No. 24-161

IN THE
Supreme Court of the United States

NEW YORK STATE TELECOMMUNICATIONS ASSOCIATION, INC., ET AL.
Petitioners,

v.

LETITIA A. JAMES, ATTORNEY GENERAL OF NEW YORK,
Respondent.

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

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BRIEF OF AMICUS CURIAE DIGITAL PROGRESS INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Digital Progress Institute ("DPI") is a District of Columbia non-profit organization that advocates for incremental, bipartisan solutions to bridge the digital divide.[1]

Ubiquitous broadband is a key goal for DPI, and DPI advocates for state and federal policies that incentivize the deployment of affordable, high-speed broadband access to the Internet for every American. DPI has been keenly focused on federal programs to close the digital divide, such as the federal Universal Service Fund, the Emergency Broadband Benefit, and the Affordable Connectivity Program.

Amicus thus has an established interest in the outcome of this proceeding and is concerned that the chosen path of the New York legislature will only widen the digital divide rather than narrow it. DPI believes that its expertise on ensuring robust deployment of high-speed broadband Internet access service to low-income American families and veterans will aid the Court and provide a broader understanding of the policy at stake here.

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[1] Per Supreme Court Rule 37.2, counsel of record received timely notice of DPI's intent to file this brief. Per Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Broadband Internet access is inextricably linked to one's ability to succeed in today's digital economy. As such, federal policies to expand access to broadband Internet are of exceptional importance to the American people.

To close the digital divide, Congress has prescribed, and the Commission has carried out, a consistent federal policy of letting the market set rates for broadband Internet access.

New York's Affordable Broadband Act ("ABA") conflicts with and undercuts this consistent federal policy by regulating the rates of broadband Internet service providers.

In the proceedings below, the district court enjoined enforcement of the ABA. It held that the ABA "is rate regulation" that "directly contravenes directly contravenes the FCC's determination that broadband internet 'investment,' 'innovation,' and 'availab[ility]' best obtains in a regulatory environment free of threat of common-carrier treatment, including its attendant rate regulation." *N.Y. State Telecomms. Ass'n v. James*, 544 F. Supp. 3d 269, 282 (E.D.N.Y. 2021).

A divided panel of the Second Circuit reversed that decision. Two members of the panel reasoned that "because broadband is now regulated as a *Title I* service," the "FCC has no power to preempt broadband rate regulation." App. 34a. A third member dissented, noting this argument "fails to account for the obvious fact that the FCC does have the power to regulate broadband . . . [y]et the FCC chose not to—a choice that 'takes on the character of a ruling that no such regulation is appropriate or approved." App. 60a

(quoting *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 178 (1978)).

Because the reasoning of the Second Circuit majority runs afoul of contrary decisions of the Eighth and D.C. Circuits, this Court must resolve this split among the circuits. What is more, because the divided panel's holding would contravene the intent of Congress in establishing a non-regulated category of communications services known as information services, this Court should grant the petition and reverse.

ARGUMENT

I. Broadband Availability Promotes Low-Income Families' Economic Mobility and Increasingly Connects Us to Essential Services

Closing the digital divide has been a national goal for more than two decades. In 1996, lawmakers of both parties saw that broadband Internet access was the future and put in place a commitment to universal service—the principle that every American should be able to participate in the digital economy and the opportunities it brings.

Too many still live on the wrong side of the digital divide. More than 23 million Americans cannot access high-speed broadband services at any price. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 22-270, 2024 Section 706 Report, FCC 24-27, at 33, Fig. 1 (2024) (showing that only 309 million out of 333 million Americans have access to 100/20 Mbps fixed broadband). The rural-urban divide is real and cruel: 28% of rural Americans lack such access, whereas only 2% of urban Americans do. *Id.*

What is more, low-income communities are more than three times as likely as wealthy neighborhoods to lack high-speed fixed broadband access. *Id.* at 75, Fig. 26 (reporting that 3.3% of households in areas in the top quartile of median incomes lack access to 100/20 Mbps fixed broadband versus 10.3% of those living in areas in the bottom quartile). And adoption rates show the stark difference between low-income households and wealthier Americans: 95% of adults with annual incomes exceeding $100,000 have adopted broadband at home, whereas only 57% of those making less than $30,000 have done so. Risa Gelles-Watnick, Pew Research Center, "Americans' Use of Mobile Technology and Home Broadband" at 5 (Jan. 2024).

