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Second Circuit Hears Preemption Challenge to New York's Broadband Rate Regulation Law

by

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On January 12, the U.S. Court of Appeals for the Second Circuit held oral argument in *New York State Telecommunications Association v. James*. At issue are conflict and field preemption claims brought by broadband providers challenging New York's Affordable Broadband Act (ABA). The case raises important issues about the preemptive effect of the FCC's 2018 *Restoring Internet Freedom Order* ("RIF Order") and the Communications Act, so this piece will provide a post-argument update, with more likely to follow at a later date.

In April 2021, the New York Assembly passed the ABA requiring broadband service providers in the state to offer internet access plans to low-income households for $15 or $20 per month. Two months later, the U.S. District Court for the Eastern District of New York granted a broadband provider association's motion for an injunction barring enforcement of the ABA. The court determined that the ABA's "price ceilings" are a type of rate regulation and "a form of common carrier treatment." It concluded that the ABA was preempted because it "conflicts with

the implied preemptive effect of both the FCC's 2018 Order and the Communications Act," and also because federal law occupies the field of interstate communications services. New York appealed.

The Second Circuit panel in James consists of Judges Richard J. Sullivan, Alison J. Nathan, and Sarah A. L. Merriam. Oral argument addressed conflict preemption issues left unanswered by the D.C. Circuit's 2019 decision in *Mozilla v. FCC* which upheld the Commission's decision in its 2018 RIF Order to reclassify broadband internet services as "information services" under Title I of the Communication Act. But the D.C. Circuit vacated the 2018 order's express preemption section, acknowledging that conflict preemption could be invoked if "a state actually undermines the 2018 Order." Because no particular state law was at issue in *Mozilla*, the court determined it would be premature to pass on the preemptive effect of the RIF Order on any state laws not before the court.

New York argues the ABA does not conflict with the FCC's 2018 RIF Order or the Communications Act because Title I reclassification removes the agency's jurisdiction over broadband services, leaving states free to exercise their sovereign authority to regulate those services within their borders. Moreover, the state argues that its authority for the ABA does not depend on broadband services being solely intrastate. In support, the state references the California Internet Consumer Protection and Net Neutrality Act of 2018, which was upheld in January 2022 by the Ninth Circuit Court of Appeals in *ACA Connects v. Bonta*.

New York also argues it can regulate interstate broadband services because the ABA applies only to in-state providers and subscribers. The state acknowledges that the ABA is a form of rate regulation, but it claims it is not common carrier regulation under federal law because the latter involves a range of regulation applicable to all consumers instead of a subset like all low-income persons.

Additionally, New York argues the ABA is not field preempted because the Communications Act nowhere clearly manifests an intent to regulate comprehensively all interstate communications services. The state characterizes "interstate communications services" as an "umbrella term" encompassing different services ill-suited for field preemption analysis because FCC authority is different for each service. Also, the state argues there is no congressional policy for removing the states' authority over information services, so there is no preemption regarding broadband prices.

The broadband provider association argues the Communications Act gives the FCC authority to regulate broadband services' rates, but the Commission's 2018 RIF Order was a decision not to exercise the fullest measure of that authority in order to promote investment and a flourishing internet. Regarding *Mozilla*, the broadband providers argue that the D.C. Circuit's majority rejected as a "straw man" the view—expressed by dissenting Senior Judge Stephen Williams—that the majority's decision would give states authority to impose common carrier regulation on interstate broadband services under Title II of the Communications Act. They charge that New York's claimed authority over interstate broadband services relies on the "straw man" that *Mozilla* rejected. Accordingly, the ABA goes beyond the intrastate space and rate regulates

interstate broadband services, thereby conflicting with the decision that the FCC was empowered to make in interpreting the federal Communications Act.

Regarding field preemption, the broadband providers maintain the Communications Act precludes state regulation of rates, terms, and conditions of interstate communications services—regardless of any FCC decision. They concede field preemption leaves room for generally applicable state laws that prohibit all commercial providers from lying to customers about prices and acknowledge conflict preemption constitutes a narrower ground for judicial relief than field preemption.

It's worth pointing out that oral argument in James also addressed threshold procedural questions. Judge Sullivan suggested New York's agreement with the broadband providers not to enforce the injunction amounted to a court-approved settlement and not a reviewable judgment. Following oral argument, the court ordered briefings from the parties on whether the court has appellate jurisdiction. Thus, the appeal could be dismissed on procedural grounds.

And it's worth noting too that a bipartisan group of ex-FCC Commissioners filed an amicus brief in the Second Circuit in support of the broadband providers arguing that the New York law constitutes unlawful rate regulation. Their brief, which by virtue of its bipartisan nature could well be consequential, declares that "if this court were to reverse the district court's judgment, such a decision would represent a dramatic departure from the well-established legal framework for communications regulation in which amici participated for many years, a framework that amici believe has served the United States well."

Both the broadband providers and the ex-FCC Commissioners explain that there already are in place several programs to ensure that low-income persons have access to broadband. So, as a matter of policy, New York's rate regulation law for broadband services is unnecessary. In our view, it is also unlawful because it is preempted.

Of course, the Second Circuit will have its say, and after that, conceivably the Supreme Court. In the meantime, we'll continue to report on any developments in this important case.

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