No. 24A138

In The
Supreme Court of the United States

NEW YORK STATE TELECOMMUNICATIONS ASSOCIATION, INC., et al.,

Applicants,

v.

LETITIA JAMES, Attorney General of New York,

Respondent.

BRIEF IN OPPOSITION TO APPLICATION FOR AN EMERGENCY STAY PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

New York enacted the Affordable Broadband Act (ABA) to help low-income state residents access broadband internet service. The ABA requires broadband providers to offer a basic broadband product to qualifying low-income state residents at specified maximum prices, while allowing smaller providers to seek an exemption from the statute's requirements.

At the time of the ABA's enactment, the Federal Communications Commission (FCC) had classified broadband as an information service subject to Title I of the Communications Act. Under Title I, Congress gave the FCC only limited regulatory authority—leaving ample room for States to regulate information services.

Applicants are associations of broadband providers. They filed this litigation claiming that the ABA was impliedly preempted by federal law when broadband was classified as a Title I information service. The U.S. District Court for the Eastern District of New York concluded that the ABA was impliedly preempted. The U.S. Court of Appeals for the Second Circuit reversed, concluding that federal law did not preempt the ABA.

Applicants now seek the extraordinary relief of a stay or injunction barring enforcement of the ABA pending resolution of their petition for a writ of certiorari. But all the factors this Court considers in weighing a stay or injunction application counsel against such relief here.

First, this Court is unlikely to grant certiorari, for several independent reasons. As an initial matter, this appeal is a poor vehicle for this Court's review

because the governing legal framework is in flux. Shortly after the decision below, the FCC issued a new order classifying broadband as a telecommunications service subject to Title II of the Act—a statutory framework that is very different from Title I and that drastically alters any preemption analysis regarding the ABA. Although enforcement of the new FCC order is temporarily stayed pending resolution of unrelated litigation in the Sixth Circuit, applicants have recognized that there would be no reason for them to pursue the current litigation further if the new rule takes effect and that they would instead file an entirely new litigation.

Moreover, the decision below does not conflict with any decision of another court of appeals (or any other court). To the contrary, two other courts of appeals agree with the Second Circuit that federal law does not broadly preempt state regulations of Title I information services.

Second, applicants would be unlikely to prevail on appeal even if this Court did grant certiorari. Congress has expressed no intent—much less the requisite clear and manifest intent—to preempt state regulation of Title I information services. Applicants' field preemption claim fails because, far from imposing a pervasive federal regulatory regime on Title I information services, Congress instead gave the FCC only limited authority over information services. Congress thus left the States' traditional police powers over information services largely untouched. Applicants expressly abandoned in the court of appeals the conflict preemption argument they raise here, which is meritless in any event.

Third, the equities and the public interest weigh heavily in favor of allowing the ABA—duly enacted consumer-protection legislation that aids the State's most vulnerable residents—to take effect without further delay. The ABA will not have the economic effects that applicants speculate about even for broadband providers in New York, let alone in other States. The three largest broadband providers in New York are already offering an affordable broadband product to low-income consumers irrespective of the ABA, and smaller broadband providers can seek an exemption from the ABA's requirements.

STATEMENT

A. Legal Background

1. Congress has declined to enact any uniform or comprehensive federal statutory regime to govern all interstate communications services—an umbrella term that includes many distinct types of services, including wireline telephone, mobile telephone, radio, cable television, and broadband internet services. Instead, through the Communications Act of 1934 and its subsequent amendments (including the Telecommunications Act of 1996), Congress regulated different types of interstate communications services differently. (Pet. App. 3a.) *See generally* Communications Act of 1934, ch. 652, 48 Stat. 1064; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

In using this targeted approach, Congress well understood that, absent clear and manifest federal law to the contrary, *see Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), States have broad sovereign powers to protect consumers in their

respective jurisdictions—including by regulating the prices charged for goods or services, *see, e.g.*, *Nebbia v. New York*, 291 U.S. 502, 537 (1934). Congress thus made clear when, and to what extent, it intended to preempt States from regulating a particular type of interstate communications service. And for each type of interstate communications service, Congress made specific choices about the scope and limits of the FCC's authority to regulate that service—including by regulating rates.

For example, as most relevant here, Congress gave the FCC only limited, ancillary authority over interstate communications services that are classified as an "information service" subject to Title I of the Act. *See* 47 U.S.C. § 153(24) (defining "information service"); *id* § 154(i) (FCC may issue regulations consistent with Title I "as may be necessary in the execution of its functions"). *See generally FCC v. Midwest Video Corp.*, 440 U.S. 689, 696-907 (1979) (summarizing ancillary authority precedents). The FCC's ancillary authority is constrained by two requirements. First, a regulation of a Title I service must be within the agency's general jurisdiction, i.e., it must concern *interstate* rather than intrastate information services. *See* 47 U.S.C. § 152; *see also United States v. Southwest Cable Co.*, 392 U.S. 157, 167 (1968). Second, a regulation of a Title I service must be "reasonably ancillary to the effective performance of the Commission's various responsibilities," *Southwest Cable*, 392 U.S. at 178, i.e., it must be reasonably in furtherance of the FCC's specific responsibilities under other titles of the Act, *see Midwest Video*, 440 U.S. at 706-07; *Comcast Corp. v. FCC*, 600 F.3d 642, 652-53 (D.C. Cir. 2010).

Unlike other titles of the Act (see *infra* at 5-6), Title I does not contain any provision authorizing the FCC to regulate rates. Nor does Title I contain any provision preempting States from regulating the rates charged for interstate information services. Accordingly, when cable television was classified as an information service subject to Title I, States routinely regulated that interstate communications service—including by regulating rates. *See, e.g.*, *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459, 463 (D. Nev. 1968) (three-judge court), *aff'd* 396 U.S. 556 (1970) (per curiam).[1]

In contrast to the FCC's limited authority over information services, Congress gave the FCC substantial authority to regulate interstate communications services that are classified as a "telecommunications service," subject to Title II of the Act. *See* 47 U.S.C. § 153(53) (defining "telecommunications service"). Telecommunications services are potentially subject to an array of statutory duties and constraints applicable to common carriers. For instance, Title II generally bars a common carrier from levying unreasonable charges. *See* 47 U.S.C. § 201(b). Congress expressly authorized the FCC to forbear from applying many of these Title II requirements to a telecommunications service if certain prerequisites are satisfied. *Id.* § 160(a)(1). If the FCC exercises its forbearance authority to decline to impose a specific Title II requirement, then a State generally may not continue to apply that federal statutory requirement. *Id.* § 160(e). And where the FCC exercises its broad Title II authority,

[1] *See also* Philip R. Hochberg, *The States Regulate Cable: A Legislative Analysis of Substantive Provisions* 29-30, 91-96 (1978). (For authorities available on the internet, URLs appear in the Table of Authorities.)

its regulations may also preempt state laws, though such preemption is by no means automatic and must be determined based on both the specific federal regulation and state law at issue. *See, e.g.*, Declaratory Ruling & Order at 170-175, *In re Safeguarding and Securing the Open Internet*, FCC Docket No. 24-52 (released May 7, 2024) ("2024 Order") (declining to preempt state regulation when reclassifying broadband as Title II telecommunications service).

Still other titles of the Act establish different regimes for other types of interstate communications services—different from both information services, governed by Title I, and telecommunications services, governed by Title II. For instance, cable television is now governed by Title VI, which authorizes the FCC to determine certain rates. 47 U.S.C. §§ 532(c), 543(a). And mobile service is governed by Title III, which expressly preempts States from regulating rates, with certain exceptions, s*ee id.* § 332(c)(3)(A)(i)-(ii), but does not preempt States "from regulating the other terms and conditions of commercial mobile services," *id.* § 332(c)(3)(A).

2. This case concerns a New York consumer-protection statute, commonly referred to as the Affordable Broadband Act (ABA), that the Legislature enacted in 2021, to help provide low-income consumers with access to broadband services. *See* N.Y. General Business Law § 399-zzzzz(3) (see Pet. App. 107a-111a).

