No. 18-1386

IN THE

Supreme Court of the United States

DAN M. LIPSCHULTZ, In His Official Capacity as Commissioner of the Minnesota Public Utilities Commission, *et al.*,

Petitioners,

v.

CHARTER ADVANCED SERVICES (MN), LLC, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

STEVE W. GASKINS
GASKINS BENNETT BIRRELL SCHUPP LLP
333 South 7th Street
Suite 3000
Minneapolis, MN 55402
(612) 333-9500

IAN HEATH GERSHENGORN
Counsel of Record
LUKE C. PLATZER
ADAM G. UNIKOWSKY
CAROLINE C. CEASE*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
IGershengorn@jenner.com

* Admitted only in Alabama, not admitted in the District of Columbia. Practicing under the supervision of the partnership of Jenner & Block LLP.

QUESTION PRESENTED

1. Whether the Eighth Circuit correctly held that the interconnected Voice over Internet Protocol (VoIP) service offered by Charter as "Spectrum Voice" is an "information service" under 47 U.S.C. § 153(24).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondents Charter Advanced Services (MN), LLC, and Charter Advanced Services VIII (MN), LLC, state that their parent corporation is Charter Communications, Inc., a publicly-held corporation. No publicly-held corporation other than Charter Communications, Inc. owns 10% or more of Respondents' stock.

PARTIES TO THE PROCEEDING

Petitioners, who were the appellants in the court of appeals, are 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.

Respondents, who were appellees in the court of appeals, are Charter Advanced Services (MN), LLC, and Charter Advanced Services VIII (MN), LLC.

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INTRODUCTION

Petitioners, the Commissioners of the Minnesota Public Utilities Commission (the "MPUC"), sought to impose the full array of the state's public utility regulations on an "Interconnected VoIP" service provided by Respondents. The Eighth Circuit correctly concluded that the Interconnected VoIP service offered by Respondents is an "information service" under the Telecommunications Act of 1996 ("the 1996 Act") and is therefore exempt from such state-level requirements. That decision does not conflict with the decisions of any other court. It is consistent with the views of the FCC, which supported Respondents' position below. It does not implicate any issue of national importance, as the FCC made clear. And it is correct. Further review is unwarranted.

To start, there is no conflict. The Eighth Circuit is the first appellate court to address the classification of Interconnected VoIP services under the 1996 Act. Every district court to consider the same question—including the district court here—has reached the same conclusion as the Eighth Circuit.

Contrary to the MPUC's Petition, the Eighth Circuit's decision also does not conflict with the interlocutory decision of the Vermont Supreme Court in *In re Investigation into Regulation of Voice Over Internet Protocol (VoIP) Services* ("*VoIP Investigation*"), 70 A.3d 997, 1006–08 (Vt. 2013). In *VoIP Investigation*, the Vermont Supreme Court expressly *declined* to decide the classification question decided by the Eighth Circuit here. Insofar as the Petition claims review is warranted because of a conflict between the

decisions of the Eighth Circuit and the Vermont Supreme Court on the preemptive effect of classifying Interconnected VoIP as an information service, the Petition is doubly mistaken: (1) the decisions are consistent, and (2) review is not warranted because the scope of preemption was not litigated in this case, and the issue was neither preserved nor developed for review by this Court.

The question presented—which even the dissent called "rather narrow"—also lacks widespread importance. The federal statutory and regulatory framework governing Interconnected VoIP services does not depend upon the legal classification of such services under the 1996 Act and is unaffected by the ruling. The ruling does not affect important state programs relating to universal service and public safety, as the FCC's amicus brief below emphasized. And although the Eighth Circuit's ruling (correctly) prevented Minnesota from extending a wider panoply of state telephone requirements to Charter's Interconnected VoIP services, Minnesota is an outlier—no other State currently requires the broad range of legacy telephone regulations that Minnesota sought to impose.

Finally, on its merits, the Eighth Circuit's decision reflects a straightforward application of the plain terms of the 1996 Act. The MPUC's Petition does not address the Eighth Circuit's textual analysis, and instead faults the Eighth Circuit for failing to apply the FCC's "functional approach" to applying the 1996 Act's categorization system for information services. The FCC itself, which supported Charter's position in the

litigation below, did not share the MPUC's views on this point. The Eighth Circuit did not err in hewing to the statutory text, and in any event, the Eighth Circuit's decision is consistent with the FCC's precedents.

Further review is unnecessary and the Petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

I. Factual Background.

Respondents Charter Advanced Services (MN), LLC and Charter Advanced Services VIII (MN), LLC, both affiliates of Charter Communications, Inc. (collectively, "Charter") offer an Interconnected VoIP service over Charter's broadband network known as "Spectrum Voice." Pet. App. 3.[1] VoIP stands for "Voice over Internet Protocol." In VoIP technology, voice signals are transmitted using Internet Protocol ("IP") "packets," the same format used to transmit data over the Internet. *Id.* "Interconnected VoIP" services are the subset of VoIP services that allow subscribers to exchange calls with users of traditional telephone services in addition to exchanging calls with other VoIP users. 47 U.S.C. § 153(25); 47 C.F.R. § 9.3. Charter also offers video and Internet access services over the same network used for Spectrum Voice, and most of its customers buy video, broadband Internet, and voice service as part of a bundle. Pet. App. 2, 23–24.

