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**The Legal Battle over Telecommunications Service Classification in the U.S.:
From Network Neutrality to Voice-Over-Internet Protocol Service**

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I. Introduction: The Importance of I-VOIP Service Classification

In the U.S., network neutrality policy has been on a trajectory of escalating political instability since the early 2000's. As explained in Cherry (2020), this trajectory can be understood as a microcosm of the more general trajectory of political dysfunction under U.S. governance that coincides with the era of deregulatory policymaking. Under U.S. governance, adversarial legalism – that is, lawyer-dominated litigation – has evolved as a means of policymaking in the U.S., the role of which has intensified with the rise of divided government and party polarization. The federal Telecommunications Act of 1996 was enacted during the waning period of bipartisan negotiation of the 1990's, and its implementation has been left to a heightened period of adversarial legalism under hyperpartisanship between the Republican and Democratic political parties. As a result, the instability of U.S. network neutrality policy is reflective of the current phase of hyperpartisanship within a process of adversarial legalism.

During this phase, the network neutrality debate in the U.S. has become a legal battle over classification of broadband Internet access services (BIAS) as a “telecommunications service” or “information service” under the federal Communications Act of 1934, as amended by the Telecommunications Act of 1996. This is because service classification under federal law determines the scope of Federal Communication Commission (FCC) jurisdiction and potentially the scope of state regulatory jurisdiction. Thus, in pursuit of deregulatory policies – whether sought by policymakers or entities seeking to avoid regulation – service classification has become the focal legal tactic to avoid federal and state government regulation.

Given the shift to a Republican Party majority of commissioners at the FCC, the network neutrality policy in the U.S. is again in flux. In December 2017, the FCC adopted an order that reversed the FCC's 2015 order (released in January 2018), and thereby reversed the classification of BIAS from a telecommunications service to an information service. In 2018, several appeals of this

FCC Order were filed, and consolidated in an appeal before the D.C. Circuit Court of Appeals. In October 2019, the D.C. Circuit Court ruled on this appeal in *Mozilla v. FCC*, 940 F. 3d 1 (D.C. Cir. 2019). A petition for rehearing en banc before the D.C. Circuit Court of Appeals was denied in February 2020. Given the recent appointment of conservative justices by the Republican majority of U.S. senators, lending uncertainty as to the potential outcome of further litigation, no party filed a petition for a writ of certiorari (petition for discretionary appeal) before the U.S. Supreme Court.

This same legal tactic focused on service classification is also being utilized to challenge the scope of federal and state regulatory authority over interconnected voice-over-Internet Protocol service (I-VOIP), which consumers find indistinguishable from traditional, time-division multiplexing (TDM-based) voice telecommunications services. Although the legal battle over service classification of BIAS service is well known, the analogous battle over classification of I-VOIP is of less prominence in the popular press or public awareness. This diminished level of public discourse as to the battle of I-VOIP classification likely arises, at least in part, from the relatively lower profile of the classification issue before the FCC. The FCC started a proceeding to address classification of I-VOIP in 2004 in *IP-Enabled Services*, 19 FCC Rcd. 4863 (2004), but the proceeding is still pending.

Yet, the issue of I-VOIP classification has also been the subject of judicial litigation in a case before the federal 8th Circuit Court of Appeals, *Charter Advanced Services v. Nancy Lange, in her official capacity as Chair of the Minnesota Public Utilities Commission*, No. 17-2290 (hereinafter “*Charter Advanced Services v. MPUC*”) 903 F. 3d 715 (8th Cir. 2018). In September 2018, a divided 8th Circuit Court (2-1 vote) upheld a federal district ruling, finding that Charter Advanced Services’ I-VOIP service is an “information service” under federal law, and is thereby preempted from Minnesota state regulation. This is the first decision by any federal Circuit Court of Appeal as to the ruling of service classification of I-VOIP service. The 8th Circuit denied a petition for rehearing and rehearing en banc in December 2018. In May 2019, the Minnesota Attorney General’s office, on behalf of the Minnesota Public Utilities Commission (MPUC), filed a petition for a writ of certiorari (petition for discretionary appeal) in this case with the U.S. Supreme Court. The U.S. Supreme Court denied this petition in October 2019. However, in a concurring opinion filed by Justices Thomas and Gorsuch, reasons for denying the petition were explained that also indicated the basis on which a petition in a future, similar case might be granted. In this regard, *Mozilla v. FCC* – the case related to legal classification of BIAS service discussed above – involved related issues that could have provided such a basis for U.S. Supreme Court consideration. However, given that parties were reluctant to file a