Today, most users connect to the internet through a broadband provider that delivers high-speed internet access. *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 690 (D.C. Cir. 2016). Broadband plays an important role in "how we educate children, deliver health care, manage energy, ensure public safety, engage govern-

ment, and access, organize and disseminate knowledge."[2] After the COVID-19 pandemic, many people continue to need high-speed internet to work and study remotely. Congress has declared it a national priority "to ensure that all people of the United States have access to broadband capability" and to develop a "strategy for achieving affordability of such service." 47 U.S.C. § 1305(k)(2)(B).

Although Congress has not expressly delineated which existing federal statutory framework applies to broadband, it has expressly recognized that States retain regulatory authority over broadband, including to set price caps on rates. Congress provided that both the FCC and each State's commission with regulatory jurisdiction over broadband "shall encourage the deployment on a reasonable and timely basis" of broadband capability to "all Americans" by utilizing, "in a manner consistent with the public interest, convenience, and necessity, *price cap regulation*, regulatory forbearance," and other measures that remove barriers to infrastructure investment. *Id.* § 1302(a) (emphasis added).

The FCC has repeatedly changed the classification of broadband internet service, sometimes classifying it as an information service subject to Title I and sometimes classifying it as a telecommunications service subject to Title II. *See Mozilla Corp. v. FCC*, 940 F.3d 1, 17-18 (D.C. Cir. 2019) (summarizing history). Although the applicable classification determines which federal statutory framework governs broadband, this case does not concern the validity of any FCC classification

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[2] FCC, *Connecting America: The National Broadband Plan* xi (2010).

decision or the scope of the FCC's statutory authority to make such decisions. *Cf. National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

At the time that New York enacted the ABA, the FCC had classified broadband as a Title I information service. *See In re Restoring Internet Freedom*, 33 FCC Rcd. 311, 312 (2018) ("2018 Order"). In the 2018 Order, the FCC also purported to preempt all state or local economic and other regulation of broadband providers. *Id.* at 426-28. After the 2018 Order was challenged in litigation, the D.C. Circuit upheld the FCC's classification of broadband as a Title I information service. *Mozilla*, 940 F.3d at 23-24. But the court rejected the FCC's attempt to preempt state regulation of broadband providers. The court found no express statutory authority in Title I (or elsewhere) for such preemption. *Id.* at 74. And the D.C. Circuit concluded that the FCC's decision to classify broadband as an information service had the consequence of placing broadband under the Title I regime, in which both the FCC's regulatory and preemptive authority is severely constrained. *Id.* at 75.

New York subsequently enacted the ABA to "expand the reach of broadband service in the State," by facilitating low-income consumers' access. (CA2 J.A. 100 (Assembly sponsor's memorandum), ECF No. 33.) Legislative memoranda explained that internet access had "become an essential service" without which "no one can successfully participate in 21st Century life." (J.A. 100.) Yet the average cost of a basic high-speed internet plan in the State—more than $50 per month—was "unaffordable to too many people." (J.A. 100.)

The ABA requires broadband service providers in New York to offer a basic high-speed broadband service at or below statutorily established price caps to low-income consumers who qualify for specified governmental benefits.[3] General Business Law § 399-zzzzz(2). A provider may comply with the statute by charging no more than $15 per month for broadband service of 25 megabits per second, or no more than $20 per month for broadband service of 200 megabits per second. *Id.* § 399-zzzzz(2)-(4). Certain price increases are allowable every few years. *Id.*

New York's Public Service Commission (PSC) may exempt certain small broadband providers, i.e., those "providing service to no more than twenty thousand households," from the ABA's requirements, if the PSC determines that compliance would result in "unreasonable or unsustainable financial impact" on the provider. *Id.* § 399-zzzzz(5). The PSC also may grant exceptions to the speed thresholds where "such download speed is not reasonably practicable." *Id.* § 399-zzzzz(2). In May 2021, the PSC provisionally exempted dozens of providers from ABA compliance while the PSC evaluated the providers' full exemption requests. (J.A. 105-113; Galasso Decl. ¶ 10.[4]) The recipients of these provisional exemptions include all the providers that serve no more than twenty thousand households and that submitted declarations in

[3] Among the qualifying consumers are those whose households are eligible for reduced-price school lunch or supplemental nutrition assistance benefits; who are Medicaid-eligible; who receive rent-increase exemptions based on disability or senior-citizen status; and who receive discounted electric or gas service. *See* General Business Law § 399-zzzzz(2).

[4] The declaration of Valery Galasso, Chief of Public Policy in the PSC's Office of Telecommunications, is attached as an exhibit to this opposition.

this litigation alleging that the ABA's implementation would cause them irreparable harm, namely, Empire Telephone Corporation, Heart of the Catskills Communications, Delhi Telephone Company, and Champlain Telephone Company.[5] (*See* J.A. 12-16, 27-38, 43-54, 112; Galasso Decl. ¶ 10.) The PSC's staff also has issued guidance on the documentation that would inform the PSC's evaluation of exemption requests, and invited public comment on any other criteria it should consider.[6] (J.A. 107-108; Galasso Decl. ¶ 8 & Exs. A-B.)

The PSC and other state agencies have also taken other actions to support broadband affordability. For instance, before the ABA's enactment, two of the three largest broadband providers in New York—Charter Communications Inc. and Altice USA Inc.—each agreed, as part of separate merger transactions approved by the PSC, to provide broadband to low-income consumers at prices consistent with the prices later codified in the ABA. (Galasso Decl. ¶¶ 5, 18, 20.) And Charter and Altice recently agreed to offer such pricing for at least the next four years. (Galasso Decl. ¶¶ 18, 20.) The PSC also has encouraged other voluntary efforts to expand broadband access for

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[5] These providers all submitted declarations in support of applicants' motion for a preliminary injunction, and three of them submitted similar declarations in support of the pending stay application. *See* Appl. Exs. 10, 11, 12.

[6] The PSC has not completed its evaluation of providers' final exemption requests because enforcement of the ABA has been stayed by either the district court's orders here or the State's agreement not to enforce the ABA pending a decision on whether to grant applicants' petition for a writ of certiorari (see *infra* at 14-15). However, the PSC stands ready to process final exemptions as soon as enforcement is set to begin. (Galasso Decl. ¶ 10 n.8.)

low-income consumers, like Verizon's voluntary program offering broadband to many low-income consumers at prices consistent with the ABA (J.A. 19; Galasso Decl. ¶ 16).

B. Procedural Background

Several associations of companies that provide broadband access in New York challenged the ABA by filing this lawsuit in the U.S. District Court for the Eastern District of New York against the New York State Attorney General in her official capacity. (J.A. 80-98.) The lawsuit sought a declaration that federal law preempted the ABA and sought both preliminary and permanent injunctive relief. (J.A. 95-97.)

The district court (Hurley, J.) preliminarily enjoined enforcement of the ABA. (Pet. App. 62a-94a.) Agreeing with the providers' sweeping field preemption argument, the court concluded that the Act preempted States from regulating broadband providers because they offered a type of interstate communications service. (Pet. App. 83a-91a.) In the alternative, the court also agreed with the providers' conflict preemption argument, which posited that the FCC's 2018 Order preempted the ABA. (Pet. App. 74a-83a.) The court declined to rule on the providers' separate conflict preemption argument, which relied on the Act's definition of "telecommunications carrier." *See* Mem. in Supp. of Pls.' Mot. for Prelim. Inj. 11-14, No. 2:21-cv-2389 (E.D.N.Y. May 6, 2021), ECF No. 16 (relying on 47 U.S.C. § 153(51)).

At the request of both parties, the court then so-ordered and entered a stipulated final judgment that expressly incorporated the reasoning in its preliminary injunction order and, on those grounds, declared the ABA federally preempted and

permanently enjoined its enforcement. The judgment explicitly preserved the State's right to appeal. (Pet. App. 95a-97a.)

