No. 24A_____

IN THE
SUPREME COURT OF THE UNITED STATES

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, AND SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION, ON BEHALF OF THEIR RESPECTIVE MEMBERS,

Applicants,

v.

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

Respondent.

APPLICATION FOR AN EMERGENCY STAY OF THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

JEFFREY A. LAMKEN
MOLOLAMKEN LLP
The Watergate, Suite 500
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 556-2000
Counsel for Applicant ACA Connects – America's Communications Association

JARED P. MARX
HWG, LLP
1919 M Street, N.W., 8th Floor
Washington, D.C. 20036
(202) 730-1328
Counsel for Applicant Satellite Broadcasting and Communications Association

SCOTT H. ANGSTREICH
Counsel of Record
ALEX A. PARKINSON
ABIGAIL E. DEHART
DAREN G. ZHANG
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(sangstreich@kellogghansen.com)
Counsel for Applicants New York State Telecommunications Association, Inc., CTIA – The Wireless Association, NTCA – The Rural Broadband Association, and USTelecom – The Broadband Association

August 2, 2024

PARTIES TO THE PROCEEDINGS BELOW

Applicants 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, and Satellite Broadcasting and Communications Association, on behalf of their respective members, were the plaintiffs in the district court and the appellees in the court of appeals.

Respondent Letitia A. James, in her official capacity as Attorney General of New York, was the defendant in the district court and the appellant in the court of appeals.

RULE 29.6 STATEMENTS

Pursuant to this Court's Rule 29.6, applicants 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, and Satellite Broadcasting and Communications Association, on behalf of their respective members, state the following:

ACA Connects – America's Communications Association. ACA Connects – America's Communications Association ("ACA Connects") states that it has no parent corporation, and no persons, associations of persons, firms, partnerships, limited liability companies, joint ventures, corporations, or any similar entities have a 10 percent or greater ownership interest in ACA Connects.

CTIA – The Wireless Association. CTIA – The Wireless Association ("CTIA") states that it has no parent corporation, and no persons, associations of persons, firms, partnerships, limited liability companies, joint ventures, corporations, or any similar entities have a 10 percent or greater ownership interest in CTIA.

New York State Telecommunications Association, Inc. New York State Telecommunications Association, Inc. ("NYSTA") states that it has no parent corporation, and no persons, associations of persons, firms, partnerships, limited liability companies, joint ventures, corporations, or any similar entities have a 10 percent or greater ownership interest in NYSTA.

NTCA – The Rural Broadband Association. National Telecommunications Cooperative Association d/b/a NTCA – The Rural Broadband Association ("NTCA") states that it has no parent corporation, and no persons, associations of persons, firms, partnerships, limited liability companies, joint ventures, corporations, or any similar entities have a 10 percent or greater ownership interest in NTCA.

Satellite Broadcasting and Communications Association. Satellite Broadcasting and Communications Association discloses that no publicly held corporation owns 10 percent or more of its stock.

USTelecom – The Broadband Association. USTelecom – The Broadband Association ("USTelecom") states that it has no parent corporation, and no persons, associations of persons, firms, partnerships, limited liability companies, joint ventures, corporations, or any similar entities have a 10 percent or greater ownership interest in USTelecom.

RELATED CASES

New York State Telecomms. Ass'n, Inc., et al. v. James, 544 F. Supp. 3d 269 (E.D.N.Y. June 11, 2021) (No. 2:21-cv-2389 (DRH) (AKT))

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New York State Telecomms. Ass'n, Inc., et al. v. James, No. 2:21-cv-2389 (DRH) (AKT), ECF No. 34 (E.D.N.Y. Aug. 10, 2021) (district court's amended judgment)

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APPLICATION FOR AN EMERGENCY STAY OF THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

To the Honorable Sonia Sotomayor, Associate Justice of the United States Supreme Court and Circuit Justice for the Second Circuit:

Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. § 1651, applicants respectfully apply for a stay of the judgment of the U.S. Court of Appeals for the Second Circuit pending resolution of applicants' forthcoming petition for a writ of certiorari.[1] That petition will seek review of a divided panel decision that presents fundamental questions about whether the Communications Act of 1934 preempts States from regulating rates for broadband internet access service and other interstate information services. In the alternative, applicants request an injunction preventing the New York Attorney General from enforcing New York's broadband rate regulation law, which the State has never enforced, until this Court acts. Applicants request that the Court rule on this application by August 15, 2024 — the day before New York may begin regulating broadband rates — and that the Court issue an administrative stay, if necessary to provide the Court sufficient time to rule on this application.

Applicants are trade associations with members that provide broadband internet access service ("broadband" or "BIAS") to customers in New York. They seek review of the Second Circuit's ruling dissolving a district court injunction and

[1] While that petition is due on September 23, 2024, *see* Docket No. 24A40 (granting extension), applicants intend to file that petition no later than August 12, 2024.

allowing New York to set a maximum price for consumer broadband, an interstate information service under federal law. The Second Circuit's decision that the Communications Act does not preempt state rate regulation of broadband because it is an interstate information service would open the door to a wave of unprecedented state rate regulation. Streaming video and music, cloud storage, email and messaging, and video-conferencing services are all also interstate information services under the Communications Act. If federal law does not preempt state rate regulation of broadband, it also does not preempt state rate regulation of those other services.

This Court should grant a limited-duration stay pending resolution of applicants' forthcoming certiorari petition, to preserve the status quo that has prevailed since 2021 — first through a preliminary injunction, *see New York State Telecomms. Ass'n, Inc. v. James*, 544 F. Supp. 3d 269 (E.D.N.Y. 2021) ("*NYSTA I*") (attached hereto as Ex. 1); *see also* Exs. 2 (preliminary injunction order), 3 (amended judgment), then through New York's agreement to the entry of an appealable permanent injunction, *see* Ex. 4, and then through the New York Attorney General's temporary agreement not to enforce the New York rate-regulation law despite the Second Circuit's ruling, *see* Ex. 5.

