SUPREME COURT, U.S.

No. 10-185 AUG 6- 2010

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

CORE COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in relevant part at 47 U.S.C. §§ 251-252), requires telephone networks to pay compensation whenever they rely on another network to complete a call. See 47 U.S.C. § 251(b)(5). Where the parties cannot agree on terms, a "State commission" must set the rate based on a "reasonable approximation of the additional costs" of completing the call. *Id.* § 252(d)(2)(A). In *AT&T Corp.* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), and *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467 (2002), this Court held that the Act permits the Federal Communications Commission ("FCC") to establish a "requisite pricing methodology," so long as state commissions "set the actual rates." See 525 U.S. at 383-385; 535 U.S. at 489. In the order under review, the FCC mandated that all rates for completing calls to Internet service providers not exceed $0.0007 per minute—a rate that concededly is not based on cost and in fact is far below cost. The question presented is:

Whether the FCC may impose a below-cost rate cap on a category of rates concededly covered by the Telecommunications Act of 1996, notwithstanding that Act's requirement of cost-based rates and explicit assignment of rate-setting authority to state utility commissions rather than the FCC.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Core Communications, Inc., was a petitioner and an intervenor for petitioners in the court of appeals.

The Public Service Commission of the State of New York and the National Association of Regulatory Utility Commissioners were petitioners and intervenors for petitioners in the court of appeals.

The People of the State of New York was a petitioner in the court of appeals.

EarthLink, Inc., O1 Communications, Inc., Pac-West Telecomm, Inc., the Pennsylvania Public Utility Commission, and the National Association of State Utility Consumer Advocates were intervenors for petitioners in the court of appeals.

Respondents Federal Communications Commission and the United States of America were respondents in the court of appeals.

AT&T, Inc., Carolina Telephone and Telegraph Company LLC, Central Telephone Company, Central Telephone Company of Texas, Central Telephone Company of Virginia, Embarq Communications, Inc., Embarq Florida, Inc., Embarq Minnesota, Inc., Embarq Missouri, Inc., Level 3 Communications, LLC, MetroPCS Communications, Inc., Qwest Communications International Inc., Sprint Nextel Corporation, The United Telephone Company of Pennsylvania LLC d/b/a Embarq, United Telephone Company of Eastern Kansas d/b/a Embarq, United Telephone Company of Indiana, Inc., d/b/a Embarq, United Telephone Company of Kansas d/b/a Embarq, United Telephone Company of New Jersey, Inc., d/b/a Embarq, United Telephone Company of Ohio d/b/a Embarq, United Telephone Company of Southcentral Kansas d/b/a Embarq, United Telephone Company of Texas, Inc., d/b/a Embarq, United Telephone Company of the

Carolinas LLC d/b/a Embarq, United Telephone Company of the Northwest d/b/a Embarq, United Telephone Company of the West d/b/a Embarq, United Telephone Southeast, LLC, d/b/a Embarq, and Verizon were intervenors for respondents in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner Core Communications, Inc., states that it is a wholly owned subsidiary of CoreTel Communications, Inc. CoreTel Communications, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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PETITION FOR A WRIT OF CERTIORARI

Core Communications, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit in this case.

OPINION AND ORDER BELOW

The court of appeals' opinion (Pet. App. 1a-14a) is published at 592 F.3d 139 (D.C. Cir. 2010). The order of the Federal Communications Commission ("FCC") (Pet. App. 15a-791a) is reported at 24 F.C.C.R. 6475 (2008).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on January 12, 2010, Pet. App. 1a, and denied panel and *en banc* rehearing on March 26, 2010, *id.* at 1085a-1088a. On June 15, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 23, 2010. On July 14, the Chief Justice further extended that time to and including August 6, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. §§ 151 *et seq.*, are set forth in the Appendix (Pet. App. 1089a-1110a).

INTRODUCTION

The Telecommunications Act of 1996 (the "1996 Act") authorizes state public utility commissions to set the rates that one telephone network must pay another for using its facilities to complete customer calls. See 47 U.S.C. § 252(b)-(d). Those rates must reflect a "reasonable approximation of the additional costs" of servicing the calls. *Id.* § 252(d)(2)(A)(ii). The FCC can prescribe *rules* state commissions must apply in determining rates. *Id.* § 201(b). But the 1996 Act does not authorize the FCC to set those rates itself. This case concerns whether the FCC may nevertheless single out a category of calls concededly covered by the Act and—supplanting state authority—prescribe rates for those calls. The FCC did that here, ordering that rates for completing calls to Internet service providers must not exceed $0.0007 per minute—a rate that concededly is not based on cost and in fact is far below cost.

The D.C. Circuit's decision upholding that order conflicts with decisions of this Court, as well as a decision of the Eighth Circuit, which make clear that the Act permits the FCC to prescribe *rules*, not *rates*. The decision imposes substantial costs on the millions of Americans who rely on dial-up Internet access. It disrupts the federal-state balance embodied in the 1996 Act. And it licenses the FCC to adopt similarly extravagant interpretations of its statutory authority to displace still more state regulation, including regulation of broadband Internet and Voice over Internet Protocol ("VoIP").

STATEMENT

I. BACKGROUND

A. Statutory Framework

Telephone calls often traverse multiple networks on their way from caller to recipient. Whenever that happens, arrangements must be made to ensure that all the service providers whose facilities are used are compensated. When a person places a long-distance call, for example, the caller pays his long-distance provider for carrying the call. See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499, ¶1034 (1996). But the long-distance provider must rely on the called party's local telephone network (a local exchange carrier, or "LEC") to complete—or "terminate"—the call. See *ibid.* The long-distance provider therefore compensates the local carrier for terminating the call by paying the local carrier a fee out of the revenue it receives from the caller. See *ibid.*

Such arrangements took on added significance when Congress passed the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. That Act—codified in relevant part as Sections 251 and 252 of the Communications Act—sought to foster competition for local telephone service and thereby end the "longstanding regime of state-sanctioned monopolies." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). To facilitate new entry, the 1996 Act requires incumbent carriers to "interconnect" their networks with those of competing carriers. 47 U.S.C. § 251(c)(2). And to address the compensation issues that arise when one carrier relies on another carrier to complete a call, the Act requires carriers "to establish reciprocal compensation arrangements for the transportation and termination of telecommunications." *Id.* §251(b)(5).

The 1996 Act sets forth a comprehensive regime for setting those compensation rates. It permits carriers to set interconnection rates by agreement, 47 U.S.C. §252(a)(1), and requires them to "negotiate in good faith" over arrangements to govern compensation for terminating calls, *id.* §251(c)(1). Where parties cannot agree, a party "may petition a State commission to arbitrate." *Id.* §252(b)(1). The "State commission" must then "establish any rates for interconnection" and "impos[e] appropriate conditions" governing compensation for terminating calls. *Id.* §252(b)(4)(C), (c)(1)-(2).

