No. 24-161

In the Supreme Court of the United States

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

Petitioners,

V.

LETITIA A. JAMES, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF NEW YORK,

Respondent.

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

BRIEF FOR NCTA – THE INTERNET & TELEVISION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

NCTA – The Internet & Television Association (NCTA) represents the cable industry, whose advanced broadband networks deliver high-speed internet access, cable television, and other innovative services to consumers and businesses throughout the United States, including millions of subscribers in New York. NCTA's members have invested billions of dollars to enable market-leading broadband performance and ever-expanding network coverage.

New York's "Affordable Broadband Act" would impose unprecedented and unlawful rate regulation on broadband services. By upholding the Affordable Broadband Act, the decision below turns the Communications Act upside down, replacing a nationwide light-touch regulatory framework for broadband with a state-by-state patchwork centered on onerous public utility regulation. And it will chill investment in a market that has thrived in the absence of heavy-handed regulation. NCTA's members have a direct interest in ensuring that they may continue to invest in broadband infrastructure and provide their consumers with new features and services under a uniform, light-touch federal regulatory framework.

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[1] *Amicus curiae* timely notified all parties of its intent to file this brief. No counsel for any party authored this brief in whole or in part, and no person or entity—aside from *amicus curiae*, its members, and its counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Until recently, no one—not the federal government, not any State—had ever tried to dictate by statute the price of broadband in the United States. To the contrary, broadband has flourished for decades under a "light-touch" federal regulatory framework that forbids government rate-setting and other heavy-handed mandates.

New York's unprecedented Affordable Broadband Act (ABA)—which forces broadband providers to sell broadband to certain households for $15 or $20 per month—marks a stark departure from that framework. The district court correctly enjoined the ABA on several preemption grounds, but a divided Second Circuit panel reversed. The panel acknowledged that because broadband is an "information service" subject to Title I of the Communications Act (rather than the common-carrier provisions of Title II), Pet. App. 36a, the FCC has "no authority to impose rate regulations" at the federal level, *id.* at 34a. But it reasoned that, in the absence of a federal power to prescribe broadband rates, each of the fifty States necessarily enjoys that power. *Id.* at 33a-35a.

That conclusion does not follow. The Communications Act draws a clear line between "telecommunications services" that may be treated as common carrier services (subject to rate regulation) and "information services" that may not be. It permits a provider of telecommunications services (called a "telecommunications carrier") to be treated as a common carrier "only to the extent that it is engaged in providing telecommunications services."

47 U.S.C. § 153(51). It defines a service "that provides access to the Internet" as an "information service" and an "interactive computer service." *Id.* § 230(f)(2). And it reflects Congress's determination 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." *Id.* § 230(b)(2) (emphasis added). In holding that the Communications Act forbids federal common-carrier regulation—but permits state common-carrier regulation—of broadband service, the Second Circuit's decision subverts Congress's intent to ensure a light-touch regulatory framework for broadband.

Indeed, the Second Circuit's decision undercuts a preemptive, light-touch federal regulatory framework that stretches back nearly 50 years. Even before the rise of the modern internet, the FCC distinguished "basic service"—i.e., a standard phone service—from "enhanced services" involving computer-processing functions accessed over telephone lines. *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)* (*Computer II*), 77 F.C.C.2d 384, 400-02 ¶¶ 39-43 (1980). The FCC consistently recognized that federal law forbade state regulation of interstate "enhanced services." And when Congress amended the Communications Act in 1996, it codified that distinction between "basic" and "enhanced" services in the statutory distinction between a "telecommunications service" and an "information service." That enactment carried forward and reinforced federal preemption of State broadband rate regulation that every State had respected until now.

The question presented by this case is profoundly important. Broadband is a vital part of modern life.

Service quality has steadily increased as prices have declined under the Communications Act's light-touch regulatory framework. And numerous providers have introduced low-income broadband programs that include significantly reduced rates for low-income and other qualifying households. New York is trying to fix what isn't broken, and the Second Circuit's decision lights a trail for other States to follow suit, thus destroying the regulatory conditions that have fostered broadband's success.

