No. 24-161

IN THE
Supreme Court of the United States

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

v.

LETITIA A. JAMES, ATTORNEY GENERAL OF NEW YORK,
Respondent.

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

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

JONATHAN D. URICK
MARIEL A. BROOKINS
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

THOMAS M. JOHNSON, JR.
Counsel of Record
MEGAN L. BROWN
JOSHUA S. TURNER
MICHAEL J. SHOWALTER
WILEY REIN LLP
2050 M Street, NW
Washington, DC 20036
(202) 719-7000
tmjohnson@wiley.law

Counsel for Amicus Curiae

September 13, 2024

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Communications Act Uses Language That Was Clearly Understood As Preemptive Under This Court's Precedent 3

A. In 1934, Constitutional Doctrine Barred The States From Regulating Interstate Commerce 5

B. This Court Interpreted Predecessor Statutes With Materially Identical Language As Preemptive 9

C. The Communications Act Borrowed The Preemptive Language Of Its Predecessors.....13

D. This Court Has Held That Contemporaneously Enacted Statutes With Materially Identical Language Preempt State Regulation 16

E. The Communications Act's Preemptive Effect Extends To Broadband Internet 17

II. State Regulation Of The Internet Undermines The Bipartisan Objectives Of The Communications Act And Sound Public Policy 20

CONCLUSION.....24

TABLE OF AUTHORITIES

Page(s)

Cases

ACLU v. Johnson,
194 F.3d 1149 (10th Cir. 1999).....18

Allen B. Dumont Lab'ys v. Carroll,
184 F.2d 153 (3d Cir. 1950) 15, 18

Arizona v. United States,
567 U.S. 387 (2012).....15

Austin v. Tennessee,
179 U.S. 343 (1900).....8

Bragdon v. Abbott,
524 U.S. 624 (1998).....4

California v. FCC,
39 F.3d 919 (9th Cir. 1994).....19

California v. FERC,
495 U.S. 490 (1990).....8

City of New York v. FCC,
486 U.S. 57 (1988).....19

City of New York v. FRC,
36 F.2d 115 (D.C. Cir. 1929).....12

Crosby v. Nat'l Foreign Trade Council,
530 U.S. 363 (2000).....15

Eldred v. Ashcroft,
537 U.S. 186 (2003).....8

FRC v. Nelson Bros. Bond & Mortg. Co.,
289 U.S. 266 (1933).....13

Guerrero-Lasprilla v. Barr,
589 U.S. 221 (2020).....13

Harris v. United States,
536 U.S. 545 (2002).....8

Hughes v. Talen Energy Mktg., LLC,
578 U.S. 150 (2016).....16

IRS v. Keystone Consol. Indus.,
508 U.S. 152 (1993).....11

Kurns v. R.R. Friction Prod. Corp.,
565 U.S. 625 (2012).....11

Lamar, Archer & Cofrin, LLP v. Appling,
584 U.S. 709 (2018).....11

Leisy v. Hardin,
135 U.S. 100 (1890).....7

In re MCP No. 185,
No. 24-7000 (6th Cir. filed June 12, 2024).....17

Missouri v. Kan. Natural Gas Co.,
265 U.S. 298 (1924).....7, 8

Nat'l Ass'n of Home Builders v. Defs. of Wildlife,
551 U.S. 644 (2007).....16

NBC v. United States,
319 U.S. 190 (1943).....12, 13, 14, 18

New Prime Inc. v. Oliveira,
586 U.S. 105 (2019).....4, 8

Or. R.R. & Nav. Co. v. Campbell,
230 U.S. 525 (1913).....6

Ortiz v. United States,
585 U.S. 427 (2018).....11

Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co.,
251 U.S. 27 (1919).....10

Pub. Utilities Comm'n of R.I. v. Attleboro Steam & Elec. Co.,
273 U.S. 83 (1927).....6, 7