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[1] The Petition asserts that Charter also offers traditional telephone services in Minnesota. *See* Pet. at 7. The record does not support this proposition, and Respondents are unaware of any basis for it.

Spectrum Voice offers real-time, two-way calling through this Interconnected VoIP service. Pet. App. 3. In order to offer this functionality, Charter must interconnect with traditional telephone providers. Traditional telephone networks use "circuit switching" technology, which establishes a dedicated pathway for the duration of a call. *Id.* at 4. A technique called Time Division Multiplexing ("TDM") allows multiple circuit-switched calls to share the same line. *Id.* Because Charter's network uses IP packets, not TDM circuits, calls must be converted between IP and TDM for Charter to exchange calls with traditional networks. *Id.* This process is called "protocol conversion." *Id.*; *see generally Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 977 (2005) ("*Brand X*") ("protocol conversion" enables "communicat[ion] between networks that employ different data-transmission formats"). Charter performs this process using a "media gateway" on Charter's side of the interconnection point, where the providers' networks meet. Pet. App. 4–5.

Because Charter uses an IP platform to provision the service, the service enables customers to access an array of additional capabilities, including digital voicemail, advanced caller-ID features, blocking of robocalls, and "softphone" applications, which let subscribers initiate and receive voice calls, video calls, and text messages from their Spectrum Voice number using a smartphone application. *Id.* at 5.

II. Regulatory Background.

The 1996 Act distinguishes between "telecommunications services" and "information

services." "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," in turn, "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 or received." *Id.* § 153(50). "Information service" is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," but excludes "any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." *Id.* § 153(24).

Telecommunications services and information services are regulated differently under the Communications Act of 1934, of which the 1996 Act is a part (the "Communications Act" or the "Act"). Telecommunications service providers, or "carriers," are subject to a wide array of common carriage obligations under Title II the Act. 47 U.S.C. § 153(51). Although the FCC has exclusive regulatory authority over interstate communications, 47 U.S.C. § 152(a), the states and the FCC otherwise share concurrent regulatory jurisdiction over telecommunications services, subject to certain statutory exceptions. 47 U.S.C. § 152(b).

However, the 1996 Act—codifying decades-old FCC policy under the Communications Act—expressly exempts information services from the Act's Title II requirements, directing that a provider "shall be treated as a common carrier under this chapter *only to the extent*

that it is engaged in providing *telecommunications services …"* 47 U.S.C. § 153(51) (emphasis added). Accordingly, the FCC has repeatedly held that "any state regulation of an information service conflicts with the federal policy of nonregulation," because such regulation by the states would impose on information service providers the types of requirements from which Congress exempted them in the Act. Pet. App. 7 (quoting *MPUC v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007)).

Interconnected VoIP services are separately defined in the Act; the statutory definition does not classify them as a type of telecommunications service. *See* 47 U.S.C. § 153(25). The FCC has never specifically addressed whether Interconnected VoIP is an information service or a telecommunications service. In its 2004 *Vonage* decision, the FCC ruled that state regulation of "nomadic" Interconnected VoIP services—*i.e.*, services that can be accessed from any fixed broadband connection—was preempted. It did not reach the question of whether those services were information or telecommunications services; instead, it found preemption because the intrastate and interstate features of nomadic VoIP services are not readily distinguishable. *In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the MPUC*, Memorandum Opinion and Order, 19 FCC Rcd 22,404, 22,417–22,424 ¶¶ 22–32 (2004), *aff'd sub nom.*, *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

The *Vonage* decision left open whether state regulation of non-nomadic services, like Spectrum Voice,

was preempted, and the FCC has not resolved that issue since. In the years since the *Vonage* decision, as fixed VoIP services have grown in popularity, the FCC and Congress have created a regulatory framework for Interconnected VoIP services that does not depend upon direct applicability of the Communications Act's Title II requirements and therefore does not depend upon how they are classified under the 1996 Act. This framework has included actions by the FCC under its general power to regulate interstate communications, *see* n.2 *infra*, as well as subsequent congressional actions that have expressly created statutory rights and duties for interconnected VoIP providers in their own right, distinct from Title II obligations. *See, e.g.*, 47 U.S.C. § 615a-1 (requiring IP-enabled voice service providers to provide 911 and enhanced 911 services); *id.* § 615a-1(f)(1) (authorizing state and municipal governments to assess 911 fees on IP-enabled voice subscribers provided that "the fee or charge may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services"); 47 U.S.C. 616 (requiring "each interconnected VoIP service provider" to participate in and contribute to the federal Telecommunications Relay Service Fund).

III. Procedural Background.

In March 2013, Charter reorganized its voice operations nationwide to reassign its voice customers to its newly-established Charter Advanced affiliates. Pet. App. 24. This reorganization affected every state in Charter's footprint at the time. Minnesota, however, is the only state that initiated litigation to challenge it. On September 26, 2014, the Minnesota Department of

Commerce ("Department") filed a complaint, alleging that Charter's internal customer transfer constituted "slamming," an unlawful practice whereby a customer's telephone service is switched to a different provider without the customer's knowledge. *Id.* Charter objected that the state-law telephone requirements upon which the complaint was based could not, as a matter of federal law, be applied to Interconnected VoIP services, since those services are information services not subject to such requirements. *Id.* at 24–25.

