No. 24-161

IN THE

Supreme Court of the United States

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

Petitioners,

v.

LETITIA 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

BRIEF OF TECHFREEDOM AND WASHINGTON LEGAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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INTEREST OF AMICI CURIAE*

TechFreedom is a nonprofit, nonpartisan think tank dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible. TechFreedom has been a prominent voice in all aspects of the broadband Title I-Title II debate. In its 2018 Restoring Internet Freedom Order, for instance, the Federal Communications Commission cited TechFreedom's comments 29 times. 33 FCC Rcd 311 (2018).

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as amicus in litigation involving the FCC's net neutrality rules. See, e.g., *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019); *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

SUMMARY OF ARGUMENT

The Telecommunications Act of 1996 is a deregulatory statute. It seeks "to preserve the vibrant and competitive free market … for the Internet … unfettered by Federal or State regulation." 47 U.S.C. §§ 230(b)(2), 230(f)(2). As part of this deregulatory policy, the 1996 Act establishes a light-touch

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* No party's counsel authored any part of this brief. No person or entity, other than amici and their counsel, helped pay for the brief's preparation or submission. At least ten days before the brief was due, amici notified each party's counsel of record of amici's intent to file the brief.

regulatory scheme for Title I information services—in contrast to more heavily regulated Title II telecommunications services. For almost twenty years, the Federal Communications Commission adhered to Congress's deregulatory directive, correctly classifying broadband as a Title I service. Then, however, over the past ten years, the FCC lost its way. It classified broadband as a Title II service in its 2015 Open Internet Order; then corrected itself, returning broadband to Title I in its 2018 Restoring Internet Freedom Order; then strayed again, recently re-classifying broadband as a Title II service in a new Open Internet Order.

As the latest round of the Title I-Title II debate played out at the FCC, something momentous occurred in New York. While almost no one was looking, New York enacted the Affordable Broadband Act. The ABA declares broadband an "essential service," and orders broadband providers to supply it to low-income consumers for $15 a month. As the FCC crawled its way to revoking the Restoring Internet Freedom Order and issuing the latest Open Internet Order, New York went ahead and imposed *ex ante* rate regulation—a measure that goes beyond anything the FCC has ever pursued.

The FCC's new Open Internet Order has been challenged in court, and the Sixth Circuit recently stayed enforcement of it. *In re: MCP No. 185 Open Internet Rule (FCC 24-52)*, 2024 WL 3650468 (6th Cir. Aug. 1, 2024) (per curiam). The stay order concludes that the FCC is likely to lose on the merits. *Id*. at *3-*5. The Sixth Circuit is poised, therefore, to vacate the FCC's latest Title II gambit, thus confirming that

broadband is—and by rights should always have been—a Title I service.

The upshot, for this case, is that New York was not free to ignore the deregulatory aims Congress codified in Title I. Under conflict preemption, a state law may not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 399 (2012). Congress wants Title I information services to flourish under a light-touch regulatory regime. New York's law imposing rate regulations on broadband is conflict-preempted, and a divided panel of the Second Circuit erred in holding otherwise. (It erred as well in failing to declare the law field-preempted—but that is outside the scope of this brief.)

We write to elaborate on where the Second Circuit went wrong, and to emphasize the catastrophic consequences of letting the Second Circuit's ruling stand:

I. The Second Circuit neglected the history and text of the Telecommunications Act of 1996. The Title I-Title II distinction harkens back to the FCC's studies, beginning in the 1960s, of what the FCC called "basic" and "enhanced" services. The "basic" service was voice calling offered by AT&T's Bell System telephone monopoly. The "enhanced" services were computer technologies that users accessed through the basic network. The FCC concluded that the "basic" service, provided by a monopoly, needed heavy-handed common carrier regulation. This position was codified into the many rules that govern Title II "telecommunications" services. The FCC

concluded that the competitive interstate "enhanced" services needed the freedom to develop and spread, unhindered by federal *or state* regulation. Congress codified this position in the light-touch regulatory regime that governs Title I "information" services. Only by ignoring this context could the Second Circuit erroneously conclude that a Title I classification *invites* onerous state common carrier regulation.

