No. 18-1386

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

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Because Voice Over Internet Protocol-based phone service (VoIP) is more efficient, it is replacing Time Division Multiplexing (TDM) protocol in phone networks. Both VoIP and TDM-based services meet the statutory definition of *telecommunications service,* but the Federal Communications Commission (FCC) has not yet classified VoIP. It has, however, often treated VoIP as a *telecommunications service, e.g.* specifying in 47 C.F.R. § 52.5, that "[f]or purposes of this part, the term "telecommunications service" includes interconnected VoIP service;" listing VoIP services as direct competitors of *telecommunications services, Numbering Policies for Modern Communications*, 30 F.C.C. Rcd. at 6840 ¶1 n.2; and conceding consumers perceive VoIP as offering the same functions as TDM-based *telecommunications services, IP-Enabled Services*, 24 F.C.C. Rcd. at 6046. Recognizing established conflict principles, the FCC also specified that, *however classified*, where, as here, "an interconnected VoIP provider" has "the capability to track the jurisdictional confines of customer calls", it is "subject to state regulation." *Universal Service Contribution Methodology*, 21 F.C.C. Rcd. at 7546. *Cf.*, *Louisiana PSC v. FCC*, 475 U.S. at 368-9. Over a strong dissent, two Judges held that VoIP services are *information services*. With no statutory support or analysis, they *also* decided that, even though Charter can track the jurisdiction of its customer calls, State oversight is preempted. The questions presented are:

1. Whether VoIP service is a *telecommunications service* or an *information service* under the Brand X functional classification test?

2. Whether State regulation of VoIP-based phone service can be preempted when the carrier can "track the jurisdictional confines of customer calls?"

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INTEREST OF AMICUS CURIAE[1]

The National Association of Regulatory Utility Commissioners (NARUC), is a quasi-governmental nonprofit organization founded in 1889. Congress and the Courts[2] have recognized NARUC as the proper party to represent government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with, *inter alia*, ensuring the provision of affordable and reliable communications services. In the Communications Act, [3] Congress calls NARUC "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate

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[1] In accordance with U.S. Sup. Ct. Rules 37.2(a) and 37.6, NARUC certifies that (1) on May 21, 2019, NARUC sent an e-mail and facsimile to all parties seeking consent to the filing of this brief, (2) all parties consented via e-mail to NARUC's request by May 22, 2019, (iii) NARUC counsel authored this brief, (3) no counsel for a party to the decision below, or other entity, authored this brief in whole or in part, and (4) no person or entity other than NARUC made a financial contribution to its preparation or submission.

[2] Both the United States Congress and federal courts have recognized that NARUC is a proper party to represent the collective interest of State regulatory commissions. *See e.g. USA v. Southern Motor Carrier Rate Conference, et al.*, 467 F.Supp. 471 (N.D. Ga. 1979), *aff.* 672 F.2d 469 (5th Cir. Unit "B" 1982); *aff. en banc*, 702 F.2d 532 (5th Cir. Unit "B" 1983, *rev'd*, 471 U.S. 48 (1985). *See also Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC,* 513 F.2d 1142 (9th Cir. 1976).

[3] *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. §151 *et seq*., Pub.L.No. 101-104, 110 Stat. 56 (1996) (Act).

operation of carriers and utilities.[4] The legislative plan of the 1996 amendments to the Communications Act is not difficult to discern. Congress set up a carefully designed structure to enhance competition among *telecommunications service* providers - seeking to "introduce competition to local telephone markets" while simultaneously "preserving universal service."[5]

Congress required the FCC to work hand-in-glove with NARUC's State Commission members to open and protect local retail phone service markets to competition,[6] to "preserve and advance universal

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[4] *See* 47 U.S.C. §410(c) (1971) (NARUC nominates members to Federal-State boards which consider universal service, separations, and other issues and provide recommendations the FCC must act upon; 47 U.S.C. § 254 (1996) (describing the universal service board's functions). *Cf. NARUC, et al. v. ICC,* 41 F.3d 721 (D.C. Cir 1994).

