INITIAL VERSION

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 15-1497

IN THE

United States Court of Appeals for the District of Columbia Circuit

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of the Federal Communications Commission

BRIEF OF VONAGE HOLDINGS CORPORATION AS INTERVENOR IN SUPPORT OF RESPONDENTS

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Dated: May 26, 2016

CERTIFICATE AS TO PARTIES, ORDERS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), intervenor Vonage Holdings Corp. certifies as follows:

A. Parties and Amici.

All parties, intervenors, and amici appearing in this Court are listed in the Brief for the Petitioners.

B. Order Under Review.

Petitioner seeks review of the Commission's order establishing a process to authorize interconnected Voice over Internet Protocol providers to obtain North American Numbering Plan telephone numbers directly from the Numbering Administrator, *Numbering Policies for Modern Communications*, *IP-Enabled Services*, *Telephone Number Requirements for IP-Enabled Services Providers*, *Telephone Number Portability*, *Developing a Unified Intercarrier Compensation Regime*, *Connect America Fund*, *Numbering Resource Optimization*, Report and Order, 30 FCC Rcd. 6839 (2015) ("*Order*") (JA___).

C. Related Cases.

Intervenor is not aware of any related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1, Vonage Holdings Corp. ("Vonage") hereby submits this Corporate Disclosure Statement. Vonage, through its wholly owned subsidiaries Vonage America Inc., Vonage Business Inc., and Vonage Wireless Inc., provides communications services connecting people through cloud-connected devices worldwide. Vonage is a publicly held corporation, traded on the New York Stock Exchange under the symbol VG. No publicly held corporation holds a 10 percent or greater interest in Vonage, directly or indirectly.

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GLOSSARY

APA	Administrative Procedure Act
CALEA	Communications Assistance for Law Enforcement Act
CPCN	Certificate of Public Convenience and Necessity
E911	Enhanced 911
FCC	Federal Communications Commission
NARUC	National Association of Regulatory Utility Commissioners
USF	Universal Service Fund
VoIP	Voice over Internet Protocol

STATUTES AND REGULATIONS

The text of relevant statutes and regulations is set forth in the addenda to the briefs filed by the National Association of Regulatory Utility Commissioners and the Federal Communications Commission.

INTRODUCTION

The Telecommunications Act of 1996, which cemented the Federal Communications Commission's central role in regulating interstate communications services, preserved certain kinds of state authority over "telecommunications services" while strictly limiting state control over "information services." The FCC has not yet decided which regulatory classification applies to Voice over Internet Protocol (VoIP) service, a new kind of internet-based voice communication that competes with traditional telephone service. The members of the National Association of Regulatory Utility Commissioners (NARUC) would expand their authority over interconnected VoIP if it were classified by the FCC as a telecommunications service. Over the years, NARUC has pursued that expanded authority by trying to interject the question of how interconnected VoIP should be classified into various proceedings, including the FCC's recent decision to grant interconnected VoIP providers direct access to the nation's pool of telephone numbers. *Numbering Policies for Modern Commc'ns*, 30 FCC Rcd. 6839 (2015) ("*Order*") (JA___). The FCC reasonably—and expressly—declined to expand its

numbering inquiry to include the classification question, which remains pending in a separate docket.

Having failed to convince the FCC, NARUC now asks this Court to take up the task and categorize interconnected VoIP as a telecommunications service. The Court should reject that invitation to circumvent the agency process for several reasons. *First*, NARUC's real complaint is not with the Order, which does nothing to harm NARUC's members. The only injury NARUC has asserted (a loss of the ability of states to impose their own common carrier regulations on interconnected VoIP) flows not from the Order, but from a decision the FCC *has not made*. That purported harm does not give rise to the standing necessary to challenge the Order. *Second*, the FCC's action is clearly authorized by Congress's decision to grant the Commission broad, exclusive authority over the numbering system. *Finally*, NARUC has identified no substantive or procedural requirement that the FCC resolve the classification question before giving interconnected VoIP providers direct access to numbers. There is no such statutory provision, nor any basis to second-guess the FCC's control over the scope of its own proceedings. The Petition should be denied.

STATEMENT OF THE CASE

The Order NARUC attacks has a limited purpose: granting interconnected VoIP providers access to the nation's pool of telephone numbers, a limited resource whose administration and coordination fall under the exclusive authority of the FCC. Since 2001, Vonage has offered interconnected VoIP services, connecting individuals through broadband devices worldwide using low-cost communication solutions. In many ways, Vonage's service looks to users like ordinary telephone service; among other things, it includes a traditional telephone number. Before the Order, Vonage was required to purchase those numbers secondhand from a traditional telephone carrier. Direct access to the nation's pool of telephone numbers will allow Vonage and other interconnected VoIP providers to operate more efficiently and better meet customer needs. The FCC's decision to extend numbering rights was informed by (A) the technical characteristics of interconnected VoIP, (B) interconnected VoIP's regulatory history, and (C) the FCC's central role in ensuring that the numbering system keeps up with current technologies.

A. Technical Characteristics of Interconnected VoIP.

At its most basic, interconnected VoIP service transmits voice communications over a broadband internet connection using packet-switched technology, instead of the traditional circuit-switched technology that transmits phone calls. *See generally* Marc Elzweig, *D, None of the Above: On the FCC*

Approach to VoIP Regulation, 2008 U. Chi. Legal F. 489, 490 (2008). The FCC has defined interconnected VoIP as a service that "(1) [e]nables real-time, two-way voice communications; (2) [r]equires a broadband connection from the user's location; (3) [r]equires Internet protocol-compatible customer premises equipment (CPE); and (4) [p]ermits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network." 47 C.F.R. § 9.3; *see also Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 574-75 (8th Cir. 2007) (describing interconnected VoIP service as a "VoIP-to-landline or landline-to-VoIP communication[]," in which "the geographic location of the landline part of the call can be determined, but the geographic location of the VoIP part of the call could be anywhere in the universe the VoIP customer obtains broadband access to the Internet").