The State timely appealed, and the Second Circuit reversed. (Pet. App. 1a-38a.) Judge Sullivan dissented. (Pet. App. 39a-61a.) As an initial matter, the court concluded that the parties' stipulation to a final judgment ordered by the district court, which ended the litigation and preserved the State's appellate rights, constituted a final judgment subject to appellate review. (Pet. App. 8a-16a.) Applicants do not challenge that determination in their petition for certiorari. Pet. 9 n.6.

Turning to the merits, the Second Circuit emphasized that States' police power may not be superseded by federal law unless preemption is Congress's "clear and manifest purpose." (Pet. App. 19a (quotation marks omitted); *see* Pet. App. 19a-21a.) The court found no field preemption because neither the text nor structure of the Act evinced any such clear and manifest congressional purpose to prevent States from regulating either interstate communications services (as the district court had ruled) or the prices charged for Title I information services (as applicants had argued in the Second Circuit). (Pet. App. 21a-31a.) To the contrary, the court explained, the Act's text, structure, and history each demonstrated that Congress intended for States "to retain their regulatory authority over many interstate communications services—and

to play a role in regulating the rates charged for such services—unless it said otherwise."[7] (Pet. App. 29a; *see* Pet. App. 19a-31a.)

The court also determined that the FCC's 2018 Order did not trigger conflict preemption. The court explained that by classifying broadband as a Title I information service, the FCC had chosen the statutory framework under which it lacked authority to regulate rates or preempt regulations like the ABA. (Pet. App. 31a-38a.)

The Second Circuit did not consider the separate conflict preemption argument, based on the statutory definition of "telecommunications provider," because applicants explicitly abandoned that argument at the circuit. *See* Br. for Pls.-Appellees 15 n.26, No. 21-1975 (CA2 Feb. 23, 2022), ECF No. 118.

C. Subsequent Events

Shortly after the Second Circuit's ruling, the FCC issued a new order that, inter alia, classifies broadband as a Title II telecommunications service rather than a Title I information service, and establishes conduct-based rules to support an open internet (commonly known as "net neutrality"). *See* 2024 Order. Several broadband providers and associations of those providers—including applicants here—petitioned for judicial review of the 2024 Order in various circuit courts of appeals. Those petitions were consolidated in the U.S. Court of Appeals for the Sixth Circuit, where they remain pending.

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[7] Applicants misconstrue the Second Circuit's decision in contending (Appl. 8, 12-13) that it ruled that Title II but not Title I has field preemptive effects. The court did not make any such ruling, instead pointing to Title II, among many other statutory provisions, as reasons why there was *no* field preemption. (Pet. App. 27a-29a.)

Applicants here indicated that they intended to file a new litigation challenging the ABA if the FCC's 2024 Order took effect. In exchange for applicants' agreement (1) not to file a new complaint asserting preemption under the FCC's 2024 Order unless and until that Order took effect, and (2) not to seek further review in the court of appeals in this litigation, respondent agreed not to enforce the ABA against applicants' members for a brief period until the 2024 Order took effect or its enforcement was stayed in the Sixth Circuit litigation challenging the Order (Appl. Ex. 5 (Dist. Ct. Stip.) at 3).

In August 2024, a motions panel of the Sixth Circuit temporarily stayed implementation of the 2024 Order while the petitions for review are pending; ordered that a new panel hear the petitions on the merits; and set the petitions for oral argument on October 31, 2024. *See In re MCP No. 185*, No. 24-7000, 2024 WL 3650468 (6th Cir. Aug. 1, 2024) (per curiam); *see also* Notice of Oral Argument (Aug. 26, 2024), *In re MCP No. 185*, No. 24-7000, ECF No. 124.

After the Sixth Circuit stayed enforcement of the 2024 Order, applicants filed this application for a stay of enforcement of the ABA pending resolution of their then-forthcoming petition for certiorari. In exchange for applicants' agreement to file their petition promptly by August 12, 2024, and to allow the parties and the Court a reasonable amount of time to brief and resolve the stay application and petition, respondent then agreed to extend the parties' prior nonenforcement agreement until this Court decides whether or not to grant the petition for certiorari—but not until final resolution of the case on the merits if the Court grants certiorari, as applicants

seek in their application.[8] *See* Jt. Ltr. from Counsel for Pet'rs and Resp. & Attachment (filed Aug. 8, 2024).

ARGUMENT

I. There Is No Basis for a Stay of the Judgment of the Court of Appeals.

In determining whether to grant a stay, this Court considers whether the applicant has demonstrated a reasonable probability that the Court will both grant certiorari and conclude that the decision below was erroneous, and whether the applicant has demonstrated a likelihood of irreparable harm absent a stay. The Court also balances the equities to assess the relative harms to the parties and the public interest. *See Indiana State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960 (2009) (per curiam). "A stay is not a matter of right, even if irreparable injury might otherwise result." *Id.* at 961 (2009) (quotation marks omitted). "It is instead an exercise of judicial discretion, and the party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* (quotation marks omitted). Applicants have not met their burden here; indeed, each of the relevant factors weighs against a stay.

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[8] The parties' agreement mooted the applicants' request (Appl. 1, 29) for a decision on their application by August 15, 2024.

A. Applicants Have Not Shown That This Court Is Likely to Grant Review.

As an initial matter, a stay is not warranted because applicants have not carried their burden to show that this Court is likely to grant certiorari, for several independent reasons.

First, this case is an exceedingly poor vehicle for certiorari. The federal framework (Title I or Title II) applicable to broadband is in flux, rendering this case a poor vehicle to review the question presented by applicants' petition, i.e., whether Congress preempted state regulation of broadband when it is classified as a Title I information service. Shortly after the Second Circuit issued its decision, the FCC finalized the 2024 Order classifying broadband as a Title II telecommunications service rather than a Title I information service. That shift drastically alters the preemption analysis relevant to the ABA. While the Second Circuit's decision here is based on broadband having been classified as a Title I information service, Congress made very different choices about the scope of the FCC's regulatory authority and the potential for preemption of state laws governing Title II telecommunications services. Indeed, applicants have made clear that they intend to file an entirely new litigation raising new claims that the ABA is preempted under the 2024 Order as soon as that Order takes effect.[9] (*See* Appl. Ex. 5 (Dist. Ct. Stip.) at 3.)

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[9] Applicants have indicated that they contend the ABA is preempted under the 2024 Order (*see* Appl. Ex. 5 (Dist. Ct. Stip.) at 3), even though the FCC expressly declined in the 2024 Order to preempt state broadband affordability programs like the ABA and found "that states have a critical role to play in promoting broadband

(*continues on the next page*)

Although applicants suggest that the Sixth Circuit's temporary stay of the 2024 Order means that the Sixth Circuit will likely overturn the Order, the temporary stay is not a decision on the merits and depended heavily on equitable considerations. *See In re MCP No. 185*, 2024 WL 3650468, at *4. Though the stay panel also found that the challengers are likely to succeed on the merits, that panel will not decide the merits appeal and its view on the merits may thus have little effect on the new panel's ultimate ruling. *See id.* at *5.[10]

Second, this Court is unlikely to grant certiorari because the decision below does not conflict with any decision of another court of appeals—or of any court. Applicants do not contend otherwise. The two other courts of appeals—the D.C. Circuit and the Ninth Circuit—that have considered whether the Communications Act preempts state regulation of broadband when it is classified as a Title I information service are in accord with the Second Circuit that "the answer is 'no.'" (Pet. App. 33a.)

As the D.C. Circuit has determined—consistent with the court of appeals below—Congress chose to give the FCC only limited ancillary authority over Title I

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affordability and ensuring connectivity for low-income consumers" (2024 Order at 175). But that is not a question that was presented or decided below, nor is it presented by applicants' petition for certiorari.

