No. _____

In the
Supreme Court of the United States

800 SERVICES, INC.,
Petitioner,

v.

AT&T CORP.,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether the Third Circuit Court of Appeals Erred in Failing to Refer this Questions of Tariff Interpretation to the FCC Under the Doctrine of Primary Jurisdiction.

2) Whether the Third Circuit Court of Appeals Erred in Failing to Recognize the Numerous Instances of Fraud on the Court Asserted by Petitioner.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this Court are as follows:

800 Services, Inc.

AT&T Corp.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner has no parent corporations and no publicly held company that owns 10% or more of any entity.

LIST OF PROCEEDINGS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
Civil No. 98-cv-01539
800 SERVICES, INC. v. AT&T CORP.
Order dated 9/20/2000 Respondent's Motion for Summary Judgment GRANTED.
Unpublished Opinion.

THIRD CIRCUIT COURT OF APPEALS
Civil No. 00-3519
800 SERVICES, INC. v. AT&T CORP.
Judgment dated 2/12/2002 District Court's Order AFFIRMED.
800 Servs. v. AT&T Corp., 30 F. App'x 21 (3d Cir. 2002).

THIRD CIRCUIT COURT OF APPEALS
Case No. 19-1294
800 SERVICES, INC. v. AT&T CORP.
Judgment dated 12/19/2019 Summary Affirmance DENIED.
800 Servs. v. AT&T Corp., 822 F. App'x 98 (3d Cir. 2020).

THIRD CIRCUIT COURT OF APPEALS
Case No. 19-1294
800 SERVICES, INC. v. AT&T CORP.
Judgment dated 8/20/2020 District Court's Order AFFIRMED and Petitioner's Motion to Vacate DENIED.
800 Servs. v. AT&T Corp., 822 F. App'x 98 (3d Cir. 2020).

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully requests that a Writ of Certiorari be issued to review the United States Third Circuit Court of Appeals' decision dismissing Petitioner's Motion to Vacate and affirming the United States District Court for the District of New Jersey's decision granting Respondent's Motion for Summary Judgment.

OPINIONS BELOW

The August 20, 2020 decision from the Third Circuit Court of Appeals can be found at *800 Servs. v. AT&T Corp.,* 822 F. App'x 98 (3d Cir. 2020) and is reproduced in the Appendix at 1-6.

The January 8, 2019 order without a published opinion from the United States District Court for the District of New Jersey is reproduced in the Appendix at 7-8.

The February 12, 2002 decision from the Third Circuit Court of Appeals can be found at *800 Servs. v. AT&T Corp.,* 30 F. App'x 21 (3d Cir. 2002) and is reproduced in the Appendix at 9-13.

The September 20, 2000 decision without a published opinion from the United States District Court for the District of New Jersey is reproduced in the Appendix at 14-36.

BASIS FOR JURISDICTION IN THIS COURT

The Third Circuit Court of Appeals affirmed the decision of the United States District Court for the District of New Jersey on August 20, 2020. This Court

has jurisdiction pursuant to statutory provisions 28 U.S.C. § 1254(1) to review on writ of certiorari the decision of the United States Court of Appeals for the Third Circuit. This matter brings questions of law that are unsettled.

In *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg*, 545 U.S. 308 (2005), this Court articulated a standard for federal question jurisdiction. The federal issue must be "actually disputed and substantial," and it must be one that the federal courts can entertain without disturbing the balance between federal and state judicial responsibility. *Id.* at 314. Here, that question is whether the Third Circuit erred in failing to refer the case to the FCC for purposes of statutory interpretation, pursuant to the doctrine of primary jurisdiction.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254(1)

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

47 U.S.C.S. § 203

(a) Filing; public display. Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.
(b) Changes in schedule; discretion of Commission to modify requirements. (1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the

Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe. (2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days. (c) Overcharges and rebates. No carrier, unless otherwise provided by or under authority of this Act, shall engage, or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule. (d) Rejection or refusal. The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective

> date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful. (e) Penalty for violations. In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

47 U.S.C.S. § 204(a)(3)

> A local exchange carrier may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under paragraph (1) before the end of that 7-day or 15-day period, as is appropriate.