To a customer using interconnected VoIP, the service may seem no different from a traditional telephone service, since it allows them to place calls to, and receive calls from, people on the public switched telephone network. Many traditional telephone service companies now offer interconnected VoIP to their customers,

making it less apparent at first glance whether a particular telephone is using a landline or a broadband connection.[1]

Nevertheless, interconnected VoIP service differs from traditional phone service in important ways. First, a defining characteristic of interconnected VoIP—"interconnected" because the service is capable of receiving calls from and placing calls to the public switched telephone network—is net protocol conversion. Net protocol conversion occurs when "an end-user [can] send information into a network in one protocol and have it exit the network in a different protocol . . . ." *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Commc'ns Act of 1934, As Amended*, 11 FCC Rcd. 21,905, 21,956 ¶ 104 (1996). When a user places a call that begins from an Internet Protocol (IP) network and the person the caller is trying to reach has a traditional phone service on the public switched telephone network, the protocol must be converted to complete the call, meaning information is not delivered "without change in the form or content" as it would be in a telecommunications service. 47 U.S.C. § 153(50).

[1] For example, AT&T and Verizon both offer traditional circuit-switched telephone services, but also sell interconnected VoIP services under the same brand name. *See, e.g.*, *Domestic and International Phone Plans*, Verizon, http://www.verizon.com/home/phone/fiosdigitalvoice/ (last visited Apr. 22, 2016), *AT&T VoIP Services*, AT&T, http://www.corp.att.com/voip/ (last visited Apr. 22, 2016).

Second, Vonage's interconnected VoIP services are nomadic. Vonage subscribers can use any broadband connection to place Vonage calls, unlike traditional landline telephony that is fixed to a particular location. The FCC recognized that this unique quality required preemption of certain state regulation of Vonage's services. *See Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, 19 FCC Rcd. 22,404, 22,437 (2004) ("*2004 Vonage Order*") ("Internet applications such as VoIP are more border busting than either long distance or mobile telephony . . . .") (Statement of Chairman Michael K. Powell). The FCC reasoned that "subject[ing] a global network to disparate local regulatory treatment by 51 different jurisdictions would be to destroy the very qualities that embody the technological marvel that is the Internet," and as a result, deliberately chose to treat interconnected VoIP differently from traditional telephone service. *Id.*

B. The Development of Interconnected VoIP Regulation.

VoIP came to market in 1995, a nascent service at the time Congress enacted the Telecommunications Act of 1996. The FCC first examined VoIP in a 1998 report to Congress, and there explained that the service "blurred [the] distinctions" between telecommunications services and information services. *Fed.-State Joint Bd. on Universal Serv.*, 13 FCC Rcd. 11,501, 11,623 (1998) ("*Report to Congress*") (Separate Statement of Comm'r Michael K. Powell, Concurring). The FCC noted

that commenters were "split on the appropriate treatment of [VoIP] services" and declined to classify them at that time, reserving that issue for future proceedings. *Report to Congress* ¶¶ 85, 90-91. The FCC emphasized the importance of not "mak[ing] any definitive pronouncements" without further investigation in order to protect competition in the marketplace. *Id.* ¶ 55.

In 2004, the FCC opened the IP-Enabled Services proceeding to "seek comment on the appropriate legal classification of each type of IP-enabled service," including interconnected VoIP. *IP-Enabled Servs.*, 19 FCC Rcd. 4863, 4868 ¶ 6 (2004). The FCC noted there that "the rise of IP-enabled communications promise[d] to be revolutionary" and it was critical to "rely[] wherever possible on competition and apply[] discrete regulatory requirements only where such requirements are necessary to fulfill important policy objectives." *Id.* ¶ 5. That proceeding is still open. *Order* ¶ 79 n.282 (JA___).

Since that proceeding opened, the FCC has applied substantial regulatory obligations to interconnected VoIP services. In doing so, the FCC has, as it did here, expressly considered the classification question and, in each case, concluded that classification was not necessary to achieve the Commission's regulatory goals. NARUC has also sought—without success—to interject the classification question in several of these proceedings.

Early on, the FCC acted to preempt state regulations from applying to Vonage's service, finding that the service's nomadic nature meant that it could not be reasonably broken down into "interstate" or "intrastate" communications. *2004 Vonage Order* ¶ 1. In this proceeding, NARUC filed comments vigorously advocating for the FCC to classify interconnected VoIP as a telecommunications service. Reply Comments of the Nat'l Ass'n of Regulatory Util. Comm'rs, WC Docket No. 03-211 (filed Nov. 24, 2003). The FCC found that it could preempt state law applicable to interconnected VoIP *without* classifying the service, emphasizing the unique nature of interconnected VoIP and its status as an emergent competitor. The Eighth Circuit upheld that decision, finding that it was "sensible" for the FCC to have acted as it did without first classifying interconnected VoIP. *Minn. Pub. Utils. Comm'n.*, 483 F.3d at 578.

Next, in 2005, the FCC extended Enhanced 911 ("E911") and law enforcement assistance requirements on interconnected VoIP providers. *See E911 Requirements for IP-Enabled Serv. Providers*, 20 FCC Rcd. 10,245 (2005) ("*VoIP E911 Order*"); *Commc'ns Assistance for Law Enf't Act and Broadband Access and Servs.*, 20 FCC Rcd. 14,989 (2005) ("*CALEA Order*"). Before the FCC issued those orders, NARUC submitted comments suggesting that the FCC needed to classify interconnected VoIP as a telecommunications service for E911 and law enforcement obligations to apply. Letter from James Bradford Ramsay, General Counsel,

NARUC, to Office of the Secretary, FCC, WC Docket Nos. 04-36, 03-211 (filed Nov. 3, 2004) (JA___). Under the E911 Order, the FCC found that classification was unnecessary because "the Commission has ancillary jurisdiction to promote public safety by adopting E911 rules for interconnected VoIP services." *VoIP E911 Order* ¶ 26. The D.C. Circuit upheld the FCC's order on appeal. *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006). The FCC determined in the CALEA Order that unlike the Communications Act, the Communications Assistance for Law Enforcement Act (CALEA) had an "overall statutory scheme" that "[did] not require the Commission to classify an integrated service," so interconnected VoIP could be brought under the statute without classifying it first. *CALEA Order* ¶ 16. The D.C. Circuit also upheld the CALEA Order. *Am. Council on Educ. v. FCC*, 451 F.3d 226 (D.C. Cir. 2006).