That temporary agreement expires on August 15, 2024. *See id.* Absent this Court's intervention, on August 16, 2024, New York would become the first government — federal, state, or local — to regulate the retail rates that broadband providers (including applicants' members) may charge.

This Court is likely to grant certiorari to review the Second Circuit's decision and to reverse it. The Second Circuit held that Title I of the Communications Act — which still governs broadband because the Sixth Circuit yesterday unanimously stayed the Federal Communications Commission ("FCC") order reclassifying broadband as a Title II service[2] — does not preempt New York from regulating broadband rates. *See New York State Telecomms. Ass'n, Inc. v. James*, 101 F.4th 135 (2d Cir. 2024) ("*NYSTA II*") (attached hereto as Ex. 7). As the district court found in 2021 and New York did not challenge on appeal, enforcing New York's $15 broadband rate regulation would cause applicants' members immediate, irreparable harm. Applicants' members' additional declarations confirm that the irreparable harms would occur today. In contrast, continuing to preserve the status quo would not harm the public interest.

The Court should therefore stay the Second Circuit's judgment, temporarily reinstating the district court's preliminary injunction while this Court reviews applicants' forthcoming certiorari petition. *See, e.g.*, *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers) (staying Fifth Circuit judgments regarding preemption pending review of petition for certiorari); *NCAA v. Board of Regents of Univ. of Oklahoma*, 463 U.S. 1311, 1311 (1983) (White, J., in chambers) (granting stay of Tenth Circuit's judgments "pending the timely filing and disposition of a petition for writ of certiorari"). In the alternative, this Court should issue an injunction pending disposition of the

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[2] *See* Order, *In re: MCP No. 185 Open Internet Rule (FCC 24-52)*, No. 24-7000, Dkt. No. 71-2 (6th Cir. Aug. 1, 2024) (per curiam) (attached hereto as Ex. 6).

certiorari petition that would have the same effect. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 15 (2020) (per curiam) (granting injunction of New York law pending review of petition for certiorari).

BACKGROUND

I. The Communications Act and FCC Decisions Regarding Broadband Regulation

In the Communications Act, Congress "divide[d] the world . . . into two hemispheres — one comprised of interstate service, over which the FCC would have *plenary authority*, and the other made up of intrastate service." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986) (emphasis added). While, "in practice," "actions taken by federal and state regulators *within* their respective domains" can "affect" the "other 'hemisphere,'" *id.* (emphasis added), federal law preempts state laws regulating intrastate services where it is "not possible" for separate intrastate and interstate regimes to co-exist, *id.* at 375-76 & n.4 (emphasis omitted).

Historically, the FCC concluded that broadband is an interstate information service subject to Title I of the Communications Act,[3] making broadband "statutorily exempt from common carrier treatment" under Title II of that Act (including *ex ante* rate regulation). *Verizon v. FCC*, 740 F.3d 623, 654 (D.C. Cir. 2014); *see also* Ex. 6, at 3-4 (recounting this history).

[3] *See National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 977-78 (2005) (upholding that classification).

In 2015, however, the FCC for the first time classified broadband as a telecommunications service subject to common-carrier regulation under Title II.[4] But even though Title II includes rate regulation and tariff filing among its provisions, *see* 47 U.S.C. §§ 201-203, the FCC used its statutory forbearance authority, *see id.* § 160, to prevent those "*ex ante* rate regulation" provisions from applying, finding rate regulation not in the public interest. *2015 Order* ¶¶ 441, 443, 449.

In 2018, the FCC returned to its pre-2015 approach, classifying broadband as an interstate information service immune from all Title II regulation, including rate regulation.[5] The FCC noted that the threat of future rate regulation under the *2015 Order* — notwithstanding forbearance — risked undermining "investments in broadband infrastructure," contrary to federal policy. *2018 Order* ¶ 101. To protect its decision from any possibility of state-level undermining, the FCC adopted a "Preemption Directive," which preempted all state regulation of broadband: even purely intrastate regulations that did not conflict with the federal regime. *See id.* ¶¶ 194-204.

The D.C. Circuit upheld the FCC's classification of broadband as a Title I information service. *See Mozilla Corp. v. FCC*, 940 F.3d 1, 26, 72-73 (D.C. Cir. 2019) (per curiam). However, a 2-1 majority vacated the Preemption Directive,

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[4] *See* Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, ¶ 47 (2015) ("*2015 Order*").

[5] *See* Declaratory Ruling, Report and Order, and Order, *Restoring Internet Freedom*, 33 FCC Rcd 311, ¶¶ 2, 18, 65 (2018) ("*2018 Order*").

holding that, under Title I, the FCC lacked statutory authority "to wipe out a broader array of state and local laws than traditional conflict preemption principles would allow." *Id.* at 74. But the majority denigrated as a "straw man" and "confuse[d]," *id.* at 85, the dissenting judge's contention that this meant that "each of the 50 states is free to impose" the "heavy hand of Title II for the Internet," *id.* at 95 (Williams, J., concurring in part and dissenting in part). Instead, the *Mozilla* majority clarified that, where "a state practice actually undermines" the Title I regime to which the *2018 Order* returned broadband, "conflict preemption" would apply. *Id.* at 85.

II. District Court Proceedings

In 2021, New York enacted the so-called "Affordable Broadband Act" ("ABA"), N.Y. Gen. Bus. Law § 399-zzzzz, a first-of-its-kind broadband rate regulation. The ABA requires all broadband providers to sell broadband (other than mobile broadband) to qualifying low-income households at a cost to consumers of no more than $15 per month (for download speeds of at least 25 Mbps) or no more than $20 per month (for download speeds of at least 200 Mbps). *See id.* § 399-zzzzz(2)-(4). The law defines the "broadband service" it regulates as "a mass-market retail service that provides the capability to transmit data to and receive data from all or substantially all internet endpoints," *id.* § 399-zzzzz(1) — mirroring the FCC's long-standing definition of broadband internet access service, *see 2018 Order* ¶ 21. The ABA authorizes the Attorney General to enforce it, including by seeking a $1,000-per-violation civil penalty. *See* N.Y. Gen. Bus. Law § 399-zzzzz(10).