[10] Yet another reason this case is a poor vehicle for review of the question presented is the issue of appellate jurisdiction raised by the dissent in the Second Circuit (Pet. App. 39a-56a). While the Second Circuit majority correctly concluded that there was finality, and therefore appellate jurisdiction (Pet. App. 8a-16a), and neither party has asked this Court to revisit the issue, the Court might well need to consider the jurisdictional issue before reaching the question presented.

information services, leaving ample room for the States to regulate such services. *See Mozilla*, 940 F.3d at 74-80.

The Ninth Circuit agrees. In *ACA Connects-America's Communications Association v. Bonta*, the Ninth Circuit rejected the same preemption arguments that applicants make here, explaining that neither Title I nor any other provision of the Communications Act remotely suggests that Congress occupied the field of interstate communications services. 24 F.4th 1233, 1247-48 (9th Cir. 2022). The Ninth Circuit also rejected the same conflict preemption arguments that applicants raise here, *see id.* at 1245-46, and abandoned at the Second Circuit (see *infra* at 25).

Federal district courts are in agreement, rejecting preemption challenges to state laws regulating broadband or other Title I information services. *See, e.g.*, *ACA Connects-Am. Commc'ns Ass'n v. Frey*, 471 F. Supp. 3d 318, 323-26 (D. Me. 2020) (Maine statute regulating broadband); *TV Pix*, 304 F. Supp. at 463-64.

Third, this appeal does not merit this Court's review because it does not implicate matters of nationwide importance. As an initial matter, applicants' arguments are based on the incorrect premise that the ABA imposes "public-utility"-style regulation on broadband. The ABA does not regulate the rates charged to all broadband users. Rather, the ABA is a consumer-protection regulation that ensures that affordable broadband access is available to the neediest state residents.

In any event, for two reasons, the ABA will not have the drastic regulatory or economic effects that applicants describe for broadband providers in New York—let alone for providers in other States. First, New York's three largest broadband

providers are already voluntarily providing affordable broadband products to low-income consumers irrespective of the ABA. And, second, the ABA exempts any small providers for whom the ABA's requirements would not be feasible. See *infra* at 29-31.

There is also no merit to applicants' speculation (Appl. 18-19) that the ABA will have substantial effects outside of New York. The ABA was enacted more than three years ago. But as far as respondent is aware, no other State has enacted a law that, like the ABA, requires broadband providers to offer low-income individuals an affordable broadband product. There is thus no reason to expect the sort of "patchwork" of differing state regulations that applicants imagine.

In any event, there is nothing novel about States making different legislative choices about how they protect consumers and regulate businesses—including through pricing-related laws. Indeed, "the structure and limitations of federalism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons," *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (quotation marks omitted), and the operation of business "in any of its aspects, including the prices to be charged," *Nebbia*, 291 U.S. at 537. Accordingly, States routinely enact a variety of laws that set different caps on prices. *See, e.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 529-30 (1992) (rent); *Nebbia*, 291 U.S. at 519-20, 539 (milk); *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257 (1931) (insurance commissions); *Griffith v. Connecticut*, 218 U.S. 563, 567-69 (1910) (interest rates on loans). The ABA fits squarely within this longstanding tradition.

Applicants also err in arguing (Appl. 18-19) that allowing the ABA to take effect would chill investment in broadband. Applicants speculate that investment in broadband has grown in recent years because of the FCC's 2018 Order classifying broadband as an information service. But the FCC has found such speculation unsubstantiated. *See* 2024 Order at 175-88. Indeed, there is substantial evidence that investment also increased significantly for various telecommunications services subject to Title II's more rigorous federal statutory regime—including broadband when it was classified as a Title II telecommunications service. *See, e.g.*, *id.* at 175-76. Given that stricter federal regulation across the board did not chill investment, there is no reason to conclude that a single state regulation governing broadband service to a small proportion of New York's population (i.e., low-income consumers) would do so.

Fourth, the Court is unlikely to grant certiorari because the court of appeals' decision is correct, for all the reasons discussed below (see *infra* at 20-27).

B. Applicants Have Not Shown That They Would Be Likely to Prevail If This Court Did Grant Review.

A stay is also inappropriate because, even if this Court did grant certiorari, applicants have not shown that they would be likely to prevail. "[B]ecause the States are independent sovereigns in our federal system," there is a strong presumption "that the historic police powers of the States were not to be superseded by [federal statute] unless that was the clear and manifest purpose of Congress." *Medtronic, Inc.*, 518 U.S. at 485 (quotation marks omitted). Applicants failed to establish any such clear and manifest congressional purpose to preempt a state law like the ABA.

Field Preemption: To establish field preemption, which is quite rare, *see Kansas v. Garcia*, 589 U.S. 191, 208 (2020), there must be a federal statutory regime "so pervasive that Congress left no room for the States to supplement it," *Arizona v. United States*, 567 U.S. 387, 399 (2012) (alteration and quotation marks omitted). The Second Circuit properly rejected applicants' remarkably sweeping argument that Congress intended to preempt States from regulating the entire field of interstate communications services (Pet. App. 17a-31a)—an argument that applicants backed away from at the Second Circuit and are now resurrecting in their certiorari petition (*see* Pet. App. 18a-19a).

That argument is plainly incorrect because the Communications Act does not impose any pervasive federal statutory regime on all interstate communications services. To the contrary, the Act's various statutory titles impose very different types of federal statutory regimes on different types of interstate communications services (e.g., radio, cable television, mobile, information services, telecommunications services). And these distinct statutory regimes reflect Congress's different choices about the extent of the FCC's regulatory authority and the scope of potential preemption of state laws—depending on the type of interstate communications service involved. See *supra* at 3-6. As the Second Circuit correctly observed, "no court ha[s] ever found field preemption of the whole of interstate communications," and courts "have upheld numerous state regulations of interstate communications services against preemption challenges." (Pet. App. 17a-18a (quotation marks omitted); *see* Pet. App. 18a (listing examples).)

The Act's targeted structure and many of its specific provisions also dispose of applicants' argument that Congress entirely ousted States from the field of regulating the rates charged for Title I information services. Title I gives the FCC only limited ancillary authority over information services, and does not expressly provide the FCC with authority over rates. See *supra* at 4-5. Such narrow federal authority is the opposite of the type of pervasive federal regime that is required for field preemption. Moreover, unlike Title I, Title II of the Act gives the FCC broad authority over the rates charged for telecommunications services, including the authority to displace certain state regulations of telecommunications services. See *supra* at 5-6. And when it wanted to do so, Congress expressly preempted certain—but not all—state regulation of the rates for other interstate communications services, such as mobile phone services. See *supra* at 6. These express preemption provisions demonstrate "that matters beyond [those provisions'] reach are not pre-empted." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992).

Congress also included various other provisions in the Act that further confirm its intent to preserve a role for the States in regulating interstate communications services, including rates. For example, a statutory savings clause provides that the Act's remedies do not "in any way abridge or alter" existing state legislative or common-law remedies, 47 U.S.C. § 414—a broad preservation of state authority fundamentally incompatible with field preemption. And another provision of the Act explicitly encourages States to promote broadband internet access, including through means such as "price cap regulation." *Id.* § 1302(a).

Section 152 of the Act does not establish field preemption, as applicants contend (Appl. 13-14). That section sets forth the general scope and limits on the FCC's jurisdiction by stating that the Act "shall apply to all interstate and foreign communication by wire and radio" in the United States, 47 U.S.C. § 152(a), and that the FCC does not have jurisdiction over "intrastate communication service," *id.* § 152(b). But § 152 does not suggest—much less clearly and manifestly demonstrate—that the FCC has *exclusive* jurisdiction over interstate communications services. *See ACA Connects*, 24 F.4th at 1246-48; *TV Pix*, 304 F. Supp. at 464. Indeed, the mere existence of a federal regulatory scheme "does not by itself imply pre-emption of state remedies." *English v. General Elec. Co.*, 496 U.S. 72, 87 (1990).