The MPUC disagreed. On July 28, 2015, it issued an order finding that Charter's Interconnected VoIP service was a "telecommunications service" under the federal 1996 Act. The MPUC thus required Charter to comply with all state-law regulations governing telephone services offered by non-incumbent providers, and it ordered Charter to submit within thirty days a plan for doing so. *Id.* at 25. Charter then brought suit in the district court, seeking a declaration that Spectrum Voice is an "information service" under the 1996 Act and accordingly not subject to the state-law requirements imposed by the MPUC's order. *Id.*

The MPUC moved to dismiss, arguing, *inter alia*, that Spectrum Voice is a "telecommunications service" under federal law. Defs.' Mot. To Dismiss, Dist. Ct. ECF No.16. The MPUC conceded that if Spectrum Voice were an "information service," its state regulations would be preempted by federal law. *Id.* at 12 ("Information services are subject to the FCC's jurisdiction but not to state regulation.").

The District Court denied the motion. Pet. App. 25–26. Following discovery and cross-motions for summary

judgment, on May 8, 2017, the District Court granted summary judgment to Charter and denied the MPUC's cross-motion. *Id.* at 42. Applying the text of the 1996 Act, it concluded that Spectrum Voice was an information service because it "has the capability to convert voice transmission data between IP and TDM as needed to hand a call off to a [traditional telephone] network." *Id.* at 30. The District Court relied on the FCC's interpretation and application of the 1996 Act in *In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21,905 (1996) ("*Non-Accounting Safeguards Order*"). In the *Non-Accounting Safeguards Order*, the FCC concluded that services that offer "net" protocol conversion—*i.e.*, "an end-to-end protocol conversion service that enables an end-user to send information into a network in one protocol and have it exit the network in a different protocol," "clearly 'transforms' user information" and hence satisfy the statutory definition of an information service. Pet. App. 30, 34 (quoting *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21,956 ¶ 104). Consistent with the *Non-Accounting Safeguards Order*, the court explained that "the touchstone of the information services inquiry is whether Spectrum Voice acts on the customer's information—here a phone call—in such a way as to 'transform' that information." *Id.* at 34. "By altering the protocol in which that information is transmitted, [Charter's] service clearly does so." *Id.* The court concluded, therefore, that "state regulation of Spectrum Voice is preempted and impermissible." *Id.* at 42.

The FCC supported Charter on appeal. *See* Brief of the FCC as Amicus Curiae in Support of Plaintiffs-Appellees, *Charter Advanced Services (MN), LLC v. Lange*, 903 F.3d 715 (8th Cir. 2018) No. 17-2290), 2017 WL 4876900 ("FCC Br."). The FCC explained that "[u]nder the longstanding federal policy of nonregulation for information services, states are independently prohibited from subjecting information services to any form of state economic regulation." FCC Br. at 10. The FCC acknowledged that it has "not yet resolved" the "overarching regulatory classification of VoIP service." *Id.* at 13–14. While it noted that the *Non-Accounting Safeguards Order* does not "definitively resolve" the classification of Interconnected VoIP, it emphasized that the order "remain[s] good law" and "provide[s] important guidance on how to interpret and apply the Communications Act." *Id.* at 26–27.

The FCC also cautioned that the MPUC's "sweeping assertion of regulatory authority over VoIP service" would have adverse consequences inconsistent with longstanding federal policy, and "threaten[s] to disrupt the national voice services market." *Id.* at 18. The effect of holding that VoIP is a telecommunications service—as the MPUC did—could be to subject VoIP providers "not only to Minnesota's state regulatory scheme, but also to the full panoply of federal common-carriage requirements found in Title II of the Communications Act" and "if the [MPUC]'s efforts to regulate VoIP service were upheld, all 50 states could potentially seek to impose a patchwork of separate and potentially conflicting requirements on VoIP service"

which "could throw the national voice services market into disarray." *Id.* at 18–19.

The FCC also explained that it had "played an active role in VoIP regulation by issuing a series of orders addressing significant issues raised by VoIP service," many of which "provide mechanisms for states to address legitimate regulatory needs arising from the proliferation of VoIP technology and to do so irrespective of how VoIP service is classified." *Id.* at 20. The FCC catalogued its "extensive series of orders regulating many different aspects of VoIP service as needed." *Id.* at 13–16.[2]

The FCC also noted that, to its knowledge, the MPUC's ruling was unique, and that "no other state requires VoIP providers to comply with such a broad range of legacy telephone regulations." *Id.* at 19. Instead, "[o]ther states have had no apparent difficulty overseeing VoIP providers within the mechanisms established by existing FCC orders," which, the FCC asserted, "rais[es] serious doubt as to whether the [MPUC]'s unprecedented order here is either necessary

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[2] These include (1) "access charges and interconnection obligations for VoIP-PSTN traffic"; (2) "federal and state universal service contribution requirements"; (3) "access to federal universal service subsidies"; (4) "E-Rate support for service to schools and libraries"; (5) customer privacy protections"; (6) "E911 and related public safety requirements"; (7) "rules governing assistance to law enforcement"; (8) "accessibility requirements and funding to support communications access for people with disabilities"; (9) "discontinuance obligations"; (10) "phone number access, administration, and portability"; (11) "rural call completion rules"; and (12) "numerous reporting requirements." *Id.* at 14–16 (footnotes omitted).

or appropriate" especially given that "each of the specific regulatory needs invoked by the [MPUC] is already addressed . . . by existing FCC orders." *Id.* at 19.