Applicants filed a complaint and sought a preliminary and permanent injunction barring the ABA's enforcement. The district court issued an order preliminarily enjoining the ABA before it took effect. The court found the rate regulation would irreparably harm applicants' members, *see NYSTA I*, 544 F. Supp. 3d at 276-79, and that applicants had established a likelihood of success on the merits, under both field and conflict preemption, *see id.* at 279-88. The court also found it "clear" that "the ABA is rate regulation" of an interstate service, *id.* at 282, rejecting New York's arguments that the ABA is an "intrastate affordable-pricing scheme," *id.* at 284.

New York soon thereafter stipulated to a permanent injunction — which the district court entered — and then appealed the final judgment while dismissing its earlier appeal of the preliminary injunction. *See* Ex. 4.

III. Second Circuit Proceedings

On April 26, 2024, a divided panel of the Second Circuit reversed the district court in a 2-1 decision that would vacate the permanent injunction.

The Second Circuit majority (Judges Nathan and Merriam) first found the court had jurisdiction to consider New York's appeal. *See NYSTA II*, 101 F.4th at 146-47.[6] Turning to the merits, the majority agreed with the district court that, "[a]s a threshold matter," the ABA regulates the rates "of interstate

[6] Applicants agreed to the Attorney General's proposal to convert the preliminary injunction into a stipulated final judgment imposing a permanent injunction. Applicants understood that the Attorney General was not relinquishing her right to appeal that permanent injunction.

communications services." *Id.* at 148 n.10. The majority rejected New York's argument that the ABA was a "purely intrastate affordable-pricing scheme." *Id.*

Yet the majority concluded that Congress had not occupied the field with respect to interstate information services. *See id.* at 147-54. The Second Circuit majority recognized that the Communications Act's "comprehensive" regulation of common carriers in Title II is field preemptive. *Id.* at 153 (citing 47 U.S.C. §§ 201-203). However, the majority wrongly concluded that the absence of similar provisions in Title I for interstate information services left the field open for States to regulate the rates of such services. *See id.* at 152-53.[7]

The majority also found that conflict preemption did not bar enforcement of the ABA. The majority noted that, when broadband is a Title I service, it is outside the FCC's authority over Title II services, including the authority to impose or forbear from rate regulation. *See id.* at 155. It then concluded that, because Title I does not give the FCC rate-setting authority over interstate information services, any state rate setting for such services could not conflict with federal law. *See id.* at 156-57.

Judge Sullivan dissented as to both appellate jurisdiction, *see id.* at 158-66, and the merits, *see id.* at 166-68. As to the latter, Judge Sullivan would have found the ABA field preempted by the Communications Act, which "grants the FCC

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[7] The majority was incorrect to state that applicants "abandoned" the breadth of their field preemption argument on appeal. *NYSTA I*, 101 F.4th at 148. Rather, applicants argued on appeal that, because rate regulation is at the core of the preempted field, the Second Circuit did not need to define the outer limits of that field, such as whether general state laws applicable to all contracts can apply to contracts for interstate information services.

authority over 'all interstate' communication services — save for a limited set of state-law prohibitions — while leaving to the states the power to regulate intrastate communications." *Id.* at 167. Judge Sullivan also would have found the ABA conflict preempted, rejecting New York's suggestion "that because the FCC currently lacks power to regulate broadband rates, it cannot prevent states from regulating those rates either." *Id.* at 168.

IV. New York's Temporary Agreement Not To Enforce the ABA and the FCC's Stayed *2024 Order*

Notwithstanding the Second Circuit's decision, the New York Attorney General entered into an agreement with applicants to preserve the status quo by temporarily not enforcing the ABA. *See* Ex. 5.[8] New York did so because, shortly after the Second Circuit ruled, the FCC released its *2024 Order*,[9] in which the FCC reverted to its 2015 claim to have authority to regulate broadband as a Title II telecommunications service. *See 2024 Order* ¶¶ 2, 188-189. In the *2024 Order*, however, the FCC adhered to its long-standing conclusion that *ex ante* rate regulation of broadband is not in the public interest. *See id.* ¶ 386. The FCC relied on 47 U.S.C. § 160 to forbear from "all Title II provisions that could be used to impose *ex ante* or *ex post* rate regulation on [broadband] providers." *Id.* ¶ 389.

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[8] In exchange for that agreement, applicants did not seek further relief from the Second Circuit. *See* Ex. 5, at 3. But applicants expressly reserved their right to petition for certiorari and for "relief pending resolution of such a petition for certiorari from the United States Supreme Court." *Id.*

[9] *See* Declaratory Ruling, Order, Report and Order, and Order on Reconsideration, *Safeguarding and Securing the Open Internet*, WC Docket Nos. 23-230 & 17-108, FCC 24-52 (rel. May 7, 2024) ("*2024 Order*"), https://bit.ly/4aexF00.

Several trade associations with internet service provider members, including some of the applicants here, filed petitions for review of the *2024 Order* and also moved for a stay pending resolution of those petitions.[10] On August 1, 2024, the Sixth Circuit granted a motion to stay the *2024 Order* pending the resolution of challenges to that order. *See* Ex. 6. In granting the stay, the Sixth Circuit found that the petitioners were likely to succeed on the merits of their challenge to the *2024 Order* — that is, that broadband is likely to remain a Title I information service permanently. *See id.* at 5-7; *see also id.* at 9-13 (Sutton, C.J., concurring) (identifying an "additional reason" why the petitioners are likely to succeed on the merits). It also found that the members would suffer irreparable harm from being subjected to a common-carrier regime while the litigation was pending. *See id.* at 7. The Sixth Circuit set an accelerated briefing schedule and will hear oral argument on review of the *2024 Order* during the week of October 28, 2024 sitting. *See id.* at 9.

New York's agreement not to enforce the ABA expires 14 days after entry of the stay pending appeal. *See* Ex. 5, at 3. Accordingly, absent this Court's intervention, the New York Attorney General may begin enforcing the ABA against applicants' members on August 16, 2024.