Robbins v. Taxing Dist. of Shelby Cnty.,
120 U.S. 489 (1887).....6, 7

Schneidewind v. ANR Pipeline Co.,
485 U.S. 293 (1988).....17

Scripps-Howard Radio v. FCC,
316 U.S. 4 (1942).....13, 14, 18

Sekhar v. United States,
570 U.S. 729 (2013).....4

Shapiro v. United States,
335 U.S. 1 (1948).....14

Staples v. United States,
511 U.S. 600 (1994).....4

Stokeling v. United States,
586 U.S. 73 (2019).....14

Tenn. Wine & Spirits Retailers Ass'n v. Thomas,
588 U.S. 504 (2019).....5

United States v. E. C. Knight Co.,
156 U.S. 1 (1895).....7

United States v. Locke,
529 U.S. 89 (2000).....20

United States v. Madigan,
300 U.S. 500 (1937).....16

United States v. Rahimi,
144 S. Ct. 1889 (2024).....16

W. Union Tel. Co. v. Boegli,
251 U.S. 315 (1920).....11

W. Union Tel. Co. v. Texas,
105 U.S. 460 (1881).....6

Wabash, St. Louis & Pac. R.R. Co. v. Illinois,
118 U.S. 557 (1886).....6, 9

Wisconsin Cent. Ltd. v. United States,
585 U.S. 274 (2018).....4

Statutes

15 U.S.C. § 717 17

16 U.S.C. § 824 16

47 U.S.C. § 152 .....5, 14, 18

47 U.S.C. § 230 .....19, 20

Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021) 22, 23

Interstate Commerce Act, Pub. L. No. 49-41, 24 Stat. 379 (1887) 10

Mann-Elkins Act, Pub. L. No. 61-218, 36 Stat. 539 (1910) 10

Radio Act of 1912, Pub. L. No. 62-264, 37 Stat. 302 12

Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 12

Regulatory Authorities

Petition for Declaratory Ruling, Memorandum Opinion and Order, 19 FCC Rcd. 3307 (2004) 19

Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015) 21

Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018).....21

Safeguarding and Securing the Open Internet, 89 Fed. Reg. 45405 (May 22, 2024).....17, 21

Other Authorities

Antonin Scalia & Bryan A. Garner, Reading Law (2012).....4, 14

Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 Va. L. Rev. 1877 (2011).....6

ConnectALL, *Federal Approval of New York's ConnectALL Deployment Plan*, nysbroadband.ny.gov.....23

ConnectALL, *Find Affordable Internet Options in NYS*, tinyurl.com/y9mdmvmb.....23

GAO, *Broadband: National Strategy Needed to Guide Federal Efforts to Reduce Digital Divide* (May 31, 2022), tinyurl.com/bdhrjycp.....22

Institute for Telecommunications Services, *August 1912: Federal Regulation of U.S. Airwaves Begins*, tinyurl.com/4tzw8hw6 12

Pew Charitable Trusts, *How State Grants Support Broadband Deployment* (Dec. 23, 2021), tinyurl.com/yckara3n.....22

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation.[1] 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 Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community. The Chamber has routinely participated in cases involving public-utility style regulation of the internet and federal preemption of state laws.

This case implicates both important issues, as it raises the question whether states may impose onerous, overlapping, and inconsistent rate regulations on broadband internet providers, which historically Congress has only lightly regulated. 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 regulating inherently interstate networks and services. The

---

[1] No party's counsel authored this brief in whole or in part, and no person or entity, other than *amicus* or its counsel, made a monetary contribution to fund the brief's preparation or submission. *Amicus* provided timely notice of this filing to all parties.

New York Affordable Broadband Act would do both of those things.

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal statutes regulating interstate commerce must be interpreted in their historical context—consistent with the contemporaneous understanding of the proper division of federal and state power. The Second Circuit failed to do that here, upholding New York's broadband rate-regulation law under an ahistorical reading of the federal Communications Act of 1934. By 1934, this Court had long held that under the U.S. Constitution the states have no power to regulate interstate commerce. This Court had additionally held that Congress displaces states' ability to burden interstate commerce even *incidentally* when Congress uses statutory language granting a federal agency jurisdiction over interstate communications or similar services. Following this approach, the Communications Act granted the FCC authority to regulate interstate communication by wire and radio. Under the well-settled precedent of the era, that statutory language made the FCC's jurisdiction exclusive, and it preempts New York's broadband rate-regulation law.

Despite recognizing that New York's law directly regulates interstate commerce, the Second Circuit held that the Communications Act permits such state regulation of broadband rates, ignoring the Communications Act's historical context and doctrinal backdrop. The Second Circuit observed that the Communications Act does not explicitly say that it occupies the field. But preemption can be express or implied—indeed, the entire category of field

preemption is a type of implied preemption. And it would be difficult to imagine a clearer example of implied preemption than the use of statutory language that this Court had repeatedly found to be field preemptive.

The Second Circuit's holding will have disastrous economic consequences if left uncorrected. The decision below will invite the creation of a patchwork of state regulation that balkanizes broadband services and the entire industry, and will stifle innovation and investment. Federal and state lawmakers currently make billions of dollars available for affordable broadband service in underserved and unserved communities. Broadband providers also voluntarily make innovative plans available to disadvantaged communities. Federal policy supports access to affordable broadband in myriad ways, but has decidedly rejected ratemaking.

The laudable goal of affordable broadband does not 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.