A family on the wrong side of the digital divide cannot access remote education (primary, secondary, collegiate, or continuing). An adult cannot learn of and apply for employment opportunities. A senior cannot conduct a video visit with her physician. And a child cannot digitally connect with loved ones that live far away—and his mother cannot read him a bedtime story when traveling or on the job.

Access to broadband is now a key indicator of economic opportunity. As studies have consistently shown, a lack of broadband can perpetuate the cycle of poverty. Nicol Turner Lee, Brookings Institute, "Can We Better Define What We Mean by Closing the Digital Divide?" (Mar. 2, 2022).

This is especially true for those in traditional minority groups. A study conducted by Deutsche Bank found that Black and Hispanic communities without access to broadband are more likely to be underprepared for 86% of the jobs that will be available by 2045. Apjit Walia, Deutsche Bank

Research, "America's Racial Gap & Big Tech's Closing Window" (Sept. 2, 2020). One reason is that most educational online tools, including remote tutoring sessions, online tutorials, and research platforms, are simply out of reach.

Without broadband, small businesses in low-income, minority communities suffer. The ACLU reported that equitable access to broadband can reduce barriers to business growth and support Black-owned and Black-women owned businesses. Brandeis Marshall & Kate Ruane, ACLU, "How Broadband Access Advances Systemic Equality" (Apr. 28, 2021).

Even if a small business itself has broadband access, a lack of broadband adoption in the surrounding community can take its toll. Businesses—especially in post-pandemic America—are struggling to find qualified candidates when they post job openings. Leveraging online ad technologies is more cost effective than traditional advertising (e.g., via local newspapers) given microtargeted-online-advertisement services. Steve Strauss, "Small Biz Owners, Take Advantage of Targeted Marketing to Reach Your Audience," *USA Today* (updated Oct. 28, 2020). But if the local population cannot access broadband, then they cannot see those openings, and the company will not be able to hire qualified applicants in their own backyard.

Broadband also provides access to essential services in low-income, rural areas. For example, telehealth capabilities leveraging broadband have helped close the health divide in rural areas. Anastassia Gliadkovskaya, "Rural Residents Face Racial Inequities in Accessing Hospital Care, Study Finds. Telehealth, Policy Changes Help Close the Gaps," *Fierce Wireless* (Feb. 8, 2022). The sad reality

is that the intersection of low income and rurality means too many Americans living with comorbidities requiring frequent checkups—diabetes with forms of heart disease being the most prevalent—reside hundreds of miles away from the nearest healthcare facility. Telehealth (which requires broadband) allows these patients to make these often lifesaving appointments.

For all these reasons and more, access to broadband is a critical service to achieve social and economic mobility and access essential services. And it makes it all the more important that laws and regulations meant to promote broadband must be coordinated between states and the federal government and implement policies that ensure we close the digital divide once and for all.

II. Congress and the FCC Have Affirmatively Chosen the Nonregulation of Broadband Internet Access Rates

Congress created the FCC for the specific "purpose of regulating interstate and foreign commerce in communication by wire and radio." 47 U.S.C. § 151. It defined the jurisdiction of the FCC to cover "*all* interstate and foreign communications by wire or radio," including "*all* persons engaged within the United States in such communications or such transmission of energy by radio." *Id.* § 152(a) (emphases added).

For the first six decades of the FCC's existence, its plenary authority over interstate communications services was unquestioned. As this Court explained, Congress "divide[d] the world . . . into two hemispheres—one comprising of interstate service over which the FCC would have plenary authority,

and the other made up of intrastate service, over which the States would retain exclusive jurisdiction." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986).

Since the advent of the computing and data-processing services that would presage the Internet, the Commission has exercised that authority to pursue a policy of nonregulation. In the *Computer Inquiries*, the Commission first adopted a policy of nonregulation of data-processing services and later extended that policy to all "enhanced" services. *Computer and Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198, 207 (D.C. Cir.1982). The D.C. Circuit upheld that policy of nonregulation. *Id.* at 206-14.

In the Telecommunications Act of 1996, Congress then codified that demarcation. Congress defined two classes of communications services that included "telecommunications": "telecommunications services" and "information services." *See, e.g.,* 47 U.S.C. § 153(50) (defining "telecommunications"); *id.* § 153(53) (defining "telecommunications service"); *id.* § 153(24) (defining "information service"). Congress in turn made clear that only "telecommunications services" would be subject to common-carrier regulation under Title II of the Act whereas information services would not be. *See* 47 U.S.C. § 153(51) ("A telecommunications carrier shall be treated as a common carrier under this chapter *only to the extent* that it is engaged in providing telecommunications services . . . ." (emphasis added)); *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975 (2005) ("The Act regulates telecommunications carriers, but not information-service providers, as common carriers.").

