No. 06-669

In the Supreme Court of the United States

VERITY INTERNATIONAL, LTD., EL AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

WILLIAM BLUMENTHAL
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

MARILYN E. KERST
Attorney
Federal Trade Commission
Washington, D.C. 20580

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission Act's exclusion of "common carriers," 15 U.S.C. 45(a)(2), applies to a company involved in billing for Internet pornography obtained through long-distance telephone lines.

2. Whether the district court abused its discretion in failing to refer this action to the Federal Communications Commission (FCC), when the FCC filed a brief urging the court not to take that action.

3. Whether the filed rate doctrine applies to bills for access to Internet pornography that were presented as bills for long-distance telephone calls to Madagascar.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

In the Supreme Court of the United States

No. 06-669

VERITY INTERNATIONAL, LTD., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 443 F.3d 48. The opinions of the district court (Pet. App. 80a-110a, Pet. App. 111a-138a, Pet. App. 39a-79a) are reported at 194 F. Supp. 2d 270, 124 F. Supp. 2d 193, and 335 F. Supp. 2d 479.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 2006. A petition for rehearing was denied on June 14, 2006 (Pet. App. 139a-140a). On August 30, 2006, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including November 11, 2006, and the petition was filed on No-

vember 13, 2006 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Robert Green and Marilyn Shein founded and controlled petitioner Automatic Communications, Ltd. (ACL). Pet. App. 8a. Green and Shein also founded and controlled petitioner Verity. *Id.* at 8a-9a. Petitioners created a billing system for dial-up access to Internet pornography that placed charges on consumers' telephone bills as if they were charges for long distance calls to Madagascar. *Id.* at 2a. That system allowed persons to obtain access to pornography over a telephone line without authorization from the telephone-line subscriber. *Ibid.*

To set up that system, ACL bought the right to use certain Madagascar telephone exchanges from the Madagascar telephone authority, Telecom Malagasy. Pet. App. 4a, 46a-47a. ACL then contracted with another company to supply an Internet dialing program that would disconnect a consumer's computer from its usual Internet connection and re-route it to petitioners' Madagascar telephone numbers. *Id.* at 3a-4a, 81a. The calls never reached Madagascar. *Id.* at 3a. Instead, the calls were "short-stopped" in the United Kingdom and routed back to adult web sites in the United States. *Id.* at 3a, 44a. The charges were billed to the telephone-line subscribers as if they had placed long distance calls to Madagascar. *Id.* at 4a. The Madagascar numbers were used because of their high per-minute tariff rate. *Ibid.*

Petitioners' billing system relied on long distance telephone companies' automatic number identification systems to identify which line subscriber to bill. Pet. App. 3a. There was no way under petitioners' system to

verify whether the computer user was a child or an adult, or whether he was the line subscriber or someone authorized to incur the charges. *Id.* at 4a.

ACL first contracted with AT&T to carry the traffic over telephone lines as far as the United Kingdom. Pet. App. 5a. AT&T handled the billing, listing the calls in the long-distance section of a customer's regular monthly bill. *Ibid.* AT&T informed customers that nonpayment could result in disconnection of local service. *Ibid.* AT&T ultimately severed its relationship with petitioners. *Id.* at 6a.

ACL next contracted with Sprint to carry the traffic. Pet. App. 6a. While Sprint initially handled billing, it quickly turned that responsibility over to petitioners. *Ibid.* ACL then contracted in Verity's name with another company to collect payments and handle consumer complaints. *Ibid.* Petitioners Green and Shein directed that company's consumer representatives to advise customers that the charges were valid, that the charges must be paid, and that nonpayment would subject the customer to further collection activity. *Id.* at 7a.

2. The Federal Trade Commission (FTC) filed a complaint alleging that petitioners had violated the prohibitions against deceptive and unfair trade practices contained in Section 5(a) of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45(a). Pet. App. 8a. Count I alleged that petitioners had caused deceptive representations to be made to line subscribers that the charges for Internet pornography could not be legally avoided. *Ibid.* Count II alleged that petitioners unfairly caused line subscribers to be billed for access to Internet pornography, although they did not use or approve of that access. *Ibid.* Count III alleged that petitioners caused deceptive representations to be made to

line subscribers that the charges were for telephone calls to Madagascar when the calls actually terminated in the United Kingdom. *Id.* at 8a; see *id.* at 129a.