ARGUMENT

I. THE COMMUNICATIONS ACT USES LANGUAGE THAT WAS CLEARLY UNDERSTOOD AS PREEMPTIVE UNDER THIS COURT'S PRECEDENT

The decision below conflicts with this Court's precedent and is clearly wrong. The Second Circuit held that the Communications Act does not preempt New York's regulation of interstate commerce because the Act does not explicitly state that the

FCC's jurisdiction is exclusive. Pet.App.24a. But that ignores the Act's historical context and a long line of this Court's decisions interpreting analogous language.

The decision below fails to respect core principles of statutory interpretation. For one, this Court has made clear that "every statute's meaning is fixed at the time of enactment." *Wisconsin Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018) (emphasis omitted). Under the fixed-meaning canon, "[w]ords must be given the meaning they had when the text was adopted." Antonin Scalia & Bryan A. Garner, Reading Law 78 (2012). Whatever particular statutory language "might call to mind" when heard by "ears today" makes no difference because "modern intuition" is irrelevant. *New Prime Inc. v. Oliveira*, 586 U.S. 105, 114 (2019). As a result, the 1934 understanding of the Communications Act's words controls—not the modern understanding were the same text enacted today.

Second, this Court also interprets statutory text in light of the contemporaneous "background rules" associated with the text's subject matter. *Staples v. United States*, 511 U.S. 600, 605 (1994). That is, the Court looks to the "cluster of ideas that were attached to [the text]" and the principles "accumulated [in] the legal tradition." *Sekhar v. United States*, 570 U.S. 729, 733 (2013). And when "judicial interpretations have settled the meaning of an existing statutory provision," "repetition of the same language in a new statute" indicates "intent to incorporate [those] judicial interpretations." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998).

Here, the Communications Act uses language that in 1934 clearly displaced any state power to regulate interstate commerce by wire or radio. Section 2 of the Act provides that "[t]he provisions of this chapter shall apply to all interstate and foreign communication by wire or radio, … and to all persons engaged within the United States in such communication," except that nothing in the Act "give[s] the Commission jurisdiction" over activity in connection with "intrastate communication service by wire or radio." 47 U.S.C. § 152(a), (b). In 1934, this division of authority was well understood to make the FCC's jurisdiction over interstate wire and radio communication services exclusive of state regulation.

A. In 1934, Constitutional Doctrine Barred The States From Regulating Interstate Commerce

As a constitutional matter—irrespective of statutory preemption—states' power over matters affecting interstate commerce was extremely limited in 1934. As a result, Congress had no reason to write express preemption language into the Act. Classifying a matter as interstate commerce was itself enough to confer exclusive federal jurisdiction.

In the decades before the Communications Act's enactment, this Court recognized and repeatedly reaffirmed the constitutional system of dual federalism. Under this system, the federal government holds power to regulate *interstate* commerce, while the states hold power to regulate *intrastate* commerce. *See Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 588 U.S. 504, 522 (2019) ("By the late 19th century, the Court was firmly of the view that the Commerce Clause by its own force

restricts state regulation of interstate commerce."). These respective spheres of power, the Court repeatedly emphasized, were "exclusive." *Robbins v. Taxing Dist. of Shelby Cnty.*, 120 U.S. 489, 492 (1887); *see generally* Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 Va. L. Rev. 1877 (2011) (discussing this historical framework of dual federalism). While states could regulate commerce within their borders that did not affect other states, "the regulation of commerce which does affect other nations or States or the Indian tribes belongs to Congress." *W. Union Tel. Co. v. Texas*, 105 U.S. 460, 466 (1881); *see also, e.g., Or. R.R. & Nav. Co. v. Campbell*, 230 U.S. 525, 535 (1913) (Oregon "had no power to fix rates for interstate transportation, or any part of it").

In one case, for example, this Court held that states lack authority to regulate interstate railroad rates. *Wabash, St. Louis & Pac. R.R. Co. v. Illinois*, 118 U.S. 557 (1886). The Court held that "this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and regulations." *Id.* at 577. In another case, the Court held that "[i]nterstate commerce cannot be taxed at all [by the States]," even if "the same amount of tax should be laid on domestic commerce." *Robbins,* 120 U.S. at 497.

The Court in this era of dual federalism distinguished between state exercises of police power that have "merely an incidental effect upon interstate commerce" and regulations that place a "direct burden upon interstate commerce." *Pub. Utilities Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273

U.S. 83, 89 (1927). A regulation directly burdening interstate commerce "must necessarily fall, regardless of its purpose," and even if the regulated entities' business is "chiefly local." *Id.* at 89–90.

