21-1975

IN 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.

On Appeal from the United States District Court for the Eastern District of New York, No. 21-cv-2389 (Hon. Denis R. Hurley)

BRIEF OF *AMICI CURIAE* FORMER FCC COMMISSIONERS JONATHAN ADELSTEIN, MIGNON CLYBURN, MICHAEL O'RIELLY, AND AJIT PAI IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

Amici Jonathan Adelstein, Mignon Clyburn, Michael O'Rielly, and Ajit Pai each served proudly as a member of the Federal Communications Commission. *Amicus* Jonathan Adelstein was an FCC Commissioner between 2002 and 2009. *Amicus* Mignon Clyburn was an FCC Commissioner from 2009 to 2018, and led the Commission as Acting Chairwoman from May 2013 to November 2013. *Amicus* Michael O'Rielly was an FCC Commissioner between 2013 and 2020. And *Amicus* Ajit Pai was a member of the Commission from 2012 to 2021, serving as FCC Chairman from January 2017 to January 2021.

Amici belong to different political parties and disagree on some prominent communications policy issues. For example, *Amicus* Clyburn voted in favor of the FCC's 2015 Open Internet Order while *Amici* O'Rielly and Pai voted against it. Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015) ("*2015 Order*"). And *Amici* O'Rielly and Pai voted in favor of the FCC's 2018 Restoring Internet Freedom Order while *Amicus* Clyburn voted against it. Declaratory Ruling, Report and Order, and Order, *Restoring Internet Freedom*, 33 FCC Rcd 311 (2018) ("*2018 Order*").

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no counsel for any party authored this brief in whole or in part, nor did any party or other person or entity other than *amici curiae* make a monetary contribution to the brief's preparation or submission.

Nevertheless, *Amici* agree on the importance of providing every American with access to affordable broadband and worked during their time at the FCC on a variety of initiatives to expand broadband access and make broadband more affordable.

Amici also agree that both the federal government and state governments should play an important role in advancing these critical objectives. At the same time, *Amici* understand, from their service at the FCC, that our nation's communications laws give different and complementary roles to the federal government and the states. For example, the power to regulate rates for interstate communications services belongs exclusively to the FCC, and the power to regulate rates for intrastate communications services generally belongs to state governments. In order for our nation's system of communications regulation to work effectively, *Amici* know that it is important for the federal government and state governments to respect the other's authority.

Although the State of New York's Affordable Broadband Act ("ABA"), N.Y. Gen. Bus. Law § 399-zzzzz (2021), may have been enacted with the best of intentions, *Amici* agree with the District Court's decision below that it is preempted by federal law. And if this Court were to reverse the District Court's judgment, such a decision would represent a dramatic departure from the well-established legal framework for communications regulation in which *Amici* participated for many years, a framework that *Amici* believe has served the United States well.

INTRODUCTION AND SUMMARY OF ARGUMENT

At its core, this case is about whether the State of New York is authorized to regulate the rates charged for an interstate communications service. While Appellant seeks to recast the ABA as regulating "intrastate pricing levied by New York companies on New York customers," Appellant Br. at 26, this characterization is fundamentally inconsistent with our nation's framework for communications governance.

The ABA regulates broadband rates. It sets a price ceiling for two levels of broadband service, N.Y. Gen. Bus. Law § 399-zzzzz(3)-(4), and price caps have been one of the main methods for regulating the rates charged for communications services in the United States. To be sure, the ABA only regulates the broadband rates that may be charged to a subset of New York households, but this does not transform quintessential rate regulation into something else.

The ABA also regulates the rates charged for an interstate communications service. The FCC has consistently considered broadband to be an interstate service. *See, e.g.*, *2015 Order*, 30 FCC Rcd at 5803. The FCC employs an end-point analysis to determine whether communications are interstate or intrastate, and broadband service regularly involves data transmissions that cross state (and national) lines. The ABA defines broadband as "a mass-market retail service that provides the capability to transmit data to and receive data from all or substantially all Internet

endpoints," whether "by a wireline, fixed wireless, or satellite service provider." N.Y. GEN. BUS. LAW § 399-zzzzz(1). This is nearly identical to the FCC's definition of broadband, *see* 47 CFR § 8.1(b), and plainly encompasses interstate communications by referencing "the capability to transmit data to and receive data from all or substantially all Internet endpoints."

