No. __-____

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

PETITION FOR A WRIT OF CERTIORARI

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August 12, 2024

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QUESTION PRESENTED

While the Federal Communications Commission ("FCC") has repeatedly reversed course on whether broadband internet access service ("broadband") is a common-carrier telecommunications service under federal law, one thing has remained constant: no government — state or federal — has regulated the rates consumers pay for broadband service. In 2021, New York sought to become the first government to do so, setting $15 and $20 caps on the price that low-income consumers pay for broadband. A federal district court correctly enjoined the New York Attorney General from enforcing that law, but a divided panel of the Second Circuit vacated that injunction.

The Sixth Circuit, in contrast, recently found that challengers to the FCC's 2024 decision to subject broadband to common-carrier regulation are likely to succeed on the merits and stayed that agency decision. Therefore, at the federal level, broadband remains — and likely will remain — an interstate information service under Title I of the Communications Act of 1934. Congress protected those services from rate regulation and other common-carrier treatment.

Although New York has agreed not to enforce its rate-regulation law while the Court resolves this petition, New York continues to assert that it has the right to do what the FCC cannot. This case thus presents the question whether broadband services will remain protected from common-carrier treatment and rate regulation by individual States:

Whether the Communications Act preempts New York's broadband rate-regulation law.

PARTIES TO THE PROCEEDINGS

Petitioners New York State Telecommunications Association, Inc., CTIA – The Wireless Association, ACA Connects – America's Communications Association, USTelecom – The Broadband Association, NTCA – The Rural Broadband Association, and Satellite Broadcasting and Communications Association, on behalf of their respective members that provide broadband internet access service in New York, were the plaintiffs in the district court and the appellees in the court of appeals.

Respondent Letitia A. James, in her official capacity as Attorney General of New York, was the defendant in the district court and the appellant in the court of appeals.

RULE 29.6 STATEMENTS

Pursuant to this Court's Rule 29.6, petitioners New York State Telecommunications Association, Inc., CTIA – The Wireless Association, ACA Connects – America's Communications Association, USTelecom – The Broadband Association, NTCA – The Rural Broadband Association, and Satellite Broadcasting and Communications Association, on behalf of their respective members that provide broadband internet access service in New York, state the following:

ACA Connects – America's Communications Association. ACA Connects – America's Communications Association ("ACA Connects") states that it has no parent corporation, and no persons, associations of persons, firms, partnerships, limited liability companies, joint ventures, corporations, or any similar entities have a 10 percent or greater ownership interest in ACA Connects.

CTIA – The Wireless Association. CTIA – The Wireless Association ("CTIA") states that it has no parent corporation, and no persons, associations of persons, firms, partnerships, limited liability companies, joint ventures, corporations, or any similar entities have a 10 percent or greater ownership interest in CTIA.

New York State Telecommunications Association, Inc. New York State Telecommunications Association, Inc. ("NYSTA") states that it has no parent corporation, and no persons, associations of persons, firms, partnerships, limited liability companies, joint ventures, corporations, or any similar entities have a 10 percent or greater ownership interest in NYSTA.

NTCA – The Rural Broadband Association. National Telecommunications Cooperative Association d/b/a NTCA – The Rural Broadband Association

("NTCA") states that it has no parent corporation, and no persons, associations of persons, firms, partnerships, limited liability companies, joint ventures, corporations, or any similar entities have a 10 percent or greater ownership interest in NTCA.

Satellite Broadcasting and Communications Association. Satellite Broadcasting and Communications Association discloses that no publicly held corporation owns 10 percent or more of its stock.

USTelecom – The Broadband Association. USTelecom – The Broadband Association ("USTelecom") states that it has no parent corporation, and no persons, associations of persons, firms, partnerships, limited liability companies, joint ventures, corporations, or any similar entities have a 10 percent or greater ownership interest in USTelecom.

RELATED CASES

New York State Telecomms. Ass'n, Inc., et al. v. James, 544 F. Supp. 3d 269 (E.D.N.Y. June 11, 2021) (No. 2:21-cv-2389 (DRH) (AKT))

New York State Telecomms. Ass'n, Inc., et al. v. James, No. 2:21-cv-2389 (DRH) (AKT), ECF No. 26 (E.D.N.Y. June 11, 2021) (preliminary injunction order)

New York State Telecomms. Ass'n, Inc., et al. v. James, No. 2:21-cv-2389 (DRH) (AKT), ECF No. 34 (E.D.N.Y. Aug. 10, 2021) (district court's amended judgment)

New York State Telecomms. Ass'n, Inc., et al. v. James, 2021 WL 4472666 (2d Cir. Aug. 25, 2021) (No. 21-1603) (withdrawing initial appeal)

New York State Telecomms. Ass'n, Inc., et al. v. James, 101 F.4th 135 (2d Cir. Apr. 26, 2024) (No. 21-1975)

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

RULE 29.6 STATEMENTS iii

RELATED CASES v

TABLE OF AUTHORITIES ix

INTRODUCTION 1

OPINIONS BELOW 4

JURISDICTION 4

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE PETITION 12

I. THE SECOND CIRCUIT ERRONEOUSLY HELD THAT STATES CAN REGULATE INTERSTATE BROADBAND SERVICE RATES 13

A. The Communications Act Occupies the Field of All Interstate Communications Services 13

B. The ABA Conflicts with the Communications Act 19

II. THE PETITION PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WITH PROFOUND IMPLICATIONS FOR THE FUTURE REGULATION OF BROADBAND AND OTHER INTERSTATE INFORMATION SERVICES 22

A. This Case Will Determine Whether Broadband Is Subject to a Uniform Federal Regime or a Patchwork of State Regulations.................................... 22

B. Broadband Rate Regulation Will Significantly Burden the Economy 23

C. The Second Circuit's Decision That the Communications Act Does Not Preempt State Rate Regulation Is Not Limited to Broadband and Applies to All Interstate Information Services.......... 25

CONCLUSION.. 26

APPENDIX:

Opinion of the United States Court of Appeals for the Second Circuit, *New York State Telecomms. Ass'n, Inc., et al. v. James*, No. 21-1975 (Apr. 26, 2024).. 1a

Memorandum and Order of the United States District Court for the Eastern District of New York, *New York State Telecomms. Ass'n, Inc., et al. v. James*, No. 2:21-cv-2389 (DRH) (AKT) (June 11, 2021)... 62a

Amended Judgment of the United States District Court for the Eastern District of New York, *New York State Telecomms. Ass'n, Inc., et al. v. James*, No. 2:21-cv-2389 (DRH) (AKT) (Aug. 10, 2021).. 95a

Statutory Provisions Involved............................... 98a

Communications Act of 1934, 47 U.S.C. § 151 *et seq.*:

§ 2, 47 U.S.C. § 152 .... 98a

§ 3(24), 47 U.S.C. § 153(24).......................... 99a

§ 3(51), 47 U.S.C. § 153(51)........................ 100a
§ 10, 47 U.S.C. § 160 .... 100a
§ 201, 47 U.S.C. § 201 .... 102a
§ 202, 47 U.S.C. § 202 .... 103a
§ 203, 47 U.S.C. § 203 .... 104a
N.Y. Gen. Bus. Law § 399-zzzzz...................... 107a

TABLE OF AUTHORITIES

Page

CASES

ACA Connects v. Bonta, 24 F.4th 1233 (9th Cir. 2022) 14

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) 21

California v. FERC, 495 U.S. 490 (1990) 16

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 19

Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982) 19

Hughes v. Talen Energy Mktg., LLC, 578 U.S. 150 (2016) 16

Interstate Nat. Gas Co. v. FPC, 331 U.S. 682 (1947) 17

Ivy Broad. Co. v. AT&T Co., 391 F.2d 486 (2d Cir. 1968) 17

Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986) 5, 15, 17

MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218 (1994) 14

MCP No. 185 Open Internet Rule (FCC 24-52), In re, No. 24-7000, Dkt. No. 71-2 (6th Cir. Aug. 1, 2024) 1, 3, 5, 11, 19, 21-22

Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019) 7, 21, 25

National Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) 5, 19

Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493 (1989).............................. 20

Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co., 251 U.S. 27 (1919).................................. 16

Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988) 16-18

Smith v. City of Jackson, 544 U.S. 228 (2005)......... 18

Spectrum Northeast, LLC v. Frey, 22 F.4th 287 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 562 (2023) 18

Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd. of Mississippi, 474 U.S. 409 (1986) 20

TV Pix, Inc. v. Taylor, 304 F. Supp. 459 (D. Nev. 1968), *aff'd mem.*, 396 U.S. 556 (1970)............... 18

Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).......... 5

Western Union Tel. Co. v. Boegli, 251 U.S. 315 (1920) 16

ADMINISTRATIVE DECISIONS

Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007) 5-6

Declaratory Ruling, Order, Report and Order, and Order on Reconsideration, *Safeguarding and Securing the Open Internet*, WC Docket Nos. 23-230 & 17-108, FCC 24-52 (rel. May 7, 2024), https://bit.ly/4aexF00 ..... 10-12, 22-25

Declaratory Ruling, Report and Order, and Order, *Restoring Internet Freedom*, 33 FCC Rcd 311 (2018) 6-7, 19, 21, 23-24

Memorandum Opinion and Order, *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd 13281 (2006) 5

Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005).................... 5

Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015) 6

CONSTITUTION AND STATUTES

U.S. Const.:

Art. I, § 8, cl. 3 (Commerce Clause) 17

Art. VI, cl. 2 (Supremacy Clause) 4

Communications Act of 1934, 47 U.S.C. § 151 *et seq.* 1-5, 9-10, 12-20, 22-23, 25-26

47 U.S.C. § 152 .... 5, 15-16

47 U.S.C. § 152(a) 15, 19, 25

47 U.S.C. § 152(b) 15

47 U.S.C. § 153(24) 25

47 U.S.C. § 153(51) 19

47 U.S.C. § 160 .... 6, 14

47 U.S.C. §§ 201-203 .... 6, 9

47 U.S.C. § 201(b) 14

47 U.S.C. §§ 203-205 14

47 U.S.C. § 230(b)(2).. 21

47 U.S.C. § 230(f)(2) 21

Federal Power Act, 16 U.S.C. § 791a et seq. 15-18

16 U.S.C. § 824(b)(1).. 15

Mann-Elkins Act, ch. 309, 36 Stat. 539 (1910)... 16-17

Natural Gas Act, 15 U.S.C. § 717 et seq. 15-18, 20

15 U.S.C. § 717(b)-(c) 15

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56......................... 13-14, 19, 21

28 U.S.C. § 1254(1) 4

N.Y. Gen. Bus. Law § 399-zzzzz 1-2, 4, 7-11, 13-14, 17-19, 23

§ 399-zzzzz(1).. 7, 14

§ 399-zzzzz(2)-(4) 7

§ 399-zzzzz(3)... 8

§ 399-zzzzz(3)-(4) 8

§ 399-zzzzz(6)... 8

§ 399-zzzzz(10)... 8

OTHER MATERIALS

Jt. Ltr. from Counsel for Pet'rs and Resp., *New York State Telecomms. Ass'n, Inc., et al. v. James*, No. 24A138 (U.S. filed Aug. 8, 2024)...... 11

USTelecom:

2023 Broadband Pricing Index (Oct. 2023), https://bit.ly/3Kz36YC 24

US vs. EU Broadband Trends 2012-2019 (Apr. 21, 2021), https://bit.ly/46EOT6p 25

Christopher S. Yoo, Ctr. for Tech., Innovation & Competition, *U.S. vs. European Broadband Deployment: What Do the Data Say?* (June 2014), https://bit.ly/3WTzMTp 25

Petitioners New York State Telecommunications Association, Inc., CTIA – The Wireless Association, ACA Connects – America's Communications Association, USTelecom – The Broadband Association, NTCA – The Rural Broadband Association, and Satellite Broadcasting and Communications Association, on behalf of their respective members that provide broadband internet access service in New York, respectfully petition for a writ of certiorari to review the judgment of the Second Circuit.