The district court entered a temporary restraining order that enjoined petitioners from continuing their billing practices and that froze petitioners' assets. Pet. App. 119a. With certain modifications, the court converted the temporary restraining order into a preliminary injunction. *Id.* at 135a, 138a.

Petitioners filed a motion for judgment on the pleadings on several grounds. Pet. App. 10a. As relevant here, petitioners argued that ACL was a common carrier and therefore outside of the FTC's jurisdiction by virtue of the FTC Act's common carrier exception, 15 U.S.C. 45(a)(2). Pet. App. 10a. They argued that the matter should be referred to the FCC under the doctrine of primary jurisdiction. *Ibid.* And they argued that the FTC's claims were barred by the filed rate doctrine. *Ibid.* The district court invited the FCC to submit a brief addressing petitioners' contentions. *Ibid.* The United States Attorney for the Southern District of New York submitted a brief on behalf of the FCC, arguing that ACL was not a common carrier, that the case should not be referred to the FCC under the doctrine of primary jurisdiction, and that the filed rate doctrine was inapplicable to the FTC's claims. *Id.* at 141a-149a.

The district court denied petitioners' motion for judgment on the pleadings. Pet. App. 80a-110a. The court held that ACL did not fall within the FTC Act's common carrier exclusion. *Id.* at 88a-90a. It concluded that the doctrine of primary jurisdiction did not make it appropriate to refer the matter to the FCC. *Id.* at 90a-94a. And it held that the filed rate doctrine did not shield petitioners from liability for their illegal scheme.

Id. at 95a. After a trial, the district court found that petitioners had engaged in unfair and deceptive trade practices and entered judgment in favor of the FTC in the amount of $17. 9 million. *Id*. at 39a-79a.

3. The court of appeals affirmed the district court's finding of liability, Pet. App. 23a-28a, but remanded the monetary award with instructions to hold further proceedings on the appropriate amount of consumer redress. *Id* at 29a-37a.

The court of appeals held that ACL did not fall within the FTC Act's exemption for "common carriers." Pet. App. 11a-18a. The court concluded that the exemption incorporates the common law definition of common carrier: "(1) the entity holds itself out as undertaking to carry for all people indifferently, and (2) the entity carries its cargo without modification." *Id*. at 15a. The court noted that the definition of common carrier under the Federal Communications Act similarly "require[s] that an entity provide[] carriage to the public." *Ibid*. Applying those definitions, the court concluded that AT&T and Sprint had acted as common carriers, but that ACL had not acted as a common carrier. *Id*. at 15a-16a. The court explained that "ACL simply brought together these carriers as part of its billing system; it never itself carried any calls." *Id*. at 16a.

The court of appeals rejected petitioners' argument that ACL's license from the FCC gave it the status of a common carrier for purposes of the FTC Act's exemption. The court explained that the license only authorized ACL to *"become"* a common carrier. Pet. App. 17a. It "does not purport to represent or determine that ACL is actually engaged in common carriage, nor did ACL's application for the license so represent." *Ibid*.

The court of appeals held that the district court did not abuse its discretion in failing to refer the matter to the FCC because none of the relevant factors supported that course of action. Pet. App. 18a-20a. The court explained that while the parties had disputed the meaning of the terms "information service" and "telecommunications service," there were many judicial and administrative precedents on the meaning of those terms. *Id.* at 19a. The court added that the FCC had filed an amicus brief "stating that it had no particular interest or expertise over the case so as to warrant declining jurisdiction." *Id.* at 20a.