The petition is also timely. The Sixth Circuit recently stayed the FCC's attempt to treat broadband providers as common carriers under Title II of the Communications Act. *See In re MCP No. 185*, 2024 WL 3650468, at *3-4 (6th Cir. Aug. 1, 2024) (per curiam). If that determination holds, then the Second Circuit's decision will encourage States to dictate broadband prices and thereby contravene federal law. To be sure, New York's attempt to regulate rates is preempted regardless of whether broadband is classified as an information service under Title I or a telecommunications service under Title II: Just as the existing information-service classification for broadband precludes State rate regulation, the FCC's express rejection of rate regulation in its recent broadband reclassification order would preempt States from contravening that determination if that order were to take effect. But given the close relationship between the classification issue and the preemptive effect of the federal regulatory scheme—and the fact that the basis for preemption differs depending on broadband's classification—the most orderly approach would be for this Court either (1) to hold this petition until after the Sixth Circuit or this Court (if someone seeks and this Court grants

certiorari) first confirms the Title I classification of broadband, or (2) to grant the petition and delay briefing and argument so the Court can address this issue alongside or after resolution of challenges to the FCC's recent order.

ARGUMENT

I. THE COMMUNICATIONS ACT PREEMPTS NEW YORK'S AFFORDABLE BROADBAND ACT

The Communications Act preempts New York's Affordable Broadband Act, which conflicts with core provisions of that statute and undermines a longstanding federal regulatory approach reaching back nearly 50 years.

A. The Communications Act Bars Common-Carrier Regulation Of Broadband

1. The Communications Act of 1934 established a federal regulatory framework for all aspects of interstate wire and radio communications. Pub. L. No. 73-416, 48 Stat. 1064 (1934). Title I of that Act established the FCC, 47 U.S.C. § 151, and gave the FCC plenary authority over "all interstate and foreign communication by wire or radio … which originates and/or is received within the United States," *id.* § 152(a); *see Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986) (noting FCC's "plenary authority" over "interstate service[s]"). In contrast, "intrastate" communication services remained outside the FCC's domain. 47 U.S.C. § 152(b).

Title II of the Communications Act subjected telephone companies to "mandatory common-carrier regulation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 973-74 (2005). Under

that common-carrier framework, the FCC may, for instance, tell telecommunications carriers where to deploy infrastructure. *See, e.g.*, 47 U.S.C. § 214. Likewise, carriers must charge rates that are "just and reasonable." *Id.* § 201(b). If the FCC finds a rate to be unjust or unreasonable, it may dictate the rates to be charged. *Id.* § 205(a) (FCC is "authorized and empowered to determine and prescribe what will be the just and reasonable charge").

In 1996, as the internet was beginning to transform interstate communications, Congress amended the Communications Act, seeking to "reduce regulation in order to secure lower prices and higher quality services" and to "encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 56 (1996 Act).

The 1996 Act distinguished between two different categories of interstate communications services: information services and telecommunications services. 47 U.S.C. § 153(24), (53). An "information service" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." *Id.* § 153(24). A "telecommunications service," by contrast, is "the offering of telecommunications for a fee directly to the public," *id.* § 153(53), where "telecommunications" is the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content," *id.* § 153(50).

Under the 1996 Act, telecommunications-service providers are regulated under Title II as common carriers, while information-service providers are instead subject to Title I's light-touch regime. *See*

Brand X, 545 U.S. at 975-76. And any "service" that "provides access to the Internet" is both an "information service" and an "interactive computer service" under the Act. 47 U.S.C. § 230(f)(2). The 1996 Act also made clear that Congress sought "to preserve the vibrant and competitive free market … for the Internet and other interactive computer services, unfettered by Federal or State regulation." *Id.* § 230(b)(2); *see also id.* § 230(a)(4) (finding that the internet has "flourished … with a minimum of government regulation").

