No. 10-544

IN THE
Supreme Court of the United States

Frank Gangi,

Petitioner,

v.

Verizon New England, Inc., d/b/a Verizon Massachusetts et al.,

Respondents.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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As the petition demonstrated, and Verizon does little to dispute, the circuits are divided over whether to apply the traditional presumption against federal preemption of state authority in the context of federal regulation of interstate telecommunications like dial-up. The First Circuit applied the presumption in this case, in conflict with the Second and Ninth Circuits, to hold that Massachusetts may regulate the prices telecommunications companies may charge for some calls to the internet (but not others), even though the FCC has issued orders[1] declaring that all such calls are jurisdictionally interstate and subject to a pricing regime intended to reduce, and eventually eliminate, intercarrier charges for internet-bound calls. That decision will have dramatic effects on small companies' abilities to compete with large incumbents like Verizon to offer internet access to underserved communities. While Verizon insists that this is what the Commission intended, the text of the relevant orders demonstrates a contrary intention, as other circuits have recognized. This Court should intervene and grant certiorari to restore uniformity to the nation's telecommunications policy.

Likewise, this case presents an opportunity to resolve ongoing confusion regarding the allocation of authority between state commissions and federal courts to resolve ICA disputes, a confusion which has led even Verizon itself to take inconsistent positions on the issue and which only this Court can resolve.

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[1] *ISP Remand Order*, ¶¶1, 7; *Second Remand Order*, ¶6.

I. Verizon Fails To Establish That The First Circuit's Decision On The Preemptive Effect Of The FCC's Orders Does Not Conflict With The Rulings Of The FCC And Other Circuits

Verizon goes to great lengths to avoid confronting the first issue raised in the Petition, whether states can impose tolls on a portion of a communication declared jurisdictionally interstate.[2] But it cannot credibly deny that the First Circuit on the one hand, and Second and Ninth Circuits on the other, have applied opposite rules regarding the preemptive effective of federal regulation of interstate telecommunications such as dial-up, or that different circuits have construed the same FCC orders to have a different scope and effect. Both conflicts have important consequences for federal telecommunications policy and this case presents an appropriate vehicle for resolving them.

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[2] As part of that strategy, Verizon resorts to an *ad hominum* attack, stating that the district court imposed sanctions on Mr. Gangi as a result of findings that he "'lied'" to the court, BIO 11. Such allegation is entirely irrelevant to the important legal rulings challenged in this petition. Petitioner nonetheless feels constrained to make clear that he strongly disagrees with Verizon's point and the factual findings of the courts below—there was no direct evidence that Mr. Gangi lied, and the district court's inferences of deceit from the ambiguous evidence before it were entirely unwarranted. Petitioner's failure to seek review of those findings here simply reflects his acknowledgment that the Court does not sit to correct such factual errors.

1. As the petition explained, and Verizon does not deny, the Ninth and Second Circuits have held that the presumption against preemption does not apply to federal regulation of interstate telecommunications and the innovative services the TCA was passed to promote. Pet. 17-19; *Ting v. AT&T*, 319 F.3d 1126, 1130 (9th Cir. 2003)[3]; *New York SMSA Ltd. v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010). Nor does Verizon deny that the First Circuit applied the opposite rule in this case, *see* Pet. App. 20a, 101a. Instead, Verizon simply points out that the Second and Ninth Circuits resolved the presumption question in cases that involved different telecommunications services. BIO 15. But that factual distinction cannot obscure the circuits' fundamental disagreement over the proper legal test for preemption claims arising from federal regulation of interstate telecommunications and services like dial-up, whose growth the TCA facilitated.

Nor does Verizon dispute that the question of the proper presumption was of critical importance here. *See* Pet. App. 111a ("We find that there is a lack of clarity about whether the *ISP Remand Order* preempts state regulation of the access charges at issue here. Given the requirement of a clear indication that the FCC has preempted state law, the *ISP Remand Order* does not have the broad

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[3] Verizon notes that *Ting* addressed the preemptive effect of a statute, instead of a regulation, BIO 16, but cites to no authority holding that this distinction makes any legal difference.

preemptive effect that Global NAPS seeks to assign to it."); *id.* at 108a (noting that FCC staff stated that the 2001 Order "'can be read to support the interpretation set forth by either party'").