[5] *Qwest Corp. v. FCC,* 258 F.3d 1191, 1196 (10th Cir.2001); See also, *AT&T Corp. v. FCC*, 220 F.3d 607, 611 (D.C. Cir. 2000), (The 1996 Act "fundamentally restructured *local telephone markets*" and "sought to eliminate the barriers that [competing carriers] faced in offering *local telephone service." (emphasis added)); Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 467 (2002) (The Act meant "to foster competition between monopolistic carriers providing local telephone service and companies seeking to enter local markets.")

[6] *See, e.g.*, *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, *LLP*, 540 U.S. 398, 402 (2004); *Weiser, Philip, Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U.L. Rev. 1692, 1694

service,"[7] and to encourage deployment "of advanced telecommunications to all Americans."[8]

The Congressional scheme hinges on the classification of communications transport networks as *telecommunications services*.

The Act defines retail phone service as *telecommunications service* in functional terms as "offering of telecommunications for a fee directly to the public . . . regardless of the facilities used."[9]

On its face, the definition includes no reference to technology or communications protocols – specifying that the "facilities used" to provide the service is irrelevant to the classification as a *telecommunications service* provider.[10]

(2001) (describing the 1996 Act as "the most ambitious cooperative federalism regulatory program to date"). See, § 252(e) (requiring State approval of all interconnection agreements between incumbent and competitive carriers).

[7] *See*, 47 U.S.C. § 254(f) (State universal service programs), § 214(e), (States designate *telecommunications carriers* to receive federal subsidies, § 251(f) (States can exempt rural *carriers* from certain Title II requirements.)

[8] *See*, 47 U.S.C. § 1302(a) which specifies the FCC and each State Commission "with regulatory jurisdiction over telecommunications services" "shall encourage" the deployment of advanced telecommunications capability.

[9] 47 U.S.C. § 153(53). (emphasis added)

[10] Not only does the definition of *telecommunications*

Telecommunications service providers (or *telecommunications carriers*),[11] carriers gain access to specific privileges necessary to provide service, but in turn, must comply with certain requirements under Title II of the Act – including a duty "to interconnect directly or indirectly with the facilities and equipment of other *telecommunications carriers*."[12]

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service specify that the technology used is irrelevant, but the definition of *information services,* at 47 U.S.C. § 153(24), on its face, also excludes technology used to provide a *telecommunication service*. Specifically, § 153(24) excludes "transforming" or "processing" "information via telecommunications" where that capability is "for the management, control, or operation of a telecommunications system or the management of a telecommunications service." On the phone networks of acknowledged *telecommunications service* providers this management exception covers, *inter alia*, the conversion of voice into a digital format called "Time Division Multiplexing" (TDM) protocol and its subsequent conversion back from TDM to voice. The Eighth Circuit's decision contends in fixed VoIP networks, the conversion of voice – an analog signal – into a different digital format – called Voice over Internet Protocol - must be treated differently even when a is terminated to a customer of another VoIP-based system and no "net" protocol conversion occurs. *See* discussion at 12 – 13, *infra.*

[11] 47 U.S.C. § 153(51) defined as "any provider of *telecommunications services*." (emphasis added).

[12] 47 U.S.C. § 251(a)(1).

While Congress was pursuing a more deregulatory approach, there is no question that it retained specific protections for the retail phone customers of *telecommunications service* providers and for local phone competition. Many of those protections reside with NARUC's State Commission members.

For example, the Communications Act specifies that State Commissions designate eligible *telecommunications carriers* (ETCs).[13] This ETC designation is required for any carrier to access subsidies from the federal universal service programs. Only providers of telecommunications services can qualify as ETCs.[14] The Act also

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[13] 47 U.S.C. § 214(e)(1) states that only *common carriers* designated as ETCs can receive federal universal service subsidies.

