No. 24-161

IN THE
Supreme Court of the United States

NEW YORK STATE TELECOMMUNICATIONS ASSOCIATION, INC., et al.,
Petitioners,

v.

LETITIA 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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

An order by the Federal Communications Commission (FCC) issued in 2018 classified broadband internet as an information service subject to Title I of the Communications Act—a statutory framework under which Congress gave the FCC only limited regulatory authority and thus left ample room for States to regulate. The 2018 Order has now been superseded by a new FCC order that classifies broadband as a telecommunications service subject to Title II of the Communications Act—a statutory framework under which Congress gave the FCC broader regulatory authority. The new FCC order is temporarily stayed as a result of separate litigation not at issue here. The question presented is:

Whether New York's Affordable Broadband Act, a consumer-protection regulation that helps low-income state residents obtain broadband access, is impliedly preempted by the Federal Communications Act when broadband is classified as a Title I information service, as it was under the now-superseded 2018 FCC order.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Laws

Laws **Page(s)**

Federal Communications Commission Sources

Miscellaneous Authority

INTRODUCTION

New York enacted the Affordable Broadband Act (ABA) to help low-income state residents access broadband internet service. The ABA requires broadband providers to offer a basic broadband product to qualifying low-income state residents at specified maximum prices, while allowing smaller providers to seek an exemption from the statute's requirements.

At the time of the ABA's enactment, the Federal Communications Commission (FCC) had classified broadband as an information service subject to Title I of the Communications Act. Under Title I, Congress gave the FCC only limited regulatory authority—leaving substantial room for States to regulate information services.

Petitioners are associations of broadband providers. They filed this litigation claiming that the ABA was impliedly preempted by federal law when broadband was classified as a Title I information service. The U.S. District Court for the Eastern District of New York concluded that the ABA was impliedly preempted. The U.S. Court of Appeals for the Second Circuit reversed, concluding that federal law did not preempt the ABA.

Certiorari should be denied for any one of four independent reasons. *First*, this case is a poor vehicle for addressing the question presented because the governing federal statutory framework is in flux. Shortly after the decision below, the FCC issued a new order classifying broadband as a telecommunications service subject to Title II of the Act—a statutory framework that is very different from Title I and that drastically alters any preemption analysis regarding the ABA. Although enforcement of the new FCC order is temporarily stayed pending resolution of unrelated

litigation in the Sixth Circuit, petitioners have recognized that there will be no reason for them to pursue the current litigation further if the new rule takes effect and that they will instead file an entirely new litigation.

Second, the decision below does not conflict with any decision of another court of appeals (or any other court). To the contrary, two other courts of appeals agree with the Second Circuit that federal law does not broadly preempt state regulations of Title I information services.

Third, the decision below does not implicate important matters of nationwide concern. As an initial matter, the ABA is not, as petitioners incorrectly suggest, "public-utility-style" regulation of rates charged to all broadband users, but rather a consumer-protection regulation to ensure that affordable broadband access is available to the neediest state residents. Moreover, the ABA will not have the economic effects that petitioners speculate about even for broadband providers in New York, let alone in other States. The three largest broadband providers in New York are already offering an affordable broadband product to low-income consumers irrespective of the ABA, and many smaller broadband providers can seek an exemption from the ABA's requirements.

Fourth, the decision below is correct. Congress has expressed no intent—much less the requisite clear and manifest intent—to preempt state regulation of Title I information services. Petitioners' field preemption claim fails because, far from imposing a pervasive federal regulatory regime on Title I information services, Congress instead gave the FCC only limited authority over information services. Congress thus left the States' traditional police powers over information services

largely untouched. Petitioners expressly abandoned in the court of appeals the conflict preemption argument they raise here, which is meritless in any event.

STATEMENT

A. Legal Background

1. Congress has declined to enact any uniform or comprehensive federal statutory regime to govern all interstate communications services—an umbrella term that includes many distinct types of services, including wireline telephone, mobile telephone, radio, cable television, and broadband internet services. Instead, through the Communications Act of 1934 and its subsequent amendments (including the Telecommunications Act of 1996), Congress regulated different types of interstate communications services differently. (Pet. App. 3a.) *See generally* Communications Act of 1934, ch. 652, 48 Stat. 1064; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

In using this targeted approach, Congress well understood that, absent clear and manifest federal law to the contrary, *see Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), States have broad sovereign powers to protect consumers in their respective jurisdictions—including by regulating the prices charged for goods or services, *see, e.g.*, *Nebbia v. New York*, 291 U.S. 502, 537 (1934). Congress thus made clear when, and to what extent, it intended to preempt States from regulating a particular type of interstate communications service. And for each type of interstate communications service, Congress made specific choices about the scope and limits of the FCC's authority to regulate that service—including by regulating rates.

