No. 24-161

IN THE
Supreme Court of the United States

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

v.

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

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

PETITION FOR REHEARING

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January 10, 2025

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RULE 29.6 STATEMENTS

Petitioners' Statements pursuant to Rule 29.6 were set forth at pages iii-iv of the petition for a writ of certiorari, and there are no amendments to those Statements.

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Pursuant to Rule 44.2, 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, petition for rehearing of this Court's December 16, 2024 order[1] denying their petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's recent decision in *In re: MCP No. 185*, – F.4th –, 2025 WL 16388 (6th Cir. Jan. 2, 2025), presents "intervening circumstances of a substantial . . . effect" that arose after this Court's disposition of the certiorari petition that warrant granting rehearing (and certiorari). Sup. Ct. R. 44.2. *See Abdirahman v. United States*, 585 U.S. 1046 (2018) (granting rehearing); *see also Boumediene v. Bush*, 551 U.S. 1160 (2007) (same).

1. When this Court denied the petition, a Sixth Circuit panel had unanimously stayed the FCC's latest attempt to transform broadband into a public-utility service—subject to the Communications Act's Title II, which includes rate regulation—but its merits review was ongoing.[2]

In opposing certiorari, New York cited that ongoing review as the primary reason to deny the petition:

- "*First*, this case is a poor vehicle for addressing the question presented because the governing

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[1] *See New York State Telecomms. Ass'n, Inc. v. James*, No. 24-161, 2024 WL 5112294 (U.S. Dec. 16, 2024).

[2] *See In re: MCP No. 185*, 2024 WL 3650468 (6th Cir. Aug. 1, 2024) (per curiam).

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 [Affordable Broadband Act]." Opp. 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." Opp. 14.
- "The Second Circuit's decision here is based on . . . Title I . . . , 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." *Id.*
- "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." Opp. 15.

2. Last week, the Sixth Circuit concluded its review, issuing a unanimous decision holding that broadband—defined as in New York's rate-regulation law[3]—is an information service regulated under Title I and, therefore, immune from common-carrier regulation. *See MCP No. 185*, 2025 WL 16388, at *5-10.

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[3] *Compare MCP No. 185*, 2025 WL 16388, at *2 n.1, *with* N.Y. Gen. Bus. Law § 399-zzzzz(1).

The court put an "end [to] the FCC's vacillations" about the regulatory status of broadband under federal law by "applying the plain meaning" of the statute to hold that broadband providers "offer only an 'information service' . . . and therefore, the FCC lacks the statutory authority to impose its desired net-neutrality policies" by regulating those providers as common carriers. *Id.* at *1, *3, *10.

The court found support for that conclusion throughout the Telecommunications Act of 1996. There, Congress both codified the information service definition and announced its intent "'to preserve the vibrant and competitive free market that presently exists for . . . interactive computer services'"—including "'information service[s] . . . that provide[] access to the Internet'" (i.e., broadband)—"'unfettered by Federal or State regulation.'" *Id.* at *7 (quoting 47 U.S.C. § 230(b)(2), (f)(2)) (first ellipsis added). The court found that it would be "strange for Congress to enact this policy while, in the same bill, shackling Internet access providers with onerous Title II regulation." *Id.*

Commissioner Carr—President-Elect Trump's selection for FCC Chairman—had dissented from the FCC order the Sixth Circuit vacated and has endorsed the Sixth Circuit's ruling "striking down the[] unlawful Title II regulations."[4] It therefore appears unlikely that the United States will seek (or support) this Court's review of that decision. The "convulsive change[s]" of the past decade, with each new "administration rescind[ing] the [prior administration's] rule

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[4] *See* Press Release, FCC, Off. of Comm'r Brendan Carr, *Carr Welcomes Court Order Invalidating President Biden's Plan to Expand Government Control of the Internet Through Title II Regulations* (Jan. 2, 2025), https://docs.fcc.gov/public/attachments/DOC-408580A1.pdf.

and replac[ing] it with another," are now at an end. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 438 (2024) (Gorsuch, J., concurring).

3. The Sixth Circuit's decision is an "intervening circumstance[] of a substantial . . . effect" that warrants rehearing. Sup. Ct. R. 44.2. To start, the decision resolves the status of broadband under federal law. It is a Title I service, just as it was when the Second Circuit ruled. The vehicle problems New York raised in its opposition (at 14-16) as its first ground for opposing certiorari no longer exist.