[14] The Act is crystal clear that only a provider of *telecommunications services* can qualify for federal universal service subsidies. The term *telecommunications carrier* is defined at 47 U.S.C. § 153(51) as "any provider of telecommunications services." Qualifying carriers, under § 214, are designated eligible *telecommunications carriers*. Also, 47 U.S.C. § 153(51) specifies that a carrier "shall be treated as a common carrier under this chapter only to the extent it is engaged in providing telecommunications services." Section 214(e) is in "this chapter." Necessarily, therefore, common carriers can only be treated as having that status under § 214(e) "to the extent they are engaged in providing telecommunications services." Some have suggested carriers can "volunteer/consent" to be a *telecommunications carrier*. But

preserves State authority to impose on providers of *telecommunications services* requirements:

> to preserve and advance universal service, protect the public safety and welfare ensure the continued quality of *telecommunications services*, and safeguard the rights of consumers.
>
> 47 U.S.C. § 253(b). (Emphasis added)

Finally, the Act also protects competition by, *inter alia*, facilitating new *telecommunications service* providers' ability to interconnect with existing carriers. Specifically, pursuant to 47 U.S.C. § 251-2, if two carriers are providing *telecommunications services*, a carrier seeking interconnection with an incumbent has the right to State commission

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the statutory text is clear. An entity cannot "be deemed" or volunteer/consent to be a *telecommunications carrier*, unless that entity - in the words of the statute - is actually offering a *telecommunications service, i.e.*, "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." Carriers are either offering a service that matches the characteristics of this functional definition of a *telecommunications service* or they are not. And only a provider of *telecommunications services* can qualify for the federal subsidies.

arbitration of an interconnection agreement to exchange traffic.[15]

The Eighth Circuit's decision in *Charter Advanced Services (MN), LLC v. Lange,* 903 F.3d 715 (8th Cir. 2018) (*Decision*) (i) to confirm the misclassification of VoIP-based retail phone service as an *information service* and (ii) to specify that the consequence of that classification is preemption of State oversight, has broad consequences.

It eliminates the Congressionally-designated State role to protect carrier-to-carrier competition, consumer safety and service quality, and the public health and welfare, *e.g.,* policing the reliability of 911 call capabilities, etc.

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[15] *Compare*, *Letter from InCompass CEO to FCC Chairman, filed May 9, 2016 In the Matter of Developing a Unified Intercarrier Compensation Regime,* WC Docket Nos. 15-247 & 05-25, RM-10593; CC Docket No. 01-92, at 3, available at: https://ecfsapi.fcc.gov/file/60001841070.pdf ("[T]he Commission should work to ensure that VoIP interconnection is occurring . . . as required under Sections 251 and 252 . . . Such action is critical to a competitive marketplace for voice services."); *Michigan Bell Telephone Co. v. Eubanks*, No. 1:14-CV-416, 2017 WL 2927485, at 1 (W.D. Mich. July 10, 2017) ("*MCI Telecomm. Corp. v. Bell Atl.*, 271 F.3d 491, 497 (3d Cir. 2001). . . [Carriers], through negotiation or arbitration, enter into "interconnection agreements," which set out the appropriate terms, rates, and conditions. *Id.* Congress . . . gave oversight of the interconnection agreements to the state public-utility commissions. *Id.")*

The direct preemption of the Minnesota commission's rules in the case on appeal, which are clearly designed to "safeguard the rights of consumers," Charter's admission below that it transferred customers from one affiliate to another to gain a competitive advantage,[16] as well as the obvious inconsistency of the Eighth Circuit's actions with the decision of the Vermont Supreme Court make that impact clear.[17] The Eighth Circuit's decision is, as Petitioners point out,[18] inconsistent with Supreme Court precedent on conflict preemption, and this Court's application of the Act's definitions in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).

The petition should be granted.

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[16] 903 F.3d at 718; Petitioners Appendix (App.) at 5 & 24.

[17] *In re Investigation into Regulation of Voice Over Internet Protocol Services,* 70 A.3d 997, 1006–08 (Vt. 2013)(Vermont).

[18] Petitioners Brief (Pet. Br.) at 8 and 21.

ARGUMENT SUMMARY

The Eighth Circuit's decision will have a significant impact nationally. Providers are shifting from Time Division Multiplexed (TDM) technology to VoIP technology to provide retail phone service. Service providers with TDM networks are acknowledged *telecommunications service* providers and subject to both State and FCC oversight.