For example, as most relevant here, Congress gave the FCC only limited, ancillary authority over interstate communications services that are classified as an "information service" subject to Title I of the Act. *See* 47 U.S.C. § 153(24) (defining "information service"); *id.* § 154(i) (FCC may issue regulations consistent with Title I "as may be necessary in the execution of its functions"). *See generally FCC v. Midwest Video Corp.*, 440 U.S. 689, 696-907 (1979) (summarizing ancillary authority precedents). The FCC's ancillary authority is constrained by two requirements. First, a regulation of a Title I service must be within the agency's general jurisdiction, i.e., it must concern *interstate* rather than intrastate information services. *See* 47 U.S.C. § 152; *see also United States v. Southwest Cable Co.*, 392 U.S. 157, 167 (1968). Second, a regulation of a Title I service must be "reasonably ancillary to the effective performance of the Commission's various responsibilities," *Southwest Cable*, 392 U.S. at 178, i.e., it must be reasonably in furtherance of the FCC's specific responsibilities under other titles of the Act, *see Midwest Video*, 440 U.S. at 706-07; *Comcast Corp. v. FCC*, 600 F.3d 642, 652-53 (D.C. Cir. 2010).

Unlike other titles of the Act (see *infra* at 5), Title I does not contain any provision authorizing the FCC to regulate rates. Nor does Title I contain any provision preempting States from regulating the rates charged for interstate information services. Accordingly, when cable television was classified as an information service subject to Title I, States routinely regulated that interstate communications service—including by regulating rates. *See, e.g.*, *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459, 463

(D. Nev. 1968) (three-judge court), *aff'd* 396 U.S. 556 (1970) (per curiam).[1]

In contrast to the FCC's limited authority over information services, Congress gave the FCC substantial authority to regulate interstate communications services that are classified as a "telecommunications service" subject to Title II of the Act. *See* 47 U.S.C. § 153(53) (defining "telecommunications service"). Telecommunications services are potentially subject to an array of statutory duties and constraints applicable to common carriers. For instance, Title II generally bars a common carrier from levying unreasonable charges. *See* 47 U.S.C. § 201(b). Congress expressly authorized the FCC to forbear from applying many of these Title II requirements to a telecommunications service if certain prerequisites are satisfied. *Id.* § 160(a)(1). If the FCC exercises its forbearance authority to decline to impose a specific Title II requirement, then a State generally may not continue to apply that federal statutory requirement. *Id.* § 160(e). And where the FCC exercises its broad Title II authority, its regulations may also preempt state laws, though such preemption is by no means automatic and must be determined based on both the specific federal regulation and state law at issue. *See, e.g.*, Declaratory Ruling & Order at 170-175, *In re Safeguarding and Securing the Open Internet*, FCC Docket No. 24-52 (released May 7, 2024) ("2024 Order") (declining to preempt state regulation when reclassifying broadband as Title II telecommunications service).

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[1] *See also* Philip R. Hochberg, *The States Regulate Cable: A Legislative Analysis of Substantive Provisions* 29-30, 91-96 (1978). For authorities available on the internet, URLs appear in the Table of Authorities.)

Still other titles of the Act establish different regimes for other types of interstate communications services—different from both information services, governed by Title I, and telecommunications services, governed by Title II. For instance, cable television is now governed by Title VI, which authorizes the FCC to determine certain rates. 47 U.S.C. §§ 532(c), 543(a). And mobile service is governed by Title III, which expressly preempts States from regulating rates, with certain exceptions, s*ee id.* § 332(c)(3)(A)(i)-(ii), but does not preempt States "from regulating the other terms and conditions of commercial mobile services," *id.* § 332(c)(3)(A).

2. This case concerns a New York consumer-protection statute, commonly referred to as the Affordable Broadband Act (ABA), that the Legislature enacted in 2021, to help provide low-income consumers with access to broadband services. *See* N.Y. General Business Law § 399-zzzzz(3) (see Pet. App. 107a-111a).

Today, most users connect to the internet through a broadband provider that delivers high-speed internet access. *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 690 (D.C. Cir. 2016). Broadband plays an important role in "how we educate children, deliver health care, manage energy, ensure public safety, engage government, and access, organize and disseminate knowledge."[2] After the COVID-19 pandemic, many people continue to need high-speed internet to work and study remotely. Congress has declared it a national priority "to ensure that all people of the United States have access to broadband capability" and to develop a

[2] FCC, *Connecting America: The National Broadband Plan* xi (2010).

"strategy for achieving affordability of such service." 47 U.S.C. § 1305(k)(2)(B).

Although Congress has not expressly delineated which existing federal statutory framework applies to broadband, it has expressly recognized that States retain regulatory authority over broadband, including to set price caps on rates. Congress provided that both the FCC and each State's commission with regulatory jurisdiction over broadband "shall encourage the deployment on a reasonable and timely basis" of broadband capability to "all Americans" by utilizing, "in a manner consistent with the public interest, convenience, and necessity, *price cap regulation*, regulatory forbearance," and other measures that remove barriers to infrastructure investment. *Id.* § 1302(a) (emphasis added).

