No. 24-161

IN THE
Supreme Court of the United States

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

v.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE MULTICULTURAL MEDIA, TELECOM, AND INTERNET COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Multicultural Media, Telecom, and Internet Council ("MMTC") is the technology, media, and telecommunications industries' leading national non-partisan, non-profit diversity organization. Since its founding in 1986, MMTC has been dedicated to promoting and preserving equal opportunity and civil rights in the media and telecommunications industries. MMTC conducts civil rights advocacy, undertakes research and analysis centered particularly around broadband access and adoption, and participates in state and federal proceedings focused on the same. MMTC supports efforts to close the digital divide and bring broadband access to more people of color, as well as to other vulnerable populations. MMTC has participated in numerous Federal Communications Commission ("FCC") proceedings relating to broadband. This case is important to MMTC because state broadband rate regulation creates an obstacle to the network investment and marketplace competition necessary to connect communities of color to broadband. MMTC participated in the case as an *amicus* below.

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[1] *Amicus* provided all parties with timely notice as required by Supreme Court Rule 37.2. Pursuant to Supreme Court Rule No. 37.6, no counsel for a party authored the brief in whole or in part; and no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

SUMMARY OF ARGUMENT

Deployment of broadband across the U.S. has been among the marvels of our age. The "digital divide" – the gap between those who have access to and can afford broadband, and those who cannot or do not subscribe – disproportionately impacts communities of color. While presumably well-intentioned, New York's "Affordable Broadband Act" or "ABA"[2] is unavoidably inimical to the closure of the digital divide, both in New York and elsewhere.

The digital divide stands in the way of all too many disadvantaged American communities – whether low-income, Tribal, communities of color, or rural – having the equal ability to participate in the modern economy. Today, it is essential to connect everyone to the opportunity that the internet makes available. State-specific regulation of broadband via rate caps is fundamentally harmful to closing the digital divide, and the Second Circuit erred in upholding the law.[3] Price regulation stands in the way of costly network investment that could, if not undermined, continue to facilitate accessible and affordable service in more communities of color and other disadvantaged communities. The ABA would deter competitive entry, distort the broadband marketplace, and leave communities in need of investment lagging behind with inferior broadband choices.

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[2] *See generally* N.Y. Gen. Bus. Law § 399-zzzzz.

[3] *See N.Y. State Telecom. Ass'n v. James*, 101 F.4th 135 (2d Cir. 2024).

The FCC's intended approach to regulation of broadband has fundamentally shifted during the pendency of this case, but under each such framework the agency has foresworn regulating broadband prices. This Court should not permit New York to undermine the bipartisan consensus against broadband rate regulation. Permitting the ABA to stand would open the floodgates for additional state regulation that would drown efforts to achieve the all-important goal of closing the digital divide.

ARGUMENT

I. The Digital Divide Harms Communities of Color and Other Vulnerable Americans

Ensuring affordable broadband connectivity is a critical and urgent civil rights challenge. As Congress recently recognized, "[a]ccess to affordable, reliable, high-speed broadband is essential to full participation in modern life in the United States."[4] To lack broadband access is too often to lack the ability to learn a new skill, obtain a valuable education, secure a quality and high-wage job, participate in civic dialogue, benefit from telemedicine – or even simply stay connected with loved ones at a distance. Wide swaths of many of our lives permanently moved online in the wake of the recent unprecedent global pandemic, and now more than ever high-speed

[4] 47 U.S.C. § 1701(1); *see also, e.g.*, *Safeguarding and Securing the Open Internet*, Declaratory Ruling, Order, Report and Order, and Order on Reconsideration, FCC 24-52, ¶ 1 (rel. May 7, 2024) ("*2024 Open Internet Order*") ("Access to broadband Internet is now an unquestionable necessity.").

internet access is fundamentally essential to everyday living.