The FCC then required interconnected VoIP providers to contribute to the Universal Service Fund (USF), which is used to support universal access to telecommunications and advanced services. *Universal Serv. Contribution Methodology*, 21 FCC Rcd. 7518 (2006) ("*USF Order*"). Under this order, the FCC found that it could impose USF payment obligations on interconnected VoIP providers under its Title I ancillary authority and section 254(d) authority over "providers of interstate telecommunications" without classifying interconnected VoIP and subjecting it to potentially burdensome regulations that could slow

innovation in that relatively new area. *Id.* ¶ 35. The D.C. Circuit upheld the parts of the USF Order requiring interconnected VoIP providers to contribute to the USF and specifically upheld the FCC's decision not to classify interconnected VoIP as a telecommunications service for the purposes of contributions to the USF. *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007).

In 2007, the FCC extended disability access requirements to interconnected VoIP providers and again declined to classify the service. Instead, the Commission relied on its Title I ancillary authority, just as it had in the past when extending disability access obligations to information services. *Implementation of Sections 255 and 251(a)(2) of the Commc'ns Act of 1934*, 22 FCC Rcd. 11,275, 11,281 ¶ 21 (2007) ("*Section 255 Order*"). More recently, the FCC decided to impose international reporting requirements on interconnected VoIP providers, again without classification, finding that "requiring providers of VoIP connected to the [public switched telephone network] to report traffic and revenue data is reasonably ancillary to the effective performance of the Commission's various responsibilities under the Communications Act." *Reporting Requirements for U.S. Providers of Int'l Telecomms. Servs.*, 28 FCC Rcd. 575, 599 ¶ 83 (2013). Neither of these orders was appealed.

C. Numbering and the Order Under Review.

During the last decade, interconnected VoIP providers have offered customers standard 10-digit telephone numbers, but they have only been able to do so through commercial workarounds. The FCC first brought interconnected VoIP providers into the system of regulating telephone numbers by imposing local number portability obligations on them in 2007, ensuring that a customer's ability to port numbers did not differ depending on whether the customer received voice service through a telecommunications provider or through a VoIP provider. *Tel. No. Requirements for IP-Enabled Servs. Providers*, 22 FCC Rcd. 19,531 (2007) ("*VoIP Number Portability Order*"). Interconnected VoIP providers had "an affirmative legal obligation to take all steps necessary to initiate or allow" their customers to retain their numbers when switching to another voice service provider. *Id.* ¶ 32. At the time, interconnected VoIP providers did not have access to the pool of telephone numbers, so from a technical perspective, the numbering partner had to actually execute the port of the numbers.

That was so because the FCC interpreted its rules as limiting access to telephone numbers to entities that could prove their authorization to provide service in a particular area by providing "either a state certificate of public convenience and necessity (CPCN) or a Commission license." *Order* ¶ 4 (JA___). As a practical matter, interconnected VoIP providers were not able to obtain either. *Id.* (JA___).

Interconnected VoIP providers could partner with a traditional telephone company to gain access to numbers by purchasing Primary Rate Interface and Direct Inward Dialing services. Those commercial relationships were challenging from the beginning, however, because the telephone companies were both well positioned to charge high prices for those services and had little incentive to come to reasonable rates, terms, and conditions with a growing competitor. As a result, Vonage and other interconnected VoIP providers petitioned the Commission for a waiver of the CPCN/license restriction. *See id.* ¶ 4 n.11 (JA___).

In 2013, the Commission issued a Notice of Proposed Rulemaking that addressed many of the issues raised in the waiver petitions by proposing, among other things, to change the FCC's rules to allow interconnected VoIP providers to gain direct access to phone numbers. *Id.* ¶ 5 (JA___). The Commission granted a limited waiver to allow direct access on a trial basis. *Id.* ¶ 4 (JA___). That trial was a success, demonstrating that "it is technically feasible for interconnected VoIP providers to obtain telephone numbers directly from the Numbering Administrators and use them to provide services." *Id.* ¶ 12 (JA___).

Based on the results of that trial and the Commission's conclusion that it had both the authority and ample policy justification to change its rules, the Order at issue here granted interconnected VoIP providers direct access to numbers. The FCC correctly concluded that doing so would serve the public interest. First, direct

access to numbers would enable deployment of advanced services, including caller ID and other number-based features, that had been delayed by the need for consent and cooperation by third-party providers of numbers. *See* Letter from Brita Strandberg, Counsel to Vonage Holdings Corp., to Marlene H. Dortch, Secretary, FCC, at 1-2, CC Docket No. 99-200 (filed Mar. 8, 2011) (JA___). The Commission found that facilitating these services would promote competition by creating more consumer choice. *Order* ¶ 17 (JA___). Additionally, the Commission found that direct access would improve number portability, *id.* ¶ 55 (JA___), and promote IP interconnection that will "further the Commission's goals of accelerating broadband deployment and ensuring that more people have access to higher quality broadband service," *id.* ¶ 18 (quoting Comments of the Voice On the Net Coalition at 4, WC Docket Nos. 13-97, 04-36, 07-243, 00-90, CC Docket Nos. 95-116, 01-92, 99-200 (filed July 19, 2013)) (JA___).

Second, the Order essentially eliminated a "middleman" that was needlessly driving up costs for VoIP services and making it more difficult for VoIP to compete with other telephony offerings. The FCC concluded that eliminating the payments from VoIP providers to carriers would lead to savings that would be passed on to consumers. *Id.* ¶ 17 (JA___); *see also* Letter from Brita Strandberg, Counsel to Vonage Holdings Corp., to Marlene H. Dortch, Secretary, FCC, at 5, CC Docket No. 99-200 (filed Nov. 11, 2011) (JA___).