STATEMENT OF THE CASE

A. Bringing the Claims to Federal Court.

Petitioner initially filed his claims in the United States District Court for the District of New Jersey on April 6, 1998. (Dkt. 1 Complaint). On January 28, 2000, Respondent AT&T Corp filed a Motion for Summary Judgment under Federal Rule of Civil Procedure 56. (Dkt. 40). That Motion was granted on September 20,

2000. (Dkt. 53). Petitioner timely filed an appeal to the United States Court of Appeals for the Third Circuit on October 13, 2000. (Dkt. 54). On February 12, 2002, the Third Circuit Court of Appeals affirmed the District Court's grant of summary judgment. (App. 9-13). On April 27, 2018, Petitioner filed a motion to vacate the judgment pursuant to Federal Rule of Civil Procedure 60(b), arguing that the original ruling was tainted by fraud on the court. (App. 2-6). AT&T also filed a motion for summary affirmance which was denied by Judges Chagares, Restrepo, and Scirico on December 19, 2019. (App. 37). These judges ordered that the case proceed to oral argument before they were replaced. (App. 1). Petitioner's motion to vacate was denied by the Third Circuit Court of Appeals on August 20, 2020. (App. 6) This appeal follows.

B. Concise Statement of Facts Pertinent to the Questions Presented.

This case presents a complex, extremely technical set of facts concerning a dispute that occurred several decades ago. The following paragraphs are an attempt to summarize these facts in a clear and concise way so that the law may be properly applied.

The Petitioner ("800 Services, Incorporated" or "800 Services") served as an "aggregator" of telecommunications services for Respondent ("AT&T Corporation" or "AT&T") in the early to mid 1990s. (App. 9). The purpose of an aggregator is to pool telecommunications services in order to provide a discount to the ultimate users of these services, known as end-users. (App. 9). AT&T is a provider of long-distance telecommunications services and made use of

many aggregators during this time period. Under this contractual relationship, 800 Services was required to meet annual revenue commitments to AT&T. (App. 10). Note that for the purposes of this case, references to AT&T's "Customer(s)" refers to the aggregators, not the end-users.

The relationship between AT&T and 800 Services was predominately contractual in nature. However, this relationship is conducted within the confines of federal law. (App. 9). Title II of the Communications Act of 1934 ("Title II") gives the the Federal Communications Commission, or FCC, the right to oversee all charges, regulations, practices, and classifications related to the telecommunications industry. *See* 47 U.S.C.S. § 203. In this context, one of the most important functions of the FCC is the issuance and enforcement of tariffs. According to the FCC, these tariffs;

> contain the rates, terms and conditions of certain services provided by telecommunications carriers. The most common tariff filed at the FCC is for interstate local access service. These tariffs are filed by local exchange carriers, or LECs. Long-distance companies and others pay the rates set out in these tariffs to LECs for access to local networks at the originating and/or terminating ends of a long-distance call.

See Tariffs (Last accessed on December 18, 2020), FCC.COM, www.fcc.gov/general/tariffs-0. The relevant tariff in this case is Tariff No. 2, which required 800 Services to pay AT&T for shortfall charges in the event

that 800 Services failed to meet its revenue commitment. (App. 13).

In July 1994, 800 Services agreed to a restructure of its current contractual arrangement with AT&T. (Appellant's Reply Br. at 4). Since that date, Phillip Okin ("Mr. Okin"), the CEO of 800 Services, has consistently asserted that he was intentionally misled by AT&T as to the terms and conditions of this restructuring agreement, particularly as it relates to AT&Ts relationship to 800 Services end-users. (Appellant's Reply Br. at 4). Furthermore, significant questions have been raised as to the legality of AT&T's interpretation of the restructure agreement under the terms of Tariff No. 2. (Appellant's Reply Br. at 6).

In 1995, 800 Services failed to meet its revenue commitments and consequently was assessed shortfall charges under Tariff No. 2. (App. 13). Petitioner asserted that this was due to AT&Ts usage of its own telemarketers to solicit 800 Services end-users. (Dkt. 60-4 at 50). It was AT&T's position that 800 Services plan was a Post June 17th 1994 plan therefore making it susceptible to prorated shortfall, while 800 Services claims it's plan was a pre June 17th 1994 plan and therefore penalty immune from prorated shortfall. (App. 21-22). 800 Services requested a second restructure but his request was denied by AT&T (Appellant's Reply Br. at 18). Petitioner asserts that this denial constituted a violation of Tariff No. 2, and further claims that AT&T fraudulently told Mr. Okin that 800 Services did not qualify for a penalty-free restructure. (Appellant's Reply Br. at 18). AT&T denied these claims and maintained that the denial was legal.