Unfortunately, this reality is accompanied by a harsher truth: Too many Americans still are not connected to modern, high-speed networks. And the negative consequences of this "divide" are not felt equally; as Congress identified, the "digital divide disproportionately affects communities of color, lower-income areas, and rural areas."[5] This statutory finding is, regrettably, amply supported by extensive data. For instance, over thirty percent of Black and twenty-five percent of Latino families lack high-speed home internet.[6] Less than three-quarters of households with incomes of below $25,000 per year reported broadband subscriptions, compared to almost 98 percent of households with incomes of over $150,000 a year.[7] Tribal areas lag behind the rest of the country in terms of access to modern 5G mobile broadband and fixed terrestrial broadband at every speed tier.[8] Even two years after the pandemic

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[5] 47 U.S.C. § 1701(3).

[6] Pew Research Ctr., *Internet, Broadband Fact Sheet* (Jan. 31, 2024), https://www.pewresearch.org/internet/fact-sheet/internet-broadband/.

[7] Daniela Mejía, U.S. Census Bureau, *Computer and Internet Use in the United States: 2021*, American Community Survey Reports, ACS-56, at 5 tbl.1 (June 2024), https://www2.census.gov/library/publications/2024/demo/acs-56.pdf.

[8] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2024 Section 706 Report, FCC 24-27, ¶ 61 fig.1, ¶ 79 fig. 7 (rel. Mar. 18, 2024).

shifted learning online for many, in 2022 over one quarter of students of color in Michigan reported lacking fast home broadband, leaving them at an education disadvantage.[9] In sum, the digital divide remains a significant challenge.

The digital divide has multiple dimensions. It is imperative to connect all Americans to high quality broadband, as too many low-income and minority Americans lack access to high-speed broadband choices at their homes.[10] Deploying broadband is highly capital intensive, and more such investment is vital for communities of color across the country. But making broadband service more available will not alone suffice to ensure that non-subscribers will actually adopt such service. Despite having ready access to broadband services, millions of Americans have still not subscribed.[11] Lack of access to devices and deficiencies in digital literacy are examples of key impediments to broadband adoption even in circumstances where broadband service is made

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[9] Keith N. Hampton et al., Quello Center, Mich. State Univ., *Broadband and Student Performance Gaps After the COVID-19 Pandemic*, at 16 (2023), https://quello.msu.edu/wp-content/uploads/2023/08/Broadband-and-Student-Performance-Gaps-After-the-COVID-19-Pandemic.pdf.

[10] *See generally* FCC, *National Broadband Map*, https://broadbandmap.fcc.gov/home (last visited Sept. 9, 2024).

[11] Andrew Perrin & Sara Atske, Pew Research Ctr., *7% of Americans Don't Use the Internet. Who Are They?* (Apr. 2, 2021), https://www.pewresearch.org/short-reads/2021/04/02/7-of-americans-dont-use-the-internet-who-are-they/.

broadly available to a community.[12] These issues are particularly acute in low-income neighborhoods, which often have significant minority and immigrant populations.[13] While the ABA is a counterproductive "solution," the cost of broadband service is a significant factor contributing to non-adoption.[14] To address these complex challenges and truly connect all communities, we need ongoing investment and real, thoughtful solutions, not mandates like the ABA.

II. The ABA Would Make it Harder to Close the Digital Divide.

Connecting everyone to broadband is vitally important and deserves significant attention from policymakers, including state legislatures. But *doing something* is not enough: to truly aid communities of

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[12] As recently as 2016, a majority of Americans reported being hesitant to adopt new technology despite its importance in today's world. John B. Horrigan, Pew Research Ctr., *Digital Readiness Gaps*, at 3 (Sept. 20, 2016), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2016/09/PI_2016.09.20_Digital-Readiness-Gaps_FINAL.pdf.

[13] *See* Sara Atske & Andrew Perrin, Pew Research Ctr., *Home Broadband Adoption, Computer Ownership Vary by Race, Ethnicity in the U.S.* (Jul. 16, 2021), https://www.pewresearch.org/short-reads/2021/07/16/home-broadband-adoption-computer-ownership-vary-by-race-ethnicity-in-the-u-s/.

[14] Emily A. Vogels, Pew Research Ctr., *Digital Divide Persists Even as Americans with Lower Incomes Make Gains in Tech Adoption* (June 22, 2021), https://www.pewresearch.org/short-reads/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/.

color on the wrong side of the digital divide, policymakers must pursue action that is effective and abstain from measures that are counterproductive. The ABA fails this test. If the ABA becomes effective, it will achieve the opposite of what it purports to accomplish, making it harder for communities of color to subscribe to broadband.