petition for a writ of certiorari in *Mozilla v. FCC*, this opportunity for Supreme Court consideration has been foregone.

This paper expands upon my prior research regarding U.S. deregulatory telecommunications policies (Cherry, 1999, 2003, 2006, 2010, 2015, 2020) to discuss the importance of the I-VOIP litigation, in both the U.S. and the international community. Under U.S. law, its importance arises from legal flaws in the 8th Circuit Court ruling in *Charter Advanced Services v. MPUC* and the resultant legal confusion as to the scope of federal preemption of state law. It is also the manifestation of yet another step in the trajectory of political instability and flawed legal analyses in U.S. telecommunications policy, distorting the economic and technical evolution of U.S. telecommunications markets. The consequences, however, will not be confined to the U.S. but will likely diffuse to international markets as well. Moreover, understanding these developments in the U.S. can serve as a case study for identifying how political instability in other nations may be distorting telecommunications regulation, markets and technology. International regimes, in turn, may require further evolution in recognition of nations' political instability on global telecommunications.

II. Legal Flaws in *Charter Advanced Services v. MPUC*

In *Charter Advanced Services v. MPUC*, the 8th Circuit Court considers appeal of a lower federal court ruling. Charter Advanced Services initiated this litigation by filing a complaint in the U.S District Court for the District of Minnesota, seeking a declaratory judgment that application of Minnesota state public utilities and common carriage requirements to Charter Advanced's fixed, interconnected VoIP service (known as Charter Phone or Spectrum Voice) is preempted by the federal Communications Act, and seeking an injunction to enjoin enforcement of Minnesota law. The district court agreed with Charter Advanced's argument that Charter Phone (or Spectrum Voice) provides a net protocol conversion between IP and TDM that renders it an information service. This case came before the 8th Circuit Court upon appeal by the Minnesota Public Utilities Commission (MPUC) as to the federal district court's ruling on cross-motions for summary judgment.

I filed an amicus curiae brief in *Charter Advanced Services v. MPUC*. An amicus curiae brief is a persuasive legal document filed by a person or entity in a case, in which it is not a party but has an interest in the outcome. In this brief, I discuss numerous legal flaws in the district court's analysis. The amicus brief is attached as an Appendix so that the reader may read the legal analyses that are briefly referred to in this paper.

1. Amicus Brief Argument and Analysis

A summary of the argument in my amicus brief is restated here. The district court narrowly framed the issue for summary judgment in this case: whether Charter Phone is a “telecommunications service” or an “information service” under the Communications Act of 1934, as modified by the Telecommunications Act of 1996 (47 U.S.C. § 153(46), § 153(20)). Revealing the flaws in the district court’s analysis begins with recognition that the district court’s framing of the issue is itself problematic. The core issue is whether the Minnesota Public Utilities Commission is preempted from asserting jurisdiction to regulate the fixed, interconnected VoIP service, known as Charter Phone (or Spectrum Voice). Of relevance to this case, there are two potential legal bases for asserting that the Telecommunications Act preempts state law. One is that Minnesota state law at issue in this case is preempted pursuant to the impossibility exception articulated by the FCC in *Vonage II*. *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22,404 (2004) (“*Vonage II*”).¹ Alternatively, a second is that Minnesota state law is preempted because Charter Phone is classified as an information service. In this regard, preemption may derive from implied or conflict preemption, but not express preemption.

Each of these legal bases requires proper analysis of the correct standards of legal inquiry. Unfortunately, the district court did not conduct the proper legal inquiry for evaluating either legal basis for federal preemption of state law. Instead, the district court conflated the inquiries, created confusion, misapplied law and precedent, and reached erroneous conclusions.