2. The First Circuit's erroneous presumption was compounded by its misconstruction of the scope of the FCC's orders, in conflict with their intent and the decisions of other courts.

a. Verizon insists that the First Circuit properly construed the orders, but largely ignores their text, relying instead on snippets from briefs filed by the Commission's staff attorneys in this and other cases. BIO 24-25. But the orders are clear and the briefs do not cast any doubt on the orders' plain meaning.

As the petition demonstrated, Pet. 7, in the 2001 Order, the FCC explained that it was setting a cap for *all* ISP-bound calls – not simply calls to local ISPs– stating that "the record indicates a need for immediate action with respect to *ISP-bound traffic*." ¶7 (emphasis added). The FCC then encompassed all ISP-bound calls in its new rate structure, explaining that it "adopt[ed] a gradually declining cap on the *amount that carriers may recover from other carriers for delivering ISP-bound traffic*." ¶7 (emphasis added); *see also* ¶82 ("[b]ecause we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic . . . state commissions will no longer have authority to address this issue."). Thus, even if the Commission's attention was initially directed to the question of ISP-bound call pricing by cases involving local calls to ISPs, *cf.* BIO 24-25, the FCC clearly decided, when it issued its *ISP Remand Order*, to apply its new rule to all ISP-bound calls. Indeed, the

Commission issued a proposed rulemaking on the same day as that order, dealing with all ISP-bound calls, including VNXX calls.[4] Nor has Verizon offered any reason why the FCC would intend to apply a uniform national rule to some calls to the internet, but leave others to the patchwork regulation of 50 state agencies.

Instead, Verizon relies on the FCC staff attorneys' statements in the amicus brief in this case. BIO 24-25. But that brief – which the authors stated did not represent the official views of the Commission itself[5]– does little to support Verizon's interpretation. The brief acknowledges that "the *ISP Remand Order* can be read to support the interpretation set forth by *either party*," *id.* at 13 (emphasis added), and that "the *ISP Remand Order* is also replete with references to 'ISP-bound calls' that do *not differentiate between calls placed to ISPs in the same local calling area and those placed to ISPs in non-local areas*," *id.* at 11 (emphasis added).

Verizon also relies on statements in FCC briefs to the D.C. circuit in the cases involving Core Communications' mandamus petition, even while insisting that those proceedings "had nothing to do" with the issues here. BIO 17; *see id.* at 17-18, 25.

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[4] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610 (2001) (*2001 NPRM*) ¶115.

[5] FCC Br. 13 (stating "it would not be possible for the Commission's litigation staff to provide an official position").

But Verizon misconstrues those statements.[6] If anything, the FCC's briefs support petitioner's position. *See* Pet. 23.

Rather than attempting to triangulate the FCC's position from several statements addressing other issues in different cases, the Court should resolve any ambiguity about the Commission's interpretation of its orders by calling for the views of the Solicitor General (who, unlike the staff attorneys charged with filing the First Circuit amicus brief, presumably will be able to represent the Commission's authoritative position).

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[6] In the 2010 D.C. Circuit proceeding, for example, the Commission's brief acknowledged that the Orders applied to local calls, BIO 25, but did not say that they were limited to such communications. To the contrary, the same brief emphasized, "it is not the law that the intrastate segment of end-to-end interstate traffic falls outside the Commission's section 201(b) ratemaking authority." FCC Br. 31. Likewise, the FCC's statement in an earlier proceeding involving Core's petition, that the "*ISP Remand Order* did not address the regulatory treatment of VNXX calls," BIO 17, merely meant that it had not yet determined how it would exercise its authority as to operational aspects of VNXX calls. The FCC's statement certainly did not mean that it had temporarily left pricing authority over VNXX calls with the states. In any case, the *Second Remand Order* made clear that the Commission was exercising jurisdiction over all ISP-bound calls, stating it had jurisdiction to regulate ISP-bound calls under section 251(b)(5) of the TCA, which it stated applies to all telecommunications, and is "not limited . . . to particular services ('telephone exchange service,' 'telephone toll service' or 'exchange access')." ¶8 (internal citations omitted).

b. Verizon's attempts to reconcile the circuits' views of the FCC orders, BIO 17-19, fail as well. While the Fourth and D.C. Circuits have not directly confronted the question presented here, each has given careful attention to the meaning of the FCC orders and reached conclusions incompatible with the decision in this case. Pet. 24-25. Verizon implies that the D.C. Circuit expressly agreed with the First Circuit's decision in this case, BIO 18, but that suggestion is entirely misleading. In the passage cited, the D.C. Circuit simply stated that "the parties agree that the link between the LEC and the interexchange carrier is *not* governed by the reciprocal compensation regime of § 251(b)(5)," and cited a brief that, in turn, cited a portion of the First Circuit's 2006 opinion that cited an FCC order describing the general distinction between local and interexchange traffic. *Core Communications v. Federal Communications Comm'n*, 592 F.3d 139, 144 (D.C. Cir. 2010).