[10] Pursuant to the process in 28 U.S.C. § 2112, those petitions for review were consolidated in the United States Court of Appeals for the Sixth Circuit. *In re: MCP No. 185 Open Internet Rule (FCC 24-52)*, No. 24-7000 (6th Cir.). On July 12, 2024, the Sixth Circuit administratively stayed the *2024 Order*. *See* Order, *In re: MCP No. 185 Open Internet Rule (FCC 24-52)*, No. 24-7000 (July 12, 2024) (attached hereto as Ex. 8).

ARGUMENT

An applicant for a stay of judgment pending a petition for a writ of certiorari must establish (1) "a reasonable probability that this Court would eventually grant review," (2) "a fair prospect that the Court would reverse," and (3) "that the applicant would likely suffer irreparable harm absent the stay" and "the equities" otherwise support relief. *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring). Applicants satisfy each of those requirements. The Court should grant interim relief to preserve the status quo — just as the Sixth Circuit did in staying the *2024 Order*, *see* Ex. 6 — until this Court resolves applicants' certiorari petition.

I. THIS COURT IS LIKELY TO GRANT THE CERTIORARI PETITION

Certiorari is warranted because whether States can set prices for interstate information services — including, but not limited to, broadband — is a question of exceptional national importance. This Court will likely grant certiorari because the Second Circuit's 2-1 decision that New York has such rate-setting authority threatens to spark a nationwide, state-by-state race to dictate the price of broadband. And that race is unlikely to stop there. On the Second Circuit majority's reasoning, the Communications Act also poses no barrier to state rate setting for ad-supported and paid internet services including video and music streaming and cloud storage, as well as email and messaging — all interstate information services under federal law. *See 2024 Order* ¶ 131.

In light of the vast legal and practical significance of this question, there is more than a reasonable likelihood that this Court will grant certiorari to confirm that the federal Communications Act — not a patchwork of state laws — governs

the regulation of broadband and other interstate information services. The Sixth Circuit has already concluded that challenges to the FCC's recent order subjecting broadband to common-carrier regulation are likely to succeed on the merits. *See* Ex. 6, at 5-7; *see also id.* at 9-13 (Sutton, C.J., concurring). If the Second Circuit's decision were allowed to stand, States in that circuit — and in the Ninth Circuit, which reached a similar decision — would be free to engage in the very common-carrier regulation that the Communications Act forbids.

A. The Second Circuit's Decision Conflicts with This Court's Precedents

1. The Second Circuit Erred in Holding That the Communications Act's Preempted Field Excludes Interstate Information Services

The Second Circuit was correct to reject, unanimously, New York's effort to deem the ABA the type of intrastate regulation with limited spillover into the interstate sphere that the Communications Act permits States to enact. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375-76 & n.4 (1986). All three judges, like the district court, found that the ABA is a direct "regulation of interstate communications services." *NYSTA II*, 101 F.4th at 148 n.10; *see id.* at 166 (Sullivan, J., dissenting); *NYSTA I*, 544 F. Supp. 3d at 282, 284. This conclusion was inescapable because the ABA defines broadband as a service that "provides the capability to transmit data to and receive data from all or substantially all internet endpoints," which are located around the country (and around the world). N.Y. Gen. Bus. Law § 399-zzzzz(1).

However, the Second Circuit majority wrongly concluded that the Communications Act is field preemptive only as to Title II services. *See NYSTA II*,

101 F.4th at 150-51. For Title II services, Congress dictated a public-utility rate regime, with carriers filing rates in tariffs and the FCC authorized to assess whether those rates are unjust and unreasonable and, if so, to dictate rates to be charged going forward. *See* 47 U.S.C. §§ 201(b), 203-205. In the Telecommunications Act of 1996, Congress also directed the FCC to exempt Title II services from those statutory provisions when it is not in the public interest to enforce them. *See id.* § 160.

Title I lacks the same public-utility rate regime. But that is not because Congress wanted each State to be free to decide whether to regulate interstate information services as public utilities. Instead, as Judge Sullivan explained, it is because the Communications Act gives the FCC "exclusive authority over interstate communications" and has left to the States only "the power to regulate intrastate communications." *NYSTA II*, 101 F.4th at 167 (Sullivan, J., dissenting). The fact that Title I does not authorize rate regulation of interstate information services means that such rate regulation is ruled out — not that States are free to regulate in the Commission's stead.

Congress divided the field of communications into separate interstate and intrastate spheres in Section 152: granting the FCC exclusive jurisdiction over "all interstate . . . communication by wire or radio," 47 U.S.C. § 152(a), while denying the FCC "jurisdiction with respect to . . . intrastate communication service," *id.* § 152(b). As Judge Sullivan explained, Section 152 thus "prescribes that the FCC has exclusive authority over interstate communications." *NYSTA II*, 101 F.4th at 167 (Sullivan, J., dissenting). This Court reads Section 152 the same way, finding

that it "divide[s] the world . . . into two hemispheres — one comprised of interstate service, over which the FCC would have *plenary authority*, and the other made up of intrastate service, over which the States would retain exclusive jurisdiction." *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 360 (emphasis added).

Congress copied Section 152 into the 1935 Federal Water Power Act (now known as the Federal Power Act ("FPA")) and the 1938 Natural Gas Act ("NGA"). Consistent with *Louisiana Public Service Commission*, this Court has repeatedly read that borrowed statutory language to be field preemptive. *See*, *e.g.*, *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 154, 163 (2016) (finding that the FPA "occup[ies] an entire field of regulation" and gives the relevant agency the "exclusive authority to regulate 'the sale of electric energy at wholesale in interstate commerce'") (citation omitted); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988) (holding that the NGA gives the relevant agency "exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce"). The language in Section 152 — mirrored in the FPA and the NGA — is how the 1930s Congress stated its intent to occupy the field and preclude state regulation of interstate services.[11]

[11] Further confirmation comes from the fact that the federal Communications Act continues the 1910 Mann-Elkins Act, which this Court twice held to preempt the field as to interstate telegraph service. *See Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27, 30 (1919); *Western Union Tel. Co. v. Boegli*, 251 U.S. 315, 316-17 (1920). Congress consolidated the Mann-Elkins Act, along with other statutes, into the Communications Act, carrying forward the existing field preemption. *See Ivy Broad. Co. v. AT&T Co.*, 391 F.2d 486, 490-91 (2d Cir. 1968).