The FCC has repeatedly changed the classification of broadband internet service, sometimes classifying it as an information service subject to Title I and sometimes classifying it as a telecommunications service subject to Title II. *See Mozilla Corp. v. FCC*, 940 F.3d 1, 17-18 (D.C. Cir. 2019) (summarizing history). Although the applicable classification determines which federal statutory framework governs broadband, this case does not concern the validity of any FCC classification decision or the scope of the FCC's statutory authority to make such decisions. *Cf. National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

At the time that New York enacted the ABA, the FCC had classified broadband as a Title I information service. *See In re Restoring Internet Freedom*, 33 FCC Rcd. 311, 312 (2018) ("2018 Order"). In the 2018 Order, the FCC also purported to preempt all state or local economic and other regulation of broadband providers. *Id.* at 426-28. After the 2018 Order was challenged in

litigation, the D.C. Circuit upheld the FCC's classification of broadband as a Title I information service. *Mozilla*, 940 F.3d at 23-24. But the court rejected the FCC's attempt to preempt state regulation of broadband providers. The court found no express statutory authority in Title I (or elsewhere) for such preemption. *Id.* at 74. And the D.C. Circuit concluded that the FCC's decision to classify broadband as an information service had the consequence of placing broadband under the Title I regime, in which both the FCC's regulatory and preemptive authority is severely constrained. *Id.* at 75.

New York subsequently enacted the ABA to "expand the reach of broadband service in the State," by facilitating low-income consumers' access. (CA2 J.A. 100 (Assembly sponsor's memorandum), ECF No. 33.) Legislative memoranda explained that internet access had "become an essential service" without which "no one can successfully participate in 21st Century life." (J.A. 100.) Yet the average cost of a basic high-speed internet plan in the State—more than $50 per month—was "unaffordable to too many people." (J.A. 100.)

The ABA requires broadband service providers in New York to offer a basic high-speed broadband service at or below statutorily established price caps to low-income consumers who qualify for specified governmental benefits.[3] General Business Law § 399-zzzzz(2). A provider may comply with the statute by charging no more than $15 per month for broadband service of 25

[3] Among the qualifying consumers are those whose households are eligible for reduced-price school lunch or supplemental nutrition assistance benefits; who are Medicaid-eligible; who receive rent-increase exemptions based on disability or senior-citizen status; and who receive discounted electric or gas service. *See* General Business Law § 399-zzzzz(2).

megabits per second, or no more than $20 per month for broadband service of 200 megabits per second. *Id.* § 399-zzzzz(2)-(4). Certain price increases are allowable every few years. *Id.*

New York's Public Service Commission (PSC) may exempt certain small broadband providers, i.e., those "providing service to no more than twenty thousand households," from the ABA's requirements, if the PSC determines that compliance would result in "unreasonable or unsustainable financial impact" on the provider. *Id.* § 399-zzzzz(5). The PSC also may grant exceptions to the speed thresholds where "such download speed is not reasonably practicable." *Id.* § 399-zzzzz(2). In May 2021, the PSC provisionally exempted dozens of providers from ABA compliance while the PSC evaluated the providers' full exemption requests.[4] (J.A. 105-113.) The recipients of these provisional exemptions include all the providers that serve no more than twenty thousand households and that submitted declarations in this litigation alleging that the ABA's implementation would cause them irreparable harm, namely, Empire Telephone Corporation, Heart of the Catskills Communications, Delhi Telephone Company, and Champlain Telephone Company.[5] (*See* J.A. 12-16, 27-38, 43-54, 112.)

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[4] The PSC has not completed its evaluation of providers' final exemption requests because enforcement of the ABA has been stayed by either the district court's orders here or the State's agreement not to enforce the ABA pending a decision on whether to grant this petition for a writ of certiorari (see *infra* at 16).

[5] These providers all submitted declarations in support of petitioners' motion for a preliminary injunction, and three of them submitted similar declarations in support of petitioners' application for an emergency stay pending resolution of their petition in this

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The PSC and other state agencies have also taken other actions to support broadband affordability. For instance, before the ABA's enactment, two of the three largest broadband providers in New York—Charter Communications Inc. and Altice USA Inc.—each agreed as part of separate merger transactions approved by the PSC, to provide broadband to low-income consumers at prices consistent with the prices later codified in the ABA. (Galasso Decl. ¶¶ 5, 18, 20.[6]) And Charter and Altice recently agreed to offer such pricing for at least the next four years. (Galasso Decl. ¶¶ 18, 20.) The PSC also has encouraged other voluntary efforts to expand broadband access for low-income consumers, like Verizon's voluntary program offering broadband to many low-income consumers at prices consistent with the ABA (J.A. 19; Galasso Decl. ¶ 16).

B. Procedural Background

Several associations of companies that provide broadband access in New York challenged the ABA by filing this lawsuit in the U.S. District Court for the Eastern District of New York against the New York State Attorney General in her official capacity. (J.A. 80-98.) The lawsuit sought a declaration that federal law preempted the ABA and sought both preliminary and permanent injunctive relief. (J.A. 95-97.)

The district court (Hurley, J.) preliminarily enjoined enforcement of the ABA. (Pet. App. 62a-94a.) Agreeing

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Court. *See* Appl. for an Emergency Stay of the J., No. 24A138 ("Stay Appl."), Exs. 10, 11, 12.

