21-1975-cv

The United States Court of Appeals
For The Second Circuit

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, SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION, on behalf of their respective members,

Plaintiffs - Appellees,

v.

LETITIA A. JAMES, in her official capacity as Attorney General of New York,

Defendant - Appellant.

Appeal From The United States District Court For The Eastern District of New York, No. 21-cv-2389 (Hon. Denis R. Hurley)

BRIEF FOR AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS-APPELLEES

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Dated: March 2, 2022

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Chamber of Commerce of the United States of America ("Chamber") states that it is not a publicly traded corporation. It has no parent corporation, and there is no public corporation that owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country.

An important function of the Chamber is to represent the interests of its members in matters before the Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the Nation's business community. The Chamber has previously participated as amicus curiae in cases addressing public-utility regulation of the Internet. *See, e.g.*, *ACA Connects v. Bonta*, No. 21-15430, 2022 WL 260642, (9th Cir. Jan. 28, 2022) (panel and *en banc*); *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016). And it regularly participates in cases involving federal preemption. *See, e.g.*, *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190 (2017); *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115 (2016); *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312 (2016); *Nw., Inc.*

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. The parties have been notified of amicus's intent to file this brief and have consented to its filing.

v. Ginsberg, 572 U.S. 273 (2014); *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 455 (2012); *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323 (2011); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011); *Wyeth v. Levine*, 555 U.S. 555 (2009); *Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008).

The Chamber has a significant interest in, and can offer a unique perspective on, the issues here. American businesses are the beneficiaries of a nationally and globally deployed broadband infrastructure, which has transformed (and will continue to transform) the way that they operate, providing numerous opportunities to create and market innovative products and services. The Chamber is a proponent of a free and open Internet, and it supports federal efforts to promote broadband deployment and affordable broadband service to all Americans. At the same time, the Chamber opposes efforts to treat the Internet like a public utility and to create a disparate patchwork of state laws. The New York Affordable Broadband Act ("ABA") would do both of those things.

SUMMARY OF THE ARGUMENT

Congress has long entrusted federal agencies with the exclusive authority to determine whether, and under what conditions, to establish rates for certain interstate services, including interstate communications services. *See* Appellees' Br. 38-43. Exercising that authority, agencies have increasingly concluded in

recent decades (relying on reams of economic evidence) that ratemaking is a blunt, inefficient, and ultimately ineffective means to attempt to make quality services available and affordable. Instead, Congress and federal agencies, including the FCC, have more recently relied on a combination of competitive forces and subsidies to spur innovation and investment and drive down prices. Despite a fundamental disagreement about the regulatory paradigm that should apply to broadband Internet access service, FCC Commissioners from both parties have concluded for decades that broadband should be free from *ex ante* ratemaking. In 2015, even as it applied other utility-style regulation to broadband, the Commission rejected what it called "old world," "pervasive and intrusive cost-of-service rate regulation."[2]

Against this deliberate choice by the Commission, New York has taken the unprecedented step of setting the prices for broadband—an inherently national, and indeed global, communications service. The district court correctly recognized that federal law prevents New York from adopting such price controls, for at least two reasons.

[2] *In re Protecting & Promoting the Open Internet*, 30 FCC Rcd. 5601 ¶¶417 n.1228, 441, 443, 447 (2015) ("2015 Order"); *see also In re Restoring Internet Freedom*, 33 FCC Rcd. 311 ¶¶441, 451-52, 449 (2018) ("2018 Order").

First, the New York pricing scheme, which uses the same interstate definition of broadband as the FCC, conflicts with the FCC's determination, confirmed over multiple administrations, that broadband should be free from *ex ante* rate regulation. Second, more than 100 years of Supreme Court and Second Circuit case law confirms that Congress gave the FCC the exclusive authority to determine whether to set prices for interstate communications services like broadband.

In seeking reversal of the lower court's decision, New York may urge this court to rely on a recent Ninth Circuit decision preliminarily finding that California likely has authority to regulate the same interstate service at issue here (broadband Internet access) by imposing "net neutrality" rules on service providers that the FCC repealed at the federal level in 2018. But that case was wrongly decided. First, the Ninth Circuit ignored governing Supreme Court precedent, and created a conflict with the D.C. Circuit's decision in *Mozilla v. FCC*, 940 F.3d 1 (D.C. Cir. 2019), in concluding that the FCC's 2018 Order could not preempt conflicting state laws. Second, the Ninth Circuit incorrectly presumed that California was only regulating intrastate activity, an error that caused it to ignore controlling precedent establishing the FCC's exclusive authority to regulate interstate communications services. To the contrary, neither California nor New York has identified an "intrastate Internet" that it claims to be regulating. Nor could it, as these states'

entire policy rationale rests on the mistaken conceit that they are making access to the *entire worldwide Internet* more readily available to consumers in their states. This Court should not adopt or compound the Ninth Circuit's errors.