The consumer benefits identified by the Commission are not hypothetical. As a result of the trial in Atlanta and Boston where Vonage converted approximately 120,000 customer telephone numbers to being directly held by Vonage, Vonage was able to enter into IP interconnection agreements with Verizon and other carriers. In order to implement IP interconnection, Vonage must directly hold telephone numbers; otherwise, its interconnection partner cannot easily route IP traffic to Vonage because it cannot identify Vonage telephone numbers in industry call routing databases.[2] Since the trial, Vonage has continued to enter into IP interconnection agreements and to prepare to implement IP interconnection more widely.

IP interconnection will also allow for the deployment of enhanced services like HD Voice, which provides higher sound quality. HD Voice cannot be deployed if the traffic is sent through middlemen over the public switched telephone network. As discussed above, IP interconnection also eliminates unnecessary costs—a result confirmed by the trial and Vonage's IP interconnection agreements. Further, by eliminating the need to convert traffic from a packet-switched to a circuit-switched format for transport over the public switched telephone network, IP interconnection

[2] Absent direct access to telephone numbers, Vonage customer telephone numbers appear in the industry routing databases as being held by a competitive local exchange carrier, which may provide multiple VoIP or other providers with telephone numbers.

improves call quality, a result also confirmed by the trial. Finally, deploying IP interconnection increases network redundancy.

To fully realize these substantial benefits, Vonage has moved as quickly as possible to implement direct access consistent with the Order's requirements. Vonage received authorization from the Commission to obtain telephone numbers on March 31, 2016. As required by the Order, Vonage notified the states where Vonage will initially implement direct access that it would be requesting numbering resources. Vonage is currently in the process of requesting numbering resources in the initial markets necessary to allow calls to route to existing Vonage customer telephone numbers when they are converted to direct access.

SUMMARY OF THE ARGUMENT

At its core, NARUC's petition asks the Court to make a decision that the FCC, in its sound discretion, has decided it should not yet make. The Petition should be denied for three reasons:

First, NARUC's petition is not properly before this Court. NARUC's brief makes clear that its real complaint is that the FCC has not classified interconnected VoIP as a telecommunications service. The FCC rebuffed NARUC's attempts to wedge that question into the Order, and the Court should likewise reject NARUC's efforts to seek backdoor relief by attacking this Order, which specifically excludes

classification from its scope, and belatedly challenging other orders the Commission adopted years ago.

Second, NARUC has not shown that the FCC lacked authority to give interconnected VoIP providers direct access to telephone numbers. Congress granted the Commission broad and exclusive authority over the nation's numbering resources, and none of the other statutory provisions NARUC cites limit that power.

Third, there is no statutory requirement that the FCC determine VoIP's classification as a telecommunications service or an information service before granting interconnected VoIP providers direct access to numbers. Neither the Telecommunications Act nor the Administrative Procedure Act (APA) required the FCC to expand the numbering proceeding to include the broader classification question.

ARGUMENT

I. NARUC'S PETITION IS NOT PROPERLY BEFORE THIS COURT.

A. NARUC Lacks Standing to Challenge the Order.

NARUC had the burden of demonstrating in its opening brief that its members meet the basic requirements of standing: "(1) a concrete and particularized and actual or imminent injury-in-fact that is (2) fairly traceable to the challenged action of the defendant (and not the result of the independent action of some third party not before the court) and (3) likely to be redressed by a favorable decision." *In re Idaho Conservation League*, 811 F.3d 502, 508 (D.C. Cir. 2016) (to bring suit on behalf of

its members, an association must show, among other things, that "its members would otherwise have standing to sue in their own right" (internal citation omitted)). Because NARUC's members "are not directly subjected to the regulation they challenge, 'standing is substantially more difficult to establish.'" *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 914 (D.C. Cir. 2015) (quoting *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1289 (D.C. Cir. 2007)).

NARUC asserts that it has standing to bring this case because the Order on review "undermines its members' authority directly and indirectly." NARUC Br. at 17. Presumably, NARUC is referring to the Telecommunications Act's preservation of state authority to impose "competitively neutral" rules as "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b). A Commission decision to classify interconnected VoIP as a "telecommunications service" could clear the way, as NARUC seems to hope, for additional state regulation by bringing that service expressly into the scope of state authority that Congress intended to preserve in § 253(b). By that logic, deciding not to classify interconnected VoIP has injured state regulators by leaving legal barriers in their path.

This bare assertion of standing should be rejected for several reasons. First, state regulators are "not the object of the government action or inaction they

challenge." *Pub. Citizen, Inc.*, 489 F.3d at 1289 (internal quotations omitted). In giving VoIP providers direct access to telephone numbers, the Order does not change the rights or responsibilities of NARUC or its members. None of the rules amended by the Order apply to state regulators in any way.

Second, NARUC's attempts to find an injury in the Order's secondary effects are unavailing. For standing purposes, NARUC must demonstrate that these injuries are an "invasion of a legally protected interest." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 555 (1992). State regulators may have an interest in preserving and expanding their own authority, but, for the reasons described below, they had no *legal right* to force the FCC to use this proceeding to classify interconnected VoIP as a telecommunications service.

Third, NARUC has not demonstrated that the Order *caused* the downstream harms on which it relies. NARUC's purported injury—the legal limitations on states' authority to regulate VoIP—was the status quo long before the Order. In 2004, the Commission determined that federal law preempts state regulations of VoIP because "it would be impractical, if not impossible, to separate the intrastate portions of VoIP service from the interstate portions, and state regulation would conflict with federal rules and policies." *Minn. Pub. Utils. Comm'n*, 483 F.3d at 574. That is true even though the Commission expressly declined to classify VoIP as part of its preemption decision.

