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,

vs.

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

Defendant-Appellant.

BRIEF OF *AMICI CURIAE* TECHFREEDOM AND WASHINGTON LEGAL FOUNDATION IN SUPPORT OF APPELLEES AND AFFIRMANCE

On Appeal from the United States District Court for the Eastern District of New York, No. 2:21-cv-2389

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/s/ Corbin K. Barthold

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INTERESTS OF *AMICI CURIAE**

TechFreedom is a nonprofit, nonpartisan think tank. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible. TechFreedom has been a prominent voice in all aspects of the net neutrality debate. In its 2018 *Restoring Internet Freedom* order, for instance, the Federal Communications Commission cited TechFreedom's comments 29 times. 33 FCC Rcd 311 (2018). The unifying theme of TechFreedom's work is a belief that there is, in fact, broad agreement on the core principles of net neutrality. Only by enacting those principles, in *federal* legislation, can we end the "net neutrality" wars that have raged at the FCC.

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* on the FCC's net neutrality rules. See, e.g., *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (per curiam); *U.S.*

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* No party's counsel authored any part of this brief. No one, apart from TechFreedom, Washington Legal Foundation, and their counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the brief's being filed.

Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016). WLF believes that the FCC's 2018 Order must be respected by the states—even those that don't agree with the FCC's decision.

If the fight over net neutrality is allowed (improperly) to drift into the states, the result could be not only disastrous, but startingly far-reaching. This case proves the point. "It is the policy of the United States," Congress has declared, "to preserve the vibrant and competitive free market that presently exists for the Internet[,] … unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). Yet New York's arguments here, if accepted, would endanger not only the "vibrant and competitive free market" for broadband Internet service, but also the "vibrant and competitive free market" for email, text messaging, business communications platforms, online video conferencing apps, and more.

SUMMARY OF ARGUMENT

The fight over net neutrality—or rather, the confused mix of policies, including rate regulation, that the term "net neutrality" has come to represent—has been so heated, it's sometimes easy to forget that the FCC does anything besides regulate Internet service providers. But the FCC regulates, or may regulate, many other communications services. Forgetting that fact could have terrible consequences. In this

appeal, New York shows how. In trying to place price caps on broadband service, New York makes arguments that could harm email, text messaging, and much more.

I. New York has passed a law, the Affordable Broadband Act, N.Y. Gen. Bus. Law § 399-zzzzz, that treats broadband service as common carriage subject to rate regulation. Congress has declared, however, that the Internet should remain "unfettered" by "State regulation." 47 U.S.C. §§ 230(b)(2), 230(f)(2). It also decided long ago that a company offering interstate communications services may be "treated as a common carrier" only "to the extent" that it "provid[es] telecommunications services." *Id.* § 153(51). In its 2018 Order, the FCC determined, as a matter of law, that broadband service is not a "telecommunications service," but an "information service." The states, therefore, may not *treat* broadband service as a common-carrier "telecommunications service," see *id.* § 153(51), such as by capping the prices providers charge. The case should end right there.

II. Because New York elides this straightforward analysis—and because the Ninth Circuit recently did so as well, in addressing a California law that regulates the manner in (though not the rates at) which broadband providers offer service, see *ACA Connects v. Bonta*, 24 F.4th 1233 (9th Cir. 2022)—it's important to take a step back, and

understand the history and significance of the distinction between Title II "telecommunications" and Title I "information services." The Title II-Title I distinction harkens back to the FCC's studies, beginning in the 1960s, of what the FCC called "basic" service and "enhanced" service. The "basic" service was AT&T's Bell System telephone monopoly. The "enhanced" services were innovative computer technologies (e.g., voicemail systems) that could plug into the basic network. The FCC concluded that the static and comparatively simple "basic" service, provided by a monopoly, needed heavy-handed common carrier regulation. This position was codified into the many rules that govern the successors of "basic" service, Title II "telecommunications services." The FCC concluded that the fast-evolving, technologically sophisticated, and competitive interstate "enhanced" services needed the freedom to develop and spread, unhindered by federal *or state* regulation. This position was codified into the light-touch regulatory regime that governs the successors of "enhanced" services, Title I "information services."