Federal and state lawmakers currently undertake efforts to make billions of dollars available for affordable broadband service and network deployment in underserved communities. Broadband providers also voluntarily make innovative plans available to underserved communities, often in coordination with federal, state and local governments, including New York. But the laudable goal of affordable broadband cannot justify unlawful and economically harmful tactics undertaken by states that disagree with the federal regulatory approach. New York's heavy-handed and retrograde ratemaking regime is neither lawful nor economically sound. The district court's judgment should be affirmed.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE NEW YORK STATE AFFORDABLE BROADBAND ACT CONTRAVENES FEDERAL LAW AND IS PREEMPTED.

The district court correctly concluded that Appellees were likely to prevail on their arguments that federal law preempts New York's attempt to set broadband prices through the ABA under theories of both conflict and field preemption. The Chamber urges this Court to affirm that the ABA is preempted both by the

Commission's 2018 Order and the Communications Act, which exclusively vests the power to set rates for broadband service with the FCC.

New York's ABA requires providers of wireline, wireless, or satellite "broadband service" to make one of two high-speed offerings available to consumers, with different specifications, at either $15 or $20 per month, inclusive of taxes and fees. N.Y. Gen. Bus. Law § 399-zzzzz(3)-(4). The ABA defines "broadband service" 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). The FCC has repeatedly defined broadband in near identical terms.[3] This "end-to-end" definition of broadband confirms that, on its face, New York is attempting to regulate an inherently interstate service; that is, a service where the communications routinely "go from one state to another," *N.Y. Tel. Co. v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980), and indeed, in this case, travel across the globe.

"FCC jurisdiction" exists whenever a "service is used for the completion of interstate communications." *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984); *see also N.Y. Tel. Co.*, 631 F.2d at 1066 (describing interstate service as the "key to jurisdiction" under the Communications Act). In

[3] *Compare* 2018 Order ¶176; 2015 Order ¶¶25, 187; *In re Preserving the Open Internet Broadband Indus. Pracs.*, 25 FCC Rcd. 17905 ¶44 (2010).

orders spanning over a decade, the FCC has exercised that jurisdiction to reach a bipartisan consensus that broadband should not be subject to ratemaking.

In 2015, the FCC classified broadband as a "telecommunications service" under Title II of the Communications Act, 2015 Order ¶47, which made broadband providers common carriers, *see* 47 U.S.C. § 201 *et seq*. Ordinarily, this classification would require broadband providers to offer their services at "just and reasonable" rates set by the Commission, *id.*, as ratemaking is "utterly central" to common carriage. *See MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 230-32 (1994). The Communications Act, however, empowers the Commission to "forbear" from applying any Title II requirements to telecommunications services if unnecessary to ensure that prices are just and reasonable and that consumers and the public interest are protected. 47 U.S.C. §160.[4] Exercising this authority, the FCC in 2015 decided to forbear from *ex ante* rate regulation of broadband—rejecting what it described as "old world," "pervasive and intrusive cost-of-service rate regulation." 2015 Order ¶¶417 n.1228, 441, 443, 447.

In 2018, the FCC returned broadband to its longstanding prior classification as an "information service" under Title I of the Act, which released broadband

[4] The Act further specifies that States "may not continue to apply or enforce any provision" of Title II that the Commission decided to forbear from applying. *Id.* §160(e).

providers from any common-carrier treatment. Notably for the present case, in so doing, the Commission found that the mere possibility of rate regulation (for example, by a potential reversal of the former FCC's forbearance decision) deterred innovation and investment in broadband. 2018 Order ¶¶101, 104. The Commission thus made clear that a central reason for reversing broadband's common-carrier designation was to relieve providers from the potential burdens of *ex ante* ratemaking. *See id.* at ¶¶ 239, 246-266.

As the district court in this case correctly observed, the FCC "made the affirmative decision" in the 2018 Order to classify "broadband internet as a Title I information service" and "not to treat it as a common carrier" service. JA137. Far from an "abdication of jurisdiction," *id*. at 138, as New York urged, the Title I classification decision "cement[ed]" the FCC's "long-standing policy choice concerning the propriety of imposing common-carrier rate regulations upon broadband internet service." *Id*. at 139. New York's ABA therefore conflicts with the 2018 Order because "the ABA is rate regulation, and rate regulation is a form of common carrier treatment." *Id*.