The Eighth Circuit affirmed. It agreed with the District Court that "the VoIP technology used by Charter Spectrum is an 'information service' under the [Telecommunications] Act" because "[f]or those [IP-TDM] calls . . . information enters Charter's network 'in one format (either IP or TDM, depending on who originated the call) and leaves in another, its system offers 'net' protocol conversion . . . ." Pet. App. 7–8; *see also id.* at 9 ("Spectrum Voice's service is an information service because it 'mak[es] available information via telecommunications' by providing the capability to transform that information through net protocol conversion."). In line with the FCC's brief, the Eighth Circuit concluded that although the *Non-Accounting Safeguards Order* does not "resolve the statutory question," it "provide[s] important guidance." *Id.* at 8 n.4. The court also concluded that Spectrum Voice did not fall within the statutory carve-out for "services that comprise a 'capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.'" *Id.* at 9 (quoting 47 U.S.C. § 153(24)).

Judge Grasz dissented. He would have held that Spectrum Voice is "either a telecommunications service or something entirely outside the primary categories of services in the Communications Act." *Id.* at 15. He stated that "a regulatory solution is needed beyond the narrow issue in this case." *Id.* at 18.

REASONS FOR DENYING THE PETITION

This Court should deny the MPUC's Petition for a writ of certiorari. *First*, the Eighth Circuit's decision does not conflict with the decision of any other court or agency. The FCC does not share the Petitioners' view that the decision conflicts with FCC precedent, as evidenced by its amicus brief below. The purported conflict with the Vermont Supreme Court identified by the Petition is based upon dicta in an interlocutory decision that did not decide the question presented here, and the MPUC's theory is neither developed in the proceedings below nor properly preserved for review.

Second, this case presents no issue of national importance requiring this Court's attention. VoIP services are already subject to a carefully tailored federal regulatory regime that does not depend upon how those services are classified, and the MPUC's order adding a duplicative layer of state regulation is a national outlier. The FCC's amicus brief below makes all this clear.

Third, the Eighth Circuit's decision represents a straightforward application of the statutory text and FCC precedent interpreting it: Interconnected VoIP service is an "information service" under the Act's plain language because it offers the capability to "transform" and "process" information through protocol conversion. Likewise, it does not fall within the statutory carve-out for network management because it offers users functional value, including to enable calls between IP-based Spectrum Voice and TDM-based traditional networks. This reasoning adheres to the statutory text and requires no further review.

I. There Is No Conflict Requiring Resolution by this Court.

The Eighth Circuit's decision is consistent with the decisions of every other court to decide the question presented.

No other federal appellate court has decided whether Interconnected VoIP services are "information services" under the 1996 Act. The Petition cites decisions from four other courts of appeals, but as the MPUC acknowledges, none of those courts addressed the classification of Interconnected VoIP. Pet. at 15 ("Unlike the Eighth Circuit, though, the other circuits avoided reaching the classification issue, on various grounds.").

Several federal district courts *have* decided the question presented here, and all of them have reached the same holding as the Eighth Circuit did. Pet. App. 19–42 (district court decision below); *Sw. Bell Tel., L.P. v. Mo. Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1082–83 (E.D. Mo. 2006), *aff'd*, 530 F.3d 676 (8th Cir. 2008); *Vonage Holdings Corp. v. N.Y. State Pub. Serv. Comm'n*, No. 04 Civ. 4306 (DFE), 2004 WL 3398572, at *1 (S.D.N.Y. July 16, 2004), *subsequent determination*, 2005 WL 3440708 (S.D.N.Y. Dec. 14, 2005); *PAETEC Commc'ns, Inc. v. CommPartners, LLC*, Civ. A. No. 08-0397 (JR), 2010 WL 1767193, at *3 (D.D.C. Feb. 18, 2010).

As there is no conflict among the courts regarding the classification of Interconnected VoIP services, the Petition presents a different theory: that there is a conflict with respect to the *consequences* of such classification. In *In re Investigation into Regulation of Voice Over Internet Protocol (VoIP) Services (2012-*

109), 70 A.3d 997 (Vt. 2013), the Vermont Supreme Court reviewed a decision by the Vermont Public Service Board that it did not have to consider the federal-law classification of interconnected VoIP services before initiating a proceeding to decide to what extent (if any) it should exercise its jurisdiction to regulate VoIP services in the state. *Id.* at 1002–03, ¶¶ 9–10. The Public Service Board had not yet applied any regulatory obligations to VoIP services—it merely held, in the first phase of a bifurcated proceeding, that it could begin the second stage to consider whether it should—and finalized its order to allow for judicial review before proceeding further. *Id.*

The Vermont Supreme Court expressly declined to decide whether Interconnected VoIP services are information services or telecommunications services. Instead, it "disagree[d] that the Board can avoid the federal classification issue" and remanded the case back to the Board for the Board to consider in the first instance whether VoIP is an information service or telecommunication service *before* deciding which regulatory requirements, if any, VoIP providers should be subject to in the state. *Id.* at 1007–08, ¶¶ 28, 32. In so doing, the court explained that "[e]ven if, as the Board explains, not *all* regulations will be preempted by [VoIP]'s designation as an information service, certainly *some* amount of preemption will occur, including any Title II-type regulation." *Id.* at 1007, ¶ 28.[3]

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[3] The proceeding in Vermont has not resulted in any state regulation of Interconnected VoIP services, as the matter remains on remand. The administrative decision to which the Petition points, *see* Pet. at 22, remains non-final as of the date of this submission.