Furthermore, proper legal inquiry based on the facts of this case also clarifies the scope of appropriate remedies to be rendered by the Court. Based on the facts of this case, this Court should reverse the district court’s summary judgment ruling outright on the basis that the impossibility exception established by the FCC in *Vonage II* does not apply. Should this Court reach the issue of

¹ Under *Vonage II*, the FCC found that federal law preempted state regulation of Vonage IP service, a nomadic form of VoIP, based on the impossibility exception because Vonage had no ability to distinguish its intrastate voice call traffic from its interstate traffic, making it impossible to ensure that state regulation of Vonage’s intrastate traffic would not invade the FCC’s exclusive jurisdiction over Vonage’s interstate traffic. *In reaching its determination, the FCC specifically declined to classify Vonage’s service as a telecommunications or information service.* This FCC ruling, that federal preemption of state regulation is based on the impossibility exception and not on service classification, was expressly recognized by the 8th Circuit Court of Appeals in *Minn. Pub. Utils. Comm’n v. FCC v. FCC*, 483 F.3d 570, at 577-578 (8th Cir. 2007) (“*Vonage III*”). The impossibility exception does not apply here as Charter’s VoIP service is fixed, interconnected service; and, as discussed in the next section of this paper, the 8th Circuit Court’s ruling does not rely on the impossibility exception.

service classification, the facts of this case also support reversal because Charter Phone (or Spectrum Voice) is a telecommunications service under the Communications Act. However, this Court should not affirm the district court's summary judgment ruling that Charter Phone (or Spectrum Voice) is an information service, not only because the facts do not support the district court's ruling, but also because any decision to preempt Minnesota's state authority over fixed, interconnected VoIP service should be made by the Federal Communications Commission (FCC) upon a referral under primary jurisdiction.

The amicus brief then provides legal analyses in support of this argument, which are briefly outlined here. First, the district court's legal analysis of the *Vonage* line of cases is flawed; moreover, the facts in the present case are distinguishable from the case *Vonage I*. Second, the district court has not properly recognized or applied the functional approach for service classification. The district court improperly classified IP-TDM protocol conversion of Charter Phone (or Spectrum Voice) as an information service, pursuant to a "transformation test". Rather, under the functional approach and the facts in this case, Charter Phone is a telecommunications service. Third, procedurally, the district court should have considered referral of the service classification issue to the FCC under primary jurisdiction rather than rule on the classification issue itself.

The amicus brief concludes that the 8th Circuit Court should rule as follows. Charter Phone (or Spectrum Voice) is a fixed, interconnected VoIP telephone service under Minnesota law that is not preempted by federal law under the impossibility exception set forth by the FCC in *Vonage I*. In the event the Court decides to reach the issue of service classification under the Telecommunications Act of 1996, Charter Phone (or Spectrum Voice) is properly classified as a telecommunications service; it is clearly not an information service as the IP-TDM protocol conversion falls within the telecommunications management exception to the definition of information service. In no event should the Court uphold the district court's summary judgment ruling that Charter Phone is an information service and that the Minnesota Public Utilities Commission is preempted from asserting jurisdiction to regulate the fixed, interconnected VoIP service. This is not only because the facts do not support the district court's ruling, but also because any decision to preempt Minnesota's state authority over fixed, interconnected VoIP service should be made by the FCC.

2. *Flaws in the 8th Circuit Majority Opinion*

By a divided vote (2-1) in *Charter Advanced Services v. MPUC*, the 8th Circuit Court upheld the district court's summary judgment, that Charter Phone (or Spectrum Voice) is an information service under the federal Communications Act (as modified by the Telecommunications Act of 1996), and that preemption of state regulation of Charter Phone (or Spectrum Voice) is therefore warranted. The majority of the Court supported the district court's view that Charter Phone (or Spectrum Voice) acts on the consumer's information (a phone call) – through net protocol conversion – in such a way as to “transform” the information. In dissent, J. Grasz states that he does not believe the net protocol conversions utilized by Charter Phone (or Spectrum Voice) qualify it as an information service under the federal Act, and would reverse the district court's conclusion that federal law preempts state regulation of Charter's fixed, interconnected VoIP service. As explained here, the majority opinion errs as to both service classification and preemption.