The district court separately identified a more foundational problem with the ABA: New York was attempting to regulate the rates of an interstate communications service, and Congress vested the FCC with the exclusive authority to determine whether and when such rates are appropriate. *See id*. The district

court rejected New York's contention that the ABA was a "purely intrastate affordable-pricing scheme," JA145, because the ABA purported to set a price for access to the worldwide Internet, not some imaginary Empire State Internet "confined to communications between two New York endpoints." JA147. In reaching this conclusion, the district court relied on over 100 years of precedent from the Supreme Court and this Court establishing that federal statutes governing rates for interstate communications service occupy the field and preclude states from regulating in this area. JA147-48 (citing *Ivy Broad. Co. v. AT&T*, 391 F.2d 486, 490-91 (2d Cir. 1968)).

The Chamber urges this Court to affirm the FCC's reasoned decision to assure interstate broadband providers that no common-carrier rate regulations await them as they make their investment decisions, which should be protected from a barrage of conflicting state laws. Affirmance would also protect the FCC's exclusive supervision, delegated by Congress, of national broadband markets, which are inherently interstate in nature.

II. THE NINTH CIRCUIT'S PREEMPTION APPROACH IN *ACA CONNECTS* IMPROPERLY ARROGATES TO STATES NEW AUTHORITY TO REGULATE NATIONWIDE BROADBAND NETWORKS AND SHOULD NOT GUIDE THIS COURT.

The district court properly applied conflict and field preemption principles, and the governing law of this Circuit, to find New York's ABA preempted. That should end the analysis for this Court. In response, New York may argue that the

ABA is lawful under the Ninth Circuit's recent decision in *ACA Connects v. Bonta,* No. 21-15430, 2022 WL 260642, (9th Cir. Jan. 28, 2022), which adopted an unprecedented and expansive view of states' authority to regulate interstate broadband service. The Ninth Circuit's reasoning is unpersuasive—it is fundamentally flawed, inconsistent with Supreme Court and Second Circuit precedent, and should not govern this case.

A. The Ninth Circuit wrongly concluded that the FCC had abandoned the field, when in fact it had adopted a "light-touch" transparency-based regime for broadband.

The Ninth Circuit erred in *ACA Connects* in holding that, once the FCC reclassified broadband as a Title I information service, states like California could "step[] into the breach" to adopt the same utility-style, common carrier obligations that the FCC had explicitly rejected. 2022 WL 260642 at *2. In fact, the FCC's decision necessarily preempts any attempts to reimpose the same utility-style rules, including *ex ante* ratemaking, at the state level.

In the 2018 Order, the FCC repealed the so-called "net neutrality" rules that the Commission had previously adopted in 2015. 2018 Order ¶239. The Commission concluded that these rules, which included *ex ante* proscriptions on content-based blocking, throttling, and paid prioritization, would hinder innovation and investment, and especially burden smaller providers and new entrants to the market. 2018 Order ¶¶251, 255. Against this backdrop, California adopted the

Internet Consumer Protection and Net Neutrality Act of 2018 ("SB-822"), Cal. Stats. 2018, ch. 976, which reimposed the same kind of utility-style regulation that the FCC had repealed, and indeed made those rules more onerous, while purporting to regulate the same "end-to-end" worldwide broadband service repeatedly defined in the Commission's orders.

Under ordinary conflict-preemption principles, SB-822 plainly stands as an obstacle to the full purposes and objectives that the FCC set forth in the 2018 Order. While the Ninth Circuit acknowledged the Commission's "policy judgment that a light-touch regulatory framework [for broadband] would be most effective," *ACA Connects*, 2022 WL 260642 at *8, the court declined even to consider whether this state law would frustrate the FCC's conscious selection of a lightly-regulated environment for broadband, *id.* at *10-12. Instead, the Ninth Circuit held that the FCC "can not preempt SB-822 because it gave up its full regulatory authority by reclassifying broadband as a Title I information service." *Id*. at *7.

That decision was incorrect. Far from surrendering authority over broadband, the FCC made an affirmative choice among the regulatory options at its disposal when it selected the tools available under Title I of the Communications Act. 2018 Order ¶¶210, 218-223, 239. Under Title I, for example, the FCC can and did impose transparency requirements on broadband providers to better inform

consumers of the nature of their service, *see* 47 U.S.C. § 257, which was upheld as reasonable by the D.C. Circuit in *Mozilla*, 940 F.3d at 57.

After comparing the costs and benefits of Title II and Title I regulation, the FCC selected the latter. The FCC concluded that Title I regulation would benefit consumers by encouraging more innovation and investment, while still providing adequate protection against unlawful conduct through a combination of provider disclosures and case-by-case enforcement under the antitrust and consumer protection laws. *See* 2018 Order ¶¶123-138, 140-154, 240-245. By so doing, the FCC substituted a regime of *ex ante* conduct rules that apply universally to all providers in all situations for an *ex post* enforcement regime surgically focused on specific instances of provider misconduct.