No conflict exists between the Eighth Circuit's decision in this case and the Vermont Supreme Court's holding. The question presented here—the classification of Interconnected VoIP services under the 1996 Act—was expressly *not* decided by the Vermont Supreme Court. *Id.* at 1008, ¶ 32. And the Vermont Supreme Court's holding—that the classification of Interconnected VoIP services under federal law is *relevant* to the preemption of state requirements—is both unremarkable and consistent with the Eighth Circuit's decision here.

The Petition reads a conflict into the fact that the Vermont Supreme Court "disagree[d] . . . that the federal designation of VoIP as an information service would necessarily result in express preemption of all state regulation" and remanded to the Board to consider the classification issue. *Id.* at 1006, ¶ 24. The Petition frames this dicta as a holding that "[i]nformation services are not wholly exempt from regulation, and state regulations are preempted only to the extent they conflict with federal law or policy." Pet. at 22 (quoting *VoIP Investigation*, 70 A.3d at 1006–07).

The Petition reads too much into this dicta. The Vermont Supreme Court's recognition that federal law does not preempt the application of *all* state-law requirements to interconnected VoIP services is unremarkable and does not conflict with the Eighth Circuit's decision here. As the FCC's amicus brief noted, Congress and the FCC have each expressly allowed states to apply and administer some requirements on VoIP providers, such as universal service fund assessments and public safety requirements

surrounding E911 service. *See* n.2 *supra*. At the time of the Vermont Supreme Court's decision, the Board had not yet extended any requirements to VoIP providers at all. 70 A.3d at 1002–03, ¶¶ 9–10. It was plausible that the Board might on remand consider requirements of the sort that Congress and the FCC have expressly permitted.

Insofar as the MPUC's Petition asserts that "at least some of the consumer protection laws and rules that [the MPUC] sought to apply to Charter's VoIP service are not inconsistent with the FCC's policy against regulation of information services," Pet. at 23—and that the Eighth Circuit's approach accordingly conflicts with the one taken by the Vermont Supreme Court because it did not remand for a granular preemption analysis for each regulatory requirement, Pet. at 21–23—this argument is neither preserved nor developed for review.

First, the MPUC waived this argument by conceding the preemptive effects of an information service classification at the district court level, where it agreed that "[i]nformation services are subject to the FCC's jurisdiction but not to state regulation."[4] Charter cited this concession on appeal, Charter 8th Cir. Br. at 19, and the MPUC never walked it back.[5] Moreover, this

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[4] Defs.' Mot. To Dismiss at 12, Dist. Ct. ECF No. 16.

[5] The MPUC's argument on appeal was rather that the court should not reach the classification inquiry because the FCC, which was "[c]harged with administering the Telecommunications Act," had already "plainly stated" that state regulation of interconnected VoIP services was *not* preempted if the service's subscribers

remand argument was nowhere raised in the MPUC's Eighth Circuit filings. This argument is thus not properly before this Court. *See, e.g.*, *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212–13 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." (quotation marks omitted)); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) ("[T]his is a court of final review and not first review . . . ." (quotation marks omitted)).

Second, the MPUC has never taken the granular approach to state regulation that it now endorses. The MPUC never so much as cited the Vermont Supreme Court's decision in its filings before the Eighth Circuit, and it never argued that some but not all of its regulations might survive. Throughout this litigation, the MPUC has sought to apply the same common-carrier regulatory regime to Spectrum Voice as it applies to traditional landline services. Indeed, elsewhere in its Petition, it endorses that same rule based on the purported need for competitive parity between interconnected VoIP providers and traditional telephone companies. Pet. at 13–15.

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accessed those services from fixed locations. *See* MPUC 8th Cir. Br. at 18 (citing *In re Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006), *aff'd in relevant part sub nom. Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007)). This was the same reasoning that the Vermont Public Service Board had relied upon, and which the Vermont Supreme Court *rejected*. 70 A.3d at 1007, ¶¶ 29–30. The FCC told the Eighth Circuit that the MPUC's reading of its orders on the subject was "incorrect," *infra* at 30, and the MPUC does not repeat this argument in its Petition.

