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

by

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On April 26, the U.S. Court of Appeals for the Second Circuit issued its decision in *New York State Telecommunications Association, Inc. v. James*. The court's majority rejected conflict and field preemption claims raised by several broadband provider associations against the State of New York's Affordable Broadband Act. The decision in *James* recognized the authority of states to rate regulate interstate communications services, including broadband internet access services, while denying the FCC authority to preempt such regulation under Title I of the Communications Act.

The State of New York appealed, and the Second Circuit held oral arguments in January 2023. In a 2-1 decision written by Judge Alison Nathan, the court panel's majority rejected the field and conflict preemption claims and sustained the ABA.

Under the field preemption doctrine, a court assumes that a state's police powers are not superseded by federal law unless there is a clear and manifest purpose of Congress to occupy the field to the exclusion of the states. Before the Second Circuit, the law's challengers narrowed their field preemption claim to contend that federal law occupies the entire field of *rate* regulations for interstate communications services. However, based on the history of states rate regulating cable TV rates and a Supreme Court-affirmed 1968 district court decision by a three-judge panel in *TV Pix, Inc. v. Taylor*, upholding Nevada's "just and reasonable" rate requirement for community antenna TV systems, the Second Circuit panel's majority "conclude[d] that there is a tradition of states using their police power to regulate rates charged for interstate communications services."

The court's majority concluded further that nothing in the text and structure of the Communications Act, nor case law, indicates a clear and manifest purpose by Congress to preempt all rate regulation of interstate communications services. It wrote that "although we agree that § 152(a) broadly grants the FCC jurisdiction over 'all interstate and foreign communication,' nothing in the text suggests that the FCC has *exclusive* jurisdiction over interstate communication." Also, the majority determined that the Supreme Court's decision in *Louisiana Public Service Commission v. FCC* "made clear that the states continue to have a role in regulating communications services, even if such regulations touch on interstate services." Moreover, the majority observed that "the Communications Act has no framework for rate regulation over Title I services like broadband," and that "[t]his *absence* of regulation is the exact opposite of a federal 'framework . . . so pervasive' that it results in field preemption.

The Second Circuit panel's majority also emphasized the absence of FCC regulatory authority under Title I of the Communications Act in its rejection of the conflict preemption argument that the ABA posed an obstacle to the FCC's "light touch" regulatory framework under the 2018 *RIF Order*. Relying on *Louisiana*, the majority explained that a federal agency may preempt state law only when acting within the scope of its delegated authority. It added that "[t]here is little doubt that when the FCC determines that a particular communications service should be subject to the heightened regulatory regime of Title II, it has the concomitant power to preempt state law that conflicts with its regulatory decisions." Yet the majority expressly agreed with the D.C. Circuit's 2019 *Mozilla v. FCC* and Ninth Circuit's 2022 *ACA Connects v. Bonta* decisions that determined the FCC has no preemptive authority under Title I. In the majority's view, the FCC's threshold decision to classify broadband under Title I does not constitute a source of independent preemptive authority or receive *Chevron* deference. It concluded that the FCC cannot take a "pick-and-choose approach" by declaring broadband a Title I service while claiming preemptive power that exists only under Title II.

Judge Richard J. Sullivan filed a dissenting opinion that primarily expressed disagreement with the panel's majority conclusion that the court had appellate jurisdiction over the case. On the merits, Judge Sullivan concluded that the ABA is field preempted because Section 152 grants the FCC authority over "all interstate" communications services. He further concluded that the ABA is conflict preempted because it would frustrate the purposes of the FCC's 2018 decision to reclassify broadband under Title I "to foster openness and investment by sheltering broadband internet service from rate regulation."

The Second Circuit's decision in *James* was issued the day after the FCC, by a 3-2 vote, decided to repeal the 2018 *RIF Order* and to change the classification of broadband from Title I to Title II. Thus, because *James* concerns the preemptive effect of the *RIF Order* that soon may be supplanted by the FCC's new order reinstating Title II common carrier regulation, its impact, as a practical matter, may be limited.

In the lead-up to the Commission's vote, Chairwoman Jessica Rosenworcel repeatedly stated that the Title II reclassification that the FCC has now adopted would not lead to rate regulation. Following the court's recognition in *James* that Title II confers on the FCC "power to preempt state law that conflicts with its regulatory decisions," a key question remains as to whether the Commission will use that conceded authority to preempt laws like New York's or permit state-level rate regulation of broadband internet access services.

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