For decades—consistent with the plain language of the 1996 Act—the FCC generally treated broadband internet access service as an "information service" subject to the light-touch regulatory framework provided for under Title I. *See Brand X*, 545 U.S. at 977-79; *Mozilla Corp. v. FCC*, 940 F.3d 1, 20 (D.C. Cir. 2019).[2] Indeed, the FCC's light-touch treatment of broadband has its roots in a much older regulatory history stretching back nearly 50 years.

2. As described below, the 1996 Act's distinction between a "telecommunications service" and an "information service" finds its roots in an older set of FCC regulatory decisions that distinguished between "basic" and "enhanced" services. *See Brand X*, 545 U.S. at 975-77 (describing this history). Under that regime, interstate *enhanced* services were not subject

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[2] Although the FCC recently tried to reclassify broadband as a "telecommunications service" subject to Title II, the Sixth Circuit has stayed that reclassification order. *In re MCP No. 185*, 2024 WL 3650468, at *1 (6th Cir. Aug. 1, 2024); *see also id.* at *2 (discussing FCC's 2015 order classifying broadband as a Title II telecommunications service and FCC's 2018 order classifying broadband as a Title I information service).

to common-carrier regulation at the federal or state level, and the FCC expressly recognized that States were preempted from regulating interstate enhanced services as common-carrier services. When Congress adopted that regulatory framework in the 1996 Act, it ratified that framework's preemptive effect.

a. In the late 1970s, the FCC developed rules to regulate data-processing services accessed through telephone wires. Recognizing that "[c]ommon carrier rules designed for telephone-wire monopolies … could inhibit the development of 'data information services,'" the FCC devised a solution. *In re MCP No. 185*, 2024 WL 3650468, at *1. Under an FCC regulatory order known as *Computer II*, the FCC "distinguished between 'basic' service (like telephone service) and 'enhanced' service (computer-processing service offered over telephone lines)." *Brand X*, 545 U.S. at 976; *see Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)* (*Computer II*), 77 F.C.C.2d 384, 400-02 ¶¶ 39-43 (1980). A "basic service" was defined as "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." *Computer II*, 77 F.C.C.2d at 420 ¶ 96. By contrast, an "enhanced service" was one in which "computer processing applications [we]re used to act on the content, code, protocol, and other aspects of the subscriber's information," as well as "protocol conversion," *id.* at 420-22 ¶¶ 97, 99, which is the "ability to communicate between networks that employ different data-transmission formats," *Brand X*, 545 U.S. at 977. Enhanced services thus "involve[d] subscriber interaction with stored information," *Computer II*, 77 F.C.C.2d at 498, and

were the "precursors to modern information services like cable Internet," *Comcast Corp. v. FCC*, 600 F.3d 642, 655 (D.C. Cir. 2010).

Importantly, basic service was subject to federal common-carrier regulation; enhanced service was not. *Id.* at 976-77; *see Computer II*, 77 F.C.C.2d at 428-32 ¶¶ 114-23. The FCC determined that enhanced services should not be subject to the "rate and service provisions of Title II," *id.* at 430 ¶ 119, because that would "restrict[] this fast moving, competitive market," "disserve the interest of consumers," and contravene "the goals of the Communications Act," *id.* at 434 ¶ 129.

Two years later, an order resolving an antitrust case against AT&T similarly distinguished between regulated "telecommunications services" and unregulated "information services." *United States v. Am. Tel. & Tel. Co.* ("*AT&T*"), 552 F. Supp. 131, 228-29 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). That order incorporated the *Computer II* framework: What *Computer II* had described as "'enhanced services'" were "essentially the equivalent of the 'information services' described in the proposed decree." *Id.* at 178 n.198. In *AT&T*, telecommunications service was defined as "the offering of telecommunications," where "[t]elecommunications" was the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content." *Id.* at 229. Information service was defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information which may be conveyed via telecommunications." *Id.*