Finally, no holding from this Court would necessarily redress NARUC's claimed injury. If NARUC's reading of the Telecommunications Act is correct—and it is not—the best NARUC can hope for is a decision vacating the Order. That would interfere with the carefully crafted regulatory scheme the FCC has chosen for VoIP, but it would not require the FCC to adopt NARUC's statutory interpretation. For NARUC's "injury" to be resolved, the FCC would need to subsequently decide the classification question *and* reverse a decade of preemption precedent. This is precisely the kind of attenuated causal chain that is too weak to confer standing. *See Allen v. Wright*, 468 U.S. 737, 759 (1984), *abrogated on other grounds by Lexmark Intern. Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014); *see also Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663, 666 (D.C. Cir. 1996) (en banc).

In short, NARUC's real complaint is with the FCC's failure to move forward on a question that NARUC wishes the Commission would resolve. If NARUC believes that the FCC is violating "a clear duty to act," it has a remedy: a petition for a writ of mandamus. *United States v. Monzel*, 641 F.3d 528, 534 (D.C. Cir. 2011). But it may not shoehorn its agenda into an appeal of an Order that does not even purport to address the problem NARUC wants solved. The "injury" NARUC claims is, in fact, the status quo that predates the Order and would not be altered by its reversal. The petition should be dismissed.

B. Arguments That the FCC Must Classify Interconnected VoIP as a Telecommunications Service Because "Only Telecommunications Service Carriers Have the Right to Receive Number Ports and the Obligation to Port Numbers" Are Untimely.

In search of a statutory provision that restricts the FCC's authority to administer the numbering system, NARUC lands on the Telecommunications Act's definition of number portability.[3] According to NARUC, that definition means that only "telecommunications carriers—providers of telecommunications services—are required to port numbers" to other telecommunications carriers. NARUC Br. at 45 (emphasis omitted). For reasons described below, *infra* at 27, that assertion is simply wrong. But the Court need not delve into the merits of this argument, because it is not properly before this Court.

Challenges to FCC orders must be brought in a petition for review *of the challenged order*. *See* 28 U.S.C. §§ 2342(1), 2344; 47 U.S.C. § 402(a). Petitions for review must be filed within 60 days after the order's entry. 28 U.S.C. § 2344. This Court has sometimes permitted belated challenges to the substantive validity of the Commission's orders—but only in the limited circumstances wherein a petitioner gains standing by being harmed by the order after the 60-day period has expired. *Nat'l Labor Relations Bd. Union v. Fed. Labor Relations Auth.*, 834 F.2d 191, 195

[3] *See* 47 U.S.C. § 153(37) ("The term 'number portability' means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.").

(D.C. Cir. 1987). Such a challenge might arise, for example, as a defense in an enforcement proceeding. *Id.* That limitation makes sense. After all, "finality 'conserv[es] administrative resources and protect[s] the reliance interests of regulatees who conform their conduct to the regulations.'" *JEM Broad. Co. v. FCC*, 22 F.3d 320, 325 (D.C. Cir. 1994) (quoting *Nat. Res. Def. Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 (D.C. Cir. 1981)).

Those limits bar NARUC's argument that the FCC must classify interconnected VoIP as a telecommunications service because "only telecommunications service carriers have the right to receive number ports and the obligation to port numbers" under the Telecommunications Act's definition of number portability. NARUC Br. at 45. Whatever the merits of that argument, the FCC has already dispensed with it—nine years ago. The VoIP Number Portability Order conferred porting obligations to and from interconnected VoIP providers. The FCC concluded that it had authority to take that step because the statute is silent on the rights and obligations of non-telecommunications carriers.[4] *VoIP Number*

[4] Contrary to NARUC's suggestion, NARUC Br. at 51, the Telephone Number Portability Order says no different. *See Tel. No. Portability*, 13 FCC Rcd. 11,701 (1998) ("*Telephone Number Portability Order*"). There, the FCC merely concluded that telecommunications carrier status necessarily confers numbering obligations. It did not decide the inverse: whether those without all the obligations of telecommunications carriers might still be required to participate in porting. That issue was later resolved in the VoIP Number Portability Order, in which the FCC found no conflict with the Telephone Number Portability Order.

Portability Order ¶ 23. The time to petition for review of that order has long since passed and, as described above, NARUC can point to no new injury-in-fact flowing from the FCC's 2007 decision that would resurrect its appeal. NARUC's arguments about the statutory definition of number portability are, therefore, not properly before this Court.

II. THE FCC HAS AMPLE AUTHORITY TO GRANT INTERCONNECTED VOIP PROVIDERS DIRECT ACCESS TO NUMBERS.

NARUC builds its case on the premise that the Telecommunications Act bars the FCC from granting numbering rights to any entities other than those that provide telecommunications services. But NARUC has not cited a single provision in the statute that prevents the FCC from granting numbers to entities providing other types of services or that conflicts with this exercise of the FCC's plenary authority over the numbering system. In fact, the Telecommunications Act instructs the Commission to "make such numbers available on an equitable basis" and nowhere limits access to a particular type of entity. 47 U.S.C. § 251(e)(1).

Finding no such limitation in the statute, NARUC weaves one out of whole cloth, ignoring text when it clearly forecloses NARUC's interpretation. NARUC Br. at 48-50. In reality, the question here is simple. Does the FCC have the authority to grant numbers to interconnected VoIP providers? The answer is yes.

A. Section 251(e)(1) Gives the FCC Plenary Authority over Numbering.

Section 251(e)(1) gives the FCC "exclusive jurisdiction" over the domestic portions of the North American Numbering Plan, and it instructs the Commission to make numbers "available on an equitable basis." 47 U.S.C. § 251(e)(1). This broad grant of authority clearly authorizes the Commission to extend numbering access to interconnected VoIP providers. That conclusion is compelled by the language, history, and purpose of the Telecommunications Act.

First, the Telecommunications Act reflects Congress's deliberate decision *not* to limit the Commission's authority. Nothing in the text of section 251(e)(1), titled "Commission authority and jurisdiction," limits the Commission's ability to grant numbers to only "telecommunications" or "telecommunications services." In contrast, sections 251(a)-(c) are littered with references to "telecommunications carriers." It is well-established that "[w]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted). Congress's use of the phrase "telecommunications carriers" elsewhere makes clear that, if it wished to restrict direct access of numbers to those entities, it could have done so. Congress did not take that step.