Appellant cites no authority for the proposition that the rates charged for an interstate communications service constitute "intrastate pricing," Appellant Br. at 26, and *Amici* are not aware of any. Indeed, according to Appellant's logic, the rates charged to New York consumers for long-distance telephone calls crossing state lines could be considered "intrastate pricing" since they involve companies offering service in New York levying charges on New York customers. But interstate long-distance telephone calls are and have long been considered an interstate communications service, and the rates for that interstate communications service are and have long been exclusively regulated by the federal government.

Similarly, because broadband is an interstate communications service, New York lacks the authority to regulate broadband rates. Under the Communications Act, any regulation of the rates charged for interstate communications services must be established by the FCC, while states generally have the authority to regulate the rates charged for intrastate communications services. *See* 47 U.S.C. § 152. This has long been a bedrock principle of communications law in the United States, and it is

notable that Appellant is unable to muster a single example of a state successfully regulating rates for an interstate communications service.

While much ink has been spilled debating whether broadband is an information service that is regulated under Title I of the Communications Act of 1934, as amended, 47 U.S.C. § 153(24), or a telecommunications service that is regulated under Title II of the Communications Act, 47 U.S.C. § 153(53), that question does not determine the proper resolution of this case. Whatever the answer, broadband remains an interstate communications service, and broadband rates may not be regulated by state governments.

To be sure, *Amici* agree with Appellant about the importance of making affordable broadband available to every American, including every New Yorker. But there are numerous lawful ways that the federal government and state governments can work and are working to advance those objectives. For example, Congress and the FCC recently established the Affordable Connectivity Program, a groundbreaking $14.2 billion program that provides monthly broadband subsidies of up to $30 a month for low-income households. 47 U.S.C. § 1752(b); *see also* Report and Order, *Affordable Connectivity Program*, WC Docket No. 21-450, FCC 22-2 (rel. Jan. 21, 2022) ("*Affordable Connectivity Order*"). Likewise, the FCC provides low-income consumers with monthly broadband discounts of up to $9.25 through its Lifeline Program, which is part of the Universal Service Fund. 47 CFR

§ 54.403. And state governments are pitching in as well. Maryland, for example, has established the Maryland Emergency Broadband Benefit Program, which provides low-income Marylanders with a broadband subsidy of up to $15 a month above and beyond the subsidy provided through the federal Affordable Connectivity Program.[2] And through the State of Oregon's Lifeline Program, low-income Oregonians can receive additional broadband discount of $10 a month beyond what is available through the federal Lifeline Program. OR. ADMIN. R. 860-033-0035.

Moreover, federal and state governments can take action to facilitate the deployment of broadband infrastructure that will provide residents with affordable broadband access. Through the FCC's Rural Digital Opportunity Fund, for example, the Commission has budgeted over $20 billion for broadband providers to deploy up to gigabit speed broadband in unserved areas. And broadband providers receiving subsidies to deploy networks in these generally sparsely-populated areas are required to charge prices that are comparable to those that they charge in urban areas. Likewise, in the recently-enacted bipartisan infrastructure law, Congress appropriated $42.5 billion through the Broadband Equity, Access and Deployment Program to deploy broadband networks in unserved and underserved areas of the

[2] *See* Maryland Department of Housing and Community Development: Community and Provider Resources, (last visited Mar. 1, 2022), https://dhcd.maryland.gov/Broadband/Pages/Provider-Resources.aspx. ("MD EBB Overview").

United States. 47 U.S.C. § 1702. The law requires broadband providers participating in the Program to offer low-income households using those subsidized networks a low-cost broadband plan. 47 U.S.C. § 1702(h)(4). State governments are also acting to encourage broader deployment. Indeed, in her recent State of the State Address, New York Governor Kathy Hochul announced a $1 billion ConnectAll initiative to transform the Empire State's digital infrastructure, which includes encouraging more eligible New Yorkers to sign up for the federal Affordable Connectivity Program.[3]

Thus, this Court can affirm the judgment below and reaffirm the basic principle that state governments may not regulate the rates charged for interstate communications services without impacting the ability of the federal and state governments to take action to expand affordable broadband access and close the digital divide.