Applicants misplace their reliance (Appl. 13-14) on *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), which "strongly undermines, rather than supports," applicants' argument (Pet. App. 23a). *Louisiana* emphasized that § 152 limits *the FCC*'s jurisdiction by prohibiting it from regulating intrastate communications services, 476 U.S. at 359—not *the States'* jurisdiction. And where *Louisiana* described the FCC's authority as "plenary," *id.* at 360, it was discussing the FCC's authority over wireline telephone service, *see id.* at 360, 366-68—which is a Title II telecommunications service. The FCC does not have such plenary authority over Title I information services. In any event, field preemption "cannot be judged by reference to broad statements about the 'comprehensive' nature of federal regulation under the Federal Communications Act," but rather must rest on "positive evidence of legislative intent" in "specific provisions of the federal statute." *Head v. New Mexico Bd. of*

Examiners in Optometry, 374 U.S. 424, 429-30, 432 (1963). Neither § 152 nor any other provision of the Act establishes congressional intent to oust States from regulating Title I information services.

Applicants also misplace their reliance (Appl. 14) on language in the Federal Power Act and the Natural Gas Act that they contend is similar to § 152 of the Communications Act. The interpretation of those statutes is properly informed by statutory provisions and history wholly different from those presented here. For instance, the Federal Power Act and the Natural Gas Act contain detailed provisions authorizing the relevant federal agency to comprehensively regulate the rates of interstate electricity and gas sales, respectively. *E.g.*, 16 U.S.C. § 824; 15 U.S.C. § 717c; *see Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 154 (2016) (relying on Federal Power Act expressly authorizing federal agency to regulate rates in finding preemption of state statute). By contrast, Title I of the Communications Act gives the FCC no comparable authority.[11] Moreover, Congress enacted the Federal Power Act and the Natural Gas Act after this Court had held in Commerce Clause decisions that States could not regulate the wholesale rates of gas or electrical energy moving in interstate commerce. *See Interstate Nat. Gas Co. v. Federal Power Comm'n*, 331 U.S. 682, 689-90 (1947). (*See also* Pet. App. 24a-25a (describing history).) These federal statutes thus

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[11] Applicants also err in relying (Appl. 14 n.11) on the Mann-Elkins Act, which this Court found preempted certain state telegraph regulation more than a century ago. *See Western Union Tel. Co. v. Boegli*, 251 U.S. 315 (1920); *Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co.*, 251 U.S. 27 (1919). Under the Mann-Elkins Act, interstate telegraph was regulated as a common carrier over which the federal government had broad authority—and thus was not analogous to Title I information services like broadband. (*See* Pet. App. 30a-31a.)

ensured that wholesale rates of interstate gas and electricity did not go entirely unregulated. *Federal Power Comm'n v. Southern Cal. Edison Co.*, 376 U.S. 205, 213 (1964). No similar history exists for the Communications Act.

Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988), does not reject the relevance of these differing historical contexts (*contra* Appl. 15). In *Schneidewind*, the Court observed that the history of the Natural Gas Act did not easily answer the question presented there, i.e., whether a particular state statute fell within the field that was indisputably preempted by that law. 485 U.S. at 304-05. Here, by contrast, the question is whether the Communications Act preempts the relevant field at all. The histories of the Natural Gas and Federal Power Act demonstrate that petitioners' reliance on those laws fails.

Conflict Preemption: Applicants' conflict preemption argument also fails. Applicants abandoned in the Second Circuit the conflict preemption argument that they raise in their petition. Applicants now rely (Appl. 16) on an asserted conflict between the ABA and the Act's definition of "telecommunications carrier," 47 U.S.C. § 153(51). But applicants explicitly abandoned that argument below. *See* Br. for Pls.-Appellees at 15 n.26. As a result, the court of appeals did not rule on it. Applicants' conflict preemption argument is thus not properly presented because it was "neither raised in nor addressed by the Court of Appeals," and thus provides no basis for reversal. *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 527 (1994).

In any event, applicants' conflict preemption argument is meritless. Section 153(51) merely defines "telecommunications carrier" as "any provider of telecommuni-

cations services," which "shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services." 47 U.S.C. § 153(51). This rather circular definition says nothing about *information services*—which are separately defined, *id.* § 153(24)—or preemption.[12] In any event, in the 1996 amendments to the Act that added this definition, Congress specifically declared that the amendments shall have "No implied effect" and "shall not be construed to modify, impair, or supersede" state law "unless expressly so provided." Pub. L. 104-104, § 601(c)(1), 110 Stat. at 143 (codified at 47 U.S.C. § 152 note). This "anti-preemption clause" precludes any interpretation of the definition that would "oust[] the state legislature by implication." *AT&T Commc'ns of Ill., Inc. v. Illinois Bell Tel. Co.*, 349 F.3d 402, 410 (7th Cir. 2003) (Easterbrook, J.); *see ACA Connects*, 24 F.4th at 1245-46.

Lacking any statutory provision that conflicts with the ABA, applicants contend (Appl. 17-18) that Congress's decision not to impose broad *federal* regulation on Title I information services impliedly preempts *the States* from such regulation. But Congress's decision not to grant the FCC broad authority over information services says nothing about the scope of the States' sovereign authority over information services. Unlike federal agencies, States do not need any grant of authority from Congress to regulate.

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[12] Section § 153(24) defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."

Although the FCC may classify services like broadband as either Title I information services or Title II telecommunications services, that classification decision does not itself preempt state laws. Rather, classification decides which federal statutory framework applies. And the consequence of the FCC classifying broadband as a Title I information service is that the FCC has only limited ancillary authority that does not include preempting States from regulating rates. *See ACA Connects*, 24 F.4th at 1241-45; *Mozilla*, 940 F.3d at 74-86. Permitting the FCC to expand its preemptive power "in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress." *Louisiana*, 476 U.S. at 374-75.

The cases on which applicants rely (Appl. 17) are not to the contrary. In *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi*, 474 U.S. 409 (1986), a State was precluded from regulating certain natural gas rates because Congress had preempted the field—which Congress did not do here.[13] *Transcontinental* did not establish that "deliberate federal inaction"—as in Title I—will "always imply pre-emption" of state law. *See Puerto Rico Dep't of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). Indeed, that rule simply "cannot be," because "[t]here is no federal pre-emption *in vacuo*," without "a federal statute to assert it." *Id.*

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[13] *See also Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 514 (1989) (explaining that *Transcontinental* was a field preemption decision).

C. The Equities Weigh Strongly Against a Stay and Applicants Have Not Shown Irreparable Harm.

The equities and the public interest also weigh heavily against applicants' requested stay. As an initial matter, a stay would prevent the State from enforcing a law duly enacted by its Legislature in an exercise of its police power. "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (alteration and quotation marks omitted). Here, that injury would fall squarely on the vulnerable state residents who either currently lack or lose access to affordable broadband internet, which is often used for needs like healthcare, education, and work. For example, although Verizon voluntarily offers an affordable broadband product to certain low-income consumers (*see* Appl. Ex. 13 ¶¶ 3-4), it might cease to do so—and there are some low-income consumers who do not qualify for Verizon's affordable broadband product who would qualify under the ABA (Appl. Ex. 13 ¶ 6). Moreover, the harm to the public would be heightened by the months- or even years-long delay in this Court's adjudication of applicants' petition that applicants have requested pending resolution of a hypothetical future certiorari petition from the yet-to-be-decided (-or-even-to-be-argued) Sixth Circuit case challenging the lawfulness of the FCC's 2024 Order. *See* Pet. 23.

Applicants' observation (Appl. 25-27) that the federal government and the State have taken steps other than the ABA to support broadband affordability further underscores that the ABA is in the public interest and that its enforcement should not be stayed by the Court. Numerous public actors have recognized the challenge of

ensuring affordable broadband access and have made efforts to close the digital divide. Yet New York's Legislature made the policy decision that the ABA is still needed, notwithstanding any recent decrease in market prices for broadband (Appl. 27). And as applicants recognize (Appl. 26), the federal Affordable Connectivity Program to subsidize broadband for low-income households recently ended—increasing the importance of the ABA to low-income consumers.