State commissions must prescribe rates and terms that are "just and reasonable." 47 U.S.C. §252(d)(1), (2). The Act defines that requirement in terms of "cost." An interconnection rate is not "just and reasonable" unless it is "based on * * * cost." *Id.* §252(d)(1)(A)(i). And terms and conditions governing compensation for terminating calls are not "just and reasonable" unless they permit "recovery by each carrier of *costs* associated" with termination, determined "on the basis of a *reasonable approximation of the additional costs of terminating such calls*." *Id.* §252(d)(2)(A)(i)-(ii) (emphasis added). State commission decisions setting those rates and terms are reviewable in federal court. *Id.* §252(e)(6).

The Act also preserves a role for the FCC. First, "[i]f a State commission fails to act to carry out its responsibility," the FCC can "assume the responsibility of the State commission" and set rates and terms itself. 47 U.S.C. §252(e)(5). Second, Section 251 of the Act contains a saving clause: "Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title." *Id.* § 251(i). Section 201—a provision of the Communications Act dating back to the 1930s, see Act of June 19, 1934, ch. 652, § 201, 48 Stat. 1064, 1070, as amended by Act of May 31, 1938, ch. 296, 52 Stat. 588—grants the FCC general authority to "prescribe such *rules and regulations* as may be necessary in the public interest to carry out" the Act (including the 1996 amendments). 47 U.S.C. § 201(b) (emphasis added). In addition, Section 201 requires all rates charged for "interstate or foreign communication" to be "just and reasonable," and prohibits interstate or foreign rates that are "unjust or unreasonable." *Ibid.* But Section 201 does not define the phrase "just and reasonable." See *ibid.*

The 1996 Act thus creates a "hybrid jurisdictional scheme." *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 489 (2002). By preserving the FCC's *rulemaking* authority, it empowers the Commission to "set[ ] a basic, default methodology for use in setting rates." *Ibid.* But the Act requires *state commissions* to apply that methodology to set rates in particular cases. The Act thus "leav[es] it to state utility commissions to set the actual rates." *Ibid.*

B. This Court's Decisions in *AT&T* and *Verizon*

Shortly after the 1996 Act's enactment, the FCC promulgated rules to guide state commissions in carrying out their statutory mandate to set rates based on "cost." See *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499 (1996). Those rules directed state commissions to apply a "forward-looking economic cost pricing methodology" known as "Total Element Long-Run Incremental Cost," or "TELRIC." *Id.* ¶¶ 29, 672-703, 1054-1068.

Challenging those rules, state commissions and incumbent carriers claimed that, by prescribing a rate-setting methodology, the FCC had usurped state commission authority to set rates. In *AT&T Corp.* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), this Court rejected that claim. Section 201, the Court observed, authorizes the FCC to promulgate rules implementing the 1996 Act. *Id.* at 377-378. And "[t]he FCC's prescription, through rulemaking, of a requisite pricing *methodology*" did not impermissibly "prevent[ ] the States from establishing *rates*." *Id.* at 384 (emphasis added). The important fact was that "States * * * will apply those standards and implement that methodology, determining the concrete result in particular circumstances." *Ibid.* "That is enough," the Court held, "to constitute the establishment of rates"—the function Congress reserved to state commissions. *Ibid.*

After a remand, the Court heard the case again in *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467 (2002). There, it rejected a narrower challenge to the FCC's TELRIC methodology. *Id.* at 497-528. The Court reiterated that Congress had prescribed "a hybrid jurisdictional scheme with the FCC setting a basic, default methodology for use in setting rates when carriers fail to agree, but leaving it to state utility commissions to set the actual rates." *Id.* at 489.

II. PROCEEDINGS BELOW

This case concerns a particular category of telephone calls—the calls a customer using dial-up Internet access makes to his local Internet service provider ("ISP"). An ISP providing dial-up access enables customers to connect to the Internet over a standard telephone line. See Pet. App. 903a. The customer's computer calls the ISP over the phone line; the ISP then reformats the signal and connects the customer to websites or other Internet resources. See *ibid.*

Often, the ISP and its customer have different local telephone service providers. See Pet. App. 904a. In such cases, the customer's chosen carrier must rely on the ISP's carrier to complete the call to the ISP. Under a straightforward reading of the 1996 Act, when that occurs, the ISP's phone company should be entitled to recover its cost of completing the call from the caller's phone company. For over a decade, however, the FCC has struggled to avoid that result.

A. Prior Proceedings Before the FCC

The FCC's initial 1996 rules did not explicitly address calls to ISPs. Those rules construed the 1996 Act to apply only to "local" calls. 11 F.C.C.R. 15,499, ¶1034. But they did not resolve whether calls to ISPs were "local."

1. The FCC first addressed that issue in 1999, concluding that calls to ISPs were "largely interstate." See Pet. App. 1034a. According to the Commission, the fact that a customer dialed only a local number to reach a local ISP located in the same State was immaterial because the ISP would connect the customer to websites or other resources that were routinely out-of-state. See *id.* at 1045a-1046a, 1052a-1054a. The local or non-local nature of the call, the FCC opined, should be "determined by the nature of the end-to-end transmission between an end user and the Internet." *Id.* at 1052a.

The D.C. Circuit vacated the FCC's decision, holding that the FCC had not adequately explained why calls to ISPs are not "local" for purposes of the 1996 Act. Pet. App. 1031a. The court noted that the Commission traditionally used its "end-to-end analysis" to assess its interstate jurisdiction under the Communications Act. See *id.*

at 1018a. Here, the Commission had "used the analysis for quite a different purpose"—denying compensation under the 1996 Act—"without explaining why such an extension made sense." *Ibid.*

2. On remand, the FCC "modif[ied] [its] analysis" but again concluded that calls to ISPs were not covered by the 1996 Act. See Pet. App. 885a. Reversing its prior position, the FCC held that the 1996 Act's coverage did not depend on whether a call was "local." *Id.* at 924a. But it held that another provision of the Act, Section 251(g), exempted calls to ISPs. *Id.* at 920a-923a. Because the 1996 Act did not apply, the Commission opined, it could invoke its general Section 201 authority to regulate rates without regard to the 1996 Act's requirements. *Id.* at 928a.

