

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

**RESPONSE TO SUPPLEMENTAL
AUTHORITY LETTER**

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.

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.

**RESPONSE TO PETITIONERS'
SUPPLEMENTAL AUTHORITY**

This supplemental brief is in response to Petitioners' October 3, 2019 letter notifying the Court of the recent decision of the United States Court of Appeals for the D.C. Circuit Court in *Mozilla Corp. v. FCC*, No. 18-1051, __ F.3d __, 2019 WL 4777860 (D.C. Cir. Oct. 1, 2019), which granted in part and denied in part petitions for review from an order of the Federal Communications Commission.

Mozilla, in pertinent part, upheld an FCC order classifying broadband internet access service as an "information service" under the Telecommunications Act of 1996, and rejected arguments that the statute compelled it to instead be classified as a "telecommunications service"—arguments that mirrored, quite closely, those asserted by the Petitioners in this case. *See Mozilla*, 2019 WL 4777860, at *5-17. *Mozilla* is pertinent to the Petition only insofar as it further reaffirms the Eighth Circuit's analysis of the merits issue litigated below—the classification of interconnected Voice over Internet Protocol ("VoIP") services under federal law.

The portion of the *Mozilla* decision cited by Petitioners holds that the FCC exceeded its statutory authority when it issued a 2018 order expressly and prospectively preempting all state regulation of broadband services. This holding does not create the circuit split with the Eighth Circuit that Petitioners claim.

At the outset, as explained in Respondents' Brief in Opposition, Petitioners in this case conceded before

the District Court that information services are not subject to state public utility regulation; the Petition in this case accordingly does not properly present the question of the preemptive effect of the information service classification on the specific Minnesota regulations at issue, much less any question as to the scope of the FCC's statutory authority. *See* Respondents' Brief in Opposition at 17-18 & n.5.

In any event, the question presented in *Mozilla*, as framed by the D.C. Circuit itself, was whether the FCC had statutory authority "expressly" to preempt, prospectively, any and all "state or local measures that would effectively impose rules or requirements" not imposed by the FCC's own broadband order. 2019 WL 4777860, at *50. The *Mozilla* court took pains to emphasize that it was not opining on whether *conflict* preemption might likewise displace state broadband regulation, and that it was not "mak[ing] a conflict-preemption assessment in this case..." instead declining to consider the issue as not properly presented in light of the specific FCC order under review and the Commission's defense of the order on appeal. *Id.* at *57.

As Petitioners here repeatedly emphasized in their petition for certiorari, the Eighth Circuit's decision in this case rested on conflict preemption doctrine, and not (as in *Mozilla*) a purported exercise of express preemption by the FCC. *See* Petition for Certiorari at 22-23 (noting that Eighth Circuit "viewed the question as a matter of conflict preemption"), *id.* at 11 (arguing that Eighth Circuit erred under "this Court's conflict preemption precedents"). The distinction between express preemption and conflict preemption negates the

purported circuit split asserted by Petitioners.¹ The D.C. Circuit itself did not believe that its holding created a split with the Eighth Circuit; it distinguished the 2007 Eighth Circuit decision upon which the Court of Appeals relied in this case—*Minnesota Public Utilities Commission v. FCC*, 483 F.3d 570 (8th Cir. 2007)—as upholding an FCC decision finding conflict preemption, as opposed to a purported exercise of express preemption. *See* 2019 WL 4777860, at *61 (“The Eighth Circuit decided only whether the [FCC]’s order was ‘arbitrary and capricious’ ... because it ‘determined state regulation of VoIP service conflicts with federal regulatory policies,’ ... [and] does not resolve the purely legal question of the Commission’s asserted preemption authority *here*.” (emphasis added)).

CONCLUSION

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

¹ *Mozilla* also involved an FCC decision expressly to preempt state regulation of broadband services, as to which—in the opinion of the D.C. Circuit—the Commission had itself forsworn any regulations or authority of its own. 2019 WL 4777860, at *59. In the context of interconnected VoIP, by contrast, the FCC has created an extensive federal regulatory regime that would be undermined by conflicting state regulations. *See* Brief in Opposition at 11 & n.2.

4

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.

Dated: October 7, 2019