The *Decision's* misclassification of VoIP-based retail phone services as *information services* and its conclusions about that classification's preemptive impact put Congressionally-sanctioned State rules that protect competition and consumers on the chopping block.

States are also charged with designating carriers to participate in the federal universal service program. 47 U.S.C. § 214(e). But only providers of *telecommunications services* can qualify. 47 U.S.C. §§ 153(53), 153(50). The *Decision* leaves States with the unpalatable choice of (i) ignoring the Act's requirement that to receive federal subsidies in-state providers *must* be offering a *telecommunications service*, or (ii) blocking federal funding to their state for all VoIP-based phone providers.

Congress requires State rules to protect consumers and the public health and welfare to be imposed "on a competitively neutral basis." 47 U.S.C. §§ 253(b). The *Decision*, if not reversed, will have the opposite impact.

No one questions that States retain authority to protect competitor interconnection rights, consumers, assure appropriate disaster response planning and restoration, and impose universal service obligations for local phone service provided by TDM-based retail phone service providers. The Eighth Circuit ruling on review requires State commissions to treat VoIP-based retail phone service providers – who compete directly with TDM-based phone services – along with their customers - differently. Below, the Court acknowledged Charter shifted its phone services to an unregulated affiliate in a bid to gain a competitive advantage. Charter's customers now lack state protections that apply to the customers of its TDM-based competitors. The *Decision* sanctions that outcome and guarantees that other carriers will follow in Charter's footsteps.

Supreme Court requires as a prerequisite for preemption "clear evidence of a conflict." [19] The *Decision* provides no evidence or analysis that indicates a conflict. It includes no discussion of any perceived conflict between the Act and the state laws preempted in the decision. It includes no discussion of Charter's ability to provide reliable enhanced 911 services and also jurisdictionally separate its other VoIP-based traffic, exactly as its competitors - *telecommunication service* providers - separate TDM-based traffic into inter- and intrastate calls. Nor does it explain why 47 U.S.C. § 152 and the Supreme

[19] *Geier v. American Honda Motor Co.*, 529 U.S. 861, 855 (2000).

Court's logic in *Louisiana PSC v. FCC,* 475 U.S. 355, 368-9 (1985), does not apply. Nor does it articulate or examine the basis of the FCC's policy of non-regulation of "information services" or its applicability in the current circumstances. The FCC has chosen for over a decade not to extend its information services policy to VoIP-based phone services. In 2006, the FCC specified that States have jurisdiction over fixed VoIP phone services, like Charter's, that provide working 911 service and discriminate between their interstate and intrastate traffic. *In the Matter of Universal Service Contribution Methodology,* 21 F.C.C.R. 7518 at 7546 ¶ 56 n. 189 (2006). The FCC has in its numbering rules, 47 C.F.R. § 52.5, specified that *telecommunications services* includes interconnected VoIP operators and has applied key provisions of the Act that Congress imposed on *telecommunications services* to such services.[20] There simply is no evidence of an actual conflict with FCC policy that can satisfy this Court's precedential requirements.[21]

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[20] *See* note 44 and accompanying text, *infra.*

[21] *See P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 504 (1988)

ARGUMENT

I. The Elimination of State Protections for Retail Phone Competition, the "Public Health and Welfare" and "the Rights of Consumers" is a Matter of National Importance.

Local retail phone service is the archetype *telecommunications service* provider defined in the 1996 Act. Telephone calls require protocol conversions.[22]

Retail phone services provided using Time Division Multiplexed (TDM) technology meet the Act's definition of *telecommunications services*.

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[22] In a typical phone call, your voice – an analog signal – is digitized. At the other end of the call it is converted back into audible speech. On a TDM-based network – it is first converted into TDM packets/protocol. On a VoIP-based network – it is first converted into IP packets/protocol. If the TDM-based network, *i.e.*, a *telecommunications service*, terminates a voice call to customer served by a VoIP-based network – the packets will have to be converted to IP protocol, and *vice versa*. For TDM networks – conversion to TDM packets is properly considered to be within the "management exception" of 47 U.S.C. § 153(24). As the dissent below points out, App. at 14-17, there is little discernible logic to the idea that a "net" protocol change in how the voice is packetized in a phone call changes the legal classification of the provider. *See also*, note 10, *supra*.

