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

REPLY BRIEF FOR PETITIONERS

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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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

ADMINISTRATIVE DECISIONS

CONSTITUTION AND STATUTES

OTHER MATERIALS

Whether a State can set the rates for broadband internet access service — an interstate communications service — is a question of exceptional national importance. New York does not seriously dispute that the Affordable Broadband Act ("ABA") is the first of its kind. No other government (at any level) has ever enacted a statute that regulates retail broadband rates. New York does not dispute that the Second Circuit's decision in *NYSTA II* opens the door to other States following suit and a patchwork regime unknown in the internet's history. Nor does New York deny that *NYSTA II* reaches far beyond broadband. It holds that the federal Communications Act does not preempt state rate regulation of interstate information services, a category that also includes video- and music-streaming services, cloud-storage services, and dozens more.

New York draws the wrong conclusion from the connection between this case and the Sixth Circuit's review of the FCC's recent (stayed) attempt to turn broadband into a public-utility offering. The Sixth Circuit's finding that broadband is likely an interstate information service immune from FCC public-utility (including rate) regulation highlights the need for this Court's review here. According to the Second Circuit, an FCC loss at the Sixth Circuit declares open season for all 50 States to regulate broadband rates *because* Congress did not explicitly authorize the FCC to do so. Yet the same interpretive principles that bar the FCC from finding implicit statutory authority to treat broadband as a public-utility service demand rejecting the Second Circuit's reading of that Act to invite, silently, each of the 50 States to claim such authority.

This Court should grant the petition. This is *the* case for reviewing this issue (Part I *infra*), presents questions of exceptional national importance (Part II

infra), and requires review to remedy serious legal error (Part III *infra*). Finally, if this Court has any doubt about the interaction between this case and the pending Sixth Circuit case, or broadband's importance to the national economy, the Court should call for the views of the Solicitor General.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION IS THE CASE FOR RESOLVING THIS ISSUE

1. New York's claim (at 14-16) that ongoing litigation over the FCC's judicially stayed *2024 Order* renders this case a poor vehicle for review is backwards. Setting aside the State's speculation (at 14) that the law might be in "flux," the Sixth Circuit litigation — which has been significantly accelerated, with oral argument tomorrow[1] — *underscores* the need to grant the petition, or at least hold it until resolution of litigation over the *2024 Order* (whether it ends with the Sixth Circuit or before this Court).

2. To attack this vehicle, New York muses (at 16 n.9) that the Second Circuit might have lacked jurisdiction sufficient to rule in New York's favor and vacate the district court's injunction. But the State's warning (*id.*) that this Court "might well need to consider" its jurisdiction is evergreen, not a reason to deny the petition — especially as New York (here and below) agrees that the Second Circuit had jurisdiction.

3. Finally, the State contends (at 17-18) that *NYSTA II* does not implicate a circuit split. That is because no other federal appellate court has ever read

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[1] *See* Oral Arg. Calendar (Judges Griffin, Kethledge, and Bush), https://www.ca6.uscourts.gov/sites/ca6/files/documents/oral_argument_calendars/10282024_arg.pdf.

the Communications Act to allow States to regulate directly the rates of interstate communications services:

- In *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (per curiam), the court acknowledged that conflicting state laws are preempted, while rejecting the FCC's assertion of authority to expressly preempt all possible future state regulation of broadband, even purely intrastate regulation that did not conflict with federal law. *See id.* at 85.
- In *ACA Connects v. Bonta*, 24 F.4th 1233 (9th Cir. 2022), the court did not address rate regulation because California's statute did not regulate retail broadband prices; the court also believed (erroneously) that it was upholding *only* intrastate regulation with some effects on interstate service. *See id.* at 1247.[2]

The district court cases the State cites (at 18) likewise do not uphold state rate regulation of interstate communications services. *Cf. ACA Connects v. Frey*, 471 F. Supp. 3d 318, 322-24 (D. Me. 2020) (addressing state privacy law); *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459, 463 (D. Nev. 1968) (addressing what the reviewing court deemed to be intrastate cable regulation), *aff'd mem.*, 396 U.S. 556 (1970) (per curiam).