Having misunderstood the 1996 Act, the Second Circuit proceeded to misread it. The FCC can forbear from enforcing discrete Title II obligations on a Title II service. And when the FCC does so, the Second Circuit observed, "the states are prohibited from imposing th[ose] same obligation[s] on the [Title II] service." Pet.App. 33a. That's true enough. But the Second Circuit then proceeded to assume that, because there is *express* preemptive authority in *Title II*, there can be no *implied* preemptive authority in *Title I*. That is a non sequitur. In effect, the Second Circuit simply refused to apply implied (conflict) preemption to a *de*regulatory statute. There is no rule by which preemption may be *implied* when Congress elects to *regulate*, but *must* be *express* when Congress elects *not* to regulate. Acting as though such a rule exists, the Second Circuit erred.

II. In seeking to treat broadband service like common carriage despite its Title I status, New York seeks, in essence, permission to treat *any* Title I service like common carriage. In other words, New York's arguments, if accepted, would allow intrusive state regulation of *all* Title I information services. Under New York's theory, states could impose market entry or exit requirements, rate regulations, and

many other onerous regulations on email, text messaging, and much more. That would be a disaster for the Internet, for technological progress, and for society.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S RULING IS DEEPLY WRONG.

The Second Circuit elided the deregulatory history behind, as well as the deregulatory aims explicitly written into, the Telecommunications Act of 1996. Having thus ignored Congress's deregulatory purpose, the court unsurprisingly proceeded to botch its preemption analysis. It applied a made up—and quite pernicious—rule under which *implied* preemption *never* applies when Congress *de*regulates.

A. The Second Circuit Ignored the Deregulatory History and Text of the Telecommunications Act of 1996.

To understand the deregulatory aims of the Telecommunications Act of 1996, it's important to review the historical significance of the distinction between Title II "telecommunications" services and Title I "information" services. Only by ignoring this history could the Second Circuit erroneously hold that a Title I classification *opens* an interstate service to state rate regulation.

From the 1960s through the 1980s, the FCC engaged in a series of "computer inquiries." Advances in computing technology were enabling the creation by

upstart competitors of innovative new products that could enhance basic telephone service while running over the same wires. The FCC had become alive to this fact, as well as to the ways that the dominant provider of "basic" telephone service—the Bell System—could hamper the attachment and integration of "enhanced" services into the telephone network. One goal of the Computer Inquiries was to ensure that the innovative "enhanced" computer services could access the "basic" telephone service, over much of which Bell held a monopoly. See generally Tom Struble, *The FCC's Computer Inquiries: The Origin Story Behind Net Neutrality*, Morning Consult, https://perma.cc/NF9D-JG25 (May 23, 2017).

The Computer Inquires spotted, defined, and analyzed this distinction between "basic" and "enhanced" services. A "basic" service simply *carries* data along, the Inquiries explained, while an "enhanced" service *processes* data in some way during data transport. This basic/enhanced distinction was then codified into the Telecommunications Act of 1996. "Basic" service became "telecommunications" service, which the 1996 Act defines as the "transmission" of information "without change in the form or content of the information as sent and received." 47 U.S.C. § 153(50). "Enhanced" service, meanwhile, became "information" service, which the 1996 Act defines as a service that has the "capability" to "generat[e]," "acquir[e]," "stor[e]," "transform[]," "process[]," "retriev[e]," "utiliz[e]," or "mak[e] available" information "via telecommunications." *Id.* § 153(24).

In short, "telecommunications" service and "information" service are not arbitrary labels. They capture ideas that stretch back to the distinction between the "dumb" carriage of the "basic" Bell telephone monopoly (telecommunications service) and the "smart" computer services that "enhanced" that system (information services).

Preemption was baked into the Computer Inquiries, as the FCC insisted that the states keep their hands off even intrastate "enhanced" (now "information") services:

> State public utility regulation of entry and service terms and conditions (including rates and feature availability), ostensibly applied to 'intrastate' enhanced services, would have a severe impact on, and would effectively negate, federal policies promoting competition and open entry in the interstate markets for such services.

In re Amendment of Sections 64.702 of the Comm'n's Rules & Regulations (Third Computer Inquiry), 2 FCC Rcd 3035 ¶ 181 n.374 (1987); see also *In re Petition for Declaratory Ruling (Pulver)*, 19 FCC Rcd 3307 ¶ 17 n.61 (2004) (discussing the FCC's conclusion, in its Computer Inquiries, that states "may not impose common carrier tariff regulation on a carrier's provision of enhanced services").