Under the Eighth Circuit's ruling, retail phone services provided using VoIP are not. Instead they are *information services*.

Since its inception, the United States' telephone network has gone through several technology transitions. The most recent is the ongoing shift from TDM data packets to Voice over Internet Protocol data packets. TDM-based phone networks offer the ability to manage personal communications using integrated features such as caller ID, call blocking, call forwarding, three-way calling, call waiting, and also enable access to text, audio, data and video.

A so-called "T-1 link" uses TDM to allow 24 *voice, video, and/or data conversations to share the same path.*[23] But TDM is not as efficient as new technologies like VoIP in which voice and data are interspersed whenever possible, rather than, as in TDM, at timed intervals.[24]

As a result, carriers are shifting quickly to VoIP technology to provide retail phone service. Total subscriptions to VoIP-based services are growing at eight percent per year.[25] Already, there are sixty

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[23] Dodd, Annabel, *The Essential Guide to Telecommunications*, Fourth Edition, at 18 (Prentiss Hall 2005).

[24] *Id.*

[25] *In re Communications Marketplace Report*, F.C.C. 18-

four million subscribers to VoIP-based retail telephone service in the United States.[26]

The *Decision's* misclassification of VoIP-based retail phone services as *information services,* along with its conclusion that preemption is required, flatly eliminates specific duties Congress reserved to States.

The *Decision* puts States' abilities to protect carrier competition and public health and safety, as well as to safeguard the rights of consumers, on the chopping block. It destabilizes the Congressional scheme to promote competition and assure universal service. This includes NARUC's member commissions' role in designating carriers to participate in the federal universal service program.

As noted *supra*,[27] there is no question that a carrier must be providing a *telecommunications service* to participate in the federal universal service program.

Many local telephone service providers today also provide broadband internet access service (BIAS). Prior to the FCC's reclassification of BIAS from an *information service* to a *telecommunications*

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181 ¶ 205 (rel. December 26, 2018), 2018 WL 6839365, at *67.

[26] *Id.*

[27] *See* notes 13 and 14 and accompanying text, *supra.*

service in 2015,[28] a number of States designated eligible *telecommunications carriers* to receive federal universal service funding based solely on the carrier's provision of VoIP-based *telecommunications services*.[29]

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[28] *In the Matter of Protecting & Promoting the Open Internet,* 30 F.C.C. Rcd. 5601 (2015).

[29] *In The Matter of Transworld Network, Corp. Petition For Designation as an Eligible Telecommunications Carrier Pursuant to § 214(E)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 214(E)(2), and 17.11.10.24 NMAC*, Before the New Mexico Public Regulation Commission, Case No. 11-00486-UT, FINAL ORDER (issued 20 February 2013) quote is from Exhibit 1, the ALJ's *Recommended Decision*, at 16. ("Based upon its common carrier regulation as an interconnected-VoIP provider, TransWorld meets the requirement of being a common carrier for purposes of ETC designation."); *In Re: Application of Public Service Wireless, Inc. for Designation as an Eligible Telecommunications Carrier in the State of Georgia, Docket No. 35999, Document #152453 Order on Application for Designation as an ETC (March 20, 2014), at 1-3*; *("*Public Service Wireless's basic service offering is wireless . . . VoIP service.") *In re: Application of Cox California Telcom, LLC (U5684C) for Designation as an ETC, Application 12-09-014*, Decision 12-10-002 (10/3/2013), Decision Approving Settlement (rel. 10/07/2013), at 8-9, 11 ("Cox does not distinguish between circuit-switched and packet-switched telephone services. The customer is merely ordering telephone service. Cox asserts by offering a service that utilize[s] VoIP to the public on a nondiscriminatory basis, Cox fulfills the role of common carrier.")

Now that the FCC has reclassified broadband services as *information services*,[30] the *Decision* leaves States, at least those in the Eighth Circuit's territory, with the unpalatable choice of either (i) designating VoIP carriers as eligible and ignoring Congress's restriction that to receive federal subsidies in-state providers *must* be offering a *telecommunications service*, or (ii) blocking federal funding to their state for the VoIP-based retail telephone services now classified as *information service* providers.