Finally, even in this Court, the MPUC's theory is undeveloped. The MPUC does not identify the regulations that it believes survive preemption, instead referring vaguely to "at least some of the consumer protection laws and rules." Pet. at 23. The Vermont Supreme Court's dictum that "not *all* regulations will be preempted by [Interconnected VoIP's] designation as an information service" expressly defers the details of that analysis until later. 70 A.3d at 1007. The Court should not grant review to conduct in the first instance a complex analysis that Petitioners chose not to develop below or to grant a novel form of relief Petitioners have never previously requested.[6]

II. Classification of Interconnected VoIP Services Under the 1996 Act Is Not an Issue of National Importance.

The Petition contends that the Court should grant certiorari because the question is "of extraordinary importance to the national communications market and

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[6] Although the issue was neither presented nor litigated, nothing about the Eighth Circuit's ruling purports to exempt Interconnected VoIP services from laws of general applicability, such as registration requirements or consumer protection laws applicable to all entities conducting business in the state. Conflict with FCC policy and with the 1996 Act arises rather from the MPUC's imposition on Interconnected VoIP services of requirements that apply to telecommunications carriers *qua telecommunications carriers*, which runs headlong into the Act's directive that Title II requirements apply to a provider "only to the extent that it is engaged in providing telecommunications services." 47 U.S.C. § 153(51).

to millions of consumers of telephone services." Pet. at 12. The MPUC overstates the issue's significance.

First, the MPUC's order here was an outlier. No State currently seeks to impose the broad range of legacy telephone regulations that Minnesota sought to impose here, and indeed a significant majority of states have done the exact opposite and expressly deregulated Interconnected VoIP as a matter of state law.[7] Any practical consequences of the Eighth Circuit's decision are inherently limited by other states' disinterest in Petitioners' regulatory approach; to the extent that interconnected VoIP services face a different state-level regulatory environment from traditional telephone services, that is not a result of the Eighth Circuit's ruling, but of state-level legislative and policy decisions in other states long preceding it.

Second, although the MPUC points to what it describes as a "frequency" with which this classification issue has arisen in other circuit courts, it points only to four cases over an eight-year-period, none of which required the reviewing courts to decide the classification question presented here. Two cases involved intercarrier compensation—a distinct issue from public utility regulation because the rules governing payment

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[7] *See* Sherry Lichtenberg, NRRI, *Examining the Role of State Regulators as Traditional Oversight Is Reduced* 2 (July 11, 2015), http://nrri.org/wp-content/uploads/2016/04/2015-Jul-Sherry-Lichtenberg-Role-of-State-Regulators.pdf (noting that as of July 2015, "44 states had specifically eliminated oversight of VoIP and other IP-enabled services"); *see, e.g.*, Cal. Pub. Utils Code § 710; House Bill 542, 2013 Reg. Sess. (N.H. 2013); House Bill 1779, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008).

for traffic exchange arise from different statutory and contractual sources, and often do not vary with the specific consumer-facing services that carriers ultimately offer using such wholesale traffic-exchange inputs. *See CenturyTel of Chatham, LLC v. Sprint Commc'ns Co., LP*, 861 F.3d 566, 573–74 (5th Cir. 2017) (rejecting the argument that the classification of retail VoIP services matters to the statutory rates governing carrier-to-carrier traffic exchange); *Centennial P.R. License Corp. v. Telecomms. Regulatory Bd. of P.R.*, 634 F.3d 17, 37–38 (1st Cir. 2011) (addressing whether carriers' interconnection agreement encompassed payment for the exchange of VoIP traffic).

The other decisions relied upon by the Petition were dismissed on other grounds and never addressed the question of VoIP classification. *See Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 851 F.3d 1324, 1329 (D.C. Cir. 2017) (*per curiam*) (concluding that the association lacked standing to seek an order requiring the FCC to classify VoIP service); *In re FCC 11-161*, 753 F.3d 1015, 1048–49 (10th Cir. 2014) (holding that a challenge to FCC order allowing universal service funds to be used to support VoIP services was unripe because no state commission had designated as an "eligible telecommunications carrier" a provider that did not offer *any* services on a common carrier basis). Far from demonstrating any "frequency with which the VoIP classification issue has arisen," Pet. at 14–15, these cases confirm the narrow reach of the Eighth Circuit's decision.

Third, interconnected VoIP services are already subject to a carefully tailored federal regulatory regime,

which addresses topics such as E911 connectivity, privacy, backup power during outages, number porting, compliance with law enforcement, and many others. *See* FCC Br. at 13–16, 20–26 (itemizing the FCC's "targeted measures"). The MPUC asserts that "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." Pet. at 13. The FCC, however, has stated that the well-developed federal regime provides substantial protections for consumers, FCC Br. at 24–25, and given that the MPUC is an outlier in attempting to transpose its entire legacy telephone regulatory regime onto VoIP providers, other States do not appear to share the MPUC's concerns.