Any "failure of [C]ongress to make express regulations," the Court at the time explained, "indicates its will that the subject shall be left free from any restrictions or impositions" because Congress's power to regulate interstate commerce was understood to be exclusive. *Robbins,* 120 U.S. at 493. "[A]ny regulation of the subject by the states, except in matters of local concern only," was accordingly "repugnant to such freedom." *Id.* "The constitution does not provide that interstate commerce shall be free," the Court reasoned, "but, by the grant [to Congress] of th[e] exclusive power to regulate it, it was left free, except as [C]ongress might impose restraints." *United States v. E. C. Knight Co.*, 156 U.S. 1, 11 (1895). As a result, "the failure of [C]ongress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states." *Id.*

There was, accordingly, a kind of clear-statement rule: "a subject-matter which has been confided exclusively to [C]ongress by the [C]onstitution" was "not within the jurisdiction of the police power of the state" "unless placed there by congressional action." *Leisy v. Hardin*, 135 U.S. 100, 108 (1890). Congress's "silence" on a matter of interstate commerce, the Court frequently explained, was "equivalent to a declaration that that particular commerce shall be free from regulation." *Missouri v. Kan. Natural Gas Co.*, 265 U.S. 298, 308 (1924). This clear-statement rule was "so often declared by this [C]ourt as to be one

of the settled rules of constitutional law." *Austin v. Tennessee*, 179 U.S. 343, 374 (1900). The rule reflected the value of "uniformity of regulation"—"even though it be the uniformity of governmental nonaction." *Kan. Natural Gas*, 265 U.S. at 310.

To be sure, this Court's understanding of the Commerce Clause has since evolved, and some justices have expressed skepticism about the historical basis for the prevailing view in 1934. But the merits of 1934's doctrine has no bearing on the original meaning of a 1934 statute. Modern interpreters must not anachronistically impose on statutory text new (or old) understandings that did not exist when the text was enacted. *See New Prime*, 586 U.S. at 113; *California v. FERC*, 495 U.S. 490, 497–99 (1990) (reaffirming decisions reading older statutes to have preemptive effect even if, "[w]ere this a case of first impression," the Court might read the statute differently today); *Harris v. United States*, 536 U.S. 545, 556 (2002) (overruled on other grounds) (rejecting "a dynamic view of statutory interpretation, under which the text might mean one thing when enacted yet another if the prevailing view of the Constitution later changed").

The Second Circuit committed that error here. NYSTA's position, the Second Circuit emphasized, "would create a regulatory vacuum in which the federal government has both declined to regulate an industry and simultaneously prohibited states from regulating." Pet.App.27a. That is precisely the inference courts drew from Congressional silence at the time of enactment. But the Second Circuit drew the opposite inference, concluding that an "absence of regulation" must mean there is no field preemption. *Id.*; *see also Eldred v. Ashcroft*, 537 U.S. 186, 236

(2003) (Stevens, J., dissenting) (it is "particularly unwise" to disregard a "very different legal landscape" "against which [a statute] was enacted"). That was clear error.

B. This Court Interpreted Predecessor Statutes With Materially Identical Language As Preemptive

In the early twentieth century, Congress sometimes enacted statutes that added to the Constitution's limits on state regulatory authority by preempting even state regulation that incidentally affected interstate commerce. For example, when Congress granted a federal agency jurisdiction over a cross-border industry, this Court treated that grant of jurisdiction as preemptive. Congress's equivalent action in the Communications Act thus indicates that the states lack authority to engage in ratemaking for interstate communications services.

A series of federal statutes leading up to the Communications Act gave federal agencies authority over rail transport, telegraphy, telephony, and radio. None of them expressly stated that their grant of jurisdiction was exclusive. But for each statute, the Court treated the grant of jurisdiction as preemptive given the background understanding of constitutional dual federalism. These statutes, in the Court's words, occupied the field.

1. Interstate Commerce Act

When *Wabash* held that the Constitution permits only the federal government to regulate interstate commerce, Congress responded by enacting the Interstate Commerce Act of 1887. That Act gave a new federal agency, the Interstate Commerce

Commission, jurisdiction over rail transport "from one State … to any other State." Pub. L. No. 49-41, § 1, 24 Stat. 379 (1887). The Act also expressly excluded from the ICC's jurisdiction any transportation "wholly within one State." *Id.*

2. The Mann-Elkins Act

In 1910 Congress amended the Interstate Commerce Act with the Mann-Elkins Act. The Act expanded the ICC's authority to include regulation of telegraph, telephone, and cable companies. The Act used a "shall apply" / "shall not apply" scheme that the Communications Act would later replicate. The Act provided that "the provisions of this Act shall apply" to "telegraph, telephone, and cable companies … engaged in sending messages from one State … to any other State." Pub. L. No. 61-218, § 7, 36 Stat. 539 (1910). And the Act provided that "the provisions of this Act shall *not* apply" to "the transmission of messages by telephone, telegraph, or cable wholly within one State." *Id.* (emphasis added).