These regimes reflect a philosophical difference about the best way to regulate broadband. But in the final analysis, they are both comprehensive federal regimes for regulating broadband, designed to balance the need for enforcement and consumer protection with the desire to encourage additional investment and provide regulatory certainty. Or in the words of the Ninth Circuit, both involve "the invocation of federal regulatory authority" needed to "preempt state regulatory authority." *ACA Connects*, 2022 WL 260642 at *3.

The panel's erroneous reading of the Communications Act and the 2018 Order conflicts with the D.C. Circuit's preemption analysis in *Mozilla*. The Ninth

Circuit panel claimed that "[w]ithout the [FCC's] authority to preempt, it does not much matter whether SB-822 conflicts with the federal policy objectives underlying the reclassification decision." *ACA Connects*, 2022 WL 260642 at *9-10. But the D.C. Circuit held that it mattered critically whether a state law conflicted with the policy objectives in the 2018 Order. While that court held that the FCC lacked authority to expressly preempt all contrary state laws under the 2018 Order, it stated that the FCC "can invoke conflict preemption" when "a state practice actually undermines" its order. *Mozilla*, 940 F.3d at 85. In fact, the *Mozilla* court rejected as a "straw man" the dissent's argument that the majority decision would allow state policies to trump conflicting FCC policies. *Id*.

The Ninth Circuit's disregard of regulatory purpose also contravenes the Supreme Court's own test for conflict preemption, where the touchstone is whether the state law "stands as an obstacle to . . . the full purposes and objectives" of the federal regulatory action. *Arizona v. United States*, 567 U.S. 387, 399 (2012); *see also Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 875-86 (2000) (applying obstacle preemption analysis to federal agency rule). In *Geier*, for example, the Supreme Court held that a Department of Transportation regulation that permitted automobile manufacturers to install a range of passive restraint features in cars impliedly preempted a more restrictive state tort that would have mandated all manufacturers to install airbags. 529 U.S. at 875-86. The state law, the Court

reasoned, would "present[] an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* at 881. Similarly, both California's mini-"net neutrality" rules and New York's ratemaking regime conflict with the "variety and mix" of regulatory measures that the FCC has deemed appropriate for broadband.

Critically, the Supreme Court reached its conclusion in *Geier* only after holding that Congress had not *expressly* preempted the state tort in question. *See id.* at 867-68. Despite the existence of a savings clause in the relevant statute, the Court concluded that "ordinary pre-emption principles . . . apply where an actual conflict with a federal objective is at stake." *Id.* at 871. So, too, in *Mozilla*, the D.C. Circuit recognized that even where the FCC was found to lack the authority to expressly preempt contrary state laws, a state law that "actually undermines the 2018 Order" would still give rise to "conflict preemption." 940 F.3d at 85. The Ninth Circuit ignored *Geier* in holding that conflict preemption was unavailable.

Geier also illustrates how directionally deregulatory policy decisions (permitting a mix of passive restraints) preempt state law (mandatory airbags) to the same extent as more pro-regulatory measures. The Supreme Court has repeatedly upheld the preemptive effect of similar federal deregulatory measures "where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate." *Bethlehem Steel Co. v. N.Y. State Lab. Rels. Bd.*, 330 U.S. 767, 774 (1947); *see*

also Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 384 (1983). Here, this Court does not need to read tea leaves to understand what the FCC was attempting to accomplish: Its Title I classification explicitly rested in part on its affirmative desire to reduce the regulatory burdens on broadband providers, thereby increasing their incentives to invest in new facilities and services. It accomplished this objective by relieving broadband providers of common carrier obligations, including ratemaking, that New York now seeks to impose through the ABA. *See* 2018 Order ¶¶1, 3, 88.

Courts of appeals, too, have recognized that the FCC may preempt state efforts to regulate Title I services with federal rules that further a "market-oriented policy allowing providers of information services to burgeon and flourish . . . without the need for and possible burden of rules, regulations and licensing requirements." *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 578-81 (8th Cir. 2007) (internal quotation marks omitted). Even the Ninth Circuit previously upheld the FCC's preemption of state structural-separation requirements that "would negate the FCC's goal of allowing [providers] to develop efficiently a mass market for enhanced services for small customers" and "defeat the FCC's more permissive policy of integration." *California v. FCC*, 39 F.3d 919, 932-33 (9th Cir. 1994) ("*California III*"); *see also Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 880 F.2d 422, 430-31 (D.C. Cir. 1989).

In short, "a direct effort by a state to impose costs on interstate services that the FCC believes are unwarranted seems rather clearly within the FCC's authority to prevent." *Pub. Serv. Comm'n of Md. v. FCC*, 909 F.2d 1510, 1515-16 (D.C. Cir. 1990) ("*Maryland PSC*"); *see also Minnesota PUC*, 483 F.3d at 580-81. This Court should reject the Ninth Circuit's contrary reasoning and conclude that the FCC's 2018 Order prevents states like New York from regulating broadband prices.