Examining the ABA's rate caps illustrates why. The dollar figures set in the ABA are not the product of any meaningful analysis. They do not account for providers' ability to recover costs (necessary to ensure continuity of service, including for historically disadvantaged communities), plans for future deployment (including capital expenditure-reliant deployments for the same communities), or even the availability of broadband in the State of New York. As a result, the district court concluded that the ABA would require providers to offer their "services at a loss," and it also concluded that the ABA would impose significant administrative costs.[15]

At the risk of simplistic economic truism, no business will invest where it will lose money, and loss is exactly what the ABA would impose. As a result, the ABA will deter new deployment and upgrades, including in communities that need them. The district court concluded that the ABA would "force [providers] to cancel preexisting business plans for upgrades to, and expansion of, their broadband

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[15] *N.Y. State Telecom. Ass'n v. James*, 544 F.Supp.3d 269, 276 (E.D.N.Y. 2021), reversed by 101 F.4th 135 (2d Cir. 2024). New York did not challenge – and the Second Circuit did not question these findings – on appeal.

networks[.]"[16] In particular, rate caps would force smaller, would-be nascent competitors to abandon expansion plans.[17] Already-disadvantaged communities do not benefit from laws that strip providers of incentives to enter the market or improve their service.

The ABA would not only hinder service availability; it actually would hurt affordability. Rate caps like the ABA's serve to unwind economic assumptions that made previous service pricings viable.[18] A negative feedback loop of reduced revenue, decreased investment, and price hikes for non-qualifying customers is foreseeable. Customers just above the ABA's thresholds or who otherwise do not qualify may have to pay much more for whatever options are available. Further, increasing competition has been far more effective in achieving favorable rates for broadband consumers than traditional top-down regulatory models could achieve.[19] Thus, the ABA is actually inimical to true

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[16] *Id.* Again, New York did not challenge – and the Second Circuit did not question – this conclusion.

[17] *See, e.g.*, Stay App. Ex. 11-12, Decl. of Glen Faulkner ¶¶ 3,6; Decl. of Jason Miller, ¶¶ 9-10.

[18] *See, e.g.*, Stay App. Ex. 11, Decl. of Glen Faulkner ¶¶ 9-18.

[19] For example, from 2010 to 2020, wireless rates decreased by 43 percent nationwide, while more heavily regulated electricity rates increased 13%, and water rates increased 63%. *See* Timothy J. Tardiff, Advanced Analytical Consulting Group, *State Utility-Style Regulation of Wireless and Broadband Services*, at 4 (Nov. 2022), https://api.ctia.org/wp-content/uploads/2022/10/AACG-Utilities-Paper_JL_Nov2022.pdf.

affordability for *all* consumers in the long run. The digital divide will not be closed by stripping underserved communities of a competitive marketplace and resulting affordable prices that they deserve.

The ABA is a threat to closing the digital divide nationwide. If New York may impose rate caps on providers, might not 55 other states and territories? Each additional state that regulates broadband rates can amplify the potential harms of rate regulation within the regulated states. With a $25 cap in State A and a $10 rate cap in State B, the mismatch of pricing via state rate caps will deter providers from expanding across states and ultimately lead to the balkanization of which products and services are available in different rate-regulated states. Those that have reliable access to broadband today, and who can afford it, may be fine with such an outcome. But communities on the wrong side of the digital divide cannot afford it.

If the ABA and other similar laws are allowed to stand, the barriers to closing the digital divide would extend even to states that do not enact broadband rate regulation akin to the ABA. For providers in a rate-regulated state with footprints in non-rate-regulated states, the losses in rate-regulated states will encourage price increases in non-rate regulated states to offset the costs of compliance. Americans already pay into a range of federal vehicles to address the digital divide, via federal taxes and FCC Universal Service Fund fees[20]; it is inefficient and

[20] *See* 47 U.S.C. § 254(d).

unjust to require citizens of other states and territories to further subsidize below-cost rate caps in rate-regulated states. Such out-of-state rate increases resulting from the ABA and similar laws would be most harmful to those citizens of other states who are already on the wrong side of the digital divide – again, a group disproportionately comprised of communities of color and other vulnerable groups. Thus, the ABA would fundamentally operate as a regressive tax on out-of-state communities *themselves in need of support*. This is not the way forward towards digital equity.