The 1996 Act brought this old soil with it. *See George v. McDonough*, 596 U.S. 740, 746 (2022). The terms "telecommunications service" and "information service" "build upon frameworks established prior to the passage of the 1996 Act"—namely, *Computer II* and *AT&T*. *Federal-State Joint Bd. on Universal Serv.*, 13 FCC Rcd. 11,501 ¶ 13 (1998). As this Court has put it, "telecommunications service" is "the analog to basic service," subject to "mandatory Title II common-carrier regulation," while "information service" is the "analog to enhanced service." *Brand X*, 545 U.S. at 977. Because "Congress passed the[se] definitions … against the background of" *Computer II*'s distinction between basic and enhanced services, "the parallel terms 'telecommunications service' and 'information service' substantially incorporated their meaning." *Id.* at 992; *see also Federal-State Joint Bd. on Universal Serv.*, 12 FCC Rcd. 8776, 9179-80 ¶ 788 (1997); *In re MCP No. 185*, 2024 WL 3650468, at *5 (Sutton, C.J., concurring). Plus, the 1996 Act takes the two terms straight from *AT&T* and defines them using virtually identical language. *Compare* 552 F. Supp. at 229, *with* 47 U.S.C. § 153(24), (50), (53).

b. That well-established precedent confirms not only the proper classification of broadband as an information service (the question pending in the Sixth Circuit), but also the *preemptive effect* of that classification. In response to petitions for clarification and further reconsideration in *Computer II*, the FCC explained that it had "preempted the states" in "determin[ing] that the provision of enhanced services is not a common carrier public utility offering and that efficient utilization and full exploitation of the interstate telecommunications network would best be achieved if these services are free from public utility-

type regulation." *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 88 F.C.C.2d 512, 541 ¶ 83 n.34 (1981). As a result, States could "not impose common carrier tariff regulation on a carrier's provision of enhanced services." *Id.*

Leading up to the 1996 Act, the FCC consistently found preemptive effect in the *Computer II* regime, holding that it "foreclose[ed] the possibility of state regulation" of enhanced services. *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 F.C.C.2d 958, 1125 ¶ 343 (1986); *see also, e.g.*, *id.* ("In the *Computer II* proceeding we preempted the states," determining that "since the provision of enhanced services is not common carriage, the efficient utilization and full exploitation of the interstate telecommunications network would best be achieved if such services are free from regulation."); *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 2 FCC Rcd. 3035, 3036 ¶ 6 (1987) ("We affirm our preemption in Computer II of state common carrier regulation of enhanced services.").

While some States attempted to avoid preemption by claiming that they could regulate purely *intrastate* enhanced services as common carriers, they did not argue—as New York does here—that they could also regulate *interstate* enhanced services. Indeed, courts ruled against States whenever their regulations impacted interstate services. *See, e.g.*, *Comput. & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198, 214-16 (D.C. Cir. 1982) (explaining that "[t]he conflicting state policy, meant to affect only intrastate use, would unavoidably affect the federal policy adversely" by

reaching interstate communications as well, and thus that "the state regulatory power must yield to the federal").

In enacting the 1996 Act, Congress adopted the FCC's regulatory framework, which sought to promote competition through deregulation. It thereby also embraced the FCC's preemption of state law. States therefore may not subject broadband providers to common-carrier regulation.

B. The Affordable Broadband Act Conflicts With The Communications Act

New York's Affordable Broadband Act treats broadband providers as common carriers by directly regulating their rates. The ABA requires all broadband providers to sell high-speed broadband to qualifying low-income households at a cost of no more than $15 or $20 per month, depending on download speeds, and strictly caps rate increases. *See* N.Y. Gen. Bus. Law § 399-zzzzz(2)-(4). Such rate regulation is the archetype of common-carrier treatment. *See MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 230-32 (1994) (describing rate regulation as "utterly central" to common carriage (citation omitted)).

The Communications Act preempts New York's attempt to treat broadband providers as common carriers.[3] New York's law is in direct conflict with "the text and structure" of the Communications Act. *Virginia Uranium, Inc. v. Warren*, 587 U.S. 761, 778 (2019) (opinion of Gorsuch, J.) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)); *cf.*

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[3] NCTA agrees with Petitioners that the ABA is preempted for multiple reasons. *See* Pet. 13-21. NCTA here focuses on conflict preemption.