Stepping back from the State's myopic framing (at 17), *NYSTA II* conflicts with decades of decisions, including from this Court, rejecting state regulation

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[2] New York disputes this, quoting (at 17 n.10) the Ninth Circuit's (incorrect) characterization of the preemption argument — that plaintiffs-appellants viewed California's law as "state regulation of intrastate communications that touches on interstate communications," 24 F.4th at 1247 (in fact, they argued that the law directly regulated interstate communications services). That mischaracterization confirms that petitioners correctly describe the Ninth Circuit's error.

of interstate communications services through public-utility-style measures. *See* Pet. 16-17; *see also* NCTA Amicus Br. 12-13.

II. THE SECOND CIRCUIT'S DECISION RAISES ISSUES OF PROFOUND NATIONAL IMPORTANCE

1. New York does not dispute that the Second Circuit's decision invites all 50 States to regulate the rates of *any* interstate information service without running afoul of the federal Communications Act. Nor does the State dispute that, if the Sixth Circuit rejects the *2024 Order*'s common-carrier classification of broadband, *NYSTA II* welcomes all 50 States to regulate broadband rates specifically *because* broadband is immune from federal rate regulation. Each of these consequences is enough to necessitate this Court's review.

New York instead begins (at 18) with the remarkable claim that the ABA is not "public-utility-style" regulation. The district court rejected that argument so soundly, *see* App. 79a-81a, that New York did not repeat it before the Second Circuit. All three appellate judges also recognized the ABA as "*ex ante* rate regulation on broadband." App. 59a (Sullivan, J., dissenting); *see also* App. 34a (majority; same). New York's claim that the ABA is not state rate regulation is not serious, as evidenced by New York spilling so much ink defending state authority to regulate broadband rates.[3]

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[3] Before the Second Circuit (*see* Br. 25, 30-31), New York acknowledged that the combination of Title II classification of broadband and forbearance from rate regulation would preempt the ABA, and the Second Circuit majority agreed. *See* App. 33a-34a. Although the stayed *2024 Order* does both things, New York now claims (at 14 n.8) that the ABA is a "state broadband affordability program[]" of the kind the *2024 Order* invites. Yet in that

2. The State also seeks to minimize the significant consequences that will befall broadband providers and consumers if *NYSTA II* disrupts the decades-long status quo of legislators and bureaucrats not setting broadband prices. New York asserts (at 20-21) that broadband investment did not decline during the brief window (2015-2017) when the FCC classified broadband as a Title II, common-carrier telecommunications service. That is wrong — investment declined — and it ignores that the FCC did not then set broadband rates. *See 2015 Order* ¶¶ 443, 499. The ABA is the first time that any government at any level enacted a statute regulating retail broadband rates in the United States.

The State posits (at 18-19) that the three largest broadband providers in New York already have affordable offerings while smaller providers might obtain exemptions — so no harm, no foul. That illustrates the propriety of preserving the status quo in which market competition has yielded better service at lower cost. *See* Stay App. 27. But the ABA's heavy-handed dictates — coupled with smaller providers' uncertainty about obtaining and maintaining exemptions,[4]

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order the FCC cited the federal Broadband Equity Access and Deployment ("BEAD") program as the sole "example" of how States may "promot[e] broadband affordability." *2024 Order* ¶ 386 n.1578; *see also id.* ¶ 275 n.1145. Providers that voluntarily participate in BEAD must offer at least one "low-cost broadband service option" over the federal-funded network. 47 U.S.C. § 1702(h)(4)(B). But unlike the ABA, Congress did not prescribe capped prices for such low-cost offerings and, instead, expressly *prohibited* construing the low-cost-offering obligation to "authorize . . . regulat[ing] the rates charged for broadband service." *Id.* § 1702(h)(5)(D).

[4] *See* Stay App. Ex. 10 ¶¶ 14-16 (Northrup Decl.); Ex. 11 ¶ 22 (Faulkner Decl.); Ex. 12 ¶ 12 (Miller Decl.); *see also* Stay App. 23 n.15.

and the possibility of New York or other States setting even lower rates — *will* disrupt the status quo of marketplace competition and investment in broadband deployment. *See id.* at 22-24 (citing declarations).