The need for the light-touch Title I regime is as great as ever, as communications technology continues to rapidly evolve. Email and text messaging are Title I services. Other services that process data while transporting it, such as business communications platforms, cloud-computing services, and video-conferencing apps, display the hallmarks

of Title I services. When one thinks of Title I, one should think of the light-touch regulatory environment necessary for *all* these services (and their successors, such as the Metaverse) to thrive.

III. New York errs (as does the Ninth Circuit) by acting as though the FCC simply preferred, for reasons of its own, to categorize broadband service as a Title I service. That underestimates what Title I is, why Title I exists, and what the 2018 Order does.

It is true that the FCC decided, as a matter of public policy, that broadband service should be subject to light-touch regulation, and that that decision has conflict-preemptive effect for the reasons set forth by the appellees. In addition, though, *Congress* has decided that a certain kind of service should be subject to light-touch regulation. The Telecommunications Act of 1996 codified the distinction long drawn by the FCC, for policy reasons, between common carrier and non-common carrier services. The 2018 Order determines that broadband service is the *type* of service—a Title I information service—that *Congress* decided should be only lightly regulated. New York is not free to ignore this statutorily grounded determination, and go on regulating broadband service as though it were common carriage. To do so is to defy the congressional policy governing a service that the FCC, the nation's expert communications regulator, has determined *is not common carriage*.

IV. If New York can trample on the FCC's finding that broadband service is a Title I information service, nothing in logic stops a state from trampling on *any* FCC finding that *any* communications service is a Title I information service. New York is arguing, in effect, that a state should be allowed to impose rate regulations, market entry or exit requirements, and more on email and text messaging (both Title I services) and possibly on any service that processes and transports data (services with Title-I-like features) to boot. Under New York's theory, each time the FCC declares a cutting-edge interstate service a Title I information service, rather than a Title II telecommunications service, the FCC's declaration serves as an announcement, to the states, that it is open season for regulating that service as common carriage. Under New York's theory, in other words, Congress designed a law that predictably, efficiently, and systemically "fetters" the Internet with state regulation. Because Congress did the opposite, see 47 U.S.C. §§ 230(b)(2), 230(f)(2), New York's theory must fail.

In short: (1) Congress has set a policy of light-touch regulation for Title I information services. The ABA conflicts with that policy, and is thus preempted. (2) Title I didn't come out of nowhere. It is a considered congressional policy, with a deep history, aimed at promoting technological innovation. (3) New York flatly refuses to take Congress's

Title I objectives seriously. This neglect causes New York to turn a simple case into a complex one. (4) New York's mistake is dangerous, as it could, if accepted, wreak havoc on all innovative, fast-evolving Title I services.

ARGUMENT

The district court found that the ABA is barred by both field preemption and conflict preemption. Although this Court could rightly find that the ABA is barred under either or both theories, this brief elaborates on why the ABA is conflict-preempted. In particular, the brief explains why the ABA is conflict-preempted not only by the FCC's policy findings in the 2018 Order (as the appellees exhaustively explain (Appellees' Response Brief 18-23)), but also (and as the FCC also found in the 2018 Order) by the Communications Act itself.

Under conflict preemption, a state law may not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 399 (2012). Congress has made clear that it wants Title I information services—fast-evolving "enhanced" technologies—to flourish under a light-touch regulatory regime. New York's arguments stand on a failure to accept the statutory consequences that flow from the FCC's declaring broadband service an information service. In seeking to treat broadband

service like a common carrier despite its Title I status, New York seeks, in effect, to be allowed to treat *any* Title I service like a common carrier. In other words, New York's arguments, if accepted, would open the door to intrusive state regulation of *all* Title I information services. Under New York's theory, states could impose market entry or exit requirements, or rate regulations, on email, text messaging, and much more. That would be a disaster for the Internet, for technological progress, and for society.

I. The ABA is an Obstacle to Congress's Title I Policy

The Communications Act of 1934 "delegate[s] authority to the FCC to expand" the nation's "communications systems." *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 804 (D.C. Cir. 2002). As part of that authority, the FCC enjoys a "general grant of jurisdiction," under Title I, that "encompasses 'all interstate and foreign communication by wire.'" *Am. Library Ass'n. v. FCC*, 406 F.3d 689, 692-93 (D.C. Cir. 2005) (quoting *United States v. Sw. Cable Co.*, 392 U.S. 157, 167 (1968)).