In doing so, Congress made evident its purposes to "promote competition and reduce regulation," Pub. L. 104-104, 110 Stat. 56, 56 preamble, and to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(2).

In line with those statutory commands, the Commission has adopted a consistent policy of nonregulation of broadband Internet rates. That was true when the question was put squarely to the Commission in 2015. *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, para. 451 (2015) ("[W]e do not and cannot envision adopting new *ex ante* rate regulation of broadband Internet access in the future."). True again in 2018. *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, para. 94 (2018) ("This evidence suggests that Title II discourages not just ISP investment, but also deployment and subscribership, which ultimately create benefits for consumers."). And true yet again this past year. *Safeguarding and Securing the Open Internet et al.*, WC Docket Nos. 23-320, 17-108, Declaratory Ruling, Order, Report and Order, and Order on Reconsideration, FCC 24-52, para. 389 (2024) ("[W]e therefore make clear that we will not impose any such rate regulation . . . .").

Congress has in turn reiterated its view that broadband Internet access should remain "unfettered" by rate regulation. In the Infrastructure Investment and Jobs Act, a bipartisan Congress allocated $65 billion to help close the digital divide with ubiquitous,

affordable broadband—but made clear "nothing" in this new authority for the National Telecommunications and Information Administration should be construed to authorize them to "regulate the rates charged for broadband service." 47 U.S.C. § 1702(h)(5)(D) (2021).

The reason for this nonregulation is ably summarized by the Second Circuit's dissenting judge: "Even the *possibility* of rate regulation attendant to Title II common carriage status had resulted in untenable social costs in terms of foregone investment and innovation." App. 59a (Sullivan, J., dissenting) (cleaned up). Or to put it syllogistically, investment is needed to close the digital divide and allowing the market to set rates best promotes investment, thus nonregulation of broadband rates is the best means to bring ubiquitous broadband to the American public.

III. New York's Law Conflicts with Congress's Carefully Wrought Scheme for Promoting Broadband Internet Access

The Supremacy Clause of the United States Constitution states that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of a State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. Thus federal law preempts any state laws or regulatory actions that would prevent a person from complying with federal law or that "stand[] as an obstacle to the accomplishment and execution" of federal objectives. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (internal quotation marks omitted); *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 108 (1992); *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

This Court has made clear that the FCC may even preempt state regulation of intrastate services (which broadband is not) "where compliance with both federal and state law is in effect physically impossible." *La. Pub. Serv. Comm'n*, 476 U.S. at 368. That occurs most often with jurisdictionally intermixed services, where "it is impossible or impractical to separate the service's intrastate and interstate components, and the state regulation interferes with valid federal rules or policies." *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 577 (8th Cir. 2007).

Accordingly, courts have repeatedly upheld FCC decisions to preempt state regulations of intrastate services that interfered with the federal scheme.

When confronted with state rate regulation of customer premises equipment ("CPE"), the FCC preempted, and the D.C. Circuit upheld that preemption, citing the federal interest in "fostering competition in the CPE market and giving consumers an unfettered selection of CPE." *Computer and Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198, 214–18 (D.C. Cir. 1982).

When confronted with state attempts to regulate the entry and rates charged for VoIP service, the FCC preempted, and the Eighth Circuit upheld that preemption, finding that "[c]ompetition and deregulation are valid federal interests that the FCC may protect through preemption of state regulation." *Minn. Pub. Utils. Comm'n*, 483 F.3d at 580.

Under this line of cases, the New York legislation cannot withstand scrutiny. As all four judges to review this legislation have agreed, the ABA is rate regulation. As all four judges have also agreed, the FCC has adopted an affirmative federal policy of the nonregulation of broadband rates. And as all four

judges have agreed, broadband Internet access service is an interstate communications service and the ABA seeks to regulate that interstate service directly. Because the ABA conflicts with the federal policy of nonregulation, it should and must be preempted.

Two members of the Second Circuit panel nonetheless reasoned that "because broadband is now regulated as a *Title I* service," the "FCC has no power to preempt broadband rate regulation." App. 34a. In other words, if the FCC cannot "enact . . . common-carrier style regulations of broadband under Title I," it cannot "preempt" such regulations. App. 33a.