By asserting that net protocol conversion “transforms” the voice service into an information service, the 8th Circuit is applying a “transformation test”. The dissenting J. Grasz asserts that the majority's application of the transformation test is in error, and that definitive resolution of the regulatory classification at issue here should be left to the FCC or Congress. J. Grasz's analysis and conclusions are described here.

J. Grasz explains that the FCC and the telecommunications industry have long debated the question of how best to address protocol conversions when categorizing services, and that lack of clarity remains as to whether protocol conversions amount to transforming information (making the service an information service) or were simply part of transmitting information (making it a telecommunications service). This lack of clarity arises “at least in part because the entire telephone network is in the process of change from time-division (“TDM”) to internet protocol (“IP”)” (903 F. 3d at 721). Moreover, J. Grasz observes that “[w]hile the FCC has not completely resolved the categorization of VoIP, it has issued some orders regarding IP lines, and Charter is avoiding that precedent based on a technicality regarding where conversion occurs” (903 F. 3d at 722). In this regard, “[t]he FCC previously declared AT&T's service is a telecommunications service, even though it uses IP lines in the middle of the network, because the call still enters and exits the network on traditional phone lines. Here, Charter's calls technically begin on IP lines and end on traditional phone lines—even though their customers use traditional phone lines to begin calls—because the converter box is inside the customer's home. The only practical difference between Charter's network and

AT&T's network is whether the first converter box is inside or outside customers' homes" (903 F. 3d at 722, citation omitted). Thus, J. Grasz observes that AT&T could simply change the physical location of the converter box and thereby transform its service from a telecommunications service to an information service. He surmises that "[t]his may be why the FCC has yet to make categorical pronouncements on protocol conversions. An overarching category for all net protocol conversions would create a potential pathway for every company to escape the heavier telecommunications service regulations" (903 F. 3d at 722).

Based on his analysis, J. Grasz believes that "the net protocol conversion in Charter's service makes it either a telecommunications service or something entirely outside the primary categories of services in the Communications Act. The one thing it cannot be is an information service" (903 F.3d at 722). Moreover, "[if] new technology has made federal law insufficient to adequately address interconnected VoIP and its relationship to state law, then the FCC should use its existing authority to solve the problem or Congress should make any necessary statutory fixes" (903 F. 3d at 723). Finally, he "reach[es] no conclusions as to whether the Communications Act of the FCC could preempt MPUC's regulations on *other* grounds ... [and] would reverse the district court's finding of preemption" (903 at F. 3d at 723-724, emphasis in original).

I agree with J. Grasz's analysis, that Charter's service should not be classified as an information service, and that the district court's finding of preemption should have been reversed. In this regard, I agree that the majority improperly applied the "transformation test" to find that net protocol conversion used in Charter's service is an information service and thereby preempts Minnesota state law.

However, I believe that the 8th Circuit Court had another option. As explained in my amicus brief, rather than a "transformation test" the Court should have recognized that classification of a service as a telecommunications service under the Act is based on the *functionality* of the service. This functionality is evaluated in two parts. The first part of functionality, referred to as technical functionality, evaluates the nature of the function of the service – does it constitute "telecommunications", that is, "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" (47 U.S.C §153(43)). The second part of functionality, referred to as commercial functionality, evaluates whether telecommunications (the first part of functionality) is being "offer[ed] ... 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” (47 U.S.C. §153(46)). It is this second part of functionality that differentiates private carriage from common carriage. The FCC evaluates the second part of functionality based on the offering of the service from the customer’s perspective.