[3] *See* Press Release, *Governor Hochul Announces New $1 Billion 'ConnectALL' Initiative to Bring Affordable Broadband to Millions of New Yorkers*, (last visited Mar. 1, 2022) https://www.governor.ny.gov/news/governor-hochul-announces-new-1-billion-connectall-initiative-bring-affordable-broadband. ("NY ConnectALL Announcement").

ARGUMENT

A. The ABA Regulates The Rates Charged For An Interstate Communications Service

1. The ABA Regulates Broadband Rates

Appellant makes a half-hearted attempt to cast the ABA as something other than rate regulation—instead, it portrays the statute as addressing the "practice" of "intrastate pricing levied by New York companies on New York customers." Appellant Br. at 26. Appellant does not explain the difference between traditional rate regulation and the "practice" that the ABA addresses, but there is no question that the ABA regulates broadband rates. The statute's intended purpose and effect are to regulate the rates charged by broadband Internet access service providers.

The ABA requires New York broadband providers to offer two levels of broadband service to qualifying low-income households and sets specific price ceilings for those offerings—$15 per month for broadband service with a download speed of 25 megabits per second and $20 per month for 200 megabits per second. N.Y. GEN. BUS. LAW § 399-zzzzz(2)-(4). And, as the District Court succinctly explained, "'[p]rice ceilings' regulate rates." Mem. & Order at 20 (ECF No. 25) (citing *AT&T Co. v. FCC*, 974 F.2d 1351, 1352 (D.C. Cir. 1992); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 758–60, 768 (1968); *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 486–87 (2002)). Indeed, price ceilings—usually taking the form of so-called "price cap" regulation—have been a leading tool employed by the FCC for

regulating the rates charged for interstate communications services in the United States for more than 30 years. Report and Order, *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786 (1990).

Furthermore, courts have uniformly recognized that setting rates through price cap regulation is a kind of rate regulation. As the U.S. Supreme Court has explained, price cap regulation is the culmination of "a century of developing ratesetting methodology." *Verizon Commc'ns,* 535 U.S. at 487. While regulating rates through price caps rather than traditional rate-of-return methods may be a relatively recent development from a historical perspective, it still serves the same fundamental purpose: regulating the rates consumers pay for communications services. *Id*. at 487-88; *see also AT&T Co.*, 974 F.2d at 1352 (noting that the FCC adopted price caps on some communications services "for regulating the rates charged"); *Nat'l Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 178 (D.C. Cir. 1993) (describing price caps as an alternative form of rate regulation to traditional rate-of-return regulation).

To be sure, the ABA does not set a price ceiling for broadband service provided to all New York customers, only those that meet the eligibility criteria set forth in the statute. N.Y. Gen. Bus. Law § 399-zzzzz(2) (providing low-income eligibility criteria for discounted rates). According to the District Court, those criteria cover more than one-third of all New York households. Mem. & Order at 4

(ECF No. 25). But the specific fraction is irrelevant. Rate regulation does not become something else simply because it only applies to a subset of consumers.

Aside from setting the price ceilings discussed above, the ABA also incorporates other telltale signs of rate regulation. First, broadband providers are only permitted to raise the price of covered broadband services once every five years. N.Y. GEN. BUS. LAW § 399-zzzzz(3). And second, they may only raise those prices by an amount determined according to a statutory formula: the most recent change in the Consumer Price Index or two percent a year, whichever is less. N.Y. GEN. BUS. LAW § 399-zzzzz(3). These features of the ABA, which limit the amount and frequency of price increases, are also hallmarks of rate regulation. *See, e.g.*, 47 CFR § 61.45 (describing annual updates to price caps for regulated carriers); *see also* 47 CFR § 54.313 (permitting only annual increases to the maximum rates charged by rural carriers receiving universal service support).

2. Broadband Is An Interstate Service

Broadband, as that term is defined in the ABA, is an interstate communications service. The FCC has long considered broadband to be a fundamentally interstate service. *See U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 730 (D.C. Cir. 2016) (discussing FCC interstate jurisdiction precedent). The FCC employs an end-point analysis to determine whether communications are interstate or intrastate. *2015 Order*, 30 FCC Rcd at 5803 n.1275; *see also* Declaratory Ruling

and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4832 ¶ 59 (2002) ("The jurisdictional analysis rests on an end-to-end analysis, in this case on an examination of the location of the points among which cable modem service communications travel. These points are often in different states and countries."). And because broadband service regularly involves data transmissions crossing state lines, if not national borders, the Commission has consistently classified it as an interstate service.