While enticingly simple, this analysis is startlingly wrong.

To start, it contravenes the decisions of the D.C. Circuit and Eighth Circuit cited above. In *Computer and Commc'ns Indus. Ass'n*, the D.C. Circuit did not ask whether the FCC could subject CPE to rate regulation—indeed, the FCC affirmatively could not given that it found that CPE was not a common-carrier service. 693 F.2d at 217 (noting "the Commission has discontinued Title II regulation of CPE"). And in *Minn. Pub. Utils. Comm'n*, the Eighth Circuit made clear it did not matter whether VoIP was a Title I or Title II service, the FCC could preempt either way. 483 F.3d at 578 (finding it "sensible for the FCC to address [the preemption] question first without having to determine whether VoIP service should be classified as a telecommunications service or an information service").

The D.C. Circuit decision is particularly instructive. When faced with the argument that the "Commission has unlawfully attempted to preempt state regulation of dual use CPE by creating a vacuum of deregulation," the court found "no critical

distinction between preemption by Title II regulation and preemption by the exercise of ancillary jurisdiction" and held that the Commission's rule of nonregulation was itself an "affirmative regulatory scheme." *Computer and Commc'ns Indus. Ass'n*, 693 F.2d at 217. It found support for this decision in precedent that "Federal regulation need not be heavy-handed in order to preempt state regulation." *N.Y. State Comm'n on Cable Television v. FCC*, 669 F.2d 58, 66 (2d Cir. 1982). That in turn followed prior precedent rejecting a state's argument that the FCC could only occupy the field for an interstate communications service by approving a federal tariff. *See New York Tel. Co. v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980).

Or to put it another way, the law does not put a thumb on the scale for regulation. Nonregulation of rates is just as valid a federal objective as intrusive regulation.

Indeed, the Second Circuit's holding clearly conflicts with this Court's decision in *Ray v. Atl. Richfield Co.*, which held that held that nonregulation by federal officials was preemptory if doing so "takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." 435 U.S. 151, 178 (1978) (cleaned up). Each of the FCC's orders, recounted above, made clear that no rate regulation was appropriate or approved pursuant to the policy of the Communications Act. To pretend otherwise is to deny reality.

The ancillary components of the majority's decision similarly fail scrutiny. The decision argues that the FCC's belief that it could "choose between Title I and Title II does not mean that the FCC can opt to retain its Title II preemption authority after reclassifying

broadband as a Title I service." App. 34a-35a. But no one has approached that strawman; the basis for preemption has always been and remains section 2 of the Communications Act (47 U.S.C. § 152), found in Title I (and invoked even in Title II preemption cases).

The decision proclaims that there is no federal policy of nonregulation because the "FCC did not justify its classification solely on policy grounds." App. 36a. But even the majority admits that the Commission *did* rest its 2018 decision on policy grounds, *id.* at 35a-36a, and even if only statutory interpretation were at issue, surely Congress's decision to prohibit the imposition of common-carrier regulation on information services, *see* 47 U.S.C. § 153(51), should evidence the federal policy of nonregulation.

To be clear, DPI recognizes that Congress has given states particular and reticulated roles within the federal regulatory scheme that allows states to influence interstate communications services in certain, discrete circumstances. For example, the Telecommunications Act of 1996 authorized state commissions to arbitrate disputes regarding interconnection agreements between incumbent local telephone companies and other carriers—even when such agreements governed interstate communications. 47 U.S.C. § 252. That Act also gave states authority to determine whether a telecommunications carrier seeking to participate in certain parts of the FCC's Universal Service Fund was "eligible" to do so. *Id.* § 214(e)(2).

That Congress had to carve out these limited roles for states demonstrates they would otherwise have no such authority as to interstate communication services. And in doing so, Congress did not relinquish

federal control; instead, it authorized the FCC to prescribe rules to define the scope and means by which states are allowed to exercise these authorities. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 380 (1999) (holding that the Communications Act "*explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies").

In short, allowing states to seize broad authority to regulate interstate communications services—as the Second Circuit has done—would wreak havoc on this carefully wrought congressional scheme and directly conflicts with other circuit court rulings concerning the FCC's authority under the Communications Act. After all, Congress has determined that deploying ubiquitous broadband communications networks is a national endeavor. A state-by-state patchwork of regulations would hamper the U.S.'s national goal of providing universal service for Americans.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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