How is the FCC to use its Title I authority to "expand" the nation's "communications systems"? When it comes to modern communications technology, the answer is clear: give innovators the room they need to innovate. "The Internet," Congress declared, in the Telecommunications

Act of 1996, has "flourished, to the benefit of all Americans, with a minimum of government regulation." 47 U.S.C. § 230(a)(4). It is thus "the policy of the United States," the 1996 Act states, "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services"—a term the Act defines to include Title I "information services"—"unfettered by Federal or State regulation." *Id.* §§ 230(b)(2), 230(f)(2). Said more directly—and putting to one side rules of general application to businesses, like consumer protection laws (see below)—interstate information services, such as broadband service, should remain "unfettered by … State regulation." *Id.* § 230(b)(2).

The 1996 Act makes this protection of information services yet more explicit by stating that a company may be "treated as a common carrier," under the Communications Act—in other words, be regulated under Title II, rather than Title I—"only to the extent" that it "provid[es] telecommunications services." *Id.* § 153(51). Other services—indeed, the services that have driven the Digital Revolution—are thus to remain free of the antiquated common-carriage rules that, though they reside today in Title II, were first formulated in the railroad regulations of the Interstate Commerce Act of 1887.

II. Understanding Congress's Title I Policy: Light-Touch Regulation of Fast-Evolving Information Services

That the ABA fails to respect broadband service's status as an unfettered Title I "information service" by itself establishes that the ABA is conflict-preempted. New York and its *amici* fail to see this. We think this is because they've missed *how* the distinction between Title I and Title II came to be, and *why* it exists.

From the 1960s through the 1980s, the FCC engaged in a series of "Computer Inquiries." Advances in computing technology were enabling the creation of innovative new products that could enhance basic telephone service while running over the same wires. The FCC had become alive to this fact, as well as to the ways that the dominant provider of "basic" telephone service—the Bell System—could hamper the attachment and integration of "enhanced" services into the telephone network. One goal of the Computer Inquiries was to ensure that the innovative "enhanced" computer services could access the "basic" telephone service, over much of which Bell held a monopoly. See generally Tom Struble, *The FCC's Computer Inquiries: The Origin Story Behind Net Neutrality*, Morning Consult, https://bit.ly/3spHuED (May 23, 2017).

The Computer Inquires spotted, defined, and analyzed this distinction between "basic" and "enhanced" services. A "basic" service simply *carries* data along, the Inquiries explained, while an "enhanced" service *processes* data in some way during data transport. This basic/enhanced distinction was then codified into the Telecommunications Act of 1996. "Basic" services became "telecommunications," which the 1996 Act defines as the "transmission" of information "without change in the form or content of the information as sent and received." 47 U.S.C. § 153(50). "Enhanced" services, meanwhile, became "information services," which the 1996 Act defines as a service that has the "capability" to "generat[e]," "acquir[e]," "stor[e]," "transform[]," "process[]," "retriev[e]," "utiliz[e]," or "mak[e] available" information "via telecommunications." *Id.* § 153(24).

The upshot is that "telecommunications" and "information service" are not arbitrary labels. They capture ideas that stretch back to the distinction between the "dumb" carriage of the "basic" Bell telephone system (telecommunications) and the "smart" computer services that "enhanced" that system (information services).

In its Computer Inquiries—making a point that would later find its way into federal law—the FCC insisted that the states respect these

distinct regulatory regimes, including by keeping their hands off intrastate "enhanced" (now "information") services:

> State public utility regulation of entry and service terms and conditions (including rates and feature availability), ostensibly applied to 'intrastate' enhanced services, would have a severe impact on, and would effectively negate, federal policies promoting competition and open entry in the interstate markets for such services.

In re Amendment of Sections 64.702 of the Comm'n's Rules & Regulations (Third Computer Inquiry), 2 FCC Rcd 3035 ¶ 181 n.374 (1987); see also *In re Petition for Declaratory Ruling (Pulver)*, 19 FCC Rcd 3307 ¶ 17 n.61 (2004) (discussing the FCC's conclusion, in its Computer Inquiries, that states "may not impose common carrier tariff regulation on a carrier's provision of enhanced services").