The court of appeals also held that the filed rate doctrine did not bar the FTC's claims. Pet. App. 20a-23a. The court explained that while the filed rate doctrine bars a challenge to the lawfulness of a filed tariff for a service, there was "no tariff that covers the actual service rendered to users of [petitioners'] billing system." *Id.* at 21a-22a. In particular, petitioners billed consumers for adult content, and that service was not covered by the AT&T or Sprint tariffs at issue. *Id.* at 22a-23a.

ARGUMENT

The court of appeals' decision is correct, and does not conflict with the decision of any other court of appeals. Review by this Court is therefore not warranted.

1. Petitioners contend (Pet. 10-13) that the court of appeals erred in ruling that ACL did not fall within the common carrier exemption. That contention is without merit and does not warrant review.

a. Under the common law, an entity has a status as a common carrier when it (1) "holds itself out as undertaking to carry for all people indifferently; and (2) * * * carries its cargo without modification." Pet. App.

15a. As the court of appeals correctly recognized, that common law definition "does not differ meaningfully for our purposes from the definition of 'common carrier' under the Communications Act," and petitioner does not qualify as a common carrier under either definition. *Ibid.* As the court of appeals explained, while AT&T and Sprint carried phone calls, "ACL simply brought together these carriers as part of its billing system; it never itself carried any calls." *Id.* at 16a.

Petitioner contends (Pet. 11) that the court of appeals erred in focusing on whether the particular activities at issue involved common carriage rather than on whether ACL had the status of a common carrier. That criticism is misguided. The court of appeals expressly assumed that the relevant question was whether ACL had the status of a common carrier. Pet. App. 17a. It simply concluded that, under the common law definition, petitioner lacked that status because it did not engage in *any* activity that involved common carriage. *Id.* at 16a-17a. That conclusion is clearly correct. Whether or not an entity that engages in common carrier activities falls within the exemption even when it is performing an activity that does not involve common carriage, an entity that does not perform a single common carrier activity cannot have the status of a common carrier.

Petitioner contends (Pet. 12-13) that ACL's FCC license gave it the status of a common carrier. But as the court of appeals explained (Pet. App. 17a), that license merely authorized ACL to *become* a common carrier. It did not purport to give ACL the status of a common carrier.

The court of appeals' conclusion that ACL was not a common carrier is also consistent with the position taken by the FCC in an amicus brief filed in the district court.

In that brief, the FCC explained that ACL did not meet the established test for a common carrier because it did not "hold itself out to the public as an indifferent provider of telecommunications services," and it did not "set the rates, or terms and conditions for long distance service." Pet. App. 144a. As the agency charged with the responsibility for regulating common carriers of telecommunications services, the FCC's views are entitled to considerable deference. Petitioners offer no basis for disturbing the FCC's considered views.

b. Petitioners contend (Pet. 10-13) that the decision below conflicts with the Seventh Circuit's decision in *FTC* v. *Miller*, 549 F.2d 452 (1977). There is, however, no conflict. In *Miller*, the court held that an entity that had the status of a common carrier because it was engaged "solely in carrier activities" subject to the jurisdiction of the Interstate Commerce Commission (ICC) did not fall outside the exemption for common carriers simply because the ICC had chosen not to regulate the particular activity at issue. *Id.* at 458. The court did not remotely suggest that an entity could have the status of a common carrier when it does not engage in a single common carrier activity. Indeed, the *Miller* court expressly reserved the question whether an entity that is a common carrier for some purposes falls outside the exemption when the activity at issue does not involve common carriage. *Ibid.* There is therefore no conflict between *Miller* and the holding of the court below that ACL lacked the status of a common carrier because it did not engage in any common carrier activity.

Petitioners refer (Pet. 11-12) to a number of other court of appeals decisions that purportedly "relied" on *Miller*. But none of those cases has any bearing on the question presented here. In *Blue Ribbon Quality*

Meats, Inc. v. *FTC*, 560 F.2d 874, 877 n.2 (1977), the Eighth Circuit merely noted that *Miller* had held that "a common carrier could assert its statutory exemption from FTC regulation and investigation in a subpoena enforcement action." The Eighth Circuit did not endorse that aspect of *Miller*, and even if it had, this case does not implicate that procedural ruling.