The FCC then exercised that purported authority by regulating the rates that carriers could charge for terminating calls to ISPs. Pet. App. 951a. As the FCC explained, ISPs are different from typical telephone customers in that they receive far more calls than they make. *Id.* at 942a-944a. Thus, while a carrier serving a typical customer would both pay and receive compensation for terminating calls, a carrier serving an ISP would receive more compensation than it paid. *Ibid.* Although the 1996 Act expressly entitles carriers to recover costs of completing calls regardless of any imbalance of incoming and outgoing calls, the FCC—echoing the arguments of large incumbent carriers—opined that invoking the statutory compensation scheme in the ISP context amounted to "regulatory arbitrage." *Id.* at 941a.

The FCC suggested that an appropriate response would be to set the compensation rate at *zero* and force carriers to try to recover their costs by charging ISPs for *receiving* calls (a so-called "bill and keep" regime). See

Pet. App. 888a. Ultimately, however, it decided to impose a declining rate cap as a "transition toward" that zero-compensation regime. *Id.* at 893a-894a. Contending that "there is no exact science to setting rate caps," the FCC looked to anecdotal evidence—four "recently negotiated interconnection agreements"—and chose caps that "approximate[d] the downward trend in intercarrier compensation rates." *Id.* at 958a-960a & n.158. Initially, carriers could charge no more than $0.0015 per minute. *Id.* at 951a. Over two years, the cap would fall by more than 50 percent to $0.0007 per minute. *Ibid.*

The FCC "emphasize[d] that the rate caps [it] impose[d] [we]re *not intended to reflect the costs* incurred by each carrier that delivers ISP traffic." Pet. App. 892a (emphasis added). To the contrary, they were designed to "*limit[]* carriers' opportunity to recover costs from other carriers." *Id.* at 940a-941a. The FCC admitted that the cost-based rates under the 1996 Act had formerly been "much higher" than the new caps. *Id.* at 892a. Indeed, evidence introduced later in the proceedings showed that the FCC's $0.0007 rate cap was roughly *one-fourth* the $0.0027 weighted average of compensation rates set by state commissions under the cost-based regime. C.A. App. 237-239. For many carriers, the $0.0007 rate did not even cover the cost of *billing*, let alone providing service. *Id.* at 131, 376.[1]

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[1] Although the FCC's rate caps were based on recently negotiated interconnection agreements, see Pet. App. 959a-960a & n.158, the FCC did not claim that those agreements reflected costs. To the contrary, as the FCC admitted, market participants had widely expected the FCC to eliminate or reduce compensation to ISP-serving carriers. See *id.* at 958a-959a. Carriers negotiating in the shadow of that impending decision obviously had sought to lock in whatever little compensation they could get before the FCC eliminated their right to compensation entirely.

The FCC noted that, given its exercise of Section 201 authority, "state commissions will no longer have authority to address this issue." Pet. App. 956a. But the FCC otherwise tried to downplay the consequences of its new below-cost regime. It asserted that carriers serving ISPs could simply "collect additional amounts from their ISP customers" for *receiving* the calls. *Id.* at 892a; see also *id.* at 940a-941a, 953a.

The D.C. Circuit again rejected the FCC's analysis. See Pet. App. 873a. It held that Section 251(g) could not justify the FCC's order because that provision was only a "transitional device." *Ibid.* Accordingly, the court again remanded, although it declined to vacate the order, speculating that the FCC might identify some other legal basis for its action. *Id.* at 880a-881a.[2]

3. Two years later, after the FCC had not acted, petitioner filed a mandamus petition in the D.C. Circuit. The court denied the petition without prejudice. Pet. App. 847a-848a. After almost two-and-a-half years of further delay, petitioner again sought mandamus. Describing the FCC's delay as "egregious," the court directed the agency to act no later than November 5, 2008. *Id.* at 793a, 816a. The FCC order at issue here followed.

B. The FCC Order Under Review

1. On November 5, 2008—the last day permissible—the FCC issued the order under review. Pet. App. 15a. In that order, the FCC reversed course again and held that the 1996 Act's compensation regime *does* apply to calls to ISPs: "[T]he better reading of the Act as a whole * * * supports our view that the transport and termina-

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[2] In July 2003, Core petitioned the FCC to forbear from enforcement of the rate caps, but the Commission refused. See Pet. App. 849a. The D.C. Circuit upheld that decision. See *id.* at 819a.

tion of all telecommunications exchanged with LECs is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2)." *Id.* at 31a.

For the first time, however, the FCC concluded that it could set rates for those calls *whether or not* the 1996 Act applied. Because calls to ISPs were "clearly interstate in nature," the FCC opined, they were "also subject to [its] section 201 authority." Pet. App. 32a. Citing Section 251(i)'s saving clause, the Commission asserted that "addressing ISP-bound traffic through the section 251 framework does not diminish the Commission's independent jurisdiction or authority to regulate traffic under other provisions of the [Communications] Act." *Id.* at 35a-37a. The FCC accordingly retained the $0.0007 rate cap implemented in its 2001 order. *Id.* at 45a.

2. Chairman Martin issued a separate statement. Pet. App. 784a. He criticized the Commission for "treat[ing] ISP-bound traffic differently than all other traffic, including other [Internet protocol] traffic," and thus "retain[ing] artificial and unsupported distinctions." *Id.* at 785a. "By singling out ISP-bound traffic for different treatment," he stated, "we perpetuate the current patchwork of rates for different traffic." *Ibid.*

The Chairman also faulted the Commission for ignoring the Act's requirement that compensation be based on cost. He explained that "[a] rate of $0.0007 is inconsistent with the current TELRIC standard." Pet. App. 785a. The Commission, he concluded, had "failed to respond" to the court of appeals. *Id.* at 786a. But he nevertheless voted to approve the order because failure to obey the writ of mandamus would have led to "an even sorrier state of affairs." *Id.* at 784a-785a.

C. The Court of Appeals' Decision

Petitioner Core Communications, Inc. (a local exchange carrier), the State of New York and its Public Service Commission, and the National Association of Regulatory Utility Commissioners petitioned for review in the D.C. Circuit pursuant to 28 U.S.C. § 2342(1). See C.A. Docket Nos. 08-1365, 08-1393, 09-1044, 09-1046. Other state commissions, local exchange carriers, and an ISP intervened or participated as *amici curiae*. See *ibid.*

The court of appeals denied the petitions. Pet. App. 1a. It first held that, notwithstanding the 1996 Act's directive of state-administered, cost-based rate-setting in Sections 251 and 252, the FCC could set interconnection rates for calls to ISPs under Section 201. *Id.* at 7a-10a. The court agreed with the FCC that calls to ISPs "simultaneously implicate[] the regimes of both § 201 and of §§ 251-252" because they involve interstate communications subject to Section 201 and intercarrier terminations subject to the 1996 Act. *Id.* at 8a. Relying on Section 251(i)'s saving clause, however, the court held that the 1996 Act permitted the FCC to regulate interstate rates under Section 201 without regard to the 1996 Act's requirements. *Id.* at 8a-9a.