3. Finally, New York's observation (at 20) that no other State has *yet* regulated retail broadband rates is cold comfort to providers. Petitioners obtained a preliminary injunction shortly before the ABA took effect and, even after *NYSTA II*, New York twice agreed not to disrupt that status quo. *See* Stay Reply 7. That is why this is the case to hear. If the ABA were to take effect, it would be a watershed moment. Many state legislators and bureaucrats would surely then follow New York's lead.[5]

III. THE SECOND CIRCUIT ERRED IN HOLDING THAT STATES CAN REGULATE RETAIL BROADBAND RATES

***Field Preemption*:** Section 152 is an express statement by the 1934 Congress precluding States from regulating interstate communications services. *See* Pet. 15-17; *see also* Chamber Amicus Br. 3-5, 9-17. This Court recognized the "plenary" federal authority over the field of interstate communications services in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 360 (1986), which — contrary to New York's assertion (at 24) — was an interpretation of Section 152 (part of Title I), not a holding limited to interstate common-carrier (Title II) communications services.

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[5] New York cites (at 20) a handful of cases involving other state price regulation — but of milk produced and sold in-state (*Nebbia*), apartment rents (*Yee*), insurance products (*O'Gorman & Young*), and state corporate and personal (but not national bank) interest rates (*Griffith*). None involved interstate communications services, let alone broadband.

The State's principal response (at 21-22) confuses how the Court expects modern Congresses to express field-preemptive intent — via a "pervasive" scheme that leaves no room for any state regulation — with what sufficed in an earlier age. *See* Pet. 15-17; Chamber Amicus Br. 9-17. And this Court has recognized that Congress's decision that some interstate commerce should not be subject to public-utility regulation does not thereby "give the States the power" to do what federal regulators cannot. *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd. of Mississippi*, 474 U.S. 409, 422 (1986); *see also* NCTA Amicus Br. 16.[6]

New York disputes (at 24-25) that Section 152 evinces preemptive intent, but it cites only *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963), which involved regulating advertisements, not interstate radio service. As to those services, it is "clear" that Congress "occupied fully the field," so that Congress's denial to the FCC of a specific power "does not mean that the States may exercise" it. *Allen B. Dumont Lab'ys v. Carroll*, 184 F.2d 153, 155-56 (3d Cir. 1950).

New York's trio of arguments (at 23) that other parts of the Communications Act bely field preemption are makeweights.

First, the State points to the express preemption provision in Section 332. But an "express preemption" clause "does *not* bar the ordinary working" of other preemption principles. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002) (cleaned up). Further, Section

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[6] *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), already rejected New York's erroneous claim (at 25) that this Court's earlier holdings recognizing field preemption springing from provisions parallel to Section 152 turned on the dormant Commerce Clause. *See* 485 U.S. at 305-06.

332 expressly preempts state regulation of *intrastate* services — an expansion of federal authority beyond its "plenary" interstate domain.[7] This federal expansion implies nothing about States' authority to regulate interstate services.

Second, the State points to the statutory savings clause, *see* 47 U.S.C. § 414, which preserves preexisting state remedies to address fraudulent business practices in the provision of interstate service. Section 414 copies an identical provision from the Interstate Commerce Act, *see* ch. 104, § 22, 24 Stat. 379, 387 (1887), which this Court has held is field preemptive — including as to interstate communications — despite the presence of the same savings clause. *See Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27, 31 (1919).[8]

Third, the State claims that Congress's reference to "price cap regulation" in Section 706, as a means by which the FCC and state public-utility commissions could "encourage the deployment" of "advanced telecommunications capability," 47 U.S.C. § 1302(a), permits States to regulate broadband rates. But even assuming broadband is an "advanced telecommunications capability," which is not at all clear,[9] Section 706

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[7] Section 332(c)(3)(A) preempts state regulation of mobile services — which can be used to make both intrastate and interstate calls — "[n]otwithstanding" the States' otherwise-reserved authority over intrastate services in Section 152(b).

[8] Section 414 also does not create state authority where none has ever existed, such as over "rates or other issues specially reserved to federal control." *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 987 (7th Cir. 2000).