Moreover, contrary to applicants' suggestion (Appl. 21-24), they would be unlikely to suffer meaningful harm from allowing the ABA to take effect pursuant to the court of appeals' judgment. New York's three largest broadband providers—Charter, Altice, and Verizon—have already voluntarily agreed to provide affordable broadband to low-income consumers in the State, and the ABA exempts any small providers for whom the ABA's requirements would not be feasible. (Galasso Decl. ¶¶ 5, 7, 15-20.) Although there are some low-income consumers in the State who do not have access to one of these providers' affordable broadband products and thus would depend on the ABA, Charter, Altice, and Verizon together provide broadband service to over 95% percent of the State. (Galasso Decl. ¶ 5.)

More specifically, Charter and Altice have already agreed to provide a broadband product that is fully compliant with the ABA's requirements—regardless of whether the law is in effect. Under recent agreements related to earlier merger conditions, Charter (owner of broadband provider Spectrum) and Altice (owner of broadband provider Optimum) each agreed to provide broadband service at speeds exceeding 25 megabits per second to low-income state residents for $15 a month, just

as the ABA requires, for at least the next four years (subject to similar inflation adjustments as the ABA itself permits). (Galasso Decl. ¶¶ 18, 20.) Thus, allowing the ABA to take effect would have no impact on the State's two largest broadband providers, at least for the time being.

In addition, Verizon voluntarily provides a broadband product that is broadly consistent with the ABA's requirements—as Verizon's own declaration explains—although there is no guarantee that Verizon will retain such a product without the ABA taking effect. (*See* Appl. Ex. 13 ¶¶ 3-4 (Verizon currently offers broadband service at speeds of at least 200 megabits per second to many low-income state residents for $19.99 a month).) Insofar as Verizon asserts that it would suffer a loss to the limited extent that the ABA applies to additional customers who are not eligible for its existing program, Verizon does not attest that such a limited loss (during the time it would take the Court to adjudicate the merits, if it were to grant certiorari) would be financially unsustainable for a company with $134 billion in revenue and $47.8 billion in operating profits (EBITDA) last year.[14] (*See* Galasso Decl. ¶ 16.)

Although applicants have identified some smaller broadband providers that attest that complying with the ABA would not be feasible for them (Appl. 22-23), the ABA has an exemption designed for precisely such providers. The ABA states that it

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[14] *See* Verizon Commc'ns, Inc., *Verizon 4Q 2023 Earnings Results* (2024). Likewise, AT&T does not attest (*see* Appl. Ex. 14) that it would be unable to sustain any losses from complying with the ABA, when the company had $122.4 billion in revenue and $24.7 billion in adjusted operating income last year. *See* AT&T, Inc., *AT&T Delivers Strong 2023 Results, Cash from Operations and Free Cash Flow Driven by 5G and Fiber Growth* (Jan. 24, 2024).

shall not apply to providers serving no more than twenty thousand households if compliance with the ABA "would result in unreasonable or unsustainable financial impact" on the provider. General Business Law § 399-zzzzz(5). Tellingly, each of the smaller providers that submitted declarations supporting applicants acknowledge that they might qualify for the exemption. (Appl. Ex. 10 (Champlain) ¶ 14; *Id.* Ex. 11 (Heart of the Catskills) ¶ 22; *Id.* Ex. 12 (Delhi) ¶ 12; *see also* J.A. 12-16 (Empire).) In fact, each of them already received a provisional exemption.[15] (J.A. 105-113; Galasso Decl. ¶ 10.)

For similar reasons, there is no merit to applicants' concern (Appl. 24) that there might be administrative costs associated with ABA compliance, such as advertising or tracking eligibility for ABA pricing. Small providers eligible for the statutory exemption need not incur any such costs. And larger providers that already have programs for low-income consumers already have existing systems for tracking eligibility for those programs and a way to advertise them—such that ABA compliance should add no meaningful incremental cost.[16] (*See* Galasso Decl. ¶ 16.)

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[15] Applicants contend (Appl. 23 n.15) that these providers do not yet know for certain whether they will be approved for a permanent exemption. But—as the PSC explains in its attached declaration (Galasso Decl. ¶¶ 9-10)—these providers attest to precisely the sort of "unreasonable or unsustainable financial impact" that the statute requires for the exemption, General Business Law § 399-zzzzz(5), and they have already received a provisional exemption.

[16] Applicants' suggestion (Appl. 24) that the ABA imposes burdensome new advertising requirements is incorrect. The statute merely requires "commercially reasonable efforts" to advertise the availability of broadband service for low-income consumers, for instance, on the provider's website. General Business Law § 399-zzzzz(7).

Likewise, applicants fail to demonstrate irreparable harm based on their speculative assertion (Appl. 24) that they might suffer a reputational harm if they were required to offer an ABA-compliant product pursuant to the court of appeals' judgment, and the providers later withdrew that product following a reversal of the judgment from this Court. Providers that are eligible for exemptions from the ABA's requirements or that offer ABA-compliant products voluntarily would suffer no such harm. And, in any event, no provider has offered any concrete evidence to support their speculation regarding possible future reputational harm.

II. FOR THE SAME REASONS, THERE IS NO BASIS FOR AN INJUNCTION PENDING APPEAL.

Applicants' alternative request for an injunction barring enforcement of the ABA pending final disposition of their case in this Court is meritless for the same reasons their (functionally indistinguishable) request for a stay of the judgment below is meritless. The standards for both forms of relief are similar. But the standard for an injunction is even harder to satisfy because, unlike a stay pending appeal, which suspends the decision below, an injunction pending appeal grants affirmative judicial intervention withheld by the lower court. *See Nken v. Holder*, 556 U.S. 418, 429 (2009). An injunction pending appeal therefore may not be granted except "in the most critical and exigent circumstances," *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313-14 (1986) (Scalia, J., in chambers), i.e., unless the injunction is "necessary or appropriate in aid of [the Court's] jurisdiction and the legal rights at issue are indisputably clear," *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403 (2012) (Sotomayor, J., in chambers) (quotation

and alteration marks omitted). Applicants have not come close to meeting their substantial burden to demonstrate an "indisputably clear" right to an injunction here.

CONCLUSION

The application for an emergency stay of the judgment of the court of appeals or an injunction of enforcement of the ABA should be denied.

Dated: New York, New York
October 15, 2024

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York

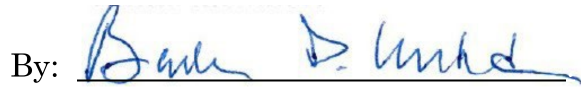
By: 

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EXHIBIT

No. 24A138

In The
Supreme Court of the United States

NEW YORK STATE TELECOMMUNICATIONS ASSOCIATION, INC., et al.,

Applicants,

v.

LETITIA JAMES, Attorney General of New York,

Respondent.

DECLARATION OF VALERY GALASSO IN OPPOSITION TO APPLICATION FOR AN EMERGENCY STAY

DECLARATION OF VALERY GALASSO

I, Valery Galasso, declare as follows:

1. I, Valery Galasso, serve as the Chief of Public Policy in the Office of Telecommunications at the New York State Department of Public Service (DPS). As chief, I am familiar with the New York Affordable Broadband Act (ABA), the litigation surrounding it, and the DPS's dealings with regulated telecommunication carriers covered by it.

2. The New York State Public Service Commission is composed of seven members appointed by the Governor of New York on the advice and consent of the State Senate, one of which is designated as Chair. The Commission has broad powers to regulate the State's electric, gas, steam, telecommunications, and water utilities, and it oversees the cable industry.

3. The DPS is the staff arm of the Public Service Commission. Staff answers to the Chair of the Commission, who also serves as Chief Executive Officer of the DPS. The primary aim of the DPS is to aid the Commission in the exercise of its mission. It does this through various actions including, but not limited to, preparing staff reports, drafting orders for the Commission, investigating and pursuing violations of the Commission's orders and regulations, and aiding the Commission in its regulatory functions.