The court of appeals rejected petitioners' argument that "'Congress's specific choice' on the matter of inter-LEC compensation, manifested in §§ 251-252, must trump the FCC's 'general rulemaking authority under section 201.'" Pet. App. 7a. It acknowledged the "'cardinal rule of statutory construction * * * that where both a specific and a general provision cover the same subject, the specific provision controls.'" *Id.* at 8a. But the court thought it "inaccurate to characterize § 201 as a general grant of authority and §§ 251-252 as a specific one." *Ibid.* "Neither regime is a subset of the other," the court asserted, because "[n]ot all inter-LEC connections are used to deliver interstate communications, just as not all interstate communications involve an inter-LEC connection." *Ibid.*

The court of appeals also rejected the argument that the FCC had acted arbitrarily and capriciously by singling out calls to ISPs for discriminatory, below-cost treatment. The court admitted that the new rate caps were "set well below the rates that had prevailed" under the cost-based regime. Pet. App. 2a. But it held that the FCC had justified the discrimination. *Id.* at 10a. For traditional carriers, it noted, "outgoing calls are generally balanced by incoming ones, so that it matters relatively little how accurately rates reflect costs." *Ibid.* But "[s]uch balance is utterly absent" in the case of ISPs. *Ibid.* The costs of compensation, the court noted, were ultimately borne by the customers of originating carriers. See *id.* at 11a. The court thus accepted the FCC's determination that "application of the reciprocal compensation regime to ISP-bound traffic would 'undermine[ ] the operation of competitive markets.'" *Ibid.* (quoting Pet. App. 944a).

On March 26, 2010, the court of appeals denied panel and *en banc* rehearing. Pet. App. 1085a-1088a. On June 15, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 23, 2010, and on July 14, the Chief Justice further extended the time to and including August 6, 2010.

REASONS FOR GRANTING THE PETITION

The decision below conflicts with decisions of this Court as well as a decision of the Eighth Circuit. Those cases all make clear that, although the Telecommunications Act of 1996 allows the FCC to impose cost-based *methodologies* for state commissions to apply when setting rates, it does not permit the FCC to set those rates itself. See *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 383-385 (1999); *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 489 (2002); *Iowa Utils. Bd.* v. *FCC*, 219 F.3d 744, 756-757 (8th Cir. 2000). The FCC order under review—which imposes a \$0.0007 rate cap for all calls to ISPs—does precisely that. The FCC's chosen rate, moreover, is concededly divorced from the cost-based standard the 1996 Act requires. The D.C. Circuit's decision upholding the FCC's order conflicts with *AT&T*, *Verizon*, and *Iowa Utilities*, and warrants this Court's review.

The issue is important. The decision below does not merely impose severe burdens on the millions of Americans who rely on dial-up connections to access the Internet. It also upsets the federal-state balance built into the 1996 Act. Congress expressly addressed the issue of compensation for local exchange carrier interconnections and terminations and assigned the task of establishing rates to state regulators. By allowing the FCC to set those rates itself under Section 201's general "just and reasonable" standard, the decision destroys Congress's federal-state allocation of responsibility. The decision also licenses the FCC to intrude further on state authority through equally extravagant interpretations of its jurisdiction in other contexts. Indeed, the FCC has already begun doing precisely that.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND THE EIGHTH CIRCUIT

The court of appeals' decision conflicts with this Court's decisions in *AT&T* and *Verizon* as well as the Eighth Circuit's decision in *Iowa Utilities*.

A. The Decision Below Conflicts With This Court's Decisions in *AT&T* and *Verizon*

1. This Court directly considered the scope of the FCC's authority to set intercarrier rates in *AT&T Corp.* v. *Iowa Utilities Board*, 525 U.S. 366 (1999). In that case, the FCC had promulgated rules directing state commissions to apply a particular rate-setting methodology—"Total Element Long-Run Incremental Cost," or "TELRIC." *Id.* at 374 & n.3. State commissions and incumbent carriers challenged those rules, urging that they were invalid because "§252(c)(2) [of the 1996 Act] entrusts the task of establishing rates to the state commissions" rather than the FCC. *Id.* at 384. This Court rejected that challenge, but *only* because the FCC had merely prescribed a *methodology* for setting rates, and had not attempted to set rates itself. See *id.* at 383-385.

The Court agreed that Section 252(c)(2) assigns responsibility to "'establish any rates for interconnection'" to "'State commission[s].'" 525 U.S. at 383-384 (quoting 47 U.S.C. §252(c)). But the Court also observed that the FCC had general rulemaking authority under Section 201 to "'prescribe such *rules and regulations* as may be necessary in the public interest to carry out the provisions'" of the Act. *Id.* at 377-378 (quoting 47 U.S.C. §201(b)) (emphasis added). Congress, the Court noted, was well aware of that rulemaking authority when it passed the 1996 Act, as the saving clause in Section 251(i) indicated. See *id.* at 378 n.5.

The Court concluded that the FCC had not exceeded its general rulemaking authority in derogation of state commission rate-setting authority because the TELRIC rules merely prescribed a pricing *methodology* and did not attempt to set actual rates. The Court explained that "[t]he FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in §252(d)." 525 U.S. at 384. "It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances." *Ibid.* "That is enough to constitute the establishment of rates." *Ibid.* The FCC, the Court held, had "jurisdiction to design a *pricing methodology*" under the 1996 Act. *Id.* at 385 (emphasis added).

Justice Thomas dissented in relevant part, joined by the Chief Justice and Justice Breyer. "[T]he 1996 Act," the dissent noted, "gives the state commissions the primary responsibility" to set rates. 525 U.S. at 410. In the dissent's view, Congress did not intend to relegate States "to mechanically apply[ing] whatever methodologies" the FCC might prescribe. *Id.* at 411. Section 201's general grant of rulemaking authority, the dissent urged, could not alter that result: "'[A] specific statute will not be controlled or nullified by a general one,'" so the "specific grant of primary authority to the States [must] control." *Id.* at 410-411; see also *id.* at 423 (Breyer, J., dissenting in part) (urging that the FCC rules "grant[ed] a state commission little or no freedom to choose among reasonable rate-determining methods").