In the FCC's *2015 Order*, for example, the Commission "reaffirm[ed] the . . . longstanding conclusion that broadband Internet access service is jurisdictionally interstate for regulatory purposes."[4] And in the *2018 Order*, the FCC once again explained that "it is well-settled that Internet access is a jurisdictionally interstate service because 'a substantial portion of Internet traffic involves accessing interstate or foreign websites.'" *2018 Order*, 33 FCC Rcd at 429 (quoting *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000)). While FCC Commissioners, including

[4] The Commission has treated broadband Internet access as an interstate service since the Internet's earliest days. *2015 Order*, 30 FCC Rcd at 5803 n.1275 (citing Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4832 ¶ 59 (2002); Memorandum Opinion and Order, *BPL-Enabled Broadband Order*, 21 FCC Rcd 13281 (2006); Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901 (2007); Order, *GTE Telephone Operating Cos. GTOC Tariff No. 1, GTOC Transmittal No. 1148*, 13 FCC Rcd 22466 (1998)).

Amici, have disagreed from time to time on certain important issues relating to broadband regulation, there has been a consensus at the FCC that broadband is a fundamentally interstate service.

In the face of this precedent, Appellant attempts to cast the ABA as purely intrastate regulation of New York broadband providers' relationships with people living in New York. According to Appellant, the statute simply regulates "intrastate pricing," Appellant Br. at 26, and is not concerned with the destination of New Yorkers' communications. *Id.* at 33.

But because the ABA defines broadband in a manner that includes interstate communications and then regulates the prices charged for that service, the ABA regulates the rates of an interstate communications service. The statute defines "broadband" as "a mass-market retail service that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints," whether "by a wireline, fixed wireless, or satellite service provider." N.Y. GEN. BUS. LAW § 399-zzzzz(1). That definition is nearly identical to the definition of broadband service that the FCC uses, *see* 47 CFR § 8.1(b), and by encompassing "the capability to transmit data to and receive data from all or substantially all Internet endpoints," it plainly includes interstate communications.

Taking Appellant's reasoning to its logical conclusion, states would have the authority to regulate rates for any interstate communications service, including even

long-distance telephone calls, a quintessentially interstate service over which the FCC has undisputedly exercised authority for decades. *See* Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 4554, 4569 n.26 (2011) (explaining that historically "[t]he Commission regulates rates for interstate calls and states regulate rates for intrastate calls"). For example, New York could claim that it is just regulating "intrastate pricing" by capping the prices that New York telephone companies can charge New York consumers for interstate long-distance phone service. But such an absurd result would overturn a fundamental tenet of decades of communications regulation.

Considered together, Appellant's admission that "the ABA's principal feature is to regulate the price of providers' high-speed broadband offerings," Appellant Br. at 32, and the fact that broadband services are interstate in nature leads to the inescapable conclusion that the ABA regulates the rates of an interstate communications service.

B. New York May Not Regulate Broadband Rates

In the Communications Act of 1934, Congress set up a "dual regulatory regime for communications services." Memorandum Opinion and Order, *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404, 22412, ¶ 16 (2004). It established the FCC "[f]or the purpose of regulating interstate and foreign commerce

in communication by wire and radio" to advance a number of objectives, including to "make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. Consistent with this purpose, Congress gave the FCC exclusive jurisdiction to regulate rates for "all interstate and foreign communications by wire or radio," 47 U.S.C. § 152(a), while denying the Commission, and thus reserving for the states, the jurisdiction to regulate the "charges . . . for or in connection with intrastate communication service by wire or radio." 47 U.S.C. § 152(b). This division of responsibility has been a centerpiece of communications regulation in the United States for decades.

That is why one of the most notable things about Appellant's brief is what it does not include. Akin to the dog that did not bark in the Sherlock Holmes short story *The Adventure of Silver Blaze*,[5] Appellant is unable to muster even a single case upholding a state's ability to regulate the rates charged for an interstate communications service.[6] And Appellant makes no mention of any prior attempt by

[5] Arthur Conan Doyle, *The Memoirs of Sherlock Holmes* (George Newnes Ltd 1894).