B. The Communications Act of 1934 provides the federal government with exclusive authority to regulate interstate communications services.

Contrary to the Ninth Circuit's conclusion that Supreme Court and court of appeals case law "foreclose" field preemption, *ACA Connects*, 2022 WL 260642 at *3, the relevant cases in fact require it. The principle of field preemption of rates for interstate communications services has been repeatedly affirmed in decisions of the U.S. Supreme Court and this Court and has served as a critical legal foundation for spurring the deployment of modern national communications networks.

Over 50 years ago, surveying the Supreme Court's case law, this Court held that "questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law and that the states are precluded from acting in this area." *Ivy Broad. Co. v. AT&T*, 391 F.2d 486, 491 (2d Cir. 1968); *see also, e.g.*,

Postal-Tel. Cable Co. v. Warren-Godwin Lumber Co., 251 U.S. 27 (1919). The same holds true of modern communications services like broadband. Indeed, this Court has not hesitated to apply field preemption to modern services like wireless telephony where the FCC has spoken "so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law[.]" *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010). Unsurprisingly, in light of this history, New York appears to be the first state to ever attempt to regulate the price of broadband service.

The Ninth Circuit attempted several analytic moves to avoid these clear and consistent holdings, but none are persuasive. *First*, the court repeatedly mischaracterized the California statute as a law that merely "touches on" interstate services. *ACA Connects*, 2022 WL 260642 at *12-13. The court apparently hoped to take advantage of case law suggesting that states remain free to regulate *intrastate* communications, even if such regulation may incidentally "impact" or "affect" interstate services. *See id.* at 13 (citing *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 373-74 (1986)). But the Supreme Court in *Louisiana Public Service Commission* permitted states to adopt their own depreciation methods in aid of *intrastate* ratemaking—a process that involved a "'separations' proceeding to determine the portions of a single asset that are used for interstate and intrastate service." 476 U.S. at 369 (citing 47 U.S.C. § 410(c)). Neither California nor New

York, by contrast, has even attempted to identify an intrastate component of the service they are regulating.

As the district court in this case correctly recognized (JA146-47), New York's ABA does not purport to set a price for provision of some local transport service (like local phone calls within the same area code). Rather, it explicitly sets a ceiling on the price of Internet access generally, or the provision of communications that are predominantly interstate, or even international, in scope. There has thus been no "correct allocation between interstate and intrastate use" that would save the ABA from preemption. *La. Pub. Serv. Comm'n*, 476 U.S. at 375 & n.4. Nor could there be, by broadband's very nature. Indeed, what makes ratemaking politically attractive to states like New York is the prospect of mandating provision at below-market cost of a popular service that offers access to any point on the Internet, no matter where the content originates or terminates. A hypothetical Big Apple Broadband service that only reaches endpoints within the confines of the state would likely be of little to no interest or value to the people of New York. Because broadband is inherently interstate, the FCC may permissibly conclude that the costs of state-level ratemaking of broadband outweigh the benefits. *See* 2018 Order ¶¶195, 433.

Second, the Ninth Circuit attempted to avoid field preemption by suggesting counterfactually that SB-822 regulates an intrastate service because Internet

service providers "build and maintain the exit ramps from the [Internet] highway to consumers' homes and businesses." *ACA Connects*, 2022 WL 260642 at *3. But neither California nor New York has suggested that their statutes regulate only this "last mile" of Internet service. On their face, the California conduct rules would appear to prohibit a provider from throttling Internet traffic in Reno that reaches a consumer's home in San Francisco, and California has never suggested otherwise. Similarly, it makes no sense to suggest that New York's rates, which apply to broadband service as a whole, are intended to pay only for traffic traveling over the first or last mile of cable wires and airwaves within New York, with providers free to charge extra to then carry the consumers' Internet traffic out-of-state to its ultimate destination. And New York has made no claim that the statute is intended to operate in that manner; in fact, it has made no effort to limit its reach to only those Internet endpoints in New York.

Even during the early days of the Internet, when the FCC briefly classified local DSL transmission as a separate Title II service,[5] no State took that as license to regulate interstate broadband access. In that late-90s timeframe, phone companies would provide "the 'last mile' connection between the end-user and the

[5] *See In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd. 2402 (1998) ("DSL Order").

[internet service provider]." 2018 Order ¶54. But that DSL service did not provide access to the Internet. Instead, early internet service providers (like AOL or EarthLink) would separately provide access to the Internet over that last-mile connection, in competition with the phone companies that offered their own non-common-carrier internet access service over the DSL service. Yet no State suggested it was free to set prices for providers like NYNEX or AOL's internet access service provided over that common-carrier DSL connection. There is even less basis to assert intrastate jurisdiction over broadband today, when cable operators and phone companies offer a "finished, functionally integrated service that provides access to the Internet," rather than "two distinct services" consisting separately of Internet access and local transmission. 2018 Order ¶47.