Fourth, the Petition's claim that the Eighth Circuit's decision "raises significant concerns about market competition between VoIP service and traditional phone service" is overstated. Pet. at 13. The FCC's national regulatory framework for VoIP providers subjects them to rules often similar or analogous to those faced by traditional carriers. *See* n.2 supra.[8] And as noted above, most states do *not* subject VoIP providers to the same rules as traditional telephone companies as the MPUC tried to do here, so

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[8] Amicus the National Association of Regulatory Utility Commissioners ("NARUC") frames some of these orders as the FCC's treating Interconnected VoIP services "as a telecommunications service." *See, e.g.*, NARUC Br. at i & at 23. The FCC, however, has consistently identified and applied regulatory obligations and privileges to VoIP providers using sources of statutory authority that do not depend upon how those services are classified.

to the extent there is any discrepancy in state-level requirements, it is a deliberate one created by state legislatures, across the country. *See* n.7 *supra*. Although the Eighth Circuit's decision confirms the inapplicability of state public utility rules to "fixed" interconnected VoIP providers, that has already been true for nomadic VoIP providers for fifteen years since the FCC issued its *Vonage* decision. The MPUC's order—had it been allowed to take effect—would have created a new competitive discrepancy *among* VoIP providers based upon whether or not they permit users to access their service remotely from a separate Internet connection; such an order could have created competitive consequences and incentives likely unintended by Congress or the FCC.

Insofar as the Petition claims that the Eighth Circuit's decision "provides an incentive for carriers to abandon traditional telephone infrastructure and transfer customers to VoIP," Pet. at 14, any such incentive is consistent with the 1996 Act's directive that the FCC "encourage the deployment . . . of advanced telecommunications capability" through "measures that promote competition in the local telecommunications market," including by "remov[ing] barriers to infrastructure investment." 47 U.S.C. § 1302(a). And it is consistent with the FCC's conclusion that protecting information services from public utility regulation will "drive further broadband investment and deployment." FCC Br. at 12.

Finally, there is no merit to the contention in the National Association of Regulatory Utility Commissioners' ("NARUC") amicus brief that the

Eighth Circuit's holding frustrates universal service programs. NARUC's theory is that the ruling would render interconnected VoIP providers ineligible to *receive* universal service fund contributions, because certain federal support programs require providers to offer services on a common carrier basis to be eligible to participate. *See* NARUC Amicus Br. at 14–16; 47 U.S.C. § 214(e). The Eighth Circuit's decision, however, is of little (if any) practical consequence to this requirement. As the FCC has held and the Tenth Circuit has recognized, designation as an Eligible Telecommunications Carrier turns on whether the provider offers *any* service on a common carrier basis, not whether the subsidized services are themselves common-carrier offerings. *See In re FCC 11-161*, 753 F.3d at 1048–49. Provisioning interconnected VoIP services (irrespective of how they are classified) generally still involves wholesale telecommunications services upstream from the consumer-facing offering, such as those relating to network access and interconnection, meaning that VoIP providers or their affiliates can be common carriers for reasons other than their consumer-facing voice services. *See In re Time Warner Cable Request for Declaratory Ruling*, Memorandum Opinion and Order, 22 FCC Rcd 3513, 3520–21 ¶15 (WCB 2007). And in any event, the FCC has long held that "a particular service can be offered on a non-common carrier or common carrier basis at the service provider's option," and that an information service provider can acquiesce to common carrier regulation if it wishes to receive the benefits of such

regulation.[9] Nothing in the Eighth Circuit's opinion affects the ability of VoIP providers to do so.

III. The Eighth Circuit's Decision Is Correct.

Finally, the Court should deny review because the Eighth Circuit's decision reflects a correct and straightforward application of the statutory text and pertinent FCC precedents—both with respect to the classification of interconnected VoIP services under the 1996 Act and the preemptive effects of that classification.

A. The Eighth Circuit Correctly Followed the Text of the 1996 Act.

As relevant here, an "information service" is defined as the "offering of a capability for . . . transforming [or] processing . . . information via telecommunications." 47 U.S.C. § 153(24). As the District Court explained (and as the Eighth Circuit quoted), under the statutory text, "the touchstone of the information services inquiry is whether Spectrum Voice acts on the customer's information—here a phone call—in such a way as to 'transform' that information." Pet. App. 7–8. By converting the protocol in which information is transmitted, Spectrum Voice undoubtedly meets this definition because its "protocol conversion" enables calls

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[9] *See In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14,853, 14,902-03 ¶ 94 & n.280 (2005) (classifying broadband Internet access services as information services, but determining that providers can offer such services on a common carrier basis voluntarily), *aff'd sub nom. Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3d Cir. 2007).

between IP-based Spectrum Voice and TDM-based traditional networks, and does so "via telecommunications," rendering it an "information service" capability under the Communications Act's plain text.

Ignoring the plain text of the "information service" definition, the MPUC argues that the Eighth Circuit failed to employ the "functionality" approach set out in *Brand X*. The MPUC's assertion of how that test should be applied is untethered wholly from the Act's text—indeed the MPUC does not so much as cite the definitions of "information service" and "telecommunications service" in this section of its Petition. And, in any event, the Eighth Circuit's decision is consistent with the functionality test, which looks to "the factual particulars of how [the] technology works and how it is provided." *Brand X*, 545 U.S. at 991. The Eighth Circuit described the technology and concluded that "Spectrum Voice's service is an information service because it makes available information via telecommunications by providing the capability to transform that information through net protocol conversion." Pet. App. 8–9 (internal quotation marks omitted). That application of *Brand X*'s functionality test, which is grounded in the text of the "information service" definition, is correct.

The MPUC also argued below that the "information service" category under the Act "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." 47 U.S.C. § 153(24). But that is no help to the MPUC here.