INTRODUCTION

Broadband internet access service ("broadband") is essential to our nation's economy. It is an inherently interstate (and international) communications service. Like all such services, it is subject to direct regulation solely under the federal Communications Act of 1934, as amended. While the Federal Communications Commission ("FCC") has reversed course over the years on how broadband fits within that federal statute — and the agency's latest flip (or flop) is stayed pending appeal[1] — one thing has stayed true: no government has *ever* regulated the prices consumers pay for broadband.

New York sought to become the first to do so, through the so-called "Affordable Broadband Act" ("ABA").[2] The ABA requires broadband providers (including petitioners' members) to sell broadband to

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[1] *See* Order, *In re: MCP No. 185 Open Internet Rule (FCC 24-52)*, No. 24-7000, Dkt. No. 71-2 (6th Cir. Aug. 1, 2024) (per curiam) ("6th Cir. Stay Order"). The order is attached as Exhibit 6 to petitioners' recent stay application, No. 24A138 (Aug. 2, 2024). The exhibits to that application that are cited herein are referred to as "Stay App. Ex. __."

[2] That is the name New York gave the law in litigation, although the legislature did not give the law that name. App. 107a.

qualifying low-income households at $15 per month (or $20 per month for a higher-speed offering). A federal district court enjoined that law shortly before it was to take effect in June 2021, finding that petitioners had shown irreparable injury and were likely to succeed on the merits of their preemption claims. In April 2024, a panel of the Second Circuit, by a 2-1 vote, vacated that injunction. The majority held that, while the Communications Act forbids the FCC from subjecting interstate information services to common-carrier regulation (including rate regulation), it leaves States free to regulate the rates consumers pay for those same interstate information services.

The Second Circuit majority erred, and the dissenting judge and district court were correct: the Communications Act preempts States from regulating the prices consumers pay for this critical interstate communications service. Both field and conflict preemption apply here.

First, in the Communications Act, Congress asserted *exclusive* federal control of all interstate communications services. That exclusive control applies equally to services Congress treated as common-carrier services and to those it protected from such treatment. And the preempted field includes rate regulation — a core feature of public-utility regulation.

Second, even if the Communications Act permitted some direct state regulation of interstate information services, the ABA conflicts with Congress's prohibition on subjecting those services to common-carrier treatment. Congress's prohibition reflects its view that the optimal regulatory regime for interstate information services is the *absence* of heavy-handed, public-utility-style regulation. It does not, as the Second Circuit concluded, reflect an invitation to States

to subject interstate communications services to that kind of regulation in the FCC's stead.

The issue this case presents is of exceptional importance. While the current FCC would treat broadband as a public utility — after many years of non-common-carrier regulation during which broadband has flourished — that decision is stayed. A Sixth Circuit panel unanimously concluded that petitioners are likely to succeed under the major-questions doctrine and that common-carrier regulation would cause their members irreparable harm. *See* 6th Cir. Stay Order at 5-7. As a result, broadband remains a non-common-carrier, interstate information service while that appeal goes forward and will likely remain so when that appeal ends following accelerated briefing and oral argument scheduled for the week of October 28, 2024.

The upshot of the Sixth Circuit and Second Circuit decisions is that each State can now do what the FCC cannot — subject an interstate information service to common-carrier regulation, including rate regulation. A world in which States can countermand Congress's preclusion of rate regulation for such services will end long-standing national uniformity for broadband, to the detriment of providers, consumers, and the nation. Nor will the harms end with broadband. The many services that rely on broadband to reach consumers — such as video and music streaming, cloud storage, email and messaging, and video conferencing — are all themselves interstate information services. The Second Circuit's reasoning means the Communications Act also does not prevent States from regulating the prices those providers charge for those online services.

This Court should grant the petition and reverse the Second Circuit's judgment, ensuring that broadband

remains subject to uniform, national regulation. Given the interrelationship between this case and the Sixth Circuit's review of the FCC's recent order, however, the most orderly approach would be for this Court to do so after the Sixth Circuit or (if someone seeks and this Court grants certiorari) this Court first confirms the Title I classification of broadband. The Court may do so either by holding this petition or by granting it and delaying briefing or argument so the Court can address this issue alongside or after resolution of challenges to the FCC's order.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-61a) is reported at 101 F.4th 135. The memorandum and order of the district court (App. 62a-94a) is reported at 544 F. Supp. 3d 269.

JURISDICTION

The court of appeals entered its judgment on April 26, 2024. On July 16, 2024, Justice Sotomayor extended the time for petitioning for a writ of certiorari to and including September 23, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides in relevant part:

> This Constitution, and the Laws of the United States . . . , shall be the supreme Law of the Land.

Relevant provisions of the Communications Act of 1934 and New York's Affordable Broadband Act, N.Y. Gen. Bus. Law § 399-zzzzz, are reproduced at App. 98a-111a.

STATEMENT OF THE CASE

Statutory Framework. In 47 U.S.C. § 152, the Communications Act "divide[s] the world . . . into two hemispheres — one comprised of interstate service, over which the FCC would have *plenary authority*, and the other made up of intrastate service." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986) (emphasis added). While "actions taken by federal and state regulators *within* their respective domains" can, "in practice," "affect" the "other 'hemisphere,'" *id.* (emphasis added), federal law preempts state laws regulating intrastate service where it is "not possible" for separate intrastate and interstate regimes to co-exist, *id.* at 375-76 & n.4 (emphasis omitted).

Historically, the FCC concluded that broadband is an information service subject to Title I of the Communications Act, making broadband "statutorily exempt from common carrier treatment" under Title II of that Act (including *ex ante* rate regulation). *Verizon v. FCC*, 740 F.3d 623, 654 (D.C. Cir. 2014); *see also* 6th Cir. Stay Order at 3-4 (recounting this history).