The Sixth Circuit's decision also crystalizes the Second Circuit's decision as a conflicting outlier. As noted above, the Sixth Circuit found that it would be "strange" if, as the FCC contended, the same Congress that wanted to keep broadband "unfettered by Federal or State regulation" also "shackl[ed]" broadband to "onerous Title II regulation." *MCP No. 185*, 2025 WL 16388, at *7. Yet the Second Circuit concluded that the Communications Act does not preempt States from regulating broadband prices *because* broadband is an information service. *See* App. 30a-31a, 33a-34a. The court below thus thought that the same Congress that prohibited the FCC from regulating Title I information services like public utilities, and wanted them "unfettered by Federal *or State* regulation," actually left each State free to choose whether to shackle broadband providers with onerous common-carrier regulations, including rate regulation. That is the same "strange" state of affairs the Sixth Circuit correctly read the Communications Act to prohibit.[5]

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[5] During the first Trump administration, the United States sought to enjoin California's law regulating broadband providers as common carriers on federal preemption grounds. *See* Mot. for Prelim. Inj., *United States v. California*, No. 18-cv-2660, ECF No.

The Sixth Circuit's decision also escalates the importance of the issues this case presents. New York's promise not to enforce its rate regulation law expires on January 14, 2025.[6] The following day will be the first day that any government—federal, state, or local—has ever regulated retail broadband rates.[7] While New York's law will be the first, it likely will not be the last. Pro-regulation advocates have already announced their intent "to look to states and local governments to help lead on broadband"[8] and "to hold the line."[9]

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2 (E.D. Cal. Sept. 30, 2018); Renewed Mot. for Prelim. Inj., *United States v. California*, No. 18-cv-2660, ECF No. 21 (E.D. Cal. Aug. 5, 2020). The United States dismissed its complaint following the 2020 election. *See* Notice of Voluntary Dismissal, *United States v. California*, No. 18-cv-2660, ECF No. 44 (E.D. Cal. Feb. 8, 2021).

[6] After petitioners filed an emergency application for a stay pending this Court's consideration of their certiorari petition, New York largely mooted that application by agreeing not to enforce its rate-regulation law until 30 days after this Court acted on that petition. *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).

[7] There is a serious risk that, once New York's does so, some providers will cease offering broadband service in New York rather than sell at a loss.

[8] Shiva Stella, *Sixth Circuit Ruling on FCC Authority Threatens Consumer Protections and Open Internet*, Public Knowledge (Jan. 2, 2025) (statement of Public Knowledge Legal Director), https://publicknowledge.org/sixth-circuit-ruling-on-fcc-authority-threatens-consumer-protections-and-open-internet/.

[9] Craig Aaron, *How Big Companies and the Courts Killed Net Neutrality*, Common Dreams (Jan. 3, 2025) (statement of Craig Aaron, President & Co-CEO, Free Press), https://www.commondreams.org/opinion/fcc-net-neutrality.

Nor does the Second Circuit's decision end with broadband service. As the Sixth Circuit noted, "[e]veryone agrees" that companies like "Netflix, Amazon, Facebook, and Google" "offer[] an information service." *MCP No. 185*, 2025 WL 16388, at *6. Under the Second Circuit's expansive holding, the Communications Act also would not preempt state rate regulation of the many other information services beyond broadband—like streaming video and music, cloud storage, email and messaging, and online video conferencing—that broadband's capabilities enable consumers and businesses to access.

* * *

The Sixth Circuit's recent decision obviates New York's primary basis for opposing certiorari, establishes the Second Circuit's decision as a conflicting outlier that relies on a "strange" reading of the Communications Act, and increases the possibility of harmful state-by-state rate regulation of broadband and other information services. This Court should grant the petition for rehearing and grant the petition for a writ of certiorari.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Pursuant to this Court's Rule 44.2, I, Scott H. Angstreich, counsel for petitioners, hereby certify that the petition for rehearing is restricted to the grounds specified in Rule 44.2. I further certify that the petition for rehearing is presented in good faith and not for delay.

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January 10, 2025