United States v. Locke, 529 U.S. 89, 109 (2000) (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 100-01 (1989)) (finding preemption where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress"). Indeed, that is so *regardless* of whether broadband is classified as an information service under Title I or a telecommunications service under Title II.[4]

1. The Communications Act preempts the ABA because broadband is an information service subject to Title I's light-touch regime. The 1996 Act explicitly provides that the FCC may "treat[]" a telecommunications carrier "as a common carrier under this chapter *only to the extent that* it is engaged in providing telecommunications services." 47 U.S.C. § 153(51) (emphasis added). Thus, insofar as an entity is providing an information service, the Communications Act does not permit treating that provider as a common carrier.

The 1996 Act expressly found that the internet and other interactive computer services have flourished "with a minimum of government regulation," and it codified Congress's direction 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." *Id.* § 230(a)(4), (b)(2) (emphasis added). The 1996 Act also defined "interactive computer service" as "any *information service* … that

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[4] Of course, because the basis for preemption is different depending on whether broadband is classified under Title I or Title II, *see infra* at 13-17, it makes sense to determine the proper classification before conducting the preemption analysis.

provides access to the Internet," *id.* § 230(f)(2) (emphasis added)—thereby confirming that such services were not to be subject to common-carrier regulation. As the FCC has previously recognized, this "light-touch framework" has fostered "rapid and unprecedented growth." *Restoring Internet Freedom*, 33 FCC Rcd. 311, 312 ¶ 1 (2018) (*2018 Order*). And, as described above, the 1996 Act adopted and ratified the FCC's preexisting distinction between basic services (subject to the FCC's Title II common-carriage regulatory regime) and enhanced services (subject to neither Title II nor any state common-carrier regulations). *Supra* at 7-10; *see also In re MCP No. 185*, 2024 WL 3650468, at *5-6 (Sutton, C.J., concurring). By codifying that framework, Congress precluded the imposition of *any* common-carrier regulation (federal or state) on an "information service" like broadband.

The conflict, then, is plain. Whereas the 1996 Act sought an unfettered market for information services like broadband—shielding such services from federal or State common-carrier regulation—New York's law shackles broadband providers to common-carrier regulation of the kind that Congress pointedly sought to avoid. And the Communications Act allows the FCC to treat a provider as a common carrier "under this chapter only to the extent that" it provides telecommunications services—not information services. 47 U.S.C. § 153(51).[5] The ABA thus

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[5] The Ninth Circuit in *ACA Connects v. Bonta*, concluded that "under this chapter" meant that only federal common-carrier regulation was prohibited and therefore allowed state common-carrier regulation to proceed without restriction. 24 F.4th 1233, 1245 (9th Cir. 2022) (emphasis and citation omitted).

conflicts with "the text and structure" of the Communications Act. *Virginia Uranium*, 587 U.S. at 778 (opinion of Gorsuch, J.) (citation omitted).

The Second Circuit thought otherwise, reasoning that because "Title I grants the FCC no authority to impose rate regulations," the "FCC has no power to preempt broadband rate regulation." Pet. App. 34a. In short, the majority thought that if Congress gave the FCC no authority to regulate broadband rates, then the States had full authority to do so.

That reasoning is wrong. The majority made a category mistake when it repeatedly referred to the "FCC" as having the "power to preempt." *Id.* at 34a, 38a. Here, it is not the FCC that preempts New York's law through its regulatory action; it is Congress through the Communications Act. *See, e.g.*, *Locke*, 529 U.S. at 116 (asking whether state law is "pre-empted by these titles or under any other federal law"); *Kansas v. Garcia*, 589 U.S. 191, 202 (2020) (noting that "federal restrictions or rights that are said to conflict with state law must stem from either the Constitution itself or a valid statute enacted by Congress"). The fundamental issue is that New York's attempt at rate regulation conflicts with the Communications Act itself. Regardless of what the FCC decides to do (or not do), that statute is clear, and the States cannot subvert congressional intent by treating broadband providers as rate-regulated common carriers.