In 2005, this Court upheld the FCC's classification of cable broadband as an information service. *See National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 978 (2005). For the next decade, the FCC held that other forms of broadband are information services because they similarly provide only a single integrated service.[3]

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[3] *See*, *e.g.*, Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005); Memorandum Opinion and Order, *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd 13281 (2006); Declaratory Ruling, *Appropriate*

In 2015, the FCC continued to conclude that broadband internet access is a single, integrated service offering, but for the first time classified that offering as a telecommunications service subject to common-carrier regulation under Title II. *See 2015 Order*[4] ¶ 47. But even though Title II includes rate regulation and tariff filing among its provisions, *see* 47 U.S.C. §§ 201-203, the FCC used its statutory forbearance authority, *see id.* § 160, to prevent those "*ex ante* rate regulation" provisions from applying to broadband. *2015 Order* ¶ 441. The FCC concluded that rate regulation is inconsistent with federal policy and unnecessary to "protect Internet openness" or "promote fair competition." *Id.* ¶¶ 443, 449.

In 2018, the FCC returned to its pre-2015 approach, classifying broadband as a single offering of an interstate information service immune from all common-carrier regulation, including rate regulation. *See 2018 Order*[5] ¶¶ 2, 18, 65. The FCC noted that even the threat of future rate regulation under the *2015 Order* — notwithstanding forbearance — risked undermining "investments in broadband infrastructure," contrary to federal policy. *Id.* ¶ 101. To protect its decision from any possibility of state-level undermining, the FCC adopted a "Preemption Directive," which declared that the *2018 Order* preempted all state regulation of broadband, even purely intrastate regulations that

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Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, 22 FCC Rcd 5901 (2007).

[4] Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015) ("*2015 Order*").

[5] Declaratory Ruling, Report and Order, and Order, *Restoring Internet Freedom*, 33 FCC Rcd 311 (2018) ("*2018 Order*").

did not conflict with the federal regime. *See id.* ¶¶ 194-204.

The D.C. Circuit upheld the FCC's classification of broadband as a Title I information service. *See Mozilla Corp. v. FCC*, 940 F.3d 1, 26, 72-73 (D.C. Cir. 2019) (per curiam). Yet a 2-1 majority vacated the FCC's Preemption Directive, holding that the FCC lacked statutory authority "to wipe out a broader array of state and local laws than traditional conflict preemption principles would allow." *Id.* at 74. But the majority denigrated as a "straw man" and "confuse[d]," *id.* at 85, the dissenting judge's contention that the majority's vacatur meant that "each of the 50 states is free to impose" the "heavy hand of Title II for the Internet," *id.* at 95 (Williams, J., concurring in part and dissenting in part). Instead, where state regulation of broadband service "actually undermines" the Title I regime to which the *2018 Order* returned broadband, "conflict preemption" would apply. *Id.* at 85.

The District Court Enjoins New York's Law. In 2021, New York enacted the ABA, a first-of-its-kind broadband rate regulation. The ABA requires all broadband providers to sell broadband (other than mobile broadband) to qualifying low-income households at a cost of no more than $15 per month (for download speeds of at least 25 Mbps) or $20 per month (for download speeds of at least 200 Mbps). *See* N.Y. Gen. Bus. Law § 399-zzzzz(2)-(4). The law defines the "broadband service" it regulates as "a mass-market retail service that provides the capability to transmit data to and receive data from all or substantially all internet endpoints," *id.* § 399-zzzzz(1) — mirroring the FCC's long-standing definition of broadband internet access service, *see 2018 Order* ¶ 21.

The ABA also limits price increases. *See* N.Y. Gen. Bus. Law § 399-zzzzz(3)-(4). And it also restricts the terms on which providers can offer service. For instance, the ABA requires providers to sell low-income subscribers a standalone broadband service, separate from any telephone or television service. *See id.* § 399-zzzzz(3). Providers must otherwise offer the rate-regulated service under the same terms and conditions they apply to market-priced offerings. *See id.* § 399-zzzzz(6). The ABA authorizes the Attorney General to enforce it, including by seeking a $1,000-per-violation civil penalty. *See id.* § 399-zzzzz(10).

Petitioners filed a complaint and sought a preliminary and permanent injunction barring the ABA's enforcement. The district court issued an order preliminarily enjoining the ABA before it took effect. App. 62a-63a. The court found the rate regulation would irreparably harm petitioners' members, App. 92a-93a, and that petitioners had established a likelihood of success on the merits, under both field and conflict preemption, App. 77a-91a. The court found it "clear" that "the ABA is rate regulation" of an interstate service, App. 79a, rejecting New York's arguments that the ABA is an intrastate "affordable-pricing scheme," App. 85a.

New York soon thereafter stipulated to a permanent injunction — which the district court entered — and then appealed the final judgment while dismissing its earlier appeal of the preliminary injunction. App. 95a-97a.

The Second Circuit Vacates the Injunction. On April 26, 2024, a divided panel of the Second Circuit reversed the district court in a 2-1 decision vacating the permanent injunction.

The Second Circuit majority (Judges Nathan and Merriam) first found the court had jurisdiction to

consider New York's appeal. App. 2a.[6] Turning to the merits, both the majority and the dissent agreed with the district court that, "[a]s a threshold matter," "the ABA is a regulation of interstate communications services." App. 19a n.10; *see* App. 57a (Sullivan, J., dissenting). The majority rejected New York's argument that the ABA is a "purely intrastate" regulation because it applies only to companies selling broadband to New Yorkers. App. 19a n.10.

Yet the majority concluded that Congress had not occupied the field with respect to interstate information services. App. 31a. The Second Circuit majority recognized that the Communications Act's "comprehensive" regulation of common carriers in Title II is field preemptive. App. 30a (citing 47 U.S.C. §§ 201-203). But the majority found that Title I, in which Congress purposefully left interstate information services largely unregulated, left the field open for States to regulate the rates of such services.[7]

The panel majority also found that conflict preemption did not bar enforcement of the ABA. The majority

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[6] Petitioners agree with the majority's disposition of this jurisdictional issue. In the district court, petitioners agreed to the Attorney General's proposal to convert the preliminary injunction into a stipulated final judgment imposing a permanent injunction. Petitioners understood that the Attorney General was not relinquishing her right to appeal that permanent injunction. And petitioners' supplemental brief in the Second Circuit similarly agreed that the Attorney General had preserved its appellate rights.