None of this is to say that states are helpless in the face of the digital divide. They can and should pursue effective measures such as investing resources in promoting access and adoption, participating in and encouraging community-led initiatives and public-private partnerships, lowering the barriers to entry for broadband access, and promoting digital literacy. But laws like the ABA are fundamentally harmful to communities of color and disadvantaged Americans. These groups need the full-fledged benefit of broadband made available to other Americans – not the stripped-down services that rate caps inevitably encourage with providers trying to avoid loss and maximize returns under artificial ceilings.

III. The ABA Undermines the Benefits of The FCC's Consistent Approach to Rate Regulation

The FCC has acknowledged the harm of broadband rate regulation on a bipartisan basis. Indeed, FCC Chairwoman Jessica Rosenworcel has

recognized this in her pledge not to regulate rates for broadband offerings.[21] Under the *Restoring Internet Freedom Order* framework pursuant to which the Second Circuit conducted its preemption analysis (and that still applies today because of the Sixth Circuit's stay pending appeal), the FCC adopted a deregulatory approach that facilitates private sector efforts to close the digital divide by, among other things, forgoing application of the sources of authority that could permit rate regulation.[22] In the *2024 Open Internet Order*, despite pursuing a common carriage framework for broadband, the FCC expressly stated that it would not adopt rate regulation.[23]

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[21] In response to questions during an oversight hearing before the House Committee on Energy and Commerce's Subcommittee on Communications and Technology about whether she supports rate regulation, Chairwoman Rosenworcel said "I support consumer protection, but don't believe that [rate regulation] is the place [the Commission] should go in order to manage the broadband industry on a going-forward basis. . . . There [are] no asterisks." *See Connecting America: Oversight of the FCC: Hearing Before the Subcomm. on Commc'ns & Tech. of the H. Comm. on Energy & Com.*, 117th Cong. 60-61, 121 (2022) (Statement of Jessica Rosenworcel, Chairwoman, Federal Communications Commission), https://docs.house.gov/meetings/IF/IF16/20220331/114545/HHRG-117-IF16-Transcript-20220331.pdf.

[22] *See Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2018) (*Restoring Internet Freedom Order*).

[23] *2024 Open Internet Order* ¶ 281 (stating that "we . . . do not adopt any rate regulation"); *id.* ¶ 321 (stating that the FCC "forbears from all ratemaking authority based on, or ratemaking regulations adopted under, sections 201 and 202").

State rate regulation of broadband interferes with and is incompatible with the federal commitment not to regulate rates because states are imposing the same rate caps that the federal government has determined are inappropriate. The ABA makes it impossible to implement the sound national policy against rate regulation. Indeed, permitting the ABA could lead to, in effect, national broadband rate regulation through the aggregative effect of state legislation—even though the FCC has consistently rejected broadband rate regulation.

Allowing the ABA to stand also renders irrelevant the factual determinations that underlie the FCC's decisions against rate regulation. For instance, in the recent *2024 Open Internet Order*, in choosing not to undertake rate regulation, the FCC observed that "we have seen no significant increases in prices or unreasonably discriminatory pricing that would seem to warrant the imposition of rate regulation or tariffing requirements."[24] New York's law, in other words, would impose a harmful solution addressed to a misapprehended problem.

Communities of color and disadvantaged Americans deserve high-quality, affordable, competitive broadband service. Despite any good intentions that motivated it, the ABA will move them further from that goal. This Court can and should prevent the ABA from undermining the sound bipartisan consensus against creating new obstacles,

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[24] *2024 Open Internet Order* ¶ 315.

via counterproductive broadband rate regulation, to closing the digital divide.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari in this case and reverse the lower court's judgment.

Respectfully submitted,

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