The Second Circuit majority erred when it concluded that field preemption does not apply to Title I services. It correctly found that the ABA regulates directly in the interstate sphere. *See NYSTA II*, 101 F.4th at 148 n.10. Therefore, the majority erred in treating the ABA as though it were a non-preempted state action regulating only *within* the intrastate sphere with limited effects that cross over that boundary. *See id.* at 150 (citing *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 375). The Second Circuit was also wrong to brush aside the similarities in the Communications Act, the FPA, and the NGA. This Court already rejected the majority's view that the Communications Act language copied into the FPA and the NGA is field preemptive only because this Court's pre-FPA and NGA cases held that the dormant Commerce Clause prevented state rate regulation of interstate gas and electricity sales. *See Schneidewind*, 485 U.S. at 304-05; *NYSTA II*, 101 F.4th at 151. Instead, the proper conclusion from Congress's decision to copy the Communications Act language into the FPA and the NGA is "that Congress intended that text to have the same meaning in [all three] statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality).[12]

[12] The majority also incorrectly found that early instances of state regulation of cable television rates, while cable was a Title I service, meant that Congress did not preempt that field. As Judge Sullivan noted in dissent, this history is "scant" and consists of one "article noting that eleven states oversaw rate regulation of cable during the 1970s," which is far from a "meaningful tradition." *NYSTA II*, 101 F.4th at 167 n.5 (Sullivan, J., dissenting). In fact, the history of cable regulation teaches the opposite lesson — States have lawfully regulated cable rates only where federal law expressly authorized such regulation. *See Spectrum Northeast, LLC v. Frey*, 22 F.4th 287, 294-96 (1st Cir. 2022), *cert. denied*, 143 S. Ct. 562 (2023).

2. *The ABA Conflicts with the Communications Act*

Telecommunications carriers may be "treated as a common carrier under [the Communications Act] *only* to the extent that [they are] engaged in providing telecommunications services." 47 U.S.C. § 153(51) (emphasis added); *see National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975 (2005) ("The Act regulates telecommunications carriers, but not information-service providers, as common carriers."); *Verizon v. FCC*, 740 F.3d 623, 654 (D.C. Cir. 2014) (same). The FCC correctly concluded in the *2018 Order* that broadband is an information service under the Communications Act, *see 2018 Order* ¶ 2, so it cannot regulate broadband as a public-utility, common-carrier service. New York's law conflicts with Congress's determination that interstate information services are exempt from common-carrier regulation.

The Second Circuit majority erroneously concluded that the prohibition on common-carrier regulation bars only the FCC from such regulation, while every State may impose rate regulation and whatever other common-carrier rules it likes onto broadband. *See NYSTA II*, 101 F.4th at 157-58. The majority thought it necessary for broadband to be a Title II service and for the FCC to forbear from the Communications Act's rate regulation provisions for conflict preemption to prevent broadband rate regulation at the state level. *See id.* at 154-55.[13] Although Title II

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[13] In this way, the Second Circuit read the D.C. Circuit's *Mozilla* decision in the exact manner its authors warned against. The *Mozilla* majority said the dissent was attacking a "straw man" in arguing that, if the FCC lacked authority to expressly preempt all state broadband laws, including those that neither field nor conflict preemption forbade, States were free to regulate broadband providers as common carriers. *Mozilla Corp. v. FCC*, 940 F.3d 1, 85 (D.C. Cir. 2019) (per

classification and forbearance would be *sufficient* for broadband rates to remain free from state regulation, it is not necessary.

Instead, for Congress's decision to protect interstate information services from common-carrier regulation to be given effect, the Act must prohibit States — no different from the FCC — from imposing rate regulation. This Court reached the same conclusion in analogous circumstances in *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi*, 474 U.S. 409 (1986). There, this Court held that Congress's decision to exempt certain gas sales from FERC's public-utility regulation under the NGA preempted States from imposing public-utility regulation on those same sales. This Court rejected the argument that Congress's decision "to give market forces a more significant role" for those gas sales reflected Congress's "inten[t] to give the States the power it had denied [the agency]." *Id.* at 422. Instead, as the Court reiterated in a later case, "Congress's intent . . . that the supply, the demand, and the price of deregulated gas be determined by market forces requires that the States still may not regulate purchasers so as to affect their cost structures." *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 507 n.8 (1989).

Here, too, Congress's intent that the market — not legislators or bureaucrats — determine the price of Title I services requires that States also not interfere with those market forces through rate setting. This Court long ago recognized that, in

curiam). Yet the Second Circuit majority adopted that same "straw man" position here, without acknowledging the *Mozilla* majority's warning. *See NYSTA II*, 101 F.4th at 154-56.

the Telecommunications Act, Congress "unquestionably" took regulatory power "away from the States." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999). The Congress that denied the FCC authority to regulate providers of Title I services as common carriers was not indifferent to whether States regulated Title I services as common-carrier services. It rejected all such regulation of those services.

B. This Case Presents Important Questions of Federal Law with Profound Implications for the Future of Broadband and Other Interstate Information Services

Absent this Court's intervention, the Second Circuit's decision will lead to *more* rate regulation. Other States are likely to copy New York once the Attorney General begins enforcing the ABA and New York consumers can buy broadband at well-below-market rates. As applicants' members have shown and show here, New York's price cap will require them to sell broadband at a loss and deter them from investing in and expanding their broadband networks. *See* Exs. 9-14. Rate regulation will stifle critical investment in bringing broadband to unserved and underserved areas.