The Court reaffirmed *AT&T* in *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467 (2002). *Verizon* reiterated that Congress had devised "a hybrid jurisdictional scheme with the FCC setting a basic, default *methodology* for use in setting rates when carriers fail to agree, *but leaving it to state utility commissions to set the actual rates.*" *Id.* at 489 (emphasis added); see also *id.* at 476 ("Congress directed the FCC to prescribe methods for state commissions to use in setting rates * * * .").

2. The decision below conflicts with those cases. As the court of appeals acknowledged, the FCC adopted an "alternative regulatory regime, principally taking the form of rate caps set well below the rates that had prevailed before." Pet. App. 2a. Those rate caps initially prohibited carriers from charging more than $0.0015 per minute, and later fell to $0.0007 per minute. See *id.* at 41a, 45a, 951a.

It is hard to imagine a more blatant example of direct federal rate-setting. *AT&T* upheld the FCC's TELRIC pricing rules only because "[i]t is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances." 525 U.S. at 384. Here, the FCC has gone beyond establishing a mere "methodology" to actually setting rates. It is no longer *state commissions* that "determin[e] the concrete result in particular circumstances." *Ibid.* Rather, the FCC has determined that "concrete result" itself.

B. The Decision Below Conflicts With the Eighth Circuit's Decision in *Iowa Utilities*

The court of appeals' decision also conflicts with *Iowa Utilities Board* v. *FCC*, 219 F.3d 744 (8th Cir. 2000).

1. In *Iowa Utilities*, the Eighth Circuit applied this Court's holding in *AT&T* on remand.[3] Specifically, the court considered certain "proxy prices" the FCC had established for reciprocal compensation under the 1996 Act. 219 F.3d at 756-757. Under the FCC's rules, States could rely on those proxy prices as a transitional mechanism before they began setting rates based on TELRIC. See *ibid.* As the Eighth Circuit explained, "[t]he proxy prices

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[3] This Court later reviewed some aspects of the Eighth Circuit's decision in *Verizon*, 535 U.S. 467, but not the portion relevant here.

consist of upper limits higher than which the rates set by the state commissions shall not go." *Id.* at 756.

The Eighth Circuit rejected those "proxy prices" under *AT&T*. 219 F.3d at 756-757. As the court explained: "The Supreme Court held [in *AT&T*] that the FCC 'has jurisdiction to design a pricing *methodology*.' However, the FCC does not have jurisdiction to set the *actual prices* for the state commissions to use." *Id.* at 757 (citation omitted; emphasis added). That distinction was fatal because, by setting "upper limits higher than which the rates set by the state commissions shall not go," *id.* at 756, the FCC had strayed beyond setting *methodology* to setting actual *rates*, see *id.* at 757.

"Setting specific prices," the Eighth Circuit explained, "goes beyond the FCC's authority to design a pricing methodology * * * ." 219 F.3d at 757. It "intrudes on the states' right to set the actual rates pursuant to § 252(c)(2)" of the 1996 Act. *Ibid.* Under *AT&T*, the FCC's proper role was only "to resolve 'general methodological issues.'" *Ibid.* "[I]t is the state commission's role to exercise its discretion in establishing rates." *Ibid.* The court accordingly held that "the proxy prices cannot stand" and vacated them. *Ibid.*[4]

2. The decision below squarely conflicts with the Eighth Circuit's decision in *Iowa Utilities*. Indeed, the rate caps here are virtually identical to the "proxy prices" struck down there: Both are "upper limits higher than which the rates set by the state commissions shall not

[4] The court also held the proxy prices invalid for two alternative reasons not relevant here: that the FCC was judicially estopped from defending them in light of its litigating position before this Court in *AT&T*, and that the proxy prices relied on an impermissible conception of "costs." See 219 F.3d at 756-757.

go." 219 F.3d at 756. The rate caps are thus invalid for the same reason.

Just as in *Iowa Utilities*, the FCC has "go[ne] beyond [its] authority to design a pricing *methodology*." 219 F.3d at 757 (emphasis added). Just as in *Iowa Utilities*, the FCC has "intrude[d] on the states' right to set the actual rates." *Ibid.* Just as the Eighth Circuit struck down the proxy prices, therefore, the D.C. Circuit should have struck down the rate caps. Yet the court refused, finding "no legal error in the Commission's analysis." Pet. App. 3a. The palpable conflict between the two cases warrants this Court's review.

C. The Court of Appeals' and FCC's Efforts To Evade the Conflict Are Unavailing

The court below purported to distinguish this case from *Iowa Utilities* (and implicitly from *AT&T* and *Verizon*) on the ground that it involves a "leg of an interstate communication" subject to Section 201's just-and-reasonable standard for interstate rates. Pet. App. 9a-10a. The court thus purported to "take no position on the issue before the 8th Circuit." *Id.* at 10a. But that supposed distinction cannot survive scrutiny. And it only underscores the vast amount of authority the D.C. Circuit's decision transfers from state commissions to the FCC in derogation of the 1996 Act.

1. As this Court has repeatedly made clear, "it is a basic principle of statutory construction that a specific statute * * * controls over a general provision." *HCSC-Laundry* v. *United States*, 450 U.S. 1, 6 (1981); see also *Corley* v. *United States*, 129 S. Ct. 1558, 1568 (2009) ("'[A] more specific statute will be given precedence over a more general one * * * .'"). That principle forecloses the FCC's position here. The court below acknowledged that rates for terminating calls to ISPs "simultaneously

implicate[ ] the regimes of both § 201 and of §§ 251-252." Pet. App. 8a. And by any measure, the 1996 Act's comprehensive cost-based, state-administered rate-setting standards are more "specific" than Section 201's.

Both the 1996 Act and Section 201 require rates to be "just and reasonable." Compare 47 U.S.C. § 252(d)(2)(A) with *id.* § 201(b). But the 1996 Act provides detailed instructions for determining whether a rate meets that standard. Terms and conditions governing compensation for call termination are not "just and reasonable" unless they permit "recovery by each carrier of costs," *id.* § 252(d)(2)(A)(i), based on "a reasonable approximation of the additional costs of terminating such calls," *id.* § 252(d)(2)(A)(ii). The 1996 Act thus not only requires rates to be "just and reasonable." It also specifies exactly what it means for a rate to satisfy that standard. Section 201, by contrast, says nothing beyond the fact that rates must be "just and reasonable." *Id.* § 201(b).

Sections 251 and 252 also specify *who must determine* whether those requirements are met. If parties cannot agree, either party "may petition a *State commission* to arbitrate." 47 U.S.C. § 252(b)(1) (emphasis added). And the "*State commission*" must then "establish any rates for interconnection" and "impos[e] appropriate conditions" governing compensation for terminating calls. *Id.* § 252(b)(4)(C), (c)(1)-(2) (emphasis added). Section 201's "just and reasonable" provision, by contrast, specifies no comparable procedures for determining the just and reasonable rate. See *id.* § 201(b).