[7] The majority was incorrect to state that petitioners "abandoned" the breadth of their field preemption argument on appeal. App. 18a. Rather, petitioners explained that, because rate regulation is at the core of the preempted field, the case did not require the Second Circuit to define the outer limits of that field, such as whether general state laws applicable to all contracts can apply to contracts for interstate information services.

noted that the FCC's conclusion that broadband is a Title I service deprived the agency of the authority it has over Title II services, including the authority to impose or forbear from rate regulation. App. 31a-32a. It then concluded that, because Title I does not give the FCC rate-setting authority over interstate information services, any state rate setting for such services could not conflict with federal law. App. 33a-34a.

Judge Sullivan dissented as to both appellate jurisdiction, App. 39a-56a, and the merits, App. 56a-60a. As to the latter, Judge Sullivan would have found the ABA field preempted by the Communications Act, which "grants the FCC authority over 'all interstate' communication services — save for a limited set of state-law prohibitions — while leaving to the states the power to regulate intrastate communications." App. 56a. Judge Sullivan also found the ABA conflict preempted, rejecting New York's suggestion that, "because the FCC currently lacks power to regulate broadband rates, it cannot prevent states from regulating those rates either." App. 60a.

The FCC's Stayed 2024 Order. Shortly after the Second Circuit ruled, the FCC released its *2024 Order*,[8] in which the FCC reverted to its 2015 claim to have authority to regulate broadband as a Title II common-carrier telecommunications service. *See 2024 Order* ¶¶ 2, 188-189. Despite that change in classification, the FCC adhered to its long-standing conclusion that *ex ante* rate regulation of the prices consumers pay for broadband is not in the public interest. *See id.* ¶¶ 267-268, 386, 389 (forbearing from "all Title II provisions

[8] Declaratory Ruling, Order, Report and Order, and Order on Reconsideration, *Safeguarding and Securing the Open Internet*, WC Docket Nos. 23-230 & 17-108, FCC 24-52 (rel. May 7, 2024) ("*2024 Order*"), https://bit.ly/4aexF00.

that could be used to impose *ex ante* or *ex post* rate regulation on [broadband] providers").

On August 1, 2024, the Sixth Circuit granted a motion to stay the *2024 Order* pending the resolution of challenges to that order. The Sixth Circuit panel unanimously found that the petitioners in that case (as here, associations with internet service provider members) were likely to succeed on the merits of their challenge to the *2024 Order* under the major-questions doctrine. *See* 6th Cir. Stay Order at 5-7. Chief Judge Sutton also found that petitioners were likely to succeed on their argument that "[t]he best reading of the statute" is that Congress "classifie[d] broadband as an information service." *Id.* at 9-13 (Sutton, C.J., concurring).

Notwithstanding the Second Circuit's decision, the New York Attorney General agreed not to enforce the ABA for a brief period in light of the litigation over the *2024 Order*. *See* Stay App. Ex. 5. While New York's agreement was set to end on August 15, 2024 — 14 days after the Sixth Circuit stayed the *2024 Order* — New York has now agreed not to enforce the ABA against petitioners' members before the Court rules on this petition.[9]

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[9] *See* Jt. Ltr. from Counsel for Pet'rs and Resp., *New York State Telecomms. Ass'n, Inc., et al. v. James*, No. 24A138 (U.S. filed Aug. 8, 2024).

REASONS FOR GRANTING THE PETITION

Whether States can set prices for interstate information services — including, but not limited to, broadband — is a question of exceptional and national importance. The Second Circuit's 2-1 acceptance of New York's contention that it has that authority threatens to spark a nationwide, state-by-state race to dictate the prices at which broadband service is sold to consumers. And that race is unlikely to stop there. On the Second Circuit majority's reasoning, the Communications Act also does not preempt States from setting rates for paid subscription services for video and music streaming and cloud storage, or for ad-supported internet services including email and messaging. All of them are interstate information services under federal law. *See 2024 Order* ¶ 131.

The Court should grant certiorari to confirm that the federal Communications Act — not a patchwork of state laws — governs the regulation of interstate communications services such as broadband. The Sixth Circuit has already concluded that challenges to the FCC's recent order subjecting broadband to common-carrier regulation are likely to succeed on the merits, so broadband is likely to remain a non-common-carrier service under the Communications Act for the foreseeable future. If the Second Circuit's decision were allowed to stand, then States in that Circuit would be free to engage in the very common-carrier regulation that the FCC cannot. The Second Circuit's decision would thus allow individual States to engage in the common-carrier regulation (including rate regulation) that a Sixth Circuit panel has found the Communications Act likely forbids.

The Second Circuit's decision is also wrong on the law. Judge Sullivan, dissenting from that decision,

correctly concluded that Congress in the Communications Act occupied the field of interstate communications services. And Congress did so for *all* such services, not merely those that Congress concluded should be regulated like public utilities and subject to Title II's common-carrier regime. The ABA also conflicts with Congress's express prohibition on subjecting interstate information services to common-carrier regulation, including rate regulation. To conclude otherwise would attribute to Congress an attitude of indifference toward state regulation of communications services that is at odds with the Telecommunications Act of 1996 ("1996 Act") that enacted that prohibition.