Even though the Act did not explicitly state that the ICC's jurisdiction over these forms of interstate commerce was exclusive, this Court held that this language nonetheless preempted state regulation. *Compare* Pet.App.24a ("nothing in the [Communications Act's] text suggests that the FCC has *exclusive* jurisdiction over interstate communication" (emphasis in original)). This Court explained that the Act "was an exertion by Congress of its authority to bring under federal control the interstate business of telegraph companies" and therefore was "an occupation of the field by Congress [which] excluded state action." *Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27, 31 (1919).

The Act "so clearly establish[ed] the purpose of Congress to subject such companies to a uniform national rule" that it was "certain" that there was "no room thereafter for the exercise by the several states of power to regulate." *W. Union Tel. Co. v. Boegli*, 251 U.S. 315, 316 (1920).

These cases' interpretation of the "shall apply" / "shall not apply" dichotomy has never been questioned, and they are entitled to stare decisis. As Justice Kagan has observed, the Court does not decide implied preemption cases "in the same way today" as it did in the first half of the twentieth century. *Kurns v. R.R. Friction Prod. Corp.*, 565 U.S. 625, 638 (2012) (Kagan, J., concurring). Back then, the Court found field preemption "based on nothing more than a statute granting regulatory authority over [a] subject matter to a federal agency," whereas now "Congress must do much more to oust all of state law from a field." *Id.* But earlier precedent "governs so long as Congress lets it." *Id.*

In addition to their precedential effect, *Postal-Telephone-Cable* and *Western Union* also form an "established and prominent part of the legal landscape" existing in 1934. *Ortiz v. United States*, 585 U.S. 427, 442 (2018). When Congress legislated in 1934 using the "shall apply" / "shall not apply" dichotomy, which these cases gave a "settled judicial … interpretation," it is presumed to have incorporated that interpretation. *IRS v. Keystone Consol. Indus.*, 508 U.S. 152, 159 (1993). In other words, by "us[ing] the materially same language" in the Communications Act, Congress "intended for it to retain its established meaning." *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 721–22 (2018).

3. The Radio Act of 1912 and the Radio Act of 1927

The Mann-Elkins Act was followed by the Radio Act of 1912 and the Radio Act of 1927, which both recognized the inherently federal (and cross-border) nature of communication by radio. The Radio Act of 1912 was the first federal law to regulate radio communications. Pub. L. No. 62-264, 37 Stat. 302 (1912); *see also* Institute for Telecommunications Services, *August 1912: Federal Regulation of U.S. Airwaves Begins*, tinyurl.com/4tzw8hw6. The Act required licensure for anyone operating in "commercial intercourse among the several states" or sending or interfering with radio signals "beyond the jurisdiction of the State or Territory in which the same are made." Radio Act of 1912 § 1. The Act provided that it did not "apply to the transmission and exchange of radiograms or signals between points situated in the same State." *Id.*

The Radio Act of 1927 created the Federal Radio Commission and gave it "wide licensing and regulatory powers." *NBC v. United States*, 319 U.S. 190, 213 (1943). These federal powers preempted state regulation. *S*ee *City of New York v. FRC*, 36 F.2d 115, 116 (D.C. Cir. 1929) ("In our opinion the interstate broadcasting of radio communications is a species of interstate commerce, and as such is subject to federal regulations."). The Act provided that it "is intended to regulate all forms of interstate and foreign radio transmissions and communications." Radio Act of 1927, Pub. L. No. 69-632, § 1, 44 Stat. 1162. Like the 1912 Act, the 1927 Act required licensure for radio communications "from any state" to "any other state." *Id.*

As this Court put it in 1933, the 1927 Act was premised on the idea that "[n]o state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities." *FRC v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266, 279 (1933). The Communications Act of 1934 was enacted the next year and incorporated the Radio Act's framework. *See NBC*, 319 U.S. at 213 ("the basic provisions of [the Radio Act of 1927] are incorporated in the Communications Act of 1934").

* * *

By 1934, the federal government had been actively regulating interstate communications services for nearly 25 years. The ICC regulated interstate telecommunications, whereas the FRC regulated interstate radio communications. But whatever the technology being used, it was settled that the federal government's regulatory jurisdiction over interstate communications was exclusive. This is the settled policy, legal, and Constitutional backdrop against which Congress enacted the Communications Act. *See Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 233 (2020) (this Court assumes that Congress is "'aware of relevant judicial precedent' when it enacts a new statute").

