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October 3, 2019

Via U.S. First Class Mail and Email

The Honorable Scott S. Harris
Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543-0001

Re: Lipschultz v. Charter Advanced Services (MN), LLC, No. 18-1386

Dear Mr. Harris:

This letter is to inform the Court of a recent D.C. Circuit Court of Appeals' decision that is relevant to the petition for writ of certiorari in the above-captioned matter and creates a circuit split that did not exist when the petition was filed. In *Mozilla Corp. v. FCC*, the court upheld a Federal Communications Commission ("FCC") order classifying broadband Internet access service as an information service, but the court rejected the FCC's attempt to preempt state regulation of the service. *Mozilla Corp. v. FCC*, No. 18-1051, 2019 WL 4777860, *1-3 (D.C. Cir. Oct. 1, 2019). Specifically, the D.C. Circuit held that the FCC's "policy of nonregulation of information services" was not a source of authority that could support preemption because "the power to preempt the States' laws must be conferred by Congress. It cannot be a mere byproduct of self-made agency policy." *Id.* at *54. The court also rejected the argument that conflict preemption barred all state regulation: "[W]hether a state regulation unavoidably conflicts with national interests is an issue incapable of resolution in the abstract, let alone the gross." *Id.* at *57 (quoting *Alascom, Inc. v. FCC*, 727 F.2d 1212, 1220 (D.C. Cir. 1984)).

The dissenting opinion in *Mozilla* explained how the majority's holdings created a conflict with the Eighth Circuit. *Id.* at *77 (Williams, J., concurring in part and dissenting in part). The Eighth Circuit has held twice, including in the opinion that is the subject of this petition, that "any state regulation of an information service conflicts with the [FCC] policy of nonregulation." Petition Appendix 7; *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007). The dissent in *Mozilla* recognized that the Eighth Circuit's approach to preemption "seems wholly incompatible with the majority's idea that there is no Commission preemptive authority vis-à-vis [an information] service." *Mozilla*, 2019 WL 4777860, at *77.



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Sincerely,



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