(Appellant's Reply Br. at 18). Mr. Okin has asserted that AT&T counsel knowingly lied to Judge Politan that Tariff No. 2 allowed AT&T to assess shortfall charges on 800 Services' end-users. (Appellant's Reply Br. at 4).

In any event, AT&T assessed a shortfall penalty of $382,651.05 on 800 Services for its failure to meet revenue commitments. (Appellant's Reply Br. at 4). 800 Services refused to pay these shortfall charges, arguing that they were illegal under Tariff No. 2. (Appellant's Reply Br. at 12). 800 Services did not need to meet prorated shortfall. (App. 47). AT&T counsel had intentionally misled Judge Politan that the Tariff No. 2 allowed AT&T to charge shortfall to 800 Services end-users, this action effectively put 800 Services out of business. (Appellant's Reply Br. at 12). As a result, AT&T proceeded to charge this amount to 800 Services end-users. (Appellant's Reply Br. at 12). This action effectively put 800 Services out of business. (Appellant's Reply Br. at 13).

C. Procedural History

On April 6, 1998, 800 Services filed suit against AT&T in the United States Dictrict Court for the District of New Jersey. (Dkt. 1). Petitioner advanced twelve counts, including "allegations of unjust enrichment, slander and libel under New Jersey state law, intentional interference with prospective economic advantage and similar interference with contractual relations, unfair competition/trade libel and various claims under 201, 202 and 203 of the Communications Act." (App. 10).

In return, AT&T filed a counterclaim against 800 Services for unpaid telephone usage charges, shortfall charges resulting from contractual obligations and prejudgment interest. (App. 10). AT&T then filed a motion for summary judgment under Federal Rule of Civil Procedure 56. (Dkt. 40). On September 18, 2000, the District Court granted AT&T's motion for summary judgment and awarded judgment on the counterclaim. (Dkt. 53).

On October 13, 2000, 800 Services filed an appeal to the United States Court of Appeals for the Third Circuit. (Dkt. 54). On February 12, 2002, the Third Circuit Court of Appeals affirmed the ruling of the District Court. (App. 9-13).

On April 27, 2018, 800 Services filed a Motion to Reopen its case against AT&T in the United States District Court for the District of New Jersey. (Dkt. 60). 800 Services alleged—among many other complaints—that AT&T violated its agreements under Tariff No. 2 by charging $382,651.05 to 800 Services' end-users. (Appellant's Reply Br. at 4), and that AT&T knowingly lied to Judge Politan that the Tariff allowed them to charge shortfall to 800 Services end-users. Tariff No. 2 states that "shortfall and/or termination liability *are the responsibility of the Customer*." (Appellant's Reply Br. at 12). Petitioner further cited the 2003 ruling of the FCC stating that;

> Because these end users did not choose AT&T as their primary interchange carrier, AT&T had neither proprietary interest in these individual end-user locations nor an expectation of revenue from them.

(Appellant's Reply Br. at 12). 800 Services additionally claimed that AT&T illegally denied their 1995 request for a restructure and committed fraud on the court by misleading the judges in the 2002 case. (Appellant's Reply Br. at 19). 800 Services also asserts that it attempted to transfer its traffic to CT-516 a much higher paying discount, but AT&T illegally refused to process its request. AT&T counsel then lied to Judge Politan that Mr. Okin admitted in his deposition that he never attempted to transfer his traffic to CT 516. (Appellant's Reply Br. at 23).

On December 19, 2019, AT&T motioned for summary affirmance from the Court. This motion was denied. (App. 37-38). Furthermore, Judges Chagares, Restrepo, and Scirico approved the case for oral argument. (App. 37-38). These judges were subsequently replaced prior to oral argument.

On January 8, 2019, the District Court denied 800 Services Motion to Reopen. (App. 7-8). 800 Services subsequently appealed to the Third Circuit Court of Appeals on February 1, 2019. (Dkt. 72). On August 20, 2020, the Third Circuit affirmed the District Court's refusal to reopen the case. (App. 1-6).

This Petition for Writ of Certiorari followed.

REASONS TO GRANT THIS PETITION

I. The Third Circuit Court of Appeals Erred In Failing to Apply the Doctrine of Primary Administrative Jurisdiction when it Affirmed the District Court's Refusal to Reopen 800 Services' Claim.

