service, or otherwise issued an order preempting state regulation of fixed VoIP, there is not clear evidence of an actual conflict between state regulation and federal communications policy. In the absence of such an order, there is not sufficient evidence of an actual conflict to satisfy this Court's precedential requirements. *See P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 504 (1988) ("There being no extant action that can create an inference of pre-emption in an unregulated segment of an otherwise regulated field, pre-emption, if it is intended, must be explicitly stated.").

III. The Decision Below Conflicts with the FCC's Functional Approach to Classification Upheld by This Court in *Brand X*.

The Eighth Circuit did not need to reach the VoIP classification issue because, regardless of how it classifies VoIP service, there is not an actual conflict between state regulation and the federal policy set by the FCC. *See supra* Part II. However, once the Eighth Circuit decided to reach the issue, it should have used the functional approach for classification determinations

developed by the FCC and upheld by this Court. *See Brand X*, 545 U.S. at 991–93. Because the court did not employ this well-established classification methodology, it misclassified VoIP service.

When classifying communications services, the FCC uses "a functional approach, focusing on the nature of the service provided to consumers, rather than one that focuses on the technical attributes of the underlying architecture." *In re Appropriate Framework for Broadband Access to Internet over Wireline Facilities*, 17 F.C.C. Rcd. 3019, 3023 ¶ 7 (2002). In *Brand X*, this Court held it was reasonable for the FCC to make a classification determination "functionally, based on how the consumer interacts with the provided information." 545 U.S. at 993. After *Brand X*, the FCC declared it is "settled law" that a classification under the Communications Act turns on the functionality for the end user. *In re Universal Service Contribution Methodology*, 21 F.C.C. Rcd. 7518, 7538–39 ¶ 40 (2006).

Under the functional approach, Charter's VoIP service is a telecommunications service because, to the consumer, it functions like a traditional telephone service. The FCC has stated that, "[f]rom the perspective of a customer making an ordinary telephone call, we believe that interconnected VoIP service is functionally indistinguishable from traditional telephone service." *In re IP-Enabled Services*, 24 F.C.C. Rcd. 6039, 6046 ¶ 12 (2009). As for Charter's interconnected VoIP service, the MPUC issued a detailed order finding that, to consumers, "the VoIP service offered by Charter is essentially indistinguishable from traditional phone

service." App. 50. Specifically, Charter's VoIP service "allows customers to place calls from their home using a traditional touch-tone phone" and their "existing phone wires, phones, and wall jacks." *Id.* The service uses traditional telephone numbers to connect to recipients on the public switched telephone network and does not require an Internet connection. *Id.* Based on these undisputed facts, Charter's VoIP service is a telecommunications service under the functional approach, because it functions like a traditional telephone service.

The Eighth Circuit, though, did not employ the functional approach. Indeed, it made no mention of the methodology, despite extensive briefing on it. There is nothing about VoIP service that makes the functional approach inapplicable. The Eighth Circuit's failure to classify VoIP service as a telecommunications service, in accordance with the well-established functional approach, provides another reason to grant review.

IV. The Decision Below Conflicts with the Vermont Supreme Court's Holding That Only Some State Regulation of Information Services Is Preempted.

Contrary to the Eighth Circuit, the Vermont Supreme Court has held that not all state regulation of information services is preempted. *In re Investigation into Regulation of Voice Over Internet Protocol (VoIP) Services*, 70 A.3d 997, 1006–08 (Vt. 2013). The conflict between the Eighth Circuit and Vermont Supreme

Court on the preemptive breadth of the FCC's information services policy provides another reason for review.

In the Vermont case, the Vermont Public Service Board determined it had the authority to regulate VoIP service, regardless of whether it is an information service under federal law. *Id.* at 999–1000. On review, the Vermont Supreme Court held that the Board could not avoid the classification issue because, if VoIP service is an information service, "certainly *some* amount of preemption will occur, including any Title II-type regulation." *Id.* at 1007. However, the court held that classifying VoIP service as an information service would not preempt all state regulation because: "Information services are not wholly exempt from regulation, and state regulations are preempted only to the extent they conflict with federal law or policy." *Id.* at 1006–07. The court remanded to the Vermont Board, which found that VoIP service is a telecommunications service under federal law. *Investigation into Regulation of Voice over Internet Protocol (VoIP) Services*, 2018 WL 835315 at *2, *52 (Vt. P.S.B. Feb. 7, 2018).

The Vermont Supreme Court and Eighth Circuit seem to agree that the classification of VoIP is a threshold question that should be answered before assessing preemptive conflicts. For the reasons argued in Part II, the MPUC believes this position is incorrect and inconsistent with this Court's preemption precedents.

The Vermont Supreme Court and the Eighth Circuit are in conflict, though, on the preemptive breadth

of the FCC's information services policy. Both courts viewed the question as a matter of conflict preemption. But while the Eighth Circuit held that the FCC's policy is so broad that "any state regulation of an information service conflicts with the federal policy of nonregulation," App. 6–7, the Vermont Supreme Court held that the FCC's policy allows for some state regulation. *In re Investigation into Regulation of Voice Over Internet Protocol (VoIP) Services*, 70 A.3d at 1006–08.

The Vermont Supreme Court has the better view. Even the FCC acknowledged that its information services policy refers primarily to "economic, public utility-type regulation" and allows for some consumer protection and customer safety regulation. FCC Br. at 10–11 n.1. It is the MPUC's position that at least some of the consumer protection laws and rules that it sought to apply to Charter's VoIP service are not inconsistent with the FCC's policy against regulation of information services. Once the Eighth Circuit determined that VoIP service is an information service, it should have analyzed which of the relevant Minnesota laws and rules actually conflict with the FCC's information services policy, or remanded for that determination.

CONCLUSION

For all of the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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