I. THE SECOND CIRCUIT ERRONEOUSLY HELD THAT STATES CAN REGULATE INTERSTATE BROADBAND SERVICE RATES

A. The Communications Act Occupies the Field of All Interstate Communications Services

The ABA directly regulates the rates of an interstate information service. While New York described the ABA as intrastate regulation — and, before the district court, denied that it was even rate regulation, *see* App. 85a — all four lower court judges rejected New York's mischaracterization of the ABA. All instead agreed that the ABA is a direct "regulation of interstate communications services." App. 19a n.10; *see* App. 57a (Sullivan, J., dissenting); *see also* App. 86a-87a. This was correct — and inescapable — because the ABA defines broadband as a service that "provides the capability to transmit data to and receive data from all or substantially all internet

endpoints," N.Y. Gen. Bus. Law § 399-zzzzz(1), which are located around the country (and the world).[10]

The Second Circuit majority erred in reading the Communications Act to be field preemptive only as to interstate communications services subject to Title II of that Act. App. 27a-28a. For Title II services, Congress dictated a public-utility-style rate regime, with carriers filing rates in tariffs and the FCC authorized to assess whether those rates are unjust and unreasonable, and, if so, to dictate rates to be charged going forward. *See* 47 U.S.C. §§ 201(b), 203-205. In the 1996 Act, Congress also directed the FCC to exempt public-utility services from those statutory provisions — by forbearing from them — when it is not in the public interest to enforce them.[11]

Title I lacks the same public-utility-style rate regime (and thus the same potential for forbearance). The Second Circuit majority misunderstood that absence to reflect Congress's intent that each State be free to decide whether to regulate interstate information service providers as public utilities. App. 29a. Instead, as Judge Sullivan explained, the Communications Act gives the FCC "exclusive authority over interstate communications" and has left to the States only "the power to regulate intrastate communications."

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[10] In this regard, the Second Circuit correctly decided what the Ninth Circuit got wrong in *ACA Connects v. Bonta*, 24 F.4th 1233 (9th Cir. 2022). In that case, the Ninth Circuit erroneously concluded that California's so-called "net neutrality" law, which used the same broadband definition as the ABA, was only "state regulation of intrastate communications." *Id.* at 1247.

[11] In 47 U.S.C. § 160, Congress granted the FCC the forbearance authority that this Court had previously found it lacked in *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218, 233-34 (1994).

App. 56a-57a. And as district court Judge Hurley noted, the FCC's authority over interstate communications "would hardly be 'plenary' if it loses, to the states' gain, the right to make rules regarding certain interstate communications services" that Congress placed under Title I. App. 90a. Congress's exclusion of interstate information services from public-utility regulation means that such rate regulation is ruled out — not that States are free to do it in the Commission's stead.

As Judge Sullivan explained, Section 152 divides the field of communications into separate interstate and intrastate spheres and "prescribes that the FCC has exclusive authority over interstate communications." App. 57a. Section 152(a) grants the FCC exclusive jurisdiction over rate regulation (among other regulations) as to "all interstate . . . communication by wire or radio," and Section 152(b) denies the FCC "jurisdiction with respect to . . . intrastate communication service by wire or radio." This Court read Section 152 the same way, finding that it "divide[s] the world . . . into two hemispheres — one comprising 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*, 476 U.S. at 360 (emphasis added).

The 1935 Federal Water Power Act (now known as the Federal Power Act ("FPA")) and the 1938 Natural Gas Act ("NGA") confirm the import of Section 152 in the Communications Act of 1934. Congress copied language from Section 152 into these other statutes — providing that federal law "shall apply" to the "interstate," but not "intrastate," sales of electricity and natural gas. 16 U.S.C. § 824(b)(1) (FPA); 15 U.S.C. § 717(b)-(c) (NGA). This Court has repeatedly read

that copied language to be field preemptive. For example, in *Hughes v. Talen Energy Marketing, LLC*, this Court found that the FPA "occup[ies] an entire field of regulation" and gives the Federal Energy Regulatory Commission ("FERC") "exclusive authority to regulate 'the sale of electric energy at wholesale in interstate commerce.'" 578 U.S. 150, 154, 163 (2016); *see also id.* at 169 (Thomas, J., concurring in part and concurring in the judgment) ("the text and structure of the . . . FPA divides federal and state jurisdiction over the regulation of electricity sales," and "[t]hat federal authority over interstate wholesale sales is exclusive"). And in *Schneidewind v. ANR Pipeline Co.*, this Court held that the NGA gives FERC "exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce." 485 U.S. 293, 300-01 (1988) (collecting cases). The language in Section 152 — mirrored in the FPA and the NGA — is how the 1930s Congress stated its intent to occupy the field and preclude state regulation of interstate services.[12]

Further confirmation comes from the fact that the federal Communications Act continues the 1910 Mann-Elkins Act. This Court has twice held that the Mann-Elkins Act preempted the field as to interstate telegraph service. *See Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27, 30 (1919); *Western Union Tel. Co. v. Boegli*, 251 U.S. 315, 316-17 (1920).

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[12] While a modern Congress might write field preemptive language differently, this Court has reaffirmed decisions reading older statutes to have preemptive effect even if, "[w]ere this a case of first impression," the Court might have read the statute differently today. *California v. FERC*, 495 U.S. 490, 497-99 (1990) (refusing "at this late date to revisit and disturb" the earlier preemption decision as there had been "no sufficient intervening change in the law" to "warrant[] [a] departure" from precedent).

Congress consolidated the Mann-Elkins Act, along with other statutes, into the Communications Act, carrying forward the existing field preemption. *See Ivy Broad. Co. v. AT&T Co.*, 391 F.2d 486, 490-91 (2d Cir. 1968).

In concluding that the Communication Act preempts the field only as to Title II services, the Second Circuit majority made several errors.

First, it over-read this Court's acknowledgment that, because companies provide interstate and intrastate services over the same wires (e.g., local and long-distance calling), state actions taken *within* the intrastate sphere might not remain wholly within that boundary. App. 23a (citing *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 375). But the majority had already (correctly) held that the ABA regulates directly in the *interstate* field — it is not intrastate regulation with some limited spillover outside of that field. Unlike the intrastate depreciation schedules this Court held could co-exist with interstate schedules, it is not "possible to apply different rate[]" regulation methods to the same interstate broadband service via a federal regime that lets market prices prevail and a state regime that dictates maximum prices. *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 375.