[6] In their brief, Appellees explain why *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459 (D. Nev. 1968), *see* Appellant Br. at 37, did not concern interstate rate regulation. Appellees Brief at 45.

a state to regulate broadband rates.

Of course, the dividing line between the regulation of interstate communications and the regulation of intrastate communications is not always a clean one. For example, there are cases where the regulation of intrastate communications will have an impact on interstate communications. And thus, there have been disputes about the circumstances under which the FCC can preempt state regulation of intrastate communications services. In *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986), the U.S. Supreme Court provided guidance on that issue, holding that the FCC can preempt state regulation of intrastate communications in situations where: (1) it is impossible to separate the interstate and intrastate components of the Commission's regulation; and (2) the state regulation would negate the Commission's lawful authority over interstate communication. *See Id.* at 368-69. This is what has come to be known as the "impossibility" exception to the normal rule that the regulation of intrastate communications is reserved for state governments.

While Appellant invokes the Supreme Court's decision in *Louisiana Pub. Serv. Comm'n v. FCC* as support for its position that New York's attempt to regulate broadband rates is not preempted by federal law, that argument falls wide of the mark. In that case, the Court ruled that the FCC could not pre-empt "state regulation over depreciation of dual jurisdiction property for *intrastate ratemaking purposes*."

476 U.S. at 379 (emphasis added). This case, by contrast, involves the State of New York's attempt to regulate the rates of *interstate* communications services. Appellant therefore seeks to transform the impossibility exception from one that allows the FCC to preempt state regulation of intrastate services in limited circumstances to one that allows states to regulate interstate communication rates in certain circumstances. This would turn the impossibility exception on its head in a manner that lacks any basis in precedent and is inconsistent with the Constitution's Supremacy Clause.

Appellant also argues that states may regulate broadband rates because the FCC has classified broadband as an interstate information service rather than an interstate telecommunications service. To be clear, *Amici* do not necessarily agree as to whether broadband should be classified as an information service regulated under Title I of the Communications Act or a telecommunications service regulated under Title II of the Communications Act. But *Amici* do agree that New York is not authorized to regulate broadband rates under the Communications Act regardless of the answer to that question.

Simply put, broadband remains an interstate communication service provided by wire or radio whether it is classified as an information service or a telecommunications service. And it is broadband's interstate character that precludes states from regulating broadband rates.

Appellant does not explain in any detail how the Commission's decision to classify an interstate service as an information service somehow gives a state jurisdiction to regulate the rates of an interstate service. But Appellant's argument seems to be based on the premise that the Commission lacks jurisdiction over interstate information services, thus clearing the way for state rate regulation.

As an initial matter, that premise is false. The Commission has jurisdiction over information services and, in fact, regulates them. For example, the FCC has classified text messaging as an information service yet maintains rules governing that service. *See* Declaratory Ruling, *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service,* 33 FCC Rcd 12075, 12101-02, ¶¶ 50-51 (2018). Among other regulations, the FCC has imposed text-to-911 requirements, *see* 47 CFR § 9.10(q), and text-to-988 requirements,[7] *see* 47 CFR § 52.201, on text message providers. The FCC also regulates robotexts. *See, e.g.,* Report and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14115, ¶ 165 (2003).

Likewise, while the Commission has yet to classify Voice over Internet Protocol (VoIP) as an information service or a telecommunications service, it has

[7] 988 is the three-digit number for the National Suicide Prevention Lifeline. Beginning July 16, 2022, all text providers covered by the FCC's regulations must route a text message sent to 988 to the current toll free access number for the National Suicide Prevention Lifeline. Report and Order, *Implementation of the National Suicide Hotline Improvement Act of 2018*, 35 FCC Rcd 7373 (2020).

imposed numerous regulations on interconnected VoIP service, reasoning that it would have the authority to promulgate those rules even if VoIP were to be classified as a more lightly-regulated information service. For example, the FCC requires interconnected VoIP service providers, among other things, to provide enhanced 911 services, *see* 47 CFR § 9.11, protect customer proprietary network information, *see* 47 CFR § 64.2003(o), comply with disability access requirements, *see* 47 CFR § 14.10(c)(1), abide by local number portability rules, *see* 47 CFR § 52.34, and contribute to the Universal Service Fund, *see* 47 CFR § 54.706(a)(18), as well as the Telecommunications Relay Services Fund, *see* 47 CFR § 64.604(c)(5)(iii)(A). Additionally, beginning later this year, interconnected VoIP services providers will be required to route VoIP 988 calls to the National Suicide Prevention Lifeline. *See* 47 CFR § 52.200(e).