4. I submit this declaration in response to the emergency stay application filed in this case and the supporting declarations of Wade Northrup of Champlain

Telephone Co., Glen Faulkner of MTC Cable (Heart of the Catskills Communications, Inc.), Jason Miller of Delhi Telephone Co., and Matthew Kramer Coakley of Verizon Communications, Inc.

5. The Commission, the DPS, and the State of New York have long recognized that access to high-speed broadband internet is critical for everyday life in the modern world. Such access supports economic development, ensures access to healthcare through telemedicine, allows individuals the flexibility to work from home, and opens educational opportunities for all. New York has made great strides in building out the infrastructure for broadband service. According to New York State's annually updated broadband map, over 97% of New York addresses are now served by at least one high-speed broadband service provider.[1] Over 95% of these address points are served by Charter Communications, Altice USA, and/or Verizon, New York's three largest internet service providers.[2] Despite these strides, affordability remains an obstacle to true access—for as many as 1.7 million New

[1] *In the Matter of the Commission's Broadband Study and Mapping Pursuant to the Broadband Connectivity Act*, 2024 Report and Map on the Availability, Reliability and Cost of High-Speed Broadband Services in New York, N.Y. Pub. Serv. Comm'n Case No. 22-M-0313 (June 20, 2024), Item No. 40. (Commission documents are available at https://documents.dps.ny.gov/public/common/search.html.)

[2] *In the Matter of the Commission's Broadband Study and Mapping Pursuant to the Broadband Connectivity Act*, Report on the Current Opportunities to Access Low-Income Broadband Programs in New York State 4, Case No. 22-M-0313 (Sept. 24, 2024), Item No. 45.

York households, cost remains a hurdle to broadband access.[3] The ABA is an important tool in responding to that problem, expanding meaningful access to broadband, and closing the digital divide.

6. Champlain, MTC, Delhi, and Verizon Communications are each companies operating in the State of New York subject to the jurisdiction of the Commission.

Small Providers

7. Champlain, MTC, and Delhi each avers that it is a small company unable to absorb costs associated with complying with the ABA's requirement to offer an affordable broadband service to certain low-income customers. But each company provides service to fewer than 20,000 subscribing households. And the ABA provides that it "shall not apply" to a broadband provider with fewer than 20,000 subscribing households if the Public Service Commission determines that compliance "would result in unreasonable or unsustainable financial impact" to the provider. N.Y. General Business Law § 399-zzzzz(5).

8. Delhi states that the Commission has not yet authoritatively "announced any standards for evaluating exemption requests." Delhi is mistaken. On April 21, 2021, DPS staff in the Office of Telecommunications did issue written guidance to providers, detailing the minimum requirements for an exemption

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[3] Affordable Connectivity Program, Universal Serv. Admin. Co., (last updated Feb. 8, 2024), https://www.usac.org/about/affordable-connectivity-program/acp-enrollment-and-claims-tracker/.

request for the Commission's consideration.[4] In that guidance document, staff explained that a request must include an attestation of the number of subscribers, its audited financial records, an estimate of the number of subscribers eligible for the ABA's low-income program, and an "estimate of the annual financial impact expected" from the ABA. That estimate, the guidance continued, should include an estimate of net revenue loss and incremental revenue loss.[5] On May 14, 2021, DPS staff released additional guidance providing that companies could file alternative information or support for their contention that they would face undue economic hardship from the ABA.[6]

9. The factual assertions Champlain, MTC, and Delhi make to this Court about the effects of the ABA on them are of the sort outlined in the DPS's guidance documents that would inform the Commission's consideration of an exemption request. Without pre-judging the factual accuracy of these assertions—only the Commission can adjudge those facts, presented with appropriate support—the purported "irreparable harms" the companies allege are financial impacts that the

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[4] *In the Matter of Company Exemptions from the Requirement to Offer a Low-Income Broadband Product*, DPS Staff Provides Guidance for Low Income Broadband Exemption, N.Y. Pub. Serv. Comm'n Case No. 21-M-0290 (April 26, 2021), Item No. 1 (attached to this declaration as Exhibit A).

[5] *Id*. at 2.

[6] *In the Matter of Company Exemptions from the Requirement to Offer a Low-Income Broadband Product*, DPS Staff Provides Updated Guidance for Low Income Broadband Exemption May 14, Case No. 21-M-0290 (May 14, 2021) Item No. 64 (attached to this declaration as Exhibit B).

Commission may consider. The companies' fears that their cases will be insufficiently compelling to trigger an exemption are thus speculative.

10. When the ABA was first scheduled to take effect (and before this litigation was commenced), Champlain, MTC, and Delhi each requested an exemption pursuant to N.Y. General Business Law § 399-zzzzz(5). Recognizing that it would be "unreasonable to require" companies asking for exemptions "to implement the provisions of [the ABA] while [their] exemption request[s] [were] pending," the Commission granted a provisional exemption to each of them, as well as to a number of other companies with fewer than 20,000 subscribers that had requested exemptions.[7] Moreover, the Commission did this promptly; petitions for exemptions were filed May 13, 14, and 17 of 2021, and the Commission acted via a single-Commissioner order to grant provisional exemptions on May 20, 2021.[8]

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[7] *In the Matter of Company Exemptions from the Requirement to Offer a Low-Income Broadband Product*, Order Granting Temporary Exemptions, N.Y. Pub. Serv. Comm'n Case No. 21-M-0290 (May 20, 2021), Item No. 88.

[8] *Id.* The May 2021 Order granted provisional exemptions to 40 small providers, and additional, automatic exemptions to any provider who requested an exemption prior to the effective date of the statute. Following the District Court's 2021 injunction barring implementation/enforcement of the ABA and in conformity with that order, the Commission and the DPS ceased activities to implement the ABA. *In the Matter of Company Exemptions from the Requirement to Offer a Low-Income Broadband Product*, Order Staying and Suspending Administrative Proceeding, Case 21-M-0290 (June 21, 2021), Item No. 115. Following the Second Circuit's decision, the DPS opened a new proceeding to process filings—including exemption filings—in relation to the ABA. The DPS stands ready to process any exemption requests as soon as enforcement of the ABA is set to begin.

11. In addition, Champlain and MTC each argue that they will lose customers in their service areas due to competition from lower ABA-priced providers in their areas. But that result is unlikely.

12. In the case of Champlain, Charter Communications is a large competitor and operates in the same service area. Charter has operated a low-income internet program since 2017. Under that program, it offered $14.99 internet for approximately six years. Although that price briefly rose to $24.99 this year, Charter will offer $15 internet as the result of a settlement with the Commission for the next four years.

13. Delhi faces the same situation: Charter has a presence in Delhi's service area. For years, Charter has offered low-income broadband well below Delhi's rates, while Delhi has continued to operate.

14. According to data maintained by the DPS, MTC has very little competition in its service area that offers wired broadband. If MTC is granted the ABA exemption it seeks, it should have no downward price pressure from the ABA.[9]

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[9] MTC also writes of its "experience with DPS," suggesting that the DPS "recently imposed burdensome and over-reaching conditions on MTC in connection with approval of a simple stock repurchase transaction." Decl. of Glen Faulkner ¶ 22. MTC appears to be referring to conditions the Commission attached to its April 21, 2023 approval of MTC's request to transfer more than 10% of its equity shares to its Employee Stock Equity Plan. *See Petition of Margaretville Telephone Company, Inc. for Authority to Transfer More than a Ten Percent Interest*, Order Granting Joint Petition Subject to Conditions, N.Y. Pub. Serv. Comm'n Case. No. 22-C-0593, (April 21, 2023), Item No. 5. Under New York law, such a plan can only be approved if the Commission finds it is in the public interest. N.Y. Public Service Law § 100. To protect the public interest in that case, the Commission conditioned its approval on

Verizon

15. Verizon is one of the three largest broadband providers in New York State.

16. Verizon already voluntarily runs a low-income broadband program, Verizon Forward, with price points as low as $20 for 300 Mbps—a price point and speed that would comply with the ABA. Although the ABA's eligibility criteria appear to be somewhat broader than Verizon's, as a large, national corporation, it is unlikely that Verizon would experience significant "irreparable" harm from complying with the ABA's eligibility criteria. Similarly, Verizon avers that it uses a verification system for its current eligibility program; there should not be significant added cost to using that system to track ABA eligibility. The DPS notes that other companies operating low-income programs in New York—including Charter and Altice (discussed further below)—employ broader criteria than Verizon's program and are able to navigate any logistical hurdles of verification.