Second, NARUC's misreading of the statute is fundamentally inconsistent with Congress's intent to grant broad latitude to the Commission to determine appropriate rules for opening up competition in local telephone markets. Congress intended the Act to "preempt[] . . . all State and local barriers to competing with the telephone companies" by requiring, among other things "number portability." 141 Cong. Rec. S7881-02 (daily ed. June 7, 1995) (statement of Sen. Pressler). Further, the Committee Report for the bill indicates that Congress intended for section 251 to be "*minimum* standards" for opening up competition in the local telephone marketplace. S. Rep. No. 104-23 at 19 (1995) (emphasis added). This shows that Congress only meant for numbering obligations imposed on local exchange carriers to be the *starting point* from which the Commission would have the authority to add to as necessary to effectuate the objectives of the Telecommunications Act.

Of course, while the legislative history notes that the Telecommunications Act is meant to encourage competition in the local telephone market by "other entities," that the Telecommunications Act fails to specifically address interconnected VoIP is not surprising. At the time the Telecommunications Act was being debated in Congress, VoIP was in its earliest stages, having only entered the market in 1995. VoIP users placed calls computer-to-computer, not to traditional landline phones, and VoIP offerings were not yet competing directly with telephone service. *Interconnected* VoIP—the service that connects with the public switched telephone

network and does offer an alternative to traditional phone service—did not emerge until a few years after the Act's passage. With new services on the horizon, but not yet commercially viable, the Telecommunications Act's grant of exclusive jurisdiction to the FCC on numbering matters, without limitation on specific types of technologies, advances the Act's competitive goals. That choice worked—it allowed the FCC to support the development of new technologies, undeveloped in 1996, that have infused competition into the once-calcified market for telephone service.

That choice was neither unusual nor unprecedented. Congress regularly gives agencies flexibility to continue to effectuate statutory goals as new technological advancements require. Section 706(b) of the Telecommunications Act is a prime example. Interpreting that section, this Court has found that the FCC has authority to regulate "advanced telecommunications capability" and "remov[e] barriers" to its deployment, despite the fact that broadband at the time of the Act's passage did not remotely resemble broadband today, and despite the fact that Congress could not have predicted the kinds of barriers that the FCC ultimately acted to remove. 47 U.S.C. § 1302; *Verizon v. FCC*, 740 F.3d 623, 641 (D.C. Cir. 2014). The *Verizon* court thought it "quite reasonable to believe that Congress contemplated that the Commission would regulate [the broadband] industry . . . limited, as it is, both by the boundaries of the Commission's subject matter jurisdiction and the requirement

that any regulation be tailored to the specific statutory goal of accelerating broadband deployment." *Verizon*, 740 F.3d at 641. Similarly, here, Congress limited the FCC's authority under section 251(e)(1) to numbering, which is hardly an overly broad topic, and further constrained the FCC by requiring that numbers be "[made] available on an equitable basis." 47 U.S.C. § 251(e)(1).

The FCC has carried out that statutory mandate as new developments in technology have demanded. As the FCC noted, "the obligation to ensure that numbers are available on an equitable basis" should be reasonably interpreted to include "not only how numbers are made available but to whom." *Order* ¶ 78 (JA___). The set of entities that should have access to numbers necessarily changes, depending on the state of the local telephone market. And courts recognize that, within the bounds of their authority, agencies have the ability "to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required to nor supposed to regulate the present and the future within the inflexible limits of yesterday." *Office of Commc'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1425 n.25 (D.C. Cir. 1983) (quoting *Am. Trucking Ass'ns, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967)). Thus, the FCC has, in the past, extended numbering resources to competitive local exchange carriers, commercial mobile radio service providers, and others, as needed based on developments in local telephone markets. *Order* ¶ 17 n.51 (JA___).

The FCC's extension of numbering rights to interconnected VoIP providers reflects the realities of the market today, where interconnected VoIP now competes with traditional telephone service. *See id.* ¶ 17 (JA___). Moreover, interconnected VoIP providers have funded number administration and portability since 2007.[5] *See VoIP Number Portability Order* ¶ 38. Having taken those facts into consideration, and only after a six-month technical trial to demonstrate feasibility, along with several rounds of comments, did the FCC decide to extend numbering rights to interconnected VoIP providers. *Order* ¶¶ 7, 9-12 (JA___, ___). The FCC's action here was clearly a reasonable exercise of its authority to make numbers equitably available.

B. Congress Did Not Limit Number Portability Rights and Obligations to Telecommunications Carriers.

Failing to demonstrate that the provision granting the FCC authority over numbering restricts direct access to numbers only to a particular set of entities, NARUC scoured the statute for other provisions that could be stretched to limit the FCC's authority. The resulting argument rests on the assertion that the FCC has

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[5] Petitioner mistakenly claims that interconnected VoIP providers "avoid funding both number administration and portability costs," asserting that it would not be "competitively neutral" for interconnected VoIP providers to be "in direct competition with existing telecommunications carriers" while receiving the benefits of numbering rights. NARUC Br. at 56–57 (emphasis omitted). Certainly, it *would* be unfair for interconnected VoIP providers to pay for numbering costs but not receive any rights; the FCC rectified that regulatory imbalance in the Order.

relied on "general authority" to act where it is precluded from doing so by other "very specific statutory provisions." NARUC Br. at 49. But there is no "very specific statutory provision[]" to which NARUC can point to limit the FCC's authority to extend number portability rights and obligations to *only* telecommunications carriers. Instead, NARUC infers limitations from several other provisions that do not, in fact, restrict the FCC in the manner that NARUC claims.