Moreover, with respect to broadband, the FCC requires service providers to publicly disclose information about their network management practices, performance characteristics, and commercial terms of their broadband Internet access service. *See* 47 CFR § 8.1(a). And the D.C. Circuit in 2019 held that the Commission retained the authority to promulgate such a rule even after classifying broadband as an information service. *See Mozilla Corp. v. FCC*, 940 F.3d 1, 49 (D.C. Cir. 2019).

So even if states were able to regulate interstate communications services over which the FCC has no jurisdiction, that would do Appellant no good here since the FCC plainly does have jurisdiction over interstate information services. And the fact that Congress permits the FCC to regulate interstate information services with respect to certain issues, but not to impose rate regulation on such services, does not open the door to states regulating the rates charged for interstate information services. *See, e.g.*, *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd. Of Miss.*, 474 U.S. 409, 422 (1986) (assessing whether "Congress, in revising a comprehensive federal regulatory scheme to give market forces a more significant role in determining the supply, the demand, and the price of natural gas, intended to give the States the power it had denied FERC" and determining that "[t]he answer to the latter question must be in the negative"). In other words, the key question here is not whether broadband is an information or telecommunications service; it is whether broadband is an interstate service.

At the end of the day, the District Court correctly held that New York may not regulate the rates charged for an interstate communications service. Its decision was a routine application of a bedrock principle that has long governed communications regulation in the United States. Were this Court to reverse the District Court's judgment, it would fundamentally alter longstanding law and practice when it comes to rate regulation and create a new system with which *Amici*, who have together

spent over 30 years as federal communications regulators, would be unfamiliar. *Amici* urge this Court not to destabilize our nation's regulatory framework for communications in that manner.

C. State Regulation of Broadband Rates Is Not Necessary To Expand Affordable Broadband Access

Amici fully support expanding affordable broadband access to all Americans. But broadband rate regulation imposed by states is not necessary to achieve that goal. Rather, the federal government and state governments are pursuing a number of approaches designed to make broadband more affordable and available, and these efforts will only accelerate in the years ahead.

As an initial matter, a wide range of subsidy programs have been enacted to make broadband more affordable for low-income Americans. For example, during the first year of the COVID-19 pandemic, Congress established the Emergency Broadband Benefit Program to help consumers participate in activities such as remote learning, telehealth, and telework. Consolidated Appropriations Act, 2021, PUB. L. NO. 116-260, § 904(b)(1), 134 STAT. 1182, 2131 (2020). The program was subsequently made permanent and renamed the Affordable Connectivity Program with the enactment of the 2021 bipartisan infrastructure law. 47 U.S.C. § 1752(b). Congress appropriated $14.2 billion dollars to fund the program, which the FCC officially established in January 2022. *Affordable Connectivity Order* at 2.

The Affordable Connectivity Program provides qualifying consumers a $30 monthly subsidy for fixed or mobile broadband service, and a one-time $100 discount to purchase equipment such as a desktop computer, laptop, or tablet. *See* 47 CFR § 54.1803. The eligibility threshold allows consumers in households with incomes up to 200% of the federal poverty guidelines to participate, as well as those who qualify through participation in other federal assistance programs like Medicaid. *See* 47 CFR § 54.1800(j). As of February 2022, the FCC reports that over 10 million households have already enrolled in the program, and the agency says that it will continue its robust outreach and awareness efforts to further increase participation in the program. Press Release, FCC, *Over 10 Million Households Enroll in Affordable Connectivity Program* (Feb. 14, 2022). Additionally, several states have created complementary broadband subsidies. For example, Maryland's Emergency Broadband Benefit Program provides an additional $15 monthly subsidy that eligible Marylanders can combine with their federal Affordable Connectivity Program subsidy, for a maximum $45 monthly broadband discount.[8]