The *Decision* also undermines congressionally-sanctioned competition while eliminating state protections for consumers of *telecommunications services*. Ironically, those consumer protections were expressly reserved in the single most explicitly preemptive authority granted to the FCC by Congress. In 47 U.S.C. § 253, Congress granted the FCC authority to preempt <u>any</u> state or local regulation that prohibits "or has the effect of prohibiting the ability of any entity to provide any *interstate* or *intrastate* telecommunications service."

However, at the same time, as noted *supra*, Congress explicitly preserved state authority to protect the public health and welfare, universal

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[30] *In the Matter of Restoring Internet Freedom*, 33 F.C.C. Rcd. 311 (2018).

service, service quality, and to "safeguard the rights of consumers."[31]

But this reservation of state authority was explicitly conditioned.

The Act requires that all such state requirements be imposed "on a competitively neutral basis."[32]

In other words, Congress wanted to be certain that there was a level playing field.

This is not a surprise, Part II of the 1996 Act, is captioned "Development of Competitive Markets" and, as discussed earlier, the focus of the Act was to level the competitive playing field for retail telephone services.[33]

The *Decision*, if not reversed, will have the opposite impact.

No one questions that State Commissions retain authority to protect competitor interconnection rights, [34] consumers, assure appropriate disaster response planning and restoration, and impose universal service obligations for local phone service provided by TDM-based retail

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[31] 47 U.S.C. § 253(b).

[32] *Id.*

[33] *See* note 5 and accompanying text, *supra.*

[34] Carrier interconnection rights are linked by the statute to telecommunications service providers. 47 U.S.C. § 251-2.

phone service providers. TDM-based phone services are acknowledged *telecommunications services*.

The Eighth Circuit ruling on review requires State commissions to treat VoIP-based retail phone service providers – who compete directly with TDM-based phone services – along with their customers - differently.

This makes no sense.

No one, including the FCC, questions that TDM-based retail voice phone services are *telecommunications services* and compete head-to-head with VoIP-based retail voice phone services.[35]

No one, including the FCC (or anyone that actually has VoIP-based phone service), questions that VoIP-based retail phone services are perceived by consumers as "indistinguishable from traditional telephone service" and offer the same functionalities as TDM-based phone service.[36]

It is illogical to suggest that Congress wanted states to protect the rights of only consumers of TDM-based retail phone service.

It is illogical to suggest that a Congress interested in competition only wanted

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[35] *In the Matter of Numbering Policies for Modern Communications*, 30 F.C.C. Rcd. 6839, 6840 ¶ 1 n. 2 (2015).

[36] *In the Matter of IP-Enabled Services*, 24 F.C.C. Rcd. 6039, 6046 (2009).

telecommunications carriers to have a duty to interconnect with only some competing carriers.

Yet that is the necessary impact of the *Decision*.

The *Decision* itself illustrates its direct impact on competition and consumer protection.

Below, Charter shifted services from a regulated affiliate to an unregulated affiliate just to gain a competitive advantage [37] by avoiding the Minnesota Commission's rules designed to "safeguard the rights of consumers."

Charter's TDM-based retail phone service competitors still have to comply with those requirements.

Charter's phone customers no longer have service quality protections that apply to the customers of its TDM-based competitors. They can no longer seek redress at the State Commission.

The *Decision* sanctions that outcome and guarantees that other carriers across the country,

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[37] *Charter Advanced Servs. (MN), LLC v. Lange*, 259 F. Supp. 3d 980, 983 (D. Minn. 2017), aff'd, 903 F.3d 715 (8th Cir. 2018). ("In March 2013, Charter Fiberlink assigned its retail voice customers to the newly-established Charter Advanced. (Id. ¶ 27.) The frank purpose behind the assignment was to limit the reach of state regulation, thereby enhancing Charter's market competitiveness. . . Charter Fiberlink notified its subscribers . . . and advised them that they could accept the revised terms by continuing their service.") (citations omitted). Pet. App. at 24.

both in and outside the Eighth Circuit's jurisdiction, will follow in Charter's footsteps.