The 1996 Act thus clearly establishes a more "specific" standard for determining just and reasonable rates than Section 201. Where both apply—*i.e.*, where a rate is both an intercarrier compensation rate and an interstate rate—the former, more specific, standard governs. See

Nat'l Cable & Telecomms. Ass'n, Inc. v. *Gulf Power Co.*, 534 U.S. 327, 335-336 (2002) (where a statute requires rates to be "just and reasonable" and prescribes a formula for two particular types, "[t]he specific [formula] controls * * * within its self-described scope"); *Ohio Power Co.* v. *FERC*, 954 F.2d 779, 784-785 (D.C. Cir. 1992) (SEC's "specific statutory mandate to establish a cost-based price" trumps FERC's "general charge to establish 'just and reasonable' wholesale electric rates").[5]

The court of appeals thought the specific-governs-general canon inapplicable because "[n]either regime is a subset of the other": "Not all inter-LEC connections are used to deliver interstate communications, just as not all interstate communications involve an inter-LEC connection." Pet. App. 8a. But the fact that neither provision's *coverage* is a subset of the other's is irrelevant. The specific-governs-general canon applies here, not solely because the 1996 Act covers a more specific category of communications, but also because it imposes a *more specific just-and-reasonable standard* for rates falling within both provisions: Section 201 requires rates to be "just and reasonable," while Sections 251 and 252 require rates to be "just and reasonable," *as measured by cost*, and *as determined by state commissions*. That latter standard is clearly more specific and thus governs.[6]

[5] Because "established canon[s] of construction" make clear that Congress has "'directly spoken to the precise question at issue,'" the FCC's views are beside the point. See *Nat'l Credit Union Admin.* v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479, 499-503 (1998) (quoting *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

[6] The same result also follows from a more basic canon: "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 550-551

2. The court of appeals' reliance on the 1996 Act's saving clause to support its opposite conclusion disregards settled principles governing the construction of such clauses. A saving clause negates any inference that Congress intends to withdraw an agency's authority by implication, but it does not allow the agency to exercise that authority in a manner that violates the mandates of specific statutory provisions. See *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) (refusing to presume that "'Congress intended to undermine [a] carefully drawn statute through a general saving clause'"); *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 869-872 (2000); *Am. Tel. & Tel. Co.* v. *Cent. Office Tel., Inc.*, 524 U.S. 214, 227-228 (1998); cf. 2A N. & S. Singer, *Sutherland Statutes and Statutory Construction* § 47:12, at 333 (7th ed. 2007) ("[R]epugnancy between the saving clause and the purview does not make the enacting part void but operates to invalidate the saving clause.").

In *Morales*, for example, this Court held that a statute preempting state regulation of air fares displaced state consumer-protection provisions despite a saving clause providing that "'[n]othing * * * in this [Act] shall in any way abridge or alter the remedies now existing at common law or by statute.'" 504 U.S. at 378-380, 384-385. "A general 'remedies' saving clause," the Court held, "cannot be allowed to supersede the specific substantive * * * provision" of the Act. *Id.* at 385. As the Court explained,

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(1974); cf. *Nat'l Cable & Telecomms. Ass'n*, 534 U.S. at 335 ("specific statutory language should control more general language *when there is a conflict between the two*" (emphasis added)). There is no necessary conflict between the 1996 Act and Section 201. The conflict arises only because *the FCC* has assumed authority to deem certain below-cost termination rates "just and reasonable" when Congress, in Sections 251 and 252, has expressly said they are not.

construing the saving clause to preserve state remedies regarding air fares would undermine Congress's specific provision prohibiting state regulation of such fares: States could "actually set air fares" simply by "having a statute requiring 'reasonable rates.'" *Ibid.*

The same analysis applies here. The 1996 Act's saving clause negates any inference that Congress intended to withdraw the FCC's Section 201 authority by implication—and thus preserves, for example, the FCC's Section 201 rulemaking authority to prescribe cost-based pricing methodologies for state commissions to apply. See *AT&T*, 525 U.S. at 377-378 & n.5. But the saving clause does not permit the FCC to exercise that authority in a way that contravenes specific provisions of the 1996 Act. That is what the FCC has done here. Congress expressly determined that intercarrier termination rates are "just and reasonable" *only* if they are based on a "reasonable approximation of the additional costs" of completing the call, as determined by a "State commission." 47 U.S.C. § 252(d)(2)(A). The FCC cannot invoke the Act's saving clause to set those rates itself, much less decree that a rate *one-fourth* the cost-based level is just and reasonable, in contravention of Section 252(d)(2)(A)'s direct command.

By its terms, moreover, the saving clause provides that "[n]othing in this section shall be construed to limit or otherwise affect the *Commission's authority* under section 201." 47 U.S.C. § 251(i) (emphasis added). Section 201 authorizes the Commission to prescribe "rules and regulations" to carry out the Act. *Id.* § 201(b). The FCC's authority under that provision is no broader than its authority under *AT&T*: It can prescribe pricing *methodologies* or other rules, but it cannot *set rates*. See *Am. Tel. & Tel. Co.* v. *FCC*, 487 F.2d 865, 874-875 (2d Cir.

1973) (FCC's general "power to regulate the communications and broadcasting industries" does not include "rate prescription[ ]").[7] Section 201(b) also separately requires interstate carriers to charge rates that are "just and reasonable." 47 U.S.C. § 201(b). But that provision is not a grant of rate-setting "authority" to the Commission. It is simply a requirement imposed on carriers to charge just and reasonable rates. The 1996 Act's saving clause cannot save an FCC rate-setting authority that Section 201 does not confer. The contrary construction adopted below improperly and unnecessarily places Section 201 at war with the 1996 Act's declaration that intercarrier termination rates are not just and reasonable unless based on cost, as well as its express assignment of rate-setting authority to the States.