Second, the Second Circuit majority was wrong to brush aside the similarities in the Communications Act, the FPA, and the NGA. The majority thought it relevant that this Court's pre-FPA and pre-NGA cases held that the dormant Commerce Clause prohibited state rate regulation of interstate gas and electricity sales. *See* App. 25a (citing *Interstate Nat. Gas Co. v. FPC*, 331 U.S. 682, 689 & n.13 (1947)). But this Court in *Schneidewind* already rejected the Second Circuit majority's view. This Court instead found Congress's

intent to preempt the field in the NGA's text itself and not as an "infer[ence] from the mere fact that States were precluded from such regulation at the time of the NGA's enactment." 485 U.S. at 305-06. The Second Circuit majority also gave no weight to Congress's decision to copy the Communications Act's language into the FPA and the NGA. The obvious conclusion is that Congress wanted that language to have the same effect in all three laws. *Cf. Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality) ("[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.").

Third, the majority incorrectly found that early instances of state regulation of cable television rates, while cable was a Title I service, meant that Congress did not preempt that field. As Judge Sullivan noted in dissent, this history is "scant" and consists of one "article noting that eleven states oversaw rate regulation of cable during the 1970s," which is far from a "meaningful tradition." App. 57a n.5. In fact, the history of cable regulation teaches the opposite lesson. For nearly 50 years, state regulation of cable rates has occurred only where Congress and the FCC affirmatively decided against preemption. *See Spectrum Northeast, LLC v. Frey*, 22 F.4th 287, 294-96 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 562 (2023). The sole contrary case — *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459 (D. Nev. 1968), *aff'd mem.*, 396 U.S. 556 (1970) (per curiam) — viewed cable television as a "local business" that was "an appendage" to any interstate service. *Id.* at 463. In contrast, all four judges here agreed that the ABA directly regulates the rates of an interstate service.

B. The ABA Conflicts with the Communications Act

In the 1996 Act, Congress allowed the FCC to "treat[]" telecommunications carriers, and not information services, "as a common carrier under [the Communications Act] *only* to the extent that [they are] engaged in providing telecommunications services." 47 U.S.C. § 153(51) (emphasis added); *see also 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 the *2018 Order*, the FCC correctly concluded that broadband is an information service under the Communications Act. *See generally 2018 Order*; *see also* 6th Cir. Stay Order at 5-7. Therefore, the Communications Act, which "shall apply to all interstate . . . communication" services, 47 U.S.C. § 152(a), forecloses public-utility, common-carrier regulation of broadband.

New York's law conflicts with the Communications Act. It applies common-carrier rate regulation to an interstate information service, while Congress determined that interstate information services are exempt from such regulation. *See id.* § 153(51). A "state law stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *see also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984) ("[W]hen federal officials determine . . . that restrictive regulation of a particular area is not in the public interest" — as Congress did here — "States are not permitted to use their police power to enact such a regulation.").

The Second Circuit majority erroneously concluded that, for conflict preemption to prevent broadband rate regulation at the state level, broadband must be a Title II service at the federal level and the FCC must forbear from the Communications Act's rate-regulation provisions. App. 33a-34a. Although that would be sufficient for broadband rates to remain free from all government regulation, it is not necessary. Congress need not have granted an agency regulatory authority that it declined to use for state law to conflict with the regime Congress enacted.

Instead, for Congress's decision to protect interstate information services from common-carrier regulation to be given effect, States — no different from the FCC — must be prohibited from imposing rate regulation. This Court held as much in *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi*, 474 U.S. 409 (1986), finding that Congress's decision to exempt certain gas sales from public-utility regulation under the NGA preempted States from regulating those sales in the manner FERC could not. This Court rejected the argument that Congress's revision of the NGA "to give market forces a more significant role" reflected Congress's "inten[t] to give the States the power it had denied FERC." *Id.* at 422. Instead, as the Court reiterated in a later case, "Congress's intent . . . that the supply, the demand, and the price of deregulated gas be determined by market forces requires that the States still may not regulate purchasers so as to affect their cost structures." *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 507 n.8 (1989).

The same is true here. Congress's intent that market forces determine the price of Title I services requires that States not interfere through rate setting.

This Court long ago recognized that, in the 1996 Act, Congress "unquestionably" took regulatory power "away from the States." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999). It also sought "to preserve the vibrant and competitive free market" for broadband service, "unfettered by Federal *or State* regulation." 47 U.S.C. § 230(b)(2) (emphasis added); *see id.* § 230(f)(2). That Congress was not indifferent to whether States regulated Title I services as common-carrier services. It rejected all such regulation of those services. As Chief Judge Sutton put it, one must assume "a two-faced Congress" to read the 1996 Act to authorize common-carrier regulation of broadband, 6th Cir. Stay Order at 11 (Sutton, C.J., concurring), to say nothing of doing so through a patchwork of state-by-state regulations.

The Second Circuit also purported to follow the D.C. Circuit's rejection of the *2018 Order*'s Preemption Directive — *see* App. 37a-38a — but reads that court's *Mozilla* decision in the exact manner its authors warned against. The *Mozilla* majority said the dissent was "confuse[d]" and attacking a "straw man" in arguing that, if the FCC lacked authority to expressly preempt all state broadband laws (including those neither field nor conflict preemption forbade), States would be free to regulate broadband providers as common carriers. *Mozilla Corp. v. FCC*, 940 F.3d 1, 85 (D.C. Cir. 2019) (per curiam). Yet the Second Circuit majority adopted that same confused position here, without acknowledging the *Mozilla* majority's warning. App. 31a-38a.