[6] The declaration of Valery Galasso, Chief of Public Policy in the PSC's Office of Telecommunications, is attached as an exhibit to respondent's opposition to petitioners' stay application, No. 24A138.

with the providers' sweeping field preemption argument, the court concluded that the Act preempted States from regulating broadband providers because they offered a type of interstate communications service. (Pet. App. 83a-91a.) In the alternative, the court also agreed with the providers' conflict preemption argument, which posited that the FCC's 2018 Order preempted the ABA. (Pet. App. 74a-83a.) The court declined to rule on the providers' separate conflict preemption argument, which relied on the Act's definition of "telecommunications carrier." *See* Mem. in Supp. of Pls.' Mot. for Prelim. Inj. 11-14, No. 2:21-cv-2389 (E.D.N.Y. May 6, 2021), ECF No. 16 (relying on 47 U.S.C. § 153(51)).

At the request of both parties, the court then so-ordered and entered a stipulated final judgment that expressly incorporated the reasoning in its preliminary injunction order and, on those grounds, declared the ABA federally preempted and permanently enjoined its enforcement. The judgment explicitly preserved the State's right to appeal. (Pet. App. 95a-97a.)

The State timely appealed, and the Second Circuit reversed. (Pet. App. 1a-38a.) Judge Sullivan dissented. (Pet. App. 39a-61a.) As an initial matter, the court concluded that the parties' stipulation to a final judgment ordered by the district court, which ended the litigation and preserved the State's appellate rights, constituted a final judgment subject to appellate review. (Pet. App. 8a-16a.) Petitioners do not challenge that determination in their petition. Pet. 9 n.6.

Turning to the merits, the Second Circuit emphasized that States' police power may not be superseded by federal law unless preemption is Congress's "clear and manifest purpose." (Pet. App. 19a (quotation

marks omitted); *see* Pet. App. 19a-21a.) The court found no field preemption because neither the text nor structure of the Act evinced any such clear and manifest congressional purpose to prevent States from regulating either interstate communications services (as the district court had ruled) or the prices charged for Title I information services (as petitioners had argued in the Second Circuit). (Pet. App. 21a-31a.) To the contrary, the court explained, the Act's text, structure, and history each demonstrated that Congress intended for States "to retain their regulatory authority over many interstate communications services—and to play a role in regulating the rates charged for such services—unless it said otherwise."[7] (Pet. App. 29a; *see* Pet. App. 19a-31a.)

The court also determined that the FCC's 2018 Order did not trigger conflict preemption. The court explained that by classifying broadband as a Title I information service, the FCC had chosen the statutory framework under which it lacked authority to regulate rates or preempt regulations like the ABA. (Pet. App. 31a-38a.)

The Second Circuit did not consider the separate conflict preemption argument, based on the statutory definition of "telecommunications provider," because petitioners explicitly abandoned that argument at the circuit. *See* Br. for Pls.-Appellees 15 n.26, No. 21-1975 (CA2 Feb. 23, 2022), ECF No. 118.

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[7] Petitioners misconstrue the Second Circuit's decision in contending (Pet. 9, 14) that it ruled that Title II but not Title I has field preemptive effects. The court did not make any such ruling, instead pointing to Title II, among many other statutory provisions, as reasons why there was *no* field preemption. (Pet. App. 27a-29a.)

C. Subsequent Events

Shortly after the Second Circuit's ruling, the FCC issued a new order that, inter alia, classifies broadband as a Title II telecommunications service rather than a Title I information service, and establishes conduct-based rules to support an open internet (commonly known as "net neutrality"). *See* 2024 Order. Several broadband providers and associations of those providers—including petitioners here—petitioned for judicial review of the 2024 Order in various circuit courts of appeals. Those petitions were consolidated in the U.S. Court of Appeals for the Sixth Circuit, where they remain pending.

In August 2024, a motions panel of the Sixth Circuit temporarily stayed implementation of the 2024 Order while the petitions are pending; ordered that a new panel hear the petitions on the merits; and set the petitions for oral argument on October 31, 2024. *See In re MCP No. 185*, No. 24-7000, 2024 WL 3650468 (6th Cir. Aug. 1, 2024) (per curiam); *see also* Notice of Oral Argument (Aug. 26, 2024), *In re MCP No. 185*, No. 24-7000, ECF No. 124.

REASONS FOR DENYING THE PETITION

A. This Case Is a Poor Vehicle for Addressing the Question Presented.

1. The Court should deny certiorari because the federal framework (Title I or Title II) applicable to broadband is in flux, rendering this case an exceedingly poor vehicle to review the question presented here, i.e., whether Congress preempted state regulation of broadband when it is classified as a Title I information service.

Shortly after the Second Circuit issued its decision, the FCC finalized the 2024 Order classifying broadband as a Title II telecommunications service rather than a Title I information service. That shift drastically alters the preemption analysis relevant to the ABA. The Second Circuit's decision here is based on an analysis of the federal law applicable to Title I information services, because broadband was at the time of the decision below classified as such a service. But now that the FCC has reclassified broadband as a Title II telecommunications service, the relevant federal law is quite different; Congress made very different choices about the scope of the FCC's regulatory authority and the potential for preemption of state laws governing Title II telecommunications services. Indeed, petitioners have made clear that they intend to file an entirely new litigation raising new claims that the ABA is preempted under the 2024 Order as soon as that Order takes effect.[8] (*See* Stay

[8] Petitioners have indicated that they contend the ABA is preempted under the 2024 Order (*see* Stay Appl. Ex. 5 (Dist. Ct. Stip.) at 3), even though the FCC expressly declined in the 2024 Order to preempt state broadband affordability programs like the ABA and found "that states have a critical role to play in promoting broadband affordability and ensuring connectivity for low-income

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Appl. Ex. 5 (Dist. Ct. Stip.) at 3, No. 24A138 (U.S. Aug. 2, 2024).)