[9] The FCC has acknowledged that "'advanced telecommunications capability' has a unique definition in section 706 that differs from the term 'broadband' in other contexts." 2015 Broadband

applies only to state agencies "with regulatory jurisdiction over *telecommunications services*." *Id.* (emphasis added). The premise of *NYSTA II* is that broadband is *not* a Title II telecommunications service, but a Title I information service. So Section 706 provides no defense of the Second Circuit's decision.

In all events, the 1996 Act "unquestionably" *expanded* federal control of communications services, taking "the regulation of local telecommunications competition away from the States." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999). And it would be "surpassing strange" to think Congress intended for a "*federal* regime" to be "administered by 50 independent state[s]." *Id.*

***Conflict Preemption*:** The ABA conflicts with Congress's express limitation of "common carrier" regulation to "telecommunications services." 47 U.S.C. § 153(51); *see also* NCTA Amicus Br. 6-7, 12-15. Because broadband remains an information service today, it is statutorily immune from rate regulation. *See Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014); *Cellco P'ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012); *cf. Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) (finding that federal law preempts state regulation of VoIP, an information service, because "any state regulation of an information service conflicts with the federal policy of nonregulation").

Federal law has never wavered on this point. Before the 1996 Act, courts consistently prohibited rate regulation of precursors to information services, known as "enhanced services." *See*, *e.g.*, *CCIA v. FCC*, 693

Progress Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 30 FCC Rcd 1375, ¶ 1 n.1 (2015).

F.2d 198, 209-12 (D.C. Cir. 1982); *California v. FCC*, 39 F.3d 919, 933 (9th Cir. 1994); *see also USTelecom v. FCC*, 825 F.3d 674, 691 (D.C. Cir. 2016) (explaining regulatory history). Those cases involved state efforts to regulate only intrastate enhanced services, which courts *still* halted when those state efforts spilled into the interstate sphere, regulating interstate rates in conflict with the federal regime. *See*, *e.g.*, *CCIA*, 693 F.2d at 209-12; *California*, 39 F.3d at 933; *see also* NCTA Amicus Br. 11-12.[10] That history leaves New York without an argument, substantive or procedural.

Regarding substance, the State's resort (at 27) to the 1996 Act's savings clause in § 601(c)(1) fails because it was federal law before 1996 that interstate enhanced services (now information services) are not subject to common-carrier regulation at the federal level. *See Howard v. America Online, Inc.*, 208 F.3d 741, 752-53 (9th Cir. 2000). The implied conflict-preemptive effect from that preexisting law does not arise from the 1996 Act or its amendments — including Congress's decision to add Section 153(51) to codify that preexisting law — so the savings provision in § 601(c)(1) about new law springing from the 1996 Act does not apply. *See* Chamber Amicus Br. 18-19; NCTA Amicus Br. 7-10.

New York therefore relies on procedure, asserting four times (at 3, 12, 17-18, 26) that petitioners abandoned this conflict-preemption argument below. Not so. Petitioners raised three preemption arguments to the district court, which found both field preemption and conflict preemption based on the FCC's *2018*

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[10] None of these States sought or claimed the authority — as New York does here — to regulate directly the rates of an interstate enhanced service.

Order, and so did not reach statutory conflict preemption. *See* App. 76a-83a. Before the Second Circuit, petitioners did "not rais[e]" their additional conflict-preemption argument, because it was unnecessary to affirm the judgment. Br. 15 n.26. Even so, the Second Circuit majority concluded, erroneously, that it would "rewrite the Communications Act" for conflict preemption to arise from Title I of that Act. App. 36a; *accord* App. 38a. In all events, this Court can reverse *NYSTA II* and reinstate the district court's judgment for any reason the record supports. *See*, *e.g.*, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1984) (deciding federal-preemption question even though the court of appeals did not address it); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our traditional rule is that once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.") (cleaned up); *see also Teague v. Lane*, 489 U.S. 288, 300 (1989) (plurality) (deciding based on argument "raised only in an *amicus* brief").

CONCLUSION

The petition for a writ of certiorari should be granted.

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