But that conclusion makes no sense under the text of the 1996 Act and the regulatory history. *Supra* at 5-12. Instead, "under this chapter" simply means that *the Communications Act* (not state law) defines the scope of common-carrier regulation. Otherwise, States could get around preemption merely by creatively redefining what it means to be a common carrier.

In fact, this Court has already rejected the Second Circuit's reasoning in the common-carrier context. When interpreting the 1938 Natural Gas Act, the Court found that Congress's decision "to give market forces a more significant role" when amending a "comprehensive federal regulatory scheme" did not thereby "give the States the power it had denied FERC." *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd. of Miss.*, 474 U.S. 409, 422 (1986). Instead, Congress's decision to let market forces "determine[e]" the relevant "price[s]" naturally entails the conclusion that "States … may not regulate" prices either. *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 507 n.8 (1989); *see also Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) ("[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate."). So too here—especially in light of the parallel statutory language. *Compare* 47 U.S.C. § 152, *with* 15 U.S.C. § 717(b)-(c) (statutes "shall apply" to "[i]nterstate" but not "intrastate" activity).

2. Although NCTA submits that broadband may not be permissibly treated as a Title II telecommunications service, it would be just as clear under such a classification that the Communications Act preempts New York's law—even under the Second Circuit's reasoning. Thus, if the FCC's recent attempt to reclassify broadband as a Title II telecommunications service were allowed to stand, the ABA would remain preempted.

Title II imposes common-carrier regulations, including the ability to regulate rates. *Supra* at 5-6;

47 U.S.C. §§ 201(b), 205. But the FCC may decline to enforce any common-carrier regulations if it believes that forbearance is in the public interest. 47 U.S.C. § 160(a). And if the FCC has decided to forbear from enforcing a provision, a "State commission may not continue to apply or enforce" that provision. *Id.* § 160(e). Thus, the Second Circuit majority had "little doubt" that the FCC's exercise of statutory forbearance authority has preemptive effect. Pet. App. 33a-34a.

The FCC has since done just that in the order that the Sixth Circuit stayed. First, the FCC classified broadband as a Title II telecommunications service, with attendant common-carrier regulation. *See* Order ¶¶ 2, 188-89, *Safeguarding and Securing the Open Internet*, WC Docket Nos. 23-230 & 17-108, FCC 24-52 (rel. May 7, 2024), https://docs.fcc.gov/public/attachments/FCC-24-52A1.pdf (*2024 Order*). Second, the FCC found that it was "in the public interest to forbear from applying" the rate-regulation provisions of Title II. *Id.* ¶¶ 386-89; *see also id.* ¶ 639 ("conclud[ing]" that "costs of applying provisions to impose *ex ante* or *ex post* rate regulation … would exceed the benefits"). By the Second Circuit's own lights, the FCC's forbearance decision preempts the ABA.[6]

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[6] The FCC's suggestion that "states may have a role to play in promoting broadband affordability," *2024 Order* ¶ 386 n.1578, *see also id.* ¶ 275, cannot override the decision by Congress that common-carrier regulation is prohibited. While the FCC did not provide any explanation or basis for this affordability role, the ABA plainly exceeds the Communications Act's limits on state authority because it establishes mandatory prices for service, which is a quintessential exercise of common-carrier regulation.

* * *

The Second Circuit majority held that Congress gave to the States what it simultaneously took from the FCC. That conclusion makes a hash of the Communications Act. And that error warrants this Court's review.

II. THE QUESTION PRESENTED IS PROFOUNDLY IMPORTANT AND TIMELY

A. New York's Rate Regulation Of Broadband Sets A Dangerous Precedent

Broadband services "are absolutely essential to modern day life, facilitating employment, education, healthcare, commerce, community-building, communication, and free expression." *2024 Order*, ¶ 26; *see also, e.g.*, *In re MCP No. 185*, 2024 WL 3650468, at *3. The COVID-19 pandemic underscored that "without a broadband connection, consumers could not fully participate in society." *2024 Order* ¶ 1. No wonder the Sixth Circuit concluded that treating broadband providers as common carriers raises a "major question" of "'vast "economic and political significance."'" *In re MCP No. 185*, 2024 WL 3650468, at *3 (citation omitted). Yet even when the FCC has claimed the power to subject broadband providers to common-carrier regulation, it has nevertheless used its statutory forbearance authority to prevent rate regulation. *2024 Order* ¶¶ 386-89; *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, 5604-05, 5612 ¶¶ 5, 37 (2015) (*2015 Order*).