C. The Communications Act Borrowed The Preemptive Language Of Its Predecessors

The Communications Act "centralize[d] [the] scattered [federal] regulatory authority" over interstate communications in a "new agency," the FCC. *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 6–7 (1942). The Act "established a comprehensive system

for the regulation of communication by wire and radio." *Id.* at 6. And the Act granted the FCC "comprehensive powers" to "promote and realize the vast potentialities" of these technologies. *NBC*, 319 U.S. at 217.

The Communications Act copied its predecessor statutes by distinguishing between interstate and intrastate commerce and granting the FCC authority over the former while preserving the states' authority over the latter. *See id.* at 214 ("the objectives of the legislation have remained substantially unaltered" from the Radio Act of 1927). The Act provided that it "shall apply to all interstate and foreign communication by wire or radio." 47 U.S.C. § 152(a). And the Act further provided that "nothing in this chapter shall be construed to apply" to "intrastate communication service by wire or radio." *Id.* § 152(b). That dichotomy mirrors the Mann-Elkins Act's framework, and Congress "must be considered to have adopted also the construction given by this Court to such language." *Shapiro v. United States*, 335 U.S. 1, 16 (1948); *see also, e.g.*, *Stokeling v. United States*, 586 U.S. 73, 80 (2019) (statutory language "transplanted from … other legislation" "brings the old soil with it"); Scalia & Garner, Reading Law at 322 ("If a statute uses words or phrases that have already received authoritative construction by [this Court]," "they are to be understood according to that construction").

Shortly after enactment, this Court recognized that the Communications Act "formulated a unified and comprehensive regulatory system for the industry" in order to "protect the national interest involved in the new and far-reaching science of broadcasting." *NBC*, 319 U.S. at 214. And while the Act's preemptive effect was too obvious to produce

much litigation, when confronted with the issue courts uniformly explained that the Communications Act preempts state regulation of interstate wire or radio. In 1950, the Third Circuit held that the Act reaches "television, as well as … radio," and that it is "clear" that the Act "occupied fully the field of television regulation and that that field is no longer open to the States." *Allen B. Dumont Lab'ys v. Carroll*, 184 F.2d 153, 155–56 (3d Cir. 1950) (citing *NBC*, 319 U.S. at 215–16). And just because the Act denied the FCC a specific power "does not mean that the States may exercise [that power]." *Id.*

The Second Circuit emphasized that the Act does not explicitly state that the FCC's jurisdiction is exclusive, Pet.App.24a, but even under today's more demanding standard, a lack of express preemption "may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 387–88 (2000). That is all the more true for a statute with language that at the time was universally understood as preemptive.

Nor is the decision below supported by the fact that Congress amended the Act decades later to expressly preempt state regulation of "specific types of communications services." Pet.App.27a. The "existence of an express preemption provision," this Court has explained, does not "impose a special burden that would make it more difficult to establish the preemption of laws falling outside the clause." *Arizona v. United States*, 567 U.S. 387, 406 (2012) (cleaned). And more fundamentally, the Act's meaning was fixed upon enactment in 1934. The "modification by implication of the settled construction of an earlier and different section" was

"not favored" then, *United States v. Madigan*, 300 U.S. 500, 506 (1937) (cleaned), and it is not now, *see, e.g.*, *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 664 n.8 (2007) (this Court has "repeatedly recognized that implied amendments are no more favored than implied repeals"). The Second Circuit clearly erred in inferring otherwise.[2]

D. This Court Has Held That Contemporaneously Enacted Statutes With Materially Identical Language Preempt State Regulation

Contemporaneous with the Communications Act, Congress adopted other statutes with materially identical language, and this Court has held that those statutes preempt state regulation.

The 1935 Federal Power Act also used the familiar "shall apply" / "shall not apply" dichotomy, providing that it "shall apply to the transmission of electric energy in interstate commerce," but not to "the transmission of electric energy in intrastate commerce." 16 U.S.C. § 824(b)(1). This Court has interpreted that language as giving FERC "exclusive authority" over interstate electricity sales. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 154 (2016).

---

[2] For similar reasons, the Second Circuit also erred by relying on its assertion that eleven states regulated cable television in the 1970s. *See* Pet.App.20a–21a. State regulation decades after enactment sheds no light on original meaning. *See, e.g.*, *United States v. Rahimi*, 144 S. Ct. 1889, 1912 n.2 (2024) (Kavanaugh, J., concurring) ("Text controls over contrary historical practices."); *id.* at 1924 (Barrett, J., concurring) ("History (or tradition) that long postdates ratification" does not "illuminate[] the meaning of the enacted law.").