3. Verizon argues that review is not warranted because dial-up is an issue of declining importance. BIO 21-22. But that claim is belied by the fact that numerous states continue to fight for the right to regulate it and the FCC has initiated (and maintains) a proposed rulemaking dealing with it.[7] In fact, dial-

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[7] *2001 NPRM*, docket available at: http://fjallfoss.fcc.gov/ecfs/proceeding/view?z=gzwj&name=01-92; *see* Arizona Corp. Comm'n docket Nos. T-0151B-05-0414, T-03654A-05-0415, available at https://edocket.azcc.gov/; Washington Utils. and Transp. Comm'n docket Nos. UT-053036, UT-053039, available at http://wutc.wa.gov/rms2.nsf/frm2005VwDSWeb!OpenForm&vw2

up remains the only access many Americans have to the internet, particularly in rural or remote areas, where access is especially important to connecting small businesses to the broader economy and affording families educational and other benefits often unavailable through any other means. *See*, *e.g.*, FCC, National Broadband Plan,[8] at xi ("[a]pproximately 100 million Americans do not have broadband at home"); *id.* at 23 (noting that data suggests that "fewer than 10% of residents on Tribal lands have terrestrial broadband available"); *id.* (describing income and racial disparities in broadband access). Given the high per capita cost of delivering broadband to less populated areas, such communities will remain reliant on dial-up access for some time. *See id.* at 21 ("It is unlikely there will be a significant change in the number of unserved Americans based on planned upgrades over the next few years . . . .").

Further, the issue of state regulation of legs of interstate telecommunications is relevant to the pricing of VoIP traffic, which is growing in importance. Pet. 30.

4. Finally, Verizon argues that this case is an inappropriate vehicle to resolve the important issues it presents because, Verizon says, petitioner's arguments are barred by the *res judicata* effect of the First Circuit's 2006 decision in these consolidated

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[8] *Available at* http://broadband.gov/download-plan/.

cases. Neither the First Circuit nor the district court[9] accepted Verizon's *res judicata* argument, and for good reason. As the First Circuit has explained, when "there was only a final judgment on a portion of the aggregate [consolidated] case," the "application of res judicata in this case [i]s inappropriate." *Bay State HMO Management Inc. v. Tingley Systems*, 181 F.3d 174, 178-79 (1st Cir. 1999) (emphasis added); *see also Devlin v. Transportation Communications Int'l Union*, 175 F.3d 121, 128-29 (2d Cir. 1999).[10] And as Verizon acknowledges, BIO 23 n.17, a party's failure to seek certiorari on an interlocutory basis is no bar to this Court's review when the entire case is concluded.[11]

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[9] Verizon claims, BIO 11 n.13, petitioner misquoted the district court by asserting that Judge Zobel stated that the court's determinations occurring prior to the FCC's issuance of the 2008 order were "law of the case." Petitioner put the phrase "law of the case" in quotations to mark it as a term of art, not to claim that the words were spoken by Judge Zobel. Moreover, the term accurately describes the Judge's statement that FCC's *Second Remand Order* "cannot undo everything that's happened in the case over the last eight years." C.A. App. 2062. Notably, while Verizon criticizes petitioner's punctuation, it does not actually claim that the court based its decision on *res judicata* principles rather than law of the case. *See* BIO 11, n.13, 22-23.

[10] Verizon's citation to cases involving subsequent litigation over implementation of an injunction, BIO 23 n.17, is inapposite. Neither decision involved an appeal at the conclusion of the litigation of two consolidated cases.