In 2015, when the FCC first classified broadband as a Title II service, it repeatedly and forcefully emphasized that it would not undertake "rate

regulation." *2015 Order* 5604-05, 5612, 5775 ¶¶ 5, 37, 382. Indeed, the FCC "d[id] not and c[ould not] envision adopting new *ex ante* rate regulation of broadband Internet access service in the future." *Id.* at 5814 ¶ 451. And so it found that forbearance from rate regulation was in the public interest. *Id.* The FCC's recent reclassification order hit the same notes, concluding that "the costs" of "*ex ante* or *ex post* rate regulation" would "exceed the benefits." *2024 Order* ¶¶ 646, 689. Again, the FCC decided to forebear from rate regulation under Title II, and it reprised the FCC's 2015 conclusion that "we do not and cannot envision adopting new *ex ante* rate regulation." *Id.* ¶ 386 (quoting *2015 Order* 5814 ¶ 451). And, again, the FCC found that forbearance is "in the public interest." *Id.*

In short, the FCC has *never* thought that compelling broadband providers to charge certain rates could be reconciled with the public interest. *Cf.* Former FCC Commissioners Jonathan Adelstein, Mignon Clyburn, Michael O'Rielly, and Ajit Pai *Amici Curiae* Br. 19, *N.Y. State Telecomms. Ass'n v. James*, 101 F.4th 135 (2d Cir. 2024) (No. 21-1975), 2022 WL 671756 (former FCC Chairman and Commissioners noting, on a bipartisan basis, that New York's law "would fundamentally alter longstanding law and practice when it comes to rate regulation" and undermine a "bedrock principle that has long governed communications regulation in the United States"). And it is not. Rate regulation is incredibly intrusive, and investment in broadband infrastructure in the United States has flourished precisely because the service has not been regulated like a public utility. Even the mere threat of rate regulation places "investments in broadband

infrastructure at risk" and has previously resulted in "lost market capitalization." *2018 Order* 369-70 ¶ 101. That threat hangs "particularly heavily on the heads of small" providers with more limited resources—thus causing "particularly deleterious effects" for the "often rural and/or lower-income" communities that such providers serve. *Id.* at 372-73 ¶¶ 103-05. The specter of rate regulation therefore "distorts" the business choices of broadband providers and "delay[s]" the rollout of "new features or services" for consumers. *Id.* at 368-69 ¶¶ 99-100.

By contrast, the 1996 Act's "'light-touch' regulatory framework" has facilitated "tremendous investment and innovation on the Internet." *2015 Order* 5603-04 ¶ 5; *see also 2018 Order* 312 ¶ 1 (noting that "a free and open Internet underwent rapid and unprecedented growth" under a "light-touch framework"). Under that framework, prices continue to fall while speeds continue to rise dramatically. From 2005 to 2015, "broadband speeds increased 3,200 percent"—while from 1996 to 2012, "prices per [megabit per second] fell by more than 87 percent." *2018 Order* 363 ¶ 86. Those trends have continued to this day: From 2015 to 2023, download speeds more than doubled, while prices dropped by about 38% *without adjusting for inflation*; and they dropped by 55% on an inflation-adjusted basis. USTelecom, *2023 Broadband Pricing Index* 3 (Oct. 11, 2023), https://www.ustelecom.org/wp-content/uploads/2023/10/USTelecom-2023-BPI-Report-final.pdf (relying on FCC and Bureau of Labor Statistics data). And such price reductions occurred even as the cost of other consumer goods and services rose by almost 28% during the same period. *Id.* at 4. In total, the price per megabit went from $28.13 in 2000 to $0.64 in

2020—a 98% decrease. NCTA, *Industry Data: Closing the Digital Divide*, https://www.ncta.com/industry-data/investment-in-infrastructure?field_industry_data_categories_target_id[84]=84 (last visited Sept. 10, 2024).