Although petitioners suggest that the Sixth Circuit's temporary stay of the 2024 Order means that the Sixth Circuit will likely overturn the Order, the temporary stay is not a decision on the merits and depended heavily on equitable considerations. *See In re MCP No. 185*, 2024 WL 3650468, at *4. Though the stay panel concluded that the challengers are likely to succeed on the merits, that panel will not decide the merits appeal and its view on the merits may thus have little effect on the ultimate ruling of the merits panel. *See id.* at *5.

There is no basis for petitioners' request (Pet. 23) for this Court to hold their petition (or grant it and delay briefing and argument) pending this Court's adjudication of a hypothetical petition seeking certiorari review of the Sixth Circuit's future merits decision—whichever way that decision comes out. The underlying legal issues in the Sixth Circuit case are entirely distinct from the legal issues in the current case. The Sixth Circuit case concerns whether Congress gave the FCC statutory authority to classify broadband as a Title II telecommunications service subject to the federal agency's broad Title II regulatory powers. *In re MCP No. 185*, 2024 WL 3650468, at *2-3. But the Second Circuit's decision here does not address that question. Moreover, the Sixth Circuit case does not concern preemption of state laws at all—let alone preemption of laws regulating broadband when it was classified as a Title I information service. *See id.*; *see also* Opening Br. of Pet'rs, *In re MCP*

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consumers" (2024 Order at 175). But that is not a question that was presented or decided below, nor is it presented by this petition for certiorari.

No. 185, No. 24-7000 (6th Cir. Aug. 12, 2024), ECF No. 85. The Court should not delay resolving the current petition to wait for a hypothetical future petition that would not raise legal questions similar to the question presented here.

Such delay would not only be based on speculation about future events, but also would potentially be very lengthy and highly prejudicial to respondent. Although the Sixth Circuit has scheduled oral argument on October 31, a merits decision is unlikely to issue for several months, at minimum, because of the complexity of the numerous consolidated petitions that the Sixth Circuit must resolve. And after that decision issues, there would be further delay to await any petition for certiorari and this Court's resolution of such petition.

Such an indefinite hold would be particularly inappropriate here. Respondent agreed not to enforce the ABA against petitioners' members pending the Court's decision on their petition to allow the parties and the Court a *reasonable* amount of time to brief and resolve the petition. *See* Jt. Ltr. from Counsel for Pet'rs and Resp. & Attachment, *New York State Telecomms. Ass'n v. James*, No. 24A138 (U.S. filed Aug. 8, 2024). But petitioners are now seeking an *unreasonable* delay of months or even years in the resolution of their petition.[9]

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[9] Yet another reason this case is a poor vehicle for review of the question presented is the issue of appellate jurisdiction raised by the dissent in the Second Circuit (Pet. App. 39a-56a). While the Second Circuit majority correctly concluded that there was finality, and therefore appellate jurisdiction (Pet. App. 8a-16a), and neither party has asked this Court to revisit the issue, the Court might well need to consider the jurisdictional issue before reaching the question presented.

B. The Decision Below Does Not Implicate Any Split Among the Circuit Courts.

Certiorari also should be denied because the decision below does not conflict with any decision of another court of appeals—or any other court. Petitioners do not contend otherwise.

The two other courts of appeals—the D.C. Circuit and the Ninth Circuit—that have considered whether the Communications Act preempts state regulation of broadband when it is classified as a Title I information service are in accord with the Second Circuit that "the answer is 'no.'" (Pet. App. 33a.)

As the D.C. Circuit has determined—consistent with the court of appeals below—Congress chose to give the FCC only limited ancillary authority over Title I information services, leaving ample room for the States to regulate such services. *See Mozilla*, 940 F.3d at 74-80.

The Ninth Circuit agrees. In *ACA Connects–America's Communications Association v. Bonta*, the Ninth Circuit rejected the same preemption arguments that petitioners make here, explaining that neither Title I nor any other provision of the Communications Act remotely suggests that Congress occupied the field of interstate communications services.[10] 24 F.4th 1233, 1247-48 (9th Cir. 2022). The Ninth Circuit also rejected the same conflict preemption argument that petitioners

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[10] Contrary to petitioners' suggestion (Pet. 14 n.10), the Ninth Circuit did not rest its holding on an assumption that the California statute at issue in *ACA Connects* regulated only intrastate communications services. The Ninth Circuit recognized that the California law—like the ABA—"touches on interstate communications" by regulating the interstate communications channel of broadband, while applying only to broadband provided to consumers in the State. *See ACA Connects*, 24 F.4th at 1247.

raise here, *see id.* at 1245-46, and abandoned at the Second Circuit (see *infra* at 5-6).

Federal district courts are in accord, rejecting preemption challenges to state laws regulating broadband or other Title I information services. *See, e.g.*, *ACA Connects–Am. Commc'ns Ass'n v. Frey*, 471 F. Supp. 3d 318, 323-26 (D. Me. 2020) (Maine statute regulating broadband); *TV Pix*, 304 F. Supp. at 463-64.