In addition to the Affordable Connectivity Program, consumers can also receive discounted broadband service through the FCC's Lifeline Program. The Lifeline Program was created by the FCC in 1985 to help low-income Americans afford voice telephone service and in 2016 was modernized to include both fixed

[8] *See* MD EBB Overview.

and mobile broadband. Third Report and Order, Further Report and Order, and Order on Reconsideration, *Lifeline and Link Up Reform and Modernization*, 31 FCC Rcd 3962 (2016). Consumers can meet the eligibility requirements for Lifeline through either the income threshold (135% of the federal poverty guidelines) or through participation in other federal assistance programs. *See* 47 CFR § 54.409. The Universal Service Administrative Company, which administers the program under the direction of the FCC, reports that as of October 2021, nearly 6.5 million Americans were participating in Lifeline, including half-a-million New Yorkers. Universal Service Administrative Company, Program Data: Lifeline Participation, (last visited Mar. 1, 2022), https://www.usac.org/lifeline/resources/program-data/#Participation.

Lifeline provides most participating consumers with a maximum $9.25 monthly discount on their broadband bills. 47 CFR § 54.403(a)(1). But those eligible consumers residing on Tribal lands are entitled to an additional $25 monthly subsidy. 47 CFR § 54.403(a)(3).

Some states have established their own companion programs to Lifeline, which provide low-income consumers with greater discounts on broadband service. Oregon's Lifeline Program, for example, provides an additional $10 a month discount above and beyond the discount provided by the federal Lifeline Program. OR. ADMIN. R. 860-033-0035. Such state programs represent an important way that

state governments can help their residents afford broadband without engaging in rate regulation.

Another important way in which the federal government and state governments are working to expand affordable broadband access is by subsidizing the deployment of broadband networks in those areas of the country where it is expensive to construct networks. After all, a prerequisite to having affordable broadband access is having access to broadband.

For example, in 2020, the FCC established the Rural Digital Opportunity Fund (RDOF) and budgeted $20.4 billion for that program to be allocated through a reverse auction mechanism to providers willing to deploy broadband to currently unserved areas of the country. Report and Order, *Rural Digital Opportunity Fund Connect America Fund*, 35 FCC Rcd 686 (2020). In order to participate in the program, providers must offer service to customers in these high-cost areas at prices that are reasonably comparable to the service they offer in urban areas. *Id.* at 707, ¶ 42. This was designed to help rural Americans afford the broadband service to be provided by RDOF-funded networks.

Additionally, in the recently enacted bipartisan infrastructure law, Congress established the Broadband Equity, Access and Deployment (BEAD) Program, through which the National Telecommunications and Information Administration (NTIA) at the Department of Commerce will distribute nearly $42.5 billion to states

and territories to expand broadband deployment. 47 U.S.C. § 1702(b)(1). States and territories will be able allocate their funding to private providers, municipal broadband providers, cooperatives, utilities, or public-private partnerships to deploy broadband to unserved or underserved locations throughout the state or territory. 47 U.S.C. § 1702(f). And providers receiving funding through the BEAD Program must offer qualifying households a low-cost broadband service over BEAD-funded networks. 47 U.S.C. § 1702(h)(4)(B).

State governments are also playing a leading role in funding broadband deployment, as shown by New York Governor Hochul's new ConnectALL initiative.[9] Through this initiative, New York will allocate $1 billion to fund key priorities such as: grants to New York municipalities and non-profits to deploy open and accessible broadband infrastructure; grants for rural last-mile and middle-mile infrastructure; grants for the development of innovative broadband solutions that will find new ways to connect New Yorkers; and a statewide marketing program to increase enrollment in the federal Affordable Connectivity Program.[10] Governor Hochul's recent announcement shows that there is much that New York and other states can do, aside from regulating state broadband rates in an unlawful manner, to expand affordable broadband access to all Americans.

[9] *See* NY ConnectALL Announcement.

[10] *Id.*

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief is in 14-point Times New Roman proportional font and contains 5,458 words as determined by Microsoft Word, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rule of Appellate Procedure, and thus complies with the typeface, typestyle, and type-volume requirements set forth in Rules 29(a)(5) and 32(a)(5)-(6) of the Federal Rules of Appellate Procedure.

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