Third, the Ninth Circuit suggests that SB-822 is intrastate regulation because it applies only to services "provided to customers in California" and to broadband providers who do business in California. *ACA Connects*, 2022 WL 260642 at *12. But the fact that consumers in California or New York utilize a particular service has no bearing on the inquiry. Consumers in New York and in every state purchase and use both interstate and intrastate communications services. It is the nature of the *service*, not the location of the consumer, that determines whether states may permissibly regulate it. *See New York Tel. Co. v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980) ("key to jurisdiction" under the Communications Act is not

"the physical location of the technology," but whether the communications "go from one state to another"); *cf. Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003) ("it is difficult, if not impossible, for a state to regulate internet activities without projecting its legislation into other States."). As the D.C. Circuit has recognized, the Communications Act "attaches no significance to the physical location of the facilities used": instead, "FCC jurisdiction" exists whenever a "service is used for the completion of interstate communications." *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984).

C. The FCC is not required to classify broadband as a Title II telecommunications service and then exercise its forbearance authority under the 1996 Telecommunications Act to preempt state activity.

The Ninth Circuit's conclusion that the FCC "abandoned" the field and lost the power to preempt when it classified broadband as a Title I service would prevent the FCC from adopting uniform federal rules to govern interstate communications services unless it first classified the service under Title II. It simply cannot be that the FCC must impose on emerging and potentially disruptive communications services the full panoply of protections against market-dominant behavior to prevent states from interfering in the FCC's work. The prospect of tariffs, network access, and interconnection requirements, subject only to the regulator's grace of forbearing from some or all of these onerous and antiquated mandates, creates regulatory uncertainty and compliance costs, such as those that

caused many small providers to abandon planned investments and support reclassification to Title I following the FCC's 2015 Order. *See* 2018 Order, ¶¶20, 88, 99.

That state of affairs cannot be squared with Congress's statements of purpose in the 1996 amendments to the Communications Act, which declared it "the policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services" (a statutory term that includes "any information service") "unfettered by Federal *or State* regulation." 47 U.S.C. § 230(b)(2), (f)(2) (emphasis added).

The Ninth Circuit's position would also mean that, prior to the 1996 Act's amendments that put in place the FCC's modern forbearance authority, the FCC lacked any tools *at all* to protect nascent interstate information services from burdensome state regulations. But history has shown the opposite is true.

For more than a decade prior to the adoption of the 1996 Act, the Commission preempted state regulation of intrastate information services that interfered with its regulation of interstate information services. *See, e.g.*, *California III*, 39 F.3d at 932-33 (upholding FCC preemption where state regulation of enhanced services, the precursors to modern information services, would frustrate federal objectives); *see also* 2018 Order ¶202 & n.748. When Congress then codified into law the distinction between more heavily regulated

Title II "telecommunications services" and more lightly regulated Title I "information services," it effectively ratified the existing regulatory regime—including the FCC's authority to preempt contrary state law. *See, e.g.*, *Pharaohs GC, Inc. v. United States Small Bus. Admin.*, 990 F.3d 217, 227 (2d Cir. 2021) ("Congress legislates against the backdrop of existing [regulatory] law.").

As the Supreme Court said of the Cable Act, also administered by the FCC, "Congress sanctioned in relevant respects the regulatory scheme that the Commission had been following" and aimed to "mirror[] the state of the regulatory law before the . . . Act was passed." *City of New York v. FCC*, 486 U.S. 57, 67 (1988). Because nothing in that Act "explicitly disapproved" of the FCC's prior preemption efforts, the Cable Act could be understood as a ratification of those efforts. *Id.* at 67-70. The same is true here.

As the Supreme Court recognized, "a preemptive regulation's force does not depend on express congressional authorization to displace state law." *City of New York*, 486 U.S. at 64 (internal quotation marks omitted). Indeed, the Ninth Circuit had previously "rejected" the contention that "the FCC may preempt state action only when it is acting pursuant to specified regulatory duties under Title II of the Act," and that "no preemption authority exists" when "the FCC's action is intended to implement the more general goals of Title I." *California III*, 39 F.3d at 932. This Court, too, should reject the proposition that the FCC can only prevent states

like New York from ratemaking by first subjecting communications services to a similarly onerous common-carrier regime at the federal level.

Indeed, if the Ninth Circuit's reasoning were to stand, states would be free to regulate nationwide interstate communications services that even proponents of utility-style broadband regulation have long conceded are Title I services—such as video conferencing over the Internet. On the Ninth Circuit's reasoning, states would be free to regulate the rates that Zoom and WebEx charge their business customers under the theory that the FCC had abandoned the regulatory playing field. Forcing the FCC to classify such services under Title II or risk conceding to a patchwork of inconsistent state regulation, even as they are rapidly evolving to meet the needs of increasingly virtual workforces and classrooms in the wake of the COVID-19 pandemic, would turn on its head Congress's expectation that such emerging services be free from federal or state regulation.