[11] Verizon's *res judicata* claim fails for the additional reason that petitioner does not seek to relitigate any *claim* he lost in the prior appeal, but rather seeks review of an *issue* decided in the first appeal that is relevant to Verizon's present counterclaim. *See* Restatement (Second) of Judgments §17

II. Verizon Fails To Refute That The First Circuit's Waiver Ruling Creates A Split Among The Circuits As To The Permissible Grounds For Allowing A Cognizant State Commission To Be Bypassed

Certiorari is independently warranted to resolve a circuit conflict regarding the authority of federal courts to resolve disputes over the meaning of an ICA imposed by a state utility commission.

1. Verizon does not dispute that the distribution of adjudicatory authority between federal courts and state commissions is a question of recurring importance in telecommunications law. Nor can it deny that the question has been the source of much debate and confusion – it acknowledges it has taken inconsistent positions on the issue. BIO 27 n.20; *see also* Pet. 40 (noting Verizon's differing positions in different cases).

(1982) (*res judicata* bars relitigation of claims, not issues). Verizon did not assert in the First Circuit or in its opposition that petitioner is barred by issue preclusion from challenging the First Circuit's construction of the preemptive effect of the FCC orders. *See* Verizon C.A. Br. 55 ("[T]he relevant principle here is *res judicata*, or claim preclusion"); *id.* 82-83 (arguing that collateral estoppel applied to bar relitigation of a different question). Accordingly, any issue preclusion argument is waived. *See* S.Ct. R. 15.2. Furthermore, the First Circuit's 2006 ruling would warrant reconsideration in any event in light of the FCC's subsequent clarification of its original order in its 2008 *Second Remand Order*. *See* Restatement (Second) of Judgments § 28(2)(b); *Montana v. United States*, 440 U.S. 147, 161 (1979).

Verizon further acknowledges that the Third Circuit has held that disputes over the meaning or enforcement of an ICA "*must* be litigated in the first instance before the relevant state commission." BIO 27 (quoting *Core Communications v. Verizon Pa.,* 493 F.3d 333, 344 (3d Cir. 2007)) (emphasis added). It insists, however, that despite this unambiguously mandatory language, "the Third Circuit would likely agree that the defense it adopted was waivable," BIO 27, because the statute is "'silent as to the procedure for post-formation disputes,'" *id.* (quoting *Core*, 493 F.3d at 340), and because "a judge-made exhaustion requirement derived from a silent statute 'is a non-jurisdictional affirmative defense,'" BIO 28 (citation omitted). But that claim misconceives the basis of the Third Circuit's decision, which did not adopt an "exhaustion" requirement as a matter of judicial interstitial lawmaking, but instead enforced an allocation of authority it found established in the structure of the statute. 493 F.3d at 342-43. The Third Circuit agreed with the Eleventh that "to allow parties to circumvent the state commissions in post-formation disputes would undermine the Act's sense of cooperative federalism, under which the states were given primary responsibility over interconnection agreements." *Id.* at 343 (citing *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1278 n. 9 (11th Cir. 2003) (en banc)).

That rationale is entirely inconsistent with treating the Third Circuit's rule as a waivable exhaustion requirement. Enforcement of a rule protecting the TCA's division of authority between states and the federal government, based on a recognition of states' superior expertise, cannot turn

on the diligence of parties in asserting the states' prerogatives.

2. Verizon also wrongly asserts that only the Third Circuit has ruled contrary to the First concerning state commissions' primary jurisdiction to interpret, in the first instance, disputed ICA clauses. BIO 26-28; *contra* Pet. 31-34. For example, although Verizon dismisses as dicta the Eleventh Circuit's discussion of the statutory scheme, there can be little question that courts within that circuit could not have adjudicated Verizon's counterclaim here, consistent with *BellSouth Telecomms.,* 317 F.3d at 1278 n. 9.

Verizon similarly dismisses the Fifth Circuit's discussion of state commissions' "plenary" authority to resolve enforcement disputes. *See* BIO 26-27 n.19 (discussing *Southwestern Bell Tel. Co. v. Pub. Util. Comm'n of Texas*, 208 F.3d 475, 480 (5th Cir. 2000)). But at least one district court within that circuit has treated that case as authoritative, citing its ruling as requiring dismissal of a breach of ICA claim because it had not been presented to the relevant state commission. *Z-Tel Communications, Inc. v. SBC Communications, Inc.*, 331 F.Supp.2d 513, 548-50 (E.D. Tex. 2004).

CONCLUSION

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

Respectfully submitted,

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