Under this functionality approach, Charter Phone (or Spectrum Voice) is clearly a telecommunications service. First, it transmits voice calls across the PSTN which constitutes the technical functionality of telecommunications. Second, Charter Phone (or Spectrum Voice) is marketed, advertised and offered to customers as a telecommunications service, and thus satisfies the commercial functionality of a telecommunications service. Third, the IP-TDM protocol conversion of Charter Phone (or Spectrum Voice) is an internetworking function that falls under the telecommunications management exception to the definition of information service and therefore should be treated as a telecommunications service.

Thus, under the facts of this case, the 8th Circuit Court could have decided the issue of service classification of Charter’s fixed, interconnected VoIP service, but only on the basis that it is a “telecommunications service” under the Act pursuant to the functionality approach. Otherwise, the 8th Circuit Court should have declined to definitively rule on the classification of Charter’s VoIP service, deferring the matter to the FCC for which there is a pending proceeding or to future statutory action by Congress. In any event, the Court should have reversed the district court’s finding of state preemption.

III. Resultant Legal Confusion Regarding Federal Preemption

The 8th Circuit Court ruling in *Charter Advanced Services v. MPUC* has far-reaching consequences. Most directly, the result of this decision is to preempt the state of Minnesota from having any regulatory authority over Charter Advanced Services’ I-VOIP service. As a general matter, such state preemption is inconsistent with the longstanding statutory framework of shared federal-state regulatory jurisdiction over telecommunications services, reflective of the U.S. Constitutional framework of federalism, retained in relevant part by the Telecommunications Act of 1996. In this regard, the 8th Circuit Court chose to render a decision with policy implications that should be addressed by the FCC or by legislative response from Congress.

However, the decision in *Charter Advanced Services v. MPUC* is also problematic given its apparent conflict with the D.C. Circuit Court of Appeals’ subsequent decision in *Mozilla v. FCC* regarding federal preemption. As explained in Cherry (2020), in *Mozilla v. FCC*, the D.C. Circuit Court upheld the FCC’s 2018 reclassification of BIAS as an information service, but two of three

judges (i.e., the majority) did so with substantial reservation. In so doing, the majority stated that they considered themselves bound by previous U.S. Supreme Court, notwithstanding the apparent conflict between the legal result and critical aspects of current broadband internet technology and marketing. Nonetheless, even though upholding the FCC's service classification, the Court also vacated the FCC's preemption of state and local measures to regulate BIAS service, "conclud[ing] that the Commission has not shown legal authority to issue its Preemption Directive, which would have barred states from imposing any rule or requirement that the Commission 'repealed or decided to refrain from imposing' in the Order or that is 'more stringent' than the Order" (940 F. 3d at 18). Thus, in combination, the 8th and D.C. Circuit Court decisions pose legal confusion as to whether federal preemption of state law necessarily follows from legal classification as an information service.

Interestingly, the U.S. Supreme Court denied the petition for certiorari to review the 8th Circuit Court's decision in *Charter Advanced Services v. MPUC* in the same month – October, 2019 – that the D.C. Circuit Court decided *Mozilla v. FCC*. In the denial of certiorari (which consists of a single sentence stating such denial), Justice Thomas filed a concurring opinion, which Justice Gorsuch joined, that is of significance here. Although Justice Thomas agrees with the Court's determination to deny certiorari in this case, he "explain[s] why, in an appropriate case, we should consider whether a federal agency's policy can pre-empt state law" (589 U.S. ___, slip opinion p. 1). Describing how federal law may preempt state law pursuant to the Supremacy Clause of the U.S. Constitution, he states:

It is doubtful whether a federal policy—let alone a policy of nonregulation—is "Law" for purposes of the Supremacy Clause. Under our precedent, such a policy likely is not final agency action because it does not mark "the consummation of the agency's decisionmaking process" or determine Charter's "rights or obligations". Even if it were final agency action, the Supremacy Clause "requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures".

Giving pre-emptive effect to a federal agency policy of nonregulation thus expands the power of both the Executive and the Judiciary. It authorizes the courts to conduct "a free wheeling judicial inquiry" into the facts of federal nonregulation, rather than the constitutionally proper "inquiry into whether the ordinary meanings of state and federal law conflict" [citation omitted]. Because this petition does not clearly challenge the underlying basis of the pre-emption theory, however, I concur in the denial of certiorari.