The Third Circuit Court of Appeals erred when it affirmed the District Court's decision to reopen 800 Services' claim against AT&T. Under the doctrine of primary administrative jurisdiction, the United States District Court for the District of New Jersey should have referred the case to the FCC for interpretation of Tariff No. 2 before proceeding any further with the litigation.

Primary administrative jurisdiction requires courts to submit questions that are within the exclusive administrative capacity of agencies to the relevant agency for interpretation. This Court elucidated the specifics of the doctrine in *Local Union 189*, stating that;

> [the] doctrine of primary jurisdiction applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case *the judicial process is suspended pending referral of such issues to the administrative body for its views*. The doctrine is based on the principle that in cases raising issues of fact not within the

> conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over, and *requires judicial abstention* in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme.

Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 684-85 (1965) (citing *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956), *Far E. Conference v. United States*, 342 U.S. 570, 574 (1952), *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 353 (1963)) (emphasis added).

The United States Supreme Court Reports, Lawyers' Edition summarizes primary jurisdiction as follows;

> In its essence the doctrine requires that a question within the peculiar competence of a federal administrative agency should be determined by such agency either prior to the institution or during the pendency of a federal action in which the court has jurisdiction of the subject matter and in which such question arises

See E.H. Schopler, Annotation, *The Doctrine of Primary Administrative Jurisdiction as Defined and Applied by the Supreme Court*, 38 L. Ed. 2d 796, 804-14 (1974).

This Court has previously found that "[the] doctrine of primary jurisdiction does more than prescribe the mere procedural timetable of the lawsuit. It is a

doctrine allocating the law-making power over certain aspects of commercial relations. It transfers from court to agency the power to determine some of the incidents of such relations." *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 65 (1956).

A. The FCC maintains primary administrative jurisdiction over the interpretation of Tariff No. 2.

This Court has held that the presence of a "pervasive regulatory scheme" in the industry in question is the primary marker of whether primary administrative jurisdiction applies. In *RCA*, this Court found that if an industry possesses "no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by federal courts can work no mischief. The justification for primary jurisdiction in an administrative agency accordingly disappears." *United States v. RCA*, 358 U.S. 334, 350 (1959).

The FCC, as the administrative agency responsible for regulating the telecommunications industry, has primary jurisdiction over the rates, charges, and regulations that apply to this case. Title II of the Federal Communications Act of 1934 states that;

> *All charges, practices, classifications, and regulations for and in connection with such communication service*, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: Provided, That communications by wire or radio subject to this Act may be classified into day,

> night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: Provided further, That nothing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of their services, *if the Commission is of the opinion that such contract is not contrary to the public interest.*

See 47 U.S.C.S. § 201 (emphasis added).

Title II constitutes a "pervasive regulatory scheme" according to this Court's ruling in *RCA*. It regulates nearly every aspect of the industry, notably including ratemaking, as well as all "practices, classifications, and charges." *Id*. In fact, it goes so far as to grant the FCC the right to prohibit parties subject to its jurisdiction from engaging in contractual relationships with parties outside of that jurisdiction. *Id*. As a result of this "pervasive regulatory scheme," the FCC holds primary jurisdiction over interpretations of its tariffs.

Title II requires all common carriers to file with the FCC schedules, known as tariffs, "showing all charges" and "showing the classifications practices, and regulations affecting such charges." 47 U.S.C.S. § 203. Tariffs certified by the FCC regulate the "charge, classification, regulation, or practice" present in the contractual relationship between long-distance providers and aggregators. *See* 47 U.S.C.S. § 204(a)(3).

Thus, these tariffs are within the "peculiar competency" of the FCC, and the FCC's right to interpret them supersedes that of the federal and state courts.

This Court should find that the FCC had the exclusive right to interpret Tariff No. 2, i.e. the tariff that regulated the rates and shortfall charges between AT&T and 800 Services. The interpretation of this tariff cuts to the very core of this case. The question of whether or not AT&T was allowed to charge 800 Services' end-users the shortfall charges AT&T assessed on 800 Services has proven to be one of the most contentious issues in the dispute. This Court should find that question to be within the unique purview of the FCC.

B. The Third Circuit erred in failing to refer the interpretation of Tariff No. 2 to the Federal Communications Commission.

This Court should find that the Third Circuit erred when it failed to vacate the District Court's opinion and refer the interpretation of Tariff No. 2 to the FCC. Since Tariff No. 2 formed part of the "pervasive regulatory scheme" enacted by Congress through the FCC, the United States District Court for the District of New Jersey should have directed all questions regarding ambiguities within that treaty to the FCC. On appeal, the Third Circuit should have vacated the District Court's decision and suspended the litigation "pending referral of such issues to the administrative body for its views." *Local Union No. 189*, 381 U.S. at 684-85.