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

Mindful of the admonition in U.S. Sup. Ct. Rule 37.1, 28 U.S.C.A., rather than reiterate Petitioner's arguments, Pet. Br. at 16-19, NARUC will provide some clarifications. Petitioners correctly point out the *Decisio*n conflicts with this Court's preemption precedent.

The deficits in the *Decision's* conflict analysis, or more accurately, lack thereof, are readily identifiable.

While the *Decision* does include a single citation to this Court's decision in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 375, (1986), [38] the entire "conflicts" rationale is provided in two sentences citing the same conclusory text from a prior 2007 Eighth Circuit decision:

> "any state regulation of an information service conflicts with the federal policy of non-regulation," so that such regulation is pre-empted by federal law. *See Minnesota Pub. Utilities*

[38] 903 F.3d 715 at 718.

Comm'n v. FCC, 483 F.3d 570, 580 (8th Cir. 2007);

*Id. at 718-7*19 (internal quote in the original) (Pet. App. at 6 and 7)[39]

The Supreme Court requires more. Specifically, it requires as a prerequisite for preemption "clear evidence of a conflict."[40]

The *Decision* provides no evidence or analysis that indicates a conflict.

It includes no discussion of any perceived conflict between the Act and the state laws preempted in the decision.[41]

It includes no discussion of Charter's ability to provide reliable enhanced 911 services and also

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[39] The first citation also references, without discussion, 47 C.F.R. § 64.702, which is an FCC regulation on enhanced services. It is inapplicable on its face.

[40] *Geier v. American Honda Motor Co.*, 529 U.S. 861, 855 (2000); *Global Naps, Inc. v. Verizon New England, Inc.*, 444 F.3rd 59, 75 (1st Cir. 2006) ("The Supreme Court has stated that, in determining whether a federal agency regulation impliedly preempts state law because it poses an obstacle to federal policy, "a court should not find pre-emption too readily in the absence of clear evidence of a conflict." (*Geier* citation omitted))

[41] Not a surprise, given there are provisions that give the FCC specific authority to preempt certain types of State oversight of *telecommunication services,* but there no corresponding provisions in the Act granting the FCC authority to limit State authority over severable intrastate *information services* in any way.

jurisdictionally separate its other VoIP-based traffic, exactly as its competitors - telecommunication service providers - separate TDM-based traffic into inter- and intrastate calls.

Nor does it explain why the Supreme Court's logic in *Louisiana PSC v. FCC* does not apply in this case.

Nor does it articulate or examine the basis of the FCC's policy of non-regulation of "information services" or its applicability in the current circumstances. Specifically, while there is acknowledgement that the FCC has not classified fixed VoIP services, there is no discussion of how Minnesota's oversight conflicts with the FCC's own treatment of VoIP services. While the FCC has not classified VoIP services, it concedes such services are direct competitors of acknowledged TDM-based *telecommunications service* providers,[42] it concedes that customers see no difference in TDM and VoIP – based phone service providers,[43] and it has extended "certain Title II obligations to interconnected VoIP providers"[44] obligations that the Act specifies can

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[42] *See, e.g., In the Matter of Numbering Policies for Modern Communications*, 30 F.C.C. Rcd. 6839, 6840 ¶ 1 n. 2 (2015).

[43] See, e.g., *In the Matter of IP-Enabled Services*, 24 F.C.C. Rcd. 6039, 6046 (2009).

[44] *In the Matter of Telephone Number Requirements for IP-Enabled Services*, 22 F.C.C. Rcd. 19531, 19538–39 ¶14 (2007). The FCC required in May 2005, working 911 service, in June

only be imposed "under this chapter only to the extent that [the carrier] is engaged in providing *telecommunications services*."[45]

Also, as part of its truncated and conclusory discussion of "conflict" with the FCC's policy of non-regulation, the *Decision* cites an FCC regulation on enhanced services that does not reference VoIP services.[46] At the same time, it provides no discussion of the directly applicable FCC's number portability rules, which reference VoIP services specifying that "[f]or purposes of this part, the term 'telecommunications service' includes interconnected VoIP service." 47 C.F.R. §52.5 (2016).