The broadband industry has also gone to great lengths to ensure affordability through low-income broadband programs. Over the last 10 years, more than 14 million consumers have connected to the internet via providers' low-cost broadband programs. *Id.* (Closing the Digital Divide). For example, Comcast and Cox both provide qualifying low-income households with high-speed broadband at reduced rates through programs like Xfinity "Internet Essentials" and "Cox Connect2Compete."[7]

Contrast this approach with that of Europe, which has "long applied centralized, utility-style controls to their continent's Internet infrastructure." *2024 Order* at 493 (Dissenting Statement of Commissioner Carr). U.S. broadband networks are faster than the broadband networks of every single country in Europe; U.S. broadband markets are more competitive than those in Europe; and U.S. broadband providers bridge the digital divide more effectively than do European carriers. *Id.* All of that is the result of a three times greater investment per household in broadband infrastructure. *Id.*

Heedless of the myriad benefits of light-touch regulation, New York has chosen a heavy-handed

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[7] *See* Xfinity, *Internet Essentials*, https://www.xfinity.com/learn/internet-service/internet-essentials (last visited Sept. 10, 2024); Cox, *Cox Connect2Compete*, https://www.cox.com/residential/internet/connect2compete.html (last visited Sept. 10, 2024).

approach. If the Second Circuit's decision is allowed to stand, and if the Title I information service classification for broadband remains in effect (as the Sixth Circuit has made clear is likely), other States are likely to follow where New York has led. Congress recently declined to continue funding the Affordable Connectivity Program, a subsidy program through which low-income consumers could receive up to $30 per month for broadband. *See* FCC, *Affordable Connectivity Program*, https://www.fcc.gov/acp (last visited Sept. 10, 2024). Absent this Court's review, state rate regulation is likely to grow, burdening broadband providers, deterring investment, and harming consumers.

B. Pending Litigation Over The FCC's Reclassification Of Broadband Makes The Petition Particularly Timely

Besides being important, the question presented here is also particularly timely. Just a few weeks ago, the Sixth Circuit stayed the FCC's *2024 Order* that reclassified broadband as a Title II telecommunications service. *In re MCP No. 185*, 2024 WL 3650468, at *1. The Sixth Circuit concluded that the FCC's order "implicates a major question, and the [FCC] has failed to satisfy the high bar for imposing such regulations." *Id.* at *3; *see also id.* at *5 (Sutton, C.J., concurring) (concluding that the "best reading of the statute … shows that Congress likely did not view broadband providers as common carriers under Title II of the Communications Act"). Because the petitioners challenging the *2024 Order* had "shown that they are likely to succeed on the merits and that the equities support[ed] them," the Sixth Circuit panel unanimously stayed the order. *Id.* at *1. That

decision means that broadband currently remains free from *federal* common-carrier regulation—and that, if the merits panel reaches the same conclusion, broadband will likely stay that way.

But if that result holds, then under the Second Circuit's reasoning, any *State* can impose onerous rate regulation on broadband providers precisely because Congress withheld that authority from the FCC. That result nullifies Congress's decision to take a light-touch approach in the Communications Act. To be sure, the Communications Act preempts States from dictating the price of broadband regardless of what the Sixth Circuit decides. *Supra* at 12-18. But the Sixth Circuit's pending determination regarding the proper classification of broadband clearly bears on the significance of the question presented here. And because the Sixth Circuit will consider that question on an expedited schedule, *see In re MCP No. 185*, 2024 WL 3650468, at *5, that question may be resolved sooner rather than later.

Ultimately, this Court should hold that the Communications Act preempts States from regulating broadband rates after the Title I classification of broadband is confirmed. The Court can achieve that ordering either by holding this petition until the Sixth Circuit's ruling becomes final, or by granting this petition and then delaying briefing or argument here so that this case can be resolved alongside or following the completion of any challenges to the FCC's *2024 Order*.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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