In 2018, the FCC likewise found that the mere threat of "rate regulation" risked chilling "investments in broadband infrastructure." *2018 Order* ¶ 101. Smaller broadband providers in particular felt the effects of that threat, "given their more limited resources, leading to depressed hiring in rural areas most in need of additional resources." *Id.* ¶ 104. Even the current FCC, a majority of which supports common-carrier regulation of broadband providers, "cannot envision" regulating broadband rates and has made a "commitment not to do so." *2024 Order* ¶ 386. Allowing New York and other States to begin regulating those rates would

be a radical departure from a long-standing status quo, under which broadband in the United States has flourished. Broadband prices continue to decline, even as broadband speeds and deployment increase.[14]

And broadband is not the only interstate information service the Second Circuit's decision opens to novel rate regulation. All online services and applications — streaming video and music, cloud storage, email and messaging, and online video conferencing — meet the statutory definition of a Title I information service. *See* 47 U.S.C. § 153(24); *see also 2024 Order* ¶ 131. The Second Circuit's holding means that the Communications Act also does not preempt States from requiring video- and music-streaming services — such as Netflix or Spotify — to offer cheaper plans to low-income households. Nor would it preempt them from mandating rates for cloud-storage services like Dropbox, the paid versions of online video-conferencing tools like Zoom, online subscription dating services like Bumble, or security or baby cameras that stream video online like Ring or Nanit. The decision could also pave the way for States to mandate that free, ad-supported online services offer a paid, ad-free tier at a state-mandated maximum price.

The implications of the Second Circuit's decision for broadband are bad enough, but the decision reaches far beyond broadband. It threatens to open the door to widespread state rate regulation not only of broadband internet access services, but also of the many online services that broadband's Title I capabilities enable consumers and businesses to access.

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[14] *See* USTelecom, *2023 Broadband Pricing Index* (Oct. 2023), https://bit.ly/3Kz36YC.

II. APPLICANTS ARE LIKELY TO SUCCEED ON THE MERITS

There is more than "a fair prospect that the Court would reverse" upon granting review. *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). For the same reasons that this Court is likely to grant review, it is likely to reverse. *See In re Roche*, 448 U.S. 1312, 1314 n.1 (1980) (Brennan, J., in chambers) ("Where review is sought by the more discretionary avenue of writ of certiorari, . . . the consideration of prospects for reversal dovetails, to a greater extent, with the prediction that four Justices will vote to hear the case.").

The Second Circuit's decision is wrong on the law and at odds with a long line of this Court's precedent as to both field and conflict preemption. As the district court explained, it is "hard to square" New York's view — and, by extension, the Second Circuit majority's view — "with [this] Court's decision in *Louisiana Public Service Commission v. FCC*." *NYSTA I*, 544 F. Supp. 3d at 287. And as Judge Sullivan correctly concluded in dissent, Congress in the Communications Act occupied the field of interstate communications services — a field that has rate regulation at its core. *See NYSTA II*, 101 F.4th at 166-68 (Sullivan, J., dissenting) (explaining that "both the Communications Act and its predecessor (the Mann-Elkins Act) manifested 'an intent on the part of Congress to occupy the field to the exclusion of state law,' including with respect to the 'rates' charged"). Congress did so for *all* such services, not merely those that Congress concluded should be regulated like public utilities and subject to Title II's common-carrier regime. The ABA not only regulates rates directly within that federal field, but also conflicts with Congress's express prohibition on the FCC subjecting interstate information

services to common-carrier regulation. Rate regulation is a quintessential form of common-carrier regulation, so state rate regulation conflicts with Congress's prohibition. To conclude otherwise would attribute to Congress an attitude of indifference toward state regulation that is at odds with the Telecommunications Act, which divested States of authority they previously enjoyed.

III. APPLICANTS' MEMBERS FACE IRREPARABLE HARMS, AND THE BALANCE OF THE EQUITIES FAVORS A STAY

To obtain a stay "pending the filing and disposition of a petition for a writ of certiorari," the applicant must also show "a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). And the final stay factors call "for assessing the harm to the opposing party and weighing the public interest." *Nken v. Holder*, 556 U.S. 418, 435 (2009). When the government is the defendant, the analyses of these two "factors merge." *Id.* The district court found in 2021 that these "factors favor preliminary injunctive relief." *NYSTA I*, 544 F. Supp. 3d at 288. The same factors favor a stay here.

A. The ABA Will Subject Applicants' Members to Immediate and Irreparable Harm

Applicants' members face immediate and irreparable harm from the ABA absent a stay from this Court. Once New York begins enforcing the ABA on August 16, 2024, broadband providers offering service in New York will face a "Hobson's choice" between "continually violat[ing]" the ABA and "expos[ing] themselves to potentially huge liability; or . . . suffer[ing] the injury of obeying the law during the pendency of the proceedings and any further review." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992). On the other side of that choice, broadband

providers that seek to comply with the ABA face immediate and irreparable harm to their businesses.

The district court found that applicants "adequately demonstrated imminent irreparable injury largely due to the monetary harm[s]" that their members would suffer barring an injunction, which are unrecoverable due to the State's Eleventh Amendment immunity. *NYSTA I*, 544 F. Supp. 3d at 276-77. Those harms include "lost income" from selling broadband at below-market rates, unrecoverable "advertising costs" to comply with the ABA's advertising mandate, and unrecoverable costs to create and maintain systems to verify eligibility. *Id.* at 277; *see also* Ex. 9 (declarations submitted in 2021).

As the attached, new declarations from applicants' members attest, these harms remain just as significant and imminent today:

First, the ABA will likely force some members to cancel preexisting plans to expand broadband networks. *See*, *e.g.*, *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 435 (2d Cir. 1993) (explaining that "[m]ajor disruption of a business can be as harmful as termination" and constitute irreparable injury). For example, The Champlain Telephone Company's current plans to overbuild its entire network with fiber optic cable so that it can offer broadband over fiber to all of its customers would become prohibitively costly given the high percentage of customers eligible for discounted service under the ABA. *See* Ex. 10 ¶¶ 3-6 (Northrup Decl.). The ABA's mandated prices will similarly cause MTC Cable and DTC Cable to forgo planned service expansions to bring broadband to currently unserved customers in rural areas. *See* Ex. 11 ¶¶ 3, 6 (Faulkner Decl.); Ex. 12 ¶¶ 9-10 (Miller Decl.). The

elimination of these planned investments would cause irreparable harm to these businesses and cost them goodwill from customers they otherwise could and would have served.[15]

Second, the ABA will substantially reduce broadband providers' revenues from providing service and in many cases require them to provide service at below cost. *See* Ex. 10 ¶ 9 (Northrup Decl.); Ex. 11 ¶¶ 14-17 (Faulkner Decl.); Ex. 12 ¶¶ 2, 7-8 (Miller Decl.); Ex. 13 ¶¶ 9-10 (Coakley Decl.); Ex. 14 ¶ 3 (Wilkin Decl.). These monetary harms are irreparable because applicants' members cannot recover or redress them through legal remedies because of New York's Eleventh Amendment immunity. *See NYSTA I*, 544 F. Supp. 3d at 277; *see also*, *e.g.*, *Odebrecht Constr., Inc. v. Secretary, Florida Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("In the context of preliminary injunctions, numerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable.").