C. The Decision Below Does Not Implicate Matters of Nationwide Importance.

Certiorari should be denied for the additional and independent reason that the decision below does not implicate matters of national significance, as petitioners erroneously contend (*see* Pet. 22-25).

As an initial matter, petitioners' arguments are based on the incorrect premise that the ABA imposes "public-utility-style" regulation on broadband (Pet. 22). The ABA does not regulate the rates charged to all broadband users. Rather, the ABA is a consumer-protection regulation that ensures that affordable broadband access is available to the neediest state residents.

In any event, for two reasons, the ABA will not have the drastic regulatory or economic effects that petitioners describe for broadband providers in New York—let alone for providers in other States. *First*, New York's three largest broadband providers—Charter, Altice, and Verizon (which together provide broadband service to over 95% percent of the State)—are already voluntarily providing affordable broadband products to low-income consumers irrespective of the ABA. (Galasso Decl. ¶¶ 5, 15-20.) Two of those three, Charter (owner of broadband provider Spectrum) and Altice (owner of broadband provider Optimum), have already voluntar-

ily agreed to provide a broadband product that is fully compliant with the ABA's requirements—regardless of whether the law is in effect. Specifically, under recent agreements related to earlier merger conditions, Charter and Altice each agreed to provide broadband service at speeds exceeding 25 megabits per second to low-income state residents for $15 a month, just as the ABA requires, for at least the next four years (subject to inflation adjustments similar to those available under the ABA). (Galasso Decl. ¶¶ 18, 20.) And Verizon already voluntarily provides a broadband product that is broadly consistent with the ABA's requirements—as Verizon's own declaration in this case explains. (*See* J.A. 18-19 (Verizon offers broadband service at speeds of at least 200 megabits per second to many low-income state residents for $19.99 a month).)

Second, although petitioners have identified some smaller broadband providers that do not voluntarily offer ABA-compliant products and attest that doing so would not be feasible for them, the ABA has an exemption designed for precisely such providers. The ABA states that it shall not apply to providers serving no more than twenty thousand households if compliance with the ABA "would result in unreasonable or unsustainable financial impact" on the provider. General Business Law § 399-zzzzz(5). Tellingly, each of the smaller providers that submitted declarations supporting petitioners in this case acknowledge that they might qualify for the exemption. (Stay Appl. Ex. 10 (Champlain) ¶ 14; *Id.* Ex. 11 (Heart of the Catskills) ¶ 22; *Id.* Ex. 12 (Delhi) ¶ 12; *see also* J.A. 12-16 (Empire).) In fact, each of them already received a provisional exemption. (J.A. 105-113.)

There is also no merit to petitioners' speculation (Pet. 22-23, 25-26) that the ABA will have substantial

effects outside of New York. The ABA was enacted more than three years ago. But as far as respondent is aware, no other State has enacted a law that, like the ABA, requires broadband providers to offer low-income individuals an affordable broadband product. There is thus no reason to expect the sort of "patchwork" of differing state regulations that petitioners imagine.

In any event, there is nothing novel about States making different legislative choices about how they protect consumers and regulate businesses—including through pricing-related laws. Indeed, "the structure and limitations of federalism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons," *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (quotation marks omitted), and the operation of business "in any of its aspects, including the prices to be charged," *Nebbia*, 291 U.S. at 537. Accordingly, States routinely enact a variety of laws that set different caps on prices. *See, e.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 529-30 (1992) (rent); *Nebbia*, 291 U.S. at 539 (milk); *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257 (1931) (insurance commissions); *Griffith v. Connecticut*, 218 U.S. 563, 567-69 (1910) (interest rates on loans). The ABA fits squarely within this longstanding tradition.

Petitioners also err in arguing (Pet. 23-25) that allowing the ABA to take effect would chill investment in broadband. Petitioners speculate that investment in broadband has grown in recent years because of the FCC's 2018 Order classifying broadband as an information service. But the FCC has found such speculation

unsubstantiated. *See* 2024 Order at 175-88.[11] Indeed, there is substantial evidence that investment also increased significantly for various telecommunications services subject to Title II's more rigorous federal statutory regime—including broadband when it was classified as a Title II telecommunications service. *See, e.g.*, *id.* at 175-76. Given that stricter federal regulation across the board did not chill investment, there is no reason to conclude that a single state regulation governing broadband service to a small proportion of New York's population (i.e., low-income consumers) would do so.

D. The Decision Below Is Correct.

Finally, this case does not merit this Court's review because the Second Circuit's decision is correct. "[B]ecause the States are independent sovereigns in our federal system," there is a strong presumption "that the historic police powers of the States were not to be superseded by [federal statute] unless that was the clear and manifest purpose of Congress." *Medtronic, Inc.*, 518 U.S. at 485 (quotation marks omitted). Petitioners failed to establish any such clear and manifest congressional purpose to preempt a state law like the ABA.

Field Preemption: To establish field preemption, which is quite rare, *see Kansas v. Garcia*, 589 U.S. 191, 208 (2020), there must be a federal statutory regime "so pervasive that Congress left no room for the States to supplement it," *Arizona v. United States*, 567 U.S. 387, 399 (2012) (alteration and quotation marks omitted).