Likewise, the 1938 Natural Gas Act states that it "shall apply to the transportation of natural gas in interstate commerce," but "shall not apply" to gas sales occurring "within" a state. 15 U.S.C. § 717(b), (c). This Court has held that this language gives FERC "exclusive jurisdiction" that carries "full pre-emptive force." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300–01, 306 (1988).

The Second Circuit's only basis for distinguishing these cases was its belief that the gas and power statutes were enacted against a backdrop of judicial decisions explaining that the states lacked power to regulate interstate commerce. Pet.App.24a–25a ("Congress was acting in an area in which it was already established that states were prohibited from regulating."). But that distinction does not work—as discussed, precisely the same backdrop existed with respect to the Communications Act.

E. The Communications Act's Preemptive Effect Extends To Broadband Internet

The Second Circuit held that this Court's prior field-preemption decisions in the communications space apply only to common carriers. Pet.App.30a–31a.[3] But nothing in those decisions' text or logic suggests that they might be limited to common

---

[3] The FCC recently reclassified broadband internet as a Title II common-carrier service, a decision that is currently being challenged in the Sixth Circuit, which stayed the FCC order pending review. *See Safeguarding and Securing the Open Internet*, 89 Fed. Reg. 45405 (May 22, 2024) (codified at 47 C.F.R. pts. 8, 20) ("2024 Order"); *In re MCP No. 185*, No. 24-7000 (6th Cir. filed June 12, 2024). *Amicus* supports NYSTA's request to hold the petition in abeyance pending resolution of that case.

carriers. In fact, some of them involved regulation of companies that definitely were *not* common carriers. And nothing in the text of Section 2(a) distinguishes between common carriers and others. The Second Circuit was simply wrong on this, too.

Section 2(a) extends without distinction to "all interstate and foreign communication by wire or radio." 47 U.S.C. § 152(a). And the Communications Act incorporated the Radio Act of 1927 and shifted the FRC's authority over broadcast to the FCC. *See, e.g.*, *Scripps-Howard Radio*, 316 U.S. at 6; *NBC*, 319 U.S. at 213–16; *Allen B. Dumont*, 184 F.2d at 156. Radio and television broadcast are not common-carrier services. So the Communications Act plainly encompassed a wide range of non-common carrier services with its "shall apply" / "shall not apply" preemptive dichotomy.

Enactment-era preemption doctrine focused not on whether a company was a common carrier but whether its service belonged to a "type[] of commerce … uniquely suited to national, as opposed to state, regulation." *ACLU v. Johnson*, 194 F.3d 1149, 1160 (10th Cir. 1999) (citing *Wabash*). Services in rail transport, telephone, telegraph, radio broadcasting, and television broadcasting all fit that description. *See supra*. And broadband does too. While "states' jurisdictional limits are related to geography," "geography … is a virtually meaningless construct on the Internet." *Johnson*, 194 F.3d at 1161. "[L]ike … rail and highway traffic," the internet "requires a cohesive national scheme of regulation." *Id.* at 1162.

The early history of regulation of "enhanced services" (the precursor to modern information service) confirms that conclusion. For more than a

decade prior to the Telecommunications Act of 1996, the FCC preempted state regulation of *intrastate* enhanced services that interfered with federal nonregulation of *interstate* enhanced services, relying on its Section 2 authority. *See, e.g.*, *California v. FCC*, 39 F.3d 919, 932–33 (9th Cir. 1994) (upholding FCC preemption where state regulation of enhanced services would frustrate federal objectives). The FCC would later describe this history as a "national policy of nonregulation" of interstate information services. *See Petition for Declaratory Ruling,* Memorandum Opinion and Order, 19 FCC Rcd. 3307, 3317 (2004).

When the Telecommunications Act then codified the distinction between Title II "telecommunications services" and Title I "information services," it ratified the existing regulatory regime—including the FCC's authority to preempt contrary state law. As this 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 the Cable 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.

The Telecommunications Act's purposes—codified in the text—further confirm this result. The Act codified an intent "to preserve the vibrant and competitive free market" for broadband service, unfettered by federal "or State" regulation. 47 U.S.C. § 230(b)(2). The Act found that the "Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of

government regulation." *Id.* § 230(a)(4). And the Act declared it the policy of the United States to "promote the continued development of the Internet" and to "preserve the vibrant and competitive free market that presently exists for the Internet." *Id.* § 230(b)(1), (2).