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[15] In May 2021, New York's Public Service Commission granted Champlain, MTC, and many other providers that serve no more than 20,000 households a temporary exemption from the ABA. *See* N.Y. Gen. Bus. Law § 399-zzzzz(5). But after the district court preliminarily enjoined the ABA, the Public Service Commission suspended its proceeding before reaching a final decision. It is unclear when the proceeding will re-start, the criteria the Public Service Commission will apply, and whether Champlain and MTC will receive permanent exemptions. As the providers explain, they cannot make investments relying on the temporary exemption from the ABA. *See* Ex. 10 ¶¶ 14-16 (Northrup Decl.); Ex. 11 ¶ 22 (Faulkner Decl.); Ex. 12 ¶ 12 (Miller Decl.); *see also NYSTA I*, 544 F. Supp. 3d at 278 (holding that the "temporary exemptions" do not eliminate irreparable harm because they "merely give the PSC more time to decide (viz. potentially deny) the requests, pursuant to 'criteria and factors' not yet identified").

Third, the ABA will impose on applicants' members significant and unrecoverable administrative costs that are likewise unrecoverable from the State. New York has not created a system providers can use to verify consumers' eligibility under the ABA, which instead leaves it to each provider to develop a system for validating eligibility. *See* Ex. 10 ¶ 12 (Northrup Decl.); Ex. 11 ¶ 19 (Faulkner Decl.); Ex. 13 ¶ 8 (Coakley Decl.); Ex. 14 ¶ 5 (Wilkin Decl.). The ABA also requires providers to spend additional money to advertise to low-income consumers the availability of the below-market prices. *See* N.Y. Gen. Bus. Law § 399-zzzzz(7). This, too, would impose substantial (and unrecoverable) costs. *See* Ex. 10 ¶ 12 (Northrup Decl.); Ex. 11 ¶ 19 (Faulkner Decl.); Ex. 13 ¶ 12 (Coakley Decl.).

Fourth, if the Court allows the ABA to go into effect but later holds that federal law preempts the ABA, then the withdrawal of the rate-regulated discounts the ABA requires would undoubtedly prove unpopular with those customers benefiting from them — harming the members' reputations and customer goodwill. *See* Ex. 10 ¶ 13 (Northrup Decl.); Ex. 11 ¶¶ 20-21 (Faulkner Decl.); Ex. 12 ¶ 11 (Miller Decl.); Ex. 13 ¶ 11 (Coakley Decl.); Ex. 14 ¶ 4 (Wilkin Decl.). That too constitutes irreparable harm. *See Jacobson & Co. v. Armstrong Cork Co.*, 548 F.2d 438, 445 (2d Cir. 1977) (affirming finding of irreparable harm because plaintiff "presented ample evidence to show a threatened loss of good will and customers"); *Rogers Grp., Inc. v. City of Fayetteville*, 629 F.3d 784, 789-90 (8th Cir. 2010) (affirming finding that "a loss of goodwill among customers was sufficient to establish a threat of irreparable harm").

B. The Equities and the Public Interest Favor a Stay

Permitting a State to enforce a preempted and therefore unconstitutional statute harms the public interest. *See*, *e.g.*, *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) ("[T]he Government does not have an interest in the enforcement of an unconstitutional law."); *United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012) ("Frustration of federal statutes and prerogatives [is] not in the public interest."); *Bank One v. Guttau*, 190 F.3d 844, 848 (8th Cir. 1999) ("[T]he public interest will perforce be served by enjoining the enforcement of the invalid provisions of state law.").

The ABA is also far from "the sole legislative effort" seeking "to expand access to broadband internet." *NYSTA I*, 544 F. Supp. 3d at 288. The federal government has allocated "billions of dollars to achieve that same end." *Id.* That includes the federal BEAD program, which is a voluntary federal program that makes available $42.5 billion in grants and funds for States to disburse — subject to federal oversight — to expand broadband capacity in unserved and underserved areas. *See* 47 U.S.C. § 1702. The broadband providers that voluntarily participate in the BEAD program must offer at least one "low-cost broadband service option," *id.* § 1702(h)(4)(B), but Congress expressly prohibited construing that obligation "to authorize . . . regulat[ing] the rates charged for broadband service," *id.* § 1702(h)(5)(D). Notably, New York's BEAD proposal deems "a price of no more

than $65 per month" for a service offering "100 Mbps" download speed to constitute a sufficient low-cost option.[16]

In addition, Governor Hochul's $1 billion ConnectALL initiative — "New York's largest-ever investment in broadband access" — is designed to "ensure that all New Yorkers have access to reliable and affordable high-speed broadband internet service."[17] Among other recent initiatives as part of that plan are $228 million "to connect tens of thousands of homes statewide to high-speed internet through grants to public entities, local or Tribal governments, municipal utilities, utility cooperatives, and their private sector partners" and $100 million "to bring new broadband infrastructure to homes in affordable and public housing."[18] These efforts and others are highlighted in New York's recently adopted Digital Equity Plan.[19] None involves rate regulation.