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[11] The FCC also has rejected petitioners' speculation (Pet. 24-25) that greater investment in broadband in the United States as compared to Europe is attributable to laxer regulation here. *Cf.* 2024 Order at 186-88.

The Second Circuit properly rejected petitioners' remarkably sweeping argument that Congress intended to preempt States from regulating the entire field of interstate communications services (Pet. App. 17a-31a)—an argument that petitioners backed away from at the Second Circuit and are now resurrecting in their certiorari petition (*see* Pet. App. 18a-19a).

That argument is plainly incorrect because the Communications Act does not impose any pervasive federal statutory regime on all interstate communications services. To the contrary, the Act's various statutory titles impose very different types of federal statutory regimes on different types of interstate communications services (e.g., radio, cable television, mobile, information services, telecommunications services). And these distinct statutory regimes reflect Congress's different choices about the extent of the FCC's regulatory authority and the scope of potential preemption of state laws—depending on the type of interstate communications service involved. See *supra* at 3-6. As the Second Circuit correctly observed, "no court ha[s] ever found field preemption of the whole of interstate communications," and "courts have upheld numerous state regulations of interstate communications services against preemption challenges." (Pet. App. 17a-18a (quotation marks omitted); *see* Pet. App. 18a (listing examples).)

The Act's targeted structure and many of its specific provisions also dispose of petitioners' argument that Congress entirely ousted States from the field of regulating the rates charged for Title I information services. Title I gives the FCC only limited ancillary authority over information services, and does not expressly provide the FCC with authority over rates. See *supra* at 4-5. Such narrow federal authority is the opposite of the

type of pervasive federal regime that is required for field preemption. Moreover, unlike Title I, Title II of the Act gives the FCC broad authority over the rates charged for telecommunications services, including the authority to displace certain state regulations of telecommunications services. See *supra* at 5. And when it wanted to do so, Congress expressly preempted certain—but not all—state regulation of the rates for other interstate communications services, such mobile phone services. See *supra* at 6. These express preemption provisions demonstrate "that matters beyond [those provisions'] reach are not pre-empted." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992).

Congress also included various other provisions in the Act that further confirm its intent to preserve a role for the States in regulating interstate communications services, including rates. For example, a statutory savings clause provides that the Act's remedies do not "in any way abridge or alter" existing state legislative or common-law remedies, 47 U.S.C. § 414—a broad preservation of state authority fundamentally incompatible with field preemption. And another provision of the Act explicitly encourages States to promote broadband internet access, including through means such as "price cap regulation." *Id.* § 1302(a).

Section 152 of the Act does not establish field preemption, as petitioners contend (Pet. 15-16). That section sets forth the general scope and limits on the FCC's jurisdiction by stating that the Act "shall apply to all interstate and foreign communication by wire and radio" in the United States, 47 U.S.C. § 152(a), and that the FCC does not have jurisdiction over "intrastate communication service," *id.* § 152(b). But § 152 does not suggest—much less clearly and manifestly demonstrate—that the FCC has *exclusive* jurisdiction over

interstate communications services. *See ACA Connects*, 24 F.4th at 1246-48; *TV Pix*, 304 F. Supp. at 464. Indeed, the mere existence of a federal regulatory scheme "does not by itself imply pre-emption of state remedies." *English v. General Elec. Co.*, 496 U.S. 72, 87 (1990).

Petitioners misplace their reliance (Pet. 15, 17) on *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), which "strongly undermines, rather than supports," petitioners' argument. (*See* Pet. App. 23a.) *Louisiana* emphasized that § 152 limits *the FCC*'s jurisdiction by prohibiting it from regulating intrastate communications services, 476 U.S. at 359—not *the States'* jurisdiction. And where *Louisiana* described the FCC's authority as "plenary," *id.* at 360, it was discussing the FCC's authority over wireline telephone service, *see id.* at 360, 366-68—which is a Title II telecommunications service. The FCC does not have such plenary authority over Title I information services. In any event, field preemption "cannot be judged by reference to broad statements about the 'comprehensive' nature of federal regulation under the Federal Communications Act," but rather must rest on "positive evidence of legislative intent" in "specific provisions of the federal statute." *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 429-30, 432 (1963). Neither § 152 nor any other provision of the Act establishes congressional intent to oust States from regulating Title I information services.

Petitioners also misplace their reliance (Pet. 15-16) on language in the Federal Power Act and the Natural Gas Act that they contend is similar to § 152 of the Communications Act. The interpretation of those statutes is properly informed by statutory provisions and history wholly different from those presented here. For instance, the Federal Power Act and the Natural

Gas Act contain detailed provisions authorizing the relevant federal agency to comprehensively regulate the rates of interstate electricity and gas sales, respectively. *E.g.*, 16 U.S.C. § 824; 15 U.S.C. § 717c; *see Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 154 (2016) (relying on Federal Power Act expressly authorizing federal agency to regulate rates in finding preemption of state statute). By contrast, Title I of the Communications Act gives the FCC no comparable authority.[12] Moreover, Congress enacted the Federal Power Act and the Natural Gas Act after this Court had held in Commerce Clause decisions that States could not regulate the wholesale rates of gas or electrical energy moving in interstate commerce. *See Interstate Nat. Gas Co. v. Federal Power Comm'n*, 331 U.S. 682, 689-90 (1947). (*See also* Pet. App. 24a-25a (describing history).) These federal statutes thus ensured that wholesale rates of interstate gas and electricity did not go entirely unregulated. *Federal Power Comm'n v. Southern Cal. Edison Co.*, 376 U.S. 205, 213 (1964). No similar history exists for the Communications Act.

Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988), does not reject the relevance of these differing historical contexts (*contra* Pet. 17-18). In *Schneidewind*, the Court observed that the history of the Natural Gas Act did not easily answer the question presented there,

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[12] Petitioners also err in relying (Pet. 16-17) on the Mann-Elkins Act, which this Court found preempted certain state telegraph regulation more than a century ago. *See Western Union Tel. Co. v. Boegli*, 251 U.S. 315 (1920); *Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27 (1919). Under the Mann-Elkins Act, interstate telegraph was regulated as a common carrier over which the federal government had broad authority—and thus was not analogous to Title I information services like broadband. (*See* Pet. App. 30a-31a.)

i.e., whether a particular state statute fell within the field that was indisputably preempted by that law. 485 U.S. at 304-05. Here, by contrast, the question is whether the Communications Act preempts the relevant field at all. The histories of the Natural Gas and Federal Power Act demonstrate that petitioners' reliance on those laws fails.

Conflict Preemption: Petitioners' conflict preemption argument (Pet. 19-21) also fails. Petitioners abandoned in the Second Circuit the conflict preemption argument that they raise in their petition. Petitioners rely (Pet. 19) on an asserted conflict between the ABA and the Act's definition of "telecommunications carrier," 47 U.S.C. § 153(51). But petitioners explicitly abandoned that argument below. *See* Br. for Pls.-Appellees at 15 n.26. As a result, the court of appeals did not rule on it. Petitioners' conflict preemption argument is thus not properly presented because it was "neither raised in nor addressed by the Court of Appeals." *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 527 (1994).

In any event, petitioners' conflict preemption argument is meritless. Section 153(51) merely defines "telecommunications carrier" as "any provider of telecommunications services," which "shall be treated 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). This rather circular definition says nothing about *information services*—which are separately defined, *id.* § 153(24)—or preemption.[13]

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[13] Section § 153(24) defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."

In any event, in the 1996 amendments to the Act that added this definition, Congress specifically declared that the amendments shall have "No implied effect" and "shall not be construed to modify, impair, or supersede" state law "unless expressly so provided." Pub. L. 104-104, § 601(c)(1), 110 Stat. at 143 (codified as 47 U.S.C. § 152 note). This "anti-preemption clause" precludes any interpretation of the definition that would "oust[] the state legislature by implication."[14] *AT&T Commc'ns of Ill., Inc. v. Illinois Bell Tel. Co.*, 349 F.3d 402, 410 (7th Cir. 2003) (Easterbrook, J.); *see ACA Connects*, 24 F.4th at 1245-46.

Lacking any statutory provision that conflicts with the ABA, petitioners contend (Pet. 20-21) that Congress's decision not to impose broad *federal* regulation on Title I information services impliedly preempts *the States* from such regulation. But Congress's decision not to grant the FCC broad authority over information services says nothing about the scope of the States' sovereign authority over information services. Unlike federal agencies, States do not need any grant of authority from Congress to regulate.

Although the FCC may classify services like broadband as either Title I information services or Title II telecommunications services, that classification decision does not itself preempt state laws. Rather, classifi-

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[14] Petitioners' passing reliance (Pet. 21) on 47 U.S.C. § 230(b)(2) is misplaced. Petitioners did not rely on that provision in the court of appeals. And that provision of the Communications Decency Act is a mere "statement of policy," *Mozilla*, 940 F.3d at 78 (quotation and alteration marks omitted), to preserve a "'vibrant and competitive'" environment for internet content and applications, *id.* (quoting 47 U.S.C. § 230(b)(2)). It says nothing about preemption, much less of broadband regulation. *See id.* at 78-79.

cation decides which federal statutory framework applies. And the consequence of the FCC classifying broadband as a Title I information service is that the FCC has only limited ancillary authority that does not include preempting States from regulating rates. *See ACA Connects*, 24 F.4th at 1241-45; *Mozilla*, 940 F.3d at 74-86. Permitting the FCC to expand its preemptive power "in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress." *Louisiana*, 476 U.S. at 374-75.

The cases on which petitioners rely (Pet. 20) are not to the contrary. In *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi*, 474 U.S. 409 (1986), a State was precluded from regulating certain natural gas rates because Congress had preempted the field—which Congress did not do here.[15] *Transcontinental* did not establish that "deliberate federal inaction"—as in Title I—will "always imply preemption" of state law. *See Puerto Rico Dep't of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). Indeed, that rule simply "cannot be," because "[t]here is no federal pre-emption *in vacuo*," without "a federal statute to assert it." *Id.*

[15] *See also Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 514 (1989) (explaining that *Transcontinental* was a field preemption decision).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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