III. THE IMPORTANT PUBLIC POLICY GOALS OF AFFORDABLE BROADBAND AND UNIVERSAL SERVICE ARE NOT EFFECTIVELY ADVANCED BY "UTILITY-STYLE" RULES AND PATCHWORK, STATE-BY-STATE REGULATION.

Affordable broadband and universal service are critical to close the digital divide and bring economic opportunity and connectivity to all parts of the United States. However, these goals are best achieved through the "light-touch" approach that the FCC put in place under Title I of the Communications Act, coupled with existing federal and state funding mechanisms for broadband. New York's

ratemaking approach, by contrast, is counterproductive, imposing unnecessary costs on providers and deterring innovation and investment in new networks, inevitably leading to an inferior product.

Since the FCC repealed its heavy-handed, utility-style federal regulations in 2018, the Internet has flourished, with massive increases in investment, faster speeds, and wider deployment and access. In recent years, broadband investment reached $80 billion—the highest amount since 2001. *See* Telecommunications Industry Association, Comments on Restoring Internet Freedom ("TIA Comments"), at 4 (Apr. 20, 2020), bit.ly/31AsCWD; *see also* Patrick Brogan, USTelecom, *U.S. Broadband Investment Continued Upswing in 2018*, at 1-2 (July 31, 2019), bit.ly/31n3xOt.

These increases in broadband investment are not merely numbers on a page; they have directly contributed to real-world improvements in broadband deployment and quality. Since the repeal of the heavy-handed federal regulations in 2018, the number of Americans living in areas without access to the FCC's benchmark internet speeds dropped from 18.1 million to 14.5 million—a decrease of more than 20%. *See* Fourteenth Broadband Deployment Report, FCC, at ¶2 (Jan. 19, 2021), bit.ly/3cYNqhh. And more than three-fourths of those newly served Americans live in rural areas. *Id*. Households with even faster fiber broadband access mirrored that trend, *see* U.S. Chamber of Commerce Technology

Engagement Center, Comments on Restoring Internet Freedom, at 3-4 (Mar. 20, 2020), bit.ly/2PtwFOw, with 2018 having the largest expansion of fiber broadband in U.S. history, *see* Statement of Chairman Pai on Increased Broadband Investment for Second Year in a Row (June 10, 2019), bit.ly/3ketyIp. Those investments are especially critical to national economic growth as more Americans work and learn from home, requiring reliable access to Internet applications and video platforms—a trend that has rapidly accelerated during the COVID-19 pandemic. Over this period of increasing demand, broadband prices have declined.[6] And, as a result, the United States "consistently ranks . . . as one of the most affordable nations for entry-level broadband," and repeatedly ranked "first in the world for broadband affordability." Doug Brake, *Lessons From the Pandemic: Broadband Policy After COVID-19, Info. Tech. & Innovation Found.*, at 11 (July 13, 2020), bit.ly/2PobvRY.

Meanwhile, Congress has taken significant steps to expand access to broadband through federal subsidies. For decades, the FCC has promoted universal service through the consumer-funded Universal Service Fund, which includes both a high-cost program to subsidize deployment in underserved

[6] *See, e.g.*, Tyler Cooper and Jason Shevik, Broadband Pricing Changes: 2016 to 2022, BROADBAND NOW (Feb. 7, 2022), https://broadbandnow.com/internet/broadband-pricing-changes; *Broadband Stats: America's Fast Internet Speeds*, The Internet & Television Association (July 7, 2021), https://rb.gy/0wqsbp.

communities and a Lifeline program to provide discounted service to low-income consumers. But in the past two years, Congress has modified this landscape by creating or amending several programs aimed at ensuring greater broadband access across the nation.

Chief among those initiatives is the Affordable Connectivity Program ("Program"), which Congress funded to the tune of $14.2 billion. See Pub. L. 117-58, Div. F, Title I, 135 Stat. 429 § 60502(b). The Program provides at least $30 per month in broadband internet access subsidies for households at eligible income levels. On top of the monthly benefit, each eligible household can receive a $100 discount towards the purchase of a computer or tablet. Vice President Kamala Harris touted the Program in a February 2022 speech, noting that 10 million people have enrolled, including those who transitioned from the expiring $3.2 billion Emergency Broadband Benefit. Kamala Harris, U.S. Vice President, Remarks by Vice President Harris on the Bipartisan Infrastructure Law (Feb. 14, 2022). The federal government plans to work to enroll even more eligible Americans, partnering with state and local governments as well as faith-based groups. *Id.*

The federal government is also focusing on implementing the $42.5 billion Broadband Equity, Access, and Deployment Program ("BEAD Program"), which provides money to states to administer grants geared at expanding broadband access in areas that are unserved or underserved as well as among low-income

Americans. Pub. L. 117-58, Div. F, Title I, 135 Stat. 429 § 60102(b)(2). Under the BEAD Program, each state is entitled to at least $100 million. *Id.* § (c)(2)(A). States can then distribute that money for eligible projects via subgrants. Those providers who receive subgrants must offer at least one low-cost broadband option for eligible subscribers. *Id*. § (h)(4)(B).