Ironically, the 2007 Eighth Circuit case cited as the sole basis to justify conflict preemption, itself does explicitly conform to the Supreme Court's precedent on how to apply conflict preemption.

That case dealt with a particular type of VoIP service not at issue in this case – so-called "nomadic" VoIP service. Nomadic or "over-the-top" VoIP services are provided over a broadband internet connection that the customer obtains from an entity

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2006, universal service contributions, in March 2007, customer proprietary network information protections, and in June 2007, disability access and deaf relay services. All four are Title II duties Congress imposes on *telecommunications carriers*.

[45] 47 U.S.C. § 153(51).

[46] *See* note 21, *supra*.

not affiliated with the VoIP service provider. The Charter's managed fixed VoIP phone services is not.[47]

There the FCC concluded state regulation of a this particular type of VoIP service should be preempted regardless of its regulatory classification because, at the time, it was allegedly impossible or impractical to separate the intrastate components of VoIP service from its interstate components.

That is clearly not the case here. Charter's services are severable into inter- and intrastate communications.

Referencing this severability issue, in 2007, the Eighth Circuit acknowledged, that after the order on review there was issued, the FCC

> [r]ecognized the potentially limited temporal scope of its preemption of state regulation in this in the event technology is developed to identify the geographic location of *nomadic* VoIP communications. In proceedings to address VoIP service providers' responsibility to contribute to the

[47] The geographic locations of users placing calls over fixed VoIP services, like Charter's in this case, can be readily identified. Moreover, TDM-based phone networks offer the same ability to manage personal communications using integrated features such as caller ID, call blocking, call forwarding, three-way calling, call waiting, and also enable access to text, audio, data and video.

> universal service fund, the FCC indicated "an interconnected VoIP provider with a capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the *Vonage Order* would no longer be applicable to such an interconnected VoIP provider." (internal citations omitted).
>
> *Minnesota,* 483 F.3d at 580.

Since the 2007 Court did not reach the question of whether fixed VoIP services like those at issue in this proceeding are also preempted, it did not also point out that the FCC *also conceded in the 2006 referenced order, that some fixed VoIP phone service providers already calculate their contributions based on the actual split between interstate and intrastate revenues* and thus are subject to state oversight.[48]

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[48] *In the Matter of Universal Service Contribution Methodology,* 21 F.C.C.R. 7518 at 7546 ¶ 56 n. 189 (2006), ("Because we permit interconnected VoIP providers to report on actual interstate revenues, this *Order does not require interconnected VoIP providers that are currently contributing based on actual revenues to revise their current practices*." (emphasis added)

As noted, *supra*, the *Decision* does not reference any conflict with the Act only with an FCC policy with respect to *information services*.

But the FCC has chosen for over a decade not to extend its information services policy to VoIP-based phone services.

The FCC has specified that States have jurisdiction over fixed VoIP phone services, like Charter's, that provide working 911 service and can discriminate between their interstate and intrastate traffic.[49]

The FCC has in its regulations, specified that "telecommunications services" includes interconnected VoIP operators and has applied key provisions of the Act that Congress imposed on "telecommunications services" to such services.[50]

As Petitioners point out, Pet. Br. at 19, there simply is no evidence of an actual conflict with FCC policy that can satisfy this Court's precedential requirements.[51]

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[49] *See* the discussion at 25-26 and note 48, *supra.*

[50] *See* note 44 and accompanying text, *supra*.

[51] *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.").

CONCLUSION

The Eighth Circuit's decision raises crucial issues of national importance that undermine Congress's scheme to protect competition and consumers in the Act. It clearly conflicts with this Court's precedent on conflict preemption, the cited Vermont Supreme Court decision, and as Petitioners accurately point out, is certainly, inconsistent with the Supreme Court's application of the Act's definitions in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005). Petition at 19-21.

For the reasons set forth, *supra*, NARUC urges the Court to grant the petition for certiorari, and on the merits, reverse the Eighth Circuit's *Decision*.

Respectfully submitted,

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June 3, 2019