Similarly, in *FTC* v. *Ernstthal*, 607 F.2d 488 (1979), the D.C. Circuit held that third parties could not raise the FTC's alleged lack of jurisdiction as a defense to a subpoena enforcement action. *Id.* at 490-491. The court noted that *Miller* had created certain exceptions to the rule that lack of jurisdiction may not be asserted as a defense to a subpoena enforcement action. But it concluded that the D.C. Circuit had never endorsed those exceptions and that the exceptions would not apply in any event. *Id.* at 491. That discussion of *Miller*'s procedural ruling provides no assistance to petitioners here.

In *FTC* v. *Winters National Bank & Trust Co.*, 601 F.2d 395 (1979), the Sixth Circuit held that while the FTC concededly had no authority to investigate banks, it nonetheless had authority to seek information from a bank that was relevant to an investigation of a non-banking entity. The court's only mention of *Miller* was in a footnote that simply described *Miller* as a case in which a "subpoena issued to [a] common carrier relating to an investigation of that carrier was not enforced." *Id.* at F.2d at 402 n. 14. That observation has no relevance here.

Finally, in *Official Airline Guides, Inc.* v. *FTC,* 630 F.2d 920 (1980), cert. denied, 450 U.S. 917 (1981), the Second Circuit held that a publisher of airline flight schedules did not qualify for the exemption for air carriers. Relying in part on *Miller*, the court explained that

the exemption applies only to air carriers, not to entities that engage in activities that affect air carriers. *Id.* at 923. That holding is fully consistent with the holding below that the exemption is inapplicable here because ACL was not a common carrier. In any event, it is up to the Second Circuit to determine the consistency of its own precedents. Any inconsistency between its decisions would not present an issue warranting this Court's review.

2. Petitioners next contend (Pet. 14-16) that the district court abused its discretion in failing to refer this matter to the FCC under the doctrine of primary jurisdiction. That contention is without merit and does not warrant review.

The doctrine of primary jurisdiction gives a district court discretion to refer a matter to an agency when that matter raises issues that fall outside the core competence of courts and fall inside the realm of administrative expertise. *Far E. Conference* v. *United States,* 342 U.S. 570, 574 (1952). The district court reasonably concluded that the matters at issue in this case did not require the special expertise of the FCC. In particular, while the parties disputed whether the services at issue in this case involved an "information service" or a "telecommunications service," that dispute was readily susceptible to judicial resolution based on existing judicial and administrative precedents. See Pet. App. 19a. Similarly, the question whether petitioners' practices were deceptive and whether ACL fell within the common carrier exemption did not require the FCC's special expertise. Indeed, in its amicus brief in the district court, the FCC specifically informed the court that the matters before it did not "require[] the FCC's specialized experience and expertise." *Id.* at 147a. Petitioners offer no

basis for overturning that judgment. In any event, the district court's determination that the dispute at issue in this case did not require the special expertise of the FCC is fact-bound and does not warrant review.

3. Petitioners finally err in contending (Pet. 16-17) that the filed rate doctrine barred the FTC's claim that petitioners engaged in a deceptive practice in violation of the FTC Act when they represented that consumers could not challenge their bills for adult entertainment. The filed rate doctrine bars a challenge by a rate payer to the lawfulness of rates that are filed with the FCC. *AT&T* v. *Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998). "Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached." *Id.* at 223. Here, the only filed rates at issue were for long-distance telephone service to Madagascar. Petitioners, however, were not providing, or charging consumers for, that service. Instead, they were charging consumers for access to adult entertainment. The filed rates at issue did not cover the charges for that service. The filed rate doctrine therefore did not preclude the FTC's claim that petitioners engaged in a deceptive practice in violation of the FTC Act when they represented that consumers could not challenge their bills for adult entertainment. Petitioners' charges for adult entertainment no more implicate the filed rate doctrine than would charges for car rentals at the long-distance telephone rate for Madagascar.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

WILLIAM BLUMENTHAL
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

MARILYN E. KERST
Attorney
Federal Trade Commission

FEBRUARY 2007