First, NARUC makes much of the section subsequent to the provision granting the FCC exclusive jurisdiction over numbering, which states that the costs of numbering portability "shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission." 47 U.S.C. § 251(e)(2). NARUC claims that extending numbering rights to entities that are not telecommunications carriers is inconsistent with the section imposing costs on telecommunications carriers. NARUC Br. at 16. However, "the broader power to administer numbers" in no way "conflicts directly" with the obligation of all telecommunications carriers to shoulder the costs of number administration and portability. *Id.* To support its contention, NARUC inserts the word "only" into the provision where it does not exist. *Id.* at 47 ("Consistent with this statutory framework, the obligation to pay for the cost of number portability is also assigned *only* to telecommunications carriers pursuant to § 251(e)(2)." (emphasis changed)). *Cf.* 47 U.S.C. § 251(e)(2) ("The cost of establishing telecommunications numbering

administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."). Section 251(e)(2) merely reflects Congress's intent to ensure that, at minimum, all telecommunications carriers were subject to those costs—it does not constrain the FCC's authority to extend these responsibilities to other kinds of providers or limit the FCC's broader authority over numbers.

NARUC also argues that section 251(e)(2)'s specific reference to "number portability," where the previous section did not use the phrase, indicates that the FCC's grant of authority under section 251(e)(1) excludes number portability. NARUC Br. at 59. That argument is wrong. Section 251(e)(1) expressly grants the FCC exclusive jurisdiction over numbering, which, of course, includes number portability. Section 251(e)(2) specifically references number portability because Congress intended to limit the *type* of costs that telecommunications carriers would bear under that provision. *See Telephone Number Portability Order* ¶ 37 (finding that costs not *directly* related to number portability are not covered under section 251(e)(2)). Congress sensibly did not mention number portability in section 251(e)(1) because it was not speaking only to number portability. NARUC's argument is akin to saying that because Congress referenced "fruit" in one statutory provision and "lemons" in a subsequent, narrower provision, the term "fruit" must be read to exclude "lemons." In this case, it is clear that Congress chose a broader

term in one place and a narrower term in another simply because it meant to denote a broader range of things in one place and a narrower range of things in the other.

Second, NARUC links the definition of number portability, 47 U.S.C. § 153(37), with section 251(b)(2) to claim that obligations regarding number portability can *only* be imposed upon telecommunications carriers. NARUC Br. at 45-46. However, neither of those provisions limits numbering rights and obligations to telecommunications carriers. The definition of number portability speaks to the ability of *users* of telecommunications services to retain the same numbers when switching to a different carrier. As such, that provision ensures rights for consumers, but it does not have anything to do with rights or obligations pertaining to *providers*.

Section 251(b)(2) requires local exchange carriers to provide number portability to their users. This section does not limit number portability to *only* local exchange carriers—and the FCC has since stated that entities other than local exchange carriers must provide number portability. *Order* ¶ 82 & n.292 (JA___, ___). Congress frequently imposes obligations on certain providers without intending to limit those obligations to only those providers. For instance, section 255 of the Telecommunications Act addresses disability access and specifically requires that "provider[s] of telecommunications services shall ensure that the service is accessible to and usable by individuals with disabilities." 47 U.S.C. § 255. However, it is evident that Congress did not intend for people with disabilities to be

unable to access other types of services; accordingly, the FCC extended section 255 requirements to voicemail and interactive menu services—both information services—and ultimately, to interconnected VoIP. *Section 255 Order* ¶ 16. Likewise, it is unreasonable to read section 251(b)(2) to mean that the FCC cannot provide consumers with number portability from providers other than local exchange carriers.

III. THE COMMISSION REASONABLY DECLINED TO CLASSIFY INTERCONNECTED VOIP IN THIS PROCEEDING.

To be successful here—and to have standing before this Court at all—NARUC must demonstrate that the FCC could not decide whether to grant interconnected VoIP providers direct access to telephone numbers without first determining whether interconnected VoIP is a "telecommunications service" or an "information service."[6] That order of operations is required, NARUC argues, by (A) the Telecommunications Act and (B) the APA. Both arguments are unpersuasive.

[6] A "telecommunications service" under the Telecommunications Act is the offering of "telecommunications" to the public for a fee, 47 U.S.C. § 153(51), where "telecommunications" is defined as "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 and received." *Id.* § 153(50). In contrast, an "information service" must involve "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." *Id.* § 153(24).

A. The Telecommunications Act Does Not Dictate the Timing of Any Classification Decision and Certainly Does Not Compel the Conclusion That Interconnected VoIP Is a Telecommunications Service Subject to Common Carrier Regulation.

Having failed to convince the FCC to discard its preference to defer classification of VoIP, NARUC now argues that Congress has, in fact, already made that decision. NARUC's brief thus opens with a startling assertion: the FCC has—despite its stated intention not to do so—classified interconnected VoIP as a "telecommunications service" and triggered the raft of common carrier regulations that comes with that designation. According to NARUC, that happened by operation of law, with no need for the Commission to exercise any direction or expert judgment. The Court should reject NARUC's convoluted reading of the Telecommunications Act and FCC orders.

First, Congress did not expressly fix the regulatory classification of interconnected VoIP in the Telecommunications Act. It could not have; VoIP was a nascent technology at the time the Telecommunications Act was passed, and the category "interconnected VoIP" had not yet been announced by the FCC. Perhaps most importantly, the FCC has not yet applied its interpretation of the Telecommunications Act to this category of service, *see Order* ¶ 79 n.282 (JA___), but when it does, that decision will be entitled to deference "so long as it is a reasonable interpretation of an ambiguous statute." *Sw. Bell Tel. Co. v. Connect Commc'ns Corp.*, 225 F.3d 942, 946 (8th Cir. 2000) (citing *Chevron U.S.A. Inc. v.*

Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)). For now, there is no decision for this Court to evaluate under the *Chevron* framework.