The 1996 Act adopts this light-touch, states-stay-out regulatory regime, both by saying that Title I "information services" should remain "unfettered by … State regulation," 47 U.S.C. §§ 230(b)(2), 230(f)(2),

and by saying that a firm may be "treated as a common carrier" only "to the extent" that it "provid[es] telecommunications services," *id.* § 153(51).

As the FCC itself explains, it has for "decades" aimed to "enable information services to function in a freely competitive, unregulated environment." *In re Pulver*, 19 FCC Rcd 3307 at ¶ 19 n.69. And Congress has adopted that aim as its own, "ma[king] clear statements," in the 1996 Act, "about leaving the Internet"—including information services—"free of unnecessary federal *and state* regulation[.]" *Id.* ¶ 25 (emphasis added). "Consequently," adds the FCC, "states have generally played a very limited role with regard to information services." *Id.* ¶ 17.

B. The Second Circuit Misapplied—and Drastically Curtailed—Conflict Preemption.

The Telecommunications Act of 1996 expresses Congress's "deregulatory policy" toward Title I services. *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 394 (D.C. Cir. 2017) (Brown, J., dissenting from denial of rehearing en banc). By imposing draconian rate regulation, New York's law stands as an obstacle to the objectives Congress enshrined in Title I.

In holding otherwise, the Second Circuit mistook the 1996 Act for a *pro*-regulatory statute. The court assumed that the only way the FCC could obtain the power to preempt state laws is to *ratchet* a service up to heavy-handed Title II regulation. That's backwards. To be sure, the FCC has the express power to lessen the burden of Title II regulation through preemption-

backed forbearance. Pet.App. 33a (citing 47 U.S.C. § 160(e)). It does not follow, however, that the FCC needs express power to preempt state regulation when it addresses something classified as a Title I service. *The whole point* of Title I status, after all, is to head off heavy-handed regulation, including rate regulation, be it at the federal or state level. 47 U.S.C. §§ 230(b)(2), 230(f)(2).

The Second Circuit wondered how Title I could "confer implied preemptive authority when it does not confer express preemptive authority." Pet.App. 37a. The answer is simple: express preemption and implied preemption aren't the same thing. Title I may not contain an express preemption provision, but that does not mean the states are free to thwart Congress's objectives by enacting statutes that nullify Title I's effect. *Arizona*, 567 U.S. at 399.

The Second Circuit's theory is perverse. Title I is a deregulatory statutory framework. See Sec. I.A., supra. Yet in the Second Circuit's view, when the FCC identifies a service as a Title I service, that drastically *expands* the universe of regulations (via the states) to which the service can be subjected. That makes no sense.

The very authority the Second Circuit cited for support, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019)—the decision that upheld (most of) the Restoring Internet Freedom Order—highlights the distinction between express and implied preemption. *Mozilla* rejected the FCC's attempt to "categorically abolish all fifty States' … authority to regulate intrastate communication." *Id.* at 86. Meanwhile,

though, *Mozilla* did "not consider whether" the Restoring Internet Freedom Order had "preemptive effect under principles of conflict preemption." *Id*. at 85. If a party can "explain how a state practice actually undermines [the Restoring Internet Freedom Order]," *Mozilla* concluded, "then it can invoke conflict preemption." *Id*.

By conflating express and implied preemption, the Second Circuit reneged on *Mozilla*'s pledge that states may not "actually undermine[]" light-touch Title I regulation. In fact, the Second Circuit managed to read *Mozilla* as saying that Title I has *no* implied preemptive effect. Quite simply, the Second Circuit erased the distinction between the *express* preemption that was at issue in *Mozilla*, and the *implied* (conflict) preemption that was left unaddressed in *Mozilla* but that's at issue here.

In placing information services in Title I, what did Congress achieve? We know this much: it wanted to reduce regulation, so that information services could flourish. Was Congress fine with states imposing a patchwork of price controls—and other common carrier rules, such as market entry and exit requirements—on information services? Obviously not. To fulfill Congress's deregulatory aims, must the FCC ignore Title I (rendering it superfluous?), try to cram services into Title II, and then fundamentally rewrite Title II through sweeping forbearance? Again, clearly no. Congress set up a scheme of light-touch regulation, in Title I, and it meant what it said.