Moreover, while the Affordable Connectivity Program ("ACP"), which provided $30 per month broadband subsidies to qualifying households, recently ended,[20] the White House has highlighted voluntary commitments by a number of providers — including those that offer broadband in New York — to offer broadband

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[16] *New York Initial Proposal, Volume II: Broadband Equity, Access, and Deployment (BEAD) Program* § 12.1, at 127 (Dec. 2023), https://on.ny.gov/46sHw20.

[17] *Governor Hochul Unveils $50 Million ConnectALL Digital Equity Plan to Close New York's Digital Divide* (Apr. 5, 2024), https://on.ny.gov/4aWF0By.

[18] *Id.*

[19] *See New York State Digital Equity Plan* (June 2024), https://on.ny.gov/3RkZ7CG.

[20] *See* Press Release, FCC, *FCC Brings Affordable Connectivity Program to a Close* (May 31, 2024), https://docs.fcc.gov/public/attachments/DOC-402930A1.pdf.

plans at a price of $30 or less to low-income households through the end of 2024.[21] Those plans should enable most New Yorkers who had been benefiting from the ACP — and who were paying, on average, more than $40 per month for internet access after applying the $30 subsidy[22] — to continue receiving discounted broadband service.

Finally, broadband prices continue to decline, even as broadband speeds increase. From 2022 to 2023, the price of providers' most popular broadband option declined by 10% *before* adjusting for inflation and 18% after adjusting.[23] That decline is consistent with longer-term trends. The price for providers' most popular broadband plan declined by nearly 55% in real terms from 2015 to 2023, while speeds increased by more than 280%.[24] In short, even as other goods and services have gotten more expensive, broadband is getting less expensive while consumers are receiving better service.

Taking all these factors together, the "balance of the equities and the public interest" supports a stay, for the same reasons the district court found in 2021.

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[21] *See* White House Fact Sheet: President Biden Highlights Commitments to Customers by Internet Service Providers to Offer Affordable High-Speed Internet Plans, Calls on Congress to Restore Funding for Affordable Connectivity Program (May 31, 2024), https://bit.ly/4cbXi2W.

[22] *See* State Level Data, appended to Public Notice, *The Office of Economics and Analytics and the Wireline Competition Bureau Announce Publication of Affordable Connectivity Program Transparency Data Collection Summary*, WC Docket No. 21-450, DA 24-504 (rel. May 30, 2024), https://docs.fcc.gov/public/attachments/DOC-402907A1.pdf.

[23] *See* USTelecom, *2023 Broadband Pricing Index* at 2 (Oct. 2023), https://bit.ly/3Kz36YC.

[24] *See id.* at 3.

NYSTA I, 544 F. Supp. 3d at 288-89. The federal and state programs described above will ensure that, at most, minimal hardship will result from a stay that would preserve the status quo and prevent irreparable harm until this Court can resolve applicants' forthcoming certiorari petition.

IV. ALTERNATIVELY, THIS COURT SHOULD GRANT AN INJUNCTION BARRING THE NEW YORK ATTORNEY GENERAL FROM ENFORCING THE ABA PENDING DISPOSITION OF APPLICANTS' CERTIORARI PETITION

For the same reasons that warrant a stay of the judgment, this Court may alternatively grant an injunction pending disposition of applicants' certiorari petition. *See Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 929 n.2 (2024) (Kavanaugh, J., concurring) (noting that "[t]his Court has used different formulations of the factors for granting emergency relief," but "[a]ll formulations basically encompass" the same factors). Under the All Writs Act, the Court "may issue all writs necessary or appropriate" to exercise jurisdiction. 28 U.S.C. § 1651(a). As relevant here, this Court may grant an injunction pending further review when (1) the applicant faces irreparable harm, (2) grant of certiorari and success on the merits are likely, and (3) an injunction will not harm the public interest. *See Tandon v. Newsom*, 593 U.S. 61, 64 (2021) (per curiam); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16-19 (2020) (per curiam). Applicants satisfy all three factors, for the reasons set out above, so the Court can preserve the status quo either through a stay of the judgment or an injunction directed to the New York Attorney General, who is the ABA's enforcer. *See* N.Y. Gen. Bus. Law § 399-zzzzz(10).

CONCLUSION

This Court should stay the judgment entered by the Second Circuit, thereby restoring the district court's preliminary injunction, pending resolution of applicants' petition for a writ of certiorari. In the alternative, this Court should issue an injunction temporarily enjoining New York from enforcing the ABA while the Court decides whether to grant the petition. Applicants respectfully ask that the Court rule on or before August 15, 2024, and that the Court issue an administrative stay, if necessary to provide the Court with sufficient time to rule.

Respectfully submitted,

JEFFREY A. LAMKEN
MOLOLAMKEN LLP
The Watergate, Suite 500
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 556-2000
Counsel for Applicant
ACA Connects – America's Communications Association

JARED P. MARX
HWG, LLP
1919 M Street, N.W., 8th Floor
Washington, D.C. 20036
(202) 730-1328
Counsel for Applicant
Satellite Broadcasting and Communications Association

SCOTT H. ANGSTREICH
Counsel of Record
ALEX A. PARKINSON
ABIGAIL E. DEHART
DAREN G. ZHANG
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(sangstreich@kellogghansen.com)
Counsel for Applicants
New York State Telecommunications Association, Inc., CTIA – The Wireless Association, NTCA – The Rural Broadband Association, and USTelecom – The Broadband Association

August 2, 2024

Respectfully submitted,

SCOTT H. ANGSTREICH
Counsel of Record
ALEX A. PARKINSON
ABIGAIL E. DEHART
DAREN G. ZHANG
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
(sangstreich@kellogghansen.com)
Counsel for Applicants New York State Telecommunications Association, Inc., CTIA – The Wireless Association, NTCA – The Rural Broadband Association, and USTelecom – The Broadband Association

JEFFREY A. LAMKEN
MOLOLAMKEN LLP
The Watergate, Suite 500
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 556-2000
Counsel for Applicant ACA Connects – America's Communications Association

JARED P. MARX
HWG, LLP
1919 M Street, N.W., 8th Floor
Washington, D.C. 20036
(202) 730-1328
Counsel for Applicant Satellite Broadcasting and Communications Association

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