The question is not, as NARUC suggests, whether the FCC has discretion "to apply or not apply" the statutory definitions of telecommunications service and information service. *See* NARUC Br. at 31-32. The Commission has never claimed that it could determine, as a matter of statutory interpretation, that one definition or the other encompassed interconnected VoIP and then exercise its discretion to nonetheless categorize the service another way. Instead, the FCC argues only that it has not yet interpreted those portions of the Telecommunications Act in the context of interconnected VoIP, *see* FCC Br. at 38-39, and that the statute could be susceptible to more than one reasonable interpretation, *id.* at 40. The FCC's discretion to classify services when it sees fit is underscored by the Supreme Court's recognition that the FCC may revisit prior classification decisions. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005). If the Telecommunications Act were not susceptible to expert interpretation on this point, there would never be occasion for the FCC to properly change its interpretation. In any event, as Vonage has argued in the IP-Enabled Services proceeding, Vonage's service, if classified, should be classified as an information service. Reply Comments of Vonage Holdings Corp., WC Docket Nos. 05-337, 03-109, 06-122,

04-36, CC Docket Nos. 96-45, 99-200, 96-98, 01-92, 99-68 (filed Dec. 22, 2008) (JA___).

Second, the Telecommunications Act does not compel the FCC to choose one category or the other on any particular timeline. Congress knows how, of course, to set clear deadlines for FCC action when it wants to. For example, the Spectrum Act gave the agency wide latitude in designing the incentive auction of 600 MHz spectrum while, at the same time, making clear that the auction must be completed by a date certain in 2022. *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156 (2012). Alternatively, Congress could have created other statutory triggers compelling a decision. It could, for example, have stated that no new technology may be subject to numbering regulations without first having been classified one way or the other. Though NARUC has scoured the Telecommunications Act in search of such a provision, none exists.

B. The Administrative Procedure Act Did Not Require the FCC to Classify Interconnected VoIP before Adopting the Order.

Despite the "narrow" scope of that review, NARUC asserts that the Order is arbitrary and capricious in violation of the APA. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). That contention misunderstands both the law and the Order itself. In adopting the Order, the APA required the FCC to "examine the relevant [considerations] and articulate a satisfactory explanation for its action[,] including a rational connection between

the facts found and the choice made." *Id.* (internal quotations omitted); *see also FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). "That standard is particularly deferential in matters such as this, which implicate competing policy choices, technical expertise, and predictive market judgments." *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 908 (D.C. Cir. 2009).

While agencies must follow the instructions Congress has given them by statute, nothing in the APA prevents them from regulating at their own pace. Inherent in the authority to interpret and implement a statute is the power to prioritize various regulatory tasks. Recognizing the evolving nature of new services like VoIP, the FCC has reasonably adopted a careful approach to imposing regulations that were designed for traditional telephone service. To that end, the Commission has chosen to devote its limited resources to more urgent areas of regulation.

None of NARUC's arguments that it should be allowed to dictate the FCC's docket are persuasive. First, NARUC argues that the Commission's "refusal" to classify interconnected VoIP shows that the Order is not supported by reasoned decision making. To that end, NARUC claims that the FCC has ignored NARUC's arguments that interconnected VoIP is a telecommunications service. That argument is flatly contradicted by the Order, which clearly and directly addresses NARUC's arguments. *See Order* ¶¶ 78-82 (JA___). The FCC did not ignore NARUC's arguments; it rejected them. Indeed, the FCC granted providers numbering rights

only after careful consideration of the consumer and public interest benefits the proposed action would deliver. The FCC collected a remarkably robust record on the issue, including multiple rounds of comments and a numbering trial that demonstrated the technical feasibility of direct access. *Id.* ¶¶ 7, 9-12 (JA___, ___). The FCC chose to extend direct access to numbers after the record showed that numbering rights would enable IP interconnection, reduce costs, increase network redundancy, and improve service quality, among other benefits. *Id.* ¶¶ 16-19 (JA___).

NARUC next suggests "the FCC must be asking the Court to assume" that interconnected VoIP is an information service as defined in the Telecommunications Act. NARUC Br. at 40 (emphasis omitted). In doing so, NARUC argues the Commission has violated the APA by failing "to provide any evidence or rationale for why that assumption is reasonable." *Id.* That misguided argument bears no relationship to what the Commission actually did. Despite NARUC's repeated requests, the FCC clearly explained that it "has not classified interconnected VoIP services as either telecommunications services or information services, and the issue remains pending before the Commission." *See Order* ¶ 79 n.282 (JA___). How that constitutes a request for the Court to "assume" VoIP is an information service, NARUC never explains.

In search of legal basis for its complaints, NARUC finally settles on the contention that the FCC's "considerable departure from the rationale provided in the prior" VoIP Number Portability Order constitutes a change of position for which the APA requires a reasoned explanation. NARUC Br. at 54 (citing *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009)). But there is no policy change here for the Commission to acknowledge, and NARUC does not attempt to identify one. Instead, NARUC seems to think that because the FCC determined that section 251(e)(1) provided the jurisdictional basis for a *different* action concerning VoIP, the Commission must now depart from its earlier reasoning in order to conclude that section 251(e)(1) *also* authorizes this action. That makes no sense. As described above, section 251(e)(1) gives the Commission broad authority to "administer telecommunications numbering and to make such numbers available on an equitable basis." 47 U.S.C. § 251(e)(1). With such a strong congressional mandate, it should come as no surprise that the Commission has concluded that many different actions fall within that section's scope.

CONCLUSION

NARUC may, of course, make its arguments to the Commission that interconnected VoIP should be classified as a telecommunications service. But there is no legal basis for NARUC's attempt to force the FCC to act on NARUC's preferred timeline. For the foregoing reasons, the Petition should be dismissed.

Respectfully submitted,

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May 26, 2016

CERTIFICATE OF COMPLIANCE

I, Brita D. Strandberg, hereby certify that the foregoing brief contains 8,421 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman.

Brita D. Strandberg

May 26, 2016

CERTIFICATE OF SERVICE

I, Brita D. Strandberg, hereby certify that on this 26th day of May 2016 I caused the foregoing brief of intervenor in support of respondents to be filed via the Court's CM/ECF system, which caused that document to be served on all parties or their counsel.

Brita D. Strandberg

May 26, 2016