II. THE PETITION PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WITH PROFOUND IMPLICATIONS FOR THE FUTURE REGULATION OF BROADBAND AND OTHER INTERSTATE INFORMATION SERVICES

A. This Case Will Determine Whether Broadband Is Subject to a Uniform Federal Regime or a Patchwork of State Regulations

The Sixth Circuit's decision that petitioners are likely to succeed on the merits of their appeal of the *2024 Order* means that broadband currently remains free from intrusive federal common-carrier regulation — including rate regulation — and likely will remain so. *See* 6th Cir. Stay Order at 5-7. The logic of that unanimous decision — that public-utility-style regulation of broadband is a major question of "vast" significance, and Congress did not "plainly authorize" the FCC to engage in such regulation, *id.* at 6 — would be inverted if, as a result, the Communications Act were read to allow each of the 50 States to choose whether to do exactly what the FCC cannot. And, yet, that is precisely what the Second Circuit majority held and the conflict that its decision presents.[13]

The Sixth Circuit has accelerated briefing of the challenges to the *2024 Order*, with oral argument to occur less than three months after the stay decision. *See id.* at 9. Those challenges to the FCC's authority, therefore, could come before this Court in short order.

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[13] *Compare* App. 33a-34a (treating Congress as giving the FCC a choice between classifying broadband as a Title II service and preempting state rate regulation via forbearance, *or* classifying it as a Title I service open to state rate regulation) *with* 6th Cir. Stay Order at 6 (Congress likely placed interstate broadband in Title I to immunize it from common-carrier treatment).

The most orderly approach to resolving these critical questions of federal and state authority over broadband would be for the Sixth Circuit or (if someone seeks and this Court grants certiorari) this Court first to confirm the Title I classification of broadband under the Communications Act and then for this Court to confirm that the Act preempts States from doing what the FCC cannot. 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 completion of any challenges to the *2024 Order*.

B. Broadband Rate Regulation Will Significantly Burden the Economy

The Second Circuit's decision — coupled with the Sixth Circuit's conclusion that broadband is likely to remain a Title I service — will likely lead to *more* rate regulation absent the Court's intervention. Other States are likely to copy New York once the Attorney General begins enforcing the ABA and New York consumers can buy broadband at below-market rates. As petitioners' members have shown, New York's price cap will require them to sell broadband at a loss and deter them from investing in expanding their broadband networks.[14] As rate regulation proliferates, those harms will as well, stifling critical investment in bringing broadband to unserved and underserved areas.

The FCC likewise found in 2018 that the mere threat of "rate regulation" risked chilling "investments in broadband infrastructure." *2018 Order* ¶ 101. Smaller broadband providers in particular felt the

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[14] *See* Stay App. Exs. 9-14 (provider declarations).

effects of that threat, "given their more limited resources, leading to depressed hiring in rural areas most in need of additional resources." *Id.* ¶ 104. Even the current FCC, a majority of which otherwise supports common-carrier regulation of broadband providers, "cannot envision" regulating broadband rates and has made a "commitment not to do so." *2024 Order* ¶ 386.

Broadband has flourished in the United States under a uniform, Title I regulatory regime. Broadband prices continue to decline, even as broadband speeds and deployment steadily increase. From 2022 to 2023, the price of the most popular broadband option declined by 10% *before* adjusting for inflation.[15] Adjusted for inflation, that is an 18% decrease.[16] That decline is consistent with longer-term trends, which have seen the price for the most popular broadband package decline by nearly 55% in real terms from 2015 to 2023, while speeds have increased by more than 280%.[17]

As FCC Commissioner Carr recognized, dissenting from the *2024 Order*, the approach in Europe — "where regulators have long applied centralized, utility-style controls to their continent's Internet infrastructure" — has led to "sluggish European networks suffer[ing] from chronic underinvestment." *2024 Order* at 455 (Dissenting Statement of Commissioner Carr). U.S. networks are faster than in every country in Europe, U.S. providers invest three-fold

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[15] *See* USTelecom, *2023 Broadband Pricing Index* 2 (Oct. 2023), https://bit.ly/3Kz36YC.

[16] *See id.*

[17] *See id.* at 3.

more per household than their European counterparts, and U.S. networks have bridged the digital divide more so than in Europe when it comes to households with high-speed fixed broadband. *See id.* at 493-94. Simply put, broadband rate regulation — the most heavy-handed of common-carrier regulations — will reduce private investment in American networks.[18]

C. The Second Circuit's Decision That the Communications Act Does Not Preempt State Rate Regulation Is Not Limited to Broadband and Applies to All Interstate Information Services

Broadband is not the only interstate information service the Second Circuit decision opens up to novel rate regulation. The Communications Act covers all interstate communication by wire or radio. *See* 47 U.S.C. § 152(a). And all interstate communication services are either information services or telecommunications services — the two categories are "mutually exclusive." *Mozilla*, 940 F.3d at 19. Information services offer the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(24). All online services and applications — streaming video and music, cloud storage, email and messaging, and video conferencing — meet this definition. *See 2024 Order* ¶ 131.

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[18] Common-carrier-style regulation on broadband in Europe has resulted in broadband investment levels that were less than half of the levels of such investment in the United States, on a per-household basis. *See*, *e.g.*, Christopher S. Yoo, Ctr. for Tech., Innovation & Competition, *U.S. vs. European Broadband Deployment: What Do the Data Say?* 13 (June 2014), https://bit.ly/3WTzMTp; USTelecom, *US vs. EU Broadband Trends 2012-2019*, at 13 (Apr. 21, 2021), https://bit.ly/46EOT6p.

The Second Circuit's decision thus removes a barrier to state rate setting for a wide range of online platforms and services that permeate every aspect of life. For example, under the Second Circuit's decision, the Communications Act would not preempt States from requiring video- and music-streaming services — such as Netflix or Spotify — to offer cheaper plans to low-income households. Nor would it preempt them from mandating rates for cloud-storage services like Dropbox and iCloud, the paid versions of online video-conferencing tools like Zoom, online subscription dating services like Bumble, or security or baby cameras that stream video online like Ring or Nanit, or from mandating that free, ad-supported online services offer a paid, ad-free tier at a state-mandated price cap.

The implications of the Second Circuit's decision for broadband are bad enough, but the decision reaches far beyond broadband. It takes a step toward widespread state rate regulation not only of broadband internet access services, but also of the many online services broadband consumers use every day.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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