The saving clause, moreover, states only that "[n]othing in *this section* [*i.e.*, Section 251] shall be construed to limit or otherwise affect the Commission's authority

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[7] By contrast, Section 205 of the Communications Act expressly authorizes the FCC to "determine and prescribe what will be the just and reasonable charge" following an adjudicatory hearing. 47 U.S.C. § 205(a). The 1996 Act's saving clause, however, does not apply to that provision. See *id.* § 251(i). Section 205's existence proves that Congress knew how to grant rate-setting authority when it intended to, and refutes the suggestion that the FCC's rulemaking authority under Section 201(b) includes the power to set rates. See *Am. Tel. & Tel. Co.*, 487 F.2d at 874 ("The Commission may prescribe a rate only after a 'full opportunity for hearing'" under Section 205, and "to determine whether rates have been prescribed the actual impact of agency action and not its form is decisive."); cf. *Comm. for Effective Cellular Rules* v. *FCC*, 53 F.3d 1309, 1318 (D.C. Cir. 1995) ("Obviously, the FCC cannot, merely by invoking its rulemaking authority, avoid the adjudicatory procedures required * * * ."). Although the court below did not discuss Section 205, see Pet. App. 12a-13a, that provision is clearly relevant and properly before this Court, see *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992).

under section 201." 47 U.S.C. § 251(i) (emphasis added). The requirements that intercarrier rates be based on cost and set by state commissions are in *Section 252* (not "this section"). See *id.* § 252(b)-(d); cf. *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 493 (1987) ("Section 505(e) merely says that '[n]othing *in this section*' * * * shall affect an injured party's right to seek relief under state law; it does not purport to preclude pre-emption of state law by other provisions of the Act."). For that reason too, the saving clause cannot support the FCC's violation of Section 252's requirements.

The saving clause's proper construction is confirmed by the FCC's own position for the decade following the 1996 Act's enactment. Until recently, the FCC consistently recognized that, where the 1996 Act applies, the Commission lacks authority to set rates under Section 201. In its 1999 order, for example, the FCC analyzed at length whether calls to ISPs were "local" calls subject to the 1996 Act's compensation requirements, or whether they were *instead* subject to the FCC's interstate authority. See Pet. App. 1039a-1061a. That analysis would have been wholly unnecessary if the FCC could regulate rates under Section 201 *whether or not* the 1996 Act applied. Likewise, in its 2001 order, the FCC characterized the issue before it as "whether intercarrier compensation for ISP-bound traffic is governed by section 251 *or* section 201." *Id.* at 887a (emphasis added). It asserted Section 201 authority only after finding the 1996 Act inapplicable. See *id.* at 928a.[8] After that, the FCC exploited the D.C.

[8] The court of appeals likewise formerly understood that the FCC could not set rates under Section 201 if the 1996 Act applied. See Pet. App. 821a ("If ISP-bound traffic were governed by § 251(b)(5), then reciprocal compensation arrangements would be required * * * ."); *id.* at 794a (similar).

Circuit's decision to remand without vacating and left its rules in place for six years with no rationale at all. See p. 10, *supra*. Only when the D.C. Circuit finally issued a writ of mandamus did the FCC discover its newfound authority to set intercarrier rates under Section 201 even where the 1996 Act applies.

The FCC cannot avoid the square holdings of *AT&T*, *Verizon*, and *Iowa Utilities* by adopting an extravagant construction of its Section 201 authority that defies Congress's express mandate of cost-based rates determined by state commissions. The conflict is unavoidable and warrants this Court's review.

II. THE QUESTION PRESENTED IS A MATTER OF NATIONAL IMPORTANCE

The consequences of the decision below are far-reaching. The decision imposes enormous costs on ISPs and the millions of Americans who rely on them to access the Internet. It upsets the federal-state balance embodied in the statute. And it licenses the FCC to rely on similarly adventurous constructions of its interstate authority in other important contexts, including broadband Internet and Voice over Internet Protocol ("VoIP"). The ramifications will persist for years to come.

A. Imposing Discriminatory, Below-Cost Rates on ISP-Serving Carriers Dramatically Increases Costs to Millions of Consumers

Ensuring universal access to the Internet has long been a public-policy priority of the highest order. See, *e.g.*, The White House, *Fact Sheet on Closing the Digital Divide*, 2000 WL 348458, at *1 (Apr. 5, 2000) (recognizing "the long-term goal of making home access to the Internet universal"). Traditional dial-up Internet service remains a critical component of that universal access. "[A]pproximately 5.6 million American households still use a dial-up telephone connection." Notice of Inquiry, *In the Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127, FCC 10-114, 2010 WL 2467985, ¶6 (June 17, 2010). And "[n]early one-third (29 percent) of them live in rural areas," reflecting "the difficulty in running broadband infrastructure to some corners of rural America." J. Horrigan, *Broadband Adoption and Use in America*, FCC OBI Working Paper Series No. 1, 2010 WL 620692, at *4, 43 (Feb. 23, 2010). For millions of Americans seeking Internet access, it is dial-up or nothing.

The decision below undermines that important policy objective by singling out ISP-serving carriers for discriminatory, below-cost compensation—a regime that drives up costs for ISPs and the millions of Americans they serve. Under the 1996 Act, all other carriers are entitled to recover their costs of completing calls from the originating carrier. 47 U.S.C. §252(d)(2)(A). But the FCC has now singled out carriers that serve ISPs for rates that, by the FCC's own admission, are "not intended to reflect the costs incurred." Pet. App. 892a. The magnitude of the difference is hard to overstate. The court of appeals and the FCC admitted that the $0.0007 rate cap was "well below the rates that had prevailed" under the cost-based regime. *Id.* at 2a; see *id.* at 892a. Evidence showed that $0.0007 was a mere *one-fourth* of the average cost-based rate, C.A. App. 237-239; see also *id.* at 90, and often did not even cover the costs of *billing*, let alone providing service, *id.* at 131, 376. The Commission itself described the rate cap as an effort to "*limit[]* carriers' opportunity to recover costs," Pet. App. 940a-941a (emphasis added), and as a "transition toward" a regime where carriers received *no compensation at all*, *id.* at 893a-894a.

Because ISP-serving carriers can no longer recover their costs of completing calls from originating carriers, they have no choice but to pass on those costs to the ISPs they serve. That is not just predictable economics; it is the avowed intent of the FCC's decision: Carriers serving ISPs, the Commission declared, should "collect additional amounts from their ISP customers" for receiving calls. Pet. App. 892a; see also *id.* at 940a-941a, 953a. Those higher costs to ISPs, in turn, mean higher costs to the millions of consumers who rely on them for Internet access. Those discriminatory costs would be cause for concern in any context. But they are particularly alarming when the consumers are often rural residents for whom dial-up access is the only lifeline to the other side of the digital divide.

In many instances, moreover, carriers unable to recover their costs have refused to serve ISPs at all. One major ISP (EarthLink) reported that "[s]everal of [its] [carriers] have exited the market already and others have notified [it] that they will soon eliminate service in hundreds of rural exchanges due, in part, to the artificially depressed value assigned ISP-bound traffic." C.A. App. 512. Another (United Online) reported that, "[s]ince 2007, [it] has been forced to terminate ISP service to approximately 20,000 subscribers due to loss of access lines" in "rural counties." *Id.* at 461. Those developments directly undermine Congress's goal in the 1996 Act of fostering competition so that customers—including ISPs—have a choice of local telephone service providers. See *AT&T*, 525 U.S. at 371.