States, meanwhile, have engaged in complementary broadband expansion efforts. Many have increased funding for broadband access and expansion independent of federal efforts. *See, e.g.*, *How State Grants Support Broadband Deployment, Pew Charitable Trusts* (Dec. 23, 2021), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/12/how-state-grants-support-broadband-deployment. For example, New York itself made a $500 million broadband infrastructure investment back in 2015. New York ConnectALL Office, https://nysbroadband.ny.gov/ (last visited March 1, 2022). And as of 2018, eight states supported broadband access for low-income consumers through their universal service funds. Sherry Lichtenberg, Ph.D., *State Universal Service Funds 2018: Updating the Numbers*, Nat'l Regul. Rsch. Inst., at 12 (2019).

Providers also voluntarily offer low-income broadband options. New York, for example, has recognized that even prior to the pandemic, consumers had "multiple options" for low-cost plans through programs offered by the providers

themselves. *Find Affordable Internet Options in New York State*, https://web.archive.org/web/20210415225444/https://forward.ny.gov/find-affordable-internet-options-new-york-state (Apr. 15, 2021 snapshot).

The federal government, states, and providers are thus participating in an evolving, interactive process for determining how best to facilitate affordable broadband in light of the massive funding allocations made over the last two years. Indeed, the FCC has already begun a statutorily-mandated proceeding to determine how the recent broadband funding should affect broadband support under the federal Universal Service Fund. *In re Report on the Future of the Universal Service Fund*, FCC 21-127, (adopted Dec. 15, 2021) (Notice of Inquiry). The Commission must issue a report to Congress by mid-August. Pub. L. No. 117-58, 135 Stat. 429 § 60104(c)(2).

Rather than wait for this iterative process to play out, New York is charging ahead with attempting to set both the price and characteristics of broadband service that New York providers are required to offer. It has done so even though Congress *specifically denied* rate-setting authority to the National Telecommunications and Information Administration, which administers many of the new broadband expansion programs. Pub. L. 117-58, Div. F, Title I, § 60102(h)(5)(D), Nov. 15, 2021, 135 Stat. 1182. ("Nothing in this title may be construed to authorize . . . the [NTIA] to regulate the rates charged for broadband

service."). And it has done so even though the FCC has concluded that utility-style rules like New York's ABA deter innovation and investment in harder-to-serve communities. In the 2018 Order, for example, the Commission concluded that the costs associated with ratemaking would lead to smaller and more rural providers investing less money in personnel and infrastructure. 2018 Order ¶104. And even though the FCC under the prior administration disagreed with the benefits of Title II classification, that Commission too agreed that providers should be free from the specter of *ex ante* ratemaking. 2015 Order ¶¶497-501.

This bipartisan consensus follows decades of economic thinking that has concluded that "the 'public utility' cost-based ratemaking approach is resource-intensive, involves arbitrary judgments on appropriate costs, and creates distortive economic incentives."[7] As Justice Breyer explained over forty years ago, "[g]iven the inability of regulation to reproduce the competitive market's price signals, only severe market failure would make the regulatory game worth the candle."[8] Recognizing the inefficiencies inherent in ratemaking, federal agencies have in recent decades abandoned the approach in economic sectors ranging from

[7] Securities and Exchange Commission, *Report of the Advisory Committee on Market Information: A Blueprint for Responsible Change*, at § VI1D.3 (SEC Sept. 14, 2001.

[8] Stephen G. Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reforms*, 92 Harv. L. Rev. 547, 565 (1979).

securities to energy production.[9] If states were to reimpose ratemaking on these increasingly deregulated sectors, it would impose cumulative or conflicting costs on providers that deter innovation and investment and lead to higher costs for consumers. So, too, with respect to communications. As both a matter of law and public policy, New York's ratemaking approach under the ABA represents a step in the wrong direction for achieving the laudable goal of affordable broadband access.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment permanently enjoining the ABA and declaring it preempted.

Dated: March 2, 2022

Respectfully Submitted,

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[9] *See, e.g.*, *NetCoalition v. SEC*, 615 F.3d 525, 535 (D.C. Cir. 2010); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993).

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 29(a)(5) of the Federal Rules of Appellate Procedure and Circuit Rule 29.1(c) because this brief contains 6978 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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