As we've seen, the 1996 Act codifies this light-touch, states-stay-out regulatory regime, both by saying that Title I "information services" should remain "unfettered by … State regulation," 47 U.S.C. §§ 230(b)(2), 230(f)(2), and by saying that a firm may be "treated as a common carrier" only "to the extent" that it "provid[es] telecommunications services," *id.* § 153(51). As the FCC itself explains, it has for "decades" aimed to "enable information services to function in a freely competitive, unregulated environment"; and Congress has adopted that aim as its own, "ma[king] clear statements," in the 1996 Act, "about leaving the Internet"—

including information services—"free of unnecessary federal and state regulation[.]" *In re Pulver*, 19 FCC Rcd 3307 ¶ 19 n.69, ¶ 25. "Consequently," adds the FCC, "states have generally played a very limited role with regard to information services." *Id.* ¶ 17.

The substantive distinction between basic/telecommunications services (relatively static services subject to common-carrier regulation) and enhanced/information services (fast-progressing services needing lightly regulated competition) is alive and well. Congress has set forth policies to govern the former in Title II, and policies to govern the latter in Title I. And a look at advances in communications technology, since passage of the 1996 Act, confirms the wisdom of the light-touch regulatory regime for Title I information services, at both the federal and the state level. In 1998, the FCC concluded that email service, with its (then-) cutting-edge capacity to "store-and-forward," and thus allow "asynchronous" access to, data, qualified as an "information service" needing "regulatory freedom" for "healthy and competitive development." *Fed.-State Joint Bd. on Univ. Serv., Report to Congress (Stevens Report)*, 13 FCC Rcd 11501 ¶¶ 46, 78 & n.161 (1998). More recently, the FCC declared Short Message Service text messaging an information service, in part to encourage the fast and free-flowing development, by wireless providers, of "robotext-blocking, anti-spoofing measures, and other anti-

spam features." *In re Petitions for Decl'y Ruling on Reg'y Status of Wireless Messaging Serv.*, 33 FCC Rcd 12075 ¶ 2 (2018).

In the last couple decades, the advance of communications technology has, if anything, accelerated, rendering the distinction between basic and enhanced services, along with the light-touch Title I regime, all the more important. There has been an explosion of innovative new modes of communication over the Internet. Business communications platforms (e.g., Slack), Internet-based video apps (e.g., Zoom), and cloud services (e.g., Amazon Web Services)—to name just a few—have arisen and thrived precisely because they're not subject to the onerous regulations, such as price controls and entry and exit requirements, typically faced by common carriers.

To be clear, the FCC has not specifically declared that these services are Title I services—but it hasn't needed to. The FCC's 2004 *Pulver* order placed Internet-based voice chat services (at least when they do not connect to the traditional telephone network) under Title I. *In re Pulver*, 19 FCC Rcd ¶ 2 n.3. Thanks to the *Pulver* order—which makes clear the very limited scope of Title II—there has been no need to officially place cutting-edge digital services under Title I. Those services have been allowed to flourish, free of government interference, in what then-Commissioner Michael O'Rielly once called a "regulatory free

arena." Michael O'Rielly, *FCC Regulatory Free Arena*, FCC, https://bit.ly/3HJvFiJ (June 1, 2018). "[T]he need for the Commission's regulatory structures (and therefore its relevance and function)," O'Rielly elaborated, "are fading like that of a snowman in springtime or, more on point, like the steep decline of the traditional switched access voice telephone service." *Id*.

Broadband service falls squarely in Title I. The FCC has determined, in its 2018 Order, that broadband service displays the qualities of a Title I information service, and thus belongs under "the light-touch framework" that has for decades promoted "innovation" and "investment" in, and enabled the "rapid and unprecedented growth" of, the Internet and Internet access. 33 FCC Rcd 311 ¶ 1; see also *id.* ¶ 30 (concluding that broadband service "meet[s] the information service definition under a range of reasonable interpretations of that term").

Title I serves an important purpose: giving cutting-edge communications technologies room to grow and thrive. And it remains as true as ever that "[s]eeking to [over-]regulate" such "enhanced" technologies "would only restrict innovation" in "fast-moving and competitive market[s]." *Stevens Report*, 13 FCC Rcd 11501 ¶ 26.

III. New York Misunderstands the Import of Title I Status

As the appellees explain, the FCC, in the 2018 Order, used sound policy judgment to categorize broadband service as a Title I information service. (ARB 18-23, 28-29.) As the appellees further explain (see *id.*), the FCC's sound policy judgment is enough, under *Mozilla*, 940 F.3d 1, and *Chevron* deference, to resolve this appeal in the appellees' favor. But we think the root problem with New York's arguments lies deeper. New York fails to grapple with the fact that the FCC, in the 2018 Order, was acting *not only* in accord with its policy judgment, *but also* in accord with a congressional statutory directive. The FCC determined that broadband service *is*, substantively, a service entitled, *as a matter of law* under the Communications Act, to a specific (i.e., light-touch) regulatory status.