(589 U.S. ___, slip opinion pp. 2-3). Yet, the D.C. Circuit’s decision in *Mozilla v. FCC* poses the very question – the pre-emptive effect of a federal agency policy of nonregulation – to which Justice Thomas’ concurrence refers. Had a petition for a writ of certiorari been filed in *Mozilla v. FCC*, the U.S. Supreme Court would have had the opportunity to accept this case – which at least Justices Thomas and Gorsuch would likely have granted – and rule on this issue. Unfortunately, a petition for certiorari was not filed in *Mozilla v. FCC*, and this opportunity has been forgone. As a result, a conflict remains between the 8th and D.C. Circuit Courts of Appeals as to whether federal nonregulation of a service, classified as an information service pursuant to an FCC or judicial decision, preempts state law.

IV. Federal Preemption Now Varies Among the States

As a result of this conflict among federal Circuit Courts of Appeals and the lack of judicial review in an appropriate case by the U.S. Supreme Court, federal preemption of state law – based on FCC legal classification of a service as an information service – can now vary among the states. Minnesota law is preempted pursuant to *Charter Advanced Services v. MPUC*. By contrast, as described below, California statutory law is (thus far) not preempted pursuant current litigation before a federal district court in California which is located within the Ninth Circuit.

Prior to the D.C. Circuit’s decision in *Mozilla v. FCC*, the American Cable Association (ACA), on behalf of members of the broadband industry, filed suit in the federal district court for the Eastern District of California, seeking an injunction to block enforcement of the California Internet Consumer Protection and Net Neutrality Act of 2019. *American Cable Association v. Xavier Becerra, in his official capacity as the Attorney General of California*, No. 18-CV-2684 (U.S. Dist. Ct., E. Distr. Calif.) (hereinafter *ACA v. Becerra*). In this case, the plaintiffs argued that the legal basis for the injunction is that the California law is preempted under federal law.

While the *Mozilla v. FCC* case was pending before the D.C. Circuit Court, the parties agreed to hold the *ACA v. Becerra* case in abeyance. After the *Mozilla v. FCC* decision was issued, which reversed the FCC’s directive of preemption in the FCC’s 2018 Order, the California case proceeded.

During a hearing for a preliminary injunction² on February 23, 2021, the federal district court judge denied injunctive relief, finding (1) that the plaintiffs have not demonstrated a likelihood of

² The plaintiffs – as the party seeking an injunction – bears the burden of proof. When considering a motion for a preliminary injunction, the court does not rule on the legal merits of granting the injunction. Rather, the plaintiffs bear the

success on the merits at this stage of the litigation, and (2) that issuing an injunction would more negatively impact the State of California and the public interest than the internet service provider (ISP) companies. As to its finding under (1), the Court found the plaintiffs' various arguments in support of federal preemption to be unpersuasive. In this regard, the Court did not find persuasive that the California statute conflicts with the FCC's 2018 Order (which classified BIAS as an information service), and found that the FCC's deregulatory purposes behind its decision do not have preemptive effect (Hearing Transcript, Feb. 23, 2021, pp. 65-67).³ In this respect, the district court's finding is consistent with the D.C. Circuit Court's holding in *Mozilla v. FCC*. Finding that there is no likelihood of success on the merits of the arguments raised under (1), the Court made its finding under (2) that there is no irreparable harm and that, at this juncture, the balance of equities and the public interest weigh in favor of denying the injunction (Hearing Transcript, Feb. 23, 2021, pp. 67-68).

Finally, the district court judge concludes his ruling by "leav[ing] all the parties with this thought":

There is clearly a political overtone in this case.... [T]his decision today is a legal decision and it should not be viewed through any type of political lens. I am expressing no view on the soundness of the policies or statutes involved in this lawsuit. Again, as I've said, it's obvious to all of us that this case raises issues that, quite frankly, might be better resolved by Congress rather than the federal courts.