The unique history of exclusive federal regulation of rates for certain interstate services in critical sectors (like communications, energy, and gas) decides this case. Reversal would not call into question the ordinary presumption against implied preemption that applies in contexts that do not have the Communications Act's history. *See United States v. Locke*, 529 U.S. 89, 107–08 (2000) (this Court takes "different approaches … in various contexts" and the "assumption of nonpreemption" depends on whether "States have traditionally occupied" the field at issue (cleaned)).

Congress has had more than a century to modify the interstate/intrastate scheme if it desired. But Congress instead has continually endorsed it in the communications context—in 1887, 1910, 1912, 1927, 1934, and 1996. New York's first-of-its-kind attempt at interstate rate regulation of the internet should not be permitted to upend centuries of settled understanding that this sort of regulation lies outside the states' domain.

II. STATE REGULATION OF THE INTERNET UNDERMINES THE BIPARTISAN OBJECTIVES OF THE COMMUNICATIONS ACT AND SOUND PUBLIC POLICY

If left uncorrected, the decision below will subvert the bipartisan objective—advocated by both Republicans and Democrats in both Congress and the

executive branch—of preserving Congress's exclusive jurisdiction over interstate broadband regulation. For decades, despite disagreement about how broadband should be classified, the FCC has consistently believed that interstate broadband regulation is a matter for the federal government and not the states.[4]

Under the logic of the decision below, however, the Communications Act would not preempt state regulation of interstate communications services that even proponents of utility-style broadband regulation have long conceded are Title I services. For example, states could regulate Zoom and WebEx rates. Forcing such services into Title II, even as they are rapidly evolving to meet the needs of increasingly virtual workforces and classrooms, would turn on its head Congress's expectation that they be free from federal or (especially) state regulation.

Universal broadband access is critical to closing the digital divide, but that goal is best achieved

---

[4] Under administrations of both parties, the FCC has concluded that utility-style rules like New York's law deter innovation and investment in harder-to-serve communities. In the 2018 *Restoring Internet Freedom* 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. *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311, ¶ 104 (2018). 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. *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, ¶¶ 497–501 (2015). The current FCC agrees too. *See* 2024 Order ¶¶ 6, 386.

through 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.

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 communities and a Lifeline program to provide discounted service to low-income consumers. Congress has recently created numerous other programs aimed at increasing broadband access as well. For example, the federal government is implementing the BEAD Program, a federal initiative designed to expand broadband access in underserved areas, that gives states money to administer grants after completing a rigorous review process by the Department of Commerce. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, Div. F, Title I, § 60102(b)(2), 135 Stat. 429 (2021). All told, GAO reported in 2022, there are "more than 100 programs administered by 15 agencies" that involve federal broadband efforts, and 25 federal programs that "have broadband as their main purpose." GAO, *Broadband: National Strategy Needed to Guide Federal Efforts to Reduce Digital Divide* (May 31, 2022), tinyurl.com/bdhrjycp.

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.*, Pew Charitable Trusts, *How State Grants Support Broadband Deployment* (Dec. 23, 2021),

tinyurl.com/yckara3n. For example, in 2015 New York made a $500 million broadband infrastructure investment. *See* ConnectALL, *Federal Approval of New York's ConnectALL Deployment Plan*, nysbroadband.ny.gov.

Providers also voluntarily offer low-income broadband options. New York has recognized that consumers have "multiple options" for low-cost plans through programs offered by the providers themselves. *See* ConnectALL, *Find Affordable Internet Options in NYS*, tinyurl.com/y9mdmvmb (listing available options throughout the state). The federal government, states, and providers are thus already participating in an evolving, interactive process for determining how best to facilitate affordable broadband.

These broad and intensive efforts notwithstanding, New York is charging ahead by setting 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 NTIA, which administers many of the new broadband-expansion programs. *See* Infrastructure Investment and Jobs Act § 60102(h)(5)(D). Because NTIA must approve state plans, this prohibition on rate regulation suggests that states cannot regulate rates as part of their participation in the BEAD program.

If states are invited to engage in ratemaking regulation of the communications industry, it will impose cumulative or conflicting costs on providers that will deter innovation and investment and lead to higher costs for consumers. As a matter of both law and public policy, New York's law represents a step in

the wrong direction for achieving the laudable goal of affordable broadband access.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

JONATHAN D. URICK
MARIEL A. BROOKINS
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

THOMAS M. JOHNSON, JR.
Counsel of Record
MEGAN L. BROWN
JOSHUA S. TURNER
MICHAEL J. SHOWALTER
WILEY REIN LLP
2050 M Street, NW
Washington, DC 20036
(202) 719-7000
tmjohnson@wiley.law

Counsel for Amicus Curiae

September 13, 2024