This action would have been far from unprecedented in the Third Circuit. (App. 39-58). In *Combined Companies* the Third Circuit decided a case remarkably similar to the dispute at hand. *See Combined Cos. v. AT&T Corp.*, No. 95-908 (WGB), 2006 U.S. Dist. LEXIS 35258 (D.N.J. May 31, 2006). The plaintiff in that case, Combined Companies Incorporated, or "CCI," sued AT&T for refusing their request for a transfer of services. *Id.* at 6. AT&T denied CCI's request for transfer unless CCI paid a deposit to ensure that AT&T did not suffer from any revenue shortfalls. *Id.* CCI claimed that the denial of their request amounted to a violation of the terms of the governing tariff and filed suit in the United States District Court for the District of New Jersey. *Id.* at 7.

Judge Politan—the same judge who heard this very case at the District Court level—issued a preliminary injunction against AT&T requiring it to allow the transfer. *Id.* at 8. However, citing primary jurisdiction, the District Court withheld its ultimate decision until the FCC had an opportunity to rule on the transfer. The District Court found that "the proper interpretation of the tariff was uniquely within the expertise and experience of the agency." *Combined Companies,* No. 95-908 at 8-9 (citing *Combined Companies, Inc. v. AT&T Corp.*, No. 95-908 at 20 (D.N.J. May 19, 2005)). Furthermore, the District Court held that "the proper application of administrative discretion to that issue will best protect against inconsistencies of outcome." *Id.*

The parties spent several years spent waiting for the FCC to issue an interpretation. Eventually, the

District Court granted a preliminary injunction stating that, until the FCC had issued its ruling, AT&T was required to grant CCI's transfer request. *Combined Companies,* No. 95-908 at 9-10 (citing *Combined Companies, Inc. v. AT&T Corp.*, 1996 U.S. App. LEXIS 15057, No. 96-5185 at 3 (3d Cir. May 31, 1996) (unpublished opinion)).

On appeal, the Third Circuit held that "the District Court's ruling contradicted its previous finding that primary jurisdiction required a determination by the FCC and therefore, *vacated the District Court's ruling*, referring the inquiry regarding the CCI/PSE transfer back to the FCC." *Combined Companies,* No. 95-908 at 9-10 (citing *Combined Co. v. AT&T Corp.*, No. 96-5185, 1996 U.S. App. LEXIS 15057 (3d Cir. May 31, 1996) (unpublished opinion)) (emphasis added). The District Court subsequently issued an order staying the case until the FCC issued a ruling. (App. 54).

This Court should find that the United States District Court erred when it failed to refer the issue of tariff interpretation to the FCC. The District Court should have afforded 800 Services the same treatment it gave to CCI in *Combined Companies* and declined to issue a ruling until the FCC had reached the decision. Instead, the District Court not only failed to issue a stay pending the resolution of the tariff interpretation issue, it failed to refer these questions to the FCC at all. In doing so, it usurped the FCC's primary jurisdiction in matters of tariff interpretation.

Moreover, this Court should find that the Third Circuit erred in denying 800 Services' request to reopen its case. In *Combined Companies*, the Third Circuit

vacated the decision of the District Court and referred the inquiry back to the FCC for deliberation. Since the national scope of these regulations makes inconsistent rulings highly undesirable, the Third Circuit should have deferred to the doctrine of primary jurisdiction and referred the tariff issue to the FCC.

In *Combined Companies*, the Third Circuit placed enough weight on the doctrine of primary jurisdiction that it was willing to vacate the decision of the District Court. In that case, the FCC's primary jurisdiction over the matter was found to be sufficiently powerful as to warrant staying the case for *over seven years* in order to provide the FCC time to issue an interpretation. All that 800 Services is requesting is that it receive the same treatment as the Third Circuit has given to others who have found themselves in its position. As a result, this Court should vacate the decision of the Third Circuit and remand the case back to the District Court of New Jersey so that it may ultimately be referred to the FCC.

II. The Third Circuit Court of Appeals Erred in Failing to Recognize the Numerous Instances of Fraud on the Court Asserted by Petitioner.