By moving broadband "outside of … Title II," the Second Circuit claimed, the FCC "surrendered the

statutory authority" to preempt state common carrier regulations. Pet.App. 32a. The FCC's authority to preempt state law must, this thinking runs, be coextensive with what the FCC *itself* has the authority to do. The Second Circuit picked up this novel "asymmetry" theory—under which federal regulatory schemes can pack implied preemptive power, but federal *de*regulatory schemes cannot—from overbroad language in *Mozilla*. The asymmetry theory says, in essence, that when it comes to *de*regulation, preemption can *only* be express.

This is not sound preemption law; it's just a prejudice against deregulation. "A federal decision to forgo regulation in a given area," the *Mozilla* dissent said, quoting this Court, "may imply an authoritative federal determination that the area is best left *un*regulated." 940 F.3d at 83 (Williams, J., dissenting) (quoting *Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983)) (emphasis added). The dissent here agreed. The FCC's finding that broadband should *not* be subject to Title II regulation, it wrote, quoting another of this Court's decisions, "takes on the character of a ruling that no such regulation is appropriate or approved." Pet.App. 60a (quoting *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 178 (1978)). To demand more "statutory authority" is to demand that, when deregulating, and *only* when deregulating, Congress add: "And we really mean it." This amounts to an erroneous claim that federal deregulatory efforts *require* express preemption. The Second Circuit upheld the ABA only by improperly stacking the deck against Congress's deregulatory objectives.

II. THE SECOND CIRCUIT'S RULING IMPERILS TECHNOLOGICAL INNOVATION.

If the Communications Act does not prevent New York from trampling on *this* Title I information service (broadband), nothing in logic stops a state from disregarding the Communications Act to trample on *any* Title I information service.

Under New York's theory, each time the FCC identifies a cutting-edge interstate service as a Title I information service, rather than a Title II telecommunications service, the FCC's identification serves as an announcement, to the states, that it is open season for regulating that service as common carriage. In other words, New York believes that Congress designed a law that predictably, efficiently, and systemically "fetters" the Internet with state regulation, when Congress explicitly demanded the opposite. See 47 U.S.C. §§ 230(b)(2), 230(f)(2). This theory obliterates the fundamental dichotomy between interstate communications, regulated at the federal level, and wholly intrastate communications, regulated at the state level.

The need for the light-touch Title I regime is as great as ever, as communications technology continues to evolve rapidly. Email and text messaging are Title I services. Other services that process data while transporting it, such as business communications platforms, cloud-computing services, and video-conferencing apps, display the hallmarks of Title I services. See 47 U.S.C. § 153(24). When one thinks of Title I, one should think of the light-touch regulatory

environment necessary for *all* these services (and their successors, such as the Metaverse) to thrive.

The Second Circuit's ruling is extraordinarily harmful. Nothing in logic enables a state to say that interstate broadband's Title I status opens the way to state rate regulation, but that email's or text messaging's Title I status does *not* open those services to state rate regulation. Under the Second Circuit's ruling, in short, the Communications Act would not prevent states from applying rate regulation to *every* service that is, or that could plausibly be, a Title I information service.

When it identified email as a Title I service, the FCC was not giving states a *green light* to rate-regulate email (or, when an email service is free, to require the provider to pay users for data). Likewise, were the FCC to identify business communications platforms like Slack as Title I services, that would not be a *green light* for states to set price controls for those products. To assume otherwise is to assume that every service *must* be subject to heavy-handed regulation by *someone*. But the 1996 Act (and common sense) tells us that that can't be the case.

The Second Circuit concluded that the forbearance power, under Title II, is the only preemptive power in the FCC's Title I-Title II arsenal. Pet.App. 33a (citing 47 U.S.C. § 160(e)). In the Second Circuit's view, the FCC must *itself* have the power to impose price caps, as it does for services under Title II, to *stop states* from imposing price caps. But when we pan out, and think about more than broadband, that claim looks like pure folly. Imagine that a state says it will start imposing

market entry and exit rules, rate regulations, or pay-for-data requirements on email. Does that mean that, for the Communications Act to bar such regulation, email must be under Title II, with the FCC then *forbearing* from treating email like a common carrier? Why would Congress, which wants the Internet to remain unfettered by state regulation, 47 U.S.C. § 230(b)(2), require such a Rube-Goldberg-esque process to head off state regulation? Such a protocol would make a mockery of Congress's straightforward conclusion that Title I is the home of services that need light-touch regulation.

CONCLUSION

The petition should be granted.

September 13, 2024

Respectfully submitted,

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