(Hearing Transcript, Feb. 23, 2021, p. 70). Thus, he asserts that whether federal law should preempt state law remains an issue that is better resolved by Congress – which is consistent with 8th Circuit Court Judge Gras's observation in his dissenting opinion in *Charter Advanced Services v. MPUC*.

burden of: (1) demonstrating the likelihood of success on the merits; and (2) the likelihood that the plaintiffs will suffer irreparable harm if preliminary injunctive relief isn't granted, such that the balance of equities tip in the plaintiffs' favor and that the injunction is in the public interest.

³ The district court judge issued his ruling verbally, so that the transcript serves as the Court's order. In this regard, the judge cited burdensome workload given the shortage of judges in his district (Hearing Transcript, Feb. 23, 2021, po. 60-61). Also, anticipating appeal of his order to the Ninth Circuit court of Appeals, the judge stated: "I do not intend to issue any final or subsequent supplemental order. If the parties are looking to draft some type of order, I would also discourage that, because it just ends up with the parties arguing over what language should be included in that order. I've tried to be as clear as possible as to my findings and conclusions of law, and I assume it's on to the Ninth Circuit from here" (Hearing Transcript, Feb. 23, 2021, p. 71).

V. Extending the Phase of U.S. Political Instability

The resultant legal confusion regarding federal preemption based on classification as an information service is yet another symptom of the political instability of telecommunications policies in the U.S. The instability of service classification of BIAS by the FCC – which, as explained in Cherry (2020), has shifted back and forth since about 2000, depending upon whether the majority of FCC commissioners has been appointed by the Republican or Democratic Party – is also contributing to instability in the classification of I-VOIP service. As a consequence, service providers will be emboldened to manipulate technical aspects of providing service for the purpose of avoiding regulation, which taken to the limit could lead to a de facto repeal of telecommunications service regulation.

Moreover, legal confusion regarding the preemptive effect of classifying a service as an information service – as demonstrated by conflicting opinions among Federal Courts of Appeals – is now also causing policy instability as to the states' authority to regulate communications-related services more generally, not just VoIP. In this way, the litigation over service classification of VoIP has heightened the uncertainty as to the scope of federal preemption per FCC order – an issue that only the U.S. Supreme Court can resolve in the absence of Congressional legislation.

This state of affairs is likely to continue for an extended period of time given the prevailing hyperpartisanship in the U.S. that blocks passage of clarifying Congressional legislation. In the meantime, policymaking by adversarial legalism will continue through litigation before the FCC, state commissions and the courts. Judicial litigation may provide an opportunity for an appropriate case to be appealed to and accepted by the U.S. Supreme Court, which could then provide greater clarity as to the scope of federal preemption under current law. Perhaps appeal of the ruling in *ACA v. Becerra* to the Ninth Circuit Court of Appeals will eventually lead to such an opportunity.

VI. Importance for the International Community

This dynamic of political instability and its impact on telecommunications policy should be of concern not only to the U.S. but to the international community as well. First, it is illustrative of how political instability creates an environment that induces service providers to manipulate technical aspects of their service to avoid regulation. Such manipulations not only distort competition in telecommunications markets but also the technical evolution of services. In turn, through path dependence, such distortions potentially create not only economic but also technical long-term inefficiencies and associated societal impacts. Second, given the significance of U.S. developments to

the global economy, these distortions in the U.S. are also likely to diffuse beyond its borders. To understand and even anticipate these distortions, the international community needs to understand the how the political environment under U.S. governance is affecting the commercial and technical evolution of telecommunications infrastructure and services. Furthermore, legal developments can diffuse internationally as well, thereby potentially distorting international governance regimes (e.g., treaties) for telecommunications. Third, political instability is not unique to the U.S. or its governance structure. Understanding political instability in the U.S. can serve as a case study for identifying how it may be occurring in other nations with resultant impacts on telecommunications regulation, markets and technology. Finally, since the 19th century, international regulatory regimes have been created in response to the rise of electronic communications technologies. As economic and technological evolution of communications technologies progresses in an ever more tightly-coupled and high-speed world, these international regimes will need to continue to evolve as well. Such evolution may require redesign of international regimes for resilience to individual nation political instability.

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