This Court should find that the Third Circuit Court of Appeals failed to correctly implement the test found in *Herring* and incorrectly denied 800 Services' claim of fraud on the Court. *Herring v. United St*ates outlined a four-part test for proving fraud on the court. The Petitioner must show "(1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) in fact deceives the court." *Herring v. United States*, 424 F.3d 384, 386 (3d Cir. 2005). All the

conditions of *Herring* were also met when AT&T counsel intentionally misled Judge Politan about the plans true effective date. (App. 45).[1]

800 Services has satisfied these requirements. AT&T intentionally committed fraud when it misled the Court as to the nature of its 1994 restructuring agreement with 800 Services. (Appellant's Reply Br. at 6). At trial, AT&T's counsel asserted that Tariff No. 2 was governed by an interpretation strikingly different than the one previously advanced by eleven top AT&T executives and legal counsel. (Appellant's Reply Br. at 6-7).

Over 60 hours of audio recordings of these executive discussions exist. (Appellant's Reply Br. at 8). These hours of audio show a broad consensus between the AT&T executives that 800 Services' interpretation of Tariff No. 2 was accurate. (Appellant's Reply Br. at 8). The tapes show that AT&T was operating under 800 Services' understanding of Tariff No. 2 when they extended their offer to Petitioner. (Appellant's Reply Br. at 7-9). This fraud was advanced by AT&T's Counsel at trial, satisfying the second and third elements. (Appellant's Reply Br. at 6-7). Additionally,

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[1] AT&T counsel was aware 800 Services plan was not new (App. 46). Mr. Inga, the President of CCI, has seconded Mr. Okin's claim that many judges on the District Court of New Jersey are biased towards AT&T. Mr. Inga has stated for the record that he "was tipped off that AT&T was bragging about fixing Judge Wigenton and was provided substantial details. It was uncovered that Judge Wigenton's husband Kevin was an AT&T attorney during the tariff infraction . . . Kevin's Organization received hundreds of thousands by AT&T." (App. 56)

all four conditions of *Herring* are met when AT&T counsel knowingly lied to Judge Politan that the Tariff allowed them to charge shortfall to 800 Services end-users. (Appellant's Reply Br. at 28).

Lastly, this fraud did, in fact, deceive the Third Circuit Court of Appeals. *See* (Appellant's Reply Br. at 1-2). The District Court and the Third Circuit mostly accepted the claims of AT&T's counsel on their face. (App. 9-36). The Third Circuit cited 800 Services' "lack of evidence" as grounds for its denial. (App. 12-13). This successful execution of the fraud satisfies the fourth element of the *Herring* test.

800 Services also satisfies all four requirement of *Herring* due to Respondent Counsel's statement that Mr. Okin admitted in his deposition that he never attempted to transfer his Traffic to CT-516, *see* reply brief. (Appellant's Reply Br. at 22). This would allow 800 Services' commission to go from 28% to 66%. (Appellant's Reply Br. at 16). For further evidence of AT&T's fraudulent behavior, see Petitioner's Appendix at App. 39-58.[2] As a result, this Court should overturn

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[2] "My companies motioned to go to damages in 2018 as the sole Third Circuit item to be interpreted was resolved and the FCC officially removed the moot 2006 NFDC referral from circulation. I was tipped off that AT&T was bragging about fixing Judge Wigenton and was provided substantial details. It was uncovered that Judge Wigenton's husband Kevin was an AT&T attorney during the tariff infraction, that AT&T helped put through law school. Kevin's Organization received hundreds of thousands by AT&T. Evidence showed the Wigenton's are strong supporters of their college Norfolk State University. AT&T hired hundreds of students from Norfolk State despite it being a very low academically ranked college. Judge Wigenton recused her Court as

the Third Circuit's decision.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: January 4, 2021.

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soon as her Court was presented with these facts . . . Judge Wigenton recused her Court on June 5, 2018 and Judge Chesler took over and oral argument on June 6, 2018. Judge Chesler said in less than one day he read 10 orders and 10,000 pages of exhibits and directed my company to file a writ of mandamus at DC Court to force the FCC to interpret the moot 2006 referral . . . Multiple DC Court attorneys warned that if my companies filed a writ of mandamus to compel the FCC to rule on a case that was already DC Court determined against AT&T in 2005, the DC Court would issue sanctions and ethics charges against my counsel. AT&T counsel Richard Brown has a copy of these emails with the DC Court staff. The DC Counsels stated the case is not a remand, it is a petition for review correction of the FCC on the sole issue and the case is over." App.56.