New York never acknowledges where advances in broadband Internet service *come* from (i.e., a painstaking process of investment-backed research, development, and implementation). Those advances seem, in New York's brief, simply to fall from the sky. Even when discussing the 2018 Order, New York refuses to mention the need for innovation, stating only that "the FCC relied in part on 'public policy arguments'" for its decision. (Appellant's Opening Brief 14.) In seeking to regulate interstate broadband service rates, New York implicitly assumes that broadband service is, in its very essence, a static, fully

mature, utility-like service akin to the Bell System—a system, in other words, that has had nearly all of the innovation wrung out of it.

To go on assuming that broadband service is akin to common carriage, the 2018 Order be damned, New York must tell a distorted story of what the FCC *did* in that order. Sometimes, in New York's telling, the FCC seems simply to have decided, on a whim, that it wanted broadband service "deregulate[d]," so it placed broadband service in Title I. (AOB 14.) That version of the story is a loser for the reasons given by the appellees. The appellees fill in the details, explaining that the FCC thoroughly analyzed the state of the broadband industry, and then permissibly construed the law in a reasonable manner that "tallie[d] with its policy judgment." (ARB 29 (quoting *Mozilla*, 940 F.3d at 26).)

At other times, in New York's brief, the FCC seems simply to have looked at "the relevant definitional provisions" in the 1996 Act, concluded that broadband service fits the definition of a Title I information service, and recategorized it accordingly. (*Id*. at 51.) To hear New York explain it, broadband service just happened to fit a basically arbitrary and meaningless category of the 1996 Act. But as we've explained (Sec. II, above), there is, once again, more to the story. Congress—a side player in New York's brief—has enacted a policy, to be implemented by an expert agency, of light-touch regulation for information services. In the 1996

Act, Congress defined what kinds of things that policy governs, and—here's what New York really misses—the FCC found that broadband service *is the kind of thing* subject to the policy. See *In re Restoring Internet Freedom*, 33 FCC Rcd 311 ¶ 30. The FCC found that broadband service *is*, in its very essence, the kind of product subject to Congress's light-touch Title I policy. See *id.* ¶ 20 ("While we find our legal analysis *sufficient on its own* to support an information service classification of broadband Internet access service, strong public policy considerations *further weigh* in favor of an information service classification.") (emphasis added).

So although you could say that the FCC "chose" not to regulate broadband service (AOB 51)—and it did, and it had good reason to (ARB 20-21)—it's more accurate, in our view, to say that the FCC *determined* that broadband service is the *type* of service that *Congress* decided *should not be regulated*. The FCC didn't express a preference that the states are free to ignore. It implemented congressional policy.

This is not to say that broadband service is "unregulated" or not subject to any state regulation. New York is correct, for instance, that an Internet service provider normally must comply with a state's consumer protection laws. New York is wrong, however, when it asserts that the ABA "resembles state consumer-protection … measures[.]" (AOB 33.)

Consumer protection laws prevent businesses from engaging in deceptive or unfair behavior. See, e.g., *Spagnola v. Chubb Corp.*, 574 F.3d 64, 74 (2d Cir. 2009) (discussing N.Y. Gen. Bus. Law § 349, New York's "deceptive acts or practices" law); *Leider v. Ralfe*, 387 F. Supp. 2d 283, 296 (S.D.N.Y. 2005) (noting that some states' consumer protection laws—though not New York's—bar "unfair" acts, typically defined as "conduct that is offensive to public policy, immoral, unethical, oppressive, unscrupulous, or causes substantial injury"). Openly offering to sell one's product at the market rate is neither deceptive nor unfair. The words "deceptive" and "unfair" won't bear the stress New York would place on them. Upholding a rate regulation by calling it "consumer protection," simply because one *likes* the regulation, would be like striking down a wage-and-hour regulation as a violation of "liberty," simply because one *dislikes* the regulation. Cf. *Lochner v. New York*, 198 U.S. 45 (1905). In each case, a reasonable and widely accepted understanding of words is discarded in favor of a highly strained understanding of words that serves a desired outcome.