The discriminatory costs imposed on ISP-serving carriers are all the more galling because the FCC's rationale for imposing them is incoherent. The FCC accuses ISP-serving carriers of engaging in "regulatory arbitrage" because ISPs receive more calls than they make. Pet. App. 940a-945a. That asymmetry may increase the importance of measuring costs accurately. But it cannot justify abandoning the 1996 Act's cost-based regime. Congress, in the 1996 Act, unambiguously sought to preserve the traditional "caller pays" system of telephone service, in which the caller pays for the call and the caller's telephone company compensates the receiver's telephone company for completing it. See 47 U.S.C. §252(d)(2)(A). Nothing in the statute conditions the right to receive that compensation on whether particular customers make as many calls as they receive. At bottom, the FCC simply disagrees with Congress's decision to preserve the traditional "caller pays" system, and has singled out ISPs for a unique "receiver pays" regime that better suits its regulatory agenda (not to mention the bottom lines of incumbent carriers). Epithets like "regulatory arbitrage" cannot disguise what is ultimately a disagreement with Congress over a basic feature of the 1996 Act's structure.

Incumbent carriers tried to convince Congress to do what the Commission has now done. The Reciprocal Compensation Adjustment Act of 2000, H.R. 4445, 106th Cong., would have amended Section 251 to provide that "no local exchange carrier shall be required to make any payment for the transport or termination of telecommunications to the Internet or any provider of Internet access service." *Id.* §2. Congress, however, refused to enact that bill. That failed legislation not only speaks volumes about the industry's understanding as to whether current law applies to ISP-bound calls. It also underscores the overriding economic importance of this issue.

B. The Decision Below Upsets the Federal-State Balance That Congress Wrote Into the 1996 Act

The decision below also upsets Congress's deliberate allocation of authority between federal and state regulators. The federal communications laws have long respected the "system of dual state and federal regulation over telephone service." *La. Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 360 (1986); see also *Verizon*, 535 U.S. at 489 (noting "the traditional federal reluctance to intrude into local telephone markets"). In the 1996 Act, Congress took great care to delineate the roles of federal and state regulators. It adopted a "hybrid jurisdictional scheme" in which the FCC prescribes a "default methodology" but "state utility commissions * * * set the actual rates." *Verizon*, 535 U.S. at 489.

AT&T, *Verizon*, and *Iowa Utilities* preserve that allocation of authority by limiting the FCC to its rulemaking role while allowing state commissions to "set the actual rates." See pp. 14-19, *supra*. But the decision below creates a gaping loophole: It authorizes the FCC to set rates and thereby displace state authority whenever a communication also happens to fall within the FCC's claimed Section 201 authority. That holding substantially alters the 1996 Act's allocation of federal-state authority for many of the communications covered by the Act. As the FCC put it: "[S]tate commissions will no longer have authority to address this issue." Pet. App. 956a.

As this Court has often stated, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States* v. *Bass*, 404 U.S. 336, 349 (1971). *A fortiori*, where Congress has deliberately calibrated a statute to preserve a role for state authorities, courts should carefully respect that design. The court of appeals' failure to follow that principle is another reason this case is important and warrants review.

C. The FCC's Theory Has Wide-Ranging Implications for Other Important Contexts

The substantial repercussions of the decision below for ISPs and their customers are reason enough to grant review. But the decision has broader ramifications. The theory accepted below would allow the FCC to set below-cost intercarrier rates whenever the FCC categorized a call as an interstate communication subject to Section 201(b). Under the FCC's so-called "end-to-end" analysis, moreover, the FCC deems even plainly local calls "interstate" for purposes of Section 201 merely because the party receiving the call engages in a further, interstate communication. See p. 7, *supra*. Here, for example, the FCC invoked that flawed analysis to deem calls to ISPs "interstate" even though the overwhelming majority are seven-digit *local* calls placed to ISPs "located in the same *local* calling area." Pet. App. 895a, 936a (emphasis added). The decision below thus licenses the FCC to set below-cost intercarrier rates, not just for genuinely interstate calls, but also for local calls that the FCC *deems* interstate under its expansive end-to-end analysis. Under that approach, States will be able to fulfill their statutory rate-setting role only in an increasingly trivial category of cases.

With increasing frequency, moreover, the FCC has relied on expansive interpretations of its general Section 201 authority over interstate communications to circumvent other restrictions and usurp state authority. Recently, for example, the D.C. Circuit rejected the FCC's so-called "net neutrality" policy for broadband Internet service, holding that the FCC had failed to show it had "ancillary authority" to issue the order because it had not "tie[d] its assertion of ancillary authority * * * to any 'statutorily mandated responsibility.'" *Comcast Corp.* v. *FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010). In response, the FCC has proposed to reclassify broadband as a "telecommunications service" and reimpose its broadband policies using Section 201 and related provisions as a source of authority. See Notice of Inquiry, *In the Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127, FCC 10-114, 2010 WL 2467985, ¶¶2, 28, 66, 68, 74-76, 86 (June 17, 2010). The FCC thus is now planning to use Section 201 to effect a vast expansion of federal authority over broadband. Promising that only the camel's nose will enter the tent, the FCC claims it will not go further and use its newfound authority to set rates as well. See A. Schlick, FCC General Counsel, *A Third-Way Legal Framework for Addressing the Comcast Dilemma* (May 6, 2010), *available at* http://www.broadband.gov/third-way-legal-framework-for-addressing-the-comcast-dilemma.html. But the Commission has identified no legal impediment to changing its mind and bringing the rest of the camel in as well.

The FCC has relied on similarly broad interpretations of its interstate authority in the VoIP context. For example, the FCC has broadly preempted state regulation of VoIP telephone service furnished to local residents—even regulations that merely require providers to enable 911 service. See *In the Matter of Vonage Holdings Corp.*, 19 F.C.C.R. 22,404, ¶¶10-13, 46 (2004). Invoking its general authority over interstate communications, the FCC held that, even where a customer uses VoIP to make a local telephone call, state regulation is preempted. See *id.* ¶¶16-19, 23-32. Applying the rate-setting theory accepted below, the FCC could presumably invoke Section 201 to prescribe rates for those local VoIP calls as well.

The expansive repercussions of the D.C. Circuit's ruling underscore the need for this Court's review. Only this Court can restore the federal-state balance Congress adopted in the 1996 Act—the balance this Court and the Eighth Circuit sought to preserve in *AT&T*, *Verizon*, and *Iowa Utilities*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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