The FCC has held for decades that protocol conversion falls within this statutory carve-out only when the carrier uses it for internal purposes (*i.e.*, where the carrier converts transmissions for easier transport within its network, for communications between the subscriber and the carrier itself—such as signaling and control communications—and where the carrier converts transmissions to retain reverse-compatibility with its subscribers' older communications equipment). *See, e.g.*, *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21,957–58 ¶ 106. "Net" protocol conversion, when it is used instead to give subscribers the ability to communicate across networks that use different communications standards, supplies additional functionality to the user beyond mere transmission and accordingly does not fall within this exception. *See id.* at 21,956 ¶ 104 ("We also agree . . . that an end-to-end protocol conversion service that enables an end-user to send information into a network in one protocol and have it exit the network in a different protocol clearly 'transforms' user information. . . . Therefore, we conclude that both protocol conversion and protocol processing services are information services under the 1996 Act.").

The FCC's interpretation is reasonable and this Court endorsed it in *Brand X*:

> Examples of [enhanced][10] services included . . . "value added networks," which lease

[10] Before the 1996 Act codified longstanding FCC policies on this subject under the Communications Act of 1934, "information services" were known as "enhanced services." *Brand X*, 545 U.S. at 977.

> wires from common carriers and provide transmission as well as protocol-processing service over those wires. These services "combined communications and computing components," yet the Commission held that they should "always be deemed enhanced" and therefore not subject to common-carrier regulation.

Brand X, 545 U.S. at 994 (citations and brackets omitted). In its amicus brief, the FCC explained that the *Non-Accounting Safeguards Order* remains good law and "continue[s] to provide important guidance on how to interpret and apply the Communications Act." FCC Br. at 26–27. Thus, the Eighth Circuit's decision is fully consistent with the FCC's approach to classification.

B. The Eighth Circuit Had the Authority to Rule that State Regulation of Interconnected VoIP Is Preempted.

The Eighth Circuit also correctly held that the *consequence* of the information service classification was to preempt the MPUC's order. The MPUC now argues in its Petition—for the first time—that even if VoIP service is an "information service," preemption should not have followed.

As explained at pages 17–18 *supra*, the preemptive consequence of the information service categorization was not litigated in this case. The MPUC conceded it in the district court and failed to argue it in the court of appeals, and the Eighth Circuit thus did not address it. The argument is neither preserved nor developed for this Court's review.

In any event, the Eighth Circuit's decision was correct. As the FCC explained in its amicus brief, it has a longstanding policy of nonregulation of information services. FCC Br. at 10 ("Under the longstanding federal policy of nonregulation for information services, states are independently prohibited from subjecting information services to any form of state economic regulation."). This policy flows naturally from Congress's decision to expressly exempt information services from the Title II framework, an exemption that would be directly frustrated by the imposition of such requirements by state regulators. Thus, when the Eighth Circuit ruled that Interconnected VoIP is an information service, the FCC's own longstanding deregulatory policy required preemption.

The MPUC now argues that preemption requires an FCC decision, and that the Eighth Circuit erred by finding preemption without one. *See* Pet. at 19 ("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 MPUC's view, the *absence* of an FCC decision expressly preempting state regulation necessarily establishes that state regulation is *not* preempted.

The MPUC did not present this argument to the Eighth Circuit. To the contrary, in the Eighth Circuit, the MPUC made the opposite argument. Rather than arguing that the FCC had exercised its discretion *not* to rule on the preemption question, the MPUC argued that the FCC *had* ruled on the preemption question, in the

MPUC's favor. *See* MPUC 8th Cir. Br. 18 (asserting that "the FCC has plainly stated that an interconnected VoIP provider with the capability to track whether calls are interstate or intrastate would be subject to state regulation"). The FCC's amicus brief stated that this assertion was "incorrect," *see* FCC Br. at 27, and the Eighth Circuit agreed that the FCC had not resolved the issue. Pet. App. 7 n.4. The MPUC's current argument—that the *absence* of an FCC ruling is dispositive on the preemption question—is new in this Court, and therefore waived.

That contention, in any event, squarely conflicts with this Court's precedents. While "a court should not find pre-emption too readily in the absence of clear evidence of a conflict," this Court has concluded that "insist[ing] on a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking, would be in certain cases to tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended." *Geier v. Am. Hondo Motor Co.*, 529 U.S. 861, 885 (2000). Here, while the FCC has not ruled on the classification of VoIP services specifically, it reiterated in its amicus brief its policy that information services should remain free from public utility regulation. FCC Br. at 10. Moreover, this longstanding policy of the FCC, spanning back decades, properly recognizes the clear conflict that would arise if states were to subject information services to public utility obligations from which Congress exempted them. The Eighth Circuit's application of these principles here was correct.

CONCLUSION

For the reasons set forth herein, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

STEVE W. GASKINS
GASKINS BENNETT
BIRRELL SCHUPP LLP
333 South 7th Street
Suite 3000
Minneapolis, MN 55402
(612) 333-9500

IAN HEATH GERSHENGORN
Counsel of Record
LUKE C. PLATZER
ADAM G. UNIKOWSKY
CAROLINE C. CEASE*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
IGershengorn@jenner.com

* Admitted only in Alabama, not admitted in the District of Columbia. Practicing under the supervision of the partnership of Jenner & Block LLP.

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