At any rate, the states may not regulate broadband service as common carriage, because broadband service *is not common carriage*. It is an information service. New York's attempt to proceed with its price caps anyway conflicts with Congress's policy that information services

remain "unfettered by … State regulation." 47 U.S.C. §§ 230(b)(2), 230(f)(2).

IV. New York's Arguments Imperil Technological Innovation Among All Title I Information Services

New York's theory is extraordinarily pernicious. Nothing in logic enables New York to say that interstate broadband service's Title I status opens the way to state rate regulation, but that email's or text messaging's Title I status does *not* open those services to state rate regulation. To treat broadband service *as though* it were a Title II telecommunications service, in other words, New York must make arguments that, if accepted, might apply to *every* service that is, or that could plausibly be, a Title I information service.

Consider this line in New York's brief: "Congress expressly provided a statutory mechanism for the FCC to block States from engaging in common-carrier rate regulations—but that mechanism is available only when the FCC exercises its Title II powers over telecommunications, and is categorically unavailable under Title I." (AOB 54.) If you're laboring under the fallacy that broadband service remains common carriage no matter what the FCC says (Sec. III, above), this sentence seems to establish that, when a service is placed under Title I, the path to state rate regulation is opened. But if you understand why Title I exists

(Sec. II, above), the sentence makes no sense. You know that when the FCC declared email a Title I service, it was not giving states a *green light* to rate-regulate email (or, when an email service is free, to require the provider to pay users for data). Likewise, you know that if the FCC were to declare that business communications platforms like Slack are a Title I service, it would not be giving states a *green light* to set price controls for those products.

Once one remembers that Title I is about much more than broadband service, it becomes absurd to assume that states get a red light when something is a Title II service, but a green light when a communications service is anything else. Indeed, such an assumption would seem to stand on the further assumption that every service *must* be subject to heavy-handed regulation by *someone*. But the 1996 Act (and common sense) tells us that that additional assumption is untenable.

The FCC needs no express power to block state rate regulation of Title I services because the whole point of bestowing Title I status is to head off heavy-handed regulation, be it federal, state, or other. In New York's view, the FCC must retain *for itself* the power to impose price caps, by placing a service under Title II, to *stop states* from imposing price caps. (AOB 38.) But when we pan out, and think about more than broadband service, that claims looks like pure folly. Imagine that a state says it will

start imposing market entry and exit rules, rate regulations, or pay-for-data requirements on email. Does that mean that the FCC must *move* email to Title II, and then *forbear* from treating email like a common carrier? Why would Congress, which wants the Internet to remain unfettered by state regulation, 47 U.S.C. § 230(b)(2), require such a Rube-Goldberg-esque process to head off state regulation? Such a protocol would make a mockery of Congress's straightforward conclusion that Title I is the home of services that need light-touch regulation.

When New York says something like "Title I contains no … mechanism authorizing the FCC to preclude States from regulating broadband prices charged to consumers" (AOB 55), the reader should replace "broadband" with another service that is, or that could plausibly be, a Title I service, and then note how implausible the new sentence sounds. As such substitutions will confirm, under New York's theory, should the FCC declare an innovative form of communication—a set of cloud computing tools, for example, or a type of social messaging service—to be an information service, that move would drastically *expand* the universe of regulations (via the states) to which the service could be subjected. That makes no sense.

In creating Title I, what did Congress achieve? One answer is that Congress wanted information services to flourish, unhindered by

regulation, but that it set up a legal regime under which states may impose a patchwork of price controls (not to mention other common carriage rules, such as market entry and exit requirements) on those services. The other answer is that Congress wanted information services to flourish, unhindered by regulation, Congress meant it, and Congress set up a legal regime of all-government light-touch regulation accordingly. There can be no doubt about which of these answers is the correct one. An information service, such as broadband service, is to remain "unfettered by … State regulation." 47 U.S.C. §§ 230(b)(2), 230(f)(2). The ABA is preempted.

CONCLUSION

The district court's order granting a preliminary injunction should be affirmed.

March 2, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

This brief complies with the type-volume limits of Fed R. App. P. 29(a)(5) because it contains 4,895 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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/s/ Corbin K. Barthold

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 2022, a true and correct copy of the foregoing brief was filed and served on all registered counsel through the Court's CM/ECF system.

/s/ Corbin K. Barthold