Charter and Altice

17. Charter is also one of New York State's three largest broadband providers.

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several requirements for MTC to meet, which is a common practice. Although MTC could have judicially challenged the Commission's determination, it instead chose to "unconditionally accept all of the terms, conditions, and requirements of the Order…." *Petition of Margaretville Telephone Company, Inc. for Authority to Transfer More than a Ten Percent Interest*, MTC Acceptance Letter, Case. No. 22-C-0593 (April 28, 2023), Item No. 6.

18. As discussed above, Charter has operated a low-income internet program in New York since 2017. Charter developed that program in connection with a merger condition when Charter acquired Time Warner Cable. Under that program, Charter offered $14.99 internet at a speed of 30 Mbps for approximately six years and will now offer $15 internet at 50 Mbps as the result of a settlement with the Commission for at least the next four years, subject to inflation adjustments. The contours of this program are broadly consistent with the ABA.

19. Altice is also one of New York State's three largest broadband providers.

20. Altice has operated a low-income internet program in New York since 2017. Altice developed that program in connection with a merger condition when Altice acquired Cablevision. Under that program, Altice initially offered $14.99 internet at a speed of 30 Mbps. In 2021, Altice voluntarily raised its speed to 50 Mbps. Altice recently petitioned the Commission to align the length of its low-income broadband commitment with Charter's commitment. If approved, Altice will continue to offer $14.99 internet at the same speed for at least the next four years, subject to inflation adjustments. Once again, the contours of this program are broadly consistent with the ABA.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14 day of October 2024 in Amenia, NY

Valery Galasso

Valery Galasso

Exhibit A

In the Matter of Company Exemptions from the Requirement to Offer a Low-Income Broadband Product, DPS Staff Provides Guidance for Low Income Broadband Exemption, Case No. 21-M-0290 (April 26, 2021), Item No. 1.

Department of Public Service

Three Empire State Plaza, Albany, NY 12223-1350
www.dps.ny.gov

Public Service Commission
John B. Howard
Interim Chair and
Interim Chief Executive Officer

Diane X. Burman
James S. Alesi
Tracey A. Edwards
Commissioners

April 26, 2021

Hon. Michelle L. Phillips, Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350

Re: Matter 21-00914 – In the Matter of Company Exemptions from the Requirement to Offer a Low-Income Broadband Product.

Dear Secretary Phillips:

On April 16, 2021, Governor Andrew M. Cuomo signed into law the Affordable Broadband Act, requiring internet service providers (ISPs) to offer a $15 broadband plan to qualifying New Yorkers, including households who are eligible for or receiving free or reduced-price school lunch, supplemental nutrition assistance program benefits (SNAP), Medicaid benefits, senior citizen or disability rent increase exemptions, or an affordability benefit from a utility. The legislation requires that ISPs make the affordable broadband plan available to the public within 60 days of enactment, or June 16, 2021. The Act allows for exemptions for ISPs with less than 20,000 subscribers if the Public Service Commission determines that compliance with the requirement would result in unreasonable or unsustainable financial impact on the provider.

The enclosed Attachment provides guidance, developed by Department of Public Service Staff to assist ISPs in filing for an exemption. The guidance includes a list of minimum requirements for any exemption request and notes that any ISP who seeks consideration of a requested exemption before June 16, 2021 must file with the Commission, in Matter 21-00914, by May 14, 2021.

Sincerely,

Debra LaBelle

Debra LaBelle
Director, Office of
Telecommunications

Low Income Broadband Service Exemption Filings

Any company that seeks consideration of an exemption before June 16, 2021 must file an exemption request with the Commission in **Matter 21-00914 by May 14, 2021.**

Exemption requests must include the following:

1. A demonstration of the number of broadband subscribers as of December 31, 2020. This demonstration should include an attestation that the number reported in the exemption filing is consistent with the most recently filed data with the Federal Communications Commission, or in the alternative include the most recently filed data provided to the FCC;
2. A copy of the company's audited income statement, balance sheet and statement of cash flows for the company's most recent fiscal year;
3. Pro forma income statement, balance sheet and statement of cash flows assuming no impact from the requirement to offer the Low-Income Broadband Service;
4. An estimate of the number of current subscribers eligible for the Low-Income Service offering;
5. An estimate of the annual financial impact expected due to the requirement to offer the Low-Income Broadband Service. This estimate should include, but is not limited to, an estimate of the net revenue loss due to low-income customers switching to the Low-Income Broadband Service (i.e., lost revenue less any associated decrease in cost of service to the company) as well as an estimate of the incremental cost (net of the revenues such customers would pay) to provide the Low-Income Broadband Service to eligible new customers;
6. Any other service offerings that will be available to Low-Income households during the upcoming year (i.e. any offers the company will be making available to Low-Income households under the Federal Emergency Broadband Benefit program).

Exhibit B

In the Matter of Company Exemptions from the Requirement to Offer a Low-Income Broadband Product, DPS Staff Provides Updated Guidance for Low Income Broadband Exemption, Case No. 21-M-0290 (May 14, 2021) Item No. 64.

Department of Public Service

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Public Service Commission
John B. Howard
Interim Chair and
Interim Chief Executive Officer

Diane X. Burman
James S. Alesi
Tracey A. Edwards
Commissioners

May 14, 2021

Hon. Michelle Phillips, Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 12223-1350

UPDATED GUIDANCE

Re: Case 21-M-0290 - In the Matter of Company Exemptions from the Requirement to Offer a Low-Income Broadband Product.

Dear Secretary Phillips:

On April 16, 2021, Governor Andrew M. Cuomo signed into law the Affordable Broadband Act, requiring internet service providers (ISPs) to offer a $15 broadband plan to qualifying New Yorkers, including households who are eligible for or receiving free or reduced-price school lunch, supplemental nutrition assistance program benefits (SNAP), Medicaid benefits, senior citizen or disability rent increase exemptions, or an affordability benefit from a utility. The legislation requires that ISPs make the affordable broadband plan available to the public within 60 days of enactment, or June 16, 2021. The Act allows for exemptions for ISPs with less than 20,000 subscribers if the Public Service Commission determines that compliance with the requirement would result in unreasonable or unsustainable financial impact on the provider.

On April 26, 2021, Department of Public Service Staff (DPS Staff) issued guidance listing the minimum requirements for any exemption requests and noted that any ISP who sought consideration of a requested exemption before June 16, 2021 must file with the Commission, in Matter 21-00914 (Case 21-M-0290), by May 14, 2021. DPS Staff would like to clarify here that in lieu of the minimum requirements listed in our April 26th guidance, providers may file alternative information/support of their respective petition to adequately demonstrate that they will face undue economic hardship due to the implementation of the Affordable Broadband Act. Such a showing should demonstrate that the costs of implementing the program, in addition to the lost revenue estimated due to the law, will have a material negative impact on the ISP's financial condition. In addition, for providers who wish to request confidential treatment of their filed information, please be advised that directions for doing can be found at the following link:

https://www3.dps.ny.gov/W/PSCWeb.nsf/All/4BDF59B70BABE01585257687006F3A57?OpenDocument

Please be advised that providers may request an exemption at any time, but the request does not relieve the ISP from its obligations under the Affordable Broadband Act until such time as the request is granted by the Commission.

Sincerely,

Debra LaBelle
Director, Office of
Telecommunications